

IN THE SUPREME COURT OF MISSISSIPPI

**FRANCES JONES PREWITT, Individually
and as the Executrix of the Estate of
RUFUS CLARENCE PREWITT, JR., deceased
and ELAINE CRITTENDEN, Individually**

APPELLANTS

VS.

SUPREME COURT CASE NO. 2007-CA-00680

**JIMMY W. VANCE and
TORREY WOOD and SON, INC.**

APPELLEES

BRIEF OF APPELLEES

**ON APPEAL FROM THE
CIRCUIT COURT OF WASHINGTON COUNTY, MISSISSIPPI
CAUSE NO. CI-2003-203**

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CERTIFICATE OF INTERESTED PERSONS

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

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The Honorable Richard Smith
Washington County Circuit Court Judge
P.O. Box 1953
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This, the ~~14~~ day of March, 2008.

Respectfully submitted,
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By: 
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STATEMENT OF ISSUES

1. Whether the Washington County Circuit Court correctly found that summary judgment was proper when Plaintiffs failed to offer proof of any act of negligence by Defendant.
2. Whether the Washington County Circuit Court correctly found that the summary judgment was proper when Plaintiffs failed to rebut the testimony of Mississippi Highway Patrol officer Dennis Weaver, the sole expert and accident reconstructionist.

STATEMENT OF THE CASE

COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

This case arises out of an automobile accident which occurred on Highway 61 in the Mississippi Delta close to Greenville, Mississippi. After the accident, Frances Prewitt, Individually and as Executrix of the Estate of Rufus Prewitt, filed suit against Ronnie Pettit, Jimmy W. Vance and Torrey Wood and Son, Inc., for the wrongful death of Rufus Prewitt and for the injuries she sustained in the accident. In the Complaint, Prewitt alleged that Jimmy Vance was negligent for failing to keep a proper lookout. After reaching a settlement with Defendant Pettit, Prewitt dismissed Pettit from the suit and proceeded solely against Vance and his employer, Torrey Wood and Son, Inc.¹ At some point in the suit, Rufus Prewitt's daughter, Elaine Crittenden, was also made a plaintiff to assert a claim for the loss of love and companionship of her father. Vance and Torrey Wood and Son, Inc. filed a motion for summary judgment on the basis that the Prewitt Plaintiffs had absolutely no proof to establish that Jimmy Vance breached any duty he owed them. The Circuit Court of Washington County granted the motion for summary judgment finding that the Plaintiffs had failed to establish any genuine issue of material fact and this appeal ensued.

STATEMENT OF FACTS

The claims against Jimmy Vance and Torrey Wood and Son, Inc. in this action stem from a three (3) vehicle automobile accident which took place on August 29, 2002, in Washington County, Mississippi. The first vehicle was driven by Rufus Clarence Prewitt, Jr. At the time of the accident,

¹Hereafter, Vance and his employer, Torrey Wood and Son, Inc. will be referred to collectively as Vance.

Mr. Prewitt was traveling south on Highway 61. Rufus Prewitt's wife, Frances Prewitt, was riding as a passenger in this vehicle. The second vehicle was driven by Ronnie Pettit. Mr. Pettit was also traveling south on Highway 61 behind the Prewitt vehicle. The third vehicle was driven by Jimmy Vance². Mr. Vance was traveling north on Highway 61.

On the date of this accident, Jimmy Vance, an employee of Torrey Wood and Son, Inc., was traveling north on Highway 61 at approximately 50 miles per hour. (Vance depo. at Supplement Record 164). The weather conditions were "[p]retty, bright, sun shiny, hot." (Vance depo. at Supplement Record 161). Mr. Vance stated and the accident report reflects that at approximately the same time and place, Frances Jones Prewitt and Rufus Clarence Prewitt were traveling South on Highway 61 when Ronnie Pettit, also traveling South on Highway 61 directly behind the Prewitts, for no reason other than his own negligence, collided with the Prewitt vehicle, sending the Prewitt vehicle into the northbound lane and into the path of travel of Jimmy Vance. (Accident Report at Supplement Record 245 and Vance depo. at Supplement Record 172-173). When Vance saw the initial impact between the Prewitt and Pettit vehicles, he immediately slowed his vehicle and pulled onto the adjacent shoulder of the Northbound lane as far over as he could go in the gravel in an effort to avoid the Prewitts oncoming vehicle. (Vance depo. at Supplement Record 173). The Prewitt vehicle ultimately collided with the vehicle driven by Vance. It is alleged that Rufus Clarence Prewitt died from of the injuries he received in this accident, although Plaintiff has offered no proof of such. As a result of the death, Frances Jones Prewitt and Elaine Crittenden filed suit against Jimmy W. Vance and his employer, Torrey Wood and Son, Inc., essentially alleging negligence,

² It is undisputed that at the time of the accident Jimmy Vance, was acting within the course and scope of his employment with Torrey Wood and Son, Inc.

of his vehicle and for failure of Jimmy Vance to keep a proper lookout.

SUMMARY OF THE ARGUMENT

Summary judgment is proper when a court finds no genuine issue of material fact present in the case at bar. MRCP Rule 56. In order to present a viable negligence claim, Appellants must establish the requisites of an ordinary negligence case. Specifically, Appellants must establish that Jimmy Vance had a specific duty during the operation of his vehicle; breached that duty; and that the breach of said duty was the proximate cause of the Appellants' damages. In the current matter, and as the Trial Court found in granting the Defendants' Motion for Summary Judgment, the Plaintiffs/Appellants have not established a breach of duty as all evidence presented before the Court was that Jimmy Vance operated his vehicle in a reasonable manner, kept a proper lookout, and did nothing to cause the subject accident.

The Appellants' claims fail first because they present no evidence to establish that the Appellees were guilty of any act of negligence which support the allegations of the Complaint, ie., that Vance, in his capacity as an employee of Torrey Wood and Son, Inc., was negligent in failing to keep a proper lookout or by any other alleged negligent manner. Frances Jones Prewitt has no recollection of the accident even though she was in the car when it occurred. (Prewitt depo. at Supplement Record 41). Elaine Crittenden has no knowledge of the accident because she was not at the accident scene and was living on the Mississippi Gulf Coast at the time of the accident. (Crittenden depo. at Supplement Record 44). Secondly, the Appellants' claims fail because they have no expert to rebut the clear and uncontradicted testimony of MHP Officer/Accident Reconstructionist, Dennis Weaver, that Jimmy W. Vance did nothing to cause and/or contribute to this accident. Finally, Appellants have offered new and additional arguments in their appeal brief

which were not previously asserted and therefore, waived and inappropriate for consideration by this Court.

STANDARD OF REVIEW

The sole issue before this court is whether the trial court correctly found summary judgment was proper for Defendants Jimmy W. Vance and Torrey Wood and Soon, Inc. In reviewing whether a motion for summary judgment was properly granted, an appellate court reviews the case de novo. *Richmond v. Benchmark Const. Corp.*, 692 So.2d 60, 61 (Miss. 1997). According to the *Mississippi Rules of Civil Procedure*, Rule 56, if there is no genuine issue of material fact as to the material elements of the Plaintiffs' claim, then summary judgment is appropriate. Summary judgment is appropriate "if the evidentiary matters before the court— pleadings, depositions, answers to interrogatories, admissions on file, affidavits, etc. — demonstrate that there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law." *Hutton v. American Gen. Life and Accident Ins. Co.*, 909 So.2d 87, 92-94 (Miss. App. 2005) (Quoting M.R.C.P. 56(c)). "The mere presence of contradictory evidence in the record does not preclude summary judgment." *Id.* "For the case to proceed to trial, material facts must be in dispute." *Id.* The burden of showing that no genuine issue of material fact exists lies with the moving party and the trial court must give every reasonable doubt to the non-moving party. *Moore v. Memorial Hospital of Gulfport*, 825 So.2d 658, 663 (Miss. 2002); *Tucker v. Hinds County*, 558 So.2d 869, 872 (Miss. 1990).

Plaintiffs have claimed that numerous factual issues exist. However, as noted in *Simmons vs. Thompson Machinery of Mississippi, Inc.*, 631 So. 2d 798, 802 (Miss. 1994):

Of importance here is the language of the rule authorizing summary judgment "where there is no genuine issue of *material fact*." ***The presence of fact issues in the record does not per se entitle a party to avoid summary judgment. The court must be***

convinced that the factual issue is a material one, one that matters in an outcome determinative sense. . .we have kept ever before us that basic tenant of Rule 56 theology that the existence of a hundred contested issues of fact will not thwart summary judgment where there is no genuine dispute regarding the material issues of fact.

Id at 308.

ARGUMENT

I. APPELLEES' CLAIM OF FAILURE TO KEEP A PROPER LOOKOUT FAILS WHEN THEY OFFER NO PROOF OF ANY SPECIFIC ACTS OF NEGLIGENCE

In a negligence action, “the plaintiff bears the burden of producing evidence sufficient to establish the existence of the conventional tort elements of duty, breach of duty, proximate causation, and injury. In a summary judgment proceeding/environment the plaintiff must rebut the defendant’s claim (i.e., that no genuine issue of material fact exists) by producing supportive evidence of significant and probative value; this evidence must show that the defendant breached the established standard of care and that such breach was the proximate cause of her injury.” *Palmer v. Biloxi Regional Medical Center, Inc.*, 564 So.2d 1346, 1355 (Miss. 1990). “Mere allegation or denial of material fact is insufficient to generate a triable issue of fact and avoid an adverse rendering of summary judgment.” *Id* at 1356. “The party opposing the motion must by affidavit or otherwise set forth specific facts showing that there are indeed genuine issues for trial.” *Id* at 1356.

A. NO CREDIBLE PROOF OF SPECIFIC ACTS OF NEGLIGENCE

Plaintiffs Prewitt and Crittenden, in their Second Amended Complaint, allege negligence on the part of Defendant Vance claiming that Vance failed to keep a proper lookout in operating his vehicle (Second Amended Complaint at R. 1-4). Neither Plaintiff Prewitt nor Crittenden can identify any specific act of negligence against Jimmy W. Vance. According to her unequivocal deposition

testimony, Mrs. Prewitt has no memory of the accident whatsoever, and can not recall anything from the date of the accident.

Q. Mrs. Prewitt, do you understand that we're here about the accident that you were involved with?

A. Yeah.

Q. In 2002?

A. 2002.

Q. It was August 29, 2002.

A. **I don't know nothing about it.**

Q. Do you remember the car accident you were in? It was in 2002.

A. I thought we in a van.

Q. Well, I believe it was an accident involving where your husband was killed?

A. Yeah.

Q. Do you remember that accident?

A. **No.**

Q. Do you remember the day of the accident?

A. **No.**

Q. Do you remember where you'd been that day?

A. (Witness moves head side to side.)

Q. Do you remember riding in the car with your husband that day?

A. Yeah. I guess. I don't know.

Q. Well, if you don't remember it's okay. You just need to be truthful in your answers. So are you unsure about that day? Is that what you're telling me? You just don't really remember that day?

A. **I don't know nothing about that wreck.**

Q. Do you remember someone hitting y'all from behind?

A. **No.**

Q. Do you remember seeing my client Mr. Vance Mr. Vance's truck that day?

A. **I don't know.**

Q. I believe he was in a white truck. Do you remember seeing a white truck?

A. **No.**

Q. Do you remember anything about the day that your husband died?

A. **Nu huh.**

Q. Do you remember anything about what happened to you that day?

A. No.

(Prewitt depo at Supplement Record 40-42).

Elaine Crittenden, the latter added Plaintiff, also has no knowledge of how this accident occurred.

Q. Do you know anything about this accident, how it might have occurred?

A. **No. I was down on the Coast when it happened.**

(Crittenden depo at Supplement Record 44).

B. MISPLACED RELIANCE UPON SPECULATION AND CONJECTURE

Appellants assert, in the “Statement of the Case” portion of their brief that “plaintiffs alleged that Jimmy Vance ‘failed to keep a proper lookout’ in the operation of his motor vehicle, [and] further, he failed ‘to take the last clear chance’ to avoid injury and death. . .” Although a review of the Plaintiffs Second Amended Complaint reveals that the “last clear chance” doctrine was never argued and/or asserted, this argument still fails as Plaintiffs offer no facts which would support this claim and rely merely on speculation and conjecture for this theory of liability. As is clearly noted above, Plaintiffs Prewitt and Crittenden have no knowledge of any specific facts which would support a claim of negligence against the Defendants/Appellees. Additional evidence of this speculation and conjecture lingers throughout the Appellants’ brief.

One example of these unfounded arguments exists on page 2 of the Appellants’ brief, where Appellant discusses the “shock and surprise” of the accident although Vance was allegedly “subdued.” Appellant then (on page 3 of his brief) alleges that Officer Weaver’s testimony was “distorted” by Defendant/Appellees when Officer Weaver opined that Vance did nothing wrong to cause the accident and identifies the Hollandale Fire Chief as someone with allegedly “more

knowledge.” However, this person was never deposed and in fact, never identified by the Plaintiffs as “a person with knowledge” when such a question was posed in the Defendants’ discovery requests to the Plaintiffs. (Such information is not within the Record). While intriguing, the primary example of this speculation and conjecture is in the Appellant’s primary argument where he entitles his argument, “A Case of Bewilderment” and cites to a Sherlock Holmes story. It is this type of unfounded and unsupported “evidence” which the Appellants rely upon to attempt to establish negligence and which the Circuit Court of Washington County declined to accept. A final example of this wild speculation is the Appellants’ attempts to offer testimony and opinion, as an accident reconstructionist, on pages 7 through 10 of their brief, where an analysis is made as to the surroundings of the accident scene and the impact the speed of the vehicles prior to the impact had on the accident and causation. Important to note is that the only expert accident reconstructionist in this case is Officer Weaver, whose testimony is discussed in more detail below.

II. INABILITY TO REBUT THE TESTIMONY OF OFFICER DENNIS WEAVER

After extensive discovery, it was revealed that there were no independent witnesses to the accident and that the Prewitt Plaintiffs had no proof to dispute Jimmy Vance’s version of how the accident happened. Specifically, Frances Prewitt testified in her deposition that she had absolutely no recollection of the accident (Depo of Prewitt Supplement Record 41). Jimmy Vance testified in his deposition that he was traveling in the northbound lane at a speed below the posted speed limit when he observed the Prewitt vehicle traveling in the southbound lane (Vance depo Supplement Record 161 and 164). Vance witnessed Ronnie Pettit rear end the Prewitt vehicle. Thereafter, Vance observed the Prewitt vehicle spinning out of control, veering into his northbound lane. In an effort to avoid colliding with the Prewitt vehicle, Vance attempted to pull onto the shoulder of the

road adjacent to his lane; however, he was unable to avoid a collision with the Prewitt vehicle (Vance depo at Supplement Record 173). Prewitt did not designate any experts to refute Vance's version of the accident.

However, after the Defendants filed their Motion for Summary Judgment, Plaintiffs sought additional time from the Court to postpone the hearing on the Defendants' Summary Judgment Motion, so it could take the deposition of Officer Dennis Weaver, of the Mississippi Department of Public Safety. The Court, out of an abundance of caution and although the request came one (1) day prior to the hearing on the summary judgment motion, granted the request so the deposition could be taken.

Dennis Weaver, the highway patrolman who investigated the accident and who is an accident reconstructionist gave the following testimony and opinion as to the subject accident: The Prewitt vehicle was traveling south on Highway 61. (Weaver depo at Supplement Record 191). Mr. Petit was traveling south on Highway 61 behind the Prewitt vehicle (Weaver depo at Supplement Record 191). Mr. Vance was traveling north on Highway 61 (Weaver depo at Supplement Record 191). Mr. Petit ran into the rear of the Prewitt vehicle and pushed the Prewitt vehicle towards the shoulder of the road (Weaver depo at Supplement Record 191). The Prewitt vehicle went across the southbound lane into the northbound lane, and as it was heading into the northbound lane, it was rotating. At this point, Mr. Vance [who was traveling on the same highway but in the oncoming direction] cut his wheel to the right, in an attempt to move onto the shoulder of the road adjacent to his lane (Vance depo at Supplement Record 173). When the Prewitt vehicle reached the east shoulder, it collided with the Vance vehicle (Weaver depo at Supplement Record 194). Specifically

as to opinions regarding the cause of the subject accident and the alleged negligence of Mr. Vance,

Officer Weaver testified as follows:

Q. Based upon your understanding of the accident report, accident, conversations, your investigation, what if anything did Mr. Jimmy Vance do to cause this incident?

A. **Nothing, I couldn't find anything that he did that contributed to the collision.**

Q. Did Mr. Vance break any laws in his operation of his vehicle that you were able to determine?

A. **Not that I could find.**

Q. Did Mr. Vance contribute, cause or do anything to cause the damage to Mr. Prewitt's vehicle, or to cause this accident, that we are here for today?

(Rephrased - Did Mr. Vance in his actions do anything to cause the collision that we are here for today?)

A. **Not that I found.**

(Weaver depo at Supplement Record 213-223)

Q. Mr. Nick asked you some questions about failure to yield the right of way. Did you find any evidence, in your experience as [an] accident reconstructionist, do you have any evidence to suggest that Mr. Vance failed to yield the right of way to either of these two vehicles involved in this accident?

A. **No.**

(Weaver depo at Supplement Record 224)

Q. A couple of questions in regards to what you were questioned earlier. This was questions about if you reviewed Mr. Vance's testimony about clockwise versus counter-clockwise. Do you remember the question, Officer Weaver?

A. **Yes.**

Q. Does that affect your opinion in how this accident took place?

A. **No.**

Q. Or what caused this accident to take place?

A. **No.**

(Weaver depo at Supplement Record 227)

Defendants' Motion for Summary Judgment was granted, in large part, due to the inability of the Plaintiffs to rebut this clear and uncontradicted testimony as to the cause of the accident. The Court held as such in the Order granting the Defendant's Motion for Summary Judgment (Record

p. 65) The Court found, on paragraph 10 of the Order Granting Defendants' Motion for Summary Judgment, that "[t]he failure of the Plaintiffs to rebut Office Weaver's testimony is alone, sufficient grounds to grant summary judgment to the Defendants." (Record p. 67).

Appellees propose that the testimony of Officer Weaver is clear in that Defendant Vance did nothing to cause the automobile accident which is the subject of this lawsuit. (See testimony above.) In fact, Officer Weaver testified that the cause of this accident was the negligence of another vehicle involved in this automobile accident.

Q. Do you know why those two vehicles [Pettit and Prewitt] collided?

A. Mr. Pettit failed to yield the right of way to the Prewitt vehicle by following too close at some point, along the highway.

Q. Colliding with the Prewitt vehicle.

A. Right.

Q. That collision, I assume. . . forced the Prewitt vehicle to be knocked. . . out of control?

A. Yes.

(Weaver depo at Supplement Record 221)



CONCLUSION

The Appellants claims of negligence and failure to keep a proper lookout fail as they have not nor cannot offer any specific and/or credible evidence of any specific act of negligence on the part of Jimmy W. Vance and/or his employer, Torrey Wood and Son, Inc. Plaintiff Vance's deposition testimony clearly shows that she does not remember anything that happened on the date of the accident nor any specifics of the actual accident. Plaintiff Crittenden was not even present at the accident scene. Although numerous allegations of negligence and failure to keep a proper lookout were made, all the evidence presented to the Court establishes to opposite result. As Officer Dennis Weaver with the MHP opined, Jimmy W. Vance did nothing to cause and/or contribute to the subject accident and did everything he could to avoid the accident. As the Plaintiffs cannot

establish any specific act of negligence, as the Plaintiffs cannot rebut the testimony of Officer Weaver nor Jimmy W. Vance, and as the trial court found, since there are no genuine issues of material fact for trial, summary judgment is proper and this Court should uphold that finding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Arnold U. Luciano, Attorney for Appellees., do hereby certify that I have this date mailed, postage prepaid, a true and correct copy of the above and foregoing Appellee's Brief to Stephen Nick, attorney for Appellants, at his usual mailing address of Post Office Box 1195, Greenville, Mississippi 38702-1195 and to Honorable Richard Smith, Washington County Circuit Court Judge, at his usual mailing address of Post Office Box 1953, Greenwood, Mississippi 38935-1953.

THIS, the 17th day of March, 2008.


Arnold U. Luciano