

No. 2016-CA-01637

IN THE SUPREME COURT OF MISSISSIPPI

BEVERLY IRWIN-GILES

Appellant

V.

PANOLA COUNTY, MISSISSIPPI

Appellee

**ON APPEAL FROM THE CIRCUIT COURT OF PANOLA COUNTY,
MISSISSIPPI, CAUSE NO. W2015-257-SMP2**

BRIEF OF APPELLEE

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SUPREME COURT OF MISSISSIPPI

BEVERLY IRWIN-GILES

Appellant

V.

PANOLA COUNTY, MISSISSIPPI

Appellee

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Panola County, Mississippi, the Appellee herein, certifies that the following listed persons and entities have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Beverly Irwin-Giles, Appellant;
2. Panola County, Mississippi, Appellee;
3. David D. O'Donnell and the law firm of Clayton O'Donnell, PLLC, 1300 Access Road, Suite 200, P.O. Box 676, Oxford, Mississippi 38655, Attorneys for Appellee;
4. Honorable Smith Murphey V, Circuit Court Judge.
5. Ralph E. Chapman, Esq., Dana J. Swan, Esq., and Sara B. Russo, Esq., Chapman, Lewis and Swan PLLC, attorneys for appellant.
6. Larry O. Lewis, Esq., attorney for appellant.

/s/David D. O'Donnell

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STATEMENT REGARDING ORAL ARGUMENT

The Appellee believes that oral argument would not materially assist in resolving the issues raised in this appeal. The circuit court below issued a summary judgment ruling based on the undisputed facts of record and other material facts viewed in the light most favorable to the plaintiff.

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STATEMENT OF THE ISSUES

1. Whether the lower court correctly held, based on the summary judgment record, that the actions of Investigator Terry Smith, an employee of the Panola County Sheriff's Department, did not constitute "reckless disregard" under the Mississippi Tort Claims Act's law enforcement exemption.
2. Whether the decedents' were engaged in "criminal activity" under the Mississippi Tort Claims Act's law enforcement exemption by operating their vehicle in excess of the posted speed limit which was a proximate cause of the vehicular accident.

STATEMENT OF THE CASE

A. Nature of the Case

This Mississippi Tort Claims Act (hereinafter the "Act") case concerns the impact of the law enforcement exemption on the plaintiff's claims which arise out of an automobile accident which occurred on July 21, 2015 between a vehicle driven by the plaintiff's mother, Lynda Irwin and a Panola County Sheriff's Department vehicle driven by investigator Terry Smith while in the course of duty. The central issue before this Court involves the meaning of the "reckless disregard" standard and its distinction from other behavior standards, including "negligence" and even "gross negligence." The circuit court below carefully considered the practical

differences in these standards in concluding that, although Smith's actions may have amounted to negligence or even "gross negligence," Smith's failure to observe the Irwin vehicle under the existing scene conditions - as known to Smith - did not rise to the level of "reckless disregard."

The course of proceedings below reflect that, after serving a notice of a claim pursuant to the Act, the plaintiff filed her Complaint on November 12, 2015 in the Circuit Court of Panola County on behalf of herself and as Executrix of the Estates of William Irwin, deceased and Lynda Irwin, deceased and on behalf of all of the wrongful death beneficiaries of William Irwin, deceased and Lynda Irwin, deceased. (R. 5). The Complaint allegations asserted that investigator Smith acted in "reckless disregard" in operating his patrol vehicle which proximately caused the death of the plaintiff's parents. (R. 7) The defendant filed its Answer on January 8, 2016 asserting, inter alia, the "law enforcement" exemption and, after a brief period of discovery which included the designation of accident reconstruction experts by both parties and the taking of the depositions of Investigator Smith and other Department personnel who responded to the accident scene, the defendant filed its motion for summary judgment. (R. __) After briefing on the motion was complete, the circuit court held a hearing on August 26, 2016, after which the court took the motion under advisement. Two months later, the circuit court issued its summary judgment opinion granting the defendant's motion based upon the

finding that there was no genuine issue of material fact regarding whether Investigator Smith acted in reckless disregard:

“Based on the definition set forth in the litany of cases previously reviewed, the Court finds Smith did not act in reckless disregard. Smith was not driving 100 miles per hour. He was not pursuing anyone. Irwin – Giles put forth no evidence that Smith’s view was blocked or the accident occurred at a dangerous intersection equating his actions to a ‘reckless disregard’ standard above that of negligence.”

(Summary judgment opinion, R. 187) After the circuit court entered its summary judgment on October 27, 2016, the plaintiff filed her notice of appeal on November 18, 2016.

B. Facts Relevant to the Issues

On July 21, 2015, Panola County Sheriff’s Department Investigator Terry Smith was on duty, working with fellow investigator Edward Dickson, investigating a recent home invasion, robbery and kidnapping. (R.50-56) Smith’s investigation led to the identification of a suspect and an arrest warrant was issued. Smith and Dickson discussed their mutual efforts to locate the suspect and effect his arrest and agreed to go to the home of the suspect’s mother that day to obtain locate information. After arriving in separate vehicles at the mother’s home, advising the mother of the charges against her son and the need to serve the arrest warrant, Smith and Dixon searched the area around the house and into the adjacent woods,

without success. (R. 45-49) Concluding their search, Smith and Dickson decided to return to the office at approximately 1:00 PM. (R. 45-49)

Leaving the suspect's home, Smith turned north on Terza Road towards the intersection with Highway 6 (US278). Smith recalls that the weather was clear that day as he came to a stop at the stop sign at the intersection of Terza Road and Highway 6, waited for traffic to clear and then proceeded across the eastbound lanes and into the median area where he again came to a complete stop. (R. 53-56;71-74) Smith recalls that there were no impediments to his vision as he looked to his right (or East) as he checked for traffic in the westbound lanes of Highway 6. (R. 71-74) As Smith crossed the highway, his vehicle collided with a vehicle driven by Linda Irwin which was traveling in the westbound lanes of Highway 6. (Traffic accident report; exhibit B hereto) The force of the collision caused Smith to be disoriented with a possible momentary loss of consciousness. (R. 51-56) Smith recalls that soon after the accident, an unknown individual came to his vehicle and asked him if he was okay. Smith told the person to check on the individuals in the Irwin vehicle while Smith contacted dispatch to advise of the accident. (R. 53-56) Emergency medical and law enforcement personnel arrived at the scene and Smith was transported to a local hospital where he was treated for a

fractured ankle and contusions to his head, right side and right hip. Lynda and William Irwin sustained fatal injuries as a result of the collision.

The traffic accident report completed by Mississippi Highway Patrolman Justin Ales reflects that Linda Irwin was traveling with her husband, William Irwin at the time of the accident and that both were killed at the scene as a result of the collision with the Smith vehicle. (R. 75-80) The scene diagram shown on page two of the report reflects the lack of “skid marks” by the Irwin vehicle prior to the point of collision and the absence of a stop or yield sign in the median for traffic proceeding north on Terza Road, like the Smith vehicle. The report also reflects that, in Ales determination, the accident was jointly caused by Smith’s “failure to yield” (R. 77) and Lynda Irwin’s failure to “avoid” the Smith vehicle. (R. 80)

During the course of the exchanged discovery between the parties, it was learned that both vehicles contained what is generically referred to as a “black box” (the Airbag Control Module or “ACM”) which digitally recorded each vehicle’s movements and other mechanical functions preceding and during the subject accident. The defendant’s retained expert accident reconstructionist Brady McMillen to download and decipher the “black box” information from the Smith and Irwin vehicles. The results of McMillen’s analysis is set forth in his affidavit

submitted in support of the defendant's motion. (R. 87-90) In paragraph 7 of McMillen's affidavit, he describes the digital information contained in the Irwin's "black box" as follows:

The pre-crash data indicates that the 5 seconds prior to impact, Linda Irwin was operating her 2006 Buick Rainier at a speed of 76 miles per hour, which is eleven (11) miles per hour over the posted speed limit of 65 mph. The pre-crash data indicates that 4 seconds prior to impact, Linda Irwin was operating her 2006 Buick Rainier at a speed of 75 mph, which is 10 miles per hour over the posted speed limit of 65 miles per hour. The CDR file records that Linda Irwin continued to operate or 2006 Buick Rainier at a maintained speed of 75 mph from 4 seconds prior to impact until impact. The CDR file records that Linda Irwin did not apply the brakes of her 2006 Buick Rainier for the entire 5 seconds recorded by the ACM prior to the collision.

(R. 89) McMillen concluded, therefore, that "the constant speed of 75 mph driven by Lynda Irwin in the absence of any breaking prior to the collision ... is an indication that Linda Irwin was willfully and knowingly operating her 2006 Buick Rainier at a speed of 10 miles per hour above the posted speed limit. It is also my opinion that the excessive speed of the Irwin vehicle was a proximate cause of the accident." (R. 89)

Although the plaintiff suggests that Smith failed to stop his patrol vehicle in the median as he proceeded north on Terza Road, insinuating that the white line marking in the median and Smith's lane of travel **required** that Smith stop his vehicle (as opposed to simply yielding the right-of-way depending on traffic conditions), that contention is contrary to the physical evidence at the scene as reflected in the accident report which did not include a stop sign at the median location. There is no proof, only argument, that the road markings at this intersection required Smith to stop his vehicle.

SUMMARY OF THE ARGUMENT

The Mississippi Tort Claims Act accords sovereign immunity for Panola County's law enforcement activities provided that its law enforcement personnel do not act in "reckless disregard" for the rights of individuals who are not otherwise engaged in criminal activity at the time of the alleged tortious action. As observed by the circuit court below in granting summary judgment, the "reckless disregard" standard requires a showing that the alleged tortious act demonstrated an "entire abandonment of any care" under the circumstances, evincing a conscious indifference to consequences. This Court has consistently held that the Legislature

has set “an extremely high bar” for plaintiffs seeking to recover against local governmental entities for a law enforcement officer’s conduct while engaged in the performance of his duties by incorporating the “reckless disregard” standard of liability on to the law enforcement exemption under the Mississippi Tort Claims Act. Accordingly, the circuit court below was correct in holding that, although the plaintiff may have made a case for investigator Smith’s inadvertence or negligence or even Smith’s “gross negligence”, there was no genuine issue of material fact as to whether Smith was guilty of “reckless disregard.”

Further, it is also the plaintiff’s burden to demonstrate that the Irwin’s were not engaged in “criminal activity” which served as a nexus or a proximate contributing factor into the circumstances of the accident at issue. Here, the summary judgment record clearly showed, without genuine dispute, that the Irwin’s were speeding at the time of the accident (10 miles per hour over the posted speed limit) and that the speed was a contributing factor to the accident. Accordingly, as an alternative basis for extending immunity to Panola County under the law enforcement exemption, even if Smith’s actions created a genuine issue of material fact as to whether he acted in “reckless disregard” under the circumstances, the Irwin vehicle’s excessive speed (which constituted a misdemeanor) entitle Panola County to sovereign immunity.

ARGUMENT

A. Standard of Review

It is well-settled that this Court is to apply a de novo standard of appellate review when considering the propriety of the entry of summary judgment by the trial court. Thus, this Court is to apply the same standard as considered by the trial court under Rule 56 of the Mississippi Rules of Civil Procedure. Rule 56 requires the grant of summary judgment “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” M.R.C.P. 56 (c). When reviewing a motion for summary judgment, “the evidence must be viewed in the light most favorable to the party against whom the motion has been made.” Kilhullen v. Kansas City Southern Ry., 8 So.3d 168, 174 (Miss. 2009). However, the opposing party “may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.” M.R.C.P. 56(e). See Alexander v. Newton County, 2013 Miss. App. LEXIS 197 (Miss. App. 2013).

In this MTCA case, the plaintiff bears the burden of proof in demonstrating viable causes of action under the Act, including the inapplicability of the pertinent exemptions and exceptions. See City of Laurel v. Williams, 21 So.3d 1170, 1173–74 (Miss. 2009). With particular reference to the “law enforcement” exemption, the plaintiff has the burden of proving “reckless disregard” and lack of a “causally related criminal activity” by a preponderance of the evidence and therefore has the affirmative burden in the summary judgment context to put forth facts which would create a “genuine issue” of material fact as to both elements in order to avoid summary judgment. Simpson v. City of Pickens, 761 So.2d 855, 859 (Miss. 2000); see also Titus v. Williams, 844 So.2d 459, 468 (Miss. 2003). Conversely, the absence of evidence demonstrating “reckless disregard” or evidence that the plaintiff was engaged in causally related “criminal activity” at the time of the alleged incident entitles Panola County to summary judgment under the law enforcement exemption. See Chapman v. City of Quitman, Ms., 954 So.2d 468, 474 (Miss. App. 2007); see also Mississippi Department of Public Safety v. Durn, 861 So.2d 990, 994 (Miss. 2003). The plaintiff failed to meet her burden in the court below.

B. The MTCA as the Exclusive Remedy

The Mississippi Tort Claims Act provides the “exclusive remedy for the filing of a lawsuit against a governmental entity and its employees.” Elkins v. McKenzie, 865 So.2d 1065, 1078 (Miss. 2003); Jackson v. Powell, 917 So.2d 59, 69 (Miss. 2005). Essentially, the Act waives the State’s sovereign immunity in limited situations and only for the torts of its employees committed in the course and scope of their employment. See Section 11-46-5 (providing that “the immunity of the state and its political subdivisions from claims for money damages arising out of the torts of such governmental entities and the torts of their employees while acting within the course and scope of their employment is hereby waived...”). Powell, 917 So.2d at 69 (the MTCA waives sovereign immunity for tort actions but “prescribes exemptions from the waiver under which the government retains its sovereign immunity”). Thus, the Mississippi Tort Claims Act exclusively governs all claims raised in this action.

1. The law enforcement exemption

The allegations and circumstances raised in the Complaint, which concern the manner in which Investigator Smith’s performed his law enforcement related duties, clearly implicates the “law enforcement” exemption set forth in Miss. Code Ann. § 11 – 46 – 9 (c). Under this exemption, Panola County cannot be held under

any claim based in negligence or even gross negligence. Rather, this exemption provides immunity for governmental entities for any claim

arising out of any act or omission of an employee of a government 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 the injury.

This Court has construed the above provision as reflecting a legislative intent to “protect law enforcement personnel from lawsuits arising out of the performance of their duties and law enforcement, with respect to the alleged victim.” City of Jackson v. Perry, 264 So.2d 7373, 376 (Miss. 2000). With regard to the “reckless disregard” fault standard incorporated into this provision, the Court has emphasized on numerous occasions that “reckless disregard” is a higher standard than even gross negligence. See City of Jackson v. Law, 65 So.3d 821, 837 (Miss. 2011). In the context of this exemption, the Court has ruled that “reckless disregard” encompasses “willful and wanton action.” See Turner v. City of Ruleville, 735 So.2d 226, 230 (Miss. 1999). According to the Court in Titus, “willful and wanton action signifies knowingly and intentionally doing a thing or wrongful act.” Titus, 844 So.2d at 468; see also Jackson v. Shavers, 97 So.3d 686, 688 (Miss. 2012) (willful or wanton conduct requires knowingly and intentionally doing a thing or wrongful act). The Court has elaborated on the definition of

“reckless disregard” by observing that this term connotes a “conscious indifference to consequences, amounting almost to a willingness that harm should follow.” Maye v. Pearl River County, 758 So.2d 391, 394 (Miss. 1999); see also Rayner v. Pennington, 25 So.3d 305, 311 (Miss. 2010) (reckless disregard is the “entire abandonment of any care”, while negligence is the failure to exercise due care). Accordingly, in order to avoid summary judgment, the plaintiff is required to meet the heavy burden of creating a material factual dispute as to whether Investigator Smith “took action that [he] knew would result or intended to result in injury.” Titus, 844 So.2d at 468.

It further bears emphasis that this Court requires that when courts analyze whether the actions of law enforcement officers amount to “reckless disregard” of the safety and well-being of others, “the nature of the officer’s actions is judged on an objective standard with all the factors that they were confronted with, taking into account the fact that the officers must make split-second decisions.” Phillips v. Mississippi Department of Public Safety, 978 So.2d 656, 661 (Miss. 2008); see also Hinds County v. Burton, 187 So.3d 1016, 1022 (Miss. 2016).

The summary judgment record before the circuit court showed that Smith exercised due care as he approached the intersection of Terza Road and Highway 6, stopping at the initial point of intersection (as indicated by a stop sign) and waiting for traffic to clear. Smith moved from his initial stop across the eastbound

lanes of Highway 6 to the median (which did not have a stop sign) and Smith again, as he recalled, waited for additional traffic to clear before proceeding north on Terza Road and across the westbound lanes of Highway 6. (R.53-56;71-74) Smith also testified, as noted by the circuit court, that there were no obstructions to his view of oncoming traffic and the weather was clear and dry, and thus nothing, under the circumstances known to Smith, suggested that additional precautions were necessary. Neither was Smith exceeding the posted speed limit. Of course, the Smith and Irwin vehicles nevertheless collided, with a point of collision in the northernmost lane of Highway 6, resulting in injuries to Smith and the death of Lynda and William Irwin. (R. 77) At the point in time of the collision, the Irwin vehicle was traveling 75 miles per hour in a 65 mile per hour zone. (McMillen affidavit, R. 89) Granted, the Irwin vehicle had the right-of-way at the Terza Road intersection, as the accident report reflected, but the undisputed evidence relating to the accident circumstances shows nothing more than inadvertence or negligence on Smith's part, not the "reckless disregard" demanded of the "law enforcement" exemption.

1. Causally related criminal activity

Even if there was is a genuine issue of material fact as to whether Smith was guilty of "reckless disregard" within the meaning of the law enforcement

exemption, the undisputed facts show that the Irwin vehicle was traveling 10 miles per hour over the posted 65 mile an hour speed limit at the point of the collision. (McMillen affidavit, R. 89) Evidence of the Irwin vehicle's speed cannot be refuted as it is derived from the digital information contained in the ACM or "black box" found in the Irwin vehicle. According to McMillen, the speed of the Irwin vehicle was a proximate cause of the accident. As related above, the law enforcement exemption provides immunity if the plaintiff was engaged in criminal activity at the time of the incident at issue even if the defendant also acted in reckless disregard for the plaintiff's safety. See McElroy v. City of Brandon, 2015 Miss. App. LEXIS 678 (Miss. App. 2015); see also Estate of Williams v. City of Jackson, 844 So.2d 1161, 1165 (Miss. 2003); City of Jackson v. Perry, 764 So.2d 373, 379 (Miss. 2000). Under this aspect of the law enforcement exemption, "it must be shown that the victim was engaged in criminal activity that has a causal nexus to the wrongdoing of the tortfeasor." Durn, 861 So.2d at 997. The criminal activity supporting the exemption must be more than "fortuitous" but it applies to misdemeanors as well as felonies. See Bridges v. Pearl River Valley Water Supply Dist., 793 So.2d 584, 588 (Miss. 2001). Indeed, misdemeanor traffic offenses are criminal activities within the statute. See Perry, 764 So.2d at 373; Durn, 861 So.2d at 997; see also Wilson v. City of Biloxi, Ms., 2013 U.S. Dist. LEXIS 71774 (S.D. Miss. 2013) (speeding is a type of criminal activity within the meaning of the law

enforcement exemption). In our case, the excessive speed of the Irwin vehicle, a traffic misdemeanor, clearly had a “causal nexus” with the subject accident and therefore exemption” of Miss. Code Ann. §11 – 46 – 9 (c).

CONCLUSION

Based upon the foregoing, the circuit court below correctly held that Panola County was entitled to sovereign immunity as a matter of law because the facts of record, when viewed objectively from Smith’s point of view, did not reflect that Smith either intended to cause harm or was subjectively indifferent to substantial risk that harm would occur absent additional precautions under the circumstances. Even if this court should find that there are genuine issues of material fact as to Smith’s “reckless disregard” under the circumstances, Panola County is nonetheless entitled to summary judgment because of the criminal activity involving the Irwin vehicle’s excessive speed.

This the 11th day of May, 2017.

Respectfully Submitted,

s/David D. O’Donnell

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CERTIFICATE OF SERVICE

I, David D. O'Donnell, hereby certify that I electronically filed the foregoing with the Clerk of the Court using the MEC system which sent notification of such filing to the following:

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And that a copy has been delivered via regular mail to :

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This the 11th day of May, 2017.

s/ David D. O'Donnell

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