IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
2016-CA-01300

WILLIAM A. MCDANIEL and KIM MCDANIEL — **APPELLANTS**

v.

WAYNE E. FERREL, JR. and LAW OFFICE OF WAYNE E. FERREL, JR., PLLC — **APPELLEES**

APPEAL FROM THE CIRCUIT COURT OF HINDS COUNTY, MISSISSIPPI

BRIEF OF APPELLEES WAYNE E. FERREL, JR. AND THE LAW OFFICE OF WAYNE E. FERREL, JR., PLLC

J. WILLIAM MANUEL (MBN 9891)
MICHAEL L. COWAN, JR. (MBN 104868)
BRADLEY ARANT BOULT CUMMINGS LLP
One Jackson Place
188 East Capitol Street, Suite 400
Post Office Box 1789
Jackson, MS 39215-1789
Telephone: (601) 948-8000
Facsimile: (601) 948-3000
Attorneys for Appellees
Wayne E. Ferrell, Jr. and
Law Offices of Wayne E. Ferrell, Jr., PLLC

Attorneys for Appellees Wayne E. Ferrell, Jr. and Law Offices of Wayne E. Ferrell, Jr., PLLC

ORAL ARGUMENT REQUESTED

Appellees, Wayne E. Ferrell, Jr. and Law Office of Wayne E. Ferrell, Jr. PLLC, do not request oral argument in this appeal. The facts are undisputed and the Circuit's grant of summary judgment in favor of Appellees was based on familiar legal concepts. Oral argument will not aid the Court in applying the settled rules of law at issue in this appeal.

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. William McDaniel, Appellant;
2. Kim McDaniel, Appellant;
3. Wayne E. Ferrell, Jr., Appellee;
4. Law Office of Wayne E. Ferrell, Jr. PLLC; Appellee
5. William Lee Guice, III, Esq., Attorney for Appellant;
6. Maria Martinez, Esq., Attorney for Appellant;
7. Rushing & Guice, PLLC, Attorneys for Appellant;
8. J. William Manuel, Esq., Attorney for Appellee;
9. Michael L. Cowan, Jr., Esq., Attorney for Appellee;
10. Bradley Arant Boult Cummings, LLP, Attorneys for Appellee; and
11. Honorable Judge Henry L. Lackey, Senior Status Judge.

This the 21st day of June, 2017.

s/ *Michael L. Cowan*
Michael L. Cowan

TABLE OF CONTENTS

Contents **Page**

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

STATEMENT OF THE ISSUES

This is an appeal in a legal malpractice action taken by the Plaintiffs/Appellants William McDaniel ("McDaniel") and Kim McDaniel ("Kim") (collectively "the McDaniels" or "Appellants")[1] from the Hinds County Circuity Court, where the trial court entered summary judgment in favor of Defendants Wayne E. Ferrell, Jr. and the Law Office of Wayne E. Ferrell, Jr., PLLC (collectively "Ferrell" or "Appellees").

On August 16, 2016, the Hinds County Circuit Court entered a judgment in favor of Ferrell, dismissing all of the McDaniels' claims against Appellees. The McDaniels now take this appeal.

This appeal presents the following questions:

I. Whether the trial court correctly found McDaniel was the sole proximate cause of his injuries because he failed to turn off the power to high-voltage equipment before attempting to perform maintenance on the system, and therefore could not have been successful in the underlying litigation;

II. Whether, in the alternative only, the trial court's order is supported by the following alternate-sustaining grounds:

(1) the McDaniels' claims against Ferrell are time-barred by Mississippi's three year statute of limitations for legal malpractice actions; and

(2) Ferrell is entitled to summary judgment because McDaniel could not have succeeded in the underlying litigation against any of the entities he claims Ferrell should have sued because each of the potential defendants were immune from liability.

[1] For the sake of simplicity and because Kim McDaniel's claims are derivative of McDaniel's claims, throughout this Brief, Ferrell simply refers to McDaniel for both appellants unless otherwise specifically noted.

STATEMENT OF THE CASE

I. Nature of the Case and Proceedings in the Court Below

This is a legal malpractice action where McDaniel has sued his former lawyer, Ferrell. This suit arose from Ferrell's representation of William and Kim McDaniel in an underlying case styled, *William A. McDaniel v. Howard Industries, Inc., et al.*, cause no. 2009-80-CV9, which was filed in the Circuit Court of Jones County, Mississippi. McDaniel, a technician with the Federal Aviation Administration ("FAA), hired Ferrell to represent him after he (McDaniel) received an electric shock while changing a fuse to a high-voltage runway-lighting system at the Jackson Airport on September 18, 2006. R.15-16, 264-266. Although McDaniel had changed this same fuse numerous times before without incident, on the day of his injury, McDaniel failed to shut the power off to the system, which caused him to receive the shock.[2] R. 1425-27. McDaniel asked Ferrell to pursue claims against several entities as a result his injury. R. 266.

On September 17, 2009, Ferrell filed suit on behalf of McDaniel, and later amended the complaint to add a loss of consortium claim on behalf of Kim McDaniel, then McDaniel's wife. R. 305-06, 334-77. After Ferrell experienced difficulty developing the case, the trial court dismissed the action for lack of prosecution.

In May 2014, McDaniel sued Ferrell claiming he breached his duty of care by failing to name certain entities as defendants in the underlying suit. R. 14-39. In April 2015, Ferrell moved for summary judgment on the basis that McDaniel was the sole proximate cause of his injuries and consequently could not have prevailed in the underlying action. *See* R. 5.

In response to the first motion for summary judgment, McDaniel requested additional time for discovery pursuant to Mississippi Rule of Civil Procedure 56(f). R.563-82. McDaniel's motion

[2] The McDaniels throughout their brief refer to McDaniel as having been electrocuted. The term "electrocuted" means death by electric shock. McDaniel did not die from the electric shock he received, and therefore, Ferrell refers to the incident as an electric shock in this brief.

was granted (R. 621-23), and extensive discovery ensued, including numerous depositions. *E.g.* R. 10-11. After a year of additional discovery, on April 11, 2016, Ferrell filed his second motion for summary judgment, again arguing, *inter alia*, that McDaniel's admitted failure to turn the power off before attempting to change the fuse was the sole proximate cause of his injuries, and therefore, he would not have prevailed in the underlying case and could not satisfy the case-within-a-case standard. R. 625-838.

In August 2016, after briefing by the parties and a hearing on the motion for summary judgment, the Hinds County Circuit Court (Honorable Henry L. Lackey presiding) entered judgment in favor of Ferrell on all of claims. R. 1425-27.

McDaniel now appeals.

II. Statement of Relevant Facts

A. McDaniel failed to de-energize the system.

The material facts are undisputed. At that time of the underlying incident, McDaniel was working as an airway-systems specialist for the FAA. McDaniel was an experienced FAA technician, with nearly 20 years of experience working on runway-lighting systems. R. 716 (he began working for the FAA in 1989). McDaniel had been trained on the system at issue, and he had worked on and inspected it numerous times before his accident. R. 717-718, 721. In McDaniel's own words, "it was [his] system." R. 720 at 61:19.

On the day of the incident, McDaniel was not scheduled to work, but was on call. Late in the morning, before lunch, McDaniel received a call from his boss at the FAA, telling him that a fuse to one of the runway lights had blown, and they needed him to come in and change the fuse. *See* R. 754. This was not out of the ordinary. McDaniel was often on call when not at work. In fact, McDaniel testified he had received similar calls and performed this exact same task at least

five times without incident. R. 728 at 83:1-17. The FAA called McDaniel on this day because he was the one trained to replace this fuse. R. 728 at 83:22-25.

McDaniel knew he alone was responsible for turning the power off, and he knew failing to do so was dangerous. *See* R. 731 at 102:8 ("where I was supposed to pull the fuses" to turn off the power); 738 at 222:22-24 (acknowledging he knew it was important to de-energize the system). Despite having safely performed this task many times before under virtually identical conditions, on the day of his injury this was a step he failed to execute. R. 732 at 105:11-17. When he arrived at the airport, McDaniel says he failed to notice the main power transformer where he was supposed to cut the power off.[3] R. 731. McDaniel then went into the housing unit where the equipment was kept to change the fuse, as he had done at least five times before without incident. R. 727-28. On this day, however, despite his experience, training, and knowledge of the danger, McDaniel failed to turn off the power. *E.g.* R. 731 at 102:8; 732 at 105:11-17 (stating he "obviously" did not de-energize the system); 734 (he forgot to turn off the main power); *see also* R. 754-58 (FAA concluded McDaniel's failure to de-energize the system and to adhere to FAA procedures and OSHA regulations caused the electric shock). As a result, while attempting to change the fuse, McDaniel came into contact with an energized wire and received an electric shock. R. 822, 734.

The difference between the time McDaniel was shocked and all the prior times McDaniel had changed the fuse without incident was solely that McDaniel forgot to disconnect the power from the transformer that fed electricity into the building where McDaniel was to replace the fuse. R. 754-758. Had McDaniel ensured the power was off as he had done every time before, he would not have been injured. *See e.g.* R. 754-58.

[3] McDaniel claims he failed to notice the transformer because his boss had parked his truck in front of the equipment. R. 731.

B. McDaniel hired Ferrell to pursue claims related to his electric shock.

After his accident, McDaniel hired Ferrell to pursue a lawsuit related to this incident. At that time, McDaniel provided Ferrell with a narrative of the events that led to his electrical shock. R. 331-33. In the narrative, McDaniel acknowledged he failed to de-energize the system. *See* R. 332 (admitting he failed to notice the transformer where he was supposed to de-energize the system). He also noted that he thought the fuse he was to replace the day of his injury began having issues after construction was completed on the airport runway. *Id.*

Ferrell filed suit on behalf of McDaniel in September 2009, naming as defendants Howard Industries, Inc., Godfrey Systems International, Inc., G.S.I., Inc.; Godfrey Engineering, Inc., and The B.F. Goodrich Company. R. 334. On November 30, 2009, Ferrell filed an amended complaint adding Kim McDaniel as a plaintiff with a claim for loss of consortium. R. 63-85. Ultimately, the circuit judge dismissed the underlying suit for lack of prosecution in August 2013.

C. McDaniel sued Ferrell, and the trial court granted Ferrell summary judgment because McDaniel was the sole proximate cause of his injury.

The McDaniels filed this action against Ferrell on May 9, 2014, claiming Ferrell was negligent in representing the McDaniels in the underlying case. R. 14-39; 302-28. Ferrell subsequently filed a motion for summary judgment, arguing that because McDaniel admits he failed to de-energize the transformer before attempting to change the fuse, he was the proximate cause of his injuries. *See* R. 5. At the time of that motion, the parties had not completed discovery, and the circuit court judge granted the McDaniels' Rule 56(f) motion to allow them additional time to conduct discovery regarding the issue of causation. R. 621-23.

After nearly a year of additional discovery, McDaniel was no closer to being able to show that someone other than himself was the proximate cause of his injuries. That failure prohibited him from showing that but for any alleged negligence by Farrell, he would have been successful

in the underlying suit. Because no one other than McDaniel was the proximate cause of his injuries, Ferrell filed a second motion for summary judgment, which was granted. R. 625-33.

The trial court found that McDaniel was the sole proximate cause of his injuries due to his admitted failure to de-energize the system. R. 1427. The court noted that McDaniel had changed the same fuse numerous times without incident when McDaniel followed the proper procedures and de-energized the system. R. 1426-27. The court also found that McDaniel knew of the danger in changing the fuse while the system was energized and that McDaniel knew it was his responsibility to de-energize the system prior to working on the equipment. R. 1426-27. As such, McDaniel's admitted failure to turn the power off was the sole proximate cause of his injuries. R. 1426-27. Consequently, the court found McDaniel could not have succeeded in the underlying action, and that Ferrell was entitled to summary judgment. R. 1427.

McDaniel now appeals. The basis of McDaniel's appeal is the mistaken belief that this case presents an issue of comparative fault. McDaniel argues that his negligence was just one cause of his injuries, and that a jury could apportion fault to others. This argument is incorrect because it ignores the fact that had McDaniel done what he knew he was supposed to do – turn off the power – he never would have been injured. As such, the trial court correctly entered summary judgment in favor of Ferrell.

SUMMARY OF THE ARGUMENT

McDaniel, a former FAA systems specialist, complains that his attorney, Ferrell, failed to sue the proper defendants after McDaniel was shocked while attempting to change a fuse to a runway-lighting system at the Jackson Airport. Although McDaniel had changed this same fuse numerous times before without incident when he followed proper procedures, on the day of his injury, McDaniel failed to shut the power off to the system. This caused him to receive an electric shock.

McDaniel has the burden to prove that, but for Ferrell's alleged negligence, McDaniel would have been successful in his underlying personal injury suit. McDaniel, however, admits that he failed to de-energize the high-voltage-runway-lighting system, in violation of federal regulations and FAA procedures, prior to attempting to change the fuse. This caused McDaniel's injury. As such, Ferrell moved for summary judgment, arguing that McDaniel's own confessed negligence was the sole proximate cause of his injuries. Thus, McDaniel would not have prevailed in his underlying suit.

McDaniel had over 20 years of experience, he was trained on the system at issue, and he routinely inspected it. On the day of his injury, he was called in to replace the blown fuse because he was the employee trained to do this job. This was a task McDaniel had completed many times before without incident when he remembered to de-energize the system. Because of his training and experience, McDaniel knew the system was to be de-energized before working on the equipment, he knew it was his responsibility to de-energize the system, and he knew how to de-energize the system.

On the day of his injury, however, McDaniel admittedly failed to turn off the power to the system. While attempting to change the fuse, he came into contact with an energized part of the equipment, received an electric shock, and was injured.

McDaniel admits he failed to de-energize the system, although he knew to do so and had properly and safely done so many times before. His negligence was an intervening cause, cutting off any claim that his injuries were caused by the alleged negligent acts or omissions of others. His negligence rendered any other alleged negligent acts remote and non-actionable as a matter of law. As such, it would have been impossible for McDaniel to have succeeded in his underlying suit and, therefore, Ferrell was entitled to summary judgment.

The trial court's order of summary judgment also is supported by alternative-sustaining grounds. First, McDaniel knew of his potential claims, but failed to file them with the three year statute of limitations. Second, Hemphill and all subcontractors, as well as the Jackson Municipal Airport Authority ("JMAA") – the entities McDaniel claims Ferrell should have sued – were immune from liability. While the lower court did not reach either of these matters, as discussed below, they each provide an independent basis to affirm summary judgment.

STANDARD OF REVIEW

Mississippi appellate courts review *de novo* the entry of summary judgment. *Wilbourn v. Stennett, Wilkinson & Ward*, 687 So. 2d 1205, 1213 (Miss. 1996). "There is no violation of a party's right to trial by jury when judgment is summarily entered in cases where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." *Id.* (citing *Brown v. Credit Center, Inc.*, 444 So. 2d 358, 362 (Miss. 1983)).

"To survive summary judgment, the non-moving party must produce specific facts showing that there is a genuine material issue for trial." *Id.* at 1213-14 (citing M.R.A.P. 56(e); *Fruchter v. Lynch Oil Co.*, 522 So.2d 195, 199 (Miss.1988)). That is, once the moving party points to an absence of proof on claims as to which the non-movant has the burden of proof at trial, the non-movant ***must*** present significant probative evidence demonstrating the existence of an issue of material fact. *See e.g., Prescott v. Leaf River Forest Prods., Inc.*, 740 So. 2d 301, 309 (Miss. 1999); *Galloway v. Travelers Ins. Co.*, 515 So. 2d 678, 683 (Miss. 1989); *Brown v. Credit Ctr., Inc.*, 444 So. 2d 358, 364 (Miss. 1983).

"The non-moving party's claim must be supported by more than a mere scintilla of colorable evidence; it must be evidence upon which a fair-minded jury could return a favorable verdict." *Id.* at 1213-14 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986)). A trial court must grant summary judgment where the non-movant

fails "to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 1214 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

ARGUMENT

I. The Trial Court Correctly Granted Summary Judgment Because the Undisputed Facts Show McDaniel Could Not Prove Anyone Other Than Himself was the Proximate Cause of His Injuries.

A. Plaintiffs' underlying negligence claim fails because McDaniel was the sole proximate cause of his injuries.

McDaniel first argues that the trial court erred in granting Ferrell's motion for summary judgment on the issue of proximate cause, *i.e.* legal cause, because McDaniel claims the issue is a matter of comparative fault for a jury to decide. Specifically, McDaniel claims that the issue of causation in the underlying suit presents a jury question. McDaniel is incorrect.

To succeed on a claim for legal malpractice, a plaintiff must establish by a preponderance of the evidence (1) the existence of a lawyer-client relationship, (2) negligence on the part of the lawyer in handling his client's affairs, and (3) proximate cause of the injury. *Luvene v. Waldrup*, 903 So. 2d 745, 748 (Miss. 2005) (citing *Wilbourn v. Stennett, Wilkinson & Ward*, 687 So. 2d 1205, 1215 (Miss. 1996)). To establish proximate cause, the plaintiff must show that, but for his attorney's negligence, he would have been successful in the prosecution of his claim. *Id.* Known as the "trial within a trial" test for establishing proximate cause in a legal malpractice case, this standard "ensures that attorneys are only held professionally liable where their failures to adhere to the standard of care actually impacted the plaintiff's interest in the case." *Crist v. Loyacono*, 65 So. 3d 837, 843 (Miss. 2011). That is, a plaintiff in a legal malpractice action must proximate cause in the underlying action in order to prove proximate cause in the malpractice suit. *Id.*

"The proximate cause of an injury is that cause which in natural and continuous sequence unbroken by any efficient intervening cause produces the injury, and without which the result

would not have occurred." *Grisham v. John Q Long V.F.W. Post, No. 4057, Inc.*, 519 So. 2d 413, 417 (Miss. 1988). "To succeed in a negligence claim, the plaintiff must prove both causation and proximate cause." *Dillon v. Greenbriar Digging Serv., Ltd.*, 919 So. 2d 172, 177 (Miss. Ct. App. 2005). "[A] defendant is not liable 'for damages which are remote or collateral, or which result from a remote, improbable or extraordinary occurrence, although such occurrence is within the range of possibilities flowing from Defendant's negligent act.'" *Id.* (quoting *Ware v. State*, 790 So. 2d 201, 214 (Miss. Ct. App. 2001)); *see also Cooper v. Ingersoll Rand Co.*, 628 F. Supp. 1488 (W.D. Va. 1986) (mine worker's failure to de-energize equipment prior to initiating repairs was negligence per se and ***the sole, proximate cause of his death***, precluding liability relating to design, manufacture, and servicing of equipment). If "another acting independently and of his own volition puts in motion another intervening cause which efficiently leads in unbroken sequence to the injuries," then the intervening cause "is the proximate cause and the original negligence is relegated to the position of a remote and, therefore, nonactionable cause." *Hoke v. W.L. Holcomb & Assocs., Inc.*, 186 So. 2d 474, 477 (Miss. 1966).

A plaintiff may not recover damages from a defendant where the plaintiff's own negligence was the sole proximate cause of his injuries. *Evans v. Journeay*, 488 So. 2d 797, 799-800 (Miss. 1986) (affirming directed verdict where plaintiff/combine operator's admitted negligence was the sole proximate cause of his own accident and alleged injuries) ("Would the injury complained of here have occurred had the employee used the instrumentalities in the proper and normal manner, to which the answer is in the negative; and since it was the employee who put in motion and followed through the improper use, the improper use became the proximate cause, relegating the condition of the sack to the position of a remote cause . . . ."); *see also Green v. Allendale Planting Co.*, 954 So. 2d 1032, 1041 (Miss. 2007) ("one who voluntarily exposed himself or his property to a known and appreciated danger due to the negligence of another may not recover for injuries

sustained thereby . . . ***one having a choice of reasonably convenient ways assumes the risk of a dangerous one, and that one who voluntarily attempts a rash, imprudent, and dangerous undertaking is to be presumed to have assumed the risk incidental thereto***.") (emphasis in original); *Etheridge v. Harold Case & Co., Inc.*, 960 So. 2d 474, 482 (Miss. Ct. App. 2007) (finding no error in a jury instruction stating that "under the law of the State of Mississippi, if a [p]laintiff is the sole proximate cause of her own injury, the [p]laintiff may not recover from another for those injuries"); *White v. Weitz*, 152 So. 484, 486 (Miss. 1934) (approving jury instruction providing "if the violation of the statute by the plaintiff was the sole proximate cause of the injury the plaintiff is not entitled to recover").

Applying this established body of law to the underlying action here, any negligence on the part of the entities McDaniel now claims should have been named as a defendant, would have been "relegated to the position of a remote and, therefore, nonactionable cause."[4] *Hoke*, 186 So. 2d at. 477.

In this instance, McDaniel is unable to demonstrate that any alleged failure on Ferrell's part negatively impacted his case, because it is undisputed that McDaniel's own negligence in failing to disconnect the high-voltage transformer caused his electric shock and related injuries and damages.[5] *See* R. 46, R. 719 at 52:7-10, 727-728 at 82:25-83:9, 733 at 109:4-10, 738 at 222:20-24. In other words, even if Ferrell had adhered to the standard of care in prosecuting the underlying

---

[4] In his Brief at 12, McDaniel argues that the caselaw cited by Ferrell in his motion for summary judgment was not applicable because a number of those cases were not "summary judgment cases." McDaniel misses the point. In the cases cited, the court found that the defendants were entitled to a judgment as a matter of law because the plaintiffs could not prove proximate cause. *E.g. Evans v. Journeay*, 488 So. 2d 797, 799-800 (Miss. 1986). Whether that occurred at the summary judgment stage or the directed verdict stage does not matter. The point is that the defendants were entitled to a judgement *as a matter of law*, as is Ferrell. Here, the facts are undisputed and as such, the issue of proximate cause was a purely legal question appropriately decided by the trial court on summary judgment. *E.g. Luvene v. Waldrup*, 903 So. 2d 745, 748 (Miss. 2005) (affirming summary judgment in favor of defendant in a legal malpractice action where plaintiff could not prove causation).

[5] Because loss of consortium is a derivative tort, McDaniel's own fault in causing his injuries is also the sole, proximate cause of any alleged loss of consortium suffered by his wife.

case (assuming for the sake of argument only that he did not), McDaniel still would have recovered nothing given that McDaniel's failure to disconnect the high-voltage transformer was the sole proximate cause of his injuries. McDaniel cannot demonstrate any conduct on the part of any other person or entity that caused McDaniel's electric shock, much less that his injury was the reasonably foreseeable result of any other party's negligence. *See Grisham*, 519 So. 2d at 417 ("The proximate cause of an injury is that cause which in natural and continuous sequence unbroken by any efficient intervening cause produces the injury, and without which the result would not have occurred."); *Hoke*, 186 So. 2d at 477 (If "another acting independently and of his own volition puts in motion another intervening cause which efficiently leads in unbroken sequence to the injuries," then the intervening cause "is the proximate cause and the original negligence is relegated to the position of a remote and, therefore, nonactionable cause.").

In *Evans v. Journeay*, the Mississippi Supreme Court held that where an employee fails to follow proper procedures and is injured as a result, the employee is the sole proximate cause of his injury. *Evans*, 488 So. 2d at 799-800. There, the plaintiff had over eighteen years of experience working around farm equipment, and was knowledgeable about the operations of certain farm machinery. *Id.* at 798. He was also familiar with various manuals regarding the equipment he worked with. *Id.* Through his experience and reading of manuals, the plaintiff came to appreciate the dangers associated with the farm equipment he used. *Id.*

Nevertheless, the plaintiff attempted to oil the drive chain of a combine tractor while the chain was engaged. *Id.* at 799. The plaintiff knew it was important to turn the tractor off before attempting to lubricate the chain and understood failing to do so posed a danger of injury. *Id.* However, instead of turning the tractor off, the plaintiff in that case tried to oil the chain while the tractor was still running. *Id.* His sleeve got caught in the chain, resulting in a broken arm. *Id.*

The plaintiff filed suit, claiming his employer was "negligent in (1) failing to provide an adequate number of co-employees, (2) failing to provide proper and suitable supervision, (3) that the area in which appellant was required to work was unsafe and hazardous, and (4) failing to properly provide maintenance and repair to defects in the machinery of which he had knowledge or which reasonably should have been discovered and repaired."[6] *Id.* at 797.

The trial court entered a directed verdict, which the Mississippi Supreme Court affirmed. The Court found that where the harm would not have "occurred had the employee used the instrumentalities in the proper and normal manner . . ." it is the employee who is the sole proximate cause of his injuries, relegating all other potential causes remote. *Id.* at 800.

The same applies here. McDaniel, just like the plaintiff in *Evans*, had nearly two decades of experience at the time of his injury, and he was knowledgeable about the equipment he maintained. R. 716 at 24:1 (started at FAA 1989), R. 730 at 97:1-2 (accident Sept. 18, 2006), R. 717-18 at 46:22-47:14 (acknowledging he was trained on the system), R. 720 at 61:19 ("it was my system"), R. 721 at 63:4-16 (stating he maintained and certified the approach light systems at issue). And just like the plaintiff in *Evans*, McDaniel knew how important it was to turn the power off before attempting to work on the equipment at issue. R. 738 at 222:22-24 ("It was definitely a good idea."). And just like the plaintiff in *Evans*, McDaniel failed to turn the power off. R. 732 at 105:1-17 (stating he "obviously" did not de-energize the system); Appellants' Brief at 15 ("Ferrell relies upon **Mr. McDaniel's post-electrocution acknowledgment that he failed to deenergize the system before replacing the blown fuse**.") (emphasis added). And just like the plaintiff in *Evans*, McDaniel nevertheless attempted to work on the equipment without cutting off the power. R. 734 at 138:11-21, R. 732 105:1-17; R. 332 (admitting he usually checked to make sure the

[6] These allegations are nearly identical to the allegations asserted by McDaniel related to his worksite injury.

power was off, but on the day of the injury, he failed to notice the transformer and failed to de-energize the system); *see also* R. 750, Nordal Clinic Medical Document ("maybe I got complacent . . . [and] forgot to turn the main power off . . . ."); R. 822, Letter from McDaniel's treating physician, Dr. Mark P. McLain to US. Dept. of Labor (indicating McDaniel "inadvertently grabbed a 600-volt transformer"). And just like the plaintiff in *Evans*, McDaniel's claims fail as a matter of law. *See Evans*, 488 So. 2d at 799-800; *see also Cooper*, 628 F. Supp. 1488 (worker's failure to de-energize equipment prior to initiating repairs was negligence *per se* and the sole, proximate cause of his death, precluding liability relating to design, manufacture, and servicing of miner).

It is McDaniel's own testimony that ***he*** failed to de-energize the system, and that on numerous other occasions he performed the very same task without incident because the power was turned off. R. 732 at 105:1-17, R. 728 at 83:1-17 (acknowledging he changed the fuse at least five previous times while the system was de-energized without issue). The only difference this time was that McDaniel failed to follow the proper procedure that he had followed numerous times before. R. 729.

This is the conclusion the FAA reached when it investigated the issue. The FAA found that the "indirect and/or basic causes" were "1) Equipment was not properly deenergized in accordance with site Lockout/Tagout Procedures . . . 3) The injured employee did not verify that the equipment was deenergized prior to proceeding with the task. . . ." R. 755-756; 29 C.F.R. §§ 1910.147, 1913.132, 1913.133 (safety regulation requiring federal employees, like McDaniel, to de-energize equipment and use lockout or tagout procedures). The inescapable conclusion is that this accident would not have happened but for McDaniel's admitted failure to follow the proper procedure and de-energize the equipment.

The lower court, just like the court in *Evans*, found that since McDaniel was the sole proximate cause of his injury, he would not have been successful in the underlying litigation and

therefore granted Ferrell's Motion for Summary Judgment. R.1425-29. There is no dispute that McDaniel failed to de-energize the system before attempting to change the fuse. This, and nothing else, was the sole proximate cause of his injury. *See Evans*, 488 So. 2d at 799-800; *see also Cedatol v. Russell Brands, LLC*, No. 2:11-CV-120-KS-MTP, 2013 WL 2385189, at *2 (S.D. Miss. May 30, 2013) (finding that one who voluntarily exposes himself to a known danger and is injured thereby may not recover for the injuries sustained) (citing *Green v. Allendale Planting Co.*, 954 So. 2d 1032, 1041 (Miss. 2007)); *see also Cooper*, 628 F. Supp. 1488 (failure to de-energize system before repairs render worker the sole proximate cause of his death). Because McDaniel cannot establish the element of causation in the underlying case, McDaniel cannot succeed on his legal malpractice claims. Therefore, summary judgment in favor of Ferrell must be affirmed.

B. Proximate cause is not a jury question when the facts are undisputed.

McDaniel's next argument that proximate cause presents a jury question is incorrect in this case because the facts are undisputed. There is no dispute that McDaniel changed the fuse in the equipment numerous times without injury when he followed the proper procedures and de-energized the system. R. 728-29. The only time McDaniel was injured was the last time when he forgot to turn off the power. R. 731-732, Appellants' Brief at 15 (confirming McDaniel failed to de-energize the system prior to attempting to change the fuse). As such, it was appropriate for the trial court to consider whether, under the undisputed facts, McDaniel was the sole proximate cause of his injuries as a matter of law.

The trial court's grant of summary judgment for Ferrell is consistent with Mississippi law. The Mississippi Supreme Court and Court of Appeals have routinely affirmed summary judgment in cases where plaintiffs in a legal malpractice action could not prove causation. *E.g.*, *Luvene v. Waldrup*, 903 So. 2d 745, 748 (Miss. 2005) (affirming summary judgment in favor of defendant in a legal malpractice action where plaintiff could not prove causation); *Jennings v. Shuler*, 147

So. 3d 847, 854 (Miss. Ct. App. 2014) (summary judgment appropriate in legal malpractice action where client-plaintiff's own negligence was the proximate cause of her injuries).

In opposition to this established law, McDaniel points to three inapplicable cases, *Mississippi Power & Light v. Merritt, Mississippi Power & Light v. Whitescarver,* and *4-County Electric Power Association v. Clardy*.

McDaniel cites to the Fifth Circuit Court of Appeals case *Miss. Power & Light Co. v. Whitescarver*, 68 F. 2d 928 (5th Cir. 1934) for the unremarkable proposition that a jury was to determine the disputed fact issue of whose negligence – an oil company worker's,in erecting a metal pole too close to power lines, or the power company workers' in failing to warn the oil company worker of the danger – was the proximate cause of the oil company worker's electrocution. Appellants' Brief at 13-14. In that case, there was a factual dispute concerning whether Whitescarver was aware that the power lines were dangerous. *Whitescarver*, at 929-30. Here, however, McDaniel admitted knew of the danger and that the high-voltage transformer should be de-energized prior to replacing the 20-amp fuse. R. 738 at 222:22-24. There also is no dispute as to whether or not McDaniel should have been warned about the danger of changing the fuse without de-energizing the transformer. He admitted knew it was dangerous, and he knew he was supposed to cut the power off. R. 738 at 222:20-24; R. 732 at 105:1-17; R. 728 at 83:1-17. Therefore, *Whitescarver* does not support McDaniel's position.

McDaniel relies on *Miss. Power & Light Co. v. Merritt*, 12 So. 2d 527 (Miss. 1943), in which the court let the jury decide whether the proximate cause of a lineman's electrocution was the lineman's failure to de-energize the wire or the foreman's failure to instruct or ensure the wire was de-energized. Appellants' Brief at 13. In fact, based on the instructions provided and the evidence presented at trial, the jury was to decide who was responsible for de-energizing the system. *Merritt*, 12 So. 2d at 529. Here, there is no question that McDaniel knew he was

responsible for de-energizing the transformer. In fact, *Merritt* shows that because McDaniel knew he was supposed to turn the power off but failed to do so, he was the sole proximate cause of his injury. *See id.*

McDaniel also points to *4-County Electric Power Association v. Clardy*, 73 So. 2d 144 (Miss. 1954); another inapplicable case. There, a well repairman was shocked while making repairs to a water well located under power lines. *Clardy*, 73 So. 2d at 145. Unlike the present case, in *Clardy* there was a factual dispute as to whether Clardy knew that the lines above the well were dangerous. *Id.* at 147. There was testimony that the uninsulated, high-voltage line (dangerous) looked similar to insulated, low-voltage lines (essentially harmless). *Id.* Importantly, Clardy testified that "he understood very little about electricity," and that "[h]e had never done any electrical work or made any study of electricity . . . ." *Id.* He further testified, he had no warning of the danger and that he thought the wire was an low-voltage, insulated "house wire[]." *Id.* As such, he did not appreciate the danger. *Id.* It was under these circumstance that the Court found that the trial court properly allowed the jury to consider the issue of proximate cause. *Id.* at 149.

The differences between the present case and *Clardy* are obvious. First, the facts here are undisputed. Unlike in *Clardy*, there is no issue of fact for the finder of fact to determine. Second, it was McDaniel's job to work on the electrical equipment, and he knew what steps he needed to take to prevent injury, *e.g.* de-energize the system. R. 755 (McDaniel received training on the system as well as safety procedures, including lockout/tagout procedures);[7] R. 728, 732. Unlike Clardy who did not know of or appreciate the danger of the situation, McDaniel was keenly aware of the danger and how to avoid it. *E.g.* R. 728; 731; 734. McDaniel was the individual responsible

[7] Lockout/ tagout procedures refer to locking equipment in a de-energized position or otherwise tagging or marking the de-energizing mechanism to ensure that the equipment remains de-energized while maintenance is performed. *See* R. 755; C.F.R. 1910.147(c).

for the safe maintenance of the electrical system, whereas Clardy was a well repairman with no connection with the use or maintenance of the wire above the well.[8] *E.g* R. 720; 728.

Finally, McDaniel, unlike Clardy, violated his own employer's (the federal government's) procedures; procedures and regulations designed to ensure the safety of federal employees. *See* R. 577-56; C.F.R. §§ 1910.147, 1913.132, 1913.133; 30 C.F.R. §§ 75.509, 75.511. As the trial court found, had McDaniel followed these procedures (of which he was intimately aware), he would not have been injured. R. 1426-27. There was no evidence in *Clardy* that the plaintiff was aware of and in violation of federal or state safety regulations specifically designed to prevent the harm that occurred like there was with McDaniel. *See id.*; R. 755-56; C.F.R. §§ 1910.147, 1913.132, 1913.133; 30 C.F.R. §§ 75.509, 75.511.

In short, none of these cases actually refutes the fact that McDaniel's own negligence was the sole proximate cause of his injuries. McDaniel knew he was supposed to de-energize the

---

[8] Many of the facts the *Clardy* Court pointed to in finding the defendants in that case contributed to Clardy's injuries, *e.g.* the placement of the wire over the well, even if similar facts existed in this case, could only point to negligence of McDaniel's employer, the FAA. For instance, the equipment McDaniel was working on was FAA equipment; the building in which the equipment was kept was an FAA facility; the air traffic controllers requesting the system be brought back on line quickly were FAA employees; the truck parked in front of the transformer was put there by McDaniel's boss, an FAA employee; the FAA was responsible for providing adequate staffing; it was the FAA's responsibility to fix any issues with the equipment; it was the FAA's responsibility to provide McDaniel personal protective gear; it was the FAA's responsibility to train McDaniel; it was the FAA's responsibility to ensure McDaniel had equipment to test whether the system wad de-energized; etc. These were all non-delegable duties of McDaniel's employer, who was immune from suit in the underlying action. *Howell v. Equip., Inc.*, 170 So. 3d 592, 600 (Miss. Ct. App. 2014) ("an employer owes its employees the nondelegable duty to provide its employees with a safe place to work."); *see also Nofsinger v. Irby*, 961 So. 2d 778, 781 (Miss. Ct. App. 2007) ("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."). As such, the only entity that could possibly be responsible for McDaniel's injuries other than McDaniel, is the FAA, which was immune from suit. *See Entergy Miss. Inc. v. Hayes*, 874 So. 2d 952 (2004); 5 U.S.C.A. § 8116 (Federal Employee Compensation Act provides exclusive remedy for injured federal employees); *see also* Miss. Code. Ann. § 11-1-66 ("No owner, occupant, lessee or managing agent of property shall be liable for the death or injury of an independent contractor or the independent contractor's employees resulting from dangers of which the contractor knew or reasonably should have known.").

system. He knew how to de-energize the system. He knew it was dangerous if he did not de-energize the system. He had de-energized the system many times before and changed the fuse without incident; however, on the day of his electric shock, he failed to de-energize the system. This was the sole proximate cause of his injury, and there were no disputed facts on this issue. All other alleged causes as a result were nonactionable, remote causes. *See Evans*, 488 So. 2d at 799-800; *Cooper*, 628 F. Supp. 1488. Consequently, McDaniel cannot show he would have succeeded in the underlying litigation, and therefore, summary judgment should be affirmed.

C. Comparative negligence is not the issue in this case.

McDaniel's third argument is that this case presents an issue of comparative fault. While Ferrell does not dispute that comparative fault is generally a question for the jury, here the question is one of proximate cause, and McDaniel's admissions conclusively establish that he was the sole proximate (legal) cause of his injury. *See, e.g., Hoke*, at 477 (If "another acting independently and of his own volition puts in motion another intervening cause which efficiently leads in unbroken sequence to the injuries," then the intervening cause "is the proximate cause and the original negligence is relegated to the position of a remote and, therefore, nonactionable cause."); *Evans*, at 799-800 (affirming directed verdict where plaintiff-combine operator's admitted negligence in failing to turn off the equipment before attempting maintenance was the sole proximate cause of his injuries).

McDaniel's argument simply ignores that his own negligence was an intervening cause, cutting off liability of any prior negligent act.[9] *Evans*, 488 So. 2d at 799-800; *Hoke*, 186 So. 2d at. 477; *Cooper*, 628 F. Supp. 1488.

[9] McDaniel's suggestion that his negligence was concurrent with the negligence of others, Appellants' Brief at 17, is patently incorrect. The construction work McDaniel complains of was completed well before his injury and, to the extent any issues existed after the construction, all of those conditions were present the five times McDaniel safely changed the fuse before. R. 719, 727-29.

The case *Cooper v. Ingersoll Rand Co*., 628 F. Supp. 1488 (W.D. Va. 1986) is on point. There, Cooper was killed when attempting to perform maintenance on a machine he and his co-workers failed to de-energize, as required by federal regulations. *Cooper v. Ingersoll Rand Co.*, 628 F. Supp. 1488, 1490 (W.D. Va. 1986) (citing 30 C.F.R. §§ 75.509, 75.511 and 75.1725(c), federal safety regulations requiring federal employees to de-energize mine equipment prior to performing maintenance). The plaintiff argued that the case presented a question of contributory negligence, because according to the plaintiff, the equipment was defectively designed, improperly maintained, and was improperly rebuilt prior to the accident.[10] *Id.* at 1494.

The court noted that causation is generally a jury issue, **but** "**when the facts are undisputed and fair minded men could draw only one inference therefrom, negligence is a question of law to be determined by the court rather than by the jury**." *Cooper*, 628 F. Supp. at 1491 (emphasis in original). Because the facts were undisputed, the court properly concluded that the issue of causation was for the court to determine as a matter of law. *Id.*

The court found that because Cooper failed to follow proper procedures as set forth by federal regulation, his actions were negligence *per se*, meaning it was undisputed Cooper breached the standard of care. *Id.* at 1492-93 (finding no legitimate reason for failing to follow federal regulations). The court then turned to proximate cause, noting that "an entirely independent, intervening wrongful act breaks the chain of causation and becomes the sole proximate cause of the accident and supersedes the antecedent negligence of a defendant." *Id.* at 1493. As such, Cooper's failure to de-energize the equipment was the sole proximate cause of his injuries. *Id.*

The court further provided that there was no contributory negligence as a matter of law because Cooper's failure to de-energize the system was an independent intervening force and that intervening force was caused by Cooper's negligence. *Id.* at 1494. Accordingly, the court found

---

[10] These are essentially the same arguments set forth by McDaniel in this action.

that any negligence other than Cooper's failure to de-energize the equipment was a remote, non-actionable circumstance. *Id.* ("The alleged improper design and any negligence possibly involved in manufacture and rebuilding is merely a circumstance of the accident and at best only a remote cause thereof."). The court found "that the mandatory safety regulations were not followed [by Cooper] and that such negligence was an entirely independent act which the defendants neither brought about nor had control over." *Id.* As such, "the court [found] that the direct and proximate cause of Cooper's death was the failure to de-energize the mining machinery before undertaking repairs." *Id.* Accordingly, the court entered summary judgment in favor of the defendants, adding that it would be "utter sophistry" to apply a contributory negligence analysis to a case such as this. *Id.*

The same applies here. Not only are the facts of *Cooper* nearly identically to this action, the law applied in *Cooper* is consistent with Mississippi law. *E.g. Evans*, 488 So. 2d at 799-800 (reaching the same conclusion as the court in *Cooper* under Mississippi law); *Entergy Mississippi, Inc. v. Hayes*, 874 So. 2d 952 (Miss. 2004). Here, just like in *Cooper* and *Evans*, the facts are undisputed and only McDaniel was responsible for failing to de-energize the equipment prior to maintenance. Had McDaniel turned the power off as he had done at least five times before, he would not have been shocked. In *Cooper* and *Evans*, under circumstances that mirror the current matter, the courts found the failure to de-energize the equipment to be the sole proximate cause of the injury, *i.e.* there was no contributory negligence. *Cooper* and *Evans* are on point, and the trial court's opinion and order are consistent with these cases and should be affirmed.

D. Evidence of negligence on behalf of others involved in the construction project is, at best, a remote cause.

1. The affidavit of John Beebe fails to establish any genuine issue of material fact.

For the first time in this litigation, McDaniel argues on appeal that summary judgment was improper because he was the only party to provide sworn testimony – in the form of an affidavit from his proposed electrical expert John Beebe – on the issue of proximate cause. Appellants' Brief, at 9, 18-23. McDaniel's argument is not only factually and legally inaccurate, he is also procedurally barred from raising this issue for the first time on appeal.

"One of the most fundamental and long established rules of law in Mississippi is that the Mississippi Supreme Court will not review matters on appeal that were not raised at the trial court level." *Mississippi Transp. Comm'n v. Adams ex rel. Adams*, 197 So. 3d 406, 416 (Miss. 2016) (quoting *Shaw v. Shaw*, 603 So.2d 287, 292 (Miss.1992)). Because McDaniel did not make this argument to the lower court, he is procedurally barred from making it now. *Id.*; *Fowler v. White*, 85 So. 3d 287, 293 (Miss. 2012); *Hudson v. Palmer*, 977 So. 2d 369, 380 (Miss. Ct. App. 2007).

In the alternative only, even if McDaniel's argument was not procedurally barred, it is factually inaccurate. McDaniel claims that Ferrell offered no sworn testimony on the issue of proximate cause. Appellants' Brief at 9. This claim ignores McDaniel's own sworn deposition testimony where he admits he failed to de-energize the system. *E.g.* R. 732, 734, 738. McDaniel's argument also ignores the other record evidence that was before the trial court, such as the FAA report that found that McDaniel's failure to de-energize the system caused his injury. R. 754-61.

Moreover, where the facts are undisputed, as they are here, the determination of proximate cause, *i.e.* legal cause, is an issue of law for the trial court to determine, not a fact issue where expert testimony may help the trier of fact. *See, e.g.*, *Ready v. RWI Transportation, LLC*, 203 So. 3d 590, 595 (Miss. 2016) (where the facts are undisputed, proximate cause is a question of law).

Here, the facts are undisputed, and as such, the opinion of an expert would have been no help to the trial court in its determination of a question of law. *See id.*

This is particularly true here given that the legal opinions offered by McDaniel's hired electrical expert are incorrect. McDaniel's proposed electrical expert is Mr. John Beebe. On appeal, McDaniel argues that Beebe's affidavit and report create a factual dispute as to legal causation. This is incorrect for a host of reasons.[11]

First, as a matter of law, none of the supposed contributing causes noted by Beebe negate the established fact that, but for McDaniel's failure to de-energize the system, the accident never would have happened. Therefore, all other alleged negligent acts were merely circumstances, and not a proximate cause of McDaniel's injuries. This is a question of law, which requires no expert opinion from an electrical engineer. As such, Beebe's opinions on causation are due no consideration by the Court, especially in light of the fact that Beebe's opinions on legal cause are wrong as a matter of law. *See supra* Section II; *see also, e.g.*, *RWI Transportation*, 203 So. 3d at 595.

Second, Beebe attempts to blame the Jackson Municipal Airport Authority ("JMAA") for a number of alleged "short comings"; none of which as a matter of law are attributable to the JMAA.[12] Beebe blames the JMAA for not properly troubleshooting and fixing the fuse prior to McDaniel's accident in violation of OSHA regulations. Appellants' Brief at 19-21; R. 944. Beebe also alleges that the JMAA was responsible for not having adequate lighting in the FAA facility, not providing McDaniel with test equipment and personal protective equipment, for not scheduling

---

[11] Ferrell also directs the Court's attention to the section of Ferrell's rebuttal memorandum brief in support of his motion for summary judgment, at R. 1407-11, that addresses Beebe's affidavit and report, which Ferrell hereby adopts and incorporates in to this brief in full.

[12] Of course, the Court need not consider any of Beebe's opinions on this point for the reasons noted above. Nevertheless, Ferrell will briefly address Beebe's opinions.

sufficient FAA staff, and for not properly training McDaniel on lockout/tagout procedures.[13] Appellants' Brief at 20-21.

It is undisputed that the FAA, not the JMAA, was responsible for the maintenance of the runway-lighting system at issue and that McDaniel was one of the FAA employees involved in that maintenance. *E.g.* R. 718 (FAA trained McDaniel on the system); R. 720-21 (McDaniel and other FAA employees were responsible for the approach lighting system); R. 722-26 (FAA had to approve the construction, which McDaniel participated in); R. 728 (FAA and McDaniel did maintenance on the system). As such, it was the FAA and McDaniel, not the JMAA, that was in violation of OSHA regulations.[14] *Hayes*, 874 So. 2d at 956; *Cooper*, 628 F. Supp. at 1492-93**.**

The FAA, as McDaniel's employer, had a nondelegable duty to provide McDaniel with a reasonably safe work environment, and the JMAA cannot be liable for the FAA's failures.[15] *See Howell v. Equip., Inc.*, 170 So. 3d 592, 600 (Miss. Ct. App. 2014) ("an employer owes its employees the nondelegable duty to provide its employees with a safe place to work."); *see also Nofsinger v. Irby*, 961 So. 2d 778, 781 (Miss. Ct. App. 2007) ("As an exception to the general rule

---

[13] McDaniel worked for the FAA, not the JMAA. R. 726.

[14] It is worth noting that the JMAA had no control over McDaniel as a FAA employee, and therefore is not responsible for McDaniel's and the FAA's violations of OSHA regulations. See Mississippi Code Section 11-1-66, providing: "No owner, occupant, lessee or managing agent of property shall be liable for the death or injury of an independent contractor or the independent contractor's employees resulting from dangers of which the contractor knew or reasonably should have known."

[15] McDaniel has acknowledged in this litigation that he violated the OSHA regulations he now claim the JMAA violated. As demonstrated in the FAA Accident Investigation Report, which the McDaniels attached to their Complaint, McDaniel has "extensive experience" with the ALSF-II facility, and it was his "primary workload." R. 437 (Plaintiffs' Amended Complaint, Ex. J at § 1.B). **McDaniel had completed sixteen hours of electrical safety training, including lockout/tagout procedures and personal protective equipment at the time of his accident.** *Id.* at § 7.A. The cause of the accident was McDaniel's failure to de-energize the equipment as required by OSHA regulations found at 29 C.F.R. § 1910.147(c), (d) and certain FAA Orders and the General Maintenance Handbook for National Airspace Systems Facilities. *Id.* at § 7.C. McDaniel failed to use personal protective equipment, also required under OSHA regulations and FAA orders. *Id.* McDaniel simply cannot show any facts to refute that he was the sole, proximate cause of his own injuries. *See, e.g., Evans*, 488 So. 2d at 799-800; *Cedatol v. Russell Brands, LLC*, No. 2:11-CV-120-KS-MTP, 2013 WL 2385189, at *2 (S.D. Miss. May 30, 2013) (one who voluntarily expose himself to a known danger and is injured cannot recover). McDaniel repeated OSHA violations also were negligence *per se*. *Cooper*, 628 F. Supp. 1488.

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."). Because Beebe assigns blame to the JMAA in direct contradiction of Mississippi law, the Court should disregard Beebe's erroneous opinions.

Beebe also makes the wildly speculative assertion that because Hemphill's contract contained a liquated damages clause – a clause ubiquitous in construction contracts[16] – this "may have" contributed to McDaniel's injury. Appellants' Brief at 21, R. 946. Such baseless conjecture can never rise to the level of a proximate cause of McDaniel's injuries. *Wright v. R.M. Smith Investments, L.P.*, 210 So. 3d 555, 558 (Miss. Ct. App. 2016), reh'g denied (Feb. 7, 2017) ("The facts upon which the expert bases his opinion or conclusion must permit reasonably accurate conclusions as distinguished from mere guess or conjecture.") (quoting *Mississippi Transp. Comm'n v. McLemore*, 863 So. 2d 31, 35 (Miss. 2003)).

Finally, even assuming there were facts in the record to support Beebe's allegation that Hemphill and McInnis, the electrical subcontractor on the project, mis-wired the transformer, which "possibly" damaged the subject service conductors such that rain fall could cause the fuse to short out, this mere *possibility*, is insufficient to create an issue to fact. *Belesky v. City of Biloxi*, 412 So. 2d 230, 233 (Miss. 1981) (finding expert opinion must conclude a causative fact was probable, and a mere possibility is tantamount to "simple guesswork or conjecture.") And, even if Beebe's simple guesswork was true, the mis-wiring can only be said to have created a condition

[16] *See e.g.*, 6 Bruner & O'Connor Construction Law § 19:52 (providing list of case and authority on liquidated damages clauses in construction contracts).

for McDaniel's injury to occur but did not put in motion McDaniel's confessed failure to de-energize the equipment. *Entrican v. Ming*, 962 So. 2d 28, 36 (Miss. 2007); *Hoke*, at 477. And the same is true for all of the allegations in Beebe's opinion.

McDaniel's reliance on *Entergy Mississippi, Inc. v. Hayes*, 874 So. 2d 952 (Miss. 2004) also is misplaced. McDaniel claims that this case supports his claim that because he offered the affidavit of Beebe, summary judgment was somehow improper. However, *Hayes* does not say this, and in fact, supports summary judgment in favor of Ferrell.

Hayes was injured when a metal pole he was holding came into contact with an overhead electrical wire.[17] In *Hayes*, the power company hung its power line in a manner that violated safety regulations, which the Court found was negligence *per se*. *Id.* at 956. The Court then found that the defendant was properly found to be partially liable for Hayes's injuries because power companies are held to a higher standard than others and that it was foreseeable that its violation of safety regulations could result in an injury. *Id.* at 957.

Here, McDaniel violated safety regulations by failing to de-energize the system, which was negligence *per se* and the sole cause of his injuries. *See id*; R. 438-39 (finding McDaniel violated OSHA and other regulations).[18] And the facts here, unlike in *Hayes*, show that McDaniel performed the exact same tasks numerous times without injury, and that the only time he was shocked was the one time he failed to de-energize the system. As such, *Hayes* offer McDaniel no

---

[17] Unlike McDaniel, Hayes was not aware of the wire before his electrocution, and therefore did not appreciate the danger of the situation. *See id.* at 953. McDaniel, of course, knew of the danger and was responsible for taking specific steps to avoid it.

[18] McDaniel's claim in his Brief, at 23, that he was never trained on lockout/tagout procedures has no support in the record. First, McDaniel's testimony was not that he was never trained on this procedure, it was that he could not remember if he was trained on this particular procedure, although he was "familiar with the term." R. 888. Second, the FAA investigation report plainly states that McDaniel had in fact been trained on lockout/tagout procedures. R. 438.

help, and supports Ferrell's position that McDaniel's admitted failure to follow procedure and de-energize the system and use lockout/tagout procedures were the legal cause of his injury.

E. Replacing the fuse was a matter of routine, not a sudden emergency circumstance.

McDaniel next argues that the abolished sudden-emergency defense somehow requires the Court to reverse the lower court's order entering summary judgment in favor of Ferrell. *See Knapp v. Stanford*, 392 So. 2d 196, 196 (Miss. 1980) (abolishing the sudden-emergency doctrine).

Even if the doctrine were not abolished, it would provide McDaniel no relief. The sudden-emergency defense requires a "sudden peril" that limits an individual's opportunity to consider the circumstances. *Peel v. Gulf Transp. Co.*, 174 So. 2d 377, 385 (1965). Here, there was no sudden peril. McDaniel was on call and testified that he knew what the problem was as soon as he received the call at home. R. 730. McDaniel had ample time to consider the issue and the steps he needed to take to avoid injury while driving to the airport. *See* R. 728, 730.

More importantly, McDaniel had performed this very task at least five times without injury under virtually identical circumstances. R. 728-34. Simply put, it is undisputed that this was not a sudden-emergency.

F. There are no disputed material facts.

Confusingly, McDaniel's sixth argument is that there are disputed ***facts*** because the trial court cited the *Evans v. Journeay* case in its opinion. Appellants' Brief at 26-27. McDaniel claims this was error because *Evans* was not a summary judgment case. McDaniel ignores the fact that in *Evans* the trial court took the case away from the jury and entered a directed verdict, finding the plaintiff's failure to de-energize the equipment prior to attempting maintenance was the sole proximate cause of his injuries. As such, *Evans*, as discussed above, supports the trial court's finding that McDaniel's failure to de-energize the equipment before attempting maintenance was

the sole proximate cause of his injuries, entitling Ferrell to a judgment in his favor as a matter of law.

G. McDaniel was the proximate cause of his own injuries.

McDaniel's last argument is that proximate cause is a jury question. This issue has been addressed above, and we will not rehash our argument here. Suffice it to say, McDaniel knew he was supposed to the turn the power off, and he admits he did not. *E.g.* 437-39, 728-34. Based on the undisputed facts, the trial court, consistent with Mississippi law, found McDaniel's confessed negligence was the sole proximate cause of his injuries.[19] *See e.g. Evans*, 488 So. 2d at 799-800; *see also Cooper*, 628 F. Supp. at 1491-94.

II. In the alternative only, even if the Court rejects the trial court's reasoning for granting summary judgment, McDaniel's claims still fail as a matter of law.

A. Plaintiff's claims are time barred.

Even if McDaniel could establish the element of causation, his claims still fail as a matter of law because they are time barred. The crux of McDaniel's argument is that Ferrell was negligent in not naming Hemphill Construction Company ("Hemphill") or related entities, including the electrical subcontractor McInnis, as a defendant. However, McDaniel failed to file the current action with the three-year statute of limitations.

McDaniel knew the identity of Hemphill, and he knew of Hemphill's alleged role in his injuries, before he met with Ferrell in July of 2007. McDaniel certainly knew of Hemphill's alleged involvement before Ferrell filed the Complaint and Amended Complaint in the underlying case. *See* R. 331-33 (memorandum from McDaniel to Ferrell written in July 2009). It was obvious

---

[19] McDaniel also suggests that it was foreseeable that an injury would occur because the transformer was allegedly miswired, and that this renders summary judgment inappropriate. As the court in Cooper held, it would be "utter sophistry" to find that, despite federal regulations, it was foreseeable that an employee would fail to de-energize equipment, because this would ignore the inescapable truth that the negligent omission of McDaniel intervened and superseded all, if any, antecedent negligence by others. Cooper, 628 F. Supp. at 1494. Again, the circumstances were the same on the day McDaniel was injured, except that McDaniel failed to turn the power off the day he was shocked.

on the face of the complaint, which was a public record filed on behalf of McDaniel, that Ferrell had not named Hemphill nor any other construction entity as a defendant. R. 334-54. Thus, McDaniel knew or should have known on the day the underlying suit was filed, that Hemphill and others were not named as defendants.

One day after Ferrell filed the underlying suit, the statute of limitations for McDaniel to bring a claim against Hemphill, or any other unnamed defendant, expired. Consequently, McDaniel's malpractice claim accrued the day the statute of limitations against Hemphill expired, which was September 18, 2009. Miss. Code Ann. § 15-1-49. This was the day that triggered the three-year statute of limitations for McDaniel to file the current action. *See id.* As a result, McDaniel's legal claims expired on September 18, 2012.[20] *See Smith v. Sneed*, 638 So. 2d 1252, 1253 (Miss. 1994) ("We hold that the statute of limitations in a legal malpractice action properly begins to run on the date the client learns or through the exercise of reasonable diligence should learn of the negligence of his lawyer."); *see also Bradley v. Jordan, Jr.*, 182 So. 3d 439 (Miss. 2016).

B. Hemphill was immune from liability at time of the incident.

Summary judgment is also proper on McDaniel's claim that Ferrell did not name Hemphill, or any other construction company or subcontractor as a defendant, because any claims against those entities would have been futile. Under Mississippi law, a contractor is not liable for work done on behalf of a public agency after that agency accepts the work. *Higginbotham v. Hill Bros. Const. Co.*, 962 So. 2d 46, 52 (Miss. Ct. App. 2006) ("[A]fter the contractor has turned the work over and it has been accepted by a public [agency] as satisfactory, the contractor incurs no further

[20] Alternatively, McDaniel's' claims against Ferrell for not naming Hemphill or any subcontractors accrued on November 30, 2009, when Ferrell filed an amended complaint that did not name Hemphill as a defendant. Consequently, McDaniel's claims against Ferrell are time barred.

liability to third parties, by reason of the condition of the work, and that the responsibility, if any, for maintaining or using it in its defective condition, is shifted to the public [agency].").

Here, the construction work at the airport had been inspected and accepted by the FAA.[21] R. 719 at 52:7-10, 722 at 76:15-18, 723-24 at 77:5-78:2, 80:12-22. Consequently, McDaniel could not have succeed on any claims against Hemphill, or any construction company or subcontractor, in the underlying litigation.[22] *See Higginbotham*, 962 So. 2d at 52.

CONCLUSION

The Court should affirm the lower court's order granting Ferrell summary judgment because the material facts are undisputed and Ferrell was entitled to judgment as a matter of law. The underlying case cannot be distinguished from *Evans v. Journeay* or *Cooper v. Ingersoll Rand Co.* in any meaningful way. As such, McDaniel would not have been successful in the underlying litigation, and therefore, he cannot meet the but-for standard required for a legal malpractice action. The trial court's order is consistent with the law, and for the reasons discussed herein, the Court should affirm summary judgment in favor of Ferrell on all claims.

RESPECTFULLY SUBMITTED, this the 20th day of June 2017.

---

[21] The work also was presumably accepted by the Jackson Municipal Airport Authority ("JMAA") to the extent its acceptance may have been required. It is undisputed that the runway was in use at the time of McDaniel's alleged accident. Certainly, the FAA and JMAA would not allow airplanes to land on the runway if it had not be inspected and accepted as satisfactory.

[22] McDaniel testified that he, as an FAA employee, was responsible for inspecting the electrical work after construction to ensure it was to the FAA's satisfaction. R. 719, 722-26. McDaniel testified he observed what he believed to be wiring issues and instructed the contractor on how to correct the problem:

> Q. (Ferrell's counsel) Did you tell the contractors how it should be wired?
> **A.** (McDaniel) **I told them what I could see according to the schematic. And according to that they had crossed some wires.**
> Q. Did they fix it according to how you told them to get it fixed?
> **A. They got it to -- yes, I believe they did.**

R. 724-25 at 78:9-79-9. According to McDaniel, it was his responsibility to ensure the wiring "worked as advertised." R. 726 at 80:12-22. As such, McDaniel could not have recovered any damages from Hemphill in the underlying suit, and Ferrell was not negligent in declining to name Hemphill as a defendant.

By: /s/ *Michael L. Cowan*
J. William Manuel (MBN 9891)
Michael L. Cowan, Jr. (MBN 104868)
BRADLEY ARANT BOULT CUMMINGS LLP
Post Office Box 1789
Jackson, MS 39215-1789
Telephone: (601) 948-8000
Facsimile: (601) 948-3000
ATTORNEYS FOR WAYNE E. FERRELL AND LAW OFFICE OF WAYNE E. FERRELL, PLLC
Appellees

CERTIFICATE OF SERVICE

I, the undersigned attorney of record, do hereby certify that I have this the 20tht day of June, 2017 filed with the Clerk of the Court using the MEC system, which will deliver copies to all counsel of record:

William Lee Guice III
Maria Martinez
Rushing & Guice, PLLC
P.O. Box 1925
Biloxi, MS 39533
Attorneys for Appellant

and that I have caused a true and correct copy of the foregoing to be delivered to the following by United States Mail, first-class postage prepaid:

Honorable Henry Lackey
Circuit Court Judge
Post Office Box 686
Jackson, MS 39205-0686

/s/ *Michael L. Cowan*
One of the Attorneys for Appellees