

IN THE COURT OF APPEALS 5/21/96

OF THE

STATE OF MISSISSIPPI

NO. 93-CA-01084 COA

RICKY BANKS AND WAYNE FONDREN

APPELLANTS

v.

**E.L.G., A MINOR, WHO SUES BY AND THROUGH HER MOTHER AND NEXT FRIEND,
C.A.G., AND HER GRANDPARENTS AND LEGAL CUSTODIANS, C.N. AND A.N.**

APPELLEES

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

TRIAL JUDGE: HON. R. KENNETH COLEMAN

COURT FROM WHICH APPEALED: CHICKASAW COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANTS: DAN H. FAIRLY AND JAMES W. BURGOON, JR.

ATTORNEYS FOR APPELLEES: JOHN H. GREGORY AND JAMES S. GORE

NATURE OF THE CASE: CIVIL: SHERIFF'S LIABILITY FOR A FURLOUGHED PRISONER

TRIAL COURT DISPOSITION: JURY HELD SHERIFF AND DEPUTY LIABLE FOR A
FURLOUGHED PRISONER WHO MOLESTED ELEVEN YEAR OLD GIRL

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

THOMAS, P.J., FOR THE COURT:

E.G., eleven years old, filed suit through her mother and grandparents (hereinafter plaintiffs) against Ricky Banks and Wayne Fondren individually and in their capacities as Sheriff and Deputy Sheriff,

respectively, of Leflore County, Mississippi (hereinafter Defendants). Fondren released Charles Ralph Clanton, Jr., a convicted rapist, on a weekend pass. While Clanton was released from jail on his weekend pass, he raped and assaulted E.G. The jury held Banks and Fondren liable for Clanton's actions and awarded E.G. one million dollars for her injuries. Feeling aggrieved, the Defendants appeal to this Court and assert the following assignments of error:

I. THE COMPLAINT FAILS TO STATE A CAUSE OF ACTION INASMUCH AS THE Defendants OWNED NO DUTY TO THE PLAINTIFF. THE ONLY DUTY OWED BY Defendants WAS TO THE PUBLIC AS A WHOLE. BREACH OF THIS DUTY DOES NOT GIVE RISE TO A CAUSE OF ACTION IN THE PLAINTIFF.

II. AS A MATTER OF LAW, THE GRANTING OF A FURLOUGH TO CLANTON WAS NOT THE PROXIMATE CAUSE OF THE ASSAULT ON THE PLAINTIFF.

III. THE Defendants HAD THE DISCRETIONARY AUTHORITY TO GRANT CLANTON A FURLOUGH FROM THE JAIL AND ARE ENTITLED TO QUALIFIED IMMUNITY.

IV. AN ACTION FOR DAMAGES IS NOT THE APPROPRIATE REMEDY IN THIS CASE.

Finding no error, we affirm.

STATEMENT OF THE CASE

E.G. filed a complaint in the Circuit Court of Chickasaw County, Mississippi, against the sheriff of Leflore County, Ricky Banks, and his jail administrator, Wayne Fondren. E.G. complained that Banks and Fondren intentionally and without authority released Charles Ralph Clanton, Jr., a convicted rapist, from the Leflore County jail on a weekend pass. While out of jail on this pass, Clanton sexually molested E.G., the eleven-year-old daughter of Clanton's girlfriend, C.G.

A jury trial was conducted, and E.G. was awarded one million dollars for her injuries. Post-trial motions were denied. Subsequently, the Defendants appealed to this Court.

FACTS

Charles Ralph Clanton, Jr., was convicted of rape in the Circuit Court of Leflore County, Mississippi, and on April 29, 1986, was sentenced to serve a term of twenty-five years in prison and was placed in the Leflore County jail. Clanton appealed his conviction to the Mississippi Supreme Court and was allowed to get out of jail pursuant to an appeal bond set by the Circuit Court of Leflore County.

While out on this appeal bond, Clanton met C.G., E.G.'s mother, and the two began living together.

Thereafter, the Mississippi Supreme Court affirmed Clanton's rape conviction. *See Clanton v. State*, 539 So. 2d 1024 (Miss. 1989). The supreme court mandate ordered that Clanton "shall not be released on bail after his conviction has been affirmed by this Court except by further order of this Court." As a result, Clanton was again imprisoned in the Leflore County jail.

While in jail, Clanton became a trusty and was entitled to certain privileges pursuant to jail policy. In Leflore County, there are several levels of trusties. First, the inmate is tested as a "laundry trusty" and is observed within the confines of the jail. The second level is a "floorwalker." If the inmate performs satisfactorily at those two levels, he qualifies for full trusty and may perform numerous jobs in the jail including working in the kitchen, around the courthouse, and at the county sanitation department. After a full trusty is monitored for an additional period of time, he may be entitled to a furlough or pass away from the jail in order to spend time with his family. The trusty is required to leave the address and telephone number of the location where he will be staying during the pass. This system has been in existence in Leflore County since 1958 and is used in numerous counties in this State.

Under this system, Clanton became a full trusty, and between February 8, 1989, and June 8, 1990, had approximately eight furloughs, all of which were six or twelve hour passes except for a three-day pass in December 1989 and a twenty-four hour pass in June of 1990.

On June 7, 1990, Clanton was given a twenty-four hour pass. C.G. drove to Greenwood and picked up Clanton from the jail. Clanton told the deputies that he was going to his mother's house in Eupora, Mississippi. In fact, C.G. and Clanton were going to Houston, Mississippi, to stay at C.G.'s home. Neither Fondren nor Banks was aware of Clanton's actual whereabouts. On the way to Houston, C.G. purchased a fifth of whiskey for Clanton, which he immediately began to consume. After arriving at her home, C.G. sent Clanton and C.G.'s daughter, E.G., to purchase hamburger buns. Instead of purchasing hamburger buns, Clanton took E.G. to a parking lot and raped her.

After he raped E.G., Clanton made her promise not to tell anyone about the rape and then drove her back to C.G.'s home. After they arrived home, E.G. was crying and C.G. asked her what had happened. E.G. explained that Clanton had raped her. C.H., E.G.'s sister, was also living at her mother's home. C.H. got the keys to her mother's car and drove E.G. to their grandparents' home. Subsequently, C.H. called Dr. Edward Gore, a medical doctor, and met him at the hospital. Meanwhile, C.G. and Clanton drove to Eupora, Mississippi, to Clanton's mother's home.

At the hospital, Gore conducted a physical examination of E.G. which revealed a "suction type bite of the right neck, a bruise of her right neck." Gore also noted a "two centimeter tear of the posterior part of the vagina" and blood present in the vagina area. Sperm was present in the vaginal washing. Gore gave E.G. an antibiotic to prevent an infection and some medication to prevent pregnancy.

As a result of the trauma, E.G. was treated by Dr. Joe Ed Morris, an expert in the field of psychology and psychodiagnostics. Morris testified that E.G. experienced flashbacks two or three times a week and continued to have thoughts about the rape. E.G. experienced frequent headaches and had a lack of hunger even at mealtime. For no apparent reason, E.G. had stomach pain and difficulty sleeping. Morris diagnosed her condition as post-traumatic stress disorder. Approximately two years after the rape, E.G. continued to experience these symptoms. Morris explained that E.G. would continue to

experience these problems especially when she develops intimate relationships.

DISCUSSION

I. THE COMPLAINT FAILS TO STATE A CAUSE OF ACTION INASMUCH AS THE DEFENDANTS OWED NO DUTY TO THE PLAINTIFF. THE ONLY DUTY OWED BY DEFENDANTS WAS TO THE PUBLIC AS A WHOLE. BREACH OF THIS DUTY DOES NOT GIVE RISE TO A CAUSE OF ACTION IN THE PLAINTIFF.

The defendants contend that any duty owed to the plaintiff was a duty to the public as a whole and not to the plaintiff or any other individual personally; thus, the Defendants conclude that the plaintiff is unable to meet the duty element required for a negligence action.

The defendant's cite two cases which discuss a public official's duty to individuals versus the public as a whole. *State v. Matthews*, 196 Miss. 833, 839, 18 So. 2d 156, 158 (1944), held that a tax collector who incorrectly determined that a landowner had failed to pay taxes on land and made such a notation on his tax rolls 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. *Id.* 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 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 cited concerning a public official's duties is *Robinson v. Williams*, 721 F. Supp. 806 (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 individually. *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* addresses the situation in the case *sub judice*. In *Matthews*, the tax collector did maintain the tax records as the law provided but did so in a negligent manner. In *Robinson*, the sheriff did maintain the jail to keep the prisoners confined as the law provides but allegedly did so in a negligent manner. Here, the sheriff *intentionally* and without authority of law released a prisoner on furlough. We recognize, as argued by the Defendants, that many sheriffs in this State may have instituted such programs as in the case here, but common practice over time cannot convert otherwise unauthorized actions into ones that are legal. There is no statute allowing the

sheriff to release a prisoner from jail for furlough purposes. In addition, section 19-25-35 and the supreme court mandate required the sheriff to keep Clanton in jail. The sheriff violated the mandate and this statute by releasing Clanton on furlough.

The Defendants make the point that if one follows the mandate literally, Clanton could not even be released on parole. However, they ignore companion statutes which tell us that if Clanton is eligible for parole, then he could be released by the parole board. Indeed, if we had a statute authorizing a sheriff to release prisoners on furlough we would not be here today.

If one follows the Defendants' argument to its logical conclusion, the sheriff could deliberately release *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. 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 furlough 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.

II. AS A MATTER OF LAW, THE GRANTING OF A FURLOUGH TO CLANTON WAS NOT THE PROXIMATE CAUSE OF THE ASSAULT ON THE PLAINTIFF.

The Defendants contend the furlough was not the legal or proximate cause of the plaintiffs injuries. Instead, the Defendants argue that the legal cause is Clanton's act of raping the plaintiff. The Defendants explain that the question is whether at the time of the furlough, the Defendants knew that Clanton would rape the Plaintiff. The Defendants urge this Court to hold "that a police department's negligence--its oversights, blunders, omissions--is not the proximate or legal cause of harms committed by others" citing *Porter v. Urbana*, 410 N.E.2d 610, 612 (Ill. App. 1980).

The Plaintiff assert that the Defendants were aware of Clanton's violent propensities and releasing him on a furlough was the proximate cause of the rape. The Plaintiff contends that in order to find negligence on the part of the Defendants, all that was necessary was that they *could have foreseen* that some injury would occur as opposed to *should have foreseen*. *Nobles v. Unruh*, 198 So. 2d 245, 248 (Miss. 1967).

The Defendants further state that the Plaintiffs' contention that "any reasonable person could foresee the danger of releasing a known violent rapist" makes several people the proximate cause of the rape which includes E.G.'s grandmother, grandfather, and her own mother. While the Defendants may be correct in this assertion, it provides them with no relief as any negligence on the part of E.G.'s grandmother, grandfather, and her mother; it simply makes them co-responsible for E.G.'s injuries. In fact, the Defendants were given instructions allowing the jury to find E.G.'s mother solely responsible for the rape or contributorily negligent.

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., Inc. 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.* (citing *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.

Concerning intervening causes our supreme court held in *M & M Pipe & Pressure Vessel Fabricators, Inc. v. Roberts*, 531 So. 2d 615, 618 (Miss. 1988):

In cases involving the issue of an intervening cause, this Court has laid particular stress on the concept of "putting in motion." That is, the original actor will not be absolved of liability because of a supervening cause if his negligence put in motion the agency by or through which injuries were inflicted. *Capitol Tobacco & Specialty Co. v. Runnels*, 221 So. 2d 703, 705 (Miss. 1969). *See also, e.g., Blackmon v. Payne, supra*, 510 So. 2d at 487; *Robison v. McDowell*, 247 So. 2d 686, 688 (Miss. 1971); *Simmons v. Amerada Hess Corp.*, 619 F. 2d 440, 441 (5th Cir. 1980). And "if the occurrence of the intervening cause might reasonably have been anticipated, such intervening cause will not interrupt the connection between the original cause and injury." *Ross v. Louisville and Nashville RR.*, 178 Miss. 69, 84, 172 So. 752, 755 (1937). *See also, e.g., Touche Ross v. Commercial Union, supra*, 514 So. 2d at 323; *Blackmon v. Payne, supra*, 510 So. 2d at 487; *McCorkle v. United Gas Pipe Line Co.*, 253 Miss. 169, 188, 175 So. 2d 480, 489 (1965). In determining whether the actor's negligence was the proximate cause of the injury, it is not necessary that the actor should have foreseen the particular injury that happened; it is enough that he could have foreseen that his conduct could cause some injury. *See, e.g., Nobles v. Unruh*, 198 So. 2d 245, 248 (Miss. 1967); *Cumberland Telephone & Telegraph Co. v. Woodham*, 99 Miss. 318, 332, 54 So. 890, 891 (1911).

Id.

Our supreme court has also stated in regards to the legal cause of the harm to the plaintiff that if the Defendants' intentional conduct through their individual acts "were substantial factors in bringing about the harm," then each is liable for the plaintiff's damages. *State v. Edgeworth*, 214 So. 2d 579,

586 (Miss. 1968). In *Edgeworth*, a justice of the peace and his deputy issued criminal warrants for the plaintiff for the collection of personal debts incurred by the plaintiff. *Id.* at 581. The supreme court noted that the justice of the peace and his deputy had no "constitutional right or power to serve as a collection agency for creditors." *Id.* at 588. As a result of the invalid warrants, the plaintiff committed suicide. The supreme court held the intentional torts committed by the Defendants (abuse of process) made each negligent for the plaintiff's suicide, and therefore, allowed the claim against them both. *Id.* at 586.

Explaining their holding, our supreme court quoted The Law of Torts, which stated:

Certain results, by their very nature, are obviously incapable of any logical, reasonable, or practical division. Death is such a result, and so is a broken leg or any single wound, the destruction of a house by fire, or the sinking of a barge. No ingenuity can suggest anything more than a purely arbitrary apportionment of such harm. Where two or more causes combine to produce such a single result, incapable of any logical division, each may be a substantial factor in bringing about the loss, and if so, each must be charged with all of it. Here again the typical case is that of two vehicles which collide and injure a third person. The duties which are owed to the plaintiff by the Defendants are separate, and may not be identical in character or scope, but entire liability rests upon the obvious fact that each has contributed to the single result, and that no rational division can be made. Such entire liability is imposed both where some of the causes are innocent, as where a fire set by the defendant is carried by a wind, and where two or more of the causes are culpable. It is imposed where either cause would have been sufficient in itself to bring about the result, as in the case of merging fires which burn a building, and also where both were essential to the injury, as in the vehicle collision suggested above. It is not necessary that the misconduct of two Defendants be simultaneous. One defendant may create a situation upon which the other may act later to cause the damage. One may leave combustible material, and the other set it afire; one may leave a hole in the street, and the other drive into it. Liability in such a case is not a matter of causation, but of the effect of the intervening agency upon culpability. If a defendant is liable at all, he will be liable for all the damage caused.

Id. at 588, (Citation omitted).

"In other words, 'each of two persons who is independently guilty of tortious conduct which is a substantial factor in causing a harm to another is liable for the entire harm, in the absence of a superseding cause.'" *Id.*; see also *Hutto v. Kremer*, 222 Miss. 374, 76 So. 2d 204 (1954).

Applying the quoted case law to the facts in the case *sub judice* establishes that a jury issue arose over whether the Defendants were in fact one of the "actors" which put Clanton "in motion" to commit the rape. Both of the Defendants and Clanton were causes which "combined" to produce E.G.'s injuries. The Defendants and Clanton were both substantial factors in causing the harm to E.G., and both were essential to her injury in view of the fact Clanton could not have raped E.G. but

for his release. Although we might have found differently if we were the fact-finder, under the facts of this case reasonable persons could differ as to whether the Defendants actions were one of the causes of E.G.'s injury and, as such, we cannot play "thirteenth juror" and overturn the jury's findings.

Moreover, the actions of the Defendants were not mere "blunders, oversights, or omissions." Here, we have a program instituted by the sheriff without authority of law. Section 19-25-35 of the Mississippi Code and the supreme court mandate required the sheriff to keep Clanton in jail.

Although not directly on point, it is illustrative that our legislature has found that inmates convicted of crimes of violence such as rape are not eligible for Mississippi Department of Corrections' work release programs. *See* Miss. Code Ann. § 47-5-401(2) (1972). 47-5-401 amply demonstrates that our legislature must have been somewhat concerned about allowing inmates convicted of violent crimes to participate in a work release program which would entail their employment outside the jail. One could reasonably infer that the legislature enacted this prohibition because of their concerns with such inmates' violent propensities.

Although we find the Defendants' argument somewhat attractive, we are faced with the stark reality that, but for Clanton's release without authority of law, there would never have been a rape.

III. THE DEFENDANTS HAD THE DISCRETIONARY AUTHORITY TO GRANT CLANTON A FURLOUGH FROM THE JAIL AND ARE ENTITLED TO QUALIFIED IMMUNITY.

The Defendants contend they had discretionary authority to release Clanton on a pass or furlough and are entitled to immunity from suit as a result of the release. The Plaintiffs argue that the Defendants had no discretionary authority to release Clanton and, in fact, were without authority to do so.

The Defendants also contend that the sheriff, in order to maintain the jail, had discretionary authority to release Clanton under Mississippi law which provides:

The sheriff shall be the executive officer of the circuit and chancery court of his county, and he shall attend all the sessions thereof with a sufficient number of deputies or bailiffs. He shall execute all orders and decrees of said courts directed to him to be executed. He *shall take into his custody, and safely keep, in the jail of his county, all persons committed by order of either of said courts, or by any process issuing therefrom, or lawfully required to be held for appearance before either of them.*

Miss. Code Ann. § 19-25-35 (1972).

The Defendants ask this Court to grant them power which simply does not exist under the statute. As counsel for the Defendants conceded at oral argument, there is no statute which authorizes the sheriff to release a prisoner on a pass or furlough.

In regards to the immunity of public officials, our supreme court has held:

[A] governmental official has no immunity to a civil action for damages if his breach of a legal duty causes injury and (1) that duty is ministerial in nature, or (2) that duty involves the use of discretion and the governmental actor greatly or substantially exceeds his authority and in the course thereof causes harm, or (3) the governmental actor commits an intentional tort. Beyond that, a government official has no immunity when sued upon a tort that has nothing to do with his official position or decision-making function and has been committed outside the course and scope of his office.

Grantham v. Mississippi Dep't of Corrections, 522 So. 2d 219, 225 (Miss. 1988).

In *Grantham*, the plaintiff sued the parole board for releasing a prisoner who arguably should not have been released. However, the parole board *does have the power to grant parole* pursuant to Mississippi law. *Id.* at 226. Mistakes made in connection with the granting of parole may preclude the parole board from suit in certain situations on the basis of sovereign immunity. *Sykes v. Grantham*, 567 So. 2d 200, 211 (Miss. 1990). Here, there is no statute which gives the sheriff the power to release a prisoner on furlough. In fact, all of the statutes and the supreme court mandate require just the opposite: keep the prisoner in jail.

In a criminal contempt case construing section 19-25-35, our supreme court affirmed a criminal contempt conviction against a sheriff for illegally releasing two prisoners from jail. *See Coleman v. State*, 482 So. 2d 219, 220 (Miss. 1986). In interpreting section 19-25-35, our supreme court quoted the following:

The custodian of a prison upon receiving a commitment can do only what the commitment orders him to do, that is, receive and safely keep the prisoner, so that the latter may be thence discharged in due course of law. The duty of an officer in executing the mandate of a judicial order in the nature of a commitment is purely ministerial and his power with respect thereto is limited and restricted to compliance with its terms.

Coleman v. State, 482 So. 2d 221, 222 (Miss. 1986).

Poyner v. Gilmore, 171 Miss. 859, 158 So. 922 (1935), is the seminal case defining ministerial duty and held:

[T]he duty is one which has been positively imposed by law and its performance required at a time and in a manner or upon conditions which are specifically designated, the duty to perform under the conditions specified not being dependent upon the officer's judgment or discretion, the act and discharge thereof is ministerial.

Poyner, 158 So. at 923.

While we hold that the sheriff's duties to incarcerate prisoners were in fact ministerial and required him to keep prisoners in jail, absent a lawful court order or parole, the issue of whether this duty was ministerial or discretionary does not change the outcome of this case. Here, as the *McQueen* case explained, a sheriff is not entitled to qualified immunity if he substantially exceeds his authority or commits an intentional tort. *McQueen*, 587 So. 2d at 922. Therefore, if the sheriff's duty to keep Clanton in jail vested him with discretionary power, the sheriff exceeded this authority when he released Clanton without authority of law. Again, as we have reiterated, unfortunately for the Defendants, there was no statute which allowed Clanton's release. On the other hand, if the sheriff's duties in regards to incarceration are ministerial, then the sheriff violated the clear dictates of the circuit court order, the supreme court mandate, and section 19-25-35 which required him to keep Clanton in jail. As a result, the Defendants are liable under either scenario.

The Defendants contend that since the legislature did not prohibit the sheriff from releasing an inmate on a pass or furlough, that sheriffs are vested with discretionary authority to do so. As the Plaintiffs point out, if one follows this logic, the sheriff could commit any number of violations of the law and be immune from suit.

Next, the Defendants argue that if they do not have authority to release Clanton under any statute concerning the sheriff or county, they assert the release was proper pursuant to Mississippi Law which provides:

The Commissioner of Corrections is hereby authorized to grant leave to an offender and may take into consideration sickness or death in the offender's family or the seeking of employment by the offender in connection with application for parole, for a period of time not to exceed ten (10) days. Within forty-eight (48) hours prior to the release of an offender on such leave, the director of records of the department shall give the written notice which is required pursuant to Section 47-5-177. However, in cases in which an offender is granted leave because of sickness or death in the offender's family, such written notice shall not be required but the inmate shall be accompanied by a correctional officer or a law enforcement officer. In all other cases the commissioner shall provide required security when deemed necessary. The commissioner, in granting such leave, shall take into consideration the conduct and work performance of the offender.

Miss. Code Ann. § 47-5-173 (1972).

The Defendants contend that since Clanton was a state prisoner in the custody of the sheriff, the sheriff was in the position of the Commissioner of the Department of Corrections and was vested with the authority to release Clanton on a pass or furlough. First, this Court finds that this statute does not apply to the case *sub judice*. The statute specifically states that the Commissioner of

Corrections may release in certain cases, not a county sheriff. There is no provision in the statute for a sheriff to "stand in the shoes of the Commissioner" for the purposes of this statute or become an agent of the commissioner for the purposes of this statute. If the legislature had intended the sheriff to have the power to release prisoner pursuant to this statute, it should have specifically given the sheriff such power. Without such a grant from the legislature, this Court cannot simply rewrite the statute and give the sheriff this power.

Assuming for argument's sake, that this statute even applies to the case *sub judice*, and the sheriff "stood in the shoes of the Commissioner," the statute simply contemplates situations where an inmate has a sickness or death in the family and gives the commissioner discretion to release. The only other situation where the commissioner has discretion under this statute to release appears to be when the inmate is seeking employment in order to submit an application for parole. If the legislature had intended the commissioner to have the power to grant a pass or release under this statute, the specific language authorizing this action should have been written in the statute.

IV. AN ACTION FOR DAMAGES IS NOT THE APPROPRIATE REMEDY IN THIS CASE.

The Defendants contend that E.G. is not entitled to a money judgment remedy and again supports this proposition with the earlier stated argument that the sheriff's actions were common practice in this state. We have already considered and rejected this argument and need not discuss it further. Second, the Defendants assert that since no law prohibits them from releasing a prisoner on furlough, a damages remedy against them is improper. Next, the Defendants argue that since the State acquiesced to the release of prisoners on furlough, a money judgment is improper. Finally, the Defendants also argue that if E.G. is entitled to a remedy, she is only entitled to an injunction against the Defendants prohibiting them from violating their duties.

There may not have been a law specifically prohibiting furloughs, but we need simply restate that section 19-25-35 of the Mississippi Code and the court mandate required the sheriff to keep Clanton in jail.

Next, the Defendants argue that the State acquiesced to the practice of granting furloughs and as such that precludes any monetary remedy for E.G.. In support of this argument, the Defendants cite *Smith v. Dorsey*, 530 So. 2d 5 (Miss. 1988). *Smith* is completely factually and legally distinguishable from the case *sub judice*.

In *Smith*, a local school board had contracted with their spouses to be employed as teachers for the school district. *Id.* at 6. Local taxpayers filed suit in chancery court seeking to declare the contracts null and void and be awarded monetary damages. *Id.* The supreme court held the contracts null and void but denied damages because, as a court of equity usually attempts to do, the parties could not be put back in the same position they were before the contracts. *Id.* at 8-9. To do so would mean the teachers would give up the salaries they had been paid for years which would mean that the teachers would have worked for free. *Id.* The supreme court also noted that there was no allegation or even proof of bad faith or any type of damages suffered by the school district as a result of the contracts. *Id.* at 8. In fact, the school district got what it bargained for: good teachers. *Id.* at 7-8. Thus, considering the foregoing, the supreme court held the only equitable solution would be to deny damages. *Id.* at 9. *Smith* has no relation to this case.

Finally, the Defendants also argue that if E.G. is entitled to a remedy, she is only entitled to an injunction against the Defendants prohibiting them from violating their duties. In support of this argument, the Defendants cite *Gates v. Collier*, 349 F. Supp. 881 (N.D. Miss. 1972) for the proposition that injunctive relief is the only remedy available to the Plaintiffs. *Gates* was a class action filed by inmates in Parchman requesting a declaratory judgment that a "continuation of certain practices and conditions at the penitentiary is unconstitutional." *Id.* at 885. The United States intervened as plaintiff and requested injunctive relief for the inmates. *Id.* There simply was no request for damages, and even if there had been such a request, the district court had the option to grant or deny such a request under the legal status of that case. *Gates* provides no comfort to the Defendants.

We have carefully reviewed briefs of counsel, all cases cited therein, and all arguments advanced. In view of the opinions expressed herein, we are constrained to affirm.

THE JUDGMENT OF THE CIRCUIT COURT OF CHICKASAW COUNTY OF ONE MILLION DOLLARS AGAINST THE APPELLANTS IS AFFIRMED. COSTS AND INTEREST, WHICH INCLUDES THE MANDATORY STATUTORY PENALTY IS TAXED TO THE APPELLANTS.

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

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

FRAISER, C.J., NOT PARTICIPATING.

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MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

SOUTHWICK, J., dissenting

We are called upon to determine whether a sheriff is liable in tort for injuries caused by a prisoner who has been temporarily released under a "trusty" program. The majority finds this long-followed practice of many counties to be a violation of state law and to constitute a basis for imposing liability. Regardless of the validity of that conclusion, it is not dispositive. Any duty breached by the sheriff was one owed to the community at large and cannot be the basis for private litigation. The crime was a heinous one. That does not answer the question of whether the sheriff had personal liability. I dissent.

For purposes of argument I will assume the sheriff exceeded his authority in releasing this prisoner. That would bring into focus the principles articulated in *Robinson v. Estate of Williams*, 721 F. Supp. 806 (S.D. Miss. 1989). That court said 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 808), and are not such as would create a cause of action for harm caused by a prisoner improperly at large. Since the duty is not owed to the injured person but to the general population, there is no cause of action. Depending on the nature of the breach of the duty to the public, a sheriff may be "sued" by the public, i.e., prosecuted criminally.

The analytical problem with the majority's view is that they are making a jailer the insurer for all injuries caused by an improperly released prisoner, no matter what kind of injury, how distant in time, the reason for the release, or any other factors. The release is just the first step in a chain of events. The same as for any other tort suit, *post hoc, ergo proctor hoc* is not enough for liability.

Interrelated to duty is the question of the foreseeability of the injury inflicted. 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. Such a set of facts can be seen in *Clark v. City of Pascagoula*, 507 So. 2d 70 (Miss. 1987). There the police had negligently released an intoxicated driver who subsequently caused a vehicular accident fatal to an innocent third party. *Id.* at 71-72. The issues of duty and foreseeability were apparently not directly raised in the appeal. Still, the *Pascagoula* case presents an arguable basis for liability since there was a readily identifiable group of persons to whom the city 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, the supreme court held that subsequent events such as 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. The court observed that "[w]ith each succeeding occurrence, the thread between [the intoxicated driver] and the defendants weakened." *Id.* at 76. The "thread" is the connection that must exist between the allegedly negligent act (the release) and the actual injury. This connecting thread is based upon considerations of proximate cause and foreseeability.

The prisoner here was incarcerated because of a previous rape. I do not find that an adequate "thread" to join his release causally/foreseeably to the subsequent rape. If it is adequate, that would mean the jailer who has authority to give temporary freedom to a prisoner has liability if the prisoner commits the same crime as the one for which he was convicted, but not for any other. Thus a sheriff would be responsible in tort if a rapist committed another rape while temporarily released, and responsible if a murderer committed another murder. However, if a rapist murdered or a murderer raped, there would be no liability. Perhaps under such an approach the jailer would also be responsible for any other crime for which the prisoner had earlier been convicted, but for which he had already served his sentence.

Such a checkerboard set of liabilities and exemptions is not what *Robinson* was discussing, nor what the *Pascagoula* case addressed. Absent compelling evidence that every prisoner convicted of one dangerous crime is a substantial risk to commit that same crime again and no other, this method of finding foreseeability makes no sense. What must be foreseeable is that there is a specific person, such as one the prisoner has threatened in a manner suggesting a continuing threat, or a specific category of people, such as those a still-drunk driver is liable to encounter after being released, who is in danger. Otherwise the duty owed by the jailer remains one owed to the general population and cannot be the basis for tort liability. *Robinson*, 721 F. Supp. at 808.

There was no special duty owed by the sheriff to this minor, beyond that duty owed to the general public, and thus no cause of action was created by the injuries.

I would reverse and render.

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

FRAISER, C.J., NOT PARTICIPATING.