THE SUPREME COURT OF MISSISSIPPI

LYNNETTE CRISS — APPELLANT

V. — CAUSE NO.: 2006-CA-01726

LIPSCOMB OIL COMPANY — APPELLEE

Brief

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Lynnette Criss, Appellant
2. Lipscomb Oil Company, Inc., Appellee
3. James C. Patton, Jr., Esq., Attorney for Appellant
4. Andrew A. Alexander III, Esq., Attorney for Appellee
5. Susan N. O'Neal, Esq., Attorney for Appellee
6. Honorable Albert B. Smith III, Circuit Court Judge, Bolivar County, Mississippi

LAKE TINDALL, LLP

Andrew N. Alexander III, Esq.
Susan N. O'Neal, Esq.
of Counsel for Lipscomb Oil
Company, Inc., Appellee

STATEMENT REGARDING ORAL ARGUMENT

Appellee submits that the law and the facts in this case are clear, and that oral argument would not assist the Court in reaching its decision.

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CASES:

STATEMENT OF THE ISSUES

Whether, in this slip and fall case, the trial court properly entered summary judgment in favor of the defendant convenience store owner, Lipscomb, where the evidence showed that Lipscomb maintained its ladies' restroom in a reasonably safe condition and had no actual or constructive knowledge of the alleged presence of water or other material on the floor of the restroom?

STATEMENT OF THE CASE

Criss filed this action in the Circuit Court of the Second Judicial District of Bolivar County on March 1, 2004 seeking damages as a result of a slip and fall that allegedly occurred at Appellee Lipscomb's convenience store. CP 1-3.[1] Following discovery, Lipscomb filed its Motion for Summary Judgment on November 1, 2005. CP 22, 85-86. Criss replied in opposition to the motion on August 23, 2006. CP 100. After a hearing, the trial court found that, under the undisputed facts, Lipscomb was entitled to judgment as a matter of law, and granted Lipscomb's motion on August 30, 2006. RE 1-4; CP 133-135.

Lynette Criss appeals from the trial court's order granting summary judgment in favor of Appellee Lipscomb Oil Company.

SUMMARY OF RELEVANT FACTS

On the evening of September 13, 2003, Appellant Lynnette Criss ("Criss") entered the ladies restroom in a Cleveland, Mississippi convenience store owned and managed by Defendant Lipscomb Oil Company, Inc. ("Lipscomb"). Criss alleged that she slipped and fell when exiting the restroom. CP 1-3.

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[1] In compliance with Rule 28(e), MRAP, all citations to the Record on Appeal appear herein as "RE [page]" (referring to the Record Excerpts filed concurrently herewith) "E [page]" (referring to the exhibits) and "TR [page]" (referring to the court reporter's transcript of the trial proceedings) or "CP [page]" (referring to the Clerk's papers) which constitute the Record on Appeal.

Valerie Jones, Lipcomb's employee, had inspected the ladies' room approximately 30 minutes prior to Criss's alleged fall, and had observed that the restroom was clean and devoid of any dangerous or defective condition. RE 8-9; CP 127-128. Specifically, there was no water on the floor at the time of Jones's inspection. This fact is undisputed.

Ms. Jones testified that other customers entered the ladies' restroom after her inspection, and none of those customers reported any water or other material on the floor. This fact is likewise undisputed. RE 7, 10; CP 125, 129.

When Criss entered the restroom approximately 30 minutes after the inspection, she walked directly to a toilet stall. She testified that she saw "water and pink stuff" which she identified as ice cream near the sink, but she did not see any such substances on the floor between the door and the toilet stall. This fact is likewise undisputed. RE 13, 14; CP 47,48.

After exiting the toilet stall, Criss walked directly back to the door. Again, she did not see any water or other foreign material on the floor on the path leading from the toilet stall to the door. This fact is likewise undisputed. RE 14-16; CP 48-50.

Criss came out of the ladies room claiming that she had slipped and fallen while attempting to exit. Ms. Jones went into the restroom, and found a "leaking" faucet and water on the floor. RE 5-6; CP 121,122.

SUMMARY OF THE ARGUMENT

Criss has failed to meet her burden of showing that Lipscomb breached any duty to her under Mississippi premises liability law, and the trial court correctly granted Lipscomb judgment as a matter of law under M.R.C.P. 56.

Lipscomb had a duty to use reasonable care to maintain its premises in a reasonably safe condition and to warn an invitee of any dangerous condition not "readily apparent" of which Lipscomb was aware. *Jerry Lee's Grocery, Inc. v. Thompson*, 528 So.2d 293, 295 (Miss.1988). As operator of a convenience store, however, Lipscomb was not an "insurer" of Criss's safety. *Kroger, Inc. v. Ware*, 512 So.2d 1281 (Miss.1987).

Criss failed to meet her burden to prove that Lipscomb caused a dangerous condition or, if the purported dangerous condition was not created by Lipscomb, that Lipscomb knew or should have known of the condition. *See, e.g. Waller v. Dixieland Food Stores Inc.*, 492 So.2d 283, 285 (Miss.1986).

ARGUMENT

Under Mississippi law, the owner or operator of a business owes its invitee the duty to use "reasonable care to keep the premises in a reasonably safe condition." *Jerry Lee's Grocery, Inc. v. Thompson*, 528 So.2d 293, 295 (Miss.1988). Further, the owner or operator has the

duty to warn the invitee of a dangerous condition that is not "readily apparent" to the invitee, but of which the owner or operator is, or should be, aware. *Jerry Lee's Grocery, Inc.*, 528 So.2d at 295.

However, the owner or operator "is not an insurer against all injuries." Id. (citing *Kroger, Inc. v. Ware*, 512 So.2d 1281 (Miss.1987); *First National Bank of Vicksburg v. Cutrer*, 214 So.2d 465 (Miss.1968); *Daniels v. Morgan & Lindsey, Inc.*, 198 So.2d 579 (Miss.1967).

The plaintiff has the burden to prove "either (1) that the operator caused the dangerous condition, or, (2) if the dangerous condition was caused by a third person unconnected with the store operation, that the operator had either actual or constructive knowledge of the dangerous condition." *Jacox v. Circus Circus Mississippi, Inc.*, 908 So.2d 181, 184 - 185 (Miss. Ct. App. 2005) (citing *Munford, Inc. v. Fleming*, 597 So.2d, 1282, 1284 (Miss. 1992); *Waller v. Dixieland Food Stores Inc.*, 492 So.2d 283, 285 (Miss.1986)).

In order to show constructive knowledge of a dangerous condition, the burden is on the plaintiff to offer proof that a "dangerous condition existed for such a length of time that, in the exercise of reasonable care, the proprietor should have known of that condition." *Munford*, 597 So.2d at 1284.

Most importantly, where a plaintiff claims to have slipped on liquid, the plaintiff must put forward proof that the liquid had been "on the floor for a sufficient amount of time to give reasonable notice to the

proprietor" in order to establish negligence. *Waller v. Dixieland Food Stores, Inc.*, 492 So.2d 283, 286 (Miss. 1986).

The *Waller* case is, in fact, factually and legally indistinguishable from the instant case. In *Waller*, the plaintiff claimed to have slipped in a puddle of "pink liquid," which he estimated to be 8-10 inches in diameter. The accident allegedly occurred at 12:30 p.m. The manager of the store testified that the floor of the store in question had previously been waxed between 6:00 a.m. and 8:00 a.m. on that morning, and that no pink liquid had been used in waxing the floors. The manager further testified that it was his practice, and that of his two assistants, to periodically walk the aisles of the store to check for debris. He personally inspected the area in question at 10:00 a.m., and found nothing out of the ordinary.

At trial, there was no evidence that the store manager or any of the store's employees actually knew about the spilled liquid. Instead (as in the instant case), the testimony was undisputed that the spilled liquid had not been brought to the store's attention prior to the Plaintiff's allegation. There was no evidence tending to show how long the liquid had been on the floor. The *Waller* court noted that, at most, there was a two and one-half hour period between the last inspection by store personnel and the plaintiff's fall. The court held that this two and one-half hour time lapse was not sufficient to prove how long the liquid had been present on the floor. *Waller*, at 286.

In the instant case, a thirty-minute period had elapsed between Ms. Jones' inspection of the ladies' room and Criss's alleged fall. Other customers had been in the restroom in the interim. As in *Waller*, there is no evidence as to the length of time that any water or other substance, if any, was present on the restroom floor.

The record is clear that the plumbing in the *men's* restroom at the convenience store had leaked on occasions prior to this incident, and that the employees placed a bucket under the men's room sink to keep the restroom floor dry. Though her deposition testimony appeared confused at times as to the distinction between leaking pipes in the men's room and the ladies' room, (see RE 8-11; CP 127-130), Ms. Jones finally clarified her testimony as follows:

> Q. In light of that last question I want to make sure I'm clear on this. I thought that's what you said earlier, that there had been a problem that you knew about in the men's restroom?
>
> A. Right.
>
> Q. But that was not the same in the women's bathroom?
>
> A. I'm not sure if it was the same. I can't really remember the women's bathroom always leaking, but I know the men's did.
>
> Q. But you don't remember the women's having the same problem?
>
> A. No.
>
> Q. Okay. That's it.

RE 12; CP 131.

Accordingly, there is no competent evidence that any problems relating to leaking pipes existed in the ladies' restroom. In any event, and of more direct relevance to the instant appeal, there was no leak when the area was inspected 30 minutes prior to the incident.

In sum, Criss has simply failed to make a showing sufficient to establish her claim of negligence.

First, she brought forward no evidence that Lipscomb or any of its employees caused or contributed to a dangerous condition in the ladies' restroom. Likewise, Criss has made no showing that any Lipscomb employee had actual knowledge of the presence of any dangerous condition. To the contrary, taken as true, Criss's own testimony shows that there was no visible water or other material visible on the floor of the bathroom on the path that she traveled from the door to the toilet stall and back.

Finally, Criss has not brought forward any proof that Lipscomb, through its employees, had constructive knowledge of any dangerous condition.

Because she has put forward no proof that Lipscomb caused any dangerous condition to exist, or that Lipscomb had actual knowledge or constructive notice of the existence of a dangerous condition, Criss has failed to meet her burden to establish that Lipscomb was negligent. Summary judgment was appropriate under M.R.C.P. 56, and the judgment of the trial court should be affirmed.

CONCLUSION

In light of the foregoing, the trial court correctly determined that Lipscomb was entitled to judgment as a matter of law pursuant to M.R.C.P. 56, and its order entering summary judgment in favor of Lipscomb should be affirmed.

This, the 25th day of September, 2007.

LIPSCOMB OIL COMPANY, INC.
Appellee

BY: 

Andrew N. Alexander III, MSB[redacted]

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing document has been served on the following person(s):

James C. Patton, Jr., Esq.
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Honorable Albert B. Smith III
Bolivar County Circuit Court Judge
Cleveland, MS 38732

This the 25th day of September, 2007.

Andrew N. Alexander III