2009-CA-00024 T

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 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

Carlton W. Reeves, Esq.
Pigott Reeves Johnson, & Minor P.A.
775 North Congress Street
Post Office Box 22725
Jackson, Mississippi 39225-2725

THIS, the 12th day of January 12, 2010.

MITCHELL O. DRISKELL, III

IN THE SUPREME COURT OF MISSISSIPPI

THE CITY OF GREENWOOD, MISSISSIPPI — APPELLANT

VS. — NO. 2009-TS-00024

V.S., by and through her next friend,
PATRICIA WESTBROOK — APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and/or entities have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. V.S., by and through her next friend, Patricia Westbrook, 118 Nichols Street, Greenwood, Mississippi;
2. The City of Greenwood, Mississippi;
3. Honorable Margaret Carey-McCray, Circuit Court Judge, Post Office Box 1775, Greenville, Mississippi 38702-1775;
4. Carlton W. Reeves, Esq., Pigott Reeves Johnson, & Minor P.A., 775 North Congress Street, Post Office Box 22725, Jackson, Mississippi 39225-2725;
5. Wilton V. Byars, III, Esq. and Mitchell O. Driskell, III, Esq., Daniel, Coker, Horton & Bell, P.A., 265 North Lamar Boulevard, Suite R, Post Office Box 1396, Oxford, Mississippi 38655; and

THIS the 12th day of January, 2010.

MITCHELL O. DRISKELL, III
ATTORNEY FOR APPELLANT

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STATEMENT REGARDING ORAL ARGUMENT

This appeal concerns substantial and important issues relating to governmental immunity under the Mississippi Tort Claims Act for acts of its employees which are not in furtherance of the governmental entity's interest and are outside the course and scope of employment. Appellant respectfully suggests that oral argument will be helpful to the Court and significantly aid the decisional process.

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SECONDARY AUTHORITIES

I. STATEMENT OF THE ISSUES

1. Whether the trial court's Findings of Fact and Conclusions of Law based on the trial court's review of the record are subject to *de novo* review.

2. Whether an employee who is off his route and at a location where there is no work to be done is "at the place" of employment establishing the MTCA presumption of course and scope of employment.

3. Whether an employee who purposefully facilitates and witnesses sex between a work release inmate and mentally handicapped person is on a personal endeavor or acting within the course and scope of employment..

4. Whether an employee who purposefully facilitates and witnesses sex between a work release inmate and mentally handicapped person, and then flees the scene when caught, is committing a crime for the purposes of MTCA immunity.

5. Whether the trial evidence which did not contain any medical evidence for post-incident treatment of emotional trauma was insufficient to support a finding of emotional damages.

6. Whether the court erred in awarding $500,000.00, the statutory maximum that could have been awarded to the Appellee under the trial facts where Appellee did not prove any special damages.

II. STATEMENT OF THE CASE

A. NATURE OF THE CASE AND COURSE OF PROCEEDINGS

The subject lawsuit arises out of an incident that involved Mississippi Department of Corrections inmate Marvin Fray and V.S. on June 28, 2002. (R. 155-56; R.E. 9-10). V.S. is mentally handicapped. (R. 155; R.E. 9). Mr. Fray was on a work release program and assigned to work on a trash truck under the supervision of Glenn Staples, an employee of the City of Greenwood.

(R. 155; R.E. 9). On the date in question, Mr. Staples left his trash route and took Mr. Fray to V.S.'s house so the Mr. Fray could proposition V.S. and then watched Mr. Fray have sexual contact with V.S.. (R. 155-56; R.E. 9-10).

On August 23, 2003, Appellee filed her Complaint against the City of Greenwood, the Mississippi Department of Corrections and Commissioner Christopher Epps asserting claims governed by the Mississippi Tort Claims Act ("MTCA"). (R. 2, 9; R.E. 41-48). Appellee did not name Mr. Staples as a defendant. (R. 1-9; R.E. 40-48). Appellee alleged that Appellant was vicariously liable for the actions of Mr. Staples and directly liable for negligently hiring, retaining, training and supervising Mr. Staples and also for negligent infliction of emotional distress. (R. 3-7; R.E. 42-46).

Appellant timely responded to the Complaint, denied vicarious liability, raised all of the privileges, defenses and immunities of the MTCA and asserted that it was not liable for the intentional acts of non-parties. (R. 23-31; R.E. 49-57). Under the MTCA, Greenwood is immune from liability for actions of employees if those actions were outside the scope of his employment. Miss. Code Ann. §§ 11-46-5 and 11-46-7. By Order dated July 19, 2005, twenty days before trial, the MDOC and Commissioner Epps were dismissed. (R. 58; R.E. 58).

A bench trial of this matter was held before the Circuit Court of Leflore County on August 8-9, 2005. At the conclusion of trial, the trial court requested submission of Proposed Findings of Fact and Conclusions of Law from all parties. (Tr. 372; R.E. 214). Approximately eight months after trial, on May 15, 2006, the Administrative Office of Court issued its Notice of Filing Pursuant to M.R.A.P. 15, which established a July 3, 2006 deadline for a decision from the trial court. (Supp.R. 152; R.E. 71). Subsequently, the trial court requested that the court reporter prepare a transcript of the trial. (R. 153; R.E. 225). On September 19, 2006, over thirteen months after trial,

Final Judgment was entered and Findings of Fact and Conclusions of law were made. (R. 154 - 64; R.E. 9-18). The trial court concluded that Glenn Staples was in the course and scope of his employment at the time of his misconduct and that Appellant was not immune under the MTCA.[2] (R. 158-63; R.E. 12-15). The trial court further concluded that Appellee was entitled to an award of damages exactly equal to the statutory limit of liability under the MTCA, $500,000.00. (R. 163-64; R.E. 17-18).

Appellant filed its Motion to Alter or Amend Findings of Fact and Conclusions of Law and Judgment, Motion for New Trial and Motion for Relief from Judgment on September 26, 2006. (R. 166, 186; R.E. 19, 39). More than two years later, on November 25, 2008, the Administrative Office of Courts provided its Notice of Filing Pursuant to M.R.A.P. 15 advising that a decision on the post-trial motion was overdue. (R. 350; R.E. 68). By order dated December 17, 2008, the trial Court denied Appellant's post-trial motion without substantive discussion of the issues presented. (R. 352; R.E. 8). Appellant's Notice of Appeal was timely filed on December 31, 2008. (R. 353-54; R.E. 69-70). Appellee did not cross appeal any issues.

B. STATEMENT OF FACTS

At all relevant times, Appellant, participated in the Mississippi Department of Correction's work release program (the Community Work Center, or CWC, program). (Tr. 15-16, 94; R.E. 94-95, 119). Under the CWC program, qualified inmates work for the participating entities. (Tr. 15-16, 113; R.E. 94-95, 127). The MDOC has strict guidelines for determining which inmates are eligible to work in the program, making sure that only non-violent offenders with comparatively little time remaining on their sentences are allowed to participate. (Tr. 15, 24-25, 34, 112, Exhibit P-4; R.E.

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2 Appellee offered no evidence of direct negligence on the part of the Appellant and the trial court's judgment was based solely on the theory of vicarious liability.

94, 98-99, 103, 126, 215-218). Inmates with a history of violent crimes, including sexual offenses, are not allowed to participate. (*Id.*). On June 28, 2002, MDOC inmates Marvin Fray and Isaac Morgan were assigned to work at Appellant's Public Works Department under the supervision of Glenn Staples. (Tr.39, 93; R.E. 105, 118). Both inmates were properly screened and were qualified to participate in the CWC program. (Tr. 17; R.E. 96).

Appellant required all employees who supervised CWC inmates to be oriented/trained by the CWC on inmate supervision on a yearly basis. (Tr. 17, 41, 96, 113; R.E. 96, 106, 120, 127). Glenn Staples was properly trained according to the CWC guidelines. (Tr. 16-18, 25, 41, 96, 113; R.E. 95-97, 99, 106, 120, 127). In fact, Mr. Staples was trained by the CWC two months prior to the subject incident. (Tr. 25, 41; R.E. 99, 106). Lieutenant Barbara Allen and Commander Walter McKinney of the MDOC each testified that Glenn Staples was trained on all of the CWC guidelines and understood his responsibilities with regard to the supervision of inmates. (Tr. 26, 41-42; R.E. 100, 106-107). Mr. Staples acknowledged this training by signing the Work Supervisor Guidelines for Working CWC Inmates on April 23, 2002. (Tr. 25; R.E. 99). Appellee offered no evidence of any pre-incident acts or omissions of Glenn Staples pertaining to the supervision of inmates, or, for that matter, anything else. Appellant had never received any complaints regarding the supervision of inmates by Glenn Staples prior to the subject incident, a fact stipulated by Appellee prior to trial. (R. 63; R.E. 62).

Appellee also failed to provide any evidence that Appellant negligently supervised either Staples or anyone else in this case. The uncontradicted evidence establishes that all Greenwood employees are required to attend, and Glenn Staples did attend, CWC training regarding the proper supervision guidelines. (Tr. 16-18, 25, 41, 96, 113; R.E. 95-97, 99, 106, 120, 127). Appellee produced no evidence that there has ever been any other instance in which an inmate assigned to

work with Appellant has had improper contact with the public, much less any sexual contact with the public. After this incident, Commander McKinney advised Appellant, by letter dated July 3, 2002, that Glenn Staples was no longer allowed to participate in the CWC program. (Tr. 37, Exhibit P-8; R.E. 104, 219). Importantly, however, Commander McKinney expressed no concern over Appellant's continued participation in the CWC program, and Appellant, with the blessing of MDOC, continued to participate in the CWC program. (Tr. 43-44, Exhibit P-8; R.E. 108-109, 219).

On the morning of June 28, 2002, Glenn Staples and the two inmates, while off of their designated trash pick-up route, passed by a house on Fulton Street and noticed a lady sitting on the porch of one of the houses. (Tr. 43, 85, 115-16, 136, 162; R.E. 108, 114, 128-29, 137, 146). That lady would later be identified as V.S., who is mentally handicapped. (R. 63; R.E. 62). After passing by the house, Glenn Staples and the inmates discussed V.S. and what the inmates would do with her. (Tr. 85; R.E. 114). Mr. Staples then returned to Fulton Street for the purpose of allowing the inmates to proposition V.S. and possibly engage in sexual activity with her. (Tr. 26, 27, 31, 67, 75, 84-86; R.E. 100, 101, 102, 110, 111, 113-15).

Fulton Street was not on Mr. Staples trash collection route. (Tr. 43, 136; R.E. 108, 137). Deborah Holland, V.S.'s sister who owns the house on Fulton Street where V.S. was sitting on the porch, testified that Louis O'Neal, a relative, picks up trash for the Appellant on Fulton Street, not Glenn Staples. (Tr. 136; R.E. 137). Commander Walter McKinney testified that his investigation revealed that Fulton Street was not on Mr. Staples' trash collection route. (Tr. 43; R.E. 108).

Marvin Fray testified that there was no trash to pick up where they stopped on Fulton Street. (Tr. 162; R.E. 146). There was simply no work to be done at that location. (*Id.*). Deborah Holland, V.S.'s sister, also testified that there was no trash to pick up on Fulton Street in the area where Mr. Staples stopped. (Tr. 136; R.E. 137). Investigations by Detective Melvin Andrews of the

Greenwood Police Department and Bennie Herring, director of the Public Works Department, confirmed the absence of trash on Fulton Street and that Mr. Staples and the inmates were not at that location for any work-related purpose. (Tr. 84-86, 115-117; R.E. 113-15, 128-30). It is undisputed that there was no trash to be picked up on Fulton Street, Mr. Staples was not stopped on Fulton Street for any conceivable work-related purpose, and Appellant did not benefit in any way from the activities of Mr. Staples and the inmates. (Tr. 116-117; R.E. 129-30).

On the morning of the incident, Deborah Holland stepped out of her Fulton Street house to take out the garbage and saw V.S. and Mr. Fray standing between two houses. (Tr. 129, 135; R.E. 133, 136). Mr. Fray ran back to the truck where Mr. Staples was sitting in the cab. (Tr. 129, 136; R.E. 133, 137). As Ms. Holland approached the truck, she could see that Staples was looking between the two houses, watching Mr. Fray and V.S. (Tr. 130, 136; R.E. 134, 137). As Ms. Holland got closer, Mr. Staples drove away. (*Id.*). Detective Andrews' investigation revealed that Glenn Staples was sitting in the truck watching Mr. Fray have sex with V.S. (Tr. 67, 75-76, Exhibit P-18; R.E. 110-12, 224). Mr. Staples' statements made to the Greenwood Police Department confirm that he did in fact witness the sexual activity and did nothing to stop it or report it. (*Id.*).

After Mr. Staples fled from the scene, Ms. Holland and V.S. went to the "City Barn" to report the incident. (Tr. 130; R.E. 134). Upon notification, Bennie Herring called all trucks back to the barn. (Tr. 97; R.E. 121). Mr. Staples and the inmates were identified by Ms. Holland. (Tr. 98; R.E. 122). Detective Andrews investigated the incident and found that Glenn Staples was not on his normal trash collection route, that there was no trash to pick up or any other work-related activity to perform on Fulton Street, that Glenn Staples intentionally took the inmates to Fulton Street and that he watched Mr. Fray have sexual contact with V.S. (Tr. 67, 75-76, 84-86; R.E. 110-15). Marvin

Fray was charged with, and later pled guilty to, sexual battery, penetration of a person with a defective mind in violation of Miss. Code Ann. section 97-3-95(1)(b). (Tr. 157; R.E. 145).

On the date of the incident and after Ms. Holland made her allegations against Mr. Staples and the inmates, Bennie Herring suspended Glenn Staples from his employment for suspicion of violating the policies and procedures of the Appellant. (Tr. 99; R.E. 123). Mr. Herring's investigation of the allegations against Mr. Staples confirmed the findings set forth in Detective Andrews' investigation, which revealed that there was no trash to pick up or any other work-related activity to preform on Fulton Street, that Glenn Staples intentionally took the inmates to Fulton Street and that he watched Mr. Fray have sexual contact with V.S. (Tr. 102, 115-117, Exhibit P-9; R.E. 124, 128-30, 220-23). Mr. Staples' employment was subsequently terminated. (Tr. 103; R.E. 125).

Turning to damages, V.S. was the victim of two prior events where she was held against her will by men. In early 1999, three years before the encounter with Marvin Fray, an incident occurred wherein V.S. was kidnaped by a man and spent the night, or possibly several nights, with him. (Tr. 254, 267; R.E. 175, 185). In 2001, V.S. was held in a house by a man until the police came and forcibly rescued her. (Tr. 267; R.E. 185). One of these incidents, it is unclear which one, involved the threat of violence with a knife. (Tr. 268; R.E. 186). V.S. describes these events as "worser" than the incident involving Marvin Fray. (*Id.*). V.S. previously suffered from and continues to suffer from what she describes as "visions" from these two traumatic events. (Tr. 256; R.E. 176). In addition to these instances of violent coercion, medical records prior to the incident reveal one instance where V.S. voluntarily ran away from home and spent the night with a man. (Tr. 258; R.E. 177).

In 1996 and again in 2002, V.S. was examined by the Hudspeth mental retardation facility in order to determine V.S.'s level of retardation. (Tr. 199; R.E. 157). Appellee's designated expert, Dr. Wood Hiatt, reviewed these examination records and agreed with the findings. (Tr. 204; R.E. 159). In 1999, V.S. was found be in the "mild" mental retardation category. (Tr. 246; R.E. 171). In 2002, prior to the Marvin Fray incident, V.S. had regressed and was found to be in the "moderate" mental retardation category. (*Id.*). Pre-incident records from the Region IV Medical Center's Lifehelp program, a state funded program providing services for the mentally handicapped, indicate that V.S. "will probably deteriorate to the point that she needs placement back at the State Hospital." (Tr. 247-48; R.E. 172-73).

Contrary to the medical records, Patricia Westbrook, V.S.'s sister and legal guardian, testified that she was not regressing, was making improvement and trying to be more independent prior to the Marvin Fray incident. (Tr. 182; R.E. 152).

After going to the City Barn on the day of the accident, V.S. was taken to the emergency room of the Greenwood-Lefore Hospital. (Tr. 131; R.E. 135). The hospital records indicate "no injuries" and show normal heart rate, skin color, temperature and moisture. (Tr. 322-23; R.E. 200-01). The records did not indicate any sign of physical arousal, a diagnostic criteria for Post Traumatic Stress Disorder. (Tr. 323-24; R.E. 201-02). Deborah Holland, the only family member to see V.S. after the accident and before medical examination, testified that V.S. was not crying or screaming at any time and had no visible injuries. (Tr. 137; R.E. 138). The inmates involved in the incident did not display any signs of physical altercation. (Tr. 88, 118; R.E. 117, 131).

After examination at the hospital, V.S. was taken to the police station and interviewed three times by Detective Andrews, who spend a good deal of time with V.S. that morning. (Tr. 87-88; R.E. 116-17). Detective Andrews testified that V.S. did not appear to be in any physical duress and

did not appear to be anxious, nervous, upset, embarrassed or guilty. (*Id.*). She was not having shortness of breath or any other breathing trouble. (*Id.*). Family members Cario Westbrook, Patricia Westbrook and Lawrence McCall testified that, on the date of the incident, V.S. was withdrawn and less talkative than usual and "held her head down." (Tr. 149, 166-67, 180; R.E. 144, 147-48, 150).

After the incident, V.S. lived with her sister Deborah Holland for several months. (Tr. 137; R.E. 138). Ms. Holland testified at trial as follows:

> Q. And you were asked some questions about some things that were said in your deposition, and you testified that you spent some time with [V.S.] after the rape. Do you think [V.S.] was hurt by the rape?
> A. She don't understand.
> Q. Ms. Holland, from your perspective on what you observed with [V.S.] after the rape, do you think she was affected by it?
> A. I don't think she understands.

(Tr. 140-41; R.E. 141-42). Two weeks after the incident, V.S. was treated at the Greenwood Comprehensive Medical Clinic. (Tr. 273, 323-24; R.E. 190, 201-02). Those records also do not show any sign of physical arousal and indicate normal blood pressure and pulse. (Tr. 232, 323-24; R.E. 167, 201-02). The Marvin Fray incident and any resulting physical and emotional or behavioral changes are not mentioned in those records. (Tr. 273, 323-24; R.E. 190, 201-02).

V.S. continued to participate in the Lifehelp work program after the Marvin Fray encounter and returned to Lifehelp only a few days after the incident. (Tr. 138, 185; R.E. 139, 153). V.S.'s primary physician for mental issues at the time was Dr. Brenda Hines, who treated V.S. at Lifehelp. (Tr. 186; R.E. 154). V.S. has received treatment at Lifehelp ever since the subject incident. (Tr. 325; R.E. 203). The Notice of Claim was dated July 16, 2002, indicating that an attorney was hired and claim was made prior to or on that date. (Supp.R. 350-51; R.E. 72-73). In October, 2002, Ms. Westbrook accompanied V.S. to her appointment with Dr. Hines and reported concerns about V.S.'s vulnerability. (Tr. 272; R.E. 189). Dr. Hines noted that V.S. did not seem "too terribly upset" about

the incident. (*Id.*). Subsequent Lifehelp records, prepared by her treating physicians, fail to diagnose depression. (Tr. 276-78; R.E. 191-93). There is no reference to any daytime bladder problems in the Lifehelp records. (Tr. 280-81; R.E. 194-95). According to the Lifehelp records, there was never any report of bowel control problems. (Tr. 281; R.E. 195). There is no reference to any sleep cycle disturbance in any of the Lifehelp records, records prepared by V.S.'s mental health professionals. (Tr. 282; R.E. 196).

The post-incident medical records contain no evidence of emotional disturbance and no complaints of emotional trauma. (Tr. 324; R.E. 202). The Lifehelp records contain no evidence of any behavioral changes whatsoever. (Tr. 327-28; R.E. 205-06). Dr. Hines never documented any symptoms of PTSD and never made a diagnosis of PTSD. (Tr. 329; 207). Lifehelp records from 2004 indicate that V.S. was currently rating as highly as possible in every area of development. (Tr. 280; R.E. 194).

Contrary to the medical records, Patricia and Cario Westbook testified that V.S. was withdrawn emotionally and stopped trying to progress since the incident. (Tr. 145, 182, 188; R.E. 143, 152, 156). They further testified that V.S. has daytime bladder accidents and increased nighttime accidents. (Tr. 145, 181; R.E. 143, 151). V.S. had bladder problems prior to the incident. (Tr. 145; R.E. 143). Ms. Westbrook testified that V.S. has bowel control problems now as well. (Tr. 181; R.E. 151). Ms. Westbroook, Cario Westbrook and Lawrence McCall all testified that V.S. is less talkative since the incident. (T 149, 169, 188; R.E. 144, 149, 156). None of these conditions are documented in the medical records, except for the pre-existing nighttime bladder problems. (Tr. 280-82, 327-28; R.E. 194-96, 205-06).

As set forth above, Deborah Holland testified at trial that V.S. was not affected by the incident. (Tr. 138, 141, 328; R.E. 139, 142, 206). Ms. Holland further testified that she discussed

the incident with Ms. Pitts at Lifehelp who said the V.S. did not understand what happened. (Tr. 139; R.E. 140). Lawrence McCall, a brother who lives in the same house as V.S., testified that, besides being less talkative, V.S. has exhibited no other behavioral changes since the incident. (Tr. 169, 286; R.E. 169, 197). Ms. Westbrook testified that V.S.'s emotional withdrawal was caused by increased supervision, not the incident itself. (Tr. 181; R.E. 151).

V.S. has received no medical treatment for any emotional injury relating to the Marvin Fray incident. (Tr. 324-25; R.E. 202-03). V.S. has continued to receive treatment due to her mental condition, which is in no way related to the subject incident. (Tr. 325; R.E. 203). The treating physicians at Lifehelp have not diagnosed any emotional injury, including PTSD. (Tr. 276-78, 280-82, 324, 327-29; R.E. 191-96, 202, 205-07).

Plaintiff's expert, Dr. Wood Hiatt, testified that plaintiff has PTSD. (Tr. 208; R.E. 160). Although Dr. Hiatt testified that the criteria for the diagnosis of PTSD are set forth in the Diagnostic and Statistic Manual of Mental Disorders – IV ("DSM-IV"), he did not rely on these criteria when making his diagnosis. (Tr. 260; R.E. 178). Dr. Hiatt based his diagnosis on four things: increased bladder control problems, bowel control problems, sleep cycle disturbance and weight gain from food intake pattern changes. (Tr. 224-26; R.E. 163-65). None of these alleged conditions are documented in the post-incident medical records of V.S.'s treating physicians. (Tr. 280-82, 327-28, 351-52; R.E. 194-96, 203-06, 212-13). In addition to these four conditions, Dr. Hiatt testified that there was evidence of depression, but confirmed that post-incident medical records of the treating physicians contradict that assessment. (Tr. 276-78; R.E. 191-93). Dr. Hiatt confirmed that there was no sign of physical arousal or trauma following the incident. (Tr. 261; R.E. 179). Dr. Hiatt's opinions are based primarily on three meetings between himself and V.S. and Ms. Westbrook, all of which occurred after suit was filed and Ms. Westbrook was referred to Dr. Hiatt by her attorney.

(Tr. 187, 265; R.E. 155, 183). Dr. Hiatt did not talk with any other family members or witnesses before preparing his opinions and concluding that V.S. has PTSD. (Tr. 266; R.E. 184).

Regarding the weight gain relied upon by Dr. Hiatt in his diagnosis, V.S. was taking Zyprexa after the accident for treatment of her schizophrenia. (Tr. 330; R.E. 208). One of the side effects of Zyprexa is weight gain. (*Id.*). After exhibiting weight gain, Dr. Hines at Lifehelp switched V.S.'s medication to one that did not cause weight gain, and V.S. lost weight. (*Id.*). Dr. Hiatt does not provide any direct evidence that V.S.'s food intake pattern was disturbed, he merely assumes the weight gain is related to food intake as opposed to other causes. (Tr. 215, 226; R.E. 162, 165).

Regarding the bladder control problems, Dr. Hiatt has recommended treatment by a urologist, indicating that Dr. Hiatt believes that the bladder control problems might be a physical problem and not a mental problem caused by the trauma. (Tr. 239-40; R.E. 168-69). Similarly, Dr. Hiatt has recommended treatment by a gastroenterologist for the bowel control problems, again, indicating Dr. Hiatt's belief that there are, or at least may be, physical causes for this problem. (Tr. 240; R.E. 169).

Regarding the sleep cycle disturbance, Dr. Hiatt testified that the cause of the disturbance is "not clear." (Tr. 225; R.E. 164). He then testified that it is partially caused by dreams about the incident, but later admitted that V.S. has dreams about the previous incident which are worse. (Tr. 256; R.E. 176) Dr. Hiatt does not quantify the effect of dreams related to the Fray incident in comparison to dreams related to the other incidents.

Regarding the family testimony that V.S. is less talkative, Dr. Hiatt admitted in his trial testimony that he did not know what this condition means as it relates to the Marvin Fray incident, making it irrelevant for the purposes of his diagnosis. (Tr. 212; R.E. 161).

Dr. Hiatt testified at trial that, regardless of the legal capacity to consent, whether or not a person voluntary participated in a sexual act is a factor to consider in a diagnosis of PTSD. (Tr. 249;

R.E. 174). Dr. Hiatt testified that the mentally handicapped can voluntarily participate in sexual acts, can have the same sexual desires as other adults and may not have the usual inhibition of other adults. (Tr. 248-49; R.E. 173-74). Dr. Hiatt testified that V.S. had normal strength and was physically and emotionally capable of resisting unwanted physical contact. (Tr. 245, 269-70; R.E. 170, 187-88). The record is void of any evidence of violence or forced physical contact or of any life threatening event, a diagnostically relevant factor for PTSD according to Dr. Hiatt. (Tr. 262-63, 331; R.E. 180-81, 209).

Appellant's expert psychiatrist, Dr. Joel Reisman, testified that V.S. did not exhibit the diagnostic criteria for PTSD according to the DSM-IV. (Tr. 321, 323; R.E. 199, 201). V.S. did not exhibit any signs of physiologic arousal evidencing exposure to a traumatic event necessary for the later development of PTSD. (Tr. 321-323; R.E. 201-03). Dr. Reisman explained that, certainly, most "rapes" are traumatic to women and involve the use or threat of violence. (Tr. 332; R.E. 210). The use or threat of violence is the "traumatic stress" which causes the Post "Traumatic Stress" Disorder. (*Id.*). Dr. Reisman explained that the issue of legal consent is irrelevant in determining PTSD; rather, the issue is whether V.S. experienced a sexual assault sufficient to meet the diagnostic criteria for PTSD. (Tr. 331; R.E. 209).

Amazingly, in testimony that directly contradicted his opinions, Dr. Hiatt testified V.S. was "probably quite unable to understand what was happening." (Tr. 231; R.E. 166). Dr. Reisman testified that, due to her mental retardation and the evidence, that there was no indication that V.S. understood the concepts of humiliation, embarrassment, etc. . . (Tr. 333; R.E. 211). Dr. Hiatt testified that V.S. did not have the capacity to describe the event or its effect on her. (Tr. 202; R.E. 158).

One of the essential features in the diagnosis of PTSD is avoidance of the person, place and thing that is in the area of the occurrence. (Tr. 264; R.E. 182). For several months after the incident, V.S. lived with Deborah Holland at her house, the place of the occurrence. (Tr. 137; 138). Ms. Holland testified at trial that V.S. was not emotionally effected by the event while living at the place of the occurrence. (Tr. 140-41; R.E. 141-42). After moving to Ms. Westbrook's house, V.S. wanted to spend the night with Ms. Holland and go visit Ms. Holland, the place where the incident occurred. (Tr. 264; R.E. 182). V.S. did not exhibit the desire to avoid the place where the event occurred. (*Id.*). In fact, V.S. was "upset" because Ms. Westbrook would not let her spend time at Ms. Holland's house. (*Id.*). Ms. Westbrook testified at trial that she is more restrictive on V.S.'s activities due to a fear of another incident occurring. (Tr. 181; R.E. 151). Ms. Westbrook stated that V.S. is withdrawn and resentful because of this increased supervision and control. (*Id.*). Importantly, according to Ms. Westbrook, V.S.'s post-incident withdrawal is related to Ms. Westbrook's increased supervision and control, not the incident itself. (*Id.*).

Dr. Hiatt relied heavily on the statements of Patricia Westbrook regarding post-incident behavioral changes in support of his conclusion that V.S. suffers from PTSD. However, Patricia Westbrook is not an unbiased observer. (Tr. 326; R.E. 204). Ms. Westbrook is understandably concerned about her sister and interested in her welfare. (*Id.*). That concern and worry leads her to have "observer bias," which occurs when a person is looking for evidence to justify concern. (Tr. 326-27; R.E. 204-05). Therefore, the medical records are a better source for unbiased, reliable information. (Tr. 327; R.E. 205).

Based on the medical records indicating a complete lack of physical or emotional trauma, the lack of evidence of violence or forced physical contact, the treating physician's failure to document evidence of PTSD or make any such diagnosis, the likely physical causes for bladder and bowel

control problems, and the likely medication related cause of the weight gain, Dr. Reisman concluded that there was not sufficient evidence of emotional trauma. (Tr. 321-24, 327-29, 351-52; R.E. 199-202, 205-07, 212-13).

III. SUMMARY OF THE ARGUMENT

Glenn Staples was not acting within the course and scope of his employment with Appellant when he took Marvin Fray to Fulton Street for the purpose of having sex with V.S., while he allowed the encounter to occur nor while he watched it from the truck. Furthermore, Staples' actions were criminal acts for which Appellant can not be liable under the MTCA.

Appellee did not introduce any medical records into evidence supporting damages and did not call one single treating physician to testify regarding the alleged damages. The trial court summarily awarded $500,000.00, the statutory maximum, based on the nature of Marvin Fray's conduct, not on the trial evidence concerning damages. The award of damages is not supported by credible, substantial evidence and is grossly excessive.

Appellant asserts that the trial court's Findings of Fact and Conclusions of Law, and Judgment against the Appellant, were in error and respectfully requests that this court reverse the trial court's determination of liability and render a decision that Appellant is immune under the MTCA. Appellant further requests that this court reverse the trial court's decision that V.S. suffered emotional damages and render a decision that Appellee failed to establish damages. Alternatively, Appellant requests that this Court reduce the trial court's unsupported award of $500,000.00 in damages to an amount, if any, supported by evidence of no special damages and no medical treatment for the alleged injuries.

IV. ARGUMENT

A. The Trial Court's Findings of Fact and Conclusions of Law Are Subject to *De Novo* Review.

This Court reviews questions of law *de novo*, including the proper application of the MTCA. *Phillips v. Mississippi Dept. of Pub. Safety*, 978 So. 2d 656, 660 (Miss. 2008). *De novo* review is the lowest standard of deference to the trial court, sometimes described as "no deference." Elligett and Scheb, Appellate Standards of Review – How Important Are They?, 70 Fla. Bar J. 33 (1996).

When, as in this case, there is no conflict in the facts, the question as to whether the employee was acting within the scope of his employment at the time of the accident is a question of law for the court. *Prairie Livestock Co. v. Chandler,* 325 So. 2d 908, 909 (Miss. 1976); *Singley v. Smith,* 739 So. 2d 448, 450 (Miss.Ct.App. 1999). Since there is no conflict in the facts, whether or not Glenn Staples was in the course and scope of his employment, as defined by the MTCA, at the time of the alleged misconduct is a question of law involving the application of the MTCA which must be reviewed *de novo*.

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*, 978 So. 2d at 660. While a review of the record will show that the trial court's findings were not so supported, such findings should not be given deferential treatment by this Court and should be subject to a heightened, *de novo* standard of review. The rationale behind the usual deferential treatment is that the trial judge is in a better position to make factual determinations. *Amiker v. Drugs For Less, Inc.* 796 So. 2d 942, 947 (Miss. 2000). This Court explained:

> It has long been recognized that the trial judge is in the best position to view the trial. The trial judge who hears witnesses live, observes their demeanor and in general smells the smoke of the battle is by his

> [or her] very position far better equipped to make findings of fact which will have the **reliability** that we need and desire.

Amiker, 796 So. 2d at 947 (emphasis added). The deference to the trial judge is based on the assumption that the trial judge's findings are based on personal recollections and observances at trial and, therefore, are more reliable. This Court described its position as "inferior" to the trial judge because this Court must make findings of fact using a "cold, printed record of a case." *Id.* See also *Gary v. State*, 760 So. 2d 743, 757 (Miss. 2000) (Banks, P.J., dissenting) (holding use of "cold, printed record" limits capacity to make determinations of fact).

Trial of this matter was held on August 8-9, 2005. At the conclusion of trial, the trial court requested submission of Proposed Findings of Fact and Conclusions of Law from all parties. (Tr. 372; R.E. 214). On May 15, 2006, the Administrative Office of Court issued its Notice of Filing Pursuant to M.R.A.P. 15 which established a July 3, 2006 deadline for a decision. Subsequently, the trial court requested that the court reporter prepare a transcript of the trial as evidenced by the bill submitted by the Court reporter on June 28, 2006 for "requested transcript by Court." (R. 153; R.E. 225). This transcript, prepared as the deadline for a decision approached, was a complete transcript 386 pages long. (*Id.*).

Finally, on September 19, 2006, over thirteen months after trial, the Findings of Fact and Conclusions of law were made. With all due respect to the trial court, it is obvious that the court relied on the "cold, printed record of the case" it requested when making the findings of fact. Thirteen months after trial, the trial court, which hears many cases and hears the testimony of witnesses on almost a daily basis, did not have the requisite recollection of live testimony or the demeanor of the witnesses. Thirteen months after trial, "the smoke of the battle" had cleared. Since the trial courts findings were made based on a review of the record, without the underlying basis for

reliability, the trial court's findings should not receive deferential treatment and are subject to *de novo* review.

Since the trial court's findings were based on its review of the "cold, printed record," this Court sits in an equal position to make findings of fact. Where the advantages of personal recollection of trial are non-existent, the appellate court is equally capable of making reliable findings of fact. *Pollard v. Sherwin-Williams Co.*, 955 So. 2d 764, 773 (Miss. 2007). Accordingly, this court should review the trial court's findings of fact *de novo*.

As to the award of damages, the trial court adopted Appellee's proposed Findings of Fact and Conclusions of Law almost verbatim. Appellee's Proposed Findings and Conclusions read as follows:

> For the foregoing reasons the Court awards her damages damage [sic] the amount of $500,000.00 for the emotional distress, humiliation, embarrassment, pain and suffering, mental anguish, mental pain and suffering, present pain and suffering and future pain and suffering. Under the facts and circumstances this award is appropriate.

(Supp.R. 93; R.E. 93). The trial court's Findings and Conclusions read as follows:

> For the foregoing reasons the Court awards [V.S.] damages in the amount of $500,000.00 for her emotional distress, humiliation, embarrassment, pain and suffering, mental anguish, mental pain and suffering, present pain and suffering and future pain and suffering. Under the facts and circumstances of this case this award is appropriate.

(R. 164; R.E. 18). *De novo* review of findings of fact is appropriate when the trial court makes only minor alterations to a party's proposed findings (i.e. adopts a party's proposed findings almost verbatim). *City of Belmont v. Miss. State Tax Comm'n*, 860 So. 2d 289, 293-95 (Miss. 2003); *Brooks v. Brooks*, 652 So. 2d 1113, 1118 (Miss. 1995). Because the trial court adopted the

Appellee's proposed findings regarding the award of damages almost verbatim, the award of damages is subject to *de novo* review.

Furthermore, even though much of the testimony at trial dealt with the issue of damages, the trial court's findings and conclusions devote only two paragraphs to this issue (one of these paragraphs is cited above and was copied almost verbatim from Appellee's proposed findings). (R. 163-164; R.E. 17-18). Respectfully, but clearly, the trial court failed to make independent, specific findings of fact and conclusions of law on the issue of damages. Where the trial court fails to make its own findings of fact and conclusions of law, this Court will review the record *de novo*. *Mississippi Dept. of Transp. v. Johnson*, 873 So. 2d 108, 111 (Miss. 2004).

Therefore, this Court should conduct a *de novo* review not only of the conclusions of law, but also of the trial judge's findings of fact, which will support reversal of the trial court's decision.

B. Glenn Staples was Not at the Place of Employment and the MTCA's Presumption of Course and Scope of Employment was Not Established by the Evidence.

The MTCA provides the exclusive remedy for all claims or suits seeking damages against a governmental entity and its employees. §11-46-7(1). Pursuant to Sections 11-46-5 and 11-46-7, a governmental entity, such as Appellant, can be liable under the MTCA for misconduct of its employees only if that misconduct occurred while the employee was "acting within the course and scope of employment."[3]

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Plaintiff alleged claims of direct negligence in her Complaint but failed to provide any evidence of direct negligence or direct wrongful conduct on the part of Appellant. The trial court's Findings of Fact and Conclusions of Law did not address these direct claims against Greenwood. (R. 155-164, R.E. 9-18). Appellant requested that the trial court amend its Findings of Fact and Conclusions of Law to expressly address these direct negligence claims, but the trial court failed to do so. (R. 166-167, 352, R.E. 8, 19-20). The Findings of Fact and Conclusions of Law only addressed Appellee's vicarious liability claims, and the trial court's decision is based solely on vicarious liability for the acts of Glenn Staples. Appellant cannot be held vicariously liable for the actions of Marvin Fray. See Miss. Code Ann. § 47-5-417(providing that a work release inmate shall never be considered an

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); *Davis v. Hoss*, 869 So. 2d 397, 403 (Miss. 2004). The trial court erred when it found "the City of Greenwood has failed to rebutt the presumption that Staples was acting within the course and scope of his employment with the City of Greenwood when he failed in performing his job." (R. 161; R.E. 15).

To establish the presumption of course and scope of employment, Appellee bears the burden of proving that Glenn Staples was "**at the place** of employment." Appellee did just the opposite. The uncontradicted evidence presented at trial conclusively establishes that Mr. Staples was not within his place of employment at the time of the alleged misconduct (his alleged failure to supervise the inmates). As a driver, Mr. Staples does not have an office or any other permanent, fixed place of employment. His place of employment is where there is trash to be picked up on his route. Every witness who testified on this issue testified that there was no trash to be picked up and no work to be done on Fulton Street where the alleged misconduct occurred. Therefore, Mr. Staples was not within the place of his employment and the facts do not establish the "course and scope" presumption under the MTCA.

Inmate Marvin Fray testified that there was no trash to pick up where they stopped on Fulton Street. Deborah Holland, V.S.'s sister, also testified that there was no trash to be picked up on Fulton Street. Two separate investigations conducted by Detective Andrews and Benny Herring confirmed the absence of trash or any work to be done on Fulton Street and that Mr. Staples and the inmates were not on Fulton Street for any work-related purpose. Further, the trial evidence

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agent or employee of a governmental entity).

established that Mr. Staples was not on his regular trash pick-up route, as testified to by Deborah Holland, whose relative works the route that includes Fulton Street. Commander McKinney's testimony confirmed this important fact.

To the extent that the trial court concluded that Appellant was vicariously liable for the actions of Glenn Staples based on the MTCA's presumption of course and scope of employment, that determination is not supported by the evidence and is an erroneous conclusion of law mandating reversal of the trial court's opinion. Since the uncontradicted evidence establishes that Mr. Staples was not at the place of employment at the time of the misconduct, this court should render a decision that the facts of this matter do not establish a presumption of course and scope of employment under the MTCA. As set forth below, the facts and controlling law mandate a conclusion that Glenn Staples was not within the course and scope of employment at the time of the incident, Appellant cannot be held vicariously liable for his actions and Appellant was entitled to immunity and a judgment in its favor on the issue of liability.

C. Glenn Staples Was Not Acting Within the Course and Scope of his Employment at the Time of the Alleged Misconduct.

Where there is no conflict in the facts, the question as to whether the employee was acting within the course and scope of his employment at the time of the accident is a question of law for the Court. *Prairie Livestock Co. v. Chandler,* 325 So. 2d 908, 909 (Miss. 1976); *Singley v. Smith,* 739 So. 2d 448, 450 (Miss.Ct.App. 1999). "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). The facts of the present matter are not in dispute, and Mr. Staples' intentional actions to facilitate sexual contact between Marvin Fray and V.S., and thereafter "driving the get away vehicle" as

alleged by the Appellee in her Complaint and proven at trial, 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.

"Under the doctrine of *respondeat superior,* the master is liable for the acts of his servant which are done in the course and scope of his employment and in furtherance of the master's business." *Children's Medical Group,* 940 So. 2d at 935 (quoting *Sandifer Oil Co. v. Dew,* 71 So. 2d 752, 758 (Miss. 1954)). Under Section 228 of the *Restatement (Second) of Agency*:

(1) Conduct of a servant is within the scope of employment if, but only if:

(a) It is of the kind he is employed to perform;

(b) It occurs substantially within the authorized time and space limits;

(c) It is actuated, at least in part, by a purpose to serve the master, and

(d) If force is intentionally used by the servant against another, the use of force is not unexpectable by the master.

(2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time and space limits, or too little actuated by a purpose to serve the master.

Restatement (Second) of Agency Section 228 (1958); See also *Children's Medical Group,* 940 So. 2d at 935. In determining whether a particular act is within the course and scope of employment, the "decisive question" is whether the employee "was at the time doing any act in furtherance of his master's business." *Lovett Motor Co. v. Walley,* 64 So. 2d 370, 390 (Miss. 1953). "To be within the course and scope of employment, an activity must carry out the employer's purpose of the employment or be in furtherance of the employer's business." *Cockrell v. Pearl River Valley Water Supply District,* 868 So. 2d 357, 361-62 (Miss. 2004) (citing *Seedkem South, Inc. v. Lee,* 391 So. 2d 990, 995 (Miss. 1980)).

The Mississippi Supreme Court has explained the rule regarding course and scope as follows:

> The inquiry is not whether the act in question in any case was done so far as time is concerned, while the servant was engaged in the master's business, nor as to mode or manner of doing it; whether in doing the act he uses the appliances of the master, but whether, **from the nature of the act itself as actually done, it was an act done in the master's business,** or wholly disconnected therefrom by the servant, not as servant, but **as an individual on his own account.**

Prairie Livestock Company, Inc., 325 So. 2d at 910 (emphasis added). The test is whether the employee is engaged in his employer's business at the time of the incident. *Seedkem South, Inc.*, 391 So. 2d at 995.

An employer is vicariously liable for intentional torts committed by an employee provided that the torts were committed in the course and scope of employment. *McClinton v. Delta Pride Catfish, Inc.*, 792 So. 2d 968, 976 (Miss. 2001). Where the intentional act is not within the course and scope of employment, there is no vicarious liability. *Id.* (citing *Forrest County Coop. Assoc. v. McCaffrey*, 176 So. 2d 287, 290 (Miss. 1965)). Where an employee commits a malicious act based on the employee's own personal motive, the employer is not vicariously liable. *Id.*

The facts of the case at bar fall within the "deviation cases" wherein an employee, initially acting within the scope of his employment, deviates therefrom to pursue a personal mission. The Mississippi Supreme Court has explained this rule, as follows:

> If a servant steps aside from the master's business for some purpose of his own disconnected from his employment, the relationship of the master and servant is so temporarily suspended and this is so no matter how short the time, and the master is not liable for his acts during such time.

Stovall v. Jepsen, 13 So. 2d 229, 230 (Miss. 1943). This Court has continued to apply this "deviation rule" holding, if an employee steps outside his employer's business, then the employment relationship "is temporarily suspended and this is so no matter how short the time and the master is not liable for his acts during such time." *Estate of Brown v. Pearl River Valley Opportunity, Inc.*,

627 So. 2d 308, 311 (Miss. 1993). See also *Children's Medical Clinic,* 940 So. 2d at 935; *Cockrell*, 865 So. 2d at 362; *Seedkem South*, 391 So. 2d at 995. "An employee's personal unsanctioned recreational endeavors are beyond the course and scope of his employment." *Cockrell*, 865 So. 2d at 362. The Mississippi Supreme Court has described the employee's personal business as "a frolic of his own" during which the employer is relieved from liability, even if the employee returns to his employment after the frolic. *Seedkem South, Inc.* 391 So. 2d at 995.

Therefore, under Mississippi law, the test for determining course and scope of employment is quite simple: whether the employee is engaged in his employer's business at the time of the incident. *Id.* See also *Cockrell,* 865 So. 2d at 361 ("Mississippi law provides that an activity must be in furtherance of the employer's business to be within the scope and course of employment.")

Glenn Staples was on a purely personal endeavor when he took the inmates to Fulton Street, where there was no work to be done, specifically for the purpose of propositioning V.S. These facts are uncontraverted and are not at issue; therefore, the determination of course and scope is solely a question of law. The trial court's conclusion that Staples was in the course and scope of employment when he took the inmates to Fulton Street and watched Marvin Fray engage in sexual activity with V.S. is an erroneous legal conclusion, and the Appellant was entitled to judgment in its favor since it cannot be held liable under the MTCA for the actions of Staples which occurred outside the course and scope of his employment.

There are several factually similar cases that are instructive to, if not binding on, this Court. In *Cockrell*, this Court held that a law enforcement officer was outside the scope of his employment when he made romantic advances toward an arrestee. *Cockrell*, 865 So. 2d at 362. In *Hollins v. City of Jackson*, 145 F. Supp. 2d 750, 757 (S.D. Miss. 2000), the district court found that a security guard who stopped the female plaintiff in his capacity as a city police officer and had sex with the woman

in exchange for letting her go with a warning was acting outside the course and scope of his employment. In *Children's Medical Group,* the Mississippi Supreme Court held that it "defied reason" to argue that a doctor's affair with a co-work furthered the business interests of the defendant clinic or that the doctor was acting within the course and scope of his employment with the clinic. *Children's Medical Group,* 940 So. 2d at 936. In *Tichenor v. Roman Catholic Church of the Archdiases of New Orleans* 32 F. 3rd 953, 959-60 (5th Cir. 1994), the Fifth Circuit found that the employee/priest was not acting within the course and scope of his employment when he smoked marijuana and engaged in sexual acts with minors because those acts no way furthered the interests of his employer. The Southern District of Mississippi, the Fifth Circuit, and the Mississippi Supreme Court, applying Mississippi law, have held that sexual misconduct falls outside the course and scope of employment. See *Cockrell,* 865 So. 2d at 362.

Other Mississippi precedent concerning intentional actions further supports the conclusion that Glenn Staples' actions were outside the course and scope of his employment. See *Patton v. Southern State Transp. Inc.,* 932 F. Supp. 795 (S.D. Miss. 1996), aff'd, 136 F.3d 1328 (5th Cir. 1996) (finding an assault and battery committed by truck driver did not render his employer liable under *respondeat superior* because the assault did not further the employer's interests); *Thatcher v. Brennan,* 657 F. Supp. 6 (S.D. Miss 1986), aff'd, 816 F.2d 675 (5th Cir. 1986) (finding that employer of pharmaceutical salesman who committed assault and battery while apparently engaged in his employment, was not liable as the assault constituted the salesman's "purely personal objectives, and did not further the interests of the employer"); *May v. VFW Post No. 2539,* 577 So. 2d 372 (Miss. 1991) (assault and battery committed by off duty janitor did not render the VFW Post liable as his employer because the employee deviated from his employment and the employer

received no benefit from his conduct). Mr. Staples deviated his employment was pursuing purely personal objectives that did not further the interests of the Appellant.

One may argue, upon a reading of the above cases, that it was always the actor whose conduct rendered him or her outside the course and scope of employment. Glenn Staples was an actor, too. Appellee alleged in her Complaint, and proved at trial, that Glenn Staples knowingly allowed Marvin Fray to sexually assault V.S. and then "drove the get away vehicle." The trial court found that Staples returned to Fulton Street for the purpose of allowing the inmate to proposition V.S. and that Staples witnessed the sexual assault and did nothing to stop it. (R. 156-57; R.E. 10-11). 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. As in *Tichenor* and *Hollins,* the acts committed by Mr. Staples directly contradict the purpose of the employment and nothing could be further from his duties as a supervisor than the commission of these intentional, heinous actions. *Hollins*, 145 F. Supp. 2d at 758. As in *Cockrell,* there is "no question" that Staples diverted from his employment for personal reasons and was no longer acting in the furtherance of his employer's interests at the time of his alleged misconduct. *Cockrell*, 865 So. 2d at 362. The actions of Mr. Staples fall into the category of personal misconduct contemplated by the Mississippi Supreme Court which 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,* 940 So. 2d at 935.

The trial court's decision was based, in part, on the fact that Staples was suspended and later terminated from employment. (R. 157; R.E. 11). However, in *Cockrell*, the law enforcement officer/employee was terminated for his intentional, personal actions but found to have been acting outside the course and scope. *Cockrell,* 865 So. 2d at 359. Clearly, subsequent termination from employment does not indicate that the actions were in furtherance of the employer's business and within the course and scope of employment. An employee's personal unsanctioned endeavors are beyond the course and scope of his employment, regardless of subsequent termination.

The trial court held that "the failure of a municipal employee to prevent an inmate under his charge from committing such acts when there is an affirmative duty to properly supervise falls within the scope of employment." (R. 159; R.E. 13). In other words, since Mr. Staples was supposed to keep such lurid occurrences as this from happening, his failure to do so is within the course and scope of employment. Under the above rationale, an employee's personal "frolic," no matter how far removed from the business purpose of the employer, is always within the course and scope of his employment as long as it constituted a violation of work responsibilities. The trial court failed to apply, and its ruling is contrary to, controlling Mississippi law. "The inquiry is not whether the act in question was done... while the servant was engaged in the master's business, nor as to the mode and manner of doing it." *Prairie Livestock*, 325 So. 2d at 910. The test for course and scope is whether "from the **nature of the act itself as actually done**, it was in the master's business." *Id.* (emphasis added). "The nature of the act itself actually done" (taking the inmates to Fulton Street for sex) determines course and scope and was purely personal and not in Appellant's business. What Mr. Staples was supposed to be doing, properly supervising the inmates, defines his job responsibilities, but not the legal analysis of course and scope of employment for the purposes of vicarious liability.

Cockrell exemplifies that the "act itself, actually done," and not the scope of the job responsibilities, determines whether or not the employee was in the course and scope of employment. In *Cockrell*, the officer was on patrol and arrested the plaintiff, which were certainly part of his job responsibilities. However, the "acts actually done" were sexual advances toward the plaintiff. The nature of these acts, not the employee's general job responsibilities, were examined by the Mississippi Supreme Court and found to be outside of the master's business. The nature of the acts in *Cockrell* and herein were intentional, sexual and in no way in furtherance of the employer's business. The "acts actually done" in *Cockrell* and herein, were not "in the master's business" and are therefore outside the course and scope of employment.

If the reasoning of the trial court was the law in Mississippi, the officers in *Cockrell* and *Hollins*, and the priest in *Tichenor,* would all have been deemed to be in the course and scope of employment because their misconduct arose out of the intentional performance, or non-performance, of job responsibilities. Apprehending criminal suspects and holding them in custody are the job responsibilities of police officers. Supervising, advising and mentoring minor church members are part of the job responsibilities of a priest. As in these cases, Mr. Staples intentionally disregarded his duties and engaged in a personal endeavor outside of the course and scope of his employment. The intentional disregard of the job responsibility is not within the course and scope of employment solely because the job responsibility existed in the first place. It is the intentional disregard of the job responsibility that can, and in this case does, take the misconduct outside of course and scope. See also *Mabus v. St. James Episcopal Church*, 884 So. 2d 747, 756 (Miss. 2004) (as a matter of law, church not vicariously liable for priest's surreptitious taping of counseling session with parishioner); *Gulledge v. Shaw*, 880 So. 2d 288, 295 (Miss. 2004) (as a matter of law, bank not vicariously liable for employee's knowing notarization of forged signature); *Adams v. Cinemark*

USA, Inc., 831 So. 2d 1156, 1159 (Miss. 2002) (as a matter of law, theater not vicariously liable for assault on a movie patron).

There exists a line that, when crossed, takes employee action out of the course and scope of employment. The Mississippi Supreme Court has drawn that line. Unsanctioned personal endeavors motivated by personal desires are outside the course and scope of employment. *Cockrell*, 865 So. 2d at 362. Moreover, sexual misconduct is outside the course and scope of employment. *Cockrell*, 865 So. 2d at 362. Staples' actions in intentionally facilitating then watching the sexual conduct between Mr. Fray and V.S. and finally "driving the get away vehicle" were personal and unrelated to Appellant's business. The "nature of the act itself, actually done" was outside the course and scope of employment. Only those acts "which the servant does in some part for the purpose of giving service to the master" are in the course and scope of employment. *Restatement (Second) of Agency* Section 228, Comment "a". It defies reason to argue that facilitating and watching sexual contact between an inmate and a citizen of Greenwood in any way furthered the business interest of Appellant.

The trial court attempted to distinguish *Cockrell* and *Tichenor* because, according to the court, Mr. Staples himself was not engaged in criminal conduct of sexual assault. (R 159; R.E. 14). As set forth below, Staples was engaged in criminal conduct which makes the trial court's distinction erroneous. Regardless, the issue of course and scope of employment does not turn on whether or not the conduct was criminal. The central and determinative issue under Mississippi law is whether or not the actions were in furtherance of the employer's business. In the cases involving direct sexual contact between the employee and the plaintiff, the employees intentionally disregarded their duties and engaged in a personal endeavor. Herein, Mr. Staples intentionally disregarded his duties and engaged in a personal endeavor: to facilitate and watch sex between Mr. Fray and V.S. By these

intentional actions, as with the employees in the numerous cases cited above, Mr. Staples stepped out of the course and scope of his employment to engage in a purely personal mission that did not further the business interests of the Appellant. The fact that it was an inmate, and not Staples, that directly engaged in this sexual activity does not change the fact that Staples' misconduct did not further the interest of the Appellant and is outside the course and scope of employment. Staples' decision to stay in the truck and watch does not somehow put his intentional, personal actions within the course and scope of employment. Mr. Staples was not acting in furtherance of Greenwood's business; rather, he was acting in furtherance of his own desires.

The court further attempted to distinguish *Cockrell, Tichenor* and similar cases by describing the case at issue as "the failure of a municipal employee to prevent an inmate under his charge from committing such acts." (R. 159; R.E. 14). The trial court has misconstrued the uncontested facts. This matter is far from a "failure to prevent" situation. Rather, it is an intentional facilitation situation, pure and simple. Inmate Fray did not sneak off without Mr. Staples' knowledge. Instead, Mr. Staples purposefully facilitated the contact between the inmates and knowingly allowed sexual contact between them and then fled when confronted, all of which was outside the course and scope of his employment.

Other courts have addressed this issue. In *Quadrozzi v. Norcem, Inc.*, 125 A.D. 2d 555, 560 (S.C.N.Y. 1986), the court found that a supervisor was not acting within the course and scope of his employment when he encouraged, allowed and witnessed an assault by his trainee. Michael Caiti was employed by the defendant/employer as a cement truck driver and delivered a load of cement to the plaintiff's concrete manufacturing plant. *Id.* Michael Caiti was accompanied by his eighteen year old son "John" who was working with the defendant's consent as a 30-day unpaid trainee. *Id.* After the load was delivered, John went to the dispatcher's office to have the delivery ticket signed.

Id. While there, he became involved in a dispute with plaintiff. *Id.* John left and returned to the truck which was driven off the premises. *Id.* John discussed the dispute with his father/supervisor who told him to "Do what you have to do. You are a man now." *Id.* John then beckoned to plaintiff from across the street to come out. Words were exchanged, and plaintiff was assaulted by John. *Id.* The Supreme Court of New York, Appellate Division, upheld the jury's verdict which found that neither Michael nor John were acting within the scope of their employment at the time of the assault. *Id.* Michael was supposed to be supervising his son and was supposed to prevent his subordinate from assaulting someone while on the job. However, his failure to properly supervise his son, a trainee, was outside the course and scope of his employment. *Id.* The same conclusion must be reached herein. Staples' failure to properly supervise and his intentional facilitation of the sexual event were outside the course and scope of employment. Appellant cannot be held liable for those acts under the MTCA, and Appellant is entitled to reversal of the trial court's Judgment and a decision rendering judgment in its favor on the issue of liability.

D. Glenn Staples Was Not Acting Within The Course and Scope of His Employment and Appellant is Immune Since Staples' Conduct Constituted Criminal Offenses.

"The MTCA specifically precludes actions against a governmental entity where the conduct of the employee constitutes . . . any criminal act." *Hollins v. City of Jackson*, 145 F. Supp. 2d 750, 757 (S.D.Miss. 2000); § 11-46-7(2); 11-46-5(2). If the conduct of the employee constitutes a criminal act, the employee is deemed, as a matter of law, to be outside the course and scope of employment and the governmental entity has not waived immunity for such criminal conduct. *Id.*

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). 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. Since Mr. Staples knew that Fray planned to commit the act and assisted him by providing time and opportunity to commit the act, he should be considered a principal in the crime.

> Every person who shall be an accessory to any felony, before the fact, shall be deemed and considered a principal, and shall be indicted and punished as such; and this whether the principal have been previously convicted or not.

Miss. Code Ann. § 97-1-3. To aid and abet in the commission of a felony, one must "do something that will incite, encourage, or assist the actual perpetrator in the commission of the crime." *Crawford v. State*, 151 So. 534 (Miss. 1923). By taking him to the scene and giving Mr. Fray the opportunity to commit his crime, and thereafter assisting him in committing the crime, Mr. Staples aided and abetted Mr. Fray and committed a criminal offense for which Appellant can not be held liable and is immune under the MTCA. 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).

Mr. Staples took Fray to Fulton Street and allowed him to commit the crime. Mr. Staples saw Fray having sex and did nothing to stop it. He gave Fray the opportunity to commit the crime and assisted Fray in the commission.

Miss. Code Ann. § 97-1-5 states as follows:

> Every person who shall be convicted of having concealed, received, or relieved any felon, or having aided or assisted any felon, knowing that such person had committed a felony, with intent to enable such felon to escape or to avoid arrest, trial, conviction or punishment, after the commission of such felony.

It is important to note that Appellee actually alleged accessory after the fact in the Complaint, specifically alleging that Staples was "the driver of the get away vehicle." Appellee proved this

allegation at trial. Mr. Staples was indeed "the driver of the get away vehicle" as he fled with the inmates and had to be identified later at the City Barn.

The trial court reasoned that there was no common plan or scheme between Staples and the inmates in finding that Mr. Staples did not commit crime. (R. 159; R.E. 13). However, aiding and abetting does not require a common plan or scheme, unlike conspiracy. *Shumpart v. State*, 935 So. 2d 962, 971 (Miss. 2006). The existence of a common plan or scheme is immaterial, and the trial court erred in holding otherwise.

The trial court apparently places great weight on the fact that Mr. Staples was never accused of committing a crime nor charged with a crime to conclude that Appellant did not waive immunity for Mr. Staples' actions. (R. 160; R.E. 14). Under MTCA, the absence of charges or convictions of a crime are immaterial. In *Kirk v. Crump*, 886 So. 2d 741, 744 (Miss. 2004), the defendant sheriff's deputy was not charged with nor convicted of a crime after he physically forced a casino patron to take mug shots for the casino. Despite this fact, the Mississippi Court of Appeals held that the deputy committed the criminal offense of assault, which was an action outside the scope and course of his employment for which the governmental entity was immune. *Id.* at 746. See *McCoy*, 949 So. 2d at 84 (holding MTCA immunity does not require a finding of guilt).

E. The Trial Court's Award of Damages was Not Supported by Substantial, Credible Evidence and Appellee Did Not Offer Any Medical Evidence Supporting Injuries or Damages.

Appellee claimed emotional damage, past and future medical expenses, diminished earning capacity, attorneys' fees and expenses and interest in her Complaint. The trial court's award of damages references only the claim of emotional distress. The trial court found that V.S. suffered Post-Traumatic Stress Disorder as a result of the incident and awarded exactly the statutory

maximum, $500,000.00 for such damages. The court's Findings and Conclusion contain only one paragraph relating to findings of facts to damages, which reads as follows:

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

(R. 163; R.E. 17). The trial court's award of damages is against the overwhelming weight of the evidence and is grossly excessive. The award of damages was unduly influenced by the nature of the claims rather than the proof at trial and therefore unreasonable, outrageous and must have been actuated by passion, partiality and prejudice.

In rendering a verdict equal to the maximum amount allowed under the MTCA, the trial court did not evaluate the sparse evidence concerning damages at all. When the Appellant was left with no idea concerning the elements of damages, the trial court had the opportunity to amend its Findings and Conclusions to explain how it arrived at the statutory cap but failed to do so. (R. 166-186, 352; R.E. 8, 19-39). Without further explanation from the trial court, the only reasonable explanation is that the Court determined liability and decided to award as much as Appellee was permitted to collect, which was error.

The trial court's award of damages was not supported by substantial, credible and reasonable evidence. Appellee introduced no past medical bills nor any evidence of future medical expenses. Further, the only medical evidence presented at trial supporting an award of emotional damages

came from Appellee's expert, Dr. Wood Hiatt. Although Dr. Hiatt testified that the criteria for the diagnosis of PTSD are set forth in the Diagnostic and Statistic Manual of Mental Disorders – IV ("DSM-IV"), he did not rely on such criteria when making his diagnosis. Instead of the established criteria, Dr. Hiatt based his diagnosis on four things: increased bladder control problems, bowel control problems, sleep cycle disturbance and weight gain from food intake pattern changes. Not a single one of these alleged conditions are documented in the post-incident medical records of V.S.'s treating physicians.

Regarding the weight gain relied upon by Dr. Hiatt in his diagnosis, plaintiff was taking Zyprexa after the accident for treatment of her schizophrenia. One of the side effects of Zyprexa is weight gain. After exhibiting weight gain, Dr. Hines at Lifehelp switched V.S.'s medication to one that did not cause weight gain, and V.S. lost weight. Dr. Hiatt does not provide any direct evidence that V.S.'s food intake pattern was disturbed; instead he merely assumes, erroneously, that the weight gain is related to food intake as opposed to other causes.

Regarding the increased bladder control problems, Dr. Hiatt has recommended treatment by a urologist, indicating that Dr. Hiatt believes that the bladder control problems might be a physical problem and not a mental problem caused by the trauma. Similarly, Dr. Hiatt has recommended treatment by a gastroenterologist for the bowel control problems, again, indicating Dr. Hiatt's belief that there are, or at least may be, physical causes for this problem. Furthermore, there is no evidence, medical record or credible expert testimony, causally connecting the alleged physical complaints of bed-wetting and loss of bowel control to the June 28, 2002 incident. V.S.'s family did not report any alleged physical problems to her treating physicians, and no such evidence was reflected in any medical records reviewed by the two psychiatrists who testified at trial.

Regarding the sleep cycle disturbance, Dr. Hiatt testified that the cause was "not clear." After initially testifying that the sleep disturbance was partially caused by dreams about the incident, Dr. Hiatt later admitted that V.S. has dreams about the previous incident which are worse. Dr. Hiatt did not quantify the effect of dreams related to the Fray incident in comparison to dreams related to the other incidents.

Each of the four factors relied on by Dr. Hiatt is contradicted by the credible medical evidence. Further, there is no credible evidence causally connecting these alleged behavioral changes to the incident. The evidence presented at trial does not provide the required substantial, credible evidence necessary to support the trial judge's determination that V.S. has PTSD or any other emotional damages.

In *Doe v. North Panola School District*, 906 So. 2d 57 (Miss. Ct. App. 2004), the Mississippi Court of Appeals gave a detailed discussion of damages in a factually similar case. In *North Panola*, a mentally handicapped 15 year old girl alleged that two of her special education classmates sexually assaulted her while at school. *Id.* at 59. Plaintiff's designated expert testified that the minor plaintiff suffered from PTSD as a result of the incident. *Id.* at 62. Plaintiff's expert was the only medical professional to make this diagnosis. *Id.* To the contrary, North Panola's expert, Appellee's expert herein, Dr. Wood Hiatt, testified that there was no evidence of PTSD. *Id.* The Court found that the evidence was contradictory but that some sort of sexual activity occurred. *Id.* The trial court awarded damages in the amount of $20,197.03, which included $5,197.03 in past medical and therapy expenses and $15,000.00 for future therapy. *Id.* at 59. Importantly, as mentioned above, Appellee in this matter has produced no evidence of past medical or therapy expenses nor any proof of future medical expenses. The trial judge in *North Panola* did not award plaintiff any pain and suffering damages because, as here, there was no evidence to support that claim. *Id.* at 62. The

Court in *North Panola* found that it was impossible to determine plaintiff's level of stress, and, therefore, found insufficient evidence to support an award for pain and suffering. *Id.* The Court of Appeals affirmed the trial court's decision in *North Panola. Id.*

The present matter is factually similar to the *North Panola* case. Dr. Hiatt, Appellee's expert is the only doctor who has diagnosed V.S. with PTSD or any emotional trauma whatsoever. V.S.'s treating physicians, Dr. Martin and Dr. Hines, not only failed to diagnose any emotional trauma, but these doctors did not even mention emotional trauma in post-accident treatment. Furthermore, V.S. did not exhibit any of the DSM-IV criteria for the diagnosis of PTSD. There was no evidence of physical trauma to V.S., just as there was no such evidence in *North Panola.* In contrast to *North Panola,* where plaintiff presented evidence of past expenses and future expenses, there is no evidence on which to base any award of past or future medical expenses in this matter.

V.S.'s treating physicians were not called to testify at trial by the Appellee even though they were located in the city where the case was tried, nor were their respective medical records introduced into evidence, even though they were marked for identification by Appellee. Neither Dr. Martin, a family physician, nor Dr. Hines, a board certified psychiatrist, diagnosed V.S. with or treated her for any mental or emotional injuries, and neither physician diagnosed plaintiff with PTSD. The fact that her own treating physicians did not diagnose nor treat any injuries or conditions caused by the subject incident is credible evidence demonstrating that V.S. did not suffer any physical or emotional injuries. This evidence from physicians who are interested in V.S.'s well-being rather than the result of trial substantially outweighs the opinions of Dr. Hiatt.

Post incident medical records contained no signs of physiologic arousal, a classic symptom of PTSD, and did not contain any complaints of emotional trauma. Approximately thirteen days after the June 28, 2002 incident, V.S. was treated by Dr. Martin, and neither V.S. nor her sister even

reported the incident to Dr. Martin, much less made any complaints of any physical or mental injuries. The failure to report the incident to her treating physician is clear evidence that V.S. was simply not traumatized, in keeping with her family members' testimony that V.S. simply did not comprehend what happened to her. Additionally, V.S. did not demonstrate the desire to avoid the place of the incident, a diagnostic criteria for PTSD.

Both expert witnesses testified that, due to her mental handicap and schizophrenia, plaintiff needed life-long treatment regardless of the existence of the subject incident. They each testified that V.S.'s continued treatment at Lifehelp is not causally related to the June 28, 2002 incident. V.S. has not sought nor received any treatment from any medical provider for the alleged emotional damages on which the trial court's award of $500,000.00 is based.

In order to be affirmed, the finding that V.S. suffers from PTSD must be supported by substantial, credible and reasonable evidence. *City of Clinton v. Smith*, 861 So. 2d 323, 326 (Miss. 2000). The trial court's finding is not so supported and must be reversed. Dr. Hiatt testified at trial that, regardless of the legal capacity to consent, whether or not a person voluntary participated in a sexual act is a factor to consider in a diagnosis of PTSD. Dr. Hiatt testified that the mentally handicapped can voluntarily participate in sexual acts. Appellant's expert, Dr. Joel Reisman, explained that, the use or threat of violence is the "traumatic stress" which causes the Post "Traumatic Stress" Disorder. Dr. Reisman explained that the issue of legal consent is irrelevant in determining PTSD; rather, the issue is whether V.S. experienced a sexual assault sufficient to meet the diagnostic criteria for PTSD. The evidence does not support a conclusion that V.S. did not voluntarily participate in the sexual act with Mr. Fray, which is immaterial to Fray's criminal conduct, but, when taken into account with the lack of medical evidence presented at trial, is substantial evidence that V.S. was not emotionally damaged by the incident.

Appellee's own expert, Dr. Hiatt testified V.S. was "probably quite unable to understand what was happening." Indeed, the medical records and Deborah Holland's testimony confirm this opinion as they do not indicate any emotional reaction to the event whatsoever. The trial court's finding that V.S. suffered emotional damage as a result of the incident must be reversed.

In the alternative, the trial judge's award of $500,000.00 should be reversed as excessive. To require reversal, the error must be of such magnitude as to leave no doubt that the Appellant was unduly prejudiced. *Fielder v. Magnolia Brewing Co.*, 757 So. 2d 925, 928 (Miss. 1999). A damages award must be reversed if it is "so excessive as to strike mankind, at first blush as being, beyond all measure, unreasonable, and outrageous, and such as manifestly show the jury to have been actuated by passion, partiality, prejudice or corruption. *USF&G v. Estate of Francis*, 825 So.2d 38,47 (Miss. 2002). As set forth above, the court's award of damages was incorporated almost verbatim from Appellee's proposed findings and conclusions resulting in *de novo* review.

Compensatory damages "are such damages as will compensate the injured party for the injury sustained, and nothing more; such as will simply make good or replace the loss caused by the wrong or injury." *Richardson v. Canton Farm Equip., Inc.*, 608 So. 2d 1240, 1250 (Miss. 1992) (quoting *Black's Law Dictionary*, 352 (5th Ed. 1979)). Other courts have reached similar conclusions. *See Jones v. Malaco Music*, 2 F. Supp. 2d 880, 884 (S.D. Miss. 1998) (holding that "[a]ny compensatory damages must be reasonable and calculated to make plaintiff whole"); *Mississippi Power Co. v. Harrison*, 152 So. 2d 892, 903 (Miss. 1963) (stating that "in computation of damages, a person is to be made whole, or complete satisfaction is to be made, or he is to recover the value of the property destroyed; it is never contemplated that the injured party should realize a profit from damages sustained").

Hospital records from the day of the incident indicate "no injuries" or any sign of physical arousal, a diagnostic criteria for PTSD. These records further document normal physical findings upon examination. Detective Andrews, who spent a good deal of time with V.S. on the morning of the incident, testified that V.S. did not appear to be in any physical duress; she did not appear to be anxious, nervous, upset, embarrassed or guilty. Two weeks after the incident, V.S. went to her primary care physician. Neither her nor her guardian complained of any physical or emotional injuries or even mentioned the incident at all.

The most descriptive medical evidence of V.S.'s post-incident mental condition was the note of her treating physician, Dr. Hines, which says that V.S. is "not terribly upset." The post-incident medical records from V.S.'s treating physicians do not contain any evidence of increased bladder control problems, sleeping problems or bowel control problems. V.S.'s brother testified that the incident has not affected V.S.'s functional ability. V.S.'s sister testified that the incident has not affected V.S. at all and that V.S. simply does not understand what happened.

Patricia Westbrook and her sons testified about a general regression in V.S.'s personal and functional development. These complaints were never voiced to V.S.'s treating physicians. The medical records contradict the family members' testimony showing a general pre-incident regression that medical professionals believed would necessitate placement in the State hospital. Post-incident records clearly reflect that V.S. has not regressed from this pre-incident level, but has actually progressed and scored as high as possible on all levels of functioning in 2004.

Marvin Fray's actions concerning V.S. were repulsive, exploitive and criminal. The issue of damages, however, turns on the trial evidence of V.S.'s emotional damages and whether substantial, credible evidence was offered supporting an award of $500,000.00 in damages for conditions which have never been treated by a doctor. In *Jordan v. McKenna*, 573 So. 2d 1371

(Miss. 1990), plaintiff was sexually assaulted and presented evidence by her treating psychiatrist, not a trial expert. *Id.* at 1377. Plaintiff therein exhibited the DSM-IV diagnostic characteristics of PTSD and had received post-incident medical treatment and presented evidence of future medical treatment, and was awarded significantly less than the trial court's award herein. *Id.* at 1374. The trial court's award of $500,000.00 is not supported by the substantial, credible evidence and must be reversed and reduced.

As unfortunate and disgusting as the actions of Marvin Fray were, the substantial, credible evidence does not support the trial court's award of damages. Accordingly, the trial court's award must be reversed and reduced to an amount, if any, credibly supported by the trial evidence of no special damages and no medical treatment for any emotional damages.

V. CONCLUSION

Marvin Fray's conduct was reprehensible, inexcusable and criminal. However, the degree to which all reasonable people are outraged by his conduct is not the issue in this case as to liability nor damages. The question as to liability is whether or not the actions of Glenn Staples were in furtherance of Appellant's interests and therefore within the course and scope of his employment. They were not as a matter of law. The question as to damages is whether or not V.S. suffered any emotional injuries as a result of the unfortunate event. The only disinterested medical providers answer that question in the negative and the overwhelming weight of the evidence establishes that V.S. did not suffer any emotional injuries.

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

By: _____
OF COUNSEL

WILTON V. BYARS, III - BAR [redacted]
MITCHELL O. DRISKELL, III - BAR [redacted]
DANIEL COKER HORTON & BELL, P.A.
265 NORTH LAMAR BOULEVARD, SUITE R
POST OFFICE BOX 1396
OXFORD, MISSISSIPPI 38655-1396
(662) 232-8979