IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
&
IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

LEAH FULTON DOOLEY, ET AL. — APPELLANTS

v. — CASE NO. 2009-CA-01830-COA

CEDRIC BYRD and INDEPENDENT ROOFING SYSTEMS, INC. — APPELLEES

REPLY BRIEF OF APPELLANTS

APPEAL FROM THE CIRCUIT COURT
RANKIN COUNTY, MISSISSIPPI

ORAL ARGUMENT REQUESTED

Submitted by:

DON H. EVANS, MSB[redacted]
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STATEMENT REGARDING ORAL ARGUMENT

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

I. The verdict was against the overwhelming weight of the evidence; therefore, the jury's failure to follow its comparative negligence instruction and assess at least some fault on Byrd and Independent Roofing amounts to bias, passion and prejudice on the part of the jury, which would entitle the Appellants to a new trial.

A. Byrd and Independent Roofing's negligent acts and omissions were clearly the proximate cause or a contributing proximate cause of the accident in question.

1. Byrd was not qualified to drive the truck and trailer in question.

The evidence revealed that Byrd failed to possess the proper license and training that was required in order for him to legally drive the truck and trailer involved in this accident. On September 29, 2003, Byrd's supervisor, McLain, sent Byrd to Smith's house in a 1996 F-450 Ford pickup pulling a 29-foot gooseneck trailer to pick up a manlift. According to McLain, Clayton, Independent Roofing's superintendent, had told McLain to send Byrd to Smith's house. McLain testified that he was concerned about doing so because Smith's driveway is a "hard place to get in and out of with an experienced driver." McLain further testified that he called Ramsey, Independent Roofing's safety director, to see what Ramsey thought about the situation, and Ramsey agreed that McLain should send Byrd. Therefore, McLain sent Byrd. Tr. Transcr. vol. 17, 332-335. Byrd did not know how to get to Smith's house; so, he met up with a fellow co-worker, Keys, and followed him there. As Byrd was making his turn into Smith's driveway, he missed the driveway and got stuck. Byrd admitted that he missed the driveway, because he just did not swing wide enough. Tr. Transcr. vol. 16, 206-208; 213:15-17; 263:18-20. Byrd and his superiors knew that Byrd needed a Class D driver's license to legally drive that truck and trailer, and they knew that he did not have one. Byrd testified that he has never had a Class D driver's license or any type of commercial driver's license. He also testified that he has never had any training in driving that type of truck and trailer. Tr. Transcr. vol. 16, 200-201. McLain, Byrd's supervisor, testified that he knew that Byrd did not have a commercial driver's license. Tr. Transcr. vol. 17, 334:26-28. Also, Ramsey, Independent

Roofing's safety director, admitted that he was aware at the time of the accident that Byrd had never taken any type of training classes to drive that truck and trailer. Ramsey further admitted that Byrd needed a Class D commercial driver's license to legally drive that trailer and did not have one. Transcr. vol. 18, 483:24-484:1; 547:16-21. This was negligence on the part of Byrd and Independent Roofing.

The Appellees argue that no special license would have prevented this accident. They further argue that the fact that Byrd failed to possess the required license was not a proximate cause of this accident. The evidence was to the contrary. The evidence showed that Byrd should not have made the turn into Smith's driveway to begin with and that a qualified driver could have made the turn. Two accident reconstructionists testified that Byrd should not have made that turn. Partenheimer testified that Byrd made a turn that he probably should not have made to begin with, because he could not make the turn "[w]ithout impeding both lanes of traffic and swinging all the way out into the other side of the road." Transcr. vol. 18, 465:26-466:2. According to Hannah, lack of knowledge and unfamiliarity caused Byrd to miss the driveway and get stuck in the ditch. He believed that the turn could have been made safely by a qualified driver. Transcr. vol. 19, 689-690. Moreover, there was evidence that a properly licensed and qualified driver had actually chosen an alternate route in lieu of making that difficult turn. Smith had a Class A commercial driver's license at the time of this accident, which gave him the right to operate anything up to 18-wheelers. Smith transported the boomlift to his house in the same truck and trailer that is at issue in this case. However, Smith chose not turn into his driveway. Instead, he took the gravel road that went down beside his house. Smith testified that he has never pulled a trailer as long as the trailer in question into his driveway. According to Smith, his driveway is a little bit narrow. Tr. Transcr. vol. 17, 316-317; 322-323; 325. Smith, a properly licensed and qualified driver, chose not to take his own

driveway. If Byrd had possessed the proper license and training, he would have known better than to attempt that turn or he would have successfully made the turn. Lack of knowledge caused Byrd to miss the driveway. A properly licensed driver would have possessed the knowledge required to handle the situation that Byrd faced on the date of this accident. Byrd's failure to possess the required license was the proximate cause of this accident.

Independent Roofing had a duty to send a qualified and properly licensed employee to do the job that Byrd was sent to do. Independent Roofing breached that duty when its employees chose to send Byrd. A reasonable person or company would not have sent Byrd. Byrd was required to have a Class D driver's license in order to operate that truck and trailer. A reasonable person would not have driven the same without the proper license. Byrd had a duty 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. Byrd breached that duty when he failed in his attempt to turn the truck and trailer from a direct course on the highway into Smith's driveway when such a turn could not be done or was not done with reasonable safety. A reasonable person would have taken an alternate route, just as Smith did.

2. There were no flagmen or warning devices in place at the time of the accident.

The Appellees claim that Byrd had no duty to place warning devices out in the roadway. To the contrary, flagmen and/or warning devices were a necessity at the time of this accident. Leah Dooley testified that she was about five car lengths back when she first noticed the trailer. She also testified that she wasn't able to see the trailer prior to that time, because it was so dark over there because of the shade. Tr. Transcr. vol. 18, 575:4-21. Also, several witnesses, including, but not limited to, two accident reconstructionists and a sergeant with the Rankin County Sheriff's Office, testified that the shaded area where this accident happened made it difficult to see the trailer in

question, thereby making those shadows a contributing factor in this accident. In their brief, the Appellees falsely state that "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**." Appellees' brief at 17. Officer Warren's actual testimony was as follows:

> A. As you -- as you pulled up to it, the way the -- sun was, there's a large oak tree behind the -- pickup and the trailer. There was a large tree behind it that had a shadow cast over the truck to where **you could not see the bed nor the trailer of the truck.**
> Q. Could you see the truck though?
> A. **You could see the truck** sitting down there. It was white. **But the trailer** and the -- **and the bed were black and you just couldn't see them too well.**

Tr. Transcr. vol. 16, 182:3-13

Hannah testified that the trees on the left side of the road make it difficult to see all the way down the roadway, as you leave Leah Dooley's house and come to the long straightaway that is shown in Plaintiff's Exhibit 63(A) because of the shadows cast by those trees. Tr. Transcr. vol. 19, 676-677. The driveway in question belonged to Smith, and he agreed with the aforementioned testimony regarding the shading and trees. Tr. Transcr. vol. 17, 320-321. Partenheimer also testified that he believed that the shadows contributed to this accident. Tr. Transcr. vol. 17, 445. Clearly, with all of those shadows cast in the area of the accident scene, there was reason to have flagmen and/or warning devices in place. According to Keys, there was about a five minute time lapse between Byrd's initial attempt at turning into Smith's driveway and the time of impact. Tr. Transcr. vol. 16, 277; 287; 298. During those five minutes or so, no warning devices or flagmen were in place out in the roadway to warn approaching vehicles that (1) Byrd's vehicle was stuck or (2) that Byrd was backing up. Byrd and Keys both testified that they never attempted to put out any warning devices, and Keys testified that he never attempted to direct traffic. Tr. Transcr. vol. 16, 257; 262; 278-279; 286. However, had Byrd and Keys considered putting out warning devices, they could not have done

so. McLain testified that there were not any type of warning devices in that truck. Tr. Transcr. vol. 17, 350:8-11.

According to Partenheimer, Byrd and Independent Roofing created a complex traffic hazard. Partenheimer testified that "[i]f you're in a position to where you're either broken down or impeding traffic, blocking traffic or creating some type of hazard, you want to put out your triangles to give traffic and -- approaching traffic an idea that they need to look out for something." Partenheimer read aloud § 392.22(b)(1) of the Federal Motor Carrier Safety Regulations, which deals with warnings and flags. Partenheimer testified that "[i]n essence [the regulation] says that if you're causing a traffic hazard you should put out your triangles **as soon as feasibly possibl[e]**, but, in any event, within 10 minutes." He further testified that it was **impossible** for Byrd and Keys to follow said regulation because there weren't any warning devices in that truck and "[y]ou can't put out what you don't have." Transcr. vol. 17, 408-409; 411-412; 424:13-19; vol. 18, 471:4-17. Officer Kazery agreed that this regulation doesn't mean they've got 10 minutes they can sit there and wait to put out the signs, and she testified that she would assume the reasonable thing for Byrd to do would be to stand at the rear of his trailer. Tr. Transcr. vol. 21, 957:26-29; 958:10-18. In addition to those witnesses mentioned above, Deputy Bryant also believed that some type of warning device was needed. Deputy Bryant testified that when he saw the trailer "protruding out in the road," he "[p]ulled [his] car around and blocked that lane of traffic to keep someone else from hitting it." Tr. Transcr. vol. 15, 144:11-17.

Byrd and Independent Roofing had a duty to have warning devices available in the truck, and they breached that duty when they failed to have them in there. A reasonable person or company would have had warning devices available in that truck at all times. Byrd had a duty to warn approaching vehicles that he was stuck. Byrd breached that duty when he failed to reasonably place

warning devices out in the roadway. A reasonable person would have had warning devices in place on the roadway when he got stuck. In this situation there were no warning devices available; therefore, the reasonable thing to do would have been to have Keys act as a flagman, or, as Officer Kazery testified, have Byrd stand at the rear of his trailer. By the time Leah Dooley saw the trailer, it was too late. She was too close to do anything to stop the accident from happening. Had there been a flagman or some type of warning device in place, she would have known to slow down or stop. The Appellees' failure to have warning devices in place was the proximate cause of this accident. At the very least, Byrd and Independent Roofing were partially at fault for impeding the roadway and for failing to have a flagman in place.

3. Byrd was negligent in backing up onto the roadway at the moment of impact.

a. At one point, the rear of Byrd's trailer was completely off of the highway; therefore, Byrd lost the right to claim that the lane was his.

Byrd's own testimony proved that the rear of his trailer was completely off of the highway at one point. Byrd testified that he drove his front wheel down to where the X is on Plaintiff's Exhibit 28. The circle/zero on that Exhibit signified the bottom of the ditch, where the culvert was. Byrd also testified that his rear tire was in that culvert at one point. Tr. Transcr. vol. 16, 221-222; 225-236. According to Hannah, Byrd's testimony confirmed Hannah's opinion that the trailer was out of the roadway at one point. Hannah referred to Plaintiff's Exhibits 28, 29, 31 and 32 when explaining how he had reached his conclusion that the rear of the trailer was out of the highway at one point. According to Hannah, if the rear tire was down in the ditch area and the front tire was where the X is on Plaintiff's Ex. 28, then the tail of the trailer would be some 5-foot further to the west, meaning that it would be further into the driveway. Tr. Transcr. vol. 19, 659; 663; 672. Partenheimer's testimony also signified that the rear of the trailer was completely off of the highway

at one point. Tr. Transcr. vol. 17, 416-418; 435-436. Moreover, Leah Dooley testified that the trailer was completely off of the highway when she first saw it. Tr. Transcr. vol. 18, 578; vol. 19, 614. Finally, Keys agreed that the truck may have been further down at one time than it was in Plaintiff's Exhibit 41. Tr. Transcr. vol. 16, 289-291. There is no question that the rear of Byrd's trailer was completely off of the road at one point. Therefore, Byrd lost the right to claim that the lane was his.

b. Byrd backed up at the moment of impact.

The record is replete with evidence proving that Byrd backed up at the moment of impact. Byrd admitted that he backed up. McLain testified that Ramsey implied to him that Byrd had backed up. In addition to this evidence proving that Byrd backed up, two accident reconstructionists, Hannah and Partenheimer, testified that Byrd backed up at the moment of impact. Tr. Transcr. vol. 17, 400-401; vol. 18, 465; vol. 19, 673:1-4. Moreover, Leah Dooley testified that Byrd "backed out into" her. Tr. Transcr. vol. 19, 627:15. Also, the combination of Byrd, Keys and Officer Kazery's testimony confirms the fact that Byrd was backing up at the moment of impact. Keys never saw Byrd try to back up, and Keys was out there the entire time. Therefore, the only time that Byrd could have backed up was while Keys was not watching, which would have been when Keys was walking back towards the front of the truck. The evidence revealed that Keys heard the impact as he was walking back towards the front of the truck. **Hence, Byrd backed up** as Keys walked back towards the front of the truck, which is **when Keys heard the impact**. This evidence alone proves that **Byrd backed up at the moment of impact**. The proof of is set forth below.

Three individuals were present at the time of this accident. They were Leah Dooley, Byrd and Keys. Keys was the only one, out of the three, who testified that he had no knowledge of the fact that Byrd had backed up. Keys testified that he never saw Byrd try to back up, and he testified that

he was out there the whole time. Tr. Transcr. vol. 16, 281:3-12. According to Officer Kazery, Keys realized that there was a wreck as he was "walking back." Officer Kazery testified that Keys told her that "[h]e was walking back that's when he heard the impact and saw the white car go off to the side." Officer Kazery took that to mean that Keys was walking from his vehicle toward Cedric's vehicle, when the accident occurred. Officer Kazery testified that Byrd and Keys never indicated to her that Byrd had been stuck. Her belief was that Byrd was just in the process of making his turn when Leah Dooley hit him. She had no idea that they had been out there for five minutes or so when the impact occurred. Her interpretation of what Keys had told her was that Keys parked, got out of his truck and began walking over to Byrd's vehicle when the accident happened. Tr. Transcr. vol. 20, 882; vol. 21, 922. This, of course, was an incorrect interpretation, as Keys' testimony revealed the area to which he was really walking back towards when he heard the impact, which was the "front of [Byrd's] truck." Tr. Transcr. vol. 16, 272:7-13; 283:21-29.

The only time that Byrd could have backed up was while Keys was not watching, which would've been when Keys was walking **back** towards the front of the truck. Keys would've had his back facing the truck and the roadway while he was walking back towards the front of the truck. This means that Keys' back would've been facing the truck when Byrd backed up. That would explain why Keys never saw Byrd back up. Moreover, the evidence revealed that Keys heard the collision as he was walking back towards the front of the truck. Thus, Byrd had either just backed up or was in the process of backing up when Keys heard the impact, meaning that Byrd backed up at the moment of impact. This is, of course, assuming that Keys was not lying when he testified that he did not see Byrd back up. Also, Byrd basically testified that right after he had backed up, he successfully moved forward and then the accident happened. His own testimony proves that he backed up at the moment of impact. His testimony to that effect was as follows:

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.

Tr. Transcr. vol. 16, 225:15-19.

Appellants' counsel caught what Byrd said, and inquired, "So . . . you had backed up just before you got hit?" Byrd realized what he had said and quickly changed his story by testifying that "it had been a good while before [he] got hit." Tr. Transcr. vol. 16, 225:20-22. According to Byrd, "not even a good 30 seconds" had passed between the time that he got his vehicle unstalled and the time of impact. Tr. Transcr. vol. 16, 223:27-29. However, Byrd was unaware of exact moment that the collision occurred, as he never felt or heard the impact. Byrd testified that he did not even know that there was a wreck until he saw the expression on Keys' face. Tr. Transcr. vol. 16, 224:4-7. Keys did not see the beginning of the impact. In fact, Leah Dooley's vehicle was already "sliding down in the ditch" when Keys first saw it after impact. Tr. Transcr. vol. 16, 272:12-13. Keys testified that he did not know that there was a wreck until he saw Leah Dooley's car to his right. Tr. Transcr. vol. 16, 283:11-17. Hence, Byrd did not know that the impact had occurred until Keys saw Leah Dooley's vehicle sliding down in the ditch. Therefore, how would Byrd know how much time had passed between the time that he backed up and the time of impact? The aforementioned testimony proves that Byrd backed up at the moment of impact. Keys did not know that Byrd had backed up because he was walking back towards the front of the truck at the same time that Byrd was backing up, which is when Keys heard the impact and when the collision occurred.

Byrd testified that Keys was not directing traffic when he backed up. Byrd also testified that he could not see down the road to tell if anyone was coming when he backed up. Tr. Transcr. vol. 16, 235:26-28; 253:8-11. Byrd admitted that he could not see if anyone was coming, and yet he chose to back up anyway without a flagman or some type of warning devices in place. According

to Hannah, Byrd was negligent. Hannah testified that Byrd's backing up was improper, because he should not have backed into a roadway without someone back there monitoring. Tr. Transcr. vol. 19, 690:10-691:27. Likewise, Officer Kazery testified that if Byrd had been backing up, she would agree that he would've needed somebody standing back there for traffic. According to Officer Kazery, if Byrd had ever gotten completely off of the roadway and then backed out into the roadway, he would have lost his right to claim that it was his lane. Transcr. vol. 20, 893-894; vol. 21, 966:14-17. Partenheimer also testified that Byrd and Independent Roofing were negligent. The Appellees claim that Partenheimer testified that Leah Dooley was negligent; however, they failed to give the full depth of his testimony. Partenheimer did testify that Leah Dooley may have had some responsibility for this accident; however, his testimony was based on his belief that Leah Dooley had testified that she did not see the trailer. That was not her testimony. She testified that she saw the trailer but stated that she did not see it until she approached the opening where the shade trees are. Smith and Sergeant Warren agreed with Leah Dooley on this issue. Moreover, Partenheimer testified that there isn't any scenario under which Byrd and Independent Roofing did not bear responsibility. He further testified that there is a scenario in which Byrd and Independent Roofing bear all of the responsibility. First, he testified that there is no doubt in his mind that the trailer was backing up at the time of impact. He testified that the Appellees should bear all the responsibility if you believe Sergeant Warren's testimony regarding the shadows, because Leah Dooley would not be able to see the trailer coming out. Second, he testified that if you accept Byrd and Independent Roofing's contention that Byrd was sitting still, they would still be negligent of impeding traffic. According to Partenheimer, Leah Dooley shouldn't bear responsibility for any part of this accident, unless you choose to disregard Sergeant Warren's testimony regarding the shadows. Transcr. vol. 18, 464-471.

Byrd had a duty to keep a proper lookout, and he failed to do so. A reasonable person would have kept a proper lookout. Byrd had a duty to warn approaching vehicles that he was backing up onto the highway. Byrd breached that duty when he backed out onto the highway without a flagman or warning devices in place. A reasonable person would not have backed up without a flagman and/or warning devices in place. Because Byrd was entering a road from a driveway, he had a duty to yield the right-of-way to vehicles on the road. Byrd failed to yield the right-of-way to Leah Dooley's vehicle approaching on the highway by backing up onto the highway. A reasonable person would have allowed Leah Dooley to pass by first, and then would have backed out onto the highway. If Byrd and Independent Roofing were not the sole proximate cause of this accident, then they were a contributing proximate cause and were partially at fault for backing up into a roadway when it was unsafe to do so without warning devices or flagmen in place.

c. Byrd and Independent Roofing tried to coverup the truth about what really happened on the date of this accident.

From day one, Byrd and Independent Roofing have been trying to coverup the truth about what really happened. McLain was an employee of Independent Roofing at the time of this accident. He was also Byrd's supervisor; therefore, McLain went out to the scene soon after the accident had occurred. According to McLain, it was obvious that Byrd had been backing up, and McLain testified that "[e]verybody seemed to be wanting to cover it up." When McLain confronted Independent Roofing's safety director, Ramsey, about this, Ramsey instructed McLain to hush and informed him that it was being taken care of. Tr. Transcr. vol. 17, 347:16-349:26; 377:25-378:1. McLain, Independent Roofing's own employee, testified that he believed that this was a cover up. In their brief, the Appellees refer to McClain as a disgruntled former employee. However, none of the witnesses at trial testified that McLain was disgruntled and/or lying. In fact, Ramsey never denied

the fact that McLain had told him that Byrd was backing up. He also never denied telling McLain, "hush, don't say anything, it's being taken care of." To the contrary, at one point, Ramsey actually admitted that he may have told McLain that but stated that he just couldn't remember. Also, Ramsey knew that McLain had information that could hurt Byrd and Independent Roofing; therefore, he never disclosed McLain's name as a witness in Independent Roofing's Responses and Supplemental Responses to the Interrogatories that were propounded to the company. Tr. Transcr. vol. 18, 515:28-517:5; 520:8-21; 526:8-28; 528:2-21. Ramsey was trying to hide the truth.

The Appellees argue that neither Byrd, McLain nor Ramsey attempted to hide the truth from anyone because there was nothing to hide. To the contrary, McLain revealed Byrd's motive for hiding the truth. McLain testified that Byrd had told him that he was warned by someone associated with Independent Roofing that if he did not stick with his story, he would be on his own with regards to obtaining an attorney to represent him in this matter. Tr. Transcr. vol. 17, 346:3-9. This would explain why Byrd was so hesitant to admit the truth about backing up. Up until the trial, Byrd vehemently denied allegations that he backed up. Initially, Byrd even denied backing up at trial; however, his own lies caught up with him so much so that he was eventually forced to tell the truth and admit that he had backed up. As previously mentioned, Byrd initially testified that he never backed up. At one point in time, Byrd testified that from the time he turned into the driveway and got stuck his vehicle never moved until after the accident was over. This testimony, of course, contradicts the testimony, whereby Byrd testified that he was "easing up" as the wreck happened. Byrd's testimony was very inconsistent, but eventually, he did admit that he backed up. Tr. Transcr. vol. 16, 213:23-26; 214:8-14; 215:23-25; 225:16; 236. Byrd attempted to hide the truth. Moreover, at trial Byrd and Keys told two completely different versions of what happened. Keyes acknowledged the fact that he and Byrd were telling two completely different versions of what

happened and admitted that one of them had to be lying. Tr. Transcr. vol. 16, 287:2-5. There is no question that Byrd and Independent Roofing tried to cover up the truth about what really happened. Byrd and Independent Roofing's negligent acts and omissions were clearly the proximate cause or a contributing proximate cause of the accident in question.

B. Jonathan Dooley's death was a direct result of Byrd and Independent Roofing's negligence.

Jonathan Dooley died as a result of the injuries that he suffered in this accident.

C. The jury was given a comparative negligence instruction.

In part, because of Officer Kazery's testimony, the Appellants chose to offer a comparative negligence instruction, which was given as Jury Instruction No. 20, allowing the jury to apportion some percentage of fault to Leah Dooley if they so desired. (R. at vol. 13, 1879-1880). At trial, Officer Kazery had testified that one of the contributing factors in this accident was "failure to yield" because Leah Dooley ran into the back of Byrd's vehicle. Tr. Transcr. vol. 20, 885:1-17. She also testified that another contributing factor in this accident was "[t]hat Leah Dooley . . . was not traveling a safe distance from the truck and trailer turning into the driveway." Tr. Transcr. vol. 20, 843:12-15. The Appellees argue that Officer Kazery's testimony was based strictly on the physical evidence she obtained through her on and off-site investigation of the accident. This is one issue that the Appellees are right about. In fact, Officer Kazery testified that she only relied upon one single mark in forming her opinion that Byrd did not back up or try to back up. Tr. Transcr. vol. 20, 848:16-28. Basically, she testified that she did not care what any of the witnesses had to say, because she was only going to rely on the physical evidence and her photographs. Tr. Transcr. vol. 21, 952. Officer Kazery's conclusions make no sense. Clearly, Leah Dooley was not tailgating. Moreover, two accident reconstructionists, **Hannah and Partenheimer, disagreed with Officer**

Kazery's conclusion that Leah Dooley was following too closely. Tr. Transcr. vol. 17, 413:22-27. **More importantly, Byrd and Independent Roofing disagreed with Officer Kazery's conclusion that Leah Dooley was following too closely**. First, Byrd testified that she wasn't following too closely. He also agreed that she wasn't anywhere around when he first got stuck. Tr. Transcr. vol. 16, 239:2-16. Then, Ramsey, Independent Roofing's safety director, testified that the company's position was that "[s]he wasn't following too close." Tr. Transcr. vol. 4, 506:14-17. Officer Kazery did agree that if there were other cars between Leah Dooley and the accident scene then she would not say that that would be following too closely. Tr. Transcr. vol. 20, 884:26-29. The evidence revealed that there were other cars between Leah Dooley and the accident scene. Byrd and Keys both testified that two to three vehicles passed by from the point of time in which Byrd began his turn into Smith's driveway and the time of the wreck; and, according to Keys, the vehicles passed at different times. Tr. Transcr. vol. 16, 212; 272-273; 278; 297. Because there were two to three vehicles that passed by during those five minutes or so, it would be absurd for a jury conclude that Leah Dooley was following too closely.

Furthermore, many of the Appellees arguments are irrelevant. They argue that Leah Dooley was going over 50 miles per hour. What they fail to mention is the fact that the evidence showed that Leah Dooley was going about 52 miles per hour at the time of this accident and that the speed limit was 55 miles per hour. Tr. Transcr. vol. 18, 474-475; 577; vol. 19, 624. Therefore, Leah Dooley was not speeding. They also claim that it was uncontradicted that the minor had moved from a child seat behind the driver to standing in the front passenger seat. Said claim is not true, because Leah Dooley testified that Jonathan Dooley had climbed up to where the armrest was in between the front seats when the accident occurred. Tr. Transcr. vol. 18, 571. Moreover, the Appellees claim that had Jonathan Dooley been properly secured he would have had no physical injury from the

accident. This was not an issue to be considered by the jury, as the jury was instructed that the fact that Jonathan Dooley was or was not properly buckled in his car seat, or got out of the car seat on his own at the time of the wreck could not be considered as evidence of negligence on behalf of Leah Dooley and that by law no negligence could be attributed to a child of Jonathan's age. (R. at Exhibit Folder [Jury Instruction No. 7].) Also, the Appellees brought up the opinion of an expert whom they chose not to call at trial, probably because that expert's report/testimony completely contradicted the testimony of Officer Kazery. Appellees' Brief at 8. Said opinion should, therefore, be stricken.

D. Conclusion

The verdict was against the overwhelming weight of the evidence. Therefore, the jury's failure to follow its comparative negligence instruction and assess at least some fault on Byrd and Independent Roofing amounts to bias, passion and prejudice. Thus, the trial court abused its discretion in failing to grant a new trial. This verdict was so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice. The Appellants are entitled to a new trial.

II. The lower court erred in failing to grant the Appellants' Motion for Judgment Notwithstanding the Verdict.

The evidence revealed that Byrd did not possess the proper license and training legally required to drive the truck and trailer in question; that Byrd and his superiors knew that Byrd did not have a Class D driver's license or any type of commercial driver's license at the time of this accident; and that Byrd and his superiors knew that Byrd needed a Class D driver's license to operate that truck and trailer. The evidence further revealed that Byrd did not have flagmen or warning devices in place at the time of the accident and that there were no warning devices available in that truck. Byrd and Independent Roofing were negligent as a matter of law with respect to these issues.

The evidence further revealed that Byrd's trailer was completely out of the highway at one point. Therefore, at that point in time, Byrd lost his position to claim that the lane was his. The evidence also revealed that Byrd backed up onto the road the moment of impact and that he did so knowing that he couldn't see if there were any vehicles approaching on the highway. Independent Roofing was, of course, liable for any negligent acts and omissions of Byrd. The evidence clearly showed that Byrd and Independent Roofing's negligent acts and omissions were the proximate cause of this accident and that Jonathan Dooley's death was a direct result of their negligence. The evidence to this effect is set out in great detail under section "I" above. The Appellants hereby incorporate all of the facts, laws and arguments made under section "I" above to the argument herein.

The evidence supporting the verdict fails the legal sufficiency test because a reasonable and fairminded jury would not have returned with a verdict in favor of Byrd and Independent Roofing. Since the facts and inferences pointed so overwhelmingly in favor of the Appellants that reasonable and fairminded jurors in the exercise of fair and impartial judgment could not have arrived at a contrary verdict, the lower court was required to grant the Appellants' Motion for Judgment Notwithstanding the Verdict. *Jesco, Inc. v. Whitehead*, 451 So. 2d 706, 713 (Miss. 1984). Therefore, the lower court erred when it denied the same. The Appellants are entitled to a judgment on liability and a new trial on the issue of damages only.

III. The lower court erred in failing to grant the Applellants' Motion for a New Trial.

A. The verdict was against the overwhelming weight of the evidence.

The evidence to this effect is set out in great detail under section "I" above. The Appellants hereby incorporate all of the facts, laws and arguments made under section "I" above to the argument herein and the arguments set forth in Sections III(B) & III(C) below.

B. The jury was confused by faulty jury instructions.

1. The lower court erred in refusing to grant Appellants' Proposed Jury Instruction Numbers P-36; P-40; P-44A; and P-44B.

The Appellees claim that the Appellants presented additional jury instructions for the first time at the jury instruction conference in violation of the rules requiring that instructions be submitted before trial. Rule 51(b)(1) does require that proposed jury instructions be submitted to the court either at the pretrial hearing or, in the event a pretrial hearing is not held, at least twenty-four hours prior to trial. Miss. R. Civ. P. 51(b)(1). However, Rule 16(k) guarantees that proposed instructions may be subsequently amended or supplemented as necessary. Miss. R. Civ. P. 16(k). In the situation at hand, the lower court accepted said instructions but denied them. The Appellees also argue that the applicable law in every one of these instructions was submitted to the jury in Jury Instruction Numbers 12 through 13. In making said argument, the Appellees fail to recognize the fact that Jury Instruction Numbers 12 and 13 were not negligence per se instructions.

The lower court erred in refusing to instruct the jury that the Appellees' failure to place warning signals on the highway was negligence per se. "Mississippi recognizes the doctrine of negligence per se, which in essence provides that breach of a statute or ordinance renders the offender liable in tort without proof of a lack of due care." *Palmer v. Anderson Infirmary Benv. Assn.*, 656 So. 2d 790, 796 (Miss. 1995). "When 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." *Gallagher Bassett Serv(s)., Inc. v. Jeffcoat*, 887 So. 2d 777, 787 (Miss. 2004). Two of the Appellants' proposed jury instructions, dealing with the issue of warning devices, were refused by the lower court. First, the lower court refused to grant P-36. (R. at vol. 14, 1999-2000.) Second, the lower court refused to grant P-44B. (R. at vol. 14, 2004.)

The refused instructions were based on Miss. Code Ann. § 63-7-71 (1972). Jonathan Dooley, a traveler on a Mississippi highway, was within the class of individuals the statute was designed to protect. The accident that occurred on Highway 468 in Brandon, Mississippi was the kind of harm that the statute was intended to prevent. As stated in *Thomas*, "[s]ections 63-3-903 and 63-7-71 were enacted by our legislature to protect motorists on highways." 667 So. 2d at 597 (quoting *Golden Flake Snack Foods, Inc. v. Thorton*, 548 So. 2d 382, 383 (Miss. 1989); *Stong v. Freeman Truck Line, Inc.*, 456 So. 2d 698, 707 (Miss. 1984)). In *Stong*, the Mississippi Supreme Court found that "[t]he trial court had erred in advising the jury that the acts or omissions which violated [§ 63-7-71] were merely evidence of negligence and not negligence per se." *Thomas*, 667 So. 2d at 597 (citing *Stong*, 456 So. 2d at 704). "*Stong* was a negligence action arising from a collision on Interstate 55 between an automobile and a stalled truck, where no warning signals were in place." *Thomas*, 667 So. 2d at 597 (citing *Stong*, 456 So. 2d at 698). The Appellees argue that Miss. Code Ann. § 63-7-71 (1972) refers only to trucks or buses **stopped on the side of the road** for **a long period of time**. The statute actually refers to "any motor truck or bus . . . **stopped upon the highway**" and **does not mention anything about** a **time** limit. However, *Hankins v. Harvey*, 160 So. 2d 63 (Miss. 1964) and *Stong*, "[h]ave imposed a reasonable time limit upon vehicle operators to set out reflectors or other warning devices." *Thomas*, 667 So. 2d at 597. In *Hankins*, the Mississippi Supreme Court held that warning signals "should be set out with 'reasonable and proper diligence, or promptly under all the facts and circumstances of the case.'" *Thomas*, 667 So. 2d at 597 (quoting *Hankins*, 160 So. 2d at 63.) The federal regulations for interstate highways employ a ten minute time limit. In *Stong*, the Mississippi Supreme Court used that ten minute time limit and held that "'[w]here there is a conflict in the evidence and where more than one reasonable interpretation may be given the facts, whether the driver acted with reasonable promptness under the circumstances or within a ten minute time limit

must be determined by the jury under proper instructions.'" *Thomas*, 667 So. 2d at 597 (quoting *Stong*, 456 So. 2d at 710). Of course, as mentioned previously in this brief, this regulation does not mean that you can just sit there for ten minutes and do nothing. In the matter at hand, the fact that there were no warning devices in place at the time of the accident is undisputed. Byrd was stuck for five minutes or so, and Byrd and Keys both testified that they never considered putting out warning devices. Moreover, in *Thomas*, the Mississippi Supreme Court held that the Defendants could not have complied with the regulation because it was "uncontroverted that the truck had no lights and was not equipped with reflectors or other warning devices." For that reason, the Court held that the trial court erred in failing to grant the Plaintiff's negligence per se instruction. *Thomas*, 667 So. 2d at 597. The matter at hand is very similar to the situation in *Thomas*. Keys testified that there were no lights on the trailer. According to Keys, there was just a turn signal on the truck. Transcr. vol. 16, 294:9-16. When Byrd was asked whether there were any warning devices whatsoever, he testified that there was "nothing but my blinker on." Transcr. vol. 16, 262:6-7. Leah Dooley testified that there were no lights or reflectors shining at the time of the accident. Transcr. vol. 18, 583:14-19. Partenheimer testified as follows with respect to the reflective tape on the trailer in question: "There are places where it's scuffed up and/or scraped off." He also testified that there would not have been anything to make the reflective strips light up or standout in this accident because the trailer was in the shade. Transcr. vol. 17, 404:23-24; 405:22-406:3. Hannah testified that you couldn't see the conspicuity tape because nothing was reflecting off of it. Transcr. vol. 19, 688:7-8. Ramsey, Independent Roofing's safety director, admitted that you can't comply with the Federal regulation that requires the placement of warning devices within certain specifications by saying we're just going to stick with the tape. He also admitted that retroreflective tape is not a substitute for warning devices. Transcr. vol. 18, 536:10-28. Moreover, Officer Kazery agreed that

Byrd's brake lights would not have been visible to Leah Dooley at the time of this accident because he would have been at an angle. She also agreed that there would not have been any type of lighting device to warn Leah Dooley that the trailer was there. Transcr. vol. 21, 977-978. McLain, Byrd's supervisor at Independent Roofing, testified that there weren't any warning devices in the truck or trailer in question at the time of this accident. Therefore, had Byrd and Keys chosen to comply with the aforementioned regulation, they could not have done so. Obviously, the situation at hand is very similar to that in *Thomas*. Byrd and Independent Roofing failed to meet their duties with respect to warning devices. By the time Leah Dooley saw the trailer, it was too late. She was too close to do anything to stop the accident from happening. Had there been a flagman or some type of warning device in place, she would have known to slow down or stop. The Appellees' failure to have warning devices in place was the proximate cause of this accident. Therefore, the lower court erred in refusing to instruct the jury that the Appellees' failure to place warning signals on the highway was negligence per se. P-36 and P-44B should have been granted.

The lower court also erred in refusing to instruct the jury that the Appellees' failure to have the required license to drive the truck and trailer in question was negligence per se. The lower court refused to grant P-44A. (R. at vol. 14, 2003). Under the commercial driver's license statute, Byrd was required to have a Class D driver's license. Miss. Code Ann. § 63-1-211. The fact that Byrd was required to have a Class D driver's license in order to legally operate the truck and trailer in question was undisputed. Ramsey, Independent Roofing's safety director, testified that he was aware of the fact that Byrd was required to have such a license to drive that truck and trailer. Moreover, the fact that Byrd did not possess a Class D driver's license or any type of commercial driver's license was also undisputed. Byrd testified that he did not have a Class D driver's license, and Byrd's superiors, McLain and Ramsey, testified that they were aware that Byrd did not possess a

Class D driver's license or any type of commercial driver's license. Moreover, Byrd admitted that he had never had any training in driving that truck and trailer. The Appellees argue that no special license would have prevented the accident. They also argue that the fact that Byrd failed to possess the required license was not a proximate cause of this accident. The evidence was to the contrary. There was evidence that Byrd shouldn't have made the turn into Smith's driveway to begin with and that a qualified driver could have made the turn. There was evidence that a reasonable person would not have attempted to turn into Smith's driveway in that truck and trailer. Smith had a Class A commercial driver's license, and he chose to take an alternate route to get the boomlift into his yard. Smith testified that he has never turned into his driveway while driving a trailer that long. Partenheimer testified that Byrd shouldn't have attempted that turn. Hannah testified that an experienced driver could've made the turn. If Byrd had possessed the proper license and training required to drive that truck and trailer, he would have known better than to attempt that turn or he would have successfully made the turn. As Hannah testified, lack of knowledge caused Byrd to miss the driveway. A properly licensed driver would have possessed the knowledge required to handle the situation that Byrd faced on the date of this accident. If Byrd had not attempted to make the turn into Smith's driveway, he never would have gotten stuck or had to back up out onto the highway. The accident never would've occurred. There is a reason why the law requires a Class D driver's license to operate that truck and trailer. Jonathan Dooley was within the class of individuals the statute was designed to protect, and the accident in question, which resulted in Jonathan Dooley's death, was the kind of harm that the statute was intended to prevent. Therefore, the lower court erred in refusing to instruct the jury that the Appellees' failure to have the required license to drive the truck and trailer in question was negligence per se. P-44A should have been granted.

Finally, the lower court refused to grant P-40. (R. at vol. 14, 2001). The Appellants hereby

incorporate all of the facts, laws and arguments made in the preceding paragraph to the argument herein. Byrd acted unreasonably when he made the turn into Smith's driveway. Therefore, the lower court erred in refusing to grant P-40.

2. The lower court erred in giving Jury Instruction Numbers 10 and 11.

The Appellants objected to the granting of these instructions on the grounds that the term "condition" in these instructions was vague, ambiguous and confusing to the jury. The Appellants argued that the instructions did not add anything and that the jury did not need to be instructed on something unnecessarily. The Appellants further argued that they had never alleged that the Appellees created the condition of the driveway or the condition of the shadows cast. (R. at vol. 21, 1017-1018; 1020-1021; 1031-1033). These were, however, conditions that should have been considered by the jury. First, there was testimony that the driveway was narrow and steep. There was also testimony that Byrd should not have attempted to turn into that driveway while driving the truck and trailer in question. Second, there was evidence proving that shade was a factor to be taken into consideration when determining whether Leah Dooley could've done anything to prevent this accident. There was also testimony that Byrd and Independent Roofing should have put out warning devices in that dark shaded area. Therefore, these conditions were important factors that should have been considered by the jury. Jury Instruction Numbers 10 and 11 basically allowed the jury to ignore these important factors.

The lower court erred in refusing to grant Appellants' Proposed Jury Instruction Numbers P-36; P-40; P-44A; and P-44B. The lower court also erred in giving Jury Instruction Numbers 10 and 11. Clearly, the jury was confused by faulty jury instructions.

C. The jury departed from its oath and its verdict was the result of bias, passion and prejudice.

The evidence revealed that Byrd and Independent Roofing's negligent acts and omissions were the proximate cause or a contributing proximate cause of the accident in question. The evidence further revealed that Jonathan Dooley's death was a direct result of Byrd and Independent Roofing's negligence. The Appellees argue that the Appellants have failed to show that the jury verdict was the result of bias, passion or prejudice. However, as the Supreme Court of Mississippi held in *Biloxi Elec. Co. v. Thorn*, 264 So. 2d 404, 406 (Miss. 1972), "[g]enerally, . . . the only evidence of corruption, passion, prejudice or bias on the part of the jury **is an inference**, if any, **to be drawn** from contrasting the amount of the verdict with the amount of the damages." (citing *Kincade & Lofton v. Stephens*, 50 So. 2d 587 (Miss. 1951)). The weight of the evidence was clearly in favor of the Appellants. Therefore, the jury departed from its oath and its verdict was the result of bias, passion and prejudice when it failed to either return a verdict in favor of the Appellants or to follow the comparative negligence instruction it was given.

D. Conclusion

Clearly, the verdict was against the overwhelming weight of the evidence; the jury was confused by faulty jury instructions; and the jury departed from its oath and its verdict was the result of bias, passion and prejudice. The lower court erred in refusing to grant Appellants' Proposed Jury Instruction Numbers P-36; P-40; P-44A; and P-44B; erred in giving Jury Instruction Numbers 10 and 11; and abused his discretion when he denied the Appellants' Motion for a New Trial. Because this verdict was so contrary to the overwhelming weight of the evidence, a new trial should be granted in order to prevent unconscionable injustice.

IV. The lower court erred in granting the Motion for Joinder and Separate Representation, filed by Appellants, Dewey Dooley and Kaitlyn Patrick.

Initially, Dewey Dooley wanted nothing to do with this lawsuit. He believed that Leah

Dooley was at fault for Jonathan Dooley's death because he was not in his car seat at the time of this accident. Dewey Dooley and his current even went so far as to assist the defense lawyers in this wrongful death action in order to prevent Leah Dooley from recovering any money. Dewey Dooley's current wife also tried to get Leah Dooley indicted for not having Jonathan Dooley in his car seat at the time of the wreck. Leah Dooley feared that Dewey Dooley was only wanting to join this lawsuit in order to sabotage the case. Her worst fears came true when Partenheimer testified that Leah Dooley may have had some responsibility for this accident. He testified as follows: "[I] believe that the vehicle was out there and someone paying attention should be able to see that, yes." Transcr. vol. 17, 431:11-24. The strange thing is that Partenheimer testified as if Leah Dooley had claimed that she never saw the trailer; however, Leah Dooley's testimony was that she did see the trailer. She just testified that she did not see it until she approached the opening where the shade trees are. Smith and Sergeant Warren agreed with Leah Dooley on this issue. Partenheimer was hired by Dewey Dooley and Kaitlyn Patrick to testify on behalf of the Appellants in this action. One would think that he would need to know what the Appellants' leading witness had to say. However, Partenheimer did not seem to care what Leah Dooley had to say, as he testified that he did not interview any witnesses.

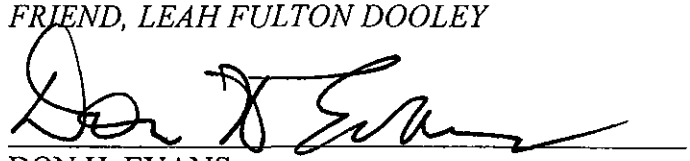
Moreover, Partenheimer was not the only "joinder issue problem" that arose at trial. During the trial, defense counsel was allowed to question Leah Dooley about her Responses to the Motion for Joinder and Separate Representation. Therefore, the jury heard about all of the issues that were addressed in that Response, including the part about how Dewey Dooley believed that Leah Dooley was at fault for not having Jonathan Dooley properly buckled up at the time of the accident. This was extremely prejudicial to Leah Dooley and all of the other Appellants. The lower court erred in granting this Motion for Joinder and Separate Representation, knowing of the conflicts at issue.

CONCLUSION

Leah Dooley, Kathryn Fulton and Peyton Dooley would show that the lower court erred in denying the Appellants' Motion for a Judgment Notwithstanding the Verdict; erred in denying the Appellants' Motion for a New Trial; erred in refusing to grant Appellants' Proposed Jury Instruction Numbers P-36; P-40; P-44A; and P-44B; erred in giving Jury Instruction Numbers 10 and 11; and erred in granting Dewey Dooley and Kaitlyn Patrick's Motion for Joinder and Separate Representation. Therefore, Leah Dooley, Kathryn Fulton and Peyton Dooley respectfully request that this Court reverse the verdict of the jury and grant a new trial on damages only or grant an entirely new trial on all issues. If Leah Dooley, Kathryn Fulton and Peyton Dooley have prayed for improper relief, then they ask that this Court grant them the appropriate relief.

RESPECTFULLY SUBMITTED,

LEAH FULTON DOOLEY; KATHRYN MARIE FULTON, A MINOR, BY AND THROUGH HER MOTHER AND NEXT FRIEND, LEAH FULTON DOOLEY; AND PEYTON DOOLEY, A MINOR, BY AND THROUGH HIS MOTHER AND NEXT FRIEND, LEAH FULTON DOOLEY

BY: 

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CERTIFICATE OF SERVICE

I, Don H. Evans, attorney for Appellants, do hereby certify that I have served, via hand-delivery, a copy of the foregoing *Reply Brief of Appellants* to the following:

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