IN THE SUPREME COURT OF MISSISSIPPI

CITY OF JACKSON, MISSISSIPPI **APPELLANT**

VS. **CAUSE NO. 2010-CA-9910**

BASIL THORNTON **APPELLEE**

On Appeal From The Circuit Court
of Hinds County, Mississippi
Cause Number 251-006-626CIV
Honorable Swan Yerger

Reply Brief

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SUMMARY OF REPLY

There are three individuals, in addition to the City of Jackson, who contributed to Plaintiff's injuries: 1) Michael Fowler, who left his keys in his unattended, running vehicle; 2) Isahiah Robertson, who stole Fowler's vehicle, fled from police and ran a red light; and 3) Kewania Lewis, who entered the intersection without keeping a proper lookout, colliding with Robertson, and causing Robertson's car to ricochet and hit Plaintiff head on. Yet, the trial court only apportioned 20% fault to Robertson and assigned 80% fault to the City. Because the facts of this case indicate other parties are also responsible for Plaintiff's injuries, the City requests that this Court reduce the amount of damages awarded and properly apportion fault.

Plaintiff's Brief consists of allegations that the City of Jackson misrepresents facts and law to this Court, and Plaintiff makes personal allegations towards the Office of the City Attorney's work product. Not only is this wholly unnecessary, but it has no place in this Court. Admittedly, the analogy of the trial judge's actions in drafting the order in this matter to Judge DeLaughter's actions in *Wilson v. Scruggs* is a harsh contrast. However, upon review of the trial judge's findings of facts and conclusions of law, the excessive damages award of $375,000, the trial judge's conduct throughout the entire trial and after the close of the trial, there is an indication of bias and impartiality against the City. The City does not take the allegation of bias lightly and weighed

the decision to bring this to the Court's attention very carefully. For the Plaintiff to now charge the City with misleading this Court because he is someway offended by this allegation pushes the envelope of professionalism. There is no misrepresentation of fact or law in the City's brief. The record speaks for itself, and the City made every effort to cite the testimony in the record that supports its argument. Plaintiff's allegation that the City has "wishful thinking," and the City's work product is a result of being an over-worked governmental agency is a non-issue and one that the City will not address unless instructed by the Court.

The real issue that this Court should examine is the damages awarded in this matter. They are not only excessive, but are unsupported by substantial evidence. The trial judge ordered $42,000 in loss of wages and earning capacity, even though testimony demonstrated that Plaintiff suffered neither loss wages nor loss of earning capacity. Importantly, Plaintiff is now earning more than he did prior to the accident.

The only actual damages in this matter are $30,000, which are Plaintiff's medical bills. The total damages awarded were $375,000. This is more than ten times the amount of the actual damages; therefore, the presumption of impartiality is inferred. Specific examples of the trial judge's bias are as follows:

- openly questioning the City's policies during trial;
- overruling nearly 90% of the City's objections;
- awarding non-economic damages that were more than ten times actual damages; and

- having improper contact with Plaintiff's counsel after the close of trial.

Further, the lower court erred in failing to properly apportion fault to Co-Defendant Robertson and Kewania Lewis. There is unrebutted testimony that Robertson was fleeing police, driving in a reckless manner, ran a red light and crashed into Plaintiff. Yet, the trial court merely apportioned 20% liability to Robertson.[1] There was also unrebutted testimony that Lewis had just completed changing a CD when entering the intersection, that she did not look down the street for cars and that she did not see or hear the sirens. She failed to keep a proper lookout. Importantly, had Lewis kept a proper lookout and not entered the intersection, Robertson would have gone straight through the intersection, without collision. Based on the above referenced facts, the City respectfully requests this Court to reverse the lower court's ruling and enter a judgment reducing the total damages and properly apportioning between all parties.

ARGUMENT

I. The damages awarded are against the overwhelming weight of the evidence.

Plaintiff's assessment of the City's argument on damages misses the mark. The trial court ordered approximately $47,000 in lost wages and earning capacity, approximately $30,000 in medical bills and $298,000 in pain and suffering. Because Plaintiff is currently making more than he was as a combined

[1] This is the same trial judge that found, under similar circumstances, that someone fleeing the police should be 50% liable. *See* ***City of Jackson v. Law,*** Cause No. 2009-CA-01611-SCT.

full-time police officer and a part-time Greyhound employee, combined, the City argues that the trial judge erred in awarding $48,000 in lost wages and earning. Therefore, the only actual damages are the medical bills of $30,000. When one looks the total award of $375,000, this amount is over ***ten*** times the amount of actual damages. This amount not only shocks the conscience of the Court, but there is paucity evidence to support the noneconomic damages award.

A. The lower court erred in awarding lost wages and earning capacity.

As previously stated, Plaintiff testified that while employed with the City of Richland Police Department, his annual income was approximately $27,000. T.T. at 507. Plaintiff also worked a second job at Greyhound Bus Company, which paid $161.00 a week. R. at 60. Plaintiff's annual income from Greyhound was approximately $8,300. Plaintiff's total annual income prior to the accident was $35,300.00.

After the accident, Plaintiff ***voluntarily*** left the City Richland Police Department and began employment at Central Mississippi Medical Center (CMMC) as a Patient Advocate in 2005, soon after the accident. T.T. at 507. There is unrebutted testimony supporting this fact. Plaintiff's current income as a patient advocate is $37,000 annually. Plaintiff is currently earning ***more*** income than he did while working as a Richland Police Officer and at Greyhound Bus combined. Plaintiff did not lose any wages and did not lose any earning capacity. The trial judge's decision is not only contrary to law, but is clear error.

Here, the lower court heard testimony that Plaintiff began earning more as a Patient Advocate than both of his previous jobs combined, yet ignored this critical fact in awarding loss wages and loss of earning capacity. This award is not only excessive, but raises the question of bias on behalf of the trial judge. Because the Plaintiff never went a day without a paycheck, never claimed he could not work and is currently making more money than his other two previous jobs combined, the City respectfully requests this Court to vacate the lower court's award of lost wages and earning capacity.

Plaintiff does not even address the City's argument of lost wages and earning capacity in his brief. Instead, Plaintiff launches an assault on the City's work product and makes false allegations that the City is misleading this Court. This can only be viewed as an attempt to detract from the fact that Plaintiff's damages are excessive and inflated.

B. The trial judge's award of non-economic damages is excessive, unsupported by evidence and a result of bias.

Plaintiff asserts that the City is being "dramatic" in arguing that the non-economic damages are more than ten times the actual damages. But, since the Plaintiff did not suffer any wage or loss of earning capacity, the actual damages are $30,000 in medical bills. This is a fact, not dramatics. The size of the damages award, in comparison to the actual damages incurred, is so excessive as to shock the conscience of this Court.

Because of the disproportionate amount of damages, the presumption that the trial judge was influenced by bias, prejudice and passion arises. The presumption of bias is further warranted because the trial judge failed to properly reduce the amount of damages when the City filed its Motion to Amend Judgment. Although there was unrebutted testimony that Robertson was driving recklessly and that Lewis failed to keep a proper lookout, the trial judge found against the City and awarded $375,000 to Plaintiff. The trial judge awarded this exorbitant amount notwithstanding the fact that Robertson was a named co-defendant, who Plaintiff admits is liable in this matter. When the City called this plain error to the court's attention, the lower court merely amended its judgment to find Robertson twenty percent (20%) at fault and reduced the damages against the City to $300,000. This reallocation skirts the true issue: the total damage award was unreasonable and unsupported. The trial judge also awarded damages for loss wages and earning capacity, against clear evidence that the Plaintiff did not suffer any loss wages and earning capacity.

As mentioned in the City's Appellate Brief, the trial judge's post-trial conduct raises even more presumptions of bias. The City weighed the decision to bring this conduct to this Court's attention very carefully, and this argument is one that no party enjoys. However, when another party is allowed to dictate the amount of damages a court should award, the City cannot sit idly by and allow this injustice to occur. The trial judge had continuous contact with Plaintiff's counsel via electronic mail, and Plaintiff's counsel essentially directed the lower court as to the calculations on damages and liability. R. at 71 – 103. This

conduct occurred after the close of evidence and was outside the scope of the proceedings. The fact that the trial judge copied the City on the electronic mails does not make it proper; rather, the fact that Plaintiff's counsel is allowed to dictate the outcome of the case creates the appearance of impropriety.

The trial judge's bias and impartiality undoubtedly affected the determination of non-economic damages. The total awarded in this case adds over $300,000 to the $30,000 sum of actual damages for non-economic damages. The plaintiff has the burden of proving his damages by a preponderance of the evidence. ***TXG Intrastate Pipeline Co. v. Grossnickle***, 716 So.2d 991, 1016 (Miss.1997). Admittedly, the Plaintiff, as well as the Plaintiff's friends and family, testified that Plaintiff's dream was to be a police officer. However, it is important to note that Plaintiff was never told by his doctor or any other medical professional that he could not work as a police officer. T.T. 507, 508, 509. Plaintiff went back to work at the Richland Police Department on "light duty." T.T. at 508. Plaintiff was assigned to work at court services, which was a position created specifically for him where he could receive the same pay while he was injured. T.T. at 484. Although the Plaintiff was not allowed to "go back on the street," he was never advised that he could not work in other divisions of the police department. T.T. at 485 – 87.

These facts do not support a large award of non-economic damages. The size of the award here, combined with the judicial conduct, is enough to "shock the conscience" of this Court. In light of the perception of bias, the City requests

that this Court significantly reduce the award for pain and suffering or remand this matter for further proceedings.

C. Apportionment of Fault.

Plaintiff glosses over the fact that the trial court apportioned a mere twenty percent (20%) of fault to Robertson, ***who is a co-defendant***, and eighty percent (80%) fault to the City. Instead, Plaintiff, yet again, alleges that the City "misrepresents and spins" these facts to the Court. The record speaks for itself, and the fact that Plaintiff named Robertson as a co-defendant and made specific allegations in the Complaint that Robertson was negligent is un-rebutted. Plaintiff, for the first time, now suggests that Robertson is an "abandoned party." This is not true. Plaintiff never amended his Complaint to omit the allegation against Robertson. The allegation that Robertson was negligent still stands. There was evidence presented at trial that Co-Defendant Robertson stole the vehicle, fled the police and subsequently collided with Plaintiff's vehicle, causing injuries.[2] Plaintiff specifically alleges that Co-Defendant Robertson acted with "negligence, negligence *per se* and gross negligence." R. at 13. Yet, the trial court only apportioned 20% fault to Robertson.

This apportionment is against the overwhelming weight of the evidence, as well as the trial judge's own pronouncement in ***Law v. City of Jackson***. In

[2] Arguably, the injuries were also caused by Fowler leaving his vehicle running, unattended while going inside a store. While Mississippi has not determined that such conduct creates liability, Tennessee determined that such conduct shields law enforcement from liability. *See* ***Hampton v. City of Memphis***, W2010-469-COA-CV (Dec. 2010).

Law, a driver was fleeing in a stolen vehicle, officers pursued, and the driver in the stolen vehicle hit the Plaintiff. Judge Yerger found the driver of the stolen vehicle in ***Law*** to be 50% at fault, yet under similar circumstances in the instant case, Judge Yerger only apportioned 20% liability to the driver in the stolen vehicle. Moreover, the driver in ***Law*** was not named as a defendant, yet was found 50% at fault. Here, Robertson was named as a defendant, and Plaintiff admits that Robertson bears liability, yet Judge Yerger only apportioned 20% fault. This inconsistency raises the specter of bias or arbitrary justice.

Plaintiff again launches verbal assaults upon the City it an attempt to distinguish ***City of Ellisville v. Richardson,*** 913 So.2d 973 (Miss. 2005). The verbal assaults can only be viewed as an attempt to divert this Court' attention from the fact that Robertson was a named party in this matter, who Plaintiff alleged was at fault for the accident. Pursuant to Supreme Court precedent, it is error for a trial court to find only one party as the proximate cause of an accident, when Plaintiff admits that another party was negligent as well. Such is the exact situation in this matter. The Plaintiff clearly named Robertson as a Defendant and alleged that Robertson acted with "negligence, negligence per se and gross negligence." See Complaint at ¶ 29. Because the trial court merely awarded 20% fault to a co-defendant, who stole a vehicle, ran a red light and collided with the Plaintiff, its findings are against the overwhelming weight of the evidence, and the City respectfully requests this Court to apportion the proper amount of fault to co-defendant Robertson.

Further, the lower failed to apportion any fault to Kewania Lewis. Although Lewis was not named as a party in this lawsuit, she is still considered a "party" for purposes of making a determination when allocating fault. *See* ***Estate of Hunter v. General Motors Corp.***, 729 So.2d 1264 (Miss.1999). Although Plaintiff claims that the City "misrepresents facts" to the Court, there is no denying that Lewis testified that she had completed changing her CD while entering the intersection of Bailey and North State Street, was not keeping a proper lookout for vehicles claiming the intersection, and did not see the vehicle until "a second before he hit her." But for Lewis's failure a proper lookout, she would not have entered the intersection and the, logical inference is that Co-Defendant Robertson would not have hit Lewis, and would not have then collided with the Plaintiff. For this Court to find that Co-Defendant Robertson, who the Plaintiff admits was grossly negligent at the time of the incident, was only twenty percent (20%) at fault is against the overwhelming weight of the evidence. And, for this Court to find that Lewis did not contribute to the collision that caused Plaintiff's injuries is against the overwhelming weight of the evidence.

II. Two other parties contributed to the accident: Kewania Lewis and Robertson.

Plaintiff asserts that the City believes it is not responsible for Plaintiff's injuries. Nowhere in the City's brief does this proclamation appear. Rather, the City submits that the proximate cause of the injuries is two other actors: Kewania Lewis and Robertson. The City further maintains that based on the actions of

Lewis and Robertson that the lower court failed to properly apportion damages between the City, Lewis and Robertson.

A. Isaiah Robertson's actions.

Plaintiff refuses to acknowledge that Robertson's criminal and reckless actions were a major contributing factor to Plaintiff's injuries. Instead of addressing this glaring fact, Plaintiff makes unfounded and unprofessional allegations that the City has misrepresented twisted facts throughout the litigation. This assertion has no merit. Plaintiff fails to acknowledge that the Court of Appeals has addressed this matter in ***Ogburn v. City of Wiggins***, which is factually and legally similar to the case at bar. In ***Ogburn***, the Court of Appeals found that it was the ***reckless driving of the fleeing driver***, rather than the officer, that was the proximate cause of the Plaintiff's injuries and his wife's death. ***Id.*** at 92 (emphsis added). The Court could not find any evidence that established that the pursuit constituted extreme or outrageous conduct or whether the accident would not have occurred had the officer not pursued the driver. ***Id.***

Here, the same can be said about the incident with Robertson. Officer Talton first simply followed the vehicle from Briarwood to State Street and then to the intersection of State and Beasley, heading North. The vehicle ran the red light at the northbound intersection of State and Beasley, and this is when Officer Talton engaged his blue lights. Only ***after*** he identified the stolen vehicle (which is a known felony), as one of the two vehicles had been stolen that morning, and ***after*** the suspect ran the red light, did officer Talton engage his blue lights. R.E.

4 pgs. 150, 163-64. The pursuit lasted approximately five minutes and spanned approximately three miles. *Id.* at p. 73. When Robertson proceeded South on State Street, he began to accelerate and drive in a reckless manner. *Id.* at p. 143, T.T. at 244. It was at this time the pursuit was discontinued by Officer Talton. Id. Shortly thereafter, Robertson picked up speed and attempted to run the red light. T.T. at 299. This indicates that it was, Robertson, the fifteen year old juvenile who was driving recklessly, who was a proximate cause to the accident.

There is absolutely no evidence to demonstrate that he would have not caused an accident even if he was not being followed by the officers. Therefore, a reasonable person of ordinary intelligence should have anticipated that a fifteen year old without a driver's license, who was committing a felony, would create dangers for others. ***Morin***, 309 F.3d at 326.

B. The actions of Kewania Lewis.

Plaintiff's main contention is that Lewis's actions did not contribute to the accident and that the City submits "significant factual inaccuracies." However, the City has cited the record for every factual representation made, and there is absolutely no "spin" on the facts. The record speaks for itself; the City has no reason to "spin" a fact when the record is in black and white before this Court. As previously mentioned, Lewis stopped at the red light, she reached down, changed the CD, and the light turned green. T.T. at 115 - 116. She then proceeded into the intersection, directly into the path of the stolen vehicle, causing Robertson to hit

her car, and then collide with the Plaintiff's vehicle. Based on Lewis's testimony in deposition and at trial, Lewis failed to keep a proper lookout:

- She had inserted a CD in the player, and when she saw the green arrow, she entered the intersection. T.T. at 123.
- Because she had a green arrow, she did not look for any other traffic. T.T. at 123-24.
- She did not see any police car before the collision. T.T. at 124
- She did not see any blue lights before the collision. *Id.*; and
- She did not hear any sirens before the collision. *Id.*

All of this is uncontroverted direct evidence that Lewis' actions proximately caused Plaintiff's injuries.

Plaintiff accuses the City of failing to reference other witnesses to the incident, but Plaintiff fails to acknowledge a key witness who clearly observed the incident. Margie Butler was parked in the northbound lane of State Street and witnessed the accident. Incidentally, Butler was driving the vehicle that was sideswiped by the stolen vehicle after it hit Lewis and before it hit the Plaintiff. T.T. at 193. Butler testified that she could see the sirens before she approached the intersection of State and Beasley. T. T. at 192 – 193. Butler testified that she slowed down for the sirens because she thought it was a funeral procession due to the slow rate of speed in which the police vehicles were driving. T.T. at 207. When Butler reached the light, she stopped and saw the stolen vehicle coming towards the intersection and hit Lewis' car as she drove over the railroad track into the intersection. T. T. at 208. This witness, who was further from the

accident than Lewis, observed the police sirens and the SUV; yet Ms. Lewis, who was at the intersection, did not observe any of this. This is unrebutted circumstantial evidence that proves Lewis failed to keep a proper lookout.

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 Lewis's actions. If Lewis would have kept a proper lookout, she would have observed a vehicle coming towards the intersection at an increasing rate of speed; she would have observed the presence of police cars; and she should have known that the vehicle would not stop. ***Id.***

Negligence which merely furnishes the condition or occasion upon which injuries are received, but does not put in motion the way in which the injuries are inflicted is not the proximate cause. ***Robison v. McDowell***, 247 So.2d 686, 688 (Miss. 1971). *See also*, ***Hoke v. Holcombe***, 186 So.2d 474, 477 (Miss 1996); ***Mississippi City Lines, Inc. v. Bullock***, 194 Miss 630, 640, 13 So.2d 34, 36 (1943). Even if the officers' actions merely furnished the condition which resulted in the Plaintiff's injuries, the officers' actions were not the proximate cause. The officers' actions of pursuing a juvenile who committed a felony did

not put in motion the act of Lewis proceeding into an intersection that had already been claimed by Robertson in the stolen vehicle.

Simply stated, it was the negligence of Robertson and Lewis which in combination were the proximate cause of the accident. Lewis' failure to keep a proper lookout was a substantial factor in bringing about the Plaintiff's injury, and without her proceeding into the intersection, the Plaintiff's harm would not have occurred. *See* ***Ogburn****, supra.*

CONCLUSION

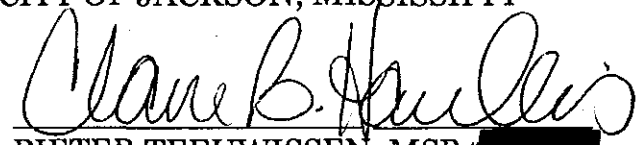
The damages awarded in this matter are not only excessive, but are unsupported by substantial evidence and are a result of bias. The trial judge ordered loss of wages and loss of earning capacity although Plaintiff is now earning more than he did prior to the accident. The only actual damages in this matter are $30,000, which are Plaintiff's medical bills. The total damages awarded were $375,000. This is more than ten times the amount of the actual damages, therefore, the presumption of impartiality is inferred.

Further, the lower court erred in failing to properly apportion fault to Co-Defendant Robertson and Kewania Lewis. There is unrebutted testimony that Robertson was fleeing police, driving in a reckless manner, ran a red light and crashed into Plaintiff. There was also unrebutted testimony that Lewis failed to keep a proper lookout. Importantly, had Lewis kept a proper lookout and not enter the intersection, Robertson would have gone straight through the intersection, without collision. As such, the City respectfully requests this Court

to reverse the lower court's ruling and enter a judgment reducing the total damages and properly apportioning between all parties.

Respectfully submitted this the 9th day of May, 2011.

THE CITY OF JACKSON, MISSISSIPPI

By: 

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CERTIFICATE OF SERVICE

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

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So certified, this the 9th day of May, 2011.

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