NOT DESIGNATED FOR PUBLICATION

ARKANSAS COURT OF APPEALS

DIVISION II
No. CA 06-521

	Opinion Delivered NOVEMBER 12, 2008
BENJAMIN F. LACKEY, JR. APPELLANT	APPEAL FROM THE FAULKNER COUNTY CIRCUIT COURT, [NO. CV-02-478]
V.	HONORABLE MICHAEL A. MAGGIO, JUDGE
MARK A. MAYS, DANA R. BRAMBLETT, et al. APPELLEES	DISSENTING OPINION UPON DENIAL OF PETITION FOR REHEARING

JOHN B. ROBBINS, Judge

This dissent pertains to Lackey's premises-liability action against Trent Properties. The trial court granted summary judgment to Trent. Lackey appealed, and we affirmed the trial court's summary judgment. Lackey has now petitioned for rehearing, and today our court denies his request. I dissent because the trial court erred in granting this summary judgment, and we compounded that error by affirming.

In Lackey's complaint against Trent, he alleged that Trent was negligent in failing to design, install, and maintain its parking lot in a safe condition, and in failing to properly warn him about the lot's dangers. The applicable law is stated in AMI Civ. 3d 1104. As the premises owner, Trent owed a duty to Lackey, an invitee, to use ordinary care to maintain the premises in a reasonably safe condition. However, no such duty would exist if the

dangerous condition was known by or would be obvious to Lackey, unless Trent should reasonably anticipate that Lackey would be exposed to the danger despite his knowledge of it or its obvious nature.

Trent's motion for summary judgment required the trial court, and our court on appeal, to consider the evidence, revealed in the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, in the light most favorable to Lackey, with any doubts or inferences resolved against Trent. Ark. R. Civ. P. 56(c)(2). *See Keller v. Safeco Ins. Co. of Am.*, 317 Ark. 308, 877 S.W.2d 90 (1994). Summary judgment could then be granted for Trent only if there was no genuine issue of material fact remaining as to whether Trent was negligent. Importantly, the function upon consideration of a motion for summary judgment is not to try the issues, but to determine whether there are issues to be tried. *Wolner v. Bogaev*, 290 Ark. 299, 718 S.W.2d 942 (1986).

The evidence, which the trial court was obliged to consider as fact in ruling on Trent's motion, included the following:

> Trent owned and maintained the North Plaza shopping center and parking lot on which the subject collision occurred.
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> The parking lot was intersected by a north/south "cut through" driveway. This cut through was also intersected by two east/west traffic ways. These two intersections were unregulated, meaning there were no traffic control devices or signs.
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> There was a history of four accidents within the past eighteen months at these intersections.
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> Deliveries R Us, a delivery service that promises hot food deliveries within forty-five minutes, was operating from an office in this shopping center. Lackey was not aware of this fact.

> Lackey proceeded to cross through the intersection after looking to the right and left. His vehicle was struck by a vehicle driven by an employee of Deliveries R Us.
>
> An expert engineer with fifteen years of experience in environmental, health, and safety consulting submitted an affidavit on appellant's behalf. Therein, the engineer opined that the intersection was dangerous and not reasonably safe, that Trent should have known, after a period of more than fifteen years, and with the accidents that occurred there, that the intersection was not reasonably safe; that the dangers and unreasonable risk of harm posed by the intersection were not obvious in that both the condition and risk would not be apparent and would not be recognized by a customer. The opinion went on to state that the delivery service operation would not be obvious to customers.
>
> In forming his opinion, this expert reviewed: (1) an aerial photograph where the north/south traffic way had been converted to parking spaces; (2) a simulation of the same aerial photograph with the north/south traffic way in place; (3) photographs showing this traffic way shortly after the wreck; (4) the affidavit of Dewayne Sledge that this situation had existed since the early 1980s; (5) the affidavit of Lackey which stated his inability to get through the intersection, exercising all due care, without being involved in a wreck and that Trent had superior knowledge of the danger of the lack of traffic controls; (6) accident reports about the February 12, 1998, February 18, 1998, August 16, 1998, and April 29, 1999, wrecks in the parking lot; (7) the deposition of Charles W. Trent; (8) the exhibits attached to the deposition of Charles W. Trent; and (9) Lackey's accident report at the Trent's shopping center.

Whether the enhanced danger of the intersection posed by its proximity to Deliveries R Us should have been obvious to Lackey is a question of fact. His expert opined that it was not an open and obvious danger. The expert engineer's opinion was far from conclusory, as declared in our court's opinion. It was rendered based upon extensive elements of fact and engineering expertise. Furthermore, whether Trent should have reasonably anticipated the harm, despite the known or obvious nature of the dangerous condition, is a question of fact for the jury that cannot be decided on summary judgment. *Van DeVeer v. RTJ, Inc.,* 81 Ark. App. 379, 101 S.W.3d 881 (2003). Appellant presented evidence to rebut the landowner's entitlement to judgment as a matter of law. Viewing the evidence presented and all inferences

in the light most favorable to the non-movant, Trent was not entitled to judgment at this juncture.

Because I believe our court erroneously denies rehearing on this point, I dissent.

GRIFFEN, J., joins in this opinion.