IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

RONALD PAYNE and THOMAS PAYNE, individually and on behalf of the wrongful death beneficiaries of Marie Payne, deceased — **APPELLANTS**

VS. — **CAUSE NO. 2010-CT-01929-SCT**

CLEVELAND GOWDY, individually and as an employee of Schneider National Carriers, Inc., and SCHNEIDER NATIONAL CARRIERS, INC. — **APPELLEES**

SCHNEIDER NATIONAL CARRIERS, INC.'S SUPPLEMENTAL BRIEF

Appealed from the Circuit Court of the First Judicial District
of Lauderdale County, Mississippi

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APPELLEE, SCHNEIDER NATIONAL CARRIERS, INC.'S
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Appellee, Defendant, Schneider National Carriers, Inc. ("Schneider"), by and through counsel, files its Supplemental Brief pursuant to Rule 17, Mississippi Rules of Appellate Procedure, and respectfully requests that this Court affirm the Court of Appeals' decision in the action styled *Payne v. Gowdy, et al.*, No. 2010 CA-01929-COA.

In their Petition, Appellants contend that they are entitled to review for three reasons. First, Appellants argue that proposed jury instruction, P-14, stating that a driver had a "duty to see what he should have seen" should have been allowed. Next, Appellants argue that prejudicial evidence of a prior fall of Ms. Marie Payne was improperly admitted. Finally, Appellants argue that JNOV should have been granted by the trial court, and that the Court of Appeals should have reversed the trial court's ruling because "no reasonable juror could have found for the driver, Mr. Gowdy."

All of the above arguments are restatements of Plaintiffs'/Appellants' earlier arguments at both the JNOV stage and on appeal before the Court of Appeals, were fully briefed and analyzed by both the trial court and the Court of Appeals, and were found to be without merit. Accordingly, Appellants' appeal should be denied.

STATEMENT OF THE FACTS

Appellee, Schneider, presented facts in its briefing for the Court of Appeals, as well as in its Response to the Petition for Certiorari, and for the sake of brevity, incorporates the same herein.

ARGUMENT

The Court of Appeals analyzed the law and facts, and its decision to affirm the trial court's rulings and the jury's verdict was proper. The trial court heard the same arguments, the Court of Appeals reviewed Appellants' arguments fully and denied them, and denied them again upon a motion for rehearing. This is Appellants' fourth attempt to show some type of error occurred at trial. They still cannot meet that burden. Accordingly, the trial court's and the Court of Appeals' rulings must be affirmed.

First, the instructions given to the jury were a correct statement of the law, individually and collectively, and adequately informed the jury of the law. The Court of Appeals correctly found, as did the trial court, that the jury was adequately instructed, without instruction P-14, on the law and duties of a driver in a parking garage to reasonably watch for pedestrians, to "look to see that the way is clear" and to keep a reasonable and proper lookout all around the vehicle while backing. Controlling precedent was considered and correctly analyzed by the Court of Appeals. Additionally, inclusion of P-14 in light of the other numerous instructions on a driver's duty to watch, and to look for pedestrians while backing, could have been interpreted by the jury as peremptory on the question of seeing Ms. Payne.

Next, the trial judge properly allowed evidence of Ms. Payne's May 2008 fall and shoulder injury into evidence, and the Court of Appeals correctly found that this limited reference to a prior fall was admissible. This Court certainly cannot safely say that the allowance of this evidence was an abuse of discretion, when the fall was only mentioned for the limited purpose of impeaching the

beneficiaries' credibility. The beneficiaries testified that they saw Ms. Payne daily, but did not know of her recent fall and broken shoulder. In fact, no link between a prior fall and the subject incident was argued until Appellants' own counsel introduced Ms. Payne's doctor's testimony. That testimony showed that there was no causal link between any prior fall and the incident at issue, curing any possible confusion. The trial court's decision on evidentiary issues must stand unless it can be safely adjudged an abuse of discretion. The trial court did not err, and the Court of Appeals correctly affirmed that ruling.

Finally, ample evidence was presented at trial to support the jury's verdict that Gowdy was not negligent, and the trial court correctly denied the Paynes' Motion for JNOV. Testimony showed zones of visibility and places in which Ms. Payne could have stood without being seen by Mr. Gowdy regardless of how carefully he looked. Testimony also indicated that Ms. Payne may not have been standing while Gowdy backed and that the Gowdy's felt only one, not two, "bumps". The "one bump" versus "two bumps" theory was advanced to show that had Ms. Payne been standing, there would have been one "bump" when she was hit with the vehicle, and a second when she was rolled over. The jury appropriately considered the evidence and made their decision. Accordingly, the Court of Appeals' ruling must stand.

I. The Jury Was Properly Instructed About a Driver's Duties, and Proposed Jury Instruction P-14 Was Unnecessary.

As this Court noted, "'jury instructions are to be read as a whole, and not in isolation.'" Op.¶48, *citing Walker v. State,* 913 So.2d 198, 234 (¶ 132) (Miss.2005) (quoting *Parks v. State,* 884 So.2d 738, 746(¶ 26) (Miss.2004)). It is well-settled that a trial court has discretion in the granting or denial of jury instructions, and that "a trial court may refuse a jury instruction when it is an incorrect statement of law, *is fairly covered in other instructions*, or has no foundation in the

evidence." *Ruffin v. State,* 992 So.2d 1165, 1176(¶ 33) (Miss.2008)(emphasis added). Finally, "[i]f other instructions granted adequately instruct the jury, a party may not complain of a refused instruction on appeal." *Investor Res. Svcs. Inc. v. Cato,* 15 So.3d 412, 423 (Miss. 2009). (quoting *Southland Enters. v. Newton County,* 838 So.2d 286, 289 (Miss.2003)).

Appellants have argued that the Court of Appeals ignored precedent regarding whether a driver has a duty to "see what he should have seen." Appellants' interpretation of the Court of Appeals' ruling is incorrect. Essentially, Appellants take the far-fetched position that without their proposed jury instruction, the jury was so confused that they believed that it was not negligence for Gowdy to have looked, missed seeing Ms. Payne in plain view, and backed up and hit her. That simply is not possible in light of the clear, accurate instructions presented. In this case, the central issue is whether Gowdy exercised ordinary care in the operation of his vehicle as he backed in a parking garage. Not "whether he should have seen Ms. Payne." *Petition for Writ of Certiorari*, p.5.

In *Utz v. Running & Rolling Trucking, Inc.,* 32 So.3d 450, 481 (Miss. 2010), this Court rejected the notion that a driver had an "absolute" duty to "see what he should have seen." While the *Utz* Court stated that it was not reversible error to give an instruction on a driver's duty to generally "see what he should have seen," that does not mean that such an instruction was required in this case. Appellants introduced *multiple* instructions on Gowdy's duty to watch for pedestrians and to keep a reasonable and proper lookout around his vehicle. The analysis, in keeping with binding precedent cited above, was whether those jury instructions, read as a whole, adequately informed the jury of the law. Ct. App. Op. ¶58-61. The Court of Appeals correctly held that a motorist's duty to "see what he should have seen" was encompassed in the duties of a motorist to keep a proper lookout, and when backing to look to the right, left and behind him, and to exercise ordinary, reasonable care when doing so. Ct. App. Op. ¶53; 61.

At trial, the Court presented a number of driving duty instructions. First, negligence and causation were defined. Second, the court instructed on a driver's duty to keep his vehicle under proper control, including Gowdy's duty to keep his truck under proper control under the circumstances so as to avoid injury to Ms. Payne. Third, the jury was further instructed that a motorist has a duty to keep a reasonable and proper lookout to the front, back and to the sides for vehicles and pedestrians, and to anticipate pedestrians within the parking lot. [Trial Tr. at 933; Ex. 47, Jury Instruction C-8 (emphasis added)]. If Gowdy failed to keep that type of proper lookout, the jury was told, he was negligent. A fourth instruction, yet again, informed the jury of Gowdy's duty to exercise reasonable and ordinary care when backing, to look and make sure the way is clear, and to continue looking when backing. [*Id. at* Jury Instruction C-9 (emphasis added)]. This instruction continued by stating that if Gowdy failed to take reasonable precautions to see Payne at the time of the collision with her, he was negligent. *Id.*

A reading of the jury instructions as a whole shows that the duty to see a pedestrian within view was quite clearly, thoroughly and repeatedly stressed to the jury, even without instruction P-14. There can be no doubt that the jury knew Gowdy had a duty to anticipate pedestrians such as Ms. Payne, to look for them and take adequate precautions, to keep watching for pedestrians while backing, to make sure the way was clear while backing, to keep a reasonable and proper lookout and his vehicle under proper control. There is no reasonable argument that, in light of these instructions, the jury was confused about Gowdy's duty to see Ms. Payne if she was within view and to avoid running over her. Additional jury instructions would have been unnecessary, so cumulative as to be prejudicial to Defendants, and interpreted as peremptory.

The jury was properly instructed as to the relevant law necessary to fairly decide the case. They weighed evidence from Gowdy, and experts from both parties about visibility and places in which

Ms. Payne could not be seen despite an exercise of due care. Accordingly, the jury's verdict must not be disturbed.

II. The Trial Court Properly Allowed Evidence Of the Prior Fall And Shoulder Injury For Impeachment Purposes.

Appellants incorrectly frame the standard of review for this point of alleged error, by arguing that the Court cannot "safely say" that introduction of evidence of "propensity to fall was not prejudicial." There was no evidence of "propensity to fall", nor was that ever mentioned at trial. Regardless, that is not the standard of review for evidentiary admissions. Instead, the standard of review regarding admission of evidence is abuse of discretion, and as pointed out in the Court of Appeals' opinion, "[w]e will affirm the trial court's ruling '[u]nless we can safely say that the trial court abused its judicial discretion in allowing or disallowing evidence so as to prejudice a party in a civil case . . .'" Ct.App.Op. at ¶23. (quoting from *Jones v. State,* 918 So.2d 1220, 1223 (Miss.2005)).

Appellants argue that Schneider used evidence of a prior fall of Ms. Payne to prejudice the jury and infer that Ms. Payne fell behind Gowdy's pickup truck in the parking garage. This contention is incorrect. Instead, a prior fall was only used to test the loss of society and companionship testimony of the Appellants. Ms. Payne's sons testified as to having a close relationship with Ms. Payne, including daily coffee visits. However, they knew nothing of her recent fall and broken shoulder in May of 2008, just months before her death. This evidence was proper under Rule 402, Miss. R. Evid., because it was relevant and probative to damages aspects of the claim over loss of the family relationship, and Plaintiffs' credibility.

Further, Plaintiffs'/Appellants' counsel sponsored the only testimony concerning a prior fall as related to this incident. Specifically, Appellants' counsel introduced testimony from Dr. Wilson, one of Ms. Payne's treating physicians, making clear that there was no connection between the prior

fall and the incident at issue. Neither Gowdy's counsel, nor Schneider's counsel argued to the jury that Ms. Payne fell "like she did before," or that she had a propensity for falling. Appellants cannot now complain when they introduced the evidence at trial. The only other time a fall was discussed was during closing arguments when defense counsel listed possibilities, supported by evidence, as to why Gowdy did not see Ms. Payne, including her standing between vehicles, or bending over or falling.

Ample evidence was presented to show that Payne may not have been visible, and the prior fall testimony was not needed for a jury to find that Payne was not visible to Gowdy. The Court of Appeals found Appellants' contention without merit because the cross-examination tested the basis of their claims as wrongful death beneficiaries and the danger of any prejudice was outweighed by its probative value. Finally, a reasonable juror would not have inferred that Ms. Payne must have fallen in the parking garage because of her uncontradicted doctor's testimony explaining that there was no relation between the prior fall and the garage incident. The Court of Appeals recognized the same. Ct. App. Op. ¶ 28. Accordingly, this appeal is without merit.

III. Plaintiffs' Motion For JNOV Was Properly Denied.

Finally, Appellants contend that the trial court should have granted JNOV. This argument is without basis. The trial recognized substantial evidence to support the verdict and correctly denied the Paynes' Motion JNOV. [R. at 1809; R.E. at 3]. The Court of Appeals upheld that decision, finding that sufficient evidence was presented to support the jury's defense verdict. Ct. App. Op. ¶ 68, 69.

As noted by this Court, "this Court will affirm the denial of a JNOV if there is substantial evidence to support the verdict." *Adcock v. Miss. Transp. Comm'n,* 981 So.2d 942, 948 (Miss.2008) (citing *Johnson v. St. Dominics–Jackson Mem'l Hosp.*, 967 So.2d 20, 22 (Miss.2007)). "This Court

will consider the evidence in the light most favorable to the appellee, giving the party the benefit of all favorable inference[s] that may be reasonably drawn from the evidence." *Spotlite Skating Rink, Inc. v. Barnes ex rel. Barnes,* 988 So.2d 364, 368 (Miss.2008) (quoting *Ala. Great S. R.R. Co. v. Lee,* 826 So.2d 1232, 1235 (Miss.2002)). "It is the province of the jury to determine the weight and worth of testimony, and the credibility of the witness." *Indep. Life & Acc. Ins. Co. v. Mullins*, 173 So. 2d 663, 666 (1965). If a jury makes a determination on conflicting evidence, "the same should be upheld unless evidence" strongly "indicates that the jury was moved by passion, prejudice or some other influence." *Indep. Life & Acc. Ins. Co.,* 173 So. 2d at 665-66. As the Court of Appeals announced, taken in the light most favorable to Schneider and Gowdy, there was sufficient evidence from which a reasonable jury could decide that Cleveland Gowdy was not negligent, and that finding must stand. Examples of that evidence are as follows:

1. **Substantial Evidence From Cleveland Gowdy Supported the Verdict.**

Cleveland Gowdy and his wife were the only witnesses who actually know what happened. Their testimony proved that he exercised ordinary and reasonable care in the parking garage while backing up his vehicle. Gowdy testified that he did not see Ms. Payne when he was driving forward in the parking garage. [Trial Tr. at 847-48, 866]. Evidence was before the jury of the many vehicles to the left which may have blocked Gowdy's view of Ms. Payne as he passed. Payne easily could have stepped between two of these vehicles as the Gowdy's approached and passed. Gowdy explained at trial that he looked behind before backing up to get to a parking space and that he did not see Ms. Payne behind or anywhere around his truck. [Trial Tr. at 844-50]. Gowdy took every reasonable effort to ensure that the way was clear before backing and by watching while backing. The jury is changed with evaluating the credibility of witnesses, and chose to believe Gowdy. There are instances in which a driver may not see a person even though the person was "visible" from other

perspectives. As noted in *Fowler Butane Gas Co. v. Varner,* 141 So.2d 226, 230 (Miss. 1962), a driver is not negligent just because an accident occurred while backing, so long as the driver keeps a reasonable proper lookout, takes reasonable precautions, and uses due care. Appellants would have the doctrine of strict liability apply in this case; however that is not the law. JNOV was properly denied, the Court of Appeals properly affirmed the decision.

2. <u>Evidence From Schneider's Expert, Dr. Parker, Supports Jury's Verdict.</u>

Gowdy's testimony alone would have been sufficient to defeat the Paynes' Motion JNOV. However, the jury also heard Dr. Parker testify that Ms. Payne would not have been visible to Gowdy had she been standing between vehicles in the parking garage or outside various zones of visibility as Mr. Gowdy was backing or considering backing his vehicle.[1] [Trial Tr. at 698-703, 745, 749-50]. His testimony proved that there were locations around Gowdy's vehicle in which Ms. Payne would not have been visible, regardless of due care and proper lookout. This evidence, taken in a light most favorable to Defendants, was sufficient for a reasonable jury to find that Ms. Payne could not have been seen by a reasonably careful, prudent driver.

The Court of Appeals' dissent, respectfully, is mistaken. Specifically, the dissenting Justices confuse the visibility of Ms. Payne generally as she allegedly walked while Gowdy drove forward, with the central issue in this case. Ct. App. Dis.Op. ¶77-78. The issue facing the jury was not whether Mr. Gowdy saw Ms. Payne while she walked through the garage at an earlier time, but instead whether Gowdy was negligent in his operation of his personal pickup truck when he later reversed. The Court of Appeals noted that

> Cleveland testified that, before putting his truck into reverse, he came to a full and complete stop. He turned his head and looked to the left, turned his head and looked to the right, and then turned his head back to the left and looked again. He looked

[1] Please keep in mind that Ms. Payne stood only 4 feet, 11 inches tall.

> behind him before he backed up, and he did not see Marie. Considering this evidence, the inferences in favor of Cleveland...the Court finds that there was sufficient evidence to support the jury's verdict[.]

Ct. App. Op. ¶69. The Court of Appeals' majority's decision was correct. Gowdy's testimony supported a finding of his proper, reasonable lookout and precautions, and the testimony of Dr. Parker explained, by measurements and scale depictions, that there were zones around Gowdy's vehicle that Ms. Payne could not be seen even by Gowdy's reasonable efforts. Appellants' own expert agreed that there were places in which Payne may not be visible. [Trial Tr. at 395, 405].

Appellants' theory that Ms. Payne was at all times in the upright position when Gowdy backed is disputed by credible evidence. First, both Gowdy and his wife consistently testified that they felt only *one single bump* when they backed up. [Trial Tr. at 848-51; R. at 626]. Had Gowdy backed into Ms. Payne and knocked her down, he would have felt or heard something when he hit her, and then a second bump when she was run over. Further, had Ms. Payne been upright and walking, she would have had ample time to cross the lane and get out of the way; a conclusion established by Appellants' own reconstruction expert and published data. [Trial Tr. at 402-403, 684, 711-12]. The only rational conclusion is that Ms. Payne was not visible at relevant times. The jury weighed the evidence presented by all parties and reached a decision in favor of the Defendants. Sufficient, probative evidence was presented to support the jury's finding that Gowdy exercised ordinary and reasonable care while driving and in backing up his vehicle. Thus JNOV was properly denied.

CONCLUSION

For the above and foregoing reasons and those stated in Appellees' Response to Appellants' Motion for Rehearing, and Appellee's Brief, Schneider respectfully requests that this Court affirm the verdict, the trial court's rulings and the Court of Appeals' ruling.

THIS the 1st day of April, 2013.

Respectfully submitted,

SCHNEIDER NATIONAL CARRIERS, INC.

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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I have forwarded via United States Mail, postage prepaid, a copy of the above and foregoing ***Appellee, Schneider National Carriers, Inc.'s Supplemental Brief*** to the following:

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THIS the 1st day of April, 2013.

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