IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

Supreme Court Docket No. 2009-CA-01904

EDWARD L. MONTEDONICO,
TRUSTEE FOR THE
BANKRUPTCY ESTATE OF MICHAEL JEFFERIES — PLAINTIFF-APPELLANT

v.

MT. GILLION BAPTIST CHURCH — DEFENDANT-APPELLEE

Appeal from the
Circuit Court for the
Second Judicial District of Panola County, Mississippi
at Batesville, Mississippi

Civil Action Number: CV2008-316MP2

BRIEF OF PLAINTIFF-APPELLANT EDWARD L. MONTEDONICO, TRUSTEE FOR THE BANKRUPTCY ESTATE OF MICHAEL JEFFERIES

Oral Argument is Requested

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v.

MT. GILLION BAPTIST CHURCH — DEFENDANT-APPELLEE

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:

Trial Judge:

Honorable James ("Jimmy") McClure, III
Circuit Court Judge
17th Circuit Court District
Post Office Box 246
Sardis, Mississippi 38666

***Defendants-Appellees*:**

Mt. Gillion Missionary Baptist Church, Inc.
George Fondren, Deacon & Incorporator
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Courtland, Mississippi 38620

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***Plaintiff-Appellant*:**

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Michael Jefferies
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***Attorney for Plaintiff-Appellant*:**

D. Reid Wamble
Attorney at Law
Post Office Box 416
Holly Springs, Mississippi 38635

THIS, the 6th day of April, 2010.

D. REID WAMBLE (MS # 9516)
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STATEMENT REGARDING ORAL ARGUMENT:

Oral Argument Is Requested

Oral argument is requested because the trial court, in granting summary judgment in favor of Defendant-Appellee Mt. Gillion Missionary Baptist Church, Inc., relied upon three cases (to-wit: *Jackson Ready-Mix Concrete v. Sexton*, 235 So.2d 267 (Miss. 1970); *Vu v. Clayton*, No. 96-CT-00408-SCT, 765 So.2d 1253 (Miss. 2000); and, *Nofsinger v. Irby*, No. 2006-CA-01344-COA, 961 So.2d 778 (Miss. 2007)) which appear to be similar to the factual scenario presented by this appeal, but, in actuality, the specific facts of this case are different and unique from those cases, and the Plaintiff-Appellant believes oral argument will greatly assist this Court in applying previously well-settled case law to the facts presented in this case.

* * * * * *

I. STATEMENT OF ISSUES PRESENTED FOR REVIEW

Issue I: ***The Trial Court Erred in Granting Summary Judgment Because the Trial Court Erred in Applying the Law to the Particular Facts of this Case.***

In granting summary judgment in favor of Defendant-Appellee Mt. Gillion Missionary Baptist Church, Inc. ("Mt. Gillion"), the trial court stated that "after a review of the facts" it found the factual scenario presented in the case *sub judice* was similar to the factual scenarios presented in *Jackson Ready-Mix Concrete v. Sexton*, 235 So.2d 267 (Miss. 1970), in *Vu v. Clayton*, No. 96-CT-00408-SCT, 765 So.2d 1253 (Miss. 2000), and "more specifically" in *Nofsinger v. Irby*, No. 2006-CA-01344-COA, 961 So.2d 778 (Miss. 2007). However, the trial court failed to address these facts: the ladder was missing a rubber safety grip; the missing rubber safety grip made the ladder defective and unsafe; the ladder was provided to Michael Jefferies by Mt. Gillion; Michael Jefferies was unaware of that the ladder was missing a rubber safety grip; and, because the ladder was missing a rubber safety grip, the ladder slipped and fell while Michael Jefferies was on the ladder. The aforesaid facts, which are uncontested and uncontradicted, distinguish this civil action from the decisions in *Jackson Ready-Mix*, *Vu*, and *Nofsinger* which the trial court relied upon.

Therefore, the decision of the trial court should be reversed and this case should be remanded for a jury trial of the disputed fact issues, including whether Defendant-Appellee Mt. Gillion was negligent in providing a defective ladder to Michael Jefferies and the apportionment of fault between Defendant-Appellee Mt. Gillion and Michael Jefferies.

* * * * * *

II. STATEMENT OF THE CASE

A. *The Nature of the Case*[1]

This is a civil action to collect damages for personal injuries which were sustained by Michael Jefferies (who may hereinafter be referred to as "Jefferies). The Plaintiff-Appellant in this civil action and appeal is Ed Montedonico, the Chapter 7 Trustee of the United States Bankruptcy Court for the Western District of Tennessee at Memphis for the Bankruptcy Estate of Michael Jefferies, Bankruptcy Docket Number 06-29747.[2] [CP, 12.] Michael Jefferies ("Jefferies'), who is a citizen of Shelby County, Tennessee, suffered physical injuries on August 19, 2006, on the property of Mt. Gillion Missionary Baptist Church, Inc., at Batesville in Panola County, Mississippi (which may be referred to herein simply as "Mt. Gillion").[3] [CP, 13, 50] The Plaintiff-Appellant alleges in the Plaintiff's *First Amended Complaint* that Defendant-Appellee Mt. Gillion provided a ladder for Michael Jefferies to use as Jefferies installed a security system in the church gym, that the ladder was

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[1]The official record in this civil action is comprised of the clerk's papers and the transcript from the summary judgment hearing conducted in the trial court. For purposes of this brief, the clerk's papers (or record) will be referred to as "CP" followed by the appropriate page number, the Plaintiff-Appellant's record excerpts (as required by Rule 30 of the Mississippi Rules of Appellate Procedure) will be referred to as "RE" followed by the appropriate page number, and reference to the transcript of the summary judgment hearing will be cited as "T" followed by the appropriate page number.

[2]Plaintiff Ed Montedonico, the Chapter 7 Trustee of the United States Bankruptcy Court for the Western District of Tennessee at Memphis for the Bankruptcy Estate of Michael Jefferies, Bankruptcy Docket Number 06-29747, commenced this civil action pursuant to 11 U.S.C. § 541 and pursuant to Rule 6009 of the Federal Rules of Bankruptcy Procedure.

[3]According to the *Affidavit of George Fondren*, the property known as and called "Mt. Gillion Baptist Church" is "owned by a corporation called Mt. Gillion Baptist Church, Inc." [CP, 50] Documents on file with the Mississippi Secretary of State's Office indicate that George Fondren is the registered agent for Mt. Gillion Baptist Church, Inc.

defective because a rubber safety shoe or rubber grip on the bottom of the ladder was missing, that the ladder slipped while Jefferies was on the ladder causing the ladder to fall with Jefferies on it, and that Jefferies sustained physical injuries in the fall of the defective ladder.[4] [CP, 13-14.] The Plaintiff-Appellant is seeking to recover damages from Defendant-Appellee Mt. Gillion for the physical injuries sustained by Michael Jefferies.

* * *

B. *The Course of the Proceedings*

This civil action commenced with the filing of the Plaintiff's original *Complaint* on September 19, 2008. [CP, 5.] Subsequently, the Plaintiff filed a *First Amended Complaint* on November 18, 2008. [CP, 12.]

Defendant Mt. Gillion Missionary Baptist Church, Inc., filed its *Answer to First Amended Complaint* denying liability on or about December 15, 2008. [CP, 19] Thereafter, Defendant Mt. Gillion filed a motion for summary judgment on August 5, 2009. [CP, 24]

The *Plaintiff's Response to Defendant's Motion for Summary Judgment* and *the Plaintiff's Memorandum of Authorities in Support of Plaintiff's Response to Defendant's Motion for Summary Judgment* were filed on November 5, 2009. [CP, 59, 80]

The trial court conducted a hearing on Mt. Gillion's motion for summary judgment on November 6, 2009. [T, 1]

The trial court entered its *Order Granting Defendant's Motion for Summary Judgment* on November 10, 2009. [CP, 117]

The Plaintiff filed the *Notice of Appeal* herein on November 24, 2009. [CP, 118]

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[4]See *First Amended Complaint*, ¶¶ 4-9.

* * *

C. *Disposition in the Court below*

The trial court entered its *Order Granting Defendant's Motion for Summary Judgment* on November 10, 2009, which granted "Summary Judgment as to all issues in this case" in favor of Defendant-Appellee Mt. Gillion Missionary Baptist Church, Inc., and which dismissed the Plaintiff's case with prejudice. [CP, 117; T, 10-12]

* * * * * *

III.

STATEMENT OF FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW

A. *Introduction*

The Plaintiff's *First Amended Complaint* alleges that Michael Jefferies sustained bodily injuries when a ladder which he was using while in the process of installing a security system slipped and fell to the floor because the ladder was missing one of the rubber safety shoes or rubber grips on the bottom of the ladder.[5] [CP, 12-18] The ladder in question had been provided for the use of Michael Jefferies by Defendant-Appellee Mt. Gillion Missionary

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[5]See *First Amended Complaint* at ¶¶ 7-8. [CP, 12-18] The manner in which the accident occurred was fully explained during the hearing on the motion for summary judgment, to-wit:

> Throughout [Defendant Mt. Gillion's] brief they misstate the fact that Mr. Jefferies fell off of the ladder. He did not fall off of a ladder, Your Honor. He held onto it all the way down. He was about 20 feet up in the air. The rubber grip on the bottom of the ladder was missing that he had not discovered, even though he had been using the ladder. ... The ladder slid down the wall because there was no rubber grip on the bottom. He held onto the ladder all the way down, and he fell on his elbow and shattered his elbow.

[T, 7]

Baptist Church, Inc. Defendant-Appellee Mt. Gillion brought a motion for summary judgment in which Mt. Gillion argued that because Michael Jefferies was an independent contractor and because "falling off a ladder is a risk inherent to or intimately connected" with Michael Jefferies' job that "there can be no liability in this matter."[6] [CP, 24-25] Mt. Gillion also argued that "the plaintiff cannot show any negligence on the part of Mt. Gillion" and, therefore, argued that the Plaintiff's civil action should be dismissed.[7] [CP, 25]

Even though the ladder which Michael Jefferies was using had been provided to him by Mt. Gillion, and even though the evidence demonstrated at least a question of fact that the ladder was defective and unsafe, the trial court, specifically citing *Vu v. Clayton*, No. 96-CT-00408-SCT, 765 So.2d 1253 (Miss. 2000), and *Nofsinger v. Irby*, No. 2006-CA-01344-COA, 961 So.2d 778 (Miss. 2007), held that "there has been no duty owed or breached" by Mt. Gillion and granted summary judgment in favor of Mt. Gillion. [CP, 117; T, 12]

The Plaintiff-Appellant asserts to this Court that the trial court, in granting summary judgment in favor of Defendant-Appellee Mt. Gillion, misapprehended the law and misapplied the law to the specific facts of this case, and, therefore, the trial court's order granting summary judgment should be reversed and this case should be remanded for a jury trial.

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[6]See *Defendant's Itemization of Material Undisputed Facts and Motion for Summary Judgment* at ¶ II. [CP, 24-25]

[7]See *Defendant's Itemization of Material Undisputed Facts and Motion for Summary Judgment* at ¶ II. [CP, 25]

B. *Facts Relevant to the Issue Presented for Review*

The facts of this civil action are straight forward. Michael Jefferies worked for Eagle Security.[8] [CP, 101] Jefferies went to the premises of Defendant-Appellee Mt. Gillion Missionary Baptist Church, Inc., to replace a security system in the main church and to install a security system in the church's gymnasium.[9] [CP. 111] Initially, Jefferies had turned this job down because "I was told that I was going to need an extension ladder" but Jefferies "did not have an extension ladder" and Jefferies "didn't want to go out and have to buy an extension ladder for this one job and I didn't have a way to carry it."[10] [CP, 111] Jefferies agreed to accept the assignment after he was told "that they would have a ladder down there for me to use."[11] [CP, 112]

Jefferies arrived at the church, upgraded the security system in the main church (during which Jefferies used his own A-frame ladder), and then took a break for lunch.[12] [CP, 112] After lunch, Jefferies began the installation of the security system in the gymnasium.[13]

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[8]See the transcript of the *Deposition of Michael Brian Jefferies* at p. 25 [CP. 101]. The transcript of Michael Jefferies' deposition may hereinafter be cited as "*Jefferies*" followed by the appropriate page number of the transcript. The complete deposition transcript appears in the record at CP 95-116.

[9]*Jefferies*, p. 63 [CP, 111].

[10]*Jefferies*, p. 65 [CP, 111]. Jefferies also testified that he used a Ford Expedition as his work vehicle, and that it was not equipped with a ladder rack. Notably, Jefferies has testified that none of the other installers for Eagle Security had extension ladders, either. This fact appears to refute a claim made by Defendant-Appellee Mt. Gillion that use of an extension ladder was occasionally required by Jefferies' job. See *Jefferies*, p. 65.

[11]*Jefferies*, p. 66 [CP, 112].

[12]*Jefferies*, p. 66-67, 68 [CP, 112].

[13]*Jefferies*, p. 67 [CP, 112].

[CP, 112] Jefferies found "the extension ladder was laying in the floor there waiting for me" when he started the installation in the gymnasium.[14] [CP, 112] Jefferies testified:

> Q. Okay. So, you see the ladder lying there and what did it look like?
>
> A. It actually looked just like a ladder I had used before. It was about an 18 foot ladder, green, I believe, fiberglass ladder.
>
> Q. Okay.
>
> A. And I had one very similar to it a couple of years before back when I did satellite TV's.
>
> Q. And so before you used the ladder for the first time did you look at it?
>
> A. Of course, I had to look at it.
>
> Q. Did you examine it to see if it would be suitable for the job?
>
> A. I picked it up, looked at it. Everything looked fine to me. The guy even picked it up – helped me pick it up like, you know, I couldn't – he didn't know if I was able to do it by myself or not. But, you know, of course, I've done it before. He helped me pick it up off the floor and lean it up against the wall.
>
> Q. Okay. But I mean, you wouldn't have climbed on that ladder unless you inspected it and made sure you thought it was safe, correct?
>
> A. Right. Everything seemed to be fine with the ladder.
>
> Q. You didn't notice anything unusual about it?
>
> A. No.
>
> Q. Was it broken in any way?
>
> A. No.[15]

[CP, 112-113]

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[14] *Jefferies*, p. 68 [CP, 112].

[15] *Jefferies*, pp. 68-70 [CP, 112-113].

Jefferies also testified:

A. The ladder wasn't cracked or anything. It stood against – it leaned against the wall. It didn't have any kind of sway in it or any play in it, you know, not about to fall apart or anything like that at all. In fact, I was almost through using the ladder. I was almost through running all the wires and I had been up on the ladder several times and the last time it was – I didn't boggle or anything. I was just walking down and that thing just went (Indicating). Just like that.

Q. Just fell to the ground?

A. Just like that with me still hanging onto the ladder.[16]

[CP, 113]

Jefferies further testified:

Q. Why did it fall?

A. Why did it fall?

Q. Yeah.

A. The reason it fell I believe is because it was missing a rubber foot that keeps it from sliding when it's on a solid surface. One of the rubber footing was slipped – I don't know what you call it, but something to keep it from slipping was missing.

Q. You said you believe that?

A. No. After I got up off the ground and was walking around looking for a puddle of water or maybe some sand or something trying to figure out what was going on here, and then looked at the ladder and it's missing a rubber foot.

Q. Was there any indication that it was going to fall?

A. Like I said, I was coming back down and it just went (Indicating).

Q. It just fell?

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[16] *Jefferies*, pp. 70-71 [CP, 113].

A. (Nodding head affirmatively). And I was almost at the top of it when it fell.[17]

[CP, 113]

In the accident, Jefferies suffered "a severely shattered right wrist" and other injuries which required surgery.[18] [CP, 102]

The Plaintiff filed the *First Amended Complaint* on November 18, 2008.[19] [CP, 12] The *First Amended Complanit* asserts that Defendant-Appellee Mt. Gillion negligently failed to "furnish a reasonably safe place for Michael Jefferies to work," negligently failed to warn Michael Jefferies "of the dangerous condition of the ladder," negligently failed "to warn Michael Jefferies that the ladder was missing a safety shoe or grip," negligently provided Michael Jefferies with a defective ladder which was missing a safety shoe or grip, and other elements of negligence.[20] [CP, 14-15]

As previously mentioned, *infra*, Defendant-Appellee Mt. Gillion argued in its motion for summary judgment that because Michael Jefferies was an independent contractor and because "falling off a ladder is a risk inherent to or intimately connected" with Jefferies' job that "there can be no liability in this matter."[21] [CP, 24-25] Mt. Gillion also argued that "the plaintiff cannot show any negligence on the part of Mt. Gillion" and, therefore, argued that

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[17]*Jefferies*, pp. 72-73 [CP, 113].

[18]*Jefferies*, p. 27 [CP, 102].

[19]The Plaintiff attached a true and correct copy of the *First Amended Complaint* as "Exhibit A" to the *Plaintiff's Response to Defendant's Motion for Summary Judgment*. [CP, 88]

[20]See *First Amended Complaint*, at ¶ 10 [CP, 14-15].

[21]See *Defendant's Itemization of Material Undisputed Facts and Motion for Summary Judgment* at ¶ II. [CP, 24-25]

the Plaintiff's civil action should be dismissed.[22] [CP, 25] Notably, Mt. Gillion attached to its motion for summary judgment (as "Exhibit B") the *Affidavit of George Fondren* in which it is admitted that the ladder in question was "borrowed ... from a member of the church" and was provided by the church to Michael Jefferies specifically for Jefferies to use while installing the security system in the church's gymnasium. [CP, 50-51]

Whereas Mt. Gillion argued that "the plaintiff cannot show any negligence on the part of Mt. Gillion" and, therefore, argued that the Plaintiff's civil action should be dismissed, the position of the Plaintiff-Appellant is that the ladder was defective and unsafe because it was missing a rubber safety grip and that Mt. Gillion was negligent in providing a defective and unsafe ladder to Michael Jefferies for his use.

* * * * * *

IV. SUMMARY OF THE ARGUMENT

It is uncontradicted and undisputed that the ladder in question in this case was provided to Michael Jefferies by Defendant-Appellee Mt. Gillion and that the ladder was defective because it was missing a rubber safety grip; thus, Mt. Gillion committed an act of negligence in providing Jefferies a defective ladder which was unreasonably unsafe, and the well-settled law of the State of Mississippi is that, even to independent contractors, the owner of the premises is 'liable for his own negligence.'

Mt. Gillion has stated that Michael Jefferies inspected the ladder prior to its use, and this is not completely disputed, but the fact that Michael Jefferies inspected the ladder and failed to observe the missing rubber safety grip does not fully absolve Mt. Gillion of its

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[22]See *Defendant's Itemization of Material Undisputed Facts and Motion for Summary Judgment* at ¶ II. [CP, 25]

liability to Jefferies for providing a defective ladder in the first place.[23] As noted in *Tharp v. Bunge Corporation*, 641 So.2d 20, 24 (Miss. 1994), even "if a plaintiff is ninety-nine (99 %) percent negligent and the defendant is only one (1 %) percent negligent, the plaintiff is still entitled to recover the one percent (1 %) attributable to the negligence of the defendant."

Because the owner of the premises is liable to an independent contractor for the owner's own negligence, because the ladder in this case was missing a rubber safety grip, because the ladder was provided to Michael Jefferies for his use by Mt. Gillion, and because it is uncontradicted and uncontested that the missing rubber safety grip is the reason that the ladder slipped and Michael Jefferies was injured, Mt. Gillion's negligence in providing the unsafe ladder to Jefferies is the proximate cause (or is a proximate contributing cause) of Jefferies' injuries and Mt. Gillion was not entitled to summary judgment.

In granting summary judgment in favor of Defendant-Appellee Mt. Gillion, the trial court stated that "after a review of the facts" it found the factual scenario presented in the case *sub judice* was similar to the factual scenarios presented in *Jackson Ready-Mix Concrete v. Sexton*, 235 So.2d 267 (Miss. 1970), in *Vu v. Clayton*, No. 96-CT-00408-SCT, 765 So.2d 1253 (Miss. 2000), and "more specifically" in *Nofsinger v. Irby*, No. 2006-CA-01344-COA, 961 So.2d 778 (Miss. 2007). However, in the aforesaid cases, it was abundantly clear that the injured plaintiff knew of the dangers involved and made an intentional choice not to use safety features and thereby voluntarily exposed themselves to the danger which caused their injuries. In this case, the trial court failed to address these facts: the ladder was missing a rubber safety grip; the missing rubber safety grip made the ladder defective and unsafe; the

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[23] *Jefferies*, pp. 68-70. [CP. 112-113]

ladder was provided to Michael Jefferies by Mt. Gillion; Jefferies was unaware of that the ladder was missing a rubber safety grip; and, because the ladder was missing a rubber safety grip, the ladder slipped and fell while Jefferies was on the ladder. The aforesaid facts, which are uncontested and uncontradicted, distinguish this civil action from the decisions in *Jackson Ready-Mix*, *Vu*, and *Nofsinger*.

Therefore, the decision of the trial court should be reversed and this case should be remanded to the trial court for a jury trial of the disputed fact issues, including whether Mt. Gillion was negligent in providing a defective ladder to Michael Jefferies and the apportionment of fault between Defendant-Appellee Mt. Gillion and Michael Jefferies.

* * * * * *

V. ARGUMENT

A. *STANDARD FOR SUMMARY JUDGMENT*

Mississippi appellate courts employ *de novo* review of a summary judgment. The key concept which must never be forgotten when considering the issue of summary judgment is this: the non-moving party is always given the benefit of any doubt as to the existence of a material fact. See, *e.g.*, *Monsanto Co. v. Hall*, No. 2004-IA-00918-SCT, 912 So.2d 134, 136 (¶ 5) (Miss. 2005) ("The movant carries the burden of demonstrating that no genuine issue of material fact exists, and the non-moving party is given the benefit of the doubt as to the existence of a material fact"). The reason that the non-moving party is given the benefit of any doubt regarding the existence of any material fact is because the non-movant has a constitutional right to a trial by jury. See MISSISSIPPI CONSTITUTION OF 1890, Art. 3, Sec. 31. See also *Kilhullen v. Kansas City Southern Ry.*, No. 2006-CT-01564-SCT, 8 So.3d 168 174 (¶ 14) (Miss. 2009).

Summary judgment is allowed by Rule 56 of the Mississippi Rules of Civil Procedure, and, specifically, Rule 56(c) provides in pertinent part:

> [Summary judgment] shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Notably, the official comment to Rule 56 states:

> A motion for summary judgment lies only when there is no genuine issue of material fact; ***summary judgment is not a substitute for the trial of disputed fact issues***. Accordingly, the court cannot try issues of fact on a Rule 56 motion; it may only determine whether there are issues to be tried. Given this function, the court examines the affidavits or other evidence introduced on a Rule 56 motion simply to determine whether a triable issue exists, rather than for the purpose of resolving that issue. Similarly, although the summary judgment procedure is well adapted to expose sham claims and defenses, ***it cannot be used to deprive a litigant of a full trial of genuine fact issues***.

(Emphasis added.) Here it should be noted again that the non-movant has a constitutional right to a jury trial, and, for this reason, the Mississippi Supreme Court has consistently held that summary judgment should be granted with great caution. *See Simpson v. Boyd*, No. 2003-CA-00425-SCT, ¶ 13, 880 So.2d 1047, 1050 (Miss. 2004) ("[S]ummary judgment should be granted with great caution."); *Evan Johnson & Sons Const., Inc. v. State*, No. 2001-CA-01675-SCT, ¶ 17, 877 So.2d 360, 365 (Miss. 2004, *reh. den.* 2004) ("This Court has continuously held: Summary judgments should be granted with great caution."); *Palmer v. Anderson Infirmary Benevolent Association*, 656 So.2d 790, 794 (Miss. 1995) ("[S]ummary judgment should be granted with great caution.").

The Court explained in *American Legion Ladnier Post No. 42, Inc. v. City of Ocean Springs*, 562 So.2d 103, 105-106 (Miss. 1990):

> The law governing the grant or denial of a motion for summary judgment is well established. *Newell*, 556 So.2d at 1041; *Fruchter v. Lynch Oil Co.*, 522 So.2d 195, 198 (Miss.1988).
>
> > This Court has explained:
> >
> > > The trial court must review carefully all of the evidentiary matters before it – admissions in pleadings, answers to interrogatories, depositions, affidavits, etc. The evidence must be viewed in the light most favorable to the party against whom the motion has been made. If in this view the moving party is entitled to judgment as a matter of law, summary judgment should forthwith be entered in his favor. Otherwise the motion should be denied.
>
> *Newell*, 556 So.2d at 1041; *Dennis v. Searle*, 457 So.2d 941, 944 (Miss.1984).

See also Wright v. Quesnel, No. 2002-CA-00385-SCT, ¶ 4, 876 So.2d 362, 365 (Miss. 2004) ("[W]here we find triable issues, we must reverse a summary judgment.").

The burden of persuasion is upon the party seeking summary judgment, and the burden is heavy. A motion for summary judgment should be overruled unless the trial court finds beyond any reasonable doubt that the non-moving party would be unable to prove any facts to support its claim. The Mississippi Supreme Court said in *Yowell v. James Harkins Builder, Inc.*, 654 So.2d 1340, 1343-1344 (Miss. 1994):

> . . . ***a motion for summary judgment should be overruled unless the trial court finds, beyond any reasonable doubt, that the plaintiff would be unable to prove any facts to support his claim.*** *McFadden v. State*, 580 So.2d 1210 (Miss.1991). "[T]he Court cannot try issues of fact on a Rule 56 motion; it may only determine whether there are issues to be tried." *Brown v. Credit Center, Inc.*, 444 So.2d 358, 362 (Miss.1983).

(Emphasis added.) *See also Simpson v. Boyd*, No. 2003-CA-00425-SCT, ¶ 10, 880 So.2d 1047 (Miss. 2004) ("'[a] motion for summary judgment should be overruled unless the trial court finds, beyond a reasonable doubt, that the plaintiff would be unable to prove any facts

to support his claim.'" (*quoting Palmer v. Anderson Infirmary Benevolent Ass'n*, 656 So.2d 790, 794 (Miss. 1995))); *Bailey v. Wheatley Estates Corporation*, No. 2001-CP-01303-COA, ¶ 17, 829 So.2d 1278, 1282 (Miss. App. 2002) ("This Court does not favor summary judgment. It is a powerful tool that should be used sparingly by the trial judge.").

The Mississippi Supreme Court has held:

> [E]ven where what is before the court does not indicate a genuine dispute of material fact and the movant is technically entitled to summary judgment, the trial court would nevertheless be justified in denying summary judgment when, in its view, a full exposition of the facts may result in a triable issue or is warranted in the interest of justice. *Brown v. McQuinn*, 501 So.2d 1093, 1095 (Miss.1986).

Great Southern National Bank v. Minter, 590 So.2d 129, 135 (Miss. 1991).

And in *Daniels v. GNB, Incorporated*, 629 So.2d 595, 599-600 (Miss. 1993), the Mississippi Supreme Court stated:

> This Court reviews the record de novo to determine whether the trial court properly granted a motion for summary judgment. *Mantachie Natural Gas District v. Mississippi Valley Gas Company*, 594 So.2d 1170, 1172 (Miss.1992). In our de novo review, this Court
>
> > looks at all the evidentiary matters before [us]– admissions in pleadings, answers to interrogatories, depositions, affidavits, etc. The evidence must be viewed in the light most favorable to the party against whom the motion has been made. If, in this view, the moving party is entitled to judgment as a matter of law, summary judgment should forthwith be entered in his favor. Otherwise, the motion should be denied. 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. In addition, ***the burden of demonstrating that no genuine issue of fact exists is on the moving party. That is, the non-movant would be given the benefit of the doubt.***
>
> *Id.* at 1172; citing *Clark v. Moore Memorial United Methodist Church*, 538 So.2d 760, 762 (Miss.1989) [citing *Short v. Columbus Rubber & Gasket Co., Inc.*, 535 So.2d 61 (Miss.1988)]. Furthermore, in *Mink v. Andrew Jackson*

Casualty Ins. Co., 537 So.2d 431, 433 (Miss.1988) [citing *Ratliff v. Ratliff*, 500 So.2d 981, 981 (Miss.1986)], this Court said:

> ***All motions for summary judgment should be viewed with great skepticism and if the trial court is to err, it is better to err on the side of denying the motion.*** When doubt exists whether there is a fact issue, the non-moving party gets its benefit. Indeed, ***the party against whom the summary judgment is sought should be given the benefit of every reasonable doubt.***

Id. at 433. A motion for summary judgment should be overruled unless the trial court finds, beyond any reasonable doubt, that the plaintiff would be unable to prove any facts to support his claim. *McFadden v. State*, 580 So.2d 1210 (Miss.1991). If facts are in dispute, it is not the province of the trial court to grant summary judgment thereby supplanting a full trial with its ruling. "Accordingly, *the court cannot try issues of fact on a Rule 56 motion; it may only determine whether there are issues to be tried.*" *Brown v. Credit Center, Inc.*, 444 So.2d 358, 362 (Miss.1983) [citing The Advisory Committee Comment to M.R.C.P. 56]. In order for there to be genuine issues of material fact, the affidavits and other evidence must be sworn, made upon personal knowledge, and show that the party providing the factual evidence is competent to testify. *Palmer v. Biloxi Regional Medical Center*, 564 So.2d 1346 (Miss.1990).

The party moving for summary judgment bears the burden of persuading the trial court that no genuine issue of material fact exists, and that they are, based on the existing facts, entitled to judgment as a matter of law. *Skelton v. Twin County Rural Elec.*, 611 So.2d 931, 935 (Miss.1992); *see also, Palmer v. Biloxi Regional Medical Center, Inc.*, 564 So.2d 1346, 1355 (Miss.1990); *Fruchter v. Lynch Oil Co.*, 522 So.2d 195 (Miss.1988).

(Emphasis in the original, boldface italics emphasis added.)

See also *Dalton v. Cellular South, Inc.*, No. 2007-CT-00750-SCT, 20 So.3d 1227, 1234 (¶ 15) (Miss. 2009) (the rule is that courts must "view the evidence in the light most favorable to the nonmovant."), and *Daniels v. GNB, Inc.*, 629 So.2d 595, 599 (Miss. 1993) ("A motion for summary judgment should be overruled unless the trial court finds, beyond any reasonable doubt, that the plaintiff would be unable to prove any facts to support his claim.").

* * *

B. *ISSUE PRESENTED FOR REVIEW*:

Issue I: ***The Trial Court Erred in Granting Summary Judgment Because the Trial Court Erred in Applying the Law to the Particular Facts of this Case.***

Section 11-7-17 of the Mississippi Code of 1972, Annotated, as amended, states, *in toto*, as follows: "All questions of negligence and contributory negligence shall be for the jury to determine." Furthermore, Section 11-7-15 states, in pertinent part, as follows:

> In all actions hereafter brought for personal injuries ... ***the fact that the person injured***, or the owner of the property, or person having control over the property ***may have been guilty of contributory negligence shall not bar a recovery***, but damages shall be diminished by the jury in proportion to the amount of negligence attributable to the person injured, or the owner of the property, or the person having control over the property.

(Emphasis added.) The Mississippi Supreme Court observed in *Tharp v. Bunge Corporation*, 641 So.2d 20, 24 (Miss. 1994):

> Our law sets forth the premise that there may be more than one proximate cause to a negligent act. ... The defendant may be negligent, but so too may be the plaintiff. Thus, our comparative law applies. ... [I]f the defendant and the plaintiff were both at fault in causing or attributing to the harm, then damages can be determined through the comparative negligence of both. Theoretically, if a plaintiff is ninety-nine (99 %) percent negligent and the defendant is only one (1 %) percent negligent, the plaintiff is still entitled to recover the one percent (1 %) attributable to the negligence of the defendant.

The record in the case *sub judice* shows that the following facts are either uncontradicted or undisputed, to-wit:

1. The ladder in question in this case was provided by the church for Michael Jefferies to use while installing the security system in the church's gymnasium.[24] [CP, 50-51, 112; T, 3]

2. The ladder in question did not have a rubber safety foot or grip on the bottom of one of the ladder's legs.[25] [CP, 113]

3. The ladder slipped and fell because of the missing rubber safety grip.[26] [CP, 113]

4. Michael Jefferies was injured when the ladder slipped and fell with him on it.[27] [CP, 113]

The Plaintiff's *First Amended Complaint* (at ¶¶ 7-8) makes the following allegations, to-wit:

> 7. Mr. Jefferies would show that he was on the ladder approximately 20 feet off of the gym floor installing the security system in the church gym, when the Defendant's ladder slipped on the gym floor causing Mr. Jefferies to fall onto the gymnasium floor.
>
> 8. Plaintiff would further show that upon Michael Jefferies [sic] examination of the ladder after Michael Jefferies fell, that Michael Jefferies discovered that the ladder was missing one of the rubber safety shoes or rubber grips on the bottom of the ladder. Prior to his fall, Michael Jefferies had no notice that the ladder was missing the rubber safety shoe or grip that

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[24]See the *Affidavit of George Fondren* which was attached as "Exhibit B" to the Defendant's motion for summary judgment which was filed in the trial court. [CP, 50-51] See also *Jefferies*, p. 68. [CP, 112]

[25]See *Jefferies*, p. 73. [CP, 113]

[26]See *Jefferies*, pp.27, 70-71, 73. [CP, 113]

[27]See *Jefferies*, pp.27, 70-71, 73. [CP, 113]

> would have prevented the ladder from slipping causing the ladder and the Plaintiff to fall to the gymnasium floor.[28]

[CP, 14] Again, it is an uncontradicted and undisputed fact that the ladder was missing a rubber safety shoe or grip.[29] [CP. 113] The Plaintiff-Appellant asserts that the absence of the rubber safety grip rendered the ladder unreasonably unsafe; thus, whether the absence of the safety grip rendered the ladder unreasonably unsafe is a question of fact, and questions of fact may only be determined by a jury. Furthermore, if a jury deems the ladder to have been unsafe, a jury may also find that Defendant-Appellee Mt. Gillion was negligent in providing an unsafe ladder to Michael Jefferies, and, again, the question of whether Mt. Gillion was negligent in loaning Jefferies an unsafe ladder is a question of fact which may only be determined by a jury. Finally, if a jury finds that Mt. Gillion was negligent, then Michael Jefferies is entitled to recover damages from Mt. Gillion under Mississippi's comparative negligence law. *Tharp v. Bunge Corporation*, 641 So.2d 20, 24 (Miss. 1994) ("... if a plaintiff is ninety-nine (99 %) percent negligent and the defendant is only one (1 %) percent

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[28]See *First Amended Complaint* (¶¶ 7-8). [CP, 14] The manner in which the accident occurred was more fully explained during the hearing on the motion for summary judgment, to-wit:

> Throughout [Defendant Mt. Gillion Baptist Church's] brief they misstate the fact that Mr. Jefferies fell off of the ladder. He did not fall off of a ladder, Your Honor. He held onto it all the way down. He was about 20 feet up in the air. The rubber grip on the bottom of the ladder was missing that he had not discovered, even though he had been using the ladder. ... The ladder slid down the wall because there was no rubber grip on the bottom. He held onto the ladder all the way down, and he fell on his elbow and shattered his elbow.

[T, 7]

[29]See *Jefferies*, p. 73. [CP, 113]

negligent, the plaintiff is still entitled to recover the one percent (1 %) attributable to the negligence of the defendant.).

In granting summary judgment in favor of Defendant-Appellee Mt. Gillion, the trial court stated that "after a review of the facts" it found the factual scenario presented in the case *sub judice* was similar to the factual scenarios presented in *Jackson Ready-Mix Concrete v. Sexton*, 235 So.2d 267 (Miss. 1970), in *Vu v. Clayton*, No. 96-CT-00408-SCT, 765 So.2d 1253 (Miss. 2000), and "more specifically" in *Nofsinger v. Irby*, No. 2006-CA-01344-COA, 961 So.2d 778 (Miss. 2007). [T, 11] The trial court stated that, under the decision in *Nofsinger*, "... the burden of proof is upon the plaintiff to show that there was either a duty owed or inherent risk that was not disclosed to the plaintiff." [T, 12] The trial court stated:

> ... using these cases as precedent, [the court] finds that in this particular matter that there has been no duty owed or breached by Mt. Gillion or any assumption of risk that was not known by the knowledge of the plaintiff, who in his deposition stated he was very familiar with ladders. And, in fact, I believe he had used this ladder according to his deposition, 15 to 20 times before the incident that caused this injury occurred.
>
> The Court, in applying the law as it understands it to the facts in this case for the motion for summary judgment, will grant the defendant's motion for summary judgment.

[T, 12]

Again, in the case *sub judice* these facts are undisputed or uncontradicted:

(1) Prior to the date of the accident, Michael Jefferies had never seen or used the ladder.[30] [CP, 112]

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[30] *Jefferies*, pp. 67-68. [CP, 112]

(2) The ladder was provided to Michael Jefferies for his use by Defendant-Appellee Mt. Gillion.[31] [CP, 50-51, 112]

(3) The ladder was defective and unreasonably dangerous because it was missing a rubber safety foot or grip.[32] [CP, 113]

Furthermore, regarding how many times Michael Jefferies had used the ladder, the actual testimony concerning is as follows:

Q. ... So, you said you climbed it several times?

A. I had almost finished doing the gymnasium. I didn't have a lick of problem with it and nothing out of the ordinary. It was just going up, coming down, looking back up, seeing what I needed to do, going to that spot, come back down and so forth.

Q. I think I saw on a statement that you gave that you maybe had been up it 15 or 20 times? Would that be fair?

A. Might have been, yeah.

Q. All right. And I think you told me earlier today there was no play in it, no sway. It was solid and worked fine?

A. Correct.

Q. Why did it fall?

A. Why did it fall?

Q. Yeah.

A. The reason it fell I believe is because it was missing a rubber foot that keeps it from sliding when it's on a solid surface. One of the rubber footing was slipped – I don't know why you call it, but something to keep it from slipping was missing.

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[31]See *Affidavit of George Fondren.* [CP, 50-51] See also *Jefferies*, pp. 67-68. [CP, 112]

[32]*Jefferies*, pp. 72-73. [CP, 113]

Q. You said you believe that?

A. No. After I got up off the ground and was walking around looking for a puddle of water or maybe some sand or something trying to figure out what was going on here, and then looked at the ladder and it's missing a rubber foot.[33]

[CP, 113]

Here it should be noted that although Michael Jefferies was able to climb and descend the ladder several times before it finally slipped, the fact remains uncontradicted and uncontested that the ladder did not have a rubber safety grip on one leg of the ladder. This Court can take judicial notice of numerous other cases that have come before the courts of this state and nation wherein a defective instrument or machine had been used repeatedly without incident prior to an injury producing accident after which the defect became all too apparent.[34]

The Plaintiff-Appellant asserts to this Court that the trial court, in granting summary judgment in favor of Defendant-Appellee Mt. Gillion, misapprehended the law and misapplied the law to the specific facts of this case. In reaching its decision, the trial court, as noted *supra*, relied upon *Jackson Ready-Mix Concrete v. Sexton*, 235 So.2d 267 (Miss. 1970), *Vu v. Clayton*, No. 96-CT-00408-SCT, 765 So.2d 1253 (Miss. 2000), and *Nofsinger*

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[33]*Jefferies*, pp. 72-73. [CP, 113]

[34]For example, it was revealed during multiple civil actions against Ford Motor Company that the Ford Bronco II was found to experience first event rollover with a frequency that was three times greater than that experienced by the Chevrolet S-10 Blazer, which was a similar vehicle (the Ford Bronco II experienced first event rollover at a frequency of approximately 19 per 100,000 vehicles, whereas the S-10 Blazer experienced a frequency of approximately 6 per 100,000 vehicles). See "Denial of Motor Vehicle Defect Petitions," 53 Fed. Reg. 34866 (Sept. 8, 1988). Obviously, tens of thousands of Ford Bronco II's were used without incident, but this did not negate the fact that the vehicles were defectively designed and were unreasonably prone to rollover during accidents.

v. Irby, No. 2006-CA-01344-COA, 961 So.2d 778 (Miss. 2007). However, as will be shown, *infra*, the specific facts of the case *sub judice* make the rulings in *Jackson Ready-Mix*, *Vu*, and *Nofsinger* inapplicable to the incident in which Michael Jefferies was injured.

When it brought its motion for summary judgment, Defendant-Appellee Mt. Gillion presented this civil action as an incident in which Michael Jefferies 'fell off of a ladder.'[35] [CP, 24; T, 5-6] Mt. Gillion argued that because Michael Jefferies had to use ladders in performing his job installing security systems that "falling off a ladder is a risk inherent to or intimately connected with his job."[36] [CP, 24-25; T, 5-6] However, the uncontested and uncontradicted facts demonstrate that Michael Jefferies did not 'fall off a ladder' but, instead, the ladder slipped out from underneath Jefferies because one of the legs of the ladder did not have a rubber safety grip.[37] [CP, 113] Mt. Gillion, in presenting its motion for summary judgment, argued its position that Michael Jefferies simply fell off the ladder and relied upon the Mississippi Supreme Court's decisions in *Jackson Ready-Mix Concrete v. Sexton*, in *Vu v. Clayton*, and in *Nofsinger v. Irby*.[38] [T, 5-6] As previously noted, the trial court, in deciding in favor of Mt. Gillion, also relied upon *Jackson Ready-Mix*, *Vu*, and *Nofsinger*.

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[35]See the *Defendant's Itemization of Material Undisputed Facts and Motion for Summary Judgment*, at Paragraph I. [CP, 24]

[36]See the *Defendant's Itemization of Material Undisputed Facts and Motion for Summary Judgment*, at Paragraph II. [CP,. 24-25]

[37]*Jefferies*, pp. 72-73. [CP, 113] See also footnote 5, *infra*.

[38]Defendant Mt. Gillion Baptist Church cited and relied upon the Mississippi Supreme Court's decisions in *Jackson Ready-Mix Concrete v. Sexton*, *Vu v. Clayton*, and *Nofsinger v. Irby* in its *Memorandum of Authorities in Support of Defendant's Motion for Summary Judgment*. This memorandum was reviewed by the trial court, however, it was not filed with the clerk and is not part of the record in this civil action.

In *Jackson Ready-Mix Concrete v. Sexton* the plaintiff was a licensed electrician who regularly performed electrical work on the defendant's premises (during the five-year period between 1961 and 1965 the defendant had paid the plaintiff over $93,000.00 for electrical work performed at various different times). The plaintiff was injured when he climbed a utility pole to install an additional electrical line. The plaintiff had worked on the pole at least twice prior to his injury and the plaintiff, himself, had previously strung wires from the pole. The pole had attached to it wires carrying a 480 volt current of electricity, the plaintiff was well-aware of the presence of the wires, the plaintiff was aware that the current was "on," and the plaintiff had safety devices (such as rubber gloves and a rubber blanket) which the plaintiff elected not to use. The plaintiff climbed to the top of the utility pole and negligently allowed his elbow to come into contact with an uninsulated electrical kerney, the shock from which caused the plaintiff to fall to the ground and suffer severe injuries.

Following a verdict for the plaintiff, the defendant appealed and the Mississippi Supreme Court ruled:

> On the whole record, it is clear that ***the sole proximate cause of Sexton's injury was his own negligence*** and complete want of care in bringing his unprotected elbow into contact with the kerney.

Jackson Ready-Mix, 235 So.2d at 272 (emphasis added).[39]

Notably, in its discussion of the facts in *Jackson Ready-Mix Concrete v. Sexton* the Mississippi Supreme Court specifically observed that the plaintiff performed the work "with

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[39]It should be noted, as Justice McRae pointed out in his dissent in *Vu v. Clayton*, that "*Jackson Ready-Mix Concrete v. Sexton*, 235 So.2d 267 (Miss. 1970), was decided many years before the assumption of risk doctrine was held to be subsumed into comparative negligence and could not, as a matter of law, create a complete bar to recovery." *Vu v. Clayton*, 765 So.2d 1253, 1257 (¶ 19) (Miss. 2007).

his own tools" and that the plaintiff "employed his own tools."[40] The Court observed that the plaintiff "did not request any assistance from [the defendant] nor did he ask for advice or tools."[41]

There is a stark difference between the factual scenario presented in *Jackson Ready-Mix Concrete v. Sexton* and the facts presented in the case *sub judice*: whereas the plaintiff in *Jackson Ready-Mix* was using his own tools, Michael Jefferies was injured while using a tool (*i.e.*, the ladder) which had been specifically presented to him by Mt. Gillion for Jefferies to use while working in the gymnasium. Again, it is uncontradicted and uncontested that the ladder in question was missing a safety feature (*i.e.*, a rubber safety grip to prevent the ladder from slipping) and it is uncontradicted and uncontested that the lack of the safety feature resulted in the ladder slipping which caused Michael Jefferies to be injured. In *Jackson Ready-Mix* it was clear that "the sole proximate cause of [the plaintiff's] injury was his own negligence," whereas in the case *sub judice* Michael Jefferies was injured solely because the ladder slipped because it did not have a rubber safety grip to prevent it from slipping. (It also should not be overlooked that in *Jackson Ready-Mix* the injured plaintiff had available to him safety equipment – rubber gloves and a rubber blanket – which the plaintiff himself chose not to utilize but which would have likely prevented the accident.)

In *Vu v. Clayton*, the plaintiff had gone into the attic of the defendant's premises to repair an air conditioner and, while in the process of performing the repair work, had fallen through an unfloored portion of the attic. Finding in favor of the defendant, the Mississippi

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[40] *Jackson Ready-Mix*, 235 So.2d at 268-269.

[41] *Jackson Ready-Mix*, 235 So.2d at 269.

Supreme Court held that "the risk of falling through the ceiling arose from or was intimately connected with" the plaintiff's job of repairing the air conditioner:

> Vu was on the premises and in the attic for the sole purpose of repairing the air conditioning system. Clearly, the risk of falling through the ceiling arose from or was ***intimately connected*** with that enterprise.

765 So.2d at 1256 (¶ 14) (emphasis added). In reaching its decision in *Vu v. Clayton*, the Mississippi Supreme Court cited and relied upon its previous decision in *Jackson Ready-Mix Concrete v. Sexton*, to-wit:

> Additionally, in *Jackson Ready-Mix Concrete v. Sexton*, 235 So. 2d 267 (Miss.1970), the Court considered a case in which an electrician fell from a utility pole while installing an additional electric line on the property of Jackson Ready-Mix. The electrician accidently allowed his elbow to come into contact with an uninsulated kerney which shocked him and caused him to fall from the pole. The Court found no liability on the part of the premises owner and that the jury should have been instructed peremptorily to return a verdict for Jackson Ready-Mix. The Court noted the rule that "the owner or occupier is under no duty to protect [independent contractors] against risks arising from or intimately connected with defects of the premises, or of machinery or appliances located thereon, which the contractor has undertaken to repair." *Id.* at 271.

765 So.2d at 1256 (¶ 12).

When it presented its motion for summary judgment, Defendant-Appellee Mt. Gillion relied upon specific language found in *Vu* and argued that "the risk of a ladder falling or falling off the ladder, something going wrong in that regard is ***intimately connected*** with the work" (emphasis added) that Michael Jefferies was doing. [T, 5] Mt. Gillion also argued, relying upon specific language from *Jackson Ready-Mix*, that by using the ladder Jefferies had "assume[d] the risk of the danger" and, therefore, under the decision in *Jackson Ready-Mix*, "[t]here is no liability when there's an assumption of risk." [T. 5-6] These arguments by Mt. Gillion complete ignore the uncontested and uncontradicted fact that the ladder,

which Mt. Gillion had provided to Jefferies, was defective and unsafe because a rubber safety grip was missing from the ladder, and the type factual scenario as presented in the case *sub judice* – where the owner of the premises provided a defective tool – is not addressed or contemplated by either *Jackson Ready-Mix* or *Vu*.

Apparently recognizing that neither *Jackson Ready-Mix* or *Vu* address a situation wherein the injured worker was injured by defective equipment which had been provided to the worker by the defendant, the trial court principally relied upon *Nofsinger v. Irby* in making its decision, stating that *Nofsinger v. Irby* "more specifically" applied to the case *sub judice*. The trial court, however, misapprehended the ruling and misapplied the ruling in *Nofsinger*.

In *Nofsinger*, the plaintiff, an independent contractor, lost his eye while using a saw which belonged to the employer-defendant when a piece of wood was thrown into the plaintiff's eye by the saw blade. The saw did not have a safety guard over the blade, a condition which was blatantly obvious, and, more importantly, the plaintiff admitted that he was aware of the danger of using the saw without a safety guard and without wearing goggles.[42] The plaintiff had also used the saw on previous occasions. The Mississippi Court of Appeals ruled that the plaintiff could not recover from the employer-defendant, holding:

> [The plaintiff] appreciated or should have appreciated the risks associated with using the table saw without the appropriate safety equipment and his assumption of that risk absolves [the employer-defendant] of the liability claimed.

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[42]The failure of the plaintiff in *Nofsinger* to wear goggles while using a saw he admitted he knew did not have a safety guard is similar to the failure of the plaintiff in *Jackson Ready-Mix* to use rubber gloves and a rubber blanket which were available to him. In both cases, the injured plaintiff voluntarily chose to expose himself to danger by making an intentional choice not to use safety equipment.

Nofsinger v. Irby, 961 So.2d at 783 (¶ 13).

Notably, whereas the plaintiff in *Nofsinger v. Irby* admitted "he was aware of the danger of using a table saw without a safety guard and goggles, and admitted to doing so on numerous occasions in the past," in the case *sub judice* Michael Jefferies had never used the ladder before the day of the accident and Jefferies was unaware of the absence of the ladder's rubber safety grip.[43] It was correct, logical, and reasonable for the Mississippi Court of Appeals to find that the plaintiff in *Nofsinger* had 'assumed the risk' where the plaintiff knew of the danger (the plaintiff knew that the safety guard was missing from the saw, but he used the saw anyway) and where the plaintiff ignored basic safety precautions (the plaintiff knew he should have worn safety goggles, but operated the saw without using any goggles). The facts of the case *sub judice*, however, differ greatly from the facts in *Nofsinger*: Michael Jefferies did not ignore or fail to follow any safety precautions, the ladder had a safety defect (the missing rubber foot), and the safety defect was unknown to Michael Jefferies until after the accident. Thus, because of these important factual distinctions, the trial court's reliance upon *Nofsinger* was misplaced and the trial court's finding that "there has been no duty owed or breached by Mt. Gillion or any assumption of risk that was not known by the knowledge of the plaintiff" was erroneous. [T, 12] Furthermore, in ruling that Michael Jefferies

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[43] *Nofsinger v. Irby*, 961 So.2d at 779 (¶ 4) ("Nofsinger acknowledged during the summary judgment hearing that he was aware of the danger of using a table saw without a safety guard and goggles, and admitted to doing so on numerous occasions in the past. He also testified to operating similar saws 'a couple of thousand times,' and that if he had been wearing goggles, the wood chip would not have struck him in the eye."). Notably, in the case *sub judice* Michael Jefferies specifically testified that he was not aware the ladder was missing the rubber safety foot until after the accident. *Jefferies*, p. 73. [CP, 113]

'assumed the risk' by using the ladder, the trial court completely ignored the uncontradicted and undisputed fact that the ladder had a safety defect.

Again, because a rubber safety grip was missing from the ladder, the case *sub judice* presents questions of fact which may only be determined by a jury, to-wit:

(1) Was the ladder defective and unreasonably dangerous because the rubber safety grip was missing from the foot of the ladder?

(2) Was Mt. Gillion negligent in providing Michael Jefferies a defective and unreasonably dangerous ladder?

(3) If Mt. Gillion was negligent, what percentage of fault should be assessed to Mt. Gillion and what percentage of fault should be assessed to Michael Jefferies?

Because questions of fact exist in this civil action, it was improper for the trial court to enter summary judgment in favor of Mt. Gillion.

Notably, the Mississippi Court of Appeals, in reaching its decision in *Nofsinger v. Irby*, relied upon its prior decision in *Grammar v. Dollar*, No. 2004-CA-01376-COA, 911 So.2d 619 (Miss. App. 2005), wherein the Court of Appeals stated:

> ¶ 7. An independent contractor, as adopted by the courts, is defined as "a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking." [Citations omitted.] ***An employer is under a duty to provide an independent contractor with a reasonably safe work environment or give warning of danger***. *Mississippi Chemical Corp. v. Rogers*, 368 So.2d 220, 222 (Miss. 1979). ***An employer is relieved of the duty of informing an independent contractor of a danger at the work site if the independent contractor knows of that danger***. *Id.*
>
> ¶ 8. As an exception to the general rule requiring the owner or occupier of premises to furnish a safe place of work to an independent contractor and employees thereof, the owner or occupier is under no duty to protect them against risks arising from or intimately connected with defects of the premises, or of machinery or appliances located thereon, which the contractor has undertaken to repair. *Jackson Ready-Mix Concrete v. Sexton*, 235 So.2d

> 267, 271 (Miss.1970). Additionally, the owner is not liable for death or injury of an independent contractor or one of his employees resulting from dangers which the contractor, as an expert, has known, or as to which he and his employees "assumed the risk." *Id.* Furthermore, when a danger exists, which is inherent to the work the independent contractor is employed to perform, or which arises from or is intimately connected with the work to be performed, the employer's duty to protect the contractor is absolved. *Coho Resources Inc. v. McCarthy*, 829 So.2d 1, 10-11 (¶¶ 20-21) (Miss.2002). Additionally, the premises owner's liability is limited by the extent to which he has "devolved upon the contractor the right and fact of control of the premises and the nature of the work." *Magee v. Transcontinental Gas Pipe Line Corp.*, 551 So.2d 182, 185 (Miss.1989).

Grammar v. Dollar, 911 So.2d at 622-623 (emphasis added).

Again, in *Nofsinger v. Irby* the plaintiff knew that the safety guard was missing from the saw and knew the dangers of using the saw without the safety guard in place; therefore, because the plaintiff 'knew of the danger' and proceeded to use the saw anyway, the employer-defendant in *Nofsinger v. Irby* had no liability to the plaintiff. Again, also, in *Jackson Ready-Mix* the injured plaintiff chose not to utilize rubber gloves and a rubber blanket which would have insulated him from the electric current. However, in the case *sub judice*, Michael Jefferies was unaware of the missing rubber safety shoe until after the ladder had slipped and he had sustained his injury.[44] Michael Jefferies cannot be said to have "assumed the risk" of using a defective ladder when Jefferies was unaware of the defect and had no knowledge of the defect until after the accident and after he .

Notably, in *Grammar v. Dollar* the Mississippi Court of Appeals stated: "An employer is under a duty to provide an independent contractor with a reasonably safe work environment or give warning of danger." *Grammar*, 911 So.2d at 622 (¶ 7). This is consistent with oft-stated Mississippi law, and where an employer fails to provide a

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[44] *Jefferies*, pp. 72-73.

reasonably safe work environment, the employer may be held liable. For example, in *Mississippi Power Co. v. Brooks*, 309 So.2d 863, 866 (Miss. 1975), the Mississippi Supreme Court stated:

> ... one who employs an independent contractor ***is nevertheless answerable for his own negligence***. So an employer owes a duty to an independent contractor and the latter's employees to turn over the them a reasonably safe place to work or to give warning of danger.

(Emphasis added.) The Court specifically stated that "... the owner is liable for his own negligence." *Brooks*, 309 So.2d at 866. Also, in *Ingalls Shipbuilding Corp. v. McDougald*, 228 So.2d 365 (Miss. 1969), the Court stated:

> Ordinarily a prime contractor is not liable for the torts of an independent contractor or of the latter's servants committed in the performance of the contracted work. This is based on the theory that the contractee does not possess the power of controlling the person employed as to the details of the work. However, ***one who employs an independent contractor is nevertheless answerable for his own negligence***. So an employer owes a duty to an independent contractor and the latter's employees to turn over to them a reasonably safe place to work or to give warning of danger.

Ingalls Shipbuilding Corp., 228 So.2d at 367 (emphasis added). Furthermore, in *Coho Resources, Inc. v. McCarthy*, No. 97-CA-01447-SCT, 829 So.2d 1 (Miss. 2002), the Court reiterated:

> Although an owner is not liable for injuries sustained by an employee of an independent contractor, caused by the negligence of such independent contractor, ***an owner is liable to employees of an independent contractor for his own negligence***.

McCarthy, 829 So.2d at 13 (¶ 29) (emphasis added).

The Plaintiff-Appellant would state and show unto this Honorable Court that in the case *sub judice* it is uncontradicted and undisputed that the ladder in question was provided to Michael Jefferies by Defendant-Appellee Mt. Gillion and that the ladder was defective

because it was missing a rubber safety grip; thus, Mt. Gillion committed an act of negligence in providing Jefferies a defective ladder which was unreasonably unsafe, and the well-settled law of the State of Mississippi is that, even to independent contractors, the owner of the premises is 'liable for his own negligence.'

Mt. Gillion has stated that Michael Jefferies inspected the ladder prior to its use, and this is not completely disputed, but the fact that Michael Jefferies inspected the ladder and failed to observe the missing rubber safety grip does not fully absolve Mt. Gillion of its liability to Jefferies for providing a defective ladder in the first place.[45] As noted in *Tharp v. Bunge Corporation*, even "if a plaintiff is ninety-nine (99 %) percent negligent and the defendant is only one (1 %) percent negligent, the plaintiff is still entitled to recover the one percent (1 %) attributable to the negligence of the defendant." *Tharp*, 641 So.2d at 24.

Because the owner of the premises is liable to an independent contractor for the owner's own negligence, because the ladder in this case was missing a rubber safety grip, because the ladder was provided to Michael Jefferies for his use by Mt. Gillion, and because it is uncontradicted and uncontested that the missing rubber safety grip is the reason that the ladder slipped and Michael Jefferies was injured, Mt. Gillion's negligence in providing the unsafe ladder to Jefferies is the proximate cause (or is a proximate contributing cause) of Jefferies' injuries and Mt. Gillion was not entitled to summary judgment. The decision of the trial court should be reversed and this case should be remanded to the trial court for a jury trial of the disputed fact issues, including whether Mt. Gillion was negligent in providing a

[45] *Jefferies*, pp. 68-70. [CP. 112-113]

defective ladder to Michael Jefferies and the apportionment of fault between the Defendant church and Michael Jefferies.

* * * * * *

VI. CONCLUSION

In the case *sub judice* the following facts are uncontradicted and undisputed: the ladder was missing a rubber safety grip; the missing safety grip made the ladder defective and unsafe; Defendant-Appellee Mt. Gillion Missionary Baptist Church, Inc., provided the ladder to Michael Jefferies; because the ladder was missing a rubber safety grip, the laddder slipped and fell while Jefferies was on the ladder; and, Jefferies was injured when the ladder slipped and fell while he was using it. The Plaintiff-Appellant asserts that it was an act of negligence to provide a defective and unsafe ladder to a worker as occurred in this case. The well-settled law of the State of Mississippi is that the owner of a premises is liable for its own negligence, even to an independent contractor. The factual scenario presented in the case *sub judice* differs substantially from the scenarios presented in the case law upon which the trial court relied when it granted summary judgment in favor of Defendant-Appellee Mt. Gillion. Because this case presents a situation in which Mt. Gillion committed a negligent act, and because this negligent act caused or contributed to the accident that injured Michael Jefferies, under Mississippi's comparative negligence law Mt. Gillion is liable for damages for the injuries to Jefferies and a jury must make the determination of how the fault is apportioned between Michael Jefferies and Mt. Gillion. Therefore, the trial court's order granting summary judgment in favor of Defendant-Appellee Mt. Gillion should be reversed and this case should be remanded to the trial court for a jury trial of the disputed fact issues, including whether Defendant-Appellee Mt. Gillion was negligent in providing a defective

ladder to Michael Jefferies and the apportionment of fault between Mt. Gillion and Michael Jefferies.

RESPECTFULLY SUBMITTED, this, the 6th day of APRIL, 2010.

EDWARD L. MONTEDONICO, TRUSTEE FOR THE BANKRUPTCY ESTATE OF MICHAEL JEFFERIES,
Plaintiff-Appellant

By: _____
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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I have this day served a true and complete copy of the above and foregoing *Brief of Plaintiff-Appellant Edward L. Montedonico, Trustee for the Bankruptcy Estate of Michael Jefferies* upon the below named parties by placing same in the regular United States Mail, postage prepaid, addressed as stated, to-wit:

***Circuit Court Judge*:**

Honorable James ("Jimmy") McClure, III
Circuit Court Judge
17th Circuit Court District
Post Office Box 246
Sardis, Mississippi 38666

Attorneys for Defendants-Appellees
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THIS, the 6th day of APRIL, 2010.

D. REID WAMBLE (MS [redacted]
Attorney for Edward L. Montedonico
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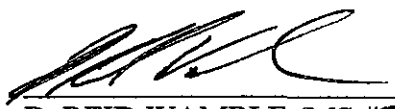
CERTIFICATE OF MAILING

I, the undersigned, hereby certify that I have, this date, placed the original of the above and foregoing *Brief of Plaintiff-Appellant Edward L. Montedonico, Trustee for the Bankruptcy Estate of Michael Jefferies* together with three (3) copies of same and a CD-ROM of the aforesaid brief stored in the Adobe Portable Document Format (PDF) as required by Rule 28(m) of the Mississippi Rules of Appellate Procedure, in the regular United States Mail, postage pre-paid, addressed to:

Honorable Betty W. Sephton
Office of the Clerk
Mississippi Supreme Court
Post Office Box 249
Jackson, Mississippi 39205-0249

THIS, this 6th day of APRIL, 2010.



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