IN THE SUPREME COURT OF MISSISSIPPI

COURT OF APPEALS OF THE STATE OF MISSISSIPPI

PAULETTE L. KNIGHT	APPELLANT
VERSUS	NO. 2010-CA-0844
PICAYUNE TIRE SERVICE, INC.	APPELLEE

BRIEF OF APPELLEE

Appeal from the Circuit Court of Pearl River County, Mississippi

Submitted by:

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ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed person 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.

Paulette L. Knight, Plaintiff/Appellant

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Attorney for Appellant

Picayune Tire Service, Inc., Defendant/Appellee

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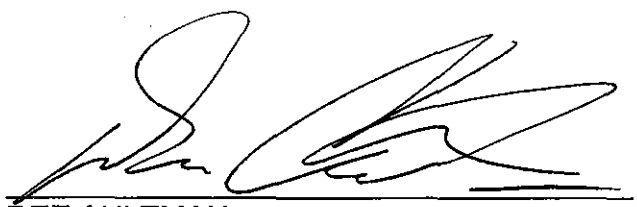

DEE AULTMAN
Attorney of record for Defendant/Appellee

ORAL ARGUMENT

The issues raised by direct appeal are, at their core, controlled by previous precedent and are properly founded in law and fact; therefore, oral argument is not necessary.

Other Authorities:

STATEMENT OF ISSUES

Summary judgment entered by the trial court was proper.

STATEMENT OF THE CASE

Paulette L. Knight (hereinafter referred to as "Plaintiff" or "Knight"), filed a complaint for injuries alleging that Picayune Tire Service, Inc. (hereinafter referred to as "Defendant" or "Picayune Tire"), created a dangerous and hazardous condition which resulted in her fall on December 10, 2005. (R. 3-6) Subsequently, Picayune Tire filed its motion for summary judgment, which was granted, and judgment entered on April 13, 2010. (R. 61-62). Paulette Knight has perfected the present appeal.

FACTS

Ms. Knight was a medically-retired[1] 60-year old female who, on December 10, 2005, parked at the Picayune Tire Service shop to have a tire repaired. (R. 38-39, *Knight depo., pp. 73-74*). It was a nice, clear day and there was no substance on the ground that made Ms. Knight fall. (R. 39; *Knight depo., p. 74; l. 1–5*). Further, Ms. Knight did not ascertain what actually made her fall nor did she observe any defects in the area. (R. 39, *Knight depo., p. 74, l. 6–15*). Knight had traversed the same general area on two previous occasions without incident. (R. 39; *Knight depo., p. 75, l. 23– 25; p. 76, l. 1–25; p. 77, l. 1–4*). Knight circled a general area where she believes her fall occurred as reflected in Exhibit 4 to her deposition. (R. 48-49, 54; *Knight depo., p. 113, l. 19–25; p. 114, l. 1–4*). Further, Knight failed to look or observe the area upon which

[1] Interestingly, the Plaintiff has been disabled and unable to work since a work-related incident occurring at the Pearl River County Courthouse where she tripped. (*R. 22, 31, 38; Knight depo., pp. 7-8, 44-45, 73).*

she was walking. (R. 49; *Knight depo., p. 114, l. 5–13*). Specifically, Ms. Knight failed to look at the area in which she was about to walk, stating, "I'm not looking down. I'm looking out." (R. 49; *Knight depo., p. 114, l. 5–25; pp. 115-116*).

Contrary to Plaintiff's assertion in her brief, there is no evidence in the record of any type of repair to the Defendant's parking lot as argued, nor is there any evidence in the record indicating what exactly, if anything (other than Plaintiff's own negligence), caused her fall.

SUMMARY OF THE ARGUMENT

On December 10, 2005, Paulette Knight patroned the Picayune Tire shop located in Picayune, Mississippi, to have a tire repaired. Once arriving at the facility, Knight parked her vehicle and proceeded to enter the Defendant's premises to inquire about a tire repair. She then exited the premises to retrieve her purse and upon her third time to traverse the area in question is when she tripped and fell.

Ms. Knight never ascertained exactly what caused her fall, but rather identified a general area where she believes the fall to have occurred. Picayune Tire breached no duty to Knight, as cracks and imperfections in sidewalks/parking lots do not constitute an unreasonably dangerous condition. In fact, all parking lots have seams, cracks and are not perfectly even. Further, Knight cannot produce any admissible evidence to show what, if anything (other than her own negligence), caused her fall, and therefore summary judgment was proper in the instant matter.

ARGUMENT

A. THE STANDARD OF REVIEW

The standard for review of a lower court's award of summary judgment is well settled. It is a *de novo* review. Therefore, this Court must apply the same standard as the lower court pursuant to Rule 56 of the Mississippi Rules of Civil Procedure. ***Massachusetts Bay Ins. Co. v. Joyner***, 763 So. 2d 877, 878 (Miss. 2000).

Mississippi Rule of Civil Procedure 56 provides that a party against whom a claim is asserted may, at any time, move for summary judgment in its favor as to all or any part of the claim. Specifically, Rule 56(c) provides:

> 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 that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Material facts are the "focal point" for summary judgment. ***Erby v. North Mississippi Medical Center***, 654 So. 2d 495, 499 (Miss. 1995). Before summary judgment may be granted, the Court must determine if there are material factual questions at issue over which reasonable jurors could disagree. ***Russell v. Orr***, 700 So. 2d 619, 624 (Miss. 1997).

The Mississippi Supreme Court has expressed its understanding of the burden of the party opposing summary judgment:

> Our own construction of Rule 56 embodies this concept that <u>when a party opposing summary judgment, on a claim or defense as to which the party will bear the burden of proof at trial, fails to make a showing sufficient to establish an essential element of the claim or defense, then all other facts are immaterial, and the moving party is entitled to judgment as a matter of law</u>.

Galloway v. Travelers Ins. Co. 515 So. 2d at 678, 684 (Miss. 1987). (Emphasis added). *See also* ***Grisham v. John Q. Long V.F.W. Post No. 4057, Inc.*** 519 So. 2d 413, 415 (Miss. 1988).

Summary judgment is necessary where the party opposing it has failed to produce evidence sufficient to establish an essential element to her case. ***Wilbourn v. Stennett***, 687 So. 2d 1205, 1214 (Miss. 1996). In other words, the non-movant (Knight) cannot just sit back and remain silent. Rather, she must produce significant probative, admissible evidence proving that there actually are issues for trial. The non-moving party's claim must be supported by more than a mere scintilla of colorable evidence. It must be evidence upon which a fair minded jury could return a favorable verdict. ***Richardson v. Grand Casino***, 935 So.2d 1146 at ¶ 8, COA MS 2006.

B: NO GENUINE DISPUTE AS TO MATERIAL FACT

Knight argues she presented evidence that "the defects in the parking area's surface were obscured by the other vehicles in the parking area." (Appellant brief, p. 6) That fact, however, is completely contradicted by her deposition. The following was asked of Ms. Knight:

Q: This is a black-and-white copy of a photograph you produced in discovery. Does that show the area where you fell?

A: Yes.

Q: All right. Where would that be?

A: Right in this area.

Q: All right. Was there anything either hiding or obstructing your view while you were walking in this area where you fell?

A: No.

Q: Okay. Did you see it before you fell?

A: No.

Q: Why didn't you see it?

A: Well, I was walking towards the store, so I was looking towards the store.

Q: So you weren't looking down?

A: No.

(R. 37; *Knight depo, p. 66, l. 3–8, 21–25; p. 67, l. 1-6*)

Q: Now, on this particular occasion when you fell, there was nothing blocking your vision from, if you wanted to, to look down at the pavement where you were walking; correct?

A: No

Q: There was nothing blocking your vision?

A: Nothing.

Q: But you weren't looking down when you fell; is that correct?

A: Correct.

(R. 37-38; *Knight depo, p. 69, l. 17–25; p. 70, l. 1*)

Q: When you were at your car turning around to go back to the door, did you look ahead to see where you were going to go?

A: I was looking towards the building.

Q: Did you see the pavement at all?

A: I wasn't looking – down at the pavement. I was looking as I was walking back at the building and I was going to go to the sidewalk, but there was two women standing there talking. And I said, well, I'm not going to be

rude and walk between them, so I came out further from my – where I had already started walking. And I came out further to go up this way.

(R. 38; *Knight depo, p. 70, l. 13-24*)

Q: When you're walking, are you looking at the area in which you are about to walk?

A: I'm not looking down. I'm looking out (indicating).

Q: So you never looked down –

A: And I saw the ladies –

Q: You never looked down at where you're fixing to walk on?

A: I assumed it would just be flat, I didn't know it would be uneven.

(R. 49; *Knight depo, p. 114, l. 14–23*)

Q: Well, the sidewalk out here that's right in front of the court, it has plenty of cracks and crevices in it. Do you ever look at where you are walking on a sidewalk?

A: I do now.

Q: But you didn't back on December 2005?

A: No. I was just going back toward the store and I saw the two women standing there, so I shifted from the way I was – the area I was going towards. I moved over and went in a direction to go towards the store.

Q: Okay. Well, you said you do now, you look down now and you will notice cracks or uneven pavement on the sidewalk, but back in December 10, 2005, you didn't do that?

A: I didn't notice anything wrong with the – the pavement because I had no problem walking in and I had walked back to my car and I had no problem walking in or back out and had started back into the store.

Q: So you had been over the same area where you fell prior –

A: Not exactly.

Q: But this time you did fall, you weren't looking down and you didn't look down and observe any cracks or uneven pavement?

A: No.

Q: Right?

A: No, I didn't.

Q: All right. But now you do, now you do look down when you're walking?

A: No, that I had fallen and got hurt so bad, I am more aware of what is going on.

(R. 49; *Knight depo, p. 115, l. 7–25; p. 116, l. 1-12*)

Clearly, Ms. Knight's testimony fails to factually support her contention that the area upon which she fell was obscured by other vehicles in the parking area, and her testimony only indicates that she failed to observe the parking lot upon which she was walking. Any argument by the Plaintiff to the contrary is without factual basis. ***City of Greenville v. Laury***, 159 So. 2d 121, 122 (Miss. 1935); ***Richardson v. Grand Casino***, 935 So.2d 1146 at ¶ 8, COA MS 2006.

Plaintiff argues that she fell when she tripped over "an irregularly shaped concrete patch." (Appellant's Brief, p. 6) This, again, is not supported by any fact in the record, but rather the Plaintiff has no idea of what, if anything, she tripped over. Plaintiff testified as follows:

Q: Did you ascertain what made you fall? Did you get up afterwards eventually and say, wow, what caused that fall, figure it out?

A: I just – I just knew that something made me start stumbling. And at that time, I wasn't thinking about what made me fall –

Q: Right.

A: – all I was worried about was I knew I fell and I was in a lot of pain. And I had to go to the hospital to get something seen about because I was hurting.

(R. 39; *Knight depo., p. 74, l. 6-15).*

Q: All right. Did you have any problems going over the parking lot or any of the area at that time?

A: No. When I parked my car, I went that way and came up the sidewalk (indicating).

Q: Again, my question is: Did you have any problems with the parking lot going to the store the first time on December 10, 2005?

A: No.

Q: Going out on December 10, 2005, did you have any problems going back to your car?

A: No.

Q: Did you observe the conditions around you at that time?

A: I wasn't—I wasn't looking for conditions, whatever you mean "conditions."

Q: Well, did you see anything that was inconsistent with your own safety?

A: No.

Q: Okay. Same thing going in the first time, did you see anything around the area that was inconsistent with your own safety?

A: No.

Q: When you fell, did you see anything that was inconsistent with your own safety?

A: I didn't see it before I fell, but I knew I'd tripped.

(R. 39; *Knight depo., p. 76, l. 1-25; p. 77, l. 1)*

Once again, the Plaintiff's argument that she tripped over some "irregularly shaped concrete patch" is not factually supported and likewise her argument that there

was a repair attempt is not supported in the record by any evidence. (Appellant's Brief, p. 6).

Knight failed to cite any factual authority in the record to support her argument and as such fail to support their contention of an unreasonably dangerous condition which proximately caused the Plaintiff's fall and injuries. ***Richardson v. Grand Casino***, 935 So.2d 1146 at ¶ 8, COA MS 2006.

C: NO UNREASONABLY DANGEROUS CONDITION

Assuming *arguendo* that the Plaintiff actually tripped in the general area circled in Exhibit 4 of her deposition, there is nothing to indicate said area is an unreasonably dangerous condition. Mississippi courts have repeatedly held that normally encountered conditions such as curbs, sidewalks and steps are not hazardous conditions. These normally encountered conditions also contain cracks and changes in elevations, and as such do not become hazardous nor unreasonably dangerous conditions. ***McGovern v. Scarborough,*** 566 So. 2d 1225, 1228 (Miss. 1990); ***Bond v. City of Long Beach***, 908 So. 2d 879, 882 (Miss. COA 2005), (one inch elevation of sidewalk did not create a dangerous condition); ***First Nat'l Bank of Vicksburg v. Cutrer***, 216 So. 2d 465, 466 (Miss. 1968), (cracks on the edge of concrete riser not unreasonably dangerous condition).

In the instant matter the Plaintiff contends the general area circled in Exhibit 4 of her deposition is an unreasonably dangerous condition. (R. 54) Depicted in Exhibit 4 is an edge of pavement sloping to the sidewalk. There is nothing unusual nor unreasonably dangerous about the parking lot as depicted by the photograph marked

as Exhibit 4 of the Plaintiff's deposition. (R. 54) There is a United States District Court case of ***Mack v. Waffle House, Inc.***, 2007 WL 1153116 (SD Miss. 2007), which is factually analogous to this case and involved a patron alleging that a crack located at the end of the sidewalk, where the handicap ramp meets the asphalt parking lot, caused her fall. The crack was approximately 2 inches wide, 4 ¾ inches long and ¾ inch deep. The trial court granted summary judgment finding that as a matter of law said crack was not an unreasonably dangerous condition based upon the previously cited Mississippi cases, as well as ***City of Biloxi v. Schambach***, 157 So.2d 386, 392 (Miss. 1963), (3–4 inches difference height between sidewalk blocks not sufficient to create a dangerous condition); ***City of Greenville v. Laury***, 159 So.2d 121, 122 (Miss. 1935), (crevice in street measuring ½ inch–3 inches in width and depth and 18 inches–2 feet in length was not a dangerous condition). Clearly the evidence adduced and not in dispute reveals that there was no dangerous condition, and as such, the Defendant is entitled to summary judgment as a matter of law. *See also,* ***Parker v. Wal-Mart***, 261 Fed. Appx. 724 (5th Cir. 2008), wherein the Fifth Circuit determined that under Mississippi Law a curb with a crack and partial paint job did not represent an unreasonably dangerous condition.

The Plaintiff principally relies upon ***Mayfield v. Hairbender***, 930 So.2d 733 (Miss. 2005), in arguing that a jury question is presented on the facts as developed. The Plaintiff is mistaken about the principal holding of ***Mayfield v. Hairbender***. The defendant ***Hairbender*** argued that an open and obvious danger was an absolute defense, irrespective of ***Tharpe v. Bunge Corp.***, 641 So.2d 20 (Miss. 1994). ***Hairbender*** urged the Supreme Court to modify ***Tharpe*** as an either/or alternative. *See*

Hairbender ¶ 25. While the condition complained of in the instant matter is open and obvious, it is not the thrust of the Defendant's motion for summary judgment, but rather the condition itself is not unreasonably dangerous. This issue was not addressed in ***Mayfield v. Hairbender***, supra, as noted in ***Parker v. Wal-Mart***, 261 Fed. Appx. 724 (5th Cir. 2008), wherein the plaintiffs cited ***Hairbender*** as an authority for the same proposition as Ms. Knight. In ***Parker***, the plaintiff alleged a fall as a result of a crack in a curb that was painted. Summary judgment was granted and appeal was taken. The Fifth Circuit found that ***Mayfield***, did not expressly address whether the condition itself was unreasonably dangerous; rather, the Court addressed the general question of whether an open and obvious condition could also be considered an unreasonably dangerous condition. ***Parker***, supra. Further, the Court held that although the curb contained a crack, this alone is insufficient to transform it into an unreasonably dangerous condition and upheld the summary judgment. ***Parker***, supra.

The Plaintiff's main contention or disagreement with the Defendant's motion for summary judgment is that an uneven and/or cracks in a parking lot is not an usual condition, and relies upon ***Tate v. Southern Jitney Jungle Co***, 650 So.2d 1347 (Miss. 1995). Examining ***Tate***, the defective condition was a sharp-edged corner hidden by a countertop on the defendant's premises. The Court found that a jury question may be raised as to whether that was an unusual fixed object. There is the obvious distinction of (1) ***Tate*** did not involve a parking lot or sidewalk condition, which is completely unobstructed, and (2) the fact that the counter concealed the condition was determinative in the Court reversing a summary judgment in favor of Jitney Jungle. ***Tate***, supra. Clearly, uneven texture in a parking lot is something normally encountered

and as such does not arise to a defective condition which warrants submission to a jury on the issue of the Defendant's liability.

The Plaintiff just speculates what caused her fall and that speculation is not sufficient to show negligence upon the part of the proprietor. ***Bernard v. Thirty-Three Foods, Inc.***, 905 So.2d 1290, 1292 ¶ 8 (Miss. COA 2004). Likewise, summary judgment was appropriate in ***Brannon v. Wal-Mart Stores, Inc.***, 209 WL 700777, SD MS 2009, wherein the plaintiff did not actually determine what made her fall, but rather speculated (sometime later) that there were some indentations in the asphalt that caused her fall. ***Brannon***, supra. The Court, in granting summary judgment, held that even if the conditions or indentations in the asphalt caused the fall, the condition itself was not unreasonably dangerous. ***Brannon***, supra. *See also,* ***Rod v. Home Depot***, 931 So.2d 692 (Miss. COA 2006). Clearly, uneven texture/cracks in a parking lot is something normally encountered and does not arise to a defective condition which warrants to the submission to a jury on the issue of the Defendant's liability.

CONCLUSION

It is unfortunate that the Appellant was not paying proper attention to the area in which she traversed, but was rather looking up when she accidentally fell. The law is rather clear that the Defendant is not an insurer as to the safety of the patron and that uneven surfaces in and of themselves do not constitute an unreasonably dangerous condition. The trial court was correct in granting summary judgment for failure to do so and allowing Knight to proceed to trial with a jury would be tantamount to making Picayune Tire an insurer and guarantor of its patron's safety in contravention of ***Rod v. Home Depot***, 931 So.2d 692 (Miss. COA 2006); ***Parker v. Wal-Mart***, 261 Fed. Appx. 724 (5th Cir. 2008); and ***Mack v. Waffle House, Inc.***, 2007 WL 1153116 (SD Miss. 2007).

RESPECTFULLY SUBMITTED, this the 31st day of January, 2011.

PICAYUNE TIRE SERVICE, INC., APPELLEE

BY: AULTMAN, TYNER & RUFFIN, LTD.

BY: _____

DEE AULTMAN
MSB [redacted]

CERTIFICATE OF SERVICE

I, DEE AULTMAN, hereby certify that I have this day mailed, postage prepaid, a copy of the foregoing Brief of Appellee to:

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SO CERTIFIED, this the 31st day of January, 2011.

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