IN THE SUPREME COURT OF THE STATE MISSISSIPPI

WAYNE COUNTY SCHOOL DISTRICT	**APPELLANT**
V.	**CASE NO.: 2011-CA-00328**
ERNESTINE WORSHAM, INDIVIDUALLY, AND ON BEHALF OF ZE'METRICE DENSON, A MINOR	**APPELLEE**

ON APPEAL FROM THE CIRCUIT COURT OF WAYNE COUNTY, MISSISSIPPI

HONORABLE LESTER WILLIAMSON, JR., CIRCUIT JUDGE

BRIEF OF APPELLEE

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CERTIFICATE OF INTERESTED PERSONS

The undersigned Counsel of Record certifies that the following listed persons have an interest in the outcome of this case. These Representations are made in order that the Justices of the Supreme Court and/or Judges of the Court of Appeals may evaluate possible disqualification or recusal.

a. Wayne County School District, Appellant;

b. Lonnie D. Bailey, Esq., and F. Edwin Henson, III, Esq., Upshaw, Williams, Biggers & Beckham, LLP. counsel for Appellant;

c. Rick Norton, Esq. and Brad Touchstone, Esq., Bryan Nelson P.A., counsel for Appellant;

d. Ernestine Worsham, Individually and on behalf of Ze'Metrice Denison, a minor, Appellee;

e. Larry Stamps, Esq. and Thomas Hudson, Esq., Stamps & Stamps, counsel for the Appellee; and

Dated this the 19th day of August, 2011.

Thomas Hudson

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I. INTRODUCTION

This school bus accident was brought under the Mississippi Tort Claims Act. The accident in question happened on February 12, 2008 on County Farm Road in Wayne County, Mississippi between the Plaintiff, Ernestine Worsham ("Worsham") and Natasha Middleton, acting on behalf of the Defendant, Wayne County School District ("Wayne County"). County Farm Road has a posted speed limit of thirty (30) Miles per Hour. Natasha Middleton's speed according to the investigating officer was forty-five (45) miles per hour, which exceeded the posted speed limit. As such, Worsham alleged negligence per se on part of the Defendants. Wayne County filed a Motion for Partial Summary Judgment filed on April 4, 2010 (R.E. 3) and a Motion for Leave of Court to file and Amended Answer filed on June 3, 2010 (R.E. 4). The Court denied both motions in its Order dated October 15, 2010. (R.E. 5) On October 26, a bench trial was held in this matter. One November 24, 2010, the Court ruled that Worsham suffered $800,000.00 in damages and assessed 25% liability to Wayne County for a total judment of $200,000.00. The Court was correct in ruling that 1) the lawful speed limit on County Farm Road was 30 miles per hour; 2) Natasha Middleton was driving in excess of the posted speed limit; 3) Natasha Middleton's excessive speed was approximate cause of Worsham's injuries; and 4) Worsham suffered damages in the amount of $800,00.00. This Court must uphold the trial courts ruling in this matter.

II. STATEMENT OF THE ISSUES

1. The Trial court was correct in finding that the signs posted by Supervisor Fred Andrews, acting in his official capacity in response to citizen complaints, was legally adopted by Wayne County and as such were lawful on the date of the accident.

2. The trial court was correct in finding that Natasha Middleton was negligent per se for driving at a speed greater than 30 mph.

3. The trial court was correct in finding that Natasha Middleton's speed was a proximate cause of the accident.

4. The Damages awarded by the Trial Court were supported by substantial, credible and reasonable evidence.

5. The Trial Court was Correct in Denying the Wayne County's Motion for a New Trial.

III. STATEMENT OF THE CASE

1. Nature of the Case.

On or about February 12, 2008, Plaintiff Ernestine Worsham ("Worsham") was exiting a private driveway onto County Farm Road in Wayne County, MS when Wayne County Natasha Middleton ("Middleton"), acting under the authority of her employer, Wayne County School District ("Wayne County"), collided with the plaintiff's vehicle . (Tr. 25:28-29; 26:1-7; 34:4; 106:2-8). It is an undisputed fact that from February 2001 until just before the trial in this case in October, 2010, two 30 mile per hour speed signs were in place and plainly visible at opposite ends of County Farm Road. It is also an undisputed fact that the speed signs were placed by County Supervisor Fred Andrews, acting in his capacity as supervisor in response to citizen complaints. As such, the speed limit on the date of the accident was thirty (30) Miles per Hour. According to the Uniform Accident Report taken at the scene of the accident, Middleton's speed was approximately forty-five (45) Miles per Hour at the time of the accident. As a result of the Middleton's actions on the day of the accident, Worsham and her Minor Child, Ze'metrice Denson, sustained severe injuries to her person and incurred substantial damages.

Wayne County filed a Motion for Partial Summary Judgment on negligence per se relying on 1*Miss. Code Ann. Section 63-3-511.* Worsham in her response successfully argued that Wayne County was procedurally barred from raising this issue 1because they did not raise the legality of the speed limit in its initial answer or any subsequent amendments as required in 1Miss. R. Civ. P. 9(d). Prior to the trial judge's ruling on Wayne County's Motion for Summary Judgment, they brought forth *another* Motion, this time for Leave of Court to File an Amended Answer to include *Miss. Code Ann. Section 63-3-511.* The trial court denied the Wayne County's motion for leave of Court to amend their response and ruled that they were procedurally barred from relying on *Miss. Code Ann. Section 63-3-511* due to their failure to raise this issue in their answer. The trial court went further however, ruling that the speed signs, having been placed there by a County Supervisor, having been in place for over nine (9) years and bearing all the characteristics of other speed signs in the County, had in fact been lawfully adopted by Wayne County.

During the trial, Worsham was able to show by clear and convincing evidence that Middleton, acting on behalf of defendant Wayne County, was travelling in excess of 30 MPH and that her actions were a proximate cause of the injuries suffered by Worsham. The Court awarded Worsham damages in the amount of $800,000.00 and assessed Wayne County 25 percent of the fault in this matter for a judgment for the Plaintiff in the amount of 200,000.

2. Course of Proceedings and Disposition Below

1On February 12, 2009, Worsham filed her Complaint in this matter, alleging that Wayne County was guilty of negligence and negligence per se in a collision between a school bus driven by Middleton, acting on behalf of the Wayne County School District and Worsham. On March 25, 2009, Wayne County answered the complaint. On April 9, 2010, Wayne County filed their motion

for partial summary judgment on Worsham's negligence per se allegation. On May 28, 2010, the Worsham filed her response. On June 3, 2010, Wayne County filed a motion for leave to amend their answer. On September 15, 2010, the trial court heard oral arguments on both of Wayne County's motions. On October 5, 2010, the trial court entered an order denying both motions. On October 26, 2010 a one day bench trial was held in this matter. On November 24, 2010, the trial court issued an order dismissing all claims against Middleton individually. The Court further found that Worsham suffered damages in the amount of $800,000.00 and finding Wayne County to be 25% negligent, awarded Worsham a judgment against Wayne County for $200,000.00. On December 3, 2010, Wayne County filed its post trial motions. On February 17, 2012, the trial court entered an Amended Judgment. On March 2, 2012, Wayne County filed its notice of appeal.

3. Statement of Relevant Facts

On or about February 12, 2008, Worsham was exiting a private driveway onto County Farm Road in Wayne County, MS. (Tr. 25:28-29; 26:1-7; 106:2-8). Natasha Middleton, acting under the authority of her employer, Wayne County School District, was travelling west on County Farm Road. (Tr. 34:4) The road conditions on the day of the accident were wet due to rain. (Tr. 58:12-13; 105:19-20; 125:13). Before exiting, Worsham saw a school bus traveling West on County Farm Road. Having judged that the school bus was at a safe enough distance for her to enter the roadway, Worsham exited the driveway onto County Farm Road. (Tr. 106:3-8; 131:18-22) County Farm Road is a two-lane county road without a center break line in the middle, going east and west. Middleton collided with Worsham's vehicle after it had made it into the roadway. At least a portion of Plaintiff's vehicle broke the imaginary center line into the East bound lane prior to collision. (Tr. 106:12-29; 107:23-28) Middleton veered left into the eastbound lane prior to collision, causing her vehicle to cross into Worsham's lane, the eastbound lane of County Farm Road and plow right into

her vehicle. (Tr. 33:27-19; 34:1; 38:21-24) The impact of the collision was to the middle and back of Worsham's car. (Pl. Ex. P-4) The point of impact indicates a portion of Worsham's vehicle was into the East bound lane when impact occurred. Defense Expert Brent Alexander's testimony states that the impact came at an angle, corroborating the testimony of Worsham in that she was partially in her lane at the point of impact. (Tr. 200: 20-27) Sheriff's Deputy Tim Hollinghead was the first officer present at the scene of the accident and compiled an accident report. (Tr. 75:6-12) Deputy Hollinghead interviewed Middleton at the scene of the accident. Middleton told Deputy Hollinghead that her speed prior to the accident was 45 Miles per Hour, meaning she was operating her vehicle 15 miles above the speed limit. (Tr. 76:19-20; 77:1-3) Deputy Hollinghead was unable to talk to Worsham at the scene of the accident due to her physical injuries. (Tr. 82:5-17) County farm road is approximately 1 mile long intersecting at HWY 45 and 145 on opposite ends. The speed limit on County Farm Road at the time of the accident was 30 mph. 30 mph speed limit signs were located at both intersections of hwy 45 and 145 from 2001 until approximately October, 2010. (See *e.g.*, Pl. Exs 3, 4; Tr. 169:20-23; Tr. 171:24, Tr. 174:24-25). The speed limit signs were not moved until just before the trial. Former County Supervisor Fred Andrews testified in his deposition that the 30 Mile per Hour signs were put in place to deter large vehicles from speeding on the populated County Farm Road. (*See* Page 13, Lines 13-25 and Page 14, Lines 1-8 of Fred Andrews Deposition Attached as Attachment "A".) Mr. Andrews further testified that citizens on County Farm Road complained about large vehicles travelling at rates of speed, making it dangerous for the citizens on the road. (Id.) Mr. Andrews, in his authority as a County Official, had the option of choosing 55 mph signs for the road but chose the 30 mph signs to make it safer on the road. (Tr. 175:24-25) Middleton had driven County Farm Road as a part of her route for approximately 2 years prior to the accident as a school bus driver employed by Wayne County School District. (Tr. 15:1-6) The 30 mph signs on

County Farm Road were readily apparent to any driver on County farm Road. (Tr. 176:8-12). The signs placed were exactly the same as any other speed limit sign placed throughout Wayne County. (Tr. 175:23-27). The accident was called in to the Sheriff's Department at approximately 2:24 p.m on February 12, 2008. (Tr. 76:9-15). Deputy Hollinghead arrived on the scene at 2:29 p.m. (Tr. 76:2-3). Natasha Middleton stated that Deputy Hollinghead arrived very shortly after the accident. Therefore it is likely that the time of the accident was just before 2:24 p.m. Middleton was on her way to Wayne County Junior High School to her posting at the time of accident. Middleton stated that her destination was approximately 10-15 minutes away from the scene of the accident. (Tr. 22:13-14). According to her testimony, Middleton was to be in place at Waynesboro Junior High school her posting at 2:00. (Tr. 23:5-12). Based on this testimony, Middleton was late to her destination. At a minimum, Middleton's time constraints caused her to travel at a speed in excess of what a reasonable and prudent driver would travel in a large passenger vehicle due to the rainy conditions of the day. Middleton, as driver of a large passenger vehicle, had heightened duty to exercise reasonable care, particularly given the condition of the road at the time of the accident. There was no physical evidence taken at the scene to determine within a reasonable degree of scientific probability the distance and speed of Natasha Middleton when she first encountered Ernestine Worsham. There were no skid marks seen at the scene of the accident. No measurements were made at the scene of the accident. In her deposition testimony on January 4, 2010, Middleton stated that she could not approximate her distance from Worsham prior to the accident and that there were no markers to determine her distance from Middleton prior to accident. (*See* Page 54, Lines 18-25 and Page 55, Line 1 of Natasha Middleton's Deposition) However during trial Middleton estimated her distance from Worsham approximately 87 feet away from Worsham when she first saw her. (Tr. 63:21) Wayne County stated she had just passed Joe Land Road, which intersects off of

County Farm Road as a marker in determining the distance. (Tr. 63:6-12). Middleton admitted that the estimates of her distance were based on markers ***her lawyer*** gave her. (Tr. 54:17-20; 72:27-29; 73:1-5). This estimate was given by Middleton are based on calculations of distance made the day before trial, over 2 years after date of accident, despite stating during deposition on January 4, 2010, that there were no road marks in which to calculate distance. (Tr. 53:16-22). Defense witness Brett Alexander was tendered as an expert witness in the area of accident reconstruction. (Tr. 178:14-24). Brett Alexander's speed and distance calculations were based on solely on statements given to him by Natasha Middleton approximately one month before trial. (Tr. 186:21-26). As such, Brett Alexander's expert testimony was only a recapitulation of Middleton's concocted statement. Brett Alexander testified that he was unable to make any calculations based on physical evidence to determine Natasha Middleton's speed and distance from Ernestine Worsham prior to impact due to a lack of physical evidence available at the scene during the time did his calculations. (Tr. 186:21-26). Brett Alexander testified that his physical examination was undertaken on October 3, 2010. (Tr. 183:7-17; 188:18-22). Brent Alexander was only able to give scientific estimates as to the point of collision between the two vehicles.

Worsham suffered severe injuries as a result of the collision on February 12, 2009. Worsham's medical bills totaled $120, 210.45. Minor Child Ze'metrice Denson suffered minor injuries and his medical bills totaled 753.00. Worsham' severe injuries required her to be under the care of her family for 6 months. (Tr. 126:22-29; 127:1-13) During this time, Worsham was also unable to care for her two children. (Tr. 128:3-16) Worsham was subjected to multiple surgeries due to injuries suffered at the scene. Worsham's injury to her left arm prevents her from extending her arm beyond a 90 degree angle. Worsham's inability to fully extend her arm beyond a 90 degree angle will undoubtedly impact her in her future career as a Nurse. (Tr. 121:22-29; 122:1-5) Worsham has

significant and permanent visible scarring on her left arm and continues to suffer pain in her arm 2 ½ years after the accident. (Tr. 120:1-13) Wayne County Middleton, as sole proximate cause of the accident, is responsible for the damages suffered by the Plaintiff.

IV. SUMMARY OF THE ARGUMENT

The trial court was corrected in assessing a judgment of $200,000.00 against Wayne County School District in this matter. This matter arose out of an accident on County Farm Road in Wayne County on February 12, 2009. Natasha Middleton, acting on behalf of Wayne County, was operating her school bus at a speed of 45 mph on the day of the accident, in excess of the 30 mph speed limit for County Farm Road and her excessive speed was a proximate cause of the Worsham's injuries. As such the trial judge was correct in finding Middleton was guilty of negligence per se. As a result of Middleton's negligence, Worsham endured multiple surgeries, severe pain, permanent visible scarring and medical bills in excess of $100,000.00. The trial court after considering all evidence in this matter found that the Worsham suffered $800,000.00 in damages and assessed 25% fault to the Wayne County. The amount of damages assessed appears modest when compared to the severe injuries suffered by Worsham and are supported by clear and convincing evidence. There is simply no evidentiary for Wayne County's assertion that the damages awarded are excessive under the law.

Based on the record as a whole, the trial court was correct in denying Wayne County's motion for a new trial. This Court should uphold the judgment of the trial court and award damages to the plaintiff in the amount assessed by the trial court along with pre and post judgments interest.

V. ARGUMENT

1. Standard of Review

Employing substantial evidence parlance, Appellate Courts will not disturb a trial judge's findings of fact where there is in the record substantial evidence supporting the same. *Cotton v. McConnell,* 435 So.2d 683, 685 (Miss.1983); *Culbreath v. Johnson,* 427 So.2d 705, 707-09 (Miss.1983); *Richardson v. Riley,* 355 So.2d 667, 668 (Miss.1978). This is so whether those findings relate to matters of evidentiary fact or of ultimate fact. *Norris v. Norris,* 498 So.2d 809, 814 (Miss.1986); *Carr v. Carr,* 480 So.2d 1220, 1222 (Miss.1985).

In a bench trial the trial judge sits as the trier of fact and is accorded the same deference in regard to his findings as that of a chancellor, and the reviewing court must consider the entire record and is obligated to affirm where there is substantial evidence in the record to support the trial court's findings." *Barnett v. Lauderdale County Bd. of Supervisors,* 880 So.2d 1085, 1088 (Miss.Ct.App.2004). "The findings of the trial judge will not be disturbed unless the judge abused his discretion, was manifestly wrong, clearly erroneous or an erroneous legal standard was applied." *Id.*

2. The Trial court was correct in finding that the signs posted by Supervisor Fred Andrews, acting in his official capacity in response to citizen complaints, was legally adopted by Wayne County and as such were lawful on the date of the accident.

First, the defendant is procedurally barred from addressing the issue of the legality of the subject posted speed limits.

On February 11, 2009, the plaintiff filed her complaint on behalf of herself and her minor child, and alleged specially, in pertinent part:

Count I: Negligence/Negligence Per Se of Defendant, Natasha Middleton

9a. Defendant drove the vehicle above the posted speed limit, which constitutes negligence per se.

9g. Defendant failed to operate the vehicle pursuant tot the laws and/or public policies of the State of Mississippi.

Count II: Negligence/Negligence Per Se of Defendant, Wayne County School District

(T. 1-15)

The allegations of negligence and negligence per se were re-adopted by the plaintiff as against Wayne County School District, through allegations of respondeat superior.

In response to the subject complaint, on March 25, 2009, the defendants, Wayne County School District and Natasha Middleton, filed their Answer general denials of those allegations of negligence and negligence per se. The defendant alleged twenty-five (25) Affirmative defenses and not one addressed the plaintiff's allegation that defendant Natasha Middleton, "drove above the posted speed limit, which constitutes negligence per se." (T. 16-25)

The very first time that the defendants raised their argument Worsham has failed to prove that Speed Limit was lawfully enacted was on April 9, 2010, the date that they filed their Motion for Partial Summary Judgement. (R.E. 3) Specifically, they allege that the speed limit signs were the act of a single supervisor and as such were not lawfully enacted. In support of their position, Wayne County relies on Miss. Code Ann. Section 63-3-511. However Wayne County is procedurally barred from making this argument. In its order denying both Wayne County's Motion for Leave of Court to file an Amended Complaint (filed on June 3, 2010) (R.E.5) and Motion for Partial Summary Judgment (filed on April 9, 2009)(R.E.3) dated October 5, 2010, the trial court ruled that Wayne

County was barred from raising the speed limit issue due to their failure to properly raise the statute in their answer.

The trial Court correctly relied on Miss. R. Civ. P. 9 (d), which states that statutes must be detailed in the initial response, specifically:

> In pleading an ordinance of a municipality or a county, or a special, local, or private statute or any right derived therefrom, it is sufficient to identify specifically the ordinance or statute by its title or by the date of its approval, or otherwise.

Id. The comments in Miss. R. Civ. P. 9 (d) provide further guidance:

> A defense based on the theory that an official document or act is defective **must** be raised by a specific denial. The trial Court in this case held that the Wayne County did not properly raised the legality of the speed limit of County Farm Road and thus denied its motion for summary judgment.

Id.

The defendant filed their Motion for Partial Summary Judgment on April 9, 2010, over a year since the filing of the Complaint. (T. 27-29) After the plaintiff's response alleging and underpinning our allegation of negligence per se and supportive memorandum (response filed on June 1, 2010)(T. 65-66), FOR THE FIRST TIME, the defendants filed a Motion for Leave to file Amended Answer on June 3, 2010, well over a year after the action was commenced alleging for the first time their twenty-sixth defense, to-wit:

> The posted speed limit on County Farm Road on the day of the accident was not adopted in accordance with Miss. Code Ann. Section 63-3-511, and therefore not a proper basis statutory basis for proving negligence per se. (T. 79)

> Our supreme court has addressed this issue in dicta and has stated, to-wit:

> If the existence of such a special speed restriction is alleged and denied, or if its legality is put on issue by a responsive pleading, proof should then be required, the burden resting upon the party having the affirmative, as in order cases of disputed fact. Where the existence of the speed zone and rate of speed are properly alleged and not denied, proof that speed signs were in fact posted is sufficient to create a

> presumption that they reflect appropriate action by competent authority in restricting speed.

Montgomery v. State, 910 So.2d 1169, 1172 (Miss. 2005)(citing Niles v. Sanders, 218 So2d 428, 30 [Miss. 1969].)

As is evident, the courts and our Mississippi Rules of Civil Procedure have established this requirement for the obvious reason: everyone would use it to object to traffic control devices, as cited in Montgomery, to-wit:

> Contrary to Montgomery's argument, our courts have never established a rule requiring such proof when the legality of the traffic sign is not questioned, and we decline to establish such a rule. As the district attorney remarked, "[W}itnesses can testify to what they observe. They always have been able to testify. And the judicial economy, it would just slow the system down to half if every defendant who got up was ever to say, well, we don't, we take exception to the testimony about red lights."

Even though the trial court was clear in their ruling that Wayne County was procedurally barred from raising the negligence per se issue, the Court also addressed the merits of Wayne County's negligence per se claim.

Specifically the trial court finding no case law similar to the issue at hand likened this issue to that of adoption by prescription. In *Armstrong v. Itawamba County*, 16 So.2d 752, 752 (Miss. 1944) the court held that although the board of supervisors never adopted a certain road as public through its official minutes, its use by the public for a number of years, along with a supervisors' direction to maintain the road, deemed it a public road by prescription. (see court record)

Furthermore, in *Turner v. Drake*, 736 So.2d 495, 497 (Miss. 1999) the court when asked refused to reverse its holding and thus the board of supervisors do not have to act through their minutes and a road can be deemed public by prescription.

In the case at bar, the county supervisor placed two 30 mph speed limits signs and no thru truck signs on each end of County Farm Road in 2001, for a period of at least nine (9) years!. While Wayne County asserts that this was a unilateral action taken by a single supervisor, the undisputed

evidence show that the signs remained in place for over 9 years and County law enforcement personnel enforced the restrictions. Further, the signs were not taken down until just before trial in October, 2010, well after the accident in question occurred.

The defendant has made much ado over the fact that the speed limit signs had only been in place from 2001 to 2010. To the contrary, this not an adverse possession where a time frame of ten (10) years is statutorily mandated requirement. There is no magic to ten (10) years in the context of accepting the posted speed limits by prescription.

Instead, our jurisprudence has long-addressed the issue of "establishment by prescription or recognition," as early as 1944, wherein our Supreme Court supports the trial court's determination that the posted speed limits should be accepted through the doctrine of prescription. Armstrong v. Itawamba, 195 Miss. 802, 106 So.2d 752).

The Armstrong court, addressed this issue in the context of acknowledgment of a public road not through eminent domain of adverse possession, but by prescription and stated:

> In the case of Kinnare v. Gregory, 55 Miss. 612, the Court said that, "It is a grave mistake to suppose that a highway may not be established by the owner or owners of the freehold which, when accepted by the public, is as complete as if the method appointed in the statute were pursued." Also, that "He may grant to certain persons or to the public the easement of a highway over his land; not that the grant is technically by deed, but he may do those acts which unequivocally manifest an intention that the community shall have and enjoy a highway on his private property.
>
> When the public accepts his offer there has been consummated that which is of equal import with a contract or grant, and there has been accomplished what is expressed by the term "dedication". The acceptance may be shown in two ways: first, by the formal act of the proper authority competent to speak and act for the public, or (second) it may be implied from circumstances, such as user, etc.
> And in the case of Rylee v. State, 106 Miss. 123, 63 So. 342, the Court said: "It seems to be well settled that a highway may be created by prescription or by dedication, as well as by being laid out and established in accordance with statutory provisions. In his work on Roads and Streets (3d Ed.) Vol. 1, per. 3, Judge Elliott says, referring to the establishment of a highway, that 'the mode of its creation does not of itself invariably determined its character, for this, in general, is determined by

> the rights which the public have in it.' In American & English Ency. of Law (2d Ed.) Vol 15, p. 494, we find that following regarding the mode of creation of highways: 'Provided the road is a highway, the mode in which it became such is immaterial, and consequently there may, in the absence of a statutory limitation, be an obstruction of a highway (acquired) by prescription or by dedication, provided the dedication has been accepted.' It has been decided that a highway may be established by immemorial usage."

Armstrong v. Ittwamba, 16 So.2d 757.

> Addressing the merits of acceptance by prescription, the Mississippi Supreme Court addressed this issue in Tegarden v. Dean et al., 33 Miss. 283:
> In the early case of Tegarden v. Dean et al., 33 Miss. 283, the question was whether a road used by the public generally, "for several years, but not for a sufficient length of time to create title by prescription, and without any adoption of it by the Board of County Police, as a public road, or jurisdiction exercised over it by that board, constitutes such a dedication as will vest the absolute right to it in the public, and divest all right out of the proprietor." The court in holding that the proprietor could not be compelled to remove obstructions therefrom, state that, "The road has never been adopted or sanctioned by the Board of Police as necessary for the public good. No overseer has been appointed to attend it, nor hands assigned to work upon it, as is required to be done in all public roads." Whereas, in the case at bar, the board of supervisors as a body sanctioned the working of the road here involved at public expense when it allowed *815 out of the district road fund compensation to the contractor, and others employed to assist in grading and maintaining this road with the road machinery and equipment of the supervisor's district wherein the same was located, in the same manner as was done for the other public roads therein.

Armstrong, supra, p. 814-815.

The most noteworthy part of this case's import is that the time frame of "several years" is not the determinative factor of whether the road could be considered a public road by prescription, but it was in combination with the facts that there was no "overseer appointed to attend it, nor hands assigned to work upon it, as is required to be done in all public roads." Id.

Whereas, in the instant case, the subject posted stop signs had been in place for nine (9) years, the signs in conformity with all other signs posted in the county, and the one mile stretch had utilized that speed limit for nine (9) years without ever any objection from either the public or private sector. The trial court was correct in finding that the subject post stop signs were deemed accepted by prescription.

In Turner v. Duke, 736 So.2d 495 (Miss. 1999), our Supreme Court specifically addressed the elements necessary to establish a public road by prescription and set forth elements that reflect those used in determining adverse possession; which includes the requirement of ten (10) years.

Obviously, at first blush, this appears to define "prescription" but in this case should be limited to establishment of a public road.

This can readily be distinguished from the case at bar in the sense that our case involves a posted speed limit (not a taking of property), which has been in force for a period of nine (9) years and acknowledged on a daily basis by all those who traveled on that stretch of road.

The Court in this case must affirm the Trial Judge's Order and hold that the stop signs were lawfully adopted. First of all, the Court ruled in its order dated October 5, 2010 that the Wayne County were procedurally barred from raising this issue due to their failure to properly raise it in their Answer. Secondly, as the trial Judge stated in the Amended Order dated February 17, 2012, "the public is entitled to depend upon the acts of their Supervisor; to hold otherwise would be misleading the public." Further, the trial court was correct in its assertion that "nothing short of anarchy would occur" if this Court invalidated speed limit signs that were placed by a member of the County Board of Supervisors, are indistinguishable from other speed limit signs in the County and were allowed to remain in place by County Officials for over nine (9) years. Finally, the Wayne County's attempt to gain a legal advantage because something was done improperly is "fundamentally wrong" and must not be allowed by this Court.

3. The trial court was correct in finding that Natasha Middleton was negligent per se for driving at a speed greater than 30 mph.

To prevail on negligence *per se* claim, a party must prove by **preponderance of evidence** that she was a member of the class sought to be protected under the statute, that her injuries were of a

type sought to be avoided, and that violation of the statute proximately caused her injuries. *Snapp v. Harrison*, 699 So. 2d. 567, 571 (Miss. 1997); *Brennan v. Webb*, 729 So. 2d 244, 249 (Miss. Ct. App. 1998). Preponderance of the evidence in Mississippi, as elsewhere, simply means that evidence which shows that the fact to be proved is **more probable than not.** See, e. g., *Gregory v. Williams*, 35 So.2d 451 (1948).

Wayne County argues that Worsham should not succeed on a claim of negligence per se because she does not meet all the elements required to prove that a statute or ordinance was violated (citing *Brennan v. Webb*, 729 So.2d 244, 249 (Miss. App. 1998). In particular Wayne County argues that Worsham did prove that (1) she was a member of the class sought to be protected under the statute and (2) that the violation of the statue proximately caused or contributed to his injuries. To address the first issue of whether plaintiff was a protected member of the class sought to be protected, Wayne County argued that there was no legally adopted reduced speed limit on County Farm Road when the accident occurred. Wayne County argued that since the Wayne County Board of Supervisors did not conduct an engineering and traffic investigation, never adopted an ordinance reducing the speed on the road, and never entered this into the county board's minutes, there was no legally adopted sign. This argument is easily cured because the trial court judge determined the reduced speed limit sign was adopted by prescription. In *Armstrong v. Itawamba County* 16 So.2d 752 (Miss. 1944), the Mississippi Supreme Court held that although the Board of Supervisors never adopted a certain road as public road in their official minutes, it was used for a number of years, and maintained by the supervisors' directions, and therefore it was deemed a public road by prescription. Similarly in the case at bar, the trial court judge in his wisdom found that since the reduced sign had been up for a number of years, no member of the public or other members of the board of

supervisors, and the sign remain even after the Supervisor who placed it there was no longer a supervisor; the reduced speed limit sign has been deemed adopted by prescription. Further, Plaintiff Ernestine Worsham is in clearly the class sought to be protected by the County when they erected the speed limit signs. Natasha Middleton was operating her vehicle in excess of the speed limit by 15 Miles per Hour. Former County Supervisor Fred Andrews testified in his deposition that the 30 Mile per Hour signs were put in place to make the road safer by deterring large vehicles from speeding on the populated County Farm Road. Mr. Andrews further testified that citizens on County Farm Road had complained previously about large vehicles travelling at rates of speed, making it dangerous for the citizens on the road. Worsham, as driver exiting a residence on County Farm, was clearly in the class sought to be protected in this action.

It is clear that Natasha Middleton, acting on behalf of the Wayne County School District, was negligent per se under the law when she operated her vehicle in excess of the 30 mph speed limit. The speed limits signs placed by County Supervisor Fred Andrews had been adopted by the County at the time of the accident and Plaintiff Ernestine Worsham, as a driver operating her vehicle on County Farm Road, was clearly in the class of citizens Supervisor Andrews sought to protect when he placed the signs on County Farm Road.

4. The trial court was correct in finding that Natasha Middleton's speed was a proximate cause of the accident.

In addressing the second requirement that the violation of the speed limit was the proximate cause of Worsham injuries, Wayne County argued that it was the plaintiff's own negligence that resulted in her injuries and not the speed of the school bus. The brunt of Wayne County's argument is that had Worsham not entered the intersection, the accident would not have occurred, and her

negligence was the proximate cause of her injuries. However, again Wayne County's arguments are flawed. The trial court correctly found had the bus driver was driving at a speed in excess of the speed limit where the proximate cause of the accident. As stated in the Trial Court's Amended Order:

> Proximate cause requires (1) cause in fact; and (2) forseeability. Morin v. Moore, 309 F. 3rd 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 the act or omission was a substantial factor in bringing about the injury, and without it harm would not have occurred." *Ogburn v. City of Wiggins,* 919 So.2d 85,91. Likewise, "forseeability means that a person of ordinary intelligence should have anticipated the dangers that his negligent act created for others," and it "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.* at 91.

Therefore, the driver's negligence was in fact the proximate cause of plaintiff's injury. More guidance is found in the controlling statute for vehicles entering highways from private roads or driveways is *Miss. Code Ann. Section 63-3-807*, which states that the driver of a vehicle about to enter or cross a highway from a private road or driveway shall yield the right-of-way to all vehicles approaching on said highway. However the statute does not require the driver of a vehicle who has already entered onto an intersection with a through highway to yield the right-of-way to an approaching vehicle which has neither entered the intersection nor approached so closely thereto from said through highway as to constitute an immediate hazard. *Jones v. Carter*, 192 Miss. 603, 7 So. 2d 519 (1942). This is likewise true as to a vehicle about to enter or cross a through highway from a private road or driveway. *Id.* As such, Worsham had a right to enter the highway if she felt the Middleton was far enough away as to not constitute an immediate hazard.

Finally Courts have repeatedly held that when the facts as to distance are in dispute, it is a question for the trier of fact as to whether Wayne County's vehicle constituted an immediate hazard. *Junakin v. Kuykendall,* 124 So. 2d 661, 665 (1959). In *Caves v. Smith*, 259 So. 2d 688 (1972), the

Supreme Court sustained a judgment against a Defendant on a favored street who failed to yield the right of way despite traveling on a favored street. In *Caves,* the Defendant first took notice of a driver in her driveway approximately 250 feet away. *Id.* The Court sustained the judgment against the Defendant despite his assertion that the driver was only 20 feet away from him when she actually exited her driveway. *Id at 690.* Finally, Physical evidence shows that the impact happened at the front of Plaintiff's vehicle, indicating that Plaintiff had just exited the driveway. *Id.* Despite this, the Court held that because the facts of this case were in dispute, they would not disturb the decision of the Trier of fact. *Id.* In the matter before this Court, there is clearly a dispute with regards to the distance the between the parties prior to collision. While Worsham could not testify to the exact distance of Natasha Middleton when she entered the roadway, prior to impact, she did testify that Natasha Middleton was rounding a curve when she first saw the school bus approaching. The measured distance from the curve to point of collision at approximately 350 feet. At this point, Plaintiff Ernestine Worsham judged the school bus to be a safe enough distance for her to enter the roadway. Plaintiff was allowed to make this judgment as Plaintiff was not required to yield the right of way to Middleton as she had not approached so closely from the thorough highway as to constitute an immediate hazard. Further, physical evidence of the impact of the collision as well as evidence presented by Wayne County's own accident reconstructionist show that the Plaintiff's vehicle had fully entered the roadway and was partially into the eastbound lane of County Farm Road when the collision occurred. Natasha Middleton stated that she could not approximate her distance from Worsham prior to the accident and that there were no markers to determine her distance from Middleton prior to accident. (*See* Page 54, Lines 18-25 and Page 55, Line 1 of Wayne County, Natasha Middleton's Deposition Attached as Attachment "B".) However during trial Middleton estimated her distance from Worsham approximately 87 feet away from Worsham when she first saw

her. (Tr. 63:21). Finally, there was no physical evidence left at the scene wherein which an independent analysis could be done to determine the distance between the parties prior to collision. It is also important to note that the trial judge took Worsham's comparative negligence in this matter into account in assessing 75% liability against her.

It is clear that there was a genuine dispute in the facts of this case and the trial court was well within their discretion in apportioning fault to the Wayne County in this matter.

5. The Damages set forth by this Court were supported by substantial, credible and reasonable evidence.

Opposing counsel argues that the trial court's assessment of the $800,000 judgment was not supported by substantial, credible, and reasonable evidence. In addition, their argument is that the amount of the judgment is "so excessive as to strike mankind, at first blush as being beyond all measure, unreasonable and outrageous." (citing *Jackson Public School District v. Smith* and *U.S. Fidelity & Guaranty Co. v. Estate of Francis ex rel Francis.*)

All of the medical records were admitted by stipulation. She suffered serious cuts, bruises all over her body, excessive bleeding, numerous surgeries, broken elbow, permanent injury (cannot bend arm over shoulder over 90 degrees).

Her mother testified to 6 months of extensive care and her complete inability to care for her son.

The medial bill for the plaintiff totaled in excess of $120,000.00.

In the case of Kinnard v. Martin *et al*, 223 So.2d 300 (Miss.1969), Mrs. Martin suffered thigh bone fractures, and wrist fractures, contusions and rib fractures. Her medical bill totaled $6,466.20, and she was awarded a verdict of $75,000.00.

Mr. Martin had medicals totaling $5,559.42 and received a verdict for $100,000.00 for a dislocated hip and paralysis of the sciatic nerve.

In the case of Gatewood v. Sampson, 812 So.2d 212 (Miss. 2002), the plaintiff suffered damages as lost wages totalling$ 4,900.00 in lost wages and $3,102.50 in medial bills. He received an award of $308,000.00.

The plaintiff Samspon described the following as evidence of his pain: Headache, soreness, recurring nightmares, causing him to lose sleep, dizziness when standing for long periods.

In Philco Distributions v. Herron, 195 so.2d 473 (Miss. 1967), the plaintiff suffered from severe headaches, bruises all over her body, and neck whiplash, and a herniated disc.

Her medical totaled $221.00 and she was awarded $40,000.00. Addressing the issue of the amount of medial bills our Appellate Court held;

> The amount of a doctor's bill does not per se indicated the seriousness fo the injures of the patient.

In consideration fo these cases cited above, it is discernibly easy to see that the award of $800,000.00 to the plaintiff Earnestine Worsham with medials of $120,000.00 and $10,000.00 fo the subject minor child whose medical total $757.00 are not only reasonable, but very conservative.

The crux of their argument is that the trial court judge awarded some amount of damages for visible impairment of Worsham's left arm, which was severely damaged in the accident. Opposing counsel relies on the cases of *Casey v. Texgas Corp and Reed v. Scott* in the reasoning. However, Counsel Opposite's is flawed in their reasoning. In *Godfrey v. Meyer*, 933 P.2d 942, 943 (Okl. App. 1996), plaintiff sued the Defendant for injuries resulting from a motor vehicle accident. Plaintiff was not diagnosed with injuries until nine days after the accident had occurred. Without objection, plaintiff admitted medical bills totaling $3,445.00 and offered testimony at trial that he

still suffered pain in his shoulder. Plaintiff was the only witness at trial. The Defendant appealed on the grounds that plaintiff did not offer expert testimony during trial to prove the extent of the injuries. The Oklahoma Appeals Court stated, "It has long been the law that where injuries are of a character that medical experts are required to determine the cause and extent of those injuries, the question is one of science to be established by the testimony of skilled professionals. (Citing *Matchen v. Magahey,* 455 P.2d. 52 (Okla.1969)). However, it is no longer the law that the mere fact an injury is subjective necessarily means expert testimony is required to prove the injury's cause. As *Reed v. Scott* teaches, even subjective injuries may be of a character that expert medical testimony is not necessary to prove the causal connection between the accident, injury, pain and suffering, medical treatment, and expense. In other words, a plaintiff may, under appropriate circumstances, establish a *prima facie* case for past medical expense and pain and suffering without the necessity of a medical expert.

In addition, Courts have routinely given great deference to the trier of fact when awarding damages in a case. "[I]t is primarily the province of the jury [and, in a bench trial, the judge] to determine the amount of damages to be awarded. 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.' " *Foster v. Noel*, 715 So.2d 174, 183 (Miss.1998), quoting *Harvey v. Wall*, 649 So.2d 184, 187 (Miss.1995). The Supreme Court has upheld awards that were fourteen times the amount of medical damages, *Purdon v. Locke*, 807 So.2d 373 (Miss.2001); ?and thirty-eight times the amount of damages, *Gatewood v. Sampson*, 812 So.2d 212 (Miss.2002).

In the matter before this Court, it is undisputed that Worsham endured numerous surgeries and a lengthy hospital stay as a result of the injuries she suffered in the collision. Her medical bills were in excess of one hundred thousand dollars ($100,000.00). Upon returning from the Hospital, Ms.

Worsham was forced to stay in the care of relatives for an additional 6 months. Further, it is uncontested that Ms. Worsham has suffered and continues to suffer excruciating pain in her left arm that forces her to use prescription pain medication. Ms. Worsham's was left with severe, visible permanent scarring on her left arm. Finally, the evidence show that Ms. Worsham does not enjoy a full range of motion in her left arm. As such, there was ample evidence in the record to support the damages awarded in this case. Indeed, it is apparent that the damages awarded in this matter are modest in comparison to awards previously upheld by this Court.

An awarding of $800,000.00 in damages when a Plaintiff has suffered numerous surgeries, a long recovery time, permanent visible scarring and where the medical bills were in excess of $100,000.00 simply cannot be viewed as excessive under the law. The Trial Court's award in this matter must be upheld.

6. The Trial Court was Correct in Denying the Wayne County's Motion for a New Trial.

In a bench trial, "The findings of the trial judge will not be disturbed unless the judge abused his discretion, was manifestly wrong, clearly erroneous or an erroneous legal standard was applied." *Barnett v. Lauderdale County Bd. of Supervisors*, 880 So.2d 1085, 1088(¶7) (Miss.Ct.App.2004). In our case, the trial judge does not meet any of the listed requirements for reversal. The trial judge in this case did not apply an erroneous legal standard and stating that the lawful speed limit on County Farm Road was 30 mph. As stated above, the trial court finding no case law similar to the issue at hand likened this issue to that of adoption by prescription. Further, the court in its discretion, found that Middleton's speed was in excess of the posted speed limit and a proximate cause of Worsham's injuries. With respect to Worsham's damages,

the evidence clearly supports the moderate amount of damages awarded by the judge in this matter.

VI. CONCLUSION

Based on the foregoing, the Court in this matter must uphold the trial court's decision in the matter and deny the Appellant's motion for a new trial.

This the 19th day of August, 2011.

Respectfully Submitted

ERNESTINE WORSHAM, INDIVIDUALLY,
AND ON BEHALF OF ZE'METRICE DENSON,
A MINOR, PLAINTIFFS

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CERTIFICATE OF SERVICE

I, Thomas Hudson, Attorney for the Appellee, do hereby certify that I have this day mailed, via United States mail, postage prepaid, a true and correct copy of the above and foregoing document to the following:

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THIS, the 23rd day of August, 2011.

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