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

LAURA KARPINKSY **APPELLANT**

VERSUS **NO. 2010-CA-02084**

AMERICAN NATIONAL INSURANCE COMPANY AND ORACLEAN, INC. **APPELLEES**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Laura Karpinsky, Appellant
2. American National Insurance Company and Oraclean, Inc., Appellees
3. William Carl Miller, Attorney for Appellant
4. Scott D. Smith, Attorney for Appellee American National Insurance Company
5. Mark Norton, Attorney for Appellee Oraclean, Inc.

By: _____
William Carl Miller
Attorney of Record for
Laura Karpinsky, Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASE LAW

I.

STATEMENT OF THE ISSUES

1. Whether the court erred in granting summary judgment in a premises liability case when it was undisputed that the premises owner and its cleaning contractor had actual notice of the dangerous condition for at least five minutes without taking any reasonable steps to warn their business invitees of the danger.

II.

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

This case is on appeal from the Circuit Court for the Second Judicial District, Harrison County, Mississippi.

On August 13, 2008, Ms. Karpinsky commenced this action by filing her complaint against Defendants American National Insurance and Oraclean, Inc. wherein she sought to recover damages as a result of a slip and fall at Edgewater Mall in Biloxi, Mississippi. (C.P. 006). The defendants timely answered, denying any liability. (C.P. 005).

On May 10, 2010, American National Insurance Company filed its Motion for Summary Judgment, and Oraclean later filed its Joinder in that motion. (C.P. 004). Ms. Karpinsky filed an affidavit from her former attorney, Dempsey Levi, in opposition to the motion on August 18, 2010, and the motion was heard on August 19, 2010. (C.P. 003). On November 2, 2010, an Order was entered granting summary judgment to American National Insurance Company (C.P. 003), and an Amended Order was entered on December 1, 2010 to included the inadvertently omitted Oraclean, Inc. in the granting of summary judgment. (C.P. 003). It is from that order that Ms. Karpinsky timely appealed on December 16, 2010. (C.P. 003).

B. STATEMENT OF RELEVANT FACTS

On August 24, 2005 at approximately 6:45 p.m., Ms. Karpinsky was walking in the Edgewater Mall outside of the Lane Bryant store when she slipped and fell in a puddle of water. (Tr. 2, C. P. 095). American National Insurance Company owns Edgewater Mall, and Oraclean, Inc. contracts with American National to provide cleaning services. (C.P. 080).

Prior to the incident, a customer had notified Guest Services of the spill in front of the Lane Bryant store, and Guest Services had notified Housekeeping. (C.P. 095). An unknown Housekeeping employee responded to the call, but arrived after the incident. (C.P. 098).

No sign warning of the wet floor had been placed prior to Ms. Karpinsky's fall. (C.P. 095). The area had last been patrolled at 6:25 p.m. (C.P. 098). The incident report prepared by the mall acknowledged that through its' employee it was aware of the condition prior to Ms. Karpinsky's fall, and that Oraclean, Inc., its' cleaning contractor, had also been notified prior to the fall. (C.P. 098).

Gail Clark was a witness to the aftermath of Ms. Karpinsky's fall. In a recorded statement taken by Dempsey Levi, Ms. Karpinsky's former attorney, Ms. Clark had stated that the puddle looked like it had been there "quite a while" and that tracks were visible through the puddle. (C.P. 088, 089). At her deposition, however, she stated that she did not notice the spill prior to going into the Lane Bryant store, but that she saw it upon her exiting the store. She estimated that she had been in Lane Bryant no longer than five minutes. (C.P. 067).

SUMMARY OF ARGUMENT

Granting summary judgment is improvident in an actual notice premises liability case wherein reasonable minds could differ as to whether there existed sufficient time for the proprietor to exercise reasonable diligence in warning its' invitee of the dangerous condition.

IV.

ARGUMENT

STANDARD OF REVIEW

In Aetna Cas. And Sur. Co. v. Berry, 669 So.2d 56 (Miss. 1996), this Court summarized the familiar standard for review of a trial court's action in the context of summary judgment:

> The standard for reviewing the granting or the denying of summary judgment is the same standard as is employed by the trial court under Rule 56(c). This Court conducts de novo review of orders granting or denying summary judgment and looks at all the evidentiary matters before it--admissions in pleadings, answers to interrogatories, depositions, affidavits, etc. 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. Issues of fact sufficient to require denial of a motion for summary judgment obviously are present where one party swears to one version of the matter in issue and another says the opposite. In addition, the burden of demonstrating that no genuine issue of fact exists is on the moving party. That is, the non-movant would be given the benefit of the doubt.
> (citations omitted).

Mantachie Nat. Gas v Miss. Valley Gas Co., 594 So.2d 1170, 1172 (Miss. 1992).

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 as to whether a genuine issue of fact exists. Ratliff v. Ratliff, 500 So.2d 981 (Miss. 1986).

ARGUMENT

A. In an "actual notice" premises liability case, the Court errs in granting summary judgment when reasonable minds could differ as to whether there was sufficient time after notice for the premises owner to warn its business invitees of the dangerous condition.

This is a premises liability case where many facts are undisputed. The premises owner and its cleaning contractors, Appellees herein, do not dispute that Ms. Karpinsky slipped and fell in a puddle of water on the premises of Edgewater Mall. The incident report prepared by Edgewater Mall clearly states that it was on notice of the condition prior to Ms. Karpinsky's fall, and that its cleaning contractor had been notified of the condition. The undisputed facts make this an "actual notice" variety of the premises liability cases.

In such situations, the duty of the proprietor is to eradicate the known dangerous condition within a reasonable time *or* to exercise reasonable diligence in warning those who were likely to be injured because of the danger. J.C. Penney Co. v. Sumrall, 318 So.2d 829, 832 (Miss. 1975). Ms. Karpinsky urges that since this is an actual notice/failure to warn case - once the mall had actual notice of the condition, it should have fulfilled its duty to take reasonable measures to warn its invitees of the danger.

In the J.C. Penney case, the Mississippi Supreme Court held that because of the extremely short time span between notice and Ms. Sumrall's fall, the proprietor had done all it could do by immediately notifying its janitor to come clean the vomit off of the floor. The Court spoke of "the limited few seconds" between actual notice and Ms. Sumrall's fall. Penney at 832.

In contradistinction to the Penney facts, here we face a much longer time span - five minutes by the mall owner's theory- during which the proprietor and/or its cleaning contractor had ample time to warn of the danger. Put simply, the question becomes whether or not those whom Ms. Karpinsky charges with negligence exercised *reasonable* diligence within the putative time frame to warn of the danger. This is, of course, the type of question that we allow juries to

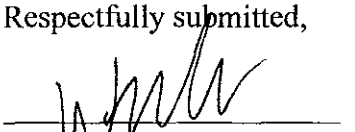
resolve. As this Court stated in McIntosh v. Deas, 501 So.2d 367 (Miss. 1987), "....even where the facts are undisputed, where reasonable minds may reach different conclusions, negligence is a jury issue." A juror could easily conclude that five minutes is more than enough time after a proprietor has received notice of a dangerous condition to take steps to warn its patrons of that danger. This is not a "limited few seconds" Penney case, but rather a case wherein, taking the facts in the light most favorable to Ms. Karpinsky, the proprietor and its cleaning contractor had ample time to comply with its duty to warn Ms. Karpinsky of the peril she faced, but notwithstanding the amplitude of time, they failed to be reasonably diligent.

V.

CONCLUSION

For the above and foregoing reasons, this Court should reverse and remand this case for further proceedings not inconsistent with its ruling.

Respectfully submitted,



WILLIAM CARL MILLER
Attorney for Appellant

IN THE SUPREME COURT OF MISSISSIPPI

LAURA KARPINKSY	**APPELLANT**
VERSUS	**NO. 2010-CA-02084**
AMERICAN NATIONAL INSURANCE COMPANY AND ORACLEAN, INC.	**APPELLEES**

CERTIFICATE OF MAILING

RULE 25(a) RULES OF APPELLANT PROCEDURE

I, William Carl Miller, Esq., attorney of record for the Appellant, Laura Karpinsky , do hereby certify that I have this date mailed, first class mail, postage prepaid, to Kathy Gillis, Clerk of the Supreme Court of Mississippi, Post Office Box 249, Jackson, Mississippi 39205-0249, the original and three true and correct copies of:

1. Brief of Appellant.

Further, this date a copy of this notice has been mailed to all counsel of record and the presiding judge.

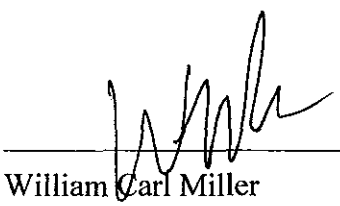
SO CERTIFIED this the 3rd day of June, 2011.

WILLIAM CARL MILLER
MSB #3311

CERTIFICATE OF SERVICE

I, William Carl Miller, do hereby certify that I have this date mailed a true and correct copy of the Brief of Appellant, postage prepaid, by means of United States mail, to Scott D. Smith, Esquire, counsel for American National Insurance Company at his usual mailing address of P.O. Box 4603, Biloxi, Mississippi 39535 and to Mark Norton, Esquire, counsel for Oraclean, Inc. at his usual mailing address of P.O. Drawer 18109, Hattiesburg, Mississippi 39404 and to Honorable Lawrence Bourgeois, Circuit Court Judge, at his usual mailing address of Post Office Box 1461, Gulfport, Mississippi 39502.

This the 3rd day of June, 2011.



William Carl Miller

William Carl Miller
Miller, & Fowlkes, PLLC
2555 Marshall Road
Biloxi, Mississippi 39531
228.388.7111(voice)
228.388.0037(facsimile)
billy@millerfowlkes.com