IN THE SUPREME COURT OF MISSISSIPPI
CAUSE NO.: 2010-CA-00683

FALANDA WILSON — APPELLANT - PLAINTIFF

VS.

BAPTIST MEMORIAL HOSPITAL-NORTH MISSISSIPPI, INC. — APPELLEE - DEFENDANT

BRIEF OF APPELLEE, BAPTIST MEMORIAL HOSPITAL-NORTH MISSISSIPPI, INC.

ORAL ARGUMENT NOT REQUESTED

Prepared by:

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CERTIFICATE OF INTERESTED PARTIES

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 this Court may evaluate possible disqualifications or recusal:

1. Appellant, Falanda Wilson;

2. Honorable Henry L. Lackey, Lafayette County Circuit Court Judge;

3. Baptist Memorial Hospital-North Mississippi, Inc.;

The undersigned counsel further certifies that the following attorneys have an interest in the outcome of this case:

For All Appellant:

1. Carlos Moore, Esquire;

2. Tangala Hollis, Esquire.

For Appellee:

1. John H. Dunbar, Esquire;

2. Kate M. Embry, Esquire.

This, the 18th day of February, 2011.

Kate Mauldin Embry

JOHN H. DUNBAR, MSB #[redacted]
KATE MAULDIN EMBRY, MSB #[redacted]

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I. STATEMENT REGARDING ORAL ARGUMENT

Baptist Memorial Hospital-North Mississippi, Inc. ("BMH-NM") does not request oral argument.

The briefs and the record adequately present the factual and legal arguments raised in this case.

Accordingly, BMH-NM does not believe oral argument would significantly assist the Court's review.

II. STATEMENT OF ISSUES

A. Plaintiff's proof of duty and breach of duty is insufficient.

B. Plaintiff failed to respond to BMH-NM's Motion for Summary Judgment with specific facts and supportive evidence of significant and probative value showing a genuine issue for trial as to duty and breach.

C. Plaintiff failed to identify supportive evidence of significant and probative value showing that BMH-NM owed a greater duty to her than the duty generally owed by a premises owner to a licensee – to refrain from causing willful or wanton injury.

D. Plaintiff failed to identify supportive evidence of significant and probative value showing she held the status of a "public invitee" at the time of her fall.

E. Plaintiff failed to identify supportive evidence of significant and probative value showing willful or wanton conduct by BMH-NM.

F. Even if this Court were to find BMH-NM owed Plaintiff a duty of reasonable care, BMH-NM would still be entitled to summary judgment, as Plaintiff has identified no evidence of significant and probative value of any failure by BMH-NM to exercise reasonable care for her safety.

G. The Brief of Amicus Curiae improperly raises questions of law against summary judgment which were not raised for the lower court before it granted summary judgment and which were not raised by Plaintiff on appeal.

H. Even if the Court were to consider the issues raised for the first time by the Amicus Curiae, this Court should affirm.

III. STATEMENT OF THE CASE

A. NATURE OF THE CASE

The present premises liability case involves a slip and fall on business premises.

Plaintiff fell at the Oxford, Mississippi location of Baptist Memorial Hospital-North Mississippi on June 3, 2007. [R. 7 at ¶¶ 6, 7]. She claims the floor on which she fell was wet. [R. 8 at ¶ 11].

B. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

Plaintiff filed her Complaint against BMH-NM in the Circuit Court of Lafayette County, Mississippi, on May 21, 2009, [R. 1-5], and filed an Amended Complaint on June 3, 2009, [R. 6-10], claiming damages arising out of her fall on BMH-NM premises on June 3, 2007.

On January 25, 2010, BMH-NM filed its Motion for Summary Judgment on Plaintiff's claims (BMH-NM's "Motion for Summary Judgment") [R. 98-154], along with a supporting memorandum of law [R. 158-166] and an itemization of material facts not in dispute [R. 155-157]. As set forth and supported in the Motion for Summary Judgment, Plaintiff was a licensee at the time of her fall, and she cannot prove breach by BMH-NM of any duty owed to her. [R. 98-154].

Plaintiff filed her Response in Opposition to BMH-NM's Motion for Summary Judgment on February 18, 2010, arguing that (1) she was a "public invitee" at the time of her fall, (2) a "simple negligence exception" to the general duty owed to a licensee applied, and (3) BMH-NM breached a duty owed to her as a licensee. [R. 168-176].

On February 26, 2010, BMH-NM filed its Rebuttal in Support of its Motion for Summary Judgment, showing that the arguments by Plaintiff in her response were not supported by facts in

evidence or by Mississippi law. [R. 186-196].

Plaintiff filed an Affidavit in Opposition of Summary Judgment on March 2, 2010. [R. 197-198]. The Affidavit does not show that Plaintiff was invited onto BMH-NM premises by BMH-NM; it does not show any benefit to BMH-NM by Plaintiff's presence on the premises; and it does not show any negligence or willful or wanton conduct by BMH-NM.

After a March 4, 2010 hearing on the Motion for Summary Judgment, Lafayette County Circuit Judge Henry Lackey granted BMH-NM's Motion for Summary Judgment by opinion and order dated March 26, 2010. [R. 201-203]. Final Judgment was entered on April 27, 2010. [R. 206].

Notice of this appeal was filed on April 19, 2010. [R. 204-205]. As set forth in the notice, this appeal is "taken from the Order Sustaining Defendant's Motion for Summary Judgment on April 12, 2010." [R. 204].

The matter now rests before this Court for consideration.

C. STATEMENT OF FACTS

On June 3, 2007, Plaintiff fell on BMH-NM's premises. [R. 7 at ¶¶ 6, 8].

At the time of her fall, Plaintiff was not a patient at BMH-NM; she had no business purpose for being on the premises; and her presence on the premises did not benefit BMH-NM.

Her sole reason for going to the hospital on the day of the fall was to bring her friend's child to visit his mother, Plaintiff's friend, who was a patient. [R. 114 at Response to Interr. No. 10; R. 147 at p. 107, ll. 20-25 and p. 108, ll. 1-7].

While on the premises prior to the fall, Plaintiff did not deviate from this stated purpose - she waited in the patient room while her friend and the child visited. [R. 147 at p. 107, ll. 20-25

and p. 108, ll. 1-7].

Plaintiff fell in the hallway after exiting the patient room and entering the hallway. [R. 148 at p. 111, ll. 16-19; p. 112, ll. 11-18]. She was no more than three or four steps outside of the doorway to the patient room. [R. 148 at p. 113, ll. 1-4].

She fell in water that was on the floor. [R. 148 at p. 112, ll. 17-18].

At the time of the fall, Plaintiff was not watching where she was going. She was turned to her right, looking at the child and talking to him about the visit with his mother. [R. 148 at p. 111, ll. 16-19 and p. 113, ll. 5-12]. She was wearing flip-flops. [R. 141 at p. 82, ll. 1-9].

She does not know whether she would have been able to see the water before her fall if she had been looking. [R. 149 at p. 117, ll. 24-25 – R. 150 at p. 118, ll. 1-2].

There is no evidence in the record that BMH-NM had knowledge prior to the fall of water on the floor.

Plaintiff testified that nurses came to her and cleaned the water from the floor *after* she fell. [R. 148 at p. 111, ll. 8-13; R. 149 at p. 114, ll. 14-20]. Plaintiff did not hear any hospital employee say he or she knew of the water on the floor prior to the fall. [R. 150 at p. 119, ll. 21-25 – p. 120, ll. 1-11].

There is no evidence in the record that water was on the floor for a sufficient amount of time that BMH-NM knew, or should have known, it was there and had an opportunity to remove the water or warn Plaintiff of its presence.

Plaintiff's testimony indicates that water was not on the floor when she entered the patient room approximately thirty (30) minutes before the fall. [R. 143 at p. 90, ll. 3-5 and p. 92, ll. 2-5; R. 147 at p. 108, ll. 8-25]. Plaintiff testified that she does not know when the water got

on the floor. [R. 150 at p. 118, ll. 9-12].

Plaintiff does not claim that BMH-NM willfully or wantonly injured her, and she has no evidence of any wanton or willful injury. [R. 8 at ¶ 12].

There is no evidence in the record that BMH-NM invited Plaintiff, expressly or impliedly, onto its premises for the purpose of bringing her friend's child to visit his mother.

IV. SUMMARY OF THE ARGUMENT

Under Mississippi law, the operator of a business is not an insurer against all injuries that occur on the premises. Proof merely of the occurrence of a fall on a floor within a business is insufficient to establish negligence. The plaintiff bears the burden of proving duty, breach, proximate cause and damages.

At the time of her fall, Plaintiff was on BMH-NM premises solely for her own convenience, pleasure or benefit.

She was a licensee, to whom BMH-NM owed a duty to refrain from causing willful or wanton injury.

She was not an invitee. She was not on the premises in response to an invitation of BMH-NM, express or implied, as opposed to BMH-NM's permission; and she was not on BMH-NM premises for BMH-NM's mutual advantage.

Plaintiff cannot prove breach.

Plaintiff fell in water on the floor of the hallway outside of her friend's patient room. She claims BMH-NM should have removed the water from the floor or warned her of the water.

She makes no claim of willful or wanton conduct by BMH-NM, and there is no evidence in the record of willful or wanton injury.

The trial court's grant of summary judgment in favor of BMH-NM was therefore appropriate.

Plaintiff failed to respond to the Motion for Summary Judgment with supportive evidence of significant and probative value showing that BMH-NM owed a greater duty to her than the duty generally owed by a premises owner to a licensee – to refrain from causing willful or

wanton injury.

Plaintiff's argument that she was a "public invitee" is not supported by evidence in the record.

A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public.

Plaintiff specified no probative evidence showing that she was on BMH-NM's premises in response to an invitation by BMH-NM, express or implied, as opposed to being on the premises pursuant to BMH-NM's permission.

She specified no probative evidence showing that BMH-NM was held open to members of the public entering for the purpose of visiting patients or escorting visitors of patients in June of 2007 or at any relevant time.

Further, she specified no probative evidence showing any benefit or advantage conferred to BMH-NM by her presence.

She was not an invitee, and she was not owed a duty of reasonable care.

The "simple negligence exception" to the general rule that the duty owed a licensee is to refrain from causing willful or wanton injury does not apply.

Plaintiff claims she was injured as a result of water on the floor, a condition on BMH-NM premises. She makes no claim of affirmative negligence by BMH-NM.

The "simple negligence exception" does not apply where the licensee is injured as a result of the condition of the premises, or passive negligence.

Even if this Court were to hold BMH-NM to a duty of reasonable care, summary judgment would be appropriate, as there is no evidence that BMH-NM either caused the water to

be on the floor or knew water was on the floor prior to Plaintiff's fall.

Lafayette County Circuit Court Lackey properly granted the motion for summary judgment in favor of BMH-NM.

Based on the evidence before the court, he held as a matter of law that Plaintiff was a licensee at the time of her fall, and he made the following factual determinations:

> From reviewing the discovery responses and briefs there is no indication that Wilson was on the property of BMH-NM for any reason other than to visit her sick friend. ... Wilson was allowed to visit her friend but only under certain circumstances, *i.e.* visiting hours, numbers allowed in room, etc.
>
> There was no benefit nor advantage flowing to BMH-NM by permitting Wilson to visit the sick room of her friend, therefore there can be no dispute but that Wilson entered the hospital for her own benefit, pleasure or satisfaction...

[R. 202-203].

Judge Lackey further found that BMH-NM did not breach its duty to refrain from willfully or wantonly injuring Plaintiff:

> The facts are undisputed that Wilson's injury was not caused by the willful or wanton acts of BMH-NM or any of its employees or staff.

[R. 202-203].

He found no active negligence on the part of BMH-NM:

> If in fact Wilson suffered an injury from the acts of Defendants it must have been from inadvertence or lack of attention by not discovering the water or liquid on the floor.

[R. 202-203].

Based upon the record before him, Judge Lackey properly granted Summary Judgment in favor of BMH-NM. This Court should affirm.

V. ARGUMENT AND AUTHORITIES

A. PLAINTIFF'S BURDEN

Where a motion for summary judgment is made and supported, as it was in this case, an adverse party may not rest upon the mere allegations or denials of the pleadings, but instead must respond by setting forth specific facts showing that there is a genuine issue for trial. Stuckey v. Provident Bank, 912 So.2d 859, 864 (Miss. 2005); Miller v. Meeks, 762 So.2d 302, 304 (Miss. 2000) (citing Brown v. Credit Ctr., Inc., 444 So.2d 358, 362 (Miss. 1983)).

A plaintiff wishing to avoid summary judgment "must be diligent in opposing a motion for summary judgment." Magee v. Transcontinental Gas Pipe Line Corp., 551 So. 2d 182, 186 (Miss. 1989). She "may not rely upon the mere unsworn allegation in [her] pleadings," and "may not create an issue of fact by arguments and assertions in briefs or legal memoranda." *Id.* Rather, "the plaintiff must rebut the defendant's claim by producing supportive evidence of significant and probative value." Saucier v. Biloxi Medical Regional Ctr, 708 So. 2d 1351, 1356 (Miss. 1998).

The claim must be supported by more than a mere scintilla of colorable evidence; it must be supported by evidence upon which a fair-minded juror could return a favorable verdict. Watson v. Johnson, 848 So. 2d 873, 878 (Miss. Ct. App. 2002).

B. STANDARD OF REVIEW

This Court reviews a trial court's grant of summary judgment de novo. Duckworth v. Warren, 10 So. 2d 1156, 1160 (Miss. 2009). The motion for summary judgment shall be granted "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." MISS. R. CIV. P.

56(c).

The scope of appellate review is "limited to those facts contained strictly in the record and not upon mere assertions in the briefs." Ross v. State, 16 So. 3d 47, 60 (Miss. Ct. App. 2009) (internal quotations omitted).

This Court will entertain amicus curiae briefs only to the extent they are confined to the issues presented in the pleadings and developed before the trial court. *See* Burnside v. Burnside, 86 So. 2d 333, 334 (Miss. 1956).

C. PREMISES LIABILITY IN MISSISSIPPI

This case involves a slip and fall on a business premises. [R. 7 at ¶¶ 6, 7].

It is well-established in premises liability cases that the operator of a business is not an insurer against all injuries that occur on the business premises and that proof merely of the occurrence of a fall on a floor within a business is insufficient to establish negligence. *See* Jacox v. Circus Circus Mississippi, Inc., 908 So.2d 181, 184 (Miss. Ct. App. 2005).

Mississippi applies a three-step analysis in premises liability cases. Massey v. Tingle, 867 So.2d 235, 238 (Miss. 2004). The first step is to classify the status of the injured person as an invitee, licensee or a trespasser. *Id.* The second step is to determine the duty owed to the injured party. *Id.* The third step is to decide whether this duty was breached by the landowner or premises operator. *Id.*

Step 1: Plaintiff's Status

Where the facts are not largely in dispute, the classification of a plaintiff as an invitee, licensee or trespasser is a question of law for the trial judge. Doe v. Jameson Inn., Inc., No. 2009-CA-00722-SCT, 2011 Miss. LEXIS 27, *7-8 (Miss. Jan. 13, 2011).

(1) **Plaintiff was a Licensee.**

The trial court properly concluded under the undisputed material facts that Plaintiff was a licensee at the time of her fall.

Plaintiff's reason for entering BMH-NM's premises is undisputed. She entered the premises for the purpose of bringing her friend's son to visit his mother, who was a patient. [R. 98, 144].

The determination of Plaintiff's status was therefore properly a question of law for the trial judge, and the trial judge properly concluded that Plaintiff was on BMH-NM premises for her own convenience, benefit or pleasure and was a licensee at the time of her fall, R. 202. *See* Jameson Inn., Inc., 2011 Miss. LEXIS 27 at *8 (stating that the only fact pertinent to the plaintiff's status was her reason for entering the defendant's property).

"A licensee is one who enters upon the property of another for his own convenience, pleasure, or benefit pursuant to the license or implied permission of the owner." Corley v. Evans, 835 So. 2d at 30, 37 (Miss. 2003).

Plaintiff entered BMH-NM premises solely for her own convenience, pleasure or benefit.

It is undisputed that her sole purpose for entering BMH-NM's premises was to bring a child of her friend to the hospital to visit the child's mother, Plaintiff's friend, who was a patient. [R. 98, 147].

In response to written discovery from BMH-NM requesting "the purpose of [her] visit to BMH-NM on June 3, 2007, ... and [her] purpose for entering the 5th floor hallway where [she] fell," Plaintiff stated: "Bringing friend's son to see her at the hospital. Her name was Joliette Jones." [R. 114].

During her deposition, she confirmed that she conferred no benefit to BMH-NM during her visit. Up to the time of her fall, she was solely on BMH-NM for her own convenience, pleasure or benefit:

> Q. Let me get back to the events of June 3 of '07. It sounds like you went into Marquez' mother's room and visited for a period of time. And did you just, what, sit there in a chair and visit with Marquez' mother or were you doing something else?
>
> A. No, I sat in a chair visiting with his mother while he was, you know, talking with her.
>
> Q. And were you in the hospital room for the - continuously for the whole time that you were visiting with her?
>
> A. Yes, sir, I was.
>
> Q. You didn't leave and come back?
>
> A. No, sir.

[R. 147 at p. 107, l. 20-p. 108, l. 7].

As Plaintiff was on BMH-NM premises solely for her own convenience, pleasure or benefit at the time of her fall, the trial court correctly found that she held the status of a licensee. *See* Hudson v. Courtesy Motors, Inc., 794 So. 2d 999, 1003-1004 (Miss. 2001) (finding that the plaintiff came to the premises of a car dealership for her own convenience and benefit and was a licensee as to the dealership where she entered the dealership premises to purchase a car from an independent used car dealer located on the premises); Lucas v. Buddy Jones Ford Lincoln Mercury, Inc., 518 So. 2d 646, 647 (Miss. 1988) (finding that the plaintiff was a licensee where she entered a business premises solely for her own convenience); Bishop v. Stewart, 106 So. 2d 899 (Miss. 1958) (finding that the plaintiff was a licensee where she entered the premises solely for her own convenience); Graves v. Massey, 87 So. 2d 270, 270 (Miss. 1956) (finding that the

plaintiff who fell on the premises of a filling station was a licensee where he was on filling station premises solely for his own benefit); *see also* Jameson Inn, Inc., 2011 Miss. LEXIS 27 at *7-8 (upholding trial court's finding that the plaintiff was a licensee on hotel premises where it was undisputed that she entered the premises for the purpose of smoking marijuana in a hotel room); Astleford v. Milner Enterprises, Inc., 233 So. 2d 524, 524-25 (Miss. 1970) (licensee status of person injured on the premises of a motel while visiting a motel employee was conceded); Dry v. Ford, 238 Miss. 98, 101 (Miss. 1960) (finding that the plaintiff who entered the defendant's garage to conduct business became a licensee when he remained on the premises for his own purpose after the garage declined his business).

(2) **Plaintiff was not an Invitee.**

An "invitee" is "a person who goes upon the premises of another in answer to an express or implied invitation of the owner or occupier for their *mutual advantage*." *See* Lucas, 518 So. 2d at 647 (emphasis in original).

This Court has recognized two classes of invitees: "public invitee" and "business invitee." Courtesy Motors, Inc., 794 So. 2d, at 1003.

"A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public, while a business visitor is invited to enter or remain on the land for a purpose directly or indirectly connected with business dealings of the possessor of the land." *Id.*

On appeal, Plaintiff argues that she was a "public invitee" at the time of her fall. (Appellant Brief, Statement of Issues, at p. 5, ¶ 1).

Plaintiff does not argue that she was a "business invitee".

To create a question for the jury as to whether she held the status of a "public invitee," Plaintiff was required to respond to BMH-NM's Motion for Summary Judgment with evidence of significant and probative value that (a) she was invited to enter or remain on BMH-NM premises as a member of the public for a purpose for which the premises was held open to the public and (b) a benefit was conferred to BMH-NM. *See* Courtesy Motors, Inc., 794 So. 2d at 1003 ("A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public."); Daulton v. Miller, 815 So. 2d 1237, 1240 (Miss. Ct. App. 2001) (holding that the plaintiff's status was properly defined as a licensee, and not a business or public invitee, where there was no proof of economic benefit, real or potential, to the premises owner).

In her response to BMH-NM's Motion for Summary Judgment, Plaintiff made the following conclusory argument without citation to supporting evidence in the record:

> 8. At the time of her injury, Plaintiff was a public invitee. A "public invitee" is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public. *Hudson v. Courtesy Motors, Inc.,* 794 So. 2d 999 (2001).
>
> 9. Due to the foregoing, Plaintiff was clearly an invitee and Defendant breached their duty owed to Plaintiff to inspect for dangerous conditions, and to warn of those dangerous conditions that would not be obvious to Plaintiff.

[R. 169].

Plaintiff's unsubstantiated assertions are not sufficient to prevent summary judgment. Watson, 848 So. 2d at 878; Magee, 551 So. 2d at 186 (stating that a party opposing summary judgment "may not rely upon the mere unsworn allegation in [her] pleadings," and "may not create an issue of fact by arguments and assertions in briefs or legal memoranda.").

Summary Judgment on Plaintiff's status as a licensee therefore was granted correctly.

On appeal, Plaintiff again fails to support her assertion that she was a "public invitee" at the time of her fall with evidence in the record.

(a) Plaintiff failed to specify evidence of significant and probative value that she was invited to enter or remain on BMH-NM premises as a member of the public for a purpose for which the premises was held open to the public.

Plaintiff has failed to identify probative facts showing that she entered BMH-NM premises in response to an invitation by BMH-NM, express or implied, as opposed to mere permission;

She has failed to identify probative facts showing that BMH-NM's premises were held open to the public in June of 2007; and

She has failed to identify probative facts showing that she was on the premises at the time of the fall for a purpose for which the premises was held open to the public.

Rather, Plaintiff offers broad, unsupported allegations as support for her argument.

For example, Plaintiff argues, "[h]ospitals are public places thus visitors entering hospitals are public invitees." (Appellant Brief at p. 9, ¶ 2). This general assertion is not supported by citation to any authority, and it is not supported by evidence in the record.

Plaintiff also failed to offer any probative evidence to support her general allegation that BMH-NM "is held open to the public for the purposes of visiting their loved ones." (Appellant Brief at p. 9, ¶ 2). Instead, Plaintiff argued, "[t]his is evidenced by the gift shops, cafeterias, vending machines, visiting hours policy etc in hospitals," again without citation to any supporting authority or any evidence in the record. (Appellant Brief at p. 9-10).

There is no evidence in the record of any such amenities at BMH-NM at any relevant time. Further, there is no evidence that Plaintiff knew of the presence of any such amenities on BMH-NM premises when she entered the premises.

It is undisputed that Plaintiff entered the premises for the sole purpose of bringing her friend's child to visit the child's mother. [R. 98, 144]. Plaintiff did not enter the premises for the purpose of visiting any such amenities, R. 98, and she did not visit any such amenities prior to her fall, R. 147 at p. 107, l. 20 – p. 108, l. 7.

Further, as pointed out by BMH-NM at the March 4, 2010 hearing, Baptist Memorial Hospital-North Mississippi, Inc. is a privately owned non-profit corporation. While persons are permitted to enter BMH-NM premises for non-medical reasons under some circumstances, access to hospital premises is restricted.

There is no evidence in the record that Plaintiff entered the premises in response to an invitation, express or implied, by BMH-NM, and there is no evidence that BMH-NM premises were held open to members of the public entering the premises to visit loved ones or to escort persons visiting loved ones in June of 2007 or at any relevant time.

At the time of her fall, Plaintiff was not on BMH-NM premises "as a member of the public for a purpose for which the land is held open to the public." Any permission Plaintiff had to be on BMH-NM premises was limited; she was not invited by BMH-NM to be on the premises. She was therefore not a public invitee. *See* Brown v. Scott Paper Co., 684 F. Supp. 1392, 1394-1395 (Miss. 1987) (finding that the plaintiff was a licensee where "the public was not prohibited from entering the lands, but [the premises owner] charged nothing to those who did.").

(b) Plaintiff failed to specify evidence of significant and probative value of any benefit to BMH-NM.

Plaintiff entered the premises for the sole purpose of bringing her friend's son to visit his mother. [R. 98, 99]. She was not seeking medical care or treatment when she entered the premises, and she was not a patient. [R. 98, 99]. She had no business purpose for being on BMH-NM premises, and she conferred no benefit, realized or expected, to BMH-NM. [R. 98, 99].

In her Response to BMH-NM's Motion for Summary Judgment, Plaintiff made no argument of any economic or business advantage to BMH-NM. [R. 168-172].

This case is therefore not like Alexander v. Jackson County Historical Soc., Inc., 227 So. 2d 291 (Miss. 1969) (holding that a woman injured while visiting Old Spanish Fort held the status of a "public invitee"). The plaintiff in Alexander paid an admission fee to enter the premises. 227 So. 2d at 929. As in Daulton v. Miller, no such mutual economic or business advantage was shown by Plaintiff in this case, and she is therefore not an invitee. 815 So. 2d at 1240 ("The obvious distinction with the case, though is that Old Spanish Fort Charged an admission fee. The mutual economic or business advantage was proven.").

On appeal, Plaintiff again failed to identify any probative evidence in the record of any economic or business advantage to BMH-NM.

Instead, Plaintiff again makes general, unsupported allegations. For example, Plaintiff again referenced "visiting hours, gift shops, cafeteria, and other amenities," without citation to any supporting evidence in the record of the existence, purpose or operation of any such amenities on BMH-NM premises at any relevant time and without any evidence that BMH-NM would have benefited if Plaintiff had "taken advantage of" any such amenities. (Appellant Brief

at p. 12, ¶ 1). Plaintiff also states, "visitors contribute to the healing and convalescent process of patients, which is undoubtedly consistent with, and the priority of, hospital business," without any support in the record or otherwise. (Appellant Brief at p. 13).

The trial court appropriately found that Plaintiff was a licensee, not an invitee.

At the time of her fall, Plaintiff was not a patient, and she did not enter the premises seeking medical care or treatment. She had no business purpose for being on BMH-NM premises, and she conferred no benefit, realized or expected, to BMH-NM. Further, there is no evidence in the record that Plaintiff entered BMH-NM premises in response to an invitation, expressed or implied, by BMH-NM, as opposed to permission.

On appeal, Plaintiff cites Biloxi Regional Med. Ctr. v. David, 555 So. 2d 53 (Miss. 2000), as support for the argument that she was an invitee at the time of her fall. (Appellant Brief at pp. 11-12).

This Court's holding in David is not pertinent to the issues before the Court in this case. The plaintiff's status as an invitee or a licensee was not at issue before the Court in that case. Trial court's instruction that the plaintiff in that case was an invitee on hospital premises was not contested and the bases for that instruction were not before the Court. 555 So. 2d at 55-56. Rather, the Court considered, among other things, the defendant's objection to a jury instruction pertaining to the extent of the duty owed by the defendant to an invitee, an issue that is not before the Court in this case. *Id.*

Step 2: Duty

The general duty owed to a licensee is to refrain from willfully or wantonly injuring the licensee. Corley, 835 So. 2d at 39; Green v. Dalewood Property Owners Ass'n, Inc., 919 So. 2d

1000, 1006 (Miss. Ct. App. 2005); Cook v. Stringer, 764 So.2d 481, 483 (Miss. Ct. App. 2000).

This Court carved out an exception to the general duty owed a licensee in Hoffman v. Planters Gin Co., 358 So. 2d 1008 (Miss. 1978), and applied the duty of ordinary reasonable care rather than the standard of willful or wanton negligence. The Court held that the premises owner is liable for injury proximately caused by the owner's active or affirmative negligence in the operation or control of activities which subjects a licensee to unusual danger or increases the hazard to the licensee when the presence of the licensee is known. 358 So. 2d at 1013. The Court "carefully limited the new standard of care to those cases involving injury resulting from active conduct as distinguished from conditions on the premises, or passive negligence." Titus v. Williams, 844 So. 2d 459, 465 (Miss. 2003).

This case does not fall within the "simple negligence exception" carved out in Hoffman.

In order for the exception to apply, Plaintiff was required to show (1) active negligence by BMH-NM that subjected Plaintiff to unusual danger and proximately caused injury to her and (2) that the presence of Plaintiff was known to BMH-NM. *See* Hoffman, 358 So. 2d at 1013; Scott Paper Co., 684 F. Supp. at 1395.

In her Response to BMH-NM's Motion for Summary Judgment, Plaintiff averred that she "is not required to show proof of wanton or willful injury, because if [the] Court finds that Plaintiff was of licensee status, Defendants' actions fall under the simple negligence exception to duty owed licensee." [R. 168, at ¶ 3].

Plaintiff's unsupported assertion was not sufficient to create an issue of fact as to duty. *See* Magee, 551 So. 2d at 186.

Further, Plaintiff claims that her fall was caused by a condition of the premises, liquid on the floor. [R. 8 at ¶ 11].

The record contains no evidence of affirmative or active negligence by BMH-NM.

It is well recognized by Mississippi courts that this "simple negligence exception" to the duty owed to a licensee "is limited to those cases involving injury resulting from *active conduct as distinguished from conditions of premises or passive negligence.*" Saucier, 708 So. 2d 1351 (emphasis in original) (internal quotations omitted); *See* Lucas, 518 So. 2d at 648 ("This exception is not applicable where the licensee is injured as a result of the condition of the premises, or passive negligence."); Adams v. Fred's Dollar Store of Batesville, 497 So. 2d 1097, 1101 (Miss. 1986) ("This exception has no application where the licensee is injured as a result of the condition of the premises, or passive negligence."); Hughes v. Star Homes, Inc., 379 So. 2d 301, 304 (Miss. 1980) (holding that the exception has no application where the licensee is injured as a result of the condition of the premises, or passive negligence).

Passive negligence is "the failure to do something that should have been done." Titus, 844 So. 2d at 466 (quoting Black's Law Dictionary 718 (6th ed. 1991)). "One is only passively negligent if he merely fails to act in fulfillment of duty of care which law imposes upon him." *Id.*

On appeal, Plaintiff states, without citation to the record or supporting authority, "Appellees certainly knew of Appellant Wilson's presence on the property, and *by their active negligence in not cleaning the water off the floor or posting a warning sign*, Appellees subjected Appellant Wilson to an unusual danger and proximately caused her injuries." (Appellant Brief at p. 16, ¶ 1 (emphasis added)).

Plaintiff's allegations of failure by BMH-NM to clean the water off of the floor or post a warning sign are at most allegations of passive negligence.

Mississippi courts have held the exception inapplicable in cases involving claims of failure to warn of a dangerous condition on the premises. *See* Adams, 497 So. 2d at 1101 (discussed hereinbelow); Scott Paper Co., 684 F. Supp. 1392 (discussed hereinbelow).

The plaintiff in Adams brought a claim against Fred's Dollar Store after she struck a concrete slab with her vehicle in the store's parking lot, which was not illuminated or marked. 497 So. 2d at 1101. The Mississippi Supreme Court held, "[a]ny negligence here was passive at most, and thus does not fall within the exception." *Id.*

The plaintiff in Scott Paper Co. brought a claim against a property owner after the plaintiff injured himself diving into a water-filled gravel pit. 684 F. Supp. at 1396. The United States District Court for the Southern District of Mississippi stated, "[t]hat defendant failed to discover the presence of [plaintiff] or others on its property and failed to discover the existence of and/or use of a water-filled gravel pit as a swimming and diving area could conceivably amount, at most, only to passive negligence for which no liability may be imposed." *Id.*

The fact that Plaintiff's claims against BMH-NM are based on an alleged condition on its premises, or passive negligence, is undisputed. [R. 8 at ¶ 11]. As such, the simple negligence exception does not apply as a matter of law, and the trial court appropriately held that the duty owed by BMH-NM to Plaintiff was to refrain from causing willful or wanton injury to her.

Step 3: Breach

Summary judgment in favor of BMH-NM is appropriate regardless of whether BMH-NM owed a duty of ordinary reasonable care or duty to refrain from causing willful or wanton injury to Plaintiff.

(1) **Plaintiff Cannot Prove Willful or Wanton Injury.**

> To constitute willful or wanton injury, 'something more is required to impose liability than mere inadvertence or lack of attention; there must be more or less extreme departure from ordinary standards of care, and conduct must differ in quality, as well as in degree, from ordinary negligence involving a conscious disregard of a known serious danger.'

Green, 919 So. 2d at 1006 (quoting Leffler v. Sharp, 891 So. 2d 152 (Miss. 2004)).

There is no evidence in the record of willful or wanton conduct by BMH-NM.

Plaintiff claims she was injured as a result of a condition on BMH-NM premises, liquid on the floor. [R. 8 at ¶ 11]. She claims BMH-NM "negligently failed to keep the floors staff [sic] from latent defects"; "failed to post a wet floor sign in an area that Defendants knew or should have known contained potentially dangerous liquid"; and "failed to maintain a proper lookout for ... this condition which caused the injuries herein complained of." [R. 8 at ¶ 12].

She makes no claim and has no evidence of any wanton or willful act by BMH-NM.

Further, this case does not involve a known trap, pitfall or other concealed danger. Plaintiff therefore cannot prove breach under Marlon Inv. Co. v. Conner, 149 So. 2d 312 (Miss. 1963).

To prove breach under Marlon, Plaintiff was required to show (a) the existence of a concealed, dangerous condition on the premises, (b) knowledge of the existence of such concealed dangerous condition by BMH-NM, and (c) failure by BMH-NM to exercise

reasonable care to see that Plaintiff was aware of the danger. 149 So. 2d at 316 (stating that a premises owner must "disclose to the licensee any concealed, dangerous conditions on the premises of which the owner has knowledge, and to exercise reasonable care to see that the licensee is aware of the danger").

Plaintiff failed to specify evidence of significant and probative value to prove breach under Marlon.

There is no evidence in the record that a concealed, dangerous condition existed on BMH-NM premises.

Plaintiff identified no evidence that the liquid on which she fell was concealed. Rather, she states, without citation to evidence in the record, "the water on the floor of the hospital in the instant case was concealed to Appellant Wilson, as it is a clear substance, not visible to the naked eye." (Appellant Brief at p. 14, ¶ 1). There is no evidence in the record to support the allegation. In fact, Plaintiff testified that she does not know whether the substance would have been visible to her prior to the fall had she been watching where she was going. [R. 175-176 at p. 117, l. 24 – p. 118, l. 5].

In Marlon, the premises owner "concealed" the dangerous condition by misleading the plaintiff with a lighted sign into the area of the premises where the dangerous condition existed. 149 So. 2d at 318; *see* Adams, 497 So. 2d at 1101 ("In essence, the misleading invitation in Marlon concealed the dangerous, unmaintained stairway.").

There is no evidence in the record of any such concealment in this case. Plaintiff's unsupported assertions are insufficient to withstand summary judgment.

Further, there is no evidence in the record that BMH-NM had knowledge of any liquid on

the floor prior to the fall. As such, BMH-NM could not have been aware of any "concealment" of the liquid.

This case therefore does not fall within the niche carved out in Marlon.

BMH-NM owed no duty to Plaintiff except not to willfully or wantonly injure her. Plaintiff has no evidence of willful or wanton injury. Summary judgment in favor of BMH-NM is therefore appropriate.

(2) **Plaintiff Cannot Prove Failure by BMH-NM to Exercise Reasonable Care.**

Even if this Court find BMH-NM owed Plaintiff a duty to exercise reasonable care for her safety, summary judgment in favor of BMH-NM is nevertheless appropriate because there is insufficient evidence in the record to show any failure by BMH-NM to exercise reasonable ordinary care.

Plaintiff claims BMH-NM was negligent in not cleaning liquid off of the floor or posting a warning sign. (See Appellant Brief at p. 16, ¶ 1).

The record contains no evidence that BMH-NM caused the liquid to be on the floor or had knowledge of the presence of the liquid prior to Plaintiff's fall. Further, even assuming BMH-NM did have knowledge of the liquid prior to the fall, which BMH-NM denies, Plaintiff has no evidence that BMH-NM had knowledge for a sufficient amount of time prior to the fall to clean the liquid off of the floor or communicate a warning to Plaintiff.

Plaintiff therefore cannot prove breach even if BMH-NM is held to the duty of ordinary and reasonable care. *See* Goodwin v. Gulf Transport Co., 453 So. 2d 1035, 1037 (Miss. 1984) (affirming summary judgment in favor of defendant bus company where the plaintiff failed to show that the liquid in which fell was put on the floor of the bus by an agent or employee of the

bus company or that the company had actual knowledge of the liquid and adequate time to clean it up prior to the fall).

Plaintiff's testimony that she was close to the nurse's station when she fell does not show that BMH-NM caused the condition or had knowledge of the condition for a sufficient amount of time prior to the fall to remove the condition or warn Plaintiff.

Summary judgment in favor of BMH-NM is therefore appropriate as a matter of law.

D. RESPONSE TO BRIEF OF AMICUS CURIAE

Issues and arguments not brought before the trial court cannot be raised appeal. Southern v. Miss. State Hosp., 853 So. 2d 1212, 1214-15 (Miss. 2003); Wilburn v. Wilburn, 991 So. 2d 1185, 1191 (Miss. 2008).

An amicus curiae cannot expand the scope of an appeal to implicate issues not presented to the parties on appeal. This Court will entertain amicus curiae briefs to the extent they are confined to the issues presented in the pleadings and developed before the trial court. *See* Burnside, 86 So. 2d at 334 ("[T]he Court would not be justified in entertaining amicus curiae briefs except to the extent they are confined to the issues presented in the pleadings and developed upon the trial of the case in the trial court."); World Wide Street Preachers Fellowship v. Town of Columbia, 591 F. 3d 747, 753 n. 3 (5th Cir. 2009) ("It is well settled in this circuit that 'an amicus curiae generally cannot expand the scope of an appeal to implicate issues that have not been presented by the parties to the appeal.' Accordingly, we will not consider the arguments raised only by the amicus curiae." (internal citations omitted)); Garcia-Melendez v. Ashcroft, 351 F.3d 657, 663 n.2 (5th Cir. 2003) ("It is well-settled in this circuit that 'an amicus curiae generally cannot expand the scope of an appeal to implicate issues that have not been

presented by the parties to the appeal.' Under this principle, we have held that a constitutional issue raised only by amici need not be considered. Thus, we decline to consider the arguments raised by [the amicus]." (internal citations omitted)); Resident Council of Allen Parkway Village v. U.S. Dep't of Housing & Urban Development, 980 F.2d 1043, 1049 (5th Cir. 1993) ("[A]n amicus curiae generally cannot expand the scope of an appeal to implicate issues that have not been presented by the parties to the appeal.").

Issues set forth by Plaintiff on appeal include:

I. "Whether Appellant was a "public invitee" at the time of her injury...." (Appellant Brief at p. 5, Issue 1).

II. "Whether if determined to be a licensee at the time of her injury, Appellant was owed a duty by Appellees to warn of dangerous conditions not likely to be discovered by Appellant, and to exercise reasonable care in conduct of activities; and thereby the breach of said duty proximately caused Appellant's injuries." (Appellant Brief at p. 5, Issue 2).

III. "Whether Appellant is required to show proof of wanton or willful injury, if Appellees' actions fall under the simple or affirmative negligence exception to the general rule that the only duty owed a licensee is to refrain from willfully or wantonly injuring the individual." (Appellant Brief at p. 5, Issue 3).

The Amicus Curiae does not argue that Plaintiff was a public invitee, and it does not argue that if determined to be a licensee, Plaintiff fell within an exception to the general duty owed a licensee. Rather, the Brief of Amicus Curiae contains arguments and issues that were not presented by Plaintiff on appeal, including:

1. The argument that the issue of whether Plaintiff held the status of a licensee or invitee is an issue of first impression for this Court and reliance on laws of other jurisdictions, (Brief of Amicus Curiae at pp. 3-4);
2. The argument that this Case is analogous to Thomas v. Columbia Group, LLC, 969

So. 2d 849, 853 (Miss. 2007), a case involving injury to a visitor of a tenant at an apartment complex, and/or Case v. Wal-Mart Stores, Inc., 13 F. Supp. 2d 597 (S.D. Miss. 1998), involving duties owed by the owner of a business premises, Wal-Mart, to an individual who was assigned by her employer, a vendor, to do work on Wal-Mart premises pursuant to an arrangement between Wal-Mart and the vendor, (Brief of Amicus Curiae at pp. 7 -8); and

3. The argument that Mississippi should abandon its current premises liability classification systems. (Brief of Amicus Curiae at pp. 8-14).

These arguments and issues are not properly before this Court and should not be entertained.

Even if this Court were to consider the arguments and issues raised by the Amicus Curiae, this Court should nevertheless affirm summary judgment in favor of BMH-NM.

(1) **This case does not present an issue of first impression for the Court.**

This case involves a slip and fall on a business premises. [R. 7].

Mississippi law defining the duty owned by a business owner to persons entering the business premises is long-standing and well-settled. Rulings of other jurisdictions are therefore not helpful.

For this reason and the additional reasons set forth hereinbelow, the Court should not consider the non-Mississippi cases cited by the Amicus Curiae in support of its argument that a hospital visitor is an invitee as a matter of law.

(2) **The Non-Mississippi cases cited by the Amicus Curiae are inapposite and unpersuasive.**

The Amicus Curiae cites a string of non-Mississippi cases as support for its contention

that:

> The majority of jurisdictions which, like Mississippi, have retained the system of classifying invitees, licensees and trespassers hold hospital visitors to be invitees.

(Brief of Amicus Curiae at pp. 3-4).

Many of the cases cited by Plaintiff do not "hold hospital visitors to be invitees."

For example, in many of the cases, the status of the plaintiff as an invitee, licensee, or trespasser was not a contested issue before the court for determination. *See* Borota v. Univ. Med. Ctr, 861 P.2d 679 (Ariz. 1993) (reviewing the trial court's grant of summary judgment in favor of the defendant based on the plaintiff's lack of evidence sufficient to show the defendant caused the condition on its premises or had knowledge of the condition - the status of the plaintiff was not a contested issue before the court); St. Vincent's Hosp., Inc. v. Auchter Co., 292 So. 2d 405, 406 (Fla. 1974) (noting that the plaintiff's status at the time of the accident and the duty owed to the plaintiff was not questioned by the parties); McCann v. Bethesda Hosp., 400 N.E. 2d 16, 18 (Ill. 1979) (reviewing the trial court's ruling that ice upon which the plaintiff fell was a natural accumulation - the status of the plaintiff was not a contested issue before the court for determination); Lutheran Hosp. of Ind., Inc. v. Blaser, 634 N.E. 2d 864, 868 (Ind. App. 1994) (the plaintiff's status was not a contested issue before the court - the defendant "contend[ed] that its general duty to exercise reasonable care to its invitees, including [the plaintiff], [did] not include protecting [the plaintiff] from a hit-and-run driver whose conduct 'could hardly be deemed foreseeable'"); Burwell v. Easton Mem'l Hosp., 577 A. 2d 394, 395 (Md. 1990) (the parties agreed that the plaintiff was an invitee of the hospital - the plaintiff's status was not a contested issue before the court); Sulack v. Charles T. Miller Hosp., 165 N.W.2d 207 (Minn. 1969) (reviewing (1) the trial court's denial of directed verdict on contributory negligence of the

plaintiff, and (2) jury instructions which the defendant argued were misleading as they related to the plaintiff's duty to exercise care for her own safety - the plaintiff's status was not a contested issue before the court); Syas v. Neb. Methodist Hosp. Found., 307 N.W.2d 112 (Neb. 1981) (reviewing the trial court's finding, on directed verdict, that the plaintiff's contributory negligence was sufficient to bar his right to recover from the defendant - the status of the plaintiff was not a contested issue before the court); Sutherland v. Saint Francis Hosp., Inc., 595 P.2d 780, 783 (Okla. 1979) (the parties were in agreement as to the plaintiff's status - it was not a contested issue of fact before the court); Gunn v. Harris Methodist Affiliated Hosp., 887 S.W.2d 248, 250-51 (Tex. App. 1994) (the parties were in agreement as to the plaintiff's status - it was not a contested issue before the court); Med. Ctr. Hosp. v. Sharpless, 331 S.E.2d 405, 405, 406 (Va. 1985) (reviewing, on the defendant's appeal from a jury verdict, "whether the defendant... was guilty of primary negligence in the construction and maintenance of a sidewalk on its premises" and finding evidence insufficient to establish actionable negligence - the status of the plaintiff was not a contested issue before the court); Person v. Children's Hosp. Nat'l Med. Ctr, 562 A.2d 648, 649, 651 (D.C. App. 1989) (reviewing trial court's grant of summary judgment on the plaintiff's claim of assault and battery) (the status of the plaintiff was not a contested issue before the court - the court merely stated, "we note that, although [the plaintiff] initially was an invitee and therefore was legally inside the Hospital, the Hospital was privileged to revoke that invitation and force [the plaintiff] to leave..."); *see also* Anderson v. Oregon City Hosp. Co., 328 P.2d 769 (Ore. 1958) (finding that the plaintiff lacked proof of a hazardous and dangerous condition and lacked of evidence to show lack of due care by the defendant, and reversing that the trial court's denial of the defendants motion for directed verdict - the plaintiff's status had no

bearing on the outcome, and it does not appear that it was a contested issue before the court).

Other cases cited by the Amicus Curiae are distinguishable from the case at hand by the record evidence before the court in those cases. *See, e.g.*, Gatskill v. United States, 129 F. Supp. 621, 622 (Kan. 1955) ("The evidence indicates that ... the plaintiff went to the VA hospital in question in response to a telegram from the hospital advising plaintiff that her husband, a patient in such hospital, was seriously ill. Upon arrival, plaintiff was assigned by an employee of the VA , to Room No. 4 ... located on hospital premises. ... [P]laintiff was charged 50 cents a day for such quarters."); Candler Gen. Hosp., Inc. v. Purvis, 181 S.E.2d 77, 78-79 (Ga. App. 1971) (stating, "[t]he plaintiff responded to the [defendant's motion for summary judgment] by attaching the affidavit of Mr. Purvis for consideration, and also defendant's answer to plaintiff's interrogatories" and finding, based on the facts before the court, that an issue was created as to whether or not the plaintiffs were invitees).

Review of the cases cited by the Amicus Curiae also shows that all jurisdictions do not define "invitee" as a person who enters the premises of another in answer to the express or implied invitation of the owner or occupant for their mutual advantage. *See e.g.* Prentiss v. Evergreen Presbyterian Church, 644 So. 2d 475, 476 (Ala. 1994) (Alabama law) (stating that an "invitee" is "[a] person who enters land *with the landowner's consent* to bestow some material or commercial benefit upon the landowner." (emphasis added)); Bowins v. Eulicid Gen. Hosp. Ass'n, 484 N.E.2d 203, 204 (Oh. App. 1984) (Ohio law) ("In Ohio, an invitee means a business visitor, that is, one *rightfully* on the premises of another for purposes in which the possessor of the premises has a beneficial interest." (emphasis added) (citations and quotations omitted)); Gunn, 887 S.W.2d at 250-51 (Texas law) (stating that "[a]n invitee is one who enters on

another's land *with the owner's knowledge* and for the mutual benefit of both" (emphasis added)).

Further, several of the jurisdictions cited by the Amicus Curiae, have done away with or abrogated the common law system of determining the duty owed by a premises owner based on the plaintiff's status as an invitee, licensee, or trespasser. *See, e.g,*. Jones v. Hansen, 254 Kan. 499, 509 (Kan. 1994) (Kansas law) ("[T]he common law classification and duty arising from the classification of licensees shall no longer be applied."); Peterson v. Balach,199 N.W.2d 639, 647 (Minn. 1974) (Minnesota law) ("The duty required of a landowner as to licensees and invitees is no more and no less than that of any other alleged tortfeasor, and that duty is to use reasonable care for the safety of all such persons invited upon the premises, regardless of the status of the individuals."); Heins v. Webster Co., 552 N.W.2d 51, 57 (Neb. 1996) (Nebraska law) ("We conclude that we should eliminate the distinction between licensees and invitees by requiring a standard of reasonable care for all lawful visitors."); Basso v. Miller, 40 N.Y.2d 233, 241 (N.Y. App. 1976) (New York law) (abandoning the common-law classifications and adopting a reasonable care standard); Nelson v. Freeland, 507 So. 2d 882, 892 (N.C. 1998) (North Carolina law) (eliminating the common-law distinction between licensees and invitees by requiring a standard of reasonable care toward all lawful visitors); Smith v. Arbaugh's Rest., Inc., 469 F.2d 97, 105 (D.C. App. 1972) (District of Columbia law) (holding that the common law status of the plaintiff is no longer determinative as to liability); Cates v. Beauregard Elec. Co-op., Inc., 328 So. 2d 367, 371 (La. 1976) (Louisiana law) (expressing agreement with application of the reasonable man standard and the view that a plaintiff's status as a trespasser, licensee, or invitee is not determinative of liability).

Mississippi law requires a Plaintiff prove duty by showing invitation and mutual benefit. Plaintiff failed to develop any record of an invitation from BMH-NM or benefit to BMH-NM during discovery, and she failed to present sufficient evidence of any such invitation and/or benefit in response to BMH-NM's motion for summary judgment or on appeal. Plaintiff has the burden of proof on the issue of duty. This Court should not create a catchall exception to this long-standing and well-settled rule by finding persons entering hospital premises invitees as a matter of law.

(3) **Duties between landlords and tenants of residential rental property are irrelevant - neither the Residential Landlord Tenant Act nor the implied warranty of habitability applies to BMH-NM.**

On Appeal, Plaintiff argues that she was a "public invitee" at the time of her fall.

Plaintiff made no argument, before the trial court or on appeal, that she was an invitee under duties applied landlords and tenants of residential rental property, and Plaintiff has made no reference to Thomas v. Columbia Group, LLC, 969 So. 2d 849 (Miss. 2007), the case cited by the Amicus Curiae. The argument by the Amicus Curiae should therefore not be considered on appeal.

Further, the argument of the Amicus Curiae is unpersuasive.

The duty of a landlord to provide reasonably safe premises to his or her tenant and to persons coming on the premises at the behest of the tenant stems from the implied warranty of habitability and the Residential Landlord Tenant Act, MISS. CODE ANN. § 89-8-1, et seq.. *See* O'Cain v. Harvey Freeman & Sons, 603 So. 2d 824, 832-33 (Miss. 1991) (Sullivan, J., concurring) (opinion joined by a majority of the Justices) (relying on the Residential Landlord Tenant Act, M.C.A. § 89-8-1, et seq., and writing that the landlord-tenant relationship gives rise

to an implied warranty of habitability that "should require a landlord to provide reasonably safe premises..."); Joiner v. Haley, 777 So. 2d 50, 51-52 (Miss. App. 2000) (relying on Justice Sullivan's opinion in O'Cain and finding that the duty owed by a landlord under the implied warranty of habitability extends to persons coming on the premises at the behest of the tenant).

Neither the Residential Landlord Tenant Act nor the implied warranty of habitability applies to BMH-NM. The duty owed by a landlord to his or her tenant is wholly inapplicable to the case at hand.

Further, in holding that the deceased in Thomas was an invitee, this Court found invitation and mutual benefit:

> Thomas made monetary contributions in the form of paying laundry at the apartment Laundromat and paying Mitchell's maintenance Bill. There is suitable evidence that Thomas was a Shady Lane under the implied invitation of the owner, and for their mutual benefit. Giving Thomas the benefit of every reasonable doubt for the purposes of summary judgment, it should be concluded that he was an invitee.

969 So. 2d at 853.

Neither Plaintiff not the Amicus Curiae, has identified probative evidence of an invitation to Plaintiff by BMH-NM or mutual benefit.

(4) Case v. Wal-Mart Stores, Inc., 13 F. Supp. 2d 597 (S.D. Miss. 1998), is inapposite.

The Amicus Curiae also relies on Case v. Wal-Mart Stores, Inc., 13 F. Supp. 2d 597 (S.D. Miss. 1998). Case is inapposite and should not be considered by this Court.

On appeal, Plaintiff argues that she was a "public invitee" at the time of her fall. (Appellant Brief at p. 5, Issue 1). She does not claim that she was a "business invitee," and she made no reference to Case on appeal or before the trial court.

In Case, the district court considered the duty owed by the owner of a business premises, Wal-Mart, to an individual who was assigned by her employer, a vendor, to do work on Wal-Mart premises pursuant to an arrangement between Wal-Mart and the vendor. 13 F. Supp. 2d at 599. The plaintiff in Case was on Wal-Mart premises for the purpose of stocking Wal-Mart's shelves with merchandise. *Id.* Under the facts of that case, the district court concluded that a mutual benefit existed - finding that Wal-Mart profited from the sale of merchandise stocked by the plaintiff. *Id.* at 601.

No similar mutual benefit exists in this case. Unlike the plaintiff in Case, Plaintiff in this case was not on BMH-NM premises as an employee of any vendor or independent contractor of BMH-NM; she did not come to BMH-NM premises for the purpose of performing any service for BMH-NM's benefit; and there is no evidence of any profit by BMH-NM as a result of Plaintiff's visit.

At the time of her fall, Plaintiff was a licensee on BMH-NM premises. She was on BMH-NM premises for her own convenience, pleasure or benefit - she bringing her friend's son to visit her friend in the hospital. She did not enter BMH-NM premises for BMH-NM's benefit; she had no business purpose for being on the premises; and she has offered no competent evidence of any benefit actually conferred to BMH-NM.

(5) **This Court should refuse to abandon the common-law distinctions between invitees, licensees, and trespassers when determining a landowner's duty.**

The Amicus Curiae requests that this Court abandon the common-law distinctions of trespasser, licensee, and invitee. (Brief of Amicus Curiae at pp. 8-14).

This Court has declined to abandon the common law distinctions as recently as January

13, 2011. Jameson Inn, Inc., No. 2009-CA-00722-SCT, 2011 Miss. LEXIS 27 at *14-15. In Jameson Inn, Inc., this Court stated, in pertinent part, as follows:

> The Court thoroughly has addressed this very argument, and has noted that, over time, courts have 'balanced the interests of persons injured by conditions of land against the interests of possessors of land to enjoy and employ their land for the purposes they wish.' [*Little v. Bell*, 719 So. 2d 757, 763 (Miss. 1998).] And to abandon 'the careful work of generations for an amorphous 'reasonable care under the circumstances' standard seems . . . improvident.' [*Id.* at 763.] Further, the Court has held that 'the system of invitee, licensee, and trespasser, evolved to delineate very fine distinctions as to when a duty was owed to an entrant on land,' and that these distinctions protect a landowner from the 'unfettered discretion of the juries.' [*Id.* at 764.] Because we find the foregoing reasons persuasive, and we agree that the need to promote stability and predictability in the law outweighs the justifications for abandoning the common-law distinctions, we decline to abandon the trespasser, licensee, and invitee distinctions.

Id. at *14-15.

This Court has applied and upheld the common law distinctions in cases that do not involve rights of private homeowners. *See, e.g,.* Jameson Inn, Inc., No. 2009-CA-00722-SCT, 2011 Miss. LEXIS 27 at *2-3, *14-15 (upholding application of common law distinctions where was injured on the premises of a hotel). The suggestion of the Amicus Curiae that in upholding the common law distinctions this Court has only been concerned with the rights of private home owners, is without merit. (*See* Brief of Amicus Curiae at pp. 11-12).

The Amicus Curiae's argument that this case presents a compelling need to abandon the common law distinctions is unsupported by facts in the record and is without merit. (See Brief of Amicus Curiae at p. 12, ¶ 1 – p. 13, ¶ 1). For example, the Amicus Curiae's assertion at p. 12, ¶ 3, that BMH-NM "expressly invites visitors onto its premises for the purpose of, among other things, visiting patients," is wholly unsupported by any evidence in the record.

This Court has repeatedly weighted the pros and cons of the common law classifications

and declined to abandon the trespasser, licensee, and invitee distinctions. *See* Jameson Inn, Inc., No. 2009-CA-00722-SCT, 2011 Miss. LEXIS 27 at *14-15; Titus, 844 So. 2d 464-65; Pinnell v. Bates, 838 So. 2d 198, 199 (Miss. 2002).

Should this Court considers the Amicus Curiae's argument that the common law distinctions should be abolished, BMH-NM respectfully submits that it should again find that the need to promote stability and predictability in the law outweighs the justifications for abandoning the common law rule and decline to abandon the trespasser, licensee, and invitee distinctions.

VI. CONCLUSION

For the foregoing reasons, Judge Lackey correctly granted BMH-NM's Motion for Summary Judgment. Plaintiff did not present sufficient proof of breach of any duty owed to her by BMH-NM. Judge Lackey's order of March 26, 2010 should be affirmed.

Respectfully submitted, this the 18th day of February, 2011.

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BY: Kate Mauldin Embry
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CERTIFICATE OF SERVICE

I, Kate Mauldin Embry, do hereby certify that I have this day mailed a true and correct copy of the above and foregoing document by U. S. Mail postage prepaid to:

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Honorable Henry L. Lackey
Circuit Court Judge
P.O. Drawer T 38916
Calhoun City, MS 38916

This, the 18th day of February, 2011.

Kate Mauldin Embry
KATE MAULDIN EMBRY