2010-CA-00769 T

**CERTIFICATE OF INTERESTED PARTIES**

I, the undersigned counsel for the Appellant, do hereby certify that the following persons have an interest in the outcome of this case. These representatives are made in order that the Justices of this Court may evaluate possible disqualifications or recusal.

Mary Carolyn Webb, Appellant

Imperial Palace of Mississippi, LLC, Appellee

Hon. Ron Peresich, Jr. Attorney for Appellee

Hon. Samuel E. Farris, Attorney for Appellant

Hon. S. Christopher Farris, Attorney for Appellant

Respectfully submitted this the 19th day of January, A.D. 2011.

S. CHRISTOPHER FARRIS

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## STATEMENT OF THE ISSUE

**THE CIRCUIT JUDGE ERRED IN GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

## STATEMENT OF THE CASE

This case was initiated by Mary Carolyn Webb filing a complaint against the Defendant, Imperial Palace of Mississippi, LLC and it's unknown employee at the time, John Doe, seeking damages. ( C.P.8-10; R.E. 24-26) The Defendants filed an original answer and an amended answer asserting numerous affirmative defenses. ( C.P.11-19; 123-131 R.E.9-17;66-74 ). After engaging in discovery and taking all of the depositions of the parties and witnesses the Defendant's filed a Motion for Summary Judgment . ( C.P.110-113; R.E.18-64 ) The parties appeared before the Circuit Judge on March 4, 2010 for oral argument. ( R. 1-18, R.E. 75-93 ). After taking the matter under advisement the Judge entered summary judgment in favor of defendants.(C.P. 132-135, R.E. 94-87 This matter is before the Court for review of the Circuit

Judge's entry of summary judgment in favor of Defendant, Imperial Palace of Mississippi, LLC and its employee, John Doe.

## STATEMENT OF THE FACTS

The Appellant, Mary Carolyn Webb was an invitee at the Imperial Palace Casino in Biloxi, Mississippi on August 6, 2006 with her friend Bill Woodard, a deputy sheriff in Forrest County, Mississippi. Ms. Webb was facing a slot machine that was being played by Mr. Woodard when the defendant's on- duty employee, James A. Taranto suddenly fell into Mr. Woodard and Ms. Webb causing her to fall.(C.P. 59, 61, 72-74, 98; R.E.31, 33, 44-46 ) As a result of the collision she sustained injuries to her neck and back.(C.P. 70; R.E.42 ) The videotape of the incident is so grainy it was impossible to determine anything other than Mr. Taranto falling into Ms. Webb and both hitting the floor.

## SUMMARY OF THE ARGUMENT

When a contested issue of fact is present the Court shall not grant summary judgment but shall leave the issue for resolution of the jury. There is no dispute that Mr. Taranto was an employee of Defendant, Imperial Palace of Mississippi, LLC at the time he fell into Ms. Webb causing both to fall to the ground. The Defendant alleges that Mr. Taranto had a sudden and unforeseen fainting spell. However, there is not one shred of proof to support that affirmative defense. Even Mr. Taranto, the defendant's employee has no idea what happened. He testified that " I was just walking around my duties, and I was standing there in a certain area, and then all of a sudden 'I just fell'...." ( C.P. 59, R.E. 31 ).

## ARGUMENT

### THE CIRCUIT JUDGE ERRED IN GRANTING DEFENDANT, IMPERIAL PALACE OF MISSISSIPPI, LLC'S MOTION FOR SUMMARY JUDGMENT

The appellate courts review a circuit judge's granting of summary judgment de novo. ***Byrne v. Walmart Stores, Inc. , 877 S0.2d 462, 464( P3) (Miss. Ct. App. 2003)( citing Young v. Wendy's Int'l, Inc. 840 So.2d 782, 783 ( P 3)( Miss. Ct. App. 2003).*** Plaintiff sued on the basis of simple negligence. Her position was Mr. Taranto was negligent in crashing into her while she was watching her friend, Bill Woodard play a slot machine at Defendant's casino. ( C. P. 8-10; R.E. 24-26 ) Defendant asserts as an affirmative defense in it's amended answer that Mr. Taranto's loss of consciousness relieves them of any liability to the Plaintiff for the injuries she sustained. ( C.P. 123-131; R.E.66-74) Mr. Taranto testified that " I was just walking around my duties, and I was standing there in a certain area, and then all of a sudden 'I just fell'...." ( C.P. 59, R.E. 31 ).

Within seconds of the incident, security officer James Taranto was helped up by Bill Woodard and returned to his full duties without the need for any medical treatment.( C.P. 56;95, 96 R.E.28; 58, 59) To date he has also failed to experience another such fainting spell.( C.P.55, 59-61; R.E.27, 31-33 ). Defendant, Imperial Palace submitted the affidavit of Dr. Mikhail, Mr. Taranto's physician in support of their affirmative defense. ( C.P.101; R.E.64 ) However, Dr. Mikhail states that Mr. Taranto has **never** complained of having a history of fainting or passing out and to Dr. Mikhail's knowledge, he **does not** have a medical condition that would cause him to faint or pass out. There was no evidence other than Mr. Taranto's self serving statement in his affidavit prepared some three years after the accident, that he "passed out". His original statement

the day of the event mentions nothing about passing out. ( C.P. 57, R.E.29 ) Bill Woodard testified that when he helped Mr. Taranto up within seconds of him falling, Mr. Taranto was not unconscious. ( C.P. 98; R.E.61 ).

In ***Dickson v. Koenig, 242 Miss. 17, 133 So.2d 721 (Miss. 1961)***, the Mississippi Supreme Court held that "whether the alleged 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 or reason to anticipate that he would be so stricken **were questions of fact for the jury** under the evidence." The Court also stated that "because of the easy simulation of fainting, and the potential for possible frauds, resulting from simulations thereof, we hold that one whose defense is that he suddenly sustained a loss of consciousness, should be required to present to the court all of the evidence known to him or of which he has information or show that such evidence is unavailable and why.

The initial statement given by Mr. Taranto was that " he felt hot and the next thing he remembered he was getting up from the floor." ( C.P. 57, R.E. 29 ). No where does he ever state that he passed out or fainted. In fact, Defendants did not assert "loss of consciousness in their first answer as an affirmative defense.(C.P. 11-19; R.E.9-17 ). The Order granting them approval to file the amended answer ( February 26, 2010) and the filing of the amended answer( March 1, 2010) was accomplished 3 days before the hearing on the Motion for summary judgment.

Three years after the incident, Mr. Taranto states "I fainted, became unconscious, and fell to the floor. When I awoke, I was informed that I had fallen into a patron as I was falling to the floor." A whole lot of detail three years after an event that took less than 15 to 20 seconds. This version is also in direct conflict with the statement he initially gave security, his deposition

testimony, and the testimony of the witnesses. ( C.P. 56, 59, 60; R.E. 28, 31, 32 )

In ***Hinton v. McKee, 329 So.2d 519 (Miss. 1976)***, 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." The evidence in ***Hinton*** in support of the affirmative defense of loss of consciousness is substantially stronger than the evidence in the case *sub judice*.

In ***Keener v. Trippe, 222 So.2d 685 ( Miss. 1969)***, the Circuit Court of Harrison County ruled against the driver of an automobile who claimed he fainted. The driver appealed and the Mississippi Supreme Court held " it was for the jury to determine

1) whether the driver had actually fainted and

2) whether he was, or should have been, forewarned of probabilities thereof

Mr. Keener, the driver had been suffering from headaches for about two months prior to the accident and had been taking prescription medicine ordered by doctor and that just a few seconds or minutes after the accident he appeared hale and hearty.

The Circuit Judge attempted to distinguish the case sub judice by skipping the first element required under *Keener,* " Whether or not Mr. Taranto had actually fainted?". The fact that Ms. Webb did not see him prior to falling into her does not mean that Mr. Taranto is telling the truth. Mr. Woodard testified that Mr. Taranto did not appear to be unconscious thus making it a contested issue of fact.( C.P. 98, R.E. ) On a Motion for Summary Judgment the trial court does not try issues of fact: It can only determine whether there exists issues to be tried by the jury. ***Elston v. Circus Circus, 908 So2d 771, ( Miss 2005).***

## CONCLUSION

Plaintiff would submit that all of the above cited authority clearly supports the denial of Defendant's motion for summary judgment. She requests that this Court reverse and remand the case for a jury trial.

Respectfully submitted,
MARY CAROLYN WEBB, Plaintiff

BY: _____

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## CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I have this date mailed a true and correct copy of the above and foregoing Appellant's Brief to Honorable Lauren L. Reeder, Page, Mannino, Peresich & McDermott, PLLC., P. O. Drawer 289, Biloxi, MS 39533-0289 and the Honorable John C. Gargiulo, Circuit Judge, P. O. Box 1461, Gulfport, MS 39502; by United States mail, postage prepaid.

DATED this the 19th day of January 2011.

_____
S. CHRISTOPHER FARRIS