

IN THE SUPREME COURT OF MISSISSIPPI
NO. 2009-CA-01876

SUZETTE SMITH

APPELLANT

VS.

THE WAGGONERS TRUCKING
CORPORATION, ANTONIO WATSON, and
JOHN AND JANE DOES 1-3

APPELLEES

APPEAL FROM THE CIRCUIT COURT OF WASHINGTON COUNTY, MISSISSIPPI

REPLY BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

HONORABLE MICHAEL R. BROWN
THE MICHAEL R. BROWN LAW OFFICES, PLLC
120 N. Congress Street, Suite 230
Jackson, Mississippi 39201
Tel: (601) 948.5330

HONORABLE THANDI WADE
TATUM AND WADE, PLLC
124 East Amite Street
Jackson, Mississippi 39201
Tel: (601) 948.7770

COUNSEL FOR APPELLANT

TABLE OF CONTENTS

	PAGES
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
ARGUMENT	1
CONCLUSION	18
CERTIFICATE OF SERVICE	19

TABLE OF AUTHORITIES

CASES	PAGES
<u>Anderson v. Eagle Motor Lines</u> , 423 F.2d 81 (1970).	8,11
<u>Belmont Homes v. Stewart</u> , 792 So.2d 229 (Miss. 2001).	1
<u>Bridges v. Enterprise Products Company, Inc.</u> , 2007 WL 433242 (S.D. Miss).	1
<u>Busick v. St. John</u> , 856 So.2d 304 (Miss. 2003)..	12
<u>Caves v. Smith</u> , 259 So.2d 688 (Miss. 1972).	6
<u>Cothorn v. Vickers, Inc.</u> , 759 So.2d 1241 (Miss. 2000).	3
<u>Dogan v. Hardy</u> , 587 F.Supp. 967 (N.D. Miss. 1984)..	6
<u>Douglas Parker Electric, Inc. v. Mississippi Design and Development Corp.</u> , 949 So. 874 (Miss. Ct. App. 2007).	3, 11
<u>Garner v. Hickman</u> , 733 So.2d 191 (Miss. 1999).	3
<u>Jamison v. Barnes</u> , 8 So.3d 238 (Miss. Ct. App. 2008).	16, 17
<u>Jesco, Inc. v. Shannon</u> , 451 So.2d 694 (Miss. 1984).	12
<u>K.M. Leasing, Inc. v. Butler</u> , 749 So.2d 310 (Miss. Ct. App. 1999).	7, 16
<u>Nobles v. Unruh</u> , 198 So.2d 245 (Miss. 1967).	15
<u>Patterson v. Liberty Associates, L.P.</u> , 910 So.2d 1014 (Miss. 2004).	11
<u>Solanki v. Ervin</u> , 21 So. 3d 552 (Miss. 2009).	17
<u>Stanley v. Morgan & Lindsey, Inc.</u> , 203 So.2d 473 (Miss. 1967).. . . .	1
<u>State Farm Auto Insurance Companies v. Davis</u> , 887 So.2d 192 (Miss. 2004).	1, 2
<u>Thomas v. McDonald</u> , 667 So.2d 594 (Miss. 1995).	16

<u>Wal-Mart Stores, Inc. v. Johnson</u> , 807 So.2d 382 (Miss. 2002).	12, 14
<u>Walton v. Owens</u> , 244 F.2d 383 (5th Cir. 1957).	6
<u>White v. Miller</u> , 513 So.2d 600 (Miss. 1987).	16
<u>Williams v. Tollier</u> , 759 So.2d 1195 (Miss. 1999)	3
<u>U.S. Industries, Inc. v. McClure Furniture</u> <u>Company of Eupora</u> , 371 So.2d 391 (Miss. 1979).	8

STATUTES

Miss. Code Ann. §63-3-807 (1972).	2
Miss. Code Ann. §63-3-903 (1972).	2, 8
Miss. Code Ann. §63-3-1201 (1972).	2
Miss. Code Ann. § 63-3-1213 (1972).	2

ARGUMENT

I. WAGGONERS TRUCKING¹ IS WHOLLY MISTAKEN IN ITS ASSERTION THAT ITS EMPLOYEE, ANTONIO WATSON, OWED NO DUTY TO SUZETTE SMITH.

The Mississippi Supreme Court has repeatedly explained that negligence is “*the result of the failure to perform a duty, therefore actionable negligence cannot exist in the absence of a legal duty to an injured plaintiff.*” Stanley v. Morgan & Lindsey, Inc., 203 So.2d 473, 475 (Miss. 1967). Generally, whether a duty exists is a question of law to be decided by the court, unless there exists an applicable statute and in such case, the statute will be the controlling law establishing a party’s duty to act. Belmont Homes v. Stewart, 792 So.2d 229 (Miss. 2001).

In the case *sub judice*, the duties owed by Antonio Watson, hereinafter “*Watson*”, to Suzette Smith, hereinafter “*Smith*”, are statutorily imposed. The Mississippi legislature codified the “*Rules of the Road*” for the purpose of protecting those who use the roads, “*thereby establishing that every motorist owes a duty to every other traveler to exercise reasonable care to prevent injury and to operate his motor vehicle in accordance with the statutes.*” State Farm Auto Insurance Companies v. Davis, 887 So.2d 192 (Miss. 2004); Bridges v. Enterprise Products Company, Inc., 2007 WL 433242 (S.D. Miss).

Consistent with the legislative purpose of the Rules of the Road, Watson owed Smith the duty to exercise reasonable care to prevent injury and to operate his motor vehicle in

¹Waggoners Trucking Corporation and Antonio Watson will be referred to interchangeably as “*Waggoners Trucking*” within the Reply Brief.

accordance with the applicable statutes since Smith was a traveler on the roadway at the time in which Watson obstructed traffic on Highway 82. Specifically, Watson owed the following statutory duties to Smith on the night of the accident:

- (1) Watson had a duty to yield the right of way to Smith since he was entering Highway 82 from a private driveway. Miss. Code Ann. §63-3-807 (1972) reads, *“The driver of a vehicle about to enter or cross a highway from a private road or driveway shall yield the right-of-way to all vehicles approaching on said highway.”*
- (2) Watson had a duty not to stop and or leave his vehicle standing on Highway 82 for an unreasonable amount of time. Miss. Code Ann. §63-3-903 (1972) reads, in relevant part, *“No person shall stop, park or leave standing any vehicle, whether attended or unattended, upon the paved or improved or main traveled part of any highway outside of a business or residence district when it is practical to stop, park or so leave such vehicle off such part of said highway.”*
- (3) Watson had a duty operate his vehicle in a careful and reasonably prudent manner. Miss. Code Ann. §63-3-1213 (1972) reads, *“Any person who drives any vehicle in a careless or imprudent manner, without due regard for the width, grade, curves, corner, traffic and use of the streets and highways and all other attendant circumstances is guilty of careless driving.”*
- (4) Watson had a duty not to operate his vehicle in a reckless manner. Miss. Code Ann. § 63-3-1201 (1972) reads *“Any person who drives any vehicle in such a manner as to indicate either a wilful or a wanton disregard for the safety of persons or property is guilty of reckless driving.”*

The duties owed by Watson to Smith arose when he began the traffic maneuver that resulted in him blocking the lanes of Highway 82 and continued until such time as Watson removed his vehicle from the roadway. Since Watson testified the traffic maneuver took less than ten (10) seconds to complete and Candace Holloway, hereinafter “Candace”, testified that Watson was blocking her lane at the time of the collision, a reasonable inference can be

drawn that the duties Watson owed Smith began approximately ten (10) seconds prior to the collision and continued until the collision occurred. R. 362 (Deposition of Antonio Watson, p. 31, ln. 10 - 17); R. 386 (Deposition of Candace Holloway, p. 83, n. 19 - p. 84, ln. 2). Watson was never relieved of his statutory duties since he was blocking Highway 82 at the time of the collision and Smith was a traveler on the roadway. This inference is consistent with and substantiated by the Rules of the Road which were codified with the specific purpose of protecting those who use the roads. State Farm Auto Insurance Companies v. Davis, 887 So.2d 192 (Miss. 2004).

II. WATSON BREACHED THE DUTIES OWED TO SMITH.

Waggoners Trucking argues in its brief that the trial court properly granted summary judgment because Watson breached no duty owed to Smith. On the contrary, the trial court erred when granting summary judgment since there was no way the court could grant summary judgment without impermissibly weighing the evidence and making credibility determinations. The trial court essentially adopted one party's version of the events as true and dismissed the other party's version entirely.

Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions and are not within the purview of the trial court when deciding a motion for summary judgment. Douglas Parker Electric, Inc. v. Mississippi Design and Development Corp., 949 So. 874 (Miss. Ct. App. 2007); Garner v. Hickman, 733 So.2d 191, 194 (Miss. 1999). Where one party swears to one version of the matter in issue and

the other party swears just the opposite, there exist issues of fact sufficient to require denial of a motion for summary judgment. Williams v. Toller, 759 So.2d 1195, 1198 (Miss. 1999). The court should resolve a summary judgment motion in favor of the non-moving party where there is the slightest doubt over whether a factual issue exists. Cothern v. Vickers, Inc., 759 So.2d 1241, 1245 (Miss. 2000). In sum, there exists reversible error where the trial court grants summary judgment after making credibility determinations and weighing evidence.

- A. There exists a genuine issue of material fact as to whether Watson breached his duty to yield the right of way to Smith.

Waggoners Trucking argues that Watson owed no duty to Smith since he allegedly “checked for traffic” before blocking the highway and determined that the traffic maneuver did not create an immediate hazard. They rely heavily on the deposition testimony given by Watson in which he indicates that he “let my window down, my flashers, made sure it was clear for traffic, wasn’t traffic coming and proceed into the east bound lane and backed straight back.” R. 362 (Deposition of Antonio Watson, p. 29, ln. 21 - p. 31, ln.25). He further testified that this maneuver took less than ten (10) seconds to complete. R. 362 (Deposition of Antonio Watson, p. 31, ln. 10 - 17).

The record evidence indicates that during this ten (10) second traffic maneuver Candace Holloway saw the subject tractor trailer blocking all four lanes of the highway and stopped approximately two or three car lengths from the truck prior to being rear ended by the vehicle driven by Smith. R. 379 (Deposition of Candace Holloway, p. 14, ln. 10-17). Watson alleges that there were four vehicles that yielded to him while he was attempting to park his

vehicle. R. 358 -359 (Deposition of Antonio Watson, p. 8, ln. 16 - p. 9, ln. 1 and p. 12, ln. 5 - 8).

On the other hand, Candace and her husband testified in their deposition that there was only one other car that yielded to Watson and that vehicle pulled into the eastbound lane and drove pass the tractor trailer once it cleared the eastbound lanes. This vehicle left the scene prior to the accident. R. 380 (Deposition of Candace Holloway, p.18 , ln. 2-9 and p. 48, ln. 4-7); R. 375 (Deposition of Ryan Holloway, p. 38 , ln. 21- p. 39, ln. 2 and p. 14, ln. 16 - p. 15, ln. 3). Candace further testified that Watson was still blocking her lane at the time of the accident. R. 386 (Deposition of Candace Holloway, p. 83, n. 19 - p. 84, ln. 2).

Taking Watson's testimony as true, during the ten (10) second traffic maneuver, five vehicles were approaching him -- the four vehicles he personally witnessed yield to him and the vehicle driven by Smith. Assuming the vehicles were traveling within the speed limit and considering Candace's testimony that Watson was still blocking her lane at the time of the accident is true, there were five vehicles within Watson's line of vision as he began the maneuver. The speed limit near the crash site was 45 mph. R. 391 (Deposition of Jamee Kaczetow, p. 41, ln. 8 - 10). Watson asserts the roadway was clear as he began his maneuver but this testimony is contradicted by his later assertion that four vehicles yielded to him. It is highly unlikely that the four vehicles observed by Watson and the vehicle driven by Smith appeared without Watson seeing them, if the maneuver only took ten (10) seconds.

Miss. Code Ann. §63-3-807 (1972) requires a “*driver of a vehicle about to enter or cross a highway from a private road or driveway shall yield the right-of-way to all vehicles approaching on said highway.*” Furthermore, a motorist who claims to have looked but failed to see vehicles approaching so closely as to constitute an immediate hazard is guilty of negligence as a matter of law. Walton v. Owens, 244 F.2d 383 (5th Cir. 1957); Dogan v. Hardy, 587 F.Supp. 967 (N.D. Miss. 1984).

There exists a jury question as to whether Watson failed to yield to oncoming traffic prior to blocking Highway 82 since he alleges traffic was clear as he began his maneuver but four vehicles yielded and one collision occurred within the ten seconds he had the roadway blocked. The fact that five cars were within ten seconds of Watson when he began his traffic maneuver creates a genuine issue of material fact as to whether his actions constituted an immediate hazard. Caves v. Smith, 259 So.2d 688, 690 (Miss. 1972)(the question of whether the defendant’s operation of a vehicle constituted an immediate hazard is one for the jury to decide).

Applying Walton and Dogan, cases which hold that a motorist is negligent where he fails to see vehicles approaching so closely as to constitute an immediate hazard, it is clear Watson, who allegedly observed the roadway “*clear for traffic*”, failed to appreciate the immediate hazard caused by his traffic maneuver since five cars were within ten seconds of him when he began his traffic maneuver.

In error, the trial court determined that “*defendant had no duty to yield to plaintiff*” since other vehicles saw Watson and avoided a collision. R. 407 - 415. There is no way the trial court could reach this conclusion without encroaching on the purview of the jury and weighing the evidence since Watson testified traffic was clear as he began his maneuver but four vehicles yielded and one collision occurred within the ten seconds he had the roadway blocked. These admissions by Watson create a genuine issue of material fact as to whether he failed to yield the right of way to ongoing traffic.

In K.M. Leasing, Inc. v. Butler, 749 So.2d 310 (Miss. Ct. App. 1999), the Mississippi Court of Appeals affirmed the jury verdict which found two drivers of the tractor trailers and their employer liable for the injuries suffered by the motorist while the trailers were standing in the roadway despite the fact that several vehicles passed around the tractor trailers without mishap.

The fact that Candace avoided a collision with Watson’s rig does nothing to negate the fact that there exists a jury question as to whether Watson’s negligence caused and contributed to Smith’s injuries since several vehicles passed around the tractor trailers in Butler without mishap and this Court affirmed liability. Therefore, it is clear that the trial court, when it decided that Watson owed no duty to Smith, weighed the evidence in violation of Mississippi law. As such, this Court should reverse the grant of summary judgment and remand this matter for further proceedings.

- B. There exists a genuine issue of material fact as to whether Watson left his vehicle standing on Highway 82 for an unreasonable amount of time as to constitute an immediate hazard.

Miss. Code Ann. §63-3-903 (1972), in relevant part, *“No person shall stop, park or leave standing any vehicle, whether attended or unattended, upon the paved or improved or main traveled part of any highway outside of a business or residence district when it is practical to stop, park or so leave such vehicle off such part of said highway.”*

In U.S. Industries, Inc. v. McClure Furniture Company of Eupora, 371 So.2d 391, 393 (Miss. 1979), the Mississippi Supreme Court held that the question of negligence was *“clearly a question for the jury”* where a driver backed his rig across a well traveled highway at night without any attempt to place flares or other warning devices on the highway to warn oncoming traffic.

In Anderson v. Eagle Motor Lines, 423 F.2d 81 (1970), a tractor trailer driver backed his vehicle across a well-traveled highway, blocking both lanes of traffic at a time where there was limited visibility. No flares or other warning devices were placed on the highway by the driver. The Fifth Circuit, interpreting Mississippi law, held that,

The evidence was uncontradicted that Mississippi Highway 550 is well-traveled, that the tractor-trailer completely blocked both lanes of traffic and that this occurred prior to sunrise which was at 6:50 on the morning of the accident, and that visibility was at best limited. Prudence would have required Jones to have moved his rig on to the shoulder of the road to either await full daylight or to place the necessary flares, or to have continued in his own lane until he found an appropriate intersection for completing the maneuver. Instead, Jones risked the possibility of collision against the possibility of completing the dangerous turn within the few moments when the road appeared to be clear of traffic. *He exercised bad judgment under the circumstances.*

Reading and interpreting McClure Furniture and Anderson together make it clear that breach of duty is an issue to be decided by the jury in cases where a tractor trailer driver blocks a well-traveled highway when visibility is limited thereby causing injury.

In the case *sub judice*, Waggoners Trucking alleges that visibility at the scene is not a material issue since the accident site was well-illuminated. They further assert that McClure Furniture and Anderson are distinguishable from the case *sub judice* because visibility was an issue in those cases and it is not an issue in case *sub judice*. These assertions are contrary to the record evidence since Suzette Smith, Candace Holloway and Ryan Holloway all testified in their depositions that it was extremely dark leading to, near and at the accident scene. R. 354 (Deposition of Suzette Smith, p. 58, ln. 23 - p. 59, ln. 23); R. 380 (Deposition of Candace Holloway, p. 19, ln. 13-14); R. 378 (Deposition of Ryan Holloway, p. 54, ln. 11-14 and p. 48, ln. 3-7).

Furthermore, Candace testified that Watson failed to take any actions to warn oncoming traffic about his maneuver and Ryan Holloway testified that he did not recall seeing any lights illuminating the side of the tractor trailer operated by Watson. R. 386-387 (Deposition of Candace Holloway, p. 49, ln. 9-11, p. 53, ln. 1-4, and p. 55, ln. 19-23). R.374 (Deposition of Ryan Holloway, p. 21, ln. 14 - 20).

As such, McClure Furniture and Anderson are indistinguishable and should be used by this Court when deciding this case. Consistent with McClure Furniture and Anderson, there exists a genuine issue of material fact as to whether Watson created an immediate

hazard when he blocked a well-traveled highway while visibility was limited causing injury to Smith. Therefore, the summary judgment granted in favor of Waggoners Trucking should be reversed and this case remanded for further proceedings.

- C. There exists a genuine issue of material fact as to whether Watson acted carelessly and with reckless disregard for the safety of Smith.

Watson, while attempting to park the tractor trailer, pulled the vehicle across Highway 82 blocking both the East and West lanes of Highway 82. Watson testified that this maneuver took approximately ten (10) seconds to complete whereas Candace and her husband, Ryan, estimated that Watson had Highway 82 blocked for approximately three to five minutes. R. 362 (Deposition of Antonio Watson, p. 31, ln. 10 - 17 and p. 95, ln. 15-20); R. 383 (Deposition of Candace Holloway, p. 47, ln. 12-18); R. 373 (Deposition of Ryan Holloway, p. 20, ln. 23 - p. 21, ln. 1)

This conflicting testimony creates a genuine issue of material fact as to how long Watson blocked traffic on Highway 82 leading up to the collision and Watson, by his own admission, acknowledges that the amount of time a rig crosses traffic determines whether the maneuver is dangerous and causes an immediate hazard in violation of Mississippi law. R. 368 (Deposition of Antonio Watson, p. 97, ln. 25 - p. 98, ln. 3)

Despite this admission by Watson, Waggoners Trucking alleges in its brief that it is "*immaterial whether Watson blocked both lanes of traffic or none*". This assertion lacks merit since this information is material and can be used by jury to

determine whether Watson violated Miss. Code Ann. §§ 63-3-1201 and 63-3-1231 (1972), statutes which requires prohibit careless and reckless driving. Anderson v. Eagle Motor Lines, 423 F.2d 81 (1970)(carelessness and reckless disregard exists where a motor vehicle accident results from a tractor trailer blocking both lanes of traffic).

The jury is charged with the duty of weighing the credibility of the conflicting evidence to determine whether Watson's operation of the his vehicle was negligent, reckless and constituted an immediate hazard. Douglas Parker Electric, Inc. v. Mississippi Design and Development Corp., 949 So. 874 (Miss. Ct. App. 2007)(credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions). Therefore, the summary judgment granted in favor of Waggoners Trucking should be reversed and this case remanded for further proceedings. The jury should be allowed to weigh the conflicting testimony and determine the credibility of the witnesses and determine whether Watson violated the aforementioned *Rules of the Road* as to create an immediate hazard at the time of the accident.

III. WAGGONERS TRUCKING IS INCORRECT IN ITS ASSERTION THAT THERE EXISTS NO GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER WATSON WAS THE PROXIMATE CAUSE OF THE INJURIES SUFFERED BY SMITH.

Proximate cause is the natural and continuous sequence unbroken by any efficient intervening cause, produces injury and without which injury would not have

occurred. Patterson v. Liberty Associates, L.P., 910 So.2d 1014 (Miss. 2004). In short, proximate cause exists where defendant's negligence "*put in motion a sequence of events which had not lost its identity and continuity when the injury occurred.*" Jesco, Inc. v. Shannon, 451 So.2d 694, 702 (Miss. 1984). Generally, causation is a jury question. Busick v. St. John, 856 So.2d 304, 307 (Miss. 2003).

In Wal-Mart Stores, Inc. v. Johnson, 807 So.2d 382 (Miss. 2002), plaintiff sued Wal-Mart for personal injuries received as a result of negligent repairs made to her vehicle. Plaintiff took her vehicle to Wal-Mart for a fuel injection cleaning and when plaintiff left the store, she noticed the vehicle malfunctioning. She called Wal-Mart, reported her concerns, and was advised that a Wal-Mart employee would come to her home and service the vehicle. Before the Wal-Mart employee arrived at her home, plaintiff decided to take the car to another repair shop and while *en route* she lost control of the vehicle and crashed into a parked vehicle. Wal-Mart appealed after the jury found it liable for plaintiff's injuries.

Wal-mart argued that plaintiff was the sole proximate cause of her injuries since she continued to drive the vehicle knowing it was malfunctioning. This Court held that proximate cause may exist where "*the intervening cause is one which in ordinary human experience is reasonably to be anticipated, or one which the defendant has reason to anticipate under the particular circumstances.*" Id. at 387-388. The Court further resolved that "*a defendant may be held liable for his failure*

to anticipate an easily predicted intervening cause and to properly guard against it.”

Id.

The Court found there was sufficient evidence to support a finding of proximate cause since Wal-Mart could reasonably foresee that plaintiff might attempt to drive her car. Id. The Court further reasoned that any analysis as to whether plaintiff should be denied recovery due to her negligence invokes comparative negligence principles not an intervening cause. Id.

In sum, Johnson stands for the proposition that proximate cause exists where a defendant can reasonably foresee that his action will cause injury and any determination as to whether plaintiff should be denied recovery should be determined based on the principles of comparative negligence.

In the case *sub judice*, Watson, when asked about the cause of the accident acknowledged that Candace was stopped in the roadway because of his actions:

Q. You just testified that you don't – correct me if I'm wrong – have any reason to think the SUV would have stopped if not for your actions. If you weren't doing the maneuver you were doing in the SUV you have no reason to think the SUV would have stopped in the roadway?

A. Right.

Q. In light of that, do you have any reason to think the SUV would have been impacted or hit if not for your actions?

A. Well, like I said, not to my knowledge.

R. 365 (Deposition of Antonio Watson, p. 80, ln. 17 - p. 81, ln. 4). Watson acknowledged that the accident would never have occurred if he had not blocked Highway 82.

He admitted that he knew and understood that blocking traffic for an extended period of time was careless, reckless and created an immediate hazard. R. 365 (Deposition of Antonio Watson, p. 80, ln. 17 - p. 81, ln. 4). He further admitted a vehicle stopped in the road at night creates a dangerous condition “*if it ain’t got no warning*”. R. 370 (Deposition of Antonio Watson, p. 122, ln. 16-19).

A reasonable inference can be drawn from Watson’s admissions that he was aware that any driving maneuver by him that blocked traffic for an extended time and caused other motorists to stop in the road at night was dangerous and could cause injury. Therefore, applying Johnson, a case that holds that proximate cause exists where a defendant can reasonably foresee that his action will cause injury, it is clear that Smith’s injuries were foreseeable by Watson as to preclude summary judgment.

Waggoners Trucking and the trial court both wrongly assert that Smith’s actions were the sole, intervening cause of her injuries. *Assuming arguendo* that Smith’s actions could be interpreted as an intervening cause, proximate cause nevertheless exists because “*the intervening cause is one which in ordinary human experience is reasonably to be anticipated, or one which the defendant has reason to anticipate under the particular circumstances.*” Wal-Mart Stores, Inc. v. Johnson, 807 So.2d 382, 387-388 (Miss. 2002). Watson can be held liable because of his failure to “*anticipate an easily predicted intervening cause and to properly guard against it.*” Id. He was aware that any driving maneuver by him that blocked traffic

for an extended time and caused other motorists to stop in the road at night was dangerous and could cause injury. Therefore, there exists proximate cause.

Furthermore, Watson's actions created a *a sequence of events which never lost its identity and continuity when the injury occurred*, as evidenced by the fact that Candace testified that Watson's vehicle was still blocking Highway 82 at the time of the collision and the accident happened within ten seconds of Watson beginning the traffic maneuver.

Despite Watson's admissions, Waggoners Trucking argued and the trial court agreed that Smith was the proximate cause of her injuries since she rear ended the vehicle driven by Candace. Specifically, the trial court determined that "*plaintiff failed to create an issue of material fact as to how defendants' actions were the proximate cause of her accident and her injuries*". R. 407 - 415. This determination is inconsistent with Mississippi law which has long held that "*the negligent act of a person, resulting in injury, is the proximate cause thereof, and creates liability therefor, when the act is of such a character that , by the usual course of events, some injury, not necessarily the particular injury, or injury received in the particular manner complained of, which would result therefrom.*" Nobles v. Unruh, 198 So.2d 245 (Miss. 1967).

Like Johnson, a case that stands for the proposition that where a defendant can reasonably foresee that his action will cause injury, any determination as to whether plaintiff should be denied recovery because of her actions should be determined

based on the principles of comparative negligence, the principles of comparative negligence should be applied to this matter. Jamison v. Barnes, 8 So.3d 238, 246 (Miss. Ct. App. 2008)(even if plaintiff is *negligent per se* for violating the Mississippi Rules of the Road, it would not bar her recovery if she could show defendant was also negligent, under the familiar doctrine of comparative negligence)

Waggoners Trucking is correct in its assertion that Mississippi law has long held that where two cars are traveling in the same direction, the primary duty of avoiding a collision rests with the following driver and *in the absence of an emergency or unusual condition*, she is negligent as a matter of law if she runs into the car ahead. White v. Miller, 513 So.2d 600, 602 (Miss. 1987); Thomas v. McDonald, 667 So.2d 594, 596 (Miss. 1995); Jamison v. Barnes, 8 So.3d 238, 242-243 (Miss. Ct. App. 2008). However, this Honorable Court has repeatedly declined to adopt a *per se* rule that the driver of the following car is negligent if she collides with the rear of the preceding vehicle since there may arise an emergency or unusual condition which would absolve the driver of liability. White, 513 So.2d at 601. Whether the circumstances rise to the level of an emergency or unusual condition is a matter for the jury. White, 513 So.2d at 602; Jamison, 8 So.3d at 243.

In K.M. Leasing, Inc. v. Butler, 749 So.2d 310 (Miss. Ct. App. 1999), the Mississippi Court of Appeals affirmed the jury verdict which found the motorist who rear ended a tractor trailer stopped in the road offering assistance to another tractor

trailer driver whose vehicle had broken down was not negligent and the two drivers of the tractor trailers and their employer were found liable for the injuries suffered by the motorist despite the fact that several vehicles passed around the tractor trailers without mishap.

Even more recently, the Mississippi Supreme Court, in Solanki v. Ervin, 21 So. 3d 552 (Miss. 2009), upheld a jury verdict for the defendant where he rear ended a vehicle that stalled on Interstate 220, killing its driver. Reading Solanki, White, and Butler together clearly indicate that the fact that a rear end collision took place is not conclusive of negligence. As such, there is a genuine issue of material fact in the case *sub judice* as to whether Smith should have seen the vehicle driven by Candace in time to avoid the collision. Jamison v. Barnes, 8 So.3d 238 (Miss. Ct. App. 2008) (a genuine issue of material fact exists as to whether a motorist should have seen the tractor in time to avoid a rear end collision where the tractor driver was operating his vehicle after sunset).

The fact that Candace avoided a collision with Watson's rig does nothing to negate the fact that there exists a jury question as to whether Smith's negligence caused and contributed to her injuries since several vehicles passed around the tractor trailers in Butler without mishap and the jury found liability.

Even if plaintiff is *negligent per se*, it would not bar her recovery since she can show defendant was also negligent. This case should be evaluated by the jury applying the familiar doctrine of comparative negligence. Therefore, the order

granting summary judgment should be reversed and this matter should be remanded for further proceeding. The jury should be allowed to weigh the conflicting testimony and determine the credibility of the witnesses and determine whether Watson caused Smith's injuries.

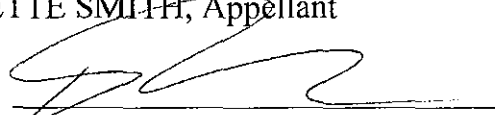
CONCLUSION

The trial court erred when it granted summary judgment in favor of Antonio Watson and Waggoners Trucking Corporation, since there exists genuine issues of material facts as to whether Antonio Watson caused the personal injuries suffered by Suzette Smith. Therefore, the order granting summary judgment in favor of Antonio Watson and Waggoners Trucking Corporation should be reversed and the case should be remanded for further proceedings.

SO REPLIED, the 13th day of December, 2010.

Respectfully Submitted,
SUZETTE SMITH, Appellant

By:


THANDI WADE
Attorney for Appellant

OF COUNSEL:

HONORABLE THANDI WADE
TATUM AND WADE, PLLC
124 East Amite Street
Jackson, Mississippi 39201
Tel: (601) 948.7770

HONORABLE MICHAEL R. BROWN
THE MICHAEL R. BROWN LAW OFFICES, PLLC
120 N. Congress Street, Suite 230
Jackson, Mississippi 39201
Tel: (601) 948.5330

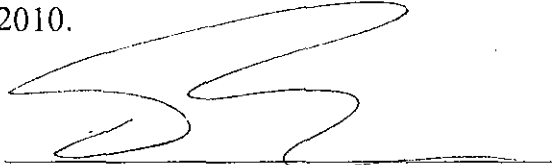
CERTIFICATE OF SERVICE

I, MICHAEL R. BROWN, attorney for appellant, SUZETTE SMITH, certify
that I have this day mailed, postage prepaid, a true and correct copy of
APPELLANT'S REPLY BRIEF to:

Honorable Leann W. Nealey
BUTLER, SNOW, O'MARA, STEVENS &
CANNADA, PLLC
Post Office Box 6010
Ridgeland, Mississippi 39158-60140

Honorable Richard A. Smith
CIRCUIT COURT JUDGE
Post Office Box 1953
Greenwood, Mississippi 38935-1953

THIS, the 13th day of December, 2010.


THANDI WADE