

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-CA-00438 COA**

CHRISMA BOGAN

APPELLANT

v.

**TANGLEWOOD PARTNERSHIP D/B/A
TANGLEWOOD APARTMENTS**

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED,
PURSUANT TO M.R.A.P. 35-B

DATE OF JUDGMENT:	03/20/96
TRIAL JUDGE:	HON. L. BRELAND HILBURN JR.
COURT FROM WHICH APPEALED:	HINDS COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	JESSIE L. EVANS
ATTORNEY FOR APPELLEES:	JOE W. HOBBS
NATURE OF THE CASE:	CIVIL - PERSONAL INJURY
TRIAL COURT DISPOSITION:	SUMMARY JUDGMENT GRANTED IN FAVOR OF APPELLEE.
DISPOSITION:	REVERSED AND REMANDED - 1/27/98
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	2/27/98

BEFORE McMILLIN, P.J., KING, AND PAYNE, JJ.

McMILLIN, P.J., FOR THE COURT:

This case is before the Court on appeal from a summary judgment rendered by the Circuit Court of Hinds County. The judgment was rendered in favor of the defendant, Tanglewood Partnership, and against the plaintiff, Chrisma Bogan. Bogan had sued Tanglewood for injuries she received in a fall on a staircase in the common area of Tanglewood Apartments, an enterprise owned by Tanglewood. Bogan claimed that she fell when her sock became snagged in a piece of the decorative iron railing that was bent or twisted out of line and protruding inward in such a manner as to create an unreasonably dangerous condition.

In her deposition, Bogan testified that her sock had been ripped and her leg cut in the accident. In the

deposition of Steven Steen, a representative of Tanglewood, photographs of the stairway were introduced which showed twisted portions of the metal stair rail. Steen admitted that the photographs showed instances of the metal protruding inward in the manner claimed by Bogan in her suit.

However, Bogan, during the course of a discovery deposition, indicated several times that she did not know what caused her to fall. At one time she said it could have been the condition of the concrete portion of the steps or the fact that she became snared on a protrusion of a part of the metal railing. At another time, she said only that she knew the fall had occurred on Tanglewood's premises; apparently indicating that in her mind, that fact was sufficient to create a question of liability. Armed principally with this testimony from Bogan, Tanglewood moved for summary judgment claiming there were no contested issues of fact and that Tanglewood was entitled to judgment as a matter of law. The trial court agreed, and this appeal ensued.

Discussion

For purposes of considering the summary judgment motion filed by Tanglewood, Bogan must be considered as an invitee on the premises. She testified in her deposition that she was at the complex at the specific invitation of David Clark, a resident who had asked her to give him a ride to work. So long as a person is on the property at the express or implied invitation of the owner or occupant for their mutual advantage, that person is an invitee. *Lucas v. Mississippi Housing Authority No. 8, 441 So. 2d 101, 103 (Miss. 1983)*. The duty owed to Bogan by Tanglewood was, therefore, to exercise reasonable care to prevent her from being injured on the premises. *Id.* It would appear to this Court that permitting the metal stair railings in the common area of an apartment complex to become bent and twisted so that portions protruded in such a way that unexpected injurious contact might occur could be seen as a breach of that duty of reasonable care.

The sole basis for Tanglewood's summary judgment motion was the proposition that Bogan would not -- or could not -- state with certainty that the protruding metal piece was, in fact, the cause of her fall. Tanglewood alleges, in effect, that since the plaintiff has the burden of proof to show the cause of injury by a preponderance of the evidence, Bogan's equivocation on the cause of her fall establishes as a matter of law that she would fail in her burden to show causation. The trial court apparently agreed with this proposition, though the summary judgment recites no findings of fact or conclusions of law.

In any event, our review of the grant of summary judgment is de novo. *Fipps v. Glenn Miller Const. Co., 662 So. 2d 594, 595 (Miss. 1995)*. Only if we are convinced that there are no disputed material issues of fact and that Tanglewood was entitled to judgment as a matter of law, based upon our own independent review of the same material seen by the trial court, are we permitted to affirm. *Id.*

We find the reasoning advanced by Tanglewood for its entitlement to summary judgment to be flawed. A plaintiff may prove the cause of injury by facts other than what the plaintiff "knows" about the incident of her own personal knowledge. A person going down a flight of stairs who suddenly loses her footing and violently falls may reasonably be expected not to know the exact cause of her fall during the incident or in the immediate aftermath. Even thereafter, her knowledge of the exact cause of the fall may be, and in all likelihood will be, based, not upon her sensory impressions of the event itself, but upon her ability to reconstruct the circumstances of the fall, examine the physical evidence, and draw some reasonable conclusion as to what might have occurred. Yet, even after such

an inquiry and attempt at reconstruction, a fall victim may be honest in saying that she cannot actually recall the circumstances of the fall and relate what occurred of her own personal knowledge. That fact does not mean that the probable cause of the accident cannot be inquired into and the jury permitted, on the best evidence available, to make a determination as to whether or not the incident occurred in the manner claimed.

In this case, there was, in opposition to the summary judgment motion, evidence indicating the presence of protruding pieces of metal from improperly bent stair railings. There was testimony that Bogan's fall occurred on the stairs in the area where the protruding pieces of metal were located. Finally, there was testimony from Bogan that the sock she had on that day had a tear and her foot received a cut in a manner that would appear consistent with her foot being ensnared on one of the protruding pieces of metal.

In civil litigation, we deal with probabilities and not certainties. There was, apparently, evidence available to Bogan, beyond her own sensory perceptions, that tended to make it more likely, rather than less likely, that she fell in the manner in which she alleged in her suit. The fact that she honestly testified that she did not, of her own personal knowledge, know what caused her fall would not prevent her from presenting to the jury other evidence in support of her theory of what, by way of a probability, caused her fall. The ultimate conclusion as to whether this proof was convincing enough to warrant recovery would then be properly left to the jury, subject, of course, to the traditional post-verdict safeguards that exist. We do not, at this stage, assess the probative weight that the jury might likely give to Bogan's evidence in support of her claim. The fact that it may be weak and unpersuasive to our way of thinking, or that the trial court thought it so, is not a reason to grant summary judgment.

Certainly, if there were nothing in this case supporting Bogan's claim beyond her allegation as to the location of the fall and her statements that she did not know what caused her to fall, summary judgment would have been in order. However, that is not the case. There was evidence before the court, both from Bogan's deposition and by other means, that would tend to make Bogan's theory of the case more probable than not. It was, therefore, error to grant summary judgment based solely on Bogan's statements about what she "knew" (or more properly did not "know") about the cause of her fall. This cause must be reversed and remanded for a trial on the merits.

THE JUDGMENT OF THE CIRCUIT COURT OF HINDS COUNTY IS REVERSED. THIS CASE IS REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLEE.

BRIDGES, C.J., THOMAS, P.J., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.