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

BRIEF OF APPELLANT

(ORAL ARGUMENT REQUESTED)

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CERTIFICATE OF INTERESTED PARTIES

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 the judges of the Court of Appeals may evaluate possible disqualifications or recusal:

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   Plaintiff/Appellant

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6. Honorable Judge Andrew K. Howorth
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7. Honorable Judge Henry L. Lackey
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STATEMENT OF THE CASE

I. NATURE OF THE CASE

This suit is brought by Plaintiff Schenille Martin, individually, and on behalf of the wrongful death beneficiaries of Floyd L. Martin for personal injuries and wrongful death pursuant to Miss. Code Ann. § 11-7-13 suffered when her husband, Floyd Martin, was struck and killed by a concrete truck owned by Defendant, B & B Concrete Company, Inc., and operated by one of its employees.

II. COURSE OF THE PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

Mrs. Martin filed this suit against B & B Concrete Company, Inc. on April 30, 2007, after her husband was killed in a collision with a B & B Concrete truck.[1] R. 1-3.[2] B & B answered the complaint on June 28, 2007, denying any and all liability to the allegations filed against it and raising numerous defenses and affirmative defenses. R. 6-9. The case was tried before a jury, and a final judgment incorporating the jury verdict in favor of the defendant was entered by the court on October 5, 2009. R. 342. Mrs. Martin then filed a Motion for New Trial pursuant to Rule 59 of the Mississippi Rules of Civil Procedure on October 15, 2009. R. 343-391. This Motion was denied by the court on January 5, 2010, and Mrs. Martin timely filed a Notice of Appeal on January 25, 2010. R. 412, 413-14.

III. STATEMENT OF THE FACTS

On June 10, 2005, Floyd Martin, a husband and father of three, was killed when he was

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[1] Citation to "R" shall refer to page numbers of the Trial Record.

[2] The citations included in Section II of the Statement of the case that are not relevant to the issues raised on appeal will not be included in the record excerpts in the interest of judicial economy. If, however, it may be necessary to review these pleadings, they can be found in the trial record.

struck by a concrete truck owned by defendant, B & B Concrete Company, Inc.[3] 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 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

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

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.

SUMMARY OF THE ARGUMENT

The trial court committed reversible error by refusing certain jury instructions and granting certain others that denied the plaintiff of her right to have the jury instructed as to her theory of the case. The jury was inadequately and improperly instructed as to the specific claims of negligence that were made and proved by plaintiff, and it was also inadequately and improperly instructed as to the specific duties of defendant's driver as he approached the intersection of Highway 278 and CR 405. These instructions, when read as a whole, failed to fairly announce the law of the case and failed to present plaintiff's theory of the case. The error by the trial court subjected plaintiff to egregious injustice; therefore, the plaintiff is entitled to a new trial on this ground.

The trial court was in error when it entered upheld a jury verdict and entered a judgment in favor of defendant that was against the substantial weight of the evidence presented at trial. Defendant's driver, at trial, presented testimony in which he admitted to engaging in certain conduct that was in violation of the rules of the road. No reasonable juror could conclude that this negligent conduct did not play some contributing role in the collision; however, the jury returned a verdict in favor of the defendant. The trial court erred in entering the verdict in favor of the defendant; therefore, plaintiff is entitled to a new trial.

The trial court was also in error when it allowed the testimony of defendant's expert regarding the speed of Mr. Martin's vehicle at the time of the collision. Upon the original designation of defendant's expert, his only opinion was that the collision occurred in the right hand lane of Highway 278, and he presented no opinion as to the speed of Mr. Martin's vehicle. His opinion was then supplemented on September 2, 2009, twenty-seven days before the trial, and in this supplemental designation, he presented eleven additional "observations," including an

"observation" as to the speed of Mr. Martin's vehicle at the time of the collision. This supplemental designation was not timely filed pursuant to Rule 4.04(A) of the Uniform Rules of Circuit and County Court Practice, and the trial court should not have allowed defendant's expert to testify to the "observations" contained therein. This error on the part of the trial court caused extreme prejudice to the plaintiff because defendant's expert was not only allowed to testify as to his vague and open-ended opinion contained in the untimely supplemented designation, but he was also allowed to enhance that opinion by giving speed testimony in much greater detail than the opinion provided in his supplemental report. This ambush tactic employed by the defense did not allow plaintiff to prepare for the testimony of defendant's expert, and it should not have been condoned by the trial court. Due to this abuse of discretion by the trial court, a new trial should be granted in favor of the plaintiff.

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.

Rule 59 of the Mississippi Rules of Civil Procedure provides in pertinent part, "A new trial may be granted to all or any of the parties on all or any of the issues in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of Mississippi." Miss. R. Civ. P. 59(a)(1). Pursuant to Mississippi law, a new trial may be granted when, *inter alia*, the jury has been confused by faulty instructions. *Kitchens v. Mississippi Insurance Guaranty Ass'n*, 560 So. 2d 129, 132 (Miss. 1989). "Jury instructions are to be read together and taken as a whole with no one instruction taken out of place. *Ford v. State*, 975 So. 2d 859, 863 (Miss. 2008). A party at trial is "entitled to have jury instructions given which present his theory of the case, however, this entitlement is limited in that the court may refuse an instruction which incorrectly states the law, is covered fairly elsewhere in the instructions, or is without foundation in the evidence." *Id.* A court will only find reversible error where the instructions actually given, read together as a whole, do not "fairly announce the law of the case" and create injustice. *Id.* at 864.

A. The Court Erred in Refusing to Grant Instruction P-2

The trial court was in error when it refused to grant instruction P-2, plaintiff's peremptory instruction. "If the Court finds that the evidence favorable to the non-moving party and the reasonable inferences drawn therefrom present a question for the jury, the peremptory instruction should not be granted." *Tentoni*, 968 So. 2d at 436. Defendant will rely on the contention that questions of fact existed as to defendant's negligence; however, defendant's driver clearly admitted in his testimony at trial that he operated his vehicle in a manner that constituted

violations of the rules of the road. This uncontradicted testimony clearly establishes that defendant's driver was negligent in the breach of his statutory duty and that his negligence was a proximate contributing cause of the accident. Plaintiff is, therefore, entitled to a peremptory instruction on this matter.

B. The Court Erred in not Granting Instruction P-6

The trial court erred when it refused to grant instruction P-6, which is a peremptory instruction as to the negligence of defendant's driver. Instruction P-6 merely instructs the jury as to the issue of negligence and leaves it to make a determination on the issue of proximate cause. This instruction is consistent with Miss. Code Ann. §63-3-505, which requires the operator of a motor vehicle to decrease his speed as he approaches an intersection. Defendant will contend that its driver was in compliance with the statute because the driver was operating below the maximum speed limit when approaching the intersection, but this application of the statute is erroneous because the driver testified that he maintained a constant rate of speed as he approached the intersection rather than decreasing his speed as is clearly required by the law. T. 347. Therefore, the trial court was in error when it failed to instruct the jury that defendant's driver was guilty of negligence.

C. The Court Erred in Refusing to Grant Instruction P-10

The court improperly refused to grant plaintiff's instruction P-10, which required defendant's driver to yield the right-of-way to Mr. Martin after Mr. Martin had yielded the right-of-way to any traffic traveling on Highway 278 that was in the intersection or constituted an immediate hazard, and Mr. Martin had proceeded into the intersection. This instruction was consistent with Miss. Code Ann. § 63-3-805 and *Richardson v. Adams*, 223 So. 2d 536 (Miss. 1969), and it was a proper statement of the law with respect to the duties of defendant's driver as

he approached the intersection. Defendant will likely argue that other instructions properly instructed the jury as to the duties of defendant's driver and that P-10 was not a proper statement of the law.

Defendant will argue that instructions P-8, P-13, and D19 cure the error caused by the trial court's refusal of P-10; however, this argument is flawed in that these instructions do not specifically address the theory that was proposed by plaintiff at trial. Plaintiff presented evidence that Mr. Martin yielded the right-of-way before proceeding across Highway 278, Mr. Martin had either stopped or was barely moving at the time of the collision and that Mr. Martin was only two-to-three feet into the eastbound lane of Highway 278 prior to defendant's driver entering the intersection. The jury should have been presented with an instruction on this issue and allowed to make a determination on the validity of plaintiff's theory. The denial of such an instruction constitutes reversible error by the trial court.

Instruction P-8 is insufficient to cure this error because it is merely a general instruction that requires defendant's driver to maintain a proper lookout. It doesn't address his specific duty to yield the right-of-way to a motor vehicle that has previously entered the intersection. Instruction P-13 is also insufficient because it fails to address Plaintiff's theory of the case. This instruction only instructs the jury as to Logan's duties upon approaching the intersection when he appreciates that Mr. Martin is going to enter the intersection *without yielding the right-of-way.* This instruction is prejudicial to the plaintiff and clearly does not address plaintiff's theory that Mr. Martin had stopped and yielded the right-of-way prior to proceeding just a few feet into the right-hand lane of eastbound Highway 278 and does not cure the error caused by the denial of P-10. Similar to P-13, instruction D-19 is also insufficient because it addresses defendant's theory that Mr. Martin did not stop rather than plaintiff's theory that he did.

Defendant will likely argue that P-10 is an improper statement of law because it omitted the duties of Mr. Martin as he approached the intersection. Plaintiff does not concede that P-10 is an improper statement of the law for omitting the duties of Mr. Martin; however, if it is found to be so, such an omission could be cured by one or more of the many given instructions. Instruction P-13 instructed the jury that defendant's driver had the right to assume that Mr. Martin would obey the law, and D-15(a) instructed the jury that Mr. Martin had a duty to maintain a proper lookout and proper control of his vehicle. Further, D-16(a) instructed the jury that Mr. Martin was prohibited from stopping or parking his vehicle in an intersection. The jury was instructed by D-17 that Mr. Martin had a duty to stop at a posted stop sign and yield the right-of-way to other vehicles which have entered the intersection or constitute an immediate hazard. The language in this instruction followed the language in Miss. Code Ann. § 63-3-805 as did instruction P-10, and these instructions, when read together, could have clearly and properly instructed the jury as to the drivers' duties to each other under the statute if P-10 had not been denied. Finally, D-19 instructed the jury that Mr. Martin had a duty to obey the stop sign, look for oncoming vehicles, and yield to through traffic, and would cure any error that may have existed in the omission of such a duty instruction in P-10.

Defendant finally argues that P-10 is an improper statement of the law because it did not define the term "immediate hazard." This term is defined in the statute as, "vehicles...which are approaching so closely on said through highway as to constitute an immediate hazard." Miss. Code Ann. § 63-3-805. Instruction P-10 addressed defendant's concrete truck being "in the intersection" or being "an immediate hazard," and any reasonable juror could determine that this instruction was referring to a hazard due to the proximity of defendant's concrete truck to the intersection. Aside from the fact that any juror could easily determine the meaning of this term,

the omission, if any, in this instruction was a minor one and could have easily been modified before being sent to the jury if this specific objection had been timely raised.

The trial court was in error when it denied plaintiff's jury instruction P-10. Instruction P-10 was a proper statement of the law and its refusal denied plaintiff of her right to have instructions given that presented her theory of the case. It has been proven that this instruction was not fairly covered in the other instructions, thus the denial of this instruction constitutes reversible error on the part of the trial court.

D. The Court Erred in Refusing to Grant Instruction P-11

The court was in error when it refused to grant plaintiff's instruction P-11. This instruction was consistent with Miss. Code Ann. § 63-3-505 and *Greyhound v. Sutton*, 765 So. 2d 1269, 1274 (Miss. 2000), and it was an accurate instruction as to the duties of defendant's driver as he approached the intersection of Highway 278 and CR 405. Defendant will argue that this case is distinguished from *Greyhound* because the driver in *Greyhound* had exceeded the maximum statutory speed limit and that the facts in this case are more applicable to the holding in *Richardson v. Adams*, 223 So. 2d 536 (Miss. 1969). This contention is erroneous, however, because § 63-3-505 was not in effect at the time that *Richardson* was decided.

The statute that was in place at the time *Richardson* was decided was Section 8176 of the Mississippi Code of 1942. Defendant will argue that the court should follow the holding in *Richardson* because the language in Section 8176 is so similar to the language in § 63-3-505. Although this statute is admittedly quite similar to the language in § 63-3-505, the similarity of the language contained in the two statutory provisions will not be the determining factor on this issue. To reach the accurate conclusion on this matter, one must look to the reasoning applied by the Court in *Richardson*.

Section 8176 was divided into two subsections with Subsection (a) setting out the maximum speed limits for state highways and Subsection (b) requiring the operator of a motor vehicle to decrease his speed under certain conditions, such as when the operator is approaching an intersection. According to the Court, subsection (b), when "taken out of context," would lend weight to the contention that the appellant was entitled to an instruction that the appellee was negligent as a matter of law because the appellee admitted that she failed to decrease her speed as she approached the intersection, even though she was already traveling below the statutory maximum. *Richardson*, 223 So. 2d at 537-38. The Court reasoned, however, that Subsection (b) "qualified the allowed maximums when any of the conditions enumerated therein arise." *Id.* at 538. "In order to be in violation of the statute one must fail to reduce his speed from the maximum provided when one of the conditions set out in Subsection (b) is present." *Id.*

When the new version of the Code was passed in 1970, there was a notable change made to the construction of Section 8176. Subsequent to the *Richardson* decision, the legislature drafted the new version of the Code with Subsection (b) standing alone in §63-3-505, and the section setting out the maximum speed limits on state highways was moved to §63-3-501. This change is quite significant because, when the reasoning that was applied in *Richardson* is applied to the current §63-3-505, the statute plainly requires the operator of any motor vehicle to decrease his speed when approaching and crossing an intersection *regardless of his prior speed.* This provision is no longer codified with the statutory maximum speed limits, and its purpose is no longer to qualify those statutory maximums. The effect of the current version of the Code is that all motor vehicle operators are required to decrease speed when approaching and crossing an intersection, and the failure to do so constitutes negligence as a matter of law, regardless of the operator's rate of speed prior to approaching the intersection.

Perhaps one reason that the legislature changed the construction of Section 8176 is that the holding in *Richardson* left trial court judges to make arbitrary determinations as to the negligence of the operator of a motor vehicle, rather than requiring them to hold that operator negligent as a matter of law for violation of the statute. In the present case, the trial court judge struggled with the instruction, and he admitted that it was a "problematic" issue. T. 605-06. During the hearing on jury instructions, the judge admitted that, "[I]t's not my job to say I'm against the Legislature on the rules of the road," but he further stated, "I've had people try to make me give that slowing down at an intersection as a negligence per se instruction, and I don't - - I just refuse it. Although it's in the rules of the road, I think...it's confusing and misleading to instruct the jury that that is negligence per se simply because it's sitting in the code." T. 466. On the issue of this instruction, which tracked the language of §63-3-505, he stated, "I just don't like that. I'm not going to give it for that reason," T. 466-67, and when he was reminded of this statement by plaintiff's counsel at the hearing on the Motion for New Trial, he further commented that his statement, "[s]ounds pretty arbitrary when it's said back to me what I said to you." T. 595. The law should not leave room for such arbitrary determinations. Due to the plain language of § 63-3-505, the statutory construction under the new version of the Code, and the need for uniformity and certainty of the law, the holding in *Richardson* should not be applied, and where the operator of a motor vehicle is shown to have failed to decrease his speed when approaching or crossing an intersection, he should be held negligent as a matter of law.

Defendant will further argue that the given instructions P-8, P-13, D-15, D-17, P-7 and D19 cured any error that may have existed for refusal to grant instruction P-11; however, this argument is in error because the other instructions fail to address plaintiff's theory that defendant's driver was negligent as a matter of law for failure to decrease his speed as he

approached the intersection. Instruction P-8, as discussed above, is merely a proper lookout instruction and does not address plaintiff's theory. Instruction P-13 does not cure the error because its language tracks § 63-3-805 and addresses plaintiff's alternate theory that defendant's driver was negligent for failure to yield the right-of-way, rather than P-11 that is consistent with §63-3-505 and plaintiff's theory that defendant's driver was negligent for failure to reduce his speed. The error is neither cured by D-15, which only instructs the jury as to proper lookout and proper control, nor by D-17, which instructs the jury as to Mr. Martin's duty as he approached the stop sign. Instruction P-7 only instructs the jury as to proper control of the operator's motor vehicle and is too general to instruct the jury as to plaintiff's theory, and D-19 fails to address the plaintiff's theory because it fails to instruct the jury as to the failure of defendant's driver to reduce his speed.

Defendant will alternatively argue that the jury could have inferred from the testimony in the case that its driver reduced his speed as he approached the intersection, but such a contention is erroneous as there is no room for an inference of reduced speed when defendant's driver admitted at trial that he did not reduce his speed as he approached the intersection.

The trial court was in error when it refused plaintiff's instruction P-11. This instruction was a proper statement of the law, and if it had been given, it would have properly instructed the jury as to plaintiff's theory that defendant's driver was negligent as a matter of law for his failure to decrease his speed as he approached the intersection. This error could not have been cured by any of the other instructions that were given and no reasonable juror could have determined that defendant's driver decreased his speed as he approached the intersection. Refusal of this instruction denied plaintiff of her right to instructions given that presented her theory of the case, and such refusal constituted reversible error by the trial court.

E. The Court Erred in Refusing to Grant Instruction P-12

The trial court was in error when it refused to grant plaintiff's instruction P-12, which addressed plaintiff's theory that, if Mr. Martin did fail to stop at the intersection, defendant's driver was still negligent for failing to take reasonable precautions to avoid the collision. This instruction is consistent with the Mississippi Supreme 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*, 765 at 1273, and it also tracks § 63-3-805. It is a proper statement of the law, and it would have properly instructed the jury as to the specific duties of defendant's driver after such time that he appreciated the fact that Mr. Martin was not going to stop prior to entering the intersection.

Defendant will contend that P-12 was properly denied because the jury was properly instructed as to the duties of defendant's driver by D-19 and P-13. Instruction D-19 fails to instruct the jury as to plaintiff's theory because, although D-19 instructs the jury that defendant's driver has a specific duty, it does not adequately instruct the jury as to what that duty is. Instruction P-13, although strikingly similar in appearance to P-12, did not properly instruct the jury as to the duties of defendant's driver because P-13 only addressed the duties when defendant's driver appreciated the fact that Mr. Martin was going to enter the intersection without yielding the right-of-way, while P-12 addressed the duties of defendant's driver when he appreciated the fact that Mr. Martin was not going to stop at the stop sign. Instruction P-12 addresses failure to stop, whereas P-13 addresses any other failure to yield the right-of way. The two instructions do not address the same specific issue, so the trial court was in error when it denied P-12.

F. The Court Erred in Granting Instruction D-16(a)

The trial court was in error when it granted defendant's instruction D-16(a). This instruction is preemptory in nature and does not continue to advise the jury as to the duties of defendant's driver after such time as he should have recognized the location of the vehicle being driven by Floyd Martin. Instruction D-16(a) is an incomplete statement of the law inasmuch as it fails to instruct the jury that defendant's driver had a duty to take reasonable precaution in avoiding the collision even if Mr. Martin's vehicle was found to be parked in the intersection by a preponderance of the evidence. This deficiency had the effect of confusing or misleading the jury as to the duties that defendant's driver and Floyd Martin owed to each other, and the trial court was in error in granting the instruction.

G. The Court Erred in Granting Instruction D-17

The trial court improperly granted defendant's instruction D-17 because it is an inaccurate description of the duties that existed between defendant's driver and Floyd Martin. As stated in *Richardson*, although the instruction is a proper statement of the law, it is "deficient in that it fails to go far enough." 223 So. 2d at 538. The instruction fails to advise the jury as to the duties of defendant's driver in the event that it found that Mr. Martin had yielded the right-of-way to other vehicles which entered the intersection from the highway or were approaching so closely as to constitute an immediate hazard. This defect may have been cured by instruction P-10, if the court had simply granted it. Instead, the instruction had the effect of making a driver stopped at a stop sign at an intersection liable for anything that happened after proceeding into the intersection. *See Hill v. Columbus Ice Cream and Creamery Co.*, 230 Miss. 634, 93 So. 2d 634 (1957).

Defendant will contend that this error is cured by other instructions that were given to the

jury. Defendant will likely argue that instructions P-7, P-8, D-15, D19, and P-13 cure this error; however, this is not possible because instructions P-7, P-8 and D-15, as discussed above, are merely general instructions as to proper lookout and proper control, and they do not directly address the specific duties of defendant's driver after he appreciated that Mr. Martin was not going to yield the right-of-way. Also discussed previously was D-19, which instructs the jury that defendant's driver has a duty but fails to advise the jury as to what that specific duty is. Defendant will argue that P-13 cures the error caused by the granting of D-17; however, these two instruction address different issues. While D-17 only addresses the issue of the duty of defendant's driver if Floyd Martin failed to stop at the stop sign, P-13 addresses the issue of duty if Mr. Martin merely failed to yield the right-of-way. The distinction between these two instructions is that Mr. Martin could have come to a complete stop and then failed to yield the right-of-way thereafter, so it is possible that he could be found negligent under the instruction in P-13 but not the instruction in D-17. Because these instructions address different issues, the duty of defendant's driver in P-13 cannot be interpreted as curing the error caused by granting D-17 that does not advise the jury as to the duty of defendant's driver.

Defendant will argue that, as in *Richardson*, the present case is distinguishable from *Hill* because the instruction given in *Hill* was found to be in conflict with the applicable law, rather than a mere incomplete statement of the law. Defendant should also note, however, that there is a key distinction between the present case and *Richardson* in that the error here, unlike in *Richardson*, is a reversible error because the defect in the instruction is not cured by one of the other instructions that was presented to the jury. The instruction given here did not address the duties of defendant's driver if Floyd Martin failed to stop at the stop sign, so the instruction given had the effect of making Mr. Martin liable for anything happening after proceeding into the

intersection, thus the present issue in this case is more analogous to *Hill* than *Richardson*. This instruction contained an incomplete statement of the law that was confusing or misleading to the jury, and the granting of an instruction that contained such an incomplete statement of the law constitutes reversible error by the trial court.

In the present case, the trial court erred in denying certain jury instructions and granting certain others that denied plaintiff of her right to have jury instructions given that presented her theory of the case. In addition to the erroneous refusal of instruction P-2, the court's refusal of instructions P-6, P-10, P-11 and P-12 had the cumulative effect of failing to adequately instruct the jury as to the duties of defendant's driver that were consistent with the plaintiff's theory. Although the court granted a general lookout (P-8) and a proper control (P-7) instruction, the jury was inadequately instructed as to the specific claims of negligence that the plaintiff had made and proven against defendant's driver. The court's granting of P-13, while proper, does not cure the error created by the court in refusing to grant instructions P-6, P-10, P-11 and P-12 because instruction P-13 merely addressed defendant's claim that Floyd Martin "blew through" the stop sign and did not address the affirmative case of the plaintiff. The error caused by the trial court's denial of these instructions was compounded by the court's granting of defendant's instructions D-16(a) and D-17. These instructions had the effect of confusing or misleading the jury by inadequately instructing it as to the duties of defendant's driver as he approached the intersection of Highway 278 and CR 405. These instructions, when read as a whole, failed to fairly announce the law of the case and created egregious injustice; therefore, the court committed reversible error, and the plaintiff is entitled to a new trial on this ground.

II. THE 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.

A new trial may also be granted when the trial court or an appellate court on appeal, "in exercise of its sound discretion, regards the verdict returned by the jury as being contradictory to the substantial or overwhelming weight of the evidence." *Coho Resources v. Chapman*, 913 So. 2d 899, 908 (Miss. 2005); *White v. Yellow Freight System, Inc.*, 905 So.2d 506, 510 (Miss. 2004). A trial judge's denial of a motion for a new trial is reviewed for abuse of discretion. *Tentoni v. Slayden*, 968 So. 2d 431, 441 (Miss. 2007). A trial judge is authorized under Rule 59 of the Mississippi Rules of Civil Procedure to "grant a new trial whenever... justice requires," and the "grant or denial of a motion for a new trial is a matter within the sound discretion of the court."*White*, 905 So. 2d at 510. . "In reviewing the trial court's decision, an appellate court must consider the credible evidence in the light most favorable to the non-moving party and generally take the credible evidence supporting the claims or defenses of the non-moving party as true." *Id.* at 510-11. "When the evidence is so viewed, this Court will reverse only when, upon review of the entire record," it is "left with a firm and definite conviction that the verdict, if allowed to stand, would work a miscarriage of justice." *Id.* at 511.

In the present case, the verdict returned by the jury was against the overwhelming weight of evidence presented to the jury at trial. Section 63-3-505 (2009) of the Mississippi Code plainly states, "The driver or operator of any motor vehicle must decrease speed when approaching and crossing an intersection;" however, defendant's driver clearly admitted during his testimony that he failed to decrease his speed as he approached the intersection of Highway 278 and CR 405. T. 347. His uncontradicted testimony left no room for any inference to the contrary, and no reasonable juror could have found that defendant's driver was not negligent for this violation of

the rules of the road.

Additionally, the driver of a vehicle, after stopping at the entrance to a through highway and yielding "the right-of-way to other vehicles which have entered the intersection from said through highway or which are approaching so closely on said through highway as to constitute an immediate hazard" is allowed to proceed, and "the drivers of all other vehicles approaching the intersection on said through highway shall yield the right-of-way to the vehicle so proceeding into or across the through highway." Miss. Code Ann. §63-3-805 (2009). Defendant's driver testified at trial that, along with his failure to decrease speed, he also failed to sound his horn, apply his brakes, or take any other action to avoid a collision with Mr. Martin when he finally noticed that Mr. Martin was within the intersection. T. 347-49. This testimony was also uncontradicted, and such failure to yield the right-of-way to Mr. Martin constitutes an obvious breach of his statutory duty under §63-3-805.

The jury verdict was also improper because the overwhelming weight of the evidence presented at trial clearly indicated that defendant's driver failed to maintain a reasonable and proper lookout and take proper precautions in response to the action of Floyd Martin entering Highway 278. Defendant's driver testified that he did not see Mr. Martin until he was almost within the intersection of Highway 278 and CR 405, although the view of the intersection from his approach on eastbound Highway 278 was unobstructed. T. 138, 352. Defendant's driver also testified, as discussed above, that he failed to decrease his speed, sound his horn, apply his brakes, or take any other action prior to colliding with Mr. Martin. T. 347-49. Such conduct clearly constitutes an absolute failure to maintain a proper lookout and take proper precautions in response to Mr. Martin entering the intersection, and no reasonable juror could find otherwise.

As previously stated, the aforementioned facts were shown at trial and uncontradicted.

Reasonable minds cannot differ as to the fact that these multiple acts of negligence played some contributing role in the accident. If the jury had been properly instructed there would have been no doubt as to the negligence of defendant's driver; however, the jury was improperly instructed and it returned a verdict for the defendant, B & B Concrete, against the overwhelming weight of the evidence. Mrs. Martin is, therefore, entitled to a new trial on that ground.

III. THE LOWER 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 standard of review for the admission or exclusion of evidence is an abuse of discretion." *Evans v. State*, 25 So. 3d 1054, 1057 (Miss. 2010). In the present case, the trial court abused its discretion in allowing testimony that supplemented the original opinion of defendant's expert, Dr. Fletcher Talbot. Rule 4.04(A) of the Uniform Rules of Circuit and County Court Practice states that, "Absent special circumstances the court will not allow testimony at trial of an expert witness who was not designated as an expert witness to all attorneys of record at least sixty (60) days before trial." According to the Mississippi Supreme Court, "[a]ll experts and expert opinions should be disclosed prior to trial, eliminating the prospect of unexpected opinions at trial," *Banks v. Hill*, 978 So. 2d 663, 666 (2008). If a proper designation of an expert and that expert's opinions does not timely occur in accordance with 4.04(A), the trial court should not allow the expert to testify as to those matters at trial.

The timeline of events relevant to this issue is set out below:

1. On February 13, 2009, the defendant filed its Designation of Expert listing Thomas Talbot as an accident reconstruction expert. It was Mr. Talbot's opinion that the accident in this litigation occurred in the right hand lane of Highway 278.

That was Mr. Talbot's sole opinion in his original designation. R. 113-137[4]

2. On February 17, plaintiff filed her Designation of Experts stating that her accident reconstructionist, Tim Corbitt, had reviewed the report of Thomas Talbot and that "based upon his review of the photographs, the location of the vehicles, and the damage done to the vehicles, it is Mr. Corbitt's opinion that at the time of the collision, that Mr. Martin's vehicle was either stopped or either traveling at a very low rate of speed." R. 140-154

3. On March 16, 2009, in response to the plaintiff's designation, the defendant filed its Motion to Strike the expert designation or in the alternative to exclude the testimony or limit the testimony of Tim Corbitt. R. 158-165

4. On June 30, 2009, the plaintiff filed the Notice of Deposition of Thomas F. Talbot for July 21, 2009 at 9:00, in order to determine the basis of any of the defendant's expert opinion. R. 211-12

5. On July 2, 2009, the trial court ordered the plaintiff to supplement her designation within ten days. R. 213

6. On July 6, 2009, the defendant filed its Motion for Protective Order alleging in part that plaintiff was not entitled to depose the defendant's expert except by court order. R. 214-15

7. On July 16, 2009, plaintiff filed her Supplemental Designation of Experts setting out further opinions which would be expressed by her reconstructionist, Tim

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[4] The citations included in this timeline that are not relevant to the issues raised on appeal will not be included in the record excerpts in the interest of judicial economy. If, however, it may be necessary to review these pleadings, they can be found in the trial record.

Corbitt. R. 217-23

8. On August 20, 2009, plaintiff re-noticed the deposition of Thomas Talbot. R. 244-46

9. On September 2, 2009, the defendant filed its Second Supplemental Response to Plaintiff's First Request for Production of Documents providing the results of an additional investigation of its expert Thomas Talbot and providing an additional eleven "observations," which were merely additional opinions. The only mention in that report of the speed of Floyd Martin's truck was that it was traveling at a "speed of at least 15 MPH." R. 247-48

10. On September 3, 2009, defendant filed its Supplemental Designation of Expert Witnesses. R. 249-257

11. On September 18, 2009, plaintiff filed her Motion in *Limine* to preclude the defendant's expert from being able to testify as to the additional matters set out in the new report. R. 258-62

12. On September 22, 2009, the defendant filed its response to plaintiff's Motion in *Limine*. R. 263-267

13. On September 29, 2009 the trial court denied plaintiff's Motion in *Limine* and allowed Mr. Talbot to testify as to all opinions in his new report. T. 89.

14. Trial on this matter began on September 29, 2009. During his trial testimony, Mr. Talbot testified not only outside his original report, but also outside of his supplemental report including specific testimony with regard to the speed of the vehicle which Mr. Martin was operating at the time of the accident. T. 77-78, 447-48.

These facts raise two issues in regard to the speed testimony of defendant's expert. The first is that he should not have been allowed to present *any* testimony regarding Mr. Martin's speed because the only disclosure of his opinion of that speed was made a mere twenty-seven days before trial in violation of Rule 4.04 of the Uniform Circuit and County Court Rules. Alternatively, if he should be allowed to give speed testimony, he should not have been allowed to give opinion testimony as to Mr. Martin's speed in any greater specificity than the opinion he gave in the report included in his supplemental designation.

At the time defendant's expert was designated on February 13, 2009, his only opinion was that the collision occurred in the right hand lane of Highway 278, and he presented no opinion as to the speed of Mr. Martin at the time of the collision. At the time plaintiff's expert was designated on February 17, however, he presented his conclusion that Mr. Martin's Ford truck was either stopped or traveling at a very low rate of speed at the time of the collision. Mr. Corbitt's opinions on the issue of speed never changed, and his testimony at trial was consistent with his conclusion contained in the February 17 designation. The first mention of speed by defendant's expert was in his supplemental designation filed on September 2, 2009, only twenty-seven days before trial, and even in this designation, he made no specific conclusion as to the speed of Mr. Martin's vehicle. He merely stated his vague and open-ended opinion that it was traveling at a rate of speed "at least 15 M.P.H."

As previously noted, the conclusion of plaintiff's expert that Mr. Martin's vehicle was either stopped or traveling at a very low rate of speed was made known to the defendant on February 17, 2009; however, even though defendant had over five months to respond with its expert's opinion as to the matter of Mr. Martin's speed by July 31, 2009, (the date sixty days before trial began), it chose not to provide plaintiff with this information until September 2, only

twenty-seven days before trial. This course of action was an ambush employed by the defense, and the "Court must reject such ambush tactics" by parties to litigation. *Banks*, 978 at 666.

If, however, the trial court was correct in allowing defendant's expert to give opinion testimony as to the speed of Mr. Martin's vehicle, it abused its discretion by allowing defendant's expert to give testimony at trial that was more specific than the opinion that he gave in the report that supplemented his original designation. When an expert is giving an opinion on a matter that can best be described specifically and quantitatively, such as the speed of a motor vehicle, he should be required to present his reported opinion in a specific and quantitative manner if he intends to testify in that same manner at trial, and he should not be allowed to enhance the vague and open-ended opinion given in his designation with specific quantitative testimony that was not provided in his expert report. In the present case, defendant's expert report merely opined that Floyd Martin was traveling at a "speed of at least 15 MPH" at the time of the collision. At trial, however, he gave much more specific testimony regarding Mr. Martin's speed, testifying that Mr. Martin's vehicle was traveling "twenty-five to thirty" miles per hour at the time of the collision. T. 448. This surprise enhancement of the defense's expert testimony was highly prejudicial to the plaintiff and should have been prohibited by the trial court.

Defendant will argue that plaintiff's expert was not properly and/or timely designated on the issue of Mr. Martin's speed, but it is clearly mistaken. As previously noted, the conclusion of plaintiff's expert that Mr. Martin's vehicle was either "stopped or traveling at a very low rate of speed" was first presented in the designation of plaintiff's expert on February 17, 2009. This is a clear indication that plaintiff's expert had drawn a conclusion on the issue of Floyd Martin's speed and that he should be expected to testify about the issue of Mr. Martin's speed at trial. If, however, this designation is found to be improper, plaintiff supplemented its designation of

expert, Tim Corbitt, on July 16, 2009, and the expert report in this supplemental designation further stated, "The lack of rearward crush damage combined with the lateral damage observed indicates that the Martin-Ford was either stopped of [sic] moving very slowly at the time of the collision." R. 223. This supplemental designation was still timely filed in accordance with Rule 4.04(A), and it also clearly indicated that plaintiff's expert had made a determination as to the speed of Floyd Martin's vehicle of which he should be expected to testify at trial.

Defendant will also argue that "special circumstances" arose that should cause it to be exempt from the sixty day requirement of Rule 4.04(A). Defendant will contend that these special circumstances arose when plaintiff completely changed her theory of the case more than two years after filing her complaint. This contention is erroneous, however, because plaintiff did not "change" her theory of the case. She merely presented an alternate theory in response to the opinion of defendant's expert that the collision occurred in the right hand lane of Highway 278. At trial, plaintiff presented multiple theories of the case. In accordance with these multiple theories, she presented both the testimony of two eyewitnesses that the collision occurred up CR 405 and expert testimony that the collision occurred in the right hand lane of Highway 278. It is common practice in litigation to present multiple theories of a case, and any implicit notion that plaintiff "changed her theory" in some attempt to surprise the plaintiff is without merit, especially when the alternate theory was only brought as a response to the opinion of defendant's expert.

Defendant will argue that plaintiff's contention should be rejected based on the rationale relied upon by plaintiff in her prior pleadings. Defendant will likely reference the following statements made by the plaintiff in her March 24, 2009, Motion for Continuance:

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. Wilkerson*, 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 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.

Defendant will also likely reference the following statements from plaintiff's response to defendant's Motion to Compel Production of Expert Information:

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).

While plaintiff concedes that there is no "hard and fast rule" with regard to the seasonableness of supplementation, she contends that Rule 4.04(A) is a guideline rule that should generally be followed by the trial courts to ensure that the parties' right to prepare for trial will not be impaired, as was the case in this instance. Rule 4.04(A) does provide a "special circumstances" exception to its sixty day requirement; however, even if special circumstances

can be shown so that a party would be allowed to supplement its expert designation within sixty days of trial, the supplementation should not be allowed where the opposing party would be unfairly surprised or lack sufficient time to prepare for trial.

In the present case, defendant's supplementation of its expert designation came a mere twenty-seven days before trial in violation of the sixty day requirement of Rule 4.04(A). Defendant will contend that plaintiff acknowledged defendant's right to supplement its expert designation after deposing plaintiff's expert; however, this right is not an absolute one. This supplementation, like others, is subject to the requirement of Rule 4.04(A). As previously discussed, defendant failed to show that "special circumstances" arose such that it should be allowed to supplement its designation within sixty days of trial, and even if it had done so, plaintiff was caused unfair prejudice by this unseasonable supplementation. The trial court abused its discretion by allowing defendant's expert to give his opinion regarding Mr. Martin's speed, and this abuse constitutes reversible error by the trial court.

Defendant will further contend that the plaintiff should have "reasonably anticipated" that defendant's expert would give testimony regarding the speed of Floyd Martin's vehicle at the time of the collision. The flaw in this argument lies in the fact that plaintiff should not have to anticipate the testimony of defendant's expert. Rule 26 of the Mississippi Rules of Civil Procedure provides, "[a] party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion." Miss. R. Civ. P. 26(b)(4)(A)(i). The purpose of Rule 26 is to prevent parties to litigation from being forced to resort to speculation when preparing for the testimony of the

opposing party's expert "since all...expert opinions should be disclosed prior to trial, eliminating the prospect of unexpected opinions at trial." *Banks*, 978 at 667 (discussing Miss. R. Civ. P. 26). Because defendant's argument is clearly contrary to the purpose of Rule 26 of the Mississippi Rules of Civil Procedure, its contention is not valid and should not be considered as such.

The trial court abused its discretion by allowing defendant's expert to testify as to the speed of Mr. Martin's vehicle at the time of the collision when the designation regarding this opinion testimony was not seasonably supplemented in compliance with Rule 4.04(A). The trial court should not have allowed defendant's expert to testify to any of his additional "observations," or, in the alternative, it should not have allowed defendant's expert to enhance the vague and open-ended opinion given in the supplementation with more specific quantitative testimony at trial. Defendant's failure to adhere to this rule in combination with the error of the trial court in allowing the expert's unexpected testimony caused great prejudice to the plaintiff, and she is entitled to a new trial for that reason.

CONCLUSION

The trial court's error entitles the plaintiff, Schenille Martin, to a new trial. The trial court erred when it refused to grant jury instructions that properly announced the law of the case and denied plaintiff of her right to jury instructions that fairly presented her theory of the case. It also erred by upholding a jury verdict and entering a judgment that was against the overwhelming weight of the evidence presented at trial. Finally, the trial court erred when it allowed the testimony of defendant's expert with regard to the speed of Floyd Martin's vehicle at the time of the collision. For these reasons, the plaintiff should have a new trial granted in her favor.

WHEREFORE, PREMISES CONSIDERED, Mrs. Martin respectfully requests that this Court find 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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Honorable Judge Andrew K. Howorth
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This the 30th day of June, 2010.

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