IN THE SUPREME COURT
OF THE STATE OF MISSISSIPPI

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

Appellee,

Vs.

CASE NO. 2008-CA-00389
Appeal from Circuit Court of Leflore
County No. 2002-0043CI

KITTLE HEAVY HAULING, INC.; CECIL
HIGGERSON;

Appellants.

REPLY BRIEF OF APPELLANTS KITTLE HEAVY HAULING, INC. AND CECIL HIGGERSON

ORAL ARGUMENT IS REQUESTED

TODD B. MURRAH/MS #[redacted]
GLASSMAN, EDWARDS, WADE
& WYATT, P.C.
26 North Second St.
Memphis, TN 38103
(901) 527-4673
(901) 521-0941
File No. 02-232
Attorney of Appellants Kittle Heavy Hauling and Cecil Higgerson

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INTRODUCTION AND SUMMARY OF ARGUMENT

In this Reply Brief, the Defendants will clarify for the Court the testimony cited by the Plaintiff, highlight the legal points raised in its principal brief to which the Plaintiff failed to respond, and squarely respond to the authorities relied upon by the Plaintiff. When citing to the record, the Plaintiff mischaracterizes or omits testimony in an effort to twist the facts to fit its interpretation of Mississippi law; Plaintiff also relies on testimony from Shannon Earby, Claude Thomas, and others from Defendants' case in chief when addressing the Motion for Directed Verdict made at the close of Plaintiff's proof. (Plf. Brief at pp. 7, 25-26) In addition, the Plaintiff does not distinguish or otherwise challenge a single case cited by the Appellants. Rather, the Plaintiff merely cites opinions from predominantly foreign jurisdictions with facts distinct from those in this case.

As set forth in Appellants' initial brief, the fact that Inland Dredging voluntarily assumed the duty with which Plaintiffs seek to charge Defendants is determinative of the case. Defendants Cecil Higgerson and Kittle Heavy Hauling did not create the risk that lead to Mr. Raines' injury, Inland Dredging did. Defendants should not therefore be charged with the duty to ensure the safety of Inland Dredging employees unloading the pipes in this case. Moreover, this case is controlled by Section 314 of the Restatement (Second) of Torts as adopted in Mississippi. Absent certain particular circumstances which are not present here, there is no affirmative duty to aid or protect others. Finally, contrary to Plaintiff's argument, the facts of this case do not fall under the rule expressed in *United States v. Savage Truck Line, Inc.*, 209 F.2d 442 (4th Cir. 1953) and its progeny. The principles of duty discussed below apply equally to Defendants' Motion for Summary Judgment and Motions for Directed Verdict. The trial court should therefore be reversed and directed to enter a judgment in favor of the Defendants.

RESPONSE TO APPELLEE'S STATEMENT OF FACTS

The Plaintiff's characterization of the facts in this case suggests that Kittle and its driver were responsible for ensuring that the pipes were safely loaded and unloaded. That is not the case. It is undisputed that Kittle had a duty to ensure the safe transportation of the load. However, it is clear from all of the evidence that Inland Dredging, Mr. Raines' employer, was responsible for loading, securing, and unloading the pipes. The Plaintiff repeatedly fails to distinguish between the duty to inspect the load so that it can be safely transported and the duty to ensure the load is safely loaded and unloaded, although the record evidence consistently maintains this distinction; as discussed below, this distinction is also supported by applicable case law. For example, Wayne Kittle testified that it was the Kittle driver's responsibility to ensure that the load was secure **for transport**. (Tr. 103) Wayne Kittle testified very clearly to this fact yet Plaintiffs misrepresent the testimony in an effort to create a broader duty.

> Q. "Was it your driver's responsibility to be sure that the load was secure, the load of pipes" --
> A. "Yes, for transport."

(Tr. 103).

Troy Kittle further testified that Kittle's duty, based on the pattern of conduct and course of dealing between the parties, was to make sure that the load is safe for transport and not unloading and loading. (Tr. 133.) Indeed, when asked whether he inspected the load upon arrival at the unloading site, Mr. Higgerson responded "why would I inspect it after I'm already there?" (Tr. 201) This indicates Higgerson's accurate understanding of his role: to transport the pipe without incident. As explained below, his duty to prevent injury to others in this case did not extend to the unloading process when Inland was in charge of both the loading and unloading and when the unloading crew had already begun to remove straps and chains. Even Inland

employee Shannon Earby testified that once the load made it to the unloading site, Kittle's duty ended and Inland's resumed.

> Q. And so Mr. Higgerson from what you recall never inspected the chains on that particular load, correct?
> A. I can't answer that with certainty, but it really wasn't his -- I mean, that's what we were there to do, is to unsecure the load and unload the truck. That was our job with Inland.

(Tr. 416)

All of the testimony is very clear that on this specific job, based on the custom between Inland and Kittle, Kittle's drivers made sure the load was secure for transport only. (Tr. 103, 105, 125, 194.) The following testimony from Troy Kittle exemplifies this.

> Q. Do you agree that on October 31, 2001, the policies and procedures of Kittle Heavy Hauling required drivers to use chocks on loads of pipes?
> A. When we were responsible, yes, ma'am.
> A. And in fact you discussed with your drivers that they should use chocks, didn't you?
> A. On every load that we have ever loaded -- where we're responsible for loading and unloading, we use chocks.
>
> ***
>
> Q. Would you agree that the Kittle driver, Cecil Higgerson, knew to check and make sure that chocks were used and in place on this particular load?
> A Normal circumstances, yes; this particular load because he did not secure the load himself, no. Chocks are only there for secure -- for loading and unloading only.
> Q. And they're there for safety, aren't they?
> A. During loading and unloading only. Not during transport.
> Q. But your driver knew he had responsibility to check this load to make sure that chocks were in place.
> MR. MURRAH: Objection, Your Honor.
> That goes to the issues we discussed over and over again about duty.
> THE COURT: Well, the objection is sustained.
> MS. BEASLEY CONTINUING:
> Q. Mr. Kittle, if your driver was following the company rules

and procedures, he would have checked to make sure that chocks were in place, wouldn't he?

A. Not for transport, ma'am.

Q. Not for safety reasons? You don't think he would have check to ensure for safety reasons?

A. He wasn't allowed to chain and unchain or load and unload his load, so no.

***

Q. But regardless who put the chains on, your driver must ensure that the load is properly secure.

A. For transport, yes.

Q. Isn't it one of your concerns at the company, at Kittle that a load of pipes like this will shift during transport?

A. Not with that many chains and straps, no, ma'am. It's always concern. I'm just saying with your picture there are plenty, sufficient chains and straps to hold it during transport.

Q. Would you agree that if chocks are not used it creates -- would create an unsafe and dangerous situation at the unloading site once the chains were removed.

MR. MURRAH: Objection, Your Honor.

THE COURT: State your objection.

MR. MURRAH: It's the objection we argued when the jury was out. That's qualifying safety issues.

THE COURT: I'll sustain the objection.

MS. BEASLEY CONTINUING:

Q. If your driver had followed the company rules, it would have made the situation at the unloading site much safer, wouldn't it?

MR. MURRAH: Same objection, Your Honor.

THE COURT: That objection is sustained.

(Tr. 120-126)

Despite Plaintiff's attempt to alter the facts, the record is clear that as between Inland and Kittle, there were two sharply distinct responsibilities. Inland Dredging was responsible for loading and securing the load. Kittle was responsible for ensuring that no accident or injuries occurred while that load was in transit. Once Inland began the unloading process, Inland, not Kittle, was responsible for the safety of the unloading crew. As discussed below, this makes good sense from a policy standpoint because Inland was in charge of the loading and unloading

and they should therefore bear the liability for injuries that occur during either of these activities. *See, e.g., Rector v. General Motors Corp.*, 963 F2d 144, 147 (6th Cir 1992) (noting that it would be illogical to hold a carrier liable to a consignee of goods where it was the shipper, rather than the carrier, who had control over the manner in which the goods were loaded.)

The next area in which Plaintiff mischaracterizes the evidence concerns Kittle's role in the actual loading process. Kittle's involvement with the loading process with respect to this particular load was limited to the operation of a crane by an employee of Kittle Crane and Rigging. (Tr. 120) This crane did nothing more than supply physical force to the pipes **at the direction of Inland employees**. (R. Supp. 38.) (R. 118-119.) (R. 102.) (Tr. 120; 169-171) Plaintiff has never alleged that there was any negligence with respect to the physical placement of the pipes on the trailer. Indeed, Mr. Higgerson unequivocally testified at trial that he did not place any timbers, straps or chains on the subject load. (Tr. 193) There is absolutely zero testimony that any Kittle employee undertook any task with respect to loading or securing the load at issue in this case. Victor Betz testified that the ground crew at the loading site was Inland, not Kittle, personnel. (Tr. 168)

> Q. "Okay. The ground crew was not Kittle Heavy Hauling personnel?"
> MR. WARD: Your Honor, I'm going to object to that. That was already asked and answered, and it calls for speculation on the part of the witness.
> THE COURT: It's overruled.
> A. "No."

(Tr. 170-171)

Testimony from people not on the site about what might or might not occur on some other load has no relevance to the issue at hand; such testimony is hearsay, it fails the personal knowledge requirement of M.R.E 602 and is based on mere speculation. Thus, Plaintiffs reliance on the deposition testimony of Donnie Cox to suggest that Kittle drivers participated in this

process is misplaced. Even if it is taken as true that some Kittle drivers would occasionally assist in the placement of straps, there is no evidence to refute the fact that Inland was in charge of the loading and there is no testimony that any Kittle driver assisted in timber, strap or chain placement on the load in question. At any rate, Donnie Cox did not testify in Plaintiff's case in chief and his testimony does not impact a review of Defendants' directed verdict motion made at that time.

In addition, the Plaintiff represents that Kittle 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.) This is misleading in that it overstates the extent of the authority for Kittle to exert any control over Inland's loading and securing of the cargo. As noted above, Kittle drivers had authority to reject loads unsafe for transport. This includes ensuring the load meets the weight and dimensional requirements imposed by law and has nothing to do with ensuring the safety of the unloading crew. As Troy Kittle testified, Kittle drivers "would make the decision to stay legal." (12/2/08 Supp. R. 97) This has no impact on the reality that Inland was in charge of the loading and securing of their pipes. Moreover, the trial court specifically found the length of the pipes, and Kittle's ability to dictate a maximum length of pipes they would haul, irrelevant to this case. (Tr. 129-130)

Inland Dredging loaded their pipe onto the Kittle trailer, Inland Dredging owned, provided and placed the 4 x 4 wooden beams beneath each layer of pipe placed on the trailer, and Inland Dredging secured each layer of pipe with straps attached to the trailer (R. Supp. 3.) (R. 102.) It is irrelevant who owned the straps and chains as there is no allegation of any defect with those items. It was a custom and practice on each load that the chains, straps and supporting timbers be placed, secured, unsecured and unloaded by Inland Dredging Company employees.

(R. Supp. 41.) (R. 111-115.) There is no testimony that Higgerson or any Kittle employee took part in securing the subject load. Any inspection of the straps and chains done by Higgerson would be in accordance with his duty to ensure load security in transport.

It is also noteworthy that the chocks present at the loading site were owned by Inland Dredging. (Tr. 132) Plaintiff's argument implies that the presence of chocks placed a duty on Kittle to use the chocks, but this is not an accurate characterization of the testimony and is not a reasonable inference. (Plf. Brief at p. 5)

> Q. Were there chocks at the Sardis site?
> A. Yes, sir.
> Q. Do you know whose chocks they were?
> A. They belonged to Inland Dredging.
> Q. Do you know what they were there for?
> A. They were there to secure the loads.
> Q. By whom?
> A. By Inland Dredging.
> Q. So when the question was put to you are they available for Kittle's use, your answer is what?
> A. No.
> Q. They are there for Inland Dredging's use?
> What is your answer?
> A. Yes.

(Tr. 132)

The fact that Inland's chocks had previously been nailed to Inland's timbers and used by Inland to secure the pipes so they could be safely unloaded is further evidence that Inland, not Kittle, was responsible for placing chocks on the loads and ensuring the safety of the Inland unloading crew. (Tr. 98-100).

Plaintiff next claims that the trial court heard evidence that the load had shifted during transit. However, at no point during Plaintiff's case in chief was there evidence sufficient to support a finding by a preponderance of the proof, or even evidence from which a jury could reasonably infer that this occurred. To the contrary, Higgerson testified that after his initial

inspection of the straps and chains, he stopped not once, but twice during the transport to inspect the load. It did not shift. (12/2/08 Supp. R. 32-33; Tr. 200-201.) Likewise, Inland supervisor Mr. Barry Locke testified that he saw nothing that indicated to him that the load had shifted once it had arrived on the loading site and that no one had ever told him anything about the load shifting. (Tr. 150; 160-161.) Both Higgerson and Locke actually observed the load with their own eyes. Plaintiff also cites Claude Thomas' deposition testimony to suggest that, on the subject load, pipes were dragging on the ground when the load arrived. (Plf. brief at p. 7) However, this is clearly a misrepresentation of his testimony. Mr. Thomas stated that on most loads, the pipes appeared to be "dragging the ground when they be [sic] coming through the gate like." (12/28/08 Supp. R. 151) However, he goes on to explain that on the load in question, the pipes "were on there fairly straight." (12/28/08 Supp. R. 152)

The only testimony offered in Plaintiff's case in chief that the load shifted during transport came in the form of a purchased expert opinion that was totally discredited on cross-examination. The relevant portions of this testimony are as follows:

> Q. Well, the slope of the timbers where they're on the truck they slope to the left or to the right or were they perfectly straight? Do you know?
>
> A. **You can't really tell from looking at the photographs other than the testimony, and the testimony is it was fairly level.**
>
> Q. **Okay. That's what -- so basically everything you use to formulate your opinion is evidence from this case that you're [seeing] through depositions outside of this courtroom.**
>
> A. **And the photographs. That's all I have.**
>
> Q. And can you show me that part where Claude said the load had shifted.
>
> ***
>
> A. It said, "Then I seen the chain done moved. The chain moved -- done moved it" -- well, I got to go back, because

it says, "So Shannon walked a good distance from the trackhoe, and Mike, he was right there by my door. Then I seen the chain move. The chain done moved about maybe about 18 inches or a foot, 18 inches and stopped. The chain did. And it moved again. And then when it moved again, that's when I heard the pipe fell. The pipe fell and it fell on the other side."

Q. Now, in that testimony I didn't see the word "shift" at any point in that testimony. What I saw was that the chain moved a foot or 18 inches. Is that fair?

A. That's right.

Q. And then you decided that the load had shifted from that testimony?

A. Yes, that's consistent with what went on.

Q. Well, what -- maybe you -- Mr. Raines was starting to pull the chain. I mean, you don't know. you weren't there.

A. No, but he was three or four feet away from the chain.

Q. In the end, in the final picture.

A. Yes, sir.

Q. Okay. But you don't -- you weren't there and you don't know if he had started to pull that chain when the pipe fell.

A. No, but it's consistent with the pipe falling off.

Q. Now, if the pipe is right on the edge of the wood timber supporting it, how is it that it moved 18 inches, the chain, and then stopped?

A. I'm not sure I understand.

Q. Well, how was there room for the pipe to move, roll 18 inches and then stop, if it's right on the edge of the timber?

A. We don't know if it rolled 18 inches. We don't know if Mr. Thomas is correct in his distance and what have you, so we don't really know.

Q. Well, you have to presume he is, don't you?

A. Pardon?

Q. You have to presume he is, don't you?

A. Not necessarily. People don't estimate distances and things accurately all the time.

Q. Well, what do you do? Do you make it up for them?

A. No, sir, I don't make it up for them.

Q. Well, how would [you] have anything to counter his testimony?

A. I don't, other than what I just said.

Q. Okay, so there's nothing to counter his testimony that it moved 18 inches.

A. Other than what I just said, no, sir.

Q. Okay. So -- and my question is if it moved 18 inches, how

can you justify that it moved 18 inches from the edge of the board and stopped?

A. Well, it could have started moving, it could have been pulled. I don't know that for sure.

Q. A lot of things could happen, couldn't they?

A. Yes, sir.

***

Q Who else did you rely on in coming to this conclusion about the load shifting?

A. The fact that it shifted and rolled off.

Q. **What testimony from what witness did you rely on?**

A. **There aren't any witnesses that said anything about it shifting.**

Q. Well, sure. Donnie Cox -- you got his deposition, don't you?

A. Yes.

Q. He said it was straight up; didn't shift at all. Did you not read that part?

A. Yes, I read that part.

Q. Okay. Well, you didn't tell the jury about that.

A. It can look straight up and still be shifted far enough to be a problem, sir.

Q. Cecil Higgerson testified the same thing; the load was straight up.

A. I understand. He testified to a lot of things that weren't right.

Q. Really?

A. Yes, sir.

Q. Okay. But you didn't tell the jury about his testimony. There's also testimony from Inland Dredging supervisors, says the load is straight up. Did you tell the jury about that?

A. No, that's already been told to the jury.

Q. What about the deputy sheriffs that were out there and their testimony that it was a straight load; they didn't see any shifting.

A. I can tell you by looking at the photographs it doesn't look straight to me.

(Tr. 264-269)

As Benedict's own testimony establishes, there is no evidence that the load shifted during transport. The only basis for his opinion on this point is the photographs **taken after the pipe**

fell; photographs he admitted were difficult to look at with respect to the slope or lateral disposition of the load. All record evidence and every single piece of testimony reviewed by Benedict contradict his opinion that the load shifted as he freely admitted live at trial. Although one witness during the Defendant's proof testified that the load was leaning to the passenger side, this does not impact the review of the trial court's denial of the Motion for Directed Verdict made at the close of Plaintiff's case in chief. Moreover, it defies logic that the load was leaning to the passenger side when it is undisputed that the pipe fell off on the left hand or driver's side of the truck. There certainly is no proof, factual or opinion, that a shift to the right caused a pipe to fall to the left and thus no inference can be drawn in Plaintiff's favor on this point.

At the close of the Plaintiff's case in chief, there is no way a reasonable jury could conclude that the load shifted during transport. Plaintiff clearly failed to prove this fact by a preponderance of the evidence. Accordingly, because the Defendants' only duty was to ensure safe transportation of the load that was loaded and unloaded by Inland, and there is no evidence of any problem with the transportation of the load, Defendants were entitled to a directed verdict. At any rate, even if the load did shift, no injury occurred during transport and it would still be Inland's job to ensure the safe unloading of the pipe. Inland's track hoe was used for this very purpose. (Tr. 144-145; Appellants' Brief at pp. 4-5; 24-28 (explaining unloading process))

Finally, Plaintiff astonishingly claims that Dr. Benedict testified that it was the responsibility of the driver, Cecil Higgerson, to ensure that chocks were on the load. (Plf. Brief at p. 8, citing Tr. 245-46.) Not only did the trial court sustain an objection to the admissibility of this testimony, **the trial court instructed the jury to disregard it**. (Tr. 246.) This is yet another example of the Plaintiff employing revisionist tactics in order to manipulate facts. Plaintiff also cites Benedict's testimony regarding industry custom in an effort to impose a duty

on these Defendants. However, industry custom is only relevant to the issue of breach, and does not impact the duty analysis. "Although custom itself does not create a duty, custom may help define the standard of care a party must exercise after it has undertaken a duty...." *Canal Barge Co., Inc. v. Torco Oil Co.*, 220 F.3d 370, 377 (5th Cir. 2000) (internal quotations omitted). Furthermore, this Court has noted that "custom and usage evidence is disfavored and recognized as dangerous." *Jones v. Jitney Jungle Stores of America, Inc.*, 730 So.2d 555, 557 (Miss.1998).

Plaintiff claims that it "presented overwhelming evidence on the issue of duty." (Plf. Brief at p 23) However, the court refused to instruct the jury that these Defendants owed any duty here. To the contrary, the trial court declined to instruct the jury that the Defendants had a definable duty and denied Plaintiff's proposed instructions in that regard. As discussed below, the trial court's refusal to let the jury hear evidence about who had the duty to chock underscores the simple fact that the issue is not one for the jury to decide but one of law for the court to decide and instruct the jury accordingly. Contrary to Plaintiff's argument, Defendants do not propose that the jury instructions are substantive evidence. Rather, based on the instructions accepted and rejected, there was no way the jury could have found a breach by these Defendants.

ARGUMENT

I. DEFENDANTS OWED NO DUTY TO PREVENT THE INJURY AT ISSUE

As asserted in the Defendants' principal brief, Inland Dredging voluntarily assumed the duty to ensure the safe loading and unloading of its own pipes. Plaintiff fails to address this vital issue and has presented no challenge to the validity of the Defendant's position. The Plaintiff's brief is also noticeably silent on Mississippi's adherence to Section 314 of the Restatement (Second) of Torts. Also absent from Plaintiff's brief is any attempt to distinguish the cases of *Jones v. James Reeves Contractors, Inc.*, 701 So.2d 774 (Miss.1997) or *Higginbotham v. Hill*

Bros. Const. Co., Inc., 962 So.2d 46 (Miss. App. 2006). Rather, Plaintiff merely recites general negligence concepts in arguing for the imposition of a duty on the Defendants here. Even if Kittle and its drivers did have a common law duty to ensure the safety of Inland's unloading crew once it started the unloading process, which is denied, that duty would be supplanted by Inland's voluntary assumption of the tasks of both loading and unloading. As set forth above, both Higgerson and the Inland crew understood that Kittle's sole responsibility was to transport the load and that Inland was in charge of ensuring the crew's safety during unloading. Even if this Court determines this case falls outside the purview of Section 314, Inland's assumption of this duty relieved Kittle of the same.

A. Inland Voluntarily Assumed The Duty With Which Plaintiff Seeks To Charge Defendants.

The very authorities cited by the Plaintiff on the subject of general negligence illustrate why this case is controlled by the voluntary assumption rule and not the general principles of foreseeability and reasonableness as Plaintiff argues. "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 *Foster* Court went on to state that "[t]he 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...." *Id.* at 974 (citing *Dr. Pepper Bottling Co. v. Bruner*, 245 Miss. 276, 282, 148 So. 2d 199, 201 (1962)) (emphasis added). The question this Court must answer in order to determine if the Defendants owed Michael Raines a duty is not, as the Plaintiff argues, whether the Defendants exercised their "senses and intelligence" in this action to avoid injury.

Instead, the question is did Kittle or Mr. Higgerson create the peril or undertake the performance of an act that caused the injury here? Quite simply, the answer is no. The only action undertaken by the Defendants was to drive the truck and transport the load safely; no accidents occurred during the performance of that act and this act created no peril to anyone.

Inland Dredging owned the pipes, Inland Dredging was in control of the loading of the pipes, Inland Dredging owned the chocks and timbers and controlled the placement of timbers, Inland Dredging was responsible for securing the pipes all the while knowing that it also was responsible for unloading the pipe. Inland's loading and securing of the pipes onto this trailer required Inland to conduct an "investigation and inspection" to ensure no danger existed and that the load was properly secured so that it could be safely unloaded by its own employees. *Foster v. Bass*, 575 So. 2d 967, 973-74 Moreover, the unloading crew had a similar duty to investigate and inspect the load so that it could be safely unloaded. *Id.* All record evidence indicates Inland voluntarily assumed these duties and that Kittle relied on Inland's assumption of these duties. (Tr. 201)

Defendants acknowledge they did have a duty to conduct an "investigation and inspection" to ensure no danger existed while the pipes were in transit and that the load was properly secured for transport. Higgerson inspected the straps and chains on the load prior to departing Sardis. He stopped and inspected the load two more times before arriving in Greenwood. He saw no evidence of any cargo shift or any other problem with the load that would make it unsafe for transport. He complied with company policy and federal regulations applicable to the transportation of a load. (Tr. 200-201.)

Plaintiff argues that "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." (Plf. Brief at p. 13.) However, as Defendants discussed in their original brief, "foreseeability is not a factor to consider when determining if a duty is voluntarily assumed...." *Wagner v. Mattiace Co*, 938 So.2d 879, 884 (Miss.App. 2006). Again, this legal point remains unchallenged by the Plaintiff. In short, Inland Dredging failed to protect its own employee from a danger that Inland Dredging created.

B. The Fact That An Actor Realizes Or Should Realize That Action on His Part Is Necessary For Another's Aid Or Protection Does Not Of Itself Impose Upon Him A Duty To Take Such Action. Rstmt. 2d Torts § 314.

The rationality for the rule found in Section 314 is apparent. Unless a defendant has undertaken by conduct or contract to perform some act, or unless a duty is imposed by law, he is under no duty to act to prevent harm to others arising from the failure to do that act safely. *See Jones v. James Reeves Contractors, Inc.*, 701 So.2d 774, 786 (Miss.1997). As the Advisory Comments to the Restatement state, "the rule stated in this Section is applicable irrespective of the gravity of the danger to which the other is subjected and the insignificance of the trouble, effort, or expense of giving him aid or protection. REST 2d TORTS § 314, cmt. (c).

The notes also state that: "[t]he rule stated in this Section applies only where the peril in which the actor knows that the other is placed is not due to any active force which is under the actor's control." REST 2d TORTS § 314, cmt. (d). Here, the peril in which the Defendants allegedly knew that Mr. Raines was placed was not due to any active force under Defendants' control. At all times relevant to the loading of the truck, the load was under the control of Inland

Dredging. Higgerson was under a duty to inspect the securement of the load to ensure it was safe for transport. Once Inland began to remove the straps, the load was under the control of Inland Dredging. Inland Dredging knew that its crew was in charge of unloading the load when its crew loaded and secured the pipe. Inland also knew that Kittle was simply there to transport the pipes and would not be assisting in the unloading. The accident did not occur until the actual unloading of the pipes began. It might be different if the pipes fell while in transit. However, this circumstance is not present here.

The Federal Trucking Regulations in place at the time of the accident did not require the carrier to use chocks. The conduct and pattern of practice between Inland and Kittle clearly demonstrates that Inland was in total control of the loading and securing process. In fact, just like the plaintiff in *Higginbotham v. Hill Bros. Const. Co., Inc.* the Plaintiff here cannot "point out any other circumstances that would remove this case from the general rule stated in section 314 of the Restatement (Second) of Torts...." *Higginbotham*, 962 So.2d 46 (Miss.App. 2006). As noted above, even if this Court refuses to apply Section 314, there is uncontroverted evidence that the duty to ensure the safety of the Inland unloading crew was voluntarily assumed by Inland itself.

II. THE DUTY TO ENSURE THE SAFETY OF AN UNLOADING CREW RESTS WITH THE SHIPPER WHEN THE SHIPPER IS RESPONSIBLE FOR LOADING AND UNLOADING THE LOAD.

Plaintiff relies on *United States v. Savage Truck Line, Inc.*, and several cases applying the rule set forth in *Savage*, in support of the argument that the duty to ensure the safety of an unloading crew rests with the carrier absent a latent defect in loading. However, there are several critical facts that distinguish the present case from the *Savage* line of cases. First, the injury in *Savage* and most of the cases following it occurred when the load was in transit. *See*

United States v. Savage Truck Line, Inc., 209 F.2d 442 (4th Cir. 1953); *Hankins Lumber Co. v. Moore*, 774 So.2d 459 (Miss. App. 2000); *Decker v. New England Public Warehouse, Inc.*, 749 A.2d 762, 767 (Me. 2000); *Hensley v. National Freight Transportation, Inc.*, 668 S.E. 2d 349 (N.C. 2008); *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). Here, clearly the accident occurred during unloading. The second critical distinction involves the relationship between the injured party and the shipper. In the instant case, the injured party was an employee of the shipper, the same shipper charged with loading the load alleged to cause the injury. None of the cases cited by the Plaintiff involve such a scenario but rather address injury to a third party or an agent of the carrier. A third determinative distinction is that in *Savage* and similar cases, the carrier had actual knowledge of the improper loading. *See Georgia Kraft Co. v. Terminal Transport Co.*, 343 F.Supp.1240, 1248 (D.C. Tenn.1972) (discussing *Savage*). The record in this case does not establish the carrier's actual notice of a defect in loading. (Tr. 193-199) To the contrary, the record indicates that Mr. Higgerson inspected the load in accordance with his duty to ensure safe transportation of the load. In fact, he did this numerous times before arriving at the unloading site. He never saw anything about the load that made it unsafe for transport. A final critical difference between the cases cited by Plaintiff and this case is that there is no evidence here that any Inland Dredging employee, including Michael Raines, detrimentally relied on Kittle's assurance that the load was safe for unloading. In many of the cases cited by the Plaintiff, detrimental reliance on the part of the injured party was central to the courts' reasoning. These critical distinctions are addressed further below.

Plaintiff's reliance on *Hankins Lumber Co. v. Moore*, 774 So.2d 459 (Miss. App. 2000) is

misplaced for several reasons. First, the case is distinguishable because it involved an accident that took place while the truck hauling bundles of lumber was in motion. *Id.* Moreover, while it was the responsibility of the shipper to secure the bundles of lumber together and to load them onto carrier's truck, it was carrier's responsibility to then secure the banded bundles to his truck utilizing nylon straps. *Id.* Finally, in the course of transporting the load, and prior to the accident, the carrier's driver lost his load and thus the driver had actual notice of a load stability issue prior to the accident. *Id.* Needless to say, those facts are remarkably distinct from the facts in the present case. Not only did the accident occur during transit, the carrier also had the express duty to secure the load to his truck and was put on actual notice of load insecurity before the subject accident. None of these factors are present in the instant case. In addition, the *Hankins* opinion only addresses the liability of the shipper and does not specifically address the liability of the trucking company. Indeed, only the lumber company was involved in the appeal. *Id.* Thus, *Hankins* does not support Plaintiff's theory.

Plaintiff next relies on *American Creosote Works of Louisiana v. Harp.*, 215 Miss. 5, 60 So. 2d 514 (1952). The issue in *Harp* was whether a shipper, who, pursuant to contract, loads a car, is liable to an injured employee of the consignee engaged in unloading the car because of the alleged improper manner of loading. *Id.* at 515. The defendant in *Harp* was the shipper, the owner and operator of a plant that essentially made poles. It sold a car load of poles to a construction company. *Id.* The defendant loaded the car and delivered it to the railroad company for transportation from Kentucky to Mississippi. When the car arrived in Mississippi it was placed on a side track where it was taken in charge of by the consignee, the construction company whose foreman directed the plaintiff, its employee, to go on top of the load with an ax and cut the metal bands which were fastened to the standards on each side of the load and

extended across the top of the load. *Id.* The issue submitted to the jury was "whether the car was properly loaded and in a manner which was reasonably safe for unloading." The only argument that the defendant shipper made on appeal was that because there was no privity of contract between the plaintiff and the defendant, that the defendant knew nothing of the plaintiff, had no contact with him and consequently owed him no duty. *Id.* at 515-516. The court held that the mere lack of a contract was insufficient to sustain a judgment in favor of the defendant. *Id.*

Not only are the facts of *Harp* different than those in this case, the argument is different as well. Most importantly, *Harp* did not even involve a suit against the carrier. *Id.* Although *Harp* did involve an injury sustained during unloading, the injured party was an employee of the defendant's consignee, a third party that was not involved in any way with the loading or securing of the load. *Id.* at 514-515. Here, Mr. Raines was an employee of Inland Dredging, the same company that loaded and unloaded the load. Arguably, his knowledge of the safe way to load and unload the pipes would be superior to the carrier's. One of the cases cited by the court in *Harp*, *Pittman v. Yazoo & M.V.R. Co.*, 158 So. 547 (Miss. 1935), illustrates the importance of the relationship between the injured party and the shipper charged with the duty to load when an injury occurs during unloading.

In *Pittman*, a heavy piece of machinery had been loaded onto a rail car the previous day by employees of the shipper lumber company. *Id.* at 548. The plaintiff, an employee of the lumber company, had nothing to do with that loading but it was done by other servants of the lumber company. *Id.* The court held that the carrier was under no duty to furnish instruments (in that case standards, which serve a similar purpose to the chocks at issue here) for load securement, and that same was the duty of the shipper lumber company. It was held that the

carrier was not liable for the plaintiff's injury because the car was being loaded by the lumber company, and the carrier had no control over the manner of loading. *Id.* Central to the court's reasoning was the fact that the plaintiff was an agent of the shipper. *Id.*

This is analogous with our case in that Inland was in control of and responsible for both loading and unloading the pipes at issue in this case; Mr. Raines was an Inland employee. The *Pittman* court stated:

> The duty of the carrier with reference to the shipper and his servants is one thing, and its duty with reference to its own servants and others is another and a very different thing. To the shipper and his servants, whose duty it is to furnish and place the standards, the carrier owes no duty to see that the standards are fit for their purposes; while as to the carrier's servants and others it is the duty of the carrier to exercise a reasonable inspection of the standard and replace any that are unfit. In other words, as to the carrier's servants and others than the shipper and his servants, the carrier adopts the standards furnished by the shipper as its own.

Pittman, 158 So. 550.

In essence, *Pittman* stands for the proposition that the duty to ensure that a load can be safely unloaded is on the shipper, when the shipper is responsible for both loading and unloading the load and the injured party is a servant of the shipper. As noted by one court, the *Savage* court "found the carrier to be the 'principal offender' and to have 'the last clear chance to avoid the catastrophe' and therefore to be liable to indemnify the shipper for its losses, even though the shipper was also negligent." *Georgia Kraft Co. v. Terminal Transport Co.,* 343 F.Supp. 1240, 1246 (D.C.Tenn. 1972). In *Pittman*, as in the present case, the "last clear chance" to avoid the injury clearly rests with the shipper. Under the reasoning of *Savage*, reasoning these Defendants embrace, no duty should be imposed on the carrier under these circumstances.

Although the court in *Pittman* found that the duty to secure the load was on the shipper

pursuant to a rule promulgated by the Interstate Commerce Commission, the holding in *Pittman* nonetheless supports Appellant's position here. In our case, there was no federal law or regulation that required either the shipper or the carrier to use chocks or otherwise ensure the load was safe for unloading. However, as discussed previously herein, the course of conduct between the parties with respect to this particular job indicated that Inland Dredging voluntarily assumed the duty to ensure that the load was safe for loading and unloading. The source of the duty, be it federal administrative law as in *Pittman* or conduct on the part of Inland as in this case, is irrelevant. *See Wagner v. Mattiace Co.*, 938 So.2d 879, 884 (Miss. App. 2006).

Plaintiff erroneously characterized the Defendants' argument in this case. In the Plaintiff's brief, they characterize the Defendants' position by saying that "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." Plaintiff's brief at p. 16. This is not accurate in that it omits the very important fact that the actual unloading process had begun when the pipes fell. The Inland crew was in the process of removing the chains and straps when the pipe fell. Kittle and its drivers had a duty to make sure that the load was secure for transportation, but all this required, pursuant to Kittle's own policy and pursuant to the federal regulations, was sufficient chains and straps. It was not until these chains and straps were being removed that the accident occurred. This goes to another key distinction mentioned above, the fact of actual knowledge on the part of the carrier and the fact that a load can be safe for transport yet potentially unsafe for unloading.

In *Savage* and similar cases, the carrier had actual knowledge of the improper loading. *See Georgia Kraft Co..*, 343 F.Supp.1240 (discussing *Savage*). "In the *Savage* case it is pointed out that with equal certainty it was shown that the driver concluded from his observation that the load was not properly fastened to the truck when he took charge of it. In *Moretz* the Court points

out, the uncontradicted evidence in the case shows that Mason & Dixon transported the goods with knowledge that they were insecurely loaded." *Id.* at 1247 (internal citations and quotations omitted). The record in this case, even when viewed in the light most favorable to the Plaintiff, does not indicate actual notice of a defect in loading for transport and there is no evidence that Higgerson or Kittle actually knew this particular load was unsafe for transport. To the contrary, the record indicates that Mr. Higgerson inspected the load in accordance with his duty to ensure safe transportation of the load. He did this numerous times before arriving at the unloading site. He never saw anything about the load that made it unsafe for transport. (Tr. 120-126;193-194)

As the court in *Georgia Kraft* stated:

> The carrier's duty to inspect for the security of a cargo loaded by the shipper is not an absolute duty exonerating the shipper in every case from the shipper's own negligence in loading. Rather, the carrier has a duty to make a reasonable inspection and to observe and correct defects or insecurities in loading that are capable of being discovered in the course of a reasonable inspection. Before accepting the load the defendant's driver made an inspection to determine the security of the load. The load appeared to have been secured in a normal and usual manner previously found **to be safe for transit**.

Id. at 1248 (emphases added).

The record in the instant case is clear: all that was required for the load to be secure for transit was the proper number of straps and chains. (Tr. 125) Indeed, other cases have recognized that a load might be adequately secure for transport such that the carrier satisfies its duty but nonetheless be negligently loaded by the shipper. In *Grantham v. Nucor Corp.*, 2008 WL 3925211 (D. Utah), the plaintiff was an employee of the carrier and was injured while unloading some angle iron; he then sued the shipper responsible for loading the iron onto his trailer. *Id.* The plaintiff was in charge of chaining and tarping the load in order to secure it. *Id.* In arguing for summary judgment, the shipper cited the Federal Regulations that require a carrier

to conduct an adequate inspection to ensure load security. *Id.* at *4. However, despite the fact that the court found there was a question of fact vis-à-vis whether the load was safe for unloading, it stated that the defendant failed to present evidence that the cargo was not properly distributed and adequately secured. "The evidence presented seems to point to the opposite conclusion. Plaintiff [carrier] testified that he secured the load before he began his trip and continued to do so until he reached his final destination. *Id.* The instant record contains the same undisputed evidence. Defendants, like the carrier in *Grantham*, complied with their lawful obligation to ensure the load was safe for transport.

Plaintiff cites and relies on the unreported case from the United States District Court for the Eastern District of Pennsylvania, *Smith v. Francisco*, 1999 WL 95716 (E.D.Pa. Jan. 8, 1999). Although the arguments made by the defendants in that case are similar to the arguments made by the Defendants here, the facts in *Smith* make it distinguishable and unpersuasive. In addition to the factual distinctions, that case appears to apply a legal standard at odds with Mississippi law.

The *Smith* plaintiff was employed at a refinery. *Id.* at *1. Plaintiff and his co-workers were assigned to move pipes from one area of the refinery to another. *Id.* Plaintiff was part of both the loading and unloading crew. *Id.* At some point after the pipes arrived at their destination, plaintiff was standing on top of the load when the pipes began to shift. He was injured when he jumped off the flatbed trailer. Importantly, it appears that the driver of the truck, defendant Francisco, personally removed the chains in place during transit before the time plaintiff jumped off the load. The flatbed trailer driven by Francisco was owned by defendant South Jersey. *Id.* Smith argued that Francisco and South Jersey were negligent in that they should have known that the pipes were improperly secured on the trailer. *Id.*

As an initial matter, the standard employed by the District Court in Pennsylvania appears to allow the jury to determine the issue of duty. *Id.* at *2. Indeed the court specifically found that reasonable jurors could find that Francisco owed a duty to Smith. *Id.* at *3. However, Mississippi law is clear that the issue of duty is one for the court. *See Donald v. Amoco Production Co.*, 735 So.2d 161, 174 (Miss. 1999). Be that as it may, the facts that the court had to consider when ruling on the defendant's motion for summary judgment in *Smith* were much different than the facts presented to the trial court here, both at the summary judgment phase and at trial.

First, the carrier in *Smith* had an express contract with the refinery that established that the carrier's employees had a **general duty** to take all necessary and proper precautions to protect the project site and all persons and property thereon from damages and injury. *Id.* at *2. Kittle and Inland had no express contract and Kittle had no "general duty" to take all necessary and proper precautions to protect the project site and all persons and property thereon from damage or injury. Second, the plaintiff in *Smith* put on an expert affidavit at the summary judgment phase. *Id.* at *3. In the present case, the Plaintiff's expert at the summary judgment stage, James Dobbs, was excluded and therefore they had no expert proof whatsoever at the summary judgment stage. (Appellants' Mandatory Record Excerpts, Tab 1--Circuit Court Docket entry 8/20/07 at p. 6 Order Granting Motion to Exclude James Dobbs) Finally, Francisco himself testified that he had a duty to inspect the pipes and to determine that **they were loaded in a manner safe for unloading**. *Id.* Quite to the contrary, in our case, Kittle's representatives and its driver all testified that the extent of their duty was to make sure that the load was safe for transportation and not for unloading. Accordingly, *Smith v. Francisco* is completely distinguishable and not persuasive authority in this case.

The final determinative distinction between the *Savage* line of cases relied upon by the Plaintiff concerns the element of reliance. In *Grantham v. Nucor Corp.*, 2008 WL 3925211 (D. Utah), the defendant shipper was responsible for loading bundles of steel onto carrier plaintiff's trailer. *Id.* at *1. Once the bundles were loaded, plaintiff, employee of carrier, expressed concern about there being too much space between the bundles but was told by the defendant that the load was fine. *Id.* After the steel was loaded, plaintiff chained and tarped it in order to secure the load. In denying the defendant shipper's motion for summary judgment based on the *Savage* rule, the court found it material that plaintiff was assured by the defendant that the load was secure. The *Grantham* court also cited *Franklin Stainless Corp. v. Marlo*, 748 F2d 865 (4th Cir 1984) when discussing the importance of reliance on assurances from the defendant. *Grantham* was also a case where a carrier employee sued the shipper that loaded the truck. There, the shipper in charge of loading assured the carrier that the manner of loading employed would cause no trouble with the load. *Id.* at 866. "The court considered important the assurances that were given, the fact that the carrier relied on those assurances and that the carrier believed that the loading was proper." *Grantham*, 2008 WL 3925211 at *3 (citing *Marlo* at at 869). In the present case, there is not one iota of evidence that the Defendants made any assurances to Inland or Mr. Raines, nor is there evidence that Mr. Raines relied on any conduct on the part of the Defendants that they would ensure his safety.

III. MICHAEL RAINES' ASSUMPTION OF THE RISK WAS THE PROXIMATE CAUSE OF HIS DEATH.

Defendants rely on the law and arguments set forth in their summary judgment pleadings below as well as those set forth in their principal brief. In addition, they would point out that Plaintiff admits the lack of chocks was open and obvious. (Plf. Brief at p. 19.)

CERTIFICATE OF SERVICE

I, hereby certify that a copy of the foregoing has been properly served, via U.S. Mail postage pre-paid upon:

Julia A. Beasley, Esq.
P. O. Box 4160
Montgomery, AL 36103-4160

Charles J. Swayze, Jr., Esq.
Post Office Box 941
Greenwood, MS 38930

Honorable Ashley Hines
Leflore County Circuit Court Judge
900 Washington Avenue
Greenville, Mississippi 38702-1315

This the 17th day of February, 2009.

TODD B. MURRAH