IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2008-CA-00950-COA

ROBERTO GILES, A MINOR, BY AND THROUGH HIS FATHER AND NEXT FRIEND, ROBERT LEE GILES AND ANTONIO GILES, A MINOR, BY AND THROUGH HIS FATHER AND NEXT FRIEND, ROBERT LEE GILES — **APPELLANTS**

v.

ROBERT A. BROWN AND LEAKE COUNTY, MISSISSIPPI BOARD OF SUPERVISORS — **APPELLEES**

DATE OF JUDGMENT:	04/14/2008
TRIAL JUDGE:	HON. VERNON R. COTTEN
COURT FROM WHICH APPEALED:	LEAKE COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANTS:	DON H. EVANS
ATTORNEY FOR APPELLEES:	MICHAEL JEFFREY WOLF
NATURE OF THE CASE:	CIVIL - PERSONAL INJURY
TRIAL COURT DISPOSITION:	JUDGMENT ENTERED IN FAVOR OF DEFENDANTS FOLLOWING BENCH TRIAL
DISPOSITION:	AFFIRMED: 08/18/2009
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

MYERS, P.J., FOR THE COURT:

¶1. Robert Giles (Giles) and his minor sons, Roberto and Antonio Giles (collectively the Gileses), brought suit against Robert Brown and the Leake County Board of Supervisors (Board) in the Leake County Circuit Court for personal injuries. The circuit court granted summary judgment in favor of Brown and the Board. The matter came to this Court on

appeal,[1] and we reversed and remanded the case to the circuit court to determine: (1) whether the children were engaged in criminal activity, given the absence of criminal charges or convictions; (2) whether any criminal activity on the part of the children had a causal nexus to the accident; and (3) whether Brown acted with reckless disregard in his pursuit of Giles.

¶2. On remand, the circuit court found that the children were engaged in criminal activity, that such criminal activity had a causal nexus to the accident, and that Brown did not act with reckless disregard. Aggrieved, the Gileses[2] appeal and assert that: (1) that the circuit court erred in finding in favor of Brown and the Board, (2) the circuit court erred in allowing Jerry Barrett to testify as an expert witness, and (3) the circuit court erred in denying the Gileses' motion requesting the court to reimburse them for the cost of the transcript. Finding no error, we affirm.

FACTS

¶3. The underlying facts for the case at bar are the same facts in *Giles I*. In *Giles I*, we stated the facts as follows:

> On September 17, 2003, Giles and his children were riding their ATV 4-wheeler along Highway 488 near Carthage, Mississippi. Brown received a call that there were individuals riding an ATV on the highway, which is

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[1] *Giles v. Brown*, 962 So. 2d 612, 618 (¶21) (Miss. Ct. App. 2006) (*Giles I*).

[2] In *Giles I*, we found that Robert Giles's criminal activity of driving on the highway on an ATV and driving with a suspended license barred him from proceeding with the case. Therefore, only the minor Gileses were involved on remand.

against the law. Brown set out in response to the call and encountered Giles.[3] Brown, with emergency lights activated, pulled behind Giles. Giles pulled off the road onto an unidentified piece of property. Brown asked Giles for his license, and Giles informed Brown that his license was suspended. Neither man left his respective vehicle during the exchange.

What happened next is disputed. According to Brown, Giles became belligerent and eventually cursed at Brown before leaving and returning to the highway on his ATV. Brown testified that he followed with lights and siren activated until Giles made a sudden turn, causing the accident at issue. Brown testified that he did not know whether he had hit Giles's vehicle or Giles's children. Brown indicated that he had attempted to slow down and avoid the accident, but was unable to do so and went into a ditch. Brown suggested that he might have been able to avoid the accident if Giles had activated his turn signal or given some other indication that he was about to turn.

According to Giles, he explained to Brown that he did not have his license, but did live nearby and suggested that he would take Brown to his house so that Brown could confirm that Giles lived nearby. Giles believed that if he did so, Brown would be more likely to let him go with simply a warning. Giles testified that he never cursed at Brown. Giles averred that he then pulled out onto the road, with the understanding that Brown would follow him to his house. Neither Giles nor his sons could recall hearing Brown's siren or seeing any emergency lights as Brown followed them down the road. In fact, Giles testified that he never looked back to confirm that Brown was following him. He simply assumed that, because of their exchange and his slow pace, Brown would follow. Giles testified that he slowed down considerably for his turn, although he admitted that he did not activate a turn signal or otherwise indicate that he was about to turn. Giles testified that Brown's vehicle hit the ATV, causing Giles and his sons to fall off and causing the ATV to collide with a third vehicle at the intersection.

It is not clear exactly how fast the parties were traveling. Brown indicated that they might have been going as fast as forty to forty-five miles per hour, while the Gileses estimated their speed to be closer to twenty to twenty-five miles per hour. Giles and his sons also testified that they slowed down significantly for the turn that eventually resulted in the accident. Amber Wilcher, the driver

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[3] It is not clear from the record whether Giles and his sons are the individuals that Brown received a call about.

> of the vehicle that was hit by the ATV at the intersection, testified that she saw Brown hit Giles's vehicle before the ATV collided with her car. She also thought that Brown's vehicle might have collided with her own. Apparently no photographs were taken of the damage to the various vehicles, or such photographs were not included as part of the record. An accident report was filled out, but the version of events related was clearly given by Brown, as the officers filling out the report made no independent findings to explain what had happened. As a result of the accident, Giles suffered an injury to his right foot which required thirteen stitches, Roberto had scrapes on his body, and Antonio suffered two broken legs and a broken pelvis. Criminal charges were filed against Giles as a result of the accident, and he pled guilty to reckless driving, improper equipment, improper restraint, and two simple assault charges.

Id. at 613-14 (¶¶3-6).

¶4. On remand, Brown, Giles, Roberto, Antonio, and Wilcher testified during the Gileses' case-in-chief. Additionally, the deposition of Suzanne Sharpe, Brown's former wife, was read in open court. Brown called Jerry Barrett as an expert witness in the field of police pursuit.

¶5. At the conclusion of the testimony, the court ordered that the parties use a copy of the transcript to draft their proposed findings of fact and conclusions of law. After reviewing the proposed findings of fact and conclusions of law submitted, the circuit court ruled in favor of Brown and the Board. Aggrieved from the trial court's ruling, the Gileses appeal.

STANDARD OF REVIEW

¶6. An appellate court affords a circuit court judge sitting without a jury the same deference as a chancellor. *City of Jackson v. Perry*, 764 So. 2d 373, 376 (¶9) (Miss. 2000) (citing *Puckett v. Stuckey*, 633 So. 2d 978, 982 (Miss. 1993)). That is, after reviewing the entire record, we will affirm if the judge's findings of fact are supported by substantial,

credible evidence and are not manifestly wrong or clearly erroneous. *Id.*

DISCUSSION

1. Reckless Disregard

¶7. The trial court found that Brown and the Board were immune from liability under the Mississippi Tort Claims Act (MTCA). After weighing the testimony of the witnesses and reviewing the evidence, the trial court found that Brown did not act in reckless disregard for the safety of the Gileses.

¶8. The MTCA provides the exclusive remedy for tort actions brought against a governmental entity or its employees. Miss. Code Ann. § 11-46-7(1) (Supp. 2008). Although the MTCA waives sovereign immunity for tort actions, it also prescribes certain exemptions from this statutory waiver under which a governmental entity retains its sovereign immunity:

> (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. 2008).

¶9. "[O]fficers who act within the course and scope of their employment, while engaged in the performance of duties relating to police protection, without reckless disregard for the

safety and well being of others, will be entitled to immunity." *City of Jackson v. Brister*, 838 So. 2d 274, 281 (¶15) (Miss. 2003).

¶10. "[T]he trial judge, sitting in a bench trial as the trier of fact, has sole authority for determining credibility of the witnesses." *Rice Researchers, Inc. v. Hiter*, 512 So.2d 1259, 1265 (Miss. 1987) (citing *Hall v. State ex rel. Waller*, 247 Miss. 896, 903, 157 So. 2d 781, 784 (1963)). In other words, in a bench trial, the trial judge has the prerogative to place whatever weight he chooses on witness testimony. *Univ. of Miss. Med. Ctr. v. Johnson*, 977 So. 2d 1145, 1149 (¶11) (Miss. Ct. App. 2007).

¶11. The issue on appeal is whether the trial court erred in finding that Brown did not act in reckless disregard. The trial court clearly favored the testimony of Brown and Barrett over that of the other witnesses.[4] Because the issue of credibility is left to the trial court's sound discretion, we must take Brown's testimony as true in reviewing the trial court's decision.

¶12. "[R]eckless disregard' embraces willful or wanton conduct which requires knowingly and intentionally doing a thing or wrongful act." *City of Jackson, Lipsey*, 834 So. 2d 687, 692 (¶16) (Miss. 2003) (citations omitted). "Reckless disregard is more than mere negligence, but less than an intentional act" and "usually is accompanied by a conscious

[4] The dissent argues that the trial court favored the testimony of Brown over that of Sharpe and Wilcher solely because the latter are women. The dissent relies upon the court's statement in its initial judgment that it would expect "most" women to be inexperienced at estimating distance. This statement, however, is taken from the trial court's initial judgment, which was superseded by a "corrected" judgment, filed by the court a short time thereafter. The corrected judgment remarks upon "these" women's experiences, an assertion we find to be supported by the record with regard to both Sharp and Wilcher.

indifference to consequences, amounting almost to a willingness that harm should follow." *Miss. Dep't of Safety v. Durn*, 861 So. 2d 990, 994-95 (¶10) (Miss. 2003) (citations omitted).

¶13. "This Court will look to the totality of the circumstances when considering whether someone acted in reckless disregard. [We must judge] the nature of the officer's actions 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. Miss. Dep't of Public Safety,* 978 So. 2d 656, 661 (¶19) (Miss. 2008) (citations omitted).

¶14. On numerous occasions, our appellate courts have addressed whether a police officer acted in reckless disregard while in his or her official capacity. In *City of Jackson*, 838 So. at 281 (¶23), the supreme court found that a police officer acted in reckless disregard. The police were pursing a suspect at high rates of speed through a heavily populated area that included apartment complexes. *Id*. at 280 (¶21). It was also revealed that the police were traveling in excess of twenty miles per hour over the posted speed limit. *Id*. The supreme court also placed emphasis in their finding on the fact that the police officers violated a departmental policy "that pursuit may only be initiated . . . [when] the suspect's escape is more dangerous to the community than the risk posed by the pursuit." *Id*. at 280 (¶21).

¶15. In *Durn*, 861 So. 2d at 995 (¶11), the supreme court found that a state trooper acted with reckless disregard in an automobile accident where the state trooper attempted to pass a vehicle on its left side after the car had activated its left turn signal in a congested area with limited visibility.

¶16. The supreme court has also found reckless disregard in *Lipsey*, 834 So. 2d at 693

(¶23) (officer suddenly turned his vehicle in front of oncoming traffic without having his headlights on or using his blue lights or siren), and in *Perry*, 764 So. 2d at 377-78 (¶¶18-19) (officer was driving twenty-seven miles per hour over the posted speed limit without using his siren or blue lights while on his way to dinner when he collided with a vehicle exiting a parking lot).

¶17. In *Morton v. City of Shelby*, 984 So. 2d 323, 336 (¶31) (Miss. Ct. App. 2007), this Court found that a policeman did not act with reckless disregard where the officer struck a jogger with his car. The evidence revealed that it was late at night when the accident occurred, and the jogger was wearing dark clothing and no reflective gear. *Id*. at 335 (¶29). Additionally, there was no evidence presented that the officer was speeding or driving recklessly. *Id*. at 336 (¶31). While this Court found that the evidence might indicate negligence, it did not rise to the higher standard of reckless disregard. *Id*. at 335 (¶30).

¶18. Moreover, in *McCoy v. City of Florence*, 949 So. 2d 69, 83 (¶55) (Miss. Ct. App. 2006), this Court, in applying the ten factors[5] for determining reckless disregard set out in *City of Ellisville v. Richardson*, 913 So. 2d 973, 977 (¶15) (Miss. 2005), found the officer did not act in reckless disregard in a high-speed pursuit involving a stolen vehicle driven by a

[5] The ten factors enunciated are as follows: (1) the length of the chase; (2) the type of neighborhood; (3) the characteristics of the streets; (4) the presence of vehicular or pedestrian traffic; (5) the weather conditions and visibility; (6) the seriousness of the offense for which the police are pursuing the suspect; (7) whether the officer proceeded with sirens and blue lights; (8) whether the officer had available alternatives which would lead to the apprehension of the suspect besides pursuit; (9) the existence of police policy which prohibits pursuit under the circumstances; and (10) the rate of speed of the officer in comparison to the posted speed limit. *Richardson*, 913 So. 2d at 977 (¶15).

person with a suspended license. This chase occurred on Highway 49 though Florence toward Richland, Mississippi. *McCoy*, 949 So. 2d at 74 (¶10).

¶19. Turning to the case at bar, we do not find that Brown's action amounted to reckless disregard for the safety of others. It was established that this accident occurred sometime around five o'clock in the evening. Giles stated that he customarily took his boys riding on the four-wheeler when he returned home from work. Brown testified that it was clear enough that day for him to be able to see Giles approximately a quarter of a mile away. This chase and accident occurred on a rural highway in Leake County, Mississippi that was not congested at the time. Additionally, Brown testified that he stayed one-and-a-half to two car lengths behind the four-wheeler prior to the accident, traveling approximately twenty-five to thirty miles per hour. Brown stated that he turned on his blue lights and sirens once he began following Giles, and they remained on throughout the chase. More importantly, Barrett, an expert in police pursuit, interviewed Brown, reviewed all the depositions taken in this case and the accident report, and viewed the accident scene with Brown. He ultimately concluded that Brown did not act in reckless disregard in this accident.

¶20. While Brown's actions may rise to the level of negligence, we find no error in the trial court's determination that Brown's conduct did not reach the heightened level of reckless disregard for the safety of others. Therefore, we find that Brown's actions are protected under the sovereignty immunity provided by the MTCA. This issue is without merit.

2. Qualification of Barrett to Offer Expert Testimony on Police Pursuit

¶21. The Gileses argue that the circuit court erred in qualifying Barrett as an expert in the area of police pursuit. Specifically, the Gileses argue that Barrett did not have sufficient training or experience to testify as an expert under Mississippi law.

¶22. We apply an abuse-of-discretion standard in reviewing a trial court's decision to admit or deny evidence, including expert testimony. *Bullock v. Lott*, 964 So. 2d 1119, 1128 (¶25) (Miss. 2007) (citation omitted). A trial court's decision to allow expert testimony will be affirmed "unless we can safely say that the trial court abused its judicial discretion in allowing or disallowing evidence so as to prejudice a party in a civil case, or the accused in a criminal case." *Id.* (citing *Jones v. State*, 918 So. 2d 1220, 1223 (¶9) (Miss. 2005)).

¶23. Mississippi Rule of Evidence 702 states that a witness may be qualified as an expert "by knowledge, skill, experience, training, or education." The comment to Rule 702 also states: "As has long been the practice in Mississippi, Rule 702 recognizes that one may qualify as an expert in many fields in addition to science or medicine, such as real estate, cotton brokering, auto mechanics or plumbing." "[A]n expert must have acquired special knowledge of the subject matter in question by study of recognized authorities 'or by practical experience' enabling him to give the jury assistance and guidance in solving some problem which jurors are not able to solve because of their own inadequate knowledge." *Ludlow Corp. v. Arkwright-Boston Mfrs. Mut. Ins. Co.*, 317 So. 2d 47, 50 (Miss. 1975) (citations omitted). A witness is qualified as an expert where he "was possessed of peculiar skill and knowledge upon the subject matter pertaining to which he was called to testify." *Id.*

¶24. We do not find the trial court abused its discretion in permitting Barrett to testify as an expert in the field of police pursuit. Barrett began working for the Jackson Police Department in 1969. He remained in various divisions of the Jackson Police Department until his retirement in 1995. Barrett testified that in every position he worked at in the Jackson Police Department, he was involved in police pursuit, except the auto theft division, where he worked for fifteen months. In November 1987, Barrett attended a tactical driving school, which trained him in pursuit driving. Barrett also testified that many of his positions with the Jackson Police Department required him to supervise and instruct other officers in police pursuit.

¶25. After retiring from the Jackson Police Department, Barrett went to work at the Mississippi Law Enforcement Officer's Training Academy (MLEOTA). While at the MLEOTA, his duties mainly pertained to instructing law enforcement officers on driving techniques. To prepare for this position, Barrett attended a police emergency-driver certification program in 1996. He testified that this was a week-long course involving classroom instruction and practical police driving experience. In 2001, Barrett attended another police driving school. He stated this school was also a week-long program lasting day and night, and involved classroom training and tactical driving experience. Barrett was certified as a tactical vehicle-intervention instructor at the close of this program.

¶26. Barrett was the primary driving instructor at the MLEOTA from 1996 until 2007. He put together a lesson plan for the MLEOTA driving program using materials from other driving programs around the nation. He stated that he teaches a tactical driving program

which involved pursuit driving and emergency driving, among other things. Each law enforcement officer in Mississippi is required to attend and pass this, or a similar, driver training program. Barrett stated that he has taught as many as fourteen driving programs a year while at MLEOTA. In summary, Barrett testified that everything he taught at MLEOTA dealt with pursuit driving.

¶27. Given Barrett's long and extensive experience, skill, and knowledge of police pursuit derived from working for the Jackson Police Department, the various police driving schools he attended, and his experience in teaching police-pursuit programs, we find that the trial court did not err in allowing him to testify as an expert in police pursuit. This issue has no merit.

3. Prejudgment Costs

¶28. Lastly, the Gileses allege that at the conclusion of the trial, the circuit court ordered a copy of the transcript and then ordered the parties to split the cost. The Gileses further allege that the circuit court ordered the attorneys to use the transcript to write proposed findings of fact and conclusions of law. It is undisputed that at the trial level, the transcript cost $5,160 and that the Gileses' portion of this cost was $2,580. The Gileses argue that the circuit court erred in denying their motion for reimbursement for the cost of the transcript. Specifically, the Gileses argue that the circuit court has no authority to order the parties to pay for a transcript in order to aid the court in rendering its decision.

¶29. On our review of the record, we find this issue was waived because the Gileses failed to make a timely objection. Contrary to the Gileses' assertions on appeal, our review of the

record indicates that the trial court instructed the parties to purchase – and split the cost of – a transcript to be used by each side for post-trial briefing. This instruction was initially made *prior* to the start of the trial. The Gileses offered no objection then, nor did they object when the instruction was reiterated at the close of trial. In fact, we can find no objection in the record save the "Plaintiff's Motion for Reimbursement of Prejudgment Transcript," filed on March 24, 2008. This motion, by its own admission, was filed approximately two weeks after the Gileses had paid for and received the trial transcript. The Gileses' acquiescence to the court's instruction and failure to make a timely objection at trial waives this issue on appeal. *Busick v. St. John*, 856 So. 2d 304, 310 (¶16) (Miss. 2003). Additionally, because the Gileses have cited no authority in support of their argument for reimbursement, this issue is procedurally barred. *Ruff v. Estate of Ruff*, 989 So. 2d 366, 372 (¶23) (Miss. 2008). This issue is procedurally barred and without merit.

¶30. **THE JUDGMENT OF THE LEAKE COUNTY CIRCUIT COURT IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANTS.**

GRIFFIS, ISHEE, ROBERTS, CARLTON AND MAXWELL, JJ., CONCUR. IRVING, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY LEE, P.J., AND BARNES, J. KING, C.J., DISSENTS WITHOUT SEPARATE WRITTEN OPINION.

IRVING, J., DISSENTING:

¶31. The majority finds that this case should be affirmed. Respectfully, I must disagree and, therefore, dissent. I believe that this case should be remanded for a new trial and a proper determination of whether Brown acted in reckless disregard as he pursued the Gileses

and a proper determination of whether Brown's actions caused or contributed to the accident in question. I would also reverse and render that part of the circuit court's opinion finding that Antonio and Roberto Giles were engaged in criminal activity.

¶32. During the trial of this case on remand, Brown called Jerry Barrett as an expert witness in the field of police pursuit practices. Barrett insisted throughout his testimony that he was not an accident reconstructionist; however, he testified to the cause of the accident, how it happened, and who was at fault. Brown also testified about his recollection of the events in question. In the circuit court's opinion, the court made it clear that it was relying heavily on Barrett's conclusions in rendering its opinion. It is clear from the record that Barrett was not qualified to testify as an accident reconstructionist. I believe that it is also clear that the court improperly devalued the testimony of Amber Wilcher and Suzanne Sharpe. For those reasons, I would reverse and remand for a new trial without Barrett's improper testimony and with the testimonies of Wilcher and Sharpe given their full consideration.

ANALYSIS AND DISCUSSION OF THE ISSUES

1. Criminal Activity by Roberto or Antonio

¶33. Although the majority does not discuss this issue at all, I find it necessary to address the circuit court's conclusion on remand that Antonio and Roberto were engaged in criminal activity that had a direct causal nexus with the accident. If Antonio and Roberto were engaged in criminal activity, then I would have to join the majority in this case in affirming the court below, since their recovery would be barred under the Mississippi Tort Claims Act

(MTCA). However, I find that the court erred in finding that Antonio and Roberto engaged in criminal activity. Therefore, I do not believe that their actions bar their recovery under the Act.

¶34. As we explained in *Giles I*, the children must have been involved in criminal activity that bore a direct causal nexus to the accident in order to bar their recovery under the MTCA. Specifically, we explained: "Under [Mississippi Code Annotated section] 11-46-9(1)(c), Brown has immunity from liability unless he acted with reckless disregard . . . when the Gileses were not engaged in criminal activity. . . . [T]he 'criminal activity' contemplated by the statute must have 'some causal nexus to the wrongdoing of the tortfeasor.'" *Giles I*, 962 So. 2d at 615 (¶11) (citations omitted).

¶35. In *Giles I*, this Court stated unequivocally that Roberto and Antonio were not barred from recovery simply because they rode the ATV on the highway or because they did not have helmets on:

> Unlike their father, Giles's children were neither charged with, nor convicted of, any crime. While they both admitted that they knew it was against the law for them to be riding the ATV on the highway and riding without their helmets on, we find that this does not rise to the level of criminal activity contemplated by the statute. Unlike their father, the children could not have been charged with reckless driving, as they were not driving, nor could the children have been charged with driving with a suspended license. Therefore, the "criminal activity" limitation would not be sufficient to dismiss the children's case at summary judgment.

Id. at 616 (¶14).

¶36. It appears that there are no statutes explicitly prohibiting the use of an ATV on a highway; however, Mississippi Code Annotated section 63-7-7 (Rev. 2004), which pertains

to the operation of a vehicle, states:

> It is a misdemeanor for any person to *drive or move* or for the *owner* to cause or knowingly permit to be *driven or moved* on any highway any vehicle . . . which is in such unsafe condition as to endanger any person, or which does not contain those parts or is not at all times equipped with such lamps and other equipment in proper condition and adjustment as required in this chapter, or which is equipped in any manner in violation of this chapter . . . .

(Emphasis added). Of course, the clear language of the statute prohibits the driving and operation of improperly-equipped vehicles, which the ATV in this case admittedly was. However, nothing in the statute criminalizes the actions of mere passengers on such a vehicle. I find nothing in the record to indicate that Roberto and Antonio were anything more than mere passengers on the ATV. I can find no statute that criminalizes their actions as passengers on the ATV.

¶37. After examining the Mississippi Code, I can also find no provision that requires the wearing of a helmet while operating an ATV or four-wheeler. Mississippi Code Annotated section 63-7-64 (Rev. 2004) requires that motorcyclists and operators of motor scooters wear helmets, but I have found no corresponding provision for operators or passengers of ATVs.

¶38. Regardless of this Court's ruling in *Giles I*, the circuit court found on remand that Roberto and Antonio had engaged in criminal activity: "The Court has already found there to have been criminal conduct on the part of Antonio and Roberto by willingly joining their father to ride on the ATV, notwithstanding their relatively young age." The circuit court cited *McCoy v. City of Florence*, 949 So. 2d 69 (Miss. Ct. App. 2006) as support for its conclusion.

¶39. Having studied *McCoy*, I must respectfully disagree with the conclusion reached by the circuit court. In *McCoy*, this Court found that recovery was barred for two plaintiffs who had actively encouraged another individual to flee from the police. *Id.* at 84 (¶59). In so finding, we noted that "[a] person who aids, assists, or encourages another to commit a crime is as guilty as the principal." *Id.* at 83 (¶59) (citing *Griffin v. State*, 242 Miss. 376, 380-82, 135 So. 2d 198, 199-200 (1961)). There is no indication in the record before us that Antonio or Roberto aided, assisted, or otherwise encouraged their father to engage in criminal activity. By all accounts, Roberto and Antonio were simply riding on the back of the ATV. There is no evidence that they told their father to drive the ATV or that they encouraged him to continue driving it at any point. In fact, when questioned as to how he ended up riding the four-wheeler that day, Antonio stated, "My dad told us to get on it, and we would ride to the chicken house." Roberto testified that his father asked Roberto and Antonio if they wanted to ride on the ATV, and that they responded in the affirmative. Giles himself testified that he "told 'em we were going to ride up by the chicken house."

¶40. I also believe that the circuit court further erred when it found that the mere riding of the ATV constituted a causal nexus to the accident. The circuit court's reasoning appeared to be that this Court had found that Giles's conduct bore a causal nexus to the accident, and that that conclusion necessitated a finding that Roberto's and Antonio's conduct also had a causal nexus to the incident. I disagree.

¶41. Accepting arguendo that riding on the ATV constitutes criminal activity, I have found no evidence in the record to suggest how Antonio and Roberto's riding of the ATV had a

causal nexus to the accident in question. As already discussed, even the statute that prohibits the operation of an ATV on the highway criminalizes only the operation or driving of such a vehicle, not merely being a passenger on an ATV. I simply cannot fathom how the decision of two minor children to ride on the back of an ATV after being told or invited to do so by their father would constitute criminal activity with a causal nexus to the accident in this case.

¶42. Consequently, I believe that this Court should reverse and render that portion of the circuit court's decision finding that Antonio and Roberto engaged in criminal activity sufficient to bar recovery by them under the MTCA. On remand, I would limit the court to two issues: whether Brown acted in reckless disregard for the safety of Antonio and Roberto and whether Brown caused or contributed to the accident, inasmuch as we clearly found in *Giles I* that riding on the ATV without a helmet was insufficient to bar recovery by Antonio and Roberto.

2. Allowance of Expert Testimony

¶43. As the majority notes, the Gileses argue that the circuit court erred in allowing Barrett to testify as a police pursuit expert. However, they further argue that Barrett gave numerous opinions based upon accident reconstruction, such as how the accident happened, whose fault the accident was, and whether Brown's behavior amounted to a reckless disregard for the safety and well-being of the Gileses. Accordingly, the Gileses argue that Barrett exceeded his scope of expertise. Unfortunately, the majority declines to address this second argument by the Gileses, with which I firmly agree.

¶44. An appellate court applies "an abuse-of-discretion standard of review when reviewing [a] trial court's decision to allow or disallow evidence, including expert testimony." *Bullock v. Lott*, 964 So. 2d 1119, 1128 (¶25) (Miss. 2007) (citing *Webb v. Braswell*, 930 So. 2d 387, 396-97 (¶15) (Miss. 2006)). A trial court's decision to allow expert testimony will be affirmed "unless we can safely say that the trial court abused its judicial discretion in allowing or disallowing evidence so as to prejudice a party in a civil case, or the accused in a criminal case." *Id.* (citing *Jones v. State*, 918 So. 2d 1220, 1223 (Miss. 2005)).

¶45. During the trial, Barrett was deemed an expert in police pursuit and allowed to testify as to whether Brown pursued the Gileses with reckless disregard.[6] However, the circuit court allowed Barrett to opine about certain aspects of the accident that only an accident reconstructionist could have made. The following are examples of Barrett delving into the realm of accident reconstruction:

> [BARRETT]: This courtroom is not but 54 feet long. I mean, from that wall to that wall. So I want you to get a -- just an idea of how big a distance that is. And so 115 feet, and the reason I know that is because, this is a crude method of

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[6] Under Mississippi Code Annotated section11-46-9(1)(c) (Supp. 2008):

> A governmental entity and its employees acting within the course and scope of their employment or duties shall not be liable for any claim . . . [a]rising 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*[.]
>
> (Emphasis added).

doing it, but I stepped outside and I counted those twelve inch squares all the way up and down that hallway. This courtroom is 40 feet wide. So I'm just trying to relate the massive amount of distance that [the Gileses] had to make this turn. *And that's why I say that he overcompensated that turn, and he turned late, and shot right in front of Robert Brown.*

Now, if there was contact, the only damage to Robert Brown's vehicle, according to the Highway Patrol Report, was a scuff mark on his right front bumper. So if there was contact, he could have contacted either the right back or the left back wheel, tire, and it would have done the same thing as far as the motion of the four-wheeler.

By Amber Wilcher's deposition, they were only maybe 5 -- the vehicles were about 5 feet from her vehicle, to the left side of it. That's very close. But now she also says that Robert Brown, in his vehicle, hit her vehicle. But that's virtually impossible, because there's no damage to his vehicle. That's by the Highway Patrol Report.

Now, to kind of give you a view of contact at 5 feet, which it actually could have been a little further than that. I don't think it would have been any closer, because if it had been, they would have been sandwiched between the car, which they were, and Robert told me that, and it's in his deposition also, that he thought that the four-wheeler might have bounced off some part of his vehicle, which more than likely would have been around the wheel well, and probably would not have shown any damage. So if the -- if there was contact with the right front bumper of his vehicle, to the left or right rear, it would have spun the four-wheeler around to the left side. I don't know if they made a complete spin or not, I mean, I wasn't there, so I can't say. But by the report, the damage to the four-wheeler was on the front end of it, and the four-wheeler hit Amber Wilcher on the left front fender, according to the Highway Patrol Report.

Now, there's a little discrepancy on that report as far as where the vehicles wound up. I think that, in my opinion, there again, when that contact was made, either to this -- this right back wheel or left back wheel, the four-wheeler would gone around the same way. If it made a complete turn, then the front end of it hit her car, it might have, as he went by, bounced back and hit him in the right -- right back wheel area, and he was shot right by 'em.

[PLAINTIFFS' ATTORNEY]: And Your Honor, I'm just going to -- I'm still making my objection as to that being an accident -- to the reconstruction's field, as to giving these opinions of what he thinks happened in there, and I'm objective on that [sic] -- still on that same ground.

[THE COURT]: Mr. Barrett, let me query you, question you on this point --

[BARRETT]: Yes, sir.

[THE COURT]: As to what you're talking about right now. We're at the juncture of [Highway] 488 and Laurel Hill Road. Does this smack of accident reconstruction, or are you still in the realm of pursuit?

[BARRETT]: I'm in the realm of the pursuit, and *why the contact, the accident took place, in my opinion, and also I want to give you a little more about the height of that vehicle and try to explain why -- how the vehicles wound up where they did and --*

[THE COURT]: Objection's overruled.

* * * *

[PLAINTIFFS' ATTORNEY]: And when [Sharpe] made the statement, on page 11, and when you say so close, do

you have an estimate as to the distance between the ATV and the car that you were in? No. Let me back up to -- all right, did you read where she said it was a very hard impact?

[BARRETT]: Yes, sir, I did.

[PLAINTIFFS' ATTORNEY]: And did she not say numerous times it was such a hard impact that the car actually went airborne?

[BARRETT]: Well, the car wasn't airborne, because it went off of an embankment down into a ditch, a lower area.

[PLAINTIFFS' ATTORNEY]: But she didn't say that, did she?

[BARRETT]: Well, no, I mean, but any reasonable person could see that by looking at the documentation into [sic] evidence here.

[PLAINTIFFS' ATTORNEY]: Did she not say that it went airborne when it hit the four-wheeler[]?

[BARRETT]: It couldn't have gone airborne when it hit the four-wheeler, because it was still on the road. It's a distance from that -- where the point of impact would have had to take place, to where they would have run off the --

* * * *

[PLAINTIFFS' ATTORNEY]: But it -- stopped to get -- [the Gileses] got run over. What could be more dangerous than what --

[BARRETT]: *Well, they got run over because they turned in front of [Brown]. And he wasn't expecting 'em to turn.*

* * * *

[PLAINTIFFS' ATTORNEY]: So my question, let me use my witness's

theory. And you ask me, and you tell me what your opinion would be. If Robert Brown is following this four-wheeler, and the other vehicle with the children on it, the ATV, gets over in this left lane where there's oncoming traffic, why would Robert try blocking him from coming across?

[BARRETT]: I don't see that he did try to block him. I see that they ran across the road in front of him unexpectedly. And there was a car sitting in the intersection, and I see by the drawings and the discrepancies in the testimonies of the Giles[es] that he obviously overshot the intersection and tried to turn at the last second. Now, that's my opinion, and that's where I'm basing that on these depositions and the drawings.

* * * *

[PLAINTIFFS' ATTORNEY]: Do you have any way to figure the speed of the vehicle coming down the road, and the speed of the vehicle over to the -- the four-wheeler, and to determine if they were going to hit at the right spot under your theory?

[BARRETT]: In my opinion, no sir, I don't have. And nobody else would have, either. Because there are no skid marks there to judge anything from. But Mr. Brown's vehicle is a -- was a Chevrolet Lumina, which has ABS brakes, which does --

[THE COURT]: We're getting into accident reconstruction, is that an accident reconstruction question --

[BARRETT]: Well, not necessarily, sir, I'm just --

[THE COURT]: Go ahead.

[BARRETT]: *The only way you can judge things like that is to have*

> *some kind of marks. His vehicle would not leave skid marks because it's a General Motors product, which all have the ABS braking system on them, which means they will not skid the tires. There could not be any skid marks.*

(Emphasis added).

¶46. During trial, Barrett stated that there was no set way to determine how fast an officer should travel or how closely an officer should follow a vehicle in a police pursuit. This is illustrated in the following colloquy:

> [PLAINTIFFS' ATTORNEY]: Let me ask you, in your officer's pursuit manual, or whatever you have, what would be your theory if you saw that four-wheeler going down the road, knowing that probably the only violation you've got is a suspended driver's license, and they're riding an ATV on a highway, and the kids are on it -- now, we're not talking about a murder, and we're talking about considering the safety of those two little boys on the back, what does your manual provide for how far you're suppose to stay behind them, stay back?
>
> [BARRETT]: There is no -- there is no laid out situation as far as how you should -- how far you should stay behind anybody. In this whole situation was because Robert Brown, by these depositions, by his deposition, was trying to keep these people from being hurt, and for possibly being killed and get 'em off the road. They were breaking the law. They were on a vehicle without helmets, with no inspection sticker, with no tag, and the father had suspended driver's license, which is a moot point here. The main thing is, that in my opinion, and there again, I base it on these depositions of what he had to say, is what he was trying to get the people to pull over for their own safety.

* * * *

[PLAINTIFFS' ATTORNEY]: I don't know. I'm going to try to ask him about the distance, how far he's suppose to stay behind, and he is the expert in police pursuit, and I haven't -- I need an answer on that.

[THE COURT]: Answer him on that, and then move to the next issue.

[BARRETT]: There is no given policy on the distance that you need to be behind a vehicle at a slow speed pursuit. Now, what I normally tell people, in a slow speed pursuit, is to stay -- judge by where the vehicles are, and try to give 'em, you know, a good distance.

Now, it's hard, in a pursuit situation, and especially with the excitement and all that, and sometimes people get a little overzealous and get too close. I'm not saying that happened here. This vehicle being off the side of the road on the shoulder, by testimony of a witness, and this one being in the shoulder -- the center of the road, does not put 'em close together. It puts 'em far apart.

¶47. Although Barrett stated that Giles caused the accident by "[running] across the road in front of [Brown] unexpectedly," he admitted he was not an accident reconstruction expert:

[PLAINTIFFS' ATTORNEY]: All right. In police pursuit, in that area that you're in, they do not train you to determine who is at fault in an accident, do they?

[BARRETT]: Not me, no, sir.

[PLAINTIFFS' ATTORNEY]: And you haven't had any training for that purpose?

[BARRETT]: No, sir. *I've already stated that numerous times* throughout this --

(Emphasis added).

¶48. Barrett's testimony should have been strictly confined to the question of whether or not Brown acted in reckless disregard in his pursuit of the Gileses. Instead, Barrett testified at some length as to the cause of the accident and who was at fault, despite his repeated statements during the trial that he was not an accident reconstructionist. Therefore, I believe that the circuit court abused its judicial discretion in allowing Barrett to testify in the area of accident reconstruction. Given the court's reliance on Barrett's conclusions in its judgment, I believe that these unqualified and improper opinions were crucial to the court's reasoning. Regardless of the majority's lengthy explanation of Barrett's qualifications as a *police pursuit expert*, I believe this case must be reversed and remanded. Like the majority, I find no error in Barrett's qualification as a police pursuit expert. However, as the above excerpts clearly show, Barrett's testimony went well beyond the scope of police pursuit and crossed numerous times into the realm of accident reconstruction. By Barrett's own admissions, he was not qualified to render accident reconstruction opinions. Therefore, I would reverse and remand.

3. Appropriateness of the Grant of Summary Judgment

¶49. In arguing that the circuit court erred in ruling in favor of Brown and the Board, the Gileses heavily rely on Sharpe's deposition testimony, wherein she stated that Brown followed the Gileses' four-wheeler at a close distance of four inches, as well as on the testimony of Wilcher, who stated that the distance between Brown and the four-wheeler was about a foot wide. The Gileses argue that Brown knew exactly what he was doing by

closely following the four-wheeler closely and that he intentionally was driving within such a close proximity in an attempt to stop them or run into them.

¶50. As the majority notes, the circuit court in this case is entitled to a highly deferential standard of review from this Court. Regardless, I find that the court abused its discretion, and I would reverse and remand on this issue as well.

¶51. In its original judgment, the circuit court gave the following assessment of the witnesses' testimonies:

> Within this spectrum the [c]ourt had to weigh the self-serving testimony of Robert, Antonio, and Roberto against Brown's sworn testimony. Clearly Constable Brown was on the scene that day acting in the scope of his duties in response to a radio call that there was an ATV violation. Posited against that was the conduct of Robert Giles, driving his ATV on a public highway without a driver's license and driving in a reckless manner, again noting he later pled guilty to both charges. In addition, Robert was exposing his two minor sons to this unlawful activity although they both generally admitted to knowledge of being a part of illegal activity.
>
> Addressing the testimony of Sharpe and Wilcher, as the [c]ourt has already commented[,] these women were testifying to an event which occurred approximately five (5) years earlier. There was nothing remarkable about their testimony which would generally dispute the testimony of Brown, except perhaps their remarks about distance, that is, the estimated number of feet between the front of Brown's vehicle and the back of the ATV. In isolation you have both women testifying in terms of "only four inches," attributed to Sharpe, and "about a foot," attributed to Wilcher. However, on balance and in context, evaluating their testimony as a whole, the [c]ourt concludes that these seemingly short distances were not the distances testified to *immediately* prior to the collision. In fact, Amber Wilcher testified to a distance of about twenty (20) feet between Brown and Robert as they approached the intersection . . . . *Also, the [c]ourt recognizes that most women are not expected to be knowledgeable about detailed distances due to their lack of experience in life situations, and Sharpe's and Wilcher's general demeanor seemed to confirm such lack of knowledge to correctly estimate distances.* Finally, even if Brown was very close behind Robert (which would be logical

> in hot pursuit) this would have only limited relevancy because this "close distance" was arguable at points other than the point of collision, and thus did not proximately contribute to the cause of the accident.

(Emphasis added).

¶52. Thereafter, the circuit judge replaced this judgment with an amended judgment stating that "*these* women are not expected to be knowledgeable about detailed distances . . . ." In my opinion, this attempt by the lower court to correct its error is insufficient. Still missing is any explanation of *why* the circuit judge concluded that Wilcher and Sharpe were unable to estimate distances properly. It is clear to me that the circuit court failed to articulate any logical reason for discounting Sharpe's and Wilcher's testimonies. In my opinion, no witness's testimony should be discounted simply on the basis of his or her gender. Despite the court's attempt to obfuscate the reason behind its discounting of Sharpe's and Wilcher's testimonies, I believe it is clear from the court's failure to articulate any reason as to why Sharpe and Wilcher could not estimate distances that the court improperly disregarded the testimonies because they were given by two women. In my opinion, credibility determinations on the basis of gender are an abuse of a trial court's discretion in judging testimony. Due to the crucial importance of Wilcher's and Sharpe's testimonies, I believe that the judge's treatment of their testimonies requires a remand of this case.

¶53. The court further found that "the cause of the accident was the sudden, sharp, right hand turn by Robert Giles." In my opinion, it is contradictory to accept that the accident was caused by Giles suddenly turning in front of Brown and at the same time discount Wilcher's and Sharpe's testimonies that Brown was following the four-wheeler closely. Furthermore,

the finding that the accident was caused by Giles suddenly turning in front of Brown is based on Barrett's testimony, which went beyond his expertise.

¶54. Even if Barrett had been qualified to testify as he did in this case, I would still find his testimony severely lacking. There is ample law in this State regarding what constitutes reckless disregard in the context of police pursuit. In *City of Ellisville v. Richardson*, 913 So. 2d 973 (Miss. 2005), the Mississippi Supreme Court approved a list of ten factors that should be utilized in determining whether the police have acted with reckless disregard in pursuing a suspect: (1) the length of the chase, (2) what type of neighborhood the chase took place in, (3) what type of streets the chase took place on, (4) whether vehicular or pedestrian traffic was present at the time of the chase, (5) visibility and weather conditions, (6) the severity of the offense that triggered the pursuit, (7) whether the officer had engaged his siren and lights, (8) whether the officer could have done something else in order to apprehend the suspect, (9) whether the police policy in effect at the time of the pursuit would have prohibited the pursuit, and (10) the rate of speed of the officer in comparison to the posted speed limit. *Id.* at 977 (¶15).

¶55. Barrett failed to address the factors that our supreme court has stated are to be considered in determining whether a police pursuit was conducted with reckless disregard. The closest that Barrett came to addressing factor six, the seriousness of the offense that initiated the pursuit, was his testimony that "[t]he second, major thing that I wanted to know about was, the reason for [Brown] attempting to stop this four-wheeler. . . . And he immediately told me that there was [sic] three people on that four-wheeler on a highway, and

for their own safety, he was trying to get 'em stopped." In fact, during cross-examination, the Gileses' attorney asked the following question:

> Let me ask you, in your officer's pursuit manual, or whatever you have, what would be your theory if you saw that four-wheeler going down the road, knowing that probably the only violation you've got is a suspended driver's license, and they're riding an ATV on a highway, and the kids are on it -- now, *we're not talking about a bank robbery, we're not talking about a murder*, and we're talking about considering the safety of those two little boys on the back, what does your manual provide for how far you're suppose [sic] to stay behind them, stay back?

(Emphasis added). Barrett's answer, in my opinion, reveals his lack of knowledge about the factors that are to be considered in these cases, as shown by the following:

> There is no -- there is no laid out situation as far as how you should -- how far you should stay behind anybody. In this whole situation [sic] was because Robert Brown, by his deposition, was trying to keep these people from being hurt, and for [sic] possibly being killed and get 'em off the road. They were breaking the law. They were on a vehicle without helmets, with no inspection sticker, with no tag, and the father had suspended driver's license [sic], which is a moot point here. The main thing is, that in my opinion, and there again, I base it on these depositions of what he had to say, is what he was trying to get the people to pull over for their own safety [sic].

Clearly, this question was the perfect opportunity for Barrett to address the factors, especially factor six. Instead, Barrett's response confirmed the truth of the situation, which was that Giles had committed a few misdemeanors. The trial court similarly declined to address the fact that this pursuit was initiated after Brown observed Giles committing mere misdemeanors. I believe that a proper analysis in this case would find that factor six weighs strongly in favor of a finding of reckless disregard on Brown's part, as Giles's crimes were far from severe.

¶56. In fact, the court declined to address many of these factors. The length of the chase was discussed only briefly in testimony, and neither Barrett nor the court discussed it when finding that Brown acted properly in pursuing the Gileses. Since the pursuit occurred in a rural area of Mississippi, the type of neighborhood, factor two, appears to weigh in favor of Brown, as noted by the trial court. The streets that the Gileses and Brown rode on were not discussed at any length, although there was video footage from the highway and some photographs. Still, neither Barrett nor the trial court discussed the characteristics of the streets. The only testimony concerning traffic indicated that there was very little; as such, the trial court properly noted that this factor weighed in Brown's favor. Similarly, the court properly found that factor five, weather conditions and visibility, indicated that the weather was clear, and that this factor did not weigh in favor of a finding of reckless disregard. Factor six, the severity of the crime that started the pursuit, has already been discussed. Factor seven addresses whether pursuit is conducted with the siren and lights engaged. There was conflicting testimony on this account; however, neither Barrett nor the trial court discussed the significance of the siren or lights as they relate to a finding of reckless disregard. Factor eight suggests that an officer should consider whether he has other ways of finding a suspect besides pursuit. Giles testified that he knew Brown, that Brown had served subpoenas at his house before, and that Giles's family had gone to school with members of Brown's family. Giles firmly believed that Brown knew where he lived. Brown testified that he knew Giles and where he lived, but that he did not realize that it was Giles that he had pulled over until they had the accident. I do not know what the court concluded

from all this testimony, because the court's judgment did not discuss this factor in any way. Given the relevance of this factor to the facts before us, I believe that the court should have addressed this factor as well. There is no testimony regarding factor nine; I assume that there was no relevant police policy and that this factor is moot. Finally, there was no discussion of whether Brown was exceeding the posted speed limit in his pursuit of Giles. Given that the highest speed estimated for the pursuit was around forty-five miles per hour, I find it unlikely that Brown exceeded the speed limit during his pursuit.

¶57. When asked by Brown's attorney whether Brown acted with reckless disregard, Barrett stated: "In my opinion, I don't find any reckless disregard on Constable Brown's behalf. I don't find any gross negligence. I don't find any malicious act on his part, as far as him trying to intentionally run over these people, on this four-wheeler." I cannot help but question how Barrett was able to arrive at this conclusion without being aware of the factors that are required to be considered before any such determination can be made. Furthermore, I must ask the same question with regard to the circuit court's conclusions, as the circuit court did not address many of these factors in rendering its judgment. Although a few of the factors weighed somewhat in favor of the court's judgment, several crucial factors were not addressed by the court at all. Therefore, I must respectfully dissent. I believe this case should be remanded for a new trial without improper testimony by Barrett. And I believe that, on remand, the circuit court needs to look at the factors that have been expounded by the Mississippi Supreme Court before making any determination as to whether Brown acted with reckless disregard.

¶58. In sum, I believe that the court improperly refused to consider the testimonies of Sharpe and Wilcher due to their gender. Further, the court allowed Barrett to testify at length on matters that he was unqualified to testify about. I would remand and ask the court to make a proper determination regarding the cause of the accident, whether Brown contributed to causing the accident, and whether Brown acted with reckless disregard during his pursuit of the Gileses. I would order that such a determination be made without consideration of Barrett's testimony that the accident was caused by Giles making a wide turn to the left and a sudden turn to the right in front of Brown and without consideration of any other opinions offered by Barrett that were outside his expertise, as I believe that this testimony could only properly be given by an accident reconstructionist. Furthermore, given the circuit court's view of the inherent fallibility of females to properly judge distance, I question whether recusal might be proper on remand, as Sharpe and Wilcher are two critical fact witnesses who happen to be female. In making a determination as to whether Brown acted with reckless disregard, I would order that the circuit court consider the factors that have been approved by our supreme court.

LEE, P.J., AND BARNES, J., JOIN THIS OPINION.