CASE NO. 2009-CA-02039

SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

RANDALL KIMBROUGH and RUTH KIMBROUGH,
Plaintiffs - Appellants

v.

DELORES KEENUM, THE WILL RAY KEENUM AND DOLORES FERRERES KEENUM REVOCABLE INTER VIVOS TRUST and DELORES KEENUM, TRUSTEE
Defendants - Appellees

Appeal From the Circuit Court of Jackson County, Mississippi
Cause No. 2008-00,134(3)

REPLY BRIEF OF APPELLANTS

ORAL ARGUMENT REQUESTED

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RESTATEMENT

ARGUMENTS AND AUTHORITIES

In their Brief, the Appellees take the unfortunate and unprofessional tack of embarking on an adhominem abusive attack against the Appellants' attorney instead of addressing the facts and law. And, it is these same attorneys who also tell this Court that the brutal and unprovoked mauling of two innocent people by two vicious pitbulls was merely "an unfortunate incident." *Appellees' Brief* at 2. In light of this approach, it is not surprising that Appellees' Brief contains many inaccuracies.

For example, Appellees state "[W]hen the lease was entered into, the Tenant did not have the dogs in question." Appellees' Brief, p. 3. However, Appellee Dolores Keenum, the landlord, testified that she knew her tenant, her daughter, had pit bulls in March 2005. (Keenum Depo p. 14, Lines 14-19 – RE 66). As for the timing of the lease, Keenum and her daughter entered into lease agreements for the subject property on April 5, 2005, April 5, 2006 and April 5, 2007. Contrary to the unsupported statement in Appellees' Brief, it is undisputed that Keenum had knowledge of the pit bulls being on the property prior to executing the lease agreement.

Next, Appellees state, in support of their argument that the attack was unforeseeable, that Keenum had no knowledge of any attacks by these dogs prior to the attack on the Appellants and no knowledge of them ever escaping. Appellee Brief, p. 3, 15. Aside from the fact that Defendant Keenum's attorney admitted there exists a jury question relative to whether Defendant Keenum knew about the dangerous propensities of the pit bulls that mauled the Kimbroughs (*Appeal Transcript* at 6 - *RE* 69), Mona Amos testified that in October 2006, when the pit bulls attacked and chased two young boys in the neighborhood, she informed Keenum the pit bulls attacked and chased two young boys. (Amos Depo p. 25, Lines 12-19 – RE 72). The attack on the

Appellants occurred on April 15, 2007, six months prior to the attack on the two boys and ten (10) days after Keenum and her daughter executed a new lease agreement. While Keenum contends she had no knowledge of prior attacks, Mona Amos' testimony creates a genuine issue of material fact with respect to the issue, and Plaintiffs, as non-movants of summary judgment, are entitled to have the evidence viewed in the light most favorable to them. See *Hust v. Forrest General Hosp.*, 762 So.2d 298, 300 (Miss. 2000) (holding that to preclude summary judgment, the "nonmovant must present affirmative evidence that a genuine issue of material fact exists."); *Travis v. Stewart*, 680 So.2d 214, 216 (Miss. 1996) (holding as to review of summary judgment, "evidentiary matters are viewed in the light most favorable to the nonmoving party").

The Appellees' statements above are important in the analysis of the liability of the landlord in this matter. The landlord's knowledge and the landlord's ability to control the lease terms and land are critical to the landlord's liability.

Appellants agree with Appellees' statement that this particular set of circumstances is a case of first impression in Mississippi in that there is no case law in Mississippi addressing landlord liability for a vicious dog bite which occurs off premises at a neighbor's house. However, this matter is not a new concept in tort law when taking into account duty, breach and foreseeability. Taking into account the totality of the circumstances and the existing case law in Mississippi, the landlord in this matter is liable because the requisite elements exist in this matter (*i.e.* knowledge of vicious propensities, ability control the land and whether the dogs could remain, foreseeability).

Moreover, Appellees assertion regarding the law in this jurisdiction is incorrect and contradicted by Appellees' own statements. In one argument, Appellees state that "*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", and in the another argument, Appellees state that "[C]learly 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." Appellees' Brief, pp. 8, 11. The reasoning in *Mongeon* regarding a landlord's liability is the law in Mississippi, and under the right circumstances, does extend to an attack off premises.

The Mississippi Supreme Court has recognized the duty of a landlord to protect others from a tenant's vicious dog when the landlord has knowledge of the dog's vicious propensities. See *Mongeon v. A & V Enterprises, Inc.*, 733 So.2d 170 (Miss. 1997). Keenum attempts to distinguish *Mongeon* by limiting its holding to situations where the landlord has control of the area wherein the attack occurred. This interpretation is incorrect.

In *Mongeon*, the Court held that where a landlord reserves control over a designated area and is negligent, the landlord is liable for the resulting injury. *Id.* at 171. However, in order for the landlord to be held liable, he or she "must have actual or constructive knowledge of the defect [or condition] and a sufficient opportunity to repair the same." *Id.* citing *Turnipseed v. McGee*, 109 So.2d 551 (Miss. 1959). While the specific facts of *Mongeon* are somewhat different from the instant matter because of the place of the actual attack, the concepts discussed in *Mongeon* can be applied to the matter *sub judice*. Specifically: (1) knowledge of the dogs' vicious propensities, (2) control over an area, and (3) negligence.

There is ample evidence to meet the three elements announced in *Mongeon* regarding landlord liability which must preclude summary judgment in this matter. The only issue is whether the principles in *Mongeon* can be extended to a situation where the actual attack takes

place off the premises. Appellees only arguments with regard to not extending *Mongeon* to attacks off premises are that landlord liability would be limitless and the lack of foreseeability. Both concerns are unfounded.

Appellants are not advocating limitless liability to landlords for tenant's dogs' attacking others. However, Appellants are asserting that in certain situations, landlords must be held liable for their actions/inactions with regard to vicious animals. The principles announced in *Mongeon* are the same elements in which a landlord must be held liable in this matter, whether the attack occurs on or off the premises. These include: (1) knowledge of the dogs' vicious propensities, (2) control over an area, and (3) negligence.

First, the landlord must have knowledge of vicious dog's propensity to attack others. Without this knowledge, landlords should not be held liable. Next, the landlord must have the ability to control whether or not the dogs can be housed on the premises. Without this ability to control, landlords should not be held liable. Finally, the landlord must have been negligent in allowing the dogs to be housed on the premises. If a landlord does not have the knowledge combined with the ability to remove the animals, landlords should not be held liable.

In *Park v. Hoffard*, the Oregon Court of Appeals and Supreme Court recognized a duty on the part of a landlord for dog attacks that may occur off the premises. *Park v. Hoffard*, 826 P.2d 79 (Or. Ct. App. 1992) *aff'd* 847 So.2d 852 (Or. 1993). The Oregon Court recognized that virtually every court considering this issue has required that the landlord have ***actual knowledge*** of the dog's dangerous propensities and ***right to control*** the tenant's possession of a dog. 826 P.2d at 81 (emphasis added). These are the same elements in *Mongeon*.

Moreover, the Oregon Court quoted a California case with regard to when the landlord's duty arises:

> "It should be emphasized that a duty of care may not be imposed on a landlord without proof that he knew of the dog and its dangerous propensities. Because the harboring of pets is such an important part of our way of life and because the exclusive possession of rented premises normally is vested in the tenant, we believe that actual knowledge and not mere constructive knowledge is required. For this reason we hold that a landlord is under no duty to inspect the premises for the purpose of discovering the existence of a tenant's dangerous animal; only when the landlord has actual knowledge of the animal, coupled with the right to have it removed from the premises, does a duty of care arise." *Id.* at 81-82 quoting *Uccello v. Laudenslayer*, 44 Cal.App.3d 504, 514 (1975).

Furthermore, Restatement (Second) of Torts 379A provides the elements when the landlord's duty shall arise for persons harmed outside the premises. Section 379A states:

> A lessor of land is subject to liability for physical harm to persons outside of the land caused by activities of the lessee or others on the land after the lessor transfers possession if, but only if,
>
> (a) the lessor at the time of the lease consented to such activity or knew that it would be carried on, and
> (b) the lessor knew or had reason to know that it would unavoidably involve such an unreasonable risk, or that special precautions necessary to safety would not be taken.

Restatement (Second) Section 379A provides the same principles announced in *Mongeon* with regard to landlord liability.

It is clear that Appellants are not advocating a limitless liability on behalf of landlords. However, if landlords have the requisite knowledge of tenant's dogs' vicious propensities and the landlord has the ability to require the dogs be removed, then the landlord must be held liable if

the landlord allows the dogs to remain on the property and the dogs attack someone, whether on the premises or not.

For example, if the landlord leases his land for use as a stone quarry, he cannot escape responsibility for blasting operations which he must know that the lessee intends to carry on, if he knows or has reason to know that any such blasting will involve an unreasonable risk of physical harm to those outside of the land. Also, if the landlord leases his property to a lessee and the landlord knows that the lessee is conducting a meth lab on the premises, he cannot escape responsibility if the meth lab explodes, if he knows or has reason to know that the operation of a meth lab will involve an unreasonable risk of physical harm to those outside of the land.

In the case of dogs, just because dogs attack someone off the premises should not preclude liability of the landlord. It is undisputed that dogs can move very fast and if they can escape, the dogs will undoubtedly leave the premises. Just because a dog crosses an imaginary property line doesn't preclude liability. This knowledge that dogs can escape and leave the property, and that the dogs have attacked before off premises, provides the forseeability element which Appellees contend is lacking. If a landlord has the requisite knowledge of the vicious propensities and the ability to have the dog removed, then the landlord has opened himself/herself up to liability and it is completely forseeable that the animal will attack someone off the premises if it escapes again. If the landlord does nothing and an attack occurs, then the landlord must be held liable. But if a landlord is truly an absentee landlord and does not possess the knowledge or the ability to control the land, then liability should not attach. It is that simple.

In the matter *sub judice*, there is a genuine issue of material fact as to whether Keenum, the landlord, had knowledge of her daughter's dogs' vicious propensities. As to the ability to

control whether the dogs could be on the property, Keenum acknowledged she had that ability, but failed to exercise it. Moreover, Keenum executed a new lease with her daughter just ten (10) days before the attack on the Appellants and approximately six months after the attack on the two young boys. Keenum chose not to have the dogs removed, and her failure to act as a reasonably prudent landlord armed with the knowledge of her daughter's pit bulls' vicious propensities was negligent.

Finally, Appellees quote the Oregon Court in *Park* for the proposition that Mississippi follows, or should follow, the "general rule." After citing the Oregon's Court holding regarding the duty of a landlord for attacks off premises, Appellees stated:

> "However, that same court noted that '[i]n other jurisdictions, the ***general rule*** is that, after 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 a tenant's dogs.'" Appellee's Brief, p. 8 quoting *Park*, 826 P.2d at 80 (emphasis added).

Throughout their brief, Appellees attempt to have the Court adopt the "general rule" which is supposedly followed in a majority of jurisdictions. However, the "general rule" quoted by Appellees is not what Mississippi follows. The "general rule" quoted by Appellees states that landlords are not responsible for dog attacks "on or off" the leased property once they transfer possession. But in *Mongeon*, the Court clearly held that landlords can be liable for a tenant's dog attack if the landlord has the knowledge and control. As such, Mississippi already does not follow the "general rule", and the principles in *Mongeon* should be extended to cover an attack off the premises if all the elements are satisfied.

CONCLUSION

The concept is simple: if a landlord has actual knowledge of the animal's vicious propensities and maintains such a degree of control over the premises that he or she can eliminate the presence of the dangerous animal, then the landlord will be liable if he or she does not exercise such control. This concept is echoed in *Mongeon* wherein the Court held that a landlord with knowledge of a defective condition (*i.e.* vicious dog) and opportunity to repair (*i.e.* have dog removed) is liable for the injuries inflicted by such vicious dogs. *Mongeon*, 733 So.2d at 171. Appellants do not advocate limitless liability of landlords. There are clear elements which must be satisfied in order for a landlord to be held liable, and those elements have been satisfied in this matter. The trial court erred in disposing of Appellants' claims via summary judgment. This Court must reverse the decision of the trial court and remand the case back to the trial court so the Appellants can have a jury trial on all issues.

RESPECTFULLY SUBMITTED

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CERTIFICATE OF SERVICE

I, PATRICK R. BUCHANAN, Attorney for the Appellants, Randall and Ruth Kimbrough, do hereby certify that I have this day mailed by United States mail, postage prepaid, a true and correct copy of the foregoing Appellants' Reply Brief to the following counsel:

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This, the 26th day of July, 2010.

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