

**IN THE SUPREME COURT OF MISSISSIPPI**

**CASE NO. 2007-CA-00105**

**KIMBERLY GATES**

**PLAINTIFF-APPELLANT**

**V.**

**DAVID HARDIN, HARDIN'S BAIL BONDING,  
AL'S BAIL BOND COMPANY, INC.,  
A-ALL AMERICAN BONDING COMPANY,  
SAFETY NATIONAL CASUALTY CORPORATION,  
ALLEGHENY CASUALTY COMPANY AND  
JOHN DOES 1 THROUGH 7**

**DEFENDANTS-APPELLEES**

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

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**BRIEF OF THE APPELLANT**

**ORAL ARGUMENT REQUESTED**

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**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.

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DAVID HARDIN	Defendant-Appellee
HON. W. SWAN YERGER	Circuit Judge Hinds County Circuit Court

SO CERTIFIED, this the 9th day of May, 2007.

A handwritten signature in cursive script, appearing to read "Jacob M. Jenkins", written over a horizontal line.

Charles E. Griffin

Jacob M. Jenkins

Counsel for Appellant

### **REQUEST FOR ORAL ARGUMENT**

Oral argument is requested so that the Court can have a clear and concise understanding of the facts and issues presented to the Court on appeal.

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## **STATEMENT OF ISSUES**

1. Whether the trial court erred in granting summary judgment to Defendant Al's Bail Bond Company on the issue of negligence.
2. Whether the trial court erred in granting summary judgment to Defendant Al's Bail Bond Company on the issue of gross negligence.
3. Whether the trial court erred in granting summary judgment to Defendant Al's Bail Bond Company on the issue of sexual assault and battery.
4. Whether the trial court erred in granting summary judgment to Defendant Al's Bail Bond Company on the issue of negligent infliction of emotional distress.
5. Whether the trial court erred in granting summary judgment to Defendant Al's Bail Bond Company on the issue of intentional infliction of emotional distress.
6. Whether the trial court erred in granting summary judgment to Defendant Al's Bail Bond Company on the issue of negligent hiring.
7. Whether the trial court erred in granting summary judgment to Defendant Al's Bail Bond Company on the issue of negligent training and supervision.
8. Whether the trial court erred in granting summary judgment to Defendant Al's Bail Bond Company on the issue of negligent retention.
9. Whether the trial court failed to consider the inherently dangerous nature of the bail bonding business, and thus the non-delegable duties associated therewith, in granting summary judgment to Defendant Al's Bail Bond Company.
10. Whether the trial court's ruling should be reversed on grounds of public policy.
11. Whether Miss. Code Ann. § 97-3-104 applies a heightened standard of care to bail bondsmen.

## STATEMENT OF THE CASE

On the night of May 14, 2003, at approximately 11:00 p.m., David Hardin went to Kim Gates's apartment to take Ms. Gates into custody for the purpose of surrendering her to the Jackson Police Department for her failure to appear for a court date. (R. at 170.) Ms. Gates had previously posted a \$600.00 bond with Al's Bail Bond Company on April 16, 2003 on a shoplifting charge. (R. at 170.) Hardin had been given Ms. Gates' file by Al Thomas, owner of Al's Bail Bond Company, Inc. and had been asked by Al Thomas to surrender Ms. Gates' bond. (R. at 171.) Hardin was given Ms. Gates' paperwork which consisted of the original bail bond, a copy of the application, a copy of the judgment *nisi scire facias* and the bench warrant. (*Id.*) Hardin testified that he would receive a fee of \$60.00 for the bail revocation. (*Id.*) Hardin further testified that Al Thomas would contact him about bail revocations in order to protect himself from having to pay the entire bond; in this case \$600.00. (*Id.*)

Thomas would provide Hardin with the file when Thomas wanted Hardin to make a bail revocation and any notations denoting what had been done on the file. (R. at 171.) He would also provide any contacts that had been made. (*Id.*) David Hardin had performed countless bail revocations for Al's Bail Bond Company in the past few years before his deposition. (*Id.*) This contradicts the misrepresented facts in Al's Bail Bonding's Motion for Summary Judgment and affidavit that Hardin had not worked for Al's Bail Bonding for some years. (*Id.*) Hardin testified at his deposition that he did not have a contract with Al Thomas or Al's Bail Bond Company, Inc. (*Id.*)

After taking Ms. Gates into custody, David Hardin drove her to A-All American Bonding Company (Chunn's) where he sexually assaulted Ms. Gates against her will. (R. at 9.) Hardin denies that he sexually assaulted Ms. Gates but admits that he had oral sex with her. (R. at 170.)

Following the sexual assault, David Hardin drove Ms. Gates to the Jackson Police Department where he surrendered her for processing. (*Id.*)

This lawsuit was filed on May 13, 2004. (R. at 1.) On May 19, 2006, Appellee Al's Bail Bond Company filed its Motion for Summary Judgment. (R. at 155.) Plaintiff filed her response on June 5, 2006. (R. at 170.) A hearing was held in the chambers of the Honorable W. Swan Yerger at the Hinds County Courthouse on September 25, 2006. (R. at 281.) No court reporter was present at the hearing to record the proceedings. On October 30, 2006, an Order was entered by Judge Yerger granting summary judgment against Kimberly Gates in favor of Al's Bail Bond Company. (R. at 262.) Plaintiff timely filed her notice of appeal on November 29, 2006. (R. at 267.) Because no court reporter was present, Plaintiff filed her Statement of the Evidence pursuant to Miss. R. App. P. 10(c) on January 29, 2007. (R. at 281.) Plaintiff now asks this Honorable Court to reverse the granting of summary judgment by the trial court, and to remand this case for a trial on the merits.

### **SUMMARY OF THE ARGUMENT**

The trial court prematurely granted summary judgment in favor of Al's Bail Bond Company in this matter. Discovery was incomplete at the time summary judgment was granted, and the Plaintiff had not taken the Rule 30(b)(6) depositions of the corporate defendants. The courts have generally favored the completion of discovery to protect a litigant from a premature granting of summary judgment.

A review of the Appellant's Statement of the Evidence and the record reveals that the trial court based its ruling in part on the employment status of David Hardin. We submit that this issue was not appropriate for summary adjudication. The employment status of a party is, in almost all situations, a question of fact that is to be decided by the jury. Time and time again, the courts have preferred to let issues pertaining to employment status go to the jury.

The Circuit Court also improperly granted summary judgment on each claim asserted in the complaint. As set out more fully below with regard to each cause of action, the trial court either dismissed the claim on the basis of David Hardin's employment status, or did not consider the claim altogether. Additionally, the lower court granted summary judgment over the objections of counsel for the Plaintiff that the depositions of the corporate defendants needed to be taken prior to a proper consideration of the summary judgment motion.

Summary judgment was also improper in this case due to the fact that certain duties owed to a plaintiff cannot be delegated to an independent contractor when the work to be performed involves dangerous actions, such as those involved in the bail bonding industry. Likewise, public policy demands that the judgment be reversed, as Plaintiff will be left with no adequate remedy if summary judgment is upheld. Finally, Mississippi's sexual battery statutes regarding law enforcement officers impose a strict standard and punishment with regard to sexual contact between law enforcement officers and detainees, and this standard should likewise be imposed on the bail bonding business. The Circuit Court's grant of summary judgment should thus be reversed.

## **ARGUMENT**

### **STANDARD OF REVIEW**

This Court reviews motions for summary judgment *de novo*. *Brooks v. Roberts*, 882 So.2d 229, 231-32 (Miss. 2004) (citing *Bowie v. Montfort Jones Mem'l Hosp.*, 861 So.2d 1037, 1040 (Miss. 2003)). All evidence is to be viewed in the light most favorable to the non-moving party. *Id.* at 232. The decision of the trial court will only be reversed if "there are indeed triable issues of fact." *Id.*

All motions for summary judgment should be viewed with great skepticism, and if the trial court is to err, it is better to err on the side denying the motion; if there is doubt as to whether or not a fact issue exists, it should be resolved in favor of the non-moving party. *Mississippi Livestock*

*Producers Association v. Hood*, 758 So.2d 447, 450 (Miss. Ct. App. 2000). A party who files a Motion for Summary Judgment under Miss. R. Civ. P. 56 carries a heavy burden. Miss. R. Civ. P. 56 states in relevant part that summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Miss. R. Civ. P. 56 summary judgment should generally be denied where the record is incomplete with regard to a material fact. *Prescott v. Leaf River Forest Products, Inc.*, 740 So.2d 301 (Miss. 1999). The Mississippi Supreme Court addressed the issue of summary judgment in the case of *Miller v. Meeks*, 762 So.2d 302 (Miss. 2000), according to the Court:

An issue of fact may be present where there is more than one reasonable interpretation of undisputed testimony, where materially different but reasonable interpretations may be drawn from uncontradicted evidentiary facts, or when the purported establishment of the facts has been sufficiently incomplete or inadequate that the trial judge cannot say with reasonable confidence that the full facts of the matter have been disclosed.

762 So.2d at 304-305 (internal citations omitted).

Summary judgment is improper where the court merely believes it unlikely that the non-moving party will prevail at trial. *National Screen Serv. Corp. v. Poster Exchange, Inc.*, 305 F.2d 647, 651, (5<sup>th</sup> Cir. 1962). Summary judgment can be granted only if everything in the record demonstrates that no genuine issue of material fact exists. The court, therefore, must not “resolve factual disputes by weighing conflicting evidence, . . . since it is the province of the jury to assess the probative value of the evidence.” *Kennett-Murray Corp. v. Bone*, 662 F.2d 887, 892 (5<sup>th</sup> Cir. 1980).

The Mississippi Supreme Court has held that summary judgment should be granted only with great caution. *Womble v. Singing River Hospital*, 618 So.2d 1252, 1256 (Miss. 1993). Unless the

trial court finds “beyond a reasonable doubt, that the plaintiff would be unable to prove any facts to support his claim,” a motion for summary judgment should be denied. *Palmer v. Anderson Infirmary Benevolent Ass’n*, 656 So.2d 790, 795 (Miss. 1995). All that is required of a nonmoving party to survive a motion for summary judgment is to establish a genuine issue of material fact by means available under Miss. R. Civ. P. 56(c). *Dailey v. Methodist Medical Center*, 790 So.2d 903 (Miss. Ct. App. 2001); *Lyle v. Mladinich*, 584 So.2d 397, 398 (Miss. 1991). In applying the summary judgment standard, the Court should review all evidentiary matters in the record to include depositions admissions and interrogatories. *Seymour v. Brunswick Corp.*, 655 So.2d 892, 894 (Miss. 1995). The evidence is viewed in the light most favorable to the non-moving party, and they are given the benefit of every reasonable doubt. *Mississippi Ins. Guar. Ass’n v. Harkins & Co.*, 652 So.2d 732, 735 (Miss. 1995).

A party opposing a motion for summary judgment may request a continuance in order to conduct further discovery pursuant to Miss. R. Civ. Proc. 56(f). Rule 56(f) provides:

When affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just.

When a Rule 56(f) continuance is requested, the trial court, “if it finds the reasons offered to be sufficient”, has the discretion to “postpone consideration of the motion for summary judgment and order among other things that discovery be completed.” *Prescott v. Leaf River Forest Products, Inc.*, 740 So.2d 301, 306 (Miss. 1999).

The courts have been reluctant to hold that an affidavit is the *sine qua non* for obtaining a Rule 56(f) continuance. The Mississippi Supreme Court has previously stated that a categorical

requirement of an affidavit might not comport with the spirit in which Rule 56(f) was drafted. *Owens v. Thomae*, 759 So.2d 1117, 1121 (Miss. 1999). One treatise states that “[t]he purpose of subdivision (f) is to provide an additional safeguard against an improvident or premature grant of summary judgment and the rule generally has been applied to achieve that purpose. Consistent with that purpose, courts have stated that technical rulings have no place under the subdivision and that it should be applied with a spirit of liberality” 10B Charles Alan Wright & Arthur E. Miller & Mary Kay Kane, *Federal Practice & Procedure*, § 2740, at 402(footnotes omitted) (3d ed. 1998).

In *Owens*, the Mississippi Supreme Court reversed the granting of summary judgment against a Plaintiff who failed to formally comply with Rule 56(f). The lower court’s granting of summary judgment turned on the employment status of the Defendants. In reversing the summary judgment, the Court stated:

Contested status issues invariably require discovery. The party seeking summary judgment on the grounds that he was not responsible for another's actions typically will be the party in possession of the information necessary to determining whether he is indeed responsible. While summary judgment may be appropriate where the status issue has been fully fleshed out and there are no material issues of fact, . . . , it cannot be said that the status issue in this case has been fully fleshed out.

*Owens*, 759 So.2d at 1122 (internal citations omitted).<sup>1</sup>

This is precisely the case here. As discussed below, the liability of the corporate Defendants in this case hinge upon the nature of the relationship between David Hardin and the other Defendants. The Plaintiff had not been able to take the depositions of the corporate defendants at

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The lower court that was reversed in *Owens* was the same lower court herein. As discussed in greater detail herein, the granting of summary judgment in the instant case was largely based on the employment status of David Hardin, precisely the same issue on which the Mississippi Supreme Court reversed the Circuit Court’s ruling in *Owens*.



the time the summary judgment hearing was held. Plaintiff pointed this fact out in her response to the motion for summary judgment, stating: “In light of the fact that the Motion for Summary Judgment is premature in that Al’s Bail Bond Company, Inc. has not been deposed and that Mississippi law holds that a determination of the relationship’s status is one typically considered a question of fact, this Court should deny the summary judgment motion.” (R. at 176.) Additionally, although there is no record available of the hearing, counsel for the Plaintiff requested at the summary judgment hearing that the Plaintiff be allowed to take the Rule 30(b)(6) deposition of Al’s Bail Bond Company, but was denied.

It is reasonable to conclude that information gleaned from such depositions would necessarily have an impact on the Plaintiff’s claims regarding the employment status of David Hardin. As discovery was incomplete at the time the Circuit Court granted summary judgment, the lower court’s ruling should be reversed.

**I. SINCE A DETERMINATION OF AN EMPLOYMENT RELATIONSHIP’S STATUS IS CONSIDERED A QUESTION OF FACT, SUMMARY JUDGMENT RESOLUTION WAS INAPPROPRIATE.**

Three traditional classifications of employment relationships exist in which a hiring party may employ a secondary party to perform work or service. *Richardson v. APAC-Mississippi, Inc.*, 631 So.2d 143, 147 (Miss. 1994). These three relationships are (1) principal/agent; (2) master/servant; and (3) independent contractor. *Id.* The hiring party’s liability is often predicated upon the status of the employment relationship, thus the classification of the employment relationship can be significant. It is generally accepted that the principal and the master are subject to liability for the actions of their agents and servants, respectively. *See Forest Oil Corp. v. Tenneco, Inc.*, 626 F. Supp. 917, 923 (S.D. Miss. 1986); *Castle Fabrics, Inc. v. Fortune Furniture Mfrs., Inc.*, 459 F. Supp. 409, 416 (N.D. Miss. 1978); *Holliday v. Pizza Inn, Inc.*, 659 So.2d 860, 864-65 (Miss.

1995). However, if the relationship is one of an independent contractor, the hiring party in an independent contractor relationship may be protected from liability arising from the actions of the independent contractor. See *McKee v. Brimmer*, 39 F.3d 94, 96 (5th Cir. 1994) (citing *W.J. Runyon & Son, Inc. v. Davis*, 605 So.2d 38, 45 (Miss 1992)); *Richardson*, 631 So.2d at 152.

The Mississippi Supreme Court has recognized the difficulty in classifying employment relationships, referring to this area of law as one of a “twilight zone.” *Richardson*, 631 So.2d at 149 (citing *Fruchter v. Lynch Oil Co.*, 522 So.2d 195, 199 (Miss. 1988)). Furthermore, since a determination of the relationship’s status is one typically considered a question of fact, it is often inappropriate for summary judgment resolution. *Champion Cable Constr. Co., v. Monts*, 511 So.2d 924, 927 (Miss. 1987). The weight of Mississippi case law holds that the question of whether an *independent contractor* relationship exists is a question of fact. When a party argued to the supreme court that “the question of whether or not he was an independent contractor or employee is one of law and not of fact,” the court responded that such an argument was “misplaced.” *Id.* The *agency relationship* is “a question of fact for jury determination, and not a question of law.” *Elder v. Sears, Roebuck & Co.*, 516 So.2d 231, 236 (Miss. 1987); see also *Kight v. Sheppard Bldg. Supply, Inc.*, 537 So.2d 1355, 1358 (Miss. 1989) (stating whether relationship is that of agency or independent contractor is question of fact). Furthermore, “when the facts pertaining to the existence or non-existence of an agency are conflicting, or conflicting inferences may be drawn from the evidence, the question presented is one of fact for the jury . . . and even though the evidence is not full or satisfactory, it is the better practice to submit the question to the trier of fact.” *Elder*, 516 So.2d at 232-33 (quoting 3 AM. JUR. 2D Agency § 372 (1986)). Lastly, summary judgment is not appropriate as “where one party swears to one version of the matter and another says the opposite.” *Caldwell v. Alfa Ins. Co.*, 686 So.2d 1092, 1095 (Miss. 1996).

It is clear that the issue of David Hardin's status as an employee or independent contractor of Al's Bail Bond Company is squarely within the province of the jury. The duties owed by all of the Defendants in this matter to Kimberly Gates stem directly from Hardin's status with the Defendants. The trial court erred in concluding that Al's Bail Bond Company owed no duty towards the Appellant regardless of whether or not Hardin was an employee. Because this is an issue for the jury, the Circuit Court should be reversed.

**II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON THE ISSUES OF NEGLIGENCE AND GROSS NEGLIGENCE.**

Actionable negligence presupposes the existence of a legal relationship between parties by which the injured party is owed a duty by the other, and such duty must be imposed by law. The duty may arise specifically by statute, or it may arise generally by operation of law under the basic rule which imposes an obligation to use due care, or to so govern one's actions as not to endanger the person or property of others. *George B. Gilmore Co. v. Garrett*, 582 So.2d 387, 391 (Miss.1991).

One who engages in a business, occupation or profession represents to those who deal with him in that capacity that he possesses the knowledge, skill and ability, with reference to matters relating to such calling, which others engaged therein ordinarily possess. He also represents that he will exercise reasonable care in the use of his skill and in the application of his knowledge and will exercise his best judgment in the performance of work for which his services are engaged, within the limits of such calling.

*Id.* at 392.

The elements of negligence are well settled in Mississippi. Under the negligence regime of tort law, a plaintiff must prove by a preponderance of the evidence (1) duty, (2) breach, (3) causation, and (4) injury. *Gulledge v. Shaw*, 880 So.2d 288 (Miss. 2004). Proximate cause of an injury is that cause which in the natural and continuous sequence unbroken by any efficient intervening cause

produces the injury and without which the result would not have occurred. *Delahoussaye v. Mary Mahoney's, Inc.*, 783 So.2d 666, 671 (Miss. 2001). Additionally, gross negligence is that course of conduct which, under the particular circumstances, discloses a reckless indifference to consequences without the exertion of any substantial effort to avoid them. *Turner v. City of Ruleville*, 735 So.2d 226, 229 (Miss. 1999).

The Mississippi Supreme Court has held that negligence is almost always an issue for a jury to decide "except in the clearest cases." *Caruso v. Picayune Pizza Hut*, 598 So.2d 770, 773 (Miss. 1992); *Bell v. City of Bay St. Louis*, 467 So.2d 657, 664 (Miss. 1985). To overcome a motion for summary judgment, the plaintiff must show that the defendant breached the established standard of care and that such was the proximate cause of the plaintiff's injury. *Palmer v. Biloxi Reg. Med. Center*, 564 So.2d 1346, 1355 (Miss. 1990).

As discussed above, the precise duties owed by the Defendants to the Plaintiff are defined by David Hardin's employment status. Because Hardin's employment status is an issue to be decided by the jury, it necessarily follows that the determination of which duties were owed to Kimberly Gates is an issue left to the sound discretion of the jury. Summary judgment on this portion of the Appellant's complaint should thus be reversed and remanded to the lower court for a trial on the merits.

### **III. THE LOWER COURT IMPROPERLY GRANTED SUMMARY JUDGMENT ON PLAINTIFF'S CLAIMS FOR ASSAULT AND BATTERY.**

An assault occurs where a person (1) acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such contact, and (2) the other is thereby put in such imminent apprehension. *Webb v. Jackson*, 583 So.2d 946, 951 (Miss. 1991) (citing Restatement (Second) of Torts § 21 (1965)). A battery goes one step beyond an

assault in that a harmful contact actually occurs. *Id.*

In granting summary judgment, the Circuit Court did not rule that there was no genuine issue of material fact as to whether or not an assault an battery was committed against Kimberly Gates by David Hardin. As discussed in greater detail below, since David Hardin was in the employment of Al's Bail Bond Company, and thus in a position of trust and authority, Al's Bail Bond Company may thus be held liable for the intentional torts of David Hardin. As such, the summary judgment granted by the Circuit Court of Hinds County should thus be reversed, and allowed to proceed to a trial on the merits of the case.

#### **IV. THE CIRCUIT COURT COMMITTED ERROR IN GRANTING SUMMARY JUDGMENT ON PLAINTIFF'S EMOTIONAL DISTRESS CLAIMS.**

Liability for intentional infliction of emotional distress is appropriate where the defendants conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society. *Wong v. Stribling*, 700 So.2d 296, 306 (Miss. 1997). In addition to suffering conduct that is outrageous or repulsive, this tort also requires proof of injury, that is, that the conduct in question caused actual mental distress. *Id.*

If there is outrageous conduct, no injury is required for recovery for intentional infliction of emotional distress or mental anguish. *Leaf River Forest Prods., Inc. v Ferguson*, 662 So.2d 648, 659 (Miss. 1995). One who claims emotional distress need only show that the emotional trauma claimed was a reasonably foreseeable consequence of the negligent or intentional act of another. *First National Bank v. Langley*, 314 So.2d 324 (Miss. 1975). If the conduct is not malicious, intentional or outrageous, there must be some sort of demonstrative harm, and said harm must have been reasonably foreseeable by the defendant. *Strickland v. Rossini*, 589 So.2d 1268, 1275 (Miss. 1991).

In order to establish a prima facie case for negligent infliction of emotional distress, Plaintiff must show that (1) the Defendants acted negligently, (2) Plaintiff suffered mental and emotional anguish and distress, and (3) the anguish and distress were foreseeable results of the Defendants' negligence. *Adams v. U.S. Homecrafters Inc.*, 744 So.2d 736, 741-743 (Miss. 1999).

Nowhere in the Appellee's summary judgment motion nor in the trial court's order was the issue of emotional distress addressed. Al's Bail Bond Company did not specifically request summary judgment against Kimberly Gates on this claim for relief, nor did it offer any evidence to show that there was no genuine issue of material fact on this issue, nor that it was entitled to judgment as a matter of law on this issue. Because this issue was not properly addressed by the trial court, the judgment of the lower court should be reversed and remanded for a proper adjudication on the merits of this claim.

**V. THE TRIAL COURT GRANTED SUMMARY JUDGMENT ON PLAINTIFF'S NEGLIGENT HIRING CLAIMS WITHOUT ALLOWING THE COMPLETION OF DISCOVERY.**

In her Complaint, the Plaintiff alleged that the corporate Defendants were negligent in their hiring of David Hardin. In order to prevail on a claim for negligent hiring, a plaintiff must prove (1) that the employer knew or should have known of some incompetence on the part of its employee and (2) that the employer failed to do anything about it. *Jones v. Toy*, 476 So.2d 30, 31 (Miss. 1985).

The Circuit Court granted summary judgment in favor of Al's Bail Bond Company on this issue without the benefit of allowing the Plaintiff to take the Rule 30(b)(6) deposition of Al's Bail Bonding, as well as the other corporate Defendants. The Mississippi Supreme Court has stated numerous times that the completion of discovery is, in some instances, desirable before a court can make a determination as to whether there is a genuine issue of material fact to be tried. *Marx v. Truck Renting & Leasing Ass'n, Inc.*, 520 So.2d 1333, 1343 (Miss. 1987) (citing *Smith v. H.C. Bailey*

*Cos.*, 477 So.2d 224, 232 (Miss. 1985)). “Justice is served,” the Court stated in *Cunningham v. Lanier*, 555 So.2d 685, 686 (Miss.1989), “when a fair opportunity to oppose a motion is provided-  
*because consideration of a motion for summary judgment requires a careful review by the trial court of all pertinent evidence in a light most favorable to the nonmovant.*” (emphasis in original).

An opportunity to flesh out discovery may especially be required where the information necessary to oppose the motion for summary judgment is within the possession of the party seeking summary judgment. *Marx*, 520 So.2d at 1344; 10B Charles Alan Wright & Arthur E. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 2741, at 419 (3d ed. 1998) (Wright & Miller).

At the time the trial court granted summary judgment, counsel for the Plaintiff was in the process of trying to schedule the Rule 30(b)(6) depositions of the corporate Defendants. Notwithstanding the fact that discovery was incomplete, or that no trial date had been set, summary judgment was granted to Al’s Bail Bond Company. Since it is highly likely that relevant and admissible evidence could be obtained from the corporate depositions, the lower court prematurely granted the motion for summary judgment. For this reason, the Circuit Court’s judgment should be reversed.

**VI. THE TRIAL COURT PREMATURELY GRANTED SUMMARY JUDGMENT ON THE PLAINTIFF’S CLAIMS FOR NEGLIGENT TRAINING AND SUPERVISION.**

The Plaintiff also stated causes of action against the Defendants for the negligent training and supervision of David Hardin in her Complaint. The sufficiency of training has been held by the Mississippi Supreme Court to be a jury issue. In *Gamble v. Dollar General Corp.*, 852 So.2d 5 (Miss. 2003), the Court was faced with the issue of whether or not an expert was required to prove a claim for training. In addressing the issue, the Court stated as follows:

Gamble has simply misstated her issue with regard to her claim for negligent training. Instead of claiming that Dollar General's training

was inadequate or negligent, Gamble's claim is better understood as an allegation that Dollar General provided no training. Stated as an issue of no training, the jury could infer Dollar General's negligence without the need of expert testimony on proper or adequate training. The jury could properly find that Dollar General was negligent in failing to provide training to Thornton.

852 So.2d at 14. In its summary judgment motion, Appellee Al's Bail Bond Company put forth no evidence to show that there was no genuine issue of material fact as to whether or not David Hardin was adequately trained by Al's Bail Bond Company, or that it was entitled to judgment as a matter of law on this count of the Complaint.

As discussed above, it should be emphasized that at the time that the lower court granted summary judgment discovery was not complete. None of the Defendants had taken the deposition of the Plaintiff, and no Rule 30(b)(6) depositions of any of the corporate Defendants had yet been taken by the Plaintiff. Despite this critical fact, the lower court granted summary judgment. For the reasons discussed above, the trial court should have allowed discovery to have concluded before considering the summary judgment motion filed by the Appellee. These reasons mandate the reversal of summary judgment against Kimberly Gates.

**VII. SUMMARY JUDGMENT WAS LIKEWISE PREMATURELY GRANTED ON THE PLAINTIFF'S ALLEGATIONS OF NEGLIGENT RETENTION.**

In its granting of summary judgment, the trial court also did not address whether or not Al's Bail Bond Company was negligent in its selection and retention of David Hardin, as was alleged by Kimberly Gates in her Complaint against the Defendants.

The law of negligent retention has been long settled in Mississippi. As succinctly stated by the Mississippi Supreme Court:

Retaining in employment a servant who is, or should be, known to be incompetent, habitually negligent, or otherwise unfit, is such negligence on the part of the master as will render him liable for



injuries to third persons resulting from the acts of the incompetent servant, whether the master's knowledge of the servant's incompetency was actual, or direct, or constructive; the master is chargeable with knowledge of the competency of the servant if by the exercise of due or reasonable care or diligence he could have ascertained such incompetence.

*Eagle Motor Lines v. Mitchell*, 223 Miss. 398, 78 So.2d 482 (1955).

Summary judgment was granted without giving the Plaintiff the opportunity to complete discovery, to take all necessary depositions, and to fully flesh out her case against the Defendants. Due to the nature of the claim, the information necessary to survive summary judgment on this count would necessarily be in the possession of the Defendants. A Rule 30(b)(6) deposition would provide the Plaintiff with the means to examine the Defendants with regard to their methodology and processes used in the retention of David Hardin. This was not allowed, and as such, the trial court prematurely granted summary judgment on this count of the Complaint. Fundamental notions of justice and fair play mandate the reversal of the summary judgment in order to allow Kimberly Gates to obtain the weapons she needs to overcome summary judgment.

**VIII. MERE EMPLOYMENT OF AN INDEPENDENT CONTRACTOR WILL NOT RELIEVE A PRINCIPAL WHERE THE DUTIES ARE NON-DELEGABLE.**

Even if this Court were to conclude that David Hardin is an independent contractor, and that the corporate Defendants thus owed a lesser standard of care to the Plaintiff, Mississippi public policy mandates that where a contractor performs work that is inherently dangerous a principal will not be shielded from liability. It is well settled that one who contracts with an independent contractor to perform certain work or service which is not illegal, dangerous or harmful, is not liable for torts committed by him. *Blackmon v. Payne*, 510 So.2d 483 (Miss. 1987); *Mississippi Power Co. v. Brooks*, 309 So.2d 863 (Miss. 1975). Where, however, the work or service to be performed in itself entails the commission of some illegal, *dangerous* or tortious act, this rule obviously cannot

apply, because the principal and the independent contractor both play an integral part, are both proximate causes, of whatever harm ensues. *Hester v. Bandy*, 627 So.2d 833, 841 (Miss. 1993) (citing *National Rating Bureau, Inc. v. Florida Power Corp.*, 94 So.2d 809 (Fla. 1951); *Peairs v. Florida Publishing Co.*, 132 So.2d 561 (Fla.App. 1961)). In such an event the principal is an accessory before the fact to the independent contractor's conduct, without which there would have been no injurious conduct by the independent contractor. *Id.* The party retaining an independent contractor for such a purpose is a principal in more than one sense of the word. *Id.*

While the Mississippi Supreme Court has not issued an opinion concerning whether bail bonding duties are non-delegable, sister courts have addressed this issues in the affirmative. In *Hayes v. Goldstein*, 697 N.E. 2d 224 (Ohio. App 1997), the Court of Appeals of Ohio held that bail bond duties are non-delegable. The Court held:

“We are convinced that there is an indisputable danger inherent in the apprehension of one who has failed to answer to a charge leveled in a court of law or who has failed to abide by an order of a court, and that this activity presents danger even if undertaken with the utmost precaution. Moreover, the requisite activities are undeniably personal in nature. Further, as a matter of policy, we believe that employers should be required to carefully select and intelligently supervise their agents, or face liability for failing to do so.”

*Hayes*, 697 N.E. 2d at 225.

Regardless of his employment status, David Hardin was engaged in inherently dangerous actions by virtue of the fact that he was apprehending the Plaintiff when the attack complained of took place. Hardin had been instructed by Al Thomas to pick up Kim Gates for her failure to appear on a shoplifting charge. The type of work a bail agent engages in consists of work that is constantly dangerous. This is further shown by the fact that David Hardin carried a firearm when working as a bail agent, and carried one when he took Kimberly Gates into his custody.

The fact that Kimberly Gates was in the custody of Al's Bail Bond Company by and through David Hardin mandates the imposition of a higher standard of care against the Defendants. It is a long-standing principle of Mississippi law that a master who places a servant in a position of trust or authority is responsible for the actions of this servant. *Doe ex rel. Doe v. Salvation Army*, 835 So.2d 76, 80 (Miss. 2003) (citing *Gill v. L.N. Dantzler Lumber Co.*, 153 Miss. 559, 121 So. 153, 156 (1929)). Since David Hardin was placed in a position of authority over Kimberly Gates by Al's Bail Bond Company, then Al's Bail Bond Company may be held liable for his misconduct. This further requires the reversal of the Circuit Court's grant of summary judgment.

**IX. THE CIRCUIT COURT'S GRANTING OF SUMMARY JUDGMENT SHOULD LIKEWISE BE REVERSED ON PUBLIC POLICY GROUNDS.**

If the summary judgment in favor of Al's Bail Bond Company is upheld, the Appellant will be denied an adequate remedy at law. In the case of *Richardson v. APAC-Mississippi, Inc.*, 631 So.2d 143 (Miss. 1994), discussed *supra*, the Mississippi Supreme Court acknowledged the applicability of a "public policy" test to determine liability in the context of an independent contractor versus employee analysis. The Court defined this test as follows:

Today we explicitly add another factor in the balancing test, heretofore implicit. When a contract is made between two parties that as between themselves creates an independent contractor relationship and involves employment generally performed under a simple master/servant or employer/employee relationship, it will be upheld as between the parties. When, however, third parties are adversely affected, this Court will carefully scrutinize the contract to see if public policy should permit the transformation of an ordinarily employer/employee relationship into that of an independent contractor. **A necessary condition precedent for the application of this factor, however, is that the party challenging the claimed relationship will be adversely affected, and denied an adequate legal remedy.** In the absence of this, the right of parties to contract as they please is a constitutionally-protected right. **Conversely, neither of the parties should be permitted to dispute a contractually-created independent contractor relationship**

**between them when to do so adversely affects an injured third party.**

*Id.* at 150 (internal citations omitted) (emphasis added).

The Fifth Circuit discussed the *Richardson* decision in *McKee v. Brimmer*, 39 F.3d 94 (5th Cir.1994). In *McKee*, the district court granted a summary judgment, finding the injured's relationship with the responsible party was that of independent contractor, and the Fifth Circuit affirmed. *Id.* at 98. The court cited the public policy rule from *Richardson* and surmised the following:

The public policy factor from *Richardson* becomes an issue when the relationship between the alleged employer and the alleged employee would “ordinarily” be characterized as that of an employer/employee, but they have a contract which defines their relationship as that of independent contractors. In that case, the court will scrutinize the contract to see if the parties should be allowed to transform an employer/employee relationship into that of an independent contractor. **In essence, an employer will not be allowed to escape liability by drafting a contract which labels its employee an independent contractor, but retains employer-like control over him.**

*Id.* (internal citations omitted) (emphasis added).

This public policy exception should be applied here due to the fact that if the lower court's granting of summary judgment is upheld, the logic supporting the summary judgment would likewise be applicable to the remaining corporate defendants. This would leave only a judgment-proof individual defendant holding the proverbial “bag.” The summary judgment should thus be reversed.

**X. THE CRIMINAL SEXUAL BATTERY STATUTE APPLICABLE TO LAW ENFORCEMENT OFFICERS APPLIES A HEIGHTENED STANDARD OF CARE TO BAIL BONDSMEN SUCH AS DAVID HARDIN.**

This appeal also raises significant public policy issues with regard to whether or not it is against Mississippi public policy for an individual under physical and legal custody of a law

enforcement officer can lawfully consent to sexual relations with that officer at the time he or she is in the custody and control of the officer. Mississippi law criminalizes sexual contact, with or without consent, between a law enforcement official and an offender in his custody. The statute provides as follows:

**§ 97-3-104. Sex between law-enforcement official and offender**

It is unlawful for any jailer, guard, employee of the Department of Corrections, sheriff, constable, marshal or other officer to engage in any sexual penetration, as defined in Section 97-3-97, or have carnal knowledge of any offender, with the offender's consent, who is incarcerated at any jail or any state, county or private correctional facility or who is serving on probation, parole, earned-release supervision, post-release supervision, earned probation or any other form of correctional supervision. Any person who violates this section is guilty of a felony and upon conviction shall be fined not more than Five Thousand Dollars (\$5,000.00) or imprisoned for a term not to exceed five (5) years, or both.

The term “offender” used in Section 97-3-104 has been construed broadly, so as to even include persons incarcerated on chancery contempt orders, persons incarcerated in the mental ward of a county jail awaiting transport to the Mississippi State Hospital, persons incarcerated while awaiting voluntary or involuntary drug and alcohol commitment, and persons incarcerated while awaiting a chancery court hearing. Op. Atty. Gen. No. 2005-0017, McDonald, February 4, 2005. It is therefore logical to conclude that Kimberly Gates was an “offender” in custody at the time of the attack.

Additionally, at the time that David Hardin took Kimberly Gates into custody, he was wearing a badge, firearm, and other indicia of authority. (R. at 9.) As such, he could reasonably be perceived to be a law enforcement officer within the purview of the statute. For this reason, any contact that he could have had with Kimberly Gates *with or without her consent* would necessarily be *per se* illegal. David Hardin had a heightened duty to refrain from sexual contact with the

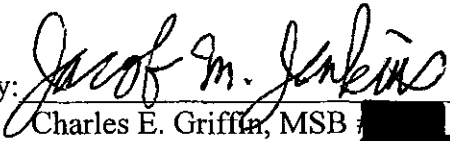
Plaintiff, and thus the corporate defendants had a duty to train and supervise him in a way which would have prevented such misconduct and to ensure his compliance with the law. The judgment of the lower court should therefore be reversed.

### **CONCLUSION**

The Circuit Court erred in granting summary judgment against the Appellant in this matter. It is clear that the contested issues are issues that are within the province of the jury. Furthermore, allowing the Appellant to take the depositions of the corporate Defendants would provide the Appellant with additional evidence with which to withstand summary judgment.

WHEREFORE, for the foregoing reasons, the Appellants respectfully request that this Honorable Court reverse the trial court's grant of summary judgment in favor of the AI's Bail Bond Company, Inc., and remand this case to the Circuit Court of Hinds County for a trial on the merits.

Respectfully submitted,  
KIMBERLY GATES

By:   
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**CERTIFICATE OF SERVICE**

I, Jacob M. Jenkins, one of the attorneys for the Appellant, do hereby certify that I have this day served a true and correct copy and electronic copy of the above and foregoing Brief of the Appellant First Class Mail, postage pre-paid, upon:

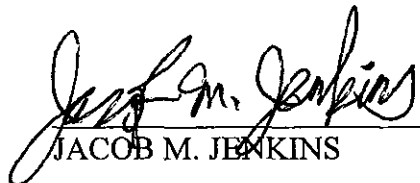
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