IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2009-CA-00933

SARAH MANNING — APPELLANT

VERSUS

FRANK GRUICH, JR., d/b/a
GRUICH PHARMACY SHOPPE and
ESTATE OF FRANK GRUICH, SR. — APPELLEES

ON APPEAL FROM THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI
SECOND JUDICIAL DISTRICT
NO. A2402-04-00010

# BRIEF OF APPELLEES

**ORAL ARGUMENT NOT REQUESTED**

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## CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel certifies that the following persons or entities have an interest in the outcome of the case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. Sarah Manning, Appellant
2. Frank Gruich, Jr., Appellee
3. Honorable Lawrence P. Bourgeois, Jr.
4. Robert W. Smith, Esquire, Attorney for Appellant
5. Brett K. Williams, Esquire and Joshua W. Danos, Esquire, Attorneys for Appellees

Respectfully submitted, this the 19th day of March, 2010.

**APPELLEES, FRANK GRUICH, JR. d/b/a GRUICH PHARMACY SHOPPE and ESTATE OF FRANK GRUICH, SR.**

By: _____
Brett K. Williams (MSB#7224)
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**BRIEF OF APPELLEES, FRANK GRUICH, JR. d/b/a GRUICH PHARMACY SHOPPE and ESTATE OF FRANK GRUICH, SR.**

COME NOW, the Appellees, Frank Gruich, Jr. d/b/a Gruich Pharmacy Shoppe and the Estate of Frank Gruich, Sr., in the above styled and numbered cause by and through their attorneys of record, and file this brief, to show as follows:

## I. STATEMENT OF THE ISSUE

The Circuit Court of Harrison County, Mississippi did not commit reversible error in excluding evidence of photographic, documentary, or oral evidence of subsequent remedial changes pursuant to Mississippi Rule of Evidence 407.

## II. STATEMENT OF THE CASE

The Appellant originally filed suit in Harrison County, Mississippi for alleged injuries she sustained when she tripped over a piece of carpet glued to the entranceway of the Appellees' storefront. In 2003, "within a few weeks" of the accident, pictures were taken by counsel for Appellant showing the entranceway as it existed at the time of the alleged fall. *See Appellant's Brief*, page 5. As a result of damage from Hurricane Katrina, the Appellees removed, or had someone remove this carpet and paint the curb beneath. Counsel for Plaintiff took pictures of the area subsequent to the carpet removal. According to Appellant's Brief, these photos were taken in August 2006. *See Appellant's Record Excerpts Index (representing the photos of subsequent remedial measures were taken in August 2006).*

The discovery process went forward and ultimately culminated in the deposition of Frank Gruich, Jr. Prior to trial, the Appellees requested the trial court grant a Motion in Limine preventing the admission of any evidence referencing subsequent remedial measures pursuant to M.R.E. 407. The only substantive purpose of allowing the post-alteration pictures or any reference thereto would

have been to imply to the jury some negligence or culpable conduct in connection with the fall, a purpose specifically prohibited by the above rule. The Judge properly granted said motion.

On January 13, 2009, this matter came to be heard for trial. On January 16, 2009, a properly empaneled jury returned a unanimous verdict for the Defendants on the issue of negligence. Judgment on said verdict was entered on February 10, 2009. Plaintiff then moved for a new trial on or about February 12, 2009. That Motion was denied and this appeal ensued.

## III. SUMMARY OF THE ARGUMENT

On appeal, Appellant charges the trial court with reversible error for refusing to allow evidence of the subsequent remedial changes made to the carpet after her fall. These changes, however fall directly within the purview of M.R.E. 407. As such, evidence relating to the carpet alteration was properly excluded.

Appellant claims that, while subject to M.R.E. 407, the instant situation fits one of the enumerated exceptions to exclusion under the rule. It has been asserted by Appellant, that evidence of post-fall alterations to the carpet should have been allowed at trial for impeachment purposes, to demonstrate the condition of premises at the time of the accident, and/or to show feasibility of precautionary measures.

First, Appellant urges she should have been allowed to submit evidence of subsequent remedial measures as an impeachment tool to counter certain assertions made by Mr. Gruich. However, Appellant's attempts to color Mr. Gruich's deposition testimony and interrogatory responses as disingenuous are misguided. At no time was Mr. Gruich dishonest in his sworn responses. As such, questioning and demonstrative aids regarding the post-fall carpet alterations would not serve to impeach. Therefore evidence of this nature was properly excluded.

Next, Appellant claims the post-fall alterations served to demonstrate the condition of the

premises at the time of the accident. This argument lacks any semblance of logic. Appellant was allowed to introduce evidence of pictures admittedly taken "within a few weeks" of the fall, but before the post-fall alterations had been performed. *See RE 1 (Trial Exhibit List), RE 2 (Plaintiff's Trial Exhibit 17), and RE 3 (Plaintiff's Trial Exhibit 15).* If Appellant wished to impress upon the jury the condition of the premises at the time of the fall as she now asserts, pictures of the scene of the fall, displaying the carpet as it allegedly existed at the time of the fall should suffice. To now claim that pictures taken several years after the fall and post-alteration would better serve that purpose is nonsensical. Because the best evidence of the condition of the premises at the time of the fall was admitted into evidence, no error can be found in the trial court's refusal to admit post-alteration pictures or testimony thereon.

Appellant next asserts that evidence of the subsequent remedial measures should have been allowed because they demonstrate the "effectiveness of warning." Under the language of M.R.E. 407, the exception Appellant is attempting to annunciate is termed "feasibility of precautionary measures." Per the rule, this exception may only be utilized if feasibility is controverted by the party pursuing exclusion. M.R.E. 407. In this case, as evidenced by Defendants' Motion *in Limine*, Appellees did not contest the feasibility of removing the carpet. Likewise, it was never disputed at trial that creating a color contrast was infeasible. As such, this exception cannot be asserted.

Additionally, Appellant asserts in the appellate brief she was unable to submit evidence of the color contrast which would have, per her assertions, show "the exact warning Plaintiff advocated." *See Appellant's Brief*, page 15. Although largely ignored in Appellant's Brief, it will be assumed this is the prejudice Appellant claims resulted from the exclusion. However, a quick glance at the trial record reveals quite the contrary. Pictures of the pharmacy prior to the subsequent remedial measures, which were entered into evidence at trial, clearly demonstrate the "color

transition" Appellant now claims was lacking at trial. *See RE 3 (Plaintiff's Trial Exhibit 15).* Therefore, the trial court's refusal to admit evidence of the subsequent remedial measures did not prevent Appellant from submitting to the jury "the exact warning Plaintiff advocated." As such, any alleged error was harmless.

Finally, despite Appellant's assertions to the contrary and over objection, she was allowed to introduce altered photographs depicting the storefront after the carpet had been removed. *See RE 4, 5, and 6 (Plaintiff's Trial Exhibits 20, 21, and 22).* Therefore, any allegations of error for refusal to permit evidence of the subsequent remedial measures are utterly lacking. In short, Appellant was indeed allowed to introduce evidence of the type she now claims was refused. Because Appellant was able to introduce such evidence, an appeal on the grounds promoted cannot survive.

## IV. ARGUMENT

### A. Standard of Review

As stated above, the sole question on appeal is whether the trial court committed reversible error in excluding evidence of subsequent remedial measures. "When reviewing the trial court's decision to admit or exclude evidence, [the appellate court is] bound by an abuse-of-discretion standard of review." *Vaughn v. Mississippi Baptist Medical Center*, 20 So.3d 645, 654 (Miss.2009). According to Black's Law Dictionary, "abuse of discretion" is an "appellate court's standard for reviewing a decision that is asserted to be grossly unsound, unreasonable, illegal, or unsupported by the evidence."

### B. Mississippi Rule of Evidence 407 Prevents Introduction of Subsequent Remedial Measures, and as Such, the Trial Court Properly Excluded the Evidence at Issue

Appellant's brief concedes the post-fall changes to the carpet at issue are subsequent remedial measures and therefore the applicable lens of analysis is Mississippi Rule of Evidence 407. This

much is agreed.

Mississippi Rule of Evidence 407 states as follows:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

M.R.E. 407. Appellant makes no assertion that the post-fall alteration falls outside the scope of Rule 407. As such, for purposes of Appellee's Brief, it will be assumed that Plaintiff contends only that the subsequent remedial measures fall within one of the enumerated exceptions to the rule.

### C. M.R.E. 407 Exceptions of Impeachment, Condition of Premises, and Feasibility of Precautionary Measures Are Inapplicable to the Case at Bar

Again, Appellant asserts only that the subsequent remedial measures (consisting of removing carpeting from the storefront curb and painting said curb) qualify as exceptions to the long-standing principle that evidence of said measures shall be excluded. Namely, Appellant cites impeachment, condition of premises and feasibility of precautionary measures (improperly termed by Appellant as "effectiveness of warning") as alternative methods to admit evidence of the type she sought to submit. However, none of the asserted exceptions apply to the subsequent remedial measures at issue in this matter.

#### i. Impeachment

Appellant contends she should have been allowed to question Mr. Gruich on subsequent remedial measures for impeachment purposes. "Impeachment" as defined by Black's Law Dictionary, is the act of discrediting a witness by catching him in a lie. Therefore, if the witness does not lie, he cannot be impeached on said statement. Appellant cites an interrogatory response and deposition testimony in an effort to muster some issue on which she might impeach Mr. Gruich.

However, Mr. Gruich offered only truthful responses. Truthful responses do not open an individual to impeachment, and therefore the trial court properly excluded evidence of subsequent remedial measures.

In support of her argument, Appellant has attempted to manipulate Mr. Gruich's deposition testimony by leaving out the precise question and answer on which she sought to impeach Mr. Gruich. Certain segments of testimony from Mr. Gruich's deposition were cited in the appeal brief, however Appellant failed to include those portions of the transcript where Mr. Gruich was specifically asked about alterations to the carpet in question. In doing so, Appellant suggests certain portions of Mr. Gruich's testimony were false and thus open to impeachment.

Although Appellant selected a few lines out of a lengthy exchange to inappropriately accuse Mr. Gruich of lying, the relevant portions of the full exchange are more illuminating:

Q. Let's move to the outside of the building since that's what we're concerned with mainly. Tell me what changes may have occurred since 1994 on the outside of the building.
A. We put in a handicap ramp.
...
Q. About what year did you get that done?
A. It's been over ten years. I don't know the exact date.
Q. Mid-nineties?
A. It might have been early nineties. I'm just guessing.
...
Q. Any other changes to the building outside?
A. He suggested because of the front windows and all, we put four posts so in case a car would come, it wouldn't hit those windows.
Q. Any other changes?
A. Outside I really can't think of anything.
...
Q. When you originally put that carpet down?
A. I'm going to guess we might have started in '85. I don't have the exact --.
Q. When's the last time you've changed that green carpet?
A. I don't know. It's been a while.
Q. ***Have you made any changes to the green carpet since April of 2003?***
A. ***Yes.***
Q. Why?

A. Let me explain this. If you notice, it folds over and went down. That part every now and then wouldn't stay glued too good but it wasn't bulging out where somebody could trip. But we couldn't get it to stay there glued because it would keep coming up a little bit. ***So when I had my friends paint the parking lot yellow and the blue and all that, we ended up cutting that off*** of there, just cut it off and got rid of it.

*See RE 7-8 (Gruich Deposition, Pg 14, Line 8 to Pg 17, Line 7 (emphasis added))* . Despite Appellant's representations to the Court, Mr. Gruich clearly admitted in deposition that changes were made to the carpet in question. In fact, he detailed removing the lip of the carpet and painting the curb. *Id.* In short, there is nothing in Gruich's testimony regarding the subsequent remedial measures on which he can be impeached.

Similarly, Appellant cites Mr. Gruich's testimony that 1) he "always thought [the entrance] was safe," and 2) removed the carpet "for appearance[1]." *See Appellant's Brief*, pages 12-13. However evidence of subsequent remedial measures contradict neither statement, and as such, cannot serve to impeach Mr. Gruich. Subsequent remedial measures are, per the rules, "measures ... taken which, if taken previously, would have made the event less likely to occur." M.R.E. 407. That Mr. Gruich believed his premises were safe and that he removed the carpet "for appearance" do not implicate whether the subsequent measures were indeed performed. Neither statement is untruthful, nor do they inherently conflict with the fact that subsequent remedial measures were ultimately undertaken. As such, no impeachment on these items was possible and the evidence was properly excluded.

Finally, Plaintiff points to an interrogatory response submitted by Mr. Gruich to imply untruthfulness. As cited in the brief, the interrogatory related to any potential changes ever performed

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Despite Appellant's assertions, no question regarding the color of the curb was pending during the cited exchange.

on the building itself. This case was filed on January 5, 2004. The Complaint makes no mention of carpet, color contrast, or the exact nature of the alleged negligence. The discovery cited by Appellant was served on the Appellee shortly after this suit was filed, and Responses thereto were submitted on April 6, 2004. Appellant now wishes to "impeach" Mr. Gruich regarding discovery responses submitted before carpet or color contrast were ever made an issue. As such, honest responses to vague discovery requests cannot now be used to impeach Mr. Gruich.

In short, evidence of subsequent remedial measures were properly excluded by the trial court. Impeachment on items answered truthfully is impossible. No amount of manipulation of the record can substitute for the clear statements of Mr. Gruich in deposition. When asked a straightforward question regarding whether he had made changes to the carpet in question, he answered honestly and affirmatively. As such, no impeachment could occur.

**ii. Condition of Premises**

Appellant contends she should have been allowed to use evidence of subsequent remedial measures to prove the condition of the premises at the time of the accident. Given the evidence submitted to the jury, this assertion borders on absurdity. According to Appellant, "in May 2003, within a few weeks after Ms. Manning's fall, photos were made of the entrance which clearly show the green carpet." *See Appellant's Brief*, page 5. Those photos were presented to the jury in the form of Plaintiff's Exhibit 15, and Plaintiff's Exhibit 17. *See RE 1 (Trial Exhibit List), RE 2 (Plaintiff's Trial Exhibit 17), and RE 3 (Plaintiff's Trial Exhibit 15).* Years passed before more pictures were taken of the entranceway. *See Appellant's Record Excerpts Index (representing the photos of subsequent remedial measures were taken in August 2006).* By the time the 2006 photos were taken, the carpet had been altered (i.e. subsequent remedial measures had been undertaken) and hurricane Katrina had damaged the storefront. Appellant now claims the evidence of subsequent

remedial measures would better exhibit the condition of the premises at the time of the accident than pictures admittedly taken "within a few weeks after" the incident in question. *See Appellant's Brief*, page 5. This argument is simply illogical, and as such should be disregarded.

**iii. Feasibility of Precautionary Measures**

Appellant contends evidence of subsequent remedial measures should have been submitted to the jury to prove "effectiveness of warning." However there is no such listed exception to Rule 407. Because Appellant terms her argument as "whether such a warning was feasible," it will be assumed she intended to invoke the "feasibility of precautionary measures" exception.

As the rule plainly states, this exception is limited by the phrase, "if controverted." M.R.E. 407. Thus, evidence of subsequent measures is acceptable to prove feasibility thereof, *only when disputed. Id.* This portion of the rule stems from the common law exception allowing the use of such evidence when the defendant has testified that modifications were not feasible.

Appellant conveniently fails to address this integral portion of the rule she seeks to invoke. At no time did Appellee's contend the subsequent remedial measures taken were infeasible. To do so would be illogical given that it was indeed the Appellee who undertook the remedial measures at issue. In any event, Appellees did not "controvert" the feasibility of the precautionary measures, and therefore, Appellant cannot utilize this exception to M.R.E. 407.

**D. Even if the Court Erroneously Attempted to Exclude Evidence of Subsequent Remedial Measures[2], Plaintiff Was Nonetheless Allowed to Present Said Evidence to the Jury**

Appellant alleges reversible error stemming from the trial court's exclusion of evidence of subsequent remedial measures. According to the appellate brief, these measures consist of

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It remains Appellant's contention that exclusion was proper.

"cut[ting] off the lip of the green carpet, re-glu[ing] the edges ... and paint[ing] ... the sidewalk bright yellow." *See Appellant's Brief*, page 5. She claims the exclusion of such evidence "gutted Plaintiff's case," and sounded "a death knell" to her "theory of the case." *See Appellant's Brief*, page 9. However, Plaintiff never explicitly details the prejudice imposed by the exclusion of said evidence. As best as can be ascertained from a review of Appellant's arguments, her "theory of the case" was that the green carpet over the lip of the curb made the height of the step-up hard to judge. Furthermore, it was Appellant's submission that such a change in height should have been marked by a color transition. *See Appellant's Brief*, page 14.

That the exclusion of subsequent remedial measures prevented Appellant from arguing this theory could not be further from the truth. In fact, counsel made these contentions at numerous points during the trial. First, evidence that the carpet was subsequently removed was allowed into evidence upon Appellant's proffer. *See RE 1 (Trial Exhibit List), 4, 5, and 6 (Plaintiff's Trial Exhibits 20, 21, and 22).* The exhibits entered into evidence as Plaintiff Exhibits 20, 21, and 22 clearly demonstrate that the carpet was removed from the entranceway. Additionally, and perhaps more importantly, Plaintiff's Trial Exhibit 15 was entered into evidence. *See RE 1 (Trial Exhibit List) and RE 3 (Plaintiff's Trial Exhibit 15).* In this exhibit, the portions of curb to the left and right of the carpet are exposed. Those exposed portions are painted blue (to the left) and "bright yellow" (to the right). *Id.* Surely Appellant cannot now assert she was prevented from presenting a "color contrast theory" to the jury. In sum, the jury had before it evidence of the carpet removal, in addition to visual evidence of a color contrast, which is "the exact warning Plaintiff advocated." *See Appellant's Brief*, page 15. As such, if erroneous, the exclusion of subsequent remedial measures was harmless, and therefore not reversible.

As demonstrated above, Appellant was certainly free to argue her "theory of the case." Additionally, for Appellant to contend she did not do so is astounding. Brief excerpts demonstrate this point. On direct examination of Plaintiff's witness, Rozina Manning, the following exchange occurred:

Q. And as you approached the place where the carpet came down over the lip, was there any contrast in the color as you stepped up onto the green carpet?
A. Not contrast easily seen.
...
Q. And I notice the curb to the right side, that would be running east --
A. Because the parking lot is over here.
Q. – is painted what color, the side of the sidewalk?
A. Yellow.
Q. And the curb to the west of the green carpet was painted what color?
A. It was blue, handicap-looking blue.
Q. And as the entranceway on the part you're walking, it was solid green?
A. The green, the green stuff.

*See RE 9-10, Trial Transcript (pages 182-183), Direct Exam of Rozina Manning.* Again, the point was illustrated in cross-examination of Rozina Manning:

Q. I think you said earlier the fact that the carpet was green and the green overlapped the lip, that that somehow kept you from identifying that as a step. Is that correct?
A. I said it's hard to see that it's a step. It is, sir. It's hard to see that it was a step.
Q. Well, can you see that the yellow part is a step?
A. Can you come?
Q. Yes, ma'am. Can you tell that's a step up right there where the yellow is?
A. No. Can you come?
Q. Oh, I'm sorry. Yes, ma'am. I didn't understand you. All right. We're talking about color contrast.
A. Okay.
Q. Can you tell that's a step?
A. You can tell this part right here is one. When you're getting closer to here, you cannot tell. You cannot see that this is a difference. Right up in here, you can't see it, sir.
Q. Okay. What about the blue part? Can you tell that's a step?
A. The blue part right here?
Q. Yes, ma'am.

A. That's a step right there.
Q. Okay. So you're telling the jury this part you know is a step, this part you know is a step, but you can't tell that's a step?
A. I'm telling the jury that you're asking me to look at the photo, and I'm looking, and I can see right here it's a step on the photo.
Q. I'm asking about the green part.
A. I'm sorry. I'm sorry.
Q. If I say something, correct me, please.
A. It's me.
Q. Are you telling the jury you personally can't tell that's a step?
A. I couldn't tell that that was a step, sir.

*See RE 11-12, Trial Transcript (pages 224-225), Cross Exam of Rozina Manning.* Clearly Appellant's "theory of the case" was unimpeded by exclusion of the subsequent remedial measures. As such, no reversible error exists, and the exclusion of such measures should be affirmed.

## V. CONCLUSION

Appellant seeks reversal of the jury's verdict based on the exclusion of subsequent remedial measures, claiming said measures fit within one of the exceptions to M.R.E. 407. More precisely, she claims the removal of the carpet and painting of the curb were offered for one or all of the following: impeachment, condition of the premises at the time of the accident, and/or feasibility of precautionary measures. However, evidence of these subsequent changes cannot serve to impeach Mr. Gruich as he was honest and candid during his sworn testimony. Additionally, the evidence of subsequent remedial measures are hardly useful to show the condition of the premises at the time of the accident, especially given the pictures of the premises taken "within weeks" of the accident. Likewise, the trial court properly excluded said evidence as feasibility of precautionary measures was never contested by Appellees. Lastly, and most importantly, Appellant failed to assert any prejudice she suffered as a result of the exclusion. Assuming the claimed prejudice lies in the inability to portray to the jury her "theory of the case," there is ample evidence in the trial record that the carpet

was removed and that a color contrast on the curb was possible. Thus, any error was harmless, and the jury's verdict should be affirmed.

WHEREFORE, PREMISES CONSIDERED, Appellees pray this Court AFFIRM the trial court's decision to exclude evidence of subsequent remedial measures under Mississippi Rule of Evidence 407. In the alternative, Appellees request this Court find any alleged error by the trial court harmless. Appellees additionally pray for any and all other remedies this Court deems just.

Respectfully submitted,

**APPELLEES, FRANK GRUICH, JR. d/b/a GRUICH PHARMACY SHOPPE and ESTATE OF FRANK GRUICH, SR.**

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## CERTIFICATE OF SERVICE

I, Joshua W. Danos, hereby certify that I have mailed, via United States First Class Mail, the original and three copies of BRIEF OF APPELLEES to the Clerk of the Supreme Court of the State of Mississippi, Kathy Gillis, Post Office Box 249, Jackson, MS 39205-0249, for filing in the record. I have also served the BRIEF OF APPELLEES, to the following, via United States First Class Mail:

Robert W. Smith, Esq.
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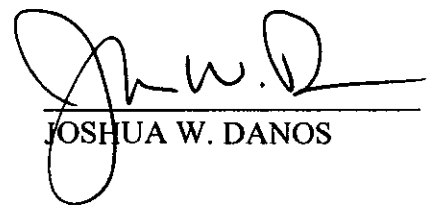
Honorable Lawrence P. Bourgeois, Jr.
Harrison County Circuit Court Judge
P.O. Box 1461
Gulfport, MS 39502

This the 19th day of March, 2010.



JOSHUA W. DANOS