# In The
# Court of Appeals
# Seventh District of Texas at Amarillo

No. 07-18-00333-CV

DANA DANIELS, APPELLANT

V.

ALLSUP'S CONVENIENCE STORES, INC., APPELLEE

On Appeal from the 223rd District Court
Gray County, Texas
Trial Court No. 37,775; Honorable Philip N. Vanderpool, Presiding

June 15, 2020

## ORDER ON MOTION FOR REHEARING

Before QUINN, C.J., and PIRTLE and PARKER, JJ.

This is an appeal involving a directed verdict in a premises liability civil cause of action. In our original opinion issued March 26, 2020, we described the alleged defective condition as "a loose facia board on [Allsup's] store awning." In its *Motion for Rehearing*, Allsup's takes umbrage at our use of the term "facia board"—contending that our decision is erroneous because we have "misstated the facts" and "relied upon evidence not in the

trial record." Remaining convinced as to the propriety of our decision to reverse the directed verdict rendered in the underlying proceeding—in denying Allsup's *Motion for Rehearing,* we deem it appropriate to issue this written order to correct any misconception as to the basis of our ruling.

Because this was a premises liability cause of action, Daniels, as plaintiff, was required to present sufficient evidence to raise a fact issue as to whether Allsup's was aware of a condition on its premises that presented an unreasonable risk of danger to a business invitee, such as Daniels. *Brinson Ford*, *Inc. v. Alger*, 228 S.W.3d 161, 162 (Tex. 2007). Daniels unquestionably established that he was seriously injured when a portion of Allsup's building (an architectural element attached to the edifice for signage) came loose and fell to the ground, striking him in the head. During the presentation of testimony, the allegedly dangerous condition was described by a multitude of terms, including "big piece of awning," "little piece of awning," "flapping awning," "plastic bricks," "piece of plywood backing," "awning," "section," "piece of awning," "thin awning," "particle board," "facia," "plywood awning," and "awning with the plywood backing." Regardless of the term any individual witness (or this court) chose to use, all parties agree, the premises condition to which they were referring was the physical status of the very part of the building that eventually broke loose and struck Daniels. Allsup's does not claim it did not have notice of a defective condition; it merely asserts it did not have knowledge of the extent of the defect. As such, our decision to refer to the dislodged part of the building as "a loose facia board" was hardly a misstatement of the record.

What Allsup's has apparently missed is the fact that this was an appeal from a directed verdict—where the standard of review is whether the party against whom the

directed verdict was granted (Daniels) has raised a scintilla of evidence that the premises owner (Allsup's) had actual or constructive notice of a dangerous condition that presented an unreasonable risk of harm to its business invitees. In that regard, it is undisputed that Allsup's had actual notice of a "condition" on its property that presented some risk of danger to others—both business invitees and its own employees. What Allsup's really wants this court to accept is its position that it just did not know the condition of the premises was "unreasonably dangerous"—a position fraught with problems because Allsup's erroneously sought to circumvent the factual resolution of that issue by moving for a directed verdict.

The evidence clearly established that Allsup's was aware of the existence of a defective condition on its premises. The mere fact that Daniels was seriously injured is some evidence that the condition was unreasonably dangerous. Construing the evidence in the light most favorable to the party against whom the directed verdict was entered, there was more than a scintilla of evidence raising a fact issue concerning whether the condition of the premises was unreasonably dangerous. *See King Ranch*, *Inc. v. Chapman*, 118 S.W.3d 742, 750-51 (Tex. 2003). Because this court did not misstate the evidence, and because Daniels did present at least a scintilla of evidence that Allsup's had actual or constructive notice of an unreasonably dangerous condition on its premises, Allsup's *Motion for Rehearing* is denied.

Per Curiam