IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2009-CA-01830

LEAH FULTON DOOLEY, KATHRYN MARIE FULTON, A MINOR, BY AND TRHOUGH HER MOTHER AND NEXT FRIEND, LEAH FULTON DOOLEY, PEYTON DOOLEY, A MINOR, BY AND THROUGH HIS MOTHER AND NEXT FRIEND, LEAH FULTON DOOLEY AND ALL HEIRS-AT-LAW OF JONATHAN WAYNE DOOLEY, A MINOR, DECEASED, DEWEY DOOLEY AND KAITLYN DOOLEY, BY AND THROUGH HER MOTHER AND NEXT FRIEND, KERI PATRICK — APPELLANTS

v.

CEDRIC BYRD AND INDEPENDENT ROOFING SYSTEMS, INC. — APPELLEES

REPLY BRIEF OF APPELLANT

APPEAL FROM THE CIRCUIT COURT
OF RANKIN COUNTY, MISSISSIPPI

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STATEMENT REGARDING ORAL ARGUMENT

These Appellants submit that, while the facts and legal arguments have been adequately presented in the briefs and the record, this Court's decisional process would be significantly aided by oral argument. M.R.A.P. 34 (a)(3).

I. INTRODUCTION

The Appellees' have continued in this Court to argue for misapplications of Mississippi Law in an effort to preserve a jury verdict that is against the overwhelming weight of the evidence and was the product of an erroneously-instructed jury. The Appellees' efforts to keep the jury from being instructed on, in their words, the "middle ground," is contrary to Mississippi Law on comparative negligence, requiring reversal.

With respect to the substantive majority of the issues at bar, these Appellants would incorporate the arguments and authorities set forth in their Brief of Appellants, as well as the responses set forth in the Brief of the Appellees, offering rebuttal thereto as follows:

A. The Refused Jury Instructions on Negligence Per Se and the Appellees' attempt to elevate the opinions of Officer Kazery regarding the "continuation of the turn" theory to binding conclusions of law.

In their brief, the Appellees' attempt to elevate the opinions of Officer Kazery to conclusions of law, contending in effect that the same were binding upon the court. Specifically, the Appellees' contend "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. at 957, 963, 966). Therefore, Appellants' argument about warning devices is without merit since no such duty arose." See Brief of the Appellees, p. 16.

This unfounded attempt by the Appellees' is, of course, necessary to their preservation of a jury verdict which was against the overwhelming weight of the evidence and was the product of an improperly instructed charge. As the Appellants showed in their brief, the refusal of the negligence per se instructions denied them the opportunity to fairly present their comparative negligence theory of the case. In response, the Appellees address the refusal of the negligence per se instruction regarding flares, triangles, or other warning devices with two conclusory

sentences: "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 decedents death. Thus, [the statute]...is inapplicable, along with the *Thomas* case cited by Appellants' in support of their argument."

In summarizing their argument that the negligence *per se* instruction should was properly refused, the Appellees state: "The simple fact is, the accident occurred during broad daylight." See Brief of the Appellees, p. 16. As with the "continuation of the turn" theory, this argument directly contradicts the statute in question, which state, in pertinent part: "Whenever any motor truck or bus is stopped upon the highway...*between the hours of one half hour before sunrise and one half hour after sunset*, the driver or person in charge shall place upon the highway in a standing position red flags..." Miss. Code Ann. § 63-7-71 (1972), as amended.

The Appellees' circular conclusions completely fail to address the evidence, which by the Appellees' own admission showed that the truck and trailer was in a state of being stuck and unstuck alternately and repeatedly, occupying portions of the driveway and portions of the southbound lane of traffic, **for a period of at least three to five minutes.** No Mississippi law has been cited by the Appellees' or found by any person involved in this case which states that a driver may occupy a lane of traffic for as long as he wishes provided he merely claims that he is still "making his turn."

However, Officer Kazery's unsupported opinion that a driver may do that very act must be accepted as a binding, controlling conclusion of law if the Appellees' argument negating the applicability of the negligence per se instruction and *Thomas v. McDonald* are to have any merit. Such opinion is not, of course, a binding conclusion of law, nor even a reasonable opinion. Thus, because the jury was not properly instructed that the failure to place warning devices constituted

per se negligence, the jury did not, and could not, properly consider whether such negligence *proximately caused or contributed to* the accident.

With the negligence per se instruction on warning devices being refused completely, it cannot be said that such was "fairly covered in another instruction." In no instruction was the jury ever instructed that the Appellees' failure to place warning devices was negligence in the eyes of the law. Since it was not so instructed, it cannot be said that the jury considered such negligence but determined that it was not a proximate contributing cause. Plainly, the Appellees' contention that the verdict shows the jury considered the failure to place warning devices as negligence but found such failure not to be a proximate cause or contribution is nothing more than hopeful speculation, because the jury was not properly instructed. And as the theory that visibility and lack of warning at least contributed to the accident was supported with "adequate foundation in the evidence of the case", the trial court committed error in two ways: (1) in refusing a negligence per se instruction to which the Appellants were entitled; and (2) in failing to allow a proper theory of the case which was supported by the evidence to be submitted to the jury. See *Utz v. Running & Rolling Trucking, Inc.*, 32 So.2d 450, 477 (Miss. 2010); *Thomas vs. McDonald*, 667 So.2d 594, 597 (Miss. 1995); see also *Ethridge v. Herald Case and Company, Inc*, 960 So.2d 474 (Miss. App. 2006); *Young v. Guild*, 7 So.3d 251 at 259 (Miss. 2009).

B. The Granted Instructions on the shadows and Condition of the Driveway Exacerbated the Improper Refusal to Grant the Negligence Per Se Instructions.

Not only were the Appellants denied the opportunity to present their theory of the case regarding comparative negligence, but the Appellees were allowed to completely negate the factual role of the conditions then and there existing through an erroneous instruction of law. At no point did the Appellants argue that the Appellees were somehow negligent for *causing* fifty-

year old trees to be planted or a narrow, or for *causing* the condition of a narrow, gravel driveway. The importance of the physical conditions on the day in question were clear until the trial court improperly instructed the jury on this issue. The evidence was substantial that these factual conditions played a role in the accident. That role was central to both issues involving the refused negligence *per se* instructions: (1) the inability of Cedric Byrd, without a Class D license or the experience that goes with it, to navigate the commercial, USDOT numbered truck and 29-foot gooseneck trailer into the narrow, gravel driveway from a two-lane highway; and (2) the decreased visibility which magnified the importance of the absence of warning devices, which would have given Leah Dooley the very additional protection contemplated by the statute on warning devices.

The volume of evidence regarding the visibility issues, not only from Leah Dooley, but from the responding officers, the experts, and the pictures have been referenced elsewhere. Further, the testimony regarding Cedric Byrd's lack of experience, from Ike McLain and Russell Ramsey, was tied to the condition of the driveway by Robert Smith, the property owner, who was more experienced and testified that he would not pull that truck and trailer into that driveway.

With this evidence before it, the trial court not only exacerbated its refusal of proper negligence *per se* instructions, but went the extra step of taking the value of the jury view from the jury and granted the Appellees' improper pronouncements of law on these issues. The effect of these instructions, on the whole, so greatly eviscerated the Appellants' comparative negligence theory that it cannot be said that the jury was able to fairly consider the Appellants' theory. The trial court clearly felt that the comparative negligence theory had evidentiary support, as it granted the Appellants' request for such an instruction, P-21. However, after

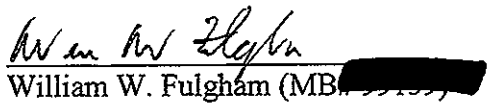
granting this instruction, the remaining instructions, including the refusal of *per se* instructions to which they were entitled, so removed comparative negligence from the scope of the jury's consideration as to deny a fair presentation of the theory in light of the facts adduced at trial.

CONCLUSION

The Appellees' theory of the case was unsupported by the credible evidence. However, it was accepted by the jury and reflected in its verdict, resulting in the verdict being against the overwhelming weight of the evidence. Further, the jury's verdict was the product of jury instructions which were faulty with error that was beyond harmless. Additionally, these Appellants were denied the substantive right to present their case to the jury, in favor of a mere procedural rule and custom. Accordingly, the Appellants ask that the verdict be vacated or reversed and that judgment on the issue of liability be rendered in their favor, or in the alternative, that this matter be remanded for a new trial on the merits.

RESPECTFULLY SUBMITTED,

Dewey Dooley and Kaitlyn Patrick Dooley,
By And Through Her Mother and Next Friend,
Keri Patrick, Appellants

BY: 
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CERTIFICATE OF SERVICE

I hereby certify that I have this day served, via U.S. Mail, postage pre-paid, a true and correct copy of the above and foregoing Reply Brief of Appellants to:

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This the 27th day of October, 2010.

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