2008-CA-00020-COAE

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CHARLES BLANTON **APPELLANT**

VS. **NO. 2009-TS-00020**

GARDNER'S SUPERMARKET D/B/A ROGERS' SUPERMARKET, FICTITOUS DEFENDANT "A" AND FICTITIOUS DEFENDANT "B" **APPELLEE**

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.

1. Charles Blanton, Appellant;
2. Gardner's Supermarket d/b/a Rogers' Supermarket, Appellant;
3. Nicholas R. Bain, Attorney for Appellants;
4. Greg R. Beard, Former Attorney for Appellants;
5. H. Richmond Culp, III, Attorney for Appellee;
6. AXA Re Property & Casualty Insurance Company, Insurer of Gardner's Supermarket d/b/a Rogers' Supermarket; and
7. Honorable Paul S. Funderburk, Trial Court Judge.

H. Richmond Culp, III

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rule 34(a)(3) of the Mississippi Rules of Appellate Procedure, Appellee requests no oral argument. The facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument. Nevertheless, if the Court desires to hear oral argument, Appellee has no objection.

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STATEMENT OF THE CASE

I. Nature of the Case

Snow and ice blanketed parts of north Mississippi, including the city of Corinth on the evening of December 22 and the morning of December 23 in 2004. As Appellant, Blanton, aptly notes, the icy accumulation was found "on the ground and other surfaces." (Appellant's Brief, p. 5). Blanton and his wife nevertheless decided to brave the icy conditions on the morning of December 23rd to purchase retail goods at the Gardner's Supermarket d/b/a Rogers' Supermarket (hereinafter "Rogers") premises in Corinth. He successfully traversed the accumulation of ice and snow on the Rogers parking lot, made purchases in the store, and upon returning to his vehicle, fell on the accumulated ice, some 48 feet from the entrance to the Rogers Supermarket. Mr. Blanton eventually filed suit in the Circuit Court of Alcorn County, Mississippi, alleging specifically that the Rogers "(a) failed to maintain the premises in a reasonable (sic) safe condition, (b) failed to warn the plaintiff of an unsafe condition, and (c) failed to exercise reasonable care." Thus, the nature of this case is a premises liability case.

II. Course of Proceedings Below

The complaint for this civil action, filed on the 18th day of December, 2007, was answered by Rogers, denying the alleged negligence and asserting applicable affirmative defenses. After the completion of a course of discovery, Rogers moved for summary judgment asserting that the same was warranted in its favor as a matter of law, there being no genuine issues of material fact regarding Blanton's fall as a result of a natural accumulation of ice and snow on a remote area of the Rogers parking lot. The Circuit

Court of Alcorn County Granted the Summary Judgment Motion on December 9, 2008. The plaintiff appealed.

III. Statement of the Facts

On the evening of the 22nd and the morning of the 23rd of December, 2004, north Mississippi experienced one of its pesky winter storms resulting in an accumulation of ice and snow blanketing roadways and parking lots, including those in Corinth, Mississippi. Rogers' Supermarket is operated at 410 Cass Street in Corinth..

Appellant, Charles Blanton and his wife, Sandra Kay Robinson, began their morning at about 4:00 a.m. on December 23rd, delivering newspapers. When Blanton and his wife had finished their morning duties of delivering papers, they began personal errands including a stop at Rogers' Supermarket for a few grocery items. Blanton testified by deposition about the weather conditions, noting that it had rained through the night and then as temperatures fell below freezing, it started to snow (See Blanton, p. 17, 19-24) (record p. 74). Blanton also testified that the Rogers' Supermarket parking lot was covered in approximately an inch to an inch and a half of snow (See Blanton, p. 20, 19-23) (record at p. 75). Mark Gardner, manager of the defendant Rogers' Supermarket, confirmed this, testifying that there was a half inch of ice covering the entire parking lot. (Gardner, p. 17, 22 – p. 18, 2) (record at p. 87). Sandra Kay Robinson likewise described the parking lot conditions as "just getting slicker" (Robinson, p. 10, 11 – 13) (record at p. 81). She also described the conditions as "kind of obvious." (Robinson p. 18, 14 – p. 19, 1) (record at p. 82). Clearly there is no dispute that ice and/or snow covered the entire parking lot of Rogers' Supermarket on the morning of December 23, 2004.

Blanton parked his van at or near a location admitted to be more than 50 feet from the grocery store. He then traversed the snow and ice-covered parking lot towards the store entrance. As he entered the store, Plaintiff said that he probably made a comment to the Rogers' employees "about them scraping ice and stuff" (Blanton, p. 25, 16-21) (record at p. 76). At this point, the employees, who were in the process of removing ice and snow, were about eighteen (18) feet from the store entrance. Plaintiff purchased items from the store and as he exited he passed the Rogers' employees again commenting "you got your work cut out, something of that nature" (Blanton, p. 28, 11-17) (record at p. 77).

As Blanton approached his parked van on his return, he slipped and fell approximately five (5) to six (6) feet behind the van (Blanton, p. 31, 17 & 18) (record at p. 78).

The location of the fall was at least forty-eight (48) feet from the entrance to the Rogers' Supermarket premises and forty-two (42) feet from the sidewalk in front of the premises. (Affidavit of Mark Gardner and accompanying photographs attached as Exhibit "H" to Appellee's Motion for Summary Judgment) (record at p. 90-91).

SUMMARY OF THE ARGUMENT

The trial court correctly granted Rogers' Motion for Summary Judgment. In Fulton v. Robinson Industries, 664 So.2d 170 (Miss. 1995) this court articulated the Mississippi law regarding whether a premises owner or operator is liable for injuries sustained when an invitee is injured by a natural condition (such as an accumulation of ice and/or snow) on a remote part of the business premises and the danger is known by

the injured party. The answer remains clearly that no liability rests with the owner or operator of the premises under those circumstances. The application of this legal standard was subsequently demonstrated in a remarkably similar case, Lawrence v. Wright, 922 So.2d 1 (Miss. App. 2004).

The uncontroverted facts in this matter, like in the Lawrence case, show that Mr. Blanton fell on the accumulation of ice and snow in a remote area of the business premises.

In this case it is also uncontroverted that the ice and snow accumulation covered the entire Rogers parking lot, not merely a portion thereof. The uncontroverted facts therefore support the trial court's granting of the Summary Judgment Motion.

Plaintiff seeks to skirt the Court's ruling with allegations, that he admits are thinly supported, namely, that the accumulation of ice at the site of Appellant's fall was the result of "defective design." However, this assertion is neither factually nor legally supported and the Judgment of the Circuit Court should be confirmed.

ARGUMENT

I. SUMMARY JUDGMENT WAS PROPERLY GRANTED

Rule 56 of the Mississippi Rules of Civil Procedure provides for entry of summary judgment where it appears from a review of the pleadings, depositions, interrogatory answers, admissions and affidavits that "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." M.R.C.P. 56. The purpose of the rule is to expedite the determination of claims without the necessity of a full trial where a party is entitled to judgment as a matter of law.

Once a motion has been made, the party against whom it was brought must set forth specific facts showing that there is a genuine issue for trial. This has been construed to mean that a party opposing the motion must be diligent in bringing forth significant probative evidence showing the existence of a genuine issue of material fact. General allegations without precisely stated facts are not sufficient Brown v. Credit Center, Inc., 444 So.2d 358 (Miss. 1983). Although immaterial facts may be controverted, only those that affect the outcome of the suit will preclude summary judgment Summers v. St. Andrews Episcopal School, 759 So.2d 1203 (Miss. 2000). Moreover, if a claim or defense of a non-moving party fails as a matter of law, it does not matter if there are disputes about non-material facts. Vickers v. First Mississippi National Bank, 458 So.2d 1055 (Miss. 1984). Application of these standards to the present case supports fully the trial court's entry of summary judgment in favor of Rogers' Supermarket.

II. THE APPLICATION OF CURRENT MISSISSIPPI PREMISES LIABILITY LAW TO THE UNCONTROVERTED FACTS IN THIS CASE WARRANTS SUMMARY JUDGMENT

A. Plaintiff's Allegations of Negligence.

The Complaint sought $1,000,000 in damages as a result of Mr. Blanton's December 23, 2004 fall, alleging certain acts of negligence on behalf of Rogers' Supermarket. In particular, the Complaint alleges generally that the defendant "(a) failed to maintain the premises in a reasonable (sic) safe condition, (b) failed to warn the plaintiff of an unsafe condition, and (c) failed to exercise reasonable care." Conspicuously absent from the complaint is any reference to liability as a result of

"defective design" of the premises, and particularly the parking lot where Plaintiff slipped and fell.

B. Controlling Case Law.

The facts of this case are indeed eerily similar to the facts of Lawrence v. Wright, 922 So.2d 1 (Miss. App. 2004). In Lawrence, the plaintiff slipped on a patch of ice after traveling from her home in Corinth, Mississippi to Burnsville, Mississippi. The previous week, north Mississippi had experienced freezing temperatures, sleet and snow. Lawrence arrived at R & W, parked her car in the first row of parking spaces, crossed the parking lot and entered the store without incident. After Mrs. Lawrence made her purchases and on the way back to her car, she slipped on a patch of ice in the parking lot and broke her leg. Id. at 2. The Mississippi Court of Appeals noted that the facts brought the Lawrence case squarely within the "natural condition" rule that was addressed in Fulton v. Robinson Industries, Inc., 664 So.2d 170, 175 (Miss. 1995).

Like the Lawrence case, there is no dispute that Appellant herein, Charles Blanton, was injured by a natural condition, not an artificial or man-made condition. Like Lawrence, Blanton slipped on ice that had accumulated in the parking lot during a winter storm. Like R & W, Rogers' Supermarket did not cause the ice to accumulate and thus, the ice in the parking lot was a natural condition. Although factually similar in many ways, it is worthy to note that the cases are not identical. Notably, on her return to her vehicle, Lawrence slipped on a "patch" of ice on a remote area of the premises, but on his return to his vehicle, Blanton slipped on ice that covered the "entire" parking lot.

Another distinction between both the Fulton case and the Lawrence case, on the one hand, and this case, on the other, is that in both Fulton and Lawrence, the plaintiffs fell and sustained injuries several days after a winter storm. In this case, however, Mr. Blanton's fall occurred on the morning of the winter storm. Mississippi law does not impose a duty on premises owners to clear obvious accumulation of naturally occurring ice and snow from remote areas of a business premise. Fulton at 175. Even if such a requirement were imposed, however, it would be only logical that the duty be imposed for conditions that remained several days after the natural accumulation, but not on the morning of the natural occurrence.

In Lawrence, the Court was faced with a summary judgment motion based on facts similar, but not identical, to the facts in this case. The granted summary judgment motion was affirmed on appeal by the Mississippi Court of Appeals. The Mississippi Court of Appeals held that the outcome of their consideration would rely on "a determination of whether Lawrence's injury occurred immediately adjacent to the entrance/exit or on a remote part of the business premises." Lawrence, 922 So.2d 1 at 3.

Lawrence fell at least twenty-five (25) feet from the designated walkway and thirty-five (35) feet from the entrance to the R & W store in Burnsville, Mississippi. Id. at 4. Faced with these facts, the Mississippi Court of Appeals said

> Here it was undisputed that Lawrence fell in the parking lot rather than on the sidewalk or covered area leading to the store's entrance. Based on *Fulton*, business owners are not required to clear naturally accumulated ice and snow from their parking lots. *Fulton*, 664 So.2d at 175. Therefore, we find that under *Fulton* the parking lot where Lawrence fell was a remote part of the business premises.

Id.

Certainly, if the location of Lawrence's fall, twenty-five (25) feet from the designated walkway and thirty-five (35) feet from the entrance to the R & W store in Burnsville, Mississippi was found to be a remote part of the premises warranting summary judgment, then the location of Blanton's fall, forty-two (42) feet from the entrance sidewalk and forty-eight (48) feet from the entrance to Rogers' Supermarket, likewise supports the trial court's grant of summary judgment in this case.

C. Defective Design

Conceding that Blanton's fall occurred on a remote part of the premises that was entirely covered with an accumulation of ice, (brief of appellant at p.9) Blanton resorts, in the face of an admittedly "thin" record (see Appellant's brief at p. 11), to articulating a new and separate basis for liability not set forth in the original complaint. Specifically, Appellant asserts that the parking lot was "designed as to effectively aid in the accumulation of water and consequently creating a man-made condition." (see Appellant's brief at p. 11). This effort to find an alternative basis for establishing a genuine issue of material fact and overcoming the summary judgment motion fails also.

From a legal standpoint, Appellant appears to assert that the allegedly defective design of the parking lot rendered Blanton's fall in the parking lot, arguably a "man-made condition." Blanton argues that there is a genuine issue of material fact as to whether the parking lot was "defective in such a way as to aid in the accumulation of snow and ice." (Appellant's brief at p.9).

To support this legal position, Appellant sets forth in great detail the "black letter conclusions" listed in Fulton v. Robinson Industries, 664 So.2d 170 (Miss. 1995)

However, the only reference in these "black letter conclusions" to a "man-made condition" is found in step 3.

> (3) if an invitee is injured by an artificial/man-made condition on an **adjacent or internal part of the business premises**, then there is a jury question as to the openness and obviousness of the danger. *Tharp v. Bunge Corp.*, 641 So.2d 20 (Miss. 1994); *Tate v. Southern Jitney Jungle*, 650 So.2d 1347 (Miss. 1995); *Baptiste v. Jitney Jungle*, 651 So.2d 1063 (Miss. 1995); *Downs v. Choo*, 656 So.2d 84 (Miss. 1995).

Id. at 175. (emphasis added.)

Clearly, this legal standard applies only to a condition existing on an "adjacent or internal part of the business premises" as opposed to a "remote" part of the business premises. Having conceded that Blanton's fall occurred on a remote area of the premises, this 3rd "black letter conclusion" from the Fulton case is wholly inapplicable. All of the cases referenced after the putative 3rd "black letter conclusion" relate to conditions on or adjacent to the premises. (*Tharp*, (doorway to grain storage facility); *Tate* (store deli); *Baptiste* (store loading dock); *Downs* (banana on grocery store floor)). The "man-made condition analysis" has no application to the case at bar, a case admitted by the plaintiff to arise from his fall on a remote location of the parking lot.

Secondly, the Appellant's effort to identify an alternative basis for liability fails because the complaint, as noted above, made no assertion of a claim based on the alleged "defective design" of the parking lot.

Third, Appellant's effort to save the civil action from summary judgment via the "defective design" theory fails because such a theory requires evidence that will satisfy the requirement of Rule 702 of the Mississippi Rules of Evidence. A query as to whether a parking lot is defectively designed based on its drainage of surface waters can

only be answered by someone with experience and expertise beyond that "of the average, randomly selected adult"; thus, it is not a query that can be answered by a layman. *See generally,* Mississippi State Highway Comm'n v. Gilich, 609 So. 2d 367, 377 (Miss. 1992). To support his "defective design theory", Blanton merely points to the deposition testimony of Mr. J.T. Trussell, a representative of Rogers, wherein he stated that water from the parking lot drained off in front of the store, and to his own affidavit stating that the parking lot facilitated the accumulation of water. Neither Mr. Trussell nor the plaintiff is an expert in the field of parking lot construction and design. It is all but axiomatic to note that surface water must drain somewhere. Whether a particular drainage pattern for standing water on the remote area of a parking lot is defectively designed is not a query that can be answered by the layman. Therefore, because the Plaintiff failed to present any expert evidence of defective design in response to Rogers' motion for summary judgment, his "defective design" theory fails.

The final reason that Plaintiff's "defective design" attack must fail is that it is of absolutely no consequence from a proximate cause analysis. As previously noted, the ice accumulation on the premises was not confined solely to the location of Blanton's unfortunate fall. In fact, Mr. Blanton testified that the Rogers' Supermarket parking lot was *covered* in approximately an inch to an inch and a half of snow (See Blanton, p. 20, 19-23 – emphasis added) (record at p. 75). Mark Gardner, the manager of Rogers' Supermarket, confirmed this, testifying that there was a half inch of ice *covering the entire parking lot*. (Gardner, p. 17, 22 – p. 18, 2 emphasis added) (record at p. 87). Additionally, as the plaintiff exited the store premises and witnessed the efforts of the Rogers' employees to remove ice from the premises, he commented "you got your work

cut out, something of that nature" (Blanton, p. 28, l. 11-17) (record at p. 77). Blanton, by his comments, was acknowledging what he cannot now deny – that the entire premises was blanketed with an accumulation of ice and/or snow, the very ice on which he concedes he fell (brief of appellant at page 9.)

Since the naturally occurring accumulation of ice was not limited to a location of an alleged design defect, Rogers submits that the fall could not have been proximately caused by a design defect, even if the existence of such a defect were proven by expert testimony. In other words, since ice had accumulated naturally on the entire parking lot premises, the absence of a putative design defect would not have negated the natural accumulation of ice at the remote location of Blanton's fall.

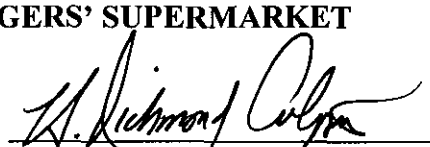
CONCLUSION

The trial court did not err in granting Rogers' Motion for Summary Judgment. Mr. Blanton has conceded that he fell on ice that accumulated on a remote location in the parking lot of the Rogers' Supermarket in Corinth, Mississippi. The only real question presented to this Court is whether Appellant's admittedly thinly supported allegation of "defective design" of the parking lot saves this case from summary judgment. Appellant's reliance on what he refers to as the third "black letter conclusion" of Fulton v. Robinson, 664 So.2d 170 (Miss. 1995) is clearly inapplicable to the uncontroverted facts in this case. The internal citations to the third "conclusion" referenced in Fulton v. Robinson underscore the inapplicability of that "black letter conclusion" to conditions found on remote areas of a business premise.

Appellant's efforts further fail because the "defective design" theory was not plead as a basis for recovery in the Complaint and even if it were somehow gleaned from the pleadings, there is no competent proof to support the alternative "defective design" theory. Whether a parking lot is defectively designed to drain surface waters in a remote area of the premises is clearly a question that is beyond the expertise of the average randomly selected adult and should only be presented properly through proof from a qualified expert pursuant to Rule 702 of the Mississippi Rules of Evidence.

Finally, and perhaps most importantly, it should be noted that whether proof of a defective design is properly before the trier of fact, (whether through lay or expert testimony), the "defective design" attack on the trial court's summary judgment must fail because even the presence of an alleged defective design would be of no consequence from a proximate cause analysis given the uncontroverted facts of this case. Since the naturally occurring accumulation of ice on the premises was not limited to the location of an alleged design defect, but covered the entire parking lot, Mr. Blanton's fall on a remote location of the parking lot could not have been proximately caused by any such design defect, even if such a defect were adequately proven. The trial court was, therefore, correct in granting summary judgment in favor of Rogers' Supermarket.

GARDNER'S SUPERMARKET D/B/A ROGERS' SUPERMARKET

BY: 

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CERTIFICATE OF SERVICE

I, H. Richmond Culp, III, one of the attorneys for the defendant, do hereby certify that I have this day served a true and correct copy of the above and foregoing Brief of Appellee on counsel of record by placing said copy in the United States Mail, postage prepaid, addressed as follows:

Honorable Paul S. Funderburk
Circuit Judge
Post Office Drawer 1100
Tupelo, Mississippi 38802

Nicholas R. Bain, Esquire
516 North Fillmore Street
Corinth, Mississippi 38834

DATED, this, the 21st day of September, 2009.

H. RICHMOND CULP, III

CERTIFICATE OF FILING

I, H. Richmond Culp, III, do hereby certify that I have served via first-class, United States mail, postage prepaid, the original and three copies of the Brief of Appellees and an electronic diskette containing same on September 21, 2009, addressed to Ms. Kathy Gillis, Clerk, Supreme Court of Mississippi, Post Office Box 249, Jackson, Mississippi 39201.

H. Richmond Culp

H. RICHMOND CULP, III