IN THE COURT OF APPEALS 11/28/95

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00129 COA

VEDA SWANSON HALL

APPELLANT

v.

HOULKA L. P. GAS COMPANY, INC.

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. R. KENNETH COLEMAN

COURT FROM WHICH APPEALED: CIRCUIT COURT OF CHICKASAW COUNTY

ATTORNEY FOR APPELLANT:

DAVID L. WALKER

ATTORNEYS FOR APPELLEE:

JOHN P. FOX

ELIZABETH F. CROSTHWAIT

NATURE OF THE CASE: CIVIL - PERSONAL INJURY

TRIAL COURT DISPOSITION: SUMMARY JUDGMENT GRANTED IN FAVOR OF DEFENDANT

BEFORE THOMAS, P.J., BARBER, AND DIAZ, JJ.

BARBER, J., FOR THE COURT:

Appellant (plaintiff below) Veda Swanson Hall ("Hall") appeals from an order of the Circuit Court of Chickasaw County granting summary judgment in favor of the Appellee (defendant below) Houlka L. P. Gas Company ("Houlka"). Finding that summary judgment was appropriate, we affirm.

I. BACKGROUND

In the early morning hours of August 9, 1981, Hall was a passenger in a brand new Chevrolet Z28 Camaro which was being driven by a woman named Debbie Box. Hall was asleep in the back seat of the car when Box attempted to pass a Chevrolet Corvette which was traveling at a speed of approximately ninety miles per hour. As the two vehicles were going up a hill, Kim Kilgo, the driver of the Corvette, swerved to avoid a collision with an oncoming car. Simultaneously, Box executed a swift left turn, struck a culvert and overturned the Camaro. The Camaro came to a halt near a propane storage tank. A fire ensued, eventually engulfing the Camaro in flames.

As a result of the accident, Hall suffered serious injuries, including severe burns. On August 5, 1987, Hall filed suit against Kilgo. This action was eventually settled for $75,000. Hall also reached a settlement of a claim against Box in the amount of $25,000.

On August 5, 1987, Hall also filed suit against Houlka, the company servicing the propane storage tank. Hall's complaint alleged that the propane tank had been negligently placed on the highway right-of-way, creating a hazard for vehicles using the road. Hall further charged that:

> [Houlka] had a duty and obligation to not fill the gas tank if it was negligently installed and created a hazard to the public. Accordingly, . . . [Houlka] filled the gas tank on numerous occasions when it had actual knowledge that the gas tank was located on the highway right-of-way and created a danger to the traveling public.

Hall alleged that her injuries resulted from the fire which occurred when the Camaro collided with the propane tank.

On January 4, 1994, the circuit court granted Houlka's motion for summary judgment. Hall now appeals.

II. DISCUSSION

Rule 56 of the Mississippi Rules of Civil Procedure provides 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 there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. M.R.C.P. 56(c). "Rule 56 provides the means by which a party may pierce the allegations in the pleadings and obtain relief by introducing outside evidence showing that there are no fact issues that need to be tried." *Brown v. Credit Ctr., Inc.*, 444 So. 2d 358, 362 (Miss. 1983). "The motion for summary judgment challenges the very existence of the legal sufficiency of the claim . . . ; in effect, the moving party takes the position that he is entitled to prevail as a matter of law because his opponent has no valid claim for relief . . . ." *Id.*

"In a negligence action, the plaintiff bears the burden of producing evidence sufficient to establish the

existence of the conventional tort elements of duty, breach of duty, proximate causation and injury." *Palmer v. Biloxi Regional Medical Ctr. Inc.*, 564 So. 2d 1346, 1355 (Miss. 1990), *reh'g denied*, 649 So. 2d 179 (Miss. 1994). "[When a party opposing summary judgment on a claim or defense as to which that party will bear the burden of proof at trial, fails to make a showing sufficient to establish an essential element of the claim or defense, then all other facts are immaterial, and the moving party is entitled to judgment as a matter of law." *Galloway v. Travelers Ins. Co.*, 515 So. 2d 678, 684 (Miss. 1987). Mere denial of the movant's allegation that there is no genuine issue of fact is insufficient to create an issue of fact. *Smith v. Sanders*, 485 So. 2d 1051, 1054 (Miss. 1986). The party opposing the motion is required to bring forward significant probative evidence demonstrating the existence of the triable issue of material fact. *Id.*

Other than stating that he was of the opinion that Houlka's motion for summary judgment should be sustained, the trial judge gave no specific reasons supporting his conclusion. Thus, we are not able to discuss the validity of his reasoning. Nevertheless, after conducting a *de novo* review of those portions of the record to which the parties direct our attention, we also conclude that summary judgment in favor of Houlka was appropriate.

As stated previously, a party seeking to prevail on a negligence claim must establish the elements of duty, breach of that duty, proximate cause and damages. To establish these elements, Hall specifically alleged that Houlka owed a duty to Hall not to fill or service a propane tank whose owner had negligently placed it either too close to or directly on the highway right-of-way. Hall also asserted that Houlka had a duty not to service a tank which was not equipped with a properly functioning safety overflow valve. Hall contended that Houlka's breach of these duties was the proximate cause of her burns because the tank caught fire and exploded when the Camaro collided with it.

After reviewing submissions of the parties, we find that Hall submitted no admissible testimony nor any other evidence supporting her allegations that the propane tank was positioned on or too close to the highway, that the propane tank was not properly equipped with a safety shut off valve or that propane from the tank caused or contributed to her burns. Hall testified in her deposition that she had no recollection of the accident since she fell asleep shortly before it occurred and did not wake up until one week later when she found herself in a Tupelo hospital bed. She further admitted that her allegations of Houlka's liability were based not upon her own personal knowledge but upon statements that both her father and brother-in-law communicated to her concerning the placement of the tank, its lack of proper safety equipment and the role that the propane played in the fire. She failed, however, to produce either affidavit or deposition testimony from these persons sufficient to substantiate these allegations.

The only eyewitness account of the events at issue was submitted by Houlka and consisted of the deposition testimony of Kim Kilgo. Kilgo testified that he drove back to the scene of the wreck immediately after the accident occurred. He testified that the Camaro had not collided with the propane tank but that it had come to rest up against it. Kilgo further testified that no propane was escaping from the tank at that point and that although the Camaro was on fire, the propane was not feeding that fire. Finally, Kilgo testified that the propane did not catch fire until *after* Hall had been successfully rescued from the car. In view of this record, we find that Hall failed to meet her burden of producing sufficient evidence supporting the requisite elements of her negligence claim and failed to establish the existence of a triable issue of material fact. Accordingly, we rule that the trial court

did not err in granting summary judgment in favor of Houlka.

THE JUDGMENT OF THE CIRCUIT COURT OF CHICKASAW COUNTY IS AFFIRMED. COSTS ARE ASSESSED AGAINST APPELLANT.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.