IN THE SUPREME COURT OF MISSISSIPPI

No. 2017-CA-01747

GEORGE WALTMAN AND LIBERTY MUTUAL INSURANCE COMPANY
Appellants/Plaintiffs

vs.

ENGINEERING PLUS, INC.
Appellee/Defendant

Appeal from the Circuit Court of Lauderdale County, Mississippi, Cause No. 16-CV-084
The Honorable Lester F. Williamson, Jr., Circuit Judge

BRIEF OF APPELLEE ENGINEERING PLUS, INC.

ORAL ARGUMENT NOT REQUESTED

Robert A. Miller (MB #3305)
Margaret Z. Smith (MB #104178)
Kathleen I. Carrington (MB #104220)
BUTLER SNOW LLP
1020 Highland Colony Parkway, Suite 1400
Ridgeland, MS 39157
Post Office Box 6010
Ridgeland, MS 39158-6010
Tel: 601-948-5711
Fax: 601-985-4500
bobby.miller@butlersnow.com
margaret.smith@butlersnow.com
kat.carrington@butlersnow.com

ATTORNEYS FOR APPELLEE/DEFENDANT
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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following 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 disqualifications or recusal.

1. Hon. Lester F. Williamson, Jr., Lauderdale County Circuit Court Judge
2. George Waltman, Plaintiff/Appellant.
3. James A. Williams, Esq., attorney for Plaintiff/Appellant.
4. Leslie C. Gates, Esq., attorney for Plaintiff/Appellant.
5. Liberty Mutual Insurance Company, Intervenor/Appellant.
6. Lindsey B. Harris, Esq., Daniel, Coker, Horton & Bell, P.A., attorneys for Intervenor/Appellant
7. Engineering Plus, Inc., Defendant/Appellee.
8. Robert A. Miller, Esq., Margaret Z. Smith, Esq., and Kathleen I. Carrington, Esq., Butler Snow LLP, attorneys for Defendant/Appellee.

s/ Robert A. Miller
ROBERT A. MILLER (MB #3305)

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STATEMENT REGARDING ORAL ARGUMENT

The underlying facts of this case are straightforward and the applicable law is well-settled. This negligence suit arises from a worksite accident that occurred when George Waltman ("Waltman") fell through a roof on which he was working to replace. At the time of the accident, Waltman was an employee of Norman Enterprises, Inc. ("Norman Enterprises"), which had a contract with the Lauderdale County Board of Supervisors ("Lauderdale County") to replace the roof on the Ulmer Building ("the Project"). Engineering Plus was the "Project Engineer" for the Project. Waltman contends that Engineering Plus was negligent in that it failed to properly inspect the Ulmer Building and failed to properly warn Waltman of the dangerous condition of the Ulmer Building.

Under Mississippi law, however, Engineering Plus, as the Project Engineer, did not have a contractual or common law duty to inspect the Project as Norman Enterprises performed its work. Nor did Engineering Plus have a contractual or common law duty to warn Norman Enterprises' employees of any condition of the roof. Simply put, Engineering Plus was not responsible for the safety of Norman Enterprises' employees, including Waltman. Rather, Norman Enterprises, as the general contractor for the Project as well as Waltman's employer, was responsible for Waltman's safety, including warnings related to the condition of the Ulmer Building. Because Waltman cannot establish that Engineering Plus owed a duty to Waltman, Waltman's claims fail as a matter of law.

Because this case involves straight forward facts and application of well-settled law, Engineering Plus believes that oral argument is unnecessary and would not be helpful to the Court.

STATEMENT OF ISSUES

Whether a genuine issue of material fact exists as to whether Engineering Plus, either by conduct or by contract, assumed supervision of safety at the worksite.

STATEMENT OF THE CASE

Waltman appeals from summary judgment entered against him by the Circuit Court of Lauderdale County. Waltman alleges that Engineering Plus had a duty to inspect the worksite and to warn Waltman of the dangerous condition of the worksite. [R. 29 at ¶ 6]. In lieu of filing an answer, Engineering Plus moved for summary judgment because there was no evidence that Engineering Plus had assumed such duties by way of conduct or by way of contract, which defeated Waltman's claims under applicable Mississippi law. [R. 33-35]. Waltman opposed summary judgment arguing (i) that the evidence could support a jury inference that Engineering Plus knew of the danger at the worksite but failed to properly warn Norman Enterprises of such, and (ii) that a jury could conclude that the danger at the Ulmer Building was not intimately connected with Norman Enterprises' work, but if intimately connected, whether Mississippi law supports liability on the part of Engineering Plus through "control of the work." [R. 130-147].[1]

After the issue was fully briefed, the Circuit Court of Lauderdale County held a hearing on Engineering Plus' Motion for Summary Judgment. Ultimately the trial court entered judgment in favor of Engineering Plus, finding as follows:

> "In Mississippi, an engineer does not have a duty to warn construction workers and/or to inspect the worksite as work is performed and/or to ensure the workers' safety. Rather, an engineer must have assumed such a duty by way of contract or by way of conduct. No responsibility for the supervision of construction at the site was contracted for or assumed by Engineering Plus. Therefore, this Court finds that Engineering Plus had

[1] Waltman initially filed a Response to Engineering Plus' Motion for Summary Judgment *pro se*. Waltman subsequently retained new counsel and filed an Amended/Supplemental Response to Engineering Plus' Motion for Summary Judgment.

> no duty to warn Norman Enterprises or any of its workers or subcontractors of any dangers or to protect them from any harm."

[R. 180].

The instant appealed followed. [R. 181-182]. For the reasons addressed below, the Circuit Court's Order granting Engineering Plus summary judgment should be affirmed.

STATEMENT OF FACTS RELEVANT TO THE ISSUE PRESENTED

On November 20, 2012, Lauderdale County contacted Engineering Plus and requested that Engineering Plus prepare contract documents with regard to replacing the roof on several county owned structures, including the roof on the Ulmer Building. [R. 37 at ¶ 4]. Engineering Plus developed the contract documents and project details based upon the information included in the structural report, information provided by Daniels Roofing Company, as well as Engineering Plus' own observation of the roof. [R. 37 at ¶ 4, R. 41-99]. Norman Enterprises bid on the Project and was ultimately awarded the bid as the general contractor for the Project. [R. 38 at ¶ 7, R. 41-99].

The contract documents and project details set forth the responsibilities of Norman Enterprises as well as the specific work to be performed by Norman Enterprises. [R. 37 at ¶ 5, R. 41-99]. To start, the Information for Bidder explicitly provided for Norman Enterprises to "satisfy themselves of the scope of work described by *examination of the site* and a review of the project documents[.]" [R. 37 at ¶ 5, R. 45 at ¶ 5] [emphasis added]. The Information for Bidder reiterated that Norman Enterprises was "responsible for reading and being *thoroughly* familiar with the enclosed documents and referenced documents." [R. 37 at ¶ 5, R. 46 at ¶ 5] [emphasis added]. Contractors were also "STRONGLY ENCOURAGED TO VISIT THE SITE PRIOR TO SUBMITTING A BID." [R. 37 at ¶ 5, R. 46 at ¶ 7] [emphasis in original].

The Project Scope described the required work as follows:

> **<u>ULMER BUILDING SITE</u>** – Existing structure is a two story brick building constructed circa 1920. The building is designed as a MS Landmark and is listed on the National Register of Historic Places. The west end of the structure is an open drive through or parking area with a lower roof. This area is not included in the project. The upper level of the roof (approximately 6,966 sq.ft.) is included in the project scope. ***The existing upper roof is composed of wood deck beneath a built up roof. Contractor shall satisfy himself of the existing size and conditions of the project area***.
>
> **Contractor shall furnish all materials and perform all necessary labor** to complete the following:
>
> Remove existing tarps and debris; ***remove existing built up roof***
> . . .
> ***Examine wood deck with project engineer to determine if or to what extent deck repairs are needed***
> …
>
> ***Should existing conditions significantly differ from those described or detrimental to placement of the new roof be discovered, Contractor shall cease work and notify Project Engineer immediately.***

[R. 37 at ¶ 6, R. 48-49] [emphasis added].

The final contract entered by Norman Enterprises and Lauderdale County, which incorporated the bid details, specifically provided for Norman Enterprises to furnish all equipment and execute all the work contemplated by the contract. [R. at 37-38, ¶¶ 6, 8, R. 48-49, R. 54-55]. It further provided that Norman Enterprises was "**responsible for all loss or damage** arising out of the nature of the work aforesaid, or from the action of the elements, and **unforeseen obstructions or difficulties** which may be encountered in the prosecution of the same **and for all risks of every description connected with the work** for faithfully completing the whole work[.]" [R. 38 at ¶ 8, R. 54 at ¶ 5] [emphasis added].

The Notice to Proceed on the Project was issued on April 15, 2013, and Norman Enterprises began working on the Project sometime thereafter. [R. 38 at ¶ 9]. During the course

of this work, Waltman apparently stepped on a deteriorated area of the roof and was injured. [R. 29 at ¶ 4-5]. Before Waltman's accident, Engineering Plus never received any indication, from Norman Enterprises or otherwise, that the condition of the Ulmer Building roof significantly differed from that described in the contract documents or that the conditions were detrimental to placement of the new roof. [R. 39 at ¶ 10]. Additionally, once Norman Enterprises was awarded the contract, Engineering Plus never specifically visited the worksite to inspect the Project until after Waltman's accident. [R. 39 at ¶ 11].

Engineering Plus was not involved in the hiring of any of Norman Enterprises' labor that worked on the Project. [R. 39 at ¶ 12]. Nor did Engineering Plus have any involvement in the subcontractors Norman Enterprises may have hired for the Project or on what material suppliers were utilized in the Project. [R. 39 at ¶ 12]. Moreover, Engineering Plus did not instruct Norman Enterprises, their subcontractors, or the material suppliers on how or when the work should be performed. [R. 39 at ¶ 12].

Engineering Plus did not retain the right to supervise or control employees hired by Norman Enterprises or subcontractors hired by Norman Enterprises or the material suppliers utilized in the Project. [R. 39 at ¶ 13]. Neither did Engineering Plus retain the right to instruct Norman Enterprises as to how to complete the Project, so long as the work was performed capably. [R. 39 at ¶ 13]. Engineering Plus had no supervision of the subcontractors on the Project, nor did Engineering Plus coordinate the subcontractors on the Project. [R. 39 at ¶ 14]. Engineering Plus did not host or participate in safety meetings at the worksite. [R. 39 at ¶ 15]. Engineering Plus did not issue any warnings or safety instructions to the workers at the worksite, including pamphlets or handouts. [R. 39 at ¶ 15]. Engineering Plus did not have the authority to issue change orders without the Lauderdale County Board of Supervisors' approval. [R. 39 at ¶

16]. Engineering Plus could not stop the work without the Lauderdale County Board of Supervisors' approval. [R. 40 at ¶ 17].

Because the foregoing facts demonstrate that Engineering Plus did not owe Waltman a duty to inspect the worksite or warn Waltman of dangerous conditions at the worksite, summary judgment was properly entered in favor of Engineering Plus.

SUMMARY OF THE ARGUMENT

Waltman contends that Engineering Plus was negligent in that it failed to properly inspect the Ulmer Building and failed to properly warn Waltman of the dangerous condition of the Ulmer Building. [R. 29 at ¶ 6]. Waltman also alleges that Engineering Plus knew or should have known that Waltman would be subject to accident and injury in the event he walked on the roof of the building at issue. [R. 29 at ¶ 7]. Further, Waltman claims he was without notice and ignorant of the fact that the Ulmer Building was dangerous. [R. 29 at ¶ 7].

To establish negligence on the part of Engineering Plus, Waltman first must show that Engineering Plus owed him a duty to inspect the worksite and/or warn Waltman of dangers at the worksite. But under Mississippi law, project engineers do not have a duty with regard to safety at the worksite. *See McKean v. Yates Engineering Corp.*, 210 So. 3d 1037 (Miss. Ct. App. 2015). The only exception to this general rule is when a project engineer undertakes supervision at the construction project either by conduct or contract. *Family Dollar Stores of Miss., Inc. v. Montgomery*, 946 So. 2d 426, 430 (Miss. Ct. App. 2006). The undisputed facts show that Engineering Plus did not contract to supervise the construction project nor did Engineering Plus assume such a role through its conduct. Nor has Waltman presented any evidence to the contrary. This Court should therefore affirm the trial court's grant of summary judgment in favor of Engineering Plus.

STANDARD OF REVIEW

This Court "employ(s) the *de novo* standard in reviewing a trial court's grant of summary judgment" and reviews "all evidentiary matters before [it]." *Brown ex rel. Ford v. J.J. Ferguson Sand & Gravel Co.*, 858 So. 2d 129, 130 (Miss. 2003) (citing *O'Neal Steel, Inc. v. Millette,* 797 So. 2d 869, 872 (Miss. 2001)). In conducting a *de novo* review, the Court looks "at all evidentiary matters before [it], including admissions in pleadings, answers to interrogatories, depositions, and affidavits." *Id.* The non-moving party has the obligation to diligently oppose summary judgment and to establish that genuine issues exist for trial. *Grisham v. John Q. Long V.F.W. Post, No. 4057, Inc.*, 519 So. 2d 413, 415 (Miss. 1988). Thus, summary judgment under Rule 56 is appropriate when the non-moving party fails to make a showing sufficient to establish the existence of an element essential to his case and on which he bears the burden of proof at trial. *Grisham,* 519 So. 2d at 416; *see also, Evan Johnson & Sons Constr., Inc. v. State,* 877 So. 2d 360, 365 (Miss. 2004).

ARGUMENT

I. Under Mississippi Law, Project Engineers Do Not Have A Duty With Regard To Safety At The Worksite.

Waltman's only claim against Engineering Plus is negligence for failure to warn and failure to inspect. [R. 29 at ¶ 6]. To succeed on his negligence claim, Waltman must "prove by a preponderance of the evidence (1) duty; (2) a breach of that duty; (3) a reasonably close causal connection between the conduct complained of and the resulting injury; and (4) the actual loss or damage resulting to the interests of another." *Little v. Miller*, 909 So. 2d 1256, 1259 (Miss. 2005) (emphasis added). "Failure to present sufficient proof as to any one of these elements requires that the entire claim be denied." *Id.*

Importantly, to "prevail in any type of negligence action, **a plaintiff must first prove the existence of a duty**." Enterprise Leasing Co. S. Cent., Inc. v. Bardin, 8 So. 3d 866, 868 (Miss. 2009) (emphasis added). **"[W]hether a duty exists in a negligence case is a question of law to be determined by the court."** Id. Waltman's negligence claims fail because he cannot succeed on his first element of proof: duty.

A. In 2003, the Mississippi Court of Appeals determined that project engineers do not have a duty to warn construction workers of any dangers.

In 2003, the Mississippi Court of Appeals issued the first Mississippi appellate court opinion that substantively addressed the question presented in the instant appeal. *Hobson v. Waggoner Engineering, Inc.*, was a wrongful death action against a project engineer and a subcontractor in which the decedent's widow alleged that the project engineer had a duty to warn decedent of any dangers. 878 So. 2d 68 (Miss. Ct. App. 2003). The Mississippi Court of Appeals began its analysis by noting that Mississippi had very little case law which addressed the duty of an engineer or architect with regard to safety at a construction worksite. *Id.* at 71. The Court also noted that, traditionally, architects and engineers have been shielded from liability. *Id.*

After discussing and distinguishing prior case law from Mississippi as well as other jurisdictions, the Court examined the contracts between the relevant parties. *Id.* at 71-73. The Court found nothing in the contracts to indicate that the engineer had agreed to supervise safety at the worksite or that the engineer had agreed to control the means and methods of construction on the project. *Id.* at74, 76. Rather, the court found that these duties fell on the general contractor and specifically noted as follows:

> The general contractor decided who would be hired as subcontractors and material suppliers. The general contractor decided when the various subcontractors and material suppliers would perform their tasks. The general contractor was responsible

> for the supervision and coordination of the work between the subcontractors and the material suppliers. As a result, the general contractor was also responsible for the work performed by subcontractors and the materials installed in the Project. Likewise, the general contractor was responsible for the actions of subcontractors, including their employees, in the performance of their construction discipline or function.

Id. at 76.

As for the engineer's duties and responsibilities, the court noted:

> "Waggoner Engineering's primary responsibility was to make sure the general contractor delivered a finished product that was constructed consistent with the Project's plans and specifications. Both the owner/engineer agreement and owner/contractor agreement establish that any and all responsibility for construction means or methods and Project safety rests solely with the general contractor . . . and not with the Project engineer[.]"

Id.

The court also applied the seven factors, known as the "*Hanna* factors," (discussed further below) previously cited by the Mississippi Supreme Court in *Jones v. James Reeves Contractors, Inc.*, 701 So. 2d 774 (Miss. 1997) to determine if the engineer's supervisory powers extended beyond the contract provisions. The court found that they did not:

> "Waggoner Engineering did not have actual supervision or control of the work. Waggoner Engineering did not retain the right to supervise and control. The record contains minimal facts to determine Waggoner Engineering's level of participation at the construction site, but the contractual agreements are clear that its participation was to be kept at a minimum. There is no evidence presented to establish that Waggoner Engineering's participation went further than or beyond the requirements of the contractual agreements. Waggoner Engineering did not coordinate or supervise the subcontractors. Waggoner Engineering neither assumed responsibilities for safety practices nor could it issue change orders or stop work without first going through the [city]."

Based on this analysis, the Mississippi Court of Appeals found that the project engineer did not contract or otherwise assume the responsibility for the supervision of construction at the

site and therefore held that the project engineer had no duty to warn decedent or any of the general contractor's workers of any dangers.

B. In 2015, the Mississippi Court of Appeals affirmed the Circuit Court of Lauderdale County's ruling and determined that a project engineer did not have a duty to provide a safe work environment for project workers nor did the project engineer have a duty to inspect the project.

In *McKean v. Yates Engineering Corp.*, 210 So. 3d 1037 (Miss. Ct. App. 2015), eight years after deciding *Hobson v. Waggoner Engineering, Inc.*, the Mississippi Court of Appeals addressed whether project engineers had a duty to inspect a project on an ongoing basis to protect workers from injury. The appeal resulted after the trial court concluded that the defendant engineer did not assume the duty to inspect or supervise the construction and implementation of the engineering design drawings either by contract or conduct. *Id.* at 1042. The plaintiffs in *McKean*, who were employees of subcontractors injured on the job, claimed that the project engineer was negligent for failure to inspect the worksite. *Id.*

The Mississippi Court of Appeals relied on language from *Family Dollar Stores of Miss., Inc. v. Montgomery*, 946 So. 2d 426, 430 (Miss. Ct. App. 2006), which held that "[u]nless an engineer had undertaken by conduct or contract to supervise a construction project, he is under no duty to notify or warn workers or employees of the contractor or subcontractor of hazardous conditions on the construction site." *Id.* at 1044. Because the defendant engineer had not entered into a written contract that required the engineer to inspect the worksite for safety, the Mississippi Court of Appeals applied the seven factors applied in *Hobson*, 878 So. 2d at 72 to determine if the engineer's supervisory powers went beyond the provisions of the contract. *Id.* These factors, known as the "*Hanna* factors," are as follows:

(1) Actual supervision and control of the work;

(2) Retention of the right to supervise and control;

(3) Constant participation in ongoing activities at the construction site;

(4) Supervision and coordination of subcontractors;

(5) Assumption of responsibilities for safety practices;

(6) Authority to issue change orders; and

(7) The right to stop the work

After applying these factors, the court concluded that the engineer's conduct did not go beyond the provisions of the contract and upheld the trial court's grant of summary judgment in favor of the engineer. *Id.* at 1044-1045.

C. The Mississippi Supreme Court recently clarified the supervisory role of project engineers and affirmed the Mississippi Court of Appeals decision in *McKean v. Yates Engineering Corp.*, 210 So. 3d 1037.

The Mississippi Supreme Court recently granted plaintiffs' writ of certiorari following the 2015 Mississippi Court of Appeals decision in *McKean v. Yates Engineering Corp.*, 210 So. 3d 1037 and clarified the duties of architects and engineers. *McKean v. Yates Engineering Corp.*, 200 So. 3d 431, 433, 435-436 (Miss. 2016). The Mississippi Supreme Court began its analysis with a discussion of prior case law interpreting an engineer and architect's respective duties with regard to construction workers. *Id.* at 434-435. The Court then formally adopted the seven *Hanna* factors. *Id.* at 435. The Court instructed that the factors were "to be used as guidance and are not exhaustive." *Id.* The Court also reaffirmed its previous holdings that for an architect or engineer to have an affirmative duty to warn of dangerous conditions, the architect must "'by contract or conduct' take on the responsibility to maintain the safety of the construction project." *Id.* (citing *Jones v. James Reeves Contractors, Inc.*, 701 So. 2d 774, 785 (Miss. 1997)). The Mississippi Supreme Court then affirmed the trial court and the Mississippi Court of Appeals' holdings that the engineer did not have a duty to inspect nor to warn based on contract or conduct. *Id.* at 436.

II. Engineering Plus did not have a duty to warn Norman Enterprises or Waltman of any dangerous condition at the worksite. Nor did Engineering Plus have a duty to inspect the worksite.

Waltman's first argument is that Engineering Plus knew of a dangerous condition and failed to warn Norman Enterprises and/or Waltman. [Appellant's Brief at p. 7-8]. Waltman further claims there is a jury issue because Norman Enterprises says Engineering Plus did not tell Norman Enterprises that the roof was unstable and dangerous, but Engineering Plus says it did through the bid and contract documents. [Appellant's Brief at p. 7-8]. Waltman's arguments are neither here nor there because Waltman cannot first establish that Engineering Plus *had a duty to warn* Norman Enterprises and/or Waltman.

Mississippi follows § 314 of the Restatement (Second) of Torts with regard to whether an architect or engineer had a duty to warn: "the fact that an actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action." *Jones v. James Reeves Contractors, Inc.*, 701 So. 2d 774, 784 (Miss. 1997) (quoting § 314 of the Restatement (Second) of Torts). Continuing, the *Jones* Court found that the "Restatement view is the more common sense approach in our opinion, and, accordingly, is the road that we choose to travel in deciding whether [an architect or engineer has a duty to inform the construction contractor of defects inherent in the construction site of which the architect/engineer had knowledge.]." *Id.* Based on this reasoning, the *Jones* Court found that an architect did not have a duty to warn the contractor or its employees of a hazardous condition at the construction site, regardless if the architect had prior knowledge of the hazardous condition. *Id.* at 786.

This reasoning was subsequently applied to project engineers in *Hobson v. Waggoner Engineering, Inc.*, 878 So. 2d 68, 71-76 (Miss. Ct. App. 2003), wherein the Mississippi Court of Appeals held that "[u]nder the standard established in *James Reeves Contractors, Inc.*," a project

engineer generally has no duty to warn a contractor or its employees of ***any*** dangers or to protect them from any harm. The same reasoning was applied by both Mississippi appellate courts in *McKean v. Yates Engineering Corp.*, 210 So. 3d 1037 (Miss. Ct. App. 2015), *aff'd,* 200 So. 3d 431 (Miss. 2016) ("We affirm the holding of the circuit court and Court of Appeals that summary judgment . . . . was appropriate and that [the project engineer] had no duty . . . to . . . warn of defects.").

Based on the foregoing, it is immaterial whether Engineering Plus knew of the deteriorated condition of the Ulmer Building roof and failed to sufficiently warn Norman Enterprises/Waltman because Engineering Plus had no duty to warn Norman Enterprises/Waltman of *any* hazards at the construction site. As a matter of law, therefore, Engineering Plus cannot be held liable.

i. Engineering Plus did not assume a duty to warn and/or inspect by way of contract or by conduct.

The general rule that a project engineer is not responsible for safety at the worksite provided under Mississippi law is only excepted if the project engineer assumed such responsibility by way of contract or conduct. The undisputed material facts of this case undoubtedly show that Engineering Plus did not assume a duty to warn and/or inspect by way of contract or by conduct.

a. The applicable contracts demonstrate that Norman Enterprises was responsible for safety on the project, not Engineering Plus.

The analysis of whether Engineering Plus assumed the duty to warn Waltman and/or inspect the worksite and/or otherwise ensure Waltman's safety begins with review of the applicable contracts. Engineering Plus did not have a written contract with Lauderdale County for this Project nor did Engineering Plus have a written contract with Norman Enterprises. Accordingly, the only applicable contract is the contract between Lauderdale County and

Norman Enterprises. The contract demonstrates that Engineering Plus' supervision on the Project was limited and that Norman Enterprises was indeed responsible for the safety of its workers.

The contract entered by Norman Enterprises and Lauderdale County expressly provided that Norman Enterprises was: "**responsible for all loss or damage** arising out of the nature of the work aforesaid, or from the action of the elements, and ***unforeseen*** **obstructions or difficulties** which may be encountered in the prosecution of the same **and for all risks of every description connected with the work** for faithfully completing the whole work[.]" [R. 38 at ¶8, R. 54 at ¶5] [emphasis added]. The contract therefore explicitly placed safety in the hands of Norman Enterprises, including all loss or damage, *unforeseen* obstructions or difficulties, and all risks of every description connected with the work.

Additionally, the contract provided for Norman Enterprises to furnish all equipment and execute all the work contemplated by the contract. [R. at 37-38, ¶¶ 6, 8, R. 48-49, R. 54-55]. In other words, Engineering Plus' supervision was limited in that it had no say in what workers were hired, what subcontractors were hired, or what equipment and materials should be used to complete the Project. Norman Enterprises was explicitly instructed to "satisfy themselves of the scope of work described by examination of the site and a review of the project documents" and was "responsible for reading *and being thoroughly* familiar with the enclosed documents and referenced documents." [R. 37 at ¶ 5, R. 46 at ¶ 5] [emphasis added]. The Project Scope further required Norman Enterprises to "satisfy [itself] of the existing size and conditions of the project area." [R. 37 at ¶ 6, R. 48-49].

The contract also required Norman Enterprises to be aware of the conditions of the Ulmer Building. If the conditions were detrimental to the replacement of the roof, then Norman

Enterprises had an affirmative duty to cease work and notify Engineering Plus immediately. [R. 37-38 at ¶ 6, R. 48-49]. This language again made Norman Enterprises responsible for ensuring that the roof conditions were not detrimental, *i.e.* provided for Norman Enterprises to be responsible for safety on the Project.

The express conditions of the contract entered between Norman Enterprises and Lauderdale County placed responsibility for safety at the worksite squarely in the hands of Norman Enterprises. It is therefore irrelevant whether Engineering Plus warned Norman Enterprises and/or Waltman because Engineering Plus had no duty to warn.

ii. Engineering Plus did not assume the responsibility of safety on the job site by way of its conduct.

Because Engineering Plus did not assume the responsibility to supervise safety by way of contract, the analysis turns to the seven *Hanna* factors to determine if Engineering Plus' supervision went beyond the specific contract provisions. *McKean v. Yates Engineering Corp.*, 200 So. 3d 431, 435. As recently clarified by the Mississippi Supreme Court, "these factors are to be used as guidance and are not exhaustive." *Id.* Applying the *Hanna* factors to the instant case demonstrates that Engineering Plus did not assume responsibility for safe working conditions on the job site by its actions.

(1) *Actual supervision and control of the work;*

Engineering Plus was not involved in the hiring of any of Norman Enterprises' labor that worked on the Project. [R. 39 at ¶ 12]. Nor did Engineering Plus have any involvement in the subcontractors Norman Enterprises may have hired for the Project or on what material suppliers were utilized in the Project. [R. 39 at ¶ 12]. Moreover, Engineering Plus did not instruct Norman Enterprises, their subcontractors, or the material suppliers on how or when the work

should be performed. [R. 39 at ¶ 12]. In short, Engineering Plus had no actual supervision or control over the work.

(2) *Retention of the right to supervise and control;*

Engineering Plus did not retain the right to supervise or control employees hired by Norman Enterprises or subcontractors hired by Norman Enterprises or the material suppliers utilized in the Project. [R. 39 at ¶ 13]. Neither did Engineering Plus retain the right to instruct Norman Enterprises as to how to complete the Project, so long as the work was performed capably. [R. 39 at ¶ 13]. In sum, Engineering Plus did not retain the right to supervise and control the Project.

(3) *Constant participation in ongoing activities at the construction site;*

No representative of Engineering Plus specifically visited the worksite to inspect the project from the time Norman Enterprises was awarded the contract until the time of Waltman's alleged accident. [R. 39 at ¶ 11].

(4) *Supervision and coordination of subcontractors;*

Engineering Plus had no supervision of the subcontractors on the Project, nor did Engineering Plus coordinate the subcontractors on the Project [R. 39 at ¶ 14]. Engineering Plus did not decide what material suppliers were used in the Project or when the material suppliers work was to be performed. [R. 39 at ¶ 12]. Further, Engineering Plus did not direct when the subcontractor's work was to be performed. [R. 39 at ¶ 12].

(5) *Assumption of responsibilities for safety practices;*

Engineering Plus did not host or participate in safety meetings at the worksite. [R. 39 at ¶ 15]. Engineering Plus did not issue any warnings or safety instructions to the workers at the

worksite, including pamphlets or handouts. [R. 39 at ¶ 15]. Simply put, Engineering Plus took no action to so much as suggest it had assumed responsibility for safety at the worksite.

(6) *Authority to issue change orders*;

Engineering Plus did not have the authority to issue change orders without the Lauderdale County Board of Supervisors' approval. [R. 39 at ¶ 16].

(7) *The right to stop the work*

Engineering Plus could not stop the work without the Lauderdale County Board of Supervisors' approval. [R. 40 at ¶ 17].

Applying the *Hanna* factors to the instant case demonstrates that Engineering Plus did not assume the responsibility for safety on the worksite by way of its conduct. Engineering Plus' participation and responsibilities in the Project were certainly no more expansive than the engineers in *Hobson* and *McKean* where the trial courts and the appellate courts consistently granted and affirmed summary judgment in favor of the project engineers. *Hobson*, 878 So. 2d 68, 76; *McKean*, 210 So. 3d 1037, 1044-1045. Because Engineering Plus did not assume the responsibility of safety at the Project by way of conduct, it did not have a duty to warn Waltman or inspect the worksite.

III. Waltman's Remaining Arguments Have No Merit.

Waltman's Appellant brief raises numerous arguments that are irrelevant to whether Engineering Plus owed Waltman a duty to warn and/or inspect the worksite. Although well-settled Mississippi law establishes that Engineering Plus owed no duty toward Waltman, Engineering Plus will address Waltman's remaining arguments so that the court will be fully informed.

A. Waltman's description of the obvious "massive deterioration" of the Ulmer Building roof is irrelevant.

Waltman argues that an observation of the Ulmer Building roof by Engineering Plus would have alerted Engineering Plus of the "dangerous condition of the work space" and rather than warn Norman Enterprises, Engineering Plus invited Norman Enterprises to work on the roof. [Appellant's Brief at pp. 7-8]. Waltman's argument is nonsensical.

Of course Norman Enterprises was invited to work on the roof – that was the whole reason Norman Enterprises and Waltman were at the worksite in the first place. Norman Enterprises won the bid on the Lauderdale County's project to repair and replace the Ulmer Building roof. And under this contract, it was Norman Enterprises that assumed the duty of determining the method and manner of completing the work and further determining whether the "existing conditions significantly differ[ed] from those described or [were] detrimental to placement of the new roof[.]" Norman Enterprises is a professional contractor familiar with construction sites/work. They were not lay persons who Engineering Plus invited onto the roof. Rather, it was Norman Enterprises' job, by way of the contract between Norman Enterprises and Lauderdale County, to inspect and assess the extent of damage to the Ulmer Building roof.

Additionally, Waltman's detailed descriptions of the "aging blue tarps" on the building that were kept in place by "weighty bucketfuls of metal or other weighty debris" along with the absence of "the gravel overlay," which indicated a "substantial likelihood of massive water damage to the wooden deck throughout the roof and such damage to the rafters underneath," have no bearing on whether Engineering Plus had a duty to warn Plaintiff. [Appellant's Brief at pp. 8-9]. Waltman submitted his affidavit in the trial court. [RE. 93-107]. The affidavit contained seven photographs depicting portions of the roof and ceiling of the Ulmer Building. [RE. 101-107]. Waltman described what was depicted in some of the photographs as showing

"three rafters that are severely deteriorated," "five severely rotted rafters," "totally rotted decking," and "rafters that are severely rotted." [RE. 94]. Waltman claims these observations "could have been made by the naked eye." [RE. 94]. If the damage was so obvious, then why would Norman Enterprises, professional roofers, have walked on the roof? Why would Waltman have walked around on the roof and risk injury to himself? Regardless, the whole purpose of the contract and the work on the Ulmer Building roof was to repair and replace the roof. It therefore follows that the roof was damaged. And it was Norman Enterprises, not Engineering Plus, that was the expert roofing company responsible for determining the method and manner to fix that damage while providing a safe work environment for its employees.

B. Engineering Plus did not control the sequence of work.

Waltman argues, incorrectly, that Engineering Plus controlled the sequence of the work. But the contract and bid documents clearly provided that Norman Enterprises controlled the sequence of work, the manner of work, and the method of work.

The Project Scope upon which Waltman relies to argue that Engineering Plus controlled the work began with the following directives:

> **"[Norman Enterprises] *shall* satisfy himself of the existing size and conditions of the project area. [Norman Enterprises] *shall* furnish all materials and perform all necessary labor to complete the following:"**

The Project Scope ended with the following directive:

> "**Should existing conditions significantly differ from those described or detrimental to placement of the new roof be discovered, [Norman Enterprises] *shall* cease work and notify [Engineering Plus] immediately."**

[R. 37 at ¶ 6, R. 48-49] [emphasis added]. Couched between these explicit directives is a list of work to be completed on the project, which is not surprising considering the document is titled "Project Scope." [R. 47-49]. Waltman contends that the list of the scope of the project meant

that Engineering Plus controlled the work. Put differently, Waltman argues that Engineering Plus, simply by including a list of the work to be completed on the project in the "Project Scope," assumed a duty to warn. This cannot be, nor is it, the law. For that is the purpose of a project scope – to inform the contractor of the scope of the work required on the project. Nothing about the Project Scope changed the fact that Norman Enterprises was responsible for determining the manner, method, and sequence of the work.

C. The provision for a joint inspection by Engineering Plus and Norman Enterprises is irrelevant to whether Engineering Plus was responsible for safety at the work site.

Additionally, Waltman's argument that a single provision in the Project Scope providing that Norman Enterprises was to "*Examine wood deck **with** project engineer to determine if or to what extent deck repairs are needed*" created a duty to warn upon Engineering Plus is without merit. [R. 37 at ¶ 6, R. 48] [emphasis added]. This single provision was one task in a list of eleven included in the Project Scope. It was the only task that mentioned the Project Engineer. Under Mississippi law, a project engineer's minimal participation at the worksite is not enough to create a duty to warn on the part of the engineer. *See Hobson v. Waggoner Eng., Inc.*, 878 So. 2d 68, 76 (Miss. Ct. App. 2003).

Even when the provision relied on by Waltman is examined by itself, Waltman's argument fails. Waltman's argument essentially comes down to the fact that one of the tasks in the Project Scope included a reference to the "Project Engineer" who was to work ***with*** Norman Enterprises on a specific task. The express language of the provision provides that Norman Enterprises was to work ***with*** Engineering Plus; not *under* Engineering Plus. It is axiomatic that a project engineer and the general contractor of a project will have to work together on certain tasks to complete the overall project. Under established Mississippi law, this does not create a duty on the part of a project engineer for the safety of the general contractor's employees at the

worksite. *See Hobson v. Waggoner Engineering, Inc.*, 878 So. 2d 68 (Miss. Ct. App. 2003); *McKean v. Yates Engineering Corp.*, 210 So. 3d 1037 (Miss. Ct. App. 2015).

Moreover, Waltman makes much ado about the fact that the joint inspection of the wood deck was not to take place until after the tarps and debris were removed. It is common sense that the wood deck located under the built up roof could not be examined until it was exposed by removal of the built up roof. This work was at all times to be performed by the contractor which won the bid for the work, ultimately Norman Enterprises. This was not a conspiracy theory or intentional concealment on the part of Engineering Plus as suggested by Waltman. Norman Enterprises was still tasked with responsibility for the method and manner of completing the work, including its employees' safety, which is explicitly set forth by the above directives clearly laid out in the Project Scope.

D. Engineering Plus did not contract to supervise the work.

Waltman also argues that Engineering Plus had a duty to warn Norman Enterprises/Waltman because of the contract language providing that "the works shall be done under the direct supervision and to the complete satisfaction of the County Engineer or his authorized representatives." [Appellant's Brief at p. 9]. This contract language was merely reciting what the Mississippi Supreme Court has already recognized: a project engineer's "primary responsibility was to make sure that the general contractor delivered a finished product that was constructed consistent with the Project's plans and specifications." *See Hobson v. Waggoner Eng., Inc.*, 878 So. 2d 68, 76. The express language of the contract documents demonstrates that Engineering Plus and Norman Enterprises had the traditional relationship of Project Engineer and Contractor. As set forth above, Norman Enterprises was responsible for furnishing all materials and performing all necessary labor to complete the work. Norman Enterprises was to satisfy itself of the existing size and conditions of the project area; in other

words, Norman Enterprises was not to rely on any statements of Engineering Plus as to the size and conditions of the Ulmer Building roof. Norman Enterprises was also to alert Engineering Plus immediately if the conditions differed from that described. These explicit provisions unequivocally show that Engineering Plus did not contract to supervise the project work.

Nor did Engineering Plus' conduct create a duty to warn on the part of Engineering Plus. Engineering Plus did not supervise Norman Enterprise. [R. 39 at ¶¶ 11-15]. Waltman's Appellant Brief even supports this fact by complaining that Engineering Plus remained off the premises and was not present when Waltman was injured. [Appellant's Brief at p. 9]. Simply put, there are no facts to support an inference that Engineering Plus supervised the project.

E. Engineering Plus was not the owner or lessee of the property.

Without any facts or law supporting the statement, Waltman contends that "the relation of Engineering Plus to Norman [Enterprises] was that of owner-invitee." [Appellant Brief at p. 10]. Based on this wild allegation, Waltman argues that the independent contractor "intimate connection" exception applies. [Appellant Brief at p. 12]. Waltman also makes an argument based on assumption of the risk as applied to actions against land owners. [Appellant Brief at pp. 13-15]. Under Mississippi law, "premises liability is a theory of negligence that establishes the duty owed to someone injured on a landowner's premises as a result of 'conditions or activities' on the land.". *Double Quick, Inc. v. Moore*, 73 73rd 1162, 1165 (Miss. 2011). Engineering Plus was the Project Engineer. Engineering Plus did not own the premises. Nor did Engineering Plus control the premises. Accordingly, premises liability law does not apply to the instant case.

CONCLUSION

For all the reasons stated above, Engineering Plus respectfully requests the Court to affirm the ruling of the Circuit Court granting Engineering Plus' Motion for Summary Judgment. Engineering Plus seeks all further, different, or additional relief as this Court deems appropriate.

This the 21st day of September, 2018.

Respectfully submitted,

ENGINEERING PLUS, INC.

By: s/ Robert A. Miller
ROBERT A. MILLER (MB #3305)
MARGARET Z. SMITH (MB # 104178)
KATHLEEN I. CARRINGTON (MB # 104220)

ITS ATTORNEYS

OF COUNSEL:

BUTLER SNOW LLP
1020 Highland Colony Parkway, Suite 1400
Ridgeland, MS 39157
Post Office Box 6010
Ridgeland, MS 39158-6010
Tel: 601-948-5711
Fax: 601-985-4500
bobby.miller@butlersnow.com
margaret.smith@butlersnow.com
kat.carrington@butlersnow.com

CERTIFICATE OF SERVICE

I, Robert A. Miller, one of the attorneys for Engineering Plus, Inc., hereby certify that I have electronically filed the foregoing document with the Clerk of the Court using the using the Court's MEC system, which sent notification of such filing to the following counsel of record:

James A. Williams, Esq.
Post Office Box 5002
Meridian, MS 39302-5002

Counsel for Plaintiff/Appellant

Lindsey B. Harris, Esq.
Daniel Coker Horton & Bell, P.A.
Post Office Box 416
Gulfport, MS 39502

Counsel for Intervener/Appellant Liberty Mutual Insurance Company

And by U. S. Mail to the following:

Honorable Lester F. Williams, Jr.
Lauderdale County Circuit Court Judge
Post Office Box 86
Meridian, MS 39302

CIRCUIT COURT JUDGE

SO CERTIFIED, this the 21st day of September, 2018.

s/ Robert A. Miller
ROBERT A. MILLER