IN THE SUPREME COURT OF MISSISSIPPI

DOROTHY HAGGARD	PLAINTIFF/APPELLANT
VS.	NO. 2010-CA-01499
WAL-MART STORES, INC.	DEFENDANT/APPELLEE

BRIEF OF THE DEFENDANT/APPELLEE WAL-MART STORES, INC.

ON APPEAL FROM THE CIRCUIT COURT OF
WASHINGTON COUNTY, MISSISSIPPI
CAUSE NO.: 2009-0220 CI

ORAL ARGUMENT NOT REQUESTED

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I. 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 judges of this Court may evaluate possible disqualification or recusal.

1. Dorothy Haggard, Plaintiff
2. Wal-Mart Stores, Inc., Defendant
3. Fred Turner, Wal-Mart, Greenville, MS
4. Patricia Lewis, Wal-Mart, Greenville, MS
5. Yancy Burns, Esq., Burns & Associates, Jackson, MS, Counsel for Plaintiff
6. R. Brittain Virden, Esq. and Renetha L. Frieson, Esq. Campbell DeLong, LLP Greenville, MS, Counsel for Defendant

RESPECTFULLY SUBMITTED, this, the 8 day of June, 2011.

By: _____

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V. STATEMENT OF THE ISSUE

1. Whether the trial court's order granting Defendant summary judgment should be affirmed as Plaintiff failed to establish any genuine issues of material fact and Plaintiff cannot satisfy any of the necessary elements of a premises liability claim under Mississippi law?

V. STATEMENT OF THE CASE

This action was commenced in the County Court of Washington County, Mississippi when the Plaintiff filed her Complaint on September 20, 2007 for alleged personal injuries which she claimed resulted from a slip and fall incident in Defendant's store located in Greenville, Mississippi. After the parties conducted discovery Defendant filed its Motion for Summary Judgment on November 6, 2008.

The first hearing on Defendant's Motion for Summary Judgment took place February 12, 2009. The Court recessed that hearing since Plaintiff's counsel stated he needed to conduct additional discovery. Thereafter, the parties conducted additional depositions and submitted supplemental information to the Court. On October 1, 2009, the second hearing on the Motion for Summary Judgment was conducted. After consideration of the pleadings, discovery, affidavits and arguments of the counsel, County Court Judge Vernita King-Johnson ruled there was no genuine issue of material fact and there was no set of facts whereby Plaintiff could satisfy her burden of proof under Mississippi premises liability law. Therefore, summary judgment was granted to Defendant.

The Plaintiff filed her Notice of Appeal in the Circuit Court of Washington County, Mississippi on October 30, 2009. After submission of additional briefs, the Circuit Court of Washington County, Mississippi entered its detailed Order Affirming the County Court's Grant of Summary Judgment on July 20, 2010. Plaintiff filed her Notice of Appeal to the Mississippi Supreme Court on August 19, 2010.

VI. STATEMENT OF THE FACTS

On July 3, 2007, Plaintiff Dorothy Haggard alleges that she fell and sustained injuries while shopping at the Wal-Mart store in Greenville, Mississippi. Plaintiff's Complaint sought damages pursuant to the Mississippi law of premises liability and alleges that the incident was caused by the presence of a liquid on the floor but she could not identify the liquid or how long it was on the floor before Plaintiff's incident. R. at 140. Plaintiff admits there is no evidence that Defendant caused the unknown substance to be on the floor or had actual knowledge of the alleged dangerous condition. R. at 99 ¶ 31. Indeed, the first time Defendant learned of the substance on the floor was after Plaintiff's incident. Despite Plaintiff's argument in her brief on appeal, her sole argument under Mississippi premises liability law at the trial court was that Defendant somehow had constructive knowledge of the alleged dangerous condition.

1. Deposition Testimony of Plaintiff

Plaintiff's argument on appeal does not match the undisputed facts established in the trial court. Plaintiff admitted in her deposition she has no information of how the unknown substance came to be on the floor or how long the liquid had been on the floor. R. at 198:23-25; 199:1-14. Most importantly, Plaintiff admitted she had no information whatsoever that Wal-Mart had actual or constructive knowledge of the substance on the floor before the subject incident. *Id.*

> Q. Did anybody from Wal-Mart that you talked to that day or since tell you anything about any information they had or knowledge they had that the white substance was on the floor before you slipped in it?
>
> A. No.
>
> Q. Is there any indication whatsoever that you know of that anybody from Wal-Mart accidentally put that substance on the floor?
>
> A. No.

Q. Okay. Do you have any information like that of how that substance got on the floor whatsoever?

A. No.

Q. Do you have any information whatsoever that anybody from Wal-Mart knew that the white substance was on the floor before you fell in it?

A. No.

Id.

Significantly, Plaintiff admitted she had no information or evidence that the spill had been on the floor for any length of time with common indicators like foot prints, smear marks, or tracks from shopping cart wheels to impute constructive knowledge to Defendant that the substance had been on the floor for such a length of time that Defendant should have known it was there. *Id.* at 201:23-25; 201:1-5.

Q. The [substance] that was still on the floor, can you describe that for me, what it looked like?

A. It was just kind of clear, thick-looking substance.

Q. Was it like just droplets or little blobs on the floor?

A. No, it looked more like a spill.

Q. When you looked at it, for the ones that you didn't fall in, did you notice anybody else stepped in it or any footprints like that at all?

A. No.

Q. Did you notice that any other, like, say shopping cart buggies, you know, the wheels on them, if they had, gone through there at all?

A. No.

Q. Do you have any idea how long that white substance was on the floor before you fell in it?

A. No.

R. at 201:16-25; 202:1-8.

2. Manager Fred Turner

The Assistant Manager for the Greenville, Mississippi Wal-Mart store, Fred Turner, submitted an Affidavit which confirms Plaintiff's recollection that he also had no knowledge of the identity of the liquid and likewise had no knowledge that the unknown substance was on the floor prior to the incident with Plaintiff. R. at 280. His affidavit confirmed that he walked past the subject area approximately twenty minutes before learning of the Plaintiff's incident and recalls that there was no spilled substance on the floor at that time. *Id.* Like the Plaintiff, Mr. Turner also confirmed he had no knowledge of how long the unknown substance was on the floor prior to the incident and did not see any foot prints, skid marks, or wheel tracks in the unknown liquid after he arrived on the scend. *Id.* He also confirmed he has no knowledge how the substance came to be on the floor. *Id.*

Mr. Turner was also deposed by Plaintiff's counsel after the first hearing on the Motion for Summary Judgment. Mr. Turner was asked a series of hypothetical and speculative questions regarding the identity of the unknown substance and whether he or anyone else at Wal-Mart had prior knowledge of the substance on the floor. R. at 31-33. The extensive questioning of Mr. Turner confirmed once again that no one from Wal-Mart had prior knowledge of the unknown substance on the floor before Plaintiff's incident. Likewise, the extensive questioning of Plaintiff's counsel reconfirmed Plaintiff's testimony that there were no indications such as smear marks or shopping cart tracks to indicate that the substance had been on the floor for any length of time before Plaintiff's incident. *Id.*

Plaintiff's characterization of Mr. Turner's testimony as allegedly uncaring if a spill was

noticed on the floor is inaccurate and irrelevant. In fact, Mr. Turner's testimony explained the procedure whereby all Wal-Mart employees are on the look out for potential spills and how they are cleaned if found to be present. *Id.* The fact that Mr. Turner was doing his job on the night of the subject incident to stock merchandise in the store and never saw the substance before Plaintiff's incident does not establish a claim for Plaintiff pursuant to Mississippi premises liability law. Mississippi law confirms that plaintiff carries the burden of proof to establish the elements of a premises liability claim and the testimony of Mr. Turner confirms that he did not have any prior knowledge of the spilled substance on the floor and likewise did not observe any indicators that the substance had been on the floor for any length of time prior to Plaintiff's incident. Plaintiff's argument that Mr. Turner's testimony "conclusively" establishes a "pattern or practice of negligence" is both inaccurate based on the undisputed facts in this case and irrelevant for Plaintiff's premises liability claim.

3. **Associate Patricia Lewis**

Plaintiff's counsel also conducted the deposition of Wal-Mart's employee Patricia Lewis, who confirmed she personally was acquainted with Plaintiff even prior to the subject incident and saw Plaintiff on the night of the subject incident. Ms. Lewis testified that after she greeted Plaintiff another associate approached her some time later and informed her that the lady she had recently spoken to fell toward the back of the store. Ms. Lewis testified she then went to the area where Plaintiff fell and spoke to Plaintiff at the scene. R. at 362. Ms. Lewis confirmed she observed a liquid near Plaintiff at the incident scene, however, she testified she did not know what the substance was and did not see any spilled or empty container bottles in and around the subject area. *Id.* Ms. Lewis stated there was a "smear" mark in the liquid but that the mark was caused by Plaintiff's foot

when she slipped. R. at 364. Significantly, Ms. Lewis confirmed there were no other markings or indications of how long the unknown substance had been on the floor prior to the incident with Plaintiff such as other footprints from other customers or tracks from shopping cart wheels. *Id.* Finally, Ms. Lewis confirmed she has no information or knowledge of any other Wal-Mart employee who knew of the substance on the floor prior to the incident and likewise has no information that any Wal-Mart employee may have caused the unknown substance to be on the floor. *Id.*

4. Conclusory Affidavits of Plaintiff's Acquaintances

Plaintiff's appeal relies on the conclusory affidavits submitted by other customers, Gladys Shaw, Edna Carter and Shenesia Peterson, who are also acquaintances of Plaintiff. R. at 26-28. The trial court extensively analyzed these affidavits in the hearings on the Motion for Summary Judgment and concluded such affidavits did not establish a question of fact in regard to the necessary elements of Plaintiff's premises liability claim. Indeed, each of the repetitive affidavits confirm none of these customers saw any Wal-Mart employee walk past the spilled substance prior to Plaintiff's fall. These affidavits merely speculate that Wal-Mart employees "should have known" of a dangerous condition or otherwise make legal arguments by a lay witness. None of the affidavits establish any actual notice of the unknown substance on the floor prior to Plaintiff's incident. Likewise, the trial court found that none of the affidavits establish a question of fact that Wal-Mart employees should have known of the spilled substance on the floor because there were footprints, smear marks or tracks through the spilled substance before they learned of Plaintiff's incident. Accordingly, as held by the trial court and affirmed by the circuit court on the initial appeal, these affidavits did not establish a genuine issue of material fact to prevent the trial court from granting summary judgment.

VII. SUMMARY OF THE ARGUMENT

The evidence from the trial court, and even Plaintiff's argument on appeal, confirm there is no genuine issue of material fact and the summary judgment Order should be affirmed. Plaintiff cannot establish any factual scenario which would permit her case to proceed under Mississippi premises liability law and, therefore, the trial court's grant of summary judgment was proper and should be affirmed. In order to establish her allegation of a premises liability claim, the Plaintiff must prove the premises owner: (1) negligently created the dangerous condition; (2) or Defendant knew of the dangerous condition; (3) or Defendant should have known of the dangerous condition via constructive knowledge. *Jacox v. Circus Circus Mississippi, Inc.*, 908 So.2d 181 (Miss. Ct. App. 2005). It is well established that mere "proof of an injury is not the basis for premises liability, rather negligence of the business owner must be shown." *Almond v. Flying J. Gas Co.*, 957 So.2d 437, 439 (Miss. Ct. App. 2007) (citing *Sears, Roebuck & Co. v. Tisdale*, 185 So.2d 916, 917 (Miss. 1966).

Plaintiff concedes there is no information that Defendant caused the unknown substance to be on the floor or had actual knowledge of the substance on the floor prior to her incident. Accordingly, Plaintiff's sole argument is that Defendant somehow had constructive knowledge of the unknown substance. Plaintiff's argument on appeal without merit. First, the affidavits on which Plaintiff relies are conclusory and do not provide a factual basis that Defendant should have known of the unknown substance on the floor. Significantly, Plaintiff cannot establish a time frame to support a finding of constructive notice by the Defendant, as correctly noted by the trial courts. R. 99 ¶¶ 31-32. In fact, there is no evidence by these affidavits or the testimony of witnesses that show any indications of constructive knowledge such as other customer footprints, smear marks, tracks

from shopping cart wheels or related indicators to show the substance had been on the floor any length of time. Even though the trial court granted Plaintiff ample opportunity to discovery any evidence imputing constructive knowledge, Plaintiff failed to produce any other evidence supporting her argument that Defendant had constructive notice of the alleged dangerous condition. Plaintiff's confusing argument seems to allege Defendant's employees "might have been" in the area prior to the incident, but the sworn testimony of employees who were known to be in the area prior to the incident confirm there was no spill at that time.

Second, the appeal is without merit because Plaintiff is mistaken of the necessary elements of a premises liability claim under Mississippi law. Plaintiff futilely argues on appeal that Defendant is potentially liable for an alleged failure to reasonably inspect the premises. Despite Plaintiff's argument, Mississippi law does not impose a set duty on a premises owner to conduct routine inspections of the premises for potentially dangerous hazards. Instead, Mississippi law requires a premises owner to maintain its premises in a reasonably safe condition, which Defendant did in this case. Even so, the testimony of Defendant's employees confirm the procedures of managers and associates to be on the lookout for spills or hazards in the store. These procedures were in place on the day of the subject incident and confirm Defendant did not have actual or constructive knowledge of the unknown substance on the floor prior to the incident. Despite Plaintiff's attempts to create a new element of a premises liability claim, her argument on appeal is not persuasive. Accordingly, the trial judges' grant of summary judgment should be affirmed.

VIII. ARGUMENT

A. Standard of Review

On appeal, the grant of summary judgment is reviewed *de novo*. *Fletcher v. Lyles*, 999 So. 2d 1271 (Miss. 2009). The appellate court "examines all the evidentiary matters before it - admissions in pleadings, answers to interrogatories, depositions, affidavits, etc. *Albert v. Scott's Truck Plaza, Inc.*, 978 So. 2d 1264 (Miss. 2008). The evidence must be viewed in the light most favorable to the party against whom the motion has been made. If, in this view, the moving party is entitled to judgment as a matter of law, summary judgment should forthwith be entered in his favor. Otherwise, the motion should be denied." *Quinn v. Mississippi State Univ.*, 720 So. 2d 843 (Miss. 1998).

B. Plaintiff Cannot Satisfy Her Burden of Proof

The Plaintiff must establish a genuine issue of material fact demonstrating either (1) that Defendant or one of its employees actually created the alleged dangerous condition causing her fall; (2) that Defendant or one of its employees had actual knowledge of the alleged dangerous condition causing her fall; or (3) that Defendant had constructive knowledge of the alleged dangerous condition causing her fall. In this appeal there is no genuine issue of material fact that there is no information to establish any of these three elements and the trial court was correct in finding that Plaintiff's claim is legally insufficient as a matter of law. MISS. R. CIV. P. 56 (2010). The trial judges correctly found that Plaintiff did not establish elements one and two as Plaintiff presented no argument regarding these elements. Similarly, the trial court correctly found that Plaintiff failed to present evidence establishing that a genuine issue of material fact existed regarding Defendant's constructive knowledge under element three. Specifically, the trial courts held that the affidavits of

Plaintiff's acquaintances did not establish a question of fact as they failed to create any time frame when Defendant should have known of the spilled substance on the floor, and were overly vague regarding what Defendant should have known before the incident took place. In affirming the county court, the circuit court held that:

> Plaintiff admitted she had no information on how the unknown substance came to be on the floor or how long the substance had been on the floor; she had no information that Wal-Mart had actual or constructive knowledge of the substance on the floor before the incident.
>
> Plaintiff admitted there were no reasonable indicators (like foot prints, smear marks, or tracks from shopping cart wheels) to impute constructive knowledge to defendant that the substance had been on the floor for such a length of time that defendant should have known it was there.
>
> The trial judge did not err in finding no genuine issue of material fat. There was no information presented that Defendant caused the unknown substance to be on the floor or had actual knowledge of the substance on the floor prior to the Plaintiff's fall.
>
> The trial judge did not err in finding no genuine issue of material fact as to the issue of constructive knowledge. The affidavits of Peterson, Shaw, and Carter merely stated conclusions and failed to provide a factual basis that Defendant Wal-Mart should have known of the unknown substance on the floor. Furthermore, no time frame was established to create an issue as to defendant's constructive knowledge.

R. at 99 ¶¶ 28-9, 31-2.

C. Constructive Knowledge under Mississippi Law

Constructive knowledge is established by proof that the allegedly dangerous condition existed for such a length of time that, in the exercise of reasonable care, the business owner should have known about it. Stated another way, "to establish a negligence claim in a slip and fall case, proof that the [substance's] presence on the floor for a sufficient amount of time to give reasonable notice to the proprietor is required." *Waller v. Dixieland Food Store*, 492 So.2d 283, 286 (Miss. 1986). Plaintiff has simply failed to meet her standard of proof in this case as she offered no evidence on

this issue and, indeed, no such evidence exists.

In a similar scenario, in *Aultman v. Delchamps, Inc.*, the plaintiff slipped and fell on an unidentified object, sustaining injury. *Aultman v. Delchamps, Inc.* 202 So.2d 922 (Miss. 1967). The trial court granted a peremptory instruction in favor of the defendant, and the plaintiff appealed. In affirming, the Supreme Court provided the following analysis:

> Finally, considering the contention of the [plaintiff] that the object had been allowed to remain on the aisle a sufficient length of time so as to charge the [defendant] with actual or constructive notice of its presence and dangerous condition, again we find no proof as to how long the object had been in the aisle. Plaintiff relies on the fact that the store opened at eight o'clock and that the object had been there from eight o'clock to approximately 9:30 when she stepped on it. Again the [plaintiff] is relying on a presumption which is not substantiated by any testimony. It does not follow that because the store opened at eight o'clock that at precisely that time some person threw the dark object on the floor. It is just as logical to assume that the object was thrown there two or three minutes before she stepped on it, and such a presumption is not sufficient to sustain a recovery on the theory that the object had been placed there and remained there for a sufficient length of time so that the [defendant] by the exercise of reasonable care should have known of the dangerous condition and removed the object from the floor.

Aultman, 202 So.2d at 924.

In another case which supports summary judgment, the well-cited decision of *Waller v. Dixieland Food Store*, the plaintiff slipped and fell on an unknown pink liquid at 12:30 p.m., approximately two and one-half (2 ½) hours after the defendant store's last review of the area where the plaintiff fell. In affirming the JNOV, the Supreme Court stated:

> If the evidence is taken in the light most favorable to the [plaintiff], there was a two and one-half hour lapse between the last documented inspection by [an employee] and the fall of [the plaintiff]. Is proof that a two and one-half hour time lapse sufficient to prove how long the liquid had been in the aisle? This Court holds that it is not.

* * *

> [Like *Aultman*], in the present case, it is just as logical to presume the liquid was spilled at 12:29 p.m. as it is to presume the liquid was spilled at 10:01 a.m.

Waller, 429 So.2d at 286.

Like the Plaintiff herein, in *Hardy v. K Mart Corp.*, it was suspected that the plaintiff's fall was the result of a spill on the floor. 669 So.2d 34 (Miss. 1996). Nonetheless, the Defendant's employee responsible for checking the store's floors for foreign items testified that the last time he checked the area where the plaintiff fell was sometime between 7:00 and 8:00 a.m. *Id.* at 37. The Supreme Court affirmed the trial court's grant of summary judgment on the issue of constructive notice because the plaintiff was unable to offer any evidence establishing the length of time the paint was on the floor just as Plaintiff herein. *Id.* at 39.

More recently, the following passage from *Jacox v. Circus Circus Mississippi, Inc.*, succinctly states why Plaintiff's claim against Defendant fails to establish the legal standard necessary:

> The plaintiff must produce admissible evidence of the length of time that the hazard existed and **the court will indulge no presumptions to compensate for any deficiencies in the plaintiff's evidence as to the time period.** *Waller*, 492 So.2d at 286. The plaintiff must present specific proof as to the actual relevant length of time. *Dickins v. Wal-Mart Stores, Inc.*, 841 F. Supp. 768, 771 (S.D. Miss. 1994).

Jacox, 908 So.2d 181, 183 (Miss. Ct. App. 2005). (Emphasis added).

D. Plaintiff's Conclusory Affidavits Do Not Create Constructive Knowledge upon Defendant

Plaintiff's appeal to this Court is focused around the affidavits from Plaintiff's acquaintances who allegedly observed the incident and events after the incident. Each affidavit reads exactly the same but signed by different people:

I, {Affiant}, being duly sworn and deposed, says that:

1. I am an adult citizen of Washington County, Mississippi, and I am competent to testify to the facts stated herein. This statement is made according to the best of my knowledge, and is not based on speculation, surmise or conjecture.

2. On July, (sic) 2007, I was shopping at the Wal-Mart Super-Center, Greenville, MS, near the grocery section. At that time, around 10:00 p.m. on the evening of July 3, 2007, I saw Mrs. Dorothy Haggard loose [sic] her footing and fall in a clear substance on the tile floor near the apparel section.

3. Based upon my personal observation of the area of her fall before she fell, the employees of Wal-Mart either knew or should have known of the hazardous condition before Mrs. Haggard fell because they were: (1) within close proximity to the hazardous condition before Mrs. Haggard fell; (2) the employees walked by the hazardous condition and failed to clean it up before she fell; and/or (3) otherwise failed to maintain the area in a reasonably safe condition prior to the (sic) Mrs. Haggard's fall.

R. 344-46.

The affidavits do not create a time frame for how long the alleged substance was present and fail altogether to create any basis for Defendant's constructive knowledge of a dangerous condition such as footprints or tracks through the unknown liquid. Specifically, the affiants never state that they personally witnessed any Wal-Mart employee in the area, when the employee was there, nor do they attempt to describe any physical attributes of any employees. Indeed, the trial courts noted that the affidavits were vague in their rulings. The circuit court made the following observations concerning the affidavits:

> The Plaintiff/Plaintiff argued Plaintiff had presented direct evidence of defendant's actual notice of the hazardous condition through sworn affidavits of three customers (Peterson, Carter and Shaw). However, none of these affidavits stated when, or if, the affiant had observed any hazardous substance before or during Plaintiff's fall. Presuming the particular affiant did see a substance on the floor, none said whether any employees were in the area at this time nor was a time frame provided.

R. at 62 ¶ 27.

The trial courts correctly found these affidavits did not create any genuine issue of material fact as to whether Defendant Wal-Mart had constructive knowledge of the presence of the substance on the floor at any time prior to the Plaintiff's incident. The trial courts' rulings should be affirmed.

E. Recent Decision of Mississippi Appellate Courts

This appeal is remarkably similar to a premises liability case which arose out of the Circuit Court of Bolivar County and reviewed by this court just two years ago. *Criss v. Lipscomb Oil Company*, 990 So.2d 771 (Miss. Ct. App. 2008). The Plaintiff in *Criss* alleged a premises liability action similar to Plaintiff's claim herein when she slipped and fell in the ladies restroom of a convenience store because of water on the floor. *Id* at 773. However, an employee of the defendant premises owner testified she was in the ladies restroom approximately thirty (30) minutes prior to the slip and fall and did not notice any water on the floor. The Circuit Court granted Defendant's Motion for Summary Judgment because Plaintiff offered no proof whatsoever that the premises owner knew or should have known of the water on the floor and the Court of Appeals affirmed. *Id*

> [Plaintiff] has failed to prove any evidence that [the premises owner] knew that an alleged dangerous condition existed on the ladies' restroom, that [the premises owner] caused the alleged dangerous condition, or that the alleged dangerous condition had existed for a sufficient period of time to establish constructive knowledge. After reviewing the record, we cannot find that [Plaintiff] has presented a general issue of material fact.

Id. at 773.

Likewise, Plaintiff herein has presented no evidence to establish her claim of premises liability under Mississippi law that the unknown liquid substance she fell in was the result of actions of Defendant Wal-Mart or that it existed for a sufficient period of time to establish constructive knowledge.

F. Plaintiff's Misinterpretation of Mississippi Case Law

In an attempt to create an issue of fact regarding whether Defendant had constructive knowledge of the unknown substance via this appeal, Plaintiff is forced to misinterpret two highly distinguishable and unpublished federal cases in her brief. First, Plaintiff cites the unpublished order of *Hudson v. Wal-Mart Stores East, L.P.* for the proposition that "Mississippi courts hold that a genuine issue of material fat concerning a business owner's knowledge of a hazardous condition exists when there is evidence that employees were located in the immediate area or vicinity of the hazardous condition and would have likely discovered the hazardous condition upon reasonable inspection." Plaintiff's Brief, pg. 10 ¶ 2. However, *Hudson* does not stand for the proposition cited by Plaintiff. Moreover, these federal court cases are not reported in the official reporters and therefore non-binding for this appeal.

Assuming *arguendo* that these non-binding decisions offer some type of persuasive authority to Plaintiff's allegations, *Hudson* involved a Plaintiff who was shopping in the Wal-Mart store in Hattiesburg when a bag of cat food fell from a shelf and struck her on the head. *Hudson v. Wal-Mart Stores*, 2008 WL 1449887, No. 2:07cv-62-KS-MTP (S.D. Miss. Apr. 9, 2008). The cat food bag bent her glasses and caused swelling to her eye. *Id.* Hudson alleged that the bag of cat food fell on her because of the "improper and negligent stacking of the bags by the Wal-Mart employees." *Id.* The store assistant manager stated in her accident report that the shelves were "too full!" The court ruled that by introducing the assistant store manager's statement, Ms. Hudson had raised a genuine issue of material fact that Wal-Mart had either actual or constructive knowledge of the dangerous condition of the shelves. *Id.* at *3.

Thus, unlike Plaintiff's argument to this court, *Hudson* stood for the proposition that an

admission by Defendant regarding pertinent facts surrounding constructive notice creates a genuine issue of material fact. In the case at bar, there is no such admission. In fact, neither Plaintiff nor Wal-Mart employees have any knowledge or idea as to how the unknown substance was placed on the floor. Moreover, *Hudson* involved allegations that the premises owner actually caused the dangerous condition of overstocked merchandise to exist, which is not alleged by Plaintiff herein. Thus, Plaintiff's citation of *Hudson* is inapplicable to the case at bar.

Next, the Plaintiff cites *Adams v. Wal-Mart Stores* for a similar proposition stating that "the Southern District Court of Mississippi found that evidence that Wal-Mart employees were assigned to the particular area at the time of the occurrence, raised a genuine issue of material fact for the jury as to Wal-Mart's knowledge of the hazardous condition and whether these employees actually know or should of known of the hazardous condition." Plaintiff's Brief, pg. 10 ¶ 2. However, *Adams* does not stand for that proposition either. In *Adams*, the plaintiff, Paula Adams, slipped on a banana, or a piece of a banana, while shopping at a Wal-Mart store in Pearl, Mississippi. *Adams v. Wal-Mart Stores, Inc.*, 2007 WL 853425, No. 3:06CV277 TSL JCS (S.D. Miss. Mar. 19, 2007). Adams presented evidence that Wal-Mart allegedly had constructive knowledge of the banana's presence on the floor through the witness testimony of fellow customer Jacqueline Woodruff.

> Ms. Woodruff testified that she was in the very near vicinity of the location of plaintiff's fall (about ten feet away) for up to five minutes before she saw plaintiff fall; that during that time, she saw no one drop the banana on the floor so that the banana must have been present on the floor at least during the time she was standing there; that she saw "plenty" of Wal-Mart associates going back and forth in that very area prior to her fall (as well as during and after); that the banana would have been within eyesight of these employee[.]

Adams, 2007 WL 853425 at *2.

Plaintiff attempts to equate the affidavits of Peterson, Carter and Shaw to the testimony given

by Ms. Woodruff in *Adams*. However, unlike Ms. Woodruff's testimony, Plaintiff's affidavits on this appeal do not create a time frame the substance on the floor, nor do the affidavits establish a specific location during which the employees observed the unknown substance. For example, Ms. Woodruff established a five minute time frame for which she was in the exact vicinity where the banana was located. Her testimony established a question of fact whether the banana was present during the five minutes before the incident occurred time because she did not see anyone drop the banana during that period of time. Even so, the federal judge called Plaintiff's proof in *Hudson* a very "close question" on whether summary judgment should be granted. *Id.*

Defendant submits there is no close question in this case and summary judgment is proper. Plaintiff's affiants in this case never establish how long they were in the vicinity of the accident scene before the incident. The affiants also do not state whether they even saw the substance before the Plaintiff's incident or how long the substance had been on the floor. These witnesses never claim they saw common indicators of how long the substance was on the floor such as footprints or smear marks. Most important, the affidavits do not state if they saw any Wal-Mart employees in the specific area where the unknown substance was later found before the incident occurred. Based on Plaintiff's affidavits, the substance could just as easily have been placed on the floor mere seconds before Plaintiff's fall. Accordingly, the facts in this case are not equivalent to *Adams*. Instead, *Adams* highlights the inadequate nature of Plaintiff's proof and supports the affirmation of the lower courts' grant of summary judgment.

CERTIFICATE OF SERVICE

I, R. Brittain Virden, attorney for Defendant/Appellee herein, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing document to the following:

Yancy Burns, Esq.
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Honorable Richard Smith
P.O. Box 1953
Greenwood, MS 38935-1953

Signed, this, the 13 day of June, 2011.

R. BRITTAIN VIRDEN