IN THE SUPREME COURT OF MISSISSIPPI
CASE NO. 2008-CA-01528

CORINE HOLMES, AS ADMINISTRATRIX
OF THE ESTATE OF DERRAL HOLMES — APPELLANT

VS.

CAMPBELL PROPERTIES INC.,
T&S TUNNEL EXPRESS, and
BENJAMIN BROOKS — APPELLANTS

APPEAL FROM THE CIRCUIT COURT OF WARREN COUNTY

BRIEF OF APPELLEES
CAMPBELL PROPERTIES INC. AND T&S TUNNEL EXPRESS

Oral Argument Not Requested

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STATEMENT OF ISSUE

Whether the owner of a car wash was entitled to summary judgment with regard to premises liability claims based on a trusted employee's sudden and unforeseeable assault with a baseball bat on a long-time acquaintance, who had insulted the employee while the acquaintance was on the business premises for social purposes.

STATEMENT OF THE CASE

A. Proceedings Below.

The Complaint in this case asserts various causes of action relating to the death of the Plaintiff's decedent, Derral Holmes, after being assaulted with a baseball bat at the T&S Tunnel Express Car Wash in Vicksburg. The claims against the owner of the car wash and the assailant-employee, Benjamin Brooks, are for "failure to provide a reasonably safe premises and failure to provided adequate security" (Count I); "failure to warn" (Count II); "assault and battery" (Count II [sic]); and "negligent hiring and negligent retention" (Count III). Counts I and II are alternative ways of pleading a premises liability negligence claim. The assault and battery and negligent hiring claims are alternative theories of liability for the same incident. Complaint (Appellees' Record Excerpts, E. 1-2).

After the parties conducted discovery, the car wash owner, named as Campbell Properties, Inc. and T&S Tunnel Express in the Complaint, filed a motion for summary judgment (E.3-10). Judge Frank Vollor of the Circuit Court of Warren County conducted a hearing on the motion on August 20, 2008, and he ruled that the motion should be granted (Transcript of Hearing of August 20, 2008 [Tr.] at 30-31). The Court then entered a Final Judgment on August 22, 2008 (E. 63-64). Plaintiff filed her Notice of Appeal on August 25, 2008.

In his bench ruling (Tr. 26-31), Circuit Judge Vollor held that there was no evidence to

support any element of any premises liability claim by Plaintiff. The only aspect of the trial court's opinion with which the Appellant now takes issue is the court's treatment of the contention in the complaint that Campbell Brothers failed to train Mr. Brooks not to assault customers with a baseball bat. Appellant's Brief at 8-15. The Plaintiff would have this Court find that Derral Holmes was a business invitee and that Campbell Brothers should have trained Mr. Brooks to deal appropriately with Mr. Holmes. Supposedly, if he had been given better training, Mr. Brooks would never have hit Mr. Holmes with a baseball bat and killed him. Plaintiff's contentions are nonsense.

B. Statement of Facts.

Campbell Development Corporation and Glen Campbell own a car wash located on Pemberton Boulevard in Vicksburg. Campbell Brothers, LLC, operates the car wash under the name "T&S Tunnel Express" pursuant to a lease from the owners. Campbell Properties, Inc. is improperly sued in this action. There is no entity named "T&S Tunnel Express", according to the records of the Mississippi Secretary of State and to the knowledge of the undersigned. Campbell Brothers' Interrogatory Answer No. 8 (E. 31). The Defendant owner of the car wash shall hereinafter be referred to as "Campbell Brothers."

On October 19, 2005, the decedent, Derral Holmes, washed and vacuumed his vehicle at the car wash. After completing this business, Mr. Holmes parked his vehicle in front of the building. He exited the vehicle and approached one of the employees, Michael Smith, and asked him for a cigarette. Mr. Holmes had worked at the car wash and was a friend of Mr. Smith. Mr. Holmes frequently came to the car wash to socialize with Mr. Holmes. On this occasion, Mr. Holmes carried on a social conversation with Mr. Smith, in which Mr. Holmes said he was getting ready to go back home because he had to go to work that night. Mr. Holmes then walked away. Testimony of Michael Smith at Criminal Trial of Benjamin Brooks, March 21, 2007, Circuit Court of Warren

County, pp. 17, 20, 27 (E.38-40).

Shortly thereafter, Michael Smith came around the corner of the building and saw Mr. Holmes lying on the ground. Benjamin Brooks was leaving the scene in a hurry. Mr. Brooks and Mr. Holmes had known each other since childhood. Mr. Smith knew of no prior conflicts between Mr. Holmes and Mr. Brooks. Criminal Trial Trans. pp. 18, 19, 21, 168 (E. 41-43, 46). Benjamin Brooks testified that he was standing in the car wash office attempting to resolve a matter involving a customer's credit card, when Mr. Holmes walked by and insulted Mr. Brooks by calling him a "weak bitch." Mr. Brooks picked up a baseball bat that was sitting in the office (it had been left at the car wash by a customer) and walked outside and hit Mr. Holmes over the head with the bat. The entire incident transpired in a matter of seconds. Testimony of Benjamin Brooks at his criminal trial, Criminal Trial Trans., pp. 174-175 (E.44-45). The blow or blows caused the death of Mr. Holmes. Complaint, ¶ 7 (E.)3-10.

When Campbell Brothers began operating the car wash, Benjamin Brooks was working there, and Campbell Brothers asked the previous owners about Mr. Brooks' job performance. The prior owners said that he was one of their best employees. Campbell Brothers' Interrogatory Answer No. 23 (E. 34). Mr. Brooks went to work for Campbell Brothers and worked there for seven or eight years. Mr. Brooks was Campbell Brothers' best employee. He never caused any problem, never raised his voice and never said a curse word. Mr. Brooks never assaulted anyone prior to the incident in question. Testimony of Glen Campbell, Criminal Trial Trans. pp. 222-223 (E. 47-48).

Campbell Brothers does not know of any crimes occurring on the premises on the Pemberton Boulevard T&S Tunnel Express in the five years preceding the assault in question. Campbell Brothers has never received notice of any crime problems of any kind on the property or in the vicinity of the property. Campbell Brothers has never been advised of a need to maintain security

at the premises and never saw the need for security, given the complete absence of any violent crimes and the fact that the manager is on the premises ninety percent of the time. Campbell Brothers' Interrogatory Answer Nos. 7, 11, 15, 16 (E. 31-33).

SUMMARY OF ARGUMENT

1. Mr. Holmes was a licensee or trespasser, to whom the only duty owed by Campbell Brothers was to refrain from wilfully or wantonly injuring him.

2. There is no evidence that Campbell Brothers failed to give Mr. Brooks appropriate training or that any training would have prevented the death of Mr. Holmes.

ARGUMENT

1. Campbell Brothers' Only Duty to Derral Holmes, as a Licensee or Trespasser, Was to Refrain from Wilfully or Wantonly Injuring Him, and Campbell Brothers Did Not Breach its Duty.

This Court applies a three-step process to determine premises liability: (1) classify the status of the injured person as an invitee, licensee, or a trespasser; (2) determine the duty which was owed to the injured party, based on his status; and (3) determine whether this duty was breached by the landowner or business operator. *Leffler v. Sharp*, 891 So.2d 152, 156 (Miss. 2004). Plaintiff devotes considerable verbiage to trying to convince the Court that the decedent, Mr. Holmes, was an invitee on the car wash premises at the time of the assault. "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." *Little by Little v. Bell*, 719 So.2d 757, 760 (Miss. 1998), *quoting Hoffman v. Planters Gin Co.*, 358 So.2d 1008, 1011 (Miss.1978) (emphasis added). In contrast, "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 whereas a *trespasser* is one who enters upon another's premises without license, invitation, or other right." *Id.* A person's status can change

from invitee to licensee or trespasser during the course of his visit to the property, when he goes beyond the scope of his invitation. *Leffler*, 891 So.2d at 157. Thus, where an invitee concludes the business for which he was invited onto the premises and goes into an area not included in the invitation or uses the property for a matter in his own, personal interests. *Id.*; *Kelley v. Sportsmen's Speedway*, 80 So.2d 785, 793 (Miss. 1955).

In this case, even if Derral Holmes initially entered the T&S Tunnel premises as an invitee to wash and vacuum his car, there is no dispute that he had finished his business, had parked his car, and was socializing in the employee area near the drive through bay when the attack occurred. Plaintiff admits that Mr. Holmes had parked his vehicle before coming to get a cigarette and talk to Mr. Smith. This fact is fleshed out by the following testimony by Mr. Smith at the criminal trial, which was attached to our Motion for Summary Judgment:

Q. Did you ever see – do you know whether or not the victim, Daryl Holmes, came to the carwash that day?
A. He came to the carwash.
Q. What was he doing?
A. He was vacuuming his car.
Q. He was what?
A. Vacuuming his car and washing his car. And he came to me and asked me for a cigarette so I gave him a cigarette. So, he say, he getting ready to go back to back home because he got work that night at Ameristar. So, he left.
* * * * * * * * * * * *
Q. Do you remember what kind of car he was driving that day?
A. I think it was a Cherokee, I think.
* * * * * * * * * * * *
Q. And where was the Jeep Cherokee parked that morning of October 19th, 2005?
A. Parked on the side of T&S, in front of T&S Tunnel.
Q. Right in front of it, wasn't it?
A. Yes, sir.
Q. It wasn't parked in any of the stalls to be washed nor in line to go through the tunnel, was it?
A. No, sir.

Criminal Trial Trans., pp. 17, 20, 27 (E. 38-40).

In short, Mr. Holmes had gone beyond his initial invitation to wash and vacuum his vehicle, and he was engaged in his own business at the time of the attack. He was at a minimum on the premises " for his own convenience, pleasure or benefit" and was a mere licensee. We submit he in fact was present at the time of the attack "without license, invitation, or other right" and was therefore a trespasser.

Either way, the only duty owed to him by Campbell Brothers was to refrain from wilfully or wantonly injuring him. *Little*, 719 So.2d at 760. Willfulness and wantonness connote knowingly and intentionally doing a thing or wrongful act. *Raney v. Jennings*, 158 So.2d 715, 717 (Miss. 1963). Campbell Brothers did not knowing or intentionally harm Derral Holmes or allow him to be harmed. There is not one iota of evidence that any management employee of Campbell Brothers had any knowledge that Benjamin Brooks was going to assault Mr. Holmes, and Mr. Brooks himself testified that the assault was a spontaneous act. Consequently, Plaintiff cannot prove that Campbell Brothers breached its duty to Derral Holmes.

2. Campbell Brothers Had No Duty to Train and Supervise its Employees in the Use of a Baseball Bat.

On appeal, Ms. Holmes' only objection to the circuit court's granting of summary judgment is with regard to her supposed claim for negligent failure to train Benjamin Brooks. Ms. Holmes alleges in her Brief that Defendants did not move for summary judgment on the failure to train issue, and therefore it was left open. However, there is no separate count for failure to train. Count III of the Complaint asserts a claim denominated "negligent hiring and retention" (E. 8), which contains one sentence mentioning failure to "properly train, manage and monitor Defendant Brooks while he was employed so as to ensure the safety of those using the car wash in question." (E.9). Defendants specifically moved for summary judgment as to all counts, including Count III (E. 16). After

Plaintiff obliquely mentioned the training issue in her Memorandum in Response (E.49-56), we addressed that issue in greater detail in our Rebuttal (E.57-62). The trial court held in his bench opinion that "the court didn't find any negligent hiring or retention [Count III] from what's been presented to this Court." (Tr. 30). Irregardless, summary judgment was sought and granted as to the *entire complaint*, and this Court should at a minimum consider *de novo* whether this ruling was proper, even under a ground not specifically relied on by the trial court. *Cucos, Inc. v. McDaniel*, 938 So.2d 238, 247 (Miss. 2006).

As to the merits of the claim for failure to train, we will start with the baseball bat in question. The bat was found in a trash can by the car washing bays, from which it was retrieved and then stored in the car wash office. (E. 43). There is no evidence that the baseball bat was used as part of Defendant's business or for protection or security purposes, so as to give rise to any inference that Campbell Brothers should have "trained" its employees in the use of a baseball bat. The baseball bat was sitting in the car wash lost-and-found and was nothing more than an innocuous piece of sporting equipment left behind by a customer cleaning his or her vehicle. Other items potentially usable as a club, such as tools and pipes, are in plentiful supply at a car wash. Yet, any such item that is not inherently deadly or dangerous cannot be presumed to be a deadly weapon. *Rushing v. State*, 753 So.2d 1136, 1146 (Miss. App. 2000). For reasons that the trial court pointed out in its bench opinion (Tr. 29), Campbell Brothers had no reason to train Benjamin Brooks in the use or non-use of a baseball bat being held in the lost-and-found.

Plaintiff suggests that Defendants should have trained Mr. Brooks on how to deal with patrons. Yet, no expert affidavit was admitted to explain what sort of training Mr. Brooks should have been given in this regard, let alone how any training could have prevented a sudden assault with

a baseball bat during a personal altercation between Mr. Brooks and the decedent.[1] More importantly, there was no reason why Campbell Brothers should have given this training, since Benjamin Brooks was a model employee, who had never had any altercation with anyone in his many years of working at the car wash, and there was no history of any problems between employees and patrons at the business.

Plaintiff relies wholly on the Fifth Circuit's decision in *Foradori v. Harris*, 523 F.3d 477 (5th Cir. 2008), to support her right to a trial on the negligent training claim. Yet, *Foradori* is entirely distinguishable from this case. First of all, the Fifth Circuit's ruling was based on the fact that the plaintiff in that case was an invitee, and the Court prefaced its opinion by stating that "Mississippi courts, like those of other states, have refined general negligence principles to require an owner of a business catering to the public to maintain a reasonably safe environment ***to protect business invitees*** from foreseeable harm by employees and third persons." 523 F.3d at 486 (emphasis added). As we established above, there is no dispute that Derral Holmes was a licensee or trespasser at the time of the assault and not a business invitee.

Even under the more stringent standard applicable to an invitee, this case fails to fall under *Foradori*, because there was no substantial advance warning of the violent confrontation in this case, as occurred in *Fodadori*. The Fifth Circuit quoted with approval the following passage from the District Court decision explaining the distinction between an advance warning case and one in which there is no warning:

[T]estimony at trial indicated that the assault in ***this case did not arise "out of the***

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[1] Plaintiff filed a conclusory expert affidavit on the eve of the summary judgment hearing, which said nothing specific about training. The trial court sustained our objection to the affidavit and disallowed it on *Daubert* grounds. Tr. 26-27. Ms. Holmes has not challenged the exclusion of the affidavit in this appeal.

> ***blue," but, rather, was preceded by a period of verbal confrontation between Foradori and Al Cannon, a Captain D's employee.*** Foradori testified that this confrontation was a loud one which should have been overheard by Captain D's management personnel, and the testimony at trial indicated that restaurant chef Jeremy Shells, who was in the kitchen area, overheard the verbal confrontation in the dining area and went out to witness what he believed would be a fight. Moreover, Captain D's manager Peggy King admitted at trial that she heard the verbal exchanges between Foradori and Cannon, and she further testified that she ordered the young men to take their dispute outside. King maintained that she only felt that "horseplay" was taking place between the young men, but she conceded that she did not investigate the matter further to determine the true facts in this regard. In the court's view, the aforementioned facts create fact issues as to whether, unlike the sudden assault in *May [v. V.F.W. Post No. 2539*, 577 So.2d 372 (Miss. 1991)], Captain D's ***management either knew or, in the exercise of reasonable supervision should have known, of the confrontation which was brewing in their restaurant.***

523 F.3d at 489-490 (emphasis added).

The advance notice requirement is inherent in Restatement (Second) of Agency §213 and Restatement (Second) of Torts § 317, which Ms. Holmes cites extensively in her Brief. Comments c and d to the Restatement (Second) of Agency §213 makes this clear:

> c. The principal or master may be negligent in that he fails to use due care to give or in giving directions to the agent or servant as to the act to be done. ***Such directions may be negligently given either because they contain misstatements or because, in view of what the employer should know concerning the capacities of the one employed, they are incomplete. Likewise, the directions may be negligent because the principal does not anticipate circumstances which he should realize are likely to arise.***
>
> d. Agent dangerous. ***The principal may be negligent because he has reason to know that the servant or other agent, because of his qualities, is likely to harm others in view of the work or instrumentalities entrusted to him.*** If the dangerous quality of the agent causes harm, the principal may be liable under the rule that one initiating conduct having an undue tendency to cause harm is liable therefor. . . . (Emphasis added; citations omitted.)

Likewise, Restatement (Second) of Torts § 317, says that "A master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an

unreasonable risk of bodily harm to them, if . . . the master (i) knows or has reason to know that he has the ability to control his servant, and (ii) ***knows or should know of the necessity and opportunity for exercising such control.***" (Emphasis added.) Again, Campbell Brothers had no knowledge of any need to control the conduct of Benjamin Brooks, and it had no obligation to train him regarding conduct that it had no reason to expect. This case truly did arise "out of the blue" from Mr. Holmes muttering "weak bitch" to Mr. Brooks, followed by the assault seconds later. The trial court agreed, when it held that "there's no showing of any notice or anything else of any propensity [for violence] between these two parties. And that's the big distinguishing factor between this case and the Foradori case." (Tr. 29).

In contrast, consider the similarities between the present case and the *May v. VFW* case discussed in *Foradori* and cited by the trial court (Tr. 27). *May v. V.F.W. Post No. 2539*, 577 So.2d 372 (Miss. 1991). In *May*, the Mississippi Supreme Court affirmed a summary judgment for the defendant in a premises liability case arising from an assault by a bar employee on the plaintiff occurring at the bar in defendant's establishment. The Court was persuaded that, because "the attack or altercation happened in a quick and unexpected manner," the employer could not be held to have anticipated the attack and taken steps to prevent it. There was no history of such altercations on the premises or any warning that the assailant would act in an aggressive manner. 577 So.2d at 376. These are the facts in this case as well.

Another distinguishing feature of the instant case, as compared to *Foradori,* is that the plaintiff in *Foradori* presented expert trial testimony that the employer's training policies and procedures were inadequate and could have been designed to prevent violent confrontations between employees and patrons. 523 F.3d at 508. In contrast, Ms. Holmes has no expert testimony to show that Campbell Brothers could have prevented this incident through better training practices, and she

failed even show what training Campbell Brothers did or did not provide to Mr. Brooks. It was her burden to demonstrate these matters in order to survive summary judgment. *Albert v. Scott's Truck Plaza, Inc.*, 978 So.2d 1264, 1266 (Miss. 2008). Her failure to do so dooms her claim.

CONCLUSION

Derral Holmes, the Plaintiff's decedent, was a licensee or trespasser on the premises of T&S Tunnel Express Car Wash, when he insulted Benjamin Brooks and was suddenly and fatally struck with a baseball bat in retaliation. The duty of Campbell Brothers was to refrain from wilfully or wantonly injuring Mr. Holmes, and there is no evidence that they failed to do otherwise. Indeed, the only claim which Plaintiff is pursuing on this appeal is for negligent failure to train, without presenting any proof as to what training was necessary and how it would have prevented the incident. Mr. Brooks was a model employee, and Campbell Brothers had no reason to anticipate any violent behavior by him or any assaults on visitors to the property. As a result, the trial court correctly entered summary judgment, and this Court should affirm that decision.

Respectfully submitted,

CAMPBELL PROPERTIES INC. AND T&S TUNNEL EXPRESS

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CERTIFICATE OF SERVICE

I, Clifford C. Whitney, Attorney of record for Defendant, do hereby certify that I have this day mailed, postage prepaid, by United States Mail a true and correct copy of the above and foregoing document to the following counsel of record:

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This the 8th day of July, 2009.

CLIFFORD C. WHITNEY III