IN THE SUPREME COURT OF MISSISSIPPI

CITY OF GREENWOOD, MISSISSIPPI — APPELLANT

VS. — CASE NO. 2009-TS-00024

V. S. By and Through Her Next Friend, PATRICIA WESTBROOK — APPELLEE

APPEAL FROM THE CIRCUIT COURT OF LEFLORE COUNTY, MISSISSIPPI

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certified that the following listed person have an interest in the outcome of this case. These representations are made in order that the Justices of this court may evaluate possible disqualification or recusal:

V. S., by and through her Next Friend, Patricia Westbrook - Plaintiff/Appellee

Carlton W. Reeves, Attorney for Patricia Westbrook

Pigott Reeves Johnson, Attorneys for Patricia Westbrook

City of Greenwood, Mississippi - Appellant

Mitchell Driskell, Attorney for City of Greenwood, Mississippi

Wilton Byars, III, Attorney for City of Greenwood, Mississippi

Daniel Coker Horton & Bell, Attorneys for City of Greenwood, Mississippi

This the 7th day of April, 2010.

CARLTON W. REEVES
Attorney for Patricia Westbrook

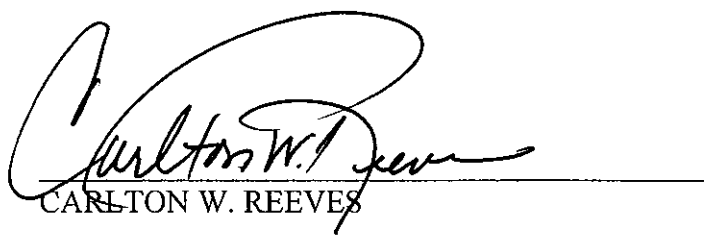
CERTIFICATE OF SERVICE

I, Carlton W. Reeves, do hereby certify that I have this day caused to be served, via U. S. mail, postage prepaid, a copy of the foregoing document to:

Honorable Margaret Carey-McCray
Leflore County Circuit Judge
P. O. Box 1775
Greenville, MS 38702-1775

Mitchell O. Driskell, Esquire
Wilton W. Byars, III, Esquire
DANIEL COKER HORTON & BELL
P. O. Box 1396
Oxford, MS 38655

Ths the7th day of April, 2010



CARLTON W. REEVES

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not necessary as this Court has substantially addressed the law on the issues which are involved in this case. Oral argument will provide little assistance to the Court, we believe.

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STATEMENT OF THE CASE

This case arises from a lawsuit filed by the Conservatrix of V.S., a mentally retarded citizen of the City of Greenwood. V.S. was assaulted by a prisoner in the custody of Mississippi Department of Corrections who was participating in the City of Greenwood's work release program. As a result of the assault, V.S. suffered significant physical and emotional trauma. After the trial in this case, the Court entered a verdict against the City of Greenwood and awarded damages to the plaintiff. The City of Greenwood appeals the verdict to this Court.

A. Course of Proceedings and Disposition in the Court Below

V.S. was assaulted by Marvin Fray, an inmate in the custody of the Mississippi Department of Corrections who participated in the City of Greenwood's Work Release Program, on June 22, 2002. On July 16, 2002, V.S., through her counsel, submitted her tort claim notice to the City of Greenwood. The City never took any action on the claim so V.S. deemed her claim denied and timely filed suit on August 27, 2003. Vol. 1, T. 1-9; R.E. 1. V.S. also sued the Mississippi Department of Corrections and its Commissioner, Christopher Epps. *Id.* With respect to the City of Greenwood, she alleged, *inter alia*, that "[t]he City of Greenwood's acts and omissions, through its employee, Glen Staples, who had the responsibility for supervising Fray, [was] negligent, grossly negligent and deliberate indifference [sic] to [V.S.'s] well being." *Id.* at 3. The defendants filed their Answers and discovery ensued. At the close of discovery, V.S. dismissed the action against the MDOC and Epps. The remaining parties, V.S. and the City of Greenwood, prepared a Pre-trial

Order executed same and submitted to the court for entry on August 8, 2005. Vol. 1, T. 60-68; R. E. 3. The two-day bench trial commenced on August 8. Vol. 4, T. 1; R. E. 4.

After the conclusion of the trial, the parties were permitted to present proposed findings of fact and conclusions of law. The parties served their respective proposed Findings and Conclusions of Law on August 19, 2005. See Supplemental Vol. 1, at 40-93; R. E. 6; and R. E. 7. The City then submitted The City of Greenwood's Supplemental Proposed Findings of Fact and Conclusions of Law. *Id.* at 99-104; R. E. 8. V.S. filed Plaintiff's Response to City of Greenwood's Supplemental Proposed Findings of Fact and Conclusions of Law on September 13, 2005. Vol. 1, at 69-73; R. E. 9. On November 17, 2005, the City served The City of Greenwood's Second Supplemental Proposed Findings of Fact and Conclusions of Law. Supplemental Vol. 1, at 109-146; R. E. 10. V.S. then filed Plaintiff's Response to the City of Greenwood's Second Supplemental Proposed Findings of Fact and Conclusions of Law on January 3, 2006. Vol. 2, T. 252-59; R. E. 11. Eight months after all briefing was done and all submissions were received, on September 13, 2006, the trial judge submitted her Final Judgment with her Findings of Fact and Conclusions of Law and awarded $500,000.00 to plaintiff and assessed costs against the City. Vol. 2, T. 152-65; R. E. 12. V.S. filed her Bill of Costs in the amount of $4,643.50 on November 8, 2006.

The City filed a Motion to Alter or Amend Findings of Facts and Conclusions of Law and Judgment, Motion for New Trial and Motion for Relief from Judgment on September 16, 2006. *Id.* at 166-97; R. E. 13. Plaintiff served her response to the post-trial motion on October 12, 2006, see, Vol. 2, T. 277-286; R. E. 14, which was followed by the City of Greenwood's reply. Vol. 2, at T. 297-99 - Vol. 3, at 301-318; R. E. 15. On December 18, 2008, the court entered an Order denying the City's post-trial motion. Vol. 3, T. 352; R. E. 16. The Court also granted V.S.'s Amended

Motion for Post Judgment Interest and awarded interest at the rate of 9.25% from September 18, 2006, the date on which the Court filed its Findings of Fact and Conclusions of Law, but it excluded the period between January 24, 2007 and December 17, 2008. Vol. 3, T. 351; R. E. 16.[1] The City then filed its Notice of Appeal on January 5, 2009. *Id.* at 353. In its Notice of Appeal, the City specifically states that it appeals from these orders:

[1] Final Judgment;

[2] Findings of Facts and Conclusions of Law entered in September 18, 2006;

[3] Order Granting Plaintiff's Motion to Enforce Agreement to Pay Expert Expenses;[2]

[4] Order Denying Defendant City of Greenwood's Motion to Alter or Amend Finding of Fact and Conclusion of law and Judgment, Motion for New Trial and Motion for Relief from Judgment; and,

[5] Order Granting Plaintiff's Amended Motion for Award of Interest.

Vol. 3, T. 353-54; R. E. 17.

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[1]Presumably, in an attempt to be fair to the City, the trial court excluded this period for calculating interest due to the extended time period the post-trial motion was under consideration.

[2] The City apparently has abandoned the appeal on this issue as it has failed to address on what basis it appeals the Order granting V.S.'s Motion to Enforce Agreement to Pay Expert Expenses. This Court is not required to address any issue not supported by reasons and authority. *Vavaris v. Perrault*, 813 So.2d 750, 753 (Miss. Ct. App. 2001), *citing* M.R.A.P. 28 (a)(1)(6). It's the City's duty "'to provide authority in support of an assignment of error.'" *Taylor v. Kennedy*, 914 So. 2d 1260, (¶ 4) (Miss. Ct. App. 2005) (citations omitted). Consequently, the City should be ordered to pay the expert expenses plus interest immediately because it has deprived the plaintiff money owed under their agreement and for which the trial court determined the City was responsible. Obviously, $4,800.00 does not matter much to the City, but that is an extremely significant amount that V.S. was left owing when the City reneged on its agreement. Apparently the City does not quibble with the lower court's ruling on the Amended Motion for Award of Interest as that issue also is unaddressed in its brief. Should the this Court affirm the judgment, interest should be ordered in the amount awarded by the trial court.

B. Statement of Facts

1. The Incident

The City of Greenwood participates in the Community Work Center Program established by the Mississippi Department of Corrections (hereinafter "MDOC"). The purpose of the program is to provide a free labor source to the City. Vol. 4, T. 15; R. E. **4**. Prisoners are allowed to perform jobs that are ordinarily performed by those employed or otherwise hired by the City. Vol. 2, T. 160; R. E. 12.

In order to participate in the program, the City entered an agreement with the MDOC . Under the agreement, the City employees who work with the inmates are required to complete training conducted by MDOC. Only certain inmates qualify for the program. However, before the inmates are allowed to participate in the program, they also have to complete orientation conducted by MDOC officials. Vol. 4, T. 16; R. E. 4. The orientation given to the inmates and the City employees include instructions concerning the limitations imposed on the inmates. For example, inmates are not allowed to work in businesses; work on private property; and they cannot "be involved with any free-world people." *Id.*, at 15; R. E. 4. At all times, the work supervisor of the City is responsible for the inmates. Id. at 16; R. E. 4.

On June 22, 2002, Marvin Fray, a participant in the Community Work Force Program, was working with the City of Greenwood's sanitation department. On that fateful morning, as was the practice, Fray, Isaac Morgan and other MDOC prisoners were brought to the City Barn and assigned to various departments which were in need of assistance. The prisoners were assigned to supervisors and vehicles. Fray and Morgan were assigned to Glenn Staples, a supervisor within the Sanitation

Department, and the driver of the city owned knuckle boom truck. They left the City Barn to collect trash, but within an hour they would return to the bar amid commotion which resulted from Fray's illicit actions.

Glenn Staples was employed by the City of Greenwood Vol. 4, T. 17, 24, 39, 40, 116; R.E. 4. He had recently completed MDOC training regarding supervising inmates participating in the work release program, and he was fully aware that all MDOC inmates must be supervised. Vol. 2, T. 156; Ex. P-4; R. E. 12; R. E. 5. He knew he could not allow inmates out of his vision and, if he did, it would be a violation of MDOC's policy. Vol. 4, T. 19, 20, 26; R. E. 4. In fact, testimony established that Staples was "crystal clear" about his responsibilities, see, Vol. 4, T. 41; R. E. 4. He fully understood that it was the policy of the City that prisoners were working under his direct supervision, and that he was responsible for supervising everyone on the crew. Vol. 4, T. 93, 98, Vol. 2, T. 156; R. E. 4; R. E. 12.

Walter McKinney, a Commander within the MDOC and the director of the Community Work Center Program, explained the importance of maintaining constant supervision of the inmates: "You need to keep an eye on them because they are out in public, and keeping an eye on them you will be knowing exactly what they are doing or you can tell what they are doing." Vol. 4, T. 31; Vol. 2, T. 156; R. E. 4; R. E. 12. Simply put, they are inmates. They are in the custody of MDOC because they have committed crimes and violated the norms of society.

The worlds of V. S. and Fray collided when V.S. was sitting on her porch waiting for the bus which takes her to the educational program in which she was enrolled. Staples was driving the knuckle boom truck while Fray and Morgan picked up trash along the side of the road. Vol. 4, at T. 48, 51, 52; R. E. 4. While he was supposed to be picking up trash, Fray assaulted V.S. He had

sex with her and forced her to perform oral sex on him. Deborah Holland, one of V.S.'s sisters, testified that she exited her house and saw Fray pulling up his pants. Holland yelled, apparently scaring Fray, who ran back to the knuckle boom truck and Staples drove away.

Holland took V.S. to the City Barn and reported the incident to Benny Herring, the Public Works Director. Herring, through a radio call, ordered all trucks which had been disbursed throughout the community to return to the barn. Vol. 2, T. 157; R. E. 12. Responding to the call, Staples returned to the barn with Fray and Morgan, and Holland identified Fray as the rapist.

The Greenwood Police Department was then called to the barn and officers began their investigation. As a part of the investigation, the police officers questioned individuals and took several statements, see Vol. 4, T. 49; R.E. 4, and V.S. submitted to a rape kit examination which confirmed that Fray had penetrated V.S. vaginally and orally. Vol. 5, T. 157; R. E. 4. Morgan was excluded as the perpetrator, and Staples was never subjected to a test because no witness identified him as a participant.

While the police department was conducting its investigation, the City also initiated its investigation since Fray was working in the City's work release program under the supervision of Staples. Based on Herring's initial findings, Staples was immediately suspended from his employment. Vol. 4, T. 99; Vol. 2, T. 157; R. E. 4; R. E. 12. City personnel polices allowed Staples to have a hearing regarding his suspension. At his disciplinary hearing the City found that Staples had violated certain City policies. As a consequence, Staples was terminated. Vol. 4, T. 103; R. E. 4. Particularly, the City determined that Staples violated Rules 8.203[3], 8.205[4] and 8.802[5]. Vol. 4,

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[3] Rule 8.203 provides that grounds for disciplinary action include where there is "willful violation of any lawful and reasonable regulation, order, or direction made or given by a supervisor where such violation has amounted to insubordination or services breach of proper

T. 103-105, Ex. 13; R. E. 4; 5. "Staples had performed his assigned duties in an incompetent or inefficient manner." Vol. 4, T. 105; R. E. 4. He "failed to supervise the inmates in accordance with the training provided." Vol. 2, T. 157; R. E. 12.

Subsequently, Staples filed for unemployment. Vol. 4, T. 105; Ex. P-6; R. E. 4; 5. The City challenged Staples' right to receive unemployment compensation. Through its challenge, the City argued that Staples had been discharged for "misconduct **connected with work**; that Staples had violated several policies which allowed an inmate "in his charge" to commit a crime. Vol. 4, T. 107-10, 122 and Ex. P-6; R. E. 4; R.E. 5. (Emphasis added). See also, Ex. P-9; R. E. 5. The City never contended before the MESC (or any time prior to trial) that Staples had gone on a frolic or was somehow acting outside the scope of his employment. He simply violated several policies, did nothing to stop Fray's assault and failed to report it. Vol. 4, T. 109; R. E. 4.[6] The trial judge concluded that Staples did not do his job. Vol. 2, T. 156-157; R. E. 12. There is no doubt that Fray raped V.S. as he was indicted, entered a plea of guilty for the charge of sexual battery and was sentenced to a term of ten years in the custody of the MDOC. Ex. P-1, P-2; R. E. 5.

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discipline or has resulted in loss of injury to the public."

[4] Rule 8.205 provides that **incompetency or inefficiency** in the performance of assigned duties shall be grounds for proper disciplinary action. (Emphasis added).

[5] Under Rule 8.802 when an employee is disciplined for an extraordinary action he shall be given written notice of specific reason for the disciplinary action within twenty-four hours of the taking of the disciplinary action.

[6]In fact, the MESC form that was completed by the City admonished the City to "Describe what [Staples] did or failed to do which caused his discharge. Explain specific act of misconduct. Avoid general terms like 'absenteeism,' 'violations of rules;' tell what rule was violated and wh, how often, etc.). Ex. P-9. On this form the City did not say that Staples was fired because he committed a criminal act or that he engaged in wilful misconduct or that he aided and abetted someone who committed a crime.

2. Who is V.S.?

Born on October 14, 1966, see, Ex. P-26; R.E.5, at the time of the attack, V.S. was thirty-five years old, but she was childlike and incapable of caring for herself. She has never lived alone and requires a lot of attention and supervision. Vol. 4, T. 127-128, 143; R.E. 4. Testing confirms that some of her cognitive skills were at the pre-kindergarten level. She cannot read or write, and her communication and daily living skills compare to those of a child less than three years old. Vol. 4, T. 102; R.E. 4. V.S. did not have the capacity to consent to sex with Fray. Indeed, the trial court found that she, in fact, did not consent to have sex with Fray. Vol. 2, T. 157; R.E.12.[7]

V.S. lives with her younger sister and primary caretaker, Patricia Westbrook, and Westbrook's three sons. Westbrook assumed the role of primary caretaker after the death of their mother. Vol. 5, T. 164, 174, 181; R.E. 4. Patricia describes V.S.'s behavior and mental capacity to be similar to her five year old son. ***Id.*** at T. 178; R. E. 4. Westbrook has to get her up, pick out her clothes out for V. S. and iron them. She even has to supervise V.S. when taking her bath. *Id.* at 175-76. V. S.'s other siblings, Deborah Holland and Lawrence McCall, also assist in taking care of their big sister. They too testified about V.S.'s inability to care for herself. See, Vol. 4, 127-28; Vol. 5, 163-64; R. E. 4. *See also*, Vol. 4, T. 143; R. E. 4 (testimony of Cario Westbrook, Westbrook's son, explaining that V.S. needs a lot of supervision); ***Vol. 4, T. 145; R. E. 4*** ([V.S.] cannot perform the simplest of tasks, like fixing her own plate of food or combing her hair.); and Vol. 5, T. 204-05; R. E. 4 ("She is very, very dependent on the people who have looked after her and protected her.").

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[7] The trial judge went the extra step of making this finding even though Fray had plead guilty to crime of sexual battery.

In order to help prepare her for the world, Westbrook enrolled V.S. in Life Help Program run by the Department of Mental Health/Retardation. As Westbrook explained:

> I thought it would help her . . . to be around other people like her, and try to get her to stop being so dependent on other people, because I know I'm probably not going to – if anything happens, [V.S.] would be able to function. I try to help out as much as I can.

Vol. 5, T. 176; R.E. 4.

Prior to the rape V. S.'s general health was pretty good. Vol. 5, T. 207; R.E. 4. She was takings steps forward at least trying to be like an adult. *Id.* at 182; R.E. 4.

3. V. S. Suffered Damages

Although V.S. was making progress and obviously was benefitting from her experiences at Life Help, *see,* Vol. 5, T. 182; R. E. 4, the assault had a devastating affect on her. She became withdrawn. She began wetting on herself and soiling her clothes. Vol. 5, T. 181; R. E. 4. Where she had been moving forward, after the rape, V.S. began to go "backwards." *Id.*, at 182. In fact, V.S. still was not doing well at the time of trial - three years after the assault. *Id.* at 182; R. E. 4.

During the trial, the impact of the rape was fully discussed by her expert witness, Dr. Wood Hiatt, a board certified physician who has extensive experience in adolescent and child psychiatry. Noted as a "respected psychiatrist," see, *Cavett v. Cavett*, 744 So.2d 372, 377 (¶17)(Miss.Ct. App. 1999), Hiatt is a former director of child and adolescent psychiatry at University of Tennessee and director of University of Mississippi Medical Center's division of Child, Adolescent and Family Psychiatry. Vol 5, T. 192-93; R. E. 4. Having been qualified as expert in Mississippi courts *see, Mississippi Dept. of Mental Health v. Hall*, 936 So.2d 917, 923 (¶ 10) (Miss. 2006), and has testified for both plaintiffs and defendants. Vol. 5, T. 196; R. E. 4. Hiatt provided convincing testimony of

the significant mental injuries V.S. suffered as a result of rape. Vol. 5, T. 207-18; R. E. 4. According to Hiatt the objective evidence suggested that the assault on V. S. was violent and traumatic. Immediately after the assault, V. S. had mud on her clothes, elbows and knees. *Id. See also id.* at 207-08. There was also evidence that she attempted to resist the attack.

In addition to reviewing V.S.'s medical records, Hiatt personally evaluated V. S. on three occasions. The personal examination provided additional significant information. Vol. 5, T. 200; R. E. 4. He opined that V.S. suffered from Post Traumatic Stress Disorder as a result of the rape. Vol. 5, T. 208; R. E. 4. The trauma, Hiatt noted, was reflected in V.S.'s description of her body schedules - *e.g.*, bed wetting, bowel control and disturbance in her sleep wake cycle, increase in her blood pressure, weight gain and she simply became disorganized. Vol. 5, T. 210-15, 227-8, 276; R. E. 4. V.S. had undergone "very distinct changes" that started immediately after the "traumatic event." Vol. 5, T. 223; R. E. 4.

Although the City of Greenwood hired its expert, who attempted to discredit Hiatt's opinion,[8] sitting without a jury, the trial court observed this battle between the experts and credited Hiatt's testimony.[9] Obviously, being armed with the personal evaluations and being equipped with his sheer experience, Hiatt's arsenal proved to formidable for the expert retained by the City.

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[8] Having stipulated that Hiatt was an expert qualified in the area designated, the only thing the City of Greenwood could do was to attack his opinion.

[9] As our courts have noted, "a trial court commits no error in finding one expert more persuasive than another as the trial court, sitting as the trier of fact, is the sole judge of the credibility of all witnesses, including experts." *University of Mississippi Medical Center v. Johnson*, 977 So.2d 1145, 1153 (¶ 21) (Miss. Ct. App. 2007). *See also, University of Mississippi Medical Center v. Pounders*, 970 So.2d 141, 148 (Miss. 2007). ("a judge may place whatever weight he or she chooses on expert testimony, the failure to acknowledge or rely upon the testimony of a particular expert is not error.")

Having heard the testimony, reviewed the evidence, received the arguments of counsel, and considered the parties' post-trial submissions the trial court found the City of Greenwood liable, entered a judgment against the City and awarded damages in the amount of $500,000 to V.S. See, Vol. 2, T. 155-64; R. E. 12. It is from this verdict which the City appeals.

SUMMARY OF ARGUMENT

The Findings of Facts and Conclusions of Law of the Circuit Court of Leflore County must be affirmed. Cases tried under the Mississippi Tort Claims Act are tried without a jury. Miss. Code Ann. § 11-46-13(1). And, any findings made by the trial court are given substantial deference, and this Court will not reversed unless the findings are clearly erroneous. *Donaldson v. Covington County*, 846 So.2d 219, 222 (¶11)(Miss. 2003). The City of Greenwood is not entitled to a new trial as the evidence clearly shows that the employee for the city was acting within the course and scope of his employment as the City has not overcome the rebuttable presumption that he was acting within the course and scope of employment. *Singley v. Smith*, 844 So.2d 448, 452 (¶15) (Miss. 2003). In fact, the City waived its right to even argue that he was acting outside the course and scope of his employment when it had not raised the issue at any time prior to the trial. As a result of the assault and rape on V.S. she suffered substantial physical and emotional damages because of the failure of the city employee to do its job. The award of damages, by the only judge who heard the testimony and saw the witnesses was appropriate and fully supported by the evidence. *Estate v. Jones v. Phillip ex. rel. Phillips*, 992 So.2d 1131, 1150 (Miss. 2008).

ARGUMENT

I. THE TRIAL COURT'S FINDINGS AND VERDICT MUST BE AFFIRMED

A. The Standard of Review to be Applied to the Trial Court's Findings is Clearly Erroneous

As all cases brought pursuant to the Mississippi Tort Claims Act ("MTCA"), the circuit judge was the finder of fact. There is no jury. Miss. Code Ann. § 11-46-13 (1). When a circuit judge sits as the fact finder, she is given the same deferential respect that a chancellor receives with regard to findings, and those findings "'will not be reversed on appeal so long as they are supported by substantial, credible, and reasonable evidence.'" *Mississippi Department of Wildlife, Fisheries and Parks v. Brannon*, 943 So.2d 53, 56 (¶9) (Miss.Ct. App. 2006), *quoting Donaldson v. Covington County*, 846 So.2d 219, 222 (¶11) (Miss. 2003). Stated another way, findings of fact and conclusions of law will not be disturbed "unless the judge abused [her] discretion, was manifestly wrong, clearly erroneous, or an erroneous legal standard was applied." *Id., citing Mississippi Dept. of Transportation v. Trosclair*, 851 So.2d 408, 413 (¶ 11) (Miss. Ct. App. 2003). The findings here must be affirmed.

The City claims that the trial court's findings are not entitled to any weight. It makes the bald assertion that "it is obvious" the trial judge only relied on "the cold printed record of the case" before issuing her ruling. See, Brief of Appellant, at 17. Not only is the City wrong, the statement is deeply offensive. The trial court sat through every minute of the trial. She was fully engaged and attentive. *See, e.g.*, Vol. 4, T. 149-50, Vol. 5, T. 151; R.E. 4 (explaining to Fray when he was being called to testify in a civil proceeding which is different from his criminal trial); and Vol. 5, T. 219-220; R. E. 4 (court having discussion and correctly advising counsel and court reporter that court's notes show exhibit had been admitted on previous day of trial). Just because the Court requested a copy of the transcript **before** issuing her ruling does not mean that she simply disregarded what she observed -

via her own eyes and own ears - in the court room. Could she possibly have requested the transcript to see if her notes and her memory gelled with the testimony? Indeed, yes. Could she have requested the transcript to make sure that the parties' representations in their Proposed Findings of Fact and Conclusion of Law conformed with the evidence? Yes! Could she not have requested the transcript to make sure that her notes were correct with regard to what evidence was admitted or excluded and what objections were made and which ones were overruled or sustained? Absolutely! Suggesting that trial court lost her personal recollection by requesting the transcript and thus transforming her to an appellate court just does not make sense.

The notion that just because it may have taken the Court longer than what the City desired for her to issue her final decision does not lead to the conclusion that the trial court some how forgot the testimony; that her recollection of the demeanor of the witnesses simply vanished; that she threw away any notes that she may have been keeping; and that she disregarded the parties' proposed findings. With all due respect to the City of Greenwood, see, Brief of Appellant at 17, it is **NOT** obvious that the trial court simply relied upon the "cold, printed record of the case." That claim is preposterous and simply not true.

It appears that the City alternatively argues that because the trial court adopted **almost** verbatim **ONE** paragraph of the plaintiff's proposed findings - the summation paragraph with respect to damages - then *de novo* review of the court's entire opinion is appropriate. *Id.* at 18. How the City can make this argument with a straight face is disturbing. The Plaintiff submitted Proposed Findings of Fact and Conclusions of Law totaling twenty-three pages.[10] The Court's opinion

[10]Incidently, the City also submitted proposed finding of facts and conclusions of law. Supp. Vol. 1, T. 40-70; R. E. 6. Not being satisfied with one submission, the City filed two supplemental proposed findings. *Id.* at 94-98; 109-112; R. E. 8; R. E. 10.

consisted of ten pages. And, all the City can point to is **ONE** paragraph! Amazingly, it uses that ONE paragraph to justify its assertion that the Court's findings are entitled to no weight.

Granted, this court has cautioned against the verbatim adoption of a party's proposed findings of fact and conclusions of law, see, *Brooks v. Brooks*, 652 So.2d 1113, 1118 (Miss. 1995), but it has not banned the practice. See, *Rice Researchers, Inc. v. Hiter*, 512 So.2d, 1266 (Miss. 1987) (it is within the trial court's discretion to adopt the findings of fact and conclusions of law submitted by the party verbatim). Moreover, the fact that a court adopts a party's findings of fact and conclusions of law verbatim does not necessarily lead to the conclusion that the trial court has committed reversible error. *City of Jackson v. Presley*, 2009 WL 3823183, at *3 (¶ 11) (Miss. Ct. App. 2010). Consequently, even if the trial court adopted the findings verbatim, which it did not, reversal is not automatic as the City suggests.

Turning to the case *sub judice*, can the City really support its assertion that the plaintiff's proposed findings were adopted verbatim? No, it can not. Verbatim is defined as: "In the exact words; word for word." Merriam-Webster Online Dictionary, 2010 Merriam-Webster Online 14 March, 2010, <http://www.merriam_webster.com/disctionary/verbatim>. One can clearly see that the Opinion and Order authored by the trial court is significantly different from the proposed findings submitted by V.S.. It is not verbatim. Apparently, the City wants the Court to do away with Miss. R. Civ. P. 16(k) and forbid parties from submitting proposed findings - the value of which were explained in *Mississippi Dept. of Transportation v. Johnson*, 873 So.2d 108, 111, n.4 (Miss. 2004) and *Delta Regional Med. Center v. Venton*, 964 So.2d 500, 504 (¶ 7) (Miss. 2007).

Even were this Court to find the trial court's Opinion and Order is a verbatim recitation of what V. S. submitted, or even substantially verbatim, a *de novo* review of the case as the City

advocates would still be inappropriate. At most, this Court would have to analyze the findings "with greater care, and the evidence is subjected to heightened scrutiny." *Brannon*, 943 So.2d at 59 (¶ 9). *See also, City of Jackson v. Spann*, 4 So.3d 1029, 1032 (¶ 9) (Miss. 2009) (where trial judge adopts a party's proposed findings and conclusion verbatim and with minimal and superficial editing, the deference afforded the trial judge is lessened).

After its thoughtful analysis of the facts, findings and the law, the trial court here merely lifted **ONE** paragraph from plaintiff's proposed findings- agreeing that the evidence supported plaintiff's claim for damages in the amount of $500,000. This alone does not justify some relaxed standard of review or deference. Moreover, it does not require some heightened scrutiny, and it certainly does not constitute reversible error.

Assuming a lesser standard of review is appropriate in this situation, for sure, on these facts, *de novo* review is not justified. This is so because *de novo* review is not even justified in instances where the trial judge adopts some of the party's sentences, or even portions of sentences and phrases, so long as the court's findings are its own. *Phillips v. Mississippi Dept. of Public Safety*, 978 So.2d 656, 660 (¶ 15) (Miss. 2008). Trial judges are permitted to adopt portions of a parties' proposed findings and where there have been alterations to that which was submitted suggests that the "trial court gave the case careful review and formed its own opinion." *Pounders*, 970 So.2d at 145 (¶ 12). There is no question that the trial judge in this case gave careful review of the evidence and the parties' multiple submissions and then wrote her own opinion. Like the judge in *Simpson v. Pickens*, 761 So.2d 855, (Miss. 2000), the trial court

> saw [the] witnesses testify. Not only did she have the benefit of their words, she alone among the judiciary observed their manner and demeanor. She was there on the scene. She smelled the smoke of battle. She sensed the interpersonal dynamic

between the lawyers, the witnesses, and herself. These are indispensable. . . .

Id. (¶ 14) at 859. The standard of review to apply, therefore, is manifest error/substantial evidence. *Id., citing City of Greenville v. Jones*, 925 So.2d 106, 109 (Miss. 2006). In order to disturb these findings this Court must find that the findings are clearly erroneous - something which this Court cannot do.

B. The City of Greenwood Is Not Entitled to a New Trial

The City challenges the verdict raising only three arguments. First, it claims that it cannot be held liable because Glenn Staples was not acting within the course and scope of his employment. *See*, Brief of Appellant, at 19-31. Second, it claims that Staples was not acting within the course and scope of his employment because Staples' conduct constituted a criminal offense. *See, id.*, **at 31-33.** And, thirdly, the City says that the award of damages was not supported by the evidence. Apparently, the City has abandoned its argument that the claims are barred by the discretionary function exception to MTCA Vol. 2, at T. 178-79; R. E. 13. It takes no exception to the trial court's determination:

> Staples did not have the luxury or choice of not keeping an eye on Fray. He did not have the luxury of allowing Fray to make contact with V. S., a free world person. He had no discretion not to do his job. . . Staples neither had the discretion to violate the rules that had been put in place by the Department of Corrections and used by the City and its employees to fulfill the City's obligation under the program nor did he have the right to fail to do his job using at least ordinary care. . . . Staples' duty to supervise the inmates pursuant to MDOC guidelines which mandate specific actions to safeguard the public safety was not discretionary.

Vol. 2, T. 162-163; R. E. 12.[11]

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[11] In its Second Supplemental Proposed Findings, the City raised for the first time the discretionary function exception argument, see, Supplemental Vol. 1, T. 109-112; R. E. 10, to which V. S. responded, Vol. 2, T. 253-58; R. E. 11. It clearly has now waived that argument having not raised the issue in its brief. *Misso v. Oliver*, 666 So.2d 1366, 1369-70 (Miss. 1996).

Having abandoned the discretionary function exception argument, the City focuses on one general argument, to-wit: Glenn Staples was not acting within the course and scope of employment. As will be discussed below this Court must affirm the judgment.

1. The City waived any argument that Staples was acting outside the course and scope of his employment.

The City contends that its employee, Glen Staples, was acting outside the course and scope of his employment. The City, however, waived any such argument when it raised the issue for the very first time on its argument for directed verdict pursuant to Miss. R. Civ. P. 41(b). Vol. 5, T. 297-300; Vol. 6, 301-302, 311-14; R. E. 4.

The City is barred from raising that defense. It did not invoke the defense in its Answer. See, Vol. 1, T. 23-30; R.E.2. In fact, the City was quite clear and specific about the defenses to the claims raised in the Complaint. In its Fourth Defense, the City proclaimed that the allegations of the Complaint were "barred by Miss. Code Ann. § 11-46-9(1)(d)(e)(m)(n) and (s)." *Id.* These provisions of the act do not speak to the course and scope issue which the City raised for first time on the Motion for Directed Verdict. Quite to the contrary. Miss. Code Ann. § 11-46-9(1), provides a list of instances where a governmental entity is not liable when the employee **is acting within the course and scope of employment**. Why even invoke these exemptions when the City contends that Staple was acting outside the course and scope of his employment? Moreover, such an assertion was also absent from the Pretrial Order, see, Vol. 1, T. 60-68; R. E. 3, which controlled the course of

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(Court has no obligation to consider assignment unaddressed in the party's submitted brief). However, even if the court were to consider the argument, it must find that the trial court was correct. *MS Dept. of Human Services v. S. W.*, 974 So.2d 253, 258-59 (¶ 11) (Miss. Ct. App. 2007) (employee has no choice but to follow agency policies and regulations that prescribe a course of action for him to follow).

the trial. See, Miss.R.Civ.P. 16. There was not one mention that Staples was acting outside of the course and scope of his employment. In fact, in its own version of the concise summary of the facts in the pre-trial order, the City alleged that "Marvin Fray and Isaac Morgan were assigned to work at the City of Greenwood's Public Works Department." Vol. 1, T. 62; R. E. 3. Additionally, the parties stipulated to the following facts including:

d. On June 28, 2002, Marvin Fray was in the custody of the MDOC and assigned to work at the City of Greenwood in the Public Works Department.

e. On June 28, 2002, Fray was assigned to work **under the direct supervision** of Glen Staples, an employee of the City of Greenwood.

f. Staples had taken the orientation course hosted by the MDOC and was made aware of his duties and responsibilities with respect to the supervision of any inmate under his supervision.

Id. (Emphasis added).

The City was barred from springing that new theory in the middle of trial during its motion for directed verdict and subsequently urging it in its Proposed Findings of Facts and Conclusions of Law. *Hertz Commercial Leasing Division v. Morrison*, 567 So.2d 832, 837 (Miss. 1990). *Cf. Leleck v. Triple G Express*, 2002 WL 441337 (E. D. La. 2002), at *2-3, *citing, Zielinski v. Philadelphia Piers, Inc.*, 139 F.Supp. 408 (E. D. Pa. 1956) (equity bars city from making this belated assertion). *See also*, Miss.R.Civ.P. 8(c) (in responding to an initial pleading a party shall set forth its affirmative defenses). The City was indeed obligated to raise the very essential fact that it was alleging that its employee, Glen Staples, was not acting within the course and scope of his employment. See *McLemore v. McLemore*, 173 Miss. 765, 163 So. 500, 501 (Miss. 1935)("The ultimate essential facts upon which any cause of action, **or affirmative defense** thereto, is based **must be averred**. . .")(emphasis added). If the City was contending, prior to the day of trial, that Staples was not acting

within the course and scope of his employment when he failed to properly supervise inmate Fray, it should have been more specific in raising its defenses. For example, the City could have specifically invoked the immunity provision set forth under Miss. Code Ann. ¶ 11-46-7(2), which specifically provides that governmental entity could not be held liable or considered to have waived immunity for "any conduct of its employee if the employee's conduct constituted . . . any criminal offense."

The City should have even asserted this defense during the course of discovery, but it did not. Certainly, the absolute latest opportunity to have raised the contention would have been in the Pre-trial Order. But even there, the City made no mention that Staples was acting outside of the course and scope of his employment. Equally important is that the City never even denied that Staples was acting within the scope and course of his employment. In its Answer, for example, the City admitted that on the day that V. S. was raped, "the public works department of the City of Greenwood was collecting trash throughout the City, [and] included on the team of workers was Marvin Fray, an inmate in the custody of the Mississippi Department of Corrections. Vol. 1, 26, ¶ 7; R.E. 2. Furthermore, the City admitted that Staples "was responsible for the on-site supervision of convict Marvin Fray." *Id.* at ¶ 9.[12] The City, therefore, has waived its right to even raise the argument that Staples was acting outside the course and scope of employment.

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[12] Most interestingly, in ¶ 9 of the Complaint, V.S. alleged as follows: "During the morning hours of June 28, 2002, while collecting trash for the City of Greenwood, Marvin Fray assaulted, attacked, sodomized and raped plaintiff V.S. Public Works employee Glen Staples was **responsible for the on-site supervision of convict Marvin Fray**, and took no action to stop Marvin Fray even though he witnessed the events." (Emphasis added). While denying the first sentence (e.g., that Fray assaulted V.S.), the City admitted that Staples was responsible for the on-site supervision of Fray.

2. Assuming the City has not waived the argument, the trial court's finding that Staples was acting within the course and scope of employment must be affirmed.

a. There is a rebuttable presumption that Staples was acting within the course and scope of his employment.

Notwithstanding the City's obvious failure to raise the defense that Staples was acting outside the course and scope of his employment, the Court's decision that Staples was acting within the course and scope of employment is supported by the evidence. Staples was not doing his job, which was to supervise Fray and Morgan, the two inmates assigned to him. "He," as the trial court noted, "was expected to pay attention to the inmates, and he was required to prevent them from acting outside the guidelines for inmate behavior." Vol. 2, T. 160; R. E. 12. *See also*, *id.* at 158-59; R.E. 12 ("Staples was acting within the course and scope of his employment- - supervising the inmates as they were out picking up trash at or near Fulton Street in Greenwood, Mississippi and when the assault in this case occurred."). The City of Greenwood was responsible for seeing to it that Fray performed his duties, and it is uncontradicted that Staples did not do his job. Furthermore, as the trial court noted:

> [w]hen contesting Staples' application for unemployment compensation, the City also advised the Mississippi Employment Security Commission (MESC) that Staples was discharged because he violated several City policies when an inmate in his charge, committed a crime. **There was absolutely no indication that the City thought that Staples was acting outside the course and scope of his employment.**

Id. (Emphasis added). *See also,* Separate Answer and Defenses of the City of Greenwood, at ¶¶ 7 and 9, Vol. 1, at 12-13; R.E. 2 (admitting that Fray was on the team of workers responsible for collecting trash throughout the City of Greenwood and that Staples was responsible for his on-site supervision). Staples was acting within the course and scope of his employment. He was

responsible for making sure trash was picked up within the city. Fray and Morgan were responsible for picking up the trash. Staples was responsible for driving the knuckle boom truck AND he was "specifically assigned the task of supervising Fray and Morgan." Vol. 2, T. 160; R.E. 12.

There is a rebuttable presumption that Staples was acting within the scope and course of employment, and the City has the burden to overcome that presumption. *Singley v. Smith*, 844 So.2d 448, 452 (¶ 15) (Miss. 2003). Overcoming the presumption is a high standard because as this Court has noted:

> Under the Mississippi Tort Claims Act it is **rebuttably presumed** that when an employee is covered by that Act, **ANY ACT or OMISSION within the time and in the place of such employment** is to be considered to be within the course and scope of such employment.

Id. at 452 (¶ 18) (emphasis added). The trial court did what it was supposed to do. It looked at the totality of the circumstances and examined the nature of the wrongful act (omission); the employment character; and the time and place where the act occurred. *Id., citing, Horton v. Jones*, 208 Miss. 257, 44 So.3d 397 (1950). "In order for the [employer] to escape liability, it must be shown that the [employee] when the wrongful act was committed, had abandoned his employment and gone about some purpose of his own, not incident to his employment." *Id.* at 453, *quoting Horton*, 44 So.2d at 399 (*citing Loper v. Yazoo and M.V. R. Co.*, 166 Miss. 79, 145 So. 743 (1933); *Barmore v. Vicksburg, S. and P. Ry.*, 85 Miss. 426, 38 So. 210 (1905)). The City failed to make this showing.

There is no question that Staples was doing his job. He reported to the City Barn, received his instructions with respect to what tasks he was to perform, and two inmates were assigned to assist him in completing those tasks. The City dispatched them in the City vehicle around 6:55 a.m. en

route to the area in which they were to pick up trash. They started at other streets and worked their way to Fulton Street. Vol. 1, Ex. P-8; Ex. P-9; Vol. 2, T. 158; R. E. 5; 12. Fray, who was assigned to that city vehicle assaulted on V.S. shortly thereafter . Vol. 1, P-8; R. E. 5.[13]

Certainly, there is no argument with the fact that this incident occurred within the authorized time and space limits of the tasks assigned to Staples and crew, and that compactness itself strongly suggests that the conduct was within the course and scope of employment. For sure, it makes overcoming the rebuttable presumption even more difficult for the City. Staples' job was to drive the knuckle boom truck, deliver Fray and Morgan to the area where trash was to be picked up and supervise them. But for the job, Staples, Fray and Morgan would not have even been on Fulton Street at the hour of the rape. *See, e.g., Partridge v. Harvey*, 805 So.2d, 668 (Miss. Ct. App. 2002) (court found that it was jury question regarding scope and course where rental agency employees broke into customer's home to repossess property. Defendant would not have had access to home but for rental agency's business). Staples, Fray and Morgan were to pick up trash. In addition, Staples' obligation was "to make sure that the inmates remained under visual contact at all times and that they did not have contact with the public." Vol. 2, T. 159; R. E. 12. He was there to make sure that Fray and Morgan performed their job. His job was to supervise them; to keep an eye on them. He, however, admitted that he could not "watch them and do the work too." Vol. 1, P-9; R.

[13] All testimony and evidence indicated that the assault happened within an hour of Staples leaving the Barn with the crew. For example, Det. Lt. Andrews says that he was dispatched to the City Barn at around 8:00 a.m. Vol. 1, P-8; R. E. 5. A second officer, Chad Hobson, indicates that the incident occurred at 8:03 - 8:07 a.m. Vol. 1, P-16; R. E. 5. Another police report says that the approximate time of the offense was 7:15 a.m. to 8:00 a.m. There was absolutely no testimony to suggest that Staples and his crew were doing anything other than the business of the City.

E. 5.[14]

The City confuses the wrongful acts of Fray and the wrongful act of Staples. The City's negligence, in part, is premised on Staples' failure to watch and supervise the inmates and for failing to take steps to prevent Fray from committing his acts. Vol. 2, T. 158; R. E. 12. The trial court found that "Staples was not doing his job." *Id.* at 160; R.E.12. In particular, he was in the employment environment under circumstances requiring that he positively supervise the inmates in his charge, consistent with MDOC guidelines, to protect the public." Vol. 2, T. 160; R. E. 12. Staples did not go on a mission of his own thereby abandoning his employment as the City suggests. He was simply negligent. Though he was not employed to be negligent, this does not mean that his failure to supervise and his failure to watch Fray pushed him outside the scope and course of his employment. *Singley*, 844 So.2d at 453 (¶ 19), *citing, Horton*, 44 So.2d at 399.

Albeit, the City cites cases to support its contention that Staples departed from his duties so significantly that he acted outside the scope of his employment, but those cases are distinguishable. In each case the court determined that the employee's conduct was outside the scope and course because the plaintiff had engaged in wholesale intentional misconduct. For example, in *Patton v. Southern State Trasp., Inc.*, 932 F.Supp. 795, 798 (S.D. Miss.), *aff'd* 136 F.3d 1328 (5th Cir. 1996), the employee intentionally assaulted the plaintiff and the employer never authorized or ratified plaintiff's conduct. Similarly, in *Thatcher v. Brennan*, 657 F.Supp. 6, 8 (S.D. Miss. 1986), the employee instigated an altercation without provocation and engaged in a fight with the plaintiff - and nothing about the altercation promoted the interests of the employer. And, in *May v. VFW Post No.*

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[14]In other words, Staples admits that he was negligent. The City is held responsible for his omission.

2539, 577 So.2d 372, 377 (Miss. 1991), the Supreme Court held that an **off-duty** employee's fist fight with an old adversary did not further the employer's business; therefore employer could not be held responsible especially since employer was not negligent in the first instance.

Certainly, the City has not demonstrated that the trial court's findings are so contrary to the overwhelming weight of the evidence that it is unconscionable for this Court to have reached such a conclusion. The rebuttable presumption that he was acting within the course and scope benefits the employee. For example, an employee can not be held individually liable for torts committed when they are on the job of a governmental entity. Moreover, under the MTCA, "the only conduct to be considered outside of the 'course and scope of employment' is 'fraud, malice, libel, slander, defamation or any criminal offense other that traffic violations.'" *Dean v. Walker*, 2009 WL 4855985, at *11 (S.D. Miss. 2990), *quoting,* Miss. Code Ann. § 11-46-5(2). As explained by another federal court, interpreting Mississippi law: "A rebuttable presumption applies that '**any act or omission of an employee within the time and at the place of his employment is within the course and scope of his employment.**'" *Fisher v. Talton*, 2007 WL 853441, *3 (S.D. Miss. 2007)(emphasis added). That presumption is overcome where there is evidence that the employee's conduct constituted fraud, malice, libel, slander, defamation or any criminal offense. *Id.* There has been no evidence presented by the City that Staples' conduct constituted fraud, malice, slander or defamation. Certainly, the City has not demonstrated that the trial court's findings are so contrary to the overwhelming weight of the evidence that it is unconscionable for this Court to have reached such a conclusion.[15]

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[15] Interestingly, the City cites *Quadrozzi v. Norcem, Inc.*, 125 A. D. 2d 559, 509 N.Y.S. 2d 835 (App. Div.2d Dep't 1986). That Court held that "[b]ecause the determination of whether a particular act was within the scope of servant's employment is so heavily dependent on factual

b. Staples was not engaged in criminal conduct.

Like it's argument that Staples was acting outside the scope and course of his employment, the City' argument that Staples' conduct constituted a criminal offense was neither raised in its Separate Answer and Defenses of the City of Greenwood, *see*, Vol. 1, T. 23-31; R. E. 2, nor the Pre Trial Order. *Id.* at 60-68; R. E. 3. In fact, in the Pre-Trial Order the City merely turned its focus on V. S. asserting as follows:

> Ms. Streeter willingly participated in the sexual activity that took place on the morning of June 28, 2002. There is no evidence of the use of coercion or force. While Ms. Streeter lacks mental capacity to legally consent, she consented to the sexual activity in the sense that she was a willing participant. Mentally retarded individuals have normal sexual desires and often lack the inhibitions that non-handicapped people learn during sexual development. Consensual sexual activity between individuals, is not a traumatic event that lead to post-traumatic stress disorder. Ms Streeter does not suffer from post-traumatic stress disorder or any other emotional trauma as a result of the sexual activity that occurred on the morning of June 28, 2002.

Vol. 1, T. 62-63; R. E. 3.

It is apparent that the City's strategy was to prove that V.S. consented to have sex with Fray; thus there was no rape, no assault, and no sexual battery, and consequently, no liability rests with the City. Raising the issue for the first time during its Motion for Directed Verdict is too late. See *supra*, at 17-20.

Assuming it has not waived the argument, however, this Court should reject it. The City relies on two provisions of the MTCA, see, Miss. Code Ann. §§ 11-46 (5)(2) and 11-46-7(2), which preclude actions against a governmental entity where the employee engages in criminal conduct.

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considerations, the question is ordinary one fo the jury." That same principle applies to this case. The trial court, sitting as the jury, heard the disputed facts and concluded that Staples was acting within the course and scope of his employment.

With respect to whether Staples was engaged in criminal conduct, the trial court made these specific findings, all of which are supported by the evidence:

> Staples did not sexually assault [V.S.]. There also was no common plan or scheme between Staples and Fray and/or Morgan to sexually assault V. S. There was no evidence that Staples knew or had sufficient contact with [V.S.] to realize that she was mentally challenged. The police department identified Fray as the only suspect. Morgan and Staples were identified as witnesses. None of the investigations conducted by the Greenwood Police Department, the City of Greenwood, and/or the MDOC resulted in charges being brought against Staples. . .

Vol. 2, T. 159-60; R. E. 12. There is absolutely no evidence that Staples committed a crime. As the trial court noted, Staples was not charged or indicted even though Fray was. In fact, Morgan was not charged either; just Fray. Deborah Holland identified the criminal, and the State arrested the criminal. The State indicted the criminal. The criminal plead guilty to the crime charged, and the criminal was sentenced. No one else was charged with the crime because no one else committed a crime. Moreover, prior to the trial, even the City acknowledged that Staples simply had not done his job - not that he engaged in criminal activity. See Vol. 1, T. 90-91; R. E. 9. ("He was suspended because he was not doing his job . . . His supervision of the inmates was not proper . . . he was not doing his job by supervising inmates.")

The City relies on three cases to support its contention that Staples was engaged in criminal conduct thereby acting outside the course and scope of his employment. Each case, however, is clearly distinguishable and does not compare with Staples' negligent behavior. In *L.T. ex rel. Hollins v. City of Jackson*, 145 F.Supp.2d 750, 757 (S.D. Miss. 2000), for example, the employee police officer engaged in sexual activity with a young lady after he caught her preparing to engage in sex with her boyfriend. Out of fear that the she might be arrested or that the officer might tell her parents, the girl offered to do "anything" to keep him from telling her parents. The officer demanded

sex which was tantamount to sexual battery- - a crime. *See also, Cockrell v. Pearl River Valley Water Supply Dist.*, 865 So.2d 357 (Miss. 2004)(officer not engaged in course and scope of employment where he assaulted arrestee by kissing, grabbing, and inappropriately touched the hair of an arrestee; thereby committing crime of battery); *Accord. Tichenor v. Roman Catholic Church of the Archdiocese of New Orleans*, 32 F.3d 953 (5th Cir. 1994)(Catholic priest not engaged in course and scope of employment where he engaged in sexual relations with children). In *Kirk v. Crump*, 886 So.2d 741, 746 (¶¶ 25-26) (Miss. 2004), also relied upon by the City, the Court found that the deputy who was acting as agent of casino actually committed criminal assault by grabbing plaintiff and throwing him to the ground. And, in *McCoy v. City of Florence*, 949 So.2d 69, 83-84 (Miss. Ct. App 2006), there were affidavits that the victim had been engaged in criminal conduct.[16] The trial court's finding that Staples was acting within the course and scope of his employment - ergo he was not engaged in criminal activity - should not be disturbed.

Furthermore, this case is not about the active, intentional criminal conduct of Staples. It is about his failure to do his job. As the trial court determined, "There was no evidence that Staples was engaged in criminal conduct." Vol. 2, T. 159; R. E. 12. Staples did not sexually assault V.S. He was never identified as a suspect, and, in fact, he was always considered only a witness - not a

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[16] Actually, the *McCoy* case is not squarely on point for the proposition urged by the City, but it provides some insight into the City's burden of actually proving Staples' *alleged* criminal conduct. There, the Court was called to determine whether the plaintiff was barred from bringing an action **due to his own criminal conduct**. The MTCA is drafted to ensure that if the victim is engaged in an illegal activity that is a cause of the harm, the government is immune from liability. *Miss. Dept. of Public Safety v. Dunn*, 861 So.2d 990, 999 (Miss. 2003). *See also City of Jackson v. Perry*, 764 So.2d 373, 379 (Miss. 2000). In that context, the courts have held that allegations of criminal conduct alone will not suffice, however. *Thomas v. Prevou*, 2008 WL 111293, *10 (S. D. Miss. 2008). In this instance too, the City has to at least show by a preponderance of evidence that Staples was engaged in criminal conduct. The City has not overcome the presumption that he was acting within the course and scope of his employment.

criminal. *Id.* at 160. Equally important is that the City always contended that Staples was not fired for committing a crime but for failing to supervise the inmates while on the job. Vol. 1, T. 160 ; R. E. 12. *See also*, Supplemental Vol. 2, T. 300; R. E. 12 (Staples was suspended because he wasn't doing his job; his supervision of the inmates was not proper; inmates were not being supervised); Supplemental Vol. 3, T. 319, 322, 324-25; R. E. 4.

The City has not rebutted the presumption that Staples was acting within the course and scope of his employment. To the extent the City contends that Plaintiff's claims are barred because a criminal offense occurred, it is the City's burden to actually prove that a crime in fact occurred. The fact that the police department thoroughly investigated this matter; that separate investigations were conducted by the City of Greenwood and the Mississippi Department of Corrections; and that the grand jury returned but a single indictment against one individual, Marvin Fray, completely supports this Court's view that Staples' actions "did not rise to the level of violations of an Mississippi criminal statute." *Id.* It is the City's burden to prove that an alleged crime occurred, and the City has not met its burden.

c. There was no conspiracy or aiding and abetting.

Reaching for something, the City suggests that Staples may have committed conspiracy or the crime of aiding and abetting. See, Brief of Appellant at 31-33. Mere hinting that some crime *may* have occurred is not enough. Even so, the City has not proven conspiracy. In order to prove conspiracy the City had to show that Staples had an agreement with Fray and/or Morgan "to accomplish an unlawful purpose or to accomplish a lawful purpose unlawfully." *Brown v. State*, 796 So.2d 223, 225 (Miss. 2001). *See also*, Miss. Code Ann. § 97-1-1. "For there to be a conspiracy, there must be a recognition on the part of the conspirators that they are entering into a common plan

and knowingly intend to further its common purposes." *Quinn v. State*, 873 So.2d 1033, 1036 (Miss. Ct. App. 2003). *See also*, *McDougle v. State*, 721 So.2d 660, 662 (Miss. Ct. App. 1998) (parties to conspiracy must understand that they are entering into a common plan and knowingly intend to further its common purpose). The City did not prove conspiracy and the trial court so found. Vol. 2, T. 160; R. E.12.

Similarly, the City has not demonstrated that Staples is guilty of aiding and abetting. In *Hollins v. State*, 799 So.2d 118 (Miss. Ct.App. 2001), the court defined an aider or abettor as one who is present at the commission of the crime, and aids, counsels or encourages another in the commission of that offense. *Id.* at 123, *citing, Hoops v. State*, 681 So.2d 521, 523 (Miss. 1996). However, "[b]efore any defendant may be held criminally responsible for the acts of others, it is necessary that the accused **deliberately associate himself** in some way **with the crime** and **participate** in it **with the intent** to bring about the crime." *White v. State*, 919 So.2d 1029, 13033 (Miss.App. July 19, 2005)(approving jury instruction with this qualifying language to the definition of aiding and abetting)(emphasis added). Furthermore, "**mere presence at the scene of a crime and knowledge that the crime is being committed, are not sufficient to establish that a defendant either directed or aided and abetted the crime.**" *Id.*(emphasis added). Alleging or suggesting is not enough. There still must be proof beyond reasonable doubt that Staples was a participant and not merely a knowing spectator. *Id.*

There is no evidence that Staples **participated** in the sexual assault of V. S.. Where the Court has found a person guilty of "aiding and abetting" defendants have actively participated and assisted in the crime. *See, e.g., Hollins*, 799 So.2d at 123 (defendant was present at illegal sale, **assisted** in the sale, he **gave** the drugs to another so that the sale could occur and he **shared** in the

profits)(emphasis added); *White, supra* (defendant **participated** in robbery and there was testimony that **defendant actually used gun to rob victim**); *Young v. State*, 908 So.2d 819, 528-27 (Miss. App.) (Defendant convicted of accessory after-the-fact where, among other things, plaintiff knew that son was a felon, that officers were searching for him, that she **refused to answer her door after deputies knocked and announced**, and the mother knew the son was seeking to avoid justice). In the case *sub judice*, the only testimony is that Staples failed to do his job by not paying attention to the inmates. When Holland fled to the barn to report the incident, Herring called all trucks into the barn. Like every other driver, Staples responded to the radio call by reporting immediately with his two inmates. There is no evidence that Staples committed a crime.

Staples was acting within the course and scope of employment. His negligence caused injury to V.S., and the City therefore, is liable.

II. The Award of Damages was Based Upon Substantial Evidence and Supported by the Record.

The City next attacks the award of damages by arguing that the amount of the award is excessive. See, Brief of Appellant, at 34. The City questions the award in spite of the trial Court's awarding these damages to V.S. "for her emotional distress, humiliation, embarrassment, pain and suffering, mental anguish, mental past pain and suffering, present pain and suffering and future pain and suffering." Vol. 2, T. 164; R.E. Said damages, the court noted,

> include post-traumatic stress disorder, which was manifested itself through nightmares, embarrassment and humiliation, disorientation, overwhelming guilt, significant adverse effects in her bladder and bowel control, substantial decrease or loss of the will to or interest in progressing in her life skills training and other forms of emotion and psychological damages as testified by Plaintiff's Expert Dr. Wood Hiatt, a Psychiatrist who is board certified in Child and Adolescent Psychiatry, and [V.S.'s] care givers. The Court further finds that said injuries persist since June 28, 2002 and are likely to continue in the future.

Id. at 163.

The trial court's findings are completely supported by the record and the damage award is completely appropriate. Those findings should not be disturbed by this Court. *Estate v. Jones v. Phillip ex. rel. Phillips*, 992 So.2d 1131, 1150 (Miss. 2008). The trial court heard and considered the extensive testimony provided by V.S.'s family members and the testimony of her expert, Dr. Wood Hiatt - direct examination, through cross examination and on re-direct. Likewise the Court also had the opportunity to evaluate the testimony of the City's expert, the only witness called by the City.

Even a cursory review of the basic facts suggests that substantial damages are appropriate. In this case, we have a vaginal rape and oral sodomy of a mentally defective woman, who has the mental capacity of a child; a diagnosis from a psychiatrist who testifies that the individual suffers from PTSD; that the PTSD manifests itself in various ways including significant adverse effects in her bladder and bowel control a substantial decrease and loss of will to or interest in progressing her life skills.[17]

A. V.S. Sustained Serious and Permanent Damages.

A more thorough review of the record reveals substantial evidence of why the award is appropriate. First and foremost the Court must reject the City's assertion that V.S. consented to sex

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[17] In *Morris Newspaper Corp. v. Allen*, 932 So.2d 810, 819-20 (Miss.App. 2006), the Court of Appeals affirmed a jury award of more than $200,000 for emotional distress damages resulting from a breach of contract where there was no doctor or expert testimony. There the plaintiff was "disheartened," "stressed," "depressed," had "difficulty sleeping," and "felt embarrassed." In this case, we have something far more egregious than a breach of contract. We have a rape! A rape which was confirmed by medical evidence and a guilty plea. Moreover, there was considerable testimony concerning the effect the rape had on the victim. This testimony came from her primary caretaker, her family members and that testimony was supported by expert testimony.

with Fray. She could not. It is a fact that Marvin Fray assaulted, attacked, raped and sodomized V.S.. There was evidence of vaginal penetration as well as forced sodomy, and she resisted his attempts. Vol. 5, T. 343; R.E. 4.

Hiatt evaluated V.S. and Westbrook, her sister and primary caretaker, on three occasions since the rape. He also reviewed V. S.'s medical records from her various providers and documents from the Greenwood Police Department concerning the investigation of the rape. The documents obtained from the police department included incident reports, transcripts of the interviews of witnesses, laboratory reports, DNA documents, emergency room records and V.S.'s psychiatric records from Life Help Facility which include records consisting of V.S.'s psychiatric care, group therapy and laboratory work. Dr. Hiatt also reviewed V.S.'s records concerning her evaluations conducted by Hudspeth Regional Center for the assessment of her intellectual abilities and social functioning. Dr. Hiatt also reviewed V. S.'s deposition testimony and that of her brother, sisters and nephews. He also had the opportunity to review the expert report of Dr. Reisman, defendant's expert. Dr. Hiatt finally had the opportunity to attend most of the trial, which gave him an opportunity to consider the testimony provided there. *See generally*, Vol 5, T. 198-222; R.E. 4.

According to Dr. Hiatt the rape was traumatic and has had a traumatic impact upon V.S. *Id.* at 207-08. V. S. suffers from dreams and nightmares. *Id.* at 209. V.S. suffers from depression and feels guilty , embarrassed and humiliated about what happened to her. *Id.* at 213-14, 227. And, her self esteem is impaired. *Id.* at 228. Dr. Reisman agrees with this finding. Although there was evidence that V.S. wet the bed from time to time at night, it is clear from the testimony that the frequency in which V.S. urinates in her clothing or in bed at night and day has increased since the rape. In fact, she not only urinates on herself, she suffers from Encopresis, marked by bowel

movements in her clothing or in her bed as often as once every week. In general her bladder and bowel control were affected. She is embarrassed and humiliated and she resents the limits that her caretakers have placed upon her for her own safety. The incident has caused her to gain weight and she now suffers from high blood pressure. These severe changes in her body rhythms("disorganization") clearly are due to the rape according to Hiatt. *Id.* at 223-228.

The disorganization in V.S. is demonstrated through her loss of bodily functions. The testimony revealed that V.S.'s toilet training was fairly secure. She wet the bed at night occasionally. Since the rape she is lost control of major bodily functions - - bladder control, bowel control, sleep. Her siblings and nephew testified that V.S. was once talkative with them, but now she is withdrawn and only talks to young children. With the adults she used to talk about the activities in which she was engaged a Life Help. Those conversations do not occur anymore.

According to Hiatt, V. S. was attempting to utilize the skills she had been learning at Life Help, but now she is not trying to learn anything more. In the words of her primary caretaker, V.S. is going backwards. *Id.* at 182. V.S. does not care about her appearance. The descriptions provided by those who see V.S. every day, and who live in the home with her are symptoms of depression. V.S. even exhibited some signs of depression when she cried during one of Hiatt's examination.

Even pursuing justice, V.S. had to be subjected to trauma. According to Hiatt, V.S. went through several traumatic experiences and there have been a number of reminders of the rape. He describes some of these things. For example, the rape itself was traumatic. There was evidence of a struggle between V.S. and Fray. She resisted the removal of her panties, and she pushed him away when he tried to "put his thing" in her mouth. Holland's act of running out of the house screaming and hollering and attempts to stop the assault added trauma. After the assault she went to the city

barn where they identified Fray. She was then taken to the hospital where she had to undergo a rape kit examination, an invasive procedure during which V.S. had to be comforted. V.S. was then questioned on three different occasions by the police officers. She had to undergo evaluations by Dr. Hiatt. She had to meet with her lawyers and her deposition was taken. The fact that she had to sit through a two-day trial has added to the trauma she experiences. The fact that she is unable to understand the events does not lessen the trauma she experienced. See, *id* at 229-31.

The rape has affected V.S. relationship between her and her siblings and other family members. As the primary caretaker for V.S., Patricia has taken steps to make sure that she is always under constant supervision. For example, Patricia will not allow V. S. to spend the night at Holland's house as she once did. V.S. resists the restrictions. It is unquestionable that V. S. suffered significant emotional psychological damage as a consequence of the rape.

It is clear and unrefuted that the City had a responsibility to make sure that its citizens were protected from the criminals who worked for city. In fact, special care and attention was required. Fray and Morgan were under the care and supervision of Staples. Because of Staples' inattentiveness and lack of due care, Fray was able to attack, assault, rape and sodomize V.S. The City had a duty to protect V.S. and every other citizen from attacks by the criminals in its charge. Fray was in the City's custody, care and control.

The omissions by Staples were outrageous. The sexual assault, rape and sodomy were outrageous and damages for mental and emotional distress and humiliation are foreseeable. The record is replete with evidence of how these events have affected V. S.[18] Damages for the mental

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[18]As noted by one court:
Compensatory damages recoverable for sexual assault, battery and intentional infliction of mental distress include compensation for the injury itself, conscious

anguish are appropriate. As explained by our supreme court in *Gamble v. Dollar General Corp.*:

> [R]ecovery for mental anguish can be appropriate under certain circumstances when the defendant's conduct evokes outrage or revulsion . . . Furthermore, expert testimony showing actual harm or proof of physical or mental injury is not always required. Where there are claims involving only sleeplessness, mental anguish, and humiliation , compensatory damages can be awarded based 'on the nature of the incident from which the damages flow.' . . . In cases in which there is evidence of willful, wanton, malicious, outrageous or intentional wrongs, and where mental or emotional distress is a foreseeable result of the conduct of the defendant, a court can assess damages for mental and emotional distress . . . 'If there is outrageous conduct, no injury is required for the recovery of infliction of emotional distress or mental anguish.' . . . The plaintiff does not have to present further proof of injury. The nature of the act itself, rather than the seriousness of the consequences, can justify an award for compensatory damages.

852 So.2d 5, 11 (Miss.2003). *See also Jordan v. McKenna*, 573 So.2d 1371, 1378 (Miss. 1990)(person who is assaulted is entitled to recover damages for all of her pecuniary losses and physical injuries as well the mental and emotional trauma proximately caused thereby). In *Jordan*, the supreme court affirmed a jury verdict award in the amount of $380,000 in compensatory damages and $50,000 in punitive damages to the victim of a rape. In that case the plaintiff was twenty one years old and there was no evidence that she suffered from any mental disability and there was no testimony that the victim had been sodomized. In assessing the damage award this Court explained:

> The measure of such damages in a case like this is particularly difficult because there is no way we can, with precision, identify a monetary equivalent for the value of the mental pain, suffering, humiliation, and stress [the victim] has experienced. What is important is that we not forget that, even more so that in a case of malicious prosecution
>
> The very nature of the tort is such that, when committed, it will inflict mental

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> pain and suffering including mental and emotional anxiety which can be based on the plaintiff's subjective testimony plus special damages which need not be pleaded.

Deborah S. v. Diorio, 153 Misc.2d 708, 583 N.Y.S.2d 872, 878 (1992).

> anguish and emotional distress upon the Plaintiff. This is one of the major elements of injury or loss . . . the victim . . . will suffer and for which she will be entitled to redress.

Jordan, 573 So.2d at 1378, *quoting Royal Oil Co. v. Wells*, 500 So.2d 439, 448 (Miss. 1986). The sexual assault, the rape and the sodomy occurred because Staples, an employee of the City of Greenwood tasked with responsibility of supervising the criminals, was not doing his job. The City, therefore, is liable. The damages to be assessed is primarily in the province of the trial judge, when sitting as a jury. "[T]he award will normally not be set aside unless so unreasonable in amount as to strike mankind at first blush as being beyond all measure, unreasonable in amount and outrageous." *Phillips, supra,* 992 So.2d at 1150.

The award of damages is fully supported by the record, and is appropriate. See, *Jordan,* 573 So.2d at 1378; *USM v. Williams*, 891 So.2d 160 (Miss. 2004); and *Whitten v. Cox*, 799 So.2d 1 (Miss. 2000). There is nothing here which suggests the award is outrageous. The verdict should stand. This is a case, but for the fact that the City is a governmental entity, which begs for an award of punitive damages.

CONCLUSION

This Court must affirm the judgment against the City of Greenwood and assess all costs against the Appellee and further grant any and such other relief to which V.S. may be entitled whether in law or in equity.

Respectfully submitted,

V. S., by and through Her Next Friend,
PATRICIA WESTBROOK

BY: _____
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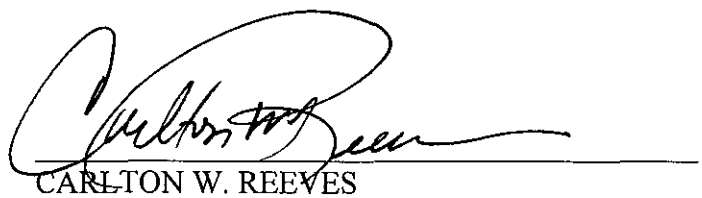
CERTIFICATE OF SERVICE

I, Carlton W. Reeves, do hereby certify that I have this day caused to be served, via U. S. mail, postage prepaid, a copy of the foregoing document to:

Honorable Margaret Carey-McCray
Leflore County Circuit Judge
P. O. Box 1775
Greenville, MS 38702-1775

Mitchell O. Driskell, Esquire
Wilton W. Byars, III, Esquire
DANIEL COKER HORTON & BELL
P. O. Box 1396
Oxford, MS 38655

Ths the7th day of April, 2010



CARLTON W. REEVES