

IN THE COURT OF APPEALS 01/28/97

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-00456 COA

DONALD VINSON

APPELLANT

v.

B & E FOODS, INC., D/B/A MCDONALD'S OF PICAYUNE

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. I. PRICHARD III

COURT FROM WHICH APPEALED: PEARL RIVER COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

RICHARD V. DYMOND

ATTORNEY FOR APPELLEE:

LAWRENCE E. HAHN

NATURE OF THE CASE: PERSONAL INJURY - SLIP & FALL

TRIAL COURT DISPOSITION: SUMMARY JUDGMENT GRANTED TO DEFENDANT

BEFORE FRAISER, C.J., DIAZ, KING, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

This appeal arises from a denial by the trial court of what Donald Vinson entitled a "Motion for New Trial." Since the motion was made after the 10-day period for seeking a new trial, the motion actually was for relief pursuant to Rule 60(b) of the Mississippi Rules of Civil Procedure. Our review is limited to whether the trial court abused its discretion in denying the motion. We find no abuse of discretion, and affirm.

FACTS

Shortly before closing time on February 4, 1992, a McDonald's Restaurant employee had swept and cleaned up an unoccupied area in the Picayune franchise. After cleaning the floor, the employee pushed a yellow mop bucket with the warning "Caution Wet Floor" near the trash bin in order to block that section of the restaurant. Vinson was a McDonald's patron that night and claims he slipped and fell over the mop bucket as he approached the trash bin with his tray in front of him. He claims that the tray blocked his path and he did not see the mop bucket. There were no witnesses to Vinson's fall. Vinson filed suit. After discovery was completed, McDonald's filed a Motion for Summary Judgment. That motion was granted on May 11, 1994.

On June 1, 1994, Vinson filed a pro se Motion for a New Trial. The trial court found that the motion was not timely under Rule 59. Treating it instead as a Rule 60 motion, the court found that under the more limited grounds of that rule, that no relief was justified. After Vinson appealed, McDonald's filed a motion to dismiss. The supreme court entered an order on June 13, 1995, finding that the appeal could proceed, but also finding "that the denial of the Rule 60 motion is the only issue that may be raised on appeal."

DISCUSSION

Preliminarily, we note that the motion that is at the heart of this appeal was under valid circuit court rules effectively abandoned by Vinson. Under Uniform Circuit Court Rule 2.06, a motion for new trial must be noticed for hearing "during the term at which the motion is filed, or at the next term of the court" if the motion is filed in vacation. U.C.C.R. 2.06, now replaced by U.C. C.C.R. 2.04. This motion was filed on June 1, 1994, never noticed for hearing, and after 3 terms of court denied on March 22, 1995. The trial judge specifically found that the motion had been abandoned.

The court also evaluated the merits of the motion under Rule 60(b), and so will we. Within a reasonable time, a litigant can move under Rule 60(b) for relief from judgment. M.R.C.P. 60(b). The grounds are limited: fraud, misrepresentation, or other misconduct; accident or mistake; newly discovered evidence; void judgment; the judgment has been satisfied, released, or discharged; or "any other reason justifying relief." M.R.C.P. 60(b). In effect, it is one last procedural opportunity to review certain kinds of fundamental errors in a trial court's judgment. It is an extraordinary remedy, not available as a means to relitigate the underlying merits of the lawsuit. *Stringfellow v. Stringfellow*, 451 So. 2d 219, 221 (Miss. 1984). The Rule can not be used as an "escape hatch" for lawyers who failed to pursue other procedural remedies, such as a Rule 59 Motion for new trial. *Bruce v. Bruce*, 587 So. 2d 898, 904 (Miss. 1991).

Appellate review from the denial of a Rule 60(b) motion is also limited. What we are *not* reviewing is the underlying judgment. We are only deciding whether the trial court abused its discretion in denying the motion. *Stringfellow*, 451 So. 2d at 221.

Vinson argued in his pro se motion that his attorney failed or refused to provide the court with evidence to show that a genuine issue of material fact existed. That is quintessentially a motion that presents again the merits of the underlying case, i.e., that there was evidence that did not get before the court that should now be considered. There is no argument that it was "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." M.R.C.P. 60(b)(3). Our supreme court has said that "neither ignorance nor carelessness on the part of an attorney will provide grounds for relief." *Stringfellow*, 451 So. 2d at 221. Though this description may well be too strong for this case, it is also controlling that this motion cannot be used because a judgment was entered due to "*incompetence or ignorance* on the part of the attorney employed by the party seeking relief." *Id.* at 221 (citing *Clarke v. Burke*, 570 F.2d 824, 831 (5th Cir. 1978)).

The preceding discussion disposes of Vinson's issue as presented to the trial court. However, what he argues on appeal is that the substantive law has changed since the trial court's original ruling. After the summary judgment in this case, but before the ruling on the 60(b) motion, the supreme court in a totally separate case ruled that proof of an "open and obvious" danger is no longer a defense in a premises liability case. *Tharp v. Bunge*, 641 So. 2d 20, 25 (Miss. 1994). By March 22, 1995, the date the circuit court denied the Rule 60(b) motion, the *Tharp* decision of July 21, 1994 had been Mississippi law for eight months.

It is true that the defendants in their motion for summary judgment argued the open and obvious defense, but they also argued others, including that McDonald's was not negligent in creating the condition. Neither in the original summary judgment nor in the Rule 60(b) order did the trial court mention the open and obvious defense. On summary judgment, the court held that "[t]he authorities relied upon by the movant-defendant are on point. . . . Consequently, the Court finds that the undisputed facts of this case establish no genuine issue of material fact which supports the plaintiff's allegations of negligence. . . ." Since the only issue raised in Vinson's 60(b) motion was the alleged failure or refusal of his attorney "to provide this court with evidence," the trial court dealt with whether such failure, if it occurred, was proper grounds for 60(b) relief. The court said "no."

At its most basic, Vinson's argument here is that a trial court's failure to grant a Rule 60(b) motion on grounds not even alleged, when we cannot tell if those grounds (the now-defunct defense) undermine the earlier decision or not, should be reversible error. After properly refusing to grant relief from judgment based on the objection Vinson presented, was the trial court obligated to search for other reasons that relief from judgment should be granted? If the trial court failed to find such error, should an appellate court declare that to be an abuse of discretion? The dissent says "yes."

We do not find the language of Rule 60 to be absolutely dispositive. However, the supreme court has held that the Rule's clear focus on the necessity of motions meant that a trial judge may not grant relief from judgment if neither party has filed a Rule 60 motion, no matter how erroneous the court feels the earlier decision to be. *State v. One Chevrolet Nova Auto.*, 573 So. 2d 787, 789 (Miss. 1990). The precise question here is a corollary -- not "can," but "must" a trial court consider certain issues not raised in a Rule 60 motion if they meet some definable threshold of importance?

We have no doubt that if this were an appeal on the merits, and if the trial court had granted summary judgment based on the open and obvious defense, then we could address that problem

under the "plain error" standard if the plaintiff for some reason had not thought to raise it. *See, Adams v. Green*, 474 So. 2d 577, 584 (Miss. 1985). However, the Rule 60 proceedings are limited, extraordinary proceedings. *Stringfellow v. Stringfellow*, 451 So. 2d 219, 221 (Miss. 1984). An appeal from a denied Rule 60(b) motion "is not an appeal of the merits of the action," *Overby v. Murray*, 569 So. 2d 303 (Miss. 1990). That necessarily means that the appellate court does not reverse just because it believes the merits were improperly resolved, such as finding the original decision clearly missed a point of law. The question is not whether the trial court originally was right or wrong, but whether the trial court abused its discretion in addressing an issue cognizable under Rule 60(b). As the *One Chevrolet* decision held, the proceedings are controlled by a motion from a party, not by general rules of accuracy of the original decision. *One Chevrolet*, 573 So. 2d at 789. It has been held in a broader context that an "appellant is not entitled to raise new issues on appeal since to do so denies the trial court the opportunity to address the matter." *Touart v. Johnston*, 656 So. 2d 318, 321 (Miss. 1995). We hold, therefore, that there is no abuse of discretion for a trial court to fail to rule on an issue that was not raised in the Rule 60(b) motion.

Had the *Tharp* question been presented the Rule 60(b) proceedings, "the trial court [would have had] the opportunity to address the matter." Regardless of whether the trial court initially decided the case on the open and obvious defense issue, or on more general failure of proof of negligence, the merits of that decision are not before us.

There is a secondary reason for affirmance here. *Tharp* has been made retroactive. *See, e.g., Baptiste v. Jitney Jungle Stores of America*, 651 So. 2d 1063, 1067 (Miss. 1995). A decision that has been held to be retroactive applies to "any case in which an appeal is pending and in which the issue has been properly preserved. . . ." *Hall v. Hilbun*, 466 So. 2d 856, 876 (Miss. 1985). Vinson's fatal procedural problem is that by failing timely to file a Rule 59 motion, he lost his right to appeal the merits. His appeal from the order denying the 60(b) motion only allows review of matters preserved by that motion, which we hold means the issue has to be raised in the motion.

The cases Vinson cites in which pre-*Tharp* judgments based on the open and obvious defense were reversed on appeal are distinguishable in two critical ways. First, they were appeals of the merits of the case, and not on whether a trial court abused its discretion in denying relief from judgment. *See, e.g., Baptiste v. Jitney Jungle*, 651 So. 2d at 1064. Secondly, the lower court judgments were clearly based on the open and obvious defense. We have neither situation here, which makes Vinson's failure to raise *Tharp* all the more critical.

Not ruling on something not raised is not an abuse of discretion.

One final word about the dissent. *Tharp* does not stand for the proposition that a plaintiff is entitled to a jury trial *if* the danger is open and obvious. That would be turning the old rule on its head. Vinson had to show a genuine issue of material fact on McDonald's negligence. *Tharp* opined that a business owner's responsibility is only to provide "reasonably safe premises," and that it was necessary for a plaintiff to show there existed an "unreasonably dangerous condition," whether obvious or not. *Tharp*, 641 So. 2d at 25. The reference to a case that categorizes openness/obviousness in three ways did not say there was a jury question on *liability* in the relevant two categories. As the dissent states, *Fulton* only held that there would be a jury question on open and obvious. *Fulton v. Robinson Industries*, 664 So. 2d 170, 175 (Miss. 1995). In fact, *Tharp* has made

openness and obviousness a side issue. To make a jury question on the more fundamental question of liability, there must be genuine issues of material fact on the safety of the premises and on unreasonably dangerous conditions. One of the recent cases in this area, and one relied upon in *Fulton*, makes this point well. The issue that divided the court evenly, with the deciding justice only concurring in the result, was whether a sharp molding edge at knee level beneath a delicatessen counter was an unreasonably dangerous condition for which a store owner was liable. *Tate v. Southern Jitney Jungle Co.*, 650 So. 2d 1347, 1351 (Miss. 1995). The court on that divided vote found the issue to be for the jury, "leaving aside the question whether on these facts the condition" was open and obvious. *Tate*, 650 So. 2d at 1351. It is evident that the same nine justices, who without dissent decided the *Fulton* case the same year, were not now saying all claims for injuries that were alleged to be caused by man-made objects inside stores and restaurants, automatically had to go to the jury. To use an extreme example, if Vinson had walked into a floor to ceiling wall -- a man-made object inside the main part of the business premises -- he would not necessarily be entitled to a jury decision on whether the wall was an unreasonably dangerous condition.

We find that Vinson wants an "escape hatch" that allows him to reargue the merits. The trial judge did not abuse his discretion. We affirm.

THE JUDGMENT OF THE CIRCUIT COURT OF PEARL RIVER COUNTY IS AFFIRMED. ALL COSTS ARE ASSESSED TO THE APPELLANT.

FRAISER, C.J., THOMAS, P.J., McMILLIN, AND PAYNE, JJ., CONCUR.

DIAZ, J., DISSENTS WITH SEPARATE WRITTEN OPINION, JOINED BY BRIDGES, P.J., BARBER, COLEMAN, AND KING, JJ.

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DIAZ, J., DISSENTING:

I respectfully dissent from the majority opinion.

This appeal was only limited to the trial court's denial of Vinson's Rule 60 motion. However, recognizing that the open and obvious defense has since been explicitly overruled as a complete defense, I would hold that it was plain error for the lower court to grant summary judgment. Because this rule was not in effect at the time the summary judgment motion was heard, I would reverse and remand this case for further proceedings.

On February 4, 1992, shortly before closing time, a McDonald's employee had swept and cleaned an unoccupied area in the restaurant. After mopping the floor, the employee pushed the yellow mop bucket with the warning "Caution Wet Floor" near the trash bin in order to block off that section of the restaurant. Vinson, a patron of McDonald's that night, claims that he tripped and fell over the mop bucket as he walked over to the trash bin with his tray in front of him. Vinson claims that his tray blocked his view of the path, and he did not see the mop bucket.

Before even reaching the Rule 60 issue, we need only recognize that the open and obvious doctrine is no longer a complete defense to negligence actions in premises liability cases. Therefore, the trial court's decision in granting summary judgment was plain error. This Court has retained the power to notice plain error when a substantial right is affected. *State Highway Comm. v. Hyman*, 592 So. 2d 952, 957 (Miss. 1991). The primary purpose of the plain error rule is to prevent a manifest miscarriage of justice. *Adams v. Green*, 474 So. 2d 577, 583 (Miss. 1985).

This Court employs a de novo standard of review in analyzing a trial court's grant of a summary judgment. *Baptiste v. Jitney Jungle Stores of America, Inc.*, 651 So. 2d 1063, 1065 (Miss. 1995) (citations omitted). In its motion for summary judgment, McDonald's claims that the mop bucket was an open and obvious condition, and that Vinson failed to exercise the degree of care an ordinary and prudent person would have exercised by failing to look where he was going. The trial court granted summary judgment stating that it found no material issue of fact.

In *Tharp v. Bunge Corp.*, the supreme court effectively abolished the open and obvious defense, and applied a true comparative negligence standard. *Tharp*, 641 So. 2d 20, 25 (Miss. 1994). In the aftermath of *Tharp*, the supreme court has attempted to summarize our application of the open and obvious doctrine:

- (1) if an invitee is injured by a natural condition on a part of the business that is immediately adjacent to its major entrance and exit, then there is a jury question as to the

openness and the obviousness of the danger.

(2) if an invitee is injured by a natural condition on a remote part of the business premises, and the danger was known and appreciated by the injured party, then there is no jury question.

(3) if an invitee is injured by an artificial/man-made condition on an adjacent or internal part of the business premises, then there is a jury question as to the openness and obviousness of the danger.

Fulton v. Robinson Industries, Inc., 664 So. 2d 170, 175 (Miss. 1995) (citations omitted). The present case falls squarely within the third scenario.

The supreme court has reversed premises liability judgments that were properly entered at the time of trial, and remanded them so that lower courts can apply the new standard. *Downs v. Choo*, 656 So. 2d 84, 87 (Miss. 1995); *Baptiste*, 651 So. 2d at 1067. Because *Tharp* has been allowed retroactive application, we must reverse and follow that law. Accordingly, I would reverse this case and remand it back to the lower court for further proceedings.

BRIDGES, P.J., BARBER, COLEMAN AND KING, JJ., JOIN THIS SEPARATE OPINION.