IN THE MISSISSIPPI COURT OF APPEALS

SATYADEV MEKA — APPELLANT

VS. — CAUSE NO.: 2009-CA-01921

GRANT PLUMBING HEATING &
AIR CONDITIONING CO. AND
ALBERT GRUBE — APPELLEES

On appeal from the Circuit Court
of Hinds County, Mississippi,
First Judicial District

BRIEF OF APPELLEES GRANT PLUMBING HEATING & AIR CONDITIONING CO. AND ALBERT GRUBE

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

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

1. Satyadev Meka, Appellant
2. Grant Plumbing Heating & Air Conditioning Company, Appellee
3. Albert Grube, Appellee
4. J. Ashley Ogden, Attorney of record for Appellant
5. C. Maison Heidelberg, Attorney of record for Appellees
6. Ginny Y. Kennedy, Attorney of record for Appellees

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Attorney for Appellees

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rule 34 of the Mississippi Rules of Appellate Procedure, the appellees state that oral argument is not necessary because the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.

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STATEMENT OF THE ISSUES

(A) Whether there was evidence to support the apportionment of fault to the appellant;

(B) Whether the trial court correctly gave Jury Instruction 11;

(C) Whether the trial court correctly gave Jury Instructions 19 and 21;

(D) Whether the order of the jury instructions confused the jury;

(E) Whether the trial court correctly refused to give proposed jury instruction P-22; and

(F) Whether evidence regarding the appellant's work authorization was admissible.

STATEMENT OF THE CASE

A. Nature of the Case

This case involves an accident between vehicles driven by the appellant, Satyadev Meka ("Meka"), and the appellee, Albert Grube ("Grube"). Meka filed a lawsuit against Grube and Grube's employer, Grant Plumbing, Heating, & Air Conditioning Company ("Grant Plumbing"), alleging that Grube was negligent, and further that Grube's negligence was imputable to Grant Plumbing. 1 R. 3-4. The lawsuit also alleged various claims of direct negligence against Grant Plumbing, including negligent failure to train. 1 R. 4.

B. Course of Proceedings and Disposition Below

This case was tried before a jury September 14, 2009, through September 16, 2009. 4 R. 1. The jury found in favor of the Plaintiff and awarded $100,000 in damages. 2 R. 186. However, the jury also apportioned 40% of the fault to the Plaintiff, thereby reducing the damages award to $60,000. 2 R. 186. The trial court denied the Plaintiff's Motion for Judgment Notwithstanding the Verdict (JNOV), for a New Trial, or in the Alternative for an Additur. 2 R. 221.

C. Statement of Facts

On February 17, 2006, Meka was driving northbound on I-55 in Jackson near the Adkins Boulevard exit during morning rush hour traffic. 6 R. 340-41. Meka was traveling in the right lane. 5 R. 184. Two vehicles were traveling behind Meka in the right lane. The first vehicle was a UtiliQuest truck driven by Jeffrey Koontz; the second

vehicle was a Grant Plumbing truck, which was following the UtiliQuest truck, and it was being driven by Albert Grube. 5 R. 182, 184, 202, 214. Meka testified that he felt some chest pain, so he jammed on his brakes and attempted to move his vehicle into a thin triangular area at the edge of a concrete barrier where the northbound on-ramp from Adkins Boulevard meets I-55. 5 R. 190, 194, 219-20; 6 R. 341. Testimony from more than one witness established that when Meka stopped, part of his vehicle remained in the right lane of I-55. 5 R. 186, 192, 195, 222. Independent witness Koontz testified that he had to put on his brakes and move into the left lane to avoid hitting Meka. 5 R. 186, 196-97. Grube, in the Grant Pluming truck, was traveling five or six car lengths behind Koontz. 5 R. 206. When Koontz braked and moved into the left lane, Grube saw Meka for the first time (because previously his view was obstructed by the UtiliQuest truck in front of him). 5 R. 219-20, 222. Grube looked in his mirror to see if he could move into the left lane, as Koontz had done, but there was a vehicle there. 5 R. 219-20. So Grube tried to get around the Koontz's truck, but in the process he grazed it and then struck the passenger side of Meka's vehicle, which was partially protruding into the highway. 5 R. 206-07, 224.

SUMMARY OF THE ARGUMENT

Meka alleged that the accident was caused by Grube, and Grube defended that the accident was caused by Meka. The jury considered the evidence and found that both Meka and Grube were negligent. Meka appeals, arguing repeatedly that there was absolutely no evidence to support a finding of contributory negligence against him. Yet Meka himself admitted that it was important for him to get his vehicle all the way off the

road so that he did not cause an accident. Koontz, the independent eyewitness, testified that Meka did not get his vehicle all the way off the road. Koontz testified that Meka's vehicle was stopped partially in the road at the time of the accident, and that he had to change lanes to avoid a collision with Meka. Grube similarly testified that Meka was stopped halfway in the road, thereby blocking his lane of travel. In addition, physical evidence of paint transfer supported Koontz's and Grube's testimony that the accident was not a rear-end collision, as Meka argued, but instead a side impact collision (which further evidenced that Meka was pulled only partially off the road at an angle). Having been properly instructed on the applicable law, the jury, as the sole judge of the credibility of witnesses and the weight of the evidence, concluded from this evidence that both Meka and the defendants were negligent. Because this verdict is amply supported by the evidence, it should not be disturbed on appeal.

ARGUMENT

The appellate court may grant a new trial only when the trial court has abused its discretion. *White v. Yellow Freight System, Inc.*, 905 So. 2d 506, 510 (Miss. 2004). "In reviewing the trial court's decision, an appellate court must consider the credible evidence in the light most favorable to the non-moving party and generally take the credible evidence supporting the claims or defenses of the non-moving party as true. *Id.* at 510-11. "When the evidence is so viewed, this Court will reverse only when, upon review of the entire record, we are left with a firm and definite conviction that the verdict, if allowed to stand, would work a miscarriage of justice." *Id.* at 511. *See also Hartel v. Pruett*, 998 So. 2d 979, 991 (Miss. 2008) ("[T]he power to grant a new trial should be

invoked only in exceptional cases in which the evidence preponderates heavily against the verdict.").

(A) There was evidence to support the apportionment of fault to Meka.

In challenging the jury's apportionment of fault to himself, Meka is challenging the jury's verdict. The Mississippi Supreme Court has set forth the applicable standard of review:

> Where an appellant challenges a jury verdict as being against the overwhelming weight of the evidence or the product of bias, prejudice or improper passion, this Court will show great deference to the jury verdict by resolving all conflicts in the evidence and every permissible inference from the evidence in the appellee's favor. 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.

Fleming v. Floyd, 969 So. 2d 868, 876 (Miss. 2007) (internal quotation marks and citations omitted).

1. Meka had a duty to not stop his vehicle in the road.

Meka argues that there was no evidence that he owed a duty to the defendants. This argument, however, was not made in Meka's post-trial motion. Thus, it is procedurally barred. *Graves v. Dudley Maples, L.P.*, 950 So. 2d 1017, 1021 (Miss. 2007) (holding that an argument not raised in a motion to reconsider or motion for a new trial is procedurally barred).

Even if not procedurally barred, this argument fails because at issue in this case is section 63-3-903 of the Mississippi Code, which provides:

> No person shall stop, park or leave standing any vehicle, whether attended or unattended, upon the paved or improved or main traveled part of any highway outside of a business or residence district when it is practical to stop, park or so leave such vehicle off such part of said highway. In every event, however, a clear and unobstructed width of at

> least twenty (20) feet of such part of the highway opposite such standing vehicle shall be left for the free passage of other vehicles and a clear view of such stopped vehicle be available from a distance of two hundred (200) feet in each direction upon such highway.

Miss. Code Ann. § 63-3-903(1). Where, as here, there is a violation of a statute, the violation constitutes negligence per se. *Thomas v. McDonald*, 667 So. 2d 594, 596 (Miss. 1995) ("[W]here there is a statute, the statute will be the controlling law for the parties' action or failure to act."). Meka conceded this in his post-trial motion. Plaintiff's Motion for Judgment Notwithstanding the Verdict, for a New Trial, or in the Alternative, for an Additur at ¶ 9 (conceding that he had a duty to pull his vehicle in the safety zone; arguing that there was no evidence he "had a duty to perform *some other* action." (emphasis added)); *see also* 6 R. 372 (Q. "[I]t was very important to you to get that vehicle all the way off the road, wasn't it?" A. "Yes.").

2. Meka was negligent.

Meka argues that there was no evidence that he was stopped in the road at the time of the accident. This is simply untrue, and in fact the compelling evidence establishes that Meka stopped partially in the highway.

First, the independent eyewitness, Jeffrey Koontz, testified that Meka's vehicle was stopped in the road at the time of the accident:

Q. And you also seemed pretty clear that when Mr. Meka stopped, he was stopped before any impact occurred; is that right?

A. Yes, he was.

Q. And was he stopped before you even began to make your move? I mean he wasn't still moving at the time you went into the left lane, was he?

A. No, he was not.

Q. And you're also confident that when Mr. Meka stopped his vehicle, he was not all the way off of I-55, was he?

A. No. It's like I said, he was about maybe ten percent in the road.

Q. I think you testified earlier also that maybe the back three or four feet of his vehicle were sticking into the road?

A. A couple feet, yes.

Q. So, you'd agree with me that that tail end was sticking out far enough that you had to slow down, correct?

A. Yes. It's a precautionary thing, yes.

Q. In fact, the tail end was sticking out far enough that you felt like you needed to be in a different lane; isn't that correct?

A. Yes. It's just standard procedure for us. If somebody pulls off the road and they're not far enough, we get into the next lane.

Q. In fact, the tail end was sticking out far enough that you felt like you could not have stayed in the right lane and passed the Meka vehicle? That would be a fair statement, wouldn't it?

A. Yes.

5 R. 195-197.

Albert Grube similarly testified that Meka was "[s]topped half on the road and half off the road." 5 R. 213. Grube further testified:

Q. That's what I'm getting at. Now, why do you say that the passenger side was sticking out in your lane?

A. Because the car was at an angle partially on to what y'all call the dead zone.

Q. All right. Where in the road or off the road did you strike the Meka vehicle? Go ahead and speak to that, please.

A. The passenger back side of the vehicle.

5 R. 224. Grube's testimony of a side impact (which evidences the Meka vehicle sticking in the road at an angle) was supported by photographs showing paint transfer to the back passenger side of Meka's vehicle. P-3-A; 5 R. 226 ("Mr. Grube, last question. If those appear to be white paint marks on the back passenger side of the vehicle, what color was your vehicle?" A. "It's white.").

Although he denied he was in I-55, even Meka conceded that he was stopped at the time of the accident:

Q. And I think you've testified that you actually stopped your car all the way before there was any impact, correct?

A. That's correct.

Q. So wherever you stopped, one thing is for sure, you stopped before anybody hit you, correct?

A. Yes.

6 R. 368.

As evidenced by the verdict, the jury believed the testimony from these witnesses that Meka's car was stopped and was partially in the road at the time of the accident. Because the jury is the ultimate judge of the weight of the evidence and the credibility of the witnesses, the verdict must stand. *Jackson v. Griffin,* 390 So. 2d 287, 289 (Miss. 1980); *see also Fleming*, 969 So. 2d at 878 ("This Court, of course, is not the jury. The weight and credibility of the witnesses . . . was for the jury, who were free to accept or reject whatever part of their testimony they chose."); *Noblin v. Burgess*, 2010 WL 2270229, *4 (Miss. Ct. App. 2010) ("[O]ur law is clear that witness credibility determinations are for the jury.").

3. Meka's negligence proximately caused his damages.

Meka also contends that there is no trial evidence whatsoever that his negligence proximately caused his injuries. However, Meka conceded that it was important for him to get his vehicle all the way off the road so that he wouldn't cause an accident. 6 R. 372 (Q. "[I]t was very important to you to get that vehicle all the way off the road, wasn't it?" A. "Yes." Q. "And the reason it was so important was because you didn't want to contribute or cause or create a condition where the accident could occur, is that fair to say?" A. "Yes."). It follows that if Meka's vehicle was in the road at the time of the accident, a fact amply supported by the evidence, then Meka was negligent, and his negligence caused the accident. Meka himself argues that the accident caused his injuries. Appellant's brief at p. 15. Concomitantly, if Meka's negligence caused the accident, his negligence caused his injuries.

In sum, there was sufficient evidence for the jury to find that Meka was negligent for stopping in the road and that Meka's negligence contributed to his injuries. As such, the verdict is not "an unconscionable injustice," and, thus, should be affirmed on appeal. *Fleming*, 969 So. 2d at 879 ("[C]lassic jury issues were created by the conflicting testimony of the witnesses, and thus it became the responsibility of the properly-instructed jury to determine what weight and credibility it wished to assign to the testimony of the various witnesses. . . . The jury verdict therefore is beyond the authority of an appellate court to disturb.").

(B) The trial court correctly gave Jury Instruction 11.

"When analyzing the grant or refusal of a jury instruction, two questions should be asked: Does the instruction contain a correct statement of law and is the instruction warranted by the evidence?" *Franklin Corp. v. Tedford*, 18 So. 3d 215, 239 (Miss. 2009). "Defects in specific instructions will not mandate reversal when all of the instructions, taken as a whole fairly-although not perfectly-announce the applicable primary rules of law." *Id.* "[W]here there is a statute, the statute will be the controlling law for the parties' action or failure to act." *Thomas v. McDonald*, 667 So. 2d 594, 596 (Miss. 1995).

1. Jury Instruction 11 contained a correct statement of the applicable law.

Again, section 63-3-903 reads:

> No person shall stop, park or leave standing any vehicle, whether attended or unattended, upon the paved or improved or main traveled part of any highway outside of a business or residence district when it is practical to stop, park or so leave such vehicle off such part of said highway. In every event, however, a clear and unobstructed width of at least twenty (20) feet of such part of the highway opposite such standing

vehicle shall be left for the free passage of other vehicles and a clear view of such stopped vehicle be available from a distance of two hundred (200) feet in each direction upon such highway.

Miss. Code Ann. § 63-3-903(1). Based upon this statute, the trial court gave Jury Instruction 11, which read:

> You are instructed that Mississippi law prohibits stopping a vehicle in the paved or main traveled portion of a public highway, whether attended or unattended, when it is practical to stop such vehicle off the paved or main traveled portion of the highway.
>
> If you find that the Plaintiff, Satyadev Meka, stopped his vehicle in a place and manner where it was unreasonably practical for him to stop his vehicle, then Satyadev Meka was negligent.
>
> If you find that Satyadev Meka's negligence was a proximate contributing cause of the accident and his own injuries, then you shall apportion liability (fault) to Satyadev Meka in accordance with the further instructions of this Court.
>
> If, however, you find that Satyadev Meka's negligence was the sole proximate cause of the accident and Satyadev Meka's injuries, then you shall return a verdict in favor of the Defendant, Albert Grube.

3 R. 414.

A similar instruction was given in *Solanki v. Ervin*, 21 So. 3d 552 (Miss. 2009). In *Solanki*, the jury instruction read as follows:

> The Court instructs the jury that according to Mississippi law no person shall stop, park or leave standing any vehicle, whether attended or unattended, upon the paved or main traveled part of any highway, unless it is impossible to avoid stopping in the roadway.
>
> Therefore, if you find from a preponderance of the evidence in this case that the decedent, Nilima Solanki, allowed her vehicle to stop in a lane of travel on the highway when it was possible or reasonably practicable for her to steer her vehicle onto the shoulder of the highway, then the Court instructs the jury that such acts constitute negligence on behalf of the decedent, and if you find from a preponderance of the evidence that such negligence was the sole proximate cause of the accident, then it is your

> sworn duty to return a verdict for Melvin Ervin and The Merchants Company.
>
> If you find that such negligence of the decedent Nilima Solanki was a proximate contributing cause of the accident and that the negligence of Melvin Ervin was also a proximate contributing cause of the accident, then it is your sworn duty to decide the amount you would have awarded for her death, if any, and then reduce that amount by the percentage of Nilima Solanki's negligence.

Solanki, 21 So. 3d at 561-62.

Jury Instruction 11 is worded very similarly, has the same overall meaning and effect, and does not misstate the law. Meka, however, attempts to distinguish *Solanki* on the ground that Solanki was not in the process of driving her vehicle off the highway, as Meka contends he was. At best, Meka's attempt at distinguishing *Solanki* is a distinction without a difference. Yet again, the evidence even from Meka himself was that Meka was stopped at the time of the accident. 6 R. 368 (Q. "And I think you've testified that you actually stopped your car all the way before there was any impact, correct?" A. "That's correct."). Further, as Meka himself admits in his brief, there was evidence that "a small bit of [his vehicle] was sticking out." Appellant's brief at pp. 11, 15.

Nevertheless, Meka argues that the jury should not have been instructed on section 63-3-903 because the proper test of negligence was whether Meka "exercised that degree of care and caution which an ordinarily careful and prudent person would exercise under the same or similar circumstances."[1] The Mississippi Supreme Court disagrees:

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[1] Moreover, the trial court did give the jury a negligence instruction, which read:

> The principle that violation of a statute constitutes negligence per se is so elementary that it does not require citation of authority. 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. *Thomas*, 667 So. 2d at 596 (citation omitted).

2. Jury Instruction 11 was warranted by the evidence.

Meka somehow argues that there was no testimony that his vehicle was stopped in the road at the time of the accident. Appellant's brief at 18. Again, Meka himself testified that his vehicle was stopped at the time of the accident. 6 R. 368 (Q. "And I think you've testified that you actually stopped your car all the way before there was any impact, correct?" A. "That's correct."). Further, as Meka himself admits, there was evidence that "a small bit of [his vehicle] was sticking out." Appellant's brief at pp. 11,15. There was also substantial testimony as to the location and positioning of Meka's vehicle. *See, e.g.*, 5 R. 186, 190, 192-95, 219-22; 6 R. 341. This testimony was supported by the physical evidence. *See, e.g.*, P-3-A; 5 R. 226. Accordingly, there was ample evidence to support the giving of Jury Instruction 11. *Solanki*, 21 So. 3d at 563.

(C) The trial court correctly gave Jury Instructions 19 and 21.

Meka also argues that the trial court erred by giving the jury two contrary jury instructions regarding the form of the verdict. No legal authority is cited in support of

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> Negligence is the failure to use reasonable care. Reasonable care is that degree of care which a reasonable careful person would use under like or similar circumstances. Negligence may consist either in doing something that a reasonably careful person would not do under like or similar circumstances, or in failing to do something that a reasonably careful person would do under like or similar circumstances.

3 R. 408.

this argument; thus, it should not be considered. *Shavers v. Shavers*, 982 So. 2d 397, 401 (Miss. 2008) ("This Court consistently has held that an unsupported assignment of error will not be considered. This Court does not have to consider alleged error when no authority is cited for the error in the brief."). Essentially, Meka re-urges his argument that the jury should not have been allowed to apportion fault to him because there was no evidence that he was negligent. Again, Meka ignores evidence, discussed *supra*, that he was stopped in the road in violation of section 63-3-903 of the Mississippi Code.

Further, neither Instruction 19 nor Instruction 21 required the jury to apportion fault against Meka.[2] Jury Instruction 19 read:

> The Court instructs the jury that *if you find* from a preponderance of the evidence that Plaintiff Satyadeva Meka was negligent and said negligence, *if any*, was the sole proximate cause of the collision at issue in this case OR that Albert Grube committed no acts of negligence which proximately caused the collision in this case, then you must return a verdict in favor of both Defendants, and the form of your verdict shall be:
>
> "We the jury find in favor of the Defendants Grant Plumbing and Albert Grube."
>
> **You must write your verdict on a separate form.**
> **It does not need to be signed.**

3 R. 422 (emphasis added). Instruction 21 plainly stated that the jury could assign a percentage of fault/negligence, *if any*, against Meka:

> If the jury finds by a preponderance of evidence in favor of Plaintiff Satyadev Meka against Albert Grube, please complete this form and return to the court:
>
> I. PERCENTAGE OF FAULT/NEGLIGENCE ASSIGNED, *IF ANY*:

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[2] Notably, Meka does not appeal the giving of Jury Instruction 20, which specifically authorized the jury to apportion fault to Meka. 3 R. 423.

Plaintiff Satyadev Meka

% of fault, *if any*

Defendant Albert Grube

% of fault, if any

Total Percentage 100%

II. TOTAL DAMAGES, IF ANY YOU FIND:

We, the jury, assess Plaintiff Satyadev Meka's TOTAL damages as $

3 R. 425 (emphasis added). These instructions, clearly, did not require the jury to apportion fault against Meka. Moreover, this verdict form is specifically authorized under Rule 49(b) of the Mississippi Rules of Civil Procedure. *Rose v. Clenney*, 748 So. 2d 172, 176 (Miss. Ct. App. 1999).

(D) The order of jury instructions did not confuse the jury.

Meka further argues summarily that the trial court erred in giving Jury Instructions 11 and 20 to the jury before Jury Instruction 21 because it confused the jury.[3] Yet the trial court specifically instructed the jury: "The order in which these instructions are given has no significance as to their relative importance." 3 R. 404; *see also Davis v. Nelson*, 221 Cal. App. 2d 62, 69 (Cal. Ct. App.1963) ("The sequence in which the instructions are given to the jury rests in the sound discretion of the trial court."). Meka provides no legal authority for his claim that the jury instructions were given in an improper order, and he offers no evidentiary support for his claim that the jury was

[3] This issue, as well as the issue of the admissibility of evidence regarding Meka's work authorization, was not included in Meka's "Statement of the Issues." *See* Miss. R. App. P. 28(a)(3) ("Each issue presented for review shall be separately numbered in the statement. No issue not distinctly identified shall be argued by counsel, except upon request of the court, but the court may, at its option, notice a plain error not identified or distinctly specified.").

confused by the instructions. *Shavers v. Shavers*, 982 So. 2d 397, 401 (Miss. 2008) ("This Court consistently has held that an unsupported assignment of error will not be considered. This Court does not have to consider alleged error when no authority is cited for the error in the brief."); *see also Solanki*, 21 So. 3d at 570 (rejecting argument that the jury was confused by the jury instructions where there was no evidentiary support for such a claim).

Meka again argues that the jury instructions required the jury to assume that Meka was negligent. The Court must review all of the instructions as a whole. *Tedford*, 18 So. 3d at 239. When read together, or even individually, these jury instructions gave the jury the option to apportion fault to Meka, which it did; the jury instructions did not require the jury to find Meka negligent. As was discussed *supra*, Jury Instruction 11 was a correct statement of the law, and it was supported by the evidence. Jury Instructions 20 and 21 are standard jury instructions which *allow* the jury to apportion fault to Meka, if it finds that Meka was negligent, which the jury did; these jury instructions did not require the jury to find that Meka was negligent. *See* Jury Instruction 20 ("*If you find* . . . that Plaintiff Satyadev Meka was also negligent; . . . ." (emphasis added)); Jury Instruction 21 ("I. Percentage of Fault/Negligence Assigned, *If Any*. . . ." (emphasis added)). The jury was appropriately instructed on the law, and its verdict should be affirmed.

(E) The trial court correctly refused to give proposed jury instruction P-22.

Meka also asserts that the trial court erred in refusing to grant proposed jury instruction P-22, which read:

You are instructed that Grant Plumbing Heating & Air Conditioning Co. did not provide any driving safety training to its employee Albert Grube, and did not instruct Albert Grube on safe driving habits while operating a Grant Plumbing Heating & Air Conditioning Co. vehicle.

Therefore, if you find from preponderance of the evidence in this case that Grant Plumbing Heating & Air Conditioning Co.'s failure to not provide any driving safety training to its employee Albert Grube, or failure to not instruct Albert Grube on safe driving habits while operating a Grant Plumbing Heating & Air Conditioning Co. vehicle was the sole proximate cause or proximate contributing cause of Plaintiff's injuries, then your verdict shall be for the Plaintiff.

However, if you believe that the Plaintiff has failed to prove any one of these elements by a preponderance of evidence in this case, then your verdict shall be for the Defendants as to this theory of liability.

3 R 358. The trial court possesses "considerable discretion" in the giving of jury instructions. *Young v. Guild*, 7 So. 3d 251, 259 (Miss. 2009). A party is entitled to jury instructions that present his theory of the case; however, this entitlement is limited. *Id.* "[T]he trial court may refuse an instruction which incorrectly states the law, is covered fairly elsewhere in the instructions, or is without foundation in the evidence." *Id.*

1. The instruction was peremptory.

First, the trial court correctly refused this instruction because it was peremptory. The standard which applies to a request for a peremptory instruction is the same as the standard for a directed verdict: the trial court must consider the evidence in the light most favorable to the nonmovant, giving him the benefit of all reasonable inferences that may be drawn therefrom; unless the nonmovant's evidence is so lacking that reasonable jurors could not reach a verdict for the nonmovant, the motion must be denied. *Wilner v. Mississippi Export R. Co.*, 546 So. 2d 678, 681 (Miss. 1989).

The proposed jury instruction stated that Grant Plumbing did not provide any driving safety training or instruction to Grube; however, there was evidence that Grube did have a manual which instructed him on safe driving habits. *See* 5 R. 205 (Q. "How do you know how far to stay back from a vehicle? Where do you get that information?" A. "Driver's book." Q. "Okay. Would it be fair to say just kind of a common understanding that you need to stay far back enough so you can stop?" A. "Yes, sir."). From this testimony, a jury could reasonably conclude that Grant Plumbing had provided Grube with driving safety training; thus, the trial court correctly refused to grant this peremptory instruction.

2. The instruction was without foundation in the evidence.

Further, the proposed jury instruction was not supported by the evidence. The sole evidence of causation relied upon to support the giving of this instruction was Grube's testimony that safety training would have "probably helped." 5 R. 218. This is not sufficient evidence of proximate cause, especially when considered in conjunction with Grube's testimony that safety training would not have prevented the accident:

> Q. Would it be fair to say that if you had taken a safety course, and they told you in the safety course always stay four car lengths back, you could have used that the morning of the wreck?
>
> A. I was five or six car lengths, so I don't think four would have helped me that day.
>
> Q. Okay. So, the bottom line is no matter what question I pose to you, your position is that you were far enough back and operating your vehicle in a

way that you could have avoided the accident or avoided contact with those vehicles if you'd wanted to, correct?

A. Yes, sir.

5 R. 219-20. Where, as here, there is no evidence of a nexus between the alleged negligence and damages, it is not reversible error for the trial court to have refused to give an instruction on negligent failure to train. *Mitchell v. Rapid Oil Change, Inc.*, 752 So. 2d 466 (Miss. Ct. App. 1999) (finding no reversible error in failure to give jury instruction on express warranty where owner failed to show some nexus between automotive business' actions and damage to his car).

In addition, "specific evidence of an employer's actual or constructive knowledge of its employee's dangerous or violent tendencies is necessary in order to create a genuine issue of material fact on an improper training . . . theory of liability." *Holmes v. Campbell Properties, Inc.*, 2010 WL 1962479, *7 (Miss. Ct. App. 2010). As Grube's testimony evidences, Grube knew the rules of the road. There was no evidence that Grube had driven dangerously in the past or had dangerous driving tendencies. Accordingly, Meka was not entitled to a failure to train instruction, which was essentially a red herring argument Meka's counsel was attempting to utilize.

3. The instruction was covered fairly elsewhere in the instructions.

In addition, the jury instructions adequately instructed the jury as to the theory of Meka's case, which was that Grube's and Grant Plumbing's negligence caused his injuries. Jury Instructions 5 and 6 instructed the jury on negligence and proximate cause. Jury Instruction 5 read:

> Negligence is the failure to use reasonable care. Reasonable care is that degree of care which a reasonable careful person would use under like or similar circumstances. Negligence may consist either in doing something that a reasonably careful person would not do under like or similar circumstances, or in failing to do something that a reasonably careful person would do under like or similar circumstances.

3 R. 408. Jury Instruction 6 read:

> In order to be proximate cause, the negligence of defendant must be a substantial factor in producing plaintiff's injury. If the plaintiff would have been injured even if the defendant had not been negligent, the defendant's negligence is not a substantial factor and not a proximate cause.

3 R. 409.

Again, in analyzing the jury instructions as a whole, "[d]efects in specific instructions will not mandate reversal when all of the instructions, taken as a whole fairly-although not perfectly-announce the applicable primary rules of law." *Young*, 7 So. 3d at 259-60. Where, as here, "other instructions granted adequately instruct the jury, a party may not complain of a refused instruction on appeal." *Id.* at 259.

In *Young v. Guild*, 7 So. 3d 251 (Miss. 2009), the Mississippi Supreme Court upheld the denial of a jury instruction because the jury instructions, considered in the aggregate, fairly and adequately instructed the jury on the applicable primary rules of law. The court concluded that the jury instructions correctly defined the elements of medical negligence, including the standard of care applicable to Dr. Guild. *Id.* at 260. Further, the court held, any imperfection in the failure to instruct the jury on the *specific* acts alleged to be negligent did not require reversal; the plaintiff's theory of the case was "squarely before the jury." *Id.* at 261. The court further noted that, although the trial court could have provided the jury with more definitive instructions, any error was

harmless because the outcome would have been the same. *Id.* The court stated: "Given the jury instructions that were provided and the clear contrasting theories that were hammered home by the skilled counsel of both litigants, it is clear to this Court that the jury had a firm understanding of the law as it applied to the facts in this case, and it reached a permissible verdict." *Id.*

Similarly, in this case, the jury instructions as a whole fairly instructed the jury on the applicable rules of law. The trial court gave negligence and proximate cause instructions to the jury; any failure to instruct the jury on the specific acts alleged to be negligent does not require reversal. *Young*, 7 So. 3d at 261.

4. Any error in not giving this instruction was harmless.

Even assuming *arguendo* that the trial court should have given the instruction, any error in not giving instruction P-22 was harmless because it did not affect the outcome of the trial; the jury actually found against Grant Plumbing on the respondeat superior claim. *O'Flynn v. Owens-Corning Fiberglass*, 759 So. 2d 526, 531 (Miss. Ct. App. 2000) ("The trial court will not be held to have erred unless the complaining party can show that the denial of the instruction probably did cause an improper judgment."). This was the most favorable result that Meka could have received against Grant Plumbing; thus, any alleged error in the jury instructions is moot. *Pickering v. Industria Masina I Traktora (IMT)*, 740 So. 2d 836, 843 (Miss. 1999) (noting that where, as here, the jury found for the complaining party, the trial court did not err by not granting a peremptory instruction).

(F) Evidence regarding Meka's work authorization was admissible.

"This Court reviews a trial judge's decision to admit or deny evidence under an abuse-of-discretion standard." *Robinson Prop. Group, L.P. v. Mitchell,* 7 So. 3d 240, 243 (Miss. 2009). "If an error involves the admission or exclusion of evidence, this Court will not reverse unless the error adversely affects a substantial right of a party." *Id.*

1. Meka is precluded from arguing that the evidence was inadmissible.

Meka complains that, despite granting his motion in limine to exclude evidence regarding Meka's citizenship status and nationality, the trial court allowed the jury to hear this testimony. 5 R. 17. However, it was Meka's own attorney, not Grube and Grant Plumbing's, who broadly and extensively highlighted this evidence in his closing argument:[4]

> Now. I'll be honest with you. I told the Court I wanted to stay away from the fact that this man's nationality is Indian because let's fact it, some people just don't like Indians. Some people do. Some people don't like African-Americans. So[me] people don't like red necks. People have prejudices. Unfortunately for the world that we live in, we have to deal with the prejudices.

6 R. 467; *see also* 6 R. 314-16. The Mississippi Supreme Court has stated: "One may not complain on review of errors for which he was responsible . . . (a)n appellant will not be permitted to take advantage of errors for the commission of which he was responsible, or which he himself committed, caused, brought about, provoked, participated in, created, or helped to create, or contributed to." *Demyers v. Demyers*, 742 So. 2d 1157, 1160 (Miss. 1999). Thus, Meka is precluded from asserting any error in the trial court's admitting any evidence regarding his citizenship status. *Id.* ("[W]here

[4] In fact, Grube and Grant Plumbing's attorney objected to this improper argument by Meka's counsel. 6 R. 468.

a party has introduced evidence on an issue, that party may not complain about the admission of evidence on the same proposition by an opposing party."); *see also Wright v. Royal Carpet Services*, 29 So. 3d 109, 114 (Miss. Ct. App. 2010) (upholding admission of evidence where although there were instances when the appellant's attorney objected to the admissibility of evidence, there were numerous other references to the evidence that were either brought up by the appellant's attorney or were not objected to).

2. This evidence was relevant to the issues of causation and damages.

Even more fundamentally, Grube and Grant Plumbing did not directly reference nor solicit testimony as to Meka's citizenship status. Instead, they questioned Meka about the real reason he was not working after the accident, and the reason Meka did not work after the accident was not due to injury; it was because Meka was not legally permitted to work:

Q. I think the question was, Mr. Meka, that outside of saying that you were unable physically to work because of the injuries that you're claiming in this case, there was actually at least another reason that you could not accept this job from Quality Matrix; is that correct?

A. That's correct.

Q. And could you tell us what that reason was?

A. At that point in time I didn't have a work authorization.

6 R. 364.[5] This evidence was clearly relevant to the issues of causation and damages, and, thus, admissible. In fact, because Meka was not legally authorized to work, Meka had not worked for an extended period of time prior to and subsequent to the accident. 6 R. 358.

3. This evidence was admissible impeachment evidence.

Moreover, this evidence was admissible impeachment evidence. Meka testified that he was unable to work solely as a result of the accident. *See, e.g.,* 6 R. 352-53. This was untrue, and, thus, the evidence that Meka had no legal work authorization was admissible to impeach Meka's testimony. *Martindale v. Wilbanks*, 744 So. 2d 252 (Miss. 1999) (holding that evidence, which is otherwise inadmissible, is admissible when the evidence is offered for another proper purpose, such as impeachment.).

4. This evidence was not barred by Rule 403.

Meka further alleges that this evidence was prejudicial as evidenced by the jury's low damages award. Rule 403 of the Mississippi Rule of Evidence, however, does not prohibit prejudicial evidence; it prohibits *unfairly* prejudicial evidence. *See* Miss. R. Evid. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."). There is simply no evidence to support the contention that the evidence that Meka did not have a work authorization unfairly

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[5] Meka argues that Grube and Grant Plumbing mentioned Meka's citizenship status at closing. Appellant's brief at p. 25. The record evidence belies that argument – citizenship was not mentioned by counsel in closing. 6 R. 455.

prejudiced the jury against him. *Solanki*, 21 So. 3d at 570 (finding no evidence that the jury was prejudiced against the plaintiffs, who were Indians, because of their race or national origin).

The damages award was not, as Meka alleges, the result of prejudice; it was amply supported by the evidence. No injuries were reported on the accident report, and Meka admitted that the first doctor that he saw found no major injury and merely prescribed anti-inflamation medicine. 5 R. 168, 6 R. 347, 366. Meka did not see Dr. Goel, the physician who recommended surgery, until one year and a half after the accident. 5 R. 280. Further, the fact that Meka had actually accepted employment one year after the accident undermined his claim that he was injured and that he would suffer future damages. 6 R. 363 (Q. "And it says, 'Agreed and accepted.' It says, 'I have read, understood and agree with the terms stated in this letter' which is their letter of engagement to employ you. 'My signature below constitutes as an acceptance of this offer of employment.' That's your signature dated what day, Mr. Meka?" A. "That's correct, yes.").[6] Given the low amount of medical costs incurred by Meka, $7,264.00, the jury's $100,000 damages award was extremely generous. 6 R. 350.

CONCLUSION

Meka argues that he should be given a new trial because there was no evidence that he was negligent. This argument is completely belied by the record evidence, including the testimony of Meka himself, who confirmed that he was indeed stopped at the time of the accident. Meka further conceded that it was important for him to get his

6 The reason Meka was unable to work after the accident was not because he was injured in the accident, but because he had no work authorization. 6 R. 364.

vehicle all the way off the road so that he did not cause an accident. The independent eyewitness, Koontz, testified that Meka did not get his vehicle all the way off the road. Koontz testified that Meka's vehicle was stopped in the road at the time of the accident, and that he had to change lanes to avoid a collision with Meka. Grube also testified that Meka was stopped halfway in the road. The physical evidence, the paint transfer, supported Koontz's and Grube's testimony that the accident was not a rear-end collision, as Meka urged, but instead a side impact collision, caused by Meka's leaving his vehicle in an angled position partially on the highway. Having been properly instructed on the applicable law, the jury, as the sole judge of the credibility of witnesses and the weight of the evidence, concluded from this evidence that both Meka and Grube were negligent. The jury's verdict was supported by the evidence such that it was not an "unconscionable injustice;" thus, the verdict should not be disturbed on appeal. *Fleming*, 969 So. 2d at 879 ("[C]lassic jury issues were created by the conflicting testimony of the witnesses, and thus it became the responsibility of the properly-instructed jury to determine what weight and credibility it wished to assign to the testimony of the various witnesses. With this being said, we can state with confidence that by allowing the jury verdict . . . to stand, we are not by any stretch of the imagination sanctioning an unconscionable injustice. The jury verdict therefore is beyond the authority of an appellate court to disturb.").

THIS the 30 of August, 2010.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, C. Maison Heidelberg, attorney for the appellees, Grant Plumbing Heating & Air Conditioning Company and Albert Grube, do hereby certify that I have this day served a true and correct copy of the above and foregoing document via United States Mail, postage prepaid, on the following:

J. Ashley Ogden, Esq.
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500 East Capitol Street, Suite 3
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Honorable Judge Tomie T. Green
P.O. Box 327
Jackson, MS 39205-0327

THIS, the 30 day of August, 2010.

C. MAISON HEIDELBERG