SUPREME COURT OF THE STATE OF MISSISSIPPI

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

APPELLANT'S REPLY BRIEF

(ORAL ARGUMENT REQUESTED)

On Appeal from the Circuit Court, Madison County, Mississippi

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I. SUMMARY JUDGMENT STANDARD

The trial court's summary judgment in favor of Sowell must be reversed. This Court has clearly defined the applicable standard:

> A motion for summary judgment should be overruled unless the trial court finds, beyond a reasonable doubt, that the plaintiff would be unable to prove any facts to support his claim. The trial court is prohibited from trying the issues; it may only determine whether there are issues to be tried.

Simpson v. Boyd, 880 So.2d 1047, 1050 (¶10)(Miss.2004)(citing *Palmer v. Anderson Infirmary Benevolent Ass'n.*, 656 So.2d 790, 796 (Miss.1995)). The record below clearly demonstrates that Rainey has proven each and every allegation advanced against Sowell, or at the very least, illustrated sufficient factual issues that support each of her claims. The trial court erred by summarily determining key disputed factual issues in Sowell's favor. The trial court must be overruled, and the case remanded for trial.

II. NEGLIGENT ENTRUSTMENT

Rainey has proven negligent entrustment, or at the very least, illustrated the existence of genuine factual issues as to the primary element of negligent entrustment, Sowell's "control" of the dangerous trailer.

A. Sowell has "Flip Flopped" and Now Concedes that Control -- Not Ownership -- is the Key to a Negligent Entrustment Claim.

In his brief before this Court, Sowell has now reversed position, and concedes Rainey's main point on appeal – that it is "control" and not "ownership" which is the critical element in a claim for negligent entrustment. *Savage v. LaGrange*, 815 So.2d 485 (Miss.Ct.App.2002); *Sligh v. First National Bank of Holmes County*, 735 So.2d 963 (Miss.1999). Unfortunately, Sowell's recent "flip flop" is too late because he already convinced the trial court that "ownership" was

the critical determinant, and the trial court expressly granted summary judgment (wrongly) on that basis.

Before the trial court, Sowell forcefully argued that ownership was **the sole relevant criteria** for a negligent entrustment claim and that transfer of ownership of the dangerous trailer absolved him of any liability. (R. 642; R.E C). Sowell repeatedly argued in his briefs and at oral argument that:

> A basic requirement of any claim for negligent entrustment is that the 'supplier' **actually own the chattel.**"

Id. Unfortunately, Sowell's persistent and incorrect recitation of the law resulted in the trial court's acceptance of "ownership" as the sole criteria for a negligent entrustment claim. As a result, the trial judge ruled incorrectly: "I don't think there's any issue of material fact that the trailer was owned by Vandy Sowell . . ." (Tr. 8; R.E. H).

Now, Sowell seeks to remedy his mistake below by expressly adopting Rainey's argument that it is "control" – and not "ownership" – which is a fundamental requirement for the negligent entrustment claim. Sowell *now* agrees:

> A basic requirement of any claim for negligent entrustment is that the 'supplier' **have a right to control the chattel.**"

(Sowell's Brief, p. 15). However, the damage has been done, and the trial court's summary judgment ruling was premised upon what **both parties now concede** was an incorrect statement of Mississippi law.

As demonstrated in her prior brief and in the trial court below, Rainey has offered more than ample evidence to establish that Sowell exercised "control" over the dangerous trailer. Vandy testified that Sowell still owned the trailer, and was letting him "use" the trailer while he paid for it. (R. 483; R.E. C). Both Vandy and Sowell could use the trailer. (R. 478; R.E. C). Vandy kept the dangerous trailer at Sowell's house (R. 480;

R.E. C), and was returning the trailer to Sowell's house at the time of the accident. (R. 478; R.E. C). The record below contains even more examples of "control." *See* Rainey's Brief, p. 17.

These examples clearly illustrate that Sowell controlled the trailer, before and after Vandy was allowed to use it. At the very least, a jury should be allowed to make this critical factual determination and ultimately decide whether Sowell still controlled the dangerous trailer.

B. Sowell Misquoted *Sligh* And Ignored *Sligh*'s Clear Holding That Retention of Control Can Lead to Liability Even if Ownership Has Passed.

In *Sligh v. First Nat'l Bank of Holmes County,* 735 So.2d 963 (Miss.1999), this Court confirmed that "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 969 (¶ 33). However, just reading Sowell's brief without actually reading *Sligh* would leave one to conclude that *Sligh* held that it was the passing of ownership which cut off liability. As Sowell quoted *Sligh*:

> The doctrine ought not be extended where...the other party actually committing the injurious wrong was the owner, *sui juris*."

(Sowell's Brief, p. 15). However, the **complete quote** from the case indicates that Sowell removed (through the ellipses) the reference to "control" of the chattel – which the *Sligh* court expressly recognized as a critical component. The complete, full and accurate quote is:

> "The doctrine ought not be extended where the party sought to be charged had **no control over the machine** and the other party actually committing the injurious wrong was the owner, *sui juris*."

Sligh, 735 So.2d at 969 (¶34)(Miss.1999)(emphasis added). Sowell's omission of this critical passage might lead the unwary reader to conclude that "ownership" is all that matters. As the complete quote demonstrates, "control" remains the key element.

In *Sligh*, this Court confronted a negligent entrustment claim involving the sale of a car two years before the accident. It was undisputed that "[a]fter the sale of the vehicle, Harreld Chevrolet had no control over it." *Id.* at ¶34. Consequently, control and ownership passed to the buyer at the moment of sale. In the overwhelming majority of cases where there is a sale of a good, both control and ownership pass, as they did in *Sligh*, simultaneously.

In this case, even if actual ownership of the dangerous trailer passed from Sowell to Vandy (which Rainey disputes), **control of the dangerous trailer did not**. Consequently, this case presents the somewhat unique circumstance where control still resided in Sowell, even if actual ownership did not. According to the clear dictates of *Sligh*, "control" governs liability in a negligent entrustment claim, and Sowell remains liable because he exercised control of the dangerous trailer, even if actual ownership passed.

For that reason, Sowell's "slippery slope" arguments regarding "infinite liability" for sales at garage sales, bequests to grandchildren, and gifts to others have no merit. *See* Sowell's Brief, p. 8. Rainey's claim would have no broadening effect on negligent entrustment because she can prove, and has proven, that Sowell continue to exercise control over the dangerous trailer even after he "gave" it to Vandy. That circumstance is not true in the overwhelming majority of sales, garage sales, bequests, and gifts where "control" over the chattel no longer exists. Consequently, where ownership and control pass simultaneously (as they did in *Sligh*, and as they would in the common sale, bequest

or gift), there is no liability. However, if "control" over the chattel remains (as it did here), then liability remains. That is the result mandated by the Restatement, and its application by Mississippi courts in *Sligh*.

Sowell also suggests that a Florida case, *Horne v. Vic Potamkin Chevrolet, Inc.*, 533 So.2d 261 (Fla.1988), provides some authority that ownership – in and of itself – cuts off liability for negligent entrustment. *See* Sowell's Brief, p. 15. ("transfer of *ownership* cuts off liability.") However, Sowell neglected to tell this Court that the primary basis for limiting liability in *Horne* was the Florida statute which specifically barred liability relating to an automobile after sale and delivery. Specifically, the *Horne* decision rested squarely on F.S.A. §319.22(2)(1981) which provided that the seller of a motor vehicle:

> "[W]ho has made a *bonafide* sale or transfer...and has delivered possession thereof to a purchaser **shall not, by reasons of any provisions of this law, be deemed the owner or co owner of such vehicle, so as to be subject to civil liability for the operation of such vehicle**..."

Id. at 262. (Emphasis added). Consequently, the Florida legislature effectively disposed of any distinction between "ownership" and "control," and combined the concepts to create a statutory bar for negligent entrustment claims against the seller after the sale of a vehicle, whether control continued or not. The *Horne* court ultimately held that there was "no liability on the part of the seller of the vehicle where beneficial ownership or legal title, together with possession, have been transferred to a purchaser." *Id.* Even if the Florida statute did not exist, however, *Horne* is clearly distinguishable because in *Horne*, as well as *Sligh*, both ownership and control were relinquished at the moment of sale.

In this case, Sowell continued to "control" the dangerous trailer, even after he no longer owned it.

III. NEGLIGENCE CLAIMS

As demonstrated above, Rainey has, at a minimum, stated a claim for negligent entrustment. Consequently, the trial court's summary judgment can, and should, be reversed on that basis alone. However, Rainey has also alleged a number of other grounds for her negligence claims, each and every one of which Sowell must refute to justify the absolute dismissal of all of Rainey's claims. In that effort, Sowell attempts to fire a number of "magic bullets" hoping to dispel all of Rainey's claims. None of those bullets hit the mark.

A. Sowell Did, And Does, Owe A Legal Duty to Everyone, Including Rainey.

The first "magic bullet" Sowell fires is legal duty. Sowell boldly claims that Sowell "owed no duty to Rainey or the public." (Sowell's Brief, p. 5). That statement is as astounding as it is incorrect. There is no question that everyone owes everyone else the duty to act "as a reasonable prudent person" would under the circumstances. *Doe v. Wright Security Services, Inc.*, 950 So.2d 1076, 1079 (¶12) (Miss.2001)(citing *Donald v. Amoco Prod. Co.*, 673 So.2d 161, 175 (¶48)(Miss.1999)). Thus, Sowell cannot simply claim that he owed no duty whatsoever.

As demonstrated above, Sowell, at a minimum, owed a legal duty as a supplier of a dangerous chattel.

However, Sowell's assertion that he escapes all liability because he had no duty whatsoever cannot be the law. Rainey agrees that the existence of a legal duty is a question of law. The paramount consideration in determining the nature and extent of duty owed is whether the injury is forseeable. *Simpson*, 880 So.2d 1047, 1050 (Miss.2004)("Duty and breach of duty, which both involve foreseeability, are essential to finding negligence..."). Moreover, "[f]oreseeability is an essential element of both duty and causation." *Rhaly v. Waste Management of Mississippi, Inc.*, 43 So.3d 509, 514 (¶ 11)(Miss.Ct.App.2010)(quoting *Patterson v. Liberty Associates, L.P.*, 910 So.2d 1014, 1019 (¶14)(Miss. 2004)). Likewise, "[t]he

important component of the existence of the duty is that the injury is reasonably foreseeable, and thus it is appropriate for the trial judge to decide." *Rein v. Benchmark Constr. Co.* 865 So.2d 1134, 1143 (¶ 30) (Miss.2004)(quoting *Lyle v. Mladinich,* 584 So.2d 397, 399 (¶14)(Miss.1991). The Mississippi Court of Appeals confirmed this Court's long standing position that foreseeability can be a ***jury*** question where "reasonable minds may differ and sufficient evidence of negligence is presented." *Rhaly*, 43 So.3d at 509 (¶14)(Miss.Ct.App.2010). Rainey contends that the jury should be allowed to consider, and decide, foreseeability. However, regardless of whether the jury or the trial court makes the final call, there is no question that Rainey's injury and this claim were foreseeable. *See* Rainey Brief, p. 26.

In fact, the cases cited by Rainey clearly hold that unlighted trailers on a roadway can, and do, constitute a foreseeable danger, and those responsible for putting that danger in motion will be held liable. In *Jester v. Bailey*, 123 So.2d 442 (Miss.1960), the court held that the jury should consider whether or not the plaintiff was negligent in parking unlighted trailers on the side of the road at night. *Id.* at 443-44. The Court would not have reached that conclusion if there was no legal duty. Clearly, there is no distinguishable difference between parking an unlighted trailer on the side of the road (enough for a jury question in *Jester*), and supplying an unlighted trailer to someone knowing that it would be used at night. Likewise, in *Dent v. Luckett*, 135 So.2d 840 (Miss.1960), the absence of reflectors or lights on the trailer was a "matter for consideration of the jury based upon their own experience and observation." *Id.* at 842. Again, if pulling a trailer without lights or parking a trailer without lights on the side of the road can lead to liability, then clearly supplying such a trailer knowing of the danger and its likely effect should at least be considered by the jury.

B. Sowell Is Liable for Failure to Warn.

Sowell next argues he cannot be held liable for a failure to warn, and that 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." (Sowell's Brief, p. 5). That bullet also misses the mark.

Not only did Rainey cite legal authority to the trial court, but Mississippi law is crystal clear that suppliers of dangerous chattels – such as Sowell – absolutely have a duty to warn of the dangers. In *Robirtson v. Gulf S.I.R. Co*, 158 So. 350 (Miss. 1935), the Mississippi Supreme Court expressly quoted and adopted Section 388 of Restatement (First) of Torts, which provided that "[o]ne who supplies directly or through a third person a chattel for another to use, is subject to liability . . . if the supplier....**fails to exercise reasonable care to inform them of its dangerous condition** or of the facts which make it likely to be so." *Id.* at 351. Of course, that early section of the Restatement was superseded by Section 388 of Restatement (Second) of Torts: *Chattel Known To Be Dangerous for Intended Use*, which contains the identical provision quoted above. RESTATEMENT (SECOND) OF TORTS §388 (1965). Moreover, the Comments to the Restatement confirm that liability extends to **all** suppliers[1] – like Sowell -- for harm caused to third parties[2] – like Rainey.

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[1] "These rules, therefore, apply to sellers, lessors, donors, or lenders, irrespective of whether the chattel is made by them or by a third person." RESTATEMENT (SECOND) OF TORTS §388, cmt. c (1965).

[2] "One supplying a chattel to be used or dealt with by others is subject to liability under the rule stated in this Section, not only to those for whose use the chattel is supplied but also to third persons whom the supplier should expect to be endangered by its use." RESTATEMENT (SECOND) OF TORTS §388, cmt. d (1965).

Sowell asserts, probably as an afterthought, that even if there was a failure to warn, the danger was "open and obvious" under *Mayfield v. The Hairbender,* 903 So.2d 733 (Miss.2005). Rainey concedes that Sowell can, and should argue that question, but the **jury – and not the court** – must reach that conclusion. And even if the absence of rear lighting was "open and obvious," this defense however is not an absolute bar to any claim and the jury must allocate fault to the responsible parties. According to the Court in *Mayfield*, "open and obvious" is "simply a comparative negligence defense." *Id.* at 737 (¶18). Consequently, the "jury must consider the alleged negligence of both and apply the comparative negligence standard." *Id.*

C. The Applicable Statutes Set Forth the Standard of Care and, At a Minimum, Present a Jury Question as to Negligence Per Se.

Finally, Sowell once again attempts to avoid the clear standard of care set forth in the applicable statutes, specifically Miss. Code Ann. §§63-13-3, 63-7-13, 63-7-15 and 63-7-7. As Rainey has argued here and in the trial court below, these statutory requirements provide the best indicia of the applicable standard of care owed to the public. These statutes place an affirmative duty to place rear-facing lights on trailers that will be used on public roadways. Lack of rear-facing lights is negligent, and can be negligence *per se* if those statutes are violated. But even if the statutes have not technically been violated, these statutes set forth the applicable standard of care. *Otto v. Specialties, Inc.*, 386 F. Supp. 1240, 1244 (N.D.Miss.1974)("Even though a statute may not expressly provide civil liabilities for its violation, if a breach occurs in the proper circumstances, courts may give added impetus to the legislative policies which prompted passage of the statute by declaring that one who violates its provision is *per se* negligent, without the need for showing that the putative tort-feasor maintained an actual lack of reasonable care. The statute itself is deemed a conclusive expression of the applicable standard of reasonable conduct."). According to these statutes, "reasonable" people using trailers on Mississippi

roadways must provide rear-facing lights. *Moore v. K&J Enterprises*, 856 So.2d 621 (Miss.2003)("Under negligence per se, the standard of care is established by the statutory requirement."); *Byrd v. McGill*, 478 So.2d 302 (Miss.1985)(Statute was "conclusive expression of the applicable standard of reasonable conduct as pronounced by legislative conduct.").

For the statutes to be violated and for negligence *per se* to apply, Rainey concedes that Sowell must be found to be the owner of the trailer. And, as argued at length in the trial court below and here, Rainey has presented at least a jury question on ownership. *See* Rainey's Brief, pgs. 21-24. That argument has been set forth at length in Rainey's prior submission, and requires no further discussion.

Surprisingly, Sowell continues to maintain that the statutes do not apply because the trailer at issue fits within the "farm equipment" exemption under those statutes. Sowell continues to assert this argument, even though the statute itself plainly does not exempt equipment "normally used on the public highways of the state."[3] Sowell's argument ignores the undisputed fact that Sowell built the trailer to go on public roadways[4] and regularly used it himself on public roadways,[5] Vandy was going to, and did, use the trailer on the public

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[3] Miss. Code Ann. §63-13-3 (1972) provides in full:

> 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**.

Id. (Emphasis added).

[4] Sowell built the trailer to go on public roadways "every working day." (R. 574; R.E. C).

[5] Sowell testified: "No, you wouldn't have to go on 22, but I did it most of the time...but it did go on 22. I won't deny that." (R. 573; R.E. C); "It did go on the road." (R. 574; R.E. C).

roadways,[6] and that Sowell knew Vandy would have to use it on the public roadways when he provided the trailer to him.[7]

A jury must be allowed to determine whether or not this direct evidence sufficiently establishes that Sowell breached the standard of reasonable conduct set forth in the statutes.

IV. CONCLUSION

The trial court erred by granting summary judgment.

Rainey has alleged, and can prove, a claim for negligent entrustment. In the trial court below, Sowell argued that "ownership" was the critical – and only – component of Rainey's claim, and convinced the trial court to dismiss Rainey's claims because Sowell did not "own" the dangerous trailer. Sowell has now reversed field, and conceded that "control" is the critical element of the claim. The record below, and clear dictates of Mississippi law in *Sligh* and other cases, demonstrate that Rainey has stated an actionable claim for negligent entrustment because Sowell continued to "control" the dangerous trailer even if he technically no longer owned it.

Rainey's other claims for negligence must also survive summary judgment. Like everyone else, Sowell owed a general duty to use reasonable care under the circumstances, and owed a specific duty not to entrust the dangerous trailer to Vandy under these circumstances. Sowell does, and did, owe a duty to warn Vandy of the lack of rear facing lights, and any question regarding the "open and obvious" nature of that defect must be resolved by the jury.

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[6] Sowell testified: "I knew he was going to be hauling fuel to the combine wherever it was." (R. 578; R.E. C).

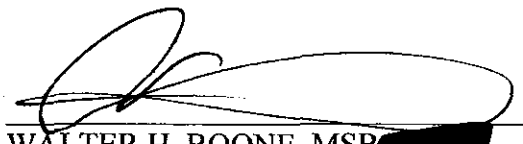
[7] Sowell knew that the trailer was occasionally kept at Vandy's daddy's house, and taken to wherever Vandy was working at the time: "I guess at his daddy's house or down at his house. See he lives about a half mile from his daddy. And the daddy lives on our old home place up there. It's on Virilia Road." (R. 577; R.E. C)

Finally, Rainey has, at the very least, created a factual dispute as to whether the Mississippi statutes requiring rear-facing lighting applied.

The trial court's summary judgment in favor of Sowell must be reversed.

THIS, the 28th day of February, 2011.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Beau Cole, certify that a copy of the foregoing document was served upon the parties below, by depositing same in the United States Mail, first-class postage prepaid:

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THIS, the 28th day of February, 2011.

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