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 CLARK COUNTY, MISSISSIPPI OF SUMMARY JUDGMENT FOR DEFENDANTS

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following list of persons have an interest in the outcome of the case. These representations are made in order that the Justices of the Court may evaluate possible disqualifications or recusal.

1. Shannon Johnson, Appellant
2. Sashaye Johnson, Appellant
3. City of Quitman, Mississippi, Appellee
4. Cathy Cameron, City of Quitman police officer, Appellee
5. Hank Gandy, City of Quitman police officer, Appellee
6. Linda A. Hampton, attorney for Appellants
7. Michael Wolf, attorney for Appellees

So certified, this the 14th day of December, 2010.

Linda A. Hampton
LINDA A. HAMPTON
ATTY. FOR APPELLANTS

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STATEMENT OF THE ISSUES

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1. WHETHER THE TRIAL COURT ERRED IN GRANTING IMMUNITY TO DEFENDANTS

2. WHETHER THE TRIAL COURT ERRED WHEN IT REQUIRED PLAINTIFFS TO PROVE BAD FAITH AS TO DEFENDANTS

3. WHETHER THE TRIAL COURT ERRED IN RULING AS A MATTER OF LAW THAT PLAINTIFFS DID NOT PRESENT SUBSTANTIAL, CREDIBLE AND REASONABLE EVIDENCE THAT DEFENDANTS ACTED IN RECKLESS DISREGARD FOR PLAINTIFFS' SAFETY AND WELL BEING WHEN THEY DID NOT ARREST DANIEL NICHOLSON ON FEBRUARY 17, 2008.

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STATEMENT OF THE CASE

Plaintiff Shannon Johnson is divorced from Mr. Daniel Nicholson. Due to Mr. Nicholson's propensity for violence toward Ms. Johnson, on May 26, 2005 in Civil Action No. 04-0385 (M) the Clarke County Chancery Court issued a divorce decree containing an order permanently restraining and enjoining Mr. Daniel Nicholson from contacting, injuring, harming, following, harassing, or disturbing Shannon Johnson's quiet peace. See Record pages 131-133, Record Excerpt Exhibit A, copy of divorce decree. A copy of this divorce decree containing the restraining order was given to the City of Quitman Police Department by Shannon Johnson. See Record pages 145-160, Record Excerpt Exhibit C, Shannon Johnson transcript.

Mr. Nicholson was convicted of a felony offense of assault in 2000. He entered a plea of guilty to the charge of assaulting an officer and threatening to kill the officer's family. Mr. Nicholson was convicted of a felony offence of possession of cocaine on December 14, 2006 in Clarke County Circuit Court Case No. 2006-69 for which he was placed on a 2 year probation said probation order prohibiting Mr. Nicholson from committing any offense against the laws of the state. See Record pages 134-144, Record Excerpt Collective Exhibit B, Clark County Circuit Court conviction and probation orders. Upon Nicholson's release from incarceration and prior to February 17, 2008 Plaintiff reported to the Quitman City Police of the increasing frequency and intensity of Mr. Nicholson's threats and harassment toward her and her family. Mr. Nicholson stalked Plaintiff in a car. Plaintiff called the Quitman Police. Chief Fowler told Plaintiff to drive to the police station. He watched as the car carrying Nicholson drove behind Plaintiff and then took off when she went to the police station. He made a radio call for officers to pull Nicholson over. Nicholson told Plaintiff later that day that her efforts to get help from the police would not work because all the police would do is stop him, talk to him and then let him go. See Record pages 145-160, Record Excerpt Exhibit C, Shannon Johnson transcript.

On Sunday, February 17th several individuals who had observed an irate ranting Nicholson making his way to Plaintiff's house telephoned Plaintiff telling her to call the police. Plaintiff called the police for help. When Nicholson came to Plaintiff's house threatening to kill her, Quitman police observed him and let him go again just as always. See Record pages 145-160, Record Excerpt Exhibit C, Shannon Johnson transcript.

On February 15, 2008 Plaintiff received an instant tax refund check. On February 16, 2008 Nicholson threatened to kill Plaintiff if she did not give him the money. Nicholson stalked, harassed and made phone calls threatening to kill Plaintiff everyday during the week prior to February 17th. Plaintiff called officer McKines many times each day asking whether they had picked Nicholson up for violation of the restraining order and domestic violence law. McKines chased Nicholson on February 14th but did not catch him. McKines told Plaintiff that they were looking for Nicholson and that she should stay hidden. He said Nicholson was "strung out on drugs" and dangerously out of control. He said Nicholson had stolen guns, was armed and dangerous. See Record pages 145-160, Record Excerpt Exhibit C, Shannon Johnson transcript.

On February 17, 2008 Plaintiff went to church with her family. After church Plaintiff went on a Sunday ride around town with her family. She went home, changed clothes, ate and sat outside the house with her family just as they do every Sunday. Later that afternoon Nicholson's threatening calls started again. Warning calls came from concerned people that Nicholson was in a tirade and was coming to Plaintiff's house threatening to kill her. Plaintiff went in the house with her family, locked the doors and started to call the police for help. 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.

On that Sunday of February 17, 2008 the Quitman City Police were called to the home of Shannon Johnson when Mr. Nicholson stood in front of Ms. Johnson's home repeatedly threatening to kill and do harm to Ms. Johnson. Ms. Johnson and her family

remained locked inside their home relying upon defendants for protection from Mr. Nicholson. See Record pages 145-160, Record Excerpt Exhibit C, Shannon Johnson transcript.

Defendants Cathy Cameron and Hank Gandy came to Plaintiffs' home in response to Plaintiff's call for help. The officers arrived and for an extended period of time the Defendants watched and listened to Mr. Nicholson as he stood in front of Ms. Johnson's home repeatedly threatening to kill and do harm to Ms. Johnson, her family and her home. See Record pages 145-160, Record Excerpt Exhibit C, Shannon Johnson transcript.

Defendants did not attempt to arrest Mr. Nicholson. Mr. Nicholson was allowed to leave the area as he continued his violent threats against Ms. Johnson, her family and her home. See Record pages 145-160, Record Excerpt Exhibit C, Shannon Johnson transcript.

After Nicholson came to her home on the 17th Plaintiff went into hiding. From the 17th through the 20th Mr. Nicholson continued to stalk and threaten to kill Ms. Johnson. On February 20, 2008 Mr. Nicholson returned to Ms. Johnson's home where he savagely attacked Ms. Johnson and her family. Mr. Nicholson beat and stabbed Ms. Johnson repeatedly. Ms. Johnson's minor daughter, Sashaye Johnson, was stabbed by Mr. Nicholson. Ms. Johnson's daughter Shonte Hailey was forced to stab Mr. Nicholson in an effort to save her mother's life. See Record pages 145-160, Record Excerpt Exhibit C, Shannon Johnson transcript, and 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.

On February 17, 2008 the Defendants wrongfully and intentionally allowed Mr. Nicholson, a person in violation of MCA §99-3-7 (3), in violation of a domestic violence order of restraint from Clarke County Chancery Court and in violation of a probation order from Clarke County Circuit Court, to continue his tirade of threats to kill Plaintiff and her family without attempting to place Mr. Nicholson under arrest. Defendants watched Nicholson threaten Plaintiffs while the Plaintiffs hid in their home and begged Defendants to arrest Nicholson before he killed them all. See Record pages 145-160, Record Excerpt Exhibit C, Shannon Johnson transcript.

Mr. Nicholson was allowed by defendants to threaten Ms. Johnson and leave unhindered. His tirade against Ms. Johnson was continuous and uninterrupted from February 17, 2008 through February 20, 2008 when Mr. Nicholson viciously beat and stabbed Ms. Johnson and members of her family.

Defendants knew their actions were done in reckless disregard for Plaintiffs' safety and welfare and attempted to conceal their wrongdoing by the bad faith act of falsifying their records and claiming that Nicholson's tirade against Plaintiff occurred on February 11, 2008 as opposed to February 17th. 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. They falsely state that the incident on the 17th only involved threatening phone calls, nothing more. They attempt to rewrite history to 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. On February 19th Plaintiff gave a sworn statement in a general affidavit charging Nicholson made threats against her at her home on February 17, 2008. On February 19th a warrant was issued for Nicholson. See Record pages 145-160, Record Excerpt Exhibit C, Shannon Johnson transcript and Record pages 163-164, Record Excerpt Exhibit E, transcript of Daniel Nicholson page 163, lines 22-25, page 164, lines 1-2, Record pages 134-144, Record Excerpt Collective Exhibit B, Clark County Circuit Court conviction and probation orders, Record pages 161-162, Record Excerpt Exhibit D, general affidavits, Record pages 169-175, Records Excerpts Exhibit G, Admissions of City of Quitman officers, Record page 176, Records Excerpts Exhibit H, 2008 Calendar.

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SUMMARY OF ARGUMENT

Under the circumstances of this case it is clear that the officers acted in reckless disregard of the Plaintiffs' safety and well being when they did not arrest Nicholson on February 17, 2008 when he terrorized Plaintiffs at their home and Defendants should not be afforded any immunity.

"The nature of the officers' actions is judged on an objective standard with all the factors that they were confronted with." *Phillips v. Miss. Dep't of Public Safety*, 978 So. 2d 656 (Miss. 2008) (citing *City of Jackson v. Powell*, 917 So. 2d 59, 71 (Miss. 2005)). The factors that indicate that an arrest is proper are (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. *City of Laurel v. Williams,* 21 So.

3d 1170. These were the factors that the Defendants were confronted with when they were called to Plaintiffs' home on February 17th. The nature of the Defendants' actions (refusal to arrest the aggressor) should remove any immunity protection that was bestowed upon them by state law.

The Plaintiffs in this case presented substantial, credible, and reasonable evidence that 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.

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ARGUMENT

Immunity 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).

Through the Mississippi Tort Claims Act (MTCA), the Legislature has provided that, as a matter of public policy, the state and its political subdivisions are immune from tortuous acts or omissions by its employees while they are acting within the course and

scope of their employment. Miss. Code Ann. § 11-46-7(1) (Rev. 2002); *Phillips*, 978 So. 2d at 660. However, the Legislature saw fit to carve out certain exceptions to the general rule of sovereign immunity. The applicable exception in this case provides that when a police officer acts within the scope of his or her employment, the city will not be held civilly liable unless the officer acted with reckless disregard of the safety and well-being of a person not engaged in criminal conduct. Miss Code Ann. § 11-46-9(1)(c) (Rev. 2002). See *City of Laurel v. Clyde Williams et al*, 21 So. 3d 1170.

In *City of Laurel v. Clyde Williams* the Court directed that to recover damages in such a matter, a plaintiff must "prove by a preponderance of evidence that the defendants acted in reckless disregard of his [or her] safety and that [the plaintiff] was not engaged in criminal activity at the time of injury." *Phillip*, 978 So. 2d at 661 (citing *Simpson v. City of Pickens*, 761 So. 2d 855, 859 (Miss. 2000)). *Mississippi Dept. of Pub. Safety v. Durn,* 861 So. 2d 990 (Miss. 2003) sets out the standard by which the courts are to determine whether an officer's conduct amounted to reckless disregard.

The Court in *City of Laurel v. Clyde Williams* reaffirmed the *Durn* standard that requires a Plaintiff to 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 addition, "the nature of the officers' actions is judged on an objective standard with all the factors that they were confronted with." *Phillips*, 978 So. 2d 661 (citing *City of Jackson v. Powell*, 917 So. 2d 59, 71 (Miss. 2005)).

APPLICATION OF *DURN* STANDARD

In *City of Laurel v. Clyde Williams* the Court applied the *Durn* standard to the factors with which the Laurel officers were confronted. In *City of Laurel* upon the officers' arrival they observed nothing unusual. No one appeared to be harmed or in danger of being harmed. Mr. Wilson, the aggressor, was calm and cooperative. No one indicated that they feared Mr. Wilson. In fact, they stated that they did not want Mr. Wilson arrested. They just wanted him to leave and assisted him in packing to go spend the night elsewhere. Under those circumstances the Court held that the officers did not act in reckless disregard of the Plaintiffs' safety by not arresting Mr. Wilson.

The Court directed that in applying the *Durn* standard, the lower court must consider the following factors:

(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 members had taken refuge from Nicholson by hiding in the house with the doors locked. 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 forced 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's violence and potential harm by way of Nicholson's criminal conviction and 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 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.

(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 the entire time as the officers watched and listened. 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.

In *City of Laurel v. Clyde Williams* the officers upon arrival observed nothing unusual. In this case upon arrival the officers observed a family hiding in their home from a ranting, raving Nicholson who was threatening to kill them and burn their house down. In *City of Laurel* upon the officers' arrival no one appeared to be harmed or in danger of being harmed. In this case the family was in danger of Nicholson carrying out his threats to kill the family and burn down the house. In *City of Laurel* upon the officers' arrival they observed that Mr. Wilson was calm and cooperative at all times. The officers in this case observed Mr. Nicholson ranting, raving and threatening to kill the family and burn down the house. He was in a state of violent anger when they arrived and he remained in a state of violent anger as he walked off still ranting, raving and threatening to kill the family. In *City of Laurel* upon the officers' arrival no one indicated that they feared Mr. Wilson. In this case the family reminded the officers that Nicholson had a history of violence, was on probation, was in violation of a restraining order and that they were afraid that he was going to kill them just as he was threatening to do. The family was hidden in the house behind locked doors in fear of the man on the rampage outside their house. In *City of Laurel* upon the officers' arrival Williams and her roommate stated that they did not want Mr. Wilson arrested and that they just wanted him to leave the residence. In this case the Plaintiff and her family begged the police to arrest Nicholson for their safety. In *City of Laurel* upon the officers' arrival Ms. Williams helped Mr. Wilson pack a bag to go and spend the night elsewhere. In this case Plaintiff and her family continued to hide in their home behind locked door begging the police to arrest Nicholson who continued to rant, rave and threaten to kill them and burn down their home from the time he arrived and continued his raging threats as he walked off.

Under the circumstances of this case it is clear that the officers acted in reckless disregard of the Plaintiffs' safety and well being when they did not arrest Nicholson. The Defendant should not be afforded the immunity granted in *City of Laurel.*

"The nature of the officers' actions is judged on an objective standard with all the factors that they were confronted with." *Phillips*, 978 So. 2d 661 (citing *City of Jackson v. Powell*, 917 So. 2d 59, 71 (Miss. 2005)). The factors set out above describe just what the Defendants were confronted with when they were called to Plaintiffs' home on February 17th. These factors indicate that the nature of their actions should remove the any immunity protection that is bestowed upon them by state law.

BAD FAITH

Defendants knew their actions on February 17th were done in reckless disregard for Plaintiffs' safety and welfare and attempted to conceal their wrongdoing by the bad faith act of falsifying their records to reflect that Nicholson's tirade against Plaintiff occurred on February 11, 2008 and that Plaintiff asked that Nicholson not be arrested. Shannon Johnson's general affidavit of February 19th, her deposition testimony, Nicholson's deposition testimony, and the 2008 calendar show that the tirade occurred on Sunday, February 17, 2008. The Defendants falsely claim that on the 17th they were contacted by Johnson reporting only threatening phone calls from Nicholson, nothing more. The Defendants make these false claims in order to conceal the fact that on the 17th they acted in conscious indifference to the safety and well being of Plaintiff and her family when they refused to arrest Daniel Nicholson. Their refusal to arrest Nicholson

allowed Nicholson to continue on his tirade of terror against the Plaintiff until he in fact carried out his threats to harm Plaintiffs. Defendants' refusal to arrest Nicholson on February 17th was in disregard for Plaintiffs' safety and was the proximate cause of Plaintiffs' injuries on February 20, 2008. See Record pages 145-160, Record Excerpt Exhibit C, Shannon Johnson transcript and Record pages 163-164, Record Excerpt Exhibit E, transcript of Daniel Nicholson page 163, lines 22-25, page 164, lines 1-2, Record pages 161-162, Record Excerpt Exhibit D, general affidavits of Shannon Johnson, Record pages 169-175, Records Excerpts Exhibit G, Admissions of Quitman officers, Record page 176, Record Excerpt Exhibit D, 2008 Calendar.

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 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 14th day of December, 2010.

BY: Linda A. Hampton
LINDA A. HAMPTON, MSB[redacted]
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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' Brief and Appellants' Record Excerpts to the following:

MICHAEL J. WOLF
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P. O. Box 1163
Jackson, MS 39215-1163

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

This the 14th day of December, 2010.

LINDA A. HAMPTON