

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION**

**VICKI WHITEAKER and
LEONARD WHITEAKER**

PLAINTIFFS

VS.

CIVIL ACTION NO: 3:08cv00129

FRED'S STORES OF TENNESSEE, INC.

DEFENDANT

**PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT**

COME NOW Plaintiffs, by and through the undersigned counsel, and file this response to Defendant's Motion for Summary Judgment (Doc. 89) and Memorandum in Support of Defendant's Motion for Summary Judgment (Doc. 90). In support thereof, Plaintiffs would show unto this Court as follows:

PLAINTIFFS' STATEMENT OF FACTS

This is a trip and fall case involving allegations that Defendant Fred's Stores of Tennessee, Inc. (Fred's) created a dangerous condition outside its Southaven, Mississippi store location by constructing a barricade made out of cinder blocks and landscape timbers that was approximately 12" high (also referred to as a "corral") and in the direct walkway of patrons entering and exiting its store. Photographs of the barricade are attached hereto as **Exhibits A-1** and **A-2**.

On December 23, 2006, Plaintiff, Vicki Whiteaker, was a customer at the Fred's store in Southaven, Mississippi. Other than Thanksgiving week, the Christmas shopping season was the busiest time of the year for Fred's. Excerpts from deposition of Kimberly

Jones attached hereto as **Exhibit B**, pp. 13-14; Excerpts from deposition of Mike Barthol attached hereto as **Exhibit C**, p. 27. During the Thanksgiving week, Fred's would take down the barricades because there were a "lot of people" and "much traffic". It was a safety issue. **Exhibit B**, pp. 35-37; **Exhibit C**, pp. 24-25.¹ The barricades were not removed during Christmas and were in place at the time of Plaintiff's fall.

On December 23, 2006, Plaintiff parked on the southwest corner of the parking lot at the Southaven Fred's store because the lot was full of cars. Excerpts from deposition of Plaintiff, Vicki Whiteaker attached hereto as **Exhibit D**, p. 24. She walked along the sidewalk on the front of the building and entered the store through the exit door. **Exhibit D**, p. 26. As a result, she never saw, nor encountered the barricades situated in front of the Fred's store. **Exhibit D**, pp. 26-27.

After Plaintiff finished her shopping, she checked out and exited the store through the exit door and began walking towards her vehicle in the parking lot. She was looking for her car and for traffic in the parking lot when she tripped and fell over the wooden railing of the barricade.² **Exhibit D**, pp. 31, 33, 34. Plaintiff struck both legs on the wooden railing just above her ankles, causing her to fall and land on her face and arms. The fall resulted in her severely breaking both arms, injuring her neck and chest, and breaking several of her teeth. **Exhibit D**, pp. 34-36.

¹ Despite the conflicting testimony of its employees, Defendant has chosen to assert in its motion for summary judgment that the decision to erect this barricade was all about safety and not about protecting Fred's merchandise from shoplifters. If safety of the customer were truly the reason for erecting these barricades, one might ask why Fred's would take them down for safety reasons during the busiest time of the year.

² Defendant has represented to this Court that the railing over which Plaintiff tripped and fell was approximately 15 ¾ inches in height. This figure represents the height of the top of the cinder block—not the wooden railing that is only 12" in height. It is undisputed that Plaintiff tripped over the wooden railing and not over the cinder block. **Exhibit D**, p. 32. See also, Exhibit 4 (diagram of barricade) to Defendant's motion for summary judgment.

Kim Jones, an employee of Fred's that was standing by the exit door and admits to having a direct view of the events, saw Plaintiff from the time that she left the checkout until the time that she fell. **Exhibit B**, pp. 8-9, 15. According to Ms. Jones, Plaintiff was walking normally and looking at her receipt when she tripped over the barricade. **Exhibit B**, pp. 8-10.

Plaintiff was not running or walking briskly, and there was nothing about the manner in which Plaintiff was walking that indicated (in any way) that she was in a hurry. **Exhibit B**, pp. 8- 10, 40-41, 49. Jones testified as follows:

Q: She wasn't even walking fastly (sic) out of the store; was she?

A: No.

Q: She was taking her time. She was looking at her receipt. Her eyes were gazed on the parking lot. Correct?

MR. JOLLY: Object to the form.

A: Yes.

Exhibit B, p. 49, lines 9-16. Barbara Newberry, the only other employee of Fred's that claims to have been an eyewitness to this incident confirms that Plaintiff was walking, not running. Ms. Newberry admits that she doesn't personally know whether the stride she witnessed from Mrs. Whiteaker was a hurried walk or just her normal walk.³

Excerpts from deposition of Barbara Newberry attached hereto as **Exhibit E**, p. 64.

³ Defendant has asserted (via footnote No:1 in its Motion) that "testimony exists that Plaintiff was in a rush as she exited the store because two small children were left unattended inside her car". Notably, Defendant does not cite to this testimony. A plain reading of the deposition testimony in this case establishes that Plaintiff was not running, walking fast, or actively doing anything that would indicate that she was in a hurry. **Exhibit B**, pp. 8- 10, 40-41, 49; **Exhibit E**, p. 64 ; **Exhibit F**, p. 160.

According to Jones, she has no doubt that Plaintiff did not see the barricade prior to her fall. **Exhibit B**, p. 9. Ms. Jones testified that the barricade in question was, in her opinion, too low and caused her concern for the safety of patrons. She admitted that people leaving the store and entering the parking area could be prone to falling over this barricade, and that it was a hazard. **Exhibit B**, pp. 17-19, 43-44.

Barbara Newberry also described the railing over which Plaintiff fell as a potential hazard and expressed her concern that customers who were walking out of the store with packages in their hands (as was Plaintiff) would trip over this barricade that had been placed outside of the exit door to Fred's. By her own admission, she had these concerns before Mrs. Whiteaker fell, but she never discussed her concerns with management or her co-workers at Fred's. **Exhibit E**, pp. 27-28, 40-41, 49.

Fred's designed the barricade in such a manner, as to insure that when customers came out of the exit door, they could not walk directly out into the parking lot, but instead they would have to stop, make a turn to the right, and exit out of a 10 ft wide opening in the barricade. Mike Barthol, manager of the Southaven Fred's store, stated that he was simply told by corporate to buy timber and cylinder blocks and to erect "*some type of a barrier so that when folks came out the door, they couldn't go straight out, they would have to stop, make a little turn, and then go out that way (indicating)*". **Exhibit C**, p. 20. The configuration of the barricade amounted to an elaborate maze designed to redirect and slow down would be shoplifters and prevent "run-outs".⁴

⁴ A "run-out" has been defined by Fred's employees as a situation where a shoplifter fills a shopping cart full of merchandise and runs out of the store to the parking area to escape by car.

Prior to Plaintiff's fall, Jones had witnessed customers exiting the store and stepping over the barricade in order to get to the parking lot (instead of going out of the designed 10ft opening in the barricade). **Exhibit B**, pp. 32, 64. Despite the fact that she has seen children playing and jumping over the barricade, she testified that she was not expected by Fred's to stop them, nor was this conduct discouraged by Fred's. **Exhibit B**, p. 31. Newberry also testified that she had seen children and adults jumping over the barricade in order to cross into the parking lot. **Exhibit E**, pp. 23-24.

Plaintiff had not shopped at this Fred's location for more than a year prior to her fall. The last time she had shopped at this Fred's store location, the barricade was not in place. **Exhibit D**, p. 24. According to David Whittington, co-manager of the Southaven Fred's store and constructor of the barricade in question, the barricade was installed in the spring of 2006, or approximately 6 months before Plaintiff's fall. Excerpts from deposition of David Whittington attached hereto as **Exhibit F**, pp. 24-25.

According to Whittington, he was told by his manager, Mike Barthol, to put up the barricade to deter theft at the store. **Exhibit F**, p. 36. Barthol, in turn, testified that he was told by Fred's district manager David Bonar and regional manager Barry Maxwell to put up the barricade after Barthol complained to them that he was having problems at the Southaven store with customers filling up their shopping carts and running out of the store with merchandise ("run-outs"). **Exhibit C**, pp. 14-15. Barthol and Whittington are both adamant that the **only** purpose of this barricade was to deter theft. **Exhibit F**, pp. 35, 38, 45-46, 82, 101, 121, 142, 143-144; **Exhibit C**, pp. 14-15, 21-23, 25, 56, 60, 63.

According to both Whittington and Barthol, potential safety hazards associated with setting up this barricade were never discussed. The primary concern of Fred's and its employees was preventing shoplifting. **Exhibit F**, pp. 82, 86, 101; **Exhibit C**, pp. 25-

26. Whittington testified as follows:

Q: You and Mike never discussed safety issues associated with putting these in a pathway exiting the store to the parking lot, did you?

A: Not that I am aware of.

Q: Because it wasn't important to you at the time, was it?

A: We was deterring shoplifters.

Q: Saving money for the store; correct?

A: Correct.

Exhibit F, p. 142, lines 1-10.

Barthol never contemplated or discussed with anyone the potential trip hazard associated with putting landscape timbers at ankle/shin level. **Exhibit C**, p. 31. More importantly, Barthol testified that he **never even considered safety** when constructing this barricade. His testimony was follows:

Q: Was there ever a discussion between you and Mr. Bonar or you and the regional manager or you and Mr. Whittington about setting these up in a manner that would provide a safe environment for customers at Fred's?

MR. JOLLY: Object to the form. You can answer.

A: I don't recall one.

Q: (By Mr. Stroud) Okay. Was that something that you considered when you put it up?

A: No, Sir.

Q: Okay. And the reason was because the primary focus was protection of the company assets; right?

A: Yes sir.

Exhibit C, pp. 25-26.⁵

According to Whittington, he received no instruction from anyone at Fred's regarding how to construct the barricade, he did not consult any engineering or code enforcement officials, and he underwent no training as it relates to designing or installing this type of barricade. **Exhibit F**, pp. 33, 34, 49, 78. In fact, Whittington testified that he received no direction from any source other than he and Barthol "*going out there and figuring out the best way [you] could to do it*". **Exhibit F**, p. 39.

Similarly, Barthol did not consult or consider any building code, and he never had any discussion with anyone at Fred's about the design or safety of this barricade. Barthol never discussed painting the wooden railings to make them more visible to people exiting the store, and Fred's corporate never even inspected the finished project. **Exhibit C**, pp. 20, 61, 46-47. Barthol testified as follows:

Q: Okay. Now you've told me he didn't give you any specific direction as far as putting them up—

⁵ Defendant's motion repeatedly suggests that the main reason for constructing this barricade was for the safety of its customers. Specifically, Defendant points to the perceived danger to customers from other customers parking cars at the front entrance of the store. Notably, the safety of customers was never mentioned by the first two deponents in this case (David Whittington and Mike Barthol—co-managers of the store location) as a reason for constructing this barricade. To the contrary, they repeatedly stated that the **only** reason for this barricade was to prevent theft of store merchandise. See **Exhibit F**, pp. 35, 38, 45-46, 82, 101, 121, 142, 143-144; **Exhibit C**, pp. 14-15, 21-23, 25, 56, 60, 63. Whittington and Barthol were deposed on March 30, 2009, but it was not until the 30(b)(6) deposition of Fred's taken over a year later on April 5, 2010, that Plaintiff first heard that "safety of customers" was even a factor, much less the main reason for constructing the barricade. See, Excerpts from deposition of David Bonar attached hereto as **Exhibit G**, pp. 13-14, 16. John Corner, Fred's Loss Prevention Manager and 30(b)(6) designee, testified that the "primary concern is the safety of our customers, and the reason that this corral was constructed is because it really wasn't for fear of losing merchandise; we were afraid somebody was going to get run over". Excerpts from deposition of John Corner attached hereto as **Exhibit H**, p. 24. Corner went on to say that, "It had nothing to do with preventing shrinkage as much as it did for preventing accidents in that parking lot". **Exhibit H**, p. 25-27. Contrary to his earlier statements, Corner admits that he was in no way involved in the decision to construct this barricade and that he has never even seen them. **Exhibit H**, p. 11, 14, 27. Interestingly enough, Corner seems to testify that he bases his opinion about safety being the primary reason for constructing the barricade not on conversations he had with Fred's personnel, but instead, upon conversations he has had with his attorney. **Exhibit H**, p. 27.

A: None that I recall.

Q: -- he just said, "put them up"?

A: Yes sir.

Q: He did he give you any examples of other stores other than Wal-Mart that use them?

A: No, sir.

Q: Did he tell you to go -- "hey, go drive by Wal-mart, see how they put them up and follow their example"?

A: No, sir.

Q: Did he do anything, other than just tell you that he wanted barricades up to prevent shoplifting?

A: I do not recall anything else, no.

Exhibit C, pp. 29-30.

David Bonar, one of Fred's 30(b)(6) deponents has a different recollection than that of Barthol and Whittington. Bonar testified that instructions were given to Barthol to (1) make the barricade open and obvious, (2) make the entry way at least six feet wide, and (3) make the railings two cinder blocks high. **Exhibit G**, pp. 18, 69. However, like Whittington and Barthol, Bonar admits that Fred's did not consult with any building expert, architect, or code officer, as it was, in his opinion, unnecessary. **Exhibit G**, p. 34. The barricade was open and obvious, so therefore it must be safe to the customers.

Exhibit G, pp. 35-37.

Finally, despite the fact that the wooden railing on the barricade was raised after Plaintiff's fall to eye-level for safety reasons, its height (or lack thereof) and the dangers

associated with same were never discussed during the planning or construction phase of this barricade. **Exhibit C**, p. 64. **Exhibit G**, p. 31.

Prior to working at Fred's, Bonar had worked for other companies that utilized merchandise corrals—specifically Wal-Mart. Bonar admits that he has **never** built a barricade directly in the walkway of a store's entrance and exit as was done at the Southaven Fred's store location. **Exhibit G**, pp. 11-12.

John Corner (Fred's Loss Prevention manager) also had experience with yard and garden merchandise corrals while working for other companies (Central Hardware, T.J. Maxx, and Wal-Mart). **Exhibit H**, p. 29. Notably, none of Corner's prior employers ever utilized corrals under the guise of "safety for customers" or positioned them in the manner that they were positioned at the Southaven Fred's store—just outside the entrance and exit to the store. **Exhibit H**, p. 29-30.

Out of approximately 661 Fred's store locations in Texas, Oklahoma, Arkansas, Missouri, Illinois, Indiana, Kentucky, Tennessee, Mississippi, Alabama, Georgia, Florida, South Carolina and North Carolina, the Fred's store in Southaven, Mississippi was the **ONLY** store location identified by Fred's to have utilized this type of barricade. **Exhibit G**, pp. 14, 36-37, 89; **Exhibit H**, pp. 23.

According to Plaintiff's expert, E.J. Lacoste, III, who has over 46 years of experience in the field of architecture and planning, the placement of concrete blocks and landscape timbers by Fred's employees directly in front of the entrance and exit of Fred's in Southaven, Mississippi, constituted an unreasonably dangerous condition to patrons of Fred's. He further opines that by placing the low barricade (approximately 1'-0" in height) directly in front of both the entrance and exit to the building, Fred's created a trip

hazard, difficult to see and certainly not usual or expected to exist in a typical parking lot in front of a store. Furthermore, the trip hazard exiting the Fred's store was even greater due to the foreseeable and reasonable expectation that customers would be carrying packages that would even further block their view. According to Lacoste, every level of Fred's administration failed to seek counsel from a design/construction professional prior to erecting a structure hazardous to the health, safety, and welfare of the general public.

Lacoste will testify consistent with his written report that the barricade constructed by Fred's failed to meet the minimum standards as set forth by the 2003 International Building Code, and that even the efforts by Fred's to raise the barricade after the accident, in his opinion, still did not meet the past 2003 International Building Code or the current 2006 International Building Code. Copy of written report by E.J. Lacoste attached hereto as **Exhibit I**.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate only when the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U. S. 317, 323 (1986). An issue of material fact is genuine if a reasonable jury could return a verdict for the non-movant. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). Furthermore, in reviewing the evidence, the Court must draw all reasonable inferences in favor of the non-moving party. *Reeves v. Sanderson Plumbing Prods. Inc.*, 530 U.S. 133 (2000).

ARGUMENT

On the date of the incident, Mrs. Whiteaker enjoyed the status of business invitee and as such Fred's owed her a duty to exercise reasonable care to keep the premises in a reasonably safe condition and, if Fred's was aware of a dangerous condition which was not readily apparent, it was under a duty to warn of such a condition. *Whalen v. The Kroger Co.*, 2007 WL 20288932 (N.D. Miss); citing *Jerry Lee's Grocery, Inc. v. Thompson*, 528 So.2d 293, 205 (Miss. 1988). The record in this case provides ample evidence for this Court to conclude that the barricades constructed on the premises of Fred's constituted an unreasonably dangerous condition, and that Fred's knew of the danger and failed to warn Mrs. Whiteaker. Furthermore, a reasonable juror could find that Plaintiffs' injuries were proximately caused by Defendant's breach of these duties.

Premises liability analysis under Mississippi law requires three determinations: (1) legal status of the injured person, (2) relevant duty of care, and (3) defendant's compliance with that duty. *Massey v. Tingle*, 867 So.2d 235, 239 (Miss.2004). It is undisputed that Mrs. Whiteaker's status was that of a business invitee at the time of her accident, and that the premises encountered by a business invitee must be reasonably safe, and when they are not, the invitee is to be warned of perils that are not in plain view. *Id.*

I. The barricade constructed by Fred's at the Southaven store location was unreasonably dangerous.

Defendant argues in its motion for summary that the Plaintiff has failed to establish that the barricade made the basis of this action was unreasonably dangerous, and that as a result, this Court should rule on the danger posed by the barricade as a matter of

law. In support, Defendant argues a plethora of cases that have held that readily noticeable conditions, such as stools, chairs, garden hoses, basketball displays, etc., are not unreasonably dangerous as a matter of law, and therefore, the barricade in question must not be as well. Each case cited by Defendant has its own unique set of facts that are easily distinguishable, and none of which are analogous to the case at hand.

A. Defendant's Open and Obvious Defense

Defendant's argument that a reasonably prudent patron would readily notice the barricade is another way of saying that this barricade was "open and obvious" and by definition not unreasonably dangerous. This logic has been rejected by the Courts and most recently analyzed in the case of *Wood v. RIH Acquisitions MS II, LLC*, 556 F.3d 274 (5th Cir. 2009)⁶.

In *Wood*, a business invitee brought action against a casino owner to recover for injuries sustained when she tripped and fell on a reflector at the casino's *porte cochere*. The trial judge entered summary judgment in the owner's favor, and on appeal the Fifth Circuit held that fact issues remained as to whether the reflectors were unreasonable dangerous and whether they were open and obvious. In the *Wood* decision, the Court affirmed that under Mississippi law, because an open and obvious condition can be unreasonably dangerous, an owner is not exonerated simply because the dangerous condition was obvious. 556 F.3d at 273 (emphasis added). In its review of the history of Mississippi premises liability law, the Court noted:

"We review some recent history of Mississippi premises liability law in order to highlight our understanding of the current applicability of certain precedents. Until relatively recently, a hazard that was open and obvious to an invitee could

⁶ Counsel for Defendant in the *Wood* case is the same counsel representing Defendant Fred's in this case.

not be the basis for liability. In one example, there was no liability when a patron stumbled on a curb that was six inches high, six inches wide, and painted orange, because the hazard was open and obvious. [Kroger, Inc. v. Ware, 512 So.2d 1281, 1282 \(Miss.1987\)](#). However, that case was quoted and its analysis superceded in a precedent that declared that the obviousness of a hazard was simply a component of comparative negligence. [Tharp v. Bunge Corp., 641 So.2d 20, 23-24 \(Miss.1994\)](#). **Recently, the Mississippi Supreme Court has stated that an open and obvious hazard can be unreasonably dangerous and a basis for liability. [Mayfield, 903 So.2d at 739](#)**".

Id. at 275-276 (emphasis added). The *Wood* Court in citing *Bell v. City of Bay St. Louis*, 467 So.2d 657, 664 (Miss.1985), stated that "Whether a danger is open and obvious is a question for the jury in all but the clearest cases". 556 F.3d at 281.

B. The barricade was not something Plaintiff should have normally expected to encounter at Fred's.

In its analysis, the *Wood* Court also addressed the issue of whether the alleged dangerous condition was one that was usual and one that customers would normally expect to encounter on the business premises. The Court noted:

"We contrast this fairly recent innovation in the open and obvious defense, to some caselaw relating to "dangers which are usual and which customers normally expect to encounter on the business premises, such as thresholds, curbs and steps." [Tate v. Southern Jitney Jungle Co., 650 So.2d 1347, 1351 \(Miss.1995\)](#). The category of usual and normally expected dangers was apparently created in [Tate](#), as no prior reference to that concept in the state's jurisprudence has been discovered. Part of the reason for the creation may be that [Tate](#) was released a year after [Tharp](#) and needed to address and perhaps minimize concerns about how much was altered on the legal landscape. [Tate](#) favorably discussed a pre-[Tharp](#) precedent which had held that a door threshold that was raised three-fourths of an inch from the height of the approach from each side had not made the premises unreasonably dangerous. *Id.* (citing [McGovern v. Scarborough, 566 So.2d 1225, 1228 \(Miss.1990\)](#)). Arguably, the curb in the 1987 [Kroger](#) precedent we just discussed would be similarly expected and non-actionable. [Tate](#) itself involved a customer who scraped her knee on a sharp-edged metal strip fastened beneath a delicatessen counter. The strip was below the usual line of sight. A jury question existed on whether that strip caused the premises to be unreasonably dangerous. *Id.* [Tate](#) can be read to find that door thresholds are in the category of hazards that can be expected and therefore do not make premises unreasonably dangerous, while the sharp metal strip beneath a deli counter was not such an expected hazard."

556 F.3d at 276.

As discussed above, the barricade made the basis of Mrs. Whiteaker's claim was not the type of hazard that she could have reasonably expected to encounter outside of the entrance to Fred's dollar store. Nor was this barricade, in any way, analogous to the line of Mississippi cases holding that conditions such as undamaged thresholds, curbs, steps, or other common architectural features for buildings and parking lots are not unreasonably dangerous. See *Tate v. Southern Jitney Jungle Co.*, 650 So. 2d 1347, 1351 (Miss. 1995).

To the contrary, the Fred's barricade was absolutely "one of a kind". Simply stated, out of over 661 Fred's stores, Defendant cannot identify one store location (apart from the Southaven store) that utilized this barricade, much less utilized it in such a dangerous manner. Both of Fred's 30(b)(6) deponents (Bonar and Corner) had work experience outside of the Fred's organization, and while both of them have been involved in the construction of "corrals" for other employers, neither one of them have ever seen corrals constructed in the direct walkway of customers attempting to enter or exit a store.

Defendant has also misrepresented in its motion that "*Plaintiff encountered and walked around the corral as she entered the store*" in an attempt to insinuate to this Court that she was familiar with the corral and that it was something that she was accustomed to seeing or something that was a usual and customary site at Fred's. First, the record is absolutely devoid of any evidence that Plaintiff encountered and walked around the corral as she entered the Fred's store. To the contrary, Plaintiff's testimony makes it clear that she approached the store from the sidewalk on the south side of the building (not from the front of the store), thereby never seeing or encountering the barricade prior to her fall. Plaintiff further testified that she had not shopped at this store location in the year prior to

her fall (the barricades were installed 6 months before her fall). **Exhibit D**, p. 24; **Exhibit F**, pp. 24-25.

Finally, Defendant has argued that from the time that this corral was erected until the time of Plaintiff's fall, over 200,000 customers have come through the store location, and Plaintiff's accident was the first and only incident in which someone tripped over the corral.⁷ In other words—the corral must be safe! Defendant supports this assertion by stating in its motion that this corral was constructed by Fred's "in response to concerns regarding customer safety", "to keep customers safe", and as "as a safety measure". Defendant cites to the deposition testimony of Bonar and Corner, which were taken over a year after the depositions of the store manager (Barthol) and co-manager (Whittington) for the proposition that the barricade was constructed for the safety of its customers.

However, Defendant fails to mention in its motion that Barthol and Whittington did not hold this opinion, but instead were very adamant that the **only** reason for the installation of these barricades was to prevent shoplifting and to protect the company's assets. Interestingly enough, it was not until after their testimony, did Fred's first assert through its corporate representatives that safety was the company's primary concern. This argument is disingenuous at best. Furthermore, one might think that a business with 661 store locations and over 200,000 people walking through its doors in Southaven in a six (6) month time frame would, at a minimum, for the safety of its customers, consult with a professional before constructing such a "make-shift" barricade.

⁷ In *Wood*, Defendant likewise argued that Bally's had received no reports of patrons tripping over the reflectors. The absence of previous incidents was not a determining factor in the Court's decision. 556 F.3d at 275.

Defendant in the *Wood* case made the same “safety” argument in attempt to persuade the Court to rule that the reflectors in question were not unreasonably dangerous as a matter of law. The Court, in response, stated:

“Accordingly, even though motor vehicle drivers may well use the *porte cochere* with greater safety due to the reflectors, also to be considered are the safety needs of pedestrians as they exit their cars or approach the casino entrance from elsewhere. **We find nothing in the precedents that allows us to conclude that because the claimed hazard was actually a safety device, it could not be unreasonably dangerous.**”

556 F.3d at 280.

* * *

“The casino argues that the driveway area was reasonably safe despite the presence of numerous small attachments to the pavement. **These objects serve a safety purpose for vehicles.** To a pedestrian emerging from a vehicle, though, they may be overly low protrusions that cannot be seen. They also are sturdy and raised enough to trip a person. We cannot accept that summary judgment can reach a proper answer here”.

556 F.3d at 281.

As an aside, one might ask if Fred’s truly intended this barricade to serve as a safety feature for its customers, why would they ever take it down? Apart from the fact that Fred’s removed it after Mrs. Whiteaker’s fall, Fred’s further admits that this barricade was routinely taken down (prior to Plaintiff’s fall) during the days following Thanksgiving due to the high store volume and traffic. What was Fred’s reasoning? According to a former Fred’s employee, Kimberly Jones, the barricade was taken down due to customer safety concerns. She testified as follows:

Q: Now according to the testimony of Mr. Barthol and Mr. Whittington in this case, they would take down the barricades during the busiest time of the year. I think the day after Thanksgiving, sometime around there. Do you recall that?

A: Yes.

Q: And do you know why they would take the barricades down on one of the busiest days of the year?

A: A lot of traffic.

Q: Okay. Why would it matter if there was a lot of traffic? Why would you take it down, if you know?

A: Why would you take it down with a lot of traffic? I'm not sure.

Q: You think it was a safety issue?

A: Yeah.

Q: Why?

A: Because due to a lot of traffic, you have to avoid people, and it would be a lot of shopping carts in an out of the store, too. So it would cause confusion within the customers of having to stop and wait and go around and try to step over—step over that due to other customers—avoiding other customers and collisions and stuff like that.

Q: So, the more traffic there is, the more likelihood someone could be hurt on the barricades, as they're constructed in Exhibit 1?

A: Yes.

Exhibit B, pp. 35-37.

C. The barricade was not painted, flagged, or otherwise marked, and was in violation of the minimum standards of the 2003 IBC

Despite all of the arguments raised by Defendant to support its claim that the barricade in question was not unreasonably dangerous, it is undisputed that it was positioned directly in the walkway of customers entering and exiting the front of the store. The railing over which Plaintiff fell was 12" high (ankle/shin height), it was not painted a contrasting color, and there were no warning signs or flags to alert customers of its presence.

According to Plaintiff's expert, E.J. Lacoste, III, the placement of concrete blocks and landscape timbers by Fred's employees at a height of 12" and directly in front of the entrance and exit of Fred's in Southaven, Mississippi, constituted an unreasonably dangerous condition to patrons of Fred's. Furthermore, by placing the low barricade directly in front of both the entrance and exit to the building, Fred's created a trip hazard that was difficult to see and certainly not usual or expected to exist in a typical store parking lot. Lacoste is also of the opinion that the barricade constructed by Fred's failed to meet the minimum standards as set forth by the 2003 International Building Code, as it failed to provide a continuous and unobstructed way of egress travel from the building to the parking area, among other things. See, **Exhibit I**. Defendant has not provided any expert testimony to rebut Mr. Lacoste's opinions.

II. Fred's knew of the danger associated with the barricade and failed to warn Mrs. Whiteaker

As stated above, if Fred's was aware of a dangerous condition which was not readily apparent, it was under a duty to warn Mrs. Whiteaker of such a condition. At a very minimum, Fred's had actual knowledge that the barricade was there.

Defendant has argued that this event was not foreseeable in light of the fact that 200,000 people had passed by this barricade and there were no reports of injury. Fred's further argues that even if it were foreseeable, its actions were reasonable in light of the foreseeable risk.

First, on the issue of whether this event was foreseeable, Fred's employee, Kimberly Jones admitted her belief that this barricade was a foreseeable safety hazard. Jones testified that the barricades in question were, in her opinion, too low and caused her

concern for the safety of patrons. She admitted that people leaving the store and entering the parking area could be prone to falling over these barricades, and that they were a hazard. **Exhibit B**, pp. 17-19, 43-44.

Likewise, Barbara Newberry described the railing over which Plaintiff fell as a potential hazard and expressed her concern that customers who were walking out of the store with packages in their hands (as was Plaintiff) would trip over this barricade that had been placed outside of the exit door to Fred's. By her own admission, she had these concerns before Mrs. Whiteaker fell, but she never discussed her concerns with management or her co-workers at Fred's. **Exhibit E**, pp. 27-28, 40-41, 49.

In the same manner, the store manager on site, Mike Barthol testified as follows:

Q: Would you agree with me, Mr. Barthol, that it is foreseeable that someone who is exiting your store, put multiple packages in their hand, were focusing their attention on the parking lot, may not see timbers at ankle to shin level and may trip over it?

MR. JOLLY: Object to the form. You can answer.

A: Can you repeat that again, please?

Q: Sure. Would you agree with me that it's foreseeable that something like that could happen, someone could be exiting the store with packages in their hand, focusing on going to the parking lot, walking directly out the door to the parking lot and trip over timbers that are ankle to shin height?

MR. JOLLY: Same objection. You can answer.

A: Yes, sir.

Exhibit C, pp. 61-62. Given this testimony, Fred's can hardly argue that a reasonable jury could not conclude that Plaintiff's fall and resulting injuries were not foreseeable. So, what reasonable actions did Fred's take to alleviate the risk of this occurring? The

record is devoid of any action taken by Fred's. To the contrary, by the admission of their own employees, Fred's concern was never safety.

Fred's instructions were simple. According to Barthol, he was told by Fred's corporate to design the barricade in such a manner, as to insure that when customers came out of the exit door, they could not walk directly out into the parking lot, but instead they would have to stop, make a turn to the right, and exit out of a 10 ft wide opening in the barricade. **Exhibit C**, p. 20. This fact alone shows that Fred's knew or should have known that the path that customers were normally taking from the store to the parking lot was different from the path that this barricade was intended to direct them.

So, after these instructions were given, what do Barthol and Whittington undertake to do? They construct a barricade with unpainted and unmarked landscape timbers that are 12" off the ground (ankle/shin level), and put them in the direct path of the primary means of ingress and egress from the building. Regrettably, they do this without so much as consulting engineers, architects, governmental officials, city planners, or code officials.

Was this approach effective in redirecting pedestrian traffic from Fred's store through the 10 ft opening in this barricade? According to Jones and Newberry, the answer is No. In fact, prior to Plaintiff's fall, both Jones and Newberry saw customers stepping and jumping over the barricades, but were never instructed by Fred's to discourage this behavior or take any affirmative steps to see that it did not occur. **Exhibit B**, p. 31, 32, 64; **Exhibit E**, pp. 23-24.

At a very minimum, Fred's had a duty to warn its customers of the foreseeable dangers associated with this barricade, if not remove it altogether. As a result of its failure to warn, Plaintiff was severely injured. According to E.J. Lacoste, III, this barricade was in violation of the building code, and it was a trip hazard. It should have never been built.

WHEREFORE PREMISES CONSIDERED, the Plaintiffs respectfully request that Defendant's Motion for Summary Judgment be denied.

RESPECTFULLY SUBMITTED, this the 20th day of May, 2010.

THE STROUD LAW FIRM, P. C.

By: s/ Philip A. Stroud

Philip A. Stroud (MSB #99401)

Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 20TH day of May, 2010, electronically filed the foregoing with the Clerk of the Court using the ECF system which sent notification of such filing to the following:

Scott Burnham Hollis, Esq.
shollis@watkinsludlam.com

Robert T. Jolly, Esq.
rjolly@watkinsludlam.com

Attorneys for Defendant

s/ Philip A. Stroud

Philip A. Stroud