IN THE SUPREME COURT OF MISSISSIPPI
CASE NUMBER 2009-IA-01472-SCT

MISSISSIPPI DEPARTMENT OF MENTAL HEALTH and ELLISVILLE STATE SCHOOL — APPELLANTS

VERSUS

DAKARI RONIES SHAW — APPELLEE

APPEAL FROM THE CIRCUIT COURT OF
THE FIRST JUDICIAL DISTRICT OF
JONES COUNTY, MISSISSIPPI

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# BRIEF OF APPELLEE
# DAKARI RONIES SHAW

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Oral Argument Is Not Requested

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## CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following persons have a possible 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.

Dakari Ronies Shaw, plaintiff/ appellee

Eugene C. Tullos, attorney for plaintiff/appellee

S. Wayne Easterling, attorney for plaintiff/appellee

Mississippi Department of Mental Health, defendant/appellant

Ellisville State School, defendant/appellant

William N. Graham, attorney for defendants/appellants

Respectfully submitted,

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## STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-appellee does not believe that oral argument would assist in resolution of the issues raised in this appeal.

Respectfully submitted,

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## STATEMENT OF ISSUES

Plaintiff agrees with the Statement of Issues asset forth by defendants. This is an interlocutory appeal, and the ultimate question involves whether the trial judge was correct in overruling defendants' motion for a summary judgment. Inasmuch as the plaintiff clearly stated a cause of action based upon negligence, the sole issue is whether the "discretionary function" exemption of Section 11-46-9(1)(d) of the Mississippi Code bars plaintiff's claim.

## STATEMENT OF THE CASE

Ellisville State School was established pursuant to what is now Section 41-19-103 of the Mississippi Code. At the time of the accident, that code section provided that its mission was "the care, training, employment, and custody of feeble-minded persons." In 2004, employees of the institution came up with the idea of running a commercial enterprise which they referred to as "Camp Fear." During the Halloween season of each year, the camp was operated as a commercial establishment, charging customers an admission fee, and providing them a Halloween experience to remember complete with costumed actors wielding chainsaws, fake body parts, and other fear-inducing devices. The customers were led over a several-hundred-yard course in what is essentially a pitch dark pasture area with the darkness briefly interrupted by periods of lighting sufficient to destroy any accumulated night vision. (R. 46-47, 54, 59, 60, 72) The customers

attending Camp Fear were encouraged to run in this darkened area. (R. 80) No inmates were employed or utilized in the operation of Camp Fear – its sole purpose was to raise money. (R. 46)

The cause of the accident is disputed. The plaintiff and several witnesses testified that they were told by agents of the defendants to run in a dark area and that the plaintiff stepped in a hole and fell while running. The version of the defendant is that the plaintiff was standing at the edge of a porch in the dark and was basically victimized by a "stampede" of frightened customers being chased out of a darkened cabin by a lady resembling a character in a well known horror movie. In either event, the negligence of the defendants is very clearly alleged. The operator of a commercial establishment has an obligation to provide a reasonably safe place for invitees. This obligation includes providing adequate lighting and protection from hazards such as elevated porches, holes in the ground on traveled paths, and crowd control when necessary.

## SUMMARY OF THE ARGUMENT

The plaintiff contends that when a state institution operates an essentially commercial activity not directly related to its statutory mission, encourages the public to attend through the use of advertisements and other inducements, and charges an admission fee, then it has an obligation to furnish the public with a reasonably safe experience.

## ARGUMENT

This Court noted in *Dancy v. East Mississippi State Hospital*, 944 So.2d 10 (Miss. 2006), that Mississippi's discretionary function statute is modeled on its counter-part in the Federal Tort

Claims Act. The Court, in *Dancy, supra*, cited with approval portions of the United States Supreme Court decision in *United States v. Gaubert*, 499 US 315, 111 S. Ct. 1267 (1991), which, in turn, noted that "the purpose of the exception is to prevent judicial second guessing of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." If the action in question does not involve such policy, then the governmental agency has no exemption and stands in the same position as any other tort-feasor. Specifically, 28 U.S.C., Section 2674 states that absent immunity, the sovereign "shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances. . . ."

The Congressional Committee considering the federal statute listed examples of governmental torts that would not be exempt from liability under the discretionary exemption. The most commonly cited example is that of a government official driving an automobile. The usage of a vehicle in its very nature involves discretionary conduct, but it was never intended that such an example falls within the exemption. The federal cases construing this statute consider whether the act of the tort-feasor is in line with government policy and the mission of the sovereign. The Court in *Dancy, supra*, referred to this in attempting to point out this distinction and noted that the *Gaubert* decision emphasized that the exemption protects only governmental actions and decisions based upon considerations of public policy. Specifically, unless the discretion to be exercised involves "social, economic, or political policy alternatives," the exemption does not apply.

Obviously, one operating a commercial establishment not remotely connected to the statutory mission of the institution cannot take advantage of the exemption. It is true that in the

case of *Dotts v. Pat Harrison Waterway District*, 933 So.2d 322 (Miss. 2006), the Pat Harrison Waterway District was permitted to take advantage of this immunity when a swimmer drowned in the Dunn's Falls water park in Lauderdale County. However, one of the missions of the Pat Harrison Waterway District was operating swimming facilities and providing recreational opportunities to the general public. This is a far cry from the situation existing at the Ellisville State School; and that institution should not be permitted to jeopardize the safety of ordinary citizens being attracted by its advertisements and, therefore, subjecting themselves to harm by a poorly operated facility.

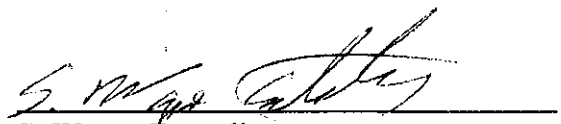
Thus, the legislature in passing Section 11-46-9(1)(d) of the Mississippi Code did not intend to give state agencies blanket immunity for all acts involving discretion. In fact, it is hard to imagine any act of a tort-feasor that does not involve a certain amount of discretion. It is only when those discretionary acts are related to social, economic, and political policy that the exemption apples. The operation of a commercial enterprise for a purpose outside the agency's statutory mission is not included in this action. Thus, the facts of this case are substantially different from *Bridges v. Pearl River Valley Water Supply District*, 793 So.2d 584 (Miss. 2001); *Urban Developers, LLC, v. City of Jackson, Mississippi*, 468 F.3d 281 (5th Cir. 2006); *Dancy, supra;* and *Gaubert, supra.*

Respectfully submitted,

S. WAYNE EASTERLING,
Of Attorneys for Plaintiff-Appellee

CERTIFICATE

A true copy of the foregoing brief has been mailed, postage prepaid, to the Honorable William N. Graham, Post Office Box 750, Hattiesburg, Mississippi 39403, attorney for appellants; and to the Honorable Billy Joe Landrum, Circuit Judge, Eighteenth Judicial District, Post Office Box 685, Laurel, Mississippi 39441, on this 22nd day of February, A.D., 2010.



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