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COME NOW Mississippi Department of Mental Health and Ellisville State School and submit this their Reply to Brief of Appellee, Dakari Ronies Shaw.

ASSESSMENT OF MS. SHAW'S BRIEF

Ms. Shaw's brief tacitly acknowledges the test for the applicability of the discretionary function exemption is the two part public policy function test discussed by the Mississippi Supreme Court in *Dancy v. East Mississippi State Hospital*, 944 So. 2d 10 (Miss. 2006). This brief likewise tacitly acknowledges that the actions by Ellisville State School in sponsoring Camp Fear was a discretionary undertaking on its part.

Ms. Shaw states that the mission of Ellisville State School is articulated in a prior version of MISS. CODE ANN. §41-19-103 which appears to date from 1921. Ms. Shaw quotes Ellisville's statement of purpose as "the care, training, employment and custody of feeble minded persons". (See page 1. of Appellee's Brief) Ms. Shaw's brief makes no mention of MISS. CODE ANN. §41-4-1 (Rev. 2009) which is the declaration of purpose of the Mississippi Department of Mental Health. This declaration of purpose is as follows:

The purpose of this chapter is to coordinate, develop, improve, plan for, and provide all services for the mentally ill, emotionally disturbed, alcoholic, drug dependent, and mentally retarded persons of this state; to promote, safeguard and protect human dignity, social well being and general welfare of these persons under the cohesive control of one (1) coordinating and responsible agency so that mental health and mental retardation services and facilities may be uniformly provided more efficiently and economically to any resident of the State of Mississippi; and further to seek means for the prevention of these disabilities. *Id.*

This statute and MISS. CODE ANN. §41-4-11(2) (Rev. 2009), which places Ellisville State School under the jurisdiction and control of the Mississippi Department of Mental Health, were enacted in 1974 when the Department of Mental Health was created. Ellisville State School and the Mississippi Department of Mental Health submit MISS. CODE ANN. §41-4-1 (Rev. 2009) is

a more current and relevant mission statement for Ellisville State School than a prior version of MISS. CODE ANN. §41-19-103 that is no longer available in the official code.

Ms. Shaw's brief then postulates that the Camp Fear funding raising event sponsored by Ellisville State School was a commercial activity unrelated to its mission. As a result, Ms. Shaw's brief contends Camp Fear did not involve social, economic, or political policy alternatives. This Brief contains no legal support for this claim.

DISCRETIONARY ACT EXEMPTION

Mississippi law indicates application of the discretionary act exemption set forth in MISS. CODE ANN. §11-46-9(1)(d) (Supp. 2009) is governed by the public policy function test. *Kaigler v. City of Bay St. Louis*, 12 So. 3d 577, 582 (Miss. Ct. App. 2009) (citation omitted). The public policy function test was adopted by the Mississippi Supreme Court in 1999 in the case of *Jones v. Miss. Dept. of Transportation*, 744 So.2d 256, 260 (Miss. 1999). In the two part public policy function test, the court must determine if the governmental act involved an element of choice or judgment and if so, whether the choice involved social, economic or political policy. *Strange ex rel. Strange v. Itawamba County School Dist.* 9 So. 3d. 1187, 1190 (Ms. Ct. App. 2009) other citations omitted.

Since their adoption of the public policy function test, Mississippi appellate courts have authorized application of the discretionary act exemption to a wide variety of activities including the manner in which a police department supervises and disciplines police officers, the decision to grant or deny parole, the placement or non placement of traffic control devises, the actions or omission of a high school football coach which caused a player to suffer heatstroke during practice, the decision of emergency medical personnel to use a "load and go" approach to an expectant mother, *Urban Developers, LLC v. City of Jackson, Mississippi*, 468 F. 3rd 286, 306 (5th Cir.) 2006 (other citations omitted), the operation of swimming facilities, *Dotts v. Pat*

Harrison Waterway District, 933 So. 2d 322 (Miss. Ct. App. 2006) and the operation and supervision of a gym, *Kaigler v. City of Bay St. Louis*, 12 So. 3d 577 (Miss. Ct. App. 2009).

ARGUMENT

There is no issue in the subject case concerning whether Ellisville State School's sponsorship of Camp Fear was a discretionary choice. Camp Fear was not mandated by any statute or regulation, but was authorized for the first time in 2004 as a means to raise money to benefit residents of Ellisville State School. Ms. Shaw's brief does not dispute that Camp Fear was a discretionary undertaking of Ellisville State School.

The issue before this Court is whether the second prong of the public policy function test is met, i.e., whether the decision to sponsor Camp Fear implicated social, economic or political policy alternatives. Ellisville State School and the Mississippi Department of Mental Health submit that their sponsorship of Camp Fear clearly involved social and economic policy alternatives. Funds raised at Camp Fear in 2006 were designated and used for a vacation expenses of residents of Ellisville State School. (R 24-23) The Mississippi Department of Mental Health and Ellisville State School submit that raising funds for vacations for residents of Ellisville State School is in furtherance of their mission "to . . . develop, improve . . . and provide all services for the mentally ill, emotionally disturbed . . . and mentally retarded persons of this state; to promote, safeguard and protect . . . social well-being and general welfare of these persons" MISS CODE ANN. §41-4-1 (Rev. 2009).

Furthermore, the decision by Ellisville State School to sponsor Camp Fear to raise funds for residents of the school is an action subject to policy analysis, *Strange* at 1191 citing *Dotts*, 933 So. 2d at 328, and it should be presumed this action was grounded in policy. *Dancy* at 18 citing *U. S. v. Gaubert*, 499 U.S. 315, 324, 111 S. Ct. 1267 (1991).

Ellisville State School and Mississippi Department of Mental Health submit the decisions to sponsor Camp Fear meets the established legal criteria for the discretionary act exemption involved in MISS. CODE ANN. 11-46-9(1)(d) (Supp. 2009).

The issue of immunity is a question of law to be determined by the court. *Dancy* at 15 other citations omitted. As this Court is aware, our state government is experiencing times of budgetary austerity. A determination by this Court that the discretionary act exemption applies to fund raising activities, such as Camp Fear, will ensure future efforts to raise funds from the public will not be eliminated because of liability considerations. *See e.g. Miller v. Elderton District Volunteer Fire Company*, 152 Pa. Cmwlth 159, 618 A. 2d 1143 (1992).

CONCLUSION

Ellisville State School and the Mississippi Department of Mental Health respectfully urge this Court to find that the discretionary act exemption of MISS. CODE ANN. §11-46-11 (1)(d) applies to the Camp Fear fund raising event and that Ms. Shaw's claim be dismissed with prejudice.

THIS the 1st day of March, 2010.

Respectfully submitted,

MISSISSIPPI DEPARTMENT OF
MENTAL HEALTH AND
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CERTIFICATE OF SERVICE

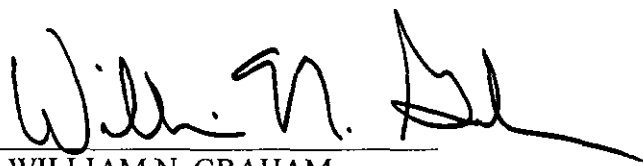
I, William N. Graham, attorney for the Appellants do hereby certify that I have this day served a true and correct copy of this **Reply Brief of the Appellants Ellisville State School and the Mississippi Department of Mental Health to Brief of Appellee** by United States mail with postage pre-paid on the following persons at these addresses:

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