

IN THE COURT OF APPEALS 12/12/95
OF THE
STATE OF MISSISSIPPI
NO. 94-CA-00088 COA

NETTIE CALHOUN

APPELLANT

v.

WARD'S, 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. RICHARD WAYNE MCKENZIE

COURT FROM WHICH APPEALED: FORREST COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

DAVID SHOEMAKE

ATTORNEY FOR APPELLEE:

THOMAS W. TYNER

NATURE OF THE CASE: CIVIL - SLIP AND FALL

TRIAL COURT DISPOSITION: SUMMARY JUDGMENT TO DEFENDANT

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

McMILLIN, J., FOR THE COURT:

Nettie Calhoun filed an action in the Forrest County Circuit Court against Ward's, Inc., a fast food

restaurant, for injuries that she sustained while on the defendant's premises. Ward's moved for and was granted summary judgment pursuant to Mississippi Rule of Civil Procedure 56. The circuit judge concluded that there were no genuine issues of material fact. Specifically, he held that, given the undisputed facts, there was no requisite defective or dangerous condition, or alternatively, that the step-down from the curb to the parking lot where Calhoun fell was open and obvious so as to preclude liability; therefore, Ward's was entitled to prevail on its motion for summary judgment.

We conclude that the trial court was not in error in concluding as a matter of law that the condition was not so defective or inherently dangerous as to create a jury issue on negligence. We, therefore, affirm the trial court judgment.

I.

FACTS

On December 29, 1987, Calhoun and her son, Billy, stopped for dinner at Ward's in Hattiesburg. It was wet and cold on that day. At that time Calhoun was seventy-seven years old and required some assistance in walking, either by using walking sticks or holding on to another person for support. Billy parked the car near the south side of the building and helped Calhoun walk from the car, up a sloped ramp onto the sidewalk, down the side of the building, and in through a door on the West side on the restaurant. After they had finished their meal, Billy went to move the car directly adjacent to the exit so that Calhoun would not have far to walk in the cold, rainy weather. While Billy was moving the car, Calhoun decided to proceed toward the car without assistance. She said that when she moved from the warmth of the restaurant to the cold outside air her glasses became fogged. Once through the doorway, Calhoun proceeded toward the car and fell as she stepped down from the sidewalk curb to the parking lot. Calhoun stated that she did not see the drop-off due to the fact that the curb was not marked or painted. She asserts that there was no color contrast between the sidewalk and the parking lot, thus making the step-down a dangerous or defective condition.

II.

SUMMARY JUDGMENT

In *Palmer v. Anderson Infirmary Benevolent Ass'n*, the Mississippi Supreme Court provided the standard of review in determining whether a trial court properly granted summary judgment, and stated:

In our de novo review, this Court looks to see if the moving party has demonstrated that no genuine issue of fact exists. *Daniels v. GNB, Inc.*, 629 So. 2d 595, 599 (Miss. 1993). '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.' *Id.* at 599 (citing *McFadden v. State*, 580 So. 2d 1210 (Miss. 1991)). The lower court is prohibited from trying the issues; 'it may only determine whether there are issues to be tried.' *Id.* (citing *Brown v. Credit Center, Inc.*, 444 So. 2d 358, 362 (Miss. 1983)).

Palmer v. Anderson Infirmary Benevolent Ass'n, 656 So. 2d 790, 795 (Miss. 1995). The evidence must be viewed in a light most favorable to the party against whom the motion has been made. "The movant has the burden of demonstrating that no genuine issue of fact exists while non-movant is given the benefit of every reasonable doubt." *Marsalis v. Lehmann*, 566 So. 2d 217, 220 (Miss. 1990).

The deposition testimony in this case reveals that there is no dispute as to the events leading up to the accident. It is uncontradicted that (1) Calhoun was a business invitee of Ward's, Inc. on January 29, 1987, the day of the accident; (2) due to her age and medical condition, Calhoun required assistance in walking; (3) Calhoun chose to exit Ward's unassisted; (4) Calhoun's glasses fogged up as she exited Ward's; and (5) there is nothing unique or unusual about the construction of the curb upon which Calhoun fell and was subsequently injured.

III.

THE ISSUE OF NEGLIGENCE

The Mississippi Supreme Court has, on numerous occasions, expressed the duty that arises in situations such as the one now before this Court. In *First Nat'l. Bank v. Cutrer*, the Court recited three rules that assist us in deciding the issue on appeal:

- (1) The owner of a business is not an insurer of the safety of its customers using its premises, including its entrances;
- (2) The owner of a business owes its invitees a duty to use reasonable care to maintain its premises, including entrances maintained by it, in reasonably safe condition for those using reasonable care for their own safety; and
- (3) the owner is not required to anticipate or foresee unusual and improbable results as a consequence of the condition of the premises.

First National Bank of Vicksburg v. Cutrer, 214 So. 2d 465, 466 (Miss. 1968).

This Court, on review of the record, is in accord with the trial court that the condition of the premises where Calhoun was injured was not so unreasonably dangerous as to create a jury issue of negligence. There are certain conditions that common sense and common experience teach may be encountered by all members of the public who go about the normal events of their lives. One such condition is that, in the construction of buildings, roads, sidewalks, and parking lots, it becomes necessary, on occasion, to provide changes in elevation of the ground surface. Step-ups, step-downs, and inclines are encountered every day, and the mere existence of a step up or down to accommodate a change in elevation from an entrance walkway to the adjoining parking lot cannot, of itself, be said to be an unreasonably dangerous condition.

In *Kroger, Inc. v. Ware*, the plaintiff, an elderly lady, had tried to step over a curb when she fell and injured herself. *Kroger, Inc. v. Ware*, 512 So. 2d 1281 (Miss. 1987), *overruled by Tharp v. Bunge Corp.*, 641 So. 2d 20 (Miss. 1994). The Mississippi Supreme reversed and rendered a verdict in favor

of the plaintiff, concluding that the condition, though unquestionably causing the injury, was not so unreasonably dangerous as to create an issue negligence. The Court, in denying recovery, concluded that the plaintiff had "encountered a condition, which was permanent, in place, known, and obvious. . . ." *Id.* at 1282.

In view of the quoted language in the *Kroger* case, we must assess the impact of the fairly recent abolition of the "open and obvious" defense on the holding in *Kroger* and similar earlier cases, since, in all such cases, the ready visibility of the instrumentality causing the injury is an element considered by the Court. (The "open and obvious" defense was abolished in the case of *Tharp v. Bunge Corporation*, 641 So. 2d 20 (Miss. 1994)).

We conclude that there is a logical distinction that can be drawn between a readily apparent but inherently dangerous condition, and a condition that, though certainly capable of causing injury, is not so unreasonably dangerous as to create an unacceptable hazard. In the first case, the *Bunge* decision teaches that the mere fact that an inherently dangerous condition was openly visible does not provide a bar to recovery. On the other hand, *Bunge* cannot be read to create a jury issue in every instance when a person is injured on another's premises. There still may exist conditions that simply are not so unreasonably dangerous as to constitute negligence on the part of the premises owner. As a practical matter, in assessing a particular situation to determine into which category it fits, it becomes necessary to consider the ready visibility of the condition, since an otherwise safe condition may be rendered unsafe by its obscurity. The discussion of such matters may invoke such words and concepts as the "obviousness" of the condition since that is a factor in assessing the inherent danger created. However, we do not believe *Bunge* serves to short-circuit the analysis process to require the matter to be sent to the jury in every case.

This proposition can be demonstrated by considering the Mississippi Supreme Court decision in *Tate v. Southern Jitney Jungle Co.*, 650 So. 2d 1347 (Miss. 1995). That case was decided after the *Bunge* decision. The decision reversed a directed verdict for the defendant, Jitney Jungle, on the conclusion that the condition of a deli counter, though a permanent part of the store, was sufficiently unusual as to create a jury issue on negligence. Nevertheless, the Court felt compelled to distinguish that case from the *Kroger* case and others cited by Jitney where the injury-causing conditions were found to be "not of such a character as to make the premises unsafe for use by persons exercising reasonable care for their own safety." *Id.* at 1350. The *Tate* Court went on to state that the distinction was that such cases as *Kroger* "involved dangers which are usual and which customers normally expect to encounter on the business premises, such as thresholds, curbs and steps." *Id.* at 1351. *Kroger*, though overruled by *Bunge* on the issue that the "open and obvious" nature of a defect provides a bar to recovery, is still good law for the proposition that certain conditions, reasonably to be expected in the everyday course of life, are simply not so unreasonably dangerous as to create a cause of action sounding in negligence.

In this case, the trial judge was presented with photographs which permitted him to properly assess the issue of the condition of the premises and whether the condition was in some way unusual or extraordinary so as to create an unreasonably dangerous situation. This Court has had the benefit of the same information. We agree that the step-down where Calhoun's injuries occurred is nothing more than the usual and ordinary condition which a customer may normally expect to encounter on the premises of a business, and one which is not calculated to cause injury to those persons exercising

reasonable care for their own safety.

We, therefore, agree with the conclusion of the trial court that there was not an issue to submit to the jury. The grant of summary judgment is affirmed.

THE JUDGMENT OF THE FORREST COUNTY CIRCUIT COURT IN FAVOR OF WARD'S, INC. IS AFFIRMED. APPELLANT, NETTIE CALHOUN, IS TAXED WITH ALL COSTS OF THIS APPEAL.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER AND SOUTHWICK, JJ., CONCUR. KING, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY COLEMAN, DIAZ AND PAYNE, JJ.

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KING, J., DISSENTING:

I would respectfully dissent from the majority's decision to affirm the entry of summary judgment. "A motion for summary judgment lies only when there is no genuine issue of material fact, and the moving party is entitled to a judgment as a matter of law." *Baptist v. Jitney Jungle*, 651 So. 2d 1063, 1065 (Miss. 1995).

I am unpersuaded that no genuine issue of fact existed in this cause, and therefore conclude that this matter should have been submitted to a jury for determination. The record indicates that Ward's knew, or should have known, that this was a dangerous area, requiring some notification and precaution.

I believe that such a conclusion can be formed from the following facts.

(1) Appellant, offered the affidavit of James Anderson, a consulting forensic engineer, who stated that because the sidewalk and driveway were made of the same material, it was difficult to see the leveling edge of the sidewalk, where the fall occurred.

(2) this was the only elevation at the restaurant, which was not painted yellow, to indicate the need for caution.

(3) there was a similar exit on the opposite side of the building, where Ward's had placed barricades and yellow cautionary paint.

The facts raise issues of negligence, which should properly be resolved by the jury.

COLEMAN, DIAZ AND PAYNE, JJ., JOIN THIS OPINION.