

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

SUZETTE SMITH

APPELLANT/PLAINTIFF

V.

**THE WAGGONER'S TRUCKING CORPORATION;
ANTONIO WATSON;
And JOHN AND JANE DOES 1-3**

APPELLEE/DEFENDANT

**APPEAL FROM THE CIRCUIT COURT
OF WASHINGTON COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT
HONORABLE RICHARD A. SMITH**

BRIEF IN SUPPORT OF APPELLANT SUZETTE SMITH

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ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that, in addition to those listed in the Brief of Appellant-Plaintiff Suzette Smith, the following persons have an interest in the outcome of the case. These representations are made in order that the Justices of the Supreme Court and/or Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Suzette Smith, Appellant-Plaintiffs
2. The Michael R. Brown Law Offices, PLLC attorney of record for Appellant
3. Michael R. Brown, Esq., attorney of record for Appellant
4. Tatum and Wade, PLLC attorneys of record for Appellant
5. Thandi Wade, Esq., attorney of record for Appellant
6. Antonio Watson, Appellee-Defendant
8. The Waggoner's Trucking Corp. Company, Appellee-Defendant.

9. Butler, Snow, O'Mara, Stevens, and Cannada, attorneys of Record for
Appellee-Defendant
10. Jody Owens, Esq., attorney of record for Appellee-Defendant
11. Arthur Spratlin, Esq., attorney of record for Appellee-Defendant

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STATEMENT OF THE ISSUES

- I. The Trial Court erred in finding no general issue of material fact as to whether Defendant owed a duty or breached a duty owed. The Trial Court therefore erred in finding no reasonable fair minded juror could find for the Plaintiff and that Defendant was entitled to Summary Judgment.**

- II. The Trial Court erred in finding no genuine issue of material fact regarding whether or not the Defendant was the proximate cause of Plaintiffs injuries.**

STATEMENT OF THE CASE

This case arises out of a motor vehicle collision wherein the Plaintiff/Appellant suffered significant personal injury. She brought suit in the Circuit Court of Washington County claiming the Defendant Antonio Watson and The Waggoner's Trucking Corporation were negligent and grossly negligent given Antonio Watson's actions within the roadway. (R. at 1-12; RE. 14-25). She relied upon arguments in the Lower Court that he was negligent because he maneuvered his vehicle for a significant amount of time, in the path of traffic, when visibility was limited, and that he could have safely maneuvered his vehicle off the roadway where he had permission to drive. (R. at 328, 339, 404; RE. 31, 42, 107). Genuine issues of material fact exist as to whether his vehicle was properly illuminated, and whether Defendant breached a duty of reasonable care to warn oncoming motorists as to its actions in the roadway given the length of time in the roadway, lighting conditions at the scene, and the driver's actions as a whole. (R. at 328, 333, 334; RE. 31, 36, 37). Genuine issues of material fact exist when considering statutory duties as well. The Trial Court failed to consider genuine issues of material fact tending to establish duties, breaches of duties, and proximate cause.

The Defendant moved for Summary Judgment on or about July 31, 2009. Oral arguments were heard before the Honorable Richard A. Smith, Washington County Circuit Court Judge on or about September 15, 2009. The Trial Court granted Defendant's Motion for Summary Judgment on or about November 3, 2009. (R at 407-415; RE. 5-13).

The facts establish that Suzette Smith (hereinafter referred to as Ms. Smith, Plaintiff, or Appellant) was traveling East on Highway 82 in Leland, Washington County,

Mississippi at approximately midnight (R. at 323; RE. 26). While driving for Defendant the Waggoner's Trucking Corporation, Antonio Watson made a decision to move his 18 wheeler vehicle across Highway 82, to bring it to stop in the middle of Highway 82, and then to back it into a private drive off of Highway 82. Id. Watson crossed traffic from a large turnabout driveway off the side of Highway 82. He blocked both lanes of travel and, at a time when visibility was limited, and engaged in an improper backing maneuver when the facts are examined as a whole. (R. at 324; RE. 27).

As a direct and proximate result of the above actions (and inactions), Appellant came upon the scene and struck another vehicle driven by Candace Holloway, whose vehicle was arguably stopped in the middle of Highway 82 solely due to Antonio Watson's backing maneuver. Id.; (R. at 349-350 *citing Deposition of Antonio Watson*, p. 80, ln. 17-p. 81, ln. 4; RE. 52-53) *See Also Argument Below §§ e addressing proximate causation, and that vehicles stopped solely due to Watson's actions.* Watson's actions caused the circumstances directly and proximately resulting in the collision as he interrupted traffic which was reasonably expected to flow forward if not for his actions, thereby creating a dangerous condition at a time when visibility was limited. Id. The Holloway vehicle and other vehicles who arguably stopped became part of the dangerous condition Defendant was responsible create when considering all of the vehicles obstructed traffic solely due to his actions.

It is undisputed that Ms. Smith has been significantly injured due to subject collision. She claims her past medical bills to be in excess of \$250,000.00. She is in need of continued medical treatment by all indications. Based on the independent medical evaluation of Dr. Howard T. Katz, M.D., Ms. Smith's diagnosis includes but is not

limited to the following C5 ASIA C with Brown Sequard syndrome and quadriplegia, Neurogenic bladder, Neurogenic bowel, Neurogenic sexual dysfunction, Status post L4/5 and L5/S1 anterior cervical fusion with instrumentation. Ms. Smith defers to the doctor for the exact diagnosis, yet illustrates her understanding only to show she has been significantly injured as a result of the collision by any reasonable analysis.

Antonio Watson had permission to park and maneuver his tractor trailer on the premises of the Yuppy Puppy, the local business off of Highway 82. (R. at 362-363; RE. 65-66). At all times, Antonio Watson could have safely maneuvered his vehicle by completing his turn within the Yuppy Puppy parking lot as opposed to the middle of a well traveled Highway 82. (R. at 404; RE. 107). Furthermore, it was dark leading to, near, and at the accident scene as illustrated by the testimony of Suzette Smith, Candace Holloway, and Ryan Holloway (R. at 328, *citing Deposition of Suzette Smith*, p. 58, ln. 23-p. 59, ln. 23; *Deposition of Candace Holloway*, p. 19, ln. 13-14; *Deposition of Ryan Holloway*, p. 54, ln. 11-14 and p. 48, ln. 3-7; RE. 31). The ability of vehicles to see a large truck in the middle of the roadway for an extended period of time is materially relevant to whether or not the truck drivers' actions were reasonable so as to warn oncoming motorists under those conditions.

The lighting conditions at the scene, and the lighting (or lack of lighting) on the truck should have been properly considered in determining whether the truck driver breached duties of reasonable care in deciding to cross traffic while motorists were reasonably expected to travel rapidly through the area (and not into a dangerous, stopped condition). Among other duties generally imposed by law, Watson had statutory duties not to leave his vehicle in the roadway for an unreasonable amount of time, not to operate

his vehicle carelessly, and not to operate recklessly. *See Argument Below, §§ d*
addressing statutory duties the Trial Court failed to properly address in light of the
roadway conditions AND failed to address adequately at all in its decision.

Appellant testified she never saw the rig before the collision, and as such a reasonable inference can be drawn that she did not see the rig because it was not properly illuminated (R. at 334 *citing Deposition of Suzette Smith*, p. 63, ln. 3-5; RE. 37). Watson testified that the vehicle's lights were illuminated, emergency flashers on, and that it contained the proper reflective tape while Candace Holloway testified she was not sure whether there were any lights illuminated on the tractor trailer (R. at 334 *citing Deposition of Candace Holloway*, p. 49, ln. 9-11; RE. 37). Candace Holloway further testified that Watson failed to take any actions to warn oncoming traffic about his maneuver (*Id.* at p. 53, ln. 1-4 and p. 55, ln. 19-23; RE. 37). Similarly, Ryan Holloway testified he did not recall seeing any lights illuminated on the side of the tractor trailer (*Id.* *citing Deposition of Ryan Holloway*, p. 21, ln. 14-20; RE 37). A genuine issue of material fact exists as to whether the tractor trailer was properly illuminated. A genuine issue of material fact exists as to whether Mr. Watson took any actions, (or in the alternative, any adequate actions) to warn oncoming motorists of a maneuver requiring him to cross traffic for up to five minutes by the account of witnesses. In contrast, the Trial Court based its decision on an erroneous assumption that the Defendant's vehicle was properly illuminated, as well as the erroneous assumption *that Plaintiff argued* it was properly illuminated. (R. at 414-415; RE. 12-13). Both conclusions are completely unsupported as partially shown by Plaintiff's reliance on testimony here and in the Trial Court tending to indicate witnesses did not see lights on the truck. (R. at 414; RE. 12).

Watson, by his own admission acknowledged 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. at 335 *citing Deposition of Antonio Watson*, p. 97, ln. 25-p. 98, ln. 3; RE. 38). Watson testified that his maneuver took approximately ten seconds to complete whereas both Candace and Ryan Holloway indicated Watson had blocked Highway 82 for approximately three to five minutes (R. at 334 *citing Deposition of Antonio Watson*, p. 31, ln. 10-17 and p. 95, ln. 15-20; *Deposition of Candace Holloway*, p. 47, ln. 12-18; *Deposition of Ryan Holloway*, p. 20, ln. 23-p. 21, ln. 1; RE. 37). There is a genuine issue of material fact as to how long Antonio Watson blocked Highway 82 under the conditions, and therefore whether he created a dangerous condition causing an immediate hazard in violation of Mississippi Law. Further in support of the fact that Watson crossed traffic for an unreasonable amount of time, he testified that four vehicles yielded to him while he attempted to park his vehicle (R. at 336 *citing Deposition of Antonio Watson*, p. 8, ln. 16-p. 9, ln. 1 and p. 12, ln. 5-8; RE. 39). Four vehicles were able to come to the scene during the time he obstructed traffic and he therefore should have known his actions significantly interrupted the flow of traffic on a well travelled highway in reduced lighting conditions.

A genuine issue of material fact exists as to whether Watson breached duties owed to Smith causing her injuries when he blocked a heavily traveled highway at a time when visibility was limited for enough time to stop a significant amount of traffic. A genuine issue of material fact exists as to whether a reasonably prudent driver would have taken alternative reasonable measures under the circumstances, taken actions to warn

motorists of his conduct in the roadway, and refrained from crossing traffic for a large amount of time when visibility was limited. *See Argument Below, §§ b.*

There is conflicting evidence as to whether Watson blocked all lanes of traffic on the highway immediately prior to the collision, how long the lanes were blocked, and whether there were any adequate warnings to oncoming traffic regarding the maneuver (R. at 333, 334, 343, and 344; RE. 36, 37, 46, 47). Ryan Holloway testified that Watson blocked all lanes of traffic for up to five minutes while waiting on Watson to complete his maneuver without warning; Candace Holloway further testified that Watson was still blocking her lane at the time of the collision (R. at 344 *citing Deposition of Candace Holloway*, p. 83, ln. 19-p. 84, ln. 2; RE. 47; R. at 373-374 *citing Deposition of Ryan Holloway* p. 20-21; RE. 76-77). Watson's conflicting testimony that he blocked traffic for approximately ten seconds on a heavily traveled roadway at a time when visibility was limited conflicts with the testimony of Ryan and Candace Holloway that he blocked Highway 82 for approximately three to five minutes. If Watson's account is taken as true, and four cars were able to come to the scene in a matter of seconds, further genuine issues of material fact exist as to whether he was reasonable in obstructing such a large amount of traffic travelling rapidly in an area where vehicles should reasonably expect to travel without interruption. A genuine issue of material fact exists as to whether he failed to yield to vehicles that had approached so closely as to constitute an immediate hazard if his account that he crossed for only ten seconds is considered in conjunction with the fact that multiple vehicles had come to the scene in that time; he should have seen the vehicles and should have yielded to them because they were able to come to the scene in a matter of seconds. *See Argument Below, §§ d discussion of Mississippi Code Annotated*

§ 63-3-805 defining statutory duties owed by drivers crossing highways, to yield to vehicles which have approached so closely as to constitute an immediate hazard.

Given a genuine issue exists as to how long he crossed traffic, stopping traffic up to five minutes under the same conditions raises genuine issues of material fact as to his actions to warn drivers, the reasonableness of his actions given the lighting conditions, and whether or not he crossed for an unreasonably dangerous amount of time.

A genuine issue of material fact exists as to whether or not he violated legal duties owed to Plaintiff when considering the time in which he blocked traffic along with his lack of actions to warn motorists, the reasonable alternative maneuvers off the roadway, and the lack of illumination from his vehicle or leading to the scene where oncoming motorists might rapidly travel.

SUMMARY OF THE ARGUMENT

The Trial Court erred by relying on limited facts without accounting for all it was required to consider in determining whether there were duties owed, breached and whether Defendant was the proximate cause of Plaintiff's injuries. The Trial Court neglected to recognize genuine issues of material fact as to statutory duties owed and focused on a limited, incorrect interpretation of Mississippi Code Annotated § 63-3-805 as applied to the present facts. (R. at 412; RE. 10). The Trial Court based its conclusions on limited information that because multiple vehicles had seen, stopped, and avoided Defendant's truck, Defendant had the right-of-way, and therefore owed no duties to the Plaintiff. The Trial Court further reasoned that even if there was a legal duty there was no issue of proximate cause because the Plaintiff was traveling 57 miles per hour, admitted she never saw the vehicles until the point of collision, and that other vehicles had stopped

indicating that Defendant's actions did not reasonably or foreseeably set in motion the circumstances causing Plaintiff's injuries. The Trial Court attempted to draw a bright-line rule there is no duty owed because a driver who has already entered the intersection through highway is not statutorily required to yield the right-of-way to an approaching vehicle who has neither entered the intersection nor approached so closely so as to constitute an immediate hazard. (R. at 412; RE. 10).

While a violation of a statute may be negligence per se, whether or not a Defendant has a duty to yield does not negate all other duties it may owe, statutorily or otherwise. The trial Court failed to account for the fact that multiple vehicles came to the scene within 10 seconds if Watson's account of how long he crossed traffic is taken as true, thereby rendering them an immediate hazard Watson should have yielded to.

Notwithstanding a duty to yield to other vehicles, a Defendant is required to act safely and reasonably under the circumstances while within a roadway, especially when it might obstruct traffic that is expected to flow rapidly through. A driver is required not to leave his vehicle stopped in the roadway for an unreasonable amount of time when considering what a reasonably prudent person would do under the circumstances. *See Argument Below, §§ d addressing statutory duties the Trial Court failed to properly address in light of the roadway conditions AND failed to address adequately at all in its decision.*

Mississippi law has considered several facts regarding a drivers' actions in light of external conditions, in determining whether those actions while entering and staying within a roadway are reasonable including but not limited to the visibility of the driver's actions to oncoming traffic given the time of day or night, the actions of the driver to

warn oncoming motorists (if any), whether the driver would have (in the exercise of reasonable care) used further lighting mechanisms to warn oncoming traffic, or whether the driver might reasonably have left the roadway completely until the area appeared to be clear of traffic. *See Argument Below*, §§ b. Whether or not Defendant was bound by statute to use certain lighting mechanisms, he was bound to use reasonable care accounting for reasonably safe actions. A genuine issue of material fact exists as to whether Defendant breached duties when considering all circumstances the Court was bound to consider under Mississippi law.

The Trial Court instead erroneously relied upon limited facts to determine that other vehicles were able to avoid the collision and that Defendant did not breach a duty nor was the proximate cause of the injuries. The fact that other vehicles were able to avoid a collision does not negate recovery.

The issue of comparative negligence, if any, is one for the jury. A Plaintiff's negligence (if any), does not negate the Defendant's negligence. Courts are empowered to consider (and should consider) lighting conditions, actions if any to warn oncoming motorists (if any), and the length of time the Defendant is within the roadway compared to all factors when determining whether a duty is owed and breached. A genuine issue of material fact exists as to whether a reasonably prudent person in Watson's circumstance would have crossed traffic for up to five minutes under circumstances where visibility was limited and under circumstances where he failed to take adequate actions to warn oncoming motorists. The above are questions which should have been reserved for the jury.

Finally, a genuine issue of material fact exists as to whether Defendant was the proximate cause of the injuries. Vehicles stopped solely due to his actions. He created a dangerous situation wherein it was reasonably foreseeable other vehicles would approach, rapidly encountering an unexpected interruption in the flow of a well-travelled highway during reduced lighting conditions. The stopped vehicles became part of the dangerous condition he created. Issues of comparative negligence and intervening/superseding cause (if any) should be properly left for the jury.

ARGUMENT

a. Introduction

The Trial Court acknowledged that fact questions are for the jury and that when the facts are in dispute as to whether the Defendant's operation of a vehicle constituted an immediate hazard, the question is one for the jury to decide. (R. at 411-415; RE. 9-13). The jury is to assess the credibility of the witnesses and to determine the weight and worth given to any particular element of the evidence. *Id.* The Trial Court improperly relied upon limited facts without properly considering all it was bound to consider in determining whether there was a duty owed or breached. The Trial Court departed from established caselaw and failed to consider duties under statutory law. It relied on a conclusion that because multiple vehicles had seen, stopped and avoided Defendant's truck, Defendant had the right of way and therefore owed no duty to Plaintiff. (R. at 415; RE. 13); *See Also Argument Below, §§ b.* The Trial Court erred in using the above reasoning to find the Plaintiff failed to establish any duty owed to her by Defendants. *Id.* In contrast, the Plaintiff illustrated statutory duties and other duties applicable to motorists which Defendant arguably breached. The Trial Court completely failed to

address genuine issues of material fact as to whether those were owed and breached. *See Argument Below Addressing Statutory Duties, §§ d.*

The Court further reasoned that even if there was a legal duty, there is no issue of material fact as to the proximate cause because the Plaintiff was traveling 57 miles per hour in a 45 mile per hour zone and because the Plaintiff admitted she never saw the Holloway vehicle until the point of collision and never saw Defendant's vehicle. (R. at 415; RE. 13). The Trial Court improperly relied solely upon incomplete facts to determine both that there could be no duty owed by Defendant, and that the Defendant was not the proximate cause of the Plaintiff's injuries given she never saw the rig. The proper focus should have been on Defendant Watson's actions and inactions within the roadway establishing breached duties owed to Plaintiff when considering his actions as a whole including but not limited to his actions to warn (if any), the length of time he crossed traffic in relation to whether or not he warned oncoming motorists, and whether his actions were reasonable when considering vehicles might come to the scene rapidly in areas which were not well lit during the time he was in the road. The Court should have also reserved the issue of proximate cause for the jury consistent with established law.

b. Whether Defendant's actions were reasonable depends on material facts considered together. Genuine issues of material fact exist establish duties owed and breached.

The Trial Court drew a bright-line rule that the Plaintiff was owed no duty under the circumstances because a driver who has already entered into an intersection from a through highway is not statutorily required to yield the right of way to an approaching vehicle who has neither entered the intersection, nor approached so closely from the through highway so as to constitute an immediate hazard. (R. at 412 *citing Jones v.*

Carter, 192 Miss. 603, 609, 7 So.2d 519 (1942); RE. 10); *See Also*, (R. at 415; RE. 13) wherein the Trial Court erroneously found that because multiple vehicles stopped and avoided Defendant, Defendant had the right-of-way and owed no duty.

Further, Plaintiff incorporates all below arguments as to why Defendant should have yielded to vehicles which came to the scene within a short time. The vehicles at the scene within ten seconds were arguably an immediate hazard he should have seen coming so closely, and which he should have yielded to prior to entering the roadway, rendering him in violation of Mississippi Code Annotated § 63-3-805. *See Argument Below Addressing Statutory Duties, §§ d.*

The law does not draw such a bright-line rule precluding all duties owed to oncoming motorists when a vehicle crosses into a roadway. Furthermore, courts have not required Plaintiffs to prove a violation of Mississippi Code Annotated § 63-3-805 in order to establish a genuine issue of material fact that a Defendant violated a duty on the roadway when crossing it. The Plaintiff does not and did not claim that violation of this single statutory duty is the only grounds establishing Defendant Watson's negligence when other statutory duties were violated as well. (R. at 340-341; RE. 43-44).

Further, unlike the Trial Court, Mississippi Law does not consider only whether a vehicle entered the roadway and whether other vehicles were able to stop in determining whether the actions of the vehicle in the roadway were negligent. Whether or not a vehicle in the roadway has the right of way, does not mean that vehicle is excused from all of his actions and inactions which might violate duties of reasonable care when considering what a reasonable driver would do once he has entered the roadway. Donald v. Amoco Production Co., 735 So. 2d 161,175 (Miss. 1999) (Standard of Care applicable

in cases of alleged negligent conduct is whether the party charged with negligence acted as a reasonable and prudent person would have under the same or similar circumstances). The driver has additional duties, statutory and otherwise. The driver may not leave his vehicle in the road for an unreasonable amount of time when it is practical not to do so, AND must operate the vehicle in a careful and reasonably prudent manner, as illustrated by the statutory duties owed and argued by Plaintiff. Id.; *See Also*, Mississippi Code Ann. §63-3-903, §63-3-1213. §63-3-1201 (1972). While Plaintiff does not concede Defendant had the right of way at all times, even if he did for the purposes of argument, he still owed duties of reasonable care with regard to his actions while he remained in the roadway for a long time, without warning, and while visibility was limited. Genuine issues of material fact exist as to whether he was in the road for up to five minutes, whether he adequately warned oncoming motorists by proper lighting on his truck or other actions, and whether vehicles might travel rapidly to the scene under reduced lighting conditions impacting stopped cars that were part of a dangerous condition he created.

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 resulting in damage to Plaintiff’s vehicle. The Court looked at whether or not the driver took adequate actions to warn oncoming traffic of dangerous actions on a main highway in reduced evening light. The Trial Court in the subject case erred in finding that there could be no duty owed to Plaintiff based only on

the reasoning that the Defendant had the right of way, when multiple vehicles had seen, and stopped and avoided Defendant's truck. (R. at 415; RE.13). The Trial Court's reasoning precludes all other arguments that Defendant Watson breached duties owed to Plaintiff, relying only on the fact that multiple vehicles had stopped while the Defendant was already in the roadway. Id. The Trial Court completely failed to consider the actions (and inactions) of the vehicle within the roadway in determining whether the Defendant's actions were reasonable (and within a duty of reasonable care). Regardless of this Court's determination as to the exact warning required, it is clear that U.S. Industries, Inc. v. McClure acknowledges that a driver has to consider whether or not he has adequately warned oncoming motorists and a driver must consider whether lighting is reduced along with other conditions at the scene. U.S. Industries, Inc. v. McClure Furniture Company of Eupora, 371 So.2d 391, 393 (Miss. 1979). Regardless of the warning required, the driver may not fail to consider duties to alert oncoming traffic when the driver is not easily visible in the path of rapidly moving traffic at night. A genuine issue of material fact exists as to whether those duties existed and were breached.

The Trial Court's argument completely failed to account for whether Antonio Watson's actions were reasonable to warn oncoming motorists given his length of time in the road, lighting conditions leading to the scene where vehicles might approach rapidly during the time Defendant crossed, nor whether the vehicle was properly illuminated. The Trial Court here should have considered all the actions and inactions together not just the fact that other motorists avoided Defendant (especially when there is also a genuine issue of material fact as to whether the vehicle was illuminated contrary to the Lower Court's conclusion it absolutely was properly illuminated. (R. at 414; RE. 12).

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 when 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, Donald, and Anderson together made it clear that breach of duty is an issue to be decided by the jury in cases where a tractor trailer driver blocked a well-traveled highway when visibility is limited thereby causing injury. *Under facts similar to the case subjudice, these courts have found such conduct to be reckless and not mere negligence.* The jury is charged with the duty of determining whether Watson's operation of his vehicle was careless, reckless, and 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).

Like McClure Furniture and Anderson, Watson operated a tractor trailer, backed his vehicle onto Highway 82, a well-traveled highway, at a time when visibility was limited. As such, the jury should be allowed to weigh the conflicting testimony and determine the credibility of the witnesses to determine whether Watson breached duties at the time of the accident when considering all factors.

The above cases make it abundantly clear that Courts are empowered to consider the actions of motorists in warning (and failing to warn) oncoming traffic. The Trial Court should consider whether visibility was limited due to the time of day or night and how a lack of visibility relates to the driver's obligations when he stops the flow of traffic unexpectedly. The Trial Court should have also considered whether a duty of reasonable care required Defendant to move to the shoulder of the road, or maneuver his vehicle off the roadway in the Yuppy Puppy, as Watson had permission to do. (R. at 362-363; RE. 65-66). At all times, Antonio Watson could have safely maneuvered his vehicle by completing his turn within the Yuppy Puppy parking lot as opposed to the middle of a well traveled Highway 82. (R. at 404; RE. 107). The subject Trial Court failed to consider all factors it was required to.

The present case involves strikingly similar facts to the above-cited cases. A genuine issue of material facts exists as to whether he breached duties of reasonable care when considering the lack of lighting, the length of time the maneuver took to accomplish, the fact that the maneuver occurred at night, and that there were arguable inadequate (or completely nonexistent) actions to warn oncoming motorists.

In rendering its decision, the Trial Court found "Whether Defendant's truck was parked on the road for ten seconds or five minutes matters not; this is not a material fact." (R. at 414; RE. 12). The Trial Court reasoned that other vehicles had seen the Defendant's truck and either stopped or slowed to allow the Defendant to proceed with his backing maneuver showing that the Defendant's truck was visible. Id. The Trial Court found that based on the above facts, there was no duty to yield to the Plaintiff Suzette Smith, and that there was no duty breached. Id. Antonio Watson, by his own admission,

acknowledged 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 at 335 *citing Deposition of Antonio Watson*, p. 97, ln. 25-p. 98, ln. 3; RE. 38).

In K.M Leasing, Inc. v. Butler, 749 So.2d 310 (Miss. Ct. App. 1999) the jury found that the motorist who rear-ended a tractor trailer, that was stopped in the road offering assistance to another tractor trailer driver whose vehicle had broken down, was not negligent. The two drivers of the tractor trailer and their Employer were found liable for the injuries suffered by the motorist despite the fact that several vehicles had passed around the tractor trailer without mishap. The Mississippi Court of Appeals, upon reviewing the evidence presented to the jury, found that there was ample evidence to support a verdict and upheld the verdict in favor of the motorist. Butler makes it clear that it is the responsibility of the jury to determine the weight and credibility given to the evidence of negligence. The fact that some motorists are able to avoid a collision does not mean a Defendant cannot be found to be negligent with regard to a Plaintiff who is involved in a collision. The fact that the Holloway vehicle, and potentially other vehicles, avoided a collision with Watson's rig does not negate a jury question as to whether his negligence caused or contributed to Plaintiff's injuries. The jury is to weight whether the fact that Watson may have crossed traffic for up to five minutes at night without adequate warning constituted a lack of reasonable care based upon the testimony of the witnesses. The fact that Ms. Holloway avoided a collision with the tractor trailer operated by Watson does not conclusively establish Plaintiff's negligence, nor bar her recovery.

The witness testimony raises genuine issues of material fact regarding the reasonableness of Defendant's actions. Ryan Holloway acknowledge that his wife put

the hazard lights on because he believed prior to the collision that someone might hit the vehicle he was in and that he was uncomfortable sitting in the middle of a four-lane highway. He indicated it was a “dangerous situation”. (R. at 346-347 citing *Deposition of Ryan Holloway*, p. 14, ln. 13-22; *Id.* at p. 50, ln. 17-23; *Id.* at p. 51, ln. 13-16; RE. 49-50). There is no doubt he was referring to a dangerous situation created by Watson’s actions which the Holloway’s unwillingly became a part of.

A reasonable inference can be drawn that Watson knew the dangers associated with blocking the highway for an extended period of time under the circumstances, and therefore willfully disregarded this knowledge blocking the highway for an unreasonable amount of time creating an immediate hazard. Courts are empowered to consider (and should consider) lighting conditions, actions (if any) to warn oncoming motorists, and the length of time a Defendant is within the roadway in determining whether there is a duty owed and breached. *See Above Discussion of Anderson, Donald, and McClure*. The Trial Court erred in finding that because others stopped, Watson had the right of way and owed no duty. (R. at 414; RE. 12).

A genuine issue of material fact exists as to whether a reasonably prudent person in Watson’s circumstance would have allowed the vehicles to pass him to avoid a possible collision, or would have removed himself from the roadway instead of allowing his vehicle to remain stopped for approximately three to five minutes. A genuine issue of material fact remains as to whether the Defendant exercised reasonable care under the circumstances as a whole. *Donald v. Amoco Production Co.*, 735 So. 2d 161,175 (Miss. 1999) (Standard of Care applicable in cases of alleged negligent conduct is whether the party charged with negligence acted as a reasonable and prudent person would have

under the same or similar circumstances). A genuine issue of material fact exists as to whether Watson failed act with reasonable care, allowing his vehicle to exist in the road without adequate warning, and under circumstances that post a dangerous condition. Namely, Highway 82 is a heavily traveled roadway which was not adequately illuminated, and he took inadequate actions to warn oncoming motorists of his maneuver.

c. The Trial Court failed to consider genuine issues of material fact implicated by the conditions under which Defendant's actions occurred.

The Trial Court further relied upon a conclusion that the Defendant's truck was "properly equipped with lighting and reflective tape" in support of its argument that the cause of the collision is not at issue. (R. at 414; RE. 12). The Trial Court also summarized the Plaintiff's argument by assuming that the vehicle entering the through highway was properly illuminated. *Id.* The Court's decision erroneously assumes that the vehicle Watson was driving was properly illuminated and had reflective tape. *Id.* In contrast, Suzette Smith testified that she never saw the rig before the collision, and a reasonable inference can be drawn that she did not see the rig because it was not properly illuminated when considering all other accounts. (R. at 334 *citing Deposition of Suzette Smith*, p. 63, ln. 3-5; RE. 37). Ryan Holloway further testified that he did not recall seeing any lights illuminated on the side of the tractor trailer. (R. at 334 *citing Deposition of Ryan Holloway*, p. 21, ln. 14-20; RE. 37). Candace Holloway testified that she was not sure whether there were any lights illuminated on the tractor trailer and could not recall them. (R. at 334 *citing Deposition of Candace Holloway*, p. 49, ln. 9-11; RE. 37). She also testified that Defendant failed to take any actions to warn oncoming traffic about the maneuver. (*Id.* at p. 53, ln.1-4 and p. 55, ln. 19-23; RE. 37). The evidence is conflicting as to whether or not the tractor trailer was properly illuminated so as to warn oncoming

traffic of Watson's presence in the roadway, and whether Watson warned oncoming traffic at all.

Regardless, it was erroneous for the Trial Court to base its decision on a completely opposite conclusion that Defendant's vehicle was in fact properly illuminated when that conclusion has not been established at all except by his own self-serving testimony in dispute. The other testimony raises a genuine issue of material fact as to whether the Defendant's vehicle was properly illuminated. At the very least, it negates a conclusion that Watson's vehicle was properly illuminated as the Trial Court assumed in the basis for its decision. (R. at 414; RE. 12). Finally, Antonio Watson admitted and acknowledged that a vehicle stopped in the roadway at night creates a dangerous condition if it doesn't have any warning. (R. at 346 *citing Deposition of Antonio Watson*, p. 122, ln. 16-19; RE. 49). Watson, by his own testimony, knew and understood that blocking traffic for an extended period of time under the circumstances was careless, reckless, and created an immediate hazard if there was no warning. A genuine issue of material fact exists as to whether he took actions to warn motorists.

As stated above, the weight given to the evidence that Watson failed to warn oncoming motorists of his actions is for the jury. It is for the jury to determine which weight to give to the fact that Mr. Watson crossed traffic for up to five minutes under conditions when he was not properly illuminated or easily visible to other motorists. The Trial Court incorrectly summarized Plaintiff's argument by stating "Plaintiff's argument boils down to this: that if a lighted properly illuminated vehicle enters a through highway at night and, with all other vehicles stopping and yielding, if a vehicle using the through highway strikes the stopped vehicle, then a jury question is always present as to whether

the initial entering vehicle created a situation/environment in which an accident could possibly happen.” (R. at 415; RE. 13). The Plaintiff has argued only that a vehicle crossing traffic for up to five minutes without proper warning constitutes an immediate hazard to oncoming motorists in violation of a duty of reasonable care when considering all factors as Trial Courts are required to consider.

Plaintiff’s arguments do not assume that the vehicle was properly illuminated as the Court states. In contrast, the Plaintiff has argued there is a genuine issue of material fact as to whether Defendant Watson was properly illuminated. The Plaintiff also argues that the fact that other vehicles avoided the collision does not negate the jury question as to whether Watson’s negligence caused or contributed to Plaintiff’s injuries. As stated above, K.M. Leasing, Inc. v. Butler recognizes that the mere fact that some motorists are able to avoid a collision does not conclusively establish that a Defendant cannot be found negligent with regard to a Plaintiff who was injured in a collision. K.M. Leasing, Inc. v. Butler, 749 So.2d 310 (Miss. Ct. App. 1999). The Trial Court erroneously relied upon an incorrect summary of the Plaintiff’s argument.

Notwithstanding the fact that the Plaintiff never argued the vehicle was properly illuminated, Plaintiff also argued that a jury question exists there is a genuine issue of material fact as to a driver’s actions to warn oncoming motorists of actions within the roadway which could be construed as dangerous or potentially dangerous. The Plaintiff has argued that the lighting conditions leading to the accident scene need to be considered. (R. at 328; RE. 31). Plaintiff has also argued that whether or not the Defendant was properly illuminate is one factor to consider as to whether he took adequate actions to warn oncoming motorists. (R. at 329; RE. 32). The Plaintiff raised

numerous other concerns with Mr. Watson's actions in the roadway including but not limited to the fact that he could have safely performed those actions within the Yuppy Puppy parking lot where he had permission to maneuver as opposed to Highway 82. (R. at 362-363, 404; RE. 65-66, 107). The Plaintiff also argues Watson failed in performing statutory duties recognizing he left his vehicle in the path of traffic for an unreasonable amount of time when considering the conditions. *See Argument Below Addressing Statutory Duties, §§ d.* The Trial Court is incorrect to have based its decision on a claim that the Plaintiff's argument is based only on a conclusion that a properly illuminated vehicle entering the highway at night with other vehicles stopping raises a jury question in the event one vehicle is not able to stop. (R. at 415; RE. 13).

The Trial Court was bound to consider additional facts in determining whether the Defendant's actions and inactions breached duties. The Trial Court therefore erroneously relied upon very limited conclusions that a properly illuminated vehicle entered a through highway at night while other vehicles were able to stop. As discussed, in Anderson v. Eagle Motor Lines, the Fifth Circuit properly interpreted Mississippi Law by considering that a tractor-trailer blocked traffic at a time when visibility was limited. The Court found that prudence would have required the driver to move his rig to the shoulder or to have continued until an appropriate intersection for completing the maneuver. Anderson v. Eagle Motor Lines, 423 F.2d 81 (1970). Regardless of the holding in Anderson, in evaluating a driver's duty, the Court must properly consider all factors as to what a reasonable person would do. Donald v. Amoco Production Co., 735 So. 2d 161,175 (Miss. 1999). This includes looking at the time of day or night, and whether the driver took any actions to warn oncoming motorists.

There is a genuine issue of material fact as to whether Defendant's vehicle was illuminated, and whether he took any actions at all to warn oncoming motorists of his actions or their timing. (R. at 334-335; RE. 37-38). Watson, by his own admission, acknowledged that the time a rig crosses traffic determines whether the maneuver is dangerous and in violation of Mississippi Law. (R. at 335 *citing Deposition of Antonio Watson*, p. 97, ln. 25-p. 98, ln. 3; RE. 38).

In the present case, there are genuine issues of material fact as to the lighting at the accident scene, whether the rig was properly illuminated, and whether there were adequate actions at all taken to warn oncoming motorists. There is also a genuine issue of material fact as to the length of time in which Watson's vehicle crossed traffic which is relevant to determining the reasonableness of his actions to warn oncoming motorists, if any.

The length of time a vehicle crosses traffic raises a greater possibility that vehicles will approach the scene confronting completely stopped traffic when they would otherwise expect it to flow quickly. The Trial Court materially erred in deciding that because some vehicles stopped to avoid the collision, Watson's actions must be considered reasonable. (R. at 415; RE. 13).

The Trial Court failed to address the material fact dispute of whether it was dark leading to, near, or at the accident scene and how that related to whether or not there is a genuine issue of material fact as to whether Defendant exercised reasonable care under the circumstances. (R. at 328; RE. 31). Despite illuminated businesses, Suzette Smith, Candace Holloway, and Ryan Holloway all testified in their depositions that it was dark leading to, near, and at the accident scene. (R. at 328 *citing Deposition of Suzette Smith*,

p. 58, ln. 23-p. 59, ln. 23; *Deposition of Candace Holloway*, p. 19, ln. 13-14; *Deposition of Ryan Holloway*, p. 54, ln. 11-14 and p. 48, ln. 3-7: RE. 31). Whether or not the accident scene was illuminated is directly relevant to whether or not Antonio Watson breached a duty by failing to warn vehicles of a maneuver lasting up to five minutes at a time when they might reasonably not see him without adequate warning as they approached unexpectedly stopped traffic. As stated, there is a genuine issue of material fact as to whether his vehicle was properly illuminated. The Court failed to account for the fact that the jury is to consider the weight given to evidence that Antonio Watson should have taken further action to warn oncoming motorists of his maneuver under the circumstances OR whether he was reckless in performing the maneuver.

In the alternative and in addition, the fact that it was dark leading to the accident scene raises a genuine issue of material fact as to whether Watson should have crossed traffic for up to five minutes under circumstances when other motorists might not have easily seen him and might have come rapidly from those obviously dark areas. It is a jury question as to whether crossing traffic for up to five minutes under reduced lighting conditions creates a dangerous condition in violation of the law when considering the roadway is heavily travelled and others might be approaching rapidly from a dark area.

Breach of duty is an issue to be decided by the fact finder once sufficient evidence has presented a negligence case. *American Nat. Ins. Co. v. Hogue*, 749 So.2d 1254, 1259 (Miss. Ct. App. 2000); *Delahoussye v. Mary Mahoney's, Inc.*, 696 So.2d 689, 690 (Miss. 1997) (negligence is almost always an issue for the finder of fact to decide except in the clearest cases); *Presswood v. Cook*, 658 So.2d 859, 862 (Miss. 1995)(the question of negligence is determined by the fact finder); *Caruso v. Picayune Pizza Hut, Inc.*, 598

So.2d 770 (Miss. 1992)(where the facts are disputed, negligence is an issue for the fact finder); McIntosh v. Deas, 501 So.2d 367 (Miss. 1987)(where the facts are undisputed and where reasonable minds may reach different conclusions, negligence is a question for the finder of fact).

d. Defendant violated duties defined by statute. In addition to failing to consider duties of reasonable care while in the roadway, the Trial Court failed to consider statutory duties which were owed and breached.

The Trial Court relied upon a conclusion that Mississippi Code Annotated § 63-3-805 “does not require the driver of a vehicle who has already entered onto an intersection with a through highway to yield the right-of-way to an approaching vehicle which has neither entered the intersection nor approached so closely thereto from said throughway as to constitute an immediate hazard.” Jones v. Carter, 192 Miss. 603-609, 7 So.2d 519 (1942). (R. at 412; RE. 10). The Supreme Court stated that “the case presented is extremely close on the question of whether the Defendant (driver crossing the road) was entitled to a preemptory instruction on his behalf.” Id.

Contrary to the Trial Court’s conclusions, Jones v. Carter does not draw a bright-line rule to all situations, nor does it preclude all duties owed in addition to statutory duties of § 63-3-805. Whether or not a Defendant is required to yield to right-of-way does not preclude examining the nature of the Defendant’s actions to determine whether they are in fact reasonable under Mississippi law when considering lighting conditions, the actions to warn oncoming traffic of the actions, and whether the amount of time in the roadway is unreasonable.

Having the right-of-way and whether or not there is the requirement to yield prior to entering the road does not absolve the driver of all responsibility to warn oncoming

motorists once the driver is in the path of traffic for an extended period of time under dangerous conditions. Genuine issues of material fact exist as to whether Defendant Watson took adequate actions to warn under conditions when visibility was limited and he crossed traffic for a very large amount of time when vehicles might be considered to be rapidly approaching. Whether or not he had the right-of-way does not negate his obligations to exercise his use of that right-of-way safely and reasonably under the circumstances. *See Above Discussion of Anderson, Donald, and McClure.*

In addition, if Watson's testimony that he crossed traffic for approximately ten seconds is taken as true, a reasonable inference may be drawn that since the accident occurred during that ten second period, he clearly saw or should have seen the vehicles driven by Smith and Candace prior to performing the maneuver and failed to yield the right of way. (R. at 334,345 *citing Deposition of Antonio Watson*, p. 31, lns. 10-17 and 4-21; RE. 37, 48). Watson further testified that up to four vehicles yielded to him while he performed the maneuver lasting only ten seconds. *Id.*; *See Also*, R. at 336 *citing Deposition of Antonio Watson* p. 8, ln, 16-p. 9, ln. 1 and p. 12, ln 5-8; RE. 39). A genuine issue of material fact exists as to whether or not he in fact was relieved of his duties given vehicles (potentially including but not limited to Plaintiff's) had approached so closely as to constitute an immediate hazard he should reasonably have seen. If the accident occurred within that short ten second period, then a reasonable inference may be drawn that vehicles, including but not limited to Plaintiff's, approached so closely prior to him entering the road so as to constitute an immediate hazard in violation of Mississippi statutory law therefore implicating duties owed by Watson. Watson testified that he had the right of way because no traffic was coming at the time he blocked the

highway but further admitted that he did not stop to observe traffic for any significant length of time. (R. at 345 citing *Deposition of Antonio Watson*, p. 29, ln. 21-p. 30, ln. 7 and p. 101, ln. 18-p. 102, ln. 7; RE. 48). The Trial Court was in error to ignore Watson's account that he crossed traffic for ten seconds in conjunction with other facts tending to indicate that multiple vehicles (including Plaintiff's) came to a stop very quickly during that time such that they were immediate hazards he should have seen and yielded to prior to entering the roadway in violation of Mississippi Code Annotated § 63-3-805.

We cannot assume, based on Watson's testimony indicating the accident occurred in a few short seconds, while multiple vehicles came to the scene that vehicles had not approached so closely prior to his maneuver, so as to constitute an immediate hazard implicating a duty to yield. The question is for the jury. A genuine issue of material fact exists as to whether he should have yielded to an immediate hazard based on his statutory duty to yield to vehicles approaching so closely as to constitute an immediate hazard. A genuine issue of material fact exists.

In the alternative, if, based on the testimony of Candace and Ryan Holloway, Watson blocked traffic for approximately three to five minutes, he had significant additional amount of time to view both the traffic, and the vehicles able to stop. He should have had adequate time to see that he significantly obstructed traffic and failed to exercise reasonable care towards oncoming vehicles in reckless violation of law. (R. at 345 citing *Deposition of Antonio Watson*, p. 31, ln. 4-21; RE.48). Antonio Watson admitted and acknowledged that a vehicle stopped in the roadway at night creates a dangerous condition if it doesn't have any warning. (R. at 346 citing *Deposition of Antonio Watson*, p. 122, ln. 16-19; RE. 49). Watson, by his own testimony, knew and

such character and done is such a situation that by the usual course of events some injury, not necessarily the particular injury would result). A jury question exists as to whether Watson violated Mississippi Code Annotated § 63-3-807 by failing to yield the right-of-way to Ms. Smith and Candace. The record evidence is clear that Candace and Smith had the right of way prior to the collision since there were no traffic signals to hinder travel in a direct course. (R. at 344; RE. 47).

Miss. Code Ann. § 63-3-903 (1972) specifically requires that no person should leave their vehicle standing upon a main traveled part of a highway when it is practical to stop, park, or leave the vehicle off the said highway. A genuine issue of material fact exists as to whether Watson was reasonable when he left his vehicle within the path of traffic for up to five minutes at a time when visibility was limited. It was dark leading up to the accident scene on a well-traveled highway. A reasonably prudent person should have expected that drivers would have been coming rapidly from dimly lit areas onto the scene and that crossing traffic for up to five minutes at a location where traffic would not usually be obstructed constituted an immediate hazard and a breach of a duty. Further, Watson had permission to use the Yuppy Puppy parking lot and was not required to use the roadway for his maneuver. (R. at 362-363, 404; RE. 65-66, 107). In addition, Watson's duty to operate his vehicle in a careful and reasonably prudent manner required him to consider relevant circumstances such as the traffic on the roadway in addition to the other factors considered by Mississippi law. Anderson v. Eagle Motor Lines, 423 F.2d 81 (1970). *See Also*, Miss. Code Ann. §63-3-1213 (1972). Watson was required not to operate his vehicle in a reckless manner either. Miss. Code Ann. §63-3-1201 (1972). Watson instead crossed traffic at a time when visibility was limited under the

circumstances stated above and he was arguably reckless in his breaches. A genuine issue of material fact exists as to whether his vehicle was properly illuminated, whether he took adequate actions to warn (if any) and whether he should have waited before crossing given a duty to yield to vehicles traveling so closely so as to constitute an immediate hazard. Regardless of statutory duties owed, the above factors should have properly been considering in evaluating a duty of reasonable care generally. Donald v. Amoco Production Co., 735 So. 2d 161,175 (Miss. 1999) (Standard of Care applicable in cases of alleged negligent conduct is whether the party charged with negligence acted as a reasonable and prudent person would have under the same or similar circumstances).

Contrary to the Trial Court's assumption, these statutory duties owed to the Plaintiff were not negated just because multiple vehicles had seen, stopped and avoided the Defendant's truck thereby automatically giving the Defendant the right-of-way and implicating absolutely no duty owed to the Plaintiff. (R. at 415; RE. 13). The Trial Court also erroneously relied upon an assumption that the Defendant's vehicle was properly illuminated and an erroneous assumption Plaintiff argued it was properly illuminated, both of which are unsupported by the record. *See, Above*. (R. at 414; RE. 12).

The Trial Court concluded "Whether the Defendant's truck was parked in the road for ten seconds or five minutes matters not; this is not a material fact. That other vehicles had seen Defendant's truck and had either slowed or stopped to allow the Defendant to proceed with his backing clearly shows the Defendant's truck was visible and had entered the through highway in such a manner as Defendants truck now had the right-of-way. At this point Defendant had no duty to yield to Plaintiff Smith and breached no duty." (R. at 414; RE.12). The Trial Court's analysis completely ignores examining the length of time

Watson left his vehicle standing on Highway 82 in relation to the fact that traffic would not have been obstructed dangerously if not for his actions. Miss. Code Ann. §63-3-903 (1972) mandates that no person shall leave their vehicle standing on a main traveled part of a highway under circumstances analogous to the present case.

Genuine issues of material fact remain as to the conditions created by Defendant reasonably and foreseeably resulting in the Plaintiff colliding with a vehicle which would not have otherwise been stopped if not for Defendant's dangerous maneuver. In addition, genuine issues of material fact exist as to the duties owed by Defendant, and whether he breached them in violation of Mississippi law.

e. Defendant was the proximate cause of Plaintiff's injuries.

The Trial Court made an unfounded conclusion based on limited information that the Plaintiff failed to raise a genuine issue of material fact as to proximate cause. The Court relied on the fact that Plaintiff rear-ended another vehicle while allegedly traveling 57 miles per hour in a 45 mile per hour zone, and that she admitted she never saw the vehicle until the point of collision. (R. at 415; RE. 13). The Trial Court thereafter summarily concluded "Plaintiff failed to create an issue of material fact as to how Defendants' actions were the proximate cause of her accident and her injuries." Paragraph 39 of the Court's decision addresses causation as well. (R. at 414; RE. 12). The Trial Court claims Plaintiff failed to raise a genuine issue of proximate cause because Plaintiff admitted she did not see the Holloway's vehicle or the Defendant's truck. The Court relied on the conclusion that both Holloway and her passengers testified that the brake lights were on and emergency flashers were on. Finally, the Court erroneously concluded that the Defendant's truck was properly equipped with lighting and reflective

tape yet there is a genuine issue of material fact as to whether that lighting was in effect or actually working at the time of the collision. (R. at 414; RE.12). For reasons stated above, the Trial Court should not have based its decision on a conclusion Watson was properly illuminate, or that Plaintiff ever argued it was. The Trial Court erred in failing to consider material facts regarding the operation of the Defendant's vehicle within a heavily travelled roadway, at night, for an extended amount of time arguably without adequate warning.

The Trial Court was incorrect to rely upon the fact that the Plaintiff Smith rear-ended the Holloway vehicle. This is not automatically conclusive of negligence. (R. at 414-415; RE. 12-13). Even if the Court were to determine that Smith violated Miss. Code Ann. § 63-3-619 in rear-ending another vehicle, it would not bar her recovery against Defendants under the doctrine of comparative negligence so long as there is evidence to suggest Watson was also negligent. Coho Res., Inc. v. Chapman, 913 So.2d 899, 911 (Miss. 2005); Jamison v. Barnes, 8 So.3d 238, 246 (Miss. Ct. App. 2008). In Jamison, Defendant driver filed a Motion for Summary Judgment alleging that Plaintiff was negligent *per se* for violating two provisions of the Uniform Highway Traffic Regulation Law. The Mississippi Court of Appeals specifically held that "*even if Jamison were negligent per se, it would not bar his recovery if he could show Barnes was also negligent, under the familiar Doctrine of Comparative Negligence.*"

The Trial Court was incorrect to rely on testimony that both Holloway and her passengers had brake lights on and emergency flashers on. These issues are in genuine dispute. Regardless of the testimony that the brake lights and emergency flashers were on, and that photos showed the taillights of the Holloway vehicle were visible, these

photographs were not taken at the moment the incident occurred and do not conclusively establish whether the lights were on. There is a material dispute as to whether the vehicle driven by Candace was properly illuminated. Smith testified she never saw any lights illuminated from that vehicle. (R. at 330 *citing Deposition of Suzette Smith*, p. 61, ln. 14-22, p. 134, ln. 4-7 *and* p. 150, ln. 8-11; RE: 33). A reasonable inference can be drawn that Candace at some point prior to the accident took her foot off the brake pedal since the car was in park and disengaged her brake lights. Further in support of this inference, Defendant Antonio Watson testified that the vehicle driven by Candace Holloway was in fact moving at the time of the accident. This would negate the conclusion that her brakes were on therefore signaling to an oncoming motorist that the vehicle was stopped. (R. at 329 *citing Deposition of Antonio Watson*, p. 21, ln. 3-p. 27, ln. 17; RE. 32). Whether or not Candace Holloway's vehicle signaled to oncoming motorists that she was in fact stopped is in significant material dispute such that the Court was incorrect to rely upon the testimony that the brakes were on. Even if, as the Trial Court pointed out, that photo showed the taillights of the Holloway vehicle to be visible, this does not indicate that the taillights in fact indicated the vehicle was stopped as would be shown by the brake lights being engaged. (R. at 414; RE.12). Rapidly travelling vehicles at night might not easily determine a vehicle is stopped if there are no brake lights engaged. The Court was incorrect to rely upon the above conclusions. The Trial Court did not properly evaluate the reasonableness of Watson's actions in light of the fact vehicles might not be easily seen on the road. It is further irrelevant to Defendant's responsibility that other vehicles had stopped or had clearly begun to go around Defendant's truck for reasons discussed above. (The fact that other motorists are able to avoid a collision does not conclusively

establish that a Defendant is not negligent with regard to an injured Plaintiff. While some may avoid dangerous situation creating negligent risk, that does not absolve a tortfeasor of all responsibility his negligence affecting all other).

Proximate cause is the “cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred.” Griffin v. Harkey, 215 So.2d 866, 868 (Miss. 1968). Negligence which puts in motion the agency by which or through which the injuries are inflicted is the proximate cause of those injuries. Titus v. Williams, 844 So.2d 459, 456 (Miss. 2003). An essential part of a personal injury claim is to demonstrate, not only the extent of the injury, but that the negligence of the Defendant was the proximate cause of the injury. Donald v. Amoco Prod. Co., 735 So.2d 161, 174 (Miss. 1999). Proximate cause exists where there is foreseeability and cause in fact. Davis Christian Brotherhood Homes of Jackson, Mississippi, Inc., 957 So.2d 390, 404 (Miss. App. 2007). Cause in fact is established where the act and omission was a substantial factor in bringing about the injury and without it the harm would not have occurred. Johnson v. Alcorn State University, 929 So. 2d 398, 411 (Miss. App. 2006). To be held liable, a person need not be the sole cause of the injury. It is sufficient that her negligence concurring with one or more efficient causes is the proximate cause of the injury. Foster v. Bass, 575 So.2d 867, 992 (Miss. 1990). Causation is generally determined by the jury. Busick v. St. John, 856 So.2d 304, 307 (Miss. 2003).

There is sufficient evidence to suggest that Watson was a proximate cause of the subject accident since the vehicle driven by Candace Holloway was stopped on Highway 82 because Watson had the highway blocked with his tractor trailer. This record evidence

is undisputed: Watson testified in his deposition that Candace was stopped to “give me room to back,” Candace Holloway testified that she stopped for the sole purpose of allowing Watson to complete his traffic maneuver and the investigating officer, Jamee Kaczetow, determined, after conducting her investigation, that Candace was stopped in the highway because Watson was backing into the Yuppy Puppy. (R. at 349 *citing Deposition of Antonio Watson*, p. 30, ln. 20-25, p. 79, ln. 15-20; *Deposition of Candace Holloway*, p. 14, ln. 10-17; *Deposition of Jamee Kaczetow*, p. 26, ln. 11-18; RE. 52).

Furthermore, Jamee Kaczetow, after completing her investigation, determined that Watson “*was the one that actually caused the victims to have the accident.*” (R. at 349 *citing Deposition of Jamee Kaczetow*, p. 18, ln. 25-p. 19, ln. 2; RE. 52). Watson admitted to Officer Kaczetow that he obstructed traffic in violation of Mississippi law and as such, she issued him a citation for obstructing traffic on the night of the accident. *Id.* at p. 38, ln. 5-13, p. 54, ln. 5-7.

Watson’s actions clearly put in motion the agency by which the injuries were inflicted. Watson blocked traffic for a significant amount of time when visibility was limited and it might reasonably be expected that vehicles would be approaching rapidly from dimly lit areas. Those vehicles would not have expected to stop except for Watson’s actions. The oncoming traffic had no reason to stop because there was no stop signal or traffic direction requiring them to stop. His actions required the vehicles to stop and set in motion a condition whereby the path of traffic was completely interrupted for a significant amount of time at night. A genuine issue of material fact exists as to whether his actions were reasonable and whether he should reasonably have foreseen that vehicles might be traveling rapidly through dimly lit areas and come upon the scene without

adequate time to stop. There is no foundation for the conclusion that because some vehicles had stopped, Watson could not have been the proximate cause of injuries. Just because some avoided injury, does not relieve him of all responsibility to all others.

It is abundantly clear that Watson's actions caused the Holloway vehicle to be stopped in the highway for up to five minutes which created an immediate hazard. There is no indication the path of heavily travelled, rapidly approaching traffic would have ever been stopped if not for Watson's actions. All vehicles stopped because of what he was doing. The Trial Court's reasoning improperly ignores that it would be completely illogical to assume any of the vehicles would have stopped if not for Watson's actions. It is clear that the negligent actions of Watson were a proximate cause to the subject accident by all reasonable conclusions. This assertion is further supported by Watson's deposition testimony. When asked about the cause of the accident he acknowledged that Candace was stopped in the roadway because of his actions and knew of no other reasons her vehicle would have been hit but for the fact she was stopped in the roadway; it was reasonably foreseeable vehicles would be hit due to 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. at 349-350; RE. 52-53) citing *Deposition of Antonio Watson*, p. 80, ln. 17-p. 81, ln. 4.

Consistent with Busick, a case that stands for the proposition that causation is generally

determined by the jury, the question of causation should be presented to the jury. Busick v. St. John, 856 So.2d 304, 307 (Miss. 2003).

This argument is also supported by U.S. Industries, Inc. v. McClure Furniture Company of Eupora, 371 So.2d 391, 393 (Miss. 1979), wherein the Mississippi Supreme court held that when the Defendant backed his truck across a much traveled highway at a time when it was dark without making any attempt to flag or warn traffic on the highway and ultimately caused damage, a verdict for the Defendant would be against the overwhelming weight of the evidence. In Choctaw Maid Farms, Inc. v. Hailey, 822 So.2d 911 (Miss. 2002), the Mississippi Supreme Court upheld a directed verdict in favor of Plaintiff where tractor trailer driver blocked two lanes of traffic when visibility was impaired and Plaintiff ran into the rig. The jury found that Defendant caused the accident by taking up both lanes of traffic when visibility was severely impaired and the Supreme Court upheld the finding of the jury.

Hailey and McClure Furniture make it clear that there is sufficient evidence to submit the issue of causation to the jury since Watson blocked the lanes of traffic on Highway 82 at a time when visibility was impaired thereby causing Smith's injuries. It is undisputed she was travelling forward along the highway and did not expect to stop for any reason except for the circumstances caused by Watson's actions.

In further support of Plaintiff's argument that Watson's actions proximately caused injuries, Watson clearly created a dangerous condition. Ryan Holloway, by his own testimony acknowledged that Watson created a dangerous situation and an immediate hazard which might directly and foreseeably result in a collision. He stated he was uncomfortable sitting there at a long stand still in the middle of the road, and when

asked whether he felt someone may hit him prior to the collision he indicated, "Yes. That's why I asked my wife to put the hazard lights on." (R. at 347 citing *Deposition of Ryan Holloway*, p. 51, ln. 13-16; RE. 50). It is clear to a reasonable person that a long-lasting maneuver which stops traffic that would otherwise flow rapidly and unobstructed, might directly and proximately result in any collision arising from fact that an oncoming motorist did not expect to suddenly stop. There is no other reason Ms. Smith would have stopped except for the condition created by Antonio Watson which Ryan Holloway also reasonably expected might result in other vehicles coming upon the scene and colliding with stopped vehicles. Ryan Holloway supports that Watson violated duties of reasonable care to operate his vehicle in a reasonably prudent manner under the circumstances in addition to the other statutory duties violated.

Defendants, in error, asserted that "*The Holloway vehicle (and other vehicles) stopped safely, thereby breaking any sequence of events and/or causal connection to the TWT vehicle and Smith.*" Following this reasoning, Defendants have alleged the actions of Candace act as a superseding intervening cause that would break the chain of causation. This argument is irrelevant since the Mississippi Supreme Court has repeatedly held that "the question of superseding intervening cause is so inextricably tied to causation, it is difficult to imagine a circumstance where such issue would not be one for the trier of fact." O'Cain v. Harvey Freeman & Sons, Inc., 603 So. 2d 824, 830 (Miss. 1991). As such, the issue of superseding, intervening causation, if applicable, is one to be considered by the jury.

In sum, considering the fact that Smith had the right of way, there were no traffic signals to hinder travel in a direct course, that the vehicles were clearly stopped due to

Watson's actions, and that fault was attributed to Watson by the investigating officer, it is clear that the issue of causation should be submitted to the jury.

Watson's actions were the proximate cause of Plaintiff's injuries. He caused the Holloway vehicle to be stopped for up to five minutes which created an immediate hazard therefore rendering him the proximate cause to the collision. He testified he knew of no other reason aside from his actions that the Holloway vehicle being required to stop in the middle of the roadway. (R. at 350 *citing Deposition of Antonio Watson*, p. 80, ln. 17-p. 81, ln. 4; RE. 53). Plaintiff argues the Holloway vehicle did not stop safely given Watson's actions which created a dangerous condition resulting in the need for the Holloway vehicle to stop in the first place; the Holloway vehicle was part of the dangerous condition created by Antonio Watson at the moment Watson's actions required it to stop while interrupting the flow of traffic when others might rapidly approach.

CONCLUSION

The Trial Court erred in finding no genuine issue of material fact as to whether Defendant owed or breached duties to Plaintiff including statutory duties and others owed. A genuine issue of material fact exists as to whether Defendant crossed traffic up to five minutes under conditions when visibility was limited, whether he took adequate actions (if any) to warn oncoming motorists, whether his vehicle was properly illuminated, and whether his actions were reasonable when considering vehicles were reasonably expected to rapidly travel in dark areas without interruption. His actions occurred unexpectedly in the path of traffic. The vehicles would not reasonably have

stopped in the middle of traffic where there was no traffic signal, except for Defendant Watson's actions.

Defendant Watson's actions created a dangerous condition which the arguably stopped vehicles became a part of posing danger to oncoming motorists. The Court improperly focused upon whether Ms. Smith was comparatively negligent by speeding. It improperly focused on a claim that other vehicles had stopped in order to find no genuine issue of material fact existed, and in finding there could be no duty breached. The Trial Court erred in concluding Watson could owe no duties because no vehicles had travelled too closely so as to constitute an immediate hazard requiring him to yield. Taking his account that he crossed traffic for 10 seconds, vehicles arguably travelled so closely as to constitute an immediate hazard he should have yielded to them.

Without Plaintiff admitting negligence, whether or not Ms. Smith was speeding may be relevant to the Court's determination of the issue of comparative negligence but does not preclude the jury from determining whether Defendant's actions were reasonable under the circumstances. The Court was incorrect to rely upon a conclusion that statutory law did not require Defendant Watson to yield to oncoming traffic without considering whether Defendant's actions were done so with reasonable care when considering all factors Mississippi Courts have been bound to consider. Whether or not Defendant Watson had a duty to yield to oncoming vehicles did not negate all other duties and still requires examining whether his actions were reasonably safe. For the above and foregoing reasons, this Honorable Court should reverse the granting of Defendant's Motion for Summary Judgment and remand this matter for trial. The Trial Court did not Grant or determine Defendant's Motion for Summary Judgment on

Punitive damages, and no ruling on Punitive damages has been appealed, yet in the event it is found the issue of Punitive damages has been determined and is properly before this Court, Plaintiff respectfully submits there is a genuine issue of material fact as to whether Defendant's actions were wanton, reckless, and in willful disregard so as to preserve her claim for Punitive damages. She reserves the right to further address this issue in a Reply Brief as needed. Nothing in this Brief shall be construed as placing the issue of Punitive damages before this Court or consenting to this Court hearing the issue when it has not been ruled upon or determined. Plaintiff prays this matter be reversed and remanded for trial.

CERTIFICATE OF SERVICE

I, Michael R. Brown, attorney for the Appellants, have this day this day served a true and correct copy of the above and foregoing:

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DATED this the 22 day of July, 2010.



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