CASE NO. 2013-CA-00037 COA E

SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

RHODA COFIELD,
Plaintiff - Appellant

v.

IMPERIAL PALACE OF MISSISSIPPI, INC.,
Defendant - Appellee

Appeal From the Circuit Court of Harrison County, Mississippi
Cause No. A2402-2010-00010

BRIEF OF APPELLEE

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or judges of the Court of Appeals may evaluation possible disqualification or recusal.

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Imperial Palace of Mississippi, LLC n/k/a Boyd Biloxi, LLC	Defendant
Boyd Gaming Corporation	Parent Company of Boyd Biloxi, LLC
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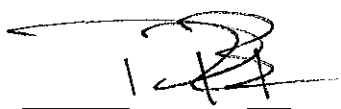

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STATEMENT OF THE ISSUE

WHETHER THE TRIAL COURT ERRED WHEN IT PROPERLY GRANTED DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

STANDARD OF REVIEW

This Court reviews the grant of a summary judgment *de novo*. *Karpinsky v. American National Insurance Company*, 109 So.3d 84, 88 (¶9)(Miss.Sup.Ct. 2013) (citation omitted).

Summary judgment is proper when 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 and that the moving party is entitled to a judgment as a matter of law. *Karpinsky*, 109 So.3d at 88 - 89 (¶ 10 - ¶ 11). The movant bears the burden of persuading the trial court that no genuine issue of material fact exists, and on the basis of the facts presented it is entitled to summary judgment. *Id.* at (¶ 11) (citation omitted).

To survive summary judgment, the non-moving party must offer significant, probative evidence on the issues that she will bear the burden at trial, demonstrating the existence of a triable issue of fact. *Karpinsky*, 109 So.3d at 88 - 89 (¶13), *Byrne*, 877 So.2d at 465 (¶3) quoting *Young v. Wendy's Int'l, Inc.*, 840 So.2d 782, 784 (Miss. Ct. App. 2003). When a motion for summary judgment is made and supported, an adverse party may not rest upon the mere allegations or denials in her pleadings, but her response, by affidavits or as otherwise provided in Rule 56 of the Mississippi Rules of Civil Procedure, must set forth specific facts showing that there is a genuine issue for trial. *Karpinsky*, 109 So.3d at 88 (¶10), Miss.R.Civ.Pro. 56(e).

STATEMENT OF THE CASE

Plaintiff fell on Defendant's property on September 13, 2008. *R.* at 173 [RE 1]. Plaintiff filed her Complaint on January 21, 2010. *R.* at 11. The Defendant filed its Answer on June 7,

2010. *R.* at 19. After engaging in discovery for over 1 ½ years, the Defendant filed its Motion for Summary Judgment on September 19, 2011. *R.* at 123. On October 28, 2011, the Plaintiff filed her response to Defendant's motion. *R.* at 156. On November 2, 2011, the Defendant filed its Reply in Support of its Motion for Summary Judgment. *R.* at 249. Defendant's Motion for Summary Judgment was set for a hearing on December 15, 2011. *R.* at 154. At the hearing on December 15, 2011, the Plaintiff asked the trial court for additional time in which to conduct discovery. *H.T.* at 13 - 15 [RE at Tab 2].

The trial court gave Plaintiff until March 2012 to conduct discovery *H.T.* at 15 [RE at Tab 2], and the Defendant's Motion for Summary Judgment was reset for hearing on March 29, 2012. *R.* at 262. The Defendant set this case for trial on July 16, 2012. *R.* at 260. On March 21, 2012, Plaintiff filed her motion to continue the hearing on Defendant's Motion for Summary Judgment, so she could continue to conduct discovery. *R.* at 286.

On April 13, 2012, Plaintiff filed her Supplemental Memorandum in Support of her Opposition to Defendant's Motion for Summary Judgment. *R.* at 320. On April 18, 2012, Defendant filed its Supplemental Reply in Support of its Motion for Summary Judgment. *R.* at 675. The trial court held a hearing on Defendant's Motion for Summary Judgment on April 19, 2012. *H.T.* at 16 [RE at Tab 2]. On May 4, 2012, Plaintiff filed her Proposed Findings of Fact and Conclusions of Law. *R.* at 768. On May 4, 2012, Plaintiff also filed her Second Supplemental Memorandum in Support of her Opposition to Defendant's Motion for Summary Judgment. *R.* at 788. The Defendant reset this case for trial on January 7, 2013. *R.* at 824. On November 5, 2012, Plaintiff filed her Third Supplemental Memorandum in Support of her Opposition to Defendant's Motion for Summary Judgment. *R.* at 828. Defendant, on November 6, 2012, filed its Response to Plaintiff's Third Supplemental Memorandum in Support of her Opposition to Defendant's Motion for Summary Judgment. *R.* at 840.

On December 4, 2012, the trial court entered its Memorandum Opinion and Final Order Granting Motion for Summary Judgment. *R.* at 854 [RE at Tab 3]. On December 28, 2012, Plaintiff filed her Notice of Appeal. *R.* at 865 [RE at Tab 4].

FACTS

This lawsuit arises from an incident that occurred on September 13, 2008, when Plaintiff fell on Defendant's property. *R.* at 173 [RE 1]. Plaintiff fell while hurriedly walking in the elevator lobby toward an elevator that was opening. *R.* at 518 [RE 2]; *Security Coverage* at 14 - 20. Immediately prior to Plaintiff falling, two people exited the elevator Plaintiff was trying to enter. *R.* at 517 - 518 [RE 3, 2]; *Security Coverage* at 14 - 20. These two people walked through the area where Plaintiff fell, without incident, just before Plaintiff walked into this area and fell. *R.* at 517 - 518 [RE 3, 2]; *Security Coverage* at 14 - 20. Plaintiff alleges the Defendant was negligent regarding this incident because a few drops of water were seen on the floor, after Plaintiff fell, in the area where she fell. *R.* at 501 [RE 4].

The specifics of Plaintiff's incident are as follows. Plaintiff claims that as she started to walk toward the second floor elevator, she pressed the elevator call button. *R.* at 133, 134 - 135 [RE 5, 6 - 7]; *Security Coverage* at 14. The third elevator on the left side opened. *R.* at 133 [RE 5]. As Plaintiff walked toward this elevator that opened, her foot went in some solution and she "went down." *Id*; *Security Coverage* at 20.

As Plaintiff walked toward the elevator that had opened, her vision of the floor was not blocked. *R.* at 136 - 137 [RE 8 - 9]; *Security Coverage* at 14 - 20. Plaintiff admits she was not looking at the floor as she was walking. *Id.* Prior to falling, Plaintiff did not see anything on the floor. *Id.* She is unable to describe the size of any puddle in which she alleges she slipped. *R.* at 138 – 139 [RE 10 - 11]. Plaintiff does not know how the substance in which she alleges she fell

got on the floor. *R.* at 139 [RE 11]. Plaintiff is not aware of how long this substance in which she alleges she fell was on the floor before she fell. *R.* at 139, 140 - 141 [RE 11, 12 - 13].

At the time of the subject incident, Plaintiff was accompanied by her friend and cousin, Juliette Murray. *R.* at 662 - 663 [RE 14 - 15]. Ms. Murray does not know how any water got on the floor. *R.* at 144 [RE 16]. Ms. Murray has no knowledge regarding how long any water was on the floor before Plaintiff fell. *Id.* When Ms. Murray checked on the Plaintiff after Plaintiff fell, Ms. Murray did not see any water on Plaintiff's shoes. *Id.* at 143 [RE 17].

Pursuant to its procedures, the Defendant preserved its security coverage of the subject incident. *R.* at 742 [RE 18]. When an incident like the subject incident occurred, and there was surveillance coverage of it, the Defendant retained the surveillance coverage of the incident. *R.* at 585 - 586 [RE 19 - 20]. The amount of coverage Defendant retained was done at the discretion of the investigator handling the incident. *R.* at 582, 585 - 586 [RE 21, 19 - 20]. In the case at bar, the investigator handling this incident (Paul Dillon) saved the coverage of Plaintiff's incident starting at a point before Plaintiff entered the elevator lobby. *R.* at 493 [RE 22]. Mr. Dillon retained this coverage because he wanted to ensure the entire incident was retained on tape. *R.* at 493 [RE 22]. To ensure the entire incident was preserved, Mr. Dillon archived security coverage of the subject incident beginning 26 seconds before Plaintiff entered the elevator lobby. *R.* at 696 - 697 [RE 23 - 24]. When coverage is not retained (archived), the security coverage records over itself in approximately every seven (7) to ten days. *R.* at 742 - 743 [RE 18, 25].[1]

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[1] Contrary to Plaintiff's unsupported allegation that the Defendant "intentionally" erased and/or destroyed security coverage (*Brief of Appellant* at 2), the actual proof is that when coverage is not retained, it records over itself in 7 - 10 days. *R.* at 742 - 743 [RE 18, 25].

By letter dated October 7, 2008, 24 days after the subject incident, Plaintiff, through her attorneys, sent a letter to the Defendant, stating: "[T]his will serve to put you on notice that we request that any and ***all videotapes***, videos, photographs, digital images, statements or any other investigation ***of this incident*** be preserved in connection with this claim. *R.* at 850 [RE 26] (emphasis added). While Plaintiff's attorney's letter was written after the 7 - 10 day period wherein the Defendant's system recorded over itself, the Defendant had archived exactly what Plaintiff requested; a recording of "this incident." *Security Coverage.*

SUMMARY OF THE ARGUMENT

The Plaintiff failed to prove that the Defendant was responsible for the few drops of water, in which Plaintiff alleges she slipped, being on the floor. The Plaintiff failed to prove how long the few drops of water had been on the floor before she fell. The Plaintiff failed to prove the Defendant knew or should have known there were a few drops of water on the floor prior to Plaintiff's incident.

To survive summary judgment, Plaintiff must prove either that the Defendant caused the drops of water to be on the floor or that the Defendant had either actual or constructive knowledge of the drops of water on the floor before Plaintiff fell. *Elgandy v. Boyd Mississippi, Inc.*, 909 So.2d 1202, 1205 (¶ 15, 16)(Miss.Ct.App. 2005). If the Plaintiff can prove the Defendant had actual or constructive knowledge of the drops of water on the floor, she must then also prove that the Defendant had a reasonable time in which to clean up the drops of water before she fell. *Karpinsky*, 318 So.3d at 91 - 92 (¶24), *J.C. Penny Company v. Sumrall*, 318 So.2d 829, 832 (Miss.Sup.Ct. 1975). Because the Plaintiff failed to sustain her burden of proof on any issue, the trial court properly granted the Defendant's Motion for Summary Judgment.

ARGUMENT

A. Mississippi Premises Liability Law

The trial court properly granted the Defendant summary judgment because the Plaintiff failed to present any evidence regarding the issues on which she would bear the burden of proof at trial. Plaintiff failed to present any evidence that the Defendant was responsible for the drops of water on the floor; Plaintiff failed to present any evidence that the Defendant knew or should have known there were a few drops of water on the floor before she fell; and, Plaintiff failed to present any evidence that the Defendant, even if it knew these few drops of water were there, had a reasonable amount of time to cleanup the drops before Plaintiff fell.

Under Mississippi law, business owners have a duty to invitees to exercise reasonable care to keep the business premises in a reasonably safe condition and to warn of dangerous conditions which are not readily apparent to the invitee. *Bonner v. Imperial Palace of Mississippi, LLC,* 117 So.3d 678, 682 (¶ 11)(Miss.Ct.App. 2013); *Stanley v. Boyd Tunica, Inc.* 29 So.2d 95, 97 (¶ 8)(Miss.Ct.App. 2010)(citations omitted). Strict liability is not imposed on business owners in premises liability cases. *Stanley,* 29 So.2d at 97. Business owners are not insurers against all injuries. *Id.* And, mere proof of a fall is not enough to show negligence on the part of the business owner. *Id.*

The duty of a business owner to keep its premises in a reasonably safe condition depends on the owner having actual or constructive knowledge of the dangerous condition. *Elgandy v. Boyd Mississippi, Inc.*, 909 So.2d 1202, 1205 (¶ 15)(Miss.Ct.App. 2005). Actual or constructive notice is not required when the dangerous condition was caused by the owner or its agent. *Id.* If the condition was caused by someone other than the owner or his agent, then actual or constructive notice is required. *Elgandy*, 909 So.2d at 1205 (¶ 16). Once notice of the dangerous

condition is established, evidence must then be presented that the business owner had a reasonable time to correct the dangerous condition. *Karpinsky*, 109 So.3d at 92 (¶24).

Because Plaintiff "had the burden of proof at trial, she must have produced sufficient evidence on one of the above three types of premises liability to withstand a motion for summary judgment." *Bonner,* 117 So.3d at 682 (¶ 13). Plaintiff failed to produce sufficient evidence on any of the above three types of premises liability and the trial court properly granted the Defendant summary judgment.

1. No Evidence the Defendant Caused the Drops of Water to be on the Floor

In the case at bar, Plaintiff produced no evidence that the Defendant caused the few drops of water to be on the floor where she fell. Neither Plaintiff, nor her cousin and friend, Ms. Murray, had any knowledge regarding the substance in which Plaintiff alleges she fell.

Under Mississippi law, Plaintiff must prove that the negligent act of the Defendant caused her injury. *Bonner,* 117 So.3d at 682 (¶ 11)(citations omitted).

Plaintiff does not know how the substance in which she alleges she fell got on the floor. *R.* at 139 [RE 11]. Plaintiff is not aware of how long this substance in which she alleges she fell was on the floor before she fell. *R.* at 139, 140 - 141 [RE 11, 12 - 13]. Ms. Murray does not know how any water got on the floor. *R.* at 144 [RE 16]. Ms. Murray has no knowledge regarding how long any water was on the floor before Plaintiff fell. *Id.* Plaintiff failed to provide any evidence regarding the substance on the floor. Plaintiff offered no evidence, beyond mere conjecture, to demonstrate that the drops of water that were on the floor were there as a result of the Defendant's actions. Therefore, the trial court properly granted summary judgment.

In an attempt to avoid summary judgment, Plaintiff produced the affidavit of Fred Del Marva.[2] Mr. Del Marva identified himself as a "professional qualified ***and comfortable*** to render expert opinions regarding the industry standard of care in hotel safety and non-gaming operations at casino/hotels..." *R.* at 632 [RE 27] (emphasis added). In his affidavit, Mr. Del Marva speculated, without any evidence, that the water in which Plaintiff fell could have come from guests who had used Defendant's pool and/or could have come from Defendant's employees using the elevators. *R.* at 642 - 643 [RE 28 - 29]; *Appellant's Brief* at 38 - 39. Mr. Del Marva posited these theories because Defendant's pool is located on the top of the parking garage, on the 11th floor, and Defendant's associates use the elevators. *R.* at 638 - 639, 642 - 643 [RE 30 - 31, 28 - 29].

The insurmountable problem for Plaintiff is that Mr. Del Marva made these proclamations regarding the source of the water droplets without any evidence. There is no evidence to suggest that the drops of water in which the Plaintiff alleges she fell were caused or contributed to by persons using Defendant's pool or the use of the elevators by Defendant's associates.

Contrary to Mr. Del Marva's speculation, Julia Jones, Defendant's Assistant Risk Manager at the time of the subject incident, was questioned about the time period of one year prior to the subject incident; June 2007 and July 2008.[3] *R.* at 702, 703 [RE 32, 33]. Ms. Jones testified that she was not aware of any incidents during this period of time where water was

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2 Mr. Del Marva has been before this court on at least one prior occasion. *See Holmes v. Campbell Properties, Inc.*, 47 So.3d 721, 725 (¶ 16)(Miss. Ct. App. 2010)(circuit court rejected Del Marva's affidavit as conclusory and did not consider it in ruling on summary judgment motion).

3 Admissibility of prior incidents is limited. *Bonner*, 117 So.3d at 687 - 688 (¶ 33)(citations omitted). They must have happened under substantially the same circumstances as the subject accident and they may not be too remote. *Id.* A one year limitation is reasonable. *Id.*

dripped in the elevator lobby (where Plaintiff fell), creating a hazard for other guests. *R* at 702, 703 - 704 [RE 32, 33 - 34]. Ms. Jones also testified that during this period of time, water on the floor in this elevator lobby was not an issue discussed by risk management. *Id.* at 704 - 706 [RE 34, 35, 36].

Plaintiff unsuccessfully attempted to survive summary judgment by trying to build a case based on unsupported speculation. *Appellant's Brief* at 38 - 40. The trial court properly granted summary judgment because the Plaintiff failed to produce any evidence. Irrespective of the fact that she produced no evidence to support her allegations, in her brief, Plaintiff cites *Elston v. Circus Circus Mississippi, Inc,* 908 So.2d 771 (Miss. Ct. App. 2005) for the premise that the trial court should not have granted summary judgment. *Brief of Appellant* at 16, 18, 22, 23, 28, 34. There is no refuge for Plaintiff in *Elston.*

In *Elston,* plaintiff slipped in defendant's lobby area, somewhere between 1:45 p.m. and 2:45 p.m, in water that was near some plants. *Elston,* 908 So.2d at 772(¶ 3-¶ 5). The proof presented to the trial court was that the defendant watered these plants between 10:00 a.m. and 11:00 a.m. *Id.* The plaintiff slipped on Thursday and the plants are normally watered on Thursday. *Elston*, 908 *So.*2d at 774 (¶ 12) The plaintiff slipped in the immediate vicinity of the plants. *Elston*, 908 *So.*2d at 774 (¶ 12). The defendant could not identify any other source for the water. *Id.* at 774 (¶ 12). Based on this evidence, the *Elston* Court stated this evidence was enough for a jury to conclude that the defendant caused the condition about which the plaintiff complained. *Id.*

In the case at bar, as set forth above, Plaintiff presented no evidence regarding the origin of the droplets of water on the floor in which Plaintiff alleges she fell. Therefore, unlike in *Elston* where the plaintiff did present evidence that the defendant created the dangerous condition, in the case at bar the Plaintiff failed to present any evidence. While *Elston* is not

applicable to the case *sub judice, McCullar v. Boyd Tunica, Inc.*, 50 So.3d 1009 (Miss.Ct.App. 2010) is on point. The *McCullar* Court affirmed the grant of summary judgment by the trial court where a patron died as the result of the ceiling in a bathroom collapsing on her. *McCullar,* 50 So.3d at 1010 (¶ 1, ¶3 - ¶ 4). In affirming the trial court's grant of summary judgment, the *McCullar* Court addressed the evidence presented in *Elston, supra,* as it applied to the issue of when a business owner's negligence caused the danger at issue. *McCullar*, 50 So.3d at 1012 - 1013 (¶16 - ¶ 18). The *McCullar* Court stated that in *Elston,* there was ample evidence that defendant's employees created the dangerous condition by watering the plants. *McCullar*, 50 So.3d at 1013 (¶ 18). Then, the *McCullar* court, relying on *Jacox v. Circus Circus Miss., Inc.*, 908 So.2d 181, 183 (¶ 2), stated summary judgment was appropriate because the plaintiff failed to produce any evidence that the defendant caused or contributed to the dangerous condition that lead to plaintiff's death. *McCullar*, 50 So.3d at 1013 (¶ 19 - ¶ 20).

In the case at bar, Plaintiff, like the unsuccessful plaintiff in *McCullar,* failed to produce any evidence that the Defendant caused or contributed to the dangerous condition (the few drops of water) in which Plaintiff alleges she fell. *See Elston*, 50 So.3d at 1013 (¶ 19). As in *McCullar*, which was a claim for wrongful death, the trial court properly granted summary judgment in the case at bar.

2. No Evidence of Actual or Constructive Knowledge

Because the Plaintiff failed to prove that the Defendant's conduct caused the drops of water to be on the floor, Plaintiff was required to produce evidence that the Defendant had actual or constructive knowledge of the drops of water on the floor, before Plaintiff fell, as well as a sufficient opportunity to correct the issue. *Karpinsky*, 109 So.3d 88 - 89 (¶ 12). This Court is not permitted to indulge in presumptions regarding the length of time any water may have been

on the floor; the Plaintiff must present specific proof on this issue. *See Waller v. Dixieland Food Stores, Inc.*, 492 So.2d 283 (Miss. 1986).

In the case at bar, Plaintiff failed to produce any evidence that the Defendant had either actual or constructive knowledge regarding the drops of water in which Plaintiff alleges she fell. As set forth above, both the Plaintiff and Ms. Murray conceded that they did not know how long the water was on the floor before the Plaintiff fell. Plaintiff did not see anything on the floor before she fell. As Plaintiff walked toward the elevator, her vision of the floor was not blocked. *R.* at 136 - 137 [RE 8 - 9]; *Security Coverage* at 14 - 20. Two persons, just prior to Plaintiff falling, walked over the area where Plaintiff fell without incident. *R.* at 517 - 518 [RE 3, 2]; *Security Coverage* at 14 - 20. *See Bonner,* 117 So.3d 688 (¶ 38). In an attempt to avoid summary judgment, Plaintiff again relied on Mr. Del Marva's musings regarding the location of Defendant's pool and the use of the elevators by Defendant's employees in an attempt to accomplish her burden on this issue. *R.* at 643 [RE 29].

As also outlined above, irrespective of Mr. Del Marva's unsupported musings, no proof was presented by the Plaintiff to support a claim that the Defendant had either actual or constructive knowledge of any water droplets on the floor prior to Plaintiff falling.

In an attempt to find proof to support her claim, Plaintiff engaged in extensive discovery. Plaintiff took the 30(b)(6) deposition of the Defendant and she took the depositions of six (6) of Defendant's current and former associates (*Record Table of Contents* at III). After this extensive discovery, the Plaintiff admitted she could not prove her claims: "After undertaking additional discovery, it is clear there (sic) that the source of the water, as well as the length of time it existed prior to plaintiff's fall, are material facts which are disputed **and unprovable by either party**..." *R.* at 320.

Undeterred by her lack of proof, Plaintiff tried to forward a novel argument in an effort to survive summary judgment. Plaintiff's argument was that while the Defendant retained security coverage of her fall, the Defendant had a duty to retain an additional, unspecified amount security coverage of the elevator lobby. And, because Defendant's security coverage system recorded over itself, the Defendant breached its duty to retain this additional, unspecified amount of coverage and was guilty of spoliation of evidence.

B. Spoliation of Evidence

Plaintiff claims the reason she cannot sustain her burden of proof is Defendant's "conscious decision not (sic) preserve the video evidence in this matter." *R.* at 323. Contrary to this assertion, the Defendant, pursuant to its policy, did retain surveillance coverage of the subject incident and in so doing, it retained exactly what Plaintiff asked it to retain (even before Plaintiff's attorney asked for it to be retained). Irrespective of the fact that the Defendant retained the exact coverage of the subject incident Plaintiff requested, Plaintiff claimed, without any legal or factual basis, that the Defendant had a duty to retain an additional, unspecified amount of coverage.

Plaintiff asserts, without any legal basis, that the Defendant had a duty to retain an additional, unspecified amount of surveillance coverage. Plaintiff then builds on this non-existent duty to claim, without proof, that this additional coverage would have provided "material, probative and conclusive evidence as to the source of the water and the time it was on the floor..."[4] *R.* at 323 - 324. Plaintiff then segues from this unsupported legal duty and this unsupported factual premise to the speculative conclusions of Mr. Del Marva, contained in his

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[4] Neither Plaintiff, her expert or her attorneys ever explain how they know what would have been seen on any additional coverage that would have been reviewed.

affidavit. As set forth above, Mr. Del Marva was tendered by the Plaintiff as an expert in hospitality safety. *R.* at 632 [RE 27]. Plaintiff and Mr. Del Marva are wrong.

1. No Duty

Plaintiff's spoliation of evidence argument fails as a matter of law because the Defendant had no legal duty to retain an additional, unspecified amount surveillance coverage.

Under Mississippi law, no legal duty exists that requires the Defendant to preserve any video coverage, and certainly no legal duty exists requiring the Defendant to preserve an additional, unspecified amount of surveillance coverage beyond that which was preserved. The Mississippi Court of Appeals in *Kimbrough v. Keenum*, 68 So.3d 738, 740 (¶ 11)(Miss.Ct.App. 2011), *cert denied* 69 So.3d 767 (Miss. 2011), held that "[t]he existence of a duty is a 'question of law to be determined by the court. The plaintiff must prove that a duty exits 'to conform to a specific standard for the protection of others against the unreasonable risk of injury. In a motion for summary judgment, the non-movement must put forth evidence that the movant breached an established duty." (citations omitted).

In the case *sub judice*, despite having no duty to retain its surveillance coverage, the Defendant preserved its security coverage of the subject incident. *R.* at 742 [RE 18]. The investigator handling this incident (Paul Dillon) saved the coverage of Plaintiff's incident starting at a point before Plaintiff entered the elevator lobby. *R.* at 493 [RE 22]. Mr. Dillon retained this coverage because he wanted to ensure the entire incident was retained on tape. *R.* at 493 [RE 22]. To ensure the entire incident was preserved, Mr. Dillon archived security coverage of the subject incident beginning 26 seconds before Plaintiff entered the elevator lobby. *R.* at 696 - 697 [RE 23 - 24].

Plaintiff had the burden of putting forth evidence that the Defendant breached an established duty when it retained this coverage of the subject incident. Plaintiff did not sustain

her burden. Plaintiff failed to prove that the Defendant had a legal duty to preserve any security coverage, and she failed to prove that the Defendant had a duty to preserve an additional, unspecified amount of surveillance coverage beyond that which was preserved. Therefore, the trial court properly granted the Defendant summary judgment.

Irrespective of Mississippi law, putative hospitality expert Del Marva, in an attempt to create a legal duty where the courts have not, never defined the parameters of the duty he wanted to create. Mr. Del Marva never said how much additional coverage was required to be retained in order to satisfy his vague dictate. *R.* at 641 - 642 [RE 37, 28]. Would saving an additional five (5) minutes comply with his duty? Or was it saving five (5) hours, five (5) days or the entire 7 - 10 days that had not yet been recorded over that had to be done in order to satisfy his duty?

Because no legal duty exists that requires the Defendant to retain an additional, unspecified amount surveillance coverage, the trial court properly granted summary judgment.

2. No Independent Cause of Action

Under Mississippi law, no independent cause of action for spoliation of evidence exists. *Richardson v. Sara Lee Corp.*, 847 So.2d 821, 824 (¶6)(Miss. 2003). The Mississippi Supreme Court has refused to recognize a separate tort for spoliation of evidence. *Dowdle Butane Gas Co. v. Moore*, 831 So.2d 1124, 1135 (¶28)(Miss. 2002).

Plaintiff, in her Complaint, did not raise a claim based upon spoliation of evidence. *R.* at 11. During oral argument, Plaintiff's counsel told the trial court the Plaintiff was not asserting a separate tort claim for spoliation of evidence. *H.T.* at 24 [RE at Tab 2]. However, irrespective of these admissions, Plaintiff's hospitality safety expert Del Marva speculated in his affidavit that the standard of care in the hospitality industry required the Defendant to preserve all video evidence

of Plaintiff's fall.[5] *R.* at 641 [RE 37]. Then, Plaintiff's hospitality safety expert claimed that Defendant's deviation from his alleged, vague standard of care was the direct, proximate cause of the injuries the Plaintiff sustained when she fell. *R.* at 644 [RE 38]. While Plaintiff and her attorneys properly disavowed a separate negligence claim for spoliation of evidence, Plaintiff's hospitality safety expert attempted to assert such a separate, negligence claim for spoliation of evidence. Unfortunately for Plaintiff's expert, his inappropriate opinion was properly rejected by Plaintiff and her attorneys.

Because the claim of spoliation was not plead, because Mississippi does not recognize a separate tort claim for spoliation of evidence and because Plaintiff's attorneys admit that Mr. Del Marva's affidavit opinion is contrary to Mississippi law, any separate claim premised on spoliation of evidence fails as a matter of law.

3. No Evidence of Intentional Spoliation or Fraud

In the case at bar, no evidence was lost or destroyed. The Defendant retained surveillance coverage of the subject incident; it retained exactly what Plaintiff requested be retained. In an attempt to create an issue where none exists, the Plaintiff assails the amount of coverage retained. Plaintiff is not entitled to a negative inference where no evidence was destroyed and where an additional, unspecified amount surveillance coverage was not retained.

In her brief, Plaintiff relies on the Mississippi Supreme Court holding that "[w]hen evidence is lost or destroyed by one party...thus hindering the other party's ability to prove his case, a presumption is raised that the missing evidence would have been unfavorable to the party

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5 Mr. Del Marva did not say how much coverage needed to be retained to comply with his dictate. He simply stated all video evidence of the fall and "the circumstances leading to the undisputed fact in this matter that water was on the floor in the elevator lobby prior to plaintiff's fall" should be retained. *R.* at 641 [RE 37].

responsible for its loss." *Thomas v. Isle of Capri Casino*, 781 So.2d 125, 133 (¶37)(Miss. 2001). *Brief of Appellant* at 6, 10, 14, 15, 18, 19, 20, 23, 44. *Thomas* is inapplicable to the case *sub judice.*

In *Thomas*, the issue presented was a gaming dispute. The defendant was required by law to report the subject gaming dispute to the Gaming Commission; something it failed to do. *Thomas*, 781 So.2d at 133 (¶ 39). As the *Thomas* Court stated: "The casino was under a statutory duty to contact the Commission when it became clear that the dispute had not been resolved to Thomas's satisfaction. Had the Isle done so, a more thorough investigation many have ensued, and the slot machine would have been preserved." *Id.* at 133 (¶ 39). In the case at bar, unlike the defendant in *Thomas*, the Defendant did not violate any legal duties that it was under.

In *Thomas,* the defendant not only violated Mississippi law when it failed to notify the Commission of the incident, it failed to comply with its own internal procedures when it failed to notify its slot surveillance department of the issue. *Id.* at 131. In the case at bar, the Defendant did not violate Mississippi law nor did it violate its own internal policies. The Defendant retained surveillance coverage of the subject incident pursuant to its policies.

In *Thomas,* the evidence was destroyed **after** a claim was filed and pending. *Thomas*, 781 So.2d at 130. In the case at bar, the evidence was retained. Further, Plaintiff's Notice of Claim letter was dated October 7, 2008. *R. at 850* [RE 26]. This notice of claim and representation was sent 24 days after the subject incident. Defendant's system retained coverage for 7 - 10 days. *Depo. of Tim Widas* R at 742 - 743 [RE 18, 25]. Therefore, Defendant's system had already recorded over itself when it received Plaintiff's attorney's letter. Fortunately, the Defendant had already preserved the exact evidence Plaintiff requested be preserved.

Even though *Thomas* is not applicable, when this presumption regarding evidence that has been destroyed referenced in *Thomas* can be raised, was clarified in *Bolden et ux v. Murray et al*, 97 So.3d 710 (Miss.Ct.App. 2012).

In *Bolden,* 97 So.3d at 717 (¶ 27 - ¶ 30, ¶ 32), the car that was at issue in the litigation was destroyed. The plaintiffs claimed that defendant's failure to preserve the car for their investigative purposes gave rise to an adverse inference that any evidence that might have been found would have shown Murray to be the driver of the vehicle. *Bolden,* 97 So.3d at 717 (¶27). The plaintiff's argument was rejected and the *Bolden* Court held that plaintiffs were not entitled to a negative inference regarding the loss of evidence because they failed to present evidence of intentional spoliation or fraud. *Bolden,* 97 So.3d at 718. As the *Bolden* Court stated: "...the mere absence of the vehicle - and the failure of the Boldens to provide any evidence of intentional or negligent destruction or negligent entrustment of the vehicle to IAA - does not allow the Boldens claim of spoliation to survive summary judgment." *Bolden*, 97 So.3d at 718 - 719 (¶ 32).

In the case at bar, as set forth above, the security coverage of the subject incident was retained pursuant to Defendant's procedures. The amount of coverage Defendant retained was done at the discretion of the investigator handling the incident. *R.* at 582, 585 - 586 [RE 21, 19 - 20]. The investigator handling this incident, Paul Dillon, saved the coverage of Plaintiff's incident starting at a point before Plaintiff entered the elevator lobby. *R.* at 493 [RE 22]. Mr. Dillon retained this coverage because he wanted to ensure the entire incident was retained on tape. *R.* at 493 [RE 22]. To ensure the entire incident was preserved, Mr. Dillon archived security coverage of the subject incident beginning 26 seconds before Plaintiff entered the elevator lobby. *R.* at 696 - 697 [RE 23 - 24]. Tim Widas, Defendant's Director of Surveillance

testified regarding the amount of coverage retained and whether it was in compliance with Defendant's policies: "I don't see a need to see the video before that time." *R.* at 741, 744 [RE 39, 40].

Plaintiff offered no evidence that the Defendant failed to comply with its policies and/or that it destroyed any evidence. Plaintiff offered no evidence that the Defendant or its employees engaged in intentional spoliation or fraud. The evidence offered proves that the Defendant complied with its own internal policies when Mr. Dillon retained surveillance coverage, starting 26 seconds before the subject incident and documenting the subject incident. The failure of the Plaintiff to provide any evidence of intentional spoliation, fraud or negligent destruction of the surveillance coverage, issues on which she bears the burden of proof, prohibited Plaintiff's theory of spoliation to survive summary judgment. *Bolden*, 97 So.3d at 718 - 719 (¶ 32). Therefore, the trial court properly granted summary judgment.

4. Plaintiff's Spoliation of Evidence Claim is Irrelevant

Page v. Biloxi Regional Medical Center, 91 So.3d 642 (Miss.Ct.App. 2012)[6] also clarifies the *Thomas* decision relied on by the Plaintiff in her brief. In *Page,* plaintiff sat in a rented chair that collapsed, causing plaintiff to fall to the floor and be injured. *Page,* 91 So.3d 643 (¶ 4). After plaintiff's incident, defendant kept the chair in a back office. *Id.* However, during a routine floor sweep to remove debris from the hospital, the chair was discarded by an unknown employee of the defendant. *Id.* Because the defendant discarded the chair, the plaintiff asserted that he should receive a negative presumption that the chair would have conclusively established that the defendant either intentionally or negligently discarded the chair. *Page*, 91 So.3d at 645

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[6] The trial court judge in *Page* is the same trial court judge who decided the unpublished, interlocutory trial court ruling in *Johnson v. Imperial Palace of Mississippi, LLC et al*, on which Plaintiff relies. *Brief of Appellant* at 10, 15, 17, 26, 42.

(¶ 15). The trial court rejected plaintiff's claims and granted the defendant summary judgment. *Page*, 91 So.3d at 643 (¶ 1).

The *Page* Court affirmed the trial court's rejection of plaintiff's spoliation claim and held: "Further, had Page obtained the chair during the discovery process, it is very unlikely than an examination of the chair would have conclusively proven that it was broken before Page sat in it." *Page*, 91 S0.3d at 645 (¶17). More importantly, the *Page* Court stated: "Therefore, because Page failed to present evidence showing that BRMC breached its duty of reasonable care, he is unable to establish negligence, making the defectiveness of the chair and the spoliation of evidence irrelevant." *Page*, 91 S0.3d at 645 - 646 (¶17).

In the case *sub judice*, Plaintiff, after taking six (6) fact witness depositions and the 30(b)(6) deposition of the Defendant, failed to show that the Defendant breached its duty of reasonable care; she was unable to establish the Defendant was negligent regarding the droplets of water on the floor in which she alleges she fell. Therefore, under *Page*, because the Plaintiff failed to present evidence showing that the Defendant breached its duty of reasonable care, she is unable to establish negligence, making Plaintiff's spoliation of evidence argument as to the surveillance coverage irrelevant.

5. Paul Dillon

Plaintiff attempts to avoid Mississippi law by arguing that Paul Dillon knew the subject incident was a "significant matter" when it occurred and that this was a "liability matter" from the moment it occurred. *Brief of Appellant* at 22. The fact aside that Mr. Dillon's testimony does not change Mississippi law, Plaintiff takes some liberties with the testimony of Mr. Dillon.

First, Mr. Dillon did not recall this incident. *R.* at 482 [RE 41]. That said, what Mr. Dillon testified to regarding this issue is:

> Q. ...[T]ell me how you decided whether it was - - how there was liability or wasn't liability in your mind? And I'm not worried what they trained you. How did you make that decision in your mind?
>
> A. I just know what types of incidents we had to report on. **Anytime anyone slipped and fell.** Anytime anyone was injured, no matter how slight, you know, those things had to be reported.

R. at 690 - 691 [RE 41 - 42].

Simply, Mr. Dillon said that in all slip and fall incidents, a report is completed - that is standard practice. There is nothing in the record that implies that Mr. Dillon did anything in the case at bar because he anticipated the Plaintiff would retain an attorney and file suit against the Defendant. When asked by Plaintiff's attorney about the legal concept of liability, Mr. Dillon simply described for Plaintiff's attorneys how he (Dillon) investigated a slip and fall incident. *R.* at 691 - 696 [RE 42 - 46, 23].

Finally, Mr. Dillon said the coverage of the subject incident that was retained starts 26 seconds before the subject incident because that is where he decided it should start. *R.* at 697 [RE 24]. He made this decision to start the saved coverage at a point before Plaintiff entered the elevator lobby. *R.* at 699 [RE 47]. As Tim Widas, Defendant's Director of Surveillance testified regarding this issue of how much coverage to save: "I don't see a need to see the video before that time." *R.* at 741, 744 [RE 39, 40].

The evidence in the record is that all slip and fall incidents were investigated, and a report generated. There is no evidence in the record that there was a pending legal dispute, or determination that litigation was imminent, when Mr. Dillon investigated this claim.

6. Defendant Used Reasonable Care

Plaintiff asserts that summary judgment should have been denied because there is no evidence the Defendant inspected its premises, thereby creating a fact question regarding whether

the presence of water on the floor violated a premises owner's duty to keep it premise in a reasonably safe condition. *Brief of Appellant* at 31. Plaintiff's argument fails both legally and factually.

Under Mississippi law, business owners have a duty to invitees to exercise reasonable care to keep the business premises in a reasonably safe condition and to warn of dangerous conditions which are not readily apparent to the invitee. *Bonner v. Imperial Palace of Mississippi, LLC,* 117 So.3d 678, 682 (¶ 11)(Miss.Ct.App. 2013).

In support of her contention that there is a fact question on this issue of reasonable care, Plaintiff cites *Elston,* 908 So.2d at 776 (¶ 17). *Brief of Appellant* at 31. Plaintiff's reliance on *Elston* is misplaced. *Elston* does not hold, as Plaintiff states, that "[w]here evidence does not exist as to the last time a premises operator had inspected a floor for water slippage (sic), and there is proof the premises operator had ample time to inspect the area, a question of fact exists for the jury whether the presence of water on the floor violated a premises operator's duty to keep its premises in a reasonably safe condition." *Brief of Appellant* at 31. What the *Elston* Court held was that plaintiff presented enough evidence for a jury to conclude that the defendant caused the condition about which the plaintiff complained. *Elston,* 908 So.2d at 774 (¶ 12).

In the case *sub judice,* as set forth above, Plaintiff failed to provide any evidence that the Defendant was responsible for the few droplets of water on the floor. Plaintiff's argument also fails factually.

Michael Hoffer, one of Defendant's security officers at the time of the subject incident (and a current Hattiesburg police officer), testified that on those occasions when water was dripped, EVS was called to remedy the issue. R. at 709 - 710 [RE 48 - 49], and R. at 712 - 715. Therrell Glen Boler, who was employed by the Defendant as a security officer at the time of the

subject incident, testified that when a spill was observed, EVS was called to clean the spill. *R.* at 720 [RE 50]. Mr. Boler said that EVS continuously walked around Defendant's property with mops and brooms looking for issues. *Id.* at 721 - 723. Mr. Boler also testified that EVS had a regular cleaning schedule for the elevators. *Id.* at 724. Mr. Boler's testimony was affirmed by Ken Figsby, one of Defendant's security guards. *R.* at 728 - 730. Mr. Figsby testified that EVS walked through the elevator lobbies on a regular basis. *R.* at 729. Yvernnee Washington, one of Defendant's Security Shift Managers at the time of the subject incident, testified that she was not aware of any problems caused by guests, who had been at the pool, dripping water. *R.* at 733 - 735.

Defendant's effort to use reasonable care to keep the business premises in a reasonably safe condition, as described above, were effective. As stated above, Julia Jones was questioned about the time period of one year prior to the subject incident; June 2007 and July 2008. Ms. Jones testified that she was not aware of any incidents during this period of time where water was dripped in the elevator lobby (where Plaintiff fell), creating a hazard for other guests. *R* at 702, 703 - 704 [RE 32, 33 - 34]. Ms. Jones also testified that during this period of time, water on the floor in this elevator lobby was not an issue discussed by risk management. *Id.* at 704 - 706 [RE 34 - 36].

7. A Second Video

On appeal, in an attempt to obfuscate the issues, Plaintiff claims there was a second video never produced by the Defendant. *Brief of Appellant* at 3, 5. Plaintiff's attorney said this second video would have come from a camera located on the elevator. *H.T.* at 25 [RE at Tab 2]. As Plaintiff knows, there was no second video. This issue of a second video is, at best, a red herring that has no relevance to the issues raised on appeal.

Plaintiff knows there was no second video. The only security camera (for the area where Plaintiff fell) that was in existence at the time of the subject incident was the one from which the security coverage was saved. *R.* at 590 - 592. Tim Widas, Defendant's Director of Surveillance (*R.* at 568) testified, when asked about a second video: "Honestly, no, I do not see how that is possible." *R.* at 591.[7] Mr. Widas' testimony is supported by the fact that Plaintiff did not mention seeing a video of her fall when she gave a statement six (6) days after this incident, on September 19, 2008. *R.* at 660 - 674. Even assuming Plaintiff's allegation of a second video is accurate, this alleged second video offers nothing new. Plaintiff testified in her deposition that this alleged second video did not contain any information that was not contained on the surveillance coverage that was produced. *R.* at 256 - 258.

Finally, Plaintiff never pursued this second video in the trial court. While Plaintiff filed a Motion to Compel the production of this alleged, second video (R. at 97 - 99), Plaintiff abandoned her motion. Plaintiff never pursued her motion to a hearing. Further, in *Plaintiff's Supplemental Memorandum in Support of her Opposition to Defendant's Motion for Summary Judgment,* Plaintiff never raised the issue of a second video. *R.* at 320 - 339.

8. Res Ipsa Loquitur

The bottom line of Plaintiff's argument is, in reality, Plaintiff's attempt to create liability using the doctrine of *res ipsa loquitur*. *Res ipsa loquitur*, meaning literally "the thing speaks for itself," is a circumstantial-evidence doctrine allowing the jury to draw an inference of the defendant's negligence. *Austin v. Baptist Mem'l Hosp. N. Miss.*, 768 So.2d 929, 932 (¶ 10) (Miss.Ct.App.2000). It is "one form of circumstantial evidence a plaintiff may rely on in certain circumstances." *Id.* However, the Mississippi Supreme Court has held that the doctrine does not apply in slip-and-fall cases. *Douglas v. Great Atl. & Pac. Tea Co.*, 405 So.2d 107, 111

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7 *See also Deposition of Therrell Glen Boler, R.* at 375 - 376.

(Miss.1981) ("[W]e recognize the well settled rule which disallows the application of the doctrine of res ipsa loquitur to slip and fall cases."); *see also Jacox,* 908 So.2d at 184 (¶ 7) (quoting *Tisdale,* 185 So.2d at 917) ("[T]he doctrine of res ipsa loquitur is inapplicable in cases of this kind."). Therefore, Plaintiff's attempts to assess liability under the doctrine of *res ipsa loquitur* fail, and the Defendant is entitled to summary judgment.

CONCLUSION

The trial court properly granted summary judgment and the Memorandum Opinion and Final Order Granting Motion for Summary Judgment of the trial court should be affirmed.

After engaging in extensive discovery, in which Plaintiff took the 30(b)(6) deposition of the Defendant as well as the depositions of six (6) of Defendant's current and former associates, Plaintiff failed to produce any evidence relative to how the few drops of water got on the floor. She also failed to produce any evidence regarding how long these drops of water had been on the floor prior to her fall. As the Plaintiff admitted: "After undertaking additional discovery, it is clear there (sic) that the source of the water, as well as the length of time it existed prior to plaintiff's fall, are material facts which are disputed **and unprovable by either party**..." *R.* at 320.

In an attempt to escape her failure of proof, Plaintiff tries to create a legal duty where none exists. Plaintiff claims the Defendant had a duty to preserve an additional, unspecified amount of surveillance coverage, even more than that which she requested be retained. However, Plaintiff's argument fails as a matter of law. "The existence of a duty is a question of law to be determined by the court. The plaintiff must prove that a duty exits to conform to a specific standard for the protection of others against the unreasonable risk of injury. In a motion for summary judgment, the non-movement must put forth evidence that the movant breached an established duty." *Kimbrough,* 68 So.3d at 740 (¶ 11). In the case at bar, the Plaintiff failed to

prove that the Defendant had a legal duty to preserve an additional, unspecified amount of security coverage beyond that which was retained.

Undeterred, the Plaintiff then argues that the putative violation of this non-existent duty created an issue of spoilation of evidence. Again, Plaintiff's argument fails. The failure of the Plaintiff to provide any evidence of intentional spoliation, fraud or negligent destruction of the surveillance coverage, issues on which she bears the burden of proof, prohibits her theory of spoliation to survive summary judgment. Further, Plaintiff fails to show that the Defendant breached its duty of reasonable care; she is unable to establish the Defendant was negligent regarding the droplets of water on the floor in which she alleges she fell. Therefore, because the Plaintiff has failed to present evidence showing that the Defendant breached its duty of reasonable care, she is unable to establish negligence, making Plaintiff's spoliation of evidence argument as to the surveillance coverage irrelevant.

Under Mississippi law and the facts presented in the record, the trial court properly granted summary judgment and the Memorandum Opinion and Final Order Granting Motion for Summary Judgment of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Patrick R. Buchanan, do hereby certify that I have this day mailed, United States mail, first class postage prepaid, a true and correct copy of the above and foregoing pleading to the following:

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Honorable Lawrence P. Bourgeois, Jr.
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This the 4 day of October, 2013.

PATRICK R. BUCHANAN