Rel 09/21/2007

SUPREME COURT OF ALABAMA

SPECIAL TERM, 2007

1051322

Jones Food Company, Inc.

v.

Clarence Shipman and Kathy Shipman

Appeal from Etowah Circuit Court
(CV-00-148)

On Application for Rehearing

PER CURIAM.

APPLICATION OVERRULED. NO OPINION.

Woodall, Stuart, Smith, Bolin, Parker, and Murdock, JJ., concur.

See and Lyons, JJ., concur specially.

Cobb, C.J., dissents.

SEE, Justice (concurring specially).[1]

On March 11, 1998, Jones Food Company, Inc. ("Jones Food"), a franchisee of Huddle House, Inc., retained Clarence Shipman, the owner of Shipman Heating and Air Conditioning, to service the heating, ventilation, and air-conditioning ("HVAC") system at its East Meighan Boulevard Huddle House restaurant in Gadsden. Shipman had performed similar services for Jones Food at other Huddle House restaurant locations.

Shipman and his assistant, Thomas McKinney, made the service call. The roof of the restaurant was about 9.5 feet above the ground and flat; on all four sides, however, it was surrounded by a facade that sloped inward at approximately a 45-degree angle and extended approximately three feet above the flat roof, enclosing the rooftop HVAC components. Shipman and McKinney decided to use a 20-foot, portable extension ladder to climb over the facade to access the HVAC system. Safety instructions on the ladder warned against positioning

[1]The opinion on original submission, released December 15, 2006, was decided by a division of this Court on which I did not sit. On application for rehearing, Chief Justice Cobb, who replaced Chief Justice Nabers, the author of the opinion, dissented from overruling the application on rehearing; the rehearing application was then referred to the entire Court for decision.

it at an angle to the ground of less than 75 degrees. A diagram on the ladder illustrated the proper angle for positioning the ladder before ascending it.

If the ladder had been positioned at the 75-degree angle contemplated by the manufacturer, the top of the ladder would have been approximately four feet from the top of the facade because of the 45-degree inward slant of the facade. To avoid this, Shipman and McKinney leaned the ladder against the face of the facade; the result was that the ladder leaned at approximately a 45-degree angle to the ground instead of the 75-degree angle recommended by the manufacturer. Thus, the base of the ladder was positioned so that the angle between the ladder and the ground was substantially less than the minimum angle recommended by the manufacturer and illustrated by the diagram on the ladder, with the feet of the ladder resting on a dry, paved surface that sloped slightly away from the back of the restaurant. The bottom of the ladder was not secured in any way, and the top of the ladder did not have hooks or any other device to secure it to the roof.

No Jones Food representative had recommended that Shipman use the particular ladder that he chose to use. No Jones Food

representative had told Shipman to position his ladder against the building at the rear of the restaurant at the angle of the facade, nor had any Jones Food representative otherwise given Shipman any instruction as to how he should access the HVAC system.

Shipman remained on the ground and held the ladder as McKinney climbed onto the roof. When McKinney reached the top of the facade, he stepped over it, stood on the roof, and held the top of the ladder while Shipman climbed to the roof. When Shipman neared the top of the facade, McKinney repositioned himself so that Shipman could climb over the facade and onto the roof. As McKinney changed his position, he continued to hold the ladder with one hand; however, as Shipman prepared to step over the facade, the foot of the ladder slipped and Shipman fell to the ground.

Shipman sued Jones Food, seeking damages for medical expenses, lost earnings, and personal injuries (including permanent disability to his right leg) that resulted from the accident. Kathy Shipman, Shipman's spouse, also asserted a claim of loss of consortium. The principal claims by the Shipmans were that Jones Food had negligently, recklessly, and

wantonly failed (1) to warn Shipman of the danger of the roof, and (2) to repair and maintain the roof area free of defects with railings or to provide a means of access to the roof other than a portable ladder. Jones Food asserted the affirmative defenses of contributory negligence and assumption of the risk.

On the day of Shipman's accident, a customer, Calvin McCoy, was inside the restaurant. As McCoy left the restaurant, he noticed McKinney on the roof and saw a ladder leaning against the building. Before Shipman fell, McCoy told him that an employee of another HVAC contractor had fallen from the roof and that another contractor had braced the bottom of the ladder against the tire of a truck in order to secure it.

Shipman testified that he had noticed the 45-degree slope of the facade before the accident, but that he did not think there was anything risky about the method he and McKinney used to access the roof, nor did he observe any open-and-obvious danger associated with the roof. Tony Jones, the owner of Jones Food, testified that on approximately eight occasions before the accident he and another representative of Jones

Food had accessed the roof by placing a portable ladder along the slope of the facade. On some of those occasions the ladder was secured at the bottom, but on others it was not. Jones also testified that he did not consider it unreasonably dangerous to climb a ladder that was aligned along the slope of the facade of the building and that was not secured at the bottom. John Verhalen, a professional engineer and expert witness for Jones Food, on the other hand, testified that it was obvious that the bottom of an unsecured portable ladder could "kick out" under the weight of a user if the ladder was positioned at a 45-degree angle to the ground.

The jury returned verdicts in the Shipmans' favor. Following the denial of Jones Food's posttrial motions, Jones Food appealed.

The Chief Justice in her dissent states that she is of the "opinion that the trial court did not err in denying Jones Food's motion for a judgment as a matter of law," based on "the fact that the question whether a danger is open and obvious is generally one of fact for the jury and given Jones's testimony that he did not consider it unreasonably dangerous to climb a ladder that was aligned with the slope of

the [45-degree] facade of the building and that was not secured at the bottom." ___ So. 2d at ___.

The dissent cites Howard v. Andy's Store for Men, 757 So. 2d 1208, 1211 (Ala. Civ. App. 2000), for the proposition that the "'question whether a danger is open and obvious is generally one of fact.'" ___ So. 2d at ___. Although this is a correct statement of the law in general, this Court has held that certain activities are as a matter of law open-and-obvious hazards that an invitee should recognize through the exercise of reasonable care. Ex parte Schaeffel, 874 So. 2d 493 (Ala. 2004) (holding total darkness to be an open-and-obvious hazard as a matter of law); Sessions v. Nonnenmann, 842 So. 2d 649 (Ala. 2003) (holding that an open stairwell is an open-and-obvious hazard as a matter of law); Lilya v. Greater Gulf State Fair, 855 So. 2d 1049 (Ala. 2003) (holding that the riding of a mechanical bull is an open-and-obvious hazard as a matter of law); and Ex parte Neese, 819 So. 2d 584 (Ala. 2002) (holding that an upside-down doormat left out in the rain on a sidewalk is an open-and-obvious hazard as a matter of law).

Quillen v. Quillen, 388 So. 2d 985 (Ala. 1980), holds that an aluminum ladder leaning against a metal gutter is an open-and-obvious hazard as a matter of law. In Quillen, the plaintiff installed and repaired television antennas. At the defendant's request, the plaintiff assisted with the installation of a television antenna on the defendant's house. The plaintiff climbed an aluminum extension ladder that was leaning against a metal gutter. After successfully installing the antenna, the plaintiff was about to climb down the ladder when it shifted, causing the plaintiff to fall. This Court held:

> "[A]n aluminum ladder leaning against a metal gutter constituted an open and obvious danger on the defendant's property which the plaintiff, in the exercise of reasonable care, should have recognized. There was no defect in the ladder, and its placement and position on the premises were as obvious to the plaintiff as they were to the defendant."

388 So. 2d at 989. The dissent would distinguish Quillen based on Jones's testimony that he had previously used a ladder in the same way Shipman used the ladder and was of the opinion that doing so was not unreasonably dangerous. Jones's actions and testimony, however, cannot alter the law established in Quillen. The fact that some people may have,

without incident, ridden mechanical bulls, walked in total darkness, stepped on wet doormats, traversed open stairwells, and ascended precariously situated ladders without perceiving their danger does not negate the open-and-obvious nature of the danger as a matter of law.

The dissent's proposition that Quillen should be distinguished because in this case one person, the business invitor, did not consider the way Shipman positioned Shipman's own ladder to be dangerous would transform the legal question whether certain dangers are open and obvious from one based on observable facts -- the positioning and placement of the ladder -- into one based on whether someone, in particular the business invitor, considered the condition dangerous. If he did not, then the danger was not necessarily open and obvious. I see no justification in reason or in law for such a modification.

I also note that in this case, even if we were to abandon established precedent in favor of the proposal urged by the dissent, it would not alter the outcome. The business invitor's duty arises from his superior knowledge. As this Court stated in Breeden v. Hardy Corp., 562 So. 2d 159, 160

(Ala. 1990): "'[The] entire basis of an invitor's liability rests upon his superior knowledge of the danger that causes the invitee's injuries. If that superior knowledge is lacking, as when the danger is obvious, the invitor cannot be held liable.'" (Quoting Heath v. Sims Bros. Constr. Co., 529 So. 2d 994, 995 (Ala. 1988)(citations omitted).) In the case before us, it cannot reasonably be argued that Jones's knowledge of the danger was superior to Shipman's. Although the record is unclear as to whether Jones was aware of the prior accident at the restaurant involving a ladder, the undisputed testimony at trial was that one of Jones's customers, Calvin McCoy, told Shipman of the prior accident before Shipman began climbing the ladder. Thus, even ignoring the fact that climbing ladders is apparently an integral part of Shipman's business, Shipman's knowledge of the particular situation that presented itself to him at the East Meighan Boulevard Huddle House restaurant in Gadsden was the same as, or greater than, Jones's.

The facts both in Quillen and in this case indicate that the plaintiffs in both cases failed to exercise the reasonable care required by the open-and-obvious hazard of an improperly

positioned ladder. In both cases, the plaintiffs were trained craftsmen, skilled in their respective businesses. There is no indication in either case that the defendant-invitor possessed superior knowledge or owed any special duty to the plaintiff. In both cases, the open-and-obvious nature of the hazard extinguished any duty that would otherwise have been owed the invitees by the invitors. The prior holding of this Court that "Jones Food owed no common-law duty to Shipman because the attendant risk here was open and obvious" should not be disturbed when the law is clear, settled, and apposite. Jones Food Co. v. Shipman, [Ms. 1051322, December 15, 2006] ___ So. 2d ___, ___ (Ala. 2006). The judgment against Jones Food Company was properly reversed.

For these reasons and because the Shipmans have not demonstrated that this Court overlooked or misapprehended any point of law or fact, Rule 40, Ala. R. App. P., I concur in overruling the application for a rehearing.

Lyons, J., concurs.

COBB, Chief Justice (dissenting).

I dissent from the majority's decision to overrule the Shipmans' application for rehearing. The opinion in this case was issued before I took office as Chief Justice. That opinion reversed the trial court's judgment in favor of the Shipmans and held that the particular placement of a ladder against the facade surrounding the roof of a Huddle House restaurant -- i.e., at a 45-degree angle to the ground -- created an open-and-obvious danger as a matter of law. I disagree with that holding, and I would grant the application for rehearing and affirm the judgment.

In its opinion, this Court, quoting Sessions v. Nonnenmann, 842 So. 2d 649, 651-52 (Ala. 2002), correctly stated the law concerning the duty an invitor owes a contractor hired to perform work on the invitor's property. However, I believe that this Court failed to properly consider the testimony of Tony Jones, the owner of Jones Food Company, Inc. During trial, Jones admitted that he owed a duty to Shipman to disclose that Thomas Cornelius, another heating-and-air-conditioning repairman, had suffered a prior fall at

the Huddle House restaurant. The following exchange occurred during trial:

> "[Plaintiffs' counsel]: [In your deposition,] I asked you this question: 'Okay. If you knew that -- If you knew that that person had fallen or if your company knew that that person had fallen from the roof, where a ladder slid off that metal roof, do you believe or do you feel that your company would have had an obligation to tell Mr. Shipman about that prior injury?' What's your answer?
>
> "[Jones]: I said -- Mr. Bergquist said you have to answer. Let's see.
>
> "[Plaintiffs' counsel]: And what was your answer?
>
> "[Jones]: I said, 'Yes.' Okay. Yes.
>
> "[Plaintiffs' counsel]: And your answer was yes, wasn't it?
>
> "[Jones]: Yes, sir. If I had known.
>
> "[Plaintiffs' counsel]: And at that point --
>
> "[Jones]: If I had known for sure that he had fell off the building.
>
> "[Plaintiffs' counsel]: Well, my question was not only if you knew, but if your company knew, wasn't it?
>
> "[Jones]: Yes, sir that's what -- It's got your company. Uh-huh.
>
> "[Plaintiffs' counsel]: Right. So, let me ask you that question again, Mr. Jones. If somebody in your company knew that Thomas Cornelius fell off a ladder at that East Gadsden store before Mr. Shipman came out there and put one on that roof to go up there

> and do some work on your air conditioner, your company had an obligation to tell him about that prior injury, didn't they?
>
> "[Jones]: Yes.
>
> "[Plaintiffs' counsel]: Now, if your company knew that Thomas Cornelius had fallen off that roof and you let Clarence Shipman put a ladder on that roof on the same angle, your company consciously made a decision to let that gentleman go out there and endanger himself on the roof that you knew somebody else had been hurt on, didn't you?
>
> "[Jones]: I don't want anyone to get hurt.
>
> "[Plaintiffs' counsel]: That's not what I asked you, Mr. Jones. Your company made a conscious decision, if it knew that Mr. Cornelius fell from that roof prior to Mr. Shipman going out there, to let Mr. Shipman go up there and face whatever danger may be -- may exist in going on that roof with a ladder, didn't it?
>
> "[Jones]: When you put it like that, yes."

Although Jones was uncertain as to whether he learned of Cornelius's fall prior to or immediately after Shipman's fall, he admitted that some employees of Jones Food had knowledge of Cornelius's fall before Shipman fell. Furthermore, Jones testified that he had accessed the roof at least eight times, and some of those times had been by way of an unsecured ladder set at a 45-degree angle. Jones also testified that he did not consider it unreasonably dangerous to climb a ladder that

was aligned along the slope of the facade of the building and that was not secured at the bottom.

When confronted with questions involving actionable negligence, this Court must adhere to the following standard:

> "'[W]here from the facts shown by the evidence, although undisputed, reasonable men might draw different conclusions as to negligence or contributory negligence, such questions are for the jury, and it is only when the facts are such that all reasonable men must draw the same conclusion that negligence or contributory negligence is ever a question of law for the Court. White Swan Laundry Co. v. Wehrhan, 202 Ala. 87, 79 So. 479 [(1918)], Tennessee Mill & Feed Co. v. Giles, 211 Ala. 44, 99 So. 84 [(1924)]; Callaway v. Moseley, 131 F.2d 414 (Ala. C.C.A. [1942]); Reaves v. Maybank, 193 Ala. 614, 69 So. 137 [(1915)]. In other words, where not only the facts constituting the conduct of the parties, but also the standard of care which they should have exercised, are to be determined the case is entirely one of fact to be decided by the jury. When the proof discloses such a state of facts, whether controverted or not, that, in essaying to fix responsibility for the injury or damage, different minds may arrive reasonably at different conclusions or may disagree reasonably as to the inferences to be drawn from the facts, the right of a party in a negligence action to have a jury pass upon the question of liability becomes absolute. Drew v. Western Steel Car & Mfg. Co., 17[4] Ala. 616, 56 So. 995, 40 L.R.A., N.S., 890 [(1911)].'

> "Patterson v. Seibenhener, 273 Ala. 204, 206-207, 137 So. 2d 758, 760 (1962). When a trial court in a negligence case is confronted with a motion for directed verdict it must apply this standard, and, in doing so, must view the evidence in a light most favorable to the party opposing the motion. If any reasonable inference drawn from the evidence proves to be adverse to the moving party, a motion for directed verdict is due to be denied. Turner v. Peoples Bank of Pell City, 378 So. 2d 706 (Ala. 1979). Alford v. City of Gadsden, 349 So. 2d 1132 (Ala. 1977). These principles are applicable to the present case and govern our decision in determining the propriety of the trial court's decision."

Quillen v. Quillen, 388 So. 2d 985, 988 (Ala. 1980). "The question whether a danger is open and obvious is generally one of fact." Howard v. Andy's Store for Men, 757 So. 2d 1208, 1211 (Ala. Civ. App. 2000). "[T]he plaintiff's appreciation of the danger is, almost always, a question of fact for the determination of the jury." F.W. Woolworth Co. v. Bradbury, 273 Ala. 392, 394, 140 So. 2d 824, 825-26 (1962). Furthermore, "[t]here is a presumption that a jury's verdict is correct; that presumption is strengthened when the trial court has denied a motion for a new trial." SouthTrust Bank v. Donely, 925 So. 2d 934, 943 (Ala. 2005) (citing First Alabama Bank of South Baldwin v. Prudential Life Ins. Co. of America, 619 So. 2d 1313 (Ala. 1993)).

Previously, this court has held that placing a ladder against a metal gutter on a home is an open-and-obvious danger. See Quillen, supra. However, I disagree with this Court's opinion that Quillen is persuasive authority. Instead, I find the facts presently before this Court distinguishable from the facts in Quillen. Whereas Jones testified that he had ascended to the roof of the Huddle House in the same manner as did Shipman and did not consider it unreasonably dangerous, no such evidence existed in Quillen.

Given the fact that the question whether a danger is open and obvious is generally one of fact for the jury and given Jones's testimony that he did not consider it unreasonably dangerous to climb a ladder that was aligned with the slope of the facade of the building and that was not secured at the bottom, I am of the opinion that the trial court did not err in denying Jones Food's motion for a judgment as a matter of law. The jury returned a verdict in favor of Shipman, it is obvious that the facts are not such that all reasonable men must draw the same conclusion that the placement of the ladder was an open-and-obvious danger. Therefore, I respectfully

dissent from the majority's decision to overrule the application for rehearing.