Mississippi College Law Review

Volume 41 | Issue 2 Article 8

Fall 2023

THE RISE AND FALL OF PREMISES LIABILITY FOR INJURIES ARISING FROM THIRD-PARTY CRIMINAL ACTIVITY IN MISSISSIPPI

Mark J. Goldberg
Mississippi College School of Law

THE RISE AND FALL OF PREMISES LIABILITY FOR INJURIES ARISING FROM THIRD-PARTY CRIMINAL ACTIVITY IN MISSISSIPPI

*By Mark J. Goldberg, Cosmich Simmons & Brown, PLLC**

Table of Contents

I. INTRODUCTION

On July 1, 2019, the Landowners Protection Act (the "Act") became effective in Mississippi.[1] The Act modified existing law as to premises liability for failure to protect against the criminal acts of third-parties in two respects. First, a new Code section was enacted, granting property owners several protections from such claims.[2] Second, Mississippi's joint and several liability statute was amended to allow for apportionment of fault between premises owners and intentional tortfeasors, i.e., criminal actors.[3]

In the debate leading to the Act's passage, proponents of the legislation provided that it was intended to codify prior court rulings and ensure that juries could apportion liability between criminal actors and landowners.[4] Opponents

* Mark J. Goldberg is an attorney with the law firm of Cosmich Simmons & Brown, PLLC in Jackson, Mississippi. He graduated from Mississippi College School of Law in 2005, clerked for the Honorable U.S. District Court Judge Keith Starrett from 2012 to 2015, and principally practices in the area of toxic torts.

1. 2019 Miss. Laws, ch. 435, sec. 3.

2. MISS. CODE ANN. § 11-1-66.1 (2019).

3. MISS. CODE ANN. § 85-5-7(1) (2019).

4. Bobby Harrison, *Bill to make it harder to sue property owners nearly stalled over fears of unintended consequences*, MISS. TODAY (Mar. 25, 2019), https://mississippitoday.org/2019/03/25/bill-to-make-it-harder-to-sue-property-owners-nearly-stalled-over-fears-of-unintended-consequences/.

argued that the Act would make it nearly impossible to establish liability against a premises owner.[5] A key opposition point was the new requirement that a plaintiff proves the property owner "actively and affirmatively, with a degree of conscious decision-making, impelled the conduct of said third party."[6] Subsequent to July 1, 2019, reported actions alleging premises liability for failure to provide adequate security have dramatically decreased, while incidents of violent crime have in no way abated. It thus appears the opponents of the Act had valid concerns.

This Article will review the historical underpinnings of premises claims for negligent security in Mississippi. Pre-Act court opinions grappling with the issue of allocating fault between intentional and negligent tortfeasors will also be addressed. Further, the Article will examine all substantive parts of the Act, and detail how one new protection effectively renders all other provisions moot by immunizing property owners unless they aid and abet criminal activity.

II. RECOGNITION OF A DUTY

Nearly 40 years ago, the Mississippi Supreme Court held that a business "[u]ndoubtedly . . . owed its patrons . . . a duty to exercise reasonable care for their safety."[7] This holding was grounded in the long-standing rule that a premises owner is to exercise reasonable care in maintaining his business in a reasonably safe condition.[8] The business at issue in *Kelly*, McDonald's, was sued for negligence by the family members of Rodney Kelly following his fatal shooting in its parking lot.[9] Plaintiffs alleged that McDonald's failed to provide adequate security and a safe premises, resulting in Kelly's death.[10] Although the court recognized that McDonald's owed Kelly a duty, it affirmed a directed verdict because plaintiffs could not prove any breach of duty.[11] McDonald's undertook reasonable security measures, such as requiring its assistant manager to patrol the parking lot every thirty minutes.[12] Furthermore, it was not reasonably foreseeable "that Kelly and other youths would choose McDonald's parking lot as their battleground."[13]

In 1988, the Mississippi Supreme Court further considered the circumstances under which a premises owner could be held to owe a duty to protect patrons.[14] Mabeline Grisham alleged that the V.F.W.'s negligence led to her assault by another woman outside the door of the V.F.W. Post in Tupelo.[15]

---

5. Giacomo Bologna, *#MSLeg: Senate moves bill making it harder for Mississippians to sue businesses*, CLARION LEDGER (Feb. 8, 2019, 12:45 PM), https://www.clarionledger.com/story/news/politics/2019/02/07/msleg-bill-would-make-harder-mississippians-sue-businesses/2800422002/.

6. *Id.*

7. Kelly v. Retzer Retzer, Inc., 417 So. 2d 556, 560 (Miss. 1982).

8. *Id.* (citing J.C. Penny Co. v. Sumrall, 318 So. 2d 829, 832 (Miss. 1975)).

9. *Id.* at 557.

10. *Id.*

11. *Id.* at 560.

12. *Id.* at 560-61.

13. *Id.* at 562.

14. *See* Grisham v. John Q. Long V.F.W. Post, No. 4057, Inc., 519 So. 2d 413 (Miss. 1988).

15. *Id.* at 414.

The trial court granted the V.F.W. summary judgment.[16] On appeal, the Mississippi Supreme Court recognized its prior ruling in *Kelly* but found the opinion distinguishable because the V.F.W. served alcoholic beverages.[17] The court then cited the following rules from secondary and out-of-state authorities:

> [T]he keeper of a bar or tavern, though not an insurer of his guests' safety, has a duty to exercise reasonable care to protect them from reasonably forseeable injury at the hands of other patrons. Authorities indicate, however, that the owner can be liable only where he had cause to anticipate the wrongful or negligent act of the unruly patron. The requisite "cause to anticipate" the assault may arise from 1) actual or constructive knowledge of the assailant's violent nature, or 2) actual or constructive knowledge that an atmosphere of violence exists in the tavern.[18]

The court held that the V.F.W. owed Grisham "a duty to exercise reasonable care to protect her from reasonably forseeable injury at the hands of another."[19] Nonetheless, summary judgment for the V.F.W. was affirmed on the issue of proximate cause. Grisham failed to show that better lighting or security guards would have prevented the assault.[20]

In 1991, the Mississippi Supreme Court rounded out the framework for establishing a claim against a business for failing to prevent a third-party attack.[21] The court considered the following factors relevant to determining if an atmosphere of violence existed at a premises: "the overall pattern of criminal activity prior to the event in question that occurred in the general vicinity of the defendant's business premises, as well as the frequency of criminal activity on the premises."[22] The plaintiff in *Lyle* presented sufficient facts to raise an issue for trial via evidence from the local police department of criminal charges relating to prior incidents at the subject business and an adjacent parking lot.[23]

The duty recognized in *Kelly* and fleshed out in *Grisham* and *Lyle* has been analyzed in suits against various businesses over the years.[24] Notably, plaintiffs have obtained favorable rulings in Mississippi's appellate courts in these cases only nine (9) times since *Kelly* was decided.[25] By contrast, summary judgment in

16. *Id.* at 415.

17. *Id.* at 416-17.

18. *Id.* (citations omitted).

19. *Id.* at 417.

20. *Id.*

21. *See* Lyle v. Mlandinich, 584 So. 2d 397 (Miss. 1991).

22. *Id.* at 399 (citing J. Landau, C. Martin, & R. Thomas, *Premises Liability* § 4.08 [2] & 4-105 (1989)).

23. *Id.* at 398-99.

24. *See, e.g.*, Kroger Co. v. Knox, 98 So. 3d 441, 442, 443-44 (Miss. 2012) (grocery store); Bennett v. Highland Park Apartments, LLC, 170 So. 3d 522, 524, 527-28 (Miss. Ct. App. 2014) (apartment complex); Am. Nat'l Ins. Co. v. Hogue, 749 So. 2d 1254, 1257-58 (Miss. Ct. App. 2000) (shopping mall).

25. *See* Galanis v. CMA Mgmt. Co., 175 So. 3d 1213, 1214 (Miss. 2015) (reversing the trial court's grant of summary judgment in favor of defendant); *Bennett*, 170 So. 3d at 451 (reversing the trial court's grant of summary judgment in favor of defendants); InTown Lessee Assocs., LLC v. Howard, 67 So. 3d 711, 713 (Miss. 2011) (affirming judgment on jury verdict for plaintiffs); Thomas v. Columbia Grp., LLC, 969 So. 2d 849, 851 (Miss. 2007) (reversing the trial court's grant of summary judgment in favor of defendant); Gatewood v. Sampson, 812 So. 2d 212, 223-24 (Miss. 2002) (affirming judgment on jury verdict for plaintiff); *Lyle*, 584 So. 2d at 397 (reversing the trial court's grant of summary judgment in favor of defendant); Minor Child *ex rel.* Doe v. Miss. State Fed. of Colored Women's Club Hous. for the Elderly in Clinton, Inc., 941 So. 2d 820, 822-

favor of businesses/property owners has been affirmed or otherwise found appropriate on appeal nineteen (19) times.[26] These numbers beg the question of whether Mississippi landowners needed statutory protection beyond the not so insubstantial requirements for establishing liability under the common law.

III. NO ALLOCATION OF FAULT BETWEEN INTENTIONAL AND NEGLIGENT TORTFEASORS PRIOR TO THE ACT

In the late 1990s, the U.S. Court of Appeals for the Fifth Circuit and the Mississippi Court of Appeals both wrestled with the issue of whether section 85-5-7 allowed for the allocation of fault between premises owners and individuals charged with assaulting patrons.[27] Both courts ruled against allocation but for different reasons.

In *Whitehead*, Kmart argued that the trial court erred in refusing to include criminal actors on the verdict form since section 85-5-7 required the jury to determine the percentage of fault for each party allegedly at fault for plaintiffs' injuries.[28] The Fifth Circuit held that "the exclusion of the assailants from the verdict form and omission of their share of fault was proper."[29] Neither legislative history nor judicial interpretations of section 85-5-7 directly resolved the issue.[30] Instead, the court found determinative the definition of "fault" in subsection (1) of the statute, which specifically excluded "any tort which results from an act or omission committed with a specific wrongful intent," i.e., an intentional tort.[31] Kmart was properly held to be 100 percent at "fault" since the intentional tortfeasors had no "fault" under the statute.[32]

The plaintiff in *Dawson*, who was stabbed in a grocery store, argued that the trial court erred in allowing the jury to apportion fault between the defendant

---

23 (Miss. Ct. App. 2006) (reversing the trial court's grant of summary judgment in favor of defendant); Gibson v. Wright, 870 So. 2d 1250, 1257-58 (Miss. Ct. App. 2004) (affirming judgment on jury verdict for plaintiff); *Hogue*, 749 So. 2d at 1257 (affirming judgment for plaintiff).

26. *See* Mitchell v. Ridgewood E. Apartments, LLC, 205 So. 3d 1069, 1071 (Miss. 2016); Adams v. Hughes, 191 So. 3d 1236, 1238 (Miss. 2016); Double Quick, Inc. v. Moore, 73 So. 3d 1162, 1164 (Miss. 2011); Titus v. Williams, 844 So. 2d 459, 461-62, 467-68 (Miss. 2003); Crain v. Cleveland Lodge 1532, Order of Moose, Inc., 641 So. 2d 1186, 1187 (Miss. 1994); May v. V.F.W. Post # 2539, 577 So. 2d 372, 372 (Miss. 1991); Grisham v. John Q. Long V.F.W. Post, No. 4057, Inc., 519 So. 2d 413, 417 (Miss. 1988); Howard v. Rolin Enters., LLC, 284 So. 3d 772, 774 (Miss. Ct. App. 2019); Evans v. Shucker's Piano & Oyster Bar, Inc., 281 So. 3d 302, 304 (Miss. Ct. App. 2019); Howard v. R.M. Smith Invs., L.P., 228 So. 3d 937, 938 (Miss. Ct. App. 2017); Wright v. R.M. Smith Invs., L.P., 210 So. 3d 555, 556 (Miss. Ct. App. 2016); Sawvell v. Gulfside Casino, Inc., 158 So. 3d 363, 364 (Miss. Ct. App. 2015); Fenelon v. Jackson Metrocenter Mall Ltd., 172 So. 3d 760, 761-62 (Miss. Ct. App. 2012); Ellis v. Gresham Serv. Stations, Inc., 55 So. 3d 1123, 1124-25 (Miss. Ct. App. 2011); Alqasim v. Capitol City Hotel Invs., LLC, 989 So. 2d 488, 490-91 (Miss. Ct. App. 2008); Magnusen v. Pine Belt Inv. Corp., 963 So. 2d 1279, 1280 (Miss. Ct. App. 2007); Davis v. Christian Brotherhood Homes of Jackson, Miss., Inc., 957 So. 2d 390, 394 (Miss. Ct. App. 2007); Martin v. Rankin Circle Apartments, 941 So. 2d 854, 856 (Miss. Ct. App. 2006); Stevens v. Triplett, 933 So. 2d 983, 983 (Miss. Ct. App. 2005).

27. *See* Whitehead v. Food Max of Miss., Inc., 163 F.3d 265 (5th Cir. 1998); Dawson v. Townsend & Sons, Inc., 735 So. 2d 1131 (Miss. Ct. App. 1999).

28. Whitehead v. Food Max of Miss., Inc., 163 F.3d 265, 279 (5th Cir. 1998).

29. *Id.* at 282.

30. *Id.* at 279.

31. *Id.* at 280-81.

32. *Id.* at 281.

store owner and his assailant.[33] The court of appeals agreed that this procedure was in error since section 85-5-7 did not allow for allocation of fault between intentional tortfeasors and those at "fault" as characterized by the statute.[34] The court took notice of the Fifth Circuit's ruling in *Whitehead* but also exhaustively examined section 85-5-7's legislative history in its analysis.[35] Ultimately, the court found the statute silent on the issue and turned to the common law principle that one creating a situation upon which another later acts to cause damage will be liable for all the damage caused if he is liable at all.[36] "Had the jury found that Townsend was negligent, then it would have been 'liable for all the damage caused.'"[37]

IV. THE ACT[38]

It would be difficult to critique the Act if it only abrogated the no-allocation rulings of *Whitehead* and *Dawson*. The concept that one may be entirely liable for damages notwithstanding another's contribution to the injury is well established under Mississippi law.[39] Yet, Mississippi "was the first state in the nation to adopt a complete comparative negligence doctrine."[40] Further, in interpreting section 85-5-7, the Mississippi Supreme Court has recognized "that the policy considerations underlying the comparative fault doctrine would best be served by the jury's consideration of the negligence of all participants to a particular incident which gives rise to a lawsuit."[41] Allowing a jury to apportion fault between negligent actors while ignoring the actions of intentional tortfeasors, i.e., those directly and purposefully causing injury, hardly comports with a system aimed at tying recoverable damages to each party's respective level of wrongdoing. "It would be patently unfair in many cases to require a defendant to be 'dragged into court' for the malfeasance of another and to thereupon forbid the defendant from establishing that fault should properly lie elsewhere."[42]

The Act, however, does much more than abrogate *Whitehead* and *Daws*on. As discussed below, it effectively eliminates premises liability unless the

33. *Dawson*, 735 So. 2d at 1133.

34. *Id.* at 1133, 1141-42. This error was harmless, however, because "the jury's deliberations on whether Townsend [the defendant storeowner] had *any* fault were not impacted by the erroneous instruction that Williams [the assailant] had *some*." *Id.* at 1146.

35. *Id.* at 1136-41.

36. *Id.* at 1141-42. Stated differently, "[e]ach of two or more persons whose tortious conduct is a legal cause of a single and indivisible harm to the injured party is subject to the liability for the entire harm." *Id.* at 1141 (citations omitted).

37. *Id.* at 1142.

38. There are no Mississippi appellate decisions applying the Act as of the date of this article. The only federal opinions considering the Act deemed it inapplicable since the actions were filed before its effective date. *See* Ruff v. Waffle House, Inc., No. 1:19-CV-140-SA-DAS, 2020 WL 4979964, at *3 (N.D. Miss. Aug. 24, 2020); Rogers v. Tallahatchie Gourmet, LLC, No. 3:19-cv-00142-GHD-JMV, 2020 WL 50432, at *3 (N.D. Miss. Jan. 3, 2020).

39. *See* D & W Jones, Inc. v. Collier, 372 So. 2d 288, 291-94 (Miss. 1979) (collecting authorities).

40. Burton *ex rel.* Bradford v. Barnett, 615 So. 2d 580, 582 (Miss. 1993).

41. Estate of Hunter v. Gen. Motors. Corp., 729 So. 2d 1264, 1273 (Miss. 1999) (holding that nonparties may be allocated fault).

42. *Id.*

premises owner himself is a partner to the crime. Ironically, this added protection also creates an irreconcilable conflict between the apportionment of fault and joint and several liability provisions of section 85-5-7.

A. Miss. Code Ann. § 11-1-66.1(2)

The first substantive provision of the Act provides that neither an owner of commercial or other real property nor the owner's agent or employee will be civilly liable to any invitee injured on the property due to the willful, wanton, or intentional tortious conduct of a third party unless the injured party can prove that:

(a) The conduct of said third party occurred on the property;

(b) The conduct of the person who owns, leases, operates, maintains or manages the property actively and affirmatively, with a degree of conscious decision-making, impelled the conduct of said third party; and

(c) The third party's conduct proximately caused the economic and noneconomic damages suffered by the injured party.[43]

Subsection (b) is the key provision since it effectively overshadows all other portions of the Act.

The meaning of subsection (b) is largely unambiguous and can be determined from the statutory text. It clearly applies to those owning, managing, or otherwise exercising some not insignificant degree of control over the property. Further, one of those individuals must act affirmatively and consciously, i.e., knowingly, as opposed to accidentally or inadvertently. Yet, how an owner or manager can be said to have "*impelled* the [willful, wanton or intentional tortious] conduct" of a third party is not entirely clear.[44] The term "impel" is not defined under the Act. Thus, resort to its dictionary definition is appropriate for determining the "common or popular meaning" of the word.[45] The *Merriam-Webster Dictionary* principally defines "impel" as "to urge or drive forward or on by or as if by the exertion of strong moral pressure."[46] Thus, a property owner must be proven to have knowingly urged, driven, or pressured another to commit an intentional tort against a patron for liability to attach.

The ordinary and plain meaning of subsection (b) is problematic for several reasons. First, it essentially requires a premises owner to aid and abet criminal activity in order to be held civilly liable. As recognized by the Mississippi Court of Appeals:

It is well established that any person who is present at the commission of a criminal offense and *aids, counsels, or encourages* another in the commission of that offense is an aider and abettor and is equally guilty with the principal offender. In order to be held criminally liable as an aider and abetter in the commission of a felony, one must do something that will *incite, encourage, or assist* the actual perpetrator in the commission of the crime.[47]

---

43. MISS. CODE ANN. § 11-1-66.1(2) (2019).

44. MISS. CODE ANN. § 11-1-66.1(2)(b) (2019) (emphasis added).

45. Lawson v. Honeywell Int'l, 75 So. 3d 1024, 1028 (Miss. 2011).

46. *Impel*, MERRIAM WEBSTER DICTIONARY (11th ed. 2023).

47. Story v. State, 296 So. 3d 104, 116-17 (Miss. Ct. App. 2019) (emphasis added) (quotation marks

Criminal and civil actions serve different purposes, *viz.*, criminal law is concerned with deterrence and punishment, while civil proceedings are intended to provide compensation for injuries.[48] Further, "[p]remises liability is a 'theory of negligence that establishes the duty owed to someone injured on a landowner's premises as a result of 'conditions or activities' on the land.'"[49] Imposing civil liability only when an actor's conduct can be deemed criminal, i.e., intentional, ignores the distinct purposes behind these areas of law, as well as the negligence standard undergirding premises liability.[50]

Second, under what real-world circumstances could a business owner be said to have affirmatively and knowingly urged a third-party to commit a crime or intentional tort against one of her patrons? Two hypotheticals come to mind. A bar owner offering a drunk patron free liquor to assault another patron because of an outstanding debt should suffice. Also, a restaurant manager paying an exterminator to put rat poison in a returning food critic's soup because of a prior negative review should meet the requirement. Neither scenario seems plausible outside the confines of a law school exam or crime drama. Furthermore, both fact patterns are incompatible with the traditional negligence-based theory of premises liability. "[T]here is no such thing as a negligent assault."[51]

Third, it is virtually certain that no member of the public will receive compensation from a business's liability carrier if the owner "affirmatively, with a degree of conscious decision-making," strongly pressured another to commit an intentional tort against the individual.[52] Expected or intended injuries are excluded from coverage under every commercial general liability insurance policy the author has encountered. Thus, the plaintiff's chances of obtaining damages from the premises owner will be about the same as those of recovering compensation from the assailant, slim to none.

B. Miss. Code Ann. § 11-1-66.1(3)

This portion of the Act provides that the existence of an "atmosphere of violence" in a premises liability action may only be established by similar violent conduct:

(a) Which occurred three (3) or more times within three (3) years before the third party act at issue;

(b) Which took place only on the commercial or other real property where the acts of the third party occurred; *and*

(c) Which are based upon three (3) or more separate events or incidents that resulted in three (3) or more arraignments of an individual for a felony involving an act of violence.[53]

---

and citations omitted).

48. *See* Miss. State Fed. of Colored Women's Club Hous. for the Elderly in Clinton, Inc. v. L.R., 62 So. 3d 351, 360 (Miss. 2010).

49. Johnson v. Goodson, 267 So. 3d 774, 777 (Miss. 2019) (citation omitted).

50. *Cf.* Estate of Puckett v. Clement, 238 So. 3d 1139, 1146 (Miss. 2018) ("[A]n intentional tort cannot be committed negligently.") (citation omitted).

51. Webb v. Jackson, 583 So. 2d 946, 951 (Miss. 1991) (citation omitted).

52. MISS. CODE ANN. § 11-1-66.1(2)(b) (2019).

53. MISS CODE ANN. § 11-1-66.1(3) (2019) (emphasis added).

Subsections (a) and (c) prescribe a three-year look-back period for other incidents and specify the requisite number and type of incidents that may be considered.[54] Subsection (b) eliminates criminal activity "in the general vicinity of the defendant's business premises" from the inquiry.[55]

One issue raised by the foregoing provision is the necessity of a prior incident leading to an arraignment for consideration in an "atmosphere of violence" analysis. The Mississippi Supreme Court has repeatedly "emphasized that the *foreseeability* of the injury sustained provide[s] the touchstone for liability."[56] The absence of a plea to a criminal indictment in open court does not mean that a property owner is unaware that a crime has occurred on his property.[57] It may simply mean that the offender has not yet been caught. A string of *unsolved* robberies at an establishment would seem to make a future holdup more likely, i.e., foreseeable.

A more salient question is why must an "atmosphere of violence" be proven at all? A plaintiff in any premises liability action based on injury caused by the intentional act of a third party must now prove that the owner or manager "actively and affirmatively, with a degree of conscious decision-making, impelled the conduct of said third party."[58] Surely, one knowingly urging another to commit an assault against an invitee can foresee and anticipate the resulting injury. Requiring the existence of prior acts of violence at a premises where the owner had "cause to anticipate the assault" he impelled seems entirely superfluous.[59]

C. Miss. Code Ann. § 11-1-66.1(4)

The last substantive provision under section 11-1-66.1 eliminates "constructive knowledge" of an assailant's violent nature as grounds for establishing liability.[60] "[C]ivil liability may not be based on the prior violent nature of the third party . . . unless the person who owns, leases, operates, maintains or manages the property *has actual, not constructive*, *knowledge* of the prior violent nature of said third party."[61] The need for this requirement in establishing the foreseeability of an injury is also questionable given the aforementioned prerequisite that a premises owner affirmatively urges a third party to injure an invitee.[62] Moreover, requiring an owner to have actual

54. *Cf.* Kroger Co. v. Knox, 98 So. 3d 441, 444-45 (Miss. 2012) (comparing and contrasting precedent regarding the evidence necessary to establish an atmosphere of violence).

55. Magers v. Diamondhead Resort, LLC, 224 So. 3d 106, 109 (Miss. Ct. App. 2016) (citation omitted).

56. Crain v. Cleveland Lodge 1532, Order of Moose, Inc., 641 So. 2d 1186, 1189 (Miss. 1994).

57. *See* MISS. R. CRIM. P. 15.

58. MISS. CODE ANN. § 11-1-66.1(2)(b) (2019).

59. *Crain*, 641 So. 2d at 1189 (citation and internal quotation marks omitted).

60. The Mississippi Supreme Court extensively examined the "constructive knowledge" requirement in Mitchell v. Ridgewood E. Apartments, LLC, 205 So. 3d 1069 (Miss. 2016). Plaintiffs argued that the defendant apartment complex had constructive knowledge of the assailant's violent nature because it was subject to federal housing regulations that authorized criminal background checks. *Id.* at 1074. The court rejected this argument because, *inter alia*, the regulations authorized but did not require the complex to investigate criminal records. *Id.* at 1076.

61. MISS. CODE ANN. § 11-1-66.1(4) (2019) (emphasis added).

62. *See* MISS CODE ANN. § 11-1-66.1(2)(b).

knowledge of the violent nature of a third party, whom they have directed to cause injury, appears more akin to an aggravating circumstance for criminal punishment than grounds for imposing civil liability.

D. Miss. Code Ann. § 85-5-7

Subsection (1) of the statute now states as follows:

(1) As used in this section, "fault" means an act or omission of a person which is a proximate cause of injury or death to another person or persons, damages to property, tangible or intangible, or economic injury, including, but not limited to, negligence, malpractice, strict liability, absolute liability or failure to warn. **Except as otherwise provided in this subsection (1),** "fault" shall *not* include any tort which results from an act or omission committed with a specific wrongful intent. **For any premises-liability action, as defined under Section 11-1-66.1(7), alleging injury as a result of the willful, wanton or intentional tortious conduct of a third party on commercial or other real property in the State of Mississippi, "fault" shall include any tort which results from an act or omission committed with a specific wrongful intent.**[63]

The additional statutory language negates *Whitehead* and *Dawson*'s no-statutory-apportionment rulings.[64] At first glance, it now appears that a jury can "determine the percentage of fault for" both a property owner *and* a third-party committing an intentional tort against an invitee.[65]

Yet, there is a catch. Joint and several liability remains the rule for "all who *consciously* and *deliberately* pursue a common plan or design to commit a tortious act, *or actively* take part in it."[66] As previously examined, a premises owner cannot be held liable under the Act unless they "*actively* and *affirmatively*, with a degree of *conscious* decision-making, impelled the" tortious conduct of a third-party.[67] This new liability protection effectively mandates a scenario in which the owner and third-party must be held jointly and severally liable. "All who actively participate in any manner in the commission of a tort, or who command, direct, advise, encourage, aid or abet its commission, are jointly and severally liable therefor."[68]

The Act thus contradicts itself. On the one hand, a jury is to apportion fault between each party contributing to the injury, including the third-party committing an intentional tort.[69] On the other hand, "[j]oint and several liability *shall* be imposed on" the premises owner who consciously directed the third-party to commit the tortious act.[70] These outcomes are irreconcilable and trigger the disfavored rule of repeal by implication. "[R]epeal by implication is not favored in law, but when there is an irreconcilable conflict between two statutes,

63. MISS. CODE ANN. § 85-5-7(1) (2019) (new text emphasized).

64. *See* Whitehead v. Food Max of Miss., Inc., 163 F.3d 265, 280-81 (5th Cir. 1998); Dawson v. Townsend & Sons, Inc., 735 So. 2d 1131, 1141 (Miss. Ct. App. 1999).

65. MISS. CODE ANN. § 85-5-7(5) (2019).

66. MISS. CODE ANN. § 85-5-7(2), (4) (2019) (emphasis added).

67. MISS. CODE ANN. § 11-1-66.1(2)(b) (2019) (emphasis added).

68. Rex Distribut. Co. v. Anheuser-busch, LLC, 271 So. 3d 445, 453 (Miss. 2019) (citation omitted).

69. MISS. CODE ANN. § 85-5-7(1), (5) (2019).

70. MISS. CODE ANN. § 85-5-7(2), (4) (2019) (emphasis added).

the latter statute repeals the former insofar as it is in conflict."[71]

The Act's public policy implications are certainly debatable. Is it wise to eliminate incentives for businesses to keep their premises safe at a time when violent crime is surging locally and nationally?[72] Conversely, should not a jury be permitted to consider and apportion fault between negligent *and* intentional actors in a true comparative fault system? What should be beyond debate, however, is the inefficacy of a single provision in a broad legislative enactment effectively neutering other provisions and implicitly repealing long-standing law.

V. REPORTED FILINGS CRATER

An exact determination of the Act's effect on the number of lawsuits filed against property owners for failure to provide security is not readily discernible. Neither the Mississippi Supreme Court's Annual Reports nor the Administrative Office of Courts' Civil Cover Sheets specifically reference these types of actions. Nonetheless, a fair measure of pre-Act versus post-Act filings can be gleaned from reports provided by Courthouse News Service ("CNS"), which is a subscription-based news service that specializes in civil litigation.[73] Summaries of civil complaints filed in Mississippi's federal district courts and Mississippi counties utilizing the Mississippi Electronic Courts ("MEC") system are available via CNS.

The author's review of CNS reports shows the following number of applicable actions filed from 2016 through 2021:[74]

- 2016: **32**,
- 2017: **46**,
- 2018: **38**,
- 2019 (pre-Act, through June 30): **62**,
- 2019 (post-Act, July 1–December 31): **5**,
- 2020: **9**,
- 2021: **8**.[75]

---

71. Jackson Mun. Airport Auth. v. Shivers, 206 So. 2d 190, 193 (Miss. 1968).

72. *See* Mina Corpuz, *Jackson ends year of record violence with more than 150 homicides; most were gun deaths*, CLARION LEDGER (Dec. 30. 2021, 9:00 PM), https://www.clarionledger.com/story/news/2021/12/31/jackson-ms-homicides-violent-crime-2021-broke-records/9059177002/ (providing that Jackson set a record of 130 homicides in 2020 and a new record of 152 in 2021); Elliot Hughes, *Another record-breaking year of homicides ends with 197 lives lost in Milwaukee*, MILWAUKEE JOURNAL SENTINEL (Jan. 13, 2022, 2:12 PM), https://www.jsonline.com/story/news/2022/01/01/milwaukee-totals-197-homicides-2021-according-law-enforcement/9037816002/ (reporting that 12 major U.S. cities broke homicide records in 2021); Kevin Johnson, *FBI: Record surge in 2020 murders; nearly 30% increase drives spike in violent crime*, USA TODAY (Sept. 27, 2021, 1:54 PM), https://www.usatoday.com/story/news/politics/2021/09/27/fbi-reports-2020-murder-surge-biggest-single-year-jump/5886792001/ ("The FBI reported a nearly 30% increase in murders in 2020, the largest single-year jump since the bureau began recording crime statistics six decades ago.").

73. *See About Us*, COURTHOUSE NEWS SERV. (Sept. 28, 2016), https://www.courthousenews.com/about-us/.

74. MEC and PACER filings were also examined in certain instances.

75. Cases alleging injuries caused by defendants' employees or agents were excluded since the Act only applies when the "tortious conduct of any *third party*" is at issue. MISS. CODE ANN. § 11-1-66.1(2) (2019) (emphasis added). Student-injury cases were also omitted from the reported filings. In the author's opinion, those lawsuits sound less in premises liability and more in a failure to supervise or monitor theory of liability.

VI. CONCLUSION

The Act has nearly eliminated premises liability for failure to protect against the criminal actions of third parties in Mississippi. A plaintiff may no longer recover by showing that his assault at a defendant's premises was foreseeable due to the existence of prior criminal activity, and that the owner failed to take reasonable measures to protect against the incident, such as maintaining adequate lighting or retaining security personnel. An injured party must now prove the foregoing *and* that the owner "actively and affirmatively, with a degree of conscious decision-making, impelled the" criminal activity.[76] The circumstances under which a claim can be proven to meet these requirements and sustain a verdict seem entirely hypothetical.

The Act is not Mississippi's first statutory limitation on its citizens' ability to obtain compensation for injuries under the common law.[77] It is also unlikely to be the last given the pro-business climate presently (and for the foreseeable future) dominating Mississippi politics. The prudent Mississippi practitioner, whether representing plaintiffs or defendants, should thus carefully consider how her practice will be affected when the State determines that another segment of society needs extra protection against civil litigation.

76. MISS. CODE ANN. § 11-1-66.1(2) (2019).

77. *See, e.g.*, MISS. CODE ANN. § 11-1-60(2)(a)-(b) (2004).