MISSISSIPPI SUPREME COURT
MISSISSIPPI COURT OF APPEALS

NO. 2006-TS-01819

WENDELL DAWSON — APPELLANT

VERSUS

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

APPELLANT'S REPLY BRIEF

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ORAL ARGUMENT REQUESTED

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FACTS (REPLY)

The facts and course of proceedings below as set forth in the Appellee's Brief are, for the most part, correct. The Appellee admits (1) Burt Steel/B & S Erection were to unload the steel but had yet to arrive on the job site (Appellee Brief, P-1); (2) the steel which injured Dawson was manufactured for Burt Steel (Appellee Brief, P-3); (3) there is an issue of fact as to who asked Magee to unload the steel, MAP Construction or Burt Steel/B &S Erection (Appellee Brief, P-5, Footnote 2); and (4) Burt Steel/B & S Erection allowed Dawson to sue both as one and the same for the purposes of this suit (Appellee Brief, P-2, P-3, Footnote 1). Dawson submits that the evidence set forth and identified in his original brief clearly shows that it was Burt Steel/B & S Erection who arranged for the unloading of the steel. However, at a minimum, Burt Steel/B & S Erection concede that there is an issue of fact on this particular point.

REPLY ARGUMENT

A. The Court erred in determining 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.

Dawson agrees that ***precisely*** what caused the unsupported 40 ft. steel girder to fall is not known. What ***allowed*** the 40 ft. steel girder to fall is known - the

removal of the smaller steel supporting the girder. Dawson submits that the creation of this condition which allowed the steel girder to fall would not have occurred but for the actions and/or inactions of Burt Steel/B & S Erection in engaging a non-professional to handle their job.

Burt Steel/B & S Erection actively contributed to create the dangerous condition which allowed the accident to occur. There is no question but that Burt Steel/B & S Erection undertook a duty by engaging a block mason to unload large steel girders and breached that duty by engaging an inexperienced block mason to unload the girders, both of which proximately caused or contributed to Dawson's accident. The jury may ultimately not agree with Dawson on one of the elements of his claim, but for the purposes of summary judgment, there is sufficient evidence in the record via witness testimony and expert testimony to, at a minimum, allow a jury to hear this case.

Dawson submits that but for the actions of Burt Steel/B & S Erection, he would have never been in the position he was in to be injured. Dawson argues more than "Burt Steel/B & S Erection are liable simply because they failed to show up". Burt Steel/B & S Erection's failure to be on site to do that which they were required to do is only part of the equation, the other part being their active participation in solving their mistake by engaging the block mason subcontractor.

Burt Steel/B & S Erection argue that Dawson did not present any facts to support his contention that they were negligent, much less any evidence that actions or omissions of Burt Steel/B & S Erection proximately caused his injuries. (Appellee's Brief, P-11) In support of their argument, they assert various facts that are contributory negligence in nature. (Appellee's Brief, P-11, Footnote 3) Dawson presented substantial evidence that Burt Steel/B & S Erection were negligent in their actions and such negligence (the retention of an untrained block mason subcontractor) proximately and foreseeably led to the creation of the dangerous condition which ultimately injured Dawson. From the moment that Burt Steel/B & S Erection engaged the block mason subcontractor to perform their work of unloading their steel, a chain of events did occur which caused Dawson to be knocked from the trailer and seriously injured. Again, a jury may not agree with all of Dawson's arguments and could place responsibility for the accident on Dawson himself, on Mapp Construction, on Magee Masonry, on Burt Steel/B & S Erection, or some combination thereof, but there are sufficient facts to withstand summary judgment and there are trial issues for a jury.

B. The case of *International Paper v. Townsend*, 2007 Miss. App. Lexis 192 (Miss. Ct App. 2007) is not factually similar to Dawson's case.

The *Townsend* case involved a truck driver who was injured while unloading

logs at International Paper Company's woodyard. Id. at * No. 2, (¶4). Apparently, Townsend had entered into an oral contract to haul logs for Cain Logging. Id. at *1, (¶2). Afterwards, Cain Logging would load the logs onto the trucks operated by Townsend. Id. Townsend would then drive the truck to a set of scales where the logs would be inspected, weighed and bound down by cables before proceeding to the International Paper woodyard. Id.

Upon arrival at International Paper woodyard, Townsend was required to stop at a gate where an International Paper employee would weigh and visually inspect the logs, Id. at *1, (¶ 3), to confirm they met standards set by International Paper, and to make sure the logs were of good quality. If the load met standards, the driver was allowed to enter the woodyard and release the binders on his load so that a crane operator employed by International Paper could begin unloading the logs. It was company policy that International Paper employees played no part removing the logs until the binders were released. Id.

Upon arrival at the International Paper woodyard, Townsend released the binders on his logs, which immediately caused a log to come off and injure him. Id. at *2, (¶ 4). Townsend alleged the following theories of liability against International Paper (theories inapplicable to Dawson's accident): (1) failure to warn of a dangerous condition (2) failure to maintain a safe premises because it failed to have an

unbinding rack to catch the log that injured him and because the road leading to the woodyard had potholes in it. Id. (¶ 5).

The Townsend court found "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. at *5, (¶ 14) (emphasis added). The Court wrote the following with regard to the aspects of Townsend's work:

> according to the undisputed facts admitted at trial, IP played absolutely no part in the loading of the logs. Although IP would have eventually played a part in unloading of the logs from Townsend's trailer, IP's job in unloading the logs did not arise until Townsend assured himself of the safety of the load and then released the binders holding the logs in place . . . [Townsend's expert] also agreed that no one from IP directs the hauler in the aspects of this job, or controls him in anyway . . . unlike in the McCarthy case, IP exercised no supervision of Townsend when he released the binders.

(Id. at *5, (¶ 14).

Burt Steel/B & S Erection played an active role in (and actually created) the events leading up to the unloading of the steel that injured Dawson. Dawson was injured while his truck was being unloaded by a block mason arranged by Burt Steel/B & S Erection.

Burt Steel/B & S Erection emphasize the fact the plaintiff in *Townsend* was injured after releasing the chains that secured his logs, in essence trying to correlate

the unshackling or release of the chains on the steel girders to that of the logs in *Townsend*. In the instant case, however, Dawson had released all of the chains that secured the steel girders, except for the sixty-four (64) foot girder. Furthermore, once the chains were released, Dawson left the construction site for approximately thirty (30) minutes and traveled to Wal-Mart to purchase some soft drinks.

Dawson was sitting in the cab of his truck when he felt it move as a result of the block mason unloading his truck. In *Townsend*, International Paper exercised **no control over Townsend's activities so as to create a duty until the binders were released and International Paper began unloading the logs.** Townsend at *5, (¶ 14) (emphasis added). Dawson had already released and removed the chains securing the steel for approximately thirty (30) minutes prior to Magee Masonry unloading the truck. In addition, Magee Masonry had **already unloaded** some of the steel on Dawson's truck prior to him being injured. (emphasis added)

Burt Steel/B & S Erection's assertions the *Townsend* case is on point is without merit as Burt Steel/B & S Erection were responsible for and created the unloading scenario that led to Dawson being injured, unlike International Paper in *Townsend*.

The court found that International Paper 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 not withstanding,

> 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)

Here, Dawson has shown Burt Steel/B & S Erection created "...those features of the work out of which the injury arose..." by securing a block mason to perform the dangerous job of unloading steel and as such "...we may have a horse of a different color...". Unlike International Paper, Burt Steel/B & S Erection created "...that aspect of the work which gave rise to the injury.", the unloading of the steel. Dawson was not injured during the ***unbinding*** process, rather he was injured during the ***unloading*** process.

C. The case of White v. Yellow Freight System, Inc., 905 So. 2d 506 (Miss. 2004) restates a legal principle which the Dawson record can meet.

Cited by the lower court and by Burt Steel/B & S Erection, the *White* decision stated "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." Id, at p 512. Here, we know Burt Steel/B & S Erection's steel arrived on site as scheduled without them to unload it, there is proof in the record Burt Steel/B & S Erection engaged Magee Masonry to unload the steel, there is proof in the record Dawson normally never participated in the unloading process except for unbinding his chains, and we know the steel girder fell after its support (the smaller steel) was removed during the unloading process. The ***only*** unknown is the reason the steel girder was unbalanced (and thus fell) after its support was removed. Regarding probabilities, there is ample evidence in the record that the steel girder fell when its support was removed leading the injuries to Dawson which would have occurred but for the actions and inactions of Burt Steel/B & S Erections.

D. Dawson is not claiming to be a third party beneficiary of the Burt Steel/B & S Erection and Mapp Construction contract nor is Dawson arguing *res ipsa loquitur*.

Burt Steel/B & S Erection argued (1) that Dawson does not have a cause of action against Burt Steel/B & S Erection as a third party beneficiary of their contract with Mapp Construction and (2) that Dawson has never pled *res ipsa loquitur*. On these two points, Dawson agrees.

CONCLUSION

Taking the facts and evidence and reviewing them in the light most favorable to Wendell Dawson, there are ample facts and evidence for a jury to determine the responsibility for the hazardous situation which led to and caused Mr. Dawson's unfortunate accident. Mr. Dawson has met his legal burden of showing that there are triable issues of fact for a jury to hear and consider. As a result, this Court should reverse the trial court's granting of summary judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, JAMES H. COLMER, JR. and/or KELLY CASH LEE, of the law firm of Williams, Heidelberg, Steinberger & McElhaney, P.A., do hereby certify that I have this day forwarded via U.S. Mail, postage prepaid, the original and three (3) copies of the Appellant's Reply Brief to the following:

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And have served via U. S. Mail, postage prepaid, a copy of the Appellant's Reply Brief on the following:

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Honorable Jerry O. Terry
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SO CERTIFIED, this the 4th day of October, 2007.

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CERTIFICATE OF COMPLIANCE

Pursuant to Miss. R. App. P. 32, the undersigned certifies this brief complies with the type-volume limitations of Rule 32.

1. Exclusive of the exempted portions in Rule 32, the brief contains:
   A. 2019 words in proportionally spaced typeface.

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3. If the Court so requires, the undersigned will provide an electronic version of the brief and/or a copy of the word or line printout.

4. The undersigned understands a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in Rule 32, may result in the Court's striking the brief and imposing sanctions against the person signing the brief.

This the 4th day of October, 2007.

BY: _____
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