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

BRIEF OF APPELLANT

On Appeal from the Circuit Court of Warren County

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DERRAL HOLMES

CERTIFICATE OF INTERESTED PARTIES

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 Mississippi Supreme Court and/or the Court of Appeals may evaluate possible disqualification or recusal.

Campbell Properties, Inc.
Defendant/Appellee

T&S Tunnel Express
Defendant/Appellee

Benjamin Brooks
Defendant/Appellee

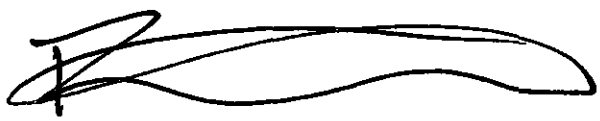
Precious T. Martin, Sr.
Trial and Appellate Attorney for Appellant

Corine Holmes
Plaintiff/Appellant

R.E. Parker, Jr.
Clifford C. Whitney, III
Trial and Appellate Attorney for Appellees

Hon. Frank G. Vollor
Circuit Court Judge

SO CERTIFIED BY ME, this the 16th day of April, 2009.



Precious T. Martin, Sr.

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STATEMENT OF THE ISSUE

The trial court erred in granting summary judgment.

STATEMENT OF THE CASE

This is a premises liability case. On October 19, 2005, Derrell Holmes was a customer at a car wash operated by the defendants. CP. 60. According to car wash employee Benjamin Brooks, Brooks was in the office of the car wash trying to resolve a matter having to do with a customer's credit card when Holmes walked by and called Brooks a "weak bitch." CP. 67. Holmes continued to walk to his car when Brooks picked up a baseball bat that had been left at the car wash by a previous customer and beat Holmes over the head. CP. 65, 67. Holmes died four days later at the University of Mississippi Medical Center.

The administratrix of Derral Holmes' estate, Corine Holmes, filed suit against Campbell Properties, T&S Tunnel Express and Benjamin Brooks in April 2007. CP. 5. An entry of default was entered against Brooks on June 8, 2007 (CP. 22) and a default judgment followed on June 14, 2007. CP. 23.

In the complaint, Corine Holmes included allegations of failure to prove a safe premises and adequate security, failure to warn, assault and battery and negligence, negligent hiring and negligent retention. (CP. 8-11). In this last count, Plaintiff alleged that Defendants not only failed to properly screen and investigate Brooks before hiring him but also that Defendants failed to "properly train, manage and monitor" Brooks while he was employed at the car wash. CP. 11, ¶ 32(b).

Campbell Properties filed a Motion for Summary Judgment arguing, among other things, that 1) as the owner of the car wash it was not responsible for Brooks' attack on Holmes as it was a criminal act outside the scope of Brooks' employment; 2) that there was no evidence that it had any knowledge of any unfitness of Brooks when it hired him and; 3) that there was no evidence it had any knowledge of Brooks' violent nature or that an atmosphere of violence existed on the premises. CP. 40. Campbell Properties insisted that it was not liable for the assault because it happened so suddenly that even had it hired security guards, those guards could not have intervened in time to prevent the assault. Thus, Campbell Properties claimed, Plaintiff could not prove causation. Campbell Properties also argued that it couldn't be liable for Holmes' murder because Brooks was a good employee (he had been given a good recommendation by the previous owner of the car wash) and there was no reason for Campbell Properties to foresee that Brooks would assault a customer. Therefore, Plaintiff had no claim for negligent hiring or retention. Campbell Properties, however, provided no proof that it had adequately trained and monitored Brooks.

The motion for summary judgment was argued on August 20, 2008. At the conclusion of argument, the trial court granted the motion for summary judgment. T. 26; RE; 4. In so doing, the court held that it would not consider the affidavit of Plaintiff's expert because it was conclusory. T. 27; RE. 5. The trial court ruled that there was no showing to indicate that Campbell Properties should have hired security personnel (T. 27;

RE. 5), that regardless of whether Holmes was an invitee or a licensee that there "is no issue of fact here under which a reasonable jury could find that the defendant was liable." T. 29; RE. 7. The court also stated that the mere fact that there was a baseball bat on the premises did not create liability on the part of the defendant (T. 29; RE. 7) and because Campbell Properties had inquired of the previous owner about Brooks as an employee, there was no case for negligent hiring. T. 30; RE. 8. The Court did not, however, make any findings concerning Campbell Properties' training and supervision of Brooks.

Final judgment was entered on August 21, 2008. CP. 218; RE. 10. It is from this judgment that Corine Holmes appeals. CP. 220.

SUMMARY OF ARGUMENT

In this premises liability case, the Plaintiff's complaint raised several theories of liability against Campbell Properties, the owner of the car wash. One of those theories was Campbell Properties' failure to train its employees. As the Fifth Circuit noted in *Foradori v. Harris,* 523 F.3d 477, 492-93 (5th Cir. 2008), when an employee feels comfortable violently assaulting a customer, this implicates the employer's level of training, supervision and discipline. In this case, Campbell Properties moved for summary judgment based on various theories of liability including vicarious liability for assault, negligent hiring and retention. However, it did not move for summary judgment on Plaintiff's failure to train its employees. The trial court nevertheless granted summary judgment on all of Plaintiff's claims. This was reversible error given that a grant of summary judgment on the failure to train theory was premature at best.

LAW AND ARGUMENT

1. The trial court erred in granting summary judgment.

Standard of review:

An appellate court applies a *de novo* standard of review on summary judgment rulings. *Moss v. Batesville Casket Co.*, 935 So.2d 393, 398 (Miss.2006). A party seeking summary judgment bears the initial burden of identifying those portions of the pleadings and discovery on file, together with any affidavits, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); M.R.C.P. 56. Once the movant carries its burden, the burden shifts to the non-movant to show that summary judgment should not be granted. *Celotex,* at 324-25; *Tucker v. Hinds County,* 558 So.2d 869, 872 (Miss.1990). The non-moving party may not rest upon mere allegations or denials in its pleadings, but must set forth specific facts showing the existence of a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 256-57, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A fact is material if it "tends to resolve any of the issues, properly raised by the parties." *Webb v. Jackson,* 583 So.2d 946, 949 (Miss.1991).

The facts are reviewed drawing all reasonable inferences in favor of the party opposing the motion. *Matagorda County v. Russel Law,* 19 F.3d 215, 217 (5th Cir.1994); *Russell v. Orr,* 700 So.2d 619, 622 (Miss.1997). "That is [the court] give[s] credence to

evidence favoring the nonmoving party as well as that evidence supporting the moving the party that is uncontradicted and unimpeached, at least to the extent that such evidence comes from disinterested witnesses." *Thomas v. Great Atlantic and Pacific Tea Co., Inc.* 233 F.3d 326, 329 (5th Cir. 2000).

In deciding whether there are any issues of material fact, the court may not make any credibility determinations or weigh any of the evidence. *Tarver v. City of Edna*, 410 F.3d 745, 753 (5th Cir. 2005); *Bazan v. Hidalgo County*, 246 F.3d 481, 492 (5th Cir. 2001); *Moore v. Willis Indep. Sch. Dist.*, 233 F.3d 871, 874 (5th Cir.2000). Because it is generally better to err on the side of denying the motion, it has been said that the circuit court must consider motions for summary judgment with a skeptical eye. *Ratliff v. Ratliff,* 500 So.2d 981, 981 (Miss.1986).

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

Mississippi applies a three-step process to determine premises liability. *Massey v. Tingle*, 867 So.2d 235, 239 (Miss.2004). The first step consists of classifying the status of the injured person as an invitee, licensee, or a trespasser. *Id.* Following this identification, the court must determine the owed to the injured party. *Id.* The third step involves determining whether this duty was breached by the landowner or business operator. *Id.* The determination of the plaintiff's status can be a jury question, but where the facts are not in dispute the classification becomes a question of law for the trial judge. *Adams v. Fred's Dollar Store of Batesville*, 497 So.2d 1097, 1100 (Miss.1986).

The trial court in this case did not decide the question of whether Derral Holmes was an invitee or a licensee; instead, it held that that Plaintiff could not establish liability under either standard. Campbell Properties argued in its Motion for Summary Judgment that Holmes was a licensee because at the time of Brooks' attack, Holmes had finished washing his car and had remained on the premises merely to visit with his friend Michael Smith. CP. 41. Campbell Properties cites the testimony of Michael Smith at Brooks' criminal trial to support this version of the facts. However, Smith's testimony is as follows:

> [Holmes was] 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 home because he got to work that night at Ameristar. So, he left.

CP. 60. Smith also testified that Holmes' vehicle was parked on the side of the car wash. CP. 62.

In this case, the facts show that Holmes was on the premises as a customer, *i.e.*, an invitee, of the car wash and, while he may have asked his friend for a cigarette, this did not change his status from that of an invitee. An occupant is an invitee where the owner of the premises and the occupant receive mutual benefits. *Corley v. Evans*, 835 So.2d 30, 37 (Miss. 2003). 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.*

It is true that a person's status on the premises can change and that an invitee who "goes beyond the bounds of his invitation ... loses the status of invitee and the rights which accompany that state." *Payne v. Rain Forest Nurseries, Inc.*, 540 So.2d 35, 38 (Miss.1989). *See also Hoffman v. Planters Gin Co., Inc.*, 358 So.2d 1008, 1011 (Miss. 1978) (the injured party may have entered the premises as an invitee, he may lose this status and acquire that of a licensee, if not a trespasser, if he exceeds the scope or purpose of the invitation by proceeding into an area not included in the invitation); *Dry v. Ford*, 238 Miss. 98, 102, 117 So.2d 456, 458 (1960) (a person can lose the status of invitee when his actions go beyond the bounds of the invitation). But here, the mere fact that Holmes asked his friend, an employee of the car wash, for a cigarette did not change his status from an invitee to a licensee. *See, e.g., Southland Corp. v. Griffith*, 633 A.2d 84, 91 (Md. 1993) (plaintiff was a business invitee when he entered a convenience store and purchased food; he remained a business invitee while he sat in the truck on the store's parking lot and consumed the food).

In this case, Campbell Properties presented no evidence that Holmes was anything other than a business invitee there to wash and vacuum his car. As an invitee, Campbell Properties owed Holmes the highest duty of care: the duty to keep its premises in a reasonably safe condition as well as to "warn of any dangerous conditions not readily apparent which the owner knew, or should have known, in the exercise of reasonable care and the duty to conduct reasonable inspections to discover dangerous conditions existing

on the premises." *Pigg v. Express Hotel Partners, LLC*, 991 So.2d 1197, 1199-1200 (Miss. 2008). It was this standard of care that Campbell Properties breached.

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.

The burden is on the party moving for summary judgment 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). Campbell Properties failed to do so with respect to Plaintiff's claim that it failed to properly train its employees. 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.

Mississippi courts 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. "Mississippi imposes on business owners 'the duty to maintain the premises in a reasonably secure or safe condition' for business patrons ...." *Am. Guar. & Liab. Ins. Co. v. 1906 Co.*, 273 F.3d 605, 613 (5th Cir.2001). To fulfill this duty, businesses must "take reasonably necessary acts to guard against the predictable risk of assaults." *Whitehead v. Food Max, Inc.*, 163 F.3d 265, 271 (5th Cir.1998). And such a duty includes the protection of patrons or invitees from the foreseeable wrongful acts of employees and third persons on the premises. *Little by Little v. Bell*, 719 So.2d 757, 760 (Miss.1998); *Steele v. Inn of Vicksburg, Inc.*, 697 So.2d 373, 377 (Miss.1997).

Moreover, an employer can be held liable for negligently training its employees. *See Irby v. Travis*, 935 So.2d 884 (Miss. 2006).

Neither Campbell Properties nor the trial court addressed Plaintiff's claim for failure to train. The viability of this theory of recovery in premises liability cases is demonstrated by the Fifth Circuit case (applying Mississippi law) of *Foradori v. Harris*, 523 F.3d 477 (5th Cir. 2008). The premises in *Foradori* was a Captain D's restaurant in Tupelo. A customer of the restaurant was badgered into a fight by Al Cannon, an older teenage restaurant employee, who was off-duty but dressed in his restaurant uniform. As Cannon and the plaintiff argued inside the restaurant, they garnered the attention of a group of spectators. *Foradori v. Harris*, 523 F.3d at 482. The restaurant manager was in the dining area at the time of the altercation. There was conflicting evidence as to whether she should have known that the escalating altercation created the risk of bodily harm to the plaintiff. The manager testified she thought it was only horseplay and ordered them to take it outside. However, the cook, who followed the parties outside, testified that it was obvious there was about to be a fight which is why he went outside – to watch it. Another employee, Garious Harris, also went outside. *Foradori*, 523 F.3d at 483. The argument continued in the parking lot. At one point, Cannon was taunting the plaintiff when Harris tackled the plaintiff from behind and struck him in the neck. The plaintiff ended up paralyzed from the shoulders down. *Id.*

The district court threw out some of the claims but allowed others to go the jury which awarded the plaintiff more $10 million. *Foradori v. Captain D 's, LLC,* 2005 WL 2585488 (N.D.Miss.); *Foradori*, 523 So.F.3d at 584-85. On appeal the Fifth Circuit

affirmed the award. The district court had thrown out the claim that Captain D's was vicariously liable for the actions of its employee because the assault by the employee was outside the employee's scope of employment. Yet the court allowed the jury to determine whether Captain D's was liable based on its negligent failure to train, supervise, and control its managers and employees. *Foradori v. Harris*, 523 F.3d at 484.

In allowing the jury to decide whether Captain D's had negligently trained its employees, the court referred to the Restatement (Second) of Agency which has been adopted by the Mississippi Supreme Court.[1] *Foradori v. Harris*, 523 F.3d at 486-87.

The Restatement (Second) of Agency § 213 states that:

> [a] person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless: (a) in giving improper or ambiguous orders or in **failing to make proper regulations;** or (b) in the employment of improper persons or instrumentalities in work involving risk or harm to others; (c) in the supervision of the activity; or (d) **in permitting, or failing to prevent, negligent or other tortious conduct by persons,** whether or not his servants or agents, upon premises or with instrumentalities under his control.

Restatement (Second) of Agency § 213 (emphasis added). More specifically, the following comment under § 213 provides as follows:

> g. Inadequate regulations. A master is negligent if he fails to use care to provide such regulations as are reasonably necessary to prevent undue risk of harm to third persons or to other servants from the conduct of those working under him. One who engages in an enterprise is under a duty to anticipate and to guard against the human

[1] *See Tillman ex rel. Migues v. Singletary*, 865 So.2d 350, 353 (Miss.2003).

traits of his employees which unless regulated are likely to harm others. He is likewise required to make such reasonable regulations as the size or complexity of his business may require.

Restatement (Second) of Agency § 123, cmt. g. *Foradori v. Harris*, 523 F.3d at 487.

Closely related to § 213 of the Restatement (Second) of Agency is the Restatement (Second) of Torts § 317

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

(a) the servant

(i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or

(ii) is using a chattel of the master, and

(b) 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.

Foradori, 523 F3d at 584.

The *Foradori* Court summarized § 317 as follows:

§ 317 provides that a master is under a duty to use reasonable care to control the actions of his servant while the servant is acting outside the scope of his employment 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 servant is on the master's premises and the master knows or has reason to know that he has the ability to control his servant, and knows or should know of the necessity and opportunity for exercising such control. An employer is under a duty to exercise reasonable care to train and supervise its employees so as to prevent the employee from harming others or from so conducting himself as to create an unreasonable risk of bodily harm to others.

Foradori, 523 F.3d at 487.

Applying the Restatements to the facts in *Foradori,* the Fifth Circuit stated,

> [T]he evidence in this case appears to establish a widespread failure among multiple Captain D's employees to behave in an appropriate manner in this case. Obviously, it is not proper behavior for a Captain D's employee such as Cannon, off-duty or not, to approach a customer on restaurant premises in a hostile manner and to encourage him to fight. The fact that Cannon apparently felt comfortable in behaving in such an improper manner on restaurant premises raises troubling questions **regarding the level of training, supervision and discipline which existed at the Captain D's franchise in question.**

Foradori, 523 F.3d at 493. All in all, the court stated, the facts strongly support "a conclusion that there was a general failure on the part of Captain D's to properly supervise and train their employees at this particular franchise" and "raises questions in this court's mind as to whether Captain D's management had adequately informed Harris of the adverse consequences which would result if he behaved in a violent manner towards a customer." *Id.*

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. This would seem to indicate a complete failure of Campbell Properties to train its staff on how to deal with customers. 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, this Court has no way of knowing what the facts are concerning this issue.

At the hearing on the Motion for Summary Judgment, Campbell Properties argued that *Foradori* was distinguishable because the manager in that case

> told his employee to go outside and fight this guy, don't do it in the store, and the Court found that was inappropriate management, that they failed to train the manager on how to handle those situations; totally different than here where there's no contention and couldn't be that somehow our management should have trained this guy not to hit somebody over the head when they got into a fight with them.

T. 24. But the Fifth Circuit in *Foradori* didn't find that liability could be based solely on the restaurant's failure to train management. There was also the fact that an employee felt that he was free to assault a customer of the business. As the Fifth Circuit stated,

> We also conclude that the district court properly denied Captain D's motion for judgment as a matter of law in respect to its negligent failure to train its managers **and employees** and inculcate in them the discipline of compliance with work rules. The district court stated:
>
> > [T]he evidence in this case appears to establish a widespread **failure among multiple Captain D's employees** to behave in an appropriate manner in this case. Obviously, it is not proper behavior for a Captain D's employee such as Cannon, off-duty or not, to approach a customer on restaurant premises in a hostile manner and to encourage him to fight. The fact that Cannon apparently felt comfortable in behaving in such an improper manner on restaurant premises raises troubling questions regarding the level of training, supervision and discipline which existed at the Captain D's franchise in question. **The fact that yet another employee-Harris-apparently felt comfortable in violently assaulting a customer on or near restaurant premises** strengthens the court's conclusions in this regard.

Foradori, 523 F.3d at 492-93 (emphasis added). This case does not involve the fault of managers (except to the extent that it may involve managers who failed to train Brooks) and/or multiple employees but it certainly involves an employee who, like the employee in *Foradori*, felt that it was ok to assault a customer on the premises. To paraphrase the *Foradori* Court, these facts raises questions as to whether Campbell Properties' management 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.

Whether Campbell Properties was negligent in failing to train Brooks and/or adequately informed Brooks of the adverse consequences of assaulting a customer is a question that was not raised on summary judgment and, thus, is an issue that Holmes should be allowed to take to the jury.

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. When reasonable minds might differ on the matter, the question of what is the proximate cause of an injury is usually one for the jury. *Dr. Pepper Bottling Co. of Miss. v. Bruner*, 245 Miss. 276, 148 So.2d 199 (1962). A defendant's conduct need not be the sole cause of plaintiff's injury. "Proximate cause arises when the omission of a duty contributes to cause an injury." *Crain v. Cleveland Lodge 1532, Order of Moose, Inc.,* 641 So.2d 1186, 1192 (Miss. 1994) (emphasis added). *See also* Restatement (Second) of Torts § 433B, Comment b (1965). And causation, even in premises liability cases, is a question of fact

for the jury. *Doe ex rel. Doe v. Wright Sec. Services, Inc.*, 950 So.2d 1076, 1085 (Miss.App. 2007).

Captain D's argued in *Foradori*, as Campbell Properties did below, that it owed no duty to protect the plaintiff from Harris's assault because it had no reason to know that Harris had any propensity for that type of conduct. The *Foradori* court held that this argument was meritless inasmuch as the plaintiff's claim was based on failure to regulate and train and not on negligent hiring. *Foradori*, 523 F.3d at 492. In this case, Campbell Properties provided evidence that it had no reason to know that Brooks was a bad employee. As in *Foradori*, this evidence may vitiate Plaintiff's claim of negligent hiring but it does not resolve Plaintiff's claim that Campbell Properties "failed to train, manage and monitor" its employees. That claim should have been allowed to go forward.

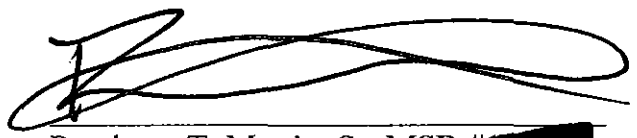
Conclusion

The burden is on the party moving for full (as opposed to partial) 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 grant of summary judgment should 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 Brief by United States mail, first class postage prepaid, to:

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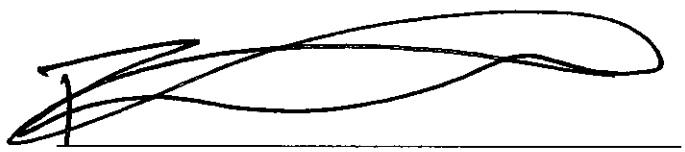
Hon. Frank G Vollor
Circuit Court Judge
P O Box 351
Vicksburg, MS 39181-0351

THIS, the 16th day of April, 2009.



Precious T. Martin, Sr.