CERTIFICATE OF INTERESTED PARTIES

1. Mary Thi Nguyen, Plaintiff/Appellee
2. Olivia M. Sliman, Defendant/Appellant
3. Honorable T. Larry Wilson, Jackson County Court
4. Edmund J. Walker, Esquire, Counsel for Plaintiff/Appellee
5. Denton Law Firm, P.L.L.C.,
6. Myles E. Sharp, Counsel for Defendant/Appellant
7. Honorable Kathy King Jackson, Jackson County Circuit Court

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STATEMENT OF THE CASE

Plaintiff/Appellee agrees that this is a personal injury case arising from a motor vehicle accident in Jackson County, Mississippi, on November 12, 1999, which resulted in a Complaint filed against Defendant/Appellant in an attempt to recover compensation for Plaintiff's injuries.

Although Defendant denied liability for the accident, Defendant admitted that she came from a private parking lot, through a line of stopped traffic, and into the lane in which Plaintiff was traveling resulting in a collision of the respective vehicles. She then admitted that she pushed the accelerator instead of the brake, forcing her car into the lane ahead of the Plaintiff. Defendant further admitted that the Plaintiff, was in pain at the scene of the accident, and that she put a wet towel and ice on Plaintiff's finger because her fingernail was ripped off in the collision.

Astounded by the jury's verdict for the Defendant, Plaintiff filed a Motion for a New Trial. After a hearing, a new trial was granted by the trial court. Defendant then filed this appeal.

SUMMARY OF THE ARGUMENT

The Plaintiff presented overwhelming evidence that the Defendant was in clear violation of Miss. Code Ann., 1972, § 63-3-807 by failing to yield right of way to another vehicle when entering a public highway from a private driveway. The Defendant, by her own admission at trial was coming out of a private business parking lot, through a space in a line of traffic, and entered into the opposite lane of a public street. By her own admission, Defendant did not see the other vehicle approaching in the lane she was trying to enter. However, she continued forward after a driver backed up creating a gap in traffic through which she passed. This is a clear violation of the statute and is negligence *per se*, clearly justifying a verdict for the Plaintiff. *T. at 77-78.*

The jury may well have been confused as to the law regarding preemption of an intersection. In the recent case of *Thompson vs. Lee County School District,925 So. 2d 121 (Miss. Ct. App., Apr. 19, 2005); 921 So. 2d 344 (Miss. C. App., Oct. 6, 2005; 925 So.2d 57 (Miss. Sup. Ct., Jan. 19, 2006); Rehearing denied,* decision without published opinion (Miss. Sup. Ct., Apr. 13, 2006); the matter of right of way was fully discussed, and the end result was that it depends on the facts of the case, but the general rule that the vehicle on the street or highway has right of way still applies. Originally, the Court of Appeals ruled that the party *traveling down the road with the right of way* is in no way at fault when someone pulls out in front of them. That was one basis for Plaintiff's Motion for a New Trial, but not the only basis. Since then, the Supreme Court has ruled that because of the facts

in *that* case, where the Plaintiff was speeding and the Defendant, driving a school bus, had first stopped at the stop sign and then entered the lane of the highway before being struck by the Plaintiff, the facts justified a contributory negligence determination by the Judge. The general rule as to right of way, however, has not changed.

The facts in this case are different. Mrs. Sliman pulled out of a private driveway, through a lane of traffic, and neither party saw the other until Mrs. Sliman pulled the front of her vehicle into the northbound lane of Vermont in front of Mrs. Nguyen. The overwhelming weight of both the facts and the law in the case at issue mandate that the jury's verdict be rejected and that the Plaintiff be entitled to a new trial in this matter. By finding in Defendant's favor, the jury clearly was either confused as to the applicable law, or was biased and/or prejudiced against a young, Vietnamese, casino worker in favor of a local Caucasian senior citizen. One could speculate forever as to why the jury found for the Defendant, but, in any event, the verdict is clearly against the overwhelming weight of the evidence and the law, and the decision of Judge Wilson to grant a new trial in this matter should be upheld and the Defendant's Appeal be denied.

ARGUMENT

In spite of Defendant/Appellant's allegation to the contrary, the facts of the accident of November 12, 1999, are not in dispute. Both parties agree as to what happened, they just dispute who was at fault. The simple facts are that the Defendant came out of a private parking lot at Taco Bell, through a stopped line of traffic when someone backed up to let her through, and entered the northbound lane of Vermont Ave., in Ocean Springs, pulling directly in front of the Plaintiff who had turned off of Highway 90 and was traveling north on Vermont. Both drivers were traveling slowly, and neither could see the other until the moment of impact because of the stopped traffic and some bushes. T. at 77-80, and 84-85.

One could speculate forever as to the jury's reason for its verdict for the Defendant. Defendant alleges that it was because the jury rejected Ms. Nguyen's testimony. It could just as easily be that the jury was confused by the arguments of Defendant's attorney as to the applicable law, was prejudiced against Vietnamese persons, was prejudiced against casino workers, or was prejudiced by their sympathy for a respectable older lady who simply made an honest mistake that resulted in the accident at issue. No matter what their reason, the jury's verdict is against the overwhelming weight of the evidence and the applicable law, and Judge Wilson's decision that said verdict should be vacated and a new trial be granted should be upheld.

1. The trial court did not abuse its discretion by vacating the verdict of the jury and ordering a new trial.

"On motion for a new trial, the trial judge should set aside a

jury's verdict when, in the exercise of his sound discretion, he is convinced that the verdict is contrary to the substantial weight of the evidence." *McKinzie v. Coon, 656 So.2d 134, 138 (Miss. 1995), citing Wells Fargo Armored Serv. Corp. v. Turner, 543 So.2d 154, 158 (Miss. 1989).*

In this case, Judge Wilson, who listened to the testimony as it was given in Court, and who knows the law, was certainly convinced that the verdict was against the "substantial weight of the evidence," and that the granting of a new trial was justified.

"It has long been recognized that the trial judge is in the best position to view the trial. 'The trial judge who hears the witnesses live, observes their demeanor and in general smells the smoke of the battle is by his very position far better equipped to make findings of fact which will have the reliability that we need and desire.'" *Amiker v. Drugs for Less, Inc., 796 So. 2d 942, 947, Par. 16 (Miss. 2000); citing Gavin v. State, 473 So. 2d 952, 955 (Miss. 1985).*

The appellant cited *Allstate Ins. Co. V. McGory, 697 So.2d 1171, 1174 (Miss. 1997)* apparently in support of the argument that Judge Wilson abused his discretion in granting a new trial in this case. However this is not what was ruled in *Allstate*. The exact wording of the decision, from Pages 1174 and 1175 is:

"In considering a motion for a new trial, the trial judge in exercising his sound discretion may grant the motion thereby overruling the jury's verdict only where such a verdict is against the overwhelming weight

of the evidence or is contrary to the law." Junior Food Stores, Inc. v. Rice, 671 So. 2d 67, 76 (Miss. 1996). *Allstate at 1174.*

"Under the authority of a long line of cases, "it is a general rule of this Court to respect and follow the holding of the trial judge with reference to his order in granting a new trial since such an order is not a final disposition of the case." *Standard Products, Inc. v. Patterson, 317 So. 2d 376, 379 (Miss. 1975).*

"When, however, all the testimony has been heard and all the arguments delivered and [*1175] the verdict returned, if, upon a completed view of the entire case, the trial judge is then of the opinion that the verdict is against the overwhelming weight, or clearly against the great preponderance, of the evidence, his duty is, upon a motion for a new trial, to set aside the verdict and grant a new trial. In the latter respect, and to the extent mentioned, the trial judge has a responsible part in the final determination of the issue upon the facts, and his duty of superintendence in that regard is one of his constitutional obligations. *Spradlin v. Smith, 494 So. 2d 354, 357 (Miss. 1986).*

"The trial judge responsibly executed his constitutional obligations in this regard and did not abuse his discretion in ordering a new trial. Allstate's argument to the contrary is without merit." *Allstate, 1174-1175.*

This is exactly what Judge Wilson did in this case, and what Circuit Judge

Kathy Jackson did when she upheld Judge Wilson's decision after it was appealed to the Circuit Court of Jackson County. Both Judges were clearly "of the opinion that the verdict is against the overwhelming weight, or clearly against the great preponderance, of the evidence," (*Allstate, 1175*) and, in accord with their constitutional obligations, granted Plaintiff's motion for a new trial. Just as in *Allstate*, Defendant/Appellant's argument in this case is without merit.

Appellant then cites *Motorola Communications and Electronics, Inc. v. Wilkerson, 555 So.2d 713 (Miss. 1989)* in support of its position. The difference in the case at bar, and in *Motorola* is that in *Motorola*, the record contained sufficient evidence to support the verdict of the jury. In the case at bar, all of the evidence, and the law, clearly support the decision of Judge Wilson, affirmed by Circuit Judge Kathy Jackson, that the jury's verdict was completely contrary to both the evidence and the law, and that the ordering of a new trial was, and is, clearly and completely justified.

The appellant cites *Illinois Cent. R.R. Co. v. Harrison, 80 So.2d 23 (Miss. 1955)* for the proposition, which is correct, that the trial court may not substitute its judgment for that of the jury merely because it would have decided the matter differently. However that case also points out that the trial court *may* set aside the verdict when " there should be such a state of facts as would render verdict unreasonable." (*Illinois Cent., 338)* In the case at bar, both the facts and the law clearly demanded a verdict for the Plaintiff, and both Judge Wilson and Circuit Judge Jackson realized that, and in the interest of justice, and in fulfilling their constitutional obligations, granted a new trial in this case.

a. <u>The jury verdict was contrary to the overwhelming weight of the evidence and the law.</u>

The jury's verdict in this case was clearly against the overwhelming weight of the evidence and the law and Judge Wilson's decision to order a new trial was completely justified. The weight of the evidence as to liability presented by the Plaintiff clearly provided a reasonable basis for the trial court to exercise its discretion and order a new trial.

The Plaintiff presented overwhelming evidence that the Defendant was in clear violation of *Miss. Code Ann., 1972, § 63-3-807* by failing to yield right of way to another vehicle when entering a public highway from a private driveway. The Defendant, *by her own admission at trial* was coming out of a private business parking lot, coming out through a space in a line of traffic, entering into the opposite lane of a public street. *By her own admission*, Defendant did not see the other vehicle approaching in the lane she was trying to enter, but she continued forward through th opening in the gap in the traffic created when another driver backed up so that she could pass through. T. at 77. She relied on this and caused the collision between her vehicle and that of the Plaintiff. This is a clear violation of the statute and is negligence *per se*, clearly justifying a verdict for the Plaintiff.

The Defendant further testified that at the moment of impact, she braced herself with her foot against the accelerator and speeded up, moving her vehicle ahead of the Plaintiff's vehicle. She testified that she then backed up, got out of her car to check on the Plaintiff, and then put a towel with ice on the Plaintiff's thumb because the nail had been ripped off in the accident. *T. at 79-80.*

The applicable law in this case is *Miss. Code Ann., 1972, § 63-3-807*:

"§ 63-3-807. Vehicle entering or crossing highway from private road or driveway

"The driver of a vehicle about to enter or cross a highway from a private road or driveway shall yield the right-of-way to all vehicles approaching on said highway."

Defendant's brief repeatedly states that Mrs. Sliman denied fault. Whether or not Mrs. Sliman admits that her actions caused the accident is irrelevant. The uncontested facts in this case are that Mrs. Sliman, the Defendant, was entering Vermont Ave., a through street, from a private driveway under conditions such that neither she nor the Plaintiff could see the other's vehicle until the moment of collision. Mrs. Nguyen clearly had right of way traveling on Vermont. Mrs. Sliman's denial of fault is not consistent with her trial testimony. The overwhelming weight of both the facts and the law clearly mandate that the jury's verdict should be rejected, that the Plaintiff is entitled to a new trial in this matter, and that Judge Wilson's decision to grant a new trial should be upheld and Defendant's appeal be denied.

In *McKinzie v. Coon, 656 So.2d 134 (Miss. 1995), citing Wells Fargo Armored Serv. Corp. v. Turner, 543 So.2d 154, (Miss. 1989),* a case similar to the one at issue, the Mississippi Supreme Court ruled that the verdict clearly should have been for the Plaintiff. A summary of the case is as follows:

The injured party was driving home on a highway, Highway 98, that had the right of way, when the defendant driver pulled out in front of

her from an intersecting highway, Highway 63, that had a Stop sign at the intersection. The injured person filed a negligence action against the driver, and the trial court entered a jury verdict in favor of the defendant driver. On appeal the court reversed and remanded. The court held that there was no testimony that suggested that the injured person was operating her vehicle negligently in any manner at the time of the collision. There was no factual evidence offered indicating any negligence by the injured person. *The driver's negligence was established as a matter of law.* Thus the verdict of the jury was contrary to the overwhelming weight of the evidence, and the trial court erred in not granting the injured person's requested directed verdict on liability.

In the case at issue, there was no factual evidence whatsoever offered indicating any negligence by the injured person, Mrs. Nguyen, and the testimony overwhelmingly established the negligence and liability of the Defendant. Based on the ruling in *McKinzie v. Coon*, Plaintiff's request at trial for a directed verdict should have been granted. Since it was not, and the jury found, contrary to all the evidence, for the Defendant, Judge Wilson rightfully granted Plaintiff's Motion for a New Trial.

In another case where the factual situation was very similar to the case at issue, *Stribling v. Hauerkamp, 771 So.2d 415, (Ct. App. Miss. 2000),* the Court of Appeals upheld the granting of a directed verdict for the party who was traveling on the public roadway and who had right of way. A summary of the case is as follows:

> Mr. Hauerkamp was driving down U. S. Highway 45 when Mr. Stribling entered the highway in front of him from a private driveway. Mr. Stribling admitted these facts at trial. The facts and evidence were not in dispute, and therefore there was no issue of fact which a jury should resolve. In this case, assuming the scenario most favorable to Mr. Stribling, that Mr. Hauerkamp's vehicle was 100 feet away and traveling at 55 miles per hour, this afforded Mr. Stribling less than 1.25 seconds to enter the highway and cross it. There was no question of fact for the jury because crossing the lane from a stopped position in 1.25 seconds was impossible. The court thus imputed fault to Mr. Stribling, and properly granted Mr. Hauerkamp's motion for a directed verdict. No factual dispute was presented. The trial court did not err in granting a directed verdict, since the evidence presented was of such quality and weight that reasonable and fair-minded jurors in the exercise of impartial judgment could not disagree that Mr. Stribling, who entered the highway from a private driveway was the sole cause of the accident.

In the case at issue, the facts are not in dispute, and "reasonable and fair-minded jurors in the exercise of impartial judgment could not disagree" that the actions of the Defendant were the sole proximate cause of the accident. The testimony of the Plaintiff and the Defendant at trial are consistent with regard to the facts of the accident. Both agree that the Defendant was exiting the Taco Bell parking lot through a gap in a line of stopped vehicles and drove into the opposing

lane of traffic directly in front of the Plaintiff who clearly had the right of way, and who had no time to stop to avoid the collision. Then, instead of stopping, Defendant speeded up, forcing her vehicle out into the opposing lane in front of the Plaintiff's vehicle. By her own admission, Defendant did not see the other vehicle approaching in the lane she was trying to enter. T. at 77-80.

Appellant states, correctly, that the burden of proof rests upon the Plaintiff in any lawsuit to prove the negligence of the Defendant. However, appellant is apparently alleging that the Plaintiff must prove the Defendant's negligence through the testimony of the Plaintiff, which is not correct. Certainly negligence can be proved, as it clearly was in the case at bar, by the Defendant's own testimony. With regard to the cases cited in this regard by the Appellant, *Fells v. Bowmen, 274 So.2d 109 (Miss. 1973)* is primarily a conflict of laws case, and *Baugh v. Alexander* was a contest over the amount of the verdict. Had, as in *Baugh*, the case at bar involved a verdict for the Plaintiff, but less damages than Plaintiff sought, or even token damages, there would be no appeal. However, in the case at bar, a verdict for the Defendant was completely and clearly contrary to the overwhelming weight of both the evidence and the applicable law.

b. Despite Defendant's allegation, the Plaintiff never alleged that "the mere fact that the Plaintiff may have been injured in the collision" rendered a liability verdict in favor of the Defendant against the overwhelming weight of the evidence.

Plaintiff has consistently argued that the jury's verdict is against the overwhelming weight of both the facts *and* the law.

Plaintiff's allegations regarding her injury were made in response to Defendant's allegations that she was not injured in the accident, not that this affected liability.

c. **The jury verdict *was* contrary to the applicable law and the granting of a new trial on this basis alone would be completely justified.**

Miss. Code Ann., 1972, § 63-3-807 : is the applicable law.

"§ 63-3-807. Vehicle entering or crossing highway from private road or driveway

"The driver of a vehicle about to enter or cross a highway from a private road or driveway shall yield the right-of-way to all vehicles approaching on said highway."

At trial, the Defendant, Mrs. Sliman, testified:

"Q. Would you tell us to the best of your memory just what happened at the scene?

A. I'd been into Taco Bell to pick up lunch and I was driving out. The traffic was backed up for a stop light. Someone moved back so I could inch out. I inched out and I was hit. Didn't know what happened at first because I did not see a vehicle. I stopped and asked the driver if she was okay. She didn't answer me. The police came, I gave a report." T. at 76, Line29 and 77, Lines 1-9.

This is a clear admission of violation of *§ 63-3-807*, which is negligence *per se* and this alone is enough to justify Judge Wilson's granting of a new trial in this

case. The Plaintiff testified at trial that she did not see the Defendant/Appellee's vehicle until they collided. She had no knowledge of what led up to Defendant's vehicle suddenly coming out between the line of stopped vehicles into the lane on Vermont in which she was traveling. T. 84-85. Liability was established by the testimony and admissions of the Defendant. T. at 76, Line 29 and 77, Lines 1-9.

Defendant also cited *Haggerty v. Foster, 838 So.2d 948 (Sup. Ct. Miss., December 5, 2002).*

Haggerty is a much cited case with regard to jury selection disputes, discovery disputes, and admissibility of evidence. The facts in *Haggerty*, however are very different from the facts in the case at issue. In *Haggerty*, the southbound Defendant turned left, across Highway 49, in Gulfport, to get to McDonald's parking lot. He crossed through three northbound lanes of stopped traffic that were stopped for a traffic signal, and had already crossed 8 to 10 feet of the 11 foot wide turn lane when Haggerty struck him, in the turn lane, at speed estimated by a witness as 20 to 30 miles per hour. There were also conflicts among the witnesses as to the actual facts of the accident.

In its decision in *Haggerty*, Page 963, Paragraph 45, the Court quoted *McKinzie vs. Coon*, *op. cit.*, stating:

> "On motion for a new trial, the trial judge should set aside a jury's verdict when, in the exercise of his sound discretion, he is convinced that the verdict is contrary to the substantial weight of the evidence."

Judge Wilson was apparently convinced that the jury's verdict in this case was against the substantial weight of the evidence and the law, and his Order

granting a new trial in this matter should be upheld, and Defendant's appeal should be denied.

2. Appellant alleges that the Plaintiff's credibility was seriously damaged.

This is not an issue in this appeal. The Appellant has pled and we agree, that "there is a single issue before the Court in the matter: Whether the trial court abused its discretion in granting the Plaintiff's motion for a new trial." The proof of liability in this case was based on the testimony of the Defendant. The Plaintiff's credibility in this case solely affects the issue of damages, which is not a factor in this appeal. A new trial is justified because the testimony of the Defendant clearly established that the verdict of the jury was completely in conflict with both the evidence and the law. Although we disagree with the allegations of the Appellant, the Plaintiff's credibility is not an issue in this appeal.

3. Appellant avers that the Circuit Court improperly remanded the case back to the County Court.

The Plaintiff prefers to take no position with regard to this issue, other than that Judge Wilson's decision, upheld by Circuit Judge Kathy Jackson, should be affirmed and that the Plaintiff is entitled to a new trial in this case.

CONCLUSION

Based on both the facts, and the applicable law, Judge Wilson was clearly correct in granting Plaintiff's Motion for a New Trial. Contrary to Defendant's assertions, there was no dispute as to the facts regarding the accident. Although the Defendant obviously believes that she was not at fault, her own testimony establishes her liability and her negligence *per se* under *Miss. Code Ann. § 63-3-807.* The only facts that are relevant is the testimony of Defendant, which clearly establishes her liability. T. at 76, Line29 and 77, Lines 1-9.

The trial judge did not abuse his discretion in granting a new trial in this matter because the jury verdict was clearly contrary to the substantial weight of the evidence presented at trial, and contrary to the applicable law, *Miss. Code Ann. § 63-3-807.* Judge Wilson's Order granting a new trial in this matter should be upheld, and Defendant's appeal denied.

Respectfully submitted, this the 28th day of January 2009,

MARY THI NGUYEN

By: _____
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CERTIFICATE OF SERVICE

I, Edmund J. Walker, certify that I have this day mailed, via United States Mail, a true and correct copy of the above and foregoing instrument to:

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Honorable Kathy King Jackson, Circuit Court, Jackson County, MS

Honorable T. Larry Wilson, County Court, Jackson County, MS

This the 28th day of January 2009.

EDMUND J. WALKER

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