

IN THE SUPREME COURT OF MISSISSIPPI

CITY OF JACKSON, MISSISSIPPI

APPELLANT

VS.

CAUSE NO. 2009-CA-01610

**MARY GRAY AND PEGGY PETTAWAY
AS CO-ADMINISTRATORS OF THE ESTATE OF ALICE
FAYE CLAUSELL, DECEASED AND ON BEHALF
OF ALL WRONGFUL DEATH BENEFICIARIES
OF ALICE FAYE CLAUSELL, DECEASED,
KIMBERLY CLAUSELL, LILLIAN BYRD
AND CHRIS CLAUSELL**

APPELLEES

**On Appeal From the Circuit Court of
Hinds County, Mississippi
Cause Number 251-07-755 Consolidated with
Cause Number 251-07-784
Honorable William Coleman**

Brief of Appellant City of Jackson

Oral Argument Requested

**PIETER TEEUWISSEN
CITY ATTORNEY
KIMBERLY BANKS
DEPUTY CITY ATTORNEY**

**OFFICE OF THE CITY ATTORNEY
CITY OF JACKSON, MISSISSIPPI
455 East Capitol Street
Post Office Box 2779
Jackson, Mississippi 39207
Telephone: (601) 960-1799**

COUNSEL FOR APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Miss.R.App. 28(a)(1), the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. City of Jackson
Appellant
2. Pieter Teeuwissen, City Attorney
Kimberly Banks, Deputy City Attorney
455 East Capitol Street
Jackson, Mississippi 39201
Counsel for Appellant
3. *Appellees*
4. Joe Tatum, Esq.
Tatum & Wade
124 East Amite Street
Jackson, Mississippi 39201
Counsel for the Wrongful Death Heirs of Alice Clausell
5. Edward Markle, Esq.
Edward D. Markle and Associates
3520 General Degaulle, Suite 5070
New Orleans, Louisiana 70114
Counsel for Chris Clausell

6. Wade G. Manor, Esq.
Scott, Sullivan, Streetman & Fox, P.C.
Post Office Box 13847
Jackson, Mississippi 39236-3847
Counsel for Alice Wilson
7. Hon. William Coleman, Presiding Judge
Hinds County Circuit Court
407 East Pascagoula Street
Jackson, Mississippi 39201

Respectfully Submitted,
CITY OF JACKSON




BY: 
PIETER TEEUWISSEN, MSB 
City Attorney
KIMBERLY BANKS, MSB 
Deputy City Attorney

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STATEMENT OF THE ISSUES

The issues that this Court should resolve on appeal are:

- I. The lower court erred when it found that City of Jackson officers acted in reckless disregard.
- II. The lower court also erred when it apportioned 20% liability to the City of Jackson when City of Jackson officers were not a proximate cause of the accident.

STATEMENT ON ORAL ARGUMENT

Because this appeal presents issues which are fact intensive, the City of Jackson respectfully requests oral argument. Further, it appears that clarification on the analysis of *City of Ellisville* is necessary. This Court's decision will have a far reaching public policy and economic impact on Mississippi law enforcement; therefore, the City of Jackson respectfully requests oral argument.

STATEMENT OF THE CASE

A. PROCEEDINGS BELOW

This action was filed on August 8, 2007 against the City of Raymond and the City of Jackson in the matter styled ***Mary Gray and Peggy Pettaway as co-administrators of the Estate of Alice Faye Clausell, deceased, and on behalf of all wrongful death beneficiaries of Alice Faye Clausell, deceased, Kimberly Clausell and Lillian Byrd v. The City of Raymond and the City of Jackson, Hinds County Circuit Court Civil Action No. 251-07-755CIV*** (hereinafter *Mary Gray, et al. v. City of Raymond, et al.*). R.at 8. The City of Jackson filed its Answer and Affirmative Defenses on September 12, 2007. R. at 23. This cause of action arises from a motor vehicle accident, which occurred on April 21, 2007 in the City of Jackson, First Judicial District, Hinds County, Mississippi.

Alice Wilson (Wilson), while fleeing from City of Raymond Police officer Randy Razor struck Appellees' vehicle at the intersection of Capitol and Congress Street in downtown Jackson.¹ Alice Wilson was fleeing from City of Raymond Police Officer Randy Razor (Razor). Razor initiated his pursuit of Wilson in the City of Raymond and continued to pursue Alice Wilson into the City of Jackson up until the collision between Wilson and Appellees'. T.E. 2, p. 25. City of Jackson police officers provided support to City of Raymond officer Randy Razor but terminated that support when Raymond officer Razor and Wilson went the wrong way down Amite Street, approximately one mile before the accident occurred. T.E. 9, T.E. 10, T.E. 11, *admitted*

¹ Kimberly Clausell was the driver of the vehicle and Alice Clausell and Lillian Byrd were passengers in the vehicle struck by Wilson. T.T. at 24.

for ID only, T.E. 12, admitted for ID only, T.T. at 182, 220, T.E. 20, p. 19-20. As a result of the collision, on or about April 21, 2007, Alice Clausell died and Kimberly Clausell and Lillian Byrd were injured. T.T. at 29, 32.

This case followed the standard pre-trial procedure with one notable exception. Chris Clausell filed a Complaint of Intervention as one of the wrongful death beneficiaries of Alice Faye Clausell on September 4, 2007. R. at 15. On or about February 25, 2008 the lower court entered a Judgment allowing Chris Clausell to intervene. R. at 42. Chris Clausell filed an action against Alice Wilson on or about August 20, 2007 in a matter styled ***Chris Clausell v. Alice Wilson, Hinds County Circuit Court Case No. 251-07-784CIV*** (hereinafter Chris Clausell v. Alice Wilson). R. at 45.² On April 30, 2008 a Motion to Transfer and/or Consolidate the two actions was filed. R. at 41. On July 24, 2008, an Order was entered to consolidate ***Chris Clausell v. Alice Wilson*** and ***Mary Gray, et al. v. City of Raymond, et al.*** R. at 3.

On February 25, 2008, an Agreed Scheduling Order was entered setting this matter for trial on March 9, 2009.³ R. at 2. The most important pre-trial matter however, was the City of Raymond's dismissal from the case as a result of Raymond settling with Appellees'. R. at 133. This case proceeded to trial, therefore, against the fleeing driver and the City of Jackson.

On March 9-10, 2009, the Honorable William F. Coleman conducted a bench trial in this matter. Former Raymond Police Officer Randy Razor's deposition was admitted into evidence in lieu of his trial testimony as was Lt. Steve McDonald's

² Alice Wilson was not a named Defendant in the Mary Gray et, al. v. City of Raymond, et al. matter.

³ Routine pre-trial motions were filed and heard. R. at 73-77.

deposition.⁴ T.E. 2, 20. The court entered its Opinion and Order on May 26, 2009. R. at 135. The lower court concluded that on April 21, 2007, Jackson police officers acted in reckless disregard of the safety of others as “they did not in fact terminate the chase and negligently contributed to the cause of plaintiffs’ injuries and death.” R. at 141. The lower court’s opinion and order spoke generally and did not address proximate cause. Accordingly, the City of Jackson filed its Motion to Amend Order requesting that the trial court, among other relief, amend its opinion and order and address proximate cause. R. at 143-145. The trial court declined to do so. R. at 162.⁵ made a broad ruling with respect to proximate cause and reckless disregard with little to no analysis.

The City of Jackson timely filed its appeal from this adverse judgment. R. at 165.

B. STATEMENT OF THE FACTS

On or about April 21, 2007, Randy Razor, then an officer of the City of Raymond Police Department, began to pursue Alice Wilson, who was driving a gold SUV on Highway 18 in Raymond, Mississippi. T.E. 2, p.27. Razor’s pursuit of Alice Wilson began around 5:00 or 5:30 p.m. Saturday, on a clear sunny day. T.E. 2, p. 22, 37. At the time Randy Razor began pursuing Alice Wilson, Razor had been working 18 straight hours. T.E. 2, p.22-23. Razor initiated the pursuit of Alice Wilson on Highway 18 in Raymond, Mississippi because she was driving erratically and weaving on to the shoulder of the highway in order to avoid hitting other vehicles. T.E. 2, p.25-26. At

⁴ A video trial deposition was taken of Lt. Steve McDonald was noticed and taken on March 6, 2009, as Lt. McDonald was called to military duty.

⁵ The trial court did adjust the amount Appelles’ could recover. Pursuant to the Mississippi Tort Claims Act, statutory damages are capped.

one point, Alice Wilson narrowly avoided hitting a motorcycle on Highway 18 in Raymond, Mississippi while Razor was pursuing her. T.E., p.31-32.

During Razor's pursuit of Alice Wilson in Raymond, Mississippi, Razor called Wilson in as a 10-92, a possible "mental person", because Razor observed Wilson talking to a passenger in her vehicle, but Wilson was in the vehicle alone. T.E. 2, p. 28-29. At all times relevant to the facts and allegations in this matter, the City of Raymond officer and the City of Jackson officers had no direct radio communication. T.E. 2, p. 43. City of Jackson officers would have to radio dispatch and advise dispatch to contact the City of Raymond's dispatch, and then the City of Raymond's dispatch would notify the Raymond officer, and vice versa. T.E. 20, p. 52.

As Razor entered the City of Jackson, the Raymond dispatcher contacted the City of Jackson dispatch and informed the City of Jackson that Raymond was in pursuit of a gold SUV and entering the City of Jackson. T.T. at 174. Razor testified that he granted himself permission to enter the City of Jackson, as he was the supervisor on duty at the time. T.E. 2, p.41-42. Detective Stephen Coleman was on Highway 80, in Precinct 2 when he heard the BOLO (be on the lookout) that a Raymond Police officer was pursuing a vehicle into Jackson. T.T. at 174. Det. Coleman as well as Jackson Police Officer Terrance Spann went to the intersection of Highway 80 and Robinson Road to block traffic. T.T. at 175. The gold SUV, driven by Alice Wilson, with the Raymond officer behind, entered the intersection of Highway 80 and Robinson Road. Id. There were no City of Jackson officers behind the Raymond vehicle at the intersection. T.T. at 200-201.

Det. Coleman and Officer Spann's police cruisers then got behind the Raymond officer to assist the Raymond officer.⁶ T.T. at 201. The order of vehicles was Wilson first, Razor second, then Det. Coleman and Officer Spann. T.T. at 201-201. Det. Coleman was able to get the tag number and what he thought was a description of the driver around the Robinson Road and Dixon Road area.⁷ T.T. at 176. Det. Coleman and Officer Spann assisted the Raymond officer for officer safety, and because Sgt. Amy Barlow, Precinct 2 Supervisor instructed them to monitor and assist with traffic. T.T. at 218, T.E. 12, *admitted for ID only*.⁸

Det. Coleman and Officer Spann continued to follow Raymond Officer Razor on Robinson Road toward downtown Jackson. T.T. at 176. At some point on Robinson Road, Andy Robinson, Program Manager and tactical flight pilot for Metro 1 maneuvered the Metro 1 helicopter into that area to get an observation. T.T. at 118. Andy Robinson received an acknowledgement from the Jackson Police Department between the intersection of Robinson and Ellis and Robinson and Amite that Metro 1 was in the air. T.T. at 128. Shortly, after that acknowledgement, the pursuit arrived at the Robinson, Capitol and Amite three-way split. T. T. at 136. Det. Coleman and Officer Spann terminated their support at this point, and Det. Coleman advised over the radio that he was terminating because the gold SUV and the Raymond officer were heading the wrong way down a one-way street, Amite Street. T.T. at 182-183, T.E. 11, *admitted for ID only*. After terminating their actions, Det. Coleman and Officer Spann deactivated their blue lights and sirens and continued onto Capitol Street, the only

⁶ Det. Coleman and Officer Spann were each driving a City of Jackson police cruiser.

⁷ Det. Coleman originally called the driver of the gold SUV in as a male driver and not a female.

⁸ There are several references herein to documents admitted for ID at the trial of this matter. While the undersigned is aware that ID documents are not evidence, these references are included to show that evidence contained elsewhere is supported by yet more evidence, the ID evidence matters.

lawful direction to proceed, at the three-way split. T.T. at 189, 203-204. In addition, Det. Coleman's beat in Precinct 2 was downtown. T.T. at 183, 186. Det. Coleman and Officer Spann reached the light at Capitol and Lamar Street and they stopped waiting on the light to change. T.T. at 205. At that light, Det. Coleman observed the SUV with Raymond officer Razor behind turn back on Capitol Street proceeding in the lawful direction. Id. At this point, Det. Coleman advised dispatch that they were eastbound on Capitol and Raymond was still behind her. Id., T.E. 14. Det. Coleman lost visual of Raymond officer Razor and Wilson due to the incline on Capitol Street. Id. Det. Coleman did not see Razor and Wilson until he arrived on the scene of the accident, he did not witness the collision. T.T. at 206. Det. Coleman and Officer Spann terminated their actions approximately one mile before the accident occurred. T.T. at 191.

As the gold SUV and Raymond officer Razor proceeded on Amite Street in the wrong direction, Lt. Steve McDonald, Watch Commander and highest ranking supervisor on duty at the time, was traveling downtown without his blue lights and sirens engaged, as he had been monitoring radio communication. T.E. 20, p. 10, 13-15. Lt. McDonald made visual contact of the Raymond officer and the gold SUV on Amite Street, proceeding the wrong way. T.E. 20, p. 16. When Lt. McDonald saw the Raymond officer and the gold SUV proceeding the wrong way on Amite Street, he again advised the City of Jackson dispatcher that they were terminating and to contact the Raymond dispatcher and advise Raymond to terminate. T.E. 20, p. 5-6, T.E. 14(A), *admitted for ID only*, T.E. 12, *admitted for ID only*, T.T. at 183.

Driver Kimberly Clausell, and passengers Lillian Byrd and Alice Clausell were stopped at the light on Capitol and Congress Street. T.T. at 27. Alice Wilson ran the red light at the intersection of Capitol and Congress and hit the vehicle driven by

Kimberly Clausell. *Id.* Alice Clausell died as a result of the accident on April 21, 2007, and Kimberly Clausell and Lillian Byrd were injured. T.T. at 32, 33, 168. Det. Coleman and Officer Spann came on the accident scene to find that Razor had arrested Wilson. T.T. at 206.

SUMMARY OF THE ARGUMENT

The circuit court erred when it ruled that City of Jackson officers acted in reckless disregard of the safety of others pursuant to *City of Ellisville v. Richardson*, 913 So.2d 973 (Miss.2005). R. at 138. In addition, the lower court erred when it apportioned liability of 20% to the City of Jackson, Mississippi when the City of Jackson was not a proximate cause of the accident.

The lower court erred when it found that City of Jackson officers acted with reckless disregard. Specifically, the lower court erred when it found that the circumstances in the instant matter were similar with those facts in *City of Ellisville v. Richardson*, 913 So.2d 973 (Miss.2005). On the contrary, the trial court should have analyzed the totality of the circumstances pursuant to the factors as outlined in *Brister v. City of Jackson*, 838 So.2d 274 (Miss.2003), and *Johnson v. City of Cleveland*, 846 So.2d 1031 (Miss. 2003). R. at 33, 250. As explained *infra*, pursuant to the *Brister/Johnson* factors, the actions of the Jackson Police Department did not constitute reckless disregard.

In addition, the lower court erred when it failed to specifically find that the City of Jackson was a proximate cause. Pursuant to *Ogburn v. City of Wiggins*, 919 So.2d 85 (Miss.Ct.App.2005), Plaintiffs must prove that City of Jackson officers acted in reckless disregard **and** establish that the officer's ***actions were the proximate cause of the accident.*** *Id.* (Emphasis added). Specifically, if City of Jackson

officers were the proximate contributing cause, the impact must be the result of an unbroken chain of events with a clearly definable beginning and ending, occurring in a continuous sequence. *Mitchell v. United Services Auto Ass'n of San Antonio, Texas*, 831 So.2d 1144, 1152 (Miss.2002). Det. Coleman and Officer Spann terminated their support approximately one mile before Alice Wilson collided with the vehicle driven by Kimberly Clausell, therefore causing a break in the chain of events. Therefore the lower court's ruling is against the overwhelming weight of the evidence in the record.

STANDARD OF REVIEW

This action is governed by the Mississippi Tort Claims Act, which controls civil actions against a municipality. The Mississippi Tort Claims Act shields political subdivisions from civil liability. The Mississippi Supreme Court recently stated that immunity is a question of law. *City of Laurel v. Williams*, No.2008-CA-01137-SCT (citing *Miss.Dep't of Pub. Safety v. Durn*, 861 So.2d 990, 994 (Miss.2003)). The Supreme Court further stated that "[t]his Court reviews errors of law *de novo*, including the proper application of the Mississippi Tort Claims Act." *Id.* (quoting *Phillips v. Miss. Dep't of Pub. Safety*, 978 So.2d 656, 660 (Miss.2008)). As such, an appellate court reviews the trial judge's application of the Tort Claims Act *de novo*.

Actions brought under the Mississippi Tort Claims Act against a municipality require a bench trial with the circuit judge sitting as finder of fact. *Ezell v. Williams*, 724 So.2d 396 (Miss.1998). A trial judge's findings are safe on appeal if they are supported by substantial, credible, and reasonable evidence. *Brister*, 838 So.2d at 278. In the case presently before the Court, the trial judge's findings are not based on substantial, credible, and reasonable evidence and should be overturned on appeal.

ARGUMENT

I. The lower court erred when it found that City of Jackson officers acted in reckless disregard.

While the City of Jackson respectfully submits that the issue of proximate cause is easily dispositive in this matter, the City of Jackson also asserts that at all times relevant, City of Jackson officers were liable. The lower court found that City of Jackson officers acted in reckless disregard of the safety of others, specifically finding that pursuant to *City of Ellisville v. Richardson*, 913 So.2d 973 (Miss.2005), the actions of City of Jackson officers on April 21, 2007 were in reckless disregard of the public. R. at 138-141. This finding is contrary to the substantial, credible and reasonable evidence.

The lower court specifically found that Det. Coleman and Officer Spann acted in reckless disregard because of the following:

- they violated City of Jackson General Order 600-20;
- the pursuit of Alice Wilson was six miles in the City of Jackson;
- Alice Wilson was speeding and traveling on the wrong side of the roadway, and that she violated numerous traffic signals;
- the City of Jackson officers were aware at a point during the pursuit of information that could lead to the apprehension of Alice Wilson;
- at some point officers of the City of Jackson knew Metro 1 was in the air and could trail the gold SUV;
- the officers were aware that the offenses were not felonies; and
- at no point did City of Jackson officers Coleman, Spann, Barlow, or McDonald order Randy Razor to terminate the pursuit.

R. at 135-142.

As explained below, these factual findings by the trial court are against the substantial, credible, and reasonable evidence.

Before examining *City of Ellisville*, *Brister*, and other Mississippi case law, one must first turn to the statute whereby municipalities are liable for the actions of its police officers while in the course and scope of employment. Pursuant to Miss. Code Ann. § 11-46-9:

(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 or activities relating to police and 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.

(Emphasis supplied)

Miss Code. Ann. § 11-46-9.

This Court has stated that “apparent in the language of Miss. Code Ann. §11-46-9 is that those officers who act within the course and scope of their employment, while engaged in the performance of duties relating to police protection, without reckless disregard for the safety and well being of others, will be entitled to immunity.” *McGarth v. City of Gautier*, 794 So.2d 983, 985 (Miss.2001). Mississippi courts have held reckless disregard embraces willful or wanton conduct which requires knowingly and intentionally doing a thing or wrongful act. *Kelley v. Grenada County*, 859 So.2d 1049 (Miss.2003). The MTCA states that for liability to attach against a municipality, a police officer **has to act** with reckless disregard. Reckless disregard is a higher standard than gross negligence, and certainly a higher standard than negligence. *Id.* Moreover, this Court recently handed down an opinion in which it held that “reckless

disregard is the ‘entire abandonment of any care,’ while negligence is the failure to exercise due care.” *Rayner v. Pennington*, 25 So.3d 305, 309 (Miss.2010), (citing *Maldonado v. Kelly*, 768 So. 2d. 906, 910 (Miss.2000); *Turner v. City of Ruleville*, 735 So.2d 226 (Miss.1996)).

A. City of Ellisville Analysis

The substantial credible evidence before this Court, and at all time during the course of these proceedings and trial, reflects that the actions of Det. Coleman and Officer Spann were in an assistance and support role to Raymond officer Randy Razor in *his* pursuit of Alice Wilson. Thus, without an active pursuit by the Jackson Police Department officers, no liability should attach. However, because of the trial court’s analysis, the City of Jackson will analyze the actions of the City of Jackson officers pursuant to *City of Ellisville* and *Brister/Johnson*.

The lower court in its Opinion and Order cites *City of Ellisville v. Richardson* and outlines ten factors to consider when determining if police officers acted in reckless disregard when pursuing a suspect. R. at 138. The factors enumerated in *City of Ellisville* are the *Brister/Johnson* factors. Those ten factors are:

1. Length of the chase;
2. Type of Neighborhood;
3. Characteristics of the Streets;
4. The presence of vehicular or pedestrian traffic;
5. Weather conditions and visibility;
6. The seriousness of the offense for which the police are pursuing the suspect;
7. Whether the officer proceeded with sirens and blue lights;

8. Whether the officer had available alternatives which would lead to the apprehension of the suspect besides the pursuit;
9. The existence of police policy which prohibits pursuit under the circumstances; and
10. The rate of speed of the officer in comparison to the posted speed limit.

Id.

Before analyzing the trial court's application of the ten factors, it is important to note that the facts in the *City of Ellisville* matter are factually different from the case at bar. Specifically, in *City of Ellisville* an officer spotted a suspect driving a vehicle that the officer knew had outstanding warrants, one of which for assaulting an officer.⁹ *City of Ellisville*, 913 So.2d 973 at 975. This personal knowledge of Officer Tolbert creates an inference that personal animosity was the reason for the pursuit. Officer Tolbert made a u-turn and began to pursue the suspect, leaving the city limits of the City of Ellisville. *Id.* Further, the evidence presented to the lower court was that after Officer Tolbert initiated the pursuit, the suspect began to run oncoming traffic off the road, that the incident occurred at night, in a residential area on a hilly, curvy, two-lane road with medium levels of traffic. *Id.* at 978. Further, both Officer Tolbert and the suspect in *City of Ellisville* were traveling at excessive rates of speed. *Id.* This Court upheld the lower court's ruling that Officer Tolbert in *City of Ellisville* acted in reckless disregard. *Id.* However, not a single fact in *City of Ellisville* is similar to the facts of the instant matter.

⁹ Officer Tolbert the officer who pursued the suspect in *City of Ellisville* had been assaulted by the suspect approximately one month before he initiated the pursuit. *Id.*

While City of Ellisville is factually distinguishable from this matter, the case does set out the pertinent ten factors a trial court should consider. In the instant matter, through the trial court only analyzes a few at best, and with respect to the factors it does analyze, there is substantial and overwhelming evidence in the record to the contrary.

1. City of Jackson officers did not violate General Orders.

First, the lower court found that City of Jackson officers violated General Order 600-20, specifically that they did not get permission to join the pursuit, that after they terminated their actions they traveled parallel to the pursuit, and that more than two officers joined in the pursuit. R. at 141. Notwithstanding that an alleged general order violation is not a *Brister/Johnson* factor at all time during the course of these proceedings and trial, the actions of Det. Coleman and Officer Spann were in an assistance and support role to Raymond officer Randy Razor in *his* pursuit of Alice Wilson. Therefore, as Sgt. Barlow testified at the trial of this matter, General Order 600-20 does not apply. T.T. at 223.

The officers in *Brister* and *City of Ellisville* were actually pursuing the suspect vehicles. In the case at bar, Det. Coleman and Officer Spann were only offering assistance and support to Raymond Officer Razor, who had authorized himself to enter the City of Jackson and continue the pursuit of Alice Wilson. T.E. 2, p.41-42, T.T. at 183.¹⁰ There is no evidence in the record that Razor either sought or received permission to enter the City of Jackson. In Det. Coleman's report made on April 21, 2007, Det. Coleman specifically states, that he was "assisting Raymond Police

¹⁰ Raymond Officer Randy Razor testified that he was the supervisor on duty at the time, as he was a sergeant, and that he authorized himself to enter the City limits of Jackson to continue to pursue Alice Wilson. T.E. 2, p. 41-42.

Department.” T.E. 11, *admitted for ID only*. In addition, Sgt. Amy Barlow in her report completed April 21, 2007, stated that she, “advised nearby units to monitor intersections and assist with traffic as a safety measure.” T.E. 12, *admitted for ID only*. Moreover, Sgt. Amy Barlow testified at the trial of this matter that, she advised Prescient 2 officers to monitor traffic and assist with traffic in intersections. T.T. at 218.

There is substantial evidence in the record of City of Jackson officers’ assistance of Raymond officer Razor and not pursuing Alice Wilson. For example, Det. Coleman and Officer Spann blocked traffic at the intersection of Highway 80 and Robinson Road. T.T. at 175. Lt. Steve McDonald testified that when Det. Coleman blocked off traffic at Highway 80 and Robinson Road, that was standard procedure, and that officers are going to assist the best way they can. T.E. 20, p.14. Moreover, Lt. McDonald testified that Det. Coleman’s and Officer Spann’s role on April 21, 2007 of assisting the Raymond officer, is because Randy Razor was alone, out of his jurisdiction, and in an unfamiliar area. T.E. 20, p.24-25.

The order of vehicles in this matter was Alice Wilson’s vehicle first, Raymond Officer Randy Razor’s vehicle second, Det. Stephen Coleman’s vehicle third and Officer Terrance Spann’s vehicle fourth. T.T. at 201-202. The City of Raymond vehicle was the lead vehicle, and City of Jackson officers did not take Razor’s place as the lead vehicle during Razor’s pursuit. *Id.*

The lower court was also incorrect in its finding that City of Jackson officers did not obtain permission for their actions on April 21, 2007. While the City of Jackson contends that permission is not necessary because General Order 600-20 is inapplicable to a support role, City of Jackson officers did receive permission for their

actions on April 21, 2007. The evidence in this matter is clear and uncontested, Sgt. Amy Barlow, Det. Coleman and Officer Spann's supervisor, advised Precinct 2 units to assist and monitor traffic. T.T. at 218, T.E. 12, *admitted for ID only*. Accordingly, Det. Coleman and Officer Spann followed the orders given by their supervisor

Further proof of the City of Jackson's role as assistance and support is that City of Jackson officers were not attempting to apprehend Wilson; rather Raymond officer Razor was attempting apprehension. Sgt. Barlow testified that the City of Jackson was not pursuing the Wilson vehicle because the City of Jackson was not in active attempt to apprehend or subdue a suspect. T.T. at 230. In addition, Det. Coleman testified that he did not assist in arresting Alice Wilson. T.T. at 206. In fact, Raymond Officer Randy Razor arrested Alice Wilson at the scene and placed her in his patrol car; the City of Jackson did not effectuate or assist in the arrest of Alice Wilson. T.E. 20, P. 30, T.T. at 206. When Det. Coleman arrived at the accident scene, Wilson was in the City of Raymond patrol car. T.T. at 206. Moreover, when the Raymond Chief arrived at the accident scene on April 21, 2007, he apologized to Sgt. Barlow. T.T. at 222.

2. Alice Wilson was not pursued six or more miles by City of Jackson officers.

Second, the lower court found that Alice Wilson was pursued six or more miles within the City of Jackson. R. at 141. While length of pursuit is a *Brister/Johnson* factor, this finding does not reflect the evidence presented at the trial of this matter. At the trial of this matter, Det. Coleman testified that he first began his support and assistance of Raymond officer Razor at Highway 80 and the Robinson Road intersection. T.T. at 181. Det. Coleman also testified that he monitored and assisted Raymond officer Razor from the Highway 80 and Robinson Road intersection to the

three-way split. T.T. at 175-182. At the trial of this matter, Appelles' counsel asked Det. Coleman on direct examination the distance in miles from Highway 80 all the way to Congress Street where the accident occurred in downtown Jackson. T.T. at 182. Det. Coleman testified that the distance was about four or five miles, and Plaintiffs counsel agreed. Specifically, the following exchange took place at the trial of this matter during the direct examination of Det. Stephen Coleman by Appelles' counsel:

Q: Do you know the distance in miles from Highway 80 all the way to Congress Street where the crash occurred in downtown Jackson? Do you know the distance in miles?

A: I'd say about four or five miles, but exact distance no.

Q: I think that's a fair representation.

T.T. at 182.

Certainly, if Appelles' counsel agreed that four or five miles was a fair representation of the entire distance from Highway 80 and Robinson Road intersection to the point of the collision, not taking into account the one mile before the accident in which City of Jackson officers terminated support, then six or more miles is an inaccurate representation of how long Det. Coleman and Officers Spann assisted Raymond officer Razor. More importantly, there was no credible evidence that the length of Razor's pursuit and support was unreasonable, extreme or dangerous.

3. City of Jackson officers were not traveling at an excessive rate of speed as required for their actions to be in reckless disregard.

Third, the lower court found that Alice Wilson was speeding and traveling on the wrong side of the roadway, and that she violated numerous traffic signals. Alice

Wilson was traveling in an erratic manner before Razor initiated his pursuit of Wilson. T.E.2, p.25-26. She continued. The lower court's order stated that "Razor observed in his rear view mirror a Ford Explorer being driven erratically, weaving from side to side and causing other traffic to run off the road." R. at 136. The lower court further found that, after Razor engaged his blue lights and siren, the Explorer continued to be driven in the same manner at about **65 miles per hour in a 65 mile per hour zone**. (Emphasis supplied). *Id.* The City of Jackson discusses *infra* in its proximate cause argument, the relevance of Wilson driving erratically before Razor initiated his pursuit.

However, with respect to speeding, even the lower court found that Wilson was traveling the speed limit of 65 mph in a 65 mph zone. *Id.* The only instance the lower court found that Wilson was traveling in excess of the speed limit is on Robinson Road, when she was traveling 45 mph in a 35 mph zone. R. at 141. While this speed was 10 miles per hour over the limit, there is no proof that Coleman nor Spann observed Wilson driving recklessly on Robinson Road. In the case at bar, Det. Coleman radioed the speeds they were traveling while assisting Raymond officer Razor on Robinson Road. T.E. 14, T.E. 11, *admitted for ID only*, T.E. 12, *admitted for ID only*, T.T. at 207. Specifically, Det. Coleman radioed speeds of 45 mph while on Robinson Road, a 35 mph zone. T.E. 11, *admitted for ID only*, T.E. 12, *admitted for ID only*, T.E. 14, T.T. at 219-220, 203. While the lower court examined the speed of the officer in comparison to the posted speed limit, there is nothing in the evidence in the record that suggests the speeds that the City of Jackson officers were traveling were reckless or that the City of Jackson officers observed Wilson driving reckless while at that speed. Wilson was driving recklessly two times, before the initiation of the pursuit and when she proceeded on Amite in the wrong direction.

Tyrone Morton and Annie Morton v. City of Shelby and James Carmicle, in his *Individual and Official Capacity*, 984 So.2d 323 (Miss. App.2007), provides clarity on this issue. The Court held that there must be evidence that the officer was traveling so far in excess of the speed limit as to rise to the level of reckless disregard. While the fact that an officer speeding might indicate negligence, it is the much higher standard of reckless disregard that Plaintiff must demonstrate. The *Morton* case stands for the proposition that even in an officer is speeding; his excessive rate of speed has to rise to the level of reckless disregard for liability to attach.

This factor is also distinguishable from the *Brister/Johnson* factors, wherein in *Brister*, the officers did not know the speed they were traveling during the pursuit while the suspect driver in *Brister* was traveling at speeds up to 70 or 80 mph in a 35 mph zone during the pursuit. *Brister*, 838 So.2d at 277,280.

4. City of Jackson officers can not allow another jurisdiction to enter its City limits and pursue a vehicle unmonitored.

Next, the lower court found that City of Jackson officers were aware at a point during the pursuit of information that could lead to the apprehension of Alice Wilson. R. at 136. The City of Jackson respectfully submits to this court that although City of Jackson officers radioed in the tag number of the Wilson vehicle in the vicinity of Robinson Road and Dixon Road, this factor was not applicable to City of Jackson officers as they were not attempting to apprehend or subdue Wilson. This trial court's opinion infers that once a support jurisdiction knows a license plate, the jurisdiction should terminate support and allow those officers from outside to proceed unescorted, unfettered and unmonitored. This action of an unmonitored and unsupported pursuit by the local law enforcement could send a chilling effect which leaves the originating

jurisdiction in a catch-22; terminate or proceed alone in unfamiliar territory. It is reasonable for local law enforcement to monitor a pursuit that enters the local jurisdiction.

5. The Jackson Police Department considered the presence of Metro 1 during the ongoing events.

Fifth, the lower court found that City of Jackson officers knew Metro 1 was in the air and could trail the gold SUV, and thus should have terminated support. *Id.* Andy Robinson, Program Manager and tactical flight officer for Metro 1, testified that upon his in flight arrival over the City of Raymond's pursuit, he received an acknowledgement from the Jackson Police Department that he was above them. T.T. at 128. After Coleman and Spann terminated their support, Lt. McDonald **again** advised over the radio to dispatch that City of Jackson officers were terminating their actions, and also requested that the City of Jackson dispatcher to contact the Raymond dispatcher and inform Raymond to terminate the pursuit, and let Metro 1 follow it. T.E. 20, p.5-6., T.E. 9, T.E. 14 (A), *admitted for ID only*, T.E. 12, *admitted for ID only*, T.T. at 136, 183. The Jackson Police Department did, therefore, consider the presence of Metro 1 during the ongoing events. There is nothing in the evidence that demonstrates that City of Jackson officers were reckless. In fact, shortly after receiving an acknowledgement that Metro 1 was in the air, City of Jackson officers terminated their actions and advised Metro 1 to follow. T.T. at 136.

Moreover, the lower court did not analyze the weather conditions, roads and visibility on April 21, 2007 as the Court in *City of Ellisville* and *Brister* did. All evidence in the record is that weather and visibility conditions on April 21, 2007 were a clear, dry, sunny day. T.E. 2, p. 22, 37. Det. Coleman also testified that Robinson

Road was a mixed use street, being both commercial and residential with light traffic on April 21, 2007. T.T. at 180. The lower court did not take into account the presence of vehicular and pedestrian traffic. Evidence at the trial of this matter was that Robinson Road contained churches, and schools which are not open on a Saturday evening between 5:00 and 5:30 p.m. T.T. at 181. The facts in this matter are unlike the facts in *City of Ellisville* and *Brister*. In *City of Ellisville*, the pursuit occurred at night in a residential area, on a hilly, curvy, two-lane road with medium levels of traffic. *City of Ellisville*, 913 So.2d 973 at 978. Moreover, in *Brister*, the expert testified that the pursuit should have been terminated after the officers turned onto Ridgewood Road in mid-day during the week in an extremely populated residential area. *Brister*, 838 So.2d at 279. The *Brister* pursuit route was through a densely populated area in mid-day that included schools and a park. *Id.* at 280.

The lower court ruled in error that City of Jackson officers acted in reckless disregard on April 21, 2007. The *City of Ellisville* case is not only distinguishable; it is the least similar case possible. The substantial weight of the evidence when analyzed with Mississippi case law proves that City of Jackson officers did not act in reckless disregard, rather City of Jackson officers determined that Raymond officer Razor and Alice Wilson's travel the wrong way on a one-way street was reckless and terminated their actions and advised Metro 1 to follow it.

6. It is of no consequence whether Det. Coleman or Officer Spann knew whether Alice Wilson committed felonies.

Next, the lower court found that City of Jackson officers were aware that the offenses were not felonies. R. at 136. The City of Jackson respectfully submits that this factor was not applicable to City of Jackson officers as they were not pursuing Alice

Wilson. Again, as stated *supra*, the trial court's opinion infers that once a support jurisdiction knows that a suspect has not committed felonies, the jurisdiction should allow those officers from outside to proceed unescorted, unfettered and unmonitored. It is reasonable for local law enforcement to monitor a pursuit that enters the local jurisdiction.

B. There are several other *Brister/Johnson* factors which the lower court did not analyze and further supports the proposition that the City of Jackson officers did not act in reckless disregard.

City of Jackson Officers were not rookies involved in their first police pursuit. Det. Stephen Coleman, Lt. Steve McDonald and Sgt. Amy Barlow were not rookies to the City of Jackson police department, as was the officer in *Brister*. *Brister*, 838 So.2d at 280. Specifically, Det. Coleman attended training at the City of Jackson Training Academy, and specifically received training on defensive driving techniques, and had been a member of the City of Jackson Police Department for three years at the time of the accident on April 21, 2007. T.T. at 198-199. Likewise, Lt. McDonald, the Watch Commander and highest ranking officer on duty at the time had been a member of the City of Jackson Police Department for fourteen years. T.E. 20, p.7. Moreover, Sgt. Amy Barlow, Det. Coleman and Officer Spann's direct supervisor has been a member of the City of Jackson Police Department for seventeen years, and a sergeant for ten of the seventeen years.¹¹ T.T. at 216-217. All members of the City of Jackson police department involved in the events on April 21, 2007, had a combined thirty four (34)

¹¹ Officer Terrance Spann did not testify at the trial of this matter because he was called away to military duty during trial. T.T. at 201.

years experience in law enforcement, certainly a distinguishing difference from the officers in *Brister*.

Moreover, Det. Coleman and Officer Spann were not assisting Raymond Officer Razor immediately preceding the collision. Det. Coleman and Officers Spann were not engaged in assisting Raymond Officer Razor at the time of the collision. T.T. at 182-183. When Alice Wilson and Raymond Officer Razor came to the three-way intersection wherein Robinson Road ends and splits to Amite Street and Capitol Street (hereinafter "three-way split"), City of Jackson officers terminated their support. *Id.* Alice Wilson along with Raymond Officer Razor proceeded on Amite Street, a one-way street in the wrong direction. T.T. at 183. When Det. Coleman and Officer Spann saw Alice Wilson and Raymond Officer Razor proceeding the improper direction on a one-way, Det. Coleman radioed to dispatch that he was terminating and disengaged his blue lights and sirens. T.T. at 183, 203-204., T.E. 14. Officer Spann also disengaged his blue lights and sirens at that time. T.T. at 203-204. Where Robinson Road ends, the only lawful direction of travel is on Capitol Street. T.T. at 189-190.

Andy Robinson, Program Manager and tactical flight officer for Metro 1, testified that upon his in flight arrival over the City of Raymond's pursuit, he received an acknowledgement from the Jackson Police Department that he was above them. T.T. at 128. Shortly after receiving that acknowledgement from the Jackson Police Department, Andy Robinson heard an officer terminate over the radio. T.T. at 136, T.E. 14. The point at where Det. Coleman and Officer Spann terminated their actions was one mile before the accident on Capitol and Congress Street. T.T. at 191.

Lt. Steve McDonald, the watch commander, was monitoring radio communication on April 21, 2007. T.E. 20, p.13. Lt. McDonald was proceeding on

Amite Street traveling in the correct lane of travel when he spotted the Alice Wilson vehicle and the City or Raymond police car traveling in the improper direction. T.E. 20, p.17. When Lt. McDonald spotted the Wilson vehicle and the Raymond police vehicle, he radioed to dispatch **again** that City of Jackson officers were terminating their actions, and also advised the City of Jackson dispatcher to contact the Raymond dispatcher and tell Raymond to terminate the pursuit, and let Metro 1 follow it. T.E. 20, p.6., T.E. 9, T.E. 12, admitted for ID only, T.E. 14, T.E. 14(A), *admitted for ID only*. Moreover, at the trial of this matter Appelles' proposed to introduce into evidence a proposed audio transcript of the City of Jackson dispatch tape. T.T. at 12, T.E. at 14(A), *admitted for ID only*. While the City of Jackson objected to the proposed audio tape transcription being admitted into evidence, even the proposed transcription offers conclusive evidence that the City of Jackson terminated because Raymond officer Razor and Wilson were going the wrong way and that the City of Jackson advised its dispatch to contact Raymond and have them terminate the pursuit, and let Metro 1 follow it. T.E. 14(A), p. 5, *admitted for ID only*.

Moreover, Andy Robinson's testimony was that from a disinterested witness. Andy Robinson worked for Metro 1, as Program Manager and tactical flight officer. T.T. at 116. Metro 1 is an independent entity from the City of Jackson and provides contract services to Hinds and Madison law enforcement agencies. *Id.* Andy Robinson testified that he also heard on the radio a supervisor terminate. T.T. at 136, T.E. 14. This evidence that City of Jackson officers terminated was uncontested at the trial of this matter. In addition, evidence that City of Jackson, specifically Lt. McDonald advised dispatch to contact Raymond and have them terminate the pursuit and have Metro 1 follow it was also not contested at the trial of this matter. Despite conclusive

evidence of the City of Jackson officers termination of their actions and advisement to Raymond to terminate their pursuit, the lower court ruled that City of Jackson officers did not terminate their actions and that, “at no point did Coleman, Spann, Barlow, or McDonald order Razor to terminate the chase.” R. at 141. This ruling is simply incorrect and against all evidence presented at trial, another reason the lower court’s ruling was in error.

The only evidence the lower court had to support its ruling that City of Jackson officers did not terminate their actions is that they allegedly drove parallel to the pursuit. R. at 141. However, after terminating, City of Jackson officers proceeded in the only lawful direction to proceed at the three-way split, on Capitol Street. T.T. at 189. More importantly, downtown Jackson was Det. Coleman’s beat, therefore Det. Coleman was in his beat at that point. T.T. at 183, 186. These facts were also uncontested at trial.

There is no evidence that any Jackson police officer re-engaged their blue lights and siren, and no testimony or radio communication stating that City of Jackson officers re-engaged in their support. T.T. at 207. Therefore, the lower courts ruling is not based on substantial evidence. Accordingly, based on the evidence in the record, a reasonable person can only conclude the following: City of Jackson officers were not pursuing Alice Wilson; City of Jackson officers were not in a support and assistance role to Raymond officer Razor immediately prior to collision; that City of Jackson officers terminated their actions approximately one mile before the accident; and that City of Jackson officers advised Raymond to terminate the pursuit and let Metro 1 follow it. T.E. 20, p.6., T.E. 9, T.E. 10, T.E. 11, *admitted for ID only*, T.E. 12, *admitted for ID only*, T.E. 14, T.E. 14(A), *admitted for ID only*.

Finally, the Court in *Brister* found that the officers did not properly balance the public's safety. *Brister*, 838 So.2d at 279. However, in this matter City of Jackson officers did balance the risks to the public. T.E. 20, p.72-73. When Raymond officer Razor and Wilson went the wrong way on Amite Street, Det. Coleman and Officer Spann did not continue their actions, rather they discontinued their support and assistance role to Razor. T.T. at 207. Further, Lt. McDonald testified that when Raymond officer Razor and Alice Wilson went the wrong way up Amite Street, it was no way that my men or myself were going to follow him. T.E. 20, p.73.

Therefore, City of Jackson officers balanced the risks to the public and when the actions of Razor and Wilson became too dangerous for them to assist and support they terminated and advised Raymond to terminate their actions.

II. In addition, the lower court erred when it apportioned liability of 20% to the City of Jackson without determining proximate cause.

The lower court found the City of Jackson liable for 20% of Plaintiffs damages. R. at 141. Specifically, the lower court held that, "under the totality of the circumstances the Jackson officers acted in reckless disregard of the safety of others and that they did not in fact terminate the chase and ***negligently contributed to the cause of plaintiffs' injuries and death.***" *Id.*

Mississippi law holds that even if a Plaintiff proves that an officer acted in reckless disregard, the Plaintiff must also establish that the officer's actions were the proximate cause of the accident. *Ogburn*, 919 So.2d at 91. (citing *McIntosh v. Victoria Corp.*, 877 So.2d 519, 523 (Miss. Ct.App. 2004)); *Sample v. Haga*, 824 So.2d 627, 632 (Miss.Ct.App.2001). Mississippi law requires a finding of both proximate cause and reckless disregard. *Ogburn*, 919 So.2d 85 at 91. As stated *supra*, proximate cause

requires: (1) cause in fact; and (2) foreseeability. *Id.* “Cause in fact” means that the act or omission was a substantial factor in bringing about the injury, and without it the harm would not have occurred. *Id.* at 91. “Foreseeability” means that a person of ordinary intelligence should have anticipated the dangers that his negligent act created for others. *Id.*

A. Alice Wilson was driving erratically and unlawfully prior to being pursued by Raymond officer Randy Razor.

As stated *supra*, former Raymond Officer Randy Razor’s deposition was admitted into evidence in the trial of this matter in lieu of trial testimony. T.E. 2. On April 21, 2007, roughly between 5:00 and 5:30 p.m. former Officer Randy Razor was parked in the median on Highway 18 in Raymond, Mississippi running radar. T.E. 2, P. 24. Razor looked in his rear view mirror and noticed a vehicle approaching him swerving in and out of traffic and running other vehicles off the highway on to the shoulder. *Id.* at 25. Razor began to pursue Alice Wilson, the driver of the gold SUV, because as the vehicle passed him, he observed her travel from the left lane all the way to the right lane, run a vehicle off the road, and then travel back to the left line. *Id.* at 25-26. As Razor made his way through traffic on Highway 18 and got behind Alice Wilson, she was driving in the middle of the highway riding the white line. *Id.* at 27.

As Razor radioed the tag information of the pursued vehicle to dispatch, he observed Alice Wilson talking to an apparent passenger in the vehicle with her hands; however Wilson was in the vehicle alone. *Id.* at 28. Razor then radioed into dispatch that Wilson was a possible 10-92, mental person. *Id.* at 29. As Razor continued the pursuit of Wilson up Highway 18 toward Jackson, Wilson continued to drive erratically, swerving around vehicles. *Id.* at 29, 40. Wilson also ran the first red light

that she approached on Highway 18. *Id.* at 30. As Wilson continued up Highway 80 she had near misses with other drivers, even almost hitting a motorcycle driver. *Id.* at 32.

The facts of the instant matter are aligned with the facts in the *Ogburn* matter. In *Ogburn*, an officer on patrol in the City of Wiggins observed a vehicle traveling in the wrong lane of traffic at a rate of speed of approximately 20 to 25 miles per hour above the speed limit. *Ogburn*, 919 So.2d 85 at 87. The driver of the vehicle in *Ogburn* continued driving recklessly and even running a stop sign. *Id.* When the officer in *Ogburn*, cleared a hill, he observed the site of an accident wherein, the driver of the pursued vehicle lost control of his vehicle crossed the center line and collided with another vehicle, causing the death of the driver. *Id.* at 87-88. The Court of Appeals upheld the trial court's ruling that the Plaintiff's did not prove proximate cause, because the pursued vehicle in *Ogburn* was driving in the wrong lane of traffic at an excessive speed before the pursuit commenced and the same behavior continued after the officer began his pursuit. *Id.* at 91.

This is the same fact pattern as the case at bar. Alice Wilson was swerving around traffic and having near misses with other vehicles before Randy Razor began to pursue her and this pattern of behavior continued after the pursuit began. T.E. 2, p.25-32. More importantly, the lower court found that, Razor "observed in his rear-view mirror a Ford Explorer that was being driven erratically, weaving from side to side and causing other traffic to run off the road . . . he pursued with blue lights on and siren sounding . . . the Explorer . . . continued to be driven in the same manner." R. at 136. Even by the lower court's own admission, the SUV was driving erratically before and after Razor instituted his pursuit. Therefore, it simply can not be said that without

the actions of the Jackson Police Department the harm would not have occurred. A reasonable person can not conclude that City of Jackson officers were the proximate cause of this accident, as Alice Wilson's driving behavior was the same prior to the pursuit and after Razor initiated the pursuit, as outlined in *Ogburn*.

B. Alice Wilson's state of mind was never entered into evidence at the trial of this matter.

In *Ogburn*, the driver of the pursued vehicle was intoxicated. *Id.* at 91. Similarly, Alice Wilson, the driver in the instant matter was reported as a 10-92 mental person, for talking to a non-existent passenger in her vehicle. T.E. 2, p.28-29. Moreover, once Razor stopped his vehicle at the scene of the accident, Alice Wilson was standing out the car just looking at him. T.E. 2, P. 73. Just as the Court of Appeals opined in *Ogburn*, there is simply no evidence in the record to establish whether Alice Wilson knew she was being pursued. Alice Wilson was a named defendant in this matter, but did not testify at the trial, nor did Appelles' attempt to take her deposition.

Pursuant to *Ogburn*, the fleeing suspect's state of mind should be entered into evidence in the record because as the City of Jackson respectfully submits, the fleeing suspect's state of mind is relevant to prove and/or disprove that the suspect would have stopped at all, whether an intoxicated or mental person even knows they are being pursued. Moreover, Plaintiffs own expert Dennis Waller testified that he did not know anything about Alice Wilson's state of mind and did not know what Alice Wilson was thinking at the time of the pursuit. T.T. at 88, 105.

Therefore, the lower court's ruling was in error as it did not make a finding of proximate cause, and pursuant to *Ogburn*, Plaintiffs did not prove by a preponderance

of the evidence that City of Jackson officers were the proximate cause of the accident on April 21, 2007.

CONCLUSION

For the above reasons, the City of Jackson requests that this Court reverse the lower court's ruling and render a judgment in favor of the City of Jackson. Specifically, the substantial, credible and reasonable evidence is contrary to a finding of reckless disregard by the officers of the Jackson Police Department and that such a finding was a proximate cause of Alice Wilson's actions up to the collision.

RESPECTFULLY SUBMITTED, this the 27th day of August, 2010.

CITY OF JACKSON, MISSISSIPPI

By: Kimberly Banks
PIETER TEEUWISSEN, MSB# [REDACTED]
City Attorney
KIMBERLY BANKS, MSB# [REDACTED]
Deputy City Attorney

CERTIFICATE OF SERVICE

The undersigned certifies that she has this day via United States Mail, postage prepaid, a true and correct copy of the foregoing Appellant's Brief on the following:

Hon. William Coleman, *Presiding Judge*
Hinds County Circuit Court
407 E. Pascagoula Street
Jackson, Mississippi 39205

Joe Tatum, Esq.
Tatum & Wade
124 East Amite Street
Jackson, Mississippi 39201
Counsel for the Wrongful Death Heirs of Alice Clausell

Edward D. Markle, Esq.
Edward D. Markle and Associates
3520 General Degaulle, Suite 5070
New Orleans, Louisiana 70114
Counsel for Chris Clausell

Wade G. Manor, Esq.
Scott, Sullivan, Streetman & Fox, P.C.
Post Office Box 13847
Jackson, Mississippi 39236-3847
Counsel for Alice Wilson

So certified, this the 27th day August, 2010.


KIMBERLY BANKS