IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

LAURA KARPINSKY — APPELLANTS

VERSUS — NO. 2010-CA-02084

AMERICAN NATIONAL INSURANCE COMPANY AND ORACLEAN, INC. — APPELLEES

APPEAL FROM THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI
SECOND JUDICIAL DISTRICT
CAUSE NUMBER A2402-08-139

BRIEF OF APPELLEE, ORACLEAN, INC.

NO ORAL ARGUMENT REQUIRED

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CERTIFICATE OF INTERESTED PARTIES

Pursuant to Rule 28(a)(1) of the Mississippi Rules of Appellate Procedure, the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

Person or Other Entities	**Connection and Interest**
1. American National Insurance Company d/b/a Edgewater Mall	Appellee
2. Scott D. Smith, Attorney at Law, PLLC Scott Smith, Esq.	Attorney of Record for Appellee American National Insurance Company
3. Laura Karpinsky	Appellant
4. William C. Miller, Esq.	Attorney of Record for Appellant
5. Oraclean, Inc.	Appellee
6. Mark Norton, Esq. V.K. Smith, III, Esq.	Attorney of Record for Appellee Oraclean, Inc.

RESPECTFULLY SUBMITTED THIS, the 29th day of June, 2011.

ORACLEAN, INC.
Defendant/Appellee

BY: Mark Norton
Mark Norton, MSB #[redacted]
V. K. Smith, III, MSB[redacted]

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STATEMENT OF THE ISSUES

I. Whether the trial court was correct in granting Oraclean's Motion for Summary Judgment finding that the Plaintiff had failed to present evidence of a genuine issue of material fact and had failed to meet her *prima facie* burden of proof to present a claim of negligence against Oraclean.

STATEMENT OF THE CASE

On August 24, 2005, Laura Karpinsky was walking through Edgewater Mall when she slipped and fell in the concourse area just outside the Lane Bryant store. Ms. Karpinsky filed a Complaint against the mall owner, ANICO, and the mall maintenance contractor, Oraclean, Inc., alleging they were on actual notice of the liquid spill at the time Ms. Karpinsky fell. The Complaint alleges that the Defendants failed to warn Ms. Karpinsky or to ensure the floor was dry.

ANICO filed a Motion for Summary Judgment based upon the fact that according to witness Gail Clark the spill had been there for less than 5 minutes when Ms. Karpinsky fell. This Motion was joined in by Oraclean. Less than five minutes was not enough time for ANICO to learn of the spill, notify Oraclean, for Oraclean to respond and clean it before an accident occurred. After a hearing, the trial court entered its Order granting ANICO's Motion for Summary Judgment. On December 1, 2010, the trial court entered an Amended Order that also granted summary judgment to Oraclean. The Plaintiff timely filed her appeal.

SUMMARY OF THE ARUGUMENT

If summary judgment is proper as to ANICO, as the premises owner, then summary judgment is also proper for Oraclean, the maintenance contractor. If anything, Oraclean is even further removed than ANICO and negligence should be harder to prove against Oraclean.

The owner or occupant of business premises is not an insurer against all injuries. An owner, occupant, or person in charge of premises owes to a business invitee a duty to exercise reasonable or ordinary care to keep the premises in a reasonably safe condition for persons exercising reasonable care for their own safety or to warn the invitee of a dangerous condition, not readily apparent, which the owner or occupant knows of or should have known of the existence in the exercise of reasonable care. An owner or occupier of premises owes a duty to eradicate a known dangerous situation *within a reasonable time* or to exercise reasonable diligence in warning those who were likely to be injured because of the danger.

Ms. Karpinsky offered no evidence of how the liquid got on the floor or how long it had been there. The only evidence was from eye-witness Gail Clark who testified that the spill had been on the floor for less than five (5) minutes when Ms. Karpinsky fell. Ms. Karpinsky has produced no actual evidence that ANICO or Oraclean were actually aware of the spill prior Ms. Karpinsky's fall. Regardless, less than five (5) minutes was insufficient time for ANICO to have received actual notice, notify Oraclean, Oraclean gather the appropriate tools and respond. Since there is no evidence the actions of Oraclean were unreasonable or negligent, summary judgment is proper.

ARGUMENT

A. Summary Judgment Standard

Rule 56(c) of the Mississippi Rules of Civil Procedure states in relevant part that summary judgment "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 a judgment as a matter of law." *Adams v. Cinemark USA, Inc.*, 831 So.2d 1156, 1162 (Miss. 2002). As a general rule of Mississippi law, summary judgment should be granted when the moving party successfully demonstrates to the Court that no genuine issue of material fact exists from the record and the movant is entitled to judgment as a matter of law. *Young v. Wendy's International, Inc.*, 840 So.2d 782, 783 (Miss.App. 2003).

Once a motion for summary judgment has been made which is supported by Rule 56, the non-moving party may not defeat the motion merely by making general allegations or unsupported speculations or denials of material fact. *Adams*, 831 So.2d at 1161. Likewise, the non-moving party's claim must offer evidence upon which a fair-minded jury could return a favorable verdict. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). *Wilbourn v. Stennett, Wilkinson & Ward*, 687 So.2d 1205, 1214 (Miss. 1996). However, if a non-moving party fails to offer such evidence, summary judgment is mandated, because the party has failed "to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Wilbourn*, 687 So.2d 1214 *citing Galloway v. Travelers Insurance Co.*, 515 So.2d 678, 683 (Miss. 1987) *quoting Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). Furthermore, evidence

offering issues of fact in general is insufficient to avoid summary judgment, because the non-moving party must establish a genuine issue of material fact. *Richmond v. Benchmark Constr. Corp.*, 692 So. 2d 60, 61 (Miss. 1997)(citations omitted).

When seeking summary judgment, the moving party bears the burden of proof in demonstrating the absence of an issue of material fact with respect to those issues on which the movant bears the burden of proof at trial. *Celotex Corporation v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2558 (1986); *Reynolds v. Amerada Hess Corp.*, 778 So. 2d 759, 761 (Miss. 2000). However, if the movant points to an absence of evidence for denying summary judgment, the burden of proof shifts to the non-movant. *Celotex*, 477 U.S. at 322, 106 S.Ct. at 2553-54. Only when there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party is a full trial on the merits warranted. *Lindsey v. Sears*, Roebuck and Company, 16 F.3d 616, 618 (5th Cir. 1994) citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

B. Mississippi Premises Liability Law

The owner or occupant of business premises is not an insurer against all injuries. *WalMart Stores, Inc. v. Littleton,* 822 So.2d 437, 439 (Miss. 2002). An owner, occupant, or person in charge of premises owes to a business invitee a duty to exercise reasonable or ordinary care to keep the premises in a reasonably safe condition for persons exercising reasonable care for their own safety or to warn the invitee of a dangerous condition, not readily apparent, which the owner or occupant knows of or should have known of the existence in the exercise of reasonable care. *Criss v. Lipscomb Oil* Co., 990 So.2d 771, 774 (Miss.App. 2005). A business owner is not required to keep the premises absolutely safe, or in such a condition that no accident could possibly happen. *Littleton,* 822 So.2d at 1059.

If a plaintiff is unable to show the dangerous condition was caused by the defendant's acts, then the plaintiff must prove by competent evidence the defendant's actual or constructive knowledge of the condition. *Walter v. Dixieland Food Stores, Inc.*, 492 So.2d 283, 285 (Miss. 1986). Even if a defendant has actual knowledge of a dangerous condition, the only duty it is owes is to eradicate the known dangerous situation within a reasonable time or exercise reasonable diligence in warning those who were likely to be injured by the danger. In either case, defendants were entitled to a reasonable time to perform the duty. *J.C. Penny v. Sumrall,* 318 So.2d 829, 832 (Miss. 1975).

C. Argument

Ms. Karpinsky is unable to meet her burden of proof in this case – that ANICO or Oraclean had actual knowledge of a dangerous condition and failed to eradicate it within a reasonable time – thus there is no genuine issue of material fact and summary judgment is proper.

Ms. Karpinsky's deposition testimony explained very little knowledge about what she slipped on and how long it had been there. She knows she slipped on a liquid, but did not really look at it and does not know if it was water. (R.53, 57). She had no idea how the liquid got on the floor and did not see any footprints in the liquid. (R. 58). She said no one was in the area where she fell (R.56). Ms. Karpinsky presented no evidence on how long the spill had been there.

The only testimony about how long the spill was there was from eye-witness Gail Clark. Her husband went to the bathroom right near the Lane Bryant store while she stepped into Lane Bryant to look around. (R.66). She did not see any water or spill on the floor when she stepped in the Lane Bryant. (R.67). She believes if a spill, cup, ice, or something else would have been there when she entered the Lane Bryant store, she would have seen it. (R.67). She was in the Lane Bryant store "about 5 minutes." (R.67,71) As she left the Lane Bryant store, she saw a liquid spill with a cup just

outside the Lane Bryant entrance. (R.67-68). She remembers seeing a cup with ice still in it. (R.67,68). She does not know the spill got on the floor out side of the Lane Bryant. (R. 70). About ten (10) seconds after she left the Lane Bryant store, Ms. Karpinsky fell in the spill. (R.68).

Based upon the testimony of Gail Clark, the liquid must have been on the floor LESS than five (5) minutes before Ms. Karpinsky fell. Nobody knows whether the spill had been on the floor 30 seconds before Ms. Karpinsky fell, four (4) minutes and thirty (30) seconds before, or some time in between.

Ms. Karpinsky argues that ANICO and Oraclean were had "actual knowledge" of the spill prior to her fall based upon language in the incident report. According to the incident report, a customer had notified guest services of the spill and guest services had called housekeeping (Oraclean). Nobody knows how long after the spill a customer notified guest services. Oraclean arrived within a couple of minutes after Ms. Karpinsky fell.

All of the following would have had to occur in LESS than five minutes that the spill was on the ground according to Ms. Karpinsky:

- Customer notices spill;
- Customer locates and walks to guest services person to notify of spill;
- Customer explains spill and location to guest services;
- Guest services walks to or calls housekeeping and explains spill and location;
- Guest services explains spill and location to housekeeping;
- Housekeeping locates and notifies employee to clean spill;
- Housekeeping gathers mop, bucket, signs, etc;
- Housekeeping walks to spill location.

It is not reasonable to say that all of this should have occurred in less than five minutes. In addition, it is undisputed that when "guest services" learned of the spill they called "housekeeping" and that housekeeping arrived within a short time after Ms. Karpinsky fell. In other words, as soon as guest services was on notice of the spill they began the steps necessary to have the spill cleaned. The plaintiff has not produced any evidence to the contrary; therefore, summary judgment is proper as a matter of law.

D. Similar Cases

In *J.C. Penney v. Sumrall,* 318 So.2d 829 (Miss.1975), a very similar scenario was discussed. In that case, the plaintiff slipped and fell in the foyer of a J.C. Penney store and the trial court jury returned a verdict in favor of the plaintiff. On appeal, evidence revealed that a customer had gotten sick and vomited in the front of the store. *Id.* at 830. A store employee witnessed the event, but rather than cleaning the vomit immediately or warning other customers of the vomit, the employee went to a telephone and called for the janitor to come clean up the vomit. *Id.* at 830. The plaintiff fell in the vomit as the employee was hanging up the telephone. *Id.* The plaintiff argued that the defendant was negligent in failing to immediately clean up the vomit and warn customers. *Id.* at 831.

The Mississippi Supreme Court noted that the defendant's duty was to eradicate the known dangerous situation *within a reasonable time* or to exercise reasonable diligence in warning those who were likely to be injured because of the danger. *Id.* at 832. (Emphasis added).The Mississippi Supreme Court held that "there must be some evidence of negligence given a jury before it can determine that a defendant is guilty of negligence." *Id.* at 832. The Court continued, stating that "[t]he mere fact that a customer succeeded in reaching the vomit and falling before the janitor, the

manager and other agents ... had a reasonable opportunity to correct the situation is not sufficient evidence to establish negligence on the part of the defendants. Consequently, there is nothing for the jury to decide." *Id.*

In the case of *Hardy v. K-mart Corp.*, the plaintiff alleged that K-mart was on notice of a paint spill before the plaintiff slipped in it. 669 So.22d 34 (Miss.1996). According to the plaintiff, when he told a K-mart employee of the paint spill and his fall, then employee explained that they already knew about the spill and was trying to get somebody to clean it up. The trial court granted summary judgment to the defendant and the Mississippi Supreme court agreed as to this actual notice issue. According to the court, whether or not K-mart had actual notice prior to the spill was irrelevant because it was undisputed that as soon as K-mart learned of the spill it began the steps to clean it up. In reaching its opinion, the Supreme Court reiterated the *J.C. Penny* case that says a premises owner is entitled to a reasonable time to respond.

E. Hearsay Affidavit and Recorded Statement

The Court should not consider the hearsay Affidavit and alleged recorded statement of Gail Clark for several reasons. First, the Affidavit is hearsay because the deponent Dempsey Levi did not have personal knowledge of the issue. Second, there is no evidence the transcript is accurate and there are multiple places where the person transcribing could not understand what was on the tape. Third, Gail Clark was deposed and testified under oath about what she saw. The plaintiff did not ask her a single question during the deposition.

CONCLUSION

The plaintiff cannot meet their burden of proving negligence against Oraclean or ANICO summary judgment is proper. Even if a defendant has actual knowledge of a dangerous condition, they are entitled to a reasonable time to eradicate a dangerous condition or to warn of that condition. In this case, the spill had been on the ground less than five (5) minutes before Ms. Karpinsky fell. It is undisputed that as soon as "guest services" learned of the spill they contacted housekeeping about cleaning it up – which is all the law requires of them. In a mall the size of Edgewater Mall, less than five (5) minutes is not a reasonable time for a customer to see the spill, find and notify guest services, guest services to find or call housekeeping, housekeeping to gather equipment, and housekeeping to walk to the spill location. Therefore, the plaintiff cannot meet her burden of proof and summary judgment is proper.

CERTIFICATE OF SERVICE

I, Mark Norton, of counsel for Defendant Oraclean, Inc., hereby certify that I have this day mailed, postage pre-paid, by United States Mail, a true and correct copy of the above and foregoing to:

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This the 29th day of June, 2011.

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