IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2010-CA-00145

SCHENILLE MARTIN, INDIVIDUALLY AND ON BEHALF OF THE WRONGFUL DEATH BENEFICIARIES OF FLOYD L. MARTIN, DECEASED — PLAINTIFF-APPELLANT

VS.

B & B CONCRETE COMPANY, INC. — DEFENDANT-APPELLEE

ON APPEAL FROM THE
CIRCUIT COURT OF LAFAYETTE COUNTY, MISSISSIPPI
CAUSE NO. L07-223

BRIEF OF B & B CONCRETE COMPANY, INC., APPELLEE

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

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

1. Schenille Martin – Plaintiff/Appellant.

2. Michael Martin, Lashaun Martin, and Lewayne Martin - Children of Floyd L. Martin.

3. Grady F. Tollison, Esq.; Robert D. Schultze, Esq.; and Tollison Law Firm, P.A., 103 N. Lamar Avenue, Post Office Box 1216, Oxford, MS 38655 - Counsel for Plaintiff/Appellant.

4. Joseph E. Roberts, Jr., Esq., and Pittman Germany Roberts & Welsh, LLP, Post Office Box 22985, Jackson, MS 39225-2985 - Counsel for Plaintiff/Appellant.

5. B & B Concrete Company, Inc. - Defendant/Appellee.

6. Wilton V. Byars, III, Esq.; J. Luke Benedict, Esq.; and Daniel Coker Horton & Bell, P.A., 265 North Lamar Boulevard, Suite R, Post Office Box 1396, Oxford, MS 38655 -1396 - Counsel for Defendant/Appellee.

7. Honorable Andrew K. Howorth, Circuit Court Judge of the Circuit Court of Lafayette County, 1 Courthouse Square, Suite 201, Oxford, MS 38655 – Presided over the trial of this matter.

8. Honorable Henry L. Lackey, Circuit Court Judge of the Circuit Court of Lafayette County, Post Office Drawer T, Calhoun City, MS 38916-1529 – Presided over jury selection in this matter.

THIS the 30th day of July, 2010.

J. LUKE BENEDICT
ATTORNEY FOR B & B CONCRETE COMPANY, INC.

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II. STATEMENT OF THE CASE

A. NATURE OF THE CASE

Plaintiff/Appellant Schenille Martin filed the instant lawsuit in the Circuit Court of Lafayette County alleging that Defendant/Appellee B & B Concrete Company, Inc. (hereinafter "B & B") was vicariously liable for the personal injuries and wrongful death of plaintiff's husband, Floyd L. Martin. Trial Record (hereinafter T.R.) 1-3. This suit arises out of a two vehicle accident that occurred on Friday, June 10, 2005, at approximately 11:10 a.m. on Highway 278 at the intersection of County Road 405 in Lafayette County, Mississippi. T.R. 1-3. At the time of the accident, Floyd L. Martin was driving a 1966 pick-up truck northbound on County Road 405. T.R. 1-3. At the same time, Anthony Logan, an employee of B & B, was driving a loaded B & B concrete truck eastbound in the right or outside lane of Highway 278, a four lane road with a grass median separating the eastbound and westbound lanes. T.R. 1-3, Trial Transcript (hereinafter T.T.) 324. Martin, who had a stop sign, proceeded into the intersection without stopping and collided with the B & B concrete truck. T.T. 327-328, 365-366. Martin died at the scene as a result of his injuries. T.T. 368.

B. COURSE OF PROCEEDINGS

Plaintiff Schenille Martin filed her Complaint on April 30, 2007, in the Circuit Court of Lafayette County, Mississippi. T.R. 1-3. This case was tried before a jury of twelve citizens of Lafayette County at the Lafayette County Courthouse on September 28-October 1, 2009. At the conclusion of the taking of evidence, the jury was properly instructed on the law pertaining to the case. After argument of counsel, the jury returned into open court a defense verdict for B & B. T.R. 339-341. A final judgment incorporating the verdict was entered on October 5, 2009. T.R.

342. Plaintiff filed a Motion for New Trial on October 15, 2009. T.R. 343-391. The Honorable Andrew K. Howorth denied plaintiff's Motion for New Trial on January 5, 2010 after considering the oral arguments of counsel along with the applicable case law and legal principles. T.R. 412. Plaintiff timely filed her Notice of Appeal on January 25, 2010. T.R. 413-414.

For purposes of discussing the third issue in this Brief, additional proceedings in the trial court pertaining to defense expert Dr. Tom Talbot are important. As mentioned, plaintiff's Complaint was filed on April 30, 2007. Plaintiff identified two witnesses in support of her theory that the accident occurred at the stop sign on County Road 405 while Mr. Martin was stopped: Nicole Johnson and Melvin Houston. These two witnesses were deposed on October 18, 2007. T.R. 418-462. Based on the plaintiff's sole allegation at the time that the subject accident occurred at the stop sign of County Road 405, B & B filed its Designation of Expert Witnesses on February 13, 2009, designating Dr. Talbot as an expert. T.R. 113-137. B & B provided Dr. Talbot's report, photographs and diagrams explaining his opinions. T.R. 113-137. Thereafter, plaintiff "designated" Tim Corbitt as an expert in the field of accident reconstruction on February 17, 2009. T.R. 140-154. Plaintiff's expert designation, however, did not comply with Rule 26 of the Mississippi Rules of Civil Procedure. Mr. Corbitt's entire testimony was "at the time of the collision, Mr. Martin's vehicle was either stopped or traveling at a very low rate of speed." T.R. 140. The "opinion" did not state where the accident happened, how the accident happened or provide any information required by Rule 26 of the Mississippi Rules of Civil Procedure. T.R. 140.

Plaintiff finally supplemented the opinion of Mr. Corbitt on July 16, 2009 after an order of the trial court. T.R. 213, 217-225. This supplemental opinion announced for the first time,

approximately two years and two months after the filing of the lawsuit, that plaintiff contended the collision occurred in the traveled lanes of Highway 278 instead of at the stop sign on County Road 405. T.R. 223. Rather than seeking a continuance, B & B immediately requested the deposition of Mr. Corbitt and deposed him on the first available deposition date of August 20, 2009. T.R. 239. It was only at that time, 39 days before trial, that Mr. Corbitt provided any speed for the Martin vehicle, and his photographs and diagrams were produced for the first time at his deposition. Immediately upon receipt of the deposition transcript, counsel for B & B forwarded the transcript and attachments to Dr. Talbot. Within one week of receiving the transcript and attachments, B & B provided Dr. Talbot's supplemental opinion to plaintiff on September 2, 2009, by way of supplemental discovery response. T.R. 247-248. This was the same day the plaintiff noticed, and then canceled, Dr. Talbot's deposition. B & B then supplemented its prior expert designation of Dr. Talbot on September 3, 2009, three and one-half weeks before trial. T.R. 249-257. Plaintiff waited two weeks and then filed a Motion in Limine on September 18, 2009, seeking to preclude testimony from Dr. Talbot regarding his supplemental report. T.R. 258-262. B & B responded to the plaintiff's Motion in Limine on September 22, 2009. T.R. 263-267. After considering the applicable case law and legal arguments, the trial court allowed Dr. Talbot to testify regarding his supplemental opinions.

C. STATEMENT OF FACTS

On June 10, 2005, at approximately 11:10 a.m., Floyd L. Martin was driving a 1966 pick-up truck northbound on County Road 405. T.R. 1-3. At the same time, Anthony Logan, an employee of B & B, was driving a loaded B & B concrete truck eastbound on Highway 278. T.R. 1-3. Logan was in the right or outside lane of Highway 278. T.T. 324. The north side of

Highway 278, to Logan's right, was lined with trees obstructing his view of County Road 405. Plaintiff's Exhibit 3, Bates 108, 126, T.T. 133, 325-327. As Logan approached the intersection, Martin, who had a stop sign, proceeded into the intersection without stopping at the stop sign and collided with the passenger side of the B & B concrete truck. T.T. 327-328, 365-366. Mr. Martin was declared dead at the scene. T.T. 368. An eyewitness, Ricky Willingham, testified that Mr. Martin ran the stop sign without ever slowing down. T.T. 365-366. The speed limit of the county road on which Mr. Martin was traveling was 35 miles per hour, and Willingham testified at trial that Mr. Martin was traveling approximately 30 miles per hour when he ran the stop sign. T.T. 365-366. B & B's expert witness, Dr. Thomas Talbot, testified at trial that Mr. Martin was traveling between 20 to 30 miles per hour. T.T. 447-449, 458-459. The speed limit on Highway 278 was 65 miles per hour. It was undisputed that Logan was traveling between 45 and 55 miles per hour at the time of the collision. T.T. 324. As such, Mr. Logan was traveling between 10 and 20 miles under the posted speed limit at all relevant times. Mr. Logan was familiar with Highway 278 and the intersections that he was going to encounter as he traveled eastbound, so he chose to travel at a decreased speed. T.T. 324-325. In addition, Logan's destination for delivery of his load of concrete was just east of County Road 405. T.T. 324-325. When faced with Mr. Martin running the stop sign, the proof was clear that, prior to impact, Mr. Logan let off the accelerator, checked his mirrors for traffic in the left or inside lane of Highway 278 East, and, upon seeing no vehicles in that lane, began steering to the left. T.T. 330-331; Defendant's Exhibit 5, T.T. 433. B & B's expert accident reconstructionist testified that Mr. Logan applied his brakes prior to the collision. T.T. 444-445, 458-459. Mr. Logan attempted to avoid Mr. Martin, but he simply did not have enough time to avoid the collision. T.T. 330-

331, 458-459. After the unsuccessful attempt to avoid Mr. Martin, the B & B concrete truck came to rest in the left or inside lane of Highway 278 East. Defendant's Exhibit 5, T.T. 433.

III. SUMMARY OF THE ARGUMENT

The jury instructions actually given must be read as a whole to determine whether a jury has been incorrectly instructed. In this case, when so read, the instructions fairly announce the law of the case and create no injustice. Plaintiff's theory of the case was properly presented through the instructions as a whole. Plaintiff has failed to demonstrate a miscarriage of justice resulted requiring reversal.

A view of the evidence in the light most favorable to the verdict results in the inescapable conclusion that the jury verdict should be affirmed. The verdict was not so contrary to the overwhelming weight of the evidence such that allowing it to stand would sanction an unconscionable injustice. B & B elicited eyewitness testimony, submitted photographs depicting the accident scene, and articulated a plausible theory concerning how the accident occurred. The facts presented by B & B proved that Floyd Martin, who had a stop sign on County Road 405, failed to yield the right-of-way as he ran the stop sign and proceeded into the intersection and collided with the B & B concrete truck on Highway 278. Notwithstanding his best efforts, the B & B driver did not have enough time to avoid the Martin pickup. Although plaintiff also had a theory of how the accident occurred, both theories were presented to the jury and the jury was entitled to decide which to credit. After being properly instructed on the law, the jury chose to believe that Mr. Martin's actions were the sole cause of the accident.

During the trial, it was within the sound discretion of the Court to allow B & B's expert to testify as to his supplemental opinion, especially since plaintiff's expert was deposed following

his supplemental opinion which offered a new theory of the case. The Court's decision to allow the testimony from B & B's expert was well-reasoned and fair considering the circumstances of plaintiff's expert designation and supplementation.

IV. ARGUMENT

A. The Jury Instructions Fairly Announced The Law Of The Case

In determining whether reversible error lies in the granting or refusal of jury instructions, the jury instructions actually given must be read as a whole to determine whether a jury has been correctly instructed. *Haggerty v. Foster*, 838 So. 2d 948, 953 (Miss. 2002). When so read, if the jury instructions fairly announce the law of the case and create no injustice, no reversible error will be found. *Id.* It is improper to consider excerpts from the jury instructions or to evaluate portions of the jury instructions out of context since the instructions must be considered with the other instructions given. *Haggerty*, 838 So. 2d at 954. As set forth below, the jury was properly instructed in this case.

1. The Court Properly Denied Instruction P-2: Plaintiff's Jury Instruction 2 was a peremptory instruction as to liability in favor of the plaintiff. The Mississippi Supreme Court has stated that a peremptory instruction should not be granted when evidence favorable to the non-moving party and the reasonable inferences therefrom present a question for the jury. *Tentoni v. Slayden*, 968 So. 2d 431, 436 (Miss. 2007).

It is unclear from this portion of Appellant's Brief which duty she alleges was violated by B & B's driver, Anthony Logan. Moreover, there is no citation to any part of the record in which Logan admitted to any such breach. Plaintiff alleged that Logan was negligent by violating Miss. Code Ann. §§ 63-3-505 ("Conditions under which speed must be decreased") and 805 ("Vehicles

entering through highway"), as well as by failing to maintain a proper lookout and failing to take proper precautions in response to Mr. Martin entering the intersection. The Mississippi Supreme Court has rejected the argument that a driver, such as Anthony Logan, was negligent *per se* when the driver did not reduce his already decreased speed, when approaching an intersection. *Richardson v. Adams*, 223 So. 2d 536 (Miss. 1969). It was undisputed at trial, even by plaintiff's expert witness, that Logan was traveling considerably less than the posted speed limit, approximately 45 to 55 miles per hour, at the time of the collision. T.T. 324. As such, Mr. Logan was traveling between 10 and 20 miles under the posted speed limit of 65 miles per hour at all relevant times. Mr. Logan was familiar with Highway 278 and the intersections that he was going to encounter as he traveled eastbound, so he chose to travel at a decreased speed. T.T. 324-325. Accordingly, Logan was not in violation of § 63-3-505 for failure to reduce his speed. The Mississippi Supreme Court has stated that a driver's failure to reduce speed upon approaching an intersection is not a violation if the driver is traveling at a speed less than the maximum speed limit. *Richardson v. Adams*, 223 So. 2d 536 (Miss. 1969). Logic mandates that it is not <u>when</u> a driver decreases his or her speed prior to encountering an intersection, but <u>whether</u> that driver decreases his or her speed prior to encountering an intersection

As pointed out by plaintiff in her Appellant's Brief, *Richardson* dealt with a predecessor statute to Miss. Code Ann. § 63-3-505. At that time, the maximum speed was part of the same statute that addressed decreasing one's speed. Presently, the maximum speed statute is found in the same series of statutes at Miss. Code Ann. § 63-3-501. These statutes are both contained in Article 11 entitled, "Restrictions On Speed; Use of Radar." Merely splitting the two sections does not change the common sense reading of *Richardson.*

In *Richardson*, the plaintiff requested a peremptory jury instruction as to negligence after the defendant admitted that she failed to decrease her already reduced speed upon approaching an intersection. *Richardson*, 223 So. 2d at 537. The Court stated that if plaintiff's contention was correct he would have been only entitled to an instruction that defendant's failure to reduce her speed was negligence and if such negligence caused or contributed to the accident then he was entitled to a verdict against her. *Id.* The Court stated that it could not agree with plaintiff's basic contention that defendant's failure to reduce her speed was negligence as a matter of law. *Id.* Rather, the actions of the defendant, as in this case, presented a jury issue. *Id.* Plaintiff was allowed to present this theory to the jury, but the jury rejected it. As explained above, the first part of the law sets the maximum speed limits permissible on the state highways. A driver must fail to reduce his speed from the maximum provided when one of the conditions set out is present to be considered a violation of the law. *Id.* In *Richardson*, as in the instant case, the defendant was traveling at a speed less than the maximum as defendant approached the intersection and whether the failure to further reduce their speed under the prevailing circumstances was negligence was a question of fact for the jury to determine. *Id.*

Plaintiff's assertion that the law requires the operator of a motor vehicle to decrease his speed when approaching an intersection "regardless of his prior speed" makes no practical sense. Taken to its logical extreme, a driver traveling 65 miles an hour who slows down to 64, is within the protection of the statute, but a driver traveling 30 miles per hour who does not slow down is negligent. The law does not favor illogical results. *McKlemurry v. State*, 417 So. 2d 554 (Miss. 1982). In the instant case, B & B's driver was traveling 10 to 20 miles per hour below the posted speed limit and it would be illogical to grant plaintiff a peremptory instruction for failing to further

reduce his speed. In the alternative, the jury could have easily inferred that Anthony Logan decreased his speed in compliance with § 63-3-505 as he was traveling at approximately 45 to 55 miles per hour at the time of the collision.

The issue concerning whether Mr. Martin had entered the intersection was a disputed issue of fact that was decided against the plaintiff. Concerning Mr. Logan's actions when faced with Mr. Martin running the stop sign, the proof was clear that, prior to impact, Mr. Logan let off the accelerator, checked his mirrors and began steering to the left. T.T. 330-331. There was also testimony that, taking the air lag into account when viewing the skid marks of the dual tires on the rear of the concrete truck, Logan likely attempted to apply his brakes before impact. T.T. 444-445, 458-459. After viewing the evidence in the light most favorable to B & B, questions of fact existed, such as whether Mr. Martin failed to decrease his speed, ran the stop sign, and entered the intersection when it was unsafe to do so, and the jury was properly charged with resolving the factual issues. A peremptory instruction in plaintiff's favor was properly denied.

2. <u>The Court Properly Denied Instruction P-6</u>: Plaintiff's Jury Instruction 6 was simply another peremptory instruction as to liability in favor of the plaintiff. As stated above, a peremptory instruction should not be granted when evidence favorable to the non-moving party and the reasonable inferences therefrom present a question for the jury. *Id.* Plaintiff discusses the application of Miss. Code Ann. § 63-3-505 at this point in her brief, and this statute has been addressed in the preceding section of this response. If § 63-3-505 even applies under this factual scenario, the jury could have inferred that the B & B driver decreased his speed in compliance with § 63-3-505 as he was traveling at approximately 45 to 55 miles per hour at the time of the accident in a 65 mile per hour zone. By traveling 10 to 20 miles per hour below the posted speed

limit, it would be unreasonable to grant plaintiff a peremptory instruction based on him not further reducing his speed. B & B presented evidence that Logan's view of vehicles approaching the highway from the county road was obstructed by a tree line and that when he was able to see that Martin would not stop as required by law, he let off the accelerator, checked his mirrors, and steered to the left to avoid Martin, but did not have enough time to avoid the collision. Plaintiff's Exhibit 3, Bates 108, 126, T.T. 133, 325-327; 330-331, 458-459. Eyewitness Ricky Willingham testified that Mr. Martin ran the stop sign without ever slowing down. T.T. 365-366. B & B's expert accident reconstructionist testified that Mr. Logan applied his brakes prior to the collision. T.T. 444-445, 458-459. Accordingly, issues of fact existed such that a peremptory instruction should not have been given.

3. **The Court Properly Denied Instruction P-10:** Plaintiff's Jury Instruction 10 regarding the duties of B & B's driver should not be read in isolation from the instructions which were given. This particular instruction dealt with vehicles entering a through highway which was plaintiff's first "alternate theory," the first theory being that the accident occurred off of the roadway. In addition to granting the more general plaintiff's Jury Instruction 8, the Court granted plaintiff's Jury Instruction 13 and defendant's Jury Instruction 19 on the issue of Miss. Code Ann. § 63-3-805. The Court also granted another "right of way" instruction by way of defendant's Jury Instruction 19. These instructions, when considered along with the other instructions given, combined to correctly instruct the jury as to the duties of B & B's driver. Plaintiff failed to define "immediate hazard" in Plaintiff's Jury Instruction 10 which was defined in the statute as "vehicles which are approaching so closely on said through highway as to constitute an immediate hazard" and also omitted the duties owed by Mr. Martin to trigger the duties owed by Anthony Logan.

Plaintiff's Jury Instruction 10 was an incomplete statement of law and did not fully set out the language of Miss. Code Ann. § 63-3-805 and was properly denied on that basis as well as being cumulative.

4. **The Court Properly Denied Instruction P-11:** Plaintiff's Jury Instruction 11 regarding the duties of B & B's driver to reduce his speed should not have been given as discussed above. Unlike the *Greyhound* case relied upon by the plaintiff where the bus driver was exceeding the speed limit, it was uncontradicted at trial that B & B's driver was traveling at a speed less than the maximum speed limit as he approached the intersection. T.T. 324. Mr. Logan was familiar with Highway 278 and the intersections that he was going to encounter as he traveled eastbound, so he chose to travel at a decreased speed. T.T. 324-325. Accordingly, Logan would not have been in violation of § 63-3-505 for failure to reduce his speed pursuant to *Richardson* as described at length above.

The Court granted plaintiff's Jury Instruction 8, plaintiff's Jury Instruction 13, defendant's Jury Instruction 15, defendant's Jury Instruction 17, plaintiff's Jury Instruction 7, and defendant's Jury Instruction 19 which, when considered along with the other instructions given, combined to correctly instruct the jury as to the duties of B & B's driver. In the alternative, the jury could have inferred that B & B's driver decreased his speed in compliance with § 63-3-505 as he was traveling at approximately 45 to 55 miles per hour at the time of the collision.

5. **The Court Properly Denied Instruction P-12:** Plaintiff's Jury Instruction 12 regarding the duties of B & B's driver upon realizing that Martin would not stop at the stop sign, plaintiff's second "alternate theory," were fully covered in Jury Instruction P-13 and in Jury Instruction D-19. Defendant's Jury Instruction 19 is consistent with *Vines v. Windham*, 606 So.

2d 128 (Miss. 1992) and *Greyhound Lines, Inc. v. Sutton*, 765 So. 2d 1269 (Miss. 2000). Further, it was granted by the Court in conjunction with plaintiff's Jury Instruction 13. In *Vines*, the Mississippi Supreme Court held that "a driver who approaches an intersection at which he has the right of way is entitled to assume that crossing traffic will obey stop signs, look for oncoming vehicles before entering the intersection, and yield to through traffic." *Vines*, 765 So. 2d at 131. The Mississippi Supreme Court has also held that "a driver has no duty to take defensive action until such time as a reasonable person would know a car approaching an intersection will not stop." *Greyhound Lines, Inc.*, 765 So. 2d at 1273. As noted above, the subject instruction is clearly a proper statement of law. When plaintiff's Jury Instruction 13 is considered along with defendant's Jury Instruction 19 and the other instructions given, the jury was correctly instructed as to the duties of B & B's driver. Plaintiff's claim that the denial of Instruction P-12 had the effect of failing to properly instruct the jury is incorrect, as the instructions read as a whole properly presented plaintiff's theory of the case. The jury simply chose to reject plaintiff's theory.

6. The Court Properly Granted Instruction D-16: Defendant's Jury Instruction 16 is consistent with and tracked the language of Miss. Code Ann. § 63-3-901, entitled "Stopping, standing or parking prohibited in specified places." It must be kept in mind that it was the plaintiff, not the defendant, who contended through one of her so-called "alternate theories" that Mr. Martin was stopped in the roadway. Plaintiff asserted that this instruction was improperly granted because it does not continue to address the duties of B & B's driver after he realized the location of Mr. Martin's vehicle. As stated above, however, the duties of B & B's driver were addressed in various other instructions of the Court, including a lookout instruction. The plaintiff,

and specifically her expert, presented a theory which supported giving Jury Instruction D-16. Jury Instruction D-16 is an accurate statement of law and it was properly granted.

7. **The Court Properly Granted Instruction D-17:** Defendant's Jury Instruction 17 is consistent with and tracked the language of Miss. Code Ann. § 63-3-805, discussed above. Plaintiff acknowledged that this instruction was a proper statement of the law, but argued it was "deficient as it failed to go far enough" citing *Richardson v. Adams*, 223 So. 2d 536 (Miss. 1969). In *Richardson*, the deficiency complained of was cured by other instructions granted by the court. *Richardson*, 223 So. 2d at 538. While by no means agreeing that D-17 was deficient standing alone, the Court granted plaintiff's Jury Instruction 8, plaintiff's Jury Instruction 13, defendant's Jury Instruction 15, defendant's Jury Instruction 17, plaintiff's Jury Instruction 7, and defendant's Jury Instruction 19 which, when considered along with the other instructions given, combined to correctly instruct the jury as to the duties of B & B's driver. The plaintiff also cited *Hill v. Columbus Ice Cream and Creamery Co.*, 93 So. 2d 634 (Miss. 1957) for the position that the instruction had the effect of "making the driver stopped at the stop sign at an intersection liable for anything that happened after proceeding into the intersection." The *Richardson* court stated that *Hill* was distinguishable because the instructions in *Hill* were given in conflict with the applicable law and found to be in error because of certain defects not present in their case. *Richardson*, 223 So. 2d at 538-9. The *Hill* case is distinguishable from the instant case for the exact same reasons. In the instant case, when read together, and especially with plaintiff's Jury Instruction 13, the jury instructions correctly instructed the jury relative to the issues involved.

The instructions actually given must be read as a whole to determine whether a jury has been incorrectly instructed. In this case, the jury received substantive instructions in a case

involving a two vehicle collision. When all of those instructions were so read, they fairly announced the law of the case and created no injustice.

B. The Jury Accepted the Testimony and Evidence that Supported B & B's Theory of the Accident

There are innumerable Mississippi Supreme Court cases describing how a "verdict against the overwhelming weight of the evidence" assignment of error must be reviewed. *Tentoni v. Slayden*, 968 So. 2d 431, 440 (Miss. 2007). When determining whether a jury verdict is against the overwhelming weight of the evidence, the Court must accept as true the evidence which supports the verdict. *Tentoni*, 968 So. 2d at 441. The court should reverse a jury verdict only when the verdict is so contrary to the evidence that to allow it to stand would sanction an unconscionable injustice. *Id.*

B & B's theory of the case was properly supported by witness testimony and exhibits. Anthony Logan was traveling between 10 and 20 miles per hour under the posted speed limit at all relevant times prior to the accident. T.T. 324. The north or right side of Highway 278 was lined with trees, obstructing the view north on County Road 405. Plaintiff's Exhibit 3, Bates 108, 126, T.T. 133. Eyewitness Ricky Willingham testified that Mr. Martin ran the stop sign without ever slowing down. T.T. 365-366. The speed limit of the county road on which Mr. Martin was traveling was 35 miles per hour and Willingham testified at trial that Mr. Martin was traveling approximately 30 miles per hour as he ran the stop sign. T.T. 365-366. Concerning Mr. Logan's actions when faced with Mr. Martin running the stop sign, the proof was clear that, prior to impact, Mr. Logan let off the accelerator, checked his mirrors and began steering to the left. T.T. 330-331. There was also testimony from expert witness Dr. Tom Talbot that, taking the air lag

into account when viewing the skid marks of the dual tires on the rear of the concrete truck, Logan likely attempted to apply his brakes before impact. T.T. 444-445, 458-459. B & B presented proof that at the speed of Martin's vehicle, as estimated by eyewitnesses and calculated by defendant's expert witness, there was nothing that Logan could have done to avoid the accident. T.T. 458-459. The jury believed this proof, drew its own inferences, and returned a verdict supported by the credible evidence.

After viewing the evidence in the light most favorable to B & B, it cannot be said that the facts point so overwhelmingly in favor of plaintiff that reasonable jurors could not have arrived at a contrary verdict. B & B presented evidence supporting its theory that the accident was entirely the fault of Mr. Martin when he failed to stop at the intersection of County Road 405 and Highway 278. B & B elicited eyewitness testimony, submitted photographs depicting the accident scene, and articulated a plausible theory of why the damage resulted as it did. B & B's theory supported its version of how the accident occurred: Floyd Martin, who had a stop sign, failed to yield the right-of-way as he proceeded into the intersection and collided with the B & B concrete truck, which had no opportunity to avoid the accident. Plaintiff presented her theory of how the accident occurred, but the jury rejected it. In short, given the deference that is afforded a jury's verdict when, as in the instant case, evidence presented at trial conflicts and is capable of more than one interpretation, the jury's defense verdict in favor of B & B must be affirmed.

C. <u>The Court Properly Allowed the Expert Testimony of Dr. Thomas Talbot</u>

The standard of review for the admission or exclusion of testimony is abuse of discretion. *Causey v. Sanders*, 998 So. 2d 393, 399 (Miss. 2008). The admission of expert testimony is left to the sound discretion of the trial judge. *Id.* Unless the trial judge's decision is arbitrary and

clearly erroneous, amounting to an abuse of discretion, a trial judge's decision will stand. *Windmon v. Ward*, 926 So. 2d 867, 876 (Miss. 2006). For a reversal based on the erroneous admission or exclusion of evidence, the error must result in prejudice and harm or adversely affect a substantial right of a party. *Id.*

The trial court made a well-reasoned decision, supported by the facts of the case and applicable law, when it allowed Dr. Thomas Talbot, B & B's accident reconstructionist, to testify at trial about the speed of Mr. Martin's vehicle. The trial court heard and thoroughly considered plaintiff's Motion in Limine regarding this testimony of Dr. Talbot prior to trial, then addressed this issue again while Dr. Talbot was on the witness stand. Plaintiff asserts that Dr. Talbot should not have been allowed to testify about the speed of Mr. Martin's vehicle because he supplemented his expert opinion less than sixty days before the trial. Dr. Talbot's supplemental opinion, however, was clearly in response to special circumstances taken into account by the trial court which arose following plaintiff's late designation of Tim Corbitt. The special circumstances arose when plaintiff completely changed her theory of the case more than two years after filing her Complaint.

A review of the chronology concerning plaintiff's allegations is helpful on this point. Plaintiff initially took the position and elicited deposition testimony that Mr. Martin was parked at the stop sign on County Road 405 when the B & B concrete truck veered off Highway 278 and hit Martin. Based upon this position, B & B filed its Designation of Expert Witnesses on February 13, 2009, designating Dr. Talbot as an expert. B & B provided Dr. Talbot's report, photographs and diagrams explaining his opinions, the thrust of which was that plaintiff's (initial) theory was unsupported by the physical facts. Thereafter, plaintiff "designated" Tim Corbitt as an expert in

the field of accident reconstruction on February 17, 2009. Plaintiff's expert designation, however, did not comply with Rule 26 of the Mississippi Rules of Civil Procedure. Mr. Corbitt's entire testimony was "at the time of the collision, that Mr. Martin's vehicle was either stopped or traveling at a very low rate of speed." The "opinion" did not state where the accident happened, how the accident happened or provide any information required by Rule 26 of the Mississippi Rules of Civil Procedure.

Plaintiff finally supplemented the opinion of Mr. Corbitt on July 16, 2009 after an order of the trial court. This supplemental opinion announced for the first time, approximately two years and two months after the filing of the lawsuit, one of plaintiff's "alternate theories," contending the collision occurred in the traveled lanes of Highway 278 instead of at the stop sign on County Road 405. Rather than seeking a continuance, B & B immediately requested the deposition of Mr. Corbitt and deposed him on the first available deposition date of August 20, 2009. It was only at that time that Mr. Corbitt provided any speed for the Martin vehicle, and his photographs and diagrams were produced for the first time at his deposition just over one month from the start of trial. Immediately upon receipt of the deposition transcript, counsel for B & B forwarded the transcript and attachments to defense expert, Dr. Talbot. Within one week of receiving the transcript and attachments, B & B provided Dr. Talbot's supplemental opinion to plaintiff on September 2, 2009, by way of supplemental discovery response. This was the same day the plaintiff noticed, and then canceled, Dr. Talbot's deposition. B & B then supplemented its prior expert designation of Dr. Talbot on September 3, 2009, three and one-half weeks before trial. Plaintiff waited two weeks and then filed a Motion in Limine on September 18, 2009, seeking to preclude testimony from Dr. Talbot regarding his supplemental report. B & B

responded to the plaintiff's Motion in Limine on September 22, 2009. After considering the applicable case law and legal arguments as well as the timeline set forth above, the trial court properly held that Dr. Talbot's supplemental opinion was in response to special circumstances and allowed Dr. Talbot to testify regarding his supplemental opinions.

Plaintiff cites Rule 4.04(A) of the Uniform Circuit and County Court Rules and *Banks v. Hill*, 978 So. 2d 663 (Miss. 2008) in support of her assertion that the court erred in allowing the expert testimony of Dr. Talbot. Rule 4.04(A) provides in pertinent part that "absent special circumstances the court will not allow testimony at trial of an expert who was not designated at least sixty days before trial." As discussed above, Dr. Talbot was designated as an expert on February 13, 2009, and his initial opinions were provided at that time. Had plaintiff never proposed her "alternate theories," based on facts not provided by any fact witness deposed or called at trial by the plaintiff, defendant would have had no need to supplement Dr. Talbot's opinions. Dr. Talbot's supplemental opinion was clearly in response to special circumstances that came about when plaintiff changed her theory of the case more than two years after filing her Complaint. Furthermore, the one case cited by plaintiff, *Banks*, in support of her argument is distinguishable.

In *Banks*, the trial court ordered that the plaintiff would be allowed to call her experts to rebut the defendants' case-in-chief in an automobile accident case. *Banks*, 978 So. 2d at 664. The Mississippi Supreme Court reversed the decision of the trial court and restricted the plaintiff to calling experts to rebut opinions not disclosed in discovery and not reasonably anticipated. *Id.* The Supreme Court noted that the plaintiff on more than one occasion flagrantly ignored the rules of discovery and the duty to designate her expert witnesses. *Banks*, 978 So. 2d at 665. Plaintiff

never properly designated her experts and never disclosed the substance of opinions to be offered. *Id.* The defendants properly and timely disclosed that their case-in-chief would include the testimony of experts. *Banks*, 978 So. 2d at 664. The opinions to be offered by the defendants' experts and other required information was provided. *Id.* The plaintiff, on the other hand, provided nothing. *Banks*, 978 So. 2d at 666. The Supreme Court found it inherently unfair and a violation of Rule 26 for the plaintiff to appear at trial with experts whose opinions had not been properly disclosed to the defendants, and to call these experts to "rebut" evidence offered in the defendants' case-in-chief. *Id.*

Plaintiff's actions in the instant case are more akin to the plaintiff in *Banks*. Plaintiff initially failed to provide her expert designations in compliance with Rule 26. After a court order compelling the plaintiff to properly designate her experts, the plaintiff provided supplemental opinions from her expert which completely changed her theory of the case. B & B supplemented its' designation with an expert opinion to address the plaintiff's new theory. Plaintiff was provided with the defendant's expert opinions in discovery and should have reasonably anticipated his testimony regarding the speed of Mr. Martin's vehicle. The supplemental opinion of Dr. Talbot contained language as to the speed of Mr. Martin, such as "the pickup truck would have been moving forward at a speed of at least 15 miles per hour," "the rotation indicates that the pickup truck was moving forward at a significant speed at the time of the initial impact," and "this damage could only occur if the pickup truck struck the concrete truck at a significant speed." The speed limit of the county road on which Mr. Martin was traveling was 35 miles per hour and eyewitness Ricky Willingham testified at trial that Mr. Martin was traveling approximately 30 miles per hour. Willingham had never before provided an estimate of speed. An expert witness

is allowed to comment on testimony elicited at trial, which is the purpose for allowing expert witnesses to stay in the courtroom as fact witnesses testify. *Northup v. State*, 793 So. 2d 618 (Miss 2001). In light of Dr. Talbot's report, the posted speed limit, and the testimony of Mr. Willingham, the plaintiff should have reasonably anticipated that Dr. Talbot would testify that Mr. Martin was traveling between 20 to 30 miles per hour at trial.

Furthermore, plaintiff's contention that the court erred in allowing the expert testimony of Dr. Talbot should be rejected outright based on the rationale relied upon by plaintiff in her prior pleadings. In plaintiff's Motion for Continuance served on March 24, 2009, the plaintiff made the following statements and cited the following case law:

> 7. This State has said that while there is no hardline rule as to what constitutes reasonable time in which to designate experts, inferentially thereby triggering opposing counsel's right to depose said designee, the focus is to avoid unfair surprise and allow the other side enough time to prepare for trial. *Young v. Mecum*, 999 So. 2d 368 (Miss. 2008) (citing *Thompson v. Patina*, 784 So. 2d 220, 223 (Miss. 2001) (quoting *Elastomer Bank for Sat. V. Hall*, 587 So. 2d 266, 272 (Miss. 1991); citing *Foster v. Noel*, 715 So. 2d 174, 182-83 (Miss. 1998); *West v. Sanders Clinic for Women, P.A.*, 661 So. 2d 714, 721 (Miss. 1995); *Motorola Communications & Electronics, Inc. v. Walkerton*, 555 So. 2d 713, 717-18 (Miss. 1989); *Jones v. Hachette*, 504 So. 2d 198 (Miss. 1987).
>
> 8. Here the issue is not the designation, but the fact that Defendant has refused to provide dates on which their expert may be deposed because it believes the request in (sic) made too late. In looking at this issue, the Court has said that designations, and by inference the right of deposing that designee, can come within the last several months and weeks before trial, so long as it does not impair the other party's rights to prepare for trial.

In plaintiff's Motion to Compel Expert Deposition, or Alternatively Exclude Expert Testimony, plaintiff acknowledged the right of B & B to supplement its expert testimony following the deposition of its own expert, which is exactly what occurred. In fact, plaintiff's brief at paragraph

7 stated that "[c]ertainly defendant's expert is entitled to supplement his expert report after, and if, defendant deposes the plaintiff's expert, as is the common practice and custom in litigation." Next, in plaintiff's response to B & B's Motion to Compel Production of Expert Information, the plaintiff made the following statements and cited the following case law:

> 9. The Mississippi Supreme Court has repeatedly held that there is "no hard and fast rule as to what amounts to seasonable supplementation ...." Hartel v. Pruett, 998 So. 2d 979, 985 (Miss. 2008). "Seasonableness must be determined on a case by case basis looking at the totality of the circumstances surrounding the supplemental information the offering party seeks to admit." *Id.*
>
> 10. Time and time again, the Courts in Mississippi have allowed expert designations and expert supplementation within mere days of the commencement of a trial. *See generally* Terrain Enters, Inc. v. Mockbee, 654 So. 2d 1122 (Miss. 1995); Motorola Communications & Elec., Inc. v. Wilkerson, 555 So. 2d 713, 717 (Miss. 1989).

It was within the sound discretion of the Court to allow Dr. Talbot to testify as to his supplemental opinion, especially since Mr. Corbitt was deposed following his supplemental opinion which offered a new theory of the case. Dr. Talbot was initially designated in the field of accident reconstruction over 7 months prior to trial, and plaintiff should have anticipated the nature of his testimony. B & B promptly supplemented the opinion of Dr. Talbot after deposing Tim Corbitt, and this supplementation occurred approximately three and a half weeks before the trial. The Court's decision to allow the testimony of Dr. Talbot was fair considering the fact the need for supplementation was brought about in the first place by plaintiff's expert designation and supplementation.

V. CONCLUSION

The jury instructions actually given must be read as a whole to determine whether a jury has been incorrectly instructed. In this case, when so read, the instructions fairly announced the law of the case and created no injustice. Plaintiff's theory of the case was properly presented through the instructions as a whole.

A view of the evidence in the light most favorable to the verdict results in the inescapable conclusion that jury verdict must be affirmed. The verdict was not so contrary to the overwhelming weight of the evidence such that allowing it to stand would sanction an unconscionable injustice. B & B elicited eyewitness and expert testimony, submitted photographs depicting the accident scene, and articulated a plausible theory concerning how the accident occurred. The facts presented by B & B proved that Floyd Martin blew through a stop sign, proceeded into the intersection when it was unsafe to do so and collided with the B & B concrete truck on Highway 278 despite reasonable efforts on the part of Mr. Logan to avoid Martin. Although plaintiff also had a theory of how the accident occurred, both theories were presented to the jury and the jury was entitled to decide which to credit. The jury chose to believe that Mr. Martin's actions were the sole cause of the accident.

During the trial, it was within the sound discretion of the Court to allow B & B's expert to testify as to his supplemental opinion, especially since plaintiff's expert was deposed following his supplemental opinion which offered a new theory of the case. The Court's decision to allow the testimony from B & B's expert was well-reasoned and fair considering the circumstances of plaintiff's expert designation and supplementation.

In short, the jury in this case was properly instructed, attentively listened to the proof and reached a decision supported by the evidence. Given the deference that is afforded a jury's verdict, the jury's defense verdict in favor of B & B should be affirmed.

WHEREFORE, PREMISES CONSIDERED, B & B Concrete Company, Inc. respectfully requests that the jury verdict affirmed in favor of B & B Concrete Company, Inc., and for such other relief as the Court deems appropriate.

Respectfully Submitted,

B & B CONCRETE COMPANY, INC.

BY: _____
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CERTIFICATE

I, J. Luke Benedict, of counsel for the B & B Concrete Company, Inc., do hereby certify that I have this day mailed a true and correct copy of the above and foregoing pleading to:

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Honorable Andrew K. Howorth
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THIS, the 30th day of July, 2010.

J. LUKE BENEDICT