NO. 2007-TS-01172

IN THE SUPREME COURT OF MISSISSIPPI

KATHY LEE — APPELLANT

v.

G & K SERVICES CO. — APPELLEE

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.

1. G & K Services, Co., Appellee/Defendant;
2. Kathy Lee, Appellant/Plaintiff;
3. James L. Jones and Everett E. White, Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C., counsel of record for G & K Services, Co., Appellant/Defendant;
4. Elise B. Munn, Berry & Munn, P.A., counsel of record for Kathy Lee, Appellant/Plaintiff;
5. Honorable Michael M. Taylor, Circuit Court Judge, Lincoln County, Mississippi.

EVERETT E. WHITE

STATEMENT REGARDING ORAL ARGUMENT

The Circuit Court of Lincoln County, the Honorable Michael Taylor presiding, granted G & K Services' Motion for Summary Judgment and dismissed Plaintiff's negligence claim in this needlestick case. The Court found that Plaintiff's only alleged injury was emotional distress from fear of disease, and that she could not recover because she did not present any evidence that she was actually exposed to a disease. Plaintiff admits that she has no evidence of actual exposure, but argues that she should not have to present such evidence.

The material facts are undisputed, so the issue presented is purely legal: whether a needlestick, by itself, can establish an emotional distress claim for fear of disease. The issue is adequately addressed in the briefs, and the decisional process would not be aided by oral argument within the meaning of M.R.A.P. 34(a)(3). Either Mississippi law does not allow recovery in a simple negligence case for fear of contracting disease (regardless of exposure); or, Mississippi law does allow such a claim, but requires substantial proof of actual exposure and medical evidence that would indicate possible future illness. The Court should affirm under either scenario.

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STATEMENT OF THE CASE

I. NATURE OF THE CASE

This case arises out of a needlestick incident. Plaintiff claims that when she reached in her uniform jacket pocket the morning of March 6, 2008, she was pricked by a used needle. (2:158).[1] She did not contract a disease, and is admittedly no longer at risk for contracting a disease. (1:9) (R.E. 1). Plaintiff, nevertheless, sued the company that provided the uniform, G & K Services, for her fear of contracting a disease. *Id.*

G & K Services denies that it delivered the jacket with a needle and syringes in the pocket, and denies that Plaintiff experienced any real emotional distress—she did not miss a day of work and did not seek any medical treatment for the alleged distress. But those issues are not before the Court. G & K Services moved for summary judgment for a more basic reason: there is no evidence that Plaintiff was actually exposed to a disease. (1:52) (R.E. 2). The Court granted G & K Services' Motion (2:221) (R.E. 3), and Plaintiff appealed (2:229).

II. STATEMENT OF FACTS AND COURSE OF PROCEEDINGS

G & K Services is in the uniform business. It contracts with various corporations and institutions to provide employee uniforms. G & K Services has an office in Jackson, Mississippi, and, at the time of the incident, provided uniforms to Plaintiff's employer, Copiah-Lincoln Community College (Co-Lin). Plaintiff Kathy Lee is a resident of Brookhaven, Mississippi. At the time of the incident, she was a maintenance employee at Co-Lin. (2:158).

On March 5, 2008, G & K Services Representative Tim Malone delivered uniforms to Co-Lin. (2:163, pp. 15-16). Among the uniforms he delivered were two smaller replacement jackets requested by Plaintiff. (2:154, pp. 19-21). Mr. Malone handed Plaintiff her jackets and hung the other uniforms in a common area in the

[1] The record is cited as follows: "[volume:page(s)]." G & K Services' record excerpts are cited as "R.E. [tab numbers]."

maintenance department.[2] *Id.* There was no plastic covering on Plaintiff's jackets. (2:164, p. 17). Plaintiff allegedly took the jackets home with her after work that evening.

Early the next morning, Plaintiff allegedly placed her left hand in the left pocket of her jacket uniform and was stuck in the middle finger by a used needle. (2:158). Plaintiff alleges that there were three needles and syringes in the pocket, all of which appeared to be used.[3] *Id.*

From March 2008 through September 2008, Plaintiff was tested for various diseases. All tests were negative. Plaintiff acknowledges that she is no longer at risk for contracting any disease as a result of the incident.

Plaintiff filed the subject lawsuit against G & K Services on December 31, 2008, alleging negligence and *res ipsa loquitor*. (1:8) (R.E. 1). She seeks recovery for her medical bills, which total approximately $700, and for six months of emotional distress caused by fear of contracting a disease. (1:9) (R.E. 1).

The parties served and responded to written discovery through July 2009. (1:50). On September 22, 2009, G & K Services filed a Motion for Summary Judgment. (1:52) (R.E. 2). The primary basis for the Motion was that Plaintiff had no evidence that she was actually exposed to a disease, and thus could not recover for her alleged emotional distress. *Id.* Plaintiff did not respond. Instead, Plaintiff filed a Motion for Additional Time to Respond (1:76) and a Motion for Protective Order and Scheduling Order (1:79) seeking further discovery.

The Circuit Court of Lincoln County, the Honorable Michael Taylor presiding, heard G & K Services' Motion and Plaintiff's Motion on November 16, 2009. At the

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[2] Plaintiff's testimony is inconsistent concerning whether she hung her jackets in the common area for the remainder of the day, or immediately placed them in her vehicle. For purposes of this appeal, however, this discrepancy is not material.

[3] Plaintiff accuses G & K Services—through selective quotation from Tim Malone's deposition—of not having a procedure for checking uniform pockets for foreign objects. (Plaintiff's Brief at p. 2). This is absolutely false. G & K Services thoroughly inspects all garments before they are distributed. Mr. Malone is a delivery man, and testified that he was not familiar with the inspection process (2:173, p. 54), and did not know what happened after the garments were washed (2:165, p. 32). This issue is likewise immaterial to the appeal.

hearing, the Court ruled that G & K Services' Motion should be held in abeyance so that Plaintiff could conduct further discovery. (1:89) (R.E. 4). The Court expressly noted, however, that G & K Services could re-urge its Motion at a later date. *Id.*

Following the hearing, the parties submitted an Agreed Scheduling Order and continued discovery. Among other things, both the Plaintiff and the G & K Services driver who delivered the subject uniform jacket (Tim Malone) were deposed. The parties also jointly submitted the syringes and needle for testing at the Mississippi State University Chemistry Laboratory. There, a chemist named Douglas Crawford tested and analyzed the subject needle and the reddish-brown substance contained in one of the syringes.

The parties received the results of the testing in January 2010. Mr. Crawford reached the following conclusions, as expressed in his affidavit: (1) the syringes are designed for one-time insulin injections and are supposed to be discarded after use; (2) the reddish-brown substance contained in one of the syringes is dried blood; and (3) the blood did not indicate the presence of any illicit drugs or toxins. (1:129) (R.E. 5).[4] Mr. Crawford also found that testing for HIV or hepatitis would be futile now. *Id.* The needle should have been tested within days or weeks of exposure. *Id.* Any disease-causing agents are no longer present. *Id.* Lastly, Mr. Crawford confirmed what Plaintiff had already admitted: that she is no longer at risk for contracting a disease, and has not been since six months after the incident. *Id.*

On March 3, 2010, G & K Services renewed its Motion for Summary Judgment because Plaintiff still did not have sufficient evidence to prove a compensable emotional distress claim based on fear of disease. (1:101) (R.E. 6). G & K Services noticed the Motion to be heard on May 19, 2010. (1:138) (R.E. 7).

Two days before the hearing, Plaintiff served her Response to the Motion and attached affidavits from Dr. Joel Nitzkin and Plaintiff. (1:147) (R.E. 8).

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[4] Mr. Crawford's affidavit was attached as an exhibit to G & K Services' Renewed Motion for Summary Judgment (1:101) (R.E. 6), contrary to Plaintiff's claim in her Brief that G & K Services' Motion for Summary Judgment was not supported by any affidavit. (Plaintiff's Brief at p. 6).

After hearing argument, the Court granted G & K Services' Motion, finding that "the black letter law is that absent proof of exposure, Plaintiff is not entitled to recover on a fear of illness claim." (2:226) (R.E. 9).

Plaintiff filed her Notice of Appeal on July 7, 2010. (2:229).[5]

SUMMARY OF THE ARGUMENT

Plaintiff did not contract a disease. Plaintiff is not at risk for contracting a disease. Plaintiff did not miss work or seek medical treatment because of the alleged distress caused by her fear of contracting a disease. Plaintiff claims, nevertheless, that a single needlestick automatically entitles her to $60,000 in emotional distress ($10,000 a month until she was cleared) for fear of contracting a disease.

No Mississippi appellate court has ever allowed recovery for fear of disease, and this should not be the first. The Court should follow *Paz v. Brush Engineered Materials, Inc.*, 949 So. 2d 1, 3 (Miss. 2007) and affirm summary judgment on grounds that Mississippi does not allow recovery for fear of disease in a simple negligence case, regardless of whether the plaintiff was exposed to a disease. Fear of disease is not a compensable injury in a simple negligence case.

Alternatively, the Court should affirm summary judgment under *Leaf River Forest Products, Inc. v. Ferguson*, 662 So. 2d 648 (Miss. 1995) and *S. Cent. Reg. Med. Center v. Pickering*, 749 So. 2d 95 (Miss. 1999), because Plaintiff admittedly has no evidence that she was actually exposed to a disease. Plaintiff's claim that she could not test the needle to prove exposure is a speculative red herring.

Actual exposure can be proven by other means, and there are good reasons for requiring actual exposure even if needle testing is not available. First, the actual exposure requirement ensures that a genuine basis for the fear exists, which is not the case with a needlestick. According to the Center for Disease Control and Prevention

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[5] Plaintiff designated the entire record, which included the affidavits attached to her Response that G & K Services received shortly before the hearing. G & K Services filed a motion to add Plaintiff Kathy Lee's deposition to the record in order to address statements made in her affidavit and to provide the appellate court with background information. Plaintiff opposed the Motion and the circuit court denied it. (2:234). In any event, Plaintiff's deposition transcript was not before the trial court when it ruled, and it is not necessary for this Court to review the transcript to affirm.

(CDC), there has never been a documented case of HIV being transmitted by a needlestick outside of the healthcare setting; not one. In fact, *even when the needle is contaminated with HIV*, there is still only a .3% chance of transmission. Second, the actual exposure requirement provides an objective component to emotional distress claims that promotes consistency and reliability. This is why a majority of jurisdictions require actual exposure to a disease and a viable means of transmission to recover for fear of contracting a disease. The Court should affirm summary judgment in G & K Services' favor.

ARGUMENT

I. STANDARD OF REVIEW

Summary judgment rulings are reviewed *de novo*. *Hudson v. Courtesy Motors, Inc.*, 794 So. 2d 999, 1002 (Miss. 2001). A party is entitled to summary judgment if the evidence shows that that there is "no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." Miss. R. Civ. P. 56(c). Questions of law are appropriate for summary judgment. *Mitchell v. City of Greenville*, 846 So. 2d 1028, 1029 (Miss. 2003). And "[w]hether an alleged injury constitutes a compensable injury is a question of law for the court, not a question of fact for the jury." *Harris v. Brush Wellman, Inc.*, 2007 WL 5960181, * 9, No. 1:04cv598, (S.D. Miss. Oct. 30, 2007).

II. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT BECAUSE PLAINTIFF PRESENTED INSUFFICIENT EVIDENCE TO RECOVER FOR FEAR OF DISEASE

Plaintiff's only cause of action is negligence.[6] (1:9) (R.E. 1). To prove a negligence claim, "a plaintiff must establish by the preponderance of the evidence each of the elements of negligence: duty, breach, causation and injury." *Paz v. Brush Engineered Materials, Inc.*, 949 So. 2d 1, 3 (Miss. 2007) (quoting *Miss. Dep't of Mental Health v. Hall*, 936 So. 2d 917, 922 (Miss. 2006)). The element at issue here is injury.

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[6] Plaintiff also plead *res ipsa loquitor*, but she is not entitled to a rebuttable presumption of negligence because she cannot show the first element of *res ipsa*: "that the instrumentality causing the damage [was] under the exclusive control of the defendant." *Read v. Southern Pine Elec. Power Ass'n*, 515 So. 2d 916, 920 (Miss. 1987). It is undisputed that the uniform jacket was in Plaintiff's possession overnight before the subject incident occurred.

Plaintiff seeks recovery for the alleged emotional distress she endured during the six months that she was worried about contracting a disease. (1:9) (R.E. 1). The only issue before the Court is whether the trial court properly granted summary judgment because Plaintiff failed to establish that she was entitled to recover for fear of disease.

The Mississippi Supreme Court has *never* allowed recovery for fear of disease. And a one-off needlestick case with no actual distress and no proof of exposure to a disease should not be the first. Even under the most lenient standard, Plaintiff's claim still fails because she admittedly has no evidence that she was exposed to a disease.

A. AN OVERVIEW OF MISSISSIPPI LAW ON FEAR OF DISEASE

A leading Mississippi case on emotional distress claims based on the fear of contracting a disease is *Leaf River Forest Products, Inc. v. Ferguson*, 662 So. 2d 648 (Miss. 1995). In *Leaf River*, the plaintiffs claimed that they were exposed to cancer-causing dioxins in the river due to the defendant's bleaching of pulpwood. Plaintiffs argued that they were entitled to recover the emotional distress caused by the fear of contracting cancer. The Supreme Court held they were not.

The Court started its analysis by describing the two categories of cases in which a plaintiff could recover for emotional distress under Mississippi law. *Id.* at 658. The first is when "there is something about the defendant's conduct which evokes outrage or revuslion, done intentionally-or even unintentionally yet the results being foreseeable...." *Id.* In this type of case, the Court "can in certain circumstances comfortably assess damages for mental and emotional distress, even though there has been no physical injury." The Court explained that, "[i]n such instances, it is the nature of the act itself-as opposed to the seriousness of the consequences-which gives impetus to legal redress." *Id.*[7]

[7] This is not a category one case. Plaintiff does not allege—and there is certainly no evidence—that G & K Services' conduct was outrageous or intentional, or even reckless. In fact, there is no evidence that G & K Services even delivered the uniform with the insulin syringes in the pocket. It seems more likely that the syringes were placed in the jacket pocket while it hung for hours in the common area of the maintenance building, or perhaps at Plaintiff's house where her diabetic father visited. Regardless, the record does not contain any evidence of the type of conduct described in category one.

The second category discussed in *Leaf River* is "garden variety negligence" claims like the one Plaintiff asserted here. In these cases, a plaintiff can recover emotional distress if the forseeability requirement is met and "there is a resulting physical illness or assault upon the mind, personality or nervous system of the plaintiff *which is medically cognizable and which requires treatment by the medical profession.*" *Id.* (emphasis added). The key difference between the two categories is that, in a simple negligence claim, the plaintiff has to prove that the injury is medically cognizable and treatable.[8]

Analyzing the Plaintiff's claims within this framework, the *Leaf River* Court found that plaintiffs failed in their proof "on both counts" because there was "a lack of evidence proving exposure of the appellees to a dangerous or harmful agent and the record is devoid of any medical evidence pointing to possible or probable future illness." *Id.* The Court went on to leave open the possibility of recovery for fear of a future illness, but only if there was "substantial proof of exposure and medical evidence that would indicate possible future illness." *Id.*

Four years later, the Court addressed the issue again in *S. Cent. Reg. Med. Center v. Pickering*, 749 So. 2d 95 (Miss. 1999). The *Pickering* Court applied *Leaf River's* actual exposure requirement to a needle/lance prick case. In *Pickering*, plaintiff sued a hospital claiming that she pricked her finger with a used lancet while checking her blood sugar level at the hospital, and that she suffered emotional distress in not knowing whether she contracted a disease. *Id.* at 96. Because the hospital destroyed the lancet, it could not be tested to determine whether it was contaminated with any disease-causing agents. *Id.* at 101. The Court found that plaintiff could not meet the actual exposure requirement because she did not have evidence that the lancets were contaminated:

> South Central correctly notes that the allegedly used lancets were disposed of before they were tested for the presence of

[8] Subsequent cases interpreted this "medically cognizable and treatable" language as requiring "a physical manifestation of injury or demonstrable harm." *Paz*, 949 So. 2d at 4; *see also Evans v. MDHS*, 36 So. 3d 463, 476 (Miss. Ct. App. 2010). Plaintiff here admittedly did not suffer any physical manifestation or demonstrable harm: she did not miss a day of work and sought no medical treatment for her alleged emotional trauma. Plaintiff's claim is that fear of contracting a disease is sufficient by itself.

> any disease causing agents. The Pickerings, therefore, are precluded from meeting the actual exposure requirement of *Ferguson*.

Id.

The Court, however, created a rebuttable presumption of actual exposure because the hospital had destroyed the evidence. *Id.* at 102. The *Pickering* Court thus affirmed the actual exposure requirement—meaning a plaintiff must prove that he or she was actually exposed to a communicable disease and not just an instrumentality—but created a presumption of actual exposure when a defendant destroys evidence. *Id.* Even though it created a presumption when a defendant destroys evidence, the Court bent over backwards to preserve the actual exposure requirement, noting that: "[o]f course, where the defendant [did not destroy evidence] . . . a rebuttable presumption in favor of plaintiff would not arise. The plaintiff would retain the burden of proving actual exposure." *Id.* In addition, the Court limited the window of recovery in fear of disease cases to "the time between when Pickering learned of the possible exposure and the receipt of conclusive HIV negative results." *Id.* at 103.

In 2007, however, the Supreme Court seemed to close the door to any fear of future injury claim in a simple negligence case. *Paz v. Brush Engineered Materials, Inc.*, 949 So. 2d 1, 3 (Miss. 2007). In *Paz*, the Fifth Circuit certified the following question to the Mississippi Supreme Court: "[w]hether the laws of Mississippi allow for a medical monitoring cause of action, whereby a plaintiff can recover medical monitoring costs for exposure to harmful substance without proving current physical injuries from that exposure?" The Court in *Paz* answered in the negative, declaring that "[t]he possibility of future injury is insufficient to maintain a tort claim." *Id. at 3.* The Court analogized medical monitoring cases to future injury cases and reasoned that: "[r]ecognizing a medical monitoring case would be akin to recognizing a cause of action for fear of future illness. Each bases a claim for damages on the possibility of incurring an illness with no present manifest injury." *Id.* The Court observed that "it is clear that Mississippi does not recognize a cause of action for fear of possibly contract-

ing a disease at some point in the future." *Id* at 5 (quoting *Brewton v. Reichhold Chemicals, Inc.*, 707 So. 2d 618, 620 (Miss. 1998)).

B. PLAINTIFF IS NOT ENTITLED TO RECOVER BECAUSE MISSISSIPPI DOES NOT RECOGNIZE FEAR OF DISEASE AS A COMPENSABLE INJURY IN A SIMPLE NEGLIGENCE CASE

This Court can and should affirm summary judgment under *Paz*. Plaintiff seeks recovery for six months of fear of contracting a disease, and, under *Paz*, Mississippi simply does not allow recovery for fear of contracting a disease in a "garden variety" negligence case such as this. *Id.* at 3-5.

Because *Paz* was a medical monitoring case and did not expressly overrule *Leaf River* or *Pickering*, however, the briefing in the trial court focused on Plaintiff's failure to meet the actual exposure requirement as articulated in *Leaf River* and *Pickering*. This Court can nevertheless affirm summary judgment under *Paz* by confirming that Mississippi does not allow recovery for fear of a future illness—with no manifestations—in a simple negligence case regardless of whether the plaintiff was exposed to a disease. *Kirksey v. Dye*, 564 So. 2d 1333, 1336-1337 (Miss. 1990).[9] This would bring some measure of clarity and stability to fear of disease claims based on negligence.

C. PLAINTIFF IS NOT ENTITLED TO RECOVER FOR FEAR OF DISEASE UNDER *LEAF RIVER* OR *PICKERING* BECAUSE SHE HAS NO EVIDENCE THAT SHE WAS ACTUALLY EXPOSED TO A DISEASE

Even under *Leaf River* and *Pickering*, Plaintiff still cannot recover for her alleged emotional distress because she has no evidence that she was exposed to a disease. Plaintiff does not deny this. Plaintiff's argument is, in essence, that the actual exposure requirement is a bad rule because it may be difficult or impossible to satisfy in needlestick cases. (Plaintiff's Brief at p. 7). This argument is built on the following two propositions: (1) the *Pickering* decision depends on the availability of a needle test that could rule out exposure to a disease; and (2) it is impossible to test needles in a way

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[9] As the Supreme Court has explained, "[a]ppellate courts are not in the business of reversing a trial court when it has made a correct ruling or decision. We are first interested in the result of the decision, and if it is correct we are not concerned with the route—straight path or detour—which the trial court took to get there . . . . appellee is entitled to argue and rely upon any ground sufficient to sustain the judgment below." *Id.* (quoting *Hickox v. Holleman*, 502 so. 2d 626, 635 (Miss. 1987)).

that rules out exposure to disease. (Plaintiff's Brief at pp. 6-8). According to Plaintiff, when the user of the needle is unknown, the only way to rule out exposure to a communicable disease is six months of blood testing. (Plaintiff's Brief at p. 8). Neither of these propositions is true, but it ultimately does not matter.

First, the *Pickering* decision does not rest on the availability of a conclusive test to rule out exposure. The Court does contemplate the availability of testing the lancet to rule out exposure, but it explicitly recognized that the plaintiff could have proved actual exposure through another route: "[a]t any rate, [the hospital's destruction of the lancet] would have forced the Pickerings to prove actual exposure via another channel of transmission...." *Pickering*, 749 So. 2d at 102. Another such channel would be proving that the user of the needle had a communicable disease or that the needle had otherwise come in contact with blood or fluid that contained a communicable disease.

Second, Dr. Nitzkin did not state that it was impossible to test needles for disease. He said that he was not aware of any protocols for physicians to test needles for disease, and that even if the test was negative, the disease-causing agent could have died between the prick and the test. (2:205).

The more fundamental flaw with Plaintiff's argument, however, is that it completely ignores the rationale for having the actual exposure requirement. Namely, ensuring that there is a genuine basis for the fear, and providing an objective component to the notoriously amorphous area of fear of disease claims.

As the Court in *Pickering* discussed, there are two basic approaches to emotional distress claims based on fear of disease. One approach is to require proof that (1) plaintiff was actually exposed to a communicable disease, and (2) that he or she was exposed to it in a way that could actually transmit the disease. This is the approach that the majority of jurisdictions[10] have adopted, and it is the approach that

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[10] *E.g., Bain v. Wells*, 936 S.W. 2d 618, 624 (Tenn. 1997) (affirming summary judgment in a needlestick case because "emotional distress injuries are not reasonable as a matter of law, in a fear of contracting AIDS case unless the plaintiff actually has been *exposed* to HIV" (emphasis in original); *Burk v. Sage Products, Inc.*, 747 F. Supp. 285, 286-287 (E.D. P.A. 1990) (granting summary judgment in a needlestick case because no proof exposed to a disease); *Babich v. Waukesha Mem. Hosp., Inc.*, 556 N.W. 2d 144, 147 (Wis. Ct. App. 1996) (affirming summary judgment in a needlestick case because no proof of exposure and reasoning that "[r]equiring a needlestick victim to offer proof that

this Court adopted in *Pickering* after much deliberation. *Pickering*, 749 So. 2d. ("A majority of the jurisdictions that have considered claims of infliction of emotional distress based on a fear of contracting AIDS have determined that *actual exposure* to HIV is a necessary requirement for the claim.") (emphasis added).

The other approach, the minority approach, "maintains that actual exposure is not a prerequisite to recovery under an infliction of emotional distress claim based on fear of contracting HIV/AIDS." *Id. at* 100. This is what Plaintiff is proposing here—that being pricked by a needle is, by itself, enough to recover emotional distress.

The *Pickering* Court spent over four pages surveying the law in other jurisdictions and weighing the different policy considerations and ultimately decided to follow the majority approach by confirming the actual exposure requirement articulated in *Leaf River*. One of the cases that the Court discussed was the *Pendergist v. Pendergrass*, 961 S.W. 2d 919 (Mo. Ct. App. 1998) decision from Missouri, in which a man received actual blood in a blood transfusion instead of synthetic blood as he requested. The plaintiff claimed he was worried about contracting AIDS or hepatitis B, and that he was entitled to damages for this worry, but the court found that he could not maintain a claim because he had no proof that he was actually exposed to a disease. *Id.*

The *Pendergist* Court articulated several reasons for requiring actual exposure. First, "it ensures that a genuine basis for the fear exists and that the fear is not premised on public misconception about AIDS...." *Id.* This is compelling in light of the CDC's statistics concerning HIV and hepatitis transmission. According to the CDC, there has *never* been a single documented case in which someone was

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the needle came from a contaminated source strikes a proper balance between ensuring that victims are compensated for their emotional injuries and that potential defendants take reasonable steps to avoid such injuries, but nonetheless protects the courts from being burdened with frivolous suits"); *Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995) ("We therefore adopt an 'actual exposure' to a disease-causing agent as a prerequisite to prevail on a claim based upon fear of contracting disease"); *Wilson-Watson v. Dax Arthritis Clinic, Inc.*, 766 So. 2d 1135, 1136 (Fla. 2nd DCA 2000) (affirming summary judgment in a needlestick case because fear of disease unreasonable as a matter of law without actual exposure); *Falcon v. Our Lady of the Lake Hosp., Inc.*, 729 So. 2d 1169, 1173 (La. App. 1st Cir. 1999) (affirming summary judgment in blood transfusion case because no proof of "presence of HIV (or other blood-borne and/or contagious disease) and a channel of exposure or infection"); *Majea v. Beekil*, 701 N.E. 2d 1084, 1090 (Ill. 1998) (affirming summary judgment in a scalpel case because "[w]ithout proof of actual exposure to HIV, a claim for fear of contracting AIDS is too speculative to be legally cognizable").

pricked with a needle in a non-health care setting and actually contracted HIV; not one. www.cdc.gov/hiv/resources/qa/transmission.htm.[11] This is because the disease-causing agents for HIV hardly ever survive more than a few hours outside the body, and even if they do, transmission only occurs in .3% of cases *when the needle is contaminated.* (2:215). Similarly, the risk of transmission of hepatitis B from a single needlestick is 6-30% *when the needle is contaminated.* (2:214). Fear of contracting HIV or hepatitis B from a needlestick is thus irrational.

Second, the "actual exposure requirement preserves an objective component in emotional distress cases necessary to ensure stability, consistency, and predictability in the disposition of those cases...." This is important because "[c]onsistent results encourage early resolution and settlement of cases." *Id.*

Years later, this Court's decision in *Pickering* was actually discussed, and distinguished, in a similar needlestick case filed in Minnesota, in which the actual exposure requirement was applied and summary judgment was granted in defendant's favor. *Dillard v. Torgerson Properties, Inc.*, 2006 WL 2974302, Civil No. 05-2334, (D. Minn. Oct. 16, 2006). In *Dillard*, the plaintiff stepped on a needle and syringe in her hotel room at the Hilton Garden. She called the hotel for assistance, and the hotel employee placed the needle in a bag. When the plaintiff tried to inspect the needle in the bag, she pricked her finger and drew blood.

The plaintiff in *Dillard* did not test the needle and could not determine who used the needle previously, so, just like Plaintiff here, she underwent testing for HIV and hepatitis. She then sued the Hilton for the emotional distress associated with not knowing whether she had contracted a disease. The court granted defendant's motion for summary judgment because, even though the plaintiff contacted a needle of unknown origin, she could not "establish that she was actually exposed to a communi-

[11] "Q: Have people been infected with HIV from being stuck by needles in non-health care settings? [A:] No.... there are no documented cases of transmission outside of a health care setting."

cable disease..." and thus could not recover for her alleged emotional distress. *Id.* at * 4.[12]

In sum, if the Court is going to recognize fear of disease as a compensable injury in a negligence case, there are good reasons for requiring actual exposure to a disease even if testing is not available—it ensures a rational basis for the fear and provides an objective component that promotes stability. This is why actual exposure is the majority rule and continues to be applied in needlestick cases in other jurisdictions today despite the alleged difficulty in testing.[13] Because Plaintiff here admittedly has no evidence that she was exposed to a disease, the Court should affirm summary judgment in G & K Services' favor.

CONCLUSION

The Court should affirm summary judgment. Either Mississippi does not recognize fear of disease as a compensable injury in a negligence case—regardless of actual exposure—or, if it does, it requires actual exposure to a disease and medical evidence that would indicate possible future illness. Because Plaintiff failed to offer any evidence that she was actually exposed to a disease, her claim fails either way. A single needlestick is legally insufficient to establish an emotional distress claim for fear of disease. The availability of certain tests for the needle is irrelevant to the analysis.

THIS the 7 day of June, 2011.

Respectfully submitted,

G & K SERVICES, CO.

By Its Attorneys,
BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWITZ, PC

By: Everett White
EVERETT E. WHITE

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[12] The Court rejected plaintiff's argument that *Pickering* created a rebuttable presumption of actual exposure because, unlike the hospital in *Pickering*, the hotel did not destroy the needle. *Id.*

[13] *E.g., Corrington v. U.S.*, - - - F. Supp. 2d - - -, 2011 WL 768043, * 2, No. 10-cv-83 (S.D. Ill. Mar. 2, 2011) (granting summary judgment under Missouri law in needlestick case because no proof of actual exposure to disease); *Hutt v. Taylor*, 2010 WL 3328028, * 9, No. 08-184 (D. Del. Aug. 20, 2010).

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CERTIFICATE OF SERVICE

I certify that I have this day forwarded, *via* Hand-Delivery, the original and three (3) copies of Brief of Appellee G & K Services Co. to the following:

Ms. Kathy Gillis, Clerk
SUPREME COURT OF MISSISSIPPI
450 High Street
Jackson, Mississippi

I also certify that I have this day forwarded *via* U.S. Mail, postage prepaid, a true and correct copy of the foregoing Brief of Appellee G & K Services Co. to the following:

The Honorable Michael M. Taylor
LINCOLN COUNTY CIRCUIT COURT
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Trial Court Judge

Elise B. Munn, Esq.
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Counsel for Appellant Kathy Lee

THIS the 7th day of June, 2011.

Everett White
EVERETT E. WHITE

CERTIFICATE OF HAND DELIVERY TO CLERK OF THE SUPREME COURT

I, Everett E. White, do hereby certify that I have this day caused to be served, *via* Hand Delivery, the original and three copies of Brief of Appellee G & K Service Co. to the Clerk of the Supreme Court of Mississippi.

DATED: June 7, 2011.

Everett White

EVERETT E. WHITE