IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CASE NO. 2007-CA-00969

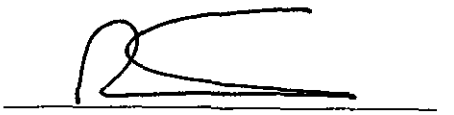
FAYE JORDAN	**PLAINTIFF /APPELLANT**
VERSUS	
ANN WILSON and NMMC	**DEFENDANTS /APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualifications or recusal.

1. Faye Jordan, Appellant;
2. Jim Waide, Esq. Attorney for Appellant;
3. Luther C. Fisher, IV, Esq., Attorney for Appellant;
4. Waide & Associates, P.A., Attorneys for Appellant;
5. Ann Wilson, Appellee;
6. Dewitt T. Hicks, Jr., Esq., Attorney for Appellee Ann Wilson;
7. P. Nelson Smith, Jr., Esq., Attorney for Appellee Ann Wilson;
8. Hicks & Smith, PLLC, Attorneys for Appellee Ann Wilson;
9. North Mississippi Medical Center, Appellee;
10. David McLaurin, Esq., Attorney for Appellee North Mississippi Medical Center; and
11. McLaurin Law Firm, Attorneys for Appellee North Mississippi Medical Center.

This the 24th day of October, 2007.



P. NELSON SMITH, JR.

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STATEMENT OF ISSUES

A. Whether or not a plaintiff can proceed on a theory of premises liability when premises liability is not pled at all in the Complaint in any manner.

B. Whether a plaintiff can proceed under a claim of "negligent assault" when assault is an intentional tort and "negligent assault" does not exist under Mississippi law.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not requested by the Defendant. There are no new or novel issues to be decided by the Court.

STATEMENT OF THE CASE

A. Defendant concurs only with the Plaintiff's statement of the case insofar as the order of court proceedings that took place in the lower Court.

B. On May 13, 1999, Plaintiff pulled into the Defendant's driveway unannounced. Defendant had previously had problems with drunk drivers and trespassers in her driveway and yard. When this strange vehicle pulled into her yard, Defendant got into her vehicle and drove down her driveway over to the Plaintiff's vehicle. Neither party exited their vehicle. At that point, an entire, though short, conversation occurred between the Plaintiff and the Defendant. The conversation, in general, consisted of the Defendant asking the Plaintiff who she was and what she was doing there, and the Plaintiff responding. The Plaintiff told the Defendant who she was looking for and the Defendant gave her directions. *Record*, pages 364-365. There were no threats or any threatening language coming from the Defendant to the Plaintiff. Both parties agree no verbal threats were made. *Record*, page 375 Importantly, the Plaintiff was not even aware the Defendant had a .22 caliber rifle in her lap during this entire discourse. The Plaintiff had to ask, once the conversation was over and she was fixing to leave, if the Defendant had been holding a rifle. *Record*, pages 371, 395, 414. All the Plaintiff saw was a just a sliver of the gun, less than an inch. *Record*, page 375. She saw so little of the gun that she even had to ask what it was. The gun was not shoved in her face, it was not pointed at her in any threatening manner and the Defendant never threatened to shoot her, and never ordered her off the property:

Q: Did she ever threaten you? Did she ever say, I am going to kill you?
A: She did not say I'm going to kill you.
Q: Or I'm going to shoot you?
A: She never said, I'm going to shoot you.
Q: Did she ever order you off her property?
A: No, she did not.

Q: Now, how much of the gun did you see?

A: I saw the end of the gun and on - - looking at the gun, like here, I saw a little tiny sliver of metal right there (indicating).

Q: Let the record show and you correct me if I am wrong, but Mrs. Jordan circled her finger and showed a distance from her center knuckle to the tip. Is that about right, about an inch?

A: That would be hard to say Mr. Hicks. I just saw a little sliver of metal.

Q: I understand, but I want you as best you can, what you described to me Mrs. Jordan, would be from your knuckle to the end of your index finger?

A: I don't believe it was that much. *Record,* page 375.

The Plaintiff then left to head to the place where she was to render home health care assistance. At some point after that she decided that she was "affected" by the conversation between the Plaintiff and Defendant to the point that now Plaintiff claims she suffered some level mental stress. After some time of on and off the job with North Mississippi Medical Center, the Plaintiff became a full time Professor at MUW, teaching nursing full time. At her current employment she makes significantly more than what she was ever making at North Mississippi Medical Center.

Subsequent to these events, of course, the Plaintiff filed a Complaint alleging that the Defendant's conduct was "negligent conduct", and not intentional, and that such negligent conduct gave rise to an assault. *Record*, pages 20-21. There are no allegations within the Complaint of any premises liability. *Record,* pages 20-21. Thorough and complete discovery over a significant period occurred with no effort by the Plaintiff to amend her Complaint to allege the intentional tort of assault, nor any premises liability. Motions to Dismiss and/or for Summary Judgment were filed by the Defendant and a hearing was held. Not only did the Plaintiff's counsel confirm that the allegations were that of negligent conduct and not the intentional tort of assault, Plaintiff's counsel admitted to the Court that the Plaintiff had even failed to adequately identify whether or not there had been a threat. *R.E. 1.* Mr. Fisher stated at the hearing that, **"Well, Your Honor, I believe that the**

negligence is given rise by her failure to adequately identify whether or not there was a threat, I will - - she—"

R.E. 1.

Subsequent to the hearing, the Court correctly and properly dismissed this action for failure to plead the intentional tort of assault and the failure to plead any premises liability. Plaintiff has made no effort to amend her complaint since the dismissal. See *Duncan v. Chamblee, 757 So. 2d 946, 949-951 (Miss. 1999).* As stated by Plaintiff's own counsel, even the Plaintiff failed to adequately identify whether or not there was a threat therefore it cannot be said there was any intent by the Defendant. Regardless whether or not there was any intent, the Plaintiff, without question failed, to plead any known theory of recovery under the laws of Mississippi and the Complaint was properly dismissed.

SUMMARY OF ARGUMENTS

In order for a Plaintiff to recover under the laws of the State of Mississippi, a Plaintiff must plead an actual, viable cause of action. The Plaintiff failed to make any allegations of premises liability and therefore it cannot be said that the Plaintiff had pled, in any manner, that tort. Further, the Plaintiff did not plead the intentional tort of assault, but pled only a tort which does not exist in the State of Mississippi, that being "negligent assault." The Plaintiff cannot file a lawsuit and fail to plead any tort recognizable under the laws of the State of Mississippi. The Trial Court was correct in dismissing this action. *R.E. 2.*

ARGUMENT

ISSUE A: Whether or not a party can proceed on a theory of premises liability when no such theory has been pled in the Complaint.

There are no allegations of premises liability alleged in the Complaint. Premises liability was never an issue in this matter and only became an issue once the Plaintiff apparently realized she

could not recover under the theory of negligent assault. The Plaintiff attempted to introduce premises liability into the case by submitting proposed jury instructions on the issue of premises liability, however Plaintiff never made any actual allegations of premises liability and never conducted any discovery along those lines during this case. There are no allegations to the status of the Plaintiff. There are no allegations as to the status of the Defendant. There are no allegations or any language in the Complaint stating whether or not the Plaintiff or the Defendant was invitee, licensee or trespasser landowner. There is no reference to any duty the Defendant may have owed an invitee, licensee or trespasser. There are no allegations that there was any breach of any alleged duty by the Defendant. The only time the word "negligent" is used in the Complaint is in reference to negligent conduct giving rise to assault. As previously stated, there is no tort of negligent assault. However, even just inserting the word negligent in the Complaint, if you take that in the light most favorable to the Plaintiff, the Plaintiff fails to even hint at the Plaintiff's status, the Defendant's corresponding duty, if any, and a breach of that duty. In other words, there are no allegations of premises liability in the Complaint. The only ground actually pled in the Complaint is "negligent assault" which does not exist under the law. However, since the Plaintiff now once again tries to state that a claim of premises liability exists in the Complaint, where it does not, the Defendant will once again address it.

In order to make any recovery under premises liability, had it been even pleaded in the Complaint, the Complaint would first have to allege the Plaintiff's status, any corresponding duty of the Defendant, and any breach by the Defendant. In order to be an invitee, there must have been a business relationship between the Defendant and the Plaintiff and it must have been a mutual advantage to both parties. *Daulton v. Miller*, 815 So.2d 1327 (C.A. Miss. 2002). The landowner must receive some sort of consideration i.e. money, or require some business advantage. *Id.*; See

also *Hall v. Cagle*, 773 So.2d 928 (Miss. 2000). There was no business relationship between the Defendant and the Plaintiff. The Plaintiff claims, on page 15 of her brief, that Jordan was at the home to care for Wilson's mother, but she was not there. Terri Conwill did not live with Defendant and any business relationship was between North Mississippi Medical Center and Conwill, not the Defendant. Conwill did not live with the Defendant, she lived down the street. Defendant personally received no benefit, no mutual advantage, no consideration, no financial gain, and no business advantage. The Plaintiff was on Defendant's property without any reason, as far as Defendant was concerned. The Plaintiff was looking for Terri Conwill, who did not live at Ann Wilson's address. It cannot be said under any stretch of imagination therefore that there was any business relationship between the Plaintiff and the Defendant. Again, none of this has ever been pled by the Plaintiff.

Without question there was a notation on the medical records of North Mississippi Medical Center that the Plaintiff was instructed to go to the Defendant's house if Terri Conwill was not home. However, no one knows who gave that instruction. It certainly did not come from the Defendant. Her uncontested affidavit clearly establishes that fact. *Record*, page 377. North Mississippi Medical Center does not know where that information comes from. *R.E. 3*. Thus, the relationship between Plaintiff and Defendant on the day at issue simply cannot be that of an invitee and land owner. We are then left only with the status of whether or not the Plaintiff was licensee and trespasser. Either status has the same corresponding duty for the landowner – to refrain from willfully and wantonly harming the person on the premises. *Vaughn v. Worrell*, 828 So. 2d 780 (Miss. 2002). Whether or not the Plaintiff willfully and wantonly harmed the Defendant is a question of law, under *Daulton v. Miller*, 815 So. 2d, 1237 (C.A. Miss. 2002).

As admitted by the Plaintiff and even her counsel, there were no threats, no physical

altercations, and the Plaintiff was not upset until some period of time after she drove off. *Record*, pages 370, 376-377; *R.E. 3.* As the Plaintiff's counsel so stated, there was a failure by Plaintiff to even feel threatened at the time. *R.E. 1.* It can hardly be said that there was willful or wanton conduct by the Defendant. So even if there was a claim of premises liability, and there has not been such a claim, it also fails and summary judgment and dismissal was proper.

The Plaintiff once again cites the *Turnipseed* case in support of its position. *Woodard v. Turnipseed*, 784 So.2d 239 (Miss. App. 2000). However, the *Turnipseed* does not apply. In the present case, without question the Defendant did not use deadly force. Nobody was shot, nobody was shot at, nobody was touched, nobody was beaten, nobody was bruised, scratched, cut, etc. It can hardly be said that deadly force was applied in the present case as the Plaintiff was untouched, unscathed, unthreatened and alive! In the *Turnipseed* case there was an actual physical altercation between an employer and an employee. *Id.* In our case there was no contact. In the *Turnipseed* case the Plaintiff was on the Defendant's property as an employee, and while on the Defendant's property, the Defendant fired the employee. *Id.* The Plaintiff next told the Defendant he was waiting on a ride and the Defendant then physically attacked the Plaintiff with a broom handle. *Id.* There was no physical altercation or any physical contact of any nature between the Plaintiff and the Defendant in the present case. What happened in the *Turnipseed* case is a far cry from the case. Faye Jordan was not on the Defendant's property as a recently-fired employee. Faye Jordan was not on the Defendant's property with prior knowledge by the Defendant. Most importantly, there was no force or physical contact between Plaintiff and the Defendant. The *Turnipseed* case has no applicability to the facts here.

Though the Plaintiff does not cite the *Hoffman* case directly, the Plaintiff attempts to make the argument that a *Hoffman* exception, would apply. In *Hoffman v. Planter's Gin Company*, 258

So. 2d. 1008 (1978), the Court stated that for the *Hoffman* exception to apply in the context of premises liability, "there must be an obligation for a landowner to exercise reasonable care for the protection of a licensee as to any act of operation which the occupier carries on." There are a long line of Mississippi cases citing *Hoffman* and its very limited exception. Recently in *Hawze v. Garner*, 928 So.2d., 900 (Miss. 2005), the Court stated that for *Hoffman* to apply, the landowner must be aware of the licensee's presence on the premises, the landowner must engage in an affirmative act of negligence in the operation or control of the business, a landowner's conduct in regards thereto must subject the licensee and invitee to unusual danger and increased hazard to him and the landowner act of negligence must have approximately caused the injury. *Id.*, at 903 citing *Little v. Bell*, 719 So.2d. 757 (Miss. 1998). Importantly, the Court stated the *Hoffman* exception does not apply when a landowner is not in operation of a business. *Howze*, 988 So. 2d at 900. The incident in *Howze* occurred at a home residence, thus the *Hoffman* rule did not apply. *Id.* The same is true here. There was no business premises at Ann Wilson's home residence. It was a home residence, thus the *Hoffman* rule does not apply. Again, there has been no allegation of premises liability and no allegation of active negligence by the Defendant. Since the Plaintiff once again brings it up in her principle brief, though not alleged anywhere in this litigation, Defendant has addressed it.

Not through any reasonable stretch of the imagination can it be said that the Plaintiff has pled any cause of action under any premises liability. Certainly nowhere has the Plaintiff pled any of the elements necessary for recovery for a cause of action under any premises liability grounds. The Plaintiff cannot legitimately claim that the Trial Court improperly dismissed the case for lack of allegations of any premises liability grounds, when in no shape form or fashion has the Plaintiff ever pled any grounds of premises liability. The dismissal of the Complaint was proper in every manner.

ISSUE B: Whether a party can proceed under a claim of negligent assault.

In order to make any recovery under the laws of the State of Mississippi, a proper cause of action must be pled. Without question, the Plaintiff has pled the unknown tort of "negligent assault." Though the Plaintiff now claims that there are two separate claims in this case, one of negligence and one of the intentional tort of assault, such pleading appears nowhere in the Complaint. *Record*, pages 20-21. The Court was right on the money in querying the Plaintiff's counsel that the allegations stated that the Defendant "apparently negligently pointed the firearm."

> **The Court:** **You allege that she apparently negligently pointed the firearm. Not intentionally, but negligently?**
>
> **Mr. Fisher:** **Well, Your Honor, I believe that the negligence is given rise by her failure to adequately identify whether or not there was a threat. I will—she--.**
>
> **The Court:** **Then secondly, you allege that the Defendant pointing a firearm at the Plaintiff was negligent conduct which constituted an assault.**

R.E. 1.

Plaintiff counsel's only response was the telling admission that the Plaintiff failed even to adequately identify whether or not there was a threat at the time! *R.E. 1.* The first count correctly found that the Plaintiff did not allege any intentional assault in the Complaint, but rather alleged "negligent assault," a cause of action which does not exist under Mississippi law. It is that plain and simple. Plaintiff failed to state a claim for which relief can be granted. There is no such thing as negligent assault. Assault is an intentional tort, not based on negligence. *Webb v. Jackson*, 583 So.2d. 946 (Miss. App. 1991). There can be no claim for negligent assault as it does not exist under the law. If the Defendant's conduct was negligent, as the Plaintiff here in the present case so pleads, then there can be no assault. *Id.*, 583 So.2d. 946. The *Webb* case is on all fours with the present one. The *Webb* case states that if the conduct is negligent then it does not arise to the tort of intentional assault. Taking the Plaintiff's Complaint in the best light possible, and in the plain language in

which it pleads, it only pleads "negligent conduct." Under *Webb*, even if Ann Wilson actually caused the apprehension of an assault without intending to cause either an actual assault or the apprehension, then there is no tort of assault. *Webb*, at 951. As heretofore stated, the Plaintiff pulled into the Defendant's driveway unannounced, on the heels of recent events which gave the Defendant concern about strangers pulling into her yard. *Record*, page 413. The Defendant drove over to the Plaintiff's vehicle and neither party exited their vehicles. An entire conversation occurred, centering around why the Plaintiff was in her driveway and then how to get to the patient whom the Plaintiff was seeking. *Record*, pages 364-365. It was only after this entire conversation, that the Plaintiff inquired whether or not the Defendant had had a gun in her vehicle. The Plaintiff was so unsure whether or not there was even a gun in the Defendant's vehicle, that she had to ask. She only saw a sliver and apparently did not recognize it to even be a gun and had to ask about it. *Record*, pages 371, 395, 414. Without question the Plaintiff admits there were never any threats or threatening language from the Defendant. *Record*, pages 370, 376-377. The Defendant did not order her off the property, did not threaten to shoot her, did not waive the gun in her face or make any other similar type of threat. *Record*, pages 370, 376-377, 414. That is a far cry from the Defendant intending to threaten the Plaintiff or intending to cause harmful contact. It was only after the Plaintiff asked if it was a gun, after she drives off, and after some period of time elapses, that Plaintiff claims she got upset, she had to pull over, and then go back to her office. It could hardly be said to be an apprehension of "imminent" offensive contact – carrying on a conversation, asking about a gun, driving off after getting directions, going somewhere else, and then deciding to be upset. As Plaintiff's counsel stated, Plaintiff failed to even identify if there had been a threat.

That being said, a plain and simple reading of the Complaint shows that there are no allegations concerning the intent of the Defendant to cause the intentional tort of assault. The only

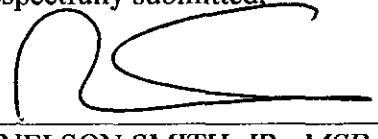
thing actually stated in the Complaint is the unknown claim of "negligent assault." It is never alleged that the Defendant's actions were intentional, it is never alleged that the Plaintiff suffered any apprehension or the threat of imminent contact or offensive contact. The Plaintiff does use the word "assault" in the Complaint, but only in the context of alleged negligent conduct of the Defendant. Under *Webb*, the Complaint fails to state a claim for which relief can be granted as there is no such thing as negligent assault. *Id.* The Plaintiff attempts to obfuscate the obvious by saying that "the Plaintiff does not have to plead any legal theories." However, the Plaintiff must plead a cause of action recognized under the laws of the State of Mississippi! Negligent assault is not a recognized cause of action. The tort of assault is well recognized and well established as an intentional tort and not a negligent tort. If you take the allegations in the Complaint as true, claiming that the Defendant's actions were negligent, then without question the Plaintiff failed to state a cause of action of intentional tort of assault. Dismissal is proper if a complaint lacks an allegation regarding a required element necessary to obtain relief. Conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to defeat a motion to dismiss. *Penn National Game, Inc. v. Ratliff*, 954 So.2d. 427 (Miss. 2007). In *Penn National Game, Inc.*, the Mississippi Supreme Court looked to a history of Mississippi cases and to the majority of federal circuits, finding that "even under the liberal pleading requirements of Rule 8 (a), a Plaintiff must set forth factual allegations, either direct or inferential respecting each material element necessary to sustain recovery under some actual legal theory." *Id.*, at 932, emphasis added. A complaint has to state allegations respecting all material elements and state a cause of action to sustain a recovery under some viable legal theory. *Id.* In the present case, the Plaintiff fails to set forth any viable legal theory. There is no tort of negligent assault. Further, the Plaintiff does not plead any of the material elements of the tort of intentional assault nor any facts respecting each of the material elements of the intentional tort.

Thus, even if the Plaintiff had alleged the intentional tort of assault had occurred, which it has not, she has failed to plead allegations of the material elements to sustain a recovery under that intentional tort. Bottom line, in order to pursue an action in the courts of Mississippi, you've got to state an actual legal theory. Negligent assault is not an actual legal theory under the law of the State of Mississippi. The Trial Court was proper in dismissing this action for failure to state any actual legal theory and for failure to plead any allegations respecting each of the material elements of the intentional tort of assault. Had the Plaintiff actually pled the intentional tort of assault, the Trial Court was still correct in dismissing the action, for as Plaintiff's counsel has admitted, the Plaintiff failed to even identify whether or not a threat was made at the time of the conversation between the Plaintiff and the Defendant – hardly an imminent apprehension.

CONCLUSION

Plaintiff failed to even remotely plead any premises liability cause of action. Plaintiff has also failed to plead the intentional tort of assault. All the Plaintiff pled was "negligent assault." There is no such tort in the State of Mississippi. If the Plaintiff had properly pled the intentional tort of assault, the Trial Court was still proper in dismissing the action as the Plaintiff, at the time of the conversation between her and the Defendant, failed to even realize whether or not any threats had been made. The Trial Court properly dismissed this action and Defendant requests this Court to affirm the dismissal by the Trial Court.

Respectfully submitted,



P. NELSON SMITH, JR., MSB #8771
Attorneys for Plaintiff/Appellee Ann Wilson

HICKS & SMITH, PLLC
AMSOUTH BANK BUILDING
710 MAIN STREET, SECOND FLOOR
POST OFFICE BOX 1111
COLUMBUS, MS 39703-1111
TELEPHONE: (662) 243-7300
FACSIMILE: (662) 327-1485
EMAIL: nsmith@ghs-law.com

CERTIFICATE OF SERVICE

The undersigned attorney, P. NELSON SMITH, JR., hereby certifies that he has this day mailed by United States first class mail, postage prepaid, a true and correct copy of the foregoing **Brief of Appellee** to the following:

David B. McLaurin, Esq.
Post Office Box 1038
Tupelo, MS 38802

James D. Waide, III, Esq.
Post Office Box 1357
Tupelo, MS 38802

SO CERTIFIED, this the 24th day of October, 2007.

P. NELSON SMITH, JR.

CERTIFICATE OF MAILING

The undersigned attorney, P. NELSON SMITH, JR., hereby certifies that this day the original and seven copies of the **Brief of Appellee** was mailed via United States first class mail, postage prepaid, to:

Betty W. Sephton, Clerk
Mississippi Court of Appeals
Post Office Box 22847
Jackson, MS 39225
(Paper and Disc)

and further certifies that a true and correct copy of the **Brief of Appellee** was mailed via United States first class mail, postage prepaid, to the following:

David B. McLaurin, Esq.
Post Office Box 1038
Tupelo, MS 38802

James D. Waide, III, Esq.
Post Office Box 1357
Tupelo, MS 38802
(Paper only)

SO CERTIFIED, this the 24th day of October, 2007.

P. NELSON SMITH, JR.

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

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FAYE JORDAN — **PLAINTIFF /APPELLANT**

VERSUS

ANN WILSON and NMMC — **DEFENDANTS /APPELLEE**

CERTIFICATE OF SERVICE

The undersigned attorney, P. NELSON SMITH, JR., hereby certifies that he has this day mailed by United States first class mail, postage prepaid, a true and correct copy of the foregoing **Brief of Appellee** to the following:

Judge Paul Funderburk
Monroe County Circuit Court
Post Office Drawer 1100
Tupelo, MS 38802-1100

SO CERTIFIED, this the 31 day of October, 2007.

P. NELSON SMITH, JR.