IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

SATYADEV MEKA — APPELLANT

VS.

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



CAUSE NO.: 2009-CA-01921

APPEAL FROM THE CIRCUIT COURT OF HINDS COUNTY, MISSISSIPPI, FIRST JUDICIAL DISTRICT

# REPLY BRIEF OF APPELLANT

**Oral argument is not requested**

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## ARGUMENT

### A. There was no evidence to support the apportionment of fault to Meka

The trial court erred in allowing the jury to considered apportioning fault to Plaintiff. The trial court erred in allowing the Defendant's jury instruction "D-13" (jury instruction 11) which required the jury to apportion fault to the Plaintiff. Tr. Trans. 417:14-418:8. The general rule is that all instructions must be supported by the evidence. Where an instruction is not supported by evidence then it should not be given. *Dennis v. State*, 555 So. 2d 679, 683 (Miss. 1989). Granting instructions not supported by evidence is error. *Lancaster v. State*, 472 So. 2d 363, 365 (Miss. 1985). The apportionment instruction did not represent the facts in evidence and was a gross misstatement of the facts in evidence and a misstatement of the law.

#### 1. No duty of Plaintiff was presented at trial

Defendant erroneously states that Meka did not argue duty in his post-trial motions thus procedurally barring this argument. This is not true. Plaintiff argued in his post-trial motions, "There was no evidence presented that the Plaintiff neither had a duty to perform some other action nor was any evidence presented that the Plaintiff's actions were unreasonable under the circumstances." R. 192, ¶9. See also, R. 197. Apportionment of fault is an affirmative defense that the Defendant has the burden of proving. *Eckman v. Moore*, 876 So. 2d 975, 989 (Miss. 2004). In *Eckman* the court stated, "it is fundamental that the burden of affirmative defenses rests squarely on the shoulders of the one who expects to avoid liability by the defense." *Id.* (citing *Marshall Durbin Co. v. Warren*, 633 So. 2d 1006, 1009 (Miss. 1994). The Defendant presented no evidence that the Plaintiff acted negligently or that the plaintiff had a duty, breached the duty, and the breached duty caused his injuries. The Defendant presented no fact witness or expert witness testimony that showed Meka was acting unreasonably for the circumstances. The Defendant presented no evidence that the Plaintiff's actions were negligent and contributed to

the accident or his injuries. And there was no testimony by anyone that the Plaintiff's acts, if they were negligent, proximately caused his injuries. The trial testimony showed Grube rear-ended witness Koontz and then ran off the road into the safety lane and rear-ended Meka. Tr. Trans. 186:8-19; 341:1-13. No testimony showed plaintiff was under any duty or that the plaintiff acted unreasonably in the operation of his vehicle under the circumstances. Plaintiff was reasonably out of the flow of traffic and was moving to completely exit before stopping. Koontz, the driver of the vehicle traveling directly behind Meka, stated that he saw the Plaintiff turn on his indicator light and brake and in a controlled manner pull his vehicle to the side of the road. Tr. Trans. 186:8-12. Koontz stated that he had plenty of time and room to react to Meka's slowing and exiting the road. "He [Meka] had pulled over to the right-hand side right after the little retaining wall where it ends. He had pulled over there. Just a small bit of him was sticking out, so I had time to adjust my speed. I was starting over into the left lane, and that's when I was hit [by defendant Grube] in the passenger rear of my vehicle." Tr. Trans. 13-19. Witness Koontz stated it was an avoidable accident. Tr. Trans. 191:9-11. There was no testimony that Meka operated his vehicle negligently. All the testimony established Meka was attempting to ease out of the right lane of traffic and stop his vehicle in the safety zone. Tr. Trans. 342:1-20. Meka testified he had not stopped in the middle of the road. Tr. Trans. 373:1-9. The defendant presented no evidence to show Meka was doing anything beyond what a reasonable person would do to exit the road.

Defendant claims that Meka is at fault because he stopped his vehicle on the road in violation of Code section 63-3-903 which states a person can not stop on the main traveled road when it is practical to stop off such highway or road. The entire testimony shows that Meka was under an emergency situation attempting to move his vehicle into the emergency lane and was 90% out of the road and into the emergency lane when Grube first struck the vehicle behind

Meka and then struck Meka's car. The statute does not apply to the facts of this case because this was an emergency situation in the making and Meka was doing everything a reasonable person would do to get out of the road. He in fact was out of the road when Grube struck him in the emergency lane. So the statute does not and should not have been applied in this case. Here is the testimony showing that the impact occurred in the safety zone as Meka was exiting the road.

Pam Meka testified:

> A. My dad felt a cramp, and he started slowing down. We were in the right lane. It was a progressive – it wasn't a sudden stop. It was progressive. He indicated to pull into the little median thing that merges on the side.... He had the emergency lights on as well to indicate that he was stopping.
> We were almost at a complete stop in the **triangle area [safety zone]** when we felt the impact of a car hitting us from behind.
> Tr. Trans. 333:4-13.
>
> Q. All right. And you were struck from behind. Were you actually sitting in the right lane, or were you half out of the right lane? Where were you when y'all were struck, if you can remember?
> A. **We were in the little triangle.[safety zone]**
> Tr. Trans. 334:24-29.

Dave Meka testified:

> A. And I had some chest pain, a little discomfort in this part of the body. And I made an indicator on – the right indicator on to make a right to the shoulder where that safe zone is in the triangular portion. I kept the signal on very well in advance, and we were almost there. We had stopped almost completely, and somebody hit us from the back.
> Tr. Trans. 341:4-11.

Officer Samuels testified:

> A. [Grube] continued and struck Mr. Meka from the rear, which **Mr. Meka was pulled over to the side.**
> Q. Okay. Where was the impact then based on that information for the second impact? Was it in the left lane, middle lane, right lane, or what I'm calling the dead zone?
> A. **The dead zone.**

Koontz testified:

A. As we were coming over the hump over Atkins Boulevard, once we got over that where the on-ramps from Atkins Boulevard meets I-55 North, I noticed Mr. Meka's vehicle. His brake lights came up, his turn signal was on. **He pulled over to the right-hand side right after the little retaining wall where it ends. He has pulled over there.** Just a small bit of him was sticking out, so I had time to adjust my speed. I was starting over into the left lane, and that's when I was hit in the passenger rear of my vehicle.

Tr. Trans. 186:8-19

A. As we were coming over the hump, Mr. Meka had put on his brake lights and turn signal, and **he had pulled over there again at the end of the retaining wall,** but his brake lights did come on and so did his turn signal.

Q. The way he was operating his vehicle, did it cause you any problems?

A. No, it did not.

Q. Were you able to get around him without any problems?

A. Yes, sir.

Tr. Trans. 191:1-11.

Grube testified:

Q. Did you leave the right-hand lane and get over into what I call the dead zone or the safety zone area?

A. No, sir.

Q. All right. So it's your testimony that you struck Dave Meka's vehicle while he was in the right-hand lane; is that correct?

A. Not totally in the right-hand lane.

Q. Where was your vehicle when you stuck Dave Meka's vehicle while he was in the right-hand lane; is that correct?

A. Not totally in the right-hand lane.

Tr. Trans. 207:1-8.

Q. So no matter what I ask you, your contention is going to be somebody else is at fault for me striking two separate vehicles that I saw and knew were in front of me?

A. One that I knew that was in front of me, yes, sir.

Tr. Trans. 230:12-17.

For the defendants' case to survive on appeal this Court will have to conclude that 63-3-903 applies to vehicles under emergency situations that are pulling off or completely pulled off into the safety zone. The facts do not bear this out.

**2. Defendant did not present evidence of Plaintiff's negligence at trial**

Witness Koontz said Meka's vehicle was 90% out of the road and in the safety zone when it was struck. "He did pull over to the right-hand side right after the little retaining wall where it ends. He had pulled over there. Just a small bit of him was sticking out, so I had time to adjust my speed." Tr. Trans. 186:13-17.

> Q. And how much of his car was still in the road as he was trying to get over?
> A. I'd say ten percent.
> Tr. Trans. 192:8-10.

Meka testified he was still pulling out of the road and not stopped when struck in the rear by Grube. Tr. Trans.341:1-13. Meka's vehicle was struck by the Grant Plumbing truck while both vehicles were in the safety zone. The jury instruction submitted to the jury said the jury should consider if the plaintiff stopped in the highway when he could get off the road. The testimony showed the plaintiff, had safely left the main roadway and was attempting to stop off the road and in the safety lane when he was struck.

> Q. All right. And you were struck from behind. Were you actually sitting in the right lane, or were you half out of the right lane? Where were you when y'all were struck, if you can remember?
> A. **We were in the little triangle where --** I don't know the name for it, but it's the lane that comes out that merges on to I-55. There's usually a little -- the metal bar that goes on, and there's a triangle right there that indicates that there's another lane coming out there. I don't know how to describe it.
> Tr. Trans. 334:24-335:6.

> Q. Did you stop all the way off of the highway, or was part of your vehicle still in the highway?
> A. **I was off the highway completely.**
> Tr. Trans. 368:22-25

Evidence was presented that the Plaintiff's actions were reasonable and no one testified that Plaintiff's actions in moving his car to the safety zone was unreasonable or caused his injuries.

Q. Would you concede that this accident was your fault if part of your vehicle was in the road?
A. No.
Q. And the reason being what?
A. **Because I had not stopped in the middle of the road.** I made my intention very clear well in advance, and I had the indicator on. And they had sufficient time for anybody behind me who is following the rules of the road, they could easily stop their vehicle.
Tr. Trans. 372:28-373:9

Grube admitted if he was maintaining proper control of his vehicle, maintaining proper lookout, maintaining proper speed, and maintaining proper distance, that he should have never made contact with Meka's car. Tr. Trans. 229:20-27.

The evidence does not prove that the plaintiff failed in any duty to properly operate his car when he was struck from behind. The trial court erred in allowing the jury to apportion fault to the plaintiff when no testimony of negligence was presented to support the jury instruction.

**3. Defendant did not present proximate cause at trial**

The defendant presented no lay or expert witness testimony to contradict the testimony of Meka's witnesses showing the defendant was the sole cause of plaintiff's injuries. Tr. Trans. 386:8. Plaintiff presented undisputed evidence that as a result of the accident Meka suffered a back injury. Meka's treating doctor testified "Dave [Meka] had suffered a ruptured disc of the lumbar spine causing him to have pain in the left leg and neuropathy as a result of the accident that he suffered on February 4, 2006. That was my evaluation." Tr. Transcr. 251:9-13. The back injury required a surgery.

I've been taking care of him since June of 2007 and seeing him suffering with the pain and finding the ruptured disc seriously affecting his left leg with the sensory function and motor function I believed then, and I believe now that he needs surgery.
Tr. Trans. 269:17-22.

Meka testified that because of the accident he was unable to work and has suffered lost income and pain and suffering.

Q. Now, Dave, let's talk a little bit if you don't mind about work. Would you like to work right now?
A. Right now I cannot work because of the pain. I can't work. But if I get better if I definitely get a chance to work, I will definitely work.
Q. And let me state you a year after the accident when Dr. Goel said I think you need the surgery. You haven't worked since at least a year after the accident, correct?
A. That's right.
Q. Is that because of the pain, or is that because you can't find a job?
A. Not because I couldn't find the job. Just because of the pain.
Tr. Trans. 352:16-353:2

Dr. Glenda Glover gave undisputed testimony that Meka's lost wages were around one million dollars. "$1,359,000.00 would be his total loss for not being able to work." Tr. Trans. 304:23-24. The defendant presented no evidence to contradict this. The general rule is that all instructions must be supported by the evidence. Where an instruction is not supported by evidence then it should not be given. *Dennis v. State*, 555 So. 2d 679, 683 (Miss. 1989). Granting instructions not supported by evidence is error. *Lancaster v. State*, 472 So. 2d 363, 365 (Miss. 1985). There was no testimony that presented any negligence against Meka and there was no evidence to contradict Meka's witness testimony regarding damages. The trial court erred in allowing the jury to consider apportionment of fault.

**B. The trial court erred in giving Jury Instruction 11**

Instruction D-13 (given as Jury Instruction 11) (See R.E. 3) incorrectly allowed the jury to apportion fault to the plaintiff. The trial court granted instruction D-13. Plaintiff objected to the instruction Tr. Trans. 477:4-7. The instruction is a misstatement of the law and facts in the case. Tr. Trans. 477:10-12. "It was peremptory for the defendant. There's no evidence in the record to support the conclusion of the instruction. It's also a composite instruction that was covered by another instruction." Tr. Trans. 477:12-17.

> The instruction does not allow the jury to consider the defendant's percentage of fault. The standard is that it's what a reasonable prudent person would do under the circumstances.
> And so the state of law is incorrect because it doesn't have the proper standard in it. It also misleads the jury. It assumes facts not in evidence. It's cumulative, and it's an abstract instruction.
> Tr. Trans. 477:18-28.

D-13 instructed the jury "Mississippi law prohibits stopping a vehicle in the paved or main travel portion of a public highway...when it is practical to stop such vehicle off the paved or main traveled portion of the highway." Tr. Trans. 417:14. It asked the jury to find the plaintiff at fault if they found he was stopped in the road when it was unreasonable to do so. Tr. Trans. 417:21. The only jury instruction that attempts to define Plaintiff's alleged negligence is Jury Instruction D-13 (C-11) which is a misstatement of the law and the facts presented at trial. This instruction instructed the jury that "Mississippi law prohibits stopping a vehicle in the paved or main traveled portion of a public highway...when it is practical to stop such vehicle off the paved or main traveled portion of the highway."

**1. Jury Instruction 11 was not supported by applicable law**

The proper test to determine a driver's negligence under the case *sub judice* is "whether he exercised that degree of care and caution which an ordinarily careful and prudent person would exercise under the same or similar circumstances." *Hankins v. Harvey*, 160 So. 2d 63, 69 (Miss. 1964) (citing 7 Am.Jur.2d 898, Automobiles and Highway Traffic, Sec. 353, and cases cited)).There was no testimony that Meka stopped his vehicle in the road or operated his vehicle in an unreasonable manner. See, *Sprayberry v. Blount*, 336 So. 2d 1289 (Miss. 1976) (Involuntary slowing or stopping a vehicle under an emergency condition does not impose a duty of due care but rather it involves a review of the circumstances. It is unreasonable to require a driver slowing under emergency conditions to anticipate the likelihood of a vehicle approaching from the rear and crashing into the rear of his vehicle). "[A]n instruction charging negligence or

contributory negligence must define those acts which would constitute such." *Trainer v. Gibson*, 360 So. 2d 1226,1228 (Miss. 1978).

**2. Jury Instruction 11 was not supported by the evidence**

Attempting safely to move his vehicle off the paved main traveled portion of the highway is exactly what Meka was doing at the time he was struck in the rear by Grube. There was no evidence that Meka **stopped** his vehicle in the middle of the road. Meka testified he was not at fault because he did not stop in the road but was moving out of the road when he was rear-ended.

> Q. Would you concede that this accident was your fault if part of your vehicle was in the road?
> A. No.
> Q. And the reason being what?
> A. **Because I had not stopped in the middle of the road.** I made my intention very clear well in advance, and I had the indicator on. And they had sufficient time for anybody behind me who is following the rules of the road, they could easily stop their vehicle.
> Tr. Trans. 372:28-373:9

Pam Meka testified:

> A. ...It was progressive. He indicated to pull into the little median thing that merges on the side. I'm not sure what it's called exactly. He had the emergency lights on as well to indicate that he was stopping.
> **We were almost at a complete stop in the triangle area when we felt the impact of a car hitting us from behind.**
> Tr. Trans. 333:7-14.

> Q. All right. And you were stuck from behind. Were you actually sitting in the right lane, or were you half out of the right lane? Where were you when y'all were struck, if you can remember?
> A. We were in the little triangle...
> Tr. Trans. 334:24-29.

Mr. Meka stated:

> A. ...I made an indicator on – the right indicator on to make a right to the shoulder where that safe zone is in the triangular portion. I kept the signal on very well in advance, and we were almost there. We had stopped almost completely, and somebody hit us from the back.

Tr. Trans. 341:5-11.

Meka's SUV was still moving within the safety zone when struck, not in the main travel portion of the highway. Therefore this instruction was incorrect based on the facts of the case and the law that should have been applied. Meka moved his vehicle into the safety zone and was struck in the safety zone.

> Q. How fast did you stop? Did you just lay down on the brakes and come to a skidding halt?
> A. No, no. It was very slow.
> Q. Was there anybody that was preventing you, any vehicle or any obstacle that was preventing you from easing off the road?
> A. No.
> Q. When you were in the right lane, did anybody run into the back of you?
> A. No.
> Q. When you were half way off the road from the right lane and getting into the safety zone, did anybody hit you?
> A. No.
> Tr. Trans. 342:3-20

There was no evidence that Meka was stopped in the public highway. The evidence was that as Meka was coming to a stop 90% of his car was out of the highway and he was struck by Grube when both vehicles were in the safety zone.

> His brake lights came up, his turn signal was on.
> He did pull over to the right-hand side right after the little retaining wall where it ends. He had pulled over there. Just a small bit of him was sticking out, so I had time to adjust my speed.
> Tr. Trans. 186:11-17.

Officer G. T. Samuels testified:

> Q. Now, can you tell me where your understanding is from Mr. Meka's testimony, where was his vehicle when he as struck by the Grant Plumbing truck? Was he in the right lane, or was he in the middle lane, left lane or in what I call the dead area? Where was he?
> A. **No. He was in the dead area, like I said, the lines where you – in that area he actually pulling over to the lane I guess because, like I said, he was complaining of chest pain. He was pulling off to the side of the road when he was struck from the rear.**

Tr. Trans. 158:19-159:1.

Q. All right. Tell me what Scott Koontz told you occurred.
A. Well when I talked to Mr. Koontz, he advised me that he noticed Mr. Meka's vehicle pulled to the right with his emergency light – signal light on. And as he was slowing down to move over, he was stuck in the right rear by the plumbing company pushing his vehicle to the left. And the plumbing company continued and hit Mr. Meka's vehicle to the rear.
Tr. Trans. 161:21-162:1

Q. Okay. So base on the statements from the witnesses – excuse me, based on the statements from Dave Meka, Scott Koontz and Mr. Grube, where did the first impact occur and which vehicles were in the first impact?
A. The first impact was the plumbing company striking Mr. Koontz and then—
Q. Let me stop you. What lane did that occur in on I-55?
A. In the right-hand lane.
Q. Where did that impact sent Mr. Koontz' UtiliQuest vehicle?
A. It sent it to the left, which is the inside lane. It was in the left lane, and he continued and struck Mr. Meka from the rear, which Mr. Meka was pulled over to the side.
Q. Okay. **Where was the impact then based on that information for the second impact [Meka's car]? Was it in the left lane, middle lane, right lane, or what I'm calling the dead zone?**
**A. The dead zone.**
Tr. Trans. 164:28-165:19

The presented trial testimony makes Instruction D-13 (Jury Instruction C-11) improper. Based on the evidence the trial court should not have allowed the jury instruction, because it was not supported by the facts and it was not a correct application of the law to the facts of this case.

### C. The trial court erred in giving Jury Instructions 19 and 21

The trial court erred by giving the jury two contrary jury instructions regarding the form of the verdict, Jury Instruction 19 (C-14) ( R.E. 4) and Jury Instruction 21 (C-15) ( R.E. 6). This argument is supported by the evidence submitted above. Jury Instruction 19 is a general form of the verdict allowing the jury to find for the Defendants if they found Meka to be at fault. Again, there was no testimony that Meka did anything negligent to allow a consideration of negligence against him. Jury Instruction 21 erroneously required the jury to apportion a percentage of fault

from 0 – 100 % to both the Plaintiff and Defendant Grube. The verdict that was ultimately returned by the jury apportioned 40% fault to the Plaintiff and 60% fault to the Defendant Grant. Under Mississippi case law the jury should not have been required to apportion fault to the Plaintiff because there was no evidence or testimony presented to the jury that the Plaintiff acted negligently or contributed to his injury in any way. See *Eckman*, 876 So. 2d at 989; *Breaux v. Grand Casinos of Miss*, 854 So. 2d 1093, 1097 (Miss. Ct. App. 2003).

**D. The order of the jury instructions confused the jury**

Jury Instruction D-13 (given at C-11) (R.E. 3) Tr. Trans. 417:14 – stopping on a public highway- and Jury Instruction 20 (C-13) (R.E. 5) were given to the jury before Jury Instruction 21 (C-15) (R.E. 6). The trial court erred in giving the flawed Jury Instructions 11 and 20 to the jury before the form of the verdict Jury Instruction 21, as it confused the jury and required them to apportion fault to the Plaintiff when they should not have done so under the case law and before they had determined if the Defendant was liable. Defendant's jury instruction "D-13" (given as "Jury Instruction 11") (R.E. 3) should have been denied by the trial court for its failure to adhere to precedent and its potential to confuse and incorrectly instruct the jury regarding their findings of liability in this matter. By giving Jury Instruction 11 and Jury Instruction 20 and then giving Jury Instruction 21 the trial court provided the jury compound and repetitive instructions requiring the jury to assume Meka was negligent when no facts were submitted to the jury to prove negligence.

**E. The trial court improperly refused Plaintiff's jury instruction P-22**

Plaintiff presented two theories of liability - 1.) general auto negligence and 2.) failure to train and warn drivers to use safe operation procedures. Plaintiff submitted P-22 (R.E. 7), which was an instruction that stated, "You are instructed that Grant Plumbing did not provide any driving safety training to its employee Grube and did not instruct Grube on safe driving habits

while operating a Grant Plumbing vehicle." The trial court did not allow this instruction. Plaintiff objected. Tr. Trans. 476:10.

**1. P-22 was not peremptory**

Jury Instruction P-22 was not preemptory. The instruction clearly stated "if you find from preponderance of the evidence in this case that Grant Plumbing Heating & Air Conditioning Co.'s failure" regarding safety training was a proximate cause then the verdict could be for the Plaintiff on that theory. A preemptory instruction does not allow the jury to make a finding. Plaintiff's proposed jury instruction clearly allowed the jury to determine whether the lack of training was a cause of the accident.

**2. P-22 was supported by the evidence**

The uncontradicted evidence at trial from defendant Grube was an admission that he had not been provided any safety training courses, and that he was not given any safe driving instructions by Grant Plumbing.

> Q. Has Grant Plumbing ever given you any specific driving or safety training courses?
> A. No, sir.
> Q. Has Grant Plumbing ever taught you any defensive driving techniques?
> A. No, sir.
> Q. Have you ever taken any defensive driving technique courses from any company?
> A. No, sir.
> Q. Have you ever been taught by any company about safety and specific distances behind other vehicles when you travel?
> A. No, sir.
> Q. All right. So, you have no specialized training in staying so far back from any particular vehicle, correct?
> A. No, sir.
> Tr. Trans. 204:25-205:12.

He also testified that having the instruction or safety training would probably have prevented the accident on his part.

Q. Mr. Grube, if you had had some form of safety training from Grant Plumbing, do you agree that that would have helped you to operate your vehicle in a safer manner on February 17th of 2006?
A. **It would have probably helped.**
Tr. Trans. 218:24-29.

Based on this testimony, the trial court was required to allow the plaintiff to submit this theory of liability to the trial court. Plaintiff was only allowed to submit the theory of liability regarding general negligence in the operation of a vehicle, but was not allowed to submit the theory of direct negligence of Grant Plumbing for failure to provide safety training and instruction on safe driving habits as testified to by the defendant Grube.

Defendant argues that Grube did have driving safety because he testified that he knew how far back to drive because he had seen a "driver's book." Grube is referring to a driver's manual that all licensed drivers have seen. The fact that Grube has seen a driver's manual does not mean he received driving safety training from the Grant Plumbing. Grube clearly states that he has received no specialized training from Grant Plumbing regarding vehicle safety.

Q. Has Grant Plumbing ever given you any specific driving or safety training courses?
A. No, sir.
Tr. Trans. 204:25-27.

**3. P-22 was not covered fairly elsewhere in the instructions**

Jury Instruction P-22 was not covered by any of the given jury instructions. None of the jury instructions presented to the jury included Plaintiff's theory of liability based on failure to adequately train Grube in safe driving habits. It was reversible error to refuse Plaintiff's proposed jury instruction P-22.

**F. Evidence regarding Meka's work authorization was inadmissible**

The trial court granted Plaintiff's oral motion in limine to exclude testimony and evidence regarding the citizenship status of the Plaintiff. Tr. Trans. 17:18-4. Despite this ruling, the jury

was allowed to hear testimony regarding the citizenship status of the Plaintiff. Allowing testimony implying that the Plaintiff was not a citizen of the United States was highly prejudicial to the Plaintiff under Miss. R. Evid. 401, 402, and 403. There was absolutely no relevance or probative value to this testimony. The Defendant was allowed to question Meka's Indian citizenship and to make him tell the jury that at one point his work permit status after the accident was withheld for a year.

> Q. Isn't it true that there was actually another reason that you could not accept the job with Quality Matrix that had nothing to do with whether or not you were injured in this accident?
> A. It is both. Not just because I -- no, not just because -- it's other reasons.
> Q. But there is another reason, isn't there?
> A. That is one of the reasons.
> Q. And what is that other reason that you --
>
> Mr. Ogden: Objection. This was handled in a motion in limine, Your Honor.
>
> .....
> A. At that point in time I didn't have a work authorization.
> Tr. Trans. 363:15-364:19.

There was no reason to allow the jury to hear that the plaintiff was not an American citizen. It was both inflammatory and prejudicial. The testimony was designed specifically to create bias with the jury. Telling the jury Meka's citizenship status was not relevant or probative to the case. The defendant raised the issue again in closing and the plaintiff timely objected.

> I would also just question what else is missing. One thing the jury instructions allow you to do is to make reasonable inferences. If you're traveling to India for a wedding on a 24-hour plane, if you're paying you daughter's tuition at MC or part of it I think was the testimony, if you've lived in places all over the world at times before the accident conceding -- I will concede that, is there missing information here? Is there some other means? Why not --
>
> Mr. Ogden: Objection, Your Honor.
> Tr. Trans. 455:16-29

The testimony regarding Meka's citizenship was admitted and was prejudicial as evidenced by the verdict which was dramatically lower than the amount of damages presented by Plaintiff.

The Defendants presented no testimony to contradict the damages presented by the Plaintiff at trial. Plaintiff's treating physician presented evidence that Meka had two ruptured disks from the accident (Tr. Trans. 251:9-19) and 10% impairment. Tr. Trans. 276:19-22. The doctor testified Meka requires a future surgery with a cost between $80,000.00 and $100,000.00 (Tr. Trans. 273: 5-6) and will require follow up treatment for the rest of his life at a cost of $3,000.00 to $4,000.00 per year. Tr. Trans. 277:22-25. Meka's doctor also testified that Meka would not be able to work with his injuries. Tr. Trans. 278:14-17. Meka testified he has been unable to work since the accident because of his injuries. Tr. Trans. 352:23-353: 2. Plaintiff's expert economist testified Meka's lost wages would range between $300,000.00 and $1,359,000.00. Tr. Trans. 304:13-24. Meka testified that he had already incurred medical costs of $7,264.00. Tr. Trans. 350:9-17. And testified to his pain and suffering, his inability to work, his depression and physical limitations. Tr. Trans. 354-356. Defendants provided no expert or lay witness testimony to contradict this evidence. The low number of undisputed damages for medical bills, costs of future surgery, and lost wages presented by Meka would easily exceed the jury verdict. There can be no other explanation of the jury's verdict than the prejudicial remarks. The submission of such testimony contrary to the trial court's prior ruling and over the objections of plaintiff was designed to bias or prejudice the jury against Meka.

**1. Plaintiff did not waive any objection to the admission of this evidence**

Plaintiff did not waive his objection to the admission of evidence of his nationality and immigration status. Defendant first brought up the evidence. Since the Defendant had already rung the bell Plaintiff was forced to address the issue. Defendant was first to raise the issue.

**2. The evidence was not relevant**

The evidence elicited by the Defendant regarding Plaintiff's work status was not relevant. Plaintiff testified that he was not working because of the injuries sustained in the accident. He had no work authorization but even if he had work authorization he could not have worked due to the injuries sustained in the accident.

**3. The evidence was not admissible to impeach**

Mr. Meka testified that he was not working not because he could not find a job but because of the pain. Tr. Trans. 353:1-2. Whether or not Mr. Meka could have taken a job with the injuries he sustained was not testified to by the Plaintiff. Plaintiff never testified that but for the accident and the injuries he sustained he would be working. Thus it was improper to attempt to impeach testimony that was not presented.

**4. The evidence was barred by Rule 403**

It was highly prejudicial to allow the Defendant to present evidence of Plaintiff's immigration status. Defendant presented more than just the fact that Mr. Meka was Indian. The Defendant presented evidence that he was not a United States citizen. This was unfairly prejudicial to the Plaintiff. The Plaintiff presented damages of a future surgery with a cost between $80,000.00 and $100,000.00 (Tr. Trans. 273: 5-6) and follow up treatment for the rest of his life at a cost of $3,000.00 to $4,000.00 per year. Tr. Trans. 277:22-25. Meka testified he has been unable to work since the accident because of his injuries. Tr. Trans. 352:23-353: 2. Plaintiff's expert economist testified Meka's lost wages would range between $300,000.00 and $1,359,000.00. Tr. Trans. 304:13-24. Meka testified that he had already incurred medical costs of $7,264.00. Tr. Trans. 350:9-17. And testified to his pain and suffering, his inability to work, his depression and physical limitations. Tr. Trans. 354-356. This evidence clearly supports a verdict

much higher than $100,000.00 which indicates that the jury was prejudiced by the irrelevant evidence presented of his immigration status.

## CONCLUSION

Plaintiff respectfully requests that this case be remanded back to the trial court for a new trial on the merits.

Respectfully submitted this the 18 day of October, 2010.

BY: _____
J. Ashley Ogden

OF COUNSEL:

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ATTORNEY FOR APPELLANT

## CERTIFICATE OF SERVICE

I, the undersigned counsel of record, hereby certify that I have this day forwarded, by U.S. Mail, postage prepaid, a true and correct copy of the foregoing Reply Brief of Appellant to:

C. Maison Heidelberg, Esq.
Maison Heidelberg P.A.
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Ridgeland, Mississippi 39157

Honorable Tomie T. Green
Hinds County Circuit Judge
Post Office Box 327
Jackson, Mississippi 39205

So certified, this the 18 day of October, 2010.

J. Ashley Ogden