IN THE SUPREME COURT OF MISSISSIPPI

No. 2007-CA-00010

SOUTHEAST FOODS, INC., d/b/a SUPER VALU, & FRED HENRY, INDIVIDUALLY AND AS MANAGER

Appellants

vs.

RHUDRO WINCE

Appellee

Appeal of the Jury Verdict and Judgment and Order on Post-Trial Motions of the Bolivar County Circuit Court, Honorable Albert B. Smith III Circuit Judge in *Wince v. Southeast Foods, Inc. d/b/a Super Valu et. al* , Cause No. 2002-41

REPLY BRIEF OF APPELLANTS SOUTHEAST FOODS, INC., d/b/a SUPER VALU, & FRED HENRY, INDIVIDUALLY AND AS MANAGER

ORAL ARGUMENT REQUESTED

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STATEMENT REGARDING ORAL ARGUMENT

Given the legal theories involved in this case, particularly the analysis involving the determination of a dangerous condition as a matter of law as to plaintiff, Appellants believe that oral argument and the opportunity to pose questions to counsel will assist the Court in determining the issues on appeal.

INTRODUCTION

Defendants showed in their opening brief that the jury's failure to apportion **any** fault to Mr. Wince in this case -- despite the uncontradicted proof of his negligence -- was against the substantial, overwhelming weight of the evidence as to Mr. Wince's own negligence; and evinced bias, passion, and prejudice on the part of the jury. Mr. Wince, in response, has failed to cite any principle that rebuts Mississippi law which provides that where a jury is presented with **uncontradicted** proof of a party's negligence -- but fails to apportion any fault to that party -- the trial court's refusal to allow a new trial is an abuse of discretion warranting reversal. For the reasons described herein and in defendants' initial brief, this Court should reverse and remand this case for a new trial based on the jury's 100% allocation of fault to the defendants.

Moreover, to prove his premises liability claim, Mr. Wince was required to show there was a "dangerous condition" on defendants' premises, assessed in light of one "using reasonable care for [his] own safety." *McGovern v. Scarborough*, 566 So. 2d 1225, 1227 (Miss. 1990). Under this standard, applied in a plaintiff-specific manner, Mr. Wince wholly failed to meet his burden of proof on an essential element of his case: The actual existence of a dangerous condition on the premises **as to him.** Mr. Wince has offered nothing contrary to this analysis in his response. Accordingly, the trial court's denial of defendants' directed verdict and subsequent motion for a judgment notwithstanding the verdict should be reversed and judgment rendered in favor of defendants.

ARGUMENT AND AUTHORITIES

A. The Trial Court's Denial of A New Trial Where the Jury Allocated No Fault to Mr. Wince Despite Uncontradicted Evidence of His Negligence Requires Reversal and Remand for A New Trial.

Uncontradicted evidence of Mr. Wince's own negligence was presented to the jury in this case. Specifically, Mr. Wince admitted that "due to not watching what [he was] doing and

talking to the young lady, [he] backed up and tripped over [the post]" at issue in this case. Tr. 207; *see* 205-06; R.E. 20; *see* 18-19. Similarly, in a portion of his deposition read at trial, Mr. Wince admitted he would "have avoided [the post]" had he been looking and not backing up. Tr. 205-06; R.E. 18-19. These admissions were corroborated by a video surveillance tape and the testimony of the only two other witnesses testifying at trial.[1] *See* Appellants' Brief at 3-4, 6-9. Nevertheless, the jury allocated 100% fault to defendants. The jury's failure to apportion **any** fault to Mr. Wince -- despite the uncontradicted proof of his negligence -- was "against the substantial, overwhelming weight of the evidence" as to Mr. Wince's own negligence and "evince[d] bias, passion, and prejudice." *Busby v. Anderson*, 2006 WL 3409899, *6 (Miss. Ct. App. 2006), *cert. granted*, 968 So. 2d 948 (Miss. Nov. 29, 2007) (TABLE); *see Coho Resources, Inc. v. Chapman,* 913 So. 2d 899, 911-12 (Miss. 2005); *Miss. Dept. of Trans. v. Trosclair*, 851 So. 2d 408, 417-419 (Miss. Ct. App. 2003). Accordingly, the trial court abused its discretion in refusing to grant a new trial due to the jury's 100% allocation of fault to the defendants. Reversal and remand is required on this basis. *See* Appellants' Brief at 6-9.

To rebut this principle, Mr. Wince relies on the general concept that it is the jury's province to weigh the evidence; and the court will not disturb the jury's verdict unless "contrary to the overwhelming weight of the evidence." *See, e.g.,* Appellee's Brief at 8-10, quoting *Breaux v. Grand Casinos of Mississippi, Inc.-Gulfport*, 854 So. 2d 1093 (Miss. Ct. App. 2003) and *Fleming v. Floyd,* 2007 WL 4200442 (Miss. 2007). But these cases address the situation where **conflicting** evidence was presented to the jury on the parties' comparative negligence -- in

[1] In his response brief, Mr. Wince suggests defendants relied on his own counsel's remarks to "demonstrate fault on [his] behalf." Appellee's Brief at 4-5. Defendants did not, however, rely on counsel's remark as "evidence", but rather quoted his lawyer to show that even he acknowledged that "there's evidence of comparative negligence in this case." Tr. 246; R.E. 25; *see* Appellants' Brief at 6, 7.

neither *Breaux* nor *Fleming* did the Court describe **uncontradicted** evidence of negligence on behalf of the party not assessed fault.[2]

In contrast, *Busby*, *Trosclair* and *Coho Resources* teach that where a jury is presented with **uncontradicted** proof of a party's negligence -- but fails to apportion any fault to that party -- the trial court's refusal to allow a new trial is an abuse of discretion warranting reversal. As defendants addressed in their initial brief, the *Busby* case is closely analogous to the facts here. In *Busby* the court specifically found that where 100% fault was allocated to the plaintiff-passenger -- in spite of uncontradicted evidence that the defendant-driver should have been allocated at least some fault -- then "the evidence . . . [was] insufficient to support the jury's verdict. The jury's verdict [was] against the substantial, overwhelming weight of the evidence and evinces bias, passion, and prejudice." *Busby*, 2006 WL 3409899, *6.

In suggesting that defendants cannot rely on *Busby* (*see* Appellee's Brief at 10-11), Mr. Wince misconstrues both the *Busby* decision and defendants' argument. Defendants do not argue that the trial court erred in allowing or refusing jury instructions, as Mr. Wince appears to imply. *Id.* Rather, defendants cite *Busby* as guidance in applying the "sufficiency of the evidence" analysis where **uncontradicted** proof of a party's negligence has been ignored by the jury.

Just as the *Busby* court found that "[n]o reasonable or fair-minded juror could find that, because [plaintiff-passenger] Marilyn refused to drive [defendant-driver] William's car, Marilyn was the **sole** proximate cause of her injuries" (*id.* at *6 (emphasis added)); the trial court here

[2] *See Breaux*, 854 So. 2d at 1099 (noting that "ample evidence was presented by the casino to rebut the claims of Mr. and Mrs. Breaux"); *Fleming*, 2007 WL 4200442, *9 ("The reality of this case is that the jury had the benefit of the [conflicting] testimony of various witnesses. . . . Not only did the testimony of Floyd conflict with that of Fleming, and not only did the testimony of Floyd conflict with that of Bowman, but also Fleming's testimony conflicted with that of her own expert, Bowman, the accident reconstructionist.").

likewise should have found that "no reasonable juror" could find Mr. Wince was **entirely** without fault, given his own admissions and the other evidence on this issue presented at trial. As the *Busby* court acknowledged, "[w]hile it is the jury's province to determine where William's negligence ends and Marilyn's begins, to say Marilyn is one hundred percent negligent and William not at all negligent is entirely inconsistent with the evidence." *Id.* This same principle holds true here: The jury's finding that defendants were 100% at fault is wholly inconsistent with the uncontradicted proof presented at trial regarding Mr. Wince's own negligence.

This concept was likewise recognized in *Miss. Dept. of Trans. v. Trosclair*, 851 So. 2d 408 (Miss. Ct. App. 2003). Bridget Trosclair sued MDOT for injuries she and her passenger incurred when the front tire of her automobile blew out upon striking an uneven roadway edge in an area being repaved. *Id.* at 412. The trial court, sitting as a jury (*see id.* at 414), allocated no fault to Ms. Trosclair. Reversing on appeal, the court delineated the "undisputed evidence" (*id.* at 417) that Trosclair, "in good weather, on a straight stretch of road, and without other explanation [ran] off the new pavement onto the unpaved and lower shoulder . . . . [and she] admitted that she knew that there was a drop-off." *Id.* at 418. As such, the court remanded the case "so that fault may be allocated to both parties" (*id.* at 419), explicitly acknowledging that "[t]hose who are negligent and proximately contribute to an injury should be allocated a percentage of fault. Miss. Code Ann. § 85-5-7 (Rev. 1999). . . . Based on the evidence before us, the failure to allocate at least some of the fault to Bridget rises to the level of manifest error." *Id.* at 417.

Similarly, in *Coho Resources, Inc. v. Chapman,* 913 So. 2d 899 (Miss. 2005) the Court held that the trial judge erred in denying a new trial after the jury failed to allocate any fault to plaintiff Chapman, despite uncontradicted evidence of his contributory negligence. *Id.* at 911-12. The Court explained: "The verdict in this case, as to the negligence of Chapman, was

substantially against the weight of the evidence." *Id.* at 912. In particular, the evidence "showing that Chapman was negligent was uncontradicted and his own expert testified to this fact. The failure of the jury to apportion any fault to Chapman was against the substantial weight of the evidence." *Id.* at 912.[3]

Just like the evidence presented in *Busby*, *Trosclair* and *Coho Resources*, the uncontradicted proof of Mr. Wince's negligence presented the jury in this case shows that the allocation of 100% fault to defendants is against the "substantial, overwhelming weight of the evidence" and "evinces bias, passion, and prejudice." *Busby*, 2006 WL 3409899, *6; *Coho Resources, Inc.*, 913 So. 2d at 911-12; *see also Trosclair*, 851 So. 2d at 417-419. As such, the trial court's refusal to grant a new trial was an abuse of discretion, requiring reversal and remand in this case.

B. Plaintiff Failed to Prove An Essential Element of His Premises Liability Claim Requiring that the Jury Verdict and Judgment Be Reversed and Judgment Rendered in Defendants' Favor.

Indeed, under the facts of this case the Court could reverse the trial court and render a decision in defendants' favor. This is so because Mr. Wince wholly failed to meet his burden of

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[3] Defendants also cited *White v. Stewman* in their opening brief for this concept, but quoted from the trial court -- and not the Mississippi Supreme Court -- in the accompanying parenthetical. *See* Appellants' Brief at 9. Defendants apologize to this Court and counsel opposite for this unclear reference. To clarify, the trial court in *White* ordered a new trial where the jury returned a verdict for the defendants, finding that "overwhelming evidence" showed defendant White was "negligent as a matter of law" and thus "the jury should have apportioned a percentage of fault to defendant Willie White." 932 So. 2d 27, 35-36 (Miss. 2006). The trial court went further than this, however, and also ordered that in the second trial a preemptory instruction be given that White was negligent as a matter of law -- a ruling this Court found to be "the functional equivalent of a grant of [plaintiff's] judgment notwithstanding the verdict." *Id.* at 38. On this basis the Court found error and reversed, holding that under the facts presented to the jury "there was sufficient evidence introduced at trial to reasonably conclude that White was not negligent and the jury verdict was based on substantial evidence." *Id.* at 38-39. Though plaintiff also relies on this holding in his response (*see* Appellee's Brief at 16-17), the *White* decision, like the *Breaux* and *Fleming* decisions upon which plaintiff also relies, is distinguishable here in light of the conflicting evidence as to White's contributory negligence presented in that case. *White*, 932 So. 2d at 37-38. As detailed above, uncontradicted evidence in this case showed Mr. Wince was negligent here. As such, the jury's allocation of **0%** fault to Mr. Wince was "entirely inconsistent with the evidence" (*Busby v. Anderson*, 2006 WL 3409899, *6) and reversal and remand is warranted.

proof on an essential element of his case: The actual existence of a dangerous condition on the premises **as to him**. Appellants' Brief at 10-13. In response, Mr. Wince discusses cases holding that the presence of a "dangerous condition" on the premises is a question for the jury and thus the jury's verdict cannot be disturbed on appeal. *See* Appellee's Brief at 12-17. In relying on this general concept, however, Mr. Wince appears to ignore the very premise of defendants' argument in this case.

In particular, the Mississippi courts have consistently recognized that certain structures or items that are not "unusual" to the general public - or which the general public would "expect to encounter on the business premises" - are not "unreasonably dangerous" as a matter of law.[4] *See* Appellants' Brief at 11. Taking this analysis one step further, and as addressed in defendants' opening brief, the facts here provide the opportunity to apply this standard in a **plaintiff-specific** manner, rather than as one applied in terms of what would be "unusual" or "unexpected" to the general public. Applied in this manner, no reasonable juror could have found that the post was a dangerous condition **as to Mr. Wince** based on the facts presented at the trial of this case: (i) Mr. Wince's admissions that he knew the post was there; (ii) Mr. Wince's own carelessness and frank acknowledgment that he would have avoided the post had he not been walking backwards; (iii) the additional testimony and the video surveillance tape corroborating these admissions; and (iv) Mr. Wince's lack of proof of any other reports or complaints about the post or any other evidence that the post was, in fact, dangerous. *See* Appellants' Brief at 10-13. Because the facts are so overwhelmingly in defendants' favor that reasonable jurors could not

[4] *See, e.g., McGovern v. Scarborough*, 566 So. 2d 1225, 1227 (Miss. 1990) (raised threshold in doorway); *Ratcliff v. Rainbow Casino-Vicksburg Partnership, L.P*, 914 So. 2d 762, 766 (Miss. Ct. App. 2005) (stool in casino); *Wal-Mart v. Littleton,* 822 So. 2d 1056, 1058-59 (Miss. Ct. App. 2002) (hand-truck for restocking shelves in store aisle).

have arrived at a contrary verdict, the "Court must reverse and render" on appeal. *Harrah's Vicksburg Corp. v. Pennebaker,* 812 So. 2d 163, 170 (Miss. 2001).

CONCLUSION

For the reasons set forth in defendants' opening brief and above, defendants respectfully request that this Court reverse the jury verdict and decision of the trial court and render a judgment in favor of defendants that they are not liable to plaintiff because he failed to show a dangerous condition as to him on defendants' premises and that plaintiff may not recover any damages against them. Alternatively, defendants respectfully request that this Court reverse and remand for a new trial because it was an abuse of discretion for the trial court to deny defendants' motion for a new trial where the jury allocated no fault to plaintiff despite the overwhelming evidence of his own negligence in this case.

THIS, the 23rd day of January, 2008.

Respectfully submitted,

SOUTHEAST FOODS, INC., d/b/a SUPER VALU, & FRED HENRY, INDIVIDUALLY AND AS MANAGER

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CERTIFICATE OF SERVICE

I LeAnn W. Nealey hereby certify that I have this day caused a true and correct copy of the foregoing Reply Brief of Appellants Southeast Foods, Inc., d/b/a Super Valu, & Fred Henry, Individually and As Manager to be delivered by United States mail, postage prepaid, to the following:

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SO CERTIFIED, this the 23rd day of January, 2008.

LeAnn W. Nealey

LeAnn W. Nealey

CERTIFICATE OF FILING

I, LeAnn W. Nealey, certify that I have had hand-delivered the original and three copies of the Reply Brief of Appellant Southeast Foods, Inc., d/b/a Super Valu, & Fred Henry, Individually and As Manager and an electronic diskette containing same on January 23, 2008, addressed to Ms. Betty W. Sephton, Clerk, Supreme Court of Mississippi, 450 High Street, Jackson, Mississippi 39201.

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