IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MARK ALBERT **APPELLANT**

VS. **APPEAL NO. 2007-CA-00008**

RONNY HUDDNAL, ET AL **APPELLEES**

APPEAL FROM THE CIRCUIT COURT
OF LAUDERDALE COUNTY, MS

BRIEF OF APPELLEE

ORAL ARGUMENT NOT REQUESTED

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MARK ALBERT **APPELLANT**

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RONNY HUDNALL, ET AL **APPELLEES**

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 and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

Mark Albert - Appellant

Jeffrey D. Leathers - Attorney for Appellant

Dorothy Huddnal and Scott's Plaza, Inc., Incorrectly named as Ronny Huddnal and Dorothy Huddnal, a Partnership d/b/a Scott's Amoco- Appellee

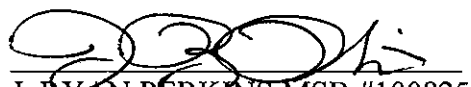
J. Ryan Perkins and Wilkins, Stephens & Tipton, P.A. - Attorneys for Appellee

Employer's Mutual Companies - Insurance Carrier for Appellee Scott's Plaza, Inc.

Longspur, L.P., Burns Family Properties, Burns & Burns, Inc. and Henry Dale Burns, Jr. - Appellee

J. Wyatt Hazard and Daniel, Coker, Horton & Bell, P.A. - Attorneys for Appellee

Respectfully submitted,



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III. STATEMENT OF ISSUES

The Appellee has not cross-appealed and no further issues are identified, here, beyond those stated in the Appellant's brief.

IV. STATEMENT OF THE CASE

A. NATURE OF THE CASE:

This cause of action arises out of a fatal accident involving a pedestrian and an automobile which occurred on a public roadway. (R. 6-9). On the date of the subject incident, December 9, 2002, Mark Albert and his wife Kyla Albert had driven that night in Mr. Albert's 18-wheeler tractor/trailer on Mr. Albert's work delivery from New Albany to Hattiesburg, Mississippi. (R. 51). They had stopped to eat breakfast at Scott's Amoco and parked Mr. Albert's tractor-trailer across the road on a lot owned by either Longspur, L.P. or Burns Family Properties (R. 52-53, 367). After they had eaten their meal, Kyla Albert attempted to cross Russell Mt. Gilead Road to return to the vehicle and was struck by a truck driven by Terra Lanterman (now Terra McDonald) in the middle of the road at about 5:08 a.m., when it was still dark outside. (R. 52-53, 203, 278, 336). Kyla Albert died as a result of the injuries she received, and her beneficiaries thereafter filed the underlying premises liability action. (R. 6-9, 336).

B. COURSE OF PROCEEDINGS:

On August 18, 2004, Mark Albert filed suit on behalf of himself and the wrongful death beneficiaries of Kyla Albert, deceased, against Terra Lanterman, landowner and lessor of the premises, Longspur, L.P., and the lessees of the truck stop, Scott's Plaza, Inc., incorrectly named as Ronny Huddnal and Dorothy Huddnal, a Partnership d/b/a Scott's Amoco. (R. 6-9). Albert alleged within his Complaint defendants' negligence in failing to provide adequate enough

lighting in the Scott's parking lot to warn oncoming motorists of pedestrians in Russell Mt. Gilead Road, in placing equipment in such a way as to amount to obstructions to the view of oncoming motorists and pedestrians and in failure to warn of hidden perils. (R. 7-8).

Defendants each filed motions for summary judgment based upon the there being no genuine issue amounting to material fact that: a) there were no obstructions, as alleged, which contributed to this accident; b) there is no duty to light a public roadway, the surrounding lights were in working order at the time of the accident; and c) there is no duty to warn of the open and obvious danger of crossing a public roadway. (R. 28-95; 275-332).

Defendants' motions came on for hearing, and oral arguments were made by all parties on November 6, 2006. The Lauderdale County Circuit Court granted summary judgment to both defendants on November 27, 2006. (R. 392-397). In its Memorandum Opinion and Judgment, the trial court found that the accident occurred in a public roadway and not on the premises of either defendant, that there was no duty on defendants' behalf to light the public roadway, that there was no duty owed by defendants to warn the decedent of the open and obvious dangers associated with the crossing of a public roadway, and that the record is devoid of proof that obstructions such as signage or a propane tank could have obstructed the view of the decedent or of Ms. Lanterman. (R. 392-397).

C. STATEMENT OF RELEVANT FACTS:

There never has been a written lease arrangement for the gas station and restaurant building leased from Longspur to Scott's Plaza, Inc. (R. 205, 249). It was originally leased around 1970 by Longspur via a verbal arrangement to a man named Chester Scott, now deceased. (R. 249). At the

time of the incident, Ronny Huddnal, now deceased, was operating the gas station and restaurant under a verbal arrangement with Longspur; his wife, Dorothy Huddnal, took over the family business for a short time after his death, until the business closed in 2003. (R. 130, 204, 254).

From Mr. Burns'(a principal of partner in Longspur) understanding of the verbal lease arrangement, the Huddnals were responsible for upkeep of their equipment inside the restaurant such as kitchen equipment, while Longspur was responsible for the outer walls of the building and the roof. (R. 364-365). Ms. Huddnal agrees. (R. 255).

The subject gas station and restaurant were built by Henry Dale Burns, Sr. (R. 360). Burns & Burns, Inc. installed the gas pumps and owned them at the time of this incident. (R. 360-361). Burns & Burns, Inc. owned the gas canopies and signage as of the time of the incident. (R. 216). The propane tank on the gas station property was already in place when Ronny Huddnal began his lease with Longspur in 1984. (R. 305, 341). There was a seventeen and a half (17 ½) foot clearance between the subject tank and the roadway, so the tank would not have blocked the view of the decedent to oncoming traffic, especially since she was struck while in the middle of the road. (R. 309).

Longspur employed a maintenance man to maintain the canopy lighting, and at the time of the accident, the canopy lights were in good working order. (R. 205, 305). The security lights around the premises were already in place when the Huddnals began their verbal lease. (R. Supplemental Volume of Record, pg. 8, exhibit 1 to Defendant's Motion for Summary Judgment, 343). At the time of the accident, all of the security lights were in good working order. (R. 205, 305). Mr. Albert testified that the lighting was sufficient for him to cross the road on the night of the accident. (R. 344). Scott's was not responsible for nor did it have any say in the installing,

positioning or choosing the number of lights outside the premises of the building it leased from Longspur. (R. Supplemental Volume of Record, pg. 8, exhibit 1 to Defendant's Motion for Summary Judgment, 343). Scott's merely paid the light bill for the on-premises security lights, as would and did any previous tenant of the Longspur property. (R. 343).

Scott's Amoco did not have any advertisements for their store outside their business. (R. 225, 342, Supplemental Volume of Record, pg. 8, exhibit 1 to Defendant's Motion for Summary Judgment). Further, there were at no time any advertisements around the propane tank on the gas island. (R. 225, Supplemental Volume of Record, pg. 8, exhibit 1 to Defendant's Motion for Summary Judgment). In her deposition, Terra Lanterman McDonald testified under oath that she did not see Ms. Albert at any time prior to striking her with the front left portion of her vehicle. (R. 288-289). Ms. McDonald has no idea whether Ms. Albert was walking, running bending down or standing prior to impact, because she did not see Ms. Albert until she was on the hood of her truck. (R. 289). Ms. McDonald's headlights were activated, and she can not think of any obstruction that would have kept her and Ms. Albert from seeing one another. (R. 289). Same is corroborated by Dorothy Huddnal, who says there was never at any time any signage placed near the road and none specifically in this area. (R. 305-306).

Longspur owned the real estate property including the truck stop and restaurant building until it was demolished recently. (R. 215). Longspur and/or Burns Family Properties also owns the gravel lot across the road from the subject real property. (R. 367). Scott's had no obligations or duties under the verbal lease with regard to the lot across the road from the truck stop. (R. 373). At different points in the past, that lot has operated as a truck stop, a bar, and a holding site for dumpsters, but at no time did the Huddnals operate any business or lease any part of the lot across

the street from Scott's Amoco. (R. 251-252). Only within the last year before the subject accident, some tractor-trailer drivers began on occasion to park on the vacant lot across the street from Scott's. (R. 132). They did so of their own accord and not because of anything Scott's did; Ms. Huddnal has no idea why these drivers began parking sporadically across the street. (R. 132). The fact that some tractor-trailers parked in the vacant lot did not increase Scott's business, and in fact some of the tractor-trailers in that lot were actually customers of the TA Truck Stop across the interstate. (R. 132).

Crossing a public roadway is an open and obvious danger. (R. 346). As a reasonable person and pedestrian, Ms. Albert knew the dangers of crossing the public roadway, and in fact, she had already crossed it once. (R. 54-55, 301, 346-347). Because the subject accident did not occur on any property owned, leased, or otherwise controlled by this defendant, this defendant could have had no duty of care regarding decedent crossing the roadway. (R. 396-397)

SUMMARY OF THE ARGUMENT

As there remain no genuine issues of material fact, the trial court's granting of Defendant's Motion for Summary Judgment should be affirmed.

The record is devoid of evidence that a propane tank located on the property leased from Longspur by Scott's Plaza, Inc. acted as an obstruction and/or contributed to the subject accident. (R. 396). When questioned about the propane tank, the very person whose vehicle struck the decedent, Terra Lanterman McDonald, clearly stated that she knew of no obstruction that could have prevented her and Ms. Albert from seeing one another. (R. 289).

The decedent was struck and killed on a public roadway, and neither Scott's nor Longspur had any duty to light the public roadway or warn Ms. Albert of a danger that is "open and obvious

to a reasonable pedestrian." (R. 396-397). Appellant himself concedes that the lighting on the night of the incident in question was sufficient to cross the road. (R. 344). Further, Scott's neither owned, rented nor maintained the lot across the street from their truck stop, and they therefore had no duty with regard to that property. (R. 347-350, 372).

ARGUMENT

I. STANDARD OF REVIEW

This Court's review of the trial court's grant of summary judgment is *de novo*. *Burton v. Choctaw County*, 730 So.2d 1, 3 ¶ 9 (Miss. 1997). On a Motion for Summary Judgment, "[t]he movant bears the burden of persuading the trial judge that: (1) no genuine issue of material fact exists, and (2) on the basis of the facts established, he is entitled to judgment as a matter of law." *Palmer v. Biloxi Regional Medical Center, Inc.*, 564 So.2d 1346, 1355 (Miss. 1990). However, "'[t]he burden of producing evidence in support of, or in opposition to, [the] motion . . . is a function of [Mississippi] rules regarding the burden of proof at trial on the issue in question.'" *Palmer*, 564 So.2d at 1355 (quoting *Fruchter v. Lynch Oil Co.*, 522 So.2d 195, 198 (Miss. 1988)). Therefore, the "movant bears the burden of production if, at trial, he 'would [bear] the burden of proof on th[e] issue' raised." *Id.* (quoting *Webster v. Mississippi Publishers Corp.*, 571 So.2d 946 (Miss. 1990)).

"In a negligence action, the plaintiff bears the burden of producing evidence sufficient to establish the existence of the conventional tort elements of duty, breach of duty, proximate causation, and injury. Therefore, in a summary judgment proceeding, the plaintiff must rebut the defendant's claim (i.e., that no genuine issue of material fact exists) by producing supportive evidence of significant and probative value . . . ." *Palmer*, at 1355. More specifically, the plaintiff may not rely solely upon the unsworn allegations in the pleadings, or 'arguments and assertions in briefs or legal

memoranda.' [*citations omitted*] The 'party opposing the motion must by affidavit or otherwise set forth specific facts showing that there are indeed genuine issues for trial.' *Fruchter*, 522 So.2d at 199 [*remaining citations omitted*] 'To have power to generate a genuine issue of material fact,' the 'affidavit or otherwise' (e.g., depositions and answers to interrogatories) must: (1) be sworn; (2) be made upon personal knowledge; and (3) show that the party providing the factual evidence is competent to testify." *Id.* at 1356.

Further, it has been held that "[m]ere allegations of facts are not sufficient to create a genuine issue of material fact sufficient to defeat a motion for summary judgment." *Gorman-Rupp Co. v. Hall*, 908 So.2d 749,757 (Miss. 2005). "The non-moving party's claim must be supported by more than a mere scintilla of colorable evidence; it must be evidence upon which a fair-minded jury could return a favorable verdict." *Wilbourne v. Stennet, Wilkinson & Ward*, 687 So.2d 1205, 1214, *reh'g denied* 691 So.2d 1027 (Miss. 1996). If the "party opposing summary judgment on a claim or defense as to which that party will bear the burden of proof at trial, fails to make a showing sufficient to establish an essential element of the claim or defense, then all other facts are immaterial, and the moving party is entitled to judgment as a matter of law." *Wilbourne*, 687 So.2d at 1214. *See also Sligh v. First National Bank of Holmes County*, 735 So.2d 963, 965-66 (Miss. 1999)(noting that focal point of summary judgment standard is upon material facts). "A genuine question of fact must be of a material fact", for "'the existence of a hundred contested issues of fact will not thwart summary judgment where none of them is material.'" *Id.* (quoting *Grisham v. John Q. Long V.F.W. Post*, 519 So.2d 413, 415 (Miss. 1988)).

II. ARGUMENT INTRODUCTION

Appellee Scott's is not liable for the death of Ms. Albert because it is guilty of no negligence, as explained, *infra.* The Appellant alleges of Scott's the following within the Third Amended Complaint for Damages:

> "Defendant Scott's Amoco and its lessor, Burns and Burns, Inc., failed to provide adequate lighting in its parking lot which would have warned oncoming traffic of possible pedestrian traffic on Mt. Gilead Road. Furthermore, Scott's Amoco had placed equipment in its parking lot which obstructed the view of pedestrians seeking to cross Mr. Gilead Road as well as obstructing the view of oncoming motorist. As such, Scott's Amoco and Burns and Burns, Inc. were negligent in failing to provide reasonably safe premises or warn its invitees of hidden perils which it knew or should have known had it exercised reasonable care." (R.3)

As such, the Appellant has alleged that Scott's was negligent in having equipment in its parking lot that obstructed the view of oncoming motorists, in having inadequate lighting and in failing to warn Ms. Albert of the 'hidden perils' of crossing the public roadway. This group of contentions is again raised in Appellant's Brief before this Court, and each contention is addressed by Appellee as follows.

A. Allegations of Obstructions on the Scott's Premises

Within discovery propounded to the plaintiff by Scott's regarding what specific obstructions were being referred to in the Complaint, the following information was provided by Appellant:

> Interrogatory No. 25: In Paragraph 8 of your Second Amended Complaint for Damages, you allege that "Scott's Amoco had placed equipment in its parking lot which obstructed the view of pedestrians seeking to cross Mt. Gilead Road as well as obstructing the view of oncoming motorist. As such, Scott's Amoco was negligent in failing to provide reasonably safe premises or warn its invitees of hidden perils which it knew or should have known had it exercised reasonable care." In regard to this allegation, specifically identify the type of equipment you contend was in the parking lot which obstructed one's view and the location of said equipment, as well as any proof you have to indicate Scott's Amoco placed any of these equipment items where you alleged they obstructed the view of oncoming motorists.

RESPONSE: A propane tank and possibly other obstacles. Discovery in this case is ongoing and this interrogatory may be supplemented.
[This interrogatory was never supplemented.]

(R. 340).

Prior to Scott's involvement in this litigation, Appellant answered Co-Appellee's interrogatories as follows:

> Interrogatory No. 14: In Paragraph 9 of the complaint, you alleged that "Scott's Amoco had placed equipment in its parking lot which obstructed the view of pedestrians seeking to cross Mt. Gilead Road as well as obstructing the view of oncoming motorist". In regard to that allegation, specifically identify the type of equipment you contend was in the parking lot which obstructed one's view and the location of said equipment.
>
> Response: Plaintiff would state various outdoor advertisements as well as a propane gas tank were located in close proximity to the roadway.
>
> (*Id.*).

With regard to the allegation that the propane tank was placed in position by Scott's, in her deposition, Dorothy Huddnal disputed same as follows:

> Q. And also at the time that this accident – that you came to work in 1984, was the propane tank which was located between the road and the gas tanks already there?
> A. Yes, it was.
> (Deposition of Dorothy Huddnal, at 47).
> (R. 341).

In response to the allegation that the propane tank obstructed the decedent's view of oncoming traffic, Mark Albert testified in his deposition (also prior to the involvement of Scott's in this litigation), the following:

> Q. Okay. You would agree that there is - - according to the photograph, a considerable distance between the tank and the main travel portion of the roadway?
> A. Yes, I do.

Q. Okay, so if one stepped - - even if one was on the other side of that tank, they would have room to look up the - - nothing would prevent that person from looking up the roadway and seeing whether a vehicle is coming, correct?
A. Correct.
(Deposition of Mark Albert at 41-42).
(*Id.*).

Further, regarding allegations of obstructions caused by outdoor advertising, plaintiff testified as follows:

Q. In regard to that (claim of outdoor advertisement blocking view) could you agree that these photographs do not indicate any outdoor advertising that would have obstructed any view?
A. Not at the time the photographs were taken, no, sir.
Q. Are you aware any other outdoor advertising that would be there at the time of the accident that would have obstructed the view?
A. To be honest with you, I don't know. Okay.
(Deposition of Mark Albert at 47).
(*Id.*).

The Affidavit of co-defendants Longspur and Burns and Burns, Inc. principal David Burns states that the propane tank was in excess of 17 ½ feet from the traveled portion of the roadway. (R. 342).

Further, the photographs show that the tank was not of sufficient height to block one's view of oncoming traffic. (R. 313-332; please reference originals of said photographs, as requested by counsel for Longspur and Burns & Burns by letter dated May 16, 2007).

Ms. McDonald testified as to the lack of obstructions on the Scott's premises as follows:

Q. As you are approaching Scott's Amoco, off to the right were there any type of signs or billboards or anything that might obstruct one's view from the road to Scott's Amoco parking lot?
A. I don't remember any signs. I haven't been back to the scene since this happened, but I don't remember any signs. There was a liquid petroleum gas thing there -
Q. A tank?

A. -By the road - yes, sir, a tank. But the way I hit - the way Ms. Albert and I collided, she was on the driver's side of my truck, meaning she had to be somewhat in the center of the road. So I don't - I mean, I don't know what could have got in the way of seeing me.

(Deposition of Terra McDonald at 13-14).
(R. 342).

Ms. McDonald further stated:

Q. And just to clarify what I think I understood and tell me if I get this wrong: It's your belief that you can't see any reason or any obstruction that would have been between the two of you. Is that correct?
A. No, sir.
Q. Did I state that correctly?
A. I can't see why I didn't see her or she didn't see me.

(Deposition of Terra McDonald at 34).
(*Id.*).

In response to allegations of outdoor signage serving as an obstruction to the view of oncoming motorists, Dorothy Huddnal testified as follows:

Q. There next to the road I know a lot of gas stations often times put up advertisements, Marlboros or Winston advertisement or sodas. Do you recall there being any such type advertising in the grassy area by the propane tank, whether or not it was a cardboard sign or perhaps even any type of sign in that area?
A. I don't remember anything around the propane tank of any kind as far as us ever having anything there.
Q. Are you saying you don't remember or that there was not any?
A. As far as around the propane tank area, that grass island there, no.
.....
Q. So there was no type of advertising out in this area?
A. No.

(Deposition of Dorothy Huddnal at 48-49).
(R. 342-343).

As such, there is no dispute and therefore no genuine issue to any material fact that a) the propane tank was installed prior to the lease agreement under which Scott's operated and Scott's had nothing to do with the placement of same; b) there is absolutely no evidence than any outdoor

signage was ever present in the subject area which could have possibly obstructed the view of the decedent or the driver; and c) a seventeen and a half (17 ½) foot clearance existed between the propane tank and the main travel portion of the roadway, and plaintiff and Ms. McDonald both admit and do not dispute that the propane tank would not have served as an obstruction. As such, Scott's is entitled to affirmation of the judgment as a matter of law granted in Scott's favor by the trial court.

B. Allegations of Failure to Provide a Reasonably Safe Premises

1. Allegations of Inadequate Lighting Against Scott's

It is undisputed that at no point in time did Scott's erect any outside lighting on the property it rented from Longspur. There is no genuine issue to any material fact that at no point in time was Scott's consulted about the placement of any security lights on the premises owned by Longspur by any party. Further, at no point in time was Scott's consulted about the number of security lights on the premises. Ms. Huddnal testified about the security lights as follows:

> Q. And at the time you came to work at the truck stop in 1984, the security lights around the parking lot were already erected. Correct?
> A. Right.
> Q. And it's your understanding those lights were erected by East Mississippi Power Association?
> A. Yes.
> (Deposition of Dorothy Huddnal at 45-46).
> (R. 342-343).

Scott's, as lessor of the truck stop premises, merely paid the power and light bill for the property as did any and all previous lessees of the property, and as would any reasonably prudent lessee. There is no allegation that the power and light bill was unpaid. There is no allegation that any of the security lights were in anything than perfect working order. At no point in time was Scott's responsible for installation, upkeep or maintenance of the lights on the canopy nearest

Russell Mt. Gilead Road. Regardless, there is no allegation that the canopy lights were not in working order. There is no allegation that Scott's failed to notify Longspur of any lights not in working order around the parking lot (to exclude the canopy lights, for which Longspur was responsible for upkeep). There is no dispute as to any of the foregoing, either. (R. 343).

Ms. Huddnal's testimony regarding upkeep of the security lights around the parking lot follows:

> Q. And Scott's Amoco would pay a monthly fee to East Mississippi Power Association for those lights?
> A. Right.
> Q. And if there were any problems with those lights, someone at Scott's Amoco would notify East Mississippi Power Association?
> A. Right.
> .....
> Q. And is it correct that during this period of time to the best of your knowledge all of these outside lights supplied by East Mississippi Power Association were in good working order:
> A. Yes, it was.
> Q. And additionally, in regard to the canopies under the gasoline island and diesel island is it correct that all of those lights were in good working order at the time of this accident?
> A. Yes, they were.
> (Deposition of Dorothy Huddnal at 46-47).
> (*Id.*).

Corroborating the above sworn testimony of Ms. Huddnal, Ms. McDonald confirmed that the lights were operational at the time the accident occurred. (Deposition of Terra McDonald at 30-31). Furthermore, Mr. Albert stated in his deposition that there was noticeable lighting around the premises and on the gas canopy, and that the lighting was sufficient for him to cross the road on the night of the accident.

> Q. You could see to cross the road when you got there, right?
> A. Yes, I could.

Q. There were some- - there's some lighting over around the truck stop and around the fuel and so forth, right?
A. Right.
(Deposition of Mark Albert at 37-38).
(Id.).

Additionally, Ms. McDonald testified that her headlights were working and turned on at the time of the incident, though she could not recall whether they were on bright. (Deposition of Terra McDonald at 17). Miss. Code Ann. §63-7-31 dictates that vehicles are to be equipped with headlights such that persons will be revealed at a distance of 350 feet on high beam and at 100 feet on low beam; despite the same, Ms. McDonald states she did not see Ms. Albert until she was on the hood of her truck. (Deposition of Terra McDonald at 19). (*Id.*).

It is undisputed that there is no duty upon a lessee of a property to light a public roadway. Scott's had no duty with regard to the installation, placement or number of security lights on the property owned by Longspur. Said lights were installed by the local power company long before Scott's lease of the property began, and the lights still remain, even after the truck stop building has been demolished. Scott's, as would any reasonably prudent lessee, paid the light bill for those security lights and was consistent and unfailing in its responsibility under the oral lease arrangement to notify the power company of the failure of any of the security lights on the premises. Regardless, it is undisputed that there is no evidence of any security light being out of order on the night of the accident. The canopy lights nearest the accident site were the responsibility of Longspur, but again, there is no allegation of any of the canopy lights being out of order. As such, the granting of judgment as a matter of law in Appellant's favor as to the Appellee's claims of inadequate lighting should be affirmed by this Honorable Court.

2. Allegations of Unsafe Conditions On and Across the Road from Scott's

Appellant cites in his brief to the case of *Allen v. Yazoo & M.V.R. CO.*, 71 So. 386 (Miss. 1916), for the principle that injuries occasioned by an invitee on the premises could be the responsibility of the owner of private ground if the injuries resulted from unsafe conditions on the premises. (Brief of Appellant, p. 8). In fact, application of the undisputed facts of this case to those in *Allen* distinguishes *Allen* as follows: a) the injury did not occur on the premises; b) Ms. Albert was no longer an invitee once she left the Scott's premises; c) Scott's did not own the private ground across Russell Mt. Gilead Road; and d) the injury did not result from any unsafe condition on said premises. For the purpose cited by Appellant, *Allen* is inapplicable to the case at bar, insofar as it serves only to further prove Scott's position on its lack of liability in the premises.

Additionally, Appellant cites to *Warrington v. Bird*, 204 N.J. Super. 611, 499 A.2d 1026 (N.J. 1985), as precedent that Scott's had some sort of duty to make the roadway safe for pedestrians. However, the facts of *Ross v. Moore*, 221 N.J. Super. 1, 533 A.2d 398 (N.J. App. Div. 1987), more closely parallel the facts of the situation at bar. In *Ross*, the New Jersey Court ruled in favor of a school when one of its patrons was struck by a car while crossing a public road after having parked across the street in a parking lot not owned by the school. *Id.* The court therein held that, while it may be foreseeable that a patron would park across the street, that fact in no way established a dangerous condition to the parking situation itself, and the school was not liable for the plaintiff's injuries. *Id.*

In the case at bar, the plaintiff parked on the opposite side of a highway even though Scott's provided a sizeable parking lot on its facilities. The on-premises lot was lighted and available for over-night parking. Mississippi law is clear that the owner of a premises is not an insurer of the

invitee's safety and has only a duty to keep the premises in a reasonably safe condition or warn of a hidden danger or peril that is not in plain and open view. *Tharp v. Bunge Corp.*, 641 So.2d 20, 25 (Miss. 1994). Clearly, the dangers of crossing a road are "open and obvious." And again, the decedent was no longer an invitee or even on the Scott's premises at all when she was struck by Ms. McDonald's vehicle in the public roadway. (R. 349-350).

Appellee requests that this Court follow the holding of *Ross*, which specifically distinguished itself from the ruling in *Warrington* for the exact same reason that the circumstances of the present case do not apply to *Warrington*:

> "We do not extend *Warrington* to the facts of the appeal before us. *Warrington* is a precedent only that a commercial establishment which provides parking facilities for its patrons across a public roadway has a duty to exercise reasonable care for their safe passage from there to the commercial establishment and back. A readily distinguishing fact is that the school plaintiff attended did not own or provide the parking facility across Warwick road from the school." *Ross* at 7; *MacGrath v. Levin*, 256 N.J. Super. 247, 606 A.2d 1108 (N.J. 1992).

In our case, it is undisputed and there is no genuine issue to any material fact that Scott's did not own any property whatsoever. This includes any and all of the property to the east of Russell Mt. Gilead Road where the truck stop building was located, as well as the empty gravel lot on the west of Russell Mt. Gilead Road, which was owned by Longspur and/or Burns & Burns, Inc. (R. 372).

As pointed out as being undisputed within Scott's Motion for Summary Judgment at the trial court level, at no point in time did Appellees operate a business on the vacant lot across Russell Mt. Gilead Road from the truck stop building owned by Longspur or control that property in any way. At no point in time did Scott's make rental or lease payments to Longspur for anything having to do with the vacant lot across the road from the truck stop building owned by Longspur. At no point in

time was Scott's consulted by any party about the number or placement of security lights on the vacant lot across the road from the truck stop building owned by Longspur. Further, the record is devoid of any evidence pointing to Scott's having any say in the placement of any security lights or other signage in the lot across the road from its establishment, which it did not own. Ms. Huddnal testified as follows:

> Q. Did Scott's have any obligations or duties in regards to that lot on the opposite side of the road?
> A. Not as I know of.
> (Deposition of Dorothy Huddnal at 17).
> (R. 344-345).

Further, Ms. Huddnal clarified that the vacant lot was not part of the Scott's business in any way:

> Q. Were there any areas in the parking lot that were actually grass that had to be weed-eated or mowed?
> A. There was three grass islands on our side of the lot, and yes, we did have to cut the grass and weed-eat on that.
> Q. When you say islands, one of these islands – would that have been where the propane tank sat?
> A. Yes.
> Q. You said three grass islands on your side of the lot. I believe that was your words.
> A. Uh-huh.
> Q. Was there another side of the lot? Am I missing something?
> A. Well, the Russell- Mt. Gilead Road – we're on the –I guess it's according to which way you're going, but if you're going down Russell Mt. Gilead Road from the interstate, we had the lot on the left-hand side.
> Q. Okay. So I'm assuming there was a lot on the right-hand side.
> A. Yes.
> (R. 372).

Appellant ignores the above and points to a portion of Ms. Huddnal's deposition wherein she used the phrase "our place" and attempts to show her words indicated she considered the vacant lot across the street to be part of the Scott's property. (Brief of Appellant, p. 4, 8). Where Appellant's Brief points out only two words from Ms. Huddnal's testimony to attempt to make such connection,

it is important to read the entire question and answer exchange in order to see that Ms. Huddnal was actually referencing the exact opposite of Appellant's contention. Ms. Huddnal will testify that her statement was in fact only in reference to the property on the east of Russell Mt. Gilead Road where the truck stop was located, as being "our place", not the vacant lot across the road to the west. Ms. Huddnal's intention was to convey that customers from the TA Truck Stop across the interstate (counsel for Appellant did not clarify when referring to "across the road" whether he was referencing across the interstate or across Russell Mt. Gilead Road) park in the lot across the street from the Scott's building. (R. 375-376). Same was at no time a reference to Scott's bearing any interest in the lot across from Russell Mt. Gilead Road, which remains strictly denied. This semantical misunderstanding is in no way indicative of any material factual dispute.

Appellant further attempts to show that Scott's enjoyed some additional 'benefit' from some vehicles parking in the empty lot across the road and that this imputes a responsibility or ownership of the vacant lot upon Scott's. However, it is undisputed that no additional benefit was created:

> Q. Okay. Do you know any reason that that started occurring? Did anything change about the premises?
> A. No. They just started doing that on their own.
> Q. Did business pick up?
> A. No, not really. It was about the same still.
> (R. 132).

Regardless, this issue has already been decided in Appellee's favor by the Court in *MacGrath*:

> "The fact that Levin may enjoy some undefined "benefit" arising from the public use of the jug handle [intersection] does not, in our view, translate into a corresponding duty to protect pedestrians from the hazards of the public thoroughfare." *MacGrath* at 255. [Emphasis added].

The Court went on to say that imposition of a "duty upon all proprietors owning property abutting

a public street who enjoy the "benefit of traffic access from the street to their business enterprises" ... "would be an extension of the law which we decline to make." *Id.*

Further, Appellant would have this Court believe that since Ms. Huddnal agreed that in the twelve months prior to this accident she realized that some trucks were parking in the empty gravel lot across the road, that this equates to Scott's 'providing' parking. However, the exact same situation occurred in *Ross*, and obviously, the Court therein found the proprietor was not liable for injuries occasioned while a pedestrian was crossing the road to the other lot:

> "The school's business administrator in his deposition acknowledged awareness that adult evening students parked in the shopping center parking lot and walked across Warwick Road to the school." *Ross* at 4.

The Court in *MacGrath* reasoned likewise in Appellee's favor:

> "The fact that Levin may have known that shopping center patrons traversed Route 22 at the controlled pedestrian walkway does not, in our view, present a basis to extend the law by imposing a duty upon it to provide a means of safe passage across the highway, or to warn patrons of the apparent dangers of highway traffic." MacGrath at 254.

Given the above undisputed facts, this Court should hold, as did the trial court, that Scott's had no duty with regard to the lot across the street from its establishment that it neither owned, rented nor maintained. Caselaw is well established that knowledge of patrons parking in a lot not owned by a business proprietor does not create any sort of duty to keep patrons safe as they cross such a road. Scott's maintains and it is undisputed that it enjoyed no added benefit in the form of increased business by the fact that some patrons chose to park across the street, and regardless, the law does not create any duty simply because of such a benefit, as seen above. Because of the foregoing considerations, Scott's should not be held to have any duty or to have breached any duty to Appellant with regard to passage to the vacant lot across the street from Scott's business that

Scott's neither owned, rented nor controlled, and the trial court's granting of judgment as a matter of law should be affirmed as to the same.

C. Allegations of Duty to Warn of Hidden Perils

1. Scott's Had No Duty to Warn the Decedent of the Open and Obvious Dangers of Crossing a Public Roadway.

Appellant's final assertion within his Complaint against Scott's is that it was "negligent in failing to provide reasonably safe premises or warn its invitees of hidden perils which it knew or should have known had it exercised reasonable care." (R. 3). Though the Complaint is ambiguous with regard to 'hidden perils', it would appear that Appellant's position is that Scott's had a duty to warn the decedent of the possibility of dangers of crossing Russell Mt. Gilead Road without first being aware of oncoming motorists. There can be no genuine issue to the fact that the dangers of crossing a public roadway are 'open and obvious.' As such, Scott's had no such duty to warn the decedent of the danger of same. (R. 345-346).

As noted in *Vaughan v. Ambrosiano*, 883 So.2d 1167 (Miss. 2004):

> "One would struggle, indeed, to justify the need to warn a plaintiff of that which was open and obvious. Stated differently, a warning of an open and obvious danger would provide no new information to the plaintiff. Stated still another way, a thing warned of is either known to the plaintiff or it's not. If it's already known to the plaintiff, then the warning serves no purpose. If it is not already known to the plaintiff, then the thing warned of was not open and obvious in the first instant." *Vaughan* at 1170-1171.
>
> (R. 346).

In regard to the issue of the decedent's knowledge of the danger, her husband Mark Albert testified as follows:

> Q. And you knew when you parked there you would - - what you'd be doing is crossing that road going to the truck stop?

A. Exactly.
Q. Okay. And your wife realized that?
A. I'm sure she did.
Q. Did you consider Kyla to be a conscientious person who looked out for her own safety?
A. Yes, definitely.
Q. Was she normally a careful lady?
A. Very careful. Very caring. She is afraid of the dark. Okay? I'm telling you that right now. She was. She was very cautious about things.
Q. So, I mean, she, as far as - - she had been around you some in truck stops - -
A. Right.
Q. - - and trucking, and she knew that safety was important to you?
A. Right.

(Deposition of Mark Albert at 32-33).
(*Id.*).

Mr. Albert continued as follows:

Q. And she'd normally be the type of person who would be, before she is going to cross a highway, she's going to be careful and cautious and - -
A. Exactly.
Q. - - looking both directions to make sure it was safe to do so?
A. Right.

(Deposition of Mark Albert at 34).
(R. 346-347).

As such, the trial court properly found that Scott's had no duty whatsoever to warn the decedent of the potential dangers of crossing a roadway (R. 397), as there is no genuine issue to the material fact that said danger was open and obvious.

2. Legal Status of Decedent

a. The Decedent Lacked Requisite Legal Status for her Beneficiaries to Now Claim a Duty to Her Was Breached

In order for a plaintiff to succeed in a premises liability action, the plaintiff must be an invitee, a licensee, or a trespasser with regard to the defendant; the defendant must owe the plaintiff

a duty of care, and the defendant must breach that duty. *Leffler v. Sharp*, 891 So.2d 152, 156 (Miss. 2005). "[A]n *invitee* is 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." *Id.* at 156 (first emphasis in original, subsequent emphasis added). In this case, while the plaintiff had been an "invitee" of Scott's while on the Longspur-owned property, her status as such ceased as soon as she entered the public roadway and exited Scott's premises. (R. 347). The granting summary judgment to Scott's at the Circuit Court level, Judge Williamson agreed:

> "The accident did not occur on the premises of the Defendants. The accident occurred in a public roadway." (R. 396).

In *Leffler*, the Mississippi Supreme Court recognized a change in status upon exiting the premises. Mr. Leffler was injured on a roof adjacent to the establishment. *Id.* at 158. The Court stated therein that, "[u]pon his entrance to the [establishment], Leffler was an invitee, but once he exited the establishment" his invitee status was lost. *Id.* at 157. In *Leffler*, as in the present case, defendants included both the owner of the property and the lessor of the establishment. The Court therein determined that the roof, not under lease, was not included in the premises of the establishment. *Id.* at 159. "Leffler was not an invitee at the location and time of the accident and, therefore, was not owed the duty given to an invitee." *Id.* at 157. It is undisputed that the public roadway is not and never has been part of the Scott's lease, so as in *Leffler*, the decedent in the present matter was not an invitee of Scott's when she was struck in the road. (R. 348).

In addition to not being an invitee, at the time of the accident, the decedent was neither a licensee nor trespasser with regard to Scott's. "A licensee is one who *enters upon the property of another* for his own convenience, pleasure, or benefit pursuant to the license or implied permission

of the owner . . . ." *Id.* (first emphasis in original, subsequent emphasis added). "A trespasser is one who *enters upon another's premises* without license, invitation, or other right." *Id.* (first emphasis in original, subsequent emphasis added). (*Id.*). Each of these classifications bear the requirement of a person being 'on the property of another,' and it is undisputed that Ms. Albert was not injured while on anything but a public roadway, not owned, operated or maintained by any party to this litigation.

The Mississippi Supreme Court has clearly limited the scope of premises liability that can be assessed to premises owners and lessors. It is undisputed that the subject injury did not occur on any property owned, leased, or otherwise controlled by this defendant. Accordingly, the Appellant has not and cannot establish the necessary element of legal status. As stated by the trial court in its Memorandum Opinion:

> "The Court fails to see how the adjacent landowner, the lessees or the gasoline provider are liable for the accident in question." (R. 397).

Affirmation herein of the trial court's granting judgment as a matter of law in Scott's favor is appropriate because at the time of the accident, the decedent was neither an invitee, licensee, or trespasser in relation to this defendant.

b. Even if Decedent Were Held to have been an Invitee, Such Status Voided When She Exited the Premises and Entered the Roadway

In *Thompson v. Chick-Fil-A*, the Mississippi Supreme Court clarified that while business invitee status extends outside the physical walls of an establishment, it is limited to within the establishment's property. *Thompson*, 923 So.2d 1049 (Miss. 2006). In *Thompson*, a restaurant patron fell off a sidewalk's curb when returning to her car. *Id.* at 1051. The plaintiff was entitled to invitee status, and therefore a reasonable duty of care "since [the] patron entered and *remained*

on restaurant's property." *Id.* at 1052 (emphasis added). The Court again focused on ownership and control of the property where the injury occurred when determining the status of the injured party and the duty owed. In *Thompson*, unlike the case *sub judice*, the plaintiff's car was within the confines of the establishment's property, thus her legal status as a business invitee remained, imposing the corresponding duty. In the present case, however, the decedent did not "remain on" this defendant's property, causing her status as a business invitee to lapse, and with it any corresponding duty. Summary judgment in the present case was appropriately granted and should be affirmed because Appellee did not own, lease or otherwise control the public roadway; thus it could not owe a duty to the decedent. (R. 349). For the above reasons pursuant and under Mississippi case law, Scott's can have no liability in this action, and the trial court's ruling should be affirmed.

CONCLUSION

This Court should affirm the trial court's decision because Appellant has failed to present any evidence pointing to the existence of a genuine issue of material fact for a jury to resolve.

The record is devoid of evidence that a propane tank located on the property leased from Longspur by Scott's or any signage acted as an obstruction and/or contributed to the subject accident, and in fact, testimony of the Appellant and others indicates the same.

The decedent was struck and killed on a public roadway, and Scott's had no duty to light the public roadway or warn Ms. Albert of such an open and obvious danger as crossing a public roadway. Appellant in fact concedes that the lighting on the night of the incident in question was sufficient to cross the road.

Further, Scott's neither owned, rented nor maintained the lot across the street from their truck stop and therefore had no duty with regard to that property, and Ms. Albert's legal status as an invitee lapsed when she entered the public roadway.

As there remain no genuine issues of material fact, the trial court's granting of Defendant's Motion for Summary Judgment should be affirmed.

Respectfully submitted,

DOROTHY HUDDNAL AND SCOTT'S PLAZA, INC., INCORRECTLY NAMED AS RONNY HUDDNAL AND DOROTHY HUDDNAL, A PARTNERSHIP D/B/A SCOTT'S AMOCO

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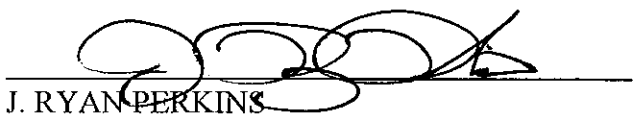
CERTIFICATE OF SERVICE

I, J. Ryan Perkins, do hereby certify that I have this day served a true and correct copy of the above and foregoing Brief by U. S. mail, postage prepaid, upon Jeffrey D. Leathers, attorney for Appellant, Mark Albert; P. O. Box 907, Tupelo, MS 38802, and J. Wyatt Hazard, attorney for Longspur, L.P., Burns Family Properties, Burns & Burns, Inc. and Henry Dale Burns, Jr.; P. O. Box 1084, Jackson, MS 39215-1084.

DATED: This the 11th day of July, 2007.



J. RYAN PERKINS