IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

GLEN AVENT	**APPELLANT**
VERSUS	**2010 CA-00865**
MISSISSIPPI POWER & LIGHT COMPANY, ET AL	**APPELLEES**

APPEALED FROM THE CIRCUIT COURT OF TUNICA COUNTY
CASE NO. 96-0246

BRIEF OF APPELLANT

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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 this Court may evaluate potential disqualifications or recusal.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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GLEN AVENT	**APPELLANT**
VERSUS	**2010 CA-00865**
MISSISSIPPI POWER & LIGHT COMPANY, ET AL	**APPELLEES**

BRIEF OF APPELLANT

COMES NOW THE APPELLANT/PLAINTIFF, by and through counsel, and files this his Brief of Appellant and would show unto the Court that the trial court was in error in granting Defendant ITT Sheraton Corporation d/b/a Sheraton Casino ("Sheraton") motion for summary judgment and in dismissing Mississippi Power & Light Company ("Entergy") for failure to prosecute.

I.

COURSE OF PROCEEDING BELOW

Suit was originally filed in this cause on November 8, 1996. On October 21, 1998, Defendant Sheraton was dismissed. On May 10, 2010, Defendant Entergy was dismissed. From those dismissals, the Plaintiff filed a timely appeal.

II.

FACTS

This cause arises from an accident which occurred on or about July 2, 1994 at the Sheraton Casino site in Tunica County, Mississippi. At this time, the Plaintiff was an employee of Andy Bland Construction Company (ABC) who is a subcontractor at the project and was doing work on the then partially constructed casino. The Plaintiff received serious injuries when a man-lift he was operating came in contact with a temporary electrical line thereby electrocuting the Plaintiff. The electric line was owned by Defendant Entergy. The construction site was owned by Defendant Sheraton Corporation (Sheraton). The general contractor on the job was Defendant W.G. Yates and Son Construction Company (Yates).

Avent was operating a man-lift (rubber tires) to install fiberglass exterior siding on the Sheraton Casino located on the Mississippi River near Tunica, Mississippi. The man-lift became stuck in the sand. A front-end loader was connected to the man-lift and was pulled approximately

80 feet at which time the man-lift contacted a three phase 13,800/7960 volt electrical distribution power line installed, owned, operated and maintained by Mississippi Power & Light Company. Avent suffered severe injuries. The power line was measured to be 28 feet above ground at the point Appellee Entergy owned the power lines which Avent came in contact with. According to the Plaintiff's expert, Yerby Hughes, lines should have been placed underground.

III.

SUMMARY OF ARGUMENT

The trial court abused its discretion in dismissing the Appellant's cause for failure to prosecute. Alternatively, dismissal is an extreme and harsh sanction that deprives a litigant of the opportunity to pursue his claim and should be reserved for the most egregious cases and where lesser sanctions are available. *Wallace v. Jones*, 572 So.2d 371 (Miss. 1990).

The trial court erred in granting the motion for summary judgment of Sheraton as factual questions remained as to whether or not a safe place to work was provided. *Downs v. Corder*, 377 So.2d 603 (Miss. 1979).

IV.

ARGUMENT

ENTERGY CORPORATION

After the dismissal of Defendants Yates and Sheraton, the cause remained dormant for several years. On or about February 12, 2005, Avent designated as an expert, Yerby Hughes, a registered professional engineer. Avent's prior expert, William Adams, died unexpectedly, therefore, a new expert was required. Considerable activity then took place. On January 11, 2006, Avent filed his fifth supplement to Entergy's interrogatories and request for production of documents and things. On March 29, 2006, Avent proposed to Entergy's counsel that the matter be mediated. On April 6, 2006, the Honorable W.O. Luckett, counsel for Avent's workers compensation carrier responded positively to mediation and suggested various dates. On April 10, 2006, Entergy responded positively to mediation and gave the dates of May 19 or May 30, 2006 for mediation. On April 12, 2006, advised that May 23, 2006 was set for mediation. On that same date, Entergy responded positively

by confirming the date and stating that they wanted to redepose Avent.

On April 18, 2006, Entergy served its third set of interrogatories. On April 25, 2006, Entergy wrote that they wanted to redepose Avent and to depose Yerby Hughes and that they would not be available for mediation on May 30, 2006. This was agreeable to Avent and on May 8, 2006 offered various dates for the proposed depositions. On May 16, 2006, Avent responded to Entergy's third set of interrogatories. On June 6, 2006, after having participated in discovery, Entergy's filed its motion to dismiss. On July 17, 2006, Avent responded to the motion to dismiss. Entergy did not pursue their motion by setting it for a hearing.

On September 6, 2006, Avent again proposed dates for the deposition of Yerby Hughes. On November 26, 2008, Entergy filed a rebuttal to Avent's response to motion to dismiss. On February 13, 2009, Avent forwarded a proposed scheduling order to Entergy. On February 19, 2009, Avent filed a motion for a pretrial conference and scheduling order. On September 23, 2009, Avent mailed its proposed pretrial order to Entergy. Again on November 29, 2009 another copy of the proposed pretrial order was submitted to Entergy. On February 12, 2010, Avent's counsel notified Entergy of several dates for a hearing on their motion. After a hearing was set, the trial court entered an order on May 10, 2010.

Entergy's motion was during a time period when considerable activity was taking place advancing the cause for trial. Consequently, the cause was being fully prosecuted. Further, having participated in advancing the cause for trial, Entergy should be judicially estopped from filing its motion to dismiss.

Alternatively, dismissal is an extreme remedy and should be reserved for the most egregious conduct, because it deprives a litigant of her day in court. *Wallace v. Jones*, 572 So.2d 371, 376 (Miss. 1990). See Also *A.T. & T v. Days Inn*, 720 So.2d 178, 180 (Miss. 1998); *Watson v. Lillard*, 493 So.2d 1277, 1278 (Miss. 1998).

No time limit has been set by this Court for prosecution of an action once it has been filed. *A.T. & T.*, 720 So.2d at 180. This Court has also articulated certain factors as "aggravating factors" to consider whether any sanctions are appropriate. These are "the extent to which the plaintiff, as

distinguished from his counsel, was personally responsible for the delay, the degree of actual prejudice to the defendant, and whether the delay was the result of intentional conduct." *Id. at 181.* When these factors are examined, the sanction of dismissal is simply not appropriate. The Plaintiff was not personally responsible for any delay. Further, there is no finding or record of intentional delay on the part of Avent's counsel. Indeed, the opposite is true, as counsel was repeatedly attempting to move the cause forward.

SHERATON

Specifically, the Plaintiff charged that Sheraton owed him a duty to provide him with a safe place to work and failed to properly inspect and warn of dangerous conditions which Sheraton knew or should have known of. Sheraton alleged in their Motion for Summary Judgment that no such duty was owed to the Plaintiff and that all responsibility for maintaining the work place and inspecting for dangers was assigned to and assumed by Yates pursuant to the contract. The Plaintiff will show that Sheraton's position is contrary to the law of Mississippi and contrary to the facts and that the Motion for Summary Judgment should have been denied.

It was Sheraton's position that Yates is solely responsible for providing labor and materials and for coordinating and supervising the work, as well as being responsible for the safety measures at the project site. Sheraton relies inter alia upon Section 1.2.3 of the contract which provides that the contract shall furnish all labor, materials, tools and equipment necessary for the execution and completion of the work, as well as Section 10.1.1 which provides that the owner will not be responsible in any way for providing for a safe place for the performance of the work by the contractor, any subcontractor, or sub-subcontractor. It was Sheraton's position that, therefore, they are not responsible for any injury to any worker which occurs on their site. According to Sheraton, Yates was an independent contractor and they are not responsible in any way for any activity which occurred at the work place.

Sheraton's position is not maintainable under the laws of Mississippi and under the facts of this case. This Court has consistently held that an owner owes employees the duty to provide them with a safe place to work. *Tribble v. Gregory*, 288 So.2d 13 (Miss. 1974). This duty is nondelegable

id. at 15. The duty imposed upon an owner is to use reasonable care to furnish safe instrumentalities to work. id. Sheraton is now attempting to use their contract to delegate what is their nondelegable duty.

Further, one who employs an independent contractor is answerable for its own negligence. *Mississippi Power Company v. Brooks*, 309 So.2d 863, 865 (Miss. 1975). In this case, the Plaintiff alleged that Sheraton failed to properly inspect and to keep the site in a reasonably safe and suitable condition, and/or to warn of danger which Sheraton knew or should have known in the exercise of reasonable care. In the case of *Downs v. Corder*, 377 So.2d 603 (Miss. 1979), this Court held that the owner of a house was liable when a gas company employee came in contact with electrical wires situated under the owners house. In *Downs*, the Court said that owner, occupant or person in charge of premises owes to invitees or business visitors thereon the duty of exercising reasonable care to keep the premises in a reasonably safe and suitable condition, or of warning invitees or business visitors of hidden or concealed perils of which he knows or should know in the exercise of reasonable care. *Id.* at 605. In reversing a grant of Summary Judgment in favor of the Defendant, the Court further noted that "the declaration further charged that Appellee knew or should have known that wires with unprotected ends either never had been properly insulated or that a protective covering or plate had never been placed over said wires, and therefore, created an extremely dangerous condition. There was a charge of failure to inspect and failure to warn about a dangerous condition known by Appellee, or that should have been known by him." *id.* at 606.

The ruling in and allegations cited by the Mississippi Supreme Court in the Downs case are precisely the same type of allegations made in this case against Sheraton. As previously stated, this duty which Sheraton owed to the Plaintiff can not be delegated to Yates.

Although Sheraton attempts to state that they are not answerable to any negligence of Yates, this Court has, under certain circumstances, held otherwise. It is the general rule that an employer of an independent contractor is not answerable for negligence of the contractor or of the contractors employee, however there are situations where the employers duty is nondelegable. *Federal Compress & Warehouse Company v. Swilley*, 252 Miss. 103, 171 So.2d 333, 338 (1965). The *Swilley* case held

that this is particularly true when the independent contractor is using a dangerous agency. *id.* at 338 There is no doubt that the use of electricity is a dangerous agency. *Mississippi Power and Light Company v. Walters,* 248 Miss. 206, 158 So.2d 2, 19 (1963). SEE ALSO *Hester v. Brady,* 627 So.2d 833, 843 (Miss. 1993) (independent contractor defense not available when one employs another to perform a task in which a serious danger to a person can reasonably be anticipated). Since electricity is a dangerous agency and it is foreseeable that someone could come in contact with the temporary electrical wires, Sheraton is also answerable for any negligence of Defendant Yates. This is in addition to their own negligence for failing to provide a safe place to work and for failing to properly inspect for dangerous conditions.

When the facts of this case are viewed in the context of the applicable law, it is clear that Sheraton was not entitled to a judgment as a matter of law, the standard for granting Summary Judgment. The Plaintiff alleged that he came in contact with a temporary power line while operating a man-lift. Prior to the accident, temporary lines were constructed at the construction site to provide electricity for the operation of the equipment. Eventually, permanent power was added to the construction site, however, the temporary lines were not disconnected. According to Andy Bland, the owner of ABC and the Plaintiff's employer, the temporary lines should have been disconnected. Bland at 28.

According to Mr. Bland, the temporary line cut across a parking lot and ran up next to the casino. Bland at 28. At the time of the accident, permanent wires had been put in place. id. Bland testified that once the permanent lines were in, the temporary lines should have been disconnected and they were not disconnected. id. There are two breakers on the line of the pole and these should have been unclipped so that power could not have gone through them. Bland at 29. Had this been done, the accident would not have happened.

Contrary to the affidavit submitted by Tony Arnheim, site representative for Sheraton, Mr. Arnheim daily conducted inspections of the work site. Arnheim's duties as the project manager were to enforce the contract with Yates and to see to it that the project was being built according to the documentation. Arnheim at 7. He would look at the progress of the construction to make sure that

everything was done according to the contract. id. Arnheim had been in the construction industry for over twenty years. Arnheim at 8. He was on the site everyday and was physically stationed at his office on the site. Arnheim at 10. He was there from the beginning of the construction. Arnheim at 14. Arnheim would occasionally meet with subcontractors if there was a subcontractor issue. Arnheim at 16. Indeed, according to the contract between Sheraton and Yates, Sheraton had to give written approval before any subcontractor was hired. Contract § 5.2.1. Arnheim testified that Sheraton had the right to veto or disapprove of any subcontractor. Arnheim at 38. Further, the contract provided that, if any provision of the contract was not complied with by Yates, then Sheraton could suspend the contract until the contract was complied with. id.

Arnheim stated that it was a big issue when the temporary electric service was installed. Arnheim at 21. It was a big issue because it helped the project and was hard to build without electricity. Arnheim at 22. Other than Harrah's Casino, Arnheim was aware of no other casino which was completed on generators and not on temporary power. Arnheim at 22.

Although Arnheim did not know when the permanent lines were installed, he was on the work site when they were put in place. Arnheim at 31. Arnheim testified that you have to have permanent power to operate the total facility and that there is no way to open the place if you don't have that. id. After the permanent line was connected, he was never concerned with whether or not the temporary line was still live. Arnheim at 34-35.

Contrary to Arnheim's affidavit, he made inspections of the work site everyday. Arnheim at 36. He would walk through the project to look at finishes, wall petitions that were in the right place, doors in the right place, generally to make sure that there was conformance to the contract documents. id. Although he stated that he did not make a visual walk through of the area where the temporary lines were, he admitted that they were between his office and the actual site of the construction and that he had to walk under them everyday. Arnheim at 37.

In addition to Arnheim, Sheraton also had Carl Bosworth on the site everyday. Arnheim at 19. In contrast to Arnheim's affidavit, Sheraton also had other representatives on the site. One was Arnheim's boss, Bob Pearson, who would come once every three weeks, depending upon what was

going on. Further, Sheraton's controller for operations, Michael Brenner, was also on the site once a month.

Since Sheraton regularly had representatives on site conducting inspections, they certainly had ample opportunity to ascertain the dangers of the temporary lines, to determine whether or not the lines were active, to see that the lines were disconnected, and/or to warn that the temporary lines were still live. This would be in keeping with their non-delegable duty to provide a safe place for employees to work.

The Mississippi decisions which Sheraton relies upon in their Memorandum do not support their position in this case. For example, in the case of *Magee v. Transcontinental Gas Pipe Line Corp.*, 551 So.2d 182 (Miss. 1989), the Mississippi Supreme Court granted summary judgment to a pipe line owner. However, in that case, the Court specifically noted that the Plaintiff did not dispute any material issues of fact by counter-affidavit or otherwise. *id.* at 185. According to the Court, "to be sure, *Magee's* administratrix counsel appeals persuasively in her briefs and if half of what is asserted there were in the record, matters might be otherwise. She runs afoul of our established law that the only unsworn matters available to a party opposing the motion or undenied allegations in his pleading and admissions secured under Rule 36." id. at 186. In short, the Plaintiff in Magee did not come forth with any sworn testimony to counter the motion for summary judgment. That is certainly not the case here, as the depositions of Tony Arnheim as well as Andy Bland have been offered in opposition to the motion. In *Magee*, the Plaintiff chose to rest upon allegations contained in the pleadings. id. at 187.

Sheraton also relied upon *Mississippi Power Company v. Brooks*, 309 So.2d 863 (Miss. 1975). In *Brooks*, the Plaintiff's decedent was fatally injured when a boiler that his employer was constructing collapsed. Mississippi Power Company had contracted with Brooks' employer to construct a boiler in one of their generators. In granting summary judgment in favor of Mississippi Power Company, the Court's specifically noted that there was no allegation or evidence in this case that the premises which were furnished by Mississippi Power Company were unsafe for use by the employees of the independent contractor. id. at 866. Indeed, the Court held that the hazard in which

Brooks was killed was created by and brought into existence by the very nature of the work itself. id. This is in contrast to the present case, in which there are allegations of and proof of unsafe conditions at the work site. Further, the hazard in which Avent was injured was not the object under construction, ie. the casino, but rather a temporary power line which was no longer necessary for the construction.

The final Mississippi case relied upon by Sheraton was *Fortenberry Drilling Co., Inc. v. Mathis,* 391 So.2d 105 (Miss. 1980). In this case, the Mississippi Supreme Court held that the owner owes no duty to an employee of an independent contractor who was on the premises to repair something and is injured by the object which he is there to repair. This case has absolutely no bearing on the present case, since no one on the job site, including the Plaintiff, was there to repair the electric line.

In conclusion, Sheraton's Motion for Summary Judgment should have been denied. Sheraton owes a duty to provide employees with a safe place to work and the duty is non-delegable. Sheraton now attempts to do which, under the law of Mississippi, they cannot do. Sheraton is attempting to delegate this duty to Yates. It is clear that they have a duty to use reasonable care and that a fact question.

V.

CONCLUSION

The trial court should be reversed and this cause remanded to the Circuit Court of Tunica County for a trial on the merits.

RESPECTFULLY SUBMITTED this the 30th day of November, 2010.

Respectfully submitted,

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By: _____

CERTIFICATE OF SERVICE

I, Dana J. Swan, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing document to; Honorable Kenneth L. Thomas, Circuit Court Judge P.O. Drawer 548 Cleveland, MS 38732, John H. Dunbar, Esquire, P. O. Box 707, Oxford, MS 38655; Hon. Lee L. Piovarcy, Esquire, 22 N. Front Street, Suite 1100, Memphis, TN 38103-1182;

THIS, The 30th day of November, 2010.

Dana J. Swan