IN THE SUPREME COURT OF MISSISSIPPI

No. 2010-CA-9910-COA

City of Jackson, Mississippi

Appellant,

vs.

Basil Thornton

Appellee.

On Appeal From the Circuit Court of the
First Judicial District of Hinds County, Mississippi.

BRIEF OF APPELLEE, Basil Thornton

(And Incorporated Motion to Strike Disrespectful Language Concerning the Trial Court)

ORAL ARGUMENT REQUESTED

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IN THE SUPREME COURT OF MISSISSIPPI

CITY OF JACKSON, MISSISSIPPI **APPELLANT/DEFENDANT**

VS. **No. 2010-CA-9910**

BASIL THORNTON **APPELLEE/PLAINTIFF**

CERTIFICATE OF INTERESTED PERSONS

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

1. Honorable Judge Swan Yerger
   Hinds County Circuit Court Judge
   Post Office Box 327
   Jackson, MS 39205
   Trial Judge

2. City of Jackson, Mississippi
   Appellant/Defendant

3. Chief of Police, Jackson, Mississippi
   Appellant/Defendant

4. Basil Thornton
   Appellee/Plaintiff

J. CHRISTOPHER KLOTZ

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I. STATEMENT REGARDING ORAL ARGUMENT

Mr. Thornton requests that this Court allow oral argument to help resolve the issues of his case. Oral Argument is permitted pursuant to M.R.A.P. 34 and would help the understanding of this appeal.

II. STATEMENT OF THE CASE AND FACTUAL BACKGROUND

At the time of the accident, Basil Thornton, the Plaintiff/Appellee, was a Sergeant with the Richland Police Department. (TR, 543). He was off duty and in his private car at the time of the accident. (TR, 460). Both the City of Jackson's expert and the Jackson Police Department officers admit that the Plaintiff neither committed a criminal act precipitating the accident nor contributed to the accident or his injuries. (TR, 238, 301, 620-621)

On the day of the wreck, Plaintiff had dropped his children off at Beth-Israel school and was driving back to his home just North of State Street. (TR, 455). Plaintiff was stopped in the left hand turn lane at a red light heading North on North State Street. He was the first car in the left hand turn lane. He was properly positioned to turn left, which, if he had not been crashed into first, would have been traveling West on Briarwood Drive. (TR, 457-458).

Unbeknownst to Plaintiff, the Jackson Police Department had initiated and engaged in a high speed chase that covered approximately 4.8 miles before the fleeing suspect vehicle lost control and ran head on into the Plaintiff. The crash broke the C-5 vertebrae in Plaintiff's neck, broke his foot, completely severed his jaw muscle, imbedded glass in his head and face, and caused severe lacerations which have permanently disfigured his face and head. (TR, 463, 463-467, 474). As recently as a couple of days

before the trial, Plaintiff Thornton pulled a piece of glass form his face that had worked its way to the surface of his skin. Glass continually works its way to the surface of Plaintiff's skin since the crash; a constant reminder of the accident. He can still feel glass under his skin. (TR, 463-464). Plaintiff's wife, Cassandra Thornton, testified that Mr. Thornton still has difficulty moving, walking and/or getting out of bed on some days. She told the trial court he is too proud to admit that he sometimes even has to resort to using a walker to get out of bed. (TR, 528-529).

Isaiah Robertson stole Michael Fowler's running car. Fowler, the theft victim, left his unlocked car running outside of the J&J filling station in Jackson, Mississippi, to go inside and pay for some items. (TR, 36-38, 294-295). Immediately prior to the theft of the car, the juvenile suspect was viewed inside the service station from close proximity by Fowler. (TR, 36-38). The juvenile suspect driver was clearly described and identified to the initial responding officer by Mr. Fowler. (TR, 293-294). The thief was described as a "young boy" probably near the age of 15 years old. (TR, 294). The suspect used no violence to take the car. (TR, 294).

Officer Strong arrived on scene at the gas station and instructed Michael Fowler to get in the police cruiser. Supposedly, Fowler's stolen car had been located, parked, with the juvenile suspect inside. As events unfolded, and the juvenile suspect failed to submit to the police. A terrifying ride for Mr. Fowler unfolded. Officer Strong's police cruiser, with Mr. Fowler inside, eventually became the lead chase vehicle in the high speed chase of the fleeing juvenile suspect. (TR, 291-294).

Though contradicted by all other eye witnesses, the pursuing officers self servingly estimate the suspect exceeded the speed limit only by 15 mph, going at most 55

mph at times on State Street where the speed limit is 40 miles per hour. Multiple other witnesses' testimony was that the suspect vehicle was traveling at 60-85 mph at various points in the chase. (TR, 55, 108, 116, 219, 372, 377, 459, 510). The City's police officers testified that the chase lasted 3-6 minutes, over a 5 mile course. The City's expert, Dunston, grudgingly agreed with the speed versus distance calculations placing the average speed of the chase cars between approximately 58 to 70 miles per hour over the course of the chase. (TR, 612-613).

The chase occurred at approximately 8:30 a.m. on a school morning. The police and the fleeing juvenile suspect sped through a 4.8 mile route past church day cares, a Head Start Program facility, Tougaloo College's main entrance, through narrow residential neighborhoods, in though the side and out through the front of at least one persons private yard and against numerous traffic control devices and stop lights. (TR, 57-58, 60-61, 145-146, 161, 351, 392-393, 399-400).

Sergeant Mason, one of the senior officers and shift supervisors on duty was on the radio at the time of the chase. Mason testified that if he had known or been advised via his radio that speeds had approached 50- 60 mph he would have ordered the pursuit to be stopped. (TR, 230, 237-238).

Officer Talton's trial testimony was presented via deposition. Because he was unavailable, Talton's deposition testimony was admitted pursuant to Mississippi Rule of Civil Procedure 32. Talton's testimony was that the juvenile suspect reached 55 mph early in the chase (Talton Depo, p. 74). Sgt. Mason was either not made aware of this fact by Officer Talton, or if he knew about the excessive speeds, disregarded his own position regarding when to terminate a pursuit. Supervisor Sgt. Mason testified that the

pursuit of the suspect juvenile would have been terminated had he been advised of the erratic or unsafe driving conduct of the juvenile suspect. (TR, 230). Sergeant Mason testified that if he had known there was a civilian, Fowler, in one of the police chase cars, he would have instructed that car to get out of the chase. (TR, 234).

The testimony of the Jackson Police Officers and lay witnesses revealed many instances of reckless and dangerous driving that should have put the pursuing officers on notice of the intent and willingness of the suspect vehicle to disregard traffic devices and his intent to evade the police. The first instance is at the beginning of the pursuit when Talton describes the suspect immediately running a red light when Officer Talton pulled in behind him. (Talton Depo, p. 121). Officer Talton testified that the suspect reached 55 mph in a 40 mph zone, 15 mph over the speed limit, one block after Talton's began his pursuit. (Talton Depo, p. 109). According to Talton's, exceeding the speed limit by 10 mph would qualify in his mind as a "high speed" chase. (Talton Depo, p. 48, 55)

JPD Detective Jarrett Taylor, conducted an investigation of the auto theft and testified that he discovered in the course of his investigation that the juvenile suspect continued to "run traffic light after traffic light", and eventually had the accident at Beasley Road and State Street. (TR, 285-286).

Officer Nathan James, who wrote the accident report, testified it is an indication of recklessness when a suspect runs multiple red lights or traffic devices; something this suspect did long before the accident. Nathan James testified that he wrote a citation to the juvenile suspect driver for reckless driving. (TR, 184, 186).

Officer Talton described in his police report, contemporaneously written on the day of the accident, how the juvenile suspect attempted to elude the police by driving

through a private yard. "At that point other units were approaching and the suspect vehicle made a right onto Brown Street, where he entered the yard at this residence and drove through the yard back onto County Line Road, East bound approaching North State." (Talton Depo, 145, Also, See Exhibit Police Report to Talton's Deposition).

Officer Talton testified the suspect vehicle went around cars stopped at a red light in order to turn south on State Street from County Line Road. According to Talton, the suspect vehicle went on the outside, to the left, of the cars that were stopped at this light, a dangerous maneuver that should have further indicated the recklessness with which the suspect driver was operating and the extent to which he would go to avoid capture by the police (Talton Depo, p. 123).

Officer Talton testified that no member of JPD called off the police chase on the radio. He testified that about 60-80 yards before the intersection of Beasley and State Street, where the accident occurred, that he "suggested" over the radio that they might want to back off the subject because he was having concerns about safety (Talton Depo, p. 111). Whether or not Talton's radio communication was a suggestion or an order to cease the chase, it was untimely in that whatever he said occurred mere yards before the impact, at a very high speed.

Jackson Police Department policy dictates that a pursuit termination consists of officers turning off their emergency lights and sirens and either fully stopping their vehicles or turning around to drive away from the fleeing vehicle. None of these steps were ever taken by the pursuing officers. (TR, 376-377). Kewania Lewis testified that the Jackson Police cars zipped into the intersection of the accident 3-4 seconds after the crash. (TR, 127-128). The officers obviously never abandoned the chase.

Michael Fowler was in the front passenger seat of Officer Strong's police cruiser beginning at the convenience store where the car was stolen, and became the lead police chase car near the Tougaloo area. (TR, 72, 83, 106). He testified that he was scared at the speeds at which the officer was chasing the juvenile suspect driver of his stolen car. (TR, 71-72). He estimated the high speeds of the chase to be 70 to 80 mph. (TR, 66-67).

Fowler testified that prior to the accident, the juvenile suspect almost lost control of the vehicle due to the high speeds at which the suspect was traveling. (Tr, 66). He testified that the suspect was operating the stolen car in such a way as to cause the stolen vehicle's tires to smoke as he accelerated and decelerated. (TR, 69-70). The police car in which Fowler was riding traveled at excessive speeds through narrow-streeted residential neighborhoods and close proximity to schools, pedestrian traffic and residences; all to keep up with the stolen vehicle. (TR, 53-54, 60-61, 67).

Kewania Lewis was the driver of one of the three cars eventually hit by the juvenile suspect. She testified that she was able to see the juvenile suspect "a split second" just before she was hit by him. (TR, 126). She testified at trial that she thought from what she felt and saw that the fleeing suspect was traveling 50-60 mph. At trial, she agreed her deposition testimony was she thought the fleeing suspect was traveling 70-80 mph at the time of the impact on State Street. (TR, 166-117).

In an odd coincidence, at the time of the accident, the Plaintiff was a police Sergeant trained and certified in operating speed detecting radar and estimating the speed of moving vehicles and that he did so on a regular basis as part of his job. (TR, 458-459). Thornton testified that the juvenile suspect was outside of the proper lane of traffic for

southbound travel as the suspect headed south on State Street. Thornton testified that the suspect was coming directly at him, head on, in Mr. Thornton's lane of traffic. (TR, 457-458). Plaintiff Thornton testified that at the time of the accident, the suspect juvenile was traveling at 60 mph. (TR, 459).

The Plaintiff's expert in police pursuit policy and procedure, Dennis Waller, testified that this pursuit was conducted in a reckless and unreasonable manner and should have been terminated long before the crash. Waller testified that the actions of Officers Talton and Strong were extreme, reckless, and posed an unreasonable danger to the public. He further testified that a greater danger was posed to the juvenile joy rider, to the officers, and to the public at large by continuing the pursuit than the danger to the public posed by the theft of a vehicle if the pursuit was terminated. (TR, 375, 389-392, 397, 402).

Expert Waller testified that the pursuit should have been terminated well before the accident because of numerous factors: the suspect juvenile indicated he was not going to yield to police, the suspect was willing to disregard numerous traffic control devices, and was operating in a reckless and highly dangerous manner to third party drivers. (TR 342-343).

Waller testified that the Jackson Police Officers and their supervisors disregarded JPD pursuit policy by not ordering and end to the pursuit. (TR, 269-370). Waller testified that an accident injuring an innocent third party driver is a foreseeable result of an improperly conducted police pursuit and is one of the reasons police departments establish policies regarding the termination of police pursuits. (TR, 397-398, 402-403).

III. SUMMARY OF THE ARGUMENT

The City of Jackson has misstated fact and case law in its brief in such a manner as warrants discussion. The City ignores relevant testimony from Kewania Lewis in its argument. Regardless of the City's arguments, Kewania Lewis, is a victim of the fleeing suspect and a victim of the City's reckless disregard. She is not superseding, intervening cause who would relieve the City of its liability to the Plaintiff. At the request of the City, the trial court specifically considered the apportionment of damages to Kewania Lewis and determined that no amount of damages be apportioned to her. She is not at fault and the trial Court so held after considering all of the evidence. In hind sight, if Lewis had had the presence of mind, she could have successfully sued the City of Jackson as a Plaintiff, too.

The damages that were awarded to the Plaintiff by the trial court were fair and below the value of other similar cases that Mississippi's Appellate Courts have considered. The court has apportioned fault to those two parties it found responsible for the injuries to the Plaintiff. The damages awarded to the Plaintiff should stand and be paid, with interest.

IV. ARGUMENT

A. Highlight of significant factual inaccuracies in the City's brief:

The City of Jackson has endeavored to spin, stretch and misstate the facts in its brief. In their presentation , the City has self-servingly misstated or simply ignored salient facts testified to by Kewania Lewis, and others. Those facts include; that Kewania Lewis had fully completed the act of inserting the CD into her CD player by the time the light turned green and before she proceeded on the green light. (TR, 118).

The City inaccurately states in its brief that "During the trial of this matter, there was unrebutted testimony that Kewania Lewis was changing her CD while entering the intersection of Bailey and North State street....." (Appellant's Brief, p.20). This statement of the Appellant is simply un-true and was never testified to in Court. A reading of the transcript of Kewania Lewis' testimony bears this out. (TR, 109-128).

In building their argument, the City fails to point out that Kewania Lewis testified that there was stopped traffic at the light coming from her left (from the North) that would have obstructed her view of the fleeing vehicle. (TR, 119-120). It not a matter of Lewis not paying attention and thus not seeing the oncoming chase. The only cars she would have been expected to see coming from her left (North on State Street) were already stopped and waiting at the red light as they should have been. (TR, 114, 119-120). The fleeing vehicle went around the already stopped vehicles, in the wrong lane of traffic, out of Lewis' view. Lewis' view of the fleeing vehicle was obstructed by the already stopped cars to her left. (TR, 114, 120, 122). The properly stopped cars to her left were in-between Kewania Lewis and the fleeing vehicle. Of course she wouldn't have seen the oncoming fleeing vehicle.

The City does not point out that the witnesses who testified they saw police lights were on a different street, facing a different direction, positioned differently in the intersection, and had no obstructions between them and the oncoming police chase.

The City confidently states in their brief that Kewania Lewis "acknowledged that she filed to keep a proper lookout". (Appellant's Brief, p15). This self serving and conclusory statement is merely the Appellant's spin and wish. Kewania Lewis never stated that she did not keep a proper lookout. That is a hopeful conclusion developed by

the City. It is a hopeful wish that has been properly rejected by the trial court and disproved by all of the witnesses except for the Defendant's highly incredible expert witness.

Regardless of all of this, and most importantly, the issue of Kewania Lewis being able to see, or not see, the oncoming pursuit is a red herring; a diversion presented by the City which was rejected as early as the City's Motion for Summary Judgment. For argument's sake, even if the City's spin on the facts was right, the case law simply does not turn on whether Kewania Lewis saw the fleeing vehicle or not.

Despite arguing at length that Kewania Lewis bears a large portion of the responsibility for the wreck and the City bears none, the City never cross claimed to add Kewania Lewis as a defendant to the law suit.

The City states that Isaiah Robertson is a co-defendant in this lawsuit. (Appellants Brief, p.19). This is not quite accurate either. Lewis was initially named as a party, but he, nor his parents, were ever served with the complaint or a summons. He is an abandoned party, a fact well known, but omitted in the briefing by the City.

The City quotes **City of Ellisville v. Richardson,** 913 So.2d 973 (Miss. 2005) as support for the City's assertion that "The Supreme Court found that the trial court was in plain error, and its findings were ambiguous, when the court found that the Defendant was the proximate cause of the collision". (Appellant's Brief, p.21). This case summary and interpretation is patently wrong. The Supreme Court never said the **Ellisville** trial court was wrong on the proximate cause issue. It only said that a trial court should specifically enumerate the percentages of fault as to all participants in the accident and remanded for a more detailed apportionment. The Supreme Court held in **Ellisville** that

a trial court's failure to specifically apportion fault in its final order rendered the trial court's opinion and order in **Ellisville** "ambiguous". The **Glover** Court did not disturb the finding of the trial court holding the City of Ellisville liable and finding them to be the proximate cause of Glover's injuries. The **Glover** case was remanded for a more specific enunciation of apportionment.

In the case at bar, the trial court entered a revised opinion and order and final judgment amending its previous order by apportioning fault to Isaiah Robertson and the City of Jackson. That Order specifically considered Kewania Lewis part I the accident, and found finding Kewania Lewis not at fault and not appropriate for apportionment. This Order took the form of the trial court's "Order Granting in Part and Denying in Pat the City of Jackson's Motion to Amend Judgment", entered on June 23, 2010.

The City quotes a Tennessee case that the City calls "alarmingly similar" to the case at bar. (Appellants Brief p.10 and Appellants Record Excerpt, Tab #5). The City must not have considered that the Tennessee Court found, unlike the Plaintiff Thornton's case, the person who caused the accident did not know they were being followed by an unmarked police car. **Hampton v. City of Memphis**, No. W2010-00469-COA-R3-CV, pp.5-6, (Dec. 2010). In other words, there was no police chase in the Memphis case.

> Mr. Madden was being followed by a pick-up truck that, unbeknownst to him, was operated by undercover Memphis City police.

Hampton v. City of Memphis, W2010-469-COA R3-CV, pp. 1-2, (Dec. 2010). Emph. Added.

The Tennessee Court goes on to note:

> [Mr.] Madden made the unfortunate decision to travel the wrong way on an interstate exit because he was lost. He was not familiar with the Warford area and had made the erroneous decision to travel against traffic before he even saw the undercover officers.

Hampton v. City of Memphis, W2010-469-COA R3-CV, p.5, (Dec. 2010). Emph. Added.

The Tennessee Court further notes:

> there is nothing to support Mr. Hampton's assertion that Mr. Madden knew he was being chased or even followed by the police when he exited I-40/240 at the Warford Street exit, made a U-turn, and proceeded up the exit ramp in the wrong direction in order to re-enter the interstate. On the contrary, Mr. Madden testified that it did not occur to him that the passengers in the pick-up truck were police officers.

Hampton v. City of Memphis, W2010-469-COA R3-CV, pp. 5-6 (Dec. 2010). Emph. Added.

It is hard to imagine a more *different* scenario than the case at bar. In Plaintiff Thornton's case, the fleeing vehicle (Isaiah Robertson) attempted to knowingly elude a cadre of blue-lighted, marked Jackson Police Department marked patrol cars over a 4.8 mile high-speed chase. The car in **Hampton** took his decisive and unfortunate action leading to the accident before he even knew police were observing or following him. Unlike Plaintiff Thornton's case, in **Hampton**, there was no high speed police chase, no lights, no siren, no multiple marked police cruisers and no evasive driving on the part of the fleeing suspect.

In the case at hand, the fleeing suspect, Isaiah Robertson, was intently aware of the police chasing him and had been aware of that fact for approximately 4.8 miles before he crashed. **Hampton** is neither similar nor analogous to the case at bar. This is, however, a perfect example of the City of Jackson's propensity, exhibited throughout the course of this litigation, to spin, misquote facts, misquote law and misquote case precedent.

One can hope that the Appellant's work product is simply a result of being overwhelmed with a large number of cases, as many governmental agencies are. Maybe there is no malicious intent on the part of the Appellants. Plaintiff counsel's hope may be optimistic in light of the City's accusations of very serious ethical violations and accusations of alleged criminal conduct against the trial judge and Plaintiff's counsel. At the very least, the City of Jackson's rendition of the facts and law deserves focused, concerned scrutiny in light of the bold inaccuracies exhibited in their briefing.

B. Law Regarding Foreseeability and Proximate Cause.

The City's argument on the issue of probable cause and foreseeability contains several fatal defects. The City of Jackson has incorrectly framed the issue of probable cause in this case and attempted to repudiate even the slightest responsibility for the accident and wholly shifting the fault for the Plaintiff's injuries to Kewania Lewis and Isaiah Robertson. The City misapplies existing case law and omits recent, controlling Mississippi Supreme Court rulings.

In the past, Mississippi precedent addressed the issue of proximate cause with some inconsistency. Recognizing this in **Glover v. JSU**, 968 So.2d 1267 (Miss. 2007), the Supreme Court issued an opinion to discuss and clarify the various tests for proximate cause. Though aware of **Glover** from prior briefing in this case, the City does not cite **Glover** in their Brief.

> ¶ 30. Upon careful review of our precedent, which has applied numerous proximate cause analyses to various factual settings, we find the law of proximate cause requires some clarification.[FN10]

Glover v. JSU, 968 So.2d 1267 (Miss. 2007).

In its analysis, the Supreme Court states:

> ¶ 33. A defendant's negligence which is found to be the cause in fact of a plaintiff's damage will also be the legal cause of that damage, provided the damage is the type, **or within the classification, of damage the negligent actor should reasonably expect (or foresee) to result from the negligent act.** Dobbs, The Law of Torts, § 180 at 443.

Glover at 1277, ¶ 33. Emphasis Added.

The City has incorrectly framed the proximate cause issue as whether it was specifically foreseeable that Kewania Lewis would have pulled into the intersection and been struck by the fleeing suspect who then ran into the Plaintiff. This argument misses the point of foreseeability. Really, the issue is this: was an accident with injuries to the Plaintiff reasonably foreseeable as a result of the Jackson Police Department's chasing a fleeing suspect with reckless disregard to the safety of the public.

Using the language in **Glover,** the question is; was the "type" or "classification" of injury, [injuries from a car wreck] a species of "damage the negligent actor should reasonably expect [or foresee] to result from the negligent act" **Glover** at 1277. [brackets added for context]. The answer to this question is, Yes.

More generally stated, the most predictable species of casualty from an improper police chase is an automobile accident. The primary goal of police policy regarding police chases is to protect innocent third parties, the public, from injuries from out of control, crashing cars. The "type" or "classification" of injury to Plaintiff Basil Thornton is precisely the result that would be foreseen to stem from a police chase conducted with reckless disregard.

To establish the officers actions were the proximate cause of his injuries, the Plaintiff does not have to prove the foreseeability of the specific chain of events in which the injury occurred. In other words, the Plaintiff is not saddled with the impossible

burden of proving it was foreseeable that the fleeing juvenile suspect would bounce precisely off of Kewania Lewis and into his car.

> ¶ 37. We reiterate today that, in satisfying the requirement of foreseeability, a **plaintiff is not required to prove that the exact injury sustained by the plaintiff was foreseeable; rather, it is enough to show that the plaintiff's injuries and damages fall within a particular kind or class of injury or harm** which reasonably could be expected to flow from the defendant's negligence.

Glover at 1278, ¶ 37. Emphasis Added.

The Supreme Court in **Glover** provides an illustration to demonstrate a foreseeable injury versus a non-foreseeable injury:

> ¶ 38. To illustrate, **one who negligently drives an automobile reasonably should foresee that his or her negligence could be expected to cause certain kinds or categories of damages. Such categories would of course include (among others) traumatic injury, medical bills, lost wages, and pain and suffering.** And in order to recover a particular damage (such as compensation for a broken leg or reimbursement for an MRI), the plaintiff will not be required to prove the tortfeasor actually contemplated that his or her negligence would lead to a *1279 broken leg or an MRI. To the contrary, **the plaintiff will be allowed to recover for all injuries and damages reasonably expected to result from automobile accidents. However, if the accident also caused the plaintiff to miss a flight to London and, consequently, miss attending an auction and a once-in-a-lifetime opportunity to purchase a rare piece of art, the negligent automobile driver ordinarily would not be liable for such unforeseeable damages.** This is so because they are not included within the type or category of damages a tortfeasor ordinarily should expect or foresee would result from careless driving.

Glover at 1278, ¶ 38. Emphasis Added.

Certainly, in the case at hand, it is foreseeable, if not predictable, that an improperly and recklessly conducted police chase through rush hour traffic would result in a crash with injuries. In order to establish proximate cause, the Plaintiff is not required to prove the foreseeability of the precise chain reaction that unleashes the injury. The Plaintiff is charged only with proving that his injuries are within the expected class of injuries which the Jackson Police Department could have reasonably

foreseen as a result of a police chase conducted with reckless disregard to the safety of the public.

The injuries to Plaintiff Thornton are not so remote to the police chase as to resemble the hypothetical example in the **Glover** case where, because of a car wreck, someone missed their plane and consequently their chance to bid on a piece of artwork at an auction.

Relevant to the foreseeability of an accident causing injury to an innocent third party, the Plaintiffs expert, Dennis Waller, testified:

- The pursuit was conducted in a reckless and unreasonable manner. (TR, 375).
- The actions of Officers Talton were extreme, reckless, and posed an unreasonable danger to the public. (TR, 390-391).
- A greater danger was posed to the juvenile, to the officers, and to the public at large by the pursuit than the danger to the public posed by the theft of a vehicle (TR, 389-392).
- Officers involved in the pursuit were aware that the stolen vehicle was most likely taken by a juvenile by non-violent means. In short, the vehicle was most likely taken for a joy ride by an irrational, immature person who was inexperienced at driving and who did not consider the consequences of his actions." (TR, 390-391).
- this pursuit presented an unreasonable risk of danger coupled with conscious indifference to the foreseeable consequences. (TR, 402).
- it is foreseeable that there may be persons in an intersection who do not see lights or hear sirens. (TR, 397).

Finally, it is instructive to more carefully digest some of the cases cited by the City of Jackson in their brief. The City relies on **Morin v. Moore**, 309 F3d 316, 326 (5th Cir. 2002). While admittedly 5th Circuit cases may constitute persuasive authority, they are not controlling authority in the Mississippi Supreme Court. Additionally, **Morin** , addresses the application of Texas' Tort Claim act and Texas' application of proximate cause, not Mississippi's definition or application. Further, when the text of the **Morin**

opinion is examined in full, it actually supports the Plaintiff's position in this case. Morin holds:

> To establish foreseeability, a plaintiff must show that a defendant should have anticipated the danger that his or her negligent act or omission created for others. Travis v. City of Mesquite, 830 S.W.2d 94, 98 (Tex.1992). **Foreseeability does not require a person to anticipate the precise manner in which an injury will occur once he has created a dangerous situation through his negligence.** Id.; see also Ambrosio, 20 S.W.3d at 265 **("Foreseeability requires only that the general danger, not the exact sequence of events that produced the harm, be foreseeable.").**

Morin at 326. Emphasis Added.

C. Kewania Lewis is not an Intervening Superseding Cause which could relieve the City's Liability.

The City wants to paint Kewania Lewis as an intervening, superseding cause because Kewania Lewis was hit first, and the Plaintiff second, by the fleeing juvenile suspect.

An intervening superseding cause may be a legal defense in some cases, but provides no relief for the City here. First, if an intervening act is foreseeable, it is not superseding and the initial tortfeasor's (the City in this case) negligence is not excused. Second, there is evidence from the Plaintiff and Officer Talton that even had Kewania Lewis not have been hit first, the fleeing juvenile suspect was in the Plaintiff's lane, headed directly at the Plaintiff and would have hit him regardless of Kewania Lewis' actions. Third and finally, the City takes the position that there are only two proximate causes of the accident, the fleeing suspect and Kewania Lewis. The City believes they bear zero responsibility for the accident.

The Plaintiff disagrees but, for argument, the law states that if there are multiple tortfeasors, then test for proximate cause is not "reasonable foreseeability" but the lower

threshold test of whether a particular tortfeasor's action was a "substantial factor" in bringing about the harm.

An act foreseeable to tortfeasor "A" cannot be an intervening superseding cause to excuse tortfeasor "A's" liability. The Mississippi Supreme Court has ruled:

> ¶ 43. JSU's argument that the rape was an intervening, superseding cause of Glover's damages has no merit. Our precedent clearly establishes that, where the intervening cause of injury was foreseeable, it cannot supersede the liability of the defendant. See, e.g.,) Southland Mgmt. Co. v. Brown, 730 So.2d 43 (Miss.1998).

Glover v. JSU, 968 So.2d 1267, *1280 (Miss.2007).

The fact that Kewania Lewis might not see a speeding suspect fleeing the police in the wrong lane of travel is foreseeable. Whether she properly looked out, or did not look out it is still foreseeable that she might not see the chase if the City conducts it in an unsafe manner. That Kewania Lewis would proceed on a green light if she can't the chase is foreseeable. (TR, 397).

The City wants to argue whether or not Lewis looked both ways and failed to scout for the fleeing suspect and was, thus, in the wrong. How do you keep on the lookout for a flying bullet that you can't see, or a sucker punch that you don't know is coming? This is a red herring. Plaintiff's expert Dennis Waller testified that the inability to see a vehicle in a recklessly conducted chase is foreseeable. (TR, 396-398). A *foreseeable* intervening cause does not excuse a tortfeasor's liability.

The trial court found, after considering the detailed diagrams, maps, photographs, testimony and experts that Kewania Lewis apportionment of fault was zero. The action s of Lewis provide no harbor form liability for the City. The trial court was uniquely positioned to make the factual determinations in this case and correctly

held that Kewania Lewis' action did excuse the City's actions or deserve apportionment of fault.

D. Plaintiff/Appellee's Motion to Strike disrespectful language.

Pursuant to Rule 28(k) M.R.A.P, the Appellee respectfully moves to strike those portions of the Appellant's brief which are disrespectful to the trial court. In its brief, the Appellant very specifically accuses the trial court (and Plaintiff's counsel) of unethical and allegedly criminal conduct in pages 24-26. To the knowledge of Plaintiff's Counsel, the City has never reported any of this alleged misconduct to the Mississippi Bar Association or appropriate law enforcement officials. Appellant's accusations of collusion and impropriety are at best, dramatic hyperbole.

There was no *ex parte* conduct whatsoever between any of the parties and the trial court. Though included in all correspondence with the Court, Appellant stood silent in the Final Order drafting process until this appeal. Appellant was free to draft whatever proposed Orders it thought appropriate and submit them to the Court. Appellant was free to comment on, edit, or critique, any proposed Order drafts Appellee submitted at the request of the trial court but, lackadaisically, refrained. Until this appeal, the City never lodged any complaint about, or objection to, the process of drafting the Final Order.

Now, because the appellant failed to devote any time to the Order drafting process, the City cries foul. The suggestion by the City that there was some unethical or potentially illegal conduct, similar to the conduct engaged in by disbarred and now incarcerated Circuit Judge Bobby DeLaughter, and others, is disrespectful and beyond farfetched. These arguments should be stricken from the Appellant's briefing. Appellee

respectfully requests that Supreme Court entertain imposing appropriate sanctions against the Appellant.

E. Are the Damages awarded against the evidence and the result of bias.

The Plaintiff testified thoroughly and extensively to the excruciating nature of his injuries. He described both the injuries at time of the accident and how they permanently effect him now. (TR 462 -515). Plaintiff used to live an active lifestyle and was in good physical shape through exercise conditioning. He taught martial arts, exercised and lived a very physically active life. The pain he experiences from his injuries and the threat of reinjury to his broken neck have kept him from doing the activities he used to do. The City did not put on one single witness or one single piece of evidence to rebut the Plaintiff's testimony regarding his injuries. The City has produced no evidence of bias. The issue is not just unsupported, it is untrue.

F. Are the Damages awarded excessive.

The Plaintiffs total medical expenses submitted to the Court were $29,115.88. (TR, 490-506). The raw numbers were presented in court, but the City agreed to the process of submitting a "summary" chart to the Court with a total of all of the medical costs and lost wages after the live trial testimony concluded. (TR, 498-499). The City of Jackson said:

> MR. TEEUWISSEN: Your Honor, if Mr. Klotz is going to present this in some summary after trial, I think he can just summarize it then. (TR, 498-499).

The Plaintiff submitted completely uncontroverted and unrebutted evidence of lost wages and inability to perform heavy manual labor. Those damages were $6230.76

for 12 weeks of lost wages from Plaintiff's work as a Richland Police officer. (TR, 494-495).

Additionally, the Plaintiff had worked a second job for 6 years at Greyhound Bus in downtown Jackson to earn extra money. He had the Greyhound job even before he was a policeman. (TR, 512). Plaintiff testified that due to the very physical nature of the Greyhound Bus job, that is lifting heavy objects, he was unable to return to that job since his accident. (TR, 495-496). Plaintiff's uncontroverted and unrebutted testimony was that regardless of any other job he held, be it his police job or his current job, he would have kept the job at Greyhound to earn additional funds. (TR, 497-498). The City of Jackson neither made an attempt via cross-examination nor submitted contrary evidence post trial to dispute or question the Plaintiff's assertions or figures.

During the City's cross of Plaintiff, there was no challenge or question of the economic losses Plaintiff suffered regarding either medical costs or lost wages. (TR, 506-512). Post trial, the City of Jackson raised no objection to the economic loss summary chart provided to the Court that was discussed on the record by the parties during the trial. (See TR, 498-499) No challenge was ever made to Plaintiff's economic losses. The issue was never presented or preserved by the City of Jackson. The City has waived the issue for appellate review.

The total economic losses presented at trial by the Plaintiff is $76,401.64, inclusive of medical expenses and lost wages. This stands in contrast to the allegation of the City that the Plaintiff's economic losses are only "$30,000.00 in medical bills". (Appellants Brief, p23). The City uses the $30,000.00 medical cost figure by itself for dramatic effect in order to argue that the Court's award is "greater than ten times the

amount of actual damages". (Appellant's Brief, p23). Actually, ten times the proven losses (which were unrebutted and uncontested by the City at trial) would be approximately $760,000.00, nowhere near the trial court's award to the Plaintiff.

Respectfully, the Plaintiff incorporates the detailed description of his extreme pain, suffering, permanent injury and loss of enjoyment of life described in the trial transcript through the Plaintiff's testimony and the testimony of his wife and friends. (TR, 452-432). All of the injuries and permanent disfigurement to Plaintiff's face, foot and neck are a result of the crash. (TR, 465). Plaintiff has gone from an exceptionally fit and healthy, physically active man to a sedentary person who lives in constant pain, with no end in sight. Because he cannot run, exercise or lift weights like he used to, he has gained 30 pounds since the crash. (TR, 482). He cannot enjoy the activities in life that he used to enjoy and will suffer pain, physical disfigurement and scarring of his face and head for the rest of his life.

The City of Jackson states that no one told the Plaintiff he could not be a police officer anymore. The truth is that he was told that if he suffered another injury in a struggle with a suspect, his fractured neck could be badly re-injured. The City of Jackson's statement in their brief that "Plaintiff was never told by his doctor or any other medical professional that he could not work as a police officer", is just not an accurate representation of the Plaintiff's unrebutted testimony. (Appellants Brief, p27).

The Plaintiff testified:

Q. Did you ever get back out on the street back on patrol what you were doing before?

A. No, and I asked my orthopedic surgeon Dr. Tarquenio if he could just release me so I could get back on patrol. He said I'm not going to do it. You

could get into a tussle with somebody or you could get into -- have to chase after somebody and that will put you in a situation, a bad situation or whatever where you weren't physically able to do that.

Q. Now, with regard to what your neurologist told you about ever taking a lick to the head, did that particular statement to you come into to your mind when you were deciding whether or not you needed to stay on as police officer?

A. Sure. And I knew with that the risk of being out on the road as a police officer or wearing a badge and a gun. Even if you're not a patrolman you make yourself a target. You go somewhere, you walk in a bank you wearing that and you're the target and, you know, the and plus people expect you to do stuff when you're wearing a badge and a gun, which I would do anyway, don't get me wrong, but you're going to get into a tussle if you're wearing that badge and gun at some point. That's what I mean by that.

Q. And because of your -- because of your injuries that you had to your neck and to your brain, your physicians have advised you against putting yourself in a position where you might sustain another injury?

A. Yes.

(TR, 484-485)

In tort claims cases, trial courts are allowed to award most species of damages:

> ¶ 20. The amount of **physical injury, mental and physical pain, present and future, temporary and permanent disability, medical expenses, loss of wages and wage-earning capacity, sex, age and health of the injured plaintiff, are all variables to be considered by the fact-finder in determining the amount of damages to be awarded**. *Woods v. Nichols*, 416 So.2d 659, 671 (Miss.1982). Each suit for personal injury must be decided by the facts shown in that particular case. Id.
>
> ¶ 21. The trial judge determined that there was overwhelming evidence that JaQuan suffered significant scarring and permanent disfigurement to his hand, fingernails, wrist, and forearm. He consequently ordered that damages be awarded to Tasha and JaQuan

> in the amount of $850,000, including $33,159.28 in medical expenses. The trial judge, however, did not make any findings concerning any potential permanent impairment or functional limitations resulting from JaQuan's injuries.

Jackson Public School Dist. v. Smith, 875 So.2d 1100, ¶20-21, Miss.App.,2004.

The above quote comes from a Hinds County, Mississippi tort claims case that is on point, analogous, and controlling. The City fails to mention **J.P.S. v. Smith** in its briefing. In **Smith** the trial Court, Judge Kidd, awarded $850,000, including $33,159.28 in medical expenses for a hand injury along with chipped teeth and scrapes on Smith's chin, nose, lip, forehead, and back. **Id** at ¶6.

The Appellate Court remitted the $850,00.00 award to $400,000.00, more than Plaintiff Thornton was awarded by the trial court in this case. The Plaintiff's award by the trial court does not shock the conscious and is in line with the seriousness and permanency of his injuries. Plaintiff's proof of his pain and suffering, loss of enjoyment of life and permanent injury are at least as significant, if not much greater than the hand injury suffered by the plaintiff in the **Smith** case.

G. The Issue of Reckless Disregard:

In its Brief, the City makes no argument, and describes no manner of the trial court's alleged error. The City cites no authority for the proposal that the trial court erred in finding reckless disregard on the part of the Jackson Police Department. (Appellants Brief, p.28).

The comments to M.R.A.P. 28(a)cites relevant case law:

> • Failure to cite any authority in support of a claim of error precludes Court of Appeals from considering the specific claim on appeal. *Funderburg v. Pontotoc Elec. Power Ass'n*, 2009, 6 So.3d 439.

- Defendant's appellate claim that plaintiff's failure to cite appropriate legal authority to support her position constituted a sanctionable event was procedurally barred, where defendant failed to cite any authority in support of its position. *Welch v. Bank One Nat. Ass'n,* 2009, 6 So.3d 435.
- A party is required to cite relevant authority for its argument, or face imposition of a procedural bar. *Steadham v. State*, 2008, 995 So.2d 835.

Comments to **M.R.A.P. 28.**

V. CONCLUSION

The trial court committed no error in holding the City of Jackson liable in this case. The trial court entered a detailed Order specifically apportioning damages in this case pursuant to the City of Jackson's post-trial Motion. Pursuant to the City's post-trial Motion, the trial court reduced the amount of damages owed by the City to the Plaintiff. The remaining amount taxed to the City of Jackson is reasonable and consistent with the extent of the Plaintiff's injuries. The damages are well within established bounds considered and approved by Mississippi's appellate courts in similar cases. The trial judge's order of damages in the amount of $300,000.00 against the City of Jackson should stand, undisturbed. The City should be required to pay the damages awarded by the trial court, plus the costs of appeal and interest to the Plaintiff.

Respectfully submitted,

BASIL THORNTON

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CERTIFICATE OF SERVICE

This is to certify that I, J. Christopher Klotz, Attorney for Plaintiff, have this day delivered by U.S. Mail a true and correct copy of the above and foregoing to the following:

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This the 28th day of March, 2011.

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