

IN THE COURT OF APPEALS 9/3/96

OF THE

STATE OF MISSISSIPPI

NO. 93-CA-00430 COA

COREY VAUGHN, JR.

APPELLANT

v.

WORLDWIDE SECURITY SERVICE, 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. ROBERT LEWIS GIBBS

COURT FROM WHICH APPEALED: HINDS COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

ANITA MATHEWS STAMPS

ATTORNEY FOR APPELLEE:

J. BRAD PIGOTT

NATURE OF THE CASE: CIVIL

TRIAL COURT DISPOSITION: SUMMARY JUDGMENT GRANTED IN FAVOR OF
WORLDWIDE SECURITY SERVICE, INC.

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

THOMAS, P.J., FOR THE COURT:

Corey Vaughn, Jr., an employee of Worldwide Security Service, Inc. (Worldwide), was injured while in the course and scope of his employment. Because Worldwide did not have workers' compensation insurance, Vaughn elected to file an action at law against Worldwide under the Mississippi Code, section 71-3-9. After the completion of discovery and the taking of depositions, the trial court granted Worldwide summary judgment, finding that Worldwide was not responsible for Vaughn's injuries. From this order, Vaughn appeals to this Court arguing that the circuit court's order should be reversed.

FACTS

In March of 1990, Vaughn was performing routine security inspections at the Kuhn Memorial Hospital in Vicksburg, Mississippi, when he fell down a flight of stairs after the railing gave way. The fall resulted in Vaughn suffering from lower back and leg pain, requiring him to undergo physical therapy.

After his injury, Vaughn filed a petition to controvert with the Mississippi Workers' Compensation Commission, seeking benefits. However, after Vaughn failed to attend the workers' compensation hearing, Worldwide, who was in attendance, moved that Vaughn's petition be dismissed for failure to appear. The commission subsequently dismissed Vaughn's claim.

Because Worldwide did not have workers' compensation insurance, Vaughn was then able to file a negligence action against Worldwide under section 71-3-9. That section states that if an employer does not have worker's compensation insurance, then the injured employee or his representative may either elect to proceed under workers' compensation or may "maintain an action at law for damages." Miss. Code Ann. § 71-3-9 (1972). If the employee maintains "an action at law" then the employer may not "plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee." *Id.*

Vaughn argued to the trial court that any trial on this matter should be limited to damages, because under section 71-3-9, negligence is admitted since the Defendant had no workers' compensation insurance. Worldwide argued that when Vaughn elected to sue Worldwide instead of proceeding under workers' compensation, Vaughn still had the burden of proving negligence, causation, and damages. The trial court agreed with Worldwide finding that:

After reviewing Section 71-3-9, the Court is convinced "an action at law" would include the requirement to prove negligence. The Legislature decided to take certain defenses away from the employer, by enacting this statute. As Nevada did, our Legislature could have taken away *all* the common law defenses, including a defense of denial of negligence or liability. Because this was not done, this Court concludes that by plaintiff electing to sue, he bears the responsibility of proving his case, as in any other action at law.

....

Once it has been decided that plaintiff must prove negligence, this Court is then faced with

defendant's motion for summary judgment. Defendant contends that there is no genuine issue of fact, as to the fact that plaintiff was injured while working as a security guard, when, in descending a flight of stairs, the rail gave way and plaintiff fell down the stairs. Defendants submit answers to interrogatories, the contract between Worldwide Security and the Department of Finance and Administration, and the affidavit of Henry C. Anderson, to prove that the stair rail was maintained by the State of Mississippi, and not by Worldwide Security. Plaintiff did not file any counter-affidavits or documents, thus, the Court concludes that there is no genuine issue of material fact. *See Newell v. Hinton*, 556 So. 2d 1737 (Miss. 1990). Thus, since the stairs in which plaintiff fell were not the responsibility of defendant, it is clear that as a matter of law judgment must be entered for defendant.

After summary judgment was granted in favor of Worldwide, Vaughn perfected his appeal with this Court.

DISCUSSION

Now, for the first time on appeal, Vaughn argues that he was an intended beneficiary of a contract between Worldwide and the State of Mississippi. The contract in question provides the following:

This AGREEMENT, made by and between WORLDWIDE SECURITY, INC. and the Department of Finance and Administration (State of Mississippi), hereinafter referred to as employer WORLDWIDE SECURITY, INC. agrees to maintain insurance coverage to fully protect its employees, representatives and the company. . . . WORLDWIDE SECURITY, INC. agrees to indemnify and hold employer harmless for all claims, losses and expenses, including reasonable attorney's fees, which the employer may incur by reason of any suits arising out of employees, subcontractors, etc. in the performance of this contract.

Worldwide argues that Vaughn should be barred from raising this argument on appeal because it was not argued in front of the lower court. We agree with Worldwide. The case of *Strait v. Pat Harrison Waterway Dist.*, 523 So. 2d 36, 41 (Miss. 1988) overruled on other grounds by *Churchill v. Pearl River Basin Dev. Dist.*, 619 S. 2d 900, 905 (Miss. 1993), is procedurally similar to the case before us. In that case, the appellant proceeded at the lower court on a theory of negligence, and then on appeal, after summary judgment had been granted against him, proceeded under a contract theory. Our supreme court affirmed the grant of summary judgment finding:

On appeal, a party must pursue the same legal theory advanced in the trial court. *Estate of Johnson v. Adkins*, 513 So. 2d 922 (Miss. 1987). In *Bailey v. Collins*, 215 Miss. 78, 60 So. 2d 587 (1952), the Court said:

Appellant has now chosen in this Court an entirely different line of battle from that chosen in the court below, and we think the theory of the case as now presented on this appeal is not properly before us for review.

215 at 83, 60 So. 2d at 589.

As this contract claim is for the first time on appeal, it is procedurally barred and will not be addressed by this Court.

In the case *sub judice* Vaughn argued that Worldwide was responsible for his injuries

because it did not carry workers' compensation insurance, and now on appeal, Vaughn argues that Worldwide is responsible for Vaughn's injuries based upon breach of contract. This new legal

theory is not properly before this Court; therefore, Vaughn's appeal is denied.

**THE JUDGMENT OF THE CIRCUIT COURT OF HINDS COUNTY IS AFFIRMED.
COSTS ARE TAXED TO THE APPELLANT.**

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