

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

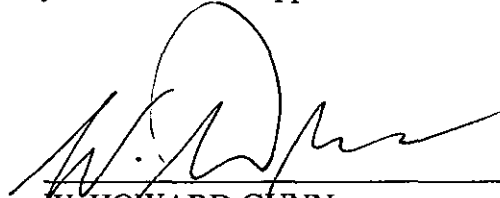
BRIEF OF APPELLANTS
FRANCES SPANN, YOLANDA THOMAS, and DEMETREAL BARBER

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


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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BRIEF OF APPELLANTS

I.

STATEMENT OF ISSUES

The Trial Court Committed Error in Granting Summary Judgment on a Finding That There
Existed No Genuine Issue of Material Fact.

II.

STATEMENT OF THE CASE

On July 11, 2005, Appellants, Frances Spann, Yolanda Thomas, and Demetreal Barber, hereinafter referred to as “Spann”, “Thomas” and “Barber” or “Plaintiffs”, filed suit in the Noxubee County Circuit Court against Appellee, Shuqualak Lumber Company, Inc., hereinafter referred to as “Shuqualak Lumber” or “Defendant”. The basis or nature of such suit was the negligence of Shuqualak Lumber in the operation of its lumber plant located in Macon, MS, wherein Spann, Thomas and Barber allege that the plant in its operation of treating lumber produced and/or generated steam, fog and/or smoke. Spann, Thomas and Barber further alleged that such steam, for or smoke, was of a dense nature which covered

alleged that Shuqualak Lumber knew or should have known of its creating of such condition and that such condition posed a hazard to drivers on said streets causing foreseeable injury and that Shuqualak Lumber failed in its duty to warn against such hazard or make correction action of same. (R.V.I, 3-5)

Shuqualak Lumber filed its Answer to the Complaint on or about August 9, 2005, raising affirmative defenses and general denials of the allegations of the Complaint. (R.V.I,14-19) After some discovery, including the depositions of Spann, Thomas and Barber, Shuqualak Lumber, pursuant to Rule 56 of the Mississippi of Civil Procedure, filed its Motion for Summary Judgment on November 22, 2006. (R.V.I,83-89) Spann, Thomas and Barber filed their Response on December 26, 2006. (R.V.I,148-150; R.V.II,151-205) A hearing on the Motion for Summary Judgment was held on March 23, 2007. On April 17, 2007, the Circuit Court entered its Order granting Shuqualak Lumber's Motion for Summary Judgment.(R.V.II,211-212) On May 11, 2007, Plaintiffs filed their Notice of Appeal herein. (R.V.II, 213-215)

III.

SUMMARY OF THE ARGUMENT

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

decreased visibility for drivers operating their vehicle thereon. (R.V.II,153-173) Shuqualak 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 Street. (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 and Residence Street (R.V.II,154-173). A review of only three of such affidavits supports the dangerous condition created by Shuqualak Lumber:

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

accident, it cannot deny that fog, smoke or steam were emitted from its plant. (R.V.II,192)

As a proximate result thereof, the vehicles of Plaintiffs, Spann and Thomas, collided 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)

A review of the above facts reveals that there exists genuine issue of material facts in this case which proscribe the granting of summary judgment for Shuqualak Lumber. The said issue of facts being, but not limited to, the following:

1. Did Shuqualak Lumber operate its lumber plant abutting Floyd Loop Drive and Residence Street in Shuqualak MS where such operation created or produced fog, smoke, and/or steam.
2. Whether or not said fog, smoke, and/or stream traveled across Floyd Loop Drive and Residence Street on October 25, 2002.
3. Whether or not such fog, steam or smoke was of such density as to create a hazard to Plaintiffs and other drivers operating their vehicles on Floyd Loop Drive and Residence Street on October 25, 2002.
4. Whether or not the accident between Plaintiffs', Thomas and Spann, vehicles on Floyd Loop Drive and Residence Street on October 25, 2002, was proximately caused by dense fog, smoke and/or steam produced by Shuqualak Lumber's plant as it abuts Floyd Loop Drive and Residence Street.
5. Whether or not Plaintiffs suffered injuries as a proximate result of the

existence of such fog, steam or smoke.

7. Whether or not Shuqualak Lumber took appropriate action to abate such steam, fog or smoke.

Based upon the above cited genuine issues of material fact, the Circuit Court erred in granting summary judgment (Rule 56 of the Mississippi Rules of Civil Procedure).

IV.

ARGUMENT

Summary Judgment is Not Proper Pursuant to Rule 56(c) of the Mississippi Rules of Civil Procedure Where There is Genuine Issue of Material Fact and the Moving Party is Not Entitled to Judgment as a Matter of Law.

An appeal from summary judgment is reviewed de novo. *Jacox v. Circus Circus Miss., Inc.*, 908 So.2d 181, 183 (¶4) (Miss. Ct. App.2005) (citing *Cossitt v. Alfa Ins. Corp.*, 726 So.2d 132, 136 (¶19) (Miss. 1998)). The standard by which we review the grant or denial of summary judgment is the same standard as is employed by the trial court under Rule 56(c) of the Mississippi Rules of Civil Procedure. *Jacox*, 908 So.2d at 183 (¶4) (citing *Dailey v. Methodist Med. Ctr.*, 790 So.2d 903, 906-07 (¶3) (Miss. Ct. App.2001)). Pursuant to Rule 56(c), summary judgment is appropriate when “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.” The evidence must be viewed in the light most favorable to the non-moving party. *Jacox*, 908 So.2d at 184 (¶4) (citing *Dailey*, 790 So.2d at 907 (¶3)).

judgment as a matter of law. The standard applied by the trial court in reviewing the evidence presented by the parties in ruling on a motion for summary judgment was addressed in *Brown v. Credit Center, Inc.*, 444 So.2d 358 (Miss. 1983). The Court must view the evidence in the light most favorable to the non-moving party. All reasonable doubts regarding the existence of a genuine issue are resolved in favor of the non-moving party. The non-moving party is entitled to the benefit of all reasonable and favorable inferences that can be drawn from the record. The inference-drawing in favor of the non-moving party arises when “the facts specifically averred by that party contradict facts specifically averred” by the moving party. The “focal point” of the summary judgment procedure is the term “material fact.” See *Erby v. North Mississippi Medical Center*, 654 So.2d 495, 43 A.L.R.5th 811 (Miss. 1995). The dispute over a material fact is genuine when “the evidence is such that a reasonable jury could return a verdict for the non-moving party.” *Page v. Wiggins*, 595 So.2d 1291 (Miss. 1992). Summary judgment is improper “unless it can be said that no reasonable juror could decide the [material fact] in favor of the non-moving party.” *Drummond v. Buckley*, 627 So.2d 264 (Miss. 1993). The determination of a genuine issue under Rule 56 is similar to the directed verdict standard under Rule 50(a). *Dennis v. Dearle*, 457 So.2d 1941 (Miss. 1984), identifies common examples of a “genuine issue.” (1) when one party swears to one version of the matter in issue and another says just the opposite; (2) when there is more than one reasonable interpretation that may be given undisputed testimony; and (3) when materially differing but nevertheless reasonable inferences may be drawn from

Drivers on Floyd Loop Drive and Residence Street Abutted by its Lumber Operation.

Of significance is the learned Trial Judge's finding in his Order Granting Summary Judgment, that Plaintiffs, Spann, Barber and Thomas, were parties to an accident that was caused in part due to Shuqualak Lumber'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. (R.V.II,211)

Nevertheless, he found no duty upon Shuqualak Lumber to abate the steam or provide adequate notice to drivers of same. Such finding is contrary to Mississippi law.

The duty of a landowner, or operator of a business abutting roads or highways wherein smoke, dust, fog or steam it produced has been conclusively established. In *Keith v. Yazoo & M.V.R. Co.*, 168 Miss. 519, 151 So.2d 916 (Miss.1934), *Keith* brought an action for personal injury and damage to his wrecked vehicle wherein he alleged injury due to dense smoke crossing a highway after a grass fire was set by employees of Yazoo causing Keith to incur impaired visibility where he could not see due to dense smoke and, hence, drove to the right side of the highway headed south and was

court. The Mississippi Supreme Court in addressing the duty of a business in which its operation created smoke near a highway, and negligence therefrom, held that whether *Yazoo* was liable based upon negligence for Keith's injuries and damages was an issue for the jury. The Court went on to hold:

The jury were warranted in finding that the fire producing the smoke was negligently set out on a windy day, that the fire was set to highly inflammable dry matter and in close proximity to a public highway, and that the smoke would be blown on and across the highway, causing thereby an effectual barricade. In this situation, we think a jury would be warranted in finding that the agent and employees of the railroad company might reasonably foresee that some injury might result to those who had the right to travel the public highway at that and other points. So far as the record indicates, Keith was where he had a right to be, and the railroad agents and employees might have reasonably foreseen that a traveler thereon would more than probably be entrapped in dense smoke and lose his way, and some injury might ensue from blocking the railroad a distance from 220 to 440 yards. Smoke is a gaseous substance; and when organic matter, highly inflammable, is set on fire, the actor must reasonably know that many unfavorable ills and injuries are likely to flow from fire and smoke at liberty on a windy day. The jury from all of these facts could and might infer negligence on the part of the actor.

v. *Turner*, 235 So.2d 464 (Miss. 1970), and *Maness v. Illinois Central Railroad Co., et al.*, 271 So.2d 418 (Miss. 1972), where such duty was addressed and further established following the Court's ruling in *Keith*.

In *Brenda Warren v. Allgood, et al.*, 344 So.2d 151 (Miss. 1977), a case with very similar facts to the case at bar, the Defendant Hamilton operated a liming operation on his fields adjacent to or abutting Highway 63. Plaintiff, while driving on Highway 63 encountered dense haze or fog which went across Highway 63 caused by Defendant's lime operation. Plaintiff alleged that as a proximate result thereof, her decedent was killed after being rear-ended by a vehicle being operated by Allgood. From a jury verdict against the other driver and for the Defendant lime operator, Hamilton, Plaintiff appealed. In ruling on an evidentiary issue wherein the Plaintiff objected to the admission of a sample of lime and testimony regarding same being admitted into evidence. The Court affirmed the Circuit Court ruling allowing such testimony and sample into evidence. Of more importance is the Court's holding that even if the source of lime sample was not sufficiently proven, the source was not of particular significance on the issue of whether or not the liming operation on the farm adjacent to the highway obstructed the view of those using the highway since all that was required was that it be identified as the same type of lime that had been used in the farm operation

property for injuries caused to operators of vehicles on Mississippi highways wherein dust, smog, or fog is produced by the operator of such business is a question for the jury. Thus, the Court further affirmed the duty of an operator of a business owed to motorist wherein such business caused smoke, fog, or dust upon a highway which is abutted by such business owner's property and impairing the visibility of drivers.

In the case at bar, Shuqualak Lumber could have reasonably foreseen that steam, fog, and/or smoke produced at its lumber plant would have traveled across Floyd Loop Drive and Residence Street, and that injury might result to Plaintiffs, Spann, Thomas and Barber, and others operating their vehicles upon such streets. Shuqualak Lumber operated its plant and produced dense fog, smoke, and/or steam which traveled across Floyd Loop Drive and Residence Street and produced a hazard to Plaintiffs and other drivers utilizing such streets. Hence, Shuqualak Lumber owed a duty to Plaintiffs to abate such for, steam or smoke, and/or to provide cautionary notice to them of same. Shuqualak Lumber did neither.

(B) Genuine Issue of Material Fact in the Case at Bar Proscribes Summary Judgment.

There exists genuine issue of material facts in this case which proscribe the granting of summary judgment for Shuqualak Lumber. The said issue of

and Residence Street in Shuqualak MS where such operation created or produced fog, smoke, and/or steam.

- (2) Whether or not said fog, smoke, and/or stream traveled across Floyd Loop Drive and Residence Street on October 25, 2002.
- (3) Whether or not such fog, steam or smoke was of such density as to create a hazard to Plaintiffs and other drivers operating their vehicles on Floyd Loop Drive and Residence Street on October 25, 2002.
- (4) Whether or not the accident between the vehicles of Plaintiffs Spann and Thomas on Floyd Loop Drive and Residence Street on October 25, 2002, was proximately caused by dense fog, smoke and/or steam produced by Shuqualak Lumber's plant as it abuts Floyd Loop Drive and Residence Street.
- (5) Whether or not Plaintiffs, Spann, Thomas and Barber, suffered injuries as a proximate result of the aforesaid accident.

(C) In the case at bar, had the Trial Court not granted summary judgment, Plaintiffs would have proved that:

- (1) Shuqualak Lumber operated its lumber mill plant adjacent to Floyd Loop Drive and Residence Street in Shuqualak MS.
- (2) In the operation of such plant, Shuqualak Lumber produced dense steam, fog, and/or smoke.


2002.

- (4) Shuqualak Lumber knew or should have known that such fog, steam or smoke went across Floyd Loop Drive and Residence Street.
- (5) Shuqualak Lumber knew various motorists traveled on Floyd Loop Drive and Residence Street.
- (6) It was foreseeable that due to such decreased visibility proximately caused by the said fog, steam and/or smoke, motorists would suffer personal injuries and/or property damages arising from accidents proximately caused thereby.
- (7) It was foreseeable that the visibility of motorists traveling on Floyd Loop Drive and Residence Street would be seriously impaired due to such fog, steam and/or smoke.
- (8) Shuqualak Lumber owed a duty to Plaintiffs to abate such dense fog, steam or smoke.
- (9) Shuqualak Lumber had a duty to warn Plaintiffs or take other steps to alert Plaintiffs regarding such dense steam, fog or smoke.
- (10) Shuqualak Lumber failed to abate such dense fog, steam or smoke.
- (11) Shuqualak Lumber failed to warn motorists or take other steps to alert motorists regarding such dense steam, fog or smoke.
- (12) The Plaintiffs suffered personal injury and property damages

CONCLUSION

In the case at bar, the above factors show that there exists genuine issue of material fact and that Shuqualak Lumber is not entitled to Summary Judgment in this matter.

Respectfully submitted,



W. HOWARD GUNN
ATTORNEY FOR APPELLANTS

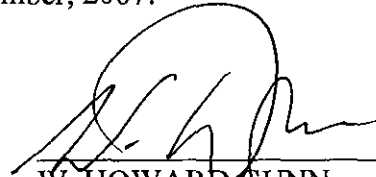
W. HOWARD GUNN
ATTORNEY AT LAW
310 SOUTH HICKORY STREET
PO BOX 157
ABERDEEN, MS 39730
1/662-369-8533
[REDACTED]
B19136

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 **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 18th day of December, 2007.

A handwritten signature in black ink, appearing to read 'W. Howard Gunn', is written over a horizontal line.

W. HOWARD GUNN
ATTORNEY FOR APPELLANTS