SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2010-CA-00850

SHANNON JOHNSON and
SASHAYE JOHNSON — APPELLANTS

V.

CITY OF QUITMAN, MISSISSIPPI
HANK GANDY, in his official capacity of
QUITMAN POLICE OFFICER and individually,
CATHY CAMERON, in her official capacity of
QUITMAN POLICE OFFICER and individually — APPELLEES

APPEAL FROM THE CIRCUIT COURT OF CLARKE COUNTY, MISSISSIPPI
OF SUMMARY JUDGMENT FOR DEFENDANTS

REPLY BRIEF OF APPELLANTS

ORAL ARGUMENT IS REQUESTED

LINDA A. HAMPTON
ATTORNEY AT LAW
P.O. BOX 99
DEKALB, MS 39328
601-743-4855 TEL.
601-743-4853 FAX
MSB [redacted]

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ARGUMENT

Under Mississippi Rule of Civil Procedure 56(c), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." A circuit court's grant or denial of a motion for summary judgment is reviewed under a de novo standard." *Herndon v. Miss. Forestry Comm.*, 2009-CA-00700-COA (Miss. App. 12-7-2010) citing *Price v. Clark,* 21 So. 3d 509, 517 (Miss. 2009) citing *Arceo v. Tolliver,* 949 So. 2d 691, 694 (Miss. 2006).

In *City of Laurel v. Williams,* 21 So. 3d 1170, 1174-75 (Miss. 2009) the Court reiterated the definition of "reckless disregard," stating that it is:

> . . . .a higher standard than gross negligence, and it embraces willful or wanton conduct which requires knowingly and intentionally doing a thing or wrongful act. . . . Reckless disregard occurs when the "conduct involved evinced not only some appreciation of the unreasonable risk, but also a deliberate disregard of that risk and the high probability of harm involved." See *Herndon v. Miss. Forestry Comm.,* 2009-CA-00700-COA (Miss. App. 12-7-2010) citing *City of Laurel v. Williams,* 21 So. 3d 1170, 1174-75 (Miss. 2009).

In *City of Laurel v. Williams* the Court directed that in order to survive a motion for summary judgment Plaintiff must show facts from which it can be concluded that: (1) there was a creation of an unreasonable risk; (2) this risk included a high probability of harm; (3) the officer appreciated the unreasonable risk; and (4) the officer deliberately disregarded that risk, evincing almost a willingness that harm should follow. In this case the Plaintiffs showed all of the facts from which the city law enforcement officers should have drawn these four conclusions on February 17, 2008 when they were called to the Plaintiffs' home.

(1) There was a creation of an unreasonable risk; On February 17th Nicholson came to Plaintiffs' home in violation of a restraining order and in violation of his order of probation. He was in a violent rage threatening to kill the family and destroy their home. Plaintiff and family member hid in the house. They told the officers they feared that Nicholson was going to carry out his threats as soon as he had an opportunity to do so. They begged the officers to arrest Nicholson, but they refused to do so.

(2) The risk included a high probability of harm; Nicholson had a history of violence. The order of restraint and probation order were due to his history of violence and violation of laws against violence. Plaintiff and family members had been force to hide in the house when they were warned that an irate Nicholson was approaching with threats to kill. They told the

officers they feared that Nicholson was going to carry out his threats as soon as he had an opportunity to do so. They begged the officers to arrest Nicholson, but they refused to do so.

(3) The officer appreciated the unreasonable risk; The officers were made aware of Nicholson violence and potential harm by way of the court order of restraint that had been filed with the Defendants by Plaintiff. The officers were also aware of the fact that Nicholson was in violation of the probation orders by being physically present at Plaintiffs' home while threatening to kill them, do all manner of harm to them and destroy their home. Defendants stood watching Nicholson as he carried on this tirade of terror. Plaintiff and family member hid in the house. They told the officers they feared that Nicholson was going to carry out his threats as soon as he had an opportunity to do so. They begged the officers to arrest Nicholson, but they refused to do so.

(4) The officer deliberately disregarded that risk, evincing almost a willingness that harm should follow. Nicholson came in a rage ranting that he was going to kill Plaintiff and her family. He remained in a rage ranting that he was going to kill Plaintiff and her family. He left in a rage ranting that he was going to kill Plaintiff and her family. The officers did no more than tell him they were going to tell his step-daddy on him. Plaintiff and family members hid in the house. They told the officers they feared that Nicholson was going to carry out his threats as soon as he had an opportunity to do so. They begged the officers to arrest Nicholson, but they refused to do so.

Plaintiffs' showed facts from which it can reasonably be concluded that: (1) there was a creation of an unreasonable risk; (2) this risk included a high probability of harm; (3) the officer appreciated the unreasonable risk; and (4) the officer deliberately disregarded that risk, evincing almost a willingness that harm should follow. See Record pages 131-133, Record Excerpt

Exhibit A, copy of divorce decree. Record pages 134-144, Record Excerpt Collective Exhibit B, Clark County Circuit Court conviction and probation orders. See Record pages 145-160, Record Excerpt Exhibit C, Shannon Johnson transcript. See also Record pages 161-162, Record Excerpt Exhibit D, general affidavits of Shannon Johnson dated February 19, 2008 charging that Nicholson came to her home threatening to kill her and her family on February 17th. Record pages 163-164, Record Excerpt Exhibit E, Daniel Nicholson transcript, lines 22-25, page 163, lines 1-2 and page 164 lines 10-17.

The officers knew their actions were wrongful and for that reason they falsely report that the incident on the 17th only involved threatening phone calls, nothing more. The officers' statements reflect that they went out to Plaintiffs' home on the 11th where Nicholson was threatening Johnson and that Johnson asked them not to arrest Nicholson on that day. Both Johnson and Nicholson verified that Nicholson's tirade of terror at the home occurred on a Sunday after church. February 17th was the Sunday and date of the tirade. February 11th was a Monday. See Record pages 167-168, Record Excerpts Exhibit F, Police Log Records, See Record pages 169-175, Records Excerpts Exhibit G, Admissions of Defendants. In Defendants' Admissions they deny that they observed Nicholson threatening to kill Plaintiff and her family on February 17th.

Under Mississippi Rule of Civil Procedure 56(c), summary judgment is a matter of law and shall be rendered only if the pleadings, depositions, answers to interrogatories, admissions and affidavits fail to show a genuine issue as to any material fact. The lower court's grant of the motion for summary judgment reviewed under a de novo standard was done in error as Plaintiffs' showed substantial facts from which it can be concluded that: (1) there was a creation of an unreasonable risk; (2) this risk included a high probability of harm; (3) the officer

appreciated the unreasonable risk; and (4) the officer deliberately disregarded that risk, evincing almost a willingness that harm should follow.

CONCLUSION

City of Laurel makes it clear that the immunity that Defendants seek is a question of law. See *City of Laurel v. Clyde Williams et al*, 21 So. 3d 1170 and *Miss. Dep't of Pub. Safety v. Durn,* 861 So. 2d 990, 994 (Miss. 2003) (citing *Mitchell v. City of Greenville*, 846 So. 2d 1028, 1029 (Miss. 2003). Regarding the question of immunity, the findings of fact by a circuit court judge, sitting without a jury, will not be reversed on appeal where they are supported by substantial, credible, and reasonable evidence. *Id.* (citing *City of Greenville v. Jones*, 925 So. 2d 106, 109 (Miss. 2006); *City of Jackson v. Perry*, 764 So. 2d 373, 376 (Miss. 2000). See also *Phillip v. Miss. Dep't of Pub. Safety*, 978 So. 2d 656, 660 (Miss. 2008). The Plaintiffs in this case have presented substantial, credible, and reasonable evidence that in accordance with the *Durn* standard, reiterated in *Herndon v. Miss. Forestry Comm.*, 2009-CA-00700-COA (Miss. App. 12-7-2010), prove that the Defendants acted in reckless disregard for Plaintiffs' safety and well being when the Defendants did not arrest Daniel Nicholson on February 17, 2008. In consideration of the circumstances of this case and the evidence submitted therein, the summary judgment ruling of the lower court should be reversed.

RESPECTFULLY SUBMITTED, this the 27th day of January, 2011.

BY: Linda A. Hampton
LINDA A. HAMPTON, MSB[redacted]
ATTORNEY FOR PLAINTIFF

HAMPTON & ASSOCIATES LAW OFFICE
P. O. BOX 99
DEKALB, MS 39328
601-743- 4855

CERTIFICATE OF SERVICE

I, Linda A. Hampton, Attorney for Appellants Shannon and Sashaye Johnson, do hereby certify that I have this day mailed, postage fully prepaid by first class mail, a true and correct copy of Appellants' Reply Brief and Appellants' Record Excerpts to the following:

MICHAEL J. WOLF
PAGE, KRUGER & HOLLAND, P.A.
P. O. Box 1163
Jackson, MS 39215-1163

HON. ROBERT BAILEY
Circuit Court Judge
P.O. Box 1167
Meridian, MS 39302

This the 27th day of January, 2011.

Linda A. Hampton
LINDA A. HAMPTON