

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
APPEAL NO.: 2010-CA-01812

CARL PATTERSON, JR.

APPELLANT

V.

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

APPELLEES

APPEAL FROM THE CIRCUIT COURT OF MARION COUNTY, MISSISSIPPI;
CAUSE NO.: 2009-0043P

BRIEF OF APPELLANT, CARL PATTERSON, JR.

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

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CARL PATTERSON, JR.

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V.

TURTLE CREEK DEVELOPMENT, LLC, and
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APPELLEES

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 Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal:

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3. **Appellees:** Turtle Creek Development, LLC, and T.L. Wallace Construction Company, Inc.
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6. **Trial Judge:** Honorable R.I. Prichard, Marion County, Mississippi

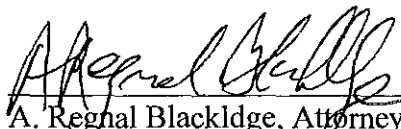

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I. STATEMENT OF THE ISSUES

1. The Circuit Court erred in granting Appellee T.L. Wallace Construction, Inc.'s Motion for Summary Judgment.
2. The Circuit Court erred in granting Appellee Turtle Creek Development, LLC's Motion for Summary Judgment.

II. STATEMENT OF THE CASE

Carl Patterson, Jr. ("Plaintiff") suffered permanent and catastrophic injuries in a motorcycle crash on November 18, 2006 in Hattiesburg, Mississippi. While riding his motorcycle on Cross Creek Parkway¹ in a lawful and legal manner, Plaintiff came upon an area of road containing debris from a construction site adjacent to each side of the road. The debris in the road caused Plaintiff's motorcycle to crash and him to suffer severe injuries. Plaintiff's injuries include but are not limited to a broken scaphoid bone in his wrist and a severely broken and mangled right leg, which necessitated an amputation of the leg below the knee. Plaintiff had no opportunity to avoid the debris and no advanced notice that the debris was present in the roadway. The debris was present in the road due to negligence of the appellees in this case. Their negligence was the proximate cause of Plaintiff's injuries and damages.

Plaintiff filed suit against T.L. Wallace Construction Company, Inc. and Turtle Creek Development, LLC². At the trial court, T.L. Wallace Construction Company, Inc. ("Wallace") and Turtle Creek Development, LLC ("Turtle Creek") filed separate Motions for Summary

¹ Cross Creek Parkway has been referred to as a number of different names throughout litigation, including Turtle Creek Crossing, Turtle Creek Mall Road and Turtle Creek Mall Crossing. Regardless of the name, the parties are all in agreement as to the actual road where the crash occurred and for simplicity, the road will be referred to in this brief as Cross Creek Parkway.

² Plaintiff also filed suit against other entities who were voluntarily dismissed by Plaintiff during the litigation process.

Judgment. Plaintiff filed a brief in response to each Motion. Without hearing oral argument, the trial court granted both Motions. Carl Patterson, Jr. has now filed this appeal whereby he asks this Court to reverse the decisions of the trial court in granting the summary judgment motions. The relevant facts pertaining to this lawsuit are as follows³:

Carl Patterson, Jr. was injured in a motorcycle crash on November 18, 2006. (R.122, 364, 697, 787, 977; R.E. "D")⁴. The crash occurred when debris from a worksite adjacent to the roadway caused his motorcycle to slip out from under him. (R.122-123, 364-365, 697-698, 787-788, 977-978; R.398, 710, 990; R.E. "D"; R.E. "E"). Plaintiff had no chance to avoid the debris before the crash. (R.410, 713, 993; R.E. "E"). Plaintiff's acquaintance, Matthew Sorrels, was riding his own motorcycle near Plaintiff and also witnessed the debris in the road. (R.435, 715, 995; R.E. "F"). Plaintiff's injuries included an amputated right leg and a broken right wrist, both of which required surgery. (R.407, 712, 992; R.E. "E"). Plaintiff's crash occurred just as he got to an area where a haul road was cut into and across Cross Creek Parkway. (R.449, 716, 996; R.E. "F").

The road on which Plaintiff was driving when he crashed his motorcycle is known today as Cross Creek Parkway. (R.612, 718, 998; R.E. "G"). The land on each side of the area of Cross Creek Parkway where the wreck occurred was owned by Turtle Creek. (R.914-915, 1000-1001; R.E. "H"). Turtle Creek hired Wallace to perform work on a haul road on the land to the west of Cross Creek Parkway beginning on November 9, 2006 (R.503, 723, 1003; R.E. "I"). The purpose of the project by Wallace was to bring the haul road up from a retention pond on the

³ Patterson will use the following abbreviations in this brief: (R. at __) for references to the Record; and (R.E. " __ ") for references to the Record Excerpt, which has been indexed and filed under separate cover.

⁴ In some instances, the same pleading, testimony or documentation appears at separate places in the Record. In this brief, the Appellant will cite to all locations of the record containing the pleading, testimony, or documentation referenced. However, for the sake of brevity, in Appellant's filing of the Record Excerpts, he will include only one copy of the relevant pleading, testimony or documentation.

west side of Cross Creek Parkway and continue it across Cross Creek Parkway to the land on the east side. (R.505, 724, 1004; R.E. "I"). On the east side of the road, a Kohl's center was to be built. (R.507-508, 726-728, 1006-1007; R.E. "I"). Prior to Wallace performing work at the site, Turtle Creek had worked at the site by rerouting a creek, leveling the land, putting underground drainage in and doing leveling and deforestation work. (R.915-916, 1001; R.E. "H").

In order to begin developing the site, Turtle Creek's predecessor in interest obtained and later transferred to Turtle Creek a Certificate of Permit Coverage under Mississippi's Construction Storm Water General National Pollutant Discharge Elimination System ("NPDES"), which was in effect prior to and continuing through construction activity in which clearing, grading and excavation will be performed on 5 or more acres. (R.1013-1022; R. 1023-1024; R.E. "J", R.E. "K"). The permit requires, among other things, owners to minimize off-site vehicle tracking of sediment, install erosion controls, and inspect the erosion controls at least once every seven days. (R.1017; R.E. "J").

On November 9, 2006, Wallace was rolling wet dirt on the haul road, setting it into wind rows so that it could be dried and set back down. (R.503, 723, 1003; R.E. "I"). Wallace continued to work at the site for ten hours on November 10, 2006. (R.506, 725, 1005; R.E. "I"). Wallace worked 10 hours at the site on November 13, 2006. (R.733, 1026; R.E. "L"). The work that Wallace performed on November 9, November 10 and November 13 wouldn't be directly charged to the owner of the land, but would be included in the dirt price. (R.1012; "I").

On November 13, 2006 Wallace, using a lowboy, moved a tractor onto the Kohl's project, which was underway on the east side of Cross Creek Parkway. (R.507, 726, 1006; R.E. "I"). The tractor had been moved from a wholly separate project. (R.507, 726, 1006; R.E. "I"). On the east side of Cross Creek Parkway, there was top soil and wash gravel. (R.735, 1028; R.E.

“L”). On November 17, 2006, using a lowboy, Wallace moved a trackhoe onto the property. (R.509, 728, 1008; R.E. “I”). The trackhoe that was moved on November 17, 2006 had been driven from Tupelo, Mississippi. (R.509, 728, 1008; R.E. “I”). When bringing the equipment to the site, Wallace would drive from highway 98 at turn onto Cross Creek Parkway and haul the equipment through Cross Creek Parkway to the site. (R.734,736; R.1027, 1029; R.E. “L”). In the days leading up to Plaintiff’s crash, Wallace had present on the site a D-6 bulldozer, a John Deere tractor and a box blade that fits behind it, a 330 trackhoe, and a 740 off-road truck. (R.511, 729, 1009; R.E. “I”).

Wallace claims that its general practice is to clean up dirt that had gotten from a project onto a roadway by sweeping the road with a broce broom and a hand broom twice a day. (R.513, 730, 1010; R.E. “I”). At the Cross Creek Parkway haul road site, Wallace never used the broce broom nor the hand broom to clean up anything in the roadway. (R.513, 730, 1010; R.E. “I”). During the time Wallace was working at the site before the wreck, no silt fence or any other fence was up on the entrance to the land adjacent to Cross Creek Parkway. (R.514, 731, 1011; R.E. “I”). Wallace’s safety operations director did not perform a safety inspection before the date of the incident. (R.623, 738, 1031; R.E. “M”). Wallace’s safety director testified that Wallace was not responsible for conducting a safety assessment until the job was “an established job”. (R.623, 738, 1031; R.E. “M”). In the days leading up to the incident, Wallace had not received a contract or notice to proceed with the job for Turtle Creek, but rather was just doing hourly work. (R.629, 1032; R.E. “M”).

IV. SUMMARY OF THE ARGUMENT

The trial court erred by granting the summary judgment motions of Turtle Creek and Wallace. There exist numerous issues of disputed material facts by which a jury could

reasonably find that both Turtle Creek and Wallace committed acts of negligence which proximately caused Plaintiff's injuries. Specifically, there is evidence that Turtle Creek and Wallace created a hazardous condition which caused Plaintiff's wreck and injuries, failed to correct the hazardous condition and failed to warn Plaintiff and others about the hazardous condition. Further, Turtle Creek and Wallace can provide no citation to Mississippi law which would preclude Appellant from proceeding with his claims given the facts present in the case.

V. ARGUMENT

The Mississippi Supreme Court reviews a trial court's grant of summary judgment *de novo*. Spann, et al v. Shuqualak Lumber Co., Inc., 990 So.2d 186, 189 (Miss. 2008). In evaluating a grant of summary judgment, this Court views all evidentiary matters, including admissions in pleadings, answers to interrogatories, depositions, admissions, and affidavits. *Id.*, citing Glover v. Jackson State Univ., 968 So.2d 1267, 1275 (Miss.2007). The evidence must be viewed in the light most favorable to the non moving party. Simpson v. Boyd, 880 So.2d 1047, 1050 (Miss.2004) (quoting Palmer v. Anderson Infirmary Benevolent Ass'n, 656 So.2d 790, 794 (Miss.1995)). The existence of a genuine issue of material fact will preclude summary judgment. Massey v. Tingle, 867 So.2d 235, 238 (Miss.2004). A fact is material if it "tends to resolve any of the issues properly raised by the parties." Simpson, 880 So.2d at 1050 (quoting Palmer, 656 So.2d at 794). The motion "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." Simpson, 880 So.2d at 1050 (quoting Palmer, 656 So.2d at 796). Given the low burden granted to the party opposing summary judgment, and given the facts present in this case, the trial court erred in granting summary judgment to Turtle Creek and Wallace.

1. The Trial Court Erred in Granting Summary Judgment to Turtle Creek

As the evidence shows, Turtle Creek's numerous negligent acts and omissions make it liable for Plaintiff's injuries and damages. Turtle Creek failed to follow the requirements of the land permit issued for the work site. The permit required Turtle Creek to conduct safety inspections and take steps to minimize off-site tracking of sediment, install erosion controls and inspect those controls every seven days. The evidence shows that Turtle Creek did not adhere to those conditions of the permit. Additionally, at the time of Plaintiff's wreck, there is ample evidence that Wallace was not working as an independent contractor, but rather as an agent and/or employee of Turtle Creek. As such, a jury could reasonably conclude that Turtle Creek is liable for any acts and omissions of Wallace. Further, Turtle Creek cannot provide any citation to Mississippi law, which would make summary judgment appropriate in the present case. For these reasons, and as will be shown below, the trial court erred in granting Turtle Creek's Motion for Summary Judgment.

A. Turtle Creek Failed to Adhere to the Land Permit

The State of Mississippi requires landowners to obtain a Certificate of Permit Coverage under Mississippi's Construction Storm Water General National Pollutant Discharge Elimination System ("NPDES") prior to and continuing through construction activity in which clearing, grading and excavation will be performed on 5 or more acres. Miss. Code Ann. §49-17-29. Turtle Creek Development's predecessor in interest applied for the necessary permit for the construction project taking place in the area adjacent to Cross Creek Parkway and the permit was granted and then transferred to Turtle Creek. (R.1013-1022; R. 1023-1024; R.E. "J", R.E. "K"). Among other conditions, the permit required the landowner to adhere to the following

guidelines: Minimize off-site vehicle tracking of sediment, install erosion controls, and inspect the erosion controls at least once every seven days. (R. 1017; R.E. "J")

It is undisputed that at the time of the incident and in the days leading up to the day of the wreck, there were no erosion controls present at the work site adjacent to the crash site. There is no evidence in the record that Turtle Creek ever conducted the mandatory inspections required by the permit. Further, Wallace's own safety director testified that Wallace did not become responsible for keeping debris out of the roadway until after the incident (R.623, 738, 1031; R.E. "M"). Consequently, during all relevant periods of time of this case, no entity was adhering to the mandatory requirements of the permit. Defendants' failure to adhere to the mandatory permit requirements means that neither Defendant took any action to minimize off-site vehicle tracking of sediment. Defendants' failure also means that neither Defendant installed any erosion controls or inspected the (non-existent) erosion controls on a weekly basis. A jury reasonably could conclude from those failures that either or both of the Defendants was negligent making summary judgment improper.

Clearly, both Turtle Creek and Wallace failed in their responsibilities and duties to ensure the requirements of the permit were being met and that the roadway stayed free from debris. In itself, the dispute over which entity, if any, had assumed responsibility of safety inspection and quality control at the site creates a genuine issue of material fact as to who had the responsibility and whose fault it was that the debris entered the roadway. A jury could reasonably find that the failures of Turtle Creek and Wallace to adhere to the permit caused the debris to accumulate in the roadway and eventually led to Plaintiff's wreck and injuries. There is evidence that the wreck occurred at the location of the work site. (R.398, 710, 990; R.449, 716, 996; R.E. "E, R.E. "F"). There is evidence that there was debris in the road from the work site. (R.398, 710,

990; R.449, 716, 996; R.E.“E”, R.E.“F”). Neither Turtle Creek nor Wallace has provided any testimony or evidence to the contrary. Given this evidence, a reasonable jury could infer that Turtle Creek failed in its responsibilities and duties. Thus, the trial court erroneously granted summary judgment.

B. Wallace was Acting as an Agent of Turtle Creek at the Time of the Wreck

It is well established in Mississippi that “[A] master who places a servant in a position of trust or authority is responsible for the actions of his servant” under the doctrine of respondeat superior. See Doe v. Salvation Army, 835 So.2d 76, 80 (2003). Here, evidence exists that shows Wallace was an agent of Turtle Creek, not an independent contractor. The evidence indicates that Wallace was an hourly employee and/or agent of Defendant Turtle Creek Development, and as such, Turtle Creek is responsible for the acts and omissions of Wallace.

By its own testimony, Wallace admits that the work performed at the site in the days leading up to the incident was performed on an hourly basis and before the project was an “established job.” (R.623, 738, 1031; R.E. “M”). Further, Wallace’s own safety director testified that Wallace’s responsibility to keep the roadway clear of debris did not begin until a notice to proceed or a contract was received from Turtle Creek. (R.1032; R.E. “M”).

Since Wallace’s own safety director testified that he believed Wallace had no responsibility for ensuring that the roadway would be kept clear of debris at the time of Plaintiff’s incident, this leaves two results: 1) Turtle Creek would be solely responsible for cleanup of the debris (which did not happen); or 2) Wallace was negligent in not cleaning the debris. Since Wallace asserts that it was merely doing hourly work for Turtle Creek, and no contract or notice to proceed was given prior to the incident, a jury question exists as to whether Wallace was an independent contractor or an agent/employee of Turtle Creek at the time of the

incident. Again, as there is evidence that Wallace was negligent and acting as an agent or employee of Turtle Creek, summary judgment is inappropriate.

C. Plaintiff's case is not Barred by Mississippi Law

It is anticipated that Turtle Creek will cite to the case of Martin v. Flanagan, 818 So.2d 1124 (Miss. 2002) in support of its opposition to this appeal. Martin is factually and legally distinct from the present matter and its holding has no bearing on this appeal.

In Martin, a lawsuit was brought against a landowner and lessee of the land as a result of an automobile wreck. Martin at 1125-1126. The suit alleged that the landowner and lessee had allowed water to run off the property and accumulate on a public road. Id at 1125. The water eventually froze on the road, creating a hazard and eventually the automobile wreck. Id at 1125. The court ruled that Defendant's Motion for Summary Judgment was properly granted because in order for a property owner to be liable for surface water running off his property, the owner must have diverted the water from its natural channel by artificial means, or unreasonably or unnecessarily increased the quantity or changed the quality of water discharged. Id at 1128. Further, the court held that absent an unreasonable act on the part of the landowners, then no liability would result. Id at 1128.

The present case is obviously distinct factually from Martin. First, the dangerous condition in the road in the present case came from land which has been graded, scraped and improved (hence the need for the permit granted to the property owner). In the Martin case, on the other hand, the land had not been developed or changed from its natural state. Here, Wallace and Turtle Creek had the ability and opportunity to: 1. Prevent the debris caused by their work to the land from entering the road; 2. Clean the debris once it did reach the road; and 3. Warn traffic

about the debris in the road. Defendants failed to do any of those options. Instead, they chose to leave the debris in the road, which created a hazardous condition and caused Plaintiff's wreck.

Secondly, the dangerous condition and wreck in Martin were a result of the unavoidable consequence of a naturally occurring phenomenon: rainwater and cold air. Here, Plaintiff's wreck was caused by conditions directly created not by a natural weather event, but rather by the acts and omissions of Turtle Creek and Wallace. The rainwater in the Martin case came from unimproved land whose owners did nothing to exacerbate the amount or change the natural flow of the rainwater. Unlike Martin, the condition encountered by Plaintiff on the roadway was a direct result of the affirmative acts by Turtle Creek and Wallace in conducting work on the land adjacent to the roadway. The evidence shows that both Defendants made substantial changes to the land before the crash in issue. (R. 914-916, R. 1000-1001; R.503, 723, 1003; R.E. "H", R.E. "I"). Defendants have offered no testimony to the contrary. Therefore, the facts and holding of Martin are completely inapplicable to the issues and facts present here and it is improper for summary judgment to be granted based upon an application of Martin to this case.

2. The Court Erred in Granting Summary Judgment to Wallace

As the evidence shows and will be outlined below, the trial court erred by granting Wallace's summary judgment motion. Wallace negligently created a hazard on the roadway, failed to clear the roadway of the hazard and failed to warn or otherwise protect the public from the hazard that was created. Due to these disputed material facts, the trial court erred in granting summary judgment.

A. Wallace was Negligent by Failing to Clear the Roadway of the Condition it Created

In Mississippi, the courts have elected to follow other jurisdictions in holding that if a defendant knew or should have known that an artificial condition created by them involved an

unreasonable risk of physical harm to others, then they have a duty to make safe or warn of the dangerous condition. See Miller v. Coast Electric Power Association, 797 So.2d 314 (Miss. Ct. App. 2001), citing Tadjer v. Montgomery County, 487 A.2d, 658 (Md. App. 1985). See also Spann, et al v. Shuqualak Lumber Co., Inc., 990 So.2d 186, 189 (Miss. 2008) (finding that a lumber drying company which produced steam had a duty to refrain from creating a condition which could impede a motorist's vision). In other words, when a person or entity creates a hazard by their actions, a duty to act arises. Undoubtedly, Wallace will argue that under Mississippi law, one is under no duty to take actions for another's aid or protection, but given the facts of this case and the holding of Miller, Wallace's arguments must fail.

In Miller, a pedestrian brought an action against Coast Electric power company for injuries to her ankle after she stepped in a hole that was created by the power company moving a power pole. Miller at 315. Coast Electric's method of moving power poles involves digging the new hole, transferring the pole to the new hole, then using the dirt from the new hole to fill in the old hole. Id. Evidence was introduced at trial to show that the pole was not placed as deeply in the ground in the new hole as it was in the old hole. Id. Thus, an inference could have been drawn that the dirt from the new hole would not completely fill in the old hole. Miller at 315. At the trial level, the Court stated that "... just a mere inference here that could be drawn in some fashion that the pole was not as deep in the second location as in the first location would just be pure surmise, speculation and conjecture on their part that there was inadequate dirt to fill it. The positive testimony is that they did find other soil to place in there, because it was done. The person that did it, Mr. Adam, was there and did it, and there's no conflict there." Miller at 315-316.

The Court of Appeals in Miller drew on citations from other jurisdictions as well as Restatement (Second) of Torts §386, in holding that if Defendants knew or should have known that an artificial condition created by them involved an unreasonable risk of harm to others, then they have a duty to make safe or warn of the dangerous condition. They found that, contrary to the trial court's conclusions, a question of fact existed as to whether the Defendant did make safe or warn of the condition and ruled that the trial court improperly awarded a directed verdict for the Plaintiffs.

The present case is factually similar to Miller. Here, Appellant encountered a hazardous condition (debris) that was created by and left unattended by Wallace. (R.122-123, 364-365, 697-698, 787-788, 977-978; R.398, 710, 990; R.E. "D"; R.E. "E"). Just as the Defendant in Miller failed to take any steps to warn the public of the dangerous condition it created, there is no evidence that Wallace attempted to make safe or warn the public of the dangerous condition that it created. The evidence here shows that Wallace not only likely caused the conditions on the roadway due to working on November 9, November 10, and November 13 and/or traversing the area with heavy equipment on November 13 and November 17, but that they undertook no effort to manage or lessen the conditions it created. (R.513, 730, 1010; R.623, 738, 1031; R.E. "I", R.E. "M"). No safety assessment was conducted prior to Plaintiff's wreck, nobody swept the roadway at any time prior to the incident and no silt fence or any other barricade was erected to prevent debris from entering the highway. (R.514, 731, 1011; R.623, 738, 1031; R.E. "I", R.E. "M"). Here, contrary to the trial court's factual conclusions, a jury could reasonably infer that Wallace's admitted omissions negligently caused Plaintiff's wreck and injuries. Therefore, genuine issues of material fact exist as to whether Wallace created the hazard and failed to warn of the hazard, and as such, the trial court erred by granting summary judgment.

B. The Evidence Shows that the Debris in the Road Came from the Wallace's Work

Site or From Wallace's Equipment

Wallace began performing a project on a haul road on the land to the west of Cross Creek Parkway on November 9, 2006. (R.503, 723, 1003; R.E. "I") On November 9, 2006, Wallace was rolling wet dirt on the haul road, setting it into wind rows so that it could be dried and set back down. (R.503, 723, 1003; R.E. "I"). Wallace continued to work at the site for ten hours on November 10, 2006. (R.506, 725, 1005; R.E. "I"). Wallace also worked 10 hours at the site on November 13, 2006. (R.733, 1026; R.E. "L") On November 13, 2006 Wallace, using a lowboy, moved a tractor onto the Kohl's project, which was underway on the east side of Cross Creek Parkway. (R.507, 726, 1006; "I"). The tractor had been moved to the Kohl's site from a different project on which they were working. (R.507, 726, 1006; R.E. "I"). On the east side of Cross Creek Parkway, where the tractor was delivered, there was top soil and wash gravel. (R.735, 1028; R.E. "L"). Further, On November 17, 2006, using a lowboy, Wallace moved a trackhoe onto the property that had earlier that day been in Tupelo, Mississippi. (R.509, 728, 1008; R.E. "I"). In the days leading up to Appellant's wreck, Wallace had present on the site a D-6 bulldozer, a John Deere tractor and a box blade that fits behind it, a 330 trackhoe, and perhaps a 740 off-road truck. (R.511, 729, 1009; R.E. "I"). For Wallace to claim that they could not have been the source of the debris simply defies all probability and logic.

It is anticipated that Wallace will argue that since Appellant never saw any Wallace equipment or employees at or near the crash site, there is no proof that Defendant was ever at the scene or could have caused the debris to be in the road. This contention is belied by the fact that Wallace admitted during sworn deposition testimony that they had been working in the area before the crash and had moved equipment to the area just one day prior to the crash. (R.509,

728, 1008, ; R.E. "I"). While the Defendant will likely argue that the evidence regarding Wallace's role in creating the hazardous condition is circumstantial, under Mississippi law negligence may be proven by circumstantial evidence and when the case turns on circumstantial evidence, it should rarely be taken from the jury. Davis v. Flippen, et al, 260 2d. 847 (1972). Indeed, if Plaintiff had testified that he was looking at the worksite and Wallace's equipment present immediately before his wreck, Wallace would have undoubtedly sought to have Plaintiff's action dismissed by arguing that Plaintiff was distracted and failed to keep a proper lookout ahead for items in the roadway.

Plaintiff has presented evidence that Wallace was working on the land adjacent to the site of the incident and had traveled over the site numerous times with their equipment in the days leading up to the wreck, including the day before the wreck. A jury could easily conclude that there was debris in the road, that Wallace caused the debris to be in the road, that the debris was a dangerous condition, and that the debris remained there because of Wallace's and Turtle Creek's failure to ensure that the dangerous condition created by them was removed. In its ruling below, the trial court erroneously made its own factual determinations concerning where the debris came from, which took from the jury their role in deciding factual disputes. Because of these facts, the trial court erred in granting summary judgment.

C. Wallace Failed to Protect the Public from the Hazards it Created

If a defendant knew or should have known that an artificial condition created by them involved an unreasonable risk of physical harm to others, then they have a duty to make safe or warn of the dangerous condition. See Miller v. Coast Electric Power Association, 797 So.2d 314 (Miss. Ct. App. 2001). By its own admission, Wallace did not undertake safety measures between the time it began work on the project until the time of Plaintiff's crash. It was


Wallace's general practice to clean up dirt that had gotten from a project onto a roadway by sweeping the road with a broce broom and a hand broom twice a day. (R.513, 730, 1010; R.E. "I"). At the Cross Creek Parkway haul road site, Wallace never used the broce broom nor the hand broom to clean up anything in the roadway before the date of the incident. (R.513, 730, 1010; R.E. "I"). Before the wreck, no silt fence or any other fence was up on the entrance to the property off of Cross Creek Parkway. (R.514, 731, 1011 ; R.E. "I"). Wallace's safety operations director did not perform a safety inspection before the date of the incident, even though work had begun at the site. (R.623, 738, 1031; R.E. "M"). Clearly, Wallace failed to take any steps to clean the debris out of the roadway or warn the public, such as Appellant, that the roadway contained debris. Defendant has presented no evidence to the contrary. Wallace's inaction in performing safety assessments, its failure to identify the hazardous condition it created, and its failure to warn the public of the hazardous condition on the roadway directly led to Plaintiff's wreck and injuries. A jury could reasonably conclude that these failures on Wallace's part constitute negligence. As such, summary judgment is improper.

VI. CONCLUSION

For the reasons stated above, Appellant has shown that numerous disputed issues of material fact remain in this case. The issue of whether Appellees' actions and inactions were negligent and whether that negligence led to Appellant's injuries and damages are questions best left to the jury to answer. Therefore, Appellant respectfully requests that this Court reverse the decision of the trial court to grant the Motions for Summary Judgment of Turtle Creek Development, LLC and T.L. Wallace Construction Company, Inc.

Respectfully submitted this 2 day of June, 2011.

A. Regnal Blackledge, Attorney at Law

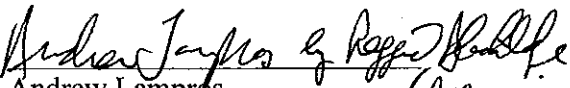


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CERTIFICATE OF SERVICE

I hereby certify that I have this day mailed, first class, postage prepaid by United States mail, a true and correct copy of the above and foregoing document to: