IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

MARY CAROLYN WEBB — APPELLANT

v. — NO. 2010-CA-00769

IMPERIAL PALACE OF MISSISSIPPI, LLC — APPELLEE

APPEAL FROM THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI
SECOND JUDICIAL DISTRICT
CIVIL ACTION NO. A2402-08-81

BRIEF OF APPELLEE

SUBMITTED BY:

RONALD G. PERESICH, JR. , MSB[redacted]
LAUREN REEDER MCCRORY, MSB[redacted]
PAGE, MANNINO, PERESICH
& MCDERMOTT
POST OFFICE DRAWER 289
BILOXI, MISSISSIPPI 39533
(228) 374-2100
FAX (228) 435-4441

ORAL ARGUMENT IS NOT REQUESTED

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MARY CAROLYN WEBB **APPELLANT**

v. **NO. 2010-CA-00769**

IMPERIAL PALACE OF MISSISSIPPI, LLC **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Appellee Imperial Palace of Mississippi, LLC, certifies that the following list of persons have an interest in the outcome of this case. These representations are made in order that the justices of the Mississippi Supreme Court and/or judges of the Mississippi Court of Appeals, may evaluate possible disqualifications or recusal:

1. Appellant, Mary Carolyn Webb;

2. Appellee, Imperial Palace of Mississippi, LLC;

3. Samuel E. Farris, 6645 U.S.Hwy 98 W Suite #3, Hattiesburg, MS 39402; Attorney for Appellant, Mary Carolyn Webb;

4. S. Christopher Farris, 6645 U.S.Hwy 98 W Suite #3, Hattiesburg, MS 39402; Attorney for Appellant, Mary Carolyn Webb;

4. Ronald Peresich, Jr., Page, Mannino, Peresich & McDermott, PLLC, P.O. Drawer 289, Biloxi, MS, 39533; Attorney for Appellee, Imperial Palace of Mississippi, LLC; and

5. Lauren Reeder McCrory, Page, Mannino, Peresich & McDermott, PLLC, P.O. Drawer 289, Biloxi, MS 39533; Attorney for Appellee, Imperial Palace of Mississippi, LLC.

THIS, the 17th day of February, 2011.

Lauren Reeder McCrory

LAUREN REEDER MCCRORY

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STATEMENT OF THE ISSUE

The Imperial Palace of Mississippi, LLC ("Appellee" or "IPM") submits that this appeal presents the following issue:

1) Whether the circuit court erred in granting summary judgment in favor of the Appellee.

STATEMENT OF THE CASE

On June 4, 2008, Plaintiff, Mary Carolyn Webb (hereinafter "Appellant"), filed this personal injury action against IPM and an employee of IPM alleging negligence for injuries she allegedly sustained at the Imperial Palace on August 6, 2006, when an IPM security officer fell into her, causing her to fall to the ground. (R. At 8.)

On August 6, 2006, the Appellant was standing in the high limit slot area of IPM. (R.71). IPM Security Officer, James Taranto (hereinafter "Mr. Taranto"), suddenly fainted and fell into the Plaintiff causing them both to fall to the ground which allegedly caused the Plaintiff injuries. (R. 55). Mr. Taranto stated that he suddenly "felt hot," and the next thing he remembered he was picking himself up off of the floor. (R.56-57). Mr. Taranto has stated through his deposition testimony that he does not recall the Appellant falling because he passed out. (R. 58-61). Furthermore, the Appellant has stated through her deposition testimony that she does not have any explanation, evidence or testimony regarding what caused Mr. Taranto to fall on her. (R. 62, 75-76). Moreover, the person who accompanied the Appellant to IPM on the date of the injury and was in proximity to the events which took place that day, Billy Woodard, has testified through his deposition testimony that he does not know what caused Mr. Taranto to fall. (R. 92, 98). Mr. Taranto has stated that after momentarily fainting, he remained unimpaired for the rest of his shift, and completed his shift at 11:00 p.m. that evening. (R. 55). Furthermore, Mr. Taranto's medical

doctor, Dr. Magdy G. Mikhail, M.D., stated that Mr. Taranto has never before complained of having a history of fainting or passing out, and that to his knowledge, Mr. Taranto did not have a medical condition that would cause him to faint or pass out. (R. 101).

After engaging in discovery and taking the depositions of pertinent parties and witnesses, Appellee IPM moved for summary judgment. (R. 46-109). After a hearing on the matter in front of Circuit Court Judge John Gargiulo on March 4, 2010, the trial court entered summary judgment in favor of the defendants. (T. 1-18) (R. 132-135). In its Final Judgement, the trial judge specifically held, "[u]pon review, this Court finds the Imperial Palace has met its burden of proving by a preponderance of the evidence that its employee, Taranto, unforeseeably fainted and lost consciousness at the time of the incident. Because Taranto did not act in a negligent manner, Imperial Palace cannot be held vicariously liable as his employer." (R. 135). This matter is now before the Court of Appeals for review of the trial judge's entry of summary judgment in favor of IPM.

SUMMARY OF THE ARGUMENT

The trial court did not err in entering summary judgement in favor of the Appellee, IPM. There was absolutely no volition on the part of the IPM employee, Mr. Taranto, for him to have been acting in a negligent manner when falling into the Appellant. Appellee more than met its burden in proving its affirmative defense of loss of consciousness. Appellant could not provide one shred of evidence otherwise. As such, there was no genuine issue of material fact, and summary judgment was proper as a matter of law.

ARGUMENT

A. Standard of Review

When reviewing a lower court's granting of summary judgment, this court employs a de novo standard of review. *Young v. Wendy's Int'l, Inc.*, 840 So.2d 782, 783 (Miss. Ct. App. 2003).

B. Appellee met its burden of proving its affirmative defense of loss of consciousness.

"The legal definition of negligence is fairly simple, universally applied, and likewise needs no citation of authority. Negligence is doing what a reasonable, prudent person would not do, or failing to do what a reasonable, prudent person would do, under substantially similar circumstances." *Glover v. Jackson State University*, 968 So.2d 1267, 1277 (Miss. 2007). "[F]undamentally to create liability for an alleged act to be negligent, it must be shown to have been a conscious act of a persons volition. He must have done, or omitted that which he ought to have done, a conscious being endowed with a will." *Lobert v. Pack*, 337 Pa. 103, 9 A.2d 365, 367 (Pa. 1939) (citing *Slattery v. Haley*, 52 Ont.Law Rep. 95). "[N]egligence presupposes a voluntary act, the actor cannot be negligent for what he does or fails to do while he is unconscious." *Warren v. Pinnix*, 241 So.2d 662 (Miss. 1970). To prove the affirmative defense of loss of consciousness, Appellee must have shown that Mr. Taranto was unconscious at the time of the act, and that Mr. Taranto's unconsciousness was an unforseeable event. *Warren v. Pinnix*, 241 So.2d 662,663 (Miss. 1970).

In this instance, IPM employee Mr. Taranto simply passed out and was unconscious as he fell into the Appellee. (R. 58, 61). Therefore, there was no volition on his part to have acted in a negligent manner when falling into the Appellee. Mr. Taranto testified that he had never been diagnosed with any kind of problem that would make him pass out or faint. (R. 58, 60). Furthermore, the only other time he had ever passed out was in the late nineteen eighties (1980's), over twenty (20) years ago, when he experienced a coughing syncope where he engaged in a

coughing "fit," and could not catch his breath. *Id.* Moreover, Mr. Taranto's doctor, Dr. Mikhail, M.D., has stated that Mr. Taranto does not have a medical condition that would cause him to faint or pass out, and that Mr. Taranto has never complained to him about fainting or passing out. (R. 101). The affidavit of Dr. Mikhail, MD, Mr. Taranto's treating physician, is uncontested medical evidence that Mr. Taranto's momentary loss of consciousness was an unforeseeable event. Clearly, Mr. Taranto's momentary loss of consciousness on August 6, 2006, was unforeseeable.

In factually similar situations, the Mississippi Supreme Court has consistently held that a driver of an automobile is not ordinarily chargeable with negligence when he becomes suddenly stricken by a fainting spell, or loses consciousness from an unforeseen cause and is unable to control his car. *See Dickinson v. Koeing*, 133 So. 2d 721 (Miss. 1961); *Warren v. Pinnix*, 241 So.2d 662 (Miss. 1970). "Nowhere in cases dealing with the subject of torts do we find the suggestion that a person should be held responsible for injuries inflicted during periods of unconsciousness." *Dickinson*, 133 So. 2d at 723-724 (citing *Lobert v. Pack*, 9 A.2d 365, 367 (Pa. 1939)). Likewise, this general principle has been recognized in many other jurisdictions. "It is undoubtedly the law that one who is suddenly stricken by an illness, which he had no reason to anticipate, while driving an automobile, which renders it impossible for him to control the car, is not chargeable with negligence." *Armstrong v. Cook*, 250 Mich. 180, 229 N.W. 433. *See also Cohen v. Petty*, 1933, 62 App.D.C. 187, 65 F.2d 820; *Slattery v. Haley*, 52 Ont.Law. Rep. 95; *Driver v. Brooks*, 176 Va. 317, 10 S.E.2d 887; *Wishone v. Yellow Cab Co.*, 20 Tenn.App. 229, 97 S.W.2d 452; *Bushnell v. Bushnell*, 103 Conn. 583, 131 A. 432, 44 A.L.R. 785; *Journey v. Zawish*, 11 N.J. Misc. 482, 167 A. 7, and *Harrington v. H.D. Lee Mercantile Co.*, 97 Mont. 40, 33 P.2d. 553. In these cases it is stated as a general principle that one who has lost consciousness cannot be held to be negligent for what he does or fails to do in the operation of an automobile, because the failure to exercise the requisite degree

of care presupposes that the person sought to be charged is capable of sense perception and judgment. *Lobert v. Pack*, 9 A.2d 365, 367 (Pa. 1939).

The Appellant has presented absolutely no evidence which would show that Mr. Taranto, and vicariously, the Imperial Palace, had acted in a negligent manner on August 6, 2006. Mr. Taranto simply fainted. His fall onto the Appellant was beyond his control because he was unconscious as he was in the act of falling. Furthermore, Mr. Taranto had no reason to anticipate that he would faint at that particular moment. (R. 55). It was a completely unforeseeable event. *Id.* In *Soule v. Grimshaw*, 266 Mich. 117, 253 N.W. 237, it was held that proof that a defendant driver had been suddenly overcome by unconsciousness, without a showing that this collapse was foreseeable or the result of negligence, was not only insufficient to create liability on his part, but served to rebut presumption of negligence which would have otherwise arisen from the manner of his operation of the vehicle.

The Appellant has failed to put forth any evidence whatsoever to dispute the fact that Mr. Taranto was unconscious at the time he fell on the Plaintiff. Nor has the Plaintiff put forth any evidence to dispute the fact that Mr. Taranto's momentary unconsciousness was an unforeseeable event. In fact, in her deposition testimony, the Appellant herself, admitted that she had no explanation, evidence or testimony regarding what caused Mr. Taranto to fall on her. (R. 62, 76). She also testified that she had no reason to believe that Mr. Taranto did anything to himself that day that would have caused him to faint. *Id* at 73. Furthermore, the person who accompanied the Appellant to the Imperial Palace on the date of the injury and was in proximity to the events which took place that day, Billy Woodard, testified that he had "no clue" as to why Mr. Taranto fell. (R. 92, 98). Since the Appellant cannot prove volition on the part of Mr. Taranto, there is no possibility to prove that Appellee was vicariously liable for any injuries she may have sustained as a result of

Mr. Taranto fainting and falling into her. Accordingly, there is no genuine issue of fact remaining for trial and summary judgment was appropriate in this matter.

Appellant argues that Appellee has presented no proof to support its defense that IPM employee James Taranto fainted. This is simply inaccurate. Appellee not only submitted the sworn affidavit of IPM employee James Taranto which states that he suddenly fainted right before falling into the Plaintiff, but also has submitted the sworn affidavit of James Taranto's medical doctor, Dr. Magdy Mikhail, M.D., which states that Mr. Taranto has never complained of fainting or passing out, and that Mr. Taranto does not have a medical condition that would cause him to faint or pass out. Affidavits are properly considered on summary judgment motions as long as they are based on personal knowledge and set forth facts that would be admissible in evidence. *See* M.R.C.P.56(e); *see also, Borne v. Dunlop Tire Corp.,* 12 So. 2d 565 (Miss. App. 2009). Clearly, through these affidavits and through deposition testimony cited in Appellee's Motion for Summary Judgment and Memorandum Brief in Support Thereof, Appellee met its burden. (R. 46-109). Furthermore, as shown in Appellee's Motion and Brief, Apellant has not and cannot dispute the fact that the Mr. Taranto fainted, nor can she dispute the fact that the Mr. Taranto's unconsciousness was an unforeseeable event. *Id.*

C. Appellant misapplies relevant authorities.

Also, the Appellant misapplies relevant case law in her Brief. *See* Appellant's Brief, pg. 7. First, Appellee sets forth under *Dickinson v. Koeing*, 133 So.2d 721,724 (Miss. 1961) that the Mississippi Supreme Court held that "whether a driver was in fact driving an automobile at the time it left the highway, and if so, whether he was suddenly stricken with a fainting spell and lost consciousness from an unforeseeable cause without previous warning to anticipate that he would be so stricken were questions of fact for the jury." However, Appellant leaves out the fact that the

Mississippi Supreme Court went on to say: "**This opinion is not to be construed to require that in every case the issue should be submitted to the jury, but we think that in this particular case...under all of the facts and circumstances the issue was properly submitted to the jury.**" *Id.* In *Dickinson*, there were more points of contention then there were in this case. For instance, in *Dickinson*, there was also a question fact as to who was actually driving the car at the time of the accident. *Id.* Also, the plaintiff in *Dickinson*, made the argument that because the car traveled in a straight line immediately before the accident, it would have had to have been guided by someone coherent. *Id* at 723. In the case *sub judice*, there no other points of contention, nor can the Appellant dispute that Mr. Taranto fainted.

Appellant next sets forth under *Hinton v. McKee*, 329 So.2d 519 (Miss. 1976), that the Mississippi Supreme Court held that "the burden of proof rested on defendant to prove affirmative defense of loss of consciousness by preponderance of the evidence and that defendant's proof of affirmative defense was so weak that the case should be tried before another jury." *See* Appellant's Brief, pg. 8. While the Appellant correctly sets forth the burden on proving an affirmative defense, *Hinton* is factually distinguishable from the case *sub judice*. In *Hinton*, the defendant (the driver of the car that was alleged to have fainted) had died at the accident scene, and thus, was not alive to testify as to what had happened. The Mississippi Supreme Court points this fact out in its reasoning. *Hinton* at 520. ("In both *Warren* and *Dickinson* the drivers of the vehicles survived the accident and were able to testify that they suffered a sudden loss of consciousness which was not foreseeable.") In the case *sub judice*, IPM employee, James Taranto is alive and well, and has testified to the fact that he unforeseeably fainted at the time of the incident in question. Therefore, Appellee had proven its burden by a preponderance of the evidence and summary judgment was appropriate.

Appellant also attempts to cite *Keener v. Trippe*, 222 So.2d 685 (Miss. 1969), in her favor.

This case, however, has also been misapplied by Appellant. In *Keener*, the Mississippi Supreme Court found that in that particular instance that it was a question of fact for the jury to decide whether the driver had actually fainted, and whether or not the driver knew or should have known of the probability of fainting. Again, *Keener* is factually different then the case *sub judice*. In *Keener*, there was an issue of fact as to the foreseeability of the defendant's unconsciousness–the driver had been suffering with headaches, and had been taking prescription medication for the weeks preceding the incident, but there was also evidence that the driver appeared "hale and hearty" after the accident. In the case *sub judice*, the evidence clearly shows that IPM employee James Taranto did not have a reason to suspect that he would have fainted that day. The affidavit from his treating physician clearly shows that he did not have a medical condition that would have caused him to faint, nor had he ever complained of losing consciousness before. Also, the driver/defendant in *Keener* did not submit any affidavit from any medical provider on his behalf. Appellee did so. The Court also notes in *Keener* that the *Dickinson* case held that all cases of this nature do not necessarily create issues of fact. *Keener* at 687.

CONCLUSION

Appellant never set forth one single shred of evidence to show that Appellee acted negligently. Appellee met its burden of proving that IPM employee, Mr. Taranto, lost consciousness, and thus, could not have volition when he fell into the Appellant. As such, the trial court did not err in granting summary judgment, and thus the trial court's ruling should be upheld.

Respectfully submitted,

IMPERIAL PALACE OF MISSISSIPPI, LLC

By: Lauren Reeder McCrory

RONALD G. PERESICH, JR., MSB #[redacted]
LAUREN REEDER MCCRORY, MSB #[redacted]
PAGE, MANNINO, PERESICH & MCDERMOTT, P.L.L.C.
759 VIEUX MARCHE' MALL
POST OFFICE DRAWER 289
BILOXI, MS 39533-0289
228-374-2100; FAX 228-435-4441

CERTIFICATE OF SERVICE

I, LAUREN REEDER MCCRORY, of the law firm of PAGE, MANNINO, PERESICH & MCDERMOTT, P.L.L.C., do hereby certify that I have this day mailed, a true and correct copy of the above and foregoing **IMPERIAL PALACE OF MISSISSIPPI, LLC'S BRIEF OF APPELLEE** to:

Christopher Farris, Esquire
Samuel E. Farris, Esquire
Farris Law Offices
6645 U S Highway 98 # 3,
Hattiesburg, MS 39402
(601) 271-2285

Honorable John C. Gargiulo
Circuit Court Judge
P.O. Box 1461
Gulfport, MS 39502

THIS, the 17th day of February, 2011.

Lauren Reeder McCrory

LAUREN REEDER MCCRORY