

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

**VICKI WHITEAKER and
LEONARD WHITEAKER**

PLAINTIFFS

V.

CAUSE NO. 3:08-cv-129-MPM-SAA

FRED'S STORES OF TENNESSEE, INC.

DEFENDANT

**DEFENDANT'S MEMORANDUM OF AUTHORITIES IN SUPPORT
OF ITS MOTION FOR SUMMARY JUDGMENT**

COMES NOW Defendant, Fred's Stores of Tennessee, Inc. ("Fred's"), by and through its counsel of record, Watkins Ludlam Winter & Stennis, P.A., and submits this Memorandum of Authorities in Support of its Motion for Summary Judgment, and requests this Court to dismiss each and every claim asserted against it by the Plaintiffs.

INTRODUCTION

This is a simple trip and fall case that occurred on or about December 23, 2006 at the Fred's location in Southaven, Mississippi. On a clear and bright sunshine filled day, Plaintiff Vickie Whiteaker ("Plaintiff") alleges that she was walking from the exit door of the Fred's store to her car in the parking lot when she tripped and fell over a cinderblock and landscape timber corral ("corral") located in the Fred's parking lot. *See* (Complaint, attached to Motion as Exhibit "A"). The subject corral was erected in response to concerns about customer safety and to deter shoplifting. The corral was 15 and $\frac{3}{4}$ inches in height. *See* (Measurements, attached to Motion as Exhibit "B"). The smallest portion of the corral nearest the façade of the building was six feet from the façade and was adjacent to the sidewalk. *See* (Schematic, attached to Motion as Exhibit

“C”). The largest section of the corral was 15 feet and 9 inches from the façade of the building. *Id.* Once Plaintiff exited the Fred’s store, she had three separate means of egress from the exit door to the parking lot. *Id.* Plaintiff chose not to use any of the three available routes when leaving the store and tripped over the corral as a result of her own negligence.¹

STANDARD FOR SUMMARY JUDGMENT

Summary judgment is proper “when there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). The party seeking summary judgment carries the burden of demonstrating that there is no actual dispute as to any material fact in the case. This burden, however, does not require the moving party to produce evidence showing the absence of genuine issues of material fact. *Celotex v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2448, 91 L.Ed. 2d 265 (1986). The moving party satisfies its burden by “pointing out to the district court ... that there is an absence of evidence to support the non-moving party’s case.” *Id.*

Once the moving party has satisfied its burden, the non-movant must “set forth specific facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e). If the non-movant fails to set forth specific facts in support of allegations essential to that party’s claim and on which that party will bear the burden of proof at trial, then summary judgment will be appropriate. *Celotex*, 477 U.S. at 323. Even if the non-movant brings forth evidence in support of its allegations, summary judgment will be appropriate “unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249–50, 106 S.Ct. 2505, 91 L.Ed. 2d 202 (1986) (citations omitted).

¹ Other than the fact that Plaintiff failed to look where she was going, testimony exists that Plaintiff was in a rush as she exited the store because two small children were left unattended inside her car.

“If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.” *Id.*

APPLICABLE PREMISES LIABILITY LAW

The mere fact that Plaintiff tripped over the corral while on Fred’s property is not, in and of itself, evidence of negligence on the part of Fred’s. It is a well-founded principle of Mississippi premises liability law that merely proving the occurrence of an accident on a business premises is insufficient to prove liability; rather, the Plaintiff must demonstrate that Fred’s was somehow negligent in the maintenance of its premises. *See Huguley v. Imperial Palace of Mississippi, Inc.*, 930 So.2d 1278 (Miss. App. 2006) (citing *Robinson v. Ratliff*, 757 So.2d 1098, 1101 (Miss. App. 2000)); and *Lindsey v. Sears, Roebuck & Co.*, 16 F.3d 616, 618 (5th Cir. 1994) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)). In order to establish a claim for negligence, moreover, it must appear that the offending defendant violated some duty owed to the plaintiff. *J.C. Penney Co. v. Sumrall*, 318 So.2d 829, 832 (Miss. 1975).

As a customer of Fred’s, Plaintiff was a business invitee of Fred’s. The duty owed by a business owner to its invitees is two-fold. It must (1) “take reasonable care in keeping its premises reasonably safe;” and (2) “warn of any dangerous condition not readily apparent.” *Parker v. Wal-Mart Stores, Inc.*, 2007 WL 672263, * 2 (S.D. Miss. Feb. 28, 2007) (citing *Caruso v. Picayune Pizza Hut, Inc.*, 598 So.2d 770, 773 (Miss. 1992). *See also Anderson v. B.H. Acquisition, Inc.*, 771 So.2d 914, 918 (Miss. 2000); and *Breaux v. Grand Casinos of Mississippi Inc. – Gulfport*, 854 So.2d 1093 (Miss. App. 2003). There is no liability for injuries resulting from conditions on the premises of which the owner had neither actual nor constructive knowledge, or from which there was simply no **foreseeable**, unreasonable risk of harm. *Evans v. United States*, 824 F. Supp. 93, 97 (S.D. Miss. 1993) (emphasis added).

Mississippi Courts have repeatedly held that business owners are not insurers of their patrons' safety. *See Parker*, 2007 WL 672263 at * 2; *Anderson*, 771 So.2d at 918; and *Breaux*, 854 So.2d at 1097 (“The owner of a business is not an insurer of the customers ... He is not required to keep the premises absolutely safe, or in such a condition that no accident could possibly happen to a customer”). Invitees are still required to use in the interest of their own safety **that degree of care and prudence which a person of ordinary intelligence would exercise** under the same or similar circumstances. *Vu v. Clayton*, 765 So.2d 1253, 1255 (Miss. 2000); *Taylor v. Biloxi Reg'l Med. Ctr.*, 737 So.2d 435, 437 (Miss. App. 1999) (citing *Fulton v. Robinson Indus., Inc.*, 664 So.2d 170, 175 (Miss. 1995) (emphasis added); *Breland v. Gulfside Casino Partners*, 735 So.2d 446, 449 (Miss. App. 1999). Thus, a premises owner is not responsible for conditions that are not unreasonably dangerous, or which are known or plainly apparent to the invitee. *Gen. Tire & Rubber Co. v. Darnell*, 221 So.2d 104, 107 (Miss. 1969); and *Nolan v. Brantley*, 767 So.2d 234, 240 (Miss. App. 2000).

Business owners have no duty under Mississippi law to warn a business invitee of a given condition if it is (1) not unreasonably dangerous in the first place; or (2) open and obvious. *Mayfield v. The Hairbender*, 903 So.2d 733, 737-38 (Miss. 2005) (“A landowner owes an invitee the duty to keep the premises reasonably safe and, **when not reasonably safe**, to warn **only** where there is hidden danger or peril that is not in plain and open view”) (internal citations omitted) (emphasis added); *See also McGovern v. Scarborough*, 566 So.2d 1225, 1228 (Miss. 1990).

In this case, for Fred's to have breached any duty owed to Plaintiff, she must demonstrate that (1) there was an unreasonably dangerous condition at Fred's, and/or (2) Fred's knew of the danger and nonetheless failed to warn Plaintiff of its existence. Furthermore, in order for

Plaintiff to make out a *prima facie* case for negligence, she must also prove that (1) her injuries were reasonably foreseeable and/or (2) that Fred's actions were not reasonable in light of the "foreseeable risks." For the following reasons, Plaintiff cannot sustain her burden of proof under either of these theories and Fred's is entitled to summary judgment as a matter of law.

ARGUMENT

A. Plaintiff Has Failed To Demonstrate The Presence Of An Unreasonably Dangerous Condition On Fred's Premises.

In Mississippi, a premises owner is not liable for injuries resulting from conditions on the premises from which no unreasonable harm could be anticipated. *See Evans*, 824 F. Supp. at 97. Although Mississippi courts have not specifically addressed whether a corral, similar to the subject corral in the instant case, constitutes an unreasonably dangerous condition, the courts have routinely held that readily noticeable conditions, like the subject corral, are generally not unreasonably dangerous.² Much like stools, chairs, garden hoses, basketball displays, Glo-Ball

² *See Ratcliff v. Rainbow Casino-Vicksburg Partnership, L.P.* 914 So.2d 762, ¶ 8 and ¶ 10 (Miss. Ct. App. 2005) (affirming circuit court's grant of summary judgment in favor of defendant casino holding that Plaintiff presented no issue of material fact regarding the inherent safety of stools and the Plaintiff provided no expert testimony or other proof that the stool was unreasonably dangerous); *see also Massey v. Tingle*, 867 So.2d 235, 239-241 (Miss. 2004) (affirming circuit court's grant of summary judgment in favor of a defendant race track owner holding that no issue of material fact existed as to whether the premises was reasonably safe because a guardrail dislodged following an impact by an out-of-control race car performed as expected and was constructed of materials approved by the State); *see also Wal-Mart Stores, Inc., v. Littleton*, 822 So.2d 1056, 1059 (Miss. Ct. App. 2002) (reversing and rendering circuit court's denial of Wal-Mart's motion for a directed verdict holding that hand truck left in an aisle of store that Plaintiff tripped over to be usual in a store like Wal-Mart and no proof existed that Wal-Mart breached any duty owed to Plaintiff as a business invitee); *see also Goff v. Coe*, 933 So.2d 992, ¶¶ 2, 7-8 (Miss. Ct. App. 2006) (affirming the circuit court's grant of summary judgment in favor of the premises owner holding that a Plaintiff injured when attempting to sit on a rolling stool presented no evidence indicating that the stool was defective or unreasonably dangerous); *see also Bouldin v. Lipscomb Oil Co.*, 962 So.2d 64, 67-68 (Miss. Ct. App. 2007) (affirming circuit court's grant of summary judgment for premises owner holding that Plaintiff injured when gas unexpectedly shot out of the nozzle and struck the Plaintiff in the face, neck and chest failed to prove the premises owner had either actual or constructive knowledge of any defect on the premises); *see also Delmont v. Harrison County School Dist.*, 944 So.2d 131, 132 134 (Miss. Ct. App. 2006) (affirming circuit court's grant of summary judgment in favor of defendant holding that cheerleading mat measuring 42'4" long, 6' wide and 1.5" in height which Plaintiff tripped over did not constitute an unreasonably dangerous condition); *see also Smith v. Fed. Cleaning Contractors, Inc.*, 126 F.App'x 672, 674-75 (5th Cir. 2005) (unpublished) (garden hose on the ground outside of a mall entrance that Plaintiff tripped over not unreasonably dangerous); *see also Smith v. Petsmart, Inc.*, No. 3:04-CV-530BN, 2006 WL 47356, at *3 (S.D. Miss. Jan. 6, 2006) (prong of forklift extending into the aisle of store is not unreasonably dangerous); *see also Ware v. Frantz*, 87 F.Supp.2d 643, 645-647 (S.D. Miss. 1999)

slung shots, display shelves, forklift prongs, hand trucks, guardrails, cheerleading mats, and gas pumps; the subject corral was not unreasonably dangerous.³

No reasonable argument exists to justify Plaintiff's averment that the subject corral posed an unreasonable risk of harm to Fred's customers. Indeed; John Corner testified that in period of time between the erection of the corral, and Plaintiff's fall, over 200,000 customers came through the Fred's location in Southaven. *See* (Excerpt from 30(b)(6) Deposition of John Corner p. 68, attached as Exhibit to Motion as "D"). Plaintiff's accident was the first and only incident in which someone tripped over the corral. *Id.* Furthermore, the corral was constructed by Fred's in response to concerns regarding customer safety and to deter shoplifting. At the 30(b)(6) Deposition of Fred's, District Manager Dave Bonar testified:

Q In your opinion at the Fred's Dollar Store we're here on today in Southaven, Mississippi, what was the need to build the corrals in front of the front door exit and entrance?

A. Well, number one, we had a safety issue. Cars would park right up on our sidewalks and when people left or came into the store they was walking between cars to go out to the parking lot.

* * *

(summary judgment appropriate where plaintiff failed to provide any evidence that free-standing display shelf was unreasonably dangerous or that premises owner failed to otherwise maintain store in a reasonably safe condition); *see also Davis v. United States of America*, No. 1:04-CV-329BD, 2006 WL 533413, at *3 (N.D. Miss. Mar. 3, 2006) (affirmed) 217 Fed. Appx. 369 (5th Cir. 2007) (unpublished) (genuine issue of material fact did not exist as to whether slingshot apparatus used to launch golf balls in "Wacky Glo-Ball Tournament" constituted an unreasonably dangerous condition); *see also Farmer v. Sam's East Inc.*, 253 Fed. Appx. 352, 354-356 (5th Cir. 2007) (unpublished) (summary judgment appropriate in case involving basketball hoop display); and *Chapman v. Picadilly Restaurants, Inc.*, No. 3:05-CV-354WA, 2007 WL 2872417 at * 3 (S.D. Miss. Sept. 26, 2007) (rolling chair on concrete floor did not constitute unreasonable dangerous condition).

³ This well-settled area of Mississippi premises liability law that certain readily noticeable conditions are not unreasonably dangerous as a matter of law was recently addressed in *Wood v. RIH Acquisitions MS II, LLC*, 556 F.3d 274 (5th Cir. 2009). Although it appears the *Wood* Court narrowly interpreted this long standing principle of law to only include undamaged thresholds, curbs and steps; the large body of both Mississippi case law and federal courts applying substantive Mississippi law suggests otherwise. Regardless, this case is clearly distinguishable from *Wood* as the subject corral, which measured 15 and 3/4 inches in height, was not "overly low" as the *Wood* Court found the reflectors under Bally's *porte cochere* to be.

Q Okay. But what you're telling me as the 30(b)(6) deponent today, the representative for Fred's Stores of Tennessee, that the main reason that these were constructed to your knowledge were for the safety of the patrons there at Fred's?

A Yes.

See (Excerpt from 30(b)(6) Deposition of Dave Bonar, pp. 12-14 attached to Motion as Exhibit "E"). As a 30(b)(6) designee, John Corner⁴, echoed Dave Bonar's concerns regarding customer safety. Mr. Corner testified:

A Our primary concern is the safety of our customers, and the reason 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.

* * *

Q It had nothing to do with preventing shrinkage⁵ as much as it did for preventing accidents in that parking lot?

A There is no merchandise in our store worth a human life.

See (Excerpt from 30(b)(6) Deposition of John Corner pp. 24-25, attached to Motion as Exhibit "F"). Thus, the corral was constructed to keep customers safe and to deter shoplifting.

Under these facts, it is evident that the alleged "dangerous" condition about which Plaintiff complains was, in fact, a safety feature which a reasonably prudent patron would readily notice. Indeed, tens of thousands of Fred's customers encountered the corral and did not injure themselves. Other than her assertion that she did not see the corral, Plaintiff offers no explanation as to why the corral is unreasonably dangerous or why it constitutes an alleged hazard.⁶ Plaintiff offers no proof

⁴ Mr. Corner is the loss Prevention Manager for Region 2 at Fred's.

⁵ Shrinkage is a reduction or loss of inventory due in part to shoplifting.

⁶ Plaintiff has offered the expert opinions of E.J. Lacoste that the corral was unreasonably dangerous. However, Mr. Lacoste's speculative, unreliable, and irrelevant opinions are currently subject to a Motion to Strike which is pending before this Court.

that the corral was damaged, leaning, sagging, wobbly, broken, or otherwise defective. Plaintiff simply argues that since she tripped over the corral at Fred's, Fred's must be liable. It is a well-founded principle of Mississippi premises liability law that merely proving the occurrence of an accident on a business premises is insufficient to prove liability; rather, Plaintiff must demonstrate that Fred's was somehow negligent in the maintenance of its premises. Plaintiff has failed to demonstrate the presence of an unreasonably dangerous condition on Fred's premises and Fred's is entitled to summary judgment as a matter of law.

B. Plaintiff Has Failed To Demonstrate The Presence Of Any Notice On The Part Of Fred's That The Subject Corral Constituted An Unreasonably Dangerous Condition.

Even if Plaintiff was able to a present genuine issue of material fact that the corral was unreasonably dangerous, Fred's would still be entitled to summary judgment. Under Mississippi law, there is no liability for injuries resulting from conditions on the premises of which the owner had neither actual nor constructive knowledge, or from which there was simply no foreseeable, unreasonable risk of harm. *Evans v. United States*, 824 F. Supp. 93, 97 (S.D. Miss. 1993)). An owner of a property is liable only to an invitee for those hidden or latent defects which are known to the owner in the exercise of reasonable care. *E.A. Lumbley v. Ten Point Co. Inc.*, 556 So.2d 1026, 1031 (Miss. 1989).

The Mississippi Court of Appeals addressed the issue of alleged dangerous conditions and the requirement of notice in *Bouldin v. Lipscomb Oil Co.*, 962 So.2d 64 (Miss. Ct. App. 2007) (rehearing denied). In *Bouldin*, the Mississippi Court of Appeals affirmed the circuit court's grant of summary judgment on behalf of the premises owner. The Plaintiff in *Bouldin* was injured when gas unexpectedly shot out of the nozzle and struck the Plaintiff in the face, neck and chest. *Id.* at 65. The Plaintiff argued that gas discharging from the hose was a defect in

the premises and the premises owner should have corrected the defect or warned its customers.

Id.

The *Bouldin* Court noted that the Plaintiff was essentially asking the court to find that the operation of a service station is so inherently dangerous as to require the application of strict liability. *Id.* The *Bouldin* Court wisely declined to do so. Similarly, the Mississippi Court of Appeals in *Ratcliff* likewise declined to create a procedural requirement whereby anytime negligence is asserted against a premises owner, summary judgment is not available and the case must go to the jury. *Ratcliff v. Rainbow Casino-Vicksburg Partnership*, 914 So.2d at 766.

In the case at bar, there is an absence of any similar incidents involving a Fred's customer tripping over the corral. Plaintiff presents no evidence that Fred's acquired actual or constructive knowledge of any alleged defective or dangerous condition by any means. With respect to actual notice, Plaintiff fails to present any evidence contradicting Fred's claim that prior to Plaintiff's accident, it never received any reports from guests indicating that the corral was dangerous or that any similar instances ever occurred. Plaintiff has therefore failed to raise a genuine issue with respect to this material fact and Fred's is entitled to summary judgment as a matter of law in regards to notice.

C. Fred's, As A Matter Of Law, Had No Duty To Warn.

Mississippi law only requires a premises owner to warn invitees of dangerous conditions. Thus, if a condition is not unreasonably dangerous to begin with, there is simply no duty to warn. Similarly, premises owners have no duty to warn business-invitees of allegedly hazardous conditions that are in plain view.⁷ *See Mayfield*, 903 So.2d at 737-38 (“A landowner owes an

⁷ It is only the duty to warn of a hidden danger that is not in plain view that involves any application of comparative negligence principles. The “open and obvious” standard is simply a comparative negligence defense used to compare the negligence of the plaintiff to the negligence of the defendant. *Tharp v. Bunge, Corp.*, 641 So.2d 20, 24 (Miss.1994). If the defendant is not negligent, i.e. the condition is not hazardous, it makes no difference

invitee the duty to keep the premises reasonably safe and, **when not reasonably safe, to warn only where there is hidden danger** or peril that is **not in plain and open view**") (internal citations omitted)(emphasis added); and *McGovern*, 566 So.2d at 1228. This rule is well-founded in the following logic:

With respect to [a] failure to warn claim . . . it would be strange logic that found it reasonable to allow a plaintiff to pursue a claim against a defendant for failure to warn of an open and obvious danger. One would struggle, indeed, to justify the need to warn a plaintiff of that which is open and obvious. Stated differently, a warning of an open and obvious danger would supply no new information to the plaintiff.

Vaughn v. Ambrosino, 883 So.2d 1167, 1170 (Miss. 2004).

In the present case, Fred's simply had no legal duty to warn Plaintiff of the corral. As discussed in Sections A and B, *supra*, the corral did not constitute an unreasonably dangerous condition. Thus, Fred's would only need to warn Plaintiff of the corral's existence if it were somehow hidden from plain view. However, such was not the case. The corral was in the parking lot and clearly visible to anyone using the degree of care and prudence which a person of ordinary intelligence would exercise. In fact, Plaintiff encountered and walked around the corral as she entered the store!

"All that is required to negate the duty to warn is that the danger be open and obvious, suggesting that the plaintiff either knew or should have known of it." *Mayfield*, 903 So.2d at 736. Since the corral was neither unreasonably dangerous nor hidden from plain view, Plaintiff's failure to warn claim must fail. Fred's is therefore entitled to summary judgment with respect to Plaintiff's failure to warn claim as a matter of law.

if the condition was open and obvious to the plaintiff because the plaintiff must first prove some negligence on the part of the defendant before recovery may be had. *Id.* Thus, before **any** analysis occurs regarding whether the duty to warn is triggered or whether a condition is open and obvious, it must **first** be determined that the condition is in fact unreasonably dangerous.

D. Plaintiff's Negligence Could Not Be Reasonably Foreseen.

The elements of proof required to support a claim for damages for negligence are a duty, a breach of that duty, damages, and proximate cause. *Grisham v. John Q. Long V.F.W. Post, No. 4057, Inc.*, 519 So.2d 413 (Miss.1988); *Crain v. Cleveland Lodge 1532, Order of Moose, Inc.*, 641 So.2d 1186 (Miss.1994). The damages **must be** reasonably foreseeable. Ordinary care does not require that a person prevision unusual, improbable or extraordinary occurrences. Failure to anticipate remote possibilities does not constitute negligence. *Crain v. Cleveland Lodge 1532 Order of Moose, Inc., supra*; *Grisham, supra*; *Pargas of Taylorsville, Inc. v. Craft*, 249 So.2d 403 (Miss.1971); *Sturdivant v. Crosby Lumber & Mfg. Co.*, 218 Miss. 91, 65 So.2d 291 (1953); *Vincent v. Barnhill*, 203 Miss. 740, 34 So.2d 363 (1948); *Mauney v. Gulf Refining Co.*, 193 Miss. 421, 9 So.2d 780 (1942); and *Illinois Central R. Co. v. Bloodworth*, 166 Miss. 602, 145 So. 333 (1933).

Remote possibilities do not constitute negligence from the judicial standpoint. *Gulledge v. Shaw*, 880 So.2d 288, 293 (Miss. 2004). The Mississippi Supreme Court has discussed foreseeability as follows:

The rule is firmly established in this state, as in nearly all the common law states, that in order that a person who does a particular act which results in injury to another shall be liable therefor, the act must be of such character, and done in such a situation, that the person doing it should reasonably have anticipated that some injury to another will probably result therefrom, but that the actor is not bound to a prevision or anticipation which would include an unusual, improbable, or extraordinary occurrence, although such happening is within the range of possibilities. This rule is affirmed in one way or another in cases which will run into the hundreds in this state.

* * *

Hence, the law must say, as it does that "care or foresight as to the probable effect of an act is not to be weighed on jewelers' scales, nor calculated by the expert mind of the philosopher, from cause to effect, in all situations," *Illinois Cent. R. Co. v. Bloodworth*, 166 Miss., page 618, 145 So. page 336; and that it would

impose too heavy a responsibility for negligence to hold the tortfeasor accountable for what was unusual and unlikely to happen, or for what was only remotely and slightly probable.... "A reasonable man can be guided only by a reasonable estimate of probabilities. If men went about to guard themselves against every risk to themselves or others which might by ingenious conjecture be conceived as possible, human affairs could not be carried on at all. The reasonable man, then, to whose ideal behavior we are to look as the standard-of duty, will neither neglect what he can forecast as probable, nor waste his anxiety on events that are barely possible."

Mauney, 9 So.2d at 780-781 (citations omitted).

The unusual and improbable nature of Plaintiff's accident was wholly unforeseeable. Fred's erected the subject corral out of concern for customer safety and to deter shoplifting. The design of the corral was open and obvious. Indeed; in the period of time between the erection of the corral and Plaintiff's fall, some 200,000 Fred's customers encountered the corral without incident. The fact the Plaintiff failed to use the degree of care and prudence which a person of ordinary intelligence would exercise under the same or similar circumstances was not foreseeable and improbable. Ordinary care does not require Fred's to provision unusual, improbable or extraordinary occurrences and Fred's alleged failure to anticipate remote possibilities does not constitute negligence. Plaintiff provides no genuine issue of material fact that her injury was foreseeable. Although unfortunate, Plaintiff's injury was simply not foreseeable and Fred's is entitled to judgment as a matter of law as Plaintiff fails to prove a *prima facie* case of negligence in this regard.

E. Even If Plaintiff's Injury Was Foreseeable, Fred's Conduct Was Reasonable In Light Of The Foreseeable Risks.

Should the Court find that Plaintiffs present genuine issues of material fact that Plaintiff's improbable and extraordinary accident was foreseeable, Fred's would still be entitled to summary judgment. The standard of care applicable in cases of alleged negligent conduct is whether the party charged with negligence acted as a reasonable and prudent person would have

under the same or similar circumstances. *Knapp v. Stanford*, 392 So.2d 196, 199 (Miss.1980); *Danner v. Mid-State Paving Co.*, 252 Miss. 776 173 So.2d 608, 615 (1965). If a defendant's conduct is reasonable in light of the "foreseeable risks," there is no negligence and no liability. *Reaves v. Wiggs*, 192 So.2d 401, 403 (Miss.1966). In addition, a defendant must only take reasonable measures to remove or protect against "foreseeable hazards" that he knows about or should know about in the exercise of due care. *Millers of Jackson, Inc. v. Newell*, 341 So.2d 101, 103 (Miss.1976). A defendant is only obligated to safeguard against reasonable probabilities and is not charged with foreseeing all occurrences, even though such occurrences are within the range of possibility. *Pargas of Taylorsville, Inc. v. Craft*, 249 So.2d 403, 407-08 (Miss.1971).

Assuming *arguendo* that it was foreseeable that an intelligent adult woman exiting a building would be completely oblivious to the same surroundings she encountered as she entered the building; Fred's took all reasonable measures to protect against that risk. In fact, the purpose of the corral was to protect customers as they exited the building.⁸ Without the existence of the corral, a customer, oblivious to their surroundings, was in danger of either being run over by a vehicle, running into a parked vehicle, or being knocked down by a criminal fleeing the Fred's store with a shopping cart weighted down with merchandise. These dangers were alleviated with the existence of the corral. Furthermore, the corral was open and obvious. Once a customer exited the building, they could either: (1) head south down the sidewalk and into the parking lot⁹; (2) head north up the sidewalk and into the parking lot; or (3) head west through the 10 foot 10 inch gap in the corral. *See* (Schematic, attached to Motion as Exhibit "C").

⁸ Again, the corral was constructed to protect customers: (1) from vehicles parked directly in front of the doors and obstructing one's view of traffic and (2) from the extremely dangerous situation caused by run-outs.

⁹ This is the route Plaintiff elected to use when she entered the store.

As a premises owner, Fred's is not required to insure the safety of its patrons. Fred's is only obligated to safeguard against reasonable probabilities and is not charged with foreseeing all occurrences. This is true even though such occurrences are within the range of possibility. Other than bare assertions, Plaintiffs offer no evidence creating a genuine issue of material fact that Fred's failed to take reasonable measures to protect against any foreseeable risk. Accordingly, Fred's is entitled to a judgment as a matter of law that its conduct was reasonable in light of any alleged "foreseeable risk."

F. Plaintiffs Cannot Meet The Burden Required To Avoid Summary Judgment.

Discovery has ended. Plaintiffs have in their possession all evidence they will have at the time of trial regarding Fred's alleged liability. Plaintiffs must, at this stage, do more than merely allege in a conclusory fashion that Fred's was negligent. Fred's has established that it did not breach any duty owed to Plaintiff. The premises of Fred's was reasonably safe. Indeed, the allegedly "dangerous condition" of which Plaintiffs complain was designed as a safety apparatus. At the time of Plaintiff's accident, Fred's received no prior reports of any customers injuring themselves on the subject corral. Moreover, Fred's had no duty to warn Plaintiff of the subject corral because it was in plain view and was, most importantly, not unreasonably dangerous to begin with. Simply put, Fred's has met every duty it owed to Plaintiff. Absent the establishment of a breach of duty, there can be no liability for negligence.

Furthermore, Plaintiffs fail to prove that Fred's possessed any notice that its corral existed in an unreasonably dangerous condition. Without actual or constructive notice of any alleged dangerous condition, Fred's can not be said to have breached any duty owed to Plaintiffs. Plaintiffs also fail to present any genuine issues of material fact that the Plaintiff's injury was

either reasonably foreseeable or that Fred's failed to take reasonable measures to protect against any foreseeable risks.

The case law pertaining to Motions for Summary Judgment is clear. "Where the non-movant bears the burden of proof at trial, the movant may merely point to an absence of evidence, thus shifting to the non-movant the burden of demonstrating by competent summary judgment proof that there is an issue of material fact warranting trial." *Celotex*, 477 U.S. at 322, 106 S. Ct. at 2553-54. Only where there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party is a full trial warranted. *Lindsey v. Sears, Roebuck & Co.*, 16 F.3d 616, 618 (5th Cir. 1994) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)).

Fred's has sufficiently demonstrated the absence of material facts that Plaintiffs bear the burden of proving at trial – breach of duty of care and foreseeability. As discussed above, Plaintiff cannot put forth competent proof that Fred's breached any duty owed to her or that her injury was foreseeable. Accordingly, Fred's is entitled to summary judgment as a matter of law.

CONCLUSION

For the above and foregoing reasons, Fred's respectfully requests that summary judgment be entered in its favor, and that all claims asserted against it by Plaintiffs in this matter be dismissed in their entirety, with prejudice.

THIS, the 30th day of April, 2010.

Respectfully submitted,

FRED'S STORES OF TENNESSEE, INC.

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CERTIFICATE OF SERVICE

I hereby certify that I have filed, this day, the foregoing Document or Notice thereof using the ECF filing system and via United States mail, postage prepaid a true and correct copy of the above and foregoing to:

Phillip A. Stroud
Stroud & Harper
P.O. Box 210
Southaven, MS 38671
(662) 536-5656

THIS the 30th day of April, 2010.

By: /s/ Robert T. Jolly
Robert T. Jolly