IN THE SUPREME COURT OF MISSISSIPPI

NO. 2010-CT-01513-SCT

MELISSA HANDY, AS ADMINISTRATRIX OF THE ESTATE OF RICCO HANDY AND ON BEHALF OF THE WRONGFUL DEATH BENEFICIARIES OF RICCO HANDY

v.

A. WADDELL NEJAM d/b/a BELLEVUE PLACE APARTMENTS

DATE OF JUDGMENT:	08/25/2010
TRIAL JUDGE:	HON. W. SWAN YERGER
COURT FROM WHICH APPEALED:	HINDS COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	JOE N. TATUM
ATTORNEYS FOR APPELLEE:	JAN F. GADOW THOMAS Y. PAIGE H. GRAY LAIRD, III
NATURE OF THE CASE:	CIVIL - WRONGFUL DEATH
DISPOSITION:	AFFIRMED - 04/18/2013
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

COLEMAN, JUSTICE, FOR THE COURT:

¶1. The instant case presents a question of premises liability in the context of a wrongful death action. The Court of Appeals affirmed the trial court's holding that the deceased was an invitee at the time of his death and that the plaintiff breached no duty to the deceased under the standard applied to those classified as invitees while on the property of another. We agree the grant of summary judgment was appropriate but disagree with the trial court

and the Court of Appeals as to the reason. We find the injured party was not an invitee at the time of the incident, but a trespasser. Because both the Court of Appeals and the trial court incorrectly classified the decedent as an invitee, we affirm only the result.

FACTS

¶2. On May 5, 2007, seventeen-year-old Ricco Handy and his cousin Courtney visited their uncle, Craig Handy, at Bellevue Place Apartments. Craig resided and leased an apartment at Bellevue Place, but Ricco and Courtney did not. After eating lunch, Ricco and Courtney notified Craig they were going to the apartment complex pool. Neither knew how to swim. Craig did not accompany Ricco and Courtney to the pool area. The pool consisted of three different depth levels: three, six, and nine feet. The two boys entered the three-feet-deep shallow end of the pool. Ricco then repeatedly walked into the six-feet-deep portion of the pool, returning to the shallow end each time. On his final venture into the deep end, Ricco purposefully put his head under water while touching the side of the pool. Eventually, he lost contact with the side of the pool and drowned.

¶3. Ricco's mother, Melissa Handy, brought a wrongful death suit against the owner of the apartment complex, A. Waddell Nejam, claiming that he had breached a duty to keep the pool in a reasonably safe condition. The trial court deemed Ricco, given that he was a social guest of his uncle, an invitee at the time of the drowning. The Court of Appeals affirmed both the trial court's finding that Ricco was an invitee and the order of summary judgment in favor of Nejam. Asserting that there was an issue of material fact regarding Nejam's

alleged breach of duty under the invitee "reasonable care" standard, Melissa Handy timely appealed.

STANDARD OF REVIEW

¶4. On appeal, we review an order of summary judgment *de novo*. ***Kilhullen v. Kan. City S. Ry.***, 8 So. 3d 168, 174 (¶ 14) (Miss. 2009). Upon reviewing a grant of summary judgment, this Court must view the evidence "in the light most favorable to the party against whom the motion has been made." ***Id.***, at 174-75 (¶ 14) (quoting ***Daniels v. GNB, Inc.***, 629 So. 2d 595, 599 (Miss. 1993)).

DISCUSSION

¶5. The dissent suggests we should follow some other jurisdictions and eradicate the distinctions between invitees, licensees, and trespassers, but the Court has already rejected that suggestion and has continued to adhere to the traditional categories. *See* ***Little by Little v. Bell***, 719 So. 2d 757 (Miss. 1998) (citing ***Skelton v. Twin County Rural Elec. Ass'n***, 611 So. 2d 931, 936 (Miss. 1992)). Time and again the Court has recognized the need for landowners to restrict access to certain parts of their property by others so as not to expose the landowner to unwarranted liability; we have therefore deliberately refused to erase these ancient categories. ***Hudson v. Courtesy Motors, Inc***., 794 So. 2d 999 (¶ 12) (Miss. 2001) ("In recent years, the invitee-licensee-trespasser trichotomy has come under attack . . . we nevertheless hold that these distinctions are well grounded in Mississippi jurisprudence and public policy, and we decline to abandon them."). *See also* ***Hall v. Cagle***, 773 So. 2d 928 (Miss. 2000); ***Albert v. Scott's Truck Plaza, Inc.***, 978 So. 2d 1264 (Miss. 2008). The

question of whether to abandon the traditional distinctions has already been presented to us and rejected, and we turn to our analysis of the instant case.

¶6. Because the salient facts are not disputed, it is proper for the Court to determine Ricco Handy's status at the time of his death as a matter of law. ***Howze v. Garner***, 928 So. 2d 900, 902 (¶ 9) (2005) (citing ***Adams v. Fred's Dollar Store of Batesville***, 497 So. 2d 1097, 1100 (Miss. 1986)). *See also* ***Buddy Jones Ford, Lincoln, Mercury Inc.***, 518 So. 2d 646, 648 (Miss. 1988).

¶7. In analyzing any premises liability action, we first must determine the injured, or in the instant case, deceased person's status. ***Titus v. Williams***, 844 So. 2d 459, 467 (¶ 28) (Miss. 2003). While he was an invitee when he first entered his uncle's apartment, ***Leffler v. Sharp*** makes clear that Ricco Handy lost his status as an invitee when he entered the swimming pool without being accompanied by his uncle. ***Leffler v. Sharp,*** 891 So. 2d 152, 154 (¶¶ 2-3) (Miss. 2004). In ***Leffler***, a guest of a hotel tenant climbed through an open window to access the rooftop where other guests had decided to gather. ***Id.*** at 154 (¶ 3). The ***Leffler*** Court took notice of two key facts which have particular relevance to the instant case. First, unbeknownst to the injured party, the hotel's lease with the owner stated that guests of the hotel would not have access to the roof. ***Id***. at 155 (¶ 6). Second, the lessor and the building owner had deliberately posted a "NOT AN EXIT" sign on the window only four feet away from the opening used by the plaintiff in accessing the roof. ***Id***. at 159 (¶ 22). Because the preceding facts were undisputed, the Court upheld the trial court's grant of summary judgment for the appellee. ***Id***. at 159-160 (¶ 24).

¶8. Here, the leasing provision and the posted regulations requiring social guests to be accompanied by the tenant lead to the conclusion that the boys lost their status as invitees and became trespassers when they entered the pool area. Craig Handy's lease, which he signed as part of his tenant agreement for at Bellevue Place Apartments, states, "The swimming pool, and all other recreational spaces shall be used *only in compliance with* the rules and regulations for the protection and convenience of the residents of the apartment community. A copy of the rules . . . are displayed at various locations within the apartment community." (Emphasis added.) It is also undisputed that a sign clearly prohibiting guests from entering the pool area without being accompanied by a resident of the apartment complex was posted by the entrance of the pool the day of the incident. "[A]lthough the injured party may have entered the premises as an invitee, he may lose this status and acquire that of a licensee, if not a trespasser, if he exceeds the scope or purpose of the invitation by proceeding into an area not included in the invitation." ***Hoffman v. Planters Gin Co., Inc.***, 358 So. 2d 1008 (1978) (citing ***Braswell v. Econ. Supply Co.***, 281 So. 2d 669 (Miss. 1973)); ***Kelley v. Sportsmen's Speedway, Inc***., 224 Miss. 632, 80 So. 2d 785 (1955). In the instant case, the pool was within Nejam's invitation to Ricco Handy only if Craig Handy accompanied him.

¶9. Handy cites two cases, ***Lucas v. Mississippi Housing Authority***, 441 So. 2d 101 (Miss. 1983), and ***John Doe v. Mississippi State Federation of Colored Women's Club Housing for the Elderly in Clinton, Inc.***, 941 So. 2d 820 (Miss. Ct. App. 2006), for the blanket proposition that the guest of an apartment complex tenant is an invitee. However, there is no such blanket rule, and the question of status turns on the scope of the invitation,

if any, to the tenant's guests. Nothing in ***Lucas***, where the decedent swam in the pool in the presence and with the permission of the tenants, *see* ***Lucas***, 441 So. 2d at 102, indicates that the lease contained restrictions on the use of the pool similar to the ones in the case *sub judice*. The ***Lucas*** Court based its conclusion on the proposition that allowing guests of tenants to use a pool is part of the rent or consideration for leasing the apartments, and therefore allowing guests to use the pool is to the benefit of the landlord, as it makes the property more desirable to prospective tenants. ***Id.*** at 103. Such a proposition is reasonable, but in the case *sub judice,* Nejam limited the attractiveness of the property and therefore the benefit to himself by placing restrictions on the use of the pool by guests of tenants. ***John Doe*** does not involve a pool accident at all, but a rape of a guest that occurred in an apartment stairwell. ***John Doe***, 941 So. 2d at 824 (¶ 9). Once again, there exists no indication that guests were prohibited from the area of the apartment building where the allegedly tortuous activity occurred.

¶10. Other cases which have held guests of tenants to be invitees are likewise easily distinguished. For example, in ***Thomas v. Columbia Group, LLC***, 969 So. 2d 849 (Miss. 2007), the Court held the guest living in an apartment with the tenant, even though not on the lease, was an invitee. However, in ***Thomas***, the injured party occupied the premises in a manner just as the tenant would without any restrictions; there were no restrictions about a guest's use of a corridor, stairwell, or parking lot. In this instance, the lease contained restrictions, and the posted regulations limited use of the common pool area. Because Ricco exceeded the scope of his invitation as permitted by Nejam, he lost his status as invitee.

¶11. Given the facts surrounding Ricco's entrance into the pool, the only issue to be resolved is whether he was a licensee or a trespasser. Although the duty owed to a licensee is the same as that of a trespasser, ***Massey v. Tingle***, 867 So. 2d 235, 239 (¶ 14) (Miss. 2004) (citing ***Titus***, 844 So. 2d at 467 (¶ 32)), we nevertheless endeavor to determine which classification is the more appropriate.

¶12. At common law, a licensee is one who enters upon the property of another with the owner's implied permission and for the convenience and benefit of the licensee. ***Hoffman***, 358 So. 2d at 1011. Conversely, a trespasser is one who enters another's property for his own "purposes, pleasure or convenience" without permission or inducement. ***Titus***, 844 So. 2d at 467 (¶ 31) (citing ***White v. Miss. Power & Light Co.***, 196 So. 2d 343 (Miss. 1987)). Ricco entered the property with permission, but neither he nor Craig Handy had the authority or the right to exceed the restrictions placed on the pool by Nejam. These restrictions were made plain both in the lease under which Craig occupied his apartment as well as the posted regulations on the pool facility itself. A guest could use the pool, *only if accompanied by a tenant*.

¶13. The crucial element is permission. *See* ***Clark v. Moore Mem'l United Methodist Church***, 538 So. 2d 760 (Miss. 1989); ***Holley v. Int'l Paper Co.***, 497 So. 2d 819 (1986). Here, not only was Ricco not granted permission, but he was explicitly prohibited from using the pool without his uncle. We therefore hold that Ricco was a trespasser when he entered the pool area.

¶14. After determining the classification of the injured party, we determine what duty, if any, the landlord owed. ***Titus***, 844 So. 2d at 467 (¶ 28). As stated above, a landowner owes a trespasser or a licensee only the duty to refrain from willfully or wantonly injuring the licensee, unless the landowner engages in active conduct and knows of his or her presence. ***Skelton By & Through Roden v. Twin County Rural Elec. Ass'n***, 611 So. 2d 931, 936 (Miss. 1992). Willful and wanton conduct means that the possessor consciously disregards a known and serious hidden danger. ***Id***. *See also* ***Marlon Inv. Co. v. Conner,*** 246 Miss. 343, 353, 149 So. 2d 312, 315 (Miss. 1963).

¶15. The final step is to determine if Nejam breached the duty. ***Titus***, 844 So. 2d at 467 (¶ 28). Again, the undisputed facts of the case eliminate any ambiguity as to whether a breach of duty occurred. First, the record reflects that Ricco was aware of the depth of the pool before ever entering the pool area. Second, as this Court has previously stated, the dangers of a swimming pool are obvious. ***Howze v. Garner***, 928 So. 2d 900, 904 (¶ 17) (Miss. Ct. App. 2005). Given that both our precedent and the facts preclude the assumption of ignorance on the part of Ricco, we can safely conclude that Nejam did not engage in willful and wanton conduct and thus breached no duty.

CONCLUSION

¶16. While we agree that Ricco enjoyed the status of invitee when he first entered Nejam's property, we respect that a property owner has the authority to restrict where his guests, whether they be business or social in nature, are permitted to be. Although the Court of Appeals and the trial court concluded correctly that summary judgment was proper, we

can agree with their decision without adopting their reasoning. "[T]his Court may affirm the lower court's grant of summary judgment on grounds other than that which the trial court used." ***Kirksey v. Dye*** 564 So. 2d 1333 (Miss. 1990) (citing ***Brocato v. Mississippi Publishers Corp.***, 503 So. 2d 241, 244 (Miss. 1987); ***Hickox By and Through Hickox v. Holleman,*** 502 So. 2d 626 (Miss. 1987)). Because we find that both the trial court and the Court of Appeals erred in their respective designations of Ricco as an invitee, we hereby reject the reasoning which led them to their correct result and affirm the order of summary judgment in accordance with this opinion.

¶17. **AFFIRMED.**

DICKINSON AND RANDOLPH, P.JJ., LAMAR, CHANDLER AND PIERCE, JJ., CONCUR. KITCHENS, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY KING, J. WALLER, C.J., NOT PARTICIPATING.

KITCHENS, JUSTICE, DISSENTING:

¶18. Hypothetically, two young men drown in an apartment pool lacking standard, nationally recognized safety equipment and practices. Their drowning reasonably could have been foreseen by a pool owner lacking such equipment and not adhering to such practices. One of the young men lived in the apartment complex in which the pool was located. The other was visiting a relative who was a resident of the complex, but who did not accompany him to the pool. Both suffer the same foreseeable injury, and both suffer such injury due to the same lack of reasonable care on the part of the owner. However, due to a strict legal classification of entrants onto a landowner's property, the estate and wrongful death beneficiaries of the youth who lived in the complex are permitted to sue the owner of the

property, while those of the visiting youth are not, regardless of whether the pool was negligently maintained. This is the nonsensical effect of a strict devotion to a system of tort liability based on the classifications of invitees, licensees, and trespassers. I respectfully dissent because I believe that defining liability based on these classifications produces unjust results, and that this Court should adopt a unitary duty of reasonable care for land possessors regardless of an entrant's classification.

¶19. Historically, the duty of care that a landowner owed was different depending on the status of various categories of entrants onto the land. *Restatement (Third) of Torts: Physical and Emotional Harm* § 51 (2012). The United States Supreme Court noted this when it held that there were no licensee-invitee distinctions in maritime cases. ***Kermarec v. Compagnie Generale Transatlantique***, 358 U.S. 625, 79 S. Ct. 406, 3 L. Ed. 2d. 550 (1959) ("The distinctions which the common law draws between licensee and invitee were inherited from a culture deeply rooted to the land, a culture which traced many of its standards to a heritage of feudalism."). When these different duties were being developed, "no general duty of care existed, and duties were based on relationships or specific activities." *Restatement (Third) of Torts: Physical and Emotional Harm* at § 51. These distinctions were relevant when they were developed because basic negligence law at the time imposed duties based only upon relationships, and not upon any general standard of care. *Id.* However, as the law of negligence evolved, jurisdictions began to acknowledge that such distinctions were "not in harmony with modern tort law." *Id.* Fifty-four years ago, the United States Supreme Court recognized that "the common law has moved, unevenly and with hesitation, towards

imposing on owners and occupiers a single duty of reasonable care in all the circumstances." ***Kermarec***, 358 U.S. at 631 (citation omitted).

¶20. The distinction between invitees, licensees, and trespassers is a product of the common law adopted by this Court. *See* ***Payne v. Rain Forest Nurseries Inc.***, 540 So. 2d 35, 37 (Miss. 1989) ("Mississippi continues to adhere to the *common law* distinctions between the status of parties coming upon the property of another[.]") (emphasis added) (citing ***Lucas v. B. Jones Ford Lincoln Mercury***, 518 So. 2d 646, 648 (Miss. 1988); ***Adams v. Fred's Dollar Store***, 497 So. 2d 1097, 1102 (Miss. 1986)). However, this Court has considered the wisdom of adopting a single duty of reasonable care. In 1970, Justice Inzer, writing for a majority of the Court, thought it was a matter that at least should be considered.

> It is the thinking of this writer, but not necessarily that of the Court, that this area of law merits further study in the light of present day conditions and it may well be that this Court will in the future abandon the traditional distinctions between trespassers, licensees and invitees, or at least draw a distinction between active and passive negligence insofar as a licensee is concerned.

Astleford v. Milner Enters., Inc., 233 So. 2d 524, 526 (Miss. 1970). In 1998, this Court came within a single vote of eradicating the distinction between invitees and licensees. *See* ***Little by Little v. Bell***, 719 So. 2d 757 (Miss. 1998). The dissent noted that several U.S. jurisdictions had established a unitary duty of reasonable care by landowners and had totally abolished the distinction between invitees, licensees, and trespassers. ***Id.*** at 766 (McRae, J.,

dissenting). Today these include Alaska,[1] California,[2] the District of Columbia,[3] Hawaii,[4] Louisiana,[5] Montana,[6] Nevada,[7] New Hampshire,[8] and New York.[9] Several jurisdictions similarly have abolished the distinction between invitees and licensees, including Florida,[10] Illinois,[11] Iowa,[12] Kansas,[13] Maine,[14] Massachusetts,[15] Minnesota,[16] Nebraska,[17] New

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[1]***Newton v. Magill***, 872 P.2d 1213, 1217 (Alaska 1994).

[2]***Alcaraz v. Vece***, 929 P.2d 1239, 1249 (Cal. 1997).

[3]***Smith v. Arbaugh's Rest., Inc.***, 469 F.2d 97, 105 (D.C. Cir. 1972).

[4]***Doe v. Grosvenor Props. (Hawaii) Ltd.***, 829 P.2d 512, 515 (Haw. 1992).

[5]***Cates v. Beauregard Elec. Co-op., Inc.***, 328 So. 2d 367, 371 (La. 1976).

[6]***Limberhand v. Big Ditch Co.***, 706 P.2d 491, 496 (Mont. 1985).

[7]***Wiley v. Redd***, 885 P.2d 592, 596 (Nev. 1994).

[8]***Oulette v. Blanchard***, 364 A.2d 631, 634 (N.H. 1998).

[9]***Basso v. Miller***, 352 N.E.2d 868, 872 (N.Y. 1976).

[10]***Wood v. Camp***, 284 So. 2d 691, 695 (Fla. 1973).

[11]Premises Liability Act, 740 Ill. Comp. Stat. 130/2 (West 2010).

[12]***Koenig v. Koenig***, 766 N.W.2d 635, 643 (Iowa 2009).

[13]***Jones v. Hansen***, 867 P.2d 303, 310 (Kan. 1994).

[14]***Poulin v. Colby College***, 402 A.2d 846, 850-51 (Me. 1979).

[15]***Mounsey v. Ellard***, 297 N.E.2d 43, 51-52 (Mass. 1973).

[16]***Peterson v. Balach***, 199 N.W.2d 639, 642 (Minn. 1972).

[17]***Heins v. Webster County***, 552 N.W.2d 51, 56-57 (Neb. 1996).

Mexico,[18] North Carolina,[19] North Dakota,[20] Oregon,[21] Rhode Island,[22] Tennessee,[23] West Virginia,[24] Wisconsin,[25] and Wyoming.[26]

¶21. What is most convincing, in my mind, is not the growing number of states that are adopting a unitary standard of care, but the inescapable logic that the adoption of such a standard is efficient and beneficial to the administration of justice. Rather than maintaining rigidly segmented duties owed by a landowner based upon the classification of the entrant onto the premises, Mississippi should impose a general duty of reasonable care to protect persons from foreseeable injuries on a landowner's property. This would place us firmly in line with modern tort law that generally requires persons to exercise reasonable care to prevent or avoid reasonably foreseeable harm. It also simplifies the "semantic morass" that has developed as the distinctions between invitee, licensee, and trespasser have evolved. *See*

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[18]***Ford v. Board of County Comm'rs of County of Dona Ana***, 879 P.2d 766, 769 (N.M. 1994).

[19]***Nelson v. Freeland***, 507 S.E.2d 882, 892-93 (N.C. 1998).

[20]***O'Leary v. Coenen***, 251 N.W.2d 746, 751 (N.D. 1977).

[21]***Ragnone v. Portland Sch. Dist. No. 1J***, 633 P.2d 1287, 1291 (Or. 1981) (imposing duty of care on all those lawfully on the land).

[22]***Tantimonico v. Allendale Mut. Ins. Co.***, 637 A.2d 1056, 1061-62 (R.I. 1994).

[23]***Hudson v. Gaitan***, 675 S.W.2d 699, 703 (Tenn. 1984), *abrogated on other grounds by* ***McIntyre v. Balentine***, 833 S.W.2d 52 (Tenn. 1992).

[24]***Mallet v. Pickens***, 522 S.E.2d 436, 446 (W. Va. 1999).

[25]***Antoniewicz v. Reszcynsky***, 236 N.W.2d 1, 11 (Wis. 1975).

[26]***Clarke v. Beckwith***, 858 P.2d 293, 294 (Wyo. 1993).

Kermarec, 358 U.S. at 631. This confusion is apparent in the case before us. Both the trial court and the Court of Appeals found, as a matter of law, that Ricco Handy was an invitee. The majority finds that both are incorrect, and that Ricco was not an invitee or a licensee, but a trespasser. Apt and able legal minds have considered Ricco's status, and have arrived at conclusions that are on opposite ends of the spectrum.

¶22. Rather than analyzing the category to which a particular person belongs, courts and juries, simply and directly, should analyze whether the landowner's conduct was reasonable, and whether the plaintiff's injuries were reasonably foreseeable. As the dissent noted in ***Little***, 719 So. 2d at 767, the traditional classifications "undermine the jury function . . . because liability is mostly dependent on the entrant's status rather than the jury's evaluation of the landowner's conduct." Instead, "recovery by an entrant has become largely a matter of chance, dependent upon the pigeonhole in which the law has put him." ***Heins***, 552 N.W.2d at 56. This "pigeonholing" inevitably leads to illogical results. Ricco Handy and a resident of the Bellevue Place Apartments could have drowned right next to each other. Both could have drowned due to the landlord's negligence. Our law permits only the estate and/or statutory beneficiaries of the resident to recover damages for that negligence. Such a result is neither rational nor just.

¶23. Imposing upon landowners and possessors a reasonable duty of care to persons on their property is not a novel concept. Jurors have long weighed defendants' reasonableness in light of the surrounding circumstances in negligence cases, and this Court has defined reasonable care in numerous opinions.

> Requisite care remains always that degree of care commensurate with appreciable danger appraised in terms of ordinary prudence and interpreted in the light of the attendant circumstances. . . . Although the expression and the basis of the rule remain fixed, its flexibility permits accommodation to each particular case. The area of factual doubt with which juries should be allowed to function is circumscribed within a circle of which care is the axis and reasonableness is the radius.

Supreme Instruments Corp. v. Lehr, 190 Miss. 600, 1 So. 2d 242, 245 (Miss. 1941); *see generally* Jackson & Miller, 6 *Mississippi Practice Series* § 52:16 (2001). Foreseeability always has been the cornerstone of negligence jurisprudence in this state. "The reasonable man, then, to whose ideal behavior we are to look as the standard of duty, will neither neglect what he can forecast as probable, nor waste his anxiety on events that are barely possible." ***Mauney v. Gulf Refining Co.***, 193 Miss. 421, 9 So. 2d 780, 781 (Miss. 1942). Asking a fact-finder to determine whether a defendant's conduct was reasonable in light of the circumstances is a fundamental part of the law of negligence in Mississippi. I can imagine no reason why it would be problematic or unfair to have jurors determine whether a landowner's conduct was reasonable under the relevant facts and circumstances before them.

¶24. Requiring a general standard of reasonable care, regardless of an entrant's status, imposes no extra duty on landowners. Regardless of what a plaintiff's classification is, a defendant landowner still is required to exercise reasonable care to protect against reasonably foreseeable perils to persons. Whether the classification is in place or not, a landowner still must conform to the same level of care. Additionally, since foreseeability is an integral component in the determination of whether a landowner exercised reasonable care, unforeseeable injuries would impose no liability upon the landowner. If a defendant's

"conduct was reasonable in the light of what he could anticipate, there is no negligence and no liability." ***Reaves v. Wiggs***, 192 So. 2d 401, 403 (Miss. 1966). "[T]he failure of a land possessor to act to protect a trespasser when there is no foreseeable risk is not negligence." *Restatement (Third) of Torts: Physical and Emotional Harm* at § 51 cmt. j. Accordingly, a landowner could never be liable for injuries to an unforeseeable plaintiff who suffered an unforeseeable injury. It is important to note that Mississippi is a comparative negligence state. Miss. Code Ann. § 11-7-15 (Rev. 2004). Juries are instructed, when applicable, to weigh and assess a plaintiff's own negligence in causing his own injuries, and reduce his damages award accordingly. This is a safeguard against landowner liability for unpredictable and risky behavior on the part of the plaintiff.

¶25. The Restatement offers another safeguard for liability by classifying one group of entrants as "flagrant trespassers." *Restatement (Third) of Torts: Physical and Emotional Harm* at § 52. This covers trespassers whose "presence on another's land is so antithetical to the rights of the land possessor . . . that the land possessor should not be subject to liability for failing to exercise the ordinary duty of reasonable care otherwise owed to them as entrants on the land." *Id.* To these egregious trespassers, a landowner would owe only the duty to refrain from willfully and wantonly causing them injury. This extreme classification of trespassers effectively would safeguard against liability to criminal interlopers injured on the premises. Such a classification should continue to be available should the facts of a case warrant it.

¶26. I note that the traditional procedural safeguards of summary judgment would continue to serve an important role in the suppression of frivolous claims. If a plaintiff is unable to make a *prima facie* case for each essential element of a negligence claim, then summary judgment for the defendant would be appropriate. A plaintiff in a negligence action would still have to prove, by a preponderance of the evidence, the indispensable elements of duty, breach, causation, and damages. The jury would weigh the facts and evidence and reach a verdict. This is neither rocket science, nor is it revolutionary.

¶27. Turning to the instant facts, under our current law, Ricco Handy is labeled a trespasser on the occasion of his untimely death in the pool of the Bellevue Place Apartments. Thus, his estate and wrongful death beneficiaries are barred from bringing an action for damages. Had he resided in the complex and drowned in precisely the same way for the same reason and in the same pool, his estate and beneficiaries would be permitted to bring and maintain a civil action on account of his status as an invitee to whom Nejam owed a duty of reasonable care. Under a unitary duty-of-reasonable-care standard, assuming that the plaintiff could make a *prima facie* showing of every material element of the negligence claim, the case would be permitted to proceed to trial, regardless of Ricco's status in relation to the property. Then, a jury would determine whether Nejam had exercised reasonable care in ameliorating the foreseeable risk of someone's accidentally drowning in the pool at his Bellevue Place Apartments. It also would consider Ricco Handy's comparative negligence for entering the pool and his being unable to swim. I offer no opinion on the likelihood of success of such a claim at trial; but I believe the facts are such that a trial is warranted. The duty of reasonable

care should not be avoided simply because of the antiquated legal classification of someone's deceased child.

¶28. In sum, the classifications of invitee, licensee, and trespasser are outdated and out of sync with our current negligence jurisprudence. Landowners and others in control of real estate should exercise reasonable care to assess and attend to unreasonably dangerous conditions on their property. In determining a landowner's reasonableness, or the lack thereof, the fact finder must consider the foreseeability of the harm created by the condition of the property, the magnitude of any foreseeable harm, the benefit of the condition, the burden of protecting against any foreseeable harm, and the comparative negligence, if any, of the plaintiff in bringing about the injury. This imposes no new burden on landowners and brings the law of premises liability squarely in line with our current negligence law. Mississippi should join the expanding number of jurisdictions that have adopted a unitary duty of care for land possessors. Under this regime, the estate and statutory beneficiaries of Ricco Handy likely would be permitted to bring their case before a jury. Because I find that, under the facts presented, they should be permitted to do so, and that a unitary standard of reasonable care upon all landowners advances the cause of justice and judicial efficiency, I respectfully dissent.

KING, J., JOINS THIS OPINION.