IN THE SUPREME COURT OF MISSISSIPPI

NO. 2008-TS-01089

BOYD TUNICA, INC. **APPELLANT**

VS.

RUTH BEASLEY LATTING
PREMIER TRANSPORTATION SERVICES, INC. **APPELLEES**

Appeal from the Circuit Court of Tunica County, Mississippi
No. 2005-0264

BRIEF FOR THE APPELLANT BOYD TUNICA, INC.

Oral Argument Requested

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and 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:

1. Boyd Tunica, Inc., d/b/a Sam's Town Hotel and Gambling Hall, Defendant/Appellant;
2. Ruth Beasley Latting, Plaintiff/Appellee;
3. Premier Transportation Services, Inc., Defendant/Appellee;
4. Richard C. Williams, Jr., trial counsel for Defendant/Appellant Boyd Tunica, Inc.;
5. Lonnie D. Bailey, trial counsel for Defendant/Appellant Boyd Tunica, Inc.;
6. Otha E. Williams, trial counsel for Defendant/Appellant Boyd Tunica, Inc.;
7. Upshaw, Williams, Biggers, Beckham & Riddick, LLP, trial counsel for Defendant/Appellant Boyd Tunica, Inc.;
8. Robert A. Miller, counsel for Defendant/Appellant Boyd Tunica, Inc.;
9. Kyle V. Miller, counsel for Defendant/Appellant Boyd Tunica, Inc.;
10. Butler, Snow, O'Mara, Stevens & Cannada, counsel for Defendant/Appellant Boyd Tunica, Inc.;
11. Richard B. Lewis, Jr., counsel for Plaintiff/Appellee Ruth Beasley Latting;
12. Daniel M. Czamanske, Jr., counsel for Plaintiff/Appellee Ruth Beasley Latting;
13. Chapman, Lewis & Swan, counsel for Plaintiff/Appellee Ruth Beasley Latting;
14. John D. Richardson, counsel for Defendant/Appellee Premier Transportation Services, Inc.;
15. Teresa A. Boyd, counsel for Defendant/Appellee Premier Transportation Services, Inc.; and
16. The Richardson Law Firm, counsel for Defendant/Appellee Premier Transportation Services, Inc.

Kyle V. Miller
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF THE CASE

A. Nature of the case, course of proceedings, and disposition.

The instant appeal arises from a personal injury action brought by the plaintiff/appellee Ruth Beasley Latting ("Beasley") against the defendant/appellant Boyd Tunica Inc. ("BTI") and the defendant/appellee Premier Transportation Services, Inc. ("Premier"). Beasley, while riding as a passenger on a Premier shuttle bus was ejected from her seat when the bus driver slammed on his brakes to avoid striking a truck operated by a BTI employee.

Beasley filed her Complaint on September 12, 2005 in the Circuit Court of Tunica County, Mississippi. The action was tried before a jury on May 5, 2008 thru May 6, 2008. At the close of Beasley's case, BTI moved for directed verdict; the Circuit Court denied the motion. The jury reached a verdict on May 6, 2008, finding BTI solely at fault and awarding Beasley $250,000.00 in damages. On May 16, 2008, the Circuit Court entered a judgment on the verdict.

BTI filed its Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial on May 22, 2008. The Circuit Court denied the motion by written order on June 6, 2008. BTI timely filed its Notice of Appeal on June 24, 2008.

B. Statement of the facts.

Premier owns and operates several shuttle buses that service the various casinos located in Tunica, Mississippi. (Tr. at 264:20 – 264:25.) Premier charges its passengers $1.00 to ride the shuttle buses. (Tr. Ex. BTI-O at 5.) Sam's Town Hotel and Gambling Hall, which is owned by BTI, is among the casinos Premier services. (Tr. at 112:19 – 112:21.)

Premier maintains a driver's guide for its drivers, setting forth various internal policies and safety regulations. (Tr. at 208:17 – 208:24; Tr. Ex. BTI-O.) The guide requires that all passengers wear their seatbelt and specifically mandates that all front-seat passengers wear a

seatbelt while the vehicle is in motion. (Tr. Ex. BTI-O at 15, B.R.E. at 53.) Premier's internal safety regulation regarding seatbelts reads:

SEAT BELT POLICY

> The law requires that all front seat passengers and driver wear the seat belt while the vehicle is in motion. Wear your seat belt at all times, it's the law. Premier Transportation insists that all passengers "buckle up." Inform the company if you find anything wrong with the vehicle safety belts as you would with any other defect in the safety, comfort or operation of the vehicle.

(*Id.* (emphasis added).) Premier mandates "strict[] and faithful[]" adherence to its seatbelt policy. (*Id.*) In addition to the seatbelt policy, the driver's guide requires drivers to "[b]e sure the passengers are *seated securely* before attempting to pull off from the curb." (Tr. Ex. BTI-O at 16, B.R.E. at 54.)

On the afternoon of January 11, 2005, Frank Weeden ("Weeden"), an employee of Premier, was driving shuttle bus number 806. (Tr. at 111:16 – 111:18, 111:26 – 112:1; Tr. Ex. BTI-Y at 34:25 – 35:6.) Bus number 806 could seat twenty-five (25) passengers. (*Id.* at 264:11 – 264:12.) That evening, at the Hollywood Casino, 76-year-old Beasley paid her $1.00 fare and boarded bus 806. (Tr. at 91:6 – 91:13, 92:24 – 92:26, 112:5 – 112:6, B.R.E. at 61:6 – 61:13, 62:24 – 62:26, 64:5 – 64:6.) She seated herself on the front row of the bus and maintained her front-row seat throughout the entire bus ride. (*Id.* at 92:13 – 92:16, 103:7 – 103:15, 178:16 – 178:19, 222:15 – 222:17, B.R.E. at 62:13 – 62:16, 63:7 – 63:15, 65:16 – 65:19, 70:15 – 70:17.)

At no point during her bus ride did Beasley put on her seatbelt. (Tr. at 222:18 – 222:20, 226:7 – 226:9, 227:2 – 227:5, B.R.E. at 70:18 – 70:20, 73:7 – 73:9, 74:2 – 74:5.)

> [Counsel for BTI:] . . . Ms. Beasley was not wearing a seatbelt at any time – from the time she got on your vehicle to the time she was thrown to the consol, correct?
>
> [Weeden:] No, she was not.

(Tr. at 227:2 – 227:5, B.R.E. at 74:2 – 74:5.) This fact went uncontested at trial.[1]

Additionally, Beasley sat on the edge of her seat throughout the bus ride. (Tr. at 224:1 – 224:22, 225:8 – 225:11, 226:4 – 226:6; B.R.E. at 71:1 – 71:22, 72:8 – 72:11, 73:4 – 73:6.)

> [Weeden:] . . . I didn't like the way she was sitting on the edge of the seat.
>
> . . .
>
> . . . She was just sitting straight up on the edge of the seat there. The one right on the – one right on the – the very first one on the aisle.

(Tr. at 224:1 – 224:22, B.R.E. at 71:1 – 71:22.) This fact also went uncontested at trial.

Once Beasley was on board, Weeden drove bus number 806 from the Hollywood Casino to Sam's Town. (Tr. at 112:5 – 112:6, 112:19 – 112:21.) After making his stop at Sam's Town, Weeden began driving toward the casino's exit. (*Id.* at 113:18 – 113:29.) As he neared an intersection, Weeden slammed on his brakes. (*Id.* at 115:25 – 116:2.) According to him, Weeden needed to slam on his brakes to avoid hitting a BTI truck that pulled out in front of the bus. (*Id.* at 114:8 – 114:18.) Because Beasley was not wearing her seatbelt, the force of the stop ejected her from the edge of the front seat, causing her to strike the dashboard of the bus. (*Id.* at 91:21 – 91:26.) The impact resulted in Beasley breaking three of her ribs. (*Id.* 132:23 – 132:29.) Beasley filed the underlying personal injury action, naming both Premier and BTI as defendants. (R. at 10 – 13.)

Before trial, BTI moved *in limine* for a ruling on two issues. First, BTI argued that Premier was a common carrier and, thus, owed Beasley the duty of highest care and diligence for her safety. Second, BTI argued that Premier's failure to enforce its internal safety regulations

[1] There was conflicting testimony at trial regarding whether the driver told Beasley to fasten her seatbelt. *Compare* Tr. at 92:1 – 92:3 (testimony of Beasley), *with* Tr. at 223:24 – 224:16 (testimony of driver).

was admissible to evince Premier's breach of its heightened duty. (R. 28 – 34, B.R.E. at 9 – 15.) Premier filed cross motions *in limine* seeking to exclude same. (R. at 131 – 140, B.R.E. at 16 – 25.)

The Circuit Court took up the motions in chambers on the morning the trial was set to commence. The Circuit Court held that Premier was a common carrier. (Tr. at 10:27 – 11:7, B.R.E. at 56:27 – 57:7.)

> The Court: . . . I agree with [BTI] that, you know, [Premier] got paid at what, a dollar to ride the thing?
>
> [Counsel for Premier]: Yes, sir.
>
> The Court: Legally, I think you are going to be a common carrier. [Premier's] motion [*in limine*] is denied.

(*Id.*) The Court then turned its attention to the admissibility of evidence regarding Premier's violations of its internal safety regulations – specifically, evidence of seatbelt non-use. (*Id.* at 11:8.)

The Circuit Court initially took the motion regarding Premier's failure to enforce its internal safety regulation under advisement. (*Id.* at 16:14 – 16:22, B.R.E. at 58:14 – 58:22.) Before opening statements, the Circuit Court ruled that evidence of the seatbelt non-use was admissible to prove that Premier breached its duty to Beasley. (Tr. at 66:1 – 66:14, B.R.E. at 59:1 – 59:14.)

> On the seatbelt issue, I think – I think [BTI] is right. I think a limiting instruction allowing that in is going to work. I don't think you can use it on comparative. And that's why I think [BTI's] limiting instruction may work. That argument about the – I mean, you got a standard – <u>that's your standard of care argument is going to be that booklet deal</u>. I think that – I think that [BTI] may be right on that. And I don't like that, because I just ruled the opposite way [in a prior case], didn't I? But anyway, that's my tentative ruling – those are my rulings on those issues.

(*Id.* (emphasis added).)

Consistent with the Circuit Court's rulings, BTI focused its defense on Premier's breach of its duty of highest care and diligence for the safety of Beasley by failing to abide by its internal safety regulations. (*Id.* at 85:11 – 85:24, 225:4 – 227:18, B.R.E. at 60:11 – 60:24, 72:4 – 72:18.) At the close of Beasley's case, Premier and BTI each moved for directed verdict. (*Id.* at 148:22 – 149:7.) The Circuit Court denied BTI's motion and took Premier's motion under advisement. (*Id.* at 148:29.) Following the close of the defendants' cases, the Circuit Court denied Premier's motion for directed verdict. (*Id.* at 290:4 – 290:8.)

Before closing arguments, the Circuit Court reviewed the instructions submitted by the parties and heard objections regarding same. BTI submitted the following jury instructions germane to this appeal:

> Jury Instruction No. D-[1]
>
> The Court instructs the jury that you may consider the fact that co-defendant Premier Transportation Services, Inc. was equipped with functional seatbelts in accordance with Premier Transportation's Tunica County Casino Shuttle Driver's Guide for the purpose of determining whether Premier met its duty of care to its passenger, Ruth Beasley. However, you may not consider plaintiff's use or non-use of seatbelts in determining, (1) whether the plaintiff was at fault for her own injuries and/or, (2) whether plaintiff's use or non-use of her seatbelt caused her injury.
>
> . . .
>
> Jury Instruction No. D-2
>
> The Court instructs the jury that under the laws of the State of Mississippi a carrier of passengers for hire is required to exercise the highest degree of care and diligence for the safety of its passengers. If you find by a preponderance of the evidence that Premier Transportation Services, Inc., negligently operated its shuttle bus when its driver, Frank Weeden, drove with the knowledge that Ruth Beasley was a font seat passenger who was not wearing a seatbelt, and that this was contrary to the Driver Guidelines of Premier Transportation Services, Inc., and that, further, by operating the vehicle while Ruth Beasley was not wearing a seat belt, the defendant Premier Transportation Services, Inc., through its driver, Frank Weeden, failed to exercise the

> highest degree of care and diligence for the safety of its passengers, including Ms. Beasley, you should find for the plaintiff, Ruth Beasley, against the defendant Premier Transportation Services, Inc.

(R. at 296, 298, B.R.E. at 26, 28.)

In direct contradiction of its prior ruling, the Circuit Court refused BTI's proposed Jury Instruction No. D-1. (Tr. at 277:5 – 277:7, B.R.E. at 75:5 – 75:7.) Instead, the Circuit Court granted Beasley's proposed Jury Instruction No. P-11: "You are instructed not to consider evidence of seatbelt use or non-use in determining liability and/or damages against the Plaintiff, Ruth Beasley." (*Id.* at 277:8 – 277:22, B.R.E. at 75:8 – 75:22; R. at 297, B.R.E. at 27.) Moreover, at the request of Premier, the Circuit Court added language to P-11, eviscerating BTI's entire theory of the case. (Tr. at 277:14 – 277:22, B.R.E. at 75:14 – 75:22; R. at 297, B.R.E. at 27.) The instruction, as amended and as given, read: "You are instructed not to consider evidence of seatbelt use or non-use in determining liability and/or damages against the Plaintiff, Ruth Beasley, or the fault of Premier Transportation." (Tr. at 300:15 – 300:19, B.R.E. at 78:15 – 78:19 (emphasis added); R. at 297, B.R.E. at 27.)

The Circuit Court stated that the proposed Jury Instruction D-2 would be given. (Tr. at 277:28 – 278:3, B.R.E. at 75:28 – 76:3; R. at 298, B.R.E. at 27.) Initially, the Circuit Court read Jury Instruction D-2 to the jury.

> The Court instructs the jury that under the law of the State of Mississippi, a carrier o[f] passenger[s] for hire is required to exercise the highest degree of care and diligence for the safety of its passengers. If you find by a preponderance of the evidence that Premier Transportation negligently operated its shuttle bus which the driver, Frank Weeden, drove with the knowledge that Ruth Beasley was a font seat passenger who was not wearing a seatbelt, and that this was contrary to the driver guidelines of Premier Transportation, Inc. and that further by operating the vehicle while Ruth Beasley was not wearing a seatbelt, defendant transportation, through its driver, failed to exercise the highest degree of care and diligence for the safety of its passengers including Ms. Beasley, you should find for the plaintiff Ruth Beasley against them.

(Tr. at 300:20 – 301:11, B.R.E. at 78:20 – 79:11.) However, immediately after reading the instruction, the Circuit Court reversed itself:

> Hmm. come here.
>
> . . . [Bench Conference.[2]]
>
> . . . Disregard that last instruction. That's not proper law. That's going to be withdrawn. That's going to be refused.
>
> I read one earlier instructing you not to consider evidence of seatbelt use or non-use to determine liability or damages against the plaintiff, Ruth Beasley, or the fault of Premier transportation.

(Tr. at 301:12 – 302:18, B.R.E. at 79:12 – 80:18.)

As a result of the withdrawal of BTI's Jury Instruction D-2, the Circuit Court did not instruct the jury regarding Premier's status as a common carrier or its duty of highest care and diligence. The jury was instructed only to consider Premier's liability under a reasonableness standard or ordinary care.

> You are instructed that if you find from a preponderance of the evidence in the case that the plaintiff has sustained actual

---

[2] The transcript of the bench conference reads, in full:

> [Counsel for Premier]: What the deal was I talked to – we noticed that. I spoke to your – we did not want to – I did not want to interrupt, your Honor.
>
> [Counsel for BTI]: What is that?
>
> ([Counsel for BTI] examines document.)
>
> [Counsel for BTI]: Is that mine?
>
> The Court: Yeah, that's yours.
>
> [Counsel for Premier]: We need a curative instruction?
>
> [Counsel for Premier]: Curative instruction, and just disregard the last statement and read that in.
>
> The Court: I've heard enough.

(Tr. at 301:18 – 302:3, B.R.E. at 79:18 – 80:3.)

> damages as a proximate result of any negligence for which the [sic] either defendant is responsible, plaintiff is entitled to a verdict in an amount which will reasonably compensate the plaintiff for her damages sustained. . . .
>
> Negligence is the failure to use reasonable care. Reasonable care is that degree of care which a reasonably careful person would use under like or similar circumstance. Negligence may consist of the doing something that a reasonably careful person would not do under like or similar circumstances and failing to do something that a reasonably careful person would do under like or similar circumstances.
>
> . . .
>
> [I]f you find from a preponderance of the evidence in the case that either defendant was negligent in the operation of their vehicle and that defendant's negligence was the sole proximate cause, the proximate contributing cause of the plaintiff's injuries, you must assess a percentage of fault to the defendant or defendants.

(Tr. at 299:8 – 300:14, B.R.E. at 77:8 – 78:14 (emphasis added).)

> You are instructed the driver of a vehicle is not absolutely liable to anyone under any circumstances for injury occasioned by the vehicle. But the driver must exercise ordinary care and avoid injury to person or persons or property.
>
> . . .
>
> If you find from the preponderance of the evidence that Defendant Boyd Tunica or Defendant Premier had reasonable control of its vehicle under the circumstances, you must find for the defendant. However, if you find that the Defendant Boyd Tunica or Defendant Premier Transportation failed to exercise ordinary care to avoid injury, you must find for the plaintiff.

(Tr. at 304:11 – 305:2, B.R.E. at 81:11 – 82:2 (emphasis added).)

During closing arguments, Premier took full advantage of the prejudice that resulted from the last minute reversal of the Circuit Court's pretrial ruling, arguing during closing arguments:

> . . . Sam's Town first made it into a seatbelt case. They are trying to blame seatbelts, anything to get out of it.

> Now, you have heard from the Court and you – I know all of you will follow the law. You heard from the Court this: "You are instructed not to consider evidence of seatbelt use or non-use in determining liability or damages against the plaintiff or the fault of Premier Transportation."
>
> Whether you like that rule of law or not doesn't matter. There's a number of reasons for that law. But the Court has given you that law. And the law is, you can't hold it against Ms. Beasley that she didn't have on a seatbelt. Likewise, you can't hold it against Premier that we didn't kick her off the bus for not wearing the seatbelt. Seatbelts are out of the case, period, gone.
>
> So, the law is that, and the Judge has so told you.
>
> The defense of Sam's Town started out simply with seatbelts. Well, they should have made her put on her seatbelt. That was their defense. Well, that's gone because the Judge has told you that.
>
> Then, the defense, when that didn't work, shifted to, oh we let her sit on the edge of her seat.

(Tr. at 323:1 – 323:29, B.R.E. at 83:1 – 83:29.)

The jury returned a verdict in favor of Beasley, apportioning 100 percent of the fault to BTI and awarding Beasley $250,000.00 in damages. (*Id.* at 332:4 – 332:9.) The Circuit Court entered a judgment in accordance with the jury's verdict. (R. at 253 – 54, B.R.E. at 29 – 30.) BTI moved for judgment notwithstanding the verdict or, in the alternative, for a new trial due, in part, to the Circuit Court's erroneous jury instructions and to the prejudicial effect created by the reversal of the pretrial rulings. (R. at 255 – 272, B.R.E. at 31 – 48.) The Circuit Court denied BTI's motion, finding "that the jury was properly instructed on the applicable law" and that BTI "was not unfairly prejudiced by any of the Court's rulings." (R. at 537 – 38, B.R.E. at 49 – 50.)

The instant appeal followed.

SUMMARY OF THE ARGUMENT

The Circuit Court erred by instructing the jury that it could not consider Premier's violations of its internal safety regulations as evidence of Premier's breach of the duty it owed to Beasley. A company's internal regulations may serve as evidence of the company's appropriate standard of care, and violations of internal regulations may serve as evidence of a breach of that standard. Though Miss. Code Ann. § 63-2-3 mandates that failure to use a seatbelt does not constitute contributory or comparative fault, § 63-2-3 is inapplicable in the instant case – Chapter 2 of Title 63 excludes buses and passenger vehicles equipped to carry more than fifteen passengers. Moreover, Premier's duty and breach thereof was not predicated on a violation of the seatbelt statute (Miss. Code Ann. § 63-2-1) but on a violation of Premier's internal safety regulations.

Additionally, the Circuit Court erred by failing to instruct the jury that Premier, as a common carrier, owed Beasley the duty of highest care and diligence for her safety as opposed to the standard of ordinary care/reasonableness. Premier was a common carrier and had a passenger/carrier relationship with Beasley.

Finally the Circuit Court erred in denying BTI's motion for new trial because the Circuit Court's reversal of its pretrial rulings resulted in unfair prejudice to BTI. In reliance on the Circuit Court's pretrial ruling, BTI focused its defense almost exclusively on Premier's failure to enforce its internal safety regulations. The Circuit Court reversed its pretrial ruling during a recess while the last witness was on the stand. Premier fully exploited the timing of the reversal to the prejudice and detriment of BTI by insinuating that BTI presented evidence on an improper point of law in an effort to avoid liability.

ARGUMENT

I. The Circuit Court Erred by Instructing the Jury that It Could Not Consider Premier's Violations of Its Internal Safety Regulations as Evidence of a Breach of Premier's Duty to Beasley.

Despite the Circuit Court's pretrial rulings regarding the admissibility of Premier's failure to comply with its internal safety regulations, the Circuit Court erroneously instructed the jury that it could not consider these failures as evidence of Premier's breach of duty.

A. The propriety of the jury instruction regarding Premier's violation of its internal safety regulations should be reviewed *de novo.*

The law of Mississippi is clear: "A party is entitled to a jury instruction so long as it concerns a genuine issue of material fact and there is credible evidence to support the instruction." *Young v. Guild*, --- So. 2d ---, No. 2004-CA-02532-SCT, 2008 WL 4740038, at *4 (¶ 20) (Miss. Oct. 30, 2008) (citing *Mariner Health Care, Inc. v. Estate of Edwards ex rel. Turner*, 964 So. 2d 1138, 1155-56 (¶ 48) (Miss. 2007)). It is reversible error if the granted instructions, taken as a whole, do not fairly present the applicable law. *Id.* On appeal, two questions are to be asked: (1) Did the given instruction contain a correct statement of the law; and (2) Is the instruction warranted by the evidence? *Id.* When the entitlement of the instruction turns on a question of law, this Court reviews the grant or denial of the instruction *de novo*. *McCune v. State*, 989 So. 2d 310, 318 (¶ 14) (Miss. 2008).

The accurateness of the given instruction (that the jury could not consider evidence of seatbelt non-use against Premier) and the validity of the decision to refuse BTI's proffered instruction (that the jury may consider evidence of seatbelt non-use against Premier) turn on a question of law. At trial, the facts regarding the existence of the internal safety regulation and Premier's breach thereof went undisputed. Premier provides its drivers with a driver's guide that calls for "strict" and "faithful" compliance with its internal safety regulation regarding seatbelts. (Tr. Ex. BTI-O at 15, B.R.E. at 53.) The policy dictates that "all front seat passengers . . . wear

the seatbelt while the vehicle is in motion. . . . Premier Transportation insists that all passengers 'buckle up.' " (*Id.*) At no point did Premier "strictly and faithfully" enforce its internal regulation and require that Beasley "buckle up." Instead, after recognizing that Beasley was not wearing her seatbelt, Premier's driver, in derogation of the Premier policy, allowed Beasley to remain unbelted in the front passenger seat. (Tr. at 222:18 – 222:20, 226:7 – 227:5, B.R.E. at 70:18 – 70:20, 73:7 – 74:5.) Thus, it is without question, that the facts of the case supported the instruction proffered by BTI.

Accordingly, the decisions to grant Premier's requested instruction and to refuse BTI's requested instruction turned on a question of law. Thus, the propriety of the Circuit Court's decisions should be reviewed *de novo*.

B. Premier's violation of its internal safety regulation was evidence of its negligence.

While a violation of an internal policy does not constitute negligence *per se*, such a violation is evidence of a breach of duty. *See Steele v. Inn of Vicksburg, Inc.*, 697 So. 2d 373, 377 (Miss. 1997); *see also Taylor v. Singing River Hosp. Sys.*, 704 So. 2d 75, 78 (¶ 12) (Miss. 1997) (noting that failure to verify physician's credentials was "legally inconsequential" where the failure did not violate a hospital policy). In *Steele*, a premises liability case, a minor invitee drowned in the inn's cloudy swimming pool. 697 So. 2d at 374. Following a jury verdict in favor of the inn, the trial court denied the plaintiff's motion for judgment notwithstanding the verdict. *Id.* at 376. On appeal, this Court noted that the jury could have concluded that failing to maintain the swimming pool in accordance with the company's policy was a breach of the inn's duty. *Id.* at 377.

The use of an internal regulation as evidence of a party's standard of care is in accord with the precedent of Mississippi federal courts. *See Shoemake v. Rental Serv. Corp.*, Civ. A. No. 1:06cv426-HSO-JMR, 2008 WL 345498 (S.D. Miss. Jan. 30, 2008). In *Shoemake*, the

plaintiff sought to introduce the internal guidelines of the defendant as evidence of the appropriate standard of care. *Id.* at *1. Noting the absence of any Fifth Circuit precedent to the contrary, the district court held that the internal guidelines, while not conclusive on issue of the standard of care, constituted relevant evidence in determining the standard of care. *Id.* (citing *Tringali Bros. v. United States*, 630 F.2d 1089, 1093 (5th Cir. 1980) (finding internal guidelines may be used as evidence of negligence, but are not conclusive of negligence); *Gordon v. SouthTrust Bank*, 108 Fed. App'x. 837, 842 (5th Cir. 2004) (finding that a jury may consider a defendant's failure to follow internal guidelines when making its liability determination); *Quijano v. United States*, 325 F.3d 564, 568 (5th Cir. 2003) (finding internal policies and procedures to be evidence of the standard of care)).

Applying a party's internal regulations to evince the standard of care is akin to this Court's holding allowing for a federal regulation to serve as a basis for determining the standard of care. *Mariner Health Care, Inc. v. Estate of Edwards ex rel. Turner*, 964 So. 2d 1138, 1155 (¶ 46) (Miss. 2007). In *Mariner Health Care*, the trial court instructed the jury that it may consider the federal regulations regarding the operation of a nursing home as evidence of negligence. *Id.* This Court affirmed that instruction finding that the regulation did not create a cause of action where none existed. *Id.* Rather, the federal regulation "may be used to inform the standard of care." *Id.*; *see also Chisholm v. Miss. Dep't of Transp.*, 942 So. 2d 165, 169-70 (¶ 16) (Miss. Ct. App. 2005) ("[W]hile the [Manual of Uniform Traffic Control Devices] may be considered as evidence of negligence, it is not conclusive proof of the standard of care."), *rev'd on other grounds*, 942 So. 2d 136, 143 (¶ 15) (Miss. 2006) ("Alleged violation of a provision of the MUTCD is one fact to be considered in determining whether a defendant violated the standard of care. . . . The MUTCD becomes a tool for assessing a breach of duty . . . ."; internal citations omitted); *Moore ex rel. Moore v. Mem'l Hosp. of Gulfport*, 825 So. 2d 658, 665-66

(¶ 24) (Miss. 2002) (violation of internal regulation of State Board of Pharmacy "may serve as evidence of negligence").

Though not binding, the holding of *Cunningham v. Vincent*, 234 A.D.2d 648 (N.Y. App. Div. 1996), is instructive. In *Cunningham*, the plaintiff, a paraplegic passenger who suffered from cerebral palsy, was injured while being lowered from a passenger vehicle to the ground via a hydraulic lift. *Id.* at 648. The operator of the vehicle did not supply the plaintiff with a wheelchair seatbelt to be used during transportation. *Id.* at 651. The carrier's own safety manual specifically required that the carrier supply seatbelts to certain disabled passengers for use while the lift was being raised or lowered. *Id.* The appellate court held that evidence of the carrier's failure to provide a seatbelt was sufficient evidence for the jury to find the carrier had violated its duty. *Id.*

Premier maintained a clear and concise safety policy. Drivers were to "faithfully and strictly" enforce the internal safety regulation requiring all passengers to "buckle up" and specifically requiring front seat passengers to wear a seatbelt. (Tr. Ex. BTI-O at 15, B.R.E. at 53.) This internal safety regulation evidenced Premier's standard of care. It was equally unequivocal that Premier violated its internal safety regulation in relation to the subject accident. Premier's driver, Weeden, testified that he operated the shuttle bus knowing that Beasley was not wearing her seatbelt. (Tr. at 225:8 – 225:18, B.R.E. at 72:8 – 72:18.) Yet, Weeden "pulled[ed] off from the curb" despite her lack of seatbelt. (Tr. at 227:10 – 227:18, B.R.E. at 74:10 – 74:18.) Weeden's failure to "faithfully and strictly" enforce Premier's internal safety regulation is evidence of Premier's breach of duty.

The jury should have been instructed that it may consider Premier's internal safety regulations and Premier's breach of those policies as evidence of Premier's negligence. Both the

law and the evidence supported this instruction. Accordingly, BTI was entitled to have the jury instructed on this point, and the Circuit Court erred in failing to do so.

C. Mississippi's seatbelt statute does not preclude the jury from considering Premier's violation of its internal safety regulations.

In the Circuit Court, Premier argued that the jury could not consider the violations of its internal safety regulations related to the use of seatbelts. Specifically, Premier averred that Miss. Code Ann. § 63-2-3 prohibited the jury from assessing fault against Premier stemming from its failure to enforce its internal seatbelt policy. The Circuit Court instructed the jury consistent with Premier's argument. However, such instruction was in error. The prohibition of § 63-2-3 does not apply to the instant situation because the shuttle bus was exempt from enforcement of the seatbelt statute. Moreover, even if the statute applied to the shuttle bus, Premier's failure to enforce its internal safety regulations falls within an exception to the applicability of § 63-2-3.

1. The Premier bus is outside the scope of Mississippi's seatbelt statute.

The Mississippi Code provides that passengers riding in the front seat of a passenger vehicle "shall wear a properly fastened safety belt system." Miss. Code Ann. § 63-2-1(1). Section 63-2-1 applies only to passenger vehicles designed to carry fifteen or fewer passengers and expressly excludes buses from its purview. Miss. Code Ann. § 63-2-1(2), (3)(d). When the mandatory seatbelt requirement of § 63-2-1(1) applies, it does not establish a "duty, standard of care, right or liability between the operator and passenger of any passenger motor vehicle." Miss. Code Ann. § 63-2-3.[3] Additionally, Mississippi law prohibits violations of the mandatory seatbelt statute to form the basis of a claim of contributory negligence or comparative fault. *Id.*

[3] "This chapter shall not be construed to create a duty, standard of care, right or liability between the operator and passenger of any passenger motor vehicle which is not recognized under the laws of the State of Mississippi as such laws exist on the date of passage of this chapter or as such laws may at any time thereafter be constituted by statute or court decision." Miss. Code Ann. § 63-2-3.

("Failure to provide and use a seatbelt restraint device or system shall not be considered contributory or comparative negligence . . . ."; hereinafter the "prohibition sentence").

Unquestionably, the mandatory seatbelt provision of § 63-2-1(1) does not apply to the instant case. *See* Miss. Code Ann. § 63-2-1(2), (3)(d). The subject Premier motor vehicle was a bus designed to transport more than fifteen people. (Tr. at 264:11 – 264:12.) Regardless of the breadth of § 63-2-3, BTI could not have argued (and did not argue at trial) that Premier violated a "duty [or] standard of care" established by Title 63, Chapter 2. Section 63-2-1 imposed no obligation of any nature upon Premier or Beasley due to the nature and size of the vehicle at issue.

The Circuit Court adopted Premier's argument at trial that the second sentence of § 63-2-3 – the prohibition sentence – precluded the jury from considering Premier's violation of its internal safety regulations as negligence on the part of Premier. To read the prohibition sentence in this overly broad manner necessarily assumes an intent on the part of the legislature to regulate causes of action beyond the purview of the mandatory seatbelt use statute and to abrogate the common law to the extent it conflicts with § 63-2-3. A more accurate reading of § 63-2-3, however, would limit the prohibition sentence to claims falling within the rubric of § 63-2-1.

The intent of the legislature must be derived from the language of the statute as a whole. *See In re Guardianship of Duckett*, 991 So. 2d 1165, 1181-82 (¶ 37) (Miss. 2008). Each section of a statute must be interpreted with respect to and in the light of all other sections. *Broadhead v. Monaghan*, 238 Miss. 239, 252, 117 So. 2d 881, 886 (Miss. 1960). Additionally, when interpreting a statute, the Court must place on the statute a construction that will render the statute valid. *Thornhill v. Ford*, 213 Miss. 49, 56, 56 So. 2d 23, 30 (Miss. 1952); *see also Alldred v. Webb*, 641 So. 2d 1218, 1222 (Miss. 1994) ("When no valid reason exists for one of

two possible constructions of a statute, the interpretation with no valid reason ought not to be adopted."). The title of the act may be useful in determining the intent of the legislature. *Giles v. Friendly Fin. Co. of Biloxi*, 185 So.2d 659, 662 (Miss. 1966).

As an initial matter, the prohibition sentence of § 63-2-3 must be read within the context of the entire section. The first sentence of § 63-2-3 states, "[Title 63, Chapter 2] shall not be construed to create a duty, standard of care, right or liability between the operator and passenger of any passenger motor vehicle which is not recognized under the laws of the State of Mississippi . . . ." This first sentence is aimed merely at constraining the applicability of Title 63, Chapter 2. The prohibition sentence should be read similarly: the mandatory seatbelt provision of § 63-2-1 does not give rise to a claim of contributory or comparative negligence.

Likewise, the prohibition sentence must be read in the context of the entire chapter, specifically, § 63-2-1. Section 63-2-1 presents the only active pronouncement regarding the responsibilities of operators and passengers of motor vehicles.[4] That active pronouncement is limited to only certain passenger vehicles, none of which are at issue here. There is no basis or expression of legislative intent for § 63-2-3 to apply beyond the scope of the one active pronouncement contained in the chapter.

The title of § 63-2-3 further buttresses this properly restrained interpretation. Section 63-2-3 is entitled "Chapter does not create rights." Miss. Code Ann. § 63-2-3. Indeed it would be curious for a section so titled not only to limit the effect of the Chapter but also to go beyond the scope of the Chapter and to limit claims and bases of liability wholly ungoverned by the Chapter. Additionally, Chapter 2 of Title 63 is entitled, "Mandatory Use of Safety Seat Belts." Again, it

[4] The latter sections of Chapter 2 of Title 63 concern educational programs and sanctions for violations of § 63-2-1. *See* Miss. Code Ann. §§ 63-2-5, 63-2-7.

would be an odd proposition for a Chapter covering the "mandatory use" of seatbelts to affect a determination of liability where seatbelt use is not mandatory.

Finally, to interpret § 63-2-3 as a limitation on the evidence that may be considered in establishing the standard of care would be to convert § 63-2-3 into an impermissible evidentiary statute. As has often been recognized by this Court, evidentiary statutes are impermissible and superseded by the Mississippi Rules of Evidence. *See Franklin Collection Serv., Inc. v. Kyle*, 955 So. 2d 284, 288 (¶ 12) (Miss. 2007); *Estate of Hunter v. Gen. Motors Corp.*, 729 So. 2d 1264, 1268 (¶ 9) (Miss. 1999). This Court has noted that § 63-2-3 must be "enforced as written and not given an overbroad application," lest the statute will improperly govern evidentiary issues, rather than substantive law. *Estate of Hunter*, 729 So. 2d at 1268 (¶ 10).

Because the statute must be interpreted in a manner that makes it valid, § 63-2-3 cannot exclude evidence pertaining to Premier's standard of care. The only permissible reading of the statute (so as not to render it void as an impermissible evidentiary statute) requires that where a duty already exists (as in the duty owed by Premier to Beasley) the use or non-use of a seatbelt can serve as evidence to define the standard of care and to establish a breach thereof.

Neither the title nor the text of the statute evinces an intent of the legislature to abrogate the common law regarding the duty owed by a common carrier to its passengers. At least as early as 1911, Mississippi recognized the common carrier's duty. *See White v. Ill. Cent. R. Co.*, 97 Miss. 91, 55 So. 593, 594 (Miss. 1911) (noting that a carrier must "exercise . . . the utmost degree of care for the safety of persons traveling [with] such [carrier]"). Chapter 2 of Title 63 was aimed not at limiting the duty or standard of care for operators or passengers. Rather, the chapter simply sought to require the use of seatbelts in some circumstances without creating any new rights or obligations between operators and passengers.

In the instant case, BTI does not and cannot seek to impose a duty upon Premier based on § 63-2-1's mandatory seatbelt requirement. Section 63-2-1 is inapplicable. Rather, BTI seeks to establish Premier's liability based upon the carrier's violations of its internal safety regulations. Mississippi common law regarding the duties of a common carrier survived the passage of Title 63, Chapter 2. Premier owed to Beasley the duty of highest care and diligence for her safety. Its internal safety regulations inform the appropriate standard of care and violations of those regulations evince a breach of that standard.

2. ***Alternatively, Premier's violation of its internal safety regulations should serve as an exception to § 63-2-3's general prohibition.***

While the seatbelt statute generally provides that evidence of seatbelt non-use is inadmissible to prove contributory or comparative fault on the part of the passenger, evidence of seatbelt nonuse may be relevant and admissible. *Estate of Hunter*, 729 So. 2d at 1268 (¶ 11). So long as the evidence of nonuse does not go to the issue of the plaintiff's contributory negligence, such evidence may be admissible when coupled with the use of a limiting instruction. *Id.*[5] In *Estate of Hunter*, this Court held that Miss. Code Ann. § 63-2-3 does not bar evidence regarding seatbelt non-usage in all cases. *Id.* at 1267-68 (¶ 9).

In *Palmer v. Volkswagen of America*, 904 So. 2d 1077, 1094 (¶ 70) (Miss. 2005), this Court found one such scenario where seatbelt non-use was admissible. The minor decedent was riding as an unbelted passenger in the front seat of the subject passenger vehicle when the air bag deployed. *Id.* at 1080 (¶ 3). The plaintiffs alleged that the subject vehicle was defective due to

[5] "This Court concludes that evidence of seat belt non-usage *may* constitute relevant evidence in some (but by no means all or even most) cases, so long as (1) the evidence has some probative value other than as evidence of negligence; (2) this probative value is not substantially outweighed by its prejudicial effect (See Miss. R. Evid. 403) and is not barred by some other rule of evidence and (3) appropriate limiting instructions are given to the jury, barring the consideration of seat belt non-usage as evidence of negligence." *Estate of Hunter*, 729 So. 2d at 1268 (¶ 11).

an inadequate warning regarding the airbag. *Id.* at 1093 (¶ 67). The defendants sought to introduce evidence of the decedent's practice of not wearing a seatbelt as evidence that the decedent likely would not have heeded any warning regarding the air bags. *Id.* This Court held that evidence of the decedent's non-use of seatbelts was admissible, subject to a cautionary instruction. *Id.* at 1094 (¶ 69).

Here, BTI sought to introduce the evidence of Beasley's seatbelt non-use, not as evidence of her negligence, but as evidence of Premier's breach of its duty of highest care and diligence for the safety of Beasley. Again, BTI's argument is not that Premier breached its duty due to a failure to comply with the seatbelt statue but, instead, that Premier breached its duty by failing to follow its own internal safety regulations. BTI requested an appropriate limiting instruction to confine the seatbelt related evidence to this proper function. (R. at 296, B.R.E. at 26.)

Mississippi law provides that violations of a company's internal policies may be considered as evidence of the company's negligence. Here, there was ample evidence that Premier both maintained and violated internal safety regulations. The fact that the subject internal safety regulations touched on the issue of seatbelts is of no moment. The twenty-five passenger Premier bus is expressly exempted from the chapter on seatbelt use, and, thus, § 63-2-3's prohibition sentence does not apply.

The Circuit Court erred in its interpretation of the Mississippi seatbelt statute. BTI was entitled to a jury instruction allowing the jury to consider the internal safety regulation and violation thereof as evidence of Premier's breach of its duty to Beasley – both the law and the facts supported the instruction. Accordingly, this Court should reverse the Circuit Court's ruling instructing the jury that it could not consider Premier's violation of its internal safety regulation as evidence of Premier's negligence and should remand the action for a new trial.

II. The Circuit Court Erred by Refusing to Instruct the Jury of Premier's Duty of Highest Care and Diligence for the Safety of Beasley.

Premier owed Beasley the duty of highest care and diligence for her safety. Despite the Circuit Court's recognition of Premier's status as a common carrier and Premier's commensurate duty, it erroneously rejected BTI's jury instruction setting forth Premier's standard of care. In the absence of this instruction the jury was erroneously instructed to evaluate Premier's conduct under the standard of ordinary care.

A. The refusal to grant the common carrier instruction should be reviewed *de novo.*

As with the instructions regarding Premier's internal safety regulations, this Court should review the Circuit Court's refusal to instruct the jury on Premier's duty as a common carrier *de novo*. Again, a party is entitled to a jury instruction that concerns a genuine issue of material fact and for which there is credible evidence to support the instruction. *See Young v. Guild*, --- So. 2d ---, No. 2004-CA-02532-SCT, 2008 WL 4740038, at *4 (¶ 20) (Miss. Oct. 30, 2008) (citing *Mariner Health Care, Inc. v. Estate of Edwards ex rel. Turner*, 964 So. 2d 1138, 1155-56 (¶ 48) (Miss. 2007)). When the decision not to grant an instruction turns on a question of law, this Court reviews that decision *de novo*. *See McCune v. State*, 989 So. 2d 310, 318 (¶ 14) (Miss. 2008).

In the instant case, the review should be *de novo* because the Circuit Court's refusal of the common carrier instruction turns on a question of law. There was sufficient, undisputed evidence that Premier was a common carrier and that it had formed a carrier/passenger relationship with Beasley.[6] The Circuit Court held that its refusal of BTI's common carrier was

[6] *See infra* § II.B.

"proper[ ] . . . on the applicable law." (R. at 537, B.R.E. at 49.)[7] Accordingly, the Court should review the Circuit Court's refusal of the common carrier instruction *de novo*.

B. Premier owed Beasley a duty of highest care and diligence for her safety.

"A carrier of passengers for hire, 'is required to exercise the highest degree of care and diligence for the safety of its passengers.' " *Anderson v. B.H. Acquisition, Inc.*, 771 So. 2d 914, 920 (¶ 15) (Miss. 2000) (citing *Goodwin v. Gulf Transp. Co.*, 453 So. 2d 1035, 1036 (Miss. 1984)); *see also Lambert v. Lott*, 222 So. 2d 816, 818 (Miss. 1969) (common carrier owes its passengers duty to exercise "the highest degree of care and precaution for their safety that is consistent with the practical conduct of its business"). A carrier/passenger relationship is established when the passenger places herself in the care of the carrier with the bona fide intention of becoming a passenger and the carrier accepts her as such. *See Anderson*, 771 So. 2d at 920 (¶ 17); *Gulf, M. & N.R. Co. v. Bradley*, 167 Miss. 603, 603, 142 So. 493, 494 (1932).

Without question, a carrier/passenger relationship was established between Premier and Beasley. Beasley boarded the Premier bus at the Hollywood Casino and paid a $1.00 fare for the right to ride. (Tr. at 91:6 – 91:13, 92:24 – 92:26, 112:5 – 112:6, B.R.E. at 61:6 – 61:13, 62:24 – 62:26, 64:5 – 64:6.) Premier accepted Beasley as a passenger. The carrier/passenger relationship commenced at the time when Beasley boarded the bus, continued though her trip to Sam's Town, and remained in effect at the time of the subject incident.

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[7] The Circuit Court's initial basis for ruling on the propriety of the common carrier jury instruction is somewhat ambiguous due to the manner in which the Circuit Court came to its ruling. During the hearing on the issue of jury instructions, the Circuit Court accepted the proffered instruction. (Tr. at 277:28 – 278:3, B.R.E. at 75:28 – 76:3.) It was not until after the Circuit Court read the common carrier instruction to the jury, that the Circuit Court reversed its earlier ruling. (Tr. at 300:20 – 302:18, B.R.E. at 78:20 – 80:18.) Despite any ambiguity that may exist regarding this point, the Circuit Court made clear in its Order Denying Defendant's Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial, that the refusal of the jury instruction was based on the Circuit Court's assessment of the applicable law. (R. at 257 – 59, 269 – 70, B.R.E. at 33 – 35, 45 – 46 (moving for new trial based, in part, on the Circuit Court's failure to issue a common carrier instruction); R. at 537, B.R.E. at 49 ("The Court also finds on review that the jury was properly instructed on the applicable law . . . .").)

In the Circuit Court, Premier fruitlessly argued that it should not be held to the standard of a common carrier and instead should be considered a contract carrier. According to Premier, the defining characteristic of a common carrier is the availability of the carrier to the general public. (R. at 133, B.R.E. at 18 (citing *Ohio Oil Co. v. Fowler*, 232 Miss. 694, 701, 100 So. 2d 128, 130 (Miss. 1958))). Premier argued that it did not provide transportation to the general public; instead, it only serviced those members of the general public who chose to go to one of the nine casinos that it serviced. (R. at 133, B.R.E. at 18.) However, Premier's reliance on *Ohio Oil Co.* is misplaced. The issue present in *Ohio Oil Co.* was whether an oil pipeline would be deemed a common carrier for the purpose of transporting oil. 232 Miss. at 701-02, 100 So. 2d at 130. In the half a century that passed since the *Ohio Oil Co.* decision, this Court has implicitly held that casino shuttle buses are common carriers and subject to the heightened standard of care. *See Anderson*, 771 So. 2d at 919-20 (applying *Gulf, M. & N.R. Co.* factors to determine whether carrier/passenger relationship existed between plaintiff and casino shuttle bus).

The Circuit Court correctly ruled at the trial of this action that, based on the undisputed facts, Premier was indeed a common carrier of passengers. (Tr. at 10:27 – 11:7, B.R.E. at 56:27 – 57:7.) Thus, pursuant to the Circuit Court's ruling, the jury should have been instructed that Premier owed to Beasley the duty of highest care and diligence for her safety.

C. The Circuit Court was required to instruct the jury that Premier and BTI owed Beasley differing standards of care.

In a case involving multiple defendants where the standard of care owed by one defendant differs from the standard of care owed by another defendant, it is reversible error for the trial court not to instruct the jury on the defendants' separate standards of care. *Mariner Health Care, Inc. v. Estate of Edwards ex rel. Turner*, 964 So. 2d 1138, 1196 (¶ 49) (Miss. 2007). The *Mariner Health Care* plaintiffs (the survivors of a nursing home patient) filed suit against the owner of the nursing home, the owner's parent corporation, and five individuals in

their capacities as administrators or licensees of the nursing home. *Id.* at 1143 (¶ 4). At trial, the Circuit Court refused the defendant's proffered instruction requiring the jury to consider the liability and defenses of each defendant separately. *Id.* at 1155 (¶ 47). This Court reversed the trial court, in part, due to the fact that the "standard of care applicable to the nursing staff and the director of nursing was not the same as that applicable to corporate officers . . . for the parent corporation." *Id.* at 1156 (¶ 49). This Court held:

> In cases involving [multiple defendant], the just adjudications of claims demands that parties be held responsible for any breaches of the duties imposed upon them by law. But a plaintiff must carefully establish what duty was owed by whom and how it was not met, and the trial court must insure that the jury is equipped to consider distinct claims and to assess liability judiciously. Because that was not done in this case, the jury's verdict must be reversed.

Id. at 1156 (¶ 52).

Just as the trial court in *Mariner Health Care* erred in instructing the jury in its multi-defendant case, so too did the Circuit Court here. While BTI owed Beasley the standard of ordinary care or reasonableness, Premier owed her the duty of highest care and diligence for her safety. The jury was not instructed as to these differing standards.

Initially, the Circuit Court gave a proper instruction on Premier's duty:

> The Court instructs the jury that under the law of the State of Mississippi, a carrier o[f] passenger[s] for hire is required to exercise the highest degree of care and diligence for the safety of its passengers.

(Tr. at 300:20 – 300:25, B.R.E. at 78:20 – 78:25.) Immediately after reading the common carrier instruction, the Circuit Court called for a bench conference (Tr. at 301:12 – 302:3, B.R.E. at 79:12 – 80:3)[8] and subsequently withdrew the common carrier instruction in its entirety (Tr. at

[8] The bench conference consisted of only fourteen lines of transcription. At no point did the Circuit Court allow for arguments or discussions regarding the propriety of the instruction. (Tr. at 302:3, B.R.E. at 80:3 ("I've heard enough.").)

302:10 – 302:18, B.R.E. at 80:10 – 80:18). "Disregard that last instruction. That's not proper law. That's going to be withdrawn. That's going to be refused." (*Id.* at 302:10 – 302:13, B.R.E. at 80:10 – 80:13.)[9]

Accordingly, the jury was not instructed as to the level of duty owed by Premier as a common carrier and instead, was instructed (despite Premier's status as a common carrier) that Premier owed Beasley only the duty to act with reasonable or ordinary care. (Tr. at 299:8 – 300:14, 304:11 – 305:2, B.R.E. at 77:8 – 78:14, 81:11 – 82:2.)

> [I]f you find . . . that the plaintiff has sustained actual damages as a proximate result of any negligence for which the either defendant is responsible, plaintiff is entitled to a verdict . . . .
>
> Negligence is the failure to use reasonable care. Reasonable care is that degree of care which a reasonably careful person would use under like or similar circumstance. Negligence may consist of the doing something that a reasonably careful person would not do under like or similar circumstances and failing to do something that a reasonably careful person would do under like or similar circumstances.

(Tr. at 299:8 – 300:1, B.R.E. at 77:8 – 79:1 (emphasis added).)

> [T]he driver [of a vehicle] must exercise ordinary care . . . .
>
> . . .
>
> If you find from the preponderance of the evidence that Defendant Boyd Tunica or Defendant Premier had reasonable control of its vehicle under the circumstances, you must find for the defendant. However, if you find that the Defendant Boyd Tunica or Defendant Premier Transportation failed to exercise ordinary care to avoid injury, you must find for the plaintiff.

[9] The transcript indicates that the Circuit Court's decision to forgo the common carrier instruction was based on the latter part of that instruction which discussed Premier's violations of its internal safety regulations. (Tr. at 302:14 – 302:18, B.R.E. at 80:14 – 80:18.)

(Tr. at 304:11 – 305:2, B.R.E. at 81:11 – 82:2 (emphasis added).) When taken as a whole, the instruction informed the jury that, despite Premier's heightened standard of care, Premier's liability for the subject incident should be measured under the standard of ordinary care.

BTI was entitled to a jury instruction regarding Premier's heightened duty as a common carrier. Ample evidence supported the conclusion that Premier was a common carrier and that a carrier/passenger relationship existed between it and Beasley at the time of the accident. Similarly, sufficient evidence was presented at trial demonstrating that Premier failed to satisfy its heightened standard of care.[10] Moreover, because BTI and Premier owed Beasley varying standards of care, the Circuit Court was required to instruct the jury as to the differing standards. Accordingly, the given instructions did not fairly represent the applicable law. This Court should reverse the Circuit Court's decision not to instruct the jury regarding Premier's duty as a common carrier and should remand this case for a new trial.

III. The Circuit Court Erred by Denying BTI's Motion for New Trial Where the Circuit Court's Reversal of Its Pretrial Rulings Resulted in Unfair and Substantial Prejudice to BTI.

Not only did the Circuit Court err in its instructions to the jury, but the belated decision to reverse its pretrial rulings constituted independent error.

A. This Court should review the decision not to grant BTI a new trial under the abuse of discretion standard.

Mississippi appellate courts review a denial of a motion for new trial under an abuse of discretion standard. *Johnson v. State*, 904 So. 2d 162, 167 (¶ 11) (Miss. 2005). However, motions for new trial are subject to a standard of review lower than the standard applicable to a

[10] Weeden conceded that he violated Premier's internal safety regulations, including both the policy regarding seatbelt use and the policy of ensuring that passengers are securely seated prior to the bus being put into motion. (Tr. at 92:13 – 92:16, 103:7 – 103:15, 178:16 – 178:19, 222:15 – 222:17, 224:1 – 224:22, 225:8 – 225:18, B.R.E. at 62:13 – 62:16, 63:7 – 63:15, 65:16 – 65:19, 70:15 – 70:17, 71:1 – 71:22, 72:18 – 72:18.)

motion for judgment notwithstanding the verdict or a motion for directed verdict. *White v. Yellow Freight Sys., Inc.*, 905 So. 2d 506, 510 (¶ 7) (Miss. 2004).

Though "against the overwhelming weight of the evidence" is one ground for granting a new trial, it is certainly not the only one. *White*, 905 So. 2d at 510 (¶ 7); *Davis v. Wal-Mart Stores, Inc.*, 724 So. 2d 907, 910 (¶ 11) (Miss. 1998). The Uniform Circuit and County Court Rules list six grounds for granting a new trial. *See* URCCC 10.05. The first among these is if a new trial is "required in the interest of justice." *Id.*; *see also* Miss. R. Civ. P. 59 cmt. ("Rule 59 authorizes the trial judge to set aside a jury verdict as to any or all parts of the issues tried and to grant a new trial as justice requires."). The trial court may grant a new trial "whenever justice requires." *White*, 905 So. 2d at 510 (¶7).

The bottom-line question is always the same: Has substantial justice been done? *Taylor v. Sorsby*, 1 Miss. 97, at *1 (Miss. 1821).

> New trials are frequently necessary, and sometimes indispensable, for the purpose of obtaining the ends of substantial justice. . . . [I]f it is manifest to a reasonable certainty, that justice has not been done, the courts will always interfere, and give the party an opportunity of having his cause reexamined by a second jury.

Id. This Court will reverse a denial of a motion for a new trial when it is "left with a firm and definite conviction that the verdict, if allowed to stand, would work a miscarriage of justice." *White*, 905 So. 2d at 511 (¶ 7).

Following the jury verdict, BTI timely moved for the Circuit Court to enter judgment notwithstanding the verdict or, in the alternative, for a new trial. Among the issues raised by BTI was the prejudicial effect that ensued as a result of the trail court's decision to reverse its pretrial rulings. (R. at 256 – 259, B.R.E. at 32 – 35.) This Court should review the Circuit Court's decision denying the new trial under the abuse of discretion standard.

B. The trial court's reversal on the issue of Premier's violations of its internal safety regulations created unfair prejudice.

The trial court's self-imposed reversal not only eviscerated BTI's primary defense – a defense presented in reliance upon the ruling in BTI's favor at the beginning of trial – but also prejudiced BTI beyond repair. Regardless of the Circuit Court's erroneous interpretation of the substantive law governing the internal safety regulations and common carrier issues, the prejudicial effect of the Circuit Court's reversing its earlier ruling was overwhelming and insurmountable. In reliance on the Circuit Court's ruling before the commencement of trial, counsel for BTI focused its liability defense almost exclusively on Premier's violations of its internal safety regulations. From opening statements (Tr. at 85:11 – 85:24, B.R.E. at 60:11 – 60:24) through its case in chief (Tr. at 208:17 – 209:2, 210:18 – 211:29, 222:8 – 222:20, 224:10 – 225:18, 226:1 – 227:18, B.R.E. at 66:17 – 67:2, 68;18 – 69:29, 70:8 – 70:20, 71:10 – 72:18, 73:1 – 74:18), BTI concentrated its defense on Premier's failure to enforce its internal safety regulations.

After the Circuit Court reversed itself, Premier exploited the baneful reversal. Premier argued in its closing arguments:

> . . . Sam's Town first made it into a seatbelt case. They are trying to blame seatbelts, anything to get out of it.
>
> Now, you have heard from the Court and you – I know all of you will follow the law. You heard from the Court this: "You are instructed not to consider evidence of seatbelt use or non-use in determining liability or damages against the plaintiff or the fault of Premier Transportation.
>
> Whether you like that rule of law or not doesn't matter. There's a number of reasons for that law. But the Court has given you that law. And the law is, you can't hold it against Ms. Beasley that she didn't have on a seatbelt. Likewise, you can't hold it against Premier that we didn't kick her off the bus for not wearing the seatbelt. Seatbelts are out of the case, period, gone.
>
> So, the law is that, and the Judge has so told you.

> The defense of Sam's Town started out simply with seatbelts. Well, they should have made her put on her seatbelt. That was their defense. Well, that's gone because the Judge has told you that.
>
> Then, the defense, when that didn't work, shifted to, oh we let her sit on the edge of her seat.

(Tr. at 323:1 – 323:29, B.R.E. at 83:1 – 83:29.)

As any litigator is fully aware, the jury is constantly assessing the credibility of the witnesses, parties, and – not least of which – the attorneys. The trial court's reversal opened the door for Premier to attack the credibility of BTI and its trial counsel by framing BTI's primary defense as a misstatement of the law. Premier intimated as vehemently as possible without making the direct assertion that BTI and its trial attorneys had attempted to mislead the jury.

The Circuit Court's decision to reverse itself at the close of evidence created an unfair prejudice over which BTI had no chance to recover. Justice requires that this case be remanded for a new trial wherein the parties may rely upon the status of the law and may argue their best cases to the jury. The Circuit Court abused its discretion in failing to order a new trial following the prejudicial effect that resulted from its self imposed reversal. Accordingly, this Court should remand this action for a new trial.

CONCLUSION

For the reasons stated herein, the Court should:

- reverse the Circuit Court on its refusal to instruct the jury that it may consider Premier's internal safety regulations and violations thereof as evidence of Premier's duty and Premier's breach of that duty;
- reverse the Circuit Court on its refusal to instruct the jury that Premier owed Beasley the duty of highest care and diligence for her safety;
- reverse the Circuit Court on its denial of BTI's motion for a new trial due to the prejudice resulting from the Circuit Court's reversal of its pretrial rulings; and
- remand the case to the Circuit Court for a retrial of this action.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day caused a true and correct copy of the **Brief for the Appellant Boyd Tunica, Inc.** to be delivered by United States mail, postage prepaid, to the following:

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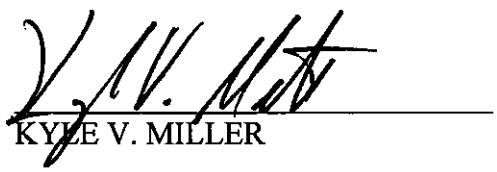
CIRCUIT COURT JUDGE

This the 26th day of February, 2009.

Kyle V. Miller

CERTIFICATE OF FILING

I, Kyle V. Miller, certify that I have had hand-delivered the original and three copies of the Brief of the Appellant Boyd Tunica, Inc. and an electronic diskette containing same on February 26, 2009, addressed to Ms. Betty W. Sephton, Clerk, Supreme Court of Mississippi, 450 High Street, Jackson, Mississippi 39201.



KYLE V. MILLER

ADDENDUM

MISS. CODE ANN. § 63-2-1

West's Annotated Mississippi Code Currentness
Title 63. Motor Vehicles and Traffic Regulations
Chapter 2. Mandatory Use of Safety Seat Belts
§ 63-2-1. Seat belts required; definition; exemptions

(1) When a passenger motor vehicle is operated in forward motion on a public road, street or highway within this state, every operator, every front-seat passenger and every child under seven (7) years of age who is not required to be protected by the use of a child passenger restraint device or system or a belt positioning booster seat system under the provisions of Sections 63-7-301 through 63-7-311, regardless of the seat that the child occupies, shall wear a properly fastened safety seat belt system, required to be installed in the vehicle when manufactured pursuant to Federal Motor Vehicle Safety Standard 208.

(2) "Passenger motor vehicle" for purposes of this chapter means a motor vehicle designed to carry fifteen (15) or fewer passengers, including the driver, but does not include motorcycles, mopeds, all-terrain vehicles or trailers.

(3) This section shall not apply to:

(a) Vehicles which may be registered for "farm" use, including "implements of husbandry" as defined in Section 63-21-5(d), and "farm tractors" as defined in Section 63-3-105(a);

(b) An operator or passenger possessing a written verification from a licensed physician that he is unable to wear a safety belt system for medical reasons;

(c) A passenger car operated by a rural letter carrier of the United States Postal Service or by a utility meter reader while on duty; or

(d) Buses.

CREDIT(S)

Laws 1990, Ch. 436, § 1; Laws 1998, Ch. 501, § 1, eff. July 1, 1998. Amended by Laws 2008, Ch. 520, § 2, eff. July 1, 2008.

Current through End of the 2008 Regular Session and 1st Ex. Session

MISS. CODE ANN. § 63-2-3

West's Annotated Mississippi Code Currentness
Title 63. Motor Vehicles and Traffic Regulations
Chapter 2. Mandatory Use of Safety Seat Belts
§ 63-2-3. Chapter does not create rights

This chapter shall not be construed to create a duty, standard of care, right or liability between the operator and passenger of any passenger motor vehicle which is not recognized under the laws of the State of Mississippi as such laws exist on the date of passage of this chapter or as such laws may at any time thereafter be constituted by statute or court decision. Failure to provide and use a seat belt restraint device or system shall not be considered contributory or comparative negligence, nor shall the violation be entered on the driving record of any individual.

CREDIT(S)

Laws 1990, Ch. 436, § 2, eff. from and after passage (approved March 20, 1990).

Current through End of the 2008 Regular Session and 1st Ex. Session

MISS. R. CIV. P. 59

West's Annotated Mississippi Code Currentness
Mississippi Rules of Court State
Mississippi Rules of Civil Procedure
Chapter VII. Judgment
Rule 59. New Trials; Amendment of Judgments

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of Mississippi; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of Mississippi.

On a motion for a new trial in an action without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for Motion. A motion for a new trial shall be filed not later than ten days after the entry of judgment.

(c) Time for Serving Affidavits. When a motion for new trial is based upon affidavits they shall be filed with the motion. The opposing party has ten days after service to file opposing affidavits, which period may be extended for up to twenty days either by the court for good cause shown or by the parties' written stipulation. The court may permit reply affidavits.

(d) On Initiative of Court. Not later than ten days after entry of judgment the court may on its own initiative order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a timely motion for a new trial for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be filed not later than ten days after entry of the judgment.

CREDIT(S)

[Amended effective July 1, 1997.]

ADVISORY COMMITTEE HISTORICAL NOTE

Effective July 1, 1997, Rule 59(b), (c) and (e) were amended to clarify that motions for a new trial and accompanying affidavits, and motions to alter or amend a judgment, must be filed not later that ten days after entry of judgment. 689 So. 2d XLIX (West Miss. Cases).

COMMENT

Rule 59 authorizes the trial judge to set aside a jury verdict as to any or all parts of the issues tried and to grant a new trial as justice requires. This practice is not new to Mississippi, but the procedures set forth in this rule are. The grounds for granting new trials remain the same as under prior state practice; generally stated, however, the court has the power and duty to set aside a verdict and order a new trial whenever, in its sound judgment, such action is required. See generally 11 Miss. Digest, New Trial, Key numbers 13-108 (1972).

The motion must be filed within ten days after the entry of judgment. This is a departure from prior Mississippi practice, National Cas. Co. v. Calhoun, 219 Miss. 9, 67 So.2d 908 (1953) (new trial may be ordered any time prior to expiration of court term), and is authorized by MRCP 6(c). The ten-day period cannot be enlarged. MRCP 6(b)(2).

When the motion for new trial is based upon affidavits, they shall be filed and served with the motion; the opposing party then has a maximum of thirty days in which to serve counter-affidavits. MRCP 59(c).

Rule 59(d) allows the court on its own initiative to order a new trial, even though there was no motion for a new trial, for any reason for which the court might have granted a new trial on the motion of a party. Sanders v. State, 239 Miss. 874, 125 So.2d 923 (1961); National Cas. Co. v. Calhoun, supra. If the court exercises this power, it must specify in its order the grounds for the new trial.

If the court is acting entirely on its own initiative in ordering a new trial, it must make the order not later than ten days after the entry of judgment and may not make such an order after that period has expired.

A motion to alter or amend must be filed within ten days after the entry of judgment; the court is not permitted to extend this time period.

See Rule 60(c) for reconsideration of an order transferring a case to another court.

[Comment amended effective July 1, 1997; amended effective July 1, 2008.]

Rules Civ. Proc., Rule 59, MS R RCP Rule 59

Current with amendments received through June 1, 2008

West's Annotated Mississippi Code Currentness
Mississippi Rules of Court State
Uniform Rules of Circuit and County Court Practice
Rule 10.05. New Trials

The court on written motion of the defendant may grant a new trial on any of the following grounds:

1. If required in the interests of justice;

2. If the verdict is contrary to law or the weight of the evidence;

3. Where new and material evidence is recently discovered which would probably produce a different result at a new trial, and such evidence could not have been discovered sooner, by reasonable diligence of the attorney;

4. If the jury has received any evidence, papers or documents, not authorized by the court, or the court has admitted illegal testimony, or excluded competent and legal testimony;

5. If the jurors, after retiring to deliberate upon the verdict, separated without leave of court; and

6. If the court has misdirected the jury in a material matter of law, or has failed to instruct the jury upon all questions of law necessary for their guidance.

A motion for a new trial must be made within ten days of the entry of judgment. The trial judge may hear and determine a motion for new trial at any time and in any county or judicial district within the trial judge's jurisdiction.

The court may, with the consent of the defendant, order a new trial of its own initiative before the entry of judgment and imposition of sentence.

The court, on motion of a defendant, may vacate judgment and dismiss the case without prejudice if the indictment or complaint did not charge an offense, or if the court was without jurisdiction, and bind the defendant over to the action of the grand jury, or take other proper steps regarding the defendant.

CREDIT(S)

[Adopted effective May 1, 1995.]

Uniform Circuit and County Court Rule 10.05, MS R UNIF CIR AND CTY CT Rule 10.05

Current with amendments received through June 1, 2008