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MISSISSIPPI SUPREME COURT
MISSISSIPPI COURT OF APPEALS

NO. 2007-CA-00969

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SUPREME COURT
COURT OF APPEALS

FAYE JORDAN

APPELLANT

VERSUS

ANN WILSON AND
NORTH MISSISSIPPI MEDICAL CENTER

APPELLEES

APPELLANT'S BRIEF

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PARTIES

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 Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Faye Jordan, Appellant;

2. Jim Waide, Esq., Attorney for Appellant;

3. Luther C. Fisher, IV, Attorney for Appellant;

4. Waide & Associates, P.A., Attorneys for Appellant;

5. Ann Wilson, Appellee;

6. Dewitt Hicks, Esq., Attorney for Appellee Ann Wilson;

7. Gholson, Hicks & Nichols, Attorneys for Appellee Ann Wilson;

8. North Mississippi Medical Center, Appellee;

9. David McLaurin, Esq., Attorney for Appellee North Mississippi Medical Center; and

10. McLaurin Law Firm, Attorneys for Appellee North Mississippi Medical Center.

This the 25th day of September, 2007.

Jim Waide

JIM WAIDE

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1. **Whether a complaint may properly be dismissed because an element of a tort was not pled.**

2. **Whether a complaint may properly be dismissed because a proper legal theory was not pled.**

3. **Whether questions of intent are fact questions for a jury.**

STATEMENT REGARDING ORAL ARGUMENT

Oral argument would be helpful to discuss the appropriate role of legal theories in a complaint.

STATEMENT OF THE CASE

A. Statement of the Proceedings

On April 14, 2000, Plaintiff/Appellant Faye Jordan (hereinafter "Jordan") filed a complaint in Monroe County Circuit Court alleging negligence and assault against Ann Wilson (hereinafter "Wilson"). R. 20-21. The Complaint alleges:

> 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.

R. 20-21.

North Mississippi Medical Center (hereinafter "NMMC") intervened, seeking recovery on a subrogation lien for compensation in medical benefits paid to Faye Jordan under the Mississippi Workers' Compensation Act, as a result of the mental injuries caused to Plaintiff Jordan by Defendant Wilson's assault. R. 42-47, 55.

Appellee Wilson filed a Motion to Dismiss and Motion for Summary Judgment against Plaintiff/Appellant Jordan, alleging that Jordan's complaint alleges "negligent assault," a non-existing legal theory. R. 361-377, 438-39.

On May 16, 2007, the circuit court issued its Final Judgment of Dismissal, dismissing Faye Jordan's complaint against Ann Wilson. Final Judgment, R. 446-67. The Final Judgment of Dismissal was based upon the court's reading of Jordan's complaint as alleging "negligent assault," a non-existing legal theory. The court ruled, alternatively, that even if Jordan had properly pled a cause of action for intentional assault, summary judgment was still appropriate because of the lack of evidence of any intent on Wilson's part. R. 446-47.

Jordan filed timely notice of appeal. R. 448.

B. Statement of the Facts

Faye Jordan has a Master's degree in nursing, and is employed as a home health nurse. Jordan made home health visits pursuant to her employment with North Mississippi Medical Center. R. 386-87, 397-98. One of the persons whom she visited pursuant to her employment is Marie Conwill. R. 386-87.

On all of her home health visits, Faye Jordan used her unmarked, personal vehicle. R. 387. Jordan was forty-eight years old, five foot three inches tall and weighed about one hundred and thirty pounds at the time and could not have been

considered a threatening figure in any way. R. 414-15. Jordan was dressed in her white nurse's uniform, with a white lab coat on. R. 414-15.

Appellee Wilson is Conwill's daughter. Wilson lives two houses away from her mom. R. 389-90, 405. On May 13, 1999, Jordan went to Conwill's home to render care. Jordan knocked on Conwill's door multiple times, without a response, and concluded Conwill was not home. Jordan then got into her vehicle, and referred to her home health care patient care summary. R. 389-90. The patient care summary, written by the admitting nurse, states: "If PT [patient] not home, will be 2 houses up on left at Ann Wilson's house - phone #256-7783." R. 389-90.

Based on the instructions in the note, Jordan drove from Conwill's house to Wilson's house. The home appeared empty. There were no vehicles at the house. R. 391. The carport was empty, the door closed and no one was in sight. Jordan began calling numbers on her printout sheet, but in Wren, Mississippi, the cell phone reception was bad, although she continued to try. R. 391.

Appellee Ann Wilson was at her guest house, next to her home. R. 404.

Seeing Jordan parked at her home, Ann Wilson got into her Tahoe and drove to her home where Jordan was parked. R. 407. Wilson pulled up on Jordan's passenger side. Wilson's car sat higher than Jordan's and so she looked down through Jordan's passenger window. R. 408. She would, therefore, have been able

to clearly see Jordan and that she was in her nursing uniform. Jordan rolled her window down as Ann Wilson approached. R. 395.

"A: When I saw her coming, I put my window down and I put my foot on the brake. I had backed up a slight bit just in the process of – you know, and when I saw the vehicle coming, I thought, great, I'll find out where Terry is.

Q: What did you first say to her and she said to you?

A: I said – I either said, I'm looking for Terry, or where's Terry?

Q: What did she say?

A: She said, she lives two houses that way (indicating) and that head nod just stunned me for a minute because it was such an exaggerated – like that (indicating) and that's when I noticed the gun.

Q: Well, why did you ask her is that a gun if you knew it already was a gun?

A: I wanted, I guess, a little humanity there, Mr. Hicks, I looked from the end of that gun to her cold blue-eyed stare –

Q: Did she ever say –

A: – and back to that gun and back to her and back to that gun and when she finally pulled it in and over that steering wheel, I said, did you have a gun pointed at me?"

R. 395.

After Jordan asked if Wilson had a gun pointed at her, Wilson just stared at her angrily for a bit and then stated "you have no business sitting in my driveway."

Wilson appeared extremely angry. R. 414 Jordan immediately drove away from Wilson's home and became almost incoherent and unable to stop crying. She drove to her office and was immediately taken to the emergency room for treatment. She was diagnosed with post-traumatic stress syndrome. *Id.*

The gun was a .22 rifle, R. 411, and was pointed directly into Jordan's vehicle at her. R. 397.

This event greatly affected Faye Jordan's life. In late 1999 or early 2000, Jordan was making a home health visit on a gravel road when she heard gun shots. She had to stop the car and duck down onto the seat. R. 399. Her employer was trying to be very careful to send Jordan only to homes "where they knew with as much certainty as humanly possible that I would be safe." R. 399-400. However, her home health nursing career ended in early 2000. *Id.* She went to an elderly man's home. He was in a wheelchair and covered with an afghan. He kept his right arm under the afghan. Jordan was afraid he had a gun. R. 400. This was the last home health visit she ever made. *Id.* Her fear of being shot, arising from Wilson's pointing the firearm, caused her to give up her home health nursing job, a job that she dearly loved. R. 414-15.

The trauma Jordan suffered is evidenced by the fact that North Mississippi Medical Center treated her for stress disorder and intervened to collect on its

Workers' Compensation lien, R. 50-52.

On May 16, 2007, the circuit court entered its "Final Judgment of Dismissal."

The opinion states as follows:

> Plaintiff's Complaint alleges a cause of action against the Defendant for negligent assault. Plaintiff alleges in paragraph III that "[t]he Defendant, apparently negligently believing Plaintiff was an unlawful intruder pointed a long firearm directly toward Plaintiff." In paragraph IV, she alleges "[t]he Defendant's pointing of a firearm at Plaintiff was negligent conduct," (emphasis-added) which "constituted an assault." Nowhere in her Complaint does Plaintiff allege that any action of the Defendant was willful or intentional.
>
> Assault and battery are intentional torts under Mississippi law. An assault occurs where a person 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 a contact, and the other is thereby put in such imminent apprehension. A battery goes one step beyond an assault in that a harmful contact actually occurs. Where a person causes the apprehension of a battery although not intending to cause either a battery or the apprehension of such, there is no liability since "there is no such thing as a negligent assault". Webb v. Jackson, 538 So.2d 946, 951 (Miss. 1991).
>
> To deny Defendant's motion to dismiss under M.R.C.P. 12(b)6 or 12(c) would require the Court to recognize a separate tort of negligent assault which this Court declines to do. Therefore, Defendant's motion to dismiss shall be granted.
>
> Had the Plaintiff properly pled a cause of action for intentional assault, summary judgment would be appropriate because there is no evidence before the Court of any intent on the Defendant's part to cause either an assault or the apprehension of such. Therefore, Defendant is entitled to summary judgment under M.R.C.P. 56 on any alleged claim of an intentional assault.

R. 446-47.

SUMMARY OF THE ARGUMENT

In dismissing the complaint, the circuit judge ignored the last sentence of ¶ 4 of the Complaint, which says: "Pointing the firearm at Plaintiff constituted an assault." The circuit judge himself stated that an "assault requires acts intended to cause a harmful or offensive conduct." R. 446-47. Thus, use of the term "assault" in the Complaint was sufficient to allege an intentional act.

In any event, legal theories need not be pled at all. All that was necessary to be pled was a sufficient statement of the claim, so as to give Defendant notice of the nature of what was being alleged. Jordan met the notice requirements of the Mississippi Rules of Civil Procedure, and the circuit judge's dismissal on the grounds that there is no such thing as a "negligent assault" was error.

Additionally, the circuit court erred in dismissing for failure to offer proof of "intent." There was a factual question for the jury as to whether Wilson "intended" to cause harm to Jordan.

Finally, there is a factual question of whether Wilson used reasonable case to avoid trauma to Jordan. There was, in other words, a factual question of whether Wilson was "negligent."

In short, the circuit judge erred both in dismissing the assault claim and in dismissing the negligence claim.

STANDARD OF REVIEW

1. M.R.C.P. 12(b)6 Motion to Dismiss

Review of a circuit court order dismissing a case pursuant to M.R.C.P. 12(b)6 is *de novo*. *Burgess v. City of Gulfport*, 814 So.2d 149, 151-52 (Miss. 2002). The well-established standard by which the Court reviews a motion to dismiss for failure to state a claim is as follows:

> "When considering a motion to dismiss, the allegations contained in the complaint must be taken as true, and the motion should not be granted unless it appears beyond doubt that the plaintiff will be unable to prove any set of facts in support of the complaint." *Burgess v. City of Gulfport*, 814 So.2d 149, 151-52 (Miss. 2002) (citations omitted).

Further, "In order to survive a Rule 12(b)6 motion, the complaint need only state a set of facts that will allowed the plaintiff 'some relief in court.'" *Board of State Institutions of Higher Learning v. Ray*, 809 So.2d 627, 631 (Miss. 2002) (citing *State v. Dampeer*, 744 So.2d 754, 756 (Miss. 1999) (quoting *Weeks v. Thomas*, 662 So.2d 581, 583 (Miss. 1995).

"For the 12(b)6 motion to be sustained, 'it must appear to a certainty that the plaintiff is entitled to no relief under any set of facts that could be proved in support of the claim and judicial practice favors disposition on the merits...'" *Gilbert v. Hall*, 620 So.2d 533, 534 (Miss. 1993).

"[T]he allegations in the complaint must be taken as true and the motion should

not be granted unless it appears beyond doubt that the plaintiff will be unable to prove any set of facts in support of his claim." *Overstreet v. Merlows,* 570 So.2d 1196 (Miss. 1990).

2. M.R.C.P. 56 Motion for Summary Judgment

The standard of review of a trial court's grant of summary judgment is *de novo.* *Miller v. Meeks*, 762 So.2d 302, 304 (Miss. 2000). This Court should employ a factual review similar to that of the trial court when considering evidentiary matters in the record. *Aetna Casualty & Surety Co. v. Berry*, 669 So.2d 56, 70 (Miss. 1996).

The threshold for summary judgment is high and requires that "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 in that the moving party is entitled to judgment as a matter of law." M.R.C.P. 56(c). "A motion for summary judgment should be overruled unless the trial court finds, beyond a reasonable doubt, that the plaintiff would be unable to prove any facts to support his claim." *Palmer v. Anderson Infirmary Benev. Ass'n*, 656 So.2d 790, 796 (Miss. 1995). The evidence must be viewed in the light most favorable to the non-moving party. *Id.,* at 794.

It is well settled that motions for summary judgment are to be viewed with a skeptical eye, and if a trial court should err, it is better to err on the side of denying

the motion. *Dailey v. Methodist Medical Center*, 709 So.2d 903, 907 (Miss. App. 2001). "If any triable facts exist, the lower court's grant of a summary judgment will be reversed;..." *Miller v. Meeks*, 762 So.2d at 304.

ARGUMENT I.

THE CIRCUIT COURT ERRED IN ITS DISMISSAL OF JORDAN'S CLAIM ON THE BASIS THAT JORDAN PURPORTEDLY PLED "NEGLIGENT ASSAULT."

The Court misapprehended Jordan's negligence and assault claims. Contrary to the Court's ruling, Plaintiff Fay Jordan was not alleging "negligent assault," but rather, makes two separate claims.

Jordan made a claim for negligence. This was rooted in the fact that "Defendant failed to use reasonable care to determine whether" pointing the rifle at Jordan was necessary. R. 21.

Jordan also made a claim for assault. The last sentence of ¶4 of her Complaint reads: "Pointing the firearm at Plaintiff constituted an assault." In any event, it was error to dismiss, even if the circuit judge was correct in his finding that Plaintiff Jordan pled a non-existing legal theory.

M.R.C.P. 8 provides a very liberal pleading standard, and a plaintiff need not plead legal theories. The Mississippi Rules of Civil Procedure were patterned on the federal rules, and federal law is instructive. *St. Paul Mercury Ins. Co. v. Williamson,*

224 F.3d 425, 435 (5th Cir. 2000) stated that "[t]he 'form of the complaint is not significant if it alleges facts upon which relief can be granted, even if it fails to categorize correctly the legal theory giving rise to the claim.'" *Id.* at 434. (quoting *Dussouy v. Gulf Coast Investment Corp.*, 660 F.2d 594, 604 (5th Cir. 1981) and citing *Doss v. South Central Bell Telephone Co.*, 834 F.2d 421, 424 (5th Cir. 1987). Accord, *Heffman v. Bass*, 467 F.3d 596, 599 (7th Cir. 2006) ("Under system of notice pleading, the plaintiff is not required to plead either facts or legal theories"); *Gins v. Mauser Plumbing Supply Co.*, 148 F.2d 974, 976 (2nd Cir. 1945) ("Particular legal theories of counsel yield to the Court's duty to grant the relief to which the providing party is entitled, and whether to amend it or not"); *Gibna Bldg Co. v. Federal Reserve Board of Richmond, CharlotteBranch,* 80 F.3d 895, 900 (4th Cir. 1996) ("A claimant 'need not set forth any theory or demand any particular relief for the court will award appropriate relief if the plaintiff is entitled to it under any theory'").

A decision that a complaint is to be dismissed because legal theories are not properly pled is contrary to the fundamental rule that an attorney's mental processes are not discoverable. This is the federal rule of *Hickman v. Taylor*, 329 U.S. 495 (1947), and Mississippi rule of *Hewes v. Langston,* 853 So.2d 1237, 1245 (Miss.2003).

Indeed, the Mississippi Rules of Civil Procedure express provide that "mental

impressions, conclusions, opinions, and legal theories of an attorney" are not even subject to discovery." M.R.C.P. 26(b)(3): " . . . In ordering discovery of such materials when the required showing has been made, the court **shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney** or other representative of a party concerning the litigation." (emphasis added). If counsel's legal theories cannot be obtained even in discovery, surely a complaint cannot be dismissed because appropriate legal theories are not pled.

In *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506 (2002), the Second Circuit dismissed a complaint because it "failed to allege the elements of a prima facie case". The United States Supreme Court summarily reversed, rejecting the theory that "one misstep by counsel may be decisive to the outcome." *Swierkiewicz*, 534 U.S. at 514. Here, the circuit judge dismissed the Complaint because plaintiff did not plead the necessary element that the assault was "intentional." However, *Swerkiewicz* precisely holds that a complaint cannot be dismissed for failure to plead an element of a legal theory of a particular claim, so long as notice of the claim is given. Here, Plaintiff had pled sufficient facts to give the Defendant "notice" of what was being pled.

Alternatively, the circuit judge ruled that there was not sufficient evidence of

intent for an assault. However, questions of intent are fact questions for a jury.[1]

As Justice Renquist said in *U.S. Postal Service Bd. of Governor v. Aikens*, 460 U.S. 711, 716 (1983), "The state of a man's mind is as much a question of fact as the state of his digestion." The cases holding that questions of "intent" are fact questions for the jury are legion. See, e.g., *Thornbrough v. Columbus and Greenville Railroad Co.*, 760 F.2d 633, 640-41 (5th Cir. 1995) (questions of motivation and intent are fact questions to be determined by a jury); *Independent Life & Acc. Ins. Co. v. Mullins*, 173 So.2d 663, 664 (Miss 1965) (conflict on issue of whether patrolman intended to kill passenger raised question of fact for jury to determine as to intent); *Berry v. State,* 754 So.2d 539, 542 (Miss.App.1999) ("Intent to do an act or commit a crime is also a question of fact to be gleaned by the jury from the facts shown in each case"); *Swington v. State,* 742 So.2d 1106, 1119 (Miss. 1999) ("intent is a question of fact to be gleaned by the jury from the facts shown in each case"); *Bullock v. State,* 525

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[1]In *Erickson v. Parchus*, ___US___, 127 S.Ct. 2197 (2007), the United States Supreme Court again disapproved of an overly technical view of a complaint. There, a lower court had dismissed an appeal on the grounds that the factual allegations were too limited to give rise to a cause of action. The United States Supreme Court ruled that a complaint need only "give the defendant fair notice of what the claim is and the grounds upon which it rests" and summarily reversed. *Id.*, at 2200. Similarly, Jordan adequately pled the nature of what had occurred, and this was sufficient to give the defendant "notice of what the claim is and the grounds upon which it rests." See *Dynasteel Corp. v. Aztec Industries, Inc.*, 611 So.2d 977, 984 (Miss.,1992) ("Under Rule 8 of the Mississippi Rules of Civil Procedure, it is only necessary that the pleadings provide sufficient notice to the defendant of the claims and grounds upon which relief which is sought"); Miss.R.Civ.P. 8 ("The purpose of Rule 8 is to give notice, not to state facts and narrow the issues....").

So.2d 764, 775 (Miss. 1987) (It would seem on principle and on common sense that if there is any fact question that should always be submitted to a jury, it is the accused's state of mind").

Contrary to the circuit judge's ruling that a defendant's display of a firearm, accompanied by an apparent display of anger, was not enough to allow a jury to find intent, this Court has held just the opposite. In *Tate v. State*, 784 So.2d 208 (Miss. 2001), this Court said:

> This Court has previously stated that the "exhibition [of a firearm] ... accompanied by an expression of vexed discontent was sufficient to support a charge of simple assault." *Edgar v. State,* 202 Miss. 505, 508, 32 So.2d 441, 442 (1947). We have also held that the mere pointing of a firearm at an individual is sufficient to support a conviction for simple assault. *Gibson v. State,* 660 So.2d 1268 (Miss.1995); *Brown v. State,* 633 So.2d 1042 (Miss.1994); *Woodall v. State,* 234 Miss. 759, 107 So.2d 598 (1958).

Tate, 784 So.2d at 212.

ARGUMENT II.

THERE WERE ISSUES OF MATERIAL FACT AS TO WHETHER APPELLE WILSON'S NEGLIGENCE CAUSED INJURY TO APPELLANT JORDAN.

Besides alleging assault, Jordan also pled negligence. Negligence is the mere failure to use reasonable care. *Dillon v. Greenbriar Digging Service, Ltd.*, 919 So.2d 172, 177 (Miss. App. 2005). "The standard of care applicable in cases of alleged

negligent conduct is whether the party charged with negligence acted as a reasonable and prudent person would have under the same or similar circumstances." *Donald v. Amoco Production Co.*, 735 So.2d 161, 175 (Miss.1999). Whether one was or was not negligent under the circumstances of a particular case is a fact question for the jury. Mississippi Constitution Art. 3, § 31. *L.W. v. McComb Separate Municipal School Dist.*, 754 So.2d 1136, 1142 (Miss. 1999) ("The issue of ordinary care is a fact question"); *Presswood v. Cook,* 658 So.2d 859, 862 (Miss. 1995) ("The question of negligence is determined by the jury").

An invitee on another's property is entitled to have the property owner use reasonable care for the invitee's safety. *Hall v. Cagle*, 773 So.2d 928, 929 (Miss. 2000). An invitee is one who goes on the property of another, an implied invitation or for 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). Since Jordan was at the home for the care of Wilson's mother, she was there for the mutual advantage of both Wilson and herself. Jordan was, therefore, an invitee on the home, to which reasonable care was required. If the jury finds that by positioning the rifle in such a way as to endanger Jordan, and to cause her such stress that she required extensive medical attention, a jury may well find that Wilson did not use reasonable care for Jordan's safety.

Alternatively, if a jury were to find Jordan were only a licensee, Wilson was still required not to engage in active conduct to harm her. *Lucas v. Buddy Jones Ford Lincoln Mercury, Inc.*, 518 So.2d 646, 648 (Miss. 1988). In this case, a jury could well find that Wilson violated this duty, because causing a rifle to be pointed at Jordan does indeed amount to a wanton disregard of Jordan's right to safety.

A jury is entitled to find there was "negligence" because Wilson used the threat of deadly force, which was extreme, and highly unnecessary. *Woodard v. Turnipseed*, 784 So.2d 239, 243-44 (Miss. App. 2000) notes that there is only a right to use such force as is "reasonably necessary." In this case, a jury may find that any threat to use a firearm was not reasonably necessary, and Wilson's pointing of the firearm represented "negligence," which caused damages to Jordan. A jury was entitled to find that Jordan was caused damage by Wilson's negligence, and the way in which Wilson positioned the firearm. Accordingly, summary judgment should not have been granted on Jordan's claim of "negligence."

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). In the face of no threat whatsoever, Wilson pulled a gun on Faye Jordan. This is wilful and wanton conduct.

Even if Wilson felt imperiled in some way, she only had the right to use such force as would have been reasonably necessary to accomplish the task. *Woodard v. Turnipseed,* 784 So.2d 239, 243-44 (Miss.App. 2000). As the *Woodard* court stated the question: "Did the facts show any such peril? The answer is an emphatic 'no.'" *Id.* at 244. No reasonable person could have believed that there was some threat to herself or her property. Wilson approached Jordan, not the other way around. Wilson was not even close enough to Jordan for Jordan to cause any harm of any kind until Wilson approached her and pulled a gun on her.

Wilson had a duty to take reasonable care for the safety of Faye Jordan. She had a duty to not pull a gun on someone who obviously posed no threat. She did pull a gun without reason, a jury may find this is negligence.

CONCLUSION

For the foregoing reasons, the order of the Monroe County Circuit Court granting Appellee Wilson's motion summary judgment should be vacated and the case remanded.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jim Waide, attorney for Plaintiff/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 3.5 WP Disk, to the following:

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THIS the 25th day of September, 2007.

Jim Waide
JIM WAIDE

MISSISSIPPI SUPREME COURT
MISSISSIPPI COURT OF APPEALS

NO. 2007-CA-00969

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APPELLANT

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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. 4,289 words in proportionally spaced typeface.

2. The brief has been prepared:

A. In proportionally spaced typeface using WordPerfect 10.0 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 25th day of September, 2007.

BY: _____
JIM WAIDE