IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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

VS. — CAUSE NO. 2008-CA-00977

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

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

REPLY BRIEF OF APPELLANT

Oral argument is not requested

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The lower court erred in its rulings before, during and after the trial. Plaintiff requests a new trial be ordered so that the jury may consider all the evidence. Appellate courts review a denial of a motion for new trial under an abuse of discretion standard. *Smith v. Parkerson Lumber, Inc.*, 888 So. 2d 1197, 1204 (Miss. Ct. App. 2004) (citing *Allstate Ins. Co. v. McGory*, 697 So. 2d 1171, 1174 (Miss. 1997). The trial court abused its discretion.

Plaintiff's Appeal Brief presented forty-three (43) errors of the trial court. In their Response Defendants did not address all the Plaintiff's issues. Plaintiff's Reply is a response to Defendants' fourteen (14) issues stated in their Statement of Issues (pg. 1-2 of Brief of Appellees).

I. THE TRIAL COURT ABUSED ITS DISCRETION BY ADMITTING EVIDENCE THAT PRESTON UTZ SMOKED CRYSTAL METHAMPHETAMINE PRIOR TO THE ACCIDENT AND DID NOT SLEEP THE NIGHT PRIOR TO THE ACCIDENT

The credible evidence does not support the admission of testimony alleging the decedent Preston Utz smoked crystal methamphetamine prior to the accident and did not sleep the night prior to the accident. There were no witnesses to the accident. The only independent witness at the scene to give testimony was Officer Ronald E. Shive. Officer Shive testified that he did not get to the scene until after the first responders had "already started extracting Mr. Utz out of the vehicle." (Tr. Transcr 419:13-14). Shive testified he did not know how long after the impact he arrived. (Tr. Transcr. 428:9-11). The alleged methamphetamine found by Preston's mother was not identified by Officer Shive, first responders, hospital staff or any professional that handled the body or that was at the scene when the accident occurred. The Defendants have used speculation and conjuncture to prejudice and mislead the jury. The fact that Preston is

alleged to have smoked methamphetamine is clearly more prejudicial than probative. Miss. R. Civ. P. 401-403.

The Defendants have not shown a **correlation** between the alleged use of drugs and the accident. In order to show the alleged use of drugs is more probative than prejudicial there must be a correlation between the use and the accident. *See*, *Magee v. State*, 912 So. 2d 1044 (Miss. Ct. App. 2005); *Accu-Fab & Const., Inc. v. Ladner*, 778 So. 2d 766 (Miss. 2001); *Donald v. Triple S Well Service, Inc.*, 708 So. 2d 637 (Miss. 1998); *Pope v. McGee*, 403 So. 2d 1269 (Miss. 1981). Defendants did not show a correlation. Also, there was no showing of a correlation between any lack of sleep by Utz and lack of sleep causing the accident. The trial court abused its discretion by allowing such information to be presented to the jury.

The cases cited by Defendants in which the Court has found alcohol consumption can have relevance to an accident are not on point with the facts in this case. In *Abrams v. Marlin Firearms Co.*, 838 So. 2d 975 (Miss. 2003), there was clear evidence that the plaintiff had consumed alcohol and that alcohol consumption could have been a factor in the incident. Abrams had cold beer in his truck. *Id.* at 979-980. The beer bottles were in various states of consumption and Abrams had the smell of alcohol on his breath according to first responders. *Id.* In the instant case there is no credible evidence that Preston used drugs. No drugs were found in the car by responders or law enforcement. No drugs were found by hospital staff or those handling the body after the accident. The toxicology screen done on the decedent also was negative for methamphetamine. (Tr. Transcr. 344-45; Exhibit P-21).

The speculative evidence of drug use that was presented at trial was presented, over Plaintiff's objections, by Michael Weaver and Ephraim Woolf. (Plaintiffs Motion to Strike, R. 407-409; Plaintiffs Motion in Limine, R. 978-979). The certified toxicology report for Utz from the Mississippi crime lab showed Utz was negative for methamphetamine. (Exhibit P-21; Tr.

Transcr. 342:22-25; 343:1-5). Defendants were allowed to present evidence and testimony at trial that the toxicology report had an un-reportable amount of something in the spectra that could be indicative of methamphetamine. The Defendants were also allowed to present testimony from expert Michael Weaver who claimed he felt that there was meth in Utz's blood even though it did not show up on the test. (Tr. Transcr. 596:17-21). This contradicted the toxicology report on Utz which showed no meth in his blood (Exhibit P-21) and the testimony of the crime lab on the findings. (Tr. Transcr. 342:22-25; 343:1-5). Also, Woolf was allowed to testify that Preston Utz was cooking methamphetamine, smoking methamphetamine and bagging up the drug to split it up. (Tr. Transcr. 539:12-22; 541:18-29). The testimony was rank speculation and hearsay and it was clearly unduly prejudicial to the Plaintiff since it had no relevance on how the wreck occurred. The trial court created reversible error by prejudicing the case with this inadmissible evidence.

II. THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING TESTIMONY OF MICHAEL WEAVER REGARDING EFFECTS OF METHAMPHETAMINE USE

Defendant asserts that Plaintiff waived her argument regarding Weaver's testimony on the effects of methamphetamine use. This is not accurate. Plaintiff filed a motion in limine seeking to prevent the Defendants from presenting testimony regarding alleged methamphetamine use. (R. 978-979). The trial court denied Plaintiff's motion. (R. 1404-1408). Since the court had already ruled on Plaintiff's motion in limine Plaintiff is not required to make a contemporaneous objection in order to preserve this issue for appeal, nor is she required to make a motion for mistrial, given that the motion in limine of this issue had already been rejected by the trial judge. *Jones v. Panola County*, 725 So. 2d 774, 775 (Miss. 1998) (citing *Kettle v. State*, 641 So. 2d 746, 748 (Miss. 1994); *Lacy v. State*, 700 So. 2d 602, 606 (Miss. 1997)). As

stated above, Weaver's testimony was in contradiction to the evidence of the toxicology report and could not be supported by the evidence which meant it was not admissible. (Exhibit P-21). The trial court's admission of this testimony was error.

III. THE TRIAL COURT ABUSED ITS DISCRETION BY ALLOWING RACHEL FOSTER TO IDENTIFY THE SUBSTANCE ALLEGEDLY FOUND IN PRESTON UTZ'S POCKET AS METHAMPHETAMINE

Rachael Foster ("Foster") was allowed to testify, over Plaintiff's objections, that approximately two months after Utz's death Martha Fly asked her to look at a plastic bag containing a white substance she allegedly found in Utz's personal effects. (Tr. Transcr. 567:14-15). Foster testified she identified the white substance was crystal methamphetamine. (Tr. Transcr. 568:6). This testimony was erroneous and highly prejudicial. The alleged, so called "drugs" were destroyed (flushed down the toilet by Fly) without being shown to anyone or tested. (Tr. Transcpt. 561:22-26). The witnesses who testified to the "drugs" existence were not qualified to testify as experts to such information. (Tr. Transcr. 561:22-26). The trial court's logic for allowing the deceased's sister, Rachel Utz, to be qualified to testify to the "drug" being crystal methamphetamine was because "the defense represented that the sister of the deceased had used crystal methamphetamine and was very familiar with such drug." (R. 1408). At trial Rachel testified she had done crystal before when she was a teenager. (Tr. Transcr. 567:28-29). The fact that someone experimented with a drug while a teenager does not qualify them to give expert testimony regarding drug identification. Testimony of what the substance was, if any substance existed, is only proper for an expert.

Also, the testimony presented was that the "substance" was not found until nearly two months after the accident. (Tr. Transcr. 567:13-15). The witness did not have the qualifications to be able to render expert opinions and there was no way to validate the truth of the story. *Cf.*

Cook v. State, 953 So. 2d 271 (Miss. Ct. App. 2007) (Officer's who preformed the arrest could testify to methamphetamine and expert in the field of drug analysis and identification can testify that to the composition of methamphetamine). The admission of this speculation and possible fabrication was prejudicial and not probative. The trial court erred in admitting it.

IV. THE TRIAL COURT ABUSED ITS DISCRETION BY EXCLUDING EVIDENCE OF THE CARRIER RATING OF RUNING & ROLLING TRUCKING, INC. AND A PRIOR VIOLATION OF ANTHONY HUNTER

Evidence of carrier ratings would have been appropriate to show that Running & Rolling was aware of past violations of FMCSR, yet the Company continued to violate FMCSR in disregarding the safety of others. Violation of the FMCSR was a proximate cause of Utz's death; therefore, this evidence was admissible. It was reversible error for the trial court to preclude this evidence. The FMCSR violations by Hunter showed his pattern and practice of violating the FMCSR. Hunter testified at his deposition that he had been placed out of service (tractor-trailer parked until violation corrected) for being in violation of the FMCSR before this accident. (R. 490, Deposition of Hunter, p. 22, ln.14 – p. 23, ln.23). This evidence would show the jury that Hunter and his company were aware that they could be placed out of service for violations and would be admissible under Miss. R. Evid. 404(b) to prove motive, intent, preparation, plan, knowledge, identity or absence of mistake or accident regarding the operation of the trailer and violation of FMCSR the night of the wreck. *Cf. Simmons v. State*, 813 So. 2d 710 (Miss. 2002) (Evidence of a prior bad act against the victim was admissible because it was relevant to motive and intent). The trial court erred on this point of evidence which prejudiced the plaintiff's case.

V. THE TRIAL COURT ABUSED ITS DISCRETION BY PROHIBITING PLAINTIFF'S EXPERT WITNESSES FROM TESTIFYING ABOUT THE CONDITION OF THE TAIL LIGHTS ON THE DEFENDANTS' TRAILER

The trial court refused to let Plaintiff's experts give opinions on the visibility of the trailer taillights (R. 1397; Tr. Transcr. 104:21-25), but allowed mere lay witnesses called by Defendants to render opinions on visibility. One of the trial issues was visibility of the trailer from the rear. Expert testimony on the visibility of the taillights would be helpful to the jury and assist the jury in determining a fact in issue. Even assuming for argument sake that not all Plaintiff's experts could testify to the condition of the tail lights, J. T. Corbitt should have been able to testify on this issue. A qualified accident reconstructionist can provide opinions as to causation of the accident. *Fielder v. Magnolia Beverage Co.*, 757 So. 2d 925 (Miss. 1999). The testimony was specialized and based on knowledge, skill and experience and admissible under the Rules of Evidence. Miss. R. Evid. 702, 703, 704. This testimony was the basis of Plaintiff's case and clearly admissible. It was reversible error for the trial court to preclude this evidence.

VI. THE TRIAL COURT ABUSED ITS DISCRETION BY PROHIBITING PLAINTIFF FROM PURSUING HER CLAIMS REGARDING THE TRAILER BEING OUT OF SERVICE AND ITS CAUSATION EFFECT ON THE WRECK

Since the trailer had no reflective tape at the time of the wreck the trailer was in direct violation of the FMCSR so as not to be allowed on the road. The trial court stated that this was "strict liability," but the court was incorrect in its analogy. (R. 20-22). The violation of FMCSR is a violation of federal and state law. Once the Defendants admitted that they were in violation of the FMCSR the trial court should have granted a peremptory instruction as to Defendants' liability. The trial court would only give a negligence *per se* instruction, but refused to let the Plaintiff's experts give testimony about causation of the accident regarding the trailer being out of service. (Tr. Transcr. 196:24-29 – causation – fact that truck should

never have been on the road). A qualified accident reconstructionist can provide opinions as to causation of the accident. *Fielder v. Magnolia Beverage Co.*, 757 So. 2d 925 (Miss. 1999). Also, Dane Maxwell an expert in FMCSR should have been able to testify regarding the Defendant truck being "out of service." The testimony was specialized and based on knowledge, skill and experience and admissible under the Rules of Evidence. Miss. R. Evid. 702, 703, 704. This testimony was regarding a theory of Plaintiff's case and clearly admissible. Also, the court refused Plaintiff's MDOT expert, Mark Dunlap, from testifying that the trailer should have been removed from the road for a dangerous violation, the lack of reflective tape. Plaintiff proffered that testimony. (Tr. Transcr. 196:7-29). It was reversible error for the trial court to preclude this evidence.

VII. THE TRIAL COURT ABUSED IT DISCRETION BY LIMITING THE TESTIMONY OF PLAINTIFF'S EXPERTS REGARDING CAUSATION

Plaintiff's expert witnesses provided reports wherein they opined on causation, but the trial court prohibited the experts from testifying before the jury regarding this information at trial. (R. 1387-1392). Causation is a question of fact and generally a matter for the jury. *Doe v. Wright Security Services, Inc.* 950 So. 2d 1076 (Miss. 2007); *Donald v. Amoco Prod. Co.*, 735 So. 2d 161 (Miss. 1999). The trial court erred in excluding Plaintiff's experts' opinions on causation in regarding FMCSR violations on reflective tape and visibility. The trial court denied Plaintiff's experts from giving opinions on whether the trailer was visible to Utz and whether it was allowed on the road. (R. 1386-1392). The Plaintiff proffered testimony the trailer was in violation of the FMCSR, it was not visible to Utz, it should not have been on the road operating and the Defendants' FMCSR violation for placing the trailer on the road was the sole proximate cause of the death of Utz. The trial court's refusal of Plaintiff's experts'

testimony and its admission of the Defendants' experts' testimony on the visibility issue substantially prejudiced the Plaintiff. The trial court's actions required the jury to disregard the Defendants' FMSCR violations. This limiting of Plaintiff's negligence and causation proof constitutes reversible error.

VIII. THE TRIAL COURT ERRED BY ALLOWING DEFENDANTS' EXPERT JOHN BENTLEY TO TESTIFY TO SEVERAL ISSUES AT TRIAL

The trial court allowed testimony by Defendants' expert witness which went beyond the scope of testimony disclosed in Defendants' Designation of Expert Witnesses. (R. 60-68). Specifically, the trial court allowed the Defendants' expert, John Bentley, to testify on subjects objected to by Plaintiff in her motion to strike or limit the testimony of Defendants' expert witnesses. (R. 402-415). The trial court ruled on the Plaintiff's motions in its order dated March 31, 2008. (R. 1372-1381). In the Order the trial court ordered that Bentley's opinions would be limited to that of a reasonably prudent driver approaching from the rear. Bentley was precluded from giving opinions as to whether Utz saw the trailer when Utz approached from behind on the night of the accident. (R. 1372-1381). The trial court ordered specifically that Bentley could not give opinion testimony regarding:

(1) Preston Utz having ample time and distance to avoid the impact with the tractor-trailer (R. 1373);
(2) Whether Utz saw the trailer before the impact (R. 1374);
(3) Preston Utz failing to maintain proper lookout and maintain control of the vehicle he was driving (R. 1374);
(4) Preston Utz could have avoided the accident by slowing and/or maneuvering to change lanes (R. 1374); and
(5) That the reflective tape on the DOT bumper was not visible in the Highway Patrol pictures, because the DOT bumper was pushed down in the collision (R. 1375).

At trial the court ignored its Order and allowed the Defendants' expert to give testimony contradicting its prior ruling. This was reversible error. See Plaintiff's Appeal Brief section #11 for more details of fact on this issue.

IX. THE TRIAL COURT ABUSED ITS DISCRETION BY NOT ADMITTING PLAINTIFFS EXHIBITS 10, 11, 12, 13, 15, 16, 17, 18, 19 AND 20

It was error and prejudicial to exclude Plaintiff's document evidence listed in the pretrial order. The trial court ordered that many of Plaintiff's exhibits be excluded. These included documents regarding visibility, which limited Plaintiff from adequately presenting her theory of negligence to the jury. (R. 1465-1479). The documents were relied upon by Plaintiff's experts and were evidence of what reflective tape is, why it is used on trailers, and its cost. The court refused to allow the Plaintiff's evidence that was already agreed to by the Defendants and the judge in the pretrial order. The court's actions were reversible error.

X. THE TRIAL COURT ABUSED ITS DISCRETION BY NOT ADMITTING TWO PHOTOGRAPHS OF AN EXEMPLAR TRAILER AND DEFENDANTS' TRAILER POST-ACCIDENT

The Plaintiff submitted photographs of what an exemplar truck and trailer with the correct reflective tape on it would look like. The purpose was to show the jury what a trailer should look like so that they could have something to determine what Utz would have seen if the trailer was operating in compliance with the FMCSR. The trial court denied the Plaintiff's photos saying it would be misleading to the jury. See, Item P-34: 2 color photos of exemplar truck with conspicuity tape. (R. 1478). Demonstrative evidence is admissible if relevant and it can aid the jury in weighing contradictory testimony. *Seal v. Miller*, 605 So. 2d 240 (Miss. 1992). As the conspicuity tape on the rear of the trailer and visibility of the trailer was at issue

in this case it was error for the trial court to not admit demonstrative photos of an exemplar trailer with the proper conspicuity tape.

The Plaintiff also presented Item P-36: 26 color photographs of the trailer at issue in this case. These were photos of the trailer taken a year later when the trailer was still in the exact condition as on the day of the wreck. The trial court refused this evidence despite the testimony that the trailer was in the same condition. (R. 1479). *Cf. Hart v. State*, 637 So. 2d 1329 (Miss. 1994) (Photographs were relevant and not prejudicial when used by an expert to show the location of wounds). Plaintiff should have been allowed to show the photos of the trailer and lack of change in the condition and where the vehicle was in non-compliance with FMCSR for conspicuity tape. The trial court committed reversible error on these points.

XI. THE TRIAL COURT ERRED BY REFUSING PLAINTIFF'S PROPOSED JURY INSTRUCTIONS LABELED P-7, P-10, P-11, P-12, P-13, -14, P-15, P-16, P-17, P-18, P-19, P-20, P-21 AND P-29

"Both parties have the right to embody their theories of the case in the jury instructions provided there is testimony to support it." *Reese v. Summers*, 792 So. 2d 992, 994 (Miss. 2001) (citations omitted). With any granted jury instruction challenged on appeal, two questions are relevant: whether instruction contains correct statement of the law, and whether instruction is warranted by the evidence. *Church v. Massey*, 697 So. 2d 407, 410 (Miss. 1997). The trial court did not allow the Plaintiff to submit jury instructions that presented her theories of liability and theories of negligence. And the trial court gave instructions that were peremptory against the Plaintiff. This Court has stated that it is reversible error to give instructions which allow a jury to find Plaintiff completely at fault for just being in the accident to the exclusion of any negligence of the Defendant. *Blackmon v. Payne,* 510 So. 2d 483 (Miss. 1987). "We have repeatedly condemned jury instructions which, if followed by the jury would completely

deny a negligent plaintiff recovery, even though the defendant may also be negligent." *Bell v. City of Bay St. Louis*, 467 So. 2d 664 (Miss.1985). Specifically, the court erred in denying various Plaintiff instructions and granting various defense instructions as set out hereinafter. For example, P-7. The Defendants state that Plaintiff did not object to the removal of P-7 and its replacement with C-10. The Plaintiff objected to P-7 not being admissible and agreeing to C-10 does not cure the error created for not allowing the language in P-7. P-7 was the proper proximate cause language and it was error to not give it. The issues are presented in greater detail in Appellant's Brief. The instructions denied prevented the Plaintiff from presenting her theories of liability. The trial court committed reversible error.

XII. THE TRIAL COURT ERRED IN GIVING DEFENDANTS' PROPOSED JURY INSTRUCTIONS D-1, D-2, D-3, D-5 AND D-6

The trial court erred in admitting Instruction "D-1," submitted as C-14. (R. 1598). This instruction was both peremptory and a misstatement of the law. It placed an absolute duty on the Plaintiff to avoid the wreck which is not the law. The instruction stated "**a motorist has an absolute duty to see** that which is in plain view or open and apparent and to take notice of obvious objects and vehicles ahead on a highway." (R 1598). Plaintiff objected to this instruction on several grounds (Tr. Transcr. 698:15-28). There is no absolute duty to avoid a collision. *White v. Miller,* 513 So. 2d 600 (Miss.1987). The duty is to act as a reasonable prudent person under like circumstances.

The trial court erred in admitting Instruction "D-2," submitted as C-1. (R. 1599). This instruction was peremptory, a misstatement of the law, a misstatement of the facts in evidence, cumulative, compound and the evidence did not support this instruction. It put an

absolute duty on the Plaintiff which is not the law. *Church v. Massey*, 697 So. 2d 407 (Miss. 1997).

The trial court erred in admitting Instruction "D-3," submitted as C-16. (R. 1600). This instruction was another peremptory instruction that stated "if you find that Preston Utz, at the time he confronted the trailer pulled by Anthony Q Hunter, was traveling at a speed in excess of the posted speed limit of 65 miles per hour, **then you must find that Preston Utz was negligent."** (R. 1600). This instruction imposed a strict liability standard and a peremptory standard on Utz which is not the law. The instruction also put the entire burden on the Plaintiff to avoid the accident regardless of whether the Defendants were at fault which is not the law. See, *Freeze v. Taylor,* 257 So .2d 509 (Miss. 1972).

The trial court erred in admitting Instruction "D-5," submitted as C-17. (R. 1601). This instruction was another defective instruction. It requires the jury to determine "If you find from a preponderance of the evidence that under the circumstances existing on December 14, 2003, **Preston Utz could not see in front of him at a distance within** which he could reduce his speed and bring his vehicle to a speed in which **he could stop within his range of vision** . . . ." (R. 1601). How could the jury determine what Utz could see or could not see when the court specifically refused to let the Plaintiff present her expert testimony? Plaintiff objected to this instruction saying, "Plaintiff objects to it on the grounds that it is a misstatement of the law, it is a misstatement of the facts in evidence, there was no testimony that Preston Utz could not see in front of him at a specific distance. The testimony was that a reasonable person would be able to see at certain distances, but not Preston Utz specifically, which the court said we couldn't talk about Preston Utz and his visibility. So that's not admissible. Also the trial court didn't allow Plaintiff's experts to testify that Utz could not see the truck; it only allowed a reasonable person standard. So this sentence in the second

paragraph needs to be struck. Otherwise, it is a misstatement of facts, misstatement of law, and it is going to confuse the jury."(Tr. Transcr. 701:6-20).

Also it is important to note that the trial court has claimed that one of its basis for not allowing the Plaintiff's experts to testify about visibility of the trailer and to what Utz would have been able to see was based on its erroneous finding that, "it does not appear to this court that there are sufficient facts and/or data for the witness to testify as to whether the deceased would have been able to see the trailer prior to the accident." (R. 1392). The trial court's restricting of the Plaintiff's evidence and theories of liability coupled with certain jury instructions guaranteed the jury would have to reach incorrect and unsupportable conclusions amounts to reversible error.

The trial court erred in admitting Instruction "D-6," submitted as C-18. (R. 1602). This instruction was another defective instruction addressing **visibility** of the trailer and what Utz could have seen. It is similar to D-5 (C-17). Plaintiff objected to the instruction on various grounds. It is the same as D-5 (C-17), a misstatement of the law, misstatement of the facts, cumulative, and it misrepresents to the jury the testimony presented by the various experts. (Tr. Transcr. 702:1-9). The trial court's complete failure to submit correct jury instructions is reversible error.

XIII. THE TRIAL COURT ERRED IN GIVING JURY INSTRUCTION C-13

The trial court submitted jury instruction "C-13" (R. 1597) in an attempt to address all the points from Plaintiff's issues raised in P-10 through P-16. (Tr. Transcr. 681:20-23; 685:9-13). However C-13 denies the Plaintiff the right to direct the jury to consider the multiple FMCSR violations by the Defendants. Each violation is a separate act of negligence that should have been considered by the jury. The trial court rejected this issue raised by the

Plaintiff. (Tr. Transcr. 682:4 – 685:13). More troubling is the language of C-13 where the trial court instructs the jury that the Defendants' failure to comply with FMCSR is negligence but then requires that the Plaintiff must show the negligence proximately caused the death of Utz. This was impossible to do since the trial court had prevented Plaintiff's experts from testifying about causation regarding the reflective tape causing the wreck. The trial court substituted C-13 (R. 1597 and Tr. Transcr. 685:9-13) which was an improper instruction 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. (R. 1597). The trial court would not let the Plaintiff put on evidence of the FMCSR violations being a proximate cause of Utz's death. (See above subsections numbered 8, 9, and 10). The trial court's failure to allow Plaintiff to put on her causation argument and evidence and its failure to allow this instruction prevented the jury from being properly instructed on the evidence and the law. The trial court's actions constitute reversible error.

XIV. PLAINTIFF DID NOT WAIVE ARGUMENTS REGARDING JURY INSTRUCTIONS

The Defendants claim some of the Plaintiff's jury instructions arguments are not admissible because no specific case law was cited. This is not correct. The Mississippi Rules of Evidence have been cited as authority and various case cites were used. The Plaintiff has cited other authority throughout her brief. The problem with the jury instructions were that they were deemed incorrect to be submitted to the jury based on the trial court's refusal to submit specific fact testimony. The refusal to submit the fact evidence arguments were presented in the Appeal Brief with case cites. If the jury instruction is defective based on the fact evidence then the matter is proper for appeal and not barred. Further, each jury instruction submitted was submitted

with cite authority referenced for the instruction which would provide more case cite information for the support of the instruction.

Many of the issues raised on appeal are fact specific to this case so existing authority is only relevant by analogy. Also, this court has stated the lack of case law **may be treated as** a procedural bar but in most cases the issues raised with only Rules cited as authority are still reviewed by the appeals court. See, *Kroger Co. v. Scott*, 809 So. 2d 679 (Miss. Ct. App. 2001) (Wherein the Court addressed multiple issues which were not supported by authority). Cases in which the courts of appeal have deemed issues waived are ones in which the appellants have made statements such as "neither Mississippi, nor Federal Law require..." but then provide no supporting law or Rules. *Grenada Living Center, LLC v. Coleman*, 961 So. 2d 33, 37 (Miss. 2007). Plaintiff in the instant case has not made arguments saying the law prohibits or provides something without stating what rule or case makes this so under the facts. The Defendants' contention that Plaintiff's appeal arguments are banned for lack of a case cite are incorrect and misleading. The trial court's refusal of Plaintiff's instructions and admission of Defendants' instructions over Plaintiff's objections created prejudice and harm to the Plaintiff's case and adversely affected a substantial right of the Plaintiff to have her theories of liability and facts presented.

CONCLUSION

The lower court's actions at trial and in its pre-trial and post-trial rulings created amount to reversible error. Plaintiff requests this Court remand this case for a new trial.

Respectfully submitted this the 29th day of September, 2009.

CARLA UTZ, ET AL

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CERTIFICATE OF SERVICE

I, the undersigned counsel of record, hereby certify that I have this day forwarded, by U.S. Mail, postage prepaid, a true and correct copy of the foregoing Appellant's Brief to:

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So certified, this the 29th day of September, 2009

J. Ashley Ogden