MISSISSIPPI SUPREME COURT
MISSISSIPPI COURT OF APPEALS

NO. 2006-TS-01819

WENDELL DAWSON — APPELLANT

VERSUS

BURT STEEL, INC., AND B & S ERECTION, INC. — APPELLEES

BRIEF OF APPELLEE

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APPEAL NO. 2006-TS-01819

WENDELL DAWSON APPELLANT

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BURT STEEL, INC., AND B & S ERECTION, INC. APPELLEES

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 Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Wendell Dawson, Appellant
2. James H. Colmer, Jr., Attorney for Appellant
3. Williams, Heidelberg, Steinberger & McElhaney, P.A., Attorneys for Appellant;
4. Burt Steel, Inc./B & S Erection, Inc., Appellee;
5. Edward C. Taylor, Attorney for Appellees;
6. David Krause, Attorney for Appellees; and
7. Daniel Coker Horton & Bell, P.A., Attorneys for Appellees.

David Krause

Attorney of record for Appellee, Burt Steel, Inc./B&S Erection Inc.

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RULE

STATEMENT OF THE ISSUE

Whether the trial court correctly determined that Dawson failed to show that any duty breached by Burt Steel/B&S Erection was the proximate cause of his accident and injuries, and therefore correctly granted summary judgment in favor of Burt Steel/B&S Erection.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This case concerns whether sufficient proof of the elements of negligence were met by the Appellant, Wendell Dawson, when he responded to Burt Steel/B&S Erection's Motion For Summary Judgment. Dawson was injured when a steel girder fell from a trailer on which he was standing. Dawson was a truck driver, and he had delivered the steel to a construction site in Waveland, Mississippi. Burt Steel/B&S Erection (hereinafter jointly referred to as "Burt Steel") was to unload the steel, but had yet to arrive on the job site. A masonry contractor, Michael Magee of Magee's Masonry, was onsite and agreed to unload the steel with a Lull forktruck. Magee successfully unloaded three trailers of steel similar to the load which was on Dawson's trailer. He then began to unload the steel from Dawson's trailer when Dawson decided to climb onto his trailer and assist. While Magee was transporting some of the steel from the trailer to a temporary storage area on the

construction site, a girder toppled over from the trailer, knocking Dawson to the ground. The girder fell on Dawson, causing him injuries.

B. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

Dawson brought suit against Mapp Construction, The Great Atlantic and Pacific Tea Company d/b/a Sav-A-Center, and Burt Steel, Inc. on December 5, 1997. Mapp Construction filed a cross-claim against Burt Steel, and later filed a third-party complaint for indemnity against B&S Erection and Magee's Masonry. The Great Atlantic and Pacific Tea Company was dismissed. Dawson filed a motion to amend his Complaint to name B&S Erection, Inc. as a defendant. Burt Steel agreed to allow Dawson to sue both Burt Steel and B&S Erection as one in the same for purposes of the suit.

Burt Steel filed its motion for summary judgment on December 18, 2002. The court ordered that additional discovery be conducted prior to ruling on Burt Steel's motion (as well as the motions for summary judgment by the other defendants). Further discovery was conducted, and Burt Steel renewed and supplemented its motion for summary judgment on April 28, 2006. Burt Steel's motion (along with Mapp Construction's motion for summary judgment) was heard by the court on May 25, 2006.

Mapp Construction settled its third-party complaint against Magee' s Masonry

and also settled with Dawson just prior to the circuit court's ruling on the summary judgment motions. At that point the only defendant remaining in the suit was Burt Steel. The court granted summary judgment in favor of Burt Steel on June 6, 2006. Dawson filed his Motion To Reconsider on June 19, 2006. The court filed its order denying Dawson's Motion To Reconsider on July 3, 2006, but neither Dawson nor Burt Steel were aware of the court's filing.

Burt Steel filed its response to Dawson's Motion To Reconsider on July 17, 2006. Once the remaining parties became aware of the court's denial of the motion to reconsider, Dawson filed his notice of appeal, by agreement with Burt Steel, on or before October 23, 2006. Dawson then served his brief on July 3, 2007, after receiving one time extension.

C. STATEMENT OF THE FACTS

On December 8, 1994, Dawson was injured after delivering a load of manufactured steel on the site where a Sav-A-Center was under construction in Waveland, Mississippi. He was employed as a truck driver by Vulcraft Steel, who manufactured the steel for Burt Steel.[1] (R. at 61.)

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[1]Burt Steel, Inc. was the supplier of the steel while B & S Erection, Inc. was to erect the building with the steel. As previously mentioned, it was agreed that the suit could proceed against both Burt Steel and B & S as one entity in order to eliminate any confusion about which entity was responsible for certain aspects of the project.

Dawson arrived at the Sav-A-Center on December 8, 1994, driving a tractor-trailer loaded with structural steel. (R. at 62.) The Sav-A-Center was being built by Mapp Construction, who had a contract with the Great Atlantic and Pacific Tea Company ("A&P") to complete the construction. (*Id.*) Mapp, in turn, subcontracted various specialty trades, including Burt Steel to supply the steel, B&S Erection for erection of the steel, and Magee Masonry for various masonry work associated with building the Sav-A-Center. Burt Steel contracted with Vulcraft to manufacture the various steel girders and other structures, and to deliver these things to the construction site.

When Dawson arrived at the job site, there were three other trailers of Vulcraft steel waiting to be unloaded. (R. at 75.) Dawson spoke to Jay Gordon, construction superintendent for Mapp Construction, asking Gordon who would unload the steel from his trailer. (*Id.*) Gordon told Dawson that there was no one on the job site to unload the trailers. (*Id.*) Jay Gordon then called Raymond Burt of Burt Steel/B&S Erection, during which a decision was made to ask the onsite masonry contractor, Magee Masonry, to unload the steel with a fork truck that

Magee had on the job site. (*Id.*; R. at 98.)[2] Magee agreed to unload the steel. Magee then unloaded three trailers of steel prior to unloading the steel from Dawson's trailer. (R. at 76.)

Dawson was sitting in the cab of his truck, talking on the telephone when Magee began to unload the steel from his trailer. (R. at 78.) Dawson testified that he felt his truck "move," so he ended his telephone conversation and stepped back to the trailer of his rig to assist Magee with the unloading. (*Id.*) No one asked Dawson to assist. (*Id.*) He did so on his own initiative. (*Id.*) Dawson knew that it was against his employer's policy for him to unload steel and knew that he could be fired for doing so. (R. at 1096.) Nevertheless, he climbed onto the trailer, then stood among the girders and directed Magee on where to place the forks of the Lull. (*Id.*)

Magee first picked up and removed a bundle of joists nearest to the edge of the trailer. (R. at 79.) Dawson stood on the trailer, between the 40-foot joist and the edge of the trailer. (R. at 80.) Magee had driven the Lull approximately 40 feet away from the trailer at the time the girder toppled over onto Dawson. (*Id.*)

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[2]There is an issue of fact as to who asked Magee to unload the steel, but that issue was not relevant for disposition of this case below and is not relevant in considering the appeal. The sole issue decided below was whether there was any proof as to what caused the steel to fall on Dawson. Since there was none, Dawson failed to show that there was an issue of material fact as to who, if anyone, breached a duty owed to him.

No one knows what caused the 40-foot girder to fall. Dawson testified that he had no idea why the girder fell. (*Id.*) Dawson's expert, Boyd Cochrane, also testified that he did not know what caused the girder to fall onto Dawson. (R. at 92.)

D. SUMMARY OF THE ARGUMENT

Dawson claims that Burt Steel was negligent in failing to unload the steel that toppled over from the trailer on which Dawson was voluntarily standing, and such failure injured him. Nothing in the record supports this claim. Dawson admits that he does not know why the steel fell. His expert, Boyd Cochrane, also admits that he does not know why the steel fell.

Dawson argues that the real cause of his injuries is that Burt Steel was not present to unload the steel. Although Magee's Masonry successfully unloaded three trailers of steel similar to the steel on Dawson's trailer, Dawson also argues Magee was not qualified to unload the steel. Nothing in the record supports either assertion. Regardless, Dawson attempts to convert the issue of whether Burt Steel breached its contract with Mapp Construction by not being present on the morning of the incident into a negligent breach of duty owed to Dawson. The two legal theories are distinct and cannot be commingled to arrive at a triable claim.

Dawson is required to put forth evidence that there is a genuine issue of material fact whether Burt Steel breached a duty owed to him and whether the breach caused Dawson to be injured. Since it is undisputed no one knows why the steel toppled over onto Dawson, he cannot show any duty otherwise owed to him and breached by Burt Steel caused him injury. It is undisputed that what ***actually*** caused him injury was the steel falling on him. It is further undisputed that despite Dawson voluntarily placing himself in harm's way, no one knows why the steel fell. It just did. Since Dawson had no disputed fact as to why the steel fell, the circuit court correctly granted summary judgment in favor of Burt Steel, and its decision should be affirmed by this Court.

E. ARGUMENT

I. THE TRIAL COURT CORRECTLY DETERMINED THAT DAWSON FAILED TO PUT FORTH A GENUINE ISSUE OF MATERIAL FACT WHETHER BURT STEEL/B&S ERECTION BREACHED ANY DUTY OWED TO DAWSON WHICH CAUSED HIS INJURIES, THEREFORE SUMMARY JUDGMENT WAS APPROPRIATELY GRANTED TO BURT STEEL/B&S ERECTION.

a. Standard of review

An appellate court conducts a de novo review of a trial court's granting of a motion for summary judgment. *McKinley v. Lamar Bank*, 919 So. 2d 918, 925 (Miss. 2005). Our rules of civil procedure require the trial court to grant summary

judgment where "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Miss. R. Civ. P. 56(c). The facts are viewed in the light most favorable to the nonmoving party, with the movant bearing the burden of demonstrating that no genuine issues of material fact exist for presentation to the trier of fact. *Hardy v. Brock*, 826 So. 2d 71, 74 (Miss. 2002).

The party opposing the motion must be diligent and "may not rest upon the mere allegations or denials of the pleadings, but instead the response must set forth specific facts showing that there is a genuine issue of material fact for trial." *Harrison v. Chandler-Sampson Ins., Inc* ., 891 So. 2d 224, 228 (Miss. 2005) (citation omitted). "If any triable issues of fact exist, the lower court's decision to grant summary judgment will be reversed. Otherwise, the decision is affirmed." *Merrimack Mut. Fire Ins. Co. v. McDill*, 674 So. 2d 4, 7 (Miss. 1996) (citations omitted). "[W]here a party opposes summary judgment on a claim or defense as to which that party will bear the burden of proof at trial, and when the moving party can show a complete failure of proof on an essential element of the claim or defense, then all other issues become immaterial, and the moving party is entitled to judgment as a matter of law." *Grisham v. John Q. Long V.F.W. Post,* 519 So. 2d 413, 416

(Miss.1988).

b. Applicable law

The elements of a negligence claim are duty, breach of that duty, proximate cause, and damages. *May v. V.F.W. Post 2539*, 577 So. 2d 372, 375 (Miss. 1991). To recover, a plaintiff must prove causation in fact and proximate cause. *Jackson v. Swinney*, 244 Miss. 117, 123, 140 So. 2d 555, 557 (Miss. 1962). "Only when the first two items are shown is it possible to proceed to a consideration of proximate cause since a duty and breach of that duty are essential to a finding of negligence under the traditional and accepted formula." *Foster v. Bass*, 575 So. 2d 967, 972 (Miss. 1990).

To survive summary judgment, the plaintiff must first establish the applicable standard or duty of care. *Donald v. Amoco Prod. Co.*, 735 So. 2d 161, 174 (Miss. 1999). "Duty and breach of duty are essential to finding negligence and must be demonstrated first." *Id.*

"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." *Delahoussaye v. Mary Mahoney's, Inc.*, 783 So. 2d 666, 671 (Miss. 2001). In order for a person to be liable for an act which causes injury, "the act must be of such character, and done

in such a situation, that the person doing it should reasonably have anticipated that some injury to another will probably result therefrom." *Mauney v. Gulf Ref. Co.*, 193 Miss. 421, 9 So. 2d 780, 780-81 (1942). "Foreseeability is an essential element of both duty and causation." *Delahoussaye*, 783 So. 2d at 671. "The inquiry is not whether the thing is to be foreseen or anticipated as one which will probably happen, but whether it is likely to happen, even though the likelihood may not be sufficient to amount to a comparative probability." *Gulledge v. Shaw*, 880 So. 2d 288, 293 (Miss. 2004). "However, remote possibilities do not constitute negligence from the judicial standpoint. ... That is, we do not charge the actor with a prevision or anticipation which would include an unusual, improbable, or extraordinary occurrence, although such happening is within the range of possibilities." *Id.* (internal citations omitted).

c. Dawson's theory of liability is without a legal basis.

Dawson's argument to this Court is that it does not matter who or what actually caused the steel to fall. Rather, he argues that he was injured solely because Burt Steel failed to show up to unload the steel. This reasoning completely disregards the well-settled elements of negligence, and instead attempts to smear the boundaries of contract and tort law. Dawson's argument assumes the Court will acquiesce in his replacing the element of negligent breach of duty with the alleged

breach of contract, and then follow along with his argument that his injuries flow naturally and uninterrupted from that contract breach. By Dawson's logic the Court should then disregard the undisputed (and dispositive) fact no one knows what caused the girder to fall off of the truck.

The theory is original and illogical. It disregards this State and the common law's long established requirements to prove negligence and conjoins pieces of two distinct legal theories. Dawson's theory of negligence not only disregards the law, but it also ignores the facts. We will now apply the actual law to the undisputed facts.

d. Dawson failed to establish a genuine issue of fact whether Burt Steel was negligent.

According to Dawson, Burt Steel's failure to arrive on site and unload the steel was the proximate cause of Dawson's injuries. Dawson did not present any facts to support his contention that Burt Steel was negligent, much less any evidence that actions or omissions of Burt Steel proximately caused his injuries.[3] Dawson

[3]Dawson's argument that there is a question of fact whether Burt Steel's conduct proximately caused the accident requires the court to disregard several undisputed facts, which are as follows: (1) Dawson could have returned the steel-laden trailer to Vulcraft (R. 92, Dawson Dep. at pp. 214-16); (2) On his own volition, Dawson climbed onto the back of his trailer while Magee Masonry removed the steel - an act which he admitted could have cost him his job; (R. at 80, Dawson Dep. at p. 145); (3) Magee agreed to unload the steel but was not compelled to do so (R. at 917-18); (4) Magee was capable of unloading the steel and successfully unloaded three other trailers of similar steel prior to unloading Dawson's trailer (R. at 77, Dawson Dep. at p. 125; R. at 923-24); (5) Dawson stood under the unshackled girders despite the obvious danger in doing so (R. at 80, Dawson Dep. at pp. 141-42).

must prove from the moment that Burt Steel did not arrive, a chain of events occurred, which naturally and inevitably, without any intervening force, caused Dawson to be knocked from the trailer by a girder and injured. The record is silent on this essential element of Dawson's claim.

The undisputed facts do not support Dawson's allegations that the conduct of Burt Steel caused or contributed to his injuries. Burt Steel had not been to the job site at the time of the accident. (R. at 76, Dawson Dep. at p. 116.) Neither company had been on the job site prior to the accident. (*Id.*). Neither were in charge of the job site or Dawson's trailer. Neither had loaded the trailer, nor even seen the steel that had been ordered from Vulcraft.

In summary, the companies were only aware that Vulcraft delivered the girders to the job site and that Mapp Construction had a contractor with a Lull onsite who had agreed to unload the steel. The steel girder which fell on Dawson was manufactured and loaded onto Dawson's trailer by Vulcraft. (R. at 66-67, Dawson Dep. at pp. 61-62.) Dawson was responsible for and did secure the steel with chains for transportation. (*Id.*) Dawson was responsible for removing the chains at the time the steel was to be unloaded. (R. at 67-68, Dawson Dep. at pp. 67-68.)

Dawson stated in his Appellant Brief he would "never normally be involving [*sic*] in the unloading of his truck," as he was on the day of the accident because

Burt Steel was not there. (Appellant Brief at p. 8.) However, he testified that he *had* done so "maybe once or twice, but I didn't make it a policy. You know, that's not my deal on it because it would get my job – that would be my job if the company knowed [*sic*] about it." (R. at 80, Dawson Dep. at p. 145.)

The parties agree no one knows why the steel fell or what actually caused it to fall. It just fell. Whether it fell due to incorrect loading, because the trailer was perched on a slight incline, a rock or some other obstruction had been beneath the girder or because the girders had expanded from sitting in the sunlight and caused them to become off balance, or because Magee bumped it, is pure speculation.

The case of *Int'l Paper Co. v. Townsend*, 2007 Miss. App. LEXIS 192 (Miss. Ct. App. 2007) is factually similar to the Appellant's case, so should be considered. The relevant facts of *Townsend* follow.

The Plaintiff Townsend was delivering logs to a woodyard in Natchez owned by International Paper ("IP"). (*Id.* at *2.) The company that Townsend had contracted to haul for had loaded the logs onto his truck. (*Id.* at *5.) Another company added some additional logs to his truck. (*Id.*) Townsend checked the load at various times along the way to the IP woodyard, and thought it stable.

Upon arrival at the woodyard, Townsend got out of the truck and began to remove the first of two cables that secured the logs to the trailer. As he did this, a

log rolled off of the trailer and injured him. (*Id.* at *6.) He sued IP under premises liability theory. (*Id.* at *7.) Townsend based his theory on IP failing to have an unbinding rack for log unloading, and because the road leading into the woodyard had potholes. (*Id.* at *7.) Trial was held, and IP moved for judgment as a matter of law, but their motion was denied. (*Id.*) A jury verdict was returned for Townsend, and IP moved for JNOV, or a new trial or remittitur, each of which was denied. IP appealed.

The Court of Appeals found that Townsend did not have enough evidence to create a jury question as to IP's liability, therefore erred in failing to grant IP's motion for JNOV. (*Id.* at *1.) The Court found as it did for the same reasons that Wendell Dawson's allegations must fail as a matter of law: there was no evidence that IP owed any duty to Townsend as he claimed, nor sufficient evidence for a jury to find on any one of Townsend theories of liability. (*Id.* at **11-12.)

The Court found that IP did not exercise sufficient control over Townsend's activities so as to create a duty toward him. (*Id.* at *15.) "However, if the plaintiff can show that 'the contract notwithstanding, the owner maintained substantial de facto control over those features of the work out of which the injury arose, we may have a horse of a different color.'... With the law thus stated, we find insufficient evidence to support a conclusion that IP exercised control over Townsend's activities

so as to create a duty. Unlike the defendant in *McCarthy*, IP exercised no control over that aspect of the work which gave rise to the injury." *Id.* (internal citations omitted.) The Court also found that the only two possible aspects of work which could have given rise to Townsend's injuries were the loading and unloading of the log which caused his injuries. (*Id.* at **15-16.)

The Court stated that IP did not play a part in loading the logs, and that Townsend was responsible for releasing the cables that held the logs to the trailer. (*Id.* at *16). Townsend, not IP, was "completely in charge when he made the decision to release the binders on his load." (*Id.* at *16.) Further, in regard specifically to premises liability, because the dangerous condition existed on Townsend's truck, IP had no duty to warn Townsend of that condition. (*Id.* at **17-18.)

The Court in *Townsend* also cited *Bevis v. Linkous Const. Co.*, 856 So.2d 535 (Miss. Ct. App. 2003) as analogous in support of its finding that Townsend incorrectly charged IP with a duty to warn him of a hazard that did not exist on the IP premises, and that was not created by IP. (*Townsend*, 2007 Miss. App. LEXIS 192 at *20.) The Court cited *Bevis* to point out the logical impossibility of Townsend's argument that IP had an awareness of both the fact of the hazardous condition and an appreciation of the dangerous nature of the condition that was

superior to that of Townsend. (*Id.* at **19-20.)

Just as *Bevis* was analogous to *Townsend*, *Townsend* is analogous to the present case. Nothing in the deposition testimony or relevant facts support Dawson's allegations that Burt Steel caused Dawson's injuries.

Dawson has framed his appeal in theories and possibilities rather than facts because he does not know why the steel girder fell. As stated in *White v. Yellow Freight System, Inc*, 905 So. 2d 506, 512 (Miss. 2004), "verdicts are to be founded upon probabilities according to common knowledge, common experience, and common sense, and not upon possibilities, and a verdict cannot convert a possibility or any number of possibilities into a probability." Thus, Dawson cannot establish a negligence claim against Burt Steel.

e. Breach of contract is not negligent breach of duty.

Dawson's claim that Burt Steel caused him injury because they failed to appear onsite to unload the steel as required in its contract with Mapp is irrelevant. For purposes of this portion of the argument, we will assume that Burt Steel breached its contract with Mapp Construction in failing to arrive onsite on the morning of the incident.

The elements of a breach of contract are: (1) the existence of a valid and binding contract; (2) the defendant has broken or breached it; and (3) the plaintiff

has been thereby damaged monetarily. *Warwick v. Matheney*, 603 So. 2d 330, 336 (Miss. 1992). Dawson does not claim to have had a contract with Burt Steel, therefore he would have to be a third-party beneficiary in order to recover for Burt Steel's breach of its contract with Mapp Construction. A third-party beneficiary "may sue for a contract breach only when the alleged broken condition was placed in the contract for their direct benefit." *Rein v. Benchmark Constr. Co.*, 865 So. 2d 1134, 1145 (Miss. 2004).

Of course Dawson does not claim to have a cause against Burt Steel as a third-party beneficiary. Nor does he claim that Burt Steel's contractual agreement to unload the steel was for his benefit. He did not make this claim in his complaint, nor argue such a claim in the summary judgment proceedings below, and is therefore precluded from making the claim on appeal.

f. *Res ipsa loquitur* is not only inapplicable, but also precluded from appeal.

Just as any breach of contract/third-party beneficiary argument is inapplicable and precluded, so is any claim of *res ipsa loquitur*. *Res ipsa loquitur* requires the presence of three elements: (1) the defendant must have control and management of the instrumentality causing the plaintiff's injury, (2) the injury must be such that in the ordinary course of things it would not occur if those in control of the

instrumentality used proper care, and (3) the injury is not a result of the plaintiff's voluntary act. *Powell v. Methodist Health Care-Jackson Hosps.*, 876 So. 2d 347, 349 (Miss. 2004).

Although Dawson never directly alleged it in the proceedings below, he appears to be making a *res ipsa loquitur* claim but failed to actually argue such a claim during argument:

> THE COURT: So you're arguing that basically that but for - when you say but for, that this is a *res ipsa* case. That's what you're arguing.
>
> MR. COLMER: I haven't looked at *res ipsa* law in quite some time but-
>
> THE COURT: Well, the thing speaks for itself. Something fell. Somebody got hurt. Now, what caused it to fall?
>
> MR. COLMER: I' d have to look at some law, Judge, to actually comment on that.

(Record item 31, Transcript of the hearing on this case on May 24, 2006, p. 97 of Transcript.)

Thus, although he is precluded from arguing *res ipsa* on appeal, he had no valid *res ipsa* argument. It is undisputed Burt Steel was not in exclusive control of unloading the steel fell on Dawson—they were not even present at the job site on the morning of the incident. It is also undisputed that Dawson, on his own volition,

climbed onto the trailer. (R. at 78.) Thus, despite the claim's preclusion on appeal, Dawson cannot present material facts that Burt Steel was in control of the unloading. Furthermore, Dawson admitted he voluntarily placed himself in harm's way, thus *res ipsa*, had it been properly asserted in the proceedings below, is without merit.

In considering the facts, the court below correctly determined Dawson did not put forth facts that would create a genuine issue as to whether Burt Steel/B&S Erection was negligent, and the court correctly granted summary judgment to Burt Steel and B&S Erection. This Court, in considering the same facts and applying the law, must affirm the lower court's decision.

II. CONCLUSION

Dawson has failed to put forth a genuine issue of material fact as to what caused his injuries. Both he and his expert have testified, with refreshing candor, that they do not know what caused the steel girder to fall on Dawson. Because Dawson failed to show that there are material facts upon which he could present proof necessary to meet the elements of negligence at trial, the court below correctly granted summary judgment for Burt Steel, Inc./B&S Erection, Inc.

WHEREFORE, PREMISES CONSIDERED, the Appellees respectfully request that this Court affirm the lower court's granting of summary judgment to

Burt Steel, Inc. and B&S Erection Services, Inc.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, of counsel for Appellees Burt Steel, Inc. and B&S Erection, Inc., do hereby certify that I have this day mailed via U.S. First Class Mail, postage prepaid a true and correct copy of the above and foregoing to:

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Honorable Jerry O. Terry
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THIS the 17th day of August, 2007

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CERTIFICATE OF FILING

I, the undersigned counsel, do hereby certify that I have this day deposited into the United States Mail a package containing the original and three (3) copies of the above and foregoing Brief of Appellee, and a copy of the same Brief in WordPerfect format on a 3-1/2" electronic disk, all of which was addressed to Betty Sephton, Clerk, Supreme Court of Mississippi, P.O. Box 249, Jackson, MS 39205-0249, via U.S. First Class Mail, postage prepaid.

SO CERTIFIED on this the 17th day of August, 2007.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief complies with the type-volume limitation of Miss. R. App. P. 32 because this brief has been prepared using WordPerfect ver. 11.0.0.300 in 14-point CG Times font face, and contains 5451 words.

THIS the 17th day of August, 2007

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