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

BRIEF OF APPELLANT

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

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

1. DIANE EVANS, APPELLANT
2. BONNIE HODGE, APPELLEE
3. ALMA WALLS, COUNSEL FOR APPELLANT
4. WILLIAM M. VINES, COUNSEL FOR APPELLEE
5. W. SWAN YERGER, CIRCUIT COURT JUDGE

Alma Walls

ALMA WALLS
Counsel of Record for Appellant

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I. STATEMENT OF THE CASE

A. NATURE OF THE CASE, COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

This is a civil action seeking monetary damages for the injuries Diane Evans (*Evans*) received on January 2, 2001, when she slipped and fell on the property owned by Bonnie Hodge (*Hodge*). (CP 4-5) Evans filed her complaint against Hodge on or about July 21, 2001, alleging that Hodge's negligent maintenance of the doormat located outside the entranceway into her home caused Evans to fall and injure herself. (CP 4-5) On or about August 3, 2001, Hodge answered the complaint and denied the allegations of negligence. (CP 6-8)

Hodge was served with a deposition subpoena indicating her deposition was scheduled for May 23, 2002, and she failed to appear for the deposition. (CP 28-33) Evans filed a motion to find Hodge in contempt for her failure to appear for the deposition and she responded to the motion by submitting a letter from her treating psychiatrist, Dr. Krishan K. Gupta, which stated that she was mentally incapacitated and unable to appear for deposition. Id. The trial court entered an order on or about October 19, 2002, denying the motion for contempt and holding the deposition of Hodge in abeyance until she was deemed by her treating physician to be medically fit to be deposed. (CP 34) Hodge subsequently tendered to Evans a copy of a statement under oath she gave to Mr. Jim Smith, claims investigator for Nationwide Insurance Company.

On or about September 9, 2005, Hodge filed a motion for summary judgment alleging that Evans was a licensee at the time of her injury and there existed no evidence that Hodge willfully or wantonly injured Evans. (CP 38-69). Evans responded by alleging that she was an invitee, not a licensee, at the time of her injury and there existed sufficient evidence to support her contention that Hodge failed to maintain her property in a reasonably safe manner. (CP 72-96) In addition, Evans

argued that she was not able to fully and adequately respond to the summary judgment motion since she was barred by court order from deposing Hodge due to her medical condition. Evans was deposed by counsel for Hodge on or about May 23, 2002 and Hodge was never deposed. (CP 43) (CP 72-96)

On or about March 6, 2006, the trial court, after reviewing the pleadings and hearing oral arguments from both parties, found there existed no genuine issues of material fact and granted the motion for summary judgment in favor of Hodges. (CP 97-98) Feeling aggrieved, Evans filed her notice of appeal to the Mississippi Supreme Court: she appealed the March 6, 2006, order of the trial court granting summary judgment to Bonnie Hodge. (CP 99-100) The only issue raised on appeal is whether the trial court committed reversible error when it granted summary judgment in favor of Bonnie Hodge.

C. STATEMENT OF THE FACTS

On or about January 2, 2001, Diane Evans slipped and fell on a doormat located at the entranceway to Bonnie Hodge's home located at 1206 Hodge Road in Pocahontas, Mississippi. (CP 53)(CP 4-5) The mat was covered with an accumulation of snow and ice. Id. It snowed days prior to the fall. Evans went to Hodge's house for the sole purpose of delivering mail to Hodge's twin sister, Betty Russell (*Russell*), who was a resident of Hodge's household. (CP 50) (RE 5)

Prior to her injury, Evans resided at 577 Dryden Avenue in Jackson, Mississippi and Betty Russell was her next door neighbor. (CP 48) She resided at 576 Dryden Avenue. Id. In October 2000, Russell's house burned and she moved in with Hodge. (CP 49) Hodge testified under oath that after the fire, 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 either Hodge or her son, Sean, would take Russell to pick up her mail. (RE 5)(CP 49)

Russell was waiting for a check from her insurance carrier for her fire loss and on or about January 2, 2001, Russell received a letter from her insurance carrier. (CP 50) Evans called Russell and informed her about the letter and Russell asked Evans to deliver the letter to her in Pocahontas. Id.; (RE 5) Russell told her sister, Hodge, that Evans was coming over to the house to deliver her mail. (RE 5) It was a dull, wintry day and snow was on the ground. (CP 50) Evans arrived at Hodge's home at approximately 7:30 p.m. as it was getting dark. (CP 51). There was not much lightning outside the house and there was an accumulation of snow and ice on the sidewalk leading to the entranceway of the house. Id. Evans tipped to the door and knocked. Id. Hodge opened the door and invited her inside. Id. They exchanged pleasantries and Evans proceeded to the back of the house to deliver the mail to Russell. Id. Hodge had not left the house all day. (RE 5).

Evans visited with Russell for about an hour and proceeded to exit the Hodge residence. (CP 50) As Evans headed toward the exit, Hodge thanked Evans for bringing the mail and told her she really appreciated her delivering the mail. Id. 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 would have taken Russell to Jackson to pick up the mail if Evans had not delivered the mail and she appreciated Evans' kind gesture of delivering the mail. Id.

Hodge testified under oath that immediately before Evans exited her home she and Evans talked about "*the weather in Pocohontas. It wasn't as bad as in Jackson I don't think, she was telling me, as it was out there in the country. You know, we have trees around. I guess that helps the snow to stay up there more. I don't know. We talked about the weather some I think. We talked about what I was watching on TV.*" (RE 5) A reasonable inference can be drawn based on the statement under oath that Hodge has a different recollection of the conversation she and Evans had prior to the fall. On the contrary, Hodge was never questioned specifically as to whether she was grateful that Evans delivered the mail to Russell. Evans was unable to depose Hodge and as such, she had no means to question Hodge about the conversation and determine whether she recalled being grateful that Evans delivered the mail.

Hodge instructed Evans to leave out of the same door she used to enter the house. (CP 53) She was busy watching television and told Evans to pull the door closed and she would get up later to lock it. Id.; (RE 5) Hodge never gave Evans the option to exit the house through any other door: there are two entrances on the front of the house.

As Evans exited the house and pulled the door closed, she slipped and fell. Id. She slipped on the doormat located near the entrance. (CP 58) There was so much snow and ice on the mat Evans did not realize the mat was even there; it was totally covered with snow and ice. Id. The mat gave way from its position near the door causing Evans to fall and ultimately landed near the edge of the walkway leading to the door. (CP 59) Hodge heard the commotion and ran to the door. (CP 53) She helped Evans get up. Id. Evans told Hodge she slipped on the mat and Hodge commented that the "mat is real icy". (RE 5) Hodge apologized to Evans and confessed that she felt she was responsible for Evans' 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).

II. SUMMARY OF ARGUMENT

The only appellate issue before this Court is whether the trial court committed reversible error when it held that Bonnie Hodge did not breach the duties owed to Diane Evans and granted summary judgment in favor of Bonnie Hodge . In other words, this Court must decide whether there are any material issues in dispute regarding the status of Diane Evans at the time of her injury and whether Hodge breached the duties owed to Evans.

In the case *sub judice*, there exists material issues of fact as to whether Evans was an invitee at the time of her injury since Hodge received a benefit from Evans entering the Hodge premises: 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 had to drive her sister, Russell, from their home in Pocohontas to Jackson to retrieve the mail. An *invitee* is a person who enters the premises of another for the benefit of the landowner and the record evidence is clear that Hodge received a benefit from Evans delivering the mail.

As an invitee, Hodge owed Evans a duty to keep the premises reasonably safe, protect her from injuries which are reasonably foreseeable and to provide a reasonably safe means of ingress and egress onto the premises. There exists material issues of fact as to whether Hodge breached her duties since Hodge knew Evans was coming to her house, there was an accumulation of ice and snow on her doormat, the doormat was slippy and Evans would have to walk on the snow and ice covered doormat to get into the house.

Therefore, it is clear that the trial court erred in granting summary judgment since there exists material issues of fact as to the status of Evans at the time of her injury and whether Hodge breached the duties owed to Evans. As such, this Court should reverse the trial court's grant of summary judgment.

III. ARGUMENT

A. STANDARD OF REVIEW

The appellate standard for reviewing the grant or denial or summary judgement is the same standard as that of the trial court under Rule 56(c) of the Mississippi Rules of Civil Procedure. Heigle v. Heigle, 771 So.2d 341, 345 (Miss. 2000). The Court employs a *de novo* standard of review of a lower court's grant or denial of summary judgment and the evidence must be viewed in the light most favorable to the party against whom the motion has been made. Miss. Dept. of Wildlife, Fisheries & Parks v. Miss. Wildlife Enforcement Officers' Ass'n, Inc., 740 So.2d 925, 929 (Miss. 1999); Williamson v. Keith, 786 So.2d 390, 393 (Miss. 2001).

Rule 56 states, in relevant part, that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law." Miss. R. Civ.P. 56(c). The moving party has the burden of persuading this Court that no genuine issue of material fact exists and the non-movant should be given the benefit of every reasonable doubt. Tucker v. Hinds County, 558 So.2d 869, 872 (Miss.1990). All evidentiary matters should be viewed in the light most favorable to the non- moving party. 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).

Where one party swears to one version of the matter in issue and the other party swears just the opposite there exist issues of fact sufficient to require denial of a motion for summary judgment. Williams v. Tollier, 759 So.29 1195, 1198 (Miss. 1999); Dennis v. Searle, 457 So.2d 941 (Miss.1984).

If there is the slightest doubt over whether a factual issue exists, the court should resolve it in favor of the non-moving party. Cothern v. Vickers, Inc., 759 So.2d 1241, 1245 (Miss. 2000). While reviewing the evidence, this Court must draw all reasonable inferences in favor of the nonmoving party, and avoid credibility determinations and weighing of the evidence. Reeves v. Sanderson Plumbing Prods. Inc., 530 U.S. 133 (2000)[1]. In doing so, the Court must disregard all evidence favorable to the moving party that the trier of fact is not required to believe. Id. Summary judgment is improper where the Court merely believes it unlikely that the non-moving party will prevail at trial. National Screen Serv. Corp. v. Poster Exchange, Inc., 305 F.2d 647, 651 (5th Cir.1962). Therefore, this Court should only affirm the trial court's grant of motion for summary judgment if the record clearly demonstrates that there exists no genuine issues of material fact.

B. THERE ARE GENUINE ISSUES OF MATERIAL FACT AS TO WHETHER DIANE EVANS WAS AN INVITEE AT THE TIME OF HER INJURY.

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). 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.

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[1]The Mississippi Supreme Court has repeatedly noted that the United States Supreme Court's analysis of Fed. R. Civ. P. 56 is persuasive evidence of its interpretation of Miss. R. Civ. P. 56. Galloway v. Travelers Ins. Co., 515 So.2d 678, 683 (Miss. 1987).

A *licensee* is one who enters upon the property of another for his own convenience, pleasure or benefit pursuant to the license or implied permission of the owner. Adams, 497 So.2d at 1100. A *trespasser* is one who enters upon another's premises without license, invitation or other right. Id. The differences among the categories focus on the landowner and whether that person is receiving an advantage, just permitting the presence of the entrant, or actually opposing the entry. Daulton v. Miller, 815 So.2d 1237, 1239 (Miss. Ct. App. 2002).

The status of a plaintiff is a *jury question* where there exists a factual dispute as to the proper classification but where the facts are not in dispute, classification becomes a question of law. Id.; Lucas v. Mississippi Housing Authority, 441 So.2d 101, 102-103 (Miss. 1983).

Under Mississippi law, an owner and the person in charge of a premises owe to an invitee a duty to exercise ordinary care to keep the premises in a reasonably safe condition or to warn of dangerous conditions, not readily apparent, which the owner knows of or should know of in the exercise of reasonable care. Waller v. Dixieland Food Stores, Inc., 492 So.2d 283, 285 (Miss.1986). A landowner owes a licensee the duty to refrain from willfully or wantonly injuring the licensee. Hall v. Cagle, 773 So.2d 928, 929 (Miss. 2000). Landowners owe trespassers the duty to refrain from willfully or wantonly injuring them. Titus v. Williams, 844 So.2d 459, 467 (Miss. 2003).

In Pinnell v. Bates, 838 So.2d 198 (Miss. 2002), plaintiff sued a homeowner for the injuries she received when she fell from the concrete steps outside the house. The homeowner invited plaintiff to her new house for a visit and while she was there she helped the homeowner clean and unpack boxes. Id. The Mississippi Supreme Court ruled that there existed a jury question as to the issue of whether the plaintiff was an invitee or a licensee since the homeowner invited plaintiff to her house and received benefit from the cleaning and unpacking done by plaintiff. Id. at 202.

In Hall v. Cagle, 773 So.2d 928 (Miss. 2000), plaintiff sued a homeowner for the injuries she received when she fell from the steps outside the mobile house. Plaintiff was invited to the house by homeowner for the purpose of unloading boxes and arranging furniture. Id. The Mississippi Supreme Court ruled there existed a genuine issue of material fact as to whether plaintiff was an invitee since she was invited to the home and the homeowner received benefit from her unloading boxes and arranging furniture. Id. at 930.

In Lucas v. Mississippi Housing Authority, 441 So. 2d 101, 102-103 (Miss. 1983), the Mississippi Supreme Court held that a child who drowned in the swimming pool of an apartment complex while visiting his mother's friends who resided in the complex was an invitee and owner owed a duty of reasonable care. The Court applying the definition of an invitee reasoned that the child was an invitee because the swimming pool was constructed and maintained for the benefit of the tenants and that part of the rent or consideration for occupying the apartments was for the inducement, pleasure and benefit of using the swimming pool. Id. at 103. The Court further recognized that it would be unconscionable to establish a principle of law that a landowner owned a duty to a tenant using the pool to use reasonable care not to injure him and would only owe an invited guest swimming in the same pool the duty not to willfully or wantonly injure him. Id.

The Mississippi Supreme Court in Corley v. Evans held *as a matter of law* that the plaintiff was an invitee where there existed a mutual advantage between the landowner and invitee: defendant received a $7 admission fee from the plaintiff and the plaintiff received the benefit of attending the crawfish boil. 835 So.2d 30 (Miss. 2003). Plaintiff was accidently shot by a friend while attending a crawfish boil sponsored by the defendant, Stacy Evans. Plaintiff's friend slipped and the .22 caliber pistol in his pocket accidently discharged severely injuring the plaintiff. The Court, after

determining that plaintiff was an invitee, reasoned that plaintiff's injury was remote and unforeseeable and therefore, defendant was not liable.

In Clark v. Moore Memorial United Methodist Church, 538 So.2d 760 (Miss. 1989), plaintiff slipped and fell while attending a church service at Moore Memorial United Methodist Church and the trial court reasoned that plaintiff was a licensee, the church did not wilfully and wantonly injure her and granted summary judgment for the church. The Mississippi Supreme Court reversed the trial court and held as a *matter of law* that plaintiff was an invitee at the time of her fall. It reasoned that the church derived benefits from the monetary contributions and offerings of its patrons and as such, classified its patrons as invitees.

In Daulton v. Miller, 815 So.2d 1237 (Miss. Ct. App. 2002), the Court of Appeals determined that plaintiff was a licensee since there existed no mutual advantage between the landowner and plaintiff where the plaintiff was injured while viewing an outdoor Christmas display on the landowner's property. The Court reasoned that although the plaintiff enjoyed the benefit of viewing the display, the landowner benefitted nothing since she did not charge an admission fee to view the display and received no other tangible form of consideration.

Reading and interpreting Pinnell and Hall together, it becomes clear there exists a jury question as to the status of a visitor where a homeowner or occupant of a leased premises derived a noneconomic benefit from the visitor's presence. Corley and Clark, on the other hand, indicate that where a homeowner or occupant derive an economic benefit from the visitor's presence, the visitor should be classified as an invitee as a matter of law.

1. *Pinnell and Hall make it clear that there exists a genuine issue of material fact as to whether Evans was an invitee at the time of her injury.*

Consistent with Pinnell and Hall, there exists a genuine issue of material fact in the case *sub judice* as to whether Evans was an invitee since she entered the Hodge residence upon an invitation from Betty Russell, an occupant of the residence, to bring Russell her mail and Russell and Hodge received a noneconomic benefit from her delivering the mail to the residence. 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 had to drive her sister, Russell, from their home in Pocohontas to Jackson to retrieve the mail. Like Pinnell and Hall, Hodge received a noneconomic benefit from Evans delivering the mail and as such, there exists a jury question as to her status as an invitee.

2. *The conflicting testimony of Evans and Hodges creates a jury question regarding the status of Evans at the time of her injury.*

In her statement under oath, Hodge testified that immediately before Evans exited her home she and Evans talked about "*the weather in Pocohontas. It wasn't as bad as in Jackson I don't think, she was telling me, as it was out there in the country. You know, we have trees around. I guess that helps the snow to stay up there more. I don't know. We talked about the weather some I think. We talked about what I was watching on TV.*" A reasonable inference can be drawn based on the statement under oath that Hodge has a different recollection of the conversation she and Evans had prior to the fall.

Where one party swears to one version of the matter in issue and the other party swears just the opposite there exist issues of fact sufficient to require denial of a motion for summary judgment. Williams v. Tollier, 759 So.29 1195, 1198 (Miss. 1999); Dennis v. Searle, 457 So.2d 941 (Miss.1984). There exists a genuine issue of material fact as to whether Hodge derived a benefit from Evans delivering the mail: Evans alleges that Hodge was grateful that she delivered the mail because it kept her from having to drive Russell to Jackson and pick up the mail and Hodge , based

on her statement under oath, did not acknowledge that she received any benefit from Evans delivering the mail. Consistent with Tollier and Searle, the parties swear to different versions of a material issue as to preclude summary judgment.

3. *In the alternative, Evans should be classified as an invitee as a matter of law.*

Corley and Clark held as a matter of law that plaintiffs were invitees because the landowner derived an economic benefit from plaintiff's presence on the land. In Corley, the landowner received a $7 admission fee and in Clark the landowner received financial contributions and offerings. Like Corley and Clark, Hodge derived an economic benefit from Evans delivering Russell's mail: she did not have to purchase gasoline to drive Russell from Pocohontas to Jackson to retrieve the mail. Unlike Daulton, a case that held that the plaintiff was a licensee because she derived no benefit from plaintiff's presence on her property, both Russell and Hodge derived benefits from Evans delivering Russell's mail and there exists no evidence that Evans received any tangible benefit for delivering the mail.

Lastly, the case *sub judice* is analogous to Lucas, a case that held a child who drowned in the swimming pool of an apartment complex while visiting friends of his mother who resided in the complex was an invitee, since Russell was an occupant of the Hodge residence, had permission to invite guests to the house and both Hodge and Russell derived benefit from Evans delivering Russell's mail to the residence. Like Lucas, Evans was an invitee.

The trial court erred when it granted summary judgment in favor of Bonnie Hodge since there exists material issues of fact as to whether Evans was an invitee at the time of her injury. Therefore, this Court should reverse the trial court's grant of summary judgment.

C. A GENUINE ISSUE OF MATERIAL FACT EXISTS AS TO WHETHER BONNIE HODGE BREACHED THE DUTIES OWED TO DIANE EVANS.

Mississippi uses a three-step approach to determine premises liability. Massey v. Tingle, 867 So.2d 235, 239 (Miss. 2004). First, you classify the status of the injured person as an invitee, licensee, or a trespasser. Id. Second, you determine the duty, if any, owed to the injured party, and then you determine whether the duty was breached by the landowner. Id.

Whether a duty exists is a question of law to be determined by the court. Belmont Homes v. Stewart, 792 So.2d 229 (Miss. 2001). Breach of duty is an issue to be decided by the finder of fact once sufficient evidence is presented in a negligence case. American Nat. Ins. Co. v. Hogue, 749 So.2d 1254, 1259 (Miss. Ct. App. 2000); Delahoussye v. Mary Mahoney's, Inc., 696 So.2d 689, 690 (Miss. 1997)(negligence is almost always an issue for the finder of fact to decide except in the clearest cases); Presswood v. Cook, 658 So.2d 859, 862 (Miss. 1995)(the question of negligence is determined by the fact finder); Caruso v. Picayune Pizza Hut, Inc., 598 So.2d 770 (Miss. 1992)(where the facts are disputed, negligence is an issue for the fact finder); McIntosh v. Deas, 501 So.2d 367 (Miss. 1987)(where the facts are undisputed and where reasonable minds may reach different conclusions, negligence is a question for the finder of fact).

In Presswood, the owner of a truck brought a negligence action against the owner of a boat and trailer for injuries suffered while hitching the boat trailer to the tow ball of the truck. Presswood v. Cook, 658 So.2d 859 (Miss. 1995). The defendant moved for summary judgment and the trial court granted the motion. Id. Plaintiff appealed and the Mississippi Supreme Court reversed and held that the trial judge may determine the duty owed to plaintiff but the finder of fact must determine whether the defendant breached that duty. Id.

Under Mississippi law, Bonnie Hodge, the landowner, owed Diane Evans, an invitee, the duty to keep the premises reasonably safe and when not reasonably safe, to warn the invitee of the danger that is not in plain and open view. Caruso v. Picayune Pizza, Inc., 598 So.2d 770, 773 (Miss.

1992). Along with that duty, the landowner has a duty to protect invitees from injuries which are reasonably foreseeable and to provide a reasonably safe means of ingress and egress onto the premises. Kelly v. Retzer & Retzer, Inc., 417 So.2d 556, 560 (Miss. 1982); Johnson v. Boydston, 605 So.2d 727 (Miss. 1992). The standard of care applicable in cases of alleged negligent conduct is whether the party charged with negligence acted as a reasonable and prudent person would have under the same or similar circumstances. Donald v. Amoco Production Co., 735 So.2d 161, 175 (Miss. 1999).

In Goodwin v. Derryberry Co., 553 So.2d 40 (Miss. 1989), plaintiff was injured when he slipped and fell on defendant's icy driveway. After the fall, plaintiff went back into the store owned by defendant, completed his purchase and exited the building through the same door and walked over the ice that caused him to fall and got into his truck. He did not fall on the way back to his truck. The jury awarded damages to the plaintiff and the trial court granted a JNOV. The Mississippi Supreme Court reversed the trial court and ruled that there existed a jury question as to whether the defendant exercised reasonable care to keep the premises in a reasonably safe condition. The ruling was based on the fact that the entire area where the store was located was covered with accumulated sleet, ice and snow and defendant was aware of the accumulation but had done nothing to remove it or to otherwise provide a safe pathway to the side entrance. Id. at 43.

1. *There exists a jury question as to whether Bonnie Hodge breached her duty to take reasonable measures to diminish the hazards associated with the accumulation of ice and snow near her doorway.*

Diane Evans was an invitee of Bonnie Hodge's home. Hodge was aware that snow fell days prior to Evans' injury and that by her own admission she knew that the trees surrounding her home caused snow and ice to "*stay up there more*". She was aware that Diane Evans was coming to her home to deliver mail to her sister, Betty Russell, and that the available route for entry into her home

required Evans to walk on snow and ice. Snow and ice covered the area in front of the entranceway into the house, including but not limited to the mat located in front of the entranceway. Hodge knew Evans would have to walk on the snow and ice covered mat to get into the house, and knew about the accumulation of ice and snow near her entranceway. As such, she had a duty to use reasonable care to provide a safe place for her guests to enter her home. Further, Hodge admits that she did nothing to diminish the hazards of ice and snow accumulations and there were things she could have done to remove the hazard. She had a reasonable amount of time to remove the ice and snow from the entranceway to her home or she could have instructed Evans to use other entranceway.

Like Goodwin, a case that held that there existed a jury question as to whether the defendant exercised reasonable care to keep the premises in a reasonably safe condition when it was aware of the ice and snow accumulation near its entrance and failed to take measures to remedy the hazard, there exists a jury question as to whether Hodge used reasonable care to keep her premises in a reasonably safe condition since she was aware of the ice and snow accumulation near the entrance of her home and took no steps to remedy the hazard. F.W. Woolworth Co. v. Stokes, 191 So.2d 411, 418 (Miss. 1986)(Where an invitee falls on a floor made slippery by moisture tracked in during inclement weather, the liability of the landowner having knowledge of the hazardous condition depends on whether, under the circumstances, he has exercised ordinary care to correct the condition. This presents jury question.);Cowan v. Lakeview Village Condominium Ass'n, 2005 WL 233555 (Mich. Ct. App. 2005)(Landowner has a duty to exercise reasonable care to diminish the hazards of ice and snow accumulations and must take reasonable measures with a reasonable time after an accumulation of ice and snow to diminish the hazard of injury to the invitee.); Albers v. Gehlert, 409 S.W. 2d 682 (Mo. 1966)(Homeowner may incur liability if she directs an invitee to take an icy route rather than a safer alternative route.)

Considering the fact that there exists a material issue of disputed fact as to whether Hodge took reasonable steps to diminish the hazards of ice and snow accumulations near her entranceway, this Court should reverse the trial court's grant of summary judgment in favor of Hodge.

2. *There exists a jury question as to whether Bonnie Hodge breached her duty to warn Diane Evans about the "icy" doormat near her doorway which was hidden from plain view.*

In Mayfield v. The Hairbender, 903 So.2d 733 (Miss. 2005), a delivery person tripped on uneven pavement at the bottom steps leading into the store and the trial court granted summary judgment: it concluded that since the delivery person was aware of the uneven pavement prior to her fall and the dangerous condition was open and obvious, there existed no liability on the part of the store. The delivery person claimed that the store was negligent in two ways: first, in failing to properly maintain and repair the pavement, and second, in failing to warn her of the danger. The Mississippi Supreme Court held that the uneven pavement was an open and obvious danger such that the store had no duty to warn the delivery person; it reasoned that it would be "strange logic that found it reasonable to allow a plaintiff to pursue a claim against a defendant for failure to warn of an open and obvious danger. Id. at 736.

As to the claim for failure to properly maintain and repair the pavement, the Court ruled that although the uneven payment was an open and obvious danger that fact was not an absolute defense to the claim that the store had negligently failed to keep the premises reasonably safe but instead required the application of comparative fault principles.

In Breland v. Gulfside Casino Partnership, 736 So.2d 446 (Miss. Ct. App. 1999), the plaintiff brought a slip and fall claim against a casino after he slipped and fell on rain water which accumulated near the casino entrance. The jury rendered a verdict in favor of plaintiff and the trial court granted a JNOV. The Mississippi Court of Appeals, citing Fulton v. Robinson Indus., 664

So.2d 170, 175 (Miss. 1995), which restated Mississippi law with regard to slip and fall cases in the aftermath of Tharp v. Bunge Corp., 641 So.2d 20 (Miss. 1994), the case that abolished the open and obvious doctrine, held that plaintiff was an invitee, the rain was a natural condition on the stairs which was a major entrance and exit to the casino, and as such, there existed a jury question as to the openness and obviousness of the danger presented by the rain on a major exit. The Court relied heavily on Fulton which held that if an invitee is injured by a natural condition on a part of the property that is immediately adjacent to its entrance and exit, then there is a jury question as to the openness and the obviousness of the danger.

Like Breland , there exists a jury question as to the openness and obviousness of the danger associated with the accumulation of snow and ice on the mat near the entrance into the Hodge property: the mat was completely covered with snow and ice and could not be seen by Evans. Evans had no way to guard herself against the fall since she was unaware of the presence of the mat and had no knowledge of its propensity to become slippery. As such, there exists a jury question as to the openness and obviousness of danger created by the rug and the trial court's grant of summary judgment should be reversed.

On the other hand, if this Court finds that the danger presented by the accumulation of snow and ice on the mat was open and obvious, consistent with Hairbender, a case which sets forth the effect of the open and obvious defense in slip and fall cases, it is duty bound to affirm the decision of the trial court as to the failure to warn claim but to allow the failure to properly maintain the premises claim to proceed to the jury. Therefore, the trial court's grant of summary judgment should be reversed.

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 BRIEFED, the 22nd day of August, 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 BRIEF to:

Honorable William M. Vines
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Honorable W. Swan Yerger
CIRCUIT COURT JUDGE
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THIS, the 22nd day of August, 2007.

Alma Walls
ALMA WALLS