CHOCTAW TRIBAL SUPREME COURT
OF THE
MISSISSIPPI BAND OF CHOCTAW INDIANS

MISSISSIPPI BAND OF CHOCTAW INDIANS D/B/A CHOCTAW RESORT DEVELOPMENT ENTERPRISE — **DEFENDANTS/APPELANTS**

V. — **CAUSE NO. SC2017-06**

CAROL SHADDOX — **PLAINTIFF/APPELLEE**

Appellant Mississippi Band of Choctaw Indians D/B/A Choctaw Resort Development Enterprise[1] appeals the verdict and award against them rendered in an October 1, 2017 bench trial. The Appellee, Carol Shaddox, had duly filed suit under the Choctaw Tort Claims Act for injuries she sustained September 10, 2010 in a slip-and-fall instance while waiting in the entryway payment line to the Chef's Pavilion buffet cafeteria of the Silver Star hotel and casino complex.

On the day in question, Shaddox and her companion went to the buffet cafeteria and walked in the entranceway where ropes were hung between stanchion poles permanently affixed in the buffet queue to separate the lanes of the queue through which patrons lined up, as was required, to pay the cashier before entering the cafeteria. When hung with ropes of appropriate length, the ropes fall at a standard height to impede a person from tripping and falling to the floor. Shaddox walked down the first lane of the queue, rounded the end, and continued away from the cashier side of the queue back towards the entrance of the Chef's Pavilion. As she approached the end of the second of three lanes, she slipped on what she later stated was a puddle of clear wet substance. Shaddox testified that she "slipped on a clear liquid on the floor causing her to stumble or fall into the rope, which then caused her to further lose her balance and fall to the floor."[2] She landed on her shoulder and face and thereby dislocated her shoulder and fractured a piece of bone on her left shoulder.

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[1] We refer to Appellants Mississippi Band of Choctaw Indians D/B/A Choctaw Resort Development Enterprise collectively variously as the "Tribe;" "Appellant or Appellants"; "government;" 'resort;" or "defendant."
[2] Memorandum Opinion and Order of Judge Webb: pp. 2-3, sec. II "Facts", Para. 3.

She underwent hospitalization, two surgeries, and several months of physical therapy for her injuries. She testified that "she did not think she would have fallen if the rope had been higher." *Id.*

The plaintiff offered the *curriculum vitae* and expert testimony through deposition of Russell Kendizior. (Exhibit #7) He testified that based on statements of Shaddox that the stanchion rope was hung too low by industry standards and thereby created an unreasonably dangerous condition. Photographic evidence of the scene not taken on the date of Shaddox's injury showed stanchion ropes of various lengths hanging at various heights between stationary poles located various distances apart. At least one of the ropes in the photograph appeared to be below the average person's knee to approximately 12 inches from the floor. Based on that evidence, Kendzior's deposition stated that anything hanging below the knee, including stanchion ropes, creates a potential trip hazard.

Deposition testimony by resort employees and by the designated corporate representative admit there were no written or unwritten policies related to the hanging of stanchion ropes; sweeping the area in question periodically for slip or trip hazards in general; or relating to inspections for the prevention of patron falls. Another employee testified by deposition that he was responsible for putting the ropes between vertical rails and that the ropes sometimes get broken and have to be replaced with different [sized] ropes. The General Liability Manager for the Resort stated that they train all associates "if they see a hazard to correct it, including, you know, slip hazards or trip hazards." The EMT/Security Officer for the resort stated in her deposition that the resort has a safety meeting about twice a year and they go over what they are supposed to be looking for in regard to safety concerns and that if the rope had been too low, she would have noted it in her report. The EMT/Security Officer's report did not contain any reference to the rail or height of the stanchion ropes.

At the conclusion of the April 13, 2017 bench trial, the presiding judge issued his eleven-page Memorandum Opinion and Order wherein he granted an award of $34,617.47 for actual medical expenses incurred and $45,000.00 for engendered pain and suffering. He further held that neither the Tribe's failure to warn of an open and obvious danger nor their failure to have actual or constructive knowledge of a slippery substance on the floor applied in this particular instance to shield the Appellants from liability. From this ruling and award Appellants seek appellate review by this Court based upon two assignments of error which they argue.

STANDARD OF REVIEW

The Tribe argues for a *de novo* standard of review, reasoning that the trial court wrongly applied an erroneous legal standard to incorrectly conclude the low-hanging stanchion ropes, rather than a slippery substance on the floor, was the immediate causation leading to plaintiff's injurious fall. The court had ruled that CTCA § 25-1-5(v)'s "open and obvious defense" was unavailable to exempt them from governmental liability here because that "provision seemed to relate to a dangerous condition created by a third-party" rather than the negligence alleged by Shaddox's complaint. It alleged the negligent affixing and maintaining of the low-hanging stanchion rope was the dangerous condition most immediately relative to her injuries and that that hazard was created by the Tribe, thereby making the open and obvious defense statutorily unavailable for their governmental claim to sovereign immunity.[3]

By arguing for *de novo* review, Appellants ask that this court retry anew the full facts and law of the record. We disagree. The adopted standard of review shall be under the "clearly erroneous" standard whereby we will not disturb findings of the trial court "unless they are manifestly wrong, clearly erroneous or an erroneous legal standard was applied." *City of Jackson v. Perry,* 764 So.2d 373, 376 (Miss. 2000) quoting *Bell v. City of Bay St. Louis,* 467 So.2d 657, 661 (Miss. 1985). As adopted the CTCA under review mirrors the MTCA and although state law is not precedential in this jurisdiction, the Court acknowledges the development of the MTCA and in this case has decided to look to the laws of MS for guidance as directed by the CTC. "Cases brought under the MTCA are tried without a jury. The circuit court has the sole authority for determining the credibility of witnesses when it sits as a trier of fact. A circuit court judge sitting as the trier of fact is given the same deference with regard to his fact-finding as the Chancellor, and his findings are safe on appeal when they are supported by substantial, credible, and reliable evidence. Questions concerning the application of the MTCA are reviewed *de novo*." *Mississippi Department of Public Safety v. Durn,* 861 So.2d 990, 994 (Miss. 2003) (internal citations omitted).

DISCUSSION

The outcome of this appeal turns on whether the Choctaw Tort Claims Act permits -- or excludes -- this tribal government and its entities from being subject to a lawsuit of this nature for accidental

[3] Shaddox's complaint is reliant upon the series of Mississippi governmental premises liability case decisions to be discussed below such as *Calonkey v. Amory School District*, 163 So 3d 940 (Miss. App. Ct. 2014) (Miss. S. Ct. *Cert.* denied May 14, 2015.)

injuries suffered by the slip-and-fall victim while she was a patron at the Chef's Pavilion Buffet of the Silver Star Casino. The trial court found on the basis of governmental premises negligence liability law that the Tribe's waiver of governmental liability applied to the Plaintiff's cause of action as alleged in Shaddox's complaint: that neither of the two distinct exemptions from liability under CTCA §25-1-5(1)(v) applied so as to specially exempt the Tribe from legal responsibility for Plaintiff's injuries. Appellants now appeal those findings of fact and law and the resultant award of compensatory damages. Appellant's principal contentions are that the trial court did not specifically find, and the Plaintiff failed to prove, the specific element of proximate causation of her accident; also that the trial court erred when it ruled that neither of the statutory CCTA §25-1-5(1)(v) defense provisions here qualified Appellants for immunity from suit.

We shall first provide a brief review of the applicable tribal statutory law.

Summary of the Choctaw Tort Claims Act: The Choctaw Tort Claims Act provides a general waiver of the Tribe's common-law tort immunity from suit, but the statute excepts from that general waiver twenty-five special categories of acts for which governmental entities continue to enjoy immunity from suit. One of those categories of exemptions is the "open and obvious danger" exception. As set forth in §25-1-5(1)(v), that provision reads:

> Neither the Tribe nor employees of the Tribe acting within the course and scope of their employment or duties shall be liable for any claim:
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> . . .
>
> (v) Arising out of an injury caused by a dangerous condition on property of the Tribe that was not caused by the negligent or other wrongful conduct of an employee of the governmental entity or of which the governmental entity did not have notice, either actual or constructive, and adequate opportunity to protect or warn against; provided, however, that the Tribe shall not be liable for the failure to warn of a dangerous condition which is obvious to one exercising due care; . . . .

The afore quoted subsection is comprised of two parts: the first exemption-explicitly provides that the Tribe has waived immunity when an injury is created by the negligent or other wrongful conduct of an employee of the Tribe (but not by a third party of which condition the Tribe had no

actual or constructive notice); and the second part for (ii) when the Tribe has notice of a dangerous condition created by a third party and failed to either remedy or warn against that danger. Subsection (1)(*v*)'s second part, starting with the wording "provided, however," says that although the Tribe can be held liable for a dangerous condition that it creates or a dangerous condition created by a third party, but of which the Tribe did not have notice, the "Tribe shall not be liable for the failure to warn of a dangerous condition which is obvious to one exercising due care."

Virtually all states, many tribes, and most other governing entities have comparable Tort Claims Acts waiving certain of their immunities from suit because this is a necessary condition of their being able to transact business with the general public. These waivers of immunity from suit, although general in nature, have narrowly crafted, but purely common-sensically-created exceptions to their otherwise broad shield of protection from accidental, deliberately injurious, or spurious lawsuits. The CTCA, like other jurisdictions' statutory waivers, is not designed to bar or otherwise preclude redresses of claimants experiencing unanticipated accidental injuries that may have been prevented (or at least mitigated) by a governing entity's exercising conscientious care, vigilance, and protective practices to safeguard those business invitees and their activities upon sovereign properties. Without striking such a balance of competing and sometimes conflicting interests, governmental operations would grind to a halt.

Subsection (1)(v) tracks exactly the language of Miss. Code Ann. §11-46-9(1)(v), except to the extent that it substitutes "the Tribe" for "the governmental entity." Being otherwise exact in wording, this Court may look to the Mississippi legislative purpose and intent together with Mississippi state and federal courts' interpretations applying Mississippi law to those of the Tribe.

Appellants first assignment of error is to the effect that "[t]he trial court erred when it concluded that § 25-1-5 (1)(v) of the CTCA did not bar the imposition of personal liability against the Tribe." They assert exemption from suit under either, or even both of subsection (1)(*v*)'s exemptions: those "(*i*) [a]rising out of an injury caused by a dangerous condition on property not caused by the neglect or other wrongful conduct of an employee or of which they did not have notice, and opportunity to protect or warn against," and those "(*ii*) arising out of a failure to warn of a dangerous condition obvious to anyone exercising due care." The primary and principal argument Appellants Tribe and Resort Development Enterprise rely upon in seeking reversal focuses upon

the "open and obvious nature of the danger" posed by the low-hanging stanchion rope and the Tribe's concomitant failure to warn of same. They point out that § 25-1-5(1)(*v*) of the Choctaw Tort Claims Act bars the imposition of liability against them for any injuries caused by open and obvious conditions and therefore contend that they were immune from suit. But as we have already pointed out, Ms Shaddox's governmental premises negligence liability lawsuit's legal basis for her complaint was that an employee of the casino negligently hung or affixed a stanchion rope dangerously low to the floor alongside the trafficway to their Chef's Pavillion buffet entrance that all patrons were required to negotiate past, and furthermore the tribal owner and operator neglectfully allowed this hazardous condition to remain neither corrected nor seemingly detected despite owing business invitees this duty of protection.

For their second error assignment Appellants claimed that the trial court in its opinion reached no conclusions relating to the contested issue of proximate cause and Shaddox did not establish that essential element of proximate cause.

The trial court issued an eleven-page Memorandum Opinion and Order wherein it is pointed out numerous times that the stanchion rope caused Shaddox to fall and that she would not have fallen had the stanchion rope been hung higher when the incident happened. See, *e.g.* Sec. III, Law, p. 8, IP 4, p. 9. IP 1-3, p.10, IP 1. Ample court findings supported by evidence adduced by Plaintiff at trial bolster the court's proximate cause finding that the low-hanging stanchion rope precipitated her fall and injuries. Had Appellant felt the trial court erred in failing to make more specific findings of fact and conclusions of law, they had available procedural recourse under the Choctaw Rules of Civil Procedure, yet failed to request such findings and conclusions in greater particularity pursuant to CRCP Rule 52(a). Headed "Findings By The Court," CRCP Rule 52(a) reads: "(a) Effect. In all actions tried upon the facts without a jury the court may, and shall upon the request of any party to the suit or when required by these rules, find the facts specially and state separately its conclusions of law thereon and judgment shall be entered accordingly." The Tribe made no such request when it had its opportunity. Furthermore, in *City of Jackson v. Internal Engine Parts Group, Inc.*, 903 So,2d 60, 67 (Miss 2005), the Mississippi Supreme Court wrote:

> Relying on *Patout v. Patout*, 733 So.2d 770, 773 (Miss. 1999), in *Mississippi Department of Transportation v. Trosclair*, 851 So.2d 408, 414 (Miss.Ct.App. 2003), the Court of Appeals found that the case involving the Mississippi Tort Claims Act was "far from complex" and found that without a specific request by the party,

> that it was not error for the court to fail to make specific findings of fact and conclusions of law. After reviewing the record and the City's post-trial motion, this Court fails to find any request made for specific findings of fact and conclusions of law."

A similar accord applies in this present action. This in addition to the initial statements of this paragraph in regards to the 11-page Memorandum Opinion and Order.

Appellee Carol Shaddox's identified and argued basis of causation for her accidental injuries was that hazard created by the inordinately low-hanging rope spanning between the two permanently anchored posts creating the queue lane entryway to the cashier and buffet/cafeteria dining area. As she testified, "at that point, I slipped on a slippery substance and it threw me into the bottom railing and I went over the rope. I went over the rope. And that's when I fell and hit my knee and then my shoulder and my face." [Trans. p. 12.][4]

The history of the decisional case law underlying the similarly worded MTCA that governs this case is two-fold: that governing private, non-governmental premises liability; and that relating to governmental premises liabilities under the Mississippi Tort Claims Acts. In Mississippi before 1994, both premises liability negligence suits brought by private business invitees and actions brought under the governmental tort claims act were ruled by the same fundamental principles of common law. Grounds for recovery were very restrictive in both governmental and private premises cases.

Private Premises Liability Law: In 1994, however, grounds for recovery changed markedly when a Mississippi Supreme Court ruling brought about a departure in the law of private action premises liability cases. In a case styled *Tharp v. Bunge Corp.*, 641 So.2nd 20 (Miss. 1994), the "open and obvious" theory as an **absolute** defense for injuries caused by a dangerous condition on non-governmental (private) premises was abolished. In doing so, the *Tharp* court explained:

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[4] Her account is more fully reflected on the transcript's next page:

Q. Now, you said a moment ago that your left leg slipped in a substance and you hit the rope railing. Where did that rope hit you?
A. Below the knee.
Q. And, more specific, where below the knee did it hit you?
A. At least two inches below my knee.
Q. Upon hitting that, how did that affect your balance?
A. It threw me off. It made me go over.
Q. Did you fall over that railing?
A. I did. [Trans. p. 16.]

> The "open and obvious" standard is simply a comparative negligence defense used to compare the negligence of the plaintiff to the negligence of the defendant. If the defendant was not negligent, it makes no difference if the dangerous condition was open and obvious to the plaintiff since the plaintiff must prove some negligence on part of the defendant before recovery may be had. On the other hand, if the defendant and the plaintiff were both at fault in causing or attributing to the harm, then damages can be determined through the comparative negligence of both.

Id., at p. 24.

In arriving at this decision, the Miss. Supreme Court initially pointed out that in the state's general law of torts, Mississippi had been an early leader in adopting progressive reform that was more equitable, logical, and practical. The Mississippi's High Court wrote:

> Mississippi led the nation at the turn of this century by being the first state to adopt a pure comparative negligence standard. Mississippi Code Ann. § 11-7-17 (1972) reads that "all questions of negligence and contributory negligence shall be for the jury to determine." Miss.Code Ann. § 11-7-17 (1972). For the open and obvious defense to be a complete bar to a negligence claim, the plaintiff must be one hundred percent (100%) negligent himself. Miss.Code Ann. § 11-7-15 (1972). Mississippi Code Ann. § 11-7-15 states the fact that "the person injured, or the owner of the property ... may have been guilty of contributory negligence shall not bar a recovery, but damages shall be diminished by the jury in proportion to the amount of negligence attributable to the person injured, or the owner of the property...." Miss.Code Ann. § 11-7-15 (1972).

Id., at p. 23.

Building on this foundation, the *Tharp* court reasoned that comparable principles should be adapted in the state's area of premises liability law governing private, non-governmental properties. The Miss. Supreme Court next explained:

> **Our law sets forth the premise that there may be more than one proximate cause to a negligent act.** See *King v. Dudley*, 286 So.2d 814, 817 (Miss.1973); *Braswell v. Economy Supply Co.*, 281 So.2d 669, 676 (Miss.1973). The defendant may be negligent, but so too may be the plaintiff. Thus, our comparative law applies.

(Emphasis added). *Id.,* at p. 24.

In recognition of the standard, *Tharp* further observed that:

> Emerging from other jurisdictions is a modern trend toward holding that the obviousness of a danger does not necessarily relieve the owner's duty of care. Moreover, many states have limited the use of this doctrine by holding that a plaintiff's knowledge or the obviousness of a dangerous condition does not preclude recovery, and, in some instances, states have expressly abolished the open and obvious doctrine after the adoption of comparative negligence. Many other states have adopted or cited as a basis for their decision Sec. 343A Restatement (Second) of Torts which states in part:
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> (1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness. (emphasis added).

Id., at p. 25.

Where, under law, a possessor of land is not liable to his invitees for physical harm caused to such invitees by any activity or condition under any of the above described circumstances, a vacuum exists between the rights of land possessors and the rights of redress accorded their invitees regardless of the severity of the injuries or damages. The equitable maxim "the law abhors a vacuum" demands, then, that there be created or provided some remedy or redress available at law. Accordingly, the Mississippi Supreme Court went on to write in response:

> This Court should discourage unreasonably dangerous conditions rather than fostering them in their obvious forms. It is anomalous to find that a defendant has a duty to provide reasonably safe premises and at the same time deny a plaintiff recovery from a breach of that same duty. The party in the best position to eliminate a dangerous condition should be burdened with that responsibility. If a dangerous condition is obvious to the plaintiff, then surely it is obvious to the defendant as well. The defendant, accordingly, should alleviate the danger.

> We now abolish the so-called "open and obvious" defense and apply our true comparative negligence doctrine.

Id., at p. 25.

The *Tharp* decision represented a sea change in Mississippi's common law approach to premises liability in private property cases. The decisional law which applied to premises liability cases over governmental properties and facilities, however, remained unchanged.

Governmental Premises Liability Law: The "open and obvious" defense continued thereafter to pose an **absolute** bar to recovery in cases brought under the Mississippi Tort Claims Act for failure to warn of a dangerous condition on governmental properties. Thus, for a number of years after 1994, Mississippi courts necessarily applied a double standard of premises liability law. Owners and operators of private premises were held to a higher degree of accountability for the presence of dangerous conditions under their dominion than were governmental entities that could allow a dangerous condition to fester indefinitely, so long as it remained open and obvious to public invitees or warnings of dangers were given.

That imbalance began to change however in 2005 when the law governing a governmental premises liability case first assimilated a component of the *Tharp* reform. *In City of Jackson v. Internal Engine Parts Group, Inc.,* 903 So.2d 60 (Miss. 2005) the Mississippi Supreme Court affirmed an award for property damage on private (corporate) property due to flooding of a municipal drainage ditch. The Mississippi Supreme Court wrote: "The issue here is not whether the City was negligent for failing to warn of a dangerous condition, but rather whether the City was negligent for failing to inspect and maintain the drainage ditch, and consequently allowing a dangerous condition to continue to exist." *Id., at 64.* This case appears to be the first claim brought under Mississippi's Tort Claims Act of governmental premises negligence liability where the Mississippi Supreme Court affirmed an award of damages against a state governmental entity that was held liable for its negligent failure to maintain its premises. By extension too, the case may be seen as a tacit adaptation of the *Tharp* principles to governmental tort claims property law. Applying that same principled concept to the present case, this Court might seamlessly paraphrase the *City of Jackson v. Internal Engine Parts Group, Inc.* quoted above to read in this Court's present case: The issue in *Shaddox* is not whether the Tribal Enterprise was negligent for failing

to warn of dangerously hung stanchion rope, but rather whether the Tribal Enterprise was negligent for failing to inspect and maintain the stanchion rope, and consequently allowing a dangerous condition to continue to exist.

That same concept of courts bringing MTCA governmental premises liability law more into conformity with post-*Tharp* tort law applicable to private premises claims was extended the next year to claims for personal injuries in *Ladner v. Stone County,* 938 So.2d 270 (Miss. App. 2006). *Ladner* saw Plaintiff's claims against Stone County upheld for injuries sustained by her in the collapse of a county bridge over which she had been driving. Ladner was awarded damages on claims for governmental negligence, failure to properly maintain the bridge, failure to inspect, and failure to warn.

In that same year, 2006, the Mississippi Court of Appeals ruled in *City of Natchez v. Jackson,* 941 So.2d 865 (Miss. App. 2006), another personal injury on governmental property case that spelled out more clearly the limitations on applicability of exemption defenses to the range of Miss.Code Ann. §11-46-9(1)(*v*) negligence claims. The *City of Natchez v. Jackson* case was an MTCA governmental premises liability claim for the city's negligent failure to properly repair a hole in a coal grate on a public sidewalk; thereby creating an unreasonable trip hazard that resulted in Plaintiff's injuries. Affirming the trial court award for damages, the Mississippi Court of Appeals wrote:

> While both parties concede that "open and obvious" is not a complete bar to recovery in this case, we recognize that it is a complete bar in a Tort Claims Act case for the failure to warn of a dangerous condition. *City of Jackson,* 903 So.2d at 64. **It is not a bar to recovery when the issue is the government's negligent maintenance or repair which led to the dangerous condition.** *Id.* This case likewise presented questions of affirmative acts of negligence by the city as well as negligent maintenance and repair. This distinction aside, there was no open and obvious defect in this case. We affirm.

(Emphasis added). 941 So.2d at 875.

Similarly, *Calonkey v. Amory Sch. Dist.*, 163 So. 3d 940 (Miss. App. 2014) was a lawsuit filed against the Amory school district seeking recovery for injuries Calonkey sustained in a fall through a hole in a theater stage catwalk that he alleged should have been covered or repaired. The circuit judge granted summary judgment for the district because he found the dangerous condition was "open and obvious" and the school therefore, under MCTA § 11-46-9(1)(*v*) enjoyed sovereign immunity. The Mississippi Court of Appeals, however, recognized that even though the school district enjoyed immunity under Miss. Code Ann. §11-46-9(1)(*v)* against claims of failure-to-warn so long as the condition is "obvious to one exercising due care," the appellate court nonetheless saw merit to C*alonkey's* second, separate basis of his claim of governmental negligence: namely, that the school district should remain subject to liability for permitting the catwalk's dangerous condition created by the district's own employees' actions or negligence to remain uncorrected. The *Calonkey* court wrote:

> But as the statute clearly states, the fact that a dangerous condition is obvious only exempts the District from liability for the failure to warn of the condition. Miss.Code Ann. Sec 11-46-9(1)(v). ***It does not exempt the District from liability for causing the dangerous condition through the negligent or willful actions of its employees. Id.; see City of Natchez v. Jackson, 941 So.2d 865, 876 (P 33) (Miss.Ct.App. 2006). Here, Calonkey is not seeking to hold the District liable for failing to warn him about the hole in the catwalk. Rather, he claims the District's negligence in constructing and maintaining the catwalk created a dangerous condition that led to his injuries. So even if the dangerous condition was "obvious," this fact does not bar Calonkey's claim.***

(Italics and emphasis added*). Colonkey,* at p. 943.

The *Calonkey* decision in 2014 brought about the same legal and practical standard of tort accountability for dangerous conditions created or maintained by governmental persons that the *Tharp* decision established for owners on private premises and Mississippi courts had applied since 1994.

Shaddox's basis of claimed negligence is near-identical to Calonkey's: namely, that the casino's affixing and maintaining of the exceptionally low-hanging stanchion ropes created the dangerous

condition that was the imminent causation of her shoulder and facial injuries inflicted upon her by her fall across that one low-hanging stanchion rope. She does not allege in her negligence action against defendant any claim of a failure to warn; therefore, Appellant's "open and obvious" and/or "assumption of risk" defenses were inapplicable.

Appellant's Rebuttal Brief doubts the authoritative weight of the *Calonkey* decision's recognition of Shaddox's premises liability claim charging such a negligence theory for recovery. The Tribe contends that as a Court of Appeals decision, *Calonkey* is of only persuasive authority and should be rejected as prevailing CTCA premises liability law. This ignores the reality that Calonkey is perfectly in line with the precedents evolving first from the Mississippi Supreme Court's *City of Jackson v. Internal Engine Parts Group, Inc.* ruling; the Court of Appeals' holding in *Ladner v. Stone County,* and their *City of Natchez v. Jackson* decision. Calonkey furthermore has that additional weight of having had *en banc* Court of Appeals review first denied in 2014, and then *certiorari* review denied by the Mississippi Supreme Court in 2015.

Instead, Appellant would advocate for a different interpretation of contemporary governmental premises liability law over that underlying *Calonkey.* Appellant writes in its rebuttal brief:

> This Court should follow the better reasoned cases, and those are the multiple cases presented by the Tribe (*See* Appellant's Brief at 5-10), not the ones presented by Shaddox. The Tribe's cases are better reasoned because (1) they are not impermissibly adding language to the statute, and (2) they do not abrogate sovereign immunity where such was not "unequivocally expressed." It is simple: when an immunity applies, the immune party **"is completely immune from the claims arising from the act or omission complained of."** *Kaigler v. City of Bay St. Louis,* 12 So. 3d 577, 581 (Miss. Ct. App. 2009) (internal citations and quotations omitted).

Appellant Reply Brief at p. 5.

In other words, the Tribe claims that because the low-hanging condition of the stanchion rope was open and obvious, whether the Appellee's claim is failure to warn or negligent failure to repair,

they cannot be held liable to Shaddox's claim. We disagree. The Tribe's claim and reasoning are rife with errors.[5]

First of all, those cases referred to by Appellant's first brief at pages 5 – 10 are all immaterial to the Shaddox claim. The cases Appellant's briefs point to are: *City of Clinton v. Smith,* 861 So.2d. 323 (Miss. 2003); *Blackston v. George County,* 102 So.3d 1182 (Miss. 2012); and *Howard v. City of Biloxi,* 943 So.2d. 751 (Miss. Ct. App. 2006). *City of Clinton v. Smith* saw recovery denied defendant for injuries caused by a fall on an open and obvious ice and snow-covered ramp outside a municipal building; *Blackston v. George County* involved an unknown party allegedly leaving a pile of dirt in a county road[6]; and *Howard v. City of Biloxi* saw recovery denied in a trip-and-fall injury involving a sidewalk crack that was caused by natural deterioration rather than any man made source. By all three of these cases Appellant seeks to establish and argue their point that there is no requirement that an "open and obvious" condition need be created by a third party before the Tribe is entitled to immunity. However, as regards these three case-types:

> The [Miss. Supreme] Court has distinguished between defects in sidewalks caused by nature or adverse weather conditions and defects or obstructions created by the municipality itself. ***We have been much more prone to hold that it is a jury question where the municipality has created the defect or obstruction.*** *City of Cleveland v. Threadgill,* 246 Miss. 23, 148 So.2d 670 (1963); *Birdsong v. City of Clarksdale*, 191 Miss. 532, 2 So.2d 827 (1941).

(Bold italics added). *Lancaster v. City of Clarksdale,* 339 So.2d 1359, 1360 (Miss. 1976).

Admittedly, the dangerously low-hanging stanchion rope condition was created and maintained by a casino employee in the case at bar – not some unknown third party. Therefore, the above cases are of no instructive value in pointing to what Appellant argues is the proper better-reasoned contemporary law this Court should be following. Rather, it appears as one of several fragile

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5 This Court is nowhere on the cited page 581 of volume 12 Southern Third able to locate Appellant's simplistic quotation "is completely immune from the claims arising from the act or admission complained of." Neither could that phrase be found elsewhere in the Kaigler opinion.

6 Blackston could prove virtually no elements of its case claim: that a pile of dirt was actually left in the roadway; whether the weather or an unknown person or agency could have left any such pile; whether a dirt pile was even any causation of the vehicle accident; or, if actually there, whether the dirt was or was not in plain sight. Blackston's plausibility as case precedent for the Tribe's proposition that it matters not whether open and obvious dangers are the creation of a third party, or no, seems specious.

attempts to someway persuade this Court that the lower court erred in its interpretation of the law attendant to CTCA § 25-1-5(1)(*v*).

Next, the Tribe contends that as a Court of Appeals decision, *Calonkey* is of only persuasive authority and should be rejected as prevailing CTCA premises liability law. We have already addressed this argument.

Neither does this Court regard as valid Appellant's suggestion that there was any language added to the statute – either by the trial court or by Shaddox. Nor do we agree with Appellant's assertion underlying their Tribe's Rebuttal Brief statement: "they do not abrogate sovereign immunity where such was not 'unequivocally expressed.'" The trial judge did not add language to the statute. He also did not abrogate any aspect of sovereign immunity not statutorily waived by the Choctaw Tort Claims Act. Appellant interprets the relevant CTCA provisions backwards in regard to claims of premises liability. The CTCA at § 25-1-3 pertinently reads: "... the immunity of the Tribe for monetary damages arising out of the Tribe, or acts of employees of the Tribe is hereby waived * * * subject to the exemptions set forth in § 25-11-5, Choctaw Tribal Code, and the limitations set forth in this Title." We read the initial portion of the language in § 25-1-3 to be a limited general waiver of immunity subject to those specified § 25-1-5 exemptions. In other words, § 25-1-3 is general in its application to claims not otherwise expressly prohibited by other sections of the CTCA. See *Miss. Band of Choctaw Indians v. Peeples*, SC-2008-05 (Choctaw S.Ct. 2009).

CONCLUSION

Those guidelines the Mississippi law of premises liability has developed over the years, both private and governmental, are realistic, practical, and straightforward in application. In Mississippi, business and government owners and operators have a duty to invitees to exercise reasonable care to keep the business premises in a "reasonably safe condition." *Jacox v. Circus Miss., Inc.*, 908 So.2d 181, 184 (Miss. Ct.App. 2005) (citing *Jerry Lee's Grocery, Inc. v. Thompson,* 528 So.2d 293, 295 (Miss.1988)). The owner or operator of business premises owes a duty to an invitee to exercise reasonable care to keep the premises in a reasonably safe condition and, if 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. *Waller v. Dixieland Food Stores, Inc.*, 492

So.2d 283 (Miss.1986); *Wilson v. Allday*, 487 So.2d 793 (Miss.1986); *Downs v. Corder*, 377 So.2d 603 (Miss.1979); *J.C. Penney Co. v. Sumrall*, 318 So.2d 829 (Miss.1975). In hindsight it should be reasonably evident that if Appellant had been more mindful and had hung a stanchion rope of appropriate length between the fixed stanchions, the rope at issue would have been high and taunt enough to impede Ms Shaddox's falling to the floor as she did.

Such an expectation is not unreasonable for "[s]trict liability is not imposed on [business owners] in premises liability cases." *Martin v. Rankin Circle Apartments,* 941 So.2d 854, 864 (Miss.Ct.App.2006) (citing *Corley v. Evans,* 835 So.2d 30, 41 (Miss.2003)). The owner or occupant is not an insurer against all injuries. *Kroger, Inc. v. Ware*, 512 So.2d 1281 (Miss.1987); *First National Bank of Vicksburg v. Cutrer*, 214 So.2d 465 (Miss.1968); *Daniels v. Morgan & Lindsey, Inc.*, 198 So.2d 579 (Miss.1967). Furthermore, mere proof "of the occurrence of a fall on a floor within [the] business premises is insufficient to show negligence on the part of the proprietor." *Byrne,* 877 So.2d at 465 (quoting *Sears, Roebuck & Co. v. Tisdale,* 185 So.2d 916, 917 (Miss.1966)). When a dangerous condition on the premises is caused by the operator's own negligence, no knowledge of its existence need be shown. *Winn-Dixie Supermarkets, Inc. v. Hughes*, 247 Miss. 575, 156 So.2d 734 (1963).

The adoption by this Court of the evolution of premises negligence liability law in Mississippi as it relates to CTCA § 25-1-5(1)(*v*) suits arising out of an injury caused by a dangerous condition on property of the Tribe, as we have shown throughout the entirety of this discussion above, has been in general, although not yet fully, towards the melding of private and governmental standards of accountability. Appellant Choctaw Resort Development Enterprise is a particular beneficiary of that equalizing trend, as so many Tribal Governments enjoy that unique ability to conduct gaming and other commercial enterprises impermissible by outside governmental entities. To be competitively successful in regards to non-governmental private enterprise ventures, equanimity of operation is needed. Furthermore, it is a better-reasoned approach than that argued for by Appellant's briefs and at oral arguments. Lastly, it is and should be the law governing the case situation presented us.

Based on the reasons and analyses set forth at length above, as well as the absence of any established reversible errors or arguments at law of merit, we find that the lower court's well-reasoned opinion and its award in favor of the Plaintiff/Appellee Carol Shaddox should be and hereby is ordered AFFIRMED with all costs assigned unto Appellant.

So ORDERED this the 8th day of June, 2020.

Chief Justice

Associate Justice

Brenda T. Pipestem
Associate Justice

CERTIFICATE OF SERVICE

I, do hereby certify that I have this, the 8th day of June, 2020 cause to be forward by electronic mail, United States mail and/or hand delivered, a true and correct copy of the above and foregoing document to the below listed counsel of record.

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