IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

FRANCES SPANN, YOLANDA THOMAS,
and DEMETREAL BARBER — APPELLANTS

VERSUS — CASE NO. 2007-TS-00807

SHUQUALAK LUMBER COMPANY, INC. — APPELLEE

APPEAL FROM THE CIRCUIT COURT OF NOXUBEE COUNTY, MISSISSIPPI
CAUSE NO. 2005-107

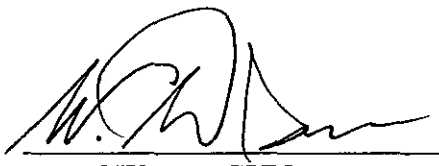
REPLY BRIEF OF APPELLANTS FRANCES SPANN, YOLANDA THOMAS, and DEMETREAL BARBER

W. HOWARD GUNN
ATTORNEY AT LAW
310 SOUTH HICKORY STREET
PO BOX 157
ABERDEEN MS 39730
662-369-8533
FAX: 662-369-9844
whgunn@bellsouth.net
[redacted]

ATTORNEY FOR APPELLANTS

The undersigned counsel of record certifies that the following persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Frances Spann, Plaintiff/Appellant
2. Yolanda Thomas, Plaintiff/Appellant
3. Demetreal Barber, Plaintiff/Appellant
4. W. Howard Gunn Attorney for Plaintiffs/Appellants
5. Shuqualak Lumber Company, Inc., Defendant/Appellee
6. Timothy D. Crawley, Attorney for Defendant/Appellee



W. HOWARD GUNN
ATTORNEY FOR APPELLANTS

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FRANCES SPANN, YOLANDA THOMAS,
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REPLY BRIEF OF APPELLANTS

I.

STATEMENT OF ISSUES

ISSUE NO. 1.

The Trial Court Erred in Determining that No Genuine Issue of Material Fact Exists

Summary Judgment is not applicable pursuant to Rule 56(c) of the Mississippi Rules of Civil Procedure where there exists genuine issue of material fact. Spann, Thomas, and Barber have submitted by testimony, supporting affidavits, and documentary evidence their version of facts, not mere allegations, in the case at bar, summarized as follows:

On October 25, 2002, Shuqualak Lumber was operating its lumber plant in Shuqualak, MS wherein said Shuqualak Plant abutted or was located on Floyd Loop Drive and Residence Street.(R.V.II,153) In the process of the operation of its aforesaid plant, Shuqualak Lumber in treating said lumber produced and/or generated steam, fog and/or smoke. (R.V.II,189) Such steam, fog and/or smoke was of a dense nature which covered

Lumber knew or should have known of its creation of such condition and that such condition posed a hazard to drivers operating their vehicles on Floyd Loop Drive and Residence Street, causing foreseeable injury to said drivers from accidents thereon. (R.V.II,189; R.V.III, 12-13; R.V.II, 153-173)

On October 25, 2002, Spann and Thomas were operating their respective vehicles on Residence Street with the said Spann vehicle heading in an easterly direction and the Thomas vehicle heading in a westerly direction when their visibility was severely impaired by the dense fog, steam, and/or smoke conditions created by Shuqualak Lumber in the operation of the plant. (R.V.II.,153-173) Appellant Barber was a passenger in the vehicle of Spann. The accident report prepared by the investigating officer found fog produced by Shuqualak Lumber on the date of accident, and as to a description of the accident, that both drivers stated that they "could not see" due to fog being produced by Shuqualak Lumber which impaired their vision while operating their vehicles on Floyd Loop Drive. (R.V.II,153) Furthermore, numerous residents in the area submitted affidavits of Shuqualak Lumber's ongoing problems of fog and/or smoke in the area which impaired drivers' visibility on Floyd Loop Drive and Residence Street (R.V.II,154-173). A review of only three of such affidavits supports the dangerous condition created by Shuqualak Lumber:

ELIZABETH THOMAS

I, ELIZABETH THOMAS, being first duly sworn, on my oath depose and state as follows:

1. I am a resident citizen of Noxubee County, Mississippi, residing at 115 Floyd Loop for over 30 years.
2. I am familiar with the Shuqualak Lumber Company in Shuqualak, Mississippi which is located on or about Floyd Loop and Residence Street.
3. During the time in which I have lived in Shuqualak, I have personally observed dense fog, steam and/or smoke coming from the Shuqualak Lumber Company plant and crossing over Floyd Loop and Residence Street. The steam from the plant is so thick and dense that you cannot see through it while driving on Residence Street.
4. I have observed fog, steam, or smoke as being so dense as it crossed Residence Street that, in my opinion, it would cause drivers on Floyd Loop and Residence Street to be unable to see other traffic approaching or following them or traveling ahead of them at the time of such dense fog.
5. I have personally traveled in my vehicle and/or in other vehicles on Floyd Loop and Residence Street and encountered severe limitations of visibility due to the dense fog, smoke and/or steam coming across Floyd Loop and Residence Street that was produced by Shuqualak Lumber Company.

Witness my signature on this the _____ day of December, 2006.

_____
ELIZABETH THOMAS

(R.V.II,172-173)

AFFIDAVIT
OF
MAXINE RICHARDS

I, MAXINE RICHARDS, being first duly sworn, on my oath depose and state as follows:

Mississippi which is located on or about Floyd Loop and Residence Street.

3. During the time in which I have lived in Shuqualak, I have personally observed dense fog, steam and/or smoke coming from the Shuqualak Lumber Company plant and crossing over Floyd Loop and Residence Street. The steam coming from the plant is so dense as it crosses Residence Street, I am surprised that someone has not gotten killed or seriously injured.
4. I have observed fog, steam, or smoke as being so dense as it crossed Residence Street that, in my opinion, it would cause drivers on Floyd Loop and Residence Street to be unable to see other traffic approaching or following them or traveling ahead of them at the time of such dense fog.
5. I have personally traveled in my vehicle and/or in other vehicles on Floyd Loop and Residence Street and encountered severe limitations of visibility due to the dense fog, smoke and/or steam coming across Floyd Loop and Residence Street that was produced by Shuqualak Lumber Company.

Witness my signature on this the _____ day of December, 2006.

_____
MAXINE RICHARDS

(R.V.II,162-63)

AFFIDAVIT
OF
LISA SHIELDS

I, LISA SHIELDS, being first duly sworn, on my oath depose and state as follows:

1. I am a resident citizen of Shuqualak, Noxubee County, Mississippi, residing across from, or in front of Shuqualak Lumber Company for over 30 years.
2. I am familiar with the Shuqualak Lumber Company in Shuqualak, Mississippi which is located on or about Floyd Loop and Residence Street.
3. During the time in which I have lived in Shuqualak, I have personally observed dense fog, steam and/or smoke coming from the Shuqualak

4. I have observed fog, steam, or smoke as being so dense as it crossed Residence Street that, in my opinion, it would cause drivers on Floyd Loop and Residence Street to be unable to see other traffic approaching or following them or traveling ahead of them at the time of such dense fog.

5. I have personally traveled in my vehicle and/or in other vehicles on Floyd Loop and Residence Street and encountered severe limitations of visibility due to the dense fog, smoke and/or steam coming across Floyd Loop and Residence Street that was produced by Shuqualak Lumber Company.

Witness my signature on this the _____ day of December, 2006.

_____
LISA SHIELDS

(R.V.II,166-67)

Also, see the Deposition of Appellant Thomas (p.178-179) and testimony of Charles Thomas III. (R.V.III,12-13) Further, see the Deposition of Plaintiff Barber. (R.V.II,183-184) Shuqualak Lumber admits that steam is produced in its lumber treatment process. (R.V.II,189):

> RESPONSE TO INTERROGATORY #4:
> The heat energy from the dry kilns is supplied by three wood waste fired steam boilers. Steam generated in the boilers is transferred via insulated steam piping to the dry kilns. Within the kilns fin piping radiates heat into the kilns where large fans circulate air to dry the lumber. At specific times during the drying cycle vents on the roofs of the kilns open to allow moisture to escape from the kilns.

And that it did not have in operation warning devices, or signs or notices given to motorist traveling on Residence Street and Floyd Loop Drive of the presence of fog, smoke or steam from its plant. (R.V.II,193) More importantly Shuqualak Lumber admits that on the date of

with each other causing Spann, Thomas and Barber personal injuries, and property damage to the vehicles of Plaintiffs Thomas and Spann. (R.V. I,3-5)

Shuqualak Lumber in response to the version of facts alleged by Spann, Barber, and Thomas has admitted that it operated its plant adjacent to or in close proximity to Floyd Loop Drive and Residence Street, Brief of Shuqualak, p.7. It further admitted that steam comes from its kilns during such operation every day, twenty-four hours a day, seven days a week, and three hundred sixty-five days a year, Brief of Shuqualak, p.8. Shuqualak Lumber does not, in addressing the factual issues herein, deny that the steam from its operation caused poor visibility or impaired vision of drivers upon Floyd Loop Drive and Residence Street. Nor does it contest or submit proof of the density of such steam as alleged by Spann, barber and Thomas. Shuqualak's primary response to the factual issue is that "the appellants have made no showing, beyond mere allegations, that material facts exist in regard to their claim". On the contrary, Appellants have stated in detail with supporting affidavits and testimony facts supporting their claims in the case at bar. Such factual issues provide sufficient evidence for a reasonable jury to find for them. Spann, Thomas, and Barber have submitted more than a scintilla of evidence to support their claims, *Page v. Wiggins*, 595 So.2d 1291 (Miss. 1992), *Drummond v. Buckley*, 627 So.2d 264 (Miss. 1993), and *Dennis v. Dearle*, 457 So.2d 1941 (Miss. 1984).

Shuqualak Lumber in its Lumber Operation Which Produced Dense Steam Which Traversed Across Abutting Streets, Floyd Loop Drive and Residence Street Had No Duty Owed to Appellants, Spann, Thomas, and Barber and Other Drivers on Floyd Loop Drive and Residence Street to Abate the Steam or Warn of Such Hazard Therefrom

Shuqualak Lumber in its Brief asserts the following argument relative to the issue of duty:

> In point of fact, the Mississippi Supreme Court has in several prior cases addressed the issue of liability of an owner or occupant of private premises abutting on or near a highway for injury or damage resulting from an automobile accident in the highway allegedly occurring because the driver's vision was obscured by smoke or steam negligently allowed to emanate from such premises. However, this Court never addressed, with specificity, the duty of care imposed upon said owners and occupiers of private premises abutting or near a highway on facts analogous to those present in the case at bar.

Appellee's Brief, pp.9-10

Shuqualak Lumber further asserts that its alleged absence of receipt of individual or government complaints regarding steam produced by its plant operation negates the imposition of a duty owed to operators of vehicles on Floyd Loop Drive and Residence Street. See Brief of Shuqualak, p.14.

Such assertions are incorrect and a misapprehension of the law relative to the duty owed to users of roads, or highways by owners of private premises abutting or near such

wherein the Court imposed a duty upon premises owners. The imposition of such duty was based upon whether the harm or injury to a person was foreseeable by the owner of the premises conducting activities thereon. The Court has found and imposed such duty based upon the foreseeability of the harm to others. Hence, such landowner as a defendant in any negligence case must take reasonable care to remove or protect against foreseeable hazards that he knew or should have known about in the exercise of due care. See *Delta Elect. Power Ass'n v. Burton, et al.*, 126 So.2d 258 (Miss.1961). For an in-depth analysis of the issue of foreseeability in the imposition of duty upon a defendant tortfeasor, see, *Rein v. Benchmark Construction Co.*, p.65, So.2d 1134 (Miss.2004). In *Rein*, the relatives of a nursing home resident who died as a result of being attacked and bitten by fire ants in her bed brought, among other claims, a negligence action against Benchmark Construction Co. which constructed the nursing home, natural landscape accents nursery and landscapers and others. The Court in refusing to impose a duty upon Benchmark where it could not reasonably have foreseen that the resident, Ms. Rein, would be attacked and killed by fire ants two (2) years after it constructed the nursing home, provided an in-depth discussion and analysis of the element of foreseeability in imposition of a duty owed by an alleged tortfeasor:

> ¶29. In analyzing an actor's alleged negligence, this Court asks whether a duty exists and whether it has been breached. This is a question of law. But, "[t]he important component of the **existence of the duty** is that the injury is '**reasonably foreseeable**,'" and thus it is appropriate for the trial judge to decide. *Lyle v. Mladinich*, 584 So.2d 397, 399 (Miss. 1991)(emphasis added). The ultimate

likely lead to an insect infestation that would cause a death by fire ant bites to a resident of the nursing home.

¶30. The Court in discussing the issues of duty and foreseeability has stated:

> To succeed on a claim for negligence, the plaintiff must prove duty, breach, causation and injury. *Meena v. Wilburn*, 603 So.2d 866, 869 (Miss. 1992). The plaintiff must show "(1) the existence of a duty 'to conform to a specific standard of conduct for the protection of others against the unreasonable risk of injury', (2) a breach of that duty, (3) causal relationship between the breach and alleged injury,, and (4) injury or damages." *Id.* at 870 n.5) (citing and quoting *Burnham v. Tabb*, 508 So.2d 1072, 1074 (Miss. 1987). Duty and breach of duty are essential to finding negligence and must be demonstrated first. *Stantz v. Pinion*, 652 So.2d 738, 742 (Miss. 1955).
>
> While **duty and causation both involve foreseeability**, duty is an issue of **law**, and causation is **generally** a matter for the jury. Juries are not instructed in, nor do they engage in, consideration of the policy matters and the precedent which define the concept of duty. W. Page Keeton, *Prosser and Keeton on Torts* §§ 37, at 236 (5th ed.1984). This Court has held that the existence vel non of a duty of care is a question of **law** to be decided by the Court. *Foster v. Bass*, 575 So.2d 967, 972-73 (Miss.1990).
>
> *Donald v. Amoco Prod.Co.*, 735 So.2d 161, 174 (Miss. 1999) (emphasis added).

¶31. The Court of Appeals considered the

Appeals stated:

> **When reasonable minds might differ on the matter**, questions of proximate cause and of negligence and of contributory negligence are **generally** for determination of jury. *American Creosote Works of Louisiana v. Harp*, 215 Miss. 5, 12, 60 So.2d 514, 517 (1952). These questions are for the jury to decide under proper instructions of the court as to the applicable principles of law involved. *Smith v. Walton*, 270 So.2d 409, 413 (Miss. 1973). **Foreseeability** and breach of duty are also issues to be decided by the finder of fact **once sufficient evidence is presented in a negligence case**. *American Nat. Ins. Co. v. Hogue*, 749 So.2d 1254,1259 (Miss.Ct.App.2000).

Hankins, 774 So.2d at 464 (emphasis added). Thus, it is a jury questions only if there is "sufficient evidence" before the Court; and therefore, the ruling by the trial court was a judgment call as a matter of law, but certainly not impermissible.

¶32. Under Mississippi law, for a person to be liable for another person's injury, the cause of an injury must be of such a character and done in such a situation that the action should have reasonably anticipated some injury as a probable result. *Mauney v. Gulf Ref. Co.*, 193 Miss. 421, 9 So.2d 780, 781 (1942). The actor is not bound to a precision of anticipation which would include an unusual and improbable or extraordinary occurrence, although such happening is within the range of possibilities. *Id.* This Court requires that:

> [t]he principles of common law must be kept within practical bounds and so as not to

law must say, as it does, that "care or foresight as to the probable effect of an act is not to be weighed on jewelers scales, nor calculated by the expert mind of the philosopher, from cause to effect, in all situations."

Id. (citing *Illinois Cent. R. Co. v. Bloodworth*, 166 Miss. 602, 145 So. 333 (1933)).

¶33. In *Sturdivant v. Crosby Lumber & Mfg. Co.*, 218 Miss. 91, 65 So.2d 291 (1953), Sturdivant was on his employer's business premises eating lunch under a tree when lightning struck a power line nearby. The lightning left the line and arced thirty feet away into a creek and over to the tree under which Sturdivant was sitting and ran down a vine into Sturdivant's body. *Id.* At 292-93. This Court opined that:

[t]o impose upon appellee liability for Sturdivant's death would be placing upon appellee the burden of prevision or anticipation of an unusual, improbable or extraordinary occurrence. It was within the range of possibilities that lightning would strike the power line, that it would not follow the line into the pump house and the planer mill, but that it would continue straight ahead, leave the line, arc thirty feet over the creek into a tree, that Sturdivant would be under the tree, and that the lightning would then go through the tree and down a vine into Sturdivant's body. But although there was a possibility, those events were most assuredly no more than that.

Id. At 101-02, 65 So.2d 291. The Court found that the event was too remote to require the defendant to foresee and guard against it. *Id.*

> foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable." *Reinstatement (Second) of Torts, §435 (1965).* This Court has expressly rejected the argument that there is no negligence because the injury rarely occurs, or never before occurred (emphasis supplied). *Gulf Ref. Co. V. Williams*, 183 Miss.723, 185 So.234, 235 (1938) (citing *Crawford v. City of Meridian*, 174 Miss. 875, 165 So. 612 (1936)). In regard to foreseeability, 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." *Williams*, 185 So. At 236. Further this Court has held that defendants "cannot escape liability because a particular injury could not be foreseen, if some injury ought to have been reasonably anticipated. " *Delta Elec. Power Ass'n v. Burton*, 240 Miss. 209, 126 So.2d 258, 261 (1961) (emphasis added).
>
> ¶35. In *McCulloch v. Glasgow*, the plaintiff alleged that his heart attack was the result of the City of Ackerman taking his property through eminent domain. *McCulloch v. Glasgow*, 620 F.2d 47, 52 (5th Cir.1980). The City called his heart attack unforeseeable. *Id.* The Fifth Circuit stated that the heart attack need not have been foreseeable if the defendant should have foreseen that its action would expose the plaintiff to risk of some otherwise compensable injury. *Id.*

Spann Plaintiffs submit that a review of the facts in the case at bar in conjunction with a reading of *Rein* supports the imposition of a duty owed to them by Shuqualak Lumber. Factors supporting the imposition of such duty may be summarized as follows:

(b) In the process of its plant operation, Shuqualak in treating lumber generated or produced steam (R.V.II, 189).

(c) The steam produced by Shuqualak traversed or crossed over Floyd Loop Drive and Residence Street (R.V.II, 153-157, Brief of Shuqualak, p.4.

(d) Shuqualak admits that it produced steam which crossed over or traversed Floyd Loop Drive and Residence Street (R.V.II, 192; R.V.III, 12-13), Brief of Shuqualak, p.4. In its Brief and in the Record, Shuqualak does not contest the character, or density of such steam which Spann, Barber and Thomas, by Affidavits and testimony, have described as dense (R.V.II, 153-173).

(e) Shuqualak knew or should have known of its creation of conditions which posed a hazard to drivers operating their vehicles on Floyd Loop Drive and Residence Street causing foreseeable injury (R.V.II, 189; R.V.III, 12-13; R.V.II, 153-173).

(f) The Trial Court found in its ruling that the accident of Plaintiffs, Spann, Barber and Thomas, was caused in part due to Shuqualak's plant operation.

> The Court finds that this case involves a constantly operating timber kiln operation located within the town of Shuqualak. On an overcast, foggy day, the Plaintiff was a party to a car accident that occurred, due in part, to poor visibility caused by steam from the kiln overlying the road (emphasis supplied) (R.V.II,211).

Shuqualak Lumber admits operating its lumber plant producing steam which

have described the steam as dense. Such description has been unrefuted by Shuqualak Lumber. Furthermore, the Trial Court found, and the testimony of Plaintiffs, Thomas, Barber and Spann, along with affidavits submitted during hearing on Motion for Summary Judgment, verified that on the date of accident, the steam was produced by Shuqualak Lumber, traversed or crossed over Flood Loop Drive and was a contributing cause of the accident of Plaintiffs, Spann, Barber and Thomas.

A review of the facts in this case, along with a reading of *Rein* which presents an in-depth analysis, review and discussion on the issue of foreseeability in the imposition of duty, supports the imposition of a duty upon Shuqualak to Spann, Barber, and Thomas. The character of Shuqualak Lumber's plant operation in producing steam of the dense nature which traveled across Floyd Loop Drive and Residence Street certainly should have caused Shuqualak Lumber to reasonably anticipate some injury caused to the operators upon such streets due to impaired visibility proximately caused by the steam in its lumber operation. *Mauney v. Gulf Ref. Co.*, 193 Miss. 421, 9 So.2d 780, 781 (1942). Shuqualak's argument that an injury had never occurred before due to the steam admittedly produced by its lumber operation or that it had never received complaints from individuals or government regulators about the steam falls on deaf ears and has been soundly rejected by this Court:

> ¶34. When the conduct of the actor is a substantial factor in brining about harm to another then, "the fact that the actor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable."

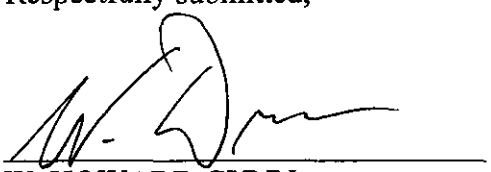
> the injury rarely occurs, or never before occurred (emphasis supplied). *Gulf Ref. Co. V. Williams*, 183 Miss.723, 185 So.234, 235 (1938) (citing *Crawford v. City of Meridian*, 174 Miss. 875, 165 So. 612 (1936)). In regard to foreseeability, the "inquiry is not whether the thing is to be foreseen 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." *Williams*, 185 So. At 236. Further this Court has held that defendants "cannot escape liability because a particular injury could not be foreseen, if some injury ought to have been reasonably anticipated. " *Delta Elec. Power Ass'n v. Burton*, 240 Miss. 209, 126 So.2d 258, 261 (1961). (emphasis added)

II.
CONCLUSION

This Court has consistently held that a duty is imposed upon an alleged tortfeasor for the injury of another where the cause of the injury is of such a character and done in such a situation that the tortfeasor should have reasonably anticipated some injury as a probable result. Hence, the Court has consistently held, in regard to foreseeability, the issue is not whether the thing is to be foreseen or anticipated as one which will probably happen, but rather, whether it is likely to happen, even though the likelihood might be sufficient to amount to a comparative probability. See *Rein v. Benchmark Construction Co.*, p.65, So.2d 1134 (Miss.2004). In summary, in the case at bar, it is certainly foreseeable that dense fog traveling across a traveled street could likely cause impaired visibility to drivers upon such streets and an automobile accident therefrom.

not a duty owed to the Plaintiffs, Spann, Barber, and Thomas, by Shuqualak Lumber. Furthermore, the Trial Court committed reversible error in finding that there was not a genuine issue of material fact proscribing its rendering of summary judgment.

Respectfully submitted,



W. HOWARD GUNN
ATTORNEY FOR APPELLANTS

W. HOWARD GUNN
ATTORNEY AT LAW
310 SOUTH HICKORY STREET
PO BOX 157
ABERDEEN, MS 39730
1/662-369-8533
[redacted]
RB19756

I, W. Howard Gunn, attorney for Claimant, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **REPLY BRIEF OF APPELLANTS** to:

Honorable James T. Kitchens
Circuit Court Judge
PO Box 1387
Columbus MS 39703

Honorable Timothy D. Crawley
Attorney at Law
PO Box 2540
Ridgeland MS 39158-2540

So certified on this the 14th day of April, 2008.

W. HOWARD GUNN
ATTORNEY FOR APPELLANTS