IN THE COURT OF APPEALS 12/3/96

OF THE

STATE OF MISSISSIPPI

NO. 93-CA-00178 COA

RAMONIA (RAMONA) ARRINGTON

APPELLANT

v.

A.C. CHAMBLISS

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. L. BRELAND HILBUN

COURT FROM WHICH APPEALED: HINDS COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

PATRICIA R. ALEXANDER

ATTORNEY FOR APPELLEE:

JULIE E. CHAFFIN

NATURE OF THE CASE: NEGLIGENCE

TRIAL COURT DISPOSITION: SUMMARY JUDGMENT IN FAVOR OF DEFENDANT

BEFORE THOMAS, P.J., COLEMAN, AND SOUTHWICK, JJ.

THOMAS, P.J., FOR THE COURT:

SUMMARY

On October 18, 1984, Arrington was a passenger in a pickup truck driven by Freddie Dearman which collided with a tractor-trailer vehicle owned by A.C. Chambliss, which was parked on Myer Avenue in Jackson. James Gray, who was going to use the vehicle on a trip, parked Chambliss' rig for a short period of time, for less than two hours, near his home. It is undisputed that the rig was parked flush with the curb in a residential area. The collision occurred around 9:00 P.M. in a well lighted area, and the rig was parked underneath a street light. The street was wide enough for a vehicle to pass the parked rig without crossing the centerline. There were no vehicles parked on the other side of the street, and there was no approaching traffic at the time of the collision.

Although he stopped at a stop sign approximately half of a block behind the rig, Dearman testified that he was driving approximately thirty-five miles per hour when he drove into the side of the trailer. Dearman also testified that he did not see the rig until a split second prior to impact.

Arrington filed suit against Chambliss in April 1985. Her complaint alleged that Chambliss was negligent per se for allegedly violating a Jackson city ordinance which prohibits leaving unattended commercial vehicles on any city street for more than two hours. The parties have since agreed that this ordinance is inapplicable to this case. After filing a motion for summary judgment to which Chambliss responded by filing a cross-motion for summary judgment on the only theory of liability in the complaint, Arrington filed a second amended complaint asserting negligence and public nuisance as additional theories of liability. Chambliss filed a supplemental motion for summary judgment addressing the two additional theories.

After hearing argument from the parties, the trial court granted summary judgment in favor of Chambliss on March 6, 1989, on all three claims. Arrington filed a motion to reconsider, alter or amend summary judgment in which she raised, for the first time, an alleged violation of a separate Jackson city ordinance.

After the trial court denied the motion to reconsider, Arrington appealed assigning as error the trial court's granting of summary judgment on all three theories of liability: (1) negligence, (2) negligence per se, and (3) public nuisance. Although we are generally hesitant to affirm summary judgments, we find no merit to this appeal since Arrington failed to raise any genuine issue of material fact on any theory of liability.

I. STANDARD OF REVIEW

In reviewing a trial court's granting of summary judgment, this Court conducts a de novo review. *Seymour v. Brunswick Corp.*, 655 So. 2d 892, 894-95 (Miss. 1995); *Daniels v. GNB, Inc*., 629 So. 2d 595, 599 (Miss. 1993); *Mantachie Natural Gas Dist. v. Mississippi Valley Gas Co*., 594 So. 2d 1170, 1172 (Miss. 1992). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." M.R.C.P. 56 (c). A material fact is any fact that "tends to resolve any of the issues, properly raised by the parties." *Webb v. Jackson*, 583 So. 2d 946, 949 (Miss. 1991) (citation omitted). The evidence must be viewed in a light most favorable to the nonmovant. *Morgan v. City of Ruleville*, 627 So. 2d 275, 277 (Miss. 1993) (citation omitted).

A party opposing a motion for summary judgment must be diligent in producing evidence showing the existence of a genuine issue of material fact. General allegations, unsupported by specific facts, are not sufficient. *Starnes v. City of Vardaman*, 580 So. 2d 733, 738 (Miss. 1991); *Brown v. Credit Ctr., Inc*., 444 So. 2d 358, 364 (Miss. 1983). Where a party produces no sworn evidence in opposition to a motion for summary judgment, the court must accept as true the affidavits produced by the other party. *MST, Inc. v. Mississippi Chem. Corp*., 610 So. 2d 299, 304 (Miss. 1992). To have the power to create an issue of material fact, the supporting documents must be (1) sworn, (2) made upon personal knowledge, and (3) show that the party making the statement is competent to testify. *Magee v. Transcontinental Gas Pipe Line Corp*., 551 So. 2d 182, 186 (Miss. 1989).

II. NEGLIGENCE

Arrington asserts that because Chambliss had a duty to exercise reasonable care in parking his rig on the street, the jury should have been allowed to determine whether Chambliss was negligent. Although the operator of a motor vehicle has a duty to exercise reasonable care as to the time, manner, and place in which he parks his vehicle, Arrington must also show that there is a genuine issue of material fact regarding a breach of this duty of care. *See Filgo v. Crider*, 168 So. 2d 805, 807 (Miss. 1964).

In a negligence action, a plaintiff must establish a triable issue of fact regarding each of the four elements of negligence in order to survive a motion for summary judgment. *Lyle v. Mladinich,* 584 So. 2d 397, 399 (Miss. 1991); *see also Grisham v. John Q. Long V.F.W. Post*, 519 So. 2d 413, 416 (Miss. 1988).

Arrington has totally failed to show any breach of the duty of care. Chambliss' rig was parked flush with the curb on a residential street where parking was allowed, on a well-lighted street, under a streetlight, for a short period of time, with more than ample room for a vehicle to pass his parked rig without crossing the centerline. There was no traffic on the road at the time of the collision, and, since the passenger side of Dearman's pickup hit the side of the trailer, the collision was more of a "sideswipe" than a rear end collision. In other words, if Dearman had simply continued driving straight down the road, he would have passed Chambliss' rig without incident, even though he admits he did not see the rig until immediately prior to the collision.

Unless the traffic on Myer Avenue was such that a reasonably prudent person would have known that an accident was likely to occur as a result of parking his rig on the street, Chambliss did not breach any duty to Arrington. *Faulkner Concrete Pipe Co. v. Fox*, 157 So. 2d 804, 806 (Miss. 1963). There is simply no proof whatsoever that such was the traffic situation in the instant case. As the *Faulkner Concrete* court noted, when affirming the granting of a peremptory instruction in favor of the defendant,

Defendant-truck-driver parked on a street in the city at a place where there was neither statute nor ordinance prohibiting such parking, and where there was ample room for traffic to pass unobstructed.

He did nothing more than thousands are doing in every city in America. We cannot hold that those thousands of automobile owners are liable when some other person runs into their parked automobiles.

Id. at 806. The trial court properly granted summary judgment on this theory of liability. There is no merit to this issue.

III. NEGLIGENCE PER SE

Arrington asserts that the trial court erred in granting summary judgment since Chambliss allegedly violated Jackson city ordinance section 27-221 which provides :

Whenever a vehicle is lawfully parked upon a street or highway in this city during the hours between a half hour after sunset and a half hour before sunrise and in the event there is sufficient light to reveal to any person or object within a distance of five hundred (500) feet on such street or highway, no light need be displayed upon such parked vehicle.

Whenever a vehicle is parked or stopped upon a street or shoulder adjacent thereto, whether attended or unattended, during the hours between a half hour after sunset and a half hour before sunrise and there is not sufficient light to reveal any person or object within a distance of five hundred (500) feet upon such highway, such vehicle so parked or stopped shall be equipped so that there shall be displayed upon such vehicle one or more lamps, projecting a light visible under normal atmospheric conditions for a distance of five hundred (500) feet to the front of such vehicle and projecting a red light visible under like conditions for a distance of five hundred (500) feet to the rear except that such parking light or lights need not be displayed upon any vehicle stopped or parked in accordance with other provisions of this chapter.

Jackson, Miss., Ordinances § 27-221.

The trial court properly granted summary judgment on this theory of liability for two reasons: (1) Arrington failed to timely raise any violation of this ordinance, and (2) Arrington failed to establish a genuine issue of material fact supporting any violation of the statute.

Arrington asserts that Chambliss was negligent per se in failing to have his parking lights on while his rig was parked on Myer Avenue. Although Arrington did raise the negligence per se theory in her initial complaint, Arrington's theory was based solely on a violation of a separate Jackson city ordinance which the parties have agreed is inapplicable in the instant case.

Arrington first pled a violation of section 27-221 in her motion to reconsider, alter or amend summary judgment. This was simply too late. When a claim is founded upon an ordinance, the ordinance must be specifically pled. M.R.C.P. 9 (d) cmt. When a party has knowledge of the facts and knew or should have known of any new theory of recovery, an amendment to assert a new theory of liability will not be allowed after summary judgment has been granted. *Bourn v. Tomlinson Interest, Inc*., 456 So. 2d 747, 749 (Miss. 1984).The trial court did not abuse its discretion in refusing to allow Arrington to amend after granting summary judgment where she had knowledge of all the facts and any theory of recovery should have been known to her when she filed the complaint.

See Briscoe's Foodland, Inc. v. Capital Assocs., Inc., 502 So. 2d 619, 623 (Miss. 1986); *Bourn*, 456 So. 2d at 749.

Further, even if Arrington had timely raised this ordinance, she has placed before the trial court no facts supporting such a violation to create a genuine issue of material fact that Chambliss did indeed violate the ordinance. Although the ordinance does furnish a standard of care, in order to establish a claim for negligence per se, Arrington must show that the ordinance was actually violated--that Chambliss breached this duty. *Thomas v. McDonald*, 667 So. 2d 594, 598 (Miss. 1995); *Cannon v. Jones*, 377 So. 2d 1055, 1058 (Miss. 1979) (citation omitted). Under section 27-221, Chambliss would have been required to provide lights for the rig only if the rig were not visible to persons within 500 feet or if the rig was not parked in accordance with other provisions of the city code. There is simply no proof whatsoever that the rig was not visible for a distance of 500 feet. In fact, numerous witnesses testified that the vehicle was clearly visible and was even sitting under a street light. Additionally, Chambliss' rig was parked in accordance with another city code provision, section 27-218, which provides: "Except as otherwise provided in this article, every vehicle stopped or parked upon a street where there are adjacent curbs shall be so stopped or parked with the right-hand wheels of such vehicle parallel to and within twelve (12) inches of the right-hand curb. . . ." Jackson, Miss., Ordinances § 27-218.

Since Arrington has offered no proof that Chambliss violated the ordinance, the trial court properly granted summary judgment in favor of Chambliss on this theory of liability. There is no merit to this issue.

IV. PUBLIC NUISANCE

Public nuisance is an unreasonable interference with a right common to the general public. Circumstances indicating that an interference with a public right is unreasonable include: (1) whether the conduct involves a significant interference with the public health, safety, peace, comfort, or convenience; (2) whether the conduct is proscribed by statute, ordinance, or administrative regulation; or (3) whether the conduct is of a continuing nature or has produced a permanent or long lasting effect with a significant effect upon the public right. *Leaf River Forest Prods., Inc. v. Ferguson*, 662 So. 2d 648, 664 (Miss. 1995). In order to recover damages for public nuisance, the plaintiff must have sustained harm different in kind, rather than in degree, than that sustained by the public at large. *Id.* at 664-65 (citation omitted.)

As discussed above, Arrington has totally failed to prove that Chambliss' conduct was negligent or in violation of an ordinance or statute. Further, even if Chambliss' conduct could be considered "continuing," Arrington has not shown how she sustained harm of a different nature than that which allegedly would have been sustained by the general public. There is no merit to this issue.

THE JUDGMENT OF THE CIRCUIT COURT OF HINDS COUNTY IN FAVOR OF THE APPELLEE IS AFFIRMED. ALL COSTS ARE ASSESSED TO THE APPELLANT.

FRAISER, C.J., BRIDGES, P.J., BARBER, COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.