IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-CA-00153 COA

ELIZABETH GUICHARD AND SHELLIE ELIZABETH BARBAY — **APPELLANTS**

v.

RONALD ALBERT ROE, DAVID REYER, AND THE CITY OF LONG BEACH — **APPELLEES**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

DATE OF JUDGMENT:	JANUARY 17, 1996
TRIAL JUDGE:	HONORABLE KOSTA VLAHOS
COURT FROM WHICH APPEALED:	HARRISON COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANTS:	DAVID R. DANIELS
ATTORNEY FOR APPELLEES:	WALTER W. DUKES
	DAVID C. GOFF
NATURE OF THE CASE:	CIVIL - TORTS (OTHER THAN PERSONAL INJURY AND PROPERTY DAMAGE)
TRIAL COURT DISPOSITION:	SUMMARY JUDGMENT FOR APPELLEES
DISPOSITION:	AFFIRMED - 12/02/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	12/23/97

BEFORE McMILLIN, P.J., HINKEBEIN, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

Elizabeth Guichard and her child, Shellie Barbay, brought suit in the Circuit Court of Harrison County for false arrest and imprisonment. The defendants were two policemen, the City of Long Beach and the father of the child. The court granted summary judgment for the the policemen and the City of Long Beach. We find that the police and the City had immunity for law enforcement decisions, and affirm.

FACTS

On January 11, 1993, Ricky Barbay executed an affidavit in St.Tammany Parish, Louisiana, alleging that his ex-wife, Elizabeth Guichard, kidnaped their minor child Shellie. Based upon his affidavit, an arrest warrant was issued for Guichard for simple kidnaping. No arrest occurred at that time. Shortly thereafter, Guichard filed a complaint for custody in the Chancery Court of Harrison County, Mississippi. She alleged that Ricky Barbay abused their child, Shellie, during the past year. The chancellor issued an *ex parte* order awarding Guichard temporary custody of the minor child and transferred the case to the Family Court of Harrison County. Additionally, the chancery court ordered that the Louisiana warrant be held in abeyance until the Family Court completed its investigation into the allegations of abuse. On January 27, 1993, the Family Court concluded that it lacked "venue jurisdiction" to proceed with the abuse allegations. The court directed the in-take unit to forward a copy of the complaint for custody to the Louisiana Department of Human Services. On June 27, 1993, the Long Beach Police Department responded to a domestic disturbance call at the Guichard residence. After arriving at the residence, the officers entered Guichard's name into the National Crime Information Center (NCIC) network and determined that there was an outstanding warrant for her. The officers then verified by telephone the existence of the warrant and notified St. Tammany's Parish. The Parish requested that the Long Beach Police Department arrest and hold Guichard until the commencement of extradition proceedings. Guichard was arrested and released the following day pursuant to a court order.

On June 17, 1994, Guichard and her minor child, Shellie, filed a complaint for false arrest and imprisonment against the two policemen, David Roe and David Reyer. Also sued was the City of Long Beach and the child's father, Ricky Barbay. The trial court granted summary judgment in favor of Roe, Reyer, and the City of Long Beach. The court concluded that the City and its employees were exempt from liability under Section 11-46-9 of the Mississippi Code.

DISCUSSION

The immunity statute relied upon by the trial court states this:

> (1) A governmental entity and its employees acting within the course and scope of their employment or duties shall not be liable for any claim:
>
> . . .
>
> (c) Arising out of any act or omission of an employee of a governmental entity engaged in the performance or execution of duties or activities relating to police or fire protection unless the employee acted in reckless disregard of the safety and well-being of any person not engaged in criminal activity at the time of injury . . . .

Miss. Code Ann. § 11-46-9 (Supp. 1997). Though Guichard acknowledges this statute, she asserts that there were genuine issues of material fact as to whether the officers were acting within the scope and course of their employment. Furthermore, Guichard asserts that whether the officers acted with

reckless disregard for the safety and well-being of others is a question of fact for the jury.

We note preliminarily a possible procedural defect in the claim. Under Section 11-46-11, an individual must file a notice of claim with the chief executive officer of a governmental entity ninety days prior to maintaining an action against the entity. **Miss. Code Ann. § 11-46-11 (Supp. 1997).** In a recent case, the supreme court dismissed a cause of action where the plaintiff failed to comply with the notice requirement. ***City of Jackson v. Lumpkin*, 697 So. 2d 1179, 1182 (Miss. 1997).**

Guichard filed suit against the City of Long Beach, Officers Roe and Reyer, and Ricky Barbay on June 17, 1994. Although Guichard notified the attorney representing the City of Long Beach and the officers, this notice occurred some three months after the commencement of the suit. We have examined the record and find no notice of claim given to the City prior to suit. However, the City of Long Beach, for whose benefit this notice provision exists, has not raised the issue on appeal. Perhaps the record is incomplete regarding notice and compliance with the provision actually occurred. We decline to rule on this point as plain error.

Instead, we rule on the obvious applicability of the immunity exception for police duties. The fact question that Guichard raises is that the police may not have been acting within the scope of their duties. In fact, the only evidence is that the two officers were responding to a domestic disturbance call. They inquired with the criminal information center regarding the individuals involved in the disturbance and thereby discovered the arrest warrant. There is absolutely no evidence that this was all some pretext.

Secondly, Guichard argues that relying on the Louisiana warrant, when in fact there was an order from the Harrison County Chancery Court holding the warrant in abeyance, was potentially "in reckless disregard of the safety and well-being of [a] person not engaged in criminal activity at the time of injury . . . ." **Miss. Code Ann. § 11-46-9 (a) (c) (Supp. 1997).** What Guichard would have this court hold is that a police officer, upon being informed through proper police channels of an outstanding arrest warrant and upon being requested by the issuing jurisdiction to effect the arrest, can be held civilly liable if the officer did not properly analyze the effect of another order issued by a different court. It is not clear from this record whether the police officers on the scene knew of the chancery court order. Guichard states that the stay order was delivered to the police department, but does not argue that she presented it to the arresting officers.

Regardless, this possible knowledge is not a material fact. Civil liability does not arise from whether the police properly determine which order "trumps" the other. This statute only removes immunity if the police officers acted "in reckless disregard of the safety and well-being" of Guichard. We will assume that for purposes of this statute Guichard is a person "not engaged in criminal activity at the time of injury," though if she were still potentially guilty of kidnapping the minor child that status of innocence might not apply. What, in fact, Guichard is arguing is not that her safety and well-being were treated recklessly, but instead that the police made a reckless and erroneous decision to arrest her at all. The distinction we make is between the decision to make an arrest, which is totally immune under this statute, and the manner in which the arrest is carried out. The latter is subject to the recklessness standard. An example might be a high-speed automobile chase to stop a traffic violator during which an innocent third party is injured or killed. Whether the police recklessly decided that the traffic offense occurred is not an issue upon which liability turns; whether they recklessly then

attempted the arrest may well determine liability.

Summary judgment for the two policemen and the City was properly entered.

THE JUDGMENT OF THE HARRISON COUNTY CIRCUIT COURT IN FAVOR OF THE APPELLEES IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANTS.

BRIDGES, C.J., AND McMILLIN, P.J., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, AND PAYNE, JJ., CONCUR.

THOMAS, P.J., NOT PARTICIPATING.