IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2009-CA-01185

EDWARD M. O'KEEFFE — APPELLANT

VERSUS

BILOXI CASINO CORP. d/b/a
CASINO MAGIC-BILOXI — APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF HARRISON COUNTY,
SECOND JUDICIAL DISTRICT

BRIEF FOR APPELLEE
BILOXI CASINO CORP. d/b/a CASINO MAGIC-BILOXI

ORAL ARGUMENT REQUESTED

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d/b/a Casino Magic-Biloxi

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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 the Supreme Court and/or Judges of the Court of Appeals may evaluate possible disqualification or recusal.

Circuit Court Judge:

Honorable Lisa P. Dodson

Parties:

Edward M. O'Keeffe, Plaintiff/Appellant

Biloxi Casino Corp. d/b/a Casino Magic-Biloxi, Defendant/Appellee

Counsel:

Robert Homes, Jr., Gulfport, Mississippi, Counsel for Edward M. O'Keeffe

Kimberly S. Rosetti and Karen K. Sawyer, Copeland, Cook, Taylor & Bush, P.A., Biloxi, Mississippi, Counsel for Biloxi Casino Corp. d/b/a Casino Magic-Biloxi

Other:

Suzy M. O'Keefe, wife of Plaintiff/Appellant

Respectfully submitted this 20th day of August, 2010.

Kimberly S. Rosetti

KIMBERLY S. ROSETTI (MSB #99394)
Counsel of Record for Biloxi Casino Corp. d/b/a Casino Magic-Biloxi

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3. Was the Plaintiff prejudiced – i.e., prevented from presenting a damages case – by the exclusion of Dr. Bratton as a witness and/or exclusion of any reference to Dr. Bratton and his report?

4. Did the trial court err in giving jury instruction number 6?

REQUEST FOR ORAL ARGUMENT

This appeal presents legal issues that are now well-settled concerning enforcement of Uniform Circuit and County Court Rule 4.04(A), which requires designation of experts at least sixty days in advance of trial. It also presents issues concerning the scope of Mississippi Rule of Evidence 703 and concerning Mississippi premises liability law. Although the legal issues presented are not novel, oral argument may be of assistance to the Court in understanding the facts of the case. Therefore, Biloxi Casino Corp. d/b/a Casino Magic-Biloxi ("Casino Magic") requests that the Court grant oral argument.

INTRODUCTION

The Plaintiff, Edward O'Keeffe, fell while taking a shower in his hotel room at Casino Magic in Biloxi, Mississippi. He sued Casino Magic, alleging that the shower stall in his room presented a dangerous and hazardous condition, created by Casino Magic, and that Casino Magic was negligent

in allowing the condition to exist. After hearing all of the evidence presented by the parties, the jury rendered a verdict on special interrogatories in favor of Casino Magic, finding that Casino Magic was not negligent.

In an attempt to overturn that verdict and require a new trial, Plaintiff egregiously misrepresents the proceedings in this case, particularly the proceedings regarding expert witnesses to be called by the parties at trial. Although the Plaintiff would have this Court believe that the Circuit Judge unreasonably and arbitrarily excluded expert testimony that was timely proffered under Uniform Circuit and County Court Rule 4.04(A), that is simply not the case. Plaintiff's Brief and Record Excerpts omit a full disclosure of what occurred in regard to the trial court's November 7, 2008 hearing and order regarding expert witnesses.[1] A complete understanding of that hearing and order is essential to an understanding of why the trial court later struck Dr. Bert Bratton as an expert for the Plaintiff.

Less than sixty days before a trial setting of December 8, 2008, counsel for Mr. O'Keeffe sought to name an entirely new, never-before-disclosed vocational rehabilitation expert (Guy Walker). Plaintiff also sought leave to supplement the opinion of his previously-designated liability expert, A.K. Rosenhan, and the opinion of a previously-disclosed treating neurosurgeon, Dr. John Steck. Plaintiff asked that the trial court continue the case in order to allow the late designation and supplementations. Casino Magic opposed the requested continuance and the late designation.

On November 7, 2008, the trial court struck Plaintiff's attempted late insertion of Guy Walker into the case as a vocational rehabilitation expert. The designation was not timely under

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[1] The November 7, 2008 hearing transcript and the November 7, 2008 Order can be found in the Appellee's Record Excerpts at Tab 1 and Tab 2, respectively.

Rule 4.04(A). The trial court made clear that it was not appropriate to grant a continuance of the trial date to allow the Plaintiff to late-designate an entirely new, never-before-disclosed expert. Because Mr. Rosenhan and Dr. Steck had previously been disclosed to the defense, the Circuit Judge granted a short continuance of the trial until February 2, 2009 so that Plaintiff could supplement their opinions. The Circuit Judge made clear that the continuance was not for the purpose of allowing any further attempted designations of completely new experts for trial.

Despite the Court's ruling in that regard, Plaintiff's counsel then attempted to designate another entirely new medical expert – Dr. Bert Bratton, a retained expert in neurosurgery. Casino Magic moved to strike that designation. As required by Rule 4.04(A), the trial court considered whether there were any special circumstances justifying the further late designation. The trial court ultimately determined there were none, and Plaintiff's designation of Dr. Bratton was rightly stricken.

Plaintiff then attempted to circumvent the Circuit Judge's ruling by providing Dr. Bratton's report to a different, previously-designated medical expert (Dr. Dyess). Plaintiff sought to have Dr. Dyess testify about Dr. Bratton's opinions. The Circuit Judge prohibited this, consistent with her previous ruling that Dr. Bratton's opinions would not be admitted at trial because they were not timely designated. No special circumstances were shown to justify their admission. Plaintiff was allowed to fully present Dr. Dyess's own opinions at trial, but without reference to Dr. Bratton or Dr. Bratton's report.

Contrary to the argument in Plaintiff's brief, he was **not** left without expert testimony concerning his claimed damages. At trial, Mr. O'Keeffe presented the deposition testimony of his three treating surgeons – Dr. Longnecker (orthopaedic surgeon), Dr. Doty (neurosurgeon), and Dr. Steck (neurosurgeon). Plaintiff also presented the testimony of Dr. Dyess, the internist who was

Plaintiff's treating physician for pain management. Despite Mr. O'Keeffe's degenerative spinal disease that pre-dated his fall in the shower at Casino Magic, his physicians related his post-fall back problems and surgeries to that incident, as Plaintiff was reportedly asymptomatic prior to his fall in the shower.

The neurosurgeon presented as an expert at trial by Casino Magic – Dr. Eugene Quindlen – testified that the majority of Mr. O'Keeffe's post-fall problems were related to pre-existing degenerative spinal disease. However, even Dr. Quindlen agreed that Mr. O'Keeffe's lumbar disc rupture at L2-L3 was related to Mr. O'Keeffe's fall in the shower.

It is quite obvious from a review of the record that the jury's verdict in favor of Casino Magic constituted a finding that Casino Magic was not negligent in causing or allowing any dangerous or hazardous condition to exist in the shower in Mr. O'Keeffe's hotel room. Although Plaintiff had a designated engineering expert – A.K. Rosenhan – present and available at trial to testify regarding alleged defects in the shower, Plaintiff did not call Mr. Rosenhan to testify. The case was submitted to the jury with no evidence whatsoever from the Plaintiff that the shower was anything more than an ordinary shower, with no special hazards attendant to it. It was simply wet, as was to be expected, once Mr. O'Keeffe turned on the water. On the core issue of whether Casino Magic created and allowed the existence of a dangerous or hazardous condition, no reasonable jury could have found for the Plaintiff in this case.[2]

As demonstrated below, the trial court did not abuse its discretion in its rulings regarding expert witnesses and admission of evidence. The jury was correctly instructed on the relevant

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Had the jury found for the Plaintiff, Casino Magic would have been entitled to a judgment notwithstanding the verdict, as there was absolutely no evidence presented to support a finding against it of liability.

aspects of Mississippi premises liability law, including comparative negligence. The judgment entered in this matter should be affirmed.

STATEMENT OF THE CASE

I. Nature of the Case, Course of Proceedings, and Disposition Below

A. Nature of the Case

On June 1, 2005, Edward O'Keeffe sued Casino Magic, alleging that Casino Magic was liable for his October 15, 2003, fall in the shower stall of Room 1616 in the casino's hotel. He alleged, *inter alia* that (1) the shower had an extremely slippery and dangerous floor; (2) the shower had no mat in or near the stall; (3) the shower had no handle grips or other hardware installed; and (3) the seat in the shower stall, on which he hit his back when he fell, had an unreasonably sharp edge. (RV1 at 20-22.) Mr. O'Keeffe also alleged that Casino Magic failed to warn of hazards inherent in the shower stall. (RV1 at 20-21.) The fall allegedly resulted in injuries to Mr. O'Keeffe's lumbar and cervical spine, with resultant medical expenses, pain and suffering, disability, mental anguish, and lost wages. (RV1 at 21-22.) He sought $750,000 plus attorneys' fees. (RV1 at 22.)

Casino Magic answered the complaint, denying liability to Mr. O'Keeffe. (RV1 at 23-27.) Specifically, Casino Magic denied that the shower stall presented any dangerous or hazardous condition and denied that it was negligent in allowing any such condition(s) to exist. Affirmative defenses were asserted that Mr. O'Keeffe's own actions were the sole proximate cause of the incident or, alternatively, that Mr. O'Keeffe was comparatively negligent. Additionally, Casino Magic asserted that the medical problems of which Mr. O'Keeffe complained resulted from pre-existing conditions. (RV1 at 23-27.)

The case was originally set for trial on December 3, 2007. (RV1 at 28.)

B. Proceedings Regarding Designations of Expert Witnesses

1. The Parties' Initial Experts and Designations[3]

In interrogatory responses and an attached report served on December 14, 2005, Plaintiff disclosed A.K. Rosenhan as an engineering expert who would be called at trial to testify that the shower in Room 1616 of Casino Magic's hotel presented a dangerous and hazardous condition and that Casino Magic knowingly allowed such a condition to exist. Rosenhan's report, rendered in March 2005, stated that showers are inherently dangerous because of water and soap. Rosenhan criticized the shower stall in Casino Magic Room 1616 because it had no handles, grips, or other hardware mounted on the wall, and it characterized the edge of the seat in the shower as "sharp." (RV2 at 207-08.)[4]

In addition to disclosing Mr. Rosenhan as a liability expert, Plaintiff disclosed his treating physicians as experts, including Dr. M.F. Longnecker (orthopaedic surgeon), Dr. James Doty (neurosurgeon) and Dr. James Dyess (internist). (RV2 at 193-95.)

On April 26, 2006, counsel for Casino Magic notified O'Keeffe's counsel by letter that the

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3 Plaintiff argues in his Brief that certain defense expert designations were improper, although he has not appealed any of the trial court's rulings against him in that regard. *See* Brief for Appellant at pp. 18-22. Rather, Plaintiff raises these arguments to attempt to excuse his own late designation of Dr. Bratton. In any event, the defense expert designations were proper, timely, and complete. Because of Plaintiff's assertions about defense experts, Casino Magic provides the Court with a brief history of both parties' expert designations.

4 In February 2005, at the instruction of Plaintiff's counsel and before suit was filed, Suzy O'Keeffe (Plaintiff's wife), returned to Casino Magic. She specifically requested and rented Room 1616 – the room in which her husband had fallen in the shower in October 2003. After renting the room – and unbeknown to Casino Magic – Mrs. O'Keeffe gave the room key to Plaintiff's counsel and A.K. Rosenhan. Mrs. O'Keeffe left the hotel, and Mr. Rosenhan stayed in the room in order to examine the shower. (RV12 at 237-41.) Rosenhan's report reflects that this inspection occurred February 10, 2005. (RV2 at 207.)

casino was being sold to Harrah's. Mr. O'Keeffe's counsel was advised that the property would not be in the possession or control of Casino Magic "in the near future." Casino Magic counsel asked that Mr. O'Keeffe's counsel notify her soon if a further inspection of the property was desired, so that she could arrange for it. (RV1 at 67.) On May 17, 2006, Casino Magic had the Room 1616 shower inspected and tested by an engineering expert, Fred Vanderbrook. (RV3 at 383.) Mr. Vanderbrook was retained as a consulting expert at that time and did not render a written report. (RV3 at 435.)

When mediation failed to resolve the case on October 2, 2007, Casino Magic obtained a written report from Mr. Vanderbrook and designated him as an expert to testify at trial. (RV3 at 364, 381-93.)[5] Mr. Vanderbrook was of the opinion that the shower was not hazardous or dangerous. The shower had cross-hatching embossed in the floor to prevent slippage. He performed slip resistance tests on the base (floor) of the shower and found it to be "slip resistant." (RV3 at 383-86.) There was no requirement that there be hand grips or bars, and such features would not have prevented Mr. O'Keeffe's fall once it started. The shower was simply an ordinary shower with no special hazards or dangers attendant to it. (RV3 at 383-86.) Casino Magic also designated an expert in neurosurgery, Dr. Eugene Quindlen. Dr. Quindlen was designated to testify regarding the Plaintiff's back problems and the role of Plaintiff's pre-existing conditions in the majority of those problems. (RV3 at 364-80.) Casino Magic's designation of Mr. Vanderbrook and Dr. Quindlen was timely made on October 4, 2007, sixty days before the scheduled December 3, 2007 trial per Uniform Circuit and County Court Rule 4.04(A). (RV3 at 361-93.) The designation was both

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Miss. R. Civ. P. 26(b)(4)(B) does not require disclosure of consulting experts. It does, however, require disclosure of experts once a decision is made that they are expected to be called at trial.

mailed and faxed to Plaintiff's counsel on October 4, 2007. (RV3 at 361-93.)[6]

Plaintiff filed a motion to continue the trial date, on grounds that he needed to reinspect the shower. (RV1 at 59-64.)[7] Casino Magic did not oppose continuing the trial. An Agreed Order of Continuance was entered, resetting the trial for December 8, 2008 (RV1 at 80), and Plaintiff did not further pursue the motion.

2. Plaintiff's Late Expert Designation Prior to the December 8, 2008 Trial Date

On September 30, 2008, Casino Magic was advised by Plaintiff's counsel that Mr. O'Keeffe underwent further back surgery on August 19, 2008. The surgery was performed by Dr. John Steck. (RV1 at 86.) The sixty-day pre-trial deadline for additional designations of expert witnesses was October 9, 2008. Casino Magic therefore moved the Circuit Court to allow it additional time to obtain Dr. Steck's records, present them to Dr. Quindlen (Casino Magic's neurosurgical expert), and supplement Dr. Quindlen's opinion. (RV1 at 82-86.) This motion was served by Casino Magic on September 30. It expressly stated:

> Trial of this matter is set to begin December 8, 2008. Pursuant to Rule 4.04(A) of the Uniform Circuit and County Court rules, all expert witnesses must be designated at least sixty (60) days

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6 Plaintiff represents in his Brief that Casino Magic's original expert designation was only mailed to him on the deadline – not faxed – so as to cut off several days of his time to evaluate it and to somehow "trap" him. *See* Brief for Appellant at pp. 19-20. This is simply untrue, as demonstrated by the fax confirmation sheet in the record showing successful facsimile transmission of the 32 page fax of Casino Magic's original expert designation to Plaintiff's counsel on October 4, 2007. (RV3 at 361.)

7 Although this was titled as a motion to exclude the testimony of Fred Vanderbrook, Plaintiff only asked for exclusion of Vanderbrook's testimony if the trial was not continued and if his expert was unable to reexamine the shower. (RV1 at 59-64.) Plaintiff was, in fact, able to reexamine the shower and actually obtained the entire shower base, which was entered as an exhibit at trial. (RV3 at 301; RV12 at 182; Exh. P-7)

> before trial. This means that all parties in this case must designate their expert witnesses on or before October 9, 2008.

(RV1 at 82.)[8] In an October 7, 2008, telephone conference with defense counsel, Plaintiff agreed to an extension of time for Casino Magic to obtain Dr. Steck's records and supplement Dr. Quindlen's opinions. This was confirmed by letter. Casino Magic counsel expressly noted that the agreed extension applied solely to Dr. Quindlen's opinions. (RV1 at 91.)

On October 22, only 47 days before trial, Plaintiff moved for leave to supplement A.K. Rosenhan's opinions, provide Dr. Steck's opinions, and designate a never-before-disclosed vocational expert, Guy Walker, to support Plaintiff's lost wage claim. (RV1 at 93-95.) On October 24, Plaintiff served a new expert designation, for the first time listing Guy Walker as an expert. (RV1 at 96-135.) Walker's curriculum vita was provided, but no opinion was provided. (RV1 at 96-135.) Casino Magic moved to strike the new designation, objecting to supplementation of Rosenhan's opinion, asking that Dr. Steck's testimony be limited to his medical records, and asking that Guy Walker be stricken completely because of designation beyond the Rule 4.04(A) deadline. (RV1 at 137-50; RV2 at 151-83.) Plaintiff then moved to continue the trial date to either February 2, 2009 or May 11, 2009 so that Dr. Steck's opinion could be obtained and so that an opinion could be provided by Guy Walker.[9] Casino Magic opposed the continuance. (RV2 at 242-45.)

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Plaintiff's counsel has suggested that he was unaware of Rule 4.04(A) before the October 9 deadline and asserts that defense counsel only advised him after the deadline had passed that Casino Magic would take the position that all experts must be designated by the deadline. *See* Brief for Appellant at pp.4-5. The above-quoted motion, served and filed on behalf of Casino Magic before the October 9, 2008, deadline, demonstrates that this assertion is incorrect.

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The motion also represented to the trial court that "Dr. Steck has not yet cleared Plaintiff to participate in the trial of this case, now scheduled for December 8, 2008." (RV2 at 239.) As of the October 29 ,2008 date this motion was served, Dr. Steck did not even know about Plaintiff's (continued...)

3. The November 7, 2008 Hearing and the Trial Court's Order

On November 7, 2008, the trial court heard the parties' cross-motions regarding Plaintiff's late expert designation and request for a continuance. (RV11 at 2-18; Appellee's RE at Tab 1.) Judge Dodson allowed Plaintiff 10 days to supplement A.K. Rosenhan's opinion and, based on a finding of special circumstances, allowed 30 days for Plaintiff to submit a supplemental expert designation concerning Dr. Steck. (RV2 at 256-57; RV11 at 14-17; Appellee's RE at Tabs 1 & 2.) Casino Magic was aware of both Rosenhan and Steck before the October 9, 2008, designation deadline.

However, Plaintiff's designation of Guy Walker as a completely new expert less than 60 days before trial was stricken. (RV11 at 17; RV2 at 256-57; Appellee's RE at Tabs 1 & 2.)[10] Judge Dodson continued the trial until February 2, 2009, so that these supplementations – particularly Dr. Steck's – could be accomplished. However, it was made clear that the court did not find it appropriate to grant a continuance to allow any completely new experts to be designated by either party. (RV11 at 14-15; Appellee's RE at Tab 1.)

4. The Flurry of Motions Concerning Dr. Steck and Plaintiff's Attempt, For the First Time, to Designate Dr. Bert Bratton

On November 14, 2008, Plaintiff served a motion for additional time to provide an expert designation regarding Dr. Steck. (RV2 at 294-95.) In that motion, Plaintiff acknowledged that the

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[9](...continued)
accident at Casino Magic or that there was any trial for which he needed to release Mr. O'Keeffe. Mr. O'Keeffe did not inform Dr .Steck of the incident at Casino Magic until October 30, 2008. (I.D. Exh. P-20 at pp. 15-16.) *See also* RV4 at 492-94.

[10] Plaintiff asserted a lost wage claim in his complaint filed in June 2005 (RV1 at 21-22) and could not demonstrate any special circumstance or reason why he did not designate a vocational rehabilitation expert earlier. Mr. O'Keeffe has not appealed the trial court's ruling striking Guy Walker as an expert.

continuance of the trial date until February 2, 2009 was not to allow new experts. Rather, "[t]he purpose of rescheduling the trial was to allow Plaintiff's counsel to obtain the expert opinions of Plaintiff's treating physician and surgeon, Dr. John Steck." (RV2 at 294.) Plaintiff's counsel recited that he had not been able to schedule a meeting with Dr. Steck before the scheduled December 8, 2008 date of his deposition, and Plaintiff sought to move the deposition to a later date. (RV2 at 294-95.) Plaintiff also sought to continue the trial until May 2010 (RV3 at 315-17) or to be allowed to use Dr. Steck's deposition as the expert designation. (RV3 at 316.) Casino Magic opposed a continuance and opposed the other relief requested by Plaintiff. Particularly with regard to Dr. Steck, Casino Magic objected to having to undergo Dr. Steck's trial deposition without any advance disclosure to it of Dr. Steck's opinions so that Casino Magic could prepare for cross-examination. (RV2 at 296-98.) Casino Magic requested that Dr. Steck's opinions at least be limited his medical records. (RV3 at 327-31.)

On November 20, 2008, without leave of court, Plaintiff served an "Amended Expert Designation" which, for the first time, included the name of Dr. Bert Bratton and an incomplete copy of Dr. Bratton's curriculum vita. No opinion of Dr. Bratton was provided. (RV3 at 318-19.)

A hearing was held in chambers on November 25, 2008, on the Plaintiff's motion for a continuance. The Circuit Judge denied the motion and declined to continue the trial yet again. However, Judge Dodson required that Dr. Steck's deposition go forward on December 8, 2008, as scheduled. (RV4 at 501-02.)

On November 26, Plaintiff served yet another designation of Dr. Bratton which, for the first time, provided a summary of Dr. Bratton's opinions prepared by Plaintiff's counsel. (RV3 at 395-

402.)[11] Casino Magic moved to strike Plaintiff's designations of Dr. Bratton as a completely new expert, in contravention of the trial court's previous Order and ruling of November 7. (RV3 at 332-39, 342-94.) Plaintiff responded, arguing that the designation was provided more than 60 days before the February 2 trial and arguing that Dr. Steck was not being cooperative because he refused to meet with Plaintiff's counsel to discuss his testimony in advance of a deposition. (RV3 at 403-09.)

On December 12, 2008, the trial court heard the parties' arguments concerning the motion to strike the designation of Dr. Bratton. (RV4 at 498-500; RV11 at 20-51.) Judge Dodson noted that the continuance of the trial until February 2, 2009 had not been meant to open the door to further expert designations. Rather, it had been made clear to the parties that no additional experts were allowed for either side. (RV11 at 43-49.) However, Judge Dodson did not strike Dr. Bratton at that time. Rather, the trial court took a middle ground and reserved ruling on that issue, ordering that the parties go forward with Dr. Steck's deposition on January 5, 2009.[12] The court noted that Plaintiff's counsel had obtained the opinion of Dr. Bratton because of averred difficulties with Dr. Steck. Judge Dodson held that, if Dr. Steck would not cooperate by giving his deposition, then the court would consider that a "special circumstance" under Rule 4.04(A) and allow Dr. Bratton to testify. However, if Dr. Steck cooperated and provided his deposition and opinions, then there would be no special circumstances, and Dr. Bratton would not be allowed to testify. (RV4 at 500; RV11 at 43-49.)

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11 On December 1, 2008 Plaintiff served yet another revised designation of Dr. Bratton. (RV3 at 410-19.)

12 Dr. Steck had cancelled the December 8 deposition and required that it be rescheduled to January 5, 2009. (RV11 at 20.)

Dr. Steck gave his deposition on January 5, 2009. (I.D. Exh. P-20.) The deposition revealed that Dr. Steck had never been a retained expert for Mr. O'Keeffe. However, he provided his testimony and opinions based on his own treatment of Mr. O'Keeffe, and he reviewed some records of other physicians during the deposition. (I.D. Exh. P-20.) Plaintiff's counsel was not satisfied with the testimony obtained from Dr. Steck as a treating physician and on January 12, 2009 again moved the trial court to allow Dr. Bratton to testify as a retained expert, despite the late designation. (RV4 at 484-91.) Casino Magic opposed the motion and submitted Dr. Steck's deposition for the court's review. (RV4 at 514-620.)

The trial court heard Plaintiff's motion on January 23, 2009. (RV9 at 1205; RV11 at 59-74.) The court noted that Dr. Steck did, in fact, cooperate and provide his opinions based on treatment of Mr. O'Keeffe. That Plaintiff's counsel was not satisfied with those opinions did not mean that Dr. Steck was not cooperative. It simply meant that Mr. O'Keeffe's most recent treating neurosurgeon did not testify entirely as Plaintiff's counsel had hoped he would. That did not constitute a "special circumstance" for a late expert designation of Dr. Bratton within the meaning of Rule 4.04(A). The court had previously made clear that the continuance of trial to February 2, 2009 was not an opportunity for the parties to obtain additional experts. To require Casino Magic to prepare within a week of trial for examination of a new, retained expert such as Dr. Bratton would be prejudicial to Casino Magic's trial preparation. Therefore, the trial court held that Dr. Bratton would not be allowed to testify at trial. (RV9 at 1205; RV11 at 69-74.)

C. Proceedings Regarding the Deposition of Dr. James Dyess

Dr. Dyess was originally deposed on November 9, 2006 as one of Plaintiff's treating physicians. (I.D. Exh. P-30 at p. 7.) Dr. Dyess continued to treat Mr. O'Keeffe after the August 2008 surgery by Dr. Steck, and a further deposition of Dr. Dyess was scheduled for January 29, 2009.

(I.D. Exh. P-30.)

On December 3, 2008, Plaintiff served a supplement regarding his designation of Dr. Dyess, showing that Plaintiff's counsel had provided Dr. Dyess with the records of Plaintiff's other treating physicians. The supplement also showed that Plaintiff's counsel had provided Dr. Dyess with the report of Dr. Bert Bratton. (RV3 at 428-33.)

During Dr. Dyess's January 29, 2009 deposition, and after the trial court's ruling striking Dr. Bratton, Plaintiff's counsel asked questions of Dr. Dyess that referred expressly to Dr. Bratton's report and opinions. Plaintiff's counsel also caused Dr. Dyess to confer by telephone with Dr. Bratton on the morning of the deposition. (I.D. Exh. P-30 at pp. 9-12, 52, 53, 81-84, 96-97, 135-36, 165.) In other words, Plaintiff's counsel sought to admit references to Dr. Bratton and his opinions through Dr. Dyess. Casino Magic then filed a motion to strike those portions of Dr. Dyess's testimony. (RV5 at 738-41; RV6at 751-87; RV6; RV7; RV8 at 1051-1196.) Plaintiff contended the testimony was proper under Miss. R. Evid. 703. The trial court ruled that references in the Dyess deposition to Dr. Bratton would be stricken, but Dr. Dyess was allowed to provide his own opinions regarding Plaintiff's condition and its relation to the 2003 fall in the shower at Casino Magic. (RV13 at 320-51.)

D. The Trial and Jury Verdict and Post-Trial Proceedings

A jury was selected on February 2, 2009 and trial began February 3, 2009. (RV11 at 114.) Plaintiff and his wife testified. (RV12 at 207-45, 257-300; RV13 at 301-17.) Mr. O'Keeffe also called the corporate representative of Casino Magic and a former employee of Casino Magic. (I.D. Exh. P-1; RV11 at 147-50; RV12 at 151-204.) Finally, he presented the deposition testimony of Dr. Longnecker, Dr. Doty, Dr. Dyess, and Dr. Steck. (I.D. Exhs. P-18, P-19, P-20, P-30.) Although Plaintiff's liability expert, A.K. Rosenhan, was present in the courtroom at trial (RV12 at 256),

Plaintiff never called him as a witness. (RV11 at i-iii.)

Casino Magic presented the testimony of its engineering expert, Fred Vanderbrook, and its neurosurgical expert, Dr. Eugene Quindlen. (RV13 at 400-50; RV14 at 451-573.)

After being instructed and retiring with special interrogatories, the jury returned a verdict for Casino Magic, finding:

> In returning your verdict in this case, you are to consider all of the facts and instructions of law given to you, and then return your verdict by completing this form. When a verdict has been reached by nine or more members of the Jury, write out your answers to the following questions on this form and notify the bailiff that you have reached your verdict.
>
> 1. Do you find from a preponderance of the evidence in this case that the Defendanat was negligent and that its negligence, if any, was either the sole proximate cause or a contributing cause of damages, if any, of the Plaintiff?
>
> _____ YES ____x_____ NO

(RV9 at 1294-95.) The jurors were polled, and all affirmed that this was their verdict. (RV9 at 1296; RV15 at 742-43.)

The trial court entered final judgment for Casino Magic on February 12, 2009. (RV9 at 1296-97) Plaintiff filed a motion for new trial on February 13, 2009, and a second motion for new trial on February 23. He complained of the trial court's rulings concerning Dr. Bratton, Dr. Dyess's testimony, and Jury Instruction Number 6. (RV9 at 1299, 1317.)[13] The trial court entered an order

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Plaintiff also filed a motion to amend judgment, seeking to impeach the result of the jury polling via an affidavit he obtained from a juror indicating that three jurors really did not agree with the verdict. (RV9 at 1315-16, 1331-33.) The trial court rightly rejected this based on the jurors answers to the polling under oath at the trial. (RV9 at 1339.) Plaintiff's counsel also presented yet another, different affidavit from the same juror attempting to suggest the jury was highly influenced by Dr. Quindlen's testimony. (RV9 at 1336-38.) The trial court properly rejected this affidavit as (continued...)

denying the motions for new trial on July 7, 2009, (RV9 at 1340-41), and Plaintiff filed his notice of appeal on July 13, 2009. (RV9 at 1342.)

II. Statement of Facts[14]

A. The Evidence At Trial Concerning Negligence Demonstrated That the Shower Was an Ordinary Shower That Presented No Dangerous or Hazardous Condition.

At trial, Mr. O'Keeffe called Casino Magic's corporate representative, Phyllis Wilbur, by deposition. (RV11 at 140; I.D. Exh. P-1.) Ms. Wilbur testified that she could find no indication of any other falls in the shower at Casino Magic. (I.D. Exh. P-1 at p. 35.) However, Mr. O'Keeffe's fall in the shower was reported to Casino Magic when it occurred on October 15, 2003, and an incident report was made. (I.D. Exh. P-1 at 6-10, 13-15.)

Mr. O'Keeffe called Marlyse Volkman, a former Casino Magic security officer who investigated the incident, filled out the incident report and took photos. (RV11 at 149.) When Ms. Volkman was deposed, she testified that she was not aware of any other such incidents at Casino Magic while she was employed there. (RV12 at 157.) Prior to trial, Plaintiff's counsel drafted an affidavit for Ms. Volkman which contradicted this and that stated Ms. Volkman was aware of numerous other such falls in bathrooms at the casino's hotel. (Exh. P-5.) Plaintiff's counsel

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[13](...continued)
inappropriate pursuant to Miss. R. Evid. 606(b) (RV15 at 748-50), and Plaintiff acknowledges in his Brief that it cannot properly be considered. *See* Brief for Appellant at p. 34.

[14] Plaintiff contends that a review of the proof presented at trial is not germane to his appeal. *See* Brief for Appellant at p. 3. That is incorrect. A review of the evidence presented is necessary to Plaintiff's arguments concerning prejudice via exclusion of evidence. It is also necessary to his arguments about jury instructions, as jury instructions cannot be reviewed in a vacuum. They must be examined in light of the evidence at trial. A brief overview of the trial evidence amply demonstrates that Plaintiff was not prejudiced and that the trial court's instructions to the jury were proper.

represented to Ms. Volkman that, if she signed the affidavit, she might not have to appear personally to provide testimony at trial. (RV12 at 161-62, 189-91.) Ms. Volkman was having personal difficulties with an ailing relative and a new job from which she did not want to take time off, so she signed the affidavit. (RV12 at 189-91.) Plaintiff's counsel then visited her home and attempted to have her sign a further, different and contradictory affidavit, and Ms. Volkman refused. (RV12 at 170, 195.) At trial, she testified that her deposition reflected the truth, and that Plaintiff's counsel had not shown her a copy before having her sign the affidavit. (RV12 at 191-94.) Had she been reminded of her deposition testimony, she would not have signed the affidavit drafted and presented to her by Plaintiff's counsel. (RV12 at 191-94.)

Mr. O'Keeffe testified that the fall occurred just after he got into the shower. He had turned the water on, but had not yet used any soap. He reached for the soap, felt unstable, and stepped backward. However, he stepped too far back and placed his right heel on the portion of the shower base that slopes up to the wall – not on the flat floor of the shower. When he put his weight on his right foot, his heel slipped down the sloped side of the shower base, and he fell. His back struck the seat that was built into the shower, and he suffered an approximately eight-inch abrasion. (RV12 at 270-71.) The shower base was introduced into evidence for the jury to view, and Mr. O'Keeffe stood on the shower base and demonstrated for the jury what occurred. (Exh. P-7; RV12 at 270-71.) The jury was therefore able to view the shower base. It had built in cross-hatching in the floor to prevent slippage. (Exh. P-7; Exh. D-3j.)

Mr. O'Keeffe testified that there were no handles or bars in the shower for him to hold onto. (RV12 at 272.) He did not see a sign on the back of the toilet stating that bath mats were available on request, and he testified he could not have seen the sign without his glasses, in any event. (RV12 at 276.)

A.K. Rosenhan, Plaintiff's engineering expert was present at trial. (RV12 at 256.) Plaintiff never called Mr. Rosenhan. (RV11 at i-iii.) Plaintiff never presented any evidence that the shower was anything other than an ordinary shower. He presented no expert opinion that anything about the shower was a hazardous or dangerous condition, that handles or grips were required or would have likely prevented his fall, or that the edge of the seat was constructed inappropriately. Plaintiff's liability evidence consisted simply of the fact that he slipped and fell in water – in the shower.

The defense called its engineering expert, Fred Vanderbrook, who testified consistent with his report given on October 3, 2007. Mr. Vanderbrook performed slip resistance tests on the cross-hatched floor of the shower and found it to be "slip-resistant." (RV13 at 423-27.) Photos were introduced of the entire shower, which showed that it was nothing more than an ordinary shower. (Exhs. D-3a-l.) Plaintiff simply stepped backward too far, put his heel on the sloping wall of the shower base rather than on the floor, and slipped when he put his weight on that foot. (RV13 at 428-29.) Hand holds or grab bars were not required in the shower by virtue of any building code. (RV13 at 432-33.) They would be unlikely to prevent a fall once it was in progress. (RV13 at 477-78.) Photos of the edge of the built-in seat in the shower showed that the tile had a curved edge, rather than a sharp edge. (RV13 at 435; Exhs. D-3d, 3g.) Mr. Vanderbrook testified that the shower was simply an ordinary shower, and there was no dangerous or hazardous condition. (RV13 at 436.)

B. <u>Plaintiff Was Able to Present Complete Damages Evidence at Trial.</u>

Mr. O'Keeffe testified about his back problems after his fall in the shower at Casino Magic and related those problems to the fall. (RV12 at 282-301.) Mr. O'Keeffe admitted that he had degenerative disease of the spine and that he had undergone two back surgeries prior to the fall in the shower. He had a previous fall at work in 1998 that occasioned those surgeries. (RV12 at 260-63, 312.) After the incident at Casino Magic, Mr. O'Keeffe was taken to the emergency room by

ambulance. (RV12 at 279.) On leaving the emergency room, he and his wife went to another casino and ate dinner. (RV12 at 216-17, 235-36, 280-81.) They then returned to Casino Magic, spent another night, and went home the next day. (RV12 at 216-17, 235-36, 280-81.)

Dr. Longnecker, an orthopaedic surgeon, saw Mr. O'Keeffe on November 20, 2003 and related that office visit to the fall in the Casino Magic shower. (I.D. Exh. P-18 at p. 7.)[15] Dr. Longnecker testified by deposition that, before fall in the shower, Mr. O'Keeffe was doing fine for about two years. (*Id.* at p. 10.) With regard to causation of Mr. O'Keeffe's post-fall back problems, Dr. Longnecker testified:

> Q. Now, when he came back to you, in November of 2003, after this Casino Magic accident, did you have any preliminary opinions as to whether this accident had aggravated the prior surgeries, or maybe caused some new problem?
>
> A. I was suspicious of it. Although I didn't find any neurologic loss, on examination, to confirm that, I was worried that he had hurt his back again, and did advise him at that point, if he wasn't better, I thought he needed to have the MRI studies repeated.

(*Id.* at p. 11.) Dr. Longnecker ultimately prescribed a repeat MRI. Upon review of the MRI report, he testified that the historic report confirmed his suspicions regarding aggravation of Mr. O'Keeffe's condition or a possible new injury. (*Id.* at 12.) He testified that his treatment of Mr. O'Keeffe was reasonable, necessary, and related to the fall in the shower at Casino Magic. (*Id.* at 15.)

Dr. James Doty, a board certified neurosurgeon who operated on Mr. O'Keeffe's back after the fall in the shower testified by deposition. Dr. Doty first saw Mr. O'Keeffe on November 1, 2004.

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15 In 1999, Dr. Longnecker had operated on Mr. O'Keeffe's back after his injury at work. (I.D. Exh. P-18 at pp. 7-8.) At the time, he found that Mr. O'Keeffe had severe spinal stenosis. (*Id.* at pp. 8-9.) Dr. Longnecker later referred Mr. O'Keeffe to Dr. Terry Smith for a second surgery, which was also performed because of degenerative spine disease. (*Id.* at 10.)

(I.D. Exh. P-19 at 4, 5, 7.) Mr. O'Keeffe historically related his problems to the fall in the shower. (*Id.* at 8.) Dr. Doty performed surgery on Mr. O'Keeffe on November 5, 2004. (*Id.* at 14-15.) Mr. O'Keeffe had a new disc herniation at L2-L3 that was symptomatic and on which Dr. Doty operated. (*Id.* at 22-23.) Dr. Doty testified there was also a herniation at L4-5 that was not symptomatic, so it was not operated on at the time. (*Id.* at 22-23.) With regard to causation, Dr. Doty testified:

> Basically, we have a guy who appeared to be functioning at work, although he would have occasional exacerbations of his low-back pain, but we, in fact, have a documented fall and, according to the patient, at least, from the time of the fall, he had markedly severe debilitating right lower-extremity pain which did not get better. So, typically, I give the benefit of the doubt to the patient.
>
> I don't have an MRI right before he fell, nor do I have one directly after. So we have to rely on the patient, but, clearly, he admitted that he was having some and still had some mild symptoms prior to the fall. It's just that the fall made them symptomatic, and, as you know, you can make the argument. It doesn't really matter what he was. He was functioning. He had mild symptoms, and, then, he had disabling symptoms which caused him to come to surgery, and that's where he's at.
>
> Did the fall cause that? Yes.
>
> I mean, if he has documented that he was working, even though he had some symptoms, and, now, he falls and he has disabling symptoms and needs surgery, well, the fall caused it.

(*Id.* at 27.)

Plaintiff presented the testimony of Dr. John Steck by deposition. (I.D. Exh. P-20.) Dr. Steck was a board certified neurosurgeon who performed the August 2008 surgery on Mr. O'Keeffe. ((I.D. Exh. P-20 at p. 7, 9, 10, 11-14.) Mr. O'Keeffe told Dr. Steck that he had been symptomatic for nine months or more. (I.D. Exh. P-20 at p. 14.) Dr. Steck was never told about Mr. O'Keeffe's fall at Casino Magic until his last post-operative follow-up visit with Mr. O'Keeffe on October 30,

2008. (I.D. Exh. P-20 at pp. 15-16.)[16] With regard to causation of Plaintiff's problems that led to the August 2008 surgery, Dr. Steck testified:

> Q. All right. Now, can you give us an opinion as to the cause of the stenosis at L2-3 and L4-5?
>
> A. Degenerative changes in the spine, facet degeneration enlargement, thickening of the ligament flavum was causes of spinal stenosis.
>
> Q. Did this have anything – any relation to the accident of October of 2003?
>
> A. Only if that accident led to symptoms. And the typical scenario would be with someone with a preexisting degenerative condition of the lumbar spine that may be asymptomatic or minimally symptomatic. And then some trauma does not necessarily change – cause any change in anatomy. It doesn't make the stenosis worse. But then can make the stenosis symptomatic.
>
> And so the possible relationship of an accident to the symptoms I treated and the surgery I did would be trauma that leads to pain and symptoms, persistent lumbar spinal stenosis symptoms, that fail conservative measure, the need for surgery to correct that. And so it would be the combination of those two things, the initial trauma that might aggravate a preexisting condition, that might lead to surgery. And then that surgery can make the patient actually more likely to need surgery in the future, particularly at that 4-5 level.

(I.D. Exh. P-20 at pp. 27-28.) Dr. Steck further testified that Mr. O'Keeffe's previous surgery by Dr. Doty (which Dr. Doty had related to the fall) played a meaningful part in the subsequent need for surgery in August 2008. (I.D. Exh. P-20 at pp. 39-40.) Although Dr. Steck testified he did not have the expertise to give a disability rating, he testified that the surgery he performed probably resulted in some increasing disability. (I.D. Exh. P-20 at p. 42.)

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16 Mr. O'Keeffe testified that he had another fall and injured his shoulder in September 2007, about a year before he saw Dr. Steck. (RV13 at 311.)

Dr. James Dyess, an internist with a focus on trauma rehabilitation also testified by deposition. (I.D. Exh. P-30 at p. 17.) He testified based on his own treatment of Mr. O'Keefe and based on records supplied by Plaintiff's counsel concerning Mr. O'Keeffe's other treating physicians. (I.D. Exh. P-30 at pp. 8, 13.)[17] Dr. Dyess testified that all of his charges for treatment of Mr. O'Keeffe since July 2004 were related to injuries Mr. O'Keeffe sustained in the October 15, 2003 fall in the shower. (I.D. Exh. P-30 at pp. 30-31, 42.) Dr. Dyess related Mr. O'Keeffe's need for surgery in 2004 to his status after the fall in the shower. (I.D. Exh. P-30 at p. 46-47.) Dr. Dyess further testified regarding his treatment of Mr. O'Keeffe between July 2004 and October 2004:

> Q. Do you have an opinion based on reasonable medical probability as to whether or not the injuries that you have already described and having initially treated Mr. O'Keefe [sic] for were cause [sic] by that accident that he described to you at the casino in 2003? Do you have an opinion?
>
> A. Yes.
>
> Q. Based on reasonable medical probability?
>
> A. Yes.
>
> Q. What is your opinion?
>
> A. Alright. I would like to separate it a little bit. All the symptoms, the actual symptoms he has, the lower back pains, the pain down the leg with the numbness, the symptoms definitely more probable than not are related to the slip and fall on 10/15/2003.

(I.D. Exh. P-30at pp. 51-52.) Additionally, Dr. Dyess testified:

> Q. That was the injury to the disc at L2-3 was that in your

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Dr. Bert Bratton was not a treating physician of Mr. O'Keeffe's. Rather, he was a retained expert (RV13 at 321-22), late-designated to provide trial testimony. Dr. Bratton only saw Mr. O'Keeffe once on November 25, 2008 in preparation for rendering a litigation report. (RV6 at 785-87; RV13 at 321-22.)

opinion, based on a reasonable medical probability was that caused by the casino accident on October 15, 2003?

A. Yes.

(I.D. Exh. P-30 at p. 61.)

Q. In your opinion, based on a reasonable medical probability was the disc rupture at L4-5 caused by the casino accident in October of 2003?

A. Given the fact that not long before, roughly, three years before Longnecker did not see any at all and being that after Smith did his surgery on 10-19-01, not long after that he had a period of somewhere between one-and-a-half and two years where he was totally asymptomatic, not taking any medicines; not seeing any surgeons of any sort. Being that he had take [sic] time period, then, definitely, unequivocally, in my opinion the symptoms would definitely be caused solely by the slip and fall.

Q. You mean at the casino?

A. Excuse me, at the casino. The structural herniation more likely than not would have been caused by the slip and fall in the shower.

(I.D. Exh. P-30at p. 64.) *See also* I..D. Exh. P-30 at pp. 67, 73-74, 79 for additional testimony repeating the opinion of a causal link between the symptoms and disc herniations and the fall in the shower.

Dr. Dyess testified that Mr. O'Keeffe would likely need Lortab and Soma for the rest of his life. (I.D. Exh. P-30 at p. 88.) According to Dr. Dyess, Plaintiff would not have had the problems that he did except for the fall in the shower. (I.D. Exh. P-30 at pp. 93-94.) He gave Mr. O'Keefe a disability rating of between 10 and 15 percent. (I.D. Exh. P-30 at pp. 95-96.)

Dr. Eugene Quindlen testified as an expert in neurosurgery retained and called by the defense. Dr. Quindlen testified that the majority of Plaintiff's problems resulted from his preexisting conditions of stenosis and spondylosis and not from the fall in the shower. (RV14 at 509-72.)

However, Dr. Quindlen did agree that Mr. O'Keeffe's disc herniation at L2-3 was likely related to the fall in the shower. (RV14 at 537, 548.)

C. The Instructions Given to the Jury

The jury was instructed as follows on the elements of Plaintiff's claim and on what it needed to find in order to hold Casino Magic liable:

JURY INSTRUCTION NO. 8

> The Court instructs the jury that, if you find from a preponderance of the evidence in this case that:
>
> 1. Biloxi Casion Corp. d/b/a Casino Magic-Biloxi was in control or possession of the premises in Room 1616 of the hotel owned by it; and
> 2. Edward M. O'Keeffe was on this property in answer to an express or implied invitation of Biloxi Casino Corp. d/b/a Casino Magic-Biloxi to do business or for their mutual advantage; and
> 3. The condition of the shower in room 1616 constituted a dangerous or hazardous condition on this property; and
> 4. Biloxi Casino Corp. d/b/a Casino Magic-Biloxi knew or should have reasonably known about this condition; and
> 5. Biloxi Casino Corp. d/b/a Casino Magic-Biloxi failed to take measures reasonably calculated to remove this danger; and
> 6. Biloxi Casino Corp. d/b/a Casino Magic-Biloxi's failure to take such measures was a proximate contributing cause of Edward M. O'Keeffe's injuries:
>
> Then your verdict shall be for the Plaintiff, Edward M. O'Keeffe.
>
> However, if Edward M. O'Keeffe has failed to show any one or more of these elements, then your verdict shall be for the Defendant, Biloxi Casino Corp. d/b/a Casino Magic-Biloxi.

(RV9 at 1217; Appellee's RE at Tab 3.) The jury was further instructed that:

JURY INSTRUCTION 9

> You may consider the following factors in determining the negligence, if any, attributable to the Defendant:
>
> (1) maintaining a shower stall that lacked any hand-holds, holdbars, or other grips

> does not mean that the shower stall complained of was an unreasonable "danger" or "hazard" or that the Defendant was negligent. Conditions which are not likely to cause injury or damage to patrons who exercise reasonable care for their own safety, may not be characterized as "hazardous" or "dangerous" simply because an accident might have occurred. Therefore, if you find from the evidence in this case that there was no condition present which was reasonably likely to cause injury to a person who was exercising reasonable care for his own safety, then there was no "danger" or "hazard" and the Plaintiff may not recover from the Defendant.

(RV9 at 1268; Appellee's RE at Tab 3.)

The jury was also instructed regarding the factors it could consider in awarding damages to Mr. O'Keeffe, if the jury found that Casino Magic was negligent and that its negligence caused Mr. O'Keeffe any injury. (RV9 at 1228, 1233, 1236-37; Appellee's RE at Tab 3.)

SUMMARY OF THE ARGUMENT

This Court reviews a trial court's decisions concerning admission or exclusion of expert testimony and admission or exclusion of evidence under an abuse of discretion standard. Trial courts have wide discretion in controlling issues of discovery and scheduling.

The trial court did not abuse its discretion in striking Dr. Bratton as an expert. The deadline for designation of expert witnesses in this case was October 9, 2008 – sixty days before the December 8, 2008 trial setting. Plaintiff was well aware of this. The trial court had previously stricken another expert – Guy Walker – who Plaintiff attempted to designate following October 9, 2008. At the time, the trial court expressly granted a continuance for the purpose of allowing Plaintiff to obtain the opinions and testimony of Dr. Steck. No other new experts were authorized, and the parties understood that there were not to be any new experts.

Before striking Dr. Bratton, the trial court properly considered whether there were any special circumstances to justify the late designation. There were none. Dr. Steck did cooperate and provide his deposition and opinions.

The trial court also properly excluded the portions of Dr. Dyess's deposition that expressly referred to Dr. Bratton. After the court excluded Dr. Bratton, plaintiff's counsel purposely tried to admit Dr. Bratton's opinions through Dr. Dyess under the guise of Miss. R. Evid. 703. Aside from the fact that this was a violation of the trial court's order, which should not be sanctioned by this Court, Rule 703 does not provide for admission of such evidence. Rule 703 allows experts to rely on facts or data that would otherwise be inadmissible. However, an expert opinion prepared solely for litigation purposes has been held not to constitute such facts or data as intended by Rule 703. An expert opinion prepared solely for litigation purposes is nothing more than hearsay in the absence of the declarant. The litigation opinion of one expert cannot be introduced through the mouth of another. The trial court was correct in its ruling.

Exclusion of Dr. Bratton's testimony and evidence of his opinions did not prejudice Mr. O'Keeffe. A brief review of the evidence presented at trial shows that he was fully able to present his damages evidence. There was a void of any evidence to demonstrate a defect in the shower or negligence on the part of Casino Magic. Under these circumstances, and given the special interrogatory question answered by the jury, this was clearly a "no liability" verdict. Exclusion of one additional, cumulative damage expert did not affect that result.

The jury was properly instructed. Plaintiff was in no way barred from recovery by the "open and obvious" rule. In fact, the only jury instruction of which Plaintiff complains – Jury Instruction Number 6 – nowhere contains the terms "open and obvious." Another instruction, of which Plaintiff does not complain, properly limited the jury to consideration of the "open and obvious" rule as a matter of comparative negligence. The jury was properly instructed it had to find that a hazard or danger was present before Plaintiff could recover, and the jury was given a definitional instruction giving guidance in determining whether there was a hazard or danger. This did not constitute error,

MR. HOMES: And let me say also, you did continue this case for me to get the information from Dr. Steck.

THE COURT: Correct.

MR. HOMES: But once the case was continued we had a whole new trial date.

THE COURT: No, sir, you did not have a whole new set of chances to get experts. I made that very clear to you guys.

MR. HOMES: Well you did make it clear, but it seems so unfair.

(RV11 at 73) (emphasis added). Thus, the issue before this Court regarding Plaintiff's attempted November 24, 2008 designation of Dr. Bert Bratton as a completely new expert[18] involves both Rule 4.04(A) and an order of the Circuit Court that the deadline for designation of new experts by the parties expired on October 9, 2008, except with regard to Dr. Steck. Plaintiff's arguments in his Brief that a new 60-day deadline was opened by the continuance of trial until February 2, 2009 should be wholly discounted, particularly in the face of his counsel's admission on the record that this was not the case.

Trial courts have wide discretion in controlling issues of discovery and scheduling, and their decisions in those respects are not reversible absent abuse of discretion. *Banks v. Hill*, 978 So. 2d 663, (¶6) (Miss. 2008). The Mississippi Supreme Court has made clear that experts who are not timely designated should not be allowed to testify at trial. *Banks*, 978 so. 2d at ¶¶13-15. Expert designation deadlines must be complied with by the parties to a case, and untimely designations are

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The disclosure of Dr. Bratton's name and an incomplete curriculum vita on November22, 2008 did not constitute a designation. The Mississippi Supreme Court considers the term "designation" to include providing all of the matters listed in Miss. R. Civ. P. 26(b)(4). *Bowie v. Montfort Jones Memorial Hosp.*, 861 So. 2d 1037, (¶4) (Miss. 2003).

subject to being stricken. *Bowie*, 861 So. 2d at ¶¶4, 13-14, 16 (expert not designated within deadline set by trial court excluded absent showing of excusable neglect).

Pursuant to the Supreme Court's mandate, Mississippi's Court of Appeals has enforced Rule 4.04 (A) and/or scheduling order deadlines regarding experts according to their terms. *Johnson v. Lee, M.D.*, 17 So. 3d 1140, (¶¶11-13) (Miss. Ct. App. 2009) (plaintiff missed Rule 4.04(A) expert designation deadline and did not show any special circumstances excusing that fact; exclusion of expert affirmed); *Moore v. Delta Regional Med. Center*, 23 So. 3d 541, (¶¶5-6, 17-29) (Miss. Ct. App. 2009) (expert not designated with all Rule 26(b)(4) information within scheduling deadline; trial court exclusion of expert affirmed based on four-factor test for exclusion of witness as a discovery sanction); *Estate of Deiorio v. Pensacola Health Trust, Inc.*, 990 So. 2d 804, (¶¶7-8) (Miss. Ct. App. 2008) (affirmed trial court exclusion of expert witness not designated until 42 days before trial in violation of Rule 4.04(A) where no special circumstances were shown); *Mississippi Dept. of Wildlife, Fisheries and Parks v. Brannon*, 943 So. 2d 53, ¶20 (Miss. Ct. App. 2006) (reversible error to allow a witness to testify as an expert without designation as required by Rule 4.04(A)).[19]

In this case, in a December 12, 2008 hearing and order, the Circuit Court expressly reserved ruling on whether to admit or strike the testimony of Dr. Bratton in order to determine whether there were any special circumstances that would justify allowing his testimony despite the late designation.

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Plaintiff attempts to make some distinction between the standards applied when a party violates a scheduling order and when a party violates Rule 4.04(A). However, the case law cited above on late-designation of experts makes no such distinction. In any event, it would be a distinction without a difference in this case, as Plaintiff violated both Rule 4.04(A) and the trial court's ruling that expert designations were cut off as of October 9, 2008, other than with regard to obtaining Dr. Steck's opinion.

It became apparent by the time of the January 23, 2009 hearing that there were no such special circumstances. Plaintiff had previously pointed to lack of cooperation by Dr. Steck, but Dr. Steck did appear and give his deposition. Plaintiff presented that deposition to the jury for its consideration at trial. Dr. Steck did relate Plaintiff's symptoms to the fall in the shower and did relate the need for the surgery he performed to the previous surgery performed by Dr. Doty. Plaintiff also had several other physicians designated as experts who he did call at trial and who gave causation opinions favorable to the Plaintiff. There were, simply, no special circumstances to justify allowing Dr. Bratton's testimony after his late designation, and the Circuit Judge properly excluded Dr. Bratton.

Plaintiff complains that the exclusion of Dr. Bratton was a "nuclear" sanction, but Plaintiff ignores that the attempted late designation of Dr. Bratton was not his first violation of the discovery rules regarding expert designation. It was the second. Plaintiff first late-designated a never-before-disclosed vocational rehabilitation expert with no special circumstances for doing so. A lost wage claim was included in Plaintiff's complaint, and there was absolutely no reason why that expert could not have been designated timely in the more than three years that the case was pending before October 9, 2008. The same point applies to Dr. Bratton. If Plaintiff had desired a retained expert on causation, as opposed to just experts who were his treating physicians, there was no reason he could not have obtained one long before October 9, 2008.

The Circuit Court noted that it properly considered the factors set out in *Moore v. Delta Reg. Med. Center* in determining whether exclusion of Dr. Bratton was the appropriate course. (RV9 at 1340-41.) It was. The *Moore* decision instructs that courts should consider "(1) the explanation for the transgression; (2) the importance of the testimony; (3) the need for time to prepare to meeting the testimony; and (4) the possibility of a continuance." *Moore*, 23 So. 3d at ¶17. Plaintiff's counsel offered the idea that Dr. Steck was uncooperative as an explanation, but Dr. Steck actually did

cooperate and give his deposition and opinions. That Dr. Steck would not discuss his opinions with counsel for the Plaintiff before the deposition is not, in and of itself, a lack of cooperation that constitutes a special circumstance. Dr. Steck was not a retained expert. He was a fact-expert as a treating physician. No witness is required to discuss his testimony with counsel in a civil case before giving it, if he chooses not to do so, and this applies to doctors as well as lay witnesses.

Dr. Bratton's testimony was not particularly important in light of all the medical testimony Plaintiff introduced at trial. In fact, Dr. Bratton's testimony as a retained expert on causation would have been nothing more than cumulative of the testimony of Mr. O'Keeffe's treating physicians.

On the other hand, it would have taken the defense substantial preparation time to try to meet Dr. Bratton's testimony and prepare for cross-examination, and the defense would have been put to that task within the week prior to trial. As the trial court noted, it would have been prejudicial to Casino Magic to allow Dr. Bratton to testify as a trial witness. (RV11 at 73-74.)[20] The trial court had already ruled and informed the parties on November 7, 2008 that there would be no further continuances of the trial. The case had been pending since June 2005. In its discretion, the trial court properly determined that a continuance was not a possibility.

The cases relied on by Plaintiff in which late-designated experts were allowed to testify are inapposite on the facts. In *Brennan v. Webb*, 729 So. 2d 244 (Miss. Ct. App. 1998), a trial court order striking an expert was reversed because special circumstances existed. Rule 4.04(A) had gone into effect 19 months after the plaintiff filed suit, and there was no interrogatory propounded to the plaintiff regarding experts. *Brennan*, 729 So. 2d at ¶¶ 7, 11. Similarly, in *City of Jackson v. Perry*,

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Plaintiff has argued that he would have paid for Dr. Bratton's deposition and thus ostensibly have removed any prejudice. This ignores that a disruption in defendant's preparation in the week before trial is still a disruption, regardless of who pays for it.

764 So. 2d 373 (Miss. 2000), there was no expert interrogatory propounded by the defendant to the plaintiff. The Supreme Court held that Rule 4.04(A) applies only if an expert interrogatory is propounded. *Perry*, 764 So. 2d at ¶52. In this case, Casino Magic did propound a Miss. R. Civ. P. 26(b)(4) interrogatory to Mr. O'Keeffe. (RV2 at 191.)

Thompson v. Patino, 784 So. 2d 220 (Miss. 2001) is likewise distinguishable. It was reversible error in that case to strike a late-designated expert under a scheduling order because the case had not yet been set for trial. *Thompson*, 784 So. 2d at ¶25. In this case, a trial date had been set for December 8, 2008. A continuance of that trial date to February 2, 2009 had already been granted because of special circumstances regarding Dr. Steck, but another expert (Walker) as to whom there were no special circumstances had been stricken.

In sum, the trial court properly exercised its discretion in excluding Dr. Bratton as a witness. Dr. Bratton was first designated on November 26, 2008 – well after October 9, 2008 and after the trial court's ruling that its continuance of the case until February 2 was solely for the purpose of allowing the Plaintiff to obtain and use Dr. Steck's opinions. The trial court's ruling should be affirmed.

III. The Trial Court Properly Excluded Any Reference By Dr. Dyess to Dr. Bratton or Dr. Bratton's Opinions or Report

The Court's Order of January 23, 2009 striking Dr. Bratton was clear. Nevertheless, in the deposition of Dr. Dyess on January 29, Plaintiff attempted to inject Dr. Bratton back into the case by deposing Dr. Dyess on whether or not his opinions agreed with those of Dr. Bratton. Plaintiff contended that admission of Dr. Bratton's opinions through Dr. Dyess was proper under Miss. R. Evid. 703. That rule, entitled "Bases of Opinion Testimony by Experts" provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made

> known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Miss. R. Evid. 703. The trial court properly rejected this argument and excluded any references to Dr. Bratton.

First, Dr. Bratton's opinions did not constitute "facts" or "data" in the sense meant by Rule 703. Rather, they were opinions held by a retained expert and, more especially, an expert whose opinions had been excluded via a prior order of the trial court. The Mississippi Supreme Court has previously held that a letter presenting an expert opinion and report, written for litigation purposes, is hearsay and cannot be admitted into evidence in the absence of the declarant. *Koestler v. Koestler*, 976 So. 2d 372, (¶¶7-9, 29-30) (Miss. 2008) (reversible error committed when Chancery Court allowed social worker to read into evidence letter written by doctor for litigation purposes to establish that person should be involuntarily committed). In just the same way, Dr. Bratton's opinions and report were developed for litigation purposes and could not be admitted through Dr. Dyess. They were hearsay and properly excluded.

Plaintiff's reliance at page 30 of his Brief on *Alexander v. State*, 759 So. 2d 411 (Miss. 2000) is misplaced. In *Alexander* a forensic medical expert was allowed to rely upon and testify concerning an autopsy report prepared by another physician. *Alexander*, 759 So. 2d at ¶¶29-30. The autopsy report was not something prepared solely for litigation purposes. Rather, it constituted "facts" or "data" and therefore fell within admissible matters under Rule 703. *Id.* Similarly, Dr. Dyess was allowed to give opinions based on the medical records of other doctors who had treated Mr. O'Keeffe. Those matters constituted "facts" or "data" about Mr. O'Keeffe's medical treatment on which Dr. Dyess was entitled under Rule 703 to rely. That is in stark contrast to the opinions and

report of Dr. Bratton. Dr. Bratton was not a treating physician. He examined Mr. O'Keefe only once for the purpose of preparing an expert report for litigation purposes.

Second, Rule 703 is not the only relevant consideration under the circumstances of this case. Plaintiff willfully attempted to circumvent the trial court's order excluding Dr. Bratton's opinions. Rule 703 was never meant to be a vehicle for conduct of that nature, and the trial court rightly excluded any reference by Dr. Dyess to Dr. Bratton. Judge Dodson's ruling should be affirmed.

IV. Plaintiff Was Not Prejudiced by Exclusion of Dr. Bratton's Opinions.

Plaintiff argues at pages 31 through 39 of his Brief that exclusion of Dr. Bratton's opinions – either through Dr. Bratton or through Dr. Dyess – prejudiced him and caused the verdict against him in this case. A review of the evidence presented at trial quickly demonstrates that nothing could be further from the truth.

Extensive testimony was presented through Plaintiff's treating physicians that – despite his degenerative conditions of the spine that pre-existed the fall in the shower at Casino Magic – his symptoms, pain, and need for surgeries following the fall were related to the fall. Such testimony was provided by Drs. Longnecker (orthopaedic surgeon), Doty (neurosurgeon), Dyess (internist focusing on trauma rehabiliation), and Steck (neurosurgeon). Dr. Doty related the L2-3 and L4-5 disc rupture to the fall. Dr. Dyess, the Plaintiff's most recent treating physician, related all of his post-accident problems to the fall in the shower.

Even the defendant's neurosurgical expert, Dr. Quindlen, agreed that the L2-3 rupture was related to the fall in the shower, although he was of the opinion that Plaintiff's other problems were solely preexisting. There is simply no basis on which to say that the trial court's ruling deprived Plaintiff of neurosurgical and other medical testimony to contradict the opinions of Dr. Quindlen. Plaintiff introduced the testimony of two neurosurgeons, one orthopaedic surgeon, and an internist.

Plaintiff's counsel was able to emphasize on cross-examination of Dr. Quindlen the fact that the L2-3 rupture was related to the fall in the shower.

The cases cited by Plaintiff regarding prejudice from wrongful admission or exclusion of expert testimony are not apposite. In *Brennan v. Webb*, discussed previously, the Supreme Court held that plaintiffs' damages expert should not have been excluded for late designation when Rule 4.04(A) had gone into effect during the pendency of their case and where the defense did not propound a Rule 26(b)(4) interrogatory. Exclusion of the expert, in conjunction with lack of a damages instruction, effectively prevented the plaintiffs from proving or recovering any damages. *Brennan*, 729 So. 2d at ¶9, 11. As detailed above, that circumstance is not present in this case. Plaintiff put on ample evidence that his injuries were related to the fall in the shower and that the fall aggravated a preexisting condition. The jury was properly instructed on damages and what to consider in order to arrive at damages in the event it found Casino Magic negligent. (RV9 at 1228, 1233, 1236-37; Appellee's RE at Tab 3.) There was no such prejudice as that described in *Brennan*.

In *Harris v. General Host Corp.*, 503 So. 2d 795 (Miss. 1986), the trial court wrongly admitted the testimony of a medical expert who had not properly been designated before trial. The doctor testified that he examined the plaintiff at the hospital after the injury at issue in the case and stated that he could not find anything significantly wrong with the plaintiff. *Harris*, 503 So. 2d at 796. The jury returned a verdict for the defendant. In reversing admission of expert testimony that was not properly designated, the Supreme Court noted that it could not tell whether or not the jury's verdict against the Plaintiff was one based on liability or on damages. *Id.* at 796 n. 1. That problem does not exist in this case.

In this instance, the jury answered a special interrogatory indicating that it found Casino Magic was not negligent. The only absence of an expert that could have influenced the jury in that

regard was the absence of any liability expert for the Plaintiff. That absence was Plaintiff's own choice. A.K. Rosenhan, Plaintiff's engineering expert, was present at trial. Plaintiff chose not to call him as a witness. Therefore, the case went to the jury with nothing more than allegations and arguments by the Plaintiff and his counsel that the shower was hazardous or needed hand grips. There was no supporting evidence for those allegations or arguments. There was such a void in the liability evidence against Casino Magic that, had the jury rendered a verdict against it, Casino Magic would have been entitled to a judgment notwithstanding the verdict. The testimony of Casino Magic's engineering expert that the shower was not hazardous or dangerous was never refuted.

Plaintiff's argument that the jury must have discussed damages first, rather than liability, has no basis whatsoever. To the extent that Plaintiff attempts to present a juror's affidavit to impeach the polling of the jury as to their verdict and to suggest that the verdict was a "no damages" verdict, the Circuit Judge properly ruled that the affidavit was inappropriate and should not be considered. Miss. R. Evid. 606(b). Moreover, even if it were considered, the fact that a juror was impressed with Dr. Quindlen does not support Plaintiff's argument. Dr. Quindlen agreed the L2-3 disc rupture was caused by the fall in the shower. If there were any basis for liability on the part of Casino Magic, Dr. Quindlen's testimony was helpful to the Plaintiff on that point. There was, however, no basis for liability on the part of Casino Magic. The jury rightly considered the evidence – or lack thereof – and rendered its verdict that Casino Magic was not negligent. The judgment in favor of Casino Magic should be affirmed.

V. Jury Instruction D-6 Properly Stated Mississippi Law and Was Properly Given.

Next, Plaintiff criticizes Jury Instruction Number 6 as error, alleging that it injected the "open and obvious" rule into the case as a complete bar to recovery. That is not so. Nowhere does that jury instruction mention the "open and obvious" rule. It was a simply a definitional instruction, which

properly gave the jury guidance on how to determine whether the shower presented a danger or a hazardous condition. The instruction stated:

> As used in these instructions, a "danger" or "hazardous" condition is defined as a condition which is likely or probably to cause injury to a patron who is exercising reasonable care for his own safety. Simply because the Plaintiff fell while in the shower at the Defendant hotel or that the Plaintiff sustained an alleged injury does not mean that the shower stall complained of was an unreasonable "danger" or "hazard" or that the Defendant was negligent. Conditions which are not likely to cause injury or damage to patrons who exercise reasonable care for their own safety, may not be characterized as "hazardous" or "dangerous" simply because an accident might have occurred. Therefore, if you find from the evidence in this case that there was no condition present which was reasonably likely to cause injury to a person who was exercising reasonable care for his own safety, then there was no "danger" or "hazard" and the Plaintiff may not recover from the Defendant.

(RV9 at 1268.) This was a correct statement of the only way in Mississippi law in which jurors are given guidance as to what may constitute a "hazard" or a "danger." *Mississippi Dept. of Wildlife, Fisheries and Parks v. Brannon*, 943 So. 2d 53, ¶¶ 32, 37 n.3 (Miss. Ct. App. 2006) (noting that Mississippi law does not specifically define "hazard" or "danger;" citing with approval *Dow v. D'Lo*, 169 Miss. 240, 248-49, 152 So. 474, 475-76 (1934) that measure of duty to maintain streets is to use ordinary care to keep them in a reasonably safe condition for persons using ordinary care).

Plaintiff wrongly compares this instruction to language in an instruction given in *Breaux v. Grand Casinos of Mississippi, Inc.-Gulfport*, 854 So. 2d 1093 (Miss. Ct. App. 2003). The *Breaux* instruction cited by Plaintiff (*Breaux* instruction D-2, part 2) expressly included language precluding the plaintiff from recovering if an expansion joint in a parking lot was "readily apparent and open and obvious under the conditions then existing . . . ." *Breaux*, 854 So. 2d at 1096. Whether the *Breaux* decision declining to reverse based on this jury instruction has survived *Mayfield v. The*

Hairbender, 903 So. 2d 733 (Miss. 2005)[21] is a debate that is pointless to this case. Jury Instruction D-6 contained no such language. The words "open and obvious" do not appear anywhere in it.

Jury Instruction D-6 was nothing more than a definitional instruction to assist the jury in understanding the meaning of the terms "danger" and "hazard." It did not preclude Plaintiff from recovery if he failed to exercise reasonable care. It instructed the jury that Plaintiff could not recover if he did not prove the existence of a danger or hazard. The jury was expressly instructed that Plaintiff could, in fact, recover even if he was negligent, and the jury was instructed that such negligence on the part of the Plaintiff would only serve to reduce damages, not eliminate them, unless Plaintiff's negligence was the sole proximate cause of the incident. (RV9 at 1230, 1276; Appellee's RE at Tab 3.) Moreover, the jury was expressly instructed that it was only a matter of comparative negligence if Mr. O'Keeffe failed "to know, see or appreciate any danger/hazard which would have been 'open and obvious' to any reasonable person exercising reasonable care for his own safety." (RV9 at 1275; Appellee's RE at Tab 3.)

A review of the jury instructions given as a whole demonstrates that the jury was fairly and properly instructed on Mississippi premises liability law. For the Court's convenience a set of the instructions given as a whole is found at the Appellee's Record Excerpts at Tab 3.

The cases Plaintiff cites regarding conflicting jury instructions simply do not apply. *See Fisher v. Deer*, 942 So. 2d 217, ¶¶9-11 (Miss. Ct. App. 2006) (hopelessly conflicting jury instructions when a peremptory instruction was properly granted in plaintiff's favor on negligence,

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Mayfield confirmed that the "open and obvious" rule is not a complete bar to recovery other than on a failure to warn claim. The rule is not, however, abolished with regard to other types of premises liability claims, but simply operates as a principle of comparative negligence. *Mayfield*, 903 So. 2d at ¶¶16, 28. To the extent Plaintiff characterizes the "open and obvious" rule as completely abolished, he is incorrect.

yet the jury was also instructed to determine whether the defendant was negligent); *Griffin v. Fletcher*, 362 So. 2d 594, (Miss. 1978) (conflicting jury instructions where plaintiff was properly granted a peremptory instruction on liability, yet issue of liability was presented to jury in other instructions). No such similar circumstances existed in this case. All of the issues were presented to the jury by virtue of the instructions as a whole that fairly stated the applicable law. Plaintiff simply did not prove that he encountered anything more than an ordinary shower which became wet when he turned on the water. He fell when he stepped back too far and put his heel and weight on the slope of the shower base, rather than on the flat cross-hatched and slip resistant floor.

The trial court's grant of Jury Instruction D-6 should be affirmed.

CONCLUSION

The circumstances demonstrated by the evidence presented at trial in this case are similar to those faced by the Supreme Court in *Mercy Regional Med. Center v. Doiron*, 348 So. 2d 243 (Miss. 1977). In *Doiron*, the medical center maintained a set of concrete steps leading from a parking lot to a street next to the hospital. There was no hand rail on the steps. While going down the steps, the plaintiff simply lost her balance and fell. She alleged she would not have fallen had there been a hand rail. *Doiron*, 348 So. 2d at 243-44. The Court discussed those common, ordinary conditions that we encounter every day, on which we suffer injury, but that do not constitute "dangers" or "hazards" in the sense meant in premises liability law. *Id.* at 244, 246. The Court held that a peremptory instruction should have been granted for the defendant. There was no defect shown in the steps. The plaintiff simply fell. The Court stated that "[w]e are of the opinion that plaintiff's injury belongs to that class of ordinary accidents which are properly imputed to the carelessness or misfortune of the one injured." *Id.* at 246.

Similarly, it is a misfortune that Mr. O'Keeffe mis-stepped and fell. Nevertheless, he did not

demonstrate any defect in the shower. There was no evidence presented to the jury other than that this was an ordinary shower that was just like any other ordinary shower, whether wet or dry. Mr. O'Keeffe simply mis-stepped, and he demonstrated for the jury exactly how he did so. Plaintiff has shown no basis for reversal of the judgment in favor of Casino Magic, and Casino Magic respectfully requests that the judgment in its favor be affirmed.

Respectfully submitted this 20th day of August, 2010.

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CERTIFICATE OF FILING

I, Kimberly S. Rosetti, do hereby certify that I have this day caused to be hand-delivered for filing the original and three correct paper copies and an electronic disc of the Brief for Appellee, Biloxi Casino Corp. d/b/a Casino Magic-Biloxi to:

Ms. Kathy Gillis
Mississippi Supreme Court Clerk
Gartin Justice Building
450 High Street
Jackson, Mississippi 39201

This 24th day of August, 2010.

Kimberly S. Rosetti

Kimberly S. Rosetti (MSB [redacted])

CERTIFICATE OF SERVICE

I, Kimberly S. Rosetti, do hereby certify that I have this day caused to be mailed via United States Mail, first class, postage pre-paid, a true and correct copy of the Brief for Appellee, Biloxi Casino Corp. d/b/a Casino Magic-Biloxi to:

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This 30th day of August, 2010.

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