CASE NO. 2009-CA-01452

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BAY POINT HIGH AND DRY, LLC

APPELLANT

V.

NEW PALACE CASINO, LLC

APPELLEE

BRIEF OF APPELLEE NEW PALACE CASINO, LLC

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

(ORAL ARGUMENT REQUESTED)

J. HENRY ROS (MS Bar No[redacted])
Watkins Ludlam Winter & Stennis, P.A.
Post Office Drawer 160
Gulfport, MS 39502
Telephone: (228) 864-3094
Telecopier: (228) 864-0516
Email: hros@watkinsludlam.com
Attorney for Appellee

GARY A. HEMPHILL (LA Bar No[redacted])
Phelps Dunbar, LLP
365 Canal Street • Suite 2000
New Orleans, Louisiana 70130-6534
Telephone: (504) 566-1311
Telecopier: (504) 568-9130
Email: gary.hemphill@phelps.com

Attorney for Appellee

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NO.: 2009-CA-01452

BAY POINT HIGH AND DRY, LLC **APPELLANT**

VERSUS

NEW PALACE CASINO, LLC **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

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

1. Bay Point High and Dry, LLC, Plaintiff/Appellant;
2. New Palace Casino, LLC, Defendant/Appellee;
3. William Lee Guice, III, Rushing & Guice, PLLC, attorney for Plaintiff/Appellant;
4. J. Henry Ros, Watkins Ludlam Winter & Stennis, P.A., attorney for Defendant/Appellee;
5. Gary A. Hemphill, Phelps Dunbar, attorney for Defendant/Appellee.

Respectfully submitted, this the 14th day of April, 2010.

J. HENRY ROS

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NO.: 2009-CA-01452

BAY POINT HIGH AND DRY, LLC **APPELLANT**

VERSUS

NEW PALACE CASINO, LLC **APPELLEE**

STATEMENT OF ISSUES

1. Whether the trial court properly granted summary judgment in favor of New Palace Casino, LLC on the basis that Hurricane Katrina constituted an unforeseeable Act of God and that New Palace Casino, LLC had exercised reasonable care.

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NO.: 2009-CA-01452

BAY POINT HIGH AND DRY, LLC **APPELLANT**

VERSUS

NEW PALACE CASINO, LLC **APPELLEE**

STATEMENT REGARDING ORAL ARGUMENT

Appellee does hereby request oral argument on this appeal.

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NO.: 2009-CA-01452

BAY POINT HIGH AND DRY, LLC **APPELLANT**

VERSUS

NEW PALACE CASINO, LLC **APPELLEE**

BRIEF OF APPELLEE

I. INTRODUCTION

"THIS IS OUR TSUNAMI."[1]

These were the words of Biloxi Mayor A.J. Holloway after witnessing the unparalleled destruction caused by the storm surge of Hurricane Katrina, the worst natural disaster in the history of the United States.

Katrina's unprecedented fury devastated the entire Gulf South region, particularly the Mississippi Gulf Coast. In particular, the Katrina storm surge, which far exceeded that which was produced in Biloxi by hurricane Camille[2] nearly forty years earlier, destroyed virtually every standing structure along the Mississippi coast and washed ashore multiple moored gaming barges from the Bay of Biloxi to the Bay of St. Louis. One of those barges was owned by appellee New Palace Casino, LLC.

---

[1] The *Sun Herald* August 30, 2005.

[2] Prior to Katrina, Camille was the benchmark storm to strike the Mississippi Gulf Coast and was deemed an Act of God. *See, In Re International Marine Development Corp,* 328 F.Supp. 1316 (S.D.Miss. 1972)(affirmed 463 F.2d 763 (C.A.S. 1972); *Ladner and Liberty Mutual Insurance Company et al v. Bender Welding and Machine Co. et.al.,* 336 F.Supp. 1261 (S.D.Miss. 1971) affirmed 455 F.2d 947 (C.A.S., 1972).

On the basis of uncontested evidence in the record, the Circuit Court of Harrison County, Mississippi, Second Judicial District, granted New Palace's motion for summary judgment, holding as a matter of law that Katrina was an unforeseeable Act of God and that New Palace was therefore not liable for any damages which may have been caused when its barge was ripped from its moorings and propelled ashore during the storm. The evidence presented to the court overwhelmingly supports that decision. The decision should therefore be affirmed.

II. STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS

This action began when Bay Point High and Dry, LLC ("Bay Point") filed suit against New Palace Casino, LLC ("New Palace") in the United States District Court for the Southern District of Mississippi. The Complaint alleged that a permanently moored gaming barge owned by New Palace broke free from its mooring during Katrina and struck a dry dock and boat storage facility leased by Bay Point. Jurisdiction in federal court was premised on the general maritime law. The owners of the building intervened in the underlying federal court action.[3] (R. 803-804).

As discovery was progressing, the United States Court of Appeals for the Fifth Circuit held in an unrelated case that permanently moored gaming barges along the Mississippi Coast were not "vessels" as a matter of federal law and that admiralty jurisdiction over claims associated with damages occasioned by Hurricane Katrina was lacking.[4] There being no other

---

[3] The building and real property was owned by four individuals who are no longer involved in this action.

[4] *See, In re Silver Slipper Casino Venture, LL,* 264 F.Appx. 363 (5th Cir. 2008).

grounds for federal court jurisdiction, Bay Point voluntarily dismissed the federal court action. (R. 72-75).

Thereafter, Bay Point filed its second complaint in the Circuit Court of Harrison County, Mississippi, Second Judicial District. (R. 15-20). In its complaint, Bay Point alleged that New Palace was negligent in failing to move its permanently moored barge prior to Hurricane Katrina's landfall, negligent *per se* in failing to comply with the applicable Mississippi Gaming Commission Regulations regarding permanently moored gaming barges, and otherwise negligent in failing to properly secure the barge.[5] (R. 19-20). New Palace Casino answered, denying all allegations and asserting Act of God as one of the defenses. (R. 23-30). The owners again intervened pursuant to Rule 24 of the Mississippi Rules of Civil Procedure. (R. 75).

By agreement, the parties adopted all discovery which had been completed in the federal court action. (R. at 83). After remaining discovery was completed, New Palace filed a motion for summary judgment on March 24, 2009. (R. 269-400). A joint response to the motion was filed by plaintiff and the intervenor on April 17, 2009. (R. 464-611). The response included the affidavit of Gregory Castleman, an expert that had been secured by the Intervenors over the objection of New Palace and Bay Point.[6] (R. 497-499). The claim of the Intervenors was resolved and voluntarily dismissed with prejudice. New Palace moved to strike Castleman's affidavit and report, or alternatively, that Bay Point be required to submit Castleman for a deposition. (R. 654-658). Bay Point then advised New Palace and the Court that it did not

---

[5] The Complaint also included allegations of intentional conduct which were not pursued at the trial court level and must now be considered abandoned.

[6] Citations to RV8 reference the transcripts of hearings before the trial court. See RV8. 9-13.

intend to utilize Castleman as an expert in this matter and withdrew his designation. (R. 668-670).

On August 7, 2009, a hearing on New Palace's motion for summary judgment was conducted.[7] (RV8 20-47). Both parties presented oral argument and written briefs. At the conclusion of the hearing, the trial court found there were no material facts in dispute and that New Palace was entitled to judgment as a matter of law. (RV8 46-47). The Court issued its written opinion on August 14, 2009. (R. 910-912). Bay Point appeals from that decision. (R. 913-914).

B. STATEMENT OF FACTS

On August 29, 2005, New Palace Casino owned a gaming facility located north of the western end of the Highway 90 bridge connecting Biloxi to Ocean Springs across the entrance to the Biloxi Back Bay. The facility consisted of two permanently moored barges in a dock slip. The main casino barge was 310 feet long and 100 feet wide. It was positioned on the north side of the barge slip. A smaller barge, known as the "Sports Zone", was moored on the south side of the barge slip adjacent to the north barge and is the one which broke free during the storm and allegedly damaged appellant's property. (R. at 304).

The Sports Zone was 310 feet long and 50 feet wide. It was secured in place with a mooring system designed by Gordon Reigstad, a registered, professional engineer licensed in 37 states, including Mississippi, with extensive experience in designing barge mooring systems on the Mississippi Gulf Coast. The mooring system designed by Reigstad held the Sports Zone in position by two "dolphins" located on the south side of the barge. These dolphins were concrete and steel tripod structures driven deep into the sea floor. The tops of the dolphins extended 32

[7] The Honorable Roger T. Clark, Senior Circuit Judge, presided.

feet above the water surface. The barge was connected to the two dolphins by a cylindrical collar or yoke welded to reinforced sections of the barge. The yokes restrained lateral movement of the barge, but permitted the barge to float up and down over 18 feet to accommodate changes in water surface elevation occasioned by tides and storm surge. (R. 304, 337-338).

The mooring system exceeded the design criteria set by the applicable regulatory authority, the Mississippi Gaming Commission (MGC). MGC's regulation required the mooring systems of non-self propelled gaming barges located on the Mississippi Gulf Coast to be able to withstand both a category 4 hurricane with 155 mph winds **and** a 15 foot storm surge. (R. at 309). Reigstad, by affidavit and sworn testimony, confirmed **without contradiction** that the system as designed, constructed and built exceeded the standards set by the MGC. (R. 337-344). Reigstad's evidence in this respect was indeed uncontradicted. Even though an engineer retained by appellant questioned the adequacy of the mooring system, he did not dispute that the system in place at the time of the storm met MGC requirements. (R. 327-28). The uncontradicted fact the mooring system exceeded the applicable governmental requirements confirms that summary judgment was appropriate in this case.

The evidence of the unprecedented and unforeseeable ferocity of Katrina was likewise unrefuted in the record. The only expert meteorological evidence offered was that of Lieutenant Colonel Richard Henning.[8] (R. 345-396). The uncontradicted expert evidence established that

---

[8] Henning's qualifications are impeccable. He was a Lieutenant Colonel in the United States Air Force Reserve and at the time of Hurricane Katrina was an aerial reconnaissance weather officer of the 53rd Weather Reconnaissance Squadron, commonly referred to as the "Hurricane Hunters". At the time of Hurricane Katrina, he was a Mission Director within the Squadron and was responsible for all meteorological data collection during hurricane penetration flights. He personally participated in 147 hurricane eyewall penetrations as a Hurricane Hunter and personally participated in the flight of the Hurricane Hunters into the eyewall of Hurricane Katrina in the early morning hours of August 28, 2005. Henning has a bachelor's degree and a master's degree in meteorology from Florida State

Hurricane Katrina was an unprecedented meteorological event in that it:

- Created the largest storm surge ever measured on the United States Coast; (R. 797-98).
- Created a storm surge at the entrance of Back Bay where the New Palace was located approximately 23 feet, 8 to 10 feet higher than that produced by Hurricane Camille at the same location; (R. at 797).
- Had the largest "envelope" of hurricane force winds in history (three times larger than Hurricane Camille); (R. at 798).
- Had the lowest recorded pressure of any hurricane making landfall up until that time; (R. at 798).
- Generated the largest amount of kinetic energy of any hurricane in history (R. at 802), four or five more times more kinetic energy than produced by Hurricane Camille. (R. 805-807)
- Subjected New Palace to hurricane force winds for 7 ½ hours and a very high storm surge for an abnormally long period; (R. at 802).
- Created the highest offshore waves ever recorded by the NOAA buoy network; (R. 804).
- Was the most expensive natural disaster ever to strike the United States and the deadliest in 79 years. (R. 805).

University and is a recognized expert in his field. It is telling that appellant offered no meteorological evidence whatsoever.

Henning testified, in short, that Katrina was *the* most destructive tropical cyclone ever to strike the United States "by a wide margin". (R. 797). Bay Point offered no meteorological testimony or evidence to contradict these facts.

III. SUMMARY OF THE ARGUMENT

New Palace Casino owed adjacent landowners a duty to exercise reasonable care in the construction and operation of its facilities. To discharge that duty, New Palace employed a competent, licensed and experienced engineer to design a mooring system for its gaming barge, the Sports Zone. The mooring system exceeded by approximately 30% the requirements of the applicable regulation adopted by the Mississippi Gaming Commission.[9]

Hurricane Katrina struck the Gulf Coast on August 29, 2005. It was then, and is now, the greatest natural disaster to strike the Continental United States. The storm surge exceeded by 8 to 10 feet all prior recorded hurricanes in the locality where the New Palace's barge was moored by 8 to 10 feet. Katrina's storm surge ripped New Palace's barge from its mooring, setting it adrift. The environmental conditions far exceeded the design criteria and were completely unforeseeable.

The dispositive facts as to which there is no genuine issue are simply these: (1) the destructive force, particularly the storm surge, of Hurricane Katrina far exceeded that which had ever been experienced before in United States history, even during Hurricane Camille; (2) the mooring system of New Palace's Sports Zone barge exceeded the requirements of the Mississippi Gaming Commission.

---

[9] The regulation required a mooring system to withstand a 15 foot storm surge. As constructed, the Sports Zone barge mooring system could withstand a storm surge of over 18 feet.

The first point was not contested at all since Bay Point offered no meteorological evidence to oppose that of New Palace. The second point is conceded by Bay Point's own expert. Stated simply, New Palace fully satisfied its legal obligation as defined by the MGC, and Bay Point's losses, like countless thousands of others all along the Gulf Coast, are solely attributable to a tragic and unforeseeable Act of God. Consequently, the grant of summary judgment by the circuit court was proper and should be affirmed.

IV. ARGUMENT

A. STANDARD OF REVIEW

Mississippi appellate courts apply a *de novo* standard of review to a grant of summary judgment by the trial court. *Hudson v. Courtesy Motors, Inc.,* 794 So. 2d 999, 1002 (Miss. 2001). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Miss. R. Civ. P. 56(c). The evidence must be viewed in the light most favorable to the non-movant. *Northern Elec. Co. v. Phillips,* 660 So. 2d 1278, 1281 (Miss. 1995).

"The burden of demonstrating that no genuine issue of material fact exists is on the moving party." *Lewallen v. Slawson,* 822 So. 2d 236, 238 (Miss. 2002). Where the non-movant bears the burden of proof at trial, the movant may merely point to an absence of evidence, thus shifting to the non-movant the burden of demonstrating by competent summary judgment proof that there is an issue of material fact warranting trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-323 (1986). The non-moving party may not defeat a motion for summary judgment with mere general allegations or unsupported denials of material fact. *Drummond v. Buckley,* 627 So. 2d 264, 267 (Miss. 1993).

Only when "there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party" is a full trial on the merits warranted. *Lindsey v. Sears Roebuck & Co.*, 16 F.3d 616, 618 (5th Cir. 1994), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). "The presence of fact issues in the record does not *per se* entitle a party to avoid summary judgment." *Shaw v. Burchfield*, 481 So. 2d 247, 252 (Miss. 1985). "[T]he existence of a hundred contested issues of fact will not thwart summary judgment where there is no genuine dispute regarding the *material* issues of fact. *Id.* (emphasis in original).

B. HURRICANE KATRINA WAS AN UNFORESEEABLE ACT OF GOD.

Under Mississippi law, the essential components of a claim based upon negligence are:

> (1) The existence of a duty to conform to a specific standard of conduct for protection of other against an unreasonable risk of injury, (2) a breach of that duty, (3) causal relationship between breach and alleged injury; and (4) injuries or damages.

Rein v. Benchmark Construction Co., 865 So.2d 1134, 1143-44 (Miss. 2004)(citations omitted). "Duty and breach are essential to finding negligence and must be demonstrated first." *Strantz v. Pinion*, 652 So.2d 738, 742 (Miss. 1995).

Whether a duty exists and whether it has been breached are questions of law. *Rein v. Benchmark Construction Co.*, 865 So.2d 1134, 1143 (Miss. 2004) Thus, this Court has held "the existence *vel non* of a duty of care is a question of law to be decided by the [trial] court" . *Id;* (citing *Foster v. Bass*, 575 So.2d 967, 972-73 (Miss. 1990).

In determining whether a duty exists, the trial judge decides whether the injury is "reasonably foreseeable". *Rein v. Benchmark Construction Co.*, 865 So.2d 1134, 1143 (Miss. 2004). Reasonably foreseeable has been defined by this Court to mean, "precaution... only so far as there is reason for apprehension. Ordinary care of a reasonably prudent man does not demand that a person should prevision or anticipate unusual, improbable, or extraordinary

occurrences though such happenings are within the range of possibilities". *Illinois Central Railroad v. Bloodworth,* 145 So.2d 333, 336 (Miss. 1933)(cited as authority in *Rein*). Thus, the very existence of any duty is limited to that which is reasonably foreseeable. Consequently, there is no duty to anticipate or guard against that which cannot be reasonably foreseen.[10]

Additionally, the law recognizes that "Act(s) of God", improbable and extraordinary events occasioned by the fury of nature, are the very type of unforeseeable events for which there is no liability. The Act of God defense is applicable to "events in nature so extraordinary that the history of climatic variations and other conditions in the particular locality affords no reasonable warning of them". *McFarland v. Entergy of Mississippi, Inc.* 919 So.2d 894, 903-904 (Miss. 2005). Hurricanes that cause unprecedented and unforeseeable devastation in a particular locality due to tidal rise or upriver storm surge constitute classic examples of "Act(s) of God". *Skandia Ins. Co. Ltd. v. Star Shipping A.S.,* 173 F. Supp. 1228, 1240-41 (S.D.Ala. 2001). Where the evidence demonstrates that a party exercises reasonable care and takes reasonable precautions in light of what is reasonably foreseeable, there is no liability for damages caused by the "Act of God". *McFarland v. Entergy of Mississippi, Inc.* 919 So.2d 894, 903-904 (Miss. 2005). This is precisely what was established by the evidence presented to the trial court.

One can hardly dispute that Hurricane Katrina is the classic example of an unforeseeable Act of God. As previously pointed out, Lieutenant Colonel Henning outlined specifically how Hurricane Katrina was unparalleled when compared with all other recorded hurricanes which previously struck the Mississippi Gulf Coast. The widespread and unprecedented physical

---

[10] Appellant's blatant appeal to anti-gaming bias in its Statement of the Facts and its assertion that, "...casinos should be held to a higher standard of care..." have no legal basis whatsoever and no place in this Court. (Appellant's Brief pp. 1-2).

destruction caused by the hurricane is a matter of public record. An example that is particularly noteworthy, because of its proximity to the Sports Zone barge, is the concrete and steel bridge connecting Biloxi and Ocean Springs that was totally destroyed during the storm as was the bridge connecting Harrison County to Hancock County. In fact, virtually every structure from Biloxi to Bay St. Louis that was impacted by the storm surge was either destroyed or severely damaged, resulting in billions of dollars of property damage.

Hurricane Katrina was indeed unprecedented. That which is unprecedented is also by definition unforeseeable and an Act of God as a matter of law. That Katrina was in fact an unforeseeable Act of God as a matter of law is precisely the conclusion reached in a number of other Katrina cases in which summary judgment was granted against a property owner who sought to recover damages allegedly caused by the property of a nearby owner that was blown or washed away during the storm.[11] The circuit court here reached the same conclusion, clearly the only conclusion the evidence allows.

Appellant does not attempt to refute the expert testimony and report of Lieutenant Colonel Henning. Rather, Bay Point makes a half-hearted attempt to obscure Henning's unequivocal testimony that Katrina was a truly unprecedented environmental event. For example, Bay Point argues, without supporting evidence, that the surge calculated by Henning as having been a record 23 feet might actually have been somewhat less than that since the model he used had a standard of error of a "couple of feet". *See,* Appellant's Brief at p. 12. Appellant doesn't take note of the fact, though, that even if the surge was slightly less than 23 feet in

---

[11] See, for example, *Lee Brother, LLC v. Crowley Liner Services*, 2007 WL 1858744 (S.D. Miss. June 26, 2007); *Royal Beach Hotel, LLC. Crowley Liner Services, Inc.* 2007 WL 1499815 (S.D. Miss. March 14, 2007); and *Defazio v. Chiquita Fresh North America LLC*, 2008 WL 2788732 (S.D. Miss. July 14, 2008).

Biloxi, this would still have been far beyond anything ever experienced at that location and far beyond the MGC mooring criteria.

To say that a given measurement has a margin of error of a couple of feet means that it is equally likely, obviously, that the surge *exceeded* the 23 feet which Henning estimated. In fact, the testimony of Bay Point's own witness, Doug Cruthirds, supports this conclusion. Cruthirds was a principal of Bay Point and testified that the building in which it was located was three to five feet higher in elevation than New Palace but experienced 26 feet of storm surge during Katrina. (R. 788; RV8-28). This means that the Sports Zone barge would have been subjected to a storm surge of 29 to 31 feet, well in excess of Henning's estimate. Appellant's attempt to discredit Henning's uncontradicted testimony is therefore foiled by the testimony of its own witness and proves to be nothing more than a conclusory argument of counsel which cannot defeat summary judgment. *Smith v. Brookhaven Police Dept.*, 914 So.2d 180, 182 (Miss.App. 2005)(cert. denied Nov. 10, 2005).

Unable to dispute the meteorological facts, appellant next attempts to challenge the adequacy of the Sports Zone mooring system. Essentially, Bay Point argues that since the MGC regulations required the mooring system to be able to withstand a Category 4 hurricane and since Katrina was "only" a Category 3 storm when it made landfall, the mooring was *per se* inadequate. The argument totally ignores the uncontradicted evidence.

First, as Lieutenant Colonel Henning explained, the designation of the "Category" of a hurricane on the Saffir-Simpson scale is a description only of the level of its highest sustained winds. That is, the Saffir-Simpson scale is a wind scale only, and has nothing to do with storm surge or wave levels. (R. 800-801). This is why the MGC regulation is written in the conjunctive – mooring systems must be able to withstand a Category 4 hurricane **and** a storm

surge of 15 feet.[12] As has been shown without contradiction, the storm surge at the Sports Zone barge location was 23 feet, and perhaps even higher, not counting wave heights of several additional feet.

Second, appellant's own "expert", William Janowsky, admitted that the Sports Zone mooring system met the MGC requirements that the mooring system be able to withstand a Category 4 storm and a storm surge of 15 feet. (R. 327-28). This admission disposes of the issue.

The undisputed facts in the record are really quite simple: New Palace hired a competent and experienced professional engineer licensed by the state of Mississippi to design the barge mooring system. The engineer was instructed to design and build the system to comply with the only regulation which specified a design criteria, namely that promulgated by the Mississippi Gaming Commission. The uncontradicted evidence presented to the circuit court was that the system, as built, was capable of withstanding winds of 155 mph and a storm surge of over 18 feet, well in excess of the regulatory requirement of 15 feet.

Because it is unable to point to anything in the record which disputes these facts, appellant next argues that is was not enough for New Palace to meet and exceed the MGC requirements – it should have done still more. According to appellant's purported engineering expert, Janowsky, the mooring system should have been designed to withstand a storm surge of fully twice the regulatory requirement – 30 feet. (R. 730). It is probably no coincidence that Janowsky has never himself designed a mooring system at all, much less one to the standard he

---

[12] The 15 foot surge level was not chosen arbitrarily. That was the level shown on the pre-Katrina FEMA Flood Maps which were based on flood levels experienced at Biloxi Bay during Camille. Obviously, the Mississippi Gaming Commission incorporated the FEMA Flood Maps in its mooring system requirements. Reigstad's report confirms this map and the 100 year historical flood data where factored into the mooring system design. (R. 339).

would impose on New Palace, and could cite no industry publication or scientific analysis to support his opinion in this respect. (R. 750-758). Stated simply, his opinion in this respect and appellant's argument are pulled out of thin air.[13]

Bay Point also suggests that Reigstad failed properly to account for potential wave action when designing the mooring system.[14] In a weak attempt to find support for this assertion, appellant cites a snippet of testimony of Reigstad and brazenly states it "seems to indicate wave action was not considered". Appellant's Brief at p. 11. However, as pointed out in the hearing before the trial court, counsel for Bay Point never questioned Reigstad regarding wave action when he was deposed related to his design. (RV8 44). Thus, such an assertion is nothing more than speculation and argument of counsel and not competent evidence that would preclude summary judgment. *Leonard v. Dixie Well Service and Supply, Inc.*, 828 F.2d 291, 295 (5th Cir. 1997)(ultimate facts, self serving assertions and arguments in briefs do not defeat summary judgment).

Finally, Bay Point argues without legal authority that the Act of God defense is inapplicable because New Palace failed to employ a "secondary" restraining system, i.e. one that only comes into play if the primary system fails. Application of the Act of God defense requires

---

[13] For these and other reasons, Janowsky was the subject of a *Daubert* motion which was pending at the time the court ruled on appellee's motion for summary judgment. (R. 728-776). See also *infra* footnote 15.

[14] Janowsky is also cited for the proposition that wave action was not considered. However, Janowsky never did any calculations whatsoever to support his testimony and opinions. (R. 750-754). It is fundamental that an expert opinion must be founded on data to be admissible. *Glen v. Overhead Door Corp.*, 935 So.2d 1074, 1079-80 (Miss. App. 2006) (cert. denied Aug. 10, 2006) "Talking 'off the cuff - deploying neither data nor analysis - is not acceptable methodology' ". *Id.* (citations omitted). Indeed, expert opinions that merely "supply nothing but a bottom line, supplies nothing of value to the judicial process" and the trial judge exercising discretion is free not to consider such proof when passing upon a motion for summary judgment. *Id.* (citations omitted). Clearly, any observations offered by Janowsky were insufficient to withstand summary judgment as they were not based upon any technical calculations or data.

the Defendant to "take *reasonable* precautions and/or exercise *reasonable* care". *McFarland v. Entergy of Mississippi, Inc.* 919 So.2d 894, 903-904 (Miss. 2005).[15] There is nothing in the record to direct this Court to any building code or applicable regulation which either required or even used the term "secondary restraint".[16] That term itself is a misnomer since the example cited by appellant, the Treasure Bay casino, involved a primary mooring system, not a secondary one. (RV8. 45-48). Moreover, Bay Point offered no evidence that such a "secondary" system was either required by regulation or recognized industry standards, could have been designed or approved for use at the New Palace site or would have otherwise held the barge in place after it was ripped from its attachments to the main barge and the mooring dolphins by the colossal storm surge of Katrina.

If ever an Act of God occurred, it occurred when Katrina washed away the Mississippi Gulf Coast. No amount of foresight, pains or care could have reasonably predicted or protected from a storm surge that dwarfed all prior recorded storms in that locality, including Camille, the

---

[15] Bay Point cites *John W. Stone Distributor, LLC v. Bollinger Shipyards, Inc,* 2007 WL 2710809 (E.D.La. 2007) as support for the proposition that more than reasonable precautions are required in order for the Act of God defense to be applicable and warrant grant of summary judgment. However, *Bollinger* is factually distinguishable from this case. In *Bollinger*, a permanently moored barge had broken loose from its restraining system before Hurricane Katrina. Since the owners knew the mooring system failed in conditions less than that produced during a hurricane, a dispute of fact existed as to whether additional measures should have been employed due to the prior failures. *Bollinger,* 2007 WL 2710809 * 2, 6 (E.D.La. Sept. 12, 2007). There are no such factual disputes in this case.

[16] Incredibly, appellant relies in this Court on the report of an "expert", Gregory Castleman, retained intervenor and who appellant specifically stated on the record it would not call as a witness. Castleman's report should therefore not be considered as being part of the record subject to review on appeal. In any case, as with appellant's other purported experts, Castleman offers nothing more than conclusory opinions totally unsupported by any research or technical analysis. *See, Glen v. Overhead Door Corp.* 935 So.2d 1074, 1079-80 (Miss.App. 2006)(cert. denied Aug. 10, 2006).

benchmark storm, by an unimaginable 8 to 10 feet.[17] Indeed, the Mississippi legislature apparently has accepted that there are no reasonable means to protect the public from hurricanes such as this, as it has now directed gaming to move ashore.[18] The trial court properly held that there was no liability since "this was an unprecedented massive storm not foreseen by anybody". (RV8 46).

C. THE MOORING SYSTEM DESIGN COMPLIED WITH ALL APPLICABLE REGULATIONS

Ironically, Bay Point argues that the regulation which established the design criteria for permanent mooring systems of all gaming vessels does not establish any legal duty in civil actions since it was merely "a condition of licensure". Appellee's Brief at p. 8. Such an argument is curious when this Court considers that Bay Point urged the trial court to take judicial notice of a portion of the regulation.[19] (R. 140-141). In fact, Bay Point, in its brief to the Circuit Court, stated...

> The regulations violated in this action are those of the Mississippi Gaming Commission ("MGC") regulations .... . which require that the permanent mooring of the Sports Zone barge be able to withstand a category four hurricane with 155 mile per hour winds and a 15 foot tidal surge.

(R. 468). Now it argues the opposite, suggesting the regulation has no legal effect.

---

[17] Bay Point certainly did not foresee the possibility of a storm surge of such magnitude since it failed to remove any boats on its yard to safety. As Bay Point's Doug Cruthirds explained, "If water was to ever get in [Bay Point's] building, the whole Coast is going to be wiped out". He proved prophetic. (R. 810-811).

[18] *See,* M.C.A. § 97-33-1 (b)(i)(ii)(iii)(approved and effective after passage October 17, 2005.) All other criminal statutes under Chapter 33 were amended to permit gaming in the 3 coastal counties up to 800 feet ashore.

[19] Bay Point urged the court to take judicial notice only that the regulation required a mooring system to be able to withstand a category 4 hurricane. Bay Point did not wish for the court to take judicial notice that the regulation further required moorings sufficient to withstand a 15 foot tidal surge. (RV8. 13-18).

It is well established that a party may not raise an issue for the first time on appeal. *Jones v. Fluor Daniels Service Corp., 959 So.2d 1044 (Miss. 2007).* It follows that a party on appeal also may not fundamentally change its position on a dispositive legal issue. That is precisely what Bay Point has done. In the Circuit Court, appellant argued the MGC regulation applied to define what the New Palace mooring system must be designed to withstand. Now that Bay Point perceives that it cannot create a genuine issue of fact with respect to whether the barge mooring system met the MGC requirements, it makes a complete reversal, arguing the regulation does not apply in the first place because the MGC was not authorized to issue it! As a matter of appellate practice, this argument is precluded because it was not made – in fact was contradicted – in the court below. Moreover, as a matter of common sense, the argument fails because it is so clearly at odds with what the legislature intended.

Gaming was authorized first by legislature when § 75-76-3 was adopted in 1990. The Gaming Control Act was intended to strictly regulate not only the actual gaming itself but the locations of the gaming establishments so as to protect public health and safety. *See* Miss. Code Ann. § 75-76-3(3)(b) and (c). The legislature then established the Gaming Commission and empowered it to "adopt.... regulations consistent with the policy, objects and purposes of this chapter" as it being necessary to be in the public interest. Miss. Code Ann. § 75-76-33 (1990). This Court upheld the Gaming Commission's authority to determine suitable locations for gaming establishments finding that such authority was a reasonable interpretation of the power vested in the Commission by the legislature through the statutes. *Mississippi Casino Operators Ass'n v. Mississippi Gaming Commission,* 654 So.2d 892 (Miss. 1995).

Certainly, hurricane preparedness and regulations related thereto are necessary to protect the health and safety of the general public. Indeed, the only way to provide such protection is

through regulations which specify the design criteria in order that not only the location but the facility itself be suitable. Location is not simply the geographical site. It necessarily implies the physical structure which would include the mooring system. Thus, the adoption of the regulation squarely falls within the Gaming Commission's power as authorized by the legislature.

Likewise, the regulation is the only standard adopted by any governing body which defines the appropriate standard of care. There are no building codes for the City of Biloxi, Harrison County, or the State of Mississippi which define design criteria to be employed for the mooring systems of permanently moored vessels. The Coast Guard Regulations touted by Bay Point contain no specifications whatsoever regarding mooring devices, opting instead to defer to the requirements set by local agencies, namely the Mississippi Gaming Commission. In short, the trial court correctly held that the only applicable design standard was that established in the regulation adopted by the Gaming Commission.

Returning then to the proof, or lack thereof, presented to the trial court it is clear that New Palace complied with the MGC design criteria and its compliance satisfied any duty it may have owed to Bay Point. Similarly, Bay Point's assertion that New Palace was negligent for failing to have the barge deemed permanently moored by the United States Coast Guard is grossly misleading and irrelevant in any case. Appellant's Brief 12-16. The Coast Guard is charged by law with the responsibility of conducting safety inspections on U.S. flag vessels that carry people or cargo in marine commerce. Those inspections are obviously not necessary when, as here, a vessel is permanently moored and no longer capable of marine transportation. Consequently, the Coast Guard has developed the "permanently moored vessel" designation. Once a vessel requests and receives that designation, it is no longer subject to periodic Coast Guard safety inspections. It is important to note that the Coast Guard does **not** evaluate the

strength or adequacy of a given vessel's mooring system in ruling on a request for permanently moored status, it merely reviews plans to determine if the vessel's moorings can easily be let go to allow it to return to use in marine transportation.

At most, New Palace is guilty of a clerical error – not filing all of the necessary paperwork with the Coast Guard to have the Sports Zone barge deemed a permanently moored vessel. Bay Point's own "expert"[20] on this issue, David Cole, admitted that had the paperwork been submitted to the Coast Guard, the permanently moored vessel designation would have been granted. (R. at 818). The allegation of a Coast Guard violation is therefore totally irrelevant in any event.

Moreover, there is nothing within any Coast Guard regulation cited to the court that would require a mooring system different than that which was constructed by New Palace. Rather, Bay Point simply states that had the paperwork been submitted to the Coast Guard, "it is likely that a more stringent mooring system and/or secondary restraint would have been required.... ." Appellee's Brief at p. 13. This is sheer speculation by counsel.

Finally, merely alleging or even establishing a statutory violation does not impose liability under a theory of negligence *per se* unless there is proof the violation proximately

---

[20] See David Cole deposition, R. 813-819. By citing this deposition, New Palace does not accept that Cole would have been entitled to offer expert testimony on this or any other subject. He has been stricken when attempting to offer similar testimony in other Katrina cases. *Defazio v. Chiquita Fresh North America LLC*, 2008 WL 2788732 (S.D. Miss. July 14, 2008). A *Daubert* motion to strike his testimony was pending at the time the court ruled on the motion for summary judgment. (R. 849-850). Cole retired from the Coast Guard 25 years ago and is now a lawyer specializing in family law. Cole was neither an engineer nor a naval architect, had never designed or been engaged to inspect a vessel mooring system, and had never been tendered or accepted as an expert on the adequacy of hurricane mooring systems for permanently moored vessels. (R. 813-819). His evidence was only that New Palace failed to file the proper paperwork - not that the mooring was inadequate or that the Coast Guard would have mandated more.

caused the accident and the injuries in question.[21] Bay Point failed in the lower court and has failed in this Court to present evidence that any failure to have the proper paperwork filed would have somehow prevented the barge from being torn from its mooring. Absent such proof, no *per se* violation can be established. On the other hand, proof that the mooring system complied with the Gaming Commission Regulations defeats any claim of *per se* negligence.[22] Thus, Bay Point failed to establish a genuine issue of material fact which would preclude summary judgment or warrant reversal by this Court.

V. CONCLUSION

Empowered by the legislature, the Mississippi Gaming Commission adopted a regulation which set the specific standards for mooring systems on permanently moored gaming barges on the Gulf Coast. This regulation required all systems to be designed to withstand a category 4 hurricane with winds of 155 miles per hour **and** a 15 foot tidal surge. The regulation incorporated historical meteorological data as to the foreseeable conditions that could reasonably be anticipated in the event of a major storm.

New Palace hired a competent licensed engineer to design the mooring at Sports Zone to comply with this standard. As designed and built, the system exceeded the regulation.

Despite such reasonable precautions, Hurricane Katrina's unprecedented storm surge ripped the barge from its mooring system and washed it ashore. The storm surge was completely unforeseeable when measured against all preceding storms which struck the Gulf Coast. It clearly was an Act of God.

---

[21] *Laurel Yamaha, Inc. v. Freeman*, 956 So.2d 881, 897 (Miss. 2005).

[22] *Roberson v. Isle of Capri Casino*, 2008 WL 564640 (S.D.Miss.)(Feb. 2008)(compliance with applicable building code defects *per se* negligence claim.)

There were no genuine issues of material fact demonstrated by the evidence with respect to these dispositive issues. Thus, the trial court correctly concluded that summary judgment was appropriate. This Court should reach the same decision.

Respectfully submitted this the 14th day of April, 2010.

NEW PALACE CASINO, LLC

WATKINS LUDLAM WINTER & STENNIS, P.A.

By: _____
J. HENRY ROS

CERTIFICATE OF SERVICE

I, J. Henry Ros, do hereby certify that I have this date mailed by United States mail, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellee to the following:

Honorable Roger T. Clark
Circuit Court Judge
Post Office Box 1461
Gulfport, Mississippi 39502

William Lee Guice, III, Esquire
Rushing & Guice, PLLC
604 Porter Avenue
Ocean Springs, Mississippi 39564

Email: bguice@rushingguice.com

SO CERTIFIED the 14th day of April, 2010.

J. Henry Ros

J. HENRY ROS (MS Bar No. [redacted])
Watkins Ludlam Winter & Stennis, P.A.
Post Office Drawer 160
Gulfport, MS 39502
Telephone: (228) 864-3094
Telecopier: (228) 864-0516
Email: hros@watkinsludlam.com