

MISSISSIPPI SUPREME COURT
MISSISSIPPI COURT OF APPEALS

NO. 2006-TS-01819

WENDELL DAWSON

APPELLANT
Brief

VERSUS

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

APPELLEES


CERTIFICATE OF INTERESTED PARTIES

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., Esq., Attorney for Appellant;
3. Williams, Heidelberg, Steinberger & McElhaney, P.A., Attorneys for Appellant;
4. Burt Steel, Inc., Appellee;
5. B & S Erection, Inc., Appellee;

6. Edward C. Taylor, Attorney for Appellees;
7. David Krause, Attorney for Appellees; and
8. Daniel, Coker, Horton & Bell, P.A., Attorneys for Appellees.

This the 3rd day of July, 2007.



JAMES H. COLMER JR.

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STATEMENT REGARDING ORAL ARGUMENT

Appellant believes oral argument may be helpful to the Court as this appeal addresses a fine, but important, distinction between liability for the creation of a hazardous condition leading to an injury versus the specific reason an unsupported 40 foot steel girder fell causing the injury. This issue can best be decided with the assistance of oral argument before the Court.

STATEMENT OF THE ISSUES

1. Whether the Court erred in granting summary judgment in favor of the Appellees, Burt Steel, Inc. and B & S Erection, Inc., by finding that the Appellant failed to show that any duty which was breached was the proximate cause of the accident and resulting injuries.

STATEMENT OF THE CASE

(A) Nature of the case.

This lawsuit arises from an accident where Appellant, Wendell Dawson, a truck driver, was injured during the unloading of steel that he delivered to a construction site in Waveland, Mississippi. During the unloading of the steel, a large, 40 foot girder fell striking Dawson, knocking him off his truck, with the girder landing upon him causing numerous and serious injuries.

(B) Procedural history

Dawson filed his Complaint against Burt Steel, Inc., Mapp Construction, Inc., the Great Atlantic and Pacific Tea Company d/b/a Sav-A-Center, and XYZ Corporation as a result of a December 8, 1994 accident where Dawson was injured during the unloading of steel that he delivered to a construction site in Waveland, Mississippi. C.P. 8-16. While other parties were involved in the litigation as defendants and third party defendants, they were dismissed and this appeal only concerns Appellees, Burt Steel, Inc. and B&S Erection, Inc.

Dawson filed his Complaint on December 5, 1997. Various written discovery was conducted and, in addition, numerous depositions were taken of the parties and witnesses. Burt Steel and B&S Erection filed Motions for Summary Judgment on December 18, 2002, (C.P. 34-215) which were argued before the Court in June, 2004

however, no ruling was issued. The case was ultimately set for trial on June 19, 2006. Mapp Construction filed a Motion for Summary Judgment on April 21, 2006, and Burt Steel and B&S Erection renewed their Motions for Summary Judgment against the Plaintiff on April 28, 2006. C.P. 651-660. Dawson responded to Burt Steel's and B&S Erection's Renewed Motion for Summary Judgment on May 23, 2006, (C.P. 845-856) and thereafter an additional supplementation was filed by Dawson on June 1, 2006. C.P. 857-1088.

Voluntarily dismissed from this lawsuit were the Great Atlantic and Pacific Tea Company by Agreed Judgment entered April 25, 2006 and Magee Masonry by Agreed Judgment entered June 2, 2006. Mapp Construction settled its claim with Dawson prior to summary judgment being granted and was dismissed by Judgment of Dismissal entered August 11, 2006.

After argument before the Court, the Court ultimately entered an Order and Final Judgment granting summary judgment in favor of Mapp Construction, Burt Steel and B& S Erection on June 8, 2006. C.P. 1094-1097.

On June 19, 2006, Dawson filed a Motion to Reconsider (C.P. 1101-1203) which was summarily denied by Order entered July 3, 2006. C.P. 1204.

On October 23, 2006, Dawson filed a Notice of Appeal from the Order and Final Judgment entered on June 8, 2006 and from the Order denying the Motion to

Reconsider entered on July 3, 2006. C.P. 1212-1213.

As a result of the Clerk failing to provide a copy of the Order denying the Motion to Reconsider to the parties, both counsel agreed that Dawson should file his Notice of Appeal on or before October 23, 2006. C.P. 1214.

SUMMARY OF THE ARGUMENT

Wendall Dawson was seriously injured as a result of a December 8, 1994, accident during the unloading of steel that he delivered to a Sav-A-Center construction site in Waveland, Mississippi. Dawson was an employee and truck driver for Vulcraft Steel, a fabrication company that was hired by Burt Steel to deliver various steel to the construction site. Burt Steel and/or B&S Erection were to unload the steel upon arrival at the site. Mapp Construction Company was the general contractor for the Sav-a-Center.

On December 7, 1994, Vulcraft notified Burt Steel and B&S Erection that four loads of steel would be delivered on December 8, 1994 to the Sav-a-Center construction site. Pursuant to Vulcraft's company policy, Vulcraft would contact Burt Steel and B&S Erection on the day prior to the delivery date, in order to verify there would be someone at the construction site to unload the steel. This was done to prevent Vulcraft from having to return to its distribution center with a load of steel.

In addition, Mapp Constuction also contacted Burt Steel and B&S Erection on December 7, 1994, to confirm the delivery and subsequent unloading of the steel.

Upon arrival at the construction site, Dawson noticed three carrier trucks loaded with steel that had not been unloaded. Dawson sought and found Mapp Construction superintendent, Jay Gordon, and inquired as to who would unload the

steel. After Dawson spoke with Jay Gordon, a telephone call was placed to Raymond Burt of Burt Steel and B&S Erection by Mr. Gordon to inquire as to who would unload the trucks. While on the telephone with Burt Steel and B&S Erection, a discussion ensued regarding possibly having a block mason unload the trucks. The block mason, who was ultimately engaged to unload the steel with a forklift and who was paid for unloading the steel by Burt Steel, was an employee of Magee Masonry who was on the job site in a different capacity laying mason blocks.

Due to the failure of Burt Steel or B&S Erection being present to unload the steel, Magee Masonry ultimately proceeded with the unloading of the steel at the request or suggestion of either Burt Steel, B&S Erection, or Mapp Construction. Wendell Dawson, as is standard practice in the industry, began the process of taking off the chains which were securing the various steel components on this truck. During the unloading process, in which Dawson ordinarily never participated, an unsupported 40 foot steel girder fell off of the truck striking Dawson, knocking him off of his truck and pinning him on the ground. Dawson was on the back of his truck acting as a spotter for Magee Masonry as a result of Burt Steel and B&S Erection not being present to unload the steel components.

The Court granted summary judgment finding that Dawson failed to show that any duty breached by Burt Steel or B&S Erection was the proximate cause of his

accident and injuries. The Court specifically found that Dawson offered no evidence as to what actually caused the steel girder to fall on him. The Court found that since Dawson could not prove what caused the steel to fall, all of his arguments as well as his expert's theories of negligence were pure speculation, which cannot survive summary judgment.

Dawson would respectfully submit that precisely what caused the unsupported 40 foot steel girder to fall is not the issue. The issue is the responsibility for the creation of the hazardous condition which allowed the steel girder to fall, a situation that Dawson submits would not have occurred but for the actions and/or inactions of Burt Steel and B&S Erection in engaging a non-professional to handle the job. There is no question but that (1) Dawson would normally never be involving in the unloading of his truck (2) neither Burt Steel nor B&S Erection were present to professionally unload the steel in question as they were required to do and, (3) a dangerous condition was created when a block mason subcontractor and Dawson were engaged in the unloading of the steel, which dangerous condition ultimately caused the accident. The question for the jury is who was responsible for the creation of the hazardous condition. A jury could find the hazardous condition was the responsibility of Burt Steel and B&S Erection, general contractor Mapp Construction, block mason subcontractor Magee Masonry, Dawson himself, or some combination

thereof. It will never be known exactly why the 40 foot steel girder tipped over, but it is clear the unloading process allowed the steel girder in question to fall. It is for the jury to determine if anyone, including Burt Steel and B&S Erection, are responsible for failing to be present as required to professionally unload the steel.

While neither Burt Steel nor B&S Erection were present on the day of the accident, their absence was the reason Dawson was injured as their absence and their actions in securing a block mason to handle their job provided the vehicle for the accident to ultimately occur.

STANDARD OF REVIEW

The law is well established with respect to the grant or denial of a motion for summary judgment. The appellate court applies a de novo standard of review concerning the propriety of a trial court's grant or denial of summary judgment. *Montgomery v. Woolbright*, 904 So.2d 1027, 1029 (Miss. 2004). Summary judgment is proper "if 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." MRCP 56(c). To survive a motion for summary judgment, the opposing party must establish that there is a genuine issue of material fact. *Matthews v. Horseshoe Casino*, 919 So.2d 278, 280 (Miss. Ct. App. 2005)(citing *Lowery v. Guaranty Bank & Trust Co.*, 592 So.2d 79, 81 (Miss. 1991)). The adverse party may not rest upon the mere allegations or denial of the pleadings, but instead, in its response, the party must set forth facts showing that there is a genuine issue for trial. *Miller v. Meeks*, 762 So.2d 302, 304 (Miss. 2000). The evidentiary matters are viewed in the light most favorable to the non-moving party. *Id.* An issue of fact may be present where there is more than one reasonable interpretation of undisputed testimony or where materially different but reasonable inferences may be drawn from uncontradicted evidentiary facts. *Dennis v. Searle*, 457 So.2d 941, 944 (Miss. 1984).

Where there is doubt as to whether fact exists, the non-moving party gets the benefit of this doubt, and all other doubts. *Taylor Machine Works, Inc. v. Great American Surplus Lines Insurance Co.*, 635 So.2d 1357, 1360 (Miss. 1994). All motions for summary judgment should be viewed with great skepticism and if the trial court is to err, it is better to err on the side of denying the motion. *Simmons v. Thompson Machinery of Mississippi, Inc.*, 631 So.2d 798, 801 (Miss. 1994). Summary judgment will only be affirmed if the Supreme Court is convinced after independent review of the record that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. *Merrimack Mut. Fire Ins. Co. v. McBill* 674 So.2d 4 (Miss. 1996).

ARGUMENT

- A. The Court erred in granting summary judgment in favor of Burt Steel, Inc. and B&S Erection, Inc. The central issue involves the creation of a hazardous condition and the party or parties responsible for the creation of the hazardous condition rather than the narrow issue regarding what specifically caused the unsupported 40 foot girder to fall injuring Dawson.

The granting of summary judgment centers on the Court's finding that neither Dawson nor his expert, Boyd T. Cochran, P.E., provided any reason as to what caused the steel girder to fall. And, as a result, "...all of his arguments as well as his expert's theories of negligence are pure speculation, which cannot survive summary judgment." C.P. 1095-1097. The 40 foot girder at issue stood for 30 minutes or so after Dawson removed the securing chains. Only after Magee Masonry removed a bundle of 35 foot joists did the 40 foot girder fall. Dawson submits there is ample evidence in the record, through both expert testimony, lay testimony, and otherwise, that the removal of the bundle of 35 foot joists by Magee Masonry created the hazardous condition/safety hazard which allowed the 40 foot girder to fall by removing its support. The creation of this hazardous condition/safety hazard, more likely than not, would have been avoided or prevented had the proper personnel been provided for the job. *i.e.*, had Burt Steel or B&S Erection performed their job.

In Dawson's Supplemental Response to the Motion for Summary Judgment,

Dawson's expert clarified his opinions and the apparent misunderstanding regarding his opinions on the cause of the accident insofar as it relates to the reason or reasons for the 40 foot girder falling and striking Dawson. As stated by Mr. Cochran, "...once Mr. Dawson initially removed the chains from his load, his load of steel was stable. Thirty minutes or so later, Michael Magee removed a bundle of 35 foot joists which were supporting the 40 foot girder causing a dangerous condition or safety hazard to exist with the regard to the 40 foot girder which fell. The removal of the 35 foot joists ultimately allowed the 40 foot girder to fall by removing its support... More likely than not, an experienced steel crew would have recognized the dangerous condition or safety hazard which would result from removing the 35 foot joists and would have taken measures to secure the 40 foot girder to prevent it from falling. The lack of an experienced steel crew to unload Mr. Dawson's truck left two inexperienced men to do the job... The dangerous condition on the premises occurred and was created when Mapp Construction and/or Burt Steel, Inc. enlisted an inexperienced man to do a job requiring the expertise of a steel crew, which led to Wendell Dawson being the "spotter" who was injured after the 35 foot bundle of joists were removed and the hazardous condition being created as a result." C.P. 864-866.

The deposition of Forrest M. Mungo, designated expert for Burt Steel and B&S

Erection, supports Dawson's arguments. Mr. Mungo agreed that it was not Dawson's responsibility to unload the girders on the back of his truck, Dawson's responsibility being to unbind his chains and allow the "steel experts" to unload the steel. C.P. 1020. Mr. Mungo also agreed that a professional steel handler would be best at deciding in what order to take the steel off Mr. Dawson's truck and that block mason, Michael Magee, was not a professional in the steel business. C.P. 1029. Mr. Mungo agreed that it was foreseeable someone would get injured if Mr. Dawson's load of steel was not unloaded properly and agreed that it was foreseeable that the 40 foot girder at issue would fall if it did not have any bracing to secure it. C.P. 1032. Mr. Mungo agreed that the 40 foot girder at issue, unsupported as it was when it fell, created a hazard that Dawson did not recognize. C.P. 1038, 1042. Mr. Mungo opined that it would not be advisable to have an inexperienced person controlling the unloading of the steel nor would you want an inexperienced or unqualified person controlling the unloading of the steel. C.P. 1032. Finally, Mr. Mungo agreed that had Burt Steel or B&S Erection been present with the men and equipment to properly unload the steel, Mr. Dawson would not have been injured. C.P. 1041, 1055.

While the exact cause of the steel girder falling will never be known, what allowed the steel girder to fall is clearly known. It is the creation of the hazardous situation which allowed the steel girder to fall which is the subject of Dawson's

lawsuit, a situation that Dawson has shown would not have occurred but for the actions and/or inactions of Burt Steel and B&S Erection. Unsupported steel beams sitting on edge create hazardous conditions, which is why professionals are engaged to handle steel. There is no question a hazardous condition existed which almost cost Dawson his life. A jury should be allowed to hear all of the evidence and determine who was responsible for the creation of the hazardous condition. A jury could find the hazardous condition was the responsibility of Burt Steel and B&S Erection, general contractor Mapp, block mason Magee Masonry, or Wendell Dawson, or some combination thereof.

According to Mapp Construction, the “arrangement” with Magee’s Masonry to unload the steel was entered into out of necessity as a result of Burt Steel and B & S Erection’s failure to be on the job site. The following testimony was taken from the deposition of Mapp Construction’s corporate representative, Mark LaHaye:

Q: How was it that you had a phone call from Raymond Burt?

A: I think I called him, actually.

Q: Who was responsible for making sure that someone was there to unload the steel on Thursday, December 8th?

A: B&S Erection.

Q: And how did B&S Erection know to be there to unload the steel?

A: From Burt Steel, from Bo Burt.

Q: **Do you know why no one was there on Thursday, December 8, 1994, to unload the steel?**

A: **B&S was on another job and couldn't get to it, to this job in time to make the unloading.**

Q: And how did you learn that?

A: From my conversation with Bo Burt the day before. He could not be certain that they were going to be there the next day.

Q: **Tell me, if you can, everything you remember about your phone call with Raymond Burt on December 7, 1994.**

A: **Confirmed that the joists and deck was still going to be delivered on the following day. And Bo made mention to the fact that B&S may or may not be there on time and he made arrangements to have somebody else there in their place.**

Q: **Who made the arrangements for Magee's Masonry to unload the steel?**

A: **Bo Burt.**

C.P. 1064, 1065, 1066.

Raymond Burt, corporate representative for Burt Steel and B & S Erection, testified in his deposition that it was Burt Steel's responsibility to make sure the steel was delivered to job site on the scheduled day, and to be responsible for unloading

and erecting the steel once it arrived. See Exhibit "C", p. 41-42; and Exhibit "B", p. 34. The following testimony was taken from the deposition of Raymond Burt regarding the arrangement with Magee's Masonry:

A: . . . probably what happened was, **Mapp sat there and worked it out with the block mason to unload it**, and they would back charge it to us, because B&S is responsible to unload the steel. But B&S is not going to drive five hundred miles to unload a few trucks, you know. So - - and what contractors do is, they'll sit there, and they'll hire the block masons to do it. And the contractor is not going to pay for it. The contractor, you know, will take it out of our pay. But he's not going to make us go five hundred miles to unload something that's their rescheduling problem.
C.P. 984.

After speaking with Jay Gordon, Dawson was informed by Magee's Masonry where to park his truck in order for it to be unloaded. Afterwards, Dawson unshackled the chains on his truck, except for the chain on the sixty-four (64) foot girder, in order for Magee's Masonry to begin unloading the steel. However, Magee's Masonry was unable to immediately begin unloading the truck because he had to catch up on his block mason work and informed Dawson it would be approximately (30) thirty minutes before the truck could be unloaded. With every chain on his truck except one unshackled, Dawson decided to go to Wal-Mart to buy some soft drinks. Dawson then returned to his truck in order to call Vulcraft

regarding the possibility of Dawson driving to Jackson, Mississippi to pick up some angle iron. C.P. 888.

While sitting in the cab of his truck, Dawson felt the truck move when Magee Masonry began unloading a bundle of girders from his truck. The truck's movement prompted Dawson to hang up the phone call with Vulcraft employee, Harold Nelson, because the sixty-four (64) foot girder was still chained to the truck. In addition, Dawson thought it would be prudent to act as a "spotter" for the block mason in order to show him where to insert the forks of the forklift in the forty (40) foot girder in order to keep it from damaging the sixty-four (64) foot girder that was still chained to the trailer. C.P. 889.

After Magee Masonry removed a bundle of thirty-five (35) foot girders, all of a sudden and without warning, Dawson was struck from behind by the forty (40) foot girder which knocked him down and landed upon him. Dawson suffered a separated shoulder, a broken thumb, and compound fractures in both of his legs, which resulted in severe and permanent injuries. For its services, Magee's Masonry charged Mapp \$275.00 to unload four trucks of steel and this amount was paid by Mapp and then deducted from payment to Burt Steel, with the approval of Raymond Burt on behalf of Burt Steel and B&S Erection.

Both Mapp and Burt Steel/B&S Erection cast the blame upon the other with

regard to the employment of Magee Masonry to unload the steel cargo. As a result, there is genuine issue of material fact as to which entity created the hazardous condition that injured Dawson. However, there is no dispute that both Burt Steel and B&S Erection had prior notice that the steel would be delivered on December 8, 1994, and they allowed and/or participated in retaining an inexperienced block mason to unload the steel without a "spotter."

Dawson admits that it was his responsibility to take the initial chains off the girders. However, Dawson was not required to assist in the unloading of the steel, a job responsibility reserved for an experienced steel unloader or contractor. In order for the steel to be unloaded, without damage, Dawson was forced to assist Magee Masonry in removing the steel from the truck. Burt Steel readily admits that a "spotter" is needed to unload the steel from a truck when a forklift is used. C.P. 1006.

Mapp Construction argued that it did not have anything to do with the unloading of steel, and the entire arrangement was between Burt Steel/B&S Erection and Magee's Masonry. Mapp Construction employee, Mark LaHaye, testified that Raymond Burt made the arrangement with Magee Masonry. The following was taken from the deposition of Mapp Construction:

Q: Everybody expected Magee to charge somebody for the work they did unloading the four trucks, correct?

A: Well, Raymond did. Bo did. He cut the deal with Michael.

Q: When you say, "he cut the deal with Michael," how do you know he cut a deal with Michael?

A: I gave Michael the phone to talk to Bo to arrange for unloading?
C.P. 1078.

Q: When you were there. Tell me about that conversation.

A: When I confirmed with Bo that the steel was or that the delivery was still going to be on the next day on the 8th. And he told me that he wasn't sure if B&S could be there. Basically, I let him know that he needed to make prior arrangements in case B&S wasn't there.

Q: You made it known to Raymond Burt that someone needed to be there?

A: Correct.
C.P. 1078.

Q: So when you told him that somebody needed to unload that steel, what did he do or say?

A: His exact words, I don't know. I mean, I let him know that we didn't have any manpower or equipment to do the job and that it was his responsibility to find somebody.

Q: And what did he do or say?

A: What he exactly said, I don't know. In some way, he understood that we had a mason on the job. **Whether he asked me we had a mason on the job with equipment or how he came about to know that, I don't know.** But at some point in the conversation,

I let him and Michael make an arrangement.

Q: Do you know Michael Magee, or did you know him just from that job?

A: Just from that job.

Q: And at some point in time, you went and gave the telephone to or got Michael Magee to come in to talk to Raymond Burt?

A: Yes. I don't know if it was in that same phone conversation or if Raymond called back during the day or what. But it was sometime during the day Michael and Bo spoke.
C.P. 1079

The proximate cause of Dawson's injuries was that neither Burt Steel nor B&S Erection had anyone present with the expertise or knowledge or manpower to unload the steel, which was delivered by Dawson as scheduled. Through no fault of Dawson, no one was present at the time of the accident that was a professional in the unloading of the steel that could properly direct the unloading of the steel. But for the fact that no one was present to properly and safely unload the steel, Dawson would have never been on the back of his truck acting as a "spotter", and would not have been injured. C.P. 730-734.

In this case, both Burt Steel and B&S Erection were fully involved in the unloading the steel via (1) failing to have proper personnel and equipment present and (2) selecting and securing a block mason to handle a dangerous job requiring

experience and expertise. Burt Steel and B&S Erection's involvement led to Dawson's injuries. Burt Steel and B&S Erection argue that they were not on the job site at the time of the accident, which is exactly what led to Dawson's accident.

Dawson's accident and resulting injuries occurred as a direct and proximate result of either Burt Steel or B&S Erection "dropping the ball" and then compounding the problem by taking a risk which ultimately lead to the accident. It is for the jury to decide who was responsible for "dropping the ball" and who was responsible for the unnecessary taking of a risk which led to the accident. This particular aspect of the job, the unloading of the steel, did not go as planned because mistakes were made. Rather than handling the unloading of the steel in the proper fashion after the mistakes were made, the Burt Steel and B&S Erection gambled in order to save both time and money and their gamble resulted in an accident and serious injuries to Dawson.

On the day prior to the steel delivery to the construction site, Burt Steel and B&S Erection chose to undertake the responsibility and obligation of unloading the steel from Dawson's truck. Although Burt Steel did not physically unload Dawson's truck, Raymond Burt, President of Burt Steel and B&S Erection, engaged the services of an inexperienced and improperly equipped block mason contractor to attempt to unload the steel and authorized and paid for the unloading of the steel. Thus, by

virtue of Burt Steel's and B&S Erection's conduct and remittance of payment, it voluntarily undertook the responsibility and obligation of unloading the steel from Dawson's truck, an undertaking it performed in a negligent and dangerous manner.

Burt Steel alleges "[n]othing in the deposition testimony or relevant facts support the Plaintiff's allegations that the conduct of these Defendants caused or contributed to the Plaintiff's injuries." C.P. 657. Neither Burt Steel nor B&S Erection were at the construction site when the accident occurred, which is the very reason the accident occurred. Their actions led to the improper and unsafe unloading of the steel. But for their actions in securing an inexperienced and improperly equipped block mason to unload the steel, Plaintiff would never have had to be on the deck of his trailer assisting in the unloading of the steel.

There are multiple genuine issues of material fact in this case and jury issues as to which Defendant's conduct created or contributed to Dawson's injuries. Dawson has presented evidence that Burt Steel's and B&S Erection's negligence created and/or led to the dangerous conditions which injured Dawson. Viewing the evidence in a light most favorable to Dawson, there are clearly genuine issues of material fact for a jury to decide.

CONCLUSION


Taking the facts and evidence and reviewing them in the light most favorable to Wendell Dawson, it is for a jury to determine the responsibility for the creation of the hazardous condition which led to and caused Mr. Dawson's unfortunate accident. Mr. Dawson's arguments and his expert theories are not speculation, the specific issue is who is responsible for the creation of the hazardous condition, not specifically why the unsupported 40 foot girder ultimately toppled. The proximate cause of Wendell Dawson's injuries was the failure of Burt Steel and B&S Erection to perform their required job and their retention of a block mason to unload the steel in their absence.

This Court should reverse the trial court's granting of summary judgment.

Respectfully submitted,

WENDELL DAWSON

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CERTIFICATE OF SERVICE

I, JAMES H. COLMER, JR., 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 Brief of Appellant to the following:

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

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

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SO CERTIFIED, this the 3rd day of July, 2007.



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VERSUS

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

APPELLEES

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. 5,564 words in proportionally spaced typeface.
2. The brief has been prepared:
 - A. In proportionally spaced typeface using WordPerfect X3 in Times New Roman, 14 point.
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 3rd day of July, 2007.

BY:



JAMES H. COLMER, JR.