IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2007-CA-00008

MARK ALBERT, individually and as representative of the wrongful death beneficiaries of KYLA ALBERT, deceased — APPELLANTS

VERSUS

SCOTT'S TRUCK PLAZA, INC., incorrectly named as RONNY HUDDNAL AND DOROTHY HUDDNAL a partnership, doing business as SCOTT'S AMOCO, LONGSPUR, L.P. and BURNS & BURNS, INC. — APPELLEES

BRIEF FOR APPELLEES, LONGSPUR, L.P. AND BURNS & BURNS, INC. ON APPEAL FROM THE CIRCUIT COURT OF LAUDERDALE COUNTY, MISSISSIPPI

J. WYATT HAZARD - BAR #[redacted]
CAROLYN CURRY SATCHER - BAR #[redacted]
DANIEL COKER HORTON & BELL, P.A.
4400 OLD CANTON ROAD, SUITE 400
POST OFFICE BOX 1084
JACKSON, MISSISSIPPI 39215-1084
TELEPHONE: (601) 969-7607
FACSIMILE: (601) 969-1116

ORAL ARGUMENT NOT REQUESTED

IN THE SUPREME COURT OF MISSISSIPPI

MARK ALBERT, individually and as representative of the wrongful death beneficiaries of KYLA ALBERT, deceased — **APPELLANTS**

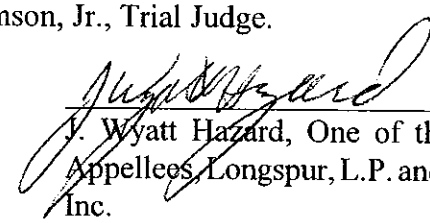
VERSUS

SCOTT'S TRUCK PLAZA, INC., incorrectly named as RONNY HUDDNAL AND DOROTHY HUDDNAL a partnership, doing business as SCOTT'S AMOCO, LONGSPUR, L.P. and BURNS & BURNS, INC. — **APPELLEES**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representatives 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.

1. Mark Albert, Appellant;
2. Ronny Huddnal, and Dorothy Huddnal, a partnership, doing business as Scott's AMOCO Appellee;
3. Longspur, L.P., Appellee;
4. Burns & Burns, Inc., Appellee;
5. Jeffrey D. Leathers, Attorney for Appellants;
6. J. Wyatt Hazard, Attorney for Appellees, Longspur, L.P. and Burns & Burns, Inc.;
7. Ryan Perkins, Attorney for Appellee, Scotts AMOCO; and
8. The Honorable Lester F. Williamson, Jr., Trial Judge.



J. Wyatt Hazard, One of the Attorneys for Appellees, Longspur, L.P. and Burns & Burns, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE COURTS:

STATUTES:

SECONDARY AUTHORITY:

I. STATEMENT OF THE ISSUES

I. THE CIRCUIT COURT OF LAUDERDALE COUNTY CORRECTLY HELD THAT NO GENUINE ISSUE OF MATERIAL FACT EXISTS, AND AS A MATTER OF LAW, APPELLEES, LONGSPUR, L.P. AND BURNS & BURNS, INC. HAVE NO LIABILITY FOR APPELLANT'S CLAIMS OF OBSTRUCTIONS, INADEQUATE LIGHTING AND FAILURE TO WARN OF AN OPEN AND OBVIOUS DANGER.

II. EVEN IF GENUINE ISSUES OF MATERIAL FACT EXIST REGARDING A DEFECT IN THE PREMISES, APPELLEES, LONGSPUR, L.P. AND BURNS & BURNS, INC., HAVE NO LIABILITY AS A MATTER OF LAW.

II. STATEMENT OF THE CASE

A. NATURE OF THE CASE AND COURSE OF PROCEEDINGS BELOW

Plaintiff brought this lawsuit against Longspur, L.P. and Burns & Burns, Inc. individually and as representative of the wrongful death beneficiaries of Kyla Albert, deceased for damages arising from an accident that occurred on December 9, 2002 approximately in the middle of Russell Mt. Gilead Road in Meridian, Mississippi. (R. at 2-5). This action named as Defendants, Terra Lanterman, Scott's Truck Plaza, Inc., incorrectly named as Ronny Huddnal and Dorothy Huddnal a partnership, doing business as Scott's Amoco, Longspur, L.P. and Burns & Burns, Inc. (R. at 207-211). Ms. Terra Lanterman was subsequently dismissed.[1] *Id.* Defendants, Longspur, L.P. and Burns & Burns, Inc. filed a Motion for Summary Judgment on August 4, 2006. (R. at 144-279). A Motion for Summary Judgment was also filed on behalf of Scott's Amoco. On November 27, 2006 Judge Lester F. Williamson, Jr., entered a Memorandum Opinion and Judgment Granting Motions for Summary Judgment as to all remaining Defendants. (R. at 392-397). On December 20, 2006, Appellant filed his notice of appeal. (R. at 398).

B. STATEMENT OF RELEVANT FACTS

As noted by the trial court, the subject premises liability action does not arise from an accident that occurred on the premises of any Defendant, rather the accident occurred on a public roadway. (R. at 392-397). The remaining Defendants include Scott's Amoco, the operator of the truck stop adjacent to the roadway, as well as Longspur, L.P., the owner and lessor of the premises, and Burns & Burns, Inc., the company that provided gasoline to the truck stop. (R. at 207-211).

---

[1] Since the accident date Ms. Lanterman married and is now Terra McDonald (hereinafter referred to as Ms. McDonald).

On December 9, 2002, Mark and Kyla Albert parked their vehicle across the road from Scott's Amoco, a restaurant and truck stop located on Russell Mt. Gilead Road in Meridian, Mississippi. (R. at 168-170). Mark and Kyla Albert walked across Russell Mt. Gilead Road to the Scott's Amoco. (R. at 170-171). The Alberts ate breakfast at the restaurant and then proceeded to the restrooms. (R. at 169). At approximately, 5:08 a.m. Kyla Albert (hereinafter decedent or Ms. Albert) while attempting to cross Russell Mt. Gilead Road was struck and killed by a vehicle being driven by Ms. McDonald. (R. at 169, 203). Mr. Albert did not witness the accident as he was still inside the restaurant. (R. at 169). There are no witnesses to the accident other than Ms. McDonald and the deceased, Ms. Albert. *Id.* At the time of the accident, Scott's Amoco was a partnership operated by Ronny and Dorothy Huddnal. (R. at 275). The Huddnals leased the premises from Longspur, L.P., the owner of the property. (R. at 275). There is no written lease agreement existing between Longspur, L.P. and the Huddnals. (R. at 204-205). Burns & Burns, Inc. provided the gasoline to the pumps located at Scott's Amoco. (R. at 216).

Plaintiff alleges liability as to the remaining Defendants under a theory that a propane tank on the premises may have obstructed the decedent's view of traffic, an allegation of insufficient lighting on the premises, and a claim the Defendants had a duty to warn the decedent of the dangers of crossing a roadway. (R. at 207-211).

At the trial court level, Appellant offered no proof of his claims that Appellees obstructed the decedent's view on December 9, 2002. (R. at 392-397). Mr. Albert testified that the propane tank at issue was a significant distance from the roadway and there was nothing to prevent a person from looking down the roadway. (R. at 171-174). Mr. Albert further testified that the photographs taken by Appellees did not depict any outdoor advertising that would have obstructed Ms. Albert's view of the roadway. (R. at 174, R.E. 1-5). Moreover, Mr. Albert stated that he was not aware of

any other outdoor advertising located on the premises that would have obstructed Ms. Albert's view at the time of the accident. *Id.* Further, the record is clear that at the time of the accident Ms. McDonald had her headlights on, thus, there is no reason that Ms. Albert did not see Ms. McDonald's vehicle. (R. at 289).

Appellant has admitted that the danger of crossing a public roadway such as Russell Mt. Gilead Road is not a hidden peril but is common knowledge. (R. at 170-171). Mr. Albert testified that he knew when he parked in the lot across the street from Scott's Amoco that he and his wife must cross the road to go to the truck stop and restaurant. (R. at 170). Mr. Albert further testified that he was sure his wife realized this fact as well. (R. at 170-171). Mr. Albert testified that Ms. Albert appreciated the danger of crossing a public roadway and would know to look both ways before crossing such a road to insure it was safe to do so. *Id.* Thus, the danger of crossing Russell Mt. Gilead Road was not a hidden peril. Appellees had no duty to warn Ms. Albert of a danger that was open and obvious.

The Appellant has failed to put forth any credible evidence that Appellees obstructed the view of either party to the accident. (R. at 392-397). Ms. McDonald testified that nothing obstructed her view. (R. at 289). Further, these Appellees did not provide, own or maintain the subject propane tank or any outside advertising as alleged in the complaint. (R. at 204-206). It is undisputed that there was a clearance of 17½ feet between the subject propane tank and the main traveled portion of the roadway. (R. at 204-206, 392-397, R.E. 22-24, 25-39). Thus, there is no proof in the record that the propane tank or any alleged outdoor advertising blocked the view of the decedent to oncoming traffic. (R. at 392-397, R.E. 25-39).

Appellant has failed to present any evidence to support allegations that the lighting on the premises was inadequate. (R. at 392-397). Further the evidence is undisputed that Appellee,

Longspur, L.P. did not provide any lighting on the premises. (R. at 204-206, R.E. 22-24). Pursuant to an agreement with between the Huddnals and East Mississippi Power Company, there were numerous security lights on the premises. (R. at 221, 305). The only lighting provided by Appellee, Burns & Burns, Inc. were the canopy lights above the gasoline and diesel pumps. (R. at 216). The evidence is uncontroverted by Appellant, that the canopy lights were in proper working order at the time of the accident. (R. at 222-224, 289, R.E. 6-20, 25-39). Moreover, it is undisputed that all outside lighting was operational at the time of the accident. (R. at 172, 222-224, 289, 305, R.E. 22-24).

Since Appellant has failed to present any evidence which creates a genuine issue of material fact that must be resolved by a jury, the trial court was correct in granting summary judgement pursuant to Miss. R. Civ. P. 56 in favor of Appellees, Longspur, L.P. and Burns & Burns, Inc. Based upon a de novo review of the evidence presented to the trial court this Court should affirm the summary judgment in favor of the Appellees.

SUMMARY OF THE ARGUMENT

The trial court was correct in finding that Appellant failed to come forward with evidence which created a genuine issue of material fact that must be resolved by a jury as to liability of Appellees, Longspur, L.P. and Burns & Burns, Inc. (R. at 392-397). The Appellant failed to make a *prima facie* case that the alleged obstructions, specifically the propane tank and the alleged advertising, were a proximate cause of the accident. *Id.* As a matter of undisputed fact, the court found that the propane tank was 17 ½ feet from the roadway. *Id.* Further, the court was correct in finding that plaintiff failed to present credible evidence to support his allegations that the lighting on the premises was inadequate and thereby a proximate cause of the accident. *Id.* The Court correctly held that Appellees owed no duty to warn the decedent of the dangers associated with

crossing a public roadway as such is not a hidden peril. *Id.* Further, the lower court emphasized the undisputed fact that the subject accident did not occur on the premises but occurred approximately in the middle of Russell Mt. Gilead Road of which Appellees have no right to control. *Id.* The lower court correctly held that the adjacent landowner, Longspur L.P., and the gasoline provider, Burns & Burns, Inc., are not liable for this accident which did not occur on the premises in question. *Id.*

Based on the undisputed facts that: (1) the propane tank in question was 17 ½ feet from the roadway; (2) advertising on the premises could not obstruct the view of decedent or Ms. McDonald and (3) there was no evidence of inadequate lighting, the trial court correctly held that plaintiff failed to set forth specific facts, by affidavits or otherwise, to demonstrate the existence of a genuine issue of material fact in dispute. *Id.* Accordingly, Appellees are entitled to a judgment as a matter of law.

STANDARD OF REVIEW

This Court reviews de novo a trial court's grant of a motion for summary judgment. *Leffler v. Sharp*, 891 So. 2d 152, 156 (Miss. 2004). The standard by which this Court reviews an appeal of summary judgment is the same standard employed by the trial court under Miss. R. Civ. P. 56 (c). *Cossitt v. Alfa Ins. Corp.*, 726 So. 2d 132, 136 (Miss. 1998). Pursuant to Miss. R. Civ. P. 56 (c), summary judgment is appropriate,"if the pleadings, depositions and answers to interrogatories and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact . . . the moving party is entitled to judgment as a matter of law." In *Palmer v. Biloxi Regional Medical Center, Inc.*, 564 So. 2d 1346 (Miss. 1990), the Court stated that, "[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*, 564 So.2d at 1335. If the moving party makes out a *prima facie* case showing the absence of a genuine issue of material fact, the opposing party may not rely solely upon the unsworn allegations or denials in the

pleadings, nor upon "arguments and assertions and briefs or legal memorandum," *McGee v. Transcontinental Gas Pipeline Corp.*, 551 So. 2d 182, 186 (Miss. 1989), "but is responsible, by affidavits or as otherwise provided in . . . [Rule 56], to set forth specific facts showing there is a genuine issue for trial." Miss. R. Civ. P. 56(a); *See also Frutcher v. Lynch Oil Co.*, 522 So. 2d 195, 198-99 (Miss. 1988).

As noted in *Raiola v. Chevron USA, Inc., et al* 872 So.2d 79, 83 (Miss. App. 2004), "a dispute about a material fact is genuine only if the evidence is such that a reasonable jury could return a verdict for the non-moving party." (citing *Reynolds v. Amerada Hess Corp.*, 778 So.2d 759 (Miss. 2000)).

ARGUMENT

I. THE CIRCUIT COURT OF LAUDERDALE COUNTY CORRECTLY HELD THAT NO GENUINE ISSUE OF MATERIAL FACT EXISTS, AND AS A MATTER OF LAW, APPELLEES, LONGSPUR, L.P. AND BURNS & BURNS, INC. HAVE NO LIABILITY FOR APPELLANT'S CLAIMS OF OBSTRUCTIONS, INADEQUATE LIGHTING AND FAILURE TO WARN OF AN OPEN AND OBVIOUS DANGER.

Mississippi applies a three-step process in determining premise liability. The first step is to determine the status of the injured party as being an invitee, licensee or trespasser. In the present case it is not disputed that Ms. Albert was a patron of Scott's Amoco prior to the accident and would be considered an invitee. However, the accident did not occur on the premises. (R. at 203). The second step is to determine the duty a landowner or business owes the injured party. As set forth in *Leffler v. Sharp, et al.*, 891 So. 2d 152, 157 (Miss. 2004), "[t]he owner of the premises is not an insurer of the invitee's safety, but does owe to an invitee the duty to keep the premises reasonably safe, *and* when not reasonably safe, to warn only where there is a hidden danger or peril that is not in plain and open view." (quoting *Massey*, 867 So. 2d at 239 (citing *Corely*, 835 So. 2d at 37)). After such a determination, the Court should then determine if this duty was breached by the

landowner and/or business entity. *Thompson v. Chic-Fil-A, Inc.* 923 So. 2d 1049, 1052 (Miss. Ct. App. 2006).

A. APPELLANT FAILED TO PRESENT ANY EVIDENCE TO SUPPORT CLAIMS THAT EQUIPMENT ON THE PREMISES OBSTRUCTED THE VIEW OF MS. ALBERT OR MS. MCDONALD.

The record is void of any evidence that Appellees, Longspur, L.P. and Burns & Burns, Inc. breached any duty owed to plaintiff as the landowner and gas supplier of the premises at issue. In the present case, Plaintiff asserts that a propane tank and outdoor advertisements located on the premises obstructed the decedents view. It is undisputed that the propane tank was 17 ½ feet from the roadway. (R. at 204-206, R.E. at 22-24). The deposition of Mr. Albert was taken wherein Mr. Albert examined photographs of the scene and testified as follows:

> 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.

(R. at 41-42, 61-65, R.E. at 1-5).[2] Further, with regard to the allegation of any outdoor advertisements obstructing the decedent's view or the view of Ms. McDonald, Mr. Albert reviewed photographs of the accident scene and testified as follows:

---

[2] The photographs contained in the record at pp. 66-80 are photocopies and the color photographs are contained in the exhibit to the record filed on May 24, 2007, and are contained in Appellees' record excerpts at RE. 25-39.

Q: In regard to that (claim of outdoor advertisements 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.

(R. at 57, 66, R.E. at 25-39). Plaintiff failed to offer any proof to support his allegations that the propane tank or outdoor advertisements obstructed the view of Ms. Albert or Ms. McDonald at the time of the accident.

It is further undisputed that the tank was not of sufficient height to block one's view of oncoming traffic. (R. at 67, R.E. 25-39). Ms. McDonald the driver of the vehicle testified that she did not know of anything that kept her from seeing Ms. Albert or Ms. Albert from seeing her car prior to impact. (R. at 289).

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.

(R. at 289).

The Plaintiff avers that the lower court erred in granting summary judgment because a genuine issue of material fact exists as to whether the propane tank located 17 ½ feet from the roadway obstructed Ms. McDonald's view or that of the decedent. The Plaintiff attempts to rely on a "common sense" argument and various allegations but fails to point the Court to any evidence in

support of these averments. The accident report clearly shows the point of impact as being in the roadway. (R. at 20-39). The undisputed facts are that the propane tank was 17 ½ feet from the roadway and even Mr. Albert has testified that it was not an obstruction. (R. at 173, 204-206). Plaintiff relies on *Clark v. Ill. Central R.R. Co.*, 794 So. 2d 191, 194 (Miss. 2001), by stating that a question of fact exists as to whether obstructions caused a dangerous condition affecting the view of the motorist. In *Clark*, this Court considered whether vegetation at a railroad crossing obstructed the view of the crossing. *Id.* However, in *Clark* the plaintiff presented evidence of an obstruction and conducted a site inspection of the crossing. The site inspection revealed that the "sight distances from the road looking down the track were severely restricted from all angles." *Id.* A railroad company's duties with regard to rail crossings are separate and distinguishable from the duties of a landowner in a premises liability action. Plaintiff's reliance on *Clark* is misguided at best.

In the present action, the Appellant has simply failed to present any evidence that any object including the propane tank and the alleged outdoor advertisements obstructed the view of Ms. Albert or Ms. McDonald. Further, the evidence is uncontradicted that neither Longspur, L.P. or Burns & Burns, Inc. provided any outdoor advertising or the propane tank at issue. (R. at 204-205, R.E. 25-39). Since no genuine issue of material fact exists regarding obstructions on the premises the trial court's holding should be affirmed.

B. APPELLANT FAILED TO PRESENT ANY EVIDENCE TO SUPPORT CLAIMS OF INADEQUATE LIGHTING OR THAT APPELLEES OWED A DUTY TO LIGHT A PUBLIC ROAD.

The trial court correctly held that the plaintiff failed to make a showing that the lighting on the premises was insufficient and thus failed to show it was a proximate cause of the accident. (R. at 392-397). Photographs of the premises and of the accident site are part of the record and demonstrate the lighting that was present. (R. at 66-80, R.E. at 6-20, 25-39). The evidence is

uncontradicted that all lighting on the premises was operational at the time of the accident. (R. at 204-206, R.E. at 22-39). Further, plaintiff has failed to show that Appellees, Longspur, L.P. as owner of the premises and Burns & Burns, Inc. as a gasoline supplier had any duty to light the premises, much less the public roadway such as Russell Mt. Gilead Road. Plaintiff alleges that there is a genuine issue of material fact as to who had control of the premises. Plaintiff further avers that appellees are required to provide adequate lighting on its premises, specifically, such lighting that aids pedestrians crossing Russell Mt. Gilead Road. Plaintiff's arguments fail as a matter of law.

As the lessor of the real property, Longspur, L.P. did not provide any outside lighting on the premises. (R. at 204-206, R.E. at 22-24). Burns & Burns, Inc. as the gasoline provider provided lighting only under the canopies. (R. at 216). The Plaintiff has put forth no evidence to support the contention that any of the lights under the canopy were not operating at the time of the accident. Further, the purpose of the canopy lights is to light the canopy and gas islands, not to light a public road. The security lights on the premises were not under the control of Longspur, L.P. or Burns & Burns, Inc. Moreover, the security lights were provided by East Mississippi Power Association and the Huddnals, the lessee and operator of Scott's Amoco. The Huddnals paid a monthly fee to the power company for the security lighting. Again, Plaintiff has failed to show that any of the security lights were nonoperational on the morning of the accident. Dorothy Huddnal testified that there were 10 to 12 security lights on the premises. (R. at 221).

> 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.

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 as Scott's Amoco would notify East Mississippi Power Association?

A: Right.

Q: During the period of time that this accident occurred you would work during the day but you would also be there at 10 p.m. to do the shift over?

A: Right, 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 (over) the gasoline island and diesel island is it correct that all of those lights were in good working order at the time of the accident?

A: Yes, they were.

(R. at 222-224). Ms. McDonald also testified that the lights were operational at the time of the accident. (R. at 289). Ms. McDonald testified that her headlights were activated at the time of the accident although she could not recall if they were on dim or bright. (R. at 289). As set forth previously, Ms. McDonald could not explain why she did not see the decedent or why the decedent did not see her. Pursuant to Miss. Code Ann. § 63-7-31, vehicles are equipped with headlights which on high beam will reveal persons at a distance of 350 feet and on low beam, at a distance of 100 feet. Despite these facts, Ms. McDonald did not see Ms. Albert until she was on the hood of her car. (R. at 291). Further, Mr. Albert testified that the lighting was sufficient for him to cross the road on the morning of the accident. (R. at 172). Plaintiff failed to present any credible evidence at the

trial court level to support his allegations of inadequate lighting. Accordingly, no genuine issue of material fact exists as to the operation of the lighting by the canopies and the security lights.

Notwithstanding the fact that the lighting was adequate, no written lease contract existed thus, Longspur, L.P., as the owner and lessor of the premises, cannot be liable for inadequate lighting on the premises. *Wilson v. Allday*, 487 So.2d 793 (Miss. 1986); (citing 65 C.J.S. *Negligence* § 63 (1966)). Simply stated, no duty exists for a premises owner or gasoline supplier to light a public roadway. Further, based upon the undisputed facts and applicable law Plaintiff fails to support his allegations of inadequate lighting. Summary Judgment is proper where plaintiff fails to bring forth evidence other than mere allegations to support a claim. In the present case, the lower court was correct in finding no genuine issue of material fact exists as to inadequate lighting and plaintiff failed to show how the alleged adequate lighting was the proximate cause of the accident.

C. AS A MATTER OF LAW, APPELLEES LONGSPUR, L.P. AND BURNS & BURNS, INC. HAD NO DUTY TO WARN OF AN OPEN AND OBVIOUS DANGER.

Appellant asserts that Longspur, L.P. and Burns & Burns, Inc. are liable in the present case based upon their failure to warn the decedent of the dangers in crossing a public road. Plaintiff contends that the open and obvious defense is not a complete bar to recovery in this case and can only be used to show comparative negligence on the part of Ms. Albert. This analysis by Plaintiff is unfounded by law and misapplied in the present premises liability action.

"There is no duty to warn of a defect or danger which is as well-known to the invitee as to the landowner, or dangers that are known to the invitee, or dangers that are obvious or should be obvious to the invitee in the exercise of ordinary care." *Thompson*, 923 So. 2d at 1052 (citing *Grammar v. Dollar*, 911 So. 2d 619, 624 (Miss. Ct. App. 2005)).

> Additionally, the owner of a business does not insure the safety of its patrons. Rather, the owner of a business owes a duty to an invitee to exercise reasonable or ordinary care to keep the premises in a reasonably safe condition or to warn of dangerous conditions not readily apparent, which the owner or occupant knows of or should know of, in the exercise of reasonable care.

Thompson, 923 So. 2d at 1052 (citing *Robinson v. Ratliff*, 757 So. 2d 1098, 1101 (Miss. Ct. App. 2000)). Plaintiff avers that the open and obvious defense does not bar recovery in the present case based upon this Court's holding in *Tharp v. Bunge Corp.*, 641 So. 2d 20 (Miss. 1994) which stated that "'the open and obvious standard is simply a comparative negligence defense used to compare the negligence of the plaintiff to the negligence of the defendant.'" *Vaugh v. Ambrosino*, 883 So. 2d 1167, 1170 (Miss. 2004)(quoting *Tharp v. Bunge Corp.*, 641 So. 2d 20, 24 (Miss. 1994)). However, this is an incorrect statement of the law as it applies to a premises liability case wherein plaintiff claims are for failure to warn of a dangerous condition. The Court in *Vaugh* went on to analyze such application in failure to warn cases such as the present action. The Court stated,

> It would be useful to pause here and distinguish a claim of a dangerous condition, from a claim that the defendant *failed to warn* of a dangerous condition. *Tharp* applies to the former. With respect to the latter, however, it would be strange logic that found it reasonable to allow a plaintiff to pursue a claim against a defendant for failure to warn of an open and obvious danger. 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 already 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 instance. Thus, an invitee may not recover for failure to warn of an open and obvious danger.

Vaugh, 883 So. 2d at 1170-71.

The undisputed facts show that the decedent had knowledge of the danger in crossing a public roadway as Mr. 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.

. . .

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.

(R. at 171).

Accordingly, the danger of crossing Russell Mt. Gilead Road on the morning of December 9, 2002 was open and obvious to Mr. Albert and the decedent. Thus, Longspur, L.P. and Burns & Burns, Inc. had no duty to warn of such an open and obvious danger. Therefore, this Court should

affirm the trial court's grant of summary judgment in favor of Appellees on the claim of failure to warn.

II. EVEN IF GENUINE ISSUES OF MATERIAL FACT EXIST REGARDING A DEFECT IN THE PREMISES, APPELLEES, LONGSPUR, L.P. AND BURNS & BURNS, INC., HAVE NO LIABILITY AS A MATTER OF LAW.

The evidence before this Court establishes that there was no written lease agreement regarding the subject property. "A landlord/lessor has no obligation to make repairs to leased premises at all, even if they are necessary, in the absence of a contract to do so." *Wilson v. Allday, et al.*, 487 So. 2d 793, 796 (Miss. 1986)(citing *Ford v. Pythian Bondholders*, 78 So. 2d 743 (Miss. 1955)). The affidavit of David Burns states that the subject premises had been leased to Ronny Huddnal and other family members for a long period of time. (R. at 204-206, R.E. at 22-24). The agreement regarding the lease of the premises between Longspur, L.P. and Ronny and Dorothy Huddnal d/b/a Scott's Amoco was an oral agreement. "When parties fail to allocate responsibility for keeping of a leased premises in a safe condition through contract, Mississippi common law places that duty squarely on the party who possesses or controls the property." *Titus*, 844 So. 2d 459, 466 (Miss. 2003). In *Titus*, the Circuit Court granted summary judgment for the property owner for a claim arising from an assault on the leased premises. This Court affirmed the lower court's holding stating that "liability runs with possession and control of the property." *Id.* at 466 (citing *Wilson*, 47 So. 2d at 796). The Plaintiff has failed to bring forth any credible evidence to support his claims against the lessor Longspur, L.P. or the gasoline provider, Burns & Burns, Inc.

As set forth above, the alleged defects on the premises relate to a propane tank, nonexistent outdoor advertising and the alleged inadequate lighting. Appellees did not provide, and were not responsible for, any of these items. (R. at 204-206, R.E. at 22-24). Appellees did not supply nor did they have knowledge of the alleged outdoor advertising. *Id.* Further, as set forth in the affidavit

of David Burns, appellees did not install, provide, or maintain the propane tank or the lighting on the premises. *Id.* Burns & Burns, Inc. only provided the canopy lighting and the record is void of any evidence that the canopy lighting was not operating at the time of the accident. Lastly, the accident did not occur on the premises, it occurred on Russell Mt. Gilead Road, a public road of which Appellees do not maintain or control.

Assuming arguendo that Appellant could create a genuine issue of material fact as to the alleged defects in the premises, as a matter of law, these Appellees can have no liability for the unfortunate accident which occurred on Russell Mt. Gilead Road.

CONCLUSION

For the foregoing reasons, Appellees, Longspur, L.P. and Burns & Burns, Inc. respectfully request this Court to affirm the final judgment entered by the trial court dismissing them from all liability.

Respectfully submitted,

LONGSPUR, L.P. AND BURNS & BURNS, INC.

BY: _____
OF COUNSEL

BY: _____
OF COUNSEL

J. WYATT HAZARD - BAR #[redacted]
CAROLYN CURRY SATCHER - BAR #[redacted]
DANIEL COKER HORTON & BELL, P.A.
4400 OLD CANTON ROAD, SUITE 400
POST OFFICE BOX 1084
JACKSON, MISSISSIPPI 39215-1084
TELEPHONE: (601) 969-7607
FACSIMILE: (601) 969-1116
ATTORNEYS FOR APPELLEES

CERTIFICATE OF SERVICE

I, J. Wyatt Hazard, of counsel for Appellees, Longspur, L.P. and Burns & Burns, Inc., do hereby certify that I have this day served via United States mail a true and correct copy of the above and foregoing to:

Honorable Lester F. Williamson, Jr.
Lauderdale County Circuit Judge
Post Office Box 86
Meridian, Mississippi 39302-0086

Jeffrey D. Leathers, Esq.
Greer, Pipkin & Russell
P. O. Box 907
Tupelo, MS 38802

J. Ryan Perkins, Esq.
Wilkins, Stephens & Tipton, P.A.
P. O. Box 13429
Jackson, Mississippi 39236

THIS, the 10 day of July, 2007.

J. WYATT HAZARD