IN THE SUPREME COURT OF MISSISSIPPI
NO. 2009-CCA-00587

BEVERLY KAY KENDRICK, Individually and as Wrongful Death Heir of THOMAS DIXON — **APPELLANT**

v.

LAURA QUIN — **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 disqualifications:

Plaintiff/Appellant:	Beverly Kay Kendrick
Her Attorney:	Donald W. Medley, Esq. Attorney at Law
Defendant/Appellee:	Laura Quin
Her Insurance Carrier:	Nationwide Mutual Fire Insurance Company
Her Attorneys:	Dorrance Aultman Aultman, Tyner & Ruffin, Ltd.

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STATEMENT OF THE ISSUE

Whether the trial court properly granted the motion for summary judgment in favor of Ms. Quinn where the Complaint asserts premises liability as the sole basis for liability but that Ms. Kendrick, as she does in the appeal, argued a negligence theory of liability.

STATEMENT OF THE CASE

In her Complaint, Beverly Kendrick alleged that the injuries and death of Thomas Dixon, father of Ms. Kendrick, "were proximately caused by the negligence of [Ms. Quin] in failing to keep their premises free of hazards and in a reasonably safe condition for use by its invitees such as Mr. Dixon." (RE 5-6) Without asserting any allegations in the Complaint, Ms. Kendrick also attempted to raise the allegation of negligence in discovery. After discovery was exchanged and depositions were taken, Ms. Quin moved the trial court for the entry of summary judgment on the basis that Ms. Kendrick failed to put forth any evidence to show that Ms. Quin owed a duty to Dixon or that such duty was breached. In opposition of the motion, Ms. Kendrick offered three exhibits – two of which were unsworn, unverified, and inadmissible. (RE 156-161) At the hearing on the matter, the trial court granted the Motion for Summary Judgment, thereby dismissing all of Ms. Kendrick's claims against Ms. Quin. (TT 11; RE 201-202) It is that Judgment that Ms. Kendrick now appeals. In the Brief of Appellant, Ms. Kendrick again relies upon the two unsworn, unverified, and inadmissible police reports.

STATEMENT OF THE FACTS

Beverly Kay Kendrick, individually and as a wrongful death heir, filed this action as a result of a fatal house fire at the home of Beverly Quin in which Ms. Kendrick's father, Thomas Dixon, died. (RE 5) The only allegation asserted in the six-paragraph Complaint is that of premises liability. Specifically, Ms. Kendrick alleges:

> 3. On January 2, 2006, within Marion County, Mississippi, while an invitee of Defendant, Thomas Dixon was fatally trapped in a fire in and upon Defendant's premises located in Columbia, Mississippi and thereby suffered a [sic] horrendous injuries and death.
>
> 4. The resulting injuries and death suffered and sustained by Mr. Dixon were proximately caused by the negligence of [Quin] in failing to keep their premises free of hazards and in a reasonably safe condition for use by its invitees such as Mr. Dixon.
>
> 5. As a result of the injuries and death sustained by Mr. Dixon arising from the fire upon Defendant's premises and due to Defendant's negligence, Plaintiff has incurred substantial expenses and has sustained other losses . . .

(RE 5)

The uncontradicted facts show that the fire started in the recliner located in the family room as a result of non-extinguished smoking materials. (RE 105, 125) According to the sole eyewitness, Ms. Quin, she was asleep when the fire began and she was awaken either by Mr. Dixon or the smoke detector. (RE 135) When she opened the bedroom door, the oxygen caused the fire to blaze. (RE 135) The wall of the house beside the carport became totally engulfed in fames. (RE 136) As Mr. Dixon and Ms. Quin were attempting to exit the home, they were separated in the living room. (RE 137) The room filled with black smoke and was pitch dark with tremendous heat. (RE 139-140) A neighbor arrived as Ms. Quin was calling for Mr. Dixon and was trying to find him. (RE 140) The neighbor drug Ms. Quin out of the home. (141)

SUMMARY OF THE ARGUMENT

The trial court's grant of summary judgment is proper under the facts of this case. Ms. Kendrick asserted a single theory of liability in the Complaint – premises liability. In response to the motion for summary judgment, as she does here on appeal, Ms. Kendrick, not only failed to raise a genuine issue of material fact sufficient to defeat summary judgment as to her claim of premises liability, but failed to respond at all regarding premises liability. Nevertheless, in this

appeal, as she did at the trial court, Ms. Kendrick attempts to proceed on a theory of negligence that was never presented in her pleadings. Even if this Honorable Court were to allow Ms. Kendrick to proceed on the negligence claim, Ms. Kendrick has failed to raise a genuine issue of material fact sufficient to defeat summary judgment. Therefore, the trial court's order granting summary judgment should be affirmed.

STANDARD OF REVIEW

An appellate court reviews a trial court's grant of summary judgment de novo. *Saucier v. Biloxi Reg'l Med. Ctr.*, 708 So.2d 1351, 1354 (Miss. 1998). Summary judgment is proper under Miss. R. Civ. P. 56 if the pleadings, deposition, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. *See Richardson v. Methodist Hosp. of Hattiesburg, Inc.*, 807 So.2d 1244, 1346 (Miss. 2002). The substantive law will identify which facts are material, and "only disputes that might affect the outcome of the suit under governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). Mere conclusory allegations are insufficient to defeat a motion for summary judgment. *Bonner v. McCormick*, 827 So.2d 39, 42 (Miss. App. 2002), *citing McClinton v. Delta Pride Catfish, Inc.*, 792 So.2d 968.(Miss. 2001). The rule requires that a party opposing a motion for summary judgment must be diligent in presenting his opposition to the trial court. *See Bourn v. Tomlinson Interests, Inc.*, 456 So.2d 747, 749 (Miss. 1984). Where a plaintiff fails to provide sufficient evidence to support his/her claim and there are no factual questions in issue, entry of summary judgment is proper. The Mississippi Supreme Court has held:

> In a summary judgment hearing, "[t]he burden of producing evidence in support of, or in opposition to, [the] motion ... is a function of [Mississippi] rules

> regarding the burden of proof at trial on the issue in question." The movant bears the burden of persuading the trial judge that: (1) no genuine issue of material fact exists, and (2) on the basis of the facts established, he is entitled to judgment as a matter of law. The movant bears the burden of production, if, at trial, he "would [bear] the burden of proof on th[e] issue" raised.
>
> In sum, "[n]one of the [the foregoing analysis] changes [the movant's] burden, once the facts are on the table, of persuading the [c]ourt, (1) that there is no genuine issue of material fact and (2) that [the movant] is entitled to judgment as a matter of law."
>
> In a negligence action, the *plaintiff* bears the *burden of producing evidence sufficient to establish the existence of the conventional tort elements of duty, breach of duty,* proximate causation, and injury. Therefore, in a summary judgment proceeding, the plaintiff must rebut the defendant's claim (i.e. that no genuine issue of material fact exists) *by producing supportive evidence of significant and probative value;* this evidence must show that the defendant breached the established standard of care and that such breach was the proximate cause of her injury.
>
> Mere allegation or denial of material fact is insufficient to generate a triable issue of fact and avoid an adverse rendering of summary judgment. More specifically, the plaintiff may not rely solely upon the *unsworn* allegations in the pleadings, or "arguments and assertions in briefs or legal memoranda."
>
> The "party opposing the motion must *by affidavit or otherwise* set forth specific facts showing that there are indeed genuine issues for trial." "To have power to generate a genuine issue of material fact," the *"affidavit or otherwise"(e.g., depositions and answers to interrogatories) must (1) be sworn; (2) be made upon personal knowledge; and (3) show that the party providing the factual evidence is competent to testify.*

Palmer v. Biloxi Regional Medical Center, Inc., 564 So.2d 1346, 1355-56 (Miss. 1990) (citations omitted) (emphasis added). Before the trial court and before this Honorable Court, Ms. Kendrick has failed to put forth any proof of admissible evidence or testimony in opposition to Ms. Quin's properly supported motion for summary judgment and, therefore, the Judgment entered by the trial court dismissing all of Ms. Kendrick's claims against Ms. Quin should be affirmed.

ARGUMENT

I. Ms. Kendrick has conceded the sole cause of action asserted in her Complaint by failing to respond or oppose the facts and authorities related to the premises liability cause of action.

In this appeal, as she did before the trial court in response to Ms. Quin's motion for summary judgment, Ms. Kendrick failed to respond to the evidence and authorities presented by Ms. Quin with regard to the claim for premises liability. As set forth fully in the Statement of Facts, above, Ms. Kendrick's sole theory of liability asserted in the Complaint was that of premises liability. In the Brief of Appellant, Ms. Kendrick does not even address this issue. In fact, Ms. Kendrick states that such a standard is inappropriate:

> The dichotomy raised by the appellee between invitee and licensee creates a burden that is inappropriate for the facts of this case. But we are not able to accurately determine how the law was applied. The trial court erred in finding that Defendant did not breach the duty owed to Mr. Dixon. Whether as an invitee or as a licensee, Defendant owed the duty to help this man.

Brief of Appellant, p. 9. Because Ms. Kendrick has failed to raise this issue on appeal, she has effectively conceded her claim for premises liability. The "failure to cite authority in support of his arguments may be construed as conceding to the [ ] arguments." *City of Vicksburg v. Cooper*, 909 So.2d 126, 130 (Miss. App. 2005) (*citing Holloway v. Jones*, 492 So.2d 573, 573-74 (Miss.1986)). *See also Yarbrough v. State*, 911 So.2d 951, 955 (Miss. 2005) (State failed to offer any opposition, so the court found that it has "conceded this element as being established."). Therefore, the trial court's grant of summary judgment should be affirmed.

II. Ms. Kendrick's purported negligence theory of liability is not proper on appeal.

As stated above, the sole theory of liability asserted in the Complaint is based upon premises liability. However, on appeal, as she did in opposition to the motion for summary judgment, Ms. Kendrick argues that Ms. Quin is liable under a theory of negligence. *See* Brief

of the Appellant, p. 9 and 10. At no time did Ms. Kendrick seek to amend her complaint to assert such a theory. (RE 1-3) Therefore, the cause of action was not properly before the trial court and is not proper on appeal.

In the Brief of Appellant, Ms. Kendrick asserts: "The defendant would like to hide behind a lack of proper pleading" and goes on to argue that Mississippi merely requires notice and that "defendant is well aware and on notice of the plaintiff's claim which should be allowed to proceed to a jury's decision which should not be supplanted by summary judgment." (Brief of Appellant, p. 13-14) Ms. Kendrick made this same argument before the trial court. The Mississippi Supreme Court has stated:

> While M.R.A.P. 8 has eliminated the technical forms of pleadings required in years past, notice pleadings are still required to place the opposing party on notice of the claim being asserted. No magic words are required by the Rules of Civil Procedure; however, this Court has previously stated:
>
> > 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.
>
> *Dynasteel Corp. v. Aztec Indus., Inc.*, 611 So.2d 977, 984 (Miss. 1992) (emphasis added). *See also Comet Delta, Inc. v. Pate Stevedore Co. of Pascagoula, Inc.*, 521 So.2d 857, 860 (Miss. 1988) (holding that a complaint must set out allegations from which the elements of the claim may be inferred); M.R.C.P. App. A, Form 21 (suggested form for complaint for conversion includes allegation that "defendant converted to his own use...").

Estate of Stevens v. Wetzel, 762 So.2d 293, 295 (Miss. 2000). The only theory of liability set forth in Ms. Kendrick's Complaint was that of premises liability, which is separate and distinct from a theory of negligence. Therefore, Ms. Kendrick's claim for negligence is improperly argued before this Honorable Court.

III. Even if Ms. Kendrick properly raised a claim for negligence in the trial court, there is no genuine issue of material fact and summary judgment is proper as a matter of law.

Assuming *arguendo* that Ms. Kendrick's theory of negligence is properly before this Court, Ms. Kendrick has failed to put forth any competent evidence or testimony to show that Ms. Quin owed a duty to Mr. Dixon or that such duty was breached. "The traditional elements of negligence: duty or standard of care, breach of that duty or standard, proximate causation, and damages or injury." *Lyle v. Mladinich*, 584 So.2d 397, 399 (Miss. 1991). Other than merely alleging a duty under the premises liability claim, Ms. Kendrick has failed to show what, if any, duty was owed by Ms. Quin to Mr. Dixon or that such a duty was breached.

Ms. Kendrick attempts to impose a duty upon Ms. Quin as a caretaker for Mr. Dixon through Ms. Quin's use of the word "caretaker" in her deposition. (Brief of Appellant, p. 11). However, Ms. Kendrick fails to address Ms. Quin's explanation of her use of the word later in her deposition:

> Q. Ms. Quin, [Plaintiff's counsel] asked you if you were the caretaker. Just say what you meant in response to that question, please ma'am.
>
> A. I am no nurse, I'm a beauty operator. I just – I was not the caretaker I just took care of him.

(RE 190, p. 80, l. 5-10). Ms. Kendrick further attempts to create a duty by Ms. Quin's purported use of the words "I'll help you" in a statement taken by Columbia Police Department the day following the fatal fire. Ms. Kendrick has provided no legal basis for the creation of a duty in this regard. Under traditional tort law, there is no duty to aid one in peril. *Scafide v. Bazzone*, 962 So.2d 585, 596 (Miss. App. 2006) (*citing* Prosser and Keeton on Torts § 56 (5th Ed. 1984) at 375).

Furthermore, Ms. Kendrick is relying upon an unsworn statement in an attempt to impeach or contradict the sworn deposition testimony of Ms. Quin. First, the statement is inadmissible as an admission by a party opponent under Miss.R.Evid. 801(d)(2). The Mississippi Supreme Court has "defined an admission as 'a statement by the accused, direct or implied, of facts pertinent to the issue, and tending, in connection with other facts, to prove his guilt.'" *Fisher v. State,* 690 So.2d 268, 274 (Miss. 1996), *citing Reed v. State*, 229 Miss. 440, 91 So.2d 269, 272 (1956). There is nothing in the Witness Statement that would "prove [Ms. Quin's] guilt" or negligence. Rather, the Witness Statement contains neutral statements describing the events that occurred on the evening of the house fire. Nor were these statements made in the presence of Ms. Kendrick. A neutral statement made outside the presence of the other party is not an admission and is deemed hearsay. *See Swaggart v. Haney*, 363 So.2d 251, 255 (Miss. 1978). Therefore, the Witness Statement should be deemed hearsay and not admissible.

Second, there is nothing about the Witness Statement that contradicts Ms. Quin's sworn deposition testimony. While the deposition testimony goes into greater detail, there is no contradiction between the two. Before a party may impeach a witness, there must be an actual contradiction "in fact between the testimony and the prior statement," meaning "under any rational theory its introduction might lead to a conclusion different from the witness's testimony" or "has a reasonable tendency to discredit the witness's testimony. *Everett v. State*, 835 So.2d 118, 133 (Miss. App. 2003) (citations omitted). There is no contradiction between the Witness Statement and Ms. Quin's deposition testimony. As such, the Witness Statement may not be used for substantive purposes. *See Cooper v. State Farm Fire & Cas. Co.*, 568 So.2d 687, 691 (Miss. 1990) (Finding reversible error where trial court permitted testimony "under the guise of

impeachment for the primary purpose of placing before the jury substantive evidence in its case in chief which was not otherwise admissible as a device to avoid the hearsay rule." (internal quotation marks omitted)). *See also Bailey v. State*, 952 So.2d 225, 237 (Miss. App. 2006), *cert. denied* 951 So.2d 562 (Miss. 2007) ("Furthermore, it is hornbook law that an unsworn prior inconsistent statement may *never* be used as substantive evidence. (emphasis original)). Even if the statements contained in the Witness Statement were inconsistent, which is denied, Ms. Kendrick has an opportunity to question Ms. Quin during her deposition and failed to do so, thus presenting sworn testimony to this Court.

Finally, even, assuming *arguendo*, that this Honorable Court does consider the words contained in the Witness Statement and Ms. Kendrick's attempt to impose a duty upon Ms. Quin based upon her use of the words "I'll help you," Ms. Quin's uncontradicted deposition testimony shows that she did in fact attempt to help Mr. Dixon. A corollary to this case can be found under the familiar *Weathersby* rule: when the defendant is the sole witness, his testimony must be accepted as true unless substantially contradicted by physical facts or by facts of common knowledge. *Weathersby v. State*, 165 Miss. 207, 147 So. 481 (1933). In her deposition, Ms. Quin described the events surrounding the fire and that Mr. Dixon held on to her as the two attempted to exit the burning home until they were separated in the living room by an explosion and, despite her efforts, she could not locate Mr. Dixon after being separated. (*See* RE 182, pp. 46-47) Ms. Kendrick may not use an unsworn, out-of-court statement to rebut sworn deposition testimony in an effort to create a genuine issue of material fact and, therefore, the trial court's grant of summary judgment should be affirmed.

Ms. Kendrick's reliance upon the Officer's Report and Autopsy Reports are likewise misplaced and should be stricken. (*See* Brief of Appellant, p. 11 and 12) Neither document has

been properly admitted before the trial court; the Autopsy Report was not even offered. This Honorable Court should similarly recognize that these documents are inadmissible on the grounds of hearsay, immaterial, irrelevant, and offered solely as prejudicial and inflammatory against Ms. Quin.

Ms. Kendrick may not rely on speculation and further allegations in an attempt to defeat a properly supported motion for summary judgment. The party opposing the motion must be diligent. *Grisham v. John Q. Long V.F.W. Post*, 519 So.2d 413, 415 (Miss. 1988). "The nonmoving party 'remains silent at her peril. For one thing, the non-movant may not rest upon allegations or denials in her pleadings ... Rather, the party opposing the motion must by affidavit or otherwise set forth specific facts showing that there are indeed genuine issues for trial." *Travis v. Stewart*, 680 So.2d 214, 217 (Miss. 1996) *citing Frutcher v. Lynch Oil Co.*, 52 So.2d 195, 198-99 (Miss 1988). Ms. Kendrick has failed to do so both before the trial court and this Honorable Court. Therefore, the trial court's grant of summary judgment should be affirmed.

CONCLUSION

Wherefore, premises considered, Ms. Quin respectfully moves this Honorable Court to affirm the Judgment as granted by the trial court, for all costs to be assessed to Ms. Kendrick, and for any other relief for which Ms. Quin may be entitled.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I, Dorrance Aultman, being the attorney of record for the Appellant, Laura Quin, do hereby certify that I have this date mailed, via U.S. Mail, first-class postage prepaid, the original and three copies of the foregoing Brief of Appellee (along with a disk containing a .pdf version of this brief) to the Clerk of the Mississippi Supreme Court, P.O. Box 249, Jackson, MS 39205-0249, and a copy to the following:

Donald W. Medley, Esq., Attorney for Ms. Kendrick
P.O. Box 1724
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Honorable Prentiss Harrell
Circuit Court Judge
P.O. Box 488
Purvis, MS 39475

THIS, the 25th day of May, A.D., 2010.

Dorrance Aultman