



IN THE SUPREME COURT OF MISSISSIPPI

FREDDIE L. KNOX, ET AL.

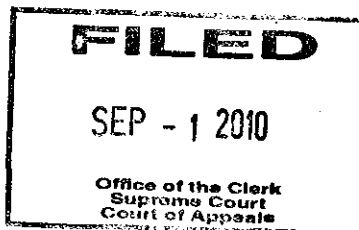
APPELLANTS

VS.

CASE NO. 2009-CA-01401

RUSSELL MAHALITC

APPELLEE



REPLY BRIEF OF APPELLANTS FREDDIE L. KNOX, ET AL.

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III. INTRODUCTION

As will be demonstrated herein, aside from the liberal use of pejorative adjectives, transparent attempts at obfuscation, including the briefing of theories the Knox Appellants conceded and/or withdrew in the trial court, and at least one asinine attempt to apparently mislead this Court, Mahalitic's Brief is devoid of any substance. While Mahalitic accurately cited to authorities that set forth the summary judgment standard provided for in *M.R.C.P.* 56, Mahalitic failed to even accurately perceive the correct application of the standard to this case and/or the summary judgment motion that he filed in the trial court. For the sake of brevity, the Knox Appellants limit their reply to addressing the specific points made by Mahalitic that actually have bearing on the issues raised in this appeal but incorporate herein ALL aspects of their initial brief.

IV. REPLY TO INITIAL ARGUMENTS OF MAHALITC

Mahalitic appears to attempt to have this Court draw the impression that the Knox Appellants did not plead and/or otherwise properly assert a negligent failure to properly equip and/or maintain the subject tractor-trailer with the statutorily required lamps and/or lighting and other safety devices against Mahalitic. Mahalitic's Brief at pp. 5-6; 9; and 18 ("The Knox Plaintiffs expressly incorporated this allegation [Mahalitic was the employer of Defendant David McCoy, the driver of the subject tractor-trailer] into each count of their complaint ..." suggesting the Knox Appellants' sole basis for seeking to impose liability on Mahalitic was through a derivative liability theory (*respondeat superior*) flowing from the negligence of McCoy; "At the hearing, counsel for the Knox Plaintiffs made the additional assertion that the trailer ... [owned by Mahalitic] lacked certain lights or other reflectors" appearing to suggest the Knox Appellants raised this negligence claim against Mahalitic for the first time at the hearing on Mahalitic's Motion for Summary Judgment; and "the plaintiffs, as masters of their complaint, cannot stand to be heard on claims that were not pled or on wrongfully pled claims

that were not amended”, respectively.).

While the Knox Appellants’ Complaint did allege Mahalitec was McCoy’s employer for the purpose of seeking to impose derivative liability on Mahalitec (which the Knox Appellants conceded and agreed Mahalitec was entitled to a dismissal of such claim based on the evidence presented), the Knox Appellants pled and raised a negligent failure to properly equip and/or maintain the subject tractor-trailer claim against Mahalitec **TOO**. There simply can not be a legitimate dispute about this point based upon the record before the Court, including the allegations in the Knox Appellants’ Complaint.

The dispositive issue in this appeal is whether the trial court erred in granting summary judgment to Mahalitec in relation to the Knox Appellants’ claims against Mahalitec, as owner of the subject tractor-trailer, for wrongfully and/or negligently maintaining and/or equipping the subject tractor-trailer with the statutorily required lamps and/or lighting and other safety devices.(R. 1-15 – Knox Appellants’ Complaint para. 12).

V. APPLICATION OF M.R.C.P. 56 TO MAHALITEC’S SUMMARY JUDGMENT MOTION IN RELATION TO THE KNOX APPELLANTS’ NEGLIGENT FAILURE TO PROPERLY EQUIP AND/OR MAINTAIN THE SUBJECT TRACTOR-TRAILER CLAIM AGAINST MAHALITEC

In the context of a summary judgment motion, **the burden of demonstrating that there are no genuine issues of material fact is upon the movant (Mahalitec)**, and the non-moving party (the Knox Appellants) must be given the benefit of every reasonable doubt. *Miller v. R.B. Wall Oil Company, Inc.*, 970 So. 2d 127, 130 (Miss. 2007) (emphasis added). In this case, **ALL** Mahalitec demonstrated through his summary judgment motion was that Mahalitec was not the employer of Defendant David McCoy and, at the time of the subject motor vehicle accident, McCoy was not pursuing or acting in the furtherance of any business interest of Mahalitec. (R.168-169 – Mahalitec

Affidavit in support of summary judgment; see also Mahalitic's Summary Judgment Motion and all other supporting exhibits (R.70-169). The Knox Appellants readily admit Mahalitic met his burden of demonstrating that he was not McCoy's employer, as well as the fact that McCoy was not pursuing or acting in the furtherance of any business interest of Mahalitic at the time of the subject accident. That is the very reason the Knox Appellants conceded Mahalitic's Summary Judgment Motion in relation to the Knox Appellants' claims that sought to impose derivative liability on Mahalitic for the negligent operation of the subject tractor-trailer by McCoy. However, whether Mahalitic has derivative liability for the negligence of McCoy has NOTHING to do with this appeal and Mahalitic DID NOT demonstrate and/or otherwise offer ANY summary judgment evidence in relation to the Knox Appellants' claims against Mahalitic, as owner of the subject tractor-trailer, for wrongfully and/or negligently maintaining and/or equipping the subject tractor-trailer with the statutorily required lamps and/or lighting and other safety devices. As a result, the record is devoid of any basis whatsoever to justify the entry of summary judgment in favor of Mahalitic on these claims.

VI. REPLY TO MAHALITIC'S ARGUMENT THAT HE, AS THE OWNER OF THE SUBJECT TRACTOR-TRAILER, OWED NO DUTY TO THE KNOX APPELLANTS IN RELATION TO THE KNOX APPELLANTS' NEGLIGENT FAILURE TO PROPERLY EQUIP AND/OR MAINTAIN THE SUBJECT TRACTOR-TRAILER CLAIM

As pointed out in the initial brief of the Knox Appellants, Mahalitic, as the undisputed owner of the subject trailer, had a statutory duty to equip and/or maintain the trailer with the proper lamps and/or lights and related safety devices. *Miss. Code Ann.* § 63-7-7 (1972, as amended) provides the following:

It is a misdemeanor for any person to drive or move or for the owner to cause or knowingly permit to be driven or moved on any highway any vehicle or combination of vehicles which is in such unsafe condition as to endanger any person, or which does not contain those parts or is not at all times equipped

with such lamps and other equipment in proper condition and adjustment as required in this chapter ...

Miss. Code Ann. § 63-7-7 (emphasis added).

Miss. Code Ann. § 63-7-27 (1972, as amended) provides, “[s]top lights shall be actuated upon application of the service (foot) brake and shall be capable of being seen and distinguished from a distance of one hundred feet to the rear of the vehicle in normal daylight.” Further, *Miss. Code Ann. § 63-7-15* (4) requires that all trailers must have tail lamps, stop lights and reflectors located on the rear of the trailer. The response to the summary judgment motion of Mahalitic, the argument, by counsel, of the Knox Appellants at the summary judgment hearing and the Knox Appellants’ *Rule 59(e)* motion ALL raise this issue and there can be no legitimate dispute by Mahalitic on this point. (R.191-192; R.Vol. 5 – Hearing Transcript at pp. 18 – 21 and 26; and R.225-228).

Rather than addressing the statutory duty of Mahalitic, as the OWNER of the subject tractor-trailer, raised by the Knox Appellants, Mahalitic boldly asserts that since he was not McCoy’s employer and McCoy was not pursuing or acting in the furtherance of any business interest of Mahalitic at the time of the subject accident, he can not have any liability to the Knox Appellants as a matter of law. (Mahalitic’s Brief at pp. 18-19, citing *West Brothers, Inc. v. Herrington*, 139 So. 2d 842 (Miss. 1962)).

Mahalitic’s reliance on *Herrington, supra*, is misplaced. As the Herrington Court observed,

In order to impose liability on a person for an injury occasioned through the operation of a motor vehicle, he must, **except where liability is otherwise imposed by statute**, either be in the actual operation thereof, or in the control thereof, or stand in the relation of master or principal to the person whose act occasions the injury.

Herrington, 139 So.2d at 843. (Emphasis added). *Miss. Code Ann. § 63-7-7* (1972, as amended), quoted above and relied upon by the Knox Appellants, specifically has application to the OWNER of a motor vehicle. Moreover, the well established law of Mississippi is that statutes delineate

negligent conduct and provide the basis for the assertion of a duty, the violation of which is negligence per se. *Thomas v. McDonald*, 667 So. 2d 594, 596-597 (Miss. 1995); *See Utz v. Running & Rolling Trucking, Inc.*, 32 So. 3d 450, 466 (Miss. 2010) (“violation of a statute demonstrates a duty and breach thereof, but not proximate cause of injury which is a question still left for the jury to answer.”). Simply put, the issue of whether Mahalitic, as the owner of the subject tractor-trailer, owed a duty to the Knox Appellants is a question of law for this Court and, based on the authorities cited herein, Mahalitic, as the owner of the subject tractor-trailer, clearly had a duty to refrain from “causing or knowingly permitting” the subject tractor-trailer from being driven and/or moved on a highway without the statutorily required lamps and/or lighting and other safety devices despite Mahalitic’s assertion to the contrary. This includes Mahalitic’s attempt to distinguish *Utz, supra*, by stating the “violation controlled the truck and employed the driver of the truck at the time of the contrary.” (Mahalitic’s Brief at footnote 7).

**VII. REPLY TO MAHALITIC’S ARGUMENTS RELATED TO THE THREE
COLORED PHOTOGRAPHS OF THE SUBJECT TRACTOR-TRAILER
SUBMITTED BY THE KNOX APPELLANTS**

As also pointed out in the initial brief of the Knox Appellants, the three colored photographs of the subject tractor-trailer owned by Mahalitic presented to the trial court and Mahalitic in opposition to Mahalitic’s Summary Judgment Motion clearly reveal the trailer did not have the statutorily required lamps and/or lights and related safety equipment including, “[s]top lights capable of being seen and distinguished from a distance of one hundred feet to the rear of the vehicle in normal daylight within the meaning of *Miss. Code Ann. § 63-7-27* (1972, as amended). (See the three colored photographs of the subject tractor-trailer attached as Exhibits “1”-“3” to the Knox Appellants’ Motion to Correct, Modify and/or Supplement Record filed with this Court which the Court ultimately granted via its August 12, 2010 Order granting the Knox Appellants’ reconsideration

motion). At a minimum, the photographs create a fact question on the issues of whether Mahalitic, as the owner of the subject tractor-trailer, breached the statutes cited herein and whether such breach proximately caused the Knox Appellants damage, all of which is for a jury to decide after, among other things, viewing the three colored photographs of the subject tractor-trailer. *Utz*, 32 So. 3d at 463-464 and 466.

Mahalitic, as movant for summary judgment, NEVER demonstrated, through any type of evidence or otherwise, that Mahaltic did not breach his statutory duty and/or duties, as addressed herein, to the Knox Appellants and did not, despite an assertion to the contrary in his brief (addressed below), make any evidentiary objections and/or otherwise file a motion to strike relative to the Knox Appellants' failure to properly authenticate and/or otherwise lay an evidentiary foundation for the photographs. As a result, Mahalitic, as movant, did not meet Mahalitic's burden under *M.R.C.P.* 56 and waived any evidentiary objections that he would have been entitled to assert to the photographs. Under such circumstances, the photographs were admissible for summary judgment purposes and, particularly so, since the photographs can be presented in an admissible form at trial. *TMC Acquisitions, LLC v. Sands Used Cars-Trucks, Inc.*, 2006 WL 2613426 *2-3 (D. Ariz. June 22, 2006); *Fonseca v. Sysco Food Services of Arizona, Inc.*, 374 F. 3d 840, 846 (9th Cir. 2004).

Mahalitic's assertions in relation to the photographs are wholly without merit and, as to one assertion, appears to be nothing more than a blatant attempt to mislead the Court. Such assertions are as follows:

Assertion No. 1: Mahaltic asserts that the photograph labeled Exhibit "3" provides one of the better views of an amber marker on the rear, passenger's side of the trailer, thereby attempting to suggest Mahalitic met his statutory duty to the Knox Appellants. (Mahalitic's Brief at footnote 6).

Response: This assertion is simply inaccurate. The "amber marker" to which Mahalitic refers

the Court is nothing more than the housing of a retractable tape measure the Knox Appellant's expert put on the trailer prior to taking the subject photograph (Exhibit "3"). The Court can see this for itself so there is no reason to say anything more about this assertion of Mahalitic.

Assertion No. 2: Mahalitic boldly asserts that "[t]wice – once in Mahalitic's brief [in support of summary judgment] and again at the hearing – Mahalitic protested that the photographs were incompetent of proving anything relative to the plaintiffs' claims on account of no accompanying Rule 56(e) affidavit. (Mahalitic's Brief at p. 10).

Response: Mahalitic's assertion that he properly objected to and/or moved to strike the subject photographs is simply not supported by the record or the applicable law. As pointed out in the initial brief of the Knox Appellants, after Mahalitic's counsel argued the Knox Appellants did not present any evidence to contest the issue of whether McCoy was an employee of Mahalitic, Mahalitic's counsel merely made the following statements concerning the subject photographs:

There is a couple of photographs – I will use the word "couple" loosely, could be two or three colored photographs of the vehicle itself, of the truck itself attached to the plaintiffs' response and in the time allotted by the filing of the response, I conducted as much an exhaustive search of the Mississippi law as I could and found no case supporting the motion you can overcome or avoid summary judgment by attaching photographs of a vehicle involved in an accident, and I submit that that is, in fact, the case.

(R. Vol. 5 – Hearing transcript at p. 7). Mahalitic's summary judgment rebuttal brief merely states, "[i]t does not escape notice that the photographs are offered on their own merit as if they are self-proving of ... of what? Of nothing. No affidavit is even offered to sponsor the photographs." (R.207 – Mahalitic's rebuttal brief at footnote 5). Mahalitic never made any specific evidentiary objection to the photographs (e.g. that the photographs had not properly been authenticated(through an affidavit and/or otherwise) within the meaning of M.R.E. 901, etc.) and/or otherwise filed a motion to strike and/or ore tenus ask the trial court to strike the unauthenticated photographs. As a result, Mahalitic

waived any objections to the photographs and therefore the Knox Appellants were entitled to rely upon the photographs in opposing Mahalitic's Summary Judgment Motion. *Board of Education of Calhoun County v. Warner*, 853 So. 2d 1159, 1163-1164 (failure to move to strike unauthenticated documents resulted in waiver of objection in the context of summary judgment motion); *See Seeling v. State*, 844 So. 2d 439, 445 (Miss. 2003) ("objections to the admissibility of evidence must specifically state the grounds; otherwise, the objection is waived."). This Court should particularly make this finding in this case since the above block quote of Mahalitic's counsel clearly reflects that the photographs submitted to the trial court and Mahalitic were actual photographs of the subject tractor-trailer and can easily be gotten into evidence at the trial of this matter.

VIII. CONCLUSION

For the reasons set forth in the initial brief of the Knox Appellants, as well as this reply, the Knox Appellants have demonstrated that Mahalitic, as the owner of the subject trailer, had a duty to equip and/or maintain the trailer with the statutorily required lamps and/or lights and related safety devices. Moreover, the Knox Appellants have demonstrated, through colored photographs of the subject trailer to which Mahalitic did not object, that Mahalitic breached his statutory duty and that a jury question exists on the issues of proximately caused damages flowing from such breach. As a result, the trial court erred by granting Mahalitic's motion for summary judgment in relation to the Knox Appellants' negligent failure to equip and/or maintain the trailer with the statutorily required lamps and/or lights and related safety devices claim and this Court should reverse the trial court on this claim.

Respectfully submitted this the 15th day of September, 2010.

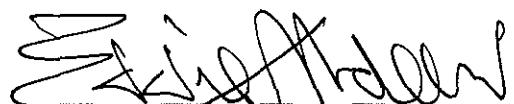
CERTIFICATE OF SERVICE

I, Eddie J. Abdeen, do hereby certify that I have this day mailed via United States Mail,
postage fully prepaid, a true and correct copy of the above and foregoing document to:

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This the 15th day of September, 2010.

A handwritten signature in black ink, appearing to read "Eddie J. Abdeen", written over a horizontal line.

Eddie J. Abdeen