IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

LEAH FULTON DOOLEY; ET AL — APPELLANTS

V. — CASE NO. 2009-CA-01830

CEDRIC BYRD AND INDEPENDENT ROOFING SYSTEMS, INC. — APPELLEES

BRIEF OF THE APPELLEES

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

In order that the Court may evaluate possible disqualification or recusal, the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case:

1. Leah Fulton Dooley, Appellant;
2. Kathryn Marie Fulton, a Minor, Appellant;
3. Peyton Dooley, a Minor, Appellant;
4. Don H. Evans, Mother's Counsel;
5. Dewey Dooley, Appellant;
6. Mary Dooley, Mother of Kaitlyn P. Dooley, a Minor;
7. Kaitlyn P. Dooley, a Minor, Appellant;
8. William W. Fulgham, Father's Counsel;
9. Cedric Byrd, Appellee;
10. Independent Roofing Systems, Inc., Appellee;
11. James D. Holland and Martin G. Street, Defendants' Counsel;
12. Honorable Samac S. Richardson, trial court judge.

This, the 9th day of September, 2010.

James D. Holland

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Appellees submit that the facts and legal arguments are adequately presented in the briefs and the record; but this Court's decisional process will be significantly aided by oral argument. M.R.A.P. 34 (a)(3).

STATEMENT OF THE ISSUES

1. Whether the trial court properly denied the Plaintiffs' Motion for New Trial.
2. Whether the jury verdict was supported by the evidence.
3. Whether the trial court properly denied the Plaintiffs' Motion for Judgment Not Withstanding the Verdict.
4. Whether the trial court properly instructed the jury.
5. Whether the trial court properly granted father's Motion for Joinder and Separate Representation.
6. Whether the trial court was within its broad discretion in ruling on issues such as "control of the litigation and participation at trial."

STATEMENT OF THE CASE

The plaintiff driver ran into the back of a trailer being pulled by the defendant driver as it pulled into a driveway (R. 431) The plaintiff driver filed a suit for personal injuries which was dismissed as the trial began (R. 22) leaving only a suit under our statutory wrongful death statute for the death of her son. The Plaintiffs introduced evidence that the child was allowed to stand in the front passenger seat (R. 82, 116, 809, but see 1048), but the jury did not hear of her prior tickets for allowing him to do so or about her criminal indictment for this accident and his death (R. 33-34, 42-44, 65, 74-76, 808-809, 811). The jury was left to decide who caused the accident.

It was uncontradicted that the minor had moved from a child seat behind the driver to standing in the front passenger seat. The only damage to the car was at head level on the passenger side of the car (R. 432-434, 832, 835-838). Had he been properly secured, he would have had no physical injury from the accident. The plaintiff driver did not. After a two week trial, the jury determined that it was the mother driver and who was at fault for driving, without braking, into the rear of the trailer (R. 437-439, 612-613, 625, 841, 843, and 846).

Plaintiffs' liability expert agreed with the Defendants' expert and the investigating officer that the mother was the cause of the accident:

> Q. Do you agree that Ms. Dooley has a responsibility for this accident? . . .
> A. Yes. I believe that the vehicle was out there and someone paying attention should be able to see that, yes.

(Plaintiffs' expert, 431). Under the shadow of the many attempts to invoke sympathy and passion in plaintiffs' favor, they now argue that the defense verdict against them was a

result of sympathy, bias and prejudice (R. 1089-1093, 1038-1042). Hearing all of the evidence, the jury found that the plaintiff driver caused the accident and that the Defendants did not.

FACTS

On September 29, 2003, the plaintiff driver, Leah Dooley, ran into the back of a flat bed trailer being pulled Cedric Byrd, an employee of Independent Roofing Systems, Inc. Cedric was traveling south on Mississippi Highway 468 and was in the process of making a right turn into a driveway when the rear of the trailer was struck by mother driver's automobile. Her two year-old child, Jonathan Dooley was standing in the front seat of the car when she hit the trailer at over fifty (50) miles per hour causing his death.

On October 8, 2003, Appellants Leah Fulton filed the underlying wrongful death suit alleging that the negligence of Cedric Byrd and Independent Roofing caused the accident. The evidence presented at trial, as reflected by the jury's unanimous verdict, showed that the mother driver's negligence was the sole proximate cause of the accident and that any negligence of Cedric and Independent Roofing was not a proximate contributing cause of the accident.

STANDARDS OF REVIEW

A. The Trial court Properly Refused to Grant Appellant's Motion for New Trial

"The standard of review in considering a trial court's denial of a motion for a new trial is ... abuse of discretion." *Poole v. Avara*, 908 So. 2d 716 at726 (Miss. 2005). When a trial court denies a motion for new trial, this Court will reverse that decision "only when such denial amounts to a[n] abuse of that judge's discretion." *Poole*, at 727.

"In determining whether a jury verdict is against the overwhelming weight of the evidence, this Court must view all evidence in the light most consistent with the jury verdict, and we should not overturn the verdict unless we find that the lower court abused its discretion when it denied the motion." *Harris v. Lewis*, 755 So. 2d 1199 at 1203-1204 (Miss. App. 1999). See also *Herrington v. Spell*, 692 So. 2d 93 at 103 (Miss. 1997). "[W]e will not set aside a jury's verdict and order a new trial unless we are convinced that the verdict was contrary to the substantial weight of the evidence so that justice requires that a new trial be granted." *Poole*, at 727. When there is a conflict in the evidence, "though all of the evidence may not point automatically to a verdict in [the Appellees'] favor, it cannot on the other hand be said that the weight of the evidence was overwhelmingly against [the Appellees]. Once the jury has spoken, "this Court will not overturn a jury verdict unless clearly erroneous." *Herrington*, at 104.

B. The Trial Court Properly Granted Appellants Motion for Judgment Notwithstanding the Verdict.

"The standard of review in considering a trial court's denial of a motion for judgment notwithstanding the verdict is de novo." *Poole*, 908 So. 2d at 726. "The trial court must view the evidence in the light most favorable to the non-moving party, giving that party the

benefit of all favorable inferences that reasonably may be drawn therefrom." *Wilson v. General Motors Corp.*, 883 So. 2d 56 at 63 (Miss. 2004). "If the facts so considered point so overwhelmingly in favor of the appellant that reasonable men could not have arrived at a contrary verdict, we are required to reverse and render." *Wilson*, at 63. (citing *Corley v. Evans*, 835 So. 2d 30 at 37 (Miss. 2003). This Court must examine the "sufficiency" of the evidence, which should not be confused for "weight" of the evidence.[1] "When determining whether the evidence was *sufficient*, the critical inquiry is whether the evidence is of such quality that reasonable and fair-minded jurors in the exercise of fair and impartial judgment might reach different conclusions." *Id.* (citing *Jesco, Inc. v. Whitehead*, 451 So. 2d 706 at 713-714 (Miss. 1984)(Robertson, J., specially concurring). In other words, a J.N.O.V. would be proper only if, looking at all of the evidence in the light most favorable to Appellees, a fair-minded jury could have only properly found for Appellants. *Poole*, 908 So. 2d at 726. If this Court determines that there was any possible way for the jury examining the evidence to have found in favor of the Appellees, as they did in the instant case, then this Court must also find that the trial court properly denied the motion for judgment notwithstanding the verdict.

C. The Trial Court Properly Denied Appellants' Proposed Jury Instructions Numbers P-36; P-40; P-44A; and P-44B; while, at the same time, properly granted Jury Instruction's Numbers 10 and 11.

"The trial court has considerable discretion in instructing the jury." *Southland Enter v. Newton County*, 838 So. 2d 286 at 289 (Miss. 2003). "This Court does not review jury instructions in isolation. Rather, instructions are read as a whole to determine if the jury was

[1] "[W]eight and sufficiency of the evidence are not synonymous ...." *Poole*, 908 So. 2d at 726.

properly instructed." *Harris, v. Lewis,* 755 So. 2d 1199 (Miss. App. 1999). "[D]efects in specific instructions do not require reversal "where all instructions taken as a whole fairly-although not perfectly-announce the applicable primary rules of law." *Starcher v. Byrne,* 687 So. 2d 737 (Miss. 1997).

The claims of the Plaintiffs were described in great detail in Jury Instructions Twelve through Fifteen drafted by the Plaintiffs (R. 1049-1056). The plaintiff presented several additional jury instructions for the first time at the jury instruction conference after the proof was in and in violation of the rules requiring that instructions be submitted before trial. The Plaintiffs now complain that the court should have granted these belated instructions and instructed that the defendants were negligent as a matter of law (Instructions P36, P44A and P44B). The plaintiff driver had an expired license at the time of the accident, but this court has recognized that a statutory violation but have a nexus with the cause of the accident to be relevant, admissible and probative. The statutory violation must be related to and be found to have proximately caused the injury. The jury here was instructed properly.

They further argue that the shadows on the road form a defense to the plaintiff driver's own negligence and the condition of the driveway a basis for liability of the Defendants (Instruction P40). The court properly instructed the jury on these several issues.

SUMMARY OF THE ARGUMENT

Appellants have provided no reason why this court should disturb the unanimous verdict of the jury or the lower court's rulings upholding of that verdict. "The proper function of the jury is to decide the outcome ..., and the court should not substitute its own view of the evidence for that of the jury's." *Harris*, 755 So. 2d at 1204. Thus, the Circuit Court did not abuse its discretion in denying Plaintiffs' Motion for New Trial or Judgment Notwithstanding the Verdict. Also, Appellants have failed to show that the jury verdict was against the overwhelming weight of the evidence or was the result of bias, passion or prejudice. *Poole*, 908 So. 2d at 726-727. After examining all of the evidence presented in the light most favorable to Appellees, the evidence fully supports a verdict in favor of the Defendants.

Likewise, the trial court did not abuse its discretion in instructing the jury. Each party had an opportunity to object to and voice their opinions on the jury instructions before they were submitted to the jury. Read as a whole, the jury instructions adequately advised the jury on all applicable areas of the law that were critical to their decision making process.

Lastly, the lower court correctly applied the holding of *Long v. McKinney* in granting the father plaintiff's joinder through separate representation. Likewise, the trial court correctly restricted the Appellants in this cause to one action for wrongful death instead of allowing both counsel for Appellants to examine every witness and present their individual and conflicting theories of liability at trial. Neither of these actions by the trial court constituted an abuse of discretion.

ARGUMENT

A. The Plaintiffs failed to establish the Court abused it discretion in denying their motion for new trial.

The plaintiffs on the mother's side argue that the jury ignored the comparative negligence instruction when it failed to allocate at least some fault to the Defendants which, they claim, proves that the verdict was based on bias, passion and prejudice. The jury verdict instead shows that the jury did not believe the "cover up" theory offered by a disgruntled former employee at their prompting (R. 360-375). The verdict also makes it clear that the jury logically concluded that the trailer was never completely off the road and then "darted out in front of her" as the driver plaintiff claims. Had the trailer been completely off of the road it would have been through the ditch and in the yard leaving no need to back up, into the road. The jury heard evidence about the defendant driver's license type and the use of warning devices and was instructed on those theories, but found them not to be a proximate cause of the accident. Nor was the jury confused by the instructions.

Accepting all of the evidence that supports the verdict as true, it is clear that the circuit court did not abuse its discretion in refusing to grant the Appellants' Motion for New Trial. *Smith v. State*, 911 So. 2d 541 (Miss. App. 2005). Further, the jury was clearly instructed by the trial judge that, "[it] should not be influenced by bias, sympathy or prejudice," but should base its decision "upon the evidence and not upon speculation, guesswork, or conjecture." (R. 1044-1045.) After hearing all of the evidence presented by both sides, the jury rendered a unanimous verdict in favor of Cedric Byrd and Independent Roofing. The trial court's refusal to disturb this verdict did not constitute an abuse of the trial court's discretion.

1. The jury verdict was not against the overwhelming weight of the evidence

The jury's verdict in favor of Cedric Byrd and Independent Roofing was in accordance with the clear evidence. The evidence presented at trial showed that the proximate cause of the accident was the plaintiff driver's failure to maintain a proper lookout as she ran into the back of the trailer in the road ahead. Plaintiffs' own expert testified that Leah Dooley was negligent (R. 431).

In their arguments, Appellants attempt to hide from the overall conclusion of Sergeant Kazery's investigation and testimony; that Leah Dooley ran into the back of a trailer as the driver of that trailer, Cedric, was pulling into a driveway. Kazery was accepted at trial as an expert in accident reconstruction after being cross-examined on her credentials by counsel for the Appellants (R. 823-828). Her testimony was based strictly on the physical evidence she obtained through her on and off-site investigation of the accident (R. 950, 952 975).

In addressing Appellants' first point of argument, the jury verdict makes it clear that this accident had nothing to do with certain classes of types of drivers' licenses. Kazery testified that Cedric Byrd's license had nothing to do with the cause of the accident (R. 875). No special license would have prevented the accident, since the proximate cause of the accident was Leah's failure to maintain a proper lookout.

At trial, Kazery was grilled at length by counsel for the Appellants about whether the warning devices or the presence of a flagman, or lack thereof, were potential contributing

proximate causes of the accident.[2] Repeatedly, Officer Kazery emphasized that Cedric was making his turn into the driveway when the accident occurred and had no duty to place warning devices during his turn (R. 957, 963, 966). Therefore, Appellants' argument about warning devices is without merit since no such duty arose. The simple fact is, the accident occurred during broad daylight. The plaintiff driver's duty was to watch where she is driving.

The jury did not believe and the evidence did not support Appellants' contention that Cedric suddenly backed the trailer into the road directly in front of the Plaintiff driver so that she had no time to react and avoid the accident (R. 573-576). The testimony at trial was quite to the contrary. Keys testified that he never saw Cedric back up (R. 281). Looking at photographs of the accident scene, Kazery explained, "I don't see anything in here showing where he [Cedric] backed up any distance back into the road" (R. 876). Looking further at the physical evidence, it is clear that Leah had no time to react because she was not paying attention, not because Cedric backed out in front of her. Kazery testified that, given Leah's testimony regarding how the accident happened and the undisputed speed of Leah's vehicle, Cedric could not have backed out in front of Leah as she contended. It was a physical impossibility (R. 871-874). Even Appellants' own expert, William Partenheimer stated that it would be impossible for the trailer to back out in front of the plaintiff driver as she contends (R. 463). It is clear that no matter how the Appellants argue the testimony

[2] This argument by Appellants is partly based on § 392.22(b)(1) of the Federal Motor Carrier Safety Regulations which states that, "whenever a commercial motor vehicle is stopped upon the traveled portion or the shoulder of the highway for any cause other than necessary traffic stops, the driver shall, as soon as possible, but in any event within **10 minutes** place the warning devices required by 393.95 of this chapter." '

offered at trial, the overwhelming weight of the evidence supports the jury verdict of no negligence of Cedric Byrd proximately caused the accident.

Appellants also claimed that the evidence showed that shadows cast on the road near the truck and trailer kept Leah from being able to see the trailer in the road. Officer Warren, a Sheriff's Deputy, testified that, when he showed up on the scene after the fact, shadows were cast over the trailer, but both the truck and trailer were still visible (R. 182). Partenheimer subsequently stated that, Leah Dooley should have seen the trailer in the road (R. 182, 470). Subsequent testimony from Kazery explained that the trees on the side of the road, as well as the shadows, would not have obstructed Leah's view ahead and played no role in causing the accident (R. 927-931).

B. The jury verdict stands and the motion for JNOV fails because the evidence viewed in the light most favorable to the Defendants giving them all favorable inferences fully support the jury's decision.

1. The testimony of a disgruntled former employee gave no basis for Plaintiff claims.

Appellants argue that the Defendants conspired to hide the truth of what really happened on the date of the accident based only on the testimony of a disgruntled former employee, McLain. In an effort to push their theory that Cedric backed into the road in front of Leah's approaching vehicle, Appellants point to one line in Cedric's trial testimony where he says, "I backed up a little bit" (R. 225). What Appellants fail to mention any of the rest of Cedric's testimony which clearly shows that he was trying to get his truck and trailer into the driveway at the time of the impact. Cedric's pertinent testimony reads:

> A. I was trying to back it up to keep from hitting the mailbox. I backed up a little bit. Then, "Come on. Come on forward. You got it. Come on forward." I was easing forward when the wreck happened."

Q. So you had backed up just – you had backed up just before you got hit?
A. It had been a good while before I got hit.

(R. 225). Thus, the evidence clearly shows that Cedric was pulling into the driveway and had the right-of-way when Leah hit the back of his trailer.

McLain is not and was never qualified as an accident reconstruction expert. He was merely a supervisor for Independent Roofing who went to the accident scene after the fact and then testified based on some photos. Since McLain was not at the accident scene when it occurred, he is not qualified to state what he feels is "obvious" about the movement of Cedric's truck (R. 337-339). Second, even accepting McLain's testimony as true, it only supports the conclusion that Cedric had the truck in reverse at one point. This is compliant with Cedric's own testimony that he tried to back up in order to keep from hitting the mailbox as he pulled in to the driveway. Neither Cedric, McLain nor Ramsey attempted to hide the truth from anyone because, as their testimony shows, there was nothing to hide.

Officer Kazery wrote in her accident report, and restated at trial, Leah failed to yield the right of way to Cedric (R. 885). Even Partenheimer, Plaintiffs own expert accident reconstruction witness testified that Leah Dooley would have seen the trailer in the road had she been paying attention (R. 431). Viewing the evidence in the light most consistent with the jury verdict, it is clear that the overwhelming weight of the evidence is in the Appellees' favor. Since the jury verdict was consistent with the weight of the evidence the trial court did not abuse its discretion in refusing Appellants' Motion for New Trial. This Court should reach the same conclusion and uphold the trial court's decision not to disturb the jury verdict.

2. There is no evidence that the verdict against the heirs was caused by passion, bias or prejudice.

Appellants provide no support for the argument that the jury verdict was a result of bias, passion or prejudice. The record is complete with the efforts of the court to accommodate the differences among the heirs, yet each family group now argues that the attorneys for the other heirs caused the jury verdict. The mother's side argues that the father's side caused the jury verdict (Mother's brief pages 45-48, 616-623) and the father's side the reverse (Father's brief pages 15-17). What is clear was that this was a tragic accident which resulted in the death of a two year old boy. The jury listened intently for two weeks as the evidence was presented, visited the accident scene at the request of the Plaintiffs (page 17-18, 63), heard from fact and expert witnesses, and was instructed on the numerous theories of liability and claims for damages. The jury allocated all fault against the Plaintiff driver and none against the defendants.

C. Reading the jury instructions, individually and as a whole, the trial court was within its considerable discretion in instructing the jury.

Read separately and as a whole, the jury instructions given by the trial court in the underlying action properly instructed the jury on the applicable primary rules of law. Appellants argue that four jury instructions should have been given that were not given; and that two jury instructions should not have been given that were given.

What Appellants fail to recognize is that the applicable law in every one of these instructions was submitted to the jury in Jury Instructions Twelve through Thirteen (R. 1049-1056). Therefore, the jury instructions, read properly as a whole, instructed the jury on the applicable primary rules of law and Appellant's arguments are without merit.

The Court is allowed to refuse an instruction which incorrectly states the law, is covered fairly elsewhere in the instructions, or is without foundation in the evidence. *Spicer v. State,* 921 So. 2d 292, 313 (Miss. 2006). "If a proposed jury instruction repeats a theory fairly covered in another instruction, incorrectly state the law, or is without adequate foundation in the evidence of the case, a trial court may properly refuse to grant the instruction." *Etheridge v. Harold Case & Company, Inc.*, 960 So. 2s 474 (Miss. App. 2006) (citing *Burr v. Mississippi Baptist Medical Center*, 909 So, 2d 721 at 726 (Miss. 2005)). The trial court has considerable discretion when instructing the jury. *Bickham*, 861 So. 2d 299 at 301 (Miss. 2003). A trial judge may refuse a proposed jury instruction that has no proper foundation in the evidence before the court. *Resource Services, Inc. v. Cato,* 15 So. 3d 412 at 423 (Miss. 2009); *Young v. Guild*, 7 So. 3d 251 at 259 (Miss. 2009).

The trial judge was correct in not giving a negligence per se instruction based on Defendant Byrd not having a Class-D license, because the evidence showed that having or not having that license could not be a proximate cause of the accident. "Instructions to a jury must be based on evidence placed into the record before they can be properly granted." *Detroit Marine Engineering v. McRee,* 510 So. 2d 462 (Miss. 1987); See Also *McBroom v. State,* 64 So. 2d 144 (1953). "While ... violations of statutes constitute negligence per se, this does not relieve a party from the burden of showing that the negligence of the opposing party caused or contributed to the injury suffered by a complainant." *Thomas v. McDonald,* 667 So. 2d 594 at 596-597 (Miss. 1995).

> [W]hen a statute is violated, a party is entitled to an instruction on negligence. However, in order to recover damages for an injury, that negligence (violation of a statute) must have proximately caused or contributed to the injury. In other words, a violation of a statute, in and of itself, does not dictate that

> either (1) the violation was the proximate cause or contributing cause of an injury suffered by a party, or (2) recovery for damages is imminent.

Utz v. Running and Rolling Trucking, 32 So. 3d 450 (Miss., 2010); See Also *Thomas v. McDonald*, 667 So. 2d 594 at 596-597 (Miss. 1995).

In the instant matter, the evidence in the record showed that the accident was proximately caused by the negligence of Leah Dooley in failing to maintain a proper lookout. Leah was paying attention to Jonathan, unrestrained and playing on the seat next to her, and not paying attention to the road ahead. Thus, the trial court properly determined that the status of Byrd's license played no role in the accident and no negligence per se instruction was warranted.

The trial court exercised its discretion at trial in submitting Jury Instruction Number 13 to the jury, which read in pertinent part:

> Instruction 13: The Court instructs the jury that the heirs contend that the death of Jonathan Wayne Dooley was proximately caused or contributed to by the defendant's failure to possess the proper training, qualification or skill to operate the truck and 25-foot gooseneck trailer; failure to have triangles or similar warning devices available; failure to place triangles or similar warning devices within a reasonable time; failure in attempting to turn the truck and trailer from a direct course on the highway into a driveway of Robert Smith when such turn could not be done or was not done with reasonable safety; failure to act as a reasonably careful person would in turning into the driveway or remaining upon the highway under the circumstances as then and there existed .... If you find by a preponderance of the evidence that the death of Jonathan Wayne Dooley was caused or contributed to by any failures, if any, of the defendants and not from any failure to keep a proper lookout, if any, by Leah Dooley, then it is your sworn duty to return a verdict in favor of the plaintiffs ...

It is clear from this instruction that the jury was adequately instructed on the areas of law about which Appellants' express their concern before it deliberated and delivered a unanimous verdict in favor of Defendants/Appellees.

1. The evidence did not support any negligence per se instructions.

Furthermore, it is a fundamental rule in civil negligence cases that the plaintiff must prove that the alleged breach of a duty proximately caused her damages. Under *Gallagher Bassett Services, Inc. v. Jeffcoat*, "[w]hen a statute is violated, the injured party is entitled to an instruction that the party violating is guilty of negligence, and if that negligence proximately caused or contributed to the injury, then the injured party is entitled to recover." 887 So. 2d 777 (Miss. 2004). At trial, Plaintiffs failed to present credible evidence of the nexus between the statutes and the accident.

Moreover, Appellants failed to prove that the above-cited statutes were even applicable to the facts of this case. The evidence presented at trial showed that Cedric was turning into the driveway when Leah Dooley ran into the back of his trailer and that Leah's failure to maintain a proper lookout was the proximate cause of the accident and decedent's death. Thus, Miss. Code Ann. § 63-7-71 (1972), which refers only to trucks or buses stopped on the side of the road for a long period of time is inapplicable, along with the *Thomas* case cited by Appellants in support of their argument. *Thomas v. McDonald*, 667 So. 2d 594 (Miss. 1995).[3] Likewise, Miss. Code Ann. § 63-1-211 (1972), which addresses the obtaining of a Class D license in order to drive certain vehicles is inapplicable where it was not shown that the failure of Cedric to have such a license proximately caused the Appellants' damages. For these reasons, the trial court did not abuse its discretion in refusing to submit Appellants'

[3] *Thomas* involved a fatal accident that occurred when a vehicle ran into the back of a truck that was broken down in the middle of a highway. 667 So. 2d 594 (Miss. 1995). In *Thomas*, it was uncontroverted that Miss. Code Ann. § 63-7-71 applied to the facts presented and that it was violated.

proposed negligence per se instructions to the jury which was properly instructed on all applicable areas of the law.

2. The instructions blaming neither party for the shadows or driveway were proper and supported by the evidence.

Jury Instructions 10 and 11 instructed the jury on conditions that Appellants argue were factors in the accident in this cause but were not attributable to either party. For example, Number 10 instructs that, "[if] you find from a preponderance of the evidence that the condition of the driveway contributed to the accident then such contribution is not attributable to any party in this case" (R. 1049). Number 11 states the exact same thing only in reference to the "condition of the shadows," that were on the road as Appellant Leah Dooley approached Appellees' truck and trailer (R. 1049). At trial, Appellants argued that both of these instructions were vague and ambiguous and confusing to the jury. (R. 1031-1033).

Appellants now argue that the conditions referred to in each of these instructions needed to be considered by the jury. After hearing arguments from counsel for all parties, the circuit court judge decided, "[i]t just doesn't fall one way or the other. If they find that something was wrong with that driveway, then Mr. Smith [the owner of the driveway] ought to be in here as a defendant in my opinion. It's not attributable to either party" (R. 1020). In the event that the jury determines the condition of the driveway or shadows were factors in the accident, neither of those conditions could be attributable to any party. In so instructing the jury on the conditions, the trial court did not abuse its discretion.

D. The court was fully within its broad discretion to regulate the control and participation at trial in allowing the father plaintiff to appear thought separate counsel and directing the separate counsel's involvement in trial.

The court throughout the trial gave considerable leeway and time to the several attorneys for the heirs to allow all issues to be presented. He gave them time to confer, allowed the separate counsel for the mother and father to separately question witnesses and argue legal issues. Many of the complaints found in the appeal briefs on this issue were not preserved in the court record (R. 85-88), and others misstate what occurred at trial. At every turn, counsel was given time to meet and present their case which took six years to prepare for trial.

Attorneys for both the mother's side and father's side were allowed to give opening statements (R. 85-88), and they frequently conferred on witness examination (R. 177, 248, 410, 888, 954, and 976). Counsel for the father complained that he was not allowed to participate, when the record clearly shows he did participate (R. 88, 380, 479, 716, 727, 976), and only asked for separate cross examination of Byrd and not the other witnesses (R. 759). Counsel for the Father called his own witnesses and experts, and gave his separate opening and closing (R. 1068).

The law has long held that there is but one action under our wrongful death statute and has also held that each heir may have separate and distinct damages. The father's expert testified that the mother was negligent in the accident and the mother testified that the father gave little support for the deceased (R. 431). The court throughout the trial gave considerable deference to the competing heirs, taking long recesses to allow coordination and allowing separate questioning and evidence from the several heirs.

This Court has already addressed a wrongful death suit in which, "two law firms representing different wrongful death heirs ... are now embroiled in a battle over

consolidation, joinder, and "control" of the litigation." *Long v. McKinney*, 897 So. 2d 160 at 162-163 (Miss. 2004). Nowhere in *Long v. McKinney* does this Court alter or amend Mississippi's well established Wrongful Death Statute, which provides that, "there shall be but one (1) suit for the same death which shall ensue for the benefit of all parties concerned ...." Miss. Code Ann. § 11-7-13 (Supp. 2004). While *Long* does allow joinder and separate representation so that all heirs' interests will be represented for purposes of assessing individual damages, *Long* does not provide that each separate counsel may put on his own client's case of liability.

1. The court's rulings were consistent with both the Long and River Region cases.

Long v. McKinney established that, while all persons entitled to recover under Mississippi's Wrongful Death statute, they entitled to separate representation to ensure their separate damage claims are adequately represented. But, there still can be but one (1) suit for the death, and "[s]uch matters as joinder, 'control of the litigation,' and participation by counsel, are left to the sound discretion of the trial judge." *Long*, 897 So. 2d at 178. In *Long* the Court's analysis began with an examination of Mississippi's wrongful death statute.

> In order to fully appreciate the potential for conflicts of interest in wrongful death litigation, it is necessary to first recognize that, in wrongful death litigation, there are several kinds of damages which may be pursued, and these damages are not due to the same claimants.

Long, 897 So. 2d at 169. However, the prevailing theme with the wrongful death statute is that a single litigant is bringing the suit in a "representative capacity," 'for the benefit of all persons entitled under law to recover ...' and "for the benefit of all parties concerned...." *Id.*

"Those being represented must trust the named plaintiff to properly prosecute the litigation ... and handle all funds recovered as trust funds for the benefit of those entitled to them. The position of the attorney representing the named plaintiff is no different." *Long*, 897 So. 2d at 169. The Court made it clear that their decision in *Long* is intended to, "eliminate the inherent conflict of interest and simplify the decisions to be made by trial courts where more than one heir wishes to participate in the litigation to protect their individual interests." *Long*, 897 So. 2d at 171.

After establishing that all parties entitled to recover may join in the wrongful death litigation with counsel of their choosing, the Long Court entered into a discussion of who controls the litigation when there are multiple attorney's attempting to vigorously represent their own client's interests. While the Court supported the age-old position that the first-to-file controls the litigation, the Court made it clear that as the first-to-file, shall represent all heirs-at-law in litigation. Ultimately, the Court's decision was simple; "[s]uch matters as joinder, 'control of the litigation,' and participation by counsel, are left to the sound discretion of the trial judge." *Id.*

In 2007, this Court rendered its opinion in *River Region Medical Corporation v. Patterson*. 975 So. 2d 205 (Miss. 2007). *River Region* reiterated this Court's observation in *Long* that different wrongful death claimants may have different types of damages to which they may be entitled. *River Region*, 975 So. 2d 205 at 208. (see *Long v. McKinney*, 897 So. 2d 160 at 169.) Then the Court took it a step further in *River Region* and joined this "multiple damages" concept with the well established principle that each plaintiff must prove her or his individual damages. *River Region*, 975 So. 2d at 208. Thus, where there are multiple heirs-

at-law in one wrongful death suit, each must put on proof of any special damages to which he or she feels entitled.

2. Counsel for the plaintiff father was given wide berth to participate at trial.

Although the father plaintiff had every right to join the wrongful death action as "persons entitled under the law to recover," the trial court fairly decided that he was not allowed to put on an entirely separate and competing theory of liability at trial. After the plaintiff driver's attorney gave the opening statement on behalf of the heirs-at-law (R. 84-88), the father plaintiff's counsel wanted to cover additional ground that mother's counsel did not cover in his opening statement (R. 85). At the same time, father's counsel correctly stated that *Long* gives the trial court the discretion as to how separate counsel for the heirs will be allowed to participate at trial (R. 85-86).

Later during trial, father's counsel again attempted to push his own client's theory of the case by asking the court if he could perform direct examination of a witness after mother's counsel concluded his examination on behalf of Leah Dooley and the heirs-at-law (R. 240-241). Contrary to what father's counsel argued to the trial judge, what he effectively wanted was a "second bite at the apple" where the wrongful death statute, explained by *Long*, clearly only allows for one. Father's counsel demonstrated exactly what this Court meant in *Long*:

> There is a lot of questioning. There are inconsistencies throughout this testimony all over the place that I want to ... bring out to the jury's attention .... (R. 242)
>
> Mother's counsel represents different clients. If I give him a question that I think is very important and he doesn't think its important, or even more he things that he disagrees with me and thinks that it's not favorable to his client,

> then his duty is not to my client to ask the question that I think my client needs asked. (R. 249)

Father's counsel pointed to *River Region Medical Corporation v. Patterson* for its support of the established rule that each plaintiff bears the burden of, "'going forward with sufficient evidence to prove their damages by a preponderance of the evidence.'" 975 So. 2d 205 at 208. (citing *TXG Intrastate Pipeline Co. v. Gossnickle*, 716 So. 2d 991, 1016 (Miss. 1997). Father's counsel argues that *River Region* supports his argument in favor of participating more at trial in order to present his own clients' cases for damages. 975 So. 2d 205 (Miss. 2007).[4]

Appellants Dewey and Kaitlyn's reliance on *River Region* is misplaced. Although *River Region* requires each heir-at-law, as a named party, to establish their own damages, it does not abrogate Mississippi's wrongful death statute and allow multiple suits for liability involving the same death. There remains only "one suit" for an alleged wrongful death. Each heir does not get a separate chance at *voir dire*, opening, examining witnesses, cross-examining witnesses and making closing statements. This would result in severe prejudice to any defendant who would effectively be forced to defend multiple suits at once. Furthermore, this stretched interpretation of *River Region* would defeat the holding in *Long v. McKinney* that all heirs-at-law must trust the named plaintiff to properly prosecute the litigation. *Long*, 897 So. 2d 169.

After a long, the trial judge put on record his ruling as to how trial would proceed under applicable cited case law.

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[4] *River Region* is distinguishable from the instant case. In *River Region*, all plaintiffs were represented by the same counsel and no proof was ever put on for one of the plaintiff's individual damages of loss of society and companionship. For that reason, this Court ruled that JNOV was proper when the jury ruled in favor of the plaintiffs.

> [T]he way I see this, after I've read the three cases that were submitted to it, is that our appellant court stated that all lawyers, all litigants should participate in a proceeding. They never said to what extent. ... I'm going to allow those damages, individual damages to go before the jury and be presented by each attorney. There is a statute that provides, even under our old first filed control to suit rule that the duty of the lawyer in that case who files a suit first has a duty to all heirs. It doesn't matter if he's under contract to one and there's ten more. By the statute that duty is extended to all heirs-at-law. Now, the Court is in a Catch-22 situation for one paramount reason and that is exactly what father's counsel just pointed out to the Court. ... If I allow father's counsel to ask those questions and show those photographs, then mother's counsel is going to be on his feet saying, "No, I don't want to do that. I disagree with it and my trial tactic is different." ... You're asking me to say, "Well, now wait, mother's counsel. I'm going to let father's counsel ask these questions because he wants to ask them." ... I think that it would be confusing to the jury. We talk about new questions or additional questions and it's going to be real hard for me to figure out new questions and additional questions and what hasn't been covered and I think that the best resolution is for the attorneys to cooperate and work together to present the issues. The theories of liability, that should have been decided by the attorneys before you got here about who was going to do what and who was going to drive the ship and when you were going to drive it and about what the theory of the case was. I think it would be confusing to the jury to have multiple theories of the case presented by multiple lawyers. That's the best I can sum it up. So, I encourage you to work together and present the case and let's go forward with it.

(R. 249-251). It is clear to see that the trial judge fully grasped the holding in *Long v. McKinney* and exercised his discretion based upon the reasonable grounds. In deciding that the separate counsel for the heirs-at-law need to work together to present one case of liability the court exercised the appropriate discretion as it was charged to do by this Court in *Long v. McKinney*.

The divided heirs should also be prohibited from filing separate appellate briefs presenting theories of liability separate and apart from those of primary counsel. Not only is this contrary to the "one-suit" principle in the wrongful death statute, but Cedric Byrd and Independent Roofing would be severely prejudiced if they were forced to fight two appeals

arising from the same jury decision based upon different theories of liability. The plaintiff father's was graciously allowed numerous opportunities by the trial judge to participate at trial and represent his separate clients' interests. It is unfair that he now be allowed to file a brief, especially one that argues that his clients' interests were prejudiced because the trial judge would not allow him to participate during trial.[5] As the circuit judge ruled during trial, counsel for all heirs-at-law should work together to present the case. They should also work together to present their issues on appeal. For these reasons, the Court should consider the Brief submitted by the representative of the estate, the brief for all heirs-at-law.

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[5] Counsel for the father plaintiff participated in the following manner at trial:
(R. 88) – Father's counsel gives opening statement introducing his clients.
(R. 177) – Father's counsel confers with attorney for Leah Dooley, about asking other questions of Deputy Don Bryant of the Rankin County Sheriff's Department.
(R. 248) – The trial court gave plaintiffs about two and one half hours to confer so that father's counsel could make suggestions and provide additional questions he wanted asked on behalf of his clients.
(R. 264) – Trial court stops the trial to explain to the jury briefly that, because there are multiple heirs-at-law, he is allowing the separate attorneys for the heirs to stop their examinations of witnesses and confer whenever they feel it necessary. This is because the court has already ruled that "only one attorney could ask questions of one witness."
(R. 312) – Father's counsel performs the direct examination of Robert Smith, the owner of the house and driveway where the accident occurred.
(R. 380) – Father's counsel performs the direct examination of his own accident reconstruction expert, William Partehneimer.
(R. 479) – Father's counsel performs the direct examination of Russell Ramsey the safety director for Independent Roofing at the time of the accident.
(R. 716) – direct of Kerri Patrick, the Mother and Next Friend of Kaitlyn Patrick Dooley in this action.
(R. 727) – direct of Dewey Dooley.
(R. 888-889) – Father's counsel confers with mother's counsel, counsel for Leah Dooley, and more questions are asked of Defendants' expert Officer Kazery that father's counsel wants asked.

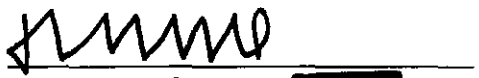
CONCLUSION

The record is complete with the efforts of the court to accommodate the differences among the heirs, yet each family group argues that the attorneys for the other heirs caused the resulting jury verdict. The mother's side argues that the father's side caused the jury verdict, (Mother's brief pages 45-48, 616-623), and the father's side the reverse, (Father's brief pages 15-17). What is clear was that this was a tragic accident which resulted in the death of a two year old boy. The jury listened intently for two weeks as the evidence was presented, visited the accident scene at the request of the Plaintiffs, (page 17-18, 63), heard from fact and expert witnesses and was instructed on the numerous theories of liability and claims of damages. The jury allocated all fault against the Plaintiff mother and none against the defendants.

For all of the foregoing reasons, this Court should find that the jury verdict was not against the overwhelming weight of the evidence and should uphold the trial court's denial of Appellants' Motions for New Trial and Judgment Not Withstanding the Verdict. In addition, this Court should uphold its previous decision in *Long v. McKinney* and defer to the trial court's discretion when it decided issues such as joinder, participation at trial and control of the litigation. Lastly, this Court should not allow Appellants Dewey Dooley and Kaitlyn Patrick to file separate grounds for appeal apart from that filed by Leah Dooley, the representative of the estate of Jonathan Dooley.

RESPECTFULLY SUBMITTED, this the 9th day of September, 2010.

CEDRIC BYRD AND INDEPENDENT
ROOFING SYSTEMS, INC., DEFENDANTS



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CERTIFICATE OF SERVICE

I, one of the attorney for the Appellees, do hereby certify that I have this date caused to be mailed via United States Mail, postage prepaid, a true and correct copy of the above and foregoing document to:

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DATED this the 9th day of September, 2010.

James D. Holland