

IN THE COURT OF APPEALS 5/21/96

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00605 COA

IVADALE MCCLAIN, JAMES DAVID MCCLAIN AND LOUELLA PITTS

APPELLANTS

v.

**JONES COUNTY SHERIFF'S DEPARTMENT AND FORREST COUNTY SHERIFF'S
DEPARTMENT**

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. BILLY JOE LANDRUM

COURT FROM WHICH APPEALED: JONES COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANTS:

LISA B. MILNER AND SANDRA C. BRADSHAW

ATTORNEYS FOR APPELLEES:

JAMES K. DUKES, JON MARK WEATHERS, AND SANDRA MOHLER

NATURE OF THE CASE: CIVIL: WRONGFUL DEATH CLAIM AGAINST SHERIFF'S
DEPARTMENT DUE TO THE RELEASE OF A PRISONER WHO ROBBED THE VICTIM
AND CAUSED HIS IMMEDIATE DEATH

TRIAL COURT DISPOSITION: GRANTED SUMMARY JUDGMENT FOR JONES AND
FORREST COUNTY SHERIFF'S DEPARTMENT

BEFORE THOMAS, P.J., BARBER, AND DIAZ, JJ.

THOMAS, P.J., FOR THE COURT:

Adam Waters, a prisoner of the Jones County Sheriff's Department free on bond, attacked James McClain in an attempted robbery. McClain suffered an immediate heart attack and died. On June 15, 1993, Ivadale McClain, James David McClain, and Louella Pitts filed suit against the Forrest and Jones County Sheriff's Department for wrongful death. Forrest and Jones County filed summary judgment motions which the trial court granted. Feeling aggrieved, the Appellants appeal to this Court and assert the following assignment of error:

WHETHER THE JONES COUNTY SHERIFF'S DEPARTMENT AND THE FORREST COUNTY SHERIFF'S DEPARTMENT WERE ENTITLED TO A JUDGMENT OF DISMISSAL AS A MATTER OF LAW.

This Court reverses in part and affirms in part. The trial court erred as a matter of law in granting summary judgment for the Jones County Sheriffs Department, and this Court reverses and remands for proceedings consistent with this opinion. This Court affirms summary judgment for the Forrest County Sheriffs Department.

FACTS

On March 24, 1992, Adam Waters was sentenced on a felony charge in Forrest County, Mississippi, to the Mississippi Department of Corrections for a term of three years. Forrest County transferred Waters to the custody of Jones County for prosecution on a burglary charge pending in that county. No written documentation was provided Jones County as to Waters' status as a state prisoner.

Morris Walters, Chief Deputy of the Jones County Sheriff's Department sent Deputy James Jennings to Forrest County to pick up Waters and transport him to Jones County, to stand trial. It is admitted that Deputy Jennings was told that Waters was a state prisoner but did not receive or ask for a commitment order, order of conviction, order of sentence, or any other written documentation. Waters' file at the Jones County jail did not indicate that Waters was a state prisoner. Waters asked Deputy Billy Byum to find out whether bail had been set for the burglary charge. Byum reviewed the jail records and found no indication that Waters was a state prisoner nor verification from any law enforcement agency that Waters should not be released on bond. As a result, Waters posted bond and was released from jail on April 4, 1992. Thereafter, on April 8, 1992, Waters attempted to rob James McClain, who died from a heart attack as a result thereof.

The Appellants filed a complaint against the Jones and Forrest County Sheriffs' Departments. After discovery, Jones County filed a summary judgment motion which the trial court granted based on the following: (1) the doctrine of qualified immunity shields the sheriff and his deputies in performance of their discretionary duties and bars the suit in the instant case; (2) any duty owed by the sheriff and his deputies was a duty to the public rather than a duty to the individual Appellants, which bars recovery; and (3) the acts of Waters were the sole, proximate cause of the Appellants' injuries and constitutes a superseding intervening cause which bars recovery. The trial court also granted Forrest County's motion to dismiss. McClain appealed the trial court's grant of summary judgment to this Court assigning the following issue:

WHETHER THE JONES COUNTY SHERIFF'S DEPARTMENT AND THE FORREST COUNTY SHERIFF'S DEPARTMENT WERE ENTITLED TO A JUDGMENT OF DISMISAL AS A MATTER OF LAW.

McClain contends that there were genuine issues of material fact which should have precluded summary judgment for the Appellees. On the other hand, Jones County and Forrest County argue that the trial court was correct in granting summary judgment.

In determining whether a trial court properly granted summary judgment this Court employs the same rule as the Mississippi Supreme Court as explained in *Palmer v. Anderson Infirmary Benevolent Ass'n*:

In our de novo review, this Court looks to see if the moving party has demonstrated that no genuine issue of fact exists. *Daniels v. GNB, Inc.*, 629 So. 2d 595, 599 (Miss. 1993). "A motion for summary judgment should be overruled unless the trial court finds, beyond a reasonable doubt, that the plaintiff would be unable to prove any facts to support his claim." *Id.* at 599 (citing *McFadden v. State*, 580 So. 2d 1210 (Miss. 1991)). "The lower court is prohibited from trying the issue; it may only determine whether there are issues to be tried." *Id.* (citing *Brown v. Credit Center, Inc.*, 444 So. 2d 358, 362 (Miss. 1983)).

Palmer v. Anderson Infirmary Benevolent Ass'n, 656 So. 2d 790, 795 (Miss. 1995).

The evidence must be viewed in a light most favorable against whom the motion has been made. If the court finds that the moving party is entitled to judgment as a matter of law, summary judgment should be entered in his favor. Otherwise, the court should deny summary judgment. *Mantachie Natural Gas Dist. v. Mississippi Valley Gas Co.*, 594 So. 2d 1170, 1172 (Miss. 1983).

DISCUSSION

Sovereign Immunity

The doctrine of sovereign immunity has its basis in England. The doctrine stems from the idea that "the King can do no wrong." When this country was established, our founding fathers decided to adopt the English doctrine and apply it to the government. Through the years most states have abolished or abrogated the doctrine because of its unfairness to the public.

In 1982, the Mississippi Supreme Court abolished sovereign immunity in the case of *Pruett v. City of Rosedale*, 421 So. 2d 1046 (Miss. 1982). However the court did not abolish the immunity granted "to all legislative, judicial and executive bodies and those public officers who are vested with discretionary authority, which principle of immunity rests upon an entirely different basis, and is left intact by this decision." *Id.* at 1052.

In 1984, in response to the *Pruett* decision, the legislature enacted the Sovereign Immunity Act of 1984. This act provided that claims arising prior to its effective date would be covered by the law at

it existed prior to the 1982 decision in *Pruett*. Each year thereafter the legislature extended the effective date of the Act by one year, effectively side-stepping the *Pruett* decision.

On August 31, 1992, the Mississippi Supreme Court decided the case of *Presley v. Mississippi Highway Commission*, 608 So. 2d 1288 (Miss. 1992). In this case, the court held that the language limiting the effect of the *Pruett* decision was unconstitutional. Subsequently, the legislature amended the Act to remove the offending language.

The Sovereign Immunity Act allows a governmental entity and/or its employees to be sued if certain conditions are met. In this case, Jones and Forrest County claim that because they were performing a discretionary function they are not liable for any claims arising therefrom. *McQueen v. Williams*, 587 So. 2d 918, 920 (Miss. 1991). Mississippi Code, section 11-46-9, in pertinent part provides:

A governmental entity and its employees acting within the course and scope of their employment or duties shall not be liable for any claim:

. . . .

(d) Based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee thereof, whether or not the discretion be abused.

Miss. Code Ann. § 11-46-9 (Supp. 1995). However, by purchasing liability insurance a governmental entity may waive the defense of sovereign immunity to the extent of insurance coverage. *Churchill v. Pearl River Basin Dev. Dist.*, 619 So. 2d 900, 905 (Miss. 1993); *see also* Miss. Code Ann. § 11-46-16 (1972).

This Court will look at the grant of summary judgment to Forrest and Jones County Sheriffs Departments separately.

I.

First, as to Forrest County, McClain asserts that it was a jury issue as to whether the Forrest County Sheriff's Department should have provided written documentation to the Jones County Sheriff's Department indicating that Waters was a state prisoner and therefore could not be released on bond.

The undisputed facts reveal the following: (1) when James Jennings, Deputy Sheriff of Jones County, arrived at the Forrest County jail to transport Waters to the Jones County jail, Richard V. Forte, Staff Sergeant at the Forrest County Jail, informed Jennings that Waters was a state inmate; (2) the Jones County Sheriff's Department admitted in its response to the Appellants' interrogatories that Jennings was advised that Waters was a state inmate; (3) H. M. Hooks, Sheriff of Jones County, admitted that Jennings was informed that Waters was a state inmate; and finally, (4) the Appellants admitted in their response to Forrest County's motion for summary judgment that Jones County personnel had been informed that Waters was a state inmate.

Whether Forrest County should have provided Jones County with written documentation of Waters'

status is not a jury issue in view of the undisputed facts. All the parties admit that a Jones County Deputy was informed that Waters was a state inmate. The deputy's knowledge of this fact is imputed to the Jones County Sheriff's Department as a whole. Any deputy who released Waters on bond was, as a matter of law, charged with this knowledge.

This Court is cited with no statute or case which mandates that documentation of the status of a prisoner be given when a prisoner is transferred from one county to another. Under the peculiar facts of this case, considering the fact that Jones County was informed of Waters' status as a state prisoner, the Forrest County Sheriff's Department did not play a sufficient enough role to be held responsible for Waters attack upon McClain. As a result, the trial court was correct in granting summary judgment to the Forrest County Sheriff's Department.

II.

As to Jones County, this Court finds that the trial court erred in granting summary judgment. There was an issue of fact to be decided by the jury.

McClain makes the following argument as it relates to Jones County: (1) despite the fact that Waters was a state prisoner sentenced to serve three years in prison, Jones County released Waters on bond; (2) it is undisputed that Waters should not have been released; (3) as a result of the release, Waters attacked James McClain which resulted in McClain having a heart attack from which he died; (4) qualified immunity does not apply to the breach of a statutory or ministerial duty and the Jones County Sheriff's Department had a ministerial duty to keep Waters in jail; and (5) the Jones County Sheriff's Department had insurance which covered them for an incident such as the one in the case at bar which results in a waiver of immunity.

Jones County, on the other hand, argues that the trial court was correct in granting summary judgment because: (1) it is protected under sovereign immunity; (2) under the public duty doctrine it owed no duty to McClain; and (3) if they did owe a duty and that duty was breached, the breach of that duty was not the proximate cause of the injuries.

A. Waiver of Sovereign Immunity

(1) Purchase of liability insurance

McClain argues to this Court that because the Jones County Sheriff's Department purchased liability insurance, that this act waives sovereign immunity. In response Jones County failed to cite any authority or even respond to the Appellants' argument that under section 11-46-16 of the Mississippi Code, Jones County waived the defense of sovereign immunity by purchasing liability insurance for the wrongful or tortious acts or omissions of its employees. This Court employs the same rule as the Mississippi Supreme Court which has consistently stated that failure to respond to an issue raised by a party is tantamount to a confession of error. *Snow Lake Shores Property Owners v. Smith*, 610 So. 2d 357, 361 (Miss. 1992); *Reed v. Reed*, 480 So. 2d 1163, 1164 (Miss. 1985); *Dethlefs v. Beau Maison Dev. Corp.*, 458 So. 2d 714, 717 (Miss. 1984).

Setting the procedural bar aside, by purchasing insurance, Jones County has waived the defense of sovereign immunity. Mississippi law provides:

(2) If any governmental entity has in effect liability insurance to cover wrongful or tortious acts or omissions of such governmental entity or its employees, such governmental entity may be sued by anyone affected to the extent of such insurance carried; however, except as otherwise provided in subsection (3) of this section, immunity from suit is only waived to the extent of such liability insurance carried and a judgment creditor shall have recourse only to the proceeds or right to proceeds of such liability insurance. No attempt shall be made in the trial of any case to suggest the existence of any insurance which covers in whole or in part any judgment or award rendered in favor of a claimant, but if the verdict rendered by the jury exceeds the limit of applicable insurance, the court, on motion, shall reduce the amount of the judgment as against the governmental entity only and not as to joint tort-feasors, if any, to a sum equal to the applicable limit stated in the insurance policy.

Miss. Code Ann. § 11-46-16 (Supp. 1995).

A plain reading of this statute demonstrates that a governmental entity such as Jones County may purchase liability insurance and thus waive sovereign immunity to the extent of insurance coverage purchased. *See also Churchill*, 619 So. 2d at 905. Here, Jones County purchased such a policy and therefore, has waived the defense of sovereign immunity.

B. Public Duty Doctrine

The Jones County Sheriff's Department argues that if the doctrine of immunity was waived, it still is not liable because the sheriff owed no duty to the Appellants.

There are two cases which discuss a public official's duty, neither of which are entirely on point. The first case is *State v. Matthews*, 196 Miss. 833, 839, 18 So. 2d 156, 158 (1944), which held that a tax collector who incorrectly determined that a landowner had failed to pay taxes on land was not liable to subsequent purchasers who bought the land. In *Matthews*, the tax collector was required by statute to correctly keep proper records to indicate whether taxes on land had been paid. *Matthews*, 196 Miss. at 838. The tax collector failed to keep proper records and, due to non-payment of taxes, the land was sold and improvements were made on the land by the subsequent purchaser. *Id.* Afterwards, it was discovered the taxes had been paid by the original owner and, as a result, the land was given back to the original owner. *Id.* The subsequent purchaser filed suit against the tax collector for the purchase price and improvements he had made to the land. *Id.* Our supreme court held that the duty of the tax collector to maintain proper tax records was a duty to the general public as a whole, which prevented the subsequent purchaser from recovering against the tax collector personally. *Id.* at 839.

The second case concerning a public official's duties is *Robinson v. Williams*, 721 F. Supp. 806, 807 (S.D. Miss. 1989). In *Robinson*, two prisoners escaped from the Clarke County jail and murdered the plaintiff's husband. *Id.* The plaintiff filed a complaint against the sheriff and alleged that the prisoners

were allowed to escape due to the negligence of the sheriff and/or his employees. *Id.* The federal district court granted the defendant's summary judgment motion and held that section 19-25-35 of the Mississippi Code, which requires the sheriff to keep all prisoners in jail, imposed a duty upon the sheriff owed to the general public as a whole and not to the plaintiff or her husband. *Id.* at 807. The court further held that without some "special relationship" between the sheriff and the plaintiff or her husband which would set the plaintiff apart from other members of the public, the sheriff owed no duty to the plaintiff. *Id.*

Neither *Matthews* nor *Robinson* address the situation in the case sub judice. In *Matthews*, the tax collector *negligently* failed to maintain proper tax records. Here, the sheriff's department *intentionally* and without authority of law released a prisoner on bond. It is undisputed that Waters was not entitled to be released on bond. The sheriff's department violated this requirement by releasing Waters on bond.

Furthermore, in *Matthews*, the tax collector was in fact performing a duty for the public: recording payment of taxes. Here, one need only employ common sense to understand that the Defendants were not performing any public duty. The only public duty that could possibly be attributed to the Defendants was releasing Waters on bond. However, as a matter of law, a release on bond without authority of law cannot be the performance of a public duty.

Robinson is also distinguishable from the case at bar. In *Robinson*, the federal district court was faced with a very different situation. One can understand the federal district court's rationale in applying the public duty doctrine to certain escape situations because the sheriff did not approve of the escape. If one follows Jones County Sheriff's Department's argument to its logical conclusion, the sheriff could deliberately release on bond *any and all* prisoners at any time and any citizen of this State who was injured by a prisoner would be barred from filing suit against the sheriff's department. The sheriff in *Robinson* was in fact performing a public duty: keeping prisoners in jail. The difference in the case sub judice is that there was no performance of a public duty since releasing a prisoner on bond without authority of law cannot be said to be a public duty. In essence, if we adhere to the public duty doctrine in this case, we would give license to actions not authorized by law.

C. Proximate Cause of the injury

The Jones County Sheriff's Department next argues that if the sheriff owed a duty to McClain, the breach of that duty was not the proximate cause of the injuries suffered.

This Court employs the same rule as the Mississippi Supreme Court which has consistently stated that negligence is a question for the jury to determine except in the "clearest cases." *Presswood v. Cook*, 658 So. 2d 859, 862 (Miss. 1995); *Caruso v. Picayune Pizza Hut, Inc.*, 598 So. 2d 770, 773 (Miss. 1992). "It is no defense the defendants may not have anticipated exactly what transpired." *Howard Bros. v. Peters*, 492 So. 2d 965, 968 (Miss. 1986). Our supreme court has stated that in order to determine whether someone's negligence was the proximate cause of the injury, "it is not necessary that the actor should have foreseen the particular injury which occurs. It is sufficient if he

could have foreseen that some injury would likely result from his negligent conduct." *Id.* (quoting *Nobles v. Unruh*, 198 So. 2d 245, 248 (Miss. 1967)).

Furthermore, as our supreme court has stated, the determination of whether a criminal act is foreseeable is to be determined by the trier of fact. *O'Cain v. Harvey Freeman & Sons*, 603 So. 2d 824, 831 (Miss. 1991).

the question of superseding intervening cause is so inextricably tied to causation, it is difficult to imagine a circumstance where such issue would not be one for the trier of fact. *See Gibson v. Avis Rent-A-Car System, Inc.*, 386 So. 2d 520, 522 (Miss. 1980) (whether intervening cause is foreseeable is for trier of fact). In summary, blanket application of the general rule that intervening criminal acts extinguish the defendant's liability is inappropriate for this case.

Id.

This Court finds that a jury *could* find that the Jones County Sheriff's Department was negligent in releasing Waters on bond, and that this negligent act was the proximate cause of McClain's heart attack and ultimately his death. The sheriff's department and Waters were causes which "combined" to produce the Appellants' injuries. Under the facts of this case, reasonable persons could differ as to whether the sheriff's department was one of the causes of the Appellants' injuries and, as such, we are compelled to allow a jury to pass upon the merits of the case.

Moreover, we have here a release on bond by the sheriff without authority of law. The sheriff was required to keep Waters in jail and failed to do so. Although we find the Jones County Sheriff's Department's argument somewhat attractive, we are faced with the stark reality that, but for Waters' release without authority of law, there would never have been an attempted robbery which allegedly caused James McClain's heart attack and death.

CONCLUSION

This Court reverses in part, and affirms in part. As to Forrest County, the trial court properly granted summary judgment. However, summary judgment was not proper against Jones County. We emphasize that we are not ruling on the merits of the Appellant's claim. We are simply stating herein that the summary judgment motion granted in favor of the Jones County Sheriff's Department based on the doctrine of qualified immunity, was incorrect since Jones County waived its immunity through the purchase of liability insurance.

THE JUDGMENT OF THE JONES COUNTY CIRCUIT COURT GRANTING SUMMARY JUDGMENT FOR JONES COUNTY IS REVERSED AND REMANDED FOR PROCEEDINGS CONSISTENT WITH THIS OPINION. THE JUDGMENT OF THE JONES COUNTY CIRCUIT COURT GRANTING SUMMARY JUDGMENT FOR FORREST COUNTY IS AFFIRMED. EACH PARTY IS TAXED WITH THEIR OWN COSTS OF APPEAL.

FRAISER, C.J., BRIDGES, P.J., BARBER, DIAZ, KING, AND PAYNE, JJ., CONCUR.

**McMILLIN, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY
COLEMAN AND SOUTHWICK, JJ.**

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McMILLIN, J., DISSENTING:

I would respectfully dissent in this case insofar as the Court determines that the judgment in favor of the Jones County Sheriff's Department must be reversed. Accepting the proposition that Adam Waters was improperly released on bail, I am still of the opinion that the consequences flowing from the sheriff's release of Waters must be considered under applicable principles of negligence, whether the actual event of the release is deemed a negligent or a wilful act.

In my mind, the release itself was a negligent act. The negligence arises out of the fact that the Jones County sheriff was less than diligent in determining that Waters was ineligible for release on bail due to the fact that he was subject to a sentence to the state penitentiary for a conviction in another county. Nevertheless, except for this consideration, Waters would have been incarcerated only on a bailable offense pending in Jones County, and his release would have been entirely proper.

However, assuming for sake of argument that the legal fiction of imputing the knowledge of one deputy to all members of the department converts Waters' release to an intentional violation of a

non-discretionary duty, that does not, in my mind, alter the proper outcome of this case. The act of release itself is not the actionable event. The plaintiffs are not seeking damages for abstract harm to the community for having a convicted criminal at large. Instead, the plaintiffs argue that this statutory violation started a chain of events that ultimately led to McClain's death. In order to recover, the plaintiffs must show that the release proximately led to a reasonably foreseeable injury, and this must be assessed under principles of negligence, since it cannot be contended that the sheriff, by his actions, intended to cause the assault on McClain. By way of analogy, the liability of a motorist involved in an accident while wilfully violating the state's speed limit laws must be assessed under principles of negligence and not under a theory of intentional tort. Merely proving a statutory violation does not establish that the violator is "*liable*" as a matter of law. Violation of a statute, when the resulting injury is of the type the statute is intended to prevent, and when the plaintiff is in the category of persons the statute is designed to protect, establishes negligence." *McRee v. Raney*, 493 So. 2d 1299, 1300 (Miss. 1986) (emphasis in original).

However, to say that the questions before this Court must be analyzed under principles of negligence is not the same thing as a determination that a cause of action for negligence exists on these facts. Analyzing the undisputed facts of this case under principles of negligence, I am of the opinion that no cause of action exists.

Though the circumstances involving the release of Waters are different from the case of a prisoner's escape, I cannot see that this fact alone should change the applicable considerations. The sheriff has a duty to "safely keep, in the jail of his county, all persons committed" to his safekeeping. Miss. Code Ann. § 19-25-35 (1972). Whether he fails in that duty by releasing a prisoner without legal authority, or through his failure to take sufficient precautions to ensure the prisoner's continued confinement, the result is the same, *i.e.*, a prisoner who should be confined is nevertheless at large, and the cause is the same, *i.e.*, the sheriff has failed in the performance of his statutory duty.

I would determine that the issues now before this Court are basically the same as those that faced the United States District Court for the Southern District of Mississippi in *Robinson v. Estate of Williams*, 721 F. Supp. 806 (S.D. Miss. 1989), and would agree with the conclusion reached in that case that the "duties imposed upon the sheriff [in regard to the keeping of prisoners entrusted to his care] are duties owed to the public as a whole," *id.* at 807, and are not such as would, standing alone, create a cause of action in the wrongful death beneficiaries of Mr. McClain.

Interrelated to this issue of duty is the question of the foreseeability of the injury inflicted. There is nothing in the record that would suggest any unique risk to Mr. McClain, or any class to which Mr. McClain belonged, by virtue of Waters being released from confinement. There is nothing in the fact that Waters was a sentenced state prisoner that would suggest a heightened danger of a violent assault should he be improperly released. No showing was made that the assault committed by Waters was connected in any way to the circumstances of his release. There may be certain acts or occurrences so essentially connected with the improper release of a prisoner that the acts could be seen as foreseeable. Without suggesting agreement with the result, we note that another jurisdiction has recognized the principle in such situations as where an escaping prisoner, to further his escape, commandeers a vehicle and kidnaps its occupants. *Edwards v. State*, 556 So. 2d 644 (La. Ct. App. 1990)).

This theory may have been suggested implicitly in Mississippi in the case of *Clark v. City of Pascagoula*, 507 So. 2d 70 (Miss. 1987), where the claim was that the police had negligently released an intoxicated driver who subsequently caused a vehicular accident fatal to an innocent third party. On those facts, the trial court permitted the issue of the city's negligence to be submitted to the jury. Though the issues of duty and foreseeability were apparently not directly raised in the appeal, it would appear to me that the distinguishing feature of the *Pascagoula* case is that there is a substantially smaller, readily identifiable group of persons to whom it could be said the city may have owed a heightened duty -- those persons using the public streets within such area as it might reasonably be expected that the released driver would operate his vehicle while still intoxicated. Even in the *Pascagoula* case, however, the supreme court approved a jury instruction as to whether subsequent events occurring after his release (the driver's parents negligently entrusting a car to the driver after his release and the driver's own negligent operation) might constitute an independent intervening cause of the accident, thereby relieving Pascagoula of liability. The court observed that "[w]ith each succeeding occurrence, the thread between [the intoxicated driver] and the defendants weakened." *Id.* at 76. In my opinion, the "thread" discussed in the *Pascagoula* case is the connection that must exist between the allegedly negligent act (the release) and the actual injury (in *Pascagoula*, an automobile accident caused by the previously intoxicated driver only a few hours after his release, and in this case, an assault on an apparently randomly selected member of the general public some four days after Waters' release). This connecting thread is based upon considerations of proximate cause and foreseeability. In my mind, the thread that grew progressively weaker in *Pas cagoula* as time passed simply does not exist as a matter of law in the factual situation now before the Court.

I would conclude that, having failed to establish a justiciable issue as to the existence of any special duty owed by the sheriff's department to Mr. McClain beyond that general duty owed to the general public, which has been said not to create a cause of action, *Robinson v. Estate of Williams*, 721 F. Supp. 806, 807 (S.D. Miss. 1989), McClain's successors in interest have failed, as a matter of law, to make out a case sounding in negligence. Alternatively, I would conclude that the act of a criminal assault by an individual improperly released from custody occurring some four days after his release, standing alone, is so remote from the improper act of releasing the prisoner as to fail to constitute an actionable claim on the basis of its unforeseeability. For either reason, the claim must fail, and I would affirm the trial court.

COLEMAN AND SOUTHWICK, JJ., JOIN THIS SEPARATE OPINION.