IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

WAYNE JAMISON — APPELLANT

VS. — NO. 2007-CA-00765

GREGORY C. BARNES — APPELLEE

BRIEF OF APPELLEE, GREGORY C. BARNES,
ON APPEAL FROM THE CIRCUIT COURT OF NOXUBEE COUNTY

J. NILES MCNEEL, ([redacted]
McNeel and Ballard
Attorneys at Law
Post Office Box 28
Louisville, Mississippi 39339
662-773-2041

WAYNE JAMISON APPELLANT

VS. NO. 2007-CA-00765

GREGORY C. BARNES APPELLEE

I. 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 are/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Wayne Jamison. — Appellant
2. Gregory C. Barnes — Appellee
3. R. Gregg Rogers — Counsel for Appellant
4. J. Niles McNeel, McNeel & Ballard — Counsel for Appellee

J. NILES McNEEL [redacted]
McNEEL & BALLARD
ATTORNEYS AT LAW
P. O. BOX 28
LOUISVILLE, MISSISSIPPI 39339
TELEPHONE: (662) 773-2041
ATTORNEY FOR APPELLEE

Page #

WAYNE JAMISON APPELLANT

VS. NO. 2007-CA-00765

GREGORY C. BARNES APPELLEE

STATEMENT OF THE FACTS

On November 5, 2005, Wayne Jamison had completed his work day at the Ralph Spurgeon farm outside of Brooksville, Mississippi. Jamison borrowed Mr. Spurgeon's tractor to drive to the Jamison home several miles away so he could use the tractor to feed hay to his horses. As he drove home, Jamison was traveling in an eastward direction on Mississippi Highway 388 in Noxubee County. Greg Barnes worked a night shift as a dredge line operator on the Tombigbee River. Barnes was traveling to his work, also traveling in an easterly direction on Highway 388. The tractor Jamison drove did not have lights on because they were disconnected and not operating. On the other hand, Barnes was abiding by all the rules of the road, including having his lights on. It was almost dark and Barnes came upon Jamison's tractor without any notice since the tractor did not have any lights operating. Barnes applied evasive action by braking and swerving to his left. His efforts were unsuccessful and Barnes' vehicle struck the left rear of the tractor and then moved into the westbound lane.

Rev. Tommy Temple, Pastor of the First Baptist Church in Maben, Mississippi, was returning from the Tombigbee River with his eleven year old son and his son's friend. Rev.

it did not have lights, but he saw the lights of Barnes' vehicle approaching from behind the tractor. Just as Rev. Temple's truck passed the tractor, Barnes' vehicle struck the tractor, moved into Rev. Temple's lane and hit his bass boat. Neither Rev. Temple or the boys were injured. The accident occurred sometime between 5:10 p.m. and 5:30 p.m. The official time for sunset on that day in Noxubee County was 4:59 p.m.

SUMMARY OF THE ARGUMENT

The plaintiff, Jamison, was undisputably operating a tractor without lights on the public roads after sunset. Such operation was in violation of Section 63-7-11 of the Mississippi Code and entitles defendant, Barnes, to a summary judgment that Jamison was negligent. There is no evidence, including eyewitnesses to the accident, that places any negligent conduct on defendant Barnes. Therefore, there is no issue of fact or law for the jury to consider on defendant Barnes' negligence, and he is entitled to summary judgment on that issue. The trial court was correct in deciding summary judgment in favor of defendant and against plaintiff Jamison.

ARGUMENT

I. Standard of Review

The evidence must be viewed in the light most favorable to the party against whom the motion for summary judgment has been made. The burden of showing that no genuine issue of material fact exists lies with the moving party, and gives the benefit of every reasonable doubt to the party against whom summary judgement is sought. See ***Tucker v. Hinds County***, 558 So.

claim is asserted may, at any time, move for summary judgement in his favor as to all or any part of the claim. Rule 56(c) provides:

> The judgement sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that he moving party is entitled to judgement as a matter of law.

The Mississippi Supreme Court expressed its understanding of the burden of the party opposing summary judgement as follows:

> Our own construction of Rule 56 embodies this concept that when a party opposing summary judgement, on a claim or defense as to which the party will bear burden of proof at trial, fails to make a showing sufficient to establish an essential element of the claim or defense, then all other facts are immaterial, and the moving party is entitled to judgement as a matter of law. ***Galloway v. Travelers Insurance Co.***, 515 So. 2d at 678, 684 (Miss. 1987).

On a summary judgement motion, the burden of producing evidence in support of or in opposition to the motion is a function of Mississippi's rules regarding the burden of proof at trial on the issue in question. The movant bears the burden of persuading the trial judge that (1) no genuine issue of material facts exists and (2) on the basis of the facts established, he is entitled to judgement as a matter of law. See ***Pargo v. Electric Furnace Co.***, 498 So. 2d 833 (Miss. 1986); ***Smith v. Sanders***, 485 So. 2d 1051 (Miss. 1986); see also ***Pearl River County Board v. South East Collection***, 459 So. 2d 783 (Miss.1984).

II. Wayne Jamison Has Presented No Genuine Issues of Material Fact Sufficient to Override Gregory Barnes' Motion for Summary Judgment

The Mississippi Supreme Court has repeatedly held that the party opposing a motion for

inappropriate, there must be genuine issues of material fact; the existence of a hundred contested issues of fact will not thwart summary judgement where none of them is material." ***Grisham v. John W. Long V.F.W. Post, No. 4057, Inc.***, 519 So. 2d 413, 415 (Miss.1998) (citing ***Shaw v. Burchfield***, 481 So. 2d 247, 252 (Miss. 1985). "A fact issue is material if it tends to resolve any of the issues properly raised by the parties." Id. (citing ***Pearl River County Bd. Of Sup'rs v. South East Collections Agency, Inc.***, 459 So. 2d 783 (Miss. 1984).

III. Negligence of Plaintiff (Jamison) The Circuit Court Properly Granted Defendant Barnes's Motion for Summary Judgment

Jamison was negligent in failing to have proper lighting on his vehicle. Section 63-7-11 of the Mississippi Code of 1972 required his vehicle to have lighted front and rear lamps during the period from sunset to sunrise and at any other time when there is not sufficient light to clearly discern any person on the highway at a distance of five hundred feet ahead. That statute in its entirety is as follows:

> "Every vehicle upon a highway within this state during the period from sunset to sunrise and at any other time when there is not sufficient light to render clearly discernible any person on the highway at a distance of five hundred feet ahead shall be equipped with lighted front and rear lamps as respectively required in Section 63-7-13 for different classes of vehicles and subject to exemption with reference to lights on parked vehicles as hereinafter stated in this chapter."

Section 63-7-13 of the Mississippi Code of 1972 (which is referred to in the preceding statute) is provided in its entirety as follows:

> "(1) *Head lamps on motor vehicles.* Every motor vehicle other than a motorcycle or motor-driven cycle shall be equipped with at least two head lamps with at least one on each side of the front of the motor vehicle, which head lamps shall comply with the requirements and limitations set forth in Section 63-7-31.

(3) *Rear lamps*. Every motor vehicle, trailer, semitrailer, pole trailer and any other vehicle which is being drawn in a train of vehicles shall be equipped with at least one rear lamp mounted on the rear, which, when lighted, shall emit a red light plainly visible from a distance of five hundred feet to the rear.

Either a rear lamp or a separate lamp shall be so constructed and placed as to illuminate with a white light the rear registration plate and render it clearly readable from a distance of fifty ee to the rear. Any rear lamp or tail lamps, together with any separate lamp for illuminating the rear registration plate, shall be so wired as to be lighted whenever the head lamps, cowl lamps or fender lamps are lighted.

(4) *Lamps on bicycles*. Every bicycle shall be equipped with a lighted white lamp on the front thereof visible under normal atmospheric conditions from a distance of at least five hundred feet in front of such bicycle and shall also be equipped with a reflex mirror reflector or lamp on the rear exhibiting a red light visible under like conditions from a distance of at least five hundred feet to the rear of such bicycle.

(5) *Lights on other vehicles*. All vehicles not required in this chapter to be equipped with special lighted lamps shall carry one or more lights, lamps or lanterns displaying a white light, visible under normal atmospheric conditions from a distance of not less than five hundred feet to the front of such vehicle and shall display a reflex reflector or red light visible under like conditions from a distance of not less than three hundred feet to the rear of such vehicle."

Since the above statutes very clearly require lighting on the tractor after sunset and any other time when there is not sufficient light, then the question is whether Jamison was operating his tractor without lights either after sunset and/or at any other time when there was not sufficient light.

At his deposition Jamison unequivocally stated the lights on the tractor were not turned on because they were not working and he admitted he would have had them on if they were working. (See pgs. 16 - 18 and p. 28 of Jamison's deposition, Appellee's R.E. pgs. 1 - 5.)

According to the United States Naval Observatory Astronomical data for Brooksville, Noxubee County, Mississippi, on November 5, 2005, (date of the accident) sunset began at 4:59 p.m. (See U. S. Naval Observatory Data Sheet, Appellant's R.E. pgs. 5 - 8.) The State of

occurred about 5:10 or 5:15 p.m. (See p. 21 of Wayne Jamison's deposition, Appellee's R.E. pg. 13.)

Rev. Tommy Temple stated he called 911 within three or four minutes of the impact. Rev. Temple's cell phone records reflect the 911 call was made at 5:22 p.m., thereby placing the accident at approximately 5:18 p.m. (Cellular South Records, Appellee's R. E. pgs. 14 - 16.) Equally important, Rev. Temple has given an Affidavit stating that it was "so dark that he had difficulty discerning the nature of the object (tractor) as he approached it. (Affidavit of Rev. Tommy Temple, Appellee's R. E. pg. 17.) Barnes has testified by Affidavit the accident occurred between 5:15 and 5:25 p.m. Therefore, the accident report and all three witnesses to the accident place the time of the incident after sunset (4:59 p.m.). The statute makes it undisputable lights were required to be operating on the tractor.

Jamison has argued that even though he did not have lights operating on the tractor, he did have a reflector on the back of the tractor at that time of evening. The reflective material does not excuse the requirement for lights. In the first place, Section 63-7-97 does require a triangular slow-moving-vehicle emblem on slow moving vehicles, but the last sentence of that statute clearly provides that vehicles displaying such reflectors shall not be operated from "sunset to sunrise". Furthermore, Section 63-7-97 states the reflector statute does not relieve the operator of vehicles from complying with the lighting requirement previously mentioned in other statutes.

In attempting to support his argument Jamison cites the case of ***Eastwood v. State***, 415 So. 2d 678 (Miss. 1982), which was a burglary case in which the criminal defendant was indicted for

the ***Eastwood*** opinion stated:

> "Some burglary statutes, like our No. 2037 Code 1942 (entering inhabited dwelling armed with a deadly weapon), provide that the breaking and entering be done 'in the night.' This is not confined to the exact period between sunset and sunrise....." Id at 679

The ***Eastwood*** case actually supports Barnes' position. If the legislature had intended for vehicles to be required to operate with lights at "night" rather than "sunset" it would have said so. There is an obvious reason why it chose "sunset" rather than "night". There is a period between sunset and complete darkness where visibility is limited but not completely obscured, and the legislature recognized people need lights operating on their vehicles during this twilight period. The statute speaks for itself when it uses the word "sunset" as time for vehicle operators to turn on their lights.

Jamison also contends a violation of the statute is only relevant to whether a traffic citation should issue by the Highway patrol. The case of ***Cuevas v. Royal D'Iberville Hotel***, 498 So. 2d 346 (Miss. 1986) and a host of other Mississippi cases refute that argument. *Cuevas* states the doctrine of negligence per se holds even though a statute may not expressly provide civil liability for its violation, if a breach occurs in the proper circumstances, courts may give added emphasis to the legislative policies which prompted passage of the statute by declaring that one who violates its provisions in a civil case is per se negligent.

2. <u>Negligence of Defendant (Barnes): The Circuit Court Properly Denied Plaintiff/Appellant's Motion for Summary Judgment</u>

Jamison correctly points out in rear-end collisions the burden shifts to the Defendant to

preceding vehicle stop suddenly, he could nevertheless stop his vehicle without colliding with the forward vehicle. ***White v. Miller***, 513 So. 2d 600 (Miss. 1987).

It is important to note there were three people who witnessed the accident.[1] Not a single one attributes any negligent act to Barnes. Let's examine each one in turn.

A. Wayne Jamison (Plaintiff/Appellant)

Mr. Jamison was questioned at his deposition on August 10, 2006, about the negligence of Barnes.

"Question: All right. I mean, what did-what did he do wrong in hitting you? What - you said that he caused the accident. What did he do to cause the accident?

Answer: How did he manage to cause the accident?

Question: Yes, sir.

Answer: Well, I mean, I don't know what he caused the accident, but what the accident was, when- you know, when he hit me.

Question: Yes, sir. But, I mean, you said he shouldn't have hit you from behind. Tell me why you say that?

Answer: Well, -really-really-really and truly, I mean, I done lost it. I mean, I-I can't answer that.

Question: Okay. Let me be more specific. Do you say that he was speeding?

[1]In addition, there were two young boys in the Temple vehicle who were asleep and did not witness the collision.

Answer: No, sir. I can't.

Question: You're not able to say how fast he was going?

Answer: No, sir.

Question: You're not able to give any estimate as to his speed?

Answer: No, sir.

Question: He had his headlights on?

Answer: Yes, sir. Headlights was on.

Question: Are you able to say that he was not paying attention to what was in front of him in any way?

Answer: No, sir. I mean, I-I'm not saying that. No, sir.

Question: Okay. Since you sued Mr. Barnes, I'm just trying to see what you're saying he did wrong in causing the accident. Do you understand what I'm asking you?

Answer: No. sir. I sure don't.

Question: Okay. But you're not able to say he was speeding?

Answer: No, sir.

Question: You're not able to say he was being reckless in driving in any way?

Answer: No, sir.

Question: The only thing you noticed before the accident was you saw his headlights, and you're not sure how close he was to you when you saw his headlights.

tractor.

Answer: Yes, sir. Yes, sir.

B. Gregory C. Barnes (Defendant)

Mr. Barnes's Affidavit, Appellee's R. E. pg. 18, states in part:

> "My headlights were on as it was almost dark. Suddenly, I saw a slow moving tractor in my lane traveling in the same direction. There were no lights on the tractor and I was almost upon it before I noticed the tractor.....I was obeying all rules of the road, was not speeding, and was attentive to the road in front of me."

C. Rev. Tommy Temple

Rev. Tommy Temple's Affidavit, Appellee's R. E. pg. 17, states in part:

> "I am not able to estimate a speed for the other vehicle but I have no reason to believe the vehicle approaching behind the tractor was speeding.....I did not observe any improper driving on the vehicle approaching behind the tractor. ..... In my opinion it was too dark for the tractor to be on the highway without lights operating."

Finally, a review of the Mississippi Uniform Accident Report by the investigating highway patrol officer is marked for the Barnes vehicle "No Apparent Improper Driving". (Appellee's R. E. pgs. 6 - 12)

There are no other eyewitnesses or experts. The testimony above has not been refuted by Jamison. Barnes has met and overcome his burden by presenting every conceivable witness who could testify as to liability. Not a one, not even the Plaintiff/Jamison, offers even the slightest evidence of negligence or wrongdoing of Barnes. To the contrary, the uncontradicted testimony

came upon it in the near darkness. The failure of the tractor to have lights operating presented an emergency situation that the ***White*** case recognizes as a condition that overcomes the burden on rear-end collisions. Id at page 602.

The only contention that Jamison makes is that Barnes rear-ended Jamison's tractor and therefore Barnes must be at fault. Jamison has offered the affidavit of Pearlie Owens, who gave her opinion "you could see where you were going without the need for headlights". (Appellant's R. E. 3 - 4) Ms. Owens was not a witness to the accident and came upon the scene a few minutes thereafter. She offers no evidence to refute the plaintiff's own admission he cannot attribute any negligence to Barnes. Ms. Owens simply offers her opinion it was not so dark that lights were required.[1] But Jamison is unable to give any basis for such any allegation. "'Mere allegations' not demonstrating the presence of 'detailed and precise facts' are insufficient to prevent summary judgment." ***Stranz vs. Pinion***, 652 So. 2d 738, 742 (Miss. 1995) citing ***Crystal Springs Ins. Agency, Inc. vs. Commercial Union Ins. Co.***, 554 So. 2d 884, 885 (Miss. 1989).

CONCLUSION

Jamison was operating a tractor on State Highway 388 after sunset without any lights, all in violation of the lighting requirements as required in the Mississippi Code. The violation of these statutes constitutes negligence *per se* and Barnes Is entitled to a Summary Judgment on the basis of the statute's violation that Jamison was negligent.

[1] Even Jamison said he would have had lights on if they were operating.

negligent and Barnes was presented, under all of the eyewitness testimony, with a sudden emergency. Such facts create the exception referred to in ***White***. There is no dispute on the facts or a basis for a jury to render any verdict in favor of Jamison and against Barnes.

The trial court's Order granting summary judgment should stand on both issues.

Respectfully submitted on this the 14th day of January, 2008.

J. NILES McNEEL ([redacted]
Attorney for Appellee, Gregory C. Barnes

J. NILES McNEEL ([redacted]
McNEEL AND BALLARD
ATTORNEYS AT LAW
P. O. BOX 28
LOUISVILLE, MISSISSIPPI 39339
TELEPHONE: 662-773-2041
ATTORNEY FOR APPELLEE

This is to certify that I, J. Niles McNeel, attorney for Appellee, have this day mailed, via U. S. Mail, postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF APPELLEE** to the following:

R. Gregg Rogers, Esquire
Attorney at Law
P. O. Box 478
Louisville, Mississippi 39339
Attorney for Appellant

Honorable James T. Kitchens, Jr.
Circuit Court Judge
P. O. Box 1387
Columbus, Mississippi 39703

This the 14th day of January, 2008.

J. NILES McNEEL