2010-CA-01499 T

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Appellant, Dorothy Haggard, certifies that the following listed persons and/or entities 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, Appellant, 1805 Jacqueline Drive, Jackson, MS 38701.
2. Wal-Mart Stores, Inc., Appellee, 702 SW 8th Street, Bentonville, AR 72716.
3. The Honorable Vernita King-Johnson, County Court Judge of Washington County, Mississippi.
4. The Honorable Richard A. Smith, Circuit Court Judge of Washington County, Mississippi.
5. Yancy B. Burns, Attorney for Appellant.
6. Brittain R. Virden, Attorney for Appellee.

Respectfully Submitted,

Yancy B. Burns (MSB[redacted])
Attorney for Appellant

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STATEMENT OF THE ISSUES

The issues for decision for the Court are the following:

1. Whether the trial courts erred as a matter of law in granting summary judgment in favor of Wal-Mart on basis that there is no genuine issue of material fact that Wal-Mart had no knowledge, actual or constructive notice, of the undisputed hazardous condition on its premises.

2. Whether the trial courts erred as a matter of law in finding that there is no genuine issue of material fact that Wal-Mart maintained its premises in a reasonably safe condition.

STATEMENT OF THE CASE

A. Nature of the Case

On September 20, 2007, Plaintiff Dorothy Haggard filed this civil action in the County Court of Washington County, Mississippi, arising out of a slip and fall that occurred on the premises of Defendant Wal-Mart Stores, Inc, which resulted in bodily injuries to Ms Haggard. (R. 139-141.) As stated in her Complaint, on or about July 3, 2007, "[A]t the invitation of the Defendant . . . Ms. Haggard was involved in a fall caused by a hazardous condition previously known of by the Defendant," and "[T]he Defendant created and/or had notice of the hazardous condition, and failed to warn the Plaintiff." (R. 139-141.) Haggard's claim is based upon general principles of negligence and premises liability. Plaintiff alleges that Wal-Mart knew or should have known of a dangerous condition on its premises and failed to warn Ms. Haggard of this hazardous condition. (R. 139-141.)

B. Course of Proceedings and Disposition of the Case Below

Plaintiff initially filed this cause in the County Court of Washington County, Mississippi. (R. 139-141.) On October 1, 2009, the County Court issued a bench ruling granting Defendant Wal-Mart's Motion for Summary Judgment. (R. 370-371.) On October 2, 2009, Order Granting Summary Judgment in favor of Defendant was entered by the County Court. (R. 22, 370-371.) The County Court found that there was no genuine issue of material fact for the jury as to

Defendant's knowledge of the undisputed hazardous condition on its premises. (R. 370-371.) On October 30, 2009, Plaintiff filed a Notice of Appeal with the Circuit Court of Washington County, Mississippi. (R. 1-2.) On July 20, 2010, the Washington County Circuit Court entered Order Affirming County Court's Grant of Summary Judgment. (R. 58-63.) On August 20, 2010, Plaintiff timely appealed the Order of the Circuit Court to the Mississippi Supreme Court. (R. 64-67.)

STATEMENT OF THE FACTS

On July 3, 2007, at approximately 11:00 p.m., Plaintiff Dorothy Haggard fell and sustained serious and permanent injuries while shopping at the Wal-Mart Super Center in Greenville, Mississippi. (R. 24-28, 185-189, 210-222, 247-253.) It is undisputed that Ms. Haggard's fall was due to an unknown clear liquid on the tile floor of Wal-Mart's premises located near the apparel section.[1] (R. 24-28.) The site of Ms. Haggard's fall bordered a major thoroughfare designated by Wal-Mart as "Action Alley." (R. 34-35.) It is undisputed that this liquid constitutes a hazardous condition, and that prior to Ms. Haggard's fall, Wal-Mart neither attempted to remedy this hazardous condition nor provide any warning of any kind to its customers, including Ms. Haggard, of this hazardous condition. (R. 30-35, 203-204.)

Wal-Mart denies any knowledge of this liquid that caused Ms. Haggard's fall and subsequent permanent injuries. (R. 142-143, 162-165.) However, as set forth herein and in opposition to Defendant's Motion for Summary Judgment, there is substantial credible evidence that Wal-Mart knew or should have known of this hazardous condition prior to Ms. Haggard's fall and failed to maintain its premises in a reasonably safe condition. (R. 18-36, 286-297.) This evidence includes: [a] the sworn affidavits of customers who prior to Ms. Haggard's fall

[1] The slippery substance that caused Ms. Haggard's fall, although not conclusively identified by either party, was later presumed to be shampoo. (R. 192-193.) Ms. Haggard immediately sought treatment for lower back and extremity injuries sustained on the premises at Delta Regional Medical Center. Haggard's injuries included a torn meniscus/left knee repaired through an arthroscopic surgery performed by Dr. Gregg Gober, a board certified orthopedic surgeon. (R. 210-222, 247-253.)

personally observed Wal-Mart employees in the immediate area of the subject liquid who failed to take any effort whatsoever to remedy and/or warn of this undisputed hazard (R. 26-28); and [b] the admitted failure of Wal-Mart, based on the sworn testimony of on-duty manager Fred Turner, to conduct a reasonable inspection of its premises for potential hazards to customers (R. 24-25, 29-35).

As stated above, prior to Ms. Haggard's fall, a number of customers personally observed the subject liquid that caused Ms. Haggard's fall. (R. 26-28.) These customers personally witnessed Wal-Mart employees in the immediate area of the subject liquid and stated that these employees either ignored the hazard or failed to recognize the hazard. (R. 26-28.) Given the close proximity of these employees to the liquid and that enough time had passed that three customers were able to observe the liquid prior to Ms. Haggard's fall, there is credible evidence that Wal-Mart knew or should have known of this hazard prior to Ms. Haggard's fall.

Immediately after Ms. Haggard's fall, Wal-Mart employee Patricia Lewis came to her aid. (R. 249.) Ms. Haggard's fall was investigated and documented by Fred Turner, who was the manager on duty at the time of the occurrence.[2] (R. 24-25, 29-35.) Mr. Turner confirmed the presence of the substance on Wal-Mart's floor near the apparel section. (R. 24-25, 29-35.) Wal-Mart does not deny that this liquid on its premises constitutes a hazardous condition. (R. 162-165.)

Mr. Turner also testified that at the time of Ms. Haggard's fall, numerous employees were assigned to work the area or zone where she fell. (R. 31.) According to Turner, at least twenty (20) night-shift employees were on duty at the time of Ms. Haggard's fall. (R. 31, p. 24.) According to Turner, several of these employees were assigned to same department or zone where Ms Haggard's fall occurred. (R. 34, p. 35.) These employees came on duty at 10:00 p.m.,

[2] Fred Turner was the on-duty manager at Wal-Mart. Mr. Turner is an eight-year veteran of the Wal-Mart management team. (R. 24-25.)

almost one full hour before Ms. Haggard's fall.[3] (R. 24-25; R. 30, p. 17; R. 34, p. 35.)

According to Mr. Turner, at the time of Ms. Haggard's fall, he and his employees were not concerned about potential hazardous conditions. (R. 31, p. 22; R. 35.) Rather, they were concerned with re-stocking merchandise in preparation for the upcoming Fourth of July holiday.[4] (R. 31. pp. 21-22.) Turner testified that it is possible that he and his employees overlooked this hazardous condition that caused Ms. Haggard's fall. (R. 34, pp. 33-35; R. 35, p. 37.) Mr. Turner testified that he had been through the area where Ms. Haggard's fall occurred about twenty or thirty minutes prior to the fall. (R. 24-25; R. 34, pp. 33-34.) Turner stated that he had no idea whether the subject liquid was on the floor at the time he walked past the site of the occurrence because he was not monitoring the area for hazards. (R. 34, p. 33.)

Turner's testimony reveals that at the time of Ms. Haggard's fall neither he nor his employees were actively monitoring Wal-Mart's premises for potential hazards. He testified, "I guess, if I was looking for it [liquid causing Ms. Haggard's fall], but I wasn't. I wasn't looking for it. You know, I didn't see it." (R. 34, p. 35.) Turner explained that neither he nor his employees discovered the spill in question because "***you know, nobody looks for, you know, spills. Spills are some things you just usually run up on or it happens while you're working in that area.*** This was just there on the floor." (R. 34, p. 35.) When Turner was questioned about whether Wal-Mart employees would actively look for things such as gel on the floor, he responded negatively.[5] (R. 34, pp. 35-36; R. 35, p. 37.) He testified that the "primary

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[3] Turner confirmed that there were employees in the area of the spill that were suppose to be "zoning continuously" but failed to discover the hazardous condition and otherwise remedy it or warn Ms. Haggard of any hazardous condition. (R. 34, p. 35.)

[4] Turner described the customer flow that evening as heavy and stated that "customers were just all over the store . . . but not that many people over in grocery." (R. 32, p. 25.) Turner conducted a shift change briefing with the twenty (20) employees at approximately 10:00 p.m. Turner's intent was to shift the priority of effort to the grocery department due to the anticipated Fourth of July holiday, and the primary task for the employees was to "get the freight up and work safely." (R. 31, p. 22.)

[5] Turner testified: "Q: Okay. Well, right. But they [employees] wouldn't just—they wouldn't be actively looking for things [hazards]—put it that way—like gel on the floor? A: No." (R. 35, p. 37.)

responsibility" of the on-duty employees at the time of Ms. Haggard's fall was "to stock the store at night and get it prepped for the next morning." (R. 35, p. 37.) Mr. Turner conducted no further investigation of the incident after confirming the existence of the clear slippery substance on the premises. (R. 33, p. 32.) Further, Mr. Turner expressed no interest in determining the cause of Ms. Haggard's fall nor did he question any employees concerning their knowledge of the hazardous condition. (R. 33, p. 32.)

Because of this substantial credible evidence that Wal-Mart knew or should have known of this undisputed hazardous condition that caused Ms. Haggard's fall, a genuine issue of material fact exists for the jury as to Wal-Mart's liability for Ms. Haggard's fall. Additionally, the testimony of Wal-Mart's manager Fred Turner conclusively establishes a pattern and practice of negligence by finding that employees under his charge do not actively look for potential hazards, such as spills on Wal-Mart's premises. Accordingly, the trial courts' grant of summary judgment in favor of Wal-Mart constitutes reversible error.

SUMMARY OF THE ARGUMENT

Longstanding precedent requires Mississippi business owners like Defendant Wal-Mart to exercise reasonable care in the maintenance of its premises. In order to avoid the entry of summary judgment, Plaintiff Dorothy Haggard must present probative evidence that creates a genuine issue of material fact whereby a reasonable jury could find that either: (1) a negligent act by the defendant caused the plaintiffs injury; or, (2) the defendant had actual knowledge of a dangerous condition, but failed to warn the plaintiff of the danger; or, (3) the dangerous condition remained long enough to impute constructive knowledge to the defendant.

The lower courts in its grant of summary judgment failed to recognize the substantial credible evidence that Wal-Mart knew or should have known of this undisputed hazardous condition. Additionally, the lower courts erred as a matter of law by disregarding direct

evidence of proprietor negligence, i.e. the failure of Wal-Mart to conduct a reasonable inspection of its premises to ascertain reasonably discoverable hazards. This evidence creates a genuine issue of material fact for the jury concerning Wal-Mart's duty to maintain its premises in a reasonably safe condition.

Mississippi premises liability jurisprudence holds that in the context of a summary judgment proceeding, the Plaintiff is only required to submit evidence that creates a genuine issue of material fact that would tend to establish that the premises owner possessed either actual or constructive knowledge of the hazardous condition prior to the occurrence. Here, the lower court disregarded the direct evidence of Wal-Mart's actual and/or constructive notice of the hazard presented by the affidavit of three (3) customers who witnessed the presence of Wal-Mart employees within the immediate vicinity of the occurrence prior to Ms. Haggard's fall. The customers' eyewitness testimony creates a genuine issue of material fact concerning actual notice and/or constructive notice of Wal-Mart.

The eyewitness testimony offered by the affidavits is enhanced by the deposition testimony of Wal-Mart's manager, Fred Turner. Turner testified that he walked through the site of the occurrence approximately twenty (20) minutes prior to Ms. Haggard's fall but did not see the substance. However, Turner admitted that it is possible that he overlooked the substance because neither he nor his employees were actively looking for hazards. At the time of Haggard's fall, Turner and his employees were focused on re-stocking merchandise. Wal-Mart's failure to actively inspect its preemies for potential hazards is clearly at odds with the duty established by Mississippi law that requires a business owner to conduct a reasonable inspection to ascertain reasonably discoverable hazardous conditions on its premises. A reasonable jury could further find that Wal-Mart's failure to conduct a reasonable inspection of its premises constitutes a breach of its duty to exercise reasonable care to keep its premises in a

reasonably safe condition.

Because of the substantial credible evidence that Wal-Mart knew or should have known of the hazardous condition that caused Ms. Haggard's fall and the evidence of Wal-Mart's failure to conduct reasonable inspections of its premises to maintain its store in a reasonably safe condition, genuine issues of material fact as to Wal-Mart's liability for Ms. Haggard's fall exist for the trial court. Accordingly, the grant of summary judgment in favor of Wal-Mart constitutes reversible error.

ARGUMENT

I. STANDARD OF REVIEW

Review of a trial court's grant of summary judgment is *de novo. Byrne v. Wal- Mart Stores, Inc.,* 877 So. 2d 462, 464 (Miss. App. 2003) (citing *Young v. Wendy's Intl, Inc.,* 840 So. 2d 782, 783 (Miss. App. 2003)). Summary judgment is proper when "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 a judgment as a matter of law." *Id.* at 464-65 (quoting *Piggly Wiggly of Greenwood, Inc. v. Fipps,* 809 So.2d 722, 725 (Miss. App. 2001)); Miss. R. Civ. P. 56(c).

"If reasonable minds might differ on the resolution of any material fact or even on the inferences arising from undisputed facts, summary judgment must be denied." *Magee v. Sheffield Ins. Co.,* 673 F. Supp. 194 (S.D. Miss. 1987) (citing *Anthony v. Petroleum Helicopters, inc.,* 693 F.2d 495, 496 (5th Cir. 1982)); *see Impossible Electronics Techniques, Inc. v. Wackenhut Protective Systems, Inc.,* 669 F.2d 1026, 1031 (5th Cir. 1982). At the summary judgment stage, the function of the trial court is not to weigh the evidence and determine the truth of the matter, but rather to determine whether there is a genuine issue for trial. *Magee*, 673 F. Supp at 194 (citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986)). A motion for summary judgment

"should only be granted when it is shown, beyond a reasonable doubt, that the non-movant would be unable to prove any facts to support his claim." *Downs v. Choo,* 656 So. 2d 84, 85 (Miss. 1995) (quoting *McFadden v. State,* 580 So. 2d 1210,1214 (Miss. 1991)). "If there is doubt as to whether or not a fact issue exists, it should be resolved in favor of the non-moving party. That is, it is better to err on the side of denying a motion for summary judgment if a doubt exists." *Aetna Casualty & Surety Co. v. Berry,* 669 So. 2d 56, 70 (Miss. 1995) (citing *Ratliff v. Ratliff,* 500 So.2d 981 (Miss. 1986)). Furthermore, the Court must view the evidence in the light most favorable to the non-movant. *Byrne,* 877 So.2d at 465. If there is a doubt as to whether there exists a genuine issue of material fact, the non-movant receives the benefit of that doubt. It is reversible error for the trial court to substitute summary judgment for a jury's consideration of disputed factual issues if material to the case. *Downs*, 656 So.2d at 86.

"To survive summary judgment, the non-moving party must offer significant probative evidence demonstrating the existence of a triable issue of fact." *Young,* 840 So. 2d at 784. In opposing summary judgment, "an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in Mississippi Rule of Civil Procedure 56, must set forth specific facts showing that there is a genuine issue for trial." Miss. R. Civ. P. 56(e). However, the Court must view the evidence in the light most favorable to the non-movant. *Byrne,* 877 So. 2d at 465. Additionally, "[A]ll questions of negligence and contributory negligence shall be for the jury to determine." Miss. Code § 11-7-17.

As demonstrated herein, the lower courts should have denied summary judgment. When viewing the evidence in the light most favorable to Plaintiff, genuine issues of material fact exist for the trial court concerning Wal-Mart's knowledge of the subject hazardous condition and maintenance of its premises in a reasonably safe manner.

II. GENUINE ISSUE OF MATERIAL FACT WHETHER WAL-MART HAD NOTICE OF UNDISPUTED HAZARDOUS CONDITION ON ITS PREMISES.

In order to succeed on her premises-liability claim, Plaintiff Dorothy Haggard must show either: "(1) a negligent act by the defendant caused the plaintiffs injury; or, (2) [the] defendant had actual knowledge of a dangerous condition, but failed to warn the plaintiff of the danger; or, (3) the dangerous condition remained long enough to impute constructive knowledge to the defendant." *Downs v. Choo*, 656 So. 2d 84, 86 (Miss. 1995). Mississippi law does not require that a plaintiff establish *all* of the above elements; it is only necessary for the plaintiff to establish *one* of the elements. *See Jacox v. Circus Circus Miss., Inc.*, 908 So. 2d 181, 184 (Miss. App. 2005) (citing *Munford, Inc. v. Fleming*, 597 So. 2d 1282, 1284 (Miss. 1992)). Here, Ms. Haggard has presented substantial credible evidence of both actual and constructive notice that Wal-Mart either knew or should have known of the subject hazardous condition that caused her fall and resulting injuries.

As evidence of Wal-Mart's actual and/or constructive notice, Ms. Haggard has presented the sworn affidavits of three customers that personally observed the subject liquid that caused Ms. Haggard's fall prior to her fall. (R. 26-28.) These customers, including Sheneisa Peterson, Gladys Shaw, and Edna Carter, all personally witnessed Wal-Mart employees who despite being in the immediate area of the subject liquid prior to Ms. Haggard's fall failed to recognize, remedy and warn customers of this hazard. All three customers swore under oath the following:

> [I] saw Mrs. Dorothy Haggard lose her footing and fall in a clear substance on the tile floor near the apparel section.
>
> Based upon my personal observation of the area of the fall ***before she fell***, the employees of Wal-Mart either knew or should have known of the hazardous condition before Ms. Haggard fell because they were:
>
> (1) within close proximity to the hazardous condition before Ms. 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 Ms. Haggard's fall.

(R. 26-28, Affidavit of Sheneisa Peterson, Gladys Shaw, and Edna Carter.)

Given the close proximity of these employees in relation to the liquid and the passage of time that allowed ***three customers*** to personally observe the liquid prior to Ms. Haggard's fall, there is strong credible evidence that Wal-Mart either knew or should have known of this hazardous condition. Thus, when viewing this evidence in the light most favorable to Plaintiff, a reasonable jury could find that the Wal-Mart employees observed by the three customers either saw the spill but deliberately chose to ignore it or failed to notice the spill that could have easily been discovered upon reasonable inspection. (R. 26-28.) Accordingly, a genuine issue of material fact concerning Wal-Mart's knowledge exists for the trial court.

The affidavits of these customers are sufficient evidence to create a genuine issue of material fact as to Wal-Mart's knowledge. Mississippi courts hold that a genuine issue of material fact 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. For example, in *Hudson v. Wal-Mart Stores East,* 2008 U.S. Dist. LEXIS 28929 (S.D. Miss. Apr. 9, 2008), the Southern District Court of Mississippi found that evidence that Wal-Mart employees were assigned to the particular area were the hazardous condition was located and actually working in that 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 knew or should of known of the hazardous condition. *Id.* at **7-8; *see also Adams v. Wal-Mart Store*s, 2007 U.S. Dist. LEXIS 19422, at **4-5 (S.D. Miss. Mar. 19, 2007) (denying summary judgment on basis that evidence that employees were in the near vicinity of

dangerous condition raised genuine issue of material fact as to business owner's knowledge of the dangerous condition).

Here, while the identity of these employees is unknown, it is undisputed that Wal-Mart employees were located in the immediate vicinity of the hazardous condition that caused Ms. Haggard to fall. (R. 26-28.) Additionally, there is undisputed evidence that the liquid was on the floor for a sufficient amount of time to be noticed by at least three customers prior to Ms. Haggard's fall and these customers all testified that these employees either knew or should have known of the liquid on the floor. This evidence is sufficient to create a genuine issue of material fact concerning whether Wal-Mart knew or should have known of this hazardous condition.

In *Adams v. Wal-Mart Stores,* the Southern District Court of Mississippi found that the following evidence was sufficient to establish a genuine issue of material fact as to whether enough time had passed that Wal-Mart knew or should have known of the hazardous condition:

> Here, plaintiff has presented testimony from a witness, Jacqueline Woodruff, who claimed 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 employees; and yet none of these employees bothered to keep a lookout for such hazards.

2007 U.S. Dist. LEXIS 19422, at **4-5 (S.D. Miss. Mar. 19, 2007); *see also Ducksworth v. Wal-Mart Sto*res, 832 So. 2d 1260, 1262 (Miss. App. 2002) ("Although a jury might have found for Wal-Mart, the question of whether Wal-Mart was negligent or had actual or constructive knowledge that the spill existed should have been presented.").

Here, the mere fact that three separate witnesses had enough time to observe the liquid prior to Ms. Haggard's fall and have all testified that the employees near the liquid walked by the hazardous condition and should have known of the liquid, creates a genuine issue of material fact

concerning whether Wal-Mart knew or should have known of this hazardous condition. Accordingly, the grant of summary judgment was error as a matter of law and should have been denied.

III. GENUINE ISSUE OF MATERIAL FACT WHETHER WAL-MART MAINTAINED ITS PREMISES IN A REASONABLY SAFE CONDITION.

Under Mississippi law, business owners have a duty to invitees to exercise reasonable care to keep its premises in a "reasonably safe condition." *Jacox*, 908 So. 2d at 184 (citing *Jerry Lee's Grocery, Inc., v. Thompson, 528* So. 2d 293, 295 (Miss. 1988)); *see Simpson v. Boyd*, 880 So. 2d 1047, 1051 (Miss. 2004) ("Although not an insurer of an invitee's safety, a premises owner owes a duty to exercise reasonable care to protect the invitee from reasonably foreseeable injuries at the hands of another.").

In order for a business to maintain its premises in a reasonably safe condition, a business owner has a duty to conduct a reasonable inspection of its premises for potential hazards and can be held liable for failure to warn customers of such hazardous conditions on its premises. *See Pigg v. Express Hotel Partners, LLC*, 991 So. 2d 1197, 1200 (Miss. 2008) (finding that part of an owner's duty of reasonable care is a duty to conduct reasonable inspections to discover dangerous conditions existing on the premises); *Simoneaux v. BSL, Inc.*, 2008 U.S. Dist. LEXIS 40944 (S.D. Miss. May 21, 2008) ("A business can be held liable for conditions of which it should be reasonably aware."); *see also Lockwood v. Isle of Capri, Corp.*, 962 So. 2d 645 (Miss. App. 2007) ("When a plaintiff has shown that the circumstances were such as to create a reasonable probability that the dangerous condition would occur, he need not prove actual or constructive notice of the specific condition."). Here, there is a genuine issue of material fact whether Wal-Mart failed to conduct a reasonable inspection of its premises and whether this failure constitutes a breach of its duty to exercise reasonable care to keep its premises in a reasonably safe condition.

In *Downs v. Corder,* 377 So. 2d 603 (Miss. 1979), the Mississippi Supreme Court reversed the lower court's dismissal of an invitee's complaint for damages allegedly caused by the premises owner's negligent failure to inspect its premises for hazardous conditions. In reversing this dismissal, the Court relied primarily on the holdings in *Jackson Ready-Mix Concrete v. Sexton,* 235 So.2d 267 (Miss.1970), and *Spruill v. Yazoo Valley Oil Mill, Inc.,* 317 So.2d 410 (Miss. 1975). In these cases, the Court set out the general duty owed to a business invitee as follows:

> [T]he owner, occupant, or person in charge of premises owes to invitees or business visitors thereon the duty of exercising reasonable care to keep the premises in a reasonably safe and suitable condition, or of warning invitees or business visitors of hidden or concealed perils of which he knows or should know in the exercise of reasonable care.
>
> . . .
>
> The duty of reasonable care owed to an invitee includes the exercise of such care and protection of the invitee and the finding of ***reasonably discoverable conditions which may be dangerous, and if such are found, the occupant of the premises has a duty to correct them, or to warn the invitee thereof"***

Downs, 377 So. 2d at 604-05 (emphasis added).

In *Wilson v. Allday,* 487 So. 2d 793 (Miss. 1986), the Court held, "The established law in this state is that the owner, occupant or person in charge of premises owes to an invitee or business visitor a duty of exercising reasonable or ordinary care to keep the premises in reasonably safe and suitable condition or of warning invitee of dangerous conditions not readily apparent which owner knows or should know of in the exercise of reasonable care." *Id.* at 795 (citing *Downs*, 377 So. 2d 603; *J. C. Penney Co. v. Sumrall,* 318 So. 2d 829 (Miss. 1975); *Sexton,* 235 So. 2d 267 (Miss.1970)).

The affidavit of Wal-Mart's manager, Fred Turner, and his deposition testimony create genuine issues of material fact concerning whether Wal-Mart exercised reasonable care in the maintenance of its premises. (R. 24-25, 29-36.) Turner's testimony reveals that he does not

require employees to conduct an inspection of Wal-Mart's premises for potential hazardous conditions, including at the time of Ms. Haggard's fall. (R. 31, 34-35.) Furthermore, according to Turner, at the time of Ms. Haggard's fall, he and his employees were admittedly not concerned about potential hazardous conditions such as spills; rather, they were primarily concerned with re-stocking merchandise in preparation for the upcoming Fourth of July holiday. (R. 31, 35.)

Turner stated that as a matter of practice and procedure, employees should clean up spills only as they ***happen*** to come across them and not required to exercise reasonable diligence to actively find spills or other hazards on Wal-Mart's premises. (R. 34.)

> Q: But when you walked through there at about 10:20—I mean, this is a clear liquid. Right?
>
> A: Yes.
>
> Q: It's not—It wouldn't just jump out to you unless you were looking for it, would it?
>
> A: I guess, ***if I was looking for it, but I wasn't. I wasn't looking for it.*** You know, I didn't see it.
>
> Q: Yeah. You're not saying it wasn't there. You just didn't see it.
>
> A: I just didn't see it.
>
> Q: Yeah. Is it something that one of your associates would have seen if they were inspecting, or is it something that's just kind of clear and just not apparent at all?
>
> A: It was clear. I mean, if they were looking for it—you know, ***nobody looks for, you know spills. Spills are some things you just usually run up on or it happens while you're working that area.*** This was just there on the floor.
>
> . . .
>
> A: I mean, ***you don't walk the floor looking for, you know, spills.*** Like I said, a spill is just something either they call for or you just walk up on it. You know, if you're not looking for it, you're not going to find it.
>
> . . .

Q: But they wouldn't just—they wouldn't be actively looking for things—put it that way—like gel on the floor?

A: No.

Q: Okay. And tell me why they would not.

A: Because their primary responsibility is to stock the store at night and get it prepped for the next morning.

(R. 34, pp. 34-36; R. 35, p. 37.) This reactive practice of Wal-Mart in this instance, of only cleaning up spills as employees come across spills, fails to meet the standard of care required of businesses owners to maintain its premises in a reasonably safe condition. It is reasonably foreseeable that spills will occur on Wal-Mart's premises, and Wal-Mart has a duty to protect customers like Ms. Haggard against these foreseeable dangers.[6]

At the time of Ms. Haggard's fall, despite the fact that three to four employees were suppose to be "zoning continuously," no one could testify as to the last time a Wal-Mart employee had inspected the area where the spill occurred. Further, Turner testified that "Action Alley" is generally not zoned or inspected by employees. (R. 34, p. 35-36.)

Q: So in this apparel area—we're talking about the second shift that was there at the time—probably been about how many employees—three or four?—in the area?

A: I'm not sure. All I can tell you, there were people over there zoning.

Q: And they were zoning continuously?

A: Yes.

Q: Okay. Is this an area that would have been zoned an hour before, or how would that work?

A: Not out in action alley. Action alley usually just features, so we fill features at night.

[6] Turner testified that spills frequently occur on Wal-Mart's premises. "Q: Have you ever had situations where you've seen people just squirt stuff on the floor? A: Yes." (R. 33, pp. 31-32.)

Q: So the last time action alley would have been inspected would have been when? Or zoned?

A: Don't really have to zone action alley. I mean, there's not any apparel. There's no clothes out in action alley. So only thing that they have is what's sitting on the carpet, and that's what they are responsible for.

Q: But this substance wasn't on carpet.

A: No. It was on the tile floor.

(R. 34, p. 35-36.)

Turner also testified that it is possible that he or another employee overlooked this hazardous condition that caused Ms. Haggard's fall. (R. 34, pp. 33-35; R. 35, p. 37.) Mr. Turner testified that he had been through the area where Ms. Haggard's fall occurred about twenty or thirty minutes prior to the fall. (R. 24-25; R. 34, pp. 33-34.) Turner stated that he had no idea whether the subject liquid was on the floor at the time he walked past the site of the occurrence because he was not monitoring the area for hazards. (R. 34, p. 33.) Mr. Turner conducted no further investigation of the incident after confirming the existence of the clear slippery substance on the premises. (R. 33, p. 32.) Further, Mr. Turner expressed no interest in determining the cause of Ms. Haggard's fall nor did he question any employees concerning their knowledge of the hazardous condition. (R. 33, p. 32.)

Based on the above credible evidence, a genuine issue of material of material fact exists for the jury concerning whether Wal-Mart breached its duty to maintain its premises in a reasonably safe condition by failing to conduct routine inspections of its premises for potential hazards. It is clearly foreseeable that spills will occur on Wal-Mart's premises, and Wal-Mart has a duty to guard against this known danger to customers. Simply cleaning up a spill as an employee happens or by chance comes across a spill falls far short of the duty required by Mississippi law. Accordingly, the grant of summary judgment was error as a matter of law and should have been denied by the trial courts.

CONCLUSION

As set forth herein, there is substantial credible evidence that Wal-Mart knew or should have known of this undisputed hazardous condition that caused Ms. Haggard's fall. According to the sworn affidavit testimony of the three customers that personally observed the subject liquid, Wal-Mart employees in the immediate area of the subject liquid failed to take any remedial action whatsoever, including warning customers of this hazardous condition. This evidence means that either these employees deliberately ignored this hazardous condition upon discovery or these employees failed to recognize and/or discover this hazardous condition, which according to testimony of these eyewitnesses would have been readily apparent upon reasonable inspection.

Additionally, the testimony of Wal-Mart's manager Fred Turner conclusively establishes a pattern and practice of negligence by finding that employees under his charge do not actively look for potential hazards, such as spills on Wal-Mart's premises. By deliberately failing to conduct a reasonable and routine inspection of its premises for potential hazards, a business owner breaches its duty to customers to maintain its premises in a reasonably safe condition.

Because of the substantial credible evidence that Wal-Mart knew or should have known of the hazardous condition that caused Ms. Haggard's fall and the evidence of Wal-Mart's failure to conduct reasonable inspections of its premises to maintain its store in a reasonably safe condition, genuine issues of material fact as to Wal-Mart's liability for Ms. Haggard's fall exist for the trial court. Accordingly, grant of summary judgment in favor of Wal-Mart constitutes reversible error. Plaintiff respectfully asks this Court to reverse the rulings of the County and Circuit Court and remand this cause for trial by jury.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Yancy B. Burns, attorney for Appellant, do hereby certify that I have this date served a copy of the foregoing Appellant's Brief via United States Mail, postage prepaid, to the following:

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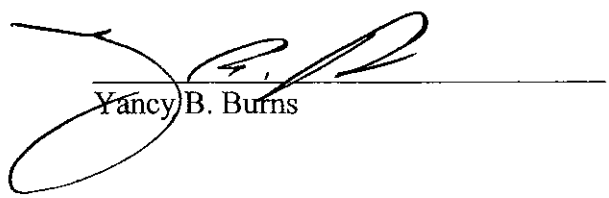
This the 9th day of May, 2011.



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