IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CAUSE NO. 2010-TS-00145-SCT

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

VERSUS

B & B CONCRETE COMPANY, INC. — RESPONDENT/DEFENDANT/APPELLEE

APPEAL FROM THE CIRCUIT COURT OF LAFAYETTE COUNTY

REPLY BRIEF OF APPELLANT

(ORAL ARGUMENT REQUESTED)

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STATEMENT OF FACTS

On June 10, 2005, Floyd Martin, a husband and father of three, was killed when he was struck by a concrete truck owned by defendant, B & B Concrete Company, Inc.[1] T. 154, 308-9. Mr. Martin was traveling northbound on Campground Road/County Road 405 (hereinafter referred to as CR 405) just east of Oxford, Mississippi in Lafayette County. T. 168. As he approached the intersection of MS Highway 6 East/U.S. Highway 278 (hereinafter referred to as Highway 278), Martin decreased his speed and brought his black 1966 Ford truck to a stop near the stop sign located at the intersection of CR 405 and Highway 278. T. 169. Evidence shows that, at the time of the collision, Mr. Martin was either stopped or moving no more than ten miles per hour. T. 215.

Highway 278 is a divided four-lane highway that generally carries traffic east and west. It has numerous center crossings, and it is divided by a grass center median. R. 220. CR 405 is a two-lane county road that intersects Highway 278 just east of Oxford, Mississippi. *Id.* This intersection is quite large in comparison to other intersections along Highway 278 in the area, and traffic traveling northbound on CR 405 has a stop sign posted at the intersection. *Id.*

At the same time that Floyd Martin was traveling north on CR 405, defendant's driver, Anthony Logan, was operating a concrete truck owned by defendant, B&B Concrete. T. 322. Logan was traveling eastbound on Highway 278 carrying six yards of concrete on his way to a job that was located near the intersection. T. 323-25. As defendant's driver approached the unobstructed intersection of Highway 278 and CR 405, he originally did not see Floyd Martin's truck; however, as he moved closer to the intersection, he saw that the front passenger corner of

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[1] Citation to "T" shall refer to page numbers of the Trial Transcript.

Mr. Martin's truck was two-to-three feet in the right side of the eastbound lane of Highway 278, due to the angle of the intersection. T. 326, 352. Defendant's driver continued with his current course and speed even though he could see that Mr. Martin had stopped a few feet into the right side of the eastbound lane, and although there was no traffic to his left to prevent him from changing lanes, defendant's driver failed to take defensive action to avoid striking Mr. Martin. T. 347-48. As a result of his failure to move left, sound his horn, or reduce his speed, defendant's 1997 Mack concrete truck slammed into Mr. Martin's vehicle causing fatal injuries that resulted in the untimely death of Floyd Martin. T. 168-71, 342, 347-49.

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING PLAINTIFF'S MOTION FOR A NEW TRIAL WHEN IT DENIED CERTAIN JURY INSTRUCTIONS AND GRANTED CERTAIN OTHERS THAT DENIED PLAINTIFF OF HER RIGHT TO HAVE JURY INSTRUCTIONS GIVEN THAT PRESENTED HER THEORY OF THE CASE

A. The Trial Court Erred in Refusing to Grant Plaintiff's Instruction P-2

The trial court was in error when it refused to grant Plaintiff's instruction P-2. Defendant's driver admitted at trial that he failed to reduce his speed when approaching the intersection of Highway 278 and CR 405 in compliance with Miss. Code Ann. §63-3-505 (2009), and he also admitted that he failed to take any defensive action to avoid Mr. Martin after he had entered the intersection, as required by Miss. Code Ann. §63-3-805 (2009). T. 347-49. Defendant argues that the "jury could have easily inferred that Anthony Logan decreased his speed," but defendant is clearly mistaken in this contention as *there is no room for inference when defendant's driver admitted at trial that he failed to reduce his speed.* As noted in Plaintiff's principal brief, this testimony was uncontradicted at trial and clearly established that defendant's driver was negligent in the breach of his statutory duties. It was a question for a properly

instructed jury to determine the proximate contributing cause of the accident; therefore, the court erred when it denied this instruction.

In its brief, defendant correctly points out that *Richardson* deals with a predecessor statute to Miss. Code Ann. §63-3-505, and it also correctly notes that, at that time, the statute regarding maximum speed, Miss. Code Ann. §63-3-501 (2009), and §505 were contained in the same statute. Defendant argues that "[m]erely splitting the two sections does not change the common sense reading of *Richardson*;" however, when one considers the current version of the Code with respect to the reasoning in *Richardson*, it becomes apparent that defendant's contention misplaced. The Court in *Richardson* reasoned that the statute should be read in its entirety to determine the context of the speed-reducing section. Defendant now wishes to extend that application to require one to read §505 in context with other statutes contained in all of Article 11 of Title 63. Defendant goes too far. The plain language of §63-3-505 requires the operator of a motor vehicle to decrease his speed as he approaches an intersection, and, due to the changes made by the legislature subsequent to the *Richardson* opinion, the reasoning in *Richardson* no longer applies. The speed-reducing section of the statute is to no longer be read in the context of the section regarding the statutory maximum, and every motor vehicle operator is required to reduce their speed upon approaching an intersection, regardless of their prior speed.

Defendant also argues that this interpretation of the statute "makes no practical sense," but this is incorrect. It is common sense that requiring all motor vehicle operators to decrease speed as they approach an intersection would lead to a decrease in traffic fatalities, and it would be imprudent to fail to enforce such a policy that would make Mississippi highways safer. What does not make sense, however, is the application advocated by the defendant that would allow,

for example, an operator traveling in a 65 mph zone to escape liability by traveling a constant 64 mph through the intersection without decreasing his speed. The statute contemplates that drivers will always be driving at or under the speed limit rather than speeding; therefore, the speed of defendant's driver as he approached the intersection is immaterial when he testified at trial that he failed to decrease his speed. T. 347. Requiring all motor vehicle operators to decrease their speed when approaching the intersection is clearly a policy favored by the Legislature, as it not only drafted the previous version of the statute interpreted by the Court in *Richardson*, but it also amended the Code subsequent to the *Richardson* opinion, splitting the two sections of the Code that the Court read together to form its opinion. The Legislature further refused to adopt any of the Court's language from the *Richardson* opinion. This is evidence of the Legislature's disapproval of the Court's interpretation of the statute, and the Court should grant "the deference due the legislature in creating the laws of this state." *Long v. McKinney*, 897 So.2d 160, 183 (Miss. 2004).

B. The Trial Court Erred in Refusing to Grant Plaintiff's Instruction P-6

It is respectfully submitted that the trial court was in error when it refused instruction P-6, which would have instructed the jury as to the negligence of defendant's driver due to his violations of Miss. Code Ann. §§63-3-505 and 805 but left the jury to make a determination on the issue of proximate cause. The application of §505 and *Richardson* has been discussed above, but defendant again argues that the jury could have inferred that its driver decreased his speed. Plaintiff will again point out that when defendant's driver admitted at trial that he failed to reduce his speed, there is no room for inference to the contrary. T. 347. Defendant's driver also admitted that he failed to take any defensive action to avoid Mr. Martin and that he "wasn't really looking

for a vehicle to be there" as he approached the intersection. T. 347-49, 352. These outright admissions of violations of the rules of the road constituted negligence on the part of defendant's driver; however, proximate cause was a determination for the jury, an issue upon which it was never instructed. The court's refusal to grant P-6 caused the jury to be improperly instructed as to the law of the case; therefore, Plaintiff is entitled to a new trial.

C. The Trial Court was in Error when it Refused to Grant Plaintiff's Instruction P-10

The court erred in refusing to grant instruction P-10. Defendant argues that this instruction contained an improper statement of the law and that it was cumulative, but Plaintiff disputes this contention. Plaintiff's contention regarding this instruction is discussed at length in her principal brief and will not be revisited here; however, P-10 is a proper statement of the law and its denial was not cured by other instructions. The trial court's refusal to grant P-10 denied Plaintiff of her right to have the jury instructed as to her specific theories of negligence; therefore, reversible error was committed by the trial court.

D. The Trial Court Erred in Denying Plaintiff's Instruction P-11

The trial court was in error when it refused to grant Plaintiff's instruction P-11. This instruction is consistent with Miss. Code Ann. §63-3-505 and *Greyhound v. Sutton*, 765 So. 2d 1269, 1274 (Miss. 2000). Defendant argues that the holding in *Richardson* is more applicable to the holding in *Greyhound*; however, as discussed above, the current version of the Code was not in effect at the time *Richardson* was decided. It should also be noted again that there was no room for the jury to infer that defendant's driver decreased his speed as he approached the intersection when he admitted at trial that he failed to do so. T. 347.

E. The Trial Court Erred by Refusing to Grant Plaintiff's Instruction P-12

The trial court erred by refusing to grant Plaintiff's instruction P-12. This instruction was consistent with the Court's rulings in *Jobron v. Watley*, 250 Miss. 792, 168 So. 2d 279, 282 (1964), *Classic Co. v. Johnson*, 823 So. 2d 517, 524 (Miss. 2002) and *Greyhound v Sutton*, and it also tracked Miss. Code Ann. §63-3-805. Defendant contends that the prejudice caused by the trial court's refusal of this instruction was cured by the court's granting of P-13 and D-19; however, as discussed in Plaintiff's principal brief, this contention is incorrect due to the fact that, while these instructions might be a proper statement of law, they did not address Plaintiff's specific theory of negligence. The trial court's refusal to grant this instruction caused great prejudice to the Plaintiff and denied her of her right to have the jury instructed as to her specific theories of the case.

F. The Trial Court was in Error when it Granted Defendant's Instruction D-16

The trial court erred in granting defendant's instruction D-16 because this instruction is peremptory in nature, and it is an incomplete statement of the law as it fails to instruct the jury as to the duties of defendant's driver. This deficiency had the effect of confusing or misleading the jury as to the duties that defendant's driver and Mr. Martin owed to each other, and the trial court was in error in granting this instruction.

G. The Trial Court Erred in Granting Defendant's Instruction D-17

The trial court erred in granting instruction D-17. This instruction failed to advise the jury as to the duties of defendant's driver if it found that Mr. Martin did not stop at the stop sign. Such an incomplete statement of law can be confusing or misleading to the jury as in this case it had the effect of making Mr. Martin liable for anything that happened after proceeding into the intersection. *Hill v. Columbus Ice Cream and Creamery Co.*, 230 Miss. 634, 93 So. 2d 634

(1957). Defendant argues that this error is cured by other instructions presented to the jury; however, as discussed in Mrs. Martin's principal brief, this contention is untrue. Defendant also argues that Plaintiff's case is similar to *Richardson* in that *Hill* is distinguishable because the instructions in *Hill* were given in conflict with the applicable law. This argument is addressed in Plaintiff's principal brief, but it should also be noted that such a distinction, if it exists, should be considered immaterial when either error would cause the same result. That is, such a distinction should be considered immaterial when either error, whether it be in conflict with applicable law or an incomplete statement of law, would cause the jury to be misled or confused or deny a litigant the right to have the jury instructed as to his specific theories of the case.

The trial court was in error denying certain instructions and granting certain others that denied Plaintiff of her right to have jury instructions given that presented her theory of the case. The instructions given, when read as a whole, failed to fairly announce the law of the case and caused injustice to the Plaintiff; therefore, she is entitled to a new trial as a result of the trial court's reversible error.

II. THE TRIAL COURT ERRED IN DENYING PLAINTIFF'S MOTION FOR A NEW TRIAL WHEN THE VERDICT RETURNED BY THE JURY WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE PRESENTED AT TRIAL

The trial court erred in upholding a jury verdict that was contrary to the substantial weight of evidence at trial. As discussed previously, defendant's driver testified that he failed to reduce his speed in compliance with Miss. Code Ann. §63-3-505. T. 347. He also testified that he failed to comply with Miss. Code Ann. §63-3-805 by failing to decrease his speed, sound his horn, apply his brakes, or take any other action to avoid a collision with Mr. Martin. T. 347-49. Defendant's driver testified that he did not see Mr. Martin until he was almost within the

intersection of Highway 278 and CR 405, and that he "wasn't looking for [Mr. Martin] to be there," a clear indication that defendant's driver failed to maintain a proper lookout when approaching the intersection of Highway 278 and CR 405. T. 326, 352. These facts were shown at trial and were uncontradicted. Reasonable minds cannot differ as to the fact that these multiple acts of negligence played some contributing role in the accident, and, if the jury had been properly instructed, there would have been no doubt as to the negligence of defendant's driver. The jury was improperly instructed, however, and returned a verdict for the defendant. The trial court upheld this verdict in error; therefore, Plaintiff is entitled to a new trial.

III. THE TRIAL COURT ERRED IN DENYING PLAINTIFF'S MOTION FOR A NEW TRIAL WHEN IT ALLOWED DEFENDANT'S EXPERT TESTIMONY REGARDING THE SPEED OF FLOYD MARTIN'S VEHICLE AT THE TIME OF THE COLLISION

The trial court abused its discretion in allowing defendant's expert to present opinion testimony regarding the speed of Mr. Martin's vehicle at the time of the collision. At trial, defendant's expert testified not only as to his opinion of Mr. Martin's speed that was not seasonably supplemented in his supplemental designation, but he also enhanced his vague and open-ended opinion with opinion testimony that was much more specific than the reports filed with either of his designations. T. 447-48. Defendant seems to concede that its supplemental designation of Dr. Talbot was untimely filed in accordance with Rule 4.04(A) of the Uniform Rules of Circuit and County Court Practice; however, it contends that "special circumstances" arose such that this speed testimony was properly presented to the jury.

On February 13, 2009, defendant designated Dr. Fletcher Talbot as an expert, and in the report filed with this designation, Dr. Talbot presented no opinion regarding the speed of any vehicle involved in the collision. On February 17, Plaintiff designated Tim Corbitt as an expert in

accident reconstruction. Mr. Corbitt's opinion in this designation was that "Mr. Martin's vehicle was either stopped or traveling at a very low rate of speed" at the time of the collision. Mr. Corbitt's opinion regarding speed never changed, and his testimony at trial was consistent with his opinion in the February 17 designation. On July 2, 2009, the trial court ordered Plaintiff to supplement her designation, and this supplementation was timely filed on July 16 in accordance with the Order and Rule 4.04(A). In this supplementation, Mr. Corbitt re-stated his opinion that Mr. Martin's vehicle was "either stopped of [sic] moving very slowly at the time of the collision." It was after this, on September 2, 2009, that defendant filed its second supplemental Response to Plaintiff's First Request for Production of Documents, in which Dr. Talbot opined that Mr. Martin's vehicle was traveling "at a speed of at least 15 miles per hour." This supplementation, filed a mere twenty seven days before trial, was the first mention of speed by defendant's expert.

Defendant contends that "special circumstances" arose when Plaintiff "changed her theory of the case more than two years after filing her Complaint," but it should be noted at this point that the defendant is attempting to broaden the scope of the issue presented by Mrs. Martin. The issue raised by Mrs. Martin is strictly regarding speed testimony. While Plaintiff did not "change" her theory, but rather presented an alternate theory in response to the opinion of defendant's expert, the opinion of Plaintiff's expert regarding the speed of Mr. Martin's vehicle never changed, so defendant's contention that "changed circumstances" caused it to untimely provide its expert's opinion of Mr. Martin's speed is erroneous. The fact remains that Plaintiff first presented Mr. Corbitt's opinion regarding speed in her February 13, 2009 designation, and this opinion never changed. Defendant had an opportunity to supplement its original designation

with its expert's opinion regarding Mr. Martin's speed but chose not to do so until twenty seven days before trial in violation of Rule 4.04(A); therefore, "changed circumstances" is not an excuse for defendant's failure to seasonably supplement its expert opinion.

Defendant also argues that the Plaintiff's conduct was more akin to the plaintiff in *Banks v. Hill*, 978 So. 2d 663 (Miss. 2008), but this contention is clearly false. Defendant points out that the plaintiff in *Banks* never properly designated their expert witnesses, but Plaintiff properly designated Mr. Corbitt at least on July 16, 2009, if not on February 13, either of which would be timely in accordance with Rule 4.04(A). Defendant also contends that Plaintiff "changed her theory of the case;" however, as Plaintiff has discussed numerous times before, this contention is not relevant to the issue of speed testimony, and Plaintiff merely presented an alternate theory in addition to, not instead of, its original theory. Defendant further argues that Plaintiff should have reasonably anticipated its expert to testify regarding Mr. Martin's speed; however, as discussed in Plaintiff's principal brief, this argument should not be considered as defendant's position is contrary to the spirit of Rule 26 of the Mississippi Rules of Civil Procedure. Finally, defendant argues that Plaintiff's contention that the trial court abused its discretion should be rejected based on the rationale relied upon by Plaintiff in her prior pleadings. This argument has been discussed at length in Plaintiff's principal brief, and it will not be revisited here.

CONCLUSION

Plaintiff, Schenille Martin, is entitled to a new trial due to error on the part of the trial court. The court erred by failing to properly instruct the jury as to Mrs. Martin's theory of the case, and it also erred in upholding the verdict returned by an improperly instructed jury that was against the substantial weight of the evidence presented at trial. The trial court further prejudiced

Mrs. Martin when it allowed defendant's expert to present opinion testimony regarding the speed of Mr. Martin's vehicle at the time of the collision. For these reasons, Plaintiff is entitled to a new trial.

WHEREFORE, PREMISES CONSIDERED, Plaintiff, Schenille Martin, respectfully requests that this Court find that the trial court committed reversible error for the aforementioned reasons and a new trial be granted in her favor.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Grady F. Tollison, Jr., of the Tollison Law Firm, do hereby certify that I have this day mailed, by United States Mail, a true and correct copy of the above and foregoing to:

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This the 12th day of August, 2010.

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