

COPY

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MARK ALBERT

PLAINTIFF/APPELLANT

VS.

FILED ^{CA} 2007-~~98~~-0008

RONNY HUDDNAL, ET AL

JUL 19 2007
DEFENDANTS/APPELLEES
OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

ON APPEAL FROM THE CIRCUIT COURT OF LAUDERDALE COUNTY, MS

REPLY BRIEF OF APPELLANT

ORAL ARGUMENT NOT REQUESTED

Attorneys for Appellant

JEFFREY D. LEATHERS, MSBN: [REDACTED]
GREER, PIPKIN, RUSSELL
DENT & LEATHERS
117 NORTH BROADWAY STREET
POST OFFICE BOX 907
TUPELO, MS 38802-0907
TEL. NO. (662) 842-5345
FAX. NO. (662) 842-6870

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF CASES	ii
REPLY BRIEF OF APPELLANT	1-3
I. OBSTRUCTIONS EXISTED ON THE PREMISES AND A QUESTION OF FACT EXISTS WHETHER THESE OBSTRUCTIONS CAUSED OR CONTRIBUTED TO THE ACCIDENT	1
II. A QUESTION OF FACT EXISTS WHETHER THE LIGHTING WAS ADEQUATE AND WHO WAS RESPONSIBLE FOR THE LIGHTING	1-2
III. A QUESTION OF FACT EXISTS WHETHER THE DEFENDANTS' FAILURE TO WARN CAUSED OR CONTRIBUTED TO THE ACCIDENT	3
IV. CONCLUSION	3
CERTIFICATE OF SERVICE	4

TABLE OF CASES

<i>Allen v. Yazoo & M.V.R. Co.</i> 71 So. 386, 388, 111 Miss. 267 (1916)	8
<i>Branch v. Durham</i> , 742 So.2d 769 (Miss. Ct. App. 1999)	6
<i>Clark v. Ill. Cent. R. R. Co.</i> 794 So. 2d. 191, (Miss. 2001)	7
<i>Vaughn v. Ambrosino</i> 883 So.2d 1167 (Miss. 2004)	12

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MARK ALBERT

PLAINTIFF/APPELLANT

VS.

CAUSE NO. 2007-TS-0008

RONNY HUDDNAL, ET AL

DEFENDANTS/APPELLEES

REPLY BRIEF OF APPELLANT

Comes now the Appellant, Mark Albert, and submits the following in reply to the responses filed by the Appellees in the above styled cause:

I. OBSTRUCTIONS EXISTED ON THE PREMISES AND A QUESTION OF FACT EXISTS WHETHER THESE OBSTRUCTIONS CAUSED OR CONTRIBUTED TO THE ACCIDENT

Ms. McDonald testified that according to the point of impact, she assumed Ms. Albert was crossing the road next to the propane tank. (R. 380, R.E. 31) Ms. McDonald further testified that the point of impact of the collision between her and Ms. Albert was almost even with the propane tank. (R. 382, R.E. 33). This tends to show that Ms. Albert was crossing the road at or very near the propane tank, thereby dramatically reducing the importance of the 17 ½ foot space between the tank and the road. See *Clark v. Ill. Cent. R. R. Co.*, 794 So. 2d. 191, 194 (Miss. 2001), a question of fact exists whether obstructions caused a dangerous condition affecting the view of a motorist.

II. A QUESTION OF FACT EXISTS WHETHER THE LIGHTING WAS ADEQUATE AND WHO WAS RESPONSIBLE FOR THE LIGHTING

Defendants, or one of them, created and maintained a condition, of which it had knowledge, and for which it was under a duty to use reasonable care to prevent injury to its customers. Mississippi law places the liability of these actions on Defendants by stating the

following:

The bare permission of the owner of private ground to persons to enter upon his premises does not render him liable for injuries received by them on account of the condition of the premises. But if he expressly or impliedly invites, induces, or leads them to come upon his premises, he is liable in damages to them (they using due care) for injuries occasioned by the unsafe condition of the premises, if such condition of the premises was the result of his failure to use ordinary care to prevent it.

Allen v. Yazoo & M.V.R. Co., 71 So. 386, 388, 111 Miss. 267 (1916) (citing *St. L., I.M. & S. R. Co. v. Dooley*, 77 Ark 561, 92 (S.W. 789)).

Ms. Albert was crossing Mt. Gilead Road to get from one part of the premises to another.

(R. 368, R.E. 19 and R.373-374, R.E. 24-25) The testimony has shown that the inadequate lighting did contribute to the accident that caused the death of Kyla Albert. The driver of the vehicle that hit Ms. Albert, Terra Lanterman McDonald testified, "If it had been more lighting, it would've been better, but I - - mean, if - - if there was lighting compared to like the TA truck stop across the road, I could've possibly seen her but, I mean..." (R. 381, R.E. 32). She further testified that she did not see Ms. Albert until the point of impact. (R. 381, R.E. 32).

Further, both defendants have denied responsibility for the lighting. Longspur, LP, has alleged in its brief, "As the lessor of the real property, Longspur, LP, did not provide any outside lighting on the premises. (R. at 204-206, R.E. 22-24)". (Longspur, Brief of Appellee, page 11.) However, Scott's has also denied it was responsible for the inadequate lighting. "...[A]t no point in time was Scott's consulted about the number of security lights on the premises..." (Scott, Brief of Appellee, page 12.) "Scott's as lessor of the truck stop premises, merely paid the power and light bill for the property." *Id.* Therefore, questions of fact exist whether the lighting was adequate and which defendant was responsible for the lighting that Ms. McDonald testified caused or contributed to the accident in which Ms. Albert lost her life.

III. A QUESTION OF FACT EXISTS WHETHER THE DEFENDANTS' FAILURE TO WARN CAUSED OR CONTRIBUTED TO THE ACCIDENT

The Supreme Court has held that "the open and obvious" standard is simply a comparative negligence defense and is not a complete bar to recovery. *Vaughn v. Ambrosino*, 883 So.2d 1167, 1170 (Miss. 2004) (citing *Tharp v. Bungee Corp.*, 641 So.2d 20, 24 (Miss. 1994)). Further, a question of fact exists regarding what was open and obvious to Kyla Albert. She had no way of knowing whether the tank sitting in the lot obstructed the motorist's view or that the inadequate lighting caused Ms. Donald not to see her until the point of impact. (Deposition of Terra McDonald, R. 381, R.E. 32)

IV. CONCLUSION

Summary judgment should not have been awarded. The granting of a summary judgment is never the preferred course for a court, they are to be viewed with a skeptical eye, and if a trial court should err, it is better to err on the side of denying the motion. *Branch v. Durham*, 742 So.2d 769,770 (Miss. Ct. App. 1999) (citing *Aetna Cas. And Sur. Co.*, 669 So.2d 56, 70 (Miss. 1996)).

This the 19 day of July, 2007.

MARK ALBERT, PLAINTIFF/APPELLANT

BY: _____

JEFFREY D. LEATHERS

MSB [REDACTED]

GREER, PIPKIN, RUSSELL, DENT & LEATHERS
P. O. BOX 907
TUPELO, MS 38802
TELEPHONE: 662-842-5345

CERTIFICATE OF SERVICE

I, Jeffrey D. Leathers, attorney for the plaintiffs, do hereby certify that I have this day served a true and correct copy of the above and foregoing

REPLY BRIEF OF APPELLANT

on the following by placing said copies thereof in the United States Mail, postage prepaid, addressed as follows:

Honorable Lester F. Williamson, Jr.
Circuit Judge
P. O. Box 86
Meridian, MS 39302

J. Wyatt Hazard, Esq.
Daniel, Coker, Horton & Bell
P. O. Box 1084
Jackson, MS 39215

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

DATED, this, the 19 day of July, 2007.



JEFFREY D. LEATHERS