No. 21-

IN THE

Supreme Court of the United States

CHERYL ROMANO, WAYNE ROMANO,

Petitioners,

v.

JAZZ CASINO COMPANY, L.L.C. *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JAMES J. CARTER
JAMES CARTER & ASSOCIATES, LLC
1100 Poydras Street, Suite 1475
New Orleans, LA 70163
(504) 324-4400

EDWARD D. MARKLE
Counsel of Record
MARKLE & ASSOCIATES, APLC
3500 Washington Avenue, Suite F
Gulfport, MS 39507
(504) 388-5848
emarkle@msn.com

Attorneys for Petitioners

313746

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED FOR REVIEW

This Court in *Tolan v. Cotton*, 134 S. Ct. 1861, 188 L. Ed. 2d 895, 572 U.S. 650 (2014), *Anderson v Liberty Lobby, Inc.* 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986), and *Eastman Kodak Company v. Image Technical Services, Inc.*, 112 S. Ct. 2072, 504 U.S. 451, 119 L. Ed. 2d 265 (1992) set the standards that must be followed by the lower courts when deciding motions for summary judgment. Both the Fifth Circuit and the District Court have failed to follow these standards and have ignored the following directives: (1) the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor; (2) the court must view the evidence in a light most favorable to the opposing party; (3) the court must properly acknowledge and address all of the key evidence offered by the party opposing the motion; (4) the court should not make findings of fact; (5) the judge's function in summary judgment is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial; (6) evidence must be viewed as a whole, and not in individual pieces; and (7) the court must determine whether a fair minded jury could return a verdict for the plaintiff on all of the evidence presented. The Fifth Circuit has decided important federal questions relating to summary judgments in a way that conflicts with decisions of this Court. (Rule 10(c) Supreme Court Rules).

The Questions presented are:

I. Did the Fifth Circuit, in accepting the District Court's findings of fact, probable cause of the fall and legal authority, violate the basic principles of *Tolan v. Cotton*,

134 S. Ct. 1861, 188 L. Ed. 2d 895, 572 U.S. 650 (2014), and *Anderson v Liberty Lobby, Inc.* 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986), thus violating guarantees of due process when it granted defendants motion for summary judgment and:

(a) failed to acknowledge and address key evidence presented by the Petitioners, opting instead to consider only an obscure, unclear and inconclusive Video of the incident, completely ignoring the vast array of evidence that proves the cause of Petitioner's fall;

(b) failed to consider post-accident or forensic evidence (including Romano's Photograph which is a major piece of evidence that compliments the Video) secured during the accident investigation to determine probable cause of the fall;

(c) isolated a single piece of evidence, the surveillance video ("Video") (See Thumb Drive filed separately with Clerk), instead of considering all of the evidence in its entirety, including the Romano photograph depicting the corner of the display ramp which the courts claim caused the fall. In other words, armed with an obscure, unclear and inconclusive video of the fall, are the lower courts permitted to ignore other key evidence that may directly impact and clarify the video evidence?

(d) failed to draw justifiable inferences in Petitioners' favor in a light most favorable to Petitioners;

(e) weighed the evidence and made findings of fact to arrive at the probable cause of Petitioner's fall by viewing only the surveillance video and no other evidence; and

(f) never determined through a complete review of the key evidence whether a fair minded jury could return a verdict for the Petitioners?

II. Did the Fifth Circuit, in accepting the District Court's findings of fact, cause of the fall and decision, violate Petitioners' right to fair and adequate due process by not considering all of Petitioners' causes of action enumerated in its Complaints (App. 11a-17a), (including violations of Fifth, Seventh and Fourteenth Amendments to the Constitution), relying only on a single law which applies solely to the merchant defendants and not to the individually named defendants which were also summarily dismissed? (See LA-R.S. 9:2800.6(b)(1), Louisiana's Merchant Liability law). Neither the District Court nor the Fifth Circuit addressed the alleged violations of the Constitution.

III. By failing to provide a fair and reasonable due process in the evaluation of the motion for summary judgment, did the Fifth Circuit violate Petitioners' Seventh Amendment right to a jury trial by granting summary judgment?

PARTIES TO PROCEEDING

Petitioners:

Petitioners, CHERYL and WAYNE ROMANO were plaintiffs in the district court and appellants in the court of appeals.

Respondents:

Respondents, JAZZ CASINO COMPANY, L.L.C., JCC HOLDING COMPANY II, L.L.C., HARRAH'S NEW ORLEANS CASINO, HARRAH'S NEW ORLEANS MANAGEMENT COMPANY,L.L.C., CEOC, L.L.C., CAESARS LICENSE COMPANY, L.L.C., CAESARS ENTERTAINMENT, INCORPORATED, CAESARS ENTERTAINMENT OPERATING COMPANY, INC., CAESARS ENTERPRISE SERVICES, L.L.C., CAESARS RESORT COLLECTION, L.L.C., PAUL FORCIER, and NICHOLAS REECE were defendants in the district court and appellees in the court of appeals.

RELATED PROCEEDINGS

1. Cheryl Romano and Wayne Romano v. Jazz Casino Company, LLC, JCC Holding Company II, LLC, Harrah's New Orleans Casino, Harrah's New Orleans Management Company, LLC, CEOC, LLC, Caesars License Company, LLC, Caesars Entertainment, Inc., Caesars Entertainment Operating Company, Inc., Caesars Enterprise Services, LLC, Caesars Resort Collection, LLC, Paul Forcier, Nicholas Reece, No. 2:20-cv-00228 (E.D. LA), judgment entered on August 12, 2021.

2. Cheryl Romano and Wayne Romano v. Jazz Casino Company, LLC, JCC Holding Company II, LLC, Harrah's New Orleans Casino, Harrah's New Orleans Management Company, LLC, CEOC, LLC, Caesars License Company, LLC, Caesars Entertainment, Inc., Caesars Entertainment Operating Company, Inc., Caesars Enterprise Services, LLC, Caesars Resort Collection, LLC, Paul Forcier, Nicholas Reece, No. 21-30554 (Fed. Cir.), judgment entered on April 1, 2022.

TABLE OF CONTENTS

Table of Contents

Table of Contents

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

Page

Page

Cited Authorities

Page

STATUTES

CONSTITUTION

PETITION FOR WRIT OF CERTIORARI

Cheryl Romano and Wayne Romano, Petitioners/Plaintiffs, respectfully petition for a Writ of Certiorari to review the Fifth Circuit Court of Appeals Decision granting summary judgment to all named defendants.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit affirming the grant of summary judgment is a non-published, Per Curiam opinion. It is titled: Cheryl Romano; Wayne Romano v. Jazz Casino Company, LLC; JCC holding Company II, LLC; Harrah's New Orleans Management Company, LLC; CEOC, LLC; Caesars License Company, LLC; Caesars Entertainment, Inc.; Caesars Entertainment Operating Company, Inc.; Caesars Enterprise Services, LLC; Caesars Resort Collection, LLC; Paul Forcier; Nicholas Reece, Fifth Circuit, No. 21-30554 (2022). (App. 1a-5a).

The decision of the United States District Court for the Eastern District of Louisiana granting defendants' motion for summary judgment may be found at Cheryl Romano; Wayne Romano v. Jazz Casino Company, LLC; JCC holding Company II, LLC; Harrah's New Orleans Management Company, LLC; CEOC, LLC; Caesars License Company, LLC; Caesars Entertainment, Inc.; Caesars Entertainment Operating Company, Inc.; Caesars Enterprise Services, LLC; Caesars Resort Collection, LLC; Paul Forcier; Nicholas Reece, USDC No. 2:20-cv-00228. (App. 6a-17a).

JURISDICTIONAL STATEMENT

The Fifth Circuit Court of Appeals issued its opinion on April 1, 2022. (App. 1a-5a). The Writ was filed within ninety days of the Fifth Circuit's decision. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the right to due process guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, which provide: "V. No person shall be deprived of life, liberty, or property, without due process of law", "XIV. Nor shall any state deprive any person of life, liberty, or property, without due process of law".

This matter also involves the right to trial by jury guaranteed by the Seventh Amendment to the United States Constitution, which provides: "VII. In suits at common law the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law."

STATEMENT OF THE CASE

A. Preliminary Statement

This is a trip and fall case in a Harrah's Casino ("Harrah's" or "Casino"). But, it is also a "rush to judgment" case.

A Harrah's surveillance video ("Video") captured portions of the fall. (The Video on a USB Drive was filed

manually with the respective Clerks separately. See *Romano v. Jazz Casino Company, LLC, et al*, United States Court of Appeals for the Fifth Circuit, No. 21-30554, ROA. 487, Exhibit D). However, the activity displayed on the Video is not clear, but is obscure, distorted, and inconclusive as to the cause of Petitioner's fall. While a Video of this nature can be viewed in many different ways because of the lack of clarity, a reasonable jury could have determined that Mrs. Romano tripped on an unsecured electrical cord ("electrical cord" or "cord") supplying electrical power to a promotional vehicle display ramp located in the middle of the Casino floor, especially if the Video is evaluated in conjunction with eye witness testimony and a very important post-accident photograph taken by Mr. Romano. In other words, if the Video is scrutinized in combination with the other key evidence, a jury could return a verdict for the Petitioners. Neither the District Court nor the Fifth Circuit analyzed the Video in conjunction with the other key evidence presented by the Petitioners. Both the District Court and the Fifth Circuit viewed the Video and without proper evaluation of the other key evidence, determined that Mrs. Romano walked directly into a corner of the display ramp and fell. As a result, the courts granted summary judgment in favor of Harrah's Casino and all other defendants. Although Mr. and Mrs. Romano and Harrah's witnesses provided detailed accounts of the fall and the cause thereof, neither the District Court nor the Fifth Circuit considered, addressed and/or referenced the supporting testimony and evidence provided by Petitioners. (See *Romano v. Jazz Casino Company, LLC, et al*, United States Court of Appeals for the Fifth Circuit, No. 21-30554, ROA.555-610, 1132, Appellants' Brief, pp. 26-40). In other words, Petitioners suit was dismissed based solely on the obscure

Video**. Had either lower court examined the photograph** (*Romano v. Jazz Casino Company, LLC, et al*, United States Court of Appeals for the Fifth Circuit, No. 21-30554, ROA.1132, Appellants' Brief, pp. 47-50)**, instead of rushing to judgment after reviewing the Video, they would have been able to determine that the light cord was located at the very same corner where they declared Romano tripped.** The courts assert that they did not review the Romano photograph because it was taken after the accident proclaiming it inconsequential. (App. 4a, 16a). The courts' failure to analyze the Video in conjunction with the photograph and other key evidence has resulted in a travesty of justice and violations of the Constitution. This Court should rectify this injustice.

The factual dispute before the Court involves two ***potential*** causes of Mrs. Romano's fall which resulted in life changing injuries: (1) an unsecured electrical cord ("electrical cord" or "cord") located at a corner of the display ramp, supplying power from a floor electrical outlet to the vehicle display light or (2) the corner of the vehicle display ramp itself ("display ramp"). The latter possibility requires Mrs. Romano to ignore the large, steel superstructure and to actually walk directly into the chrome, steel ramp. Because of its lack of clarity, the Video relied upon by the District Court and the Fifth Circuit to swiftly grant summary judgment does not conclusively show what Mrs. Romano actually tripped on. One cannot actually see her foot hit the corner of the display ramp or actually become entangled in the electrical cord. However, examining the Video with the very important photograph and eyewitness testimony leads one to the understanding that, more probable than not, her foot became entangled in the cord located at the corner of the display ramp and she fell. *(See Romano v. Jazz Casino Company, LLC, et al*,

United States Court of Appeals for the Fifth Circuit, No. 21-30554, Appellants' Brief, pp. 26-40). The photograph clearly shows the corner of the display ramp where the courts assert the fall occurred. **Remarkably, the electrical cord and the display light are located at the very same corner.** The physics and calculus of the event were thoroughly discussed and examined in Petitioner's Fifth Circuit appeal brief. *(Romano v. Jazz Casino Company, LLC, et al*, United States Court of Appeals for the Fifth Circuit, No. 21-30554). Petitioners' discussion and forensic arguments were not properly considered by the District Court or the Fifth Circuit, who opted instead to view only the obscure and inconclusive Video to arrive at the "likely cause" of the fall.

The courts' concentration only on the Video to arrive at the "likely" or "probable cause" of the fall (App. 14a, District Court Opinion; App. 2a, 3a, Fifth Circuit Opinion), is an activity they are not allowed to perform under this Court's standards. Neither the District Court nor the Fifth Circuit discussed whether a reasonable jury could have viewed the matter in any other way or whether a jury could have accepted plaintiffs' version of the fall. The District Court and Fifth Circuit completely disregarded the role of the jury and its Constitutional mandates. Plaintiffs/Petitioners take exception with the courts' observations of the Video, their failure to consider the Romanos' testimony and the other supporting evidence (including the photograph) that compliments the Video. The courts' failure to properly and adequately examine all key and relevant evidence and their failure to draw justifiable inferences in Petitioners' favor in a light most favorable to them violated Petitioners' guarantees of due process.

Through counsel's forty (40) plus years of practice, he has seen a dramatic increase in the disposal of cases through summary proceedings. Citizens' rights and guarantees of due process and trial by jury have been steadily and methodically whittled down and diminished through the use of the summary judgment process. The artists' knife appears to be sharpening to a greater degree over the last several years. The erosion of basic constitutional rights is justified through arguments of judicial economy, crowded dockets, and insufficient resources. All of these arguments are self-sustaining and through the eyes of the courts (not the litigant) valid. But, are they honorable and Constitutional? In hopes of amplifying these serious issues, Petitioners seek an audience with this Honorable Court. Petitioners are simply seeking someone that will actually listen and truly review the key evidence, including the Romano photograph.

B. Procedural History

The Romanos filed suit in state court and the matter was removed to federal court by the defendants on allegations of complete diversity. The diverse members of Jazz Casino Company ("Harrah's") and their domiciles were used by the defendants to remove this matter from state court.

Harrah's sought to dismiss its partners by means of a motion for summary judgment supported only by a ***sham*** affidavit provided by an affiant (Stacy Dorsey) without knowledge of the ownership of the casino or company structure. Mr. Dorsey's deposition testimony demonstrated that the affidavit submitted by Harrah's is not based on first-hand knowledge in violation of

the rules governing the requirements for supportive affidavits. Simply put, the affidavit is a sham. Mr. Dorsey testified ***contrary*** to his affidavit stating:[1] (1) He did not know who employed him, whether it was Jazz Casino Co, LLC or one of the other entities; (2) He has no first-hand knowledge of which entity owns the Casino; (3) He has no first-hand knowledge of which entity operates the Casino; and (4) He has no first-hand knowledge of which entity is responsible for the Casino. (See *Romano v. Jazz Casino Company, LLC, et al*, United States Court of Appeals for the Fifth Circuit, No. 21-30554, Appellants' Brief, pp. 21-22). Neither the District Court nor the Fifth Circuit addressed these issues.

The District Court viewed the Video and granted summary judgment. (App. 6a-17a). A timely appeal to the Fifth Circuit was taken by Petitioners. The Fifth Circuit basically rubber stamped the District Court's decision, issuing an unpublished opinion. (App. 1a-5a). Petitioners are now before this Court seeking relief because they have not been allowed fair, adequate and proper due process guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. The violations of due process have also resulted in the violation of the Seventh Amendment, the right to trial by jury.

C. Petitioners' Causes of Action

The Romanos asserted numerous causes of action against ALL defendants, including Harrah's employees

1. See *Romano v. Jazz Casino Company, LLC, et al*, United States Court of Appeals for the Fifth Circuit, No. 21-30554, Appellants' Brief, pp. 21-22)

(Reece and Forcier) that improperly and negligently installed the unsecured electrical cord that entangled Romano's foot causing her fall. The Plaintiffs asserted that: "This is a suit for personal injury damages against the Defendants for their negligence and strict liability for failing to provide patrons and invitees such as CHERYL ROMANO with a safe place in its business establishment in which to enjoy the Casino's entertainment and in creating a defective, dangerous and ultra-hazardous condition which caused CHERYL ROMANO to incur serious injuries." (See *Romano v. Jazz Casino Company, LLC, et al*, United States Court of Appeals for the Fifth Circuit, No. 21-30554, Appellants' Brief, pp. 23-24). The suit also asserts that ALL DEFENDANTS, including Reece and Forcier, " have violated numerous laws of the State of Louisiana, including, but not limited to the following: (1) LA-R.S. 9:2800.6 (merchant liability), (2) LA-C.C. Art. 660 (premises liability), (3) LA-C.C. Art. 2317, (4) LA-C.C. Art. 2317.1 (premises defects), (5) LA-C.C. Art. 2322 (ruin of premises), and (6) LA-C.C. Art. 2315 (negligence). The only cause of action addressed by the courts is the merchant liability statute, LA-R.S. 9:2800.6. (App. 3a, 11a-14a) This statute does not apply to the individual defendants, Forcier and Reece, but yet, both were dismissed under this statute. (See *Romano v. Jazz Casino Company, LLC, et al*, United States Court of Appeals for the Fifth Circuit, No. 21-30554, Appellants' Brief, pp. 23-24, 62-63).

D. Facts

Defendant, JAZZ CASINO COMPANY, LLC, ("Harrah's") is in the business of inviting and enticing patrons into their establishment for the purpose of

gambling. Harrah's attracts people into their Casino by offering various games, but also entices the general public into the Casino through countless promotions of free vehicles, food, drink and free entertainment in the form of Mardi Gras Parades conducted on its dimly lighted Casino floor. The Harrah's surveillance video ("Video") noticeably displays Harrah's parade attraction and the various patrons following and watching the parade. The Mardi Gras float is unmistakably an "attention getter." Harrah's purpose is to create a fun and jovial environment for the patrons according to Ms. Loston, Harrah's security personnel who investigated Romano's fall and drafted the accident report. (*Romano v. Jazz Casino Company, LLC, et al*, United States Court of Appeals for the Fifth Circuit, No. 21-30554, Appellants' Brief, pp. 26-40). It certainly attracted Mrs. Romano's attention along with many other guests in the Casino, as can be seen from the Video. Of important note is that Harrah's had gratuitously given Mrs. Romano a "second line" white napkin to engage in the parade festivities, completing the distraction environment.

Mrs. Romano walked beside the moving parade until she encountered the prize vehicle display ramp ("display ramp"). At this point, she began to continue to travel with the float direction but had to walk beside the display ramp because it interfered with her direction of travel. As she walked beside the display ramp, she either became entangled in the electrical cord positioned at the corner of the display ramp or stepped into the display ramp corner, resulting in her fall. One cannot determine solely from the obscure and unclear Video exactly what caused the fall. However, after the fall, the Video discloses that another Harrah's employee had to kick the electrical cord out of the highly traveled isle way to prevent others

from tripping. The Video analyzed with reference to a post-accident photograph ("Romano photograph" or "photograph", *Romano v. Jazz Casino Company, LLC, et al*, United States Court of Appeals for the Fifth Circuit, No. 21-30554, ROA.555-610, ROA.1132, Appellants' Brief, pp. 26-40) and evaluated with the testimony of various Harrah's witnesses establish, more probable than not, that the cord at the corner of the display ramp caused the fall. (*Id*). So, the evidence gathered after the fall compliments the Video and directs one to a reasonable conclusion and probable cause of the fall. The electrical cord is not visible in the Video prior to the fall but is clearly visible in the Video and photograph after the fall.

Mr. Romano took an iPhone photograph ("photograph") of the cord seconds after Mrs. Romano's fall. Elesha Loston, a Harrah's employee, conducted an investigation after the fall and issued an accident report. The courts erred by not considering the post-accident evidence needed to make sense of the Video. The courts erred by considering an isolated, single piece of evidence, the Video, to determine the probable cause of the fall and to grant summary judgment.

E. Testimony and Evidence Ignored and/or Not Properly Evaluated by the District Court and the Fifth Circuit

The following evidence was not properly considered or thoroughly discussed by the District Court or the Fifth Circuit.

1. **Mrs. Romano, plaintiff:** Testified that she felt the cord on her foot and then fell. She had no doubt that the cord caused her fall. (*Romano v. Jazz Casino Company,*

LLC, et al, United States Court of Appeals for the Fifth Circuit, No. 21-30554, ROA.555-610, 1132, Appellants' Brief, pp. 26-40).

2. **Paul Reece, defendant:** A Harrah's employee testified that he installed the display ramp and that the cord shown in the post-accident photograph was potentially a "trip hazard". (*Id*)

3. **Paul Forcier, defendant**: a Harrah's employee who helped install the display ramp, also testified that the electrical cord posed a "trip hazard". (*Id*).

4. **Charles Stephens, Harrah's electrician:** Testified that he repaired the vehicle display light connected to the electrical cord shortly after the Romano accident. His notes about the repair said: "Replace light strip on car ramp for promo car at convention entrance." "We have an issue with the floor plug on car ramp. One of the electrical prongs is actually broke off in the outlet. What else can [we] do to minimize guest tripping on this?" (*Id*).

5. **Elesha Loston, Harrah's accident investigator:** Testified that she took several photographs of the accident area and the electrical cord attached to the light. **However, Harrah's lost the photographs and are no longer available.** She testified that Mrs. Romano tripped on the electrical cord according to her investigation. She also said that there was nothing else that Mrs. Romano could have tripped on. She also verified that a Harrah's employee kicked the cord out of the isle way after the fall. (*Id*).

6. S**hayna Kinchen, Harrah's supervisor**: Testified that the cord was a trip hazard. She also said that no one

at Harrah's knows what caused Romano to fall and that there was no evidence to dispute Romano's version of the accident. (*Id*).

7. **Mr. Romano, plaintiff:** Testified that his wife tripped on the cord. He took the only photograph of the cord, the light and the ramp still available. Harrah's photographs have been lost.

8. **Mr. Romano's photograph** depicting the cord and the light located at the corner of the ramp where the fall occurred. (*Romano v. Jazz Casino Company, LLC, et al*, United States Court of Appeals for the Fifth Circuit, No. 21-30554, ROA.555-610, 1132).

REASONS FOR GRANTING THE PETITION

1. Violations of Due Process guaranteed by the Fifth and Fourteenth Amendments – The Courts Failed to consider and credit key evidence presented by Petitioners. See Question Presented No. 1:

Petitioners understand that a petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings. (Rule 10 (a), Supreme Court Rules). While there are multiple erroneous factual findings by the District Court which are not supported by the record and which were accepted by the Fifth Circuit, the issues in this Writ address the egregious nature of the **courts' failure to consider and credit key evidence presented by Petitioners** which actions have resulted in a departure from the accepted and usual course of judicial proceedings, or sanctioned such a departure by the lower court, as to call for an

exercise of this Court's supervisory powers. (Rule 10 (a), Supreme Court Rules). Both the District Court and the Fifth Circuit dismissed all of Petitioners' causes of action based solely on a review of a single piece of evidence, an obscure, unclear and inconclusive Video, while ignoring the entirety of other evidence presented by Petitioners. The Fifth Circuit's errors have resulted in violations of Petitioners guaranteed rights of due process under the Fifth and Fourteenth Amendments to the United States Constitution.

The prime directive from the United States Supreme Court addressing summary judgment evaluation is that a judge's function is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. In *Tolan v. Cotton,* 134 S. Ct. 1861, 188 L. Ed. 2d 895, 572 U.S. 650, 656 (2014), this Court issued the following directives to courts considering motions for summary judgment:

> "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc* ., 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). (572 U.S. 650, 651)."
>
> * * *
>
> " a "judge's function" at summary judgment is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson,* 477 U.S., at 249, 106 S.Ct. 2505. Summary judgment is appropriate only if "the movant shows that

there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed. Rule Civ. Proc. 56(a). In making that determination, a court must view the evidence "in the light most favorable to the opposing party." *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970) ; see also *Anderson, supra,* at 255, 106 S.Ct. 2505"

* * *

"Accordingly, courts must take care not to define a case's "context" in a manner that imports genuinely disputed factual propositions. See *Brosseau,supra,* at 195, 198, 125 S.Ct. 596 (inquiring as to whether conduct violated clearly established law " 'in light of the specific context of the case' " and construing "facts ... in a light most favorable to" the nonmovant)."

* * *

"The witnesses on both sides come to this case with their own perceptions, recollections, and even potential biases. It is in part for that reason that genuine disputes are generally resolved by juries in our adversarial system. By weighing the evidence and reaching factual inferences contrary to Tolan's competent evidence, the court below neglected to adhere to the fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the nonmoving party."

Mindful that Romanos' version of any disputed issue of fact must be presumed to be correct, plaintiffs' version of the factual basis of Petitioners' claims demonstrated by the Video, the photograph, the testimony of Harrah's witnesses and the testimony of the Romanos' must be considered as a whole and all considered accurate. *Eastman Kodak Company v. Image Technical Services, Inc,* 112 S. Ct. 2072, 504 U.S. 451, 456, 119 L.Ed.2d 265 (1992).

The Supreme Court cautioned judges about not adequately considering the jury's role in our legal system when ruling on motions for summary judgement. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 106 S. Ct 2505, 91 L. Ed. 2d 202 (1986).

> " Our holding that the clear-and-convincing standard of proof should be taken into account in ruling on summary judgment motions does not denigrate the role of the jury. It by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. *Adickes,* 398 U.S., at 158-159, 90 S.Ct., at 1608-1609. Neither do we suggest that the District Courts should act other than with caution in granting summary judgment or that the District Court may not deny summary judgment in a case where there is reason to believe that the better course would

be to proceed to a full trial. *Kennedy v. Silas Mason Co.,* 334 U.S. 249, 68 S.Ct. 1031, 92 L.Ed. 1347 (1948)."

* * *

Summary judgment will not lie if the dispute about a material fact is "genuine," that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. At the summary judgment stage, the trial judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. There is no such issue unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. In essence, the inquiry is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.

* * *

"More important for present purposes, summary judgment will not lie if the dispute about a material fact is "genuine," that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."

* * *

" it is clear enough from our recent cases that at the summary judgment stage the judge's

function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. As *Adickes, supra,* and *Cities Service, supra,* indicate, there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. *Cities Service, supra,* 391 U.S., at 288-289, 88 S.Ct., at 1592. If the evidence is merely colorable, *Dombrowski v. Eastland,* 387 U.S. 82, 87 S.Ct. 1425, 18 L.Ed.2d 577 (1967) (*per curiam*), or is not significantly probative, *Cities Service, supra,* at 290, 88 S.Ct., at 1592, summary judgment may be granted."

* * *

" the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict—"whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed." Munson, supra, 14 Wall., at 448."

A. Validity of Post-Accident/Forensic Evidence

The Fifth Circuit made an astonishing statement relating to Harrah's accident investigation and the forensic evidence relevant to the cause of the fall. The court said:

> "Second, appellants criticize the district court for ignoring other evidence regarding the cord's position. Specifically, appellants point to a photograph taken by Mr. Romano after the accident, which shows the cord lying outside the perimeter of the vehicle display, and testimony by Harrah's employees about the photograph. But all of this evidence is relevant only to the cord's position after the incident. None of appellants' evidence supports their assertion that the cord created a hazard before Mrs. Romano's fall." [Emphasis added]. (App. 4a).

The Fifth Circuit, as did the District Court, takes the position that a cause of an accident cannot be determined by evidence found and preserved at the scene of an incident. They argue that because the cord cannot be seen in the Video prior to the fall, that it is impossible to prove that the cord was located in a dangerous area before the fall. Of course, these positions are utterly irrational and unsupportable. Causes of accidents are proven everyday through post-accident evidence, including the use of post-accident photographs and witness statements. The causes of most vehicle and aircraft accidents can only be proven through the evaluation of post-accident evidence. In the present matter, we have an inconclusive, obscure Video that cannot be relied upon without the aid of witness testimony and Mr. Romano's photograph. The Fifth

Circuit erred in failing to consider all of the relevant evidence and further erred by accepting the District Court's determination of the cause of the accident without a review of all of the available evidence. Probable cause of an accident must be left to the jury's wise evaluation and decision process.

The evidence in the form of the Video, the witnesses' testimony, the accident investigation report and the Romano photograph prove, more likely than not, that Romano tripped on the electrical cord positioned at the corner of the display ramp. If the cord was not in a position where Romano's foot could have come into contact with it, dragging it far into the passageway, how did the cord end up in a position far into the aisle-way where a Harrah's employee had to kick it out of the way so no one else would trip on it? The cord was not visible before the fall but was far into the isle-way after the fall and clearly visible in the Video. Romano's foot had to come into contact with the cord. But this evaluation should have been left to the jury's evaluation. The District Court opined that the cord was probably disturbed by Mrs. Romano after her fall. (App. 14a-16a). This determination of likely cause is not appropriate by a court ruling on a motion for summary judgment.

It is respectfully submitted that the Video shows the "snag", the "tug" and the fall. Romano's photograph shows that the cord was positioned by Harrah's at the corner of the ramp where it could have been entangled with Romano's foot. The Romano photograph shows that the cord was positioned exactly where the courts assert the fall occurred. (App. 2a, 3a-4a, 7a, 8a, 14a-17a). The Romano photograph shows the "trip hazard" at the corner

of the ramp. The Video shows the cords length and location after the fall. The Video compliments the photograph by showing that Mrs. Romano's fall was in a direction opposite to that of the final resting place of the cord. Ms. Loston, the Harrah's investigator, took photographs of the cord's position after the fall (photographs which are now lost) and came to the conclusion that Mrs. Romano tripped on the cord. All of Harrah's employees were of the opinion that the cord created a trip hazard. The hazard was so obvious once discovered that Harrah's actually taped and secured the electrical cord properly to the floor after the accident and posted warning signs about the cord's location. (See *Romano v. Jazz Casino Company, LLC, et al*, United States Court of Appeals for the Fifth Circuit, No. 21-30554, Appellants' Brief, pp. 31-33). The courts did not address these undisputed facts.

Armed with the Video and the post-accident evidence, a jury could have rendered a judgment for the plaintiff. See the factors enumerated by *Marshall v. Jazz Casino Company, LLC*, 197 So. 3d 316 (La. App. 4th Cir. 2016). Notwithstanding, if there are reasonable questions about the cause, shouldn't the jury decide probable cause? See *Howlett v. Birkdale Shipping Co., SA*., 512 U.S. 92, 114 S. Ct.2057, 129 L. Ed. 2d 78 (1994).

B. Failure to Consider Key Evidence

The District Court dismissed all of Plaintiffs' causes of action based solely on a review of the unclear, obscure and inconclusive Video without full and complete consideration of the large array of other supporting evidence that, at the very least, create genuine disputes of material fact. Without a proper *de novo* review and discussion of the key evidence, the Fifth Circuit rubber stamped the District

Court's decision stating: "Appellants argue a jury could conclude from the video that Mrs. Romano tripped over a dangerously positioned electrical cord. But the video shows that Mrs. Romano tripped over the corner of the display itself. (App. 4a)." "Appellants' version of the facts is contradicted by the video." (*Id*).

The Video does not clearly and conclusively show Mrs. Romano walking into the corner of the display ramp. She falls to the side of the display ramp only after the entanglement of the cord starts the fall process. She falls forward and the cord is jerked rearward into the isle-way. If Romano's foot did not become entangled in the cord, how did it end up far into the isle-way, opposite Romano's direction of fall?

Nowhere in the opinions can a discussion be found about Mr. or Mrs. Romano's testimony and explanation of the incident. Mrs. Romano said she felt the cord on her foot prior to the fall. (*Romano v. Jazz Casino Company, LLC, et al*, United States Court of Appeals for the Fifth Circuit, No. 21-30554, ROA.555-610, Appellants' Brief, pp. 26-29). Romano's photograph was not analyzed or properly considered by either court. The decisions are void of any discussion and analysis of the testimony of: Mr. Dorsey, Ms. Loston, Ms. Kinchen, Mr. Reece, Mr. Forcier, or Mr. Stephens. There is no mention by the courts of the Accident Report. Simply put, the courts ignored the majority of the key evidence presented by the plaintiffs, except for the Video. Both decisions ignore the instructions issued by this Court in *Tolan v. Cotton,* 134 S. Ct. 1861, 188 L. Ed. 2d 895, 572 U.S. 650, 656 (2014) and *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 106 S. Ct 2505, 91 L. Ed. 2d 202 (1986).

The Fifth Circuit cites *Scott v. Harris,* 127 S. Ct. 1769, 167 L. Ed. 2 686, 550 U.S. 372 to argue that the existence of a video should prevent any consideration of other key evidence contained in the record. (App. 5a). However, this Court in *Scott* did NOT make any such ruling. Not only is *Scott* distinguishable on the facts alone, but the instructions provided by the Court support Plaintiffs' arguments. "Where the record taken ***as a whole*** could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Scott*, 550 U.S. 372, 380. [emphasis added]. "When opposing parties tell two different stories, one of which is ***blatantly contradicted by the record,*** so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott*, 550 U.S. 372, 380. [Emphasis added].

First, Plaintiffs explanation of the fall is not and has not been "blatantly contradicted by the record". Instead, the ***entire*** record proves, more probable than not, that Mrs. Romano tripped because of the unsecured electrical cord located at the corner of the ramp where both courts pinpointed the fall. The unclear, obscure and inconclusive Video by itself does not disprove Petitioners' version of the fall nor does the Video alone prove that Mrs. Romano walked directly into the corner of the display ramp. The evidence taken as a whole proves, more probable than not, that the cord was part of the display light system, that the cord ran from the light to an electrical socket outside the perimeter of the ramp and that the cord was in a position to create a trip hazard at the corner of the ramp. These facts were confirmed by Ms. Loston and her investigation.

The Fifth Circuit also highlights a statement made by the District Court: "And in the moments before the

accident, the video shows several people passing by the left, front corner of the vehicle display – the very same corner where Mrs. Romano fell-and none of those other individuals stumble or step over any cords." (App. 4a). **The Video establishes that other patrons did not walk along the exact same path as Romano; therefore, there would be no reason for other accidents to have occurred.** Simply put, Mrs. Romano, unlike other patrons, walked from the right corner of the display ramp to the left side, became entangled in the unsecured cord lying outside of the ramp and fell.

Both courts suggest that because other patrons did not fall on the cord that Romano must have been negligent or that the cord was open and obvious. However, this does not establish that Romano was negligent or that the cord was open and obvious. While it is true that other patrons walked by the left, front corner of the display, there is no evidence that other patrons traveled the exact same path as that of Mrs. Romano from the right corner to the left corner where the cord was located according to Romano's photograph. No one walks beside the display from the right front corner to the left front of the display.

C. Findings of Fact, Cause Determination and Inferences to Be Drawn

The Fifth Circuit and the District Court erred by failing to draw justifiable inferences in favor of the Petitioners and in weighing the evidence to arrive at the cause of the fall. The District Court's observations, endorsed by the Fifth Circuit, speak in terms of "likely" cause and "explanation" of the incident. (App. 4a, 16a-17a).

In determining the probable cause of the fall, the District Court said:

> "After the parade moved pass the display, Cheryl, who the video shows is looking at her phone screen and talking to her husband as she is walking in the aisle, trips and falls over the left, front edge of the car display where the ramp begins." "As the couple approaches the left, front corner of the vehicle display, where the ramp meets the ground, Cheryl's left foot ***appears*** to clip the corner of the ramp and she trips and falls."[Emphasis added]. To be sure, the cord is not evident in the video, and the ***most likely explanation*** for its condition after the accident is that Cheryl, when she clipped the corner of the display and fell, dislodged the cord from where it had been placed." [Emphasis added]. (App. 15a).

The photograph shows that the cord is located at the corner of the display ramp. Had the courts analyzed the Video with the photograph, they would have learned that instead of Romano's foot coming into contact with the corner of the ramp that it could have just as easily became entangled in the cord located at the same corner.

The Court's evaluation, analyzation and weighing of the evidence pose numerous questions and legal errors. It is a fact that the cord was found to be located far into the passageway resting in the opposite direction of the fall. It is a fact that Mrs. Romano fell forward with the cord being propelled in the opposite direction. The Video shows that a Harrah's employee moved the cord out of

the passageway with his left foot after the fall. The cord was again moved to its photo location by another Harrah's employee according to Mr. Romano. If the cord was "dislodged" by Romano as suggested by the courts, what part of her body caused the movement of the cord? Was it her foot? The courts do not say.

The District Court's "most likely explanation" of the fall, accepted by the Fifth Circuit, does not discuss, speculate, evaluate, foretell or hypothesize on how the cord was pulled so far away from the display. The District Court states that the cord became "dislodged" but does not explain how it ended up far into the passageway. It ended far into the isle-way because Romano's foot pulled it there during the fall. In any event, the jury should be given the right to determine the truth of the matter and which version is more likely.

Reasonable inferences are inferences reasonably ***drawn from all the facts then before the court***, after sifting through the universe of all possible inferences the facts could support. Reasonable inferences are not necessarily more probable or likely than other inferences that might tilt in the moving party's favor. **Instead, so long as more than one reasonable inference can be drawn, and one inference creates a genuine issue of material fact, the trier of fact is entitled to decide which inference to believe and summary judgment is not appropriate.** *Hunt v. Cromartie*, 526 U.S. 541, 119 S. Ct. 1545, 143 L. Ed. 2d 731 (1999); *Patterson & Wilder Const. Co., v. United States*, 226 F. 3d 1269 (11th Cir. 2000).

This Court has instructed district courts that the evidence of the nonmovant is to be believed, and all

justifiable inferences are to be drawn in his favor. *Tolan v. Cotton, 134 S. Ct. 1861, 188 L. Ed. 2d 895, 572 U.S. 650, 656 (2014).* Also see *Variety Stores, Inc. v. Wal-Mart Stores, Inc.*, 888 F. 3d 651 (4th Cir. 2018). In evaluating a motion for summary judgment, the court must view the evidence in the light most favorable to the opposing party. *Id.* Plaintiffs' version of any disputed issue of fact must be presumed to be correct. (*Eastman Kodak Company v. Image Technical Services, Inc*, 112 S.Ct. 2072, 504 U.S. 451, 456, 119 L.Ed.2d 265 (1992); *Arizona v. Maricopa County Medical Society,* 457 U.S. 332, 339, 102 S.Ct. 2466 2470, 73 L.Ed.2d 48 (1982)).

The District Court and the Fifth Circuit violated theses directives by not considering Mrs. Romano's testimony and by drawing improper, inaccurate and erroneous inferences without considering the entirety of the evidence and all the potential causes of the fall. See *Salazar-Limon v. City of Hous*, 137 S. Ct. 1277, 197 L. Ed. 2d 751 (2017).

D. A Fair Minded Jury Could Have Returned a Verdict for Petitioners After Reviewing the Entirety of the Evidence.

The evidence presented by the plaintiffs is strong and explicit. The photograph taken by Mr. Romano shortly after the fall discloses the cord's location in reference to the display ramp and that its length was more than sufficient to cause a trip hazard. Both Romanos testified that the cord caused the fall. Harrah's security and accident investigator, Loston, testified that she was told by Mr. and Mrs. Romano that the cord caused the fall. **According to Ms. Loston, there was nothing else**

that could have caused the fall. Two other Harrah's employees, Reece and Forcier, said that the cord could pose a trip hazard. Harrah's confirmed in discovery that the electrical cord was taped to the floor and warning signs placed about the cord after the fall. The trip hazard was also confirmed by Harrah's electrician, Stephens. Finally, Ms. Kinchen stated under oath that her investigation yielded no other evidence that would suggest anything other than the cord causing the fall.

Of significant importance is the fact neither the District Court nor the Fifth Circuit ever discussed or considered whether a fair minded jury could have determined that the electrical cord caused the fall. While the District Court acknowledges the standard in its general discussion, it never applies it. The Fifth Circuit also mentions the standard, but does not discuss or apply it. The District Court and the Fifth Circuit erred by not applying these standards to the facts. See *Kisela v. Hughes*, 138 S. Ct. 1148, 200 L. Ed 2d 449 (2018).

It also appears that neither court considered the testimony of the Romanos. Notably, some of the evidence addressing the electrical cord and its condition comes from the plaintiffs' own testimony and the photo taken by Mr. Romano.

> "To the extent the testimony of a witness who is also a party may be impaired by party self-interest, it is ordinarily the role of the jury—not the court on summary judgment—to discount it accordingly." *Dewan v. M-I, LLC*, 858 F. 3d 331 (5th Cir. 2017). "But unless a self-serving assertion is conclusory or so undermined as

> to be incredible, it makes no difference that a plaintiff's testimony is uncorroborated. After all, evidence a party proffers in support of its cause will usually, in some sense, be 'self-serving.' Whether self-serving or not, the parties are legally competent to give material testimony and in many cases are the key, or even sole, witnesses. To the extent the testimony of a witness who is also a party may be impaired by party self-interest, it is ordinarily the role of the jury—not the court on summary judgment—to discount it accordingly." *Robinson v. Pezzat* , 818 F.3d 1, 9, 10 (D.C. Cir. 2016); *Rodriguez v. Adams Rest. Grp*, 308 F. Supp. 3d 359 (D. D. C. 2018).

2. Violations of Due Process guaranteed by the Fifth and Fourteenth Amendments – The Courts erred by addressing only one cause of action out of many. See Question Presented No. II:

Petitioners understand that a petition for a writ of certiorari is rarely granted when the asserted error consists of the misapplication of a properly stated rule of law. (Rule 10 (a), Supreme Court Rules). While there are multiple misapplications of properly stated rules of law by the District Court which were accepted by the Fifth Circuit, the issues in this Writ address the **egregious nature of the courts' failure to consider and address only one cause of action out of eight (8) presented by Petitioners**, which actions have resulted in a departure from the accepted and usual course of judicial proceedings, or sanctioned such a departure by the lower court, as to call for an exercise of this Court's supervisory

power. (Rule 10 (a), Supreme Court Rules). The egregious departures also resulted in the misapplication of the single cause of action that was actually addressed by the courts. The Fifth Circuit's errors have resulted in violations of Petitioners guaranteed rights of due process under the Fifth and Fourteenth Amendments to the United States Constitution.

The plaintiffs pled numerous causes of action under Louisiana law, including merchant liability under LSA-R.S. 9:2800.6, negligence under LSA-C.C. Art. 2315, strict liability and premises liability under LSA-C.C. Art. 660, 2317, 2317.1 and 2322. (See *Romano v. Jazz Casino Company, LLC, et al*, United States Court of Appeals for the Fifth Circuit, No. 21-30554, Appellants' Brief, pp. 23-25). The numerous causes of action were directed against the various merchants collectively referred to as Harrah's. But, they were also directed specifically against the two individuals who installed the display ramp and the electrical cord, Forcier and Reece.

LSA-R.S. 9:2800.6 applies to duties and liability imposed upon "merchants" and not on individual named defendants such as Reece and Forcier. Additionally, the law specifically states that other causes of action are reserved and are not adversely affected by the statute.[2] The District Court, whose actions were endorsed by the Fifth Circuit, erred by dismissing the individual defendants, Reece and Forcier, under the single consideration of R.S. 9:2800.6. The District Court dismissed all defendants without considering, evaluating, analyzing, or applying other law that may be applicable to the facts. This is clear error.

2. LSA-R.S. 9:2800.6 D.

Neither the District Court nor the Fifth Circuit fully analyze and applied the one statute referenced. LSA-R.S. 9:2800.6 outlines three "elements" that a plaintiff must prove to prevail in a matter against a *merchant* under the statute. The Fifth Circuit overlooked these errors. The District Court focused only on one element, whether the display ramp (not the cord) presented an unreasonable risk of harm. It did not address the other two elements nor did it address the role that the cord played in the fall. This was clear error.

When analyzing the unreasonable risk of harm issue, the District Court enumerates the four tests announced in *Dauzat v. Curnes Guillot Logging, Inc.*, 995 So. 2d 1184 (2008), but does not properly apply the tests to the facts. There is no discussion about utility, magnitude of harm, obviousness and apparentness of the electrical cord, the cost of preventing the harm or the nature of plaintiff's activities. The District Court's failure to properly apply the statute against the merchant defendants was clear error. The Fifth Circuit accepted these errors without comment.

3. Violations of Petitioners' Seventh Amendment to Right to a Jury Trial by Granting Summary Judgment Under the Circumstances. See Questions Presented III.

When the evidence supports differing versions of the truth, it is not for a judge to resolve the dispute. *Salazar-Limon v. City of Houston*, 137 S. Ct. 1277, 1281, 197 L. Ed. 2d 751 (2017); *First National Bank of Ariz. V. Cities Service Co.*, 39 U.S. 253, 289, 88 S. Ct. 1575, 20 L. Ed. 2d 569 (1968). Summary Judgment is proper only if there

is only one reasonable conclusion a jury could reach. *Brosseau v. Haugen*, 543 U.S. 194, 207; Bryant v. U.S. Treasury Dept., Secret Service, 903 F. 2d 717, 721 (CA9, 1990).

According to this Court, the District Court does not have authority to take inherently factual questions away from the jury. *Brosseau v. Haugen*, 543 U.S. 194, 206 (2004); *Hunter v. Bryant*, 502 U.S. 224, 229 (1991). Such infringement on the rights of a jury violates the Constitutional rights of the litigants, including violations of the First, Seventh and Fourteenth Amendments. The District Court and the Fifth Circuit erred by removing the jury's role in our legal system by solely and unilaterally determining the probable cause of the fall when several potential causes existed.

Only once has the Supreme Court examined the constitutionality of summary judgment, on a claim that the procedure deprives a nonmovant of their Seventh Amendment rights to a trial by jury. *Fidelity Deposit Company of Maryland v. United States of American to the Use of Lewis Smoot*, 187 U.S. 315, 23 S. Ct. 120, 47 L. Ed. 194 (1902). The Court rejected this argument, reasoning that any time summary judgment is granted, it is only because there is no triable issue for the jury. No lower federal court has ever declared summary judgment unconstitutional to counsels' knowledge.

The plaintiffs are not asserting that Rule 56 is Unconstitutional on its face or that Congress had no authority to establish the rule. However, the plaintiffs are taking exception with the manner in which the Rule was applied. In 1902 the Supreme Court reasoned that "It

was never contemplated that this rule required a party to follow his case through all the lights and shadows of the evidence in it. That would be to hold it essential that he should try his case in his plea." (*Id*). But the District Court did just that. It basically reviewed the evidence, weighed the credibility of the witnesses and determined the "likely cause" of the fall. (App. 15a-16a). The Fifth Circuit followed suit. This is the danger with summary judgments. It takes away a litigant's right to trial by jury when a District Court does not properly apply the directives from the Supreme Court. This danger is sharpened by the system because this Court is not able to hear every summary judgment wrongfully granted.

Our legal system has changed dramatically since 1902 and the Rule has been amended many times. But the basic premise still exists that summary judgment should not be substituted for the wisdom instilled in a properly constituted jury. In the instant matter, the District Court, with acceptance from the Fifth Circuit, reviewed one piece of evidence (Video) and declared the winner under a single Louisiana statute without fairly considering all of the evidence and applying all of the appropriate legal standards. This matter should have gone to a jury. The plaintiffs are not required to try their case on a motion for summary judgment. The plaintiffs are not required to try their case solely before a judge when a jury has been properly requested. By depriving the plaintiffs of their right to trial by jury under the present circumstances, plaintiffs' First, Seventh and Fourteenth Amendment rights have been violated. See *Fidelity Deposit Company* of *Maryland v. United States of America to the Use of Lewis Smoot*, 187 U.S. 315, 23 S. Ct. 120, 47 Led. 194 (1902).

CONCLUSIONS

The Fifth Circuit erred by not adhering to the summary judgment standards announced by this Court in Tolan v. Cotton, 134 S. Ct. 1861, 188 L. Ed. 2d 895, 572 U.S. 650, 656 (2014) and Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986) thus violating Petitioners' right to fair and equitable due process guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. The Fifth Circuit failed to consider any of the key evidence presented by Petitioners, opting instead of swiftly disposing of the case through the use of an obscure and unclear Video that did not conclusively show the cause of the fall. By weighing the evidence and arriving at the probable cause of the fall, the Fifth Circuit also violated Petitions right to trial by jury by dismissing Petitioners' causes of action through summary proceedings.

To right an egregious wrong, this Court should grant Writs so the summary judgment standards can again be announced clearly and plainly. Any ambiguities in the positions held by this Court or the lower courts must be clarified in order to prevent continued violations of the Constitution by the lower courts. This Writ should be GRANTED.

Respectfully submitted,

James J. Carter
James Carter & Associates, LLC
1100 Poydras Street, Suite 1475
New Orleans, LA 70163
(504) 324-4400

Edward D. Markle
Counsel of Record
Markle & Associates, APLC
3500 Washington Avenue, Suite F
Gulfport, MS 39507
(504) 388-5848
emarkle@msn.com

Attorneys for Petitioners

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED APRIL 1, 2022

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

April 1, 2022, Filed

No. 21-30554

CHERYL ROMANO; WAYNE ROMANO,

Plaintiffs-Appellants,

versus

JAZZ CASINO COMPANY, L.L.C.; JCC HOLDING COMPANY II, L.L.C.; HARRAH'S NEW ORLEANS CASINO; HARRAH'S NEW ORLEANS MANAGEMENT COMPANY, L.L.C.; CEOC, L.L.C.; CAESARS LICENSE COMPANY, L.L.C.; CAESARS ENTERTAINMENT, INCORPORATED; CAESARS ENTERTAINMENT OPERATING COMPANY, INCORPORATED; CAESARS ENTERPRISE SERVICES, L.L.C.; CAESARS RESORT COLLECTION, L.L.C.; PAUL FORCIER; NICHOLAS REECE,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana.
USDC No. 2:20-cv-00228.

Appendix A

Before SOUTHWICK, OLDHAM, and WILSON, *Circuit Judges*.

PER CURIAM:*

Plaintiffs in this case assert state-law claims arising out of a slip-and-fall in a Louisiana casino. The district court granted summary judgment to the defendants. We affirm.

I.

Cheryl Romano and her husband Wayne visited Harrah's New Orleans on January 25, 2019. While there, Mrs. Romano tripped on the casino floor. She suffered serious injuries.

The Romanos sued the casino in Louisiana state court, asserting claims of merchant liability, strict premises liability, and negligence. Defendants removed to federal district court.

The district court reviewed security footage documenting the incident. It concluded Mrs. Romano tripped over a vehicle display, which was an open and obvious hazard. So the court held the Romanos failed to create a genuine dispute regarding whether there was an unreasonable risk of harm before the accident, and it granted summary judgment to defendants. The Romanos timely appealed.

---

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

II.

Appellants argue the district court erred by granting summary judgment to defendants. We review *de novo* a district court's grant of summary judgment, applying the same standards as the district court. *Jones v. New Orleans Regional Physician Hosp. Org., Inc.*, 981 F.3d 428, 432 (5th Cir. 2020). Summary judgment is warranted if the movant shows there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a).

Under Louisiana law, the Romanos bear the burden to prove that a condition on the casino's premises "presented an unreasonable risk of harm." LA. REV. STAT. § 9:2800.6(B)(1). Louisiana's courts consider "the obviousness and apparentness of the condition" to determine whether a condition presents such a risk. *Dauzat v. Curnest Guillot Logging Inc.*, 995 So. 2d 1184, 1186-87 (La. 2008). A defendant generally has no duty to protect against obvious and apparent hazards. *See id.* at 1186.

Appellants contend they provided sufficient evidence to create a genuine fact dispute as to the cause of Mrs. Romano's fall. They say she could have tripped over an unsecured electrical cord instead of the display itself. And they point to two sources of evidence in support of that contention: First is the security footage. Second is evidence of the cord's position after Mrs. Romano's fall.

Neither source of evidence is sufficient to preclude summary judgment. First, the security footage.

Appellants argue a jury could conclude from the video that Mrs. Romano tripped over a dangerously positioned electrical cord. But the video shows that Mrs. Romano tripped over the corner of the display itself. Moreover, there are no electrical cords or wires visible in the video before Mrs. Romano's fall. And in the moments before the accident, the video shows several people passing by the left, front corner of the vehicle display—the very same corner where Mrs. Romano fell—and none of those other individuals stumble or step over any cords.

Second, appellants criticize the district court for ignoring other evidence regarding the cord's position. Specifically, appellants point to a photograph taken by Mr. Romano after the accident, which shows the cord lying outside the perimeter of the vehicle display, and testimony by Harrah's employees about that photograph. But all of this evidence is relevant only to the cord's position *after* the incident. None of appellants' evidence supports their assertion that the cord created a hazard before Mrs. Romano's fall. And "the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

We agree with the district court that appellants have not carried their summary-judgment burden. Appellants' version of the facts is contradicted by the video. And they

presented no other evidence sufficient to create a genuine issue of material fact regarding the cord's position *before* the accident. *See Scott v. Harris*, 550 U.S. 372, 380, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007) ("When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment."). Appellees were therefore entitled to summary judgment.

AFFIRMED.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, FILED AUGUST 12, 2021

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NO. 20-228
SECTION M (3)

CHERYL ROMANO AND WAYNE ROMANO

VERSUS

JAZZ CASINO COMPANY, LLC, *et al.*

August 12, 2021, Decided;
August 12, 2021, Filed

ORDER & REASONS

Before the Court is a motion for summary judgment filed by defendant Jazz Casino Company, LLC ("Jazz Casino") on behalf of all named defendants.[1] Plaintiffs Cheryl and Wayne Romano (collectively, "Plaintiffs") respond in opposition,[2] and Jazz Casino replies in further support of its motion.[3] Having considered the parties'

1. R. Doc. 68.

2. R. Doc. 81.

3. R. Doc. 86.

memoranda, the record, and the applicable law, the Court issues this Order & Reasons granting Jazz Casino's motion because Cheryl's alleged injuries resulted from her tripping over an open and obvious display.[4]

I. BACKGROUND

This matter concerns a trip-and-fall accident in a casino. Jazz Casino owns and operates Harrah's New Orleans Casino ("Harrah's").[5] On January 25, 2019, Cheryl fell as she was walking through the casino.[6] A security video of the incident shows that, shortly before her fall, Cheryl was using her cell phone to take photographs of a second-line parade in the casino.[7] The parade passed by a large, illuminated prize vehicle display located on a raised chrome ramp in the middle of the casino's open floor.[8] The display effectively created passageways for pedestrians on each of its sides, and the parade passed in the aisle on the car's left side. After the parade moved passed the display, Cheryl, who the video shows is looking at her phone screen and talking to her husband as she is walking in the aisle, trips and falls over the left, front

4. Because Plaintiffs' claims are dismissed with prejudice, defendants' motion to exclude from trial or limit the testimony of Cheryl's treating physicians (R. Doc. 69) is DISMISSED as moot.

5. R. Doc. 68-1 at 2.

6. R. Doc. 19 at 6.

7. R. Doc. 68-6 (manual attachment).

8. *Id.*

edge of the car display where the ramp begins.[9] Plaintiffs allege that she tripped and fell on an electrical cord that was hidden by the ramp.[10] Plaintiffs filed the instant suit alleging that the electrical cord created a dangerous condition of which the casino had actual or constructive knowledge.[11] Plaintiffs assert claims of merchant liability under Louisiana Revised Statute 9:2800.6, strict premises liability, and negligence.[12]

II. PENDING MOTION

Jazz Casino argues that it is entitled to summary judgment because the video shows that there was no dangerous condition and the vehicle display was an open and obvious object that Cheryl should have seen and as to which it has no duty to protect patrons.[13] It further argues that there is no electrical cord visible in the aisle prior to the accident, and thus the cord is part of the display as a whole which was open and obvious.[14]

In opposition, Plaintiffs argue that Cheryl tripped over a hidden electrical cord connected to the vehicle display, which cord they contend was not an open and

---

9. *Id.*

10. R. Doc. 19 at 6.

11. *Id.*

12. *Id.* at 7-8.

13. R. Doc. 68-1 at 4-6, 9-13.

14. *Id.* at 5-6.

obvious condition because it cannot be seen in the security footage.[15] In support of their argument, they reference the security video and the testimony of some Jazz Casino employees, including security guard Elesha Loston who completed the accident report and testified that she was told Cheryl tripped over the cord which was part of the vehicle display.[16]

III. LAW & ANALYSIS

A. Summary Judgment Standard

Summary judgment is proper "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 a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) (quoting Fed. R. Civ. P. 56(c)). "Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* A party moving for summary judgment bears the initial burden of demonstrating the basis for summary judgment and identifying those portions of the record, discovery, and any affidavits supporting the conclusion that there is no genuine issue of material fact. *Id.* at 323. If

15. R. Doc. 81 at 1-5, 8-25.

16. *Id.*

the moving party meets that burden, then the nonmoving party must use evidence cognizable under Rule 56 to demonstrate the existence of a genuine issue of material fact. *Id.* at 324.

A genuine issue of material fact exists if a reasonable jury could return a verdict for the nonmoving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The substantive law identifies which facts are material. *Id.* Material facts are not genuinely disputed when a rational trier of fact could not find for the nonmoving party upon a review of the record taken as a whole. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986); *EEOC v. Simbaki, Ltd.*, 767 F.3d 475, 481 (5th Cir. 2014). Unsubstantiated assertions, conclusory allegations, and merely colorable factual bases are insufficient to defeat a motion for summary judgment. *See Anderson*, 477 U.S. at 249-50; *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994); *Hopper v. Frank*, 16 F.3d 92, 97 (5th Cir. 1994). In ruling on a summary-judgment motion, a court may not resolve credibility issues or weigh evidence. *See Delta & Pine Land Co. v. Nationwide Agribusiness Ins. Co.*, 530 F.3d 395, 398-99 (5th Cir. 2008). Furthermore, a court must assess the evidence, review the facts, and draw any appropriate inferences based on the evidence in the light most favorable to the party opposing summary judgment. *See Tolan v. Cotton*, 572 U.S. 650, 656-57, 134 S. Ct. 1861, 188 L. Ed. 2d 895 (2014); *Daniels v. City of Arlington*, 246 F.3d 500, 502 (5th Cir. 2001). Yet, a court only draws reasonable inferences in favor of the nonmovant "when

there is an actual controversy, that is, when both parties have submitted evidence of contradictory facts." *Little*, 37 F.3d at 1075 (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990)).

After the movant demonstrates the absence of a genuine issue of material fact, the nonmovant must articulate specific facts showing a genuine issue and point to supporting, competent evidence that may be presented in a form admissible at trial. *See Lynch Props., Inc. v. Potomac Ins. Co.*, 140 F.3d 622, 625 (5th Cir. 1998); Fed. R. Civ. P. 56(c)(1)(A) & (c)(2). Such facts must create more than "some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586. When the nonmovant will bear the burden of proof at trial on the dispositive issue, the moving party may simply point to insufficient admissible evidence to establish an essential element of the nonmovant's claim in order to satisfy its summary-judgment burden. *See Celotex*, 477 U.S. at 322-25; Fed. R. Civ. P. 56(c)(1)(B). Unless there is a genuine issue for trial that could support a judgment in favor of the nonmovant, summary judgment must be granted. *See Little*, 37 F.3d at 1075-76.

B. Merchant Liability

Section 9:2800.6 of the Louisiana Revised Statutes establishes the merchant's duty and the claimant's burden of proof in claims against a merchant arising out of a fall due to some condition existing on the merchant's premises. It provides in pertinent part:

Appendix B

A. A merchant owes a duty to persons who use his premises to exercise reasonable care to keep his aisles, passageways, and floors in a reasonably safe condition. This duty includes a reasonable effort to keep the premises free of any hazardous conditions which reasonably might give rise to damage.

B. In a negligence claim brought against a merchant by a person lawfully on the merchant's premises for damages as a result of an injury, death, or loss sustained because of a fall due to a condition existing in or on a merchant's premises, the claimant shall have the burden of proving, in addition to all other elements of his cause of action, all of the following:

> (1) The condition presented an unreasonable risk of harm to the claimant and that risk of harm was reasonably foreseeable.
>
> (2) The merchant either created or had actual or constructive notice of the condition which caused the damage, prior to the occurrence.
>
> (3) The merchant failed to exercise reasonable care. ...

La. R.S. 9:2800.6.

The statute requires a merchant "to exercise reasonable care to protect those who enter his establishment, to keep his premises safe from unreasonable risks of harm, and to warn persons of known dangers." *Foster v. Pinnacle Ent., Inc.*, 193 So. 3d 288, 295 (La. App. 2016). However, the merchant is not the insurer of its patrons' safety and is not liable for every accident that occurs on its premises. *Id.* (citing *Richardson v. La.-I Gaming*, 55 So. 3d 893, 895-96 (La. App. 2010)). Thus, to prevail in a slip-and-fall or, as here, trip-and-fall case, the plaintiff must prove all three elements of section 9:2800.6(B), and the failure to prove even one is fatal to the cause of action. *Id.* (citing *Alonzo v. Safari Car Wash, Inc.*, 75 So. 3d 509, 511 (La. App. 2011)).

Courts use a four-part risk-utility test to determine whether a condition presents an unreasonable risk of harm, which examines:

> (1) the utility of the complained-of condition;
>
> (2) the likelihood and magnitude of harm, including the obviousness and apparentness of the condition;
>
> (3) the cost of preventing the harm; and
>
> (4) the nature of the plaintiff's activities in terms of social utility or whether the activities were dangerous by nature.

Dauzat v. Curnest Guillot Logging Inc., 995 So. 2d 1184, 1186-87 (La. 2008). Generally, a defendant does not have a "duty to protect against an open and obvious hazard." *Id.* at 1186. The second factor "focuses on whether the allegedly dangerous or defective condition was obvious and apparent." *Foster*, 193 So. 3d at 295 ("A defendant generally does not have a duty to protect against that which is obvious and apparent."). A condition is considered obvious and apparent if "it is open and obvious to everyone who may potentially encounter it." *Id.* (citing *Bufkin v. Felipe's La., LLC*, 171 So. 3d 851, 856 (La. 2014)). "If the facts of a particular case show that the complained-of condition should be obvious to all, the condition may not be unreasonably dangerous, and the defendant may owe no duty to the plaintiff." *Dauzat*, 995 So. 2d at 1186. Said differently, a merchant "is not liable for an injury which results from a condition which should have been observed by the individual in the exercise of reasonable care, or which was as obvious to a visitor as it was to the [merchant]." *Id.* To that end, a "pedestrian has a corresponding duty to see that which should be seen and observe whether their pathway is clear." *Perrin v. Ochsner Baptist Med. Cntr., LLC*, 2019 La. App. LEXIS 1386, 2019 WL 3719546, at *4 (La. App. Aug. 7, 2019) (granting summary judgment for defendant in slip-and-fall case where hazard, a wet carpet, was open and obvious and did not present an unreasonable risk of harm).

In the case at bar, the security footage is the best and undisputed summary-judgment evidence documenting Cheryl's trip-and-fall accident. The video shows the casino space, near the casino's doors, where an illuminated red

Porsche Macan is displayed on a raised vehicle platform or ramp. An indoor Mardi Gras parade with a second-line band passes on the left side of the vehicle display, and Cheryl is standing in front of the vehicle display, to the right, taking photographs of the parade with her phone. During this time, several people pass near the left, front corner of the vehicle display and nobody falls. There are no electrical cords or other wires visible in the video. After the parade passes, Cheryl meets up with her husband and the pair walk toward the vehicle display while talking. Cheryl appears to be looking alternately at her phone, her husband, or off in the distance. She never looks at the display. As the couple approaches the left, front corner of the vehicle display, where the ramp meets the ground, Cheryl's left foot appears to clip the corner of the ramp and she trips and falls. She lands right next to the display.

The video makes it is clear that the vehicle display was open and obvious to everyone near it. It is a large, well-lit red car on a ramp. Everyone in the video, except Cheryl, takes a wide enough berth around the display to miss it and not trip. Although Plaintiffs argue that Cheryl tripped on an electrical cord hidden under the vehicle platform, if Cheryl were exercising reasonable care as a pedestrian she should have seen the large display, including the platform allegedly hiding the electrical cord, and avoided it entirely. *See Lafaye v. SES Enters., LLC*, 318 So. 3d 1052, 1055-56 (La. App. 2018) (granting summary judgment where hose connected to a truck and suspended over a sidewalk was an open and obvious condition that a pedestrian could have avoided by taking an alternate route; and collecting and discussing triad of

Louisiana supreme court decisions upholding summary judgment for defendants where conditions causing injury were open and obvious); *Upton v. Rouses's Enter., LLC*, 186 So. 3d 1195 (La App. 2016) (affirming summary judgment in favor of grocery store where pallet under a box of watermelons was part of the large display that was an open and obvious condition).

Plaintiffs argue that the trip hazard was not the car display but an electrical cord, which they say was not observed *by anyone* before Cheryl's fall but which they also claim raises disputed issues of fact. For the latter point, Plaintiffs rely on the deposition testimony of a casino employee who said the cord was a potential trip hazard when asked by Plaintiffs' counsel to assume that, at the time of the accident, the cord was lying outside the perimeter of the car display as it appeared in a post-accident photograph taken by Cheryl's husband.[17] This is insufficient to create a genuine dispute because Plaintiffs present no summary-judgment evidence to support their naked assertion that the cord was in that condition before the accident, and they repeatedly assert that no one saw the cord before the accident. To be sure, the cord is not evident in the video, and the most likely explanation for its condition after the accident is that Cheryl, when she clipped the corner of the display and fell, dislodged the cord from where it had been placed. Plaintiffs, then, have not borne their summary-judgment burden to show that the cord constituted a hazard before the accident occurred. In short, there simply was no hidden danger here on the

17. R. Doc. 81 at 8-13.

undisputed facts, and Jazz Casino (on behalf of all named defendants) is entitled to summary judgment in its favor dismissing Plaintiffs' case.

IV. CONCLUSION

Accordingly, for the foregoing reasons,

IT IS ORDERED that Jazz Casino's motion for summary judgment (R. Doc. 68) is GRANTED, and Plaintiffs' claims are DISMISSED WITH PREJUDICE as to all named defendants.

New Orleans, Louisiana, this 12th day of August, 2021.

/s/ Barry W. Ashe
BARRY W. ASHE
UNITED STATES
DISTRICT JUDGE