IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NO. 2009-CA-01830

LEAH FULTON DOOLEY, ET AL. **APPELLANTS**

v.

CEDRIC BYRD AND INDEPENDENT ROOFING SYSTEMS, INC. **APPELLEES**

BRIEF OF APPELLANTS

APPEAL FROM THE CIRCUIT COURT
RANKIN COUNTY, MISSISSIPPI

ORAL ARGUMENT REQUESTED

William W. Fulgham, Esq.
Mississippi Bar N[redacted]
FULGHAM LAW FIRM, PLLC
533A Keyway Drive
P. O. Box 321386
Flowood, MS 39232
Telephone: (601) 932-9710
Facsimile: (601) 932-9712

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NO. 2009-CA-01830

LEAH FULTON DOOLEY **APPELLANT**

v.

CEDRIC BYRD AND INDEPENDENT ROOFING SYSTEMS, INC. **APPELLEES**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Dewey Dooley, Appellant
2. Mary Dooley, wife of Dewey Dooley, and employee at Mississippi Court of Appeals
3. Kaitlyn Patrick Dooley, a Minor, Appellant
4. Keri Patrick, Mother and Next Friend of Kaitlyn Patrick Dooley, a Minor Appellant
5. Leah Fulton Dooley, Appellant
6. Kathryn Marie Fulton, a Minor, Appellant
7. Peyton Dooley, a Minor, Appellant
8. Cedric Byrd, Appellee
9. Independent Roofing Systems, Inc. Appellee
10. William W. Fulgham, Esq., Attorney of record for Appellants Dewey Dooley and Kaitlyn Patrick Dooley, a Minor
11. Erin S. Rodgers, Attorney of record for Appellants Dewey Dooley and Kaitlyn Patrick Dooley, a Minor
12. Don H. Evans, Esq., Attorney of record for Appellants Leah Fulton Dooley,

Kathryn Marie Fulton, a Minor, and Peyton Dooley, a Minor

13. Don H. Evans, Esq., Attorney of record for Appellants Leah Fulton Dooley, Kathryn Marie Fulton, a Minor, and Peyton Dooley, a Minor

14. James D. Holland, Esq., Attorney of record for Appellees

15. Honorable Samac S. Richardson, Circuit Court Judge of Rankin County, Mississippi

16. Harvey J. Rayborn, Court Reporter, Rankin County Circuit Court.

This the 18th day of June, 2010.

WILLIAM W. FULGHAM

TABLE OF CONTENTS

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES

Mississippi Supreme Court cases

Mississippi Court of Appeals Cases

Statutes

Other

I. STATEMENT OF THE ISSUES

A. The verdict of the jury was against the overwhelming weight of the evidence as the evidence does not support a finding that either (1) the vehicle driven by Appellee Cedric Byrd was "continuing its turn forward" at the time of the collision or (2) that the actions of Leah Dooley were the sole proximate cause which in natural and continuous sequence unbroken by any efficient intervening cause, produced the injury without which the result would not have occurred.

B. The Trial Court erred in refusing the Appellants' proposed jury instructions regarding the negligence per se of the Appellees for statutory violations by failing to have warning devices and failing to possess the required Class D commercial drivers' license, as well as refusing Appellants' proposed instruction on the issue of standing still in a roadway.

C. The Trial Court erred in failing to apply this Supreme Court's precedent established in the case of Long v. McKinney and thereby refusing to allow counsel for these Appellants to participate in examining key witnesses and present their theory of the case. In so doing, the Trial Court abused its discretion by favoring a general, procedural rule covering the facing of only one attorney per witness over the substantive rights of these Appellants.

D. The Trial Court erred in granting Jury Instructions # 10 and # 11 over the objection of the Appellants, as the same improperly instructed the jury to disregard key factual elements relevant to the Appellants' theory of the case.

II. STATEMENT OF THE CASE

A. NATURE OF CASE, COURSE OF PROCEEDINGS, AND DISPOSITION

This matter first came into court upon the filing of a complaint by Leah Fulton Dooley, who filed on behalf of herself, a minor child, a child in gestation, and all heirs-at-law of Jonathan Wayne Dooley, a minor, deceased, in October 2003. Based upon this Supreme Court's holding in the case of Long v. McKinney, 897 So.2d 160 (Miss. 2004), Appellants Dewey Dooley and Kaitlyn Patrick Dooley, a minor child, entered into this action through the filing of a Motion for Joinder and Separate Representation by undersigned counsel on February 15, 2005. That motion was later granted by telephonic hearing which took place immediately prior to the second deposition of Leah Dooley.

From May 27, 2009 through June 5, 2009, a trial was held in this matter in the Circuit Court of Rankin County, Mississippi before the Honorable Samac Richardson. Following the presentation of evidence, the parties submitted proposed jury instructions and moved for various relief. Though the Honorable Trial Judge endeavored to deliver the case fairly to the jury, and struggled with the lack of developed case law on at least one issue as more fully set forth herein, the jury was instructed in a manner which did not offer all parties a fair opportunity for a fair consideration of their theories of the case, which were supported by the overwhelming weight of the credible evidence, constituting reversible error. Based upon their improper charge, and against the overwhelming weight of the evidence, the jury returned a verdict in favor of the Defendants, with a Final Judgment being entered on June 22, 2009.

On July 2, 2009, these Appellants filed their post-trial motions pursuant to Rule 59 of the Mississippi Rules of Civil Procedure, and other authority, as did the Leah Dooley Appellants. At

a hearing of the respective post-trial motions on August 24, 2009, undersigned counsel was instructed that only counsel for the Leah Dooley Appellants would be allowed to argue, to the exclusion of the undersigned counsel for Dewey Dooley and Kaitlyn Patrick Dooley. In an effort to mitigate the prejudice of such ruling, the undersigned attempted to argue these Appellants' post-trial motion, but the same was disregarded by the trial court. Thereafter, the trial court entered an order denying the Appellants' respective post-trial motions on October 14, 2009.

B. STATEMENT OF FACTS RELEVANT TO THE ISSUES

These Appellants' Brief is offered in the spirit of the authority announced in Long v. McKinney, and through which these Appellants attempted to proceed at trial. Accordingly, efforts will be made to avoid duplication of arguments and recitation of relevant facts. In addition to the Statement of Facts, Summary of the Argument, and Record Excerpts offered by the Leah Dooley Appellants, these Appellants will offer in the Argument section of this Brief factual presentations and authorities which are either in addition to those previously submitted by the Leah Dooley Appellants or which differ from the same, and have highlighted additional material through the submission of a separate Record Excerpts compilation.

C. STANDARD OF REVIEW

The standards of review the trial court should have employed when considering a motion for judgment notwithstanding the verdict and a motion for new trial are set forth in the case of Hankins Lumber Company v. Moore, 774 So.2d 459 (Miss. App. 2000), which quoted the case of Jesco, Inc. v. Whitehead, 451 So.2d 706, 714 (Miss. 1984) as follows:

> The motion for j.n.o.v. tests the legal sufficiency of the evidence supporting the verdict. It asks the Court to hold, as a matter of law, that the verdict may not

> stand. Where a motion for j.n.o.v. has been made, the trial court must consider all of the evidence--not just evidence which supports the non-movant's case--in the light most favorable to the party opposed to the motion. The non-movant must also be given the benefit of all favorable inferences that may reasonably be drawn from the evidence. If the facts and inferences so considered point so overwhelmingly in favor of the movant that reasonable men could not have arrived at a contrary verdict, granting the motion is required. On the other hand, if there is substantial evidence opposed to the motion, that is, evidence of such quality and weight that reasonable and fairminded men in the exercise of impartial judgment might reach different conclusions, the motion should be denied and the jury's verdict allowed to stand."

Hankins Lumber Co. v. Moore, 774 So.2d at 463 (emphasis added)(citations omitted). Further, "When a trial judge denies a motion for JNOV, this Court examines all the evidence, not just evidence supporting the non-movant's case in the most favorable light." Fiddle, Inc. v. Shannon, 834 So. 2d 39, 45 (Miss. 2003) (citing C & C Trucking, Inc. v. Smith, 612 So.2d 1092, 1098 (Miss. 1992).

A motion for new trial "may be proper in circumstances where a JNOV should not have been granted." Id. (citing Larkin v. Perry, 427 So.2d 138, 138-39 (Miss. 1983)). A new trial should be ordered when the trial judge "is convinced that the verdict is contrary to the substantial weight of the evidence." Id. (citing Adams v. Green, 474 So.2d 577, 582 (Miss. 1985). The Hankins Court further set forth the standard for reviewing whether the granting or refusing of a new trial is proper by stating:

> The standard for reviewing the action of a trial court in the granting or refusing of a new trial was set out in the case of Dorr v. Watson, 28 Miss. 383 (1854). That case states that though it is within the sound discretion of the court below whether to grant a new trial, if a new trial is refused it may be reversed when the denial of the motion is manifestly wrong. Id. at 395.

Hankins Lumber Co. v. Moore, 774 So.2d at 463-64.

III. ARGUMENT

A. The verdict of the jury was against the overwhelming weight of the evidence as the evidence does not support a finding that either (1) the vehicle driven by Appellee Cedric Byrd was "continuing its turn forward" at the time of the collision or (2) that the actions of Leah Dooley were the sole proximate cause which in natural and continuous sequence unbroken by any efficient intervening cause, produced the injury without which the result would not have occurred.

The sole defenses relied upon by both Appellees Cedric Byrd and Independent Roofing were (1) that the truck and trailer was "continuing its turn forward" at the time of impact, such that it was still entitled to the lane of traffic; and (2) the affirmative defense that the actions or inactions of Leah Dooley constituted a failure to keep a proper lookout which was the sole proximate cause of the accident. In their closing argument, the Appellees stated unequivocally that they were not asking for an allocation of fault (Tr. 1078 - 1079); rather, their theory of the case was that Leah Dooley's purported failure was the sole proximate cause of the accident. The overwhelming weight of the evidence simply does not support either contention, much less both.

1. Appellees' "Continuation of the turn" theory

In support of their affirmative defense, the Appellees called Trooper Cecilia Kazery to the stand and elicited expert opinion testimony. Further, Cedric Byrd had been called to the stand by Plaintiff, Leah Dooley during her case-in-chief, whereupon he testified that he was moving the truck and trailer forward at the time of the accident. This testimony is wholly unsupportable by the physical evidence, and no reasonable juror could find that the trailer was "continuing its turn forward" at the time of impact. Though the evidence at trial no longer supported the "continuation of the turn theory", the Appellees stuck with that theory through the jury instruction phase and closing arguments, resulting in a verdict that is against the overwhelming weight of the evidence, and requiring reversal.

The Appellees first stated this theory in their Answers and Defenses, wherein they stated the following, in part:

"FIRST DEFENSE

The Complaint fails to state a claim or cause of action against this Defendant upon which relief can be granted and should be dismissed with prejudice. The named Plaintiff is responsible for the accident and was grossly negligent in driving into the rear of the truck of this Defendant, allowing her child to ride unrestrained in her car and driving at a speed wholly improper for place where the accident occurred. The Appellants lack standing to pursue this action, as they caused the accident. Further, an unborn child has no standing to bring this action."

***

"THIRD DEFENSE

This Defendant affirmatively pleads that the sole proximate cause or proximate contributing cause of the Plaintiff's injuries, if any, was the negligence of Leah Fulton Dooley."

(R. 84-85; 88-89).

In the course of that joint defense, both Appellees maintained the theory with respect to the trailer moving forward at the time of impact. On January 10, 2006, the Appellees both served interrogatory responses which contained the following statement in response to an interrogatory requesting the Appellees' version of the facts:

"RESPONSE NO. 12: On September 29, 2003, Defendant, Cedric Byrd, was driving west on Mississippi 468, while pulling an empty gooseneck trailer. **He was in the process of turning right into a driveway** when the left, rear corner of his trailer was struck by a vehicle driven by Plaintiff, Leah Fulton Dooley. At the time of the accident, Plaintiff was also driving west on Mississippi 468. Please also see the deposition of Cedric Byrd."

See Independent Roofing Systems, Inc.'s Responses to Plaintiff's First Set of Interrogatories and Cedric Byrd's Responses to Plaintiff's First Set of Interrogatories. (R. 1914-15; 1919-20)[emphasis added].

On February 14, 2006, the Appellees jointly moved for summary judgment on the basis of the same theory, wherein they stated that Cedric Byrd "was in the process of making a right turn

into a driveway when the rear of his vehicle was struck by the Plaintiff." See Appellees' Motion for Summary Judgment, paragraph number 2 (R. 379). Pursuant to the Mississippi Rules of Court, the Appellees jointly filed an Itemization of Facts in support of that motion wherein it maintained that the trailer "was in the process of making a right turn". (R. 376).

The Appellees stuck with this theory throughout the course of the trial. During arguments for jury instructions, counsel for the Appellees stated as follows in support of the "continuation of turn" theory:

> Your Honor, the evidence in the case is the jury has a choice of deciding one of two issues: One, that we were backing out. The second one is that we were turning in. Those are the only two issues here. It's uncontradicted before this jury that if he didn't back out then he had the right of way and those – that's the choice.
>
> What they're trying to do is get the middle ground. They can't have that.

Tr. 988 - 989. Indeed, the evidence supported, and the Dewey Dooley Appellants were trying to offer, just that: the theory that even if the truck and trailer were stranded or sitting still while the employees were trying to figure out their next move, their actions in doing so constituted at the least a proximate contributing cause, particularly when considering their failure to warn. However, these Appellants were denied the opportunity to question Cedric Byrd, Patrick Keys, and Leah Dooley on this evidence due to the Trial Court's error in misapplying the Long v. McKinney standard, severely prejudicing their fair opportunity to be heard, as set forth infra. Simply because the Appellees intended to pursue an all-or-nothing approach, eschewing any potential allocation of fault by the jury (Tr. 1078-79), the Dewey Dooley Appellants should not have been precluded from pursuing their alternative theory of allocated fault if the jury found that the trailer was neither backing up nor continuing forward with its turn. That denial constituted reversible error, as these Appellants were denied their opportunity to present their case.

As shown, the Appellees stayed with their "turn continuation" theory all the way through the trial, even though the credible evidence simply no longer supported it. Patrick Keys testified that, during the period of time between the initial attempt to turn in by the truck/trailer and the moment of impact, "two or three cars had passed by." (Tr. 272). Cedric testified that "He walked up there and had about two or three cars going..."(Tr. 212, ln 5-6), and "When the first three cars went passed, he came back to the front of the truck and he was guiding me in." (Tr. 212, ln 23-25).

Accordingly, even affording the Appellees the benefit of all favorable inferences that may *reasonably* be drawn from the evidence, the facts and inferences so overwhelmingly point in favor of the Appellants that reasonable jurors could not have arrived at a verdict in favor of the Appellees' on their "continuation of the turn" theory. Rather, the evidence regarding the three to five minute period and the passing of two to three vehicles during which the truck and trailer was stalled or otherwise at a standstill completely negates such a theory, and the same being against the overwhelming weight of the evidence is grounds for reversal.

2. Appellees' Affirmative Defense Theory that Leah Dooley's acts were the sole proximate cause of the accident.

With the "continuation of their turn" theory being against the overwhelming weight of the credible evidence, the Appellees were left with the burden of proving their affirmative defense that Leah Dooley failed to keep a proper lookout and that such failure was an efficient, intervening cause which was the sole proximate cause of the accident.

Throughout their maintenance of the affirmative defense that Leah Dooley was the sole, proximate cause of the accident, the Appellees avoided use of the term "intervening cause." Whether this omission was purposeful or unintentional, the effect is the same. For negligence to legally be determined to be the sole, proximate cause of some damage, it must be determined to be

the *efficient* cause. The very definition of proximate cause has been stated as follows: "Proximate cause is defined as the 'cause which in natural and continuous sequence unbroken by any efficient intervening cause produces the injury without which the result would not have occurred.'" Titus v. Williams, 844 So.2d 459, 466 (Miss. 2003) (citing Delahoussaye v. Mary Mahoney's, Inc., 783 So.2d 666, 671 (Miss. 2001)). "Negligence which merely furnishes the condition or occasion upon which injuries are received, but does not put in motion the agency by or through which the injuries are inflicted, is not the proximate cause thereof." Mississippi City Lines v. Bullock, 13 So.2d 34, 36 (Miss. 1943) (cited with approval most recently in Entrican v. Ming, Hinds 62 So.2d 28, 36 (Miss. 2007) and Williams v. Jackson, 989 So.2d 991, 994 (Miss. App. 2008)).

Assuming for the sake of argument that evidence was introduced during the trial of this case upon which reasonable inferences could be drawn to the effect that Leah Dooley failed in some degree to keep a proper lookout, the Appellees failed to prove that any such purported failure was the cause which *in natural and continuous sequence unbroken by any efficient intervening cause* produced Jonathan's death. Even absent a finding that the truck/trailer was backing up at the moment of impact, the Appellees simply failed to prove that their original actions in failing to complete the initial turn into the driveway and in failing to employ warning devices or otherwise warn was relegated to the position of a remote, non-actionable cause, and thus was not a proximate cause. See Mississippi City Lines, Inc. v. Bullock, 13 So.2d 34, 36 (Miss. 1943). This Supreme Court has spoken regarding this standard as follows:

> To be sure, the determination of proximate cause involves a temporal element. However, the last cause put in motion which *in fact* contributes to the result is not necessarily the sole proximate cause.
>
> True, this Supreme Court has stated: [T]hat negligence which merely furnished the condition or occasion upon which injuries are received, but does not put in motion the agency by or through which the injuries are inflicted, is not the proximate cause thereof. However, if an antecedent negligent act puts

> in motion an agency which continues in operation until an injury occurs it would appear to be more like a second proximate cause than a remote and unactionable cause.

Blackmon v. Payne, 510 So.2d 483, 487 (Miss. 1987)[emphasis in original]. In Blackmon, the Court reversed a verdict in favor of the Defendant, stating "Neither instruction D-9 nor the instructions as a whole take into account that 'the original negligence of one party will not be insulated if the occurrence of the intervening cause might reasonably have been anticipated.'" Blackmon v. Payne, 510 So.2d at 487. The Court further stated:

> "The facts as presented suggest the former rather than the latter, since it would appear that any negligence on the part of Payne, assumed for purposes of the instruction, would have put in motion an agency, his tractor-trailer, which would have still been operating at the time of the accident. We are familiar with the fact that there is often some degree of negligence on the part of both parties to an automobile collision, and this does not mean that one or either is barred from recovery. It should make little difference in this context which negligent act actually happened last.
>
> In suits arising from such circumstances the jury should not be confused by an instruction which implies that it should excuse a Defendant who was negligent merely because he was not the last link in an uninterrupted causal chain."

Id.

The cases in which the first act of negligence was such that it was a non-actionable cause have typically been based upon facts in which the original act was truly remote. See Milam v. Gulf, Mobile & Ohio Railroad Co., 284 So.2d 309 (Miss. 1973) (holding that negligence of railroad in placing guardrail too close to highway was non-actionable in case where driver attempted to pass another motorist at excessive speed within prohibited distance of railroad crossing; Glorioso v. Young Mens' Christian Assoc. of Jackson, 556 So.2d 293 (Miss. 1989) (finding that any negligence of municipality in placing a 1,400 pound light pole upon the ground at the top of an embankment was remote, where child was killed after other children dislodged the pole from its place on the ground); Mississippi Department of Transportation v. Johnson, 873 So.2d 108 (Miss.

2004) (holding that any negligence by department in permitting bales of hay to remain in right-of-way was not proximate cause of injuries where motorists collided with a cow standing in the middle of a roadway); Illinois Central Gulf Railroad Co. v. Milward, 902 So.2d 575 (Miss. 2005) (holding that railroad's negligence in failing to maintain reflective material on a cross buck was not a proximate contributing cause of injuries to motorist who was driving while legally intoxicated, at night, in a severe rain and windstorm with virtually no visibility).

The undisputed evidence from all witnesses who testified on this point was that the damage to the Dooley vehicle began at the outer, right side at the bottom of the windshield where the A pillar met the front, right fender. The evidence further clearly showed that the left, rear point of the trailer penetrated from that point into the passenger compartment where it contacted and killed Jonathan Dooley. The evidence further established, and was undisputed, the following: (a) that the lane was 10.9 feet wide at the accident site; (b) that the left side tires left a scuff mark which was measured to be 1.5 feet from the center line; (c) that the final resting point of the left, rear point of the trailer was 5.5 feet into the lane from the right side of the lane. These figures establish a difference of 3.9 feet measured from the final resting point of the left, rear point of the trailer to the left side tires of the Dooley vehicle. No proof was ever introduced, or could be reasonably found from any evidence that was introduced, that the four-passenger, four-door Dooley vehicle was only 3.9 feet wide.

Not only was the contention of Leah Dooley that the trailer was backing up at the moment of impact supported by the physical evidence, but the sworn testimony of Cedric Byrd that he was moving forward at the moment of impact is wholly unsubstantiated and unsupportable by the physical evidence. Both Appellees put forth the same evidence and theory of the case. Not only is Defendant Independent Roofing responsible for the actions of its employees, including Defendant

Byrd, but the Appellees maintained a joint defense. Thus, both are bound by the testimony of Appellee Byrd, and given that his "continuation of the turn" testimony lacks any credibility, the Appellees were left with no credible evidence to support this theory.

The Appellees bore the burden of proving each and every central element of their affirmative defense that the purported failure of Leah Dooley to keep a proper lookout was the sole proximate cause. Specifically they failed to prove that their original acts of negligence were remote and did not put in motion the sequence which resulted in Jonathan's death. Assuming for the sake of argument that reasonable inferences could be drawn from the evidence upon which some degree of negligence could be attributed to the actions or inactions of Leah Dooley, the jury could have engaged in an allocation of fault. However, when the Appellees waived any such allegation and instead rested their defense on their theory that any such negligence of Leah Dooley was the sole proximate cause of the accident, the evidence so overwhelmingly pointed in favor of the Appellants that reasonable jurors could not have arrived at a contrary verdict. Accordingly, the Appellants would respectfully urge that judgment notwithstanding the verdict be granted in their favor, and that a trial solely on the issue of damages be conducted. Or, alternatively, that the verdict of the jury be reversed and that this matter remanded for a new trial.

B. The Trial Court erred in refusing the Appellants' proposed jury instructions regarding the negligence per se of the Appellees for statutory violations by failing to have warning devices and failing to possess the required Class D commercial drivers' license, as well as refusing Appellants' proposed instruction on the issue of standing still in a roadway.

At the close of the evidence, counsel for the Appellants offered and requested that the jury be instructed that the Appellees were negligent per se in the following respects: (a) the breach of their duties regarding the employ of warning devices; and (b) the failure of Cedric Byrd to possess a Class D commercial driver's license. As with the arguments set forth above, the same result is

reached when analyzing the Appellants' contention that the Appellees failed to meet their duties with respect to warning devices. The undisputed evidence established that the Appellees had no warning devices on the truck. Independent Roofing employee Patrick Keyes testified that he, in essence, acted as a flagman for a period of time; however, he was not performing such function in the period of time preceding the approach of the Dooley vehicle or at the moment of impact. Further, even the witness called by the Appellees as an expert, Trooper Kazery, testified that the reasonable action for Patrick Keyes to have taken would have been to remain at the highway warning traffic. The case of Thomas v. McDonald establishes that a party is legally precluded from arguing that it acted reasonably with respect to the placement of warning devices when it does not have any such warning devices available. Thus, as with their failure to yield the right-of-way, the evidence so overwhelmingly points in favor of the Appellants that a reasonable man could not have arrived at a contrary verdict with respect to the Appellees' failure to place warning devices and failure to warn.

In the case of Thomas v. McDonald, 667 So.2d 594 (Miss. 1995), this Supreme Court reversed a jury verdict in favor of the Appellees therein on the basis that an instruction requested by the Appellants regarding the Appellees' negligence per se on the issue of warning devices had been refused. The facts in the Thomas case are nearly identical to those in this appeal on the issue of warning devices. In Thomas, as in the instant case, the Defendant truck driver had not placed warning devices upon the road, and the evidence showed that no such devices were available on the vehicle. In reversing the jury's verdict on the basis that they requested negligence per se instruction was denied, this Supreme Court stated:

> Because we have provided a 'reasonable time' interpretations of the statute, McDonald and DAPSCO might have had a viable defense had the vehicle been equipped with the required warning devices. However, regardless of how we construe the statute, DAPSCO could not have complied. It is uncontroverted

> that the truck had no lights and was not equipped with reflectors or other warning devices. Thus, the Circuit Court erred in failing to grant Thomas the negligence per se instruction she saw.

Thomas v. McDonald, 667 So.2d at 597. See also Utz v. Running & Rolling Trucking, Inc., 32 So. 3d 450, 477 (Miss. 2010)(stating "Thomas states that when a statute is violated, a party is *entitled* to an instruction on negligence.")[emphasis added]. The above-cited passage immediately followed the discussion regarding the placement of "flairs, reflectors, or other signals". Id. In the instant case, the testimony of Ike McLain that no triangles or other warning devices were kept on the trucks was undisputed.

The testimony of Independent Roofing's safety director, Russell Ramsey, that Cedric Byrd was required to have a commercial driver's license to operate the truck and trailer in question, but did not have such license, was also undisputed. As set forth also in the Thomas v. McDonald case, in order for the doctrine of negligence per se to apply, it must be shown that the Appellants are a member of the class the statute was designed to protect and that the harm suffered was the type of harm which the statute was intended to prevent. Sections 63-1-77 and 63-1-82 of the Mississippi Code require the use or the holding of a commercial driver's license "with applicable endorsements valid for the vehicle he is driving" and cover class D commercial driver licenses. Miss. Code Ann. §§ 63-1-77 and 63-1-82 (1972, as amended, respectively. The beginning of that article of the Mississippi Code, which is titled as the "Mississippi Commercial Driver's License Law," contains a statement of purpose and construction provision at Section 63-1-74. That section states in part that "[t]his article is a remedial law which should be liberally construed to promote public health, safety and welfare." Miss. Code Ann. § 63-1-74 (1972), as amended. Clearly, this accident and the death of Jonathan Dooley present the very type of injury which the commercial driver's license laws of this state were designed, at least in part, to prevent. Accordingly, the

negligence per se instruction regarding the failures of the Appellees in not having a commercial drivers license and in allowing an employee to operate the truck and trailer when one was required was undisputedly required should have been granted.

Additionally, as set forth in Section A. 2. above, these Appellants were denied the opportunity to develop their theory that even if the truck and trailer were stranded or sitting still while the employees were trying to figure out their next move, their actions in doing so constituted at the least a proximate contributing cause, particularly when considering their failure to warn. The Appellants offered Instruction P-21 in hope that enough evidence had been introduced despite undersigned counsel not being given the proper opportunity to do so; however, the Court denied the same, allowing the Appellees' proffered dichotomy between backing up and continuing forward in the turn, with no "middle ground," to be submitted to the jury. To do so, was reversible error, and constitutes grounds for reversal and remand for a new trial.

C. The Trial Court erred in failing to apply this Supreme Court's precedent established in the case of Long v. McKinney and thereby refusing to allow counsel for these Appellants to participate in examining key witnesses and present their theory of the case. In so doing, the Trial Court abused its discretion by favoring a general, procedural rule covering the facing of only one attorney per witness over the substantive rights of these Appellants.

Throughout the course of the trial, Appellants, Dewey Dooley and Kaitlyn Dooley, moved on various occasions for an opportunity to fully participate in the trial of this matter pursuant to this Supreme Court's holding in the case of Long v. McKinney, 897 So.2d 160 (Miss. 2004). (Tr. 240-251; 759-762; 889). Those issues were fully presented to the Trial Court in argument covering 16 pages of trial transcript, and the Appellants herein would incorporate those arguments in full as is fully set forth herein. Specifically Appellants, Dewey Dooley and Kaitlyn Dooley, were denied a substantive right in favor of affording the Appellees the adherence to a procedural

rule.

In Long v. McKinney, this Supreme Court clearly enunciated the right of individual wrongful death beneficiaries to have their own counsel and to have that counsel fully participate in trial. As more fully set forth during the motions and arguments in the midst of trial, several issues arose and opportunities were presented whereby counsel for the Appellants should have been allowed to participate but were not. The purported cure offered by the Appellees that counsel for the different Appellants simply work together and question witnesses or otherwise introduce evidence through one attorney is no cure at all. Specifically, certain circumstances arose which were more clearly proffered and enunciated during trial, whereby counsel for the other Appellants chose a course of action which he felt to be in the best interests of his client, but which were not in the best interests of the Dewey Dooley Appellants. See Tr. 759-762. These conflicts were most clearly evidenced in the portions of the trial involving the questioning of Cedric Byrd, Patrick Keys and Trooper Kazery, as well as in the questioning of Leah Dooley by counsel for the Appellees with regard to a pleading filed in Response to these Appellants' Motion for Separate Representation, which contained language that was of a highly adversarial nature.

In analyzing the issue, the Trial Court seemed to rest its interpretation of Long v. McKinney on the case of River Region Medical Corp. v. Patterson, 975 So.2d 205 (Miss. 2007). However, in the River Region case, this Supreme Court was only faced with an issue involving differing claims of damages, not of differing theories of liability and of trial strategy. River Region Medical Corp. v. Patterson, 975 So.2d at 207-08. Further, at no point did the River Regions Court attempt to distinguish or pare down the breadth of the Long v. McKinney case, which went to extensive lengths to summarize the history of wrongful death litigation in this State, and to set forth standards for the bench and bar to follow going forward. See River Region

Medical Corp. v. Patterson, 975 So.2d 205 (Miss. 2007); see also Long v. McKinney, 897 So.2d 160 (Miss. 2004).

Certainly the Trial Court was placed in a difficult position in attempting to balance the interests of all parties. However, Long v. McKinney *clearly supports* the favoring of substantive rights of the individual wrongful death beneficiaries over any procedural rules urged by the Appellees, that being the traditional "one lawyer per witness" rule. Further, the prejudice to the Appellants in not being able to fully protect and present their substantive case clearly outweighed any perceived harm in modifying the traditional "one lawyer per witness" procedural rule. Accordingly, the Appellants would respectfully urge that this issue alone, and particularly in combination with the remaining issues offered herein constitute grounds for a reversal of the verdict and remand for new trial.

D. The Trial Court erred in granting Jury Instructions # 10 and # 11 over the objection of these Appellants, as the same improperly instructed the jury to disregard key factual elements relevant to the Appellants' theory of the case.

The Appellants objected to the granting of instructions to the Appellees which allowed the Appellees to instruct the jury as follows: (a) that the Appellees were not responsible for the shadow in question (Tr. 1049); and (b) that the Appellees were not responsible for the condition of the driveway in question. Tr. 1049.

Jury instructions are required to be specific rather than abstract and are further required to be tied to the evidence in the case. No contention was made by the Appellants that the Appellees had created the shadow cast by a large tree or that they had created the condition of the driveway. However, those conditions were pertinent facts to be considered by the jury. Instructing the jury that the Appellees were not responsible for their creation added nothing to the jury's understanding

and instead allowed the jury to excuse these pertinent issues from their deliberations. Further, the instruction regarding the car safety seat which allowed them to consider that Jonathan had gotten out of the seat for "other purposes under Mississippi Law" also allowed the jury to incorporate the same into their deliberations, potentially excuse the actions of the Appellees, and potentially hold against Appellants that which is prohibited by Mississippi Law, where it is stated that failure to use seatbelts may not be incorporated as comparative negligence. The purported "other purposes under Miss. law" were not spelled out or cited in any way. Accordingly, the Appellants respectfully urge that the granting of each of these three instructions to the Appellees was error.

IV. 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: Wm W Fulgham
William W. Fulgham (MB# [redacted])

FULGHAM LAW FIRM, PLLC
533A Keyway Drive
P.O. Box 321386
Flowood, MS 39232
Tel: 601-932-9710
Fax: 601-932-9712
Attorneys for Appellants Dewey Dooley and Kaitlyn Patrick Dooley

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 document to:

James D. Holland, Esq.
Jacqueline H. Ray, Esq.
PAGE, KRUGER & HOLLAND, P.A.
10 Canebrake Blvd., Suite 200
Jackson, MS 39232
Attorneys for Cedric Byrd & Independent Roofing, Appellees

Don H. Evans, Esq.
James W. Smith, Jr., Esq.
Suite 100, Capitol Towers
125 S. Congress St.
Jackson, MS 39201-3302

Attorneys for Leah Fulton Dooley; Kathryn Marie Fulton, A Minor, by and Through Her Mother and next Friend, Leah Fulton Dooley; Peyton Dooley, by and Through His Mother and next Friend, Leah Fulton Dooley, Appellants

This the 18th day of June, 2010.

WILLIAM W. FULGHAM (MB[redacted])