

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NO. 2006-TS-02140

ANTHONY PAUL WILLIAMS

PLAINTIFF-APPELLANT

VERSUS

ENTERGY MISSISSIPPI, INC.

DEFENDANT-APPELLEE

Appeal from the Circuit Court of Washington County, Mississippi

**BRIEF OF APPELLEE,
ENTERGY MISSISSIPPI, INC.**

ORAL ARGUMENT NOT REQUESTED

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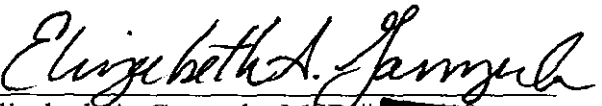

DEFENDANT-APPELLEE

CERTIFICATE OF INTERESTED PERSONS

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

1. Anthony Paul Williams—Plaintiff-Appellant
2. Entergy Mississippi, Inc.—Defendant-Appellee
3. R. Brittain Virden, Campbell DeLong, LLP—Attorney for Plaintiff-Appellant
4. William O. Lockett, Lockett Tyner Law Firm, Clarksdale, MS—Trial Counsel for Defendant-Appellee
5. James L. Robertson and Elizabeth A. Ganzerla, Wise Carter Child & Caraway, P.A., Jackson, MS—Appellate Counsel for Defendant-Appellee
6. Franklin Alan Garrison, Entergy Mississippi, Inc.—Counsel for Defendant-Appellee
7. Judge Richard A. Smith, Circuit Court of Washington County, Mississippi—Trial Judge

RESPECTFULLY SUBMITTED, this the 7th day of March, 2008.

By: 
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STATEMENT CONCERNING ORAL ARGUMENT

Defendant/Appellee, Entergy Mississippi, Inc. (Entergy), does not believe oral argument would be useful for the resolution of this appeal. The consideration of the issues in this matter will not be significantly aided by oral argument because the facts and legal arguments are straightforward and adequately presented in the briefs and record. However, should the court determine that oral argument would be useful to clarify some matter raised by the plaintiff/appellant in his reply brief, Entergy is prepared to proceed.

STATEMENT OF THE ISSUES

The Appellees submit that the issues on appeal are:

- I. Whether the trial court properly granted a directed verdict in favor of Entergy because as a matter of law, Mississippi Code Annotated § 11-27-43 and the National Electric Safety Code impose no duty on Entergy to install and maintain a conspicuous marker on its guy wire?
- II. Whether Plaintiff failed to provide sufficient credible evidence by which the jury could conclude that Entergy had a duty to maintain streetlights and received actual notice that the streetlight across the street from the guy wire was not functioning?
- III. Whether the trial court properly excluded as prejudicial irrelevant photographic evidence of a BellSouth guy wire at a different location than the guy wire which Plaintiff allegedly tripped over?

STATEMENT OF THE CASE

A. Nature of the Case

Plaintiff Anthony Paul Williams claims he tripped on a high angle guy wire¹ affixed to a standard pole holding an electrical power distribution line along the 700 block of Central Street in Greenville. Plaintiff, who was intoxicated at the time, was walking home from a late night fish fry on August 20, 2004 when his mishap occurred. Initially, he could not remember the circumstances of his injury due to his extreme intoxication, but only later alleged that his foot became caught in a guy wire owned and maintained by Defendant Entergy Mississippi, Inc. (“Entergy”), even though the guy wire had been in place for more than fifty (50) years without incident. Plaintiff had grown up in the area and visited it more than 100 times, and the record makes clear that he was aware of the guy wire’s location; in fact he conceded he had walked past it several times that day while going to purchase beer. The wire was out of the path of pedestrian traffic. Nonetheless, Plaintiff sought to blame Entergy for a fall that was clearly his own fault.

B. Course of Proceedings and Disposition Below

Plaintiff commenced his action on April 4, 2004, in the Circuit Court of Washington County, Mississippi. Plaintiff charged Entergy with failure to follow Mississippi Code Annotated § 11-27-43 and the National Electrical Safety Code and simple negligence. (R. at 3). Entergy denied the essential allegations of the complaint. The case was called for trial on October 23, 2006. On October 25, 2006, Plaintiff rested his case and Defendant moved for a directed verdict. Circuit Judge Richard A. Smith granted the motion, finding that, because the guy wire was not in an area exposed to traffic, and Plaintiff offered no credible proof to the contrary, NESC § 282(E) did not even apply. He further found insufficient evidence to submit

¹ A guy wire is a wire of coiled steel that operates to stabilize poles on a line. It is **not** energized.

Plaintiff's simple negligence theory to the jury. Judge Smith entered his Order Granting

Directed Verdict on November 20, 2006, stating:

there is insufficient credible evidence to allow the case to go to the jury for any consideration of fact given that Mississippi Code Annotated Section 11-27-43 provides in pertinent part and in summary that should the Court find as a matter of law that Entergy complied with the National Electric Safety Code in the placement of the subject electric facility's guy wire, then it shall have satisfied its duty to the public, and the Court having listened carefully to all testimony, including the testimony of electrical engineer, Troy Little, and having considered as Mr. Little so testified the intent of the NESC writers was to use "dictionary meanings" of wording in said Code, and the Court having considered that the word "traffic" means a circulation of persons to and fro at the location of the guy wire, and the Court having heard undisputed testimony that there were sidewalks available adjacent to the guy wire for pedestrian traffic, and the Court having applied a fair meaning of the wording of the Code vis-à-vis the statute mentioned hereinabove, and the Court having considered the theory of the Plaintiff that there was no operating street light illuminating the area, but having further concluded under the agreement by and between Entergy and the City of Greenville, that it is not incumbent upon Entergy to patrol and/or inspect for lights out, and the Court having found no credible evidence to support a finding that Entergy had any notice of lights out in the general time period until a date after the subject accident, again taking all the facts and reasonable inferences to be drawn therefrom in a light most favorable to the Plaintiff, finds that there is a lack of credible evidence to submit any issue of fact to the jury and that as a matter of law, the Defendant, Entergy Mississippi, Inc., is entitled to a directed verdict.

(R. at 186-188). The Circuit Court then entered Final Judgment dismissing the complaint.

Plaintiff filed his Notice of Appeal on December 4, 2006. (R. at 189).

C. Statement of the Facts

On August 20, 2004, Plaintiff attended a neighborhood fish fry party near Central Street in Greenville, Mississippi. (T. at 46). Plaintiff grew up in the neighborhood and often returned for similar parties. (T. at 44). A number of witnesses testified there was drinking at the party. (T. at 130; T. at 278; T. at 309). During the course of the day and evening while he and others ate and played dominoes, Plaintiff was drinking. (T. at 130-131). He could not recall how much he drank that evening (T. at 130), but a nurse commented when he arrived at the hospital, a number of hours after the party ended, Plaintiff was "[v]ery intoxicated" and "unable to answer questions." (T. at 337; Depo. Almand at 93). At the hospital, Plaintiff was disoriented,

uncooperative, and had impaired judgment. (T. at 337; Depo. Almand at 94). Medical records described Plaintiff as “very intoxicated, speech slurred, difficulty following commands, very hostile at times.” (T. at 337; Depo. Almand at 99). The doctor who operated on Plaintiff noted that Plaintiff was inebriated upon admission and could not remember the details of his accident. (T. at 337; Depo. Almand at 96).

In this impaired state, Plaintiff left the fish fry party and began walking with some friends towards a car to go home for the evening, possibly around 10:30.² (T. at 143). Plaintiff said the street was dark, but not so dark that he could not see a hand in front of his face. He also stated that it was light enough to see his steps. (T. at 91). Despite the fact that Plaintiff admitted lighting conditions were sufficient enough that he could see to walk, he stumbled and fell. Sometime after his fall and after being denied entry due to his intoxication, Plaintiff was treated in the emergency room of Delta Regional Medical Center. (T. at 206, Pl. Ex. P-5).

How Plaintiff tripped and fell remains in dispute. Unsurprisingly, given his intoxicated state, Plaintiff did not remember what happened to him when he arrived at Delta Regional Medical Center. In the emergency room, Plaintiff reported that he “stepped off curb and twisted [his] ankle.” (T. at 225). His operating physician noted that Plaintiff did not remember the exact details of his injury. (T. at 334; Pl. Ex. P-8). On a follow-up visit on September 1, 2004, Plaintiff wrote with certainty that he “trip[ped] over a telegram line,” which caused the injury. (T. at 335; Pl. Ex. P-10). In his deposition, Plaintiff stated that he told personnel in the emergency room the night of his fall “what [he] thought may have happened [to him].” (T. at 153-156; Depo. Williams 75:15) (emphasis added). He said that while he was in the emergency room, he was thinking he “must have hit a water meter or something or tripped on something.” (T. at 153-156; Depo. Williams 75:5). He then stated, “I told the truth about what I thought may

² Plaintiff said he did not know what time it was, but that it could have been around 10:30 p.m. (T. at 143). Debra Bradley testified that it happened at about 8:30 or 9:00 p.m. (T. at 294).

have happened or whatever because, you know, like I say, I don't know what it was. It was dark, I told them what I thought may have happened." (T. at 153-156; Depo. Williams 75:14).

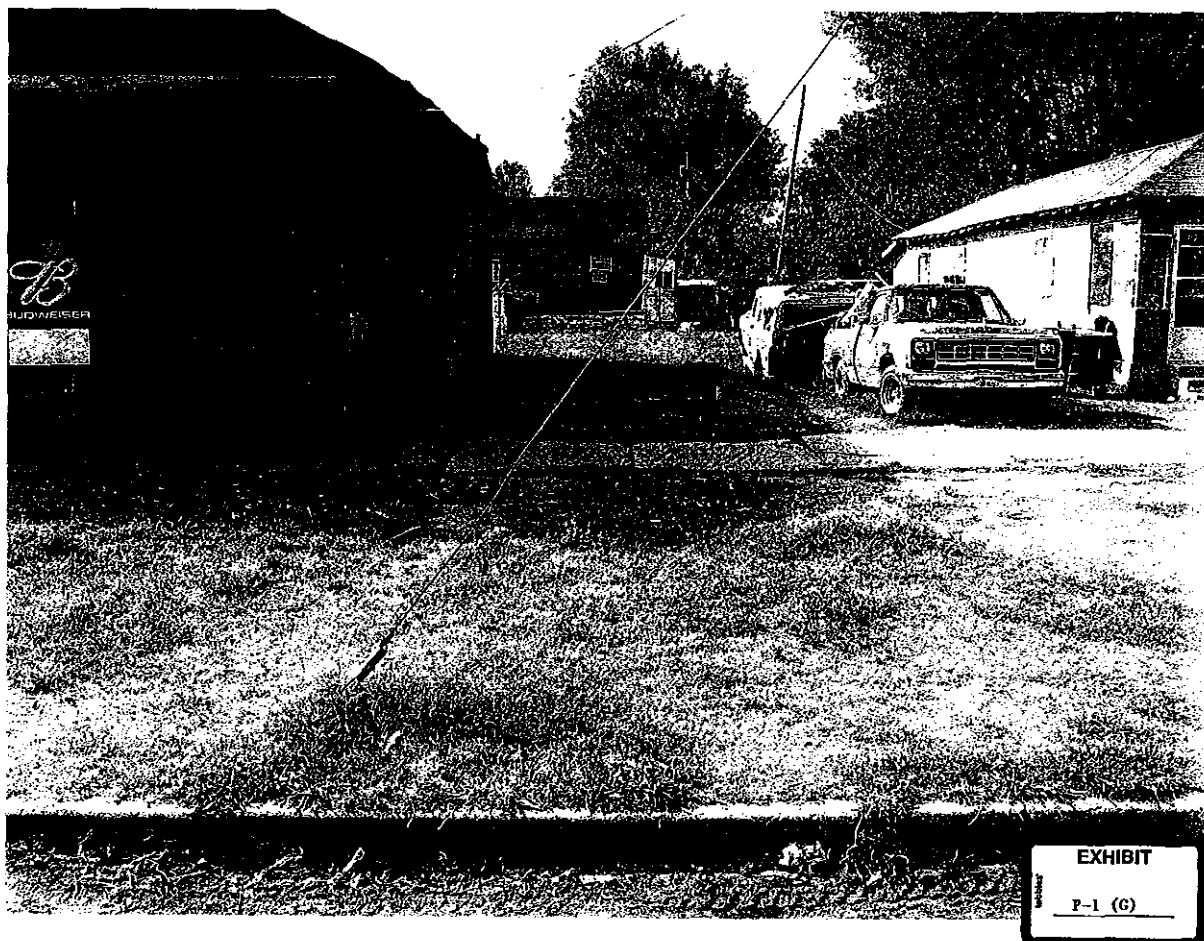
However, at trial, Plaintiff was conveniently more certain. He testified that he told the admitting clerk at the emergency room that he "tripped over an electrical wire." (T. at 79; T. at 150.) At trial, defense counsel asked, "Did you really know what happened to you when you told her that?" to which Plaintiff responded, "Yes, I did." (T. at 152.) However, upon reviewing his deposition testimony, Plaintiff admitted that while he was in the emergency room, he really did not know what had happened. (T. at 154).³

Although contradictory to other witnesses and his own testimony, eventually, Plaintiff settled on the story that he tripped over a guy wire belonging to Entergy. (T. at 47; T. at 80). The wire was visible, and its existence had been known to members of the community. (T. at 287). The guy wire had been in place at that location for over fifty (50) years without incident. Plaintiff "knew there was a pole there" and "knew of the guy wire." (T. at 141). Community resident Debra Bradley stated, "You could see the wire," and, "I don't know why he didn't see it." (T. at 287). The guy wire has a high angle, is not low-lying, and is easily seen by passersby. (T. at 69; Pl. Ex. 1(G) and 1(H)). Plaintiff had been in the immediate area of the guy wire before (T. at 133) and admitted that he had walked back and forth in front of the wire several times that day going to purchase beer. (T. at 130; T. at 143).

The relevant National Electric Safety Code requires guy markers only on guy wires exposed to traffic. NESC, § 282 (E); (T. at 397). The subject guy wire is not exposed to traffic; a sidewalk runs parallel to the guy wire, ensuring that pedestrian traffic (of which there was no evidence) bypasses the guy wire. The sidewalks are 6 feet in width and are approximately ten

³ The veracity of Plaintiff's testimony was further called into question by his admission to a previous conviction for giving false information to a police officer, a conviction which Plaintiff, under oath, initially denied having on his record. (T. at 156-58).

(10) feet away from the guy wire. (T. at 69; Pl. Ex. P-1 (G) and P-1 (H)). A street curb assures that vehicular traffic will not encounter the guy wire. (T. at 69; Pl. Ex. P-1 (C) and P-1 (D)). No sidewalks or driveways come into contact with the immediate area surrounding the guy wire, as illustrated in the below photograph, plaintiff's exhibit 1 (G):



The wire is surrounded by untouched grassy area and there is no exposure to traffic. (T. at 381; Depo. Glenn Isom 52:8-21). Plaintiff submitted no evidence of pedestrian foot traffic over that immediate area. In fact, the grass appears untouched in photographs submitted by plaintiff. (T. at 69; Pl. Exs. P-1 (C), P-1 (D), P-1 (G), P-1 (H)). Though the guy wire has been in place for over fifty (50) years, there is no record of any prior accident, complaint, claim or incident involving the wire.

Across the street from the subject guy wire is a streetlight. (T. at 347). Plaintiff alleges that he was unable to see the guy wire because that streetlight was out. (T. at 89). Plaintiff presented **no** evidence of prior notice of the streetlight outage to Entergy of the streetlight being out. Plaintiff offered testimony from two community residents that the light was not working. (T. at 244; T. at 280). When a customer calls Entergy to report an outage, the company's computer creates a work ticket in the work management system. (T. at 381; Depo. Glenn Isom at 88). On cross-examination of Entergy employee Jerry Steed, the defense offered into evidence Defendant's exhibit 4, a work ticket record showing that Entergy had received a call from Addie Bradley on August 26, 2004, after Plaintiff's accident, concerning streetlight outages. Following extensive discovery, Plaintiff presented no credible evidence that Entergy had logged any calls about streetlights out prior to Plaintiff's accident. (T. at 381; Depo. Glenn Isom at Ex. 8).

Addie Bradley testified that she had called Entergy and reported that the streetlight was not working. (T. at 244). She, however, conceded that she did not know when she called Entergy to report the outage. (T. at 254). Entergy's business records show that the phone call was placed after Plaintiff's injury. (T. at 365; Def. Ex. D-4). Debra Bradley also testified that she had called Entergy and spoke to a serviceman working in the area. (T. at 280-281). Like Addie Bradley, Debra Bradley also admitted she did not know when these calls and conversations had taken place. (T. at 283).

Plaintiff's evidence at trial produced multiple inconsistencies as to non-material facts: the circumstances of the accident,⁴ the location of the fish fry,⁵ and the visibility of the wire and

⁴ Plaintiff testified that he was walking with two other people with a plate of food in his hands towards a car to go home at the time of the accident, which was around 10:30 p.m. (T. at 47, 147, 175, 187). Debra Bradley testified that he was alone when he fell, had nothing in his hands, and the time was about 8:30 p.m. (T. at 287, 289, 295). Rod Hood testified that Plaintiff came over to talk to him and was walking back to the party alone with nothing in his hands at the time of injury. (T. at 304, 305, 313). Addie Bradley testified that Plaintiff fell on the opposite side of the street from where other witnesses testified he fell. (T. at 256).

how dark it was.⁶ The confusion caused by all these inconsistencies, however, could not conceal the serious deficiencies in Plaintiff's proof of his claims as to material facts: lack of credible evidence of the guy wire's exposure to pedestrian traffic and lack of credible evidence of actual notice to Entergy of streetlight outages. Faced with this dearth of evidence, the trial court had no choice but to direct a verdict in favor of Entergy. This Court should affirm that verdict.

SUMMARY OF THE ARGUMENT

The directed verdict tests a party's proof and ensures that sufficient credible evidence exists to submit a case to the jury. When put to that test, Plaintiff's evidence of Entergy's "negligence" failed to measure up. The trial court must determine, as a threshold matter of law, whether Entergy owed any duty of reasonable care to Plaintiff and whether Plaintiff presented enough credible evidence for the jury to conclude that § 282(E) of the National Electrical Safety Code applied to the guy wire subject to this action. Though Plaintiff's expert witness, who had been to the area exactly once over a year after the accident, characterized the area as "high traffic," that witness's observations and descriptions indicated an area sparsely populated with passersby. The few pedestrians in the neighborhood had access to sidewalks removed from the immediate area of the guy wire. Plaintiff presented no evidence that Entergy acted unreasonably in the placement of the wire or that the guy wire was unreasonably dangerous. In fact, the guy wire had been in place for over fifty (50) years without a single complaint, claim, or incident. This establishes low traffic in the area and that the facility was not unreasonably dangerous. Plaintiff could not show that his accident resulted from anything other than his own imprudent

⁵ Plaintiff testified that the fish fry was held in an open lot between a green house and a tan house. (T. at 75). Debra Bradley confirmed this. (T. at 271). Rod Hood said that the fish fry was at a blue house and that everyone was sitting in front of the blue house. (T. at 314, 328).

⁶ Plaintiff said he did not see the wire because it was dark on that side of the street. However, he acknowledged a small area was lit by a porch light. (T. at 90). Debra Bradley said it was dark, but she could see the wire (T. at 287, 292). Rod Hood said some porch lights were on. (T. at 324).

actions while intoxicated. The trial court correctly concluded that insufficient credible evidence existed to submit the issues of negligence and negligence *per se* to the jury.

Plaintiff alleged that Entergy created darkness in the area due to streetlight outages. Entergy does not create the darkness. Entergy had no duty to Plaintiff to maintain the streetlights. Under its agreement with the city, Entergy strives to maintain streetlights within the city and repair or replace streetlights when it receives notice of an outage. Plaintiff offered only the slightest contradictory and incredible testimony from community residents that they had contacted Entergy about the streetlight outage but they did not know when they made their complaints. Work records showed that Entergy received no notice until six (6) days *after* that accident. Plaintiff presented no credible evidence of actual notice to Entergy of streetlight outages prior to the subject incident.

The subject guy wire had been in place for over fifty (50) years without incident. Plaintiff offered no evidence that anyone else had ever been injured as a result of the wire, but instead sought to admit confusing evidence of another guy wire at a different location, not owned or maintained by Entergy. Though Plaintiff now attempts to characterize this as “prior acts evidence,” it defies logic to understand how the alleged acts of another entity, at a different location, under a different set of circumstances, reveal any evidence of Entergy’s prior acts. The trial court properly excluded that evidence as irrelevant and prejudicial.

The trial court properly directed a verdict against Plaintiff. Plaintiff’s evidence was so deficient as a matter of law that the jury’s function was unnecessary. This Court should affirm the directed verdict against Plaintiff.

STANDARD OF REVIEW

The grant or denial of a motion for directed verdict is reviewed *de novo* by this Court, which considers the evidence in the light most favorable to the non-movant, giving that party the

benefit of all favorable inferences that may reasonably be drawn from the evidence. *Mariner Health Care, Inc. v. Estate of Edwards ex rel. Turner*, 964 So. 2d 1138, 1144 (Miss. 2007). “The trial court may direct a verdict for the defendant at the close of the plaintiff’s proof under authority of the Mississippi Rule of Civil Procedure 50(a) if, in the opinion of the court, the plaintiff has failed to present credible evidence to establish the necessary elements of his right to recover.” *Elgandy v. Boyd Mississippi, Inc.*, 909 So. 2d 1202, 1205 (Miss. 2005) (citing *Hall v. Mississippi Chem. Express, Inc.*, 528 So. 2d 796, 798 (Miss. 1988)).

This court may affirm a lower court’s ruling on “grounds other than that which the trial court used.” *Kirksey v. Dye*, 564 So. 2d 1333, 1336 (Miss. 1990) (citations omitted). This court:

... [is] not in the business of reversing a trial court when it has made a correct ruling or decision. We are first interested in the result of the decision, and if it is correct we are not concerned with the route—straight path or detour—which the trial court took to get there ... An appellee is entitled to argue and rely upon any ground sufficient to sustain the judgment below.

Hickox by and through Hickox v. Holleman, 502 So. 2d 626, 635 (Miss. 1987) (citations omitted); see also, e.g., *Pride Oil Co., Inc. v. Tommy Brooks Oil Co.*, 761 So. 2d 187 (Miss. 2000) (affirming summary judgment on partially different grounds).

ARGUMENT

I. Whether the trial court properly granted a directed verdict in favor of Entergy because as a matter of law, Mississippi Code Annotated § 11-27-43 and the National Electric Safety Code impose no duty on Entergy to install and maintain a conspicuous marker on its guy wire?

After the conclusion of Plaintiff’s evidence at trial, the trial judge granted Entergy a directed verdict, finding that as a matter of law, plaintiff presented insufficient evidence to show that § 282(E) of the National Electrical Safety Code applied to the unmarked guy wire. The Court found that § 282(E) did not apply because Plaintiff did not present enough credible

evidence to conclude that the guy wire in question was exposed to traffic, as required by that section of the NESC. Plaintiff's allegations of negligence hinged on Entergy's alleged violation of § 282(E), and the court found, correctly, that Plaintiff presented no credible evidence to establish that Entergy had breached any duty to Plaintiff. The existence of a duty *vel non* is a question of law in a negligence action. The court correctly directed the verdict.

A. Entergy's duty to install and maintain a conspicuous marker on its guy wire was a question of law for the trial judge to determine because Plaintiff failed to offer credible evidence from which a jury could find that the guy wire was exposed to traffic.

No dispute exists as to whether or not the guy wire in question had a guy marker on it; it did not. Plaintiff states that Entergy's defense of this action "hinged on whether the jury would accept Entergy's claims that this area was not subject to pedestrian or vehicular traffic and no traffic was expected as the NESC specifically required a conspicuous guy marker on guy wires exposed to traffic." Plaintiff refers to § 282(E)⁷ of the NESC, which Plaintiff argued applied to the subject guy wire. Plaintiff's misunderstanding of Entergy's argument reveals a confusion of the required elements of negligence *per se* and the appropriate finder of those elements. When the facts are so clear that reasonable minds could not differ as to the applicability *vel non* of a statute to plaintiff's circumstances, it is the court, not the jury, that determines whether Entergy had a duty at law established by an applicable statute. *See Stong v. Freeman Truck Line, Inc.*, 456 So. 2d 698, 708 (Miss. 1984).

Plaintiff's claim concerning Entergy's alleged violation of § 282(E) is one of negligence *per se*. In a negligence claim, a plaintiff must establish a duty or standard of care, breach of that duty or standard, proximate causation, and damages or injury. *Lyle v. Mladinich*, 584 So.2d 397,

⁷ Section 282(E) states, "The ground end of all guys attached to ground anchors exposed to traffic shall be provided with a substantial and conspicuous guard not less than 8 feet long." Appellant's Record Excerpts § 4.

398-99 (Miss. 1991). Whether defendant has a duty to the plaintiff is a question of law. *Id.* at 400 (citing *Harris v. Pizza Hut of Louisiana, Inc.*, 455 So.2d 1364, 1371 (La. 1984)); *Foster v. Bass*, 575 So.2d 967, 972-73 (Miss. 1990). “Actionable negligence cannot exist in the absence of a legal duty to the plaintiff.” *Sligh v. First Nat. Bank of Holmes County*, 735 So. 2d 963, 973 (Miss. 1999) (quoting *Stanley v. Morgan & Lindsey, Inc.*, 203 So.2d 473, 475 (Miss. 1967)). If plaintiff cannot establish the existence of a duty of care, the court should dismiss the action. Additionally, a person alleging negligence must have exercised reasonable care for his own safety. *Robinson v. Ratliff*, 757 So. 2d 1098, 1102 (Miss. App. 2000).

Plaintiff attempted to establish duty of care and breach through a negligence *per se* argument. He argued that Miss. Code Ann. § 11-27-43 required Entergy to comply with the National Electrical Safety Code and that Entergy’s alleged violation of § 282(E) resulted in a violation of Miss. Code Ann. § 11-27-43.⁸ The Mississippi Supreme Court has stated that “[t]he principle that violation of a statute constitutes negligence *per se* is so elementary that it does not require citation of authority.” *Thomas v. McDonald*, 667 So. 2d 594, 598 (Miss. 1995). First though, the plaintiff must show that he is a member of the class that the statute was designed to protect and that the harm he suffered was the type of harm which the statute was intended to prevent. *Id.* While statutes furnish the standard of care, the facts must support the applicability of the statute. *Id.* at 598 (citing *Stong v. Freeman Truck Line, Inc.*, 456 So.2d 698, 707-08 (Miss.

⁸ Miss. Code Ann. § 11-27-43(1) states, “All companies or associations of persons incorporated or organized for the purposes set forth in Section 11-27-41 are authorized and empowered to erect, place and maintain their posts, wires and conductors along and across any of the public highways, streets or waters and along and across all turnpikes, railroads and canals, and also through any of the public lands, and to do such clearing as may be reasonably necessary for the proper protection, operation and maintenance of such facilities, provided in all cases such authorization shall meet the requirements of the National Electrical Safety Code. The same shall be so constructed and placed as not to be dangerous to persons or property; nor interfere with the common use of such roads, streets, or waters; nor with the use of the wires of other wire-using companies; or more than is necessary with the convenience of any landowner.”

1984)). Though courts generally may not take fact-driven issues away from the jury, where “the facts are so clear that reasonable minds could not differ,” the court may determine as a matter of law the applicability *vel non* of a statute in a negligence *per se* action. *Stong*, 456 So. 2d at 708. As will be established *infra*, Plaintiff offered no credible evidence from which a jury could conclude that the guy wire in question was exposed to traffic based on the dictionary meaning of the term “traffic” or that § 282 (E) applied to Entergy in this instance, and the trial judge correctly directed a verdict on the negligence *per se* argument. Additionally, Plaintiff offered no evidence of an unreasonably dangerous condition at the location, and the trial judge correctly directed a verdict on that claim, as well.

Plaintiff failed to exercise reasonable care for his own safety. He admitted that after an evening of drinking, he walked in the dark without taking care for his steps and was so distracted by his impaired state and conversation with his companions that he stumbled at or near a guy wire and pole, the existence of which was known to him. Extensive evidence confirms his extreme intoxication. By failing to exercise care for his own safety, Plaintiff cannot now seek remedy for an injury that he could easily have prevented.

B. The trial judge correctly determined that the subject guy wire was not exposed to traffic and granted a directed verdict because Entergy owed no duty to Plaintiff under Miss. Code Ann. § 11-27-43 and the National Electric Safety Code.

The crux of Plaintiff’s argument is that Plaintiff offered evidence “sufficient for reasonable jurors to conclude” that Entergy violated the NESC—and therefore, is negligent *per se*. Plaintiff argues that Entergy’s duty was to comply with NESC § 282(E), but the trial judge determined that, as a matter of law, Plaintiff failed to present sufficient evidence for the jury to conclude that the provision even applied, much less that Entergy violated it. Plaintiff must

establish duty before the other elements of negligence, and failed here because sufficient evidence did not establish that the NESC provision applied.

When considering a motion for directed verdict, the trial court looks at *all* evidence in a light most favorable to the non-movant and all *reasonable* inferences that may be drawn from that evidence. *White v. Stewman*, 932 So. 2d 27, 36 (Miss. 2006) (emphasis added). The directed verdict tests the legal sufficiency of the litigant's case and puts a party to its proof, determining whether "the evidence, as applied to the elements of a party's case, is either so indisputable, or *so deficient*, that the necessity of a trier of fact has been obviated." *Id.* at 32 (emphasis added). A review of Plaintiff's evidence concerning the guy wire and applicability of Section 282(E) reveals its deficiency and confirms that the trial judge correctly granted a directed verdict on this point.

Section 282(E) of the National Electrical Safety Code states, "The ground end of all guys attached to ground anchors *exposed to traffic* shall be provided with a substantial and conspicuous guard not less than 8 feet long." At trial, plaintiff offered Troy Little as an expert in the area of electrical engineering, maintenance, and distribution lines. Little agreed that the meaning of the word "traffic" was fundamental to interpreting § 282(E). (T. at 418). He further testified that the National Electrical Safety Code provided no definition of "traffic," but that the interpretations committee "said their intention was always that traffic meant the dictionary meaning of traffic and that that particular rule applied to pedestrian traffic." (T. at 426). Little accepted Entergy's proposed dictionary definition of "traffic" and acknowledged that it is the "[c]irculation of vehicles or pedestrians passing to and fro." (T. at 421).

Though Plaintiff presented no evidence that Little had special expertise in the field of traffic, Little testified about the dictionary meaning of traffic. Based on his observation of the

area while preparing his expert report,⁹ Little asserted that the area around the guy wire was a “high traffic” area for foot traffic, requiring that Entergy place a guy marker on the guy wire. (T. at 397). To support that assertion, Little speculated based on his brief observation of the area, when he saw people walking back and forth across the street, though he did not know where they were going or if they were walking in the immediate area surrounding the guy wire. (T. at 401-02). Part of his testimony consisted of speculation about schoolchildren from a school several blocks away visiting the store; however, he did not actually observe *any* children walking in the immediate area surrounding the guy wire. *Id.* Little admitted that the area where the pole is located is surrounded by streets and sidewalks so that pedestrians could get anywhere by walking down a sidewalk or a street. (T. at 421).

At no point did Little observe anyone walking near or through the grass surrounding the guy wire. Rather, he saw people walking in the street and on the sidewalk, which is well behind the guy wire. The street and sidewalk do not come into contact with the pole or guy wire because they are situated parallel to the guy wire. (T. at 381; Depo. Glenn Isom at 52). Traffic is diverted from the guy wire, and it is *not* exposed to traffic. Little (and indeed Plaintiff) had no specific evidence concerning traffic around the pole; rather, all of his evidence was related to his non-expert opinion of the general character of the neighborhood. Based on his vague, non-specific, and largely speculative, personal observations that were the result of a single visit to the area, more than a year after the incident, the Court found that Little’s conclusion that the area surrounding the guy wire was “high traffic” was simply not credible.

Plaintiff’s counsel questioned several residents of the neighborhood, but presented no evidence of pedestrian traffic exposed to the guy wire. Plaintiff presented no evidence that the few pedestrians who walk nearby do anything other than follow the demarcated paths of

⁹ Little visited the site one time, during the day, well over a year after Plaintiff’s accident occurred. (T. at 395).

circulation away from the guy wire. Plaintiff testified that *he* left the sidewalk and street when he tripped that evening, but one intoxicated person walking does not create pedestrian traffic. Plaintiff presented no evidence establishing that the guy wire itself was exposed to pedestrian traffic. There was insufficient evidence for a jury to conclude reasonably that the area surrounding the guy wire itself was exposed to traffic and that, therefore, the guy wire was subject to § 282(E) of the NESC. The trial court correctly granted the motion for directed verdict, ruling that as a matter of law, Plaintiff had failed to present evidence establishing that the guy wire was exposed to traffic. The fact that the pole and guy wire had been there for over fifty (50) years with no incident strongly confirms the trial court's conclusion that the guy wire was not exposed to traffic. One allegation of injury in fifty (50) years does not signify exposure to traffic.

C. To support his arguments, Plaintiff relies primarily on high voltage electricity cases, though he was never threatened with exposure to electricity.

Plaintiff asserts that extensive precedent, both in-state and out-of-state, confirms his arguments concerning the NESC and negligence *per se*. None of the cases cited by Plaintiff concern a plaintiff tripping over an unmarked guy wire or a negligence *per se* argument, nor do they provide analogous facts, primarily because he heavily relies on Mississippi cases involving plaintiffs injured by high voltage electricity. Plaintiff was never at any risk of exposure to electricity by coming into contact with the guy wire, nor has he alleged such danger. Entergy owed Plaintiff no heightened degree of care. *McFarland v. Entergy Mississippi, Inc.*, 919 So. 2d 894, 899 (Miss. 2005) (reaffirming that "if electricity is not present, the utility company should exercise 'reasonable care.'").

Plaintiff cites *Miller v. Coast Electric Power Assn.*, 797 So.2d 314 (Miss. 2001), which adopted out-of-state authority to hold that, "if the defendants knew or should have known that

the artificial condition created by them involved an unreasonable risk of physical harm to others, then they have a duty to make safe or warn of the dangerous condition. *Id.* at 317 (quoting *Tadjer v. Montgomery County*, 61 Md.App. 492, 487 A.2d 658, 662 (1985)). Though Plaintiff attempted to elicit from his expert witness, Troy Little, evidence that the guy wire was unreasonably dangerous, the trial judge did not permit that line of questioning because it was outside the scope of Little's expert witness report and responses to interrogatories. (T. at 409). Plaintiff presented no evidence at trial to show that the guy wire presented an unreasonable risk of physical harm to others. In fact, it defies logic and common sense to assert that facilities in place for half a century without incident could be "unreasonably dangerous." Rather, as to the guy wire, he relied on a negligence *per se* argument.

Unable to cite Mississippi case law where this Court held a public utility company liable for a plaintiff's injury after falling over a guy wire, Plaintiff directs this Court to several opinions from other jurisdictions. Established Mississippi precedent provides ample authority by which this Court may reach its decision; reference to foreign cases is unnecessary. Moreover, the foreign jurisdiction cases cited by Plaintiff do not support his arguments for negligence or negligence *per se* because they address the issue of causation, which Plaintiff never reached because he failed to show any duty on Entergy's part as a matter of law. Plaintiff's reliance on these foreign jurisdiction cases indicates that Plaintiff believes a verdict was directed despite his establishment of a *prima facie* case, which is an inaccurate portrayal of what occurred in the trial court. The trial judge granted a directed verdict in Entergy's favor because Plaintiff failed to establish as a matter of law that § 282(E) of the NESC applied to the guy wire. Furthermore, the *sole* proximate cause of Plaintiff's injury was *his own conduct*.

II. Whether Plaintiff failed to provide sufficient credible evidence by which the jury could conclude that Entergy had a duty to maintain streetlights and received actual notice that the streetlight across the street from the guy wire was not functioning?

A. Plaintiff failed to show the applicability of NESC § 282 (E) to Entergy or that the guy wire was unreasonably dangerous, so actual notice of the streetlight outage to Entergy, is irrelevant. If relevant, however, Plaintiff provided no evidence that Entergy had notice of a streetlight outage.

Plaintiff asserted that Entergy owed him a duty to, *inter alia*, “have sufficient lighting in the area illuminating the guy wire and pole for nighttime pedestrian traffic.” In his brief, Plaintiff argues that “the darkness created by the utility company’s failure to act contributed to his injuries when he could not see the gray colored or ‘camouflaged’ guy wire.” Entergy does not create the darkness, has no duty to overcome a natural condition, and is not an insurer against accidents in the dark. Entergy has a contractual relationship with the City of Greenville to supply streetlight services and strives to maintain streetlights when it receives notice of an outage; however, no duty to Plaintiff accrued from that contract, nor did Plaintiff provide evidence of such a duty. (T. at 437; Pl. Ex. P-20).

Plaintiff’s assertions indicate that the streetlight outage was, at most, merely a condition existing at the time of Plaintiff’s injury; in other words, Plaintiff does not contend it was the proximate cause of his injury, nor did he present evidence that it was the proximate cause of his injury. Without showing negligence on the part of Entergy in the maintenance of its guy wire, *supra*, Plaintiff’s offer of evidence that Entergy had actual notice of the streetlight outage is irrelevant. Plus, as noted *infra*, there is no evidence Entergy had notice of any streetlight outages on Central Avenue.

B. Plaintiff presented no evidence by which the jury could conclude that Entergy had notice of the non-functioning streetlight prior to Plaintiff's injury.

Plaintiff relies on neighbors' inconsistent statements that they had contacted Entergy prior to Plaintiff's injury and that this evidence of actual notice required the trial court to take the evidence as true and submit it to the jury. This assertion that the presentation of *any* evidence at all requires submission to the jury is inaccurate. The trial court may direct a verdict for the defendant at the close of the plaintiff's proof "if, in the opinion of the court, the plaintiff has failed to present *credible evidence* to establish the necessary elements of his right to recover." *Alfa Mutual Ins. Co. v. Cascio*, 909 So. 2d 174 (Miss. App. 2005) (citing *Hall v. Mississippi Chem. Express, Inc.*, 528 So. 2d 796, 798 (Miss. 1988)) (emphasis added). "All *credible inferences* tending to support the non-movant's case and all favorable inferences reasonably drawn therefrom are accepted as true and work in favor of the non-mover." *Trustmark Nat. Bank v. Jeff Anderson Reg. Med. Ctr.*, 792 So. 2d 267, 275 (Miss. App. 2000) (citing *C & C Trucking Co. v. Smith*, 612 So. 2d 1092, 1098 (Miss. 1992)) (emphasis added). Considering the evidence as a whole, the only credible and reasonable inference that a jury could draw is that the calls placed by Addie Bradley and Debra Bradley to Entergy occurred after Plaintiff's injury.

At trial, Addie Bradley testified that she had called Entergy and made complaints that the streetlight was not working and that a man told her he was not going to fix the light. (T. at 244). Though she claimed that she called prior to Plaintiff's injury, she admitted that she did not know when she called Entergy to report the outage. (T. at 254). Debra Bradley also testified that she had called prior to the Plaintiff's injury and had spoken to a "man" working in the area. (T. at 280-281). Like Addie Bradley, however, Debra Bradley also admitted she did not know when these calls and conversations had taken place. (T. at 283). Plaintiff's evidence of notice is no evidence at all.

The evidence presented by Plaintiff is much like that presented in *McFarland v. Entergy Mississippi, Inc.*, 919 So. 2d 894 (Miss. 2005). In *McFarland*, plaintiff attempted to prove actual notice based on the vague allegations of a witness who claimed to have reported a sagging line to a man sitting in a truck with an MP&L¹⁰ logo on it. The witness could not really remember the man or recall what he said. The Mississippi Supreme Court held that those facts “fail[ed] to satisfy the condition precedent of notice to Entergy.” *Id.* at 900. Because there was no proof that the man was an Entergy employee, a serviceman, or that he had apparent or direct authority, the Court found “the *evidence was insufficient* to establish notice to Entergy.” *Id.* at 901 (emphasis added). Likewise, Plaintiff’s witnesses could not remember when they called Entergy, and they could not assure the court that they had called the correct number.¹¹

Entergy established that any customer call to Entergy reporting an outage creates a work ticket in the work management system. Without a complaint, there is no work ticket created. (T. at 381; Depo. Glenn Isom at 88). An Entergy work ticket showed that Entergy received a call from Addie Bradley on August 26, 2004, after Plaintiff’s accident, concerning streetlight outages. (T. at 365). No other pre-accident work tickets were introduced into evidence. The trial court had no choice but to conclude that Entergy had no notice of any streetlight outage until after this incident. Plaintiff presented no credible evidence of actual notice to Entergy of the non-functioning streetlight prior to Plaintiff’s injury.

C. Plaintiff’s Exhibits 19, 20, and 21 are not properly before this Court for consideration as part of the evidence in this appeal.

¹⁰ MP&L was Entergy’s predecessor.

¹¹ Addie Bradley’s testimony of her phone calls to Entergy was confusing. She said that she called the toll-free customer service number, but did not tell them where the light was, where she lived, or her name because “he already know that all the time.” She immediately contradicted that statement by recounting that she did give the man on the phone all of that information. (T. at 248-50).

In his brief, Plaintiff draws to this Court's attention Exhibits 19, 20, and 21, which were marked at trial for *identification purposes only*. (T. at 436-438). Plaintiff intended to call Entergy employee Willie Pree, who attended the trial as a corporate representative for defendant, as a witness to testify about a Comprehensive Street Lighting Plan,¹² the streetlight agreement between the city of Greenville and Mississippi Power and Light Company,¹³ and a collective bill beginning in July 2004. The trial judge correctly excluded this evidence because it is irrelevant. Plaintiff does not contend that these documents were improperly excluded, but inexplicably asserts that their presence in the record for identification establishes that Defendant has assumed a duty to maintain streetlights in the City of Greenville. Plaintiff provides no rationale for why this Court should consider these exhibits when they were excluded from evidence at trial. The trial judge did not consider this evidence in directing his verdict, and this Court should likewise not consider this evidence in its *de novo* review. Plaintiff has not raised its exclusion as an error and has made no attempt to argue why it should have been admitted at the trial.

III. Whether the trial court properly excluded as prejudicial irrelevant photographic evidence of a BellSouth guy wire at a different location than the guy wire which Plaintiff allegedly tripped over?

A. The trial judge properly excluded the photographic evidence because it was irrelevant and risked confusion to the jury.

The trial court repeatedly excluded photographic evidence offered by the plaintiff that showed a BellSouth pole with a guy marker located on the opposite side of Central Street from the guy wire which Plaintiff allegedly tripped over. Plaintiff's counsel explained to the trial judge that the photograph was offered to show that Plaintiff passed a guy wire with a guy marker

¹² It should be noted that this plan was merely a proposal, did not create a contractual relationship, and was never signed.

¹³ MP&L was Entergy's predecessor.

and did not trip, but did trip over the Entergy guy wire, which did not have a guy marker.¹⁴ (T. at 56). Entergy argued that Plaintiff had made no efforts prior to trial to discover when the BellSouth pole was installed and what regulations applied to that particular pole. (T. at 60-61). There was no evidence about when or how the pole was installed, who maintained it, or how it was maintained. The trial judge excluded these photographs because of their prejudicial effect, finding that the BellSouth guy marker would confuse the jury into thinking that Entergy had to maintain its pole in the same way that BellSouth maintained its poles in the same area.

A lower court's findings on evidentiary matters are disturbed on appeal only if the trial judge committed an abuse of discretion. *Lockwood v. Isle of Capri Corp.*, 962 So. 2d 645, 647 (Miss. App. 2007). The trial judge clearly stated that he believed the evidence did not pass Rule 403 of the Mississippi Rules of Evidence. He was best situated to make that determination and his ruling on this issue should stand. The evidence was properly excluded.

B. Plaintiff's comparisons to prior acts and prior accidents are wrongly made.

In support of his position that the trial court should have allowed evidence and testimony of the BellSouth guy marker, Plaintiff provides an incorrect and confusing argument that such evidence was "evidence of substantially similar conditions or circumstances of prior incidents" or evidence of "prior accidents." The BellSouth guy marker did not cause and was not related to Plaintiff's injury.¹⁵

Mississippi Rule of Evidence 404(b), states that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." In other words, evidence of a prior wrong committed by defendant unrelated to plaintiff's claim cannot be used to infer that defendant committed the same wrong

¹⁴ Addie Bradley testified that plaintiff fell on the same side of the street as the BellSouth guy wire pole. (T. at 256; *see also* footnote 4, *supra*).

¹⁵ See footnote 14, *supra*.

against the plaintiff. The rule provides an exception where the prior acts evidence is offered to show “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” Prior to admitting such evidence, the plaintiff must show that the prior incident occurred under substantially similar conditions. Plaintiff inexplicably argues that the existence of the BellSouth guy marker is proof of a prior incident to show a dangerous condition.

One of the cases cited by Plaintiff clearly reveals his misapplication of prior acts evidence. In *Lockwood v. Isle of Capri Corporation*, 962 So. 2d 645 (Miss. App. 2007), prior acts evidence of water standing in the same spot repeatedly on a casino floor was permitted to show that the casino had knowledge of the recurrent condition of water on the floor and should have instituted procedures to protect its patrons. Unlike the evidence presented in *Lockwood*, where defendant’s actions repeatedly caused the same result at the same location, Plaintiff sought to admit evidence not of Entergy’s actions at the guy wire relevant to this case, but rather of BellSouth’s actions at a completely different guy wire.


Simply stated, the evidence offered by Plaintiff is evidence of BellSouth’s prior acts. Plaintiff presented no evidence that anyone had previously injured themselves by falling or coming into contact with Entergy’s guy wire. BellSouth is not a party to this dispute, and whether the Plaintiff did or did not trip over a marked guy wire before tripping over an unmarked guy wire is irrelevant. Relevant prior acts evidence in this instance is that Entergy’s unmarked guy wire had been in place for over fifty (50) years, unexposed to pedestrian traffic, with no prior accidents. The evidence of the BellSouth guy marker was properly excluded.



CONCLUSION

The trial court correctly found that Plaintiff presented insufficient credible evidence by which it could submit this case to the jury and properly directed a verdict in favor of Entergy. This Court should affirm the ruling of the lower court.

RESPECTFULLY SUBMITTED, this the 7th day of March, 2008.

ENTERGY MISSISSIPPI, INC.

BY: 

JAMES L. ROBERTSON, MSB 
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ATTORNEYS FOR DEFENDANT/APPELLEE
ENTERGY MISSISSIPPI, INC.

CERTIFICATE OF SERVICE

I, Elizabeth A. Ganzerla, Attorney for Entergy Mississippi, Inc., certify that I have this day mailed, by United States Postal Service, postage prepaid, a true and correct copy of the foregoing Brief of Appellee to the following address:

R. Brittain Virden
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SO CERTIFIED, this the 7th day of March, 2008.


ELIZABETH A. GANZERLA

CERTIFICATE OF SERVICE

I, Elizabeth A. Ganzerla, Attorney for Entergy Mississippi, Inc., certify that I have this day mailed, by United States Postal Service, postage prepaid, a true and correct copy of the foregoing Brief of Appellee to the following address:

Honorable Richard A. Smith
Washington County Circuit Court
P. O. Box 1953
Greenwood, MS 38935-1953

SO CERTIFIED, this the 12th day of March, 2008.


ELIZABETH A. GANZERLA