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

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

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Appellants

vs.

RHUDRO WINCE

Appellee

CERTIFICATE OF INTERESTED PERSONS

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

1) Southeast Foods, Inc. d/b/a Super Valu, Defendant
2) Fred Henry, Individual Defendant
3) Rhudro Wince, Plaintiff
4) LeAnn Nealey, Attorney for Appellants
5) Serena R. Clark, Attorney for Appellants
6) Butler, Snow, O'Mara, Stevens & Cannada, PLLC, for Appellants
7) Lindsey Meador, Trial Court Attorney for Defendants
8) Meador & Crump, Trial Court Attorney for Defendants
9) Ellis Turnage, Attorney for Plaintiff
10) Albert B. Smith, III, Bolivar County Circuit Court Judge

LeAnn W. Nealey

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TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iii
STATEMENT OF ISSUES 1
STATEMENT OF THE CASE 2
A. Nature of the Case, Course of the Proceedings and its Disposition Below. 2
B. Statement of the Facts Relevant for the Issues on Review. 3
SUMMARY OF THE ARGUMENT 4
ARGUMENT AND AUTHORITIES 5
A. The Standard of Review 5
B. The Jury's Failure to Allocate Any Fault To Mr. Wince Under Mississippi Comparative Negligence Standards Requires Reversal and Remand for A New Trial. 6
C. 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. 10
CONCLUSION 14
CERTIFICATE OF SERVICE 15
CERTIFICATE OF FILING 16

TABLE OF AUTHORITIES

Federal Cases

United States v. Jefferson Electric Manufacturing Co., 291 U.S. 386 (1934) 6

State Cases

Busby v. Anderson, ___ So. 2d __, 2006 WL 3409899 (Miss. Ct. App. 2006) 5, 6, 7, 8

General Tire & Rubber Co. v. Darnell, 221 So. 2d 104 (Miss. 1969) 6

Harrah's Vicksburg Corp. v. Pennebaker, 812 So. 2d 163 (Miss. 2001) 6, 13

McGovern v. Scarborough, 566 So. 2d 1225 (Miss. 1990) 5, 10, 11

Miss. Dept. of Trans. v. Trosclair, 815, So. 2d 408 (Miss. Ct. App. 2002) 5, 7, 8

Mississippi Transp. Com'n v. Ronald Adams Contractor, Inc. 753 So. 2d 1077 (Miss. 2000) 6

Ratcliff v. Rainbow Casino-Vicksburg Partnership, L.P., 914 So. 2d 762 (Miss. Ct. App. 2005) 11

Sivira v. Midtown Restaurants Corp., 753 So. 2d 492 (Miss. Ct. App. 1999) 6

Tate v. Southern Jitney Jungle Co., 650 So. 2d 1347 (Miss. 1995) 10, 11, 12

Wal-Mart v. Littleton, 822 So. 2d 1056 (Miss. Ct. App. 2002) 11

White v. Stewman, 932 So. 2d 27 (Miss. 2006) 5, 7, 9

Young v. Wendy's International, Inc., 840 So.2d 782 (Miss. Ct. App. 2003) 10

Rules and Statues

Miss. Code Ann. § 85-5-7 9

STATEMENT OF ISSUES

I. Where the jury rendered a $250,000 verdict against defendants and allocated no fault to plaintiff, Rhudro Wince, despite Mr. Wince's own testimony; the testimony of other witnesses; and surveillance video that all showed his own negligence, did the trial court err in failing to grant defendants' motion for a new trial based on the jury's 100% allocation of fault as to them?

II. Where, at the close of plaintiff's evidence, Mr. Wince failed to show the actual existence of a dangerous condition on the premises as to him; did the trial court err in denying defendants' directed verdict and subsequent motion for a judgment notwithstanding the verdict?

STATEMENT OF THE CASE

A. Nature of the Case, Course of the Proceedings and its Disposition Below.

Plaintiff Rhudro Wince brought a premises liability action against Defendants Southeast Foods, Inc., d/b/a SuperValu and Fred Henry, individually ("defendants" or "SuperValu" collectively), claiming an approximately 30" high post[1] located in SuperValu's deli area was an allegedly dangerous condition on defendants' premises. R. 1-5; 14-18. Defendants filed their Answer and Defenses asserting contributory negligence as an affirmative defense. R. 8-11; 24-27. At the close of plaintiff's case at trial, defendants moved for a directed verdict based on the undisputed evidence of Mr. Wince's negligence. Tr. 230-32; R.E. 21–23. The trial court denied defendants' motion for a directed verdict. Tr. 232-33; R.E. 23-24. At the close of trial, though the jury was instructed on sole proximate cause as to plaintiff (Tr. 267 (R.E. 28); R. 843 (R.E. 41)) and comparative negligence (Tr. 263; 266-67 (R.E. 26; 27-28); R. 831; 842 (R.E. 37; 40)); and although the jury verdict form provided for an allocation of fault to plaintiff (Tr. 267-70 (R.E. 28-31); R. 835-36 (R.E. 38-39)); the jury returned a verdict for Mr. Wince for $250,000, allocating no fault to Mr. Wince. Tr. 297-300 (R.E. 32-35); R. 835-36 (R.E. 38-39). Judgment was entered on the jury verdict. R. 849-50; R.E. 42-43. Defendants timely moved for a judgment notwithstanding the verdict or in the alternative a motion for a new trial on liability and damages based on plaintiff's actual knowledge of the condition he claimed dangerous and based on the jury's failure to allocate any fault whatsoever to Mr. Wince. R. 851-56 (Defendants' Motion); R. 933-43 (Plaintiff's Response). The trial court denied defendants' motion. R. 944; R.E. 44. From that order; the order on the judgment; and the jury verdict, Defendants Super Valu and Fred Henry timely appealed. R. 945-46; R.E. 45-46.

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[1] Specifically, the "post" was a bumper guard on a 30" post bolted to the floor, designed to protect a steam table from being hit by grocery carts. Three to four months prior to Mr. Wince's accident, a smaller steam table had been installed; leaving the post free-standing. Tr. 120-21; R.E. 10-11.

B. Statement of the Facts Relevant for the Issues on Review.

Plaintiff Rhudro Wince was a frequent customer at the SuperValu deli in Cleveland, Mississippi and was well aware of a post approximately 30" high post located in the deli area. Tr. 205-07; R.E. 18-20. On June 18, 2001, however, Mr. Wince, while talking to a young lady and walking backwards, tripped over the exposed post, injuring his back. Tr. 205-07; R.E. 17-20. He sued Southeast Foods, Inc., d/b/a SuperValu and Fred Henry, individually, bringing a premises liability claim alleging the post was a dangerous condition on Defendants' premises.

At trial, Mr. Wince admitted he frequented the SuperValu deli at least 2-3 times a week (Tr. 204; R.E. 17); he had seen the post in the same position for at least a week before he backed over it (Tr. 205-07; R.E. 18-20); he had, in fact, walked around the post a number of times the very day he backed into it (Tr. 206-07; R.E. 19-20); and "due to not watching what [he was] doing and talking to the young lady, [he] backed up and tripped over [the post]." Tr. 207; *see* 205-06; R.E. 20; *see* R.E. 18-19. In deposition, Mr. Wince admitted he would "have avoided [the post]" had he been looking and not backing up. Tr. 205-06; R.E. 18-19.

Mr. Wince's admissions were corroborated by a video surveillance tape and the testimony of the only two other witnesses testifying at trial, Fred Henry and Maggie Cameron (the former SuperValu store manager and former deli employee during the relevant time period). Ms. Cameron testified that Mr. Wince fell backward over the post when a woman calling to him caught his attention. Tr. 128; R.E. 14. Mr. Henry testified that Mr. Wince tripped over the post "walking backwards" when his attention was diverted by a lady talking to him (Tr. 116; R.E. 9 (discussing video tape)); and further explained that the video surveillance tape showed that Mr. Wince had walked around the post the very day of his accident. Tr. 121; R.E. 11.

Additionally, Mr. Henry and Ms. Cameron both testified that the post had been in the same place and in the same condition for a period of three to four months. Tr. 122-23; 135; R.E. 12-13; 16. Mr. Henry estimated that between 40-50 people ate lunch in the deli each day and thus approximately 2,500 customers would have encountered this post during the 3-4 month time period. Tr. 122-23; R.E. 12-13. Ms. Cameron estimated about 3600-4000 customers went through the deli during the relevant time period. Tr. 134-35; R.E. 15-16. Despite the thousands of people passing through the deli (and by the post) each day, no complaints had been received about the post (Tr. 123; R.E. 13); nor had anyone else been seen running into the post (Tr. 123; 135; R.E. 13; 16) before Mr. Wince backed over it and fell on the day of the accident.

SUMMARY OF THE ARGUMENT

Plaintiff Rhudro Wince was a frequent customer at the SuperValu deli in Cleveland, Mississippi and was well aware of a post approximately 30" high post located in the deli area. On one of his many lunch hour visits, Mr. Wince, while talking to a young lady and walking backwards, tripped over the exposed post, injuring his back. He sued Southeast Foods, Inc., d/b/a SuperValu and Fred Henry, individually, to recover for his injuries. In his premises liability claim against defendants, he alleged the post was a dangerous condition on the business premises. At trial, the jury rendered a $250,000 verdict against defendants; allocating no fault to Mr. Wince despite Mr. Wince's own testimony; the testimony of other witnesses; and surveillance video that all showed, in his counsel's own words, that "there's evidence of comparative negligence in this case." Tr. 246; R.E. 25. Though defendants sought a new trial based on the jury's 100% allocation to them; the trial court denied defendants' motion. The trial court's failure to allow a new trial where **no** fault was allocated to Mr. Wince is reversible error

Wince was aware + therefore some degree of fault must go to him

and requires remand for a new trial. *See Busby v. Anderson,* ___ So. 2d __, 2006 WL 3409899, *7 (Miss. Ct. App. 2006); *Miss. Dept. of Trans. v. Trosclair*, 815, So. 2d 408, 417 (Miss. Ct. App. 2002); *see also White v. Stewman,* 932 So. 2d 27, 35-36 (Miss. 2006).

Moreover, to prove his premises liability claim plaintiff 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 analysis, 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. 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.

Failed to show the existence of a dangerous condition

Specifically, at the close of Mr. Wince's case, the only proof showed that Mr. Wince admitted he knew the post was there; he had walked around the post that very day; and he frankly acknowledged he would have avoided the post had he not been distracted and walking backwards. Indeed, the testimony of the only other trial witnesses, as well as the video surveillance tape of the incident, corroborated these admissions. Nor did Mr. Wince put forth any proof of other reports or complaints about the post or any other evidence that the post was, in fact, dangerous. Because these facts are so overwhelmingly in defendants' favor that reasonable jurors could not have arrived at a contrary verdict, reversal is warranted with judgment to be rendered in defendants' favor.

ARGUMENT AND AUTHORITIES

A. The Standard of Review.

The plaintiff bears the burden of proving every element of his premises liability claim, and a trial court errs by denying a defendant's motion for directed verdict if the plaintiff has failed to present "substantial evidence fairly tending to establish every element of the plaintiff's

causes of action." *United States v. Jefferson Electric Manufacturing Co.*, 291 U.S. 386, 407 (1934); *see Mississippi Transp. Com'n v. Ronald Adams Contractor, Inc.* 753 So. 2d 1077, 1083 (Miss. 2000). The standard of review for the denial of a motion for directed verdict and on a motion for judgment notwithstanding the verdict is identical. *Ronald Adams*, 753 So. 2d at 1083. Though the Court will consider the evidence in the light most favorable to the appellee, "[i]f the facts are so overwhelmingly in favor of the appellant that reasonable jurors could not have arrived at a contrary verdict, this Court must reverse and render." *Harrah's Vicksburg Corp. v. Pennebaker,* 812 So. 2d 163, 170 (Miss. 2001) (other citations omitted). Regarding the standard of review "[w]hen determining whether a trial court erred in refusing a new trial, this Court reviews for abuse of discretion." *Ronald Adams,* 753 So. 2d at 1083.

B. The Jury's Failure to Allocate Any Fault To Mr. Wince Under Mississippi Comparative Negligence Standards Requires Reversal and Remand for A New Trial.

Mr. Wince, as a business invitee on SuperValu's premises, is required to use that degree of care and prudence that a person of normal intelligence would exercise under the same or similar circumstances. *General Tire & Rubber Co. v. Darnell,* 221 So. 2d 104, 107 (Miss. 1969); *Sivira v. Midtown Restaurants Corp.*, 753 So. 2d 492, 494 (Miss. Ct. App. 1999). He did not exercise such care here: Mr. Wince's own testimony; the testimony of other witnesses; and surveillance video all showed, in his counsel's own words, that "there's evidence of comparative negligence in this case." Tr. 246; R.E. 25. Despite this overwhelming evidence, the trial court denied defendants' motion for a new trial which was based upon the jury attributing 100% fault to defendants. The trial court's failure to allow a new trial where **no** fault was allocated to Mr. Wince is reversible error. *See Busby v. Anderson,* ___ So. 2d __, 2006 WL 3409899 (Miss. Ct. App. 2006) (reversing trial court's denial of new trial where jury failed to allocate at least some fault to defendant on evidence showing defendant was negligent at least to some degree, holding:

"The jury's verdict is against the substantial, overwhelming weight of the evidence and evinces bias, passion, and prejudice." *Id.* at *7.); *see also Miss. Dept. of Trans. v. Trosclair*, 815, So. 2d 408, 417 (Miss. Ct. App. 2002); *White v. Stewman*, 932 So. 2d 27, 35-36 (Miss. 2006).

In particular, Mr. Wince admitted he frequented the SuperValu deli at least 2-3 times a week (Tr. 204; R.E. 17); he had seen the post in the same position for at least a week before he backed over it (Tr. 205-06; 207; R.E. 18-19; 20); and he had, in fact, walked around the post a number of times the very day he backed into it. Tr. 206-07; R.E. 19-20. Most tellingly, 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]." Tr. 207; *see* 205-06; R.E. 20; *see* 18-19. In deposition, Mr. Wince admitted he would "have avoided [the post]" had he been looking and not backing up. Tr. 205-06; R.E. 18-19.

Is backing up negligence?

Mr. Wince's admissions were corroborated by a video surveillance tape and the testimony of the only two other witnesses testifying at trial, Fred Henry and Maggie Cameron (the former SuperValu store manager and former deli employee during the relevant time period). Ms. Cameron testified that Mr. Wince fell backward when a woman calling to him caught his attention. Tr. 128; R.E. 14. Mr. Henry testified that Mr. Wince tripped over the post "walking backwards" when his attention was diverted by a lady talking to him (Tr. 116; R.E. 8 (discussing video tape)); and further explained that the video surveillance tape showed that Mr. Wince had walked around the post the very day of his accident. Tr. 121; R.E. 11. Even Mr. Wince's counsel acknowledged in chambers that "there's evidence of comparative negligence in this case." Tr. 246; R.E. 25. Without question, these facts show that the "jury's verdict is against the substantial, overwhelming weight of the evidence and evinces bias, passion, and prejudice" (*Busby v. Anderson*, ___ So. 2d __, 2006 WL 3409899, *7 (Miss. Ct. App. 2006)); thus a new trial is mandated.

The *Busby* case is closely analogous to the facts here and shows that where a jury has failed to attribute at least **some** fault to a party undeniably negligent, the trial court has abused its discretion in refusing to grant a new trial. In *Busby*, plaintiff (Marilyn) sued William, the driver of the car in which she was a passenger, seeking damages for injuries she suffered when he fell asleep at the wheel, causing the vehicle to crash into a ditch. *Id.* at *4. Though William did not dispute Marilyn's assertion that he fell asleep at the wheel, he claimed she was solely at fault because she refused when he asked her to drive. *Id.*

The trial court denied Marilyn's motion for a directed verdict; and refused a peremptory instruction on William's negligence. *Id.* at 3. The jury ultimately returned a verdict for William, attributing 100% liability to Marilyn. The trial court denied Marilyn's motion for a new trial based on this 100% allocation to her. *Id.* The Court of Appeals reversed and remanded the case for a new trial, because "[n]o reasonable or fair-minded juror could find that, because Marilyn refused to drive William's car, Marilyn was the sole proximate cause of her injuries. To conclude such is to completely ignore William's own behavior in refusing to stop his car when he knew he was too ill or sleepy to drive." *Id.* at 7.

Though the Court acknowledged that "[w]hile it is the jury's province to determine where William's negligence ends and Marilyn's begins," the relevant point is that "[e]ven in the light most favorable to William, there is no conflict over whether William fell asleep at the wheel. The overwhelming weight of the evidence indicated that William was negligent to some degree, whether solely or comparatively. A jury must resolve that question, as well as assessment of damages." *Id.* at *8. Because the trial court erred in overruling Marilyn's motion for a directed verdict; peremptory instruction; and motion for a new trial where **no** fault was allocated to William (*id.* at 3-4), reversal and remand was required. *Id.* at 7-8; *see Miss. Dept. of Trans. v. Trosclair*, 815, So. 2d 408, 417 (Miss. Ct. App. 2002) (reversal and remand where, in bench

trial, lower court failed to allocate some fault to plaintiff; the Court of Appeals recognized 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;" and held that "[b]ased on the evidence before us, the failure to allocate at least some of the fault to [the plaintiff] rises to the level of manifest error."); *White v. Stewman,* 932 So. 2d 27, 35-36 (Miss. 2006) (setting aside jury verdict and requiring new trial where no fault apportioned to defendant in case in which the "overwhelming evidence presented at trial established that defendant . . . was negligent as a matter of law. As such, the jury should have apportioned a percentage of fault to defendant. . . It would be an obvious injustice to allow the jury verdict to stand.").

These principles are equally applicable to the situation at hand - - as noted above, Mr. Wince **admits** he knew of the post's location; he tripped over it walking backwards; and had he been paying attention he would not have backed into it. His admissions are corroborated by the surveillance tape and the testimony of the only other witnesses in the case. Accordingly, defendants sought and obtained jury instructions on sole proximate cause as to plaintiff (Tr. 267; R.E. 28); comparative negligence (Tr. 263; 266-67; R.E. 26; 27-28); and a jury verdict form providing an allocation of fault to plaintiff. Tr. 267-70; R.E. 28-31. Nevertheless, the jury attributed 100% fault to defendants. Based on this 100% allocation, defendants moved for a new trial. The trial court, however, denied defendants' motion despite the overwhelming proof described above. Because the jury's 100% allocation of fault to defendants was against the substantial, overwhelming weight of the evidence and undeniably "evinces bias, passion, and prejudice;" the trial court's refusal to grant a new trial was manifest error. Reversal and remand is mandated.

Jury received comp ng instruction

C. 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, in the case at hand, 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. Under this analysis, 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. In particular, though Mississippi law requires premises owners to provide a reasonably safe premises, the Mississippi courts are mindful that "[t]he owner of a business is not an insurer of the safety of its customers using its premises" and thus this duty encompasses only the duty to maintain the premises in a reasonably safe condition *"for those using reasonable care for their own safety."* *McGovern v. Scarborough*, 566 So. 2d 1225, 1227 (Miss. 1990) (emphasis in original).

To prove his premises liability claim, therefore, plaintiff must show there was a "dangerous condition", *i.e.* that the condition "may be found to be unusual" and thus "unreasonably dangerous" as something "which customers normally [do not] expect to encounter on the business premises." *Tate v. Southern Jitney Jungle Co.*, 650 So. 2d 1347, 1351 (Miss. 1995); *see Young v. Wendy's International, Inc.*, 840 So.2d 782, 784 (Miss. Ct. App. 2003) ("In order for [the plaintiff] to prove some dangerous condition existed which led to her fall, evidence must be given."). Additionally, as *McGovern* teaches, this "dangerous condition" must be assessed in light of one "using reasonable care for [his] own safety." *McGovern,* 566 So. 2d at 1227 (affirming directed verdict for business owner where plaintiff tripped over raised threshold in doorway and finding plaintiff's injury was one that "belongs to *that class of ordinary accidents which are properly imputed to the carelessness or the misfortune of the one injured."* *Id.* at 1227 (emphasis added)); *see also Ratcliff v. Rainbow Casino-Vicksburg Partnership,*

door threshold common

L.P., 914 So. 2d 762, 766 (Miss. Ct. App. 2005) (affirming summary judgment in favor of casino where customer tripped over stool; noting that in deposition plaintiff had acknowledged that that the stool was "where [she] had herself placed it" (*id.* at 766)); *Wal-Mart v. Littleton,* 822 So. 2d 1056, 1058-59 (Miss. Ct. App. 2002) (reversing and rendering trial court's denial of JNOV by Wal-Mart where customer tripped over hand-truck, noting plaintiff had testified she misjudged its actual location and "'didn't pay . . . too much attention' to the location of the [hand truck]." *Id.* at 1059.).

In assessing the first factor, the "dangerous condition" test under *Tate*, the Mississippi courts have, to date, addressed what would be "unusual" or "unexpected" to the **general public**; holding that 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.[2] Though the Mississippi courts have not had the opportunity to apply this standard in a **plaintiff-specific** manner; that opportunity presents itself here. This is so because all the evidence presented at the close of plaintiff's case shows that the post was neither "unusual" nor "unexpected" as to Mr. Wince. As to the second factor, the proof of Mr. Wince's own carelessness is undisputed.

As detailed above, Mr. Wince admitted he had seen the post in the same position for at least a week before he backed over it (Tr. 205-06; 207; R.E. 18-19; 20); and walked around the post a number of times the very day he backed into it. Tr. 206-07; R.E. 19-20. Indeed, the "dangerous condition" about which Mr. Wince complains was created by his own actions: He tripped over the post walking backwards while distracted by a conversation with a young

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[2] *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).

woman. In deposition, Mr. Wince admitted he would "have avoided [the post]" had he been looking and not backing up. Tr. 205-06; R.E. 18-19. His fall was admittedly "due to not watching what [he was] doing and talking to the young lady" (Tr. 207; R.E. 20); as a result, "[he] backed up and tripped over [the post]." *Id*; *see* 205-06; R.E. 18-19; *see also* p. 7, above (noting corroborating testimony of surveillance tape and other two witnesses).

That any "dangerous condition" was of Mr. Wince's own doing is further supported by the **uncontradicted** testimony of Mr. Henry and Ms. Cameron, who both testified that the post had been in the same place and in the same condition for a period of three to four months. Tr. 122-23; 135; R.E. 12-13; 16. Mr. Henry estimated that between 40-50 people ate lunch in the deli each day and thus approximately 2,500 customers would have encountered this post during the 3-4 month time period (Tr. 122-23; R.E. 12-13); Ms. Cameron estimated about 3600-4000 customers went through the deli during the relevant time period. Tr. 134-35; R.E. 15-16. Despite the thousands of people passing through the deli (and by the post) each day, **no** complaints had been received about the post (Tr. 123; R.E. 13); nor had anyone else been seen running into the post (Tr. 123; 135; R.E. 13; 16) before Mr. Wince backed over it and fell on the day of the accident.

A comparison to *Tate v. Southern Jitney Jungle Co.,* 650 So. 2d 1347 (Miss. 1995) shows the complete lack of proof Mr. Wince had that the post was a "dangerous condition" as to him and that, instead, his own carelessness was the sole cause of his injury. In *Tate* this Court reversed a directed verdict in Jitney Jungle's favor where plaintiff injured her knee on a jagged edge of the deli counter that was out-of-sight. In contrast to Mr. Wince, Ms. Tate supplied the jury with at least some evidence upon which it could have found the jagged counter edge was a "dangerous condition." Ms. Tate was not walking backwards, but rather bumped her knee on the sharp edge of the counter strip while getting tea (*id.* at 1348); she testified that after she hurt her

common area

knee the store manager told her to report it because "I have told them before that this spot needs to be fixed because someone else have (sic) gotten hurt here;" and Ms. Tate also testified that although she had visited the grocery store many times before, she was not aware of the sharp corner edge. *Id.* Additionally, the store manager admitted at trial that he knew another customer had been injured by the jagged edge. *Id.*

prior awareness

No such proof was presented by plaintiff here. Instead, at the close of Mr. Wince's proof in this case, there was simply no evidence that the post was a dangerous condition, given (i) Mr. Wince's admissions that he knew the post was there; (ii) his 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. Because the facts are so overwhelmingly in defendants' favor that reasonable jurors could not 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).

Facts overw

CONCLUSION

For the foregoing reasons, 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 reversible error to deny Defendants' motion for a new trial where the jury allocated no fault to Plaintiff despite the overwhelming evidence of Plaintiff's own negligence in this case.

THIS, the 5th day of November, 2007.

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 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:

Honorable Albert B. Smith III
P. O. Drawer 478
Cleveland, MS 38732

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COUNSEL FOR PLAINTIFF

SO CERTIFIED, this the 5th day of November, 2007.

LeAnn W. Nealey

CERTIFICATE OF FILING

I, LeAnn W. Nealey, certify that I have had hand-delivered the original and three copies of the Brief of Appellant Southeast Foods, Inc., d/b/a Super Valu, & Fred Henry, Individually and As Manager and an electronic diskette containing same on November 5, 2007, addressed to Ms. Betty W. Sephton, Clerk, Supreme Court of Mississippi, 450 High Street, Jackson, Mississippi 39201.

LeAnn W. Nealey

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