**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

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NO. 2006-TS-01756

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**DIRECT APPEAL FROM THE JUDGEMENT OF THE JACKSON COUNTY CIRCUIT COURT IN THE MATTER**

BOBBY THOMAS

VERSUS NO. 2002-00,389(1)(3)

GERALD WAYNE BRADLEY,
JERRY BALDWIN AND JOHN DOES 1-10

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# BRIEF OF THE PLAINTIFF/APPELLANT BOBBY THOMAS

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**ORAL ARGUMENT REQUESTED**

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## CERTIFICATE OF INTERESTED PARTIES

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

1. Honorable Dale Harkey, Circuit Judge for Jackson County, Mississippi.
2. Robert Niles Hooper and John D. Moore, counsel for plaintiff/ appellant.
3. Gerald Kucia, Mathew Taylor, the law firm Daniel, Coker, Horton & Bell, and the law firm Clarke Scott & Streetman, counsel for the defendants/appellees.



Robert Niles Hooper
Counsel for Appellant

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A) The trial court erred by requiring "concrete" evidence at the summary judgment state in this case and by ignoring the substantial evidence of the breach of the general duty of reasonable care owed to the plaintiff. A de novo review shows ample factual support for the plaintiffs' case.

B) There is a material dispute of fact as to whether Bradley was Baldwin's principle or *de facto* employer. At the least the summary judgment evidence demonstrates an issue of fact as to whether they were joint tortfeasors.

# IV. STATEMENT OF THE CASE

## A) PROCEDURAL HISTORY

This lawsuit stems from the ill advised decision of Gerald Bradley to direct his cousin, Jerry Baldwin, to fix his roof. As a result of that decision, the plaintiff was seriously injured on April 19th, 2001. Suit was timely filed on November 5th, 2002. Limited discovery was had, but due to Gerald Bradley's absence in Iraq, his deposition was not taken. Both defendants filed motions for summary judgment. A hearing was had on February 24th, 2006. The Court granted both motions on September 18th, 2006, resulting in this appeal.

## B) RELEVANT FACTS

The defendant, Gerald Bradley owned a house at 1608 Skyline Street, in Gautier Mississippi. Jerry Baldwin, Gerald's cousin, had recently lost his job and was living with Gerald Bradley. Jerry Baldwin was helping Gerald out with utilities as well as helping around the house. ***R. 227, RE 005 - Deposition Extract of Jerry Baldwin, RE 003 - Affidavit of Bobby Thomas.***

The roof on the house needed repair. Rather than hire a professional to do it, Bradley asked Jerry Baldwin to do it. ***R. 206-7, RE 003 - Affidavit of Bobby Thomas.*** Jerry had no experience in roofing, so Gerald called Bobby Thomas, who knew something about roofing, and asked him to show Baldwin how to do it. ***R. 102, 206; RE 003 at ¶ 2,3; RE 004 - Deposition Extract of Bobby Thomas at p. 23.***

At the time, Bobby Thomas (also Gerald and Jerry's cousin) was living with his sister, Patricia West, in Laurel, Mississippi. Nevertheless, Bobby was agreeable to travel to Gautier and assist Bradley

and Baldwin so long as he got room and board. ***R. 99; RE 004 at 11; RE 003 at ¶ 9.*** Bobby traveled to Gautier and spent the night of April 18th, 2001 in anticipation of starting work the next day. ***R. 103; RE 004 at 25.***

The next morning, Bobby and Jerry got up and got started on the roof. Bradley was at work but had provided the two men with a 20 foot extension ladder. No other equipment or instructions were provided. Jerry, without Bobby Thomas' assistance, set up the ladder against the garage. ***R. 228. RE 005 at 19.*** The two climbed up the ladder to ascend the roof. ***R. 101, 110; RE 004 at 20, 53; R. 228; RE 005 at 18.*** What happened next is disputed.

According to Bobby, he was still on the upper part of the ladder when Jerry started coming back down from the roof. Bobby maintains that Jerry slipped and hit the ladder, causing it to fall, while Jerry testified that he did not slip, but that the ladder simply came loose from the bottom.

Both agree, and it is undisputed at this point, that as soon as Jerry's foot hit the ladder, whether because he fell, or because he stepped onto it, the *bottom* of the ladder came loose causing both men to fall. ***R. 101, 103, 206; RE 004 at 20, 26, 27; RE 003 at ¶ 4.*** Jerry testified specifically and explicitly that the ***bottom*** of the ladder slipped loose:

> Q. I see. So when you got both your feet on the ladder, the ladder cut out from under you?
> A. Yes.
> Q. Did it fall over backwards or ---
> A. It started coming down as a slope.
> Q. So the -- for lack of a better word, the feet of the ladder started sliding out; is that right?

. . .

A. No. It slid out. I mean, I don't know what caused it.

Q. I see. But what I'm getting at is, the bottom of the ladder slid out and then the top of the ladder went down?

A. Yes.

***R. 228; RE 005 at 19-20.***

Jerry and the ladder landed on Bobby. ***R. 103*** Bobby was seriously injured and suffered in excess of $100,000 in medical fees as a result of his extended hospitalization and comatose state. Jerry, however, suffered only scrapes and bruises, presumably because his fall was broken by landing on Bobby.

The plaintiff sued on both premises liability and general negligence theories. During discovery, both parties were hampered by their inability to depose Gerald Bradley, who was, and apparently remains, deployed to Iraq. The lower court heard both defendants' motions for summary judgment on February 24th, 2006.

During the hearing, the lower court focused almost exclusively on the issue of whether the plaintiff was provided with a safe work environment, despite the fact that plaintiff has and does maintain a general negligence claim as well. Ultimately, the court lumped the two claims together and dismissed both because "[t]he plaintiff has put forth several allegations against the defendant's, but at this point, in the face of a summary judgment motion, there [sic] are still just mere allegations with no concrete supporting facts." ***R. 240.***

Because this is an incorrect statement of the law, and because the plaintiff has offered ample evidence of negligence to overcome the minimal bar to summary judgment, the lower court should be

reversed and this matter should be sent back for trial.

# V. SUMMARY OF THE ARGUMENT

The standard of review for appeal on the grant of a motion for summary judgment is *de novo*. ***Russell v. Orr***, 700 So.2d 619 (Miss. 1997)(*citing*, ***Northern Elec. Co. v. Phillips***, 660 So.2d 1278, 1281 (Miss.1995)). In this case, there is no doubt that the plaintiff has met his burden of demonstrating a triable issue of fact as to the general negligence claims because there is a material dispute of fact as to not only who caused the accident but whether Baldwin even properly placed the ladder. The trial court erred by requiring a "concrete" evidentiary standard to establish breach and considering only evidence related to the safe work environment claims. ***R. 240.***

Bobby Thomas was an invitee and was owed a duty of reasonable care by both Bradley and Baldwin. ***Hall v. Cagle***, 773 So. 2d 928 (Miss. 2000); ***Pinnell v. Bates***, 838 So. 2d 198 (Miss. 2002). The duty of care owed to an invitee is a duty to provide a reasonably defect free and safe premises. Defendants' general duty of care in this case, however, is not limited to simply providing a safe work environment. Here, both defendants owed a general duty of care as part of their joint undertaking to fix the roof.

There is direct testimony supporting the allegation that Baldwin breached the duty of reasonable care owed to Bobby Thomas by failing to properly set up the ladder and/or failing to secure adequate footing prior to attempting to come off the roof. The plaintiff testified that he saw Jerry Baldwin slip and hit the top of the ladder, causing it to fall. ***R. 101, 103, 206; RE 004 at 20, 26, 27; RE 003 at ¶ 4.*** Furthermore, even assuming away the version of facts sworn to by the plaintiff, and believing Jerry

Baldwin's version of events, the doctrine of *res ipsa loquitur* is applicable here and defeats summary judgment on the negligence claims against Baldwin as to safe work environment as well.

It is undisputed that the *bottom* of the ladder slipped out, causing the men to fall. ***R. 228; RE 005 at 19-20.*** It is undisputed that Jerry Baldwin had exclusive control in setting the ladder prior to ascending onto the roof. ***R. 228; RE 005 at 18/19,19/10-11.*** Had proper care been used in setting the bottom of the ladder, it would not have slipped out, causing the fall.

This is a classic case of *res ipsa loquitur*, and the presumption of negligence raised on the undisputed testimony is sufficient to defeat the defendants' motion for summary judgment under any version of the facts accepted at the summary judgment stage. ***Coleman v. Rice***, 706 So. 2d 696, 698 (Miss. 1997); ***Phillips v. Ill. Central Railroad Co.***, 797 So. 2d 231, 236 (Miss. Ct. App. 2000).

The lower court summarily dismissed the claims against Bradley, finding no evidence to support claims of negligence against him. ***R. 240.*** Such a holding, however, ignores the fact that Bradley and Baldwin, on the undisputed facts of this case, are joint torfeasors who may be held independently liable for their actions. Bradley and Baldwin both lived in the house, both sought the benefit of the roof repair and both were engaged in the common purpose of securing the repair of the roof. Bradley knew that Baldwin had no experience roofing and that he lacked any of the proper safety equipment required for such a job.

# VI. ARGUMENT

## A) THE PLAINTIFF HAS OFFERED AMPLE SUMMARY JUDGMENT EVIDENCE DEMONSTRATING DUTY BREACH AND CAUSATION AS TO BOTH DEFENDANTS.

### 1. Bobby Thomas was an Invitee on April 19th, 2006 and both Bradley and Baldwin Owed him a Duty to Provide a Reasonably Safe Work Environment.

The trial court correctly found that Bobby Thomas was an invitee on April 19th, 2001. The trial Court reasoned:

> In the case at bar the plaintiff was requested by the homeowner to help supervise a roofing job because the plaintiff had been a roofer in the past. . . . Even though the plaintiff may have been a social guest, he was there for the benefit of the homeowner, Bradley, and must be considered an invitee.

R. 239 (*citing*, ***Pinnell v. Bates***, 838 So. 2d 198 (Miss. 2002)).

A *de novo* review of this issue demonstrates that the trial court was correct in determining that Bobby Thomas was an invitee, or at least that there was a factual jury question on that issue whenever there are supported facts tending to show that the "social guest" was present for the benefit of the homeowner. ***Id. at 202.***

Where the trial court erred, however, was by limiting this duty to Bobby Thomas to Bradley. Baldwin lived in the house. ***R. 99; RE 004 at 11; RE 003 at ¶ 9*** He had been living there quite some time, paid for some portion of the rent, and helped out around the house. ***Id.*** As such, he was a person is possession and control of the premises and had the same duty to invitees as did the owner, Bradley. ***Titus v. Williams***, 844 So.2d 459, 466 (Miss. 2003).

2. IRRESPECTIVE OF BRADLEY AND BALDWIN'S DUTY IN THE PREMISES, BOTH OWED A DUTY OF REASONABLE CARE UNDER THE CIRCUMSTANCES.

As noted above, both Bradley and Baldwin owed a premises based duty to provide a safe work environment. This, however, in no way limits the general duty of care owed by both Baldwin and Bradley to Thomas.

Simply because Bobby Thomas was owed a duty under premises liability principles in no way relieves Baldwin from acting reasonably under the circumstances when actually interacting with Thomas. It is a very old rule that:

> The law imposes upon every person who undertakes the performance of an act which, it is apparent, if not done carefully, will be dangerous to other persons or the property of other persons, the duty to exercise his senses and intelligence to avoid injury, and he may be held accountable at law for an injury to person or to property which is directly attributable to a breach of such duty. The duty so arising is absdute.
>
> ***U.R.S. Co., Inc. v. Gulfport-Biloxi Regional Airport Authority***, 544 So.2d 824, 828 (Miss.1989)(*quoting*, 38 Am. Jur., pages 656-657)).

More recently, in ***Rein v. Benchmark Const. Co.***, this Court undertook a carefully reasoned examination of the basis for the general duty of care and reiterated that it arises from the basic principles of foreseeability and probability:

> [F]or a person to be liable for another person's injury, the cause of an injury must be of such a character and done in such a situation that the actor should have reasonably anticipated some injury as a probable result. The actor is not bound to a precision of anticipation which would include an unusual and improbable or extraordinary occurrence, although such happening is within the range of possibilities.
>
> ***Rein v. Benchmark Const. Co.***, 865 So.2d 1134, 1144 (Miss. 2004)(*citing*, Mauney v. Gulf Ref. Co., 193 Miss. 421, 9 So.2d 780, 781 (1942)).

Possession and control may give rise to a duty in the premises under common law, but that does not abrogate the duty of reasonable care. ***Doe v. Wright Security Serv., Inc.***, 2005-CA-02198-COA (¶22)(Miss. Ct. App. 2007)(noting the difference in limited duty under premises liability and general tort duty). The touchstone of duty is foreseeability, and "[t]he general duty is to act as a reasonable prudent person would under the circumstances." ***Donald v. Amoco Prod. Co.***, 735 So.2d 161, 175 (Miss. 1999).

Here, it is not only foreseeable, but also probable, that Bobby Thomas would be injured if Jerry Baldwin was careless in setting the ladder. Equally foreseeable and probable is that failure to secure his footing, or to take reasonable steps to prevent slipping would be equally likely to result in injury. The lower Court simply chose to ignore the testimony of both witnesses, instead focusing on the alleged lack of "concrete" evidence that there was anything wrong with the ladder.

Baldwin in this case certainly undertook to place a ladder to allow access to the roof by the plaintiff. This act clearly and foreseably must be done with at least some care to avoid injury. This alone triggers an independent duty of reasonable care on Baldwin's part.

Bradley, for his part, in undertaking the common enterprise to re-roof the house, had an obligation to at least exercise the minimal level of care necessary to prevent foreseeable injury to those persons he sought to employ. Here, it is undisputed that Bradley knew that Baldwin was inexperienced. It is undisputed that Bradley sought the help of Bobby Thomas to assist Baldwin and that both Baldwin and Bradley were aware that fixing the roof would entail ladder work. A reasonable person in Bradley's position would appreciate that that the lack of care, equipment, or instruction could, and did, result in

injury.

Duty is a question of law. Based on the authority above, there is clearly a duty in both Baldwin and Bradley to exercise a degree of reasonable care. Whether they met that duty in this case is a question for the jury.

3. THERE IS A MATERIAL ISSUE OF FACT AS TO WHETHER EITHER OR BOTH DEFENDANTS BREACHED THEIR DUTY OF REASONABLE CARE UNDER THE CIRCUMSTANCES.

From the above, it is plain that the defendants owed two separate, but related, duties to the plaintiff. First, they owed Bobby Thomas the duty to ensure that the premises tendered to him were at least reasonably free of defect. Second, they owed to him a general duty of care in the performance of their common enterprise, re-roofing the house. The plaintiff has presented substantial summary judgment evidence that the defendants breached both duties, but in particular, there is ample direct and circumstantial evidence that Baldwin breached his duty of care as to Bobby Thomas.

First, this court has consistently maintained that when one party swears to one version of the events, and another swears to the other, summary judgment is inappropriate. "Issues of fact sufficient to require denial of a motion for summary judgment obviously are present where one party swears to one version of the matter in issue and another says the opposite." ***Oaks v. Sellers***, 2006-IA-00005-SCT (¶8) (Miss. 2007)(*quoting*, ***Tucker v. Hinds County***, 558 So.2d 869, 872 (Miss. 1990)). Equally obviously, the fact in dispute must be a material one. ***Id.*** Here, there is substantial dispute as to whether Baldwin or Thomas caused Thomas' fall. What is not, ironically, in dispute is that the ladder's bottom feet came loose

before it fell.

Jerry Baldwin testified that he placed the ladder and climbed up on the roof. He stated that the plaintiff was on the roof as well and that as Jerry was starting to descend, the bottom of the ladder slid out:

> A. Set the ladder up. We went on the roof and I was going to come back down. I stepped on the ladder, the ladder cut out from under me. And, apparently, Bobby seen the ladder falling, and I guess he was going to reach and try to stop it or got over balanced, but I fell on my back and he fell off forward.
> Q. Was he already on the roof?
> A. Yes.
> Q. So both of you were on the roof?
> A. Yes.
> Q. And you were the first one to come back down?
> A. Yes.
> ...
> Q. Did you get one foot on it or were both your feet on the ladder?
> A. I stepped one foot on it and I stepped my other foot and the ladder cut out from under me.
> Q. I see. So when you got both your feet on the ladder, the ladder cut out from under you?
> A. Yes.
> Q. Did it fall over backwards or ---
> A. It started coming down as a slope.
> Q. So the -- for lack of a better word, the feet of the ladder started sliding out; is that right?
> . . .
> A. No. It slid out. I mean, I don't know what caused it.
> Q. I see. But what I'm getting at is, the bottom of the ladder slid out and then the top of the ladder went down?
> A. Yes.

***R. 228; RE 005 at 18-20.***

Bobby Thomas remembers things differently. According to Bobby Thomas, he was still on the ladder when it fell. He saw Jerry slip, fall, and strike the top the ladder, causing it to fall.

Q. Was Mr. Baldwin holding the ladder at the time that you fell?
A. No, he slipped.
Q. He slipped?
A. Feet kicked the ladder out when he slipped. And he fell, too, on top of me and the ladder and all crushed me.
Q. So Mr. Baldwin slipped; is that correct?
A. Correct.
Q. And you are saying his feet hit the ladder?
A. [Witness nods head.]

***R. 103; RE 004 at 26-27; RE 003 - Affidavit of Bobby Thomas at ¶4.***

Either version creates a triable issue of fact as to negligence because it calls into question the credibility of the parties and requires a final determination of fact as to why the accident happened. Furthermore, the question as to whether Baldwin took appropriate precautions to secure the ladder prior to the accident, as well as whether he actually slipped are all disputed factual issues.

The trial Court was clearly confused and required that the plaintiff show "concrete" facts supporting the allegations of unsafe work environment, irrespective of the undisputed and obvious evidence that Baldwin was careless in either erecting the ladder or descending from the roof. The plaintiff quite plainly testified that he believed Baldwin was careless and caused his fall. ***R. 105, RE 004 at 31/11-20, 32/8-9.*** Baldwin quite clearly testified that the ladder inexplicably came loose from the bottom, causing the fall. ***R. 228; RE 005 at 19-20.*** Both of these involve active, direct actions which have nothing to do with the restricted standard of care owed under a premises liability case.

Nevertheless, the trial Court erroneously relied exclusively on the question of whether there was sufficient evidence to support a finding that Bradley had provided a safe working environment under the

duty owed by an absentee landowner to an entrant on the property.

> The duties the plaintiff cites for the defendants were to provide a safe work environment and instrumentalities. However, as noted above, the plaintiff has presented no proof to support his claims. The plaintiff readily admits that there was no problem with the ladder, the way it was placed against the house, that is was a safe way to access the roof and that he knows of nothing *Bradley* did to create an unsafe condition.
>
> ***R. 239.*** (emphasis added)

In sum, the trial Court took the weakest element of the plaintiff's case, applied it to every single claim, and dismissed them all, irrespective of the substantial evidence supporting the plaintiff's general negligence claims. This is simply wrong. The plaintiff quite plainly has pled, argued, and demonstrated by summary judgment evidence that Baldwin was negligent in placing the ladder or in failing to maintain his footing on the roof, causing the fall. ***R. 9 - Plaintiffs complaint at ¶ 9.***

Furthermore, even discounting the dispute of fact surrounding the mechanism of the fall, the ***undisputed*** evidence regarding the way the ladder fell in this case entitles the plaintiff to a presumption of negligence which is more than sufficient to defeat summary judgment in this case.

*Res ipsa loquitur* is a judicial doctrine which recognizes the inherent uncertainty of proof while acknowledging that there are some events which simply do not occur in the absence of a lack of due care.

> The doctrine of res ipsa loquitur is a rule of circumstantial evidence allowing the inference of negligence from the mere fact of an unexplained accident. In order for the doctrine to apply, plaintiffs must be capable of proving: 1) that the character of the accident must be such that it would not ordinarily occur in the absence of negligence; and 2) the instrumentality causing the injury must have been under the management and control of the defendant.

***Johnson v. Davidson Ladders***, 403 F. Supp.2d 544, 551 (N.D. Miss. 2005)(*citing*, ***Morgan v. Mississippi Power Co.***, 298 So.2d 698, 700 (Miss. 1974)).

In this case, the undisputed testimony creates an inference of negligence under any version of the facts alleged. If the court believes Baldwin, he was indisputably in control of the ladder when it was set up. ***R. 228. RE 005 at 19.*** Alternatively, if Thomas' version is credited, there is no doubt that Baldwin alone was responsible for his footing on the roof, and ultimately, for the stability of the ladder he erected. ***Id.*** This Court has recognized res ipsa loquitur as applicable to foreseeable, but hard to prove, claims in the past. In ***Ballenger v. Vicksburg Hardwood Co. Inc.***, 119 So.2d 778 (Miss. 1960) a log rolled off a stack and injured the plaintiff. The plaintiff could not secure any testimony as to the proper or improper stacking of the logs. The lower Court granted a peremptory instruction in favor of the defendant because there was no direct testimony of a negligent act. ***Id.*** On appeal, this Court noted applied *res ipsa* because the log pile was in the exclusive control of the defendant, and specifically noted that "it was a question for the jury to determine whether the log would have become dislodged and rolled against the plaintiff if the pile of logs had been properly stacked." ***Id. at 658.***

Similarly, in the similar cases of ***Stringer v. Bufkin***, 465 So.2d 331 (Miss. 1985) and ***Peerless Supply Co. v. Jeter***, 65 So.2d 240 (Miss. 1953) this Court recognized that a tractor trailer wheel coming loose while the truck was in motion qualified as *res ipsa.* Such an occurrence was not the type of event which would normally happen in the absence of negligence on someone's part, even if there was no direct admission by the defendant. Since the defendant was in exclusive control of the instrument, and since the

defendant could offer no explanation, the plaintiff got a presumption of negligence.

In both ***Stringer*** and ***Jeter***, as here, the plaintiff was unable to point to any specific breach of a duty, but this Court correctly recognized that there must have been some breach of the standard of care since tractor trailer tires do not simply fly off if due care has been employed. ***Id.***

Like counsel in ***Stringer***, ***Jeter***, and ***Ballenger***, counsel for Baldwin argued to the trial judge that there was no specific negligent act alleged:

> And Your Honor, he has not shown any bit of evidence of the element of breach of a duty. Just saying that my guy fell does not equate to negligence . He's got to prove duty, breach, causation, and damages, and he's shown no affirmative act that would meet the breach element of that of any lifting up of tile on the roof, pushing against the ladder . There's been no affirmative act that's been shown . All he says was, the guy slipped into me. And, Your Honor, it's our position that, absent showing an affirmative breach of the duty owed to his client, the summary judgment is proper . He's got to have some element there to show that my guy did something negligent.
>
> ***Transcript of Hearing of February 24th, 2006 at p. 28.***

This is exactly what *res ipsa* is intended to address, however. Baldwin was in exclusive control of the instrumentality, the ladder, or, depending on who you believe, his own footing.

Furthermore, the accident in this case could not happen *without* carelessness on Jerry Baldwin's part, either carelessness in maintaining his footing, or carelessness in setting the ladder, whoever the jury ultimately believes. Ladders are used every day in this state. Hundreds of workers successfully negotiate up and down them performing a million tasks every day, but it is only when there has been some lack of care that the bottom feet of a ladder spin out from under its users or, again believing the defendant's preferred version, it is only through carelessness that a person ventures unsecured onto a high roof without

any precautions to prevent slipping.

Just as the defendant in ***Peerless***, Baldwin admits that he has no idea why the accident occurred. ***R. 228; RE 005 at 19-20.*** He also no doubt contends that he was not negligent in any way, just as the trucking company in ***Bufkin*** and ***Jeter*** did, and just as the lumber company in ***Ballenger*** also argued. This, however, is a proper question for the jury in this case, just as it was in ***Stringer***, ***Ballenger***, and ***Jeter***. Under the defendants' and the lower court's theory of this case, no simple negligence claim would ever make it to the jury without an admission of carelessness or a video of a careless act. This simply not the law and it was error to dismiss the general negligence claims in this case.

B) THERE IS A QUESTION OF FACT AS TO WHETHER BRADLEY IS VICARIOUSLY LIABLE FOR ANY NEGLIGENCE OF BALDWIN

Lastly, there is a material issue of fact in this case as to whether Bradley may be held liable as the master or employer of Baldwin. The allegations against Bradley are, admittedly, not as strong as those against Baldwin, especially since plaintiff was unable to depose Bradley.

Nevertheless, there is evidence in the record that Bradley secured Bobby Thomas' agreement to assist Baldwin. ***R. 206; RE 003 at ¶2.*** Furthermore, Bradley supplied the ladder Baldwin used. ***R. 228; RE 005 at 19/7-11.*** A gratuitous agent is still an agent, and a jury could rationally conclude that Baldwin had undertaken either a de facto employee relationship or a gratuitous agency on behalf of Bradley. ***Lee Hawkins Realty, Inc. v. Moss***, 724 So.2d 1116, 1119 (Miss. Ct. App. 1998).

A jury could alternatively conclude that Bradley and Baldwin were in engaged in a common

purpose to re-roof the house and are thus joint torfeasors. "Joint tortfeasor claims arise where the separate wrongful conduct of two or more individuals combine to cause an injury, and each because of his conduct bears some responsibility for the injury." ***J&J Timber Co. v. Broome***, 2004-IA-01914-SCT (¶20) (Miss. 2006).

Questions as to apportionment of fault are traditionally questions for the jury and plaintiff should be entitled to present his case that Bradley was negligent in failing to ensure that Baldwin acted with due care.

# VII. CONCLUSION

Based on the above authority and argument, plaintiff requests that this Court reverse the lower court's grant of summary judgment and remand this matter to the Circuit Court of Jackson County for Trial.

There is clearly sufficient evidence of negligence on the part of Baldwin and Bradley to warrant a trial. First, Bobby Thomas was an invitee and owed a duty of reasonable care under the circumstances by both Baldwin and Bradley. Furthermore, since Bradley undertook to place the ladder, he owed a duty of reasonable care under the circumstances. There is ample evidence that Baldwin breached this duty from his own testimony that the latter came unstuck at the bottom, or, alternatively, that Baldwin failed to maintain his footing and slid into the ladder, causing the plaintiff to fall. Either version of this very disputed fact is sufficient to warrant a trial on the merits. Furthermore, Baldwin was in exclusive control of both the ladder and his own footing. An accident such as this one simply does not occur when due care is exercised and the plaintiff is entitled to a legal presumption of negligence under *res ipsa loquitur* which is more than sufficient to overcome the low bar of summary judgment.

Finally, there is a bona fide question of fact as to the nature of the agency relationship between Baldwin and Bradley. The sworn testimony raises the permissible inference that Baldwin was either a joint tortfeasor or was acting as Baldwin's principle.

For the foregoing reasons it was error to grant the motion for summary judgment in this case. Plaintiff requests that this court reverse the lower court and remand this matter to the circuit Court of

Jackson County fortrial.