IN THE SUPREME COURT OF MISSISSIPPI

DOCKET NUMBER: 2010-TS-01829 E

CERTIFICATE OF INTERESTED PERSONS

ZENOBIA FAUL, AS GUARDIAN AND NEXT FRIEND OF THE MINOR CHILD A.F. — PLAINTIFF / APPELLANT

VERSUS

ESTHER PERLMAN — DEFENDANT / APPELLEE

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 Court of Appeals may evaluate possible disqualification or recusal.

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Respectfully Submitted,

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STATEMENT OF THE CASE

I. NATURE OF THE CASE

This case stems from three criminal acts perpetrated, undisputably, by Johnny Lee Adkins against the minor child, A.F., in 2004. Mr. Adkins was arrested and subsequently plead guilty to touching of a child for lustful purposes, receiving a sentence of fifteen (15) years in prison with ten (10) suspended, and three (3) years of probation. He also was fined $1000.00. This civil lawsuit was brought against Mr. Adkins and his wife, Esther Perlman[1] by the grandmother of A.F., Zenobia Faul. Ms. Perlman ("Defendant") was sued solely because she was the owner of the home in which Mr. Adkins committed his crimes against A.F. There were no criminal allegations ever lodged against Ms. Perlman and no indication of actual or constructive knowledge on the part of Ms. Perlman of the actions taken by Mr. Adkins.

II. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

This case was filed July 27, 2007 in the Circuit Court of Harrison County, Mississippi. (R. 9). Discovery progressed over the course of nearly three (3) years and trial was to be held July 13, 2010. Defendant filed her motion for summary judgment on or about June 18, 2010 and Plaintiff filed a response June 28, 2010. (R. 58, 106). Oral argument on summary judgment was set for July 12, 2010 but the Circuit Court granted the motion on July 9, 2010 and removed the hearing and trial from the docket. This motion applied only to Defendant Esther Perlman, leaving Johnny Lee Adkins as a defendant in this lawsuit. The Circuit Court entered its order granting Defendant's summary judgment on July 14, 2010, with the judgment as to Defendant Perlman being entered July 16, 2010.

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[1] For the Court's knowledge, Plaintiff misspelled "Perlman" throughout her brief. Plaintiff also incorrectly stated that Ms. Perlman is "formerly Esther Adkins," which is untrue, as she never went by that name. (R. at 67, deposition p. 6).

(Pl. R.E. 9-11).

Plaintiff filed a motion to reconsider and was granted oral argument that was heard August 26, 2010. (Pl. R.E. 60-84). After carefully reviewing the hearing transcript, briefings of the parties, and cases cited the Circuit Court denied the motion to reconsider on September 24, 2010 and entered final judgment for Defendant Perlman on October 7, 2010. (Pl. R.E. 19, 23). As stated before, Mr. Adkins remains an active litigant in the Circuit Court. Plaintiff sought a stay in the Circuit Court in order to pursue this appeal of the judgment in favor of Esther Perlman.

III. STATEMENT OF THE FACTS

Defendant Esther Perlman resides at 2401 Palmer Drive, Gulfport, Mississippi, and is the sole owner of that property. (R. 486; R. 69, p. 16). At the time of the alleged wrongful conduct she resided there with her husband, Johnny Lee Adkins. (R. 67, p. 8). Mr. Adkins had no ownership interest in the home. (R. 197). Defendant and Mr. Adkins were married February 6, 2004 (R. 67, p. 8) after dating for approximately four years. (R. 68, p. 10). The two had been co-workers at Keesler Air Force Base in Biloxi prior to marrying. (R. 68, p. 9). Mr. Adkins had been married twice prior, has one child, and is also a grandfather. (R. 200, 211, 219). Defendant Perlman also had been married before and has two children. (R. 67, p. 6-7).

Esther Perlman and Plaintiff, Zenobia Faul, were close friends who have known each other since the early 1980's. (R. 70, p. 20; R. 477, p. 9; R. 479, p. 14). In fact, Ms. Faul stood as a bridesmaid at the wedding of Ms. Perlman and Mr. Adkins. (R. 70, p. 20). Plaintiff has had custody of A.F. since approximately 2003. (R. 477, p. 7). A.F.'s father lived in Gulfport, Mississippi and worked as a security officer at the time of these events, while her mother lived in Arkansas during this time. (R. 98; R. 84, p. 8). A.F. saw her mother in the summers and her father on some

weekends. (R. 85, p. 9). Plaintiff had no one living with her to assist in caring for A.F., who turned eleven years old in 2004, perhaps not old enough to stay by herself but certainly old enough that constant surveillance is not required. (R. 84, p. 6-7). Plaintiff often relied on Ms. Perlman to pick A.F. up from school or watch A.F. when she would go shopping, take a trip to Jackson, run errands, go to the casinos, or to go see a show. (R. 71, p. 22-24; R. 87, p. 19; R. 489-491). In fact, A.F. was left by Plaintiff with Ms. Perlman approximately fifteen to twenty-eight times from 2003 to 2004. (R. 72, p. 26-27; R. 479, p. 17).

Over the years A.F. and Ms. Perlman became very close, as evidenced by A.F. referring to her as "Aunt Esther." (R. 71, p. 21; R. 86, p. 14). They would do many activities together, including shopping, going out to eat, swimming, going to church, and watching movies. (R. 71, p. 22; R. 87, p. 17; R. 88, p. 21). Plaintiff would have A.F. spend the night with Ms. Perlman, even after she married Mr. Adkins and he moved into the house. (R. 67, p. 8; R. 490; R. 480, p. 18-19). Plaintiff knew that Adkins was in the home and that he and A.F. would engage in activities such as swimming and playing video games. (R. 93, p. 41-42).

There is nothing in the record to indicate that Mr. Adkins had ever been arrested for, or accused of, inappropriate actions toward a child. He was in the Air Force for twenty (20) years, is a college graduate, had been a civilian employee on the military base, and gave no indication of any propensity to abuse children. (R. 201, 557). There is no evidence that Adkins' prior marriages ended because of inappropriate activity toward children and Plaintiff points to nothing in her brief that could serve as notice or a warning of any kind that Adkins could be capable of such behavior.

It was alleged in the criminal indictment of Adkins and by A.F. that he molested A.F. on three (3) separate occasions in the home owned by Ms. Perlman. (Pl. Record Excerpts p. 39-41; R.

89, p. 28). A.F. testified that Ms. Perlman was not in the room and had no knowledge of the first incident at the time it occurred. (R. 90, p. 31). A.F. also never told Perlman about this first incident with Adkins. *Id.* Ms. Perlman was also not present and was never told of the second unlawful incident. (R. 91, p. 34-35). Finally, A.F. also never told Ms. Perlman of the third incident between she and Adkins. (R. 92, p. 37).

Ms. Perlman was not arrested or charged in any manner in connection with the actions of Adkins. In fact, she has never been arrested or charged with any crime. (R. 69). There is nothing in the record to indicate that anything of this nature, or harm to children in any way, had ever previously occurred on her property. Likewise, there is nothing in the record to demonstrate actual or constructive knowledge by Ms. Perlman, **prior to these incidents,** of Adkins' propensity or likelihood of committing such terrible acts. A.F. did not tell her mother or anyone else that Ms. Perlman was involved and nothing overt occurred, such as Perlman telling A.F. not to discuss events at her home. (R. 92, p. 39; R. 93, p. 41). Adkins plead guilty to unlawful touching of a child and was sentenced to fifteen (15) years in prison, with ten (10) being suspended. (Pl. Record Excerpts p. 42-44; R. 218).

SUMMARY OF THE ARGUMENT

Plaintiff has alleged both negligent supervision and negligence per se against Defendant Perlman. These claims fail because Plaintiff is unable to produce any evidence of either cause in fact or legal causation. Perlman had no reason to suspect her husband, Adkins, was capable of these monstrous acts against A.F. It is beyond dispute that Ms. Perlman was not told of any of these incidents such that she could prevent the next one from happening. There is nothing in the record or set forth in Plaintiff's brief to this Court that demonstrates the existence of actual or constructive knowledge that Adkins would abuse A.F. Therefore, there is no genuine issue of material fact.

Plaintiff has reached a conclusion as to what Perlman knew or should have known. Where Plaintiff's claim so clearly breaks down is that she has no evidence, instead wishing the Circuit Court and this Court to reach that same conclusion without supporting evidence and by using pure conjecture. Plaintiff must bring forth significant probative evidence and not mere conclusions to withstand a motion for summary judgment. She failed.

Plaintiff also seeks the grant of summary judgment overturned because it was ruled on without a hearing. The caselaw is clear that while hearings are favored, any error is harmless where the there are no material facts at issue and the hearing would be unnecessary, which is the situation in this matter. Also, Plaintiff did receive her hearing on a motion to reconsider. Plaintiff brazenly tells this Court that if the motion had not been ruled upon three (3) days before the hearing she would have had affidavits that demonstrate the liability of Ms. Perlman. However, even the passage of greater than six (6) weeks between the grant of summary judgment and the hearing on the motion to reconsider did not find the production of these affidavits. In addition, Plaintiff filed this case nearly three (3) years prior to Perlman's motion for summary judgment, and Plaintiff filed a brief

in response to Perlman's motion approximately two (2) weeks before the Circuit Court granted summary judgment. Yet, amazingly, Plaintiff expects this Court to believe that the affidavits with the incriminating evidence were going to be brought forth in the final hours prior to the summary judgment hearing, even though nearly one year later they still have not been produced.

Plaintiff also asserts that the Circuit Court erred in not deeming Perlman's motion abandoned for not being heard greater than ten (10) days prior to trial. The Circuit Court was again correct because the Court's own calendar caused the timing of the hearing and there was no undue delay by Perlman. The summary judgment was filed approximately six (6) weeks after trial was requested and a full month ahead of the trial. Plaintiff was given ample time to respond, but just had no facts to back up her argument.

All of Plaintiff's issues for appeal fail. The Circuit Court of Harrison County committed no reversible error in the grant of summary judgment for Esther Perlman.

ARGUMENT

I. The Trial Court Did Not Err In Granting Summary Judgment For Defendant And Dismissing Her From The Case[2]

A. 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). A party opposing a motion for summary judgment must be diligent in their defense, not just sit idly by. *Newell v. Hinton,* 556 So.2d 1037, 1041 (Miss. 1990). To avoid summary judgment, the nonmovant "must bring forward **significant** probative evidence demonstrating the existence of a triable issue of fact." *Smith v. First Federal Savings & Loan Association of Grenada,* 460 So.2d 786, 792 (Miss. 1984) (citing *Union Planters National Leasing, Inc. v. Woods,* 687 F.2d 117, 119 (5th Cir. 1982)) (emphasis added). At the summary judgment phase, both the movant and nonmovant "bear the burden of production corresponding to the burdens of proof they would have at trial." *Skelton By and Through Roden v. Twin County Rural Elec. Ass'n,* 611 So.2d 931, 935 (Miss. 1992).

This Court has made it very clear that summary judgment is proper even in cases that are "highly fact sensitive" and involve a "multitude of factors and circumstances [to] be considered." *Adams v. Cinemark USA, Inc.,* 831 So.2d 1156, 1159 (Miss. 2002) (citing *Loper v. Yazoo & M.V.R. Co.,* 166 Miss. 79, 145 So. 743, 745 (1933)). This is true when there are no "material" facts to be

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[2] Defendant has chosen to combine Plaintiff's Issues 1, 3, and 4 into one rebuttal argument contained in this section

determined. *See Adams,* 831 So.2d at 1162.

B. Summary Judgment Was Proper As To Plaintiff's Negligent Supervision Claim

Plaintiff asserts that Ms. Perlman was negligent in her supervision of A.F. when at the Perlman home. In order to sustain a claim of negligence a plaintiff must prove duty, breach of duty, proximate cause, and damages. *Holmes v. Campbell Properties, Inc.,* 47 So.3d 721, 724 (Miss.Ct.App. 2010) (citing *Crain v. Cleveland Lodge 1532, Order of Moose, Inc.,* 641 So.2d 1186, 1189 (Miss. 1994)). For purposes of this appeal, the focus is on causation. "There are two components to the element of proximate cause: (1) cause in fact **and** (2) legal cause." *Holmes,* 47 So.3d at 724 (emphasis added) (citing *Glover v. Jackson State Univ.,* 968 So.2d 1267, 1277 (Miss. 2007); *Davis v. Christian Bhd. Homes of Jackson, Miss., Inc.,* 957 So.2d 390, 404 (Miss.Ct.App. 2007)).

A defendant's actions are the cause in fact of a plaintiff's injuries if it can be shown that "but for the defendant's negligence, the injury would not have occurred." *Holmes,* 47 So.3d at 724 (quoting *Glover,* 968 So.2d at 1277). It is beyond dispute that the horrific acts of Adkins were his doing alone. A.F. never stated that Ms. Perlman harmed her, the police report does not implicate Ms. Perlman in any way (R. 304-450), and no indictment was ever returned against Ms. Perlman. There is nothing in the record that demonstrates "but for" the actions of Ms. Perlman these acts by Adkins would not have occurred. Plaintiff has not even identified what actions of Ms. Perlman constitute "but for" causation. Therefore summary judgment was proper.

Even if Plaintiff can show sufficient evidence of actual causation to defeat summary judgment, she still must show legal causation. The actions of the alleged negligent party are the legal cause of an injury if it "'is the type, or within the classification, of [injury] the negligent actor should

reasonably expect (or foresee) to result from the negligent act.'" *Holmes*, 47 So.3d at 724 (quoting *Glover*, 968 So.2d at 1277) (emphasis added). The injury must be a "'reasonably foreseeable consequence" of the alleged negligence. *Id.* In the case at bar, Plaintiff must put forth significant probative evidence that it was reasonably foreseeable to Ms. Perlman that Adkins would commit these terrible and extraordinary acts against A.F. A.F. never told Ms. Perlman these acts were occurring so future incidents could be stopped. There were no dangers to A.F. that were known or foreseeable to Ms. Perlman or evidence that she should have "reasonably expected" these acts to occur on her property.

The Mississippi Court of Appeals has stated that injuries on a premise are reasonably foreseeable to sustain a negligence claim "if the defendant had either: (1) 'actual or constructive knowledge of the assailant's violent nature,' or (2) 'actual or constructive knowledge an atmosphere of violence existed on the premises.'" *Holmes*, 47 So.3d at 725 (quoting *Newell v. S. Jitney Jungle Co.*, 830 So.2d 621, 623 (Miss. 2002)). *Holmes* involved an employer being sued for the violent acts of its employee, specifically striking someone in the head with a baseball bat and killing him. 47 So.3d at 723. The Court of Appeals upheld summary judgment in favor of the defendant when the plaintiff failed to bring forth any contrary evidence to the defendant's assertion that the employee had never been a problem and it had no reason to believe the employee was dangerous. 47 So.3d at 725.

The Circuit Court relied heavily on the *Holmes* opinion in granting summary judgment for Ms. Perlman. (R. 127-128). This makes it particularly telling that Plaintiff made no effort whatsoever to discuss or distinguish *Holmes* in her brief to this Court. There is not a single citation to *Holmes* and no effort made to counter the Circuit Court's reliance thereon. Instead, Plaintiff

points to the fact that Adkins plead guilty and admitted the incidents occurred in Ms. Perlman's home and expects this Court to take this alone as evidence of actual or constructive knowledge. *Appellant's Brief* at 8. The Plaintiff then points to a police finding of pictures as supposed proof of knowledge, but cites to nothing that shows Ms. Perlman ever saw the pictures, or that they were even taken prior to any of the criminal acts by Adkins such that they could have been prevented. *Id.* at 9. These arguments go beyond the bounds of logic and certainly do not meet the test clearly annunciated in *Holmes*. *See* 47 So.3d at 725. Plaintiff makes no analysis as to how these facts can possibly be construed as actual or constructive knowledge by Ms. Perlman. Instead Plaintiff has set forth damaging evidence as to a case against Adkins and expects this Court to condemn Ms. Perlman for the same reasons. As the Circuit Court stated, a "'presumption may not be based upon another presumption,...[and] an inference essential to establish a cause of action many not be based upon another inference.'" (R. 144) (quoting *Goodyear Tire & Rubber Co. v. Brashier,* 298 So.2d 685, 688 (Miss. 1974)).

The Mississippi Supreme Court has also addressed the issue of notice in a negligent supervision case involving allegations of inappropriate sexual activities on a school playground. *Summers v. St. Andrew's Episcopal School, Inc.,* 759 So.2d 1203 (2000). Prior to the incident that instigated the lawsuit, the minor plaintiff had allegedly been hit with a pine cone and spit on by her classmates. *Id.* at 1206. The Supreme Court noted that a school could be "held liable for a **foreseeable** injury that is proximately related to the absence of supervision." *Id.* at 1214 (citation omitted) (emphasis added). The issue was whether the plaintiffs "sufficiently demonstrated that the cause of injury was a failure by [the school] to protect [plaintiff] from a **known and foreseeable source of harm.**" *Id.* (emphasis added).

Another case that sets forth what is needed to constitute notice is *American National Insurance Company v. Hogue,* 749 So.2d 1254 (Miss.Ct.App. 2000). *Hogue* was a premise liability case that involved the physical assault of a woman in the parking lot of Edgewater Mall in Biloxi, Mississippi in 1992. 749 So.2d at 1257. The Court of Appeals noted that the Supreme Court looks to the "pre-tort overall pattern of criminal activity" to determine if the mall's operator had actual or constructive knowledge of the dangerous situation. *Id.* at 1258-59. The *Hogue* plaintiff introduced a compilation of calls from the mall to Biloxi police from 1990-1992 that concerned crimes against persons and property. *Id.* The compilation showed over seventy (70) calls from the mall to the Biloxi Police Department annually. *Id.* at 1259. At trial it was determined that this constituted constructive notice. *Id.* In this matter, Adkins had no history of any type of criminal activity, and specifically no history of sexual misconduct with minors. Unlike the approximately 150 instances of notice given to Edgewater Mall over the years, Ms. Perlman had nothing to serve as notice.

Plaintiff cites to the case of *Hankins Lumber Company v. Moore* to support her argument that the foreseeability of Adkins' actions should have gone to a jury. 774 So.2d 459 (Miss.Ct.App. 2000); *Appellant's Brief* at 13. However, the analysis is flawed because it is unequivocal that the defendant in *Hankins Lumber* knew of the potentially dangerous condition, namely loose lumber on his truck, and the issue was whether he acted reasonably with that knowledge. 774 So.2d at 464. In the case at bar, the critical issue is that Ms. Perlman had no prior knowledge of any foreseeable risk such that her actions in response thereto could be deemed unreasonable.

On the other hand, the Supreme Court has held that the assault of a patron at a bar was not foreseeable despite two prior reports of crimes of robbery at that same location in the year prior. *Crain,* 641 So.2d at 1192. The *Crain* Court stated that "[t]hese incidents, in and of themselves,

hardly seem adequate to put Moose Lodge on notice that a serious assault upon an invitee was foreseeable." *Id.* Also of importance, there had been 111 reports of violent crimes within a two block radius of the Moose Lodge in the five years prior to this attack, and the Court still did not find the assault in *Crain* to be foreseeable. *Id.* at 1187, 1192. Further, the *Crain* Court looked favorably to a Michigan opinion that held "[c]riminal activity, by its deviant nature, is normally unforeseeable." *Id.* at 1190 (quoting *Papadimas v. Mykonos Lounge,* 176 Mich.App. 40, 439 S.W.2d 280, 283 (1989)). Likewise, Adkins' criminal behavior was not foreseeable to Perlman.

In her motion to reconsider and again in briefing to this Court, Plaintiff emphasized a note found on a door in Ms. Perlman's house that may, as the Circuit Court noted, allege immoral behavior, but is not sufficient to constitute notice that Adkins would pray on A.F. (R. 132-135, 143-144; *Appellant's Brief* at 12). There is nothing to indicate the note was written prior to any of the acts committed by Adkins since it was not found until after the last incident. (R. 143). This, again, is an attempt by Plaintiff to stack inferences to find even a shred of evidence.

There is absolutely no evidence that Ms. Perlman had actual or constructive knowledge of any propensities of Adkins that would lead to his actions, or that she should have known it was occurring over the course of the three times alleged. As noted, *supra,* Ms. Perlman had known Adkins for many years, he had never been arrested or convicted for a crime, and he had been in the military and a civilian employee on a military base for decades. By any objective standard, Adkins seemed an upstanding member of society. There is nothing to indicate he could not be trusted by his wife the same as any other wife could trust her husband. Without any proof offered that the actions of Adkins against A.F. were foreseeable to Ms. Perlman, summary judgment was proper. *See Holmes,* 47 So.3d at 726. Causation is undeniably an essential element of any negligence claim,

and Plaintiff's failure to put on any proof of proximate causation through foreseeability demanded summary judgment, which the Circuit Court properly granted. *Id.* at 729-30. (Citing *Grisham v. John Q. Long V.F.W. Post No. 4057, Inc.*, 519 So.2d 413, 416 (Miss. 1988)).

There are no facts for a jury to consider that may support Plaintiff's allegations. Further, Plaintiff has not pointed to a single analogous case that supports her argument that Ms. Perlman could be held to have actual or constructive knowledge of Adkins' propensities. Plaintiff believes that simply putting forward what she wants evidence to show somehow transforms the facts into being supportive of that conclusion. Facts speak for themselves, and none say that Esther Perlman had knowledge of Adkins' capabilities of hurting A.F. or any other child. Nothing in his background suggested this. It was not unreasonable to believe Adkins could be left in the same room with A.F., or that A.F. was not in need of constant supervision to protect her from dangers such as this. Plaintiff's argument that Ms. Perlman knew of Adkins' dangerous propensities because she knew generally what A.F. was doing while in her home is illogical and weak. *Appellant's Brief* at 8. This does nothing to demonstrate foreseeability **before** the acts by Adkins took place. The only issue is whether Ms. Perlman knew the actions were taking place or knew Adkins was capable of such prior to their commission. The fact that she did not have constant eye contact with a child of eleven has nothing to do with the foreseeability of Adkins' actions.

C. The Trial Court Did Not Usurp The Province Of The Jury

Plaintiff complains that the grant of summary judgment improperly usurped the "province of the jury." *Appellant's Brief* at 13. Defendant does not dispute that a determination of negligence is generally for a jury "except in the clearest cases," and this is one such "clearest [of] cases" where reasonable minds cannot differ as to whether it was reasonably foreseeable to Esther Perlman that

Adkins would commit these acts. *Caruso v. Picayune Pizza Hut, Inc.,* 598 So.2d 770, 773 (Miss. 1992) (citation omitted). "The purpose of a summary judgment is not to resolve issues of fact but to determine whether issues of fact exist." *Dailey v. Methodist Medical Center,* 790 So.2d 903, 916 (Miss.Ct.App. 2001) (quoting *Davidson v. North Central Parts, Inc.,* 737 So.2d 1015, 1016 (Miss.Ct.App. 1999)). There simply are no issues of fact that must be left to a jury. Not one shred of factual evidence points to actual or constructive knowledge on the part of Ms. Perlman.

Plaintiff is attempting to substitute innuendo and conjecture for facts. The cases cited, *supra,* clearly demonstrate what does and does not constitute notice such that injurious acts of a third party are foreseeable to the allegedly negligent party. When the defendant had no knowledge of prior violent actions, said actions were not foreseeable. *See Holmes,* 47 So.3d 721. Even when there is a slight indication of possible criminal activity, it is not necessarily foreseeable. *See Crain,* 641 So.2d 1186. On the contrary, when there exists actual knowledge of the issue that eventually causes harm, or an overwhelming history of similar problems, courts should not hesitate to find that the eventual harm is foreseeable. *See Hankins,* 774 So.2d 464; *American National,* 749 So.2d 1254.

In the case at bar, Plaintiff repeatedly states that there is evidence of knowledge but fails to put forth any objective facts demonstrating this. Instead, this Court, and the Circuit Court prior, are left to search for evidence that demonstrates knowledge and foreseeability. For these reasons, the province of the jury was not usurped, as there are no issues of material fact to be determined.

D. Plaintiff Failed To Produce Evidence Of Her Negligence Per Se Claim

Ms. Perlman is entitled to summary judgment as to the claims of negligence per se due to a complete failure by Plaintiff to demonstrate she violated any statute. In fact, the complaint does not even allege a specific statute that Moving Defendant violated. (R. 12-23). "The principle that

violation of a statute is negligence per se is so elementary that it does not require citation to authority." *Thomas v. McDonald,* 667 So.2d 594, 596 (Miss. 1995) (quoting *Bryant v. Alpha Entertainment Corp.,* 508 So.2d 1094, 1096 (Miss. 1987)). Without putting forth any evidence, or even alleging, that Defendant herself violated a specific statute, summary judgment as to negligence per se was proper.

Finally, Plaintiff provided no briefing as to this cause of action. "Failure to cite relevant authority obviates the appellate court's obligation to review such issues." *Waters v. Allegue,* 980 So.2d 314, 317 (Miss.Ct.App. 2008) (quoting *Taylor v. State,* 754 So.2d 598, 604 (Miss.Ct.App. 2000)). This Court, therefore, need not even consider this topic and summary judgment should be affirmed.

II. The Circuit Court Did Not Commit Reversible Procedural Error

A. Standard Of Review

Harmless error is the test to be applied to alleged procedural errors. *Adams,* 831 So.2d at 1163 (citing *Sherrod v. United States Fidelity & Guaranty Co.,* 518 So.2d 640 (Miss. 1987)). Plaintiff acknowledges that this Court often finds harmless error when a dispositive motion is granted without a hearing. *Appellant's Brief* at 10. Even assuming it was error to not initially hold a hearing in this matter, it was obviously harmless. Likewise, there was no reversible error in the Circuit Court not deeming Defendant's motion abandoned.

B. The Circuit Court Did Not Improperly Rule Without A Hearing

This case was filed July 27, 2007, Defendant's summary judgment motion was filed June 18, 2010, Plaintiff responded June 28, 2010, and summary judgment was not granted until July 9, 2010. (R. 12, 58, 106, 127). Plaintiff's primary reason for complaint stems from her own failure to timely

request and produce documents received in response to a subpoena for records from the Gulfport Police Department. *Appellant's Brief* at 9. However, Plaintiff did not even serve her subpoena to obtain these records until June 10, 2010, nearly three years after filing suit and approximately seven years after the incidents between Adkins and A.F. (R. 47). The reason these documents were not submitted in opposition originally to Defendant's motion, in addition to containing no relevant evidence, was that Plaintiff waited too long to request them.

Plaintiff further argues that the Circuit Court erred because the ruling came "during the time period in which Faul had the right to supplement her opposition to the motion with additional affidavits as provided by M.R.C.P. 56(c)." *Appellant's Brief* at 9. This makes no sense whatsoever. Plaintiff filed a response on June 28, 2010. (R. 106). The hearing on the summary judgment was to be held July 12, 2010 with trial to start July 13, 2010. (R. 132). The ruling from the Circuit Court did not come until the afternoon of Friday, July 9, 2010, eleven (11) days after Plaintiff filed her response and just three days prior to the scheduled hearing. (R. 132). This begs the obvious question: When were these affidavits set to arrive? Plaintiff had approximately three weeks from the time Ms. Perlman's summary judgment was filed with the Circuit Court to gather all of these mystery affidavits and did not do so. It certainly is implausible that they would have appeared in the final hours prior to the hearing.

The *Adams* Court, citing *Sherrod,* noted that where the complaining party "had ample time for discovery prior to the entry of summary judgment" any error will often be harmless. *Id.* At 1163-64. In this matter, Plaintiff had nearly three years to conduct discovery from the filing of the civil suit. The error is also harmless if there are no "unresolved issues of material fact." *Croke v. Southgate Sewer District,* 857 So.2d 774, 778 (Miss. 2003) (citing *Adams,* 831 So.2d at 1163-64).

"A fact is 'material' if it tends to resolve any of the issues properly raised by the parties and matters in an outcome determinative sense." *Adams,* 831 So.2d at 1162. In this matter, there were no "material facts" that were to come before the Circuit Court at oral argument, or even at trial, that necessitated a hearing. The record was very well developed and the Circuit Court had access to deposition testimony of the two primary witnesses who would be brought forth to testify, A.F. and Ms. Perlman. (R. 66-99).

The *Adams* Court looked to the Fifth Circuit and noted that "the court has the power to order summary judgment without a hearing if it feels that sufficient information is available in the pleadings and the papers in support of and opposition to the motion so that **a hearing would be of no utility.**" 831 So.2d at 1165 (emphasis in original). In this matter the Circuit Court clearly had sufficient information at its disposal. There were no issues of material fact and, therefore, any error was harmless.

Of course, one reason there was not error was that the hearing was eventually afforded to Plaintiff upon her motion to reconsider. (Pl. R.E. at 60-84). This gave Plaintiff the opportunity to produce not only the mystery affidavits, but also any evidence she deemed incriminating against Ms. Perlman from the Gulfport Police Department file. Unfortunately for her, all she attached to that motion was the undated note of Ms. Perlman to Adkins and the list of evidence against Adkins in his criminal case. (R. 132-138). The note has already been addressed, *supra,* as to why it is irrelevant and does nothing to demonstrate knowledge or foreseeability. The evidence list does even less. Finally, the Circuit Court allowed Plaintiff to make a thorough argument as to why summary judgment should be denied and issued a second opinion that clearly shows it considered the oral argument and new evidence, but still found there to be no issue for trial. (R. 142-145).

Plaintiff argues, that "[i]f allowed an opportunity to supplement, even more incriminating evidence showing Pearlman [sic] knew of Adkins' propensity to commit criminal sexual acts would have been included in Faul's opposition to the motion for summary judgment." *Appellant's Brief* at 12. Plaintiff **was** allowed to supplement due to the hearing on the motion to reconsider, and in fact produced no "incriminating evidence." She had several years to find this evidence and no action by the Circuit Court kept her from discovering it and using it in opposition to summary judgment, if it indeed existed. In fact, given that this "incriminating evidence" had not been disclosed to Defendant just four (4) days prior to trial when the Circuit Court ruled on summary judgment, Defendant submits it would have been improper for any new evidence to be considered at all.

Plaintiff had every opportunity to produced the as yet unseen affidavits and failed, including in her motion to reconsider served July 22, 2010. (Pl. R.E. 12-15). While claiming that the Circuit Court did not have all of the evidence at its disposal prior to reviewing the motion for summary judgment makes for a good argument, facts to support the assertion would make an even better one. If Plaintiff truly had affidavits in her hip pocket and waited until the weekend before the summary judgment hearing and trial to produce them, then she was playing games with discovery that clearly violate the Rules of Civil Procedure. However, Defendant knows this is not the case, and in reality there were no such affidavits. Plaintiff is just desperate in her arguments as to how the Circuit Court erred when there is no error to be found.

It is clear that any error by the Circuit Court in initially ruling without a hearing was harmless, as ample time for discovery had passed, the record was well developed, and there remained no issues of material fact to resolve. Further, Plaintiff was afforded oral argument after filing a

motion for reconsideration and was able to present all arguments and evidence she deemed necessary.

C. The Circuit Court Was Correct In Not Deeming Defendant's Motion Abandoned

Plaintiff contends that Ms. Pearlman violated Uniform Rule of Circuit and County Court Practice 4.03 by failing to have the motion for summary judgment heard more than ten (10) days prior to trial. However, this calls for an overly strict interpretation of the rule and ignores the facts that made a hearing outside ten days impossible.

It is baffling that Plaintiff can say out of one side of her mouth that she had not produced "incriminating evidence" in the form of affidavits just three days prior to the summary judgment hearing, and out of the other say that Ms. Perlman's summary judgment should not have been considered because it was late. The facts are clear that Plaintiff was still conducting discovery right up until the trial, in fact serving the subpoena on the Gulfport Police Department that has caused such consternation on June 11, 2010, just one month prior to trial. (Pl. R.E. at 13). Further, Plaintiff made three different productions of documents and discovery responses in June 2010. The last of these was June 24, 2010, just nineteen (19) days before trial. (R. 510-542). If any party was late, it was Plaintiff.

Defendant served her motion for summary judgment on June 15, 2010, twenty-eight days prior to trial. (R. 65). As noted by the Circuit Court in its opinion denying the motion to reconsider, it was the Court's schedule that did not accommodate a hearing outside of the ten (10) days prior to trial, and not the fault of Defendant or her counsel. (Pl. R.E. at 21). What is important for this Court to consider is whether Ms. Perlman, as the movant, exhibited the intent to pursue her motion, not the technicalities of Uniform Rule 4.03. *See Nance v. State,* 766 So.2d 111, 114 (Miss.Ct.App.

2000). Also of great importance was the finding of the Circuit Court that the failure to have the motion heard greater than ten (10) days before trial was not the result of an "unreasonable delay in filing the motion for summary judgment." (Pl. R.E. at 22). The intent to pursue the motion by Perlman was present and there was no unreasonable delay.

Because this is a procedural issue decided under a harmless error standard, this Court should find that the Circuit Court did not err. To hold the motion abandoned would be a penalty to Ms. Perlman through no fault or error of her own. This was not a case where discovery had been completed many months prior and a trial that had been set for many months and Defendant waited until the last minute to file summary judgment. In addition to Plaintiff still producing new discovery, even past the date Ms. Perlman filed for summary judgment, the trial itself was not even requested until April 30, 2010. (Pl. R.E. at 21). Ms. Perlman was not guilty of delay in bringing this summary judgment before the Circuit Court. The ruling of the Circuit Court should not be disturbed on these grounds.

CONCLUSION

The Circuit Court committed no reversible error. Plaintiff bears the burden of putting forth "significant probative evidence" that Ms. Perlman had actual or constructive knowledge regarding Adkins' criminal acts on A.F., or his propensity to commit such acts. She instead relies on innuendo and presumptions as to what evidence would show if it had been presented. Adkins had nothing in his past suggestive of this behavior and Ms. Perlman had known him a long time without any sense he was capable of these acts. There is no evidence supportive of causation, and therefore negligent entrustment and negligence per se causes of action cannot be sustained.

Plaintiff was afforded a hearing on her motion to reconsider the grant of summary judgment.

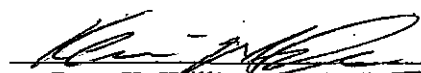
This hearing occurred over two (2) months after the original trial date and Plaintiff still could not put forth the evidence she was supposedly deprived of presenting due to the Circuit Court originally ruling without a hearing. Further, there were no material facts at issue such that a hearing was required in order for the Circuit Court to rule.

Finally, the Circuit Court was correct in holding that Ms. Perlman did not abandon her motion for summary judgment. Plaintiff was still producing documents the month before trial and the timing of the scheduled hearing was based on the availability of the court, and not caused by Defendant.

The Circuit Court did not commit reversible error and this Court should affirm the grant of summary judgment in favor of Esther Perlman.

Respectfully,

ESTHER PERLMAN

By: 

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the undersigned has this day caused to be mailed, postage prepaid and firmly affixed thereto, a true and correct copy of the foregoing brief of the Defendant / Appellee to the following:

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Honorable Roger T. Clark
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Trial Court Judge

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SO CERTIFIED, this the 28th day of July, 2011, in Pascagoula, Jackson County, Mississippi.

Respectfully Submitted,

ESTHER PERLMAN

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ADDENDUM

West's Annotated Mississippi Code

Mississippi Rules of Court State

Mississippi Rules of Civil Procedure

Chapter VII. Judgment

M.R.C.P. Rule 56

Rule 56. Summary Judgment

Currentness

(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.

Editors' Notes

COMMENT

The purpose of Rule 56 is to expedite the determination of actions on their merits and eliminate unmeritorious claims or defenses without the necessity of a full trial.

Rule 56 permits any party to a civil action to move for a summary judgment on a claim, counterclaim, or cross-claim when he believes that there is no genuine issue of material fact and that he is entitled to prevail as a matter of law. The motion may be directed toward all or part of a claim or defense and it may be made on the basis of the pleadings or other portions of the record, or it may be supported by affidavits and other outside material. Thus, the motion for a summary judgment challenges the very existence or legal sufficiency of the claim or defense to which it is addressed; in effect, the moving party takes the position that he is entitled to prevail as a matter of law because his opponent has no valid claim for relief or defense to the action, as the case may be.

Rule 56 provides the means by which a party may pierce the allegations in the pleadings and obtain relief by introducing outside evidence showing that there are no fact issues that need to be tried. The rule should operate to prevent the system of extremely simple pleadings from shielding claimants without real claims or defendants without real defenses; in addition to providing an effective means of summary action in clear cases, it serves as an instrument of discovery in calling forth quickly the disclosure on the merits of either a claim or defense on pain of loss of the case for failure to do so. In this connection the rule may be utilized to separate formal from substantial issues, eliminate improper assertions, determine what, if any, issues of fact are present for the jury to determine, and make it possible for the court to render a judgment on the law when no disputed facts are found to exist.

A motion for summary judgment lies only when there is no genuine issue of material fact; summary judgment is not a substitute for the trial of disputed fact issues. Accordingly, the court cannot try issues of fact on a Rule 56 motion; it may only determine whether there are issues to be tried. Given this function, the court examines the affidavits or other evidence introduced on a Rule 56 motion simply to determine whether a triable issue exists, rather than for the purpose of resolving that issue. Similarly, although the summary judgment procedure is well adapted to expose sham claims and defenses, it cannot be used to deprive a litigant of a full trial of genuine fact issues.

Rule 56 is not a dilatory or technical procedure; it affects the substantive rights of litigants. A summary judgment motion goes to the merits of the case and, because it does not simply raise a matter in abatement, a granted motion operates to merge or bar the cause of action for purposes of res judicata. A litigant cannot amend as a matter of right under Rule 15(a) after a summary judgment has been rendered against him.

It is important to distinguish the motion for summary judgment under Rule 56 from the motion to dismiss under Rule 12(b), the motion for a judgment on the pleadings under Rule 12(c), or motion for a directed verdict permitted by Rule 50.

A motion under Rule 12(b) usually raises a matter of abatement and a dismissal for any of the reasons listed in that rule will not prevent the claim from being reasserted once the defect is remedied. Thus a motion to dismiss for lack of subject matter

or personal jurisdiction, improper venue, insufficiency of process or service of process, or failure to join a party under Rule 19, only contemplates dismissal of that proceeding and is not a judgment on the merits for either party. Similarly, although a motion to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief can be granted is addressed to the claim itself, the movant merely is asserting that the pleading to which the motion is directed does not sufficiently state a claim for relief; unless the motion is converted into one for summary judgment as permitted by the last sentence of Rule 12(b), it does not challenge the actual existence of a meritorious claim.

A motion for judgment on the pleadings, Rule 12(c), is an assertion that the moving party is entitled to a judgment on the face of all the pleadings; consideration of the motion only entails an examination of the sufficiency of the pleadings.

In contrast, a summary judgment motion is based on the pleadings and any affidavits, depositions, and other forms of evidence relative to the merits of the challenged claim or defense that are available at the time the motion is made. The movant under Rule 56 is asserting that on the basis of the record as it then exists, there is no genuine issue as to any material fact and that he is entitled to a judgment on the merits as a matter of law. The directed verdict motion, which rests on the same theory as a Rule 56 motion, is made either after plaintiff has presented his evidence at trial or after both parties have completed their evidence; it claims that there is no question of fact worthy of being sent to the jury and that the moving party is entitled, as a matter of law, to have a judgment on the merits entered in his favor.

A Rule 12(c) motion can be made only after the pleadings are closed, whereas a Rule 56 motion always may be made by defendant before answering and under certain circumstances may be made by plaintiff before the responsive pleading is interposed. Second, a motion for judgment on the pleadings is restricted to the content of the pleading, so that simply by denying one or more of the factual allegations in the complaint or interposing an affirmative defense, defendant may prevent a judgment from being entered under Rule 12(c), since a genuine issue will appear to exist and the case cannot be resolved as a matter of law on the pleadings.

Subsections (g) and (h) are intended to deter abuses of the summary judgment practice. Thus, the trial court may impose sanctions for improper use of summary judgment and shall, in all cases, award expenses to the party who successfully defends against a motion for summary judgment.

For detailed discussions of Federal Rule 56, after which MRCP 56 is patterned, see 10 Wright & Miller, Federal Practice and Procedure, Civil §§ 2711-2742 (1973); 6 Moore's Federal Practice ¶¶ 56.01-.26 (1970); C. Wright, Federal Courts § 99 (3d ed. 1976); see also Comment, Procedural Reform in Mississippi: A Current Analysis, 47 Miss.L.J. 33, 63 (1976).

Notes of Decisions (477)

Current with amendments received through 6/8/2011

End of Document

West's Annotated Mississippi Code

Mississippi Rules of Court State

Uniform Rules of Circuit and County Court Practice

URCCC Rule 4.03

Rule 4.03. Motion Practice

Currentness

The provisions of this rule shall apply to all written motions in civil actions.

1. The original of each motion, and all affidavits and other supporting evidentiary documents shall be filed with the clerk in the county where the action is docketed. The moving party at the same time shall mail a copy thereof to the judge presiding in the action at the judge's mailing address. A proposed order shall accompany the court's copy of any motion which may be heard ex parte or is to be granted by consent. Responses and supporting evidentiary documents shall be filed in the same manner.

2. In circuit court a memorandum of authorities in support of any motion to dismiss or for summary judgment shall be mailed to the judge presiding over the action at the time that the motion is filed. Respondent shall reply within ten (10) days after service of movant's memorandum. A rebuttal memorandum may be submitted within five (5) days of service of the reply memorandum. Movants for summary judgment shall file with the clerk as a part of the motion an itemization of the facts relied upon and not genuinely disputed and the respondent shall indicate either agreement or specific reasons for disagreement that such facts are undisputed and material. Copies of motions to dismiss or for summary judgment sent to the judge shall also be accompanied by copies of the complaint and, if filed, the answer.

3. Accompanying memoranda or briefs in support of other motions are encouraged but not required. Where movant has served a memorandum or brief, respondent may serve a reply within ten (10) days after service of movant's memorandum or brief. A rebuttal memorandum or brief may be served within five (5) days of service of the reply memorandum.

4. No memorandum or brief required or permitted by this rule shall be filed with the clerk. Memoranda or briefs shall not exceed 25 pages in length. If any memorandum, brief or other paper submitted in support of a legal argument in any case cites or relies upon any authority other than a Mississippi or federal statute, Mississippi or federal Rule of Court, United States Supreme Court case, or a case reported in the Southern or Federal Reporter series, a copy of such authority must accompany the brief or other paper citing it.

5. All dispositive motions shall be deemed abandoned unless heard at least ten days prior to trial.

Credits
[Adopted effective May 1, 1995; amended May 23, 2002.]

Notes of Decisions (7)

Current with amendments received through 6/8/2011

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