2010-CA-683T

CERTIFICATE OF INTERESTED PERSONS

Falanda Wilson v. Baptist Memorial Hospital-North Mississippi, Inc., et.al. 2010-CA-00683

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28(a)(1) have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Falanda Wilson	Appellant
Baptist Memorial Hospital-North Mississippi, Inc.	Appellees
Jane Doe	
Carlos E. Moore	Attorneys for the Appellant
Tangala L. Hollis	
Kate M. Embry, Esq.	Attorneys for the Appellees
John H. Dunbar, Esq.	
Henry L. Lackey	Circuit Court Judge

Carlos E. Moore

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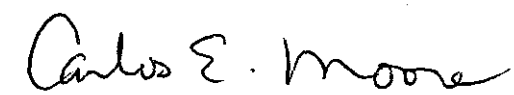
Attorneys of Record for Appellant

CERTIFICATE OF INTERESTED PERSONS

Terrience Bates v. Dedicated Management Group, et.al. 2010-WC-00792

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28(a)(1) have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Terrience Bates	Appellant
Dedicate Management Group, LLC.	Appellees
Employers Insurance of Wausau,	
A Mutual Company	
Carlos E. Moore	Attorneys for the Appellant
Tangala L. Hollis	
Don Burch	Attorney for the Appellees
Cindy Wilson	Administrative Law Judge
Liles Williams	Full Commission
John R. Junkin	
Augustus Collins	
Judge David Strong	Circuit Court Judge



Carlos E. Moore
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STATEMENT OF THE ISSUES

I. Issue 1

Whether Appellant was a public invitee at the time of her injury, and owed a duty of reasonable care by the Appellees, to inspect for dangerous conditions, and to warn of dangerous conditions not obvious to Appellant; and thereby, the breach of said duty proximately caused Appellant's injuries.

II. Issue 2

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.

II. Issue 3

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 and wantonly injuring the individual.

STATEMENT OF THE CASE

This is a premises liability case on appeal from an Order of the Circuit Court of Lafayette County, granting summary judgment to Appellees.

On or about June 3, 2007, Appellant Falanda Wilson (hereinafter Appellant Wilson) was visiting a friend at Baptist Memorial Hospital – North Mississippi, Inc. located at Highway 7 South, Oxford, MS 38655. Appellant Wilson was leaving the friend's room on the 5th floor and fell in a puddle of water near the 5th floor nurses' station. Appellees, Baptist Memorial Hospital – North Mississippi, Inc. and Jane Doe (hereinafter collectively Appellees), did not have a wet floor sign in the area. Appellant Wilson suffered injuries as a result of the fall on Appellees' wet floor.

As a result of the foregoing, Appellant Wilson filed her original Complaint on the basis of premises liability in the Circuit Court of Lafayette County against Appellees on or about May 20, 2009. (Rec. p.1-5). Appellant Wilson filed an Amended Complaint on or about June 3, 2009. (Rec. p.6-10). Appellees filed their Answer to Appellant Wilson's Amended Complaint on or about June 19, 2009, in which they admitted Appellant Wilson fell on their premises, and that there was no "wet floor" sign in the area in which Appellant Wilson fell. (Rec. 12).

Appellees subsequently filed for summary judgment in the Circuit Court of Lafayette County. (Rec. p.98-154) On or about February 18, 2010, Appellant Wilson filed her Response in Opposition to Appellees Motion for Summary Judgment with Memorandum of Laws opposing the same. (Rec. p.168-176). Appellant Wilson also filed an Affidavit in Opposition of Summary Judgment. (Rec. 197-198). The matter came on

hearing before Circuit Court Judge Henry Lackey March 4, 2010. Judge Lackey took the matter under advisement and subsequently and erroneously granted Appellees Motion for Summary Judgment March 26, 2010. (Rec. 206).

SUMMARY OF THE ARGUMENT

Appellant Wilson was a public invitee at the time of her injury. As an invitee, she was owed a duty by Appellees to use reasonable care, to inspect for dangerous conditions, and to warn of dangerous conditions not obvious to Appellant Wilson. Appellees breached said duty when they negligently left a puddle of water on the floor, and did not warn Appellant Wilson of the dangerous condition. Further, as a public facility, the subject hospital certainly provides an implied or expressed invitation to the public to enter its premises for their mutual advantage.

Even if determined to be a licensee at the time of her injury, Appellant Wilson 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. While there is no duty to inspect, as with invitees, an owner does owe unto a licensee the duty to use reasonable care, and to warn of dangerous conditions not likely to be discovered. Appellees breached said duty when they failed to warn Appellant Wilson of the wet floor, which was not readily discoverable to her.

Finally, if determined to be a licensee, Appellant Wilson falls under the simple negligence or affirmative negligence exception to the general rule that the only duty owed a licensee is to refrain from willfully and wantonly injuring the individual. Appellees were aware of Appellant Wilson's presence on the premises, and yet engaged in affirmative or active negligence.

ARGUMENT

The appellate court employs a *de novo* standard of review of a lower court's grant or denial of summary judgment and the evidence must be viewed in the light most favorable to the party against whom motion for summary judgment has been made. *Jackpot Mississippi Riverboat, Inc. v. Smith*, 874 So.2d 959 (Miss. 2004) *citing Mississippi Dept. of Wildlife, Fisheries and Parks v. Mississippi Wildlife*, 740 So.2d 925 (Miss. 1999); *McCullough v. Cook*, 679 So.2d 627 (Miss. 1996); *Mantachie Natural Gas Dist. v. Mississippi Valley Gas Co.*, 594 So.2d 1170 (Miss. 1992); *Clark v. Moore Memorial United Methodist Church*, 538 So.2d 760 (Miss. 1989); Rules Civ. Proc., Rule 56(c).

I. Appellant Wilson was an invitee at the time of her injury and Defendants were not entitled to summary judgment.

Hospitals are public places and thus visitors entering hospitals are public invitees. 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 (Miss. 2001); *Alexander v. Jackson County Historical Soc., Inc.*, 227 So.2d 291 (1969)(held that a woman injured while visiting the Old Spanish Fort, an historical spot, belonged to that class of invitees known as "public invitees" because she was invited to enter and remain on the land as a member of the public for the purpose for which the land was held open to the public). As in *Alexander*, hospitals are held open to the public for the purposes of people visiting their loved ones. This is evidenced by the gift shops, cafeterias, vending machines, visiting hours policy, etc in

hospitals. It is expected and anticipated that members of the public will enter hospitals to visit their loved ones. As a result, visitors are public invitees.

While visiting her friend at the hospital, Appellant Wilson was certainly in the position to take advantage of the aforementioned amenities. Whether she partook of such amenities is irrelevant, as a person shopping in Wal-Mart does not lose his or her status as an invitee, simply because he or she does not make a purchase. If the person injured on premises is an invitee, the property owner is under a duty to have the premises in a reasonably safe condition for use in a manner consistent with the invitation or at least a duty not to lead plaintiff into a dangerous trap or expose him to unreasonable risk. *Hoffman v. Planters Gin Co.*, 358 So.2d 1008, 1011 (Miss. 1998). Appellees breached their duty owed to Appellant Wilson by failing to post a sign warning Appellant Wilson of the water on the floor. Owner, occupant, or person in charge of premises owes to invitee or business visitor a duty to exercise ordinary care to keep premises in reasonably safe condition or to warn invitee of dangerous conditions, not readily apparent, which owner or occupier knows of or should know of in exercise of reasonable care, and **when dangerous condition is traceable to proprietor's own negligence, no knowledge of its existence need be shown**. *Anderson v. B. H. Acquisition, Inc.*, 771 So.2d 914 (Miss. 2000). In other words, even if the Appellees did not have *actual* knowledge of the water on the floor, they are still liable if they have "constructive knowledge" of the dangerous condition, based on the length of time the condition existed. *Id.* at 918. In the instant case under *Anderson*, whether Appellees created the dangerous condition that proximately caused Appellant Wilson's injuries, or had actual or constructive knowledge of said condition is a question for the jury; thus [summary judgment] is not appropriate,

as reasonable minds could differ. *Id.* at 919. The instant case is analogous to *Biloxi Regional Medical Center v. David*, 555 So.2d 53 (Miss. 2000), which was cited and referenced during the summary judgment motion hearing by Appellant Wilson's counsel.

In *David*, a woman brought suit for damages due to injuries she sustained as a result of tripping over a raised piece of concrete in the parking lot of the Biloxi Regional Medical Center after visiting her husband. *Id.* at 53. The trial court found in favor of the plaintiff (wife), and the medical center appealed. The medical center claimed the trial court erred in one of its instruction to the jury, which stated that the wife was a business invitee as a matter of law. *Id.* at 55-56. The jury instruction read as follows:

> You are instructed by the Court that an invitee is a person who goes upon the premises of another in answer to the express or implied invitation of the owner, either on the business of the owner or for their mutual advantage. In this case, you are instructed as a matter of law that [the wife] was a business invitee on the hospital premises at the time of her accident on April 2, 1982.
>
> A party in control or possession of premises is liable for injuries to an invitee caused by a dangerous condition on his premises if the owner knew or in the exercise of reasonable care should have known about the condition and failed to take measures reasonably calculated to remove the danger or warn the invitee of its existence. If you find from a preponderance of the evidence in this case that:
>
> 1. The Defendant, Biloxi Regional Medical Center, was in control or possession of the parking lot and pathway, and
> 2. The Plaintiff was on the Defendant's premises for a purpose consistent with the hospital business operated by the Defendant, and
> 3. The subject pathway constituted a dangerous condition upon the Defendant's premises, and
> 4. The Defendant knew or in the exercise of reasonable care should have known about the condition, and
> 5. The Defendant failed to take measures reasonably calculated to remove the danger, if any, or to warn the Plaintiff of its existence, and
> 6. The Defendant's failure to take such measures, if any, was the proximate cause or a contributing proximate cause of the Plaintiff's accident and injuries, then your verdict shall be for the Plaintiff.
>
> *Id.* at 56.

The medical center specifically claimed that paragraph five imposed a higher duty than is required by law because no one testified that the raised piece of concrete was a concealed hazard or a danger. *Id.* The center further argues that even if it was an unreasonable hazard, it was not latent or concealed and therefore no warning was necessary. *Id.* However, the Mississippi Supreme Court disagreed with the medical center, citing its holding in *Bell v. City of Bay St. Louis*, 467 So.2d 657 (Miss. 1985), in which they held:

> [C]onditions are not either open and obvious or not open and obvious. Common sense and experience negates an either or categorization of such conditions. Just how open and obvious a condition may have been is a question for the jury in all except the clearest of cases.
>
> 555 So.2d 53 at 56 *citing Bell,* 467 So.2d 657 at 664.

The Mississippi Supreme Court held that whether the piece of concrete was open and obvious was a question for the jury; therefore, the aforementioned jury instruction from the trial court designating the wife as an invitee was not error. *Id.* at 56. The Court also held that because the jury in the trial court found in the wife's favor, they obviously found that the hazard was concealed. *Id.* This Honorable Court should hold the same in the instant case.

Under *David* and *Bell*, Appellant Wilson was an invitee as a matter of law at the time of her injury. In examining the jury instructions in *David*, Appellant Wilson was an invitee at the time of her injury, and Appellees breached their duty to her, proximately causing her injuries. For instance, (1) Appellees were certainly in control and possession of the walkway, in which Appellant Wilson fell; (2) Appellant Wilson was on Appellees' premises visiting a friend, which is certainly consistent with the hospital business, as evidenced in specified visiting hours, gift shops, cafeteria, and other amenities for

visitors. Further, visitors contribute to the healing and convalescent process of patients, which is undoubtedly consistent with, and the priority of, hospital business; (3) the subject wet pathway or hallway constituted a dangerous condition upon Appellees' premises; (4) Appellees knew, or in the exercise of reasonable care, should have known about the condition, as said location of Appellant Wilson's fall was in the vicinity of the nurses' station, while nurses were present. Therefore, Appellees knew or should have known of the water on the floor. Appellant Wilson testified during her sworn deposition that she fell in close proximity to the nurses' station. (Rec. p. 148). Appellant Wilson also stated in her sworn Affidavit In Opposition of Summary Judgment that nurses were present at the nurses' station when she fell, and no sign was posted indicating the floor was wet. (Rec. p. 197); (5) Appellees failed to take measures reasonably calculated to remove the danger, and/or or to warn Appellant Wilson of its existence, as there was no wet floor sign posted, and the puddle was not removed until *after* Appellant Wilson was injured; and (6) Appellees' failure to take such measures, was certainly the proximate cause of Appellant Wilson's accident and injuries, as she would not have fallen on the wet floor, but for Appellees' failure to remove and/or warn of the dangerous condition. As an invitee, Appellant Wilson was owed a duty of reasonable care, and a duty to be warned of dangerous conditions not obvious to her that Appellees knew, or should have known of, and taken measures to warn, or otherwise resolve, said conditions. As a result, Appellant Wilson sustained injuries. Given the foregoing, a reasonable juror could certainly find due to the availability of hospital aforementioned amenities, such as gift shops, cafeterias, vending machines, visiting hours policy, Appellees conveyed an express or implied invitation to Appellant Wilson, designating her as an invitee. Whether

Appellees had actual or constructive knowledge of the dangerous condition also creates a genuine issue of material fact. Summary Judgment should not have been granted.

II. If determined to be a licensee, 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.

Under Mississippi law, 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...." *Vaughn ex rel. Vaughn v. Estate of Worrell*, 828 So.2d 780 (Miss. 2002) *citing Payne v. Rain Forest Nurseries, Inc.*, 540 So.2d 35 (Miss. 1989). The duty of landowner or possessor is not to maintain land in safe condition, but to disclose to licensee any concealed, dangerous conditions on premises of which owner has knowledge, and to exercise reasonable care to see that the licensee is aware of the danger. *Marlon Inv. Co. v. Conner*, 149 So.2d 312 (Miss. 1963)(held that under the evidence, the jury could find that the landowner had failed to use reasonable care to discover and to warn the plaintiff licensee of a dangerous condition and that even if the plaintiff was contributorily negligent in trying to ascend the stairs she would not be barred under the comparative negligence statute where the landowner had placed her in a concealed pitfall or trap). As in *Marlon*, 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. As a result, Appellees should have used reasonable care to warn Appellant Wilson of the danger. Posting a "Wet Floor" sign would certainly have been sufficient and effective. However, because Appellees failed to use reasonable care, their negligence proximately caused Appellant Wilson's injuries. Further, Appellees attempt to argue that Appellant

Wilson was a licensee at the time of her injury, and she conferred no benefit upon the hospital.

While Appellant Wilson did not initially enter Appellees' premises as a patient, she did receive treatment at the premises following her injury. During the March 4, 2010 hearing on Appellees' Motion for Summary Judgment, counsel for Appellant Wilson conveyed this fact to the Court. *See* p.12-13 *Transcript of Motion for Summary Judgment Hearing*. Appellant Wilson also testifies to the same in her sworn Affidavit in Opposition to Summary Judgment (Rec. p. 198). As a result of visiting her friend on Appellees' premises, Appellant Wilson had the opportunity to observe Appellees' treatment and care procedures, and to make an informed decision of whether she desired to receive treatment on Appellees' premises. Appellant Wilson was certainly not required to treat on Appellees' premises, as she could have just as easily requested to be taken to the nearest alternative hospital. However, Appellant Wilson chose to receive treatment on Appellees' premises, after being injured on said premises due to Appellees' negligence, and therefore, did confer an economic benefit upon Appellees. Summary Judgment should not have been granted.

III. If Appellant Wilson is determined to be a licensee, the subject incident falls under the simple or affirmative negligence exception to the general rule regarding the only duty owed a licensee.

In *Hoffman v. Planters Gin Co., Inc.*, 358 So.2d 1008 (Miss. 1978), the Mississippi Supreme Court set out an exception to the general rule that the duty owed a licensee is to refrain from willfully and wantonly injuring him:

> We think the premises owner is liable for injury proximately caused by affirmative or active negligence in the operation or control of a business which subjects either licensee or invitee to unusual danger, or increases the hazard to

him, when his presence is known and that the standard of ordinary and reasonable care has application.

Vaughn, 828 So.2d 780 at 784 *citing Hoffman* 358 So.2d 1008 at 1013.

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. The instant case is a clear example of the exception to the general rule that landowner owes licensee a bare duty to refrain from willfully or wantonly injuring him when landowner engages in active conduct and the licensee's presence is known to him; that exception is not applicable where the licensee is injured as a result of the condition of the premises for passive negligence. *Lucas v. Buddy Jones Ford Lincoln Mercury, Inc*, 518 So.2d 646 (Miss. 1988)(held Plaintiff's injury did not fall under simple negligence exception because ice Plaintiff fell on was obvious because it was as a result of a vicious ice storm). As mentioned above, the water and the floor of the hospital was not open and obvious to Appellant Wilson. Therefore, its presence does not qualify as passive negligence, but as simple negligence, as Appellees could have, and *should have*, taken reasonable measures to warn Appellant Wilson of the dangerous condition or to remedy the condition. Further, Appellees admitted in their Answer to Appellant Wilson' Amended Complaint that no "wet floor" sign was posted, demonstrating their affirmative negligence. (Rec. p. 12).

CONCLUSION

For the foregoing reasons, the Appellant, Falanda Wilson, is asking this Honorable Court to reverse Lafayette County Circuit Court's granting of summary

judgment, and to remand the case to the Lafayette County Circuit Court, as there exists genuine issues of material fact that should be decided by a jury.

Respectfully submitted, this the 22nd day of October, 2010.

Carlos E. Moore

Carlos E. Moore, MB [redacted]
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CERTIFICATE OF SERVICE

I, Carlos E. Moore, Appellant's attorney, do hereby certify that I have this day mailed via United States mail, postage prepaid, a true and correct copy of the above and foregoing document to the attorneys for Appellees:

Kate M. Embry, Esq.
John H. Dunbar, Esq.
DUNBAR DAVIS, PLLC
324 Jackson Avenue East
Oxford, MS 38655

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

THIS, the 22nd day of October, 2010.

Carlos E. Moore

Carlos E. Moore, Esq.
Tangala L. Hollis, Esq.