



IN THE SUPREME COURT OF MISSISSIPPI

FREDDIE L. KNOX, ET AL.

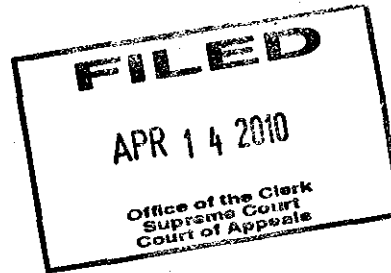
APPELLANTS

VS.

CASE NO. 2009-CA-01401

RUSSELL MAHALITC

APPELLEE



BRIEF OF APPELLANTS FREDDIE L. KNOX, ET AL.

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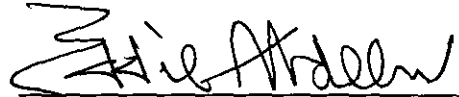
APPELLEE

I. CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons 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. Freddie L. Knox, individually, as the natural father and legal guardian of Kenyetta Knox, Jeremy Knox and Kishun Knox and as the administrator of the estates of Mary L. Knox and Lakidra Knox, Appellant;
2. Tyangela Knox, Appellant;
3. Yolanda Knox, individually and as the administrator of the estate of Deliyah Watson, Appellant;
4. Walter Watson, Appellant
5. Natasha Knox, Appellant;
6. Frederick Knox, Appellant;
7. Markeya Knox, Appellant (all Appellants are sometimes hereinafter collectively referred to as the "Knox Appellants")
8. Oby Rogers, Thomas S. Moore, Attorneys for Appellants;
9. Russell Mahalitc, Appellee;
10. Bradley F. Hathaway, Attorney for Appellee Russell Mahalitc; and

11. Honorable Richard A. Smith, Washington County Circuit Court Judge



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IV. STATEMENT OF THE ISSUE(S)

1. Whether the trial court erred in granting summary judgment in favor of Russell Mahalite on ALL of the claims of the Knox Appellants.
2. Whether, under Mississippi law, Russell Mahalite, the owner of a tractor-trailer that had been loaned to a third party at the time of the subject motor vehicle accident, had a duty to the Knox Appellants to properly equip and/or maintain the subject tractor-trailer with the statutorily required lamps and/or lighting and other safety devices.
3. Whether the Knox Appellants submitted sufficient summary judgment materials and/or evidence to demonstrate a jury question exists in relation to whether Russell Mahalite, as owner of the subject tractor-trailer, breached the duty to properly equip and/or maintain the subject tractor-trailer with the statutorily required lamps and/or lighting and other safety devices.
4. Whether a jury question exists on the issues of proximate cause and damages in relation to the Knox Appellants negligence claim against Russell Mahalite, as owner of the subject tractor-trailer, for the negligent failure to properly equip and/or maintain the subject tractor-trailer with the statutorily required lamps and/or lighting and other safety devices.

V. STATEMENT OF THE CASE/OPERATIVE FACTS

A. Background/Procedural History.

The claims of the Knox Appellants are straightforward and arise out of a motor vehicle accident that occurred on October 7, 2006 on Highway 16 in Issaquena County, Mississippi.

Specifically, a collision occurred between a vehicle being driven by Yolanda Knox and a tractor-trailer being driven by Defendant David McCoy, the trailer portion of which was partially extended into Yolanda Knox's lane of traffic and was the point of impact between the two vehicles. The collision resulted in the deaths of three members of the Knox family, as well as physical injuries to one or more of the Knox Appellants. Russell Mahalite does not dispute these core facts although his characterization of the accident is that Yolanda Knox's vehicle collided into the rear of the tractor-trailer as McCoy was turning off of the highway. (R.176 – Russell Mahalite's Memorandum Brief in Support of Motion for Summary Judgment).

The following background/procedural facts have bearing on and/or are pertinent to the issues raised in this appeal:

1. On or about March 4, 2008, the Knox Appellants filed their complaint in this action

in the Washington County, Mississippi Circuit Court. (R.14 and R.1-15). Based upon the information contained in the accident report related to the subject collision, the Knox Appellants named David McCoy, Russell Mahalite d/b/a Magnolia Plantation ("Mahalite") and, pursuant to *M.R.C.P.* 9(h), certain "John Does"¹ as defendants. (R.1-15 – Knox Appellants' Complaint). Specifically, the accident report listed McCoy as the driver of the tractor-trailer and Mahalite as the owner thereof. (R.Vol.5 – Hearing Transcript at pp. 2-3 – Mahalite's counsel acknowledging

¹ Plaintiff's initially alleged that Mahalite not only owned the subject tractor-trailer but that he was also the employer of McCoy and, as a result, sought to impose liability upon Mahalite under the legal principle of *respondeat superior*. However, because, as the facts in this case demonstrate, the owner of a tractor-trailer can turn out not to be the driver's employer, the Knox Appellants also named the employer of McCoy as a John Doe Defendant pursuant to *M.R.C.P.* 9(h). (R.3-6 – Knox Appellants' Complaint at paras. 8-10).

the contents of the subject accident report).

2. On March 27, 2008, McCoy and Mahalitic filed separate answers and defenses in which they both denied that Mahalitic was McCoy's employer. (R.25-45)².

3. On December 9, 2008, Mahalitic filed a Motion for Summary Judgment asserting that while Mahalitic/Magnolia Plantation³ (collectively sometimes herein after referred to as "Mahalitic") was the owner of the subject tractor-trailer, Mahalitic was not the employer of McCoy

² While the Knox Appellants acknowledge their appeal is limited to what is "in the record", after both McCoy and Mahalitic both denied Mahalitic was McCoy's employer, the Knox Appellants sent out written discovery directed towards the issue of the identity of McCoy's employer. Based upon the responses of McCoy and Mahalitic to the written discovery of the Knox Appellants, the Knox Appellants amended their complaint substituting, pursuant to *M.R.C.P.* 9(h) and 15, George Mahalitic d/b/a GM Farms as McCoy's employer. (R. Supplemental Vol. 1 at pp. 65-68 – trial court's order granting the Knox Appellants' Motion to Amend Complaint). The Knox Appellants have, for the first time, recently learned, through the Motion to Dismiss the Knox Appellants' Amended Complaint filed by George Mahalitic, that GM Farms is actually a Mississippi Partnership. Depending on the trial court's ruling on the dismissal motion of George Mahalitic (based on statute of limitations grounds and contesting the propriety of the Knox Appellants' substitution of him as a fictitious party), the Knox Appellants' claims against George Mahalitic are also likely to be the subject of an appeal in this Court.

³ While the Knox Appellants named as a defendant in their original complaint, "Russell Mahalitic d/b/a Magnolia Plantation, Magnolia Plantation has ultimately been determined to be a Mississippi Partnership and not a sole proprietorship of Russell Mahalitic. However, since it is undisputed by Russell Mahalitic that he is a partner of Magnolia Plantation (R.168-169 – Affidavit of Russell Mahalitic admitting he is a partner of Magnolia Plantation in para. 1), he is liable for the claims of the Knox Appellants arising solely out of the ownership of the tractor-trailer, as discussed herein. A partnership such as Magnolia Plantation, may be sued in the partnership name, **or in the names of the individuals composing the partnership**, or both and service of process on any partner shall be sufficient to maintain the suit against all the partners so as to bind the assets of the partnership and of the individual summoned. *Miss. Code Ann.* § 13-3-55 (1972, as amended)(emphasis added); *See Miss. Code Ann.* § 79-13-306(a)("partners are liable jointly and severally for all obligations of the partnership").

and, therefore, could not be liable for the negligent operation of the tractor-trailer by McCoy. (R.175-181-Mahalitc's Memorandum Brief in Support of Summary Judgment at, *inter alia*, pp. 1-3)⁴.

4. On or about March 5, 2009, the Knox Appellants filed their response in opposition to Mahalitc's summary judgment motion. (R.191-200). Attached thereto as Exhibits "1", "2" and "3", were three colored photographs⁵ depicting the tractor-trailer in the same condition it was in

⁴ As will be discussed in greater detail herein, there can be no legitimate dispute that Mahalitc's summary judgment motion was directed towards the point that Mahalitc was not the employer of McCoy, and therefore Mahalitc could not be held liable under the legal principle of *respondeat superior* for the negligence of McCoy. Such point was clearly and unambiguously conceded and/or confessed by counsel for the Knox Appellants at the summary judgment hearing. However, Mahalitc, in his rebuttal argument at the hearing, asserted the Mahalitc summary judgment motion was directed towards all of the claims of the Knox Appellants. Incredibly, the trial court bought into the Mahalitc rebuttal argument and granted summary judgment in favor of Mahalitc not only on the claims based upon *respondeat superior* but also the asserted claims based upon Mahalitc's ownership of the subject tractor-trailer (related to the lack of statutorily required lamps and/or lighting on the trailer) DESPITE Mahalitc offering NO EVIDENCE on the issue of proximate cause and/or any other element of such claims.

⁵ The quality of the copies of the photographs in the record are such that the Court will not be able to determine what is depicted in the photographs. Pursuant to *M.R.A.P.* 10(b)(5), the Knox Appellants sought to have the trial court "correct" the record by, among other things, allowing "viewable" copies of the SAME photographs submitted to the trial court to be included in the record. (R. Supplemental Vol. 1 at pp. 1-2). Mahalitc objected to the Knox Appellants efforts to address the photograph quality issue and the trial court denied the request of the Knox Appellants to substitute "viewable" copies of the photographs into the record. (R. Supplemental Vol. 1 at pp. 13-14). However, since Mahalitc and the trial court had clear copies of the subject photographs at the summary judgment hearing, the Knox Appellants respectfully assert the trial court erred in denying the Knox Appellants' *M.R.A.P.* 10 request to correct the record and they will be taking the photograph issue up with this Court through a motion filed pursuant to *M.R.A.P.* 10(e). (R. Vol. 5 – Hearing transcript at pp. 7, 18 and 33 [Counsel for Mahalitc acknowledging Exhibits "1"- "3" to the Knox Appellants' Response to Summary Judgment were COLORED PHOTOGRAPHS;

at the time of the subject collision and clearly depicting that the subject trailer did not have the statutorily required lamps and/or lighting and related safety devices. (R.198-200). As set forth in footnote five hereto, Mahalite and the trial court had clear copies of the subject photographs at the summary judgment hearing. (R. Vol. 5 – Hearing transcript at pp. 7, 18 and 33 [Counsel for Mahalite acknowledging Exhibits “1”-“3” to the Knox Appellants’ Response to Summary Judgment were COLORED PHOTOGRAPHS, the trial court, during oral argument, being referred to the Exhibit “2” photograph of the tractor-trailer with no issue being raised by the trial court about being able to see what the photograph depicted and directing counsel for the Knox Appellants not to forget the photographs provided to the trial court during oral argument, respectively]). However, despite such fact and the photographs contained in the record prepared by the clerk being of such poor quality that this Court will be unable to determine what is depicted in the photographs, Mahalite objected to and the trial court denied the Knox Appellants’ request, pursuant to *M.R.A.P.* 10, to correct the record by including the SAME three high quality colored photographs Mahalite and the trial court had in front of them at the hearing on Mahalite’s summary judgment motion.(R. Supplemental Vol. 1 at pp. 13-14). Such a set of circumstances CANNOT be allowed to stand in this Court and, as set forth herein, the Knox Appellants will be filing a *M.R.A.P.* 10 motion to address the photograph quality issue since the trial court denied the Knox Appellants’ requested *M.R.A.P.* 10 relief related thereto.

5. On March 9, 2009 the parties argued the summary judgment motion of Mahalite before the trial court. (R. Vol. 5).

trial court being referred to the Exhibit “2” photograph of the tractor-trailer with no issue being raised by the trial court about being able to see what the photograph depicted; and directing counsel for the Knox Appellants not to forget the colored photographs provided to the trial court during oral argument, respectively]).

6. On March 26, 2009, the trial court granted Mahalitic's summary judgment motion dismissing, as a matter of law, ALL of the claims of the Knox Appellants against Mahalitic. (R.219-222).

7. On April 6, 2009, the Knox Appellants, pursuant to *M.R.C.P.* 59(e), filed a Motion to Alter and/or Amend the Order Granting Mahalitic's Summary Judgment Motion. (R.223-234). While the Knox Appellants improperly included an excerpt of the deposition of Yolanda Knox as part of their *Rule* 59 Motion (because the deposition was previously available at the original hearing on Mahalitic's Summary Judgment Motion), as will be demonstrated herein, the Knox Appellants' *Rule* 59 Motion was still proper because the trial court made a clear error of law in dismissing the claims of the Knox Appellants related to Mahalitic's ownership of the subject trailer and Mahalitic's failure, as owner, to properly equip and/or maintain the trailer with the statutorily required lamps and/or lighting and related safety devices. *See Brooks v. Roberts*, 882 So. 2d 229, 233 (Miss. 2004)(three grounds for *Rule* 59(e) motion are "(i)an intervening change in controlling law; (ii) availability of new evidence not previously available; and (iii) need to correct a clear error of law or to prevent manifest injustice.").

8. April 17, 2009, Mahalitic filed a response in opposition to the Knox Appellants' *Rule* 59 Motion. (R.235-244).

9. On June 1, 2009, the parties argued the *Rule* 59 Motion of the Knox Appellants (R. Vol. 5).

10. On July 16, 2009, the trial court denied the Knox Appellants' *Rule 59* Motion. (R.309-317).

11. Thereafter, the Knox Appellants timely perfected their appeal to this Court. (R.261).

B. Facts and Claims Pled in the Complaint.

(1) Claims in the Knox Appellants' Complaint.

The Knox Appellants' Complaint asserted that Mahalitic was the employer of McCoy and that McCoy and Mahalitic, under *respondeat superior* grounds, wrongfully and negligently operated the "commercial vehicle" that was involved in the occurrence made the basis of the Plaintiffs's claims (R.1-15 – Knox Appellants' Complaint paras. 9, 12 and 13). However, the Knox Appellants also included claims against Mahalitic, as owner of the subject tractor-trailer, for wrongfully and/or negligently maintaining, equipping and/or inspecting the "commercial vehicle" in violation of, among other things, Mississippi law.(R.1-15 – Knox Appellants' Complaint para. 12).

(2) Hearing on Mahaltic's Summary Judgment Motion.

(a) The Knox Appellants Confessed Their Claims Based Upon the Allegation that McCoy was the Employee of Mahalitic.

As set forth herein, the basis for Mahalitic's Summary Judgment Motion was that Mahalitic was merely the owner of the tractor-trailer being driven by McCoy at the time of the collision, that McCoy was not an employee of Mahalitic and that at the time of the collision, Mahalitic had loaned the tractor-trailer to GM Farms, who was the employer of McCoy. (R.Vol. 5 – Hearing Transcript at pp. 3 and 14; R.175-181-Mahalitic's Memorandum Brief in Support of Summary Judgment at, *inter alia*, pp. 1-3). Mahalitic then made a big production at the hearing

on the summary judgment motion that the Knox Appellants had failed to meet their burden under *M.R.C.P.* 56(e) of responding to the affidavit of Mahalitic (which stated, among other things, McCoy was the employee of Mahalitic), etc. with their own “affidavits” and/or other proper summary judgment evidence demonstrating a fact question existed on the issue of whether McCoy was employed by Mahalitic at the time of the collision. (R.Vol. 5 – Hearing Transcript at p. 15).

After Mahalitic’s counsel made the point that no fact question existed on the issue of Mahalitic being the employer of McCoy, counsel for the Knox Appellants readily conceded such point and informed the trial court that the Knox Appellants had no objection to the dismissal of the claims of the Knox Appellants that were based upon the allegation that McCoy was the employee of Mahalitic (i.e. the allegations that sought to impose liability upon Mahalitic under the legal principle of *respondeat superior*). (R.Vol. 5 – Hearing Transcript at p. 16 – lines 10-14). There is no legitimate issue related to this aspect of Mahalitic’s summary judgment motion but it is important for this Court to have a full understanding of what transpired at the subject hearing so the error made by the trial court in dismissing ALL of the claims of the Knox Appellants against Mahalitic can be corrected, through reversal and/or otherwise.

(b) The Knox Appellants’ Claims Against Mahalitic Based Upon Mahalitic’s Ownership of the Subject Tractor-Trailer and Failing to Equip and/or Maintain the Trailer with the Statutorily Required Lamps and/or Lighting and Related Safety Devices.

At the hearing on the Mahalitic summary judgment motion, counsel for the Knox Appellants pointed out that Mahalitic’s summary judgment motion only addressed the issue of McCoy not being the employee of Mahalitic and was therefore, in reality, on a motion for partial summary judgment. (R.Vol. 5 – Hearing Transcript at p. 15). Neither Mahalitic’s motion nor

memorandum brief addressed the Knox Appellants' negligence claim based upon Mahalite's ownership of the subject tractor-trailer and the corresponding failure of duty to equip and/or maintain the subject trailer with the statutorily required lamps and/or lights and related safety devices and Mahalite submitted no summary judgment evidence on these claims with a view towards obtaining dismissal of such claims as a matter of law. (R.Vol. 5 – Hearing Transcript at pp. 15-16). Despite Mahalite's motion and brief making no arguments in relation to the Knox Appellants' negligent failure to equip and/or maintain the subject trailer claim (and Mahalite offering NO EVIDENCE in support of dismissal of such claim), counsel for Mahalite asserted that Mahalite's summary judgment motion sought dismissal of ALL of the Knox Appellants' claims against Mahalite. (R.Vol. 5 – Hearing Transcript at p. 17 – lines 25-26).

Given Mahalite's assertion, by counsel, that Mahalite's summary judgment motion was as to ALL of the claims of the Knox Appellants, counsel for the Knox Appellants directed the trial court's attention to the photographs of the subject trailer (attached as Exhibits "1"-"3" to the Knox Appellants' response to Mahalite's summary judgment motion) and pointed out the subject trailer did not have the statutorily required lamps and/or lighting and related safety devices. (R.Vol. 5 – Hearing Transcript at pp. 18 – 21 and 26).

In rebuttal, counsel for Mahalite boldly asserted Mahalite's motion was to ALL of the Knox Appellant's claims because "the undisputed material facts and evidence demonstrates" Mahalite "owed no legal duties towards the plaintiff[s]." (R.Vol. 5 – Hearing Transcript at p. 27). Then Mahalite appeared to argue that the negligence claims of the Knox Appellants' for the failure of duty to properly equip and/or maintain the subject trailer with the statutorily required lamps and/or lights and related safety devices were newly asserted claims (which was clearly

inaccurate based upon the contents of the Knox Appellant's Complaint).(R.Vol. 5 – Hearing Transcript at pp. 30-31).

Despite counsel for the Knox Appellants clearly pointing out that the Knox Appellants' negligent failure to equip and/or maintain the subject trailer with the statutorily required lamps and/or lights and related safety devices was stated in the original complaint, the trial court thereafter dismissed ALL of the Knox Appellants claims against Mahalite, thereby committing error. (R.Vol. 5 – Hearing Transcript at pp. 32).

VI. SUMMARY OF THE ARGUMENT

As this Court is well aware, whether a party owes a duty to another party is a question of law that is reviewed *de novo* on appeal. In this case, Mahalite, as the owner of the subject tractor-trailer, clearly had a duty to properly equip and/or maintain the subject trailer with the statutorily required lamps and/or lights and related safety devices. The Knox Plaintiffs have alleged such a duty, demonstrated, at a minimum, a fact question exists on the issue of whether the duty was breached through colored photographs of the tractor-trailer, which were neither objected to by counsel for Mahalite nor the subject of a motion to strike by Mahalite, and have alleged proximately caused damages flowing from such a breach. Moreover, through his summary judgment motion, Mahalite offered NO EVIDENCE (nor could he) that established, as a matter of law, there were no jury issues on the issue of whether Mahalite's breach of duty to equip and/or maintain the subject trailer with the statutorily required lamps and/or lights and related safety devices proximately caused damages to the Knox Appellants. As a result, summary judgment was improperly granted to Mahalite as to these claims.

VII. ARGUMENT

A. Standard of Review and Summary Judgment Standard.

This Court reviews a trial court's disposition of a motion for summary judgment *de novo*. *Treasure Bay Corp. v. Ricard*, 967 So. 2d 1235, 1238 (Miss. 2007). As the Court is well aware, Mahalitic was not entitled to summary judgment unless he demonstrated that there were no genuine issues of material fact and that Mahalitic was are entitled to judgment as a matter of law. *Canizaro v. Mobile Communications Corp. of America*, 655 So. 2d 25, 28 (Miss. 1995). The summary judgment evidence must be viewed in the light most favorable to nonmoving party (the Knox Appellants) and the non-movant must be given the benefit of every reasonable doubt. *Summers v. St. Andrews Episcopal School, Inc.*, 759 So. 2d 1203, 1208 (Miss. 2000). Moreover, in situations where there is a doubt as to whether a genuine issue of material fact exists, "the trial judge should err on the side of denying the motion and permitting full trial on the merits." *Todd v. First Baptist Church of West Point*, 993 So. 2d 827, 829 (Miss. 2008). As will be demonstrated herein, when the applicable *Rule 56* standard is applied to the summary judgment motion of Mahalitic, the trial court erred in dismissing the negligence claims of the Knox Appellants arising out of Mahalitic's ownership of the subject tractor-trailer and breach of duty to properly equip and/or maintain the subject trailer with the statutorily required lamps and/or lights and related safety devices.

B. Mahalitic, as the Owner of the Subject Tractor-Trailer, Owed a Duty to the Knox Appellants to Equip and/or Maintain the Statutorily Required Lamps and/or Lighting and Related Safety Devices.

The well settled elements of a *prima facie* case of negligence are duty, breach, causation, and damages. *Rein v. Benchmark Construction Co.*, 865 So. 2d 1134, 1143 (Miss. 2004). As this Court has observed, "[w]hile duty and causation both involve foreseeability, **duty is an issue of**

law, and causation is generally a matter for the jury.” *Rein*, 865 So. 2d at 1143. (emphasis added). The Court of Appeals has likewise stated:

[w]hen reasonable minds might differ on the matter, questions of proximate cause and of negligence and of contributory negligence are generally for determination of [sic] jury. [citation omitted]. These questions are for the jury to decide under proper instructions of the court as to the applicable principles of law involved. [citation omitted]. Foreseeability and breach of duty are also issues to be decided by the finder of fact once sufficient evidence is presented in a negligence case.

Hankins Lumber Co. v. Moore, 774 So. 2d 459, 464 (Miss. Ct. App. 2000).

In this case, there can be no legitimate dispute that Mahalitc, as the 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. Simply put, the trial court erred when it found that Mahalitc, the owner of the subject tractor-trailer, owed no duty to the Knox Appellants and/or any other

motorist to properly equip and/or maintain the subject tractor- trailer with the statutorily required lamps and/or lights and related safety devices when it failed to so equip the trailer and allowed McCoy and GM Farms to operate the tractor-trailer on the highways of Mississippi. The response to the summary judgment motion of Mahalite, 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 Mahalite on this point.(R.191-192; R.Vol. 5 – Hearing Transcript at pp. 18 – 21 and 26; and R.225-228.

C. The Three Photographs of the Subject Tractor-Trailer Offered by the Knox Appellants Establish, at a Minimum, a Fact Question on the Issue of Whether, Mahalite, as the Owner of the Tractor-Trailer, Breached Mahalite's Duty to Equip and/or Maintain the Trailer with the Statutorily Required Lamps and/or Lights and Related Safety Equipment.

1. The three photographs of the subject tractor-trailer establish a breach of statutory duty by Mahalite.

The three colored photographs of the subject tractor-trailer owned by Mahalite presented to the trial court and Mahalite in opposition to Mahalite's summary judgment motion clearly reveal the trailer did not have the statutorily required lamps and/or lights and related safety equipment. (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; compare the copies of the three IDENTICAL photographs included in the record by the clerk which are of such a poor quality that neither this Court nor anyone else can determine what is depicted therein (R.198-200).

As referenced herein, since the trial court denied the Knox Appellants' request to include "viewable photographs" in the record, the Knox Appellants are filing a motion pursuant to

M.R.A.P. 10 to have this Court take up the issue of whether the Knox Appellants are entitled to include in the record of this case IDENTICAL colored copies of the photographs that are of the same high quality as those the trial court and Mahalitic had in front of them at the hearing on Mahalitic's summary judgment motion. (R. Vol. 5 – Hearing transcript at pp. 7, 18 and 33 [Counsel for Mahalitic acknowledging Exhibits "1"-“3" to the Knox Appellants' Response to Summary Judgment were COLORED PHOTOGRAPHS; trial court being referred to the Exhibit “2" photograph of the tractor-trailer with no issue being raised by the trial court about being able to see what the photograph depicted and directing counsel for the Knox Appellants not to forget the colored photographs provided to the trial court during oral argument, respectively])). Simply put, the negligence claims of the Knox Appellants based upon Mahalitic's failure to properly equip and/or maintain the subject trailer with the statutorily required lamps and/or lighting and related safety devices should be decided on the merits and this Court should be entitled to view the SAME COLORED PHOTOGRAPHS viewed by the trial court when ruling on the issues raised in this appeal.

2. The Knox Appellants are Entitled to Rely Upon the Three Photographs of the Subject Tractor-Trailer to Defeat Mahalitic's Summary Judgment Motion.

In retrospect, while there is no dispute that the photographs are authentic and depict the Mahalitic tractor-trailer in the same condition they were in on the date of the subject collision, the Knox Appellants should have submitted the three photographs of Mahalitic's tractor-trailer via an affidavit from its expert that took the photographs. However, **Mahalitic never made any evidentiary objections and/or otherwise filed a motion to strike based upon the Knox Appellants' failure to do so.** Rather, 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).

As a result, Mahalitic has waived any evidentiary objections that he would have been entitled to assert and the photographs were admissible for summary judgment purposes because they can be presented in an admissible form at trial. *Fonseca v. Sysco Food Services of Arizona, Inc.*, 374 F. 3d 840, 846 (9th Cir. 2004)⁶ (defective evidentiary materials are admissible for summary judgment purposes where such materials can be presented in admissible form at trial; and noting propriety of reversing grant of summary judgment and exclusion of evidence where defense made no evidentiary objection, citing *Scharf v. United States Atty. Gen.*, 597 F. 2d 1240, 1243 (9th Cir. 1979)); *See Eguia v. Tompkins*, 756 F. 2d 1130, 1136 (5th Cir. 1985) (“[d]ocuments presented in support of a motion for summary judgment may be considered even if they do not comply with the requirement of *Rule 56* if there is no objection to their use.”). Therefore, the Knox Appellants clearly were and are entitled to rely upon the subject photographs in opposing

⁶ Because the Mississippi Rules of Civil Procedure are patterned after the federal procedural rules, Mississippi Courts rely on federal decisions, as well as those of the Mississippi Appellate Courts, when considering questions presented under the Mississippi rules. *Stanton & Assoc., Inc. v. Bryant Construction Co., Inc.*, 464 So. 2d 499, 505 n. 5 (Miss. 1985).

Mahalitc's summary judgment motion and in demonstrating the trial court erred in granting summary judgment to Mahalitc on the Knox Appellants' negligence claims against Mahalitc for failing to properly equip and/or maintain the subject trailer with the statutorily required lamps and/or lights and related safety devices.

D. Since the Knox Appellants have Demonstrated Mahalitc Owed Them a Duty and
a Fact Question on the Breach of Such Duty, a Jury Question Exists on the Issues
of Proximate Cause and the Amount of Damages Sustained by the Knox Appellants.

As noted herein in the context of a negligence claim, "[w]hile duty and causation both involve foreseeability, duty is an issue of law, and **causation is generally a matter for the jury.**" *Rein*, 865 So. 2d at 1143 (emphasis added); *Hankins Lumber Co.*, 774 So. 2d at 464 ("[w]hen reasonable minds might differ on the matter, questions of proximate cause and of negligence and of contributory negligence are generally for determination of [sic] jury."). In this case, whether Mahalitc's breach of Mahalitc's duty to properly equip and/or maintain the subject trailer with the statutorily required lamps and/or lights and related safety devices was a proximate cause of Yolanda Knox colliding into the portion of the subject trailer that was partially extended into Yolanda Knox's lane of traffic (resulting in three fatalities) is for a jury to resolve. The evidence the Knox Appellants will present to the jury on this issue includes, among other things, that at the time of the collision, the sun did not affect the vision of Yolanda Knox; that Yolanda Knox did not see the trailer in her lane of travel until right before the collision occurred; and that, while Yolanda Knox attempted to take a defensive driving maneuver to avoid the impact, she had insufficient time to do so under the circumstances that existed at the

time of the collision. (R.231-234 – Excerpts from the Deposition of Yolanda Knox)⁷.

The trial court simply committed error by disposing of this claim as a matter of law on the basis of the summary judgment motion filed by Mahalite. Mahalite neither made any legal arguments related to the Knox Appellants' negligence claim for failure to equip and/or maintain the subject trailer with the statutorily required lamps and/or lights and related safety devices nor, more importantly, offered ANY evidence directed at the issue of proximate cause and/or any other element of such claim. As a result, the Knox Appellants were never required to submit evidence on the issue of proximate cause and/or damages because Mahalite had the burden of initially establishing the lack of a factual issue on these elements (which he NEVER attempted to do with summary judgment type evidence and/or otherwise). Mahalite cannot legitimately dispute this point and the trial court's grant of summary judgment to Mahalite on this claim should be reversed.

E. The Trial Court Erred by Finding and/or Ruling that the Knox Appellants' Negligence Claim Arising out of Mahalite's Ownership of the Subject Trailer and Failure to Equip and/or Maintain the Trailer with the Statutorily Required Lamps and/or Lights and Related Safety Devices Was Never Briefed or Presented to the Trial Court at the Summary Judgment Hearing.

The trial court's July 16, 2009 order denying the Knox Appellants' *Rule 59* Motion states, in pertinent part, the following:

⁷ As noted herein, the Yolanda Knox deposition excerpt was included as an exhibit to the Knox Appellants' *Rule 59* motion and was not submitted in connection with the Knox Appellants' original response in opposition to Mahalite's summary judgment motion. The Knox Appellants are not improperly attempting to utilize such deposition testimony to "create error" on the part of the trial court (by relying on such testimony when it was not presented at the summary judgment hearing). Rather, the purpose for pointing to the subject testimony is to point out why a jury question exists on the issue of proximate cause.

At the hearing on Mahalite's motion for summary judgment, the Plaintiffs, through their counsel, argued that maybe there were other possible theories of liability which might, if developed, create a cause of action against Magnolia [Mahalite]. Among these were the claim that Mahalite negligently equipped, maintained and inspected the vehicle being driven by David McCoy at the time of the accident. Neither this nor any of the other theories mentioned by the Plaintiffs at the summary judgment hearing were ever briefed or otherwise properly presented to the Court or to Mahalite in response to the summary judgment motion, much less were any facts offered in support of these elusive theories in the form of competent Rule 56 evidence.

Thus, not only are the Plaintiffs incorrect that this Court failed to address all of Plaintiffs' claims, the Court further finds that the Plaintiffs have failed to demonstrate any error in the Court's treatment of those claims.

(R.314-315).

Respectfully, the portion of the trial court's order quoted above pays no deference to the Knox Appellants' Complaint (R.7-8 – Knox Appellants' Complaint at para. 12); the Knox Appellants response to Mahalite's summary judgment motion (R.191-200) or the argument of the counsel for the Knox Appellants at the hearing on Mahalite's summary judgment motion (R.Vol. 5 – Hearing Transcript at pp. 18 – 21 and 26). Moreover, as set forth in the "Statement of the Case/Operative Facts" portion of this brief, the Knox Appellants not only "properly presented" their failure to properly equip and/or maintain the statutorily required lamps and/or lights and related safety equipment claim through argument and a pleading opposing summary judgment, counsel for the Knox Appellants directed the trial court's attention to colored photographs of the subject trailer, to which Mahalite never raised an evidentiary objection, that clearly demonstrated, at a minimum, a fact question existed on the issue of Mahalite's breach of Mahalite's statutory duty related to such claim. Therefore, since a proper purpose of a *Rule 59*

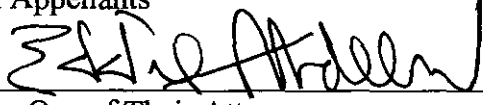
Motion is to correct a "clear error" of law, the Knox Appellants' motion was proper and the trial court erred in failing to find, for a second time, that Mahalitic, as the owner of the subject trailer, had a statutory duty to equip and/or maintain the trailer with lamps and/or lights and related safety devices, that, at a minimum, a fact question existed on the issue of whether Mahalitic breached such duty (based upon the colored photographs of the trailer to which Mahalitic asserted no objection) and that a jury issue exists on the issue of proximately caused damages flowing from such breach.


IV. CONCLUSION

The Knox Appellants have demonstrated that Mahalic, 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.

Respectfully submitted this the 14th day of April, 2010.

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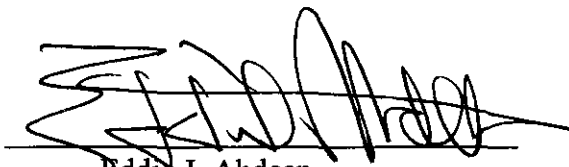
CERTIFICATE OF SERVICE

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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Honorable Richard A. Smith,
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This the 14th day of April, 2010.


Eddie J. Abdeen

