NO. 2001-CA-00300

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

HEATHER J. MARTIN; ANNETTE MCKAY MARTIN, Mother and Representative of the Heirs at Law of Lisa May, Deceased; JUDY SMITH, Mother and Court Appointed Conservator of the Person and Estate of William Greg Smith; MAMIE IVY, Mother and Representative of the Heirs at Law of Calandra C. Ivy, Deceased; DELMONTEZ MAGEE; PAMELA LOUIS HARRIS; LORIE LEE ARMSTRONG; ANNIE STEVENS, Mother and Representative of the Heirs at Law of Yusef McKinley, Deceased; FRANKIE M. HUGHES, Mother and Representative of the Heirs at Law of Chris Hughes, Deceased; and WILLIE PAUL DIXON, Father and Representative of the Heirs at Law of Marcus Dixon, Deceased — APPELLANTS

v.

DR. SUSAN FLANAGAN, Administratrix of the Estate of Mary R. Vanderbeck, Deceased; SCRUGGS FARMS, a joint venture and SCRUGGS FARMS AND SUPPLIES, LLC — APPELLEES

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On Appeal from the Circuit Court of Lee County, Mississippi

BRIEF OF APPELLEE VANDERBECK ESTATE

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

To evaluate the need for possible disqualification or recusal, the undersigned counsel of record certifies that the following listed persons are involved in or have an interest in the outcome of this case:

A. Heather J. Martin; Annette McKay Martin; Judy Smith; Mamie Ivy; Delmontez Magee; Pamela Louis Harris; Lorie Lee Armstrong; Annie Stevens; Frankie M. Hughes; Willie Paul Dixon (Plaintiffs).

B. Dr. Susan Flanagan, Administratrix of the Estate of Mary R. Vanderbeck, deceased, Scruggs Farms and Scruggs Farms and Supplies, LLC (Defendants).

C. Mary Jane Vanderbeck and Ann Kruze, legatees of the Estate of Mary R. Vanderbeck, deceased.

D. Phelps Dunbar, LLP, William M. Beasley and Gregory M. Hunsucker (Attorneys for the Vanderbeck Estate).

E. Copeland, Cook, Taylor & Bush, P.A., Charles G. Copeland, Patricia H. Cottingham and Rebecca S. Jordan (Attorneys for the Scruggs Defendants).

F. Greer & Pipkin, Michael Greer, Jeffrey Leathers, Langston, Langston, Michael & Bowen, Ronald Michael, Priest, Wise & Russell and Bo Russell (Attorneys for Plaintiffs).

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APPELLEE'S STATEMENT OF THE ISSUES

Appellant Martin misstates the issues addressed in the lower court. Taken verbatim from the Order of Dismissal, the issues presented to the Circuit Court[1] are as follows:

1. Whether an owner of unimproved property that adjoins a public highway has an affirmative duty in tort to prevent surface rainwater from flowing across the property onto the road? The Circuit Court said no.

2. Whether there is a genuine issue of triable fact that the Defendants performed an affirmative act that created artificial conditions on the property which increased the flow of rainwater? The Circuit Court said no.

STATEMENT OF THE CASE

1. Nature of the Case and Procedural History

Plaintiffs filed this negligence action in 1998, after an automobile accident on Coley Road resulted in the death of three persons and the injury of five others.[2] The sole claim asserted against the Vanderbeck Estate in the Plaintiffs' complaint is that the "[Vanderbeck Estate] . . . should have had the property ditched so as to defer any excess flow of water into

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[1]For the first time on appeal, Martin argues that the crop land owned by the Vanderbeck Estate is "improved" property. This was not an issue raised by the Plaintiffs below, accordingly, Plaintiffs are barred from raising it for the first time on appeal. "It is established that this Court will not review matters on appeal that were not considered by the lower court." *One 1979 Ford 15V v. State*, 721 So. 2d 631, 637 (Miss. 1998) citing *Ditto v. Hinds County*, 665 So. 2d 878, 880 (Miss. 1995); *see also Lewis v. Griffith*, 664 So. 2d 177, 185 (Miss. 1995) (improper to raise an issue on appeal not presented to the trial court); *accord CIG Contractors v. Miss. State Bldg. Comm'n*, 510 So. 2d 510, 514 (Miss. 1987) (citations omitted). Moreover, as explained further below, Martin's suggestion that the crop land is "improved" property is not supported by any evidence. *See* Flanagan Affidavit ¶¶15, 18-19 (R. 207-208).

[2]On information and belief, Plaintiffs settled with the City of Tupelo for an unknown amount of money and have sued the engineering company that designed Coley Road, Cook Coggins Engineers, Inc., in a separate lawsuit.

proper channels, streams and ditches which were available on the right of way of Coley Road . . .." Complaint, Paragraph 24. For purposes of summary judgment only, the Defendants admitted that the cause of the accident was the freezing of surface rainwater that flowed from the Vanderbeck property onto the roadway. After extensive discovery, the Vanderbeck Estate filed its motion for summary judgment on January 4, 2000, R. 185-233, followed by a motion for summary judgment by the Scruggs Defendants, both of which were granted by the Circuit Court in its Order dated January 30, 2001. R. 430.

2. The Circuit Court's Opinion

In its Order granting the motions for summary judgment ("Order"), the Circuit Court held that "as long as owners of unimproved property do not perform an affirmative act altering the natural flow of water they do not in Mississippi have an affirmative duty in tort to prevent surface water from flowing across their property onto a roadway." R.431 (Order at 2, ¶2). The Court further found "that the Plaintiffs . . . presented no credible evidence from which a reasonable juror could conclude that the Defendants created an artificial condition on the property." *Id.*

3. Statement of the Relevant Facts

Approximately 20 years before the accident, the roadway upon which the accident occurred was naked, unimproved land without any state or county road running through it. Affidavit of Dr. Susan M. Flanagan at ¶¶ 1-3 (hereafter, "Flanagan Affidavit") (R. 205). In 1975, Lee County, as part of the Appalachian Access Highway Project and under threat of eminent domain, purchased a 100 foot strip of the land from the Vanderbeck Estate and constructed what is now Coley Road. Flanagan Affidavit at ¶ 3 (R. 205). The only alterations

made to the Vanderbeck Estate's otherwise unimproved property consist of the excavation of dirt and creation of the roadbed, including appurtenant ditches and culverts, by Lee County or the City of Tupelo[3] as a part of the construction and maintenance of Coley Road. Flanagan Affidavit at ¶ 15 (R. 207). No alterations have been made to the unimproved property by Mrs. Vanderbeck or the Vanderbeck Estate. Flanagan Affidavit at ¶¶ 15, 17 (R. 207-08).

As a result of the grading and other work done in constructing Coley Road, the Vanderbeck property on either side of the road is at a higher elevation than the roadbed. Plaintiffs have alleged, and for purposes of the motion for summary judgment only, the Vanderbeck Estate has admitted, that the three car accident that occurred on or about January 12, 1996, on the east side of Coley Road in Tupelo, Mississippi, was caused by frozen rainwater runoff from the Vanderbeck property onto Coley Road.

4. The Vanderbeck Estate's Corrections to Plaintiffs'/Appellants' Statement of the Facts

A. The plaintiffs offered no evidence to support their bald factual assertion that there were "three or more field roads" that continued into the Vanderbeck Estate. Instead, the plaintiffs offered unauthenticated lawyer-made hearsay photographs showing Mike Greer (Plaintiffs' lead counsel) pointing at patches of dirt and grass. After Plaintiffs' counsel was informed that the Court was going to grant the motion for summary judgment, Plaintiffs filed Richard Forbes' affidavit, which is nothing more than a speculative opinion based upon a review of the same unauthenticated lawyer-made hearsay photographs and a viewing of the accident scene over four years after the date of the accident.

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[3]Coley Road was subsequently acquired by the City of Tupelo through annexation.

B. Plaintiffs' also baldly assert that the proximate cause of the accident was the accumulation of water on the Vanderbeck property. Proximate cause includes a determination of legal causation, an issue which Plaintiffs failed to create a genuine issue of material fact about. There is no evidence in the record to support Plaintiffs' statement about proximate causation.

SUMMARY OF THE ARGUMENT

Plaintiffs have failed to provide a single authority to support the preposterous rule of law that Plaintiffs contend for, i.e., that the Vanderbeck Estate can be held liable for the runoff of surface rainwater from its property onto Coley Road when it took no affirmative action to increase or channel the flow of surface rainwater. There is a simple reason for Plaintiffs' failure to provide such authority. None exists. Owners of unimproved property do not become insurers of public highway users simply because rainwater runs off their property onto a public highway. Put within the context of this case, Plaintiffs have provided no legal authority for their contention that the Vanderbeck Estate had an affirmative duty in tort to fend off the natural force of rainwater runoff or to modify the Estate's unimproved property for the benefit of the traveling public. *See* Complaint at ¶24.

The simple facts here are that after Lee County purchased a 100 foot strip of land from the Vanderbeck Estate and constructed what is now Coley Road, Lee County (or the City of Tupelo) installed the appurtenant ditches and culverts. At the time of the accident, the City of Tupelo controlled the road and therefore owed a duty to the public to keep the road reasonably safe for persons exercising ordinary care. *City of Ruleville v. Grittman*, 250 Miss. 842, 168 So. 2d 527 (Miss. 1964). Thus, the municipality, not the Vanderbeck Estate, owed the

Plaintiffs a duty in tort. *Compare Curl v. Indian Springs Natatorium*, 550 P.2d 140 (Idaho 1976) (abutting property owner not liable for dangerous condition on highway constructed by public entity). That is the whole point of this case. Recognizing this, Plaintiffs have apparently already settled with the party truly at fault, the public entity that failed to provide for adequate drainage of the road. Plaintiffs' attempt to foist the costs of road maintenance (or lack thereof) from the City of Tupelo to the Vanderbeck Estate (an individual landowner) through tort law is simply not supported by the facts or by any legal authority.

Ignoring the facts, Plaintiffs nevertheless suggest that they "offered evidence at the lower court demonstrating the existence of three or more field roads that extended from the culvert, up an incline, and continued into some wooded areas of the Vanderbeck Estate." Plaintiffs' Brief at 3. Plaintiffs' suggestion is simply untrue. Neither the late submitted Forbes affidavit (which Plaintiffs cite in support of their statement), the Coley Affidavit, Mitchell Scruggs' deposition testimony nor the unauthenticated lawyer-made photographs showing Mike Greer pointing at patches of dirt and grass support the Plaintiffs' statement.[4]

Undeterred by their failure to present any proof in support of their contentions, Plaintiffs ask the Court to assume without proof that a jury could find that the Vanderbeck Estate created an "artificial condition" on the Vanderbeck property in their misguided efforts to align this case with their inapplicable non-Mississippi case authorities and inapplicable Mississippi case authorities regarding dirt mounds, loose restaurant carpet,

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[4]The unauthenticated photographs are incompetent hearsay evidence taken long after the accident. The late submitted Forbes affidavit is but speculative opinion based upon a viewing of the accident scene over four years after the date of the accident and based upon a review of the same unauthenticated lawyer-made photographs. Mitchell Scruggs' deposition testimony and the Coley Affidavit establish only uncontested and immaterial facts.

landowner laid culverts and trees. The bottom line here—and this principle is a common thread of the cases and secondary authorities cited by both the Plaintiffs and by the Vanderbeck Estate below and herein—is that absent some affirmative act on part of a landowner causing a public road to become dangerous, keeping public roads safe is a public function born by the taxpayers, not by individual landowners. As the Circuit Court correctly found on the determinative issue of whether the Vanderbeck Estate performed an act to concentrate rainwater flow onto Coley Road, Plaintiffs "presented no credible evidence from which a reasonable juror could conclude that the [Vanderbeck Estate] created an artificial condition on the property." Order at 2 (R. 431).

ARGUMENT

I.
Summary judgment must be affirmed when, as here, there is no genuine issue as to any material fact and the moving party (here, the Vanderbeck Estate) is entitled to judgment as a matter of law.

Although the familiar standard of *de novo* appellate review applies to this civil action, summary judgments should not be viewed "as a disfavored procedural shortcut, but rather as an integral part of the [Mississippi] Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." MISS. R. CIV. P. 1; *compare Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (same regarding the federal counterpart); *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994); *Murphree v. Federal Ins.*, 707 So. 2d 523, 529 (Miss. 1997) ("In construing MISS. R. CIV. P. 56, it is appropriate for this court to rely on federal law.") (citations omitted). Application of this *de novo* review standard to the present case mandates affirmance of the trial court's award of summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, if any, show that [a]

there is no genuine issue as to any material fact and that [b] the [Defendants are] entitled to judgment as a matter of law." MISS. R. CIV. P. 56(c) ("[J]udgment . . . shall be rendered . . ".) (emphasis supplied); *Brown v. Credit Center*, 444 So. 2d 358, 363 (Miss. 1983).[5]

After the movant (here, the Vanderbeck Estate) carries its burden of pointing out or demonstrating, with or without supporting evidence, the absence of material facts, MISS. R. CIV. P. 56(a), (b), the nonmovant (here, Martin et al.) must come forth with evidentiary materials such as depositions, answers to interrogatories or admissions on file, *see Celotex*, 477 U.S. at 324, demonstrating a genuine issue of fact that is material under the substantive governing law. *Liberty Lobby,* 477 U.S. at 248.[6]

Here, to survive summary judgment, Plaintiffs had to either (1) demonstrate by competent legal authority that the Vanderbeck Estate had an affirmative duty in tort to prevent surface rainwater from flowing across the Vanderbeck property onto Coley Road, or (2) produce significant probative evidence demonstrating the existence of a triable issue of material fact on the question of whether the Vanderbeck Estate performed an affirmative act that artificially increased or channeled the flow of water from the Vanderbeck property onto Coley Road. Plaintiffs failed to do either.

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[5]"Material facts" include those that might affect the outcome of an action only, and are determined solely by the substantive governing law—here, Mississippi tort law. *Anderson v. Liberty Lobby,* 477 U.S. 242, 248 (1986). A "genuine issue" arises only if a reasonable jury could resolve the issue in favor of the nonmovant. *Id.*; *Murphree*, 707 So. 2d at 529 (citations omitted).

[6]A nonmovant cannot satisfy its burden by merely resting on its pleadings, *Fruchter v. Lynch Oil*, 522 So. 2d 195, 199 (Miss. 1988), by mere allegations, *id.*, or by a mere scintilla of evidence. *Davis v. Chevron*, 14 F.3d 1082 (5th Cir. 1994). Moreover, a mere "metaphysical doubt as to the material facts" does not create a genuine issue, *Matsushita Electric v. Zenith Electric*, 475 U.S. 574, 586 (1986), but rather the doubt regarding the material facts must rise to a level sufficient for a reasonable juror to resolve the disputed issue in the nonmovant's favor. *Liberty Lobby,* 477 U.S. at 248; *see also Smith v. Sanders*, 485 So. 2d 1051, 1054 (Miss. 1986).

For example, Plaintiffs provided no competent legal authority for the broad position that a landowner has a duty in tort to control surface rainwater runoff from her unimproved property onto a public road when she has taken no steps to artificially increase or channel the flow of water onto the road. *See* Complaint, Paragraph 24 (Plaintiffs alleging that the Vanderbeck Estate had a duty to have "the property ditched so as to defer any excess flow of water into proper channels, streams and ditches which were available on the right of way of Coley Road. . ..").

Moreover, Plaintiffs admitted (in their memorandum brief to the Circuit Court) that the law does not impose a duty upon the Vanderbeck Estate to maintain Coley Road or to warn highway travelers of any dangerous condition on Coley Road not created by the Estate. Furthermore, the legal authorities explained below demonstrate that the Vanderbeck Estate is entitled to judgment as a matter of law because owners of unimproved property in the State of Mississippi have no duty in tort (contrary to Plaintiffs' suggestion) to dig ditches to fend off the forces of nature (here, rainwater) for the benefit of the traveling public. Plaintiffs' legal authorities at best stand for the proposition that a possessor of land can be held liable in tort for "artificial conditions" he creates which result in a concentrated discharge or an accumulation of water on a public thoroughfare. Merely stating this general principle of law, however, begs the question of whether the Vanderbeck Estate created any such "artificial condition."

Regarding the question of whether the Vanderbeck Estate created an "artificial condition" on the property, the Vanderbeck Estate provided sworn testimony that it did nothing to alter the natural state of the property. Under the Mississippi Rules of Civil Procedure, the burden thus shifted to Plaintiffs to demonstrate by competent evidence that a genuine issue of

triable fact exists on this outcome determinative question. *See Simmons v. Thompson Mach. of Miss.*, 631 So. 2d 798, 801 (Miss. 1994).

Instead of providing probative evidence as to whether the Vanderbeck Estate performed any act to concentrate rainwater flow onto Coley Road, however, Plaintiffs merely make the bald and unsupported assertion that the Vanderbeck Estate created "artificial conditions" on the property based upon hearsay.[7] For example, the unauthenticated lawyer-made photographs (taken long after the accident) offered by the Plaintiffs are incompetent hearsay evidence. The late submitted Forbes affidavit, based upon a review of the same unauthenticated lawyer-made photographs, is likewise incompetent evidence.

The Coley Affidavit offered by the Plaintiffs establishes at best that water had frozen at a location in the "big curve in the road which is South of the Ridgeway entrance between the Ridgeway entrance and the Furniture Market on Coley Road" before the accident and that the point at which the accident occurred was icy on January 12, 1996. In short, Plaintiffs offer no evidentiary support for their contention that the Vanderbeck Estate performed an affirmative act to concentrate rainwater flow onto Coley Road. As the Circuit Court correctly held, Plaintiffs' response is simply is not enough under Mississippi law to survive the Vanderbeck Estate's motion for summary judgment.

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[7]Although the nonmovant (Plaintiffs) need not necessarily produce evidence that would be admissible at trial, *see Celotex*, 477 U.S. at 324, hearsay testimony does not satisfy the requirements of Rule 56(e), does not create an genuine issue of material fact, and, therefore, is insufficient to rebut a properly supported motion for summary judgment. *See Howard v. City of Greenwood*, 783 F.2d 1311, 1315 (5th Cir. 1986) (affirming grant of summary judgment rejecting that portion of the nonmovant's affidavit that was not founded upon personal knowledge); *see also* MISS. R. EVID. 801, 802.

II.

Because the Vanderbeck Estate had no duty to maintain Coley Road and because the Vanderbeck Estate had no duty to warn travelers of dangerous conditions existing on Coley Road that were not created by it, it is entitled to summary judgment as a matter of law.

The Mississippi Supreme Court has often adopted sections of the Restatements as Mississippi law. *See, e.g., State Stove Mfg. v. Hodges*, 189 So. 2d 113 (Miss. 1966) (adopting Restatement (Second) of Torts Section 402A (products liability)) (superseded by statute adopting product liability standards); *Clark v. St. Dominic-Jackson Memorial Hosp.*, 660 So. 2d 970 (Miss. 1995) (applying Restatement (Second) of Torts Section 311 (negligent misrepresentation)); *George B. Gilmore Co. v. Garrett*, 582 So. 2d 387 (Miss. 1991) (applying Restatement (Second) of Torts Section 299A (standard of care for professionals and tradesmen)); *Cenac v. Murry*, 609 So. 2d 1257 (Miss. 1992) (applying Section 205 of the Restatement (Second) of Contracts).

A. RESTATEMENT (SECOND) OF TORTS § 349 and Mississippi case law squarely reject Plaintiffs' theory that the Vanderbeck Estate can be held liable for surface water runoff from its unimproved property.

RESTATEMENT (SECOND) OF TORTS § 349 squarely rejects liability under the Plaintiffs' theory that water flowing from the Vanderbeck Estate's property froze and caused an unreasonably dangerous condition on Coley Road for which the Vanderbeck Estate is liable in tort:

> A possessor of land over which there is a public highway or private right of way is not subject to liability for physical harm caused to travelers upon the highway or persons lawfully using the way by his failure to exercise reasonable care (a) to maintain the highway or way in safe condition for their use, or (b) to warn them of dangerous conditions in the way which, although not created by him, are known to him and which they neither know nor are likely to discover.

RESTATEMENT (SECOND) OF TORTS § 349 (1965) (emphasis supplied).[8]

Plaintiffs may on reply attempt to distinguish Section 349 by first arguing (as they did below) that Section 349 does not apply to "the scenario at hand, where the danger on the public highway is created by the conditions of the land"—a factually unsupported statement—and then by arguing that RESTATEMENT (SECOND) OF TORTS § 368 applies instead. Such an argument is faulty for several reasons.

First, the explanatory comments to Section 368, which are part and parcel of the Restatement,[9] make clear that Section 368 does not apply on these facts. For example, comment k to Section 368 expressly states that "[t]he Special Note to § 367 is applicable to this Section [368]." The Special Note to Section 367 (which is made expressly applicable to Section 368) clearly states that "[t]his Section deals with a possessor's liability to persons harmed while actually upon his land." RESTATEMENT (SECOND) OF TORTS § 367, Special Note. (emphasis supplied). Here, Plaintiffs' alleged harm did not occur on the Vanderbeck property, but rather on Coley Road, a public thoroughfare. Hence, Section 368 does not apply to Plaintiffs' "scenario."

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[8]On page 5 of their memorandum brief to the Circuit Court, Plaintiffs admitted that the RESTATEMENT (SECOND) OF TORTS § 349 is "[u]ndoubtedly . . . an accurate statement of the law."

[9]In explaining the transition from the First Restatement to the Second Restatement, the Director of the American Law Institute explained that "a new format has been used, which calls for more expansive commentary, giving fuller statement of the reasons for positions taken, commentary no less carefully examined and debated by the Advisers, the Council and the Institute than the black letter rules themselves." RESTATEMENT (SECOND) OF TORTS, Vol. 1, Introduction at p. IX, ¶2 (emphasis supplied). The Mississippi Supreme Court has also followed the comments to the Restatement of Torts to explain the meaning of the "black letter" statements of law. *See, e.g., Stewart v. Southeast Foods*, 688 So. 2d 733, 737 (Miss. 1996) (relying upon the analysis in comment c to RESTATEMENT (SECOND) OF TORTS § 660 to explain the policy embraced by the Restatement and basing its decision on the policy considerations in the comment).

Moreover, even if Section 368 applied to the facts of this case as Plaintiffs contend (as explained above it does not), no action would lie. For example, comment j to Section 368 clearly states that it does not "impose any duty to remove or guard dangerous conditions [on the highway] created by a natural force, such as rains or floods, or by an act of a third person done without the permission of the possessor." RESTATEMENT (SECOND) OF TORTS § 368, cmt. j.

Thus, even under Section 368, Plaintiffs must produce probative evidence creating a genuine issue of material fact as to whether Mrs. Vanderbeck or the Vanderbeck Estate (rather than a third person or a force of nature) performed some act to the Vanderbeck property that resulted in a dangerous condition on Coley Road. Plaintiffs have failed to produce any evidence to contradict the sworn testimony offered by the Vanderbeck Estate that it made no alterations to the unimproved Vanderbeck property. Flanagan Affidavit at ¶¶ 15, 17 (R.208). As a result, Plaintiffs cannot survive the Vanderbeck Estate's motion for summary judgment even under RESTATEMENT (SECOND) OF TORTS § 368.

Second, the argument that RESTATEMENT (SECOND) OF TORTS § 349 does not apply on these facts fails. Section 349 clearly states that the possessor of land has no duty to maintain or warn of a condition on a highway, which as explained by the illustrations to Section 349, includes conditions caused by force of nature such as ice and snow:

> **1.** A, while walking on the sidewalk of a city street upon which a house in the possession of B abuts, is hurt by stumbling into a hole in the sidewalk which is caused by the wear and tear and the working of the frost upon the bricks which pave it. This condition has been of long standing and is well known to the city authorities and to B. B is not liable to A.
>
> **2.** The sidewalk on a city street upon which A's property abuts, is covered with hummocky snow and ice and has been in that condition to A's knowledge for a

considerable time. On a dark night A sees B about to walk upon this ice in obvious ignorance of its dangerous condition. A might easily warn B but does not do so. A is not liable to B.

RESTATEMENT (SECOND) OF TORTS § 349, Illustrations 1 and 2.

In a similar case, *Fazio v. Fegley Oil Company, Inc.*, 714 A.2d 510 (Pa. 1998), a plaintiff who slipped and fell on ice in a public alleyway sued the adjacent property owners in negligence contending that the property owners caused or allowed water to accumulate in the alleyway which subsequently turned into ice and caused her fall. The Pennsylvania Court rejected the plaintiff's contention that Section 368 was applicable, and held that a landowner is liable for the effects of surface water runoff only when he either diverts the water from its natural channel by artificial means or unnecessarily increases the quantity or quality of water discharged from his property. *Fazio*, 714 A.2d at 513-14; *see also id.* at n. 3 (explaining that Section 349 was applicable).

Although no reported Mississippi case has directly applied Section 349, Mississippi case authorities uniformly demonstrate that the rule in Mississippi as to unimproved property is the same as Section 349 of the Restatement (Second) of Torts: So long as landowners do not perform an affirmative act altering the natural flow of surface water, owners of unimproved property in the State of Mississippi have no duty in tort to dig ditches to fend off the forces of rainwater for the benefit of the lowland owner, or by extension, to the traveling public. *Compare Payne v. Touchstone*, 372 So. 2d 1277, 1279 (Miss. 1979) (upland owner incurs no liability for damages to the lowland owner unless he "collect[s] and discharge[s] water on the lower owner" or "by artificial means discharge[s] such water in increased quantities") *with Steed v. Kimbrough*, 197 Miss. 430, 19 So. 2d 925 (1945) (injunction affirmed against upland

owner who channeled his surface water to flow into lowland owner's ditch) *and Newton Coca-Cola v. Murphy*, 212 Miss. 824, 55 So. 2d 485 (1951) (damages and injunction affirmed against upland owner who graded his lot and caused surface water to flow in an artificial and concentrated manner unto the lowland owner's property) *and Hall v. Wood*, 443 So. 2d 834 (Miss. 1983) (affirming in principle an injunction requiring an upland owner who cleared his property to take measures to stop the flow of silt from his land to the lowland owners' lake).

Section 349 and Mississippi case law squarely reject liability under the Plaintiffs' theory that water flowing from the Vanderbeck Estate's property froze (i.e., became ice) and caused an unreasonably dangerous condition on Coley Road for which the Vanderbeck Estate is liable in tort. Under Section 349, Plaintiffs must produce probative evidence creating a genuine issue of material fact as to whether the Vanderbeck Estate (not a force of nature or some third person) performed some act to the Vanderbeck property that resulted in a dangerous condition on Coley Road. Plaintiffs have failed to produce any evidence to contradict the sworn testimony offered by the Vanderbeck Estate that it made no alterations to the unimproved Vanderbeck property. Flanagan Affidavit at ¶¶ 15, 17 (R. 207). Consequently, the Circuit Court's Order granting summary judgment must be affirmed.

B. Plaintiffs' misconstruction of case authorities does not save them from summary judgment.

Plaintiffs' legal arguments, which misconstrue Mississippi and non-Mississippi case authorities, are fundamentally flawed because they rely upon bald unsupported assertions of fact. For example, Plaintiffs' quotation of the dirt mound case, *Mathews v. Thompson*, 231 Miss. 258, 95 So. 2d 438 (Miss. 1957), for the general proposition that one who creates or maintains a condition upon or near a highway is liable for injuries therefrom, Plaintiffs' Brief

at 6, assumes without proof that the Vanderbeck Estate created an "artificial condition", thereby skirting the determinative issue of whether Mrs. Vanderbeck or the Vanderbeck Estate performed an act to concentrate rainwater flow onto Coley Road. Similarly, Plaintiffs' argument that the Vanderbeck Estate had a duty of reasonable care to prevent surface water runoff from flowing onto Coley Road, Plaintiffs' Brief at 9-10, likewise either assumes without proof that Mrs. Vanderbeck or the Vanderbeck Estate created an "artificial condition," or, advances a new theory of liability that is not only without any legal precedent, but which is also directly contrary to Restatement Section 349 and existing Mississippi case law.

1. Plaintiffs' Mississippi authorities regarding dirt mounds, land owner laid culverts, loose restaurant carpets and trees do not support their position that the Vanderbeck Estate owed them a duty in tort to prevent surface water runoff from flowing onto Coley Road.

In support of their broad statement that Mississippi law imposes a duty upon all persons not to endanger the safety of persons using public roads, Plaintiffs rely upon four cases: (1) *Mathews v. Thompson*, 231 Miss. 258, 95 So. 2d 438 (Miss. 1957) (defendant built a dirt mound that obstructed the view of highway travelers and caused an optical illusion), (2) *Mizell v. Cauthen*, 251 Miss. 418, 169 So. 2d 814 (Miss. 1964) (a fallen tree case upon which Plaintiffs rely upon a general statement of dicta while ignoring the rationale for the decision) (3) *Illinois Central R.R. v. Watkins*, 671 So. 2d 59, 61-62 (Miss. 1996) (railroad liable for failing to maintain roadbed and culvert that it created) and (4) *Caruso v. Picayune Pizza Hut*, 598 So. 2d 770 (Miss. 1992) (pizza restaurant can be held liable for failing to secure carpet, but affirming jury verdict in favor of defendant).[10] None of these cases lend support to

[10]Another Mississippi authority mistakenly relied upon by the Plaintiffs below, *Standard Oil v. Decell*, 166 So. 379 (Miss. 1936), arose out a plaintiff's fall into a grease pit on the possessor's property. *Standard Oil* falls squarely into RESTATEMENT (SECOND) OF TORTS § 368, which as explained

Plaintiffs' argument that the Vanderbeck Estate can be held liable for the runoff of surface rainwater from its property onto Coley Road when it did nothing to increase or channel the flow of rainwater.

In *Mathews*, the first Mississippi case relied upon by the Plaintiffs, the Mississippi Supreme Court upheld the trial court's decision that the defendant construction company was liable because it had

> piled a large mound of dirt six to eight feet high just off of the south side of the pavement in a curve, which curved southward and which obstructed Leslie's view as he traveled east. They placed a mechanical pump approximately 18 inches onto the pavement on the south side and about 30 feet east of the mound of dirt. They scattered mud and sand on and across the highway both east and west of and at the place where the pump and mound of dirt were located; and for a distance of 135 feet east this sand and dirt covered the south lane to such an extent that it was dangerous to the traveling public. They piled lumber and timbers on the north shoulder of the highway, one of which was next to the paved portion, and they placed a flare at this point and others also east thereof, and such flares were burning on this occasion. The shoulder on the south side was soft. They placed a flare just west of the mechanical pump and on the pavement, and others on the pavement and just south of the paved portion, and these flares were burning on that occasion. They placed a warning sign a considerable distance west of the pile of dirt on the south side, and another a considerable distance east of the impact of the cars on the north side, but such signs were so covered with mud and dirt that they were not readily readable by a traveling motorist. They were guilty of negligence, under the circumstances, in allowing the road to be in a dangerous condition; and because of this condition, [Plaintiff], when he came upon the pile of dirt, pump and condition of the road at this place, could not see the west bound traffic, lost control of his car, came onto the north side of the highway, and collided head-on with the automobile of [Codefendant], who did everything, under the circumstances, that he could have done to avoid the collision. The collision would not have occurred if these defendants had discharged their duty with reference to the highway in a lawful and prudent manner.

Mathews, 95 So. 2d at 443.

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above, applies only when a person is harmed on the possessor's land. Here, there is no allegation that the Plaintiffs were harmed on the Vanderbeck Estate's property (which, again was in the possession of Defendant/lessee Scrugg's possession).

In other words, the defendant construction company in *Mathews*, by accepting a construction job that required it to install a sewer line on the right of way of the highway, had a duty to exercise reasonable care to avoid jeopardizing the safety of highway travelers. The "general rule" from the now obsolete American Jurisprudence section cited in *Mathews* and relied upon by Plaintiffs—"one who, without right or authority, creates or maintains in, upon, or near a highway a condition which endangers the safety of travelers does so at his own peril and is liable for injuries proximately resulting therefrom"— must be read in context of the numerous affirmative acts (creating the dirt mound, scattering mud and dirt upon the road, etc.) committed by the defendant contractor that caused the accident.

Read thusly, *Mathews*, in which the defendant construction company failed to exercise reasonable care when they created a mound that obstructed the view of highway travelers, is in direct contrast to this case where Plaintiffs have absolutely failed to produce any probative evidence that Mrs. Vanderbeck or the Vanderbeck Estate performed any affirmative act to her property that caused the accident.

In *Mizell*, the second Mississippi case relied upon by Plaintiffs, the plaintiff argued that the property owner was liable for damages sustained when a tree growing on the property owner's land fell on the plaintiff. *Mizell*, 169 So. 2d at 816. The statement made in the Plaintiffs' Brief that the *Mizell* "court did impose a duty of reasonable care on the landowner to prevent his or her property from becoming a source of danger to persons using the highway," Plaintiffs' Brief at 9, is simply not true. The Mississippi Supreme Court in *Mizell* upheld a jury verdict in favor of a property owner. *Mizell*, 169 So. 2d at 818. The Court did not impose a duty upon the landowner in *Mizell*, it simply discussed in dicta the duty that a

landowner has to exercise reasonable care with respect to trees on his property. *Mizell*, 169 So. 2d at 817; *Hardin v. Jackson Yacht Club*, 232 So. 2d 721, 725 (Miss. 1970) (acknowledging that the sentence relied upon by Plaintiffs is dicta).

While relying upon dicta in *Mizell*, Plaintiffs ignore the rationale given by the Mississippi Supreme Court for affirming the trial court's denial of the plaintiff's request for a peremptory instruction on the issue of liability:

> The city would not be required to make an inspection of that which presented no visible signs of defects or danger; such as the tree in this case. The city created nothing artificial overhead in this tree. **This situation was created by the forces of nature, over which the municipality had no control, and this fact must be borne in mind. We see no reason, by analogy, why the hereinabove announced rule should not also apply to an abutting owner of property.** We are of the opinion that the court below was correct in refusing plaintiff's motion for a peremptory instruction on the question of liability.

Mizell, 169 So. 2d at 817 (internal punctuation modified, emphasis supplied). This rationale perfectly explains why Plaintiffs have no cause of action against the Vanderbeck Estate—owners of unimproved property in the State of Mississippi have no duty in tort to fend off forces of nature for the benefit of the public, which in this case means that the Vanderbeck Estate owed Plaintiffs no duty to have "the property ditched so as to defer any excess flow of water into proper channels, streams and ditches which were available on the right of way of Coley Road. . .." Complaint, Paragraph 24.

The third and fourth cases parenthetically cited by the Plaintiffs do not support their theory of liability either. The third case, *Illinois Central R.R. v. Watkins*, 671 So. 2d 59 (Miss. 1996) turned on the railroad's failure to maintain a culvert created by the railroad that was blocked by a beaver dam resulting in flooding. *Id.* at 60-61. That case, unlike this case, clearly involved artificial conditions (a roadbed and a culvert) created by the landowner.

Compare Bransford v. Intn'l Paper Timberlands Operating Co., 750 So. 2d 424, 426 (La. App. 2000) (rejecting *Watkins* because the defendant had not created any artificial condition and granting the defendant's motion for summary judgment).

The fourth case, *Caruso v. Picayune Pizza Hut*, 598 So. 2d 770 (Miss. 1992), is even farther removed from the facts of this case. Therein, the jury returned a verdict in favor of the defendant restaurant after the plaintiff fell on a piece of loose carpet. *Id.* at 771-72. Here, the Plaintiffs were not injured on the Vanderbeck Estate's property.

Despite the fact that none of these Mississippi authorities stand for the proposition that Plaintiffs contend they stand for, Plaintiffs conclusorily deduce from the general dicta in *Mizell* that the Vanderbeck Estate owed them a duty enforceable in tort. At the base of this conclusory deduction, lies the Plaintiffs' evidentially unsupported assertion that there were field roads on the Vanderbeck Estate property that captured surface water and channeled it downhill onto Coley Road. Plaintiffs' Brief at 11.

2. *Plaintiffs' non-Mississippi authorities do not support their position that the Vanderbeck Estate owed them a duty in tort to prevent surface water runoff from flowing onto Coley Road.*

The first non-Mississippi case authority relied upon by Plaintiffs, *Maucieri v. Ware*, 30 N.Y.S.2d 672 (N.Y. App. Div. 1941), simply upheld a jury verdict that held a landowner liable for an icy formation on a sidewalk caused by an "artificial discharge" resulting from a driveway constructed by the landowner which changed the natural contours of the land. Plaintiffs misleadingly present and cite this case as one emanating from the highest court of the State of New York (the Court of Appeals), when it is in fact a four-sentence affirmance issued by one of the numerous appellate divisions of the New York courts. Moreover, the law of

New York state is, as it has been for over a century, that landowners have no duty in tort to control water flowing from their property to public thoroughfares when such water flow is the result of natural causes. *Moore v. Gadsen*, 87 N.Y. 84, 41 Am. Rep. 352, 1881 WL 13047 (N.Y. 1881).

The next non-Mississippi case authority relied upon by Plaintiffs, *Powers v. Judd*, 553 A.2d 139 (Vt. 1988), is again offered to support a duty based upon Plaintiffs' unsupported statement that the condition of the Vanderbeck property (Plaintiffs again assume without any evidence that there was a driveway or roadway on the Vanderbeck property) constituted an artificial condition. Plaintiffs' Brief at 6. *Powers*, however, does not stand for the proposition that a landowner has a duty in tort to control rainwater runoff from her unimproved land onto a public road when she has taken no steps to artificially increase or channel the flow of water onto the road. Instead, *Powers* simply upheld a jury verdict in favor of a lowland owner against an upland owner who had installed a road and culverts and maliciously discharged the resulting increased accumulation of water onto the lowland owner. *Powers*, 553 A.2d at 140-41 (upholding punitive damages).

Plaintiffs final non-Mississippi authority, *DiBlasi v. City of Seattle*, 969 P.2d 10 (Wa. 1998), differs in no material respect from the ones discussed above—it also requires an affirmative act on part of the land possessor/alleged tortfeasor. Therein, the Washington Supreme Court held that a public entity can be held liable in tort for creating a public street that collects, channels and thrusts water onto a homeowner's property at double the natural flow rate. *DiBlasi*, 969 P.2d at 10, 16, 18. Thus, *DiBlasi* is, as are the other authorities cited by Plaintiffs, distinguishable from the instant case because Plaintiffs have adduced no probative

evidence pointing to an affirmative act performed by Mrs. Vanderbeck or the Vanderbeck Estate that changed the contour of the land and caused an "artificial discharge" or "accumulation of water" upon Coley Road.[11]

C. Uncontested facts and bare allegations—when Plaintiffs failed to produce even an iota of evidence that the Vanderbeck Estate created a dangerous condition on Coley Road—do not create triable issues of fact.

Neither bare allegations, a mere scintilla of evidence or hearsay are sufficient to rebut a properly supported motion for summary judgment. *Howard v. City of Greenwood*, 783 F.2d 1311, 1315 (5th Cir. 1986) (hearsay insufficient); *Branch v. Durham*, 742 So. 2d 769, 771 (Miss. App. 1999) (hearsay insufficient); *Davis v. Chevron*, 14 F.3d 1082 (5th Cir. 1994) (mere scintilla of evidence insufficient); *Brown v. Credit Center*, 444 So. 2d 358, 364 (Miss. 1983) (party opposing motion for summary judgment must bring forth significant probative evidence demonstrating the existence of a triable issue of fact) (citation omitted) (emphasis supplied); *see also* MISS. R. EVID. 801, 802. Nor does a mere "metaphysical doubt as to the material facts" create a genuine issue, *Matsushita Electric v. Zenith Electric*, 475 U.S. 574, 586 (1986), but rather the doubt regarding the material facts must rise to a level sufficient for a

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[11]Below, Plaintiffs argued that Section 547 of 40 Am. Jur. 2d (1998) supported their position. Section 547, however, does support the Plaintiffs' theory that a landowner has a duty in tort to control rainwater runoff from her unimproved property onto a public road when she has taken no steps to artificially increase or channel the flow of water onto the road. Instead, the Am. Jur. "authority" address situations in which the property owner or possessor has performed some affirmative act that changed the contour of the land and caused an "artificial discharge" or "accumulation of water" upon a public way. Moreover, the Am. Jur. "authority" and controlling case law in the jurisdictions of the cases cited by Plaintiffs distinguish cases such as the instant one in which natural forces cause a discharge or accumulation of water upon the highway. For example, Section 549 expressly recognizes that an abutting landowner is not liable for injuries sustained by passers by on public ways due to "ice formed . . . as the result of the natural flow of surface water onto the [public way], nor is such owner under any obligation to erect a barrier to keep water off." 40 AM. JUR. 2D HIGHWAYS, Streets and Bridges § 549.

reasonable juror to resolve the disputed issue in the nonmovant's favor. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986); *see also Smith v. Sanders*, 485 So. 2d 1051, 1054 (Miss. 1986).

1. Bob Coley's affidavit does not create a triable issue of fact because the relevant facts that he asserts were admitted for purposes of summary judgment.

The only arguable evidence offered by the Plaintiffs (other than the four-page excerpt of Mitchell Scruggs deposition testimony and the late submitted affidavit of Richard Forbes, which are discussed below) is the Affidavit of Bob Coley, which, construed in a light most favorable to the Plaintiffs (the standard this Court must apply in its review of this matter), establishes only that (a) before the wreck of January 12, 1996, water drained across Coley Road at a "big curve in the road which is South of the Ridgeway entrance between the Ridgeway entrance and The Furniture Market on Coley Road" at a point where a drive goes back East in the curve several times, that (b) said water had frozen on that location before the accident and that (c) the point at which the accident occurred was icy on January 12, 1996, and on the following day. Affidavit of Bob Coley, R. 410-12 (found in the Appellants' record experts).

Bob Coley's Affidavit does not create an issue for trial. The issue for purposes of summary judgment is not whether the water flowed from the Vanderbeck property. This allegation was admitted by the Vanderbeck Estate for purposes of the summary judgment:

> For purposes of its Motion for Summary Judgment only, [the Vanderbeck Estate] admits the following facts to be true and undisputed: that the water which traversed Coley Road at the site of the motor vehicle accident on January 12, 1996, was rainwater which flowed from Vanderbeck property adjacent to Coley Road, froze on the roadway and was the cause of the subject accident.

Itemization of Facts at ¶1 (R. 179).

The issue for purposes of summary judgment is whether Mrs. Vanderbeck or the Vanderbeck Estate performed an act to concentrate rainwater flow onto Coley Road, or, as Plaintiffs baldly assert, whether Mrs. Vanderbeck or the Vanderbeck Estate created "artificial conditions." The Vanderbeck Estate has provided testimonial evidence that neither it nor Mrs. Vanderbeck made any alterations to the unimproved Vanderbeck property, Flanagan Affidavit at ¶¶ 15, 17 (R. 207). Bob Coley's affidavit does not even address the issue of whether Mrs. Vanderbeck (or anyone else) made alterations to the Vanderbeck property. Plaintiffs reliance upon Bob Coley's affidavit to create a genuine issue of triable fact on the outcome determinative question of whether the Vanderbeck Estate or Mrs. Vanderbeck made any alterations to the unimproved Vanderbeck property is misplaced: the affidavit simply does not create a triable issue of material fact.

2. *Plaintiffs' unsupported assertions of fact and lawyer-made hearsay photographs do not create a triable issue of fact.*

Plaintiffs must bring forth significant probative evidence, not hearsay or lawyer-made photographs, to survive the Vanderbeck Estate's motion for summary judgment. *See supra* pp. 22-23. Yet, Plaintiffs merely advance conjectures based upon bald assertions of evidentially unsupported facts:

> The plaintiffs presented credible evidence that field roads extending from the ingress exhibited excessive wear and erosion in the form of ruts. These ruts captured the surface water from the Vanderbeck land and channeled it downhill toward Coley Road. The water then flowed over the culvert, spilled onto Coley Road and froze.

Plaintiffs' Brief at 11.

As explained above, the Coley Affidavit does not create an issue of triable fact. The unauthenticated hearsay photographs showing Mike Greer pointing at patches of dirt and grass are not competent evidence and were in fact taken after the accident. Moreover, neither the unauthenticated photographs nor the four-page excerpt of Mitchell Scruggs deposition (attached by the Plaintiffs to their response below, R 288-91) support Plaintiffs bald allegations that there are three "field roads," that there was concentrated run-off or Plaintiffs' theory that the culverts maintained by the City of Tupelo were unable to capture the runoff.

The Forbes Affidavit is based upon a review of the unauthenticated lawyer-made hearsay photographs and a viewing of the accident scene over four years after the date of the accident. R. 429, ¶8 (found in the Appellants' record excerpts). The affidavit is nothing but shear speculation based upon incompetent hearsay. Moreover, like the Coley affidavit, the Forbes affidavit does not even address the issue or whether Mrs. Vanderbeck (or anyone else) made alterations to the Vanderbeck property.

Finally, the four-page excerpt of Mitchell Scruggs' deposition testimony (attached by the Plaintiffs to their response below, R. 288-91) merely establishes that (a) Mr. Scruggs never saw any water freezing across the culvert and that (b) after the lawsuit was filed, Mr. Scruggs saw fresh ruts going up a hill (in an area in which work had recently been done, assumably by the City of Tupelo) that appeared to him to have been made by a car or truck. Like Bob Coley's affidavit, the four-page excerpt of Mitchell Scruggs' deposition testimony does not address the issue or whether Mrs. Vanderbeck (or anyone else) made alterations to the Vanderbeck property.

Plaintiffs' attempt to avoid summary judgment without probative evidence to rebut the testimonial evidence provided by the Vanderbeck Estate—i.e., that neither the Vanderbeck

Estate or Mrs. Vanderbeck made any alterations to the unimproved Vanderbeck property, Flanagan Affidavit at ¶¶ 15, 17 (R. 207)—is insufficient as a matter of law to overcome the Vanderbeck Estate's properly supported motion for summary judgment.

CONCLUSION

The Vanderbeck property was naked, unimproved land until 1975, when Lee County, purchased a 100-foot strip under threat of eminent domain and created the road in question, including the ditches and culverts. As supported by testimonial evidence, neither Mrs. Vanderbeck nor the Vanderbeck Estate did anything to improve the property and Plaintiffs have provided no evidence creating a genuine issue of material fact for trial on this issue. Moreover, Plaintiffs have failed to prove that a landowner has an enforceable duty in tort to fend off natural forces such as rainwater runoff or to modify unimproved property for the benefit of the traveling public.

Thus, while the accident was unfortunate and tragic, extension of tort law to the boundaries that Plaintiffs suggests "would not only be unjust, but preposterous. Wisdom, the disciple of experience, advocates the extension of a rule of law only so far as reasonable necessity requires." *McGill v. City of Laurel*, 252 Miss. 740, 764, 173 So. 2d 892, 903 (1965). Upon information and belief, Plaintiffs have already settled with the party truly at fault here, the public entity who failed to provide for adequate drainage of the road. Thus, there is no necessity to stretch the rule of law in this rural agricultural state to the point at which owners of unimproved lands become insurers of public highway users simply because rainwater runs off their property onto a public highway. Plaintiffs' attempt to foist the costs of road maintenance (or lack thereof) from the City of Tupelo to the Vanderbeck Estate (an

individual landowner) through tort law should be summarily rejected by the Court. For these reasons, the Circuit Court's Order should be affirmed.

Respectfully submitted, this the 17th day of September, 2001.

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CERTIFICATE OF SERVICE

I, Gregory M. Hunsucker, one of the attorneys for Appellees, do hereby certify that I have this day served the above and foregoing Brief of Appellee on the following via U.S. mail, postage fully prepaid:

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This the 17th day of September, 2001

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CERTIFICATE OF FILING

I, Phyllis Schmidt, do hereby certify that I have this day transmitted by Federal Express, for overnight delivery, postage prepaid, the original and three (3) copies of Brief of Appellee for filing to:

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This the 17th day of September, 2001.

Phyllis Schmidt