

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JAMIE L. KIRKLEY

APPELLANT

VS

CIVIL ACTION NO: 2007-CA-00746

**FORREST COUNTY GENERAL HOSPITAL
A POLITICAL SUBDIVISION OF THE
STATE OF MISSISSIPPI**

APPELLEE

APPEAL FROM THE CIRCUIT COURT OF FORREST COUNTY, MISSISSIPPI

TWELFTH JUDICIAL DISTRICT

APPELLANT'S REPLY BRIEF

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

I, the undersigned counsel of record, certify pursuant to Mississippi Rule of Appellant Procedure 28(a)(1), 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.

Jamie L. Kirkley	Appellant
David L. Sullivan	Attorney for Appellant
Kyle Robertson	Attorney for Appellant
Forrest General Hospital	Appellee
R. Christopher Wood	Attorney for Appellee
James K. Dukes	Attorney for Appellee
Robert B. Helfrich	Forrest County Circuit Judge

This the 27th day of February, 2008.



DAVID L. SULLIVAN
Co-Counsel for Jamie L. Kirkley

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STATEMENT OF ISSUES RAISED IN FORREST GENERAL'S BRIEF

- ISSUE 1:** Whether certain Facts asserted by Forrest General Hospital in their brief are erroneous.
- ISSUE 2:** Whether the Trial Court erred when it applied the assumption of the risk doctrine and failed to apply Mississippi Landlord/Tenant law.
- ISSUE 3:** Were the Actions of Forrest General Hospital Negligent.

REBUTTAL ARGUMENT

ISSUE 1

Whether certain Facts asserted by Forrest General Hospital in their brief are erroneous

The Plaintiff, Jamie Kirkley, would show that certain factual assertions made by Forrest General Hospital in their brief are erroneous. Because these “erroneous” facts are material to a proper determination of the issues, it is important that these “erroneous” facts be addressed by pointing out the testimony in the record by the witnesses who testified to these facts.

The Plaintiff would show that there were essentially only four fact witnesses who testified at the trial of this matter and they were as follows: Dr. Brad Holifield, Jamie Kirkley, Oliver Pollard, and Sam Herrin, Director of the Engineering Department at Forrest General Hospital. The testimony of these four witnesses is the sole testimony in regard to the condition that existed and how that condition was created. It is important to understand that their testimony regarding the issues is virtually the same and does not conflict with one another such that a determination would have to be made as to which witness was more credible than another. There are certain issues which only one witness may have had knowledge of but that witness’ testimony was not ever in dispute. For instance, Dr. Holifield is the only witness who testified regarding the fact that Forrest General’s employees modified the plug and extended cord on the washer/dryer and advised Dr. Holifield and his staff to use the only available 220 volt electrical outlet over the hot water heater. These facts were never questioned or disputed by Forrest General. William Oliver, president of Forrest General, was designated as the 30(b)(6) deponent and testified that he had no personal knowledge of any of the facts of the case. (T. 196)

In the Plaintiff’s initial Brief to this court, the Plaintiff pointed out numerous factual errors made by the lower court in its final order. The Plaintiff addressed each error individually

by citing testimony from each fact witness whose testimony addressed the errors. Defendant Forrest General asserts many of the same erroneous facts in the Appellee's brief to this Court. As previously addressed in the Appellant's brief, the undersigned never received a copy of Defendant's Proposed Findings of Facts and Conclusions of Law. As such, no determination was made as to whether the trial court in this matter simply adopted the Defendant's findings of fact. In *University of Mississippi Medical Center v. Peacock*, the Mississippi Court of Appeals found that the trial judge had basically adopted the opposing party's findings of fact and, in that instance, the Court opined that 'deference to such findings is necessarily lessened.', 2006 WL 3199492 citing *Omnibank of Mantee v. United S. Bank*, 607 So. 2d 76, 83 (Miss. 1992). Although the Defendant/Appellee could have addressed this issue in its brief, they failed or refused to do so. Therefore, the Plaintiff would respectfully request that deference to the lower court's findings be lessened pursuant to the holding in *University of Mississippi Medical Center v. Peacock*.

The disputed or erroneous facts set forth by Forrest General are as follows:

1. Forrest General Hospital asserts that the Mechanical Room was not part of Dr. Holifield's leasehold premises on page 2 of their brief. This was an issue that was fully addressed in Plaintiff's initial brief on pages 16-18 when the Plaintiff addressed erroneous findings by the lower court. In response to the facts asserted by the Plaintiff with regard to this issue, Defendant Forrest General only states that William Oliver stated that "we're not leasing that square footage" to Dr. Holifield. (Defendant's Brief at page 2) The Defendant failed to address the issue that Oliver admitted at trial that the mechanical room was a part of Holifield's leased premises by an implied agreement with Forrest General. Forrest General and its employees had installed Dr. Holifield's equipment in the mechanical room for Holifield and his

employees to use including the washer/dryer in question. This arrangement had been made several years before Jamie Kirkley's accident with the full knowledge and blessing of Forrest General.

The trial of this matter took place in 2005 and, at that time, Dr. Holifield continued to lease Suite 106 of the Forrest General Medical Plaza. (T 7, 207, 209) Dr. Holifield and his employees continued to have use and access to the mechanical room and his equipment including the washer/dryer which was still housed in the mechanical room. (T 20, 225-226) At no time through the trial of this matter approximately 6-7 years after Jamie's injury had any officer or employee of Forrest General ever advised Dr. Holifield or his staff that they did not have use and access to the mechanical room where his equipment was installed or that he needed to move his equipment to another location. (T20) If this space had not become part of Holifield's lease by implied agreement, why would Forrest General not have advised Holifield to remove his equipment from the mechanical room after Kirkley's injury? Forrest General did not advise him to stop using the mechanical room but instead, within one week of the Plaintiff's injury, Forrest General corrected the dangerous condition and allowed his employees to continue to use the mechanical room.

2. Forrest General asserts that "in 1994, Dr. Holifield installed a stacked washer/dryer in the mechanical room" on page 2 of their brief. This statement is simply inaccurate. Dr. Holifield testified that he contacted Forrest General because he developed a need for a washer and dryer for his dental practice. Forrest General and its employees installed the washer/dryer in the mechanical room for Holifield's use. Further, Forrest General's employees modified the cord on the washer/dryer because there were not enough 220 outlets and cut an air vent for the dryer. (Holifield T. 11-13; 29-31; Oliver T. 209; 227)

3. Forrest General asserts that Dr Holifield did not provide written notice to the Lessor, Forrest General. This simply has no relevance because Forrest General and its employees admit that they were notified by Dr. Holifield that this condition needed to be fixed and that his request was written down by Oliver Pollard and by Sam Herrin when he put in the work order..

Dr. Holifield testified that he placed Forrest General on notice of the condition using the means established during his lease which was to contact Oliver Pollard who was in charge of maintenance at the Medical Plaza Building. (See Holifield T. 48, 49, 50; Pollard T. 85-95; Herrin 62, 63, 64) Mr. Pollard testified that when a tenant at the Medical Plaza Building had a problem, he would write down their complaint and either fix the problem himself or take it to the engineering department to create a work order. (Pollard T. 85-87) Although Dr. Holifield himself did not write down the problem which existed when he requested that additional 220 V outlets be added, he discussed the problem with Oliver Pollard who did take his request down in writing. (Pollard T. 91) Mr. Pollard testified that he then contacted Sam Herrin, Director of the Engineering Department. Sam Herrin inspected the mechanical room with Oliver Pollard who advised him of the problem and Mr. Herrin then created a work order to add the additional breakers for the additional 220 V outlets. As a result of the work order, Jerry West was sent to the mechanical room to fix the problem. (Pollard T. 92; Herrin T. 65-66)

There is simply no issue as to whether Forrest General was notified in writing about the need to add the additional 220 volt outlets. Forrest General's employees discussed the situation and determined how to fix the condition but failed to complete the task because West was fired.

4. Forrest General asserts that "the only maintenance personnel at Forrest General Hospital who had knowledge of the fact that Ms. Kirkley had been placing herself in a venturous situation every time she would connect or disconnect certain appliances were Oliver Pollard and

Jerry West, both maintenance mechanics at page 11 of their brief. Once again, this is simply not correct.

Initially, Dr. Holifield discussed the problem with Oliver Pollard when he requested that additional 220 V outlets be added in the mechanical room so that his employees would not have to climb on the table to plug and unplug the washer/dryer. (Holifield T. 16-17; Pollard T. 91) Mr. Pollard testified that he then contacted Sam Herrin, director of the engineering department at Forrest General, who came to the mechanical room to discuss the problem with Oliver Pollard. At that time, Pollard showed Sam Herrin how he and Dr. Holifield's employees were unplugging the outlet from the hot water heater to plug in the washer/dryer by climbing onto the table. (Pollard T. 91-92) Mr. Herrin verified that Mr. Pollard had discussed the need for additional 220V outlets with him but stated he just could not remember what all he and Pollard had discussed. (Herrin T. 65-66) However, Sam Herrin did remember that after he met Pollard and discussed the problem, he created a work order to add the additional breakers for the additional 220 V outlets. (Herrin T. 65-66) Thereafter, pursuant to the work order, Jerry West was sent to the mechanical room to fix the problem. (Pollard T. 92; Herrin T. 65-66) Also, Dr. Holifield testified that he met with some engineers from Forest General to discuss the problem before Jerry West began working on the breaker box. There is nothing in the record including any testimony from any witness which would refute that Sam Herrin went to the mechanical room with Oliver Pollard and that Pollard showed him how Holifield's employees were climbing on the table to plug and unplug the washer/dryer prior to the work order being created.

Simply put, the facts listed above are verified by testimony in the record transcript of the case and the pages of transcript testimony which support these facts are provided. Again, these facts testified to by the witnesses are not disputed or in conflict with other witnesses testimony.

There is simply no testimony by any witness to refute the facts stated above.

ISSUE 2

Whether the Trial Court Erred In Applying the Assumption of the Risk Doctrine and Failing to Apply Mississippi Landlord/Tenant Law

The Trial court erred when it applied the assumption of the risk doctrine and failed to apply the Mississippi Landlord/Tenant law. In all cases such as this, the plaintiff must be given a status. The duty owed by a defendant to a plaintiff depends on their relation to one another. *Skelton by and Through Roden v. Twin County Rural Elec.*, 611 So.2d 931, 936 (Miss. 1992). An employee of a lessee has the status of a lessee and is owed the same duty that a lessor owes a lessee. *Wilbourn v. Hardin* 234 So. 2d 606, 611 (Miss. 1970) As such, the principals of Landlord /Tenant law apply. Forrest General concedes as much in its brief with the following statement: "The pivotal issue determined by the Circuit Court is the issue of whether Forrest General's actions were negligent, and the duty owed by Forrest General, as Lessor, to Plaintiff as an employee of a Lessee." (Brief of Appellee p. 8) However, Forrest General then asserts that the status of the Plaintiff in the case at issue is a licensee under premises liability law. Such status and application of premises liability law under these facts are simply erroneous.

The duty owed by Forrest General to the plaintiff in this case was to make repairs to a defective condition of which it had been made aware and which it had agreed to repair. *Wilson v. Allday*, 487 So.2d 793, 796 (Miss.1986). Forrest General asserts and the lower court held that, despite the duty owed by Forrest General to the plaintiff, the assumption of the risk doctrine bars the plaintiff from recovery. As stated in Plaintiff's brief, the assumption of the risk doctrine does not apply where a continued exposure to risk is due to a lack of reasonable opportunity to escape after the danger is appreciated, or is the result of influence, circumstances, or surrounding

which are a real inducement to continue. *Elias v New Laurel Radio Station, Inc.*, 146 So.2d 558, 561 (Miss. 1962). The Appellee, in its reply brief, maintains that the Appellant's employment or continued employment can not be such "influence, circumstances, or surrounding" which are such an inducement.

The Mississippi legislature and the Mississippi Supreme Court disagree. *Miss. Code Ann. Sec. 11-7-19* states as follows:

In all actions for personal injury to an employee, and in all actions where such injury results in death, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death results in whole or in part from the negligence of the master. This rule shall not apply to conductors, or locomotive engineers, in charge of dangerous or unsafe cars or engines voluntarily operated by them.

Miss. Code Ann Sec. 11-7-19 (as amended). Further, the Supreme Court of Mississippi has held that in an action by an employee against an employer for injury sustained from a falling beam in a cotton mill, where it was alleged that accident was caused by defective hoisting equipment, the employee did not assume the risk incident to operation of the equipment if the employer was negligent in requiring its use. *Aponaug Manufacturing Co. v. Carroll*, 184 So. 63, 65 (Miss. 1938); See, also, *Ingalls Shipbuilding Corp. v. Trehern*, 155 F.2d 202 (5th Cir. 1946) (Shipfitter who was required to work on scaffold consisting of one board ten inches wide, and who requested a safer scaffold from his foreman but was instructed to go ahead with the work, did not assume the risk of injury sustained in fall from scaffold, in view of Mississippi statute abolishing such defense where negligence of employer is shown).

Whether or not Dr. Holifield was negligent in ordering the plaintiff to continue to use the washer/dryer is not the issue. The cases cited above, however, do shed light on the nature of

one's employment and that continued employment is such an "influence, circumstance or surrounding" which is an inducement to continued exposure to a risk. Dr. Holifield, the plaintiff's employer, testified at trial as follows:

BY MR. DUKES:

Q. Well, did she ever come and say, I'm not going to work here if I have to climb up on the table and change the plug? Did she ever say that?

A. No, she didn't say that. She may have said something like, well, I'll be glad when they get the 220 changed out so we don't have to do this.

Q. You didn't require her to do it, did you?

A. Well, it was part of her job.

(T. 46)

Dr. Holifield made it clear that he expected the plaintiff to plug and unplug the washer/dryer as a part of her job duties. (T. 46). In their brief, Defendant Forrest General asserts that "it is pure assumption on the part of Appellant to take the position that Ms. Kirkley would have been terminated by Dr. Holifield for refusing to put herself in danger." As stated by Dr. Holifield above, this was part of her job. It is quite clear that the plaintiff's duties of her employment were the influence and/or circumstances which induced her continued exposure to the risk of climbing on the table to plug and unplug the washer/dryer into the 220 outlet so that her job could be performed. Therefore, the assumption of the risk doctrine should not be applied in this case.

ISSUE 3

Were the Actions of Forrest General Hospital Negligent

In order to determine if Forrest General Hospital's actions were negligent, the duty owed by Forrest General must be established. Even Forrest General acknowledges in its brief that the

“pivotal issue determined by the Circuit Court is the issue of whether Forrest General’s actions were negligent, and the duty owed by Forrest General, as Lessor, to Plaintiff as an employee of a Lessee.” (Brief of Appellee p. 8) Because Dr. Holifield leased the premises from Forrest General, the application of Landlord/Tenant law is the correct standard to be applied in this case. Forrest General’s assertions that the Plaintiff should be considered a “licensee” are erroneous.

In the Plaintiff’s brief to this Court, the duty established pursuant to Landlord/Tenant law is fully discussed along with the facts which constituted negligence on the part of Forrest General and its employees. Significantly, Forrest General does not discuss the duty owed as it relates to Landlord/Tenant law nor does it discuss its actions of creating the condition in the first place or that Forest General specifically agreed to fix the problem. The reason is simply that if Landlord/Tenant law applies a duty clearly existed on the part of Forrest General to fix the problem and they failed to do so.

What is the standard to be applied? In Mississippi, the law is very clear and well established that a lessor may be held liable for injuries which occur in an area designed for common use over which he has control or where the lessor has expressly covenanted to make repairs to a defective condition of which the lessor has been made aware. The Court in *Wilson v. Allday* stated that “{i}t is more generally held that liability runs with possession and control of the property”. *Wilson v. Allday*, 487 So. 2d 793, 796.

In the instant case, the lessor, Forrest General, was in legal possession of the mechanical room and allowed Dr. Holifield to house his equipment including the washer/dryer there. In fact, Forrest General installed the washer/dryer and other equipment in this room for Holifield’s use. The lessor, Forrest General, had actual knowledge of the defect and certainly had more than sufficient opportunity to repair the defective condition.

Which facts establish that Forrest General was aware of the necessity to fix the condition in the instant case? Dr. Holifield contacted Oliver Pollard and discussed the problem of the lack of 220 electrical outlets. Holifield explained to Pollard that his employees were forced to climb on top of the table and unplug the hot water heater and plug in the washer/dryer. Further, Oliver Pollard was aware of this condition because he saw Ms. Kirkley and Dr. Holifield's employees climbing on top of the table, and, in fact, Mr. Pollard and other Forrest General employees climbed on the table to plug in the washer/dryer for Dr. Holifield's employees. (T. 87-89)

Oliver Pollard then contacted Sam Herrin, the director of the Department of Engineering for Forrest General to discuss the problem. Mr. Herrin came to the mechanical room and discussed the situation with Mr. Pollard including how Dr. Holifield's employees were climbing on top of the table to unplug the washer/dryer and plug in the hot water heater. In response, Mr. Herrin created a work order to correct the problem. Jerry West, an employee of the hospital, began to make repairs to correct this problem for Forrest General but he was terminated prior to completion of the task.

Forrest General is also liable for injuries to the Plaintiff in this case because Forrest General expressly agreed to make the repairs requested by Dr. Holifield. Where the lessor expressly covenants to make repairs but fails to do so or does so negligently, the lessor is liable for injuries to the Plaintiff. *Hodges v. Hilton*, 161 So.2d 686, (Miss. 1935).

In the instant case, the express agreement and promise by Forrest General and its numerous employees to repair the defective condition is "on all fours" with the Supreme Court's holding in *Hilton*. Forrest General and its employees made a specific agreement with Dr. Holifield to provide additional 220 electrical outlets specifically to keep the employees having to climb on top of the table to unplug the hot water heater from the 220 electrical outlet and plug in

the washer/dryer. As in *Hilton*, the lessor, Forrest General, is bound to anticipate that personal injuries would naturally and probably result from the action of climbing on top of a three foot table and reaching through pipes to unplug the hot water heater plug approximately 6 feet off the ground. This condition was known by Sam Herrin, Oliver Pollard, Jerry West, and the engineers Dr. Holifield met with prior to West beginning installation of the electrical panel.

Further, this condition was created by Forrest General and its employees as they changed/modified the end of the washer/dryer plug to fit the 220 volt electrical outlet over the hot water heater and directed Holifield and his employees to use said plug even though it was 6 feet off of the ground. See *Kassis v. Perronne*, 209 So. 2d 444 (Miss. 1968) (If lessor voluntarily decides to make repairs during term of lease, he may be held liable for any negligent acts which he commits in the performance of the repairs). In this case, Forrest General and its employees created the dangerous condition at issue by altering/modifying the washer/dryer plug so that it could only be plugged into the 220 outlet above and behind the hot water heater. (Holifield T. 29)

Even though the condition was known by Forrest General and a work order created to remedy the problem, Forrest General and its employees negligently failed to take action and, as a proximate cause of its failure to repair the condition, Jamie Kirkley fell and was injured. Forrest General's initial creation of the condition and its failure to make said repairs once the problem was pointed out by Dr. Holifield was the sole and proximate cause of the injury to the Plaintiff.

As to whether Forrest General breached its duty and was negligent, Sam Herrin testified that Forrest General's employees should have never created the condition which would allow the washer/dryer to plug into the hot water heater 220 volt outlet. (Herrin T. 71-74) Mr. Herrin admitted the outlet was being used improperly and should never have been used the way it was and that it should have been immediately corrected when he learned of it.

Further, a work order was created to fix the problem but this failed to happen despite the fact that Jerry West began work on the project prior to Ms. Kirkley's fall because he was fired. Sam Herrin testified that the fact Jerry West failed to complete this task should have been discovered and that it was a mistake by the engineering department and Forrest General that this job was not completed when assigned. (Herrin T. 67-69) If it had been completed, Ms Kirkley would not have been injured. Once again, this "mistake" was negligence on behalf of Forrest General.

Forrest General's actions in creating the condition initially; Forrest General's knowledge that the dangerous condition existed; and the fact that Forrest General specifically told Dr. Holifield that they would fix the condition created a duty on their behalf which they breached.

CONCLUSION

Respectfully, the Plaintiff would request that the trial court's judgment in favor of Forrest General be reversed and judgment entered for Plaintiff on the issue of liability based on the case law and facts submitted herein. Further, the Plaintiff would request that this case be remanded to the trial court for a determination of the damages sustained by the Plaintiff.

Respectfully submitted, this the 27th day of February, 2008.

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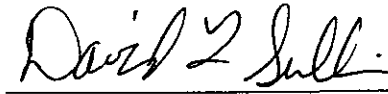
CERTIFICATE OF SERVICE

We, David L. Sullivan and Kyle Robertson, attorneys for the Appellant, do hereby certify that we have mailed by US Mail a true and correct copy of the foregoing Appellant's Rely Brief to:

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Honorable Robert B. Helfrich
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This the 27th day of February, 2008.



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CERTIFICATE OF MAILING

We, the undersigned, David L. Sullivan and Kyle Robertson, Attorneys of Record for Appellant in Cause No: 2007-CA-00746 do hereby certify that pursuant to Mississippi Rules of Appellant Procedure, We have this day mailed the original and three (3) copies of the foregoing Appellant's Reply Brief, by placing same in United States mail, postage pre-paid to:

Ms. Betty Sephton
Clerk of the Mississippi Supreme Court and the Court of Appeals
Post Office Box 249
Jackson, MS 39205-0249

This the 27th day of February, 2008.



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KYLE ROBERTSON, Co Counsel