IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NO. 2006-CA-01756

BOBBY THOMAS — APPELLANT

VS.

GERALD WAYNE BRADLEY,
JERRY BALDWIN AND JOHN DOES 1-10 — APPELLEES

ON APPEAL FROM THE CIRCUIT COURT
OF JACKSON COUNTY, MISSISSIPPI

BRIEF OF APPELLEE GERALD WAYNE BRADLEY

ORAL ARGUMENT REQUESTED

SUBMITTED BY:

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and/or 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 disqualifications or recusal.

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Respectfully submitted,

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STATEMENT OF THE CASE

This is a premises liability case. The Plaintiff filed this lawsuit against Mr. Bradley seeking damages for injuries he sustained on April 19, 2001 when he fell from a house roof (R 7 – 10). The house and roof from which the Plaintiff fell were owned by Mr. Bradley (R 12 – 20). The Plaintiff's Complaint asserted that Mr. Bradley had a duty to maintain safe working conditions and to provide adequate and safe work instrumentalities for the Plaintiff to accomplish his work, that Mr. Bradley failed to satisfy these duties, and that Mr. Bradley's failure to satisfy these duties caused the Plaintiff's injuries (R 7 – 10). The Plaintiff also sued Jerry Baldwin, Mr. Bradley's cousin who was temporarily staying in the house (R 7 – 10).

After conducting the discovery necessary to analyze the issues surrounding the liability issues of this matter, both Mr. Bradley and Mr. Baldwin moved for summary judgment (R 76 – 131, 133 – 143. The Plaintiff filed a responsive pleading to Mr. Bradley's and Mr. Baldwin's motion for summary judgment (R 157 – 166). On February 24, 2006, the Court heard oral arguments in support of Mr. Bradley's and Mr. Baldwin's motion for summary judgment. Thereafter, the trial court granted both motions (R 238 – 240). This appeal followed.

STATEMENT OF FACTS

This is a premises liability case. The Plaintiff filed this lawsuit against Mr. Bradley seeking damages for injuries he sustained on April 19, 2001 when he fell from a house roof (R 7 – 10). The house and roof from which the Plaintiff fell were owned by Mr. Bradley (R 12 – 20). The Plaintiff's Complaint asserted that Mr. Bradley had a duty to maintain safe working conditions and to provide adequate and safe work instrumentalities for the Plaintiff to accomplish his work, that Mr. Bradley failed to satisfy these duties, and that Mr. Bradley's failure to satisfy these duties caused the Plaintiff's injuries (R 7 – 10). The Plaintiff also sued Jerry Baldwin, Mr. Bradley's cousin who was temporarily staying in the house (R 7 – 10).

The parties conducted the discovery necessary to analyze the issues surrounding the liability issues of this matter. In his interrogatory responses, the Plaintiff described how the complained of incident took place (R 83 – 95). The Plaintiff stated:

> **INTERROGATORY NO. 8:** State in complete and accurate detail your full account of how the incident in question took place, from just before its occurrence, and thereafter until you were given medical attention, if any, including the date, hour, and minute as nearly as possible in which the Plaintiff's injury took place.
>
> **RESPONSE:** I was contacted by Defendants who requested that I supervise a roofing job at the subject property. I went to the subject property on April 19, 2000. I was climbing the ladder that is owned by Defendants and which was placed against the house by Defendants, when the ladder kicked out from under me and I fell to the concrete slab.

(R 83 – 95). During the course of the Plaintiff's deposition, the Plaintiff provided more details about how the complained of accident happened and made several candid admissions. Specifically, the Plaintiff confessed:

A. He and Mr. Bradley were first cousins.

B. He was present at Mr. Bradley's house as a guest and had spent the previous night visiting with Mr. Bradley.

C. He knew he was not being paid for the work that he was performing at Mr. Bradley's house.

D. He was not Mr. Bradley's agent or employee at the time that the complained of incident occurred.

E. He had previous experience supervising crews that worked on roofs.

F. There was nothing wrong with the ladder that he used to climb onto Mr. Bradley's roof.

G. The ladder fell because Jerry Baldwin's foot hit the ladder while the Plaintiff was standing on it.

H. Mr. Baldwin correctly positioned the ladder and it was a safe way to gain access to Mr. Bradley's roof.

I. Mr. Bradley was not present at the house when the complained of incident took place.

(R 97 – 111) Based upon these admissions, Mr. Bradley moved for summary judgment.[1] The Plaintiff filed a responsive pleading to Mr. Bradley's motion for summary judgment (R 157 – 166). On February 24, 2006, the Court heard oral arguments in support of Mr. Bradley's motion for summary judgment. Thereafter, the trial court granted Mr. Bradley's motion (R 238 – 240). When rendering its decision, the trial court specifically noted that the Court had examined the evidence in this case in the light most favorable to the plaintiff and had, ". . . basically used the plaintiff's version of the facts in its determination." (R 238 – 240). Viewing the evidence in the light most favorable to the Plaintiff, the trial

[1]Ultimately, Mr. Baldwin filed a motion for summary judgment. The trial court granted Mr. Baldwin's motion for summary judgment. The Plaintiff has also appealed the court's decision granting Mr. Baldwin's motion.

court found that the Plaintiff should be considered an invitee at Mr. Bradley's home (R 238 – 240). However, even though the trial court concluded that the Plaintiff enjoyed invitee status, the trial court rejected all of the Plaintiff's arguments asserting why Mr. Bradley's motion for summary judgment should be denied (R 238 – 240).

Initially, the trial court rejected the Plaintiff's argument that a dangerous condition existed on Mr. Bradley's property. The trial court ruled:

> With the status of an invitee the duty owed by Bradley is that of reasonable care for the invitee's safety. A review of the deposition testimony of the plaintiff, though, reveals no evidence of any condition on the property that was dangerous or unsafe. The plaintiff knew of no problems with the ladder he was ascending nor with the way it was placed against the home. There is absolutely no evidence before the Court that Bradley breached his duty to the plaintiff; there, judgment as a matter of law is appropriate on that claim.

(R 238 – 240).

The trial court then addressed the Plaintiff's general negligence claim (R 238 – 240). The trial court found:

> The plaintiff also alleges a general negligence claim against both defendants. For a negligence claim, the plaintiff must show a duty, breach, causation and damages. The duties the plaintiff cites for the defendants were to provide a safe work environment and instrumentalities. However, as noted above, the plaintiff has presented no proof to support his claims. The plaintiff readily admits that there was no problem with the ladder, the way it was placed against the house, that it was a safe way to access the roof and that he knows of nothing Bradley did to create an unsafe condition. (Citations omitted).

(R 238 – 240)

Finally, the trial court held that there was no proof that the Plaintiff had an agency relationship with either Mr. Bradley or Mr. Baldwin (R 238 – 240). The trial court declared:

> The plaintiff also claims an agency or employee relationship between himself and either or both defendants. At the outset, the plaintiff has put forth no evidence that would lead the Court to find an employer/employee relationship. The situation here was nothing more than a relative helping fix the roof on another's relative's house. Even if the Court were to consider a master/servant relationship, ". . . we fail to discern any difference in the master's duty, and that of an owner or occupier of a premises to an invitee." The lack of evidence supporting a breach of duty as to the plaintiff as an invitee has been discussed above. Furthermore, if the Court were to examine the issue with the plaintiff being an independent contractor, the owner would have no duty to protect the plaintiff from dangers that are intimately connected with the work he is performing. (Citations omitted).

(R 238 – 240)

Feeling aggrieved, this appeal followed.

SUMMARY OF THE ARGUMENT

The Jackson County Circuit Court correctly granted Mr. Bradley's motion for summary judgment. The trial court rightfully concluded that there were no genuine issues of material fact regarding whether a dangerous condition existed on Mr. Bradley's property at the time that the Plaintiff was injured. Additionally, the trial court correctly determined that there were no genuine issues of material fact pertaining to whether Mr. Bradley was negligent by failing to provide the Plaintiff a safe work environment and/or instrumentalities. Finally, the trial court properly concluded that there were no genuine issues of material fact as to whether the Plaintiff had an agency or employee relationship with Mr. Bradley. Because there were no genuine issues of material fact as to these issues, and because Mr. Bradley was entitled to judgment as a matter of law, the trial court properly granted Mr. Bradley's motion for summary judgment.

ARGUMENT

I. Whether the Jackson County Circuit Court Correctly Granted Mr. Bradley's Motion for Summary Judgment

Rule 56 of the Mississippi Rules of Civil Procedure provides that summary judgment shall be rendered if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there are no genuine issues as to any material fact and that the moving party is entitled to a judgment as a matter of law. Applying Rule 56, this Court has ruled that where a non-moving party fails to show evidence sufficient to establish the existence of an essential element to the case, summary judgment is proper. *PDN, Inc. v. Loring,* 843 So. 2d 685, 688 (Miss. 2003); *Sligh v. First National Bank of Holmes County*, 735 So. 2d 963 (Miss. 1999); *R. E. Wilbourn v. Stennett, Wilkinson & Ward,* 687 So. 2d 1205 (Miss. 1996); *Benson v. National Union Fire Insurance Company of Pittsburgh,* 762 So. 2d 795, 800 (Miss. Ct. App. 2000). A motion for summary judgment should be granted if the quality of proof offered is insufficient to sustain the plaintiff's burden of proof. *PDN, Inc.,* 843 So. 2d at 689; *Buelow v. Glidewell,* 757 So. 2d 216, 220 (Miss. 2000). In *Sligh*, this Court declared:

> The focal point of our standard for summary judgment is on material facts. If the party opposing the motion is to avoid entry of an adverse judgment, he or she must bring forth evidence which is legally sufficient to make apparent the existence of triable fact issues. Summary judgment is mandated where the nonmoving party fails to show evidence sufficient to establish the existence of an essential element to his case. (Citations omitted).

Sligh, 735 So. 2d at 965-66.

This Court has further declared that the nonmoving party must be diligent in opposing a motion for summary judgment. *Grisham v. John Q. Long V.F.W. Post,* 519 So. 2d 413 (Miss. 1988). The nonmoving party:

> . . . remains silent at her own peril. For one thing, the non-moving party may not rest upon allegations or denials in her pleadings. . . Rather, the party opposing the motion must by affidavit or otherwise set forth specific facts showing that there are indeed genuine issues for trial.

Frutcher v. Lynch Oil Company, 522 So. 2d 195, 198-99 (Miss. 1988).

In the case now before this Court, when faced with Mr. Bradley's motion for summary judgment, the Plaintiff failed to present evidence showing that a genuine issue of material fact existed necessitating the submission of this matter to a jury. While the Plaintiff did provide his own affidavit along with his response to Mr. Bradley's motion for summary judgment, his affidavit did nothing to dispute the admissions he made during his deposition. Specifically, the Plaintiff admitted that there was nothing wrong with the ladder that the Plaintiff used to climb onto Mr. Bradley's roof. The Plaintiff also admitted that the ladder fell because Jerry Baldwin's foot hit the ladder while the Plaintiff was standing on it. The Plaintiff conceded that Mr. Baldwin correctly positioned the ladder and it was a safe way to gain access to Mr. Bradley's roof. Finally, the Plaintiff admitted that Mr. Bradley was not present at the house when the complained of incident took place. In light of these admissions, there were no genuine issue of material fact that needed to be decided by a jury regarding what, if any, action or inaction on Mr. Bradley's part caused the ladder to fall. Instead, based upon the Plaintiff's admissions, it was clear that Mr. Bradley had no role in

causing the ladder to fall. Accordingly, the trial court properly granted Mr. Bradley's motion for summary judgment.

The Plaintiff's case is similar to the Mississippi Court of Appeals' decision in *Young v. Wendy's International, Inc.*, 840 So. 2d 782 (Miss. Ct. App. 2003). In *Young,* Catherine Young filed suit against Wendy's International, Inc. and Wenstar Inc. alleging that Wendy's and Wenstar breached its duty to maintain the premises of a Wendy's Restaurant in a safe manner by allowing a defective chair to remain in the dining room. In her deposition, Ms. Young admitted that she knew of no facts supporting her claim that the chair was defective or showing that Wendy's had notice of any alleged instability in the chair. Reviewing this Court's grant of Wendy's and Wenstar's motion for summary judgment, the Mississippi Court of Appeals affirmed this Court's decision. The Mississippi Court of Appeals stated:

> In the present case, under the applicable summary judgment standards, the record clearly supports a shift of the burden of proof, from the defendants to the plaintiff, to present any evidence she may have to support her allegations of negligence against Wendy's and Wenstar. The plaintiff has failed to present such evidence and has therefore failed to meet her burden of proof.

Young, 840 So. 2d at 784-85.

In the present lawsuit, the Plaintiff filed his Complaint claiming that Mr. Bradley failed to provide him with a safe premise and safe instrumentalities with which to do his work. Like Ms. Young, the Plaintiff admitted in his deposition that he had no proof to support his claim that the ladder was defective. Absent such proof, the Plaintiff could not

meet her burden of proof. Accordingly, the trial court correctly granted Mr. Bradley's motion for summary judgment. This Court should affirm the trial court's order.

Now before this Court, the Plaintiff asserts several new reasons regarding why the trial court's decision to grant Mr. Bradley's motion for summary judgment was incorrect. Initially, the Plaintiff argues that Mr. Bradley had an obligation to exercise the minimal level of care necessary to prevent foreseeable injury to this persons he sought to employ. The Plaintiff claims that a reasonable person in Mr. Bradley's position would appreciate that the lack of care, equipment, or instruction could, and did, result in injury. However, were this Court to adopt the Plaintiff's argument, the Court would actually be adopting a standard mirroring strict liability. In *Stewart v. Kroger Grocery,* 21 So. 2d 912, 913 (Mis. 1945), this Court analyzed the duty an employer owed to an employee regarding the provision of a safe premise and/or instrumentality to perform work. This Court recognized:

> We turn, however, to familiar principles established by numerous cases in our own reports, cases so numerous that they may be cited by dozens and by scores, and these are that it is not the duty of the employer to furnish and maintain perfect appliances or even the best and safest. He is not obliged to exercise the highest degree of care to avoid injuries, nor any care to avoid injuries not likely to occur. His obligation is to use reasonable care, and what is reasonable care is largely determined in each case by the nature, condition and extent of the danger of the instrumentalities furnished to and maintained for a servant in his work, and the greater or lesser the danger the greater or lesser is the degree of care which must be taken. His obligation is not to make the applicance with which, or the place in which, to work absolutely safe, but reasonably safe, the nature, condition and extent of the danger considered.

Stewart, 21 So. 2d at 912.

Like the arguments presented to the trial court, the Plaintiff's argument is totally unsupported and ignores the admissions he made during his deposition. The Plaintiff admitted that there was nothing wrong with the ladder that was provided by Mr. Bradley, that the ladder was an acceptable way to gain access to the house roof, and that Mr. Baldwin properly placed the ladder. In light of these admissions, it must be asked, "what lack of ***reasonable*** care, equipment, or instruction on Mr. Bradley's part is the Plaintiff referring to that could, and did, result in injury?" Looking at a total absence of evidence to support that there is a genuine issue of material fact regarding whether Mr. Bradley was negligent, the trial court correctly granted Mr. Bradley's motion for summary judgment. This Court should affirm the trial court.

The Plaintiff next argues that a material issue of fact regarding whether he was Mr. Bradley's agent or employee. However, this argument ignores the Plaintiff's admission that he was not Mr. Bradley's agent or employee. During the course of the Plaintiff's deposition, the following exchange occurred:

Q: Did Mr. Bradley ever discuss paying you in that conversation?

A: No, sir.

Q: Did you know you were doing this for free?

A: Sure.

Q: And that you were not going to be paid?

A: No.

Q: You knew you were not going to be paid?

A: Sure.

(R 102). When responding to Mr. Bradley's motion for summary judgment, the Plaintiff did not present any evidence to demonstrate that a genuine issue of material fact existed on this issue. In reality, because the Plaintiff confessed that he was not Mr. Bradley's agent or employee, he could not present credible evidence to the contrary. The trial court recognized this short-coming in the Plaintiff's argument and ruled in Mr. Bradley's favor. This Court should uphold the trial court's decision.

Finally, the Plaintiff maintains that Mr. Bradley and Mr. Baldwin were joint-tortfeasors engaged in a common purpose to re-roof the house. As stated above, the trial court found that there were no genuine issues of material fact regarding whether Mr. Bradley was negligent. Absent evidence of negligence, it can not be said that Mr. Bradley was a joint-tortfeasor with Mr. Baldwin. This argument should be summarily rejected by this Court.

CONCLUSION

For the reasons stated above, this Court should affirm the trial court's decision to grant Mr. Bradley's motion for summary judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gerald L. Kucia, of counsel for Gerald Wayne Bradley, do hereby certify that I have this day served via United States mail a true and correct copy of the above and foregoing Brief of Appellee to:

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THIS, the 5th day of July, 2007.

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