

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**

Brief of Appellant City of Jackson

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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STATEMENT OF THE ISSUES

The issues that this Court should resolve on appeal are:

- I. The lower court erred when it found that Officer Adrian May acted with reckless disregard on June 11, 2006.
- II. Alternatively, the court erred in determining that Officer May's actions were a proximate contributing cause.
 - a. The lower court erred when it found that Carol Dearman was only 60% at fault.
 - b. The lower court erred when it found that Eric Law was not contributory negligent in his actions on June 11, 2006.

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 *Brister* and its progeny 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 September 18, 2007 against the City of Jackson, City of Jackson Police Department, and Jackson Police officer Adrian May ("Officer May") in his official capacity. R.at 3. This cause of action arises from a motor vehicle accident wherein Plaintiffs' vehicle was hit by Carol Dearman ("Dearman"), who was operating a stolen vehicle in the City of Jackson. R.at 7. Plaintiffs allege that as a proximate result of Officer May's reckless actions, Plaintiffs Eric and Kristina Law were injured. The City of Jackson filed its Answer and Affirmative Defenses, Motion to Dismiss of Defendant Jackson Police Department, and Motion to Strike on October 12, 2007. R. at 16.

This case followed the standard pre-trial procedure with one notable exception. Defendant City of Jackson propounded its first set of Interrogatories, Request for Production and Request for Admission on November 9, 2007. Plaintiffs did not timely file their Responses to Defendants Request for Admissions. Accordingly the Answers were deemed admitted. M.R.C.P. 36(b). Notwithstanding Plaintiffs failure to proffer any good cause for failing to timely answer the Request for Admissions, the City of Jackson agreed to accept Plaintiffs out of time Admissions. R. at 33. Thereafter, on December 11, 2008, an Agreed Order setting the matter for trial was entered. R. at 34.

On June 1-2, 2009, the Honorable Swan Yerger conducted a bench trial in this matter. The court entered its Findings of Fact and Conclusions of Law and Final

Judgment on September 3, 2009. R. at 39, 61. The lower court concluded that on June 11, 2006, Officer May, while acting in the course and scope of his employment, engaged in a seven mile pursuit of Carol Dearman. R. at 37. The lower court further concluded that Officer May acted in reckless disregard, "which negligence was a proximate contributing cause of the accident between Dearman and the Plaintiffs." *Id.* The lower court concluded that neither Eric or Kristina Law were contributory negligent and that the City of Jackson was 40% at fault, and assigned 60% fault to Carol Dearman. *Id.*

The City of Jackson timely filed its appeal from this adverse judgment. R. at 64.

B. STATEMENT OF THE FACTS

Dearman was in possession of and driving a stolen Jeep Cherokee on Sunday June 11, 2006 in the City of Jackson. T.T. at 8. A BOLO (be on the lookout) went out over the dispatch radio for a stolen gray Jeep at the start of Officer May's shift. T.T. at 112. Officer May spotted Dearman on June 11, 2006 at approximately 5:45 p.m. in the Winter Street/Terry Road area driving a stolen gray Jeep. T.T. at 110-111. Officer May identified Dearman as a known drug user and prostitute in the area. T.T. at 12. Officer May also knew that Dearman did not have a driver's license and no fixed or permanent residence. T.T. at 14, 92. Officer May knew Dearman used an address in Copiah County, but Dearman did not live at that address. *Id.* After Officer May identified Dearman in a new model gray Jeep in a high crime area, he chirped his siren in attempt to stop Dearman. T.T. at 14-15. Dearman did not yield so Officer May engaged his blue lights and siren to attempt to pull Carol Dearman over. T.T. at 15. Dearman did not yield to Officer May's blue lights and sirens. T.T. at 16. Officer May

then pursued Dearman in an attempt to pull her over while traveling no more than 50 miles per hour on non-busy City streets and 70 miles per hour on a short section of I-55. T.T. at 81-82. Shortly into the pursuit of Dearman, Officer May received confirmation on Gallatin Street that the gray Jeep Dearman was driving was stolen. T.T. at 48. As detailed herein, the pursuit was uneventful until reaching South Jackson.

Shortly after exiting I-55 South, Dearman entered a residential neighborhood in South Jackson and began to increase her vehicle speed and increase in distance from Officer May. T.T. at 107. Officer May then decided to decrease his speed at this point, and terminate pursuing the stolen Jeep because Dearman entered a residential neighborhood, picked up speed, and Officer May was not familiar with the neighborhood. T.T. at 107-109. Officer May continued to canvass the neighborhood but lost sight of the stolen Jeep in the South Jackson neighborhood approximately one mile or more before Dearman collided with the Law's vehicle. T.T. at 112. The stolen Jeep was last seen by Officer May when Dearman made a left onto Woody Drive. T.T. at 109. At all times relevant to the pursuit on June 11, 2006, the traffic on the roads were light to none, there were no near misses on the road with pedestrians or other vehicles, the area was mostly commercial, and the weather conditions were clear and sunny. T.T. at 103-106. The collision between Dearman and the Laws was at the intersection of McFadden and McDowell Roads. T.T. at 27. Officer May was not present at the time of the collision, nor was he the first Jackson police officer on scene. T.T. at 94.

Jackson Police Officer Kevin Nash ("Officer Nash") heard the radio transmissions of Officer May, specifically that a pursuit was entering his Precinct. T.T. at 450. Officer Nash proceeded south on McDowell Road at approximately two to five miles per hour with his blue lights engaged. *Id.* Officer Nash engaged his blue lights to warn the public of the pursuit, specifically Nash testified that he was at the intersection of McDowell and McFadden Roads to try to make traffic come to a standstill. T.T. at 459. Officer Nash was traveling in the direction facing the vehicle in which Eric Law was the driver. T.T. at 453. At the same time, Jacqueline Johnson and Nicolas Thomas were also traveling in the same direction as the Law vehicle on McDowell Road. *Id.*

Jacqueline Johnson and Nicolas Thomas were stopped at the intersection of McDowell Road and McFadden Road at a red light. T.T. at 407. Jacqueline Johnson was the driver of a Dodge Caravan van, in which Nicolas Thomas was a passenger. T.T. at 438. They both saw Officer Nash approaching them with his blue lights engaged doing approximately two to five miles per hour. T.T. at 407, 440. When the traffic light at McDowell and McFadden Road turned green, Jacqueline Johnson did not accelerate, instead she took caution because of Officer Nash's slow speed and flashing lights. T.T. at 422. Although Jacqueline Johnson did not proceed through the intersection, Eric Law turned in front of Officer Nash's patrol car with its blue lights activated and was hit by Dearman's vehicle. T. T. at 454. Witnesses Jacqueline Johnson and Nicolas Thomas testified that they did not see another patrol car, come from the direction of Monticello Drive until 4-5 minutes after the accident between Dearman and the Law vehicle. T.T. at 408, 431.

Dearman was subsequently indicted and plead guilty to aggravated assault for the automobile accident on June 11, 2006, and sentenced to twenty (20) years in the Mississippi Department of Corrections. *Defendants Exhibit 3*, admitted for Identification. Dearman never offered testimony via deposition or trial, so the trial court did not have any evidence of Dearman's state of mind as basis for her actions at any time on June 11, 2006.

SUMMARY OF THE ARGUMENT

The circuit court erred in determining that, "Adrian May was found to be acting with reckless disregard, which negligence was a proximate contributing cause of the accident between Dearman and the Plaintiffs." R. at 37. Pursuant to *Ogburn v. City of Wiggins*, 919 So.2d 85 (Miss.Ct.App.2005), Plaintiffs must prove that the officer acted in reckless disregard **and** establish that the officer's actions were the proximate cause of the accident. *Id.* (Emphasis added).

The lower court erred when it found that Officer May acted with reckless disregard. Specifically, the lower court found that the facts in the instant matter were similar with the facts in *Brister v. City of Jackson*, 838 So.2d 274 (Miss.2003). R. at 33, 250. As explained *infra*, *Brister* is distinguishable on every factor. Thus, because the trial court mis-applied the *Brister* factors, its judgment is in error. *Id.*

In the alternative, the circuit court erred in determining proximate cause. Specifically, if Officer May is 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. Officer May testified that he lost visual of

Dearman and turned off his blue lights and sirens approximately one mile before Dearman collided with the Law's vehicle. T.T. at 96. Moreover, Chief Mark Dunston, Defendant's expert, is the only witness who testified to proximate cause. T.T. at 528-529. Chief Dunston opined that Officer May was not the proximate cause of the accident between the Laws and Dearman on June 11, 2006. T.T. at 528-529.

In addition, the lower court erred in finding that Eric Law's actions did not amount to contributory negligence. R. at 37. Eric Law testified that he does not remember anything prior to the accident. T.T. at 328. Appellee Kristina Law testified that the last thing she remembered seeing was the light at the intersection of McFadden and McDowell Road that was red ahead of their vehicle. T. T. at 391. Three eye witnesses to the accident; Officer Nash, Jacqueline Johnson, and Nicolas Thomas all testified that Eric Law's actions were a proximate contributing cause to the accident.

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 Officer Adrian May acted with reckless disregard on June 11, 2006.

The lower court found that Officer May acted with reckless disregard, finding that the case *sub judice* aligns with the facts in *Brister*. R. at 33, 50. The lower court examined the length of the pursuit, the conditions of the roads, the seriousness of the suspect's offense, the experience and training of the officer, and whether an applicable pursuit policy was followed. R. at 54. The facts in the case at bar do not align with the facts in *Brister* and are not supported by substantial, credible and reasonable evidence in the record.

Before examining *Brister*, 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)).

In *Brister*, the first case in Mississippi to establish that a law enforcement pursuit could result in civil liability, the Plaintiff’s expert concluded that the officers conduct was extreme and unreasonably dangerous to the public. *Brister*, 838 So.2d at 279. However, there are major distinctions between the case presently before the Court and *Brister*, thereby reflecting the lower court’s analysis and ruling was in error.

In *Brister*:

- (a) the officer driving the City of Jackson patrol car, was a rookie who was on the force thirty (30) days, and involved in his first pursuit;
- (b) the officers did not know the speed they were traveling during the pursuit, and the suspect driver in *Brister* was traveling at speeds of up to 70 or 80 mph in a 35 mph zone; and
- (c) the officers in *Brister* drove through red lights;
- (d) 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;
- (e) the officers were still engaged in active pursuit up to the collision (eye witnesses place them within twenty (20) yards behind the suspect's car at the time of collision);
- (f) there was testimony that the officers never should have initiated this high speed pursuit; and
- (g) the officers in *Brister* did not properly balance the public's safety versus the immediate apprehension of a check forger.

Id.

The City of Jackson recognizes that there is a subsequent case after *Brister* where the *Brister* factors are discussed, namely *Johnson v. City of Cleveland*, 846 So.2d 1031 (Miss.2003). However, as the trial court's analysis revolves around *Brister*, this is where the City will confine its argument.

a. Officer May was not a rookie involved in his first police pursuit.

Officer May was not a rookie with only 30 days on the force as the officer in *Brister* was. *Brister*, 838 So.2d at 280. Officer May attended the 16 week training academy at the City of Jackson Training Academy. T.T. at 6. In addition, after graduating from the academy, Officer May was assigned a ride along training officer for ninety (90) days. T.T. at 6. At the time of the pursuit with Dearman, Officer May

had been on the Jackson police force for more than a year and a half assigned to Precinct 2, a high crime area with drugs, prostitutes, and gun fights. T.T. at 6-7.

b. Officer May knew the speed he was traveling during the pursuit and Dearman did not get to the excess speeds the suspect vehicle in *Brister* was traveling.

Another factor distinguishable in the case at bar from *Brister* is the officers in *Brister* 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. In the instant matter, Officer May was in constant radio communication reporting his speed and location over the radio to his supervisor, Sgt. Campbell. T.T. at 47. When Officer May first attempted to stop Dearman on Winter Street, the speed limit was 25 mph and Officer May testified that Dearman was traveling around 30 mph. T.T. at 81. When Dearman got on Gallatin Street, Officer May testified that the speed limit is 40 mph and Dearman was traveling around 50 mph on Gallatin. *Id.* As Dearman and Officer May traveled on McDowell Road, Dearman was traveling around 35 mph in a 35 mph zone. T.T. at 82. As Dearman turned onto I-55 South, Officer May testified that Dearman was traveling around 70 or 75 mph in a 70 mph zone. *Id.*

Officer May testified that Dearman began to unreasonably increase speed when she turned onto Dona Avenue where the speed limit is 35 mph. T.T. at 107. Officer May testified that when Dearman began to increase speed on Dona Avenue, he evaluated this as a factor and decided to decrease his speed and allow for greater

distance between the two vehicles. T.T. at 107-108. In the case at bar, Dearman did not travel at speeds of 70 to 80 mph in a 35 mph zone during the pursuit and therefore this is another distinguishing factor from *Brister*.

c. The suspect driver in *Brister* was driving recklessly at the initiation of the pursuit.

At the beginning of the *Brister* pursuit, the suspect squealed out of the parking lot in her car and jumped over the walkway nearly hitting the patrol car in the process. *Brister*, 838 So.2d at 277. Those facts are clearly distinguishable from the case *sub judice*. After Officer May attempted to stop Dearman at the intersection on Evergreen and Peabody, there is no evidence in the record that Dearman had any near misses with any pedestrians or vehicles during the entire pursuit route. T.T. at 99, 101, 105. While Dearman failed to yield to Officer May, he testified that the only time during the pursuit that Dearman was driving recklessly was on I-55, because she was switching lanes and looked as if she did not know what exit to take, and when she entered the South Jackson neighborhood and began to pick up speed. T.T. at 105, 107.

In addition, as stated *supra* the officers in *Brister* ran a red light at the heavily populated intersection of Ridgewood Road and Old Canton Road. *Brister*, 838 So.2d at 277. Officer May testified in this matter that to his knowledge Dearman did not run a red light. T.T. at 107. In fact, at the intersection of Cooper and Terry Roads, Dearman slowed down at a traffic light, there was no traffic coming and she made a left turn. *Id.*

d. The conditions of the road, traffic, time of day and character of surrounding area are factually distinguishable from *Brister*.

The expert in *Brister*, 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 that included schools and a park. *Id.* at 280. Officer May pursued Dearman at approximately 5:00 p.m. on a Sunday through city traffic that was little to none, through mostly commercial areas, with a small segment of the pursuit on the interstate, specifically I-55 South. T.T. at 100, 101, 102, 105.

The pursuit route in the case at bar was down Gallatin Street, McDowell, Road, I-55, Daniel Lake, Terry Road, and Dona Avenue. T.T. at 81-82. Officer May testified that on Gallatin Street, the businesses were closed and traffic was light to none, unlike the facts in *Brister*, during the day mid-week all business and stores were open. T.T. at 102. Officer May also testified that when he reached McDowell Road there was no traffic on McDowell Road until he approached the railroad track and there was an 18-wheeler on McDowell Road. *Id.* Likewise Officer May testified that when Dearman traveled onto I-55, the traffic was also light. T.T. at 104. When Officer May reached Daniel Lake Boulevard, the traffic was light and in fact at all times relevant to the pursuit the traffic was light to none. This evidence was not disputed by any witness during the course of the trial, not even Plaintiffs' expert witness.

e. Officer May was not engaged in an active pursuit with Dearman up to the collision.

Officer May in the case at bar was not engaged in active pursuit at the time of the collision. T.T. at 96. Two independent eye witnesses Jacqueline Johnson and

Nicolas Thomas as well as Officer Nash place Officer May at the intersection of the collision some 4-5 minutes *after* the Dearman vehicle entered the intersection of McDowell and McFadden Road. T.T. at 408, 431. 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 to contradict Officer May's testimony. Moreover, Plaintiff's own expert witness testified that he had no facts in evidence to dispute that assertion by Officer May. T.T. at 182. Lastly, Johnson, Thomas, and even the Law's testified that they did not hear any police sirens while at or approaching the intersection of McDowell and McFadden Roads. T.T. at 392, 422, 430.

Jacqueline Johnson, the driver of a Dodge van in which Nicolas Thomas was a passenger, was stopped at the intersection of McDowell and McFadden Roads. T.T. at 407. Johnson and Thomas witnessed Dearman come through the intersection and hit the vehicle driven by the Law's. T.T. at 406, 430. They also witnessed Officer May's police cruiser come through the intersection some 4-5 minutes after the accident occurred. T.T. at 408, 431. Moreover, Jacqueline Johnson testified that she had time to reverse several times in the street and turn her van around to get out of the street before she saw Officer May's police cruiser coming from Monticello into the intersection. T.T. at 416.

Therefore based on the evidence in the record, one can only conclude that Officer May was not in active pursuit of Dearman immediately prior to collision and that he terminated his pursuit approximately one mile or more before the accident.

- f. There was no testimony from any expert that the pursuit in the case at bar should not have been initiated.**

Lastly, there was no testimony from Plaintiffs' expert that Officer May should not have initiated the pursuit, contrary to the expert opinion in *Brister*. *Brister*, 838 So.2d at 279-280. Plaintiffs' expert Steven Ashley did not have any criticism of Officer May's actions at the initial attempt to pull over Dearman and initiate the pursuit. T.T. at 194. Ashley further 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. Moreover, Plaintiffs' proposed expert Ashley was never tendered and accepted as an expert witness. During Ashley's testimony, defense counsel constantly objected based on Ashley's inability to testify to a methodology of how he reached his results and conclusions. T.T. at 164, 176, 177. Further, Ashley testified that there is no national guideline as to when a pursuit must be initiated or terminated. T.T. at 186.

The lower court in this matter was in error when it did not apply its gatekeeper function and properly apply *Daubert* and its progeny to Ashley's proposed expert testimony and opinions.

g. Officer May balanced the public's safety with the apprehension of Dearman, and terminated the pursuit when he deemed it unsafe to the public.

The Court in *Brister* found that the officers did not properly balance the public's safety versus the immediate apprehension of a check forger. *Brister*, 838 So.2d at 279. However, in this matter Officer May did balance the risks to the public with arresting Dearman, a known prostitute, drug user, with no license who was driving a stolen vehicle. T.T. at 14. The Court in *Brister* pointed out that when the officers were pursuing the suspect, the suspect had not committed a felony. *Brister*, 838 So.2d at 280. However, in the instant matter Officer May got confirmation on McDowell Road, early in the pursuit, that the vehicle Dearman was driving was in fact a stolen vehicle, a

felony pursuant to Mississippi state statute. T.T. at 48. Dearman was indicted on June 5, 2007 for grand larceny under Miss. Code Ann. § 97-17-41. ~~Defendants Exhibit 5,~~ admitted for identification. Moreover, Officer May made a decision after continuing to balance the risks to the public that the increased risks were becoming apparent when the pursuit: (1) entered a residential neighborhood when he turned onto Dona Avenue; (2) Officer May was not familiar with the area; (3) Dearman was beginning to pick up speed; and (4) the distance between their vehicles began to grow further and further apart. T.T. at 108.

Officer May considered these factors and disengaged from the pursuit at the intersection of Woody Drive and Monticello. T.T. at 121. At this point Dearman was completely out of Officer May's visual and Officer May disengaged his blue lights and sirens. T.T. at 108.

Not only is Officer May's point of disengagement reasonable, but Plaintiffs' own expert asserted a mere difference of opinion rather than a solid expert opinion backed by a methodology with respect to termination location. T.T. at 205. Ashley testified that Officer May should have terminated the pursuit on McDowell Road and/or on Daniel Lake Boulevard. T.T. at 202. However, Ashley could not point to any national standard, Mississippi standard, or Mississippi case law that mandated Officer May to terminate his pursuit at the McDowell Road and/or Daniel Lake locations, as opposed to Woody and Monticello Drive. T.T. at 181-182. He further testified that he could not offer a specific point on Daniel Lake where Officer May should have terminated. T.T. at 205, 210.

Plaintiffs' expert Steve Ashley also could not testify and state a point where the pursuit became "reckless", instead he testified that he was uncomfortable with the

word “reckless” and only testified that the risks to the public elevated on McDowell Road. T.T. at 196. In fact, Ashley testified that he did not understand how the term reckless disregard is used in Mississippi law as it applies to police activities and could not articulate how the facts in the pursuit in the instant matter compare to the facts in *Brister*. T.T. at 181-182. Not only was Ashley unable to articulate how the instant facts in the pursuit compare to the facts in *Brister*, Ashley testified that he did not apply the *Brister* factors to the area around McDowell Road, the area where Ashley asserted that the pursuit should have been terminated. T.T. at 209. Moreover, Plaintiff’s expert testified that he did not know the speed the vehicles were traveling on Daniel Lake Blvd, another area that he testified that the pursuit should have been terminated. T.T. at 201. In addition, Ashley testified that it was in the officer and supervisors discretion to allow the pursuit to continue. T.T. at 205. At all times relevant to this pursuit Officer May was in constant radio contact with his supervisor and Officer May was never instructed by his supervisor to terminate the pursuit. T.T. at 102-103.

Ashley also testified that pursuits have some level of inherent risks or danger, and stated that he was not testifying that all police pursuits were bad. However, Ashley could not define the levels of risks and definitely could not articulate or testify by his own admission when that level of risks rises to the level of reckless disregard. T.T. at 47.

Lastly and most importantly, Ashley testified that there were no methods or methodology used to form his conclusion, and that he did not apply any principle of methodology to the facts of the instant case. T.T. at 209. As stated *supra*, defense counsel constantly objected based on Ashley’s inability to articulate a methodology. T.T. at 164, 176, 177. Not only could he not articulate a methodology, Ashley testified

that there was no national standard, and no Mississippi definition for what he called “acceptable levels of risks”. T.T. at 181. In addition, Ashley had no studies from other experts in the field that could explain “acceptable levels of risks.” Likewise, Ashley testified that there are no national guidelines of which a pursuit must terminate or begin. T.T. at 186.

Since Ashley offered no principle or methodology for forming his opinions, the only remote methodology Ashley could have used, is to apply the *Brister* factors to the case. However, Ashley testified that he did not apply the *Brister* factors to where he concluded Officer May should have stopped on McDowell Road, and he was not knowledgeable of Mississippi pursuit law, specifically the *Brister* factors. T.T. at 206, 209. Therefore Ashley’s testimony was not based upon sufficient facts or data, not the product of reliable principles and methods, and he did not apply the principles and methods reliably to the facts of the case. Ashley should not have been allowed to testify to his conclusions and opinions because pursuant to Mississippi precedent, the admissibility of his expert testimony was improper based on the reliability factors of his opinions. *Watts v. Radiation Speciality Co.*, 990 So.2d 143 (Miss.2008).

Nothing in *Daubert* permits a court to admit opinion evidence which is connected to data only by the *ipse dixit* of the expert. *Watts*, 990 So.2d at 143. The focus of the *Daubert* analysis “must be solely on principles and methodology, not on the conclusions they generate.” *Id.* Otherwise stated, Ashley’s mere conclusions based on no methodology, insufficient facts, and his inability to apply a method to the facts, is nothing more than pure conjecture and speculation, and not an expert opinion as defined by Mississippi law. *Id.*

II. Alternatively, if this Court finds that Officer May did act with reckless disregard, Officer May was not the proximate cause of the accident on June 11, 2006.

Should this Court conclude that Officer May was reckless in his actions on June 11, 2006, the City of Jackson respectfully requests a *de novo* review of the trial court's proximate cause analysis. The lower court determined that Carol Dearman was 60% at fault and Officer May was 40% at fault for the accident. R. at 37. The City of Jackson respectfully submits that the actions of Dearman were the significant proximate cause while Eric Law's actions on June 11, 2006 were a contributing proximate cause.

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. Officer May terminated the pursuit.

Officer May lost visual of Dearman as she turned onto Woody Drive, therefore he terminated his pursuit and turned off his blue lights and sirens. T.T. at 107-109. Officer May terminated his pursuit of Dearman approximately one mile before

Dearman collided with the Law vehicle. T.T. at 109. Two independent witnesses, who witnessed the accident, Jacqueline Johnson and Nicolas Thomas testified that they heard no police sirens before the accident at the intersection of McDowell and McFadden Roads. T.T. at 420, 440. Moreover, both Johnson and Thomas testified that after witnessing the accident at the intersection, another police cruiser did not come through the intersection traveling in the same direction as Dearman until about 4-5 minutes after the collision. T.T. at 408, 431. Therefore, Officer May was not in active pursuit of Dearman and was more than enough mile(s) back from Dearman to not be the proximate cause or contributing cause of the accident.

When Officer May turned onto Dona Avenue, Dearman began to pick up speed and pull away from Officer May. T.T. at 64. Officer May then lost visual of Dearman as she turned onto Meadow Lane. *Id.* This fact is undisputed, as Plaintiffs' own expert testified that he has no reason to dispute that Dearman pulled away and Officer May decreased his speed. T.T. at 202. As Plaintiffs' proposed expert, with his more than thirty (30) plus years of training could not indicate a specific location where the pursuit should have terminated, then certainly Officer May's point of termination was reasonable. Because as Ashley testified, pursuits are always evolving and not static. T.T. at 187. Otherwise stated, some segments of the pursuit may have a higher level of risk than the other then drop back down to no risks, as there are some inherent risks in all pursuits. T.T. at 167. There are always changing factors to evaluate. T.T. at 172. Therefore, Officer May acted accordingly; when the pursuit entered a residential area, he backed off and then terminated. Officer May weighed the changing factors, and decided to terminate the pursuit. T.T. at 108.

Not only, did Officer May terminate his pursuit of Dearman and lose sight of her one mile before the accident, Plaintiffs' expert Ashley could not state what route Dearman would take had Officer May stopped pursuing her on Daniel Lake Boulevard. T.T. at 208. Likewise he testified that he had no way of knowing the route Dearman would have taken had Officer May stopped pursuing her on McDowell Road either. T.T. at 208. As outlined in the statement of facts and argument *supra*, the accident between the Law's and Dearman occurred at the intersection of McDowell and McFadden Roads. Consequently, Ashley could not state that if Officer May stopped pursuing Dearman on McDowell Road, then Dearman would have not proceeded onto McDowell Road and collided with either the Law's or another innocent bystander.¹ In fact, Ashley testified that he did not know what Dearman would have done differently if May would have stopped the pursuit at the points that Ashley suggested were proper, either at McDowell Road or Daniel Lake Boulevard. T.T. at 208. On the contrary, Appellants expert testified that Officer May's actions were not the proximate cause of the collision. T.T. at 528-529. This testimony was un-refuted.

Further, the Court in *Ogburn*, held there was no evidence placed in the record that the suspect driver had any knowledge of the pursuit. *Ogburn*, 919 So.2d 85 at 91. Officer May testified that he lost visual of Dearman and terminated the pursuit one mile before Dearman reached the intersection of McDowell and McFadden Roads causing the accident with the Law's. T.T. at 112. As Dearman did not testify either by deposition or at trial, there is no evidence in the record that Dearman knew or thought that Officer May was still behind her in the last mile of the pursuit. Moreover,

¹ As stated above, Ashley testified that he had no criticisms of Officer May until the McDowell Road area. T.T. at 194.

Plaintiffs' own expert testified that he has no objective way of knowing what was going on in Dearman's mind nor what her state of mind was at any point while Officer May was behind her. T.T. at 185. More importantly, Ashley testified that he had no way of knowing at what point she may have known Officer May was not behind her. *Id.* These are the same issues present in the case at bar as were present in *Ogburn*. The Court in *Ogburn* further held that the evidence in that matter was insufficient to establish that the officer was the proximate cause of the accident because there was insufficient evidence to know one way or the other whether the suspect knew the officer was following him, and even if he did, there are additional questions of whether the suspect knew the officer was still behind him in the last half a mile from when the officer lost visual of the suspect. *Id.* at 92. The Court in *Ogburn* found that it was the reckless driving of the suspect that proximately caused the injuries in the automobile accident and not the officer. *Id.*

The accident in the case at bar must be the result of an unbroken chain of events with a clearly definable beginning and ending, occurring in a continuous sequence. *Mitchell*, 831 So.2d 1144 at 1152. Officer May losing visual of Dearman and terminating the pursuit, which is uncontested, caused a break in the chain of events; therefore breaking the continuous sequence of events. Otherwise stated, it simply cannot be said under these facts that Officer May was a substantial factor in bringing about the injury and without his actions the harm would not have occurred.

- b. The lower court erred when it found that Carol Dearman was only 60% at fault for the accident on June 11, 2006.**

Officer May initiated a VTO (Vehicle Traffic Stop) of Dearman on June 11, 2006 on the corner of Winter and Peabody Streets. T.T. at 110-111. As Officer May attempted to stop Dearman she failed to yield to his blue lights and siren. T.T. at 15. Not only did Dearman fail to yield to his blue lights and sirens when Officer May initiated the pursuit, but she failed to yield to his blue lights and sirens while Officer May was behind her. Dearman chose to disregard law enforcement authority, causing Officer May to decide whether to pursue Dearman. Appellees' expert had no criticism of Officer May's initial decision to pursue Dearman. T.T. at 192-194.

As Officer May pursued Dearman along the route as discussed *infra*, Dearman's failure to yield was uneventful until reaching the South Jackson neighborhood. T.T. at 104, 107. After Dearman turned onto Dona Avenue, she began to increase her speed through the residential neighborhood. T.T. at 107. Shortly after entering the South Jackson neighborhood, Officer May lost visual of Dearman as she began to increase her speed, then he terminated the pursuit. T.T. at 107-108. Yet, apparently Dearman chose to continue disregarding speed limits and traffic laws. Dearman allegedly disregarded a red light at the intersection of McDowell and McFadden Roads and collided with the vehicle driven by Eric Law.²

After the accident on June 5, 2007, Dearman was indicted on five counts; including but not limited to, breaking and entering, auto theft, and aggravated assault. *Defendants Trial Exhibit 5*, admitted for Identification. On June 6, 2007, Dearman plead guilty to aggravated assault under Miss Code Ann. § 97-3-7 (2)(A) and was sentenced to twenty (20) years. *Defendant's Exhibit 3*, admitted for Identification.

² The Appellants use the term "allegedly disregarded a red light", because although there was testimony from Jacqueline Johnson that the light facing her was green, there was no testimony in the record that the light facing Dearman as she entered the intersection of McDowell and McFadden Roads was a red light.

Because of the actions of Dearman and her disregard of law enforcement and her voluntary guilty plea to aggravated assault, the City of Jackson respectfully submits that she was the significant proximate cause of the collision.

c. The lower court erred when it found that Eric Law was not contributory negligent in his actions on June 11, 2006.

Officer Nash a Precinct 1 City of Jackson Patrolmen testified that he heard that a pursuit was entering his precinct and he began to travel west on McDowell Road between two and five miles per hour, with his blue lights engaged, as to caution the public. T.T. at 452. Officer Nash testified that as he approached the intersection of McDowell and McFadden Road with his blue lights engaged, the Law vehicle turned in front of Officer Nash's patrol car. T.T. at 451. In addition, independent witnesses Jacqueline Johnson and Nicolas Thomas who were also stopped at the intersection of McDowell and McFadden Road, traveling in the same direction as the Law's, testified that that they saw Officer Nash's vehicle in front of theirs, proceeding at an alarming slow pace around five miles per hour with his blue lights engaged. T.T. at 406, 422. Jacqueline Johnson took caution at the intersection and therefore did not proceed when the light at the intersection turned green, because of Officer Nash's lights. T.T. at 422, 430.

Mississippi law holds that a motorist's right to assume that the driver of a vehicle proceeding toward an intersection will obey the law of the road extinguishes when the motorist knows or in the exercise of care should know the proceeding vehicle will not stop. *Busick v. St. John*, 856 So.2d 304, 317 (Miss.2003). Such a failure to recognize that a proceeding vehicle will not stop constitutes a failure to keep a proper

lookout and maintain control of one's vehicle. *Id.* at 318. This rule of law applies directly to Eric Law's actions.

Moreover, pursuant to Miss. Code Ann. §63-3-809, Eric Law should have approached Officer Nash's vehicle with due caution, yield the right of way, and be prepared to stop to his blue lights. Pursuant to Miss Code Ann. §63-3-809:

(d) upon approaching a stationary authorized emergency vehicle, when such vehicle is giving a signal by use of flashing, blinking, oscillating or rotating lights, a person who drives an approaching vehicle shall:

i. Proceed with due caution, yield the right of way, .

...

Miss. Code Ann. §63-3-809.

Not only did Eric Law not take any precautionary measure, his wife Kristina Law testified that she did not see any blue lights or hear any sirens immediately prior to the accident. T. T. at 392. Independent witness Jacqueline Johnson and Nicolas Thomas saw Officer Nash's blue lights. Jacqueline Johnson, the driver of a Dodge van, saw Officer Nash's lights and took caution by stopping at the intersection as required by statute. T.T. at 407.

Mississippi statutory law imposes a duty to drivers to keep a proper lookout when entering an intersection and to yield to oncoming vehicles that may be "immediate hazards". *Busick*, 856 So.2d at 317. Mississippi statute also imposes a duty to drivers to proceed with caution and be prepared to stop when approaching an emergency vehicle with its lights engaged. *Miss. Code Ann. § 63-3-809*. Eric Law failed to perform these duties. Eric Law failed to yield to Dearman's vehicle that was an "immediate hazard", and Eric Law failed to yield to Officer Nash's blue lights.

Further, Eric Law testified that he had been working thirteen (13) straight days immediately prior to the accident. T.T. at 329. Moreover, ~~Eric Law also testified that~~ when working on the weekend, he would only receive four hours of sleep. *Id.* The accident at issue in this matter occurred on Sunday, June 6, 2006. *Id.* Had Eric Law not breached these statutory duties, this accident would not have occurred, and therefore Plaintiffs' damages must be reduced by the proportion of Eric Law's liability. Eric Law's actions were a substantial cause in bringing about the injuries, as the driver and passenger in the next lane took caution to Officer Nash's blue lights and did not proceed into the intersection. Had Eric Law keep a proper lookout and headed Officer Nash's blue lights, this accident would not have happened. Therefore, the City of Jackson respectfully requests that this Court find Eric Law 25% at fault for the injuries sustained by the Plaintiffs on June 11, 2006.

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 City respectfully requests that this Court find that Officer May did not act with reckless disregard. Alternatively, Defendant City of Jackson respectfully requests that if this Court does find that Officer May acted with reckless disregard, that it 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.

RESPECTFULLY SUBMITTED, this the 7th day of July, 2010.

CITY OF JACKSON, MISSISSIPPI

By: Kimberly Banks
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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:

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So certified, this the 7th day of July, 2010.

Kimberly Banks
KIMBERLY BANKS

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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:

So certified, this the 7th day of July, 2010.

Kimberly Banks
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