

**IN THE COURT OF APPEALS 5/16/95**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 94-CA-00124 COA**

**RICHARD ELLINGTON AND LIBERTY MUTUAL**

**INSURANCE COMPANY APPELLANTS**

**v.**

**FARM FRESH CATFISH CO. APPELLEE**

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

TRIAL JUDGE: HON. GRAY EVANS

COURT FROM WHICH APPEALED: WASHINGTON COUNTY CIRCUIT COURT

ATTORNEY(S) FOR APPELLANT(S): KINNY M. SWAIN

ATTORNEY(S) FOR APPELLEE(S): RICHARD BENZ, JR.

NATURE OF THE CASE: TORT - PERSONAL INJURY

TRIAL COURT DISPOSITION: SUMMARY JUDGMENT IN FAVOR OF APPELLEE

BEFORE BRIDGES, P. J., McMILLIN AND SOUTHWICK, JJ.

BRIDGES, P.J., FOR THE COURT:

Richard Ellington was injured when he slipped and fell on the icy steps leading into the building owned by Farm Fresh Catfish Co. Ellington filed a lawsuit against Farm Fresh, which then filed an indemnity claim against Ellington's employer. That claim was dismissed. A motion for summary judgment was filed by Farm Fresh which was granted by the trial judge. Ellington appeals contending that the motion for summary judgment should not have been granted. We agree.

## STATEMENT OF THE FACTS

Ellington was the manager of a clean-up crew employed by BMS Contract Services. BMS and Farm Fresh had entered into a contract whereby BMS would perform certain cleaning and janitorial services at the plant site of Farm Fresh. On the night of December 23, 1990, Ellington and his cleaning crew arrived at the plant and entered the facility through a specific entrance and stairway as was required of them by Farm Fresh policy. Snow was falling at the plant site and the steps were covered with snow. Ellington was not given any materials with which to clear the snow from the steps nor did his job description require him to do so.

Ellington's version of the the facts, as supported by his deposition, is as set out in the following discussion.

While Ellington and his crew were inside the plant performing their janitorial duties, an employee of Farm Fresh used a blow torch in an attempt to melt and remove the snow from the steps. The blow torch caused the snow to melt and then freeze over into an icy glaze.

On the morning of December 24, 1990, Ellington and his crew were exiting the plant through the same route by which they had entered. No one had warned Ellington that a blow torch had been used on the steps and that the steps were in an icy condition instead of in a slushy condition as they had been when he entered. As Ellington came down the steps he fell and was injured. Ellington claims that he was unable to see the change in condition from snow to ice in the early morning light as he exited the plant. Farm Fresh disagrees and contends that Ellington was aware of the condition of the steps and that he was injured as a result of his own negligence.

Ellington filed a complaint against Farm Fresh alleging that it and its employee were negligent in failing to provide Ellington with a reasonably safe place to work or in failing to warn him of the danger created by the ice on the steps. Liberty Mutual was granted leave to intervene on behalf of Ellington. Thereafter, Farm Fresh filed an indemnity complaint alleging that an agreement between Farm Fresh and BMS gave Farm Fresh the right to an indemnity suit against BMS. The indemnity action was dismissed without prejudice. Farm Fresh then filed a motion for summary judgment.

The trial judge granted summary judgment in favor of Farm Fresh on the grounds that Ellington was fully aware of the ice and snow present at the time of his fall and, therefore, Farm Fresh had no duty to warn Ellington of the icy conditions of the steps.

## ARGUMENT AND DISCUSSION OF THE LAW

In *Donald v. Reeves Transp. Co.*, our Supreme Court reiterated, as follows:

Summary judgments, in whole or in part, should be granted with great caution. . . . A motion for summary judgment lies only where there is no genuine issue of material fact; summary judgment is not a substitute for the trial of disputed fact issues . . . *when doubt exists whether there is a fact issue, the non-moving party gets its benefit.* Indeed, the party against whom the summary judgment has been sought should be given the benefit of every reasonable doubt.

*Donald v. Reeves Transport Co. of Calhoun, Georgia*, 538 So. 2d 1191, 1195 (Miss. 1989) (citing *Brown v. Credit Center, Inc.*, 444 So. 2d 358, 362 (Miss. 1983)). The *Donald* Court went on to quote from *Brown*:

We recognize that reasonable minds may often differ on the question of whether there is a genuine issue of material fact. In this context we find appropriate the admonition in a leading commentary on Federal Rule 56: If there is to be error at the trial level it should be in denying summary judgment and in favor of a full live trial.

*Donald*, 538 So. 2d at 1195.

In *Palmer v. Anderson Infirmary Benevolent Ass'n*, No. 91-CA-00654-SCT, slip op. at 6 (Miss. Feb. 23, 1990), the supreme court reiterated the procedure to be used in determining whether the trial court properly granted a motion for summary judgment, stating:

In our de novo review, this Court looks to see if the moving party has demonstrated that no genuine issue of fact exists. 'A motion for summary judgment should be overruled unless the trial court finds, beyond a reasonable doubt, that the plaintiff would be unable to prove any facts to support his claim.'

If the Court finds that the moving party is entitled to judgment as a matter of law, summary judgment should forthwith be entered in his favor. Otherwise, the court should deny the motion for summary judgment. See *Mantachie Natural Gas Dist. v. Mississippi Valley Gas Co.*, 594 So. 2d 1170, 1172 (Miss. 1992).

In order for Ellington to prevail at trial and on motion for summary judgment, he must show that Farm Fresh breached a duty owed to him and that the breach was the proximate cause of his injuries. Ellington, in his complaint, alleges that he was an invitee. As such, and in the event Ellington could prove such, then Farm Fresh owed him the duty of exercising reasonable care to keep the premises safe, or of warning him of hidden or concealed perils of which Farm Fresh knew or should have known in the exercise of reasonable care. *Lucas v. Buddy Jones Ford Lincoln Mercury, Inc.*, 518 So. 2d 646, 648 (Miss. 1988). Viewed in the light most favorable to Ellington, he has met that burden. If Ellington were a mere licensee, Farm Fresh would have owed him only the duty not to willfully or wantonly harm him. *Id.* at 648.

In the case sub judice, the trial court found that the cause of Ellington's fall was his own negligence in failing to take proper cautionary measures since he was fully aware of the dangerous and slippery condition of the steps. Although Ellington was aware of the condition of the steps when he arrived at

the plant, he argues that he was unaware of the enhanced danger caused by the Farm Fresh employee's actions. To make this a genuine issue of fact which should be left for the jury to decide, Ellington was required to put some evidence in the record to support his allegation. In his deposition, Ellington asserted that when he fell he saw the gentleman (Thomas, the employee) with a blow torch in his hand, that he (Thomas) was melting the ice with the blow torch, that he had not seen Thomas before he fell, and that no one had talked to him about the condition of the steps or about any changes in them.

Where a defendant negligently creates a reasonably unsafe condition in an area where the plaintiff has every right to be, that defendant may not escape liability by arguing that the condition was "open and obvious." *See Bell v. City of Bay St. Louis*, 467 So. 2d 657, 664 (Miss. 1985). Furthermore, the "open and obvious" defense has been abolished. *Tharp v. Bunge Corp.*, 641 So. 2d 20, 22 (Miss. 1994).

If an owner or an operator of business premises is aware of a dangerous condition which is not readily apparent to the invitee, he is under a duty to warn the invitee of such a condition. *Munford, Inc. v. Fleming*, 597 So. 2d 1282, 1284 (Miss. 1992). In the case at bar, Ellington made a sufficient factual issue regarding whether Farm Fresh had its employee perform an act that changed the condition of the steps from snowy and slushy to icy without informing Ellington, who only knew about the snow and slush, but was required to use the steps. In such a case, we do not believe a summary judgment was proper. *See Johnson v. Boydston*, 605 So. 2d 727, 729 (Miss. 1992).

A genuine issue of fact existed as to whether Ellington was aware there was an enhanced danger of the ice and as to whether Farm Fresh had a duty to warn Ellington of the hazardous conditions caused by their own employees' potential negligence. Ellington made an issue of fact regarding whether Farm Fresh actually altered the condition of the steps, whether that alteration made the steps more dangerous, whether Farm Fresh was charged with the nature of the alteration, and whether that alteration contributed to the accident.

This cause is reversed and remanded for trial.

**THE SUMMARY JUDGMENT OF THE CIRCUIT COURT OF WASHINGTON COUNTY IN FAVOR OF FARM FRESH CATFISH CO. IS REVERSED AND THIS CASE IS REMANDED FOR TRIAL. FARM FRESH IS TAXED WITH THE COST OF THIS APPEAL.**

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