IN THE SUPREME COURT OF MISSISSIPPI

No. 2008-CA-01083

SIDHARTH SOLANKI, INDIVIDUALLY, AND AS WRONGFUL DEATH BENEFICIARY; DEVESHA S. SOLANKI AND AVANI S. SOLANKI, MINORS BY AND THROUGH THEIR FATHER AND NATURAL GUARDIAN, SIDHARTH SOLANKI, AND NEHA SOLANKI, WRONGFUL DEATH BENEFICIARIES OF NILIMA SOLANKI, DECEASED, AND ALL OTHER WRONGFUL DEATH BENEFICIARIES OF NILIMA SOLANKI, DECEASED,

Appellants

vs.

MELVIN TYRONE ERVIN AND THE MERCHANTS COMPANY D/B/A MERCHANTS FOODSERVICES

Appellees

On Appeal from the Circuit Court of the
First Judicial District of Hinds County, Mississippi

BRIEF OF APPELLEES

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Melvin Tyrone Ervin and The Merchants Company d/b/a Merchants Foodservices, certify that the following listed persons and/or entities have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Sidharth Solanki, Appellant.
2. Devesha S. Solanki, Minor by and through her Father and Natural Guardian, Sidharth Solanki, Appellant.
3. Avani S. Solanki, Minor by and through her Father and Natural Guardian, Sidharth Solanki, Appellant.
4. Neha S. Solanki, Appellant.
5. Melvin Tyrone Ervin, Appellee.
6. The Merchants Company d/b/a Merchants Foodservices, Appellee.
7. The Honorable William Coleman, Circuit Court Judge of Hinds County, Mississippi.
8. Don H. Evans, Attorney for Appellant.
9. Roy H. Liddell, Attorney for Appellees.
10. J. Spencer Young, Jr., Attorney for Appellees.
11. Wells Marble & Hurst, PLLC, Attorneys for Appellees.

Respectfully Submitted,

_____

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FORM OF CITATIONS TO THE RECORD

1. Citations to "Tr." are to pages of the transcript in Volumes 9 through 12 of the record.

2. Citations to "CP" are to the clerks papers in Volumes 1 through 8 of the record.

3. Citations to "CP Supp." are to the clerks papers in Supplemental Volume 1 of the record.

4. Citations to "Ex." refer to exhibits introduced at trial, which are marked in the record as such.

5. Citations to "RE-D" are to pages in Appellees' Record Excerpts. Corresponding citations to the record for each item in these record excerpts are set forth in a table of contents to Appellees' Record Excerpts.

6. Citations to "RE-P" are to pages in Appellants' Record Excerpts.

STATEMENT OF THE CASE

This case arises from an auto accident that occurred on March 29, 2007, on I-220 in Jackson, Mississippi, when a tractor-trailer driven by Melvin Ervin ("Ervin") for The Merchants Company ("Merchants") collided with a car driven by Nilima Solanki ("Solanki"). Solanki died, and her heirs brought suit in the Circuit Court of Hinds County, alleging wrongful death.

On April 10, 2008, after weighing all the evidence presented at trial, a qualified and impartial panel of jurors returned a verdict in favor of Ervin and Merchants (collectively "Merchants"). (CP 991-92.) The verdict was not against the overwhelming weight of evidence, but instead was based on substantial evidence from which the jury fairly and rationally concluded that neither Ervin nor Merchants was negligent. Further, there was substantial evidence from which the jury rationally could have also concluded that Solanki was herself negligent, and that her negligence was the root cause of her death.[1]

Nevertheless, the Solankis filed a Motion for Judgment Notwithstanding the Verdict (JNOV) and/or for a Judgment on Liability and a New Trial on the Issue of Damages Only and/or for a New Trial on Both Issues of Liability and Damages. On May 2, 2008, the trial court properly denied the Solankis' post-trial motions. (CP 1073.) Merchants respectfully asks this Court to affirm this ruling. Legitimate factual issues existed for determination by the jury. The jury weighed the evidence and resolved all issues in favor of Merchants, as it had every reason to do. There was no basis for the Solankis' motion for a JNOV and it was properly denied.

The trial court also properly denied the Solankis' motion for a new trial. The jury was properly instructed according to the law, and the trial court conducted the proceedings in a fair

[1] Indeed, the jury's general verdict for Merchants could be premised: a) on a finding that neither Ervin nor Solanki was negligent; b) on a finding that Solanki was negligent; or c) on both a) and b) above. Because no written questions and answers were permitted (Merchants' request for same was rejected by the trial court), the only question is whether a general verdict for Merchants is based on sufficient evidence. (CP Supp. 1-35.) Given the record at trial, there was more than sufficient evidence to sustain the verdict.

and equitable manner. No reversible error was committed, if there was any error at all. The trial court acted well within its discretion in granting Jury Instruction No. 20 (D-8) (CP Supp. 34) and Jury Instruction No. 22 (D-11) (CP Supp. 35). These instructions fully and clearly state the duty of Nilima Solanki, pursuant to Miss. Code Ann. § 63-3-903, to move her vehicle off the highway when it is reasonably practicable to do so and allowed the jury to consider the negligence of Nilima Solanki, if any, in rendering its verdict. Accordingly, Merchants respectfully asks this Court to affirm the judgment in all respects.

STATEMENT OF THE FACTS

This wrongful death action brought by the Solankis arises from an automobile collision that occurred on March 29, 2007, on I-220 in Jackson, Mississippi, between Appellee/Defendant Melvin Tyrone Ervin ("Ervin") and Decedent Nilima Solanki ("Solanki"). (Ex. 10; RE-P 1.) At the time of the accident, Ervin was employed by Appellee/Defendant The Merchants Company ("Merchants") to transport groceries. (Tr. 156-58.) On the day of the accident, Ervin was driving a tractor-trailer, which consisted of a 1996 International truck and thirty-six foot trailer. Ervin was driving in the southbound lane of I-220 as part of his regular delivery route that comprised the areas of Jackson, Ridgeland, and Madison.[2] (Tr. 157-58.)

Solanki was also proceeding south on I-220, ahead of Ervin, at 70 miles per hour. (Tr. 310-11; Ex. 10.) For unknown reasons, Solanki's car began to stall. (Tr. 154-55, 288; Ex. 10.) Instead of steering her car to the shoulder of the road as it slowed, Solanki allowed her car to stop squarely within the left lane of travel. (Tr. 122-23, 177-78, 191-92, 312-14, 365-66, 376-77, 385-86, 388, 420-23, 456-57, 476.) Then, instead of exiting her vehicle, Solanki stayed in her car for several minutes talking on her cell phone. (Tr. 365-67, 376-77.) At trial, Don Williams, an unbiased nonparty witness, testified that before the accident, he observed Solanki's vehicle

[2] Appellees do not dispute that at the time of the accident, Ervin was acting within the course and scope of his employment with The Merchants Company. (Tr. 158.)

stopped in the left lane of travel for a minute to a minute and a half, sitting in the driver's seat with the door open, talking on her cell phone, and making no effort at all to move herself or the infant Kirsh[3] to a place of safety. (Tr. 365-67, 376-77, 386, 389-90.) The Solankis' own expert, James Hannah ("Hannah"), conceded that Nilima Solanki's actions created a hazard to Ervin and other travelers. (Tr. 314-16.) The jury also considered a GPS Location Report that showed the speed of Ervin's truck at 10:46 a.m. at 23 miles per hour and the following entry at 0 miles per hour (indicating approximately when the accident happened). (Ex. 38.) Alongside the GPS data, the jury considered cell phone records indicating that Nilima Solanki called her husband, Sidharth Solanki, at 10:41 a.m. (Ex. 17; Tr. 144-45, 153-54.) The cell phone records, when viewed in conjunction with the GPS Location Report, provided substantial and virtually uncontrovertible evidence that Sidharth Solanki was on the phone with Nilima Solanki for about four to five minutes before the collision, leaving ample time for Nilima Solanki to have moved to safety.

There was no barrier preventing Solanki from steering her vehicle onto the side of the road as it was stopping. (Tr. 192, 310, 312.) Instead, there was a paved shoulder and grassy median onto which Solanki could have steered. (Tr. 316.) Both the Solankis and Merchants introduced numerous photographs and diagrams depicting this paved shoulder. (Exs. 1, 4, 5, 8, 21, 22, 27, 33, 37, 39A, 39B, 41.) The Solankis' expert, Hannah, testified that he was not aware of any mechanical or other problem (engine lock, steering defect, etc.) that would have kept Solanki from steering onto the shoulder of the road. (Tr. 310-17.) The Solankis did not offer any evidence at trial to show Solanki was unable to steer her car to the shoulder of the road and then move to safety.

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[3] Due largely to Ervin's efforts to avoid the accident, the infant known as Kirsh was not injured. Kirsh was not the Solankis' child, but they claimed an intention to adopt Kirsh. Following the accident, however, Kirsh was returned to his natural mother.

Despite doing all he could to avoid a collision, the right front of Ervin's truck struck the left rear of the Solanki vehicle. (Tr. 191.) During his approach, Ervin was driving at a speed of no more than 70 miles per hour, which is the speed limit on I-220. (Ex. 38; Tr. 120-21, 125, 169, 424, 491-92.) As Ervin approached the Highway 49/Medgar Evers intersection, he moved from behind a slower-moving dump truck in the right lane to the left lane. (Tr. 159, 161-63, 167, 180, 182-83, 186-87.) Ervin consistently testified that he maintained a proper lookout while driving and first ascertained that it was safe to move from the right lane to the left lane before changing lanes. (Tr. 159, 161-63, 167, 170, 172, 174-76, 184-85, 188-91, 193-95.)

Ervin further testified that he saw Solanki's vehicle, but did not immediately perceive the vehicle as stopped. (Tr. 172, 175, 190.) This is not an unusual phenomenon given the natural expectation in such a context in which cars are expected to be moving and are moving. (Tr. 428-42.) However, once Ervin realized Solanki's car was stopped, he braked and attempted to move to the right lane to avoid her but was unable to move over due to traffic. (Tr. 175, 184-85, 188-89, 194-95.) Ervin then turned to the left and into the median, but was unable to avoid striking the left rear bumper of Solanki's vehicle. (Tr. 167, 170, 176, 178-79, 184, 186, 189.) Even the Solankis' expert agreed that it would have been more hazardous for Ervin to have steered more sharply and to have jackknifed before reaching the Solanki vehicle. (Tr. 308-09.)

Ervin testified that he began braking once he perceived Solanki's vehicle as a hazard and did everything he reasonably could to avoid the collision, including driving into the median and overturning his tractor-trailer. (Tr. 170, 174, 176, 184, 189-91, 193.) Both experts agreed that Ervin was traveling at 67 miles per hour (mph) as he approached the bridge over Medgar Evers

Boulevard, but that he had slowed to 55 mph just prior to the moment of impact. (Tr. 189, 287-88, 302, 326-332, 423-24, 458, 484.)[4]

The jury had every reason to find that Ervin was not negligent based on evidence of Ervin's inability to have avoided the accident. Merchants' expert, William Messerschmidt, testified that Ervin did everything reasonably possible to avoid the accident (Tr. 427-28, 440-42), and illustrated this to the jury using a diagram that showed that Ervin perceived and responded to the hazard of Solanki's stopped vehicle more quickly than the average driver would have responded under identical circumstances (Tr. 438-41, 488, 492; Exs. 39A & 39B). Messerschmidt also explained that a driver is not limited to a general 1½ to 2 second reaction time given a complex scenario such as existed in this case. (Tr. 429-42, 467-74, 480.)[5] In sum, there was ample evidence that Ervin acted reasonably in a difficult scenario that was not of his causing.

At the time of the accident, Ervin was of sound mind and was not under the influence of alcohol, drugs or any other substance that would have adversely affected his driving ability. (*Id.*) Nor was Ervin operating a cellular phone or any other device or doing anything that would have distracted him or adversely affected his driving ability. (Tr. 123, 190-92.) In the investigative report, which was introduced into evidence by the Solankis, the officer recorded his conclusion that there was "**No Apparent Improper Driving**" on Ervin's part. The jury, having heard all the evidence, had every reason to agree.

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[4] There was no testimony or evidence presented that Ervin was traveling 67 mph immediately before impact, as suggested by counsel for the Solankis, so as to indicate a failure of Ervin to have reacted.

[5] Notably, even applying a two second reaction time considered appropriate by the Solankis' expert (Tr. 240-43), Ervin only had one second to react given his speed (Tr. 304-07) and did react approximately 100 feet prior to reaching the Solanki vehicle (*Id.*).

SUMMARY OF THE ARGUMENT

The verdict of the jury in favor of Merchants was supported by ample evidence and should not be overturned. At trial, Merchants presented substantial evidence from which the jury rationally concluded that Ervin and Merchants were not negligent. Ervin consistently testified that he kept a proper lookout before changing lanes, immediately braked and took other evasive maneuvers when confronted with a hazardous circumstance, and did everything he reasonably could to avoid the collision, including driving into the median and overturning his tractor-trailer. Merchants' expert William Messerschmidt testified that Ervin's response is not uncommon given the context presented by a vehicle that is completely stopped in a lane of travel in a 70 mile per hour zone where a driver expects traffic to be moving. Messerschmidt also testified that Ervin perceived and responded to the hazard of Solanki's stopped vehicle much more quickly than the average driver would under identical circumstances. Messerschmidt explained to the jury that a driver is not limited to a basic 1 ½ to 2 second perception and reaction time as alleged by the Solankis given a complex scenario such as existed in this case. He testified that given this complex scenario, Ervin did everything reasonably possible to avoid the accident. In fact, both Messerschmidt and the Solankis' expert testified that if Ervin had turned more sharply to avoid the Solanki car, the Merchants vehicle would have jackknifed before reaching Solanki, leading to greater loss of life. The police officers investigating the accident determined there was "no apparent improper driving." Taking all of this evidence into account, the jury had a substantial body of credible evidence on which to base its decision.

There was also substantial evidence presented at trial from which the jury rationally could have concluded that Nilima Solanki was herself negligent, and that her negligence was the root cause of her death. It is undisputed in the record that Solanki's vehicle was completely stopped within the left, southbound lane of I-220, and that there was no barrier preventing

Solanki from steering her vehicle onto the side of the road as it was stopping. Moreover, there was no evidence of a sudden stop or mechanical fault that would have prevented Solanki from steering onto the shoulder as her car stopped. Instead, the evidence demonstrated that Solanki rolled to a stop within the left, southbound lane of travel. She then chose to remain in her vehicle. Solanki made no effort to exit her vehicle or move herself and her infant passenger to a place of safety, but instead called her husband and talked for several minutes by cell phone.

The trial court was well within its discretion in granting Jury Instruction No. 20 (D-8) and Jury Instruction No. 22 (D-11), as these instructions accurately state the duty Nilima Solanki had, pursuant to Miss. Code Ann. § 63-3-903, not to allow her vehicle to stop in the interstate roadway and remain there as occurred in this case. In doing so, Nilima Solanki was negligent and caused the subject loss.

ARGUMENT

I. The verdict was not against the overwhelming weight of the evidence and was not the product of bias or prejudice; therefore, the Solankis' post-trial motions were properly denied.

A. Standard under Mississippi law to sustain a motion for JNOV.

A jury's verdict should be affirmed unless it is so against the overwhelming weight of the evidence that to allow it stand would sanction an unconscionable injustice. *Baker Donelson Bearman & Caldwell, P.C. v. Muirhead*, 920 So. 2d 440, 449 (Miss. 2006). Only in the rare and extreme case when the verdict of the jury is irrational and against the overwhelming weight of the evidence should it be overturned. *Id.* A verdict is deemed against the overwhelming weight of the evidence only when no reasonable hypothetical juror could have reached the conclusion of the jury. *Blossman Gas, Inc. v. Shelter Mut. General Ins. Co.*, 920 So. 2d 422, 426 (Miss. 2006) (citing *Brandon HMA, Inc. v. Bradshaw*, 809 So. 2d 611, 616 (Miss. 2001)). If the evidence is such that fair minded jurors "might have reached different conclusions," the verdict of the jury

must be affirmed. *Coho Resources, Inc. v. Chapman*, 913 So. 2d 899, 904 (Miss. 2005). And, in reviewing a jury verdict, all evidence must be viewed in a light most favorable to support the verdict. *Johnson v. St. Dominics-Jackson Memorial Hosp.*, 967 So. 2d 20, 22 (Miss. 2007); *see also Miss. Transp. Comm'n v. SCI, Inc.*, 717 So. 2d 332, 338 (Miss. 1998) (The evidence is considered "in the light most favorable to the appellee, giving the appellee the benefit of all reasonable inferences that my reasonably be drawn from the evidence.").

Another guiding principle is that in evaluating the legal sufficiency of the evidence, great deference must be given to the findings of the jury as to any conflicting facts. *See, e.g., Johnson v. St. Dominics-Jackson Memorial Hospital,* 967 So. 2d at 23 ("A jury's verdict is given great deference by this Court, and conflicts of evidence presented at trial are to be resolved by the jury."); *see also Venton v. Beckham*, 845 So. 2d 676, 684 (Miss. 2004) ("[W]hen the evidence is conflicting, we defer to the jury's determination of the credibility of witnesses and the weight of their testimony.") (quoting *Ducker v. Moore*, 680 So. 2d 808, 811 (Miss. 1996)).[6]

In *Johnson*, the Court poignantly noted that the jury was free to accept or reject any or all of the testimony and evidence presented, and where it chose to accept the testimony that supported the defendant and rendered a verdict in its favor, the jury's verdict should stand. *Id.*; *see McFarland v. Entergy Mississippi, Inc.*, 919 So. 2d 894, 906 (Miss. 2005) ("It is a well-established principal that the jury should be the sole judges of fact. The right to a trail by jury is guaranteed to every citizen of this state by Miss. Const. Art. 3, § 31, and the limited power of the trial court to review a jury's verdict is function of constitutional mandate. Fact determination should be left to reasoning of a jury of one's peers.") (citing *Jackson v. Locklar*, 431 So. 2d 475, 478 (Miss. 1983)).

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[6] *See* Court's Instructions C-1 (Jury Instruction No. 1) (CP Supp.1-3), C-2 (Jury Instruction No. 2) (CP Supp. 4), C-5 (Jury Instruction No. 8) (CP Supp. 7), Plaintiffs' jury instruction P-8 (Jury Instruction No. 4) (CP Supp. 14), which properly instructed as to the jury's prerogative to weigh evidence.

1. <u>There was substantial evidence presented at trial from which the jury rationally concluded that Ervin and Merchants were not negligent.</u>

At trial, Merchants offered substantial and consistent testimony that Ervin kept a reasonable lookout when changing lanes and did everything he reasonably could to avoid the accident with Nilima Solanki, including risking his own life by driving into the median and overturning his tractor-trailer. (Tr. 159, 161-63, 167, 170, 172, 174-76, 184-85, 188-91, 193-95.) Ervin further testified that although he did not initially perceive Solanki's vehicle as stopped in the lane of travel, upon realizing Solanki was stopped, Ervin immediately applied his brakes and steered to avoid the collision. (Tr. 167-68, 170, 174, 176, 178-79, 184, 186, 189-91, 193.) Ervin said: "I done everything possible that I could to avoid hitting the vehicle by slowing the truck down and even by trying to go around—around the vehicle to keep from hitting the vehicle," (Tr. 170.); and, "I done everything I could do to keep from hitting it. It was just a stalled car on the highway." (Tr. 189.)

There was no evidence that Ervin was speeding, under the influence of alcohol or drugs or doing anything at all that would have impaired his driving ability. (Exs. 10, 38; RE-P 1; Tr. 120-21, 125, 169, 424, 491-92.) As Ervin approached the area of the accident, he was driving at a speed of no more than 70 mph, which is the speed limit on I-220. (*Id.*) Officer Maurice Kendrick, who investigated the accident, determined that there was "**No Apparent Improper Driving**" on the part of Ervin when filling out the Uniform Crash Report. (Tr. 108-31.) (Ex. 10; RE-P 1.)

The jury also heard substantial evidence in the testimony of Appellees' expert, William Messerschmidt, from which it rationally determined that Ervin was not negligent. (Tr. 390-493.) Messerschmidt testified that in his expert opinion Ervin did everything reasonably possible to avoid the accident. (Tr. 427-28, 438-41, 488, 492; Exs. 39A, 39B.) Messerschmidt further explained to the jury using a diagram, which was admitted into evidence by the Solankis (Exs.

39A, 39B), that Ervin perceived and responded to the hazard of Solanki's stopped vehicle much more quickly than the average driver under identical circumstances (Tr. 438-41, 488, 492). Ervin's ability to respond and react to the hazard presented by Nilima Solanki was exceptional and not negligent. *Id.* Taking all of this evidence into account, the jury certainly had a rational and sufficient basis for its decision.

As the Mississippi Supreme Court held in *McFarland*, the question is not what the reviewing court would have done had it been sitting as the jury, but whether the court can say that no reasonable jury could, on these facts, have found for the defendants. 919 So. 2d at 907. Based on the evidence, a reasonable hypothetical juror could well have reached the same conclusion as the jury in this case and found for Merchants. *Blossman Gas*, 920 So. 2d at 426. Accordingly, the findings of the jury should not be overturned, and the verdict for Merchants should be affirmed.

2. The Solankis' arguments concerning Ervin's alleged violation of Mississippi Code § 63-3-603 and related duties are inapplicable and provide no basis for disturbing the jury's verdict.

The Solankis were granted an instruction, over Merchants' specific objection (Tr. 508-20), based on Miss. Code Ann. § 63-3-603, which places a heightened duty on drivers relative to changing lanes in certain enumerated circumstances. *See* Jury Instruction No. 11 (P-26) (CP Supp. 20-21.) They argue that the jury had no choice but to find that Ervin violated Section 63-3-603. In making this argument, the Solankis overlook substantial evidence of Ervin's due care. Regardless, the Solankis' reliance on Section 63-3-603 is unfounded, though, because this statute is facially inapplicable to the location of the accident on Interstate-220, where it passes within the city limits of Jackson.

Section 63-3-603 provides: "Whenever any roadway has been divided into three (3) or more clearly marked lanes for traffic, *except through or bypassing a municipality*, the following rules

in addition to all others consistent herewith shall apply..." (emphasis added). Section 63-3-603 therefore has no application to this accident which occurred on I-220 where it passes "through or bypassing a municipality."[7]

In addition to being legally inapplicable, pronouncements of duties under Section 63-3-603, the cases on which the Solankis rely are distinguishable in every respect. In *Nobles v. Unruh*, 198 So. 2d 245 (Miss. 1967), the Court found sufficient evidence to warrant a peremptory instruction on the issue of liability under Miss. Code § 63-3-603. However, in *Nobles*, unlike the instant action, the defendant blindly pulled into the passing lane without first looking to see if it was safe to do so. The Court noted: "There is no dispute in the testimony, and [defendant] offered no evidence excusing or justifying his conduct. For this reason the lower court erred in overruling [plaintiffs'] request for a peremptory instruction." *Id.* at 247. In contrast, Ervin consistently testified that he maintained a proper lookout and first ascertained that it was safe to move from the right lane to the left lane before changing lanes. (Tr. 159, 161-63, 167, 170, 172, 174-76, 184-85, 188-91, 193-95.) Ervin never testified that he "blindly" changed lanes without looking to see if it was safe to do so. *(Id.)* Thus, there was a legitimate factual issue for the jury to weigh concerning whether Ervin properly changed lanes, and the jury resolved this issue in favor of Merchants, as it had every right to do.

The Solankis' reliance on *Cipriani v. Miller*, 160 So. 2d 87 (Miss. 1964), *McRee v. Raney*, 493 So. 2d 1299 (Miss. 1986), and *City of Jackson*, 349 So. 2d 527 (Miss. 1977) is similarly misplaced. Like the holding in *Nobles*, each of these cases involved circumstances

[7] *All* of the cases cited by the Solankis for the proposition that Ervin breached duties in changing lanes involve circumstances in which Section 63-3-603 (or its predecessor, Section 8187) was specifically held to apply. *See Nobles v. Unruh*, 198 So. 2d 245, 247 (Miss. 1967) ("By appellee's admission he was in violation of section 8187 at the time of the accident."); *McRee v. Raney*, 493 So. 2d 1299 (Miss. 1986) ("[Plaintiff] contends that [defendant] was negligent by virtue of having violated § 63-3-603..."); *City of Jackson v. Sullivan*, 349 So. 2d 527 (Miss. 1977) (same); *Mills v. Nichols*, 467 So. 2d 924 (Miss. 1985) (same); *Cipriani v. Miller*, 160 So. 2d 87 (Miss. 1984) (same). Accordingly, none of these cases apply or establish any duty to which Ervin could be held as a matter of law. As discussed, *intra*, they are factually distinguishable in any event.

implicating Section 63-3-603, and each is therefore legally inapplicable. These cases are also factually distinguishable in that in each case, the court found that it was uncontradicted that the driver blindly changed lanes and made no attempt whatsoever to see if it was safe to change lanes. Ervin consistently testified that he maintained a proper lookout and looked to see if it was safe before changing lanes. (Tr. 159, 161-63, 167, 170, 172, 174-76, 184-85, 188-91, 193-95.) The Solankis' reliance on *Mills v. Nichols*, 467 So. 2d 924 (Miss. 1985), is therefore unavailing for the same reasons.

Hence, even if Miss. Code § 63-3-603 were applicable to this action (despite plain language to the contrary), as explained above, Merchants presented substantial evidence that Ervin maintained a proper lookout and first ascertained that it was safe to move from the right lane to the left lane before changing lanes. (Tr. 159, 161-63, 167, 170, 172, 174-76, 184-85, 188-91, 193-95.) At worst, the evidence was conflicting; however, conflicts in evidence are for the jury to decide. *Johnson*, 967 So. 2d at 23. Thus, this issue was properly submitted to the jury, and the jury's resolution of this issue in favor of Merchants was not against the overwhelming weight of evidence.

3. The Solankis' arguments concerning the law regarding "rear-enders" provide no basis for disturbing the jury's verdict.

In Jury Instruction No. 10 (P-27) (CP Supp. 22-23), the trial court instructed the jury on the general duties imposed upon Melvin Ervin under Mississippi law regarding the operation of a motor vehicle. (Tr. 507-08.) Merchants presented substantial evidence that Ervin kept his vehicle under reasonable control, drove at a reasonable rate of speed, kept a reasonable and proper lookout for other vehicles on the roadway, and reasonably anticipated the presence of other vehicles on the roadway. (Tr. 159, 161-63, 167, 180, 182-83, 186-87, 189-91, Tr. 427-28, 438-41, 488, 492; Exs. 39A, 39B.) This evidence came from Ervin himself who consistently testified that he maintained a proper lookout before changing lanes, immediately began braking

once he perceived Solanki's vehicle as a hazard, and did everything reasonably possible to avoid the collision. (Tr. 159, 161-63, 167, 170, 172, 174-76, 184-85, 188-91, 193-95.)

As he approached the area of the accident, Ervin had been driving at a speed of no more than 70 miles per hour, which is the speed limit on I-220 (Ex. 38; Tr. 120-21, 125, 169, 424, 491-92.) Ervin was not operating a cellular phone or any other device or doing anything at all that would have distracted him or adversely affected his driving ability. (Tr. 123, 190-92.) Further, at the time of the accident, Ervin was of sound mind and was not under the influence of alcohol, drugs or any other substance that would have adversely affected his driving ability. (*Id.*) Merchants' expert William Messerschmidt testified that Ervin did everything reasonably possible to avoid the accident and responded to the hazard of Solanki's stopped vehicle much quicker than the average driver would under identical circumstances. (Tr. 427-28, 438-41, 488, 492; Exs. 39A, 39B.)

Nevertheless, the Solankis suggest that the following vehicle must have been negligent when a so-called "rear-ender" occurs. Specifically, they cite *White v. Miller*, 513 So. 2d 600 (Miss. 1987), for the proposition that "[a]bsent unusual conditions, following a driver who runs into the rear of a stopped car must have failed in one or more of his four duties and is negligent as a matter of law." (Appellants' Brief, p. 17.) However, in *White*, the Supreme Court rejected such a generalization, holding: "This Court has never adopted a *per se* rule that the driver of the following car is negligent if he collides with the rear of a preceding vehicle" and "should not be interpreted or applied to impose on a driver an absolute duty to avoid a collision." 513 So. 2d at 601. Moreover, the Court held that the issue of driver negligence is an issue for the jury unless no reasonable, hypothetical juror could disagree. *Id.* at 602.

The jury's resolution of this issue in favor of Merchants was not against the overwhelming weight of evidence as reasonable; hypothetical jurors could have disagreed on this

issue. Thus, the Solankis' reliance on *White* is inapposite and provides no basis for disturbing the jury's verdict.

4. The Solankis are merely re-arguing the weight of the evidence and credibility of witnesses.

The Solankis argue that "Ervin clearly made a lane change at a time when he did not first ascertain that the lane change could be safely made," pointing to "Ervin's three different versions as to when, where and why he made the lane change from the right-hand lane of I-220 into the left-hand lane of I-220." (Brief of Appellants at p. 18.) The Solankis then argue that "[a]ll versions regarding Ervin's lane change(s) clearly and unequivocally make him negligent and totally at fault for the subject accident." (*Id.*)

These conclusory assertions of Ervin's negligence by the Solankis are contradicted by a substantial body of evidence considered by the jury, and they ignore the jury's prerogative to weigh discrepancies in evidence and evaluate the credibility of witnesses. It was for the jury to resolve any perceived discrepancies in Ervin's testimony and it did so. *Venton v. Beckham*, 845 So. 2d 676, 684 (Miss. 2004) (deferring to the jury's determination of the credibility of witnesses and the weight of their testimony).

The jury was free to consider the Solankis' theory of conflicting testimony (which was ably argued by counsel for the Solankis) in rendering their verdict. But it was also at liberty to weigh and credit Ervin's consistent testimony that he maintained a proper lookout while driving and ascertained that it was safe to move from the right lane to the left lane before changing lanes. (Tr. 159, 161-63, 167, 170, 172, 174-76, 184-85, 188-91, 193-95.) The jury also had every reason to believe the testimony of Merchants' expert, William Messerschmidt, who demonstrated how the location of the lane change did not matter in his reconstruction of the accident and resulting opinions. (Tr. 449-50, 476-79.)

The Solankis' attempt to provoke a reevaluation of the credibility of Ervin's and Messerschmidt's testimony is improper. *See Scott Prather Trucking, Inc. v. Clay ex rel. Sanders*, 821 So. 2d 891, 821-22 (Miss. 2002) ("[T]he evidence is to be viewed in the light most favorable to the party in whose favor the jury decided. [citations omitted] That party is given all favorable inferences that can reasonably be drawn from that evidence. *If that evidence is contradicted, we will defer to the jury, which determines the weight and worth of testimony and the credibility of the witnesses at trial*.") (emphasis added) (citing *Odom v. Roberts*, 606 So. 2d 114, 121 (Miss. 1992)); *see also McFarland*, 919 So. 2d at 899-900 ("A motion for JNOV test the legal sufficiency of the evidence supporting the verdict, *not the weight of the evidence*.") (emphasis added).

Consequently, any inconsistencies in Ervin's testimony are not grounds for a JNOV or a new trial because these inconsistencies are to be examined and evaluated by the jury, not the court. *See Caruso v. Picayune Pizza Hut, Inc.*, 598 So. 2d 770, 773 (Miss. 1992) ("[E]xcept in the clearest cases, questions of negligence are for the jury. Of course, where the facts are disputed, negligence is a jury issue."); *see also City of Jackson v. Locklar*, 431 So. 2d 475, 478 (Miss. 1983). As the Mississippi Supreme Court found in *Blossman Gas, Inc.*, "This Court gives jury verdicts great deference," and "[a]ny conflicts in the evidence presented at trial are to be resolved by the jury." 920 So. 2d at 426.

The Solankis argue that "Ervin had a duty to have seen the Solanki car before he changed lanes" (Appellants' Brief, p. 19.), but they cite no authority for this supposed blanket duty. Under Mississippi law, Ervin unquestionably had a duty to maintain a proper lookout and abide by the rules of the road, which he did. In fact, Ervin testified that he *did* see the Solanki vehicle, but initially saw it as moving in the context in which he saw it. (Tr. 159, 161-63, 167-68, 174-75, 188-90.) Ervin consistently testified that he maintained a proper lookout while driving and

first ascertained that it was safe to move from the right lane to the left lane before changing lanes. (Tr. 159, 161-63, 167, 170, 172, 174-76, 184-85, 188-91, 193-95.) The jury reasonably believed Ervin's testimony in this regard.

The Solankis state that "the evidence indicates that he [Ervin] may not have even let off the accelerator, much less applied his brakes." (Appellants' Brief, p. 20.) This purely speculative and self-serving conclusion of the Solankis is in direct conflict with both Ervin's testimony at trial (Tr. 156-195) and expert testimony provided by William Messerschmidt (390-492). Ervin consistently testified at trial that he immediately applied his brakes once he perceived Solanki's vehicle as a hazard. (Tr. 170, 172, 174-176, 184, 189-91, 193). Ervin testified: "When I noticed it [Solanki's vehicle] being a hazard, that's when I began braking and trying to find an out as far as getting back over, and there was no way I could get back over;" (Tr. 175); "I started hitting my brakes once I noticed it was a hazard," (Tr. 176); "Once I noticed it—once I notice the vehicle I began to slow the truck—slow the truck down once I noticed the vehicle being a hazard." (Tr. 172).

The Solankis further argue, "There was absolutely no indication whatsoever in the evidence that physically showed that Appellee Ervin ever attempted to do anything to avoid the accident, other than jerk to the left at the last split-second" and cite the lack of skid marks as proof of Ervin's failure to brake. Again, Ervin testified at trial that he applied his brakes upon seeing Solanki's vehicle as a hazard. (Tr. 170, 172, 174-176, 184, 189-91, 193.) Furthermore, Merchants' expert William Messerschmidt explained to the jury that the lack of skid marks does not prove that Ervin did not apply his brakes. (451-56.) Messerschmidt testified that Ervin's truck had an anti-lock braking system (ABS), and that failing to leave skid marks after an

accident is common for vehicles with ABS even though a driver engages in emergency braking.[8] Messerschmidt stated, "Mr. Ervin testified that he hit his brakes, the tractor is equipped with antilock brakes and the fact that there aren't clear skid marks is consistent with it having antilock brakes, and that's a very common response to see steering and braking at the same time in accident reconstruction." (Tr. 452.) The jury had every reason to credit Messerschmidt's testimony in this regard.

The Solankis next make the spurious argument that "[h]ad there been cars to the right of Appellee Ervin, as well as a dump-truck that he had just passed, and if he were traveling at the rate of 65 miles per hour, then all of these other vehicles would have been involved in this wreck. In spite of this, not one witness came forward claiming to have seen this accident." (Appellants' Brief, p. 22.) Again, the Solankis are improperly arguing the weight of evidence rather than the legal sufficiency of the evidence. While the jury was free to consider the Solankis' theory in rendering their verdict, and presumably did so, it is possible that the cars and dump truck passed Ervin's and Solanki's vehicles as Ervin suddenly applied his brakes in an attempt to avoid the accident, and were beyond the area of impact when the collision occurred. Mere testimony of certain witnesses that they never saw a dump truck or other vehicles in no way proves that Ervin fabricated their existence. Witness Herbert Jones only saw Ervin's truck as it was turning over, and never even saw Solanki's car. (Tr. 206-17.) Witness Don Williams did not see the accident. (Tr. 367-68.) Nor did the investigating officer, Maurice Kendrick, who arrived after the accident occurred. (Tr. 107-30.) In rendering their verdict, the jury simply chose to believe Ervin's testimony over the Solankis' speculative theory. The conflicting theories of the parties does not show that the jury's verdict was against the overwhelming weight of the evidence, as the jury

[8] It bears noting that both the Solankis' expert, James Hannah, and Appellees' expert, William Messerschmidt, agreed that Ervin began steering to avoid the Solanki vehicle approximately 100 feet before impact, thus negating any conclusory argument that Ervin "jerked" the wheel at "the last split-second." (Tr. 282-83, 306-07, 436.)

was impaneled for the sole reason of weighing and evaluating these alleged factual inconsistencies cited by the Solankis.

The Solankis cite alleged inconsistencies in Ervin's testimony regarding the exact point at which Ervin began braking. However, Ervin repeatedly testified at trial that he does not remember the exact point at which be began to brake. (Tr. 168, 186.) However, when pressed at trial by the Solankis' counsel to mark the exact point he began braking, Ervin marked a spot on an aerial photograph that was not drawn to scale. Nonetheless, Ervin's core testimony remained unchanged, and any inconsistency concerning the exact point Ervin began braking in no way undermines the findings of the jury. Ervin consistently testified that he immediately began braking once he perceived Solanki's vehicle as a hazard and did everything he reasonably could to avoid the collision, including driving into the median and overturning his tractor-trailer. (Tr. 159, 161-63, 167, 170, 172, 174-76, 184-85, 188-91, 193-95.) As discussed above, mere inconsistencies in Ervin's testimony are not grounds for a JNOV or a new trial because these inconsistencies are to be examined and evaluated by the jury, and the jury must be presumed to have weighed the evidence in this regard.

The Solankis next complain that when the investigating officer interviewed Ervin after the accident, he did not record any mention of a dump truck in the summary of the interview. From this, the Solankis seem to argue that the jury must have wrongly ignored the Solankis' efforts to discredit Ervin. Of course, in rendering their verdict, the jury was free to consider the Solankis' theory. However, it was also reasonable for the jury to infer that the cars and dump truck identified by Ervin passed both Ervin's and Solanki's vehicle as Ervin applied his brakes in an attempt to avoid the accident. When asked, "Do cars sometimes drive through a scene and then just keep going and not come back and give reports," the Solankis' own witness, Officer Maurice Kendrick, responded, "Sometimes they do." (Tr. 127.) Thus, the mere fact that Ervin

failed to report (or the officer failed to record) the existence of the dump truck does not mean that Ervin fabricated its existence. Ervin's core narrative of the accident as reflected in the accident report lines up completely with his trial testimony on material points. (Ex. 10; RE-P 1.)

The Solankis next claim that if Ervin changed lanes to allow traffic to merge, then the jury must have found Ervin negligent. The fallacy of this theory was exposed by defense expert William Messerschmidt's testimony. As discussed above, Messerschmidt testified that in his expert opinion Ervin would *not* have had "plenty of time," as the Solankis claim, to perceive Solanki's vehicle as hazard in order to avoid the collision. (Tr. 427-42, 467-74, 480, 488, 492; Exs. 39A, 39B.) Messerschmidt's expert opinion was in no way premised on Ervin's testimony, but instead on the physical evidence from the accident. (Tr. 446-47, 465-67, 476-77, 479-80, 481, 489-90.) Messerschmidt testified that it is not imperative that one know exactly when Ervin changed lanes to calculate his response time and determine whether his response time was reasonable.

In rendering their verdict, the jury simply chose to believe Ervin's testimony over the Solankis' theory, and it had every reason to do so given the evidence. The conflicting theories of the parties do not show that the jury's verdict was against the overwhelming weight of the evidence, because the jury was impaneled for the sole reason of weighing and evaluating any factual inconsistencies cited by the Solankis. *Odom*, 606 So. 2d at 121. The jury properly weighed all of the evidence, and rationally found in favor of Ervin and Merchants. To hold otherwise would disregard the jury's prerogative to weigh evidence and find facts.

5. Defense expert William Messerschmidt's testimony provided substantial evidence from which the jury rationally concluded that Ervin was not negligent.

William Messerschmidt was properly qualified by the trial court as an expert in accident reconstruction, which the Court noted included expertise in driver perception and response time.

(Tr. 413-14.) This issue was critical to the outcome given the acknowledged hazard presented by Solanki's stopped car. (Tr. 314-16.) The Solankis argue that Messerschmidt somehow discredited himself by not relying exclusively on the testimony of Melvin Ervin in reconstructing the accident. This argument ignores the essential role of the expert—to reconstruct the accident using available physical evidence. Yet again, the Solankis are improperly arguing the weight of evidence and credibility of a witness rather than the legal sufficiency of the evidence.

A jury is free to accept or reject any expert testimony it chooses, and the jury in this case chose to accept the expert testimony of Messerschmidt. *See Tunica County v. Matthews*, 926 So. 2d 209, 215 (Miss. 2006) ("The opinions of experts . . . are not to be passively received and blindly followed, but are to be weighed by the *jury* and judge in view of all of the testimony in the case and *jury's* own general knowledge of affairs, and are to be given only such consideration as the *jury* may believe them entitled to receive.") (emphasis added); *Herring v. Poirrier*, 797 So. 2d. 797, 809 (Miss. 2000) ("the weight accorded to differing opinions of experts is a question of fact for the jury"); *see also Johnson*, 967 So. 2d at 23 ("A jury's verdict is given great deference by this Court and conflicts of evidence presented at trial are to be resolved by the jury. . . . The jury was free to accept or reject any or all of the testimony and evidence presented.") (emphasis added); *Venton*, 845 So. 2d at 684 ("When evidence is conflicting, we defer to the jury's determination of the credibility of witnesses and the weight of their testimony.").

The Solankis are of course correct in noting that Messerschmidt's testimony is not exclusively dependent upon Ervin's testimony. (Tr. 446-47, 465-67, 476-77, 479-81, 489-90.) Indeed, Messerschmidt made it clear that his opinions were based on the *physical evidence* from the accident scene. (*Id.*) Even so, it is significant that Ervin's core testimony of how the accident happened conformed in every material way with Messerschmidt's reconstruction of the

accident, and the jury plainly recognized this. Messerschmidt testified that a driver is not limited to a general 1½ to 2 second reaction time given a complex scenario such as in this case. (Tr. 429-42, 467-74, 480.) Messerschmidt explained that Ervin was not solely focused on what was directly in front of him because he had to watch for other hazards on the road such as the traffic merging from the right feeder lane in addition to routinely checking his mirrors and speedometer. (Tr. 429-42, 467-74, 480.) Further, Messerschmidt illustrated his theory to the jury using a diagram, introduced into evidence by the Solankis (Exs. 39A, 39B), which showed that Ervin responded much more quickly than the average driver under identical circumstances. (Tr. 438-41, 488, 492).

Plaintiffs ultimately resort to mischaracterizing Messerschmidt's testimony in a last-ditch effort to undermine the verdict. In particular, the Solankis argue:

> He [Messerschmidt] stated that Appellee Ervin responded 98.5 feet from impact. This means that the Appellees' expert was attempting to say that Ervin moved over 158 feet from impact, and that this was too close for Ervin to avoid hitting the stalled Solanki vehicle. This clearly makes Appellee Ervin 100% at fault for the subject accident. The point of impact was 223 feet south of the bridge. This means that Appellee Ervin had crossed the bridge and was 71 feet past the bridge when he moved over into the left-hand lane without nothing in front of him but the stalled Solanki vehicle.

(Appellants' Brief, p. 28-29.) This statement is a gross mischaracterization of the evidence presented at trial as Messerschmidt declined to speculate when the lane change occurred, because it was not necessary to his formulating opinions and reconstructing the accident. (Tr. 446-47, 449-50, 465-67, 476-81, 489-90.) In making this argument, the Solankis are merely drawing their own conclusions about the evidence, rather than examining the legal sufficiency of the evidence. In rendering their verdict, the jury had ample reason to credit Messerschmidt's testimony and to find for Merchants. Indeed, Messerschmidt's testimony was compelling evidence on which the jury based its verdict that Ervin did all he reasonably could to avoid the collision.

6. There was substantial evidence presented at trial of Nilima Solanki's negligence.

The Solankis argue that "the case was totally void of any evidence of negligence on the part of Nilima Solanki." (*Id.*, p. 10.) But this ignores the substantial body of evidence of Solanki's negligence that was presented at trial and was weighed by the jury in reaching its verdict.

Perhaps most significantly, it is undisputed that Solanki's vehicle was completely stopped within the left, southbound lane of I-220. (Tr. 122-23, 177-78, 191-92, 312-14, 365-66, 376-77, 385-86, 388, 420-23, 456-57, 476.) It is also undisputed that there was no barrier preventing Solanki from steering her vehicle onto the side of the road as it was rolling to a stop over hundreds of feet. (Tr. 192, 310, 312.) Instead, there was a paved shoulder and grassy median onto which Solanki easily could have steered. (Tr. 316.) Numerous photographs and diagrams depicting this paved shoulder were introduced by both Merchants and the Solankis. (Exs. 1, 4, 5, 8, 21, 22, 27, 33, 37, 39A, 39B, 41.) The Solankis' own expert Hannah testified that he was not personally aware of anything that would have kept Nilima Solanki from steering onto the shoulder of the road and does not dispute that her vehicle was completely stopped within the left lane of travel. (Tr. 310-17.) Hannah testified:

> Q. Well, let's talk about what we do know. We do know there are no skid marks of her car indicating that it came to a sudden stop or that she applied her brakes.
>
> A. No. There is no evidence of that.
>
> Q. There's no barrier to her moving off of the highway assuming her car is rolling forward, correct?
>
> A. There is no barrier, but her car was at the yellow line.
>
> . . .
>
> Q. You don't dispute the fact that her car was fully situated in the left southbound lane?

A. And I'll say it again. The car the evidence has it in the southbound left lane.

(Tr. 310-314.) Furthermore, there was no evidence of a sudden stop or mechanical fault that would have prevented Nilima Solanki from steering to the shoulder as her car stopped. (Tr. 312.) As shown above, Hannah testified that there was no evidence of skid marks to indicate that Solanki came to a sudden stop or applied her brakes. (Tr. 312.) Based on this evidence, a reasonable jury could well and reasonably infer that Nilima Solanki had ample opportunity to steer her vehicle off the roadway as it was stopping but chose to remain in the left lane of travel.

Under Mississippi law, as the jury was properly instructed (CP Supp. 34), a driver may not stop, park or leave a vehicle attended or unattended on a paved highway. Miss. Code Ann. § 63-3-903 (Rev. 1992). Section 63-3-903 provides, in pertinent part, as follows:

> (1) No person shall stop, park or leave standing any vehicle, whether attended or unattended, upon the paved or improved or main traveled part of any highway outside of a business or residence district when it is practical to stop, park or so leave such vehicle off such part of said highway. In every event, however, a clear and unobstructed width of at least twenty (20) feet of such part of the highway opposite such standing vehicle shall be left for the free passage of other vehicles and a clear view of such stopped vehicles be available from a distance of two hundred (200) feet in each direction upon such highway.
>
> (2) This section shall not apply to the driver of any vehicle which is disabled on the paved or improved or main traveled portion of a highway in such manner and to such extent that it is impossible to avoid stopping and temporarily leaving such disabled vehicle in such position.

Miss. Code Ann. § 63-3-903 (Rev. 1992).

In examining § 63-3-903, the Mississippi Supreme Court held, "The effect of the statute is to provide that no person shall stop his motor vehicle on the main traveled part of the highway when it is practical to stop off the highway." *Strong v. Freeman Truck Line, Inc.*, 456 So. 2d 698, 707-08 (Miss. 1984) (citing *Whitten v. Land*, 188 So. 2d 246, 249 (Miss. 1966); *Hankins v.*

Harvey, 160 So. 2d 63, 70-71 (1964); *Gulf Refining Co. v. Brown*, 16 So. 2d 765, 767 (1944)); *Sprayberry v. Blount*, 336 So. 2d 1289, 1293 (Miss. 1976).

Notably, the issue of whether it was reasonably practical for Nilima Solanki to steer or move her vehicle off the highway is a question of fact for the jury. In *Strong v. Freeman Truck Line, Inc.*, the Mississippi Supreme Court held,

> Our question is whether it was reasonably practical for [defendant] to pull his truck off of the main traveled right hand or westerly land of I-55, not whether it was merely possible for him to have done so. *This question is ordinarily one of fact to be submitted to the jury on proper instruction.* We may take such issues from the jury only where, under our familiar test, the facts are so clear that reasonable minds could not differ.

456 So. 2d at 708 (emphasis added).

It is thus immaterial *why* Nilima Solanki did not steer her vehicle onto the shoulder of the road. As the Court held in *Strong*, a jury need only consider whether it was *reasonably practicable* for a driver to move or steer his or her vehicle off the roadway instead of remaining in the lane of travel. 456 So. 2d at 708. The physical evidence made clear that it was not only possible but reasonably practical for Nilima Solanki to have steered to the shoulder as she rolled to a stop. The Solankis never produced any evidence showing that Solanki was unable to steer or move her vehicle onto the shoulder of the road as it was coming to a gradual stop. (Tr. 310-14.) The physical location and direction of the Solanki vehicle, combined with the absence of evidence of a sudden stop, provided substantial and probative evidence from which the jury rationally could have determined that Solanki negligently failed to steer to the shoulder to park. (*Id.*)

The Solankis argue, without any evidentiary support in the record, that "[Solanki] was maybe a little on the shoulder," "[t]he photographs, that were offered into evidence, clearly showed that she had almost gotten off," and "[t]he photographs show/indicate that Nilima Solanki was pointing towards getting off of the roadway and that she had almost gotten off."

(Appellants' Brief, p. 5.) The Solankis also contend that "Nilima Solanki got far enough to the left that Appellee Ervin should have been able to pass her on the right." (*Id.*) However, these allegations are in no way supported by the evidence, but are directly contradicted by the testimony of the Solankis' own expert Hannah. Again, it is undisputed by Hannah that Solanki's vehicle was completely stopped *within* the left lane of travel at the time of the accident. (Tr. 310-17.) While Hannah did testify that Solanki's vehicle was possibly "right at the yellow line," he never testified that the evidence shows that Solanki was anything but completely stopped *within* the left lane of travel. (Tr. 310-313.) When asked explicitly, "Do you have any evidence that her [Solanki] car was outside the fog line or outside the lane of travel of the interstate at any time before impact," Hannah responded, "Do not. Never have I said I did." (Tr. 310.) The Solankis allege that Trial Exhibits 33, 35, 36, and 37 indicate that Solanki was almost off the highway and that "[a]t least ½ of the fast lane was still open to her right." (Appellants' Brief, p. 35.) However, these exhibits plainly show that Solanki's vehicle was completely within the lane of travel at the time of the accident as the Solankis' own expert testified.[9] (Tr. 310-17.)

The Solankis next contend that Solanki did not have enough time to exit her vehicle and move to a place of safety before the collision. However, the jury heard, and was entitled to consider, overwhelming evidence to the contrary. Don Williams, an unbiased nonparty witness, testified that before the accident, he observed Solanki's vehicle stopped in the left lane of travel for a minute to a minute and a half. (Tr. 363-90.) He testified as follows:

> A. As I stated earlier, I was going to Presidential Hills, and when I got closer, I saw the car, and I saw that—I noticed that it was not moving. And so I just slowed, and I would have normally exited off and went north on 49, but I slowed

[9] Appellees' expert William Messerschmidt when asked "What, if anything, did the accident scene show regarding any effort by Mrs. Solanki to move her vehicle from the highway," responded, "Well, as has been testified and agreed to by everyone so far, the vehicle is approximately one feet—one foot from the yellow line. It is oriented predominately straight. That is not definitive or clear evidence of anything other that what it is, and anything more about her intention other than to be close to the yellow line, I mean, I'm not here to guess what was in her mind." (Tr. 422.)

down, and I got over on the shoulder right over here, and I just started going slow, and I noticed that car for a while just still sitting there. And what I did notice that it was stopped, you know, in the left-hand lane, and I noticed that the driver door was open, and someone sitting on the inside had the driver's door open with one leg on the ground and on the cell phone.

Q. All right. How long did you observe the person stopped with the door open on the cell phone?

A. *At least a minute* because I kind of got off, and it's kind of a shoulder of the road where you can get off here, and you kind of go pretty slow, and I exited on around, and *I probably viewed her for a while.* In this gravel right here I tried to pull over, you know, because I noticed that she was just in a bad spot.

Q. Sure. What do you mean by a bad spot?

A. Well, because when you're kind of coming south, that's kind of, like, a little incline there. When you come over it, if she was just sitting right there in a bad spot, you know, someone come up and hit her from behind.

. . .

Q. Was the person who was sitting in the car making *any effort* to get out of the car or move to a position of safety?

A. No.

(Tr. 366-67.)

Contrary to the Solankis' allegations, Williams' testimony is substantial evidence that Solanki's vehicle was in fact a significant hazard not only to Ervin but also to other travelers on I-220. (Tr. 363-90.) The evidence shows that Solanki was sitting in the driver's seat with the door open for at least a minute to a minute and a half, talking on her cell phone, and making no effort *at all* to move herself or the infant Kirsh to a place of safety. (Tr. 365-67, 376-77, 386, 389-90.)

The Solankis' expert James Hannah even conceded that Nilima Solanki's actions created a hazard to Ervin and other travelers. (Tr. 314-16.) He testified as follows:

Q. You don't dispute the fact that her car was fully situated in the left southbound lane?

A. And I'll say it again. The car the evidence has it in the southbound left lane.

Q. Correct

A. Right at the yellow line

Q. And where it was situated it presented a significant hazard both to Mrs. Solanki and to other drivers on the interstate?

A. That's what whenever a car is stopped on the highway that's what happens. *It was presenting a hazard to all of the traffic.*

(Tr. 314-15.)

Removing any doubt that Nilima Solanki had plenty of time to exit to safety, the jury considered a GPS Location Report that was introduced into evidence by the Solankis (Ex. 38) that showed the speed of Ervin's truck at 10:46 a.m. at 23 miles per hour and the following entry at 0 miles per hour (indicating when the accident happened). Alongside the GPS data, the jury considered cell phone records indicating that Nilima Solanki called her husband at 10:41 a.m. (Ex. 17; Tr. 144-45, 153-54.) The cell phone records, when viewed in conjunction with the GPS Location Report, provided substantial and virtually uncontrovertible evidence that Sidharth Solanki was on the phone with Nilima Solanki for about *four to five minutes* before the collision, leaving ample time for Nilima Solanki to have moved to safety had she been careful to do so. The jury reasonably could have concluded, based on this evidence, that Nilima Solanki was not making any effort to exit her vehicle and move herself or the infant Kirsh to a place of safety despite ample time and opportunity to do so.

In this regard, the jury had every reason to discredit Sidharth Solanki's testimony that he was only on the phone with Nilima Solanki for 20 seconds. *See Ill. Cent. R.R. Co. v. Hawkins*, 830 So. 2d 1162, 1183 (Miss. 2002) ("[W]hen evidence is in conflict, the jury is the sole judge of both the credibility of a witness and the weight of his testimony."); *Johnson*, 967 So. 2d at 23

("conflicts of evidence presented at trial are to be resolved by the jury"); *see also McFarland*, 919 So. 2d at 906 ("the jury should be the sole judges of fact").

The Solankis ultimately resort to gross speculation to defend the actions (or inactions) of Nilima Solanki that led to the accident. In particular, they argue:

> Based upon the location of the Solanki vehicle at the time it was hit, it can reasonably be inferred that Nilima Solanki was traveling in the right-hand lane of I-220 when her vehicle began to become disabled and stall and that she could not move over to the right, as there was traffic entering I-220 via the Medger Evers on-ramp, which was attempting to move over into the right-hand lane in which Nilima Solanki was traveling. It can further be inferred that, as Nilima Solanki could not exit the roadway to her right, she attempted to get left and simply could not make it all the way across the left-hand lane and onto the left shoulder of the roadway before her vehicle stopped moving. There could have been cars passing her on the right also.

(Appellants' Brief, pp. 34-35.) However, no such inferences are warranted in light of the evidence. Indeed, this is pure, unadulterated speculation with no evidentiary foundation whatsoever. The Solankis' own expert acknowledged the speculative nature of this particular theory. (Tr. 311-12, 316):

> A. We don't know whether she [Solanki] started in the left-hand lane or if she was actually in that right-hand lane and there were cars possibly beside her in the left-hand lane. We do not know that. . . . So we do not know. *I don't know of anyone that knows what lane, if she was in the right-hand lane or the left-hand lane when she began to try to get over.*
>
> Q. That's total speculation on your part?
>
> A. On anybody's part. *Nobody knows that.* I haven't seen any information that would give that.

(Tr. 311-12.)

Ultimately, there was substantial evidence of Nilima Solanki's negligence on which the jury could have based its verdict. However, it should be noted that the general verdict for the Appellees/Defendants in this case was not dependent upon the existence of substantial evidence of the negligence of Nilima Solanki. The Solankis' repeated argument that the verdict put "one

hundred percent negligence on the part of Nilima Solanki, Deceased" is not necessarily true. (Appellants' Brief, pp. 10, 18, 37, 38, 42, 43.) While the court granted Defendants' Jury Instruction D-8 (Jury Instruction No. 20) (CP Supp. 34) and D-11 (Jury Instruction No, 22) (CP Supp. 35), these instructions simply instructed the jury that it was *allowed* to consider the negligence of Nilima Solanki, if any, in rendering their verdict. However, in finding for the Merchants, the jury could have found that the Solankis' simply failed to meet their burden of proof without attributing any negligence to Nilima Solanki. *See* Jury Instruction No. 19 (D-6) (CP. Supp. 31-32). Thus, even if there were insufficient evidence to support the negligence of Nilima Solanki, which Merchants flatly denies, the general verdict for the Appellees/Defendants should still be affirmed based on the finding that Ervin was not negligent. *See Burr v. Mississippi Baptist Medical Center*, 909 So. 2d 721, 726 (Miss. 2005) ("The instructions are to be read together as a whole, with no one instruction to be read alone or taken out of context. A defendant is entitled to have jury instructions given which present his theory of the case."); *see also Nunnally v. R.J. Reynolds Tobacco Co.*, 869 So. 2d 373, 378 (Miss. 2004); *Payne v. Rain Forest Nurseries, Inc.*, 540 So. 2d 35, 40 (Miss. 1989). The Supreme Court has not found error in damage awards merely because of the jury's failure to explicitly assign percentages of fault. *Rose v. Cleary*, 748 So. 2d 172 (Miss. App. 1999) (*citing Leach v. Leach*, 597 So. 2d 1295, 1298-99 (Miss. 1992)).

B. Standard under Mississippi law to sustain a motion for new trial.

In considering a motion for a new trial, the Mississippi Supreme Court holds, "[A] new trial becomes appropriate when a trial court determines that error within the trial mechanism itself has caused a legally incorrect or unjust verdict to be rendered." *White v. Stewman*, 932 So. 2d 27, 33 (Miss. 2006); *see also Hamilton v. Hammons*, 792 So. 2d 956, 965 (Miss. 2001) ("The motion for a new trial has only been employed in rare cases when there would be injustice either

in allowing the verdict to stand or in granting a j.n.o.v.") (quoting *C&C Trucking Co. v. Smith*, 612 So. 2d 1092, 1099 (Miss. 1992)) (emphasis added). In *Ford Motor Co. v. Tennin*, the Court found that "a trial court should grant a motion for a new trial only when upon a review of the entire record the trial judge is left with a firm and definite conviction that the verdict, if allowed to stand, would work a miscarriage of justice." 960 So. 2d 379, 390 (Miss. 2007). In *Hamilton v. Hammons*, the Court held that justice requires a new trial only "when the verdict is against the overwhelming weight of the evidence, or when the jury has been confused by faulty jury instructions, or when the jury has departed from its oath and its verdict is a result from bias, passion, and prejudice." 955 So. 2d at 965.

1. <u>The Solankis' motion for a new trial was properly denied.</u>

Like the Solankis' motion for JNOV, the Solankis' motion for a new trial falls far short of that which is required under Mississippi law to nullify the verdict of the jury and order a new trial. (CP 1073.) The verdict was not the product of any error within the trial mechanism itself that has caused a legally incorrect or unjust verdict to be rendered. Nor is there any indication in the record that the jury was confused by faulty jury instructions. Indeed, the instructions granted by the trial court scrupulously adhered to Mississippi law. Nor is there any indication that the jury departed from its oath and rendered a verdict based on bias, passion or prejudice. Even if there were errors in the conduct of the trial, to require reversal, the error must be of such magnitude as to leave no doubt that the Solankis were unduly prejudiced. *Burr v. Mississippi Baptist Medical Center*, 909 So. 2d 721, 730-31 (Miss. 2005) (citing *Busick v. St. John*, 856 So. 2d 304, 308 (Miss. 2003)). Here, the Solankis can point to no instance of having been unduly prejudiced by any rulings of the trial court, and any supposed error relied upon by the Solankis is not of such magnitude as to warrant a new trial.

2. **The Trial Court did not err in granting Jury Instruction No. 20 (D-8).**

In response to the Solankis' arguments regarding Jury Instruction No. 20 (CP. Supp. 34), Merchants hereby incorporates all of the facts, law and arguments made in response to the Solankis' preceding arguments regarding evidence presented at trial supporting Nilima Solanki's violation of Mississippi Code § 63-3-903 for *stopping, parking* or *leaving* her vehicle on a paved highway when it was reasonably practicable for her to steer her vehicle onto the shoulder of the highway. Merchants was clearly entitled to a jury instruction on this issue. The Solankis readily acknowledge that "the question of whether it is practical to stop a motor vehicle off [the] highway pursuant to statute is ordinarily one of fact to be submitted to [the] jury on proper instructions." (Appellants' Brief, p. 32.) *See Strong*, 456 So. 2d at 707. The Solankis agree that this is an issue of fact for the jury unless "reasonable minds could not differ." (Appellants' Brief, p. 32.) Here, reasonable minds could differ as to whether it was reasonably practical for Solanki to steer her vehicle off the highway rather than remain parked in the lane of travel. Thus, this issue was properly submitted to the jury and resolved in favor of Merchants.

Further, Solanki's violation of § 63-3-903 constitutes negligence *per se* as Merchants is the class of persons § 63-3-903 was designed to protect and the injury to Merchants was the kind of injury § 63-3-903 was designed to prevent. *See Byrd v. McGill*, 478 So. 2d 302, 304-05 (Miss. 1985); *State Farm Auto Ins. Companies v. Davis*, 887 So. 2d 192, 194 (Miss. App. 2004). According to the Mississippi Supreme Court, § 63-3-903 was enacted by the legislature "to protect motorists on our highways." *Strong*, 456 So. 2d at 707. "They made unlawful conduct found to have been the frequent cause of accidents and were designed to deter that conduct. In sum, [§ 63-3-903] [was] intended to safeguard life and life and limb." *Id.*; *see Golden Flake Snack Foods, Inc. v. Thornton*, 548 So. 2d 382, 384 (Miss. 1989). As noted by the Supreme Court, "[i]t is much too late to question that [§ 63-3-903] furnish[es] the standard of care of a

reasonable man and that deviations constitute negligence per se." *Strong*, 456 So. 2d at 707, n. 7 (emphasis added).

The trial court was well within its discretion granting Merchants' jury instruction D-8 (Jury Instruction No. 20) (CP Supp. 34) and instructing the jury that Nilima Solanki had a duty under Mississippi law to steer or move her vehicle out of the lane of traffic if it was reasonably practicable for her to do so. This is clearly articulated law of Mississippi. The Solankis allege that "this instruction [D-8] basically stated that it was illegal to park your vehicle on a highway unless you could show it was impossible to have parked it off the roadway." (Appellants' Brief, p. 30.) In doing so, however, the Solankis mischaracterize Merchants' jury instruction D-8 (CP Supp. 34), as Merchants purposefully refrained from using the word "impossible" and used the term "reasonably practicable" as instructed by the Court in *Hankins v. Harvey*, 160 So. 2d at 70-71. Thus, the instruction fully and clearly states the law of Mississippi as to Solanki's duty.

Finally, at trial, the Solankis' counsel made a general objection of "misleading" to this jury instruction but failed to articulate any specific basis for such objection. (Tr. 533-34.) The Solankis' counsel stated, "I think it's misleading, confusing, and I don't think it's based upon testimony in the court." (Tr. 533.) This general objection by the Solankis' counsel is insufficient to support the Solankis' assignment of error. Therefore, the Solankis' counsel waived any error in the instruction. *Nunnally*, 869 So. 2d at 378.

3. The Trial Court did not err in granting Jury Instruction No. 22 (D-11).

In response to the Solankis' arguments regarding Jury Instruction No. 22 (D-11) (CP Supp. 35), Merchants hereby incorporates all of the facts, laws and arguments made in response to the Solankis' preceding argument regarding evidence presented at trial supporting the negligence of Nilima Solanki. The Solankis repeatedly assert that "there is no way under this set of facts that the jury could have rationally reached the decision that Appellee Ervin was not even

1% at fault and that the wreck was 100% Nilima Solanki's fault." (Appellants' Brief, pp. 37, 42.) Further, the Solankis allege, "One can clearly see that the Court did not see any negligence on the part of Nilima Solanki, and for the jury to have assessed her with 100% of the negligence evidences bias or prejudice on the party of the jury or shows that they were just confused as to what the law was and as to how they were suppose to rule." (*Id.*, pp. 38, 42.)

First, the Solankis are wrong in concluding that the jury necessarily placed 100% of the fault on Nilima Solanki in rendering a verdict in favor of Merchants. A general verdict for the Appellees/Defendants in this case was not dependent upon the existence of substantial evidence of the negligence of Nilima Solanki. While the court granted Defendants' Jury Instruction D-8 (Jury Instruction No. 20) (CP Supp. 34) and D-11 (Jury Instruction No, 22) (CP Supp. 35), these instructions simply instructed the jury that it was *allowed* to consider the negligence of Nilima Solanki, if any, in rendering their verdict. However, in finding for the Defendants, the jury could have found that Ervin was not negligent, without attributing any negligence to Nilima Solanki. *See* Jury Instruction No. 19 (D-6) (CP. Supp. 31-32). Thus, even if there were insufficient evidence to support the negligence of Nilima Solanki, which Merchants flatly denies, the general verdict for the Appellees/Defendants should still be affirmed based on the finding that Ervin was not negligent. *See Wallace*, 672 So. 2d at 729 (On appeal, we do not review jury instructions in isolation; rather, they are read as a whole to determine if the jury was properly instructed. [citations omitted] Therefore, defects in specific instructions do not require reversal where all instructions taken as a whole fairly-although not perfectly-announce the applicable primary rules of law); *see also Burr*, 909 So. 2d at 726; *Nunnally*, 869 So. 2d at 378; *Payne*, 540 So. 2d at 40.

Second, as Merchants has already discussed at length, Merchants presented substantial evidence at trial supporting the negligence of Nilima Solanki, both in the absence of any mechanical or physical impediment to her steering off the road; the location and direction of the

car where she stopped (indicating she was not coasting toward the median but rather straight ahead); and evidence that Solanki remained in her car for several minutes after stopping in the roadway instead of moving to safety. (Tr. 122-23, 126, 177-78, 191-92, 310, 312-16, 365-67, 376-77, 385-86, 388, 420-23, 456-57, 476.) Further, the Solankis own expert James Hannah conceded that Solanki's actions created a hazard to Ervin and other travelers on I-220. (Tr. 314-16.) Thus, there was substantial evidence in the record from which the jury could have found Solanki 100% negligent. Jury Instruction No. 22 (CP Supp. 35) is based upon Miss. Code Ann. § 11-7-15, which allows a jury to consider the comparative negligence of *both parties* in rendering their verdict. *See Munn v. Algee*, 924 F.2d 568 (5th Cir. 1991) ("Under Mississippi law, an injured plaintiff may not recover for damages that he did not take reasonable efforts to avoid").

The Solankis argue, "One can clearly see that the Court did not see any negligence on the part of Nilima Solanki." (Appellants' Brief, p. 38.) However, the trial court granted Jury Instruction No. 22, permitting consideration of Solanki's negligence. (Tr. 523-28, 535.) The trial court never found that there was no negligence on the part of Nilima Solanki as a matter of law. This issue was subsequently revisited in consideration of the Solankis' post-trial motions at which point the court again determined that Jury Instruction No. 22 was properly granted. (CP 1073.)

Finally, the Solankis' instruction P-30 (Jury Instruction No. 23) (CP Supp. 27-28), like Jury Instruction No. 22 (CP Supp. 35), asks the jury to consider the comparative negligence of both parties in rendering their verdict. The Solankis can hardly object to the jury being instructed on the issue of comparative negligence as they themselves submitted, and were granted, an instruction on this issue. (Tr. 523-24.) Any claimed error was therefore waived by the Solankis.

II. The Trial Court properly denied the Solankis' Motion for Directed Verdict.

In considering a motion for directed verdict, a trial court must consider whether sufficient evidence has been presented "to create a question of fact with which reasonable jurors could disagree." *Canadian National/Illinois Central Railroad Co. v. Hall*, 953 So. 2d 1084, 1090 (Miss. 2007). As the Mississippi Supreme Court holds, "Factual disputes arise when one party swears to one version of the matter in issue and another says the opposite. . . . A directed verdict is inappropriate when questions of fact exist." *Wallace v. Thornton*, 672 So. 2d 724, 727 (Miss. 1996); *see Regency v. Nissan, Inc.*, 678 So. 2d 95, 99 (Miss. 1995) (same). Here, the trial court properly denied the Solankis' Motion for Directed Verdict as genuine issues of fact existed for submission to the jury. (Tr. 494-95.) For purposes of brevity and avoidance of repetition of Merchants' previous arguments, Merchants hereby incorporates all of the facts, laws and arguments made in response to the Solankis' preceding arguments regarding denial of the Solankis' motion for JNOV and new trial. As explained at length in the preceding sections, Merchants presented substantial evidence that Ervin ascertained whether it was safe to change lanes before doing so, maintained a proper lookout, kept his vehicle under control, and did everything reasonably possible to avoid the accident with Solanki. (Tr. 159, 161-63, 167, 170, 172, 174-76, 184-85, 188-91, 193-95, 427-28, 438-41, 488, 492; Exs. 39A, 39B.)

The Solankis again rely on the holdings in *Nobles*, 198 So. 2d 245, and in *Cipriani*, 160 So. 2d 87, to argue that the trial judge should have granted the Solankis' request for a preemptory instruction on the issue of liability. However, as previously explained, these cases are distinguishable and inapplicable to this action. In both *Nobles* and in *Cipriani*, it was undisputed that the defendant driver *blindly* pulled into the passing lane without first looking to see if it was safe to do so. However, in this case, Ervin never testified that he "blindly" changed lanes without looking to see if it was safe to so. (Tr. 159, 161-63, 167, 170, 172, 174-76, 184-85,

188-91, 193-95.) Ervin affirmatively and consistently testified that he maintained a proper lookout and looked to see if it was safe before changing lanes. (*Id.*) Thus, in this case, there was a legitimate factual issue for the jury to weigh concerning whether Ervin properly changed lanes, maintained a proper lookout, and kept his vehicle under control, and the jury resolved these issues in favor of Merchants as it had every right to do. Accordingly, the trial court properly denied the Solankis' request for a preemptory instruction.

The standard for review of a denial of directed verdict is the same as that of a denial of a motion for JNOV, in that "[t]he evidence is considered in the light most favorable to the appellee, giving the appellee the benefit of all reasonable inferences that may reasonably be drawn from the evidence." *Hall*, 953 So. 2d at 1092; *see Entergy Mississippi, Inc. v. Bolden*, 854 So. 2d 1051, 1055 (Miss. 2003) (same); *see also Regency*, 678 So. 2d at 99 ("When contradictory testimony exists, this Court will defer to the jury, which determines the weight and worth of testimony and credibility of the witness at trial."). Under this standard, the trial court was manifestly correct in declining to direct a verdict in favor of the Solankis.

CONCLUSION

For all the foregoing reasons, the trial court properly denied the Solankis' Motion for Judgment Notwithstanding the Verdict (JNOV) and/or for a Judgment on Liability and a New Trial on the Issue of Damages Only and/or for a New Trial on Both Issues of Liability and Damages. The verdict was not against the overwhelming weight of evidence, as the record clearly reflects that the verdict was based on substantial evidence from which the jury fairly and rationally concluded that neither Ervin nor Merchants was negligent. Further, there was substantial evidence from which the jury rationally could have concluded that Nilima Solanki, the Appellants' decedent, was herself negligent and that her negligence was the root cause of her death. Merchants respectfully asks this Court to affirm this ruling.

Additionally, Merchants respectfully asks this Court to affirm the trial court's denial of the Solankis' Motion for Directed Verdict. In this case, legitimate factual issues existed for the jury, and the jury resolved these issues in favor of Merchants as it had every right to do. The verdict should not be disturbed as a matter of settled Mississippi law. Further, there is no basis whatsoever for a new trial. The jury was properly instructed according to the law and the trial court conducted the proceedings in a fair and equitable manner. No reversible error was committed, if there was any error at all. Specifically, the trial court was well within its discretion in granting Jury Instruction No. 20 (D-8) and Jury Instruction No. 22 (D-11). These instructions fully and clearly state the duty of Nilima Solanki pursuant to Mississippi law regarding her duty pursuant to Miss. Code Ann. § 63-3-903 to move her vehicle off the highway when it is reasonably practicable to do so and allowed the jury to consider the negligence of Nilima Solanki, if any, in rendering its verdict.

Accordingly, Merchants respectfully asks this Court to affirm the rulings of the trial court and allow the jury verdict for Merchants to stand.

Respectfully submitted,

MELVIN TYRONE ERVIN AND THE MERCHANTS COMPANY D/B/A MERCHANTS FOODSERVICES

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CERTIFICATE OF SERVICE

I, Roy H. Liddell, one of the attorneys for Appellees, do hereby certify that I have this date served a copy of the foregoing Appellees' Brief via United States Mail, postage prepaid, to the following:

Hon. William Coleman
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Circuit Judge

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This the 18th day of February, 2009.

Roy H. Liddell

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