

BEFORE THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
Cause No. 2010-CC-01057-COA

CITY OF JACKSON, MISSISSIPPI

APPELLANT

v.

SLADE MOORE

APPELLEE

REPLY BRIEF OF THE APPELLANT, CITY OF JACKSON, MISSISSIPPI

(On Appeal from the Circuit Court for the First Judicial District of Hinds County, Mississippi)

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STATEMENT REGARDING ORAL ARGUMENT

The City of Jackson, Mississippi ("City"), as the Appellant herein, had previously requested oral argument. Upon reviewing the Appellee's Brief, and finding that it fails to address the arguments contained in the City's Brief, the City respectfully withdraws its request for oral argument. As detailed herein, applicable case precedent resolves the issues raised by the City.

INTRODUCTION

The City of Jackson, Mississippi (“City”), through counsel, pursuant to Rule 28(c) of the Mississippi Rules of Appellate Procedure and other applicable authority, files its Reply Brief herein to the Brief of the Appellee, Slade Moore (“Moore”)¹. Specifically, the City requests that this Court reverse the decision of the Hinds County Circuit Court affirming the decision of the Jackson Civil Service Commission (“Commission”). As set forth by the City previously and herein below, the City’s termination of Appellee Moore’s employment as a Jackson police officer was made in good faith and for cause, and pursuant to controlling Mississippi case and statutory authority. The Circuit Court for the First Judicial District of Hinds County, Mississippi, improperly found that the Commission’s Order was based on substantial evidence and not arbitrary and capricious. However, because forced reinstatement of Moore to the City’s employ violates clear Mississippi statutory and case authority and guarantees liability of the City, the judgment of the Circuit Court of the First Judicial District of Hinds County, Mississippi, should be reversed.

SUMMARY OF RELEVANT PROCEDURAL HISTORY

Moore was terminated by the City on July 18, 2006, for use of excessive force in the arrest of Chad Calcote.² Moore requested and received a review hearing regarding his termination before the Jackson Civil Service Commission. [R. 8-11] The Commission entered its Opinion and Order reinstating Moore’s employment on March 13, 2008. [R. 5- 7] The City timely appealed the Commission’s Opinion and Order to the Circuit Court for the First Judicial District of Hinds County,

¹The Brief of the Appellee, Moore was filed on or about July 12, 2011, and is hereinafter referred to as the “Appellee Brief” or “Moore’s Brief.”

²See also *City of Jackson, Mississippi v. Calcote*, 910 So.2d 1103 (Miss. App. 2005), hereinafter referred to as *Calcote* case.

Mississippi, on or about April 14, 2008. [R. 3-4]. By Order entered by the Mississippi Supreme Court on August 3, 2009, the Honorable William J. Lutz was appointed Special Judge to hear the matter. [R. at 36]. After briefing of the issues by the City and Moore, a hearing was conducted on the City's appeal of the Civil Service Commission's Opinion and Order before Judge Lutz on May 24, 2010. [See Transcript 1-32]. The Circuit Court for the First Judicial District of Hinds County, Mississippi, Special Judge William Lutz presiding, affirmed the Opinion and Order of the Jackson Civil Service Commission on June 3, 2010. [R. 37-38] On June 29, 2010, the City timely filed its Notice of Appeal of the decision by the Hinds County Circuit Court. [R. 39-41;46-50] On April 26, 2011, the City filed its Appellant Brief herein. Following this, and on May 18, 2011, an Amicus Curiae Brief was filed by Robert B. McDuff, Esq. and Jim Kopernak, Esq. Moore finally filed his Appellee Brief on July 12, 2011, and after receiving a deficiency notice from the Supreme Court Clerk (issued on June 28, 2011). This matter was then reassigned to the Mississippi Court of Appeals on July 27, 2011.

SUMMARY OF RELEVANT FACTS

As set forth above, this matter arises from the City's termination of Jackson Police Officer Slade Moore. Moore, a Sergeant with the Jackson Police Department ("JPD"), was terminated on July 18, 2006, in part and as the result of numerous complaints lodged against him for excessive use of force, including, but not limited to, the *Calcote* case referenced hereinabove.³ [R. 23-29] As evidenced in JPD's termination letter dated July 18, 2006 [R.27-29], the City particularly stated that,

³Moore has also been the subject of a lawsuit filed against the City of Jackson in Federal Court. The City settled claims alleging excessive use of force and violations of constitutional rights by Moore in the matter of *Nichols v. City of Jackson*, In the United States District Court for the Southern District of Mississippi, Jackson Division, Cause No. 3:06-cv-364 HTW-JCS.

based on the charges and specifications, “federal law holds that City of Jackson accountable for any behavior that may be considered a common practice, pattern or procedure...” [R. 27]. The City specified Moore’s violations of JPD’s General Orders⁴ and Rules and Regulations⁵, as well as Moore’s violations of the Civil Service Rules for the City of Jackson⁶, which resulting in the filing of at least two suits against the City and/or the Jackson Police Department.

Despite the numerous complaints and litigation arising from Appellee Moore’s excessive use of force and this Court’s determination of Moore’s actions in the *Calcote* case, the Commission determined that the City’s disciplinary action of terminating Moore “was not supported by the evidence.” [R. 45].⁷ Specifically, the Commission concluded that “the liability of the City of Jackson for negligence of an officer *is not necessarily grounds*⁸ for termination of the officer even when injury results to an arrested individual.” [R. 45 (emphasis supplied)] The Commission further held that, despite the Court of Appeals’ determination that Moore “shoved [Calcote’s] face into a concrete floor, pressed his fingers into [Calcote’s] eyes and rolled [Calcote’s] face back and forth across the concrete floor,”⁹ that the City’s termination of Moore was not supported by the evidence.¹⁰

⁴General Order Nos. 500.1, §II-A; 600-1, §III; 600-10, §A-1; 600-10, §A-6 and 600-10, §IV-A. [R.28]

⁵JPD Rules and Regulations, § 2, Attention to Duty, 2.6 Truthfulness, and §4, Restriction on Behavior, 4.20 Use of Force. [R.28]

⁶Civil Service Rule for the City of Jackson, Mississippi: Section XII, § 2(M), Conduct Unbecoming to a City Employee, and Civil Service Rule for the City of Jackson, Mississippi: Section XII, § 2(O), Willful and wanton brutality or cruelty to a prisoner or one detained or under arrest. [R. 29]

⁷ Moore asserts that his termination was made for political reasons and because he is a Caucasian male. [Transcript, pp. 6-9]. As a result, Moore alleges that the City termination of him and was not made in good faith for cause.

⁸Notably, there is nothing in the record that states definitively that the City’s termination of Moore for the resulting liability to the City for Moore’s use of excessive force does not constitute a good faith basis and cause for disciplinary action. In fact, the Commission’s ruling utterly contradicts this Court’s decision in the case of *Burleson v. Hancock Co. Sheriff’s Dept. Civil Service Commission*, 872 So. 2d 43 (Miss. App. 2004).

⁹*Calcote*, 910 So.2d 1103, 1110 (Miss. App. 2005).

¹⁰Moore has also filed suit against the City alleging racial discrimination and retaliation in violation of 42 U.S.C. § 1981 and § 1983, alleging that he was racially discriminated against, starting on September 28, 2005, by being transferred to a desk job, and then his subsequent termination by the City on July 18, 2006. See *Slade Moore*

[R. 37-38; 45] The Hinds County Circuit Court affirmed the Jackson Civil Service Commission's decision ordering Appellee Moore's reinstatement.

SUMMARY OF REPLY BRIEF ARGUMENT

Moore's Brief is unsupported and without merit. The Appellee Brief fails grotesquely and is nothing more than a confession of errors by the Appellee. Appellee More fails to address nor coherently respond to a single issue raised by the City that is germane to the appeal. Likewise, the Appellee fails to respond to the City's argument and supporting authorities that "forcing Moore's reinstatement violates clear Mississippi statutory and case authority."¹¹ The Appellee Brief is also devoid of any meaningful response whatsoever to the City's argument and supporting authorities that retention of Moore as an employee guarantees liability for the City of Jackson.¹² Conspicuously absent from the Appellee Brief is the Appellee's recognition or reconciliation of unequivocally clear Mississippi case precedent permitting the Appellant's termination of the Appellee as an employee. Thus, the subject Appellee Brief is a confession of errors, as well as an admission by the Appellee. Accordingly, this Court should reverse the Hinds County Circuit Court's Judgment affirming the reinstatement of Moore as an employee and police officer of the City. By reference herein, the City incorporates fully its argument and authorities contained in its Appellant Brief filed herein.

ARGUMENT AND AUTHORITIES

I. Appellee concedes City's arguments in Appellee Brief.

Under Mississippi law, the failure of an appellee to respond to the issues raised by the

v. *City of Jackson, Mississippi*, In the United States District Court for the Southern District of Mississippi, 3:10-cv-454 DPJ-FKB.

¹¹See General Docket date 4/26/11 and Appellant Brief, p. 6.

¹²See General Docket date 4/26/11 and Appellant Brief, p. 14.

appellant, as is the case here, is considered a “confession of errors” on the part of the appellee. *See Tower Loan of Mississippi, Inc. v. Jones*, 749 So. 2d 189, 191 (Miss. App. 1999). This Court has specifically concluded that a police officer, like the Appellee, who fails to cite authorities in support of his arguments on appeal, is “...**construed as conceding the City’s arguments.**” *City of Vicksburg v. Cooper*, 909 So. 2d 126, 130 (Miss. App. 2005)(emphasis supplied)(“*Cooper*”). Thus, since the Appellee Brief is nothing more than a confession of errors that concedes the City’s arguments, reversal of the Hinds County Circuit Court’s judgment and in favor of the City, is proper.

In the *Cooper* case, *supra*, Gary Cooper, a police officer with the City of Vicksburg, appealed the decision of Vicksburg’s Mayor and Board of Aldermen to terminate him. *Cooper*, 909 So. 2d at 128. Like the Appellee here, Cooper had received several reprimands and suspensions leading up to the incident that lead to his termination. *Cooper*, 909 So. 2d at 128 (Miss. App. 2005). Also like the Appellee here, Cooper was terminated because the string of disciplinary actions against him. *Id.* The City of Vicksburg declared, in terminating Cooper, that Cooper demonstrated an inability to perform his police officer duties and had a pattern of unbecoming conduct that violated Vicksburg’s civil service regulations and the Vicksburg Police Department’s operating guidelines. *Id.*

Unlike the instant matter, however, the Vicksburg Civil Service Commission affirmed the municipality’s termination of Cooper as a police officer. *City of Vicksburg v. Cooper*, 909 So. 2d 126 (Miss. App. 2005). Cooper thereafter appealed the Vicksburg’s Civil Service Commission’s decision affirming his termination to the Warren County Circuit Court. *Id.* The Warren County Circuit Court reversed and remanded the decision of the Vicksburg Civil Service Commission, and,

like the City of Jackson in this case, the City of Vicksburg appealed the Circuit Court's reinstatement of its police officer to the Mississippi Court of Appeals. *Cooper*, 909 So. 2d at 128 (Miss. App. 2005). In reversing the decision of the Warren County Circuit Court, this Court stated that:

...[commissioner impartiality] issue is **procedurally barred for Cooper's failure to raise the issue on appeal to the circuit court...Cooper cites no authority in support of his arguments** before us, and **while Cooper is responding to the City's issue [Cooper] has not raised an "issue" or "assignment" of error...**[Cooper's] **failure to cite authority in support of his arguments may be construed as conceding the City's arguments....**

City of Vicksburg v. Cooper, 909 So. 2d 126, 130 (Miss. App. 2005), citing *Holloway v. Jones*, 492 So. 2d 573, 573-74 (Miss. 1986).

This Court also opined that the "City correctly argued that Cooper's failure to brief or argue [a recusal] issue..waived the issue for review." *City of Vicksburg v. Cooper*, 909 So. 2d at 130 (Miss. App. 2005), relying on *Slay v. Spell*, 882 So. 2d 254, 261 (Miss. App. 2004). It is the same here. Moore, as Appellee has conceded the City's arguments in his Appellee Brief by failing to respond to the issues raised by the City in its Appellant Brief. Therefore, the City requests that this Court reverse and render the Hinds County Circuit's decision in the City's favor.

II. Gross Errors and Omissions contained in Appellee's Brief.

In addition to the foregoing, the Appellee's Brief is devoid of any citation to the record or reference to sufficient facts that support the Appellee's arguments in response to that of the Appellant. There is not a single specific reference or citation to the record by the Appellee in support of his arguments contained in any of the nine (9) pages making up the subject Appellee Brief.

Even the Appellee's Certificate of Interested Parties in connection with his Appellee Brief is wrong. For example, Appellee's Certificate of Interested Parties erroneously identifies Frank

Melton as an interested party and the Mayor. Frank Melton is not the current Mayor for the City of Jackson, and is, moreover, deceased.¹³ Appellee's Certificate of Interested Parties also identifies Sarah O-Reilly-Evans as the current City Attorney.¹⁴ Furthermore, the Certificate of Interested Parties improperly names and/or identifies only six (6) members of the Jackson City Council, and fails to recognize that the Jackson City Council consists of seven actual members. This error by the Appellee is compounded with the error that, out of the six Jackson City Council members erroneously identified by the Appellee as interested parties, two (2) are incorrect. Jeff Weill, Sr., became a Hinds County Circuit Judge on January 1, 2011, and no longer serves as a council person. Marshand Crisler is also no longer a council person, as he resigned his City Council seat upon his decision to run for Mayor for the City of Jackson in May of 2009.

However, the aforementioned failings are not the only errors by the Appellee set forth in the Appellee Brief. For example, the Appellee relies on the case of *Beasley v. City of Gulfport*, 724 So. 2d 883 (Miss. 1998)¹⁵ ("*Beasley*"), for his assertion that the circuit court's scope of review of a civil service commission is limited. This is another blunder by the Appellee, as the controlling Mississippi statute cited by the Appellee as limiting the scope of review by the circuit court was amended in 2001. *See* Miss. Code Ann. § 21-31-23 (Rev. 2001) and *City of Vicksburg v. Cooper*, 909 So. 2d 126, 130 (Miss. App. 2005). Moreover, in *Beasley*, the Mississippi Supreme Court

¹³The Mayor of the City of Jackson, Mississippi, is Harvey Johnson, Jr., who was elected Mayor in May 2009, and has held the office since that time. The Appellant respectfully submits that a deceased person, whose estate has been properly probated and thereafter closed, cannot have an interest in an appeal of this nature.

¹⁴The current City Attorney is Pieter Teeuwissen, who was appointed by the governing authorities for the City of Jackson, Mississippi, in November of 2009. Prior to his appointment, however, Mr. Teeuwissen was appointed by Mayor Johnson as Acting City Attorney on July 1, 2009.

¹⁵The City would note that, in the Appellee Brief, the Appellee's citation of the year the *Beasley* case was decided is incorrect, as Appellee cites the case as decided in the year 1988 [*see* p. 5, Appellee Brief]. Actually the *Beasley* case was decided ten (10) years after 1988, and in 1998, and approximately three (3) years before Miss. Code Ann. § 21-31-23 was amended.

actually *affirmed* the Harrison County Civil Service Commission's finding that "there was sufficient evidence of *misconduct* on the part of Louis Beasley..." *Beasley v. City of Gulfport*, 724 So. 2d 883, 887 (Miss. 1998)(emphasis added). This is exactly opposite of what the Jackson Civil Service Commission did in the instant matter and wholly inapplicable as asserted by the Appellee.

The Appellee's reliance on the case of *Chandler v. City of Jackson*, 687 So. 2d 142 (Miss 1997) is likewise misplaced. In *Chandler*, the Mississippi Supreme Court unequivocally concluded that the standard of review of commissions such as the Jackson Civil Service Commission is that as the City states in its Appellant Brief:

[S]hould *the record and proceedings below reflect a decision wholly unsupported by any credible evidence*, we would regard that decision as contrary to law and, as a matter appearing on the face of the record or proceedings, subject to modification or reversal.

Chandler v. City of Jackson, 687 So. 2d at 144 (Miss 1997), relying on *Gill v. Mississippi Dept. of Wildlife Conservation*, 574 So. 2d 586, 591 (Miss. 1990). As a result, the Appellee actually relies on case authority that contradicts his position in this appeal, thereby conceding that the decision of the Hinds County Circuit Court should be reversed.

III. Retention of Appellee as employee contrary to civil service statutes and controlling Mississippi law.

As noted above, the Appellee makes no meaningful response whatsoever to the City's argument that forcing the City's retention of Moore as an employee guarantees City liability. All that is contained in the Appellee Brief in response to this particular argument by the Appellant is a single sentence on page 6 of the Appellee's Brief, claiming that the City's argument assumes facts which do not exist, court rulings which have not taken place, events that have not happened and/or actions that have not accrued. This is simply an unsupported assertion that asks this Court to ostrich itself

and stick its head in the sand. It also requests that this Court reverse its own precedent, as specifically set forth below.

In reality, the applicable civil service statutes do not permit any civil service commission or circuit court to subordinate the safety needs of the public and permit a single police officer to brutalize citizens of a municipality and get paid for it. Such a request by the Appellee is not only offensive, it is contrary to the purposes contained in Mississippi's civil service statutes and controlling Mississippi law.¹⁶ The Mississippi Supreme Court has, in fact, clearly stated that "the idea implicit in our state civil service statutes is below the policy-making levels, *the public needs... [public is] entitled to the service of a competent professional* core of state employees..." *Gill v. Mississippi Dept. of Wildlife Conservation*, 574 So. 2d at 591 (Miss. 1990)(emphasis supplied). Thus, despite the Appellee's cries to contrary, the civil service laws of this State protect the interest and needs of the public, and are not limited to the only the rights of a protected employee as the Appellee may contend.

Stated differently, the Appellee is entitled to certain due process as a civil servant, but the Appellee's rights do not automatically trump the rights and interests of a municipality and/or the citizens of a municipality. The decision of the Jackson Civil Service Commission and the Hinds County Circuit Court's Judgment affirming same is therefore erroneous, because it places the Appellee's protected property interest in his employment above and beyond all else. The City would

¹⁶It is true that the civil service rules, like the Fourteenth Amendment of the United States Constitution forbid a State or municipality from depriving any individual of life, liberty or property, without due process. However, this Court has recognized that due process requirements are not the same in every situation, and the amount of process required varies according to the circumstances of the deprivation. *Burleson*, 872 So. 2d 43, 48-49 (Miss. App. 2005), citing *Mathews v. Eldridge* 424 U.S. 319 (1976) and *Nichols v. City of Jackson*, 848 F. Supp. 718,720 (S.D. Miss. 1994). The determining factors for due process include the importance of the individual interests involved, *but also* the value of the specific safeguards to that interest and *the government interest in administrative efficiency*. *Id* (emphasis supplied).

also refer this Court to the fact that two (2) plaintiff attorneys, Robert B. McDuff, Esq. and James D. Kopernak, Esq., have filed their Amicus Curiae Brief, which, in part, supports the conclusion that retention of the Appellee as a police officer for the Appellant offends justice and compromises the welfare and safety of Jackson citizens.

However, even disregarding the foregoing, permitting Moore's reinstatement is contrary not only to the purpose the civil service statutes and applicable Mississippi case authority. Specifically, the City refers this Court to its decision in the case of *Burleson v. Hancock County Sheriff's Department Civil Service Commission*, 872 So. 2d 43 (Miss. App. 2004) ("*Burleson*"). In *Burleson*, this Court upheld the termination of a deputy sheriff, who, like the Appellee, had a protected property interest in his employment but was terminated ***for the risk the employee posed to the employer***. See *Burleson*, 872 So. 2d 43, 47 (Miss. 2004)(emphasis added). The Plaintiff, *Burleson*, was informed by his superior, Sheriff Peterson, that he was being transferred to the patrol division of the Hancock Sheriff's Department because he was an insurance risk. *Id.* *Burleson's* employment constituted an insurance risk (exactly like the Appellee here), as it stemmed **from two separate lawsuits filed against the sheriff's department based on the actions of *Burleson***. *Id.* at 47-48 (emphasis added). In fact, the county's insurer had threatened not to renew the insurance policy that covered the sheriff's department because of *Burleson's* conduct as a deputy sheriff. *Id.*

Burleson was initially transferred to patrol by Sheriff Peterson, without any objection, and never complained of the transfer, until he was terminated. *Id.* Following his initial transfer and some months later, *Burleson* received a written letter that he was being terminated from his employment because of the insurance risk he posed. *Id.* at 47. The subject letter also included *Burleson's* right to appeal and his entitlement to accumulated compensatory and vacation time. *Id.*

The letter, however, was from Sheriff Garber, who had defeated Sheriff Peterson in election. *Burleson*, 872 So. 2d at 47 (Miss. 2004). Burleson requested a hearing and likewise filed a complaint with the Harrison County Civil Service Commission. *Id.* The Harrison County Civil Service Commission (unlike the Jackson Civil Service Commission in the instant matter), affirmed Burleson's termination because of the liability Burleson posed to the sheriff's department. *Id.* Burleson appealed the affirmation of his termination to the Harrison County Circuit Court and then to this Court. *Id.*

This Court ultimately upheld Burleson's termination. *Burleson*, 872 So. 2d at 52 (Miss. 2004). In so doing, this Court specifically found "that Burleson's conduct in his official capacity, *more particularly in two incidents that lead to suits being brought against the sheriff's department, constituted inattention to duty and incompetence...*" *Id.* (emphasis supplied). This Court also specifically found, as a fact, "...that the *continued employment of Burleson by the department raised a substantial risk to that the department* [and the department] would be unable to renew its existing liability insurance policy, which would have the potential to substantially hamper the department in the performance of its duties..." *Burleson*, 872 So. 2d at 52 (Miss. 2004) (emphasis supplied). Accordingly, this Court affirmed Burleson's termination because the foregoing facts "were sufficient, as a matter of law, to constitute grounds for [Burleson's] discharge." *Id.*

This is exactly what the City requests in its Appellant Brief herein and now, and which this Court has already blessed previously in *Burleson*. The facts and credible proof from the City show that the City has been and will be liable for claims resulting from the conduct of the Appellee as a police officer. Affirmation by this Court of the reinstatement of the Appellee will substantially hamper the Jackson Police Department in the performance of its duties. Affirmation of Appellee's

reinstatement will likewise permit the persistent threat to the health and welfare of the citizens of Jackson, as the Appellee is a police officer who intentionally and maliciously assaulted an unarmed, non-threatening individual.¹⁷

CONCLUSION

Based on the foregoing, the judgment of the Circuit Court for the First Judicial District of Hinds County, Mississippi, must be reversed. Moore, as Appellee, has conceded the City's arguments in his Appellee Brief by failing to respond to the issues raised by the City in its Appellant Brief. The Appellee Brief is likewise replete with errors and contradictions. Permitting Moore's reinstatement is further contrary to the purpose the civil service statutes and applicable Mississippi case authority. Accordingly, the City respectfully requests that this Court reverse and render the Hinds County Circuit Court's judgment in the City's favor. Finally, the City requests any and all other relief that this Court deems fit.

THIS the 26th day of August, 2011.

Respectfully submitted,

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¹⁷Chad Calcote - see also *City of Jackson, Mississippi v. Calcote*, 910 So.2d 1103 (Miss. App. 2005).

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CERTIFICATE OF SERVICE

I, Lara E. Gill, one of the attorneys for the Appellant, the City of Jackson, Mississippi, do hereby certify that I have this day delivered, via hand delivery and/or United States Mail, postage prepaid, a true and correct copy of the foregoing Appellant's Reply Brief to the following:

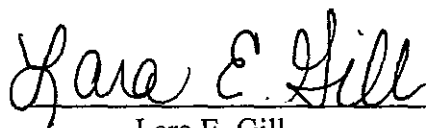
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THIS the 26th day of August, 2011.



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