

COPY

IN THE SUPREME COURT OF MISSISSIPPI

FRANCES JONES PREWITT

APPELLANT

VS.

NO. 2007-CA-00680

JIMMY W. VANCE

APPELLEE

APPELLANT'S BRIEF

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

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

Frances Jones Prewitt

Elaine Prewitt Crittenden

Jimmy W. Vance

Torrey Wood & Son, Inc.

Stephen Nick, attorney for the Appellants

Arnold Luciano, attorney for the Appellees



Stephen Nick

TABLE OF AUTHORITIES

Amendment VII of the United States Constitution	1.
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STATEMENT OF THE CASE

This suit is a claim alleging Jimmy Vance acting in a negligent manner caused the death of R. C. "Bud" Prewitt and certain serious injuries to his wife, Frances Prewitt, on August 29, 2002.

The plaintiffs are Frances Prewitt and her daughter, Elaine Crittenden. The defendants are Jimmy Vance and his employer, Torrey Wood & Son, Inc.

The plaintiffs alleged that Jimmy Vance failed "to keep a proper lookout" in the operation of his motor vehicle, further, he failed "to take the last clear chance" to avoid injury and death resulting in the claim for damages filed herein by the plaintiffs. The plaintiffs allege that by his conduct he breached a duty owed to the Prewitts to safely operate his vehicle on the highways of the State of Mississippi.

The defendants filed a motion for summary judgment; same was granted by the Circuit Court of Washington County. The plaintiffs have filed their appeal to the Mississippi Supreme Court citing error by the Circuit Court.

ISSUE

The appellants contend that the Order granting summary judgment pursuant to Rule 56 of the Mississippi Rules of Civil Procedure is reversible error, further, the matter should be reversed and remanded to the Circuit Court of Washington County to be tried by jury pursuant to the laws of the State of Mississippi.

- A. Did the defendant Jimmy Vance, fail "to keep a proper lookout" during the operation of his motor vehicle on the highways of the State of Mississippi?
- B. Did Jimmy Vance fail "to take the last clear chance" to avoid injury and death while operating his motor vehicle on the highways of the State of Mississippi?
- C. Was Jimmy Vance operating his vehicle on August 29, 2002 at speeds in excess of the posted speed limits as provided by the laws of the State of Mississippi?

SUMMARY OF ARGUMENT

The plaintiffs submit that Jimmy Vance operated his motor vehicle in a negligent manner on the highways of the State of Mississippi inasmuch as he failed to keep a proper lookout. It was his duty to see that which is open and apparent, to take notice of danger and to be on alert to avoid a collision with the Prewitts' stationwagon. It, further, was his duty to take proper steps to avoid a collision with the Prewitts' station wagon, that is he had a duty to take the last clear chance to avoid death and injury. That his failure to comply with the duties owed by him to the Prewitts were the proximate cause of the death of R. C. "Bud" Prewitt and the injuries suffered by Frances Prewitt.

The Circuit Court of Washington County misapprehended the law wherein he incorrectly granted the defendants motion for summary judgment, thus, plaintiffs submit said judgment should be reversed and remanded for a trial by jury.

STATEMENT OF THE LAW

Amendment VII. Civil Trials of the United States Constitution provides:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Art. 3 §31. Trial by jury of the Mississippi Constitution provides:

The right of trial by jury remain inviolate, but the legislature may, by enactment, provide that in all civil suits tried in the circuit and chancery court, nine or more jurors may agree on the verdict and return it as the verdict of the jury.

The defendants filed a Motion for Summary Judgment pursuant to MRCP Rule 56 alleging that there are no genuine material issues of fact.

In Tucker v. Hinds County, 558 So.2d 869, 872 the Court stated:

"The trial court must review carefully all of the evidentiary matters before it—admissions in pleadings, answers to interrogatories, depositions, affidavits, etc. The evidence must be reviewed in the light most favorable to the party against whom the motion has been made."

"In addition, the burden of demonstrating that no genuine issue of fact exists is on the moving party. That is, the non-movant should be given the benefit of every reasonable doubt."

In Smith v. Sanders, 485 So. 2d 1051, 1054:

Frances Prewitt, who was injured in the automobile accident, wherein her husband was killed has no memory of the accident. The other participants, Jimmy Vance and Ronnie Pettit gave recorded statements subsequent to the accident. After suit was filed the defendants, Jimmy Vance and his employer, Torrey Wood & Son, Inc., took the depositions of Frances Prewitt and her daughter, Elaine Crittenden, who was not a witness to the accident and the plaintiffs' counsel took the deposition of Jimmy Vance and the employer's representative, Robert Nunnery. The depositions were taken on July 6, 2006. The defendants filed their motion for summary judgment on July 19, 2006.

The Court's Order granting the summary judgment is fraught with error. Essentially, the Court's Order finds there is no material fact in dispute, notwithstanding, the glaring material facts that are present.

First, the Court finds that Vance testified that after the collision he did everything he could to avoid the collision. The following is Vance's account of the collision as stated to Denise Luna of Allstate on November 20, 2002. (Clerk's papers, Vol. I, pages 107-110)

A. Basically what happened, the other pickup hit the Ford station wagon, in the rear, spinning it around it, or spinning it sideways in the highway, which sent it into my lane.

Vance does not express any sense that he did everything to avoid the accident.

Contrast Vance's statement with that of Ronnie Pettit. (Clerk's papers, Vol. I, page 120 on November 16, 2002)

A. Well, I can kind of attempt to, I was driving down the road heading south, and if I recall correctly there was signs something like around 52 miles to Interstate 20. Which I was trying to get to. And I looked at my speedometer, and apparently, I, well, the last time I saw it I was going about 57 miles an hour, maybe 58 miles an hour. And I'm driving down the road, and I'm going around this corner, and the next thing I know I'm on top of a vehicle, driving over it. It just kind of like happened. That's--you know, I mean, I remember seeing the white truck, but, I'm not sure, because it all kind of happened, and you know--

I cite these statements to make the point shortly after the accident each made a statement that I submit indicates that Pettit was shocked and surprised, yet, Vance is subdued. Obviously, neither man wanted this to happen. Their contemporaneous comments offer insight into the state of mind of each. As you will learn Vance during his deposition adamantly disagrees with Officer Weaver's account of the rotation of the Prewitt vehicle. I submit defense counsel realized this difference spoiled their summary judgment, thus, counsel accuses the plaintiffs of acting in bad faith for requesting permission to take the deposition of Dennis Weaver. See: (page 4 of the Oral Argument of March 5, 2007.)

Second, the Court finds that Officer Weaver concluded Vance did nothing to cause the accident. I submit such is a distortion of Weaver's testimony. It is important to note that Officer Weaver arrived to investigate the accident. Obviously, he did not see the accident, further, he would not be in a position to ascertain the contribution of the shed fire and the distraction it caused. I submit the Hollandale Fire Chief, Mitchell Baugh, would be more able to elaborate on this point. Further, this fact is a jury issue and a jury would be in a better position to assess the accident and what contributed to same.

A material point that is disputed is the rotation of the Prewitt vehicle after same was struck by the Pettit vehicle before same was hit by the Vance vehicle. Officer weaver describes how the Prewitt vehicle rotated 360 degrees before same was struck on the driver's side, killing Bud Prewitt, by Jimmy Vance. Yet, Vance adamantly disputes this finding contending that the Prewitt vehicle rotated, only, 90 degrees, before he struck the Prewitt vehicle. (Clerk's papers, Vol. II, pages, 195, 196).

Q. So he disagrees with you because you indicate the car turned counter-clockwise?

A. It turned counter-clockwise a lot more than 90 degrees.

Q. Was there any evidence, at that point, to support Mr. Vance's assertion that it turned clockwise, that you recall seeing or--

A. When they collided on the shoulder, the Prewitt car was probably 90 degrees with his vehicle. But it had already rotated, it had already rotated 360 degrees, and a little more to get him back to 90.

I would suggest that it is clear that Vance did not see the collision involving the Prewitt vehicle and the Pettit vehicle, otherwise, he would be able to accurately describe the rotation that Officer Weaver says occurred after Pettit hit the Prewitt vehicle in the rear causing same to rotate.

This case presents a classic example of the companion principles of law that require the operator of a motor vehicle to "keep a proper lookout" and take the "last clear chance" to avoid injury and or death on the highways of the State of Mississippi.

On Thursday, August 29, 2002, Frances J. Prewitt and R. C. "Bud" Prewitt, husband and wife, were in an automobile accident. Bud was 72 years of age and Frances was 67 years of age. Fortunately or unfortunately, depending on your point of view, Frances has no memory of the accident.

The plaintiffs are Frances and her daughter, Elaine Crittenden. The defendants are Jimmy Vance and his employer, Torrey Wood & Son, Inc. Jimmy Vance is the farm manger for the defendant, Torrey Wood and Son, Inc.

After taking the depositions, the defendants quickly filed a motion for summary judgment, hoping to foreclose any opportunity by the plaintiffs to develop the evidence of the defendants negligence in this matter.

The following is S/Sgt. Dennis Weaver's account of the accident.

This collision occurred when the 1992 Chevrolet truck, driven by Ronnie Pettit, struck the 1992 Ford car, driven by Rufus Prewitt, in the left rear with the front of the truck. This caused the car to rotate counter clockwise and cross to the north bound shoulder where the car, facing west, was struck in the driver side by the 2000 Chevrolet truck, driven by Jimmy Vance. The car rotated counter clockwise coming to rest on the north shoulder facing south. The 2000 Chevrolet truck came to rest off the road near the area of impact with the car facing east. The 1992 Chevrolet continued south running off the west side of the road and over turned. The 1992 Chevrolet came to rest on its driver side facing north.

Neither Vance nor Pettit were injured. The report does not include mention of the shed fire in the cotton field to the west of the accident scene. As you will see the fire is the clue to solving the cause of the accident.

The defendants "urgency" to close the "factual" door by its motion for summary judgment denied the plaintiffs their right to a jury trial wherein they would establish the material facts that will prove the defendants' liability regarding the death of Bud Prewitt and the injuries to Frances Prewitt.

As stated, this case presents a classic example of the companion principles of law that require the operator of a motor vehicle to "keep a proper lookout" and take the "last clear chance" to avoid injury. Jimmy Vance acknowledges certain facts that indicate that he was negligent inasmuch as he did not take the "last clear chance" to avoid injury. Vance states that he was traveling 50 mph when he saw the collision of the Pettit vehicle and the Prewitt vehicle. Officer Dennis Weaver advises that Vance could have stopped his vehicle under those circumstances, thus, he could have taken the "last clear chance" to avoid injury and death in this matter. (Clerk's papers, Vol. II, page 206)

Q. So I want to know with that 300 feet to work with, if he had attempted to stop, at 50 miles an hour, how far would he have traveled?

A. He should have been able to stop in 300 feet.

"it is familiar Mississippi law that the operator of a motor vehicle on its highways has a duty to exercise ordinary care toward other persons by keeping his vehicle on the highway in its own lane of traffic and under proper control and must maintain an adequate lookout for the normal risks attendant to operation of a motor vehicle on a public highway.....

Otherwise stated, if plaintiffs put on evidence of circumstances tending to show that an accident ordinarily would not have happened without negligence on the part of the driver, the finder of fact may infer from that circumstantial evidence that the driver was negligent.

Williams v. Rambauer, 325 F.S. 716, 720

"Last clear chance" doctrine is that negligence of party having the last opportunity of avoiding accident is the sole proximate cause of resulting injury, and is not excused by negligence of anyone else."

Malfetano v. United Elec. Rep.Co. 91 A. 491, 498

ARGUMENT

"A CASE OF BEWILDERMENT"

Summary judgment is , only, appropriate, if it is demonstrated that there is no genuine issue of material fact. However, what is baffling to me, this case is riddled with material facts that support a judgment in favor of the plaintiffs.

Discerning the facts in this matter requires a careful analysis of the accident. Judge L. T. Senter, United States District Judge, a former Mississippi Circuit Court Judge, stated the following regarding negligence claims.

"Deciding the merits of a claim based on allegations of negligence requires a fact - intensive inquiry." See, the Friday edition of the Clarion Ledger, November 17, 2006. (Clerk's Papers, Vol. I page 92)

Upon receipt of the Mississippi Uniform Accident Report prepared by S/Sgt. Dennis Weaver. I read same hoping to resolve my questions regarding the accident. The report left me perplexed, consequently, I drove to Hollandale to inspect the accident scene. (Clerk's Papers Vol. I pages 93-105)

Once there, I noticed a motel located not far from the accident scene. I drove over to make inquiry. I met with the desk clerk and asked if he had any knowledge of the accident of August 29, 2002. He advised that he did not see the accident, but, advised that a fire was in progress near the scene on the day of the accident.

I, then went to Hollandale to the Fire Department and interviewed Mitchell Raugh, the Fire Chief. He confirmed the incident of the fire. (Clerk's Papers Vol. I page 106)

Subsequently, I informed Mississippi Farm Bureau of the incident of the fire, to no avail. They showed no interest in the incident of the fire, notwithstanding, my belief that same was instrumental to the accident that caused the death of Bud Prewitt and the injuries sustained by his wife, Frances Prewitt.

In November of 2002, two months after the accident, Petitt and Vance gave recorded statements regarding their version of the accident. (Clerk's papers, Vol. I pages 107-133) I found myself puzzled as if something was left unsaid.

I was reminded of the Sherlock Holmes short story, Silver Blaze, penned by Sir Arthur Conan Doyle. Holmes is asked to solve the murder of John Straker and the theft of the racehorse, Silver Blaze. (Clerk's papers, Vol. I pages 134-147) Just as Holmes observes that the dog did not bark because he must have known the intruder, I submit the incident of the fire is a clue similar to the incident of the dog that didn't bark in understanding the dynamics of this vehicle accident.

It is important to note what Vance and Petitt observe about the fire.

Vance speaking: Page 6 of his recorded statement.

"Actually, there was a fire truck and rescue there probably within ten minutes, because they were at a fire, very near."

In his deposition of July 6, 2006, Vance said the following regarding the shed fire. (Clerk's papers, Vol. II pages 148-183)

Vance speaking:

Q. Okay. The general area I'm to'd for a lack of a better term I'm going to use the word "shed", was there a shed to your left out in the field that you were aware of?

A. Yes.

Q. Describe that shed for me please.

A. Well, I've never really paid that much close attention to it but it was an old pole type shed and it was dilapidated and falling down.

Q. Pole type, what do you mean by that term?

A. You put poles in the ground and you put joists across it and add a roof to it and you've got an open shed that's under the roof.

I submit for someone to have not paid much attention to the shed, he gives a very factual description of the shed. I submit that on the day of the fire he was intensely interested to the incident of the shed fire and that said fire was a distraction and consequently he failed to keep a proper lookout, thus, he was negligent and his negligence caused the the death of Bud Prewitt and the injuries to Frances Prewitt.

On to his description of the fire.

Q. On the day of the accident I'm told the shed was burning. Do you recall that?

A. I. do.

Q. Describe that for me.

A. It was just ashed where they had started trying to burn some trash around it and they caught the shed on fire and the fire truck was there and they were just standing back watching it burn because of the shed was of no value so they decided to let it burn down.

Vance was making these observations of the shed fire, while, he is required to keep a proper lookout on the road in front of him just before he crashes into the Prewitts' killing Bud Prewitt.

Understanding the dynamics of this accident, the shed fire as described by Jimmy Vance is crucial to solving the cause of the accident.

Ronnie Petitt stated the following about the fire. (Clerk's papers, Vol. I. pages 120, 121)

A. Going around ~~the~~ corner, I don't know if there was a wreck already, or if I just didn't see the this vehicle and ran up on it. I mean, I went back later to the accident and looked, and it kind of appears, which, I don't know because I really couldn't say, there's a little road right there, right in the curve, right at the very end of the curve, you know, it has a group of trees right there, which you can't see past.

A. You can see down Highway 61 every where, but until you get ready to go around this curve, probably the only curve it has. Because it's on both sides of it, but it has that patch of trees where you can't see. But it there's a little road right there.

Obviously, Petitt did not see the fire as he approached, however, he confirms that Vance's view coming from the other direction was unobstructed. Let us see what each says about the other's vehicle.

Petitt's statement:

And I'm driving over it. It just kind of like happened. That's -- you know, I mean, I remember seeing the white truck, but, I'm not sure, because it all kind of happened, and you know--

Vance's version: (Clerk's papers Vol. I. pages 109, 110)

Basically what happened, the other pickup hit the Ford station wagon, in the rear, spinning it around it, or spinning it sideways in the highway, which sent it into my lane.

Q. Did you see the impact between the other pickup and the car?

A. Well, I saw the pickup hit the car in the rear, yes.

Vance stated the following in his deposition testimony:

(Clerks' papers, Vol. II, pages 173, 174)

"Mr. Petitt came in behind them at a rather fast speed and hit them in the rear knocking their car out of control across my lane onto the shoulder of the highway where I had already gotten off onto the shoulder trying to miss them and they hit me on the shoulder of the highway.

As you can see Vance admits that he left the roadway and struck the Prewitts on the shoulder of the road to the right of his lane of travel.

Further, he accuses Petitt of traveling at a fast rate of speed, yet, when asked about his speed, he denies speeding, notwithstanding, having been cited for speeding at least three times by the Mississippi Highway Patrol.

When asked to state the distance between his vehicle and the collision between the Prewitt vehicle and the Petitt vehicle, he stated a distance of 300 feet. (Clerk's papers, Vol. II, page 174)

It appears Petitt saw the white truck contemporaneous with hitting Prewitt vehicle. Yet, Vance says the collision was the distance of a the length of a football field. I submit that Vance was closer and going faster than than he is willing to admit. Obviously he is protecting his own liability and the liability of his employer.

Let us examine what each says about the speed of his vehicle.

Vance: (Clerk's papers, Vol. 1, page 113)

Q. What speed were you travelling at the time that this accident happened?

A. About 50 miles an hour.

Petitt: (Clerk's papers, Vol.1,page 120)

, the last time I saw it I was going about 57 miles an hour, maybe 58 miles an hour.

However, Vance says Petitt came in behind the Prewitts at a fast rate of speed. It is important to note when evaluating Vance's testimony regarding speed of Petitt's truck, Vance states that he was length of a football field (300 feet) when he says he saw the collision between petitt and the Prewitts. As you will learn later that Vance cannot describe accurately the rotation of the Prewitt vehicle after same was hit by Petitt, yet, he declares he saw the collision at a distance of 300 feet.

The rotation of the Prewitt vehicle after the collision with Petitt is a material fact in dispute and it is a clue that demonstrates that Vance did not see the collision as he states, thus, he must have been negligent inasmuch as he did not keep a proper lookout as required.

I ask Vance about his driving record, (Clerk's papers, Vol. II pages 164--166)

His response to that inquiry is evasive and less than forthcoming. However, he ultimately admits to three speeding citations. He is very reluctant to admit the violations that have occurred since the accident. His record reveals that he has two citations since the accident wherein he killed Bud Prewitt. I find that most disturbing and it obviously demonstrates that he has no regard for the traffic laws regarding speeding, thus, his self-serving statement that he was traveling 50 miles an hour is highly suspect. (Clerk's papers, Vol. II, page 183)

The report reveals, that Vance on two occasions was cited for speeding in 2004. On May 30, 2004 he was cited for speeding at the speed of 72mph in a 55 mph zone, the same speed zone applicable to the highway where the accident occurred. Further, he was cited for speeding in October of 2004 for speeding at the speed of 78 mph in a 65 mph zone. Obviously, Vance's speed of choice and his favorite is in excess of 70 mph. I simply submit that his assertion that he was travelling about 50 mph on the day of the accident, not true. His speed is a material fact that is in dispute.

In the short story of "Silver Blaze", Holmes observes the speed of the carriage enroute to Exeter. He states the speed of the train by his observation of the telegraph posts. The fictional statement regarding the speed of the carriage is a dramatic example of the folly of Vance's assertion that he was travelling about 50 mph at the time of the accident and he, further, is able to determine Petitt's speed at the time of the accident.

Jimmy Vance testified in his deposition that he disagreed with the findings of S/Sgt. Dennis Weaver regarding the rotation of the Prewitt vehicle after same was struck by Ronnie Petitt. Obviously, if Vance saw the collision as he claims, then, you would assume that he would be able to describe the rotation as same occurred. I submit his inability to accurately describe the rotation of ~~the~~ Prewitt vehicle is a material fact that is in disagreement that precludes a summary judgment. Further, the contribution of the shed fire as a distraction is a material fact that must be addressed with the testimony from Mitchell Raugh, Fire Chief of Hollandale, Mississippi.

Vance speaking: (Clerk's papers, Vol. II, page 178)

A. He says when Mr. Petitt hit their car in the rear Mr. Prewitt's car it turned couner clockwise. It did not. It turned clockwise 90 degrees.

Q. Turned clockwise and then did what?

A. And came down the highway scooting sideways.

Vance is adamant in his assertion that the car turned clockwise 90 degrees. He is simply wrong in his assertion and is in direct conflict with S/Sgt. Weaver findings. (Clerk's papers, Vol. II, pages 195-216)

S/Sgt/ Weaver in his findings as testified to in the foregoing. I have attempted to isolate parts that describe the accident, but, I suggest that you read the testimony as found in the record excerpts to appreciate the rotation of the accident as determined by S/Sgt. Weaver.

Sgt. Weaver is puzzled to Vance's assertion that the car rotated clockwise. Further, he states the 90 degrees asserted by Vance could be the appearance of the Prewitt vehicle as same is sliding toward the shoulder of the road where it was hit by the Vance vehicle.

Vance's inaccurate description of the accident rotation as the Prewitt vehicle was struck by the Petitt vehicle can only signify one thing. He did not see ~~the~~ initial collision as he asserts. He only saw the vehicle after the collision, if he did not see the collision as he asserts, then why not? Vance was preoccupied with watching the burning shed in the cotton field to his left as he was enroute to Sanders Seed Co.

Further, once he focused his attention to the road ahead an accident had occurred and he was travelling too fast, probably in excess of 70mph, to take the last clear chance to avoid injury and death. He violated the duty owed to the Prewitts to keep a proper lookout and maintain a safe speed to be in position to take the "last clear chance" required of him to avoid death and injury.

Vance's powers of observation are remarkable. He was able to watch a shed fire, operate his truck observe the crew as they watched the fire, watch the highway ahead, observe Petitt's vehicle, note his speed, and maintain his "lawful" speed just before his vehicle collides with the Prewitt vehicle after he took precaution to leave his lane of travel and move to the shoulder of the road where he states the Prewitts hit his truck.

One wonders why he was not able to avoid the collision, if, he was able to observe all the above.

LEGAL AUTHORITY

Clayton v. Thompson, 475 So.2d 439

Proximate cause arises when the omission of a duty contributes to cause and injury.

Pearl River County Board of Supervisors v. South East Collections Agency, Inc.
459. So 2d 783

A fact issue is material if it tends to resolve any of the issues properly raised by the parties.

Jones v. Hatchett, 504 So. 2d 198

In an automobile accident case, instructions that defendant was not liable if he acted reasonable in attempting to avoid accident when he saw plaintiff's vehicle was operating vehicle in careful manner at safe speed when plaintiff's vehicle first came into view were properly refused as ignoring duty imposed on defendant to keep a proper lookout.

Hutcheson v. Mesenheimer, 194 S.E. 665,667, 169 VS. 511

The "last clear chance" doctrine presupposes time for effective action and is inapplicable to sudden emergencies affording no time to avoid the accident.

Mueller v. Roben, 82 N.W. 2d 98, 102

With reference to motor vehicle operation, "lookout" is that watchfulness which a prudent and reasonable person must maintain for his own safety and the safety of others, taking into consideration circumstances with which he is immediately concerned or confronted.

Shideler v. Taylor, 292 So. 2d 155

It is duty of automobile driver to see that which is in plain view, open and apparent, to take notice of obvious danger and to be on alert so as to avoid collision with objects, vehicles and others using highway.

It is duty of automobile driver to take reasonably proper steps to avoid accident on injury to persons and property after having knowledge of the danger.

Motorist confronted with sudden emergency and imminent peril, not of his own making, is only required to exercise ordinary care under stress of surrounding circumstances to avoid accident, and where he does not have sufficient time in which to determine with certainty the best course to pursue, he is not held to same coolness of judgment or degree of care as would be required of one having ample opportunity for full exercise of judgment.

CONCLUSION

As previously presented the appellants have conclusively demonstrated that the motion for summary judgment is fraught with error and the order granting same should be reversed and remanded for a full trial by jury on the issues of negligence.

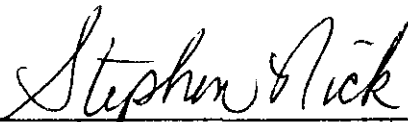
The negligent acts of the defendants is indisputable. The companion principles of the dual obligations to "keep a proper lookout" and the duty to exercise "the last clear chance" to avoid death and injury are clearly present with factual foundation, so much so, how this matter was decided by summary judgment without the appropriate fact inquiry is something that cannot be explained.

The comment found on page 67 of the Mississippi Rules of Court, 1997, is instructive, pursuant to a Rule 56 Motion for a Summary Judgment.

"A motion for summary judgment lies only when there is no genuine issue of material fact, summary judgment is not a substitute for the trial of disputed fact issues. Accordingly, the court cannot try issues of fact on a Rule 56 motion; it may only determine whether there are issues to be tried. Given this function, the court examines the affidavits or other evidence introduced on a Rule 56 motion simply to determine whether a triable issue exists, rather than for the purpose of resolving that issue. Similarly, although the summary judgment procedure is well adapted to expose sham claims and defenses, it cannot be used to deprive a litigant of a full trial of genuine fact issues."

The appellants respectfully request that the Court reverse and remand this matter for a trial on the issues of negligence present in the factual presentation before the Court.

This the 28 day of December, 2007.



Stephen Nick, attorney for the
Appellants, Frances Prewitt
and Elaine Crittenden

CERTIFICATE

I, Stephen Nick, do hereby certify that I have this day mailed a true and correct copy of the Brief and Record Excerpts, postage prepaid, to the following: Mr. Arnold Luciano Attorney at Law, Post Office Box 1209, Cleveland, Mississippi, 38732

This the 28 day of December, 2007.



Stephen Nick

IN THE SUPREME COURT OF MISSISSIPPI

FRANCES JONES PREWITT

APPELLANT

VS.

FILED
JAN 07 2008
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SUPREME COURT
COURT OF APPEALS

NO. 2007-CA-00680

JIMMY W. VANCE, ET AL

APPELLEES

CERTIFICATE

I, Stephen Nick, do hereby certify that I mailed a true and correct copy of the Brief and Record Excerpts, postage prepaid, on the 28th day of December, 2007 to Judge Richard Smith, Circuit Court Judge, Post Office Box 1953, Greenwood, Mississippi, 38935-1953.

This the 4th day of January, 2008.



Stephen Nick