IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NO. 2008-CA-00977

CARLA UTZ, INDIVIDUALLY AND ON BEHALF
OF ALL WRONGFUL DEATH BENEFICIARIES
AND THE ESTATE OF PRESTON JIMMY UTZ,
DECEASED — APPELLANT

VS.

RUNNING & ROLLING TRUCKING, INC.
AND ANTHONY Q. HUNTER — APPELLEES

ON APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL DISTRICT OF BOLIVAR COUNTY, MISSISSIPPI

BRIEF OF APPELLEES

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ORAL ARGUMENT IS NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Carla Utz, individually and on Behalf of the Wrongful Death Beneficiaries of Preston Jimmy Utz, Deceased ..... Appellant

2. J. Ashley Ogden, Esq.
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3. Running & Rolling Trucking, Inc. ..... Appellee

4. Anthony Q. Hunter ..... Appellee

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6. Hon. Charles E. Webster
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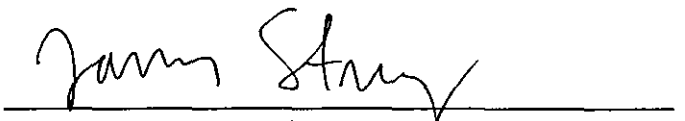
Clarksdale, Mississippi 38614 ..... Circuit Court Judge



Attorney of Record for Appellees

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STATEMENT OF THE ISSUES

1. Whether the trial court abused its discretion to the undue prejudice of the Plaintiff by admitting evidence that Preston Utz smoked crystal methamphetamine and did not sleep prior to the accident;

2. Whether the Plaintiff waived any objection to the testimony of Michael Weaver concerning the depressant effects of crystal methamphetamine on Preston Utz and, if not, whether the trial court abused its discretion to the undue prejudice of the Plaintiff by admitting this evidence;

3. Whether the trial court abused its discretion to the undue prejudice of the Plaintiff in permitting Rachel Foster to identify the substance found in Preston Utz's pocket as crystal methamphetamine;

4. Whether the trial court abused its discretion to the undue prejudice of the Plaintiff by excluding evidence of the carrier rating of Running & Rolling Trucking, Inc. and a prior violation of Anthony Hunter;

5. Whether the trial court abused its discretion to the undue prejudice of the Plaintiff by prohibiting her experts from opining as to dirt on the taillights of the trailer allegedly depicted in a photograph when the jury could view that photograph and make that determination on its own;

6. Whether the trial court abused its discretion to the undue prejudice of the Plaintiff by prohibiting the Plaintiff from pursuing at trial a claim founded on strict liability;

7. Whether the trial court abused its discretion to the undue prejudice of the Plaintiff by limiting the testimony of her expert witnesses that the absence of reflective tape caused the accident;

8. Whether the trial court abused its discretion to the undue prejudice of the Plaintiff in the manner it handled her objection at trial to the testimony of the Defendants' accident reconstructionist, John Bentley;

9. Whether the trial court abused its discretion to the undue prejudice of the Plaintiff by not admitting the documents labeled within the Pretrial Order as P-10 through P-13 and P-15 through P-20;

10. Whether the trial court abused its discretion to the undue prejudice of the Plaintiff by not admitting two photographs of an unrelated tractor-trailer and 26 photographs of the subject trailer taken over a year after the accident;

11. Whether the trial court committed reversible error by refusing the Plaintiff's proposed jury instructions labeled P-7, P-10 through P-21 and P-29;

12. Whether the trial court committed reversible error by giving the Defendants proposed jury instructions D-1 through D-3 and D-5 through D-6;

13. Whether the trial court committed reversible error by giving jury instruction C-19;

14. Whether the Plaintiff waived the numerous assignments of error for which she failed to cite authority.

STATEMENT OF THE CASE

This wrongful death action arose from a collision between a Nissan Maxima operated by Preston Utz, deceased, and a tractor-trailer driven by Anthony Hunter. The Maxima rear ended the tractor-trailer as the vehicles traveled south on Highway 61 north of Cleveland, Mississippi.

The case was tried in the Circuit Court of the Second Judicial District of Bolivar County[1] from April 7, 2008 through April 10, 2008. The overarching issue at trial was the visibility of the trailer and whether the Defendants' admitted violation of the reflective tape requirements of the Federal Motor Carrier Safety Regulations played any role in causing the accident. After the proof was concluded, the trial court instructed the jury the Defendants were negligent by violating the Federal Motor Carrier Safety Regulations, leaving proximate cause as the only liability issue. The jury determined the Defendants' negligence was not the proximate cause of the accident and returned a verdict for the Defendants. The trial court denied the Plaintiff's post-trial motions and this appeal ensued.

STATEMENT OF THE FACTS

In December 2003, 23-year old Preston Utz was experiencing marital discord with his wife, Plaintiff Carla Utz. As a result, Preston Utz took up temporary residence that month at the home of a friend – Ephriam Woolf – in Cleveland, Mississippi. Tr. 534, R. 947.[2]

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[1]As the orders in the record demonstrate, the trial court did yeoman's work in ruling on the numerous pretrial issues raised by the parties.

[2]The designation "Tr." refers to the transcript of the trial and the two pretrial motion hearings. "R." denotes the pleadings and exhibits filed with the circuit clerk. References to

On Saturday, December 13, 2003, Preston Utz, Ephriam Woolf and mutual friend Sabrina Ashmore made a plan to "cook" and smoke crystal methamphetamine. Tr. 536. The group spent most of that Saturday afternoon gathering in Cleveland the various ingredients needed to cook crystal methamphetamine. Tr. 536-37. They eventually traveled with their ingredients to a remote, wooded location in rural Bolivar County near Lake Beulah, arriving near midnight, and began "cooking dope" around 1:00 a.m. on Sunday the 14th. Tr. 537. By 4:00 a.m., the first "pull" was ready and each member of the party began smoking crystal methamphetamine to get high. Tr. 539-40. The group continued cooking and smoking crystal methamphetamine into the daylight hours. Tr. 540. No one among the group slept during the entire event. Tr. 540.

During the afternoon hours on Sunday, the group stopped. Tr. 541. They secured the scene and hid the unused ingredients. Tr. 541. They returned together to Cleveland around 6:00 p.m. and stopped at the home of another friend, Steve Brooks, to continue getting high and divide the remaining crystal methamphetamine. Tr. 541. Steve Brooks was provided a portion of the drugs. Tr. 542.

That night at approximately 10:30 or 11:00 p.m., Preston Utz borrowed Steve Brooks' Nissan Maxima and left with Sabrina Ashmore *en route* to Clarksdale, Mississippi. Tr. 542. At trial, Ephriam Woolf explained he would have been skeptical riding a substantial distance in a vehicle driven by Preston Utz, as ". . . [they] had all been smoking, [they] had been up for days. Not the best time to be going on a road trip." Tr. 543. Ephriam Woolf last

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Plaintiff's or Defendants' exhibits are those received into evidence at trial.

observed Preston Utz smoking crystal methamphetamine that night at an approximated point between 6:00 p.m. and 10:00 p.m. Tr. 546.

Crystal methamphetamine is a potent central nervous system stimulant that provides a temporary high of euphoria, elation and increased alertness and mood. Tr. 582. The drug dramatically increases metabolism, "cranking" up the body to 150% or 200% of its usual capacity. Tr. 583. Once the stimulant is metabolized and dissipates, however, extreme depressive effects emerge and the body is overcome by fatigue and lethargy. Tr. 583. Common attendant symptoms also are decreased perception and reaction and are amplified in the absence of sleep or stimuli. Tr. 583-84. A methamphetamine user that partakes in binge use, as did Preston Utz, may sleep for days once a binge ceases. Tr. 583. Post mortem biological specimens indicated that Preston Utz only had a low level of crystal methamphetamine in his blood at the time of his death. Tr. 581; R. 1348. Hence, he had metabolized the lion's share of the stimulant.

A few minutes before midnight as Preston Utz returned alone to Cleveland, the Nissan Maxima he operated sped directly into the rear of a white commercial trailer, pulled by Anthony Hunter, in the right southbound lane of Highway 61 about two miles north of the Cleveland city limit. Tr. 414.[3] The Nissan Maxima left no skid marks, critical steer marks or sign of any evasive maneuver and the impact occurred practically dead center in the right southbound lane. Tr. 434. Highway 61 at the area of impact is a typical Delta highway.

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[3]Highway 61 at this point is comprised of four lanes separated by a grassy median. *See* Defendants' Ex. 15(b) and (e).

It is open, straight and level; visibility is good and without obstruction. Tr. 436; *See also* Defendants' Ex. 15(b), (e), (g) and (i). As Preston Utz traveled south towards and caught up with the trailer, he did so along a straightaway that spanned .8 of a mile. Tr. 270, 607. Preston Utz had, at a minimum, 36 seconds of a clear, direct sight line to the trailer as he traveled towards and ultimately struck it. Tr. 608. Because of the straight, flat and dark character of this stretch of highway, it is in the words of the responding Mississippi Highway Patrol Trooper, Ronald Shive, an "environment [that] causes fatigue". R. 444.

The rear of the trailer was equipped with four red corner taillights, three red identification lights centered along the middle of the lower deck, and a white tag light. Tr. 464-65; *see also* Defendants' Ex. 15(m), (s), (v) and (w). Testimony from Charles Richard[4], who traveled to the scene immediately following the accident, proved the corner taillights alone were visible at a distance of approximately one mile. Tr. 468-69.[5] Trooper Shive, who arrived on the scene minutes after the collision, characterized the corner taillights as "bright", "glowing in the night", and as good as any others he typically sees on vehicles. Tr. 430-32. As did Charles Richard, he provided first hand information that the taillights and trailer were visible from considerable distances at the scene.[6] Tr. 433-34, 437.

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[4]Charles Richard is the principle of Running and Rolling Trucking, Inc. Tr.460.

[5]The identification lights and tag light were destroyed in the collision and, therefore, are not visible in the scene photographs. Tr. 456.

[6]Trooper Shive took several photographs of the vehicles. *See* Defendants' Ex. 15(a) - (w). These photographs were used extensively by all parties during trial.

The rear of the trailer was not equipped with reflective tape in the upper corners or along the lower rear deck as required by the Federal Motor Carrier Safety Regulations ('FMCSR"). *See* Defendants' Ex. 15(m), (s), (v) and (w). Testimony from Charles Richard indicated, however, that there was reflective tape along the DOT bumper, which was detached and propelled underneath the trailer in the collision. Tr. 465-66; 456; 449. The Plaintiff filed suit, alleging the accident was caused by the negligence of Anthony Hunter and his employer Running and Rolling Trucking, Inc .

SUMMARY OF THE ARGUMENT

The trial court did not abuse its considerable discretion by admitting evidence that Preston Utz stayed up all night prior and into the day of the accident smoking crystal methamphetamine. This evidence was highly relevant to the ultimate cause of the accident and Preston Utz's potential negligence. The trial court also did not abuse its discretion by admitting testimony of forensic toxicologist Michael Weaver concerning the crystal methamphetamine evident in the blood of Preston Utz. Michael Weaver's testimony was based upon a sufficient foundation and supported by evidence.

The trial court did not abuse its discretion by prohibiting the Plaintiff from offering evidence of the carrier rating of Running & Rolling Trucking, Inc. and a leak that developed in a tractor operated by Anthony Hunter. This evidence had no relationship to the visibility of the trailer or the cause of the accident and was irrelevant and otherwise inadmissible.

The trial court did not commit reversible error by prohibiting the Plaintiff from pursuing at trial a strict liability claim, instead requiring the jury to determine that the

negligence of the Defendants was the proximate cause of the accident in order to return a verdict for the Plaintiff. A violation of a traffic statute or regulation does not result in strict liability and proximate cause still must be proven.

The trial court did not abuse its discretion by limiting the testimony of the expert witnesses on causation. The opinions of the Plaintiff's experts that the accident occurred because of the absence of reflective tape on the rear of the trailer did not satisfy Mississippi Rule of Evidence 702 and were not relevant and reliable as required by *Miss. Transp. Comm'n v. McLemore*, 863 So. 2d 31 (Miss. 2004).

The trial court did not abuse its discretion by not admitting into evidence the various articles, two photographs of a purported exemplar tractor-trailer, and 26 photographs of the subject trailer taken well over one year after the accident offered by the Plaintiff. The articles were hearsay and contained numerous unfairly prejudicial and inadmissible statements. The two photographs of the unrelated tractor-trailer were not relevant and are not subject to appellate review because they are not in the record. The Plaintiff did not establish the 26 photographs depicted the trailer in substantially the same condition as at the time of the accident and the photographs were not relevant. Further, numerous photographs of the trailer at the scene of the accident were introduced by stipulation and utilized during the examination of witnesses by both sides.

The trial court did not commit reversible error by refusing certain jury instructions proffered by the Plaintiff. The Plaintiff's proposed jury instructions labeled as P-17 through P-19, P-21 and P-29 were not supported by credible evidence. The proposed instructions

labeled P-11 through P-16 were subsumed and unneeded when the trial court instructed the jury the Defendants were negligent by violating the Federal Motor Carrier Safety Regulations.

The trial court did not commit reversible error by giving the Defendants' jury instructions labeled D-1 through D-3 and D-5 through D-6. The instructions were correct statements of law supported by credible evidence introduced during trial. The trial court similarly did not err by giving the jury instruction C-19.

ARGUMENT

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE THAT PRESTON UTZ SMOKED CRYSTAL METHAMPHETAMINE PRIOR TO THE ACCIDENT AND DID NOT SLEEP THE NIGHT PRIOR TO THE ACCIDENT

Evidence that Preston Utz stayed up the entire night prior to the accident smoking crystal methamphetamine and continued smoking it into the day of the accident was highly relevant. The testimony from the witnesses that observed the trailer at the scene was consistent: The trailer and lights were highly visible and obvious. The evidence showing Preston Utz did not sleep at all the night before the accident, and instead repeatedly smoked crystal methamphetamine, provided a plausible explanation on why he collided with the trailer with no attempt at avoidance. The jury reasonably could have inferred at the time the accident occurred Preston Utz was tired, groggy, lethargic, suffering from decreased perception and reaction, nodding in and out of sleep, or all of these, based upon this

evidence. The Plaintiff's Brief suggests the purpose for this evidence was to denigrate the character of Preston Utz and somehow confuse the jury. It was not. This evidence was highly relevant to the issue of Preston Utz's potential fault in colliding with the trailer, which the on scene witnesses demonstrated, and the jury found, was plainly visible. The Supreme Court and Court of Appeals both have noted the relevance that alcohol consumption can have in accident cases. *See Abrams v. Marlin Firearms Co.*, 838 So. 2d 975 (Miss. 2003); *O'Neal v. Roche Biomedical Laboratories, Inc.*, 805 So. 2d 551 (Miss. Ct. App. 2000); *Hageny v. Jackson Furniture Co. of Danville, Inc.*, 746 So. 2d 912, 920 (Miss. Ct. App. 1999) (Consumption of alcohol was relevant to issue of whether Plaintiff was contributorily negligent.) Preston Utz's use of crystal methamphetamine is no different in this matter.

Abrams involved a product liability action against a gun manufacturer after the plaintiff accidentally shot himself in his pickup truck. *Abrams*, 838 So. 2d at 977. Beer bottles were found in his truck and a paramedic attending him smelled alcohol on his breath. *Id.* After a defense verdict, the Plaintiff alleged the trial court committed reversible error by admitting this proof because "there was no evidence that alcohol had anything to do with the accident and the proof never established that [the plaintiff] was actually intoxicated." *Id.* at 979. The Supreme Court affirmed, finding "evidence of possible alcohol consumption just prior to the accident was highly relevant and probative as to . . . [the plaintiff's] contributory negligence." *Id.* at 980. As in *Abrams*, the evidence of crystal methamphetamine use and lack of sleep was highly relevant to Preston Utz's negligence and the proximate cause of the accident.

The Plaintiff also argues the trial testimony from Mississippi Crime Laboratory Toxicologist Carmen McIntire places the trial court in error. Ms. McIntire testified at trial that she performed two tests on Preston Utz's blood at the Mississippi Crime Lab; an immunoassay test and a mass spectra test. The immunoassay test did not reveal methamphetamine.[7] It was Ms. McIntire's opinion that the mass spectra data displayed some features indicative of methamphetamine but did not meet the reporting criteria of the Mississippi Crime Lab. Tr. 344-45; *see also* Plaintiff's Ex. 21.[8] As a result, Ms. McIntire reported negative for methamphetamine. Tr. 345.

The Plaintiff's argument, however, ignores the testimony of Michael Weaver. Mr. Weaver is a board certified forensic toxicologist and section chief with the Alabama Department of Forensic Sciences and was accepted by the trial court as an expert without objection to his expertise. Tr. 577-79.[9] He testified unequivocally that the mass spectra data showed methamphetamine was, in fact, present. Tr. 581. As a result, a classic issue of material fact existed for the jury to resolve.

Further, Mr. Weaver's opinion should not be considered singularly, as it is consistent with the testimony offered by Preston Utz's friend, Ephriam Woolf. Mr. Woolf, on personal

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[7]The immunoassay is a quick drug screen that is not sensitive for methamphetamine at low levels. R. 1348.

[8]In her pretrial deposition, Ms. McIntire testified the mass spectra data, in fact, "indicated the presence of methamphetamine." R. 533. At trial, she retreated a bit from that statement.

[9]Mr. Weaver previously worked with the Mississippi Crime Laboratory prior to returning to his home state of Alabama to work with the Alabama Department of Forensic Sciences. Tr. 577. He is intimately familiar with the testing methods utilized by the Mississippi Crime Lab in this case. Tr. 579.

and first hand knowledge, testified that Preston Utz began smoking crystal methamphetamine at roughly 4:00 a.m. on the day of the accident and he last observed Preston Utz smoke crystal methamphetamine on that day at a point between 6:00 p.m. and 10:00 p.m. Tr. 536-39. Hence, there was ample factual support for Mr. Weaver's opinion on the methamphetamine data and he testified his opinion was consistent with the testimony offered by Ephraim Woolf. Tr. 582.

The trial court's admission of evidence is to be reviewed for an abuse of discretion and reversal is inappropriate unless an error was made of such magnitude as to leave no doubt that the plaintiff was unduly prejudiced. *Belmont Homes, Inc. v. Stewart*, 792 So. 2d 229, 236 (Miss. 2001) (citation omitted)[10]. That did not occur in this case.

Moreover, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice under Mississippi Rule of Evidence 403. The probative value of the evidence was high and supported the Defendants' theory of how the accident occurred. It is inherent that nearly all evidence is prejudicial to a party in one way or another. *Abrams*, 838 So. 2d at 981. The inquiry as regards admissibility is whether that prejudice is unfair. *Id.*

The trial court conducted the appropriate balancing test under Rule 403 and determined the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. R. 1405. The trial court did not abuse its discretion.

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[10]The Plaintiff references in her brief at page 6 evidence that Preston Utz was "selling" methamphetamine. No such evidence was offered at trial.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE TESTIMONY OF MICHAEL WEAVER CONCERNING THE DEPRESSANT SIDE EFFECTS ASSOCIATED WITH THE ELIMINATION OF CRYSTAL METHAMPHETAMINE.

During direct examination, Mr. Weaver explained that as crystal methamphetamine is eliminated from the body and the euphoric effect wears off, the associated depressant side effects, such as decreased perception and reaction, emerge. Tr. 583. Mr. Weaver subsequently was asked, based on his assessment that the mass spectra data indicated Preston Utz had been smoking crystal methamphetamine and the factual testimony concerning Preston Utz offered by Ephriam Woolf, if he had an opinion as to whether Preston Utz would have been fatigued at the time of the accident. Tr. 584. At that point, the Plaintiff's counsel objected, arguing no opinion of Mr. Weaver on fatigue was provided in discovery[11] and that such an opinion would violate the trial court's orders (found within the Record at 1372-75and 1391-92) governing the parameters set for the opposing accident reconstructionists. Tr. 584-85. The objections were overruled. Tr. 587. Mr. Weaver then answered the question by stating that Preston Utz could have been fatigued at the time of the accident. Tr. 588. He also testified Preston Utz could have experienced delayed perception. *Id.*

The Plaintiff may not fairly assert that the trial court committed reversible error because Mr. Weaver used the words "could have". The Plaintiff raised no objection at all to the words chosen by Mr. Weaver at trial. Simply put, the Plaintiff cannot allege the trial court made a reversible error on an evidentiary issue the Plaintiff did not raise, and preserve,

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[11]This opinion clearly was disclosed within the Defendants' expert designation. R. 62-63.

at trial. *Kroger Co. v. Scott*, 809 So. 2d 679, 686 (Miss. Ct. App. 2002) (Failure to raise a contemporaneous objection constitutes a waiver of the issue on appeal.) *See also Hood v. State*, __ So.3d __, 2009 WL 2259937 (Miss. July 30, 2009) (same); *Davis v. State*, __ So.3d __, 2009 WL 2857043 (Miss. Ct. App. Sept. 8, 2009) (same); A specific, contemporaneous objection is required. *Id.*

Further, it would seem that if the Plaintiff took issue at trial with Mr. Weaver opining that Preston Utz "could have" been fatigued, the Plaintiff made the strategic decision to raise no objection. Certainly, if the Plaintiff had objected Mr. Weaver could have rephrased and explained his answer. Mr. Weaver previously had submitted a pretrial affidavit wherein he opined Preston Utz would have been fatigued at the time of the accident:

> Given the testimony that Preston Utz had stayed up the entire Saturday night before the accident at issue in this case and repeatedly smoked crystal methamphetamine throughout that night and into Sunday, along with the fact that the accident occurred at almost midnight at a point when Preston Utz's body had eliminated nearly all of the methamphetamine, it is my opinion to a reasonable degree of toxicological probability that Preston Utz would have been experiencing, at a minimum, extreme fatigue and compromised perception and reaction abilities as he operated his vehicle. R. 1348-49.

The Plaintiff's complaint should not be heard at this juncture. She can not fail to raise an objection and then argue the trial court committed reversible error.

Further, Mr. Weaver's opinions were based on a sufficient foundation under Mississippi Rule of Evidence 702. He received the screening data for Preston Utz and after studying it found it showed a low level of methamphetamine. R. 1348. He also heard the

testimony from Ephriam Woolf that Preston Utz had been up all night repeatedly smoking crystal methamphetamine and had ceased smoking it at a point prior to the accident. Tr. 539-540. It was not error to permit Mr. Weaver to testify that based upon those factors – Preston Utz's sleep deprivation; his having repeatedly smoked crystal methamphetamine; and the accident occurring just prior to midnight as Preston Utz drove alone on a dark, desolate highway – that Preston Utz could have been fatigued and experiencing delayed reaction time.[12] The evidence is uncontradicted that these are typical symptoms associated with crystal methamphetamine being eliminated from the body. R. 1348. Both toxicologists that testified at trial explained this occurrence. Tr. 349; 588.

The admission of expert testimony is addressed to the sound discretion of the trial court and unless the trial court's decision is arbitrary and clearly erroneous, amounting to an abuse of discretion, the decision will stand. *Seal v. Miller*, 605 So. 2d 240, 243 (Miss. 1992) (citation omitted). The trial court's admission of this testimony was not arbitrary and clearly erroneous.

3. THE EVIDENCE REGARDING PRESTON UTZ'S CRYSTAL METHAMPHETAMINE USE PRIOR TO THE ACCIDENT WAS ADMISSIBLE BECAUSE OF THE TESTIMONY OF PLAINTIFF'S WITNESS, STEVE BROOKS

While the evidence of Preston Utz's crystal methamphetamine use and failure to sleep was relevant on its own, the Plaintiff made it even more so by presenting testimony from

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[12]The Court of Appeals recently found a toxicologist's testimony that it was "possible" a driver was in an alcohol elimination phase did not render her testimony irrelevant and unreliable. *Lepine v. State*, 10 So.3d 927, 936 (Miss. Ct. App. 2009).

Steve Brooks. The Plaintiff elicited testimony in her case in chief from Mr. Brooks that Preston Utz was a capable and slow driver. Tr. 484. Mr. Brooks also testified that Preston Utz slept on his couch until approximately 10:00 or 11:00 a.m. on the day of the accident, spent an uneventful day, and departed from Cleveland at around 5:00 or 6:00 p.m. to drive Sabrina Ashmore to Clarksdale. Tr. 480-81. Mr. Brooks also testified that he spoke with Preston Utz by telephone just a few minutes before the accident and that he did not sound fatigued. Tr. 483.

The evidence that Preston Utz spent all of Sunday morning smoking crystal methamphetamine near Lake Beulah was directly inconsistent with the testimony of Steve Brooks. In sum, the Plaintiff's motive was to have the jury infer from Steve Brooks' testimony that since Preston Utz was a good driver and slept until 10:00 or 11:00 a.m., he was not tired and did not negligently cause the accident. The testimony from Ephriam Woolf and Michael Weaver was necessary to show that the testimony of Steve Brooks, who was a close friend of Preston Utz and had motivation not to admit he entrusted his vehicle to a person who had stayed up all night smoking crystal methamphetamine, was not truthful. The jury was entitled to see the other side of the coin and weigh the evidence. The trial court did not abuse its discretion in affording the jury that chance.

4. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING LAY WITNESS TESTIMONY REGARDING THE CRYSTAL METHAMPHETAMINE FOUND IN PRESTON UTZ'S POCKET

The day after the accident, Preston Utz's mother, Martha Fly, obtained the clothes he wore at his death from the funeral home. Tr. 552. Ms. Fly placed the clothes in a trunk. Tr. 553. Some time later, she was going through the clothes and found a plastic bag containing a white substance. Tr. 553. She telephoned her daughter, Rachel Foster, to come examine the substance.[13] Tr. 553.

Rachel Foster viewed the substance and believed it to be crystal methamphetamine. Tr. 567. She was familiar with crystal methamphetamine because she smoked the drug as a teenager. Tr. 567. Ms. Foster testified unequivocally that she knows what crystal methamphetamine looks like and knows what it smells like. Tr. 567. She testified that the substance was crystal methamphetamine. Tr. 568.

It is well settled that the failure to cite authority may be treated as a procedural bar and the appellate court is under no obligation to consider an assignment not supported by authority. *Grenada Living Ctr., LLC v. Coleman*, 961 So. 2d 33, 37 (Miss. 2007) (citation omitted). Though the Plaintiff mentions rules of evidence in her argument on this point, she cites no specific case authority, and Mississippi precedent suggests merely referring to a rule of evidence is insufficient. *See Scott*, 809 So. 2d at 686 ("While Mississippi rules of evidence were mentioned in each of [the appellant's] arguments, these issues were asserted without cited authority.")

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[13]The trial court found Martha Fly did not have a level of familiarity with crystal methamphetamine sufficient to offer an opinion on the white substance and ordered she could not opine that it was crystal methamphetamine. R. 1407-08. She did not state during direct examination that she believed the substance to be crystal methamphetamine. Tr. 552-54.

To the extent the Court considers this assignment of error, no abuse of discretion exists. Rule 701 of the Mississippi Rules of Evidence provides that a lay witness may offer an opinion that is rationally based on the perception of the witness and helpful to a clear understanding of testimony or determination of a fact in issue. The trial court found Ms. Foster's opinion met Rule 701 given her familiarity with crystal methamphetamine. R. 1407-08. The trial court did not abuse its discretion in doing so. *See, e.g., Davis v. State*, 904 So. 2d 1212 (Miss. Ct. App. 2004).

Rachel Foster's testimony also was relevant. A disputed issue of fact existed on whether or not Preston Utz had smoked crystal methamphetamine as asserted by Ephriam Woolf and Michael Weaver and denied by Steve Brooks. Given that Preston Utz had crystal methamphetamine in his pocket at the time of the accident, this evidence aided the jury in resolving this disputed factual issue and satisfied Rule 701.

5. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY EXCLUDING AS EVIDENCE THE CARRIER RATING OF RUNNING AND ROLLING TRUCKING, INC. AND A PRIOR FMCSR VIOLATION OF ANTHONY HUNTER

The Plaintiff failed to cite any authority for these assignments of error and waived them. *Grenada Living Ctr.*, 961 So. 2d at 37.

In the event this Court considers the assignments, the trial court did not abuse its discretion to the undue prejudice of the Plaintiff. *Belmont Homes*, 792 So. 2d at 237. The Defendants admitted at trial, and the Plaintiff's witnesses nonetheless established time after time, that the rear of the trailer was not in compliance with the FMCSR because reflective

tape was not affixed in the upper corners and horizontally along the bottom deck. Tr. 174-75; 178; 221; 296-98. Because there was no dispute on this point, the trial court instructed the jury that the Defendants were negligent in failing to comply with the FMCSR. R. 1597; 1603. Hence, the Defendants' duty and breach were established; the sole liability issue for the jury was whether the absence of tape caused or contributed to the accident. Stated differently, the jury had to determine whether or not Preston Utz should have recognized the trailer ahead of him and not run into it as he did.

The carrier rating of Running & Rolling Trucking had no relationship to the visibility of the trailer and whether the absence of reflective tape caused or contributed to the accident. Further, the carrier rating, which incidentally was satisfactory, was affected by a handful of violations, all of which occurred subsequent to the accident and did not even involve reflective tape. R. 1021-1027. This was not relevant evidence.

The prior incident involving Anthony Hunter also was not relevant to the jury's effort to determine whether the absence of reflective tape caused the accident. Sometime prior to the accident, a leak developed in the tank of a tractor Anthony Hunter was driving around Natchez, Mississippi. R. 490. He was placed out of service until the leak was fixed and he could continue his trip. R. 490. Once the leak was fixed, he completed the trip. R. 490. Such evidence would not have benefitted the jury and the trial court did not abuse its discretion in ruling it was not relevant.

6. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN PROHIBITING THE PLAINTIFF'S EXPERTS FROM OPINING THAT THE CORNER TAILLIGHTS WERE COVERED BY DIRT OR GRIME

The Plaintiff failed to cite authority for this assignment of error and waived it. *Grenada Living Ctr.*, 961 So. 2d at 37.

To the extent the Court considers this assignment, it is without merit. The Plaintiff apparently sought to have two of her liability experts, Tim Corbitt and Dane Maxwell, opine that the scene photographs taken by Trooper Shive revealed the corner taillights were marred by dirt and grime. Neither Messrs. Corbitt nor Maxwell had ever seen the trailer or its taillights outside of the photographs. The trial court's reasoning in prohibiting any expert – Plaintiff's or Defendants' – from opining as to whether dirt over the corner taillights is depicted within the photographs is unassailable:

> Whatever the status of the taillights on the trailer immediately following the accident, such status is depicted in the photographs taken by the Mississippi Highway Patrol. It is this court's view that it does not take an expert to advise a jury as to what is depicted in a photograph. The jury can view the photograph itself and make its own determination as [*sic*] what is depicted therein. Thus, the court finds that an opinion from an expert as to what is depicted in a photograph would not be of assistance to the jury. As such, the Motion in Limine of the defendants regarding this matter is **GRANTED.** R. 1397.

The trial court did not abuse its discretion. Rule 702 of the Mississippi Rules of Evidence provides that expert testimony must assist the trier of fact to understand the evidence or determine a fact in issue in order to be admissible. Further, the true criterion of expert testimony is that of necessity. *Illinois Cent. R.R. Co. v. Williams*, 135 So. 2d 831, 839

(Miss. 1961). Where a jury is capable on its own of drawing a correct conclusion, expert testimony is not admissible. *Williams*, 135 So. 2d at 840 (Since an expert witness in a sense discharges the function of a juror, his opinions should not be admitted unless it is clear that the jurors themselves are not capable, from want of experience or knowledge of the subject, of drawing correct conclusions from the facts.); *See also Poole v. Avara*, 908 So. 2d 716, 723 (Miss. 2005) (In determining whether expert testimony is relevant in accordance with the trial court's gate keeping function, the trial court should consider if the testimony will assist the trier of fact.)

The trial court correctly ruled that the jury itself could make its own determination as to what is depicted in the photographs and would not benefit from expert comment. R. 1397. The trial court followed Mississippi law and this assignment has no merit.

Contrary to the Plaintiff's assertions, the trial court did not permit witnesses called by the Defendants to circumvent this ruling. Trooper Shive, who actually was called by the Plaintiff, testified he personally observed the taillights glowing from substantial distances while he was on the scene. Tr. 431-34. Charles Richards similarly testified he personally saw the taillights from approximately one mile away as he drove south on Highway 61 towards the accident. Tr. 467-68. This testimony was highly relevant and based upon what these persons actually observed. There was no unfair advantage gained by the Defendants through the trial court's ruling as the Plaintiff suggests.

7. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY PROHIBITING THE PLAINTIFF FROM PURSUING AT TRIAL STRICT LIABILITY CLAIMS AGAINST THE DEFENDANTS

The Plaintiff failed to cite authority for this assignment of error and waived it. *Grenada Living Ctr.*, 961 So. 2d at 37.

The Plaintiff's complaint appropriately was grounded upon a negligence theory. R. 8-12. As discovery progressed, however, it became apparent that the Plaintiff intended to try much more than just a negligence case. For example, each of the three persons designated as expert witnesses by the Plaintiff on the FMCSR – Mark Mori, Mark Dunlap, and Dane Maxwell – set forth a common theme in their disclosed opinions: The trailer did not meet the reflective tape requirement of the FMCSR and, as a result, it "should not have been on the road." R. 169; 173; 178; 187. From there, these experts sought to opine that since the trailer violated the FMCSR, it was illegally on the roadway at the time of the accident and, as a result, the Defendants were absolutely liable for the death of Preston Utz. Under the Plaintiff's theory advanced by her experts, it did not matter whether the trailer was visible to Preston Utz. It similarly did not matter whether the absence of reflective tape was a proximate cause of the accident. By extension, it would not have mattered whether Preston Utz ran into the trailer solely because he fell asleep behind the wheel. The Plaintiff intended for her experts to testify at trial that the trailer should not have been on the roadway and the Defendants were therefore liable. End of story. This was strict liability.

The person designated by the Plaintiff as an expert truck driver, Mark Mori, testified concerning this strict liability theme during his discovery deposition:

> Q. What methodology did you use in formulating your opinions?

A. Methodology? How did I come at it?

Q. What's your methodology? Yeah.

A. Well, I look at the vehicle, the pictures, and - - I mean, basically I look at the picture, I see no tape, and I see that it's required to have tape.

Q. Okay. And so you take those two factors, then, and come to the conclusion that the accident happened because there was no tape?

A. Well, its kinda like if - - **if the truck is not supposed to be on the road, it - - the accident never would have happened,** because all of these things right here, Mr. Strong, are - - have to be in working order or on before he can pull out on the road.

Q. **Well, but does that have anything to do with whether the trailer was or was not visible?**

A. **Well, it - - it wasn't supposed to be on the road, so whether it's visible or not, it - - it's not supposed to be on the road.** (emphasis added) R. 220-21.

Under this novel theory, any violation of the FMCSR would have rendered the Defendants liable for the death of Preston Utz, even if the violation played no role in causing the accident. Mr. Mori intended to advance testimony that the Defendants were liable no matter how visible the trailer may have been to Preston Utz and even if he plainly saw it or should have seen it and avoided the accident:

Q. . . . [I]n your mind, if this truck had been visible to Preston Utz, alright, even though it had no reflective tape, what if it had been visible to him just because of those red lights, alright, and he runs into the back of it for whatever reason, under your methodology, is my client still at fault?

A. If he's on the road without the striping, yes, sir. R. 221.

The Plaintiff's counsel confirmed this strict liability theme was to be front and center at trial, announcing that it was "the gist of [his] case." R. 221.

Dane Maxwell advanced the same strict liability theory during his pretrial deposition:

> Q. Did you utilize a methodology in formulating your opinions in this case that the lack of conspicuity tape caused this accident?
>
> A. Sure. I used, of course, the regulations themselves. I mean, that's - -
>
> Q. How do the regulations allow you to - -
>
> A. I'm sorry.
>
> Q. - - to determine that the accident would not have been caused but for the lack of reflective tape?
>
> A. **Well, it's easy. He shouldn't have been on the road without it. So if he would have complied with the regulations, he wouldn't have been on the road, there would have never been an accident.** (emphasis added) R. 266.

The Plaintiff's remaining FMCSR designated expert, Mark Dunlap, reiterated this concept during a proffer at trial:

> Q. Give us your opinion on causation in regards to the injuries as to Preston Utz?
>
> A. The only thing that I could comment on is the fact that the truck should never have been on the road in the first place. That would be my causation. Tr. 196-197.

This strict liability concept plainly does not comport with Mississippi tort law. It dispenses with the fundamental notion that the regulation breached must be the proximate cause of the accident. Violations of statutes or regulations do not result in strict liability. Consequently, a plaintiff must prove the violation was the proximate cause of the injury sued upon. *See, e.g., Fleming v. Floyd*, 969 So. 2d 881 (Miss. Ct. App. 2006) (overruled on other grounds) ("One party's violation of a traffic regulation and consequent negligence *per se* do not equate to fault. The violation must have been a proximate cause of the accident."); *Shaw v. Phillips*, 193 So. 2d 717, 718 (Miss. 1967) (Although it is negligence to drive a vehicle while intoxicated, such negligence must be causally related to the accident.); *McFarland v. Leake*, 864 So. 2d 959, 961 (Miss. Ct. App. 2003) (Committing misdemeanor traffic offense is negligence, but must still be shown to have been the cause of the accident.); *Somerville v. Keeler*, 145 So. 721, 724 (Miss. 1933) (Defendants were negligent in permitting their daughter to operate vehicle in violation of city ordinance, but negligent act must have been proximate cause of injury.) This has long been, and remains, the law in Mississippi.

Further, the Plaintiff intended to make the argument that the trailer was "out of service" under the FMCSR when it plainly was not. The applicable federal regulation – CFR § 396.9 – governs when a commercial vehicle is out of service. The regulation indicates a commercial vehicle is not "out of service" unless someone authorized by the FMCSR determines the vehicle "by reason of its mechanical condition or loading would likely cause an accident or a break down." R. 798. That regulation expressly requires that an "out of service" vehicle sticker be used to mark a vehicle out of service. R. 798. Those

criteria were not met and the Plaintiff was misconstruing the regulation by asserting the trailer was out of service. Mr. Dunlap actually confirmed during his proffer that the trailer was not "out of service" under the regulations. Tr. 197.

Moreover, the Plaintiff's strict liability theme was shown to produce absurd results inconsistent with Mississippi Tort Law and the proximate cause requirement. For example, if strict liability were a valid cause, a carrier would be liable if a motorist rear-ended a trailer fully equipped with reflective tape, yet pulled by a tractor with an inoperable front turn signal that had no causal relationship to the accident. Because a faulty turn signal is an FMCSR violation, an injured person could, under the theory espoused by the Plaintiff, hold the carrier liable because the tractor-trailer should not have been operating with a faulty signal.[14]

The trial court carefully weighed this issue. Its ruling, set forth as follows, was not an abuse of discretion:

Causation – Strict Liability

> A common theme running through all of the opinions of the plaintiff's experts is their position that because the truck failed to have the federally required amount of reflective tape on the rear of the truck, the truck should not have been on the highway, and thus they conclude the defendants are liable for the injuries and death of the plaintiff simply because the truck was on the

[14]As was noted in the Defendants' Motion to Strike Various Opinions of the Plaintiff's Experts (R. 98-134), Preston Utz himself should not have been on the roadway. For example, the Nissan Maxima he was operating had no tag. *See* Defendants' Ex. 15(a), (m) and (w). He also was a felon in possession of a .22 rifle in violation of his probation. R. 1333; 1325-34; 336. His driver's license also appeared to be suspended. R. 337. Noting that the absence of a tag bore no relevance to why the accident occurred or the proximate cause thereof, the trial court prohibited such evidence, which the Defendants had no choice but to offer in reply to the Plaintiff's strict liability theme in a "what is good for the goose is good for the gander" fashion. R. 1408

> roadway. By this argument, the plaintiff seeks to impose strict liability against the defendants.
>
> Strict liability is not pled in the complaint. Also, this court is of the opinion that this case is not one premised upon strict liability. Although the violation of federal regulations alleged by the plaintiff – the failure to have reflective tape attached to the rear of the trailer – is a factor that may be considered by the jury when assessing liability, there must exist some causal connection between the alleged violation and the accident. Without such a causal connection, it is this court's view that no liability would attach to the defendants premised only upon an alleged violation of federal or state regulations.
>
> For the reasons stated above, no expert will be permitted to opine or give testimony to the effect that the subject truck should not have been on the highway due to its alleged failure to comply with federal regulations. (emphasis in original) R. 1392-93.

The logic employed by the trial court also is illustrated within portions of the colloquies between the trial court and the Plaintiff's counsel during separate pretrial motion hearings found at pages 6-10 and 106-109 of the Transcript.

Mississippi precedent also indicates FMCSR violations do not render a tortfeasor strictly liable. In *Choctaw Maid Farms, Inc. v. Hailey*, the plaintiff there argued various misconduct by the defendant commercial carrier – *i.e.*, its failure to maintain and preserve drivers' and maintenance logs, failure to require its drivers to be conversant in the federal and state regulations governing the maintenance and operation of tractor-trailers[15], and failure to train its drivers – warranted submission of punitive damages for jury consideration. 822 So. 2d 911, 923-24 (Miss. 2002). The Supreme Court affirmed the trial court's decision not to

[15]Though not stated in the *Hailey* opinion, these federal regulations are the FMCSR.

submit punitive damages, reasoning there was ". . . no nexus between the alleged gross negligence of [Choctaw Maid Farms] and the accident." *Hailey*, 822 So. 2d at 924. In other words, the alleged misconduct (all of which singularly appear to have been FMCSR violations) did not proximately cause the accident, and it would have been inappropriate for the defendant to be liable for conduct which did not harm the plaintiff.

8. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN LIMITING THE TESTIMONY OF THE PLAINTIFF'S EXPERT WITNESSES CONCERNING THE ULTIMATE CAUSE OF THE ACCIDENT

The Plaintiff cited no authority for these assignments of error and waived them. *Grenada Living Ctr.*, 961 So. 2d at 37.

To the extent the Plaintiff alleges reversible error in not permitting her experts to testify the trailer "should not have been on the roadway" and the strict liability implications thereof, the Defendants rest on their previous argument.

With respect to the Plaintiff's argument that the trial court committed reversible error in limiting the proposed causation opinion testimony of the Plaintiff's experts Messrs. Mori, Dunlap, Maxwell and Corbitt, the Defendants respond as follows.

A. Mark Mori

Mr. Mori is a former truck driver. R. 192. At the time of his pretrial deposition, he was selling luggage at his family-owned retail luggage business. R. 190. He has no expertise in accident reconstruction and held himself simply as an expert in "truck driving". R. 202. He did not obtain a college degree. R. 190.

The Plaintiff sought for Mr. Mori to testify that the accident occurred due to the absence of reflective tape on the trailer and, consequently, the Defendants were at fault. Yet Mr. Mori admitted during his discovery deposition that he lacked the ability to credibly testify as to what anyone besides himself would have seen in regards to the trailer at the time of the accident:

> Q. What I want to know is whether you have the ability to say whether other motorists would or would not have seen this particular vehicle that had no reflective tape. You either can or you can't. You tell me.
>
> A. All right. Ask me one more time.
>
> Q. All right. Does Mark Mori have the expertise, have the ability, to testify in court as to whether other people could have seen this vehicle - -
>
> A. No.
>
> Q. - - without reflective tape?
>
> A. No.
>
> Q. Okay. And Mark Mori has the ability to say what Mark Mori would have seen, correct?
>
> A. Yes, sir. R. 216.

Mr. Mori then went on to admit that the trailer, with its glowing taillights and white color, would have been visible to him from a distance of <u>as far as one-half a mile</u>:

> Q. Assuming you're on a flat stretch of Delta Highway, and that trailer is up ahead of you going through the night, from 500 yards, you would have seen those four lights burning, wouldn't you?

A. In the wintertime, yeah.

Q. Alright.

A. Summertime, you know, with the heat - - you know, so many different things.

Q. And I want you to assume that it's wintertime, because it's during the winter this accident took place, okay?

A. Okay.

Q. What about from a thousand yards away; can you give an opinion on whether Mark Mori would have seen it, assuming you had a line of sight to it?

A. Oh, yeah, I would have seen - - a thousand yards?

Q. Uh-huh (affirmative).

A. Yeah, I would have seen the lights.

Q. 3,000 feet, which is just over half a mile.

A. Right, I'd have seen the lights.

Q. You would have known that vehicle was up there, correct?

A. (Witness nods head affirmatively).

Q. Yes.

A. I would have, yes. R. 219.

The Plaintiff apparently sought for Mr. Mori to tell the jury that the trailer would have been visible to him, but speculate that it was invisible, or perhaps barely visible, to Preston Utz.[16]

[16]The Plaintiff did not call Mr. Mori at trial.

Expert testimony is only admissible if it withstands a two pronged inquiry under Mississippi Rule of Evidence 702. *Miss. Transp. Comm'n v. McLemore*, 863 So. 2d 31, 35 (Miss. 2004) (citation omitted). First, the witness must be qualified by virtue of knowledge, skill, experience or education. *McLemore*, 863 So. 2d at 35 (citation omitted). Second, the witnesses' specialized knowledge must assist the trier of fact in understanding or deciding a fact in issue. *Id.* Further, the party offering the expert's testimony must show that the expert has based his testimony on the methods of science, not his subjective beliefs or unsupported speculation. *Id.* at 36. (citation omitted). And the facts upon which the expert bases his opinion must permit reasonably accurate conclusions as distinguished from mere guess or conjecture. *Id.* at 35. (citation omitted). The trial court is the ultimate gatekeeper, ensuring that expert testimony is both relevant and reliable. *Townsend v. Doosan Infracore Am. Corp.*, 3 So.3d 150, 154 (Miss. Ct. App. 2009) (citation omitted).

Mr. Mori was not qualified to give expert testimony on the cause of the accident and whether or not the absence of reflective tape played a role. *See Poole v. Avara*, 908 So. 2d 716 (Miss. 2006) (Trial court must be assured that a proffered witness is qualified to testify since only reliable and relevant expert testimony is to be presented to a jury.) He admitted as much during his deposition. Courts applying Rule 702 have found as unqualified experts which the Defendants submit, respectfully, appear to have been more qualified to state their proffered opinion than was Mr. Mori. *See Shelter Ins. Co. v. Ford Motor Co.*, 2006 WL 3780404 (5th Cir. Dec. 18, 2006) (College educated automotive technician, inspector and instructor not qualified under Rule 702 to opine that speed control deactivation switch caused

fire, despite expert's prior investigation of 190 fires.); *Troupe v. McAuley*, 955 So. 2d 848, 857 (Miss. 2007) (Neurosurgeon not qualified under Rule 702 to provide opinion on standard of care in field of neuro-otolaryngology.); *Wilson v. Woods*, 163 F.3d 935, 938 (5th Cir. 1999) (Mechanical engineer not qualified as an accident reconstructionist because his expertise was no greater than any other individual with a general scientific background.)

Moreover, the Plaintiff failed to establish that the proposed causation opinion was based upon facts which permitted reasonably accurate conclusions as distinguished from guess or conjecture. Talking off the cuff – deploying neither data nor analysis – is not an acceptable methodology. *Townsend*, 3 So.3d at 154 (citation omitted). Mr. Mori may have been a capable commercial truck driver during his tenure and the trial court permitted him to give testimony in that area. R. 1386. However, he was not in a position to reliably opine that the accident was caused by the absence of reflective tape in the areas of the trailer compelled by the FMCSR. The trial court did not abuse its discretion when it determined that testimony from Mr. Mori as to the cause of the accident was not based upon sufficient facts or data, would not be helpful to the trier of fact, and limited his testimony. R. 1387-88.

B. <u>Mark Dunlap</u>

Mr. Dunlap is a law enforcement officer with the Mississippi Department of Transportation. R. 229. He did not have any specialized training or expertise in accident reconstruction. R. 241

One of the opinions the Plaintiff intended for Mr. Dunlap to offer was "the cause of [the] wreck and the death of Mr. Utz was due to the driver, Mr. Hunter, and company

Running & Rolling Trucking not acting in compliance with the Federal Motor Carrier Safety Regulations". R. 173. As with Mr. Mori, the Plaintiff sought for Mr. Dunlap to testify that the accident occurred because the full gamut of reflective tape was not on the rear of the trailer.

Despite his opinion on causation set forth in his written report (R. 170-73), Mr. Dunlap conceded in his discovery deposition that he held no useful information concerning the visibility of the trailer at the time of the accident:

> Q. Okay. Now, I had - - I think I had asked you whether the trailer was invisible, and you had conceded that, no, it's not invisible.
>
> A. Correct.
>
> Q. Alright. Do you have an opinion on how visible it was that night?
>
> A. **Without being there, I wouldn't be able to say.**
>
> Q. Right.
>
> A. But, again, it's - - not in compliance with the regulations.
>
> Q. Right. So you're not here to testify that the trailer was invisible that night?
>
> A. Obviously not.
>
> Q. Okay. And you're not going to try to give opinion testimony on how visible it may or may not have been?
>
> A. **I wasn't there. There's no way I could know that.**
>
> (emphasis added).

* * *

Q. . . . Do you have an opinion on how far away one could be and still have seen that trailer that night?

A. No, not based on the information I have.

Q. Do you have an opinion on whether, as Preston Utz approached this particular trailer on that night, that - - that he would have been able to see it?

A. No.

Q. You have no opinion one way or the other?

A. Not other than to say that had the vehicle been properly equipped with conspicuity tape, he would have been able to see it from a further distance. As to whether it was 50 feet or a hundred feet or a hundred yards, I couldn't say.

Q. Well, he would have been able to see it further out if there had been the conspicuity tape on it; is that what you're saying?

A. Yes. R. 241.

The trial court found Mr. Dunlap was qualified as an expert regarding the content of the FMCSR and their application to the facts of this case. R. 1389. However, as with Mr. Mori, the trial court ruled that Mr. Dunlap could not opine concerning the cause of the accident and the visibility of the subject trailer at the time of the accident. R. 1389.

The trial court did not abuse its discretion in its gatekeeping obligation. Mr. Dunlap was not qualified to give expert testimony on whether or not the trailer was visible to Preston Utz or why the accident occurred for the same reasons as Mr. Mori. Mr. Dunlap similarly was not situated to provide reliable testimony on this issue. *See Poole*, 908 So. 2d at 723.

Mr. Dunlap could have done nothing more than speculate on why this accident occurred and whether reflective tape would have prevented it. His proposed testimony on this point was inadmissible under M.R.E. 702, *McLemore*, and its progeny.

C. Dane Maxwell

Mr. Maxwell has a background in law enforcement and operates a business entitled CMV Investigations and Transportation Compliance Services. R. 258. He did not obtain a degree from any four year college or university. R. 269. He has no expertise in accident reconstruction.

As Messrs. Mori and Dunlap, one of the opinions the Plaintiff sought Mr. Maxwell to state at trial was the lack of reflective tape caused the accident: "In conclusion, it is my opinion that the violations of both state and federal regulations by both driver Hunter and Carrier Running & Rolling Trucking for allowing the operation of this commercial motor vehicle without proper reflective tape was the cause of the crash and the death of Mr. Utz." R. 178.

The basis for Mr. Maxwell's opinion also was explored during his discovery deposition. His testimony made clear that he would attempt to testify at trial that the trailer, even with several lights and notwithstanding that he had never seen it outside of photographs, was invisible as it traveled on Highway 61.

> Q. So you're saying that the trailer was invisible then, correct?
>
> A. Yes.

Q. Have you ever personally seen this trailer?

A. Not personally.

Q. Have you ever personally seen the lights?

A. Not personally. R. 261.

From there, Mr. Maxwell sought to tell the jury that the invisible trailer would have become visible to Preston Utz only if the FMCSR reflective tape requirement was fully met:

Q. How much tape was needed for Preston Utz to have been aware of the trailer in the road?

A. **As much as it took to comply with the regulations.**

Q. So for Preston Utz to have seen the trailer, tape on the DOT bar would have had to have been present, correct?

A. Uh-huh (affirmative).

Q. Yes?

A. Yes.

Q. And on the bottom of the trailer itself, correct?

A. Yes.

Q. And in the top right corner, correct?

A. Correct.

Q. If there had only been tape on the bottom of the DOT bumper, would Preston Utz have been aware of the presence of the trailer?

A. If it had just been on the bottom?

Q. Yes.

A. No.

Q. Why not?

A. **Because it didn't comply with the regulations.**

Q. So strict compliance with the regulations was required for Preston Utz to have any awareness that the trailer was in the highway, correct?

A. **Correct**. (emphasis added) R. 262-63.

The trial court found Mr. Maxwell was qualified to provide expert testimony regarding the content of the DOT Regulations and their application to the facts of the case. R. 1390-91. However, as with Messrs. Mori and Dunlap, the trial court found the Plaintiff failed to establish Mr. Maxwell was qualified to testify what was (or was not) visible to Preston Utz at the time of the accident. R. 1389-91. Further, Mr. Maxwell was unable to provide reliable opinion testimony on this issue. The trial court did not abuse its discretion.

D. Tim Corbitt

The trial court accepted Mr. Corbitt as an expert in accident reconstruction. R. 1391-92. The only restriction the trial court placed upon Mr. Corbitt was to prohibit him from offering an opinion "as to whether the deceased actually saw the truck prior to impact". R. 1392. Given his experience in accident reconstruction, the trial court granted Mr. Corbitt considerably more leeway than the Plaintiff's FMCSR experts, ruling that Mr. Corbitt could opine "regarding the visibility of the trailer from the point of view of a reasonably prudent driver, including how far away from the trailer a reasonably prudent driver would have been able to see the trailer at night if it was properly equipped with reflective tape." R. 1392.

To that end, Mr. Corbitt gave substantial testimony at trial regarding these issues and the cause of the accident. For example, he testified to each of the following:

- A reasonably prudent person would only have been able to see the lights on the rear of the trailer whereas this reasonable person would have been able to see the entire outline of the trailer had it been in compliance with the reflective tape regulations of the FMCSR. Tr. 223;
- Lighting from outdoor street lights and buildings converged to hide the trailer in the absence of reflective tape. Tr. 225;
- No evidence was found to indicate Preston Utz was asleep at the wheel at the time of the accident. Tr. 231;
- No evidence of fault was found against Preston Utz. Tr. 235;
- A reasonably prudent person would not have been able to see the trailer at the time of the accident. Tr. 278;
- Reflective tape is needed on the rear of a trailer to solve "red dot confusion". Tr. 281;
- Reflective tape is utilized to alert all drivers that a trailer is ahead in the roadway. Tr. 284;
- Reflective tape gives a driver a greater visibility of a trailer at a further distance. Tr. 285;
- Reflective tape provides greater conspicuity than taillights. Tr. 285;
- If reflective tape had been on the rear of the trailer the trailer would not have been invisible. Tr. 285.

The Plaintiff was permitted to and did solicit from Mr. Corbitt substantial testimony that the absence of the reflective tape was the cause of the accident. The jury weighed this testimony, as well as all the other testimony, and found the absence of reflective tape did not

cause or contribute to the accident. The trial court did not commit reversible error in its handling of Mr. Corbitt's testimony.

9. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN THE MANNER IT HANDLED THE PLAINTIFF'S OBJECTION TO CERTAIN TESTIMONY OF JOHN BENTLEY

The Plaintiff failed to cite authority for this assignment of error and waived it. *Grenada Living Ctr.*, 961 So. 2d at 37.

John Bentley is a professional engineer with expertise in accident reconstruction. Tr. 599. He has served as an accident reconstructionist in approximately 2200 cases and worked in the field since approximately 1981. Tr. 600. He was designated by the Defendants and accepted by the trial court as an expert in accident reconstruction. Tr. 601.

The Defendants disclosed the following in their expert designation as one opinion expected to be offered at trial by Mr. Bentley:

> Preston Utz had ample time and distance to avoid the impact with the tractor-trailer. R. 61.

Consistent with the limitations it placed upon the Plaintiff's accident reconstructionist, Tim Corbitt, the trial court ruled this specific opinion was inadmissible because it was "not offered in terms of a reasonably prudent driver or vehicle approaching from the rear, but rather . . . in terms of *the deceased*." R. 1373. Hence, any question to Mr. Bentley regarding time and distance available to avoid the accident were to be phrased from the perspective of a reasonably prudent driver and not upon what would have been available to Preston Utz.

During the direct examination of Mr. Bentley, defense counsel inadvertently phrased a "time and distance" question to Mr. Bentley from the perspective of Preston Utz rather than a reasonably prudent driver. Tr. 611. Mr. Bentley answered, explaining ". . . there was sufficient time and distance available to Mr. Utz to comfortably slow his vehicle or make a lane change to the left lane." Tr. 611. At that point, the Plaintiff's counsel requested a bench conference and objected to the testimony. Tr. 611. After some discussion, the trial court reviewed its order governing Mr. Bentley's opinions and agreed with the Plaintiff's counsel that the question was phrased improperly. Tr. 615-16. The following discussion then occurred:

> By the Court: Gentlemen?
>
> By Mr. Hazard: Your Honor, there was no contemporaneous objection. It was certainly not - -
>
> By the Court: - - It was dealt with in the Motion *in Limine*, though.
>
> By Mr. Hazard: Sir?
>
> By the Court: It was dealt with in my order.
>
> By Mr. Hazard: I certainly didn't recall that particular aspect and I reframed my question.
>
> By the Court: You did reframe your question, but it has been asked and answered. I think I'm going to instruct the jury to disregard any testimony given specifically dealing with what Preston Utz may or may not have perceived or at least have ample time and distance.
>
> By Mr. Hazard: Alright.

By Mr. Ogden: I would suggest that Plaintiff be allowed to put on testimony to contradict this.

By the Court: Well, if I do that, then I can't instruct the jury to disregard it. I'll give you one or the other.

By Mr. Ogden: Which one would the court prefer I do? Put on testimony or instruct the jury?

By the Court: I'll let you choose. Since they're the one that interjected it.

By Mr. Ogden: I would like the court to instruct the jury that they have entered evidence that wasn't to be admitted - -

By the Court: - - I'm not going to instruct them along those lines. I'm going to instruct them to disregard the evidence. And I - - I will instruct them to disregard that evidence, disregard that testimony.

By Mr. Ogden: I want the right to put the contradictory testimony on also.

By the Court: I'm not doing both. If I instruct them to disregard it from them, then I would have to advise you similarly.

By Mr. Ogden: But can you instruct the jury that some information has gotten in that shouldn't have?

By the Court: No, sir. If you want to brings yours in, them I'm not going to tell them anything about it. It's just coming in. I'm not going to say they violated a court order, you know, and let it in and now the Plaintiff is going to get to let it in. I will either let you bring it in or I will instruct them to disregard it.

By Mr. Ogden: Okay. Then I want the right to call witnesses to contradict that statement. Rebuttal witnesses. Whether they be experts - -

By the Court: - - How many?

By Mr. Ogden: How ever many it is going to take to cure it.

By the Court: Well, I'll let you call an expert.

By Mr. Ogden: I'm entitled to call an expert at least and maybe a lay witness.

By Mr. Strong: I take it a disclosed lay witness?

By Mr. Ogden: It would be somebody already on your list. It would be somebody we've already called.

By the Court: I'm not certain that I think a lay witness would have that opinion - - that I would let a lay witness give that opinion.

By Mr. Ogden: Well, Ronald Shive.

By the Court: He's not an expert.

By Mr. Ogden: I know, but they've had lay witness testimony now from both the defendant, Mr. Richard, and from Ronald Shive that the vehicle could be seen at a certain distance.

By the Court: That they saw it at a certain distance.

By Mr. Ogden: That they saw it. So I want my objection noted and I want the court to rule to authorize me to put somebody on to contradict the statement. And I will take an expert.

By the Court: I will permit you to put an expert on.

By Mr. Ogden: **Good. Then that solves my problem. As long as I can put somebody on, I'm happy.** (emphasis added) Tr. 615-18.

Following the bench conference, the question was rephrased and Mr. Bentley was questioned "whether a reasonably prudent driver would have had ample time and distance

to avoid the tractor-trailer?" Tr. 618. Mr. Bentley then indicated a reasonably prudent driver would have. Tr. 618. He reasoned:

> . . . the layout of the accident, 0.8 miles straight roadway, a little over 4,000 - - actually 4,224 feet, the time to cover that distance is going to be a little over 35 seconds. It's a long period of time. There's minimal traffic at that time of night, minimal other light sources in the area, it's a rural location. The taillights, like we talked about, had been visible for an extended distance. And then the other aspect is both these vehicles were going in the same direction, they're not closing in on each other, they're both heading south, and the rear vehicle is slowly catching up on the other one. Tr. 618-19.

The Defendants rested after Mr. Bentley testified. Tr. 642. The Plaintiff then called Mr. Corbitt and he rebutted the testimony by opining Preston Utz did not have ample time and distance to avoid the impact with the trailer. Tr. 650.

No reversible error is present in the manner in which the trial court handled this issue. The trial court sustained the Plaintiff's objection after reviewing its order governing Mr. Bentley's testimony[17] and advised the Plaintiff's counsel he would either direct the jury to disregard Mr. Bentley's response to the "ample time and distance" question or permit the Plaintiff to offer rebuttal testimony. The statement made by the Plaintiff's counsel after he indicated he preferred the second option – "then that solves my problem" – is indicative this is not an issue of any real magnitude. Tr. 618. The Defendants concede that a mistake was made in the manner the question was phrased; however, the situation was handled correctly by the trial court. It did not abuse its discretion to an end result of unfair prejudice to the

[17]This order is located at pages 1372-1375 of the Record.

Plaintiff and reversal on this ground is inappropriate. *Eckman v. Moore*, 876 So. 2d 975 (Miss. 2004).

10. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY EXCLUDING FROM EVIDENCE EXHIBITS MARKED AS P-10 THROUGH P-13 AND P-15 THROUGH P-20

The Plaintiff cited no authority for these assignments of error and waived them. *Grenada Living Ctr.*, 961 So. 2d at 37.

The document identified in the Pretrial Statement as P-9, FMCSA's Conspicuity Requirements for Commercial Motor Vehicles, was actually admitted into evidence as Plaintiff's Exhibit 9. Tr. 712; R. 1606; Plaintiff's Ex. 9.

The documents identified in the Pretrial Statement as P-10 through P-20 were ruled inadmissible because they were hearsay. R. 1469-75. Hearsay is defined by Mississippi Rule of Evidence 801(c) as an out-of-court statement offered in evidence to prove the truth of the matter asserted. Miss. R. Evid. 801(c) (West 2008). The only purpose in offering Exhibits P10-P20 was to prove the truth of the very matters asserted therein concerning how reflective tape is important to the prevention of accidents involving tractor-trailers at night. The trial court did not abuse its discretion.

Further, many of the exhibits at issue contained statements highly prejudicial and inadmissible under Rule 403 of the Mississippi Rules of Evidence. As an illustration, P-12, entitled Safety Bulletin 01-03, boasts the following: "Without the [reflective] tape, many trailers are not visible to other road users until they are dangerously close." R. 811.

P-13, entitled Public Citizen: NHTSA Data Shows Safety Costs Little, Saves Thousands , closes with the following: "**The historical record is clear, a modest investment in safety is worth tens of thousands of saved lives per year**." (emphasis in original) R. 813-816

P-16, entitled Truck Conspicuity from Auto Safety Expert.com contains the following statements:

- **These photos illustrate the danger of a trailer stretched across the lane ahead**. Note that the trailer across the road is virtually invisible in the left-hand photo . . . versus the dramatic difference in the right-hand photo that shows how reflective tape makes the trailer notably more conspicuous as a danger across the road ahead. (emphasis in original) R. 829.

- **Since the 1960s, the trucking industry had known about the safety benefits of reflective tape**, but generally ignored the conspicuity issue. Studies in the 1970s showed that truck underride crashes at night were often "surprise" events to the on-coming driver, who didn't perceive the truck until it was too late to avoid the crash, and they noted that reflective tape could help solve this problem. (emphasis in original) R. 829.

P-15, entitled Underride Network — Victims First quips as follows:

- "In 2005, the US still allows deadly guillotine guards on the back of all single unit trucks and many specialty trailers, including all trailers built prior to 1998. Is this 1952 safety regulation the best the U.S. government can achieve after 53 years? These false guards do not prevent underride even at low speeds and cannot be considered state of the art in civil litigation." R. 831.

- Safety begins when we acknowledge victims . . . . R. 831.

- The compatibility of all vehicles is a human right, no company, or government has the right to build, or allow to be built vehicles that are designed to kill the occupants of other vehicles! R. 831.

- Imagine your beloved family cruising along the highway in the beautiful hills of the eastern U.S., it is dark and visibility is poor . . . . Now, imagine an

> overloaded coal truck limping slowly up one of the many hills at 10 miles per hour due to the heavy load, lights obscured by the overly long tray and both lights and tape covered with a grimy black coating of coal dust. The stiff 1952 underride guard swings in the wind like a child's toy. Alright, this is too terrible, I will stop here. R. 836.

These were not admissible publications and the trial court did not abuse its discretion in ruling them inadmissible.

Further, the Plaintiff introduced as Plaintiff's Exhibit 8 the March 2001 NHTSA Technical Report entitled The Effectiveness of Retro Reflective Tape on Heavy Trailers along with the summary of conclusions from that report in spreadsheet format; (R. 1606; Plaintiff's Ex. 8); the publication entitled FMCSA's Conspicuity Requirements for Commercial Motor Vehicles as Plaintiff's Exhibit 9; (R. 1606; Plaintiff's Ex. 9); and as Plaintiff's Exhibit 14 the article entitled Recognizing a Truck at Night Shouldn't Be a Hit or Miss Proposition.[18] R. 1606; Plaintiff's Ex. 14. Each of these publications extolled the virtues of reflective tape and Plaintiff's Exhibit 9 contained computer-generated color illustrations detailing exactly where reflective tape is to be placed on a trailer under the FMCSR. Further, Plaintiff's Exhibit 14 contained testimonials with accompanying depictions from businesses within the trucking industry concerning the virtues of the reflective marketing materials attached to their respective fleets. *See* Plaintiff's Ex. 14. The Plaintiff can not credibly claim prejudice.

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[18]The trial court found the Defendants opened the door for this exhibit during their examination of Mr. Corbitt. Tr. 249-50.

In addition to these written materials, the Plaintiff called three separate experts who each repeatedly informed the jury of virtues of reflective tape, the requirements under the FMCSR and how they applied to the trailer in question, the Defendants' failure to comply with the reflective tape requirements, and the reasons reflective tape is required by the FMCSR. The Plaintiff was not denied a fair trial by the inadmissibility of the exhibits referenced in her brief.

Finally, the Plaintiff's counsel indicated at a pretrial hearing on the Defendants' motion *in limine* concerning the documents at issue[19] that the Plaintiff did not intend to introduce the documents into evidence and instead planned to use them only for demonstrative purposes. Tr. 110-11. It would therefore seem that the Plaintiff's complaint should not be heard at this juncture.

11. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN NOT ADMITTING THE 2 PHOTOGRAPHS OF A PROPOSED EXEMPLAR TRACTOR-TRAILER NOR THE 26 PHOTOGRAPHS OF THE SUBJECT TRAILER TAKEN OVER ONE YEAR AFTER THE ACCIDENT.

The Plaintiff failed to cite authority for these assignments of error and waived them. *Grenada Living Ctr.*, 961 So. 2d at 37.

The "Exemplar Truck" Photographs

The Plaintiff produced in discovery two photographs taken during daylight hours of a tractor-trailer traveling down the roadway. One of the photographs depicted the rear of the trailer with reflective tape in the areas prescribed by the FMCSR. R. 1478. The other

[19]This motion is found at pages 986-1003 of the Record.

photograph was taken at an angle from the rear of the trailer. It depicted tape on the rear of the trailer as well as tape along one side. *Id.*

The trial court did not commit reversible error in refusing to admit the photographs into evidence. R. 1478. First, the trial court correctly noted that the photograph depicting a portion of the side view of the trailer did not constitute relevant evidence as "[t]here [was] no evidence that the deceased was ever in a position to view the subject trailer from the vantage point demonstrated by the photo" and "[e]ven if used for exemplary and/or comparison purposes, the jury [would] garner[ ] little by comparing a photo taken from a vantage point that could not have been seen by the deceased." R. 1478. The trial court also found the other photograph irrelevant and therefore inadmissible since it was taken during daylight hours while the accident occurred just prior to midnight in almost total darkness. *Id.* Finally, and perhaps most importantly, the trial court noted that it was admitting as evidence other depictions that indicated the proper placement of reflective tape under the FMCSR on the rear of a trailer. *Id.*

Reversible error does not exist. The Plaintiff was permitted to and did offer a plethora of illustrations that depicted reflective tape on the rear of a trailer. Plaintiff's Exhibit 9 was a color reproduction of the FMCSA's Conspicuity Requirements for Commercial Motor Vehicles. This publication alone contained 12 illustrations of illuminated reflective tape affixed to commercial motor vehicles. *See* Plaintiff's Ex. 9. Four of those illustrations depicted a van-type trailer. *Id.* Plaintiff's Exhibit 8, the NHTSA Technical Report, entitled The Effectiveness of Retro Reflective Tape on Heavy Trailers, likewise contained two

separate illustrations of reflective tape properly affixed to a van trailer. *See* Plaintiff's Ex. 8. Also, the Plaintiff's expert witnesses on multiple occasions testified concerning and pointed out the areas where reflective tape was supposed to be on the trailer pursuant to the FMCSR. Tr. 172; 216; 221-22; 301-02. The Plaintiff was in no way denied the opportunity to show the jury where reflective tape was required to have been affixed to the trailer as claimed in her brief.

It also appears the Plaintiff failed to have the two photographs in question marked for identification at trial or otherwise included within the Record and they are not before this Court. Hence, even if the trial court theoretically could have erred, the Plaintiff did not make a sufficient offer of proof with respect to the photographs to preserve the issue for appellate review. *Redhead v. Entergy Mississippi, Inc.*, 828 So. 2d 801, 808 (Miss. Ct. App. 2001) (Offer of proof required for appellate review).

The 26 Photographs of the Trailer Taken Over One Year After the Accident

The Plaintiff also sought to introduce as evidence 26 photographs of the trailer taken in broad daylight that she claims were taken a year after the accident and depicted the trailer "in the exact condition as on the day of the wreck."[20] The trial court preliminarily ruled the photographs inadmissible because the Plaintiff set forth no evidence that the trailer as depicted in the photographs was in substantially the same condition as at the time of the

[20]Actually, these photographs were taken much later than one year after the subject accident. The accident occurred on December 14, 2003. R. 9. The Plaintiff did not file suit until February 14, 2005, and the Defendants answered on March 28, 2005. R. 8-12, 18-24. After some discovery, counsel for the parties traveled to Chicago, Illinois, where the Plaintiff's counsel obtained the subject photographs.

accident. R. 1479. However, the trial court expressly noted that it would reconsider the matter if the Plaintiff presented evidence that established this point. R. 1479. The Plaintiff did not present any such evidence, nor did she attempt to do so.

It is undisputed that the DOT bumper[21] was detached from the trailer in the accident. Tr. 451; Defendants' Ex. 15 (k), (l). The morning after the accident, a makeshift bumper was attached to the trailer at the Running & Rolling Trucking yard and the trailer and its contents were transported to Louisiana. Tr. 456. Sometime thereafter, the trailer returned into the possession of its owner in the Chicago area, Tony Harlin.[22] The makeshift DOT bumper was still attached to the trailer at the time the 26 photographs in question were taken. The trailer necessarily was not in substantially the same condition as it was at the time of the accident and the photographs were not admissible. *See Louisville & Nashville R.R. Co. v. Daniels,* 172 So. 2d 394, 396 (Miss. 1965) (Material inquiry on admission of photographs is whether they are a fair and accurate reproduction of conditions as they existed at time of accident.)

Further, Defendants' Exhibit 15 comprised in part of ten high resolution photographs of the trailer taken by Trooper Shive at the scene of the accident were received into evidence. R. 1606; Defendants' Ex. 15. These photographs were used at length and displayed to the jury both during the testimony of Defendants' accident reconstructionist, John Bentley, and

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[21]The DOT Bumper also is referred to as the rear under ride guard. It extends downward from the lower deck of the rear of the trailer and hangs horizontally above the roadway.

[22]Mr. Harlin is related by marriage to Charles Richard.

the Plaintiff's expert liability witnesses.[23] Tr. 172; 216; 221-22; 301-02. No legitimate argument exists that the jury, as alleged in the Plaintiff's brief, was not permitted to "see how the trailer appeared the night of the wreck" because the 26 photographs taken in Chicago well over one year after the accident were not admitted into evidence. And it seems plausible that the Plaintiff's intent in utilizing the photographs was to show that in the several months subsequent to the accident the trailer was not equipped with reflective tape, which was not relevant, and not to show its condition on the night of the accident.

12. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN LIMITING THE TESTIMONY OF THE PLAINTIFF'S EXPERT, TIM CORBITT

The Plaintiff failed to cite authority for this assignment of error (found at heading 16 in the Plaintiff's brief) and waived it. *Grenada Living Ctr.*, 939 So. 2d at 37.

The gist of the Plaintiffs' argument on this point appears to be that Tim Corbitt was precluded by the trial court from opining before the jury that the accident occurred because Anthony Hunter was "traveling slow in Highway 61, about 40 miles an hour, 25 miles less than the posted speed limit, and there is no conspicuity tape on the back of the trailer." However, Mr. Corbitt actually testified at length before the jury concerning the absence of reflective tape on the rear of the trailer, how this would have affected the visibility of the trailer, and his opinion concerning the causal relationship between these factors and the speed of the tractor-trailer. By way of illustration, Mr. Corbitt testified to the following:

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[23]Also, Plaintiff's Exhibit 33 was admitted into evidence. R. 1606. This exhibit contained two photographs of the trailer taken the morning after the accident. One of the two photographs depicts the rear of the trailer before the makeshift DOT bumper was attached.

- He did not see any reflective tape on the rear of the tractor-trailer in the scene photographs;
- Reflective tape was supposed to have been on the lower deck and in the upper corners of the rear of the trailer. Tr. 221;
- Only the lights on the rear of the trailer would have been visible in the absence of reflective tape. Tr. 223;
- A silhouette effect operated to hide the subject trailer at the point of impact in the absence of reflective tape. Tr. 225;
- The tractor-trailer was a hazard to other drivers because it was traveling 25 miles per hour slower than the posted speed limit and was not properly marked with reflective tape. Tr. 232-35;
- Mr. Corbitt found no fault on behalf of Preston Utz. Tr. 235.

Following cross and re-direct examination of Mr. Corbitt, the Plaintiff elicited a short proffer from Mr. Corbitt. In response to the question of "[a]nd what was the cause of the crash? What did they [Defendants] do wrong?", Mr. Corbitt repeated the high points of his testimony:

> Traveling slow on Highway 61, about 40 miles an hour, 25 miles less than the posted speed limit, and there is no conspicuity tape on the back of the trailer. Tr. 287.

In sum, the matters Mr. Corbitt stated by proffer were the same as those to which he previously testified.

Further, Mr. Corbitt's proposed testimony that the accident occurred because there was no reflective tape on the rear of the trailer would have been based upon speculation and inadmissible. The trial court had previously entered its well-reasoned opinion that any testimony by an expert as to whether Preston Utz actually saw the trailer prior to impact or

whether the trailer was or was not visible to him would not be based upon sufficient facts or data as required by Mississippi Rule of Evidence 702 and would not be helpful to the trier of fact. R. 1392. The trial court did not abuse its discretion in prohibiting Mr. Corbitt from attempting to testify as to what Preston Utz could or could not perceive.

13. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN REFUSING THE PLAINTIFF'S PROPOSED JURY INSTRUCTION LABELED P-17

Southbound Highway 61 at the scene of the accident is comprised of two lanes. Trooper Shive testified at trial to the familiar rule governing this form of roadway; the right lane is for slower traffic and the left for passing vehicles. Tr. 436. Visibility along this stretch of Highway 61 is good and the roadway is straight, flat and even. Tr. 436. Highway 61 is not a limited access roadway as is an interstate; as a result there are countless roads and intersections by which vehicles access and exit it. There is no minimum speed on Highway 61 and the posted speed limit was 65 miles per hour. Tr. 435. Trooper Shive patrols Highway 61 and testified he regularly observes vehicles traveling 40 to 45 miles per hour on it. Tr. 435.

Anthony Hunter's trial testimony was that he was traveling 45 miles per hour "or better" at the time he was rear ended by Preston Utz. Tr. 414. Mr. Hunter had accessed Highway 61 immediately after leaving the Running & Rolling facility and had traveled south on the highway towards Cleveland for over two miles before the accident occurred. Tr. 413. The tractor-trailer entirely was within the right-hand lane when it was rear-ended. Tr. 414.

The Plaintiff submitted a jury instruction, P-17, that relied upon the tractor-trailer being a hazard to the "flow of traffic" on Highway 61 based solely upon its rate of speed.[24] R. 1509. During the instruction conference, the trial court noted the only testimony concerning the speed of the tractor-trailer indicated it was traveling, at a minimum, 40 miles per hour and by law was exactly where it should have been – in the right-hand lane of traffic. Tr. 685, 691. The trial court found the evidence insufficient to support the instruction. Tr. 691.

The trial court possessed considerable discretion regarding the instructions to submit and did not commit reversible error. *Young v. Guild*, 7 So.3d 251, 259 (Miss. 2009) (citation omitted). It is well settled that a jury instruction is to be given only if supported by credible evidence. *Young*, 7 So.3d at 259. There was not adequate support for this instruction. And the case cited by the Plaintiff in support of the instruction, *Jackson v. Griffin*, 390 So. 2d 287 (Miss. 1980), is factually dissimilar and does not aid her.

There was no factual evidence from which the jury reasonably could infer that the tractor-trailer posed by its speed alone a "hazard to the flow of traffic" or "other vehicles traveling on the same roadway." The accident happened minutes before midnight;[25] hence, the highway generally was unoccupied outside of Anthony Hunter and Preston Utz. There was no "flow of traffic" as referenced within P-17 traveling behind Anthony Hunter, but

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[24]P-17 said nothing about the absence of reflective tape and would have enabled the Plaintiff to pursue liability based upon the tractor-trailer's rate of speed alone.

[25]11:50 p.m. according to the report of Trooper Shive.

rather a single vehicle, the Nissan Maxima operated by Preston Utz. Further, the tractor-trailer was at all times relevant traveling completely within the right-hand lane. Tr. 413-14. Even if there theoretically had been a "flow of traffic" a tractor-trailer traveling at 40 or 45 miles per hour would not have been a hazard proceeding, as was Anthony Hunter, in the right lane. This instruction was properly denied by the trial court.

14. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN REFUSING THE PLAINTIFF'S PROPOSED JURY INSTRUCTIONS LABELED P-18 AND P-19

The trial court refused the Plaintiff's proposed jury instructions labeled P-18 and P-19 that encompassed a failure to yield the right-of-way theory. R. 1567; Tr. 691-92. The instructions would have advised the jury that liability could attach to the Defendants if it found Preston Utz's vehicle was approaching "so close as to constitute an immediate hazard" when Anthony Hunter first entered Highway 61. R. 1567. These instructions were not supported by the proof offered at trial.

The evidence established that Anthony Hunter entered Highway 61 from the Running and Rolling facility without incident and traveled 2.5 miles south towards Cleveland. Tr. 226; 413; 691-92. Only after Anthony Hunter had traveled that distance (well over 10,000 feet) did the Nissan Maxima enter the picture, gain ground on, and strike the tractor-trailer.

The evidentiary foundation needed for P-18 and P-19, that Anthony Hunter "cut off" and failed to yield to Preston Utz by immediately pulling in front of his oncoming vehicle, did not exist. Preston Utz was miles from Anthony Hunter's range of vision when Hunter entered the roadway and began his trip. It is axiomatic that there must be credible evidence

to support any proffered jury instruction. *Young*, 9 So.3d at 259. There was none and the trial court correctly refused the proposed instructions. Tr. 691-92.

15. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN REFUSING THE PLAINTIFF'S PROPOSED JURY INSTRUCTION LABELED AS P-7

The Plaintiff waived any claim of error regarding the trial court's decision to instruct the jury on proximate cause via C-10 rather than P-7 submitted by the Plaintiff. R. 1657. During the instruction conference, the trial court expressed dissatisfaction with the respective proximate cause instructions submitted by the parties, ultimately drafting and submitting its own proximate cause instruction for comment by counsel. Tr. 677; 704.

After the Plaintiff's counsel read C-10, the following colloquy between the Plaintiff's counsel and the trial court occurred:

> By the Court: What say you, Mr. Ogden?
>
> By Mr. Ogden: I'm okay with that instruction. Tr. 706.

The Plaintiff acquiesced to the submission of C-10 and may not object to it at this point. *Jones v. State*, 776 So. 2d 643, 653 (Miss. 2000) (Failure to object to jury instruction procedurally bars appellate review.)

Further, P-7 was insufficient notwithstanding the consent to C-10. Any jury instruction must be a proper statement of law and instructions that are confusing serve no purpose. *Young*, 9 So.3d at 259. P-7 was confusingly worded and not a proper definition of proximate cause. R. 1488.

Additionally, reversible error will not be present where the jury instructions, taken as a whole, fairly announce the law and create no injustice when read as a whole. *Id.* The Plaintiff was not denied her right to a fair trial because P-7 was not given.

16. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR BY REFUSING THE PLAINTIFF'S PROPOSED JURY INSTRUCTION LABELED AS P-10

The Plaintiff failed to cite authority for this assignment and waived it. *Grenada Living Ctr.*, 961 So. 2d at 37.

By P-10, the Plaintiff sought to instruct the jury that the Defendants were negligent *per se* for violating the FMCSR at the time of the accident. R. 1494. The trial court submitted to the jury its own negligence *per se* instruction, C-13, peremptorily instructing the jury that the Defendants were negligent in failing to comply with the FMCSR and leaving only the issue of proximate cause to the jury. R. 1597. The trial court's instruction was not in contradiction of Mississippi law. *See Thomas v. McDonald*, 667 So. 2d 594, 596 (Miss. 1995) (When a statute is violated, the injured party is entitled to an instruction that the party violating is guilty of negligence, and if that negligence proximately caused or contributed to the injury, then the injured party is entitled to recover.) The Plaintiff's claim of reversible error is without merit.

17. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN REFUSING THE PLAINTIFF'S PROPOSED JURY INSTRUCTIONS LABELED AS P-11, P-12, P-13, P-14, P-15 AND P-16

The Plaintiff failed to cite authority for these assignments of error and waived them. *Grenada Living Ctr.*, 961 So. 2d at 37.

The proposed instructions labeled P-11, P-12, P-13, P-14, P-15 and P-16 all related to the Defendants' violation of the FMCSR due to the absence of reflective tape along the bottom deck and in the upper corners of the trailer. R.1496-1507. These proposed instructions were subsumed and rendered superfluous by the trial court's instruction C-13, which directed the jury that the Defendants were negligent by violating the FMCSR. R. 1597. There was no point in submitting singular instructions relating to the violation considering the trial court's peremptory instruction.

The Plaintiff's complaint that C-13 was insufficient "because it looks like a negligence *per se* instruction but then it requires the Plaintiff to prove the Defendants' violation of FMCSR was the proximate cause of Utz's death" has no merit. Mississippi law plainly requires a plaintiff to prove this very thing. *Thomas*, 667 So. 2d at 596.

18. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR BY REFUSING THE PLAINTIFF'S PROPOSED JURY INSTRUCTION LABELED AS P-20

The trial court did not err regarding this proposed instruction. P-20 was modeled upon Miss. Code Ann. § 63-3-701, which states that no person shall start a stopped, standing or parked vehicle unless and until such movement can be made with reasonable safety. Miss. Code Ann. § 63-3-701.[26] The only basis proffered by the Plaintiff during the instruction conference for P-20 was that the tractor-trailer should not have been "moved" from its initial stopped position at the Running and Rolling yard 2.5 miles north of the accident site because of the absence of reflective tape. Tr. 694. The trial court correctly ruled that P-20 was not

[26]The Defendants were unable to locate a single case interpreting this statute.

a proper instruction. Tr. 694. P-20 was abstract and unspecific to the facts of the case. It also would have enabled the Plaintiff to back door her strict liability theme by arguing the trailer should not have been "moved" from the Running and Rolling facility and, consequently, should not have been on the roadway.

Moreover, even if the trial court erred in refusing P-20, the error would be harmless and insufficient to warrant reversal as the instructions, taken as a whole, adequately presented the law. *Young,* 9 So.3d at 259. The jury was instructed the Defendants were negligent by violating the FMCSR. After applying the instructions to the evidence, the jury affirmatively found this negligence did not cause or contribute to the accident. R. 1603. Given that the jury found the absence of reflective tape did not cause or contribute to the accident and, by implication, that the trailer was sufficiently visible to Preston Utz, there could not be reversible error in refusing P-20. P-20 sought to instruct the jury that the Defendants could be liable if the jury found "movement" of the tractor-trailer "could not be made with reasonable safety". R. 1515. The jury's resolution of the facts indicate the tractor-trailer could be, and was, moved with reasonable safety.

19. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR BY REFUSING THE PLAINTIFF'S PROPOSED JURY INSTRUCTIONS LABELED AS P-21 AND P-29

The trial court did not commit reversible error in denying P-21 and P-29. The Plaintiff did not present any factual evidence from which the jury reasonably could infer that the trailer, which the testimony showed had seven burning taillights, constituted an emergency condition or unusual condition as it traveled south on Highway 61. There was

no evidence that Anthony Hunter abruptly pulled in front of Preston Utz's oncoming vehicle or that Anthony Hunter slammed on his brakes and suddenly decreased his speed. The undisputed evidence was Anthony Hunter had traveled 2.5 miles when Preston Utz's vehicle approached and struck the trailer from behind within the right lane. Tr. 226; 413. There was not evidentiary support for an emergency condition instruction.

Further, the jury found that the absence of reflective tape did not cause or contribute to the accident. Any error in refusing P-21 and P-29 could only have been harmless.

20. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR BY GIVING THE DEFENDANTS' PROPOSED JURY INSTRUCTION LABELED AS D-1

The trial court did not commit reversible error in giving D-1, which was submitted to the jury as C-14. R. 1598, Tr. 698. C-14 was based upon and tracked Mississippi case law. The Supreme Court has stated that a "driver is charged with the absolute duty of seeing what he should have seen." *Bolden v. Cobb*, 606 So. 2d 111, 113-14 (Miss. 1992) (citation omitted). He also has the duty "to see that which is in plain view or open and apparent and to take notice of obvious dangers." *Tippit v. Hunter*, 205 So. 2d 267, 671 (Miss. 1967). Likewise, a driver is charged with "keeping a proper lookout and being on alert for vehicles, objects and persons ahead in the highway." *Bolden*, 606 So. 2d at 113 (citing *Fowler Butane Gas Co. v. Varner*, 141 So. 2d 226 (Miss. 1962)). In that vein, he must "avoid striking plain objects." *Id.* at 114 (citing *Barkley v. Miller Transporters, Inc.*, 450 So. 2d 416 (Miss. 1984)). Finally, as stated within C-14, a driver has no right to assume a highway is clear. *Parkins v. Brown,* 241 F.2d 367, 370 (5th Cir. 1957) (citing *Terry v. Smylie*, 133 So. 662

(Miss. 1931)). C-14 was based upon Mississippi law as demonstrated by these cases. There was no error in giving it.

Additionally, the Plaintiff's argument that C-14 was peremptory is without merit. The instruction plainly did not, as claimed by the Plaintiff, place an absolute duty on Preston Utz to avoid the accident, but rather to observe that which was in "plain view" or "open and apparent". This is an appropriate statement of law. *See Bolden*, 606 So. 2d at 114-15. And there was credible evidence indicating the trailer was in plain view and open and apparent.

21. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR BY GIVING THE DEFENDANTS' PROPOSED JURY INSTRUCTION LABELED AS D-2

The trial court did not err in giving D-2, submitted to the jury as C-15.[27] R. 1599. C-15 was modeled upon an instruction which came before the Supreme Court in *Church v. Massey* and again in *Fielder v. Magnolia Beverage Co.*, and found substantively proper. 697 So. 2d 407, 412 (Miss. 1997); 757 So. 2d 925, 935-36 (Miss. 1999). C-15 conforms in all material respects to that instruction.

Moreover, C-15 clearly was supported by evidence. John Bentley calculated the speed of the Nissan Maxima in excess of 80 miles per hour at the time of impact. Tr. 603. Ample evidence was received by the jury from which it could find Preston Utz failed to keep a reasonable lookout ahead. Indeed, the jury heard testimony from Trooper Shive that the trailer was not invisible as urged by the Plaintiff, but rather clearly visible and easily discernable from hundreds of yards. Tr. 433-34. Testimony was offered by Charles Richard

[27]The Plaintiff mistakenly refers to this instruction as "C-1" on page 42 of her brief.

that he could see the corner taillights on the trailer that remained post impact as he drove toward the scene from a distance of nearly a full mile. Tr. 468-69. The jury also received the photographs taken by Trooper Shive depicting the red burning taillights on the trailer and its conspicuous white color. *See* Defendants' Ex. 15.

Based upon this evidence, the jury reasonably could have inferred Preston Utz did not keep a reasonable lookout and keep his vehicle under easy control. *See Tippit*, 205 So. 2d at 271 (If an automobile driver fails to reasonably observe that which was apparent and within clear view, the jury can reasonably determine from the circumstances that he was not keeping a proper lookout.) The jury likewise reasonably could have determined Preston Utz was traveling in excess of what was safe under the circumstances.

Finally, the Plaintiff's argument that the instruction was improper because no witness specifically testified that Preston Utz did not have his vehicle under control or anticipate vehicles in front of him is without merit. The jury plainly, as the trier of fact, could have made that determination based upon the evidence presented.

22. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR BY GIVING THE DEFENDANTS' PROPOSED JURY INSTRUCTION LABELED AS D-3

The trial court did not err in giving D-3, which was submitted to the jury as C-16. R. 1600. C-16 was a simple and straightforward instruction based upon Miss. Code Ann. § 63-3-501, which prohibits a vehicle from being driven in excess of 65 miles per hour on the highways of Mississippi. The instruction was supported by evidence, as testimony was offered showing Preston Utz was traveling over 80 miles per hour at impact. Tr. 603. The

jury reasonably could have accepted this testimony and driving over the speed limit, in this case more than 15 miles per hour in excess of the speed limit, is negligence.

The Supreme Court sanctioned a similar instruction in *Fielder,* 757 So. 2d at 935. There, the relevant portion of the instruction stated:

> You are instructed that it was the duty of the Plaintiff, Lanice Fielder, to drive her vehicle at a rate of speed which was not greater than the lawful speed limit . . . . *Id.*

That instruction, as C-16 in the case *sub judice,* compelled the jury to find the plaintiff negligent if it found she was traveling at a rate of speed in excess of the speed limit. *Id.* The trial court did not err.

The Plaintiff's argument that C-16 was peremptory ignores the plain language of the instruction. It expressly instructed that Preston Utz was negligent *if* the jury determined he was traveling in excess of the posted speed limit. R. 1600. It did not require the jury to find for the Defendants nor did it usurp the jury's prerogative of determining the proximate cause of the accident. Finally, there is no basis for the Plaintiff's claim that C-16 forced "the jury to ignore any contributory negligence on the part of the Defendants."

23. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR BY GIVING THE DEFENDANTS' PROPOSED JURY INSTRUCTION LABELED AS D-5

The Plaintiff failed to cite authority for this assignment and waived it. *Grenada Living Ctr.*, 961 So. 2d at 37.

The trial court did not err in giving D-5, submitted to the jury as C-17. R. 1601. The general rule is that a motorist is negligent if he operates his automobile on a highway at such

a speed that it cannot be stopped within the range of his vision. *Hailey*, 822 So. 2d at 919. (citation omitted). C-17 correctly stated this rule of law and was supported by sufficient evidence.

Testimony by John Bentley established Preston Utz was traveling over 80 miles per hour and likely closer to 85 miles per hour at the time of the accident. Tr. 603. Plaintiff's accident reconstructionist, Tim Corbitt, testified that headlights typically provide illumination for approximately 150 feet on low beam and 400 feet on high beam. Tr. 269. The jury reasonably could have found Preston Utz was traveling in excess of a speed at which he could stop within his range of vision by traveling 80 to 85 miles per hour.

Further, it is settled that jury instructions are to be viewed in the aggregate and a defect in a specific instruction will not mandate reversal when all of the instructions, taken as a whole, fairly – although not perfectly – announce the applicable primary rule of law. *Young*, 9 So.3d at 259 (citation omitted). The jury instructions here, certainly viewed as a whole, sufficiently announced the rules of law.

24. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR BY GIVING THE DEFENDANTS' PROPOSED JURY INSTRUCTION LABELED AS D-6

The Plaintiff failed to cite authority for this assignment and waived it. *Grenada Living Ctr.*, 961 So. 2d at 37.

The trial court did not commit reversible error in giving D-6, submitted to the jury as C-18. R. 1602. This instruction embraced the ultimate issue in the case: whether or not Preston Utz, in keeping a proper lookout, should have recognized the trailer and avoided

running into it. C-18 was straightforward and grounded in the law. *See Dennis*, 606 So. 2d at 113 (citations omitted) (driver of a car charged with the duty of keeping a proper lookout ahead and being alert for vehicles ahead in the highway).

There was ample evidence that supported C-18. The proof showed Highway 61 at the point of impact is a "straightaway" of .8 of a mile. Tr. 607. As Preston Utz traveled down this straightaway gaining ground on the trailer, he had a clear, wide-open view of the trailer and its assortment of glowing taillights for, at a minimum, 36 seconds. Tr. 608.[28] He therefore had more than ample time and distance to perceive the trailer and move left into the passing lane. The witnesses who observed the trailer at the scene testified unequivocally that the lights on the trailer were glowing and visible from substantial distances. Tr. 432; 468-69. All of this evidence constituted a sufficient factual foundation by which the jury could conclude Preston Utz did not keep a proper lookout. Additionally, the instructions, taken as a whole, sufficiently announced the law and reversal would not be in order even if there was error in C-18. *Young*, 9 So.3d at 259.

25. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR BY GIVING JURY INSTRUCTION C-19

The Plaintiff failed to cite authority for this assignment and waived it. *Grenada Living Ctr.*, 961 So. 2d at 37.

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[28]If the jury were to accept the testimony from Mr. Corbitt that Preston Utz was traveling at or below the speed limit, this amount of time would have been even greater. Tr. 271. For example, Mr. Corbitt testified that a speed of 60 miles per hour, Preston Utz would have had 40 seconds of direct sight access to the trailer. Tr. 271.

C-19 is the Special Interrogatory Verdict Form by which the Jury returned its verdict for the Defendants. R. 1603. The Plaintiff's main point of contention appears not with the instruction itself, but rather her perceived error by the trial court in its evidentiary rulings. The Defendants do not appreciate any reason to repeat their responses to those claims.

The Plaintiff broadly claims that C-19 was incorrect, a misstatement of the law, and misleading to the jury. These claims are belied by the instruction. There is nothing incorrect or misleading about it.

CONCLUSION

The Plaintiff was afforded a fair trial and the verdict should stand. The Defendants request the Court to affirm the judgment in their favor.

Respectfully submitted,

RUNNING & ROLLING TRUCKING, INC. AND ANTHONY Q. HUNTER

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