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.

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

ORAL ARGUMENT IS REQUESTED

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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-TS-00389

KITTLE HEAVY HAULING, INC.; CECIL HIGGERSON — APPELLANTS

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.	Kittle Heavy Hauling, Inc.:	Appellant
3.	Todd Murrah:	Attorney for Appellant
4.	Cecil Higgerson:	Appellant
5.	Occidental Fire & Casualty Co. of North Carolina	Bonding Company for Appeal Bond
6.	M. Brian Raines	Estate Administrator
7.	Harco National Insurance Co.	Defendants/Insuror

SIGNED, this 28th day of October, 2008.

TODD B. MURRAH/MS [redacted]
Attorney of Record for Appellants

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STATEMENT OF ISSUES

Appellants present the following issues for review:

I. Whether the trial court erred in denying Defendants' Motion for Summary Judgment on the issues of duty and proximate cause.

II. Whether the trial court erred in denying Defendants' Motions for Directed Verdict on the issue of duty.

STATEMENT OF THE CASE

Introduction and Procedural Posture

This lawsuit arose from an accident that occurred at a staging area for a dredge project on the Yazoo River near Greenwood, Mississippi. (R. Supp. 12.) The dredge project was conducted in part by Inland Dredging Company (Inland). Inland hired Defendant Kittle Heavy Hauling (Kittle), the owner of a tractor truck and trailer, to transport Inland's dredge pipes from a location in Sardis, Mississippi to the staging area near Greenwood. Inland maintained responsibility for loading, securing and unloading the pipe, while Kittle was responsible for ensuring the load, once secured by Inland, was safely driven from the loading site to the unloading site. (R. Supp. 12, 38.)

Michael Raines, an employee of Inland, was fatally injured on October 31, 2001 when an Inland pipe situated upon the flatbed trailer fell while Mr. Raines and other Inland employees were beginning to unload the pipe from the trailer after it had safely arrived at the staging area. (R. 2); (R. Supp. 12.) Plaintiffs then sued Kittle and its driver, Cecil Higgerson, in negligence, alleging that Defendants' failure to ensure the load of pipes was safely loaded, secured and unloaded was the proximate cause of the death of Mr. Raines. (R. Supp. 23.)

Defendants moved for Summary Judgment on, among other things, the ground that Defendants had no duty under Mississippi law to ensure the subject pipes were properly secured for unloading when Kittle was simply hired to transport the load. (R. Supp. 145.) Although it made no specific findings of fact or conclusions of law, the trial court denied Defendants' Motion for Summary Judgment because it found "genuine issues of material fact and that Summary Judgment would be inappropriate." (R. 145). The court below never ruled on Defendants' Mississippi Rule of Civil Procedure 56(d) Motion. (R. 146.) Defendants' Motion

for Interlocutory Appeal was also denied. (R. 150.)

The case was eventually tried before a jury. At the close of the Plaintiffs' case, Defendants moved for a directed verdict on the basis that Plaintiffs failed to establish that Mr. Higgerson and Kittle Heavy Hauling had a duty beyond ensuring the safe transport of the load. This Motion was denied, with the trial court ruling that "it's a jury question, so we'll proceed." (Tr. 364). Again, at the close of their own proof, Defendants renewed their motion on the same basis and it was again summarily denied. (Tr. 473.) Finally, after the jury instructions were finalized, and after the court refused any instruction regarding any duty on the part of the Defendants, Defendants argued that Plaintiffs were unable to establish any duty and again sought a dismissal. This Motion was also denied. (Tr. 516.) Defendants now seek review of the trial court's denial of their Motion for Summary Judgment, as well as the denials of their Motions for Directed Verdict.

Statement of Facts Relevant to Review of Ruling on Motion for Summary Judgment

On October 31, 2001, the date of the accident, Michael Raines was employed by Inland Dredging Company in Greenwood, Mississippi. (R. 2.) On the date of the accident, a tractor and trailer owned by Defendant Kittle was carrying plastic pipe which had been loaded by employees of Inland Dredging Company. (R. 102.) (R.Supp. 38) Kittle's involvement with the loading process was limited to the operation of a crane by an employee of Kittle which did nothing more than supply physical force to the pipes at the direction of Inland employees. (R. Supp. 38.) (R. 118.) (R. 102.) Employees of Inland placed 4x4 wooden beams, which were provided by Inland Dredging Company, beneath each layer of pipe placed on the trailer. (R. Supp. 38.) (R. 102.) Importantly, in opposition to Defendants' Motion, Plaintiffs did not dispute that Inland Dredging

loaded the subject pipe onto the Kittle trailer, Inland Dredging 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 was further undisputed that 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.) Employees of Inland Dredging Company secured each layer of pipe with straps attached to the trailer. (R. Supp. 38.) Employees of Inland Dredging Company also secured the entire group of pipes with a number of chains secured to each side of the trailer and passing over the top layer of pipes. The chains each included a ratchet binder for tightening and loosening the chains. This custom and practice was consistently followed including on the load of pipe which Michael Raines and the other Inland Dredging Company employees were unloading at the time of Mr. Raines' death. At the time of the accident, Inland Dredging did not have a policy that its pipe would be secured by chocks or blocks, secured to its wooden support timbers. (R. Supp. 38-42.) (R. 101-111.)

The Inland Dredging crew responsible for unloading the trailers at the unloading site consisted of Shannon Earby, Michael Raines, and Claude Thomas. (R. Supp. 41.) Inland employees were in charge of and solely responsible for unloading the pipes. (R. Supp. 41.) (R. 111-115.) Once the load arrived safely at the staging area in Greenwood, an employee of Inland Dredging Company positioned a track hoe on the passenger side of the trailer placing the bucket of the track hoe in close proximity to the pipe on the top most layer of the pipe, being that pipe most laterally disposed toward the passenger side of the trailer. (R. Supp. 39.) (R. 104-105.) The ratchet connectors previously described relative to the securing chains were positioned on the passenger side of the trailer. The track hoe bucket was positioned as described to ensure that

no pipe inadvertently rolled off the top of the trailer onto an employee while he was unratcheting the chains. After the track hoe was positioned as described, Shannon Earby, an Inland Dredging Company employee, began loosening the chains via use of the ratchet connector. (R. Supp. 38-42.) During this process, a pipe fell off on the driver's side, fatally injuring Mr. Raines. (R.Supp. 40.) (R. 110-111.)

The tractor and trailer were driven by Cecil Higgerson, an employee of Kittle Heavy Hauling. (R. Supp. 38.) At no time during this transport did the subject vehicle leave the State of Mississippi. (R.Supp. 43.) (R. 101.) The loading site and the unloading site were on private property not on any highway or other public road. The unloading site where the accident occurred was an open space in the middle of a farmer's cotton field. (R.Supp. 43.) The unloading site was accessed from one direction from a levy along the Yazoo River by a graded dirt pathway constructed exclusively for access to the unloading area. The unloading area had no other exit point and Inland Dredging personnel and their subcontractors had access to the cotton field only by contractual agreements with the landowner. (R. Supp. 38-43.)

Statement of Facts Relevant to Motions for Directed Verdict

a. Plaintiffs' case in chief.

Plaintiffs' first witness was Wayne Kittle, president of Kittle Heavy Hauling. (Tr. 92.) Although Wayne Kittle was not present when the subject load was being loaded and he had never been present when pipes were being unloaded off of the trailer, (Tr. 97; 102), Mr. Kittle did testify without objection that Inland employees were the ones to strap and chain the pipes not only on the subject load, but that was in fact the customary practice for the entire two year relationship between Kittle Heavy Hauling and Inland Dredging. (Tr. 102-103). Mr. Kittle further testified that it was the Kittle driver's responsibility to ensure that the load was secure for

transport. (Tr. 103). Accordingly, although Mr. Wayne Kittle was not present at the loading site in Sardis, nor was he ever present at the unloading site, he did testify that it was the customary practice for Inland to secure the pipes at the loading site with chains and straps. No testimony from Wayne Kittle established that Kittle or Higgerson had a duty to protect Mr. Raines while unloading the trailer.

The next witness to testify in the Plaintiffs' case in chief was Troy Kittle. Troy Kittle was vice-president of the company at the time of the accident. (Tr. 118.) Troy Kittle testified that he was familiar with the rules, policies and procedures of Kittle Heavy Hauling in effect in October, 2001. (Tr. 119.) Troy Kittle testified that Kittle Heavy Hauling was hired by Inland Dredging to transport pipe from several different places including Sardis, Mississippi. (Id.) On the particular load in question, Cecil Higgerson, the Kittle driver, did not load or secure the load himself. (Tr. 124.) Troy Kittle specifically testified that chocks had nothing to do with the safety of the load during transport. (Tr. 124:11-17.) During Troy Kittle's testimony, the court refused to allow testimony on whether the driver had the responsibility to check the load to ensure that chocks were in place because it was improper testimony regarding the legal issue of duty. (Tr. 124.) Cecil Higgerson did not chain and unchain or load and unload this particular load or any of the loads. (Tr. 125.) Troy Kittle further testified that chocks were present at the loading site in Sardis and belonged to Inland Dredging. (Tr. 132.) Again, on cross examination, Troy Kittle confirmed that Inland Dredging was, by their own conduct, responsible for loading and securing the pipes on the trailer. (Tr. 132-133.) Troy Kittle further testified that Kittle's primary 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.) None of the testimony from Troy Kittle established that Kittle or Higgerson had a duty to protect Mr.

Raines while he and the other members of the Inland Dredging crew were unloading the trailer.

The Plaintiff's next witness was Barry Locke, a supervisor and manager for Inland Dredging. (Tr. 135.) Although he was employed for Inland on October 31, 2001, he was not directly involved with the loading site at Sardis. (Tr. 136-137.) Rather, Mr. Locke was responsible for quality control and general supervision of the unloading site in Greenwood. (Id.) When asked whether it was the driver's responsibility to unbind and unsecure chains for a load like this, the trial court sustained an objection regarding the propriety of opinion testimony on the issue of duty. (Tr. 140.) Mr. Locke further testified that he was not present during any of the times when Kittle Hauling delivered loads to the unloading site in Greenwood prior to this particular incident. (Tr. 142.) Mr. 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.) In addition, Mr. Locke testified that Inland Dredging had written policies for loading and unloading pipe from a flatbed truck at the time of the accident. (Tr. 162.) Mr. Locke was not permitted to answer any questions regarding his opinion as to whether Kittle or Higgerson had a duty to ensure the load could be unloaded safely. (Tr. 140.) None of the testimony from Barry Locke established that Kittle or Higgerson had a duty to protect Mr. Raines while unloading the trailer.

Plaintiff's next witness was Victor Clay Betz. (Tr. 163.) Victor Betz was the crane operator that assisted in placing the pipes on the subject load. (Tr. 164.) Mr. Betts testified that his role in the process consisted simply of picking up something off the ground and placing it on the trailer with the crane. (Tr. 165.) Mr. Betz testified that he did nothing other than place the pipes on the trailer and that the ground crew was responsible for securing the load. (Tr. 166.) Mr. Betz further testified that he did not help put chains and binders on the pipes. (Tr. 166.)

Again, Mr. Betz confirmed that the ground crew took on that role. (Tr. 167.) Mr. Betz further testified that although there were Kittle drivers at the site Inland employees made up the ground crew who actually secured the loads. (Tr. 168.)

Importantly, Victor Betz testified that when he used the crane to place the Inland pipes on Kittle trailers, he was told how to do so by Inland Dredging employees because it was their pipe. (Tr. 169-170.) On cross examination, Victor Betz confirmed that the ground crew in charge of placing the timbers, straps and chains to secure the load was not made up of Kittle Heavy Hauling personnel. (Tr. 170-171.) He further confirmed that there would be no reason to doubt the fact that Inland Dredging people placed the timbers on Cecil Higgerson's truck and secured that load on Mr. Higgerson's truck with chains and straps. (Tr. 172.) None of the testimony form Victor Betz established that Kittle or Higgerson had a duty to protect Mr. Raines while unloading the trailer.

Plaintiff's next witness was Defendant Cecil Higgerson. (Tr. 186.) With respect to the loading and securing of the load, Mr. Higgerson testified that Inland Dredging employees placed the 4x4 timbers on the trailer at the Sardis location. (Tr. 193.) Mr. Higgerson further confirmed that he did not place the chains or the straps on the load. (Tr. 193.) Rather, the Inland Dredging ground crew was responsible for placing and did place the chains and straps on the pipes. (Tr. 194.) On cross examination, Mr. Higgerson confirmed that he did not participate in placing any timbers on the load. (Tr. 211.) Prior to departing Sardis for Greenwood, Mr. Higgerson checked the chains and the straps to make sure they were good and tight and in the proper place. (Tr. 194.) Mr. Higgerson further testified that he stopped twice to check on the stability of the load prior to his arrival in Greenwood. (Tr. 200.) He confirmed that neither time had the load shifted. (Tr. 201.)

Mr. Higgerson further testified that this particular load had standards placed on it and those standards were there to keep the pipe from falling to the ground during unloading. (Tr. 204-205.) He confirmed that these standards were placed on this particular load of pipes by Inland Dredging. (Tr. 204-205.) Mr. Higgerson further confirmed that the only involvement he had during the unloading process was to place the straps and chains in his truck once they were unsecured by the Inland Dredging crew. (Tr. 206.) Mr. Higgerson was sixty one years old at the time of the accident and Kittle did not bring a loading crew with them on the project nor did they bring an unloading crew. (Tr. 215.) He further testified that he had never witnessed any Kittle driver loading timbers or otherwise loading or securing loads at the Sardis site. (Tr. 215.) Mr. Higgerson did not provide any testimony upon which it could be inferred that Kittle assumed any duty to ensure the safe unloading of the subject pipes.

Plaintiff's next witness was Collie Berry. Mr. Berry is the safety director for Inland Dredging. (Tr. 219.) Mr. Berry confirmed that Inland Dredging hired Kittle Heavy Hauling to deliver the subject load. (Tr. 222.) In addition, Mr. Berry stated that he had never been to an unloading site where this load or any similar load was being unloaded. (Id.) Mr. Berry confirmed that the pipe fell during the time that the Inland crew was removing the chains from the load. (Tr. 225.) Collie Berry did not provide any testimony upon which it could be inferred that Kittle assumed any duty to ensure the safe unloading of the subject pipes.

Plaintiff's next witness was Dr. Charles Benedict, an engineering expert. (Tr. 226, 237.) While Dr. Benedict testified about various physical aspects of load security, he was forbidden by the trial court from testifying on the issue of who had a legal responsibility for ensuring the security of a load during the unloading process. (Tr. 242-243.) While Dr. Benedict may have been permitted to testify about standard of care and industry custom, he was not permitted to

testify regarding the Federal Motor Carrier Safety Regulations or who had a common law duty to ensure that the load would be secure for unloading. (Tr. 246.) Furthermore, during the testimony of Dr. Benedict, the court refused to permit any testimony regarding the Federal Motor Carrier Safety Regulations because the court thought that there would be a jury instruction on the law. (Tr. 247.) Based on the evidence permitted at trial, nothing in the testimony of Dr. Benedict could support a factual or legal conclusion that Kittle or Higgerson had any duty to protect Mr. Raines from the dangers associated with unloading the pipe.

The other remaining witnesses presented during Plaintiff's case in chief pertain to the issue of damages and are not relevant to the issues on appeal. At the close of the Plaintiffs' case, Defendants moved for a directed verdict on the basis that Plaintiffs failed to establish that Mr. Higgerson and Kittle Heavy Hauling had a duty beyond ensuring the safe transport of the load. This Motion was denied, with the trial court ruling that "it's a jury question, so we'll proceed." (Tr. 364.)

b. Defendants' case in chief.

Defendants' first witness during its case in chief was Claude Thomas. (Tr. 368.) Claude Thomas was a member of Inland's unloading crew at the Greenwood site on October 31, 2001. (Tr. 369-370.) Claude Thomas confirmed that the unloading of the load was done by Inland Dredging employees and that Mr. Higgerson would simply roll the straps up and put them inside his truck once they were unsecured by the Inland crew. (Tr. 373; 376.) Mr. Thomas confirmed that Cecil Higgerson did not undo any straps on this load. (Tr. 378.) Furthermore, Claude Thomas testified that he never saw the Kittle driver telling people what to do at the unloading site. (Tr. 383.) The testimony of Claude Thomas indicates that neither Kittle nor Mr. Higgerson

had any duty to ensure the load of pipes could be unloaded safely.

The next witness for the Defendants was Shannon Earby. (Tr. 388.) Shannon Earby was another member of the unloading crew at the Greenwood site. He indicated that when pipe was loaded, it was loaded and secured by Inland Dredging. (Tr. 391; 392.) However, Shannon Earby testified that he had no knowledge of how this particular truck was loaded because he was not at the Sardis site when it was loaded. (Tr. 414.) Importantly, on cross examination, Shannon Earby testified that Mr. Higgerson likely did not ever inspect the chains after the load arrived at the Greenwood site because Inland was hired to unsecure the load and unload the truck and that it was not the responsibility of the Kittle drivers, including Mr. Higgerson. (Tr. 416.) "None of the drivers helped us, I mean, other than them stowing away their straps and chains after we handed them to them. We were – I mean, that's what we were there for, was to unsecure loads and unload the truck." Id. This was the normal and routine customary practice between the Inland crew and the Kittle driver. (Tr. 417.) Finally, Mr. Earby testified that the unloading site in Greenwood was on a private farm and not on a road. (Tr. 419.) Mr. Earby confirms the consistent testimony of every witness that Kittle and Higgerson never undertook to secure the load such that it was safe for unloading because Inland Dredging took on that role.

The next witness called by the Defendants was Donnie Cox. (Tr. 421.) Donnie Cox was a dredge captain for Inland Dredging. (Tr. 422.) Donnie Cox testified that it was the Inland supervisor who was ultimately responsible for making sure that pipe is unloaded correctly on a job site. (Tr. 422.) Mr. Cox was not present when the subject truck was loaded. (Tr. 434:9-10.) Inland Dredging provided the 4x4 timbers used to load the subject trailer and they were used on load after load. (Tr. 434-435.) Nobody ever told Mr. Cox the load had shifted once it arrived on site in Greenwood. (Tr. 441.)

The final witness called by the Defendants was Ken Spencer, a deputy with the Leflore County Sheriff Dept. Mr. Spencer's testimony is not relevant to the issue raised on appeal. Following the close of Defendants' case in chief, Defendants again renewed their Motion for Directed Verdict on the issue of duty. (Tr. 473.) The motion was summarily denied. Id.

SUMMARY OF THE ARGUMENT

The Defendants in this case did not have a duty to make sure that the Inland Dredging unloading crew could safely unload the pipes in question. The Plaintiffs argue that a pipe fell on Mr. Raines because the load did not have chocks, which would have prevented the pipe from falling during the unloading process. However, neither at the summary judgment stage nor at any point during trial were Plaintiffs able to establish that Kittle Heavy Hauling or its driver, Cecil Higgerson, had a duty to place chocks on the load. Even if they did, there was overwhelming evidence that the negligence of Mr. Raines and the other Inland employees was the sole proximate cause of the accident. The trial court erred in failing to grant summary judgment on the issues of duty and proximate cause. The court below also erred in failing to direct a verdict in favor of the Defendants on the basis that Plaintiffs could not establish the existence of a definable duty to place chocks on the subject load.

Here, Plaintiffs maintain that the Defendants had a duty to protect Mr. Raines and the Inland unloading crew from falling pipe, even though the undisputed facts demonstrate that the only job Kittle was hired to do was transport a load from one point to another. However, Mississippi law is clear that absent certain particular circumstances, there is no affirmative duty to aid or protect others. *Higginbotham v. Hill Bros. Const. Co., Inc.* 962 So.2d 46, 56-57. Examples of the circumstances in which such a duty will arise include the existence of a contract, a special relationship, or some gratuitous undertaking. Another circumstance would be if a duty was imposed by law, such as the Federal Motor Carrier Regulations. In this case Plaintiffs failed to establish any of these predicates so as to establish the duty element of their negligence claim. Based on the facts, both as they existed at summary judgment and as they developed at trial, the only conclusion that can be reasonable drawn is that Inland Dredging

voluntarily assumed the duty to make sure the load was loaded and secured in such a way that it would not expose the unloading crew to an unreasonable risk of injury. This was not the duty of the Defendants and judgment should have been entered accordingly.

ARGUMENT

I. STANDARD OF REVIEW.

An appellate court reviews a trial court's ruling on a motion for summary judgment de novo. *Callicutt v. Prof'l Servs. of Potts Camp, Inc.*, 974 So.2d 216, 219 (Miss.2007). In evaluating such a ruling, the reviewing court views all evidentiary matters, including admissions in pleadings, answers to interrogatories, depositions, admissions, and affidavits. *Glover v. Jackson State Univ.*, 968 So.2d 1267, 1275 (Miss.2007) (citing Miss. R. Civ. P. 56(c)). The evidence must be viewed in the light most favorable to the non moving party. *Simpson v. Boyd,* 880 So.2d 1047, 1050 (Miss.2004) (quoting *Palmer v. Anderson Infirmary Benevolent Ass'n,* 656 So.2d 790, 794 (Miss.1995)). The non-moving party bears the burden of setting forth by affidavit or other means "specific facts showing that there are indeed genuine issues for trial." *Fruchter v. Lynch Oil Co.*, 522 So.2d 195, 199 (Miss. 1998). The existence of a genuine issue of material fact will preclude summary judgment. *Massey v. Tingle,* 867 So.2d 235, 238 (Miss.2004). A fact is only material if it "tends to resolve any of the issues properly raised by the parties." *Simpson,* 880 So.2d at 1050 (quoting *Palmer,* 656 So.2d at 794). "Put another way, if, viewing the evidence in the light most favorable to the party against whom the motion has been made, that party's claim or defense still fails as a matter of law, summary judgment generally ought to be granted, even though there may be hot disputes regarding non-material facts." *Vickers v. First Miss. Nat. Bank*, 458 So.2d 1055, 1061 (Miss. 1984).

"The motion for summary judgment is the functional equivalent of the motion for directed verdict made at the close of all the evidence, the difference being that the motion for summary judgment occurs at an earlier stage." *Spann v. Diaz*, 987 So.2d 443, 446 (Miss. 2008).

There is no difference between the standards employed in considering a summary judgment and a directed verdict. *Breland v. Gulfside Casino Partnership,* 736 So.2d 446, 448 (Miss.Ct.App.1999). "There is no principle of Mississippi law that the refusal to grant a summary judgment bars a later directed verdict on the same grounds." *Scafide v. Bazzone*, 962 So.2d 585, 597 (Miss.App. 2006).

II. THE TRIAL COURT ERRED IN RULING THAT GENUINE ISSUES OF MATERIAL FACT PREVENTED SUMMARY JUDGMENT ON THE ISSUE OF DUTY.

Defendants respectfully submit that the lower court erred because the issue of duty is one for the court, no material factual disputes regarding the duty issue existed at the summary judgment stage and Plaintiffs were unable to produce facts or law sufficient to establish Defendants had a duty to ensure that the subject load was unloaded safely. Defendants respectfully request this Court reverse the ruling below, vacate the Order denying Summary Judgment and the final judgment and instruct the trial court to enter a judgment in favor of the Defendants.

A. Plaintiffs' have the burden to prove by a preponderance of the evidence a definable duty to conform to a specific standard of conduct.

It is well established in Mississippi that for a Plaintiff to prevail in a negligence action, "the Plaintiff must establish by a preponderance of the evidence each of the elements of negligence: duty, breach, causation and injury." *Strantz v. Pinion*, 652 So.2d 738, 742 (Miss. 1995). A Plaintiff must demonstrate to the Court "(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) casual relationship between the breach and alleged injury, and (4) injury or damages." *Donald v. Amoco Production Co.*, 735 So.2d 161, 174 (Miss. 1999), *citing*

Meena v. Wilburn, 603 So.2d 866, 870 (Miss. 1992), *quoting Burnham v. Tabb*, 508 So.2d 1072, 1074 (Miss. 1987). While duty and causation both involve foreseeability, duty is an issue of law, and causation is generally, though not always, a matter for the jury. *Donald v. Amoco Production Co.*, 735 So.2d 161, 174 (Miss. 1999). "It is well-settled law in this state that [the plaintiff] ha[s] the burden to show the following by a preponderance of the evidence: (a) a definable duty...." *White v. Rainbow Casino-Vicksburg P'ship, L.P.*, 910 So.2d 713, 718 (¶ 15) (Miss.Ct.App.2005).

B. Plaintiffs cannot establish Defendants had a common law duty to ensure that a pipe did not fall during the unloading process.

Plaintiffs argued below that simply because it was foreseeable that Michael Raines would be injured by a falling pipe while unloading the load, Defendants had a duty to ensure that a pipe did not fall during the unloading process. (R. Supp. pp. 25-27.) In order to meet their burden of showing "a definable duty" by a preponderance of the evidence, however, Plaintiffs must do more than establish a foreseeable injury. Rather, Plaintiffs must establish some special circumstance from which a legal duty will arise as a matter of law, such as a contract, special relationship, or voluntary assumption of a duty by conduct. *See St. Louis-San Francisco Ry. Co. v. Mills,* 271 U.S. 344, 346 (1926); *see also Jones v. James Reeves Contractors, Inc.*, 701 So.2d 774 (Miss.1997). Plaintiffs cannot establish any such circumstances vis-à-vis the Defendants and the trial court should have granted summary judgment.

Plaintiffs relied on *Rein v. Benchmark Constr. Co.*, 865 So.2d 1134 (Miss. 2004) for the proposition that when determining if a duty exists, an important component of the inquiry is whether the injury at hand is reasonably foreseeable. *See Id.* However, even though "that question is paramount in determining if a duty exists, *Rein* and other precedents show that

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). Furthermore, in the absence of a contractual or statutory duty, a plaintiff must demonstrate that a specific duty was voluntarily assumed and that the injured party actually relied to his detriment on the defendants' voluntarily assumption. *Id.* "Over five decades ago, the supreme court held in *Higgins Lumber Co. v. Rosamond,* 63 So.2d 408 (1953), that an agent could be held to a duty of reasonable care for a gratuitous undertaking if the plaintiff relied upon the agent's performance. The Fifth Circuit applied *Higgins* in *Coleman v. Louisville Pants Corp.,* 691 F.2d 762 (5th Cir.1982), in finding that Mississippi law only imposes a duty of care for a gratuitous or voluntary undertaking if the plaintiff detrimentally relied on the defendant's undertaking." *Wagner v. Mattiace Co*, 938 So.2d 879, 884 (Miss.App. 2006).

In this case, the duty to ensure the safe loading and unloading of the pipes was assumed by Inland Dredging, not Kittle Heavy Hauling. All record evidence indicates that Inland assumed this duty and nothing in the record could support a finding that this duty was voluntarily assumed by Higgerson or Kittle. Moreover, there is no evidence that Mr. Raines relied on any assumed undertaking on the part of Higgerson or Kittle. If anything, the evidence reveals that Defendants relied on Inland's voluntary undertaking to secure and unload the pipes. Under Rule 56, Plaintiffs have the burden to point to the specific facts that would support a finding that Defendants had a duty and they failed to do so. The only duty assumed by Kittle was to make sure the load got from the loading point in Sardis to the unloading point in Greenwood without incident; it is undisputed that this duty was faithfully executed.

In opposition to Defendants' Motion, Plaintiffs cited numerous cases setting forth general principles regarding the duty of due care. (R. Supp. pp. 25-27.) However, taken to its logical

conclusion, Plaintiffs' argument would create a rule of law in which all actors are under an affirmative obligation to act for another's protection any time they are in a position to foresee potential danger. As discussed below, this is not the law in a majority of states, including Mississippi.

Jones v. James Reeves Contractors, Inc., was a case in which three men were killed after the walls of an excavation site caved in. *Jones v. James Reeves Contractors, Inc.*, 701 So.2d 774 (Miss.1997). The respective estates sued the architects on the project. *Id.* As framed by the Court, the issue was "whether there was a common law duty to warn on the part of the architects based upon their prior knowledge of the dangerous soil conditions." *Jones,* 701 So.2d at 784. There, the defendant architects were aware of the dangerous condition of the soil but did not warn construction crews of this condition or take any other steps to prevent the foreseeable harm. As a result, three men were trapped, suffocated, and killed when the walls of the site caved in. *Id.* at 776-77.

The court carefully considered the reasons supporting the imposition of a duty under the circumstances of the case, but ultimately concluded that no duty was present. "One articulable reason in favor of holding the architect liable is that the status of the professional architect confers special duties upon him to warn the contractor and/or the contractor's employees due to the foreseeability of harm if no such warnings are given." *Id.* at 784 (citing *Tarasoff v. Regents of the Univ. of California,* 551 P.2d 334 (1976) (psychiatrist treating deranged patient held liable to victim of patient's assault where doctor failed to warn victim of patient's ill intent toward him)). Stated differently, "because the architect knows of the danger and is in a position to take reasonable steps to prevent the harm, he must give a warning that would allow those in control to prevent harm to the worker." *Id.* However, the *Jones* court expressly rejected this argument

and found that the architects did not have a duty to warn of the dangerous soil condition. *Id.*

In refusing to impose a duty under these circumstances, the Mississippi Supreme Court acknowledged Mississippi's adherence to section 314 of the Restatement (Second) of Torts, which states that "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." *Id.* at 784. The Court in *Jones* held that, for the architects to have an affirmative duty, the architects would have had to take on the responsibility, "by contract or conduct," to maintain the safety of the construction project. *Id.* at 785-86. In essence, *Jones* stands for the proposition "that absent certain particular circumstances, there is no affirmative duty to aid or protect others." *Higginbotham v. Hill Bros. Const. Co., Inc.* 962 So.2d 46, 56 -57 (Miss.App.,2006), *citing Evans v. United States,* 883 F.Supp. 124 (S.D.Miss.1995) (construing Mississippi law in holding that doctor did not have duty to warn members of patient's family of patient's threats of violence); *Long v. Patterson,* 198 Miss. 554, 22 So.2d 490 (1945) (citing Restatement, Vol. 2 Torts, section 314 to support decision that minor, a passenger, did not have duty to warn tractor operator of oncoming traffic); *White v. Rainbow Casino-Vicksburg P'ship, L.P.,* 910 So.2d 713, 719(¶ 19) (Miss.Ct.App.2005) (declining to establish duty of casino to render aid to patron in the absence of authority by Mississippi Supreme Court or by legislature); *Cooper v. Missey,* 881 So.2d 889, 893 (¶¶ 12-13) (Miss.Ct.App.2004) (finding that there is no case law and no statute to establish social host's affirmative duty to render aid to a guest).

The undisputed facts in this case established that Kittle and Higgerson had no contractual duty and no assumed duty to load, unload, secure or unsecure the pipes on the subject trailer or any duty to supervise or ensure the proper loading or unloading of the pipes on the subject trailer, at least as it applies to Michael Raines or other members of the unloading crew. To the contrary,

these duties were contractually, practically and legally the duty of Inland Dredging and its employees. (As discussed in the context of the directed verdict argument below, the trial court's jury instructions make it clear that this was in fact the case.)

As set forth in Defendants' Motion, the issue in the present case is simple: does a driver or the commercial carrier for whom he drives have a duty to ensure that a load can be safely unloaded when the undisputed facts on the record reveal that (1) the driver did not load the pipe being hauled; (2) the driver did not select or place the timbers supporting the load of pipe being hauled; (3) the driver did not strap or chain the load during the loading process; and (4) when third party employees, not under the control of the driver or the driver's employer, loaded and secured the subject pipe and were responsible for unsecuring and unloading the subject pipe? In opposition to Defendants' Motion, Plaintiffs did not object to or dispute this framing of the issue; therefore there was no dispute between the parties regarding the material issues. The only *material* facts for summary judgment purposes are those directly connected to the four preceding factual predicates. In responding to Defendants' Motion for Summary Judgment, Plaintiffs failed to establish facts sufficient to support a finding that Defendants had a contractual duty to ensure the safety of the Inland unloading crew. Plaintiffs also failed to establish facts sufficient to support a finding that Defendants voluntarily assumed the duty to ensure the safety of the Inland unloading crew. As discussed below, no duty was imposed by federal or state law.

Based on the logic of the Restatement (Second) of Torts and the Mississippi cases applying that rule of law, a finding that Kittle and its driver undertook no responsibility for the securing and unloading of the subject load precludes a finding that Kittle or its driver had a duty to warn of or remedy any condition that would make the load dangerous to unload, even assuming Defendants knew of the dangerous condition. *See Higginbotham v. Hill Bros. Const.*

Co., Inc. 962 So.2d 46, 56-57 (Miss.App. 2006). In this case, Plaintiffs can point to no "special circumstance" that would require the Defendants to ensure the safety of everyone that ever came into contact with the subject load; much less can they establish a duty existed after the load safely arrived at the unloading site. The case would be manifestly different if some accident occurred on the highway while Mr. Higgerson was transporting the load. However, it is undisputed that the load was transported without incident.

The undisputed facts make clear that the only job Kittle was hired to do, and the only obligation they had, by contract or conduct, was to take pipes from Sardis to Greenwood. Defendants do not dispute the fact they had a common law obligation to do this job safely. However, that does not create a duty above and beyond the safe transport of the load. The fact that Victor Betz, a Kittle employee, operated the crane used to place the pipes on the truck does not alter the analysis. The undisputed facts in the record establish that Inland Dredging assumed the task of securing, unsecuring and unloading the pipe. The duty to secure the load so as to make it safe for unloading did not transfer to Kittle simply because Mr. Betz was the crane operator or because Mr. Higgerson drove the truck. This duty rested squarely with Inland Dredging. Accordingly, the trial court erred when it ruled that disputed facts prevented summary judgment on the issue of whether Defendants had a common law duty to ensure the safety of the Inland unloading crew.

C. Plaintiffs failed to establish a duty imposed under the Federal Motor Carrier Safety Regulations.

In response to Defendants' Motion for Summary Judgment, Plaintiffs stated that the duty the Defendants owed arose from Mississippi common law and that the failure to comply with the

Federal Motor Carrier Safety Regulations (FMCSRs) was merely evidence of a breach of that common law duty. (R. Supp. Vol. p. 25.) As set forth above, there was no common law duty. However, to the extent Plaintiffs argue a duty arises from the Federal Regulations, that argument is also misplaced. Although the FMCSRs govern the "operation" of tractor-trailers like the Kittle vehicle at issue in this case, a review of the relevant regulations reveals that they do not apply to the loading and unloading of the trailer and do not give rise to a legal duty requiring Kittle to ensure the safety of the Inland crew.

As discussed in detail in their Memorandum in Support of the Motion for Summary Judgment, the Federal Motor Carrier Safety Regulations do not establish a duty on a commercial carrier to prevent accidents during the unloading process of a trailer not operating on a highway, roadway, or way. As one court has noted, the term "operating" is not to be read as synonymous with "loading," especially in light of the Supreme Court's admonishment that statutory terms not be treated as surplusage. *Pouliot v. Paul Arpin Van Lines, Inc.* 292 F.Supp.2d 374, 379 (D.Conn. 2003) (citing *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon,* 515 U.S. 687, 698, (1995). The *Pouliot* court also concluded that "Congress has made manifest an intention that loading and unloading be considered separately from the act of driving a motor vehicle." *Id.* Similarly, in *Turner v. Goodyear Tire & Rubber Co.*, 2004 WL 3119008 (N.D.Ill.), the court stated "that the regulations clearly indicate that the FMCSR were not intended to cover or create a duty in regards to accidents that occur while unloading cargo in a private loading area." 2004 WL 3119008 at *5. Given the clear language of the regulatory framework, this is the only reasonable construction.

Specifically, 49 CFR §390.5 entitled "Definitions," subsection (2)(ii) states the term "accident" does not include an occurrence involving only the loading or unloading of cargo.

Section 390.5 further defines an accident as "an occurrence involving a commercial motor vehicle operating on a highway." As set forth above, the loading site was near Sardis, Mississippi. The unloading site was near Greenwood, Mississippi. The unloading site where the accident occurred was an open space in the middle of a farmer's cotton field. It is clear that any reliance on the Federal Motor Carriers Safety Regulations as establishing an applicable standard of care for the loading or unloading of a commercial carrier which results in personal injury to an individual when such accident occurs during the unloading process and not on a highway, is not only unfounded but contrary to the very terms of the FMCSRs. Accordingly, no duty arises from the FMCRs. This argument is bolstered by the subsequent rulings of the trial court as discussed below.

III. THE TRIAL COURT ERRED IN RULING THAT GENUINE DISPUTES OF MATERIAL FACT PREVENTED SUMMARY JUDGMENT ON THE ISSUE OF PROXIMATE CAUSE.

Even if these Defendants breached some duty to ensure that the subject pipes were better secured to prevent the pipes from rolling from the trailer during the unloading process, which is denied, such a breach was not the proximate cause of the death of Michael Raines. For a particular damage to be recoverable in a negligence action, the plaintiff must show that the damage was proximately caused by the negligence of the defendant. In order for an act of negligence to proximately cause the damage, the fact finder must find that the negligence was both the cause in fact and legal cause of the damage. Dobbs, The Law of Torts, § 180 at 443 (2000). A defendant's negligence is the cause in fact of a plaintiff's damage where the fact finder concludes that, but for the defendant's negligence, the injury would not have occurred. Stated differently, the cause in fact of an injury is "that cause which, in natural and continuous sequence

unbroken by any efficient intervening cause, produces the injury and without which the injury would not have occurred." *Gulledge v. Shaw,* 880 So.2d 288, 293 (Miss.2004).

In the case at bar, Plaintiff is unable to set forth facts that would support an argument that these Defendants were the proximate cause of Mr. Raines' death. When reasonable minds would not differ on the matter, the question of what is the proximate cause of an injury can be decided as a matter of law. *See, e.g., American Creosote Works of La. v. Harp*, 60 So.2d 514, 517 (Miss.1952). Although the assumption of the risk doctrine was absorbed into the comparative negligence framework in most situations, "in certain circumstances the facts may show as a matter of law that the plaintiff understood and appreciated the danger." *Herod v. Grant,* 262 So.2d 781, 783 (Miss.1972). "However, in the absence of evidence that the injured person knew of the danger, or that the danger was so obvious that he must be taken to have known of it, it cannot be held that he assumed the risk of injury therefrom." *Id. See* also *Green v. Allendale Planting Co.*, 954 So.2d 1032, 1041 -1042 (Miss., 2007). Here, there is undisputed evidence that Mr. Raines knew or should have known about the danger presented by the subject load.

According to Claude Thomas, the Inland Dredging Supervisor, other loads of pipe had inadvertently fallen from the supporting timbers in the presence of the Inland Dredging unloading crew, so the members of the crew were well aware that the unchocked pipe, when not secured by chains, could fall from the truck. (R.Supp. 42.) In fact, it was the custom and practice of Inland Dredging company and this particular unloading crew to use the trackhoe bucket placed in close proximity to the upper most layer of pipe as a blocking mechanism to ensure that a pipe did not fall onto an Inland Dredging Company employee while he was releasing the chains from one side of the trailer. (R.Supp. 42.) As was the custom and practice,

the Inland Dredging Company employees would then move the trackhoe to the other side of the trailer and place the trackhoe bucket in close proximity to the top layer of pipe to ensure that the pipes did not fall onto an Inland Dredging Company employee while the chains, now disengaged from the other side of the trailer, were pulled off the load for storage. (R. 42.) As a matter of custom and practice, Inland Dredging Company and, particularly this crew of Inland Dredging Company employees, were required to ensure that all persons were protected by the trackhoe bucket or were standing behind the trackhoe out of harm's way. (R.Supp. 42.) When this safety process was adhered to, there was no chance for an individual to be on the other side of the trailer while the chains were unsecured. This safety procedure was in place in order to prevent the very incident that killed Michael Raines. The failure to follow this procedure was the sole proximate cause of Mr. Raines' death.

For reasons unknown, Michael Raines went to the other side of the trailer. Mr. Raines apparently had pulled at least one of the chains over the top of the trailer without the protection of the trackhoe bucket when the pipe fell. (R. 40.) Mr. Raines' actions violated the custom and practice of Inland Dredging Company and were a direct and proximate cause of his death. Furthermore, Claude Thomas, the driver of the trackhoe, failed to ensure that Michael Raines and Cecil Higgerson were behind the trackhoe, as was the custom and practice, before initiating the unchaining process. (R. 43.) The same applies to Shannon Earby. One by one, Shannon Earby released the chains. Both he and Claude Thomas could see at least one chain being pulled over the top of the load and neither ensured that Michael Raines or Cecil Higgerson was behind the trackhoe. Instead, Mr. Earby and Mr. Thomas allowed Michael Raines to remain on the other side of the trailer, arguably knowing that he was there given the fact that chains were being pulled over the top of the trailer. Mr. Earby and Mr. Thomas allowed this to happen in complete

disregard for Inland Dredging Company's practices. This was also a direct and proximate cause of the accident.

Although the "assumption of the risk doctrine" has been subsumed into comparative negligence by the Mississippi Supreme Court, Mr. Raines' conscious decision to place himself in harm's way, combined with Claude Thomas' and Shannon Earby's decision to proceed with the unchaining process, was the proximate cause of Mr. Raines' death. *See generally Churchill v. Pearl River Basin Development Dist.,* 757 So.2d 940, 943 (Miss. 1999). While the "comparative negligence doctrine gives juries great flexibility in reaching a verdict... [and] any fault on the part of the plaintiff should be considered only in the context of comparative negligence," the evidence here shows that reasonable minds could not differ on the question of whether the negligence of Mr. Raines, Claude Thomas and Shannon Earby were the only proximate causes of Mr. Raines' injury. *Churchill v. Pearl River Basin Development Dist.* 757 So.2d 940, 944 (Miss.,1999). The fact that someone would knowingly and voluntarily introduce himself into such a dangerous position cannot be reasonably foreseeable by the Defendants. Nor can the total disregard for company policy and sheer good sense on the part of Mr. Thomas and Mr. Earby be reasonably foreseeable.

Michael Raines, Shannon Earby and Claude Thomas were all aware of the condition of the pipes, chains, straps and supporting timbers. (R. 42.) Each individual had helped to unload trailer after trailer. Each had seen pipe fall from these trailers, but proceeded without caution to unload the trailer driven by Cecil Higgerson in a manner not only contrary to usual custom and practice, but without any regard for any safety. Simply remaining behind the track hoe would have ensured Mr. Raines' safety even without chocks.

Defendants Cecil Higgerson and Kittle Heavy Hauling had no contractual or legal

authority over Michael Raines, Claude Thomas, Shannon Earby or any other employee or supervisor of Inland Dredging Company. Had Defendant Higgerson possibly foreseen that the pipe would fall from the trailer and told Shannon Earby, Claude Thomas and Michael Raines that such was the case, he would not have provided them with any information that they did not already have prior to the accident. Mr. Higgerson's failure to warn or to somehow put chocks on the timbers is not what led to Michael Raines' death. Michael Raines died because he and his fellow Inland Dredging Company employees did not comply with their own customs and practices for the safe unloading of an unchocked load of pipe, and they did not act reasonably under the circumstances. Mr. Raines and his fellow co-workers had each previously maintained the custom and practice described above and thus ensured no one would have been injured by falling pipe while unloading the trailer. In summary, no action or inaction by Cecil Higgerson or Inland Dredging was the proximate cause of the death of Michael Raines and accordingly, as a matter of law, the Plaintiff's Complaint should have been dismissed.

IV. THE TRIAL COURT ERRED IN OVERRULING DEFENDANTS' MOTIONS FOR DIRECTED VERDICT ON THE ISSUE OF DUTY.

As set forth above, the refusal to grant a summary judgment motion does not bar a later directed verdict on the same grounds. *Scafide v. Bazzone*, 962 So.2d 585, 597 (Miss.App. 2006). In this case, three different Motions were made on the basis that Plaintiffs failed to establish the law or facts necessary to support a finding that Defendants had a duty to keep Mr. Raines safe while he was unloading the subject trailer. Although the existence of a duty is a question of law, the trial court overruled Defendants' first motion on the basis that it was "a jury question." (Tr. 364). The second motion, made at the close of Defendants' proof, was overruled without a

stated reason. (Tr. 473.) Finally, after vigorous argument on jury instructions, and repeated attempts by the Plaintiffs to craft an appropriate instruction on the duty issue vis-à-vis Defendants, the trial court refused to instruct the jury that either Kittle or Mr. Higgerson had any duty in this case, whether under common law or under the FMCSRs, to prevent the injury suffered by Mr. Raines. (R. at pp. 245, 246, 247, 252, 253, 254, 261, 263, 272.); (Tr. 516.) There were, however, numerous instructions about the duties of Inland and its employees to prevent that injury. (R. at pp. 215, 223, 228, 230,232, 234) Accordingly, after the instructions were finalized by the trial court but prior to the actual jury charge, Defendants again asked for a dismissal based on the fact that without an instruction concerning the duty owed to Mr. Raines, the jury could not find a breach. Again this request was overruled. (Tr. 516.) As set forth below, the trial court erred in refusing to grant Defendants' Motions and should be reversed.

A. Defendants were entitled to a directed verdict after the close of Plaintiffs' case in chief.

The Mississippi Supreme Court has clearly acknowledged that simply because one realizes or should realize that some 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. *Jones,* 701 So.2d at 784. Rather, a plaintiff must establish something more, such as a contract or some voluntary undertaking which causes someone to believe that they will be protected from some identifiable harm *See Id. See also Wagner v. Mattiace Co*, 938 So.2d 879, 884 (Miss.App. 2006). Because the standard for a directed verdict is the same as summary judgment, and Plaintiffs' burden to establish a clearly definable duty is the same at trial as it is at the summary judgment stage, Defendants will not restate the legal authorities relied upon above but will incorporate them here by reference.

The first two witnesses called by the Plaintiffs consistently testified that the customary

practice between Kittle and Inland was that Inland was responsible for loading and securing the pipes as well as unloading them and that the only responsibility Kittle had was to ensure that the pipes were safely transported from the loading site to the unloading site. *See* testimony of Wayne Kittle and Troy Kittle cited at pp. 5-6, *supra*. The entire testimony of Barry Locke indicates that Inland Dredging had specific written policies regarding how their employees were to load and unload pipe from a flatbed trailer. Nothing in his testimony indicated that Kittle Heavy Hauling or it driver Cecil Higgerson had any responsibility for ensuring the load could be safely unloaded. *See* p. 7, *supra*. Furthermore, no testimony from any of these witnesses indicates that Mr. Raines relied to his detriment on any voluntary undertaking on the part of Higgerson or Kittle. Even if Kittle did voluntarily assume the duty to make sure the load was safe for unloading, there is absolutely no proof in the record to indicate that Mr. Raines relied to his detriment on that alleged voluntary undertaking.

The testimony of Victor Betz solicited during Plaintiff's case in chief confirms the fact that the only involvement any Kittle employee had with the loading and securing of the subject load was the transfer of the pipes from the ground to the trailer by use of a crane. *See* p. 7-8, *supra*. Mr. Betz consistently maintained that the ground crew responsible for securing a load was made up entirely of Inland Dredging employees. Indeed, Mr. Betz was instructed on how to load by Inland Dredging. (Tr. 169-70.) Mr. Betz did testify that he would see Kittle drivers checking to see whether the chains and binders were secured properly. (Tr. 167.) However, this is not surprising considering that checking to see that the chains and binders are properly in place is part of the driver's duty to ensure that the load is safe for transport from one place to another. There is no dispute that Kittle was responsible for safely transporting the pipes from the loading site in Sardis to the unloading site in Greenwood. The fact that he testified that Kittle Heavy

Hauling drivers inspected the chains and straps once placed and secured by the Inland Dredging ground crew is consistent with the responsibility of the drivers to make sure that the load is properly secured for transport from one place to another. That does not create any reasonable or logical inference that a greater duty had somehow been assumed by Kittle. There is simply no testimony that Kittle's or Higgerson's duty extended to making sure the subject load could be safely unloaded. Furthermore, Plaintiffs have identified no legal authority to support such a duty.

Importantly, Mr. Betz did not specifically recall the subject load in question and his testimony regarding whether drivers helped Inland place timbers on other loads has no bearing on whether Mr. Higgerson or Kittle assumed a duty. There is no testimony that Mr. Higgerson took any part in the loading or securing of the load at issue. In addition, the fact that a driver may have helped put a timber on the truck bed as a load was being loaded does not establish that the Kittle drivers, by that act, assumed a duty to ensure the safety of the load for unloading purposes. The undisputed testimony is that the customary practice was for the Inland ground crew to oversee and facilitate the securing of the loads with chains, straps and timbers.

Perhaps one of the most important pieces of testimony from Mr. Higgerson concerning his responsibility with respect to this load of pipes occurred when Mr. Higgerson was asked whether he inspected the load after he parked it at the unloading site in Greenwood. Mr. Higgerson responded "why would I inspect it after I'm already there?" (Tr. 201). Clearly, this statement reflects the fact that any duty to inspect or maintain the security of the load terminated upon the safe arrival at the unloading site. It is indicative of the way in which responsibilities were divided. Mr. Higgerson's testimony makes clear that the Inland Dredging employees were responsible for securing the load at the loading site. In order to ensure the load was safely

transported from Sardis to Greenwood, Mr. Higgerson inspected the straps and the chains to make sure that the load would not shift or fall during transport. He further testified that he stopped twice in route to Greenwood and checked the stability of the load. At no time during the transportation of the load was there any issue with respect to safety. Once Mr. Higgerson arrived at the unloading site in Greenwood, any responsibility he had with respect to the security of the load was terminated. Plaintiffs can cite to no legal authority to the contrary.

The trial court repeatedly refused to entertain expert testimony on the issue of duty, stating that issue was a legal one and would be the subject of a proper jury instruction. (Tr. 30.) The court also refused to allow lay opinion on who was legally responsible for keeping the unloading crew safe. (Tr. 24; 140; 246.) At the close of Plaintiffs' case, Defendants sought a directed verdict, the premise of which was that Plaintiffs could not establish the duty element of their negligence claim as to the Defendants. However, even though the existence of a duty is clearly a question of law for the court, the trial court overruled the Motion claiming the issue of duty was an issue for the jury. Respectfully, this is in error.

In some situations, the issue of whether a duty is voluntarily assumed can be a fact question. As clearly shown by Mississippi case law, "whether a party assumed a duty must be determined by the individual facts of the case and the existence or absence of detrimental reliance on that assumed duty." *Wagner v. Mattiace Co.*, 938 So.2d 879, 886 (Miss.App. 2006). Accordingly, it is possible that the trial court intended to have the jury determine whether the facts supported a finding of both (a) an assumed duty and (b) detrimental reliance on that assumption. However, based on the proof at trial, there was no evidence to support either finding. The trial court should have directed a verdict for the Defendants at the close of the plaintiff's proof under authority of Mississippi Rule of Civil Procedure 50(a) because the

Plaintiffs failed to present credible evidence to establish the necessary elements of their right to recover. *Hall v. Mississippi Chem. Express, Inc.*, 528 So.2d 796, 798 (Miss.1988).

B. Defendants were entitled to a directed verdict after the close of Defendants' case in chief.

No evidence was offered during Defendants' case in chief that in any way supported a finding that there was any duty to aid or protect Mr. Raines while he was unloading the subject load. None of the witnesses called by Defendants were present at the loading site. However, all of the witnesses testified that, with respect to unloading, Inland employees were ultimately responsible for making sure that pipe was unloaded correctly. Some of the most compelling testimony came from Shannon Earby, who stated that "[n]one of the drivers helped us, I mean, other than them stowing away their straps and chains after we handed them to them. We were – I mean, that's what we were there for, was to unsecure loads and unload the truck." (Tr. 416.) Quite simply, there was absolutely no evidence of any contractual duty or voluntary undertaking accompanied with detrimental reliance that would support the imposition of a duty on the Defendants to place chocks on the load in order to aid or protect Mr. Raines while unloading the pipes.

In short, after all of the proof was presented, it was impossible for Plaintiffs to establish that Defendants had a duty to ensure that the load could be safely unloaded because the undisputed facts were that (1) the driver did not load the pipe being hauled; (2) the driver did not select or place the timbers supporting the load of pipe being hauled; (3) the driver did not strap or chain the load during the loading process; and (4) the Inland Dredging crew, not under the control of the driver or the driver's employer, loaded and secured the subject pipe and were responsible for unsecuring and unloading the subject pipe. To impose such a duty on the

Defendants in this case would run afoul of Mississippi's adherence to section 314 of the Restatement (Second) of Torts. Again, that Section provides that "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." *Jones at 784.*

C. Following The Trial Court's Ruling On Jury Instructions, Plaintiffs Were Unable To Provide An Issue Of Duty For Resolution By The Jury As To The Defendants.

Throughout the course of this litigation, the same arguments were made repeatedly with respect to the issue of duty. During the motions in limine at trial, the issue was raised again in the context of Plaintiffs' expert. (Tr. 23-24.) In ruling on a motion in limine with respect to the scope of expert testimony, the court stated as follows:

> I see what you are saying. That's for the court to give in jury instructions. This witness can't testify as to who has the legal responsibility to do something. That will be decided in jury instructions, and the court will instruct the jury as to that.

(Tr. 30.)

Throughout the trial, not only with respect to this witness but to others as well, the court refused to allow testimony regarding who was in fact responsible, from a legal standpoint, to ensure that the load was secure for unloading. *See, e.g.,* (Tr. 24: 18-24; 140:19-26; 246:17-24.) Accordingly, based on the law cited above, in order for there to be any duty the court would have to instruct the jury that Kittle Heavy Hauling had a duty to ensure the safe unloading of the truck as a product of some law or regulations such as the Federal Motor Carrier Safety Regulations, or by contract, or by some special circumstance such as voluntary assumption of the duty. Also as discussed above, the undisputed evidence did not support a finding of duty under any possible theory. A review of the jury instructions given by the court confirms that.

In arguing over the jury instructions, the court made some important findings. Importantly, the court refused to instruct the jury on the applicability of the Federal Motor Carrier Safety Regulations. On page 476 of the trial transcript, argument begins on Plaintiff's proposed Jury Instruction No. 13. (Tr. 476); (R. 253.) Plaintiffs had multiple proposed jury instructions regarding the Federal Motor Carrier Safety Regulations. (R. 245, R.246.) As stated by Plaintiff's counsel, the intent of these jury instructions was to provide general statements that the federal regulations applied to the Defendants in this case. However, Plaintiff's counsel noted that "it was kind of difficult for us to form an instruction, because I really didn't know what you wanted us to say in this area. The expert rendered his opinion as to fault on their part, that the [sic] thought the Defendants violated the standard of care. The basis of his opinion each time he cited the federal regulations, but Your Honor sustained the objection of the defense as to any discussion of the federal regulations, the reading of it or the interpretation of it." (Tr. 477.)

Ultimately, the court made two key rulings. First, the court determined that taking the chains off of the load constitutes unloading as it applies to the interpretation of the Federal Motor Carrier Safety Regulations. (Tr. 487.) The court went on to cite *Pouliot v. Paul Arpin Van Lines.* After engaging in a discussion, the court stated "I mean, from reading this case it appears to me that --- that these motor carrier regulations do not apply to a truck parked in a cotton field regardless – under any circumstances, so I think I will refuse this jury instruction. So that's 13, and it's refused and that will also apply to 13-A." (Tr. 488.) The court also refused Plaintiff's proposed Jury Instruction No. 14 (R. 252). The court also refused to instruct the jury based on Plaintiff's proposed Instruction Nos. P-23, P-24 and P-25. (R. 245-247.) In addition, the court refused Jury Instruction No. P-10. (Tr. 500); (R. 261-262.) The Defendants objected to Jury Instruction P-10 on the basis that Plaintiffs failed to identify the specific duty violated by Kittle

Heavy Hauling or Cecil Higgerson. "For instance if we had a duty to comply with the federal regulations and we violated those regulations, then we would be deemed negligent." (Tr. 499-500.) Put simply, the Court rejected every proposed jury instruction that would have enabled Plaintiffs to establish duty.

On the other hand, the court instructed the jury on numerous times regarding the Inland employees' voluntarily assumed duties to ensure the safe loading of the truck and the safe unloading of the truck. After an opportunity to re-draft P-10 and P-11, Plaintiff still was unable to establish a duty on the part of the Defendants. (Tr. 505.) As stated by defense counsel at trial, "the Plaintiffs have to establish the duty. They have not done that. They didn't do it before. Quite frankly, Your Honor, they can't do it. That's the real problem here. They can't do it. They can't say where the duty of Kittle Heavy Hauling lies to put chocks on this truck. It's not in the contract. They didn't assume the duty. And it's not in the regs." (Tr. 506.) Of course, if Plaintiffs can't show duty, they cannot show breach. The Plaintiffs erroneously argued that that duty is a question for the jury. (*Id.*) However, there is no doubt that the issue of duty is a question of law. In sum, the court refused the instructions "because I think what you would have to do, you would have to show – you would have to put an instruction that would show that the Defendants were liable for the loading in some way, that they had a contractual or other duty to load it, and I don't think you can – I don't think that --- this jury instruction doesn't make that clear." (Tr. 506.) The fact of the matter is that, based on the proof at trial, no such instruction was possible.

Defendants are not arguing on appeal that any instructions by the court were erroneous and are not requesting a new trial. However, the argument on jury instruction and a review of the instructions given, and those refused, reveals the exact point that Defendants have been

making since they moved for summary judgment. Plaintiffs have the burden to establish that these Defendants had a duty to aid or protect Michael Raines from being injured by a falling pipe while unloading the trailer. After all the proof was elicited at trial, the trial court was unable to instruct the jury that these Defendants had a duty to ensure the load could be safely unloaded. To the contrary, Defendants submitted numerous jury instructions regarding the voluntarily assumed duty of Inland Dredging and its employees. All of these instructions were accepted. (R.230-235.) Again, Plaintiffs attempted to draft instructions regarding the duty of the Defendants; all of these were refused. (Tr. 514-516.) At the end of the jury instructions Defendants again moved for dismissal which was overruled. At that point in the trial at which the court had finally determined that it was unable to instruct the jury in such a way that they were able to determine that these Defendants had any duty whatsoever, and in the absence of any instructions that they had in fact assumed some duty, or that duty existed as a matter of law, there is no way that Plaintiffs would have been able to establish the essential elements of their negligence claim against these Defendants. At that time it would have been appropriate for the case to be dismissed. Defendants' request was again erroneously overruled.

CONCLUSION

Based on all of the foregoing, the only conclusion that could be reasonably made is that Defendants were not responsible for protecting Mr. Raines while he was unloading the pipes. Even if they did, Mr. Raines' failure to appreciate a known risk and to otherwise watch out for his own safety was the sole proximate cause of his injury. Accordingly, the trial court should have entered a judgment in favor of the Defendants.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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This 29th day of October, 2008.

TODD B. MURRAH

CERTIFICATE OF SERVICE

I, Todd B. Murrah, do hereby certify that I have mailed a true and exact copy of the Appellant's Brief in Cause No. 2008-CA-00389, to the Honorable Ashley Hines, Leflore County Circuit Court Judge, at his mailing address, 900 Washington Avenue, Greenville, Mississippi 38702-1315, postage prepaid, on this the 29th day of October, 2008.

Todd B. Murrah