IN THE SUPREME COURT OF MISSISSIPPI

NO. 2009-CA-00722-SCT

JIM DOE AND BARBARA DOE, INDIVIDUALLY, AND AS NATURAL PARENTS OF A.D. A MINOR

v.

JAMESON INN, INC., KITCHIN HOSPITALITY, LLC AND ERICA COVINGTON

DATE OF JUDGMENT:	04/20/2009
TRIAL JUDGE:	HON. WILLIAM E. CHAPMAN, III
COURT FROM WHICH APPEALED:	RANKIN COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANTS:	WAYNE E. FERRELL, JR. JANICE T. JACKSON BRIAN K. HERRINGTON
ATTORNEYS FOR APPELLEES:	B. STEVENS HAZARD AARON REESE EDWARDS
NATURE OF THE CASE:	CIVIL - PERSONAL INJURY
DISPOSITION:	AFFIRMED - 01/13/2011
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE CARLSON, P.J., LAMAR AND PIERCE, JJ.

PIERCE, JUSTICE, FOR THE COURT:

¶1. This case comes before the Court on appeal from the Rankin County Circuit Court, Hon. William E. Chapman presiding. Jim and Barbara Doe,[1] individually and as natural parents of Ann Doe, appeal the grant of summary judgment in favor of Jameson Inn, Inc., Kitchin Hospitality LLC, and Erica Covington (defendants). Because no genuine issue of

[1] On appeal, the names of the appellants have been changed to protect the minor's identity.

material fact exists as to the status of Ann Doe at the time she entered upon the premises of Jameson Inn, we affirm the trial court's grant of summary judgment.

FACTS AND PROCEEDINGS

¶2. On approximately March 1, 2003, Kelvin Washington rented a room at the Jameson Inn, located in Pearl, Mississippi. At some point, Washington turned over the keys to the room to several teenage boys so they could celebrate the birthday of one of them. The group eventually made its way to Tinseltown, a local movie theater located directly across the street from the Jameson Inn. On the same evening, Ann Doe and her friend were dropped off at Tinseltown. At the time in question, Ann was thirteen years old, and her friend was twelve years old.

¶3. According to Ann, her friend approached a man in the game room of the theater and asked him for a smoke. The man told the girls he did not have a cigarette, but that he had "something else." The girls then left the theater and accompanied the man to the Jameson Inn. The teenage boys also joined the group and headed back with the girls to the Jameson Inn. Ann admitted that she and her friend had left the theater to smoke marijuana at the Jameson Inn.

¶4. The group entered the Jameson Inn through the side door, which could be opened only with a working key. Erica Covington, the front-desk clerk, did not see the group enter the hotel.[2] While in the room, the group passed around a marijuana cigarette. But Ann stated

[2]Additionally, two other employees of Jameson Inn claim they saw two white girls together with several African-American boys leave the hotel. But neither employee could provide further details of the group other than race. Specifically, one of those employees claimed she saw "a group" get off of the elevator in the front lobby and exit through the front

she took only one puff and did not inhale. After smoking marijuana, Ann was raped by one of the young men in the bathroom of the hotel room. Ann's friend also had sexual intercourse with more than one of the teenage boys.

¶5. Ann and her friend left the Jameson Inn and walked back to the movie theater. The girls were picked up by the grandfather of Ann's friend. Ann did not report the incident immediately. The next day, the girls were caught stealing pregnancy tests from a nearby drugstore. The girls advised the police officer of what had taken place the night before at the Jameson Inn. Ann's attacker pleaded guilty to statutory rape.

¶6. On December 22, 2003, Jim and Barbara Doe filed a complaint against Jameson Inn, Kitchin Hospitality LLC, and Erica Covington in the Hinds County Circuit Court. Venue was transferred to the Rankin County Circuit Court. On November 26, 2007, defendants filed their Motion for Summary Judgment. Because it was undisputed that Ann had been on the premises of the Jameson Inn to smoke marijuana, the trial court determined Ann Doe's status to be that of a "licensee."[3] The trial court further found that none of the defendants had breached any duty to Ann, and granted summary judgment in favor of Jameson Inn, Inc., Kitchin Hospitality LLC, and Erica Covington.

¶7. The Does now appeal and raise five issues for this Court's review. In the interest of brevity, the issues have been consolidated into the following three issues:

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door. The other employee claimed she saw "a group" talking and laughing outside the door to the side entrance of the hotel. Ann claims the group she was with entered through the side door of the Jameson Inn, and that she and her friend exited the Jameson Inn alone.

[3] As a licensee, the defendants owed Ann Doe a "duty to refrain from willfully or wantonly injuring" her. ***Little v. Bell***, 719 So. 2d 757, 760 (Miss. 1998).

I. Whether the trial court erred in considering the Does' claims as a single cause of action for premises liability.

II. Whether the trial court erred in granting summary judgment on the basis that Ann Doe was a licensee.

III. Whether the Court should abandon the common-law distinctions between invitees, licensees, and trespassers when determining a landowner's duty, or, in the alternative, exempt minors from such distinctions.

DISCUSSION

¶8. On appeal, this Court reviews a trial court's grant of summary judgment de novo.[4] The motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact."[5]

I. Whether the trial court erred in considering the Does' claims as a single cause of action for premises liability.

¶9. The Does contend that the instant case is not only one of premises liability, but also a case of simple negligence. They cite ***Keith v. Peterson***[6] and ***Presswood v. Cook***[7] for the proposition that not all causes of action that arise on one's property are governed by the law which encompasses premises liability. Both ***Presswood*** and ***Keith*** relied on this Court's

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[4]***Duckworth v. Warren***, 10 So. 3d 433, 436 (Miss. 2009) (citing ***One South, Inc. v. Hollowell***, 963 So. 2d 1156, 1160 (Miss. 2007)).

[5]Miss. R. Civ. P. 56(c).

[6]***Keith v. Peterson***, 922 So. 2d 4, 10 (Miss. Ct. App. 2005).

[7]***Presswood v. Cook***, 658 So. 2d 859, 861-62 (Miss. 1995).

holding in ***Hoffman v. Planters Gin Co.***, in which the Court carved out an exception to the general standard of care owed to a licensee.[8]

¶10. The ***Hoffman*** exception has no place in determining whether a cause of action falls within the realm of premises liability versus that of simple negligence. Rather, the ***Hoffman*** exception is applicable only in premises liability cases where, by a finding of certain factors, the duty of care owed to a licensee should be elevated from "willful and wanton injury" to a "reasonable standard of care."[9] Thus, whether Ann's cause of action falls under the general theory of negligence or a specific type of negligence warrants a review of the facts that gave rise to Ann's claim.

¶11. The injury of Ann, i.e., the rape, took place in a private room on the premises of the Jameson Inn. And the Does allege that Ann's injury resulted from the dangerous condition of the Jameson Inn. Since premises 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"[10] on the land, we find the trial court properly treated the Does' claim as one of pure premises liability. As such, we cannot hold the trial court in error on this point.

II. Whether the trial court erred in granting summary judgment on the basis that Ann Doe was a licensee.

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[8]*See* ***Hoffman v. Planters Gin Co.***, 358 So. 2d 1008, 1013 (1978).

[9]*See* ***Little v. Bell***, 719 So. 2d 757, 761 (Miss. 1998); ***Hughes v. Star Homes, Inc.***, 379 So. 2d 301, 304 (Miss. 1980); ***Hoffman v. Planters Gin Co.***, 358 So. 2d 1008, 1011-12 (Miss. 1978).

[10]*Black's Law Dictionary* 961 (7th ed. 2000).

¶12. Ann claims she was an invitee at the time she entered the premises of the Jameson Inn and was raped. But the trial court determined Ann's status to be that of a licensee. In order for this Court to determine whether the trial court erred in granting summary judgment in favor of the defendants, we must first address whether the issue of Ann's status was one for the trial court or the jury.

¶13. This Court has held that, where the facts of the case are not largely in dispute, the classification of a plaintiff becomes a question of law for the trial judge.[11] Here, the only fact pertinent to the determination of Ann's status is her reason for leaving Tinseltown and entering the Jameson Inn property. The dissent attempts to show that Ann's reason for leaving Tinseltown is in dispute. But the record reveals that, while Ann's attacker denied that he had smoked marijuana in the hotel room, he admitted that he could not remember whether anyone else had smoked marijuana. Ann, however, admitted that she had left the movie theater to smoke marijuana and, in fact, had taken one puff off a marijuana cigarette while in the hotel room.[12] Since Ann's attacker does not confirm or contest whether Ann left

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[11] ***Leffler v. Sharp***, 891 So. 2d 152, 156 (Miss. 2004) (citing ***Adams v. Fred's Dollar Store of Batesville***, 497 So. 2d 1097, 1100 (Miss. 1986); ***Little v. Bell***, 719 So. 2d 757, 761 (Miss. 1998); ***Graves v. Massey***, 87 So. 2d 270, 271 (Miss. 1956)).

[12] The following exchange concerns Ann's written statement to the police:

Q. "Then we asked if he had a cig to smoke and he was like, no, but I have some weed." Is that true?
A. Yes, sir.
Q. "And [Rachel Roe] was like really, well, come on let's go smoke it and I thought for a second and like, okay, whatever." Is that true?
A. Yes, sir.

And again in the following colloquy:

the movie theater to smoke marijuana, Ann's reason for leaving Tinseltown remains undisputed. Therefore, the determination of Ann's status was properly a question of law to be decided by the trial judge.

¶14. Next, we must address the ***Hoffman*** exception. As mentioned previously, under the ***Hoffman*** exception, this Court has held that "the ordinary and reasonable standard of care has application and 'the premises owner is liable for injury proximately caused by his affirmative or active negligence in the operation or control of a business which subjects either a *licensee* or invitee to unusual danger, or increases the hazard to him, when his presence is known.'"[13] This exception, however, applies only to cases involving the operation or control of a business, and where injury results from "active conduct [of the landowners] as distinguished from conditions of the premises, or passive negligence."[14]

Q. Did you call your parents or anyone to tell them that this man had invited you over to a hotel room to smoke marijuana?
A. No, sir.
Q. Why not?
A. I didn't want anybody to know.
Q. Why not? Didn't want them to know you were smoking marijuana or didn't want them to know you were going to a room with a guy that you didn't know?
A. I didn't want them to know I was going [with Rachel Roe] to a room with people I didn't know.
Q. To smoke marijuana?
A. Yes, sir.

. . .

Q. So how many puffs did you take off this marijuana cigarillo?
A. Just one.

[13] ***Little***, 719 So. 2d at 761(quoting ***Hoffman***, 358 So. 2d at 1013) (emphasis added).

[14] ***Id***. at 761.

¶15. Ann claims that she, her friend, and the group of boys entered the Jameson Inn through the side entrance. But Jessica Donahue, a cleaning attendant at the Jameson Inn, claimed in her deposition that she saw "a group" enter and exit through the front door of the hotel. This disputed fact[15] calls into question whether the Jameson Inn had knowledge of Ann's presence on the night of the rape. But the ***Hoffman*** exception requires more than mere knowledge. Even if Jameson Inn knew of Ann's presence at the hotel, the record lacks any evidence to suggest that the defendants engaged in any "active negligence" that somehow caused injury to Ann. Additionally, no evidence was presented of an "unusual danger" on the premises or an "increase in hazard" to Ann.[16] Thus, the ***Hoffman*** exception does not apply.

¶16. Since the ***Hoffman*** exception is inapplicable to the present facts, we must determine Ann's status under the guidance of the common-law distinctions of trespasser, licensee, and invitee. "A licensee is one who enters upon the property of another for his [or her] own convenience, pleasure or benefit, pursuant to the license or implied permission of the owner."[17] An invitee is a person who "goes upon the premises of another in answer to the express or implied invitation of the owner or occupant for their mutual benefit or

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[15]Again, Jessica Donahue claimed she saw "a group" get off of the elevator in the front lobby and exit through the front door. The other employee claims she saw "a group" talking and laughing outside the door to the side entrance of the hotel. Ann claims the group she was with entered through the side door of the Jameson Inn, and that she and her friend exited the Jameson Inn alone.

[16]*See* ***Hoffman***, 358 So. 2d at 1013.

[17]***Lucas v. Miss. Housing Authority # 8***, 441 So. 2d 101, 103 (Miss. 1983).

advantage."[18] "[A] trespasser is one who enters upon another's premises without license, invitation or other right."[19]

¶17. According to Ann, she entered the premises of the Jameson Inn to perform the illegal activity of smoking marijuana. Thus, Ann's status on the night in question could not be that of invitee, as the element of mutual benefit is lacking.[20] Jameson Inn received no benefit by virtue of Ann's presence on the premises.[21] The defendants owed no higher duty to Ann other than to refrain from willfully or wantonly injuring her.[22] To constitute willful and wanton injury, something more than mere inadvertence or lack of attention is required.[23] Because the record lacks any evidence to suggest that the defendants intended willfully or wantonly to injure Ann the night she was raped at the Jameson Inn, we cannot find that the defendants violated any duty to Ann.

¶18. Additionally, the Does' argument appears to allege that the defendants were "passively negligent" rather than "actively negligent," since they allege that the defendants "failed to take any action at all to prevent the minor girls from going to the hotel room with the older boys." Again, passive negligence is defined as "the failure to do something that

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[18] ***Hughes v. Star Homes, Inc.***, 379 So. 2d 301, 303 (Miss. 1980).

[19] ***Hoffman***, 358 So. 2d at 1011.

[20] ***Little***, 719 So. 2d at 761.

[21] ***Id.***

[22] ***Id.***

[23] ***Id.***

should have been done."[24] But even assuming, *arguendo*, that the defendants were liable for any "passive negligence," the duty owed to Ann would be to refrain from willfully or wantonly injuring her. And we have stated previously that the record lacks any evidence that the defendants intended willfully or wantonly to injure Ann.

¶19. The dissent opines that Ann could have been found by a trier of fact to have been the guest of a hotel guest, making her a invitee of the Jameson Inn, and, therefore, entitled to receive a higher duty of care. It cites a case from the Florida Supreme Court to support this proposition. But the case is easily distinguishable from the present facts, and adds no instructional value to this Court's analysis.

¶20. In ***Steinberg v. Irwin Operating Co.***, the Florida Supreme Court held that the injured party "enjoyed the status of an implied invitee when she entered the hotel lobby," because she was a friend of a *registered* hotel guest.[25] But Ann would not qualify as a "guest of a registered hotel guest," because the room in which she visited was not registered to her attacker. Rather, it was rented by and registered to Kelvin Washington. Thus, Kelvin Washington was the only registered hotel guest. If anything, Ann was the guest of a guest of a registered hotel guest. And even with this status, we find that Ann was, at most, a licensee at the time she entered the Jameson Inn. Thus, the trial court did not err in granting summary judgment in favor of the defendants.

III. Whether the Court should abandon the common-law distinctions between invitees, licensees, and trespassers when determining a landowner's duty.

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[24] ***Titus v. Williams***, 844 So. 2d 459, 466 (Miss. 2003).

[25] ***Steinberg v. Irwin Operating Co.***, 90 So. 2d 460, 461 (Fla. 1956).

¶21. On appeal, the Does request that this Court abandon the common-law distinctions of trespasser, licensee, and invitee, and opt for a reasonable-care standard. Alternatively, the Does argue that, if the Court should retain the common-law distinctions, it should exempt minors from such classifications.

¶22. As recently as 2003, this Court has declined to abandon the common-law distinctions at issue today.[26] The Court thoroughly has addressed this very argument, and has noted that, over time, courts have "balanced the interests of persons injured by conditions of land against the interests of possessors of land to enjoy and employ their land for the purposes they wish."[27] And to abandon "the careful work of generations for an amorphous 'reasonable care under the circumstances' standard seems . . . improvident."[28] Further, the Court has held that "the system of invitee, licensee, and trespasser, evolved to delineate very fine distinctions as to when a duty was owed to an entrant on land," and that these distinctions protect a landowner from the "unfettered discretion of the juries."[29] Because we find the foregoing reasons persuasive, and we agree that the need to promote stability and predictability in the law outweighs the justifications for abandoning the common-law distinctions, we decline to abandon the trespasser, licensee, and invitee distinctions.

¶23. Lastly, we will address the Does' alternative argument of whether a minor should be exempt from the common-law classifications of trespasser, licensee, and invitee. In

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[26] *See* ***Titus***, 844 So. 2d 198 (Miss. 2003).

[27] ***Little***, 719 So. 2d at 763.

[28] ***Id***. at 763.

[29] ***Id***. at 764.

Mississippi, the question of a minor's capacity to perceive danger has arisen in the context of contributory negligence and the doctrine of attractive nuisance. Contributory negligence is the "act or omission amounting to want of ordinary care on part of the complaining party which, concurring with the defendant's negligence, is the proximate cause of injury."[30] Within this doctrine, there is a presumption that a minor between the ages of seven and fourteen does not possess sufficient discretion to make him or her guilty of contributory negligence.[31] The doctrine of attractive nuisance is "the rule that a person who owns property on which there is a dangerous thing or condition that will foreseeably lure children to trespass has a duty to protect those children from the danger."[32]

¶24. This Court has held that the attractive-nuisance doctrine does not apply to "obvious, natural dangers," and that an "occupant may assume that a child's guardians will have warned the child about readily apparent dangers."[33] And within the realm of contributory negligence, the presumption that a minor cannot exercise judgment with regard to a dangerous condition on the land may be rebutted by showing the minor was capable of exercising judgment and discretion, i.e., exceptional capacity.[34] Likewise, the doctrine of

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[30] *Black's Law Dictionary* 716 (6th ed. 1991).

[31] ***Glorioso v. YMCA***, 556 So. 2d 293, 295 (Miss. 1989).

[32] *Black's Law Dictionary* (8th ed. 2004).

[33] ***Skelton v. Twin County Rural Electric Ass'n***, 611 So. 2d 931, 937 (Miss. 1992) (citing ***McGill v. City of Laurel***, 173 So. 2d 892, 898 (Miss. 1995)).

[34] ***Skelton***, 611 So. 2d at 937.

premises liability does not exempt a minor from the common-law classifications, where it can be shown the minor was capable of recognizing an obvious and open danger.[35]

¶25. Here, the Does would like this Court to consider the notion that Ann was not capable of understanding the consequences of entering a private hotel room with strange men she did not know and without an adult. Yet the facts uncontrovertedly show that Ann understood the potential danger of going to the hotel room with strangers. In fact, Ann admitted in her deposition that she was aware of the potential danger, but went to the hotel anyway. Since Ann admittedly recognized the potential consequences of her actions, and the defendants owed only a duty to refrain from willful and wanton injury to Ann, the Does' argument on this point must fail.

CONCLUSION

¶26. Based on the foregoing reasons, the trial court's grant of summary judgment is affirmed.

¶27. **AFFIRMED.**

WALLER, C.J., CARLSON, P.J., RANDOLPH AND LAMAR, JJ., CONCUR. GRAVES, P.J., CONCURS IN RESULT ONLY. KITCHENS, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY CHANDLER, J. DICKINSON, J., NOT PARTICIPATING.

KITCHENS, JUSTICE, DISSENTING:

¶28. The majority employs the common law distinctions of trespasser, licensee, and invitee and determines, incorrectly, that A.D. was a licensee, rather than an invitee, of Jameson Inn when she was raped. Maj. Op. at ¶¶ 16-17. That assessment is premised on the majority's

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[35] *See* ***id***. at 938.

mistaken assertion that there is undisputed fact that A.D. "enter[ed] upon the property of [the Jameson Inn] for her own convenience, pleasure or benefit . . . ." Maj. Op. at ¶ 16.

¶29. Ordinarily, the determination of whether a person is an invitee, a licensee, or a trespasser is a question for the jury's decision; however, where the facts are not in dispute, the classification becomes a question of law for the trial judge. ***Leffler v. Sharp***, 891 So. 2d 152, 156 (Miss. 2004) (citing ***Adams v. Fred's Dollar Store of Batesville***, 497 So. 2d 1097, 1100 (Miss. 1986)). Because contradictory deposition testimony was before the trial judge about the relevant facts, A.D.'s status is a jury question. Therefore, the trial court erred in granting summary judgment for the defendants.

¶30. The majority inaccurately asserts that Ann Doe entered the premises of the Jameson Inn to perform the illegal activity of smoking marihuana, and that the trial court correctly adjudicated A.D. to be a licensee. Maj. Op. at ¶ 13. In support of that assertion, the majority relies on the portion of A.D.'s deposition at which she was questioned about the contents of a statement that she had made to police. *Id.* However, the majority neglects to acknowledge that A.D. had made more than one statement to the police, and that she admitted having been dishonest in at least one of those statements. When questioned about her untruthfulness in the police statement, Doe responded that she was dishonest because she was scared.[36]

¶31. The record includes contradictory deposition testimony with regard to the purpose of A.D.'s having been inside the Jameson Inn on March 1, 2003. The child first testified that she had not wanted to go to the hotel and agreed to do so only because she did not want her

[36] Doe was a thirteen-year-old seventh grader at the time she was questioned. The majority concedes that the child was, in fact, raped. Maj. Op. at ¶ 11.

friend to go there alone. A.D. also testified that she had not known whether she would smoke marihuana with her friend and the men once they had entered the hotel room. Later in her deposition, in response to a leading question of dubious clarity, A.D. tacitly acknowledged that she had gone to the hotel room to smoke marihuana. She also said that she had taken one puff of a marihuana cigarillo. A.D.'s assailant, Rodriguez Smith, testified in his deposition that the group did not go to the hotel room to smoke marihuana and that no one smoked marihuana in the room on the night in question. Smith later testified that he could not remember whether anyone else had smoked marihuana that night, but he was certain that he had not. This brief review of the pertinent testimony illustrates that material facts of this case were genuinely disputed, so much so that the grant of summary judgment was inappropriate.

¶32. Patrons of a hotel are business invitees of the hotel. ***Pigg v. Express Hotel Partners, LLC***, 991 So. 2d 1197, 1199 (Miss. 2008) (citing ***Thomas v. The Columbia Group, LLC***, 969 So. 2d 849, 852 (Miss. 2007)). However, this Court has never spoken specifically on the duty, if any, owed by a hotel to a guest of a hotel guest. Florida case law is instructive on the duty owed by a hotel owner to the guest of a hotel guest.

¶33. In ***Steinberg v. Irwin Operating Co.***, 90 So. 2d 460, 461 (Fla. 1956), the Florida Supreme Court held:

> There is no doubt that a registered guest of a hotel is a business invitee and is entitled to receive the degree of care applicable to invitees. We are of the view that one entering a hotel to communicate with a registered guest is entitled to receive and enjoy the same degree of care . . . . A hotel is not to be considered an insurer of the safety of every person who decides to roam around its lobby or other public rooms. On the other hand, by the very nature of the business, the operator of the hotel is bound to anticipate that a registered guest is apt to

> have business and social callers. The invitation to such callers arises by operation of law and out of the relationship between the hotel and its registered guests.

Steinberg, 90 So. 2d at 461. In that case, a friend of a hotel guest came to a hotel to deliver a message to the guest; however, the guest was not in his room. ***Id.*** Unable to find the hotel guest, the friend decided to explore various rooms adjacent to the lobby. ***Id.*** While thus engaged, the friend fell and suffered injuries as she walked from the "TV Room" to the "Movie Room." ***Id.*** The Florida court found that the friend of the hotel guest "enjoyed the status of an implied invitee when she entered the hotel lobby." ***Id.*** However, when the hotel guest was unavailable for the friend to visit, the friend became a licensee of the hotel when she began to explore various rooms adjacent to the lobby, because she had exceeded the implied invitation. ***Id.***

¶34. In this case, Kelvin Washington rented a room for Smith and several other young men. After paying for the room, Washington relinquished the room keys to Smith. Smith and his cohorts invited A.D. and her friend to accompany them to the rented room. A.D. and her female friend were invited guests of Smith, a hotel guest. A.D. entered the hotel with hotel guests, accompanied the guests to their room, and later left the hotel. Accordingly, A.D. did not exceed the implied invitation of Jameson Inn. The presence on the hotel's premises of persons in A.D.'s circumstances was foreseeable – indeed, to be expected – by the hotel. Consistent with the persuasive reasoning of ***Steinberg***, Doe could have been found by a trier of fact to have been the guest of a hotel guest, making her an invitee of Jameson Inn at the time of the crime perpetrated upon her.

¶35. Under controlling Mississippi case law, Doe's status as invitee versus licensee is an issue of fact for a jury's determination. ***Sharp***, 891 So. 2d at 156. Accordingly, I would reverse the trial court's grant of summary judgment and remand the case for trial.

CHANDLER, J., JOINS THIS OPINION.