

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2008-CA-00669

BARRY S. LOGAN

APPELLANT

VS.

OVERLEY ELECTRIC, INC.

APPELLEE

APPEAL FROM THE CIRCUIT COURT OF OKTIBBEHA COUNTY, MISSISSIPPI

CIRCUIT COURT CAUSE NO. 2005-0234CV

**REPLY APPEAL BRIEF OF APPELLANT BARRY S. LOGAN**

ORAL ARGUMENT NOT REQUESTED

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**I. Overley has never presented any argument in opposition to Logan's claim that Overley breached its assumed, contractual duty to maintain the temporary lighting in the stairwell in question.**

Throughout the course of this litigation, Overley has never addressed or contradicted the undisputed allegation that Overley breached its assumed, contractual duty to maintain the temporary lighting in the stairwell in question. Overley continues that trend in its appeal brief. Instead, Overley presents a "red herring" and argues that there is no evidence that Overley removed or disconnected the temporary lighting; that there is no evidence that Overley had knowledge that the temporary lighting had been removed or disconnected; and that there is no evidence that Overley left a piece of conduit in the stairwell. In making these irrelevant arguments, Overley simply ignores Logan's primary contention.

Admittedly, Overley had the duty to maintain the temporary lighting in the stairwell in question. (R. 310). As discussed more fully in Logan's original appeal brief, Logan was a third-party beneficiary of this duty since the temporary lighting was obviously in place to benefit workers such as Logan. Further, the uncontradicted testimony and evidence in this case have established that the temporary lighting in the stairwell where Logan fell was not functioning at the time of Logan's accident and had not been functioning for at least three and one-half hours (and possibly up to five hours) prior to the time of Logan's accident. (R. 229-230, 260, 275, 368-369). Overley does not dispute the fact that the lights were off at the time of Plaintiff's fall and does not dispute Plaintiff's timeline. (R. 298).

Further, Overley's failure to maintain the temporary lighting in question clearly was the proximate cause or proximate contributing cause of Logan's accident and resulting damages. As Logan testified and as common sense indicates, due to the fact that temporary lighting in the stairwell was not functioning, Logan was unable to see and avoid the piece of conduit upon

which he slipped. (R. 239-240, 260, 274-275). In other words, but for Overley's breach of its duty to maintain the temporary lighting, Logan would have been able to see and avoid the piece of conduit, and the accident would not have occurred. At the very least, this question is one for the jury to decide. See, e.g., *Churchill v. Pearl River Basin Development District*, 757 So. 2d 940, 943 (Miss. 1999).

By ignoring Logan's primary contention that Overley breached its duty to maintain the temporary lighting in the stairwell in question, Overley is attempting to deflect this Court's attention from the material facts, as it successfully did in the Court below. Ignoring the issue, however, does not change the fact that the Circuit Court incorrectly applied premises liability law to the facts of this case and that the Court below committed reversible error by granting summary judgment to Overley. Accordingly, the summary judgment granted to Overley should be reversed, and this case should be remanded to the trial court.

**II. Overley ignores and does not address key evidence that Overley had both actual and constructive knowledge that the temporary lighting in question was not functioning prior to the time of Logan's accident.**

As demonstrated in Logan's original appeal brief and above, this is not a case to which premises liability law applies. However, even if premises liability law did apply, Logan has produced sufficient evidence to demonstrate that Overley had both actual and constructive knowledge of the dangerous condition, i.e. that the temporary lighting in question was not functioning prior to the time of Logan's accident. In its appeal brief, Overley completely ignores this evidence.

**a. Actual Knowledge**

As the Court will recall from Logan's earlier brief, testimony in the instant case demonstrates that Overlay, through its foreman, had actual knowledge that the temporary lighting was not functioning in the stairwell prior to Logan's accident:

Q. Okay. You said the electricians were fussing about the painters taking the light. What -- what electrician was fussing about the painters taking the lighting down?

A. That would be the foreman.

Q. And what was his name again?

A. I don't know. I don't remember his name.

Q. Okay. That's the guy you said he's just a good guy?

A. Yeah. Just a good fellow.

Q. All right. Do you remember what he looked like?

A. He's a white guy, about six foot.

Q. White guy?

A. Yeah.

Q. White?

A. White fellow.

Q. Six foot.

A. Uh-huh.

Q. About what age?

A. Oh, about 30, 35 years old.

Q. Okay.

A. He wore glasses.

Q. Okay.

A. Slender.

Q. Okay. Dark hair, light hair?

A. Brown hair.

Q. Brown hair. Okay. All right. And you say that the foreman for Overley Electric said that the painters had taken the temporary lighting?

A. Yeah, I believe he did.

Q. Okay. Did he say that to you?

A. Yes, ma'am.

Q. Okay. When did he tell you that?

A. I think it was at break time.

Q. At 9:00 --

A. Yeah.

Q. -- time? Okay. And where were you when he told you that?

A. All out gathered around the truck taking a break.

(R. 237-238).

From this testimony, it is obvious that Overley's foreman knew that the lighting in question was not functioning at least as early as 9:00 a.m. on the morning of Logan's accident. Despite this fact, and despite the fact that Logan's accident did not occur until approximately 12:40 p.m., no one from Overley did anything to rectify the problem or to provide warnings to workers on the jobsite. Instead, the lighting remained off and the unreasonably dangerous condition resulting therefrom ultimately caused Logan's accident.

**b. Constructive Knowledge**

From the uncontradicted testimony in this case, the temporary lighting had been off for at least three and one-half hours prior to Logan's fall. (R. 229-230, 260, 275, 368-369). As previously noted, there is additional testimony which demonstrates that the lights had been off even before 8:00 a.m. (R. 368-369). Thus, taking the evidence in the light most favorable to Logan, the temporary lighting had been off for up to five (5) hours prior to the accident. Clearly, this unreasonably dangerous condition had remained long enough to impute constructive knowledge to Overley, especially considering that the stairwell was one of the most highly traveled areas of the job site. (R. 313, 380). Once again, Overley does not address this point.

**CONCLUSION**

Despite the fact that Overley ignores Logan's primary contention in its appeal brief, Overley's admissions and the uncontradicted evidence establish that Overley breached its assumed duty to maintain the temporary lighting in question and that such breach was the proximate cause of Logan's injuries. Likewise, Logan has produced sufficient evidence to create genuine issues of material fact both as to whether Overley had actual knowledge and constructive knowledge of the dangerous condition in question, yet failed to rectify the condition or issue warnings. Accordingly, Logan has satisfied his burden of proof and Overley's Motion for Summary Judgment should have been denied. Based upon all of the above, Logan respectfully requests that this Court reverse the trial court's grant of summary judgment and remand this cause for a full trial on the merits.



Respectfully submitted, this the 24<sup>th</sup> day of November, 2008.

**BARRY S. LOGAN, Appellant**

BY:

  
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**CERTIFICATE OF SERVICE**

I, J. Kristopher White, one of the attorneys for Appellant, Barry S. Logan, do hereby certify that I have this day served by mail a true and correct copy of the above and foregoing *Reply Appeal Brief of Appellant*, via U.S. Mail, postage prepaid, on the following:

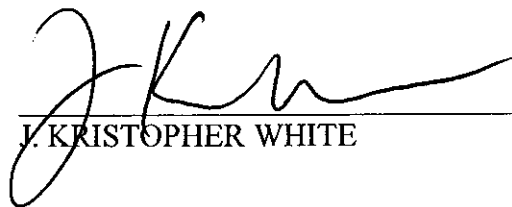
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