

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2009-CA-00281

BILL STANLEY

APPELLANT

VS.

**BOYD TUNICA, INC. D/B/A/ SAM'S TOWN
HOTEL AND GAMBLING HALL**

APPELLEE

BRIEF OF APPELLANT

**APPEALED FROM THE CIRCUIT COURT
OF TUNICA COUNTY, MISSISSIPPI
CIVIL ACTION 2005-0148**

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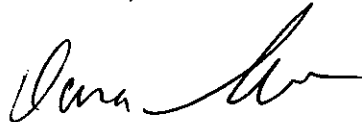
APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate potential disqualifications or refusal.

1. The Honorable Albert B. Smith, III
2. Richard C. Williams, Jr., Esq.
3. Dana J. Swan, Esq.
4. Boyd Tunica Inc.

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF OF APPELLANT

COMES NOW, the Plaintiffs/Appellant, Bill Stanley, by and through counsel, and file this his brief of Appellant. The Appellant would state unto the Court that factual issues remain which must be resolved by a jury. Therefore, the granting of summary judgment was improper.

I.

STATEMENT OF ISSUE

Did the trial court err in granting the motion for summary judgment filed by the Defendant/Appellee Boyd Tunica Inc. (Hereafter "Boyd"). Did the trial court err in denying the Plaintiffs the right to have a jury decide their claims.

The standard of review for is de novo. See *Hartford Cas. Ins. Co. v. Haliburton Co.*, 826 So. 2d 1206, 1209-10 (Miss. 2001).

II.

STATEMENT OF THE CASE

On or about May 31, 2005, the Plaintiff/Appellant Stanley, filed suit in the Circuit Court of Tunica County, Mississippi against Defendant/Appellee Boyd. (R. 9-12). This suit arose out of an incident which occurred on or about June 10, 2002, when Stanley was injured by a slip and fall on Boyd's premises. (R. 10-13).

Boyd filed its answer on or about June 16, 2005. (R. 24-30). On November 17, 2008, Defendant Boyd moved for summary judgment. (R. 130-288). The motion was granted, in favor of Defendant Boyd on or about January 20, 2009. (R. 319-320). The Plaintiffs timely perfected this appeal on February 19, 2009. (R. 322).

III.

STATEMENT OF FACTS

The Plaintiff/Appellant, Stanley, was injured on June 10, 2002, when a guest at Boyd. The injury occurred when he slipped and fell while taking a shower in one of Boyd's rooms. As a result of his fall, Stanley experienced severe injuries.

IV.

SUMMARY OF THE ARGUMENT

Summary judgment was not proper since factual questions remained as to whether or not Defendant Boyd had notice of a dangerous condition and whether or not a dangerous condition existed. See *Munford, Inc. v. Fleming*, 597 So. 2d 1282, 1284 (Miss. 1992). The room in which Stanley fell was under the exclusive control of Boyd. This evidence creates a triable issue of fact which precludes the granting of summary judgment. On a motion for summary judgment, a court cannot try issues of fact; it can only determine if there are issues to be tried. *Hartford Cas. Ins. Co. v. Haliburton Co.*, 826 So. 2d 1206, 1210 (Miss. 2001) (citing *Baptiste v. Jitney Jungle*

Stores of Am., Inc., 651 So. 2d 1063, 1065 (Miss. 1995).

V.

ARGUMENT

The trial court committed reversible error when it granted Defendant Boyd's motion for summary judgment. Defendant Boyd raised the issue of notice on its motion for summary judgment and further alleged that the condition of their room was not dangerous. The issue was whether or not Boyd had notice, either of actual or constructive, of the dangerous condition which caused Stanley to fall must be answered in the affirmative. As previously stated, the evidence presented by the Plaintiffs created a triable issue of fact concerning the issue of notice; therefore, the trial court was in error when it granted Defendant Boyd's motion for summary judgment.

To establish that Defendant Boyd had notice, the Plaintiffs must show that the casino either had actual or constructive knowledge of the dangerous condition or that it created the dangerous condition. *Munford*, 597 So. 2d at 1284. "Constructive knowledge is imputed to a store by a showing of the length of time the dangerous condition existed prior to the plaintiff's injury." *Byrne v. Wal-Mart Stores, Inc.*, 877 So.2d 462, 465 (Miss. Ct. App. 2003) (citing *Waller v. Dixieland Food Stores, Inc.*, 492 So. 2d 283, 285 (Miss. 1986)). In the case subjudice, Stanley presented evidence of notice of the dangerous condition because Boyd had exclusive control of the room.

SEE *Lockwood v. Isle of Capri Corp.*, 962 So.2d 645, 648 (Miss. App.2007)(actual knowledge is not necessary when premises owner creates the dangerous condition).

A jury is allowed to consider circumstantial evidence. See *Miss. Winn-Dixie Supermarkets v. Hughes*, 156 So. 2d 734, 736 (Miss. 1963) (stating “[v]erdicts may rest upon reasonable probabilities”). “[C]ircumstantial evidence of adequate probative value may establish that the condition of the room, was one of which the proprietor either had actual notice or the condition existed for such a length of time that, in the exercise of reasonable care, he should have known of it.” *Hughes*, 156 So. 2d at 736. In *Hughes*, the court held that evidence raised a jury question on whether the store manager who had been in the aisle about five minutes before the fall simply overlooked the dry vermicelli on the floor. *Id.* at 737-38. The jury could conclude that the vermicelli was on the floor at the time the store manager was in that aisle and that in the exercise of reasonable diligence, he should have seen the pasta, recognized the danger it presented and should have removed it. *Id.* at 737.

Like the store manager in *Hughes*, Defendant Boyd had ample time to observe the condition of their showers. Evidence supports a jury finding that the slippery bathmat, coupled with no hand bars to catch oneself if a fall occurred was present for and that the bellmen, the internal maintenance employees, and other employees of Defendant Boyd all overlooked it. Therefore, applying the reasoning used by the court in *Hughes*, this Court should allow a jury to decide whether Defendant Boyd

should have discovered the dangerous condition.

Boyd also argued that their showers were not unreasonably dangerous. However, the testimony of Joann Stanley (Stanley's wife) as well as Stanley reveal why the room was unreasonably dangerous. The following description of Joann Stanley reveals that the tub was slick and that there was nothing to hold on to.

Q. Did you see or find anything unusual about the shower or the bathtub?

A. Other than being slick.

Q. Okay. And what was slick?

A. The tub itself.

Q. The tub?

A. (Nods head.)

Q. Okay. And did you put – was there a mat provided, a rubber mat provided?

A. Yes.

Q. And where was that mat?

A. In the tub.

Q. Okay. When you went to – well, so, I mean, did you put the mat down?

A. No.

Q. Okay. The mat was –

A. And I did not use the mat.

(R. 163)

Joann Stanley later described the lack of hand bars on the tub to steady one's balance or the catch one's fall.

Q. Did you have trouble maintaining your balance in the shower?

A. No. Because I got there and just stood there.

Q. Okay. Did you have – and then out of the shower you didn't have any trouble?

A. No. I sat down on the edge of the tub and got out to make sure that I didn't have a way for my feet to slip.

Q Okay.

A. Instead of stepping out, **because there's nothing to hold onto at all. Not even a towel rack or nothing.** I got on the edge of the tub and to sit and get out to make sure I didn't slip.

(R. 162, Emphasis ours).

Bill Stanley describes the incident as follows:

Q. Okay. Were you standing on the mat when you were turning around?

A. Yes, sir.

Q. Okay. Were you under the shower?

A. Yes, sir.

Q. Had you - - you're saying you hadn't used any soap or lather?

A. No, sir, I hadn't even got completely wet down. It just happened just that quick. I got in, I was facing the showerhead, and I started to turn to get the rest of my body wet, and that's when I went. The mat just slid out from under my feet.

(R. 174).

A review of the photograph of the shower also reveals that there is no hand bar of any sort to grip while exiting or using the shower. (R. 186). The slippery tub, coupled with a lack of hand bars creates a jury question as to whether or not this was an unreasonably dangerous condition.

Furthermore, Mississippi law requires a premise's owner "to keep its premises in a reasonably safe condition and to warn of dangerous conditions which are readily not apparent to the invitee." *Munford*, 397 So. 2d at 1284. No proof of the owner's knowledge of the condition is necessary where the condition is created by his negligence or the negligence of someone under his authority. *Drennan v. Kroger Co.*, 672 So. 2d 1168, 1171 (Miss. 1996). In the case subjudice, the condition of the rooms was under the exclusive control of Boyd. A question exists for the jury on whether such a condition violated Defendant Boyd's duty to keep its premises in a reasonably safe condition. The condition of the tub mat and the lack of hand bars was under the control of Defendant Boyd, and the Plaintiffs were not required to prove actual notice in order to submit this case to a jury.

Since triable issues of fact exist, the trial court erred in granting the motion for

summary judgment, and in denying the Plaintiffs the right to have a jury decide their claims.

VI.

CONCLUSION

Factual questions existed which precluded the granting of summary judgment. Defendant Boyd is liable for the injuries incurred by the Plaintiffs. The Plaintiffs would respectfully request that this cause be reversed and remanded for a trial on the merits.

Respectfully submitted,

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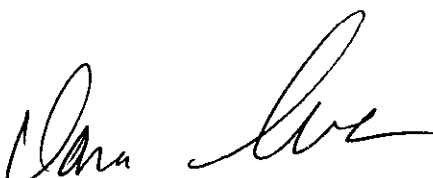
CERTIFICATE OF SERVICE

I, Dana J. Swan, do hereby certify that I have this day mailed, postage prepaid,
a true and correct copy of the above and foregoing Brief of Appellant to:

The Honorable Albert B. Smith, III
Circuit Court Judge
P. O. Drawer 478
Cleveland, MS 38732

Richard Williams, Esq.
P.O. Box 9147
Jackson, MS 39286-9147

This, the 25th day of June, 2009.



Dana J. Swan