

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons 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.

Dakari Ronies Shaw, Plaintiff and Appellee

Mississippi Department of Mental Health, Defendant and Appellant

Ellisville State School, Defendant and Appellant

Eugene Tullos, counsel for the Plaintiff and Appellee

Wayne Easterling, counsel for the Plaintiff and Appellee

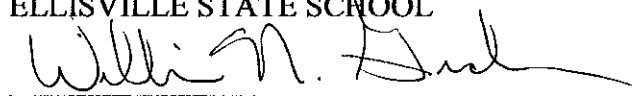
William N. Graham, counsel for the Defendants and Appellants

THIS the 8<sup>th</sup> day of February, 2010.

Respectfully submitted,

MISSISSIPPI DEPARTMENT OF  
MENTAL HEALTH AND  
ELLISVILLE STATE SCHOOL

By:



WILLIAM N. GRAHAM  
ATTORNEY FOR APPELLANTS

WILLIAM N. GRAHAM  
MSB# [REDACTED]  
Aultman, Tyner & Ruffin, Ltd.  
315 Hemphill Street  
P. O. Box 750  
Hattiesburg, MS 39403-0750  
Phone: 601-583-2671  
Facsimile: 601-583-2677

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## **STATEMENT OF ISSUES**

### **1.**

Does the discretionary function exemption of the Mississippi Tort Claims Act set forth in MISS CODE ANN. §11-46-9(1)(d) (Supp. 2009) bar Dakari Ronies Shaw's claims against Ellisville State School and the Mississippi Department of Mental Health for the injuries she sustained on October 31, 2006 at the "Camp Fear" fund raising event sponsored by Ellisville State School?

### **2.**

Whether the Circuit Court erred in denying Ellisville State School and the Mississippi Department of Mental Health's Motion for Summary Judgment based on the discretionary function exemption of the Mississippi Tort Claims Act?

## **STATEMENT OF THE CASE**

Since 2004, Ellisville State School has sponsored Camp Fear, a Halloween themed fund raising event for the benefit of residents of Ellisville State School. (R. 24-25) In 2006, funds raised by Camp Fear were used for vacation expenses for residents of Ellisville State School. (R. 24-25)

On October 31, 2006, Dakari Ronies Shaw, accompanied by her friends, tripped and fell while leaving one of the attractions at Camp Fear. Ms. Shaw sued Ellisville State School and the Mississippi Department of Mental Health for injuries she sustained in her trip and fall. (R. 3) Ellisville State School is under the jurisdiction and control of the Mississippi Department of Mental Health. MISS. CODE ANN. §41-4-11(2) (Rev. 2009).

## **COURSE OF PROCEEDINGS IN THE CIRCUIT COURT**

Ms. Shaw filed her Complaint on January 15, 2008. (R. 3) Ellisville State School and the

Mississippi Department of Mental Health filed their Amended Answer to the Complaint on March 4, 2008 (R. 9).

In January, 2009, two current and one former employee of Ellisville State School were deposed. During the same month, Ms. Shaw and six friends who accompanied her at Camp Fear were deposed.

On March 13, 2009, Ellisville State School and the Mississippi Department of Mental Health filed their Motion for Summary Judgment, Itemization of Facts, and Memorandum of Law. (R. 15-41) This motion sought dismissal of Dakari Shaw's claims asserting that the discretionary function exemption set forth in MISS CODE ANN. §11-46-9(1)(d) (Supp. 2009) barred the Plaintiff's claims. After a hearing in the Circuit Court of Jones County, Mississippi on August 17, 2009, the Circuit Court entered its Order denying Defendants' Motion for Summary Judgment on August 31, 2009. (R. 93) On September 11, 2009, the Defendants filed their Petition for Permission to Appeal. On November 4, 2009, the Supreme Court entered its Order granting the Mississippi Department of Mental Health and Ellisville State School's Petition for Permission to Appeal. (R. 94)

### **STATEMENT OF FACTS**

In 2004, the Director of Ellisville State School, Dr. Suzie Lassiter approved recommendations by her staff to hold a fund raiser during the Halloween season to raise funds for the benefit of Ellisville State School residents. (R. 24-25) "Camp Fear", a Halloween themed attraction, which was begun in 2004 and continues to the present, charged an admission fee for entry. During Dakari Shaw's departure from one of the attractions at Camp Fear, she tripped and fell and suffered injuries to her leg. Ms. Shaw has sued the Mississippi Department of Mental Health and Ellisville State School alleging negligence. (R. 3) Ellisville State School and the Mississippi Department of Mental Health deny Ms. Shaw's claims of negligence. (R. 9)

## **SUMMARY OF ARGUMENT**

Ellisville State School and the Mississippi Department of Mental Health assert Ellisville State School's sponsorship of Camp Fear meets the established legal criteria for application of the discretionary function exemption of MISS CODE ANN. §11-46-9(1)(d) (Supp. 2009). Approval of the Camp Fear fund raising event was a discretionary decision by the Director of Ellisville State School. The objective of Camp Fear in 2006, when Ms. Shaw was injured, was to raise funds for vacation expenses for residents of Ellisville State School. This objective is in furtherance of the social and economic policies of Ellisville State School and the Mississippi Department of Mental Health to develop, improve, and provide services and promote social well being and the general welfare of mentally ill, emotionally disturbed and mentally retarded persons of this state as set forth in MISS CODE ANN. §41-4-1 (Rev. 2009). Because Camp Fear meets the public policy function test adopted by the Mississippi Supreme Court, Ms. Shaw's claim should be barred by the discretionary function exemption in MISS CODE ANN. §11-46-9(1)(d) (Supp. 2009).

## **ARGUMENT**

Ellisville State School became subject to the jurisdiction and control of the Mississippi Department of Mental Health in 1974. MISS CODE ANN. §41-4-11(2) (Rev. 2009). The statement of purpose of the Mississippi Department of Mental Health is, in part, "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).

In 2004, Dr. Suzie Lassiter, the then Director of Ellisville State School, authorized the Camp Fear fund raising event and it was held for the first time. Camp Fear was a Halloween themed attraction during the Halloween season which charged admission for entry. Funds raised

by Camp Fear in 2006, when Ms. Shaw suffered injuries, were used for a vacation fund for Ellisville State School residents. These facts are not disputed by Ms. Shaw. (R. 26, 86)

Ms. Shaw tripped and fell when she and her friends were leaving one of the attractions at Camp Fear and Ms. Shaw suffered injuries. She claims Ellisville State School and the Mississippi Department of Mental Health's negligence caused her injuries. Ellisville State School and the Mississippi Department of Mental Health deny Ms. Shaw's claims of negligence.

### LAW

The discretionary function exemption of MISS CODE ANN. §11-46-9(1)(d) (Supp. 2009) was discussed by this Court in detail in *Dancy v. East Mississippi State Hospital*, 944 So.2d 10 (Miss. 2006). This Court noted that the Mississippi discretionary function statutory exemption appeared to be modeled on a similar exemption in the Federal Tort Claims Act. *Dancy* at 16. This Court then cited portions of the United States Supreme Court opinion in *United States v. Gaubert*, 499 U.S. 315, 111 S. Ct. 1267 (1991) which interpreted the discretionary function exemption in the Federal Tort Claims Act. This Court noted the United States Supreme Court held "that only those functions which by nature are policy decisions, whether made at the operational or planning level, are protected." *Dancy* at 16 citing *Gaubert* at 499 U.S. 315, 322 (1991). This Court also cited *Gaubert* noting "[t]he 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." *Dancy* at 16 citing *United States v. Gaubert*, 499 U.S. 315, 323 (1991) other citations omitted.

This Court in *Dancy* referenced a two-part test for application of the discretionary function exemption: "(1) whether the activity involved in an element of choice or judgment; and if so, (2) whether the choice or judgment in supervision involved social, economic or political

policy alternatives.” *Dancy* at 16 citing *Bridges v. Pearl River Valley Water Supply District*, 793 So.2d 584, 588 (Miss. 2001) other citations omitted.

Ellisville State School and the Mississippi Department of Mental Health would show there is no dispute as to whether or not Camp Fear was a discretionary choice. First, Camp Fear did not exist until its authorization by the Director of Ellisville State School in 2004. Also, Camp Fear was not mandated by statutes or regulations. In addition, Ms. Shaw has conceded that Camp Fear was a discretionary undertaking in her Memorandum Brief In Opposition to Defendants’ Motion for Summary Judgment. She states in her memorandum “It is true that this establishment and operation of Camp Fear involved a certain amount of discretion by officials of the Ellisville State School. (R. 88)

Ellisville State School would show the contested issue before this Court whether or not the decision to sponsor Camp Fear involves social, economic or political policy alternatives.

Ms. Shaw has cited MISS CODE ANN. §41-19-103 (1972) as providing the purpose of Ellisville State School. (R. 43) The source of the current version of MISS. CODE ANN. §41-19-103 (Rev. 2009) indicates this statute dates from 1921. The Mississippi Department of Mental Health and Ellisville State School would show MISS CODE ANN. §41-4-1 (Rev. 2009), which was enacted in 1974 is a more current statement of purpose and mission statement for these governmental entities. This statute states in part:

The purpose of this chapter is to coordinate, develop, improve, plan for, and provide all services for the mentally ill, emotionally disturbed . . . 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 a responsible agency . . . . *Id.*

The Mississippi Department of Mental Health and Ellisville State School would show funds raised at Camp Fear for vacation expenses for residents of Ellisville State School are in



furtherance of the statutory policy objectives of promotion of social well being and general welfare of mentally ill, emotionally disturbed and retarded citizens of this state.

Ellisville State School and the Mississippi Department of Mental Health would show that by authorizing Camp Fear, they should be presumed to have been pursuing policy objectives. This Court quoted *Gaubert* as follows: “[w]hen established governmental policy, as expressed or implied by statute . . . , allows a Government agent to exercise discretion, it must be presumed that the agent’s acts are *grounded in policy when exercising that discretion.*” *Dancy* at 18, citing *Gaubert* at 324, 111 S. Ct 1267 (emphasis added).

Ellisville State School and the Mississippi Department of Mental Health would show they meet the established legal criteria for application of the discretionary function exemption of the Mississippi Tort Claims Act set forth in §11-46-9(1)(d) (Supp. 2009). Furthermore, although a case addressing fund raising activities in a Mississippi Tort Claims Act context has not yet been decided, a wide variety of governmental actions have been held by Mississippi appellate courts to involve implementation of social, economic, or political policy. *Urban Developers, LLC v. City of Jackson, Mississippi*, 468 F.3<sup>rd</sup> 281, 306 (5<sup>th</sup> Cir. 2006). Ellisville State School and Mississippi Department of Mental Health would show a fund raiser designed to benefit residents of Ellisville State School should also be found by this Court to implement social and economic policies of these state agencies.

## CONCLUSION

Authorization of the Camp Fear fund raising event was a discretionary decision by the Director of Ellisville State School. Money raised by Camp Fear in 2006 when Ms. Shaw fell was used for vacation expenses for residents of Ellisville State School. The Camp Fear fund raiser was in furtherance of the Mississippi Department of Mental Health and Ellisville State School’s policy of developing, improving and providing services, as well as promoting social

well-being and the general welfare of mentally ill and mentally retarded persons. This policy is articulated in the statement of purpose of the Mississippi Department of Mental Health in MISS. CODE ANN. §41-4-1 (Rev. 2009).

There are no material facts in dispute concerning the application of the discretionary function exemption of the Mississippi Tort Claims Act to the circumstances of this case. The Mississippi Department of Mental Health and Ellisville State School would show that they meet the public policy function test adopted by this Court and referenced in *Dancy* and *Gaubert*.

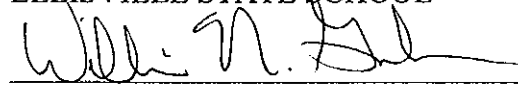
See *Dancy* at 17 and *Gaubert* 499 U.S. 322-323. Under the law, Ms. Shaw's Complaint should be dismissed with prejudice.

THIS the 8<sup>th</sup> day of February, 2010.

Respectfully submitted,

MISSISSIPPI DEPARTMENT OF  
MENTAL HEALTH AND  
ELLISVILLE STATE SCHOOL

By:



WILLIAM N. GRAHAM  
ATTORNEY FOR APPELLANTS

WILLIAM N. GRAHAM  
MSB [REDACTED]  
Aultman, Tyner & Ruffin, Ltd.  
315 Hemphill Street  
P. O. Box 750  
Hattiesburg, MS 39403-0750  
Phone: 601-583-2671  
Facsimile: 601-583-2677

**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 **Brief of the Appellants Ellisville State School and the Mississippi Department of Mental Health** by United States mail with postage pre-paid on the following persons at these addresses:

HONORABLE BILLY JOE LANDRUM  
Jones County Circuit Court Judge  
P. O. Box 685  
Laurel, MS 39441

EUGENE C. TULLOS  
Attorney at Law  
Post Office Box 74  
Raleigh, MS 39153

S. WAYNE EASTERLING  
Attorney at Law  
120 South Tenth Avenue  
Hattiesburg, MS 39401

This the 8<sup>th</sup> day of February, 2010.

  
\_\_\_\_\_  
WILLIAM N. GRAHAM