IN THE SUPREME COURT OF MISSISSIPPI

No. 2009-CA-01677

JAMES M. KITCHENS **APPELLANT**

VS.

DIRTWORKS, INC. **APPELLEE**

APPEAL FROM THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI
SECOND JUDICIAL DISTRICT

REPLY BRIEF OF THE APPELLANT
(ORAL ARGUMENT REQUESTED)

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STATEMENT REGARDING ORAL ARGUMENT

This appeal involves a relatively complex factual record, and Appellant believes that oral argument will provide an opportunity for any clarification or explanation of the factual record which the Court might deem appropriate.

REBUTTAL ARGUMENT

Dirtworks, Inc. argues that the circuit court was correct in granting summary judgment in its favor for two basic reasons. First, Dirtworks contends that it would be liable for negligently entrusting the forklift to DK Aggregates only if Dirtworks had knowledge at the time it "subleased" the forklift to DK Aggregates that DK Aggregates would put the machine to an unreasonably dangerous use. In other words, according to Dirtworks, any knowledge it gained after turning control of the forklift over to DK Aggregates would be immaterial to the negligent entrustment issue. Second, Dirtworks' president Murray Moran denied that he knew DK Aggregates was using the forklift in an unreasonably dangerous manner by lifting personnel. DK Aggregates former president Richard Anthony also denied that Dirtworks would have known that the forklift would be used to lift personnel. According to Dirtworks, these self-serving statements by these corporate officers establish conclusively that Dirtworks lacked knowledge of unreasonably dangerous use necessary to support a negligent entrustment claim.

As will be demonstrated herein, the Court should reject both aspects of Dirtworks' argument. The law does not limit negligent entrustment to the initial act of entrustment of a potentially dangerous instrumentality. When Dirtworks was aware or should have become aware of the dangerous use to which DK Aggregates had put the forklift, it was under a duty to regain control of the forklift or otherwise ensure that DK Aggregates did not continue to misuse the forklift. Despite Moran's and Anthony's denials, other evidence in the record clearly demonstrates that Dirtworks should have been aware of DK Aggregates misuse of the forklift through Murray Moran's presence at the job site and domination of both Dirtworks and DK Aggregates in general.

A. Dirtworks had a continuing obligation to prevent DK Aggregates' unreasonably dangerous use of the forklift even after the initial act of entrustment.

As set forth in Plaintiff's principal brief, the Court of Appeals has enumerated the elements of a negligent entrustment claim as follows:

> "(1) that the defendant supplied a third party with the chattel in question for the use of the third party; (2) that the supplier of the chattel knew or should have known that the third party would use the chattel in a manner involving an unreasonable risk of harm; and (3) that harm resulted from the use of the chattel."

Bullock Bros. Trucking Co. v. Carley, 930 So. 2d 1259, 1262 (Miss. Ct. App. 2005) (citing Restatement (Second) of Torts § 390). The actual restatement section, as recited by this Court, states:

> One who supplies directly or through a third person a chattel for use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.

Restatement (Second) of Torts § 390 (quoted in Sligh v. First Nat. Bank of Holmes County, 735 So. 2d 963, 969 (Miss. 1999)).

Dirtworks argues that a defendant's knowledge at the initial moment of entrustment is all that matters -- regardless of subsequently obtained knowledge. Such an argument can only be based on an unreasonable reading of the definitions of negligent entrustment set forth above. Neither formulation of negligent entrustment absolves an entrustor of liability if he or she makes no effort to regain control of a dangerous instrumentality once he or she becomes aware that the party to whom it was entrusted is putting the instrumentality to a dangerous use.

The Supreme Court of Colorado has directly addressed this issue in case applying Restatement (Second) of Torts § 390. Casebolt v. Cowan, 829 P.2d 352 (Colo.1992). In that

case, the defendant Cowan entrusted a vehicle to Casebolt, who was killed in a collision while operating Cowan's vehicle while intoxicated. Casebolt, 829 P.2d at 354-55. The record established that after Cowan entrusted the vehicle to Casebolt, Cowan became aware that Casebolt was drinking excessively. Id. at 354. However, "Cowan did not suggest that Casebolt stop drinking and took no action to revoke or condition his permission to use the car." Id. at 355. The court noted "the plaintiffs do not assert that Cowan was negligent when he initially permitted Casebolt to use the vehicle." Id. at 360.

Regarding Restatement § 390, the Colorado court observed, "The rationale underlying imposition of negligent entrustment liability on suppliers of chattels is that one has a duty not to supply a chattel to another who is likely to misuse it in a manner causing unreasonable risk of physical harm to the entrustee or others." Casebolt, 829 P.2d at 360. Recognizing that this duty extends beyond that point of the initial act of entrustment, the court stated "The same logic supports **a duty to take reasonable action to terminate the entrustment if the entrustor acquires information that such an unreasonable risk exists or has come into being after the entrustment** and the entrustor has the legal right and ability to end the entrustment.." Id. (emphasis added). The court concluded that "Cowan had a duty to take reasonable action to terminate the entrustment before leaving [Casebolt's company] if by that time he possessed knowledge that Casebolt was likely to use the vehicle in a manner involving unreasonable risk of physical harm to himself or others." Id. at 361.

This Court should follow the precedent of the Colorado Supreme Court and find that the doctrine of negligent entrustment imposes a continuing obligation on the entrusting party beyond the initial instance of entrustment. As discussed in the next section, Dirtworks should have known both from its knowledge beforehand and its knowledge gained after supplying the forklift to DK Aggregates that the latter company was going to and did use the forklift in an

unreasonably dangerous manner. At the point Dirtworks became aware (or should have become aware) that DK Aggregates was actually misusing the forklift, it should have taken steps to terminate the entrustment or otherwise ensure that DK Aggregates used the machine properly.

B. Despite the testimony of Murray Moran and Richard Anthony, Dirtworks should have known that DK Aggregates was using the forklift in unreasonably dangerous manner.

Dirtworks argues that the circuit court was correct in granting summary judgment on the negligent entrustment issue because Murray Moran (Dirtworks' president) denied that he knew that DK Aggregates was using the forklift in a dangerous manner and Richard Anthony (DK Aggregates' president) denied that Dirtworks would have known how DK Aggregates would use the forklift. Without a doubt, these corporate officers testified to that effect. However, the circuit court appears to have disregarded other evidence in record demonstrating that Dirtworks should have known that DK Aggregates was using the forklift improperly. Plaintiff discussed these facts in detail in his principal brief, but to provide the Court a summary, the following pertinent facts are in the record:

- Murray Moran is the president of Dirtworks, Inc. and is a principal in DK Aggregates, LLC. (R. at 359; 401-402).
- Mr. Moran conducts the day-to-day operations of Dirtworks. (R. at 413-414).
- At the time of the accident, Richard Anthony controlled the day-to-day operations of DK Aggregates. (R. at 414).
- Murray Moran himself negotiated the contract under which Plaintiff's employer began work at DK Aggregates' site. (R. at 407-408, 431).
- Murray Moran personally made the decision to put Plaintiff and his co-workers to work on the sand and gravel hopper on which Plaintiff was working when he was injured. (R. at 425).
- According to the Plaintiff's boss, "And when we went out there to do these jobs on the dredge and then ultimately on the hopper, [Murray Moran] seemed to be the main guy." (R. at 442).

- Plaintiff's employer's foreman had discussed the job on-site with Murray Moran several times. (R. at 447-448).

- Dirtworks leased the forklift from Puckett Rental and in turn subleased it to DK Aggregates for "use in building a sand and gravel hopper located on its premises." (R. at 360; 416-417).

- DK Aggregates' foreman Leeroy Rogers provided the Pearl River employees – including the Plaintiff – an all terrain extendable-boom forklift and basket for use in accessing the dead screen hopper (which was 20 to 25 feet tall). (R. at 672, 683, 695).

- Mr. Rogers testified that Murray Moran was his boss. (R. at 426).

- DK Aggregates' employees themselves had previously used the forklift and basket to access their work at heights. (R. at 426,429, 437-438).

- The basket attached to the forklift had been purchased by Richard Anthony and Murray Moran at auction. (R. at 429-30).

These facts establish that Murray Moran oversaw the work of the Plaintiff and his co-workers on the hopper, knew that the work would require access to a 20 to 25 height and had been involved in the purchase of the work basket which was being used with the forklift to the lift the men.

Murray Moran's and Richard Anthony's denial of knowledge on Dirtworks' part as to the use of the forklift cannot in itself be a basis for summary judgment – particularly where such testimony is at odds with other direct and circumstantial evidence in the record. "All motions for summary judgment should be viewed with great skepticism" and the trial court should err on the side of denying the motion. Ratliff v. Ratliff, 500 So. 2d 981, 981 (Miss. 1986). Self-serving testimony such as that of Murray Moran and Richard Anthony "cannot form the basis of summary judgment evidence". Burton v. Choctaw County, 730 So. 2d 1, 9 (Miss. 1997). Even if Plaintiff's evidence presented in opposition to the motion for summary judgment were entirely circumstantial, a fact issue preventing judgment as a matter of law would nevertheless be present. See Quay v. Crawford, 788 So. 2d 76, 81 (Miss. Ct. App. 2001) ("we are not aware of

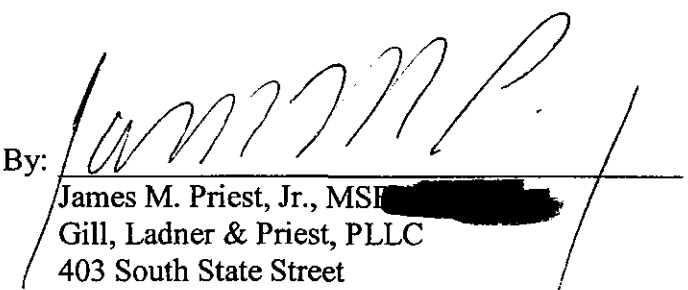
any case law which holds that circumstantial evidence is insufficient to raise a question of fact in the summary judgment context.").

CONCLUSION

The circuit court granted summary judgment to Dirtworks on the sole basis that Dirtworks lacked knowledge that DK Aggregates would use the forklift in an unreasonably dangerous manner likely to cause harm to the Plaintiff and others. As demonstrated herein and in the Plaintiff's principal brief, Dirtworks' knowledge of the proposed and actual use of the forklift is at least subject to factual disputes. Therefore, the Court should reverse the judgment of the circuit court and remand this case for trial.

Respectfully Submitted,

JAMES M. KITCHENS

By: 

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CERTIFICATE OF SERVICE

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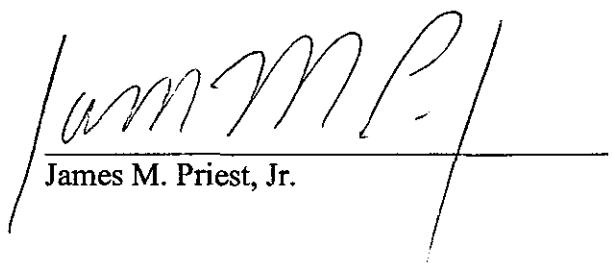

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