IN THE SUPREME COURT OF MISSISSIPPI
CASE NO. 2010-CA-00481

FRED'S STORES OF TENNESSEE, INC. **APPELLANT**

V.

JESSE PRATT **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 disqualifications or recusal.

1.	Honorable Betty W. Sanders	Circuit/Trial Court Judge
2.	Jesse Pratt	Appellee
3.	Charles J. Swayze III	Attorney for Appellee
4.	Employees, officers or shareholders of Fred Stores of Tennessee, Inc.	Appellant
5.	Richard D. Underwood	Attorney for Appellant

Signed this the 7th day of October, 2010.

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II. **Whether the trial court properly denied the Defendant's Motion for Judgment Notwithstanding the Verdict or New Trial after the Plaintiff presented overwhelming evidence that Defendant failed to exercise reasonable or ordinary care to keep its store in a reasonably safe condition?**

III. **Whether the trial court abused its discretion in denying the introduction of certain medical records of Plaintiff?**

IV. **Whether the trial court properly denied the introduction of Plaintiff's deposition as part of Defendant's case in chief?**

V. **Whether the trial court properly denied Defendant's Motion for a Mistrial?**

STATEMENT OF THE CASE

A. Nature of Case and Court Proceedings.

On December 20, 2003, Jesse Pratt slipped and fell on a Fred's Discount Store (hereinafter "Fred's") plastic shopping bag while checking out of the store. Jesse Pratt suffered severe injuries to her knee. On August 24, 2004, Jesse Pratt filed this lawsuit against Fred's contending that her injuries were the proximate result of the failure of Fred's to maintain its premises in a reasonably safe condition for its invitees. Said failure constitutes negligence which proximately caused injuries to Pratt.

On October 6, 2004, Fred's removed this case to the United States District Court for the Northern District of Mississippi arguing the presence of federal diversity jurisdiction since there was complete diversity and the amount in controversy exceeded $75,000.00. On October 18, 2004, Pratt filed her motion to remand attaching an affidavit from Pratt herself averring that she was not seeking an amount over $75,000.00 from Fred's. On July 10, 2006, the case was remanded back to the Circuit Court of Leflore County.

In the summer of 2006, due to the untimely and unfortunate death of Richard Benz, Jr., initial counsel for Pratt, the law firm of Whittington, Brock and Swayze, P.A. was retained to represent Pratt.

After three years of discovery and after the trial court denied Defendant's motion for summary judgment, the case was presented to a jury on December 7, 2009. The jury heard Plaintiff's arguments and evidence concerning the Defendant's duty to Jesse Pratt, how that duty was breached and how that breach proximately caused Pratt's injuries. The Defendant argued that it did not have a duty to Pratt. After hearing all of the evidence presented and, after being properly instructed on the applicable law of the case, a jury rendered a unanimous verdict finding

Defendant liable. The jury awarded $25,000.00 to Plaintiff for the injuries she suffered. The Defendant has raised numerous errors in hopes that this Court will grant it a reprieve. However, the trial court properly ruled on all issues raised by Defendant in its brief.

B. Statement of Facts.

On December 20, 2003, Plaintiff, Jesse Pratt, was a business invitee at the Fred's discount store located at 2616 Highway 82 West, Greenwood, Mississippi. (Tr. 91-92). The Plaintiff visited Fred's to purchase an extension cord. (Tr. 91, lns. 19-20). After the Plaintiff paid for the extension cord she began to exit the store. (Tr. 92, lns. 1-6). While leaving the second checkout aisle, the Plaintiff slipped on a Fred's plastic shopping bag that was on the floor. (Tr. 92, lns. 1-6).

John Beck was behind the Plaintiff in the checkout aisle at the time she fell. (Tr. 102, lns. 19-20). Beck witnessed Plaintiff slip and fall on the Fred's plastic shopping bag. (Tr. 103, lns. 8-14). Beck saw multiple Fred's plastic shopping bags on the floor prior to the Plaintiff's fall. (Tr. 104, lns. 2-3). After the fall, Beck and Andrew McQueen, another patron of Fred's, immediately assisted the Plaintiff who was on the floor. (Tr. 104, lns. 14-21). According to Beck there were multiple Fred's plastic shopping bags on the floor next to the Plaintiff after the fall. (Tr. 104, lns. 11-13). Pratt felt terrible pain in her shoulder and left knee. (Tr. 93, lns. 15-19). She was also very embarrassed because people were staring at her. (Tr. 93, lns. 20-23). Pratt left Fred's and attempted to continue shopping at Big Star. (Tr. 94, lns. 24-25) Pratt testified that she left Big Star and went to the emergency room. (Tr. 94, lns. 27-28).

Walter Moses, M.D. was Pratt's treating physician at the emergency room. (Tr. 95, ln. 5). According to his testimony and coupled with the medical records from Pratt's emergency room visits, Pratt suffered an anterior cruciate ligament tear, medial meniscus tear and a tear to the

lateral meniscus. (R.E. pg. 2 lns., 1-7, R.E. pg. 7). Dr. Moses testified that Pratt's injuries were caused by her fall at Fred's and striking her knee. (R.E. pg. 4, lns. 1-7). He stated that her injuries were the result of trauma and not caused by arthritis. (R.E. pg. 3, lns. 2-7).

SUMMARY OF THE ARGUMENT

The Plaintiff presented overwhelming evidence that the Defendant, Fred's Stores of Tennessee, owed Plaintiff Jesse Pratt a duty to keep its store in a reasonably safe condition. Mississippi law is clear that if the defendant creates a dangerous condition, notice is not required to prove negligence. In this case, Plaintiff put on proof that there were multiple Fred's plastic shopping bags on the floor in the check out aisle of Fred's in Greenwood, Mississippi. Plaintiff slipped and fell on the plastic shopping bags causing her severe injuries. The Defendant's corporate representative testified that Fred's employees are the only individuals who handle the plastic shopping bags. The corporate representative for the Defendant admitted that a plastic shopping bag is considered a tripping hazard and thus a dangerous condition. After hearing the substantial evidence presented by Plaintiff, the trial court correctly denied Defendant's directed verdict motions and motion for judgment notwithstanding the verdict or motion for new trial.

The trial court did not abuse its discretion in suppressing certain medical records of Plaintiff from Greenwood Orthopedic Clinic prior to December 20, 2003. Evidentiary matters are discretionary and Defendant has failed to prove how he was prejudiced by the trial court's decision.

The trial court's decision to deny the introduction of portions of Plaintiff's deposition was proper and did not amount to reversible error. Defendant had the opportunity to call Plaintiff in its case in chief or use Plaintiff's deposition on cross-examination. It did not do so. Depositions are not evidence. The trial court properly ruled that since Plaintiff was present,

Defendant could use the deposition to impeach her. There was no prejudicial error on the part of the trial court.

Finally, the Court properly instructed the jury to disregard Plaintiff's statement in closing argument about the Defendant failing to call a witness available to both parties. Mississippi case law is clear that such statements do not warrant a mistrial. The trial court properly instructed the jury to disregard the statement and the Defendant was not prejudiced.

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION FOR DIRECTED VERDICT BECAUSE THE PLAINTIFF PUT FORTH SUBSTANTIAL EVIDENCE IN WHICH A JURY COULD FIND THAT THE DEFENDANT OWED THE PLAINTIFF A DUTY AND THERE WAS A BREACH OF THAT DUTY THAT RESULTED IN JESSE PRATT'S INJURIES.

A. Standard of Review for Denials of Directed Verdict.

A motion for a directed verdict is a test of the legal sufficiency of the Plaintiff's evidence. "In ruling on a motion for a directed verdict, the trial court must look only to the testimony adduced for the plaintiff and afford truthfulness to it and indulge all favorable inferences that could be drawn therefrom, and if either is sufficient to support a verdict, then the motion for a directed verdict should be overruled." *Gee v. Hawkins*, 402 So. 2d 825, 827-28 (Miss. 1981)(quoting *King v. Dudley*, 286 So. 2d 814 (Miss. 1973)). "The circuit court, and this court on appeal, are required to consider the evidence in the light most favorable to the plaintiffs . . . giving those plaintiffs the benefit of all favorable inferences that may reasonably be drawn from the evidence. Unless the evidence is so lacking that no reasonable jury could find for the plaintiffs, the motion must be denied." *Wall v. Swilley*, 562 So. 2d 1252, 1256 (Miss. 1990).

B. Plaintiff presented overwhelming evidence on the issue of liability which required the trial court to deny the Defendant's Motions for a Directed

Verdict.

Defendant contends that it was entitled to a directed verdict because the Plaintiff failed to present evidence that Defendant was negligent. The Defendant makes the same arguments and cites to the same law that they relied upon at the summary judgment stage. The Defendant's argument still lacks merit at this stage too.

To prevail in a slip and fall case, a plaintiff must prove at least one of three theories by a preponderance of the evidence, namely that either (1) the defendant created a dangerous condition which caused the plaintiff's injuries **or** (2) that the defendant possessed actual knowledge of a condition yet failed to remedy it **or** (3) a dangerous condition existed for such a length of time that the defendant should have known of the existence of the dangerous condition. *Elston v. Circus Circus*, 908 So. 2d 771, 773 (Miss. Ct. App. 2005)(emphasis added).

The jury verdict should be affirmed in this premises liability case because Plaintiff established that the Defendant created the dangerous condition that caused her injuries. "Mississippi law requires the owner or operator of a business to keep the premises in a reasonably safe condition." *Elston*, 908 So. 2d at 773(quoting *Jerry Lee's Grocery, Inc. v. Thompson*, 528 So. 2d 293, 295 (Miss. 1988)). It is not necessary to show that the owner was aware of the dangerous condition "where the condition is created by his negligence or the negligence of someone under his authority." *Id.*(quoting *Drennan v. Kroger Co.*, 672 So. 2d 1168, 1171 (Miss. 1996)). Matters as to notice are "eliminated where it appears that the condition was created by defendant or persons for whose conduct he is responsible." *Mississippi Winn-Dixie Supermarkets, Inc. v. Hughes*, 156 So. 2d 734, 736 (Miss. 1963)(quoting 61 A.L.R. 2d at 24). Negligence of the defendant "may be found from circumstantial evidence of adequate probative value . . . the plaintiff may prove from circumstances from which the jury might

conclude reasonably that the condition on the floor was one which was traceable to the proprietor's own act or omission . . . ." *Id.*

The record is clear that the Plaintiff presented overwhelming evidence to the jury that the Defendant owed Jesse Pratt a duty to exercise reasonable or ordinary care to keep its store in a reasonably safe condition by removing dangerous plastic shopping bags from the floor; that the Defendant's breached this duty; and as a result, Plaintiff slipped and fell on the Defendant's plastic shopping bag causing her severe injuries.

The first issue to address is whether a dangerous condition existed. It is an indisputable fact that the Fred's plastic shopping bag on the floor in the checkout aisle constituted a dangerous condition. It was admitted at trial by the Defendant that a bag on the floor represented an unsafe condition. Gayle Prewitt, corporate representative of Defendant, testified:

Q. Is a bag on the floor considered an unsafe condition?

A. I mean if it's in the floor it needs to be picked up.

Q. Would it be considered an unsafe condition?

A. I mean it's just like a newspaper.

Q. Well, I understand that but would it be considered an unsafe condition?

A. Yeah. I mean it's the same thing. Take a newspaper would be an unsafe condition.

(Tr. 111, lns. 1-10). Furthermore, Prewitt testified that a plastic shopping bag on the floor would be considered a tripping hazard. (Tr. 112, lns. 9-11).

Defendant argues in its brief that Plaintiff was not sure that she fell on a plastic shopping bag. This is false. Plaintiff testified that she slipped and fell on a Fred's plastic shopping bag.

(Tr. 92, lns. 1-6). This testimony was corroborated by John Beck who witnessed the fall. (Tr. 103, lns. 8-14). He testified that Plaintiff slipped and fell on a Fred's plastic shopping bag and that their were multiple Fred's shopping bags on the floor. (Tr. 103-04). The testimony of Plaintiff, Beck and Prewitt clearly proved that a dangerous condition existed.

The second issue to address is whether the Defendant created the dangerous condition which caused the Plaintiff's injuries.

Based on the testimony and evidence presented at trial, Fred's plastic shopping bags are only handled by employees from Fred's. Prewitt, the corporate representative of Defendant, testified:

> Q. So the way the check out aisles are set up, the only person who has access to the bags - -
>
> A. Is the cashier.
>
> Q. - - is the cashier; correct?
>
> A. Yes.

(Tr. 108, lns. 11-16). By Defendant's own admission, agents or employees from Fred's are the only ones who have access to the plastic shopping bags. Prewitt further testified that Fred's plastic shopping bags are not supposed to be in the aisles on the floor. (Tr. 112, lns. 18-25).

In *Elston*, 908 So. 2d at 774, the plaintiff slipped in a puddle of water adjacent to plants in the lobby of the Gold Strike Casino. The plaintiff argued that the defendant created a dangerous condition, puddle of water, because employees in the casino watered the plants on the day plaintiff fell. The casino's position was that it was speculative at best to assume that the puddle was caused by agents of the casino and not from a spill caused by a guest. *Id.* The Court disagreed with the defendant opining that the substance the plaintiff slipped on was water which

was the same substance used by casino employees to wet the plant. *Id.*

The case *sub judice* presents a similar hazard caused by a proprietor. We know that agents or employees from Fred's are the only ones who handle the shopping bags. (Tr. 108, lns. 11-16). Pratt testified that she slipped on a Fred's plastic shopping bag in the checkout aisle. (Tr. 92, lns. 1-6). Beck witnessed the Plaintiff fall as a result of the Fred's plastic shopping bag being in the aisle. (Tr. 103, lns. 8-14). Based on the testimony and evidence presented at trial, a reasonable jury could trace the plastic shopping bag on the floor in the checkout aisle to a negligent act of Defendant.

The trial court acted properly in refusing to grant a directed verdict for the Defendant. "The plaintiff may prove circumstances from which the jury might conclude reasonably that the condition of the floor was one which was traceable to the proprietor's own act or omission, in which no proof of notice is necessary . . . ." *Hughes*, 156 So. 2d at 736. The Defendant admitted that a shopping bag in the aisle was a dangerous condition. The Defendant admitted that the plastic shopping bags are only handled by employees from Fred's. A jury could reasonably conclude that the Fred's plastic shopping bags on the floor in the checkout aisle were caused by the negligence of the Defendant. Since the dangerous floor condition was traceable to the proprietor's own act a directed verdict would not have been appropriate.

II. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR IN THE ALTERNATIVE FOR A NEW TRIAL.

The trial court properly denied Defendant's motion for judgment notwithstanding the verdict or a new trial.

A. Standard of Review.

"The standard of review in considering a trial court's denial of a motion for judgment

notwithstanding the verdict is de novo." *Wilson v. Gen. Motors Acceptance Corp.*, 883 So.2d 56, 64 (Miss. 2004). The trial court must view the evidence in the light most favorable to the non-moving party and look only to the sufficiency, and not the weight, of that evidence. *Id.* at 63. "When determining whether the evidence was sufficient, the critical inquiry is whether the evidence is of such quality that reasonable and fair minded jurors in the exercise of fair and impartial judgment might reach different conclusions." *Jesco, Inc. v. Whitehead*, 451 So.2d 706, 713-14 (Miss. 1984).

It is well established in Mississippi jurisprudence that "in deciding a motion for judgment notwithstanding the verdict, the trial court must consider the evidence in the light most favorable to the non-moving party, giving that party the benefit of all favorable inferences that reasonably may be drawn therefrom." *Solanki et. al v. Ervin*, 21 So.3d 552, paragraph 35 (Miss. 2009)(quoting *Corley v. Evans*, 835 So.2d 30, 36 (Miss. 2003)(quoting *Goodwin v. Derryberry Co.*, 553 So. 2d 40, 42 (Miss. 1989)).

"An appellate court will not set aside a jury's verdict and order a new trial unless it is convinced that the verdict was contrary to the substantial weight of the evidence so that justice requires that a new trial be granted." *Bullock v. Lott*, 964 So. 2d 1119, 1133 (Miss. 2007). The Mississippi Supreme Court has ruled that it "will reverse a trial judge's denial of a request for new trial only when such denial amounts to a abuse of that judge's discretion." *Shields v. Easterling*, 676 So. 2d 293, 298 (Miss. 1996) (quoting *Bobby Kitchens, Inc. v. Miss. Ins. Guar. Ass'n*, 560 So. 2d 129, 132 (Miss. 1989)).

B. Argument.

Defendant argues in its brief that it is entitled to a judgment notwithstaning the verdict or a new trial based on two issues, 1) that there was no proof of negligence on part of the defendant,

and 2) trial court's denial of medical records marked for identification as R-D-2-ID in the record. Plaintiff has already addressed the first issue above and it is absolutely clear that based on the evidence a fact question existed and a reasonable juror could have reached a verdict in favor of Plaintiff.

The Plaintiff testified that she slipped and fell on a plastic shopping bag. (Tr. 92, lns. 1-6). John Beck testified that he witnessed the Plaintiff slip and fall to the ground on a plastic **Fred's** shopping bag and that there were multiple **Fred's** plastic shopping bags on the ground next to Plaintiff. (Tr. 103, lns. 8-14). Gayle Prewitt, representative of Defendant Fred's, testified that the plastic shopping bags are only handled by Fred's employees. (Tr. 108, lns. 11-16). She also testified that Fred's shopping bags constitute a tripping hazard and are not supposed to be on the ground. (Tr. 112, lns. 9-11). Finally, Walter Moses, M.D., the Plaintiff's treating physician, testified that the injuries suffered by the Plaintiff were directly related to the fall. (R.E. pg. 4, lns. 1-7). The Defendant provided no evidence in its case in chief and no rebuttal evidence on the issues of liability and injuries to the Plaintiff. In light of the overwhelming evidence the Plaintiff presented at trial on the issue of negligence, the trial court properly denied the Defendant's motion for directed verdict and motion for judgment notwithstanding the verdict or motion for a new trial. The trial court looked at all of the testimony on behalf of the Plaintiff and properly recognized that the reasonable inferences drawn from that testimony required the case to be submitted to the jury and therefore, the verdict handed down by that jury should not be disturbed.

Defendant further argues that it is entitled to a new trial based upon medical records from Greenwood Orthopedic Clinic marked for identification as R-D-2-ID which were not admitted into evidence. (Tr. 133, lns. 3-15). This issue is addressed in detail in the next section. The trial court reviewed the medical records marked for identification as R-D-2-ID and ruled that they

were not relevant. (Tr. 131, lns. 22-29, Tr. 132, lns. 1-3). The jury knew of Plaintiff's pre-existing medical conditions because they were in her medical records admitted into evidence as exhibit P-1 and Defendant addressed her left knee problems in its closing argument. (R.E, pg. 5)(Tr. 183, lns. 9-12). Defendant has failed to explain how it was prejudiced. In order to reverse a case on the exclusion of evidence, "the ruling must result in prejudice and adversely affect a substantial right of the aggrieved party." *Brandon HMA v. Bradshaw,* 809 So.2d 611, 619 (Miss. 2001). The jury weighed the testimony of Dr. Moses and the medical records from Greenwood Orthopedic Clinic and returned a verdict in favor of Plaintiff. There was no prejudicial error and Defendant's argument fails.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE INTRODUCTION OF CERTAIN MEDICAL RECORDS OF PLAINTIFF?

The Mississippi Supreme Court has opined that the "standard of review for the admission of or refusal to admit evidence is well settled." *Haggerty v. Foster*, 838 So. 2d 948, 958 (Miss. 2002). "Admission or suppression of evidence is within the discretion of the trial judge and will not be reversed absent an abuse of that discretion." *Id.* (quoting *Broadhead v. Bonita Lakes Mall, Ltd. P'ship*, 702 So. 2d 92, 102 (Miss.1997) (quoting *Sumrall v. Miss. Power Co.*, 693 So. 2d 359, 365 (Miss.1997)); *Gen. Motors Corp. v. Jackson*, 636 So. 2d 310, 314 (Miss.1992); *Walker v. Graham*, 582 So. 2d 431, 432 (Miss.1991). "For a case to be reversed on the erroneous admission or exclusion of evidence, the error must result in prejudice and harm or adversely affect a substantial right of a party." *Windmon v. Marshall,* 926 So. 2d 867, 875 (Miss. 2006)(quoting *Busick v. St. John*, 856 So.2d 304, 319 (Miss. 2003)(citing *Terrain Enters., Inc. v. Mockbee*, 654 So.2d 1122, 1131 (Miss. 1995); *Hansen v. State,* 592 So.2d 114 (Miss. 1991)).

Defendant has failed to prove that it was prejudiced by the trial court's ruling to deny the

admission of medical records from Greenwood Orthopedic Clinic for treatment received prior to December 20, 2003. Based upon Dr. Walter Moses's testimony that Plaintiff's injuries were not caused by arthritis, the trial court sustained Plaintiff's objection to the admission of her medical records prior to December 20, 2003. Defendant argues that the jury was not allowed to hear evidence that Plaintiff had pre-existing injuries to her left knee. The record does not support Defendant's argument.

The jury was aware of Plaintiff's pre-existing conditions in her left knee. Plaintiff testified that she had problems with her left knee prior to her fall at Defendant's store on December 20, 2003. (Tr. 100-01). Medical records admitted into evidence as P-1 from Plaintiff's visit to the Greenwood Orthopedic Clinic after December 20, 2003, reveal that Plaintiff had pre-existing arthritis to her left knee and that she had received a series of injections prior to her fall at Fred's. (R.E. pg. 5). Medical records admitted into evidence as D-2A from Plaintiff's visit to Greenwood Orthopedic Clinic on May 4, 2006 describe Plaintiff has has had trouble with her knee for three years. (R.E. pg. 6).

Moreover, the medical records admitted into evidence were brought to the attention of the jury by Defendant during closing arguments. It argued that, based on the medical records admitted into evidence, Plaintiff suffered a bruise or at most a sprain to her left knee as a result of her fall. (Tr. 184-85). Defendant argued extensively about Plaintiff's pre-existing conditions to her left knee. Defendant was able to cite to Plaintiff's medical records admitted into evidence as P-1 because all of her pre-existing conditions were described in those records. (Tr. 181-85).

The trial court has discretion to admit or suppress evidence. *Haggerty,* 838 So. 2d at 958. The trial court will only be reversed if there is an abuse of that discretion. *Id.* Defendant has failed to show how it was prejudiced or how the trial court abused its discretion. If anything, the

exclusion of the medical records marked for identification as R-D-2-ID only amounted to harmless error because Defendant addressed all of the medical conditions listed in those records. Defendant's request for a new trial should be denied.

IV. THE TRIAL COURT PROPERLY DENIED THE INTRODUCTION OF PLAINTIFF'S DEPOSITION AS PART OF DEFENDANT'S CASE IN CHIEF.

The trial court's decision to deny the introduction of portions of Plaintiff's deposition was proper and did not amount to reversible error. This court recently addressed this issue in *Figueroa v. Orleans*, 2009-CA-00556-COA. "The admission of deposition testimony is within the sound discretion of the trial court." *Id.* at ¶ 8 (citing *Smith v. City of Gulfport*, 949 So. 2d 844, 848 (Miss. Ct. App. 2007)). Errors in evidentiary rulings are reversed only if a substantial right is affected. *Id.* (citing *Bowman v. CSX Transp., Inc.*, 931 So. 2d 644, 658 (Miss. Ct. App. 2006)).

"Rule 32(a)(1) of the Mississippi Rules of Civil Procedure states that a deposition may be used to contradict or impeach the testimony of the deponent as a witness." *Id.* Plaintiff was called as a live witness in her case in chief. (Tr. 89-97). Defendant cross-examined Plaintiff. (Tr. 97-101). Defendant did not use Plaintiff's prior deposition statements at any time to contradict or impeach Plaintiff. Defendant opened its case in chief by proffering Plaintiff's deposition from February 6, 2007. (Tr. 143-44). Plaintiff objected and the trial court properly ruled that since Plaintiff was present, Defendant could use the deposition to cross-examine or impeach her. (Tr. 147, Lns. 5-8). Defendant did not.

To reverse the trial court on evidentiary rulings, the Defendant must show that a substantial right has been affected. The Defendant has not done so. The Defendant argues in its brief that refusal to allow it to introduce prior sworn deposition testimony of the Plaintiff either by reading it to the jury or admitting the deposition testimony as an exhibit amounts to

prejudicial error. There is no explanation as to how Defendant was prejudiced. The Defendant could have used the deposition to impeach the Plaintiff on cross-examination but it did not. Here, the Defendant has failed to prove that a substantial right was affected as required by this court in *Bowman*, 931 So. 2d at 658. As a result, there was no prejudicial error and the Defendant's argument fails.

V. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION FOR A MISTRIAL.

The Court properly instructed the jury to disregard Plaintiff's statement in closing argument about a Defendant failing to call a witness available to both parties. This Court has ruled that "an improper comment on a failure to call a witness does not require reversal unless the probable effect of the improper argument created unjust prejudice against [the defendant] resulting in a decision influenced by prejudice." *Gayle v. State*, 743 So.2d 392, 402 (Miss. Ct. App. 1999). The Defendant has failed to prove that Plaintiff's counsel's statements created unjust prejudice resulting in a decision influenced by prejudice.

In Defendant's closing argument, it discussed all of Plaintiff's pre-existing injuries. (Tr. 182-83). He explained to the jury that Greenwood Orthopedic Clinic had diagnosed Plaintiff with pre-existing arthritis and that they thought her injuries were degenerative. (Tr. 183, lns. 9-12). Plaintiff's statement in rebuttal did not create an unjust prejudice against Defendant because it asked the jury to weigh the testimony of Dr. Moses to that of the medical records of Greenwood Orthopedic Clinic. Plaintiff's counsel's statement as to why the Defendant had not called the physician from Greenwood Orthopedic Clinic to testify was "harmless error" which does not warrant reversal according to the Mississippi Supreme Court. *Ross v. State*, 603 So. 2d 857, 865 (Miss. 1992). The trial court correctly sustained Defendant's objection. Furthermore,

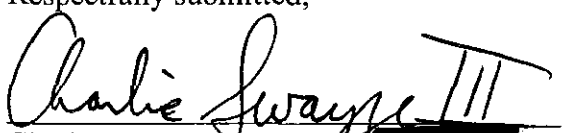
the trial court properly instructed the jury to disregard the statement orating "any comments as to who counsel opposite calls or does not call is inappropriate." (Tr. 192, lns. 3-7). This cured any alleged misstatement. For the foregoing reasons, the trial court's ruling to deny Defendant's motion for a mistrial was appropriate.

CONCLUSION

Based upon the overwhelming evidence presented by the Plaintiff that Defendant was negligent in failing to maintain a reasonably safe premises by allowing Fred's plastic shopping bags to lay on the floor and that Plaintiff slipped and fell on the Fred's plastic shopping bags resulting in severe injuries to her left knee, the trial court properly denied Defendant's directed verdict motions and motion for judgment notwithstanding the verdict or motion for new trial. The trial court properly allowed the jury to reach a verdict in this case. The trial court did not abuse its discretion on any evidentiary issues and properly instructed the jury on Plaintiff's counsel's misstatements. There was no error and the jury verdict should be upheld.

This the 7th day of October, 2010.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I do hereby certify that on this date a true and correct copy of the foregoing Brief of Appellee was served, via U. S. Mail, postage prepaid, to the following:

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