IN THE SUPREME COURT OF MISSISSIPPI

DOCKET NUMBER: 2009-CA-02039

RANDALL KIMBROUGH
and RUTH KIMBROUGH — PLAINTIFFS / APPELLANTS

VERSUS

DELORES KEENUM, THE WILL RAY KEENUM AND DELORES FERRERES KEENUM RECOVABLE INTER VIVOS TRUST and DELORES KEENUM, TRUSTEE — DEFENDANTS / APPELLEES

ON APPEAL FROM THE
CIRCUIT COURT OF JACKSON COUNTY, MISSISSIPPI
CIVIL ACTION NO.: 2008-00,134(3)

BRIEF OF DEFENDANTS / APPELLEES

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

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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.

Delores Keenum	Defendant / Appellee
Will Ray Keenum and Delores Ferreres Keenum Revocable Inter Vivos Trust	Defendant / Appellee
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Respectfully Submitted,

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STATEMENT OF ISSUES

I. Whether the trial court erred in granting summary judgment in favor of the Defendants based on no duty being owed to Plaintiffs.

II. The creation of a new duty, if this Court should do so, should apply prospectively only.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

The case stems from an unfortunate incident involving two dogs owned by the boyfriend of Margarete Younts. Ms. Younts rented and occupied a residence located at 5019 Weems Street, Moss Point, Mississippi 39562 ("the residence"). The residence was owned by the Will Ray Keenum and Delores Ferreres Keenum Revocable Inter Vivos Trust ("the Trust"), for which Defendant Delores Keenum is the sole trustee. Neither the Trust nor Defendant Keenum owned the dogs. The dogs attacked the plaintiffs outside the boundaries of the residence on April 15, 2007. There is no allegation that any attack on Plaintiffs by these dogs occurred at the residence.

Plaintiffs sued under a negligence theory, which of course requires the presence of a duty owed to Plaintiffs. The trial judge correctly ruled that the State of Mississippi has never recognized a duty on the part of a landlord, here the Trust, for an attack by dogs owned by a tenant that occurs off the property owned and controlled by the landlord. Plaintiffs have introduced many novel arguments and created several theories of negligence law in their brief, but the truth remains that the Trust and Defendant Keenum ("Defendants") did not owe a duty to Plaintiffs.

II. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

This case was filed June 20, 2008 in the Circuit Court of Jackson County, Mississippi. Summary judgment was filed on behalf of Defendant Keenum June 30, 2009 and was later joined by the Trust. Hearing was held October 30, 2009. The trial court entered its order granting the summary judgment December 4, 2009. The order dismissing the claims against the Defendants was entered December 15, 2009 and Plaintiffs filed their notice of appeal on December 28, 2009. The case against Margarete Younts was stayed pending the outcome of this appeal.

III. STATEMENT OF THE FACTS

Plaintiffs were unfortunately attacked by two pit bull terriers on or about April 15, 2007. (Record "R" at 12). The dogs in question were owned by a man named Tommy Weaver (R.at 38) and kept at 5019 Weems Street in Moss Point, Mississippi. (R.at 38-39). The lessee and resident of this address on April 15, 2007 was Defendant Margeret Younts ("Tenant"). (R.at 38). Tommy Weaver was the boyfriend of the Tenant and did not appear on the lease. (R.at 38, 53).

Defendant Delores Keenum is the sole trustee of theWill Ray Keenum and Delores Ferreres Keenum Revocable Inter Vivos Trust ("the Trust") that owns and operates 5019 Weems Street as a rental property.[1] (Keenum depo. p. 7, Defendants' Record Excerpts "DRE" at 1). Defendant Delores Keenum resides at 2709 Briarwood Circle in Moss Point, Mississippi. (R.at 37). Defendants did not own the dogs in question. (R.at 38). The alleged attack did **not** occur on the premises of 5019 Weems Street or any other property owned, operated, or controlled in any manner by Defendants. (R.at 12).

Nothing in the lease between Defendants and the Tenant creates an obligation by Defendants to secure any animals living on the premises. (R.at 53). When the lease was entered into, the Tenant did not have the dogs in question. (Keenum depo. p. 39, DRE at 2). Defendant Keenum had no knowledge of any attacks by these dogs prior to the one on Plaintiffs (R.at 43; Keenum depo. p. 18, DRE at 3) and no knowledge of them ever escaping. (Keenum depo. p. 43, DRE at 4). Defendant Keenum only came to the property approximately once per month (Keenum depo. p. 32, DRE at 5), but when she did she observed the dogs playing peacefully with her grandson. (Keenum depo. p. 36-37, DRE at 2, 6). Mr. Weaver had constructed a pen with chain link walls approximately ten feet

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[1]When the Trust and Defendant Keenum are referred to jointly, they will be known collectively as "Defendants".

high to contain the dogs. (Keenum depo. p. 42-43, DRE at 4).

SUMMARY OF THE ARGUMENT

Despite Plaintiffs' attempts to confuse the issues and sidetrack this Court, this matter is actually very simple. Defendants are not denying that Plaintiffs were bitten by the dogs in question on the property owned and occupied by Plaintiffs. Likewise, the evidence is indisputable that the dogs were not owned by the Trust or Delores Keenum. The attack did not occur on property owned by the Trust or Delores Keenum, and there is no allegation to the contrary.

The establishment of a duty in negligence actions is clearly a question of law to be determined by the Court. This is a case of first impression in Mississippi. This Court has never determined whether an absentee landlord owes a duty to protect against attacks that occur off his or her premises by dogs that are owned by, and under the control of, the tenant.

Clearly no such duty can exist. Many courts throughout the country have addressed this very issue and agree with Defendants' position. Accepting Plaintiffs' theory would create a duty of indefinite proportion. In other words, where would it end? In this case it happened to be neighbors, but under Plaintiffs' theory a landlord would be liable for attacks that occurred miles from the home. It simply is not just to impose a duty on someone other than the owner of the dogs for attacks that occur off the leased premise.

Defendants acknowledge Mississippi has ruled on the issue of duty of a landlord as it relates to attacks by dogs owned by a tenant on common area owned by the landlord. This situation is not analogous. Plaintiffs seemingly expect a landlord to simply evict the dog owner and take the dogs to another neighborhood, which of course accomplishes nothing when speaking of attacks that occur off the premise. Plaintiffs' novel "general duty" concept would not dispose of any liability by the landlord just because the dogs have relocated, instead requiring them to track the dogs and warn

anyone with whom they may come in contact.

A landlord does not have the ability to control dogs it does not own. In the case at bar, if the dog owners had taken them to the park and the attack occurred there, would the landlord still be liable? Under Plaintiffs' "general duty" creation, the landlord would be, presumably. This Court has never taken such an expansive view of duty. A duty is owed by the person whose actions injured a party. In this case, no actions by Defendants caused injuries to Plaintiffs. Defendant Keenum did not live on the property, own the dogs, or control the dogs.

Defendants urge this Court to look past the inflammatory and often irrelevant information presented in Plaintiffs' brief and look closely at the only issue: Does Mississippi recognize a duty by a landlord to prevent attacks by his tenant's animals that occur off the leased property? The answer is that such a duty has never been recognized in Mississippi and for the reasons contained herein, one should not be established now. Further, there was no assumption of any duty by Defendant Keenum relative to the dogs. Nothing in the lease contract transferred responsibility for the dogs to Defendants, and Defendant Keenum took no actions that constitute an assumption of the duty.

Finally, should this Court determine that such a duty does exist, such a ruling should apply only prospectively. Landlords throughout Mississippi have relied on the law as it currently stands and should not be subjected to suit for any attack that may have occurred in the last three years when they had no duty to those off the leased premises.

ARGUMENT

I. Standard of Review

This Court reviews summary judgments on a *de novo* basis. *Wagner v. Mattiace Company,* 938 So.2d 879, 882 (Miss. 2006). Summary judgment is proper when "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 and the moving party is entitled to a judgment as a matter of law." Miss.R.Civ.P. 56(c). "[T]o rebut the movant's claim of a lack of any genuine issue of material fact, the nonmovant must bring forth supportive evidence of significant and probative value which shows the movant breached an **established duty**, and that the breach was the proximate cause of the non-movant's injury." *Wagner,* 938 So.2d at 883 (emphasis added) (citing *McFarland v. Leake,* 864 So.2d 959 [¶ 7] (Miss.Ct.App. 2003)). The existence of a duty is a question of law. *Wagner,* 938 So.2d at 883 (citing *Brown v. J.J. Ferguson Sand & Gravel Co.,* 858 So.2d 129 (¶9) (Miss. 2003)).

II. Defendants Had No Duty To Prevent Attacks By Dogs They Did Not Own Or Control That Occurred Off The Leased Premises

A. Mississippi does not recognize a duty on the part of the landlord for attacks that occur off the property

It is undisputed that the alleged attack in this case occurred off the premises owned by Defendants. It is also undisputed that Mississippi has not specifically recognized a duty on the part of a landlord to protect people against attacks by a lessee's dog that occurs off the premises owned by the landlord. This is a case of first impression for this Court.

Mississippi law regarding duty in a negligence case is clear and well established. **Plaintiffs must prove** that a duty exists "to conform to a specific standard for the protection of others against

the unreasonable risk of injury"....*Enterprise Leasing Co. South Cent., Inc. v. Bardin,* 8 So.3d 866, 868 (Miss. 2009) (quoting *Burnham v. Tabb,* 508 So.2d 1072, 1074 (Miss. 1987)). The existence of a duty "is a question of law to be determined by the court." *Id.* (quoting *Belmont Homes, Inc. v. Stewart,* 792 So.2d 229, 232 (Miss. 2001)).

Plaintiffs have vigorously tried to fit a square peg in a round hole by citing cases such as *Mongeon v. A & V Enterprises, Inc.,* 733 So.2d 170 (Miss. 1997). *Mongeon* stands for the principal that a landlord can be liable for the actions of a dog it knows to be dangerous **on land he or she owns and controls**. *See Id.*(emphasis added). That is factually inapplicable to the case at bar. The dogs owned by the Tenant did not attack Plaintiffs on land owned and controlled by Defendants.

Plaintiffs expend a great deal of energy analyzing the *Mongeon* ruling and attempting to find similarities to this matter. However, the threshold that must be crossed before any analysis to *Mongeon* can be made is the location of the attack.

The trial court clearly reached the proper ruling. As stated in *Wagner*, the non-movant must put forth evidence that the movant breached an **established** duty, and Plaintiffs failed. *See* 938 So.2d at 883. Plaintiffs failed because no duty exists in Mississippi for the allegations in this case.

B. The majority of jurisdictions do not recognize such a duty

Plaintiff has found just one jurisdiction, Oregon, that has created a duty on the part of a landlord for attacks that occur off the leased property. *Park v. Hoffard,* 111 Or.App. 340, 826 P.2d 79 (Or.Ct.App. 1992). However, that same court noted that "[i]n other jurisdictions, the general rule is that, after a transfer of possession and control of leased property to the tenant, the landlord is not responsible for injuries to persons on or off the premises caused by the tenant's dog." 826 P.2d at 80 (citing *Annot.,* 81 ALR3d 638 (1977)).

The Michigan Court of Appeals has held that "[a] landlord has no duty to protect third parties from injuries inflicted by a tenant's pet that occur away from the leased premises." *Feister v. Bosack,* 497 N.W.2d 522, 523 (1993). Going further, the court in *Feister* specifically rejected the plaintiff's claim that once a landlord has reason to believe a dog has "dangerous proclivities, the landlord must act to protect all potential victims from the dog." *Id.* at 524. It then convincingly reasons that even if the landlord had evicted the dog owner "in time to protect **this** plaintiff, the result would only have been to expose other individuals to the same dog." *Id.* at 525 (emphasis in original).

The Nevada Supreme Court, in a case cited by the *Feister* Court, noted that the defendant "had no initial duty to protect [the plaintiff] and others from injuries caused by his tenants' escaped pit bulldog." *Wright v. Schum,* 781 P.2d 1142, 1146 (1989). The *Wright* Court also made an excellent analogy concerning whether the law should require landlords to evict tenants, forcing them to relocate if they have dangerous animals by stating that it would "merely result in the tenants' moving off to another location with their still dangerous animals" and likened it to the case of "'Typhoid Mary' who was outcast from one place only to continue her deadly disease-spreading activity at another place." *Id.* at 1143.

In 2003 the Appellate Court of Connecticut reviewed this issue as a case of first impression in *Stokes v. Lyddy,* 815 A.2d 263. That court noted that, when "the attack occurred away from the leased property...under the theory of premises liability - that a landlord has a duty to maintain property he controls in a reasonably safe manner - the defendants owed no duty to the plaintiff." 815 A.2d at 271. The *Stokes* decision also discounted certain case law cited by that plaintiff as inapplicable when the subject was attacks that occurred on common areas rather than on property

outside the landlords's control. *See Id.* at 279. Using this same reasoning, the *Mongeon* case should not be relied upon by this Court. Finally, the *Stokes* Court made a compelling public policy argument against extending liability in this situation. They wrote that "[i]f landlords were held liable for off premises injuries cause by their tenants' dogs, landlords would become the insurers of the general public without end. That should not be encouraged." *Id.* at 277. The *Stokes* court believed this would create a "flood of litigation" should that plaintiff's view be adopted. *Id.* Finally, the *Stokes* court specifically rejected the notion that even if the landlord had knowledge at the inception of the lease of the dangerous animals that liability could ensue. *Id.*

The State of Washington has also specifically rejected Plaintiffs' argument when stating in a case against a landlord by a pedestrian passing a house: "The landlord's ownership of the property does not in and of itself make them liable for persons thereon who own or possess, harbor or keep a dangerous dog." *Shafer v. Beyers,* 613 P.2d 554, 556 (Wash.App. 1980) (citing *Harris v. Turner,* 466 P.2d 202 (Wash.App. 1970)). The Washington Appellate court later clarified dicta contained in the *Shafer* opinion regarding the importance of whether the landlord knew of dangerous tendencies in the tenant's dog. *Clemmons v. Fidler,* 791 P.2d 257 (Wash.App. 1990). *Clemmons* actually involved an attack by a pitbull on the premises owned by the landlord, but the court specifically addressed the off premise attack case of *Shafer* in stating "the landlord's knowledge is immaterial. We hold that the common law rule applies: only the owner, keeper, or harborer of the dog is liable for such harm." *Id.* at 259.

An appellate court in Hawaii noted that the **owner** of a dog is required to take note of the breed's propensities and must take reasonable care to guard against injuries to others. *Fernandez v. Marks,* 642 P.2d 542, 544 (Haw.App. 1982) (emphasis added). The *Fernandez* court declined to

extend knowledge or notice on the part of the landlord as to the dog's propensities to create liability. *Id.* It was correctly noted that this would "[make] a landlord, in effect, an insurer of the public against injuries, off the premises, by dogs domiciled on the landlord's premises." *Id.*

In New York it was held very succinctly in a two paragraph opinion that "[t]he landlord has no responsibility to passersby who are injured outside the landlord's premises." *Shen v. Kornienko,* 253 A.D.2d 396, 676 N.Y.S.2d. 593 (N.Y.A.D. 1998).

Courts in Florida have held repeatedly that liability cannot extend to a landlord for attacks that occur off the premises:

> In tort cases involving liability for the actions of dogs, no Florida court has held that a landowner has a duty to prevent injuries that might occur when a tenant's animal escapes the leased premises and causes injury away from the property.

Tran v. Bancroft, 648 So.2d 314, 315 (Fla.App. 4 Dist. 1995). The *Tran* court also noted that at common law, "only those who owned the dog, had an interest in the dog, or harbored the dog could be liable for injuries caused by the animal." *Id.* (citing 4 AmJur.2d *Animals* § 98 (1962)). A person must assume care for the dog as an owner would before he or she can be liable for its actions. *See* 648 So.2d at 315.

Clearly Mississippi is in the majority and the mainstream of jurisprudence in not recognizing a cause of action against a landlord for the actions of a tenant's dog. This Court should reject Plaintiffs' overture to create this duty now.

C. Duty is created as an operation of law and not by the parties

Plaintiffs have put forth a novel and completely incorrect theory regarding the establishment of a duty in negligence actions. Essentially, Plaintiffs argue that a party can create a duty by statements made in a deposition. (Appellant's Brief at 24). Presumably, if Defendant Keenum had

simply stated that she had no duty regarding people living around her rental properties Plaintiffs would have dismissed their lawsuit for lack of duty owed to them, though for some reason that seems doubtful.

Plaintiffs go on to completely misstate the most basic element of tort law by stating "[t]he issue of what **duty** Defendant Keenum owed to the Kimbroughs, knowing these pit bulls were dangerous, is a text book example of an issue that must be resolved by a jury; it is not an issue to be disposed of by a trial court via summary judgment." (Appellant's Brief at 24)(emphasis added). Whatever "text book" is relied on for this premise should never again be opened or referred to in any way. This Court has stated:

> ...duty is an issue of law, and causation is generally a matter for the jury. Juries are not instructed in, nor do they engage in, consideration of the policy matters and the precedent which define the concept of duty. W. Page Keeton, *Prosser and Keeton on Torts* §§ 37, at 236 (5th ed. 1984). This Court has held that the existence vel non of a duty of care is a question of law **to be decided by the Court.** *Foster v. Bass,* 575 So.2d 967, 972-73 (Miss. 1990).

Rein v. Benchmark Construction Company, 865 So.2d 1134, 1143 (Miss. 2004) (emphasis added) (quoting *Donald v. Amoco Prod. Co.,* 735 So.2d 161, 174 (Miss. 1999)). In other words, Plaintiffs could not be more wrong that the determination of the duty owed to them by Defendants is an issue for the jury.

Plaintiffs present yet another puzzling argument by stating that Defendant Keenum is an expert in duties owed by a landlord. (Appellant's Brief at 24). As noted above, duty is an issue for courts to determine, so it is unclear how anyone can be an expert in that field. Plaintiffs, of course, cite to no Mississippi law that demonstrates how someone can be an expert in the establishment of a duty in a negligence action. Rule 702 of the Mississippi Rules of Evidence states that expert opinion is permissible to "assist the trier of fact to understand the evidence or to determine a fact in

issue..." Similarly, Rule 701 permits opinion testimony by lay persons if it will be "helpful to the clear understanding of the testimony or the determination of a fact in issue...." Conspicuously absent in both rules is any reference to assisting in the determination of the duty owed by the defendant. The trial court correctly stated that "[t]he existence of a legal duty is a matter of law, not a lay person's opinion." (R. at 249).

D. Defendants did not assume a duty by contract or actions

Plaintiffs argue that Defendant Keenum assumed a duty "relative to the safety of her neighbors." (Appellant's Brief at 25). While it is unclear to Defendants exactly what the phrase "relative to the safety of her neighbors" means in regards to a duty, it is abundantly clear that Plaintiffs' argument fails.

Plaintiffs fall back on the alleged "admissions" of Defendant Keenum that she had a duty to protect them from the Tenant's dogs. (Appellants' Brief at 25).[2] Defendants fully incorporate the arguments made, *supra,* that demonstrate the legal insufficiency of arguing that a party can create their own duty. However, there are some issues brought forth in Section 9 of Appellants' Brief that must be addressed as well.

In support of this argument, Plaintiffs partially quote from Defendant Keenum's depostion, taking great strides to misrepresent to this Court the complete nature of the testimony. (Appellants' Brief at 25). In their brief, the testimony submitted only as "..." (Appellants' Brief at 25) actually contains the following exchange:

> Q. And what is it you believe your obligation is at that point?
>
> A. If the dog attack the person that is **in my property**, then I will ask to be

[2]Plaintiffs refer here to themselves as "her [Keenum's] neighbors", which of course they were not. This improperly misstates the facts and implies Defendant Keenum lived next to Plaintiffs.

immunized or out and will not there be.[sic]

(R. at 248) (emphasis added). The trial court correctly noted in its opinion that Defendant Keenum's statements do not amount to an assumption of any duty. (R. at 249). The trial court further correctly noted that even if a duty had been created by these statements, Defendant Keenum was clearly only speaking of attacks that occur on her property. (R. at 249). Therefore, it is clear that even with Plaintiffs' misstating the applicable testimony, no duty was created by Defendant Keenum's testimony.

A duty regarding the condition of a premises can be assumed through the lease contract between the lessor and lessee. *See Wagner*, 938 So.2d at 883-84. Plaintiff makes no argument that a duty was assumed in this manner. Likewise, the trial court dispatched of this potential argument by noting that the lease agreements are "completely silent on any obligation of Keenum in this regard." (R. at 249 FN1).

The other way to assume a duty under Mississippi law is not by statements made in a deposition, but by actions taken by a party. *See Wagner*, 938 So.2d at 884-87. It is well established that "the negligent party can only be held liable to the extent of the gratuitous undertaking." *Id.* at 885. Plaintiffs allege that "Defendant Keenum admitted she had and undertook the duty to protect her neighbors of her rental property from vicious dogs." (Appellants' Brief at 26). Again, though, Plaintiffs rely solely on misrepresentations of her deposition testimony of Defendant Keenum rather than her actions. Cases decided by this Court consistently focus on the actions of the allegedly negligent party as to whether they assumed a duty.

In *Wagner* the duty assumed was limited to those activities that the agent of the landlord had previously performed, a premise well settled in Mississippi law. 938 So.2d at 886. In the case at

bar, Defendant Keenum did not assume the duty of keeping the dogs contained in the Tenant's yard, nor could she since she was not a resident and not the owner of the dogs. Even if the so called admission created an assumption of the duty, it would only be for incidents that occur on the rental property. Plaintiffs point to no specific actions by Defendant Keenum whereby she undertook the responsibility for ensuring the dogs were not able to escape. The Tenant was responsible for the dogs.

It also is clear in Mississippi law that when a gratuitous duty is assumed, "the plaintiff must show detrimental reliance on the performance." *Wagner,* 938 So.2d at 885. In this matter, Plaintiffs have not demonstrated how their injuries were the result of detrimental reliance on an assumption of a duty by Defendants.

Plaintiffs have failed to present any evidence that Defendant Keenum assumed a duty on her own behalf or on behalf of the Trust to protect them from attacks by Tenant's dogs on Plaintiffs' property. This argument fails.

E. The attack on Plaintiffs was not foreseeable to Defendants

Plaintiffs assert repeatedly in their brief that Defendant Keenum had knowledge of a previous attack by the dogs kept by the Tenant. However, they never once cite to any evidence that demonstrates this knowledge. On the contrary, Defendant Keenum testified in her deposition that she had no knowledge of the prior incident involving the dogs and two boys. (Keenum depo. p. 18, DRE at 3; R. at 43). Defendant Keenum also visited this property only approximately once per month, but when she did it was noticed that the dogs played well with her grandson. (Keenum depo. p. 32, 36-37, DRE at 5-7). Defendant Keenum also had no knowledge of the dogs ever escaping from Tenant's yard. (Keenum depo. p. 43, DRE at 4). Also, the dogs were provided a pen with

walls of ten feet to keep them contained and Defendant Keenum knew of this structure. Id. It is certainly reasonable that Defendants could rely on Mr. Weaver and the Tenant to keep the dogs in that pen, thus making unforeseeable they would escape and injure someone on a different property.

Defendants do not dispute that foreseeability is one element in the court's determination of the existence of a duty. *See Donald,* 735 So.2d at 175 (Miss. 1999). However, one only has a duty to take "reasonable measures" to prevent injuries to another and is not charged with taking steps to prevent all possible occurrences. *Id.* (citing *Millers of Jackson, Inc. v. Newell,* 341 So.2d 101, 103 (Miss. 1976); *Pargas of Taylorsville, Inc. v. Craft,* 249 So.2d 403, 407-08 (Miss. 1971)).

Plaintiffs cite to several cases regarding foreseeability and the creation of a duty, but none are analogous to this matter. They first cite to *Rein,* in which a company assumed the duty to prevent fire ants from accumulating on the grounds of a nursing home by virtue of its assertions to the building owner that it could control ant beds. 865 So.2d at 1147. Defendant Keenum made no promise or representation to Plaintiffs that she would protect them from dog attacks. Therefore, the *Rein* case is not applicable.

Likewise the case of *Lyle v. Mladinich* is not analogous whatsoever to this matter. 584 So.2d 397 (Miss. 1991). That case involved a criminal assault that occurred on the defendant business owner's property. *Id.* at 398. The plaintiff in that matter was on the defendant's premises as a business invitee, which requires a completely different standard than the case at bar. The *Lyle* defendant had a duty to maintain a safe and secure property for its patrons. *Id.* at 399. Since the attack in this matter did not occur on Defendants' property and Plaintiffs were not invitees on the property, *Lyle* is not applicable.

In *Delta Electric Power Association v. E. R. Burton* the issue was whether the defendant

power company had been negligent in eliminating or warning about the hazards of its power lines. 240 Miss. 209, 126 So.2d 258 (1961). This case is clearly not analogous because Defendants did not own the dogs in question. Likewise, the case of *Donald v. Amoco Production Co.* involves claims of negligence regarding an item owned or controlled by the defendant, in this case the disposal of oil. 735 So.2d 161. As in *Delta Electric,* the fact that the accusations of negligence involve the handling of a product owned or controlled by the defendant separate it from the case at bar.

The case of *Doe v. Wright Security Services, Inc.* brings back the issue of the assumption of a duty. 950 So.2d 1076 (Miss. 2007). In that matter, the defendant contracted to protect students at a bus stop. *Id.* at 1080. By specifically contracting to protect students through a variety of ways, that operated to create a duty. *Id.* at 1081-1084. There is no allegation of a contract creating a duty in the case at bar.

Finally, in the case of *Dr. Pepper Bottling Company of Mississippi v. Bruner,* the defendant's employee was engaged in the potentially dangerous activity of pushing a cart through a building and injured the plaintiff. 245 Miss. 276, 148 So.2d 199, 200 (1962). This differs from the case at bar because it addresses the conduct of a person actually engaged in a task that could injure someone. *Id.* That is clearly unlike this matter because there is no allegation that Defendants were actually performing a task that could injure Plaintiffs.

It is evident that the cases cited by Plaintiffs for the importance of foreseeability in the establishment of a duty are not relevant. None of them addresses the liability of a third party for an occurrence that takes place off property the third party controls, by a means beyond the third party's control. Instead, they all deal with negligent actions against the party who had direct control of the

mechanism that caused the injury and/or the property where it occurred. The reason for this is simple, the threshold of foreseeability cannot be met in circumstances such as this.

In their discussion of general and common law duty, Plaintiffs completely misrepresent the evidence by stating Defendant Keenum was more concerned with collecting rent than protecting people. (Appellants' Brief at 22). The context of Defendant Keenum's statement they reference is clearly that she does not interfere with the personal lives of the tenants at her various rental properties and leaves them in peace so long as rent is paid, as any good landlord should. (Appellants' record excerpts at 68). The dogs were not even the topic of the questions being asked. Defendant Keenum never stated or implied in any manner that she was fine with dogs attacking neighbors so long as the rent was paid.[3]

F. Public policy is served by not extending duty

Public policy dictates that this duty not be extended to an absentee landlord. There would potentially be no end to the liability of one who does not even own or control the animals. It goes against better judgment to hold the landlord responsible for an animal off the property. What if the dogs get out and roam miles before biting someone? What if the owners take the dogs to a park and they bite someone? Under Plaintiffs' view, so long as the landlord could have evicted the tenants or forced them to give up the dogs, that landlord is responsible for any damage that may occur. There simply is no correlation to the ability to evict a tenant or to ban the dogs and protecting the general public from the dogs.

Only the owner or keeper of the animals can take the necessary steps on a 24 hour per day basis to control the dogs and protect others. The analogy made by the Nevada court to "Typhoid

[3]While this topic is not necessarily determinative of any issue on appeal, Defendants felt it important to point out the blatant mischaracterization of this testimony.

Mary" is perfect. Evicting the tenant or forcing the removal of the dogs does not eliminate the potential problem. A landlord has no power to seize the dogs and take more drastic action, only the dogs' owner does. A landlord can only move the potentially dangerous actions by the dogs to another location.

It is important to note the differences between holding a landlord responsible for attacks that occur on property they own and control, such as in *Mongeon*, and attacks that occur off the property. If the duty is just to eliminate incidents on the property, that is easily accomplished through the methods Plaintiffs here advocate, such as eviction of the tenant, 24 hour chaining of the animals, or simply telling the tenant to remove the animals. However, when it comes to attacks off the property, Plaintiffs seek to make landlords insurers of the safety of all those who may come in contact with dogs housed on their rental properties. Once the dogs are off the property, the connection is broken to the landlord. The owner of the dogs is always the owner and should bear responsibility. But a landlord does not have control over dogs off the property any more than they have control of the tenants themselves once removed from the property. In essence, no parameter can be set for when a landlord's duty would end. The facts of this case are that the people attacked were neighbors, but the attack could have occurred miles away if the dogs got out and roamed free. The line should remain at the boundary of the property owned by the landlord.

Therefore, it is against sound public policy to hold landlords to a duty for the actions of animals that occur off the property they own. A duty cannot be imposed on persons who cannot eliminate the danger.

III. If This Court Chooses To Create A New Duty, It Should Apply Prospectively Only

While Defendants have full confidence that this Court will not create a duty whereby landlords are responsible for the actions of their tenants' animals that occur off the rental property, if such a duty is created it should be prospective only. Otherwise the thousands of landlords across Mississippi will be subject to suits going back three years for actions of animals belonging to tenants. They would be held to a duty that heretofore did not exist. Landlords would be punished for not taking actions against tenants that the law did not require of them.

This Court has previously held that the abolishment of sovereign immunity was prospective only because of the longstanding reliance on immunity and the fact that governmental bodies had not adequately protected themselves. *Presley v. Mississippi State Highway Com'n,* 608 So.2d 1288, 1298-99 (Miss. 1992) (overruled on other grounds). This is consistent with the position of all landlords in Mississippi. They have always relied on the premise that they were not responsible for off premise behavior of a tenant's animal and have taken no measures to protect themselves, namely by eliminating pets or evicting tenants. Fairness dictates that any change in this duty be prospective only.

CONCLUSION

Mississippi has never recognized a duty of a landlord to protect against injuries caused by its tenant's animals that occur off property. It should not start now. An absentee landlord is simply too remote and far removed to hold liable for not keeping an animal contained.

Defendants in this matter did not assume any duty to contain these dogs in Tenant's yard. Nothing contractual existed in the lease and no specific actions were taken by Defendant Keenum that would indicate she had assumed responsibility for containing the animals. While Plaintiffs allege this unfortunate incident was foreseeable to Defendant Keenum, nothing in the record indicates such. She had no prior knowledge of the dogs escaping, knew of no other attacks by the dogs, and had only observed the dogs behaving in a non-menacing manner.

The vast majority of states that have taken up this very issue have held that the landlord has no duty for off premise attacks. Mississippi should follow this lead. It simply is too remote to hold a landlord liable for incidents that occur off its property based on the fault of the tenants. An absentee landlord cannot be held liable for incidents like this that occur off its property. Sound public policy dictates this conclusion.

Finally, should this Court create this duty in a landlord, it should be applied prospectively. Such a radical departure from our entire history of tort law, landlord-tenant law, and premise liability should not be held against those who relied on the law as it existed.

Respectfully,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the undersigned has this day caused to be hand delivered or mailed, postage prepaid and firmly affixed thereto, a true and correct copy of the foregoing writing to the following:

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Honorable Dale Harkey
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Ph. (228) 769-3244
Circuit Court Judge

SO CERTIFIED, this the 7th day of June, 2010, in Pascagoula, Jackson County, Mississippi.

Respectfully Submitted,

Delores Keenum and the Will Ray Keenum and Delores Ferreres Keenum Revocable Inter Vivos Trust

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ADDENDUM

C
West's Annotated Mississippi Code Currentness
Mississippi Rules of Court State
Mississippi Rules of Civil Procedure
Chapter VII. Judgment
→ **Rule 56. Summary Judgment**

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim, or to obtain a declaratory judgment may, at any time after the expiration of thirty days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least ten days before the time fixed for the hearing. The adverse party prior to the day of the hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if 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 and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone, although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered on the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matter stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise

provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(h) Costs to Prevailing Party When Summary Judgment Denied. If summary judgment is denied the court shall award to the prevailing party the reasonable expenses incurred in attending the hearing of the motion and may, if it finds that the motion is without reasonable cause, award attorneys' fees.

Current with amendments received through June 1, 2009

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C
West's Annotated Mississippi Code Currentness
Mississippi Rules of Court State
Mississippi Rules of Evidence
Article VII. Opinions and Expert Testimony
→ **Rule 701. Opinion Testimony by Lay Witnesses**

If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to the clear understanding of the testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

CREDIT(S)

[Amended March 2, 1987, effective October 1, 1987; April 17, 2000, effective December 1, 2000. Amended effective May 29, 2003 to prohibit opinion testimony under Rule 701 based on scientific, technical, or other specialized knowledge within the scope of Rule 702.]

Current with amendments received through June 1, 2009

END OF DOCUMENT

C
West's Annotated Mississippi Code Currentness
Mississippi Rules of Court State
Mississippi Rules of Evidence
Article VII. Opinions and Expert Testimony
Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

CREDIT(S)

[Amended effective May 29, 2003 to clarify the gatekeeping responsibilities of the court in evaluating the admissibility of expert testimony.]

Current with amendments received through June 1, 2009

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