2009-CA-00024 Rt

CERTIFICATE OF SERVICE

I, Mitchell O. Driskell, III, of counsel for the Appellant, the City of Greenwood, Mississippi, pursuant to Rule 25 of the Mississippi Rules of Appellate Procedure, do hereby certify that I have this day mailed, by first class mail, postage prepaid, the original and three (3) copies of the above Reply Brief of the City of Greenwood, Mississippi, Appellant, to the Clerk of the Mississippi Supreme Court. I further certify that I have mailed a true and correct copy of same to the following:

Honorable Margaret Carey-McCray
Circuit Court Judge
Post Office Box 1775
Greenville, Mississippi 38702-1775

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THIS, the 26th day of May, 2010.

MITCHELL O. DRISKELL, III

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A. The Material Facts Are Not In Dispute.

As for the actions of Glenn Staples that control the liability determination, there is no dispute as to the operative facts, and neither party challenges the trial court's finding that Staples returned to Fulton Street for the sole purpose of allowing the inmates to proposition V.S. and that Staples witnessed the sexual assault and did nothing to stop it. (R. 156-57; R.E. 10-11).[1]

While the actual facts are not in dispute, Appellee attempts to ignore her own pleadings and trial evidence and urges this court to interpret these facts as a situation involving inattention, as opposed to blatant, intentional conduct. On appeal, Appellee attempts to magically transform this case into one of negligence. Staples was not inattentive and merely negligent. This is not a matter of not keeping an eye on an inmate; rather, this is a matter of active participation in criminal conduct wholly unrelated to the business purposes of the Appellant.

Regarding damages, it is undisputed that the medical records clearly indicate no emotional trauma or physical manifestations of trauma. It is undisputed that the evidence does not show any medical treatment, past, present or future, for emotional trauma. It is undisputed that plaintiff did not attempt to introduce, and did not prove, any special damages. The only issue of any disagreement is whether or not the trial court ignored these matters when it awarded $500,000.00 for emotional trauma based solely on the testimony of a paid expert who failed to consider the medical evidence and failed to follow the approved diagnostic criteria.

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[1] Additionally, Appellee does not contest the fact that no evidence of any direct negligence on the part of Appellant was presented at trial nor that the trial court erred in failing to expressly deny those claims.

B. The Trial Court's Judgment is Subject to De Novo Review.

Appellee does not contest that the appropriate standard of review for the trial court's conclusions of law is de novo.[2]

Appellee correctly argues that, ordinarily, a trial judge's findings of fact are afforded deferential treatment and will not be reversed on appeal where they are supported by "substantial, credible and reasonable evidence." *Phillips v. Mississippi Dept. of Pub. Safety*, 978 So.2d 656, 660 (Miss. 2000). However, the present matter is not an ordinary situation. The trial court's ruling was made thirteen months after the conclusion of trial and after the trial court reviewed the printed record. While it is true the trial court was fully engaged and attentive at trial, there can be no argument but that the substantial passage of time and reliance on the record undermines the reliability that justifies the ordinary deferential treatment afforded. Appellant is not suggesting that the trial court be put in error for this reason, only that this Court apply the heightened standard of review and weigh the evidence without deference to the trial court's findings of fact which were made long after the smoke of the battle had cleared.[3]

Appellee misunderstands Appellant's position with regard to the trial court's adoption of Appellee's Proposed Finding of Facts and Conclusion of Law with regard to damages. Appellant is not suggesting that this verbatim adoption results in heightened review of all findings of fact, only

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[2] This Court reviews questions of law de novo, including the proper application of the Mississippi Tort Claims Act ("MTCA"), Mississippi Code Annotated sections 11-46-1, et seq. The question as to whether an employee was acting within the scope of his employment at the time of the accident is a question of law for the court which will be reviewed de novo. *Prairie Livestock Co. v. Chandler,* 325 So. 2d 908, 909 (Miss. 1976); *Singley v. Smith*, 739 So. 2d 448, 450 (Miss.Ct.App. 1999).

[3] Appellee's defense of the trial court in her brief is unnecessary as Appellant has not attacked the actions of the trial court. Appellant merely asks this court to review the findings of fact de novo because all human recollection, including that of the busy trial court, necessarily fades. In this case, the trial court's actions confirm that its memory faded as well, requiring a review of the record, during the thirteen months between trial and the ruling.

the findings of fact on damages, the issue on which the verbatim adoption indicates that the trial court did not make its own findings.

De novo review of findings of fact is appropriate when the trial court makes only minor alterations to a party's proposed findings. *Smith v. Orman*, 822 So. 2d 975, 977-78 (Miss.Ct.App. 2002). This Court should review the award of damages with greater care because the verbatim adoption of Appellees proposed findings on damages indicates that the trial court's award of damages does not possess the reliability justifying deferential treatment. See *Mississippi Dept. of Transp. v. Johnson*, 873 So. 2d 108, 111 (Miss. 2004) (where the trial court fails to make its own findings of fact and conclusions of law, this Court will review the record **de novo**).

C. The Trial Court Did Not Abuse It's Discretion in Holding that Course and Scope of Employment Was Effectively Asserted and Not Waived.

Appellant raised course and scope of employment in its Answer, conducted discovery on that issue and presented evidence at trial on that issue. Appellee's attempt to avoid the application of the MTCA's course and scope of employment requirement must be rejected by this court.

The trial court determined that the issue of course and scope was effectively asserted and not waived by Appellant during discovery. This court examines a trial court's decision as to waiver of an issue on an abuse of discretion standard. *Jones v. Fluor Daniel Services*, 2008-CA-00456-SCT (Feb. 18, 2010) (P.17) (*reh'g denied* April 29, 2010). The trial court did not abuse its discretion in holding that course and scope of employment was preserved.

Course and scope of employment was raised in Appellant's answer. In Appellant's Separate Answer and Defenses, Appellant raised its Second Defense as follows:

> The City of Greenwood invokes the provisions of Miss. Code Ann. § 11-46-1, *et seq.*, commonly referred to as the Mississippi Tort Claims Act, and **all of the privileges, defenses and immunities** afforded it therein.

(R. 23; R.E. 49) (emphasis added). Appellee knew that her claims were governed by the MTCA. She sent Appellant a Notice of Claim pursuant to the MTCA. (R. 350-51; R.E. 72-73) The Complaint states that the action is brought pursuant to the MTCA. (R. 2; R.E. 41). In response to Appellee's allegations, Appellant raised all of the privileges, defenses and immunities of the MTCA. Under the MTCA, immunity is waived only for actions within the course and scope of his employment. § 11-46-5(1).[4] This limited waiver of immunity is explicitly provided by the MTCA, was known or should have been known by Appellee and was raised in Appellant's Answer and Defenses.

In *Stuart v. University of Mississippi Medical Center*, 21 So. 3d 652 (Miss.Ct.App. 2008), the Court of Appeals held that the governmental entity's second defense in which it "reserve[d] all rights and defenses accorded to it pursuant to Miss. Code Ann. § 11-46-1 et. seq., including but not limited to bar of limitations . . ." was sufficient to effectively plead the MTCA's prohibition of filing suit until 90-days after the Notice of Claim is served. (*Id.* at 655). This Court reversed *Stuart* on other grounds. In so doing, the Court assumed that the 90-day tolling period was effectively plead. *Stuart v. University of Mississippi Medical Center*, 21 So. 3d 544, 547 (Miss. 2009). As in *Stuart*, Appellant effective plead the course and scope requirement in its Answer.

Where claims are not stated clearly, defenses will not be found to be waived. *Jones v. Fluor Daniel Services*, 2008-CA-00456-SCT (Feb. 18, 2010) (P.17) (*reh'g denied* April 29, 2010). Appellee's Complaint does not contain a single allegation that Glenn Staples was acting within the course and scope of his employment at the time of the wrongful conduct. (R. 1-9; R.E. 40-48). If such an allegation had been made in the Complaint, it clearly would have been denied by Appellant.

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[4] Despite the fact that course and scope of employment is a required element of Appellee's claim, it was not alleged in the Complaint.

Appellant is not required to respond to allegations which are not asserted in the Complaint. M.R.C.P. 8(b) ("Denials shall fairly meet the substance of the averments denied"). If Appellee desired a specific response to the "course and scope" issue, Appellee should have been more specific in its allegations. Appellee cannot now claim that Appellant waived course and scope when it was she who failed to even make that allegation.

Appellee states that "the City never even denied that Staples was acting within the course and scope of employment" without pointing out that course and scope was never alleged. (Brief, p. 19). Regardless, all allegations that could be arguably characterized as course and scope allegations were denied. In the second sentence of paragraph 9 of the Complaint, Appellee alleges that "During the morning hours of June 28, 2002, while collecting trash for the City of Greenwood, Marvin Fray assaulted, attacked, sodomized and raped V.S." (R. 3; R.E. 42). Appellant denied this allegation partially because Fray and Staples were not "collecting trash for the City of Greenwood" when the encounter occurred and were therefore outside the course and scope of employment.[5] (R. 26; R.E. 52) In paragraph 26 of the Complaint, Appellee alleged "Fray, who was performing work for the City . . ." (R. 6; R.E. 45). The fact that Fray was performing work for the city was denied. (R. 28; R.E. 54). In paragraph 30 of the Complaint, Appellee alleges that Appellant breached its duties to the public through the actions of Staples. (R. 7; R.E. 46). This allegation was denied because Staples actions were outside of the course and scope of employment and the Appellant cannot be found to have breached any duties through those actions. (R. 29; R.E. 55).

Appellee points to several admissions and denials in the Answer which have no relevance to the issue of course and scope of employment. Appellant's admission that the public works

[5] M.R.C.P. 8(b) does not require a responding defendant to set forth the reasons for denials, only that the denials fairly meet the substance of the averments.

department was collecting trash on the day of the accident is not an admission that Glenn Staples was acting in the course and scope of employment at the time of the incident. The admission that Glenn Staples was responsible for supervising Marvin Fray is likewise not an admission on course and scope of employment at the time of the alleged wrongful conduct. Nothing contained in the Answer supports Appellee's argument that course and scope was admitted or not effectively asserted.

To the extent that Appellant was required to raise course and scope of employment in its Answer, it was effectively asserted. This issue of course and scope of employment, however, is an element of Appellee's case she was required to prove. Under the MTCA, governmental entities are immune from civil liability. Miss. Code Ann. §11-46-3(1). However, immunity is waived for "the torts of their employees while acting within the course and scope of their employment." §11-46-5(1). Therefore, immunity exists until and unless a plaintiff proves that the tort of the employee was within the course and scope of employment. This is an essential element of Appellee's case, and an element plaintiff must prove to fall within the limited waiver of immunity provided in 11-46-5(1).

Course and scope of employment is not a matter of avoidance for the Appellant. To the contrary, it is an element of Appellee's claim in order for her to establish that immunity is waived under §11-46-5(1).[6] This Court has held that MTCA affirmative defenses that would terminate the action can be waived by delay and active participation in a lawsuit. *Price v. Clark*, 21 So. 2d 509,

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[6] §11-46-5(1)'s requirement of course and scope of employment is not one of the enumerated affirmative defenses in Rule 8(c), and this requirement is not in the nature of those affirmative defenses. Course and scope of employment must be proven in order for plaintiff to succeed in overcoming the immunity established by §11-46-3(1). "If, in order to succeed in the litigation, the defendant depends upon the plaintiff failing to prove all or part of his claim, the matter is not an avoidance or affirmative defense." *Hertz Commercial Leasing Division v. Morrison*, 567 So. 2d 832, 835 (Miss. 1990).

524 (Miss. 2009). To the extent that course and scope is an affirmative defense as opposed to an element of Appellee's claim, it was not one that could be raised before trial to "terminate the action." Ordinarily, course and scope is a fact issue. However, Appellee put on uncontested proof that the conduct was outside of the course and scope of employment as a matter of law, and made the strategic, and fatal, decision to rest when her case was devoid of any evidence that Glenn Staples was acting within the course and scope of employment. After Appellee closed her case-in-chief, Appellant moved for dismissal on the issue of course and scope.[7] (T. 297; S.R.E. 22). Appellant appropriately and timely asserted course and scope throughout the entire course of litigation, and the trial court's conclusion that this issue was not waived was not an abuse of discretion.

Appellee argues that Appellant's assertion of alternative defenses constitutes waiver of course and scope of employment. Pleading in the alternative is allowed under Mississippi practice and does not constitute a waiver or admission of inconsistent claims or defenses. M.R.C.P. 8(c)(2) ("A party may also state as many separate claims or defenses as he has, regardless of consistency").

Appellee's argument that Appellee failed to assert course and scope of employment in discovery is not supported by the record and must therefore be rejected. In response to the waiver argument asserted in Appellee's Brief, Appellant moved to supplement the record to include discovery materials that would disprove Appellee's position. Appellee opposed this Motion, and

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[7] In response to Appellant's Rule 41(b) Motion for Involuntary Dismissal, Appellee did not claim that the issue of course and scope had been raised for the first time at trial. (T. 302-314; S.R.E. 24-36). Rather, she argued the substance of the Motion. (*Id.*). Had Appellee truly been unaware of and surprised by this issue, she would have brought it to the attention of the Court. When the Motion was renewed after the close of all evidence, Appellee again did not claim that course and scope had been raised for the first time at trial. (T. 352-372; S.R.E. 37-57). It was only after the closing of all evidence and a period of reflection that the Appellee asserted the waiver argument in post-trial submissions in an effort to avoid the dispositive impact of the trial testimony. (R. 330-32 (Vol. 2); S.R.E. 16-18). The trial court's denial of this post-trial argument was not an abuse of discretion.

the Motion was denied. The parties are left with a record that fails to document the extent to which course and scope was or was not the subject of discovery.

This court cannot consider matters not included in the record. *Page v. State of Mississippi*, 990 So. 2d 760, 762 (Miss. 2008). Appellee had the duty to see to it that the record contained support for its argument that the trial court's denial of the waiver argument was error. *Id.* A party attempting to put the trial court in error has the burden on appeal, and this Court will entertain no claims for which no supporting authority has been cited. *Kelly v. International Games Tech.*, 874 So. 2d 977, 981 (Miss. 2004). Appellee did not meet this burden, and her assignment of error must fail.

The Court's docket sheet shows that numerous depositions were taken, including the 30(b)(6) deposition of Appellant. (R.E. 1-6). Whether or not Staples was in the course and scope of employment was one of the subjects of these depositions. Certainly, Appellee had the opportunity to ask Appellant about its defenses and denials in the 30(b)(6) deposition. Her failure to do so during the 30(b)(6) deposition does not support her contention that course and scope of employment was waived during discovery. Moreover, a review of Appellee's written discovery to Appellant reveals that appellant did not ask for information related to defenses or denials. (R. 275-289 (Vol. 2); S.R.E. 1-15). There was not one written request asking Appellant for any information on its defenses or denials. Appellee's failure to request information does not support her claim that course and scope was not raised or was waived. The record supports the trial court's finding that Appellant raised course and scope in pleadings and during discovery, and does not support reversal of the trial court's holding on this issue as an abuse of discretion.

Having failed to show that course and scope was waived in the Answer and during discovery, Appellee looks to the last pre-trial pleading, the Pretrial Order, for support of her

argument that the trial court erred. The Pretrial Order contained the following categories of information:

1. Identification of Counsel;
2. The Procedural Posture of the Case;
3. A Concise Summary of the Facts;
4. Stipulated Facts;
5. Identification of Witnesses and Exhibits.

(R. 60-68; R.E. 59-67). There was no requirement for the Pre-trial Order to identify contested issues of law or fact, which is where the issue of course and scope of employment would have been properly identified. (*Id.*). In the absence of identification of contested issues, the issue of course and scope was not required to be identified in the Pretrial Order and there was no proper place to identify that issue. As with her Complaint, in Appellee's concise summary of the facts she never alleged that Staples was in the course and scope of his employment when he knowingly facilitated the sexual encounter. (R. 61-62; R.E. 60-61). The stipulated facts do not in any way stipulate that Staples nor the inmates were acting within the course and scope of employment when they went off their route to Fulton Street and the sexual encounter occurred. (R. 63; R.E. 62). The Pretrial Order is not evidence that the trial court abused its discretion in holding that the issue of course and scope of employment was not waived.

Under the MTCA, criminal acts are outside the course and scope of employment as a matter of law and are part of the course and scope analysis and a plaintiff's burden of proof to establish that the MTCA's immunity has been waived. Just as the larger issue of course and scope of employment was raised in the pleadings and discovery, Staple's criminal conduct was also raised. The trial court did not abuse its discretion in holding that the issue of course and scope of employment was effectively asserted in this matter. On this issue, the trial court should be affirmed.

D. The Issue of Course and Scope Was Tried By Consent Pursuant to Rule 15(b).

In the alternative, if this Court finds that the issue of course and scope was not effectively asserted and/or waived, the issue of whether or not Staples was within the course and scope of employment was tried by consent and shall be treated as if it was raised in the pleadings under M.R.C.P. 15(b).

"When issues not raised by the pleadings are tried by expressed or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." M.R.C.P. 15(b). The requirements of Rules 8(c) and 15(b) are harmonious in application, meaning, even if the issue tried by consent was an affirmative defense required to be pled under Rule 8(c), Rule 15(b) operates to amend the pleadings to include that defense. *Red Enters. Inc. v. Peashooter, Inc.*, 455 So. 2d 793, 795-96 (Miss. 1984). See also *Rankin v. Clements Cadillac, Inc.*, 905 So. 2d 710, 713 (Miss.Ct.App. 2004) (*rev'd on other grounds*, 903 So. 2d 749) (holding there is no prohibition of Rule 15(b) applying to affirmative defenses).

The failure to object to evidence offered by a party which is outside the scope of the pleadings constitutes "tried by consent" under Rule 15(b). *Lahmann v. Hallmon*, 722 So. 2d 614, 619 (Miss. 1994). Whether an issue is tried by consent depends on whether it is reasonable for the opposing side to recognize that the evidence not presented in the pleadings is being tried. *Southland Enterprises, Inc. v. Newton County*, 940 So. 2d 937, 941 (Miss.Ct.App. 2006). In the present matter, the issue of course and scope of employment was tried in plaintiff's case-in-chief and testimony was elicited that was relevant only to course and scope of employment. Appellee should have reasonably recognized that the issue of course and scope of employment was being tried. Moreover, Appellee was aware that the issue was being raised when Appellant moved for Rule 41(b) involuntary dismissal. Appellee did not object at any time. Therefore, the issue of course and scope of

employment was tried by consent under Rule 15(b), and the trial court's denial of plaintiff's asserted procedural bar of the issue should be affirmed.

Whether or not Staples and the inmates went to Fulton Street for the purpose of the sexual encounter or to pick up trash is relevant only to the issue of whether or not Staples was acting in the course and scope of employment. At trial, during cross-examination of plaintiff's first witness, Appellant asked whether or not Staples and the inmates were picking up trash at the time of the incident. (T. 27; R.E. 101). Appellee did not object. (*Id.*). During cross-examination of the next witness, Appellant again asked whether or not there was trash to be picked up on Fulton Street. (T. 43; R.E. 108). This same witness was asked if his investigation revealed that Fulton Street was off Staples' route, which he confirmed. (*Id.*). These questions relevant solely to the issue of course and scope of employment did not draw an objection. (*Id.*).

The third witness was also asked about matters relevant only to course and scope of employment. This witness testified that Staples and the inmates returned to Fulton Street solely for the purpose of having an encounter with V.S. (T. 90; S.R.E. 21). Again, Appellee did not object.

During the cross-examination of plaintiff's fourth witness, Bennie Herring of the Public Works Department, the following testimony was given:

> Q. When Glenn Staples took those inmates back over to Fulton street, was he doing any work for the City of Greenwood at that time?
>
> A. Not at that time, he was not.
>
> Q. Was anything that he was doing benefitting the City of Greenwood in any way?
>
> A. Not any way at all.
>
> Q. Was there any City related purpose that he should have been over there on Fulton Street?

A. No, sir.

Q. When Glenn Staples watched them have sexual relations, watched one of them have sexual relations with Ms. Streeter, was he doing anything to benefit the City of Greenwood?

A. He was not doing anything at all to benefit the City of Greenwood.

Q. Was there any City related purpose that he was accomplishing when he was doing that act?

A. No, sir, it was not.

Q. Was there any City related purpose or was Glenn Staples benefitting the City of Greenwood at all when he failed to stop and report what had happened?

A. That's correct.

Q. There was no purpose for the City of Greenwood?

A. No purpose whatsoever.

Q. And he was not doing his job?

A. No, sir, he was not doing his job.

Q. You testified, in response to counsel opposite, that I believe you said Mr. Staples was not doing his job at all; is that what you said?

A. That's correct.

Q. He wasn't doing anything about -- there was nothing about his job that he was doing that day, was there?

A. Not at all.

(T. 116-17; R.E. 129-30). These questions and evidence regarding the lack of benefit and the fact that there was no employment related purpose of the trip to Fulton Street are unquestionably relevant only to the issue of whether or not Staples was acting within the course and scope of his employment at the time of the alleged wrongful acts. Appellee did

not object, and, therefore, consented to trial of the course and scope issue pursuant to Rule 15(b).

Appellee knew or reasonably should have know that the issue of course and scope of employment was being tried. In fact, when the issue was the basis for a Rule 41(b) motion, Appellee did not express any surprise nor raise any procedural bar to that issue. (T302-314). At all times, Appellee knew that the MTCA applied to this matter and that immunity was not waived unless the acts were in the course and scope of employment. Miss. Code Ann. §11-46-5(1). Appellee knew that course and scope of employment was being tried, and, by failing to object during examination or otherwise (until post-trial submissions), the issue was tried by consent under Rule 15(b). Appellee was not surprised at the fact that course and scope was an issue; instead, she was surprisingly upset with the overwhelming and dispositive manner in which it was developed at trial. Strategy decisions in litigation require that one has to commit, one way or the other. Appellee chose not to plead course and scope, not to sue Glenn Staples, not to call Staples as a witness at trial and instead to focus on the undeniably despicable nature of the actions of Fray and for that matter Staples. Appellee was surprised only in how that proof backfired. The trial court's denial of Appellee's argument should be affirmed.

Yet another witness called by Appellee, Deborah Holland, testified during cross examination by Appellant that Fulton Street was not Staples' route. (T. 136; R.E. 137). She also testified that there was no trash to be picked up on Fulton Street. (*Id.*). Even the perpetrator, Marvin Fray, on Appellant's cross examination, testified that there was no trash to be picked up on Fulton Street. (T. 162; R.E. 146). Each and every witnesses who was called on the issue of liability was asked to provide and did provide course and scope

testimony without objection from Appellee. If this issue was not raised in the pleadings, it was tried by consent.

An example of a much more extreme situation than the present one occurred in *Callahan v. Ledbetter*, 992 So. 2d 1220 (Miss.Ct.App. 2008), where the defendant did not raise the affirmative defense of contributory negligence. *Callahan*, 992 So. 2d at 1224-1225. The defendant argued during a Rule 41(b) motion that the plaintiff was partially at fault for the accident. *Id.* at 1225. Plaintiff did not voice any objection. *Id.*. The Court of Appeals affirmed the trial court's holding that the issue was tried by consent under Rule 15(b). Herein, the testimony elicited by Appellant on course and scope could not be more clear. There was no subterfuge or hidden agenda. From the first witness to the last, it was clear that course and scope was being tried. Moreover, when the issue was raised by motion after plaintiff rested, Appellee still voiced no objection. This issue was tried by consent under Rule 15(b), and the trial court's denial of Appellee's argument that the issue was procedurally barred should be affirmed.

E. Staples Was Acting Outside of the Course and Scope of His Employment When His Reprehensible Actions Occurred.

The following statement from Appellee's Brief demonstrates the error of both the Appellee and the trial court in failing to consider the requirement that an employee's actions must be within the course and scope of employment in order for the employer to be vicariously liable for those acts:

> The sexual assault, the rape and the sodomy occurred because Staples, an employee of the City tasked with the responsibility of supervising the criminals, was not doing his job. The City, therefore is liable.

(Appellee's Brief, p. 36). The record and brief are replete with variations of this argument,[8] and the trial court's decision is an adoption of this argument.[9] With all due respect to Appellee and the trial court, this is not the law. The fact that Mr. Staples "was not doing his job" does not mean that Appellant "therefore is liable." This reasoning does not take into account the "course and scope of employment" requirement for waiver of immunity and vicarious liability under section 11-46-5(1). In order for Appellant to have waived immunity and be liable for those acts, Staples must have been acting within the course and scope of employment at the time of the alleged wrongful acts.

Under the MTCA, "an activity must be in furtherance of the employer's business to be within the scope and course of employment." *Cockrell v. Pearl River Valley Water Supply District,* 868 So. 2d 357, 361 (Miss. 2004). Mississippi law recognizes that an employee can cross a line while "not doing his job" and the employer will not be vicariously liable for those actions. Staples crossed that line, and his intentional actions are so clearly beyond the course and scope of his employment that they cannot form the basis for a claim of vicarious liability as a matter of law.[10]

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[8] "Staples was not doing his job." (Appellee's Brief, p. 20). "Staples did not do his job." (*Id.*). "Staples was not doing his job." (*Id.* at 21). "He was not doing his job." (R. 337 (Vol. 2); S.R.E. 19). "He was not doing his job." (T. 305; S.R.E. 29). "The fact, your honor, that Mr. Staples did not do his job is the negligent act." (T. 309; S.R.E. 31). "In this instance, Mr. Staples did not do his job." (T. 362; S.R.E. 47). Mr. Staples "did not perform what he has supposed to do." (T. 364; S.R.E. 49).

[9] "Staples was not doing his job." (R. 160; R.E. 14). Staples "failed in performing his job." (R. 161; R.E. 15).

[10] "Some actions are so clearly beyond an employee's course and scope of employment that they cannot form the basis for a claim of vicarious liability, as a matter of law." *Children's Medical Group, P. A. v. Phillips,* 940 So. 2d 941, 935 (Miss. 2006). See also *May v. V.F.W. Post #2539,* 577 So. 2d 372 (Miss. 1991) (holding employee was outside of course and scope of employment as a matter of law).

If the correct analysis was whether or not the employee "was not doing his job" the entire line of "deviation cases" would not exist. In these cases, the employee is never doing his job, but the analysis of vicarious liability does not end there. Contrary to Appellee's argument, the employment relationship can be temporarily suspended, no matter how short the time, if an employee steps aside from the master's business for some purpose of his own disconnected from his employment. *Estate of Brown v. Pearl River Valley Opportunity, Inc.*, 627 So. 2d 308, 311 (Miss. 1993). In the relevant case law cited in Appellant's Brief, the purpose of the employees' intentional acts were disconnected from the employment. Likewise, the purpose of Staples' intentional acts was disconnected from the employment. He stepped aside from his employment.

Appellee claims that the cases cited by Appellant are distinguishable because the defendants therein engaged in "wholesale intentional misconduct." (Brief, p. 23). This fact does not distinguish these cases; rather, this fact renders these cases directly on point. Appellee forgets that she alleged and proved, and that the trial court held, that Mr. Staples knowingly facilitated and witnessed Fray's sexual contact with V.S. The pleadings and trial evidence establish "wholesale intentional misconduct." Staples was not "simply negligent" as Appellee now claims, and the facts of this case present something very far from simple negligence. This case is about a man who knowingly facilitated a sexual encounter between an inmate and a citizen. He did not merely fail to act with reasonable care. He was not negligent. He did not commit an act of omission. He made the encounter happen. Appellee alleged and proved that Staples acted knowingly and intentionally, her characterization of these actions as negligence on appeal notwithstanding.

Appellant does not confuse the actions of Staples and the actions of Marvin Fray as Appellee argues in her brief. (Brief, p. 23). Appellant focuses solely on the personal, intentional actions of Staples. The evidence presented at trial conclusively established that Mr. Staples was not picking up trash, traveled completely out of his designated work route to go to Fulton Street at the request of the inmates, knowingly allowed Mr. Fray to have sexual contact with V.S., watched Mr. Fray have sexual contact with V.S., failed to call his supervisor or otherwise to attempt to stop the sexual activity, and drove quickly away after being confronted by Deborah Holland. These actions were purely personal, perpetuated his own purposes and not the purposes of his employer and were not in furtherance of Appellant's business.

Contrary to Appellee's brief, not only is there an argument that the incident occurred within the authorized time and space limits of Staples' employment, the facts presented at trial conclusively establish that the acts were entirely outside of the place of employment.[11] At the time of the acts at issue, Fulton Street, off Mr. Staples' assigned route and where there was no trash to be picked up, was not within "the place of employment." Mr. Staples was supposed to be on his route and stopped only at locations where there was trash to be picked up. The trial court erred when it found that the "time and place" presumption of course and scope had been established. It was not. Even if it were, the shocking facts of this case rebut the presumption and mandate that Staples acts were outside the course and scope of employment as a matter of law.

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[11] For the purposes of the MTCA, a rebuttable presumption exists 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." §11-46-5(3), §11-46-7(7) (emphasis added).

The only trial evidence Appellee cites in support of the trial court's decision are documents submitted to the Mississippi Employment Security Commission in response to Staples' application for unemployment benefits. (Brief, p. 20). This is a red herring. Importantly, the trial court's reliance is not based on what these documents actually say; rather, the Court and Appellee focus on that fact that Appellant, in response to information related to a determination of unemployment benefits, did not express its position on the issue of MTCA immunity for acts of employees which are outside the course and scope of employment. (R. 160; R.E. 14).

After Staples' termination for knowingly facilitating the sexual encounter, he astonishingly applied for unemployment benefits. Appellant received and responded to a notice and request for information from the Mississippi Employment Security Commission. (Exhibit P-6; S.R.E. 58-60). The notice requested information so that "a proper determination may be made of this claimant's rights to Unemployment Insurance benefits." (*Id.*). Appellant responded stating that Mr. Staples had been discharged because he facilitated Fray's crimes. (*Id.*).

The determination of course and scope of employment (i.e. whether or not the acts at issue were in furtherance of the employer's business or for personal motives) is irrelevant to a claim for unemployment benefits, but that demonstrates the stretch Appellee must make in support of her argument since she cannot rely on any witness testimony. The notice was specifically for the purpose of making a proper determination of his claim for unemployment benefits and the instructions on the notice limited its request for information to issues related

to Staples' claim under the employment security statute.[12] There was no reason for Appellant to relate facts relevant to or express an opinion on the MTCA's course and scope of employment requirement in response to the limited-purpose notice.

Yet Appellee would have this Court believe that, since Appellee did not explicitly state something to the effect of "Staples' acts were not in furtherance of the business interests of the City of Greenwood, and, therefore, he was not in the course and scope of employment as defined by Miss. Code Ann. § 11-46-5(1) and as interpreted by the Mississippi Supreme Court in *Cockrell v. Pearl River Valley Water Supply District,* 868 So. 2d 357 (Miss. 2004)," then Appellant was taking the position that immunity was waived pursuant to § 11-46-5(1). Appellant is not expected to respond to the notice in such a manner. In fact, any such comment would have been irrelevant and improper considering the express instructions on the Notice limiting it to information regarding the claim for benefits. The response to the notice is not evidence that Appellant took the position that Staples was acting within the course and scope of employment nor that Staples was so acting. Regardless, the facts asserted in the

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[12] The Mississippi Employment Security Law requires that employee misconduct must be "connected with his work" in order to preclude benefits. § 71-5-513(A)(1)(b). Importantly, the statute does not require that the misconduct must be "within the course and scope of employment" as provided in the MTCA. There is a different test. The legislature was aware of the employment security statute's "connected with work" requirement when it passed the MTCA. The legislature was also aware of the common law test of course and scope of employment. The legislature chose to adopt the course and scope of employment test as the causal connection necessary to impose vicarious liability on governmental entities for the acts of their employees. § 11-46-5(1). Mississippi appellate courts have found that conduct was "connected with work" under the employment security statute in situations where the employee was not acting within the scope and course of employment for purposes of vicarious liability. See *City of Corinth v. Cox*, 565 So. 2d 1142 (Miss. 1990) (holding employee's sale of illegal drugs away from the workplace was connected with his work for purposes of benefit determination); *City of Vickburg v. Winters*, 928 So. 2d 241 (Miss. 2006) (holding employee's assault of girlfriend was connected with work under employment security statute); *Mississippi Employment Security Commission v. Douglas*, 758 So. 2d 1059 (Miss.Ct.App. 2000) (holding employee's illegal manufacture of identification cards away from the workplace was connected with his work for purposes of benefit determination).

notice are the same facts proven at trial, which describe acts outside the course and scope of employment as a matter of law.

Appellee cites *Partridge v. Harvey*, 805 So. 2d 668 (Miss.Ct.App. 2002) in support of the trial court's judgment, but that case is easily distinguishable. In *Partridge*, rental agency employees broke into plaintiff's home, not for their own purposes, but for the purpose of repossessing property for the employer. *Id.* at 67–71. The Court of Appeals reversed the trial court's summary judgment in favor of the employer finding that the employees "were actually working to further the business of [the employer] in committing the break-in to recapture the property." *Id.* at 672. *Partridge* might be applicable herein if Staples and the inmates had trespassed on private property to collect garbage and assaulted a homeowner in an effort to complete their assigned task. In the present matter, there is no rational way that the acts of Staples on Fulton Street furthered the interest of Appellant.

For these reasons and those set forth in Appellant's Brief, Staples was acting outside the course and scope of employment at the time of the alleged wrongful conduct, and section 11-46-5(1)'s waiver of immunity is inapplicable. Therefore, the immunity provided by § 11-46-3(1) applies and mandates reversal of the trial court's decision.

F. Staples' Conduct Constituted Criminal Offenses.

Appellee argues that "there is absolutely no evidence that Staples committed a crime." (Appellee's Brief, p. 26). Appellee forgets that she alleged and proved criminal conduct by Mr. Staples. In her Complaint, plaintiff alleged the following:

> Glenn Staples took no action to stop Marvin Fray even though he witnessed the events (R.3; R.E. 43);
>
> Glenn Staples acted as the driver of the get away vehicle (*Id.*);

> Glenn Staples allowed Fray to commit the acts and then assisted him in avoiding apprehension (R.3-4; R.E. 43-44);
>
> Glenn Staples witnessed the illegal and immoral conduct of Fray but did nothing to prevent it and in fact, supported the conduct by whisking Fray away from the scene (R.7; R.E. 46);

Appellee proved these facts at trial. The trial court found that Staples returned to Fulton Street for the purpose of allowing the inmates to proposition V.S. and that Staples witnessed the sexual assault and did nothing to stop it. (R.156-57; R.E. 10-11).

Appellee ignores her own pleadings and trial evidence when she says that "this case is not about the active, intentional criminal conduct of Staples." (Brief, p. 27). Again, Appellee is now only concerned with how that proof backfired. Criminal conduct is exactly what this case is about, what Appellee said she would make this case about in her Complaint and what she made this case about at trial. Appellee does not dispute the elements constituting aiding and abetting nor that these elements were satisfied by the evidence.[13]

Instead, Appellee and the trial court focus on the fact that Staples was never accused of committing a crime nor charged with a crime. Under MTCA, the absence of charges or convictions of a crime are immaterial. See *Kirk v. Crump*, 886 So. 2d 741, 744 (Miss. 2004) (holding formal charges unnecessary for finding criminal conduct resulting in immunity); *McCoy v. City of Florence*, 949 So. 2d 69, 84 (Miss.Ct.App. 2006) (holding MTCA immunity does not require a finding of guilt).[14]

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[13] According to Mississippi law, Mr. Staples was an accessory to Mr. Fray's criminal conduct, both before and after the fact. Miss. Code Ann. §§ 97-1-3 and 97-1-5. See *McCoy v. City of Florence*, 949 So. 2d 69, 83-84 (Miss.Ct.App. 2006) (holding aiding and abetting is crime for purposes of MTCA immunity).

[14] The *McCoy* case involves the application of the police and fire protection immunity providing that a governmental entity is immune from claims related to these activities if the plaintiff was committing a crime at the time of the alleged injury. There is no reason for any different analysis of the course and scope of employment requirement. Under both provisions, the issue is whether the acts constituted criminal conduct.

The trial court's findings that Staples returned to Fulton Street for the sole purpose of allowing the inmates to proposition V.S. and that Staples witnessed the sexual assault and did nothing to stop it are unchallenged by either party. The question for this court is whether those actions constitute a crime. They do, and the trial court erred holding otherwise. The Appellant is therefore immune from civil liability for these criminal actions.

G. The Trial Court's Award of Damages Is Not Supported by the Substantial Weight of the Evidence.

Neither V.S. nor Appellee reported this incident, or any manifestations of alleged PTSD, to V.S.'s treating physicians until after suit was filed. Appellee failed to introduce any medical records or bills nor any evidence of emotional trauma that was not generated for the purposes of litigation. The only "treatment" V.S. has had for her alleged damages consisted of forensic interviews by her expert for the purpose of his testimony in this case. The trial court's award of $500,000.00 (which coincidently was the statutory maximum) is not based on substantial evidence and, in the alternative, is excessive.

While a judge may place whatever weight she chooses on expert testimony, a court's ruling on damages is not supported by substantial evidence "if glaringly obvious evidence is ignored." *University of Mississippi Medical Center v. Pounders*, 970 So. 2d 141, 147 (Miss. 2007). With all due respect to the trial court, the lack of evidence supporting $500,000.00 in emotional damages is glaringly obvious. V.S. has received no treatment whatsoever from her state supported mental health provider for any mental condition or injury resulting from the subject incident. Absolutely no evidence was presented at trial that V.S. would need any future medical treatment. Not a single medical record was offered supporting damages, and none of the treating mental health providers were called to testify at trial, even though they

are located in the same county where trial was held. This is not a "battle of the experts" case.[15] This is a case where the evidence presented does not support, and its absence and content contradicts, the award of damages.

In her Brief, Appellee identifies the documents reviewed by Dr. Hiatt prior to forming his opinions. What Appellee fails to point out is Dr. Hiatt's disregard of these records and the fact that these records contradict his trial opinions. Dr. Hiatt's diagnosis is not supported by the medical and physical evidence and was not made according to the generally accepted scientific criteria for PTSD diagnoses under the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition ("DSM-IV").

Recognizing the lack of evidence presented at trial, Appellee urges this court to affirm the award of damages due to "the nature of the act itself." Appellant is immune for the acts of Marvin Fray.[16] Immunity has only been waived for the acts of employees that occur in the course and scope of their employment. Appellee, in an attempt to overcome the MTCA's course and scope of employment requirement, attempts to characterize Staples' actions as negligence and acts of omissions, rather than the intentional acts pled in the Complaint and proven at trial. Conversely, when the issue turns to damages, Appellee says that Staples actions evoke "outrage or revulsion" and were "willful, malicious, outrageous and intentional wrongs." Appellee cannot have it both ways. Regardless of how one characterizes Staples' actions, the evidence clearly establishes that there was no resulting emotional trauma, and

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[15] Even if it were, Dr. Hiatt's opinions that contradict every other piece of medical evidence are "so incredible as to be absolutely unworthy of belief" that the trial court's reliance on Dr. Hiatt's opinions, and disregard of the other medical evidence, is error and warrants reversal. *University of Mississippi Medical Center v. Johnson*, 977 So. 2d 1145, 1152 (Miss.Ct.App. 2007).

[16] Miss. Code Ann. §47-5-417 (providing that work release inmate shall never be considered an agent or employee of a governmental entity).

certainly not sufficient emotional trauma to support a $500,000.00 award. Again, not one medical record was introduced by Appellee at trial.

Rather than relying on the DSM-IV criteria for his opinions, Dr. Hiatt based his diagnosis of PTSD on four physical conditions (bladder control, bowel control, weight gain and sleep cycle disturbance). The substantial evidence did not establish that these conditions manifested from the incident. In fact, the medical evidence indicates that other causes are just as likely as the subject incident. Appellee argues that the incident caused a general regression of V.S.'s forward progress. In contrast, the only medical evidence of V.S.'s functional capacity showed a pre-incident regression that would soon necessitate admission into the State hospital. Post-incident medical records show that V.S. had actually progressed and scored as high as possible on all levels of functioning in 2004, two years after the incident. This evidence was ignored by the trial court.

The award of damages is within the province of the fact finder. However, the fact finder is bound by the evidence presented at trial. In this matter, no medical records were introduced. No medical depositions were taken. No treating physician was called to testify. Instead, a paid expert ignored the medical records and accepted diagnostic criteria. There were no complaints of any trauma until claims were asserted against the City of Greenwood. V.S. has not been treated for any mental trauma even though she has access to mental health care. V.S.'s treating physicians have not diagnosed any trauma. [17] Even Dr. Hiatt and V.S.'s sister testified that V.S. simply did not understand what occurred on the date of this

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[17] In *Jordan v. McKenna*, 573 So. 2d 1371 (Miss. 1990), a case cited by Appellee in support of the award of damages, the plaintiff therein received medical treatment for PTSD and her treating physician testified about the substantial effect the incident had on plaintiff. No such evidence was presented at trial. In fact, the trial evidence was to the contrary.

unfortunate incident. This result should not stand. The proof presented, and more importantly what was not presented, does not support an award of $500,000.00 for emotional damages that were never reported before litigation, have never been treated and are entirely disproved by the medical records.

V. CONCLUSION

Appellant respectfully requests that this Honorable Court reverse the trial court's judgment in favor of the Appellee and render judgment in favor of the Appellant. In the alternative, the Appellant requests that this Court find the trial court's award of $500,000.00 as not supported by the substantial credible evidence. Appellant further requests any other relief to which it may be entitled.

Respectfully submitted,

THE CITY OF GREENWOOD, MISSISSIPPI

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