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

Brief of Appellant City of Jackson

PIETER TEEUWISSEN
CITY ATTORNEY
CLAIRE BARKER HAWKINS
DEPUTY CITY ATTORNEY

OFFICE OF THE CITY ATTORNEY
CITY OF JACKSON, MISSISSIPPI
455 East Capitol Street
Post Office Box 2779
Jackson, Mississippi 39207
Telephone: 601-960-1799

COUNSEL FOR APPELLANT

IN THE SUPREME COURT OF MISSISSIPPI

CITY OF JACKSON, MISSISSIPPI **APPELLANT**

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

BASIL THORNTON **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Miss.R.App. 28(a)(1), the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. City of Jackson, Mississippi
   Appellant

2. Pieter Teeuwissen, Special Assistant to the City Attorney
   Claire Barker Hawkins, Deputy City Attorney
   455 East Capitol Street
   Jackson, Mississippi 39201
   Counsel for Appellant

3. Basil Thornton
   Appellee

4. J. Christopher Klotz, Esq.
   P.O. Box 12906
   Pensacola, FL 32591-2906
   Counsel for Appellee

5. Hon. Swan Yerger, Presiding Judge
   Hinds County Circuit Court
   407 East Pascagoula Street
   Jackson, Mississippi 39201

Respectfully submitted,

CITY OF JACKSON, MISSISSIPPI

By: 

PIETER TEEUWISSEN, MSB [redacted]
Special Assistant to the City Attorney
CLAIRE BARKER HAWKINS, MSB [redacted]
Deputy City Attorney

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGES**

OTHER AUTHORITIES:

STATEMENT OF THE ISSUES

The issue that this Court should resolve on this appeal is:

1. Whether the trial judge erred in apportioning fault between the City of Jackson, Co-Defendant Robertson, and Kewania Lewis.

2. Whether the damages awarded were against the overwhelming weight of the evidence.

STATEMENT OF THE CASE

A. PROCEEDINGS BELOW

On June 20, 2006, Plaintiff filed suit in the Hinds County Circuit Court against the City of Jackson and the Parents of Isaiah Robertson. R. at 7. Plaintiff alleged that the City of Jackson officers engaged Co-Defendant Robertson in a "high speed pursuit," causing Co-Defendant Robertson to crash into Plaintiff's vehicle. R. at 10. Plaintiff alleged that the officers acted with reckless disregard of Plaintiff's safety because they allegedly "ignored or failed to ascertain and consider the factors contained in their General Orders, thereby violating Jackson Police Department policy." R. at 11. Plaintiff also alleged negligence, negligence *per se* and gross negligence against Co-Defendant Robertson. R. at 13.

The normal course of discovery and pre-trial motions ensued, and on November 2, 2009 a four day bench trial was held before the Honorable Swan Yerger. Judge Yerger found in favor of the Plaintiff and awarded damages in the amount of $375,000. R. at 47 – 62. The City filed a Motion to Amend the Judgment, asserting that the trial judge failed to apportion liability to Co-Defendant Robertson pursuant to Miss. Code Ann. §85-5-7. The City also asserted that the trial judge failed to apportion liability to Kewania Lewis. Lewis was entering the intersection at the same time as Robertson, causing Robertson to ricochet off of Lewis and hit Plaintiff head on. R. at 63. The trial judge found that no apportionment of liability should be attributable to Lewis and that only twenty percent (20%) of liability should be apportioned to Robertson. R. at 124.

The damages against the City were reduced from $375,000 to $300,000. R. at 125. From this judgment, the City timely appealed. R. at 67.

B. STATEMENT OF THE FACTS

On the morning of December 15, 2004, Michael Fowler left the keys inside of his Ford Expedition while the vehicle running and went into J&J's Quickstop located on Bounds Street in Jackson. T.T. at 37. A fifteen year old black male stole Fowler's vehicle, and the identity of the man was later learned to be Co-Defendant Robertson. T.T. at 38. This was the second vehicle that Robertson stole that morning. T. T at 246. The police were called to the scene, and shortly thereafter Officer Kenneth Talton observed the stolen vehicle at the Shadowood Forest Apartment Complex on State Street and Briarwood Road. See R.E. 4, pgs. 74, 129 – 131.[1]

Officer Talton testified that when he first observed Robertson, he was inside the stolen vehicle at the apartment complex, with his head down and "doing something with his hands," which led Officer Talton to believe that Robertson could have a weapon. *Id.* Due to the fact that Robertson had committed a felony and was driving the stolen vehicle, Officer Talton followed him from the apartment complex on to Briarwood, to North State Street. *Id.* at 117. At this point, Officer Talton did not have his blue lights engaged; he was simply following Robertson. *Id.* Robertson turned North on State Street, and

[1] Former Jackson Police Officer Kenneth Talton was not available for trial, as he was working overseas in Iraq. The trial judge admitted Talton's deposition testimony at trial, and the entire deposition is attached as Record Excerpt 4.

Officer Talton continued to follow the vehicle to the intersection of Beasley Road. *Id.* at 117 – 18. Officer Talton had still not activated his vehicle's blue lights or siren. *Id.* Robertson stopped at the intersection of Beasley and State, looked both ways, and went through the intersection, running the red light. *Id.* at 118. It was at this time Officer Talton blue lighted the stolen vehicle. *Id.*

Once Officer Talton engaged his blue lights at the northbound intersection of State and Beasley, (because Robertson had already committed a felony and now is breaking traffic laws) he then followed Robertson up State Street to West County Line Road. *Id.* at 133. Robertson took a left on West County Line, and Officer Talton continued following him onto Kelly and Brown Streets, which are adjacent to County Line Road and across the street from the Tougaloo College area. Robertson then turned around on either Kelly or Brown Street and proceeded East on County Line Road, back towards State Street. *Id.* at 134 – 35. Talton continued to follow Robertson South on State Street towards Beasley Avenue, and Officer Strong filed in behind Robertson at this time.[2] *Id.* at 135.

Once Robertson turned South on State Street from County Line Road, his vehicle began to increase speed. T.T. at 244. It is important to note that this section of State Street is a five lane highway; there are two southbound lanes, two northbound lanes, and one turning lane in the middle, running the length of the street. T.T. at 148. Furthermore, there is a railroad track running parallel with the southbound lanes of State Street, thus there are no residences or businesses

[2] It should be noted that Michael Fowler was in the patrol car with Officer Strong during this time. However, Officer Strong testified that the reason Fowler was in his patrol vehicle was because Strong did not realize that the vehicle was occupied when he told Fowler to get in the car. Rather, he thought that the police had recovered an abandoned vehicle. See T.T. at 293.

on the west side of the highway where Robertson increased speed. *Id.* As the officers began to approach the intersection of State Street and Beasley Road, Officer Talton signaled over the radio to discontinue the pursuit because Robertson began to drive erratically, going around vehicles in the Southbound turning lane on State Street. R.E. 4, p. 111, 143.

The light at the intersection of State and Beasley turned red for the southbound traffic, and the stolen vehicle driven by Co-Defendant Robertson began to pick up speed, in an apparent attempt to run the red light. *Id.* at 59. As Robertson approached the intersection, Kewania Lewis was stopped in the eastbound, left-hand lane of Beasley. See T.T. at 121.

Lewis testified that while she was stopped at the intersection, she reached into her CD case to change the music in her car. T.T. at 123. As she was changing the CD, the light turned green, and Lewis attempted to turn North on State Street. T.T at 123-24. Lewis testified that she never looked for other traffic as she proceeded into the intersection and never saw any police lights, cars or sirens as she was entering the intersection. T.T. at 124, 126. She was then struck by Robertson as he ran the red light on State Street. *Id.* The stolen vehicle then ricocheted off Lewis's vehicle and struck the Plaintiff head on. T.T. at 193-94. Robertson then got out of the vehicle and ran from the police. Once the Police apprehended Robertson, they recovered approximately 4 grams of marijuana. T.T. at 285.

SUMMARY OF THE ARGUMENT

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 damages awarded in this matter 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. Plaintiff ***voluntarily*** left his position at the Richland Police Department and is now earning more than he did prior to the accident. The trial judge clearly erred in awarding loss wages.

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. The trial judge openly questioned the City's policies during trial, overruled nearly 90% of the City's objections, awarded non-economic damages that were more than ten times actual damages, and had improper contact with Plaintiff's counsel after the close of trial. After the close of evidence, the trial judge emailed Plaintiff's counsel on numerous occasions requesting "assistance" in calculations of the damages and on the issue of liability. Although the City was copied on these emails, the appearance of impropriety was no less.

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. There was also unrebutted testimony that Lewis was changing a CD when entering the intersection, did not look down the street for cars and did not see or hear the sirens. She 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. But, Lewis proceeded into the intersection, and Robertson collided with her vehicle, causing Robertson's vehicle to crash into the Plaintiff. Based on this testimony, the lower court erred in failing to apportion fault. 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.

STANDARD OF REVIEW

This action was brought under the Mississippi Torts Claims Act, which permits actions against a municipality, but requires a bench trial with the circuit judge sitting as finder of fact. In ***Ezell v. Williams***, 724 So.2d 396 (Miss.1998), this Court enunciated that the standard of review in such cases requires that when a trial judge sits without a jury, this Court will not disturb his factual determinations where there is substantial evidence in the record to support those findings. Stated another way, this Court generally will affirm a trial court sitting

without a jury on a question of fact unless, based upon substantial evidence, the court must be manifestly wrong. This Court must examine the entire record and accept that evidence, which supports or reasonably tends to support the findings of fact made below, together with all reasonable inferences that may be drawn therefrom and which favor the lower court's findings of fact.

This Court employs a *de novo* standard when reviewing questions of law, including those questions concerning the application of the Mississippi Tort Claims Act. ***Maldonado v. Kelly***, 768 So.2d 906, 908 (Miss.2000) (citing ***City of Jackson v. Perry***, 764 So.2d 373, 376 (Miss.2000)).

ARGUMENT

I. The lower court erred in finding that Kewania Lewis and Co-Defendant Robertson were not proximate causes of the accident.

The Court of Appeals has held that even if a Plaintiff proves that an officer acted in reckless disregard, ***he must establish that the officer's actions were the proximate cause of the accident***. ***Ogburn v. City of Wiggins***, 919 So.2d 85, 91 (Miss.Ct.App. 2005) (emphasis added) (citing ***McIntosh v. Victoria Corp.***, 877 So.2d 519, 523 (¶ 14) (Miss.Ct.App. 2004)); ***Sample v. Haga***, 824 So.2d 627, 632 (¶ 8) (Miss.Ct.App. 2001). In the case *sub judice*, the Court need not address whether any of the officers' actions constituted reckless disregard. Because Mississippi law requires ***both*** reckless disregard ***and*** proximate cause to be present in order to recover as a matter of law, the City submits that the issue of proximate cause is outcome determinative. This is not

to say that the City concedes the issue of reckless disregard. Rather, the analysis of the reckless disregard factors in a pursuit context is unnecessary in this matter, as the dispositive issue is whether the City proximately caused the Plaintiff's injuries.

Proximate cause requires: (1) cause in fact; and (2) foreseeability. ***Morin v. Moore***, 309 F.3d 316, 326 (5th Cir. 2002) (citing ***Ambrosio v. Carter's Shooting Ctr., Inc.***, 20 S.W.3d 262, 265 (Tex.App. 2000)). "Cause in fact" means that the act or omission was a substantial factor in bringing about the injury, and without it the harm would not have occurred. ***Ogburn***, 919 So.2d at 91. "Foreseeability" means that a person of ordinary intelligence should have anticipated the dangers that his negligent act created for others. ***Id.*** (citing ***Morin***, 309 F.3d at 326). Foreseeability does not require that a person anticipate the precise manner in which injury will occur once he has created a dangerous situation through his negligence. ***Id.***

In the case at bar, there are two individuals who proximately caused the accident at Beasley and State. First: Isaiah Robertson. Robertson stole two vehicles on the morning of December 15, 2004, Mr. Fowler's vehicle being second. T.T. at 246. Robertson failed to yield Officer Talton's blue lights, proceeded to drive recklessly down State Street, eventually running the red light, hitting another car and crashing into the Plaintiff. Second: Kewania Lewis. She was clearly not paying attention as she proceeded through the intersection and failed to yield. She admitted that she did not observe the lights, sirens or the

stolen vehicle. Rather, the stolen vehicle hit Lewis and ricocheted into the Plaintiff's car causing injuries.

The Court of Appeals of Tennessee recently addressed a similar issue with facts alarmingly similar to the case at bar. In ***Hampton v. City of Memphis***, Cause No. W2010-00469-COA-R3-CV (Dec. 14, 2010) a City of Memphis police officer in an unmarked vehicle pursued Defendant Madden in the wrong direction on an exit ramp, colliding head on with the Plaintiff. *See* R.E. 5. The Tennessee Court of Appeals affirmed the lower court's finding that the Plaintiff's injuries were caused solely by the acts of Defendant Madden, not the City of Memphis. ***Id.***. In reaching this conclusion, the Court of Appeals considered the facts that Madden admitted to having used illegal drugs that morning, that medical syringes containing methamphetamine were found in his vehicle, and that Madden made the decision to disobey traffic laws and drive the wrong way up an interstate ramp. ***Id.***, p.4. The Court of Appeals affirmed the trial court's holding that the officers' actions were not the proximate, legal cause of the collision, and that although Mr. Hampton "suffered horrendous injuries, through no fault of his own, ***these injuries were the result of a criminal traveling the streets and highways of Memphis, Tennessee under the influence of drugs.***" ***Id.***, p. 5 (emphasis added).

The ruling by the Tennessee Court of Appeals is instructive in the case *sub judice* because the facts before the ***Hampton*** court are nearly identical to the case at bar: Defendant Robertson was charged with possession of marijuana, this was the second car Robertson stole that morning, Robertson made the decision to

disobey traffic laws and speed through a red light, causing injuries to the Plaintiff. Simply put, Robertson was a criminal, driving recklessly through the streets of Jackson, causing the unfortunate accident with Plaintiff Thornton.

A. The actions of Isaiah Robertson were a proximate cause of Plaintiff's injuries.

In the instant matter, it was primarily the negligent acts of driver Robertson, as opposed to any alleged reckless disregard of Officer Talton that were the proximate cause of the collision. 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 officer initiated a pursuit with a driver who was driving on the wrong side of the road. 919 So.2d at 87. The officer followed the vehicle, but lost sight of it briefly, as the road contained hills. ***Id.*** at 88. The officer did not see the vehicle again until he reached the scene of the accident. ***Id.*** The driver lost control of the vehicle, crossed over the center line, and collided with another vehicle driven by Ogburn, who was killed in the collision. ***Id.*** The entire pursuit lasted one to two minutes and spanned approximately 1.7 miles. ***Id.*** 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. 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 clearly indicates that it was, Robertson, the fifteen year old juvenile who was driving recklessly, rather than Officer Talton, Mullins or Mason, that proximately caused the accident.

The Plaintiff failed to demonstrate any evidence at trial that this accident would not have occurred had the officers not pursued Robertson. As previously mentioned Robertson was fifteen years old, did not have a driver's license and was in the process of committing a felony, had stolen another vehicle that morning, and was charged with possession of marijuana. 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 were a proximate cause of Plaintiff's injuries.

The second proximate cause of the Plaintiff's injuries was the actions of Kewania Lewis. Ms. Lewis was at the intersection where the accident occurred. She was stopped in the eastbound lane of Beasley Road. She had taken her daughter to school and was on her way to work. T.T. at 111. As Lewis stopped at the red light, she reached down to change the CD's, while she was inserting the CD in to the player, the light turned green. T.T. at 115 - 116. She then proceeded into the intersection. *Id.* Lewis was clearly not paying attention or keeping a proper lookout, as she did not yield to the oncoming stolen vehicle or the law enforcement sirens or lights. Lewis 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. The following actions indicate that Lewis failed to keep a proper lookout and amount to proximate cause:

- She was inserting a CD in her car, 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.

Conversely, there were witnesses at the scene who clearly observed the stolen vehicle and the law enforcement lights and sirens, and these witnesses were not in the close proximity of the accident, as Lewis was. 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 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 Kewania Lewis's actions. Lewis acknowledged that she failed to keep a proper lookout when she conceded that she was changing the CD in her vehicle, then proceeded through the intersection when the light turned green. Furthermore, she acknowledged that she did not see the stolen vehicle before it hit her, did not see the police or hear the sirens. 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.*** Unfortunately, Lewis failed to keep such a lookout, thus failing to maintain proper control of her vehicle. And, Robertson collided into her vehicle as she approached the intersection, causing his car to then strike the Plaintiff head-on. But for Lewis' failure, this accident would not have occurred.

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.

Mississippi law required Lewis to yield to the stolen vehicle, as it was approaching the intersection in such a manner that constituted immediate danger. Miss. Code Ann. § 63-3-805 states:

> The driver of a vehicle ***shall*** stop as required by this chapter at the entrance to a through highway and shall yield the right-of way to other vehicles which have entered the intersection from said through highway or ***which are approaching so closely on said through highway as to constitute an immediate hazard***.

(emphasis added). In the case at bar, it is clear from the record that Lewis had a duty to stop at the entrance of State Street, which is a five lane road, and yield the right-of-way of the stolen vehicle, which was approaching so closely to the intersection that it created an immediate hazard. Indeed, the stolen vehicle created such a hazard, that it hit Lewis and then crossed into the oncoming lane of traffic, causing injury to the Plaintiff.

Mississippi law also required Lewis yield to the police sirens and lights, which she failed to do. Miss. Code. Ann. § 63-3-809 states:

> Upon the immediate approach of an authorized emergency vehicle, when the driver is giving audible signal by siren, exhaust, whistle, or bell the driver of every other vehicle ***shall yield the right-of-way*** and shall immediately drive to a position parallel to, and as close as possible to, the right-hand edge or curb of the highway clear of any intersection and shall stop and remain in such position until the authorized emergency vehicle has passed, except when otherwise directed by a police officer.

(emphasis added). It is clear from Lewis' testimony and from the testimony of the officers and other witnesses that Lewis did not yield the right-of-way of the

emergency vehicles. She definitely did not stop and remain stopped until the emergency vehicles passed; rather, she drove directly into the emergency vehicle's direction. Had Lewis yielded to the sirens and stopped at the intersection, the stolen vehicle would not have hit her car, causing it to spin out of control, hitting the Plaintiff's car and causing serious injury.

Assuming Lewis did come to a complete stop at the intersection, she still had the duty not to enter the intersection without a proper lookout. To "proceed cautiously" naturally involves maintaining a proper lookout, as well as yielding to those vehicles which are "approaching so closely as to constitute an immediate hazard." Miss.Code Ann. Section 63-3-805. That the accident occurred more than suggests Robertson entering the intersection posed an "immediate hazard." *Id.* Lewis admitted he had no idea why he never saw Robertson's truck approaching. The clear and obvious inference is that she failed to "proceed cautiously," by failing to maintain a proper lookout. *See* ***Shideler v. Taylor***, 292 So.2d 155 (Miss.1974) (automobile driver has a duty to see that which is in plain view, open and apparent; to take notice of obvious danger; and to be on alert so as to avoid collision with objects, vehicles, and others using highway); ***Campbell v. Schmidt***, 195 So.2d 87 (Miss.1967) (a motorist is charged with seeing what he should have seen); ***Tippit v. Hunter***, 205 So.2d 267 (Miss.1967) (automobile driver is chargeable with knowledge of all conditions which would be obtainable by the exercise of his faculties, and it is his duty to see that which is in plain view or open and apparent and to take notice of obvious dangers). As a result, she

pulled out in front of Robertson's truck, a vehicle which she should have, but failed to, see. Lewis never claimed she believed Robertson's car was far enough away so as not to constitute an "immediate hazard." All she stated was: "I did not see him."

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.*

C. The trial judge failed to properly apportion fault

As a result of the City's Motion to Amend Judgment, the trial judge apportioned twenty percent (20%) of fault to Robertson and eighty percent (80%) fault to the City. The trial judge found that Lewis was not negligent and did not apportion fault.

Section 85-5-7 of the Mississippi Code Annotates provides in pertinent part:

> (1) As used in this section "fault" means an act or omission of a person which is a proximate cause of injury or death to another person or persons, damages to property, tangible or intangible, or economic injury, including but not limited to negligence, malpractice strict liability, absolute liability or failure to warn.
>
> ...
>
> (7) In actions involving joint tortfeasors, the trier of fact ***shall*** determine the percentage of fault for each party alleged to be at fault.

(Emphasis added).

In the case at bar, the Plaintiff named Isaiah Robertson as a Co-Defendant in the Complaint. 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. Plaintiff specifically alleges that Co-Defendant Robertson acted with "negligence, negligence *per se* and gross negligence." R. at 13. Plaintiff never dismissed Co-Defendant Robertson from this lawsuit.

The lower failed to apportion fault to Kewania Lewis. Section 85-5-5 of the Mississippi Code Annotates provides in pertinent part:

> (1) As used in this section "fault" means an act or omission of a person which is a proximate cause of injury or death to another person or persons, damages to property, tangible or intangible, or economic injury, including but not limited to negligence, malpractice strict liability, absolute liability or failure to warn.
>
> ...
>
> (7) In actions involving joint tort-feasors, the trier of fact ***shall*** determine the percentage of fault for each party alleged to be at fault.

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. In ***Estate of Hunter v. General Motors Corp.***, 729 So.2d 1264 (Miss.1999), this Court held that "party" in § 85-5-7(7) "refers to ***any participant*** to an occurrence which gives rise to a lawsuit, and not merely the

parties to a particular lawsuit or trial." ***Id.*** at 1276 (emphasis added). That ruling was "based on sound considerations of judicial fairness," ***Id.*** at 1275.

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, was not keeping a proper lookout for vehicles claiming the intersection, and did not see the vehicle until "a second before he hit her." Indeed, if Kewania Lewis kept a proper lookout, she would not have entered the intersection, Co-Defendant Robertson would not have hit her car, and would not have 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 Plaintiff's injuries is against the overwhelming weight of the evidence.

City of Ellisville v. Richardson, 913 So.2d 973 (Miss. 2005) is nearly factually and legally identical to the case at bar. The Plaintiff in ***City of Ellisville*** alleged in their Complaint that Evans, the driver of the vehicle engaged in the police pursuit, "negligently entered the southbound lane of Highway 29, and while so doing, his motor vehicle collided with the motor vehicle driven by the Plaintiff, Tammy Richardson." ***Id.*** at 980. Such is the ***exact*** situation in the case at bar. 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. 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;" especially when the Plaintiffs clearly alleged that Evans, was negligent. ***Id.***

II. The damages awarded are against the overwhelming weight of the evidence and are a result of bias.

After a four day bench trial, Judge Yerger awarded the Plaintiff $375,000 in damages. This excessive award is a result of the trial judge's bias against the City of Jackson. The only actual damages Plaintiff incurred as a result of the accident are approximately $30,000 in medical expenses. Yet, the trial judge awarded total damages that amount to 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.

The trial court found that Plaintiff incurred approximately $47,200 in loss wages and earning capacity. This finding was in error. During trial, 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.

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. "A presumption of no loss of wage-earning capacity arises when the claimant's post-injury earnings are equal to or exceed pre-injury earnings." ***Univ. of Miss. Med. Ctr. v. Smith***, 909 So.2d 1209, 1218 (¶ 32) (Miss.Ct.App.2005). Yet, the trial judge awarded the Plaintiff $42,000 in loss wages anyway. 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, as will be discussed *infra*. Plaintiff presented no evidence at trial to rebut the presumption that he is not entitled to loss of earning capacity, yet the trial judge awarded $47,200 in loss wages and earning capacity. There was no testimony to support Plaintiff's allegation that he has a diminished earning capacity due to the incident. Plaintiff never claimed that he could not work. In fact, Plaintiff never went a day without a paycheck. He went back to work at the City of Richland Police Department as a Sergeant, received the same pay, left voluntarily and began employment immediately, receiving higher pay. Therefore, the City requests that this Court adjust the damages to reflect that Plaintiff did not receive any loss wages or loss of earning capacity.

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

Since the Plaintiff did not suffer any wage or loss of earning capacity, the total economic damages that Plaintiff incurred as a result of the accident is $30,000 in medical bills. Yet, the trial judge awarded the Plaintiff $375,000 in damages, which is greater than ***ten times*** the amount of actual damages. The size of the damages award, in comparison to the actual damages incurred is so excessive as to shock the conscience of this Court.

The standard of review employed when examining a fact-finder's award of damages for error as follows:

> It is primarily the province of the jury [and the judge in a bench trial] to determine the amount of damages to be awarded and the award will normally not be set aside unless ***so unreasonable in amount as to strike mankind at first blush as being beyond all measure, unreasonable in amount and outrageous***." ***Lewis v. Hiatt,*** 683 So.2d 937, 941 (Miss.1996).

(emphasis added). Further, a trial court's decision on damages will not be disturbed so long as the ruling is supported by substantial, credible, and reasonable evidence. ***DePriest v. Barber,*** 798 So.2d 456, 459(¶ 10) (Miss.2001). The trial court's ruling on loss wages and non-economic damages is not supported by substantial and reasonable evidence.

In the case at bar, the disproportionate amount of damages creates a presumption that the trial judge was influenced by bias, prejudice and passion in awarding the damages and erred in failing 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.

In and of itself, these facts may not raise the question of bias. But, while preparing the findings of facts and conclusions of law, 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. The plaintiff "assisted" the lower in the following manner:

- Calculations regarding loss wages from Plaintiff's employment at Greyhound Bus; R. at 100-101.
- Calculations regarding the valuation of Plaintiff's vehicle; R. at 100;

- Page references to deposition of Kenneth Talton, which the lower court heavily relies upon in its Findings of Facts and Conclusions of Law; R. at 100.

The aforementioned contact between the Court and Plaintiff's counsel was after the close of evidence and 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. But for the fact that the City was copied on the emails, this is the ***same exact conduct*** that raised the appearance of impropriety in the matter of ***U.S. v. DeLaughter,*** United States District Court, Northern District of Mississippi, Western Division Cause No. 3:09-002GHD-SAA-2. In the matter concerning former Hinds County Circuit Court Judge DeLaugher, the trial judge had *ex parte* communication with Plaintiff when he afforded Defendant Scruggs' legal team secret access to the court, along with the court's proposed opinions, and therefore, allowing Scruggs an unfair advantage in the *Wilson v. Scruggs* litigation.

Although this is not a matter in which the City requested that Judge Yerger recues himself, Mississippi law on recusal is useful to draw an analogy to the trial judge's bias against the City. The case of ***Collins v. Dixie Transport, Inc.***, 543 So.2d 160 (Miss.1989), provides that a judge who is otherwise qualified to preside over a trial must be free of disposition and sufficiently neutral to be capable of rendering a fair decision. "If a reasonable person, knowing all the circumstances, would harbor doubts about a judge's impartiality, he is required to recuse himself." ***Garrison v. State,*** 726 So.2d 1144, 1152 (Miss.1998). This is the only

way to overcome the presumption that the trial judge acted in a fair and unbiased manner at trial. ***Id.*** The standard here is that this Court must review the entirety of Judge Yerger's rulings against the City at trial to determine manifest abuse of discretion. ***Id.*** In this regard, Judge Yerger presided over this matter having a pre-disposed notion that the City had "questionable policies" in place regarding police pursuit. This is demonstrated in his questioning of City Attorney Teeuwissen regarding the availability of a tape-recording of the officers' pursuit. T.T. at 156 – 158. After the third witness was called, the trial judge inquired as to why police tapes were taped over after a year. The City explained that it was for budgetary reasons, and the trial judge maintained that this was a "questionable" policy. This comment on the record, as well as the excessive damages, the emails with Plaintiff's counsel and the award of loss wages raises the question as to whether Judge Yerger was capable of giving an impartial opinion as to whether the City was liable in this matter.

The trial judge's bias and impartiality undoubtedly affected the determination of non-economic damages. This Court proceeds on a case-by-case basis in determining whether an award is excessive. ***Biloxi Elec. Co. v. Thorn***, 264 So.2d 404, 405 (Miss.1972). The Court will not disturb an award of damages unless its size, in comparison to the actual amount of damage, shocks the conscience. ***City of Jackson v. Locklar***, 431 So.2d 475, 481 (Miss.1983). "The bias, prejudice or passion standard is purely a circumstantial standard[.]" ***Cade v. Walker***, 771 So.2d 403, 407 (Miss.Ct.App.2000). "[E]vidence of corruption, passion, prejudice or bias on the part of the jury (if any) is an inference ... to be

drawn from contrasting the amount of the verdict with the amount of the damages." ***Rodgers,*** 611 So.2d at 944-45. 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 her damages by a preponderance of the evidence. ***TXG Intrastate Pipeline Co. v. Grossnickle,*** 716 So.2d 991, 1016 (Miss.1997). During the trial in this matter, the Plaintiff did not offer testimony and evidence to support the trial court's award non-economic damages. Rather, the award appears to be established by Plaintiff's counsel.

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. In essence, Plaintiff was able to go back to work at the Richland Police Department receiving the same pay, but chose to voluntarily leave the police department and immediately begin employment with CMMC receiving a higher salary.

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. These actions resulted in the trial court abusing its discretion in determining damages. 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.

III. The lower court's finding of reckless disregard.

The determination of whether the officers acted with reckless disregard pursuant to the Mississippi Tort Claims act is a factual finding. The City recognizes that the lower court weighed the evidence and made a determination in this case in favor of the Plaintiff. The City contends this was in error, but submits that the determination of reckless disregard is not necessary to reach the determination that the damages in this case were excessive, the apportionment improper, and a result of bias on behalf of the trial judge.

CONCLUSION

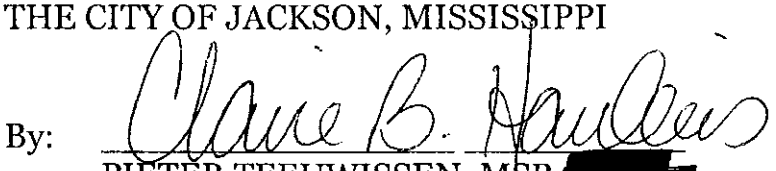
The damages awarded in this matter are not only excessive, but are unsupported by substantial evidence and are a result of bias. The trial judge ordered loss of wages and loss of earning capacity although it was clear that Plaintiff voluntarily left his position at the Richland Police Department and 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. Yet, the trial court merely apportioned 20% liability to Robertson. There was also unrebutted testimony that Lewis was changing a CD when entering the intersection, did not look down the street for cars and did not see or hear the sirens. She 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. But, Lewis proceeded into the intersection, and Robertson collided with her vehicle, causing Robertson's vehicle to crash into the Plaintiff. Based on this testimony, the lower court erred in failing to apportion fault. 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 4th day of January, 2011.

THE CITY OF JACKSON, MISSISSIPPI

By: 

PIETER TEEUWISSEN, MSB [redacted]
City Attorney
CLAIRE BARKER HAWKINS, MSB [redacted]
Deputy City Attorney

OF COUNSEL:
Office of the City Attorney
455 East Capitol Street
Post Office Box 2779
Jackson, Mississippi 39207-2779
Telephone: 601-960-1799
Facsimile: 601-960-1756

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 Appellee's Brief to the following:

Chris Klotz, Esq.
P.O. Box 12906
Pensacola, FL 32591-2906
Counsel for Appellee

Honorable Swan Yerger,
Hinds County Circuit Court Judge
407 East Pascagoula Street
Jackson, Mississippi 39201

So certified, this the 4th day of January, 2011.

CLAIRE BARKER HAWKINS