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

MILDRED ELAINE THOMPSON RAYNER, ET AL. — APPELLANTS

VS.

SHERIFF RONNIE PENNINGTON, ET AL. — APPELLEE

ON APPEAL FROM THE CIRCUIT COURT
OF RANKIN COUNTY, MISSISSIPPI

BRIEF OF THE APPELLANT

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed person have an interest in the outcome of this case. These representation are made in order for the Judges of the Mississippi Supreme Court to evaluate disqualification or recusal.

1. Mildred Elayne Rayner, Appellant;
2. Billy Joe Bynum Jr., Appellant;
3. Billy Joe Bynum as next friend of Billy Joe Bynum Jr., Appellant;
4. J. Edward Rainer Esq., Attorney for the Appellant
5. Gary Lee Williams, Attorney for the Appellant
6. Deputy Michael B. McCarty, Appellee
7. Sheriff Ronnie Pennington, Appellee
8. Michael J. Wolf Esq., Attorney for Appellee
9. C. Allen McDaniel II, Attorney for Appellee
10. Hon. Judge William C. Chapman; Rankin County Circuit Court Judge

Respectfully Submitted

J. Edward Rainer

Gary Lee Williams
Attorneys for the Appellant

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STATEMENT OF THE ISSUE

The Circuit Court of the Twentieth District for the State of Mississippi granted a summary judgment Motion finding the Defendants' actions did not rise to the level of reckless disregard when Deputy McCarty proceeded through an intersection against a red light in a non-emergency situation while responding to a disturbance and struck Plaintiffs vehicle who was travelling through a green light and obeying the traffic laws of the state of Mississippi at the time of the collision. More specifically, the court held the Defendants are entitled to immunity under Mississippi Code Section 11-46-9(1)(c). This Court must decide whether the Circuit Court of the Twentieth District's decision should be reversed and remanded based upon a misapplication of law when interpreting "reckless disregard" and granting summary judgment to Defendants.

STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal of a grant of summary judgment in favor of Defendants/state in the Twentieth Circuit Court District for the State of Mississippi. The Complaint was filed by Plaintiffs based upon personal injuries and property damages received in a collision with Deputy Michael B. McCarty of the Rankin County Sheriff's Department on or about March 22, 2006. The trial court held that the Defendants are entitled to immunity under Mississippi Code Section 11-46-9(1)(c), where police actions do not rise to the level of reckless disregard. Additionally, the court found there were no genuine issues of material fact with regard to the manner in which the accident occurred, and that the evidence presented demonstrated the Deputy involved did not act with reckless disregard. This Court must decide whether trial court's order granting summary judgment was a misapplication of law when interpreting reckless disregard.

B. Course of Proceedings and Disposition in the Court Below

This case began when the Plaintiffs initiated suit on March 21, 2007 by filing a Complaint in the Twentieth District Circuit Court of Rankin County, Mississippi.

Defendant/state received notice of the Complaint and filed a Motion to Dismiss on basis of failure to provide notice of claim, with said Motion being dismissed by the circuit court on November 26, 2007. Additionally, Defendant/State filed their answer on or about August 3, 2007. Defendant/state denied responsibility for the damages sustained as stated in Plaintiffs Complaint concerning personal bodily injuries. Defendant/state also raised twelve affirmative defenses, including the affirmative defense of Mississippi

Code §11-46-9(1)(c), which exempts governmental entities from liability for actions "[a]rising out of any act or omission of an employee of a governmental entity engaged in the performance or execution of duties or activities 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."

On January 22, 2008, Defendant/state filed a Motion for Summary Judgment pursuant to Mississippi Rule of Civil Procedure 56. Defendant/state argued that Plaintiffs failed to establish a prima facie case for liability from the Defendant/State. Defendant/State claimed that it was entitled to immunity for actions arising during the scope of employment. More specifically, Defendant/state asserted that it could not be held liable because their action did not rise to the level of reckless disregard for the safety of one not committing a crime. Defendant/state supported its motion with a copy of the accident report made out by the Brandon Police Department, the Deposition of Deputy Michael McCarty, one page of the Deposition of Mildred Rayner, the Deposition of Janet Cook, and the Deposition of Marsha Williams. On April 3, 2008, Plaintiffs filed a Response to Defendant/state's Motion for Summary Judgment. In support of their Response, Plaintiffs submitted the complete Deposition of Mildred Rayner, the Deposition of Billy Joe Bynum, the Deposition of Deputy Michael McCarty, and a copy of the Law Enforcement Policies and Procedures, 3.1 Patrol Functions and Tactics. On April 16, 2008, Defendant/State submitted its Reply to Plaintiffs Response to Motion for Summary Judgment.

On July 15, 2008, the Circuit Court granted Defendant/state's Motion for Summary Judgment. The circuit court held that Defendant/state is entitled to immunity under Mississippi Code Section 11-46-9(1)(c), where police actions do not rise to the level of reckless disregard. The circuit court also held that there are no genuine issues of material fact in regard to the manner in which the accident occurred, and that the evidence presented demonstrated that the deputy did not act with reckless disregard. Plaintiffs' timely filed an Amended Motion for Reconsideration on July 24, 2007. Defendant/State filed their Response to the Amended Motion for Reconsideration on July 28, 2009. On October 27, 2008, the circuit court denied Plaintiffs' Motion for Reconsideration. Plaintiffs timely filed a Notice of Appeal on November 21, 2008.

C. Statement of the Facts

On March 22, 2006, around 1:30 p.m., Michael McCarty, a deputy employed with the Rankin County Sheriff's Department Court Services Division, was on his way home for lunch. (R. at 144:21-24 and 146:18-21.) At the same time, Mildred Rayner and her infant grandson Billy Joe David Bynum (hereafter "Plaintiffs") were travelling East towards Plaintiff Rayner's home on U.S. Highway 18. (R. at 69:20-23.) While on his way home for lunch, at the intersection of Star Road and Highway 468, Deputy McCarty heard a call go out over dispatch that there was a "disturbance". (R. at 147:10-14.) Deputy McCarty was not dispatched to the "disturbance", but called in to the dispatcher and informed dispatch that he would be en route with the other officer. (R. at 147:21-22 & 148:5-7.)

Deputy McCarty testified in his depositions that at that point he initiated his lights and siren and proceeded South on Hwy 468 toward the intersection of Hwy 468 and Hwy 18. (R. at 149:15-24.) Mildred Rayner disputes that Deputy McCarty had his siren on at any point. (R. at 88:1-6.) Marsha Williams, a witness, has no recollection if the siren was on as Deputy McCarty proceeded through the intersections, however did state that Deputy McCarty's lights were on as he went through. (R. at 128:-2-9.) As Deputy McCarty approached the intersection, there was a van in the left hand turn lane of Highway 468, another SUV going West on Highway 18, and another vehicle in the center turn lane that *obstructed his view from the East.* (R. at 152:9-10, 154:22-25, 155:1-9) *(emphasis added.)* Deputy McCarty then proceeded into the oncoming lane of traffic, with his view from the east obstructed, and ran through the intersection against a red light. (R. at 152:17-19, 155:8-22.) **Deputy McCarty never knew what kind of "disturbance" he was heading towards.** (R. at 148:8-11.) (*emphasis added*)

At about the same time, Mildred Rayner was approaching the same intersection. (R. at 70:3-15.) On her approach, the Plaintiff slowed down upon seeing the road sign indicating that there was a light ahead. *Id.* As Mrs. Rayner proceeded through the intersection while facing a green street light, she suddenly saw a flash of white and thereafter felt a tremendous blow to car holding herself and her infant grandson. *Id.* Immediately thereafter, the Plaintiffs felt a second blow. *Id.* Mrs. Rayner never saw the police vehicle in her approach to the intersection. (R. at 87:20-22.) Consistent with Marsha Williams testimony, Mrs. Rayner did not hear a siren and emphatically stated that there was *no* siren prior to the accident. (R. at 88:1-10.) Mrs. Rayner also testified that

she would not have been able to tell whether or not Deputy McCarty had his flashing lights engaged prior to the accident. (R. at 88:7-10.)

STANDARD OF REVIEW

In reviewing a trial court's ruling on a Motion for Summary Judgment, the Supreme Court conducts a *de novo* review and examines all evidentiary matters, including admissions in pleadings, answers to interrogatories, depositions, and affidavits. *Progressive Gulf Ins. Co. v. Dickerson And Bowen, Inc.*, 965 So. 2d 1050, 1052 (Miss. 2007). On appeal of a summary judgment, the Supreme Court must view the evidence in the light most favorable to the party against whom the motion was made. *Id.* at 1053. Furthermore, a *de novo* standard of review applies to questions of law. *See Windham v. Latco of Miss., Inc.*, 972 So.2d 608, 610 (Miss.2008).

SUMMARY JUDGMENT STANDARD

Rule 56(c) of the Mississippi Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

SUMMARY OF THE ARGUMENT

The Circuit Court erroneously applied the law when construing the standard for reckless disregard and therefore, Defendant/State is not entitled to summary judgment as a matter of law. The Circuit Court held the Defendants are entitled to immunity under Mississippi Code Section 11-46-9(1)(c), where police actions do not rise to the level of reckless disregard. More specifically, the court found there were no genuine issues of material fact in regard to the manner in which the accident occurred, and that the evidence presented demonstrated the Deputy involved did not act with reckless disregard. This Court shall review, *de novo,* whether or not Deputy McCarty acted with reckless disregard while entering an intersection against a red light despite his knowledge that his view was obstructed.

ARGUMENT

When considering the gravity of the dispatcher's call, the fact that Deputy McCarty was not dispatched to the scene, that no evidence has been admitted suggesting Deputy McCarty was a first responder, the policies and procedures employed by the Rankin County Sheriff's Department, and that there is no evidence suggesting that Deputy McCarty was responding to an "emergency", this Court should find that as a matter of law Deputy McCarty was acting with reckless disregard when he drove in the oncoming lane of traffic, through a red-light, all the while knowing that his view was obstructed to traffic that had the right of way and thereby causing an accident between himself and Plaintiffs.

AS A MATTER OF LAW, PLAINTIFFS ARE ENTITLED TO CONTINUE THEIR CLAIM FOR PERSONAL INJURIES AS DEPUTY McCARTY'S ACTIONS WERE VOLUNTARY, WRONGFUL, AND DONE KNOWING THERE WAS A CHANCE THAT AN ACCIDENT WOULD OCCUR

A. Reckless Disregard

The following illustrates the different definitions and applications as they relate to Reckless Disregard. 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). This Court has defined reckless disregard as the voluntary doing by [a] motorist of an improper or wrongful act ... [with] heedless indifference to results which may follow and the reckless taking of chance of [an] accident happening without intent that any occur...." *Davis v. Latch,* 873 So.2d 1059, 1061-62(¶8) (Miss.Ct.App.2004) (quoting *Turner v. City of Ruleville,* 735 So.2d 226, 229(¶11) (Miss.1999)). This means that the act must be voluntary, with reckless disregard for the safety of others. Malice is not required. Intent to harm is not required. The only thing that is required is that the *act* must be voluntary and the *act* must be with reckless disregard for the safety of others. In the present case, Deputy McCarty voluntarily proceeded through an intersection while facing a red light in a non-emergency situation, all while in the improper lane of traffic. (R. at 152:17-19) Moreover, in his own deposition he states that his view was obstructed from oncoming traffic travelling east. (R. at 155:5-9.) Despite his view being obstructed he proceeded through the intersection anyway. More specifically, Deputy McCarty recklessly took the chance that an accident may occur without the intent that one actually would.

This standard "embraces willful or wanton conduct" and usually is accompanied by a "conscious indifference to consequences" and a deliberate disregard "that risk and the high probability of harm [are] involved." *Willing v. Estate of Benz,* 958 So.2d 1240, 1247(16) (Miss.Ct.App.2007) (quoting *Miss. Dep't. of Pub. Safety v. Durn,* 861 So.2d 990, 994-95 (&& 10, 13) (Miss.2003)). Deputy McCarty willfully proceeded through a red light, even when he knew that he could not see whether or not there was oncoming traffic. The intersection crossed was an intersection wherein crossing through a red light would create a high probability of harm.

"In order to establish 'reckless disregard' according to the standards established above [Plaintiff] must show facts from which a trier of fact could conclude that: (1) Deputy [McCarty's] conduct created an unreasonable risk; (2) this risk included a high probability of harm; (3) Deputy [McCarty] appreciated the unreasonable risk; and (4) Deputy [McCarty] deliberately disregarded that risk, evincing 'almost a willingness that harm should follow.'" *Vo v. Hancock County* 2008 WL 2025843, 2 (Miss.App.,2008). As applied to Deputy McCarty, the intersection at issue was crossed in a non-emergency situation while the Deputy's vision was obstructed. (R. at 147:10-14, 155:5-9.) He was travelling in an improper lane and against a red light. (R. at 152:17-19.) The accident caused by Deputy McCarty and injuries sustained by Plaintiffs are evidence of the grave risk taken by Deputy McCarty. Crossing an intersection during a red-light does indeed bear a high probability of harm. Traffic lights are installed at intersections with high volumes of traffic to prevent the very harm that resulted here. Deputy McCarty knew that he clearly could not tell or see if there was any oncoming traffic. Knowing the high

probability of harm, Deputy McCarty proceeded through the intersection anyway. It was his decision to proceed through an intersection against a red light when responding to a non-emergency situation that created the injuries and massive amounts of medical bills suffered by Plaintiffs. Mildred Rayner relied upon a green light to safely enter an intersection. But for Deputy McCarty's willful, deliberate, and knowing entrance into the intersection against a red light, this accident would not have occurred.

The Restatement of Torts supports the idea that in order for an actor's conduct to be reckless, it is not necessary that he recognizes it as being extremely dangerous. It is enough that he knows or has reason to know of circumstances which would bring home to the realization of the ordinary, reasonable man the highly dangerous character of his conduct. REST TORTS § 500. Additionally, if an actor's conduct is such as to involve a high degree of chance that serious harm will result from it to anyone who is within range of its effect, the fact that he knows or has reason to know that others are within such range is conclusive of the recklessness of his conduct toward them. It is, however, not necessary that the actor should know that there is anyone within the area made dangerous by his conduct. It is enough that he knows that there is strong probability that others may rightfully come within such zone. *Id.* In the instant case, Deputy McCarty should have know that there was a high likelihood of oncoming traffic at an intersection that has such a high volume of traffic that it requires a stop light.

B. Rankin County Sheriff's Department Policies and Procedures

The policies and procedure of the Rankin County Sheriff's Department outline eight (8) situations (but not limited to) wherein a first responder may exercise

discretion in determining the best course of action. (R. at 170 & 171). There has been no testimony that Deputy McCarty was the first responder to the "disturbance" and moreover, a "disturbance" is not one of the listed situations by the Policies and Procedures of the Rankin County Sheriff's Department. Additionally, the policies and procedures of the Rankin County Sheriff's Department require that the *safety of deputies and innocent life will always be a prime factor when considering options*. Due to the nature of the dispatch, crossing the intersection in the oncoming lane of traffic, and proceeding through a red-light with an obstructed view, Deputy McCarty could not have been considering the safety of innocent life as a prime factor when he purposefully ran the red light causing the accident.

The policies and procedures of the Rankin County Sheriff's also fail to address when a "back-up" officer may cross an intersection during a red-light. Therefore, emergency driving techniques used when crossing through a red light at an intersection should be determined based upon Mississippi Law. "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." Miss.Code Ann. § 63-3-315 (Rev.1996)(*emphasis added*) There has been no indication through the pleadings or otherwise that the "disturbance" that Deputy McCarty was en route to was indeed an emergency. In fact, **Deputy McCarty never knew what kind of "disturbance" he was heading towards.** (R. at 148:8-11. (*emphasis added*)

Therefore, Deputy McCarty proceeding through the intersection was against departmental policies and in violation of Mississippi law. Given Deputy McCarty's limited knowledge about the call he was responding too, there was simply no reason for him to institute emergency driving techniques and proceed through an intersection against a red-light. The state provided no facts to support the notion that Deputy McCarty was the first responder and therefore on summary judgment motion, such a fact should be construed against the moving party, in this case the Defendants. Therefore, Deputy McCarty must have been acting in response to an emergency to conform to Mississippi law. There simply is no proof that Deputy McCarty was responding to anything other than a "disturbance". A disturbance could be as miniscule as a dog incessantly barking and creating a nuisance. Deputy McCarty simply had no justifiable reason to implement emergency driving techniques in response to a "disturbance". Disregard of departmental policy and Mississippi law is inherently reckless and consequently should be considered a voluntary action made with reckless disregard for the safety and well-being of persons not engaged in criminal activity at the time of injury.

C. Similar Cases Distinguished and Acknowledged

This Court in *Maye v. Pearl River County,* found "reckless disregard" does not require a showing of specific intent to harm. 758 So.2d 391, 395 (Miss.,1999) In *Maye,* a deputy's actions rose to the level of reckless disregard because he showed a conscious disregard for the safety of others when he backed up the incline entrance to the parking lot **knowing he could not be sure the area was clear**. *Id.(emphasis added)* Much like *Maye,* Deputy McCarty proceeded through an intersection knowing he could not be sure

the area was clear. There was no high speed chase or other factors that justified Deputy McCarty going through the intersection. Deputy McCarty's own policies and procedures did not outline a call to a "disturbance" as an act that is discretionary in nature. (R. at 170 & 171.) Moreover, his own departmental policies did not outline the propriety of instituting emergency driving measures. *(See generally Id.)*

In support of their Motion for Summary Judgment in the Circuit Court, Defendants *cite Kelley v. Grenada County* in their Reply to Plaintiffs Motion for Summary Judgment and state that the facts are incredibly similar to the instant case. However this case is distinguished from Kelley for the following reasons. In *Kelley,* Officer Miller "received a call from a fellow officer requesting assistance because four people had just stolen a vehicle." *Kelley v. Grenada County* 859 So.2d 1049, 1051 (Miss.App.,2003). Here, Deputy McCarty volunteered his assistance and was never dispatched. Moreover, Deputy Miller was in pursuit of a stolen vehicle, whereas Deputy McCarty instituted emergency driving measures for a "disturbance". A disturbance was the extent of Deputy McCarty's knowledge of the call he was responding to.

Defendant also attempts to utilize *Davis v. Latch* to support the Motion for Summary Judgment. In *Davis*, a Police officer struck a motorist's vehicle at in intersection when responding to a call and was found immune from liability under state Tort Claims Act. *See generally Davis v. Latch* 873 So.2d 1059 (Miss.App.,2004). However this case is distinguished from *Davis* for the following reason, in *Davis* "nothing was obstructing view of either officer or motorist, motorist's left turn signal was not activated, and officer's actions were consistent with department policy." *Id.* at 1063.

In this case, by his own admission, Deputy McCarty's view was obstructed. (R. at 155:5-9.) Moreover, there is no factual basis to support whether or not Deputy McCarty was a first responder or that his actions were consistent with departmental policy.

On remand from this Court, the Sunflower County Circuit Court found that a state trooper "was operating his vehicle at an excessive speed, in reckless disregard for the safety of others. The speed was excessive due to *the limited visibility and the congested area.*" *Mississippi Department of Public Safety v. Durn* 918 So.2d 672, 675 (Miss.,2005) *(emphasis added).* The Durn Court further establishes the need for the acting Court to view the totality of circumstances when determining whether or not a state employee has acted with reckless disregard. Much like the trooper in *Durn,* Deputy McCarty had limited visibility and was operating in a congested area at the time the accident occurred.

The dissent in *Maldonado v. Kelly* eloquently stated that "[b]ecause Maldonado failed to secure a clear view to his right before entering the intersection, Maldonado acted in reckless disregard of Kelly and of any other motorists proceeding North on Clinton Street. ... This Court made it clear in both *Maye* and *Turner* that proceeding forward in spite of a 'knowledge' or an 'awareness' of the potential or probable danger is the equivalent of recklessness." 768 So.2d 906, 913 (Miss.,2000) (*dissenting* J. McCrae joined by P.J. Banks and J. Diaz.) Moreover, Maldonado testified that he knew that his vision was substantially blocked to the right, the direction from which Kelly approached. *Id.* In similar fashion, Deputy McCarty allegedly proceeded through the intersection in a "stop and start fashion", however Deputy McCarty also knew that his view was obstructed from the right. "Not only was this a failure to exercise 'due care,' but this, in

effect, amounts to a failure to exercise any care at all. **Performing a precautionary task that one knows to be futile, is the same as taking no precautions at all."** *Id.*

This Court in *City of Jackson v. Brister*, found that an officer's conduct rose to the level of reckless disregard when an officer began a high speed chase in direct violation of police policy *without knowing what crime had been committed by the suspect.* 838 So.2d 274, 280 (Miss. 2003)(*emphasis added).* In the instant case, Deputy McCarty was not involved in a high speed chase, but was on his way to a "disturbance". This was the only information Deputy McCarty had about the offense and despite this limited knowledge Deputy McCarty drove in the wrong lane of traffic against a red light with his vision obstructed from the east. "One of the factors to be considered in ascertaining whether an officer acted in reckless disregard in pursuing a suspect is 'the seriousness of the offense for which the police are pursuing the vehicle.'" *Broome v. City of Columbia* 952 So.2d 1050, 1054 (Miss.App.,2007) *quoting Brister,* 838 So.2d at 280. While Deputy McCarty was not in pursuit of a vehicle, it is certainly logical to use the seriousness of the offense in which a Deputy is responding as a factor in determining whether or not a state employee has acted with reckless disregard. Deputy McCarty's conscious decision to proceed through the intersection unnecessarily placed the lives of innocent people at risk. A conscious decision that was made upon the limited information that there was a "disturbance" and another officer was en route.

CONCLUSION

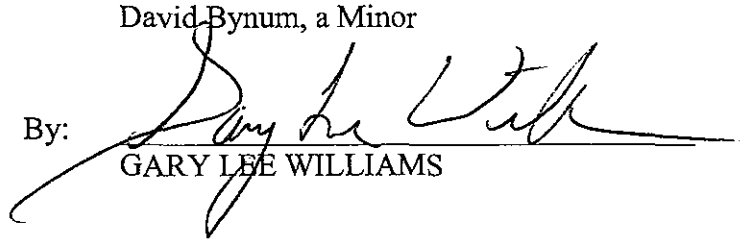
For the above reasons, Plaintiffs respectfully submit that the Rankin County Circuit Court improperly applied the law when interpreting the whether or not Deputy

McCarty acted with reckless disregard for the safety and well being of a person not engaged in criminal activity. The totality of the circumstances must be viewed when determining whether or not a state employee has acted with reckless disregard. Deputy McCarty responded to a call for a "disturbance". Deputy McCarty was not dispatched to respond to the "disturbance" and was merely going as back up for another officer. With no knowledge other than the fact that dispatch had released a call to "disturbance," Deputy McCarty employed emergency driving techniques in a congested area with limited visibility. The policies and procedures of the Rankin County Sheriff's Department do not justify emergency driving techniques in response to a "disturbance." Further, there was no evidence employed to show that Deputy McCarty was a first responder. Accordingly, if he is not the first responder, Deputy McCarty would have no discretion in determining the best course of action. Therefore, Deputy McCarty's actions would be governed by Mississippi law and in order to justify running a red-light, the officer must be responding to an *emergency*.

Deputy McCarty knew that his view was obstructed and despite this knowledge he willfully and deliberately entered the intersection unable to determine whether or not there was oncoming traffic. There have been no allegations that Mildred Rayner was disobeying the law. Clearly, Deputy McCarty acted in a manner showing reckless disregard for Mildred Rayner and Billy Joe Bynum. Therefore, Plaintiffs pray this Court will enter its opinion and order finding that Deputy McCarty acted with reckless disregard at the time of the accident between himself and Plaintiffs. Plaintiffs further pray for such general relief as this Court may allow.

DATED this the 18th day of May 2009

Mildred Elaine Thompson Rayner, Individually, and Billy Joe Bynum, as Natural Father and Next Friend of Billy Joe David Bynum, a Minor

By: 

GARY LEE WILLIAMS