IN THE SUPREME COURT OF MISSISSIPPI

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
Appellees

REBUTTAL BRIEF OF APPELLANT

On Appeal from the Circuit Court of Warren County

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ADMINISTRATRIX OF THE ESTATE OF
DERRAL HOLMES

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LAW AND ARGUMENT

1. The trial court erred in granting summary judgment.

A. Holmes was an invitee at the time he was attacked and as such, he was owed the highest duty of care.

Campbell Properties insists that Holmes was, at best, a licensee on the premises. The trial court, however, made no finding on Holmes' status at the time of the attack. Campbell Properties' insistence that Holmes was a licensee when he was killed is based on the testimony of Michael Smith who testified that Holmes was at the car wash to wash and vacuum his car and, as he was leaving, he stopped and asked Smith for a cigarette. CP. 41. As a customer of the car wash, Holmes' visit benefited both himself and Campbell Properties and, thus, he was an invitee. *Corley v. Evans*, 835 So.2d 30, 37 (Miss. 2003) (an occupant is an invitee where the owner of the premises and the occupant receive mutual benefits).

Where an invitee remains on the premises **beyond a reasonable time** after his invitation has expired, his status may change. 65A C.J.S. Negligence § 438 (emphasis added). *See also Restatement (Second) of Torts § 332 cmt. l* (explaining that an invitee retains his invitee status until "after the expiration of a reasonable time within which to accomplish the purpose for which he is invited to enter"). In this case there was no evidence that Holmes remained on the premises an unreasonable time after vacuuming and washing his car and, thus, that his status changed from invitee to licensee. At the

very least, whether Holmes had overstayed his invitation to the point where his status changed from an invitee to a licensee was a question for the jury. *McCain v. Lehman Bros., Inc.*, 2008 WL 872431 *2 (S.D.Miss. 2008) ("Status is ordinarily a factual determination for the jury or other trier of fact)." *See also Hudson v. Courtesy Motors, Inc.*, 794 So.2d 999, 1003 (Miss. 2001); *Martin v. B.P. Exploration & Oil, Inc.*, 769 So.2d 261, 265-66 (Miss.App. 2000).

B. Campbell Properties failed to put forth a case that it wasn't liable to Plaintiff for insufficient training of its employees. At the very least, Plaintiff is entitled to go forward on this claim.

Campbell Properties attempts to persuade this Court that Holmes cannot make out a case on her claim of failure to train. The problem with this argument is that Campbell Properties failed to make it below. As set forth in Holmes' opening brief, the burden is on the party moving for summary judgment - in this case Campbell Properties - to come forth with a showing that no genuine issue of material fact exists. *Tucker v. Hinds County,* 558 So.2d 869, 872 (Miss.1990); *Albert v. Scott's Truck Plaza, Inc.*, 978 So.2d 1264, 1265 (Miss. 2008). If the movant fails to discharge the burden of showing the absence of a genuine issue concerning any material fact, summary judgment must be denied. *John v. Louisiana,* 757 F.2d 698, 708 (5th Cir. 1985).

> It is absolutely clear, however, that Rule 56 contemplates a shifting burden: the nonmovant is under no obligation to respond unless the movant discharges the initial burden of demonstrating that "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), Fed.R.C.Proc. If the moving

> party fails to discharge this burden, summary judgment must be denied-even if the nonmoving party has not responded to the motion. *See, e.g., Environmental Defense Fund v. Marsh*, 651 F.2d 983, 991 (5th Cir. 1091) ("[t]he non-moving party is not required to respond unless and until the moving party has properly supported the motion with sufficient evidence"); *Benton-Volvo-Metarie, Inc. v. Volvo Southwest, Inc.*, 479 F.2d 135, 138-39 (5th Cir. 1973) (same).

John, 757 F.2d at 708.

In this case, Campbell Properties made no showing whatsoever with respect to Holmes' claim of failure to train. While Campbell Properties argued that it was not responsible for negligently hiring Brooks, it made no similar claim regarding Plaintiff's failure to train allegation. The burden, then, never passed to Holmes to come forward with actual proof of each of the essential elements of a failure to train case.

Campbell Brothers distinguishes *Foradori v. Harris*, 523 F.3d 477 (5th Cir. Cir. 2008), on the grounds that the plaintiff in *Foradori* was an invitee. Here, Campbell Brothers argues, "there is no dispute that Derral Holmes was a licensee or trespasser at the time of the assault and not a business invitee." *Campbell Brothers' Brief at p. 9.* The trial court in this case, however, never made a finding on Holmes' status. The testimony is uncontradicted, though, that Holmes came on to the property in order to wash and vacuum his car. CP. 60. Since he came on to the property to accomplish that very thing that Campbell Brothers invited people on to their property to do, Holmes was an invitee. Even if there is an argument to be made that his status changed when, as Holmes was leaving, he asked a friend who worked on the premises for a cigarette, the question of

whether Homes' status changed from an invitee to licensee was one for the jury. Therefore, Holmes' status does not distinguish this case from *Foradori.*

Campbell Brothers also argues that the instant case differs from *Foradori* in that the assault in *Foradori* came after a period of verbal confrontation and, thus, there was an "advance warning." *Campbell Brothers' Brief at p. 10* citing *Foradori*, 523 F.3d at 480-89. But whether this was an "advance warning" case or not is of little moment when the issue is failure to train. The issue is not whether Campbell Brothers failed to train Benjamin Brooks in the seconds between his picking up the baseball bat and bringing it down on Holmes' head. The issue is whether Campbell Brothers property trained its employees how to properly treat customers they did not like. The fact that the assault happened quickly and not more slowly does not distinguish *Foradori* on the failure to train claim. What was said in *Foradori* is applicable here: all in all, the facts strongly support that "there was a general failure on the part of [Campbell Brothers] to properly supervise and train their employees at this particular franchise" and "raises questions in this court's mind as to whether [Campbell Brothers'] had adequately informed [Brooks] of the adverse consequences which would result if he behaved in a violent manner towards a customer." *Foradori*, 523 F.3d at 493 (paraphrased).

In this case, Campbell Properties had an employee who, upon allegedly being called a "weak bitch" by a customer, reacted by picking up a baseball bat and killing the customer. It may well be that Campbell Properties trained its staff but inasmuch as it

failed to set forth its case for summary judgment on this theory of liability, Campbell Brothers was not entitled to summary judgment on this claim.

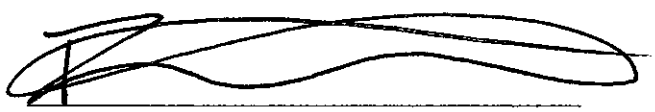
Whether Campbell Properties failed to train its employees and whether that failure to train was a cause of Holmes' death were issues for the jury to decide.

Conclusion

The burden is on the party moving for summary judgment to demonstrate that there are no genuine issues of material fact and the party is entitled to judgment as a matter of law on every claim presented. The Defendant did not meet this burden of proof with respect to Plaintiff's claim for negligent failure to train. Just as in *Foradori*, a jury could conclude that management failed to issue appropriate regulations and train its employees in dealing with its customers and that this failure contributed to Plaintiff's death. Therefore, the trial court's order granting summary judgment must be reversed.

Respectfully submitted,

CORINE HOLMES
AS ADMINISTRATRIX OF THE
ESTATE OF DERRAL HOLMES



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CERTIFICATE OF SERVICE

I, Precious T. Martin, Sr., Attorney for Appellant, certify that I have this day served a copy of Appellant's Rebuttal Brief by United States mail, first class postage prepaid, to:

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Hon. Frank G Vollor
Circuit Court Judge
P O Box 351
Vicksburg, MS 39181-0351

THIS, the 26th day of August, 2009.

Precious T. Martin, Sr.