IN THE SUPREME COURT OF MISSISSIPPI

NO. 2010-TS-01829

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

VERSUS

JOHNNY LEE ADKINS AND ESTHER PEARLMAN (FORMERLY ESTHER ADKINS) — APPELLEES

ON APPEAL FROM THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT
CAUSE NO. A2401-07-263

APPELLANT'S REPLY BRIEF

(ORAL ARGUMENT REQUESTED)

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STATEMENT REGARDING ORAL ARGUMENT

In accordance with Rule 34 of the Mississippi Rules of Appellate Procedure, Zenobia Faul, as Guardian and Next Friend of the Minor Child A.F. ["Appellant"], requests that an oral argument be permitted in this case. It has been found by this court to be error when the trial court does not have a hearing on a Motion for Summary Judgment if there are material facts at issue. See *Partin v. North Mississippi Medical Center, Inc.*, 929 So.2d 924 (Miss. Ct. App. 2005) (citing *Croke v. Southgate Sewer Dist.*, 857 So.2d 774, 778 (¶¶ 10, 12) (Miss. 2003) and *Adams v. Cinemark USA, Inc.*, 831 So.2d 1156, 1163 (¶ 26) (Miss. 2002).) Appellant contends that there are material facts at issue. This court would benefit from hearing arguments of counsel as to the material facts at issue.

SUMMARY OF THE ARGUMENT

Appellee Esther Perlman's motion for summary judgment should not have been granted because there were genuine issues of material fact as to whether she had actual or constructive knowledge of her husband Johnny Lee Adkins' acts or propensities to commit criminal sexual acts on minor children. These issues of material fact should have been decided by a jury, and it was reversible error for the Circuit Court to grant Perlman's motion without a hearing.

The Circuit Court usurped the province of the jury by deciding issues of fact. With regard to negligence and reasonable foreseeability, those issues are generally for a jury, not the court, to decide.

The Circuit Court also erred in granting Pearlman's Motion for Summary Judgment without the opportunity for Faul to present further exhibits obtained by subpoena from the Gulfport Police Department prior to the scheduled hearing as provided for in M.R.C.P. 56(c). The Circuit Court also erred in not deeming Perlman's Motion for Summary Judgment abandoned because it was not heard ten days before trial. The rule is clear and uses mandatory language. Since there were material issues of fact to be decided, it was not harmless error, but reversible error.

ARGUMENT

I. The Circuit Court erred in granting Defendant Esther Perlman's Motion for Summary Judgment and dismissing Perlman as a defendant.

The Circuit Court erred in granting Perlman's motion for summary judgment because Faul showed there were genuine issues of material fact as to whether Pearlman had actual or constructive knowledge of Adkins' acts or propensities to commit criminal sexual acts on minor children.

Perlman argues Faul did not show Perlman's negligent supervision of A.F. was the cause in fact of her injuries. (Appellee's Brief 9.) Perlman further argues A.F. never claimed Perlman harmed A.F., the police report does not implicate Perlman, and Perlman was never indicted of any crime. (Appellee's Brief 9.) However, a cause of action for negligent supervision does not require Perlman to actively participate in sexually molesting A.F. Faul must prove only that but for Perlman's negligent supervision of A.F. in Perlman's own home while A.F. was under Perlman's care, the sexual molestation would not have occurred. As will be shown below, Perlman had actual or constructive knowledge of Adkins' molestation of A.F. and did nothing to stop it. Perlman was thereby negligent in her supervision of A.F.

Perlman further argues even if there was actual causation, there is no legal causation because A.F.'s injuries were not reasonably foreseeable. (Appellee's Brief 9-10.) In Mississippi, a victim's injuries on a premise were reasonably foreseeable if the defendant had "actual or constructive knowledge of the assailant's violent nature." *Holmes v. Campbell Properties, Inc.*, 47 So.3d 721, 725 (Miss. Ct. App. 2010) (quoting *Newell v. S. Jitney Jungle Co.*, 830 So.2d 621, 623 (Miss. 2002)).

Perlman makes much of the fact that Faul did not discuss *Holmes* in her brief. (Appellee's Brief 10-11.) Faul did not discuss *Holmes* in her brief for two reasons. The first is the appellate court's review is "*de novo*, without deference to the trial court." *Palmer v. Biloxi Regional Medical Center, Inc.*, 649 So.2d 179, 181 (Miss. 1994) (citing *W.B. Crain v. Cleveland Lodge 1532, Order of Moose, Inc.*, 641 So.2d 1186 (Miss. 1994). Second is because *Holmes* is factually distinguishable from the case at hand. *Holmes* is about a car wash employee physically assaulting a customer on the business premises, which assault caused the victim's death. The instant case is about the sexual molestation of A.F. while in her babysitter's care.

The main evidence of Perlman's actual or constructive knowledge regarding Adkins' acts or propensities comes from Perlman's own deposition. Pearlman testified:

> Q: So you did watch her [A.F.] 100 percent of the time that she was at your home?
>
> A: Yes. I may not have been in the same room 100 percent of the time, but *I knew where she [A.F.] was and what she was doing.*

(Emphasis added.) (Pearlman Dep. 43:24 – 44:3); (R. at 179); (R.E. at 36).

Contrary to Perlman's admission under oath, which is never directly addressed in Perlman's brief and stands unrebutted, Perlman's counsel claims Perlman only "knew generally what A.F. was doing while in her home." (Appellee's Brief 14.) Perlman testifying she knew 100 percent of the time where A.F. was and what she was doing (Pearlman Dep. 43:24 – 44:3); (R. at 179); (R.E. at 36) was neither vague nor ambiguous, and it was certainly not "illogical and weak" (Appellee's Brief 14) to take Perlman's testimony at face value and conclude she admitted to having actual, if not merely constructive, knowledge of the events that took place in her own home.

During the time Perlman knew where A.F. was and what she was doing, Adkins sexually molested A.F. and took pornographic pictures of her. It is not the mere fact the pictures exist or the molestation happened that is the basis for Perlman's actual or constructive knowledge, as Perlman's counsel disingenuously claims (Appellee's Brief 10-11), it is the fact these events occurred *while Perlman admittedly knew where A.F. was and what she was doing, 100 percent of the time* (Pearlman Dep. 43:24 – 44:3); (R. at 179); (R.E. at 36).

This admission raises a question of material fact as to whether or not Perlman knew or should have known about Adkins' acts or propensities and certainly does not constitute "absolutely no evidence that Ms. Perlman had actual or constructive knowledge." (Appellee's Brief 13.) Perlman's admission that she always knew where A.F. was and what she was doing is the proof of Perlman's knowledge.

Perlman cited *Summers v. St. Andrew's Episcopal School, Inc.*, for the proposition that there is liability only when the defendant school failed to protect the plaintiff student from a known and foreseeable source of harm. 759 So.2d 1203 (Miss. 2000). However, the Court in that case found the adequacy of the school's supervision was an issue for the jury. In this case as well, the adequacy of Perlman's supervision should be an issue for the jury to decide.

Perlman then cites the *Hogue* case and states Adkins had no prior history of criminal activity. *American National Insurance Company v. Hogue*, 749 So.2d 1254 (Miss. Ct. App. 2000). *Hogue* is factually different from the instant case because it is about a physical assault at a shopping mall where there were approximately 150 calls from the mall to the police department over two years. *Id.* at 1259. Although Adkins had no prior criminal record, there is a material question of fact as to whether Perlman had actual or constructive

knowledge of Adkins' acts or propensities because she testified she knew where A.F. was and what A.F. was doing 100 percent of the time. (Pearlman Dep. 43:24 - 44:3); (R. at 179); (R.E. at 36).

Perlman then claims Faul's reliance on *Hankins* is flawed. *Hankins Lumber Co. v. Moore*, 774 So.2d 459 (Miss. Ct. App. 2000). However, *Hankins* is pertinent because it was cited for the legal premise that the issue of reasonable foreseeability is "to be decided by the finder of fact once sufficient evidence is presented in a negligence case." *Id.* at 464 (citing *American Nat. Ins. Co. v. Hogue*, 749 So.2d 1254, 1259 (Miss. Ct. App. 2000)).

Perlman then cites *Crain*, in which an unknown assailant assaulted a patron at a bar, and the court did not find the assault reasonably foreseeable. *Crain v. Cleveland Lodge 1532, Order of Moose, Inc.*, 641 So.2d 1186 (Miss. Ct. App. 2010). In that case, there had been two prior reports of robbery at the bar (*Id.* at 1192), and 111 reports of violent crimes within a two-block radius during the previous five years (*Id.* at 1187). First, Adkins, being Perlman's husband, was hardly an unknown assailant. Second, the molestation occurred at Perlman's home, not at a business where virtual strangers go in and out all day. Third, Perlman's counsel seems to be insinuating that like the two prior robberies in *Crain*, two instances of sexual molestation are not enough to give rise to reasonable foreseeability. It is not clear whether counsel believes there should be more than 111 instances of sexual molestation before Faul can claim her injuries were reasonably foreseeable. Regardless, there exist questions of material fact as to whether Perlman knew or should have known about Adkins' acts or propensities. Such knowledge would fulfill the requirement of reasonable foreseeability.

Finally, Perlman cited *Papadimas*, referenced in the *Crain* case, which was also about an unknown assailant. *Papadimas v. Mykonos Lounge*, 176 Mich. App. 40, 439 S.W.2d 280,

283 (1989). Faul agrees that criminal activity from an unknown assailant "is normally unforeseeable." *Id.* Such is not the case here, as the criminal activity occurred in Perlman's own home where Perlman admitted knew where A.F. was and what she was doing 100 percent of the time. (Pearlman Dep. 43:24 - 44:3); (R. at 179); (R.E. at 36). Additionally, Perlman's husband, Adkins, was certainly not unknown to her.

As for the note, when Perlman says Adkins looks at "girls" and she cannot trust him, it raises a question of material fact as to whether Perlman knew or should have known about Adkins' acts or propensities to commit criminal sexual acts on minor children, specifically, on minor girls. (R. at 136); (R.E. at 16) This goes beyond the mere "immoral behavior" Perlman's counsel claims. (Appellee's Brief 13.)

Taking all the above into account, there exist genuine issues of material fact as to whether Perlman knew or should have known about Adkins' acts or propensities to commit criminal sexual acts on minor children. The issue should be decided by a jury.

II. The Circuit Court committed reversible error in granting Defendant Esther Pearlman's Motion for Summary Judgment unilaterally without a hearing or opportunity for counsel to present further exhibits obtained by subpoena from the Gulfport Police Department prior to the scheduled hearing.

A. *The Circuit Court committed reversible error in granting Pearlman's Motion for Summary Judgment.*

Perlman argues Faul did not timely request or produce documents subpoenaed from Gulfport Police Department. (Appellee's Brief 16-17.) Faul was not untimely. She issued the subpoena duces tecum on Gulfport Police Department a week before Perlman filed her motion for summary judgment. (R. at 7, 53-57, 58-65); (R.E. at 6)(Addendum: Subpoena Duces Tecum). Gulfport Police Department was delinquent in answering the subpoena because it filed a motion to quash the subpoena on June 30, 2010. (R. at 6); (R.E. at 5). Once Gulfport Police Department learned Faul was the one making the request for the

benefit of A.F., it agreed to respond to the subpoena and did not pursue its motion to quash. When Gulfport Police Department's response to the subpoena came in on or about July 1, 2010, it was reviewed, Bates stamped, and made ready to be submitted before the hearing on the motion for summary judgment. (R. at 133); (R.E. at 13). Unfortunately, the Circuit Court granted Perlman's motion for summary judgment before Faul could supplement her response to the motion for summary judgment with this new evidence. (R. at 127-28); (R.E. at 9-10).

Perlman attempts to make an issue of Faul conducting further discovery in June 2010. (Appellee's Brief 20.) If Perlman took issue with Faul conducting discovery at that time, she was able to file a motion to strike Faul's production of documents, discovery responses, or subpoena duces tecum, but she did not.

Perlman then claims the Circuit Court committed harmless error in granting her motion for summary judgment without a hearing because there were "no unresolved issues of material fact." (Appellee's Brief 17); *Croke*, 857 So.2d at 778 (citing *Adams*, 831 So.2d at 1163-64). As detailed in Section I, above, there are genuine issues of material fact as to whether Perlman had actual or constructive knowledge of Adkins' acts or propensities to commit criminal sexual acts upon minor children. The existence of these genuine issues of material fact makes the Circuit Court's error reversible, not harmless. *Croke*, 857 So.2d at 778 (citing *Adams*, 831 So.2d at 1163-64).

Perlman argues further there was no reversible error because Faul was afforded a hearing on her motion for reconsideration, but cites no case law to back up this assertion. (Appellee's Brief 18.) Perlman also claims the note found by Gulfport Police Department during their search of her home and attached as an exhibit to Faul's motion for reconsideration "is irrelevant and does nothing to demonstrate knowledge or

foreseeability." (Appellee's Brief 18.) The significance of the note and why it raises a question of material fact as to whether Perlman knew or should have known about Adkins' acts or propensities are discussed in Section I, above.

Since genuine issues of material fact exist as to Perlman's knowledge, and since the Circuit Court granted her motion for summary judgment without a hearing, the Circuit Court committed reversible error, and this case should be tried before a jury.

B. ***The Circuit Court erred in granting Pearlman's Motion for Summary Judgment because it should have been deemed abandoned since it was not heard ten days prior to trial.***

Perlman argues deeming her motion for summary judgment abandoned because it was not heard ten days before the trial is an "overly strict interpretation" of Uniform Circuit and County Court Rule 4.03(5). (Appellee's Brief 20.) Rule 4.03(5) states: "All dispositive motions *shall* be deemed abandoned unless heard at least ten days prior to trial." (Emphasis added.) The Circuit Court was required by the non-discretionary "shall" language in U.C.C.C.R. 4.03(5) to deem the motion for summary judgment abandoned. This is not an "overly strict" interpretation of the rule because the rules mandatory language leaves no room for interpretation.

Nance v. State, cited by Perlman to support her argument, can be distinguished on the facts because the movant in that case did nothing to set a hearing, so the court deemed his motion abandoned and the court did not rule on it. 766 So.2d 111, 114 (Miss. Ct. App. 2000). In this case, a hearing was set less than ten days prior to trial, and the Circuit Court did rule on the motion when it should have deemed the motion abandoned. The fact pattern in *Nance* is almost the direct opposite of the facts here.

The Circuit Court was required by the language of Rule 4.03(5) to deem the motion for summary judgment abandoned and did not do so. Therefore, the Circuit Court erred in granting Perlman's motion for summary judgment.

III. The Circuit Court usurped the province of the jury by deciding issues of fact.

The Circuit Court erred by deciding issues of fact that are the province of the jury. As explained in Section I, above, genuine issues of material fact existed, and Perlman's motion for summary judgment should not have been granted.

Contrary to Perlman's claims, there is evidence, detailed in Section I, above, that Perlman had actual or constructive knowledge of Adkins' acts or propensities to commit criminal sexual acts on minor children. The evidence shows more than "a slight indication of possible criminal activity." (Appellee's Brief 15.)

For these reasons, Perlman's motion for summary judgment should have been denied, and the case at hand should have been allowed to proceed to trial so that a jury could decide the issues of negligent supervision and actual or constructive knowledge.

CONCLUSION

The trial court erred in granting Pearlman's Motion for Summary Judgment and finding that no genuine issues of material fact existed; in deciding the Motion for Summary Judgment without a hearing; in not deeming the Motion for Summary Judgment abandoned since it was not heard ten days before trial and in not giving Faul the opportunity to supplement her opposition with additional affidavits; in dismissing Pearlman from the lawsuit; and in deciding issues of fact, thereby usurping the province of the jury.

For the reasons stated herein, Appellant Zenobia Faul, as Guardian and Next Friend of the Minor Child A.F., respectfully requests this Court to reverse the decision of the Circuit Court and remand the case for trial.

Respectfully submitted, this the 29 day of August, 2011.

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

BY: Russell S. Gill

RUSSELL S. GILL

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CERTIFICATE OF SERVICE

Pursuant to M.R.A.P. 31(c), I hereby certify that I have delivered, via overnight mail, the original and three (3) true and correct copies of the above and foregoing Appellant's Reply Brief to Betty W. Sephton, Clerk, Mississippi Supreme Court, Gartin Justice Building, 450 High Street, Jackson, Mississippi 39201.

I further certify that I have this date delivered, via overnight mail, a true and correct copy of the above and foregoing Appellant's Reply Brief to the following:

Brett Williams, Esq.
734 Delmas Ave.
Pascagoula, MS 39567
Attorney for Esther Pearlman

James F. Thompson, Esq.
1904 22nd Ave.
Gulfport, MS 39501
Attorney for Johnny Lee Adkins

Honorable Roger T. Clark
Harrison County Circuit Court
P.O. Box 1461
Gulfport, MS 39502
Trial Court Judge

I further certify that, pursuant to M.R.A.P. Rule 28(m), I have also mailed an electronic copy of the above and foregoing on an electronic disk and state that this brief was written in Microsoft Word format.

SO CERTIFIED, this the 29 day of August, 2011.

RUSSELL S. GILL

Russell S. Gill, MSB No. [redacted]
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ADDENDUM

Return COPY

IN THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

FILED
JUN 17 2010
GAYLE PARKER
CIRCUIT CLERK
BY DC

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

VERSUS — CAUSE NO. A-2401-07-263

JOHNNY LEE ADKINS AND ESTHER ADKINS, JOINTLY AND SEVERALLY — DEFENDANTS

SUBPOENA DUCES TECUM

STATE OF MISSISSIPPI
COUNTY OF HARRISON

TO: GULFPORT POLICE DEPARTMENT
GULFPORT, MISS.

YOU ARE HEREBY SUMMONED TO PRODUCE THE FOLLOWING:

A complete copy of the contents of Investigator Rosario Ing's file and the Department's Investigative File also on Case No. 04-035680 concerning (AF Minor child) and Johnny Lee Adkins. (See copy of Multi-Count Indictment attached)

On or before June 29, 2010, at the office of Russell S. Gill, P.L.L.C., 638 Howard Avenue, Biloxi, MS 39530 (Tel: 228-432-0007).

These documents are to be produced as directed above.

WITNESS MY HAND AND SEAL OF SAID OFFICE, this the 11th day of June, 2010.

Gayle Parker, Clerk
By: Elizabeth Parker
Deputy Clerk
P.O.Box 998
Gulfport, MS 39502

ISSUED AT THE REQUEST OF:

Russell S. Gill, MSB#4840
Russell S. Gill, PLLC
638 Howard Avenue
Biloxi, MS 39530
Tel: 228-432-0007
Fax: 228-432-0025

RETURN

I, Alan Roberts a process server over 18 years of age and not a party to this action, served this Subpoena Duces Tecum on Belinda Head (Gulfport PD) on the 15 day of June, 2010, by personally giving the Subpoena Duces Tecum to the person to whom it was issued.

Alan VA
Process Server

PO Box 6603
Address
Diamondhead, MS 39525

Telephone: 228-868-1150

MULTI-COUNT INDICTMENT

THE STATE OF MISSISSIPPI, CIRCUIT COURT MARCH TERM, A.D., 2005

FIRST JUDICIAL DISTRICT, HARRISON COUNTY No. B2401-2005-562

THE GRAND JURORS of the State of Mississippi, taken from the body of the good and lawful citizens of the First Judicial District of Harrison County, duly elected, empaneled, sworn and charged to inquire in and for the said State, County and District, at the Term of Court aforesaid, in the name and by the authority of the State of Mississippi, upon their oaths present:

SEXUAL BATTERY
Section 97-3-95(1)(d), Miss. Code of 1972, as amended

COUNT I

That: JOHNNY LEE ADKINS

in the First Judicial District of Harrison County, Mississippi, on or between June, 2003, and June, 2004,

being at the time in question twenty-four (24) or more months older than A. F., did wilfully, purposely, unlawfully and feloniously commit Sexual Battery upon A. F., a child who was at the time in question under fourteen (14) years of age, by engaging in the act of sexual penetration, to-wit: by inserting his finger into the vagina of the said A. F.,

contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Mississippi.

TOUCHING OF A CHILD FOR LUSTFUL PURPOSES – THREE COUNTS
Section 97-5-23(1), Miss. Code of 1972, as amended

COUNT II

As part of the same common scheme or plan That:

JOHNNY LEE ADKINS

in the First Judicial District of Harrison County, Mississippi, on or between June, 2003, and June, 2004,

being at the time in question over the age of eighteen (18) years, for the purpose of gratifying his lust or indulging his depraved licentious sexual desires, did unlawfully, wilfully and feloniously handle, touch or rub with his hands, the vagina of A. F., a child who was at the time in question under the age of sixteen (16) years,

contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Mississippi.

MULTI-COUNT INDICTMENT

THE STATE OF MISSISSIPPI, CIRCUIT COURT MARCH TERM, A.D., 2005

FIRST JUDICIAL DISTRICT, HARRISON COUNTY No. B2401-2005-562

COUNT III

As part of the same common scheme or plan That:

JOHNNY LEE ADKINS

in the First Judicial District of Harrison County, Mississippi, on or between June, 2003, and June, 2004,

being at the time in question over the age of eighteen (18) years, for the purpose of gratifying his lust or indulging his depraved licentious sexual desires, did unlawfully, wilfully and feloniously handle, touch or rub with his hands, the breasts of A. F., a child who was at the time in question under the age of sixteen (16) years,

contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Mississippi.

COUNT IV

As part of the same common scheme or plan That:

JOHNNY LEE ADKINS

in the First Judicial District of Harrison County, Mississippi, on or between June, 2003, and June, 2004,

being at the time in question over the age of eighteen (18) years, for the purpose of gratifying his lust or indulging his depraved licentious sexual desires, did unlawfully, wilfully and feloniously handle, touch or rub with his penis, the hand of A. F., a child who was at the time in question under the age of sixteen (16) years,

contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Mississippi.

A TRUE BILL

DISTRICT ATTORNEY

FOREMAN OF THE GRAND JURY

MULTI-COUNT INDICTMENT

THE STATE OF MISSISSIPPI, CIRCUIT COURT MARCH TERM, A.D., 2005

FIRST JUDICIAL DISTRICT, HARRISON COUNTY No. B2401-2005-562

WITNESSES:
Lt. Chayo Ing, Gulfport Police Department, Gulfport, MS
A. F.

AFFIDAVIT

Comes now Alfred Bauer, Foreman of the aforesaid Grand Jury, and makes oath that this indictment presented to this Court was concurred in by twelve (12) or more members of the Grand Jury and that at least fifteen (15) members of the Grand Jury were present during all deliberations.

Alfred Bauer
FOREMAN OF THE GRAND JURY

Sworn to and subscribed before me this the 8th day of August, 2005.

GAYLE PARKER, CIRCUIT CLERK

By Cathy Reynolds, D.C.

FILED
AUG 08 2005
GAYLE PARKER
CIRCUIT CLERK
By Cathy Reynolds D.C.