

# 2009-CA-01452-T

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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 the case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

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## STATEMENT OF THE ISSUES

Whether the Trial Court committed reversible error in granting summary judgment in favor of New Palace Casino, L.L.C.

## STATEMENT OF THE CASE

### A. RELEVANT HISTORY

This matter stems from a sports bar on a barge called SportsZone owned by New Palace Casino, L.L.C. (“New Palace”) breaking free from its moorings during Hurricane Katrina and striking and destroying a Bay Point High and Dry, L.L.C. (“Bay Point”) marina. The sports bar broke free because New Palace failed to properly moor and secure the barge. Bay Point filed its Complaint in the Circuit Court of Harrison County, Second Judicial District, on September 21, 2007, and New Palace answered on or about February 18, 2008. Subsequently, New Palace filed a motion for summary judgment on March 24, 2009, and said motion was granted by the court in a judgment dated August 14, 2009. Bay Point has appealed the entry of said judgment.

### B. STATEMENT OF FACTS

Casinos exist today due to the strong resolve of several Mississippi legislators in spite of extreme resistance at the time of the creation of legalized gaming. “The battle over the bill [which legalized casinos in Mississippi] was fought in the 52-member state Senate. After extensive wheeling, dealing, trading, and pleading, the vote was 22 to 20 in favor of the bill. Ten senators took a walk. Thus, by a margin of 2 votes, with only 80 per cent of the Senate voting, the economic, political, and cultural makeup of the state was radically altered.” Toledano, Ben C. “Mississippi Gambles: The carpetbaggers are back.” National Review 7 April 1997: p.1.

The casinos have brought prosperity and opportunity to the Gulf Coast, but in the same breath, they have also brought misfortune along with them. As the casinos’ very existence on the

Coast is at the whim of the Legislature, the casinos should be held to a higher standard of care when it comes to preventing the type of damage that occurred in this case. The casinos are in the best position due to their vast resources to prevent their barges from becoming dislodged due to powerful storms that have ravaged the Coast and caused destruction for as long as the mind can remember. Irrespective of the numerous powerful storms that have struck the Coast in the past, including Hurricane Camille, the mere fact that the Mississippi Gaming Commission included a regulation that dictates moorings must be designed to withstand Category 4 hurricanes reveals that catastrophic storms as powerful as Katrina were foreseeable.

The Plaintiff, Bay Point, operated a marina and dry dock at 169 5<sup>th</sup> Street, Biloxi, Mississippi. The Defendant, New Palace, operated a sports bar on a barge moored in Biloxi Bay at the time Hurricane Katrina struck the Mississippi Gulf Coast on August 29, 2005. The sports bar barge was adjacent to the main casino barge of the New Palace Casino. The sports bar barge was attached to the main casino barge on one side and to immovable dolphins on the other with a sliding but otherwise rigid mooring. During Hurricane Katrina, the sports bar barge owned by New Palace broke free from its moorings, and the barge violently struck and destroyed the Bay Point marina. New Palace is liable for the damages caused by its negligence in failing to properly secure the sports bar barge. The failure to design, construct, and maintain a mooring system which could withstand a Category 4 hurricane in compliance with gaming regulations and United States Coast Guard requirements. Failure to moor the barge such that the barge could withstand known prior storm conditions on the Gulf Coast evidences further negligence. Additionally, New Palace negligently failed to secure the barge with secondary restraints in order to keep the barge on location even if the mooring system failed. Such unextraordinary, secondary restraints were successful in securing the Treasure Bay Casino during Hurricane Katrina.

Due to the negligence of New Palace, even after the general manager of the casino acknowledged that owners of vessels which have broken free of their moorings are liable for damage those vessels cause to others property, Bay Point's building was destroyed, while other similarly situated buildings remained standing. A witness who was actually in the Bay Point building and in one of the many miracles of Hurricane Katrina survived the destruction of the building and was able to swim out of the rubble to a nearby debris post and cling to that post for his life, recounts in his affidavit how he heard the noises outside of the building change from the sound of the wind and water to the sound of metal on metal and repeated violent impact of a large object against the Bay Point building until the support for the building finally gave way, knocking over one by one in a domino effect. He goes on to recount that from his position right near the building on his debris post the barge came directly at him and he feared for his life that the barge would run him over. As can be seen on the diagram attached to his affidavit, the only path the barge could have taken was directly over the Bay Point Building that just moments before had been standing.<sup>1</sup>

Engineer William Knesal, Jr. stated that "it would be a mystery if there weren't a casino barge that had evidence of having a close encounter" with Bay Point High's building. Everything that Knesal examined was consistent with the injury to Plaintiff's building being caused by New Palace's barge. Knesal could offer no other alternative for the trauma sustained by the building.<sup>2</sup> Further, Knesal examined the casino barge and found trauma consistent with the barge having struck Bay Point's building.<sup>3</sup> Summarily, Mr. Knesal is stating that **but for** the barge breaking loose from

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<sup>1</sup>See Affidavit of Terrell Rawls [623-625].

<sup>2</sup>Deposition of Knesal p. 20-25, p. 33. [Knesal Affidavit & report???

<sup>3</sup>Deposition of Knesal p. 36. [KNESAL REPORT????]

its mooring, the Bay Point marina would still be standing to this day. The marina might have sustained some superficial damage, but the fact remains that the Gulf Coast would have the benefit of another local small business operating today if it was not for New Palace's negligence.

Additionally, similar structures in nearby locations, including Pelican Point Marina, and its Marine Travel Lifts withstood the damage of Hurricane Katrina.<sup>4</sup> Without damage from a barge striking them, these structures, although sustaining some damage below the water line, were structurally intact. This in conjunction with the on site witness, Terrell Rawls, supports the position that without the negligence of New Palace, Bay Point's building would still be standing.

The horrific account of Terrell Rawls, the testimony of William Knesal, the clear regulations of the Mississippi Gaming Commission Regulations and the United States Coast Guard regulations, the testimony of Defendant's own witnesses and the reports and testimony of weather experts and marine engineers all leave too many genuine issues of material fact to support summary judgment in this matter.

#### **SUMMARY OF THE ARGUMENT**

The Trial Court's granting of New Palace's Summary Judgment was based upon the determination that New Palace took reasonable measures when designing a mooring system to prevent foreseeable injuries and damages in the event of a hurricane. The Trial Court held that because New Palace's mooring system met, if not exceeded, the requirements of the Mississippi Gaming Commission, New Palace breached no duty owed to Bay Point.

The Trial Court also ruled that New Palace's violation of Coast Guard Regulations could not be shown to have proximately caused the destruction of Bay Point. Finally, the Trial Court ruled that

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<sup>4</sup>Affidavit of Doug Cruthirds [534-535].

Hurricane Katrina was an “Act of God,” and New Palace could not have guarded against this unanticipated event.

Bay Point contends that New Palace negligently designed, constructed, and maintained a mooring system that could not withstand prior known storm conditions on the Gulf Coast. Although Bay Point contends that New Palace never actually complied with Mississippi Gaming Commission regulation,<sup>5</sup> the Trial Court erroneously ruled that satisfying the Mississippi Gaming Commission mooring requirement was the duty owed to Bay Point. However, the State Legislature never delegated the power to the Mississippi Gaming Commission to create legal duties, and therefore, the Trial Court’s implication that no duty is breached as long as the Mississippi Gaming Commission’s mooring requirement was met or exceeded by New Palace is fatally flawed and must be reversed. Additionally, New Palace negligently failed to secure the barge with reasonable, cost-effective secondary restraints in order to keep the barge on location in the event the mooring system failed.

New Palace also violated federal regulations when it failed to have the SportsZone barge inspected and certified by the United States Coast Guard prior to its use as a passenger vessel/gaming facility. Such an inspection would have required New Palace to take into account conditions encountered during one-hundred year storms. A jury would likely conclude that such a consideration would have required more stringent moorings and secondary restraints. There exist genuine issues of material fact to be resolved. Therefore, the Circuit Court’s decision should be reversed and this matter should be remanded for additional consideration.

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<sup>5</sup>

When it came ashore, Hurricane Katrina was a Category 3 storm; the casino barge was supposed to withstand a Category 4 storm.

## ARGUMENT

### A. STANDARD OF REVIEW

The Mississippi Supreme Court applies a *de novo* standard of review of a lower court's grant or denial of summary judgment. *Lewallen v. Slawson*, 822 So.2d 236 (Miss.2002) citing *Hudson v. Courtesy Motors, Inc.*, 794 So.2d 999, 1002 (Miss.2001); *Jenkins v. Ohio Cas. Ins. Co.*, 794 So.2d 228, 232 (Miss.2001); *Heigle v. Heigle*, 771 So.2d 341, 345 (Miss.2000). Our appellate standard for reviewing the grant or denial of summary judgment is the same standard as that of the trial court under Rule 56(c) of the Mississippi Rules of Civil Procedure, which states that summary judgment shall be granted if “the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact....” *Lewallen, supra*, citing *Hudson*, 794 So.2d at 1002; *Jenkins*, 794 So.2d at 232; *Heigle*, 771 So.2d at 345. This evidence must be viewed in the light most favorable to the party against whom the motion for summary judgment has been made. *Brown ex rel. Ford v. J.J. Ferguson Sand & Gravel Co.*, 858 So.2d 129 (Miss.2003) citing *Leslie v. City of Biloxi*, 758 So.2d 430, 431 (Miss.2000). Summary judgments should be granted with great caution. *Smith v. Sanders*, 485 So.2d 1051, 1054 (Miss.1986). Furthermore, the non-movant is granted the benefit of all inferences that can be adduced from the evidence. *Id.* When reviewing the evidence in a light most favorable to Bay Point, there exist genuine disputed material issues of fact, which require the reversal of summary judgment and trial by jury.

### B. THE TRIAL COURT ERRONEOUSLY IMPLIED THAT THE MISSISSIPPI GAMING COMMISSION'S MOORING REQUIREMENT WAS THE DUTY OWED TO BAY POINT HIGH AND DRY, L.L.C.

The Trial Court held that New Palace owed a duty to the owners of real property in close proximity to the casino to take reasonable measures to prevent foreseeable injuries and damages in

the event of a hurricane. “This Court [held] as a matter of law that New Palace did that when it constructed a mooring system that met, if not exceeded, the requirements of the Mississippi Gaming Commission,” despite Bay Point’s proof that New Palace failed to satisfy the Mississippi Gaming Commission’s mooring requirement.<sup>6</sup> Therefore, the Trial Court ruled that New Palace breached no duty owed to Bay Point.

The Mississippi Gaming Commission is not a legislative body and cannot establish legal duties. “State boards and commissions are creatures of the Legislature and have no powers other than those delegated to it by the Legislature.” *Howard v. Estate of Harper*, 947 So.2d 854 (Miss.2006) citing *Masonite Corp. v. State Oil & Gas Bd.*, 240 So.2d 446 (Miss.1970). The Mississippi Gaming Commission was created by the Legislature to “adopt, amend or repeal such regulations, consistent with the policy, objects and purposes of this chapter, as it may deem necessary or desirable in the public interest in carrying out the policy and provisions of this chapter.” Miss.Code Ann. § 75-76-3. The purpose of the Mississippi Gaming Commission is to regulate licensing activities. Miss.Code Ann. § 75-76-1, *et seq.* The courts have held that the authority of the Mississippi Gaming Commission is limited and must not exceed the authority conferred upon it by the legislature’s enactment of gaming laws. *Mississippi Casino Operators Assoc. v. Mississippi Gaming Commission*, 654 So.2d 892 (Miss.1995); *Mississippi PSC v. Miss. Power and Light*, 593 So.2d 997 (Miss.1991).

The regulation states, “**as a condition of licensure**, that cruise vessels utilized for gaming on the Mississippi Gulf Coast, in the Biloxi Bay or in the Bay of St. Louis, that are not self-propelled, to be moored to withstand a Category 4 hurricane with 155 mile per hour winds and 15

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<sup>6</sup>See Judgment, page 2 [911].

foot tidal surge.” (Emphasis added) (Miss. Gaming Comm. Reg. § II(B)(10)). The regulation was created as a “condition of licensure,” not for establishing a legal duty in civil actions.

A similar issue to the current one was addressed in *Howard v. Estate of B. Harper*, 947 So.2d 854 (Miss.2006). A plaintiff tried to establish a legal duty by directing the court to look to regulations required for licensure of a nursing home. An “institution for the aged or infirm” is required to obtain a license in order to operate legally in the state of Mississippi. Miss.Code Ann. § 43-11-5. The purpose of the licensing provisions is to “insure safe, sanitary and reasonably adequate care of individuals” while under the care of nursing home facilities. Miss.Code Ann. § 43-11-3. The statute gives the Dept. of Health the authority to grant and revoke such licenses, as well as promulgate regulations. Miss.Code Ann. § 43-11-7 through Miss.Code Ann. § 43-11-13. This is comparable to the Gaming Control Act’s granting of authority to the Mississippi Gaming Commission to regulate licensing.

In *Howard* the court noted that there was no express language creating a legal duty in the statutes or regulations. The court stated that the regulations issued by the Dept. of Health are a result of the legislature’s mandate to impose **licensing requirements** on nursing homes. “As the scope of sections 43-11-1 *et seq.* is limited to licensing concerns, any duty (or inference thereof) created by the regulations is unenforceable.” *Howard, supra*. In addition, the Mississippi Supreme Court has held in, *Moore v. Mem’l Hosp.*, 825 So.2d 658 (Miss.2002), that alleged violations of internal regulations do not give rise to an independent cause of action for damages and that although a violation of a regulation may serve as evidence of negligence, it does not, by itself, create a separate cause of action. *Estate of Hazelton v. Cain*, 950 So.2d 231 (Miss.Ct.App. 2007).

The Gaming Control Act states that gaming establishments must be licensed, controlled and assisted to protect the public health, safety, morals, good order and general welfare of the inhabitants

of the state and because regulation of licensed gaming is important in order that licensed gaming is conducted honestly and competitively, that the rights of the creditors of licensees are protected and that gaming is free from criminal and corruptive elements. Miss.Code Ann. § 75-76-3. The legislative act contains no express or implied language granting the Mississippi Gaming Commission the power to create legal duties. The Gaming Control Act created the Mississippi Gaming Commission to impose licensing requirements on gaming facilities. Mere compliance with the mooring requirement does not absolve New Palace of liability, although a violation of the mooring requirement may serve as evidence of negligence. See *Estate of Hazelton, supra*. The regulation is, at best, a minimum standard of care that must be met by New Palace, and the plain and simple truth is that the minimum standard was not met because Hurricane Katrina was a Category 3 storm when it came ashore. Accordingly, the Mississippi Gaming Commission regulation was not satisfied, and the Trial Court's interpretation that New Palace's compliance with the regulation established no duty owed to Bay Point was breached is a clear error in the application of Mississippi law.

C. THE VIOLATION OF THE MISSISSIPPI GAMING COMMISSION MOORING REGULATION SERVES AS EVIDENCE OF NEW PALACE CASINO, L.L.C.'S NEGLIGENCE

The regulations violated in this action are those of the Mississippi Gaming Commission<sup>7</sup> which requires that the permanent mooring of the SportsZone barge be able to withstand a Category 4 hurricane with 155 mile per hour winds and 15 foot tidal surge.

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<sup>7</sup>Miss. Gaming Comm'n. Reg. § II(B)(10). Specifically, the regulation provides as follows:

**Section 10. Hurricane Preparedness Policy.**

It is the policy of the Mississippi Gaming Commission to require, as a condition of licensure, that cruise vessels utilized for gaming on the Mississippi Gulf Coast, in the Biloxi Bay<sup>7</sup> or in the Bay of St. Louis, that are not self-propelled, to be moored to withstand a Category 4 Hurricane with 155 mile per hour winds and 15 foot tidal surge.

William Janowsky, P.E., expert for Bay Point, has testified that in his expert opinion, the design of the mooring system did not comply with the Mississippi Gaming Commission Regulations at issue. Specifically, he stated:

Q. My question to you is if this was the design criteria for the New Palace Casino, in your professional opinion did the design of the mooring system of the New Palace Casino meet these requirements?

A. No.

Q. In what way did it not meet those requirements?

A. Because there are conditions coincident to those that weren't accounted for.

Q. Well, you're adding additional requirements that aren't mentioned in that report, aren't you?

A. I'm not. Again they are not specifically mentioned in there but they are going to occur as a result of those conditions so they have to be accounted for.

Q. To that end if we used the page 41 Gaming Commission regulations that you referred to earlier, is it your expert opinion that in order to comply with those stated regulations, a design would need to allow for wave action, lateral movement in addition to vertical?

A. Yes. I believe so. Those -- the two pieces of information provided in there are two a number of pieces that you need to perform the design. They're two important pieces but they're not the only pieces that are required.

Janowsky Depo., pp. 65-66 [553], 83-84 [557].

Janowsky's point here is that the design criteria of the Mississippi Gaming Commission, as interpreted by a qualified, prudent engineer, clearly require that wave action under those conditions

be taken into account. In this instance, it is his opinion that New Palace design was in violation of the regulation because such wave action was not taken into account. Intervening Plaintiffs' expert in naval architecture agrees with the opinion of Janowsky that the design of the mooring system should have taken into account wave action. Mr. Castleman states in his report that his firm "would have further considered the motions of the PMV in waves generated by hurricane-force winds. The PMV will heave, pitch and roll under the influence of these waves. . . [F]ull evaluation of wave interaction would have been considered in the design phase."<sup>4</sup>

In addition, Defendant's own expert<sup>5</sup> testified that in order to properly design to Mississippi Gaming Commission regulations, the mooring design must take into consideration the high tides experienced on the Mississippi Gulf Coast, such as the high tides generated by Hurricane Camille.<sup>6</sup> Accordingly, as there is expert testimony in the record that the mooring system did not comply with the applicable Mississippi Gaming Commission Regulations, this noncompliance should serve as overwhelming evidence of New Palace's negligence.

Furthermore, NOAA's National Climatic Data Center indicates that Hurricane Katrina made landfall as a Category 3 Hurricane.<sup>7</sup> The report of New Palace's meteorological expert, Richard

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<sup>4</sup>See Report of Gregory Castleman, p.2 [501].

<sup>5</sup>

Terry Moran was not designated by New Palace in this case, but was used by New Palace as an expert in litigation with its insurance carrier, RSUI, on a Hurricane Katrina property damage claim

<sup>6</sup>See Depo. of Terry Moran, pp. 10-12 [562].

<sup>7</sup>

See NOAA's National Climatic Data Center report of October 2005 entitled Hurricane Katrina: A Climatological Perspective [369-396].

Henning, supports the scientific fact that Hurricane Katrina was a Category 3 storm.<sup>8</sup> As the moorings for SportsZone barge failed in a Category 3 storm, this fact must serve as evidence of New Palace's negligence.

It should also be noted that there is evidence in the record that the surge in the back bay during Hurricane Katrina may have been within the 15 foot Mississippi Gaming Commission design criteria. Mr. Henning's report details the storm surge in Biloxi Bay at 23 feet above mean sea level.<sup>9</sup> He conceded in his deposition, however, that there is a standard of error of at least "a couple of feet" depending on the model. He further testified that the standard of error in all models changes proportionately with the magnitude of the surge, so "if you have an extremely high surge, the variance is going to be larger." Thus, depending on the models used, the standard of error could be as much as several feet which could easily be within the design criteria. This is further evidence of non-compliance with the applicable regulations.

D. NEGLIGENCE PER SE OF THE NEW PALACE CASINO, L.L.C. DUE TO THE VIOLATION OF THE UNITED STATES COAST GUARD'S REGULATIONS

Sufficient evidence is in the record to support a finding of negligence per se against New Palace. Summary judgment in favor of New Palace, therefore, was not warranted. Negligence per se is defined as a "breach of a statute or ordinance [that] renders the offender liable in tort without proof of a lack of due care." *Palmer v. Anderson Infirmary Benevolent Ass'n*, 656 So. 2d 790, 796 (Miss. 1995). A negligence per se plaintiff must show that (1) he is a member of the class sought to be protected under the statute; (2) that his injuries were of a type sought to be avoided by the statute; and (3) that the violation of the statute proximately caused or contributed to his injuries. *Moore v.*

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<sup>8</sup>See Henning Report [345-368].

<sup>9</sup>See Henning Report at p. 13 [359].

*K & J Enterprises*, 856 So. 2d 621 (Miss. Ct. App. 2003). When a statute is violated, the injured party is entitled to an instruction that the party violating is guilty of negligence, and if that negligence proximately caused or contributed to the injury, then the injured party is entitled to recover.” *Thomas v. McDonald*, 667 So. 2d 594, 596 (Miss.1995).

The Trial Court ruled that “even assuming violations with regard to paperwork regarding the barge’s status as a permanently moored vessel, those violations cannot be shown to have proximately caused the destruction of Bay Point.”<sup>10</sup> It is undisputed that New Palace failed to have the U.S. Coast Guard inspect and certify the SportsZone barge prior to its use as a passenger vessel/gaming facility.<sup>11</sup> This requirement was mandatory under the federal regulations,<sup>12</sup> as the SportsZone barge was intended to be a permanently moored vessel after its enclosure.<sup>13</sup> Such a failure constitutes negligence on the part of New Palace. Had the U.S. Coast Guard inspected the moorings, conditions of 100 year storms would have been considered.<sup>14</sup> Given those parameters, it is likely that a more stringent mooring system and/or secondary restraints would have been required before certification.

The background is as follows: New Palace Casino obtained Permanently Moored Vessel (“PMV”) status from the U.S. Coast Guard in 1994.<sup>15</sup> In granting that status, the Coast Guard

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<sup>10</sup>See Judgment, page 3 [912].

<sup>11</sup>

See Report of Gregory Castleman [499-509]; see also Deposition of Commander David Cole [567-582].

<sup>12</sup>See 33 U.S.C. §§1221, *et seq.*

<sup>13</sup>See Report of Gregory Castleman [499-509].

<sup>14</sup>Marine Safety Manual, Volume II, Section (B)(4)(I)(1) Permanently Moored Vessels [510-515].

<sup>15</sup>Cole Depo. p. 25, ll. 15-18 [574].

expects that the owner will maintain the PMV in that same state for which the PMV status was granted.<sup>16</sup> At the time the PMV status was granted, the SportsZone barge had not been enclosed; it was merely a floating pier attached to the main casino barge.<sup>17</sup> The only purpose of the floating pier was fire egress.<sup>18</sup> “As an egress barge, . . . there was no mooring system designed to be attached to the barge.”<sup>19</sup> Such a floating pier would not have been part of the PMV consideration because it was not a passenger carrying vessel.<sup>20</sup> In fact, New Palace has testified that the floating pier was not part of the PMV package.<sup>21</sup> Eventually, the floating pier was enclosed and used as the SportsZone barge.<sup>22</sup> In order to configure it into the SportsZone, New Palace transported the floating pier hull to Mobile, Alabama to have the hull re-skinned.<sup>23</sup> It had “never been moored at the capacity it was until [New Palace] made it into a gaming space.”<sup>24</sup> Once the floating pier was turned into a passenger carrying vessel, it should have been inspected by the USCG so that it might also be granted PMV

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<sup>16</sup>*Id.* at p. 25, ll. 18-22 [574].

<sup>17</sup>*Id.* at p. 25, 22-25, p. 26, p. 27, ll. 1-13 [573-574].

<sup>18</sup>

*See* Deposition of New Palace 30(b)(6) representative Keith Crosby at p. 11, ll. 6-19 [593].

<sup>19</sup>Crosby Depo., p. 12, ll 11-13 [594].

<sup>20</sup>Cole Depo. p. 25, ll. 19-22 [574].

<sup>21</sup>Crosby Depo. p. 11, ll. 23-25 [593], p. 12, ll. 1-3 [594].

<sup>22</sup>Crosby Depo. p. 10-12 [592-594].

<sup>23</sup>Crosby Depo. p. 11, ll. 23-25[593], p. 12, ll. 1-3 [594].

<sup>24</sup>Crosby Depo., p. 11, ll. 23-25[593], p. 12, ll. 1-3 [594].

status.<sup>25</sup> New Palace, however, failed to have the SportsZone barge inspected by the Coast Guard after it was enclosed.<sup>26</sup>

New Palace had a duty to obtain a U.S. Coast Guard inspection and certification under applicable federal regulations.<sup>27</sup> New Palace, however, failed to do so.<sup>28</sup> Had the inspection taken place, the U.S. Coast Guard would have (1) required that the mooring design meet the criteria of the Mississippi Gaming Commission; and (2) considered 100 year storm winds and flood waters.” Had such conditions been considered, after a 100 year review of conditions on the Coast, a building should have at least been built to withstand at least Hurricane Camille’s 24.5 foot surge. Richard Henning testified as follows:

Q. My question is this, Colonel: If the general asked you to consider 100-year storm surge history and asked you for an elevation for a minimum elevation for his building, so it would not be affected from the surge -- so that it would not be affected by the surge, what would you tell him the minimum amount of elevation to build that structure to be?

A. Well, again, if we look at the history, we now have Katrina to look at. And the storm surge in Waveland was 31 feet. So if -- again, if there were no other considerations other than meteorology, I would say to build them up on 30-foot stilts above the beach.

Q. Keeping that in mind, Colonel, let’s go back to July of 2005. If he asked you the same question, what would you say then?

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<sup>25</sup>*Id.*; see Report of Gregory Castleman [499-509].

<sup>26</sup>Cole Depo., p. 11, ll. 6-19 [570].

<sup>27</sup>See 33 U.S.C. §§1221, *et seq.*

<sup>28</sup>

It is arguable that New Palace should be held strictly liable for the damage for conducting gaming activity on a non-certified vessel on government controlled waterway. See 33 U.S.C. §§1221, *et seq.* and 46 C.F.R. 71.01-1(a).

A. the highest surge that had ever been encountered on the Mississippi coast was 24-and-a-half feet, and again, if there were no other considerations, I would say build them 25 feet above the -- above the terrain, if the terrain is the beachfront.

Q. Right, and certainly higher than 15 feet; would you agree?

A. Again, if there are no other considerations other than meteorology, then yes.

Henning Depo. pp. 61-63. As noted, *infra*, Henning also testified that the surge in the area of the SportsZone barge could have been within the range of Hurricane Camille's surge.<sup>29</sup> Again, based on the above-outlined evidence in the record on the issue of the reasonableness of New Palace's actions in mooring the SportsZone barge, this issue should be determined by a jury. See *John W. Stone Oil v. Bollinger*, 2007 WL, 2710809 (E.D. La.) at \*6. If the Trial Court was not willing to rule New Palace was guilty of negligence per se, the Court should have at least considered the violation of the U.S. Coast Guard's regulation as evidence of New Palace's negligence. As such, summary judgment was not appropriate.

E. NEW PALACE CASINO, L.L.C. FAILED TO EMPLOY ALL REASONABLE MEASURES TO PREVENT THE SPORTSZONE BARGE FROM DESTROYING THE BAY POINT HIGH AND DRY, L.L.C. MARINA

The Trial Court and New Palace cited two cases in support of their position that New Palace took reasonable measures to prevent foreseeable injuries and damages in the event of a hurricane.<sup>30</sup> However, the authorities used in support are distinguishable. These cases involved plaintiffs suing defendants for failing to secure storage containers during Hurricane Katrina, which ultimately

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<sup>29</sup>Marine Safety Manual, Volume II, Section (B)(4)(I)(I) Permanently Moored Vessels [510-515].

<sup>30</sup>See *Defazio*, 2008 WL 2788732; *Royal Beach Hotel*, 207 WL 1499815 and cases cited within those opinions.

destroyed plaintiffs' property. These were the same types of storage containers that are seen being transported by ships and trains. There is nothing similar about a storage container, which has a purpose of moving from location to location, and a permanently moored vessel, which is built to do exactly what its name says, be "permanent." Nevertheless, the defendants in the storage container cases took painstaking **additional** preventative measures in an attempt to secure their storage containers and keep them from breaking free from their facilities, and in spite of their tremendous efforts, they were still unsuccessful.<sup>31</sup> The Court in *Lee Brother, LLC v. Crowley Liner Services, Inc.*, 2007 WL1858744 held that the defendant owed no duty to the plaintiff "because the enormously destructive force of Katrina was unprecedented and defendant could not have reasonably foreseen that its containers, trailers, and chassis might wash and blow away and cause damage to neighboring property **unless additional**, extraordinary measures were taken to secure them." (Emphasis added).

The present case involves issues of whether New Palace employed all reasonable measures to properly moor and secure the SportsZone barge at the time of its inception. The cases cited by the Trial Court and New Palace pertain to parties taking additional measures to prevent injuries when Hurricane Katrina was actually approaching. The fact that Katrina was an "unprecedented" storm does not, by itself, clear New Palace of any liability. New Palace was still required to employ reasonable measures, which could have been the same unextraordinary secondary restraints successfully used by another entity on the coast, Treasure Bay Casino, to prevent foreseeable injuries to Bay Point.<sup>32</sup> However, New Palace never took these reasonable measures.

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<sup>32</sup>See Depo of Terry Moran, pp. 11-12 [593-594], 22-23 [604-605].

Evidence in the record establishes that a stronger mooring system design and secondary restraints could easily have been designed and utilized at little cost increase to New Palace, which could have prevented the break-away of the SportsZone barge.<sup>33</sup> Intervening Plaintiffs' expert in the field of naval architecture, Gregory Castleman, N.A., has submitted his findings in this case, and he is of the opinion that the system should have been designed "to withstand at least the surge associated with Hurricane Camille. The cost of fabricating and installing dolphins that would have accommodated a higher storm surge was minimal in the cost of the overall investment."<sup>34</sup> Mr. Castleman is also of the expert opinion that the use of secondary restraints would have prevented the vessel from drifting away and causing damage to the surrounding structures.<sup>35</sup>

Furthermore, New Palace's engineer, Terry Moran<sup>36</sup>, testified in this case that in order to properly design standards in the industry, an engineer designing a casino project must take into consideration the historic high tides associated with hurricanes along Mississippi Gulf Coast, such as the thirty to forty foot tides generated by Hurricane Camille. "Engineers take into account the location, the geographical configuration of the site, and "typically use the minimum design criteria, plus a safety factor of 30 percent." Moran Depo., p. 14 [596].

Q. Do you take into consideration when you design for a casino project such as Treasure Bay or others the higher tides in storms like Hurricane Camille?

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<sup>33</sup>See Report of Gregory Castleman [499-509].

<sup>34</sup>See Report of Gregory Castleman, p. 1 [500].

<sup>35</sup>See Report of Gregory Castleman, p. 1 [500].

<sup>36</sup>

Terry Moran is an engineering expert hired by New Palace Casino, LLC in a separate lawsuit with its insurance company over damage sustained to New Palace Casino, LLC's property during Hurricane Katrina.

A. Yes.

Q. And do most of the engineers, to your knowledge, within this area who are from the Gulf Coast and work on the Gulf Coast take that into consideration also?

A. Yes.

Moran Depo. pp. 11-12 [593-594].

In addition, at least one other casino property, Treasure Bay, used secondary restraints which were designed to pull the casino vessel back away from the main connection points after the mooring system had exceeded its height limitations. These restraints performed as planned and contained the Treasure Bay vessel.

Q. Do you have any knowledge of modifications to any of the casinos after Hurricane Georges to place in secondary restraints?

A. Yes, sir, with Treasure Bay.

Q. And what type of secondary restraints did they use at Treasure Bay?

A. Chains.

Q. How were they configured?

A. Basically they were added to the connection points. The primary mooring facility was on shore, and these chains were designed after they rose up and exceeded the height limitations to pull the vessel back away from the main connection points.

Q. Do you know if they worked?

A. Yes, sir. I think they did what they were supposed to do. I don't know if the term "worked"---

Q. Okay. That's my-- Did they do what they were supposed to do. Is that a better question?

A. Yes. I think so.

Depo. of Terry Moran, pp. 11-12 [593-594], 22-23 [604-605].

F. NEW PALACE CASINO, L.L.C. COULD HAVE GUARDED AGAINST HURRICANE KATRINA'S DESTRUCTIVE FORCE

Finally, the Trial Court ruled that Hurricane Katrina was an "Act of God" and, therefore, New Palace could not have guarded against it.<sup>37</sup> An Act of God is a "loss happening in spite of all human effort and sagacity." *The Majestic*, 166 U.S. 375, 386, 17 S.Ct. 597, 602, 41 L.Ed. 1039 (1897). "An 'Act of God' is not only one which causes damage, but one as to which reasonable precautions and/or the exercise of reasonable care by the defendant, could not have prevented the damage from the natural event." *McFarland v. Entergy Mississippi, Inc.* 919 So.2d 894 (Miss.2005) citing *Skandia Ins. Co. v. Star Shipping*, 173 F.Supp.2d 1228 (S.D.Ala.2001). The Act of God "defense has been widely defined as any 'any accident, due directly and exclusively to natural causes without human intervention, which by **no amount** of foresight, pains, or care, reasonably to have been expected could have been prevented.'" *McFarland, supra* citing *Skandia Ins. Co., supra* at 1239. (Emphasis added).

Even ignoring the fact that Hurricane Camille had 30 to 40 foot tides, the mere fact the New Palace relied upon the Mississippi Gaming Commission's regulation when designing its mooring system, shows that a storm of Katrina's magnitude was foreseeable. The regulation called for the New Palace's barge to be able to withstand a Category 4 storm and a 15 foot storm surge, period. Astoundingly, in spite of the fact that the SportsZone barge failed during a Category 3 Hurricane, Defendant continues to argue that because plaintiff's expert stated that the system was sufficient to

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<sup>37</sup>See Judgment, p.3 [912].

withstand category 4 winds and a 15 foot regulatory threshold for surge, New Palace did not breach a duty.<sup>38</sup> Defendant goes on to argue that because Katrina produced storm surge levels higher than 15 feet, no duty was breached. However, New Palace has yet to definitively prove which forces involved with Hurricane Katrina actually caused the barge to become dislodged from its moorings. “A hurricane includes a number of weather conditions, elements, and/or forces, at times acting dependently, at other times independently.” *Corban v. USAA*, 20 So.3d 601 (Miss.2009). Therefore, any combination of forces, either acting concurrently or sequentially, could have caused the New Palace barge to dislodge. Defendant merely assumes that if the storm surge associated with Katrina was above the 15 foot surge level, then that must have been the lone element to cause the barge’s mooring failure. Although the *Corban* case is an insurance case, the Mississippi Supreme Court placed the onus on the defendant to prove which forces destroyed the property that was the subject matter of the litigation, and in which order. See *Corban, supra*. Whether or not the a storm surge above 15 feet was the first and only force to cause the SportsZone barge to fail is an affirmative defense and must be proven by Defendant. Accordingly, there is a genuine issue of material fact as to whether New Palace even complied with the minimum, but not dispositive, standard for mooring requirements set by the Mississippi Gaming Commission.

Furthermore, the Trial Court failed to consider reasonable precautions that New Palace could and should have taken to prevent Bay Point’s injuries when it stated that New Palace could not have guarded against Hurricane Katrina. As stated earlier in this memorandum, Treasure Bay Casino employed a simple, cost-effective secondary restraint system that held the barge in place when the moorings failed. Treasure Bay Casino’s implication of secondary restraints clearly demonstrates that

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<sup>38</sup>Defendant’s Reply to Plaintiff’s Memo in Opp to MSJ, p.9 [785].

there was, at very least, some amount of foresight, pains, or care that New Palace could have exercised to prevent Bay Point's injuries. It defies all logic to rule that New Palace could not have guarded against Hurricane Katrina when Treasure Bay did exactly that. There is nothing extraordinary or unreasonable about this fail-safe device, and it could have prevented the SportsZone from destroying the Bay Point marina. Additionally, New Palace knew or should have known of the wave action which would be required to be accounted for in addition to surge height and the failure to account for wave action caused the failure of the mooring system. Logically, this explains why Treasure Bay Casino used secondary restraints of chains, much as any recreational boater would have, in order to keep the vessel on site even if the mooring system was unable to withstand the wave action. It should not be lost on this Court that New Palace's designer of the SportsZone barge, Gordon Reigstad, is originally from Minnesota and not the Gulf Coast and, therefore, he would likely not be accustomed to the sheer magnitude and destructive nature of storms experienced throughout the history of the Gulf Coast, such as Hurricane Camille.

The Affidavit of Mr. Reigstad indicates that the horizontal wave action was not considered in the design of the mooring system, as "[t]he yokes restrained lateral movement of the barge." [338] Likewise, the deposition testimony of Mr. Reigstad seems to indicate that horizontal wave action was not considered in the design of the mooring system.

This thing is set in the wind for lateral loads, and you can see it's- it's very strong in this direction, okay, and will handle all the wind loads in these directions easily (indicating). Okay. But as it goes up and down and it floats to the top and goes out of the design parameters, then all of a sudden, you know, who knows, if this end comes off, if the whole thing rips off and stays, as most of them did at the Grand, you know.

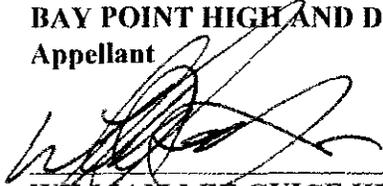
Reigstad Depo., p. 43. 32. The failure to consider horizontal wave movement given the nature of the SportsZone site is further evidence of an inadequate mooring system and New Palace's negligence.

**CONCLUSION**

In addition to the Trial Court's erroneous interpretation that the Mississippi Gaming Commission's mooring regulation established the duty owed to Bay Point, the following genuine issues of material fact still exist and must be determined by the trier of fact: (1) whether New Palace actually satisfied the minimum standard set by the Mississippi Gaming Commission regulation; (2) whether a U.S. Coast Guard inspection might have required more stringent mooring and secondary restraints; (3) whether the surge in the Biloxi Bay was actually above fifteen (15) feet; (4) whether New Palace was negligent by not employing simple secondary restraints; and (5) whether a tide above fifteen (15) feet was the first and only force to dislodge the SportsZone. Accordingly, Bay Point respectfully requests that this Court rule the Trial Court committed reversible error in granting summary judgment in favor of New Palace.

Respectfully submitted, this the 10<sup>th</sup> day of February, 2010.

**BAY POINT HIGH AND DRY, L.L.C.,  
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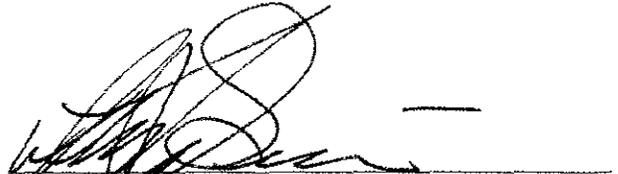
**CERTIFICATE OF SERVICE**

I hereby certify that I have this day transmitted via U.S. mail, postage prepaid, a true and correct copy of the foregoing to the following:

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This the 10<sup>th</sup> day of February, 2010.



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