

IN THE COURT OF APPEALS 03/25/97

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-01280 COA

J.W. CARTER

APPELLANT

v.

MARK DUNNING INDUSTRIES, 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. JERRY OWEN TERRY, SR.

COURT FROM WHICH APPEALED: HARRISON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

THOMAS D. BERRY, JR.

ATTORNEY FOR APPELLEE:

DAVID L. COBB

NATURE OF THE CASE: PERSONAL INJURY

**TRIAL COURT DISPOSITION: DIRECTED VERDICT IN FAVOR OF MARK DUNNING
INDUSTRIES, INC.**

EN BANC

McMILLIN, P.J., FOR THE COURT:

This is an appeal from a judgment rendered against the plaintiff, J. W. Carter, in a personal injury action brought against Mark Dunning Industries, Inc. in the Circuit Court of Harrison County. The trial court directed a verdict in favor of the defendant at the close of the plaintiff's evidence. We affirm.

I.

Facts

Carter worked as a meat cutter at the Gulfport Seabee Base Commissary in early 1988. His employer furnished clean smocks to Carter and his fellow employees at the beginning of the work day and provided a locker room to change. At the end of the day, the employees deposited the dirty smocks into a large garbage can kept in the locker room. The can was only emptied once a week.

Carter claims that he was injured in January 1988 when the garbage can, which was full of bloody smocks, fell from the top of a row of lockers and struck him. He asserted in his complaint that the incident happened at the beginning of the work day after the locker room floor had been cleaned during the previous night. He blames the cleaning crew for placing the can on top of the lockers to get it out of the way. He alleged that the defendant, Dunning Industries, was providing janitorial service to the base at the time of his accident, and that, therefore, it must have been the company's employees who placed the can in the precarious position.

In his case in chief, Carter called three fact witnesses concerning events surrounding his injuries. The witnesses were two fellow employees and himself. Both fellow employees testified that each morning when they came to work, the locker room floor was clean, but neither claimed to have any knowledge of who was responsible for the cleaning activities. Carter testified that he had seen Dunning Industries trucks in the parking lot during that period. He also testified that he had seen people who appeared to be associated with that company in the building and had observed them putting cleaning equipment in these trucks. No agents or employees of Dunning Industries were called as witnesses, and no official of the base was called to testify as to the company's activities on the base during that time. No documentary evidence was offered concerning any contractual duties undertaken by Dunning Industries at the base.

The trial court, in granting the defendant's motion for a directed verdict when the plaintiff rested, concluded that this evidence was insufficient as a matter of law to make a prima facie case of negligence against the company.

II.

Discussion

The plaintiff has the burden of proof to support his claim by competent evidence. *See Palmer v. Biloxi Regional Medical Ctr.*, 564 So. 2d 1346,1355-56 (Miss. 1990) (plaintiff bears burden of producing evidence to establish basic elements of a tort). Carter presented no credible evidence that Dunning Industries had any responsibility for the daily cleaning of the locker room where his injuries occurred. His testimony that he observed Dunning Industries vehicles and employees on the base

during early 1988 was not, by any stretch, sufficient to permit an inference by the jury that the company was responsible for the daily mopping of this particular locker room floor.

Certainly, probative evidence on this issue would seem readily available, either through documentary records of the company, testimony from Dunning Industries officials or employees, or from similar sources at the Seabee Base. The failure to present more probative evidence bearing on this basic element of the plaintiff's case is fatal.

Carter argues that a jury could reasonably infer from (a) the clean floor and (b) the location of the garbage can that whoever cleaned the floor placed the can in the precarious position that ultimately led to his injuries. We do not necessarily disagree with that proposition. The point this argument fails to take into account is the insufficiency of the evidence implicating Dunning Industries in the cleaning activities.

The supreme court has cautioned against a case constructed of inferences stacked on inferences. *See Vines v. Windham*, 606 So. 2d 128, 131-32 (Miss. 1992) (citing *Goodyear Tire & Rubber Co. v. Brasher*, 298 So. 2d 685, 688-89 (Miss. 1974)). We conclude that evidence of the presence of Dunning Industries trucks and employees on the base, with nothing more, is not sufficient to support a reasonable inference that the company's duties included the nightly cleaning of the meatcutters' locker room, much less the next inference necessary to permit the jury to find for Carter -- namely that a Dunning Industries employee placed the garbage can on top of the lockers. Thus, the trial court did not err when it directed a verdict for the defendant.

**THE JUDGMENT OF THE HARRISON COUNTY CIRCUIT COURT IS AFFIRMED.
COSTS OF THIS APPEAL ARE ASSESSED TO APPELLANT.**

**BRIDGES, C.J., COLEMAN, DIAZ, HERRING, KING, AND SOUTHWICK, JJ., CONCUR.
THOMAS, P.J., AND PAYNE, J., NOT PARTICIPATING.**