IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

WALLACE B. MCCULLAR, SPOUSE OF DECEDENT, MARY F. MCCULLAR, PERSONALLY AND ON BEHALF OF ALL STATUTORY WRONGFUL DEATH BENEFICIARIES — APPELLANT

VERSUS — CAUSE NO. 2009-TS-00616

BOYD TUNICA, INC. D/B/A SAM'S TOWN CASINO AND GAMBLING HALL TUNICA — APPELLEE

BRIEF OF APPELLEE

APPEALED FROM THE CIRCUIT COURT
OF TUNICA COUNTY, MISSISSIPPI
CIVIL ACTION NO. 2005-0279

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ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

Appellant Wallace McCullar, Spouse of Decedent Mary McCullar and on behalf of all Statutory Wrongful Death Beneficiaries

Appellee Boyd Tunica Inc., d/b/a Sam's Town Casino and Gambling Hall Tunica

The Honorable Kenneth L. Thomas

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SO CERTIFIED, this the 4th day of December, 2009.

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument would needlessly consume judicial and private resources. Based upon the undisputed evidence and the controlling authority, the Circuit Court of Tunica County properly granted summary judgment. This appeal does not concern complicated facts or legal issues. Additionally, the facts and legal arguments regarding this appeal are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

STATEMENT OF THE ISSUES

1) Whether the trial court properly held that no genuine issues of material fact existed as to the essential elements of actual or constructive notice.

2) Whether the trial court properly held that no genuine issues of material fact existed as to the element of proximate cause.

SUMMARY OF THE FACTS

Wallace McCullar, Billie Ruth McCullar and decedent Mary Frances McCullar were business invitees of Boyd's when they visited the Sam's Town hotel and casino in November of 2003. (R. Vol. 1, p. 006; R. Vol., 1 p. 88). On the morning of November 24, 2003, Wallace McCullar assisted in placing Mary Frances McCullar on the commode of their hotel bathroom in Room 2024. (R. Vol. 1, p. 97). Wallace McCullar testified that no problem in the bathroom of Room 2024 existed prior to or at the time he took his wife into the bathroom, assisted her in taking off her clothes, and sitting her on the commode, in order to "be sure she sat down and hit the commode right."[1] (R. Vol. 1, p. 95; R. Vol. 1, p. 97).

[1] Evidence in the record suggests that Frances McCullar had a history of falling. In fact, the medical records indicate that shortly prior to the fall at Boyd's hotel, Mary Frances McCullar was taken to the Emergency Room on October 20, 2003 where it was noted that she "fell 6 times last week". (R. Vol 1, pp. 50-63).

As Mary Frances McCullar was sitting on the commode, water suddenly began coming down from the ceiling and falling directly into the bathtub. (R. Vol. 1, p. 97, 102). The source of the water was a spontaneous leak from the bottom of a U-shaped pipe called a P-trap. (R. Vol. 1, p. 35). The water was coming down the side of the pipe from above, beginning at the top of the P-trap which connects to the bathtub in room 3024. (R. Vol. 1, p. 35). Room 3024 is the room directly above the room occupied by the McCullars. (R. Vol. 1, p. 34). Shortly after the spontaneous leak sprung, Mary Frances McCullar fell off the commode onto the floor. No one else was in the bathroom with Mary Frances McCullar when she fell and no one saw any defects, leaks or water in the bathroom prior to the spontaneous leak.

Based on these and other facts presented, the trial court held that no genuine issues of material fact existed as to the essential elements of actual notice, constructive notice or proximate cause. (R. Vol. 3, p. 2). Accordingly, the trial court granted Boyd's motion for summary judgment.

SUMMARY OF THE ARGUMENT

Mr. McCullar can not meet his burden of proving that Boyd had either actual or constructive knowledge of the spontaneous leak. Furthermore, Mr. McCullar's bare assertions and speculations fail to establish that any act or omission on the part of Boyd was the proximate cause of his wife's injury. In fact, Mr. McCullar cannot even prove the water of which he complains was the cause of his wife's fall. Thus, the trial court properly granted Boyd's motion for summary judgment as Mr. McCullar failed to establish a prima facie case for negligence.

ARGUMENT

I. Standard of Review

An appeal from summary judgment is reviewed de novo. *Jacox v. Circus Circus Miss., Inc.*, 908 So.2d 181, 183(¶ 4) (Miss.Ct.App.2005) (citing *Cossitt v. Alfa Ins. Corp.*, 726 So.2d

132, 136(¶ 19) (Miss.1998)). The standard by which the Appellate Court reviews the grant or denial of summary judgment is the same standard that is employed by the trial court under Rule 56(c) of the Mississippi Rules of Civil Procedure. *Jacox*, 908 So.2d at 183(¶ 4) (citing *Dailey v. Methodist Med. Ctr.*, 790 So.2d 903, 906-07(¶ 3) (Miss.Ct.App.2001)). Pursuant to Rule 56(c), summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." The evidence must be viewed in the light most favorable to the non-moving party. *Jacox*, 908 So.2d at 184(¶ 4) (citing *Dailey*, 790 So.2d at 907(¶ 3)).

II. Mr. McCullar Fails to Prove that Boyd Breached any Duty Owed or Possessed Notice of Any Alleged Dangerous Condition

In his Brief, Mr. McCullar states that "Notice in the case subjudice, is not relevant." *See* Brief of Appellant p. 6. That is not correct. Notice in this case is completely relevant as it is an essential element to Mr. McCullar's claim which he can not prove. Accordingly, the trial court's grant of summary judgment was proper because Mr. McCullar's claims failed to create a genuine issue of material fact that Boyd breached any duty owed or that Boyd possessed actual or constructive notice of any alleged defect or dangerous condition. In fact, by Mr. McCullar's own admission, he fails to put forth any proof of notice since notice is "not relevant." This failure is fatal to Mr. McCullar's claim.

In *Jacox v. Circus Circus Mississippi, Inc.*, 908 So. 2d 181 (Miss. App. 2005), a case strikingly similar to the case at bar, the Mississippi Court of Appeals stated the well-established Mississippi law applicable in premises liability cases:

> Under Mississippi law, an operator of a business premises owes a duty to an invitee to exercise reasonable care to keep the premises in a reasonably safe condition. *Jerry Lee's Grocery, Inc. v. Thompson*, 528 So. 2d 293, 295 (Miss.1998); *Munford, Inc. v. Flemming*, 597 So. 2d 1282 (Miss.1992). However, the operator of a business is not an insurer against all injuries. *Munford*, 597 So. 2d at 1284. "Proof merely of the occurrence of a fall on a floor within a business

> is insufficient on the part of the proprietor...and the doctrine of res ipsa loquitor is inapplicable in cases of this kind." *Sears, Roebuck & Co. v. Tisdale*, 185 So. 2d 916, 917 (Miss.1996). To prove that the operator was negligent, the plaintiff must show either (1) that the operator caused the dangerous condition, or (2) if the dangerous condition was caused by a third party person unconnected with the store operator, that the operator had either actual or constructive knowledge of the dangerous condition. *Munford*, 597 So. 2d at1284; *Waller v. Dixieland Food Stores Inc.*, 492 So. 2d 283 (Miss.1986).
>
> Constructive knowledge is established by proof that the dangerous condition existed for such a length of time that, in the exercise of reasonable care, the proprietor should have known of that condition. *Munford*, 597 So. 2d at 1284. The Plaintiff must produce admissible evidence of the length of time that the hazard existed and the court will indulge no presumptions to compensate for any deficiencies in the plaintiff's evidence as to the time period. *Waller*, 492 So. 2d at 286. The plaintiff must present specific proof as to the actual relevant length of time. *Dickins v. Wal-Mart Stores, Inc.*, 841 F. Supp. 768, 771 (S.D.Miss. 1994).
>
> *Jacox*, 908 So. 2d 181,184-185 (Miss.App. 2005).

In *Jacox,* the Plaintiff alleged that he used a toilet in one of the casino's first floor public restrooms. While sitting on the toilet, Jacox flushed it, at which time the toilet rapidly overflowed. Jacox claimed that the rapidly rising water caused him to attempt to get up from the toilet and in the process, he fell down. Jacox offered no evidence that the defendant or any individual under its control caused or contributed to the overflowing toilet. Thus, the court found that Jacox failed to prove that the defendant caused any dangerous condition. *Id.* at 185. The Court further found that Jacox presented no evidence that the defendant had actual or constructive notice of any dangerous condition in the bathroom. *Id.* The court pointed to Jacox's own deposition in which he stated that there was no visible indication of a problem with the toilet before he used it. *Id.* Accordingly, the Mississippi Court of Appeals affirmed the lower court's grant of summary judgment.

Save only the source of the water in the bathroom, *Jacox* is identical to the subject case. Both Jacox and Mary Frances McCullar were sitting on the toilet. Both allege water spilled onto

the floor. Both allege they slipped and fell due to the water. Both allege they were injured as a result. Both testified there was no apparent problem before they fell.

In the case at bar, no one noticed a hazard prior to Mary Frances McCullar's fall. Mr. McCullar testified that on the morning of November 24, 2003, Billie Ruth McCullar[2] got up first, went in the bathroom, took a shower, changed clothes, and returned to the room. (R. Vol. 1, p. 94). It is undisputed that Billie Ruth McCullar did not see any water in the bathroom prior to the time Mary Frances McCullar was taken into the bathroom and assisted in getting on the toilet:

Q. ...see any water dripping down from the ceiling –

A. No.

....

Q. Did you see any water on the floor?

A. Not that I remember.

(R. Vol. 2, p. 161).

After Billie Ruth finished in the bathroom, Wallace went in the bathroom, took a shower, dressed, and returned to the bedroom. (R. Vol. 1, p. 94). It is undisputed that Wallace McCullar did not see any water dripping or coming down from the ceiling while he was in the bathroom:

Q. And my question is did you see any water dripping down from the ceiling the first time you went in the bathroom that morning?

A. No, sir.

Q. There was no water coming down from the ceiling when you were in the bathroom?

A. That's correct because I was in the shower and it was right over the shower. I can swear to that real fast.

(R. Vol. 1, 95).

[2] Billie Ruth is the sister of Mary McCullar and the sister-in-law of Wallace McCullar.

Both Mr. McCullar and Billie Ruth McCullar testified that no water was leaking from the ceiling prior to the incident. Mr. McCullar himself testified that no water was leaking from the ceiling only minutes before he left his wife on the toilet in the bathroom. Thus, it follows from both Mr. McCullar's and Billie Ruth McCullar's admissions, there was nothing which would have provided actual or constructive notice to Boyd that the spontaneous leak was about to occur or was likely to occur. Similarly, without manifest symptoms, no inspection would have discovered the not-yet-occurring leak, nor would Boyd have been prompted to repair a potential malfunction which had not yet occurred. Therefore, Boyd did not cause the dangerous condition of which the Plaintiff complains and did not possess any notice of any alleged defect.

Mr. McCullar simply can not prove that Boyd should have known about the dangerous condition, nor can he prove Boyd caused the dangerous condition. Accordingly, just as the Court in *Jacox* found, summary judgment in the case at bar was appropriate because Boyd did not have actual or constructive knowledge of the spontaneous leak nor did Boyd cause the leak. The trial court properly granted Boyd's motion for summary judgment in this regard.

III. Mr. McCullar Must Prove the Essential Element of Notice to Survive Summary Judgment

In his brief, Mr. McCullar attempts to bypass his failure to prove notice by wrongly dismissing its applicability. *See* Brief p. 6. In support of this argument, Mr. McCullar relies upon *Drennan v. Kroger Co.*, 672 So.2d 1168 (Miss. 1996). Mr. McCullar argues that *Drennan* stands for the proposition that proof of notice is not necessary when the defendant created the dangerous condition. Mr. McCullar's reliance on *Drennan* is misguided. Although the *Drennan* Court held that proof of notice is not necessary where it is claimed the condition was created by the negligence of the proprietor, *Drennan* is inapplicable to the case at bar.

In *Drennan*, the Plaintiff slipped in fell in water while shopping at Kroger. *Drennan*, 672 So.2d at 1169. The source of the water was a leaking roof. The Plaintiff in *Drennan* produced evidence of water stains on the ceiling tile above the location of her fall, provided proof that it was raining very heavily on the day she fell, provided statements from the store manager admitting that the roof had previously sustained damage, and provided proof that despite repairs to the roof, management was aware that leaks occurred during periods of heavy rains. *Drennan*, at 1173. In light of this proof, the *Drennan* Court held the evidence was sufficient to create a jury issue as to whether Kroger was negligent in repairing the roof and that the Plaintiff could recover without proof of the length of time the water was on the floor prior to her fall. *Id.*

In the case at bar, no such evidence of a leak or dangerous condition exists. Both Mr. McCullar and Billie Ruth McCullar testified that no water was leaking from the ceiling prior to the incident. In fact, Mr. McCullar testified that no water was leaking from the ceiling only minutes before he left his wife on the toilet in the bathroom. There is no evidence that the pipe in question ever leaked on any prior occasion. There were no ceiling stains above the tub in Room 2024. Thus, unlike the defendant in *Drennan*, Boyd lacked any notice that the leak was about to occur, had occurred or was likely to occur. Furthermore, as no leak previously occurred, evidence does not exist that Boyd failed to properly repair the subject plumbing fixtures. Thus, Mr. McCullar's reliance on *Drennan* is misplaced and he must prove the essential element of notice to survive summary judgment.

Furthermore, Mr. McCullar fails to address an important element that goes into the determination of whether a Plaintiff is required to show proof of notice. That element is whether the operator or someone under his authority committed an **affirmative act** that caused the dangerous condition.

In *Douglas v. Great Atlantic & Pac. Tea Co.,* the Plaintiff, Mary Douglas, slipped in water at the A&P that leaked from a frozen food case. According to the porter, water sometimes collected in front of the frozen food case, but the store manager maintained that the freezer never leaked before. *Douglas,* 405 So.2d at 109. Another employee indicated that no water was on the floor fifty (50) minutes prior to the accident. In holding that Mary Douglas bore the burden of establishing notice because she failed to prove that the water was the result of an affirmative act of the proprietor or his employee, the Mississippi Supreme Court stated:

> In *Hevelston v. Gibson Products Company of Hattiesburg, Inc.*, 192 So.2d 389 (Miss. 1966) we affirmed a jury verdict for a defendant wherein plaintiff slipped and fell on a puddle of liquid in Gibson's. There we held proof of actual or constructive notice is required where there is no proof of the dangerous condition is the result of an affirmative act of the store proprietor or any of his employees. Here, appellant also failed to prove that the wet hazardous condition was a result of an affirmative act of the proprietor or his employees so plaintiff had the burden of proving notice.

Douglas at 110. Much like the freezer leak in *Douglas,* in the case at bar, no affirmative action was taken either by Boyd or its employees that resulted in the leak. Furthermore, the leak in *Douglas* developed in the span of some fifty (50) minutes from the last time an employee checked the aisle until Mrs. Douglas slipped in the water. In the case at bar, the leak spontaneously developed in the span of two or three minutes from the time Mr. McCullar placed Mary Frances McCullar on the toilet until the sound of falling water could be heard dripping into the bathtub. Accordingly, Boyd possessed no actual or constructive knowledge that the leak occurred until after it was reported by Mr. McCullar that Mary Frances McCullar had fallen. Mr. McCullar must prove such knowledge on the part of Boyd in order to survive summary judgment. Mr. McCullar's failure to put forth any proof as to the essential element of notice is fatal to his claim. Accordingly, the trial court properly granted Boyd's motion for summary judgment as no proof of notice on the part of Boyd existed.

IV. *Res Ipsa Loquitor* is Inapplicable in Premises Liability Cases

Mr. McCullar asserts that since Boyd had exclusive control over the inspection, maintenance and repairs of the pipes between the rooms, knowledge of the defect need not be proven as an element of Mr. McCullar's case. This argument amounts to a thinly veiled attempt to wrongly insert the doctrine of *res ipsa loquitor* into the premises liability context. As a matter of law, *res ipsa loquitor* is inapplicable in premises liability cases. *See Jacox v. Circus Circus Mississippi Inc.*, 908 So.2d 181, 184 (Miss. Ct. App. 2005) (quoting *Sears, Roebuck & Co. v. Tisdale*, 185 So.2d 916,917 (Miss.1966)). Mr. McCullar alleged *res ipsa loquitor* in his Complaint (R. Vol. 1, p.7) and cited to its elements in his Response in Opposition to Boyd's Motion for Summary Judgment.[3] Although in his Brief, Mr. McCullar abandons the phrase "*res ipsa loquitor*", he nevertheless incorrectly invokes the doctrine in an impermissible attempt to conjure up an issue of fact and shift the Court's focus from his failure to prove the essential elements of his claim.

Mr. McCullar argues that since the pipe leaked, Boyd must have negligently maintained or inspected it. *See* Appellant's Brief, pp. 6-7. In support of this assertion, Mr. McCullar points to the alleged lack of maintenance records arguing that the lack of records indicates that the pipe was never inspected or properly maintained. *Id.* Such a conclusory assertion is nothing short of wild speculation and is wholly insufficient to create a genuine issue of material fact that will survive summary judgment. Mr. McCullar cites to *Elston v. Circus Circus Mississippi, Inc.*, 908 So.2d 771 (Miss. App. 2005) to support his argument that the lack of evidence regarding

[3] Although Wallace's Response is included in the record (*see* R. Vol. 1 pp. 103-137) and the other exhibits are attached to the Response, Wallace's Memorandum is not included in the record. The citation to *res ipsa loquitor* is located on page 6 of his Memorandum.

inspections and repairs is circumstantial[4] evidence of Boyd's failure to inspect and maintain the premises. However, Mr. McCullar's reliance on *Elston* is misplaced.

Elston involved plants watered by defendant's employees in the hotel lobby and centered on whether the water from those plants was the source of a puddle near the plants that caused Plaintiff's fall. *Elston,* 908 So.2d 772-773. To prove it maintained the premises in a reasonably safe condition, the defendant hotel pointed to procedures in place to maintain the lobby area. *Elston,* at 773. Although the *Elston* Court found that the defendant's procedures were adequate to keep the premises reasonably safe, the Court found that the procedures did not establish that the lobby was in a reasonably safe condition on the day of the accident. *Elston*, at 774. On the day of the incident, the defendant hotel could not show when the lobby was last inspected and the manager was not on duty. *Id.* Most importantly, the Court pointed out that the individuals who watered the plants carried towels to clean up spills. *Id.* The Court held that "this fact puts the employees on notice that the area where the plants are watered is particularly susceptible to spills." *Id.*

Thus, the *Elston* decision did not turn on the issue of internal procedures and whether they were followed or documented. Instead, the *Elston* decision focused on whether the defendant created the dangerous condition, i.e. watering the plants, and whether the defendant possessed constructive notice of the dangerous condition, i.e. how long the puddle of water existed near the plants. As previously discussed Mr. McCullar fails to prove that Boyd either created any alleged dangerous condition or possessed any notice of its existence. Regardless, in

[4] Wallace uses the term "circumstantial" (*See* Appellant's Brief p. 7) but the Court in *Elston* never held that the alleged lack of evidence regarding inspections and maintenance constituted circumstantial evidence that the defendant hotel failed to maintain its premises is a reasonably safe condition. Instead, the *Elston* Court discussed circumstantial evidence only in the context of constructive notice. *Elston*, at 774-776.

the case at bar, maintenance records do exist for both room 2024, the subject room, and room 3024, the room above. These records have been produced to Mr. McCullar and include:

(1) Guestroom Preventative Maintenance Checklist for Room 3024, dated April 27, 2003.

(2) Work Order History Comprehensive for Room 3024, dated August 4, 2003.

(3) Work Order History Comprehensive for Room 3024, dated August 6, 2003.

(4) Work Order History Comprehensive for Room 3024, dated August 18, 2003.

(5) Guestroom Preventative Maintenance Checklist for Room 2024, dated April 11, 2003.

(6) Work Order History Comprehensive for Room 2024, dated August 29, 2003.

(7) Work Order History Comprehensive for Room 2024, dated September 7, 2003.

(R. Vol. 2, pp. 162-168).

Admittedly, the records do not specifically address the culpable bits of plumbing hardware, but how could Boyd possibly have on file specific maintenance records for a problem that did not previously exist? Contrary to Mr. McCullar's argumentative inferences, one could just as easily argue the lack of maintenance records clearly indicates that the hardware in question was properly functioning prior to the subject event. However, two combating argumentative inferences do not an issue of fact make. Even if the subject bathroom was inspected just minutes before the spontaneous leak occurred, said inspection would not have revealed any defects.

It is poor reasoning on the part of Mr. McCullar to assert that simply because Boyd lacks detailed inspection or maintenance records on the hardware in question that one must assume that Boyd negligently maintained it as evidenced solely by the subsequent leak. Mr. McCullar has offered no expert testimony on this alleged failure and its effect upon the bathroom plumbing. Mr. McCullar points to no proof that Boyd's maintenance or inspection of the pipes fell below any industry standard or was the cause of the leak. Plumbing fixtures leak for a

myriad of reasons. To hold a premises owner liable because a fixture spontaneously springs a leak through no fault of the premises owner, not only improperly injects the doctrine of *res ipsa loquitor* into premises liability cases, but also subjects the owner to a strict liability standard. Under Mississippi law, premises owners are not held to a strict liability standard for premises liability. *Ratcliff v. Rainbow Casino-Vicksburg Partnership, L.P.*, 914 So.2d 762 (Miss. App. 2005).

V. No One Knows What Caused Mary Frances McCullar to Fall

Even if the Court finds that Boyd was negligent in some regard, Mr. McCullar's claim would still fail as a matter of law because proximate cause does not exist. Under Mississippi law, in order to succeed on his claim for negligence, Mr. McCullar must prove that Boyd's alleged negligence was the proximate cause of the injury to his wife. The trial court properly found that Mr. McCullar produced no evidence creating a genuine issue of material fact as to the essential element of proximate cause.

The Mississippi Supreme Court has defined proximate cause as the "cause which in the natural and continuous sequence unbroken by any efficient intervening cause produces the injury and without which the result would not have occurred." *Delahoussaye v. Mary Mahoney's Inc.*, 783 So.2d 666,671 (Miss. 2001). Furthermore, "negligence which merely furnishes the condition or occasion upon which injuries are received, but does not put in motion the agency by or through which the injuries are inflicted, is not the proximate cause thereof." *Newell v. Southern Jitney Jungle Co.*, 830 So.2d 621, 623 (Miss. 2002) (citing *Miss. CityLines v. Bullock*, 194 Miss. 630, 13 So.2d 34, 36 (1943)).

The evidence obtained through discovery, including Mr. McCullar's own statements, forecloses the possibility that any act or omission on the part of Boyd was the proximate cause of

Mary Frances McCullar's injury: *no one saw or has any actual knowledge as to why Mary Frances McCullar fell.*

Mr. McCullar did not see his wife fall. He testified that he was in the bedroom when he heard his wife yell for him from the bathroom. (R. Vol. 1, p. 95). Mr. McCullar further testified that upon reaching the bathroom he picked his wife up off the floor and sat her on the bed. (R. Vol. 2, p. 154). Regarding whether he saw his wife slip and fall, he testified at his deposition as follows:

Q. Did you see your wife fall?

A. No, Sir.

.....

Q. How do you know she slipped on the water?

A. I don't know that she slipped in the water, sir.

.....

Q. So you don't know why she fell?

A. No, sir.

Q. All right. You just know that when you got to the bathroom that she was on the floor?

A. Yes, sir.

(R. Vol. 1, p. 99). Furthermore, in his written statement given to Boyd employees directly following his wife's accident, Mr. McCullar stated that he did not actually see his wife fall. "I heard her fall and ran back into bathroom and found Frances lying on floor." (R. Vol. 2, p. 155).

Even less compelling is the deposition testimony given by Billie Ruth McCullar. She also did not see Mary Frances McCullar fall. Billie Ruth McCullar testified that she was in the bedroom at the time of the accident. (R. Vol. 2, p. 157). She stated that she did not see Mary

Frances McCullar on the floor because Mr. McCullar had already gotten to the door. (R. Vol. 2, p. 159). Billie Ruth McCullar stated that Mr. McCullar was not in the bathroom at the time of the accident.

Q. Okay. And did Wallace help her up from the commode?

A. No. He wasn't in - - she fell when she got – she stood up and fell.

Q. When she got up from the commode she fell?

A. She didn't completely stand up. She just fell. I think it scared her.

Q. I am not asking you what you think. I am just asking you now you're telling me that Wallace is standing in there with her and she fell?

...

A. No.

(R. Vol. 1, p. 78). Although Billie Ruth McCullar's deposition testimony is inconsistent in several respects, she did state numerous times that she was not in the bathroom at the time of the accident.

Q. And I believe that you told Mr. Caputo that you were in the room at the time Frances McCullar fell; is that correct?

A. I was in the room. I wasn't in the bathroom. I was in the bedroom.

(R. Vol. 2, p. 157).

Q. Okay. Well, what did you see?

A. Well, when I heard the noise too I went to the, the water running I went to the door and I saw the water coming down.

Q. As soon as you heard the water you went to the bathroom door and you looked in; right?

A. (Witness moves head up and down.)

Q. And you saw Frances?

A. No. He had already gotten Frances out because he was at the door before I got there.

(R. Vol. 2, p. 159).

Mr. McCullar and Billie Ruth McCullar's assertions and speculations as to what they "think" caused Mary Frances McCullar to fall off the commode simply do not satisfy the legal requirements to establish a prima facie case for negligence. "It is elementary law that in any law-suit based on negligence, it is incumbent upon the plaintiff to first prove by a preponderance of the evidence that the defendant was negligent and that such negligence was a proximate cause of the accident." *Rudd v. Montgomery Elevator Company*, 618 So.2d 68, 73 (Miss. 1993). Furthermore, "the basis of liability is negligence and not injury. Proof merely of the occurrence of a fall on a floor within business premises is insufficient to show negligence on the part of the proprietor." *Sears Roebuck & Co. v. Tisdale*, 185 So.2d 916, 917 (Miss. 1966). In *Campbell v. Willard,* 205 Miss. 783, 39 So.2d 483 (1949), the Mississippi Supreme Court eloquently explained the relationship between negligence and proximate cause stating:

> Sufficient stress is lacking upon principles which the lay mind too often ignores, and which even in judicial opinions are assumed rather than asserted. These are that injury of itself confers no legal right; that danger of itself is not negligence; and that negligence of itself is not liability. While negligence is the failure to use reasonable care, it remains an abstract concept until such negligence results proximately in injury to one whom the obligation of due care is owed.

Campbell, 205 Miss. at 792-93, 39 So.2d at 484.

Neither Billie Ruth McCullar nor Mr. McCullar actually witnessed Mary Frances McCullar fall. Other than post-fall speculative inferences, they possess no actual knowledge as to whether or not Mary Frances McCullar in fact fell due to the alleged presence of water on the floor. Thus, Mr. McCullar fails to establish that any act or omission by Boyd was the proximate cause of the injury to Mary Frances McCullar. "If the nonmoving party rests merely upon conclusory allegations, improbable inferences and unsupported speculation, summary judgment

may be appropriate." *Krim v. BancTexas Group, Inc.*, 989 F.2d 1435, 1449 (5th Cir. 1993). A court may not rely upon "unsupported, conclusory allegations to defeat a motion for summary judgment where there are no issues of material fact." *Jacox v. Circus Circus Mississippi, Inc.*, 908 So. 2d 181,184 (Miss. App. 2005).

VI. Any Alleged Circumstantial Evidence is Nothing More Than Pure Speculation and Insufficient to Create a Genuine Issue of Material Fact as to the Essential Element of Proximate Cause

Mr. McCullar presents no evidence as to why Mary Frances McCullar fell. Despite this failure and the fact that no one saw Mary Frances McCullar fall, Mr. McCullar asks this Court to assume that simply because a leak occurred in the bathtub adjacent to the toilet, Mary Frances McCullar either slipped in water or was startled by the water causing her to fall. Neither assumption is adequate to survive summary judgment. Realizing that he lacks adequate proof, Mr. McCullar attempts to argue that there is enough circumstantial evidence to defeat summary judgment as to proximate cause.

Mr. McCullar cites to *Mississippi Dept. of Transp. v. Cargile*, 847 So.2d 258, 262 (Miss. 2003) to support his assertion that proof of a "causal connection may be established by circumstantial evidence to make the plaintiff's theory reasonably probable, 'and that it is generally for the trier of fact to say whether circumstantial evidence meets this test.'" *See* Appellant's Brief p. 8. Mr. McCullar is arguing that since he lacks the requisite conclusive proof satisfying the essential elements of his claim, his claim should nevertheless reach the trier of fact based merely on more speculative circumstantial evidence. While creative, such an argument perverts the purpose of summary judgment and turns its application on its ear.

The Mississippi Supreme Court has held that negligence may be proven by circumstantial evidence where the circumstances are such as to remove the case from the realm of **conjecture** and place it within the field of **legitimate inference**. *See Kussman v. V & G Welding Supply,*

Inc., 585 So.2d 700, 703 (Miss.1991) (citing *Cadillac Corp. v. Moore*, 320 So.2d 361, 366 (Miss.1975) (emphasis added)). However, the Mississippi Supreme Court has cautioned that:

> while inferences of negligence may be drawn from circumstantial evidence, those inferences must be the only ones which reasonably could be drawn from the evidence presented, and if the circumstantial evidence presented lends itself equally to several conflicting inferences, the trier of fact **is not permitted** to select the inference it prefers, since to do so would be the equivalent of engaging in pure speculation about the facts. Where plaintiff in a negligence action has only presented proof that the actual cause was one of a number of possibilities, to enable an inference to be drawn that any particular cause is probable, the other causes must be eliminated. Thus, when the evidence shows that it is just as likely that accident might have occurred from causes other than defendant's negligence, the inference that his negligence was the proximate cause **may not be drawn**.

Mississippi Valley Gas Company v. Estate of Walker, 725 So.2d 139, 145-146 (Miss. 1998) (citing 57 Am.Jur.2d *Negligence* § 462 (1989) (emphasis added)).

Mr. McCullar's blind assertions simply do not establish genuine issues of material fact as to whether Mary Frances McCullar slipped in any alleged water on the bathroom floor. Furthermore, Mr. McCullar's assertions that Mary Frances McCullar possibly slipped in water or was possibly startled by the water are no more likely the cause of her fall than the fact that she simply fell on her own accord. It is just as inferentially likely that Mary Frances McCullar slipped and fell in water on the floor from Mr. McCullar's and Billie Ruth McCullar's prior showers earlier that morning. Furthermore, evidence in the record suggests that Mary Frances McCullar had a history of falling without regard to hazards. In fact, the medical records indicate that prior to the fall at Boyd's hotel, Mary Frances McCullar was experiencing stroke-like symptoms and was taken to the Emergency Room on October 20, 2003 where it was noted that she "fell 6 times last week". (R. Vol. 1, pp. 50-63).

Thus, Mr. McCullar fails to present compelling circumstantial evidence sufficient to create an inference that his version in the only version that can be reasonably drawn from the

evidence. Without any actual knowledge as to what caused Mary Frances McCullar to fall, Mr. McCullar can not establish the causal link between any alleged negligence on the part of Boyd and her subsequent injury. Thus, by failing to prove proximate cause, either through conclusive or circumstantial evidence, Mr. McCullar can not establish a prima facie case for negligence. Accordingly, Boyd respectfully requests this Court to affirm the trial court's grant of summary judgment due to the Appellants' failure to prove that any action or omission by Boyd was the proximate cause of Mary Frances McCullar's injury.

CONCLUSION

Based on the foregoing analysis, Boyd respectfully requests that the trial court's grant of summary judgment be affirmed.

Mr. McCullar fails to put forth any evidence to establish notice on the part of Boyd. In fact, by Mr. McCullar's own admission, he fails to put forth any proof of notice since, in his opinion, notice is "not relevant." Notice is not only relevant, but it is an essential element to Mr. McCullar's claim. The failure to provide any proof of notice is fatal to Mr. McCullar's claim. Mr. McCullar simply can not prove that Boyd should have known about the dangerous condition, nor can he prove Boyd caused the dangerous condition. Accordingly, just as the Court in *Jacox* found, summary judgment in the case at bar is appropriate because Boyd did not have actual or constructive knowledge of the spontaneous leak nor did Boyd cause the leak. Accordingly, the trial court properly granted Boyd's motion for summary judgment in this regard.

Furthermore, Mr. McCullar incorrectly invokes the doctrine of *res ipsa loquitor* in an impermissible attempt to manufacture an issue of fact where none exists and shift the Court's focus from his failure to prove the essential elements of his claim. It is poor reasoning on the part of Mr. McCullar to assert that since Boyd had exclusive control over the inspection, maintenance and repairs of the pipes between the rooms and that Boyd allegedly lacks detailed inspection or

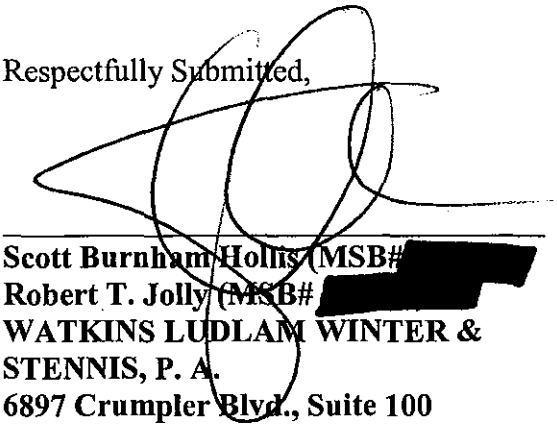
maintenance records on the hardware in question that one must assume that Boyd negligently maintained it as evidenced solely by the subsequent spontaneous leak. To hold a premises owner liable because a fixture spontaneously springs a leak through no fault of the premises owner, not only improperly injects the doctrine of *res ipsa loquitor* into premises liability cases, but also subjects the owner to a strict liability standard – neither of which is appropriate.

Lastly, Mr. McCullar's assertions and speculations fail to establish that any act or omission on the part of Boyd was the proximate cause of his wife's injury. In fact, Mr. McCullar cannot even prove the water of which he complains was the cause of his wife's fall. Neither Billie Ruth McCullar nor Mr. McCullar actually witnessed Mary Frances McCullar fall. Other than post-fall speculative inferences, they possess no actual knowledge as to whether or not Mary Frances McCullar in fact fell due to the alleged presence of water on the floor. Furthermore, Mr. McCullar's assertion that since he lacks the requisite conclusive proof satisfying the essential element of proximate cause, his claim should nevertheless reach the trier of fact based merely on circumstantial evidence is disingenuous. The evidence shows that it is just as likely that the accident might have occurred from causes other than any alleged negligence on the part of Boyd. Thus, the inference that Boyd's alleged negligence was the proximate cause of Mary Frances McCullar's fall may not be drawn.

The trial court correctly granted Boyd's motion for summary judgment. Accordingly, Boyd respectfully requests that the judgment below should be affirmed.

THIS the 4th of December 2009.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I, Scott Burnham Hollis, hereby certify that a true and correct copy of the above and foregoing has this day been sent via U.S. Mail, postage prepaid to the following:

The Honorable Kenneth L. Thomas
Circuit Court of Tunica County
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Cleveland, MS 38732

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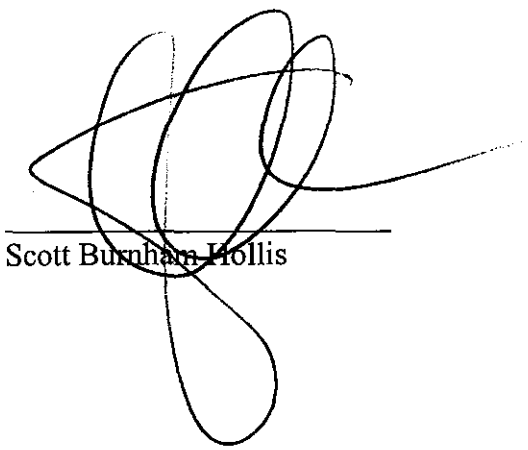
Clarksdale, MS 38614

This the 4th day of December, 2009.



Scott Burnham Hollis