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 APPELLANT

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

ANDREW C. BURRELL, ESQ.
MS BAR [redacted]
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ORAL ARGUMENT IS NOT REQUESTED

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

JODIE PENTON **APPELLANT**

VS.

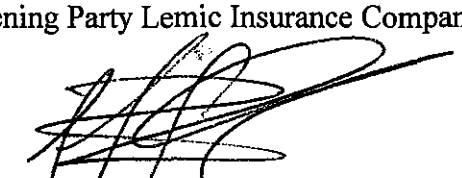
BOSS HOGGS CATFISH CABIN, LLC

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 representations are made in order that the Justices of the Supreme Court and/or the Judges of Court of Appeals may evaluate possible disqualification or recusal:

1. The Honorable R. I. Prichard - Circuit Court Judge of Pearl River County.
2. Boss Hoggs Catfish Cabin, LLC - Defendant/Appellee.
3. Vicki Leggett - Attorney for Boss Hoggs Catfish Cabins, LLC.
4. Jodie Penton- Plaintiff/Appellant
5. Andrew C. Burrell - Attorney for Jodie Penton.
6. Susan Bruhnke - Attorney for Intervening Party Lemic Insurance Company



ANDREW C. BURRELL
ATTORNEY FOR APPELLANT JODIE PENTON

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IN THE SUPREME COURT OF MISSISSIPPI

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I. STATEMENT OF ISSUES PRESENTED FOR REVIEW

Whether the Circuit Court erred in granting, Defendant's, Boss Hoggs Catfish Cabin, LLC Motion for Summary Judgment.

STATEMENT OF THE CASE

References to the Record Excerpts submitted by Penton shall be by notation. (R. Ex.).

On or about February 15, 2008, Plaintiff, Ms Jodie Penton, filed her Complaint against Defendant, Boss Hoggs Catfish Cabin, LLC, for an incident which occurred at its location on or about February 24, 2005. (R. 3-5). Defendant filed their Answer to said Complaint on June 2, 2008. (R. 9-15).

Lemic Insurance filed its Motion for Leave to Intervene on September 29, 2008. (R. 25). An Agreed Order allowing the intervention was filed on October 22, 2009. (R. 35).

Defendant, Boss Hoggs Catfish Cabin, LLC, filed its Motion for Summary Judgment on April 22, 2009. (R. 54-104). Plaintiff, Jodie Penton, filed her Response to Defendant's Motion on June 9, 2009. (R. 109-112). The Court granted Defendant's Motion for Summary Judgment on July 21, 2009. (R. 114-121). Final Judgment was entered on the same day. (R. 123.) Plaintiff filed her Notice of Appeal on August 17, 2009. (R. 125-6).

STATEMENT OF FACTS

On or about February 24, 2005, Plaintiff, Ms Jodie Penton, went to the Defendant's establishment for the purpose of purchasing catfish meals for a school board meeting. (R. 76-7). Ms Penton stated she parked close to the front of the restaurant. (R. 77). Ms Penton stated that when you get to the restaurant, there is only one entrance; you have to go up a ramp. (R. 77). When she got inside of the Defendant's store, she had to wait for the food to be ready. (R. 77). Ms Penton, received help from a Defendant employee to carry the food to her vehicle. They took the bags of food to her vehicle. Ms Penton placed her bag in first and then the employee placed his bag in. It was raining at the time. Ms Penton then had to go back in the Defendant's establishment to pick up a receipt for the food. As she turned around to go obtain the receipt

from the restaurant, Ms Penton tripped on the concrete pad which led into the restaurant. (R. 78) Ms Penton stated that when she turned, her heel caught the exposed pad and she fell. (R. 78).

Ms Penton fell forward and landed on her right side; she laid there until she made it back into Defendant's establishment. (R. 78). This fall caused Ms Penton to suffer severe and permanent injuries to her arm. (R. 79). In fact, Ms Penton, had to undergo a shoulder replacement surgery.

Mary Franz, owner of Defendant, Boss Hoggs Catfish Cabin, LLC, stated she and her husband purchased the restaurant in March 2004. (R. 70). They made no changes or improvements to the buildings during ownership or at the time of the incident or before. (R. 71). She testified that prior to the Plaintiff's fall, there had been no complaints from anyone concerning the concrete pad or slab nor the handicap ramp. (R. 73). In deposition, Ms Franz, examined the photograph of the concrete pad in question which showed an uneven edge. (R. 74). Further, Ms Frantz stated she never conducted any inspection of the grounds of the restaurant. (R. 111).

III. SUMMARY OF THE ARGUMENT

The trial court erred in granting Defendant's Motion for Summary Judgment as the evidence shows there is a genuine issue of material fact if Defendants met or owed a duty to the Plaintiff in the case at bar.

Defendant has testified that she as owner never conducted an inspection of the grounds of the restaurant at any time during her ownership prior to the fall; a period of 11 months. However, pictures of the slab clearly show uneven sides with the ground. The fact that there were no prior complaints does not absolve the Defendant of their duty to inspect or provide a safe environment to the Plaintiff. Moreover, since there is a genuine issue of material fact as toward

whether a duty is owed to the Plaintiff, and whether the same was met, is an issue for the jury to decide. Therefore, granting the Motion for Summary Judgment was improper and should be reversed.

IV. ARGUMENT

Summary judgment is appropriate "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," MRCP 56(c). Appellate courts apply a de novo standard in reviewing the grant or denial of summary judgment motions, making its own determinations separate and apart from the trial court. *Lowery v. Guaranty Bank and Trust Co.,* 592 So.2d 79, 81 (Miss. 1991). On a motion for summary judgment, a court does not try facts; rather, it can only determine whether there are issues to be tried. *Hartford Cas. Ins. Co. v. Halliburton Co.,* 826 So.2d 1206, 1209-10 (Miss. 2001).

For a plaintiff to recover in a slip and fall case, he must show one of the following: (1) a negligent act by the defendant caused the plaintiff's injury; (2) the defendant had actual knowledge of a dangerous condition; or (3) a dangerous condition existed for a sufficient amount of time to establish constructive knowledge of a dangerous condition. *Munford, Inc. v. Fleming,* 597 So.2d 1282, 1284 (Miss. 1992).

Mississippi law requires the owner or operator of a business to "exercise reasonable care to keep the premises in a reasonably safe condition." *Jerry Lee's Grocery, Inc. v. Thompson,* 528 So.2d 293, 295 (Miss. 1998). No proof of the owner's knowledge of the condition is necessary where the condition is created by his negligence or the negligence of someone under his authority. *Drennan v. Kroger Co.,* 672 So.2d 1168, 1171 (Miss. 1996).

In the case, at bar, Ms Penton, filed suit against the Defendant after she tripped on an exposed concrete pad. Plaintiff alleged the concrete pad was not maintained in a reasonable and safe condition which created a dangerous condition which existed for a sufficient period of time that Defendant knew or should have known of the condition and failed to correct the same or warn of the danger.

Plaintiff alleges Defendant's premises were not in a reasonably safe condition and that because of the condition of the concrete pad, she turned to enter the restaurant and her heel caught an uneven portion of the pad causing her to fall and sustain severe injury.

That summary judgment will not lie if the dispute about a material fact is genuine; that is, if the evidence is such that a reasonable jury could return a verdict for the non-moving party.

That Plaintiff is correctly identified as a business invitee and thus must prove either that the Defendant's negligence injured [him], that the Defendant had knowledge of the dangerous condition and failed to warn [him], or that the condition existed for a sufficient amount of time so that the Defendant should have had knowledge or notice of the condition. *Thompson v. Chick-Fil-A, Inc.*, 923 So.2d 1049, 1052, (Miss. 2006).

In the case at bar, Ms. Penton fell due to an uneven portion of concrete. Defendant alleges this is an open and obvious hazard and should have been known of in the exercise of reasonable care.

Ms. Penton was parked next to the pad in disputed weather condition (Ms. Penton stated in her deposition that it begun raining). Defendant testified that it had rained on the day of the accident like it had never rained before. Due to the rain, the uneven concrete pad was not open and obvious. As such, the determination as to whether this uneven pad was a dangerous condition is a question for the jury to decide. *Tharp v. Bunge Corp.*, 641 So. 2d 20 (Miss.

1994).

Defendant argues that this concrete pad should be placed in line as not being a dangerous condition such as thresholds, curbs and steps as set forth in *Tate v. Southern Jitney Jungle Co.*, 650 So. 2d 1347 (Miss. 1995). However, in each of those cases, the court details out how the threshold, curb and step were uniform in design and outlay.

Here at bar, as clearly seen by photographs which exist in the record of the Court, there are different exposed areas of the concrete pad. Parts are fused with the ground, parts are above ground and other parts have the ground worn out. When a party is up close to the pad and their attention is directed away from the ground, certainly an uneven, non-uniform area creates a reasonably dangerous condition.

Thus, if the Court should find that there are genuine issues of material fact concerning whether the condition of the sidewalk as alleged by the Plaintiff was a condition normally encountered on business premises, and whether the condition of the sidewalk was readily noticeable to one paying attention, then Defendant's Motion should be denied as it was in *Green v. Highland Health Club, Inc.*, 2008 U.S. Dist. Lexis 9888; Civil Action No. 5:06cv152.

Defendant, indeed, breached its duty to the Plaintiff by failing to correct the uneven exposure of the concrete pad which existed for a sufficient period of time to which constructive knowledge existed. *Hardy v. K Mart Corp.*, 669 So.2d 34, 38 (Miss. 1996).

Defendant, by testimony via deposition, stated they have owned the establishment since 2004, and that they made no inspection or changes to the area. Defendant also stated said area is the only way to enter the establishment. Thus, it is reasonable to infer that Defendant walked by, around and near the concrete pad to the extent to notice the uneven area and that a reasonable person could consider those areas dangerous and unsafe to invitees.

In *Green v. Highland Health Club, Inc.*, the Court found that summary judgment should be denied as there were genuine issues of material fact concerning whether the sidewalk was readily noticeable and whether Defendant had knowledge.

As similar to the case at bar, the issues as toward breach of duty and knowledge are in question as the uneven exposed parts of the pad, and if these conditions were readily noticeable to the Plaintiff.

The cases of *Tate* and its progeny as the Defendant rely, can be distinguished from the case at bar due to each involving a uniform area. That does not exist in the matter at bar. The concrete pad in issue was far from being uniform, thus creating several issues of material fact between Plaintiff and Defendant. As such, any Motion for Summary Judgment should be denied.

V. CONCLUSION

Since there is a genuine dispute as toward the extent of exposure on the pad, and the fact there is an admission of no inspection since the time of ownership, along with no changes to the structure being made since that time, the granting of Defendant's Motion For Summary Judgment was improper. The Defendant should not be able to rest on the allegations that since there were no prior falls or complaints until that of the Plaintiff's, they owed no duty to her. Even if one argues for the Defendant that said pad was open and obvious, photographs clearly show uneven sides, which alone should have placed the Defendant on notice of a dangerous condition. The fact that Defendant failed to take any action to correct the condition, is a violation of the duty owed to the Plaintiff and thus shows an issue of genuine material fact which should be for a jury to decide. As such, the Court erred in granting the motion and the decision should be reversed.

Respectfully submitted this the 16, day of December, 2009.

JODIE PENTON,

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CERTIFICATE OF SERVICE

I, Andrew C. Burrell, do hereby certify that I have this day filed this Appellant's Brief with the Clerk of this Court on behalf of the Supreme Court of Mississippi, and have served a copy of this Notice of Appeal by United States mail, with postage prepaid, to counsel for Defendant\Appellee, as follows:

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Honorable R. I.. Prichard
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This the 16th day of December, 2009

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Attorney for Jodie Penton,
Plaintiff/Appellant