IN THE SUPREME COURT OF MISSISSIPPI

JESSE PRATT
Plaintiff/Appellee,

V. No: 2010-TS-00481

FRED'S STORES OF TENNESSEE, INC.
Defendant/Appellant.

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 disqualification or recusal.

1. Employees, officers or shareholders of Fred Stores of Tennessee, Inc. (a wholly owned subsidiary of Fred's, Inc.);
2. Counsel for Appellant Fred Stores of Tennessee, Inc. and the attorneys and employees of the firm;
3. Plaintiff Jessie Pratt; and
4. Charles Swayze, Jr. and Charles Swayze III, and the attorneys and employees of Whittington, Brock and Swayze, attorneys for Appellee.

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STATEMENT OF THE CASE

This is a premises liability/personal injury case filed by Jessie Pratt alleging she was injured on the premises of a Fred's Discount Store on the date in question. Ms. Pratt alleges that she slipped on a plastic shopping bag which caused injury to various parts of her body. The case was tried in circuit court and the jury returned a verdict for the Plaintiff.

STATEMENT OF FACTS

On December 20, 2003, Plaintiff alleges she was injured in the Fred's Discount Store. (R-91) She says she slipped on a plastic shopping bag. (R-91) She did not see it before she slipped, does not know how the bag got there, and does not know how long it had been there. (R-99) She claims to have injured her left knee (among other things). (R-97) Photographs show how the aisle looked and the layout. (RE-5)

SUMMARY OF THE ARGUMENT

Defendant appeals from the judgment of the Circuit Court on the basis that the Trial Court should have granted a directed verdict in its favor as there was no evidence upon which a reasonable jury could find liability on the part of the Defendant based upon the facts. In the alternative, Defendant seeks a new trial on the basis that the cumulative errors of the Trial Court amounted to a miscarriage of justice. The Trial Court refused to allow Defendant to introduce evidence of prior medical treatment to Plaintiff's left knee, which is the same knee she complained of in this instance, which precluded the Defendant from arguing that all or part of her pain may have been the result of a preexisting condition to her left knee. In fact, the prior records which Defendant sought to introduce showed that Plaintiff had in fact been treated for some time for pain to her left knee and had pain relief injections in recent months prior to this accident. Those records were relevant for the jury's determination of whether her condition may have been preexisting and the jury should have been allowed to consider those records.

Defendant also sought to introduce portions of Plaintiff's deposition testimony. The deposition testimony is not hearsay and is an admission under oath of the Plaintiff. Therefore, the deposition testimony was admissible as substantive evidence. In the alternative, at a minimum, Defendant was entitled to read the subject portions of the deposition testimony to the jury.

In closing, counsel for the Plaintiff argued that failure of the Defendant to call the treating physician (whose entire record the trial court did not allow Defendant to introduce) was indicative of no proof of anything other than the testimony of the preexisting condition called by the Plaintiff. The orthopedic physician was Plaintiff's treating physician that Plaintiff complained Defendant did not call. Plaintiff had access to the physician, could exercise ex parte communications with the physician, and he was not unavailable to them. The argument that

Defendant should have somehow called a treating physician (whose records the trial court did not allow to be introduced in toto) was unfairly prejudicial and inflammatory.

Based on the foregoing, any one of the foregoing errors is enough to warrant that the case be reversed. The civil action should be reversed and rendered for failure of the Trial Court to grant a directed verdict. In the alternative, the case should be reversed and remanded for a new trial based upon any one of the foregoing errors. Cumulatively, the errors of the Trial Court amount to a miscarriage of justice and certainly warrant a new trial for the Defendant.

ARGUMENT

I.

THE TRIAL COURT ERRED IN REFUSING TO GRAND A DIRECTED VERDICT FOR THE DEFENDANT ON THE ISSUE OF LIABILITY.

LAND OWNER'S DUTY

The duties of a land owner in Mississippi have been succinctly stated:

> There is no duty to warn of a defect or danger that is as well known to the invitee as to the land owner, or of dangers that are known to the invitee, or dangers that are obvious or should be obvious to the invitee in the exercise of ordinary care. Grammar v. Dollar 911 S2d 619, 624 (Miss. Ct. App. 2005). Additionally, the owner of a business does not insure the safety of its patrons. Rather, the owner of a business "owes a duty to an invitee to *exercise reasonable or ordinary care to keep the premises in a reasonably safe condition or to warn of dangerous conditions not readily apparent, which the owner or occupant knows of, or should know of, in the exercise of reasonable care.*" Robinson v. Ratliff, 757 S2d 1098, 1101 (Miss. Ct. App. 2000).

Chriss v. Lipscomb Oil Company, 2008 Miss. App. LEXIS 2002.

In order to recover, as a business invitee, Ms. Pratt must prove that Fred's caused an unreasonably dangerous condition to exist on the premises. McGovern v. Scarborough, 566 S2d 1225, 1228 (Miss. 1990) (Affirming directed verdict for the Defendant). As stated by the Scarborough court, and applicable here, "by any stretch of the imagination can it be said that... this building was not reasonably safe?" Id.

Ms. Pratt never complained to anyone at Fred's. Fred's received no complaints of any problems with the check out line.

For the Plaintiff to prevail, or even allow a jury to even hear the claim, there "must be some evidence of negligence". Jerry Lee's Grocery, Inc., v. Thompson 528 S2nd 293, 296

(Miss. 1988). In this case, Plaintiff simply testifies that she was in the store fell, thinks it was a plastic bag that she slipped on but does not know how it got there or how long it had been there. Given the scant facts provided by the Plaintiff, and her lack of specificity regarding the accident itself, it is impossible for the Defendant to rebut what is not any evidence of anything. "Merely proving that an accident occurred on a business premises is not sufficient to prove liability or by itself prove that a dangerous condition existed at the time of the accident." Hugley v. Imperial Palace of Mississippi, Inc. 930 S2d 1278 (Miss. App. 2006) citing Robinson v. Ratliff 757 S2d 1098, 1101 (Miss. Ct. App. 2000). There must be proof the business was negligent. Id. There is simply no proof that Fred's was negligent in any way.

II.

THE COURT ERRED IN REFUSING TO GRANT DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE FOR A NEW TRIAL

At the close of all the proof, Defendant renewed its Rule 50 Motion for Directed Verdict. (R-151). The court denied the motion. (R-151). Admittedly, all reasonable inferences are to be drawn in favor of the verdict and/or the proof. However, in this instance, drawing all reasonable inferences in favor of the Plaintiff, there is simply no proof whatsoever in the record that an employee of Defendant caused a plastic bag to be in the floor. At trial, at argument on Defendant's Motion for Directed Verdict, Plaintiff abandoned the "constructive notice" theory and rested their entire case on direct liability of Fred's employee causing a bag to be in the floor. The record is absolutely void of any negligence on the part of a Fred's employee in causing the bag to be on floor. Admittedly, as admitted by the Fred's representative, a plastic bag in the floor can be a hazard. However, Plaintiff still has the burden of showing that the plastic bag was put there or caused to be there by the direct negligence of a Fred's employee. Hugley v. Imperial Palace, supra.

There was simply no reasonable inference the jurors could draw based upon the complete lack of proof. The mere fact that the accident occurs is not negligence on the part of the defendant. Robinson v. Ratliff at 1101. The standards regarding a judgment notwithstanding the verdict, a directed verdict and a preemptory instruction are the same. Steele v. Inn of Vicksburg, Inc., 697 So. 2d 373 (Miss. 1997).

III.

THE COURT ERRED IN NOT GRANTING DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

A motion for JNOV tests the legal sufficiency of the evidence supporting the verdict, not the weight of the evidence. White v. Yellow Freight Systems, 905 So. 2d (Miss. 2004). In this circumstance, Defendant moved for a directed verdict and renewed the motion at the close of the proof. There was absolutely no evidence of negligence on the part of a Fred's employee that caused a plastic bag to be on the floor. As a matter of law, the verdict could not stand based upon the lack of proof. The purpose of the JNOV motion was to allow the court to address the issue and, with the ability to look back at the record as a whole, consider all of the evidence and find that there was a complete lack of proof on the issue of liability. Under these circumstances, the Plaintiff put on absolutely no proof of negligence on the part of the Defendant. Overall, based upon the proof, it is also clear that Defendant was deprived of the opportunity to put on evidence clearly showing Plaintiff suffered from a pre-existing condition to her left knee which was so severe that her doctor had previously suggested she may need knee replacement surgery. (R-D-2-ID) (Exhibit 2 of Record Excerpts).

A new trial is a totally different issue than judgment notwithstanding the verdict. A motion for a new trial falls within a lower standard of review. See White v. Yellow Freight at 510. Rule 59 authorizes the trial judge to set aside a jury verdict as to all or any parts of the issues and grant a new trial whenever justice requires. Miss. R. Civ. P. 59. Whether to grant a motion for a new trial is within the Trial Court's sound discretion. Green v. Grant, 641 So. 2d 1203, 1207 (Miss. 1994). Verdicts, of any kind, as stated by the Supreme Court previously, "are to be founded upon probabilities according to common knowledge, common judgment and common sense, and not upon possibilities; and a verdict cannot convert a possibility or any

number of possibilities into a probability." White v. Yellow Freight, 905 So. 2d 506, 512 (Miss. 2004) (quoting Ellsworth v. Glindmeyer, 234 So. 2d 312, 319 (Miss. 1970). Findings of fact are to be set aside when they are against all reasonable probability. Id.

The uncontroverted evidence in this case was that the only thing the Plaintiff could say was that she slipped, and then after she slipped, she saw a plastic bag, but did not know how long it had been there, and did not know how it got there. No other witness had any knowledge of how the plastic bag may have gotten there. Furthermore, in regard to the damages, it is uncontroverted that Dr. Moses, Plaintiff's treating physician, who testified her knee pain was as a result of her fall, based his entire testimony on the fact that his opinion would change completely if Plaintiff had prior complaints of pain to her left knee (which she did according to D-2-ID which was not allowed to be put into evidence by the Trial Court). Therefore, under all of the facts and circumstances, it was appropriate for the court to at a minimum, grant a new trial.[1]

The probabilities in this case are that at worst, Plaintiff suffered a bruised knee. Her treating physician, Dr. Moses, gave an opinion based upon a presumption that there was absolutely no prior pain or problems with the left knee. In fact, Plaintiff's prior pain and problems with her left knee were so severe that her physician had already suggested that she have knee replacement surgery. The overall uncontroverted facts warranted a new trial.

[1] The error of the trial court in regard to not admitting the medical records showing previous treatment to the left knee was compounded by the fact that plaintiff's counsel argued in closing that defendant should have somehow called a treating physician from the clinic where the court did not allow the prior records showing a pre-existing left knee condition to be considered by the jury.

IV.

THE COURT ERRED IN NOT ADMITTING RELEVANT EVIDENCE OF A PRE-EXISTING CONDITION OF THE PLAINTIFF IDENTICAL TO WHAT WAS COMPLAINED OF AT TRIAL

At trial Plaintiff contended that her left knee was injured in this accident. (R-97). She complained that her knee hurt that day, she was treated for her left knee at the emergency room, and her knee continued to hurt through trial. (R-96). At trial, Defendant attempted to introduce medical records of Plaintiff's orthopedic physician, dated prior to the date of her accident, which showed specifically that she was treated numerous times for pain and problems with her left knee prior to this accident. (R-D-2-ID). In fact, Plaintiff's knee pain was so severe prior to this accident that physicians from Greenwood Orthopedic Clinic had suggested she may need knee replacement surgery (again prior to this accident). (R-D-2-ID). The court erred in not admitting these records as they are clearly relevant in regard to whether Plaintiff suffered from a pre-existing condition that may have accounted for some or all of her alleged pain. Her left knee pain had to have been very severe prior to this accident for her physician to be suggesting that she would need knee replacement surgery.

The rules of evidence define "relevant evidence" as follows:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would have been without the evidence.
>
> N.R.E.401

Evidence is relevant if it is likely to affect the probability of a fact of consequence in the case. Mississippi State Highway Commission v. Dixie Contractors, Inc., 375 So.2d 1202, appeal after remand 402 So.2d 811 (1979). Certainly, Plaintiff's left knee injury and alleged left knee pain is a "fact of consequence" in the case. In reality, the most significant fact is that is where

Plaintiff received most of her treatment post-accident (just as she received most of her treatment pre-accident).

It is has been held that a pre-existing issue is for a jury to determine. Rotwein v. Holman, 529 So.2d 173 (Miss. 1988). In fact, there is no way for a jury to determine the issue without admitting medical records of a pre-existing condition that involves the exact body part complained of at trial.

Trial courts, under similar circumstances, who have refused to admit relevant evidence regarding a pre-existing condition or conditions relating to the same body parts have been reversed. In Beverly Enterprises, Inc. v. Reed, 961 So.2d 40 (Miss. 2007), it was held that testimony about the plaintiff's condition prior to the alleged negligence in the case was relevant to the determination of whether she had suffered new and distinct injuries at the nursing home. Id. In this case, it was certainly relevant for the jury to be allowed to examine relevant evidence relating to Plaintiff's left knee, and treatment received to it, prior to the accident complained of wherein she alleged injury to her left knee. Failing to allow the Defendant to introduce such evidence, involving the exact same body part, and significant prior treatment to the exact same body part, is a manifest injustice and completely prevented Defendant from arguing any type of lack of causation with any specificity at trial.

Based on the foregoing, the failure to admit relevant evidence of the pre-existing condition of Plaintiff's left knee was an abuse of discretion and for that reason the trial court decision should be reversed and remanded for a new trial.

V.

THE COURT ERRED IN NOT ALLOWING DEFENDANT TO INTRODUCE DEPOSITION TESTIMONY OF THE PLAINTIFF

Defendant tendered, but was not allowed, to admit certain portions of Plaintiff's deposition testimony. (R-146) The deposition testimony was not hearsay and it was irrelevant whether the Plaintiff was present then and there to testify. The applicable Rule of Evidence is Rule 801(d)(2). The relevant portion of the Rule states as follows:

> (2) *Admission by party opponent.* The statement is offered against a party and is (a) the party's own statement, and either an individual or a representative capacity or...

As the comments to the Mississippi Rules of Evidence state:

> Under Rule 801(d)(1)(a) the prior inconsistent statements may be admissible as substantive evidence if they were made under oath, e.g., at a deposition or a judicial proceeding.

See, comment M.R. 801. In this circumstance, the prior deposition testimony of the Plaintiff simply was not hearsay under any stretch of the Rules or imagination. Numerous Mississippi decisions have held that a prior statement of a witness is not hearsay because it is an admission. See, e.g., Morgan v. State, 818 So. 2d 1163 (Miss. 2002) (prior statement of a witness is not hearsay); Sudduth v. State, 562 So.2d 67 (Miss. 2008) (out of court admission is not hearsay); Conley v. State, 790 So.2d 773, 788 (Miss. 2001) (prior unsworn statement of witness is admissible to rebut testimony at trial); Burns v. State, 729 So.2d 203 (Miss. 1998) (prior letters of a party opponent were admissions and not hearsay). It appears from those decisions that the prior statements were admitted as substantive evidence. In this case, all Defendant wanted to do was introduce prior sworn admissions of the Plaintiff, under oath, which were not hearsay. The refusal to allow the Defendant to introduce the prior sworn deposition

testimony of the Plaintiff, either by reading it to the jury, or admitting the deposition testimony as an exhibit, amounted to prejudicial error which warrants reversal and a new trial.

VI.

THE COURT ERRED IN NOT GRANTING A MISTRIAL WHEN PLAINTIFF'S COUNSEL ARGUED IN CLOSING THAT DEFENDANT SHOULD HAVE CALLED PLAINTIFF'S TREATING PHYSICIAN

At closing, Plaintiff's counsel argued as follows verbatim:

> "Jesse Pratt did not suffer a bruise. And you want to know why she didn't suffer a bruise? Because everything he read to you, who was that doctor? Did anybody see that doctor today? I didn't see that doctor. I don't know who that doctor is. I don't know the name of that doctor. We have not heard one person rebut Dr. Moses' diagnosis of an MRI -- the MRI which said torn ACL, torn medial meniscus, torn lateral meniscus. There's been no rebuttal testimony of that. Absolutely zero. We didn't hear that doctor say anything, and I can guarantee you that if that doctor was going to rebut Dr. Moses' testimony, you can guarantee they would have had that doctor up here."

Those comments amount to reversible error. Defense counsel promptly objected and moved for a mistrial. (R-191). The court asked the jury to disregard the statements, but did not grant a mistrial. (R-192). Failure to grant a mistrial under those circumstances was prejudicial error. There was simply no way for Defendant to rebut that type of inappropriate argument under the circumstances. In fact, to the contrary, the person with the most knowledge of the treating physician, and the ability to contact or have communications with the treating physician, was the Plaintiff. Under those circumstances, a treating physician was "more available" to the Plaintiff than the Defendant. To argue that the Defendant should have somehow called a treating physician to testify, via subpoena, without being allowed to communicate with the treating physician is prejudicial and warranted a mistrial. It is well settled in Mississippi that commenting about a party's failure to call a particular witness, when the witness is available to both parties, is grounds for a mistrial. E.g., Holmes v. State, 537 So.2d 882, 885 (Miss. 1988); Madlock v. State, 440 So.2d 315, 317 (Miss. 1983). See also Collins v. State, 408 So.2d 1376, 1380 (Miss. 1982) (Reversed for cumulative comments including failure to call a witness equally

available). Most of the cases involve prosecutorial misconduct wherein a defendant does not call a particular witness. In this case, Plaintiff's counsel argued the Defendant, who had no access to a treating physician, should have been calling him at trial to testify to rebut Plaintiff's allegations regarding the left knee injury when in fact the court had previously ruled Defendant could not even admit medical records showing a previous left knee injury, condition or treatment. (R-191). Combined with the failure to admit the records in the first place, the argument of counsel was highly prejudicial and could not be cured simply by an admonishment from the court for the jury to disregard it.

In this civil case, the proof is even stronger that it was reversible error to allow such comments and not grant a mistrial. The treating physician involved was someone that Plaintiff's counsel had the ability to talk to, ability to communicate with ex parte, and obtain whatever ex parte information was necessary to make a determination on whether he was available for trial and whether it was in Plaintiff's best interest for him to be called. To the contrary, the Defendant could only obtain information from a treating physician by either deposing him or issuing a trial subpoena.[2] From a cumulative error standpoint, Plaintiff's theory of the case was that the treating physician opined that Plaintiff's knee condition resulted from this accident, but his opinion was contingent solely upon the fact that the Plaintiff had no prior left knee complaints and he further deferred any definitive opinion to an orthopedic specialist. (R-132) By depriving the Defendant of the right to put in the records of the orthopedic specialist, showing treatment to the left knee prior to the injury or accident complained of in this case, and then allowing Plaintiff to argue that Defendant should have somehow called the treating

[2] Incidentally, there was simply no way for the defendant to know or have any idea prior to trial that medical records from the clinic showing treatment of the Plaintiff's left knee prior to this accident would not be admitted by the trial court. Consequently, given the gravity and clarity of the pre-existing condition records, it was unnecessary to have the physician testify by deposition as the records themselves, had they been admitted, clearly explained any pre-existing issues without the necessity of physician testimony.

physician to rebut incomplete testimony, amounts to a miscarriage of justice under the circumstances.

For the foregoing reason, the Trial Court should have granted a mistrial. Under the circumstances, her failure to grant the mistrial is reversible error and this case should be reversed and remanded for a new trial.

CONCLUSION

The Trial Court should have granted a directed verdict for Defendant. In the alternative, having the opportunity post trial to review the incorrect evidentiary rulings, the Trial Court should have granted a new trial. It was a manifest if injustice to allow the case to go to the jury with a record void of any evidence of negligence. The error was further compounded when the Trial Court refused to allow the admission of prior records and testimony in support of Defendants factual defenses. For the foregoing reasons, the verdict should be reversed and rendered. In the alternative, the case should be reversed and remanded for new trial.

Respectfully submitted,

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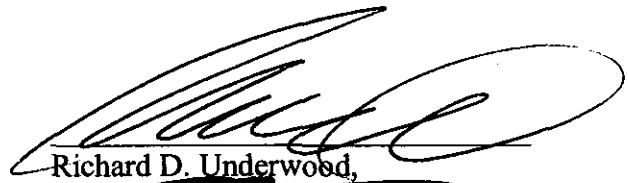
CERTIFICATE OF SERVICE

I, Richard D. Underwood, certify that today, 9/8/12, a copy of the Brief for Defendant-Appellant Fred's Stores of Tennessee, Inc. was served by United States Mail upon Mr. Charles Swayze, III, Whittington, Brock & Swayze, P.A., P.O. Box 941, Greenwood, MS 38935-0941, Attorney for Plaintiff/Appellee.



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