

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

**NO. 2010-CA-01812**

**CARL PATTERSON, JR.**

**APPELLANT**

**VS.**

**TURTLE CREEK DEVELOPMENT, LLC  
AND T.L. WALLACE CONSTRUCTION COMPANY, INC.**

**APPELLEES**

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**APPEAL FROM THE CIRCUIT COURT OF MARION COUNTY, MISSISSIPPI;**

**CAUSE NO. 2009-0043P**

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**BRIEF OF APPELLEE, TURTLE CREEK DEVELOPMENT, LLC.**

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**CERTIFICATE OF INTERESTED PERSONS**

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The undersigned counsel of record certifies that the following listed persons and entities 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. Carl Patterson, Jr., Appellant;
2. Turtle Creek Development, LLC, Appellee;
3. T. L. Wallace Construction Company, Inc., Appellee;
4. A. Regnal Blackledge, Esq., counsel for Appellant;
5. Andrew Lampros, Esq. and Mathew Cathey, Esq., Cook, Hall and Lampros, LLP, counsel for Appellant;
6. Walter Dukes, Esq. and Adam B. Harris, Esq., Dukes, Dukes, Keating and Feneca, PA; counsel for, Appellee, T.L. Wallace Construction Company, Inc.;
7. Roger C. Riddick, Esq. and Bradley S. Kelly, Esq., Copeland, Cook, Taylor & Bush, PA, counsel for Appellee, Turtle Creek Development, LLC;
8. Honorable Anthony A. Mozingo, Marion County, Mississippi.

## **TABLE OF CONTENTS**

CERTIFICATE OF INTERESTED PERSONS .....	i
TABLE OF CONTENTS .....	ii
TABLE OF AUTHORITIES .....	iv
STATEMENT OF THE ISSUES .....	vii
STATEMENT OF THE CASE .....	1
SUMMARY OF THE ARGUMENT .....	3
STANDARD OF REVIEW .....	3
ARGUMENT .....	4
1. The Trial Court Properly Granted Turtle Creek Development's Motion for Summary Judgment .....	4
2. Turtle Creek Owed No Duty to Maintain Cross Creek Parkway, a Public Roadway ....	5
3. Even Assuming A Duty was Owed or Breached, Patterson's Accident was not Reasonably Foreseeable to Turtle Creek Development. ....	10
4. Patterson's Assertions that Turtle Creek failed to Adhere to Mississippi's Construction Storm Water General National Pollutant Discharge Elimination System Permit (NPDES) are Legally Insufficient to Create a Genuine Issue of Material Fact .....	13
5. The Acts or Omissions by T. L. Wallace, an Independent Contractor for Turtle Creek, Can Not Be Used to Impute or Create Liability on the Part of Turtle Creek Development .....	15
6. The Court Properly Granted Summary Judgment to T. L. Wallace .....	20
A. Wallace was not Negligent in Failing to Clear the Roadway of a Condition For Which It Did Not Create and Wallace's Negligence, if any, as an Independent Contractor Can Not Be Imputed to Turtle Creek .....	20
B. The Evidence Wholly Fails to Prove that the Alleged Debris in the Public Roadway Came From T. L. Wallace's Work Site or Equipment. It is Likewise Undisputed that Turtle Creek Didn't Cause the Debris to Enter the Roadway .....	20

C.	T. L. Wallace, Like Turtle Creek, Had No Legal Duty to Prevent the Public Using a Public Roadway from Alleged Hazards Which It Did Not Create . . . . .	20
VII.	CONCLUSION . . . . .	21

## **TABLE OF AUTHORITIES**

<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986) .....	4
<i>Arata v. Orleans Capitol Stores</i> , 219 La. 1045, 55 So.2d 239, 244 (La. 1951) .....	7
<i>Bond v. City of Long Beach</i> , 908 So.2d 879, 881 (Miss. Ct. App. 2005) .....	5, 7
<i>Brown v. Credit Center, Inc.</i> , 444 So.2d 358, 362 (Miss. 1983) .....	4
<i>Chisholm v. Miss. Dept. of Transp.</i> , 942 So.2d 136, 141 (Miss. 2006) .....	19
<i>Donald v. AMOCO Prod. Co.</i> 735 So.2d 161, 174 (Miss. 1999) .....	5, 7, 12
<i>Erby v. North Miss. Med. Center</i> , 654 So.2d 495, 499 (Miss. 1995) .....	3, 4
<i>Friends of Earth, Inc. v. Laidlaw Environmental Serv., Inc.</i> , 528 U.S. 167, 174, 120 S.Ct. 693, 701 (U.S. 2000) .....	14
<i>Hubbard v. Wansley</i> , 954 So.2d 951, 964 (Miss. 2007) .....	7
<i>Hudson v. Farrish Gravel Co., Inc.</i> , 279 So.2d 630, 636 (Miss. 1973) .....	6
<i>Illinois Cent. R. Co. v. Bloodworth</i> , 145 So. 2d 333 (Miss. 1933) .....	11
<i>Jones v. Howell</i> , 827 So.2d 691, 702 (Miss. 2002) .....	13
<i>Kelly v. International Games Tech.</i> , 874 So.2d 977, 981 (Miss. 2004) .....	13
<i>King v. Bunton</i> , 43 So.3d 361, 364 (Miss. 2010) .....	16
<i>Laurel Yamaha, Inc. v. Freeman</i> , 956 So.2d 897, 905 (Miss. 2007) .....	14, 15
<i>Lott v. Harris D. Purvis &amp; BRJ, Inc.</i> , 2 So.3d 789, 792 (Miss. App. 2009) .....	6
<i>Lowery v. Statewide Healthcare Serv., Inc.</i> , 585 So.2d 778, 783 (Miss. 1991) .....	19
<i>Martin v. Flanagan</i> , 818 So.2d 1124, 1128 (Miss. 2002) .....	7, 8, 9
<i>Mauney v. Gulf Refining Company</i> , 9 So.2d 780, 781 (Miss. 1942) .....	11, 12, 13
<i>Millers of Jackson v. Newell</i> , 341 So. 2d 101, 103 (Miss. 1976) .....	12
<i>Mississippi Power and Light Company v. Thomas</i> , 206 Miss. 201, 39 So. 2d 759, 40 So. 2d 597 (1949) .....	10

<i>New Orleans, and N. E. Railroad Co. v. Burge</i> , 191 Miss. 303, 2o. 2d 835 (1941) .....	10
<i>Owens v. Thomae</i> , 759 So.2d 1117, 1122 (Miss. 1999) .....	16,18
<i>Palmer v. Biloxi Reg. Med. Center, Inc.</i> , 564 So.2d 1346, 1355 (Miss. 1990) .....	4
<i>Pargas of Taylorsville, Inc. v. Kraft</i> , 249 So. 2d 403 (Miss. 1999) .....	10, 12
<i>Pearl River County Bd. v. South East Collection</i> , 459 So.2d 783, 785 (Miss. 1984) .....	4
<i>Reaves v. Wiggs</i> , 192 So.2d 401, 403 (Miss. 1996) .....	12
<i>Richardson v. APAC-Mississippi, Inc.</i> , 631 So.2d 143, 148 (Miss. 1994) .....	18
<i>Sears Roebuck and Co. v. Tisdale</i> , 185 So.2d 916, 917 (Miss. 1966) .....	5, 6
<i>Sellars v. Wallgreen Co.</i> , 971 So.2d 1278, 1279 (Miss. App. 2008) .....	5
<i>Shaw v. Burchfield</i> , 481 So.2d 247, 252 (Miss. 1985) .....	4
<i>Shelton by and through Roden v. Twin Co. Rural Elec. Ass'n.</i> , 611 So.2d 931, 935-36 (Miss. 1992) .....	4
<i>Smith v. First Fed. Savings and Loan Assoc. of Grenada</i> , 460 So.2d 786, 792 (Miss. 1984) ....	4
<i>Stewart v. Lofton Timber Co.,LLC</i> , 943 So.2d 729 (Miss. App. 2006) .....	16
<i>Sturdivant v. Crosby Lumber and Manufacturing Company</i> , 65 So.2d 291, 295 (Miss. 1953) .	13
<i>Titan Tire of Natchez, Inc. v. Miss. Comm. Of Environmental Quality</i> , 891 So.2d 195, 198 fn.1 (Miss. 2004) .....	14
<i>Watson Quality Ford, Inc. v. Casanova</i> , 999 So.2d 830, 835 (Miss. 2008) .....	7
<i>Webb v. Braswell</i> , 930 So.2d 387, 395 (Miss. 2006) .....	3
<i>Wilbourn v. Stennett, Wilkinson &amp; Ward</i> , 687 So. 2d 1205, 1214 (Miss. 1996) .....	4
<i>Yowell v. James Harkins Builders, Inc.</i> , 645 So. 2d 1340 (Miss. 1994) .....	4
<u>Statutes</u>	
<i>Miss. Code Ann.</i> 49-17-1 to 49-17-43 .....	14
<i>Miss. Code Ann.</i> §49-17-3 .....	14

Rules

Rule 56(c) of the <i>Mississippi Rules of Civil Procedure</i> .....	3
Rule 28(i) of the <i>Mississippi Rules of Appellate Procedure</i> .....	20

## **STATEMENT OF THE ISSUES**

1. Pursuant to Rule 28(b) of the *Miss. Rules of Appellate Procedure*, Appellee, Turtle Creek Development, LLC rejects Appellant's statement of the Issues as it relates to the appeal of the summary judgment in favor of Turtle Creek Development, LLC. The specific issues are as follows:
  - a. Whether the trial court was correct in its ruling that Turtle Creek Development, LLC owed no duty to Appellant;
  - b. Whether the trial court was correct in its ruling that Turtle Creek Development, LLC did not breach any duty to the Appellant;
  - c. Assuming a duty was owed by Turtle Creek, the Appellant's injury was not reasonably foreseeable; and
  - d. Whether T. L. Wallace Construction Company, Inc. was an independent contractor for Turtle Creek Development, LLC on the date of the accident.
2. Pursuant to Rule 28(b) of the *Miss. Rules of Appellate Procedure*, Appellee, Turtle Creek Development, LLC accepts Appellant's Statement of the Issues as it relates to the appeal of the grant of summary judgment in favor of T. L. Wallace Construction Company, Inc. and is satisfied with the statement of the Appellant in that regard.



## STATEMENT OF THE CASE

This case arises from a single vehicle accident on Cross Creek Parkway<sup>1</sup>, in Hattiesburg, Mississippi, on November 18, 2006. Appellant, Carl Patterson (“Appellant” or “Patterson”), was driving a high performance Suzuki motorcycle at the time of the accident. Cross Creek Parkway is a public roadway owned by the City of Hattiesburg, which runs north and south from Highway 98 to 4<sup>th</sup> Street, west of Turtle Creek Mall. [R. 814-17]. Patterson alleges that as he was traveling south on Cross Creek Parkway, he “got into some gravel and lost control of his motorcycle.” [R. 396]. Although Patterson argues that he had no opportunity to “avoid the debris” he admits that only seconds before his accident Matt Sorrels, riding a motorcycle in front of Patterson, saw the debris and rode through the area without incident. (Appellant’s Brief at p. 1 and R. 436).

Patterson’s allegations against Turtle Creek Development, LLC (Turtle Creek), are premised upon the theories of negligence, negligence *per se*, and *respondeat superior*.

Specifically, Patterson alleges that Turtle Creek owned property on the west side of Cross Creek Parkway on which T. L. Wallace Construction Company, Inc. (T. L. Wallace), was performing work in preparation for the construction of a Kohl’s Department Store which was to be built on the southeast side of the Cross Creek Parkway. That as owners of the property, Turtle Creek had a non-delegable duty to ensure that the adjacent roadway remained in a reasonably safe condition and that Turtle Creek had a duty to either keep the roadway clear of debris or warn motorists that the roadway had debris on it. He asserts that as owners of the adjacent property Turtle Creek Development had

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Throughout the pleadings and testimony in this case, the subject road has been referred to as various different names, including, but not limited to, Cross Creek Parkway, Turtle Creek Crossing Road, Turtle Creek Crossing, Turtle Creek Mall Road and Turtle Creek Mall Crossing. All parties agree as to the road and general location where the subject accident occurred. In this Appeal Brief, the road will be referred to as Cross Creek Parkway or Parkway.

a non-delegable duty and is liable for the alleged negligent acts of T. L. Wallace and its employees. [786-89].

Patterson asserts that in the days leading up to the crash, T. L. Wallace performed construction, contracting, or other work near the site of the crash and that debris on the roadway came directly from activities by T. L. Wallace on the Turtle Creek property. [R. 789].

Patterson further alleges that Turtle Creek failed to adhere and comply with the requirements of Mississippi's Construction Storm Water General Natural Pollutant Discharge Elimination System Permit ("NPDES") and that these alleged failures resulted in debris being deposited in the roadway.

It is undisputed that on the date of the accident, Cross Creek Parkway and the adjacent right of way were owned by the City of Hattiesburg. [R. 814-17] T. L. Wallace, an independent contractor, was retained by Turtle Creek to perform certain work on the west side of Cross Creek Parkway, prior to the date of the subject accident. The undisputed testimony was that prior to the accident any work performed by T. L. Wallace was no closer than 150' - 200' from the west side of the Parkway. [R. 506, 736 and 829]. Actual crossing of the Parkway by T. L. Wallace and work on the east side of Cross Creek Parkway did not begin until after the date of the subject accident when work on the Kohl's project began. [R. 830-31 and 834-35]. After extensive discovery the trial court found that Patterson failed to present any evidence to show how the debris got onto the Parkway, how long the debris had been on the Parkway, nor did Patterson present any proof that Turtle Creek had knowledge of the presence of the alleged debris on the Parkway on the date of the accident. Patterson, likewise, failed to prove the necessary elements to support his claims and Turtle Creek's Motion for Summary Judgment was properly granted by the trial court.

## SUMMARY OF ARGUMENT

The trial court properly found that under the undisputed facts Turtle Creek Development owed no duty to Patterson and granted Turtle Creek's Motion for Summary Judgment based upon Patterson's failure to present any genuine issue of material fact to support his claims against Turtle Creek. Patterson did not present sufficient probative factual evidence to create an issue of fact as to any duty owed, any duty breached, nor did he prove legal causation with respect to the allegations against Turtle Creek. The trial court found that Patterson failed to present any legally sufficient or probative factual evidence to prove that T. L. Wallace was acting in any capacity other than that of an independent contractor in the work they were performing for Turtle Creek in the days leading up to the accident. Even assuming a duty owed, under the facts of this case, Patterson's accident was not reasonably foreseeable to Turtle Creek Development based upon the undisputed facts developed through discovery.

## STANDARD OF REVIEW

The Supreme Court "reviews de novo a trial court's grant of a motion for summary judgment." *Webb v. Braswell*, 930 So.2d 387, 395 (Miss. 2006). Rule 56(c) of the *Mississippi Rules of Civil Procedure* provides that summary judgment should be granted on claims where there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. Where "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, the moving party is entitled to judgment as a matter of law." *Erby v. North Miss. Med. Center*, 654 So.2d 495, 499 (Miss. 1995). "The non-moving party's claim must be supported by more than 'a mere scintilla of colorable evidence'; it must be evidence upon which a fair-minded jury could return a favorable

verdict.” *Wilbourn v. Stennett, Wilkinson & Ward*, 687 So. 2d 1205, 1214 (Miss. 1996), (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986)).

The summary judgment movant has the burden of establishing that there is no genuine issue of material fact to be tried. *Shaw v. Burchfield*, 481 So.2d 247, 252 (Miss. 1985), citing *Pearl River County Bd. v. South East Collection*, 459 So.2d 783, 785 (Miss. 1984); *Brown v. Credit Center, Inc.*, 444 So.2d 358, 362 (Miss. 1983). “The focal point of our standard for summary judgment is on material facts.” *Erby*, 654 So.2d at 499. If the party opposing the motion is to avoid entry of an adverse judgment, he or she must bring forth evidence which is legally sufficient to make apparent the existence of triable fact issues. *Id.*; See also *Smith v. First Fed. Savings and Loan Assoc. of Grenada*, 460 So.2d 786, 792 (Miss. 1984). The movant must produce significant, probative evidence to support the Motion for Summary Judgment. *Shelton by and through Roden v. Twin Co. Rural Elec. Ass’n.*, 611 So.2d 931, 935-36 (Miss. 1992), citing *Palmer v. Biloxi Reg. Med. Center, Inc.*, 564 So.2d 1346, 1355 (Miss. 1990). Neither party may rely upon mere allegations or denials. *Id.* Where the Plaintiff fails to bring forth any credible evidence to prove any facts supporting his claim, the Defendant is entitled to summary judgment. *Id.*, at 935. Granting a Motion for Summary Judgment is appropriate when the Plaintiff’s evidence fails to sufficiently establish an essential element of a case and as a result, no issue of material fact exists to support that element. *Yowell v. James Harkins Builders, Inc.*, 645 So. 2d 1340 (Miss. 1994).

## ARGUMENT

### 1. The Trial Court Properly Granted Turtle Creek’s Motion for Summary Judgment

When a Plaintiff asserts a claim of negligence, “to overcome summary judgment he must show a genuine issue to prove each of the four elements of negligence: 1) a duty, or obligation,

recognized by law, requiring [the defendant] to conform to a certain standard of conduct, 2) a breach of the duty, a failure on [the defendant's] part to conform to the standard required, 3) a reasonably close causal connection between the conduct and the resulting injury, and 4) actual loss or damage. *Sellers v. Wallgreen Co.*, 971 So.2d 1278, 1279 (Miss. App. 2008) (emphasis added). If the proof fails on any point the Plaintiff's case fails as a matter of law. Patterson has failed to address any of the first three elements in his appeal brief, focusing instead on element 4) actual loss or damage. However severe the injuries or damages might be, "[t]he basis of liability is negligence and not injury." *Sears Roebuck and Co. v. Tisdale*, 185 So.2d 916, 917 (Miss. 1966). "Duty and breach of duty are essential to finding negligence and must be demonstrated first." *Donald v. AMOCO Prod. Co.*, 735 So.2d 161, 174 (Miss. 1999).

2. Turtle Creek Owed No Duty to Maintain Cross Creek Parkway, a Public Roadway.

The trial court properly held under the undisputed evidence presented that:

"Turtle Creek owed no duty to maintain the Parkway as it was a public roadway dedicated to the City of Hattiesburg. Any hazardous condition that proximately caused the Plaintiff's injuries likely resulted from a breach of duty by the City of Hattiesburg because the City, not Turtle Creek, had a "non-delegable duty to maintain its sidewalks and other public ways in a reasonably safe condition. *Bond v. City of Long Beach*, 908 So.2d 879, 881 (Miss. Ct. App. 2005)." (R. 1071).

Patterson failed to present sufficient evidence to create a genuine issue of material fact exist regarding the origin of the debris. There is no proof to support the claim that the debris came from any activity performed by Turtle Creek there can be no duty to keep clean a public roadway, an essential element of his negligence claim. *Sellers*, 971 So.2d at 1279.

Patterson's speculative assertions aside the trial court found that Turtle Creek did not owe a duty to the Appellant. Even assuming the existence a duty; there was no causal connection between the accident and injuries and Patterson's claim fails to meet the legal test for imposing

they performed on Turtle Creek's property stopped approximately 150 to 200 feet west of before the roadway. [R. 506, 736 and 829]. As noted, Patterson, has not produced any evidence that the alleged debris on the roadway was placed there by T. L. Wallace or its employees. Even if such proof existed in the record, as T. L. Wallace, as an independent contractor, Patterson's claims against Turtle Creek must fail. There is simply no proof to show debris from the area where T. L. Wallace was working ended up in the street after migrating 150' - 200' and across the city owned right of way.

To overcome summary judgment on a negligence claim, a Plaintiff must show a genuine issue of material fact regarding each of the four elements of negligence. "[I]f a defendant's conduct is reasonable in light of 'foreseeable risk,' there is no negligence and no liability." *Donald*, 735 So. 2d at 175. Also, "in all claims for negligence, causation must be proven in order to establish a prima facie case." *Watson Quality Ford, Inc. v. Casanova*, 999 So.2d 830, 835 (Miss. 2008)(citing *Hubbard v. Wansley*, 954 So.2d 951, 964 (Miss. 2007)). As the trial court held, the City of Hattiesburg has a "non-delegable duty to maintain its sidewalks and other public ways in a reasonably safe condition." *Bond*, 908 So.2d at 881. A property owner is generally not liable for injuries arising out of a defect in property adjoining his own unless he is responsible for creating the defect. *Arata v. Orleans Capitol Stores*, 219 La. 1045, 55 So.2d 239, 244 (La. 1951). "A possessor of land over which there is a public highway or private right of way is not subject to liability for physical harm caused to travelers upon the highway or persons lawfully using the way by his failure to exercise reasonable care (a) to maintain the highway or way in a safe condition for their use, or (b) to warn them of dangerous conditions in the way which, although not created by him, are known to him and which they neither know nor are likely to discover." *Martin v. Flanagan*, 818 So.2d 1124, 1128 (Miss. 2002).

harm from his conduct is an external one, from the point of view of the actor prior to the occurrence. *Sturdivant v. Crosby Lumber and Manufacturing Company*, 65 So. 2d 291, 295 (Miss. 1953). Courts cannot “look from affect to cause.”

“A reasonable man can be guided only by a reasonable estimate of probabilities. If men went about guarding themselves against every risk to themselves or others which might by ingenious conjecture be conceived as possible, human affairs could not be carried on at all. The reasonable man, then, to whose ideal behavior we are to look as a standard of duty, will neither neglect what he can forecast as probable, nor waste his anxiety on events that are barely possible.” *Mauney*. 9 So. 2d at 781.

4. Patterson’s assertions that Turtle Creek failed to adhere to the Mississippi’s Construction Storm Water General National Pollutant Discharge Elimination System Permit (NPDES) is legally insufficient to create a genuine issue of material fact.

Patterson failed to cite any legal authority to support his contention that Turtle Creek’s alleged failure to adhere to the NPDES permit, if any, creates a genuine issue of material fact. The “Supreme Court will entertain no claims on appeal for which no supporting authority has been cited.” *Kelly v. International Games Tech.*, 874 So.2d 977, 981 (Miss. 2004). “It is the duty of the appellant to provide authority in support of an assignment of error, ‘and the appellate court’ considers assertions of error not supported by citation of authority to be abandoned.” *Jones v. Howell*, 827 So.2d 691, 702 (Miss. 2002). Based upon Patterson’s failure to cite any authority to support of his claim that Turtle Creek’s failure to adhere to the requirements of the NPDES permit, creates legal liability for Patterson’s injury, Turtle Creek submits that these allegations have been abandoned.

Turtle Creek will, however, address Patterson's argument relating to the NPDES permit. Patterson fails to cite the applicable permit requirements of the NPDES allegedly violated. Patterson apparently claims negligence *per se* applies with regard to the alleged, but unspecified NPDES permit violations. "To prevail in an action for negligence *per se*, a party must prove that he was a member of the class sought to be protected under the statute, that his injuries were of a type sought to be avoided, and that the violation of the statute proximately caused his injuries." *Laurel Yamaha, Inc. v. Freeman*, 956 So.2d 897, 905 (Miss. 2007).

NPDES permits were intended for the purpose of imposing limitations on the discharge of pollutants, and to establish related monitoring and reporting requirements, in order to improve the cleanliness and safety of the Nation's water." *Friends of Earth, Inc. v. Laidlaw Environmental Serv., Inc.*, 528 U.S. 167, 174, 120 S.Ct. 693, 701 (U.S. 2000). NPDES permits in Mississippi are governed by the Mississippi Air and Water Pollution Control Law found in *Miss. Code Ann.* 49-17-1 to 49-17-43. The stated purpose of a NPDES permit is to "regulate industrial and municipal wastewater discharges." *Titan Tire of Natchez, Inc. v. Miss. Comm. Of Environmental Quality*, 891 So.2d 195, 198 *fn. 1* (Miss. 2004). The legislative intent of the Mississippi Air and Water Pollution Control Law and its related permits, including NPDES permits, is stated in *Miss. Code Ann.* §49-17-3:

Whereas, the pollution of the air and waters of the state constitutes a menace to public health and welfare, creates a public nuisance, is harmful to wildlife, fish and aquatic life, and impairs domestic, agricultural, industrial, recreational and other legitimate beneficial uses of air and water, and whereas, the problem of air and water pollution in this state is closely related to the problem of air and water pollution in adjoining states, it is hereby declared to be the public policy of this state to conserve the air and waters of this state and to protect, maintain and improve the quality thereof for public use, for the propagation of wildlife, fish and aquatic life, and for domestic, agricultural, industrial, recreational and other legitimate beneficial uses; to maintain such a reasonable degree of quality of the air resources of the state to



protect the health, general welfare and physical property of the people, and to provide that no waste be discharged into any waters of the state without first receiving the necessary treatment or other corrective action to protect the legitimate beneficial uses of such waters; to provide for the prevention, abatement and control of new or existing air or water pollution; and to cooperate with other agencies of the state, agencies of other states, and the federal government in carrying out these objectives.

The clear legislative intent, states the “class sought to be protected” by the Mississippi Air and Water Pollution Control Law, specifically NPDES permits, is the general public using and consuming the air and water resources of this state. *Laurel Yamaha, Inc.*, 956 So.2d at 905. The type of damage sought to be avoided by the Mississippi Air and Water Pollution Control Law, (NPDES permits) is damage to the state’s air and water resources and preventing unwanted pollutants from being discharged or placed into the air and waters of this state.

Patterson has not provided any evidence that an operator of a motor vehicle on a public roadway, is a member of the class of persons to be protected by the Mississippi Air and Water Pollution Control Law, or by applicable NPDES permit requirements. Patterson has provided no evidence or legal authority to support his claim, that his damages from his single, high performance motorcycle accident are the type of damages sought to be protected by the Mississippi Air and Water Pollution Control Law, or by applicable NPDES permit requirements. Turtle Creek asserts that any alleged violations of the NPDES permit requirements do not constitute negligence *per se* in this case and, therefore, Patterson has wholly failed to produce any evidence or facts to support his negligence claim against Turtle Creek by alleging violation of the NPDES permit.

5. The acts or omissions by T. L. Wallace, an independent contractor for Turtle Creek, can not be used to impute or create liability on the part of Turtle Creek Development.

Patterson asserts that T. L. Wallace was an employee or agent of Turtle Creek, and not an independent contractor at the time of the subject accident. Patterson’s argument supporting his

contention that T.L. Wallace was an “employee” or “agent” of Turtle Creek in the days leading up to the subject accident is premised upon the lack of a written contract for the work T. L. Wallace was performing at that time. (Appellant’s Brief at 4 and 6). Patterson cites no Mississippi law to support his argument that a written contract is required for a person or entity to be considered an independent contractor. Mississippi law is clear that a written contract is not required in order to create an independent contractor relationship. In *Stewart v. Lofton Timber Co., LLC*, 943 So.2d 729 (Miss. App. 2006), the Court held that Nickerson was acting as an independent contractor, not an employee of Lofton Timber Company at the time of the accident. “Nickerson was under no contractual obligation to haul for Lofton.” *Id.* at 733. An oral agreement existed between Nickerson and Lofton, with the price terms changing from day-to-day or load-to-load. *Id.*

“Contested status issues invariably require discovery. The party seeking summary judgment on the grounds that he was not responsible for another’s actions typically will be the party in possession of the information necessary to determining whether he is indeed responsible.” *Owens v. Thomae*, 759 So.2d 1117, 1122. However, “summary judgment may be appropriate where status has been fully fleshed out and there is no material issue of fact.” *King v. Bunton*, 43 So.3d 361, 364 (Miss. 2010) (quoting *Thomae*, 759 So.2d at 1122)).

It is undisputed that the work T. L. Wallace performed on the west side of Cross Creek Parkway, prior to the accident, was preparatory site work performed prior to the execution of the construction contract for the Kohl’s project. (R. 837 and 924). Patterson argues that the work performed by T. L. Wallace prior to the accident was hourly work and therefore, insufficient for T. L. Wallace to create an independent contractor relationship.

Mr. William C. Noffke, corporate designee for T. L. Wallace, testified regarding the nature

of the work being performed by T. L. Wallace on Turtle Creek's property prior to the subject accident:

Q. . . . [T]he work that's described there November 9<sup>th</sup>, 10<sup>th</sup> and 13<sup>th</sup>, 2006. T. L. Wallace was hired by Bennett York [Turtle Creek] to perform work north and west of the box culvert. That's the same work that you've been calling prep work? It's just part of the overall project?

A. Right. It probably could have been stated better, but it's a part of the project that we entered into agreement later on. It was word of mouth.

(R. 517).

Q. How was T. L. Wallace paid for this job?

A. We were not paid for that part of the it. That's preparatory work. We have a unit price for actual dirt moved across the road.

Q. Okay. Explain that to me.

A. When we price a yard of dirt, we figure in all roads, et cetera. And they become a part of the unit price for a yard of dirt being moved. Just like we maintain it while we're hauling.

(R. 510).

Q. And there are no charges on here for the work that we talked about that Mr. Barney and the other folks did from November 9<sup>th</sup> to November 17<sup>th</sup>?

A. No. That's included in the dirt price.

(R. 517).

Mr. Noffke testified that the work being performed by T. L. Wallace on November 9<sup>th</sup>, 10<sup>th</sup>

and 13<sup>th</sup>, 2006 would have been T. L. Wallace preparing the haul road so that when we moved the dirt, T. L. Wallace would have gotten paid 2 dollars or whatever it was a yard. (R. 514).

Dr. Bennett York, on behalf of Turtle Creek, also testified regarding the nature of the agreement for the work being performed by T. L. Wallace on Turtle Creek's property prior to the subject accident:

Q. Tell me the arrangements that Turtle Creek Development had with T. L. Wallace in terms of payment.

.....

A. . . . Mr. Wallace was doing work, his crews were doing work on a subdivision that we were doing called Bellegrass at that point in time. And we knew that we had an obligation to get the pad ready for Kohl to do the rough dirt work. So in anticipation of this happening, Turtle Creek Commons, with a line of credit that we had from Trustmark Bank, paid Mr. Wallace for the preliminary work that they did for our entity before Kohl took over and bought the land from us.

(R. 924).

In *Richardson v. APAC-Mississippi, Inc.*, 631 So.2d 143, 148 (Miss. 1994), the Mississippi Supreme Court set out the legal definition of an independent contractor: "[a]n independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking." The general rule is that the person employing an independent contractor has no liability for the torts of the independent contractor or for the torts of the independent contractor's employees in the performance of the contract. *Thomae*, 759 So.2d at 1122. While the doctrine of

*respondeat superior* applies where a tortious act by an employee is casually connected to the act, in such situations, the negligent act places vicarious liability on the employer. *Lowery v. Statewide Healthcare Serv., Inc.*, 585 So.2d 778, 783 (Miss. 1991). However, the doctrine of *respondeat superior* does not impose liability on the principal for the acts of independent contractors. *Chisholm v. Miss. Dept. of Transp.*, 942 So.2d 136, 141 (Miss. 2006).

T. L. Wallace admits that it was an independent contractor on the date of the accident. (T. L. Wallace's Brief at p. 8). Turtle Creek admits that it contracted with T. L. Wallace to perform dirt work on its property in preparation for the Kohl's project. [R. 924]. Patterson has not provided any evidence that Turtle Creek controlled the work of T. L. Wallace. Patterson erroneously argues that T. L. Wallace was an employee of Turtle Creek because the work being performed was being done on an hourly basis. [R. 510, 517, 837 and 924].

T. L. Wallace has been in operation for over 23 years. [R. 502]. T. L. Wallace employs between 250 and 300 employees involved in at least two separate divisions, dirt and bridge. [R. 503 and 627]. T. L. Wallace maintains its own human resources department, handling employee benefits, insurance and subcontracts. [R. 612]. T. L. Wallace has its own Director of Safety Operations and maintains liability insurance [R. 623]. It is clear that T.L. Wallace is a large, independent company in the business of moving dirt and construction.

T. L. Wallace was clearly an independent contractor in the performance of its work on Turtle Creek's property in the days leading up to the subject accident. The trial court was correct in its ruling that Turtle Creek cannot be liable for the negligent acts, if any, of T. L. Wallace nor can T. L. Wallace's negligence, if any, be imputed to Turtle Creek Development.

6. The Court Properly Granted Summary Judgment to T. L. Wallace

Pursuant to Rule 28(I) of the *Miss. Rules of Appellate Procedure*, Turtle Creek adopts and incorporates by reference as if set forth in full length herein, all assertions, arguments and facts set forth by T. L. Wallace in its appeal brief.

A. Wallace was not negligent in failing to clear the roadway of a condition for which it did not create and Wallace's negligence, if any, as an independent contractor can not be imputed to Turtle Creek.

Pursuant to Rule 28(I) of the *Miss. Rules of Appellate Procedure*, Turtle Creek adopts and incorporates by reference as if set forth in full length herein, all assertions, arguments and facts set forth by T. L. Wallace in its appeal brief.

B. The evidence wholly fails to prove that the alleged debris in the public roadway came from T. L. Wallace's work site or equipment. It is likewise undisputed that Turtle Creek didn't cause the debris to enter the roadway.

Pursuant to Rule 28(I) of the *Miss. Rules of Appellate Procedure*, Turtle Creek adopts and incorporates by reference as if set forth in full length herein, all assertions, arguments and facts set forth by T. L. Wallace in its appeal brief.

C. T. L. Wallace, like Turtle Creek, had no legal duty to protect the public using a public roadway from alleged hazards which it did not create.

Pursuant to Rule 28(I) of the *Miss. Rules of Appellate Procedure*, Turtle Creek adopts and incorporates by reference as if set forth in full length herein, all assertions, arguments and facts set forth by T. L. Wallace in its appeal brief.

## CONCLUSION

Appellant's allegations allegedly supporting his claims against Turtle Creek are based on speculation and conjecture, "akin to a wish list" of facts. [R. 1069]. Appellant has wholly failed to address the first three (3) required elements of his negligence claim, duty, breach, and causation, instead merely addressing the last element, his injuries. Appellant has failed to bring further any credible evidence that Turtle Creek owed him a duty, that any such duty was breached, that his accident was reasonably foreseeable to Turtle Creek, or that T. L. Wallace was acting as anything other than an independent contractor of Turtle Creek in the days leading up to the subject accident. Plaintiff has failed to bring further credible evidence to prove that a genuine issue of material fact exist as to the essential elements of his claims against Turtle Creek; therefore the Circuit Court's granting of Turtle Creek's Motion for Summary Judgment was proper and Turtle Creek respectfully requests affirmance of the Circuit Clerk's ruling.

This the 1<sup>st</sup> day of August, 2011.

Respectfully submitted,

**TURTLE CREEK DEVELOPMENT, LLC,  
DEFENDANT**

BY:

  
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**CERTIFICATE OF SERVICE**

I, Roger C. Riddick / Bradley S. Kelly, do hereby certify that I have this date served, via U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing document to the following counsel of record:


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THIS, the 1<sup>st</sup> day of August, 2011.

  
\_\_\_\_\_  
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