

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
CAUSE NO. 2016-M-01687-SCT**

**BUFFALO SERVICES INC. d/b/a
B-KWIK FOOD MART;
BUFFALO SERVICES INC.;
CLIFTON VAN CLEAVE;
LANE McCARTY;
DONALD GALMON;
AND JOHN DOES 1-5**

PETITIONERS

VS.

BRANDER SMITH

RESPONDENT

RESPONSE TO PETITIONERS' PETITION FOR INTERLOCUTORY APPEAL

COMES NOW, Respondent, Brander Smith, and files this Response to Buffalo Services, Inc D/B/A B-Kwik Food Mart, Buffalo Services, Inc., Clifton Van Cleave, and Lane McCarty's (Hereinafter "Defendants") Petition for Interlocutory Appeal. In support thereof, she states as follows:

INTRODUCTION

This is a response to a Petition for Interlocutory Appeal seeking immediate review of a Wilkinson County Circuit Judge's November 28, 2016 order denying Petitioners' Motion for Summary Judgment.

This case is not ripe for an interlocutory appeal. This case involves a civil action brought by Plaintiff, Brander Smith, seeking monetary damages for bodily injuries caused by the negligence and gross negligence of Defendants, Buffalo Services, Inc d/b/a B-Kwik Food Mart, Buffalo Services, Inc., Clifton Van Cleave, and Lane McCartry in the ownership, leasing, design and operation of the parking lot located at 1294 HWY 24 E Centreville, Mississippi.

On April 30, 2015, Brander Smith drove to the thrift store located at 1294 Highway 24 E Centreville, Mississippi to buy clothes, she went into the store and while shopping, a vehicle Driven by Donald Galmon struck Ms. Smith causing injuries.

Defendants had knowledge of the dangerous condition on their property and failed to erect bollards on the property.

Defendants filed a Motion for Summary Judgment alleging that the Buffalo Defendants had no duty to protect the Plaintiff from vehicular traffic on the premises. At the time of the accident, the Buffalo Defendants were under a duty to provide a reasonably safe premise.

The Trial Court denied the Motion for Summary Judgment finding a genuine issue of material fact existed as to whether the incident was foreseeable.

This case is not ripe for an interlocutory appeal because there exists certain factual issues that exist that give rise to a duty of the Defendants to erect bollards for the safety of customers inside and outside of buildings on their property.

Defendants have filed this interlocutory appeal because they believe that there is no duty to erect bollards in cases similar to the one at bar. The Defendants are completely off base in their position. The Defendants stated in its petition, that, “Mississippi property owners do not owe a duty to patrons inside of stores to protect from runaway vehicles.” However, the Supreme Court has held that there can be a duty to erect bollards in cases like the one at hand.

A substantial basis does not exist for a difference of opinion on a question of law. There is not an issue here of general importance to warrant this interlocutory appeal. The Defendants ask this Court to decide an issue that has already been addressed previous cases. *See Carpenter v. Stop-N-Go Markets of Georgia, Ind.*, 512 So.2d 708, *Cheeks v. AutoZone, Inc.*, 154 So. 3d 817. Here, the Question of duty is a question of law and fact based on the *Carpenter*, and *Cheeks*.

Mississippi law is clear that there are circumstances where a property owner would have the duty to erect bollards on their property to protect patrons inside and outside of a store. The Defendants knowingly do not state the law established in *Cheeks* fully. In *Cheeks v. AutoZone*, the court reaffirmed the holding of *Carpenter* that premises owners do not have a duty to erect protective barriers to insure the safety patrons inside the store, and also reaffirmed that a premises owner has no duty to protect against runaway vehicles where such incidents would be unforeseeable; however, **as the special concurrence opinion in *Carpenter* recognized, certain factual circumstances give rise to the possibility for a duty to arise.** 154 So. 3d 817, 823.

Based on Mississippi case law the trial court was correct in denying the Defendants' Motion for Summary Judgment. It is clear that the Court agreed that the factual circumstances here give rise to a duty to erect bollards.

FACTS

Location of the Premises

The property that is the subject of this case is located at 1294 Highway 24 E Centreville, Mississippi. The property is owned by Buffalo Services, Inc. *Please see attached deed and land plot labeled as Exhibit "A."* There is one tract of land, which is approximately 0.57 acres. There is one parking lot and two buildings on that tract. The property sits at a slope at the intersection of Highway 24 East and Camp Street. The subject thrift store is situated at approximately 3.25 feet lower than the west entrance from Highway 24, and approximately 3.5 feet lower than the service entrance from Camp Street. *See Expert Report of Lamar Hawkins attached as Exhibit "B."* Vehicles enter onto the property from either of two entrances, located on Highway 24 or on Camp Street. Situated on the property are two buildings that are adjacent to one another. One

building operates as a convenience store and gas station (B-Kwik), and the other operates as a thrift store.

Parking Lot

There is no separation in the parking lot, as customers of either store are allowed to park anywhere in the parking lot. Customers are even allowed to park in areas of the lot that are not marked by parking lines. *Please see attached Picture labeled Exhibit "C."* Immediately in front of the convenience store are parking spots marked off by yellow parking lines. There is no sidewalk or curb in front of the store. *See Photograph attached Exhibit "D."* Immediately in front of the thrift store is a sidewalk with no raise and parking spots marked off with white parking lines. *See photograph of front of Thrift Store attached as Exhibit "E."*

Parking Stops

Each park in front of the B-Kwik store has a parking stop located a few feet away from the store. A parking stop is a small barrier at the end of parking spaces. Unlike the B-Kwik store, there are no parking stops designated to the parking spots in front of the thrift store. There is a designated sidewalk in front of the store, but the sidewalk is not raised. On occasion customers who park in front of the thrift store drive onto the sidewalk because there is no restriction. *Please see Dorothy Neal Deposition attached as Exhibit "F" at pg. 25.*

Bollards

On the far west side of the thrift store there are three bollards situated at the corner of the building. Lane McCarty testified that the bollards were there to make sure vehicle traffic was out far enough as to not hit the roof or drive over the sidewalk. *See Deposition of Lane McCarty attached as Exhibit "G" at pg. 41.* There are also bollards placed around the gas pumps and around the Chevron sign on the property. *See photograph of Bollards attached Exhibit "H"*

On April 30, 2015, Brander Smith drove to the thrift store located at 1294 Highway 24 E Centreville, Mississippi to buy clothes. Ms. Smith parked her vehicle in front of the thrift store. Ms. Smith then exited her vehicle. She entered into the store and shopped for less than five minutes. While standing in the store with her back facing away from the glass windows located at the front of the store, a vehicle driven by Donald Galmon, drove through the glass windows and brick wall and struck Ms. Smith throwing across the store. *See Brander Smith Deposition attached as Exhibit "I" at pgs 39-44.* Sometime before the subject crash, Defendants voluntarily installed or had installed protective yellow pole bollards and parking stops designed to protect customers from moving vehicles.

Before the subject incident, Ms. Smith had gone to the property on several occasions. She was keenly aware of the existence of safety bollards at the store and parking stops to protect pedestrians walking on the walkway of the store and customers in the store. Ms. Smith relied on the bollards and parking stops and Buffalo's placement of the bollards and parking stops to protect her from being struck by a moving vehicle as she walked on the sidewalk and while shopping in the store. *See Plaintiff's Discovery Responses attached as Exhibit "J."* Before the subject incident there had been at least one previous incident where a vehicle was driven through the front of the store.

At all times relevant to this action, Buffalo Services, Inc D/B/A B-Kwik Food Mart, Buffalo Services, Inc., Clifton Van Cleave, and Lane McCartry either exercised control, possession and/or authority over the subject premises, including all functions which relate to safety of store patrons in the store on the sidewalk and in the parking lot. As a result of being struck by Galmon's vehicle, Brander Smith suffered severe injuries and has to date incurred more than \$25,000.00 in medical bills.

ARGUMENT

A. The factual circumstances of this case placed a duty on the Buffalo Defendants to erect protective barriers in front of the thrift store.

The Defendants contend that there is no basis for liability for injuries Plaintiff sustained on the premises. However, their position is contrary to Mississippi law. In the special concurring opinion of *Carpenter v. Stop-n-Go*, Justice Hawkins knew that there would come a time where a property owner would have a duty to erect a barrier. He opined specifically as follows:

“I doubt the wisdom, however, of declaring as a matter of law that the owner of a public business is *never* under any duty to erect some kind of barrier to prevent motor vehicles from running through the building walls.”

Carpenter v. Stop-N-Go Markets of Georgia, Ind., 512 So.2d 708, 710 (Miss. 1987). Emphasis added. Further, in *Cheeks v. AutoZone, Inc.*, a case that dealt with an owner’s failure to erect protective bollards as well, the Supreme Court held that, “as the special concurrence in *Carpenter* recognized, certain factual circumstances give rise to the possibility for a duty to arise. The case *sub judice* is one of those cases.” *Cheeks v. AutoZone, Inc.*, 154 So. 3d 817, 824 (Miss. 2014). Again in *Stanley v. Scott Petroleum Corporation*, a case similar to the case *sub judice*, citing *Cheeks*, held that “while premises owners do not have a duty to erect protective barriers to insure the safety of patrons inside a store or to protect against runaway vehicles where such incidents would be unforeseeable, ***such a duty can arise depending on the factual circumstances of a given case.***” *Stanley v. Scott Petroleum Corporation*, 184 So.3d 940 (Miss. 2016). In essence, courts are required to determine the duty of the property owners in situations like the one at hand based on the “factual circumstances of each case.” Based on the facts of the case *sub judice* a duty does arise.

Previous Incident

Here, there was a prior accident involving a vehicle crashing into their property. Based on the deposition testimony of Dorothy Neal, there had been a previous incident similar to the subject incident where a vehicle crashed into the building on the Buffalo Defendants property. Neal further testified that there had been instances where vehicles would drive on the sidewalk when parking in front of the thrift store. *See Exhibit "F"* at page 25. Daisy Angelety the tenant of the Thrift Store even asked for parking lines to be drawn in front of the store because customers were parking any kind of way. *See Exhibit "F"* at page 27. The Defendants also knew of the danger of a vehicle encroaching the side walk because Lane McCarty testified that the bollards were there to make sure vehicle traffic was out far enough as to not hit the roof or drive over the sidewalk. *See Deposition of Lane McCarty attached as Exhibit "G"* at pg. 41. Buffalo even testified that it knew that on occasion a driver could possibly lose control in the parking lot. *See 30(b)(6) Deposition of Buffalo attached as Exhibit "K"* at page 39-40. There has even been an accident at the subject property as recently as December of 2015, where an individual drove into the B-Kwik convenience store. *See Exhibit "K"* at page 42.

Sloped Parking Lot

The most glaring issue with the parking lot is that it is sloped. From either entrance to the parking lot, vehicles enter in a downhill manner. In the special concurring opinion in *Carpenter*, Justice Hawkins (joined by Justice Lee, Robertson, and Anderson) after clarifying that there are some instances where a property owner would have a duty to erect bollards, he went on further to give a clear example of when an owner would have the responsibility to erect some kind of barrier. He stated specifically,

The parking area may be on an incline with the building on the lowest part of the lot. Masonry walls have notoriously low tensile strength, and furnish very little protection against a

marauding uncontrolled vehicle. A minimum prudence by the owner of the business would impel the construction of some kind of barrier or railing around the exposed parts of the building. With hundred of customers coming into his place of business he should expect upon occasion some of them to forget to put their vehicle in gear, or the brake secure...

Carpenter at 710. Justice Hawkins predicted the same factual circumstances that exist here today. Here, Plaintiff's Expert Lamar Hawkins has opined, that "[t]he Thrift Store is on a lower elevation than the Highway service entrance and parking lot which creates a greater potential for a vehicle to stray, from driver error, and cause said vehicle to roll downgrade and crash into customers and or a building." *See Exhibit "B"* at page 6. "The Thrift store being located at a lower elevation makes driver error more hazardous and the need for safe protection, such as bollards, from vehicle crashes." *See Exhibit "B"* at page 7. The Buffalo Defendants knew or should have known that the sloped parking lot created a dangerous condition.

Frequency of Incidents

Further, Mr. Hawkins has opined that these incidents are common across the United States. Specifically, he opined that "[f]rom early April 2013 through early April 2014 at least 16 customers, employees or other bystanders were killed in accidental crashes into buildings or adjacent property. At least 587 others were injured during the 12 month period." *See Exhibit "B"* at page 7. A fact finder could conclude that Plaintiff's injuries were foreseeable based on the frequency of vehicle incursions. Based on the facts presented by the Plaintiff the Buffalo Defendants knew of the dangerous condition and failed to properly place bollards and parking stops in front of the adjacent thrift store.

B. This case does not present a question of law about which there is a substantial basis for a difference of opinion.

Under Mississippi Rule of Appellate Procedure 5(a), interlocutory appeals are appropriate where:

“a substantial basis exists for a difference of opinion on a question of law as to which appellate resolution may:

- (1) Materially advance the termination of the litigation and avoid exceptional expense to the parties; or
- (2) Protect a party from substantial and irreparable injury; or
- (3) Resolve an issue of general importance in the administration of justice.”

“Interlocutory appeals, pursuant to the rule, must involve **questions of law only**”. *Byrd v. Mississippi Power Co.*, 943 So.2d 108, 112 (Miss.App. 2006) (emphasis added). Here there is clearly not a question of law only, the *Carpenter*, *Cheeks*, and *Stanley* cases, make it clear that the duty to erect bollards is not only a question of law, but a question of fact as well. Interlocutory appeal, then, is wholly inappropriate under M.R.A.P. 5(a).

CONCLUSION

This Court should not grant Petitioners’ Petition for Interlocutory Appeal because the Circuit Court’s denial of the Defendants’ Motion for Summary Judgment was proper. This Court has held in *Carpenter*, *Cheeks*, and *Stanley* that a duty to erect bollards can arise depending on the factual circumstances of a given case. Based on the lower court’s ruling, it is clear that those factual circumstances exist. Based on the factual circumstances of this case, a minimum prudence by Buffalo should have impelled the construction of some kind of barrier or railing around the exposed parts of the building. Further the causes of action for voluntary assumption of the duty and the failure to warn are still pending before the trial court, as the Petitioners did not address the claims in its Petition for Interlocutory Appeal. Petitioners’ Motion for Summary Judgment in the lower court was filed solely on the duty to erect bollards. Interlocutory appeal in his matter is not proper for the above mentioned reasons.

In support of this Response, Respondent offers the following Exhibits:

Exhibit A: Deed and Land Plot

Exhibit B: Expert Report of Lamar Hawkins
Exhibit C: Photos of Parked Vehicles
Exhibit D: Photos of Front of B-Kwik
Exhibit E: Photos of front of Thrift Store
Exhibit F: Deposition of Dorothy Neal
Exhibit G: Deposition of Lane McCarty
Exhibit H: Photo of Bollards
Exhibit I: Brander Smith Deposition
Exhibit J: Plaintiff's Supplemental Responses to Plaintiff's First Set of Interrogatories
Exhibit K: 30(b)(6) Deposition of Buffalo Services

RESPECTFULLY SUBMITTED, this the 15th day of December, 2016.

BRANDER SMITH, PLAINTIFF

By: /s/Crystal Wise Martin
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CERTIFICATE OF SERVICE

I do hereby certify that I have this day caused to be mailed via U.S. Mail postage paid a true and correct copy of the above foregoing instrument to the following:

Honorable Judge Lillie Sanders
115 South Wall Street
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SO CERTIFIED this, the 15th, day of December, 2016.

/s/Crystal Wise Martin
CRYSTAL WISE MARTIN