IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BRITTANY REEVES	**APPELLANT**
VS.	**NO. 2010-TS-01429**
JOHN WAYMAN SOWELL	**APPELLEE**

BRIEF OF THE APPELLEE

On Appeal from the Circuit Court of Madison County, Mississippi

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. John Wayman Sowell, Appellee

2. J. Tucker Mitchell and Matthew T. Biggers, and Mitchell Day Health Law Firm, PLLC, attorneys for Appellee

3. Brittany Reeves (Rainey), Appellant

4. Walter H. Boone and Edderek L. Cole, and the law firm of Forman Perry Watkins Krutz & Tardy, LLP, attorneys for Appellant

5. Caryn Milner and the law firm of Copeland, Cook, Taylor & Bush, P.A., formerly attorneys for Appellee

6. Mississippi Farm Bureau Casualty Insurance Company

7. Vandy James Sowell

8. The Wayman and Bettie Sue Sowell Family Limited Partnership, No. 1

9. The Wayman and Bettie Sue Sowell Family Limited Partnership, No. 2

Attorney of Record for John Wayman Sowell, Appellee

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1. Whether the trial court properly granted summary judgment to John Wayman Sowell.

STATEMENT OF THE CASE

Appellee John Wayman Sowell ("Wayman Sowell") asks this Court to affirm the Madison County Circuit Court's grant of summary judgment in his favor. On August 23, 2006, Plaintiff Brittany Reeves, later Brittany Rainey, ("Rainey") was involved in an automobile accident with Vandy Sowell ("Vandy"). (R. at 18; R.E. A). At the time of the accident, Rainey was a passenger in a police car driven by Deputy John Harris ("Harris") of the Madison County Sheriff's Department.[1] (R. at 18; R.E. A). The accident occurred on Mississippi Highway 22 near Canton, Mississippi. (R. at 50; R.E. B) (R. at 477-78; R.E. C). At the time of the accident, Vandy was driving his own vehicle and was towing his unlighted farm trailer. (R. at 485; R.E. C). Harris, with Rainey as a passenger, approached Vandy from behind and collided with Vandy's trailer.

Rainey and Harris filed a Complaint in this matter on November 2, 2006 (less than three months after the accident), suing Vandy and claiming he was negligent because his farm trailer did not have operating lights. (R. at 18-20; R.E. A). Harris settled his lawsuit against Vandy for $25,000. (R. at 67-77; R. at 84-88). In late 2008, Rainey settled her lawsuit against Vandy for $100,000. (R. at 180-183).

On December 30, 2008, Rainey amended her complaint to add as defendants: (1) John Wayman Sowell, Vandy's uncle and the individual who transferred the trailer to Vandy; and (2) two partnerships, The Wayman and Bettie Sue Sowell Family Limited Partnerships Nos. 1 and 2. (R. at 102; R.E. D). In her Amended Complaint, Rainey asserted two causes of action against Wayman Sowell, "product liability"; and "negligence." (R. at 101-102; R.E. D).

On May 3, 2010, Wayman Sowell filed his Motion for Summary Judgment (R. at 463-466)

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[1] There are two differing accounts as to why Rainey was riding with Harris.

and accompanying Memorandum in support of that motion (R. at 633-650; R.E. E). Rainey responded to the Motion for Summary Judgment on May 24, 2010. (R. at 656-676). Wayman Sowell filed his Rebuttal to Rainey's Response on June 20, 2010. (R. at 687-708; R.E. F).

The Circuit Court of Madison County ("the trial court") heard oral argument on Wayman Sowell's Motion on July 26, 2010. (Tr. at 1-10; R.E. G). The trial court granted summary judgment in favor of Wayman Sowell on July 28, 2010. (R. at 716; R.E. H). The trial court found that there was no issue of material fact that the trailer was owned by Vandy Sowell. (Tr. at 8; R.E. G). "For that reason, and all the reasons set forth in [Wayman Sowell's] motion, the motion for summary judgment [was] granted." (Tr. at 8; R.E. G). Rainey appealed the trial court's grant of summary judgment as to her negligence claim to this Court on August 26, 2010. (R. at 717). Rainey did not dispute or appeal from the trial court's summary judgment on her product liability claim. Appellant's Br., p. 8 n.2.

STANDARD OF REVIEW

The Mississippi Supreme Court employs a de novo standard of review in reviewing a lower court's grant of summary judgment. *Anglado v. Leaf River Forest Products*, 716 So. 2d 543, 547 (Miss. 1998).

> A motion for summary judgment challenges the very existence of legal sufficiency of the claim or defense to which it is addressed; in effect, the moving party takes the position that he is entitled to prevail as a matter of law because his opponent has no valid claim for relief or defense to the action.

Brent Towing Co., Inc. v. Scott Petroleum Corp., 735 So.2d 355 (Miss. 1999). This Court will consider all the evidence before the lower court in the light most favorable to the non-moving party. *Palmer v. Anderson Infirmary Benevolent Ass'n*, 656 So. 2d 790, 794 (Miss. 1995). "Mere allegations [made by the non-moving party] which do not reveal detailed and precise facts will not prevent an award of summary judgment." *Reynolds v. Amerada Hess Corp.*, 778 So.2d 759 (Miss. 2000).

SUMMARY OF THE ARGUMENT

The trial court properly granted summary judgment as to all claims brought by Rainey. Wayman Sowell owed no duty to Rainey or to the public. Existence of a legal duty is a question of law. If, as Rainey contends, the existence of a legal duty is based solely on foreseeability, then the question of whether a legal duty exists would always be a question of fact. Mississippi's law is clear that existence of a legal duty is a question of law to be decided by the court, not a jury.

The statutes Rainey relies on as evidence of a legal duty do not apply to Wayman Sowell. The plain language of the Mississippi statute that requires the installation of lights or lamps applies to persons who drive, move, or own the subject vehicle. Wayman Sowell did not drive, move, or own the trailer at issue at the time of the subject accident. Further, the statutory lighting requirements specifically exempt the subject farm trailer as an implement of husbandry. The subject trailer was adapted for agricultural use, namely transporting fuel and refueling farm machinery.

In addition, Mississippi law and the facts of the case do not support the acts of negligence Rainey alleged as to Wayman Sowell. Rainey's negligent entrustment claim must fail, as Wayman Sowell neither owned nor controlled the subject trailer at the time of the subject accident. Wayman Sowell's transfer of the subject trailer to his nephew Vandy extinguished any potential liability on Wayman Sowell's part relating to any alleged negligent entrustment of the subject trailer. Even assuming Wayman Sowell could somehow control the subject trailer despite Vandy's ownership of the trailer, Wayman Sowell cannot be liable for negligent entrustment of the trailer where, as here, the party who injured Rainey was the owner of the trailer.

Rainey has failed to cite any legal authority to show that Wayman Sowell can be liable to a third party, Rainey, for any alleged failure to warn Vandy of the lack of lighting on the trailer. Assuming the "failure to warn" theory applied to third parties, it would not apply in this case because

the alleged defect (absence of powered lighting and/or lamps) was open and obvious, negating any potential liability for a failure to warn.

Rainey's argument that Wayman Sowell failed to prevent use of the trailer on public roadways in its alleged dangerous condition also is without merit. No legal duty exists for a person who transfers a product to someone else to thereafter "take reasonable precautions" to prevent that person from using the product in different conditions. After transferring the trailer to Vandy Sowell, Wayman Sowell no longer had control over how, when and in what manner the trailer was used. If the Court adopts Plaintiff's argument, courts would be forced to impose infinite liability on people who sell items at garage sales, grandparents who pass down items to their grandchildren, and any person who gives an item to someone else.

The trial court properly granted summary judgment in favor of Wayman Sowell, and this Court should affirm that grant of summary judgment.

ARGUMENT

I. WAYMAN SOWELL HAD NO LEGAL DUTY TO RAINEY OR THE PUBLIC

The trial court properly granted summary judgment in favor of Wayman Sowell. Wayman Sowell owed no legal duty to Rainey or to the public regarding the subject trailer. Despite Rainey's best efforts to create a fact issue, existence of a legal duty is a question of law. The statutes Rainey relied on as creating a legal duty do not apply to Wayman Sowell, as he did not own the subject trailer at the time of the accident and was not moving the subject trailer at the time of the accident. Even if the statutes Rainey relied on apply to Wayman Sowell, the Mississippi Legislature has specifically exempted "implements of husbandry" such as the subject farm trailer from the requirements of those statutes. This Court should affirm the trial court's grant of summary judgment.

A. Existence of a Legal Duty is a Question of Law.

Whether Wayman Sowell owed a duty to Rainey or to the public is a question of law. In the trial court proceedings below, Rainey contended that whether a legal duty exists depends on foreseeability, and because foreseeability is a jury question, the trial court should have denied summary judgment. Mississippi law is clear that whether a legal duty exists is a question of law for the Court to decide. "To prevail in any type of negligence action, a plaintiff must first prove the existence of a duty." *Enterprise Leasing Co. South Cent., Inc. v. Bardin,* 8 So.3d 866, 868 (Miss. 2009)(citing *Laurel Yamaha, Inc. v. Freeman,* 956 So.2d 897, 904 (Miss.2007)). The Court stated that "the plaintiff must show (1) the existence of a duty 'to conform to a specific standard for the protection of others against the unreasonable risk of injury ' ". . . . *Id.* (quoting *Burnham v. Tabb,* 508 So.2d 1072, 1074 (Miss.1987) (emphasis in original)). The Court also has stated that " 'whether a duty exists in a negligence case is a question of law to be determined by the court.' " *Brown v. J.J.*

Ferguson Sand and Gravel Co., 858 So.2d 129, 131 (Miss.2003) (quoting *Belmont Homes, Inc. v. Stewart*, 792 So.2d 229, 232 (Miss.2001)).

Rainey contends that Wayman Sowell "was fully aware of the risks associated with driving the trailer at night" and that "Sowell should have refused Vandy access to the trailer at night, put lights on the trailer himself, or at least warned Vandy of the risks." Appellant's Br., p. 27. In essence, Rainey states that because Wayman Sowell could foresee an accident might occur if the trailer were used at night, that he had a duty to ensure that Vandy, an adult and the owner of the trailer, would never use the trailer at night. Rainey's contention is without merit. After transferring the trailer to Vandy Sowell, Wayman Sowell no longer had control over how, when, and in what manner the trailer was used. If the Court adopts Plaintiff's argument, courts would be forced to impose infinite liability on people who sell items at garage sales, grandparents who pass down items to their grandchildren, and any person who gives an item to someone else. There is no law to support such a duty.

If, as Rainey contends, the existence of a legal duty is based solely on foreseeability, then the question of whether a legal duty exists would always be a question of fact. Stated otherwise, in response to a dispositive motion on a lack of legal duty, the responding party can simply argue, "it was foreseeable" – thereby converting the issue into a fact issue. Rainey's contention is not supported by the law of Mississippi. To adopt Rainey's argument would be to disregard the numerous Mississippi cases dismissing lawsuits for a lack of legal duty.

In fact, in the *Rhaly* case cited by Rainey, the Mississippi Supreme Court agreed:

> While duty and causation both involve foreseeability, **duty is an issue of law**, and causation is generally a matter for the jury. Juries are not instructed in, nor do they engage in, consideration of the policy matters and the precedent which define the concept of duty. **This Court has held that the existence vel non of a duty of care is a question of law to be decided by the Court**.

Rhaly v. Waste Management of Mississippi, Inc., 43 So. 3d 509, 514 (Miss. Ct. App. 2010)(emphasis added).

Further, Rainey relies on *Jester v. Bailey*, 234 So. 2d 442 (Miss. 1960) and *Dent v. Luckett*, 135 So. 2d 840 (Miss. 1961) as authority showing the Wayman Sowell owed a duty to Rainey. Rainey's reliance on those cases is misplaced, as both cases are distinguishable from the instant case. In *Jester*, the plaintiff Bailey parked several trailers on the shoulder of a roadway. 234 So. 2d at 443. The trailers had no rear lights, signals, or reflectors. *Id.* Jester, the defendant, struck one of the trailers and pinned the plaintiff between them. *Id.* The trial court granted a directed verdict against Jester, finding that his negligence in colliding with the trailers was the sole proximate cause of the accident. *Id.* This Court reversed, finding that the jury should have been given an opportunity to consider whether Bailey was contributorily negligent in parking the unlit trailers on the shoulder of the roadway. *Id.* The Court in *Jester* does not discuss the existence of a duty, instead focusing on whether the jury should have considered whether Bailey's conduct in parking unlit trailers on the shoulder of the roadway was a proximate cause of Jester's injuries. In addition, *Jester* focuses on the actions of the person who actually parked the trailers on the shoulder of the roadway rather than on the person who sold the trailers to the tortfeasor. In the instant case, Vandy was pulling the subject trailer at the time of the accident. Wayman Sowell was not pulling the trailer at the time of the accident, and he did not cause Vandy to pull the trailer at the time of the accident. *Jester* does not support Rainey's contention the Wayman Sowell owed a duty to Rainey or to the public.

In *Dent*, a driver was injured after colliding with an allegedly unlighted cotton trailer at night. 135 So. 2d at 842. The parties presented conflicting testimony as to the presence or absence of lighting on the cotton trailer. *Id.* The Court found that whether the subject cotton trailer did or did

not have lights or reflectors was a question of fact for the consideration of the jury. *Id.* The presence or absence of lighting is not at issue in the instant case, and the absence of lighting on the trailer at issue is undisputed. *Dent* does not support Rainey's contention that Wayman Sowell had a duty to Rainey regarding the subject trailer.

Rainey's attempt to create a fact issue regarding whether a legal duty exists is without merit and contrary to Mississippi law.

B. The Statutes Rainey Relied on Do Not Apply to Wayman Sowell.

Rainey contended that Mississippi Code Annotated Sections 63-13-3, 63-7-13, 63-7-15, and 63-7-7 established Wayman Sowell's duty to her. Rainey argued that "the statute applies to Sowell" on page 9 of her Response to Wayman Sowell's Motion for Summary Judgment. Section 63-7-7 provides:

> It is a misdemeanor for any person to drive or move or for the owner to cause or knowingly permit to be driven or moved on any highway any vehicle or combination of vehicles which is in such unsafe condition as to endanger any person, or which does not contain those parts or is not at all times equipped with such lamps and other equipment in proper condition and adjustment as required in this chapter, or which is equipped in any manner in violation of this chapter, or for any person to do any act forbidden or fail to perform any act required under this chapter.

Miss. Code Ann. § 63-7-7. In her Response, Rainey interpreted the statute to mean, "If you manufacture, own, rent, lease, lend, entrust, or give a trailer to someone else and it doesn't have the required lights, you have violated your legal duty to those on the roadways." That interpretation is erroneous. The plain language of the statute only applies to persons who drive, move, or own the subject vehicle. Wayman Sowell did not drive, move, or own the trailer at issue. Rainey cites no legal authority to support her interpretation that Section 63-7-7 applies to persons beyond drivers, movers, or owners. No such authority exists. Therefore, Wayman Sowell did not owe a legal duty to Rainey or to the public.

C. The Statutory Lighting Requirements Relied on by Rainey Specifically Exempt the Subject Farm Trailer

Even assuming the statutes relied on by Rainey create a duty owed by Wayman Sowell to Rainey, Rainey's negligence claims must still fail because the subject farm trailer is exempt from the statutory lighting requirements. In Mississippi Code Annotated Section 63-7-9, the Mississippi Legislature specifically exempted certain classes of vehicles from statutory lighting requirements. That section provides, "Except as may otherwise be provided in this chapter, the provisions of this chapter with respect to equipment on vehicles shall not apply to implements of husbandry, road machinery, road rollers, or farm tractors." Miss. Code Ann. § 63-7-9.

The Mississippi Supreme Court, as recently as 2008, upheld this exemption as valid and enforceable as it pertains to implements of husbandry. This Court interpreted this precise exemption in the identical context of a claim for improper lighting on farm equipment. *See Jamison v. Barnes,* 8 So.3d 238, 246 (Miss. Ct. App. 2008). The court explained:

> This exemption extends to the lighting requirements of sections 63-7-11 and 63-7-13(3). *See Williams ex rel. Dixon v. Thude,* 180 Ariz. 531, 885 P.2d 1096, 1099-1100 (Ct. App.1994) (implements of husbandry exempted from lighting requirements); *See Liquid Fertilizer Co. v. Mock,* 92 Ga. App. 270, 88 S.E.2d 531, 532 (Ct. App.1955) (farm tractors exempted from lighting requirements unless the tractor falls under a Georgia-specific addition to the uniform act, which required tractors originally equipped with lights to use them); *Thomas v. Johnson,* 181 So.2d 487, 488-89 (La. Ct. App.1965) (implements of husbandry exempted from equipment requirements); *Bernhard v. Lincoln County,* 150 Mont. 557, 437 P.2d 377, 379 (1968) (road machinery exempted from lighting requirements); *Griffin Grocery Co. v. Logan,* 309 P.2d 1074, 1077 (Okla.1957) (road machinery exempted from lighting requirements); *Cook v. Caterpillar, Inc.,* 849 S.W.2d 434, 438-439 (Tex. App.1993) (road machinery exempted from turn signal requirement); *Western Packing Co. v. Visser,* 11 Wash. App. 149, 521 P.2d 939, 942-43 (1974) (implements of husbandry exempted from lighting requirements).

Id. Section 63-21-5(d) defines "implement of husbandry" to mean:

> . . . [E]very vehicle designed and adapted exclusively for agricultural, horticultural or livestock raising operations or for lifting or carrying an implement of husbandry

and in either case not subject to registration if used upon the highways.

Miss. Code Ann. § 63-21-5(d).

Wayman Sowell testified that the farm trailer "was made strictly to carry fuel to and from the field." (R. at 572, R.E. I). It had a diesel tank, air compressor and vise on it. (R. at 573; R.E. I). There is no question that Wayman Sowell "designed and adapted exclusively for agricultural, horticultural or livestock raising operations or for lifting or carrying an implement of husbandry and in either case not subject to registration if used upon the highways." As an "implement of husbandry," the farm trailer is specifically exempted from the lighting requirements relied on by Rainey. Accordingly, Rainey's claim must fail as Wayman Sowell had no legal duty to her or to the public.

The Legislature further expressed its desire to exempt farm trailers from the lighting requirements in enacting Mississippi Code Annotated Section 63-13-3, which provides:

> Operating unsafe vehicles; exceptions
>
> No person shall drive or move on any highway any motor vehicle, trailer, semitrailer or pole trailer, or any combination thereof, unless the equipment upon any and every said vehicle is in good working order and adjustment as required in this chapter, and said vehicle is in such safe mechanical condition as not to endanger the driver or other occupant or any person upon the highway. **This section shall not apply to** disabled vehicles being moved to a garage or service station by means of another vehicle, or to **farm trailers engaged in farm operations, or to any farm tractor, combine, cotton picker, semitrailer, pole trailer, or other agricultural or farming equipment or machinery, or any combination thereof, used primarily for agricultural purposes, and not normally used on the public highways of the state.** Moreover, pulpwood trucks or log trucks used exclusively during daylight hours shall not be required under the provisions of this chapter to have any lights in addition to headlights and taillights.

Miss. Code Ann. § 63-13-3.

The subject trailer fits squarely within the foregoing exemption. In consideration of the foregoing, the statute does not apply in this case because the subject farm trailer is specifically

exempted as an implement of husbandry and farm trailer.

In sum, Wayman Sowell had no legal duty to Plaintiff. There is no genuine issue of material fact on this element of Plaintiff's negligence claim. In fact, there is no proof whatsoever to support this element of Plaintiff's claim. In consideration of the foregoing, and given the absence of any proof on an essential element of Plaintiff's negligence claim, Wayman Sowell was entitled to judgment as a matter of law on Plaintiff's claim. *Maxwell v. Baptist Memorial Hospital-DeSoto, Inc.* 15 So.3d 427, 434 (Miss. Ct. App. 2008) ("[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.").

II. THE ACTS OF NEGLIGENCE RAINEY ALLEGED ARE NOT SUPPORTED BY MISSISSIPPI LAW OR THE FACTS OF THE CASE.

The five specific acts of negligence Rainey alleged as to Wayman Sowell are not actionable under Mississippi law. Rainey alleged Wayman Sowell was negligent in:

a. Manufacturing, constructing and devising the subject trailer without the required lights and/or reflectors when he knew, or should have known, that the trailer was unsafe in that condition;

b. Selling, lending, entrusting and/or giving the subject trailer to Vandy Sowell, when he knew, or should have known, that such trailer was unsafe;

c. Permitting, knowing and/or allowing the trailer to be used on the roadways in violation of Mississippi law;

d. Failing to warn Vandy Sowell of the defective and dangerous condition of the subject trailer; and

e. Failing to take reasonable precautions to ensure that the trailer was not used on the roadways in its dangerous condition, or at the very least, not used at dusk or night in its dangerous condition.

(R. at 102; R.E. D). Rainey has since abandoned her allegations regarding the manufacture, construction, and devising of the trailer. Appellant's Br., p. 8 n.2.

A. "Selling, Lending, Entrusting and/or Giving the Subject Trailer to Vandy Sowell, when He Knew, or Should Have Known, That Such Trailer Was Unsafe"

Rainey's allegations regarding Wayman Sowell's selling, lending, entrusting, and/or giving of the subject trailer to Vandy Sowell is a claim for negligent entrustment. Rainey presented no evidence that would support a claim for negligent entrustment. A basic requirement of any claim for negligent entrustment is that the "supplier" have a right to control the chattel. In *Sligh v. First Nat. Bank of Holmes County* 735 So.2d 963, 969 (Miss.1999), the Court explained:

> Suppliers in terms of the Restatement must have the right to control the chattel. *Broadwater v. Dorsey,* 344 Md. 548, 555, 688 A.2d 436 (1997). "The paramount requirement for liability under the theory of negligent entrustment is whether or not

> defendant had a right to control the vehicle." *Id.* at 561, 688 A.2d 436. See *Lopez v. Langer,* 114 Idaho 873, 761 P.2d 1225, 1227 (1988); *Casebolt v. Cowan,* 829 P.2d 352, 359 (Colo.1992); *Alioto v. Marnell,* 402 Mass. 36, 520 N.E.2d 1284, 1286 (1988).

The Court further stated that, "The doctrine ought not be extended where . . . **the other party actually committing the injurious wrong was the owner**, sui juris." *Sligh*, 735 So. 2d at 969 (emphasis added).

The arguments by the plaintiff in *Sligh* are identical to those advanced by Plaintiff in this case. In *Sligh*, the plaintiff was injured by a drunk driver. *Id.* at 965. The plaintiff filed suit against the dealership who sold the vehicle to the drunk driver, arguing that the dealership was liable because it failed to ensure the vehicle would be operated safely on the public roadways. *Id.* The Court rejected any such argument and upheld summary judgment in favor of the dealership, finding that liability in such circumstances did not extend to parties who have relinquished possession of the chattel at issue. *Id.* at 970.

Further, in *Horne v. Vic Potamkin Chevrolet, Inc.*, 533 So.2d 261 (Fla. 1988) (cited and relied on by the Mississippi Supreme Court in *Sligh*, 735 So. 2d at 969), the defendant (dealership) sold a car and allowed the purchaser to drive away with the car even though its agent salesman knew that the purchaser was an incompetent driver. Shortly after leaving the dealership, the purchaser was involved in a single-car accident which injured her passenger, petitioner Horne. *Id.* The issue presented was whether under those circumstances the seller of a motor vehicle is liable under the theory of negligent entrustment. *Id.* In finding no liability, the Court reasoned:

> It is clear that under existing law there is no liability on the part of the seller of a motor vehicle where beneficial ownership or legal title, together with possession, have been transferred to a purchaser and injuries occur because of the negligence of the purchaser operating the vehicle. **In short, transfer of ownership cuts off liability on the part of the former owner.**

Id. at 262 (emphasis added).

There is no dispute that Wayman Sowell did not own the trailer on the date of the accident. On October 26, 2006, six months after the accident, Vandy prepared an Affidavit with the assistance of his attorney. (R. at 611; R.E. J). In that Affidavit, Vandy stated he owned the truck and trailer at the time of the accident. (R. at 611; R.E. J). In his deposition on August 28, 2008, Vandy again testified that he owned the trailer, answering "I did" when asked by Rainey's counsel who owned the trailer at the time of the accident. (R. at 483; R.E. C). Wayman Sowell, in his deposition taken September 30, 2008, testified regarding the ownership of the trailer:

> Q. Did you actually tell [Vandy] [the trailer] was his?
>
> A. Yes. I told him it was his if he wanted it. And that's the way I left it.

(R. at 556; R.E. K). After amending her Complaint to add Wayman Sowell as a defendant, Rainey deposed him a second time. Wayman Sowell again testified regarding the ownership of the trailer:

> A. I said, "You can have the trailer, Vandy. I don't need it." I said, "You can have it if you want it." And he hooked it. And the next time I saw it was in the wreck.

(R. at 576; R.E. I). Wayman Sowell gave the trailer to Vandy in April or May and did not see it again until after the accident, at least three months later. (R. at 577; R.E. I).

Rainey cites *Savage v. Lagrange*, 815 So. 2d 485 (Miss. Ct. App. 2002) in support of her negligent entrustment claim. In *Savage*, the plaintiff asserted his negligent entrustment claim against the person who owned the subject vehicle, had legal title to the vehicle, and also was financially responsible for the vehicle. *Id.* In the instant case, Wayman Sowell no longer owned, had legal title to, or was financially responsible for the subject trailer. As stated in *Horne*, "Transfer

of ownership cuts off liability on the part of the former owner." 533 So. 2d at 262.

There is further no dispute that Wayman Sowell did not control how, when and in what manner Vandy operated the trailer on the day of the accident. Rainey attempts to create issues of fact on ownership of the trailer by listing excerpts of testimony and attempting to highlight alleged contradictions in testimony. It remains undisputed, however, that Vandy owned the trailer at the time of the accident. Even assuming Wayman Sowell somehow could control the subject trailer despite Vandy's ownership of the trailer, Wayman Sowell could not be liable for negligent entrustment where, as here, the party who injured Rainey was the owner of the trailer.

Rainey's argument that Wayman Sowell could be liable under a theory of negligent entrustment is controverted by both the law and the facts. Rainey has not disputed the similarity of facts between the case *sub judice* and *Sligh* (upholding summary judgment for dealership who sold car to drunk driver), as well as *Horne (*no liability for dealership who sold car to driver the dealership knew was incompetent; court held that "transfer of ownership cuts off liability on the part of the former owner."). Unlike the defendants in those cases, Wayman Sowell did not own or control the subject trailer and therefore cannot be liable for negligent entrustment of the subject trailer. Rainey attempts to attack the trial court's ruling by stating that the trial court focused solely on Sowell's lack of ownership. That argument neglects to mention the trial court's statement that it granted summary judgment based on Wayman Sowell's lack of ownership and "**for all the reasons** set forth in the defendant's motion." (Tr. at 8; R.E. G) (emphasis added).

Due to the complete failure of proof as to an essential element of this claim, Plaintiff's claim for negligent entrustment should be dismissed as a matter of law. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial, entitling the moving party to a judgment as a matter of law." *Maxwell,* 15 So.3d at 434

(Miss. Ct. App. 2008).

Rainey also alleges that Wayman Sowell negligently sold, lended, and/or gave the trailer to Vandy Sowell. Mississippi law does not recognize a tort of "negligent selling," "negligent lending" and/or "negligent giving." Rather, these allegations are virtually identical to those alleging negligent entrustment. For the reasons already discussed, these claims likewise have no merit and should be dismissed.

B. "Permitting, Knowing And/or Allowing the Trailer to Be Used on the Roadways in Violation of Mississippi Law"

Rainey's allegations that Wayman Sowell permitted, knew of, and/or allowed Vandy to use the trailer on the roadways in violation of Mississippi law are merely a variant of her claim for negligent entrustment discussed in Subparagraph 1 above. For the reasons already discussed, Rainey's claim for negligent entrustment is both factually and legally without merit.

C. "Failing to Warn Vandy Sowell of the Defective and Dangerous Condition of the Subject Trailer"

Rainey's allegations that Wayman Sowell can be liable to her for failing to warn Vandy Sowell of the alleged defective and dangerous condition of the subject trailer are not supported by Mississippi law. Rainey has failed to cite any legal authority to show that Wayman Sowell can be liable to a third party, Rainey, for any alleged failure to warn Vandy.

Typically, the "failure to warn" is invoked by a plaintiff to allege the defendant failed to warn *the plaintiff*, and therefore the plaintiff suffered damages. Plaintiff's claim assumes that: (1) Mississippi law applies the failure to warn doctrine to third parties; (2) that Vandy Sowell was unaware of the absence of any powered lighting and/or lamps on the trailer on the date of the accident; and (3) had Vandy Sowell been warned of such absence, the accident would not have occurred, i.e., causation. Rainey has not and cannot offer any proof in support of any of these

elements. Accordingly, Rainey's claim must fail.

Even further, assuming the trailer did not have powered lighting and/or lamps, this would be open and obvious. "All that is required to negate the duty to warn is that the danger be open and obvious." *Mayfield v. The Hairbender,* 903 So.2d 733, 736 (Miss. 2005). Thus, even assuming the "failure to warn" theory applied to third parties, it would not apply in this case because the alleged defect (absence of powered lighting and/or lamps) was open and obvious.

In consideration of the foregoing, Rainey's claim was properly dismissed as both legally and factually invalid.

D. "Failing to Take Reasonable Precautions to Ensure That the Trailer Was Not Used on the Roadways in its Dangerous Condition, or at the Very Least, Not Used at Dusk or Night in its Dangerous Condition"

Rainey alleged that Wayman Sowell failed to take reasonable precautions to ensure the trailer was not used on the roadways in its alleged dangerous condition or at least not used at dusk or night in its alleged dangerous condition. No legal duty exists, however, for a person who gives a product to someone else to thereafter "take reasonable precautions" to prevent that person from using the product in different conditions. This claim is simply a hybrid of Plaintiff's claims of "failure to warn" and "negligent entrustment." For the reasons already discussed hereinabove, Plaintiff's claims for "failure to warn" and "negligent entrustment" have no basis in law or fact. Once Wayman Sowell transferred the trailer to Vandy Sowell, Wayman Sowell no longer had control over how, when and in what manner the trailer was used. Any alleged absence of powered lighting and/or lamps would be open and obvious, negating a duty to warn. Rainey has offered no facts or legal authority to support such a cause of action, much less to support a cause of action against Mr. Sowell for such a "claim."

If the Court adopts Rainey's argument, if at a yard sale, someone sells an all-terrain vehicle

("ATV") without taillights to a third party, the seller must take reasonable precautions to make sure the third party does not use the ATV on the roadways or at dusk/nighttime. Under Rainey's theory, the seller would need to continue to monitor the third party's use of the four wheeler, even after it is sold. This is nonsensical. There is no law to support such a duty. In consideration of the foregoing, Rainey's claim for "failing to take reasonable precautions" should be dismissed.

CONCLUSION

This Court should affirm the trial court's grant of summary judgment in favor of Wayman Sowell. Rainey has not shown the existence of a genuine issue of material fact as to her claims of negligence.

This the 11th day of January, 2011.

Respectfully submitted,

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ADDENDUM

Mississippi Statutes

Miss. Code Ann. § 63-7-7. Operation of vehicle in violation of chapter.

It is a misdemeanor for any person to drive or move or for the owner to cause or knowingly permit to be driven or moved on any highway any vehicle or combination of vehicles which is in such unsafe condition as to endanger any person, or which does not contain those parts or is not at all times equipped with such lamps and other equipment in proper condition and adjustment as required in this chapter, or which is equipped in any manner in violation of this chapter, or for any person to do any act forbidden or fail to perform any act required under this chapter.

Miss. Code Ann. § 63-7-9. Applicability of chapter.

Except as may otherwise be provided in this chapter, the provisions of this chapter with respect to equipment on vehicles shall not apply to implements of husbandry, road machinery, road rollers, or farm tractors.

Miss. Code Ann. § 63-13-3

No person shall drive or move on any highway any motor vehicle, trailer, semitrailer or pole trailer, or any combination thereof, unless the equipment upon any and every said vehicle is in good working order and adjustment as required in this chapter, and said vehicle is in such safe mechanical condition as not to endanger the driver or other occupant or any person upon the highway. This section shall not apply to disabled vehicles being moved to a garage or service station by means of another vehicle, or to farm trailers engaged in farm operations, or to any farm tractor, combine, cotton picker, semitrailer, pole trailer, or other agricultural or farming equipment or machinery, or any combination thereof, used primarily for agricultural purposes, and not normally used on the public highways of the state. Moreover, pulpwood trucks or log trucks used exclusively during daylight hours shall not be required under the provisions of this chapter to have any lights in addition to headlights and taillights.

Miss. Code Ann. § 63-21-5

(d) "Implement of husbandry" means every vehicle designed and adapted exclusively for agricultural, horticultural or livestock raising operations or for lifting or carrying an implement of husbandry and in either case not subject to registration if used upon the highways.

CERTIFICATE OF SERVICE

I, J. Tucker Mitchell, certify that I have this day mailed by U. S. mail, postage prepaid, a true and correct copy of the above and foregoing to the following:

Honorable William E. Chapman, III
Madison County Circuit Judge
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Trial Court Judge

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This the 11th day of January, 2011.

J. TUCKER MITCHELL