IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NO. 2006-CA-01756

BOBBY THOMAS — **APPELLANT**

VS.

GERALD WAYNE BRADLEY, ET AL — **APPELLEES**

BRIEF OF THE DEFENDANT/APPELLEE JERRY BALDWIN

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CERTIFICATE OF INTERESTED PARTIES

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

1. Honorable Dale Harkey, Circuit Judge for Jackson County, Mississippi.

2. Robert Niles Hooper and John D. Moore, counsel for Plaintiff/Appellant.

3. Gerald Kucia, the law firm of Daniel, Coker, Horton & Bell, counsel for Defendant/Appellee, Gerald Wayne Bradley.

4. Matthew A. Taylor, and the law firm of Scott, Sullivan, Streetman & Fox, P.C., counsel for Defendant/Appellee, Jerry Baldwin.

Matthew A. Taylor
Counsel for Appellee, Jerry Baldwin

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III. SUMMARY OF THE ARGUMENT

In his *Complaint*, Bobby Thomas alleges that Jerry Baldwin breached his duty to maintain a safe working condition and to provide adequate and safe working instrumentalities for Thomas to accomplish his work. Thomas further alleges that Baldwin negligently caused the ladder on which he was climbing to slip and/or fall, causing his injuries. In granting summary judgment to Baldwin, the trial court found that a duty to provide a safe work environment and instrumentalities was owed to Thomas. However, the Court found that Thomas presented no proof to support his claims.

In rendering its opinion, the Court correctly noted that by Thomas' own admission, there was no negligent act committed by Baldwin. Baldwin concedes that he owed Thomas a duty of reasonable care. However, there was not sufficient evidence presented to the trial court to support a finding that no genuine issue of fact exists as to whether Baldwin breached his duty. Notwithstanding Thomas' own admissions, there was not a scintilla of evidence presented to the trial court which demonstrates any breach of the applicable duty of care.

Thomas also urges this Court to reverse the trial court's ruling, arguing that this is a classic case of res ipsa loquitur. Despite Thomas' assertion, res ipa loquitur only applies where an event occurs that does not usually occur without negligence, the instrument of the event was in the Defendant's sole control and the Plaintiff did not contribute towards the negligence. In this lawsuit, Thomas readily admits that this is not a situation of negligence. Further, Thomas states that he was on the ladder at the time of the incident. Under these circumstances, res ipsa loquitur is not applicable.

IV. ARGUMENT

A. Jerry Baldwin did not owe a duty to Bobby Thomas as an invitee

In rendering its summary judgment as to the premises liability claims against Bradley, the trial court found that Thomas was an invitee. The premises liability claims were not addressed as to Baldwin, as said Defendant was merely a guest in Bradley's home. Baldwin had no ownership interest in the property, and did not pay any rent on the premises. He only assisted with utilities and work around the house while he was staying at Bradley's house, while he searched for his own residence after moving to the Mississippi gulf coast.

Q. Was there a particular reason you were living with Mr. Bradley? Were you out of a job? or - - tell me why you were living with him.

A. When I moved – when I lost my job in Georgia, I moved back home here, to the coast, and I got a job at the shipyard.

Q. I see. And you stayed with Mr. Bradley until you could get your own place?

A. Yes.

Q. Did you pay him any rent?

A. Yes. I helped with utilities.

Q. You didn't pay him rent but you helped him with utilities?

A. Yes.

Q. Do you know how much you would give him for utilities?

A. About $450, somewhere along there.

Q. $450 a month?

A. Yes.

Q. Would that be every month?

A. Yes.

Q. What other sort of arrangement did you have with him?

A. Nothing.

Q. Did you do any work around the house for him?

A. Yes.

R. 227; RE 5 at 13-15.

Thomas cites no evidence to support his assertion that Baldwin was in possession and control of the premises which would render him even susceptible to a claim of premises liability. Therefore, Thomas can only assert claims under the general negligence standard.

B. No genuine issue of material fact exists which would defeat summary judgment

Thomas asserts that there is substantial dispute as to whether Baldwin or Thomas caused Thomas' fall and that, regardless of the version, a triable issue of fact as to negligence is created.

As noted by the trial court, in order to establish a negligence claim against Baldwin, Thomas must show a duty, breach, causation and damages. *Presswood v. Cook*, 658 So.2d 859, 862 (Miss. 1995) (citing *May v. V.F.W. Post #2539*, 755 So.2d 372 (Miss. 1991)). In this case, Thomas is unable to present any material fact establishing a breach of any duty owed to him, and summary judgment is proper.

Pursuant to Thomas' own admission, there was no dangerous condition present at the time of his fall:

Q. Who put the ladder in the position that it was in when you and Mr. Baldwin fell from the roof?

A. Mr. Baldwin put it there.

Q. Did you have any concern for the way Mr. Baldwin put the ladder there on the side?

A. No. He had it up right. He had it up right.

Q. Did you have any concern that the ladder that y'all were using to get on the roof was not as safe way to get on the roof?

A. No, it was safe

Q. Did you have any concern for where Mr. Baldwin put the ladder in or der for y'all to get up on the roof?

A. No.

R. 103; RE 4 at 28.

Furthermore, Thomas has admitted that there is no basis for this allegation, whatsoever:

Q. Paragraph 17 of the Complaint says that Defendant Baldwin - - Mr. Baldwin, the fellow that went up on the roof - - was going up on the roof with you - - had a duty to maintain safe working conditions and to provide adequate and safe instrumentalities for the plaintiff to accomplish his work. Other than him slipping like you testified, was there anything unsafe?

A. Not that I know of.

R. 104-105; RE 4 at 32-33.

Thomas argues that it was foreseeable and probable he would be injured if Baldwin failed to set the ladder properly or secure his footing to prevent slipping. This position, however, is nothing more than a mere allegation of negligent conduct, without any evidence to support that Baldwin, in fact, was careless in setting the ladder or securing his footing.

Thomas' presents this Court with a lengthy recitation of caselaw to support his position that a duty was owed to him by Baldwin. However, Baldwin does not dispute that he owed a duty to Thomas. The dispute is whether sufficient evidence was presented to the trial court to support finding that no genuine issue of fact exists as to whether Baldwin breached his duty.

Thomas urges this Court to conclude that because Thomas and Baldwin remember the events

underlying this lawsuit, summary judgment was improper. Indeed, as cited by Thomas, issues of fact sufficient to require denial of a motion for summary judgment obviously are present where one party swears to one version of the matter in issue and another says the opposite. *Oaks v. Sellers*, 2006-IA-00005-SCT (¶8) (Miss. 2007) (quoting *Tucker v. Hinds County*, 558 So.2d 869, 872 (Miss. 1990)). However, the fact in dispute must be a material one. *Id.*

According to Thomas, the accident occurred when Baldwin slipped and his feet hit the ladder:

A. My aunt had called me and talked to him, and in conversation, I guess they made some type of arrangement for him to come down to go up there and look at it, as well.

Q. Is that the line of work Mr. Thomas was in?

A. He's always done odds and ends jobs like that, as far as my knowledge.

Q. Do you know if Mr. Bradley was going to pay Mr. Thomas to help him with the roof?

A. No. I didn't hear no particulars.

Q. You don't know if he was or not?

A. No. Not to my knowledge.

Q. What sort of preparations did you do to get ready to fix the leak in the roof?

A. I set a ladder up.

Q. Okay. You called - - who called Mr. Thomas?

A. Who called? I think my aunt called him. I'm not real sure. Because they was talking about it when I came in from work one day. So to be honest with you, I don't know.

Q. So you had already started working at this point?

A. Correct.

R. 103; RE 4 at 26-27.

According to Baldwin, Thomas was on the roof and attempted to reach forward to stop the ladder from falling, and fell:

A. Yes.

Q. Was your work around the house understood to be part of your part of the responsibility around the house?

A. No.

Q. Would he pay you anything to help you around the house?

A. No.

Q. How much work did you do around the house for Mr. Bradley?

A. Not very much.

Q. There came a time when you were going to help him with the roof, though; is that right?

A. Yes.

Q. And tell me about how he asked you to help him with the roof?

A. It was - - he had a leak and - - he had a leak, so I went up there and looked, looked around. And Bobby - - you know, Bobby does roofing and so he came down.

Q. He wasn't paying you to help him, though?

A. No.

Q. And how did you know that Mr. Thomas would be able to help you with the roof?

R.228; RE 5 at 18-20.

Despite the fact that these versions differ, the factual dispute does not require a denial of summary judgment because the facts are not material to the ruling. Regardless of which version this Court concedes in its analysis, no evidence of any act by Baldwin has been shown which indicates any breach of the standard of care.

C. *Res ipsa loquitur* is not applicable in this case

The doctrine of res ipsa loquitur applies where an event occurs that does not usually occur without negligence, the instrument of the event was in the defendant's sole control, and the plaintiff did not contribute towards the negligence. *Coleman v. Rice*, 706 So.2d 696, 698 (Miss. 1997). The instant case is analogous to a "slip and fall" case, wherein this court has held that the doctrine of res ipsa loquitur is not applicable.

In *Hardy v. K Mart Corp.*, 669 So.2d 34 (Miss.1996), Plaintiff slipped in a puddle of paint while shopping at the K Mart in Biloxi. The trial court determined that there was no evidence that K Mart created the paint spill and granted summary judgment. *Id at 38*. In its opinion, this Court held that the mere fact that the paint was spilled on the floor and that the plaintiff slipped in it and fell does not suffice to establish a breach of duty because the doctrine of res ipsa loquitur is inapplicable in cases such as this. *Id.* (citing *Douglas v. Great Atlantic & Pacific Tea Co.*, 405 So.2d 107, 111 (Miss. 1981).

Furthermore, in the instant case, the ladder was not in the control of the Defendant, Rather, as the Plaintiff testified:

Q. Now, let's go back and talk some more about the roof. As I understand what you have said, you were on the roof at the time that you fell; is that correct?

A. Correct. I was on the ladder up at the roof.

Q. Were you on the ladder, or were you on the roof?

A. I was on the ladder, right up to the roof.

Q. And where was Mr. Baldwin?

A. Up on the roof.

Q. So Mr. Baldwin was on the roof?

A. Right.

Q. His feet were on the roof, not on the ladder?

A. Huh?

Q. His feet were on the roof, and not the ladder?

A. Right, yeah

R.103; RE 4 at 25-26.

In support of his argument in favor of applying the doctrine of res ipsa loquitur to the instant case, Thomas cites the case of *Ballenger v. Vicksburg Hardwood Co. Inc.*, 119 So.2d 778 (Miss. 1960). There, this Court noted that there was no direct testimony as to any active negligence on the part of the defendant. Likewise, in the cases of *Stringer v. Bufkin*, 465 So.2d 331 (Miss. 1985) and *Peerless Supply Co. v. Jeter*, 65 So.2d 240 (Miss. 1953), also cited by Thomas, this Court was unable to point to any specific breach of a duty by the defendants and found that the doctrine of res ipsa loquitur was applicable.

Each of these cases are easily distinguishable from the case at bar because, in this case, there is direct testimony from Thomas that there was no negligent act by Baldwin. The question of whether a breach of duty and/or negligent act occurred is not an issue, and therefore, the doctrine of res ipsa loquitur is not applicable.

Finally, Plaintiff asserts that the accident in this case could not happen without carelessness on the part of Defendant. This argument presents a misunderstanding of a simple negligence claim. As discussed, *supra*, in order to prevail on his negligence claim, Plaintiff must demonstrate the elements of duty, breach, causation and damages. *Mississippi Department of Transportation v. Cargile*, 847 So.2d at 262. The standard of care applicable in cases of alleged negligent conduct is

whether the party charged with the negligence acted as a reasonable and prudent person would have under the same or similar circumstances. *Donald v. AMOCO Prod. Co.*, 735 So.2d 161, 175 (Miss. 1999) (citing *Knapp v. Stanford*, 392 So.2d 196, 199 (Miss. 1980); *Danner v. Mid State Paving Co.*, 173 So.2d 608, 615 (Miss. 1965).

In the instant case, the evidence presented by Plaintiff indicates only that Defendant Baldwin "slipped" and fell against the ladder on which he was climbing. As discussed, *supra*, Plaintiff has provided no evidence, whatsoever, of any act by Defendant Baldwin which would indicate any breach of the applicable standard of care. In the absence of any genuine issue of material fact, Plaintiff cannot maintain his negligence claim against this Defendant, and summary judgment was proper.

CONCLUSION

As stated herein, the trial court correctly applied the summary judgment standard to the facts of this case. Thomas did not present any evidence of a breach of the applicable duty of care by Baldwin. As no genuine issue of fact exists as to that issue, summary judgment was proper as to all claims.

Based upon the above and foregoing argument and authority, Baldwin respectfully requests that this Court affirm the trial court's award of summary judgment in this action.

CERTIFICATE OF SERVICE

I, Matthew A. Taylor, one of the counsel of record for Defendant, **JERRY BALDWIN**, do hereby certify that I have this date caused to be delivered, **via United States Mail, postage prepaid,** a true and correct copy of the above and foregoing document(s) to the following:

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The Honorable William T. Harkey
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P.O. Box 998
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THIS the 25th day of May, 2007.

MATTHEW A. TAYLOR