IN THE SUPREME COURT OF MISSISSIPPI
NO. 2008-CA-01924

MILDRED ELAINE THOMPSON RAYNER, ET AL. — APPELLANTS

V.

SHERIFF RONNIE PENNINGTON, ET AL. — APPELLEES

BRIEF OF APPELLEES SHERIFF RONNIE PENNINGTON, MICHAEL MCCARTY AND RANKIN COUNTY, MISSISSIPPI

ON APPEAL FROM THE CIRCUIT COURT OF RANKIN COUNTY, MISSISSIPPI

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PARTIES

MILDRED ELAINE THOMPSON RAYNER, ET AL. **APPELLANTS**

VS. **No. 2008-CA-01924**

SHERIFF RONNIE PENNINGTON, ET AL. **APPELLEES**

In order that the Justices of the Supreme Court or the Judges of the Court of Appeals may evaluate possible disqualification or recusal, the undersigned counsel of record certifies that the following listed persons/entities have an interest in the outcome of this case:

Mildred Elaine Thompson Rayner, Appellant;

Michelle Lynn Rayner Bynum, as Natural Mother and Next Friend of Billy Joe David Bynum, a Minor, Appellant;

Billy Joe David Bynum, a Minor, Appellant;

J. Edward Rainer, Gary Lee Williams, Rainer Law Firm, PLLC, Attorney for Appellant;

Sheriff Ronnie Pennington, Appellee;

Michael B. McCarty, Appellee;

Rankin County, Mississippi, Appellee;

Michael J. Wolf, C. Allen McDaniel II; Page, Kruger & Holland, Attorneys for Appellee;

Honorable William E. Chapman, III, trial court judge.

THIS, the 16 day of June, 2009.

MICHAEL J. WOLF
C. ALLEN MCDANIEL II
ATTORNEYS FOR APPELLEES

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I. STATEMENT REGARDING ORAL ARGUMENT

The Defendants, respectfully submit that oral argument is necessary to the resolution of the issues on appeal. The issues presented on appeal involve issues of sovereign immunity which would be significantly aided by oral argument.

II. STATEMENT OF THE ISSUES

Did the trial court properly apply the "reckless disregard" standard, pursuant to Miss. Code Ann. § 11-46-9(1)(c), in granting summary judgment, particularly where the plaintiff has conceded that the conduct alleged did not rise to the level of gross negligence and that reckless disregard is a higher standard than gross negligence.

III. STATEMENT OF THE CASE

On March 22, 2006, Michael McCarty was responding to a radio call regarding a disturbance at the Cedar Ridge Trailer park off highway 468. (R 162) He had reported to dispatch that he was going to take the call, and initiated his blue lights and sirens. (R 164, 167) He proceeded up to the red light at the intersection of highway 468 and Highway 18, when he came to a complete stop. (R 167)

When McCarty came to a complete stop he looked over and observed an SUV, when he knew that that car had stopped he proceeded forward, then stopped again when a car in the turn lane obstructed his view, and then he "slowly creeped forward and stopped, creeped forward and stopped, creeped forward and stopped." (R 167-170) Despite slowly proceeding into the intersection, his front end was suddenly struck by the plaintiff vehicle. (R 171) Despite this caution, Deputy McCarty was unable to see the plaintiff vehicle. (R 170-171)

Plaintiff Mildred Rayner was driving on highway 18, "just thinking how beautiful it turned out, you know. And then I'm going under the light. It's still green. And there's a white flash in front of my eye." (R 185) She continues, "[a]nd instinct you know it is not a dog. And before you can actually think our loud, you take a tremendous blow." (R 185)

Mildred Rayner never observed the patrol car prior to the accident. (R 185, 381) When asked "[a]s, you approached the intersection, did you ever see the police vehicle prior to the accident?", Ms. Rayner responded "No." (R 185)

Although, the plaintiff did not observe the patrol car, several independent witnesses did observe the incident.

Janet Cook, was sitting at the red light, in the first position on Highway 468 heading toward Florence, and "heard sirens behind me, which, of course scared me, and I turned around and looked." (R 193) She continued "And officer came up beside me. We made eye contact. Everyone had

stopped at the intersection at every other light. Although our light was red, he continued through the intersection – cautiously continued through the intersection. And he was hit on the side by a minivan." (R 193-194) At the time she made eye contact with the officer, the patrol vehicle was stopped. (R 195)

Janet Cook further observed the patrol car "was going very slowly", and the deputy was looking right and left. (R 204) She observed that the patrol car started and stopped as it passed through the intersection. (R 205) She also observed the sirens and lights were on. (R 196)

Witness Marsha Williams, approached the intersection from the same path of travel as the plaintiff, ahead of plaintiff on highway 18, and as she was turning down highway 468, she pulled into the turn lane and waited for the officer to come through the intersection. (R 215) Ms Williams heard the sirens of the patrol car as she approached the intersection, observing the flashing lights as well. (R 215) Plaintiffs have suggested Ms Williams did not hear sirens, but this suggestion is taken out of context, and clearly is not genuine. (R 215, 216, 217, 229, 230)

Ms Williams observed, " I pulled in - - over into the turn lane and waited for the officer to come through the intersection. I watched as he pulled up alongside the car that was stopped at the light and stopped. And then he slowly proceeded into the intersection. And once he got completely in the - - into the middle of the intersection, he stopped. And about that time I saw the vehicle coming from the same direction I had been coming from, probably at the speed limit." (R 215-216)

Ms Williams added, that "she had the green light, but the police officer was there with the sirens and light on." (R 216)

Plaintiffs then filed suit in the Circuit Court of Rankin County, Mississippi on March 21, 2007. On July 15, 2008 the Court entered an Order Granting Summary Judgment specifically finding that the defendants are entitled to immunity under Mississippi Code Section 11-46-9(1)(c), as the actions of the law enforcement officer Deputy Michael McCarty did not rise to a level of reckless

disregard. (R 488)

Plaintiff submitted on July 24, 2008 their "Motion for Reconsideration, Request for Entry of Order Requiring that Children be evaluated for Custody Purposes and Notice of Hearing" (R 490) and subsequently filed an "Amended Motion for Reconsideration". (R 495) Both Motions, filed pursuant to Mississippi Rule of Civil Procedure 59, contain identical arguments and it is presumed that the Amended Motion is merely a correction in title only of the former motion. On October 27, 2008 the Court entered an Order Denying Plaintiff's Motion to Reconsider. (R 505) Plaintiff subsequently appealed the ruling of the Rankin County Circuit Court. (R 506)

IV. SUMMARY OF THE ARGUMENT

The July 15, 2008 ruling of the trial court dismissing the claims against Sheriff Ronnie Pennington, Michael McCarty and Rankin County, Mississippi on the basis of summary judgment should be upheld. (R 488) After having considered the motions, pleadings, exhibits and oral argument, the Court found that that the defendants are entitled to immunity under Mississippi Code Section 11-46-9(1)(c), where police actions do not rise to a level of reckless disregard. The Court found that there are no genuine material issues of fact in regard to the manner in which the accident occurred, and that the evidence presented demonstrates that the deputy involved did not act with reckless disregard. (R 488)

Further, Plaintiff submitted on July 24, 2008, their Motion for Reconsideration and Amended Motion for Reconsideration. (R 490-494, 495-499) However, in paragraph four (4) of Plaintiff's Motion they correctly assert that "Reckless disregard is a higher standard than simple or gross negligence, but less than an intentional act. *City of Jackson v. Brister*, 838 So. 2d 274. 280(23) (Miss.2003)" (R 491, 496) In the next sentence Plaintiff asserts "PLAINTIFF'S admit that the conduct committed by Deputy McCarty was not that of which rises to the level of gross negligence." (R 491, 496)

As such, Defendants and the trial court are in agreement with Plaintiffs' position that the Defendants' conduct did not arise to the level of gross negligence and that Reckless Disregard is a higher standard than gross negligence. The Plaintiff therefore conceded the very issue which they assert forms the basis of the appeal.

Regardless, the grant or denial of a Rule 59 motion is within the discretion of the judge and appeals courts will not reverse the denial absent an abuse of discretion or if allowing the judgment to stand would result in a miscarriage of justice. *Clark v. Columbus & Greenville Railway Co.*, 473 So.2d 947 (Miss.1985). M.R.C.P. 59(e) provides for a motion to alter or amend a judgment. In order to succeed on a Rule 59(e) motion, the movant must show: (1) an intervening change in controlling law, (2) the availability of new evidence not previously available, or (3) the need to correct a clear error of law or to prevent manifest injustice. *Brooks v. Roberts,* 882 So.2d 229, 233(¶ 15) (Miss.2004). Since the plaintiff is not offering a change in the law or new evidence, he relies on the argument that there was a clear error of law. Yet there is no such clear error in the law.

Where the Plaintiffs are affirmatively asserting, not once but twice in the record below (in both the first Motion and the corrected Motion), that the conduct of the Defendants did not arise to the level of gross negligence, it could not rise to the higher level of reckless disregard on appeal. *Brister* at 280 (Miss. 2003).

On October 27, 2008, the parties, through counsel, appeared before Rankin County Circuit Court Judge William Chapman, denied the Plaintiffs' Amended Motion for Reconsideration.

V. ARGUMENT

A. STANDARD OF REVIEW

The law concerning appellate review of the grant or denial of summary judgment is well settled. For a summary judgment motion to be granted, there must exist no genuine issue of material fact, and the moving party must be entitled to judgment as a matter of law. Miss. R. Civ. P. 56(c). On

appeal the court "... reviews errors of law, which include the proper application of the Mississippi Tort Claims Act, de novo." *Fairley v. George County*, 800 So.2d 1159,1162 (¶ 6) (Miss.2001). The burden of demonstrating that there is no genuine issue of material fact falls upon the party requesting the summary judgment. *Id.* The court must carefully review all evidentiary matters before it; admissions in pleadings, answers to interrogatories, depositions, affidavits, etc., in the light most favorable to the party against whom the motion for summary judgment is made. *Leflore County v. Givens*, 754 So.2d 1223, 1225 (¶ 2) (Miss.2000). When a motion for summary judgment is made and supported as provided in Rule 56, an adverse party may not rest upon the mere allegations or denials of his pleadings, his response must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him. If any triable issues of fact exist, the lower court's decision to grant summary judgment will be reversed. Otherwise, the decision is affirmed.

B. WHETHER THE TRIAL COURT ERRED IN FINDING THAT THE DEPUTY DID NOT ACT WITH RECKLESS DISREGARD

1. Plaintiffs have admitted that Deputy McCarty's conduct did not rise to the level of gross negligence.

The position of the Plaintiffs at the trial court level was that the alleged conduct of Deputy Michael McCarty did not rise to the level of gross negligence. Plaintiffs also took the position at the trial court level that reckless disregard is a standard higher than gross negligence. There is nothing in the record to contradict this admission and the Appellate Court will act upon or consider only matters which actually appear in the record. *Ditto v. Hinds County, Mississippi*, 665 So.2d 878 (Miss. 1995) In paragraph four (4) of Plaintiff's Motion for Reconsideration he correctly asserts that "Reckless disregard is a higher standard than simple or gross negligence, but less than an intentional act. *City of Jackson v. Brister*, 838 So. 2d 274. 280(23) (Miss.2003)" (R 491) In the next sentence Plaintiff then asserts "PLAINTIFF'S admit that the conduct committed by Deputy McCarty was not that of

which rises to the level of gross negligence." (R 491) Plaintiff subsequently filed an Amended Motion for Reconsideration. (R 495-499) In paragraph four (4) of the Plaintiff's Amended Motion for Reconsideration he again asserts that "Reckless disregard is a higher standard than simple or gross negligence, but less than an intentional act. *City of Jackson v. Brister*, 838 So. 2d 274. 280(23) (Miss.2003)" (R 496) In the next sentence Plaintiff again asserts "PLAINTIFF'S admit that the conduct committed by Deputy McCarty was not that of which rises to the level of gross negligence." (R 496)

Where the Plaintiffs have affirmatively asserted below, not once but twice (in both the first Motion and the corrected Motion), that the conduct of the Defendants did not rise to the level of reckless disregard, they are bound by this established fact. *City of Jackson v. Brister*, 838 So. 2d 274. 280(23) (Miss.2003)" Plaintiffs cannot change their position on appeal. *Ellison v. Meek*, 820 So2d 730 (Miss.App. 2002) The uncontradicted record of the trial court shows the position of taken by the Plaintiffs to be that Deputy McCarty's actions did not rise to the level of gross negligence and the further admission that reckless disregard is a higher standard than gross negligence. The record of the trial court is correct in this matter is clear and the appeal of the Plaintiffs should be denied.

2. The trial court correctly found that the conduct of Deputy McCarty did not rise to the level of reckless disregard.

Regardless of the Plaintiffs admission that the conduct did not rise to a level of reckless disregard, the record also establishes that even without the Plaintiffs' admission, the conduct of Deputy McCarty did not rise to the level of reckless disregard. The trial court found that the conduct of Deputy McCarty did not constitute reckless disregard not once but twice, as Plaintiffs filed a Motion for Reconsideration of the previous finding of summary judgment, in favor of the Defendants. (R 505)

As correctly applied by the trial court, the Mississippi Tort Claims Act, Miss. Code Ann.

§11-46-1 to - 23 (Rev.2002), as the exclusive remedy against a governmental entity and its employees for acts or omissions which give rise to a suit, provides immunity. *Lang v. Bay St. Louis/Waveland Sch. Dist.*, 764 So.2d 1234, 1236 (Miss.1999). Miss. Code Ann. §11-46-9 (Supp.1998) provides that a governmental entity and its employees acting within the course and scope of their employment shall not be liable for any claim based upon an act or omission enumerated therein. If the act or omissions fall under any one the subsections of §11-46-9, then the governmental entity is exempt from liability. *Lang*, 764 So.2d at 1237.

In the current action, it is undisputed that Deputy McCarty was acting in the course and scope of his employment. It is undisputed in the record that the alleged actions in this case relate to police protection. Thus, the standard applied was whether or not the deputy acted with reckless disregard for the safety and well-being of any person not engaged in criminal activity at the time of injury. The trial court correctly held that the actions of Deputy McCarty did not rise to the level of reckless disregard. (R 488, 505)

Specifically, the exemption in this case comes from Miss. Code Ann. §11-46-9(c) (Supp. 1998) which provides as follows:

> "(1) A governmental entity and its employees acting within the course and scope of their employment or duties shall not be liable for any claim:
>
> .....
>
> (c) Arising out of any act or omission of an employee of a governmental entity engaged in the performance or execution of duties relating to police or fire protection unless the employee acted in reckless disregard of the safety and well-being of any person not engaged in criminal activity at the time of injury; ..."
>
> Miss. Code Ann. §11-46-9 (1972) as amended

Under the Mississippi Tort Claims Act, "the plaintiff has the burden of proving 'reckless

disregard' by a preponderance of the evidence." *Titus v. Williams*, 844 So.2d 459, 468 (Miss. 2003) (citing *Simpson v. City of Pickens*, 761 So.2d 855, 859 (Miss. 2000)). Thus, the plaintiff is required to make a sufficient evidentiary showing of reckless disregard, as an essential element of her claim in summary judgment proceedings. (*Morton v. City of Shelby*, 984 So.2d 323 (Ms. Ct. App. 2007)). Not only does the Plaintiffs concede twice in the record that the conduct wasn't reckless, they have failed to make the necessary evidentiary showing.

The purpose of Mississippi Code Annotated section 11-46-9 is "to protect law enforcement personnel from lawsuits arising out of the performance of their duties in law enforcement, with respect to the alleged victim." *Maldonado v. Kelly*, 768 So.2d 906, 909 (Miss.2000) (quoting *City of Jackson v. Perry*, 764 So.2d 373, 379 (Miss.2000)). Entities engaged in police protection are more likely to be exposed to dangerous situations and/or liability. *Id.* Public policy therefore requires that they be insulated from simple negligence, and held liable for reckless acts only. *Id.*

The Mississippi Supreme Court has defined reckless disregard as:

> the voluntary doing by [a] motorist of an improper or wrongful act, or with knowledge of existing conditions, the voluntary refraining from doing a proper or prudent act when such an act or failure to act evinces an entire abandonment of any care, and heedless indifference to results which may follow and the reckless taking of chance of accident happening without intent that any occur.

Turner v. City of Ruleville, 735 So.2d 226, 229 (Miss.1999). "Reckless disregard is a higher standard than gross negligence by which to judge the conduct of officers." *Davis v. Latch*, 873 So.2d 1059, 1062 (Miss. Ct.App.2004) (quoting *Turner*, 735 So.2d at 229(¶ 11)). Our courts have also held:

> The terms 'willful,' 'wanton,' and 'reckless' have been applied to that degree of fault which lies between intent to do wrong, and the mere reasonable risk of harm involved in ordinary negligence. These terms apply to conduct which is still merely negligent, rather than actually intended to do harm, but which is so far from a proper state of mind that it is treated in many respects as if harm was intended. The usual

> meaning assigned to [these] terms is that the actor has intentionally done an act of unreasonable character in reckless disregard of the risk known to him, or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow. It usually is accompanied by a conscious indifference to consequences, amounting almost to a willingness that harm should follow. *Maldonado*, 768 So.2d at 910 (quoting *Maye v. Pearl River County*, 758 So.2d 391, 394 (Miss.1999)).

This standard of wanton and willful misconduct is accepted in Mississippi (See *Collins v. Tallahatchie* 876 So.2d 284 (2004).), with reckless disregard as a higher standard than gross negligence. *Miss. Dep't. of Pub. Safety v. Durn*, 861 So.2d 990, 994 (Miss. 2003). This standard "embraces willful or wanton conduct which requires knowingly and intentionally doing a thing or wrongful act." *Id.* at 995 (quoting *City of Jackson v. Lipsey*, 834 So.2d 687, 691-92 (Miss. 2003)). "Reckless disregard usually is accompanied by a conscious indifference to consequences, amounting almost to a willingness that harm should follow." *Id.* (quoting *Maye v. Pearl River County,* 758 So.2d 391, 394 (¶19) (Miss. 1999)). Reckless disregard has consistently been found where the conduct at issue demonstrates that the actor appreciated the unreasonable risk at stake and deliberately disregarded "that risk and the high probability of harm involved." *Id.* at 995 (quoting *Maldonado v. Kelly*, 768 So.2d 906, 910-11 (¶11) (Miss. 2000)).

Consider *Kelly v. Grenada County* 859 So.2d 1049 (2003), wherein a sheriff deputy failed to anticipate the movements of another vehicle and caused a collision. Although this suggested negligence it did not demonstrate the level of wanton and willful action to support a finding of reckless disregard. The county was entitled to immunity. *Id.*

The undisputed facts are that Deputy McCarty was responding to an emergency call, driving his patrol car, stopped first at the intersection then slowly made his way through, looking both ways, and creeping forward. He was observed by other motorists to have been using his lights and sirens.

Plaintiff driver did not observe him and the two vehicles collided.

Contrast Deputy McCarty's conduct with that of the plaintiff Mildred Rayner, whose approach through the intersection was in violation of the rules of the road. Miss. Code Ann §63-3-809, requires that upon the approach of authorized emergency vehicles drivers must use reasonable care:

> "(1) Upon the immediate approach of an authorized emergency vehicle, when the driver is giving audible signal by siren, exhaust whistle, or bell, the driver of every other vehicle shall yield the right-of-way and shall immediately drive to a position parallel to, and as close as possible to, the right-hand edge or curb of the roadway clear of any intersection and shall stop and remain in such position until the authorized emergency vehicle has passed, except when otherwise directed by a law enforcement officer..." (63-3-809)

Mississippi Code §63-3-809, provides criminal penalties for the failure of drivers to yield to emergency vehicles. Given the plaintiff's failure to yield, she arguably was committing a crime, which would provide yet another source of immunity within 11-46-9(1)(c). (See *Estate of Williams v. City of Jackson*, 844 So2d 1161 (Miss 2003).

The trial court, in their Order Granting Summary, correctly considered the pleadings, exhibits, and oral argument, and correctly found that that the Defendants are entitled to immunity under Mississippi Code Section 11-46-9(1)(c), where police actions do not rise to a level of reckless disregard. The Court found that there are no genuine material issues of fact in regard to the manner in which the accident occurred, and that the evidence presented demonstrates that the deputy involved did not act with reckless disregard.

C. APPELLATE COURT CANNOT ADDRESS ISSUES NOT ADDRESSED IN TRIAL COURT'S JUDGMENT

For the first time on appeal the Appellants argue that the "Policies and Procedures" of the Rankin County Sheriff fail to address when a "back-up" officer may cross an intersection during a

red-light1. Appellants then proceed to conduct an analysis of Miss. Code Ann. § 63-3-315 for the first time on appeal without citing any further legal authority. However the Appellate Court will not address issues not addressed in the trial court's judgment. *Creel v. Cornacchione*, 831 So.2d 1179 (Miss.App. 2002) Likewise, to the degree Appellant claims any errors regarding the failure to address Miss. Code Ann. § 63-3-315, this issue is moot as well. Errors cannot be raised for the first time on appeal. *Ellison v. Meek*, 820 So2d 730 (Miss.App. 2002) (see also *Farmer v. B&G Food Enterprises, Inc.*, 818 so2d 1154 (Miss. 2002) Further, the Appellant's failure to cite any legal authority obviates the appellate court's obligation to even review such an issue. *Id.* The Appellate Court will only consider the record and no new matters presented for the first time by the Appellant will be acted upon. *Ditto v. Hinds County, Mississippi*, 665 So.2d 878 (Miss. 1995)

Regardless of their failure to address this matter previously, there is still no merit to this assertion. As previously put forth in the Defendants' Motion for Summary Judgment, although the deputy entered the intersection on the red light, this does not constitute reckless behavior where an emergency vehicle is authorized by law to do so. According to Miss. Code Ann § 63-3-315:

> "The driver of any authorized emergency vehicle when responding to an emergency call upon approaching a red or stop signal or any stop sign shall slow down as necessary for safety but may proceed cautiously past such red or stop sign or signal. At other times drivers of authorized emergency vehicles shall stop in obedience to a stop sign or signal."

Where the deputy is permitted to enter the intersection against the red, the focus is on the manner in which this is done. In this instance, there is simply no evidence in the record whatsoever that the deputy was reckless in the manner in which he proceeded into the intersection. The plaintiff did not observe the patrol vehicle before the accident, and the deputy and independent witnesses

1 Plaintiff-Appellant's argument further ignores that the failure to adhere to the fact that Policy Manuals cannot serve as the basis of liability under the Mississippi Tort Claims Act where such training and supervision materials are part of the discretionary function, and creates immunity under Miss. Code Ann. § 11-46-9(1)(d).

provide the only evidence in the record as to how he approached the intersection. It is undisputed that the deputy stopped and then proceeded slowly, creeping through the intersection, looking both ways. (R 167-170, 204, 215-216) As such, it can hardly be said that the behavior constituted a "reckless disregard" and is consistent with the Plaintiff-Appellant's description in the Amended Motion to Reconsider as not rising to a level of reckless disregard.

Regardless of the Plaintiffs' failure to address Miss. Code Ann. § 63-3-315 in the lower court, the argument is without merit and Summary Judgment was still proper.

D. PLAINTIFFS OFFER NO AUTHORITY WHICH WOULD CONTRADICT THE DECISION OF THE TRIAL COURT

Plaintiffs attempt to suggest authority which they allege demonstrate that Deputy McCarty showed a "reckless disregard" for the safety of others, yet fail to put forth any additional argument in their Appellant Brief other than generalities and accusations.

Plaintiffs cite as authority the dissent in *Maldonado v. Kelly*, 768 So.2d 906 (Miss. 2000). But, *Maldonado* actually held that the Deputy Sheriff did not act in reckless disregard. *Id.* In *Maldonado*, the deputy sheriff approached a dangerous intersection. *Id.* Prior to proceeding through the intersection the deputy sheriff came to a complete stop and looked right and left and saw no oncoming traffic. *Id.* However the deputy's view to the right was partially blocked and the collision occurred. *Id.* In *Maldonado* the deputy was taking the patrol car to the shop for maintenance and did not have its lights or sirens on. *Id.*

In the present action it is undisputed that Deputy McCarty came to a complete stop at the subject intersection. (R 167-170) Witnesses Janet Cook and Marsha Williams both confirm that prior to entering the subject intersection, Deputy McCarty initiated his blue lights and sirens. (R 196, 215) Witnesses Janet Cook and Marsha Williams both confirm that after Deputy McCarty stopped, he then proceeded slowly, and stopped additional times as he proceeded through the subject

intersection. (R 204, 215-216) Plaintiffs did not observe the patrol car prior to the accident. (R 185, 381) It is undisputed that Deputy McCarty showed a cautious effort to avoid unknown dangers by creeping through the intersection. Under *Maldonado*, immunity applies.

Likewise, Plaintiffs cite *Maye v. Pearl River County*, 758 So.2d 391 (Miss. 1999) as authority showing reckless disregard on the part of Deputy McCarty. Again, Plaintiffs are mistaken. In *Maye,* a sheriff backed up an incline knowing he could not be sure the area was clear, showed "...an appreciation of the unreasonable risk of danger involved coupled with a conscious indifference to the consequences that were certain to follow." *Id.* Significantly, in *Maye*, the sheriff failed to even look behind him and was going too fast. *Maye* at 395. Once again it is undisputed that Deputy McCarty showed a cautious effort to avoid unknown dangers by creeping through the intersection. The evidence in the record before the Court distinguishes *Maye*.

Ultimately, Plaintiff relies on accusations and broad generalities, to distinguish the current action from cases cited by Defendants in their Motion for Summary Judgment. This is not enough. "...There must be genuine issues of material fact; the existence of a hundred contested issues of fact will not thwart summary judgment where none of them is material." *Grisham v. V.F.W.*, 519 So2d 413, 415 (Miss. 1988) *citing Shaw v. Burchfield*, 481 So.2d 247, 252 (Miss. 1985) Failure of proof of concerning an essential element of a non-moving party's case renders all other facts immaterial. *Johnson & Sons Construction, Inc. v. State of Mississippi*, 877 So.2d 360365 (Miss., 2004). By way of response Plaintiffs must put forth admissible evidence of a willful or wanton conduct on the part of Deputy McCarty or evidence of a conscience indifference to the consequences of his actions almost to a willingness that harm should follow. *City of Jackson v. Lipsey,* 834 So.2d 687 (Miss. 2003). They have not.

The trial court correctly found that the Plaintiffs failed to put forth any contradictory evidence. An adverse party may not rest upon the mere allegations or denials of his pleadings, but

her response, by affidavits or otherwise, must set forth specific facts showing that there is a genuine issue for trial. *Brown v. Credit Center, Inc.*, 444 So.2d 358, 362 (Miss. 1983). The plaintiff must respond to a motion for summary judgment with admissible evidence. *Watts v. Kroger Company*, 170 F. 3d 505, 508 (5th Cir.1999). It is not the Court's duty to examine whether a nonmoving party's evidence might be reduced to admissible form by the time of trial, *Duplantis v. Shell Offshore, Inc.*, 948 F.2d 187, 192 (5th Cir. 1991). Plaintiffs have failed in this task.

VI. CONCLUSION

The Appellants have failed to prove that they are entitled to relief from the Order and Judgment of Dismissal executed on July 15, 2008 and the subsequent Order denying Plaintiff's Motion for Reconsideration on October 27, 2008. The Appellants have not set forth grounds through which grant of summary judgment may be set aside and is attempting to relitigate a matter that has already been judicially settled in direct conformity with Mississippi jurisprudence.

WHEREFORE, PREMISES CONSIDERED, Defendants, respectfully request that the Appellants' appeal be denied and that the lower court's award granting Appellees' Motion for Summary Judgment be affirmed.

THIS, the 18 day of June, 2009.

Respectfully submitted,

SHERIFF RONNIE PENNINGTON, MICHAEL MCCARTY AND RANKIN COUNTY, MISSISSIPPI, APPELLEES

BY: _____

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CERTIFICATE OF SERVICE

I, MICHAEL J. WOLF/C. ALLEN MCDANIEL II, do hereby certify that I have this day forwarded, via U.S. mail, postage prepaid, a true and correct copy of the foregoing to:

J. Edward Rainer, Esq.
Rainer Law Firm, PLLC
P.O. Box 258
Brandon, MS 39042

Honorable William E. Chapman, III
Rankin County Circuit Judge
P.O. Box 1885
Brandon, MS 39043

THIS, the 18 day of June, 2009.

MICHAEL J. WOLF
C. ALLEN MCDANIEL II