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ARGUMENT

I. Premise Liability Proper Cause of Action

Ms. Kendrick properly presented her claims for liability as set forth in her complaint and subsequent arguments and at no time conceded the issue of premises liability. Each element was discussed in detail in plaintiff's various responses and oral argument before the trial court. A prima facie case for premises liability requires the plaintiff prove the elements of duty, breach of duty, proximate cause and damages. *Holmes v. Campbell Prop., Inc., et al.* v. 2008-CA-01528-COA ¶ 10 (Miss. Ct. App. 2010), *Nunez v. Spino*, 14 So.3d 82 (Miss. Ct. App. 2009).

In a premise liability action, the duty owed is determined by the status of the third party present on the property as either an invitee, licensee, or trespasser. *Id.* at ¶ 11. An invitee is a person, like the deceased, who enters the premises of another in response to an "express or implied invitation of the owner for their advantage." *Id.* When applied to the instant facts, the deceased, being an invitee, was owed the highest duty to keep the premises safe and to be warned of dangers. For the sake of argument, a licensee is classified as a social guest who is owed a duty by the property owner to refrain from wilfully or wantonly injuring licensee. In other words, a duty to refrain from a conscious disregard of a known and serious danger. Even the lesser status of licensee, does not protect a defendant who fails to act in the presence of known dangers. A reasonable person would expect a property owner to owe a duty to a invited guest to aid them in situations which were known to be dangerous, particularly a handicapped guest who would be incapable of protecting himself.

More particularly stated in Appellant's Brief, the defendant breached her duty when she found decedent but failed to lead him out of the burning home, failed to retrieve his crutches after he requested them, and specifically offered her assistance to him, yet abandoned her efforts,

leaving him with no way to escape. See Affidavit of Sherriann Fortenberry dated Jan. 3, 2006. Due to his inability to escape the burning home, decedent died.

Causation is the causal relationship between the breach and the subsequent injury. Simply put, due to the failure of the defendant to provide a safe premises and protect decedent from a known danger, the decedent died. But for the defendant's breach, the decedent could have been lead outdoors or been provided his crutches and saved himself, as opposed to relying on defendant for his safety.

The injury and/or damages is obvious Mr. Dixon died. Prior to his untimely death, the decedent was in fairly good health for his 74 years of age and enjoyed his family. Both he and his family have suffered needlessly. Based on the foregoing, a jury could reasonably determine the defendant breached her duty and that failure resulted in decedent's death.

II. Negligence is Appropriate on Appeal

As stated above, the basic elements of negligence are appropriately put before this Court. Duty, breach of duty, causation and damages are necessary elements of both negligence and premises liability. *Holmes* at ¶ 10. Premises liability was set forth in the Complaint sufficiently as to provide notice to the defendant of the cause of action in accordance with Rule 8 of the Mississippi Rules of Civil Procedure. Despite defendant's claims, discussion of these elements is properly raised on appeal and is necessary in determining the appropriate disposition of this matter.

III. Defendant Waived Objections regarding Affidavit

Regardless of the merit of defendant's arguments, defendant waived her right to challenge the sufficiency of such testimony as she failed to file a motion to strike. *Moore v. M&M*

Logging, Inc., 2008-CA-01519-COA (Miss. Ct. App. 2010). Simply raising the issue of insufficiency, without filing a motion to strike is not enough. *Id.* At no time did the defendant file a Motion to Strike the offered testimony in issue, thus such objections are waived and the testimony is allowed.

IV. There are Genuine Issues of Material Fact

Additionally, there are various contradictions in defendant's testimony illustrated by affidavit and through deposition sufficient to create genuine issues of material fact. For instance, defendant states the room was dark, yet she also states the chair in the room was in flames. See Affidavit of Sherriann Fortenberry dated Jan. 3, 2006. She states decedent occupied the south bedroom, yet his pajamas, teeth, cigarettes, and lighter were found in the north bedroom. See Affidavit of Sherriann Fortenberry dated Jan. 2, 2006. Further, she claims decedent was watching television on the night in question and she found his chair was in flames, yet he received no contact burns. See Affidavit of Sherriann Fortenberry dated Jan. 3, 2006. . Defendant states she found the decedent to help him exit the home, but next states she returned to the beauty shop to call 911, leaving him in the home. See Affidavit of Sherriann Fortenberry dated Jan. 3, 2006. The Supreme Court has reversed a trial court's grant of summary judgment when "there was sufficient conflict in the statements of the witnesses to create a genuine issue of material fact suitable for a jury's determination. *Delahoussaye v. Mary Mahoney's, Inc.*, 696 So. 2d 689, 689 (Miss. 1997). As reasonable minds could differ, the instant matter should be considered by a jury to distinguish the credible facts from the inconsistencies of the survivor in order to achieve the appropriate outcome for the survivors.

Conclusion

The remedy of dismissal with prejudice “is an extreme and harsh sanction that deprives a litigant of the opportunity to pursue his claim, and any dismissals with prejudice are reserved for the most egregious cases.” *Hillman v. Weatherly*, 14 So.3d 721, 726 (Miss. 2009) (quoting *Wallace v. Jones*, 572 So.2d 371, 376 (Miss. 1990)). The severity of the injury coupled with the numerous inconsistent statements of the defendant who voluntarily took charge of decedent’s care should be put before a jury to determine the credible facts and decide the issues at hand. There are too many facts still in issue for summary judgment to be appropriate. As such, the Plaintiff requests this Court remand the matter to be considered by a jury as the ultimate trier of the facts.

Respectfully submitted, this the 11th day of August, 2010.


DONALD W. MEDLEY
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CERTIFICATE OF SERVICE

I, Donald W. Medley, being the attorney of record for the Appellants in this case, 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 the Appellant to the Clerk of the Supreme Court, Supreme Court of Mississippi, P.O. Box 249, Jackson, MS 39205-0249, and to the following:

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Honorable Prentiss Harrell
Circuit Court Judge
P.O. Box 488
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This the 11th day of August, 2010.


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