IN THE SUPREME COURT OF MISSISSIPPI
NO: 2009-CA-00933

SARAH MANNING — APPELLANT

v.

FRANK GRUICH, JR. d/b/a
GRUICH PHARMACY SHOPPE and
ESTATE OF FRANK GRUICH, SR. — APPELLEES

APPEAL FROM THE CIRCUIT COURT OF HARRISON COUNTY MISSISSIPPI
Second Judicial District
Cause No.: A2402-04-00010

REPLY BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

COUNSEL FOR THE APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

I. INTRODUCTION

Appellees' brief totally omits any statement of facts which is required by Mississippi Rules of Appellant Procedure 28(b), cites only one case as "authority" for the entire legal argument, and contains some absolutely nonsensical statements concerning the proceedings below.

Perhaps the omission of any statement of facts in the brief is because the facts are inconvenient. It is an unalterable fact that Defendant Gruich was caught with yellow paint on his hands in the midst of his denials that the premises had been altered after the Plaintiff's fall. Gruich was allowed to wash his hands before he testified in front of the jury.

Perhaps the omission of any case authority is because the overwhelming case authority supports Appellant's argument and refutes Appellees'. Indeed, Appellees' brief did not even bother to address any of the twelve cases, law review article, or the lengthy A.L.R. 5th article cited in Appellant's original brief. This court can surmise by the lack of substance of Appellees' brief that something is amiss in Appellees' case. We respectfully suggest the something amiss is a clear lack of supporting facts and a dearth of supporting law.

II. MISSING FACTS

On page 1 of Appellee's brief is the outrageous statement:

> As result of Hurricane Katrina, the Appellee removed, or had someone remove this carpet and paint underneath.

This court can take judicial notice Hurricane Katrina occurred on August 29, 2005. Defendant Gruich testified in his deposition that he and his friends cut off the lip of the carpet

and repainted the curb in August 2003 – fully two years before Katrina. (Exhibit 16) (RE 37-39) (RE 40-44)

For counsel to put such misleading and wildly inaccurate statements in their brief is simply inexplicable. Alteration of the accident scene was done by Gruich and friends, not by Hurricane Katrina.

III. IMPEACHMENT

Appellees contend at pages 2 and 5-8 of their brief that, "at no time was Gruich dishonest," and that Gruich's responses to interrogatories and to questioning in his deposition were "only truthful responses," therefore, he could not be impeached.

Appellees support these bald conclusions by making the statement, "the [Plaintiff's] interrogatory related to any potential changes ever performed on the building itself." (See Appellees' Brief, bottom of Page 7, top of Page 8) Such a statement is flatly false. The interrogatory quite specifically asked about changes to the appearance of the building and/or sidewalk leading into the building. (Emphasis added) (See, CR 73-74; Appellant's Brief at Page 12) For Appellees to inform the court that the interrogatory concerned only the building is inexplicable. Gruich's answer to the interrogatory was patently false, but the jury was not allowed to be told.

Appellee, at Page 6-7 of their brief incredibly cite Gruich's testimony when he confesses to having altered the carpet as "proof" that he was "truthful." (Talk about turning truth on its head!) Sure, Gruich confessed, but his new found truthfulness was only after his false interrogatory answer, and only after he had testified untruthfully in the preceding pages of his

deposition. There quite simply is no logic and no accuracy to Appellees' bald conclusions that Gruich was honest and truthful – he was not and the transcript and written discovery prove it.

The more important question – and the question Appellees fail to address – is what is this court going to do about it. We respectfully suggest that the proper course of action is that taken by the courts in *Martinez v. Grace,* 782 P.2d 827 (Colo. 1989) (failure to allow admission of evidence curb was painted yellow post accident requires reversal), *Alexander v. Greer,* 959 So.2d 586 (Miss. 2007) (failure to allow evidence of post accident ophthalmologist visit requires reversal), and *Muzyka v. Remington Arms, Co., Inc.*, 774 F.2d 1309 (5th Cir. 1985) (failure to allow evidence that safety of gun was changed three weeks after accident requires reversal.).

The fact that Gruich was untruthful and deceptive about the post accident changes is irrefutable. No amount of bald, unsupported conclusions to the contrary can change Gruich's responses. Appellant clearly should have been allowed to impeach him at trial in accordance with Mississippi Rules of Evidence 407.

IV. FEASIBILITY

At Page 9 of their brief, Appellee contends that because they did not contest the "feasibility" of painting the curb, the post accident changes were therefore inadmissible. Appellees contend that because effectiveness of the warning is not specifically enumerated in Mississippi Rules of Evidence 407, there is no such rational for admission of post accident evidence.

Appellee apparently failed to read the official comments to Rule 407. The official comments state:

> The rule mentions ownership, control, feasibility and impeachment as admissible purposes, but this is not an exclusive list of permitted grounds, only an illustrative list. (Emphasis added)

M.R.E. 407

Appellant has cited twelve cases and a lengthy A.L.R. 5th article in support of admission of this evidence – none of which Appellees even address much less refute. Appellees' brief in contrast makes an erroneous statement of law which also fails to cite the official comments to the rule. Take your pick as to which argument is more persuasive. The concept of feasibility includes effectiveness of warning which was one of the main disputes in this case.

V. HARMLESS ERROR

The height of spin in Appellees' brief is their assertion at Pages 9-10 of their brief that exclusion of the post accident changes was harmless error. Appellee's theory is that since a yellow curb is shown in some of Plaintiff's photos which were admitted into evidence, this eviscerates any claim of harmful error. Appellees fail to cite a single case or authority in support of their argument, and this reason alone is enough to give short shrift to Appellees' argument. See, *AmSouth v. Gupta*, 838 So.2d 205, 210 (Miss. 2002), and *Smith v. Dorsey*, 599 So.2d 529, 532 (Miss. 2002) (issues on which a party fails to expend any discussion or citation of authority are not reviewed by the appellate court).

Despite Appellee's failure to cite any authority, we will reply because the argument of harmless error is patently frivolous. See *Harris v. Burton T.V., Inc.*, 460 So.2d 828 (Miss. 1984) (held that no offer of proof is necessary where a party is improperly prohibited from cross examining a witness). See also, Mississippi Rules of Evidence 103.

The sentence at the middle of Page 10 of Appellees' brief reads, "First, evidence that the carpet was subsequently removed was allowed into evidence upon Appellant's proffer." Such a statement is nonsensical. The fact Appellant had to make a proffer means the evidence was excluded, not admitted.

The effect of the court's exclusion of evidence in this case was to allow the jury to believe that Gruich "always" thought his entrance was safe, that Hurricane Katrina removed the carpet in 2005 rather than Gruich in 2003, that the carpet was smooth rather than needing to be glued down shortly after the accident, and that Gruich was a truthful person whose testimony was unimpeached. One can hardly claim the exclusions of the major part of Plaintiff's case to be harmless. In short, the jury did not receive the true facts upon which to base their decision.

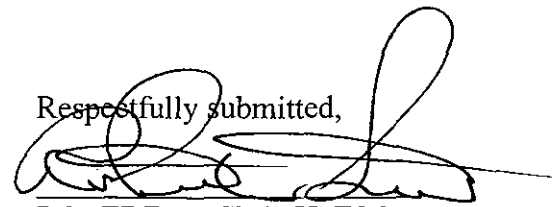
CONCLUSION

Appellant, Sarah Manning, did not receive a fair trial due to multiple erroneous evidentiary rulings by a young trial judge. These rulings gutted the truth from the case and allowed the jury to base its decision on a mirage.

Appellee's brief and its multiple misstatements of fact and total lack of authorities of law are illustrative of the weakness of Appellee's position.

We respectfully request this case be reversed for a new trial with instructions to the trial court to allow into evidence the multiple evidentiary matters cited herein under M.R.E. 407.

Respectfully submitted,



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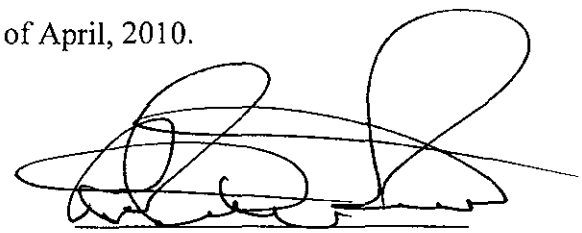
Attorney for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I, ROBERT W. SMITH, do hereby certify that I have this date mailed, postage prepaid, a true and correct copy of the above and foregoing Reply Brief of Appellant to Joshua W. Danos, Esq., P. O. Box 1618, Pascagoula, MS 39568, and Honorable Lawrence Bourgeois, Circuit Court Judge, P. O. Drawer 1461, Gulfport, MS 39502.

SO CERTIFIED, this the 2 day of April, 2010.



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CERTIFICATE OF SERVICE
Pursuant to Mississippi Rules of Appellate Procedure Rule 25(a)

I, Wanda Soukup, do hereby certify that I have this day mailed in the United States Mail, first class, postage prepaid, a package containing the original and three (3) copies of the above and foregoing Reply Brief of Appellant which was addressed to Betty Sephton, Clerk of the Supreme Court of Mississippi, P. O. Box 249, Jackson, MS 39205-0249

SO CERTIFIED this the 2 day of April, 2010.

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