

IN THE SUPREME COURT OF MISSISSIPPI

CASE NO. 2005-CA-01966

STEPHEN W. MILLER

APPELLANT

VS.

R. B. WALL OIL COMPANY, INC.

APPELLEE

ON APPEAL FROM THE
CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF
HINDS COUNTY, MISSISSIPPI
NO. 251-97-159CIV

**R.B. WALL OIL COMPANY, INC.'S
SUPPLEMENTAL BRIEF**

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VS.

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed person have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

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Respectfully submitted this the 30th day of July, 2007.

BY:


OF COUNSEL

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STATEMENT OF THE ISSUES

1. Whether there is a genuine issue of material fact as to whether R. B. Wall Oil Company had notice of the allegedly dangerous condition that resulted in the Plaintiff's injuries.

STATEMENT OF THE CASE

The issue relied on by the Court of Appeals to affirm the trial court's granting of summary judgment for R.B. Wall Oil Company, Inc. ("R.B. Wall") against Appellant, Stephen W. Miller ("Miller") was notice. Specifically, Miller claims he slipped on a patch of fuel at the Bogue Chitto Truck Stop. R.B. Wall's Motion for Summary Judgment was based on the lack of agency relationship and notice. The Court of Appeals found that although there was a genuine issue of material fact with regard to the alleged agency relationship between R.B. Wall and the other Defendants (Op. ¶13), there was no genuine issue of material fact with regard to notice of the allegedly dangerous condition to R.B. Wall and, therefore, the Court affirmed the trial court's summary judgment on that basis. (Op. ¶21) The Court of Appeals' reasoning with regard to notice was correct and its decision should be upheld by this Court.

Argument

A. R.B. Wall Had No Notice of the Allegedly Dangerous Condition

In order to hold R.B. Wall liable, Miller must show either that R.B. Wall created a dangerous condition that caused him injury or that R.B. Wall knew or should have known of the dangerous condition that caused him injury. *Munford v. Fleming*, 597 So

2d 1284 (Miss. 1992). In this case, the allegedly dangerous condition is a patch of fuel around one side of a gas pump island at the subject truck stop. Miller has no evidence that the fuel spill was created by any of the Defendants. (Op. ¶15) Accordingly, Miller must show that R.B. Wall had notice of the fuel spill or should have known about the fuel spill. *Id.*

In order to make that link to R.B. Wall, Miller claims that R.B. Wall had notice of an alleged malfunctioning gas pump. That by itself means nothing; Miller must also show the pump caused or led to the fuel spill. As the Court of Appeals correctly pointed out, Miller offers no credible evidence connecting the pump and the spill and thus Miller cannot prove notice against R.B. Wall. *Id.* ¶13

In Miller's Petition for Writ of Certiorari, he points to 13 "facts" that support his claim that the Court of Appeals' decision is erroneous. Not one of those facts deals with the issue of notice; all of them deal with the issue of control that is central to the vicarious liability issue. The Court of Appeals ruled there was a dispute as to the control which would get Miller to a jury if he could prove the elements of his claim. Because Miller cannot prove the element of notice, the control issue does not matter.

All Miller can do to point to notice is offer speculation that a different malfunctioning pump one week prior to Miller's accident somehow gives notice to R.B. Wall (and the other Defendants) that there was a fuel spill at the subject truck stop in the area where Miller fell one week later. No credible evidence supports this claim. Miller offers this speculation through the testimony of Donnie McWilliams. Donnie McWilliams

cannot remember what pump he was using one week before when he noticed an overflow problem. R. Vol. 2, p. 133. McWilliams does not know what pump Miller was using when he had an alleged overflow problem a week later. *Id.* He does not know whether Miller and he used the same pump. He does not know what side of the island either he or Miller were on at the time of the accident. *Id.* Additionally, the Court of Appeals found that: (1) there was no evidence indicating when Miller's fall occurred; (2) how long the spill might have been present; (3) that any customers had complained about the spill putting the truck stop on notice; and (4) that an inspection by the truck stop's employees would have revealed the spill. (Op. ¶16).

All Miller knows is that McWilliams knew of a malfunctioning pump the week before the accident which caused a fuel overflow that was so slight that McWilliams was able to wash it off immediately after the spill. R. at 132-33. Assuming that McWilliams' testimony about a malfunctioning fuel pump causing a spill a week before the accident is true,¹ Miller still must link the malfunctioning pump reported by McWilliams to the fuel spill that he claims caused him injuries. Miller cannot make that link with any credible evidence at all; all he can offer is speculation that because some pump at the truck stop malfunctioned a week before, it must have somehow created the fuel spill that Miller

¹Miller tries to link notice of the malfunctioning pump to R.B. Wall by virtue of the testimony of truck stop employee Jason Miller, who testified that he reported the malfunctioning pump "to someone" at some point prior to Miller's fall. R. B. Wall objected to this testimony as being hearsay but the Court of Appeals did not rule on the admissibility or inadmissibility of the proffered testimony. Instead, the Court of Appeals ruled that even if the testimony was admissible, it would not be enough to show notice as to R.B. Wall.

slipped in. Miller cannot give any details putting the two together (such as location, pump number, details about the spill itself, etc.) that would enable any trier of fact to reach the conclusion that the spill more likely than not resulted from overflow from the malfunctioning pump. All he can offer is the speculation that it might have. Fuel spills can happen under a variety of circumstances that have nothing to do with a malfunctioning gas pump – for example, it could be accidentally spilled by a customer pumping gas. Indeed, the limited evidence before the Court leads to the conclusion that the spill was more likely than not caused in some other manner than the pump McWilliams testified about. The Court of Appeals noted that the testimony showed that the truck stop performed inspections every four hours. Op. ¶16. Even assuming the inspection occurred four hours before Miller’s fall, the fact that nothing was noticed indicates the spill was not something from a week old malfunctioning pump but rather some event happening closer in time to the fall that the station knew nothing about.

The Court of Appeals correctly recognized this in determining that Miller could not put on any proof regarding notice sufficient to hold the Defendants liable as a matter of law. Unsupported speculation and allegations have never been sufficient to defeat a motion for summary judgment. *See Adams v. Cinemark USA, Inc.*, 831 So. 2d 1156, 1161 (Miss. 2002); *Huguley v. Imperial Palace of Mississippi, Inc.*, 930 So. 2d 1278, 1279 (Miss. App. 2006).

As the Court of Appeals pointed out in *Jaycox v. Circus Circus Mississippi, Inc.*, 908 So. 2d 181, 184 (Miss. App. 2005):

Constructive knowledge is established by proof that the dangerous condition existed for such a length of time that, in the exercise of reasonable care, the proprietor should have known of that condition. [citations omitted] The plaintiff must produce admissible evidence of the length of time that the hazard existed and the court will indulge no presumptions to compensate for any deficiencies in the plaintiff's evidence as to the time period.

The Court should make no indulgence here either with regard to Miller's lack of evidence. A critical element of Miller's claim is notice; to prove notice he must show that R.B. Wall knew or should have known of the fuel spill. To do that, he must come up with evidence showing the cause of the fuel spill that would put notice on R.B. Wall. All Miller can do is claim the source is a malfunctioning gas pump. That is it. No evidence links that pump to the spill that Miller claims he slipped in and, thus, it cannot meet Miller's burden with regard to R.B. Wall or any other Defendant for that matter.²

Conclusion

For the reasons cited above, Appellee R.B. Wall Oil Company, Inc. submits that the Court of Appeals' Opinion in this case upholding the trial court's granting of summary judgment should be affirmed by this Honorable Court.

Respectfully submitted,

R. B. WALL OIL COMPANY, INC.

BY: 

OF COUNSEL

²The Court of Appeals noted "...there has been no credible evidence presented to indicate that Bueto or her employees knew or should have known about the spill in question." Op. ¶16. Thus, the fact question with regard to vicarious liability does not matter because there is no evidence of any notice to vicariously impute to R.B. Wall from the operators.

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CERTIFICATE OF SERVICE

I, M. James Weems, of counsel for Defendant, R. B. Wall Oil Company, Inc., do hereby certify that I have this day mailed a true and correct copy of the above and foregoing pleading to:

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THIS, the 30th day of July, 2007.



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