IN THE SUPREME COURT OF MISSISSIPPI

ERIC LAW AND KRISTINA LAW — APPELLEE

VS. — NO. 2009-CA-01611

THE CITY OF JACKSON
CITY OF JACKSON POLICE DEPARTMENT
ADRIAN MAY — APPELLANTS

On Appeal From the Circuit Court
Of Hinds County, Mississippi
Cause Number 251-07-893
Honorable Swan Yerger

Reply Brief

ORAL ARGUMENT REQUESTED

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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 Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal:

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Respectfully Submitted,

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ARGUMENT

The facts and circumstances of the case *sub judice* are of an earnest nature. This Court is charged with the task of deciding whether a police pursuit under the facts and circumstances in the instant matter give rise to reckless disregard. This Court's decision in turn affects the manner in which law enforcement officers across the State of Mississippi perform their duties. This Court has previously decided cases involving police pursuits resulting in serious injuries, permanent injuries and even death, and the Legislature has responded by criminalizing fleeing behavior as felonious. Yet, as the largest urban area in the State, the City of Jackson continuous to find itself with a *Hobson's* choice: pursue felons, though such pursuits may not end well; or, refrain from pursuits, thus allowing felons to know that evasive action will prevail.

The City of Jackson[1] does not take lightly the issues presented in this case or any other pursuit case that comes before this Court. Plaintiffs' use of dramatic language in their brief, while full of emotion and entertaining as a literary reading, is impertinent to the seriousness of police pursuits and the issues placed before this Court. Plaintiffs' numerous references to watching the pursuit in this matter on a reality show and the carnage that unfolded as entertaining and "neat" mocks the real time decisions made during an unfolding series of events.

The reality of this matter is that Carol Dearman ("Dearman") was operating a recently stolen Jeep on June 11, 2006 and was a known drug user who did not have a driver's license or routine place of residence. Officer Adrian May pulled behind Dearman in an attempt to pull her over, yet she refused to yield to his blue lights. Officer

[1] Officer Adrian May was sued in his official capacity, which is synonymous with suing the City of Jackson. For case of reading, this brief uses the terms City of Jackson and or Defendant May in a singular fashion.

May received confirmation that the Jeep was stolen, a felony, and thus continued in his attempts to attempt to apprehend Dearman. As the pursuit continued, Officer May made a determination, after weighing several factors, that it was not safe to pursue Dearman and disengaged from his pursuit. The facts and circumstances in the case at bar are neither "neat" nor entertaining. Carol Dearman, who is now serving a twenty-year sentence, seriously injured the Laws.

The Legislature of the State of Mississippi set an extremely high bar for Plaintiffs seeking to recover against a municipality and/or governmental agency for the conduct of law enforcement officers while engaged in the performance of duties. *City of Jackson v. Presley*, 40 So.3d 520, ¶12 (Miss.2010). One may logically infer the reason for this. As Plaintiffs' expert and Defendant's expert in this matter both opined, the very nature of police work is dangerous, and involves an inherent risk. Due to the inherent danger and risks involved in police duties, a municipality and/or governmental agency is immune from liability for acts of negligence, and even gross negligence is not enough. *Id.*

Plaintiffs' brief presents to this Court its interpretation of the facts. Although there are two (at least) interpretations of the facts, enough facts for both the City and Plaintiffs to argue about, this does not alleviate Plaintiffs from their burden of proof. Plaintiffs' argument that this is a matter with two sets of facts renders the issues to be decided a factual dispute, but Plaintiffs' argument does not legally rise to a level of reckless disregard. Under a *de novo* review, Plaintiffs must show more than a mere factual *dispute* to meet their burden: Plaintiffs must prove that the actions of the Jackson Police Department amounted to a conscious indifference to the consequences, almost a willingness that harm should follow. *Miss Dep't of Safety v. Durn*, 861 So. 2d

990, 994-95 (Miss. 2003). Competing interpretations of the facts are simply not enough for Plaintiffs to meet this high burden.

Plaintiffs submit two misguided arguments to this Court. First, Plaintiffs assert that pursuant to *Brister* and its progeny, Officer May not only acted with reckless disregard, but somehow the facts of the pursuit in the instant matter are "the worst case scenario" ever presented to this Court. *See* Plaintiffs' Brief, p. 12. Secondly, Plaintiffs assert that the City of Jackson is liable under a training theory, and/or that because Officer May did not terminate the pursuit as stated in General Order 600-20, the City is liable. The City will briefly rebut each contention.

A. Officer May did not act with reckless disregard on June 11, 2006.

This Court has consistently held that reckless disregard is a standard higher than gross negligence and 'embraces willful or wanton conduct which requires knowingly and intentionally doing a thing or wrongful act.' *City of Jackson v. Presley*, 40 So.2d 520 ¶13 (Miss.2010). In addition, reckless disregard is usually "accompanied by a conscious indifference to consequences, amounting almost to a willingness that harm should follow." *Id.* This Court also 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.2d 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)).

As stated in Defendant's brief, the trial judge's findings in the case at bar are not based on substantial and credible evidence in the record and should be overturned on

appeal because the trial judge's findings do not rise to this high level. Officer May exercised care and continued to evaluate a fluid situation eventually disengaging before the Dearman/Law collision.

1. Officer May's experience as a member of the Jackson Police Department is not in any way similar and/or worse than the experience of the pursuing officer in *Brister*.

Plaintiffs, in their brief, repeatedly attempt to make this very real set of facts farcical. For example, Plaintiffs in their brief reference Officer May's previous job before being a member of the City of Jackson Police Department. Plaintiffs Brief, p. 18, comments that the previous job Officer May held was that of a carpenter. While this is true, it is irrelevant and serves no purpose in analyzing whether the pursuit and termination were reckless. Officer May was a member of the Jackson police force for 18 months on the day in question; that is what matters.

Officer May's length of service is distinguishable from the facts in *Brister*, where the pursuing officer was a rookie with only 30 days on the force. Officer May was on the Jackson Police Department for a year and a half and assigned to Precinct 2, the busiest Precinct in the capitol city riddled with gunfights, and drugs. T.T. at 6-7.

2. The fact that the pursuit in the case *sub judice*, lasted for seven miles does not mean that it is similar and/or worse than *Brister*.

Plaintiffs assert that the police pursuit in this matter is "much worse" than the facts in *Brister*. Plaintiffs' assertion that the pursuit in the instant matter lasted for seven miles is, like the officer's experience, taken out of context.

Plaintiffs focus on the alleged seven miles of pursuit and state that this pursuit went through every type of road imaginable. However, the truth is that Plaintiffs' own expert only testified that pursuits are "dynamic" and that this pursuit had points that

were more dangerous or more safe as the pursuit unfolded. T.T. 187, 191-203. More importantly, Plaintiffs' expert was contradictory in his testimony as to where the pursuit should have terminated. Plaintiffs' expert testified that on McDowell Road there were no facts or evidence in the record that indicated that anything dangerous was going on. T.T. at 197. However, Plaintiffs' expert later testified that even though there was nothing dangerous occurring on McDowell Road, it was his expert "opinion" that Officer May should have terminated the pursuit on McDowell Road and/or Daniel Lake Boulevard. T.T. at 202, 203. And even in that criticism of Officer May, Plaintiffs' expert could not offer a specific point of where Officer May should have terminated the pursuit. T.T. at 205, 210. As the expert offered, he had a "difference of opinion" with Officer May. T.T. at 205. A difference of opinion, with all due respect, doesn't amount to reckless conduct by Officer May.

This inconclusive and contradictory nature of Plaintiffs' expert testimony is not the type sufficient to support the trial judge's opinion. Under Mississippi law an experts' opinion based merely on "subjective beliefs or unsupported speculation" is insufficient. *Miss. Transp. Comm'n v. McLemore*, 863 So. 2d 31, 36 (Miss. 2003). Moreover, the expert testimony must include proof on the element of proximate cause, something that Plaintiffs apparently concede. As recently stated by this Court, where the "speculative testimony of the expert witness called by the plaintiff was insufficient as a matter of law to establish proximate cause", the testimony is insufficient to allow recovery. *Double Quick, Inc. v. Travis*, 2008-CA-01713-SCT, paragraph 35 (Miss. 2010). Where an experts' testimony is general in nature resulting in the trier of fact being left to speculate and guess about causation, such testimony is insufficient to

permit recovery. *Id.* Counsel for the City repeatedly objected during trial the testimony of Plaintiffs' expert was insufficient. *See generally*, T.T. at 164, 176, 244.

Lastly, because Plaintiffs repeatedly state in their brief that this pursuit was worse than the pursuit in *Brister* and encompasses seven miles, one would believe that this pursuit should have not begun, and that one can criticize Officer May's actions from the beginning, including Officer May's reason to pull Dearman over Winter Street. Importantly, Plaintiffs' expert had no such criticisms of Officer May's actions at the initial attempt to pull Dearman over or to initiate the pursuit and continue the pursuit for some period. T.T. at 194. The expert in *Brister* testified that that pursuit should not have been initiated. That is not the set of facts and circumstances in this matter.

3. Officer May's actions of pursuing Dearman through intersections does not mean that the City's actions are similar and/or worse as the facts in Brister.

Plaintiffs assert as evidence that Officer May acted in reckless disregard because Officer May and/or Dearman allegedly ran red lights during the course of the pursuit. Plaintiffs' expert, however, to the extent he could provide any meaningful testimony, concluded that regardless of whether red lights were run, these actions did not pose a danger to the public. T.T. 242, 243. With this concession, the alleged running of red lights is a non-issue.

Officer May was the first witness called at the trial of this matter, and Plaintiffs called Officer May as an adverse witness. While Officer May responded to leading questions by Plaintiffs' counsel during cross examination, the nature of the questioning does not in and of itself create evidence in the record. May testified in this matter that to his knowledge Dearman did not run a red light. T.T. at 107. In fact, Officer May testified that at the intersection of Cooper and Terry Roads, Dearman slowed down at

the traffic light, there was no traffic coming and she made a left turn. *Id.* Moreover, as distinguishable from the *Brister* facts, in *Brister*, the officers ran a red light at the heavily populated intersection of Ridgewood and Old Canton Road. *Brister*, 838 So.2d at 277. There was little to no traffic on the streets at the time of the instant pursuit, and Officer May testified that Dearman slowed through and paused at the intersection and continued.

4. The road, time of day, and character of area are not similar and/or worse than *Brister*.

Another factor not similar to or worse than in *Brister* is the road, traffic, time of day and character of surrounding areas. In *Brister*, the pursuit occurred during mid-day, during the week and not on a Sunday evening, as in the case *sub judice*. The pursuit in *Brister* proceeded through a densely populated area that included schools and parks, mid-day during the week. The pursuit in the case at bar occurred at approximately 5:00 p.m. on a Sunday through light traffic and mostly commercial areas. T.T. at 100, 101, 102, 105. When the pursuit did enter a residential neighborhood, the officer disengaged. Plaintiffs disingenuously imply that the City would mislead the Court into believing that this pursuit occurred through a "ghost town", and that this was just some leisurely Sunday stroll. However, because Plaintiffs do not like the facts in evidence in this matter, is not reason to attack counsel for the City. Simply, this pursuit bears little resemblance to the *Brister* pursuit.

5. Officer May balanced the risks to the public in this matter, unlike the officers in *Brister* did, which does not result in the facts being similar and/or worse than *Brister*.

When the pursuit entered a residential area on Dona Avenue, Officer May backed off and allowed Dearman to gain distance between the two vehicles. Plaintiffs

argue that Officer May did not evaluate and balance the public's safety with respect to his alleged later apprehension of Dearman at some other time. Specifically, Plaintiffs emphasize that Officer May testified that seeing Dearman was like seeing family and that Officer May had another way of apprehending Dearman because he knew what beats she frequented in the precinct. However, Plaintiffs' oversight in this argument is that Officer May also testified that Dearman was a drug user driving a stolen car and had no license. T.T. at 14. Moreover, Dearman had no fixed or permanent address from where she could be apprehended. While Officer May knew Dearman frequented certain beats within the precinct, Officer May knew that Dearman gave an address in Copiah County where she did not live. T.T. at 14, 92. There is not, as Plaintiffs suggest, some designated location that Officer May could go to apprehend Dearman. The only way Officer May would be able to apprehend Dearman is if he happened to see her in the Precinct during his shift. So here is Officer May's *Hobson's* choice: allow a drug user and prostitute with no known physical address in a newly stolen vehicle to simply drive away and hope to see her later, or attempt to apprehend her and hopefully return a stolen vehicle.

In addition, Plaintiffs assert that in Officer May's prior encounters with Dearman, he never saw Dearman as a physical danger to the public. However, just because she did not pose a danger to the public during those prior encounters does not mean that she did not pose a danger to the public when Officer May attempted to stop her in a stolen vehicle on June 11, 2006. The simple fact that an individual with a known criminal record in a stolen vehicle would choose to flee from the police and not stop when a law enforcement officer is attempting to stop them, makes that person a danger to the public.

Officer May balanced the risks to the public in a "dynamic" situation. When the increased risks were apparent upon Dearman entering a residential neighborhood on Dona Avenue, Officer May considering that he was not familiar with the area and that Dearman was beginning to increase speed and distance between the vehicles, Officer May determined that the risks to the public were apparent and terminated the pursuit at that time. T.T. at 108. This balance by Officer May, in hindsight, may be one with which another can criticize, but it falls short of an indifference to the consequences of his actions.

6. Officer May was not engaged in an active pursuit of the suspect immediately prior to the collision. This factor is neither similar and/nor worse than in *Brister* either.

Officer May was not engaged in an active pursuit of Dearman at the time of the collision, unlike the officers in *Brister*. Two independent witnesses, Jacqueline Johnson and Nicolas Thomas, place Officer May's patrol vehicle at the intersection of the collision some 4-5 minutes after the Dearman vehicle entered the intersection and hit the Law's. T.T. at 408, 431. Moreover, Officer May terminated his pursuit of Dearman one mile before Dearman collided with the Laws. T.T. at 96. There was no evidence or testimony in the record that contradicts either Officer May's testimony or that of the two independent witnesses. Even Plaintiffs' expert admitted that he had no evidence to dispute that assertion by Officer May. T.T. at 182.

Plaintiffs' brief only makes one mention of Johnson and Thomas, the disinterested witnesses, and this reference is in an attempt to discredit them because there was discrepancy in their testimony regarding the placement of the Law vehicle prior to the accident. However, Jacqueline Johnson, Nicolas Thomas, and Officer Nash all testify consistently that Officer May's police cruiser did not enter the intersection of

McDowell and McFadden Road until some 4-5 minutes after the accident occurred. T.T. at 408, 431. More importantly Johnson, Thomas, and Officer Nash also all testified that they did not hear a police siren while at or approaching the intersection of McDowell and McFadden Road. T.T. at 392, 422, 430. Based on the only evidence in the record, one can only conclude that Officer May was not in active pursuit of Dearman immediately prior to the collision and that Officer May disengaged from the pursuit, as he testified, approximately one mile before the accident.

B. Plaintiffs' miscellaneous arguments do not support a finding of reckless disregard.

1. General Order 600-20 is not the controlling standard

Plaintiffs have a second misguided argument. Plaintiffs attempt to make General Order 600-20, the City of Jackson's police pursuit policy, have the effect of law. Plaintiffs spend considerable time arguing that because Officer Adrian May did not terminate the pursuit in the manner outlined in General Order 600-20, the City of Jackson is liable under Miss. Code Ann. §11-46-9. Specifically, Plaintiffs argue that Officer May did not turn his vehicle around and proceed in the opposite direction of travel from Dearman after the pursuit was terminated. However, Officer May disengaged his blue lights and sirens as provided in the policy, and then Officer May headed in the direction that he was pointed by a concerned citizen. Officer May had no independent knowledge that Dearman continued along that street, and did not turn off on one of the side streets.

Assuming *arguendo*, that Officer May did not terminate his pursuit in the manner outlined in the general order, this does not amount to reckless disregard. Just

as the Court in *City of Jackson v. Presley* reasoned, Plaintiffs cite to no authority for the proposition that a violation of an internal police operating procedure constitutes reckless disregard. *Presley*, 40 So.3d 520, ¶16. Likewise, Plaintiffs' expert conceded that no national or state standards exist which state where or how Officer May should have disengaged from the pursuit. *See generally* T.T. 181-182, 204–206. Further, Plaintiffs' expert could not opine what would have occurred differently that day if Officer May had disengaged at different point or earlier in the pursuit. See generally T.T. 207-214.

2. A state law failure to train claim does not constitute reckless disregard.

Plaintiffs also assert that if Defendant City of Jackson would have employed some and/or device to attempt to get Dearman to stop, the pursuit in the instant matter would have had a successful outcome.

In addition, Plaintiffs attempt to hold the City of Jackson liable under a theory of recovery that it is not precluded under *stare decisis*. Plaintiffs attempt to assert liability against the City under a theory of failure to train by alleging that Officer May was not trained to utilize a pursuit to apprehend a suspect and/or when Plaintiffs allege that Officer May was not trained to use a method to ensure that Dearman stops, i.e. stop sticks, etc. Plaintiffs' Brief, p. 11. Mississippi law, however, precludes recovery against a municipality for failure to train. Specifically, this Court held in *City of Jackson v. Powell,* 917 So.2d 59, 74 (Miss. 2005) that "the manner in which a police department supervises, disciplines and regulates its police officers is a discretionary function of the government and thus the city is immune to suit under Miss. Code Ann.§ 11-46-9 (1)(d)." *City of Jackson v. Powell,* 917 So.2d 59, 74 (Miss. 2005).

Despite the fact that the City of Jackson is not liable for its regulation of Officer May, Plaintiffs assert that Officer May violated a supervisor's direct orders by not disengaging the pursuit when Dearman allegedly ran a red light. However, what Officer May's supervisor stated to him and what is heard on the dispatch tapes is that if she is "blowing through lights", let her go. T.T. at 48. Officer May testified that he understood "blowing through red lights" to mean, if Dearman was flooring it through red lights at intersections, and not pausing, terminate your actions. T.T. at 103.

Moreover, this Court has recently addressed what an officer "understands" with respect to their duties. In *Presley*, this Court stated that while the officer at issue knew another officer had been called to assist her, she **understood** the call to be hers. *Presley*, 40 So.3d 520, ¶2. Just as the officer in *Presley* understood the call to be hers, likewise Officer May understood that when his supervisor stated let Dearman go if she was "blowing through red lights", that meant only if she was blowing through the intersections and not pausing at the red lights. T.T. at 103. Plaintiffs attempt to mischaracterize evidence again with respect to this argument. The record and the audio dispatch accurately reflect the correct terminology that was used by Officer May's supervisor and that was "blowing through red lights", and not proceeding through traffic controlled intersections as Plaintiffs suggest.

Plaintiffs again dislike the facts of the instant matter and assume facts not in evidence. Plaintiffs had an opportunity at the trial of this matter to rebut the testimony of Officer May with respect to what he understood from his supervisor's statement. However, Plaintiffs did not rebut this evidence, nor did they call Officer May's supervisor as a witness at trial. Even more interesting, Plaintiffs did not call as trial

witnesses either Carol Dearman or her passenger, L.B. Carson, who could have testified regarding whether Dearman ran any red lights (not to mention when Officer May disengaged, states of mind, speeds, etc.)

The recent headlines with respect to employing devices in a police pursuit have been to the contrary. Recently, the George County, Mississippi Sheriff was killed on July 21, 2010 while attempting to lay spike sticks across a road to stop a vehicle fleeing from the police. *The Munz, Remembering the Fallen*, themunz.wordpress.com, July 21, 2010. Moreover, as recent as September 29, 2010, stop sticks were deployed in the Olive Branch, Mississippi area twice to attempt to stop a fleeing vehicle and the pursuit ended with the fleeing vehicle crashing into a tractor trailer. *WMC, TV-5 News, Memphis, TN* September 29, 2010. Simply said, law enforcement cannot guarantee that certain tactics and/or devices, if used during a pursuit, will end in a favorable outcome. This can be said of all police work. It can not be said that when an officer responds to a domestic call and/or a routine traffic stop that there will be a favorable outcome, which is why the City of Jackson contends that the Legislature of the State of Mississippi has required a high standard with respect to suing municipalities. The very nature of police work is dangerous and high risk, as such a heightened standard applies.

3. The trial court should have considered the contributory negligence of Eric Law

Lastly, Appellees argue that Eric Law should not be contributory negligent for the injuries sustained by Plaintiffs, but Plaintiffs' argument is nonsensical and again argues against a position not raised by Defendants. Plaintiffs assert in their brief that Defendants somehow want to make Eric Law contributory negligent for him not foreseeing and predicting the chase would come through the intersection of McDowell

Road and McFadden Road. That is not what the City argued. Plaintiffs' attempt in their argument is to relieve Eric Law of any duty at all as a driver in the State of Mississippi; that simply is not the case in Mississippi law. Plaintiff Eric Law, as a driver of a motor vehicle on June 11, 2006, had a duty to keep a proper look out, and at the least, a duty to yield to an emergency vehicle with its emergency lights activated. *See Busick v. St. John*, 856 So.2d 304, 317 (Miss.2003); *see also*, Miss. Code Ann. §63-3-809.

The City argued in its Brief that disinterested witnesses Jacqueline Johnson and Nicolas Thomas both witnessed Officer Nash's vehicle approaching west on McDowell Road, traveling at an excessive slow speed with his blue lights engaged. This testimony was consistent between Johnson and Thomas. Jacqueline Johnson and Nicolas Thomas both testified that they witnessed Officer Nash's blue lights and yielded for the blue lights of the officer, as required by Miss. Code Ann. §63-3-809. However, Eric Law was at that same intersection and did not yield for Officer Nash's blue lights, as evidenced by the accident that occurred at that intersection. Mississippi statute imposes a duty to drivers to proceed with caution and be prepared to stop when approaching an emergency vehicle with its lights engaged. *Id.*

Eric Law failed to yield to Officer Nash's blue lights. Accordingly, had Eric Law not breached his statutory duty and kept a proper lookout, this accident would not have occurred, and, therefore Plaintiffs' damages must be reduced by the proportion of Eric Law's liability.

CONCLUSION

The City of Jackson respectfully requests that this Court reverse the lower court's ruling and render a judgment in favor of the City of Jackson. Specifically, the City submits to this Court that Officer May did not act with reckless disregard. Alternatively, Defendant City of Jackson submits that if this Court does find after its *de novo* review that Officer May acted with reckless disregard, the Court should reverse the trial court's proximate cause analysis and apportionment of fault. The City of Jackson submits that reversing and rendering a judgment for the City of Jackson is proper because the lower court was in error when it found that the facts and circumstances of the case at bar align with established Mississippi case law.

RESEPCTFULLY SUBMITTED, this the 11th day of October, 2010.

THE CITY OF JACKSON, MISSISSIPPI

BY: _____
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CERTIFICATE OF SERVICE

The undersigned does certify that he has this date mailed, via United States mail, postage pre-paid, a true and correct copy of the above and foregoing Appellee's Reply Brief to the following:

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So certified, this the 11TH day of October 2010.

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