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IN THE SUPREME COURT OF FLORIDA

SPRINGTREE PROPERTIES, INC., SPRINGTREE PROPERTIES, INC., as General Partner of SPRINGTREE LTD., PHASE I, and HARDEE'S FOOD SYSTEMS, INC.,

Petitioners,

vs.

JAMES P. HAMMOND, JR. and LUCY R. HAMMOND, his wife,

Respondents.
_____/

CASE NO. 87,684

2D DCA Case No. 95-00714

COPY

RESPONDENTS' ANSWER BRIEF ON THE MERITS

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Rules

STATEMENT OF THE CASE AND OF THE FACTS

Pursuant to Rules 9.210(c) and 9.120(f), Florida Rules of Appellate Procedure, Respondents will note only the areas of specific disagreement they have with the "Statement of Case and Facts" of Petitioners' Initial Brief on the Merits, hereinafter cited as "(IB at page number)". (Petitioners will sometimes be referred to herein as "Hardee's," as in their Initial Brief.) These areas of disagreement can roughly be divided into two categories.

Respondents' first area of disagreement with Petitioners' statement focuses on inclusions with which Respondents disagree, particularly Petitioners' argumentative and conclusory characterizations of the evidence as well as the opinion of the appellate court below. It is well established that such matters are not properly included in a brief's statement of the facts and of the case. *See, e.g., Williams v. Winn-Dixie Stores, Inc.*, 548 So.2d 829 (Fla. 1st DCA 1989) (statement of case and facts "unduly argumentative and contains matters immaterial and impertinent to the controversy between the parties"; motion to strike granted); *Pawley v. Pawley*, 160 Fla. 903, 37 So.2d 247 (1948) ("history of case" not to be confused with matters relating to "argument"; court will assume that argument has been placed in "argument" section of brief; discussion of evidence does not belong in "history" portion of brief.

Examples of these areas of disagreement include Petitioners' repeated characterizations of their corporate representatives' testimony as "unrebutted" (IB at 2, used twice), despite Petitioners' subsequent listing, on the very next page (IB at 3) of the affidavits and photographic evidence presented to the trial court supporting Respondents' contention that Hardee's parking area was negligently designed and/or constructed. While neither Hardee's nor Respondents found a record of a *similar accident* at this particular drive-through restaurant or at another Hardee's location, this "fact" cannot be equated with Petitioners' attempt to portray their evidence as "unrebutted."

An example of improper legal argument, not constituting a statement of either fact nor of the procedural history of the case, is found in Petitioners' claim (IB at 4) that the ruling of the District Court below was made "[d]espite" "numerous cases" that are purportedly "on all fours" with the case *sub judice*. As will be seen in the argument section of this brief, Petitioners predictably mischaracterize existing Florida case law as compelling the result Hardee's desires. The point here is that Petitioners have improperly asserted such argument in their brief's statement of the case and of the facts in the first instance.

In addition to the above inclusions in Petitioners' statement of the case and facts with which Respondents specifically disagree, Respondents also disagree with

Petitioners' *omission* of some of the facts concerning the evidence presented by Respondents' registered professional engineer expert witness. Petitioners correctly note that the expert's affidavit (R.479-487) concluded that Hardee's parking lot was negligently designed, since an automobile could mount a 5 inch curb traveling at only four miles an hour. (IB at 3). However, Petitioners fail to mention that, in addition to this scientific evidence showing how easily an accident such as the one in the instant case could occur at any of Hardee's drive-through restaurants, this same expert also noted that Hardee's original construction documents for the *particular location* where Mr. Hammond was injured specified the placement of four-inch steel bollards filled with concrete for the restaurant's trash dumpster area and at the drive-thru window area; yet none were specified for the head-in parking spaces immediately adjacent to the sidewalk and front door walkway. (R.480). Moreover, the same expert also noted by photographic evidence (R. 480,487) the existence and locations of bollards on the Hardee's premises, where Mr. Hammond was injured.

SUMMARY OF THE ARGUMENT

Hardee's claim (IB at 6), that "[m]ultiple decisions hold that a store . . . owner is not liable to an individual who is injured by a car which unexpectedly jumps the curb and drives onto the sidewalk," is an example of the classic half-truth. The operative word in Hardee's statement is the term

"unexpectedly." The bulk of the Florida case law on which Hardee's relies involved truly unusual, even bizarre, occurrences, most commonly involving motor vehicles crashing *through* store walls to injure patrons *inside buildings*. Such occurrences can truly be said to be "unexpected" as a matter of law. A car proceeding at a minimum of only four miles per hour, thus enabling the vehicle to "hop" a 5 inch curb and seriously injure a pedestrian patron *outside* a building that has as one of its main purposes the serving of fast foods to hungry motor vehicle operators, many of whom attempt to eat and drive simultaneously, is an entirely different matter.

Hardee's second argument is that a ruling that a jury should be allowed to consider foreseeability will lead to "broad and unreasonable liability which can be avoided only by barricading all sidewalks throughout the state." *Id.* Of course, Hardee's provides no economic or societal data to back up its claims of such dire consequences, which can best be described as the infamous "slippery slope," down which manufacturers and premises owners have always claimed everyone will surely slide if a court decision ever permits a jury to consider whether *reasonable* measures have been taken to ensure that purchasers or customers are not maimed or killed while using a product or visiting business premises.

Of course, the reason Hardee's cannot back up its familiar refrain with any sort of evidence is that these dire consequences never really happen. What *might* happen is that

Hardee's might end up charging an extra penny for its burgers and fries to help ensure the reasonable safety of its patrons. Whether Hardee's should have to take reasonable measures to protect its patrons, because a risk of serious harm is foreseeable, is a material issue precluding summary judgment in the instant case.

ARGUMENT

THE TRIAL COURT ERRED IN ENTERING SUMMARY FINAL JUDGMENT IN THE DEFENDANTS' FAVOR ON THE GROUND THAT, AS A MATTER OF LAW, THE DUTY OF REASONABLE CARE WHICH THE DEFENDANTS OWED TO ITS BUSINESS INVITEES WAS NOT BREACHED BY THEIR FAILURE TO MAINTAIN VERTICAL BUMPER POSTS BETWEEN THE HEAD-IN PARKING SPACES AND THE ADJOINING SIDEWALK IN FRONT OF THEIR "DRIVE-THROUGH" RESTAURANT.

Hardee's relies (IB at 7) on the following cases, which it claims involve "an automobile leaving the public roadway and striking an individual on a public sidewalk in front of a store": *Winn-Dixie Stores, Inc. v. Carn*, 473 So.2d 742 (Fla. 4th DCA 1985), *review denied*, 484 So.2d 7 (Fla. 1986); *Schatz v. 7-Eleven, Inc.*, 128 So.2d 901 (Fla. 1st DCA 1960); *Cabals v. Elkins*, 368 So.2d 96 (Fla. 1979); *Molinares v. El Centro Gallego, Inc.*, 545 So.2d 387 (Fla. 3d DCA 1989); *Jones v. Dowdy*, 443 So.2d 467 (Fla. 2d DCA 1984). As will be seen, Hardee's description of the factual circumstances of these cases, to be charitable, is inaccurate. Even were this *not* the case, however, it is worth noting that in the instant case Mr. Hammond was not on a "public sidewalk" on the perimeter of

Hardee's restaurant premises, but was on a sidewalk in front of the entrance door of the building, and the vehicle which struck Mr. Hammond did not leave a "public roadway," but was in Hardee's own parking lot.

Hardee's begins its discussion of these cases (IB at 7-8) with *Schatz v. 7-Eleven, Inc.*, 128 So.2d 901 (Fla. 1st DCA 1961), but glosses over the fact that the plaintiff in *Schatz* was struck by an automobile while *inside* the defendant's store building, unlike Respondent in the instant case. Respondents respectfully assert that the foreseeability of being struck by an automobile while *inside* a building is a totally separate consideration from the foreseeability of being struck by a car while standing outside, on a sidewalk directly adjacent to a parking space in which automobiles are expected to park facing towards pedestrians, as in the instant case. Injury from an automobile while the injured party is standing inside a building probably is not reasonably foreseeable. However, the evidence below, when viewed in a light most favorable to Respondents (the non-movant at the summary judgment stage) presents a jury question as to forseeability. This factual distinction was made in *Johnson v. Hatoum*, 239 So.2d 22 (Fla. 4th DCA 1970) (IB at 10) a subsequent case in which the court not only distinguished *Schatz* on these facts, but in which the court also disagreed with the test of foreseeability used in *Schatz*. 239 So.2d at 26-27.

The same analysis and distinction as applied above to *Schatz* is equally applicable to *Jones v. Dowdy*, 443 So.2d 467 (Fla. 2d DCA 1984) (IB at 7); *Cabals v. Elkins*, 368 So.2d 96 (Fla. 1979) (IB at 7-8); and *Krispy Kreme Doughnut Co. v. Cornett*, 312 So.2d 771 (Fla. 1st DCA 1975) (IB at 9). In all these cases the injured plaintiffs were *inside* the defendants' buildings when they were struck and injured by a motor vehicle.

At first glance the case of *Winn Dixie Stores, Inc. v. Carn*, 473 So.2d 742 (Fla. 4th DCA 1985) (IB at 8) appears to be more on point, since the plaintiff in *Carn* was injured while outside and standing on a sidewalk. While the distinction between being *within* the protected confines of a building (as in *Schatz*) and being *outside* such a building was not made by the court in *Carn*, Respondents respectfully assert that *Carn* is inapplicable to the instant case not only because it was, quite simply, wrongly decided, but also because *Carn* has been subsequently limited to its facts by the same court which originally decided *Carn*. (As will be seen, the facts in *Carn* are indeed distinguishable from those of the instant case.)

The reason *Carn is* inapposite to the instant case is because the automobile in *Carn left the roadway* and struck a plaintiff who was standing on a *public* sidewalk adjacent to the public road. This fact is not mentioned in Hardee's discussion of *Carn* (IB at 8), for obvious reasons.

Cohen v. Schrider, 533 So.2d 859 (Fla. 4th DCA 1988), unequivocally shows that *Carn*, on which Hardee's relies, does not apply to these facts:

> We are also aware of our decision in *Winn-Dixie v. Carn*, 473 So.2d 742 (Fla. 4th DCA 1985), but can easily distinguish it from this case. In *Winn-Dixie* the plaintiffs were injured by a car which left the *public roadway* in front of the grocery store and struck appellee on the *public sidewalk*. Here the car was in the defendant's parking lot and drove onto its store-front walk area and struck appellant.

533 So.2d at 860-61 (emphasis in original). The *Cohen* court also noted "the passage of . . .twenty-seven years" in deciding *not* to follow *Schatz*, even though *Schatz* was "very similar" on its facts to the *Cohen* case. 533 So.2d at 860.

Following its discussion of *Carn*, Hardee's moves on (IB at 8-9) to *Molinares v. El Centro Gallego, Inc., supra*, the only case of recent vintage on which Hardee's relies and which is not clearly distinguishable from the instant case. Respondents respectfully assert that the majority opinion in *Molinares* relies on the same inapposite case law relied on by Hardee's herein, without recognizing the glaring factual dissimilarities between such cases and the operative facts in *Molinares*.

In short, *Molinares* was wrongly decided. Respondents are not alone in this conclusion. Respondents would note that *Molinares* was decided by a very divided court. Respondents respectfully assert that the proper analysis, and the one more

in line with that of current Florida law, was voiced by the dissent of Judge Baskin in *Molinares*, who opined:

> Applying the decision in *Schatz v. 7-Eleven, Inc.*, 128 So.2d 901 (Fla. 1st DCA 1961), and deciding that the restaurant owner breached no duty to Molinares because the accident was not reasonably foreseeable, the trial court entered final summary judgment. The majority affirms; I would reverse.
>
> An occupier of premises has a duty to guard against foreseeable harm by maintaining the premises in a reasonably safe condition. *Earley v. Morrison Cafeteria Co.*, 61 So.2d 477 (Fla.1953); *Johnson v. Hatoum*, 239 So.2d 22 (Fla. 4th DCA 1970), *cert. dismissed*, 244 So.2d 740 (Fla.1971); *Carter v. Parker*, 183 So.2d 3 (Fla. 2d DCA 1966); *Schatz*. The duty extends to providing a reasonably safe method of egress and ingress for business invitees. *Marhefka v. Monte Carlo Management Corp.*, 358 So.2d 1171 (Fla. 3d DCA 1978); *Shields v. Food Fair Stores*, 106 So.2d 90 (Fla. 3d DCA 1958), *cert. denied*, 109 So.2d 168 (Fla.1959). In *Schatz*, the first district ruled that, as a matter of law, it was unforeseeable that an automobile parked in a marked stall would move forward, over a sidewalk and into a store, and injure a patron inside the store. The *Schatz* scenario is not present here. The automobile that struck Molinares was parked directly in front of the restaurant even though the marked stalls were on the side of the building. Molinares, unlike Schatz, was not inside the establishment at the time of his injury; he was in the process of entering the building when he was struck by the automobile. I am unable to say that, under these circumstances, such an accident was unforeseeable. Indeed, in other cases with similar facts, courts have held that the question of foreseeability is a matter for jury determination. *Thompson v. Ward Enter.*, 341 So.2d 837 (Fla. 3d DCA), *cert. denied*, 351 So.2d 409 (Fla.1977); *see*

> *also, Cohen v. Schrider*, 533 So.2d 859 (Fla. 4th DCA 1988); *Johnson*. I would therefore reverse the judgment and remand the cause to permit the jury to determine whether the accident was foreseeable and, thus, compensable.

545 So.2d at 389.

Hardee's then mentions (IB at 10) "[t]he four cases cited by the district court which appear to reach a contrary decision" to Hardee's position: *Grissett v. Circle K Corp. of Texas*, 593 So.2d 291 (Fla. 2d DCA 1992); *Cohen v. Schrider, supra*; *Thompson v. Ward Enterprises, Inc.*, 341 So.2d 837 (Fla. 3d DCA 1997); *Johnson v. Hatoum*, 239 So.2d 22 (Fla. 4th DCA 1970). But Hardee's discussion of these cases is again more noteworthy for its omissions than for the analysis itself. For example, in *Grissett* the court relied on *Cohen*, 593 So.2d at 293, instead of Hardee's cases of *Schatz* and *Jones v. Dowdy*.

Hardee's attempts to distinguish *Grissett* and *Cohen* because in these cases the premises owners "were aware of . . . instances of cars jumping curbs," but can only distinguish these cases by asking this Court to "*infer* that such problems arose because of the unique circumstances in the location in layout of the premises," while at the same time admitting that "these two decisions *do not* . . . state" that such was the case. (IB at 10, emphasis supplied). Such invited conjecture should not be a sufficient basis for this Court to reverse the long-standing tenet that if there are issues of fact and even

the "slightest doubt" remains, summary judgment cannot be granted. *Grissett v. Circle K Corp. of Texas, supra*; *Sfeir v. Equitable Life Assur. Soc'y of U.S.*, 595 So.2d 971 (Fla. 2d DCA 1992); *Martin v. Golden Corral Corp.*, 601 So.2d 1316 (Fla. 2d DCA 1992); *Williams v. City of Lake City*, 62 So.2d 732 (Fla. 1953) (if evidence raises slightest doubt on any issue of material fact, if it is conflicting, if it will permit different reasonable inferences, or if it tends to prove issues, it should be submitted to jury as question of fact to be determined by it).

Regarding the "notice" factor as it applies to foreseeability, Hardee's seeks to have this Court retreat to the days when the "first bite" rule was in vogue, effectively arguing that premises owners can safely ignore occurrences on other premises and fail to take reasonable precautions to protect their patrons unless and until one such unfortunate victim (here, Mr. Hammond) is maimed or killed on its premises. Thus, Hardee's insists that only *actual* notice is sufficient to allow a finding of foreseeability. Such a position is directly contrary to Florida case law on premises owners' liability for criminal attacks, in which it has repeatedly been established that any "notice" necessary for premises liability can be *either* actual *or constructive*. *See, e.g., Relyea v. State*, 385 So.2d 1378 (Fla. 4th DCA 1980), *overruled on other grounds, Avallone v. Board of County Comm'rs*, 493 So.2d 1002 (Fla. 1986); *Drake v. Sun Bank & Trust*

Co., 400 So.2d 569 (Fla. 2d DCA 1981); *Fernandez v. Miami Jai-Alai, Inc.*, 386 So.2d 4 (Fla. 3d DCA 1980); *Holly v. Mt. Zion Terrace Apts., Inc.*, 382 So.2d 98 (Fla. 3d DCA 1980).

This same approach has been used in parking lot injury cases in court decisions of other states as well. *See, e.g., Dalmo Sales of Wheaton, Inc. v. Steinberg*, 43 Md. App. 659, 407 A.2d 339 (Md. 1979) (testimony that it was "common practice" for some type of barrier generally to be used established jury question as to foreseeability requiring reversal of directed verdict for defendant); *McAllen Kentucky Fried Chicken No. 1 v. Leal*, 627 S.W.2d 480, 482 (Tex. Civ. App. 1981) (merely because similar accident had not yet occurred on premises did not mean that injury "was not foreseeable as a matter of law," since the "foreseeability element of proximate cause does not require the particular act to have been foreseen").

Respondents respectfully assert that the above two cases are more closely on point than Hardee's out-of-state authority, *Southern Bell Telephone & Telegraph Co. v. Dolce*, 342 S.E.2d 497 (Ga. Ct. App. 1986) (IB at 10), despite Hardee's claim that the Georgia case is "factually identical" to the instant one. Respondents are unaware of when Southern Bell went into the "drive-through" fast-food restaurant business. Respondents respectfully assert that if a *criminal* attack by a person *trespassing* on a business premises can be foreseeable based on what has occurred on other premises, as

held in the Florida case law, then surely a merely *negligent* act by a lawful *invitee* may be foreseen on such a basis as well. At some point, "common sense and experience" must enter the equation, *Johnson v. Hatoum, supra* 239 So.2d at 27, and a premises owner cannot "stick his head in the sand" like the proverbial ostrich, claiming ignorance of what is commonly known to be a danger to his patrons, simply because the first accident on his own premises has yet to occur.

Hardee's seeks to distinguish (IB at 10) *Johnson v. Hatoum* because "there were no marked parking spaces and 'vehicles were permitted to drive onto the premises and park anywhere and at any angle . . . as the operator wished.'" Respondents respectfully assert that such a distinction makes the result in *Johnson v. Hatoum* all the *more* appropriate in a case such as the instant one, where Hardee's did not leave its vehicular patrons to their own devices in the restaurant parking lot, but rather *directed* such customers to park in spaces in which the motor vehicle would be parked in spaces directly adjacent and at right angles to a sidewalk, from which Hardee's invited its pedestrian patrons to enter its store.

Another element of *Johnson v. Hatoum* present here is that Hardee's *does* use bollards to protect its buildings, trash dumpsters and electrical junction boxes from injury by vehicles. It should be up to a jury to decide whether similar measures are reasonably required to safeguard flesh-and-blood

pedestrian patrons. 239 So.2d at 27; *see also, Foster v. Po Folks, Inc.*, 674 So.2d 843, 846 (Fla. 5th DCA 1996) (restaurant's policy of escorting *employees* to cars at night to avoid criminal attack raised "inference management was aware of potential danger to employees;" court, reversing premises owner's summary judgment on foreseeability grounds, rhetorically asked "Why not its customers?"). To paraphrase the *Po Folks* court, if Hardee's knows that bollards protect its buildings, trash dumpsters, and electrical junction boxes, why not its customers?

Hardee's begins to conclude its argument with a "Pandora's box" argument under which "every premises owner" is "mandate[d]" to "erect barriers" in order to escape liability, a rule which supposedly "runs afoul of equal protection laws," apparently because this result will "hinder ingress and egress by persons in wheelchairs!" (IB at 11). While it is difficult to respond to such hyperbole other than to note the sheer magnitude of its overstatement, such a conclusion assumes that juries will suddenly discard the "reasonable man" standard at the very foundation of our entire tort jurisprudence, which standard has served our nation so well for so long. Similarly, this case is not a "slip and fall" case [*see*, IB at 12, *citing*, *Adventura Mall Venture v. Olson*, 561 So.2d 319 (Fla. 3d DCA 1990) and *Bowles v. Elles Pontiac Co.*, 63 So.2d 769 (Fla. 1953] and this Court's

affirmance of the district court opinion will have no effect whatsoever on such cases.

Finally, Hardee's seeks to distinguish *McCain v. Florida Power Corp.*, 593 So.2d 500 (Fla. 1992) (IB at 12) by characterizing it as a "product liability" claim (*id.* at 13), even though the danger in *McCain* was a *buried underground cable*. Obviously, such a situation involves a fixture to real property and is much closer akin to a premises liability case than a products liability case. But even if such were not the case, the appellate court's holding below is clearly correct under the previously-discussed Florida case law on foreseeability, and citation to *McCain* cannot alter that inescapable conclusion.

CONCLUSION

For the foregoing reasons, the decision of the district court below must be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 14th day of August, 1996, to: Shelley H. Leinicke, Esq., WICKER, SMITH, TUTAN, O'HARE, McCOY, GRAHAM & LANE, P.A., attorneys for Springtree Properties, Inc., d/b/a Hardee's, One East Broward Blvd., Fifth Floor, P. O. Box 14460, Fort Lauderdale, Florida 33302.

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