2009-CA-00653-COAR+

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I. ARGUMENT

A. Landowner liability law applies to this case[1].

Patricia Walters admits on page 5 of her brief that she was a social guest at the home of Randy Davis on the date of the accident. However, Walters argues that even though she was a social guest at the time of the accident, her status as a "licensee" and the duty owed to a licensee in premises liability cases should be ignored. In other words, Walters asserts that landowner liability law does not apply in this case because she has alleged negligence. Mississippi law does not support Walters' position. In addition, the cases cited by Randy Davis, ***Cook v. Stringer*** and ***Nunez v. Spino***, are clearly on point and require that landowner liability law be applied in this case.

As Walters clearly admits in her brief, she was a social guest at the home of Randy Davis when the accident occurred. As such, under the law she was a licensee and Randy Davis only owed her the duty not to willfully or wantonly injure her. In addition, Walters does not rebut Davis' argument that there was no evidence of willful or wanton conduct presented to the jury.

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[1] Despite Walters' admission that she was a licensee at the time she was injured, Walters contends that landowner liability law does not apply to this case because she alleged negligent entrustment. However, the Mississippi appellate courts have consistently applied landowner liability law to premises liability cases even where negligence is alleged. For example, in cases where injured plaintiffs have alleged negligence of a landowner/owner of property for lack of security or failure to provide adequate security, the Court of Appeals of Mississippi and the Supreme Court of Mississippi have consistently applied landowner liability law. ***See Gibson v. Wright***, 870 So. 2d 1250 (Miss. App. 2004)(landowner liability law applied where plaintiff alleged that defendant was **negligent** in the operation of its business due to a lack of security measures; plaintiff did not allege an actual defect in the premises); ***Thomas v. The Columbia Group, LLC***, 969 So. 2d 849 (Miss. 2007) (landowner liability law applied where plaintiff alleged **negligent** security; case did not involve an actual defect in the premises); ***Davis v. Christian Brotherhood Homes of Jackson, Mississippi, Inc.***, 957 So. 2d 390 (Miss. App. 2007)(landowner liability law applied where plaintiff alleged defendant was **negligent** for failing to provide adequate security measures). Likewise, landowner liability law applies to this case and this position if further supported by the ***Cook*** and ***Nunez*** cases discussed below.

Therefore, two crucial elements have already been established - (1) Walters was a licensee[2] at the time of the accident and (2) Randy Davis did not commit any willful or wanton conduct. Because Randy Davis did not willfully or wantonly injury Patricia Walters, he cannot be liable for her injuries.

Patricia Walters argues that the ***Cook*** and ***Nunez*** cases do not have any bearing on this case because those cases only applied landowner liability law because of alleged defects in the premises. Walters' position is wrong. (***See,*** eg fn.1 *supra*) In ***Cook***, the plaintiffs specifically alleged that the defendants were "negligent in not providing safety equipment or operational guidance to the plaintiff prior to allowing her to operate the ATV." ***Cook v. Stringer,*** 764 So. 2d 481, 483 (Miss. 2000). The plaintiffs in the ***Cook*** case did not solely allege that the defendants were liable for injuries and damages because of a defect in the premises. ***Id.*** In ***Cook***, even though negligence was alleged by the plaintiffs, the Court still held that the only duty owed to the plaintiffs, who were social guests, was not to willfully or wantonly injure them. ***Id.*** at 484. (emphasis added) The fact that Patricia Walters has alleged negligent entrustment in this case does not change the duty Randy Davis owed Patricia Walters as a licensee. Applying the duty owed here, Patricia Walters cannot recover from Randy Davis because she (1) was a social guest and licensee; and (2) he did not willfully or wantonly injure her. These facts are not disputed and as such Randy Davis is entitled to prevail on his appeal.

Walters also asserts that the ***Nunez*** case is not applicable because it involved a defect in the premises and they have alleged negligent entrustment. However, that is simply not the

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[2] As demonstrated by Randy Davis in his brief, the only duty owed a licensee by a landowner is not to willfully or

case. (***See,*** eg fn.1 *supra*) In ***Nunez*** as in ***Cook***, the plaintiff claimed that the defendant was aware that the ATV had steering and brake problems, and that the defendant failed to warn her. ***Nunez v. Spino***, 14 So.3d 82 (Miss. App. 2009)[3] In other words, Plaintiff made allegations that Defendant was liable for negligent upkeep of the ATV and in failing to warn her. Unlike ***Cook*** though, in ***Nunez***, Plaintiffs made no allegations of defects in the actual premises. The plaintiff claimed that the defendant was aware that the ATV had steering and brake problems and he failed to warn her. ***Id.*** at 83. The Mississippi Court of Appeals correctly affirmed the trial court's decision in the ***Nunez*** case by holding that Nunez was a licensee at the time of her accident and that Spino did not take any action to willfully or wantonly injure Nunez. ***Nunez v. Spino***, 14 So.3d 82 (Miss. App. 2009)(emphasis added).

Walters' assertion that the ***Cook*** and ***Nunez*** cases do not apply is without merit. In ***Cook***, there were allegations of negligence just as Walters has asserted in this case. Further, the ***Nunez*** case did not contain any allegations pertaining to alleged defects in the premises or land. In this case, the fact that Patricia Walters has alleged negligence does not change the duty owed to a licensee. The only duty owed to Walters at the time of the accident was to refrain from willfully or wantonly injuring her. Walters already admits that she was a social guest and/or licensee at the time of the accident. Furthermore, the record is completely devoid of any proof and Plaintiff does not contest that Randy Davis did not act willfully or wantonly to injure her. Walters did not even address whether sufficient evidence of

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wantonly injure her. ***Cook v. Stringer***, 764 So.2d 481 (Miss. App. 2000).

[3] Walters states in her brief that the ***Nunez*** case should not be cited by the Appellant because the case had not been released for publication. The ***Nunez*** case has now been released for publication and is cited as ***Nunez v. Spino***, 14 So.3d 82 (Miss. App. 2009).

willfulness or wantonness was presented to the jury so that issue has also been admitted by Walters. Because Walters was a licensee at the time of the accident and because there was no evidence of any willful or wanton conduct on behalf of Randy Davis, Davis was entitled to a judgment notwithstanding the verdict.

B. Randy Davis leased the premises where the accident occurred.

Patricia Walters argues unsuccessfully that Randy Davis did not even have control over the property where the accident occurred. Patricia Walters was visiting the home of Randy and Ann Davis when the accident occurred on May 8, 2005. The accident happened when the ATV overturned on land leased by Randy Davis adjacent to his house. Randy Davis is a farmer in Tippo, Mississippi. Randy Davis leases the land on which he farms. (T. 69; R.E. 34.) Although Randy Davis did not own the land behind his house where the accident occurred, Randy Davis was leasing this property for his farming operation. (T.69; R.E. 34.) The Mississippi Supreme Court has held that a lease "operates as a demise or conveit type of property" for the specified time period; it leaves the landlord with no right of possession unless the landlord expressly reserves such a right. ***Skelton v. Twin County Rural Electric Assoc.***, 611 So.2d 931 (Miss. 1992) quoting ***Hearst v. English***, 357 So.2d 132, 134 (Miss. 1978). The fact that the accident happened on the leased property behind Davis' home does not change the fact that Patricia Walters was a social guest at the time of the accident. Patricia Walters was a licensee at the time she was injured and the Trial Court correctly made such a ruling prior to trial.[4] Randy Davis leased the land behind his house where the accident

[4]If Patricia Walters was not a social guest because Randy Davis leased the property, she was a trespasser as clearly

occurred for his farming operation. Randy Davis had control over the property where the accident occurred and the fact that he does not actually own the land does not change the fact that Walters was a licensee at the time of the accident.

C. The trial court erred in instructing the jury on both negligence and willfulness/wantonness.

Patricia Walters asserts that the trial court committed harmless error in instructing the jury on both negligence and willfulness/wantonness. Walters asserts that since the jury apportioned negligence they chose the correct jury instruction and ignored the jury instructions dealing with willfulness/wantonness. However, the Trial Court had already ruled that Patricia Walters was a licensee at the time of the accident. Consequently, the jury should not have been instructed on negligence as Patricia Walters was clearly a licensee and the duty owed her was not to willfully or wantonly injure her. Clearly, the jury instructions given by the Trial Court likely misled or confused the jury as to the principles of law applicable to this case. The jury, despite the absence of any proof that Randy Davis willfully or wantonly injured Patricia Walters, found Randy Davis 20% liable. The Trial Court should have never given jury instructions with respect to negligence. The conflicting standards allowed the jury to find against Randy Davis despite the fact that there was no proof of willfulness or wantonness on the part of Randy Davis. When the Trial Court instructed the jury on negligence in addition to the legal standard with respect to a licensee, the trial court committed error. However, because there was no proof of willfulness and wantonness by Randy Davis, this Court should

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she was not on the property for the mutual benefit of the owner.

determine that judgment notwithstanding the verdict was proper and rule in favor of Randy Davis.

II. CONCLUSION

Patricia Walters was admittedly a social guest at the time of the accident. The ***Cook*** and ***Nunez*** cases applied landowner liability law even though allegations of negligence were made in those cases. Patricia Walters was a licensee at the time of the accident and, as admitted by Walters, there was no evidence of any willful or wanton conduct on behalf of Randy Davis. Randy Davis' Motion for Judgment Notwithstanding the Verdict should have been granted and, therefore, this Court should reverse the Trial Court's denial of Randy Davis' Motion for Judgment Notwithstanding the Verdict and render a verdict in favor of Randy Davis.

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CERTIFICATE OF SERVICE

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