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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MARK ALBERT — PLAINTIFF/APPELLANT

VS. — CAUSE NO. 2007-CA-0008

RONNY HUDDNAL, ET AL — DEFENDANTS/APPELLEES

ON APPEAL FROM THE CIRCUIT COURT OF LAUDERDALE COUNTY, MS

BRIEF OF APPELLANT

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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**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel if record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that this Court may evaluate possible disqualifications or refusal:

1. Mark Albert – Appellant

2. Greer, Pipkin, Russell, Dent & Leathers – Attorneys for Appellant
   Jeffrey D. Leathers, Esq.

3. Dorothy Huddnal and Ronny Huddnal, d/b/a Scott's Amoco - Appellee

4. Longspur, L.P. (owned by Henry Dale Burns, Jr. and family) - Appellees

5. Daniel, Coker, Horton and Bell - Attorneys for Appellee
   J. Wyatt Hazard, Esq.

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

SO CERTIFIED, this the 7 date of May, 2007.

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STATEMENT OF ISSUES

Whether questions of material fact exist preventing summary judgment in this cause, based on three essential elements:

1) that obstructions near the road that altered the line of sight of motorists and/or pedestrians;

2) Defendants were responsible for the lighting conditions existing at its business;

3) Whether a duty to warn exists.

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STATEMENT OF THE CASE

A. STATEMENT OF FACTS

This cause of action arises out of a fatal automobile/pedestrian accident. On or about December 9, 2002, Kyla Albert and her husband, Mark Albert were engaged in over-the-road trucking employment. On one such trip, in the early hours of December 9, 2002, the Alberts stopped at Scotts Amoco Truck Stop in Meridian, Mississippi for an early breakfast. They parked the 18 wheel truck across the road from the truck stop in a gravel parking area. Use of the parking area across the highway was a common and customary occurrence. (This fact is uncontroverted R. 368, R.E. 19 and R.373-374, R.E. 24-25) The restaurant building, gas pumps, and shop at Scott's Amoco Truck Stop were rented by Ronny Huddnal[1] and his wife, Dorothy Huddnal, now being referred to as Scott's Plaza, Inc., through an oral agreement with Longspur, LP (Longspur was owned by the Henry Dale Burns, Jr. and family. (R. 359, R. E. 10).

On the day in question, after finishing their meal, Kyla Albert, was crossing the highway to return to the truck, when she was struck and killed by a vehicle being driven by Terra

[1]Ronny Huddnal is now deceased.

Lanterman (now Terra Lanterman McDonald).

B. COURSE OF PROCEEDINGS

On or about July 26, 2004, Mark Albert filed suit on his behalf and on behalf of the wrongful death beneficiaries against the driver of the vehicle, Terra Lanterman McDonald, landowner and Lessor of the premises, Longspur, L.P., and the lessees of the truck stop, Ronny and Dorothy Huddnal, (R. 15-19) alleging that there were obstructions to the view of motorists and pedestrians, the lighting was inadequate, that Defendants were liable for the unsafe lighting condition, and thus caused or contributed to the death of Kyla Albert.

The Defendants, filed a motions for summary judgment denying liability based on three essential elements: 1) that there were no obstructions near the road that altered the line of sight of motorists and/or pedestrians; 2) it was not responsible for the lighting conditions existing at its business; and 3) it had no duty to warn Ms. Albert of the dangerous conditions on its premises. (R. 28-95) A dispute exists whether the landowner or the lessee is responsible for the lighting on the premises. (R. 26 and R. 371, R.E. 22). The lower court granted summary judgment was granted on November 27, 2006, finding that the accident did not occur on the premises of the defendants, the defendants had no duty to light the roadway, and there was no duty to warn because the dangers were open and obvious to Plaintiffs' decedent. (R. 392-397, R.E. 3-8)

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SUMMARY OF THE ARGUMENT

Summary judgment should not have been granted to the Defendants as material questions of fact exist.

A propane tank was located on the Defendants' property, which obstructed the view of the driver of the vehicle that hit Kyla Albert. Mississippi law holds that a question of fact exists whether an obstruction caused a dangerous condition affecting the view of a motorist.

The property of the Defendants extended to the parking lot across the highway due to continued use and the Lessee referred to the parking lot across the street from the truck stop as a part of "our place ". (R.376, R.E. 27) Therefore, the Defendants had a duty to maintain a reasonably safe condition for invitees of the truck stop crossing the road. Although a dispute exists whether the Lessor or the Lessee was responsible for the inadequate lighting, the testimony has shown that the inadequate lighting did contribute to the accident that caused the death of Kyla Albert. (R.381, R.E. 32 - deposition testimony of the driver of the vehicle, Terra Lanterman McDonald)

Although Kyla Albert may have been comparatively negligent due to the open and obviousness of crossing the highway, this is not a complete bar to recovery and the conditions

that existed at the time of the accident which created the dangerous condition, were not open and obvious to the pedestrian crossing the road.

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ARGUMENT

I. STANDARD OF REVIEW

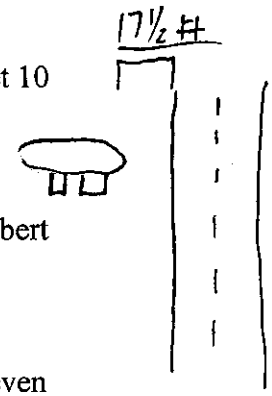
Summary judgment is only proper when there are no genuine issues of material fact. Rule 56, M.R.C.P. In determining whether to grant the defendant's motion, a court will look at all of the evidentiary material to determine whether a material issue remains to be tried. *Branch v. Durham*, 742 So.2d 769,770 (Miss. Ct. App. 1999). The moving party bears the burden of showing that no genuine issue of material fact exists, and a court should give any benefit of the doubt to the non–moving party. *Id.* Where the non-moving party would bear the burden of proof at trial, it must bring forth evidence which establishes a genuine issue of material fact to avoid summary judgment. *Id.* However, 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. *Id.* (citing *Aetna Cas. And Sur. Co.*, 669 So.2d 56 70 (Miss. 1996)). The Supreme Court employs a de novo standard of review of the lower court's grant of summary judgment. *Saucier v. Biloxi Reg'l Med. Ctr.*, 708 So.2d 1351, 1354 (Miss. 1998 (citing *Townsend v. Estate of Gilbert*, 616 So.2d 333, 335 (Miss. 1993)). "The evidence must be viewed in light most favorable to the . . . non-moving party [that party is] to be given the

benefit of every reasonable doubt. *Id.* (quoting *Townsend*, 616 So.2d at 335).

II. THERE WERE OBSTRUCTIONS TO THE LINE OF SIGHT OF MOTORISTS AND/OR PEDESTRIANS AT THE SCENE OF THE ACCIDENT.

A propane tank was placed on the premises, with only a space of seventeen and a half (17 ½) feet between the propane tank and the road, obstructing the view with respect to motorists or pedestrians. This amount of space has a varying effect and therefore is not determinative of visual ability when considering the distance from the tank of a pedestrian and/or motorist, angles of sight, and speed of a vehicle.

For instance, common sense tells us that a pedestrian crossing the street 100 feet from the tank has a much broader line of sight through the 17 ½ feet than a pedestrian crossing the street 10 feet from the tank. The exact same analysis would apply to motorist's line of sight. A motorist would considerably less amount of time to react to a pedestrian crossing the street 10 feet from the tank than one crossing the street 100 feet from the tank.



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.

Summary judgment should not have been granted on this issue.

III. SCOTT'S FAILED TO PROVIDE REASONABLY SAFE PREMISES THROUGH INADEQUATE LIGHTING NEAR THE ROAD IN WHICH CUSTOMERS OFTEN CROSSED AS AN INTEGRAL PART OF ITS BUSINESS.

The lack of adequate lighting on Scott's premises near the road, which is imperative to providing reasonably safe premises to its business invitees who often cross this road, is directly tied to Defendants liability in this action under the theory of premises liability to invitees. Therefore, the defendant 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 Scott's 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)).

Defendants deny liability based on the fact that the Alberts were parked in the lot across the street (which is owned by the Burns, Longspur entities), and not in the parking lot of Scott's Amoco. However, it was common for truckers to use this lot and Defendants had knowledge of the use. (R. 368, 374 and 378, R.E. 19, 25, 29) Ms. Huddnal, in her deposition, went as far as to refer to the parking lot across the road as "our place." (R. 376, R.E. 27). Due to the fact that customers using the parking lot across the road was an integral part of Scott's business, it should be considered a part of its premises, at least with respect to customers going to and from the lot.

Scott's maintains that it simply paid the electric bill and had nothing to do with the

placement or the maintenance of the lights on the property. However, Scott's had full authority and in fact a duty to provide additional lighting in tailoring its premises to its business practices in a reasonably safe manner. Therefore, in considering the fact that all parties knew that the parking lot was regularly used in direct relation with Scott's, Scott's should have made its premises reasonably safe for its invitees by erecting and maintaining proper lighting near the road in which invitees often crossed. (*Warrington v. Bird*, 204 N.J. Super., 499 A.2d 1026 (1985), restaurant owner had duty to provide safe passage for its patrons across a county road - danger due to inadequate lighting.)

The testimony has shown that the inadequate lighting did contribute to the accident that caused the death of Kyla Albert. McDonald, the driver of the vehicle that hit Kyla Albert, testified that she didn't see Albert. She further testified that the parking area was lit up around the building, but not lit up around the road. (R. 379, R.E. 30). "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 was unable to see Ms. Albert in the road until her own headlights had reached her. (R. 381, R.E. 32).

With all Defendants denying any duty to provide adequate lighting on the premises a genuine question of material fact arises as to who had the duty to provide such lighting. It is unconverted that Scotts Amoco was rented from Longspur, LP on a weekly basis and there is no written rent agreement. (R. 363, R.E. 14) However, a material disputed fact exists regarding the responsibility for the maintenance and repair of the outside of the building, including lighting. Dorothy Huddnal testified as follows:

> Okay. As far as all of the inside, we did all of the maintenance, changing lights out, and stuff like that. Or if we had a problem with the commodes, we usually - - if we could handle it, we did that. If not, we reported it to Longspur. And as far as any outside - - the canopy lights, we called Longspur and reported that and they would come and, you know, change out the light. Or if we had any problem with the pumps and as far as like CAT scales, if we had any problem with that we would call them, but they usually was there every month anyway checking on everything.

(R. 371, R.E. 22, Huddnal Deposition, page 10, lines 7-18)

Burns testified that the Huddnals were responsible for the equipment they owned, such as kitchen equipment and Longspur was responsible for the outer walls and roof. (R. 364-366, R.E. 15-17). Therefore, a question of material facts exists regarding whether the Longspur/Burns entities or Scott's Plaza, Inc. was responsible to install, maintain, and oversee the adequate lighting in the parking lot.

The Supreme Court has stated that there is a duty to keep reasonably safe the property you are in possession of or have control over. *Thomas v. Smith*, 786 So. 2d 418 (Miss. App. 2001).

Premises liability law in the State of Mississippi provides that the premises owner must use reasonable care and provide reasonably safe premises. *Rod v. Home Depot USA, Inc.*, 931 So. 2d 692, 694 (Miss. App. 2006). As laid out in the arguments above, Scott's failed to provide such a reasonably safe premises by not providing adequate lighting in an area that was known to be dangerous and for allowing obstructions to the roadway. This area that was known to be dangerous was the unavoidable dangerous condition of the road basically running in the middle of Scott's business premise. Therefore, Scott's essentially increased the hazard, as stated in *Hoffman* directly above, to Ms. Albert by failing to provide a safe passage way to her vehicle.

Defendants should be required to provide adequate lighting on its own premises in order to aid its invitees in crossing a road, and Defendants should be required to provide a crossing free

of obstructions, especially when the crossing of that road is a known, integral part of Defendant's business.

In support of the Motion for Summary Judgment, Scott's used *Leffler v. Sharp*, 891 So. 2d 152 (Miss. 2004) to make the argument that Ms. Albert had exited the premises at the time of her accident. However, *Leffler* is easily distinguished from the case *sub judice*. In Leffler, the person seeking invitee status for purposes of premise liability had climbed through a small window, after many hours of drinking, to get on the roof of the establishment adjacent to the actual bar he was in. Subsequently, he fell through the roof and was injured. *Id.* The Court found that not only was he not an invitee, but instead he was actually a trespasser. *Id.* Ms. Albert could hardly be considered a trespasser in the case *sub judice*. Ms. Albert maintained invitee status in crossing the street to get to her vehicle because this was common to the business of Scott's.

The case *sub judice* is more akin to *Thompson v. Chick-Fil-A, Inc.* In *Thompson*, premises liability was extended beyond the walls of an establishment and to its parking lot. *Thompson v. Chick-Fil-A, Inc.*, 923 So. 2d 1049 (Miss. App. 2006). The accident in question happened as Ms. Albert was returning to her vehicle, which was parked in a lot regularly used by Scott's customers. Although Scott's did not own the actual road in which Ms. Albert was struck, it did have control over and used both sides of the road in its business operations. Scott's claims to not have had any type of lease agreement or ownership in the opposite side of the road. However, Scott's did lease that property immediately prior to moving across the road to its current location. (R. 372-373, R.E. 23-24, R. 367, R.E. 18) and Mrs. Huddnal considered the area a part of "our place". (R. 376, R.E. 27).

Scott's also argued the New Jersey case of *Ross v. Moore* in an effort to show that Ms. Albert was not on the premises and Scott's owed her no duty when struck while crossing the road. In *Ross*, a student parked across the street from the school in a shopping center parking lot and was struck while crossing the street to get to the school. *Ross v. Moore*, 533 A.2d 398 (N.J. 1987). *Ross* is distinguishable from the case *sub judice* because the parking lot in that case was completely independent from the school. In this case, the parking lot across the street from Scott's is used solely for Scott's business invitees. In the public's eye and in the "eye" of the Lessees, it would seem that Scott's owns or leases the parking lot across the street from its building.

testimony also used by customers of TA truckstop

IV. FAILURE TO WARN/OPEN AND OBVIOUS

In *Vaughn v. Ambrosino*, 883 So.2d 1167, 1170 (Miss. 2004), the Court held that it would be "strange logic" to find it reasonable to allow a plaintiff to pursue a claim for failure to warn of an open and obvious danger. Therefore, argument falls upon whether the conditions were open and obvious to Kyla Albert. The Supreme Court has also held that "the open and obvious" standing is simply a comparative negligence defense and is not a complete bar to recovery. *Id.* (citing *Tharp v. Bungee Corp.*, 641 So.2d 20, 24 (Miss. 1994)) Although commons sense tells us that at first blush crossing the road is a dangerous condition for which no duty is owed, common sense also tells us that some conditions in a roadway are more dangerous than others and the perceptions of the motorist and the perceptions of the pedestrian are two different things. The lighting and obstructions may very well affect the motorist's ability to avoid the accident. At most, Kyla Albert may have been comparatively negligent.

V. CONCLUSION

Therefore, numerous disputed material facts exist under which a jury may find that Scott's Plaza, Inc. is liable as the premises lessee and that it caused or contributed to the accident that caused the death of Kyla Albert. Upon this finding, the jury may impute liability in and for all the elements of premises liability to which the Defendant Scott's Plaza, Inc. had a duty, i.e., defect in the subject premises and/or a duty to warn of the hazards located in and upon its premises. Furthermore, the mere fact that all Defendants deny responsibility and liability relating to the lighting of the premises creates a fact issue as to which Defendant(s) was actually responsible for the inadequate lighting.

MARK ALBERT, PLAINTIFF/APPELLANT

BY: _____

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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

BRIEF OF APPELLANT

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

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DATED, this, the 7 day of May, 2007.

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