IN THE SUPREME COURT OF MISSISSIPPI
NO. 2007-CA-00527

DIANE EVANS — APPELLANT

VS.

BONNIE HODGE — APPELLEE

APPEAL FROM THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

REPLY BRIEF OF APPELLANT

ORAL ARGUMENT NOT REQUESTED

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A. BONNIE HODGE IS WRONG IN HER ASSERTION THAT IT IS UNDISPUTED SHE RECEIVED NO BENEFIT FROM DIANE EVANS DELIVERING MAIL TO HER SISTER, BETTY RUSSELL.

Bonnie Hodge, hereinafter "*Hodge*", alleges in her brief that "[i]t is undisputed that any 'advantage' by Evans' visit was gained by Russell, not Hodge, insofar as Evans was delivering mail to Russell, not Hodge." *See* Appellee's Brief, p. 6. Black's Law Dictionary (8th ed. 2004) defines an **undisputed fact** as an uncontested or admitted fact. It further defines *undisputed* as an adjective meaning not questioned or challenged. Diane Evans, hereinafter "*Evans*", in her initial brief, repeatedly **disputed** and **challenged** the allegation that Hodge received no benefit from Evans delivering the mail to her sister, Betty Russell. Specifically, she alleges both Russell and Hodge received a benefit from Evans delivering the mail. Betty Russell, hereinafter "*Russell*", derived a benefit from receiving the correspondence from her insurance company she had been anxiously awaiting and Hodge, because Evans delivered the mail to Russell, received the benefit of not having to drive her sister from their home in Pocohontas to Jackson to pick up the mail.

Hodge testified under oath that she moved Russell into her home "*because she* [Russell] *doesn't drive, I bought her to my house so I could help see about her.*" (RE 5). After moving in with her sister, Russell asked Evans to pick up her mail. (CP 49) Evans would pick up Russell's mail daily and Russell would come by Evans' home and pick up her mail on a weekly basis. Id. Russell has a pseudotumor that caused her to lose vision in her eyes and she is unable to drive so Hodge would take Russell to pick up her mail. (RE 5)(CP 49)

In addition, Evans testified in her deposition that Hodge thanked her for bringing the mail, "*it was helping her out a lot*" because otherwise she would have driven her sister, Russell, from their home in Pocohontas to Jackson to retrieve the mail. Specifically, Evans testified in her deposition

that Hodge "*thanked me for bringing the mail and everything, you know, appreciate it, it was helping her out a lot, you know, by me doing that for her, because she say – always say she wasn't the best driver, you know. She don't like to get out that much for driving.*" (CP 50) Hodge admitted in her statement under oath that she hates driving in inclement weather. (RE 5, p. 14) A reasonable inference can be drawn that Hodge, as she had on numerous other occasions, would have taken her sister to Jackson to pick up the mail if Evans had not delivered the mail and she recognized, acknowledged and expressed gratitude to Evans for the benefit she received from Evans delivering the mail – she did not have to take her sister to Jackson to pick up the mail.

Hodge has presented absolutely no evidence to refute the record evidence which supports the fact that she derived a benefit from Hodge delivering the mail. In her statement under oath, Hodge was never questioned specifically as to whether she received a benefit from and was grateful Evans delivered the mail to Russell. Evans was unable to depose Hodge because of her medical condition and as such, she had no means to question Hodge as to whether she derived a benefit from Hodge delivering the mail. Hodge presented no affidavit in support of her motion for summary judgment which refuted the allegation that she received no benefit from Evans delivering the mail. The lack of evidence on the part of Hodge denying that she received a benefit in consideration with the testimony of Evans which clearly indicates that Hodge received a benefit from her delivering the mail, at minimum, creates a material issue of disputed fact to whether Hodges received a benefit from Evans delivering the mail.

This Court, in accordance with the standard of review, should review the record evidence in the light most favorable to Evans. City of Jackson v. Sutton, 797 So.2d 977, 979 (Miss. 2001); Pearl River County Board v. South East Collection, 459 So.2d 783, 785 (Miss.1984); Brown v. Credit

Center, Inc., 444 So.2d 358, 362 (Miss.1983). In viewing the evidence in the light most favorable to Evans, it is clear the record evidence supports the fact that Hodges derived a benefit from Evans delivering the mail – she did not have to travel from their home in Pocohontas to Jackson to retrieve the mail.

The status of a plaintiff is a *jury question* where there exists a factual dispute as to the proper classification and since there exists a material issue of disputed fact as to whether Hodges received a benefit from Evans delivering the mail as to classify her as an invitee, this Court should reverse the trial court's grant of summary judgment in favor of Hodge. Lucas v. Mississippi Housing Authority, 441 So.2d 101, 102-103 (Miss. 1983).

B. HODGE IS INCORRECT IN HER ASSERTION THAT SHE NEVER INVITED EVANS INTO HER HOME.

Hodge argues that "[i]n the absence of any proof that Hodge, the homeowner against whom recovery is sought, participated in extending the invitation to Evans, Evans cannot be considered an invitee." *See* Appellee's Brief, p. 11. An *invitee* is a person who goes upon the premises of another in answer to the **express or implied** invitation of the owner or occupant for their mutual advantage. Adams v. Fred's Dollar Store of Batesville, 497 So.2d 1097, 1100 (Miss. 1986). Black's Law Dictionary (8th ed. 2004) defines implied as not directly expressed, suggestive in nature.

A visitor may be an *invitee* where he comes to the home of the occupant, not for business purposes, but, for the occupant's benefit. Pinnell v. Bates, 838 So.2d 198 (Miss. 2002). Although an invitation does not itself establish an invitee status, it is essential to it. Clark v. Moore Memorial United Methodist Church, 538 So.2d 760, 764 (Miss. 1989). An invitation differs from mere permission: an invitation is conduct which justifies others believing that the landowner or occupant

desires them to enter the land and permission is conduct justifying others in believing that the landowner is willing to allow them to enter if they desire to do so. Id.

The record evidence suggests that Hodge expressly invited Evans into her home: when Evans arrived at Hodge's home, she tipped to the door, knocked and Hodge opened the door and invited her inside. (CP 51). Clark indicates that an invitation is conduct which justified Evans in believing that Hodge desired her to enter the property. The act of opening the door and inviting Evans into the her home indicated Hodge desired Evans to enter her home.

Furthermore, Evans is an invitee pursuant to Pinnell, which held that a visitor may be an *invitee* where she comes to the home of the occupant, not for business purposes, but, for the occupant's benefit, since she entered Hodge's home to deliver mail to Russell and Hodge derived a benefit from Evan's coming upon her property. Hodge, as she had on numerous other occasions, would have taken her sister to Jackson to pick up the mail if Evans had not delivered the mail and she recognized, acknowledged and express gratitude to Evans for the benefit she received from Evans delivering the mail – she did not have to take her sister to Jackson to pick up the mail. Therefore, there is no merit to Hodge's argument that she never invited Evans into her home. The record evidence is clear that Hodge invited Evans into her home.

C. HODGE ADMITTED THAT SHE WAS AWARE THE WELCOME MAT WAS SLIPPERY AND FAILED TO TAKE PRECAUTIONS TO REMEDY THE CONDITION OR WARN EVANS ABOUT IT.

Hodge argues that "[r]esidential homeowners in Mississippi should not be shouldered with the unreasonable burden of ensuring that no one slips and falls on their 'welcome mats' in a snowstorm." *See* Appellee's Brief, p. 12. This argument is disingenuous considering the fact Hodge knew the mat was slippery and admitted that she failed to take corrective measures to ensure Evans

was not injured as a result of walking on the mat. After Evans fell, Hodge commented that the "mat is real icy". (RE 5) Hodge apologized to Evans and confessed that she felt she was responsible for her fall. (CP 53) She knew the trees around her property caused snow and ice "to stay up there [near her entranceway] more". (RE 5). She admitted that "*there was something I could have done*" to prevent Evan's fall but she did nothing. (RE 5).

Mississippi law imposes a duty on a homeowner to make sure that her property is reasonably safe and to warn an invitee of hidden dangers that are not plain and open. Little by Little v. Bell, 719 So.2d 757, 760 (Miss. 1998). Hodge, by her own admission, knew the mat was unusually slippery and completely covered by ice and snow but failed to take action to ensure Evans was not injured while walking on the mat. This inaction by Hodge is in direct violation of the duty imposed upon homeowners to kept their property reasonably safe and to warn invitees of hidden dangers on the property. Therefore, contrary to Hodge's argument, a homeowner is responsible for ensuring no one slips on their welcome mats where they are aware the mats are unusually slippery thereby creating a hidden danger to invitee.

Hodge admits she knew the mat was dangerous, was aware Evans was en route to her home but failed to take any precautionary measures to ensure Evan's safety and as such, this Court should reverse the trial court's grant of summary judgment in favor of Hodge. Hodge breached the duties owed to Evans to make sure that her property was reasonably safe and to warn Evans of hidden dangers that were not plain and open.

CONCLUSION

The trial court erred in granting summary judgment in favor of Bonnie Hodge since there exists material issues of fact as to whether Diane Evans was an invitee at the time of her injury and whether Bonnie Hodge exercised reasonable measures to diminish the hazards associated with the accumulation of ice and snow near her doorway. Therefore, the order granting summary judgment in favor of Bonnie Hodge should be reversed and the case should be remanded for further proceedings.

SO REPLIED, the 14th day of November, 2007.

Respectfully Submitted,
DIANE EVANS, APPELLANT

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CERTIFICATE OF SERVICE

I, ALMA WALLS, attorney for appellant, DIANE EVANS, certify that I have this day mailed, postage prepaid, a true and correct copy of APPELLANT'S REPLY BRIEF to:

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Honorable W. Swan Yerger
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THIS, the 14th day of November, 2007.

Alma Walls
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