

**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**

**CASE NO. 2009-TS-00616**

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

**APPELLEE**

**BRIEF OF APPELLANT**

**APPEALED FROM THE CIRCUIT COURT  
OF TUNICA COUNTY, MISSISSIPPI  
CIVIL ACTION 2005-0279**

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**ORAL ARGUMENT REQUESTED**

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**CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record certifies that in addition to the named parties 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 Kenneth L. Thomas
2. Scott Burnham Hollis, Esq.

Daniel M. Czamanske, Jr.  
CHAPMAN, LEWIS & SWAN  
Attorney for Appellants  
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MSB No. [REDACTED]

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### **STATEMENT OF POSITION REGARDING ORAL ARGUMENT**

The Appellant respectfully requests oral argument. This appeal presents complicated facts and legal issues, and an oral argument would be beneficial to this Court and to the parties. The Appellant therefore respectfully submits that oral argument would be appropriate in this case.

# **IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

## **BRIEF OF APPELLANT**

COMES NOW, the Plaintiff/Appellant, Wallace B. McCullar, 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**

First, did the trial court err in granting the motion for summary judgment filed by the Defendant/Appellee Boyd Tunica, Inc. d/b/a Sam's Town Casino and Gambling Hall Tunica (hereinafter "Sam's Town"). Second, did the trial court err in denying the Plaintiff/Appellant the right to have a jury decide its claims.

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

### **II.**

#### **STATEMENT OF THE CASE**

On or about September 23, 2005, the Plaintiff/Appellant Wallace B. McCullar filed suit in the Circuit Court of Tunica County, Mississippi against Defendant/Appellee Sam's Town. (R. 9-12). This suit arose out of an incident which occurred on or about November 24, 2003, when Mary F. McCullar was injured by a slip and fall on Sam Town's premises. (R. 10).

Sam Town filed its answer on or about October 24, 2005. (R. 32-35). On March 12, 2008, Defendant Gold Strike moved for summary judgment. (R. 86-110). On December 3, 2008, a hearing was held on this matter and on March 23, 2009, the motion was granted in favor of Defendant Sam's Town. (R. 173-75). The Plaintiffs timely perfected this appeal. (R. 202-03).

### III.

#### STATEMENT OF FACTS

The Plaintiff/Appellant, Wallace McCullar, is the husband and surviving spouse of Mary Frances McCullar. Mary Frances McCullar, was injured on November 24, 2003, due to a fall in the Defendant/Appellee's hotel room bathroom. Mary Frances McCullar was hospitalized and ultimately died from these injuries on or about December 13, 2003. A complaint was filed against the Defendant/Appellee, Boyd Tunica Inc., dba Sam's Town Casino and Gambling Hall Tunica (hereinafter "Sam's Town") on September 23, 2005. (R. 5).

Decedent Mary Frances McCullar (hereinafter "Frances" or "decedent") and her husband Wallace McCullar (hereinafter "Wallace" or "Plaintiff/Appellant") were guest invitees of Sam's Town during all pertinent times. They were staying in room 2024 at the Sam's Town Casino. Billie Ruth McCullar (hereinafter "Ruth") was Frances' sister and she was also a guest and stayed in the room with Wallace and Frances. On the morning of November 24, 2004, Wallace assisted his wife Frances to the hotel room bathroom and assisted her to the commode. (R. 97). Wallace left the bathroom door open and exited the bathroom. While outside the bathroom, Ruth heard water splashing as if the shower was on, and she called to Wallace. (R. 108). At the same time, Frances called out for Wallace. (R. 106). Water was pouring out of a trap door above the bath tub and splashing in the bathroom. (R. 102). Frances slipped and fell in the water. (R.106-107). Wallace assisted his wife whose injury was a broken hip. She was hospitalized and eventually died on December 13, 2003.

Plaintiff/Appellant's complaint alleged that Sam's Town was negligent for failing to maintain a reasonably safe premises, for failing to properly inspect and/or repair its premises, for failing to maintain the plumbing where the leak occurred, and for failing to adequately construct or design the

room where the incident occurred. (R. 6). Plaintiff/Appellant further alleged that the dangerous condition was under the exclusive control of Sam's Town and that such an incident is not likely to occur in the absence of negligence. (R. 7).

Sam's Town moved for a summary judgment on the basis that the Plaintiff/Appellant could not make a prima facie showing that Sam's Town was actively negligent nor that Sam's Town had actual or constructive knowledge of the dangerous condition. (R. 26). In its Rebuttal to Plaintiff/Appellant's Response to the summary judgment, Sam's Town also argued that the Plaintiff/Appellant could not prove decedent's fall was caused by the water falling from the ceiling of the bathroom. (R. 139).

On the morning of the accident, Wallace and Ruth had already used the bathroom and were waiting for Frances to use the commode, the door to the bathroom was open. (R. 73). Ruth heard water running and hollered at Wallace that someone had left the shower on, but the water was coming from the ceiling above the bathtub which is right next to the commode. (R. 74). She heard it clearly, it was a lot of water. (R. 75). Ruth testified, "I saw her trying to get up off the commode when Wallace was in there helping her and she slid and fell." (R. 106). Sam's Town was notified of the incident and came to the room. The EMT Bradley Mason noted Frances' leg to be rotated to the right. (R. 118). Paramedics were then called and Frances was transported off the premises at about 10:05 that morning. (R. 118).

The EMT Bradley Mason, an employee of Sam's Town, completed an incident report with regard to this matter. He took three pictures of the area where Frances fell, but took no picture of the area where the water came out of the ceiling. (R. 112). In his report, Bradley Mason stated, "PATRON MARY F. MCCULLAR WAS IN THE BATHROOM WHEN SHE SLIPPED AND FELL IN WATER DRAINING FROM THE CEILING AND HER HUSBAND REQUESTED TO



SEE AN EMT.” (R. 113). According to the Rule 30(b)(6) deponent on behalf of Sam’s Town, when asked whether the incident report should have contained photographs of the area where the water came from, he testified that they should have photographed it if they were aware of where the water came from. (R. 113-114). Clearly they were aware of where the water came from as noted in the statement above, yet they did not photograph it. It should be noted that the water was not just coming from the ceiling, there is a trap door above the tub in the subject bathroom that allows access to the plumbing fixtures where the leak in this case occurred. (R. 126). John Logwood, the employee who fixed the faulty plumbing, describes the door in the ceiling as a removable panel. (R. 35). According to Logwood, the tub above room 2024 had a leak around its seal and the water drained from the tub above to the subject bathroom. (R. 36). Though Sam’s Town disputes the extent of the leak, their own incident report contained a statement written by John Logwood which stated, “From what I noticed the water came from room 3024. The P-trap in this room came aloose (sic), what caused the water to pour down into the room below it which cause the water to hit about center ways of the front upper base of the tub causing the water to splash onto the floor outside the left side of the toilet.” (R. 120).

Sam’s Town produced Greg Lacki as its corporate representative to testify, among other things, as to the inspection, maintenance and repair of the subject bathroom. (R.110). In his deposition, Mr. Lacki testified that he could not tell us, one way or another, whether the plumbing fixture which cause the leak in this instance, had ever been repaired at any point prior to this incident. (R. 117). He did testify that they do an annual inspection, but he specifically testified that he does not know whether the annual inspection would include inspecting the plumbing behind the trap door above the tub. (R. 126). When asked about the last time, prior to this incident, that anyone had opened the trap door above this bathroom and inspected the plumbing, he could not provide a

date or an occasion. (R. 127). He did agree that Sam's Town has exclusive control over the plumbing behind the trap door and that there are no subcontractors involved in the maintenance of that portion of the premises. (R. 131).

The trial court held that there was no evidence of actual notice, or constructive notice, or proximate cause, and therefore granted Sam's Town's Motion for Summary Judgment.

#### IV.

#### SUMMARY OF THE ARGUMENT

Summary judgment was not proper since factual questions remained as to whether or not Sam's Town was negligent in its maintenance and/or inspection of the subject premises, and further there was a factual dispute with regard to whether the dangerous condition was one which was created by Sam's Town. Further, with regard to the issue of proximate cause, there was sufficient factual evidence that the dangerous condition caused decedent's fall. 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. Halliburton 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 Sam Town's motion for summary judgment. There were two bases for the trial court's ruling, first a lack of notice, either constructive or actual, and second a lack of evidence as to proximate cause. Each of these will be addressed below.

## I. NOTICE

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, Inc. v. Fleming, 597 So. 2d 1282, 1284 (Miss. 1992). 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). Notice, in the case subjudice, is not relevant. In the case of Drennan v. Kroger Co., the plaintiff claimed that the puddle of water on the floor which caused the fall was the result of the store not repairing the roof properly. The Court held proof of notice is not necessary because the defendant created the dangerous condition. Drennan v. Kroger Co., 672 So. 2d 1168, 1172 (Miss. 1996).

Further, Plaintiff/Appellant specifically pled failure to properly inspect, maintain, and adequately construct the room where the incident occurred. The piping in room 3024, the room directly above the subject bathroom, without dispute failed to perform properly. [There is also no dispute in this case that the premises owner had control over the inspection, maintenance and repairs of the pipes between the rooms, yet when their corporate representative was asked about the inspections, repairs and maintenance, he could not provide any information.] He could not even say when the trap door above the bath tub had last been inspected or opened for any purpose. The casino opted to take the Sergeant Schultz approach and say we know nothing! Such evidence goes to more than credibility though, it goes to the issue of negligence as well. It constitutes circumstantial evidence that the casino failed to inspect and maintain the pipes behind the trap door. The question of prior repairs is completely unanswered. The trial court's ruling effectively allows a defendant in a premises liability case to say we don't know if this was ever repaired, inspected, or maintained, and therefore since we don't know, we are entitled to a summary judgement because the plaintiff can't

*circumstantial evidence of negligence*

prove otherwise.) This issue should be for the jury to decide, not the trial court. In Elston v. Circus Circus Mississippi, Inc., 908 So.2d 771 (Miss.App.2005) the casino was sued for a slip and fall due to water in the lobby. The defendant casino offered evidence of its lobby maintenance and inspections to suggest they were not aware of any hazards. They had two maintenance employees who walked the lobby looking for hazards. But on the day of the accident, no one could testify as to the last time the casino employees inspected the lobby. Id. at 774. The Court held:

While the Gold Strike employees were supposed to clean spills, these employees may have breached that duty. The guest services manager was not working at the casino on the day of the fall. He had no personal knowledge of whether or not the internal maintenance employees actually performed the inspections. For this reason, a question of fact exists for the jury whether the presence of water on the floor violated Gold Strike's duty to keep its premises in a reasonably safe condition. Id.

The Court in Elston went on to note the following:

Negligence of the defendant and notice to him may be found from circumstantial evidence of adequate probative value. Stated differently, "the plaintiff may prove circumstances from which the jury might conclude reasonably that the condition of the floor was one which was traceable to the proprietor's own act or omission." Id. at 775, citing Winn-Dixie Supermarkets v. Hughes, 156 So.2d 734, 736 (Miss.1963).

As in Elston, the Defendant/Appellee Sam's Town attempts to use a lack of evidence as a sword to strike down Plaintiff/Appellant's case summarily. [To the contrary, as noted above, the lack of evidence regarding inspections and maintenance, and in this case even any repairs, is circumstantial evidence of Sam's Town's failure or omission to inspect and maintain its premises to keep it reasonably safe for its customers.] At the very least it should be for the jury to decide this issue rather than the trial court. / Circumstantial evidence

## II. PROXIMATE CAUSE

It should be noted at the outset that the raised here by Sam's Town was not whether the injuries and or death of the decedent were related to the fall, but whether the fall itself was related to

the dangerous condition, that is whether the water pouring from the trap door caused the decedent to fall. (R. 139). Sam's Town asserts that, "no one saw or has any actual knowledge as to why Frances McCullar fell." (Id.). This statement is factually incorrect. As noted and quoted above, Ruth testified that she saw the decedent fall. (R. 106-107). Even the incident report by the EMT employed by Sam's Town specifically stated she fell in the water draining from the ceiling. (R. 113). Moreover, if the position of Appellant were to be accepted, the only way to prove proximate cause would be by direct eyewitnesses. However this is not the burden imposed by our common law.

Proof of a causal connection may be established by circumstantial evidence if it is sufficient to make the plaintiff's theory reasonably probable, "and it is generally for the trier of fact to say whether the circumstantial evidence meets this test. See Mississippi Dept. of Transp. v. Cargile, 847 So.2d 258, 262 (Miss. 2003).

There is more than sufficient evidence to support that the water pouring from the ceiling caused the decedent to fall, eyewitness testimony as well as the circumstantial evidence describe by Wallace. (R. 140). The Appellee did raise an issue as to whether the decedent was prone to falling, citing medical testimony which indicated a history of falls, but this evidence is conflicting at best and would be for the jury to consider in deciding the issue. The trial court, to the extent it may have relied on a history of falls, erred in making a factual determination that this particular fall, witnessed by Ruth at the time water was pouring from the ceiling, was due to the decedent's propensity to fall rather than the condition of the premises.

Since triable issues of fact exist, the trial court erred in granting the motion for summary judgment and in denying the Plaintiff/Appellant the right to have a jury decide his claims.

VI.

CONCLUSION

Notice is not an issue where the evidence, albeit circumstantial, is that the hazzard was traceable to omission or failure to act by the owner of the premises. To allow a premises owner to assert it does not know when a fixture under their sole control was last inspected, maintained, or repaired and thereby conclude the Plaintiff's proof must fail, ignores the legitimate circumstantial inference that by failing to inspect and maintain the fixture the owner may have breached its duty to keep its premises reasonably safe. Further, there was sufficient eyewitness testimony and proof with regard to the water being the cause of decedent's fall for the Plaintiff/Appellant to meet their prima facia case. These issue should have been decided by a jury rather than the trial court.

Respectfully submitted,

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By: 

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MSB 

**CERTIFICATE OF SERVICE**

I, Daniel M. Czamanske, Jr., 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 Kenneth L. Thomas  
Circuit Court Judge  
P. O. Drawer 548  
Cleveland, MS 38732

Scott Burnham Hollis  
Watkins Ludlam Winter & Stennis, P.A.  
P.O. Box 1456  
Olive Branch, MS 38654

This, the 4<sup>th</sup> day of November, 2009.

  
\_\_\_\_\_  
Daniel M. Czamanske, Jr.