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

BRIEF OF APPELLANT BARRY S. LOGAN

ORAL ARGUMENT NOT REQUESTED

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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 and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Barry S. Logan, appellant
2. Overley Electric, Inc., appellee
3. Claude F. Clayton, Jr., attorney for appellant
4. J. Kristopher White, attorney for appellant
5. Clayton O'Donnell, PLLC, attorneys for appellant
6. Reagan D. Wise, attorney for appellee
7. Webb, Sanders & Williams, PLLC, attorneys for appellee
8. Martha Bost Stegall, attorney for Lloyd G. Oliphant & Sons Paint Co., Inc.
9. Mitchell, McNutt & Sams, P.A., attorneys for Lloyd G. Oliphant & Sons Paint Co., Inc.
10. Builders and Contractors Association of Mississippi Self Insurers Fund, intervenor (workers' compensation carrier lien)
11. John L. Hinkle, IV, attorney for intervenor
12. Markow Walker, P.A., attorneys for intervenor

13. Honorable Lee J. Howard, Circuit Court Judge, Oktibbeha County, Mississippi.

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STATEMENT OF THE ISSUES

The following issues are presented for review in this appeal:

1. Whether the trial court committed error by granting summary judgment to Overley Electric, Inc. in spite of the undisputed evidence that Overley Electric, Inc. breached its assumed, contractual duty to maintain the temporary lighting in the stairwell in question, which was a proximate cause, or proximate contributing cause, of Barry Logan's injuries.

2. Whether the trial court committed error by granting summary judgment to Overley Electric, Inc., when, even under a premises liability analysis, Barry Logan presented more than sufficient evidence to create a genuine issue of material fact which precludes summary judgment.

3. Whether the trial court committed error by finding that Barry Logan's injuries were solely caused by his own negligence when, under well-settled Mississippi law, any issue regarding Barry Logan's comparative negligence should have been reserved for the jury.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, and Disposition in the Court Below

Plaintiff Barry S. Logan ("Logan") was injured on May 20, 2002, while working on a renovation project at the Cresswell Dormitory on the campus of Mississippi State University. Logan was employed by Jody Plumbing & Mechanical, Inc., one of the subcontractors on the job. Subsequently, Logan filed a negligence action against Overley Electric, Inc. ("Overley") and Lloyd G. Oliphant & Sons Paint Co., Inc. ("Oliphant") on February 19, 2005. Both Overley and Oliphant were also subcontractors on the Cresswell job site.

On March 29, 2007, Overley filed a motion for summary judgment or, in the alternative, for partial summary judgment as to the issue of punitive damages.[1] On August 14, 2007, Logan filed his response to Overley's Motion. On December 10, 2007, the Circuit Court of Oktibbeha County granted summary judgment in favor of Overley. Logan's motion for reconsideration was subsequently denied, and final judgment was entered in Overley's favor on April 1, 2008.[2] It is from this final judgment that Logan now appeals.

B. Statement of the Facts

This case arises out of an accident which occurred at approximately 12:40 p.m. on May 20, 2002, during a renovation project at the Cresswell Dormitory on the campus of Mississippi State University. Logan was working as a foreman for one of the subcontractors on the job, Jody

[1] Defendant Oliphant also filed a motion for summary judgment in the court below. Oliphant's motion for summary judgment and its motion to reconsider were both denied. Oliphant has now also filed an appeal in this matter.

[2] Summary judgment was granted to Overley pursuant to Rule 54(b) of the Mississippi Rules of Civil Procedure. The circuit court expressly directed an entry of a final judgment with prejudice as to Overley after it expressed a determination that there was no just reason for delay of an entry of final judgment. (R. 504, 506).

Plumbing & Mechanical, Inc. While descending the internal (center) stairwell[3] of the Cresswell Dormitory, on the landing between the first and second floors, Logan slipped on a piece of conduit which had been left on the landing and fell all the way to the bottom of the stairwell.[4] (R. 239-240, 274-275). The temporary lighting in the stairwell was not functioning at the time of the accident and the stairwell was "completely dark." (R. 260, 275). Obviously, due to the fact that the lights weren't functioning, Logan was unable to see and avoid the piece of conduit on which he slipped.

Overley was the electrical subcontractor on the Cresswell job. By Overley's own admissions, it had the responsibility for installing and maintaining the temporary lighting on the Cresswell job, including the installation and maintenance of the temporary lighting in the stairwell where Logan fell. (R. 310). Specifically, in regard to the stairwell where Logan fell, Overley has admitted the following:

REQUEST NO. 7:

> Please admit that on May 20, 2002, Overley Electric, Inc., was responsible for installation and maintenance of the temporary lighting in the center stairwell of Cresswell Hall.

RESPONSE:

> Admitted.

(R. 310).

---

[3] The Cresswell dormitory had three stairwells—one stairwell on each end of the building and one internal stairwell in the center of the building. (R. 231). There was no natural lighting in the internal stairwell where Logan's accident occurred. (Id).

[4] As a result of this accident, Logan was knocked unconscious and suffered severe injuries to his back and his shoulder, for which he has undergone several surgeries. (R. 245-253). Logan has been unable to work since the accident and has been unable to enjoy many of the activities he previously enjoyed. (Id). Logan was awarded total social security disability benefits in March 2007.

Despite the contractual duty Overley had assumed to install and maintain the temporary lighting on the Cresswell job, including the lighting in the stairwell in question, the uncontradicted testimony in this case has established that the temporary lighting in the stairwell where Logan fell had been off/not functioning for at least three and a half hours prior to the time of Logan's accident. Logan recalls that at approximately 9:00 a.m. on the day of the accident, he and one of his co-workers, Mark Iseley, were in the stairwell where the accident occurred and the lights were not functioning at that time. (R. 229-230). Mark Iseley actually remembers the lights being off in the stairwell earlier than 9:00 a.m., perhaps even before 8:00 a.m.[5] (R. 368-369). By either account, since Logan's accident occurred at approximately 12:40 p.m., the lights had not been functioning for at least three and a half hours prior to Logan's fall. Overley does not dispute this timeline. (R. 298).

As Overley pointed out in its motion for summary judgment, Logan concedes that he did not make a formal complaint to anyone with Overley regarding the lights in the stairwell after he discovered that the lights were not functioning. What Overley neglects to mention, however, was that such a complaint was not necessary because Overley's foreman was already aware of the problem:

> 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?

[5] Mark Iseley recalled the lights in the stairwell being off "first thing that morning" at some time between 7:30 and 8:00 a.m. (R. 368, 381). Thus, using Mark Iseley's calculation, the temporary lighting in the stairwell had been off for approximately four and a half to five hours at the time of Logan's accident. (R. 381).

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).

Further, even though Overley admits that it had the responsibility not only to install, but also to **maintain** the temporary lighting on this jobsite, management at Overley **never** designated or directed any of Overley's employees to inspect the temporary lighting to make sure that it was functioning properly.[6] In regard to the stairwell where Logan's fall occurred, this was true even though Overley knew that this was the primary stairwell being utilized by virtually all employees on the job. (R. 313, 380).

Q. Okay. So there's no checks done then, I guess, to make sure the lights were all on that had been installed?

A. No.

MR. WISE: What do you mean by checks?

MR. WHITE: Yeah, I knew you were going to ask that. I'll come back to that.

BY MR. WHITE:

Q. Let me ask it this way. Was there anyone who went and inspected the light, the temporary lighting, to make sure that it was functioning property?

A. Not that I'm aware of. Not for Overley Electric it wasn't.

***

[6] This cavalier, irresponsible attitude toward the maintenance of temporary lighting by Overley was indicative of other problems on the Cresswell/Hathorne jobsite with temporary lighting. As Mark Iseley testified during his deposition, problems with adequate temporary lighting were common on this job, both before and after Logan's accident. (R. 381).

Q. Was there anyone direct -- we've covered this a little bit, but as I understand it, there was no one that was directed from Overley Electric's standpoint to go and inspect temporary lighting?

A. No.

***

Q. Okay. In your opinion, Mr. Overley, if someone from Overley Electric Company would have inspected the lighting that morning, they would have seen the lights were off?
MR. WISE: Object to the form of the question.

A. Yes, they would have seen it. If they were off, they would have seen it.

Q. And in your opinion, Mr. Overley, is a dark unlighted stairwell dangerous?

A. Yes.

(R. 293, 298-299).

From the evidence set forth above and the authority set forth below, there are clearly genuine issues of material fact regarding Overley's liability which should be decided by a jury.

As such, the trial court committed reversible error by granting Overley's motion for summary judgment.

SUMMARY OF THE ARGUMENT

Logan's primary claim against Overley stems from the undisputed allegation that Overley breached its assumed, contractual duty to maintain the temporary lighting in the stairwell in question. Due to Overley's breach in this regard, the stairwell was completely dark, which was the proximate cause of Logan's fall and resulting damages. In other words, Overley's negligence in this case is derived not from any allegation that it removed or disconnected the temporary lighting, but rather from the breach of its assumed, contractual duty to maintain the temporary lighting.

In its motion for summary judgment, Overley did not address or contradict Logan's allegations as set forth above. Instead, Overley's motion applied premises liability law to Logan's claim against Overley and focused solely on two arguments: (1) that there is no evidence that Overley or any of its employees removed the temporary lighting in question, and (2) that Overley did not have any knowledge that the temporary lighting had been removed or disconnected prior to Logan's fall. These arguments by Overley completely missed the mark.

This is not a premises liability case between one invitee and a business owner. This case addresses the liability of a subcontractor which had the contractual duty to maintain the lighting in the stairwell where the accident occurred and knew the unlighted stairwell was dangerous. While the circuit court's order granting Overley's motion for summary judgment did not provide any analysis for the reasoning behind its decision, Logan must assume that the circuit court adopted Overley's argument and applied premises liability law in granting Overley's motion for summary judgment. The application of premises liability law to this case by the circuit court was reversible error.

Further, while this is not a case where premises liability law applies, even if it were, Logan has presented more than sufficient evidence to create genuine issues of material fact which preclude summary judgment. As the court is well aware, for a plaintiff to recover in a "slip and fall" premises liability case, the burden is upon plaintiff to prove by a preponderance of the evidence one of the following things: (1) a negligent act by the defendant caused the plaintiff's injuries, or (2) the defendant had actual knowledge of a dangerous condition but failed to warn plaintiff of the danger, or (3) the dangerous condition remained long enough to impute constructive knowledge to the defendant.

As demonstrated by the facts set forth above, Logan has presented more than sufficient evidence from which a jury could conclude that Overley had actual knowledge that the lighting in the stairwell was not functioning and/or that the lights had been off long enough to impute constructive knowledge to Overley.

In regard to actual knowledge, Logan testified that Overley, through its foreman, had actual knowledge of the dangerous condition, i.e. that the temporary lighting in question was not functioning prior to the time of Logan's accident. Specifically, during the 9:00 break on the morning of the accident in question, Overley's foreman indicated to Logan that he was aware that the temporary lighting was not functioning in the stairwell and stated his belief "that the painters had taken the temporary lighting."

Likewise, in regard to constructive knowledge to Overley, the uncontradicted testimony in this case reveals that the temporary lighting in the stairwell in question had been off for at least three and a half hours prior to Logan's fall. In fact, there is additional testimony which indicates that the lights in question had been off for up to four and a half to five hours. Thus, taking the evidence in the light most favorable to Logan, 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.

Finally, Overley's motion for summary judgment also argued that Logan "assumed the risk" of entering the stairwell in question, and that such assumption of risk is an absolute bar to Logan's recovery. Once again, while it is unclear from the circuit court's order granting summary judgment whether the court adopted Overley's argument on this point, Logan must assume that it did. Overley's argument on this point, however, ignores long established Mississippi case law on this issue, which holds that the assumption of risk doctrine has been subsumed into the doctrine of comparative negligence. Since this is clearly not a case in which Logan has failed to offer any evidence of negligence attributable to Overley, (e.g. Overley's negligent failure to properly maintain the temporary lighting in the stairwell) any issues concerning Logan's comparative fault should have been reserved for the jury. Thus, summary judgment was not proper based upon this argument by Overley.

Based upon all of the above, the grant of summary judgment to Overley by the circuit court was reversible error, and Logan requests that this court reverse the summary judgment granted to Overley in this cause by the trial court and remand this case for a full trial on the merits.

ARGUMENT

I. Standard of Review.

This is an appeal from a summary judgment granted to Overley by the Circuit Court of Oktibbeha County, Mississippi. The Supreme Court applies the same standard as the trial court in ruling on a motion for summary judgment. Under Rule 56(c) of the *Mississippi Rules of Civil* Procedure, a motion for summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits, if any, show that there is no genuine issue as to any material facts and that the moving party is entitled to a judgment as a matter of law." Upon considering a motion for summary judgment, the evidence must be viewed in the light most favorable to the party against whom the motion has been made. *Russell v. Orr*, 700 So. 2d 619, 622 (Miss. 1997); *Northern Elec. Co. v. Phillips*, 660 So. 2d 1278, 1281 (Miss. 1995). The burden of showing that no genuine issue of material fact exists lies with the moving party, and the non-moving party must be given the benefit of every reasonable doubt. *Tucker v. Hinds County*, 558 So. 2d 869, 872 (Miss. 1990). "Issues of fact sufficient to require denial of a motion for summary judgment obviously are present where one party swears to one version of the matter in issue and another says the opposite." *Tucker*, 558 So. 2d at 872. "Furthermore, it is well-settled that motions for summary judgment are to be viewed with a skeptical eye, and if a trial court should err, it is better to err on the side of denying the motion." *Crum v. Johnson*, 809 So. 2d 663, 665 (Miss. 2002) (citing *Aetna Cas. & Sur. Co.*, 669 So. 2d 56, 70 (Miss. 1996); *Ratliff v. Ratliff*, 500 So. 2d 981, (Miss. 1986)).

II. The trial court committed reversible error by granting summary judgment to Overley Electric, Inc. in spite of the undisputed evidence that Overley Electric, Inc. breached its assumed, contractual duty to maintain the temporary lighting in the stairwell in question, which was a proximate cause, or proximate contributing cause, of Barry Logan's injuries.

This is a negligence cause of action. (R. 213). As the court is well aware, there are four elements which must be established in order for Logan to recover on his claims: (1) a duty owed by the Overley to Logan; (2) a breach of that duty; (3) proximate causation; and (4) damages. *See, e.g., Rolison v. City of Meridian*, 691 So. 2d 440 (Miss. 1997). "If a triable issue of fact regarding each of these elements exists, then summary judgment must [not be granted]." *Lyle v. Mladinich*, 584 So. 2d 397, 398-99 (Miss. 1991).

Logan's claims against Overley are premised on the undisputed allegation that Overley breached its assumed, contractual duty to maintain the temporary lighting in the stairwell where Logan fell. Due to Overley's breach of this duty, the stairwell was completely dark and Logan was unable to see and avoid the piece of conduit on which he slipped. Thus, Overley's breach of duty was a proximate cause of Logan's fall and resulting damages.

In its motion for summary judgment, Overley did not address or contradict Logan's theory of recovery. (R. 129-153). Instead, Overley erroneously applied premises liability law to Logan's claims and argued (1) that there is no evidence that Overley or any of its employees removed the temporary lighting in question, and (2) that Overley did not have any knowledge that the temporary lighting had been removed or disconnected prior to Logan's fall. (R. 138-141). These arguments by Overley completely missed the mark.

Likewise, even though the circuit court's order granting Overley's motion for summary judgment does not provide any analysis for its decision, Logan must assume that the circuit court

adopted the reasoning applied by Overley. As shown below, the circuit court incorrectly applied premises liability law to the facts of this case.

A. The duty owed by Overley to Logan.

Overley has admitted, both in response to requests for admission and in its pleadings in the court below, that it had assumed the duty of providing temporary lighting in the stairwell where Logan's accident occurred. (R. 310, 442).

Under Mississippi law, a negligence duty "exists where a party **contracts** to undertake or otherwise **assumes** a duty." *Doe v. Wright Security Services, Inc.*, 950 So. 2d 1076, 1080 (Miss. App. 2007) (citing *Rein v. Benchmark Constr. Co.*, 865 So. 2d 1134, 1144-45 (Miss. 2004); *Wagner v. The Mattiace Co.*, 938 So. 2d 879 (Miss. App. 2006); *Hobson v. Waggoner Eng'g, Inc.*, 878 So. 2d 68, 76 (Miss. App. 2003)) (emphasis added). "This duty extends to third party beneficiaries." *Id.* (citing *Rein*, 865 So. 2d at 1145).

When dealing with the question of whether a person, such as Logan in the instant case, is considered a third party beneficiary who can maintain a negligence action based upon this type of duty, the *Rein* court explain:

> In order for a third person beneficiary to have a cause of action, the contracts between the original parties must have been entered into for his benefit, or at least such benefit must be the direct result of the performance within the contemplation of the parties as shown by its terms. It must have been a legal obligation or duty on the part of the promissee to such third person beneficiary. This obligation must have a legal duty which connects the beneficiary with the contract. In other words, the right (of action) of a third party beneficiary to maintain an action on the contract must spring from the terms of the contract itself.

Rein, 865 So. 2d at 1146.

Applying this language, the *Rein* court was faced with a situation in which a nursing home patient had died as a result of fire ant attack, while she was in bed. Her husband brought a

wrongful death action against the landscaping company which had been retained by the nursing home to provide "ant bed control." The trial court granted summary judgment to the defendant landscaping company on the grounds that the company did not owe a duty to the deceased nursing home patient. In reversing the trial court's grant of summary judgment, the Supreme Court held that the deceased nursing home patient was a third party beneficiary of the contract between the nursing home and the landscaping company, and accordingly, a negligence action could be brought on her behalf. *Id.* at 1148. In reaching this holding, the Supreme Court noted that the landscaping company, by its own acknowledgment, had undertaken the duty to inspect and treat the ant beds in question. *Id.* The scope of that duty, as the court observed, is "a proper question for the trier of fact." *Id.*

Likewise, in *Doe v. Wright Security Services, supra,* the Court of Appeals employed the same reasoning. In *Wright Security Services*, a student in the Jackson Public School District was sexually assaulted by a fellow student after leaving an after-school bus stop to go to a nearby McDonald's. The victim brought suit against, *inter alia*, the private security company which had contracted with the Jackson Public Schools to provide security for the bus stop location. The trial court applied premises liability law and granted summary judgment to the defendant security company, once again, on the basis that no duty was owed to the victim by the security company. On appeal, the Court of Appeals reversed the grant of summary judgment and held that the student victim was a third party beneficiary of the contract between the Jackson Public School District and the security company. *Wright Security Services, Inc.*, 950 So. 2d at 1080. Thus, the student victim could maintain a negligence action against the security company based upon the duty the security company had assumed to provide protection for children at this location and to keep children from leaving this location. *Id.* In reaching this decision, the Court of Appeals

placed significant emphasis on one of the security company's primary responsibilities under its agreement—to prevent violence or altercations between the students. *Id.* As such, the duty owed by the security company was directly for the benefit of the student such as the victim, and therefore, the student victim could maintain a negligence action on this basis. *Id.*

Just like the deceased nursing home patient in *Rein*, as well as the student victim in *Wright Security Services*, Logan in the instant case was a third party beneficiary of Overley's assumed contractual duty to provide and maintain temporary lighting at the Cresswell jobsite. Common sense indicates that the reason temporary lighting is utilized at a location such as the jobsite in question is to provide a safer work environment for the workers on the job. Logan, as one of those workers, was entitled, and should have expected, to receive the benefit of this temporary lighting. Likewise, Overley has acknowledged that the temporary lighting was provided so that workers could "see to get around by..." (R. 291), and that an unlighted stairwell, such as the one in question where the temporary lights were not functioning, is a "dangerous" situation. (R. 299).

Further, it is undisputed that Defendant Overley had assumed the duty to maintain the temporary lighting on the job site in question. Overley admitted this fact during discovery in response to Requests for Admission:

REQUEST NO. 7:

> Please admit that on May 20, 2002, Overley Electric, Inc., was responsible for installation and maintenance of the temporary lighting in the center stairwell of Cresswell Hall.

RESPONSE:

> Admitted.

(R. 310). Also, Overley, in its reply brief in support of its motion for summary judgment stated that "Overley does not dispute that it assumed the duty of providing and maintaining temporary lighting for the worksite." (R. 442).

From the testimony of Overley's 30(b)(6) designee, it is customary for electrical subcontractors, such as Overley, to provide and maintain temporary lighting on all construction jobs such as this. (R. 292).

Obviously, from the evidence and Overley's own admissions, Overley owed a duty to install and maintain temporary lighting in the stairwell where Logan fell, and as a matter of law, Logan is a third party beneficiary who is entitled to maintain this negligence action based upon that duty.

B. The evidence shows that Overley breached its duty to maintain the temporary lighting in question and that such breach was a proximate cause of Logan's damages.

Now that Overley's duty to Logan has been established (i.e., to install and maintain temporary lighting in the stairwell in question), the only remaining question in determining whether Overley was negligent is to determine whether Overley breached its duty. *Weems & Weems,* Miss. Law of Torts, §§3-6, 3-7; *Palmer v. Anderson Infirmary*, 656 So. 2d 790, 794 (Miss. 1995).

Under Mississippi law, all questions of negligence "shall be for the jury to determine." *Miss. Code Ann.* §11-7-17. Therefore, as long as Logan presents "evidence from which a reasonable juror could conclude that the defendant probably committed the alleged act or acts and that said act or acts constitute negligence," the question of whether or not Overley breached its duty should be reserved for the jury and summary judgment is not proper. *Weems & Weems*, Miss. Law of Torts, §3-7 (citing *Palmer v. Anderson Infirmary*, 656 So. 2d 790 (Miss. 1995));

see also Wright Security Services, Inc., 950 So. 2d at 1085; *Ainsworth v. Capform, Inc.*, 784 So. 2d 1008, 1012. In the instant case, as set forth in the "Statement of the Facts" section above, Logan has presented more than sufficient evidence from which a reasonable juror could conclude that Overley breached its duty.

The undisputed testimony and evidence in this case have established that the temporary lighting in the stairwell where Logan fell were not functioning at the time of Logan's accident and had not been functioning for at least three and one-half (3 ½) hours prior to the time of Logan's accident. Further, Overley was working in the building on the date of Logan's accident. (R. 229, 340, 368-369). Overley does not dispute the fact that the lights were off at the time of Logan's fall and does not dispute Logan's timeline:

> Q. And you stated earlier, I guess, that you had -- you had read something, is that Mr. Logan's deposition that you've read?
>
> A. Uh-huh, it was mailed to me.
>
> Q. Okay. So I guess from -- from reading that you also know that Mr. Logan claimed he had been in that stairwell earlier that morning before his accident, do you recall that?
>
> A. I guess so.
>
> Q. And specifically Mr. Logan alleges that -- that he was in that stairwell as early -- well, I guess as late as nine o'clock that morning potentially earlier and the lights were off at that time in the stairwell, do you have any evidence to indicate that that's not true?
>
> A. No.
>
> Q. Do you have anything or any evidence that would lead you to believe that the lights were turned back on between the time in the morning that Mr. Logan was in the stairwell and the time of this accident?
>
> A. No.
>
> Q. Has anyone told you that they were turned back on?

A. No.

Q. Okay.

A. I wasn't aware they was off.

Q. Let me rephrase that. Since this lawsuit was filed, has anyone told you that the lights were turned back on during that interceding time?

A. No.

Q. So Mr. Logan claimed that the lights were off at nine o'clock on the morning of the accident, and they were still off at the time of his accident which was approximately 12:40. You have nothing -- you have no evidence that you're aware of that would dispute the fact they were off the entire time?

A. No.

Q. Anything that -- that you're aware of that indicated that the lights were on at all that morning?

A. No.

(R. 298).

In addition, Robert Henderson, the first person to render assistance to Logan following his accident, has also offered sworn testimony that the temporary lighting in the stairwell was not functioning at the time of Logan's accident. (R. 275).

From this testimony, there is more than sufficient evidence to prove that Overley breached its duty to maintain the temporary lighting in the stairwell in question, as the lighting had been off/not functioning for at least three and one-half (3 ½) hours prior to Logan's accident and was not functioning at the time of Logan's accident.

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 has testified and as common sense indicates, due to the fact that the temporary lighting in

the stairwell in question was not functioning, Logan was unable to see the piece of conduit upon which he slipped. (R. 260). In other words, but for Overley's breach of duty in this regard, Logan would not have been injured. At the very least, this question is one for the jury to decide. *See, e.g., Churchhill v. Pearl River Basin Development District*, 757 So. 2d 940, 943 (Miss. 1999).

Based upon all of the foregoing, the court below committed reversible error by granting summary judgment to Overley.

III. The trial court committed reversible error by granting summary judgment to Overley Electric, Inc., when, even under a premises liability analysis, Barry Logan presented more than sufficient evidence to create a genuine issue of material fact which precludes summary judgment.

In its motion for summary judgment, Overley argued that Logan cannot meet his burden of proof under the premises liability case of *Byrne v. Walmart Stores, Inc.*, 877 So. 2d 462 (Miss. App. 2003). (R. 144-145). As demonstrated above, the *Byrne* case does not present the proper analysis for the scope of Overley's duty in the instant case. However, if *Byrne* did present the appropriate analysis, Logan has produced sufficient evidence to withstand Overley's motion for summary judgment. Under *Byrne*, as Overley points out, for one to recover on a premises liability slip and fall case, the burden is upon plaintiff to prove by a preponderance of the evidence one of the following things: (1) a negligent act by the defendant caused the plaintiff's injuries; or (2) defendant had actual knowledge of a dangerous condition but failed to warn the plaintiff of the danger; or (3) the dangerous condition remained long enough to impute constructive knowledge to the defendant. *Byrne*, 877 So. 2d at 465.

In regard to item 2 set forth above, testimony in the instant case demonstrates that Overley, through its foreman, had actual knowledge of the dangerous condition, i.e. that the temporary lighting in question was not functioning prior to the time of 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.

In regard to item 3 above, the dangerous condition remained long enough to impute constructive knowledge to the defendant, and the same analysis applies. From the uncontradicted testimony in this case, the temporary lighting had been off for at least three and

one-half (3 ½) hours prior to Logan's fall. As previously noted, there is additional testimony which demonstrates that the lights had been off even before 8:00 a.m. (R. 368-369).

Therefore, taking the evidence in the light most favorable to Logan, the temporary lighting had been off for up to four and one-half (4 ½) or five (5) hours. 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 jobsite. (R. 390).

Thus, even utilizing the standard proposed by Overley, Logan still met his burden under Rule 56 and Overley's motion for summary judgment should have been denied.

IV. The trial court committed error by finding that Barry Logan's injuries were solely caused by his own negligence when, under well-settled Mississippi law, any issue regarding Barry Logan's comparative negligence should have been reserved for the jury.

In its motion, Overley also argued that Logan's own contributory negligence was the sole proximate cause of his injuries. (R. 147-148). In other words, Overley argued that since Logan "assumed the risk" of entering the stairwell in question, such assumption of risk is an absolute bar to Logan's recovery.[7] (Id.).

This argument by Overley completely ignored established Mississippi case law regarding the current status of the doctrine of comparative negligence. In fact, one of the very cases cited by Overley, *Churchill v. Pearl River Basin Development District,* 757 So. 2d 940 (Miss. 1999), holds as follows:

> We take this opportunity to hold once again that the assumption of risk doctrine is subsumed into comparative negligence. Any actions which might constitute an assumption of risk should be dealt with only in the context of the comparative negligence doctrine. A jury is always free to decide that an act which constitutes an assumption of risk was the sole proximate cause of Logan's injuries. We see

[7] Once again, while the trial court order granting summary judgment does not provide any analysis or rationale for its decision, Logan must assume that this argument was adopted by the trial court.

> no reason why acts which might constitute an assumption of risk should, as a matter of law, create a complete bar to recovery. **The comparative negligence doctrine gives juries great flexibility in reaching a verdict. Any fault on the part of the Logan should be considered only in the context of comparative negligence.**

Id. at 943 (emphasis added).

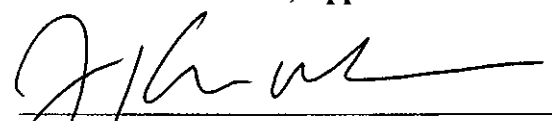
Furthermore, this is not a case in which the Logan has failed to offer evidence of negligence attributable to Overley. To the contrary, as set forth above, Overley was negligent in failing to properly maintain temporary lighting in the stairwell where Logan's accident occurred. Due to the fact that the temporary lighting in the stairwell was not functioning, Logan was unable to see the piece of conduit upon which he slipped. In other words, but for Overley's breach of duty in this regard, Logan would not have been injured. For this reason, Overley was not entitled to summary judgment on this issue.

CONCLUSION

Logan presented sufficient evidence to create genuine issues of material fact as to whether Overley breached its duty to maintain the temporary lighting in question and as to whether such breach was the proximate cause of Logan's damages. Likewise, Logan produced sufficient evidence to create genuine issues of material fact both as to whether Overley had actual knowledge of the dangerous condition in question and failed to issue warnings and as to whether the dangerous condition remained long enough to impute constructive knowledge to Overley. Accordingly, Logan 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 5th day of September, 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 ***Brief of Appellant***, via U.S. Mail, postage prepaid, on the following:

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THIS, the 5th day of September, 2008.

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