IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

SATYADEV MEKA — **APPELLANT**

VS. — **CAUSE NO.: 2009-CA-01921**

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

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

BRIEF OF APPELLANT

Oral argument is 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 justices of the Supreme Court and/or judges of the Court of Appeals may evaluate possible disqualification or recusal.

I. Satyadev Meka, Appellant

II. Grant Plumbing Heating & Air Conditioning Co., Appellee

III. Albert Grube, Appellee

IV. Honorable Tomie T. Green, Circuit Judge

V. Honorable C. Maison Heidelberg, Esq. Attorney for Appellees

VI. Honorable J. Ashley Ogden, Esq. Attorney for Appellant

RESPECTFULLY SUBMITTED, this the 28 day of June, 2010.

BY: J. Ashley Ogden
J. Ashley Ogden

OF COUNSEL:

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STATEMENT OF THE CASE

This case is an action for damages by Satyadev Meka (hereinafter "Meka") against defendants Grant Plumbing Heating & Air Conditioning Co. (hereinafter "Grant Plumbing") and Albert Grube (hereinafter "Grube") for negligently operating a vehicle and for negligent training amoung other things, and for causing bodily injury to Meka from an automobile accident which occurred on February 17, 2006.

The trial was held before a jury of twelve (12) commencing on September 14, 2009 and ending on September 16, 2009. The case was submitted to the jury on instructions delivered by the lower court. The jury found in favor of plaintiff Satyadev Meka and awarded him $100,000.00 in damages but apportioned 40% fault to the plaintiff and 60% fault to the defendant Albert Grube, thereby reducing his damages award to $60,000.00. In post trial motions, the plaintiff requested a new trial and additur but was denied. Appellant perfects his appeal from the lower court's judgments.

ARGUMENT

A. The Trial Court Erred by Allowing the Jury to Apportion Fault to the Plaintiff

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. Transcr. 417:14-418:8. Plaintiff objected to the instruction. Tr. Trans. 477-479. Based on this instruction the jury erroneously assigned 40% fault to the Plaintiff. R. 186-187. This 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. Defendant Did Not Prove Apportionment of Fault Elements

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.

In order for the jury to be able to consider apportioning fault to the Plaintiff or any other party, the Defendant must prove (1) negligence by a preponderance of the evidence and (2) also

show that such negligence contributed to the cause of the Plaintiff's injury. *Breaux v. Grand Casinos of Miss*, 854 So. 2d 1093, 1097 (Miss. Ct. App. 2003); *Carpenter v. Nobile*, 620 So.2d 961, 964 (Miss. 1993). Since the Defendant failed to present any evidence that the Plaintiff acted negligently or caused or contributed to his injuries, the jury under the law should not have been required to consider apportioning any percentage of fault to him.

2. Defendant Presented No Evidence of Any Duty by Plaintiff

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 presented evidence that Grube, while acting in the scope and course of his employment, negligently rear-ended Meka. Tr. Transcr. 200:24-26. Plaintiff showed that Meka reasonably put on his blinker and reasonably moved his vehicle to the side of I-55.

Q. Would you describe for this jury when Dave [Meka] was slowing, how was he operating his vehicle?
A. When I observed him stopping?
Q. Yes. Before the impact, what did you see when you saw him?
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 no problem?
A. Yes, sir.
Q. How would you describe Dave's slowing of his vehicle? Would you describe it as controlled or not controlled?
A. It was controlled.
.....
Q. Did you see his vehicle do anything that was erratic or inappropriate so that you as a driver would say what's going on?
A. No, I did not.

Tr. Transcr. 190:24-191:24

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. Transcr. 186:8-12. Meka's passenger also testified Meka was pulling off the road.

> 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. I'm not sure what it's called exactly. He had the emergency lights on as well to indicate that he was stopping. Tr. Transcr. 333:4-11.

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. Transcr. 13-19. Meka testified he was able to pull off the road and was almost stopped when he was rear-ended by Grube.

> I was driving in my right lane, and I was going at a regular speed with the flow of traffic. And I had some chest pain, a little discomfort in this part of the body**. And I made an indicator on -- the 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. Transcr. 341: 2-11.

Witness Koontz stated it was an avoidable accident. Tr. Transcr. 191:9-11. Koontz stated when he was moving to the left to go around Meka's car he was struck from behind by Grube in the Grant Plumbing truck. "I was starting over into the left lane, and that's when I was hit in the

passenger rear of my vehicle." Tr. Transcr. 186:17-19. After Grube struck Koontz, Grube veered right and struck the Plaintiff who was moving into and almost stopped in the "safety zone" off the side of the road Tr. Transcr. 188:1-4. Grube's truck struck Meka's car with such force that Meka's car flipped and came to rest in the right lane of traffic.

> We were almost at a complete stop in the triangle area when we felt the impact of a car hitting us from behind. Now we didn't know what happened. We felt the impact and then we're okay for a second, and then the car flipped over.
> The next thing I know, we're upside down hanging from our seat belts.
> Tr. Transcr. 333:12-19.

Grube had a duty to maintain proper control, maintain proper look out ahead, maintain safe speed, and maintain sufficient distance between his vehicle and vehicles in front of him. *White v. Miller*, 513 So. 2d 600, 602 (Miss. 1987). Grube testified that he saw the vehicles and he could not explain why he hit the vehicles.

Q. **Now on the morning of the accident when you were going down the road, did you see any brake lights on the UtiliQuest truck before you struck it?**
A. Yes, sir.
Q. Yes, sir or no, sir?
A. Yes, sir, I did see brake lights.
Q. **When you saw the brake lights, how close were you to the UtiliQuest truck?**
A. Probably about five or six car lengths.
Q. All right. And how fast were you traveling when you saw the brake lights?
A. I guess around 60 like you said.
Q. Would you tell me whether or not if you were maintaining a proper lookout?
A. Yes, sir.
Q. Will you tell me whether or not if you were maintaining a proper speed?
A. Yes, sir.
.....
Q. Okay. **But you still struck the back of the UtiliQuest truck, correct?**
A. Yes, sir.

Tr. Transcr. 205:21-206:20.

Q. **Do you admit that you struck the back of Mr. Meka's vehicle?**
A. Yes, sir.
Tr. Transcr. 209:29-210:2.

Q: So, you were too close. At that point you couldn't stop your vehicle, correct?
A: Yes, sir.
Q: You struck the back of Dave Meka's vehicle correct?
A: the back corner, yes sir.
Q: And what did Dave Meka's vehicle do?
A: Flip.
Tr. Trans. 209:2-10

Q: **So, what could you have done to avoid striking the two vehicles? Could you have maintained a farther distance back?**
A: **I guess if I was farther back, yes, sir it would have helped.**
Tr. Trans. 213:28- 214:3

Q: And you were too close and moving too fast to bring your vehicle to a safe stop on I-55, so you struck Mr. Meka's vehicle, correct?
A: Yes sir I did.
Tr. Trans. 220:16-19

Grube admitted he was too close to the vehicles in front of him to stop. Tr. Trans. 209:1-10; 214:1-3. He could not stop and first struck Koontz's truck and then continued forward and struck Meka's SUV in the dead area (safety zone) causing it to flip over. The responding officer testified:

> When I arrived on the scene.... It [Meka's car] was upside down. And the plumbing company was on the Frontage Road as you enter on 55.
> Tr. Transcr. 157:26-28

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.

3. Defendant Presented No Evidence that Plaintiff Breached Any Duty or Was Negligent.

Witness Koontz said Meka's vehicle was 90% out of the road and in the safety zone. "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. Transcr. 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. Transcr. 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. Transcr. 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. Transcr. 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. Transcr. 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.

4. Defendant Presented No Evidence of Plaintiff Causing or Contributing to His Injuries

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. Transcr. 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. Transcr. 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. Transcr. 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.

5. Trial Court Mistakenly Applied Facts of Non-Similar Case for Apportionment

The trial court stated the apportionment issue was being admitted based on the recent decision of, *Solanki v. Ervin*, 21 So. 3d 552 (Miss. 2009). The case *sub judice* is not similar and not on point to *Solanki*. In *Solanki*, the court granted a comparative negligence instruction against the plaintiff when the case was submitted to the jury. The grounds for the instruction were based on the fact that the motorist stopped her car on the highway after it stalled instead of moving over to the median. There was also evidence that she was sitting in the car talking on her cell phone for one minute to one and a half minutes before the accident and that she had plenty of time to exit her vehicle and remove herself from harm's way. The *Solanki* scenario is completely different from Meka who while giving proper signals was moving his vehicle off the road and into the safety zone when he was struck from the rear by Grube. Grube first struck the Koontz truck in the right lane and then while still out of control, left the road and struck Meka who had moved into the safety zone. There was no testimony Meka's actions were unreasonable, so apportionment of fault to Meka was error.

Based on the evidence presented at trial the defendant did not prove the affirmative defense elements of duty, breach, cause, and injury. The court should not have allowed the jury to consider an apportionment of fault to the plaintiff.

B. TRIAL COURT ERRED IN ADMITTING JURY INSTRUCTION D-13 (C- 11)

Instruction D-13 (given as Jury Instruction 11). (See R.E. 3) incorrectly allows the jury to apportion fault to the plaintiff. The trial court granted instruction D-13. Plaintiff objected to the instruction Tr. Transcr. 477:4-7. The instruction is a misstatement of the law and facts in the

case. Tr. Transcr. 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. Transcr. 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. Transcr. 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 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). 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." 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 rearended.

> 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. Transcr. 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. Transcr. 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. Transcr. 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. Transcr. 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. Transcr. 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. Transcr. 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. Transcr. 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. Transcr. 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. Transcr. 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. Trial Court Erred by Giving the Jury Two Contrary Form of the Verdict Jury Instructions, One Which Erroneously Instructed the Jury to Apportion Fault to the Plaintiff

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*, 854 So. 2d at 1097.

D. The Trial Court Erred by Giving Jury Instruction 11 and 20 Before Jury Instruction 21 Which Erroneously Required the Jury to Apportion Fault to the Plaintiff Before Determining the Liability of the Defendants

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 Erred by Denying P-22, Plaintiff's Second Theory of liability of Defendant's Failure to Instruct Grube on Safe Driving Habits

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. 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. Transcr. 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. Transcr. 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.

F. The Trial Court Erred by Allowing Testimony and Argument Regarding the Plaintiff's Citizenship Status

The trial court granted Plaintiff's oral motion in limine to exclude testimony and evidence regarding the citizenship status of the Plaintiff. Tr. Transcr. 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. Transcr. 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. Transcr. 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 a 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.

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 28th day of June, 2010.

BY: J. Ashley Ogden
J. Ashley Ogden

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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 Appellant's Brief to:

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

So certified, this the 28th day of June, 2010.

J. Ashley Ogden
J. Ashley Ogden