SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

LISA STEPHENS	**APPELLANT**
VS.	**CASE NO. 2006-CA-01570**
SHANNON MILLER	**APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Appellee, Shannon Miller, certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Honorable Justices of this Court may evaluate possible disqualification or recusal.

INTERESTED PERSONS	CONNECTION OR INTEREST
Paul N. Jenkins, Jr., Esquire Emily M. Parker, Esquire Webb, Sanders & Williams, PLLC	Attorneys for Appellee
Tommy D. Cadle, Esquire Kenneth E. Floyd, II, Esquire Cadle & Floyd	Attorneys for Appellant
Shannon Miller	Appellee
Lisa Stephens	Appellant
Honorable Sharion Aycock	Itawamba County Circuit Judge

RESPECTFULLY SUBMITTED on this the 24th day of April, 2007.

Emily M. Parker

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Appellee Brief

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STATEMENT OF THE ISSUE

Whether the Trial Court was correct in granting summary judgment to Appellee, Shannon Miller.

STATEMENT OF THE CASE

On October 31, 2005, Plaintiff, Lisa Stephens ("Stephens") filed her Complaint against Defendant, Shannon Miller ("Miller") in the Circuit Court of Itawamba County, Mississippi. On or about December 27, 2005, Miller mailed her pro se Answer to counsel for Stephens. On February 6, 2006, Paul N. Jenkins, Esquire, and Emily M. Parker, Esquire, of Webb, Sanders & Williams, PLLC, filed their Notice of Appearance of Counsel. On February 14, 2006, an Agreed Order Granting Leave to Amend (Miller's pro se Answer) was filed with the Court. Also on February 14, 2006, Miller filed her First Amended Answer and Affirmative Defenses. Discovery commenced but no depositions were taken. On June 14, 2006, Miller filed her Motion for Summary Judgment and Memorandum Brief in support of same. On August 4, 2006, Stephens filed her Response to Miller's Motion for Summary Judgment. The trial court judge heard oral arguments from both parties on August 7, 2006. An Order granting Miller's Motion for Summary Judgment was entered on August 14, 2006, which also dismissed the action with prejudice [1].

On July 19, 2004, Shannon Miller visited her hairdresser, Lisa Stephens, at Stephens's salon in Mantachie, Mississippi, to have Stephens cut her daughter Cambria Thompson's hair. (RE 30) On Miller's way out of Stephens's place of business, Stephens offered to assist Miller in securing Miller's children in Miller's minivan. (RE 30) While Stephens was assisting Miller and

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1 The Order Granting Summary Judgment was entered without the trial court's specific findings of fact and conclusions of law regarding the case. In *Koestler v. Mississippi College*, 749 So. 2d 1122,1126 (Ct. App. Miss. 1999), the court held that the absence of findings of fact and conclusions of law was not reversible error in an appeal from a Motion for Summary Judgment as the rationale behind such ruling would not be particularly helpful. Nonetheless, if Stephens wishes to maintain that the trial court's rationale for granting Miller's MSJ was flawed in that regard, she should have requested the trial court make findings of fact and conclusions of law pursuant to MRCP 52.

attempting to restrain the children in the vehicle, Cambria Thompson pushed the button that activated the automatic door closing mechanism on Miller's minivan. (RE 4, 30) According to Stephens, the door closed on Stephens's posterior. (RE 30) At all times relevant herein, Cambria was four years old. (RE 56)

SUMMARY OF THE ARGUMENT

Stephens has presented no appealable issue, but rather, simply restated the argument she made to the trial court in her Response to Miller's Motion for Summary Judgment, by alleging as her only procedurally viable issues that Miller was negligent in the supervision of her minor child, and that the child's acts were reasonably foreseeable. Those arguments were fully briefed, argued and properly ruled upon in the Trial Court below.

In addition, Stephens attempts to claim, for the first time on appeal, status as an invitee. It is well established law in the State of Mississippi that issues may not be raised for the first time on appeal; therefore, that argument should be procedurally barred. However, should the Court wish to entertain that theory, Stephens's argument still fails because she clearly fails to plead or even allege those facts necessary to rise Stephens to the level, and thus afforded a higher stand of care, as an invitee upon Miller's property.

The record herein lacks any evidence of a material question of fact which would have precluded the entry of summary judgment. The Trial Court's decision granting summary judgment was therefore correct and should be affirmed.

ARGUMENT

A. Standard of review and applicable law

A *de novo* standard of review is applied to the grant of summary judgment by the lower court. *Hudson v. Courtesy Motors, Inc.*, 794 So.2d 999, 1002 (Miss. 2001). The evidence must be viewed in the light most favorable to the party against whom the motion has been made. *Id.*, citing *Russell v. Orr*, 700 So.2d 619, 622 (Miss. 1997). The presence of fact issues in the record does not automatically preclude summary judgment. The appellate court must be convinced the factual issue is a material one, one that matters in an outcome determinative sense. *Satchfield v. Morrison & Son, Inc.*, 872 So.2d 661, 663 (Miss. 2004). The "existence of a hundred contested issues of fact will not thwart summary judgment where there is no genuine dispute regarding the material issues of fact." *Id.*, quoting *Simmons v. Thompson Mach. of Miss., Inc.*, 631 So.2d 798, 801 (Miss. 1994). While summary judgment cannot substitute for a trial to resolve disputes of material fact, neither should a trial on undisputed facts substitute for a summary judgment. *Wolf v. Stanley Works*, 757 So.2d 316, 319 (Ct. App. Miss. 2000).

As the alleged injurious conduct engaged in by the four-year old minor child, namely Cambria Thompson, was not reasonably foreseeable, there was no opportunity by Miller to exercise control over the child for said alleged injurious conduct. Even if the conduct of the child was reasonably foreseeable by Miller, said conduct still did not rise to the level necessary to prove negligent supervision of a child to hold Miller responsible for any alleged injuries suffered by Stephens as a result of said conduct. In essence, there was no breach of Miller's duty to control her child in this situation. Because Stephens has completely failed to show that Miller was negligent in supervising her child, and thus cannot prove a breach of any duty by Miller, there are no genuine issues of fact which would preclude summary judgment in favor of Miller.

In addition, Stephens has submitted no evidence to support her contention that she was an invitee, an issue which she improperly raises for the first time on this appeal.

B. The undisputed evidence clearly establishes that Miller did not breach any duty owed to Stephens, Miller was not negligent in the supervision of her own minor child, and Miller's child's acts were not reasonably foreseeable.[2]

To prevail on her claim for damages under her theory of negligent supervision, Stephens must show: (1) there was some duty owed to her by Miller; (2) Miller breached her duty to Stephens; and (3) the breach of Miller's duty was the proximate cause of some injury to Stephens. *Tatum v. Lance*, 238 Miss. 156, 117 So.2d 795 (Miss. 1960); *Williamson v. Daniels*, 748 So.2d 754 (Miss. 1999); Restatement (Second) of Torts §316 (1965). Though Mississippi has not specifically adopted the language of the Second Restatement of Torts, it has been used in the Supreme Court's decision making process in determining whether negligent supervision has occurred. It states that:

> "a parent is under a duty to exercise reasonable care so to control his minor child as to prevent it from intentionally harming others or from so conducting itself as to create an unreasonable risk of bodily harm to them, if the parent
> (a) knows or has reason to know that he has the ability to control his child, and
> (b) knows or should know of the necessity and opportunity for exercising such control."

Restatement (Second) of Torts §316 (1965); *see also Williamson v. Daniels*, 748 So.2d 754 (Miss. 1999); *see also Chandler v. Coleman*, 759 So.2d 459 (Ct. App. Miss. 2000).

There is no proof in the record that Miller was aware or should have been aware of the

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In addition, the minor child, Cambria, was age four (4) at the time of the incident in question, and pursuant to well established common law followed in the State of Mississippi, "a child under 7 years of age is conclusively presumed to be without discretion, and incapable of committing crime ..." *Westbrook v. Mobile & O.R. Co.*, 6 So. 321, 322 (Miss. 1889). A child of such age as that of Cambria in this case is wholly incapable of choosing between good and evil, and between right and wrong, and therefore cannot be held responsible for her acts. To follow that argument, Cambria's acts cannot then be imputed to her parents as negligence, when the child herself is incapable of negligence.

necessity or opportunity to control her daughter, Cambria Thompson. Parents have a duty to take measures to supervise their children to protect others from acts of their children that are reasonably foreseeable. *Williamson v. Daniels*, 748 So.2d 754 (Miss. 1999). Parents assume liability under the common law "where the parents [own] negligence has made it possible for the child to cause the injury complained of and probable that the child would do so." *Tatum v. Lance*, 238 Miss. at 162, 117 So.2d at 797 (quoting 67 C.J.S. Parent and Child §68, p. 798).

In other words, the fact that a parent does not control a child is not sufficient to prove negligence on the part of the parent, unless they fail to act as reasonably prudent parents would in a similar situation. *Williamson v. Daniels*, 748 So.2d 754 (Miss. 1999). This implies that once they are on notice of a child's dangerous behavior, that they are then obligated to control the child to prevent such behavior. *Id.*

In this case, Stephens and Miller were both with the children in an attempt to get them properly restrained in Miller's minivan, when the minor child, Cambria Thompson, pushed the button to automatically close the van door. The record reflects that Miller had no knowledge that Cambria was about to push the automatic door button. There is no reasonable expectation for her to have had that knowledge, unless Cambria made a habit of engaging the automatic van door mechanism, which is not shown anywhere in the record. It is also obvious that Stephens (who was also responsible for Cambria at that point in time) had no knowledge of any proclivity of the child to randomly engage the automatic door mechanism.

Because Stephens is unable to show that Miller was on notice of any reasonably foreseeable injurious conduct, nor that there was any opportunity to control Cambria's conduct in that situation, there is no genuine issue of any material fact sufficient to proceed.

C. The undisputed evidence clearly establishes that even if Miller's child's acts were

reasonably foreseeable, they did not rise to the level necessary to hold Miller responsible for her child's acts.[3]

Stephens offered only one Affidavit in support of her contention that Miller's child's acts were reasonably foreseeable. (RE 98-99) This Affidavit was executed by Stephens herself, and attempted to bring to the Court's attention a specific quote that was allegedly made to Stephens by Miller, at the scene of the alleged accident. (RE 98-99)

Stephens's Affidavit should have been stricken because it was wholly irrelevant and not probative. The Affidavit was simply and clearly self-serving and did not contain any facts to defeat summary judgment. By Stephens's own admission within the Affidavit, she "cannot absolutely state that the foregoing quote is the exact words of Shannon Miller ..." (RE 98) Therefore, the Affidavit was clearly deficient and should have been stricken. In addition, the Affidavit itself contained hearsay inadmissible under the Mississippi Rules of Evidence 801, 802 and 805. In that the statement by Stephens was offered to prove a statement made by another party (Miller), and that Miller had foreseeability with regard to Cambria's prior conduct in engaging the automatic door closing mechanism, and by Stephens's own admission she could not state the exact words of Miller as pertaining to same, Stephens's Affidavit constituted inadmissible hearsay.

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This argument was fully outlined and set forth in *Defendant Shannon Miller's Combined Reply to Plaintiff's Response for Defendant's Motion for Summary Judgment/Motion to Strike Affidavit*, which was presented to the Lower Court on the date of the Summary Judgment motion hearing, on August 7, 2006, and the Judge marked said Combined Reply/Motion as filed (See page 3 of the transcript of the August 7, 2006, motion hearing). However, the Combined Reply/Motion was mistakenly left out of the Court file and therefore not designated as a part of the record for this appeal. The arguments as presented in that Combined Reply/Motion were fully argued by counsel for Miller, and thereafter addressed by counsel for Stephens, at the summary judgment motion hearing (See pages 7-11 of the transcript of the August 7, 2006, motion hearing).

Alternatively, even assuming Stephens's Affidavit was accepted and taken in the light most favorable to Stephens, the Affidavit still had no merit. A party opposing a motion for summary judgment by affidavit or otherwise, must set forth specific facts showing there are issues for trial. *Palmer v. Biloxi Regional Medical Center, Inc.*, 564 So.2d 1346, 1356 (Miss. 1990) (citing *Fruchter v. Lynch Oil Co.*, 522 So.2d 195, 199 (Miss. 1988)). Stephens's Affidavit failed to demonstrate specific facts showing there were any issues for trial, as the facts to which Stephens attested in her Affidavit did not present any genuine or material issues.

A genuine issue of fact must be of a material fact in order to preclude summary judgment. *Wilbourn v. Stennett, Wilkinson & Ward*, 687 So.2d 1205 (Miss. 1996). Any disputed facts presented must be shown to be material, as a showing of factual disputes about matters that are not material will not serve to defeat summary judgment. *Grisham v. Long V.F.W. Post No. 4057*, 519 So. 2d 413, 415 (Miss. 1988); *Shaw v. Burchfield*, 481 So. 2d 247, 252 (Miss. 1985) ("existence of a hundred contested issues of fact will not thwart summary judgment" if there is no genuine dispute as to material factual issues). Whether or not the statements offered by Stephens in her Affidavit were accurate was immaterial, as the statements offered were not material factual issues to the case. Even assuming Miller's statement as set forth in Stephens's Affidavit were accurate, it clearly did not show that Miller had the additional knowledge necessary to prevail on a claim against her for negligent supervision of her minor child.

In the *Williamson* case, the court stated as follows:

> Both the Restatement (Second) of Torts § 316 (1965) and the general common law principles of negligence regarding parental supervision of the minor child suggest that the parent must have knowledge of prior malicious acts similar enough to the specific act complained of to put the parent on notice of the necessity to control the child. The parent will be charged with the knowledge of such acts as would be discovered in the exercise of reasonable supervision. The parent must also have failed to act as a reasonably prudent parent would to control

> the child's behavior so as to prevent a recurrence. We think it important to note that the mere fact that the parents failed to control the child is insufficient to prove negligence; they must have failed to act as reasonably prudent parents based on notice of the child's propensity to do harm.

Williamson v. Daniels, 748 So.2d 754 (Miss. 1999); Restatement (Second) of Torts §316 (1965). Even assuming Miller's statement as set forth in Stephens's Affidavit were accurate, it clearly did not show that Miller had knowledge that her child Cambria's prior conduct was "malicious" or that Miller "failed to act as a reasonably prudent parent would to control the child's behavior so as to prevent a recurrence." *Id.*

D. Stephens may not attempt to introduce new matters, namely claiming status as an invitee, for the first time on appeal.

"One of the most fundamental and long established rules of law in Mississippi is that the Mississippi Supreme Court will not review matters on appeal that were not raised at the trial court level." *Shaw v. Shaw*, 603 So.2d 287, 292 (Miss. 1992), quoting *Estate of Myers v. Myers*, 498 So.2d 376, 378 (Miss. 1986). The Mississippi Supreme Court has also stated: "It is elementary that this Court will not review on appeal those issues which were not raised in the court below." *Estate of Johnson v. Adkins*, 513 So.2d 922, 925 (Miss. 1987). More recently, in 2005, the Mississippi Supreme Court held:

> We have been consistent in holding that we need not consider matters raised for the first time on appeal, which practice would have the practical effect of depriving the trial court of the opportunity to first rule on the issue, so that we can then review such trial court ruling under the appropriate standard of review.

Alexander v. Daniel, 904 So.2d 172, 183 (Miss. 2005).

Stephens attempts to submit to this Court that she is owed a higher duty and standard of care by Miller as an invitee upon Miller's property. However, at no time prior to the filing of Stephens's Appellant Brief did Stephens raise the issue of claiming status as an invitee in this

matter. Instead, Stephens attempts to assign, argue and present this issue for consideration for the first time on appeal, which is clear by well-established precedent in the State of Mississippi to be improper and thus unacceptable. As a result, Stephens's argument regarding her attempt to claim status as an invitee in this matter should not be considered by this Court.

E. Should this Court consider Stephens's argument that she should have status as an invitee upon Miller's property, Stephens's argument still fails for lack of any evidence whatsoever to support said argument.[4]

In the *Little* case, the Mississippi Supreme Court defined an invitee as "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 advantage." *Little v. Bell*, 719 So.2d 757, 760 (Miss. 1998), quoting *Hoffman v. Planters Gin Co.*, 358 So.2d 1008, 1011 (Miss, 1978). In addition, the Court held that a property owner owes an invitee the following duty: "to keep the premises reasonably safe and when not reasonably safe to warn only where there is hidden danger or peril that is not plain and open view." *Little*, 719 So.2d at 760, quoting *Caruso v. Picayune Pizza Hut, Inc.*, 598 So.2d 770, 773 (Miss. 1992).

Stephens's arguments attempting to place her in the category of an invitee wholly fail. First, by her own admission she volunteered to assist Miller in securing Miller's children in their car seats (RE 30), so she was not at Miller's van due to some express or implied invitation from Miller. In addition, at no time that Stephens was engaged in this act was she there for her advantage, nor has she alleged such at any point in this action. So, there was no mutual advantage to Stephens's act of helping Miller secure Miller's children in their car seats.

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In fact, Miller was a business invitee of Stephens, having just had Stephens trim the hair of her children at Stephens's place of business. So, if anyone was due a higher standard of care in this situation, Stephens owed Miller and her children that higher duty, as they were actual business invitees on Stephens's business property at the time of the incident in question.

If Stephens is to prevail on this issue, she must also be able to show that Miller did not keep her premises (i.e., her van) reasonably safe, or that Miller breached some duty to warn Stephens of some hidden danger not in plain view. At no point throughout these proceedings has Stephens even attempted to allege such facts, even including in her Appellant Brief where she attempts to raise the invitee issue for the first time on appeal.

CONCLUSION

It is undisputed that the closure of the minivan door on Stephens occurred as a direct result of the minor child's, Cambria's, actions in pressing the button that closed the minivan door. It was not the result of any negligent supervision on the part of Miller, Cambria's mother. Miller had not engaged in any negligence which would have made it possible or probable that Cambria would push the button to engage the automatic door mechanism on the minivan, nor did she know or reasonably should have known, that Cambria would engage in that activity. Without notice of a need to restrain the child to prevent some harm to Stephens or anyone else, Miller could not be found to be negligent in not restraining said child.

Even assuming it was reasonably foreseeable to Miller that her child would engage the automatic door mechanism, that knowledge alone clearly did not show that Miller had the additional knowledge necessary to prevail on a claim against her for negligent supervision of her minor child. In addition, Miller must have been shown to have had knowledge that her child Cambria's prior conduct was malicious, or that Miller failed to act as a reasonably prudent parent would to control the child's behavior so as to prevent a recurrence, which Stephens failed to allege or show at any point in the record, or at the summary judgment motion hearing.

Stephens also attempts to allege her status as an invitee upon Miller's property, which would afford her a higher duty and standard of care by Miller. However, this argument should be procedurally barred, as Stephens attempts to raise this issue for the first time on appeal. But should the Court wish to entertain this theory, Stephens's argument still fails because she clearly fails to plead or even allege those facts necessary to rise Stephens to the level of an invitee.

There is no evidence of the existence of any material fact questions left unaddressed by the Trial Court. Therefore, summary judgment was proper and the Trial Court's decision should

be affirmed.

RESPECTFULLY SUBMITTED, this the 24th day of April, 2007.

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CERTIFICATE OF SERVICE

This will certify that the undersigned attorney for Webb, Sanders & Williams, P.L.L.C., has this date delivered a true and correct copy of the above and foregoing ***Brief of Appellee***, by placing a true and correct copy thereof in the United States Mail, postage prepaid, addressed to the following:

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THIS, the 24th day of April, 2007.

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