IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2019-CA-00307-COA

MARLENE NOLAN **APPELLANT**

v.

GRAND CASINOS OF BILOXI LLC **APPELLEE**

DATE OF JUDGMENT:	11/15/2018
TRIAL JUDGE:	HON. CHRISTOPHER LOUIS SCHMIDT
COURT FROM WHICH APPEALED:	HARRISON COUNTY CIRCUIT COURT, SECOND JUDICIAL DISTRICT
ATTORNEY FOR APPELLANT:	MATTHEW G. MESTAYER
ATTORNEYS FOR APPELLEE:	TAYLOR BRANTLEY McNEEL JACOB ARTHUR BRADLEY
NATURE OF THE CASE:	CIVIL - PERSONAL INJURY
DISPOSITION:	AFFIRMED - 06/09/2020
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE J. WILSON, P.J., GREENLEE AND McCARTY, JJ.

GREENLEE, J., FOR THE COURT:

¶1. Marlene Nolan was injured when she fell down some steps[1] at the Harrah's Gulf Coast Hotel and Casino. Marlene filed a premises-liability suit in the Harrison County Circuit Court against Grand Casinos of Biloxi LLC ("Grand Casinos"), the entity that operated Harrah's at the time of her fall. In the suit, Marlene alleged that Grand Casinos was liable for her injuries and that the subject stairs constituted an unreasonably dangerous condition. After two years of discovery, Grand Casinos moved for summary judgment, contending that

[1] The architectural feature included three descending steps. We hereinafter refer to the feature as "stairs," which is consistent with the parties' briefs.

the stairs were not unreasonably dangerous. The circuit court granted Grand Casinos' motion for summary judgment and dismissed the action. On appeal, Marlene argues that the circuit court erred by granting summary judgment. Finding no error, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2. The facts in this case are largely undisputed. On February 9, 2015, seventy-three-year-old Marlene Nolan and her partner, Richard Nolan, checked-in at the Harrah's Gulf Coast Hotel and Casino in Biloxi, Mississippi. The next morning, on February 10, 2015, the Nolans decided to visit other casinos. The Nolans waited on the casino trolley for a period of time before asking for directions to the casino's sky bridge. The sky bridge connected Harrah's to the neighboring Golden Nugget casino. According to Marlene, a lady who she believed to be a Harrah's employee directed the Nolans to exit the lower level concourse and go through the "double doors."

¶3. After receiving those directions, the Nolans exited the concourse and walked through the double doors and onto the casino's pool deck. On the deck, Marlene asked another lady[2] for directions, who instructed them to "follow the hall[,] go around the corner[, and] look for the [sky bridge] sign." The Nolans continued their walk down the hallway and around the corner. Marlene then fell down stairs that consisted of three steps. At her deposition, Marlene testified that she never saw the stairs. Marlene stated, "I was looking for the sign, which is what [the lady] told me to do, just follow the road and look for the sign." As a result of the fall, Marlene suffered numerous injuries, including a broken hip.

[2] At her deposition, Marlene testified that she believed the lady was another casino employee, but the lady remained unidentified.

¶4. On July 21, 2016, Marlene filed suit in the Harrison County Circuit Court against Caesars Entertainment Corporation[3] claiming the stairs were a dangerous condition. In her complaint, Marlene argued that she "slipped and fell down stairs," and that Grand Casinos was liable for "fail[ing] to keep the premises in a reasonably safe condition" and for "fail[ing] to warn [her] of a dangerous condition which was not readily apparent." Discovery proceeded for two years. During that time, both parties designated expert witnesses. Marlene designated Dennis Cowart, an architect, and Grand Casinos designated Peter Combs, also an architect.

¶5. On July 13, 2018, Grand Casinos moved for summary judgment under Mississippi Rule of Civil Procedure 56, attaching nine exhibits to the motion.[4] Grand Casinos argued that the subject stairs were a common architectural feature frequently encountered by customers. Additionally, Grand Casinos claimed that Marlene's allegations were insufficient to create a genuine issue of material fact. Marlene responded in opposition on August 2, 2018, attaching ten exhibits.[5] Marlene contended that the subject stairs were unreasonably dangerous because of "design defects, [noncompliance] with building codes, and other

---

[3] By an agreed order, Grand Casinos of Biloxi LLC was substituted for Caesars Entertainment Corporation.

[4] Those exhibits included (1) the complaint; (2) Marlene's deposition; (3) Cowart's expert report; (4) Combs's expert report; (5) Cowart's expert rebuttal report; (6) Cowart's deposition; (7) Amanda Hansen's Rule 30(b)(6) deposition; (8) surveillance-video footage; and (9) a cell-phone video.

[5] Many of the exhibits were the same exhibits attached to Grand Casinos' motion. The additional exhibits included (1) a photograph of the stairs; (2) a photograph of the stairs' railing; and (3) the City of Biloxi Code of Ordinances.

applicable regulations." To support this position, Marlene cited seven defects in the subject stairs. Those defects included: (1) "[t]he stairs did not have a contrasting edge marking on the leading edge of the stairs"; (2) "[t]he stairs were a monolithic non-contrasting color"; (3) "[t]here was no signage to indicate a change in level or step"; (4) "[t]here was poor lighting for discerning the edge of steps both during daylight and nighttime conditions"; (5) "[p]oor location of directional signage to Sky Bridge"; (6) "[the stairs] had non-uniform step risers heights and tread depths in violation of the [International Building Code (IBC)]"; and (7) "[t]he beginning of the graspable rail on either side of, and at the top of the steps is obscured by the adjacent poles supports." She also argued that Grand Casinos was negligent per se because it "violated the City of Biloxi Code of Ordinances and the IBC."

¶6. After a hearing on Grand Casinos' motion, the circuit court granted summary judgment in favor of Grand Casinos, holding that the stairs did not constitute an unreasonably dangerous condition. The court alternatively held that "even if the stairs were a dangerous condition," "it is irrelevant" because Marlene's "failure to look precisely where she was walking [was] sufficient to grant summary judgment." The court also dismissed Marlene's negligence per se argument, finding that "there [was] no proof in the record that any code violations were the proximate cause of her fall."

¶7. Following the circuit court's order, Marlene filed a motion to alter or amend the judgment under Mississippi Rule of Civil Procedure 59(e). That motion was denied. Marlene then filed the instant notice of appeal.

STANDARD OF REVIEW

¶8. We review a trial court's decision granting or denying summary judgment de novo. *Robinson v. Holmes County*, 284 So. 3d 730, 732 (¶7) (Miss. 2019). "Summary judgment is proper only when no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law." *Owen v. Pringle*, 621 So. 2d 668, 670 (Miss. 1993). And to determine whether there is a genuine issue of material fact, we will review "all admissions, answers to interrogatories, depositions, affidavits, and any other evidence, viewing the evidence in a light most favorable to the non-movant[,]" in this case, Marlene. *Elliott v. AmeriGas Propane L.P.*, 249 So. 3d 389, 395 (¶22) (Miss. 2018); *see also* M.R.C.P. 56(c) ("The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.").

DISCUSSION

¶9. Marlene raises two issues on appeal. First, she argues that the circuit court erred by determining that the subject stairs were not a dangerous condition. Second, she claims that the circuit court erred by finding in the alternative that her failure to see the stairs precluded liability. In short, we agree with the circuit court that the stairs were not an unreasonably dangerous condition. Because we find the first issue dispositive, we need not reach the circuit court's alternative holding.

¶10. Premises-liability law in the state of Mississippi is well established. Here, the parties agree that Marlene was a business invitee of Grand Casinos. "[A] business 'owes a duty to

an invitee to exercise reasonable care to keep the premises in a reasonably safe condition . . . .'" *Patterson v. Mi Toro Mexican Inc*., 270 So. 3d 19, 21 (¶7) (Miss. Ct. App. 2018) (quoting *Jerry Lee's Grocery Inc. v. Thompson*, 528 So. 2d 293, 295 (Miss. 1988)). "However, 'the store owner is not an insurer of business invitees' injuries,' and 'mere proof that the invitee fell and was injured while on the premises is insufficient to establish liability.'" *Id.* (quoting *Jones v. Wal-Mart Stores E. LP*, 187 So. 3d 1100, 1104 (¶12) (Miss. Ct. App. 2016)). Instead, Grand Casinos, as a business owner, owes certain duties to its customers to protect them from "dangerous conditions" on the premises. *Jones*, 187 So. 3d at 1103 (¶12). The often-cited *Jerry Lee's Grocery Inc.* case outlines those duties:

> [I]f the operator is aware of a dangerous condition, which is not readily apparent to the invitee, he is under a duty to warn the invitee of such condition . . . . When a dangerous condition on the premises is caused by the operator's own negligence, no knowledge of its existence need be shown. When a dangerous condition on the premises . . . is caused by a third person unconnected with the store operation, the burden is upon the plaintiff to show that the operator had actual or constructive knowledge of its presence.

528 So. 2d at 295 (citations omitted). But regardless of the precise theory of liability, Marlene is required to prove that her injuries were caused by a dangerous condition. *See Stanley v. Boyd Tunica Inc.*, 29 So. 3d 95, 97-98 (¶10) (Miss. Ct. App. 2010). Because "[i]n every premises-liability case, the plaintiff must show that a dangerous condition exists." *McCullar v. Boyd Tunica Inc.*, 50 So. 3d 1009, 1012 (¶13) (Miss. Ct. App. 2010).

¶11. In its appellate brief, Grand Casinos argues that it is entitled to summary judgment as a matter of law because Marlene herself cannot say that the stairs at issue constitute an unreasonably dangerous condition, as stairs are a normally encountered danger. Grand

Casinos further argues that Marlene failed to meet her burden on summary judgment because the significant and probative evidence she set forth does not render the stairs defective or unreasonably dangerous. Marlene acknowledges Grand Casinos' first argument—that the subject stairs are a normally encountered danger—but contends that a normally encountered danger may still be unreasonably dangerous if that condition possesses a physical defect.

¶12. Marlene relies heavily on *Davis* and *Renner* to argue that stairs may be an unreasonably dangerous condition based on their proximity to other conditions on the premises. In *Davis v. Variety Stores Inc.*, No. 3:12-cv-267-DPJ-FKB, 2014 WL 2967908, at *1 (S.D. Miss. July 1, 2014) (applying Mississippi substantive law), the plaintiff tripped and fell over a clothing rack located on the defendant's premises. After discovery, the defendant filed a motion for summary judgment, arguing that clothing racks were not an unreasonably dangerous condition. *Id.* at *2. In denying that motion, the trial court reasoned that the *positioning* of the clothing racks on the defendant's premises may have created an unreasonably dangerous condition. *Id.* at *3. In *Renner v. Retzer Resources Inc.*, 236 So. 3d 810, 811 (¶2) (Miss. 2017), the plaintiff was injured after tripping over a highchair located in a McDonald's restaurant. The trial court initially granted summary judgment to the defendant. *Id.* at 813 (¶13). But on appeal, our supreme court reversed, concluding that a question of fact existed as to whether the *placement* of those highchairs constituted an unreasonably dangerous condition. *Id.* at 815 (¶21).

¶13. We find *Davis* and *Renner* distinguishable from the instant case. Both the *Davis* court and the *Renner* court found it conceivable for a jury to conclude that the positioning or

placement of the defendants' (moveable) furnishings (i.e., clothing racks and highchairs) created an unreasonably dangerous condition. *Davis*, 2014 WL 2967908, at *3; *Renner*, 236 So. 3d at 815 (¶19). But unlike *Davis* and *Renner*, the record in the instant case is devoid of any probative evidence demonstrating that the location of the subject stairs created an unreasonably dangerous condition.

¶14. Furthermore, the stairs in the instant case were a type of condition that invitees normally expect to encounter. *See Jones*, 187 So. 3d at 1104 (¶14) ("Mississippi has long recognized that normally encountered dangers such as curves, sidewalks, and *steps* are not hazardous conditions." (emphasis added)) (quoting *Knight v. Picayune Tire Servs. Inc.*, 78 So. 3d 356, 359 (¶9) (Miss. Ct. App. 2011)); *see also Martin v. Trustmark Corp.*, 292 So. 3d 245, 248 (¶12) (Miss. Ct. App. 2019) ("As this Court has held before, common architectural conditions in a building are not considered unreasonably dangerous conditions." (quotation marks and brackets omitted)) (quoting *Benson v. Rather*, 211 So. 3d 748, 754 (¶22) (Miss. Ct. App. 2016)).

¶15. Marlene also argues that the stairs are unreasonably dangerous based on the existence of seven alleged defects, none of which concern the location of the stairs. In its order granting summary judgment, the circuit court reviewed those seven defects and divided them into three distinct categories. The categories included (1) "code violations," (2) "deviation from common practice," and (3) "human factors and accident reconstruction opinions." For purposes of clarity, we review the circuit court's findings as outlined in those categories.

¶16. As to the first category, code violations, Marlene alleged that the stairs violated two

provisions of the IBC. Marlene first asserts that the stairs had no contrasting edge marking on the leading edge of each stair as prescribed under IBC § 1009.7.4 (2012). She also claims that the stairs violated a provision of the IBC by having non-uniform riser heights and tread depths. Grand Casinos' expert witness, Peter Combs, stated in his report that tread marking strips are required on stairs that "intersect[] with a sloping sidewalk." Marlene's expert, Dennis Cowart, agreed with this point at his deposition. He also testified that he agreed that the purpose of putting tread marking strips on the leading edges of stairs is not to alert a customer that the stairs are present, *but to alert the individual that the bottom of the surface below the stairs is sloped.* Upon careful review of the record, the first and the second alleged defects are immaterial for purposes of summary judgment because Marlene failed to negotiate the steps or the surface below the steps. The record shows that Marlene fell at the top of the stairs (or before she took *any* steps down the stairs). Because she never debated the surface below the bottom step (or any of the steps), we cannot conclude that these alleged defects (i.e., tread marking strips and non-uniform riser heights and tread depths) created an unreasonably dangerous condition. Clearly, these defects were not the proximate cause of Marlene's injuries.

¶17. The second category includes two alleged defects that relate to deviations from common architectural practice. Marlene claims that Grand Casinos deviated by permitting the stairs to be constructed in a monolithic, non-contrasting color. She also alleges that Grand Casinos deviated by not installing warning signs or markings that indicated a change in level or step. According to the circuit court, our common law provides that as a matter of

law business owners are not under a duty to provide visual warnings, including color variations, to warn its customers. We agree. Our common law has long held that business owners are "[not] expected to guard against events which are not reasonably to be anticipated or which are so unlikely that the risk would be commonly disregarded." *E.g.*, *Stanley v. Morgan & Lindsey Inc.*, 203 So. 2d 473, 476 (Miss. 1967) (citing *Reaves v. Wiggs*, 192 So. 2d 401, 403 (Miss. 1966)). In a more recent case, for example, this Court affirmed a finding of summary judgment where the plaintiff fell off an unmarked sidewalk curb. *Thompson v. Chick-Fil-A Inc.*, 923 So. 2d 1049, 1053 (¶15) (Miss. Ct. App. 2006) ("We are unpersuaded that the absence of such markings violated Chick-fil-A's duty to exercise reasonable care to keep the premises in a reasonably safe condition."). The third and fourth alleged defects are without merit.

¶18. Finally, the third category includes three alleged defects relating to human factors, such as perception. The alleged defects include that (1) the stairs were poorly lit, (2) the sky bridge sign was in a poor location, and (3) the handrails were obscured by adjacent pole supports. In its order, the circuit court found that Cowart was unqualified to give opinions relating to human factors, stating "[Cowart] testified during his deposition that he had not received any special training concerning either the human factors of negotiating stairs or accident reconstruction with regard to causation of falls. His own admission in this regard precludes consideration . . . of his opinion on these . . . issues." We agree with the circuit court that Cowart was unqualified to offer expert testimony in this area of expertise. *See Delta Reg'l Med. Ctr. v. Taylor*, 112 So. 3d 11, 25 (¶41) (Miss. Ct. App. 2012) (citation

omitted); *see also Fields v. Gulf Pub'g Co. Inc*., 284 So. 3d 876, 883 (¶17) (Miss. Ct. App. 2019) ("Ultimately, an expert's opinion is reliable if it is grounded in the methods and procedures of science, not merely his subjective beliefs or unsupported speculation." (citations and internal quotation marks omitted)).

¶19. Regardless of Cowart's qualifications, we find that the alleged defects outlined in this category do not preclude a finding of summary judgment. To begin, the stairs were not poorly lit. Notably, the record shows that the subject stairs were located outside. It also shows that Marlene fell at 11:30 a.m. on a sunny day. We also do not agree with Marlene that the sky bridge sign was poorly located, as the record indicates the sign was located at the bottom of the steps. Lastly, we find no defects concerning the handrails or pole supports. In *Mercy Regional Medical Center v. Doiron*, 348 So. 2d 243, 243 (Miss. 1977), our supreme court questioned whether a hospital's failure to provide a handrail on a flight of thirty steps constituted a breach of its duty in keeping its premises in a reasonably safe condition. Finding the hospital did not breach its duty, our supreme court held:

> Most, if not all of us, use steps almost daily. Certainly any reasonable person recognizes the necessity of maintaining his balance when ascending or descending a stairway. Absent an unknown or concealed defect in a stairway, if it is otherwise reasonably safe, no negligence exists.
>
> . . . .
>
> We are of the opinion that plaintiff's injury belongs to [the] class of ordinary accidents which are properly imputed to the carelessness or the misfortune of the one injured.

Id. at 246.

¶20. Because we find the subject stairs are a common architectural condition that invitees

normally expect to encounter, and because Marlene has failed to put forth significant and probative evidence that the stairs were defective and, in turn, unreasonably dangerous, we affirm the circuit court's judgment that there exists no genuine issue of material fact and that Grand Casinos was entitled to judgment as a matter of law.

¶21. **AFFIRMED.**

BARNES, C.J., CARLTON AND J. WILSON, P.JJ., WESTBROOKS, McCARTY AND C. WILSON, JJ., CONCUR. McDONALD, J., CONCURS IN RESULT ONLY WITHOUT SEPARATE WRITTEN OPINION. LAWRENCE, J., NOT PARTICIPATING.