

IN THE SUPREME COURT OF MISSISSIPPI

CASE NO. 2006-TS-02140

ANTHONY PAUL WILLIAMS

APPELLANT

VS.

ENTERGY MISSISSIPPI, INC.

APPELLEE

**APPEAL FROM THE
CIRCUIT COURT OF WASHINGTON COUNTY, MISSISSIPPI
CASE NO. CI2005-83**

ORAL ARGUMENT REQUESTED

BRIEF OF PLAINTIFF/APPELLANT ANTHONY PAUL WILLIAMS

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I. CERTIFICATE OF INTERESTED PERSONS

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 Court of Appeals may evaluate possible disqualification or recusal.

1. Anthony Paul Williams, Plaintiff
2. R. Brittain Virden, Campbell DeLong, LLP, Counsel for Plaintiff
3. Entergy Mississippi, Inc., Defendant
4. James Robertson, Wise Carter Child & Caraway, Jackson, MS, Counsel for Defendant
5. William O. Lockett, Lockett Tyner Law Firm, Clarksdale, MS, Counsel for Defendant

RESPECTFULLY SUBMITTED, this, the 4 day of December, 2007.

By: _____

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IV. STATEMENT OF ISSUES

1. Whether the trial court's grant of directed verdict should be reversed as the Circuit Court failed to allow the jury to consider whether utility company violated Miss. CODE ANN. §11-27-43 and National Electric Safety Code by failing to install and maintain a conspicuous marker on its guy wire exposed to pedestrian and vehicular traffic when Plaintiff tripped over such unmarked guy wire due to low visibility and poor lighting?

2. Whether the trial court misapplied the standard for a directed verdict and failed to weigh the evidence in the light most favorable to Plaintiff on questions of fact whether utility company had a legal duty, or assumed a duty, to maintain street lights in a reasonably safe condition and failed to act as a responsible prudent utility company upon actual notice that street lights were blown out thereby diminishing visibility in well known pedestrian area which caused Plaintiff to trip and suffer personal injury?

3. Whether Circuit Court committed reversible error in granting directed verdict despite credible evidence from qualified expert witness who offered opinions that utility company was negligent and committed violation of the NESC and such violation caused injury and damages to Plaintiff?

4. Whether evidence of substantially similar guy wire across the street from subject incident which contained guy marker should be admitted as relevant evidence even though guy wire and marker across the street was installed by communications utility company rather than electrical utility company?

5. Should expert opinions be allowed into evidence that electrical utility company violated Miss. CODE ANN. §11-27-43 by creating an unreasonable risk of harm to the public by leaving in place an unnecessary guy wire in a high pedestrian traffic area?

V. STATEMENT IN SUPPORT OF ORAL ARGUMENT

Plaintiff believes that oral argument would assist the Court in presentation of the issues herein. While the standard for directed verdict which Plaintiff believes was violated by the Circuit Court is straight forward, presentation of the facts in oral argument touching on the reasons why the standard was violated should provide further information to the Court on this *de novo* appeal. Additionally oral argument will present the parties with the opportunity to rebut allegations of opposing counsel with additional information.

VI. STATEMENT OF THE CASE

This is a personal injury action which occurred when Plaintiff Anthony Paul Williams severely fractured his ankle on August 20, 2004 when he tripped over an unmarked and obscured guy wire located on Central Street in Greenville, Mississippi. The subject guy wire was owned and maintained by Defendant Entergy Mississippi, Inc. and was utilized to secure a utility pole and electrical distribution service live to residential customers in the neighborhood along Central Street in Greenville. The incident occurred at night and the guy wire was difficult to see as it did not have a conspicuously colored guy marker attached and the wire itself was dark gray in color. Moreover, Defendant, who had a contract with the City of Greenville, Mississippi to install and maintain street lights, failed to repair a blown out street light directly across the street from the unmarked guy wire even though neighbors in the area provided actual notice that the street lights were blown out prior to the incident and requested the lights be repaired. In turn, the poor lighting conditions contributed to the cause of the subject incident.

Plaintiff filed suit on March 4, 2005 against Defendant in the Circuit Court of Washington County, Mississippi based on Defendant's violation of Mississippi statute, the National Electric Safety

Code (NESC), failure to maintain, Defendant's general negligence and negligence *per se* for creating a dangerous condition and unnecessary risk of harm but failed to warn or repair such condition after actual notice. The parties conducted a partial trial on October 23 -25, 2006 but the Circuit Court Judge granted a directed verdict in favor of Defendant and entered his Order Granting Directed Verdict on November 17, 2006 in a draft prepared by counsel for Defendant. Plaintiff timely filed his Notice of Appeal on December 4, 2006 and this matter is currently pending in this Honorable Court. On October 10, 2007, Defendant's first counsel moved to withdraw and that is the only pending motion.

VII. STATEMENT OF THE FACTS

This is a personal injury action against an electrical utility company that violated Mississippi law in regard to installation and maintenance of an electrical power distribution line and in particular the failure to properly maintain a guy wire located in a residential neighborhood that did not contain a conspicuously colored guy marker. Defendant further failed to maintain and repair street lights across the street from the improperly maintained guy wire which obstructed the unmarked guy wire in darkness.

On August 20, 2004 Plaintiff Anthony Paul Williams got off of work and went to meet friends for a fish fry on a Friday evening in the neighborhood where he grew up on Central Street in Greenville, Mississippi. At approximately at ten o'clock that night Mr. Williams was ready to go home and gathered his food and began walking across the street with two of his friends who were going to give him a ride home. (T. at 47). The fish fry was located in a vacant lot on the north side of the 700 block of Central Street and Mr. Williams had to cross Central Street walking in a south east direction and towards a neighborhood store known as the Better Deal Food Market as the vehicle was parked on the east side of that store. After Mr. Williams crossed over Central Street and was approaching the sidewalk

located on the south side of Central, his right foot suddenly got stuck and he fell forward. After he fell he looked over and saw that his foot was lodged under the guy wire and anchor owned by Defendant. (T. at 48). Mr. Williams confirmed his path of travel from the area where the neighborhood fish fry was held to his friend's vehicle took him diagonally across Central Street walking generally in a south east direction. (T. at 76-78; 86-87; P-1 (s)). The incident caused Plaintiff to fall directly forward and caused a severe pylon fracture of his ankle. Plaintiff was driven to the emergency room at Delta Regional Medical Center and diagnosed with separate fractures of the distal tibia and fibula and underwent surgery performed by Dr. William Ogden. (P-9). Due to the severe nature of the fracture, Plaintiff developed complications and had to undergo a second surgery performed by Dr. Ogden's partner, Dr. Jeff Almand on July 11, 2005 whereby his right ankle was permanently fused to eliminate movement. (T. at 338, depo. of Dr. Jeff Almand, p.78). Plaintiff was finally released from physician care on September 9, 2005 but had incurred medical expenses of \$34,062.10 and lost wages totaling \$13,312.50. (T. at 124-130; Ex. P-3).

The guy wire over which Plaintiff tripped did not contain a conspicuously colored guy marker and because of its dark gray color was "camouflaged" and very difficult to see in the darkness.¹ (T. at 77-78, 93). Plaintiff submitted numerous photographs and a diagram from his expert, Troy Little, which confirmed the location of the unmarked guy wire in the area between the south curb of Central Street and the side walk and the distances from various points measured by Mr. Little. Across the street in a nearly identical configuration was another utility pole owned by Entergy that contained a guy wire

¹Counsel for Entergy himself admitted the dark gray color of the guy wire in the darkness caused the guy wire to be "hard to see" because it appeared to be "camouflaged" in the darkness. (T. at 35).

installed and maintained by a communications utility company, Bell South.² The guy wire across the street was significant to Plaintiff's proof and relevant evidence in this action as the path of travel taken by Mr. Williams carried him directly past that guy wire, which in fact had a yellow colored guy marker attached. Even though the area was poorly lit because the street light was blown out, Mr. Williams did not trip on the guy wire across the street but did trip when his path of travel took him towards the Defendant's unmarked guy wire.

1. Entergy's Negligent Maintenance of Guy Wire

Upon inspection of the guy it revealed Defendant Entergy failed to install and maintain a conspicuously colored guy marker on the subject guy wire in violation of MISS. CODE ANN. §11-27-43 and the National Electric Safety Code (NESC). Even though the subject electrical distribution line was apparently installed by Defendant's predecessor prior to 1961, expert testimony from Mr. Little confirmed that the subject guy wire was required to comply with the 1961 version of the NESC and be brought up current to that Code even if it required repairs or retrofitting. (T. at 398). In regard to the guy wires, the NESC 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 eight feet long. It is recommended that in exposed or poorly lighted locations such guards should be painted white or some other conspicuous color.

NESC, §282 (E); (T. at 397).

Defendant readily admitted that it owned the subject guy wire and was responsible for the proper and safe maintenance of such wire. (T. at 380, 30(b)(6) depo. at p.13). Defendant's excuse for not

²Expert Little confirmed this guy wire across the street was installed and maintained by Bell South as it directly tied into the communication wire installed on the utility pole owned by Entergy, pursuant to a common lease agreement between those utility companies.

installing and maintaining a guy marker was random allegations that no guy marker was needed on this guy wire because Defendant did not believe this neighborhood area was exposed to pedestrian traffic. (Entergy (30(b)(6) depo. at 52).

2. Defendant's Negligent Maintenance, Repair and Failure to Warn of Blown Out Street Light

Compounding the statutory violation and negligence of Entergy whereby it failed to install the required guy marker was its negligence and potential intentional refusal to repair a street light located directly across the street from the unmarked guy wire. Defendant Entergy had a long standing contractual obligation with the City of Greenville whereby it was paid to install and maintain street lights to illuminate city thoroughfares for the use and safety of the citizens of Greenville. (Ex. P-19, Ex. P-20, Ex. P-21). Despite this contractual and assumed duty, Plaintiff offered evidence from two citizens who lived in the neighborhood who notified Entergy before the subject incident that street lights on Central Street were blown out and needed to be repaired. Addie Bradley testified that she lived at the same house on Central Street in Greenville for over thirty (30) years and was present at the fish fry on the night of the subject incident. (T. at 238, 240). Ms. Bradley was aware that the street light across the street from the unmarked guy wire was blown out and contacted Defendant Entergy via telephone to ask them to repair the light. (T. at 240). However, she testified that Defendant informed her they would not repair the subject light and, in any event, it was not repaired prior to the subject incident. *Id.*

Debra Bradley also testified that she was present the night of the subject incident and lived at the corner of Central and Delesseps Street in Greenville. (T. at 269). Debra Bradley testified there was a street light on the side of her house which faced Central Street and the neighborhood convenience store which was located directly across from the unmarked guy wire over which Plaintiff tripped. Debra

Bradley was actually the cook for the fish fry and recalls witnessing the subject incident and Plaintiff's foot directly under the unmarked wire and anchor after he tripped. (T. at 272-77). Ms. Bradley has lived in this neighborhood her entire life and knows that the subject guy wire did not have a conspicuous marker located on it on the night of the subject incident. (T. at 275)³. Debra Bradley also confirmed the street light directly across from the subject guy wire had not been working for approximately two or three months before the subject incident. (T. at 280). Ms. Bradley confirmed she contacted Defendant Entergy about the blown out street light two or three times before the subject incident and asked them to repair the street light at the corner of Central and Delesseps Street. *Id.* Further, Debra Bradley personally spoke with an Entergy employee, Jerry Steed, while he was in the neighborhood on other matters and asked him to repair the light but testified that Mr. Steed told her "he wasn't going to come out and put nary another damn light on that corner." (T. at 280).

Despite this actual knowledge that the street lights in this area were not working, Entergy failed to correct the dangerous condition despite ample notice and a reasonable time to make repairs. Indeed, Jerry Steed testified that he was reluctant to repair the street lights on Central Street even though that was a service area because "they always shoot them out or throw bricks." (T. at 353). Even counsel for Entergy suggested that Defendant did not have any duty to maintain or repair the street lights and suggested citizens of Greenville should walk around with "flashlights" or "shuffle their feet" when presented with dark streets caused by non-functioning street lights. (T. at 37). Plaintiff submitted proof that once Defendant was informed of the subject incident it did make repairs to the street light directly across the street. (T. at 370). In fact, when Entergy sent Mr. Steed to repair street lights on Central

³Plaintiff also called Roderick Hood who testified he also lived in the area and physically witnessed Plaintiff trip over the subject guy wire. (T. at 304). Mr. Hood also testified that the guy wire did not have a yellow protective marker on it at the time of the incident. (T. at 306).

Street six days after the subject incident, his work ticket confirmed that he repaired four street lights on that one block alone. (T. at 371; Ex. D-4).

3. Plaintiff's Expert Troy Little

Plaintiff offered the expert testimony of Troy Little who was qualified as an expert witness in the fields of electrical engineering and maintenance of electrical distribution lines. (T. at 393). Mr. Little has extensive experience in designing, constructing and maintenance for electrical distribution lines similar to the installment at issue in this action. (T. at 390, Ex. P-14). He also has extensive experience in regard to the history, purpose and compliance with the NESC. (T. at 391). Expert Little confirmed he conducted a full site and scene inspection after the subject incident. (T. at 395-96).

Expert Little also provided an extensive history of the NESC and the requirement that Entergy was compelled to maintain the subject distribution line in accordance with the sixth edition of the NESC even though parts of the distribution line were installed prior to that publication. (T. at 398). Mr. Little testified that in regard to guy wires and guy markers the NESC requires that "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 eight feet long." (T. at 397; NESC § 282(E)). However, since Entergy failed to install a conspicuously colored guy marker on the subject guy wire, then in his opinion Entergy was negligent and the electrical distribution line and subject guy wire were in violation of NESC and Mississippi law. (T. at 397).

Expert Little confirmed that the guy marker was necessary because pedestrian traffic would be expected in this neighborhood area. For instance, Mr. Little confirmed there was a neighborhood convenience store directly to the side of the guy wire along with evidence of foot traffic around the guy itself with down trodden grass. (T. at 401). He also noted there was a concrete sidewalk near the wire.

Moreover, Mr. Little personally observed people walking back and forth during his site inspection just as Entergy's employee, Jerry Steed, witnessed on many occasions while he was in the area; as did Entergy Area Design Manager, Glenn Isom, who witnesses pedestrian traffic in the area when he did his initial investigation after the incident which was confirmed in the corporate deposition. *Id.*; (T. at 351; 30(b)(6) depo. at 52-53). Moreover, the photographs Plaintiff admitted plainly show cars parked in and around the guy wire and even one neighbor walking in front of the unmarked guy wire in a photograph taken by Mr. Little during his inspection. (T. at 402). Mr. Little further testified that not only did he find the area had a clear expectation of pedestrian traffic he believed it was a "high traffic area." (T. at 405).

Mr. Little further confirmed that the intention of a guy marker is to be brightly colored to make the guy wire more visible so that people can "avoid it and don't get injured." (T. at 406). Expert Little testified that the non-functioning street light directly across the street from the unmarked guy wire contributed to the cause of the incident in his opinion and in fact is the basis for the Rule 282(E) so that the guy wire can be seen in low light conditions. (T. at 414). Even worse, Plaintiff's evidence proved that installation of the guy marker was very inexpensive costing only \$2.00 for the guy marker itself and requiring less than five minutes for a lineman to install. (T. at 408).

4. Stated Grounds for Directed Verdict

After Plaintiff made an extensive proffer of evidence which was excluded by the Circuit Judge and then rested, Defendant moved for a directed verdict on three grounds. (T. at 438). First, Defendant maintained it had no legal, contractual or assumed duty to maintain functioning street lights in the City of Greenville. (T. at 439). Second, defense counsel made a confusing argument contrasting the different definitions of "traffic" which were offered in evidence through testimony and different dictionary

definitions as that term applies to Rule 282(E) of the NESC.⁴ (T. at 440). Third, Defendant alleged Plaintiff was contributorily negligent because he did not cross Central Street at the time of the subject incident at a right angle at the corner of Central and Delesseps Street and therefore was jaywalking. (T. at 442).

Each of these grounds are insufficient to impose a directed verdict and the Circuit Court failed to comply with the stringent standard which required the judge to consider the evidence in a light most favorable to Plaintiff and thereafter consider objectively whether fair and impartial jurors could reasonably differ on whether such evidence could be utilized to render a verdict in favor of Plaintiff. Plaintiff submits that the trial judge failed to follow this standard and essentially decided for himself the factual disputes and his own personal inputs or definition of the relevant terms and issues in the case. The record plainly reflects the trial judge's improper understanding of the standard to impose a directed verdict whereby he mistakenly stated that the Court must make a determination whether he himself believed the testimony of the witnesses and if their testimony was credible before he could allow the case to be presented to the jury for their determination.

In the ruling from the bench the trial judge stated:

It's my understanding that under Rule 50, *if in the opinion of the Court*, the Plaintiff has failed to present credible evidence to establish the necessary elements of his right to recovery, and the Court considering all evidence before it in the light most favorable to the Plaintiff must concede to the Plaintiff all favorable inferences that could be reasonably be said to rise from the evidence.

* * *

I don't find there is *enough credible evidence* to show the circulation definition that we

⁴In fact, when counsel for Defendant was making his argument he admitted he did not know if the second grounds for a directed verdict would "be a factual issue or a legal issue." (T. at 440).

talked about. . . *I don't believe there has been any credible evidence* as to notice to Entergy and then depending on what version you want to look at.

(T. at 466-67) (emphasis added).

The trial judge was merely stating in his own opinion what he believed was “credible evidence” and further stated he did not find any “probable cause or proximate cause” for the darkness in the area because a “car could be coming down the street” which hypothetically could shed light on the darkness caused by the blown out street light. (T. at 467). The trial judge further plainly stated that he felt he himself was in the best position to judge credibility of witnesses and his own personal interpretation of the definition of traffic under the NESC found there was not *enough* credible evidence of *more than one person* walking through the subject area and therefore allegedly provided him grounds for granting the directed verdict.⁵ (T. at 467). Plaintiff submits this reasoning is plain error and grounds for reversal and a new trial. Specifically, the trial judge specified in his findings that he himself could not identify “enough” credible evidence to show a circulation of traffic to and fro in the accident area. *Id.* at 467. Of course, our system of justice and the standard for directed verdict does not permit the trial Court to determine the credibility of witnesses or other evidence and certainly does not permit the trial

⁵Several weeks after issuing his directed verdict, the trial judge signed an Order Granting Directed Verdict in the exact form prepared and submitted by counsel for Defendant. (R. at 186). Counsel for Plaintiff objected to the draft Order prepared by defense counsel but the trial judge nevertheless signed the draft Order without any revisions or further hearing as to the form of the Order. (R. at 188). The primary objection of Plaintiff to the draft Order was that it went beyond the ruling and reasons stated by the trial judge in his direct verdict. Specifically, the draft submitted by defense counsel stated that the Court found compliance with the NESC “satisfied its duty to the public,” which was never mentioned by the trial judge and, in fact, is in direct contradiction to Mississippi law. See *infra*, *Ware v. Entergy Mississippi, Inc.*, 888 So.2d. 763 (Miss. 2004). Plaintiff submits that because the trial judge did not prepare the draft Order Granting Directed Verdict and it was entered over objection of opposing counsel, the best evidence of the trial judge’s reasoning for granting directed verdict was those statements made from the bench as reflected in the trial transcript. (T. at 466-67).

court to grant a directed verdict because he determines the evidence was “not enough.” The standard specifically states that all evidence should be weighed in favor of the non-moving party and the Circuit Court’s statement that he did not find “enough” evidence on these issues is tantamount to an admission that there was at least some evidence in favor of the Plaintiff which would in turn would prohibit a directed verdict. Indeed, the standards applicable to directed verdict requires that the Circuit Court consider this evidence as true and in a light most favorable to Plaintiff before then determining whether reasonable minds could differ as to credibility or whether such evidence was enough to find a verdict for Plaintiff. Moreover, the Circuit Court’s statement that he did not find “any credible evidence” as to notice to Entergy of the street light being out simply ignores the sworn testimony of neighbors, Debra Bradley and Addie Bradley, who confirmed they each made telephone calls to Entergy before the subject incident and also had a direct conversation with an Entergy line man in the area to notify him of the blown out street lights. Also, the trial court’s statement that he believed there was evidence of only one person walking in the subject area ignores Plaintiff’s testimony that he was walking side by side with two friends.

5. Circuit Court Improperly Excluded Relevant Evidence

As previously stated, across the street was another guy wire in a nearly identical configuration to the unmarked guy wire at issue in this case. Moreover, Plaintiff attempted to offer additional opinions of expert Little in regard to another violation of MISS. CODE ANN. §11-27-43 that the subject guy wire was completely unnecessary in that location and therefore posed an unreasonable risk of harm to the public in this high traffic pedestrian area.

Throughout the trial Plaintiff attempted to admit evidence of the substantially similar guy wire with a guy marker attached but the Circuit Court withheld admission of such evidence and his ruling

until the final day of trial. Eventually, the Circuit Court excluded any evidence in regard to the guy wire and marker across the street and stated in his ruling random reasons including:

“I think, number one, it’s a discovery violation, number two, it doesn’t pass through 403, it is prejudicial, and it does not pass the 403 test. It’s not relevant, and it’s probably hearsay by conduct, which double hearsay by Bell-South through Mr. Little by conduct, so for all those reasons, we are not going to get into subject of the guy wire markers on the other side of the street.”

(T. at 387.)

Judge Smith’s grounds for excluding this evidence was improper as evidence of a substantially similar installation of a guy wire and marker directly across the street also exposed to the same type of pedestrian/vehicle traffic and in a similar configuration is directly relevant to the issues presented by this case and the defenses asserted by Entergy that a guy marker was not required on their guy wire. First, there was no discovery violation as the photographs were produced in discovery and pre-marked as exhibits prior to trial. Moreover, admitting this information through expert Little was not a discovery violation as his opinions, grounds therefor, photographs and diagrams were properly revealed and Defendant even conducted a full evidentiary deposition of him prior to trial. Second, this evidence was not unduly prejudicial to Defendant and even if there was a finding of prejudice, it was completely outweighed by the probative effect of the similarly situated utility company installing a guy wire in a nearly identical configuration directly across the street. Third, this evidence was not hearsay as alleged by the Circuit Judge as Plaintiff was not attempting to admit a statement made by someone other than the declarant outside of trial. Indeed, Plaintiff has no understanding of how photographs of the guy marker across the street constitutes “hearsay by conduct” or “double hearsay” as stated by the trial judge.

Second, Plaintiff attempted to offer expert testimony from Mr Little in regard to his opinion that the guy wire itself constituted an unreasonable risk of harm to the public in violation of MISS. CODE

ANN. §11-27-43. When this evidence was excluded counsel for Plaintiff made an offer of proof to explain that Mr. Little intended to offer further expert testimony that the subject guy wire itself was unnecessary in its location and purpose as there were no forces pulling against the subject guy wire. Therefore, as this guy wire was in a high traffic area and, in fact, not even needed for structural support, the threat of injury to the public could have been easily eliminated by removal of the guy wire. (T. at 429-36). Expert Little was improperly prohibited from offering credible testimony in regard to this opinion and another violation of statutory requirement of the defendant utility company.

VIII. SUMMARY OF ARGUMENT

In this *de novo* review, the Court should reverse and render the directed verdict granted by the trial court. Plaintiff put on credible lay and expert proof that the Defendant utility company violated the NESC and Mississippi law when it failed to install and maintain a conspicuously colored guy marker on this guy wire which was exposed to heavy pedestrian and vehicular traffic. This proof included a neighborhood convenience store located behind and to the side of the subject guy wire which numerous customers visited throughout the day and on the night of the subject incident. There are also public sidewalks nearby the guy wire and evidence of people walking on the trampled grass in between the sidewalk and the curb. Photographs were presented that showed individuals crossing the street during the inspections conducted by Plaintiff's expert and two agents of Entergy admitted seeing pedestrians walking around the subject area and wire. The submitted photographs also showed vehicles parked over the curb and directly in front of the guy wire and evidence of tire tracks nearby the subject guy wire. In fact, right before the subject incident Plaintiff testified he was walking side by side with two friends who were about to drive him home. Plaintiff thus submitted ample proof to show a circulation of vehicles and pedestrians passing to and fro the subject area which was the definition of traffic supported

by Defendant.

Most significant for this appeal, the Circuit Court had to consider all of this evidence as true under the standard for direct verdicts and should have affirmed reasonable minds could differ on whether Plaintiff or Defendant was correct in their opposing positions. Indeed, it is difficult to image when Rule 282 (E) of the NESC would apply and require a conspicuous guy marker if not the subject guy wire in light of the extensive evidence of pedestrian and vehicular traffic. Additionally Plaintiff offered substantial evidence that Defendant Entergy created a dangerous condition of an unmarked and obscured guy wire and knew or should have known that this artificial condition created an unreasonable risk of harm to Plaintiff but was negligent as it failed to make the artificial condition safe by installation of a conspicuous guy marker or warn of the danger. Accordingly, the directed verdict should be reversed and the parties be allowed to conduct a full trial on the merits and allow the jury to decide these issues.

There are also consistent holdings from this Court that after a Plaintiff submits evidence of a violation of the NESC it is left to reasonable jurors to conclude that a violation of the NESC actually happened. Plaintiff believes he submitted sufficient evidence for reasonable jurors to conclude that Defendant Entergy violated Rule 282 (E) of the NESC. These line of cases affirm that the decision on whether a violation of the NESC actually occurred shall be left to the discretion of reasonable jurors and is not appropriate for a directed verdict order of the trial Court.

Likewise, the directed verdict should be reversed because Plaintiff submitted ample evidence that Defendant was on notice of the blown out street lights for several weeks before the subject incident but did not act as a reasonable prudent utility company to repair such lights. This evidence included sworn testimony from lifelong residents of the neighborhood who called Defendant to request repairs

to the street lights, four of which were blown out on this single block alone. Defendant even had one of its employees flatly state he would not repair street lights in that neighborhood and in turn that negligence contributed to Plaintiff's incident and injuries as the area was poorly lit. Further, Plaintiff submitted evidence that the poor lighting conditions contributed to cause this incident as the gray colored guy wire was difficult to see in the darkness. If the Circuit Court had taken that evidence as true as required under the standard for directed verdict, the judge should have determined that reasonable minds could have differed on the notice and negligence issues and permitted the jury to decide. Plaintiff submits that the Order granting directed verdict should be reversed on these separate grounds as well and appropriate instructions rendered to confirm admission of such evidence at a new trial.

Upon remand, the plaintiff submits two other items of evidence should be allowed. The significant evidence of a similarly situated guy marker across the street installed by a communications utility was relevant to Plaintiff's case and should have been admitted. Any prejudice or confusion in regard to this marked guy wire was substantially outweighed by the probative value to Plaintiff's case. There are numerous relevant conclusions and inferences a reasonable jury could draw from this substantially similar guy marker configuration, especially in light of Defendant's position that no guy marker was required on its wire. Both lay and expert proof showed that the diagonal path of travel Plaintiff carried him directly past the marked guy wire on the north side of the street, where he did not trip, but he did trip on the unmarked guy wire owned by Defendant on the south side of the street. As this Court has routinely allowed evidence of substantially similar conditions of prior incidents to prove negligence and causation, it should allow this evidence as it was actually existing at the time of the subject incident that came directly into play when Plaintiff walked past the marked guy wire in the

darkened street but did not trip. Further, this evidence was highly significant to Plaintiff's rebuttal to the allegations of Defendant that he was intoxicated as he had no trouble avoiding the guy wire and marker on the north side of the Street. Finally, the trial court should have allowed expert testimony concerning the unreasonable risk of harm created by the unnecessary guy wire itself as Plaintiff's expert believed it could have been easily removed since it did not support any bearing or load of the electrical wire.

IX. ARGUMENT

1. Standard of Review and Applicable Law

This Court conducts a *de novo* review of all orders granting a directed verdict. *Entergy Miss. Inc. v. Bolden*, 854 So.2d. 1051 (Miss. 2003); *Gulfport-Biloxi Reg. Airport Auth. v. Montclair Travel Agency, Inc.*, 937 So.2d. 1000 (Miss. App. 2006) (reversing trial court grant of directed verdict for misapplication of standard). As stated in the comment "[r]ule 50 is a device for the Court to enforce the rules of law by taking away from the jury cases in which the facts are sufficiently clear that the law requires a particular result." MISS. R. CIV. P. 50 (2007), Comment. The Rule and long established precedent compels that this legal device be utilized sparingly and with careful consideration as our system of legal justice favors a jury to decide questions of fact over an authoritarian figure of a judge. U.S. CONST. 7TH AMEND.; MISS. CONST., Art. 3, §31. To dramatically underscore the limited circumstance upon which a trial judge should exercise power under Rule 50, this Court has imposed a stringent standard for a trial court to consider before granting a directed verdict.

The court will consider the evidence in a light most favorable to the appellee, giving that party the benefit of all favorable inference that may be reasonably drawn from the evidence. If the facts so considered point so overwhelmingly in favor of the appellant that reasonable men could not have arrived at a contrary verdict, we are required to reverse and render. On the other hand if there is substantial evidence in support of the

verdict, that is, evidence of such quality and weight that reasonable and fair minded jurors in the exercise of impartial judgment might have reached different conclusions, affirmance is required. The above standards of review, however, are predicated on fact that the trial judge applied the correct law.

Steele v. Inn of Vicksburg, Inc., 697 So.2d. 373, 376 (Miss. 1977), citing, *Sperry-New Holland v. Prestage*, 617 So.2d. 248 (Miss. 1993).

This Court's standard of review for directed verdict "strongly favors the non-moving party." *Straughter v. Collins*, 819 So.2d. 1244, 1253 (Miss. 2002). The reason for the stringent standard established against directed verdicts is the preference our judicial system and Constitution grants to juries to decide disputed factual issues. "When the facts are in dispute as they are in this case, the jury is given the power to resolve factual dispute. . . . " *White v. Stewman*, 932 So.2d. 27 (Miss. 2006). A directed verdict will not be granted unless the facts are so overwhelming in favor of the movant that reasonable jurors could not have reached a different verdict. *McMillan v. King*, 557 So.2d. 519 (Miss. 1990). If there are any relevant questions of fact to be determined by the jury, a directed jury should not be granted. *Fox v. Smith*, 594 So.2d. 596 (Miss. 1992).

Plaintiff submits that the Circuit Judge failed to grant the benefit of all favorable inferences to Plaintiff's evidence supported by authoritative expert testimony and relevant proof that Defendant was negligent in failing to install and maintain a guy marker on its guy wire in violation of the Mississippi statute and the NESC and such failure directly caused Plaintiff's injuries. Moreover, Plaintiff submits that reasonable and fair minded jurors in the exercise of impartial judgment could have reached different conclusions and the entire juror should have been permitted the opportunity to decide the disputed facts of this case.

2. Unmarked Guy Wire Was Code and Statutory Violation

Defendant admitted that it failed to install a guy marker on the subject guy wire over which

Plaintiff tripped. Defendant's primary defense to this negligence was tactical by claiming that no guy wire was needed because Defendant itself "did not expect" pedestrian or other traffic in this neighborhood and around this particular wire. (30(b)(6) depo. Entergy at p.52). This rather unusual defense 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. NESC, §282 (E); MISS. CODE ANN. §11-27-43 (rev. 2004)

Plaintiff put on credible lay and expert proof that Entergy violated the NESC when it failed to install and maintain a conspicuously colored marker on this guy wire. (T. at 397). There was extensive proof that not only was pedestrian, vehicular and related traffic expected in and around the subject guy wire, this area was a "high traffic" area. (T. at 422). For instance, there was a neighborhood convenience store located adjacent to the this guy wire and numerous customers visited the store throughout the day and on the night of the subject incident. There are also sidewalks nearby the guy wire and evidence of people walking on the trampled grass in the curledge and even photographs of individuals crossing the street during the inspection conducted by expert Little. Two agents of Entergy witnessed pedestrians walking around the subject area as well. Photographs of inspections taken at different times showed vehicles parked on the curledge and directly in front of the guy wire and evidence of tire tracks nearby the subject guy wire. In fact, right before the subject incident Plaintiff testified he was walking side by side with two friends who were about to drive him home. (T. at 47).

The definition of traffic used by defense counsel held that one potential definition was "the circulation as of vehicle or pedestrian through an area to and fro." (T. at 420). Plaintiff submits that ample proof was submitted to show a circulation of vehicles and pedestrians passing to and fro the

subject area which supported Plaintiff's position in the case and the expert opinions of Mr. Little. Most significant for this appeal, the Circuit Court had to consider all of this evidence as true under that standard for direct verdicts and therefore allow the jury to decide whether Plaintiff or Defendant was correct in their opposing positions. Indeed, it is difficult to image when Rule 282 (E) of the NESC would apply and require a conspicuous guy marker if not the subject guy wire in light of the extensive evidence of pedestrian and vehicular traffic. Accordingly, the directed verdict should be reversed and the parties be allowed to conduct a full trial on the merits and allow the jury to decide such issues.

Plaintiff submits the trial judge was merely stating in his own opinions as to what he believed was credible upon his ruling from the bench. The trial judge mistakenly placed himself in a superior position to ascertain credibility of witnesses based on his own personal interpretation of the definition of traffic under the NESC and claimed there was not enough credible evidence of more than one person walking through the subject area. However, the trial judge is not permitted to grant a directed verdict because he determines the evidence was "not enough" as he is required to weigh all evidence in favor of the non-moving party and the fact the trial judge admits there was at least some evidence in favor of the Plaintiff would in turn would prohibit a directed verdict. Indeed, the standard requires the trial court to consider this evidence as true and then determine whether reasonable minds could differ as to credibility or whether such evidence was enough to find a verdict for Plaintiff. Plaintiff submits the trial court committed plain error in granting the directed verdict as he did not properly apply the standard and substituted himself as the judge of witnesses credibility. "The Court must not invade the fact-finder's province, and should not use the concepts of credibility and reliability interchangeably." *Treasure Bay Court v. Ricard*, 2007 WL 3293256 (Nov. 8, 2007 Sup.Ct. Miss.).

"The truthfulness of a particular factual representation is a matter of credibility.

Credibility is a question of fact that must be decided by the jury.”

Cousar v. State, 855 So.2d. 993, 997 (Miss. 2003).

3. **Extensive Precedent Affirms Plaintiff's Case**

There are numerous decisions and precedent supporting Plaintiff's position under Mississippi jurisprudence and other jurisdictions. In *Miller v. Coast Electric Power Assn.*, 797 So.2d. 314 (Miss. 2001), this Court interpreted MISS. CODE ANN. §11-27-43 and the effect of the NESC on utility companies. In *Miller* the Plaintiff was injured when the electric utility company moved its power pole to a new location and negligently failed to make the area safe or warn of the dangerous condition it created after removal. *Id.* at 316. As here, the trial court granted a directed verdict and this Court confirmed upon review that the proper procedure for the trial court was to consider the “evidence of the non-moving party is to be believed and all justifiable inferences are to be drawn in that party's favor.” *Id.*, citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505 (1986). This Court held that the directed verdict was improper and remanded for a new trial finding MISS. CODE ANN. §11-27-43 imposed a “strict duty on public utilities not to harm the public” while maintaining their right of ways and electrical power lines. The Court further cautioned utility companies under a negligence standard that if they “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.

In the instant case, Plaintiff put on sufficient evidence to prove a violation of the NESC and the Circuit Court should have allowed the jury to determine if a violation occurred based on the evidence presented and the various definitions provided for the word “traffic.” Moreover, the jury should be allowed to consider the extensive evidence of heavy pedestrian and vehicular traffic all around the

subject guy wire to determine if they believe that definition is applicable and sufficient traffic is exposed to the unmarked guy wire. Likewise, under the negligent standard of *Miller*, Defendant Entergy created a dangerous condition of an unmarked and obscured guy wire and knew or should have known that this artificial condition created an unreasonable risk of harm to Plaintiff but was negligent as it failed to make the artificial condition safe by installation of a conspicuous guy marker or warn of the danger. *Id.*

Numerous other decisions confirm that a violation of the NESC constitutes negligence *per se* and Plaintiff believes he submitted ample proof that Entergy was negligent *per se* because it violated the NESC when it failed to install and maintain a conspicuous guy marker as required. *Mississippi Power & Light Co. v. Lumpkin*, 725 So. 2d. 721 (Miss. 1998). Most significant for this appeal is consistent holdings from this Court that a Plaintiff must offer evidence “sufficient for reasonable jurors to conclude” that a violation of the NESC actually happened. *Gifford v. Four-County Electric Power Assn.*, 615 So.2d 116, 1173 (Miss. 1992); *Redhead v. Entergy Mississippi, Inc.*, 828 So.2d. 801 (Miss. App. 2002). Plaintiff believes he submitted sufficient evidence for reasonable jurors to conclude that Defendant Entergy violated Section 282 (E) of the NESC. These line of cases affirm that the decision on whether a violation of the NESC actually occurred shall be left to the discretion of reasonable jurors and is not appropriate for a directed verdict order of the trial Court. *Id.*

In the instant case, Entergy attempted to argue as it had in other cases that its alleged compliance with the NESC shielded it from liability under the amended version of 11-27-43. Nevertheless, as this Court clearly stated in *Ware v. Entergy Mississippi, Inc.*, 888 So.2d. 763 (Miss. 2004) compliance with the NESC is one method to prove negligence but there is an additional reasonable standard of care imposed upon utility companies. *Id.* at 773. The instant case presents a situation where Entergy failed

to comply with the NESC when it did not install a conspicuous guy marker and should have been found negligent *per se*. Secondly, Plaintiff submitted substantial proof that Entergy breached its duty to “anticipate and guard against events which may be reasonably expected to occur, and the failure to do so is negligence, even though the power company may not anticipate the identical injury that occurs.” *Id.* at 773, citing *Mississippi Power & Light Co. v. Shepard*, 285 So.2d. 725 (Miss. 1973). Accordingly, Plaintiff submits that the Circuit Court’s grant of directed verdict failed to properly consider both of the standards and in turn violated each.

Additionally, numerous other jurisdictions affirm the same standards as well and have routinely held utility companies liable for injuries suffered by citizens who trip over negligently installed and maintained guy wires. For example, in *Laufer v. Long Island Lighting Co.*, 402 N.Y.S. 2d. 611 (1978), the Plaintiff was injured when he and three friends crossed the street and tripped over a guy wire in a grassy area in between a curb and a sidewalk. Plaintiff and his witnesses testified it was very difficult to see the dark colored guy wire in the darkness. In that case, the New York Appellate Court found Plaintiff made a *prima facie* case of negligence against the utility company and held the questions of fact should be decided by the jury. *Id.*

Likewise, the Michigan Supreme Court found that a Plaintiff is not precluded from bringing a negligence action when tripping over a guy wire placed off the edge of a sidewalk stating “such departure from the sidewalk is not negligence *per se* in the individual, nor does it relieve the [defendant] of the duty to keep its streets in proper condition for travel at places where people may reasonable be expected probably to walk.” *Joblonski v. City of Bay City*, 226 N.W. 865 (Mich. 1929); see *Stokka v. Cass County Electric Coop., Inc.*, 373 N.W. 2d. 911 (ND 1985) (denying summary judgment to electrical utility for liability resulting in death of snowmobile rider killed after striking unmarked guy

wire).

In *City of Fort Worth v. Williams*, 119 S.W. 137 (Tex. App. 1909), the Plaintiff was injured by severely fracturing her ankle when walking with her sister in a neighborhood and crossed the street to complete their journey home. Just as in the instant case, Plaintiff's foot was caught under the guy wire anchor and injured. The Texas Court of Appeals affirmed the judgment rendered in favor of the Plaintiff finding that the communications utility company "had the right to construct and maintain such guy wires as were reasonably necessary for its telephone poles, provided that in doing so it exercised ordinary care for the safety of pedestrians" and failure to do so was negligence subjecting the communications utility to liability. *Id.* at 144.

Likewise, the Court of Appeals in Indiana affirmed a verdict in favor of a police officer rendered in the Superior Court of Tippecanoe when he sustained injuries after falling over a guy wire. *Lafayette Telephone Co. v. Cunningham*, 114 NE 227 (Ind. App. 1916). As here, the utility company defended the case by arguing the guy wire was located in a grassy area next to the road way between the sidewalk and the curb and they did not expect pedestrians in the area. However, the Court rejected this argument and affirmed the jury's verdict finding that the location of the guy wire over which Plaintiff tripped even in an area with no crosswalk that was between a sidewalk and curb did not relieve the utility company of liability. *Id.*

4. Negligent Maintenance of Street Lights

Similarly, the Circuit Court's grant of a directed verdict should be reversed on the issue of maintenance of street lights and the duties assumed by Defendant to maintain the street lights for the safety and use of the citizens in Greenville. Even though the Circuit Court prohibited Plaintiff from admitting numerous exhibits which showed that Defendant entered into a contract with the City of

Greenville to install and maintain street lights in and around the City, Plaintiff's counsel made an extensive proffer of such evidence. (T. 433-38). This evidence showed written documentation of a Comprehensive Street Lighting Plan between Defendant and the City of Greenville, the Street Light Agreement between those parties, and the City of Greenville's utility bill for street lights during the time of the subject incident. (*Id.*, P-19, P-20, P-21). Accordingly, Plaintiff asserts Defendant Entergy has assumed a duty and otherwise has a legal duty to maintain street lights to illuminate the city thoroughfares for the citizens of Greenville and is paid to do so.

While Defendant may not have a duty to constantly patrol the City of Greenville to locate extinguished or blown out street lights, it should be held to a reasonable standard of care to repair street lights when placed on notice. Accordingly, Plaintiff put on sworn testimony from neighbors who lived on Central and Delesseps Streets near the area where the incident occurred to show that they had indeed contacted Entergy before the subject incident to inform them of the blown out street lights. (T. at 238; 280). Despite this notice, one of Entergy's customers, Debra Bradley, was rudely told by Entergy's employee that he "was not going to fix nary another light" in that neighborhood because he alleged individuals broke them out with bricks or shot them out. (T. at 282). Accordingly, Plaintiff submits that Defendant breached the duty owed to him to act as a reasonable prudent utility company to repair street lights after being placed on notice to do so and 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. Indeed, when neighbor Addie Bradley contacted Entergy to inform them that Plaintiff was hurt by their guy wire after the incident, their employee, Jerry Steed, finally went to make repairs and found there were four blown out street lights on this one block of Central Street alone. (T. at 370, D-4).

Plaintiff thereby submits the directed verdict was improper because there was ample evidence

submitted that Defendant was on notice of the blown out street lights for several weeks before the subject incident but did not act as a reasonable prudent utility company to repair such lights. Defendant even had one of its employees flatly state he would not repair street lights in that neighborhood and in turn that condition and negligence (or possibly intentional act) contributed to Plaintiff's incident and injuries. If the Circuit Court had taken that evidence as true as required under the standard for directed verdict, the judge should have determined that reasonable minds could have differed on the negligence issue and permitted the jury to decide the issue and the credibility of the witnesses. Accordingly, Plaintiff submits that the Order granting directed verdict should be reversed on these grounds as well and appropriate instructions rendered to confirm admission of such evidence at a new trial.

This Court long ago recognized the potential liability for a company responsible for illuminating a public area when that company creates unreasonable risk of harm due to poor lighting conditions. *Standard Oil Co., Inc. v. Decell*, 166 So. 273 (Miss. 1936). In *Decell* the Plaintiff was injured when she fell into a grease pit located next to a public walk way. *Id.* at 380. The Supreme Court affirmed the verdict in favor of Plaintiff as it found appropriate evidence that the Defendants created an artificial condition which posed unreasonable risk of harm to the public. *Id.* at 383. In addition to the close proximity of the grease pit to the walk way, the Court found evidence of the dimly lit area as sufficient evidence to impose liability. *Id.*

5. Proof of Nearly Identical Guy Marker Across the Street

Even though Defendant Entergy argued that a conspicuous guy marker was unnecessary for this particular guy wire because they did not expect pedestrian traffic, Plaintiff offered proof that a nearly identical guy wire placement directly across the street from the subject guy wire did indeed have a bright yellow guy marker attached. Plaintiff attempted to offer proof that the guy wire across the street was

located in nearly identical distances from the opposite side walk and same distance to the street curb as the subject guy wire. Plaintiff submitted proof through expert Little's diagram of the incident scene which graphically displayed Plaintiff's path of travel from the neighborhood fish fry walking in a south east direction across Central Street which took Plaintiff directly past the guy wire with the conspicuous guy marker, where he obviously did not trip; and then across the street to the guy wire maintained by Defendant that did not have a marker, where he did trip. (T. at 382-88; P-18). In fact, the only apparent difference between the two guy wires was that the guy wire which had a conspicuous guy marker attached was owned by a telephone utility company, Bell South, rather than the Defendant electrical utility company. Plaintiff intended to prove he was able to walk directly past the guy wire with the conspicuous marker attached and not trip was overwhelming evidence of causation when Plaintiff did indeed trip over the unmarked guy wire walking in the same direction of travel. Further, Plaintiff submits such evidence is relevant to rebut Defendant's allegations that Plaintiff was intoxicated which caused him to trip when he walked past numerous other obstacles that were visible and did not trip with the same amount of alcohol consumption.

Nevertheless, the trial judge refused to allow any evidence whatsoever of photographs, testimony or descriptions of the guy marker located across the street . This ruling is reversible error and unfairly prejudiced Plaintiff's case as evidence of a substantially similar condition located directly across the street and which came into play when Plaintiff walked past the conspicuously marked guy wire and did not trip, yet did trip over the unmarked guy wire. "Reversal is appropriate if the lower Court's ruling affects a substantial right or prejudice or harm results to a party." *Smith v. State*, 839 So.2d. 489, 495 (Miss. 2003). Such common sense and logical information is credible evidence and relevant to Plaintiff's case. Miss. R. Civ. P. 402 (2007). Rule 401 provides:

“Relevant Evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Miss. R. Evid. 401 (Miss. 2007).

Plaintiff is mindful that under Rule 403 relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading to the jury. Miss. R EVID. 403 (Miss. 2007). However, Rule 403 should be used sparingly to exclude relevant evidence of substantially similar conditions of a warning device located directly across from the offending device such as the instant action.

The trial judge’s ruling excluding any evidence of the guy marker across the street is reversible error and Plaintiff submits this evidence should be allowed upon remand. Moreover, as the Court Judge failed to admit all of the evidence to be offered by Plaintiff on the guy marker across the street the Judge also did not fully appreciate the Plaintiff’s case and did not consider such evidence in the light most favorable to Plaintiff when ruling for a directed verdict. Indeed, Plaintiff submits that reasonable minds would certainly differ on whether Defendant Entergy was negligent for failure to maintain a guy marker on the subject guy wire when another utility company placed a marker on its guy wire located in a nearly identical configuration directly across the street.

Defendant Entergy argued that proof of the guy marker located directly across the street was not relevant and prejudiced Defendant because the guy marker was installed by a telephone utility company rather than an electrical utility company. (T. at 13, 57, 384-87). In response, expert Little quickly confirmed that the NESC applies to all utility companies who install their transmission lines on a public utility system and the same rules regarding guy markers apply to all utilities if they are electrical, communication or otherwise. This significant evidence was therefore relevant for the jury to consider

and not unduly prejudicial . In reality, Defendant's real objection to this significant evidence was that it damaged their defenses, but that is insufficient legal grounds to exclude such evidence.

Entergy's position that Bell South was not subject to the same NESC requirements for guy wires is simply not true as all utilities located on any electrical distribution system such as the one at issue in this case are subject to the NESC. The NESC specifically states:

The purpose of these rules is the practical safeguarding of persons during the installation, operation, or maintenance of electrical supply and *communication lines and associated equipment*. These rules contain the basic provisions that are considered necessary for the safety of employees and the public under the specified conditions.

* * *

These rules cover supply and communication lines, equipment, and associated work practices employed by a public or private electrical supply, communications, railway or similar utility in the exercise of its function as a utility.

* * *

All electrical supply and communication lines and equipment shall be designed, constructed, operated, and maintained to meet the requirements of these rules.

NESC §§10,11,12 (emphasis added); (T. at 386). See *Mississippi & Light Co. v. Lumpkin*, 725 So.2d 721, 727 (Miss. 1998) (citing NESC and holding all electrical supply and communication lines and equipment shall be installed and maintained so as to reduce hazards to life as far as practical).

Indeed, it would be highly ironic for the NESC to require an electrical utility company to have certain safety measures on its poles and guy wires but not require a communication utility which has communication distribution lines on the same pole not to be subject to the same requirements. It is even more ironic that the lawyer for Entergy does not know the rules requiring all such utility companies to comply with the safety requirements of the NESC.

The evidence of the guy marker across the street was relevant to Plaintiff's case and should have been admitted to Rules 402 and 403 of the *Mississippi Rules of Evidence*. Moreover, any prejudice or

confusion in regard to this marked guy wire was substantially outweighed by the probative value to Plaintiff's case. Miss. R. Civ. P. 403 (2007). There are numerous relevant conclusions and inferences a reasonable jury could draw from this substantially similar configuration, especially in light of Entergy's position that no guy marker was required on its wire. For instance, proof showed that the diagonal path of travel Plaintiff took from the fish fry across Central Street took him directly past the marked Bell South guy wire on the north side of Central Street where he did not trip but he did trip on the unmarked guy wire owned by Entergy on the south side of Central Street. Indeed, this Court has routinely allowed evidence of substantially similar conditions or circumstances of prior incidents to prove negligence and causation from a subsequent accident. *Lockwood v. Isle of Capri Corp.*, 962 So.2d, 645, (Miss. App. 2007) (reversing trial court grant of summary judgment based on question of fact of prior puddle of water on floor as substantially similar).

Admission of the marked guy wire across the street is akin to admission of prior accidents because they show substantially similar conditions. *Noah v. General Motors Corp.*, 882 So.2d. 235, (Miss. 2004). However, what makes the current condition and facts more relevant is that it was not a "prior" incident but evidence that was existing at the time of the subject incident that came directly into play when Plaintiff walked past the marked guy wire in the darkened street but did not trip. Further, this evidence was highly significant to Plaintiff's response to the allegations of Defendant that he was intoxicated and was unable to aware of his surroundings as he had no trouble avoiding the numerous obstacles on the north side of Central Street but did trip over the unmarked and obscured guy wire of Defendant.

Likewise, upon remand Plaintiff should be allowed to offer expert testimony from Mr Little concerning his opinion that the subject guy wire is unnecessary to support any load from the electrical

wire and can be removed. As MISS. CODE ANN. §11-27-43 requires utility companies such as Defendant Entergy to correct hazards which pose "an unreasonable risk of harm to the public" Mr. Little believes this guy wire violates that statute since it is located in a high traffic area with extensive pedestrian and vehicular traffic. MISS. CODE ANN. §11-27-43 (rev. 2000). The trial court's exclusion of this opinion was improper and subject to reversal. This opinion is relevant to the issues in this case and should be permitted upon remand.

X. CONCLUSION

Plaintiff submits that the Circuit Judge failed to grant the benefit of all favorable inferences to Plaintiff's evidence supported by authoritative expert and lay testimony that Defendant was negligent in failing to install and maintain a guy marker on its guy wire in violation of the Mississippi statute and the NESC and such failure directly caused Plaintiff's injuries. Moreover, Plaintiff submits that reasonable and fair minded jurors in the exercise of impartial judgment could have reached different conclusions and the entire juror should have been permitted the opportunity to decide the disputed facts of this case. Therefore, Plaintiff requests this court reverse the directed verdict of the trial court and remand the action for a full trial on the merits with instructions concerning admission of Plaintiff's other relevant evidence.

RESPECTFULLY SUBMITTED, THIS, the 4 day of December, 2007.



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CERTIFICATE OF SERVICE

I, R. Brittain Virden, attorney for Plaintiff/Appellant, Anthony Paul Williams do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing document to:

James L. Robertson, Esq.
Wise Carter Child & Caraway
P.O. Box 651
Jackson, MS 39194

Signed, this, the 4 day of December, 2007.



R. BRITTAIN VIRDEN

CERTIFICATE OF SERVICE
BRIEF

I, R. Brittain Virden, attorney for Plaintiff/Appellant, Anthony Paul Williams do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing document to:

James L. Robertson, Esq.
Wise Carter Child & Caraway
P.O. Box 651
Jackson, MS 39194

Honorable Richard A. Smith
Circuit Court Judge
P. O. Box 1953
Greenwood, MS 38935

Signed, this, the 7 day of December, 2007.



R. BRITTAIN VIRDEN