

IN THE CIRCUIT COURT OF COUNTY, MISSISSIPPI

PLAINTIFFS

VS.

CAUSE NO.

DEFENDANT

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE ISSUE OF LIABILITY

FACTS

On or about , Plaintiff was operating a vehicle in which his/her husband/wife, Plaintiff , was a passenger; they were traveling , in the City of , County, Mississippi. Said vehicle proceeded into the and , with the right of way under the protection of a green traffic signal. The Defendant's driver, , while in the course of his/her employment with , and driving owned by , was traveling in a ; disregarded a red traffic signal and without maintaining proper control of said vehicle he/she entered and and struck the Plaintiff's vehicle as it proceeded through said intersection under the protection of a green traffic signal. The resulting collision caused severe damage and injury to said and his/her husband/wife, .

On , a trial was conducted in the Municipal Court of , County, Mississippi, wherein was represented by competent legal counsel. After a full hearing, the Court, presiding, found guilty of running a red traffic signal at the intersection of and on , when he/she struck the vehicle in which the Plaintiffs were riding. The Court levied a fine of \$ . The fine was paid. The conviction was not appealed and became final. The proceedings were stenographically recorded and have been transcribed.

The Plaintiffs filed their Complaint on , against , alleging injuries proximately caused by the negligence of the employee of said defendant, . The defendant was properly served with process on , . The Defendant filed an Answer on , admitting that the vehicle operated by on , collided with the Plaintiffs; that the vehicle operated by was owned by ; and that the operator of the truck, , was an employee of , and was operating the vehicle within the course and scope of his/her employment with said at the time of the accident.

ARGUMENT

The Plaintiffs charge that the Defendant's employee, , while in the course and scope of his/her employment, caused injury to the Plaintiffs when he/she collided with the vehicle in which Plaintiffs were traveling through an intersection under protection of a green traffic signal, negligently failing to maintain proper control of his/her vehicle and running a red

signal in violation of State law. The violation of this statute, Miss. Code Ann., Sections 63-3-309, and 63-3-313, which are intended to prevent the type of injuries suffered by your Plaintiffs on \_\_\_\_\_, \_\_\_\_\_, constitutes negligence *per Se*. McRee v. Raney, 493 So.2d 1299 (Miss., 1986).

The Defendant's employee, \_\_\_\_\_, was convicted in the Municipal Court of \_\_\_\_\_, \_\_\_\_\_ County, Mississippi, of entering an intersection in disregard of a red traffic signal, in violation Miss. Code Ann., Sections 63-3-309 and 63-3-313. It is the Plaintiff's position that the finding of the Municipal Court that the Defendant's employee was guilty of violating the aforementioned Statutes is a final binding decision on the issue of whether the employee of the Defendant ran the red traffic signal, and that the Defendant is precluded from litigating this issue a second time under the doctrine of collateral estoppel.

The controlling authority on the application of collateral estoppel is the case of Jordan v. McKenna, 573 So.2d 1371 (Miss., 1990). Jordan involved a civil action for Assault and Battery. The defendant had been previously convicted of raping the plaintiff. The Supreme Court found that the defendant was collaterally estopped from re-litigating the fact of whether he had committed the rape.

The doctrine of collateral estoppel is not invoked casually, but when the elements of estoppel have been satisfied, the Court in the subsequent proceeding should consider only that the prior decision was final, and should not inquire whether it was erroneous. State Ex Rel. Moore v. Molpus, 578 So.2d 624 (Miss., 1991), at page 642. The decision relied upon as preclusive must be a reliable decision. There must exist a mutuality of interest in both proceedings and there must have existed an incentive for the party against whom the doctrine is to be invoked to have to litigate the issues in the prior proceeding. In addition, the party should have been effectively represented by counsel. Jordan, *supra*.; State Ex Rel. Moore, *supra*. In the case *sub judice*:

1.

The Defendant's employee, \_\_\_\_\_, who was charged with the violation of statute, was represented by counsel who conducted a spirited defense on behalf of \_\_\_\_\_, as can be seen from the transcript of the Municipal Court proceedings, attached as an exhibit to the Plaintiff's Motion.

2.

Whether \_\_\_\_\_, who was admittedly an employee of the Defendant and acting in the course and scope of this employment, entered the intersection in disregard of a red traffic signal in violation of State law, was the issue in the prior proceeding and is an issue in the case *sub judice*.

3.

The Defendant and the Defendant's employee had common interests and were both aware at the time of the Municipal Court proceeding that claim was being made by your Plaintiff's against both parties for injuries sustained as a result of running the red traffic signal and

colliding with the vehicle in which the Plaintiffs were traveling. The Plaintiff's attorneys, in separate letters to each dated \_\_\_\_\_, \_\_\_\_\_, notified both that Plaintiffs had secured legal representation to assert their rights in connection with the \_\_\_\_\_, \_\_\_\_\_ collision; copies of these documents are attached as exhibits to the Motion of the Plaintiffs.

The only possible objections to applying collateral estoppel to this misdemeanor conviction are lack of incentive to resist, and lack of counsel. See: \_\_\_\_\_, at page \_\_\_\_\_. However, in the case *sub judice*, there is a clear showing of the fact of a vigorous resistance of the Municipal Court action by \_\_\_\_\_, with representation and participation by competent counsel. There is no reasonable basis for revisiting the issue decided by the Municipal Court beyond a reasonable doubt. Plaintiffs concede that this does not conclude the Defendant from submitting evidence at trial on the issue of damages, including contributory negligence. See: \_\_\_\_\_, at page \_\_\_\_\_.

The Defendant admits in his/her Answer and in Discovery, and the Defendant's employee admits in his/her deposition, that the 18--wheel rig driven by \_\_\_\_\_ on \_\_\_\_\_, \_\_\_\_\_, collided with the vehicle containing Plaintiffs after entering \_\_\_\_\_ and \_\_\_\_\_, and that the Plaintiffs were damaged to some extent. Therefore, the Defendant's employee, having entered the intersection against a red signal in violation of Miss. Code Ann., Sections 63-3-309 and 63-3-313, is guilty of negligence *per Se*, and is liable for such damages as the Plaintiffs suffered, McRee, supra.

#### CONCLUSION

By operation of collateral estoppel, there is no issue of fact as to whether the Defendant's employee, \_\_\_\_\_, entered \_\_\_\_\_ and \_\_\_\_\_ in violation of; Statute. \_\_\_\_\_ violation of Statute constitutes negligence *per se*. There is no issue of fact whether the Defendants vehicle collided with the Plaintiffs, nor that the Plaintiffs suffered some damage.

Wherefore, premises considered, the Plaintiffs contend that the issue of whether the Defendant's employee, \_\_\_\_\_ is liable in tort to the Plaintiffs is controlled by the finding of the Municipal Court of \_\_\_\_\_, \_\_\_\_\_ County, Mississippi, entered on \_\_\_\_\_, \_\_\_\_\_, and that the Honorable Court should sustain the Plaintiff's Motion For Summary Judgment, setting this cause for trial on the issue of damages.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, \_\_\_\_\_, do hereby certify that I have this day mailed by United States mail, postage prepaid, a true and correct copy of the above and foregoing Memorandum of Law in Support of Plaintiffs' Motion for Partial Summary Judgment on the Issue of Liability to:

SO CERTIFIED, this the \_\_\_\_\_ day \_\_\_\_\_, \_\_\_\_\_.

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