Case No. 2009-CA-01830

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

LEAH FULTON DOOLEY; KATHRYN MARIE FULTON, A MINOR, BY AND THROUGH HER MOTHER AND NEXT FRIEND, LEAH FULTON DOOLEY; PEYTON DOOLEY, A MINOR, BY AND THROUGH HIS MOTHER AND NEXT FRIEND, LEAH FULTON DOOLEY; AND ALL HEIRS-AT-LAW OF JONATHAN WAYNE DOOLEY, A MINOR, DECEASED,
APPELLANTS

v.

CEDRIC BYRD and INDEPENDENT ROOFING SYSTEMS, INC.,
APPELLEES

Appeal from the Circuit Court of Rankin County, Mississippi

BRIEF OF APPELLANTS

ORAL ARGUMENT REQUESTED

Submitted by:

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LEAH FULTON DOOLEY; KATHRYN MARIE FULTON, A MINOR, BY AND THROUGH HER MOTHER AND NEXT FRIEND, LEAH FULTON DOOLEY; PEYTON DOOLEY, A MINOR, BY AND THROUGH HIS MOTHER AND NEXT FRIEND, LEAH FULTON DOOLEY; AND ALL HEIRS-AT-LAW OF JONATHAN WAYNE DOOLEY, A MINOR, DECEASED **APPELLANTS**

v. **CASE NO. 2009-CA-01830**

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

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and/or entities 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.

I. Leah Fulton Dooley, Appellant;

II. Kathryn Marie Fulton, a minor, by and through her Mother and Next Friend, Leah Fulton Dooley, Appellant;

III. Peyton Dooley, a minor, by and through his Mother and Next Friend, Leah Fulton Dooley, Appellant;

IV. Dewey Dooley, Appellant;

V. Kaitlyn Patrick, a minor, by and through her Mother and Next Friend, Keri Patrick, Appellant;

VI. Cedric Byrd, Appellee;

VII. Independent Roofing Systems, Inc., Appellee;

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

IX. Honorable Don H. Evans, Attorney for Appellants, 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;

X. Honorable James W. Smith, Jr., Attorney for Appellants, 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;

XI. Honorable William W. Fulgham, Attorney for Appellants, Dewey Dooley and Kaitlyn Patrick, a minor, by and through her Mother and Next Friend, Keri Patrick;

XII. Honorable Erin S. Rodgers, Attorney for Appellants, Dewey Dooley and Kaitlyn Patrick, a minor, by and through her Mother and Next Friend, Keri Patrick; and

XIII. Honorable James D. Holland, Attorney for Appellees.

RESPECTFULLY SUBMITTED, this the 17th day of May, 2010.

BY: _____
DON H. EVANS

OF COUNSEL:

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STATEMENT OF THE ISSUES

1. Whether the verdict of the jury was against the overwhelming weight of the evidence?
2. Whether 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, which would entitle the Appellants to a new trial?
3. Whether the lower court erred in failing to grant the Appellants' Motion for Judgment Notwithstanding the Verdict?
4. Whether the lower court erred in failing to grant the Appellants' Motion for a New Trial?
5. Whether the lower court erred in refusing to grant Appellants' Proposed Jury Instruction Numbers P-36; P-40; P-44A; and P-44B?
6. Whether the lower court erred in giving Jury Instruction Numbers 10 and 11?
7. Whether the lower court erred in granting the Motion for Joinder and Separate Representation, filed by Appellants, Dewey Dooley and Kaitlyn Patrick?

STATEMENT OF THE CASE

This case is an action for damages by the Appellants against the Appellees for the wrongful death of Jonathan Wayne Dooley [hereinafter referred to as "Jonathan Dooley"], a minor, who died as a result of a fatal automobile accident occurring on September 29, 2003. The trial of the case sub judice was held before a jury of twelve commencing on May 27, 2009 and continuing until June 5, 2009. The jury found in favor of theAppellees, Cedric Byrd [hereinafter referred to as "Byrd"] and Independent Roofing Systems, Inc. [hereinafter referred to as "Independent Roofing"], and against the Appellants, Leah Fulton Dooley [hereinafter referred to as "Leah Dooley"]; Kathryn Marie Fulton, a minor, by and through her Mother and Next Friend, Leah Fulton Dooley [hereinafter referred to as "Kathryn Fulton"]; Peyton Dooley, a minor, by and through his Mother and Next Friend, Leah Fulton Dooley [hereinafter referred to as "Peyton Dooley"]; Dewey Dooley; and Kaitlyn Patrick, a minor, by and through her Mother and Next Friend, Keri Patrick [hereinafter referred to as "Kaitlyn Patrick"]. A Final Judgment was entered by the lower court on June 22, 2009.

On July 2, 2009, Leah Dooley, Kathryn Fulton and Peyton Dooley filed post-trial Motions. On that same date, Dewey Dooley and Kaitlyn Patrick filed their post-trial Motions. On July 22, 2009, Byrd and Independent Roofing filed their Response to Plaintiffs' Several Motions for New Trial and JNOV. Said post-trial Motions were denied by the trial court on October 14, 2009. Leah Dooley, Kathryn Fulton and Peyton Dooley perfect their appeal from the lower court's Judgment.

FACTS

The Appellants brought this action as a result of an automobile accident occurring on September 29, 2003, whereby a minor child, Jonathan Dooley, was killed. Jonathan Dooley was only two-and-a-half years old at the time. The accident in question occurred on Highway 468 and was between a 2000 Malibu and a 1996 F-450 Ford pickup pulling a 29-foot gooseneck trailer. Leah

Dooley, the mother of the deceased child, was the driver of the 2000 Malibu. Jonathan Dooley was a passenger in her vehicle. Byrd was the driver of the 1996 F-450 Ford pickup and gooseneck trailer. At the time of the accident, Byrd was acting within the course and scope of his employment with Independent Roofing. The evidence revealed that Byrd did not possess the proper license and training to drive the truck and trailer in question and that Byrd's superiors were aware of this. The evidence revealed that Byrd missed the driveway and got stuck; that he was stuck for five minutes or so prior to this accident; and that Byrd never should've made that turn. The evidence revealed that Byrd did not have any type of warning devices in place at the time of the accident and that there were no warning devices in the truck or trailer. The evidence revealed that Byrd's trailer was completely out of the highway at one point, and that, at that point in time, Byrd lost his position to claim that the lane was his. The evidence further revealed that Byrd was backing up at the moment of impact and that he did so knowing that he couldn't see if there were any vehicles approaching on the highway. With respect to Leah Dooley, there was evidence that the shadows hindered her ability to see the trailer until it was too late to do anything in order to avoid this collision.

SUMMARY OF THE ARGUMENT

Leah Dooley, Kathryn Fulton and Peyton Dooley would show that the lower court erred when it denied their Motion for a Judgment Notwithstanding the Verdict and/or for a New Trial. The lower court's failure to rule in the Appellants' favor was reversible error. In considering the lower court's failure to correctly rule on said Motion, the Appellants ask this Court to address the following issues: (1) whether the evidence was of such quality that reasonable and fairminded jurors in the exercise of fair and impartial judgment might reach different conclusions; (2) whether the verdict of the jury was against the overwhelming weight of the evidence; (3) whether the jury departed from its oath and its verdict was the result of bias, passion and prejudice; (4) whether the jury was

confused by faulty jury instructions; and (5) whether 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, which would entitle the Appellants to a new trial.

The Appellants further argue that 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 erred in granting the Motion for Joinder and Separate Representation, filed by Appellants, Dewey Dooley and Kaitlyn Patrick.

ARGUMENT

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. Standard of Review

"When discussing whether the verdict is against the overwhelming weight of the evidence, the standard of review is abuse of discretion in failing to grant a new trial." *Smith v. St.*, 911 So. 2d 541, 544 (Miss. App. 2004). In *Herrington v. Spell*, 692 So. 2d 93, 103-104 (Miss. 1997), the Mississippi Supreme Court held that:

> In determining whether a jury verdict is against the overwhelming weight of the evidence, this Court must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial. Only when the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice will this Court disturb it on appeal.

Harris v. Lewis, 755 So. 2d 1199, 1203 (Miss. App. 1999) (quoting *Herrington*, 692 So. 2d at 103-104).

B. Elements of a Negligence Action in Mississippi

In Mississippi, there are four elements that a plaintiff must prove by a preponderance of the

evidence in a negligence suit. They are duty, breach of duty, causation and injury. *Davis v. Christian Bhd. Homes of Jackson, Miss., Inc.*, 957 So. 2d 390, 398 (Miss. App. 2007). When dealing with a negligence action, an individual is held to a reasonable person standard with regard to duty and breach of duty. The following instruction was given as Jury Instruction No. 3: "The Court instructs the jury that the word 'negligence' used in these instructions means the doing of something which a reasonably prudent person would not have done under like circumstances, or the failure to do something which a reasonably prudent person would have done under like or similar circumstances." (R. at Exhibit Folder.) According to *Davis*, "proximate cause is a concept which is more accurately defined by reference to the distinct concepts of which it is comprised, which are '(1) cause in fact; and (2) foreseeability.'" 957 So. 2d at 404 (quoting *Johnson v. Alcorn St. U.*, 929 So. 2d 398, 411 (Miss. App. 2006)). "Cause in fact means that the act or omission was a substantial factor in bringing about the injury, and without it the harm would not have occurred." *Id.* "Foreseeability means that a person of ordinary intelligence should have anticipated the dangers that his negligent act created for others." *Id.* With regard to damages, a plaintiff must prove that the defendant's negligent act caused him to be injured. *Amiker v. Brakefield*, 473 So. 2d 939 (Miss. 1985).

C. Evidence Presented at the Trial of this Matter

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

At the time of this accident, Byrd had only been working for Independent Roofing for about six months and had been hired on as a laborer in the yard, located at 5090 McRaven Road in Jackson, Mississippi. On September 29, 2003, Byrd's supervisor, Ike McLain [hereinafter referred to as McLain], sent him to Robert Smith's [hereinafter referred to as "Smith"] house in a 1996 F-450

Ford pickup pulling a 29-foot gooseneck trailer to pick up a manlift. Byrd's superiors at Independent Roofing were aware of the fact that Byrd needed a Class D driver's license to drive the truck and trailer in question, and they were also aware that Byrd did not have one. Byrd did not know how to get to Smith's house; therefore, he met up with a fellow co-worker, Patrick Keys [hereinafter referred to as "Keys"], and followed him to Smith's house, which was located at 540 Highway 468 in Brandon, Mississippi. As he was making his turn into Smith's driveway, Byrd missed the driveway and got stuck. The Appellees' versions of what happened after this point vary among their witnesses; however, one thing is certain. If Byrd and Independent Roofing were not the sole proximate cause of this accident, then they were at least a contributing proximate cause. Byrd did not possess the proper license to drive that truck and trailer. Also, Byrd's testimony as to where his tires were proves that his trailer was completely off of the highway at one point. At that point, Byrd lost the right to claim that the lane was his. Moreover, the evidence showed that Byrd backed up at the moment of impact, knowing that he could not see if any vehicles were approaching on the highway. Also, 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. During those five minutes or so, no warning devices 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. In fact, if Byrd and Keys had considered putting out warning devices, they could not have done so. No warning devices existed in that truck or trailer. Byrd and Independent Roofing's acts and omissions were clearly a substantial factor in bringing about the death of Jonathan Dooley, and had it not been for their negligent acts and omissions, Jonathan Dooley would not have received the injuries that caused his death.

Leah Dooley lived just a little over a mile from where the accident happened. Just before the accident, Leah Dooley had left her house and was on her way to Allen's Grocery Store. Prior to

leaving her house, she had put her two-and-a-half-year-old son, Jonathan Dooley, in his car seat and had buckled him in. As Leah Dooley pulled out onto the road from her driveway and had driven just a short distance, there was a curve and from that point on she could see all the way down to where the accident occurred, which is about a mile. So as Leah Dooley was driving towards the prison and Whitfield on Highway 468, she could see that the road was clear, as there were no vehicles in front of her. When Leah Dooley was about halfway to the accident scene, Jonathan Dooley unbuckled himself and crawled out of his car seat. There was testimony at trial that he had done this many times before. Leah Dooley and Dewey Dooley testified that they had tried several different car seats, but none of them had solved the problem. Jonathan Dooley could always work his way out of them. When Jonathan Dooley climbed in between the front seats, Leah Dooley became more precautious and told him to sit down. As she approached the opening where the shade trees were, Leah Dooley saw the trailer. She testified that she was about five car lengths from Smith's driveway when she first noticed it. According to Leah Dooley, the trailer was completely out of the roadway at that point in time. As she got closer to the trailer, it backed out right in front of her. She claimed that it happened so quickly that she did not have time to react. The left rear corner of the trailer cut through Leah Dooley's door posts, cut through her windshield and jerked her vehicle over to the right, into a ditch. The edge of the trailer hit Jonathan Dooley, killing him instantly. Tr. Transcr. vol. 18, 567-581; 585-586; vol. 19, 614; 742; vol. 20, 834; 838 (May 27 - June 5, 2009).

In part, because of Officer Kazery's testimony, the Appellants chose to offer a comparative negligence instruction, allowing the jury to apportion some percentage of fault to Leah Dooley if they so desired. Said proposed Jury Instruction was given as Jury Instruction No. 20. (R. at vol. 13, 1879-1880). 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. Officer Kazery testified as follows with regards to what would be considered following too closely:

> A. A safe distance. There's that two or three car lengths, depending on the speed. But most drivers can tell that -- when they're too close and when they're tailgating. But when you see someone's brake lights, that's your automatic reaction to hit your brake lights too or take your foot off the accelerator and slow down.

Tr. Transcr. vol. 20, 870:24-871:1.

Obviously, Leah Dooley was not tailgating; and 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. Tr. Transcr. vol. 21, 977-978.

Two accident reconstructionists, James Hannah [hereinafter referred to as "Hannah"] and William Partenheimer [hereinafter referred to as "Partenheimer"], disagreed with Officer Kazery's conclusion that Leah Dooley was following too closely. Hannah did not believe that Leah Dooley was following to closely. His testimony is set out in great detail below. Partenheimer also testified that Leah Dooley was not 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, in fact, 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 to conclude that Leah Dooley was following too closely.

a. 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. 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. McLain, Independent Roofing's own employee, testified that he believed that this was a cover up. McLain could tell that Byrd and Ramsey were trying to hide the fact that Byrd had backed 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, for the first time, that he had backed up. As previously mentioned, Byrd initially testified that he never backed up. His testimony to the same was as follows:

Q. And you had never went backwards or forwards?
A. I tried to back up. It wouldn't go backwards.
Tr. Transcr. vol. 16, 213:23-26.

. . .

Q. Did you ever move?
A. Yeah, I moved up. When -- when he came back and he was directing me forward,

I was easing up and that's when the wreck happened.

Q. You was easing up or easing back?

A. It can't go back. That truck will not push that trailer up the hill.

Q. It never did go back at all?

A. No.

Tr. Transcr. vol. 16, 215:22-216:1.

A. [W]hen I tried to back up, it wouldn't go back.

Tr. Transcr. vol. 16, 253:15-16.

At one point in time, Byrd even testified that from the time he turned into the driveway and got stuck his vehicle never moved until after the accident was over. His testimony was as follows:

Q. And so . . . from the time you turned off this truck never moved . . . until after the accident was over and somebody finally moved it on down?

A. Yes.

Q. And that's your testimony?

A. Yes.

Tr. Transcr. vol. 16, 214:8-14.

This testimony, of course, contradicts the testimony above, whereby Byrd testified that he was "easing up" as the wreck happened. Tr. Transcr. vol. 16, 215:23-25. Eventually, Byrd was forced to admit that he had backed up. His exact words were "**I backed up** a little bit." Tr. Transcr. vol. 16, 225:16. The reasoning behind Byrd's inconsistent statements was also revealed. McLain testified that Byrd had been 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. McLain's testimony to the same was as follows:

Q. Did you ever talk to Cedric any other time about when he was backing up?

A. Yes, I did.

Q. And what did he tell you?

A. **He told me that he was told if he stuck to his story he could use Independent's attorneys. But if he changed his story, he was on his own.**

Q. So he never told you one way or the other?

A. No, sir, he did not.

Tr. Transcr. vol. 17, 346:3-11.

Byrd may not have admitted to McLain that he backed up; however, Ramsey, Independent

Roofing's safety director, implied to McLain that he had. McLain observed all of the spinning marks and told Ramsey that Byrd was backing up. Ramsey then told McLain to "hush" and informed him that it was being taken care of. McLain's testimony regarding this issue was as follows:

Q. -- while you were out there that day, did you at any time discuss with Russell Ramsey in regards to the spint marks and backing up?
A. Yes, I did.

. . .

A. We was standing beside the truck and I told him to get on that -- that -- the cell phone was throwed towards the front of the truck. I said he was backing up, and Russell told me first don't say anything, leave it at that.
Q. Did you do that?
A. I did. I didn't say anything else.

. . .

Q. Okay. Now, I asked you if you had talked to . . . Mr. Russell Ramsey, the safety man, at that time, director out at the scene, in regard to the -- the dirt kicked up and the spinning of the tires. Did you talk to him?
A. Yes, I did.
Q. What did you tell him and what did he say?
A. I was showing him how the back tires was spinning the dirt up and the grass in front of the tire. **I said he was backing up and Russell told me to hush, don't say anything, it's being taken care of.** And I didn't say anything else. I just throwed my hands up and walked away from it.

Tr. Transcr. vol. 17, 347:16-349:26.

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. His testimony was as follows:

Q. Did he come up to you and say, "They were spinning out here; they were backing up?"
A. I have no recollection of that.
Q. You just don't remember whether it happened or not?
A. (Nods head negatively.)
Q. Is that true?
A. That's true. I don't remember anything that we talked about. It was, you know --

. . .

Q. You say no that you don't remember whether or not Ike actually did make the statement to you at the scene, "There are spin marks here. They were backing up."

You say now maybe he could have, you just don't remember. Is that a fair –

. . .

A. I don't remember -- sorry.

Tr. Transcr. vol. 18, 515:28-517:5.

. . .

Q. You seemed unsure a little -- a minute ago and it has been a while. So I want to ask you: **Did Ike McLain ever come up to you and say they were backing up and you respond, "Hush. Don't say anything. It's being taken care of?"**

. . .

Q. **Did you tell him that?**
A. **I don't remember that.**
Q. **You could have, you just don't remember?**
A. **I don't remember.**

Tr. Transcr. vol. 18, 520:8-21.

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. Ramsey testified as follows when questioned about why he never revealed McLain's name in said Responses:

Q. As you sit here today, who all do you know had knowledge of this accident?
A. I mean, Cedric and Pat and Ike, myself.
Q. Let's stop right there. We'll pick up there in a minute. You knew that each of those people had knowledge because you talked to everyone of them out on the scene; is that right?
A. That's right.
Q. Why did you not disclose Ike McLain's name when you signed these interrogatory responses under oath stating these are the people that know about this accident?
A. I'm not sure.
Q. No explanation as to why you left his name out? You talked to him on the scene. You don't have any explanation as to why you didn't include his name in your interrogatory responses?

. . .

A. No, I don't.

Tr. Transcr. vol. 18, 526:8-28.

. . .

Q. Your second interrogatory responses were January 2006. Why did you still not disclose Ike McLain's name?
A. I'm -- probably because I didn't remember. I just didn't remember.
Q. You didn't remember him?
A. Yeah. I mean, I just -- you know, I didn't remember him. I mean, I just didn't remember. I don't -- I don't know the answer.

Q. Did you ever ultimately add Ike McLain's name to these responses?
A. I can't remember. I mean --
Tr. Transcr. vol. 18, 528:2-21.

McLain, Independent Roofing's own employee, believed that Byrd and Independent Roofing were trying to cover up something, and his testimony to the same was as follows:

Q. What did you say was wrong with what they were telling?
A. Well, none of it added up. I mean, you know, **it was obvious to me that the truck was backing up and everybody seemed to be wanting to cover it up.**
Tr. Transcr. vol. 17, 377:25-378:1.

Byrd and Independent Roofing tried to coverup the truth about what really happened on the date of this accident. There is no question about that.

b. Byrd and Keys told two completely different versions of what happened.

First, Byrd testified that he asked Keys to check the mailbox because he did not want to hit it. Byrd also testified that Keys was helping him because he was stuck. Tr. Transcr. vol. 16, 211-212. Keys testified that he was just helping Byrd check to see if he was going to miss the mailbox, and that "[t]hat's the only reason [he] could see why [Byrd] was stopped." Tr. Transcr. vol. 16, 272:22-25. Keys implied that he did not know that Byrd was stuck. Second, Byrd testified that Keys walked to the mailbox. Tr. Transcr. vol. 16, 254:18-22. To the contrary, Keys testified that he never walked to the mailbox. Tr. Transcr. vol. 16, 273:7-10. Third, Byrd testified that Keys directed traffic. Keys testified that he never directed traffic. Byrd's testimony to the same was as follows:

A. [P]atrick went up there to check the mailbox and he directed at least three cars pass.
Tr. Transcr. vol. 16, 211:15-16.

A. [H]e walked up there and had about two or three cars going -- getting out of the street and he direct them on passed and he told me I had it clear on the mailbox.
Q. He -- he was directing the cars back behind you?
A. They had no more than about three.
Q. But he directed them around you?
A. Yes.

Q. That's because you were stuck out in the road, weren't you?
A. Yes.
Q. Now, you hadn't never testified he directed traffic around you, did you?
A. I been say they had three -- about three or four cars passed by.

Tr. Transcr. vol. 16, 212:5-20.

Keys' testimony regarding this issue was as follows:

Q. Okay. Now you yourself, you didn't never flag anybody around the cars, around the trailer, did you?
A. No.

Tr. Transcr. vol. 16, 286:24-27.

Fourth, Byrd testified that Keys told him to back up. Later, Byrd testified that Keys had never asked him to back up at any time; however, when confronted with his prior testimony, he changed his story. He then went on to testify that Keys told him to back up when he first got there. Keys, on the other hand, testified that he never told Byrd to back up. Keys actually admitted that one of them had to be lying about this issue. Byrd's testimony to the same was as follows:

Q. And he told you to back up, didn't he?
A. Yes.

Tr. Transcr. vol. 16, 236:18-19.

. . .

Q. Had he ever asked you to back up at any time?
A. No. I -- I backed up.
Q. Do you remember testifying that he -- to start with, he came over where he -- he told you to back up?
A. Yes, he told me to back up when he first got there.
Q. When he -- when he first came over to your vehicle?
A. Yes. He said back up just a little bit. Back up just a little bit, you know, catch the hole.

Tr. Transcr. vol. 16, 254:1-13.

Keys testified that he never told Byrd to back up. His testimony was as follows:

Q. Did you ever ask him to back up?
A. No.
Q. You never not one time?
A. No.

Tr. Transcr. vol. 16, 274:11-14.

. . .

Q. All right. You say that you never told Cedric Byrd to back up?
A. No.
Q. **And if he testified in this court today that you told him to back up, one of you wouldn't be telling the truth, would you**?
A. **That's true**.

Tr. Transcr. vol. 16, 286:28-287:5.

Fifth, Byrd testified that he "had to back up." Tr. Transcr. vol. 16, 233:25. Keys testified that he saw no reason why Byrd had to back up. Tr. Transcr. vol. 16, 274:15-17. Sixth, Byrd testified that he was "easing forward" as the wreck happened. Tr. Transcr. vol. 16, 225:18-19. To the contrary, Keys said Byrd had not started moving forward when the wreck happened. Keys' testimony was as follows:

Q. All right. Cedric Byrd was -- when you walked up to start move-- to direct him down, had he ever actually get start -- got started moving yet?
A. No. Like I said, by the time I got back -- by the time I got back around the front to start motioning down, that's when we hear the loud noise.
Q. So he was sitting right there when she hit him?
A. Yes.

Tr. Transcr. vol. 16, 286:13-23.

Byrd and Keys told two completely different versions of what happened. Obviously, at least one of them was being untruthful. There is no question that Byrd lied several times.

c. The combination of Byrd, Keys and Officer Kazery's testimony confirms Leah Dooley's contention that Byrd was backing up at the moment of impact.

Keys never saw Byrd try to back up. Byrd testified that he did back up. 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. Byrd admitted that he backed up. Leah Dooley testified that Byrd backed out in front of her. Tr. Transcr. vol. 19, 627:11-15. 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. Keys also 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." Tr. Transcr. vol. 20, 882:9-13. Officer Kazery took that to mean that Keys was walking from his vehicle toward Cedric's vehicle, when the accident occurred. Tr. Transcr. vol. 21, 922:12-16. Officer Kazery testified that Byrd and Keys never indicated to her that Byrd had been stuck. Tr. Transcr. vol. 21, 922:17-28. 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." Keys' testimony was as follows:

> A. [B]y that time . . . I was walking in front of the truck. That's when I heard a big'o loud noise like glass . . . something just busted. Then I looked to my left, I didn't see anything. I looked over to my right and that's when I seen the car sliding down in the ditch.

Tr. Transcr. vol. 16, 272:7-13.

> Q. And at the time she come off this bank, if I understand you, you said you was in front of the truck?
> A. Yes. Yes. Almost to the front of it, yes.
> Q. How far in front it?
> A. Mostly to the left of the truck. I mean, if you stand in front of it, it'd be to the left of

the truck.
Tr. Transcr. vol. 16, 283:21-29.

As shown above, Keys testified that he was out there the whole time and that he never saw Byrd try to back up. Byrd testified that he backed up. Therefore, 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 of Byrd, Keys and Officer Kazery 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.

d. At one point, the rear of Byrd's trailer was completely off of the highway.

Byrd's own testimony proved that the rear of his trailer was completely off of the highway at one point. According to Byrd, his front wheel went down in the ditch as he was turning into Smith's driveway. Tr. Transcr. vol. 16, 212-215; 236. At first he claimed that his "back tire hadn't been in no hole." Tr. Transcr. vol. 16, 217:21. However, Byrd eventually admitted that his back tire had been in the hole. Tr. Transcr. vol. 16, 225-236. 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. Tr. Transcr. vol. 16, 221-222. Byrd also testified that his rear tire was in that culvert at one point. Tr. Transcr. vol. 16, 225-227. According to Hannah's testimony set forth below, Byrd's testimony confirmed Hannah's opinion that the trailer was out of the roadway at one point.

Hannah is an accident reconstructionist who has investigated thousands of automobile

accidents. Hannah testified that the rear of the trailer was out of the highway at one point. Tr. Transcr. vol. 19, 659; 663; 672. Hannah referred to Plaintiff's Exhibits 28, 29, 31 and 32 when explaining how he had reached this conclusion. Hannah also heard Byrd's testimony, and used his testimony in forming his opinion. According to Hannah, if the rear tire was down in the ditch area and the front tire was where the X is, then the tail of the trailer would be some 5-foot further to the west, meaning that it would be further into the driveway. Hannah's testimony regarding the same was as follows:

Q. [E]xhibit Number 28, . . . did you hear the testimony where Cedric Byrd said he drove his front wheel down to where . . . I put the X?
A. Yes, I did hear that testimony.
Q. And -- did you hear him say that this road down through here . . . is the path that he traveled the first time down?
A. [I] did hear that . . . .

Tr. Transcr. vol. 19, 662:7-16.

Q. Now, to where the zero was, what does that supposed to have been?
A. That was signified as, you marked it based on his answer, as the bottom of the . . . ditch.
Q. The ditch. Where the culvert was?
A. Yes. Where the rear tire was at one point.
Q. Okay. Now . . ., looking at this, if this rear tire was down in this hole or down in this area, and the front tire was out where we put the X . . ., where would the tail of the trailer be?
A. It would be some 5-foot further to the west. It would be further into the driveway. Because in order for that vehicle's rear tire to be at the bottom of that ditch area and the front tire to be further to the west towards that house, that would take the whole unit[] and move it towards the house.
Q. So . . . at that point once it comes down here and gets down like he says down in here, **would there be anything in the road out there when Leah Dooley came by**?
A. Well, when you look at where the trooper marked the very edge of the rear of that trailer in the roadway, it was measured at about 5.5 feet. The bed of that truck is roughly a 10-foot bed. So if you move the tire forward down into the ditch, it's going to be about 5 or 6 feet down further. So that would take that entire unit and move it. **The rear of it would be out of the road. She has the fog line, the edge of that roadway.**

Tr. Transcr. vol. 19, 662:25-663:27.

Hannah then went on to testify that there were several other indications that the truck moved

further back than where the mark was for the tire. His testimony was as follows:

Q. Now, that's looking at just the tire, and do you have any indication from these other photographs here that, in fact, the truck moved further back than where the mark was for the tire?
A. Yes. There's several. Actually, that's one that helps, and that is Exhibit -- I'm not sure what the number on that one is.
Q. This is Exhibit Number 31. . . .

Tr. Transcr. vol. 19, 663:28-664:6.

Q. Okay. Now, in looking at Exhibit Number 31, if this orange mark is where the truck is, where is the marks?
A. Well, the . . . dig out marks that would be associated with where the orange mark is belong to those dual wheels that are on the driver's side of this F-450 truck here. And as it backs up the hill digging out ground, we can see in Exhibit -- to the left of you, sir, which one is that? Exhibit?
Q. Exhibit Number 31 right here.
A. **Exhibit 31, that the truck actually had dug out further up the hill than it was at final rest**. That information that you see in Exhibit 31 is underneath the truck and it's covered in shadows there. But **there are some better pictures that show even passed the shadows with the mud flap hanging down that the truck actually had backed up further up the hill than what final -- at the -- than what that final rest**.
Q. And you say with the mud flap. **I'm going to hold up Exhibit Number 32 and ask you . . . if that's the one you're talking about**?
A. **Yes**. That would be one of the pictures with the truck still sitting there. That picture is very similar to what we see in the picture here with the green garbage can, which is Exhibit -- I'm not --
Q. The green garbage can is Exhibit Number 29.
A. And Exhibit 29, that's just a better closer-up picture with the shadow. You can see the information under the -- the tire versus the one in 29.
Q. Now, in looking at Exhibit Number 28 here, you see the pawing marks all the way across there. And where is the orange?
A. The orange is to the -- back towards the house further down this -- this hill.
Q. And would it be where I've got it marked right there at the orange?
A. Yes. Take the mark for a moment.
Q. (Attorney complies.)
A. Yes. That would be where it is.
Q. Okay. The tire's sitting there. What does that indicate for all that distance across there and up this hill?
A. That . . . indicated that that tire, as we can see here, which would be the driver's side rear drive axil, that the tire on that tire, the dual tires, were digging as it was backing, attempting to go back up the hill, and **it actually was further up the hill than what we see in Exhibit 29**.

Tr. Transcr. vol. 19, 664:11-666:5.

Q. Is there anymore marks in here that would lead you to believe that you can make any determination as to any movement out in this area --

A. Yes.

Q. -- on 28, Number 28?

A. Yes. **In 28** you can see, and it's a lot clearer on the smaller photo, the 8 by 10s versus the blowups, that any area where we see the red X that was marked during Cedric Byrd's testimony and where the orange final rest mark for the front driver's side tire is, that in that area there's been some twisting and turning as the vehicle's going back and forth. You can see the grass has been laid over and that **it actually was further to the south and towards the house where the X is**.

And as you look at where the orange paint was in this particular photograph where we see the back of the trailer is at the front of the house. Now, you can see that in that area the grass has been laid over because the front tire has gone through that area. There's been twisting and turning as the vehicle's attempted to go forward and backward.

Tr. Transcr. vol. 19, 666:24-667:17.

Q. So can you form an opinion as to one way or the other as to whether or not the truck, after pulling in, ever got completely out of the driveway, out of the highway?

A. Yes. Based on the -- information that I was able to look at, which again would be these photographs and the information that was documented with final rest and where the driver of the -- this vehicle documented by marking on this photograph where it was at one point, it gives us the information to show us that **it was at least six feet off the roadway from where final rest was**; and, so, **so that would put the rear of it off the roadway**.

Tr. Transcr. vol. 19, 672:17-29.

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. She 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. 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. This coincides with Hannah's testimony that "[t]he truck actually had dug out further up the hill than it was at final rest." Tr. Transcr. vol. 19, 664:21-23. The rear of Byrd's trailer was

completely off of the road at one point.

e. Byrd backed up at the moment of impact.

The record is replete with evidence proving that Byrd had backed up at the moment of impact. Byrd, McLain, Leah Dooley, Hannah and Partheimer all agree that Byrd backed up. Byrd admitted that he backed up. McLain, Independent Roofing's own employee at the time of this accident, testified that Ramsey, Independent Roofing's safety director, implied to him that Byrd had backed up. Leah Dooley testified that Byrd "backed out into" her. Tr. Transcr. vol. 19, 627:15. In addition to the evidence presented above proving that Byrd backed up, two accident reconstructionists, Hannah and Partenheimer, testified at trial. Hannah and Partenheimer both testified that Byrd backed up at the moment of impact.

According to Hannah, Byrd backed up just prior to the impact. Initially, Hannah went over all of the evidence proving that Byrd had backed up. His testimony to the same was as follows:

A. And as you look at where the orange paint was in this particular photograph [Exhibit Number 28] where we see the back of the trailer is at the front of the house. Now, you can see that in that area the grass has been laid over because the front tire has gone through that area. There's been twisting and turning as the vehicle's attempted to go forward and backward.

. . .

Q. Okay. Now, . . .the back tire, did it go up on above the culvert as it pulled down?
A. ~~That is what he represented it to do.~~
Q. And so in backing up, if -- if -- in his first trip through there, why could he not go on straight on down?
A. The vehicle obviously got hung up as --
Q. On what?
A. -- he attempted to. On the top edge of the driveway.
Q. And that means he couldn't go forward anymore?
A. Couldn't go forward at that point. **He started trying to back up. And as he backed up**, because of the slant of the hill, **the vehicle actually went up the hill, but it also was** - - we can see in the photographs that the vehicle was **actually going down the hill at the same time as it was trying to back up the hill**.
Q. When you say down the hill, as he's backing here is he also going that way?
A. Well, the directions would be in that particular photograph, the T, as we look at it there, would be running the longer part up in the -- top to bottom, the vertical of that

photograph, would be east and west; where the T comes off would be north and south. So as we look east and west, that -- that hill off that driveway slopes downward and it slopes downward down to the south also. I think everybody was able to walk around out there and kind see how it sloped both directions. **So as he's trying to climb the hill, it's pushing him also, and then there was an impact.**

. . .

A. My investigation revealed that based on the factual evidence that was found, the marks where they were found, and the distance of them, and knowing where the vehicle came to final rest, that this -- **the edge of the trailer was out of the road**, that it was about the fog line, which would be the white line on the edge of the road; based on all this information and its totality of what we have in these photographs, and then coupling that with the information that I've heard as far as testimony.

Q. So when you say it was out of the road on over to the white line is what you're saying?

A. Yes, into that driveway.

Q. And then . . . what happened?

A. **The vehicle did go backwards**. It did go back to the east. The driveway exits the road onto the west. The vehicle re-entered the road back to the east into that traffic lane.

Tr. Transcr. vol. 19, 669:23-672:16.

Hannah then testified that **Byrd backed up onto the highway "[s]ometime just prior to that impact."** Tr. Transcr. vol. 19, 673:1-4. Partenheimer also testified that the evidence showed that Byrd was backing up at the time of impact. Tr. Transcr. vol. 17, 400-401; vol. 18, 465.

f. Shade was a factor to be taken into consideration when determining whether Leah Dooley could've done anything in time to prevent this accident.

Shade was a factor to be considered when determining whether Leah Dooley could've done anything to prevent this accident. Dan Warren is a sergeant with the Rankin County Sheriff's Office. Sergeant Warren testified that he went to the accident scene on September 29, 2003. Tr. Transcr. vol. 16, 178-179; 181:7-11. According to Sergeant Warren, you couldn't see the bed nor the trailer of the truck as you pulled up to the accident scene. He testified as follows:

Q. All right. As you approached the scene, describe the terrain, especially on the right-hand side, and what, if anything, you could see?

A. As you -- as you pulled up to it, the way the -- the sun was, there's a large oak tree behind the -- 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.

Tr. Transcr. vol. 16, 181:29-182:8.

Q. Now again, sir, I ask you whether or not coming down 468 going westbound could you see that portion of that trailer as you approached that scene?

A. No, sir. This picture [Plaintiff's Exhibit 22] was taken sometime after the accident and it -- it's just going be matters of -- a matter of minutes there to where the -- you can see the shadow in the background. At the time I arrived, the shadow was still on the trailer and on the truck and **you couldn't see that black truck and trailer sticking out into the road**.

Tr. Transcr. vol. 16, 183:11-21.

At trial, 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. He testified that based on his compass and the vehicle that he was in, the road in question runs north and south, "[w]hich would put the sun in the east and west portions of the road casting shadows" at the time of day in which this accident happened. Tr. Transcr. vol. 19, 675:25-27. Hannah then referred to Plaintiff's Exhibits 58 and 63(A). He testified that you can't see off to the side until you get to the opening. Hannah stated that there was no way you could see back at the distance shown in Plaintiff's Exhibit 63(A). He took measurements from there and testified that "[i]t would be about a thousand feet from where we are in this photograph to where the driveway is . . . and . . . about four mailboxes up." Tr. Transcr. vol. 19, 677:23-678:3. The opening that he was referring to is shown is Plaintiff's Exhibit 58, which is a photograph of where the accident happened. Hannah testified as follows with regards to what Plaintiff's Exhibit 58 and Plaintiff's Exhibit No. 63(A) showed:

Q. Now the opening that I'm talking about, which all the jurors went out there and saw . . . these orange marks, is that where the wreck occurred in Exhibit Number 58?

A. Yes. The orange marks, the bottom of that picture to the left, would be the two trailer tires, the driver's side and the trailer tires of the trailer, at final rest.

The part, in the picture at the top, we see back up on the highway.

Where the trooper is standing would be the rear edge, right in front of him back towards us would be the rear edge of that trailer.

And the other two marks are the scuff mark left by the driver's front tire are the driver's side of that Malibu.

Q. And we've talked about coming down. The . . . picture you just looked at was Exhibit 63(A), . . . is this picture from a different direction?

A. Yes. That's the same lane. We're looking to the lane to the right in the -- in the 63--

Q. A?

A. -- A, and it's in the left part of --

Q. Fifty-eight.

A. -- fifty-eight.

Q. So the opening we're talking about, you see trees over to the left top up here?

A. Yes, sir.

Q. So the only opening we're talking about is from . . . the trees to these orange areas.

A. There's an opening there, but also there's a shadow being cast in that area. You can see that there has to be a tree back to the west of that area.

Tr. Transcr. vol. 19, 678:4-679:10.

There was testimony that Leah Dooley was going about 52 miles per hour at the time of the accident in question. Tr. Transcr. vol. 18, 474-475; 577. There was also testimony that the speed limit was 55 miles per hour. Tr. Transcr. vol. 19, 624. Hannah measured the distance between these trees and Smith's driveway. He testified that it was less than 300 feet, somewhere in the vicinity of 250, 260 feet. Hannah testified that a car coming down the road at 52 miles an hour is 76 feet per second. According to Hannah's calculations, using 250 feet, it would have taken Leah Dooley a little over 3.2 seconds to cross from that opening there to where the accident occurred. Tr. Transcr. vol. 19, 679:11-29. Also, Hannah testified that Leah Dooley would've had to have been 234 feet back from the trailer once she saw it backing out to actually stop before she got there. According to Hannah, Leah Dooley was too close to do anything to stop the accident from happening. He reiterated the fact that the evidence clearly showed that Byrd was backing up and that Byrd's vehicle "[s]hould have been away from the edge of the road based on the evidence and the testimony of the driver of this particular vehicle." Tr. Transcr. vol. 19, 682-683.

Hannah also testified that he had watched the video from Sergeant Warren's camcorder that

was in his patrol car. He described what he saw on that video. Hannah testified the trailer blended in with the shadows that were cast from the trees that were there on the side. He said that you could distinguish the truck but not the trailer. He also testified that you couldn't see the conspicuity tape because nothing was reflecting off of it. Tr. Transcr. vol. 19, 684-685; 687-688. Sergeant Warren reached the accident scene before Officer Kazery. Tr. Transcr. vol. 19, 929:21-23. Sergeant Warren's video was introduced into evidence as Plaintiff's Exhibit 80.

The driveway in question belonged to Smith, and he agreed with the aforementioned testimony regarding the shading and trees. Smith testified that when you're coming from Brandon there is a line of trees that come up to the edge of the highway until roughly before you get to his house. Smith further testified that you can't see his house until you clear that line of trees. Tr. Transcr. vol. 17, 320-321. Partenheimer believed that the shadows contributed to this accident. Tr. Transcr. vol. 17, 445. Several witnesses testified that the shaded area where this accident happened made it difficult to see the trailer in question. Shade was certainly a factor to be taken into consideration when determining whether Leah Dooley could have done anything to prevent this accident.

g. Byrd and Independent Roofing were partially at fault for this accident.

Byrd and Independent Roofing were partially at fault for this accident. The evidence proved that Byrd actually backed up onto the highway and hit Leah Dooley's vehicle, causing the death of Jonathan Dooley. However, for the sake of argument, even if you go with the Appellees' multiple contentions of what happened, Byrd and Independent Roofing would still be negligent, because the trailer was sticking out in the roadway with no flagman or warning devices in place in what was considered to be an extremely shaded area. Furthermore, Independent Roofing was negligent in sending Byrd, a man without a Class D driver's license, out in a F-450 Ford pickup pulling a 29-foot

gooseneck trailer to pick up a manlift.

i. Byrd was not qualified to drive the truck and trailer that was involved in the accident.

Byrd failed to possess the proper license and training that was required in order for him to legally drive the truck and trailer that were involved in this accident. 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 type of training in driving the truck and trailer that he was driving at the time of this accident. According to Byrd, he drove 18-wheelers in the '80s for his father; however, he only drove from one yard to another, which was only about a mile down the road. Byrd was hired on at Independent Roofing as a laborer about six months prior to this accident. Byrd's job as a laborer consisted of loading materials, going to jobs, unloading trucks, getting in materials, storing materials and keeping materials in proper order. Byrd claimed he had pulled the trailer in question many times. Tr. Transcr. vol. 16, 197-202. McLain, Byrd's supervisor, testified that Byrd had pulled the trailer a couple of times or so but had never made any long trips. According to McLain, Bill Clayton 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 testified that he called Ramsey to see what Ramsey thought about the situation, and Ramsey agreed that McLain should send Byrd. Therefore, McLain sent Byrd to do the job. Tr. Transcr. vol. 17, 332-335.

Byrd had never been to Smith's house; therefore, he followed behind Keys. According to Byrd, no one warned him about the sharp turnoff with the dangerous driveway. Byrd testified that he got stuck as he was turning into Smith's driveway. Tr. Transcr. vol. 16, 206-212. Byrd admitted that he missed the driveway, because he just did not swing wide enough. Tr. Transcr. vol. 16,

213:15-17; 263:18-20.

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 was the one who transported the boomlift to his house. He did so in the same truck and trailer that is at issue in this case. Tr. Transcr. vol. 17, 316, 317. Smith testified that he knew his driveway well; however, when he was asked whether or not he had any trouble getting into his driveway with the boomlift, he testified as follows:

A. I didn't take it in my driveway.
Q. How did you get it in?
A. The gravel road that went down beside my house.

Tr. Transcr. vol. 17, 322:12-18.

Smith further 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. Smith had a Class A commercial driver's license, and he chose not to take his own driveway, which he knew well. Tr. Transcr. vol. 17, 322, 323, 325.

Two accident reconstructionists testified that Byrd shouldn't have made that turn. Partenheimer testified that Byrd made a turn that he probably shouldn't have made to begin with, because he couldn't 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, 465:26-466:1. 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.

Ramsey, Independent Roofing's safety manager, admitted that he was aware at the time of the accident that Byrd had not ever had any type of training classes to drive that truck and trailer. Ramsey also **admitted that Byrd needed a Class D commercial driver's license to 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 Independent Roofing.

Independent Roofing had a duty to send an experienced employee who had a Class D driver's license to do the job that Byrd was sent to do. Independent Roofing breached that duty when its employee sent Byrd out to do the job. Byrd failed to possess the proper license and training required to operate that truck and trailer. A reasonable person or company would not have sent Byrd out in that truck and trailer. Furthermore, 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 that truck and trailer 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 on September 29, 2003. Byrd breached that duty when he failed in his attempt to turn the truck and trailer from a direct course on the highway into a driveway of Robert Smith 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. Byrd never should've driven that truck and trailer. Byrd and Independent Roofing were partially at fault for this accident.

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

There were no flagmen or warning devices in place at the time of this accident. According to Keys, Byrd began his turn into Smith's driveway about three, four or five minutes before the wreck occurred. He testified that he believed that it may have been about five minutes. Tr. Transcr. vol. 16, 277; 287; 298. Byrd believed it to be more like two minutes. Tr. Transcr. vol. 16, 223-225. During that time period of five minutes or so, Byrd and Keys made no attempt to put out any warning devices, and Keys testified that he never made an attempt to direct traffic. Tr. Transcr. vol. 16, 257; 262; 278-279; 286. Byrd testified that Ramsey had told him to put out flags and have someone flagging if he ever got stuck in the road. Tr. Transcr. vol. 16, 236-237. However, Byrd and Keys

failed to do so on that day; and had they even thought about putting out warning devices, they could not have done so. McLain, Byrd's supervisor at Independent Roofing, testified that there weren't any type of warning devices in that truck. Tr. Transcr. vol. 17, 350:8-11.

Neither Byrd nor Keys saw Leah Dooley's vehicle prior to the accident. Tr. Transcr. vol. 16, 232; 275. Byrd testified that he could have pulled out of the way, if he had only known that she was coming. Transcr. vol. 16, 232:4-6. Byrd was completely dishonest, however, when it came to the issue of whether he knew that he was out in the roadway. His testimony was as follows:

> Q. All right. Did you know that you were out in the road?
> A. **I knew I was a little bit in the road**. That's why I was pulling in.
> Q. [D]id you not testify in your deposition that at that particular time you didn't know you were still stuck out in the road?
> A. No, sir, I didn't.
> Q. You didn't say that or you --
> A. I -- **I didn't know that I was still stuck out in the road**.

Transcr. vol. 16, 232:23-233:5.

According to Partenheimer, the Appellees created a complex traffic hazard. Transcr. vol. 17, 408-409; 411-412. 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." Transcr. vol. 17, 424:13-19. Partenheimer read aloud § 392.22(b)(1) of the Federal Motor Carrier Safety Regulations, which deals with warnings and flags. He read as follows:

> A. "General Rule. The sections provided in Paragraph B(2) of this section whenever a commercial motor vehicle is stopped upon the traveled portion or the shoulder of the highway for any cause other than necessary traffic stops, the driver shall, **as soon as possible**, but in any event -- but in any event within 10 minutes place the warning devices required by 393.95 of this chapter."

Transcr. vol. 17, 444:16-23.

Partenheimer testified that "[i]n essence [the aforementioned 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." Tr. Transcr. vol. 18, 471:4-17.

Officer Kazery even agreed that this regulation doesn't mean they've got 10 minutes they can sit there and wait to put out the signs. Tr. Transcr. vol. 21, 957:26-29. She also testified as follows with regards to what she would've expected Byrd to do:

> Q. Well, what if Cedric's situation where he's stuck and his trailer is out in the road? Then would you say that he can sit there without any warning devices out?
> A. I would think that he would go ahead and stand out there. Since he's stuck, he can't move the vehicle. **I would assume the reasonable thing to do would be for him to go stand at the rear of his trailer.**

Tr. Transcr. vol. 21, 958:10-18.

As soon as Deputy Bryant arrived at the accident scene, he used his vehicle as a warning device so that no one else would collide with the trailer. 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.

According to Partenheimer, the Appellees were negligent. **Partenheimer testified that there isn't any scenario under which the Appellees did not bear responsibility**. He further testified that there is a scenario in which the Appellees 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 the Appellees' contention that Byrd was sitting still, the Appellees 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 and Independent Roofing had a duty to have warning devices available in the truck and/or trailer, 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 or trailer 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 triangles, cones and/or similar warning devices out in the roadway within a reasonable time period. 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. That is what a reasonable person would have done in that situation. The Appellees were partially at fault for impeding the roadway and for failing to have a flagman or warning devices in place.

iii. Byrd backed up at the moment of impact, knowing that he couldn't see if a car was coming; knowing that there were no warning devices in place; and knowing that there was no flagman back there directing traffic.

At trial, there was evidence proving that Byrd backed up at the moment of impact. Byrd testified that Keys was not directing traffic when he backed up and that he couldn't see down the road to tell if anyone was coming. His testimony was as follows:

Q. So . . .you wasn't trying to back up when he [Keys] was up there directing traffic?
A. No. Huh-uh. (Negative response.)
Tr. Transcr. vol. 16, 253:8-11.

Q. Could you see down the road and tell if anybody was coming?
A. **No, I can't see down the road.**
Tr. Transcr. vol. 16, 235:26-28.

He admitted that he couldn't 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, this was

negligence on the part of the Appellees. Hannah's testimony to the same was as follows:

Q. [A]re you familiar with the Mississippi Driver's manual?
A. I'm familiar with that and the rules of the road. I had to enforce them for years.
Q. And what about backing out in a road? What's the rule in regard to before you can back out in a road?
A. Well, you need to make sure it's safe and that you can safely do it. Someone needs to be back there checking it to make sure you're safely -- you don't use your mirrors to do it. You don't just pull out into the roadway. You need to make sure it's safe.
Q. Did you - - did you determine whether or not he had someone back there checking at the time you say he backed out in the road?
A. Well, no, that is what's particular about this accident is that there were two people there. There was a driver and another driver that had already gotten in a vehicle into the location and he got out of his vehicle and actually started back, by his testimony, where he should have been, which would have been up at the roadway, to keep the motoring public safe. Because before you pull or back into a street, you need to make sure because the through traffic on a highway, a Mississippi highway, has the right of way when you're pulling from a private drive

So what I found in this particular case is that the person that was there or even close to -- ones says he was close, that he was at the rear of the truck; the other says -- the driver of the truck says he was back there at some point in time, that he moved back to the front of the truck, that --that there was no purpose for that. He should have stayed at the rear to make sure nothing was coming.

I found that, from both testimony, they didn't even know a car was coming down the roadway.

Q. **So did you form an opinion as to whether it made an improper back-up**?
A. **Yes**. We're not -- failing to warn the motoring public, that was -- on this particular day southbound, which was Ms. Dooley, and **the backing was improper**. **You would not back into a roadway without someone back there to monitor**.

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. Tr. Transcr. vol. 21, 966:14-17.

Partenheimer also testified that the Appellees were negligent. He testified that there's no doubt in his mind that the trailer was backing up at the time of impact. As mentioned above, he further testified that the Appellees should bear all the responsibility if you believe Sergeant Warren's testimony regarding the shadows. Transcr. vol. 18, 464-465. 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.

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. As evidenced above, the Appellees were partially at fault for backing up into a roadway when it was unsafe to do so.

iv. Conclusion.

There is no question that the Appellees were partially at fault for this accident. Byrd and Independent Roofing's negligent acts and omissions were clearly the proximate cause or a contributing proximate cause of the accident in question. A person of ordinary intelligence should have anticipated the dangers that the aforementioned negligent acts and omissions created for others.

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

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. Leah Dooley testified that she found Jonathan Dooley lying on the floorboard. According to Leah Dooley, "[h]is skull . . . was completely shattered open in the back and there wasn't anything in there." She knew at that moment that he wasn't alive. Transcr. vol. 18, 580:25-581:7.

Byrd and Independent Roofing's negligent acts and omissions were the proximate cause or a contributing proximate cause of the accident in question. Also, Jonathan Dooley's death was a direct result of Byrd and Independent Roofing's negligence.

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.

A. Standard of Review

The standard of review is de novo when considering a trial court's denial of a motion for judgment notwithstanding the verdict. *Poole v. Avara*, 908 So. 2d 716, 726 (Miss. 2005) (citing *Wilson v. Gen. Motors Acceptance Corp.*, 883 So. 2d 56, 64 (Miss. 2004)). "The trial court must view the evidence in the light most favorable to the non-moving party and look only to the sufficiency, and not the weight, of that evidence." *Poole*, 908 So. 2d at 726 (citing *Wilson*, 883 So. 2d at 63). "When determining whether the evidence was *sufficient*, the critical inquiry is whether the evidence is of such quality that reasonable and fairminded jurors in the exercise of fair and impartial judgment might reach different conclusions." *Poole*, 908 So. 2d at 726 (citing *Jesco, Inc. v. Whitehead*, 451 So. 2d 706, 713-14 (Miss. 1984)).

B. 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.

No reasonable, hypothetical jurors could have found as these jurors did and concluded that Byrd and Independent Roofing were not at fault for this accident. The evidence revealed that Byrd did not possess the proper license and training to drive the truck and trailer in question; that Byrd's superiors at Independent Roofing knew that he 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's superiors at Independent Roofing knew that Byrd needed a Class D driver's license to operate the truck and trailer in question. The evidence further revealed that Byrd did not have a flagman or any type of warning devices in place at the time of the accident and that there were no warning devices available in the truck or trailer. The Appellants believe that 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 was backing up at 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. With respect to Leah Dooley, there was evidence that the shadows hindered her ability to see the trailer until it was too late to do anything in order to avoid this collision. 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, in the case at hand, 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.*, 451 So. 2d at 713. 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 APPELLANTS' MOTION FOR A NEW TRIAL.

A. Standard of Review

"A Motion for a new trial addresses the weight of the evidence and should be granted to prevent unconscionable injustice." *Wall v. St.*, 820 So. 2d 758, 759 (Miss. App. 2002) (citing *Daniels v. St.*, 742 So. 2d 1140 (Miss. 1999)). When considering a trial court's denial of a motion for a new trial, the standard of review is "abuse of discretion." *Poole*, 908 So. 2d at 726.

> A new trial may be granted pursuant to Miss. R. Civ. P. 59. A new trial may granted in a number of circumstances, such as when the verdict is against the overwhelming weight of the evidence, or when the jury has been confused by faulty jury instructions, or when the jury has departed from its oath and its verdict is a result of bias, passion, and prejudice.

Poole, 908 So. 2d at 726-727 (quoting *Shields v. Easterling*, 676 So. 2d 293, 298 (Miss. 1996)).

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

The verdict was against the overwhelming weight of the evidence. The evidence revealed that Byrd did not possess the proper license and training to drive the truck and trailer in question; that Byrd's superiors at Independent Roofing knew that he 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's superiors at Independent Roofing knew that Byrd needed a Class D driver's license to operate the truck and trailer in question. The evidence further revealed that Byrd did not have a flagmen or any type of warning devices in place at the time of the accident and that there were no warning devices available in the truck or trailer. As is discussed in detail under section III(C)(2) below, the Appellants believe that 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 was backing up at 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 liable for any negligent acts and omissions of Byrd. With respect to Leah Dooley, there was evidence that the shadows hindered her ability to see the trailer until it was too late to do anything in order to avoid this collision. The evidence clearly showed that Byrd and Independent Roofing's acts and omissions were a substantial factor in bringing about the death of Jonathan Dooley and that without their negligent acts and omissions, Jonathan Dooley would not have suffered the injuries that caused his death. A person of ordinary intelligence should have anticipated the dangers that these negligent acts and omissions created for others. There is no question that Jonathan Dooley's death was a direct result of Byrd and Independent Roofing's 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.

C. The jury was confused by faulty jury instructions.

The jury was confused by faulty jury instructions. The Appellants hereby incorporate all of the facts, laws and arguments made under section "I" above to the arguments herein.

1. Standard of Review

When determining whether the jury was properly instructed, the appellate courts read jury instructions as a whole, rather than in isolation. *Harris*, 755 So. 2d at 1204. "Accordingly, defects in specific instructions do not require reversal 'where all instructions taken as a whole fairly-although not perfectly-announce the applicable primary rules of law.'" *Id.* (citing *Starcher v. Byrne*, 687 So. 2d 737, 742-43 (Miss. 1997)). Trial courts have "considerable discretion in instructing the jury." *Fitch v. Valentine*, 959 So. 2d 1012, 1023 (Miss. 2007) (citing *Southland Enter(s)., Inc. v. Newton County*, 838 So. 2d 286, 289 (Miss. 2003)).

2. 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 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). "To prevail in an action for negligence per se, a party must prove that he was a member of the class sought to be protected under the statute, that his injuries were of a type sought to be avoided, and that violation of the statute proximately caused his injuries." *Snapp v. Harrison*, 699 So. 2d 567, 571 (Miss. 1997) (citing *Thomas v. McDonald*, 667 So. 2d 594, 597 (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, which read as follows:

> The Court instructs the jury that whenever a truck and trailer combination such as the one in this case is stopped upon the highway at the time of day as in this case, the driver or person in charge of such vehicle shall place upon the highway in a standing position red flags, one at a distance not less than one hundred feet to the rear of the vehicle and one not less than one hundred feet in advance of the vehicle and the third upon the roadway side of the vehicle.
>
> The Court further instructs that the flags in such circumstances should be set out with such reasonable and proper diligence, or promptly under all the facts and circumstances of the case. Consequently, the Court instructs that if you find that either (a) the truck did not contain any flags, or (b) that the truck had flags on board but that Cedric Byrd had not been trained on when and how they should be used, then you shall find the Defendants guilty of negligence and determine causation in accordance with the other instructions.
>
> If however, you find that (a) flags were on board and (b) Byrd had been trained on the proper usage of the flags, but you further find that Byrd did not act with reasonable and proper diligence, or promptly under the facts and circumstances of the case, then you shall find the Defendants guilty of negligence and determine causation in accordance with the other instructions.

(R. at vol. 14, 1999-2000.)

Second, the lower court refused to grant P-44B, which read as follows:

> The Court instructs the jury that the Defendants were negligent as a matter of law in failing to have warning devices available on the vehicle as required. If you find that this failure was the proximate cause or a proximate contributing cause of the accident, then it shall be your sworn duty to enter a verdict in favor of the Plaintiffs, and you shall assess damages in accordance with the remaining instructions.

~~(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).

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 withing 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 and Keys were stuck for five minutes or so. Byrd and Keys both testified that they did not even consider 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, as previously mentioned, 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. 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. 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, which read as follows:

> The Court instructs the jury that the Defendants were negligent as a matter of law in failing to have the required license. If you find that this failure was the proximate cause or a proximate contributing cause of the accident, then it shall be your sworn duty to enter a verdict in favor of the Plaintiffs, and you shall assess damages in accordance with the remaining instructions.

(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 at Independent Roofing, 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. 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 was very familiar with his driveway. Smith testified that he has never turned into his driveway while driving a trailer that long. Smith chose to take an alternate route to get the boomlift into his yard. Partenheimer testified that Byrd shouldn't have attempted that turn. Hannah testified that an experienced driver could've made the turn. Had Byrd possessed

the proper license and training, he would have known better than to attempt that turn. 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 the truck and trailer that were involved in this accident. 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, which read as follows:

> The Court instructs the jury that if you find that a reasonably prudent person would not have attempted to maneuver the type of flat bed truck and 29 foot gooseneck trailer as that used by the Defendants from a highway into a narrow, private drive of the dimension and character as the one in this case, in the manner employed by the Defendants, then you shall find that the Defendants were negligent.
>
> If the jury so finds, then you shall then decide whether such negligence proximately caused or contributed to the accident and death of Jonathan Dooley, and shall do so in conjunction with the remaining instructions given.

(R. at vol. 14, 2001).

As mentioned in the preceding paragraph, there was testimony that Byrd never should've attempted that turn into Smith's driveway. 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.

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

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. Jury Instruction Number 10 read as follows: "If you find from the preponderance of the evidence that the condition of the driveway contributed to the accident then such contribution is not attributable to any party in this cause." (R. at Exhibit Folder.) Jury Instruction Number 11 read as follows: "If you find from the preponderance of the evidence that the condition of the shadows contributed to the accident, then you are instructed that contribution is not attributable to any party in this cause." (R. at Exhibit Folder.) The Appellants argued that the instruction 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.

D. 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. Therefore, the jury departed from its oath and its verdict was the result of bias, passion and prejudice when it failed to follow the comparative negligence instruction that it was given.

E. 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 trial judge 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.

The lower court erred in granting the Motion for Joinder and Separate Representation, filed by Appellants, Dewey Dooley and Kaitlyn Patrick. On October 8, 2003, Attorney Don H. Evans filed a Complaint on behalf of Leah Dooley; Kathryn Fulton; Leah Dooley's unborn child at the time, Peyton Dooley; and all heirs-at-law of Jonathan Wayne Dooley, a minor, deceased. (R. at vol. 1, 57-61.) On February 11, 2005, Attorney William W. Fulgham entered his appearance in this cause as counsel for Dewey Dooley and Kaitlyn Patrick. (R. at vol. 2, 160-161.) On February 15, 2005, Dewey Dooley and Kaitlyn Patrick filed a Motion for Joinder and Separate Representation. (R. at vol. 2, 157-159.) On February 28, 2005 and June 3, 2005, Leah Dooley, Kathryn Fulton and Peyton Dooley filed responses to said Motion, requesting that the court deny the same. (R. at vol. 2, 162-166; 169-177.) In their Responses in opposition to said Motion, Leah Dooley, Kathryn Fulton and Peyton Dooley argued that the Motion should be denied for the following reasons:

1. The Respondents would show that Dewey Dooley has repeatedly stated he did not

want anything to do with this wrongful death case and that he did not want any of the money, although the Respondent has repeatedly told him that she had included him as an heir.

2. Dewey Dooley has always, and repeatedly, said that the accident was Leah Dooley's fault and not that of Cedric Byrd, nor Independent Roofing Systems, Inc., and Dewey Dooley has diligently fought to prevent the wrongful death claim from being successful.
3. Dewey Dooley's present wife, who is the same person whom he left and abandoned Leah Dooley and their children for, has repeatedly tried getting Leah Dooley indicted and sent to the penitentiary, contending that the accident was Leah Dooley's fault.
4. Dewey Dooley has regularly dealt with the defense lawyers in this wrongful death case and has aided and assisted them in every way possible to prevent Leah Dooley from being successful on the wrongful death action.
5. Dewey Dooley has repeatedly contended that the reason the child was killed was because Leah Dooley did not have him properly buckled up and that it was her fault in the wreck.
6. The Respondents contend that Dewey Dooley is only wanting to join this lawsuit so that he can completely sabotage the case. The Respondents' contention is that he desires to get involved in the lawsuit in order to get inside information to give to the defense lawyers so that he can get enough information to try re-indicting Leah Dooley.
7. The Respondents would show that Dewey Dooley had no interest in the children in the past, and as proof, he completely left them without support or any way to care for themselves at a time when Leah Dooley was pregnant with his child and at a time when she had no job. Respondents would show that he completely abandoned them at a time when he was making good money and that he left them for another woman which is presently his new wife. Respondents would show that at the present time he is over $6,000.00 past due in alimony and child support and that because of his neglect and abandonment, he does not qualify as an heir at law under the wrongful death statute. Respondent would show that, from the time, Dewey Dooley abandoned his family until Jonathan Wayne Dooley's death, Dewey Dooley had not ~~paid a dollar towards child support, although he is presently, or was, making,~~ between $80,000.00 and $100,000.00 per year.
8. Respondents deny that Kaitlyn Patrick is an heir-at-law and contend that there is no biological proof that she is the daughter of Dewey Dooley and that she has not, and can not, qualify as an heir under the wrongful death statute of Mississippi.
9. Dewey Dooley has repeatedly stated that he wanted no part of the lawsuit and, for him to come in now, seeking money, after Leah Dooley has had to fight the battle against him and the defense lawyers for almost two years and has had to, through her attorney, take numerous depositions and hire experts to try making a case, would be unfair at this time.
10. Furthermore, Dewey Dooley had no interest in Jonathan Wayne Dooley prior to his death or he would have not abandoned him and failed to support them at a time when he needed the money the most of all. Furthermore, Dewey Dooley had his girlfriend, who he had deserted his family for, at the visitation and the funeral of Jonathan

Wayne Dooley, showing total disrespect for Leah Dooley and the death of his son. At the time of Jonathan Wayne Dooley's death, Leah Dooley was pregnant with Peyton Dooley and, after Peyton Dooley was born, Dewey Dooley did not even see the newborn baby for over five months. He only saw Peyton at that time, when Leah Dooley drove over two and one half hours to Dewey Dooley's house to show him the baby.

11. The Respondents would show that under these circumstances it would be extremely prejudicial for the present attorney and plaintiffs to have to allow parties diametrically opposed to their position and who are and conniving to defeat the case to join in and disrupt it at this time.

12. Additionally, the Chancellor of Rankin County entered the Order Granting Petition to Open Estate and Letters of Administration on October 22, 2003. The Order, which is attached to this Amended Response as Exhibit "A," stated that "The Petitioner has retained the law offices of Don H. Evans to represent her and the other heirs-at-law in the wrongful death action," and, "Don H. Evans has already filed a wrongful death suit." The Order also states that "...the contract of employment entered into between Leah Fulton Dooley and Don H. Evans be and is hereby ratified and approved and Leah Fulton Dooley is authorized to pursue the wrongful death claim for the death of Jonathan Wayne Dooley and that Don H. Evans is hereby authorized to pursue the wrongful death action to collect damages on behalf of the heirs-at-law of Jonathan Wayne Dooley, Deceased." Don H. Evans has been pursuing the wrongful death action, which is pending in Rankin County, for almost two years.

(R. at vol. 2, 162-166; 169-177.)

The lower court verbally granted the Motion, allowing said joinder and separate representation; however, it appears that an Order was never actually entered.

As stated above, 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 wife, who was his girlfriend at the time of Jonathan Dooley's death, 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. Moreover, Dewey Dooley's current wife also continuously tried to get Leah Dooley indicted and sent to prison 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, the accident reconstruction expert that Dewey Dooley and Kaitlyn Patrick had hired,

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.

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 all about the issues that were addressed in that Response, including, but not limited to, 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 and about how Dewey Dooley had assisted defense counsel in hopes of preventing Leah Dooley from being successful in this wrongful death action. This was extremely prejudicial to Leah Dooley and all of the other Appellants. The lower court granted this Motion for Joinder and Separate Representation knowing of the conflicts at issue. The lower court erred in granting the same.

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

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CERTIFICATE OF SERVICE

I, Don H. Evans, attorney for Appellants, do hereby certify that I have served, via U.S. Mail, postage prepaid, a copy of the foregoing Appellants' Brief to the following:

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On this the 17th day of May, 2010.

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