IN THE SUPREME COURT
OF THE STATE OF MISSISSIPPI

CASE NO. 2008-CA-00389

M. BRIAN RAINES, As Administrator of
The Estate of Michael C. Raines, Deceased,

Appellee,

Vs.

KITTLE HEAVY HAULING, INC.;
CECIL HIGGERSON,

Appellants.

Appeal from Circuit Court of
Leflore County No. 2002-0043CI

BRIEF OF APPELLEE

ORAL ARGUMENT REQUESTED

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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 and/or the Judges of the Court of Appeals may evaluate possible disqualifications or recusal.

1.	Honorable Ashley Hines	Circuit/Trial Court Judge
2.	Michael Brian Raines	Estate Administrator
3.	Eric Raines	Wrongful Death Beneficiary
4.	Julia A. Beasley	Attorney for Appellee
5.	Navan Ward	Attorney for Appellee
6.	Charles J. Swayze, Jr.	Attorney for Appellee
7.	Charles J. Swayze, III	Attorney for Appellee
8.	Cecil Higgerson	Appellant

9.	Kittle Heavy Hauling, Inc.	Appellant
10.	Todd B. Murrah	Attorney for Appellant
11.	Inland Dredging Company, LLC	Employer of Deceased

Signed this 30th day of December, 2008

CHARLES J. SWAYZE, JR.
Attorney for Appellee

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the Certificate of Interested Parties upon the following by placing a copy of the same in the U.S. Mail, postage prepaid and properly addressed on this the 5th day of January, 2009.

Hon. Ashley Hines
P. O. Box 1315
Greenville, MS 38702-1315

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9.	Kittle Heavy Hauling, Inc.	Appellant
10.	Todd B. Murrah	Attorney for Appellant
11.	Inland Dredging Company, LLC	Employer of Deceased

Signed this ___ day of _____, 2008

_____
CHARLES J. SWAYZE, JR.
Attorney for Appellee

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STATEMENT OF ISSUES

I. **Whether the trial court properly denied the Defendants' Motion for Summary Judgment after the Plaintiffs presented substantial evidence of the Defendants' duty and causation including evidence that the Defendants admitted that they had a duty to secure the load of pipes, the Defendants had a company policy to secure loads of pipe with chocks, the Defendants loaded and inspected the pipes, and that, had the load of pipes been chocked, the pipe would not have fallen and Michael Raines would not have been killed?**

II. **Whether the trial court properly denied the Defendants' Motion for Directed Verdict after the Plaintiffs presented overwhelming evidence of the Defendants' duty including evidence that the Defendants admitted that they had a duty to secure the load of pipes, the Defendants had a company policy to secure loads of pipe with chocks, the Defendants loaded and inspected the pipes, and that, had the load of pipes been chocked, the pipe would not have fallen and Michael Raines would not have been killed?**

STATEMENT OF THE CASE

A. Introduction and Procedural Posture.

On October 31, 2001, Michael Raines was killed when a 1600 pound pipe rolled off the top of Defendant Kittle Heavy Hauling, Inc.'s truck (hereinafter "Kittle Hauling") and struck Mr. Raines' head. (12/2/08 Supp. R. 399-412; Tr. 252.) Cecil Higgerson, Kittle Hauling's employee, had just completed hauling a load of 16 of these large pipes from Sardis, Mississippi to Greenwood, Mississippi when the accident happened. The pipe fell off the Defendant's truck because the pipes had not been properly secured and had shifted during transportation. (Tr. 244-246.) Michael Raines died because the Defendants, Kittle Hauling and Cecil Higgerson, did not properly secured the load of pipes, despite knowing that someone could be injured or killed if these pipes were not properly secured. (Tr. 244-246; 252.) After Michael Raines' death, the Plaintiffs filed this lawsuit against Kittle Hauling and Cecil Higgerson contending that these Defendants acted negligently and wantonly in failing to secure the load of pipes with chocks. (12/2/08 Supp. R. 399-412.) A chock is a triangular piece of wood that is nailed to the end of a 4X4 timber and placed between the pipes. More specifically, had the Defendants secured the pipes with chocks, Michael Raines would not have been crushed to death because the pipe would not have fallen off the truck. (Id.)

The case was initially filed March, 2002. (Id.) After over five years of discovery and after the trial court denied the Defendants' motion for summary judgment, the case was presented to a jury in February, 2008. For four days, the jury heard Plaintiffs' arguments and evidence concerning the Defendants' duty to Michael Raines, how that duty was breached and how that breach proximately caused Michael Raines' death. (Tr. 519-532; 541-545.) The jury also heard evidence and arguments from the Defendants that Inland Dredging Company, LLC

(hereinafter "Inland"), Michael Raines' employer, and Inland's employees had the sole responsibility to secure the load of pipes. (Tr. 532-541.) The Defendants argued to the jury that Inland, its employees and Michael Raines himself were at fault in causing his death. (Tr. 532-541.) After hearing all of the evidence presented and, after being properly instructed on the applicable law of the case, a jury rendered a unanimous verdict finding that Michael Raines and his co-employees (Shannon Earby and Claude Thomas) was 0% at fault, Inland was 60% at fault and the Defendants were 40% at fault. (Tr. 275.) The jury awarded $850,000 for the death of Mr. Raines. (Tr. 275.) The trial court promptly entered an order awarding $340,000 to the Plaintiffs which represented the percentage of fault the jury allocated to the Defendants. (Tr. 276.) Interestingly, in this appeal, the Defendants find no fault or error in any of the Court's evidentiary ruling at trial or with the trial court's jury instructions. Instead, the sole error they have raised before this Court is that the trial court should have ruled as a matter of law that these Defendants owed no duty to safely secure the pipes.

B. Statement of Facts.

Inland hired Kittle Hauling to haul 3 ½ miles of dredging pipe from Sardis, Mississippi, to Greenwood, Mississippi. (12/2/08 Supp. R. 92-95.) There was no written contract for this job. It was solely a verbal agreement. (12/2/08 Supp. R. 92, 93.) Cecil Higgerson was an employee of Kittle Hauling. (12/2/08 Supp. R. 5; Tr. 186.) Mr. Higgerson was the driver of the truck that carried the load of pipe to Greenwood, Mississippi that ultimately caused the death of Michael Raines. Mr. Higgerson had been driving commercial trucks since 1969. (12/2/08 Supp. R. 7.) He attended truck driving school in Ft. Wayne, Indiana, in 1968 and took a 10 week driving course. (12/2/08 Supp. R. 11.) Higgerson had been working for Kittle Hauling since 1994. (12/2/08 Supp. R. 16.) Wayne Kittle, the owner of Kittle Hauling, gave all of its employees a DOT regulations briefing on safety and compliance. (12/2/08 Supp. R. 50.) Wayne

Kittle instructed Mr. Higgerson how to properly load, secure and unload a trailer. (12/2/08 Supp. R. 14.) Mr. Higgerson had experience hauling these types of pipes. (12/2/08 Supp. R. 10-13; Tr. 188.) Mr. Higgerson was familiar with the Federal Motor Carrier Safety Regulations and understood that those regulations addressed loading, transporting, and unloading of cargo. (12/2/08 Supp. R. 50; Tr. 186-87.) He knew that the Federal Regulations addressed the proper securement of a load and addressed the protecting of the load from the shifting or falling of cargo. (Tr. 187.) It was Mr. Higgerson's responsibility to ensure that a load he was transporting was properly secured. (12/2/08 Supp. R. 350-51; 353; Tr. 188.) Mr. Higgerson conceded that, as a commercial truck driver, he has the responsibility to check the load to make sure that the load did not shift during transportation. (12/2/08 Supp. R. 18-19; Tr. 188.)

In addition to transporting the load, one week before the accident, Inland also hired the Defendants to "load" the pipes onto Kittle Hauling's trailer with Kittle Hauling's crane. (12/2/08 Supp. R. 79-80; Tr. 113.) On the day of the accident, Victor Betz, an employee of Kittle Hauling, operated Kittle Hauling's crane, using it to load the pipes onto the Kittle Hauling trailer. (12/2/08 Supp. R. 22-23; 350-351; Tr. 164-165.)

The pipes on the subject load were loaded in 4 levels of pipes with 4 pipes per level. (12/2/08 Supp. R. 28-29; Tr. 197.) There were 4x4 wooden timbers placed between the layers of pipes. (12/2/08 Supp. R. 24; Tr. 197.) According to Victor Betz, some Kittle drivers helped place the 4X4 timbers on the pipes. (12/2/08 Supp. R. 430; Tr. 168-169.) Cecil Higgerson then inspected the 4X4 timbers to ensure they were in the proper place. (12/2/08 Supp. R. 27.) Donnie Cox, the Inland operations manager, testified that Kittle Hauling drivers were also responsible for binding each layer of the pipe. (12/2/08 Supp. R. 170-71.) The Kittle Hauling drivers agreed that they had the responsibility of ensuring that the chains and binders were in the proper place and properly secured. (12/2/08 Supp. R. 16, 17, 20, 182; Tr. 103, 105, 125, 194.)

According to Troy Kittle, Vice President of Kittle Hauling, Kittle Hauling drivers had the authority to decide how many pipes to put on each trailer and could even order Inland Dredging to cut the pipes if Kittle thought the pipes were too long. (12/2/08 Supp. R. 97; Tr. 192.) In addition, the ratchet binders, chains and straps which were used by the Defendants and Inland to tie down the load of pipes belonged to Kittle Hauling. (12/2/08 Supp. R. 74; Tr. 102.) Troy Kittle admitted that the Kittle Hauling driver had the responsibility to ensure the load was secure. (12/2/08 Supp. R. 111; Tr. 103, 105, 125, 194.)

Chocks are wooden triangular wedges used to secure cargo to prevent cargo from shifting during transportation and to prevent cargo from falling off the trailer once the straps and chains are removed. (12/2/08 Supp. R. 99; Tr. 98.) A chock is usually nailed to a 4X4 timber every 12 feet on a given load. (12/2/08 Supp. R. 62, 104; Tr. 95.) A load of pipes like the load at issue would typically require at least 4 chocks under each layer of pipe to secure the load properly. (12/2/08 Supp. R. 62, 104; Tr. 95.) Additionally, one chock would be placed in the middle of the load. (12/2/08 Supp. R. 62.)

Kittle Hauling had a company policy that required its drivers to chock the pipes after loading. (12/2/08 Supp. R. 61-63, 99-100; Tr. 93, 120.) All Kittle Hauling drivers knew to use chocks on a load of pipes to prevent the pipes from rolling off. (12/2/08 Supp. R. 61-63, 98-100; Tr. 120.) Kittle Hauling drivers normally used the chocks on their loads. (12/2/08 Supp. R. 108; Tr. 383.) In fact, the Defendants had chocks at the Sardis loading site that could have been used to secure the pipes. (12/2/08 Supp. R. 67-68, 101; Tr. 98.) Defendant Higgerson was fully aware of Kittle's policies and procedures. (12/2/08 Supp. R. 51.) According to Troy Kittle, if chocks had been used, it would have been Cecil Higgerson's responsibility to ensure that the chocks were properly placed to secure the load. (12/2/08 Supp. R. 105; Tr. 120.)

Kittle Hauling never told anyone at Inland that it was Kittle's company policy for chocks to be used. (12/2/08 Supp. R. 396-397.) No one from Inland ever told or instructed the Defendants that Kittle Hauling could not nail chocks to the loads. (12/2/08 Supp. R. 396-397.) In fact, Kittle Hauling had delivered previous loads of this type of pipes with chocks between each layer for Inland. (12/2/08 Supp. R. 68-72; Tr. 383.)

It is undisputed that nailing chocks to the 4X4 timbers is a safer method of securing a load of pipes. (12/2/08 Supp. R. 78,109; Tr. 121-122, 124, 243.) It is the custom and practice in the trucking industry to use chocks on loads of pipe to prevent the pipes from shifting. (Tr. 233, 245.) Without chocks, there is nothing to prevent pipes from rolling off a trailer after the chains and straps are removed. (12/2/08 Supp. R. 63, 110; Tr. 121, 167-168, 243.) In fact, the Defendants recognized that it would create a dangerous and unsafe situation to unload the pipes if chocks were not used. (12/2/08 Supp. R. 106; Tr. 124.) Sadly, no chocks were used by the Defendants to secure the subject load of pipes. (12/2/08 Supp. R. 107, 135-136, 153, 433-435; Tr. 196-197.)

After the loading process was complete, Kittle Hauling inspected the subject load to be sure it was properly loaded. (12/2/08 Supp. R. 16, 33, 173-174; Tr. 194.) During transportation, it was Kittle's policy for its drivers to stop and check the straps and chains to ensure the load had not shifted and was secure. (12/2/08 Supp. R. 75-76; Tr. 200.) It was Cecil Higgerson's duty to ensure that the load of pipes did not shift during transport. (12/2/08 Supp. R. 18; Tr. 188.) It was between 81-100 miles from Sardis to the Greenwood. (12/2/08 Supp. R. 32; Tr. 199.) After traveling halfway to Greenwood, Mr. Higgerson stopped along the route to inspect the load to be sure his cargo had not shifted. (12/2/08 Supp. R. 32-33; Tr. 200.) Inland expected the Defendants to ensure the load was secure and stable prior to loosening any chains or binders. (12/2/08 Supp. R. 182.)

The subject load was delivered later than the previous loads of pipe. (12/2/08 Supp. R. 39-41; Tr. 400.) Mr. Higgerson arrived at the Greenwood site with the subject load between 4:00 and 4:30 p.m. At the time it arrived, the load was leaning toward the passenger's side. (12/2/08 Supp. R. 117, 137; Tr. 400, 415.) Claude Thomas said there were 2-3 pipes on the back dragging the ground when the driver pulled through the gate, but that it was common for pipes to look like they were about to fall off the truck when the truck came in the gate. (12/2/08 Supp. R. 151.) Defendant Cecil Higgerson never inspected the load upon arrival. (12/2/08 Supp. R. 118; Tr. 201.)

After the load arrived, Inland employees began removing the straps on the trailer. Michael Raines was employed by Inland as a dredge tender operator. He had been employed by Inland for only two weeks. (Tr. 279-280, 330.) During that time, Mr. Raines unloaded trucks for Inland. On this particular load, the straps were very tight. Therefore, Defendant Higgerson used a "tire buddy" to help loosen the straps for the Inland employees. (12/2/08 Supp. R. 156.) Then Claude Thomas, another Inland employee, positioned a track hoe on the passenger side of the truck.[1] The track hoe was not touching the trailer or pipes. (12/2/08 Supp. R. 53, 155.) Once the track hoe was in place, Shannon Earby, an Inland employee, using Kittle Hauling's ratchet, began loosening the binders on the chain on the top layer of pipes. (12/2/08 Supp. R. 120, 132.)

Michael Raines and Mr. Higgerson were both on the driver's side of Kittle Hauling's tractor-trailer. (12/2/08 Supp. R. 47, 120, 122; Tr. 208.) Mr. Raines was gathering the straps and chains for Cecil Higgerson to put in the storage compartment on Higgerson's truck. (12/2/08 Supp. R. 35-36; 44-45; Tr. 208.) Michael Raines was on the same side of the truck that Cecil

[1] A track hoe is always positioned within 15 feet of the trailer to assist in unloading the pipes after the chains and binders are removed. (12/2/08 Supp. R. 37-38.)

Higgerson was on. (12/2/08 Supp. R. 47; Tr. 208.) At the time of the accident, Defendant Higgerson testified that Michael Raines was not doing anything that was unsafe and that he did not feel Mr. Raines was in any danger. (Tr. 208.) After the second binder was released from the top layer of pipes, one of the 1600 pound pipes rolled off the top of the loaded trailer and struck Mr. Raines on his head, causing his death. (12/2/08 Supp. R. 125; Tr. 400-407.) No one was unloading the pipes when the pipe fell off the trailer. (12/2/08 Supp. R. 52; Tr. 207.) The pipe fell within a few moments after the chains were removed.

Dr. Charles Benedict, an accident reconstructionist and an expert on the custom and practices in the trucking industry, opined that as a result of the load not being chocked, the pipes shifted during transportation creating an unstable load. Therefore, when the binders, chains and straps were removed, a pipe rolled off the trailer, killing Michael Raines. (Tr. 244.) Dr. Benedict further testified that the Defendants breached the standard of care within the trucking industry by failing to ensure that the load of pipes was secured, by failing to chock the load so that the pipes would not shift during transportation and would not fall off after the chains and binders were removed. (Tr. 245-46.) Dr. Benedict testified that it was the responsibility of the driver, Cecil Higgerson, to ensure that chocks were on the load, and that the Defendants breached the standard of care by not providing the chocks on the load and not seeing that the chocks were nailed to 4X4 timbers to secure the load. (Tr. 245-46.) Finally, Dr. Benedict testified that this accident would not have happened and Michael Raines would not have been killed if chocks had been used to secure the subject load of pipes. (Tr. 252.)

SUMMARY OF THE ARGUMENT

The Plaintiffs presented overwhelming evidence that the Defendants, Kittle Hauling and Cecil Higgerson, owed Michael Raines a common law duty to use reasonable care to ensure that the load of pipes they were transporting to Greenwood, Mississippi was properly secured, did not shift during transportation, and did not cause injury or death to anyone who could be at a foreseeable risk of injury because of an unstable and unsecured load of pipes. Mississippi law, along with the majority of courts across the country, recognize that a carrier has a common law duty to use reasonable care to ensure the cargo the carrier is transporting is secured. In this case, the Plaintiffs proved that it was common practice in the trucking industry to use chocks to secure loads of pipes. The Defendants had a company policy that this type of load should be chocked before transporting. All previous loads had been chocked and the Defendants had chocks available for use at the loading site but failed to nail them to the load. The evidence also demonstrated that Kittle Hauling's employees loaded the pipes on the trailer and inspected the load of pipes before leaving for Greenwood, Mississippi. The Defendants admitted that it was their responsibility to ensure that the load was properly secured and would not shift during transportation. However, the evidence demonstrated that, when it arrived at Greenwood, the load of pipes had shifted. As a result, after the binders and straps were removed, a pipe rolled off the trailer and struck and killed Michael Raines. The Defendants conceded that, if the load had been properly secured, the pipe would not have fallen after the straps and binders were removed. Thus, the evidence proved that (1) the load was not secure; and (2) had the load been chocked, the pipe could not have fallen and Michael Raines would not have been killed. After hearing the substantial evidence presented by the Plaintiffs, the trial court correctly denied the Defendants' Motion for Summary Judgment and Motions for Directed Verdict and allowed the case to be submitted to a jury.

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED DEFENDANTS' SUMMARY JUDGMENT MOTION WHEN PLAINTIFFS PRESENTED SUBSTANTIAL EVIDENCE OF DUTY AND CAUSATION

A. Standard of Review for Denials of Summary Judgments.

This Court reviews matters involving summary judgment *de novo*. *Townsend v. Estate of Gilbert*, 616 So. 2d 333, 335 (Miss. 1993). A *de novo* review entails reviewing all evidentiary matters in the record including "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits. . . ." *Thomas v. Bradley*, 987 So. 2d 1020, ¶12 (Miss. 2008). The evidence must be viewed in the light most favorable to the non-moving parties, and the non-moving parties are to be given the benefit of every reasonably doubt. *Townsend* at 335. A motion for summary judgment will lie only when there is no genuine issue of material fact. *Id.* Issues of fact are present when one party swears to one version of a matter and another says the opposite. *Cook v. Children's Med. Group, P.A.*, 756 So. 2d 734, 739 ¶15 (Miss. 1999). When there is the slightest doubt over whether a factual issue exists, the court should resolve in favor of the non-moving party. *Rein v. Benchmark Construction Co.*, 865 So. 2d 1134, 1142 ¶25 (Miss. 2004) (*Cothern v. Vickers, Inc.*, 759 So. 2d 1241, 1245 ¶6 (Miss. 2000)).

This Court is "to consider a motion for summary judgment with a skeptical eye because it is preferred to err on the side of denying the motion." *Thomas v. Bradley*, 987 So. 2d 1020, ¶13 (Miss.Ct.App. 2008).

B. The Defendants Owed A Legal Duty To Michael Raines To Ensure The Load Of Pipes Was Properly Secured.

Ignoring the undisputed facts that their employees loaded the pipes onto their truck (12/2/08 Supp. R. 23, 351), that they have a company policy to chock loads of pipe (12/2/08 Supp. R. 99), that they inspected the load of pipes to determine if it was secure (12/2/08 Supp. R. 20), and that they had the responsibility to ensure the load of pipes were secure for transportation (12/2/08 Supp. R. 78), the Defendants have boldly proclaimed to this Court that there was no substantial evidence presented to the trial court to justify the trial court's denial of summary judgment on whether these Defendants owed Michael Raines a common law duty to ensure the load of pipe was properly secured. More specifically, the Defendants argue that the Plaintiffs failed to demonstrate "a definable duty" owed by the Defendants to Michael Raines at the summary judgment stage and, therefore, the trial court erred in denying their Motion for Summary Judgment.

To succeed on a claim for negligence, the plaintiffs 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." *Donald v. Amoco Production Co.*, 735 So. 2d 161, 174 ¶42 (Miss. 1999) (citing *Meena v. Wilburn*, 603 So. 2d 866, 870 n.5 (Miss. 1992)). "The standard of care applicable in cases of alleged negligent conduct is whether the party charged with negligence acted as a reasonable or prudent person would have under the same or similar circumstances." *Donald* at 175 ¶48 (citing *Knapp v. Stamford*, 392 So. 2d 196, 199 (Miss. 1980)). This definition of duty for the standard of care owed by a defendant is well settled in Mississippi law.

> Whether a duty is owed is a question of law. The general duty is to act as a reasonable prudent person would under the circumstances. The important component of the existence of the duty is that the injury is reasonably foreseeable.

> When the conduct of the actor is a substantial factor in bringing about the 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. Defendants cannot escape liability because a particular injury could not be foreseen, if *some* injury ought to have been reasonably anticipated.

Doe v. Wright Security Services, Inc., 950 So. 2d 1076, 1079-1080 ¶12 (Miss.App. 2007) (citations omitted) (emphasis added).

> The standard of care in cases of alleged negligence conduct is whether the party charged with the negligent conduct acted as a reasonable and prudent person would under like circumstances. If the conduct of the defendant is reasonable given the foreseeable risk, the defendant is not negligent and there is no liability. The defendant must take reasonable steps to remove or protect against foreseeable risk that he knows about or should know about in the exercise of due care."

McIntosh v. Victoria Corp., 877 So. 2d 519, 523 ¶11 (Miss. App. 2004) (emphasis added).

> A defendant charged with a duty to exercise ordinary care must only take reasonable measures to remove or protect against foreseeable hazards that he knows about or should know about in the exercise of due care. Such a defendant must safeguard against reasonable probabilities, and is not charged with foreseeing all circumstances, even though such occurrences are within the range of possibility. A defendant whose conduct is reasonable in light of the foreseeable risk will not be found liable for negligence.

Pritchard v. Von Houten, 960 So. 2d 568, 580 ¶29 (Miss.App. 2007) (citations omitted) (emphasis added).

> 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 actor should have reasonably anticipated some injury as a probable result. The actor is not bound to a precision of anticipation which would include an unusual and improbable for extraordinary occurrence, although such happening is within the range of possibilities. This court requires that: the principles of common law must be kept within practical bounds and so as to occupy an attitude that would place it over and above the heads of those who must carry on the everyday affairs of life. Hence, the 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.

Rein v. Benchmark Construction Co., 865 So. 2d 1134, 1144 ¶32 (Miss. 2004) (citations omitted); *Hankins Lumber Co. v. Moore*, 774 So. 2d 459, 464 ¶¶12-13 (Miss. 2000); *American Creosote Works of Louisiana v. Harp v. Louisiana*, 215 Miss. 5, 10, 60 So. 2d 514, 515-16 (1952).

> Every person is under duty to exercise his senses and intelligence in his actions in order to avoid injury to others, and where a situation suggests investigation and inspection in order that its dangers may fully appear, the duty to make such investigation and inspection is imposed by law. It is no excuse that one who has created a peril did not intend or expect any injury to result therefrom; every person is held to a knowledge of the natural and probable consequences of his acts.

Foster v. Bass, 575 So. 2d 967, 973-74 (Miss. 1990) (emphasis added).

> The law imposes upon every person who undertakes the performance of an act which, it is apparent, if not done carefully, will be dangerous to other persons, or the property of other persons – the duty to exercise his senses and intelligence to avoid injury, and he may be held accountable at law for an injury to personal property which is directly attributable to a breach of such duty . . . stated broadly, one who undertakes to do an act or discharge a duty by which conduct of others may be properly regulated and governed as under a duty to shape his conduct in such a manner that those rightfully led to act on the faith of his performance shall not suffer loss or injuries through his negligence.

Id. at 974 (citing *Dr. Pepper Bottling Co. v. Bruner*, 245 Miss. 276, 282, 148 So. 2d 199, 201 (1962)).

The question this Court must answer in order to determine if the Defendants owed Michael Raines a duty is whether the Defendants exercised their "senses and intelligence" in this action to avoid injury? Did the loading and securing of the pipes onto this trailer require the Defendants to conduct an "investigation and inspection" to ensure no danger existed and that the load was properly secured? Finally, because the most important component of the existence of a duty is whether the injury is reasonably foreseeable, the ultimate question becomes whether the Defendants could reasonably foresee that their failure to properly secure the load of pipes with chocks could likely lead to the load shifting during transportation and that could result in causing serious injury and death to someone participating in the removal of chains and straps of the load upon arrival at its destination.

This Court has previously recognized that such a duty exists. In *Hankins Lumber Company v. Moore*, 774 So. 2d 459 (Miss. App. 2000), a motorist was injured when a board fell off of a truck that had not been properly loaded and secured. The owner of the truck was found

negligent despite the fact that he had hired an independent contractor, i.e., the truck driver, to ensure that the load was properly secured. *Hankins Lumber Co.*, 774 So. 2d at 464 ¶13. The Court held that the evidence was sufficient to find the trucking company did not act reasonable under the circumstances to protect against a foreseeable hazard. *Id.* The Court found that the question of whether it was reasonable for Hankins Lumber to have foreseen that conditions were ripe for an accident when the independent contractor called and whether it breached a duty at that time were issues for the jury. *Id.*

In *American Creosote Works of Louisiana v. Harp.*, 215 Miss. 5, 60 So. 2d 514 (1952), the plaintiffs were injured because of the alleged improper manner in which the defendant loaded flat car of poles on which the plaintiffs were working as an employee of the defendant's co-signee. There, the defendant argued that they did not owe a duty to the plaintiffs because there was no contractual relationship between them. *American Creosote*, 60 So. 2d at 515. The Supreme Court held that the mere fact that there was no contractual relationship did not relieve the defendant of its duty to exercise reasonable care for the prevention of injury to him in connection with the unloading of the car. *Id.*

Here, the trial court properly denied the Defendants' motion for summary judgment because substantial evidence existed of a duty. The Defendants agreed to haul the load of pipe from Sardis, Mississippi to Greenwood, Mississippi using the Defendants' own trucks and trailers. (12/2/08 Supp. R. 92-93). The Defendants provided the ratchet binder, chains, and straps used to tie down the load of pipe. (12/2/08 Supp. R. 74.) Kittle Hauling provided its own crane to load the pipe and allowed its own employees to aid in loading the pipe. (12/2/08 Supp. R. 22-23, 79-80, 350-351.) The driver, Cecil Higgerson, inspected the 4X4 timbers used to secure each layer of pipe. (12/2/08 Supp. R. 27.) Kittle drivers were even responsible for binding the layers of pipe. (12/2/08 Supp. R. 170-71.) Defendants' own employees admitted that the Kittle Hauling

drivers, which would include Cecil Higgerson, had the responsibility of ensuring that the chains and binders were properly placed and properly secured for transportation. (12/2/08 Supp. R. 16-17, 20, 182,) Kittle Hauling had a company policy that its drivers should chock the pipes after the pipes were loaded. (12/2/08 Supp. R. 60-61, 99-100.) The Defendants had chocks available to them at the loading site, which could have been used. (12/2/08 Supp. R. 67-68, 101.) The Defendants recognized that it would create a dangerous and unsafe situation to unload these pipes if there were no chocks on the load of pipes. (12/2/08 Supp. R. 106.) The record before the trial court contained numerous admissions by the Defendants that it was their responsibility to ensure that the load of pipe was properly secured for transportation. (12/2/08 Supp. R. 18-19, 111.) Defendant Higgerson even admitted that it was his responsibility to ensure the load of pipe did not shift during transportation. (12/2/08 Supp. R. 18-19.) The Plaintiffs presented the trial court with overwhelming evidence that the Defendants owed a common law duty to Michael Raines to use reasonable care to ensure the pipes were properly secured for transportation. Accordingly, the trial court properly denied the Defendants' summary judgment on the issue of duty.

Yet, despite Mississippi's clear recognition of a common law duty and the abundance of facts demonstrating the Defendants' duty to ensure that the load of pipes it was transporting was properly secured, these Defendants still argue that they owed no duty to Michael Raines. Instead, they argue that their only duty was to transport the pipes and the exact moment that they reached the unloading site in Greenwood, Mississippi, their duty ended. In practical terms, the Defendants' argument is that its duty did not begin until the wheels of the tractor truck were rolling, and once the wheels of the tractor truck stopped in Greenwood, Mississippi, its duty ended. The Defendants implicitly assert that they may turn a blind eye when its own tractor trailer is improperly loaded even though their employees assisted in the loading and provided the

equipment to load the pipes. The Defendants implicitly argue that they may turn a blind eye to a load that is not properly secured on their own trailers even though they had a company policy to chock these types of loads and they had the authority to refuse to transport a load if they felt the load was not secure. In the Defendants' world, as long as no accident happens while the wheels on their truck are rolling, they have no duty to anyone around the truck once those wheels stop.

These exact arguments were rejected in *Smith v. Francisco*, 1999 WL 95716 (E.D. Pa., January 8, 1999). In *Smith*, the plaintiff was injured when he jumped off a flatbed tractor trailer loaded with steel pipes that had shifted and had become unstable. Smith sued the owner of the flatbed trailer and the driver for negligence arguing that they should have known that the pipes were improperly secured on the trailer because the pipes were not chocked. The defendants argued that they owed no duty to the plaintiff. More specifically:

> Defendants argue, to the contrary, that because Smith and his co-workers were responsible for loading and unloading the pipes, Francisco had no duty to ensure that Smith would not be injured during the unloading process as a result of the method used to load the pipes. Defendants further assert that Francisco only had a duty to inspect the pipes to make sure that they were safe for transportation, and pursuant to that duty, transported the pipes without incident. Once the pipes reached their destination, and Francisco verified that the load had arrived in the same condition in which it departed, defendants thus conclude, their duty was at an end.

Smith at *1. Analyzing the case under common law negligence principles, the court specifically rejected the defendants' argument holding that the defendants knew that, without individual chocks, the pipes that Smith loaded were likely to roll and shift. *Smith* at *2-3.

Here, the facts are even more compelling that a duty existed than they were in *Smith*. Kittle Hauling employees actually assisted in loading the pipes onto the trailer; its employees were responsible for binding the layers of pipes; and Cecil Higgerson admitted that it was his responsibility to inspect the pipes to make sure they were properly secured. Mississippi law and

the facts of this case support the trial court's denial of summary judgment because of the existence of a common law duty by the Defendants.

Since the 1950's, the majority of courts around the country has recognized that a common law duty rests upon the carrier to see that the load of cargo received by it for transportation is secured.[2] This common law duty was recognized in *United States v. Savage Truck Line, Inc.*, 209 F.2d 442 (4th Cir. 1953). The Fourth Circuit stated:

> The primary duty as to the safe loading of property is therefore upon the carrier. When the shipper assumes the responsibility of loading, the general rule is that he becomes liable for the defects which are latent and concealed and cannot be discerned by ordinary observation by the agents of the carrier; but if the improper loading is apparent, the carrier will be liable notwithstanding the negligence of the shipper.

Savage Truckline, 209 F.2d at 445 (emphasis added). In *Savage*, the defendant was hired by the United States to transport on its truck a cargo of six airplane engines. The engines were loaded upon the defendant's truck by agents of the United States. As the Savage truck was rounding a curve, the cylinder shifted, causing the vehicle to cross over the double center line. Another truck was proceeding in the opposite lane, and as the two trucks passed each other, one of the cylinders fell off of the defendant's truck and killed instantly the driver of the passing truck. The estate of the driver, along with the owner of the passing truck, filed suit against Savage Truck Line and the United States alleging negligence in the manner in which the cargo was loaded and secured for transportation. The Court found that the employees of the United States who loaded the truck were guilty of negligence in failing to use ordinary care to secure the engine properly,

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[2] Plaintiffs emphasize the words "common law duty" because the Defendants imply that the duty Plaintiffs sought to impose was a statutory duty under the Federal Motor Carrier Safety Regulations. Plaintiffs have never argued that a statutory duty existed. Defendants' duty arises under Mississippi common law. The federal regulations were only indicative of the proper allocation of duty between Inland Dredging and the Defendants. See *Hensley v. National Freight Transportation, Inc.*, 668 S.E.2d 349, 352 (N.C.App. 2008) ("While not dispositive, these regulations are indicative of the proper allocation of duty as between a common carrier and a shipper for the proper loading of goods.") (quoting *Rector v. General Motors Corp.*, 963 F.2d 144, 147 (6th Cir. 1992)).

and that the employees of Savage failed to exercise ordinary care in accepting the cargo in the manner in which it was loaded on the truck. The Court determined that, under these facts, "the principle fault lay with the carrier." *Id.* at 447.

"Most courts now accept the rationale of *Savage* and require carriers to take responsibility for the loads they carry, even if those loads have been improperly loaded by others." *Decker v. New England Public Warehouse, Inc.*, 749 A.2d 762, 767 (Me. 2000).

> The policy behind the *Savage* rule is well founded. The everyday practice and understanding in the trucking industry, as aptly reflected in the federal regulations on this subject, reflect that carriers logically should have the final responsibility for the loads they haul. No shipper, . . ., can force a driver to accept a load that the driver believes is unsafe. By the same token, a driver must take responsibility for the safety of his or her cargo by inspecting and securing the load. The *Savage* rule does not absolve shippers from all responsibility as they bear the onus when cargo has been loaded improperly and that defect is latent. The *Savage* rule simply extends the industry's reasonably understanding to negligent suits involving carriers and shippers.

Decker, 749 A.2d at 766-767 (citations omitted) (emphasis added).

> The reasoning in *Savage* comports with the established duty of care notion that an injury must be foreseeable before a duty attaches. Here, the carrier has the opportunity to intercept any problems through inspection. In fact, the carrier's driver is under the obligation to conduct such a safety inspection pursuant to federal law. Carriers, through their drivers, must ensure the safety of their own loads, even when cargo is loaded by shippers.

Decker at 767 (emphasis added). See *Grantham v. Nuco Corp.*, 2008 WL 3925211 (D. Utah, August 20, 2008) (stating that most "courts now accept the rationale of *Savage* and require carriers to take responsibility for the loads that they carry, even if those loads have been improperly loaded by others."); *Lobdell v. Masterbrand Cabinets, Inc.*, 2008 WL 2224094 (E.D. Mich., May 29, 2008) (finding that this rule "does not demand abnormal scrutiny from carriers. All that is required of the carrier is a reasonable inspection."); and *Hensley v. National Freight Transportation, Inc.*, 668 S.E. 2d 349 (N.C. 2008) (In relying upon *Savage,* the Court reversed the trial court granting of summary judgment holding that genuine issues of material fact existed

as to whether a facility owner or a trucking company bore responsibility for loading wires onto the truck). See also *Smart v. Am. Welding & Tank Co.*, 149 N.H. 536, 826 A.2d 570 (2003); *Brashear v. Liebert Corp.*, 2007 WL 184888, 2007 Ohio 296 (Ohio App. 10 Dist., 2007); *W.J. Casey Trucking & Rigging Co. v. General Elec. Co.*, 151 N.J. Super. 151, 376 A.2d 603 (N.J.Super.L., 1977); *Pierce v. Cub Cadett Corp.*, 875 F.2d 866 (6th Cir. 1989); and *Rector v. General Motors Corp.*, 963 F.2d 144 (6th Cir. 1992). Plaintiffs have been unable to find any case which has rejected the notion that a carrier has a duty of care even in situations where the shipper was solely responsible for loading of the cargo, unless the defect in the loading was hidden. Here, however, the failure to chock the pipes was open and obvious to the Defendants. (12/2/08 Supp. R. 107, 135-136, 153, 433-435.) In fact, in his deposition, Defendant Higgerson first testified that the subject load was chocked, but, after being confronted with clear evidence to the contrary at trial, he conceded the load was not chocked. (12/2/08 Supp. R. 24-27; Tr. 195.)

Notwithstanding the foregoing, even assuming this Court accepts the Defendants' definition of the duty it owed, i.e., it only had a duty to ensure that the load of pipes was safe for transportation and did not shift during transportation, there was clear evidence that this duty was breached by the Defendants and resulted in the death of Mr. Raines. Cecil Higgerson testified that, if the load was properly secured, then the pipe would not fall off the trailer once the binders and straps were removed. (12/2/08 Supp. R. 54.) Evidence was presented to the trial court that, when the tractor trailer arrived at the Greenwood site, the "load was leaning toward the passenger side." (12/2/08 Supp. R. 117, 137.) In other words, there was testimony that the pipe had shifted during transportation causing the pipe that killed Mr. Raines to fall once the straps were removed. The clear admission by the Defendants that they did owe a duty to ensure that the load was properly secured for transportation and to ensure that the load did not shift during transportation, coupled with the evidence that the load was "leaning severely" when it arrived in

Greenwood, Mississippi, was substantial evidence to survive the Defendants' summary judgment. The trial court clearly did not err in denying summary judgment on the issue of duty in this case.

C. The Trial Court Did Not Err When It Denied Summary Judgment on Defendants' Assumption of the Risk Defense and Causation.

Defendants argue that the trial court erred when it denied summary judgment on causation because they contend that Michael Raines assumed the risk of his death by standing on the side of the truck that the pipe fell on. Mississippi law requires that this Court look with a "skeptical eye" at motions for summary judgments and should "err on the side of denying the motion." *Thomas v. Bradley*, 987 So. 2d 1020 ¶13 (Miss. App. 2008). The applicability of this Court's "skeptical eye" is especially relevant to this issue because the assumption of the risk doctrine has been subsumed into comparative negligence. *Churchill v. Pearl River Basin Dev. Distr.*, 757 So. 2d 940, 943 ¶12 (Miss. 1999). "[A]ssumption of the risk on the part of the plaintiff merely goes to the percentage of fault attributable to the plaintiff; it no longer affords a complete defense to the defendant unless the jury finds that the plaintiff's assumption of the risk proportionately reduces damages to zero." *Donald v. Triple S. Well Service, Inc.*, 708 So. 2d 1318, 1325 ¶ 34 (Miss. 1998) (emphasis added).

> Any actions which might constitute an assumption of the risk should be dealt with only in the context of the comparative negligence doctrine. A jury is always free to decide that an act which constitutes an assumption of the risk was the sole proximate cause of a plaintiff's injuries. We see no reason why acts which might constitute assumption of the risk should, as a matter of law, create a complete bar to recovery. The comparative negligence doctrine gives juries great flexibility in reaching a verdict. Any fault on the part of the plaintiff should be considered only in the context of comparative negligence.

Churchill, 757 So. 2d at 943-944 ¶ 12 (emphasis added). Here, the trial court correctly denied summary judgment because, under Mississippi law, the assumption of the risk defense is "no longer a complete bar to recovery." *Id.* Mississippi law clearly mandated that the trial court

deny summary judgment because it is the jury's role to determine whether Michael Raines' actions were the sole cause of his death.

Further, even assuming that the law would allow the trial court to consider their argument, the Defendants failed to carry their burden of proof on the assumption of the risk. Assumption of the risk is an affirmative defense on which the Defendants bear the burden of proof. *Huffman v. Walker Jones Equip. Co.*, 685 So. 2d 871, 873 (Miss. 1995).

> Assumption of the risk is measured by the subjective standard of the injured party. Also, it must be shown that the risk was known to the injured party and that the injured party appreciated the danger in the condition. Furthermore, the injured party's conduct must rise to a level of venturousness, as opposed to carelessness, with regards to appreciation of the known peril.

Huffman, 685 So.2d at 874 (citations omitted). In support of their assumption of the risk defense, Defendants rely solely upon the testimony of Michael Raines co-employees who said that Michael was aware that he should not be on the side of the truck that is opposite the side of the truck that the track hoe is placed. (Appellants' Br. at 25-26). Other evidence however demonstrated that Michael Raines had only been working at Inland for two weeks. At the time of the accident, Michael was collecting the chains and straps and handing them to Cecil Higgerson. (12/2/08 Supp. R. 35-36, 44-45.) Defendant Higgerson was on the same side of the truck that Michael was on. (12/2/08 Supp. R. 47.) This was normal procedure. (12/2/08 Supp. R. 122.) Cecil Higgerson admitted that, if the load had been properly secured, the pipe should not have fallen off the trailer after the binders and straps were removed. (12/2/08 Supp. R. 54.) Therefore, Michael Raines would have been safe standing on the driver's side of the truck if the Defendants had properly secured the load. Further, the evidence was undisputed that, had the chocks been placed on the load of pipes, no pipe would have fallen off the trailer and Michael Raines would not have been killed. (12/2/08 Supp. R. 61-63, 99, 110.)

Causation, like duty, involves questions of foreseeabililty. *Rein*, 865 So. 2d at 1143 ¶¶ 30-31. "Unlike duty, causation is a question of fact." *Doe v. Wright Security Services,* 950 So. 2d at 1085 ¶37. "When reasonable minds might differ on the matter, questions of proximate cause and of contributory negligence are generally for determination of the jury. . . . 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." *Hankins Lumber Co.,* 774 So. 2d at 464 ¶11. There was substantial evidence presented that the Defendants knew that the failure to chock the load of pipes was dangerous. There was simply no error in the trial court's denial of summary judgment on causation and assumption of the risk.[3]

II. THE TRIAL COURT DID NOT ERR WHEN IT DENIED THE DEFENDANTS' MOTION FOR DIRECTED VERDICT BECAUSE THE PLAINTIFFS PUT FORTH SUBSTANTIAL EVIDENCE IN WHICH A JURY COULD FIND THAT THE DEFENDANTS OWED THE PLAINTIFFS A DUTY AND THERE WAS A BREACH OF THAT DUTY THAT RESULTED IN THE DEATH OF MICHAEL RAINES.

A. Standard of Review for Denial of Directed Verdict.

A motion for a directed verdict is a test of the legal sufficiency of the Plaintiffs' evidence. "In ruling on a motion for a directed verdict, the trial court must look only to the testimony adduced for the plaintiff and afford truthfulness to it and indulge all favorable inferences that could be drawn therefrom, and if either is sufficient to support a verdict, then the motion for a directed verdict should be overruled." *Gee v. Hawkins,* 402 So. 2d 825, 827-28 (Miss. 1981) (quoting *King v. Dudley*, 286 So. 2d 814 (Miss. 1973). "The circuit court – and this Court on appeal – are required to consider the evidence in the light most favorable to the plaintiffs . . . giving those plaintiffs the benefit of all favorable inferences that may reasonably be drawn from

[3] Interestingly, the Defendants did not even raise the issues of causation and assumption of the risk in their directed verdict at the trial of the case.

the evidence. Unless the evidence is so lacking that no reasonable jury could find for the plaintiffs, the motion must be denied." *Wall v. Swilley*, 562 So.2d 1252, 1256 (Miss. 1990).

B. Plaintiffs Presented Overwhelming Evidence On The Issue Of Duty Which Required The Trial Court To Deny The Defendants' Motion For Directed Verdict.

Defendants contend that they were entitled to a directed verdict because the Plaintiffs failed to present substantial evidence of a legal duty that the Defendants owed to Michael Raines. The Defendants make the same arguments and cite to the same law that they relied upon at the summary judgment stage. To avoid being redundant, the Plaintiffs would simply refer this Court to the "Argument" section I, B of this brief, which sets forth the law regarding the legal duty owed to Michael Raines and, just as it did at the summary judgment stage, the Defendants' argument still lacks merit at this stage, too.

The record is clear that the Plaintiffs presented overwhelming evidence to the jury that the Defendants owed Michael Raines a duty to ensure that the load of pipes was properly secured on the Defendants' trailer; that the Defendants breached that duty; and as a result, a pipe fell off the truck and killed Michael Raines. The evidence demonstrated that, at the time of this accident, Kittle Hauling's company policy was to use chocks to secure the pipes. (Tr. 93, 120.)

> Q. Was it your company's policy back at the time of this incident to use chocks or blocks to secure pipes?
>
> A. It would be our policy, yes.

(Tr. 93.) Defendant Kittle Hauling trained its drivers that they should use chocks on their loads. (Tr.120.) It was the custom and practice in the trucking industry to chock loads of pipes so that the pipes would not shift during transportation. (Tr. 232-33.) In fact, it was the responsibility of the driver, Cecil Higgerson, to ensure that the load was secured. (Tr. 103, 105, 125, 188.) Cecil Higgerson conceded at trial that he had the responsibility to ensure that the load was properly

secure before he drove off the premises. It was also his responsibility to make sure the load was secure so that it would not shift during transportation.

Q. Do you agree that you as the commercial truck driver have to ensure that the load is properly secure before you take off?

A. Yes, ma'am.

Q. And you also as the commercial truck driver have a responsibility to check the load and make sure that it has not shifted; is that correct?

A. Yes, ma'am.

Q. You've been trained how to properly and safety secure a load of pipes?

A. Yes, ma'am.

(Tr. 188.) Troy Kittle conceded that the Defendants had the responsibility to determine how many pipes could safely fit on a Kittle trailer and that its drivers could refuse to transport a load if they felt it was improperly secured. (Tr. 119, 131.)

On the day of the accident, the evidence demonstrated that Kittle Hauling employees used a Kittle Hauling crane to load the pipes onto Kittle Hauling's trailer. Victor Betz, the Defendant's employee, testified:

Q. What was your involvement with that job? What did you do?

A. Operated a crane.

Q. When you operated the crane, what was your -- what were you doing?

A. I loaded some trailers.

Q. And what did you do in relation to loading the trailers and the crane project?

A. When you load a trailer, you pick something up off the ground and put it on the trailer.

Q. Were you loading pipes onto the trailer?

A. I loaded some, yes.

Q. If Mr. Higgerson said that you did, would you have any reason to dispute that?

A. No.

(Tr. 164-65.) Not only did Kittle Hauling employees help load the pipes onto the trailer, the Kittle Hauling employees also inspected the trailer to ensure chains and binders were put on properly. (Tr. 167.) Victor Betz testified that some Kittle Hauling drivers even assisted the Inland employees in putting the 4 X 4 wooden timbers between the layers of pipes. (Tr. 168-69.)

The evidence was undisputed that one of the main purposes of using chocks was to prevent the load of pipes from shifting during transportation. (Tr. 190, 243.) Every other load of pipe that had made it to Greenwood, Mississippi was chocked. (Tr. 383.) Claude Thomas, an Inland employee who was present at Greenwood when the accident happened, testified:

Q. Had other loads of pipe come in on truckloads that did not have chocks?

A. Every one that came in there had some chocks on it.

(Tr. 383.) Troy Kittle reluctantly conceded that the subject load of pipes should have been chocked. (Tr. 124.)

Finally, there was evidence presented that if the load of pipes had been properly secured, the pipes would not have shifted during transportation nor would the pipe had fallen after the binders and chains were removed. Again, Troy Kittle testified:

Q. Do you admit that if this pipe, this load of pipe was properly and safety loaded, the pipes should not shift or fall once the chains and binders are removed?

A. If they were safely load, yes.

(Tr. 126.) Plaintiffs presented substantial evidence that the load of pipes had indeed shifted prior to their arrival in Greenwood, Mississippi. Shannon Earby, an Inland employee, testified that the load of pipes were leaning severely to the right when it arrived.

Q. Let's talk about the load that came in that the pipe fell off of landing on Mr. Raines resulting in his death. Tell me what you remember as that – when you first saw the truck?

A. The truck come in, and we – it was real close to quitting time. It was almost dark. And we all – I remember us all commenting about how badly that the load was leaning to the right.

Q Can you be more specific about which way right is?

A. What you would call a passenger side of a vehicle. I would say to the right of his truck.

(Tr. 400.) Dr. Charles Benedict, an expert who reconstructed the accident, testified that the pipes shifted during transportation as a result of them not being chocked. As a result of the shifting of the pipes and the lack of chocks, the pipe was able to roll off the truck once the chains and straps were removed. (Tr. 244-45.) Dr. Benedict's opinions are unchallenged in this appeal.

In light of the overwhelming evidence the Plaintiffs presented at trial on the issue of duty and the breach thereof, the trial court properly and correctly denied the Defendants' Motion for Directed Verdict. The trial court looked at all the testimony on behalf of the Plaintiffs and properly recognized that the reasonable inferences drawn from that testimony required the case to be submitted to a jury.

C. Any Error Made By The Trial Court In Its Jury Instruction Was Not Properly Preserved By The Defendants On Appeal.

Despite the abundance of evidence the Plaintiffs presented to the jury on the Defendants' duty and the breach thereof, Defendants make the strange argument that the trial court's failure to give specific jury instructions which identify the facts that support the duty owed to Michael Raines was actually substantive evidence that no duty existed and that they were entitled to a directed verdict. Yet, the Defendants did not object to the Court's jury instructions on duty. (Tr. 473-516.) They cite no law in their appellate brief to support their argument that a Court's failure to give a particular jury instruction can be considered as substantive evidence of the

Plaintiffs' alleged failure to prove a duty. The reason the Defendants cite no law for this proposition is because none exists. Instead, Mississippi law provides that jury instructions are not substantive evidence. "The statements of counsel are not evidence and neither are the instructions of the court which should only serve to guide the jury as to the applicable law." *Haggerty v. Foster*, 838 So. 2d 948, 954 ¶7 (Miss. 2003) (citations omitted). Because jury instructions are not evidence, they cannot serve as proof of the Defendants' argument that Plaintiff failed to present substantial evidence of a duty. Accordingly, the Defendants' argument must fail.

Further, the Defendants have waived any alleged error in the jury instructions. The Defendants failed to object to the jury instructions on duty. Since no objection was made, the issue was not properly preserved for appeal. "Where a party fails to make a proper, specific objection to allow the lower court to consider an issue, this Court will not normally entertain the assignment of error. This issue was not properly preserved for appeal." *Dixie Ins. Co. v. Mooneyhan*, 684 So. 2d 574, 589 ¶19 (Miss. 1996) (citations omitted). If the Defendants felt it was error for the trial court to not give more specific instructions on the duty they owed to Michael Raines, it was incumbent on them to voice their objections, which they failed to do. *Dixie Insurance Company v. Mooneyhan, supra.*, is directly on point. There, Dixie argued that the jury instructions were "silent as to what acts on the part of Dixie might amount to 'a grossly negligent manner tantamount to intentional disregard for the rights of the Mooneyhans' and that no other jury instruction cures this error." *Id.* This Court rejected the defendant's argument and made clear that a defendant must object to jury instructions "on the grounds that specific facts alleged to amount to 'gross negligence' were not included in the instruction." *Id.* Because of the defendant's failure to make a specific objection, the issue was not preserved for appeal.

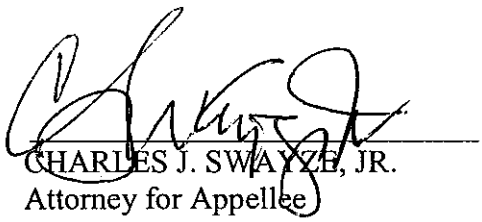
Here, the Defendants failed to make any objection to the Court's jury instructions on duty. In fact, they even concede that there was no error in the instructions. (Appellant's Brief at 36) As a result, this issue is not properly before this Court because it was not preserved for appeal.

Finally, there was no prejudicial error in the trial court's jury instructions that would necessitate a reversal. "All jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the evidence, there is no prejudicial error necessitating a reversal." *O'Flynn v. Owens-Corning Fiberglas*, 759 So. 2d 526, 531 ¶6 (Miss.App. 2000). "When so read, if the instructions fairly announce the law of the case and create no injustice, no reversible error will be found." *Haggerty v. Foster*, 838 So. 2d 948, 953 ¶4 (Miss. 2002). "The trial court will not be held to have erred unless the complaining party can show that the denial of the instruction probably did cause an improper judgment." *O'Flynn,* 759 So. 2d at 531 ¶6.

Here, the Defendants have failed to prove that the trial court's jury instructions created an "injustice" or "improper judgment." The trial court's instructions included general negligence law and provided that the Plaintiffs must establish a duty and breached of that duty in order to recover against the Defendants. (Tr. 215, 220, 221, 226-227.) Further, when the jury instructions are read as a whole, they are not misleading, correctly state the law, and adequately cover the issues presented to the jury. (Tr. 202-236.) As a result, there was no prejudicial error in them and the Defendants' arguments fail.

CONCLUSION

Based upon the overwhelming evidence presented by the Plaintiffs that Defendants owed Michael Raines a duty, that they breached that duty and, as a result, Michael Raines was killed, the trial court properly denied the Defendants' summary judgment and directed verdict motions. The Defendants' arguments simply lack merit. The trial court properly allowed a jury to reach a verdict in this case. There was no error and, as a result, the jury verdict should be upheld.



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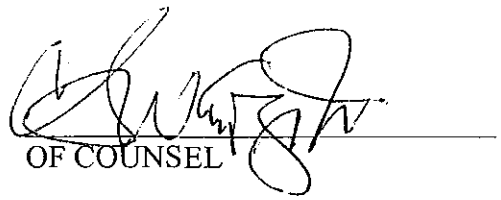
CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing document upon the following by placing a copy of the same in the U.S. Mail, postage prepaid and properly addressed on this the 30th day of December, 2008.



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IN THE SUPREME COURT OF MISSISSIPPI

KITTLE HEAVY HAULING, INC.; CECIL HIGGERSON — **DEFENDANTS/APPELLANTS**

V.

SUPREME COURT NO. 2008-TS-00389
LEFLORE COUNTY NO. 2002-0043CI

M. BRIAN RAINES, AS ADMINISTRATOR OF THE ESTATE OF MICHAEL C. RAINES, DECEASED — **PLAINTIFF/APPELLEE**

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of Appellee's Brief in the above styled case upon the Honorable Ashley Hines by placing a copy of the same in the U. S. Mail, postage prepaid, and properly addressed at Post Office Box 1315, Greenville, Mississippi 38702-1315 on the 30th day of December, 2008.

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