IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2009-CA-01360

JODIE PENTON

PLAINTIFF - APPELLANT

versus

BOSS HOGGS CATFISH CABIN, LLC

DEFENDANT - APPELLEE

BRIEF OF APPELLEE

APPEAL FROM THE CIRCUIT COURT OF
PEARL RIVER COUNTY, MISSISSIPPI
CAUSE NO. 2008-0096

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ORAL ARGUMENT NOT REQUESTED

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2009-CA-01360

JODIE PENTON **APPELLANT**

VS.

BOSS HOGGS CATFISH CABIN, LLC **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and/or entities have an interest in the outcome of this cause. These representatives are made in order that the Justices of the Supreme Court and/or the Judge of the Court of Appeals may evaluate possible disqualifications or recusal:

1. Jodie Penton - Plaintiff/Appellant
2. Boss Hoggs Catfish Cabin, LLC - Defendant/Appellee
3. Mary Franz and husband, Cliff Franz - Owners of Boss Hoggs Catfish Cabin, LLC at the time of the incident in question
4. Andrew C. Burrell - Attorney for Appellant
5. Vicki R. Leggett - Attorney for Appellee
6. Susan F. E. Bruhnke - Attorney for Intervenor, LEMIC Insurance Company
7. Honorable R. I. Prichard, III - Circuit Court Judge of Pearl River County, MS

Respectfully submitted this the 7th day of January, 2010.

VICKI R. LEGGETT, MS Bar [redacted]
ATTORNEY FOR BOSS HOGGS
CATFISH CABIN, LLC, APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGES**

OTHER AUTHORITIES

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether upon a *de nova* review of the record, the Circuit Court properly granted summary judgment as a result of the Plaintiff's failure to prove a dangerous condition existed on the Defendant's property.

STATEMENT OF THE CASE

On February 15, 2008, Jodie Penton (hereinafter "Penton") filed a Complaint in the Circuit Court of Pearl River County, Mississippi, against the Defendant, Boss Hoggs Catfish Cabin, LLC (hereinafter "Boss Hoggs") as a result of a fall which occurred on the Defendant's premises on February 24, 2005 (R. 3-5; RE. 5-7). An Answer was filed on behalf of Boss Hoggs on June 2, 2008. (R. 9-15; RE. 8-14).

On September 29, 2008, LEMIC Insurance Company filed a Motion for Leave to Intervene so as to seek recovery of its subrogation lien for worker's compensation benefits paid to Penton. (R. 25; RE. 15). An Agreed Order allowing the intervention was filed on October 27, 2008. (R. 35; RE. 17). Thereafter, an Intervening Complaint was filed on October 31, 2008, and Boss Hoggs filed an Answer thereto on November 4, 2008. (R. 36-41). After discovery was conducted in this cause, Boss Hoggs filed a Motion for Summary Judgment along with an Itemization of Material Facts Relied Upon and Not Genuinely Disputed and noticed the matter for hearing on May 11, 2009. (R. 54-103; RE. 18-66). Said Motion was re-noticed for hearing on June 8, 2009. (R. 107).

On July 21, 2009, the trial court entered an Order granting Boss Hoggs' Motion for Summary Judgment. (R. 114-122; RE. 71-79). A Final Judgment was likewise entered in

this cause on July 21, 2009. (R. 23-4; RE. 80, 81). Thereafter, Penton filed a Notice of Appeal on August 17, 2009. (R. 125-6; RE. 82, 83).

STATEMENT OF FACTS

On February 24, 2005, Mary Franz and her husband, Cliff Franz (hereinafter referred to as "Franz") operated a restaurant known as Boss Hoggs Catfish Cabin in Picayune, Mississippi. (R. 69, 70, 72; RE. 32, 33, 35). At the time Franz purchased the restaurant in March, 2004, a concrete pad or slab and a handicap ramp were in existence and in order to enter or exit the restaurant, a customer was required to traverse the concrete pad or slab and the handicap ramp. (R. 72; RE. 35). During the time that Franz owned the subject restaurant, she made no changes to the building nor to the concrete pad or slab nor the handicap ramp leading into the restaurant. (R. 71, 72; RE. 34, 35). Additionally, from the time that Franz purchased the restaurant until the incident involving Penton, noone made any complaints about the handicap ramp nor had anyone fallen or had any type of accident at or near the concrete pad or slab nor at, near or on the handicap ramp. (R. 73; RE. 36).

On the date of the accident giving rise to the underlying suit, Penton visited the restaurant for purposes of purchasing some catfish dinners for her employer. (R. 76, 77; RE. 39, 40). Prior to that date, Penton had been a business invitee at Boss Hoggs on at least two (2) separate occasions and on each occasion, she had utilized the handicap ramp to enter the restaurant and utilized the handicap ramp to exit the restaurant. (R. 81-83; RE. 44-46). On those prior occasions, she made no complaints to the owner of the restaurant about the concrete pad or slab or handicap ramp nor did she experience any problems traversing the concrete pad and/or utilizing the handicap ramp. (R. 83; RE. 46).

Upon arriving at the restaurant on February 24, 2005, the date of the incident giving rise to this suit, Penton entered the restaurant which required that she traverse the concrete pad or slab and utilize the handicap ramp. (R. 77, 85, 86; RE. 40, 48, 49). Once the catfish meals were prepared, Penton was assisted by one of Boss Hoggs' employees in carrying the meals to her car. (R. 77, 87, 89; RE. 40, 50, 52). Upon exiting the restaurant, Penton utilized the handicap ramp and traversed the concrete pad or slab in question. (R. 74, 87-90; RE. 37, 50-53).

After placing the catfish meals in her vehicle, Penton returned to the restaurant to obtain a receipt and upon reaching the concrete pad or slab, she fell forward on her right side. (R. 77, 78, 91, 92; RE. 40, 41, 54, 55). According to Penton, when she stepped onto the concrete pad, the heel of her shoe caught the edge of the pad causing her to trip and fall. (R. 78, 79, 92-94; RE. 41, 42, 55-57).

The undisputed sworn testimony of Penton is that the accident occurred when she reached the edge of the concrete pad or slab as depicted in the photograph contained in the record and as evidenced by the drawings which she prepared during the course of her deposition testimony. (R. 78, 79, 98; RE. 41, 42, 61).

SUMMARY OF ARGUMENT

Based upon a *de nova* review of the record and upon reviewing the evidentiary matters in light most favorable to Penton, Summary Judgment was property granted by the trial court.

On the day that Penton fell on Defendant's premises, she was an invitee and accordingly, the Defendant owed her a duty of reasonable care. The undisputed evidence

reveals that Penton fell due to the heel of her shoe catching the edge of the concrete pad causing her to trip and fall. Penton failed to come forward with any competent evidence establishing that a dangerous condition existed on the Defendant's premises. The mere fact that an accident occurred does not establish the existence of a dangerous condition and Penton failed to produce any evidence to establish that the mere existence of a slight height difference between the ground and the concrete pad constituted an unreasonably dangerous condition which would give rise to liability on behalf of Boss Hoggs. As such, the trial court properly granted Summary Judgment in this cause.

ARGUMENT

I. STANDARD OF REVIEW.

Summary Judgment was appropriately entered by the trial court. Rule 56(c) of the Mississippi Rules of Civil Procedure provides in pertinent part as follows:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

To prevent summary judgment, the non-moving party must establish a genuine issue of material fact by means allowable under the rule. *Galloway v. Travelers Ins. Co.* 515 So.2d 658, 682 (Miss. 1987). In other words, the non-moving party to a motion for summary judgment is not entitled to rely on general allegations or denials, but must come forth with significant probative evidence demonstrating the existence of triable issues of fact. *Prescott v. Leaf River Forest Products, Inc.*, 740 So.2d 302, 308 (Miss. 1999). It is incumbent upon a party opposing a motion for summary judgment to respond with diligence and set forth by affidavit or some other form of sworn statement or proof, specific

facts which give rise to genuine issues that should be submitted to a jury. *Richmond v. Benchmark Construction Corp.*, 692 So.2d 60, 62 (Miss. 1997).

In determining whether the entry of summary judgment in this cause was appropriate, it is incumbent upon this Court to review the judgment *de novo* and make its own determination on the motion, separate and apart from that of the trial court. *Lowery v. Guaranty Bank & Trust Co.*, 592 So.2d 79, 81 (Miss. 1991). Boss Hoggs respectfully submits that upon reviewing the evidentiary matters in the light most favorable to Penton, there are no genuine issues of material fact and accordingly, summary judgment heretofore entered by the trial court should be affirmed.

II. NO DANGEROUS CONDITION EXISTED ON THE PREMISES.

Our Mississippi Supreme Court has continuously and regularly adhered to the common law distinction between an invitee and a licensee. In fact, in several recent decisions, our Mississippi Supreme Court has continued its application of the invitee-licensee-trespasser trichotomy in analyzing the duty of care owed by property owners to personal injury Plaintiffs. *Thompson v. Chick-Fil-A, Inc.*, 923 So.2d 1049 (Miss. 2006) and *Hudson v. Courtesy Motors, Inc.*, 794 So.2d 999 (Miss. 2001).

In the instant case, there is no factual dispute as to the status of Penton on the date of the subject accident. Under Mississippi law, an invitee is defined as a person who goes upon the property of another in answer to the express or implied invitation of the owner or occupant for their mutual advantage. *Lucas v. Buddy Jones Ford Lincoln Mercury, Inc.*, 518 So.2d 646, 647 (Miss. 1988). On the day in question, there is no doubt that when Penton came to the restaurant, it was for the purpose of purchasing catfish dinners for her employer and was for a purpose connected with the business dealings of Boss Hoggs. As

such, she would be classified as an invitee under Mississippi law. The duty owed by a landowner to an invitee is a duty of reasonable care for the invitee's safety. *Hall v. Cagle,* 773 So.2d 928, 929 (Miss. 2000).

It has long been established that a business owner or operator is not an insurer of the safety of its invitees. *Caruso v. Picayune Pizza Hut, Inc.,* 598 So.2d 770 (Miss. 1992). Merely proving the occurrence of an accident within the business premises is insufficient to prove liability but instead, it is incumbent upon the Plaintiff to demonstrate that the owner or operator of the business was negligent. *Sears Robuck & Co. v. Tisdale*, 185 So.2d 916, 917 (Miss. 1966).

Penton claims that she tripped on the concrete pad which allegedly constituted a dangerous condition. As a business invitee, the burden of proof is upon Penton to prove Boss Hoggs owner's negligence injured her; that the owner of Boss Hoggs had knowledge of the alleged dangerous condition and failed to warn her; or that the alleged dangerous condition existed for a sufficient amount of time such that the owner should have knowledge or notice of the condition. *Anderson vs. B. H. Acquisition, Inc.*, 771 So.2d 914, 918 (Miss. 2000) (citing *Downs vs. Choo*, 656 So.2d 84, 86 (Miss. 1995).

Under any of the aforesaid theories of liability, it is incumbent upon Penton to first prove that a dangerous condition existed. It is axiomatic that in order for a Plaintiff to prove some dangerous condition existed which led to her fall, she must bring forth "significant probative evidence demonstrating the existence of a triable issue of fact." *Young v. Wendy's International, Inc.*, 840 So.2d 782, 784 (Miss. App. 2003). Plaintiff is not allowed to rely on the mere fact that the accident occurred in order to show the existence of the dangerous condition. The only competent proof in the record as to the manner in which

the accident occurred is Penton's sworn deposition testimony. According to Penton, when she stepped onto the cement pad, the heel of her shoe must have caught the edge of the pad causing her to trip and fall. (R. 78, 79, 92-94; RE. 41, 42, 55-57). There is absolutely no proof that the rain somehow interfered with her ability to see the concrete pad; there is absolutely no evidence from lay witnesses or experts to substantiate that the minor height difference between the concrete pad and ground constituted a dangerous condition; nor is there any competent proof that Penton was unable to observe the minor height difference between the ground and pad in the exercise of ordinary care. Instead, the proof is to the contrary. Penton had traversed the concrete pad twice before the accident occurred and it was only upon her return to the restaurant to obtain a receipt that she fell. (R. 77, 85-87, 87-90; RE. 40, 48-50, 50-53).

Penton's reliance upon *Green v. Highland Health Club, Inc.*, 2008 U.S. Dist. Lexis 9888 (January 9, 2008) is simply misplaced. The Plaintiff, John Green tripped and fell on a sidewalk adjacent to the Defendant's building in Natchez, Mississippi and filed suit claiming that the Defendant's premises were not in a reasonably safe condition. However, unlike *Green*, there is no dispute in the case at bar as to the manner in which the accident occurred and the cause of the accident. *Green* testified in his deposition that as he walked down the sidewalk adjacent to the Defendant's building, he turned the corner on the sidewalk, tripped on a portion of the concrete at the corner of the building that was uneven and not otherwise marked. He further testified that he was prevented from seeing where he was stepping by the location of the corner of the building and the position of the door relative to the alleged defect in the sidewalk. As there was a dispute as to how the alleged defective condition was encountered, the Court found there was a genuine issue of

material fact. Unlike *Green*, Penton had traversed the area two (2) times on the very day that the subject accident occurred and admitted that her heel caught the edge of the concrete pad. There is no dispute as to how she encountered the area or how the accident occurred.

Boss Hoggs respectfully submits that based upon the record before the Court, there is simply no evidence to establish that the mere existence of a slight height difference between the ground and the concrete pad constituted an unreasonably dangerous condition which would give rise to liability on behalf of Boss Hoggs.

Our Supreme Court has on several occasions found that as a matter of law, cracks or height differences in pavement or sidewalks do not constitute unreasonably dangerous conditions. A business owner is simply not laden with the burden of making its sidewalks perfectly level or in a condition which eliminates the possibility of an accident. *Stanley v. Morgan & Lindsey, Inc.*, 203 So.2d 473, 476 (Miss. 1967). In fact, this Honorable Court has on several occasions found that as a matter of law, cracks or height differences in pavement or sidewalks do not constitute unreasonably dangerous conditions. *See City of Biloxi v. Schambach*, 247 Miss. 644, 157 So.2d 386, 392 (1963) (three to four-inch difference in height between sidewalk blocks not sufficient to impose liability); *Rowe v. City of* Winona, 248 Miss. 411, 416, 159 So.2d 282, 283 (1964) (upholding a trial court's grant of directed verdict in favor of *City* where the defect in the sidewalk was a crack wide enough to catch the heel of a pedestrian's shoe); and *City of Meridian v. Raley*, 238 Miss. 304, 312, 118 So.2d 342, 345 (1960) (reversing judgment in favor of a pedestrian who tripped by stepping in a hole between the end of a dirt sidewalk and the beginning of a concrete sidewalk partly covered by grass).

More recently, this Court affirmed the ruling of a trial court wherein the Plaintiff tripped on an irregularity in the pavement of approximately one inch. In *Bond v. City of Long Beach*, 908 So.2d 879 (Miss. Ct. App. 2005), the Court specifically found that the one inch elevation of sidewalk did not create a dangerous condition.

Likewise, the Federal Courts of this State have followed suit noting that these type of conditions do not constitute an unreasonably dangerous condition for which a business owner may be held liable. In *Mack v. Waffle House, Inc.,* No. 1:06-cv-559, 2007 WL 1153116 (S.D. Miss. Apr. 18, 2007), a Plaintiff/patron filed suit against the Defendant restaurant seeking to recover damages for personal injuries she sustained when she tripped and fell on a sidewalk adjacent to the restaurant's handicap ramp. The crack in the sidewalk was approximately 2 inches wide, 4.75 inches long, and 1.75 inches deep that caused her to fall. Finding that the sidewalk crack did not constitute an unreasonably dangerous or hazardous condition, the restaurant was granted summary judgment by United States Magistrate Judge, Robert H. Walker. In ruling on the Summary Judgment, the Court relied upon *Tate v. Southern Jitney Jungle Co.,* 650 So.2d 1351 and its progeny that normally encountered dangers such as thresholds, curbs and steps are not considered hazardous conditions under controlling Mississippi precedent.

Penton has readily admitted that her heel caught the edge of the concrete pad causing her to fall. In responding to the Motion for Summary Judgment, Penton was required to establish the existence of a dangerous condition and show by competent evidence that Boss Hoggs was negligent; that Boss Hoggs had notice of the alleged dangerous condition or that the alleged dangerous condition existed for a sufficient amount

of time such that Boss Hoggs should have knowledge or notice of the condition. *Anderson v. B. H. Acquisitions, Inc.*, at 918. The record is totally devoid of any such proof. Thus, Boss Hoggs would submit that based upon the material, undisputed facts and the foregoing authorities, the trial court properly granted Summary Judgment.

CONCLUSION

Based upon a *de novo* review of the record and reviewing the evidentiary matters in the light most favorable to Penton, Summary Judgment was properly granted by the trial court. Accordingly, the Judgment of the Circuit Court of Pearl River County, Mississippi heretofore entered in this cause on July 21, 2009, should be affirmed.

Respectfully submitted,

BOSS HOGGS CATFISH CABIN, LLC,
DEFENDANT/APPELLEE

BY: ZACHARY & LEGGETT, PLLC

VICKI R. LEGGETT, MSB [redacted]

CERTIFICATE OF SERVICE

I, the undersigned, being the attorney of record for the Appellee in Case No. 2009-CA-01360, in the Supreme Court of Mississippi, do hereby certify that I have, pursuant to Mississippi Supreme Court Rules 25 and 31, this day delivered for filing the original and three (3) copies of the foregoing Brief of Appellee to Betty Sephton, Supreme Court Clerk, Carroll Garten Justice Building, 450 High Street, Post Office Box 117, Jackson, Mississippi 39205 and that I have this day mailed, by United States Mail, postage prepaid, a true and correct copy of the foregoing Brief of Appellee to Andrew C. Burrell, Esquire, 750 East Pass Road, Gulfport, Mississippi 39507, attorney for Appellant; Susan F. E. Bruhnke, Esquire, Franke & Salloum, PLLC, P.O. Drawer 460, Gulfport, Mississippi 39502, attorney for Intervenor, LEMIC Insurance Company and to the Honorable R. I. Prichard, III, Circuit Court Judge, P. O. Box 1075, Picayune, Mississippi 39466.

This the 7th day of January, A.D., 2010.

VICKI R. LEGGETT

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