SUPREME COURT OF THE STATE OF MISSISSIPPI

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

BRIEF OF THE APPELLANT
(ORAL ARGUMENT REQUESTED)

On Appeal from the Circuit Court, 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. Brittany Reeves (Rainey), Appellant

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

3. John Wayman Sowell, Appellee

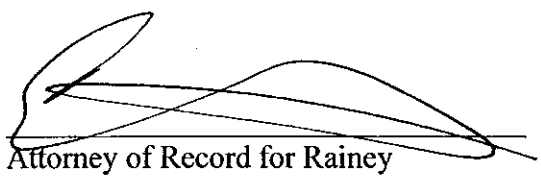
4. Mississippi Farm Bureau Casualty Insurance Company

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

6. Vandy James Sowell

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

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



Attorney of Record for Rainey

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other

STATEMENT OF THE ISSUES

1. Whether The Trial Court Erred in Granting Summary Judgment to John Wayman Sowell?

STATEMENT OF THE CASE

On August 23, 2006, Brittany Reeves (later Brittany Rainey) ("Rainey") was employed as a twenty-three year old dispatcher for the Madison County Sheriff's Department. (R. 18; R.E. A).[1] While participating in a department-sanctioned "ride-along" with a superior officer, she was involved in an automobile accident on Highway 22 with Vandy Sowell ("Vandy"). *Id.* Vandy was pulling an unlighted trailer on the public roadways at night, stopped in the middle of Highway 22, and was turning into John Waymon Sowell's (his uncle's) driveway. (R. 467-520; R.E. B). Vandy was returning the dangerous and unlit trailer to where it was normally kept, and where it was going to be used the following day. *Id.* The sheriff's deputy driver did not see the unlit trailer stopped in the road, unsuccessfully swerved at the last moment to avoid impact, and slammed the passenger side of the deputy's vehicle (where Rainey was sitting) into the dangerous trailer. *Id.* Rainey sustained severe injuries, including a skull fracture and severe facial lacerations as a result of the collision. (R. 99; R.E. C.)

Rainey filed her complaint against Vandy on November 2, 2006 in the Circuit Court of Madison County, Mississippi. (R. 18; R.E. A). In her original Complaint, Rainey alleged that Vandy was negligent, careless, and reckless by driving his truck and towing a trailer without the required lighting devices. *Id.* Discovery commenced, and Rainey eventually discovered that John Wayman Sowell ("Sowell") also bore responsibility for the accident, including but not limited to, the following facts:

- Sowell built the trailer without rear facing lights, and provided that trailer for Vandy to use. (R. 541-566; R.E. B).
- Sowell owned the trailer and a combine and they were lent to Vandy as a "package deal." Vandy was allowed to "use" the trailer while he paid for it. (R. 576; R.E. B)

[1] The trial court record is referenced according to the Index of Appellant's Record, including the specific tab and page number of each excerpt cited.

- At the time of the collision, Vandy was attempting to return the dangerous trailer to Sowell's home, where the trailer was normally kept. (R. 478; R.E. B). Vandy intended to use the unlighted trailer on Sowell's property the following day. *Id.*

On December 30, 2008, Rainey amended her complaint to add Sowell as a defendant in the action. (R. 99; R.E. C). In her Amended Complaint, Rainey alleged that Sowell was negligent, grossly negligent, and negligent per se by providing an admittedly dangerous instrumentality to Vandy when Sowell knew that it would be used in a manner involving risk of harm to Rainey and others. *Id.* Rainey alleged, in the alternative, that Sowell was liable as a manufacturer of a defective product under Mississippi law. *Id.* Several months later, Rainey settled her claims against Vandy, and he was subsequently dismissed. (R. 180; R.E. D). Discovery continued on Rainey's claims against Sowell, and Rainey was able to establish that Sowell controlled the trailer, knew the trailer was dangerous, and failed to take any action to prevent the use of the dangerous trailer.

On May 3, 2010, Sowell filed his motion for summary judgment. (R. 463; R.E. B). In that motion, Sowell argued that he was exempt from any statutory or common law duties because Sowell did not own the trailer, the statutes requiring lighting on trailers did not apply to him, and even if they did, the trailer was exempt "farm equipment" under Miss. Code Ann. §63-7-9. *Id.* Next, Sowell argued that he was not the owner of the trailer at the time of the collision and, therefore, was not liable for negligent entrustment of the dangerous trailer. (R. 633; R.E. B) Finally, Sowell argued that he was not a "seller" or "manufacturer" of products under Mississippi law. *Id.*

Rainey responded to Sowell's motion for summary judgment on May 24, 2010. (R. 656; R.E. E). Rainey cited a host of factual evidence and testimony supporting her claims for negligence, gross negligence, and product liability. The trial court heard oral argument on Sowell's motion, and entered summary judgment dismissing all of Rainey's claims on July 28,

2010.[2] (R. 716; R.E. F). While the trial court essentially adopted all of Sowell's arguments, the trial court specifically ruled, as a matter of law, that Sowell did not own the trailer, and Sowell owed no common law or statutory duty to anyone, including Rainey. (Tr. 8; R.E. G). Rainey appealed to this Court on August 26, 2010. (R. 717; R.E. H).

[2]Rainey does not dispute, or appeal from, the trial court's dismissal of her product liability claim. While Sowell admittedly manufactured the defective and unreasonably dangerous trailer, the record supported Sowell's contention that he was an "occasional" seller, and not liable for product liability. When this case is remanded for trial, Rainey will not prosecute her product liability claim.

SUMMARY OF THE ARGUMENT

The trial erred court when it entered summary judgment as to all claims brought by Rainey for several reasons.

First, Rainey alleged in her complaint, and offered substantial evidence in the record to support, claims of negligence and gross negligence against Sowell, including but not limited to, the following:

- Selling, lending, entrusting and/or giving the subject trailer to Vandy Sowell, when Sowell knew, or should have known, that such trailer was unsafe;
- Permitting, knowing and/or allowing the trailer to be used on the roadways in violation of Mississippi law;
- Failing to warn Vandy Sowell of the defective and dangerous condition of the subject trailer;
- 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; and
- Other acts of negligence which will be proven at trial.

(R. 99; R.E. C). The trial court erroneously focused on **one of** Rainey's claims –"negligent entrustment" – and ignored the substantial evidence which supported **all of** Rainey's negligence claims.

Second, as to Rainey's negligent entrustment claim, Sowell and the trial court wrongly narrowed the focus to "ownership" of the dangerous trailer, when "control" of that trailer was, and is, the primary determinant of liability in a negligent entrustment claim. The record below is ripe with evidence that Sowell "controlled" the trailer at issue, even if Sowell didn't technically own it. Rainey also believes she has proven that Sowell actually owned the trailer, or at least established a genuine dispute of material fact about who did.

Third, the trial court erred when it ruled that Sowell owed no duty at all to the public at large for making, supplying, permitting the use of, and failing to warn about the dangers of, a trailer without required lighting, when Sowell knew that the unlit trailer was dangerous. At the very least, where there has been substantial evidence of negligence presented, the question of foreseeability must be left to the jury.

Considering the established facts and testimony, the trial court erred by granting summary judgment and dismissing all of Rainey's claims. Summary judgment must be overruled unless the court finds "beyond any reasonable doubt" that the plaintiff cannot prove his claim. *Burton v. Choctaw County*, 730 So.2d 1, 3 (Miss. 1999). The evidence and record in this case, at the very least, is subject to "more than one reasonable interpretation," and must therefore be viewed in the light most favorable to the non-moving party. *Miller v. Meeks*, 762 So.2d 302, 304 (Miss. 2000). The trial court must be overruled, and the case remanded for trial.

ARGUMENT

I. RAINEY ALLEGED, AND HAS PROVEN, A NUMBER OF NEGLIGENCE CLAIMS.

In granting summary judgment, the trial court erred in focusing on only one of Rainey's claims – negligent entrustment. Rainey alleged that Sowell was negligent in a number of different respects, but Sowell attempted to limit all of Rainey's claims to negligent entrustment, and then focus the inquiry solely on Sowell's lack of "ownership" as a complete defense to the negligent entrustment claim. Unfortunately, the trial court embraced Sowell's myopic view. As demonstrated below, however, Rainey has proven each and every independent act of negligence alleged or, at the very least, demonstrated the existence of genuine factual disputes which must be resolved by a jury. The trial court failed to consider all of Rainey's claims, failed to apply the appropriate legal standard to Rainey's negligent entrustment claim, and then completely discounted the testimony supporting these claims. The trial court's ruling invaded the province of the jury, and effectively prevented a jury from considering the "weight and worth" of the testimony supporting all of Rainey's negligence claims.

A. RAINEY HAS ALLEGED A HOST OF NEGLIGENCE CLAIMS, AND HER COMPLAINT WAS NOT, AND IS NOT, LIMITED TO NEGLIGENT ENTRUSTMENT.

Rainey alleged that Sowell was negligent and grossly negligent. Rainey specifically alleged claims of negligence and gross negligence against Sowell, including but not limited to, the following:

- Selling, lending, entrusting and/or giving the subject trailer to Vandy Sowell, when Sowell knew, or should have known, that such trailer was unsafe;
- Permitting, knowing and/or allowing the trailer to be used on the roadways in violation of Mississippi law;
- Failing to warn Vandy Sowell of the defective and dangerous condition of the subject trailer;

- 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; and

- Other acts of negligence which will be proven at trial.

(R. 99; R.E. C). Rainey did not limit her claims to "negligent entrustment." In fact, Sowell specifically asked Rainey to describe "everything in specific factual detail that you contend this Defendant [Sowell] did or failed to do that was negligent, wrong or improper that caused...the alleged incident." Rainey responded:

> **RESPONSE**: John Wayman Sowell manufactured and/or sold a defective and unreasonably dangerous trailer to Vandy J. Sowell with the knowledge that it had been used, and continue to be used on the public roadways of the State of Mississippi. The trailer was defective and unreasonably dangerous because, at the time of the manufacture, it had no rear lights and insufficient, if any, reflectors to warn others of its presence in the roadway. John Wayman Sowell admitted in his April 30, 2009 deposition that the use of such a defective product on a public roadway was "risky and wrong" and otherwise "unsafe." John Wayman Sowell knew about the danger which caused the accident and was aware of a design alternative (i.e., installation of rear lights) which would have prevented the accident.
>
> John Wayman Sowell was negligent in selling, lending, entrusting, and/or giving the subject trailer to Vandy Sowell, when he knew that such trailer was unsafe and would be used on the public roadways. This defendant was negligent in permitting the trailer to be used on the public roadways without any warning of its defective condition or use limitations based on its admittedly defective condition. The defective and unreasonably dangerous condition of the trailer caused severe and permanent injury to Plaintiff including but not limited to severe facial and head lacerations; broken and crushed skull and bones; head injury; bruising on arms and legs; multiple surgeries on right eye and head; psychological and emotional trauma; withdrawal from pain medications; headaches; eye irritation; disfigurement; scarring; lack of feeling in head, teeth, and other areas; pain and discomfort; irreparable damage to marriage, embarrassment, and other damages. Discovery on this issue is ongoing and this response will be supplemented in accordance with the Mississippi Rules of Civil Procedure.

(R. 523-524; R.E. B). Rainey's complaint, her response to written discovery, and the substantial proof gathered in discovery were not limited to a "negligent entrustment" claim.

B. RAINEY HAS OFFERED EVIDENCE PROVING THOSE NEGLIGENCE CLAIMS, OR AT LEAST CREATED DISPUTED ISSUES OF MATERIAL FACT.

With regards to the specific acts of Sowell's negligence alleged in the Complaint, Rainey offered the following proof from which a jury – the ultimate finder of fact – could have concluded that Sowell failed to exercise ordinary care, and was negligent.

- Sowell built the trailer at issue without rear facing lights and provided that trailer for Vandy to use. (R. 541-566; R.E. B).

- It was, and is, a violation of Mississippi law to operate **or knowingly permit a trailer to operate** without lights on the public roadways. MISS. CODE. ANN. §§ 63-13-3, 63-7-7, 63-7-13, and 63-7-15.

- The unlighted trailer, as built and used by Sowell, lent to Vandy, and at the time of the accident, was "defective and unreasonably dangerous," according to the sworn affidavit of Chris Barron, Rainey's liability expert. (R. 656; R.E. E).

- Sowell knew that the trailer was dangerous, and testified that to have a trailer without lights is "wrong and risky." (R. 584; R.E. B).

- Sowell built the trailer to go "every working day" on the public roadways, but didn't put lights on it. (R. 574; R.E. B).

- Sowell himself took the trailer out at night, even though he knew it was unsafe. ("It's unsafe enough. I don't want to take that chance I'll say. With them reflectors on it, it wasn't altogether unsafe. But it was unsafe enough I wasn't willing to take that chance.")(R. 574; R.E. B).

- Vandy testified that Sowell still owned the trailer, and was letting him "use" the trailer while Vandy paid Sowell for it. (". . . he and I made a deal that I could – I could – he would let me use it – or he gave it to me so that I could use it when I was pulling corn, and I pulled his corn in terms of we swapped it out.")(R. 483; R.E. B).

- Sowell owned a combine and trailer, and they were lent/given to Vandy as a "package deal" in exchange for pulling Sowell's corn. (R. 576; R.E. B). Vandy would either pay cash a little at a time or come and cut Sowell's corn, and Sowell would subtract it from the purchase price of the combine and trailer. *Id.* The "package deal" for the use of the trailer occurred only a "few months" months before the accident. *Id.*

- Regardless of who technically "owned" the trailer, Sowell exercised control over the trailer.

- Vandy was returning the trailer to Sowell's property, and turning right into Sowell's driveway at the time of the accident. (R. 577; R.E. B).

- Vandy testified that, at the time of the accident, he was going to leave the trailer at his uncle's shop because Vandy was going to cut corn for him the next day. (R. 478; R.E. B).

- Vandy normally left the trailer at Sowell's shop. *Id.*

- Sowell testified that "if he didn't need, just bring it back when he got through with it. . ." (R. 576; R.E. B).

- Sowell confirmed that the trailer stayed at his house "a portion of the time." (R. 551; R.E. B).

- Vandy testified that the trailer "would have been at Uncle Wayman's shop where I would have picked it up from. He has a big shed that I was parking the combine under and everything, and I could just leave it there." (R. 480; R.E. B).

- Vandy further testified that "I could use it and he could use it." *Id.*

- Sowell confirmed that "all my equipment basically stayed on my home place." (R. 552; R.E. B).

- Sowell knew that Vandy was going to be using the trailer on public roadways. (R. 578; R.E. B).

- Sowell knew that Vandy had no land himself so the trailer had to be used on public roadways. *Id.*

- Sowell failed to warn Vandy of the danger associated with use of the unlighted trailer at night:

> Q. Yes, sir. But you didn't tell him anything about lights did you?
>
> A. About what?
>
> Q. Lights on the trailer.
>
> A. No.
>
> Q. And you didn't tell him anything about don't run this trailer at night, did you?
>
> A. No.

Q. And you didn't tell him anything about before you run this trailer at night, you need to go put lights on it, did you?

A. I didn't tell him anything.

(R. 578-579; R.E. B).

The above examples illustrate that Sowell was negligent, and Sowell's negligence proximately caused the accident and Rainey's injuries. Sowell knew that the trailer was dangerous and knew that to have a trailer without lights was "wrong and "risky," but lent, provided, or supplied that dangerous trailer without any warnings to Vandy anyway. (R. 584; R.E. B).

The proof cited above clearly illustrates that Sowell's negligence created an "unreasonable risk of injury" or, at the very least, the existence of genuine factual issues. A jury should have been allowed to resolve the question of Sowell's "reasonable care" (or the lack thereof) and the ultimate question of whether or not Sowell's negligence caused or contributed to this accident. *Doe v. Wright Security Services, Inc.*, 950 So.2d 1076, 1084 (Miss. 2007) (Reasonable care, or the lack thereof, is a question to be decided by the finder of fact in any negligence case.); *Hankins Lumber Co. v. Moore*, 774 So.2d 459, 464 (Miss. 2000) ("The 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....it is a question of fact for the jury to determine."); *J.K. Dent v. Luckett*, 135 So.2d 840, 842 (Miss. 1961) (In an action by a driver who sustained injury as a result of colliding with an unlighted cotton trailer, the court found that the absence of reflectors or lights on the trailer was a "matter for the consideration of the jury based upon their own experience and observation."). The trial court's summary dismissal of all of the negligence claims was improper and must be reversed.

This Court has previously held that trial courts should "err on the side of denying motions for summary judgment." *Clark v. Ill. Cent. R.R. Co.*, 794 So.2d 191, 198 (Miss. 2001)(*citing Doe v. Stegall*, 757 So.2d 201, 204)(Miss. 2000)). Summary judgment is "not a substitute for trial of disputed fact issues." *Dennis v. Searle*, 457 So.2d 941, 944 (Miss. 1984)(*overruled on different grounds by Thornhill v. System Fuels, Inc.*, 523 So.2d 983, 2007 (Miss. 1988)). The trial court cannot try issues of fact in a summary judgment motion, and should be limited to determining "whether there are issues to be tried." *Id.* In this case, the trial court should have simply determined whether Rainey would have been "unable to prove any facts" to support her negligence claims "beyond any reasonable doubt." *Burton*, 730 So.2d 1, 3 (Miss. 1999) (citing *Daniels v. GNB, Inc.*, 629 So.2d 595, 599 (Miss. 1993)). The trial court's summary dismissal of all of Rainey's negligence claims – where there were clear factual issues – was an invasion of the jury's role in deciding the critical factual issues.

II. RAINEY HAS PROVEN NEGLIGENT ENTRUSTMENT.

Even though Rainey's claims were not limited to negligent entrustment, she has offered more than sufficient proof of negligent entrustment to survive summary judgment. At Sowell's urging, the trial court focused its entire analysis of negligent entrustment on the question of whether or not Sowell owned the trailer. At the oral argument, the trial court concluded that "I don't think there's any issue of material fact that the trailer was owned by Vandy Sowell. And for that reason, and all the reasons set forth in the defendant's motion, the motion for summary judgment will be granted." (Tr. 8; R.E. G).

Unfortunately, "control" – and not "ownership" – is the determinative factor in a negligent entrustment case, and Rainey has offered more than sufficient proof to meet her burden of proof on that claim. Moreover, even though "ownership" is not the determinative factor, Rainey can offer, and has offered, enough testimony and reasonable inference to create an issue

of fact on the question of ownership. For these reasons, Rainey has proven a negligent entrustment claim, and summary judgment dismissing that claim must be reversed.

A. "CONTROL" – AND NOT "OWNERSHIP" – IS THE PRIMARY ELEMENT OF NEGLIGENT ENTRUSTMENT, AND RAINEY OFFERED EVIDENCE THAT SOWELL "CONTROLLED" THE DANGEROUS TRAILER.

Liability arises for negligent entrustment where a person makes a dangerous instrumentality available to another under "circumstances that create an unreasonable risk of injury" to others. *Savage v. Lagrange*, 815 So.2d 485, 492 (Miss. Ct. App. 2002) (discussing the Mississippi view of the doctrine of negligent entrustment). This Court and numerous other courts have adopted the law of negligent entrustment set forth in the Restatement of Torts, Second. *Id.* According to the Restatement,

> 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, inexperienced, 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 (1965). (Emphasis added). The Restatement does not require that the chattel be "owned" by the defendant. Instead, liability falls upon the "supplier," who is described in the Restatement as the one who has the right to control the chattel. *Sligh v. First Nat. Bank of Holmes County*, 735 So.2d 963, 969 (Miss. 1999)(citing *Broadwater v. Dorsey*, 688 A.2d 436, 439 (Md. 1997)); *Laurel Yamaha, Inc. v. Freeman*, 956 So.2d 897, 903 (Miss. 2007)(reaffirming control is the necessary condition for liability in a negligent entrustment action). "Control" is the moment at which the "third person is entitled to possess or use the thing or engage in activity only by the consent of the actor, and that the actor has reason to believe that by withholding consent he can prevent the third person from using the thing..." RESTATEMENT (SECOND) OF TORTS §308 cmt. a.

In Mississippi, the element of "control" is the "paramount requirement" to establish a claim for negligent entrustment. *Savage*, 815 So.2d at 492 (*citing Sligh*, 735 So.2d at 969). In *Savage v. LaGrange*, Gref and Lagrange were involved in a car wreck with Monti Savage, the defendant's son. Gref and Lagrange sued the defendant, Curtis Savage ("Curtis"), alleging that Curtis negligently entrusted his son with a vehicle when he knew that the son had a history of alcohol-related driving offenses and that his license was suspended at the time of the wreck. The vehicle was titled in Curtis' name and was also financed by a loan in Curtis' name. After a bench trial, the trial judge entered a verdict against Curtis. Specifically the trial court ruled Curtis had knowledge of the son's condition and a sufficient interest to be deemed in control of the vehicle. Curtis appealed, contending that there was insufficient evidence to establish his liability under the doctrine of negligent entrustment. Specifically, Curtis argued that the car was always in the exclusive control of his son and that he did not have any right of possession or control over the vehicle. This Court held that legal ownership was not the critical determinant in negligent entrustment claims. *Id.* Particularly, the *Savage* court recognized that "in the normal circumstance, proof of legal ownership of personalty would carry with it a presumption of the right of possession." Curtis' interest and control of the vehicle, the Court held, was "greater than that of a mere straw man holding the bare legal title as an accommodation for the true owner." *Id.* at 493. Consequently, according to the *Savage* court, it was the "right of possession" and control – rather than ownership – which was the determinative factor in a negligent entrustment claim.

Many other jurisdictions have held that it is "control" which is the essential element in a negligent entrustment claim[3]. The right to control does not always mean ownership, but simply

[3] *See, e.g. S.B. Thompson v. Mindis Metals, Inc.*, 692 So.2d 805, 807 (Ala. 1997)("To entrust property to another, . . . one must retain either ownership of the property or dominion and control over it.");

means the defendant has a greater right of possession or control than the entrustee. In fact, many jurisdictions have explicitly held that ownership is not an essential element for a finding of liability a negligent entrustment action[4]. *DeWester v. Watkins*, 745 N.W.2d 330, 336 (Neb. 2008) ("[t]he basis for liability under the doctrine of negligent entrustment is the power to permit

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McGlothlin v. Municipality of Anchorage, 991 P.2d 1273, 1280 (Alaska 1999)("[t]he doctrine of negligent entrustment requires that the defendant have a greater right of possession or control of the chattel than the person to whom he or she entrusts it."); *Reid v. Town of Mount Vernon*, 932 A.2d 539, 547 (Me. 2007)(defendant must have right to control property in question for liability to attach in a negligent entrustment claim); *Broadwater v. Dorsey*, 688 A.2d 436, 439 (Md. 1997)(defendant must "have a right to control" the dangerous object); *Bahm v. Dormanen*, 543 P.2d 379, 382 (Mont. 1975(*quoting* Restatement 2d of Torts § 308); *Dewester v. Watkins*, 745 N.W.2d 330, 335 (Neb. 2008))(an actor must have an exclusive or superior right of control in order to be liable for negligent entrustment); *Ferry v. Fisher*, 709 A.2d 399, 403 (Pa. 1998)(liability for negligent entrustment is imposed due to the actions of the defendant in regards to the instrumentality under his control); *Cox v. Stoughton Trailers, Inc.*, 837 N.E.2d 1075, 1079, 1083 (Ind. 2005) (control of an instrumentality creates liability for that instrumentality); *Garcia v. Cross*, 27 S.W. 3d 152, 154 (Tex. App. 2000)("The entrustor need only have the right of control," to be liable.); *Casebolt v. Cowan*, 829 P.2d 352, 359 (Colo. 1992)(The first issue to address in a negligent entrustment action is whether the defendant had the right and ability to control the use of the entrusted object); *Alioto v. Marnell*, 520 N.E.2d 1284, 1286 (Mass. 1988)(must show defendant owned or controlled the vehicle and gave driver permission to operate); *West v. East Tennessee Pioneer Oil Co.*, 172 S.W.3d 545, 555 (Tenn. 2005)(Negligent entrustment occurs at the moment when control is relinquished and need only exist at the time of entrustment to establish a prima facie case of negligence).

[4] *See, Harrison v. Carrol*, 139 F.2d 427, 428 (4th Cir. 1943) (applying Virginia law)(the custodian or person in control of a vehicle is liable for negligent entrustment); *Green v. Harris*, 70 P.3d 866, 868 (Okla. 2003)(defines entrustment as "owns" or "has possession and control" and allows another to operate); *Estate of Trobaugh v. Farmers Ins. Exch.*, 623 N.W.2d 497, 505 (S.D. 2001)(negligent entrustment requires the ability to entrust and the giving of permission to use) ; *Neary v. McDonald*, 956 P.2d 1205, 1209 (Alaska 1998) (negligent entrustment requires a superior right of control); *Broadwater v. Dorsey*, 688 A.2d 436, 439 (Md. 1997)(negligent entrustment requires a superior right of control over the entrustee or the chattel); *Ransom v. City of Garden City*, 743 P.2d 70, 75-76 (Idaho 1987)(the legal right to control a vehicle creates liability); *Chiniche v. Smith*, 374 So.2d 872, 874 (Ala. 1979)(to establish negligent entrustment it is not necessary that the entruster own the vehicle only that he has the authority to control either the entrustee or the thing entrusted); *Dicranian v. Foster*, 45 A.2d 650, 652-53 (Vt. 1946)(quoting Restatement § 308); *Salamone v. Riczker*, 590 N.E.2d 698, 699 (Mass. App. Ct. 1992)(in regards to negligent entrustment control is the ability to determine whether another may use the chattel); *Cameron v. Downs*, 650 P.2d 260, 262 (Wash. Ct. App. 1982)(owning the vehicle is not a necessity for liability under doctrine of negligent entrustment); *Jones v. Cloud*, 168 S.E.2d 598, 602 (Ga. Ct. App. 1969)(liability can be imposed on a person who has control and entrusts the chattel to another); *Tissicino v. Peterson*, 121 P.3d 1286, 1289 (Ariz. App. 2005) (recognized that the majority of jurisdictions define right to control as the essential element of negligent entrustment and remanded case for jury to decide if defendant had right to control chattel); *Williams v. Bumpass*, 568 So.2d 979, 981 (Fla. App. 1990) (negligent entrustment of firearm is not predicated on ownership but on foreseeability of harm by person entrusting weapon); *Lopez v. Langer*, 761 P.2d 1225, 1227(Idaho 1988)(Ownership is not necessarily control).

and prohibit the use of the entrusted chattel, which need not arise from legal ownership.") (Emphasis added).

According to the Restatement (Second) of Torts, the Mississippi court decisions applying the Restatement, and rulings from all across the country, the trial court erred by holding that "ownership" was the sole consideration in Rainey's negligent entrustment claim. As demonstrated above, "control" – and not ownership – is the key element of a negligent entrustment claim. In response to the summary judgment motion, Rainey submitted numerous examples of Sowell's control of the dangerous trailer, including, but not limited to:

- Vandy testified that Sowell still owned the trailer, and was letting him "use" the trailer while he paid for it. (". . . he and I made a deal that I could – I could – he would let me use it – or he gave it to me so that I could use it when I was pulling corn, and I pulled his corn in terms of we swapped it out.") (R. 483; R.E. B).

- Sowell testified that "if he didn't need, just bring it back when he got through with it. . ." (R. 576; R.E. B).

- Sowell confirmed that the trailer stayed at his house "a portion of the time." (R. 551; R.E. B).

- Vandy testified that the trailer "would have been at Uncle Wayman's shop where I would have picked it up from. He has a big shed that I was parking the combine under and everything, and I could just leave it there." (R. 480; R.E. B).

- Vandy testified that "I could use it and he could use it." (R. 478; R.E. B).

- Vandy was taking the trailer back to Sowell's shop on the day of the collision because he "was suppose to start cutting corn for him" and "to park it." *Id.*

- In fact, Vandy normally left the trailer at Sowell's. He "just left it there; or either there or in the field, wherever **we** needed the fuel tank." *Id.*

- Sowell controlled access to the trailer, and put up several gates to "keep people from going out to my shop without anybody being out there." (R. 582; R.E. B).

- Sowell did not "want people going in there and going to my shop when I'm not around" and "would lock that gate" to be certain. *Id.*

- Sowell disposed of the trailer after the collision; he "cut it up" after the wreck, and sold it for scrap. (R. 550; R.E. B).

At the very least, there are many instances of conflicting proof as to this element which should have been construed in her favor. "It is well settled that a motion for summary judgment should be overruled unless the trial court finds that the plaintiff would be unable to prove any facts to support his claim." *Delahoussaye v. Mary Mahoney's, Inc.*, 696 So.2d 689, 690 (Miss. 1997)(*citing Daniels v. GNB, Inc.*, 629 So.2d 595, 599 (Miss. 1993)).

Even though Sowell denied any control of the dangerous trailer, "a jury is entitled to reach reasonable inferences based on circumstantial as well as direct, evidence." *Ill. Cent. Gulf R.R. Co. v. Int'l Paper Co.*, 889 F.2d 536, 542 (5th Cir. 1989). Moreover, fact issues are present where there is more than one reasonable interpretation for undisputed testimony, where materially different yet reasonable inferences can be drawn from uncontradicted evidentiary facts, or the full facts of the matter have not been disclosed. *Burton*, 730 So.2d 1, 4 (Miss. 1999)(*citing Dennis v. Searle*, 457 So.2d 941, 944 (Miss. 1984)).

The above examples clearly illustrate how "materially different, but reasonable inferences may be drawn" about whether or not Sowell "controlled" the dangerous trailer at issue. Rainey submits that the above proof is at least sufficient evidence to create a genuine issue of fact as to Sowell's superior right to control the trailer, and that a jury must be allowed to decide that question. As such, the summary judgment must be reversed and a jury allowed to determine these issues.

B. EVEN THOUGH OWNERSHIP IS NOT ESSENTIAL TO A CLAIM FOR NEGLIGENT ENTRUSTMENT, RAINEY HAS CREATED A FACTUAL DISPUTE WHETHER SOWELL OWNED THE TRAILER.

"Ownership" of the entrusted property is only one indicia of control, and Rainey offered proof that Sowell in fact still owned the dangerous trailer. *Hobbs Automotive, Inc. d/b/a Kim's*

Chrysler Jeep Dodge Toyota v. Dorsey, 914 So.2d 148, 167 (Miss. 2005). See also, *DeWester*, 745 N.W.2d 330, 335 (Neb. 2008)("[m]ost courts have framed the relevant issue in a negligent entrustment case as whether the defendant in a negligent entrustment action had the right to control the entrusted property, with ownership simply being one way of proving a right to control."). Even though Sowell's ownership should not be outcome determinative in a negligent entrustment claim, the trial court erred when it held, as a matter of law, that Sowell did not own the trailer at issue. Rainey contended below, and contends now, that she offered substantial evidence from which a jury could reasonably infer that Sowell did, in fact, own **and** control the defective trailer which caused her accident.

This Court has held on numerous occasions that evidence presenting contradictory versions of events should be left to the fact finder for deliberation[5]. *Yowell v. James Harkins Builder*, Inc., 645 So.2d 1340, 1344-45 (Miss. 1994)(This Court remanded a property dispute "[b]ecause there ***appears*** to be conflicting evidence and testimony as to . . . an issue of material fact, a finder of fact should consider the weight and worth of such testimony."); *Dennis*, 457 So.2d 941, 944 (Miss. 1984)("[s]ummary judgment is not a substitute for trial of disputed fact issues. . . Issues of fact sufficient to require denial of a motion for summary judgment obviously are present where one party swears to one version of the matter in issue and another says just the opposite.").

Rainey offered evidence and testimony from which a reasonable jury could have concluded that Sowell did in fact still own the trailer at the time of the accident. For instance:

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[5] *See, e.g. Smith v. State*, 913 So.2d 365, 367 (Miss. Ct. App. 2005)(Criminal trial in which this court held "it is the duty of the jurors as fact finders to resolve any conflicts with any testimony that they hear."); *Simmons v. Simmons*, 724 So.2d 1054, 1059 (Miss. Ct. App. 1998)(Appeal of divorce in which court held it is the fact finder's responsibility to assess witness credibility in the face of conflicting testimony.); *Hudson v. Bank of Edwards*, 469 So.2d 1234, 1238 (Miss. 1985) (*citing Dennis v. Searle*, 457 So.2d 941, 944 (Miss. 1984).

- Vandy testified that Sowell was letting him "use" the trailer while he paid for it. (R. 483; R.E. B). Specifically, Vandy testified:

  > "[h]e and I made a deal that I could – I could – he would let me use it – or he gave it to me so that I could use it when I was pulling corn, and I pulled his corn in terms of we swapped it out."

- Sowell testified that Vandy was still paying for the trailer at the time of the accident. His testimony indicates that he owned the trailer and that Vandy was not finished paying for it. He testified that Vandy would either pay cash a little at a time or come and cut Sowell's corn, and Sowell would subtract it from the purchase price of the "package deal" combine and trailer. (R. 576; R.E. B).

Of course, like every defendant seeking to avoid the consequences of his own negligent actions, Sowell adamantly denied "ownership" of the dangerous trailer, and pointed to contradictory testimony from Vandy on that issue:

- Sowell testified:

  > Q. Did you actually tell him it was his?
  >
  > A: Yes. I told him it was his if he wanted it. And that's the way I left it. (R. 556; R.E. B).
  >
  > *******
  >
  > "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. 576; R.E. B).
  >
  > *******
  >
  > Q. All right. You told him he could have the trailer until he wanted to bring it back?
  >
  > A. No. I told him he could have it. I didn't expect him to ever bring it back. (R. 577; R.E. B).

- When Vandy was asked earlier in the same deposition quoted above who owned the trailer, Vandy testified: "I did." (R. 483; R.E. B).

- Vandy also submitted an affidavit, which denied ownership:

> "[t]he other Defendants [Sowell and certain limited partnerships owned by Sowell] referred to in the complaint . . . had no ownership or other interest in the truck and trailer involved in the accident at issue. . ." (R. 611; R.E. B).

All of this testimony regarding "ownership" of the dangerous trailer is clearly contradictory. "[I]ssues of fact sufficient to require denial of a motion for summary judgment obviously are present where one party swears to one version of the matter in issue and another says the opposite." *Yowell*, 645 So.2dat 1343 (Miss. 1994); *See also*, *Clark*, 794 So.2d at 197 (Miss. 2001)(Contradictory testimony "certainly" presents "a classic question for the fact finder to resolve.") At the very least, a jury could reasonably conclude that either Vandy or Sowell owned the trailer. An issue of fact may be present where there is "more than one reasonable interpretation of undisputed testimony" or "where materially different but reasonable inferences may be drawn from uncontradicted evidentiary facts." *Miller*, 762 So.2d at 305 (*citing Dennis*, 457 So.2d at 944 (Miss. 1984)). Finally, "it is not for the trial court to decide which of the witnesses is telling the truth, or to give greater weight to the testimony of certain witnesses." *Delahoussaye,* 696 So.2d at 691 (Miss. 1997).

Mississippi law is clear that where contradictory testimony exists, a jury must weigh the testimony and determine each witness's credibility, or lack thereof. All of the testimony should have been viewed with "great skepticism" and in the light most favorable to Rainey. *Burton,* 730 So.2d at 4 (Miss. 1999). The trial court effectively ignored these conflicts, weighed the witnesses' credibility in a light most favorable to Sowell, and in essence resolved these critical factual disputes as a matter of law. A jury -- not the trial court -- should have been allowed to assess the conflicting testimony as to "ownership" and determine the credibility of Vandy and Sowell in the larger context of Rainey's claims. Therefore, this Court must reverse the trial court's ruling regarding both issues and remand the factual issues for determination by a jury.

III. SOWELL OWED A DUTY TO RAINEY, AND TO THE GENERAL PUBLIC.

The trial court erred in determining that Sowell owed no legal duty to Rainey. Specifically, the trial court held that there "was no duty owed for all the reasons" set forth in Sowell's brief. (Tr. 9; R.E. G) Sowell's primary argument, as addressed herein, is that he owed no duty since he did not own the trailer. As demonstrated above, even though ownership of the trailer is not the critical determinant for Rainey's negligence claims, there is much dispute on that issue. Aside from this clear factual dispute which must be resolved by a jury, Sowell owed a legal duty to Rainey, and Rainey provided more than adequate proof of that duty.

While duty is normally an issue of law, the paramount consideration in determining the nature and extent of the duty owed is whether or not the resultant injury is foreseeable. *Id. See also, Rein v. Benchmark Constr. Co.*, 865 So.2d 1134, 1143 (Miss. 2004)(Summary judgment reversed in a negligence action finding that the "important concept of the existence of the duty is that the injury is 'reasonably foreseeable.'"); *Jowers v. BOC Group, Inc.*, 2009 WL 995613 (S.D. Miss. 2009) ("The existence and scope of the duty of the defendant in a particular case rests on all the relevant circumstances, including the foreseeability of harm to the plaintiff and other similarly situated persons."); *Pritchard v. Von Houten*, 960 So.2d 568, 579 (Miss. 2007)("An important component of the existence of a duty is that the injury is reasonably 'foreseeable.'"); *Garcia v. Cross*, 27 S.W.3d 152, 155 (Ct. App. Tx. 2000)("foreseeability is...decided from the facts surrounding the occurrence in question.").

In *Rhaly v. Waste Management of Mississippi, Inc.*, 2008-CA-01085-COA (Miss. Ct. App. 2010), the Court of Appeals reiterated this Court's long standing position that forseeability presents a jury question where "reasonable minds may differ and sufficient evidence of negligence is presented." *Id.* at (¶14)(*citing Lyle v. Mladinich*, 584 So.2d 397, 399 (Miss. 1991)). In *Rhaly*, the plaintiffs brought suit against a dumpster owner for property damages

caused when unsecured dumpsters placed near a flood prone ditch floated away from their original locations. The trial court determined that the dumpster owner had no duty to the landowners. The Court of Appeals disagreed and reversed summary judgment, specifically finding that the event was foreseeable and the dumpster owner therefore owed a duty of reasonable care. The court in *Rhaly* opined:

> We think it beyond question that, as a matter of law, Waste Management owed a duty to use reasonable care in placing its dumpster so as to avoid injury to nearby property owners. We cannot agree with the trial court that the harm alleged–the flooding of nearby properties– is so "unusual, improbable, or extraordinary a consequence of placing a large, unsecured object on the banks of a drainage ditch that the issue of foreseeability may be resolved as a matter of law. Instead, we find that this case presents at least a jury question as to whether Waste Management acted reasonably under all the circumstances.

Id. at (¶15). *See also, Hankins Lumber Co. v. Moore*, 774 So.2d 459, 464 (Miss. 2000)("The 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....it is a question of fact for the jury to determine.").

The record below is clear that it was reasonably foreseeable to Sowell that an accident of this nature would occur if the unlighted trailer was used at night or at dusk. The best proof of foreseeability came from Sowell himself:

- Sowell knew that the trailer was dangerous, and testified that to have a trailer without lights is "wrong and risky." (R. 584; R.E. B).
- Sowell himself took the trailer out at night, he knew it was unsafe. ("It's unsafe enough. I don't want to take that chance I'll say. With them reflectors on it, it wasn't altogether unsafe. But it was unsafe enough I wasn't willing to take that chance.") (R. 574; R.E. B)
- When Sowell took the trailer out at night he attempted to take precautions to guard against this very type of accident by having a truck with lights follow the trailer "for safety." *Id.*

Sowell clearly knew that driving the very same unlighted trailer was dangerous and likely to cause the exact harm which did occur. The jury could have, and should have, considered that

Sowell was fully aware of the risks associated with driving the trailer at night, and 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. Some or all of that conduct is a classic failure to exercise reasonable care. Thus, a jury should have been allowed to ultimately determine if Sowell violated his general duty to act "as a reasonably prudent person" would under the circumstances. *Doe*, 950 So.2d at 1079 (Miss. 2007).

This Court has previously addressed the duty issue in the context of unlighted trailers. In *Jester v. Bailey*, 123 So.2d 442 (Miss. 1960), Bailey, the plaintiff, parked several trailers on the shoulder of the roadway, and was hitching the trailers to his tractor. Much like the present factual scenario, it was dark at the time of the accident and the trailers parked on the road by Bailey, the plaintiff, had no rear lights, signals or reflectors. Jester, the defendant, struck one of the trailers and pinned the plaintiff between them. Even though Jester argued that Bailey was comparatively negligent because Bailey parked the trailers on the shoulder without lights and reflectors, the trial court granted a directed verdict against Jester, finding that Jester's negligence in rear-ending the trailers was the sole, proximate cause of the accident. This Court reversed finding that Jester, the defendant, was entitled to have the jury consider whether or not Bailey was negligent in parking the unlit trailers on the side of the road:

> It is clear that, if the jury believed defendant's testimony, plaintiff was negligence [sic] in parking his trailers half on and half off the highway on a dark, moonless night, without any rear lights, reflectors or flares. Such a failure is a violation of the statutes. [citations omitted]. If the jury accepted defendant's evidence, plaintiff violated these statutes and was guilty of negligence which was a proximate cause of his injuries.

Id. at 443-444. In a similar case, *J.K. Dent v. Luckett*, 135 So.2d 840, 842 (Miss. 1961), an injured driver was injured brought suit after colliding with an unlighted cotton trailer. This Court found that the absence of reflectors or lights on the trailer was a "matter for the consideration of

the jury based upon their own experience and observation." *Id.* at 842. The trial court should have followed this Court's guidance and allowed the jury to make the ultimate determination. *Id. See also, Warren v. Campagna*, 685 So.2d 969 (La. App. 4th Cir. 1996)(A jury failed to consider violations of state lighting requirements as evidence of breach of duty where plaintiff was injured in collision with unlighted trailer.)

Finally, Rainey argued that certain Mississippi statutes regarding the necessity of rear facing lights applied to the circumstances of this accident, constituted negligence per se, and, at the very least, set forth the applicable standard of care. Sowell argued that because he did not technically "own" the trailer, the statutes did not apply and he owed no duty whatsoever. Once again, Sowell's argument misconstrues Rainey's claims.

Rainey has alleged, and can prove, that the applicable statutes applied to Sowell, and the violation of those statutes constituted negligence per se. Miss. Code Ann. §§63-13-3, 63-7-13, 63-7-15 and 63-7-7 requires that all trailers be equipped with rear-facing lights if they are to be used on public roadways. Under Miss. Code Ann. §63-7-7, it is breach of the duty imposed for any "person to drive or move or for the owner to cause or to 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." *Id.* As demonstrated above, Rainey has created a material fact issue as to whether or not Sowell in fact owned the dangerous and unlit trailer. If he did, then his failure to put lights on the trailer constituted negligence per se. Whether or not he did own the trailer is a fact issue, which must be decided by the jury.

However, even if Sowell did not own the trailer, the applicable statutes set forth the standard of care regarding rear facing lights on the trailer. The statutes clearly provide that the owner and operator of vehicles must provide rear facing lights to protect those on the roadway.

The statutes create the standard of care (i.e., that reasonable people should provide rear facing lights on trailers, especially at night). *Moore v. K&J Enterprises*, 856 So.2d 621, 630 (Miss. 2003)("Under negligence per se, the standard of care is established by the statutory requirement."); *See also, Byrd v. McGill*, 478 So.2d 302 (Miss. 1985)(Reversal of a jury verdict in a wrongful death suit finding that the Mississippi boating safety statute was "a conclusive expression of the applicable standard of reasonable conduct as pronounced by legislative enactment" that a jury should have been allowed to consider.). Moreover, the concept of "foreseeability" remains relevant in a negligence per se analysis. *Moore*, 856 So.2d 621, 632 (Miss. 2003)(The role of forseeability in a negligence per se analysis mirrors that of traditional negligence for conduct below the standard established by law and "necessarily involves a foreseeable risk, a threatened danger of injury, and conduct unreasonable in proportion to the danger."). Rainey has clearly established Sowell's awareness of the risk associated with the unlighted trailer and the foreseeability of Rainey's injury. Inasmuch as these statutes prescribe the applicable standard of care and take into account the foreseeable risks, that same standard of care would, and should, apply to Sowell regardless of whether or not he owned the trailer. If, as demonstrated above, Sowell "controlled" but did not own the trailer, he is liable for negligently entrusting the dangerous vehicle because the applicable standard of care set forth in the statutes required rear facing lights. Without such required lights, Sowell should not have entrusted that trailer to Vandy or at least should have warned Vandy of the dangerous condition. Sowell can, and should, be held liable for his failure to do so.

II. CONCLUSION.

Rainey pled, and has offered substantial evidence in support of, a myriad of claims based on Sowell's negligence. Each and every one of those negligence claims should have survived summary judgment. Rainey's negligent entrustment claim, in particular, was supported by the evidence and the law. As demonstrated above, the trial court erred by focusing exclusively on the question of "ownership" of the dangerous trailer, when "control" is the key inquiry. From the evidence presented, it is clear that Rainey has offered conclusive circumstantial evidence that Sowell "controlled" the dangerous trailer, and should be held liable for negligently entrusting it to Vandy. Moreover, Rainey offered compelling evidence that Sowell in fact still owned the trailer at the time of the accident. According to Vandy's sworn testimony, Vandy was permitted to "use" Sowell's trailer while he "swapped it out." At the very least, the conflicting testimony on the question of "ownership" presented a classic factual dispute, which required the jury to resolve. Finally, despite Sowell's best efforts to avoid the consequences of his actions, Sowell owed a duty to Rainey and to the general public to exercise reasonable care. Because Sowell knew that it was "wrong and risky" to have a trailer without lights, because he did absolutely nothing to put lights on the trailer, and because he failed to warn Vandy about that dangerous condition, the injury which occurred was reasonably foreseeable to Sowell. Rainey was, and is, entitled to have her claims decided by a jury, and not dismissed as a matter of law.

THIS, the 9 day of November, 2010.

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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