IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

ZENA TILLIS — APPELLANT

VS. — NO. 2009-KA-0304

STATE OF MISSISSIPPI — APPELLEE

SUPPLEMENTAL BRIEF FOR THE APPELLEE

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VS. **NO. 2009-KA-0304**

STATE OF MISSISSIPPI **APPELLEE**

SUPPLEMENTAL BRIEF OF THE APPELLEE
ARGUMENT

I. Whether Kathy Hogue was an employee of the Walnut Grove Youth Correctional Facility for purposes of Sections 47-4-1 and 97-3-7 of the Mississippi Code Annotated of 1972 (as amended).

Mississippi Code Annotated Section 47-4-1 of 1972 (as amended), provides in pertinent part,

> A person convicted of simple assault on an employee of a private correctional facility while such employee is acting within the scope of his or her duty or employment shall be punished by a fine of not more than One Thousand Dollars ($1,000.00) or by imprisonment for not more than five (5) years, or both.

In *Smith v. Braden*, 765 So.2d 546, (Miss. 2000), the Mississippi Supreme Court addressed the question of whether or not Mississippi Code Annotated § 11-46-1(f), on its face, excluded a physician from the protections of the MTCA. The Court in *Braden* determined that the trial court's summary judgment was improper, since a question of fact existed as to Dr.

Braden's employment status. The Court reversed the trial court's judgment and remanded the case for additional discovery.

On remand, the Mississippi Supreme Court instructed the trial court to utilize the test set forth in *Miller v. Meeks*, 762 So.2d 302 (Miss.2000). In *Miller*, this Court adopted the following five-part test for determining the employment status of doctors like Dr. Braden for the purposes of liability under the MTCA:

1. the nature of the function performed by the employee;
2. the extent of the state's interest and involvement in the function;
3. the degree of control and direction exercised by the state over the employee;
4. whether the act complained of involved the use of judgment and discretion;
5. whether the physician receives compensation, either directly or indirectly, from the patient for professional services rendered.

Miller at 310 (citing *James v. Jane*, 221 Va. 43, 282 S.E.2d 864 (1980)).

The statute being applied in the instant case refers to the protection of employees of private correction facilities and the creation of a safe work environment by enhancing the penalties for assault on the employees of a private correctional facility. The statute at issue in *Braden* and *Meeks* had the purpose of protecting employees from liability by legislating their coverage under the Mississippi Tort Claims Act. The common thread between these two statutes is the protection of those who are carrying out the responsibilities and duties of the State. Therefore, it seems logical that the same analysis would apply as to whether a "private practitioner" or a "contract employee" is covered under the applicable statute. The Court in *Meeks* stated that it, "declined to infer negative legislative intent solely because the lawmakers

chose not to enumerate a laundry list of state 'employees.'" In that case, independent contractors were excepted, but in the instant case, independent contractors are not excepted. Applying the principle of *Meeks*, it is improper to infer negative legislative intent in the instant case.

Based on the test applied in *Braden* and *Meeks*, Kathy Hogue was an employee of Walnut Grove Youth Correction Facility Mississippi Code Annotated § 47-4-1 (1972, as amended). There were sufficient facts at trial to show that Ms. Hogue functioned as an employee of the Walnut Grove Youth Correctional Facility pursuant to the first factor in the test applied in *Meeks*. The record reflects that Ms. Hogue's function, her sole job duty was to provide medical care for the inmates at the facility. She worked daily at the facility providing medical care, including dispensing medications twice a day. The State's interest in the function is significant, since there is a required standard of adequate medical service to inmates:

> [W]hen the State takes a person into its custody and holds him against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 206, 109 S.Ct. 998, 1005, 103 L.Ed.2d 249 (1989) (citing Youngberg v. Romeo, 457 U.S. 307, 317, 102 S.Ct. 2452, 2458, 73 L.Ed.2d 28 (1982)).

Therefore, the entity with whom the State contracted to house it's prisoners, was bound by that standard and held the same interest in the function of Ms. Hogue's job, which was to provide medical care for the prisoners.

The record reflects that Ms. Hogue was under the control and direction of the facility. She testified that her job and her duties were at the Walnut Grove Youth Correctional Facility. (Tr. 40) Ms. Hogue worked at the facility on a daily basis. In fact, it was the only place she worked. She had an office there and her. (Tr. 40) Every day, twice a day, Ms. Hogue took

medication to the inmates, taking care that each one got the right medication and the right dosage. Ms. Hogue's testimony was that her place of employment was the Walnut Grove Youth Correctional Facility.

The fourth factor and fifth factors applied by the *Meeks* Court are not applicable in the instant case, since Ms. Hogue is not the subject of any complaint or malpractice action.

In short, Ms. Hogue was carrying out the constitutionally required duties of the State which had been contracted to Walnut Grove Correctional Facility. Her function was to carry out these duties which Walnut Grove had assumed by contract. She worked at the facility full-time and had an office there. All her duties were carried out at the facility – it was her "place" of employment. As noted earlier, the Court in *Meeks* stated that it, "declined to infer negative legislative intent solely because the lawmakers chose not to enumerate a laundry list of state 'employees.'" Under any test, Ms. Hogue is as the very least, a dual employee, serving two masters. The trial court correctly concluded that Ms. Hogue was an employee of Walnut Grove Youth Correction Facility for purposes of § 47-4-1 of the Mississippi Code Annotated of 1972, as amended. Ms. Hogue, as a person who works among the inmate population on a daily basis, providing necessary medical services to the inmates, is exactly the kind of worker the legislature intended to protect with this law. It would be an absurd result to say that Ms. Hogue is not protected by this statute based on a hyper-technical definition of employee. The evidence clearly showed the Ms. Hogue was an employee and worked at the Walnut Grove Youth Correction Facility regardless of who signed her paycheck. Therefore, Zenas Tillis was correctly indicted and convicted under § 47-4-1 of the Mississippi Code Annotated of 1972, as amended, for the felony crime of simple assault of an employee of a private correctional facility and was correctly

sentenced to five years in the custody of the Mississippi Department of Corrections to be served consecutively with Tillis's current sentence. The trial court therefore correctly denied Tillis's Motion for Directed Verdict at the close of the State's case, his requests for peremptory instructions and his motion for new trial.

Counsel for the State was unable to find any case law from other states addressing the definition of "employee" under similar statutes.

(2) Whether, for purposes of Mississippi Code Section 97-3-7(1), Walnut Grove Youth Correctional Facility is considered a "youth detention center."

Walnut Grove Youth Correctional Facility houses inmates under the age of 22 who have been convicted as an adult in the criminal justice system and have been sentenced into the custody of the Mississippi Department of Corrections. It differs from a youth detention facility with is a Youth Court Facility which houses youth under the jurisdiction of a youth court which is a separate entity from the Mississippi Department of Corrections.

CONCLUSION

The Appellant's assignment of error is without merit and the jury's verdict and the rulings of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Laura H. Tedder, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **SUPPLEMENTAL BRIEF FOR APPELLEE** to the following:

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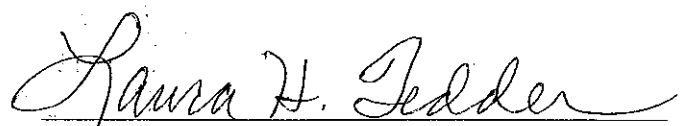
This the 24th day of February, 2010.



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