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

BRIEF OF APPELLANT

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 judges of the Court of Appeals may evaluate possible disqualification or recusal.

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

II. Running & Rolling Trucking, Inc., Appellee

III. Anthony Q. Hunter, Appellee

IV. Honorable Charles E. Webster, Circuit Judge

V. Honorable B. Stevens Hazard, Esq. and Jason H. Strong, Esq. of Daniel, Coker, Horton & Bell, P.A., Attorneys for Appellee

VI. Honorable J. Ashley Ogden, Attorney for Appellant

RESPECTFULLY SUBMITTED, this the 22nd day of June, 2009.

BY: J. Ashley Ogden
J. Ashley Ogden

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7. **Trial court erred in excluding evidence of Hunter's driving record.**
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9. **Trial court erred in not admitting evidence regarding the trailer being "out of service" and its causation effect on the wreck**
10. **Trial court erred in not allowing plaintiff's experts to testify that the cause of the wreck was the defendants' failure to put reflective tape on trailer- visibility**
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12. **Trial court erred in excluding plaintiff's document evidence of reflective tape**
13. **Trial court erred in not admitting plaintiff's photos of an exemplar truck with reflective tape and the defendant's trailer post-accident**
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17. **Trial court erred in not allowing plaintiff's FMCSR expert, Maxwell, to testify about causation in regards to FMCSR violations**

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19. **Trial court erred by ruling "as a matter of law that two and a half miles is insufficient to creating an immediate hazard**
20. **Trial court erred in allowing defendant's expert Weaver to testify to fatigue and delayed perception**

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43. **Trial court erred in admitting cumulative instructions D-1, D-2, D-3, D-5 and D-6**

STATEMENT OF THE CASE

This case is an action for damages by Carla Utz Individually and on Behalf of All Wrongful Death Beneficiaries of Preston Jimmy Utz against Defendants Running & Rolling Trucking, Inc. and Anthony Q. Hunter, for operating a tractor-trailer in violation of the Federal Motor Carrier Safety Regulations, failure to yield the right of way, and for causing the death of Preston Jimmy Utz which occurred in December 2003. On May 1, 2008 the Circuit Court of the Second Judicial District of Bolivar County, Mississippi, Honorable Charles E. Webster, presiding, weighing the greater weight of the credible evidence entered a Final Judgment for the Defendants and an Order denying the Plaintiff's Motion for Judgment Notwithstanding the Verdict (JNOV), or in the Alternative for a New Trial. Plaintiff perfects her appeal from the lower court's judgment.

FACTS

On December 14, 2003 at about 11:50 p.m. just north of the city of Boyle, Bolivar County, Mississippi, Preston Jimmy Utz ("Utz" and "deceased") was driving southbound on Highway 61 in the right lane, about .40 miles south of McWimus Road. Anthony Q. Hunter ("Hunter") was driving for Running & Rolling Trucking, Inc. ("Running & Rolling") and pulled his 1995 International tractor-trailer truck from a side road onto Highway 61 South in front of and into Utz's travel lane. When Hunter entered the road the Federal Motor Carrier Safety Regulations ("FMCSR") controlled how he operated the truck and trailer (Tr. Transcr. 392:21-25; Tr. Transcr. 445:26-29). The FMCSR are federal regulations governing commercial carriers to improve the safety of the motoring public (Tr. Transcr. 171:20-26). On the night of the wreck the FMCSR required the trailer to have reflective tape ("conspicuity tape") on the rear of the trailer for visibility purposes (Tr. Transcr. 392:26; Tr. Transcr. 446:1-4). The FMCSR required reflective tape at the top right and top left of the trailer (Tr. Transcr. 393:18-

21). On the night of the wreck the trailer did not have reflective tape on the top right and top left of the trailer (Tr. Transcr. 393:22-25). The FMCSR also required reflective tape to run all the way across the back of the trailer on the deck (Tr. Transcr. 394:1-5). Additionally the FMCSR required the reflective tape to be continuous across the back of the trailer to the furthest edges of the trailer or its bumper (Tr. Transcr. 222:6-26). At the time of the wreck there was no reflective tape running across the back of the trailer on the deck (See photos and picture Exhibits D-15 a-w, P-9 and P-33). In fact there was no reflective tape on the back of the trailer at all (Tr. Transcr. 448:1-8; see photos). Without any reflective tape on the rear of the trailer the Defendants were operating the trailer in violation of the FMCSR. (Tr. Transcr. 193:14-22). The driver, Hunter, admitted at trial that on the night of the wreck he was operating the trailer in violation of FMCSR for no reflective tape (Tr. Transcr. 395:1-6). The Defendants' safety manager, Charles Richard ("Richard"), admitted at trial that there was no reflective tape on the back of the trailer (Tr. Transcr. 448:1-8; Tr. Transcr. 449:3-11). Safety manager, Richard, also admitted at trial that the Defendants failed to properly place reflective tape on the back of the trailer as required by FMCSR (Tr. Transcr. 449:12-16). Richard admitted that at the time of the wreck the trailer was operating on the road while not in compliance with the FMCSR (Tr. Transcr. 449:17-20). Officer Mark Dunlap with Mississippi Department of Transportation, an expert in the field of DOT regulations and FMCSR, confirmed that the trailer had no reflective tape on its rear (Tr. Transcr. 173:22-29) and that the trailer was not in compliance with FMCSR (Tr. Transcr. 193:14-22). The tractor-trailer should not have even been on the road and should not have been allowed to operate on the road (Tr. Transcr. 196:7-25).

When the tractor-trailer entered the road it maintained a very low rate of speed and did not move up to the flow of traffic (Tr. Transcr. 227:22-27). The posted speed on Highway 61

in that area is 65 mph (Tr. Transcr. 211:27-29). Hunter pulled into the road by swinging into the left lane and then eventually moving over into the right lane (Tr. Transcr. 399:21 – 400:2). Hunter said he saw lights approaching from behind in the distance (Tr. Transcr. 409:16-26) and he did not know how fast the car was going (Tr. Transcr. 410:6-8). He then said he never saw a car coming from behind his trailer (Tr. Transcr. 410:9-22). The low speed of the truck created a road hazard to vehicles approaching from behind (Tr. Transcr. 232:20-24). Preston Utz's car struck the back of the practically invisible trailer that had pulled out in front of him. Utz died at the scene from his injuries.

SUMMARY OF THE ARGUMENT

Plaintiff argues that the lower court erred in its rulings in pre-trial, trial and post-trial motions. Plaintiff also argues the trial court's actions in admitting certain evidence, excluding other evidence and in preventing the Plaintiff from presenting her theories of liability created reversible error. Plaintiff argues the trial court committed reversible error in entering a final judgment in favor of the Defendants (R. 1607-1608) and in denying Plaintiff's Motion for Judgment Notwithstanding the Verdict (JNOV), or for a New Trial on May 1, 2008. (R. 1647-1670). The evidence proves the sole proximate cause of the wreck was the Defendants' violations of the FMCSR and failure to yield the right of way. The Plaintiff argues that the overwhelming amount of errors committed by the trial judge, from admitting prejudicial evidence to preventing the Plaintiff's experts from testifying to causation and allowing jury instructions that were peremptory as a whole, amounts to reversible error. In considering the trial court's denial of Plaintiff's Motion for Judgment Notwithstanding the Verdict (JNOV), or for a New Trial, Carla Utz, Individually and on Behalf of All Wrongful Death Beneficiaries and the Estate of Preston Jimmy Utz, Deceased, asks this Court to review these points:

1. Trial court erred in admitting testimony alleging Utz was using, making and/or selling methamphetamine before the wreck;

2. Trial court erred in allowing Defendants to claim Utz had methamphetamine in his blood at the time of the wreck;

3. Trial court erred in admitting testimony regarding alleged drugs being found in Utz's pants a month after the wreck;

4. Trial court erred in allowing testimony of lay witnesses identifying unknown substance to be alleged methamphetamine;

5. Trial court erred in allowing toxicologist Weaver, to testify that Utz's alleged lack of sleep "could have" lead to fatigue and delayed perception;

6. Trial court erred in not admitting Defendants' prior FMCSR violations;

7. Trial court erred in excluding evidence of driver's driving record;

8. Trial court erred in limiting the Plaintiff's expert testimony regarding taillight visibility;

9. Trial court erred in not admitting evidence regarding the trailer being "out of service" and its causation effect on the wreck;

10. Trial court erred in not allowing Plaintiff's experts to testify that the cause of the wreck was the Defendants' failure to put reflective tape on trailer visibility;

11. Trial court erred in allowing Defendants' expert, Bentley, to testify on several issues;

12. Trial court erred in excluding Plaintiff's document evidence of reflective tape;

13. Trial court erred in not admitting Plaintiff's photos of an exemplar truck with reflective tape and the Defendants' trailer post-accident;

14. Trial court erred in not limiting the testimony of witness, Ephraim Woolf;

15. Trial court erred by excluding testimony of Plaintiff's MDOT expert, Dunlap, regarding causation and FMCSR violations;

16. Trial court erred in not letting Plaintiff's expert, Corbitt, testify regarding causation on Defendant's failure to yield the right of way and for causing an immediate hazard;

17. Trial court erred in not allowing Plaintiff's FMCSR expert, Maxwell, to testify about causation in regards to FMCSR violations;

18. Trial court erred by finding as a "matter of law that 40-45 mph is not unreasonably slow";

19. Trial court erred by ruling "as a matter of law that two and a half miles is insufficient to creating an immediate hazard";

20. Trial court erred in allowing Defendants' expert, Weaver, to testify to fatigue and delayed perception;

21. Trial court erred in denying and admitting various jury instructions;

22. Trial court erred in denying jury instruction P-7;

23. Trial court erred in denying jury instruction P-10;

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25. Trial court erred in denying jury instruction P-12;

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29. Trial court erred in denying jury instruction P-16;

30. Trial court erred in submitting jury instruction C-13;

31. Trial court erred in denying jury instruction P-17 and for declaring as a "matter of law" that 40 mph speed limit is not "unreasonably slow";

32. Trial court erred in denying jury instruction P-18;

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39. Trial court erred by admitting jury instruction D-3;

40. Trial court erred by admitting jury instruction D-5;

41. Trial court erred by admitting jury instructions D-6;

42. Trial court erred in admitting jury instruction C-19 (Special Interrogatory); and

43. Trial court erred in admitting cumulative instructions D-1, D-2, D-3, D-5 and D-6.

ARGUMENTS

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.

I. EVIDENTIARY AND PROCEDURAL ERRORS

1. Trial court erred in admitting testimony alleging Utz was using, making and/or selling methamphetamine before the wreck.

The trial court denied Plaintiff's motion to exclude speculation regarding the deceased using, making and/or selling methamphetamine before the wreck. (R. at 1404-1406). In trial witness, Ephraim Woolf, was allowed to testify to these various prejudicial statements- that two weeks before the car wreck he and Utz were smoking methamphetamine ("meth") (Tr. Transcr. 535:29), that the day before the wreck he and Utz spent the day picking up ingredients to cook meth (Tr. Transcr. 536:26), that Utz was with him and a girl cooking meth the day before the wreck (Tr. Transcr. 537:23-28), that Utz tested the meth (Tr. Transcr. 539:21), that Utz got high (Tr. Transcr. 540:3), and that they spent all day at Steve Brooks' house getting high the day of the wreck (Tr. Transcr. 542:24). All this testimony was overtly prejudicial. There was no testimony that the actions of Utz and Woolf in the days before the wreck were related to the wreck. This testimony was hearsay, prejudicial and not relevant. It portrayed Utz as a drug making, drug using, drug selling felon inflaming the jury and confusing the issues.

Evidence is generally admissible if it is relevant. Miss. R. Evid. 402. "Relevant Evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Miss. R. Evid. 401. Testimony that Utz allegedly used, made or sold methamphetamine is not relevant evidence under Rule 401. For evidence to be relevant it must be logically connected to the issues. This case is a wrongful death automobile accident. Without showing a connection between the alleged use, manufacture or sale of methamphetamine and the subject accident there is no relevance in allowing testimony on these topics. *Cf. Magee v. State*, 912 So. 2d 1044 (Miss. Ct. App. 2005) (evidence that someone else, who was a known drug user, drove the vehicle in which the drugs were found is not sufficient to show that the Defendant did not know about the drugs); *Stewart v. State*, 662 So. 2d 552 (Miss. 1995) (testimony by a witness about conversations prior to the Defendant becoming involved in the conspiracy is not probative). Assuming decedent's alleged drug use, manufacture and selling were relevant it would still not be admissible because the evidence is highly prejudicial. "Evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . ." Miss. R. Evid. 403. It was highly prejudicial to allow testimony alleging the descendent Utz had used, made or sold methamphetamine. Defendant did not present evidence that any alleged use, manufacture or sale of drugs caused or contributed to the accident. *Donald v. Triple S Well Service, Inc.*, 708 So. 2d 637 (Miss. 1998) (where Plaintiff was injured on the job it was error to allow evidence of Plaintiff's drinking on the job because did not connect drinking to the accident).

Allowing hearsay testimony of use, production and/or distribution of methamphetamine is clearly more prejudicial than probative and violated Miss. R. Evid. 401 and 403. The manufacturing, consumption and sale of meth is a felony. The trial judge tainted the jury by

allowing this information before the jury despite the fact that it had no relevance and was more prejudicial than probative. This is especially erroneous when the Mississippi State toxicology report (Exhibit P-21) and the State toxicologist, Carmen McIntire, testified that the state crime lab tests showed Utz had no meth in his body at the time of the wreck (Tr. Transcr. 342:22-25; 343:1-5). By allowing the Defendants to essentially say Utz was a felon the court tainted the evidence and confused the issues and jury. This testimony, especially when contradicted by the findings of the state toxicology report, guaranteed the jury would be prejudiced and confused about the issues.

2. Trial court erred when allowing Defendants to claim Utz had methamphetamine in his blood at the time of the wreck

The trial court denied Plaintiff's motion to exclude speculative testimony regarding the deceased having methamphetamine in his blood at the time of the accident. (R. 1404-1406). This ruling was reversible error. The trial court found "despite the Plaintiff's argument to the contrary, that the probative value of evidence concerning methamphetamine in the blood of the deceased at the time of the accident is not substantially outweighed by the danger of unfair prejudice." (R. at 1406). The Defendants were allowed to have a toxicologist claim Utz had meth in his blood at the time of the wreck in contradiction to the actual results of the crime lab report (Exhibit P-21) and the testimony of the crime lab expert, Carmen McIntire (Tr. Transcr. 342:22-25; 343:1-5).

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). The prejudicial effect outweighed any possible probative value. *Donald v. Triple S Well Service, Inc.*, 708 So. 2d 637 (Miss. 1998) (where Plaintiff was injured on the job it was error to allow evidence of Plaintiff's drinking on the job because did not connect drinking to the accident). This Court has dealt with a similar instance in *Classic Coach, Inc. v. Johnson*, 823 So. 2d 517 (Miss. 2002). The trial court properly disregarded evidence and testimony regarding drugs found in the decedent's blood because the blood samples did not provide an exact quantitative amount so neither expert could conclude with medical certainty what influence or effect the drug had on the decedent. In *Classic Coach, Inc.*, the judge limited the amount of fault of the driver because there was no evidence to show amount of drugs in his system at time of accident, and there was no evidence indicating that he was under the influence of drugs at time of accident. *Id.* at 523. In the case *sub judice* there was no evidence presented that Utz was under the influence of meth at the time of the wreck and the Mississippi State toxicology reported no methamphetamine in Utz's system. (Tr. Transcr. 342:22-25; 343;1-5). The testimony was rank speculation and hearsay.

Defendants provided no evidence that suggested Utz suffered from an impairment which caused or contributed to the wreck and his death. Defendants did not lay a proper foundation to allow them to claim Utz was impaired. See, *Accu-Fab & Construction, Inc. v. Ladner*, 970 So. 2d 1276, 1284 (Miss. Ct. App. 2000) (without evidence that the Plaintiff's work was affected by the influence of drugs a positive drug screen was irrelevant); *Holladay v. Tutor*, 465 So. 2d 337, 338 (Miss. 1985) (finding- a box of marijuana and Quaaludes found in Defendant's car was not relevant and its only purpose was to prejudice the jury); *Pope v. McGee*, 403 So. 2d 1269, 1271

(Miss. 1981) (excluding evidence of two six packs of beer and an unidentified white powered found in Defendant's car because they offered no proof on proximate causation of the collision, and its prejudicial valued greatly outweighed its probative value).

The certified toxicology report from the Mississippi Crime Laboratory shows Utz tested positive for caffeine, but was negative for all other substances tested (Exhibit P-21). At trial Carmen McIntire, from the Mississippi Crime Lab, was admitted as an expert in the field of forensic science and toxicology without objection from the Defendants. (Tr. Transcr. 340:6-13). McIntire testified that she performed the alcohol/drug analysis on the blood sample of Utz for the Mississippi Crime Laboratory. (Tr. Transcr. 340:19-21). McIntire testified Utz's blood was meth free.

> Q: So if I was to ask you whether or not on the night of the wreck if Preston Utz had **crystal meth in his blood** based on this report, what would your answer be?
> **A: No.**
> Q: And if I was to ask you on the night of the wreck, based on Preston Utz's blood and the report that your findings come from, did he have barbiturates or benzenoid or cannabinoids or cocaine or methadone or opiates or phencyclidine in his blood?
> A: No.
> Q: What did you find, if anything, in Preston Utz's blood from the report that ya'll were able to conclude?
> A: **The report that I issued on this case was negative, meaning there was no drugs present.**
> (Tr. Transcr. 342:22 - 343:8).

McIntire stated the only substance reported from the blood sample in Utz was **caffeine.** (Tr. Transcr. 343:13-15). McIntire stated she was asked specifically to test the decedent's blood for methamphetamine. Although, the spectra had some features which could be indicative of methamphetamine, it did not meet the proper criteria for her to be able to conclusively present such as fact. Thus, under the state crime laboratory policy the test for methamphetamine was a negative result. (Tr. Transcr. 345:1-5; Tr. Transcr. 352:2-3). Trace

amounts of a substance may be attributed to multiple causes and are considered false positives. The test result was thus negative for methamphetamine. (Tr. Transcr. 345:5).

Defendants' expert witness Michael Weaver also testified that he could not disagree with Carmen McIntire, the state toxicologist and head of the Mississippi Crime Lab in charge of quality assurance (Tr. Transcr. 593:1-5) and that given the same data he would have to agree the report was negative for meth (Tr. Transcr. 594:14). The trial court's admission of testimony that Utz had meth in his blood at the time of the wreck was error, because it was not relevant under Miss. R. Evid. 401, inadmissible under Miss. R. Evid. 402 and extremely prejudicial and confusing to the jury under Miss. R. Evid. 403. The testimony was hearsay and nothing more than speculation.

3. Trial court erred in admitting testimony regarding alleged drugs being found in Utz's pants a month after the wreck

The trial court overruled the Plaintiff's motions to exclude testimony (R. at 1406-1407) allowing Utz's mother, Martha Fly, to testify she found an alleged substance in Utz's pants a month after wreck and it "appeared to be meth." The court then overruled Plaintiff's motion to exclude Utz's sister, Rachel Foster, from identifying the substance as methamphetamine (R. 1406-1408). At trial Fly was allowed to testify that in late January or early February, a month or more after the car wreck, she claimed to have found "a plastic bag containing a white substance" (Tr. Transcr. 553:14) that "appeared to be crystal meth." (Tr. Transcr. 561:19). When asked if she could prove it was meth Fly stated "I did not have a toxicology report" (Tr. Transcr. 561:16-21) and that she destroyed the alleged substance before it could be verified what it was. (Tr. Transcr. 561:22-26). Fly testified she notified her daughter, Rachael Foster, that she had found a plastic bag containing a white substance (Tr. Transcr. 553:19-22). Allowing this testimony amounts to reversible error.

Rachael Foster ("Foster") testified approximately two months after Utz's death 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 the white substance was crystal methamphetamine. (Tr. Transcr. 568:6). This testimony was clearly erroneous and highly prejudicial. The alleged, so called "drugs" were destroyed (flushed down the toilet by Fly (Tr. Transcpt. 561:22-26)) without being tested and 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 testimony regarding drug identification. Testimony of what the substance was, if any substance existed, is only proper for an expert. Furthermore, the testimony presented was that the "substance" was not found until nearly two months after the accident (Tr. Transcr. 567:13-15). By allowing an unqualified witnesses to say they found a substance in the pants of the deceased almost two months after Utz's death and that it was crystal meth allowed the jury to infer that Utz was under the influence of methamphetamine at the time of the wreck when such evidence was only supported by rank speculation at best. It was overwhelmingly prejudicial to allow the jury to consider Margaret Fly's and Rachel Utz's highly prejudicial and inflammatory testimony. The testimony was hearsay, unsupported speculation and not admissible under any hearsay exception. This testimony was not relevant under Miss. R. Evid. 401, inadmissible under Miss. R. Evid. 402 and highly prejudicial and

confusing to the jury under Miss. R. Evid. 403. The admission of such testimony is reversible error.

4. **Trial court erred in allowing testimony of lay witnesses identifying unknown substance to be alleged Methamphetamine**

It was error to allow the testimony of witnesses, Martha Fly and Rachel Utz Foster, regarding their claims that the alleged substance they found in Utz's pants two months after his death was methamphetamine when there was no way to test and substantiate the substance found. The so called "drugs" were destroyed without being tested by any expert or laboratory qualified to conduct such proper analysis. This issue is addressed in section number 3 above in sufficient detail. The testimony presented was that the "substance" was not found until nearly two months after the accident and there was no proof of any chain of custody to even establish if this substance found was actually on Utz's person the night of the wreck. (Trial transcript, 567:13-15). No one could substantiate the substance and the testimony was speculation and hearsay. The toxicology report reflected a negative result for methamphetamine in Preston Utz's blood. (Exhibit P-21). The testimony of Martha Fly and Rachel Utz is unsubstantiated hearsay, irrelevant under Miss. R. Evid. 401, not admissible under Miss. R. Evid. 402 and confusing and misleading to the jury under Miss. R. Evid. 403. The trial court committed reversible error when it admitted this testimony.

5. **Trial court erred in allowing toxicologist Weaver to testify that Utz's alleged lack of sleep "could have" lead to fatigue and delayed perception**

The trial court erred in denying Plaintiff's motion to exclude testimony that the deceased had not slept for an extensive period of time prior to the accident (R. 1409-1410) and then later denied the Plaintiff's request to strike Defendants' claim that Utz was fatigued at the time of the wreck (Tr. Transcr. 584:11-15). Woolf testified that Utz had been smoking and was awake for days when the decedent left to drive to Clarksdale before the wreck (Tr. Transcr.

543:4-7). From this statement toxicologist, Michael Weaver, was allowed to extrapolate and testify that Utz was fatigued. Plaintiff objected on grounds that this testimony was never provided to Plaintiff in discovery and was outside of Weaver's designated testimony (Tr. Transcr. 588:7-8). Even then Weaver only stated, "He **could have been** [fatigued]." (Tr. Transcr. 588:7-8). "Could have been" is not the proper legal standard. This testimony constituted hearsay and speculation. Weaver then testified, over plaintiff's objection, "He [Utz] **could have been** experiencing [delayed perception]" (Tr. Transcr. 588:9-10). Contrary to this rank speculation, witness, Steve Brooks, testified that Utz was asleep on his couch until noon the day of the wreck. (Tr. Transcr. 492:6-12). The testimony of Woolf did not conform to the scientific physical evidence. Woolf testified that Utz had been smoking meth for days (Tr. Transcr. 543:4-7). But, Utz's toxicology screen was negative for methamphetamine. (Exhibit P-21). There was only one witness to the accident, the Defendant driver, Anthony Q. Hunter. He testified at trial that he saw a vehicle coming up behind him. (Tr. Transcr. 402:6-14). There was no testimony from Hunter that the vehicle was swerving or drifting, or that the driver appeared to be fatigued or was having a perception problem. Therefore, there was no probative value in allowing Woolf's or Weaver's testimony. The testimony incorrectly allowed the jury to assume speculative facts not in evidence. Admission of this testimony was error because it was speculation, not properly admissible under the standard of testimony for an expert under Miss. R. Evid. 702 and 703, not relevant under Miss. R. Evid. 401, inadmissible under Miss. R. Evid. 402 and prejudicial and confusing to the jury under Miss. R. Evid. 403. This admission of evidence amounted to reversible error.

6. Trial court erred in not admitting Defendant's prior FMCSR violations

The trial court erred in excluding evidence of the carrier rating of Running & Rolling Trucking, Inc. (R. 1395-1396). Defendants' admitted that they had FMCSR violations. Plaintiff

argued the carrier rating would show how many FMCSR violations the company had received. This evidence would go to the Defendant Company's pattern and practice of not following the FMCSR. The trial court ordered the information was "both too remote to have relevance to the issues involved in the instant litigation and/or if relevant, such relevance would be substantially outweighed by the danger of unfair prejudice as contemplated by Miss. R. Evid. 403." (R.1396). Under the Rules, evidence regarding the Defendant company's carrier rating was clearly relevant. FMCSR are put in place to protect persons traveling the roads with interstate tractor-trailers. 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.

7. Trial court erred in excluding evidence of Hunter's driving record

The trial court erred in not admitting Defendant Anthony Hunter's driving record. (R. 1396). The FMCSR violations by Hunter showed his pattern and practice of violating the FMCSR. Hunter testified at his deposition that he had been put out of service (tractor-trailer parked until violation corrected) for being in violation of the FMCSR before the instant accident. (R. 490, Deposition of Hunter, p. 22, ln.14 – p. 23, ln.23). The trial court excluded evidence of Hunter being cited and placed out of service for a fuel leak. (R. 1396-1397). This information would show the jury how strict the FMCSR are and that any violation that affects the ability of the driver to operate the tractor-trailer safely would subject the tractor-trailer to being parked until the violation was corrected. This violation occurred prior to the date of Defendant's wreck with Utz. (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

have been to be removed from the road for a dangerous violation, the lack of reflective tape. Plaintiff proffered that testimony (Tr. Transcr. 196:7-29).

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). It was reversible error for the trial court to preclude this evidence since it prevented the Plaintiff from presenting her theory of the case.

10. Trial court erred in not allowing Plaintiff's experts to testify that the cause of the wreck was the Defendants' failure to put reflective tape on trailer- visibility

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. *Doe v. Wright Security Services, Inc.* 950 So. 2d 1076 (Miss. 2007) and generally a matter for the jury. *Donald v. Amoco Prod. Co.*, 735 So. 2d 161 (Miss. 1999). Plaintiff's expert Mark Mori, an expert truck driver, provided a report stating because the trailer did not have reflective conspicuity tape it should not have been on the road. (R. 167-169, Expert Report of Mori). Mori further opined that it was reckless for Defendants to operate a vehicle which was out of service at the time. (R. 169). The trial court found that Mori's opinion would not assist the trier of fact and he was prohibited from giving any opinion testimony on causation. (R. 1387-1388). An expert should be permitted to

give testimony that will assist the jury in determining a fact in issue. Mori, an expert truck driver, clearly had special knowledge which would have assisted the jury in understanding this issue. The trial court refused to admit his expert testimony.

Mark Dunlap, MDOT expert, provided expert opinion that the trailer, equipped with no reflective sheeting, on the rear and the absolute minimum lighting on the rear made it a danger to others driving on the roads. (R. 170-173, Expert Report of Dunlap). Dunlap stated the trailer was operating in violation of FMCSR 393.13 for no reflective tape (Tr. Transcr. 178:12-15; Tr. Transcr. 196:11-14). Dunlap concluded the cause of the accident was the Defendants' lack of compliance with the federal regulations. (Tr. Transcr. 196:24-29). Dunlap proffered testimony at trial on causation stating, "The only thing that I could comment on is the fact the truck should never have been on the road in the first place." (Tr. Transcr. 196:24-29). The trial court refused to admit Dunlap's expert testimony.

Dane Maxwell, FMCSR expert, provided expert opinion the Defendants were in violation of multiple FMCSR at the time of the wreck. (R. 174-178, Expert Report of Maxwell and Tr. Transcr. 302:26 – 304:23). Maxwell opined due to the FMCSR violations and danger the trailer posed to others on the roadway, the trailer should not have been in operation at the time of the wreck. (R. 178). Plaintiff proffered Maxwell's testimony that the cause of the accident was a "violation of the conspicuity regulations" and the fault lies only with the Defendants and not with Utz. (Tr. Transcr. 336:12-19). Plaintiff proffered Maxwell would have presented evidence that the tractor-trailer was out of service and that the tractor-trailer should not have been on the road at the time of the accident. (Tr. Transcr. 673:12-16). The trial court refused to admit Maxwell's expert testimony.

Tim Corbitt provided expert opinion Defendants were in violation of the FMCSR regarding conspicuity tape. (R. 179-188, Expert report of Corbitt). He opined the trailer

"should not have been on the road due to its failure to meet with Federal regulations on conspicuity." (R. 187). Corbitt proffered testimony regarding causation of the wreck. He stated the Defendant trailer was "traveling slow on Highway 61, about 40 miles an hour, 25 miles less than the posted speed limit, and there's no conspicuity tape on the back of the trailer." (Tr. Transcr. 287:26-28). The trial court refused to admit Corbitt's expert testimony.

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 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 court's actions required the jury to disregard the Defendants' FMSCR violations. This limited plaintiff's negligence and causation proof and constitutes reversible error.

11. Trial court erred in allowing Defendants' expert Bentley to testify on several issues

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 the Utz saw the trailer when the 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. Bentley testified at trial, "That 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. Transcr. 611:18-20). This testimony was in direct violation of the trial court's own ruling in pre-trial motions. (R. 1373). Plaintiff objected, but the trial court allowed the jury to hear the testimony. (Tr. Transcr. 611:25 –613:5). Also, over Plaintiff's objections and against the trial court's prior order Bentley testified that Preston Utz had ample time and distance to avoid the impact with the tractor-trailer. This is the visibility issue the trial court prevented the Plaintiff's experts from addressing.

Q: [D]o you have an opinion based on reasonable engineering certainty as to whether or not Preston Utz had ample time and distance to avoid the impact with the tractor-trailer?
A: Yes.
Q: What is that opinion?
A: That there was sufficient time and distance available to Mr. Utz to comfortably slow his vehicle or make a lane change to the left.
(Tr. Transcr. 611:11-20)

Q: Mr. Bentley, would a reasonably prudent driver have had ample time and distance to avoid collision with this trailer?
A: Yes, sir.
(Tr. Transcr. 614:21-23)

Plaintiff objected, but was instructed by the trial court that Plaintiff could re-call her expert to explain the comment or rebut it. (Tr. Transcr. 615:1 –618:21). The trial court had already tainted the jury by allowing the Defendants' expert to discuss Utz's specific visibility issue when the Plaintiff had rested her case without presenting this testimony since the trial court had prevented the Plaintiff from presenting such testimony to the jury. It was erroneous and extremely prejudicial for the trial court to allow the Defendants' expert, Bentley, to continue to offer opinions that were excluded by the trial court's prior order, but allowed at trial after the Plaintiff had rested her case and was unable to present her side of the issue. It was erroneous and prejudicial to the Plaintiff for the trial court to allow Defendants' expert, Bentley, to present evidence of his opinions regarding Utz's visibility as a contributing factor in the wreck when the trial court refused to allow Plaintiff's experts to give opinion about visibility during Plaintiff's case-in-chief. The trial court's actions amounted to reversible error.

12. Trial court erred in excluding Plaintiff's document evidence of reflective tape

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 trial court denied these documents:

Item P-9: FMCSA's Conspicuity Requirements for Commercial Motor Vehicles;
Item P-10: 3M Information on Conspicuity Tape;
Item P-11: J.J. Kelly 2007 Transportation Catalog Conspicuity Tape Information;
Item P-12: Safety Bulletin 01-03 December 27, 2001: Retroreflective Tape on Cargo Tank Trailers;
Item P-13: Public Citizen: NHTSA Date(sic) Show Safety Cost Little, Saves Thousands;
Item P-14: Recognizing a Truck at Night Shouldn't be a Hit or Miss Proposition;

Item P-15: Underride Network Victims First;
Item P-16: Auto Safety Expert.com: Truck Conspicuity;
Item P-17: Newsline: NHTSA Study Confirms Reflective Tape on Trucks Reduces Crashes;
Item P-18: Underride Network Victims First/The Invisible Semi;
Item P-19: Does your truck trailer have reflective tape; and
Item P-20: Avery Dennison vehicle conspicuity tape catalog.

All these documents are information from the government, industry or private groups regarding the need for reflective tape and its effects in preventing accidents. The trial court denied allowing any of this information to be used by the Plaintiff's experts or to allow the evidence to be presented to the jury regarding visibility issues. (R 1469-1474). The trial court prejudiced the Plaintiff's case by refusing to allow the Plaintiff to enter document evidence necessary to prove the elements of her case.

13. Trial court erred in not admitting Plaintiff's photos of an exemplar truck with reflective tape and the Defendant's 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 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).

The Plaintiff also presented Item P-36: 26 color photographs of the trailer at issue in this case. These were actual 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 court refused this evidence despite the testimony that the trailer was in the same condition (R. 1479). The trial court's exclusion of both P-34 and P-36 was error because the evidence was directly related to the Plaintiff's claims regarding the condition of the trailer without reflective tape. The jury should have been

allowed to see how the trailer appeared the night of the wreck and how it was intended to look under FMCSR. It was a comparison the jury was not allowed to make and it was prejudicial to the Plaintiff's case. The court's actions amounted to reversible error

14. Trial court erred in not limiting the testimony of witness Ephraim Woolf

It was error and prejudicial to admit testimony of witness, Ephraim Woolf. Woolf's testimony was solely to taint the case with claims that Utz was cooking methamphetamines, taking meth or hanging out with someone who was making or taking meth. There is no relevance or probative value to this information. Even if the testimony was accurate its prejudicial effect outweighed any probative value and the court did not conduct a proper balancing test under Miss. R. Evid. 403. This testimony directed the jury away from the facts of the wreck and to the accusation that Utz was an alleged felon. The trial court allowed Woolf to testify that he and Utz were making and smoking methamphetamine on December 14, 2003 before the accident. (Tr. Transcr. 536:24 –538:1; 539:17-22). The court allowed Woolf to testify that he and Utz went back to Steve Brooks' house to divide up the meth. (Tr. Transcr. 541:18-20). Woolf testified he and Utz had a history of using meth. This testimony allowed the jury to place a greater weight of evidence on Woolf's testimony about meth rather than properly focusing on the facts of this case. The facts in evidence showed Utz tested negative for methamphetamine at the time of his death. (Exhibit P-21). There are no facts to support that drug use by Utz, specifically meth, caused the wreck. Woolf's accusations are hearsay, speculation, not relevant evidence under Miss. R. Evid. 401, not admissible under Miss. R. Evid. 402 and more prejudicial than probative under Miss. R. Evid. 403.

II. TESTIMONY LIMITATIONS EFFECTING CAUSATION

15. Trial court erred by excluding testimony of Plaintiff's MDOT expert, Dunlap, regarding causation and FMCSR violations.

The trial court limited the testimony of Plaintiff's experts at trial. The limitations placed on Plaintiff's experts made it impossible for Plaintiff to present her evidence and put forth her theories of liability. Plaintiff's expert, Dunlap, testified at trial without objection from the Defendants, as an expert in the field of DOT regulations and Federal Motor Carrier Safety Regulation. (Tr. Transcr. 169:25-29). Dunlap testified in conformance with his expert report. (R. 612-615). Dunlap was precluded from giving testimony that the "cause of this wreck and the death of Mr. Utz was due to the driver, Anthony Q. Hunter, and company Running and Rolling Trucking not acting in compliance with Federal Motor Carrier Safety Regulations." (R. 615, Dunlap Report). Dunlap proffered testimony regarding his conclusion that the Defendant trailer "should not have been on the road in that condition." (Tr. Transcr. 196:7-11). He proffered, "The only thing that I could comment on is the fact the truck should never have been on the road in the first place. That would **be my causation."** (Tr. Transcr. 196:28 –197:1). Ironically, even though the trial court excluded the Plaintiff's causation testimony, it did acknowledge in its pretrial rulings that the FMCSR reflective tape issue was part of Plaintiff's causation argument. The trial court stated "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 casual 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." (R. 1393). The Plaintiff presented both testimony of the violation and its causation to Utz's

death. The trial court's refusal to allow Dunlap to testify about FMCSR and its cause in the wreck constitutes reversible error. It denied the Plaintiff her right to present her theory of liability.

16. Trial court erred in not letting Plaintiff's expert, Corbitt, testify regarding causation on Defendant's failure to yield the right of way and for causing an immediate hazard

Tim Corbitt was tendered as an expert witness in the field of accident investigation with a specialty in the field of accident reconstruction. (Tr. Transcr. 209:23-28). The trial court limited Corbitt's testimony precluding his conclusions about causation. Corbitt proffered testimony that Hunter and Running & Rolling was the cause of the accident because they were "traveling slow on Highway 61, about 40 miles an hour, 25 miles less than the posted speed limit, and there's no conspicuity tape on the back of the trailer." (Tr. Transcr. 287:22-28). Corbitt proffered testimony that no evidence proved Utz contributed to the accident. (Tr. Transcr. 287:29 – 288:6). The trial court's failure to allow this testimony, which was submitted in Corbitt's original opinions, constitutes reversible error. It prevented the Plaintiff from being able to offer her theories of liability and from putting evidence before the jury about causation. It also prevented the Plaintiff from being able to have jury instructions submitted to the jury regarding the Plaintiff's theory of liability.

17. Trial court erred in not allowing Plaintiff's FMCSR expert, Maxwell, to testify about causation in regards to FMCSR violations

Dane Maxwell testified at trial, without objection, as an expert in the field of DOT regulations and Federal Motor Carrier Safety Regulations. (Tr. Transcr. 294: 2-9). The trial court limited Maxwell's testimony. Maxwell was prohibited from presenting testimony regarding **causation**. The following testimony was proffered by Maxwell:

> Q: Mr. Maxwell, will you tell the jury what your findings were as to causation of this accident?

A: Violation of the conspicuity regulations.
Q: By who?
A: By Running and Rolling Trucking.
Q: What did your findings -- what are your opinions regarding fault of Preston Utz?
A: That the fault lies with the Defendants.
(Tr. Transcr. 336:12-19).

The limitations placed on Plaintiff's experts by the trial court clearly made it impossible for Plaintiff to fully present her evidence and establish her theories of liability. Without having a causation argument the Plaintiff could not establish her required elements of duty, breach, cause and injury required under general negligence. The case was about whether the Defendants' failure to follow the FMCSR was negligent and whether that negligence caused the wreck. The trial court's refusal to allow this testimony (R. 1389-1391) is reversible error.

18. Trial court erred by finding as a "matter of law that 40-45 mph is not unreasonably slow"

Plaintiff submitted her theory of negligence regarding the trailer moving so slow in the road after it failed to yield the right that it was a hazard to oncoming cars. The trial court incorrectly made a ruling to stop the Plaintiff from presenting the theory supported by the evidence. The trial court summarily ruled that as a "matter of law" 40-45 miles per hour is not unreasonably slow. (Tr. Transcr. 691:10-14). The trial court's duty is to instruct the jury as to the law, but the jury determines the facts of the case. A question of whether speed is a proximate cause of an accident is not an issue of law; rather, it is an issue of fact. Therefore, it is solely for the jury to determine whether 40-45 miles per hour under the facts of this case was unreasonably slow. There was testimony from the MHP officer Ronald Shive that driver Hunter told him he was going 40 miles per hour. (Tr. Transcr. 420:18-21). There was testimony from Plaintiffs' expert Corbitt that 40 miles per hour was too slow under the existing circumstances. Corbitt further testified that the fact that the Defendants' tractor-trailer was

traveling too slow impeded the flow of traffic. Corbitt stated the rate of speed of the tractor-trailer under this condition created an emergency or unusual circumstance, because it was an impediment of traffic. (Tr. Transcr. 226:25 – 227:2). The trial court ignored the testimony and brazenly stated "I'm refusing it (instruction P-17 dealing with Defendant's truck moving too slow for traffic flow) despite his [Corbitt's] testimony." (Tr. Transcr. 691:10).

"The jury is the sole judge of the weight of the evidence and the credibility of the witnesses. Conflicts in the evidence are to be resolved by the jury" and are not to be determined by a court. *Jackson v. Griffin*, 390 So. 2d at 289 (Miss. 1980) (holding the jury had the duty and prerogative, to determine whether a vehicle was traveling a reasonable speed and whether or not such speed proximately caused or contributed to the collision). The trial court erred when it put itself in the place of the jury and found that as a "matter of law" 40-45 miles per hour is not unreasonably slow (Tr. Transcr. 691:10-14) when the evidence presented was contradictory. This error prevented the Plaintiff from presenting her theory of liability regarding whether the trailer was creating an emergency situation, or hazard in the road or was disrupting the flow of traffic. It also put a peremptory instruction on the jury to find Utz at fault on the visibility issue. The trial court's actions constitute reversible error.

19. Trial court erred by ruling "as a matter of law that two and a half miles is insufficient to creating an immediate hazard"

It was error for the trial court to rule "I'm going to find, as a matter of law, that two and a half miles is insufficient to creating an immediate hazard." (Tr. Transcr. 692:10-11). The trial court summarily determined that the Defendants' truck had entered the road and traveled 2.5 miles and that distance would not "as a matter of law" be a sufficient distance to create an immediate hazard. The trial court would not consider the evidence of expert Corbitt who testified that the trailer's invisibility, coupled with slow speed on a dark, long, straight stretch

of highway did constitute an immediate hazard to all vehicles traveling behind it. Deciding whether the facts constituted an emergency or unusual situation is for the jury to determine. It cannot be ruled upon as a "matter of law" by the trial court. Whether particular circumstances rise to the level of an emergency or an unusual situation is a jury question. See, *Reese*, 792 So. 2d 992, 996 (Miss. 2001). Plaintiff's expert, Corbitt, presented testimony that the Defendant driver had plenty of time to be traveling at a speed which did not constitute a hazard if he had been on the road for 2.5 miles. (Tr. Transcr. 227:22-24) and his slow speed creates a problem to the normal flow of traffic (Tr. Transcr. 227:1-29). Because the trial court declared that "as a matter of law that two and a half miles is insufficient to creating an immediate hazard," it then denied Plaintiff's jury instruction P-18 (Tr. Transcr. 692:9-11) which prohibited the Plaintiff's theory regarding the immediate hazard issue and failure to yield the right of way issue that was supported by the Plaintiff's expert witness testimony. This ruling prevented the Plaintiff from having a jury instruction that represented her theories of liability. The trial court's actions constitute reversible error.

20. Trial court erred in allowing Defendant's expert Weaver to testify to fatigue and delayed perception

The trial court erred when it allowed the Defendants' expert to testify that Utz was fatigued and experiencing delayed perception. (Tr. Transcr. 588:4-11). The Plaintiff objected to this testimony because it was never offered as testimony by the expert (Tr. Transcr. 584:11- 587:27). The trial court overruled the objection (Tr. Transcr. 587:27). This testimony was improper for three reasons. 1. It was never offered by the Defendants' as an expert opinion as required by Miss. R. Civ. P. 26 expert disclosures; 2. The testimony was not offered "to a reasonable degree or certainty" but was posed as "could have been" which is not admissible; 3. It went to the issue of visibility of what the Plaintiff could have seen, an

area about which the court had precluded the Plaintiff's experts from testifying. When the transcript is reviewed the error is obvious.

> Q: Based on the testimony of Ephraim Woolf and what you have seen within the mass spectra date, do you have an opinion as to whether at the time of this accident that Preston Utz would have been **fatigued**?
> A: He **could have been**
> Q: Same question with respect to **delayed perception.**
> A: He **could have been** experiencing that also, yes.
> (Tr. Transcr. 588:4-12)

Plaintiff then objected and again the court refused to stop the improper testimony:

> Mr. Ogden: Your honor, can we approach?
> The Court: Yes, sir.
> The Court: I don't recall making any order on perception.
> Mr. Ogden: **He just said delayed perception. Perception is directly involved with visibility.**
> The Court: No, sir, it's not.
> (Tr. Transcr. 588:12-23)

And the Defendant then moved into the delayed reaction issue:

> Q: Same question with respect to **delayed reaction**?
> A: Yes, **he could have been.**
> (Tr. Transcr. 588:24-26)

In the pretrial hearing, the trial court had refused to let the Plaintiff's experts testify to the fatigue, perception and delayed reaction issue because it dealt with visibility (R. at 1389-1392).

But at trial, after objection by Plaintiff (Tr. Transcrp. 584:15 - 587:27) the court allowed this evidence (Tr. Transcr. 588:1-27). This improper evidence was used to support many of the Defendants' jury instructions D-1 (R. 1598), D-2 (R. 1599), D-3 (R. 1600), D-5 (R. 1601), and D-6 (R. 1602), all of which were procedurally not admissible. The trial court's actions constitute reversible error.

III. JURY INSTRUCTION ERRORS

21. Trial court erred in denying and admitting various jury instructions

"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 the 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.

22. Trial court erred in denying jury instruction P-7

The trial court erred in denying the Plaintiff's substantive instructions on the Plaintiff's theories of liability. Instruction "P-7" was not included in the jury instructions given to the jury. Instruction "P-7" was a proximate cause instruction. (R. 1488-1489). The trial court limited the proximate cause instruction to only include court instruction "C-10," which was both a misstatement of the law and incomplete. (R. 1594). The C-10 instruction stated if Utz's death was the result of "a remote, improbable, or extraordinary occurrence, although within the range of possibilities. . . ." This is not the law and is a faulty instruction. The standard of care applicable in cases of alleged negligent conduct is whether the party charged

with negligence acted as a reasonable and prudent person would have under the same or similar circumstances. *Donald v. Amoco Product. Co.*, 735 So .2d 161 (Miss. 1999); *Knapp v. Stanford*, 392 So. 2d 196, 199 (Miss. 1980); *Danner v. Mid-State Paving Co.*, 252 So. 2d 776 (Miss. 1965). P-7 incorporated this correct language but C-10 did not. The trial court's actions constitute reversible error.

23. Trial court erred in denying jury instruction P-10

The trial court erred by refusing Instruction "P-10" (R. 1494-1495). P-10 dealt with Defendants' failure to comply with the FMCSR. This instruction is a model jury instruction and directly instructs the jury regarding the Defendants' failure to comply with FMCSR. The evidence directly showed the Defendants were not in compliance with FMCSR but the trial court still refused the instruction (R. 1558). 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 problem is compounded because 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 actions constitute reversible error.

24. Trial court erred in denying jury instruction P-11

The trial court erred in refusing Instruction "P-11" (R. 1495-1496). Concerning the Defendants' failure to have reflective tape on the trailer. The instruction specifically stated that Defendants failed to comply with FMCSR 393.13 – requirement of reflective tape. The evidence supported this instruction. Plaintiff was entitled to this instruction but it was refused by the trial court. (R. 1559). 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 actions constitute reversible error.

25. Trial court erred in denying jury instruction P-12

The trial court erred in not allowing Instruction "P-12" (R. 1496-1497). This instruction dealt with Defendants' violation of FMCSR 393.13- failing to conduct a pre-trip inspection of trailer. Plaintiff was entitled to this instruction, but it was refused by the trial court. (R. 1560). The trial court substituted C-13 (R. 1597 and Tr. Transcr. 685:9-13) which was an improper instruction because is 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 actions constitute reversible error.

26. Trial court erred in not admitting jury instruction P-13

The trial court erred in not allowing Instruction "P-13" (R. 1500). This instruction dealt with Defendants' failure to conduct a post-trip inspection. Plaintiff was entitled to this instruction, but it was refused by the court. (R. 1561). The 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 actions constitute reversible error.

27. Trial court erred in denying jury instruction P-14

The trial court erred in not allowing Instruction "P-14" (R. 1502). This instruction dealt with Defendants' allowing the trailer to be operated in such a condition as to likely cause an accident in violation of FMCSR 396.7. Plaintiff was entitled to this instruction but it was refused by the trial court (R. 1562). 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 and visibility being a proximate cause of Utz's death. (See above subsections numbered 8, 9, and 10). But, 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.

28. Trial court erred in denying jury instruction P-15

The trial court erred in not allowing Instruction "P-15" (R. 1504). This instruction dealt with Defendants' failure to inspect and repair the trailer while in its control as required by FMCSR 396.3. Plaintiff was entitled to this instruction, but it was refused by the trial court (R. 1563). 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 and visibility were 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 actions constitute reversible error.

29. Trial court erred in not admitting jury instruction P-16

The trial court erred in not allowing Instruction "P-16," (R. 1506-1507). This was another model jury instruction modeled after MJI 19.3 (R. 1508) dealing with Defendants' failure to operate with reflective tape on the trailer and exercise reasonable care to inspect trailer when the evidence supported this instruction. (R. 1564). Plaintiff was entitled to this instruction but it was refused by the trial court (R. 1564). 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 and visibility being a proximate cause of Utz's death. (See above subsections numbered 8, 9, and 10). The trial court's actions constitute reversible error.

30. Trial court erred in submitting 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.

31. Trial court erred in denying jury instruction P-17 and for declaring as a "matter of law" that 40 mph speed limit is not "unreasonably slow"

The trial court erred in refusing Instruction "P-17" (R. 1509). This instruction dealt with the Defendants' operation of the truck and trailer at a **speed so slow** as to constitute a hazard in the road. The instruction required the jury to determine if the Defendants' truck was traveling at a reasonable speed and whether that speed constituted a hazard. The trial court refused the instruction. (R. 1565). The court refused to the allow Plaintiff's expert, Corbitt, to testify to the jury that the cause of the wreck was the Defendant was driving his truck too slow and that his slow movement created a hazard on the road. Plaintiff proffered the testimony that the cause of the wreck was Defendant "traveling slow on Highway 61, about 40 miles an hour, 25 miles less than the posted speed limit, and there's no conspicuity tape on the back of the trailer". (Tr. Transcr. 287:21-28). Corbitt testified that the tractor-trailer was operating at 40 mph which was too slow for the conditions and was hazardous because of the lack of reflective tape. (Tr. Transcr. 235:10-13). Plaintiff's expert, Corbitt, testified:

which the court said we couldn't talk about Preston Utz and his visibility. So that's not admissible. Also the 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).

The trial court admitted the instruction over objection (Tr. Transcr. 701:24). The court refused to allow Plaintiff's experts to put on evidence regarding the visibility of the trailer at night and what Utz would have been able to see. In its Order of April 1, 2009 (R. 1382-1393) the trial court took the unusual attempt at trying to limit the evidence in the Plaintiff's proof to destroy Plaintiff's visibility argument and causation argument. It limited Plaintiff's MDOT expert, Dunlap, from testifying on visibility and causation:

> [T]he court remains of the view that testimony **regarding the visibility of the trailer at night will not assist the trier of fact** and.... **prohibit this witness from testifying and/or offering opinions regarding the visibility of the trailer at night, whether the deceased would have been able to see the trailer prior to the accident and/or the cause of the accident,** such motion is hereby GRANTED.
> (R. 1389).

The Court also refused to let Plaintiff's FMCSR expert, Maxwell, testify regarding visibility and its cause in relation to the wreck.

> [T]he court remains of the view that testimony **regarding the visibility of this particular truck/trailer immediately prior to the accident will not assist the trier of fact. ...prohibit this witness from testifying and/or offering opinions regarding the visibility of the trailer at night, whether *the deceased* would have been able to see the trailer prior to the accident and/or the cause of the accident,** such motion is hereby GRANTED
> (R. 1391).

And finally it refused to allow accident reconstruction expert, Corbitt, to testify regarding his opinions about visibility and lack thereof. The trial court did say Corbitt could state what a reasonably prudent driver could see.

> As with the other witnesses, **the court is of the view that opinions regarding the visibility, or lack or visibility, of the truck at night would not assist the trier of fact**. For that reason, this witness will **not be permitted to offer testimony or opinions as to whether this truck was visible to *the deceased* prior to the accident**. However, the witness will be permitted to **offer an opinion regarding the visibility of the trailer from the point of view of a reasonably prudent driver**, including how far away 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).

The trial court limited the Plaintiff's experts to testifying to the reasonably prudent person standard regarding what someone may or may not have seen. (R. 1392; Tr. Transcr. 225:11). Expert Corbitt had to answer the questions on visibility and could only state by court direction under the "reasonably prudent driver" standard (Tr. Transcr. 252:1-13; 260:11-17). Since the trial court refused to allow the Plaintiff's experts to provide opinions regarding what Utz could have seen or did not see regarding visibility of the trailer, it is improper for the instruction to tell the jury to determine what Utz could have seen or did not see.

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). In Plaintiff's Response to Defendants' Motion to Strike Various Opinions of Plaintiff's Experts

(R. 455-1284) contained an explanation for each expert's qualifications (R. 457-465), methodology on causation (R. 465-469) and included each expert's depositions, written reports and updated affidavits explaining the methodology used by Mori (R. 578-579), Dunlap (R 616-617), Maxwell (R. 668-669), and Corbitt (R. 724-725). Plaintiff provided the court with the National Highway Transportation Safety Administration Report of March 2001 – The Effectiveness of Retro-reflective Tape (R. 726-789) which is the federal government findings, investigations and directives on the usefulness and visibility of reflective tape in drastically reducing rear-end collisions with trailers. Plaintiff produced industry documents, studies and other data used by the trucking industry and federal government (R. 801-862). 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.

41. Trial court erred by admitting jury instructions D-6

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 entered the instruction (Tr. Transcr. 702:4). The instruction states, "if you find from a preponderance of the evidence that the trailer pulled by Anthony Q. Hunter would have **been visible to** a driver keeping a proper lookout for vehicles in the roadway from a distance in which that driver reasonably could have avoided running into it, then it is **your sworn duty to find that Preston Utz was negligent."** This instruction is a generic visibility instruction version of D-5. But the problem is the

same. The trial court refused to allow the testimony by the Plaintiff's experts to support Plaintiff's explanation of the visibility issue. The court refused to allow Plaintiff's experts to put on evidence regarding the visibility of the trailer at night and what Utz could see. In its Order of April 1, 2009 (R. 1382-1393) the trial court took the unusual attempt at trying to limit the evidence in the Plaintiff's proof. It limited Plaintiff's MDOT expert, Dunlap, on visibility and its causation:

> [T]he court remains of the view that testimony **regarding the visibility of the trailer at night will not assist the trier of fact ....prohibit this witness from testifying and/or offering opinions regarding the visibility of the trailer at night, whether the deceased would have been able to see the trailer prior to the accident and/or the cause of the accident,** such motion is hereby GRANTED.
> (R. 1389).

The Court also refused to let Plaintiff's FMCSR expert, Maxwell, testify regarding visibility and its cause in relation to the wreck.

> [T]he court remains of the view that testimony **regarding the visibility of this particular truck/trailer immediately prior to the accident will not assist the trier of fact. ...prohibit this witness from testifying and/or offering opinions regarding the visibility of the trailer at night, whether *the deceased* would have been able to see the trailer prior to the accident and/or the cause of the accident,** such motion is hereby GRANTED
> (R. 1391).

And finally it refused to let Plaintiff's accident reconstruction expert, Corbitt, to testify regarding his opinions about visibility and lack of it. The court only allowed Corbitt to state what the view of a reasonably prudent driver would be.

> As with the other witnesses, **the court is of the view that opinions regarding the visibility, or lack or visibility, of the truck at night would not assist the trier of fact.** For that reason, this witness will **not be permitted to offer testimony or opinions as to whether this truck was visible to *the deceased* prior to the accident.** However, the witness will be

> permitted to **offer an opinion regarding the visibility of the trailer from the point of view of a reasonably prudent driver**, including how far away 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).

The trial court limited Plaintiff's experts to testifying to the reasonably prudent person standard regarding visibility (R. 1389-1392; Tr. Transcr. 225:11). Expert Corbitt had to answer the questions on visibility and only could state by court direction under the "reasonably prudent driver" standard (Tr. Transcr. 252:1-13; Tr. Transcr. 260:11-17). The trial court limited Plaintiff's experts' testimony on what Utz could have seen or did not see making the instruction improper. It required the jury determine what would have been visible to a reasonably prudent person and then find "then it is your sworn duty to find that Preston Utz was negligent." This instruction is defective because it mixes the reasonable person with Utz's personal experience and is peremptory

The statement in the first paragraph "it is your sworn duty to find that Preston Utz was negligent" is also peremptory as stated above.

42. Trial court erred in admitting jury instruction C-19 (Special Interrogatory)

The trial court erred in allowing the special interrogatory instruction C-19 (R. 1603). The instruction was incorrect, a misstatement of the law and misleading to the jury. The instruction states the Defendants were negligent in failing to comply with the FMCSR but then requires the jury to find that the failure was a proximate cause of Utz's injuries. This is impossible since the trial court refused to allow the Plaintiff put on evidence that the violation of the FMCSR was the cause of Utz's death. Based on the trial court's improper limiting of the Plaintiff's evidence and theories of liability it was impossible for the jury to find any causation because the court would not allow this evidence.

43. Trial court erred in admitting cumulative instructions D-1, D-2, D-3, D-5 and D-6

The trial court erred in allowing the Defendants' substantive instructions "D-1"(C-14), "D-2" (C-15), "D-3" (C-16), "D-5"(C-17) and "D-6"(C-18) (R. 1598-1602). The instructions were cumulative and when considered as a whole, put an absolute duty on Utz to see the trailer and avoid the accident which was peremptory in nature. The instructions as a group created a strict liability standard, were a misstatement of the law and the facts and peremptory directive to the jury that was not supported by the evidence. The instructions were compound instructions putting a greater duty on the Plaintiff than the law allows. The instructions did not take into consideration the admitted fault of the Defendants. As stated above the instructions directed the jury to find against the Plaintiff while they failed to address the Plaintiff's theory of liability about the visibility of the trailer and the FMCSR violations and the causation issue regarding the Defendants' liability. The Defendants' testimony to support these instructions came from inadmissible testimony.

Jury instructions are read as a whole. Plaintiff's theories and Defendants' theories of liability should be allowed in the jury instructions in order that the jury be correctly instructed. *Jackson v. Griffin*, 390 So. 2d 287, 289 (Miss. 1980). Plaintiff's companion instructions should have been given. "Both parties are entitled to have the jury instructed as to the law as it applies to their competing theories of the case." *Widdon v. Smith*, 822 So. 2d at 1060, 1065 (Miss. Ct. App. 2002). The trial court's actions constitute reversible error.

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 22 day of June, 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 22 day of June, 2009

J. Ashley Ogden
J. Ashley Ogden