Case No. 2008-CA-01083

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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, THE MERCHANT COMPANY D/B/A MERCHANT FOODSERVICES, JOHN DOE PERSONS 1-10, AND JOHN DOE ENTITIES 1-10,
APPELLEES

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

BRIEF OF THE APPELLANTS

ORAL ARGUMENT REQUESTED

Submitted by:

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies 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 justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

I. Sidharth Solanki, Appellant;

II. Devesha S. Solanki, Minor by and through her Father and Natural Guardian, Sidharth Solanki, Appellant;

III. Avani S. Solanki, Minor by and through her Father and Natural Guardian, Sidharth Solanki, Appellant;

IV. Neha S. Solanki, Appellant;

V. Melvin Tyrone Ervin, Appellee;

VI. The Merchant Company, d/b/a Merchant Foodservices, Appellee;

VII. William Coleman, Circuit Court Judge of Hinds County, Mississippi;

VIII. Honorable Don H. Evans, Attorney for Appellants; and

IX. Honorable Roy Liddell, Attorney for Appellees.

RESPECTFULLY SUBMITTED, this the 22nd day of December, 2008

BY: 
DON H. EVANS

OF COUNSEL:

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2. Whether the trial court erred in not granting the *Appellants' Motion for a Direct Verdict in favor of the Appellants at the close of the Trial testimony and in Not Granting a Peremptory Instruction in Favor of the Appellants on the Grounds that the Appellees were Negligent as a Matter of Law in the Appellee, Melvin Ervin, made a Lane Change without first ascertaining that the lane change could be safely made, failed to keep and maintain a proper lookout, and failed to keep and maintain his vehicle under free and easy control.*

3. Whether the trial court erred in granting Appellees' Jury Instruction Number D-11, which was the Court's Jury Instruction No. 22.

4. Whether the trial court erred in granting Appellees' Jury Instruction Number D-8, which was the Court's Jury Instruction No. 20.

STATEMENT OF THE CASE

A. Nature of the Case

On or about March 29, 2007, Nilima Solanki was driving and operating her vehicle in a westerly direction on Interstate 220 in the City of Jackson, First Judicial District of Hinds County, Mississippi, when her vehicle suddenly went dead and stalled in the left-hand lane. Before Nilima Solanki could get her car off of the highway and before she could get herself and her baby out of the car, she was hit from the rear by the Appellee, Melvin Ervin **(hereinafter referred to as "Appellee Ervin")**. At the time of the wreck in question, Appellee Ervin was driving and operating an 18-wheeler belonging to the Appellee, The Merchant Company d/b/a Merchant Foodservices **(hereinafter referred to as "Appellee Company")**. Also, at the time of the wreck in question, Appellee Ervin was an employee who was on duty and who was working within the course and scope of his employment with Appellee Company. Appellee Ervin was traveling in the same direction as Nilima Solanki, but directly behind Nilima Solanki, when he carelessly, recklessly and negligently failed to pay attention to Nilima Solanki's vehicle in front of him, failed to maintain a safe following distance between he and the automobile in front of him, failed to slow his vehicle to a reasonable speed given the traffic conditions present then and there at the time, and failed to stop his vehicle behind Nilima Solanki, which was stopped in the left-hand lane, thereby colliding with the rear of Nilima Solanki's vehicle with great force, causing her death or he changed lanes at a time when it was unsafe to do so and rear-ended her.

B. Course of Proceedings and Disposition of the Court Below

The trial of the case sub judice was held before a jury of twelve commencing on April 8, 2008. The case was submitted to the jury on instructions delivered by the Court. The jury found

in favor of the Appellees, Melvin Ervin and The Merchant Company d/b/a Merchant Foodservices. Feeling aggrieved by the jury verdict, the Appellants filed a *Motion for Judgment Notwithstanding the Verdict, or, in the alternative, for a Judgment on Liability and a New Trial on Damages only, or, in the alternative, for a New Trial on both Liability and Damages.*

C. Statement of the Facts

This is a case brought by the Heirs at Law of Nilima Solanki, Deceased, for damages for her having been killed as a result of an automobile/eighteen-wheeler wreck on I-220 in Jackson, Mississippi, on or about March 29, 2007. Nilima Solanki had a two-year-old baby in the car with her when, for some unknown reason, her car went dead and stopped on the I-220 roadway. Nilima Solanki was apparently trying to pull off the interstate, to the left, but, before she could get out of her car, Appellee Ervin, negligently changed lanes, allegedly from behind a dump truck, at a time when he was too close to her to do anything but rear-end her, and he ran into the rear of her car. The law in Mississippi is well established that a person can only change lanes after he or she has first ascertained that the lane change can be safely done. All of the evidence showed that when Appellee Ervin changed lanes, he was either so close to Nilima Solanki's vehicle that he did not have time to even hit his brakes or he was so close that he could not avoid hitting her and that he changed lanes without keeping and maintaining a proper lookout for the vehicle in the next lane ahead of him, which he was moving into. Appellee Ervin rear-ended Nilima Solanki because he did not see her until the last second, and he only had time to snatch his vehicle to the left. The evidence showed that Appellee Ervin was so close to Nilima Solanki's vehicle, that he could not avoid hitting the rear of her vehicle. Appellee Ervin had a duty, under Mississippi law, to keep and maintain a proper lookout and to keep his vehicle under reasonable control. During the discovery process, the

Appellants' attorney took Appellee Ervin's deposition. During that deposition, Appellee Ervin said that he moved over and that he saw Nilima Solanki's vehicle up ahead but that he thought then that she was moving. The place where he said that he first saw her, after changing lanes, was approximately three football fields away. This was Appellee Ervin's first version. He gave another version, whereby he stated that when he moved over, Nilima Solanki was so close that he did not even have time to do anything but hit her. This was Appellee Ervin's second version. In addition to the first two versions, Appellee Ervin told the officer, when he arrived at the scene, that he moved over because cars were coming up the ramp from 49 highway and that he moved over to give them room to merge onto Interstate 220 and that he did not have time to avoid the accident once he moved over. This third version was supported, at trial, by the investigating Officer and was reflected on the accident report. These are three totally different versions of how and when Appellee Ervin claims that he changed lanes. When Appellee Ervin spoke to the Officer at the scene, he did not mention a dump truck being in front of him, and he also said that the reason he could not cut back to the right to go back into the lane he had just came out of was that there were too many cars in that lane. No one else ever testified that they saw a dump truck or any of the other cars. Neither the dump truck nor any of the other cars stopped. As such, the dump truck and other cars appear to have been phantom vehicles. Had they really been there, they would have had to have been in the wreck because Appellee Ervin instantly knocked Nilima Solanki's car to the right, which in turn instantly blocked the entire right lane, and the 18-wheeler laid down across both lanes, meaning that at 70 miles-per-hour they could not have passed by him, nor could they have stopped without wrecking. If he had been passing them and if that is the reason he could not pull back into the right lane, then there is no way they could have avoided being in the wreck. The fact that none of them stopped is

highly suspicious. The Appellees hired an accident reconstructionist who gave a fourth version of where Appellee Ervin changed lanes, and he stated that he did not use any of the three versions of Appellee Ervin. The Appellees' own expert testified, in Court, that he did not use any of Appellee Ervin's versions because Appellee Ervin had given a different version each time he had testified. In fact, the Appellees' expert had never even spoken with Appellee Ervin and was only looking at the three different versions of how he had previously testified as to when and how he changed lanes. The Appellees' expert had only testified twice before, as an Accident Reconstructionist, and he just arbitrarily chose a distance on the roadway, whereby Appellee Ervin would not have had time to stop or avoid the accident. He had no testimony, nor any facts, to establish that the place he used for Appellee Ervin's lane changes was actually where Appellee Ervin changed lanes. In any event, if Appellee Ervin had changed lanes at that place where his expert suggested, then it was absolutely and totally illegal under our law, because he would have been in a flat area with no reason for him to not have been able to see Nilima Solanki before changing lanes. In that situation, Appellee Ervin was required, under the law, to see Nilima Solanki and not change lanes. The photographs offered into evidence, clearly showed these various versions and how Appellee Ervin had no excuse for hitting Nilima Solanki except for his own negligence.

At the time Appellee Ervin ran into Nilima Solanki's vehicle, she had her emergency lights on because she had just told her husband, Appellant Sid Solanki, over the phone, that she had them on. Appellant, Sid Solanki, also testified, in Court, that the emergency lights were still on the "on" position at the time of the trial and that he had just recently observed them flashing when the key was turned on. No one, to this day, has cut the emergency lights off. There was absolutely no evidence to refute the fact that Nilima Solanki's emergency lights were on at the time of the wreck.

It was agreed to and established that, at the time of the wreck, Appellee Ervin was on duty for and was working within the course and scope of his employment with, the Appellee, The Merchant Companies d/b/a Merchant Food Services.

Nilima Solanki was going to Monticello, Mississippi, that morning to meet her husband at their place of business. She lived in Madison, Mississippi. Nilima Solanki and her husband had three children of their own and had a small boy that they had raised from birth, which they were adopting. The child was two years old at the time, and he was in a car seat in the back on the right side. Nilima Solanki's car went dead while she was going down the road, and, apparently, she could not get off of the roadway either because cars were on each side of her as she was slowing down to get off the roadway or it just stopped too quickly. Nilima Solanki had a small car, and she had gotten to the left lane of I-220, which indicates that she was trying to get off of the roadway. She was maybe a little on the shoulder. The photographs, that were offered into evidence, clearly showed that she had almost gotten off. There was no evidence, whatsoever, offered that showed that Nilima Solanki could have gotten off of the roadway. The Defense simply argued that there was nothing to the side of the road to keep her from getting off but they did not produce any evidence that she could have gotten off the roadway. However, no logical person would assume that Nilima Solanki just decided to park her car on the interstate, in the fast lane, with her baby on the back seat, if she had the option of parking on the shoulder of the roadway. The photographs show/indicate that Nilima Solanki was pointing towards getting off of the roadway and that she had almost gotten off. In any event, Nilima Solanki got far enough to the left that Appellee Ervin should have been able to pass her on the right.

The evidence showed that immediately upon Nilima Solanki's car stopping on the roadway,

she called her husband on her cell phone, in a state of panic, and told him that her car was stalled near the yellow lane of the interstate on I-220; that she had the baby in the car; and that she could not get him out. Nilima Solanki also told her husband that she had her emergency lights on, and he testified that he told her to get the baby and run from the car and as soon as he told her that she said, "Oh my God," and he heard the impact from the truck hitting her. Nilima Solanki's phone never went dead, and Appellant Sid Solanki could hear the baby crying. However, he never heard his wife again. Appellant Sid Solanki kept his phone on all the way from Monticello. Nilima Solanki was taken to University Hospital, whereby she died of a massive brain trauma after nine days. Nilima Solanki only had seconds, after her car stopped, before she was hit.

Appellee Ervin said that it looked like Nilima Solanki was moving when he first saw her but that he later realized that she was stopped. If Nilima Solanki was moving, as he thought, that means that she had absolutely no time to get over. A witness coming from the other way, which cut off about two hundred yards before the scene of the subject accident, said that he also thought that Nilima Solanki was moving when he first saw her, but realized, as he got closer, that she was stopped. He also said that Nilima Solanki was on her cell phone with one foot out the door. This indicates that when Nilima Solanki's husband was telling her to get out fast, that she was trying to do so and, that she opened the door to get out and was immediately hit. Another witness who was coming from the opposite direction said that he actually saw the wreck. He testified that he was looking her direction but that he did not see the car but that he did see the 18-wheeler do a sudden jerk to the left and then back to the right, and that the 18-wheeler then laid down across both lanes of the road. Until he got up to where the wreck had occurred, he said that he did not know that the truck had hit a car. This indicates that Appellee Ervin hit Nilima Solanki as soon as he changed

lanes or that he waited until he was within a few feet of her to attempt to miss her. If he had not been so close to her when he changed lanes, he could have just pulled on the shoulder and gone around her. Also, if he were going 65 to 70 miles-per-hour, as all evidence showed, he would have been able to slow down some if he were paying attention. Appellee Ervin contends that he only slowed to 55 to 60 miles-per-hour. That is not slowing down at all. If he had hit his brakes at all, he would have had to slow down some. The Appellees' expert testified that Appellee Ervin was traveling 67 miles-per-hour at 98 feet before the impact. The speed was taken from the device from the truck that records the speed of the truck. This was taken from the downloading of the GPS and its telematic interface with the engine control module.

There was no logical explanation offered as to why he had to change lanes at a time when he had not first ascertained that it was safe to do so. This is strict negligence on his part.

The Court gave an instruction to the jury, which was Jury Instruction No. 20 (Appellees' Jury Instruction No. D-8), that stated that it is illegal to park a vehicle on the highway unless it is impossible to get off the road. This instruction was given over the objection of the Appellants, and it clearly created a very confusing situation with the Jury, in that it appeared that if the Appellants could not prove that it was impossible for Nilima Solanki to get off the road, then the wreck was totally her fault.

The Court, reluctantly, gave some comparative negligence instructions to the Jury, basically telling the Jury that they could assign negligence to any party and that if they thought Nilima Solanki was negligent in any way, then they could award her damages and deduct her percentage of fault from the total verdict. While giving the Jury their Instructions, the trial judge stated that he did not think that any comparative negligence instructions should be given because, as he stated on the

record, he saw no negligence on the part of Nilima Solanki. The trial judge went on to explain why. However, he said that out of abundance of caution he would give the instruction.

The Jury returned a verdict for the Appellees, which meant that they assigned 100% fault to Nilima Solanki, whom the trial judge had just said that he saw absolutely no negligence on her part. All four versions of the lane change clearly showed Appellee Ervin to be in violation of the lane change law and just plain common law negligence.

It appears that (1) the Jury got completely confused about the alleged "parking in a roadway" instruction and as to what affect it had on the case; (2) the Jury did not understand the instruction; or (3) the jury was prejudice against the Appellants. The Appellants are from India, and they are well-educated. The Appellant children are extremely smart, and one is getting ready to go to medical school. The others are also thinking of going to medical school, when they get old enough to do so.

At the close of the trial the Appellants moved for a directed verdict on liability on the grounds of an improper lane change, failure to keep and maintain a proper lookout and for failing to keep his vehicle under control. The Court denied said motion, even though there were many cases cited by the Appellants, whereby the Supreme Court had held that the lower Court should have granted a directed verdict under similar situations.

Also, the Appellants asked for a peremptory instruction at the close of the trial on the question of liability, and it was denied.

The Appellants filed a Motion for Judgment Notwithstanding the Verdict, or, in the Alternative, for Judgment on Liability and a New Trial on Damages Only, or, in the Alternative, for a New Trial on Both Liability and Damages as the Verdict of the Jury was Against the Overwhelming Weight of the Evidence and the Law, and Evinced Bias and Prejudice on part of the

Jury Against the Appellants. The trial Court denied said Motion, and it is from the denial of said Motion that the Appellants perfect their appeal.

There are other issues but the Appellants will raise them separately.

SUMMARY OF THE ARGUMENT

This case is a suit by the Heirs at Law of Nilima Solanki, Deceased, who was killed on Interstate 220 just Southwest of the Highway 49 bridge in Jackson, Mississippi, when her car stalled in the left lane of the highway as she had been traveling southwest bound. As soon as her vehicle stalled, Nilima Solanki called her husband, who was in Monticello, Mississippi and told him, in a state of panic, that her car was stalled on I-220. She also told him that her emergency lights were on, that their baby was in the back seat and that she did not know what to do. He advised her to get the baby and jump out, when the 18-wheeler, driven by Appellee Ervin and owned by Appellee Company, ran into the back of her on the Interstate. It is undisputed that, at the time that Appellee Ervin ran into Nilima Solanki's vehicle, he was on duty and was in the course and scope of his employment with Appellee Company. Nilima Solanki received severe brain trauma in the wreck and, after staying in the University of Mississippi Hospital for about nine or ten days, died. Basically, there was no evidence as to why Nilima Solanki could not get off of the roadway, and there was no evidence put on by the Appellees that she was negligent in any way. The Appellees only had three witnesses, which were Appellee Ervin, the Appellees' Accident Reconstructionist and Don Williams. Appellee Ervin gave no testimony as to Nilima Solanki being negligent, and he could only testify that she was stopped in the left-hand lane of the highway. The Appellees' Accident Reconstructionist testified that he had no evidence as to why she did not get off of the road, and he said that he would not even try to testify to that fact. The only other witness that the Appellees put

on was Don Williams, who was traveling north bound and was meeting Nilima Solanki. Don Williams had turned off about 200 yards before he got to where Nilima Solanki was stalled. He testified that he saw her from that distance, and he said that when he first saw her, he thought that she was moving, but he later determined that she was stopped. He said that Nilima Solanki had her door open and one foot out and was talking on her cell phone. He testified that he saw her for about one minute, and she was out of sight. He said that he did not remember whether she had her emergency lights on or not. He did not testify, in any way, with regard to whether she could have gotten out of the roadway or not. Therefore, the case was totally void of any evidence of negligence on the part of Nilima Solanki.

The Court gave two comparative negligence instructions which gave the jury a right to assign negligence to each party if they felt that each party was negligent. However, the jury returned a verdict for the Appellees. The verdict put 100% negligence on the part of Nilima Solanki, Deceased, and it did not put even 1% negligence on the Appellees. The verdict was clearly and totally against the overwhelming weight of the evidence and showed bias and prejudice on the part of the jury against the Appellants, and as evinced bias and prejudice on their part against the Appellants. The Appellants ask the Court to set aside the Judgment entered for the Appellees and to direct a verdict in favor of the Appellants on the issue of liability and to grant a new trial on damages only or, in the alternative, to grant a new trial on all issues.

ARGUMENT

I. THE COURT ERRED IN DENYING THE APPELLANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, OR, IN THE ALTERNATIVE, FOR JUDGMENT ON LIABILITY AND A NEW TRIAL ON DAMAGES ONLY, OR IN THE ALTERNATIVE, FOR A NEW TRIAL ON BOTH LIABILITY AND DAMAGES AS THE VERDICT OF THE JURY

WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE AND THE LAW, AND EVINCED BIAS AND PREJUDICE ON PART OF THE JURY AGAINST THE APPELLANTS

A. Law in Regards to Lane Change

At the close of all the evidence and after both parties had rested, the Appellants made a motion for a directed verdict on the grounds that the Appellees were negligent, as a matter of law, in making a lane change at a time when it was unsafe to do so, as well as failing to keep a proper lookout and failing to keep his vehicle under control. The Appellants also asked for peremptory instructions against the Appellees, and both of these were denied.

The law in Mississippi in regard to the changing of lanes by a vehicle is very clear, and it is as follows:

Miss. Code Ann. § 63-3-603:

"A vehicle shall be driven as nearly as practical entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety." 248 Mississippi at 676-677, 167 So. 2d at 88/ *Cipriani v. Miller,* 160 So. 2d 87 (Miss. 1964).

The following cases clearly set out Mississippi law with regard to lane change, failure to keep and maintain a proper lookout and failure to keep and maintain a vehicle under free and easy control:

- When neither explained nor excused, violation of statute requiring vehicle to be driven as nearly as practical entirely within single lane and not to be moved from such lane until driver has first ascertained that such movement can be made with safety is negligence as a matter of law. *Mills v. Nichols,* 467 So. 2d 924 (Miss. 1985).
- When neither explained nor excused, violation of statute providing that vehicle shall be

driven as nearly as practical entirely within single lane and shall not be moved from such lane until driver has first ascertained that movement can be made with safety constitutes negligence. *Nobles v. Unruh,* 198 So. 2d 245 (Miss. 1967).

- The Supreme Court held that where a motorist who had been driving at midnight on roadway divided into four clearly marked lanes had been negligent in not ascertaining that left lane was clear before she drove into it to pass, crashed through barricade and went into shallow excavation the city had dug to repair water line leak; thus she was not entitled to recover from city for resulting injuries and property damage. *City of Jackson v. Sullivan,* 349 So. 2d 527 (Miss 1977).

- In suit against host driver by heirs of automobile passenger who was killed when host attempted to pass transport truck on four-lane highway and collided head on with pickup truck which was traveling in wrong traffic lane, evidence that host driver failed to ascertain whether he could pass transport truck safely before he turned his vehicle into passing lane, coupled with failure of host driver to offer excuse or justification for his conduct, entitled passenger's heirs to peremptory instruction on issue of liability. *Nobles v. Unruh,* 198 So. 2d 245 (Miss. 1967).

- Eastbound motorist on four-lane highway who had observed disabled automobile in south eastbound lane in time to pull into north lane and, though she had seen following automobile some distance behind her, turned suddenly back into south lane where her automobile collided with the disabled automobile was negligent in changing lanes in violation of statute proscribing the changing of lanes when it cannot be done safely and in not having automobile

under control. *Cipriani v. Miller,* 160 So. 2d 87 (Miss. 1964).

- Automobile driver, who was making left turn in front of oncoming traffic, who saw police motorcycle approaching from opposite direction, and who stopped and was struck by motorcycle, violated statute providing that vehicle shall be driven, as nearly as practical, entirely within single lane and shall not move from lane until driver has first ascertained that movement can be made with safety, and thus, automobile driver was negligent. *McRee v. Raney,* 493 So. 2d 1299 (Miss. 1986).

- Fact that automobile driver who had head-on collision with pickup truck as he attempted to pass another vehicle could not have anticipated or foreseen that pickup truck would be traveling in wrong lane of traffic did not vitiate finding that automobile driver's conduct was proximate cause of accident. *Nobles v. Unruh,* 198 So. 2d 245 (Miss. 1967).

In *Nobles*, a wrongful death action was brought against a host driver by heirs of automobile passenger who was killed when host attempted to pass transport truck on four-lane highway and collided head on with pickup truck which was traveling in the wrong lane. The Circuit Court of Leflore County, Arthur B. Clark, Jr., rendered judgment for defendant, and plaintiffs appealed. The Supreme Court, Gillespie, P.J., held that evidence that host driver failed to ascertain whether he could pass transport trucks safely before he turned his vehicle into passing lane, coupled with failure of host driver to offer excuse or justification for his conduct, entitled passenger's heirs to peremptory instruction on issue of liability under statute. The case was reversed and remanded for trial on the issue of damages only. The court, citing Miss. Code 1942, §8187, held that the fact that an automobile driver who had a head-on collision with pickup truck as he attempted to pass another

vehicle could not have anticipated or foreseen that pickup truck would be traveling in wrong lane of traffic, did ***not vitiate finding*** that automobile driver's conduct was proximate cause of accident. The court further held that the negligent act of a person, resulting in injury, is the proximate cause thereof and creates liability therefor, when the act is of such character that, by usual course of events, some injury, though not necessarily the particular injury, would result therefrom.

In *Nobles*, the Appellee was traveling at approximately fifty-five miles per hour. He overtook a transport truck which was also traveling in an easterly direction toward Greenwood. Both appellees' vehicle and the transport truck were traveling in the south traffic lane reserved for eastbound vehicles. The truck had red lights flashing on its rear. Appellee proceeded in the south traffic lane ***until he was within approximately twelve feet of the rear of the transport. At that point he suddenly turned his vehicle into the adjacent north traffic lane*** in order to pass the transport, and upon doing so collided head-on with a pickup truck which was proceeding in the wrong direction in the north traffic lane reserved for eastbound traffic. The collision resulted in the death of Mrs. Nobles, appellee's guest passenger.

The court in *Nobles* relied on Miss. Code Ann. § 63-3-603 and § 8187, which states, "A vehicle shall be driven as nearly as practical entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety." The Court held that this statute was designed to prevent, among other things, the type accident involved in the present case. Appellee strongly urged that § 8187 has no application to four-lane highways such as that involved here. However, ***the court held that the statute, by its express language, states that it is applicable to any roadway 'divided into three or more clearly marked lanes for traffic'. § 8187 has been applied by this Court to a four-lane highway in Cipriani v.***

Miller, 248 Miss. 672, 160 So.2d 87 (1964). In *Cipriani,* the plaintiff, while traveling on a four-lane highway, had a flat tire on his car and pulled as close to the curb in the extreme right lane of traffic as possible. The defendant saw plaintiff's vehicle stopped on the side of her traffic lane, and to avoid it, she pulled into the left lane to pass. However, as she proceeded to pass, something behind her caused her to become frightened. She thereupon pulled back into the lane where plaintiff's vehicle was parked and collided with it. The court, in holding that the trial court erred in failing to grant plaintiff a peremptory instruction, stated as follows:

> ***The lower court was in error in declining the peremptory instruction on liability as requested by appellant. Taking the testimony and all reasonable inferences most favorable to her, it appears that she could only have gotten into the north eastbound lane by negligently violating Sec. 8187(a), Miss.Code of 1942, which provides: 'A vehicle shall be driven as nearly as practical entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety.'*** 248 Miss. at 676-677, 160 So. 2d at 88 (emphasis added).
>
> The Court further held that appellee "had not first ascertained that movement into the other lane could be made with safety." 248 Miss. at 677, 160 So. 2d at 88. The rule in the*Cipriani* case applies with particular force in the present case. The court in *Cipriani* went on to hold:
>
> By appellee's ***own admission*** he was in violation of § 8187 at the time of the accident. The statute imposed upon him the duty to ascertain that the north eastbound lane of traffic was clear before he began passing the vehicle preceding him. This he failed to do. This Court has said on numerous occasions that the violation of statutes of this type, when neither explained nor excused, constitutes negligence as a matter of law. E.g, *Vaughn v. Lewis*, 236 Miss. 792, 112 So. 2d 247 (1959); *Hill v. Columbus Ice Cream & Creamery Co.*, 230 Miss. 634, 93 So. 2d 634 (1957); *Wilburn v. Gordon*, 209 Miss. 27, 45 So. 2d 844 (1950).
>
> There is no ***dispute in the testimony, and appellee offered no evidence excusing or justifying his conduct.*** For this reason the lower court erred in overruling appellants' request for a peremptory instruction.
>
> Appellee urges that he could not be required to anticipate or foresee that another vehicle would be traveling in the wrong lane of traffic, citing *Clarke v. Hughes*, 134 Miss. 377, 99 So. 6 (1924). Upon this ground appellee contends that his conduct in pulling into the passing

lane without looking was not the proximate cause of the fatal accident. This contention is without merit. There could have been obstructions in the north eastbound lane of traffic other than an oncoming vehicle. ***Another vehicle traveling in the same direction as appellee could have been stalled.*** An animal or an individual could have been crossing the highway. Any number of obstacles could have obstructed appellee's safe passage.

We hold that in determining whether the actor's negligence was the proximate cause of the injury, ***it is not necessary that the actor should have foreseen the particular injury which occurs. It is sufficient if he could have foreseen that some injury would likely result from his negligent conduct.*** *In Cumberland Telephone & Telegraph Company v. Woodham*, 99 Miss. 318, 332, 54 So. 890, 891 (1911), this Court said:

Without attempting to define proximate cause in such terms as will be applicable in all states of fact-for to do so is practically impossible-it will be sufficient to say that the negligent act of a person, resulting in injury, is the proximate cause thereof, and creates liability therefor, when the act is of such character that, by the usual course of events, some injury, not necessarily the particular injury, or injury received in the particular manner complained of, would result therefrom.

(Emphasis added).

In the case at hand, the Solanki matter, the jury was also given Jury Instruction No. 11 (P-26) on lane change which was as follows:

The Court instructs the jury that the law requires when a motorist is operating a motor vehicle upon any roadway divided into two or more clearly marked lanes for traffic headed in the same direction, the vehicle shall not be move from the lane of traffic in which it is traveling until the driver has first ascertained that such movement can be made with safety. The failure to make sure the lane change can be safely made is negligence.

Therefore, if you find from a preponderance of the evidence that Melvin Tyrone Ervin was traveling in the right hand lane of I-220 and that he either changed to the left hand lane either due to a dump truck being in his lane in front of him or due to other vehicles being in front of him or vehicles coming up the ramp from 49 Highway and that he changed lanes without first ascertaining that the movement could be made with safety, and that the stalling Solanki vehicle was stopped in his lane but too close for Melvin Tyrone Ervin to avoid hitting her, then Melvin Tyrone Ervin was negligent and if you further find from a preponderance of the evidence that the aforesaid negligence was the proximately cause or the proximately contributing cause of the accident and the injury and death of Nilima Solani then you should return a verdict for the Plaintiffs and against the Defendants, The Merchants Company and Melvin Tyrone Ervin.

Supplemental Record, Volume 1 at page 20-21.

Even if we did not have the statute, Appellee Ervin would be guilty of common law negligence, because it is clearly negligent to change lanes at a time when one does not know whether it is safe to do so or not.

B. Law in Regards to Rear-Enders

The law in regard to rear-enders is basically that a driver of a car following along behind another has a duty encompassing four interrelated functions: He must (1) have his vehicle under proper control; (2) keep a proper lookout ahead; (3) drive at a sufficient speed so that if a preceding vehicle stops suddenly, driver can stop without colliding with forward vehicle; and (4) drive at a sufficient distance behind preceding vehicle so that if preceding vehicle stops suddenly, driver can stop without colliding with forward vehicle. Absent unusual conditions, a following 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. *White v. Miller*, 513 So. 2d 600 (Miss. 1987).

The Court gave Jury Instruction No. 10 (P-27) that read as follows:

The Court instructs the jury that, under the laws of the State of Mississippi, the operator of a motor vehicle is under a duty to constantly keep his motor vehicle under reasonable control, to drive at a reasonable rate of speed, and he must keep a reasonable and proper lookout for other vehicles on the roadway and to anticipate the presence of other vehicles on the roadway so as to enable him to avoid colliding with such other vehicles when such other vehicles would, by the exercise of ordinary care, come within his vision or under his observation. Consequently, if you should find from a preponderance of the evidence in this case that Melvin Tyrone Ervin, while going South on I-220 failed to keep his vehicle under reasonable control and/or failed to drive at a reasonable rate of speed and/or that he failed to keep a reasonable and proper lookout for other vehicles on the roadway and/or to anticipate the presence of other vehicles on the roadway so as to enable him to avoid colliding with such vehicle when such vehicle would by exercise or ordinary care, have come within his vision or under his observation then Melvin Tyrone Ervin was negligent as a matter of law. If you should further find by a preponderance of the evidence that such negligence was the proximate cause or proximate contributing cause of the accident in question and the injuries and death of Nilima Solanki then you should return your verdict for the Plaintiffs against the Defendants, The Merchants Company and Melvin Tyrone Ervin.

Supplemental Record, Volume 1 at page 22-23.

Appellee Ervin certainly failed in all of the above-mentioned categories.

C. Argument applying the facts of the present case to Mississippi Law in showing that the jury verdict was against the overwhelming weight of the evidence in this case.

The facts in the present case clearly make it a case, whereby the Court should have granted a directed verdict for the Appellants or should have granted a peremptory instruction for the Appellants at the close of the evidence. The trial court gave a comparative negligence instruction even though there was no evidence to show that the Deceased was negligent. However, with the court giving the comparative negligence instruction, the Jury had to completely ignore this instruction in order to find for the Appellees. In any event, the facts would never support a verdict for the Appellees that puts 100% fault on the Deceased, Nilima Solanki. A verdict for the Appellees implies that Appellee Ervin was not guilty of ***any*** negligence. Appellee Ervin clearly made a lane change at a time when he did not first ascertain that the lane change could be safely made. One only has to look at Appellee Ervin's ***numerous*** versions as to how the accident occurred, specifically Appellee 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. ***All versions*** regarding Appellee Ervin's lane change(s) clearly and unequivocally make him negligent and totally at fault for the subject accident. He would even be totally at fault by his expert's version of when Appellee Ervin changed lanes.

The Appellees put on four versions as to how the subject accident occurred, three told by Appellee Ervin and one by the Appellees' expert, William Messerschmidt. Appellants will begin by analyzing the three completely different versions told by Appellee Ervin. They are as follows:

1. Appellee Ervin's First Version, Version #1

In his deposition, Appellee Ervin testified under oath that when he moved over he was less than a football field away from the stopped car. He said that there was a dump truck in front of him in the right-hand lane of I-220, and that the dump-truck had a high bed that blocked his view, partially keeping him from being able to see the stalled Solanki car before he moved over.

Furthermore, when the following portion of his deposition was read to him at trial, Ervin testified when asked, "So when you moved over, all of a sudden there was a car right close to you there, at that point stopped?," that he ***did***, indeed, testify during his deposition, "yes."

Appellee Ervin further testified that when he changed lanes, he was traveling at the rate of sixty miles an hour.

He said that he did not see the stalled car prior to his changing lanes. Under the law, Appellee Ervin had a duty to not change lanes until first ascertaining that it was safe to do so; therefore, Appellee Ervin had a duty to have seen the Solanki car before he changed lanes. Appellee Ervin testified that he did not immediately hit his brakes because he did not realize that the car was stopped. If Appellee Ervin did not move over until he was less than a football field away from the stalled vehicle, and he was going 65 miles-per-hour as he testified to (Trial Transcript Record, Volume 10 at page 169. and did not apply his brakes when he first moved over, this would make Appellee Ervin almost hitting the Solanki vehicle before he even saw her or realized that she was stopped. Under Mississippi law, Appellee Ervin would have clearly and unequivocally been in violation of the lane change statute. This would, in turn, make him guilty of negligence as a matter of law. It was his duty to see the stalled vehicle before he changed lanes.

Appellee Ervin testified that he could not move to the right because there were so many cars

to his right. He testified that he had already passed the dump-truck and had no time to do anything, other than to jerk his 18-wheeler to the left to try to avoid hitting Nilima Solanki, but that he could not keep from hitting her because her vehicle was too close for him to avoid hitting her. Under Mississippi law, it is absolutely illegal to change lanes when another vehicle is in the lane so close to you that you cannot avoid hitting that vehicle. It was obvious that Appellee Ervin changed lanes at a time when he had not ascertained that he could make the lane change safely. From Appellee Ervin's own testimony and without the aid of others, he had clearly testified that he moved over, from the right-hand lane of I-220 into the left-hand lane of I-220, without seeing the Solanki car until he was already in the left-hand lane of I-220, and that by the time that he realized that Nilima Solanki's vehicle was stopped, it was too late for him to avoid the accident. Appellee Ervin testified that he only slowed his vehicle down to approximately 55 or 60 miles-per-hour before impact with the Solanki vehicle. If Ervin was going 65 miles-per-hour and only slowed down to 60 miles-per-hour, that means that he could not have even touched his brakes before the impact. Appellee Ervin's testimony was that he only reduced his speed by five miles-per-hour before impact. If Appellee Ervin had merely lifted his foot off of his accelerator, his speed would have been reduced by at least five miles-per-hour. Therefore, the evidence indicates that he may not have even let off of the accelerator, much less applied his brakes. Appellee Ervin made no effort to avoid the accident until it was too late. This means that he did not even see Nilima Solanki until he maneuvered into the left-hand lane of I-220. Clearly, Appellee Ervin failed to ascertain he could safely make a lane change before doing so, failed to keep and maintain a proper lookout and failed to keep and maintain his vehicle under free and easy control. Appellee, Ervin, testified that he was only approximately one car length away from the stalled vehicle when he pulled to the left to go around it. (Trial Transcript

Record, Volume 10 at page 170-172).

The following is a quote from the trial transcript when Appellee, Ervin, was testifying:

Ervin: What was that question again?

Don Evans: All right. It says - - the question is: When you made the left turn, so how close were you to her vehicle before you tried to maneuver to the left? And it goes on, but your lawyer is objecting a lot.
We come on down. When I made the left turn to merge to the median? Well, to miss. When you turn left to miss hitting the back of her car, ***how close were you when you made that turn?*** I'm not sure of the distance of how close.
And then that's when I said would you have been - - I'm going to use some examples, and you see if it helps you. A car length away? To car lengths away? Five lengths way? Approximately. ***Your answer was: At least a car length.***

Tr. Transcr. vol. 10, 171:22-29, 172:1-7 (Apr. 8, 2008).

Trial Transcript Record, Volume 10 at page 171-172.

Ervin continued to testify at trial to the following:

Don Evans: ***Okay. But when you got up here you said a car length away from her, you took a left. You turned that way, didn't you?***

Ervin: ***Yes.***

Roy Liddell: Objection, Your Honor. It's mischaracterizing evidence. He said at least was his testimony.

Court: Rephrase it.

Don Evans: ***At least a car length away you took a left to try to miss her at that point, didn't you?***

Ervin: ***Yes.***

Tr. Transcr. vol. 10, 178:24-29, 179:1-6 (Apr. 8, 2008).

Also, there were no skid marks as demonstrated by all the photographs that were introduced

into evidence. None of these photographs showed any skid marks. They were taken at the scene by the police officers that were called to the scene immediately following the accident. 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. This is a full indication that Appellee Ervin never saw Nilima Solanki until a split-second before the subject accident.

Furthermore, upon impact, the Solanki car was immediately knocked into the right-hand lane of I-220 and completely blocked the right-hand lane. The Appellee Company's 18-wheeler laid down across both the right-hand and left-hand lanes. Had 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. Furthermore, not one witness, including the only two witnesses listed on the accident report, Don Williams and Herbert Jones, came forth stating to have seen any vehicles, including a dump-truck, to the right of the 18-wheeler or even near the accident. In fact, Williams and Jones specifically testified that they ***did not*** see any of the alleged aforementioned vehicles. Moreover, the investigating police officers never saw or heard any mention of any other vehicles, including a dump-truck.

If Appellee Ervin changed lanes less than a football field away, and if he was too close to even slow down more than 5 miles-per-hour based on the GPS and his testimony (Trial Transcript Record, Volume 11 at page 449), then he had to be right at the stalled car when he moved over. There is no issue that he was strictly in violation of the Mississippi Statute on lane changes, and that is exactly what the aforementioned cases that the Judges granted directed verdicts on were saying.

The Appellees gave no reason or excuses as to why Appellee Ervin pulled over to make a lane change without first ascertaining that the lane change could be safely done.

There was nothing to block Appellee Ervin's view from seeing the stalled car. There are numerous photographs, which have been introduced into evidence, which demonstrate this, and all the witnesses say that there was nothing blocking Appellee Ervin's view.

Obviously, no one else hit Nilima Solanki while she was stalled, and it is strange that Appellee Ervin is attempting to say that she had been sitting there for a good while and no other vehicle had hit her and that Appellee Ervin is the only individual that came along and hit Nilima Solanki, killing her. It is obvious that Appellee Ervin was not keeping and maintaining a proper lookout, and that he did not, and could not, have had his vehicle under reasonable control. The accident happened in the daytime, and visibility was clear.

The Appellees' expert testified that, just 98 feet prior to impact, Appellee Ervin was traveling approximately 67 miles-per-hour. Appellee Ervin, at trial and in his deposition, actually testified that he was going 65 miles-per-hour. The police officer testified that Appellee Ervin told him, at the scene, that he was going 70 miles-per-hour.

Both experts agree that if Appelle Ervin was going 65 miles-per-hour to 70 miles-per-hour, that he was traveling 100 feet per second. He said that he moved over less than football field away from the stalled car. Both the Appellants' and the Appellees' experts testified that it would probably take 1½ to 2 seconds to perceive and react. The Appellees' expert basically figured from the point of impact, because he said he was so close to the car that he did not have time to perceive and react. The expert said that Appellee Ervin was only 98 feet from the stalled car when he realized that it was stopped and that he was going 67 miles-per-hour. This would clearly make it Appellee Ervin's fault

when his own expert testified that at the place where he changed lanes he was so close to a stalled car that he did not have time to perceive and react to it and that he could only get slowed down 5 miles-per-hour.

If Appellee Ervin had merely 1 ½ to 2 seconds to do anything, that was totally his fault. No one made him change lanes when he was so close to this car. He clearly did not ascertain that the road was clear and that he could safely make his lane change. In the case of*Cipriani*, the court held that a driver should have anticipated that something could be in the other lane and, in that particular case, the judge gave an example stating the possibility of exactly what our case is. Again, *Cipriani* held that one must look out for other vehicles and other things in the roadway. It said,

> "***another vehicle traveling in the same direction as the Appellee could have been stalled.*** An animal or an individual could have been crossing the highway. Any number of obstacles could have obstructed appellee's safe passage."
>
> (Emphasis added).

This is exactly what the legislature intended to make illegal by creating this statute. The Solanki car was stalled in the roadway, just as the judge in *Cipriani* said that a vehicle could have been stalled in the roadway.

2. Appellee Ervin's Second Version, Version #2

Appellee Ervin testified in the trial and in his deposition that he came up behind a dump truck and that he moved over from behind the dump truck long before he got to the bridge and long before reaching the loop that comes up onto I-220 from Highway 49. This would have made Appellee Ervin having moved over approximately 700 to 800 feet before the stalled Solanki car. This would have been approximately 2 ½ football fields away. Appellee Ervin testified that he saw the Solanki car when he first moved over, but he said that he thought the vehicle was moving and then realized

it was stopped. He testified as follows, which also goes with Trial Exhibit 20, which the Appellees marked as reference:

Q. That's the loop that comes on to 220 there from 49. Now, point about where.

A. I must have been right in this area here.

Q. And is that when you moved over?

A. I began to merge over.

Tr. Transcr. vol. 10, 160:25-29 (Apr. 8, 2008).

Appellee Ervin continued to testify as follows:

Q. And at that point when you moved over there, you said -- when you moved over, what did you see?

A. When I moved over into the left lane?

Q. Right. Yeah.

A. I noticed traffic ahead of me.

Q. Was it her?

A. It was cars ahead of me and possibly was her, but I didn't know -- I didn't see anything that wasn't normal at the time. I saw traffic, but it didn't appear at that time once I moved over that anything was stopped.

Tr. Transcr. vol. 10, 161:11-21 (Apr. 8, 2008).

Appellee Ervin also testified that he applied his brakes at approximately 600 feet from the stalled vehicle. This is approximately 2 football fields away. However, when asked when he applied his brakes, Appellee Ervin testified in trial to the following:

A. But once I noticed the car being a hazard, that's when I started applying my brakes.

Q. And so you think it's just before the bridge?

A. ***Could have been.***

Tr. Transcr. vol. 10, 168:11-14 (Apr. 8, 2008).

Q. All right. So how hard did you come down on your brakes at that point?

A. I come down on my brakes, you know, hard enough to control the truck to slow the truck down.

Tr. Transcr. vol. 10, 168:17-20 (Apr. 8, 2008).

However, Appellee Ervin testified that he was traveling approximately 65 miles-per-hour (Page 169 of the Trial Transcript). But, Appellee Ervin, who claims that he came down hard on his brakes at approximately 500 feet from where Nilima Solanki's vehicle was stopped (Page 185), testified in his deposition that he was traveling between 55 and 60 miles-per-hour at the point of impact (page 168 of the Trial Transcript).

Appellee Ervin said that when he first moved over, he had not seen the stalled car, but as soon as he moved over, he saw the Solanki vehicle, but he thought it was moving. He then says he hit the brakes before he got to the bridge. He marked a spot on a chart during trial, which was approximately 115 feet before the bridge, as being the place where he first applied his brakes. The bridge is 265 feet long, and the car was stalled 223 feet south of the bridge. ***This is marked as Trial Exhibit 20 and in the trial testimony at pages 160-161.*** If the distances are added up, it comes to 603 feet of space of which Appellee Ervin had to travel after he allegedly hit his brakes before he got to the stalled Solanki vehicle. Both experts testified that he should have been able to come to a complete stop between 250 to 309 feet. Please see the Trial Testimony of James Hannah at Pages 263-264 and the Trial Testimony of William Messerschmidt at pages 485-486. Therefore, Appellee Ervin could have stopped 2½ times within that distance. However, according to Appellee Ervin,

he only slowed down from 65 miles-per-hour to 55 or 60 miles-per-hour before impact. Appellee Ervin never testified that he ever let his foot off of his brakes. He would have the Court believe that in 603 feet with his brakes on, he could only slow down 5to 10 miles-per-hour. This story is absurd. If Appellee Ervin did, in fact, see Nilima Solanki back 700 to 800 feet, he apparently forgot about her and did not keep and maintain a proper lookout. The Appellees' expert, William Messerscmidt, testified that one must see something and then perceive it before he is able to react. The Appellants' expert, James Hannah, testified that it takes 1 ½ to 2 seconds to perceive something and to react. Keeping this in mind, if Appellee Ervin was already hitting his brakes at 603 feet before impact, he obviously had seen her at least 700 to 800 feet prior to impact. This proves, beyond a shadow of a doubt, that Appellee Ervin failed to keep and maintain a proper lookout. This story does not match up with anything, and the Appellees' expert did not even use his story to reconstruct the accident and/or form his opinion(s).

3. Appellee Ervin's Third Version, Version #3

The investigating Officer testified that, when he interviewed Appellee Ervin at the scene, he never mentioned a dump truck. The Officer testified that he was told by Appellee Ervin that he was traveling 70 miles-per-hour (Trial Transcript Record, Volume 9 at page 120-121) in the right lane of I-220 and that he moved over into the left-hand lane to allow oncoming cars, coming up the loop from Highway 49 onto I-220, onto the interstate (Trial Transcript Record, Volume 9 at page 114-115). The Appellants would refer the Court to Trial Exhibit "10," the accident report, as well as the Officer's testimony at page 121 of the Trial Transcript.

This version clearly makes Appellee Ervin at fault, if he had started moving over as the cars were coming on to I-220 because Appellee Ervin would have had plenty of time to see the Solanki

vehicle 488 feet away and would have had plenty of time to stop. This obviously means Appellee Ervin was not paying attention and was not keeping a proper lookout. There was nothing in Appellee Ervin's view, and he had a distance almost 2 football fields to stop before impact. The other version of when he moved over would have been just before he hit the Solanki vehicle, and that clearly would have been an improper lane change. It would have also been a failure to keep and maintain a proper lookout and a failure to keep his vehicle under reasonable control.

Appellee Ervin had no logical reasoning for not seeing Nilima Solanki and for hitting her, other than that he failed to keep and maintain a proper lookout and failed to keep his vehicle under reasonable control.

4. Appellees' Expert, William Messerschmidt's, Version

The Appellees' accident reconstruction expert, William Messerschmidt, testified that he did not use ***any*** of Appellee Ervin's testimony as to when Appellee Ervin changed lanes, and Messerschmidt testified as to his reasoning for not using his testimony. That reason was that ***Appellee Ervin gave a different version each time he testified*** . It is absurd when the Appellee driver's testimony is ***so unreliable that his own expert refuses to use any of it.*** This should have indicated to the jury that Appellee Ervin was clearly at fault for the subject accident.

The Appellees' expert used, in his calculation(s) and testimony, a diagram which he and another expert person created, whereby he used a specific point, 158 feet from impact, as Appellee Ervin's lane-changing point or the point where the Appellee Ervin first realized that the car was stopped. It is not clear what his testimony was in this respect. Messerschmidt said this was 1.6 seconds from impact. In his diagram, Messerschmidt stated that only 15 % of drivers could respond this quickly. He also stated that the average driver would have responded 59 feet from impact. He

stated that Appellee Ervin responded 98.5 feet from impact. This means that the Appellees' expert was attempting to say that Appellee Ervin moved over 158 feet from impact, and that this was too close for Appellee 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 with nothing in front of him but the stalled Solanki vehicle.*** It is clear that, at that close range, Appellee Ervin could not do anything, other than to jerk to the left to avoid hitting the Solanki car. Under the Appellees' expert's opinion as to where Appellee Ervin changed lanes or where he said he first realized that the Solanki vehicle was stopped, Appellee Ervin clearly made an improper lane change under the laws of the State of Mississippi. There is no way that Appellee Ervin could have moved over that close to the Solanki vehicle and avoided hitting the Solanki vehicle, under the Appellees' expert, William Messerschmidt's, version.

In fact, William Messerschmidt cannot testify as to where Appellee Ervin changed lanes or when he actually saw Nilima Solanki's vehicle. Messerschmidt's testimony at trial was as follows:

> A. There's no way for me to work backward in time and space to where he changed lanes. If there's a way that someone else can work backward to that point mathematically, physically, scientifically, that would be something I don't know how to do.

Tr. Transcr. vol. 11, 450:18-22 (Apr. 8, 2008).

> Q. ***So what you just got through saying basically was he's told a different story nearly every time he testifies, doesn't he?***
>
> A. ***Every time somebody makes him he says, I don't know, and then he's tried to accommodate, I guess, and guessed radically different things.***

Tr. Transcr. vol. 12, 466:15-20 (Apr. 8, 2008).

The Appellees' expert's version is the most ridiculous version of all because it was not based upon anything. He wrote in red on Exhibit 22, which was a drawing to scale of the highway. He put an "X" on the road which he said was 98 feet from the point of impact, and he testified that Appellee Ervin was traveling 67 miles-per-hour at that point. He used the download off of the truck to determine that speed. The expert simply said that when you are only 98 feet away and you are traveling at 67 miles-per-hour, you do not have time, basically, to do anything. This is exactly what the Appellants are arguing. Appellee Ervin should not have been going 67 miles-per-hour when he got within 98 feet of a stalled car on the Highway when he had nothing blocking his view. He was required, under Mississippi Law, to keep and maintain a proper lookout and to keep his vehicle under reasonable control. He did neither.

5. JURY INSTRUCTIONS

A. STOPPING IN THE ROAD WITH COMPARATIVE NEGLIGENCE INCLUDED

The Court gave Appellees' Jury Instruction No. D-8, which was the Court's Jury Instruction No. 20, over the objection of the Appellants. Please refer to page 533 of the Trial Transcript for Appellants' objections. This instruction basically stated that it was illegal to park your vehicle on a highway unless you could show that it was ***"impossible"*** to have parked it off the roadway. This is argued as error number IV and the Appellants, as opposed to writing the same information twice, simply incorporate that argument into their assignment as to why the jury was probably confused and not sure what they were to do. It is clear from the information in assignment III that Nilima Solanki did not park her vehicle in the roadway and that this statute, clearly, was speaking of actually "parking" in the roadway as opposed to one's vehicle breaking down in the roadway. A man may

have figured out how to not get stopped in the roadway but many women, when given mechanical problems, do not know what to do. This point needs to be argued because one needs to see the whole picture to see that the jury went against the overwhelming weight of the evidence. The Court gave Instruction No. 20 which had to do with parking in the roadway and also instruction on comparative negligence the Court's Jury Instruction No. 20 read as follows:

> The Court instructs the jury that according to Mississippi law no person shall stop, park or leave standing any vehicle, whether attended or unattended, upon the paved or main traveled part of any highway, unless it is impossible to avoid stopping in the roadway.
>
> Therefore, if you find from a preponderance of the evidence in this case that the decedent, Nilima Solanki, allowed her vehicle to stop in a lane of travel on the highway when it was possible or reasonably practicable for her to steer her vehicle onto the shoulder of the highway, then the Court instructs the jury that such acts constitute negligence on behalf of the decedent, and if you find from a preponderance of the evidence that such negligence was the sole proximate cause of the accident, then it is your sworn duty to return a verdict for Melvin Ervin and The Merchants Company.
>
> If you find that such negligence of the decedent Nilima Solanki was a proximate contributing cause of the accident and that the negligence of Melvin Ervin was also a proximate contributing cause of the accident, then it is your sworn duty to decide the amount you would have awarded for her death, if any, and then reduce that amount by the percentage of Nilima Solanki's negligence.

Supplemental Record, Volume 1at page 34.

The Appellees contend that, at the time of the subject accident, Nilima Solanki's vehicle was stopped in the left southbound lane of I-220 and that it was illegal for Nilima Solanki's vehicle to be stopped in the roadway. This is the reasoning behind Appellees' Jury Instruction No. D-8. The Appellees contend that there was no barrier or anything to prevent Nilima Solanki from steering her vehicle onto the shoulder of I-220 as her car was stopping, and that there was nothing to prevent Nilima Solanki from exiting her vehicle to a place of safety after her car stopped. The Appellees argue that, as a result of the above-mentioned contentions, Nilima Solanki's actions were in violation of Miss. Code Ann. § 63-3-903, making the actions of Nilima Solanki negligent.

The Appellant would show that applicable portions of Miss. Code Ann. § 63-3-903 state the following:

> (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 . . . .
> (2) This section shall not apply to the driver of any vehicle while 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.

The Appellants would show that *Hankins* holds that, "the word 'impossible' as used in paragraph [2], should not be given a literal construction. The word should be construed as 'not reasonably practical.'" *Hankins v. Harvey*, 248 So. 2d 639, 658 (Miss. 1964).

The question of whether it is practical to stop a motor vehicle off highway pursuant to statute is ordinarily one of fact to be submitted to jury on proper instructions. *Strong v. Freeman Truck Line, Inc.*, 456 So. 2d 698, 707 (Miss. 1984). *Strong* further holds that, "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." *Id.* at 708 (emphasis added).

It is undisputed that Appellant, Sidharth Solanki, was on the phone with his deceased wife, Nilima Solanki, at the time of the subject accident. Witness, Don Williams, testified that he saw Nilima Solanki as her vehicle was disabled on I-220 and that she was on her cell phone at the time he saw her. Furthermore, Appellant, Sidharth Solanki, has testified that he was on the phone with his wife at the time of the subject accident, and that, prior to the accident, ***he knew she was in danger***, as she told him that her vehicle had become disabled on I-220 and she ***could not*** get their

child and get out of the vehicle. Then, Appellant, Sidharth Solanki, heard the crash and never heard his wife's voice again, although he could hear his baby crying. Appellant, Sidharth Solanki, testified as follows:

Q. And what did she say to you?

A. She called me, and, you know, she says that she was coming to see me with the baby, and she called me and says, "My car has broke down."
And so, you know, I didn't realize the situation, what kind of situation she was in. So I asked her, like, "Where are you," you know, in my language. We were talking in my accent, my Indian language, you know. And she said, "I'm on 220." And I said, "where on 220?" And she said, "I'm close to the yellow line."
And that's when I got panicked, and I started shouting, shouting, and I said, "Get the baby and get out of the car." And all of a sudden she says, like, "How could I get out of the car?"
And the next thing I hear she says, "Oh, my God." And I hear something hit the car, but I didn't know who. I was sitting in Monticello, so I did not have any idea whether it was truck or car or nothing.
But she told me that she was on 220. So I got panicked and tried to find out. I couldn't hear her voice or nothing, but I see the baby start crying calling, "Mommy, mommy, mommy, mama, mama, mama."

Tr. Transcr. vol. 9, 135:6-27 (Apr. 8, 2008).

The Appellants would show that Appellant, Sidharth Solanki, remained on the phone, hearing sounds occurring at the accident scene, trying desperately to hear his wife's voice.

Sid Solanki went on to testify to the following in regards to Nilima Solanki having her emergency lights on:

Q. Now, back to the car, when you said that she said that she had her hazard lights on, did she say she already had them on or was putting them on or what did she say?

A. ***No, no. She said, I was going 70 miles the speed, and then all of a sudden my car got stalled, and I just turned my lights on, the emergency lights on, the hazardous light on. You know, I call it emergency lights, you know.***

Q. Yeah.

A. ***Those blinking lights, yellow lights in back and front.***

Q. Is there anything that caused you to believe that she did have them on?

A. ***She did have it on. And I mean I promise you because that lights were on, and you still can go back and check it, if you want, you know.***

Q. Have your checked it?

A. ***Yes, I have.***

Q. And tell me do they blink?

A. ***Yeah, it does blink.***

Tr. Transcr. vol. 10, 152:17-29; 153:1-8 (Apr. 8, 2008).

The Appellants would show that the Appellees did not show that it was reasonably practical for Decedent Nilima Solanki to pull her motor vehicle off of the highway. It is clear that Nilima Solanki's car became disabled and stalled on I-220 on the day of the subject accident. The Appellees argued that there was a paved shoulder onto which Nilima Solanki could have steered. The Appellees have not shown, however, that it was reasonably practical for Nilima Solanki to steer her vehicle onto this shoulder. It is unknown what lane of I-220 Nilima Solanki was in at the time her vehicle began to become disabled, as ***no*** witnesses have come forth which actually saw the Solanki vehicle as it began slowing, or as it continued to slow and/or stop. I-220 is a high-traffic interstate. Furthermore, the accident occurred around a bustling exit and entrance ramps to I-220, at which there are multiple lanes at any given point. 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 Medgar 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 go 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. The photographs listed as Trial Exhibits 33, 35, 36, and 37 show the white marks where her wheels were. She was almost off of the highway. At least ½ of the fast lane was still open to her right.

Moreover, based upon the testimony of Sidharth Solanki, Appellant and husband of the decedent, the two of them were on the phone prior to impact for approximately 20 seconds. Based upon this short length of time, there was no way that Nilima Solanki had time to exit her vehicle and to get the small child out or even attempt to move her vehicle from the roadway before she was hit by Appellee Ervin. It was obvious from Appellant, Sidharth Solanki's, testimony that the vehicle was stalled and that Nilima Solanki could not get out of the roadway. The Appellants have established that Nilima Solanki could not reasonably get off the roadway.

B. COMPARATIVE NEGLIGENCE INSTRUCTION NO. 23

The Court gave Jury Instruction No. 23, a comparative negligence instruction, which read as follows:

> If you find from a preponderance of the evidence in this case that:
> 1. Melvin Tyrone Ervin was negligent but also,
> 2. That Nilima Solanki, Deceased, was negligent;
> 3. That the negligence of both Melvin Tyrone Ervin and Nilima Solanki, Deceased were the proximate, contributing causes of the accident in this case, and
> 4. That Nilima Solanki and the Plaintiff sustained injuries and damages caused by the combined negligence of Melvin Tyrone Ervin and Nilima Solanki, Deceased,
>
> then you will, in arriving at your verdict, first determine that sum of money which will fairly and adequately compensate the Plaintiffs, for said injuries and damages, and then reduce this sum in proportion to the causal negligence of Nilima Solanki, Deceased, using the following method:
> 1. determine the proportion that Nilima Solanki's own causal negligence bears to the

causal negligence as a whole, as a part or percentage of 100% (100% = total causal negligence of both actors in case);

2. multiply the sum of money you determined as Plaintiffs' damages by the percentage figure representing the proportion of Nilima Solanki's own causal negligence;
3. subtract the result, of your multiplication from the sum you first determined to be the Plaintiffs' total damages;
4. return a verdict for that final amount, as reached in Step 3, for the Plaintiffs.

Supplemental Record, Volume 1at page 28.

C. COMPARATIVE NEGLIGENCE INSTRUCTION NUMBER 22

The Court also gave Jury Instruction No. 22 over the objection of the Appellants. It read as follows:

> You are instructed that Mississippi law provides for comparative negligence, that is, more than one party may be responsible for causing a person's injury or death.
>
> Further, you are instructed that while operating her vehicle, the decedent, Nilima Solanki, had a duty to use reasonable care in the interest of safety of others on the roadway that a person of ordinary intelligence would exercise under the same or similar circumstances. If you find that Nilima Solanki did not exercise such reasonable care by failing to steer her vehicle onto the shoulder of the roadway as her vehicle began to stall and/or by talking on her cell phone instead of exiting the vehicle in order to move to a place of safety after her vehicle stopped, and if you further find that her failure to use reasonable care proximately caused or contributed to the accident or her own death, then it is your sworn duty to decide the amount you would have awarded for such death, if any, and then reduce your verdict by the percentage of Nilima Solanki's own negligence.
>
> Furthermore, should you find that Nilima Solanki's own negligence was the sole proximate cause of the accident, then you shall return a verdict in favor of Melvin Ervin and The Merchants Company.

Supplemental Record, Volume 1at page 35.

Instruction No. 22 will be argued more fully as Error Number V and Appellants incorporate all of that argument into that assignment of error. However, one can just look at how the Instruction No. 22 is written and tell that it was extremely confusing and misleading as the Appellants had argued at the time it was given. Said Instruction lays blame on Nilima Solanki if she talked on her

cell phone instead of exiting, without taking into consideration that a mother would not leave her child in the car and just try saving herself. If Appellee Ervin had not been driving so recklessly she would not have had to make that choice.

In the last paragraph it clearly says that if you find that Nilima Solanki's own negligence was the ***sole proximate cause of the accident then you shall return a verdict in favor of Melvin Ervin and the Merchants Company.***

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.

When the trial court was going over said instruction the Appellants made the following objection and the Court made the following comments:

Evans: We've got P-30, which is a contributory negligence instruction.

Tr. Transcr. vol. 12, 524:1-2 (Apr. 8, 2008).

Court: This is comparative negligence statute, and I expected it to come from the defense, ***but I don't understand what negligence is there of the deceased?***

Tr. Transcr. vol. 12, 524:11-14 (Apr. 8, 2008).

Court: ***What negligence is there - - what proof is there of any negligence on the part of the deceased?***

Liddell: Our part—our position is the proof is from the scene of the accident that she failed to steer her car to the side of the road when all indications are she had an opportunity to do so.

Court: ***I didn't interpret the evidence to that point.***

Liddell: I think the position of the vehicle is compelling evidence.

Court: All the evidence as to the roadway was at the scene of the impact, not as to the condition of the roadway after he passed the south end of the bridge.

Liddell: I think if you look at the evidence that she did not come to an immediate stop. She rolled to a stop. There was testimony she had been going 70. There's no indication at all of any action to move to the side.

The other, Your Honor, is the fact that there's uncontradicted evidence that she sat there for a minute and a half after she was stopped in the lane as observed by a witness and failed to get out of the way.

Court: ***I don't know that that is negligence for a minute and a half.***

Liddell: Oh, I believe it is.

Court: You've got to get a--you've got a child sitting in probably--it never was brought out but sitting in a child seat in the right here.

Tr. Transcr. vol. 12, 524:19-29; 525:1-23 (Apr. 8, 2008).

Liddell: So it's really two things. Its failure to steer the car to the shoulder of the road, and it's failure to do anything once she got there.

Court: ***Well, out of an abundance of precaution I'm going to give the comparative negligence instruction*** because I was not able to see all of the pictures of everybody talking about from here to here to here to here without stating for the record what they were talking about, ***but I will certainly take this up on any post trial hearing regardless of what the verdict is.***

Tr. Transcr. vol. 12, 527:6-18 (Apr. 8, 2008).

Court: I am going to give a comparative negligence instruction.

Tr. Transcr. vol. 12, 527:24-25 (Apr. 8, 2008).

Court: ***It's given reluctantly.***

Tr. Transcr. vol. 12, 528:12 (Apr. 8, 2008).

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 evinces bias or prejudice on the part of the jury, or, shows that they were just confused as to what the law was and as to how they

were supposed to rule. In any event, Appellees' Jury Instruction regarding "parking in a roadway," which was the Court's Jury Instruction No. 22, clearly confused and mislead the Jury.

Also, the Appellants are from India, and the Jury could have been prejudice for this reason, but there was no basis for a verdict totally for the Appellees under these facts.

II. THE COURT ERRED IN NOT GRANTING THE APPELLANTS' MOTION FOR A DIRECTED VERDICT IN FAVOR OF THE APPELLANTS AT THE CLOSE OF THE TRIAL TESTIMONY AND IN NOT GRANTING A PEREMPTORY INSTRUCTION IN FAVOR OF THE APPELLANTS ON THE GROUNDS THAT THE APPELLEES WERE NEGLIGENT AS A MATTER OF LAW IN THAT APPELLEE ERVIN MADE A LANE CHANGE WITHOUT FIRST ASCERTAINING THAT THE LANE CHANGE COULD BE SAFELY MADE, FAILED TO KEEP AND MAINTAIN A PROPER LOOKOUT, AND FAILED TO KEEP AND MAINTAIN HIS VEHICLE UNDER FREE AND EASY CONTROL.

The Court erred in not granting the Appellants' Motion for Directed Verdict in favor of the Appellants at the close of the trial testimony, and in not granting a peremptory instruction in favor of the Appellants on the grounds that the Appellees were negligent as a matter of law. The Appellants hereby incorporate all of the facts, laws and arguments made in the preceding assignment of error (Assignment of Error "I" above), to the assignment of error herein and to the argument and law set out hereafter in this Brief.

In the case of *Nobles v. Unruh*, 198 So. 2d 245 (Miss. 1967), the Court held that the heirs of a passenger was entitled to a peremptory instruction on the issue of liability whereby the passenger was killed when the host driver attempted to pass a transport truck on a four-lane highway and collided head-on with a pick-up truck which was traveling in the wrong lane and when the host driver failed to ascertain whether he could pass the transport truck safely before turning his vehicle into the passing lane. The host driver failed to offer an excuse or justification of his conduct.

Certainly the heirs of Nilima Solanki should have been given a directed verdict or the Court should have granted the peremptory instruction on the question of liability. The Appellee, Melvin Tyrone Ervin, never offered an excuse except that after he changes lanes he did not realize that she was stopped and that he did not have time to stop before hitting her. Under the law, that was strictly his negligence that caused the accident.

In *Cipriani v. Miller,* 160 So. 2d 87 (Miss. 1964), the Court held that the lower Court should have granted the Plaintiff a peremptory instruction when the Plaintiff, who was traveling on a four-lane highway, had a flat tire on his car and pulled up as close to the curb in the extreme right-hand lane of traffic as he possibly could. The Defendant saw the Plaintiff's vehicle stopped on the side of the traffic lane and in order to avoid the vehicle, she pulled into the left lane to pass. Then, apparently, another car approaching scared her and she pulled back into her lane and hit the Plaintiff's parked vehicle.

These cases, as well as the other cases cited in this brief, clearly indicate that if the Appellee changes lane without first ascertaining that the lane change could be safely made, then the Appellants should be entitled to a directed verdict, or, to a peremptory instruction on the issue of liability.

III. THE APPELLANT WOULD SHOW THAT THE COURT ERRED IN GRANTING APPELLEES' INSTRUCTION NO. D-8, WHICH WAS THE COURT'S JURY INSTRUCTION NO. 20.

The Court erred in granting Appellees' Jury Instruction No. D-8, which is listed as Court's Jury Instruction No. 20, which stated that it is illegal to park a vehicle on the highway. The Appellees contend that, at the time of the subject accident, Nilima Solanki's vehicle was stopped in the left southbound lane of I-220 and that it was illegal for Nilima Solanki's vehicle to be stopped in the roadway. This is the reasoning behind Appellees' Jury Instruction No. D-8. The Appellees

contend that there was no barrier or anything to prevent Nilima Solanki from steering her vehicle onto the shoulder of I-220 as her car was stopping, and that there was nothing to prevent Nilima Solanki from exiting her vehicle to a place of safety after her car stopped. The Appellees argue that, as a result of the above-mentioned contentions, Nilima Solanki's actions were in violation of Miss. Code Ann. § 63-3-903, making the actions of Nilima Solanki negligent.

The Appellants adamantly argue that Nilima Solanki did not park her vehicle in a manor that would constitute negligence on her part and that under the facts and circumstances the instruction should not have been given.

The Appellants have already fully argued this point on pages 10 through 39 in the brief and in the interest of not repeating the exact argument again, and because the limits of the pages in this brief, the Appellants incorporate each and every fact, law and/or argument set out in the brief into the assignment number III.

IV. THE COURT ERRED IN GRANTING JURY INSTRUCTION NO. 22, WHICH WAS APPELLEES' NO. D-11.

The Court also gave Jury Instruction No. 22 (D-11) over the objection of the Appellants. It read as follows:

> You are instructed that Mississippi law provides for comparative negligence, that is, more than one party may be responsible for causing a person's injury or death.
>
> Further, you are instructed that while operating her vehicle, the decedent, Nilima Solanki, had a duty to use reasonable care in the interest of safety of others on the roadway that a person of ordinary intelligence would exercise under the same or similar circumstances. If you find that Nilima Solanki did not exercise such reasonable care by failing to steer her vehicle onto the shoulder of the roadway as her vehicle began to stall and/or by talking on her cell phone instead of exiting the vehicle in order to move to a place of safety after her vehicle stopped, and if you further find that her failure to use reasonable care proximately caused or contributed to the accident or her own death, then it is your sworn duty to decide the amount you would have awarded for such death, if any, and then reduce your verdict by the percentage of Nilima Solanki's own negligence.

> Furthermore, should you find that Nilima Solanki's own negligence was the sole proximate cause of the accident, then you shall return a verdict in favor of Melvin Ervin and The Merchants Company.

Supplemental Record, Volume 1at page 35.

In the last paragraph, it clearly states that if you find that Nilima Solanki's own negligence was the ***sole proximate cause of the accident, then you shall return a verdict in favor of Melvin Ervin and the Merchants Company.***

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 it was 100% Nilima Solanki's fault.

The Appellants incorporate any and all allegations contained in Sections I, II, and III of the Appellants' Brief into this argument.

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 part of the jury or shows that they were just confused as to what the law was and as to how they were supposed to rule. In any event, Appellees' Jury Instruction No. D-11, regarding "parking in a roadway," which was given by the Court as Jury Instruction No. 22, clearly confused and mislead the Jury.

Also, the Court gave Appellants' comparative negligence instruction, and there was no need to give another. This Instruction was totally misleading, and the Appellants incorporate its argument used in assignment number I into the assignment.

CONCLUSION

The Appellants contend that they lost Nilima Solanki as a result of the negligence of the Appellees. The Appellants also feel that they clearly put on evidence proving that Nilima Solanki

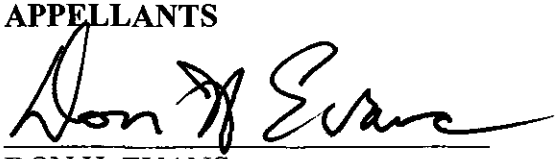
was not totally at fault for the accident in question and that Appellee Ervin was totally or, at least, partially at fault. The Jury had the comparative negligence instructions, and they should have assessed some degree of negligence on Appellee Ervin and awarded a verdict in favor of the Appellants, reflecting the deduction for whatever proportion they felt she may have caused, if any. However, they did not do that. They put 100% fault on Nilima Solanki. The Appellants feel that the Jury was so confused by the "parking in a roadway" instruction and by the comparative negligence instruction that the Appellees gave or that they were just simply bias and prejudice and simply ruled against the Appellants due to the fact they were foreigners. In any event, the Appellants request that the Court reverse the verdict of the jury and grant a new trial on damages only or to grant an entirely new trial on all issues.

If Appellants have prayed for improper relief, then Appellants ask that the court grant them whatsoever relief it deems proper.

RESPECTFULLY SUBMITTED, the 22nd day of December, 2008.

RESPECTFULLY SUBMITTED,

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

BY: 

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CERTIFICATE OF SERVICE

I, Don H. Evans, attorney for Appellants, do hereby certify that I have served, via U.S. Mail, postage prepaid, a copy of the foregoing Appellants' Brief to the following:

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Circuit Court Judge of Hinds County, Mississippi
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Jackson, Mississippi 39205

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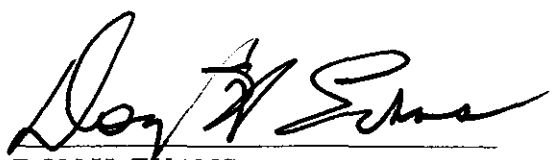
On this the 22nd day of December, 2008.



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