IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2010-CA-01267 TS

DIANA LADNIER and
LAWRENCE LADNIER **APPELLANTS**

VERSUS

JOSEPH HESTER **APPELLEE**

SUPPLEMENTAL BRIEF OF PLAINTIFFS/APPELLANTS

The Plaintiff-Appellants, Diana and Lawrence Ladnier, would submit this Supplemental Brief to this Honorable Court and in support of reversing the Circuit Court of George County and the Mississippi Court of Appeals rulings and remand this matter for trial on the merits.

Diana Ladnier has been wrongfully denied her day in court for the injuries she sustained based upon the negligence of the Defendant-Appellee, Joseph Hester. The fact remains that the "box wire or field fence" in question failed, which was constructed by Joseph Hester to contain his horses. The portion of fencing that failed was a section replaced by Hester. Hester negligently and carelessly replaced this section with a barbless section of field fence to save time, effort and money. This section was knocked down and trampled by three large animals weighing more than 1000 pounds each. The horses escaped and caused Diana Ladnier to sustain grievous injuries. Hester, as the movant for summary judgment, never met his burden of proving that no genuine issue of material fact existed and that he was not negligent. Hester never produced anything to show or prove that the fence was constructed to industry standards for

maintaining large horses. Hester cannot make that showing without producing uncontradicted evidence showing that he was not negligent.

Mississippi Law states that the movant bears the burden of persuasion and production that no genuine issue of material fact exists. **If, and only if**, the proponent makes such a showing, the opponent, or adverse party, cannot rest on his pleadings; **Hester did not make the showing that no material fact existed.** The lower courts erred for various reasons.

First, the Court has erroneously relied upon Hester's testimony over Lawrence Ladnier's testimony. Hester stated "field fence was suitable" and Ladnier testified it was not. Why should Hester's opinion be given more weight than that of Ladnier's? Hester is no more of an authority or expert of fence construction or livestock containment than Lawrence Ladnier, who gave testimony from his experience with horses and the type of fence that Hester used.

Respectfully, the lower Courts have misapplied this burden. Hester produced nothing to show his fence was up to industry standards to safely enclose large horses. The only thing Hester produced was his own testimony stating he thought field fence was suitable, and the passage of time. This does not meet the requirements for the movant for a summary judgment under Mississippi Law.

Secondly, the trial Court and Court of Appeals have erred in relying upon the passage of time. To say that Hester's construction of the fence was not negligent because the horses did not escape for two years is an improper standard and a very dangerous one for this Court to adopt. What if the horses would have escaped the next day in the same fashion, or the next week, or the next month, or the next year? Is the trial Court or Court

of Appeals the appropriate authority to decide whether a delineated amount of time will negate a negligent act? Ladnier would suggest that it is not and that question remains for a jury to decide.

As discussed in the Motion for rehearing and the appeals brief, time should not negate a negligent act. If one was to leave a dangerous substance, loaded handgun, or matches around adolescent children, would the passage of two years negate the culpability or negligence of that action? Surely, the answer to that question is no. This was a situation of a negligent act waiting on proximate cause.

The point is this, just because the horses did not escape for two years does not ensure that the choice of "box wire or field fence" was not negligent under the circumstances. Either way, the length and duration is surely a jury question and not one for the Court to decide. This is a dangerous precedent for the Court to establish. Where is the time line to be drawn? The trial Court and Court of Appeals erred and abused its discretion by making that determination.

Just as the dissent points out, "if we were to accept, as the majority does, that the failure of the horses to escaped for nearly two years proves that the fence was adequate and that Hester was not negligent in utilizing "just basic horse and cattle box wire," the converse would also be true. That is, since the horses *did* escape, despite never having done so for nearly two years, the fence had to be inadequate, for if the fence was adequate, the horses would have never escaped.

Further, other factual issues remain that require a jury determination. It is also equally important to note that some of the pasture was enclosed with a large wooden

fence, another section was 3 stranded "barb wired" fencing, and the section where the horses escaped was "box wire or field fence." This section of fencing was specifically chosen by Hester because it was cheaper and easier to install than either a wooden fence and or barbed wire fencing. Further, a jury must determine whether "regular fence staples" and the fasteners Hester used were reasonable to contain 1000 pound animals.

Also, Hester testified as to allowing the horses to pasture in the neighboring field across the road where the accident occurred. Hester should have known that the horses had a liking to the Bahia grass in the adjacent pasture.

The trial Court abused its discretion when granting summary judgment for Hester. Similarly, the Court of Appeals erred in affirming that decision. This Honorable Supreme Court should carefully consider its longstanding language and law in regards to Rule 56 summary judgment. (1) the Court of Appeals misapplied the burden of proof to grant a summary judgment motion and erroneously heightened the burden on Ladnier as the non-moving party; (2) there are contested factual issues in dispute; (3) the Court of Appeals failed to view the evidence in light most favorable to the non-movant; (4) the Court of Appeals failed to err in favor of trial on the merits; (5) there are undisputed facts which are susceptible to more than one interpretation; and (6) the Court of Appeals wrongfully addressed jury issues. The miss-application of law was explained by the written dissent artfully authored by Justice Irving of the Mississippi Court of Appeals in this case.

In regards to circumstantial evidence, the Mississippi Court of Appeals and trial Court chose to wholly ignore the language from this Court in *Hardy By and Through Hardy v. K-Mart Corp.*, 669 So.2d 34 (Miss. 1996). This Court stated"

> "Negligence, however, may be proven by circumstantial evidence, that is 'evidence of a fact, or a set of facts, from which the existence of another fact may reasonable be inferred.' *Id.* at 38. (citing *Mississippi Winn-Dixie Supermarkts v. Hughes*, 247 Miss. 575, 585, 156 So.2d 734, 736 (1963)). However, this circumstantial evidence must be such that it creates a legitimate inference that places it beyond conjecture." *Downs v. Choo*, 656 So.2d 84, 90 (Miss. 1995). (emphasis added)

In that case, Hardy was injured when he slipped and fell in paint that was on the floor in the defendant's store. No one knew how the paint got on the floor. Hardy contended that such a legitimate inference of negligence beyond conjecture was based upon the testimony about stacking paint cans and a photograph of the paint display. K-Mart argued that there was no evidence, circumstantial or otherwise, to support a claim that the manner of stacking cans in the display caused Hardy's injury. According to K-Mart, the only evidence about the spilled paint is that it came from an undamaged paint can lying about two feet from the display. Hardy posited that K-Mart created an unstable display from which the paint can fell and spilled its contents.

In *Hardy*, the trial Court granted summary judgment and the matter was appealed and presented to the Mississippi Supreme Court. This Honorable Court reversed the trial Court, stating the trial judge could not have said with reasonable confidence that the full facts of this matter had been disclosed, thus granting the (summary judgment) motion was reversible error. This decision explained that negligence may be proven by circumstantial evidence, that is, evidence of fact or set of facts from which existence of another fact may be reasonably be

inferred; however, this circumstantial evidence must be such that it creates a legitimate inference that places it beyond conjecture.

Just as it is in the case at bar, the circumstantial evidence would suggest that Hester negligently constructed the section of fence which was incapable of detaining such massive animals. Circumstantial evidence reveals that not only did the fence fail under the weight of the animals, but the staples and fasteners failed as well. Hester claims that "field fence" or box wire is appropriate for the detainment of such animals. Lawrence Ladnier claims that "field fence" or box wire is not suitable for containing 1000 pound animals. Hester produced no expert who stated that box wire, fence staples, and the fasteners he used were suitable for safe enclosure of such large animals. Hence, a material factual dispute arises to determine whether the fencing and material was adequate under the circumstances.

As this Mississippi Supreme Court has previously stated, the Circuit Court "does not try issues; rather [it] only determines whether there are issues to be tried" *Burkes v. Fred's Stores of Tennessee, Inc.*, 768 So.2d 325 (Miss. 2000). The Circuit Court should deny a motion for summary judgment "**unless it is established beyond a reasonable doubt that the plaintiff would be unable to prove any facts to support the issues presented in the complaint.**" *Branch v. State Farm Fire and Casualty Co.*, 759 So.2d 430 (Miss. 2000) (emphasis added). To that end, "[a]ll motions for summary judgment should be viewed with great skepticism and if the trial court is to err, it is better to err on the side of denying the motion." *Ratliff v. Ratliff*, 500 So.2d 981, 981 (Miss. 1986). Most importantly of all, "when evaluating a motion for summary judgment, the court must view all of the evidence in the light most favorable to the non-moving party." *Price v. Park Mgmt.*, 831 So.2d 550, 551 (Miss. Ct. App. 2002).

CONCLUSION

Appellants respectfully request that this matter be reversed and remanded to the Circuit Court of George County for a full trial on the merits.

DATED this the 9th day of April, 2012.

GARNER J. WETZEL, Attorney for Appellants, Diana Ladnier and Lawrence Ladnier

CERTIFICATE OF SERVICE

I, undersigned counsel, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing Supplemental Brief to the following counsel of record: Tristan Russell Armer, Esquire, with the law firm of Heidelberg Steinberger Comer & Burrow at their mailing address of Post Office Box 1407, Pascagoula, MS 39568 and to Patrick Collins, Esquire (*Pro Hac Vice*), at his usual mailing address of Post Office Box 3062, Daphne, AL 36526, and to Honorable Judge Kathy Jackson, Circuit Court of George County, Post Office Box 998, Pascagoula, MS 39568.

DATED this the 9th day of April, 2012.

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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 Judge of this Court may evaluate possible disqualifications or recusal.

Diana Ladnier	Appellant
Lawrence Ladnier	Appellant
James K. Wetzel, Esquire	Counsel for Appellants
Garner J. Wetzel, Esquire	Counsel for Appellants
Joseph Hester	Appellee
Tristan Armer, Esquire	Counsel for Appellee
Patrick Collins, Esquire	Counsel for Appellee
Honorable Kathy Jackson	Circuit Court Judge

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