

**MISSISSIPPI SUPREME COURT  
MISSISSIPPI COURT OF APPEALS**

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**NO. 2007-CA-00969**

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**FAYE JORDAN**

**APPELLANT**

**VERSUS**

**ANN WILSON AND  
NORTH MISSISSIPPI MEDICAL CENTER**

**APPELLEES**

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**APPELLANT'S REPLY BRIEF**

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**ORAL ARGUMENT REQUESTED**

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## FACTS

The Appellee/Defendant's recitation of facts in their brief is astounding. Ann Wilson ignores the principle that facts are to be viewed in the light most favorable to the non-moving party. *Harmons v. Regions Bank*, 961 So.2d 693 (Miss. 2007). The non-moving party is given the benefit of the doubt as to the existence of material fact. *Webb v. Braswell*, 930 So.2d 387, 395 (Miss. 2006). Wilson characterizes the events that are the subject of this lawsuit as "carrying on a conversation, asking about a gun, driving off after getting directions, going somewhere else, and then deciding to be upset." Brief of Appellee/Defendant Ann Wilson, at p. 11. Wilson conveniently leaves out the part where she pointed a rifle at Faye Jordan, the Appellant/Plaintiff. Wilson characterizes the fact that Faye Jordan became almost incoherent and was unable to stop crying, was taken to an emergency room, and later diagnosed with post-traumatic stress syndrome as "deciding to be upset." Wilson's characterization of the facts bear almost no relation to sworn testimony in this case. This incredible spin demonstrates that summary judgment was improper in this case. "Issues of fact sufficient to require reversal of a summary judgment obviously are present where one party swears to one version of the matter in issue and another says the opposite." *Lawrence v. Lawrence*, 956 So.2d 251, 255 (Miss. App. 2006).

Wilson's disturbing disconnect from reality is also made apparent by her

attempts to misconstrue statements at the summary judgment hearing made by Faye Jordan's counsel. Wilson claims that "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 --**.'" Wilson's brief, pp. 4-5. The transcript cited by Wilson as constituting an admission of some kind by Faye Jordan's counsel is exactly the opposite. Counsel in the trial court were discussing what constituted negligence on the part of Ann Wilson. The transcript itself specifically states this.

The Court:

Where in your complaint do you allege any intentional conduct on behalf of Mrs. Wilson?

Mr. Fisher:

We allege that it's an assault, Your Honor, which includes intentional conduct. And we also allege that she 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."

Hearing transcript, p. 16.

The transcript makes clear that Jordan's counsel was discussing the negligence of Ann Wilson, not making some admission that Faye Jordan was not aware of the rifle pointing directly at her. Wilson's characterization of the facts in the hearing transcript are dishonest, a fact which underlines the weakness of Wilson's position and the error of the trial court.

The facts in evidence demonstrate that there are genuine issues of material fact related to Faye Jordan's claims of both negligence and assault.

## **REPLY ARGUMENT I.**

### **THE COMPLAINT**

Both the trial court and Ann Wilson characterized Faye Jordan's complaint as one alleging "negligent assault." The complaint, itself, states as follows:

#### **III.**

Plaintiff is employed as a home care nurse. On or about May 13, 1999, Plaintiff parked her vehicle, temporarily, in the Defendant's driveway, while attempting to locate a patient whom she was scheduled to see. The Defendant, apparently negligently believing Plaintiff was an unlawful intruder, pointed a long firearm directly toward Plaintiff. Defendant kept her firearm pointed at Plaintiff for several minutes. Plaintiff feared for her life. Plaintiff was so frightened that she was required to seek medical attention, and has had to undergo counseling. She has suffered extreme stress and anxiety, and has lost income, as a result of the Defendant's actions.

#### **IV.**

The Defendant's pointing of a firearm at Plaintiff was negligent conduct, since Defendant failed to use reasonable care to determine whether such an action was necessary. Pointing the firearm at Plaintiff constituted an assault.

Jordan's complaint clearly pleads two different claims, one for negligence and one for assault. The negligence action is based upon Ann Wilson's failure to use reasonable care to determine whether or not Faye Jordan was an "unlawful intruder" or a danger at all before deciding to point a rifle at her. The complaint clearly states

that the action of pointing a firearm at the Plaintiff constituted an assault, a separate cause of action.

M. R. Civ. P. 8(a) requires only that the complaint be “(1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.” The comment to M. R. Civ. P. (8) states: “The purpose of Rule 8 is to give notice, not to state facts and narrow the issues as was the purpose of pleadings in prior Mississippi practice.” See also *Church v. Massey*, 697 So.2d 407, 412 (Miss. 1997). The Court should construe the pleadings so as to do “substantial justice.” M. R. Civ. P. 8(f).

The complaint in this case does exactly what it is supposed to do. It put Ann Wilson on notice the claims being made against her. The complaint alleges that Ann Wilson was negligent in determining whether or not the diminutive Faye Jordan, in her nursing uniform, constituted a threat before Wilson approached her and pulled a gun on her. The complaint also specifically pleads that Wilson did, in fact, point a rifle at Faye Jordan. The complaint specifically alleges that this conduct constitutes an assault.

Faye Jordan never pled “negligent assault” but, rather, pled two claims, one for negligence and one for assault. The factual allegations of the pleadings are sufficient



to make out the “short and plain statement of the claim” required by M. R. Civ. P. 8. The Court must assume that the factual allegations in the complaint are true, construe them in a manner most favorable to the non-movant, and decide that the facts alleged could give rise to an actionable claim. *Ngo v. Centennial Ins. Co.*, 893 So.2d 1076, 1081 (Miss. App. 2005). Even if Jordan’s complaint failed to correctly categorize a legal theory giving rise to her claims, it is still sufficient, based upon the notice that it gave to Wilson. *St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 435 (5<sup>th</sup> Cir. 2000). Wilson understood that Jordan was making a claim for assault. Prior to an earlier trial setting, both sides submitted jury instructions for assault, an intentional tort. See Jury Instructions P-1, P-2, P-3, P-5 and D-8. R. pp. 271-273, 277, 314.

The trial court, therefore, erred in dismissing Jordan’s claim pursuant to M. R. Civ. P. 12(b)(6).

## **REPLY ARGUMENT II.**

### **THERE ARE GENUINE ISSUES OF MATERIAL FACT REGARDING FAYE JORDAN’S CLAIM FOR ASSAULT.**

Faye Jordan’s complaint adequately alleges assault, she alleges that Ann Wilson pointed a rifle at her for no good reason. Additionally, the facts adduced during discovery demonstrate that there are genuine issues of material fact on the issue of Jordan’s assault claim. Faye Jordan was just trying to find her patient, Ann

Wilson's mother. She followed the directions on her contact sheet to go to Ann Wilson's residence. Ann Wilson was in no danger. She was at her guest house, away from where Faye Jordan was parked, trying to use her phone to find Wilson's mother. Wilson approached Jordan, not the other way around. Wilson drove up next to Jordan and pointed a rifle at her, even though Jordan was still in her car and Wilson was able to see that Jordan was no threat to her whatsoever.

"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." *Morgan v. Greenwaldt*, 786 So.2d 1037, 1043 (Miss. 2001).

There is absolutely no reason for a stranger to openly point a weapon at someone, except for the purpose of putting that person in "imminent apprehension" of "a harmful or offensive contact", i.e., being shot. Pointing a gun at someone constitutes the tort of assault. *Sims v. Collins*, 762 So.2d 785, 786-87, 791 (Miss. App. 2000). See also *Whitten v. Cox*, 799 So.2d 1, 6-8 (Miss. 2000). When someone displays a deadly weapon and indicates a willingness to use it by pointing, it can be presumed that the person displaying the weapon intends to cause the person the weapon is pointed at to be in imminent apprehension of a harmful or offensive contact. *Cittadino v. State*, 24 So.2d 93, 95-96 (Miss. 1945).

### REPLY ARGUMENT III.

#### THERE ARE GENUINE ISSUE OF MATERIAL FACTS REGARDING FAYE JORDAN'S CLAIM FOR NEGLIGENCE.

The familiar elements of negligence are (1) a duty owed to the plaintiff by the defendant; (2) a breach of that duty; (3) damages; and (4) a casual connection between the breach and the damages, such that the breach is the proximate cause of the damages. *Grisham v. John Q. Long V.F.W. Post No. 4057, Inc.*, 519 So.2d 413, 416 (Miss. 1988).

What duty Ann Wilson owed to Faye Jordan depends upon Jordan's status on the property, whether she was an invitee, a licensee or a trespasser.

An invitee is a person who goes upon the property of another because of an expressed or implied invitation of the property owner for their mutual advantage. *Holliday v. Pizza Inn, Inc.*, 659 So.2d 860, 865 (Miss. 1995); *Skelton v. Twin County Rural Electric Ass'n*, 611 So.2d 931, 936 (Miss. 1992). The directions Faye Jordan was given by her employer specifically directed her to Ann Wilson's property. There is a genuine issue of material fact whether that information would have been given to the hospital, either with Ann Wilson's knowledge and/or permission. Trying to care for Ann Wilson's relative at Ann Wilson's home would seem to be to the parties' mutual advantage and the jury could so find. A landowner owes an invitee a duty of

reasonable care for the invitee's safety. *Hall v. Cagle*, 773 So.2d 928, 929 (Miss. 2000).

Even if Faye Jordan was not an invitee, she was a licensee. A licensee is one who enters upon the property of another for his own convenience, pleasure or benefit, pursuant to the license or implied permission of the owner. *Payne v. Rain Forest Nurseries, Inc.*, 540 So.2d 35, 37 (Miss. 1989). There was no bar to Jordan's entry on the property. Jordan had more call to be on the property than someone seeking help with a broken car or Jehovah's witnesses, who would not be considered trespassers. A landowner owes a licensee the duty to refrain from wilfully or wantonly injuring the licensee, unless the landowner engages in active conduct and knows of the licensee's presence. *Lucas v. Buddy Jones Ford-Lincoln-Mercury, Inc.*, 518 So.2d 646, 648 (Miss. 1988). In this case, the landowner, Ann Wilson, engaged in active conduct and knew of Faye Jordan's presence and, therefore, is held to a reasonable care standard.

Even if Jordan was a trespasser, a far-fetched idea under the circumstances, Ann Wilson would still have owed her the duty to refrain from wilfully or wantonly injuring her. *Adams v. Fred's Dollar Store of Batesville*, 497 So.2d 1097, 1100 (Miss. 1986).

Under either standard, Ann Wilson negligently failed to determine whether or

not Faye Jordan was threat to her. Wilson's negligence in ascertaining whether or not Faye Jordan was a threat directly caused her to take the action of threatening deadly force, willful and wanton behavior which was totally uncalled for.

### **CONCLUSION**

Faye Jordan did not plead "negligent assault." She pled separate claims for negligence and assault. Even if the negligence claim did not stand on its own, the assault claim certainly does. The complaint specifically alleged, and the proof demonstrated, that Ann Wilson pointed a rifle at Faye Jordan for no reason, and that this action constituted assault. The circuit court erred in ruling that Jordan's complaint did not adequately allege assault. The allegation of pointing a rifle at someone is an allegation of willful and intentional behavior. Jordan specifically pled that the act of pointing the rifle constituted an assault. The trial court's citation of *Webb v. Jackson*, 583 So.2d 946, 951 (Miss. 1991), does not apply to the facts of this case. A reasonable jury could find that when Ann Wilson pulled up to Faye Jordan and openly pointed a rifle at her, she intended to cause Jordan to have apprehension of a battery.

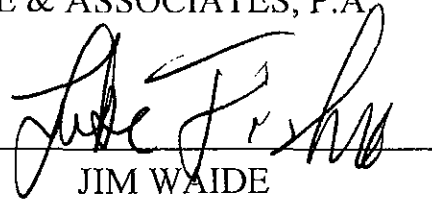
The circuit court erred in granting the Defendant's Motion to Dismiss and Motion for Summary Judgment. Further, the circuit court did not address Jordan's claim for negligence at all.

Therefore, Faye Jordan, the Appellant/Plaintiff, prays that the Final Judgment of Dismissal entered by the circuit court be reversed and that this cause be remanded for a trial.

Respectfully submitted,

WAIDE & ASSOCIATES, P.A.

BY: \_\_\_\_\_

A handwritten signature in black ink, appearing to read "Jim Waide", is written over a horizontal line.

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**CERTIFICATE OF SERVICE**

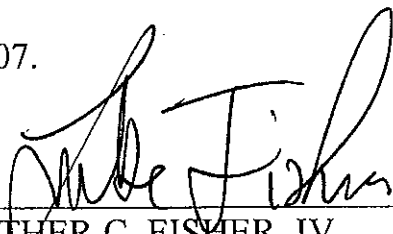
I, Luther C. Fisher, IV, attorney for Appellant, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing, as well as a WP 3.5 disk to the following:

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Honorable Paul Funderburk  
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THIS the 12<sup>th</sup> day of December, 2007.

  
\_\_\_\_\_  
LUTHER C. FISHER, IV

**MISSISSIPPI SUPREME COURT  
MISSISSIPPI COURT OF APPEALS**

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**NO. 2007-CA-00969**

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**FAYE JORDAN**

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NORTH MISSISSIPPI MEDICAL CENTER**

**APPELLEES**

**CERTIFICATE OF COMPLIANCE**

Pursuant to Miss. R. Civ. P. 32, the undersigned certifies this brief complies with the type-volume limitations of Rule 32.

1. Exclusive of the exempted portions in Rule 32(c), the brief contains:

A. 2,261 words in proportionally spaced typeface.

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A. In proportionally spaced typeface using WordPerfect 12.0 in Times New Roman, 14 point.

3. If the Court so requires, the undersigned will provide an electronic version of the brief and/or a copy of the word or line printout.

4. The undersigned understands a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in Rule 32, may result



in the Court's striking the brief and imposing sanctions against the person signing the brief.

This, the 12<sup>th</sup> day of December, 2007.

BY: \_\_\_\_\_

  
LUTHER C. FISHER, IV