

**STATE OF MISSISSIPPI  
CIRCUIT COURT OF HARRISON COUNTY  
FIRST JUDICIAL DISTRICT**

DEAN E. KELLY and LAUREN M. BRUNELLE,

Plaintiffs,

vs.

KENAN BEL BUCHERT, MISSISSIPPI DEPARTMENT OF  
TRANSPORTATION, GRANITE CONSTRUCTION, INC.,  
et al.

Defendants.

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Case No.: A2401-09-369

**CONSOLIDATED FOR ALL PURPOSES WITH:**

JOSHUA DRIGHT,

Plaintiff,

vs.

MISSISSIPPI DEPARTMENT OF TRANSPORTATION AND  
COUNTY OF HARRISON, MISSISSIPPI TRANSPORTATION  
COMMISSION, GRANITE CONSTRUCTION COMPANY,  
et al.,

Defendants.

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Case No.: A2401-09-377

**CONSOLIDATED FOR ALL PURPOSES WITH:**

BRANDON ALEXANDER,

Plaintiff,

vs.

MISSISSIPPI DEPARTMENT OF TRANSPORTATION AND  
COUNTY OF HARRISON, MISSISSIPPI TRANSPORTATION  
COMMISSION, GRANITE CONSTRUCTION COMPANY,  
et al.,

Defendants.

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Case No.: A2401-09-378

**CONSOLIDATED FOR ALL PURPOSES WITH:**

KENAN BEL BUCHERT,

Plaintiff,

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Case No.: A2401-09-369  
File No.: 11-059-DJC  
Page 1 of 13

vs.

MISSISSIPPI DEPARTMENT OF TRANSPORTATION,  
GRANITE CONSTRUCTION COMPANY, et al.

Defendants.

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\* Case No.: A2401-10-32  
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**CONSOLIDATED FOR ALL PURPOSES WITH:**

EDWARD VINCENT BRADLEY,

Plaintiff,

vs.

KENAN BEL BUCHERT,

Defendant.

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\* Case No.: A2401-09-370  
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**POWELL CONSTRUCTION SERVICES, INC.'S  
RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO ALTER OR AMEND  
JUDGMENT OF THE COURT Or In the Alternative, FOR REHEARING**

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COMES NOW, POWELL CONSTRUCTION SERVICES, INC. ("PCS"), a defendant in the above-styled cause, and hereby responds in opposition to plaintiffs Dean Kelly, Lauren Brunelle, Joshua Dright and Brandon Alexander's Motion to Alter or Amend Judgment of the Court Or In the Alternative, For Rehearing. As grounds for the opposition, PCS sets down and assigns the following, to-wit:

## Introduction

The plaintiffs present the Court with no intervening change in controlling law. Nor do the plaintiffs present new evidence for consideration<sup>1</sup>. Rather, the plaintiffs dress up a tired old misreading of Kenan Bel Buchert's deposition testimony. While the plaintiffs give cause for one more reading of the colorful deponent's carefully-scrutinized transcript, the plaintiffs fail to present a clear error of law and they certainly cannot show manifest injustice.

## Law and Argument

In *Lashley v. Pfizer, Inc.*, 877 F.Supp.2d 466, 479 (S.D. Miss. 2012), the United States District Court for the Southern District of Mississippi stated as follows:

“A Motion filed under Rule 59(e) ‘calls into question the correctness of a judgment.’ *Templet v. HydroChem Inc.*, 367 F.3d 473, 478 (5<sup>th</sup> Cir.2004) (quoting *In re Transtexas Gas Corp.*, 303 F.3d 571, 581 (5<sup>th</sup> Cir.2002)). ‘Rule 59(e) permits a court to alter or amend a judgment, but it “may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment.” *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 486 n. 5, 128 S.Ct. 2605, 171 L.Ed.2d 570 (2008) (quoting 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2810.1, pp. 127–128 (2d ed. 1995)). ‘A motion to alter or amend the judgment under Rule 59(e) must clearly establish either a manifest error of law or fact or must present newly discovered evidence and cannot be used to raise arguments which could, and should, have been made before the judgment issued.’ *Rosenblatt v. United Way of Greater Houston*, 607 F.3d 413, 419 (5<sup>th</sup> Cir.2010) (quotation omitted). ‘A party seeking reconsideration must show more than disagreement with the court’s decision and recapitulation of the same cases and arguments already considered by the court.’ *Texaco Exploration and Production Inc. v. Smackco*, 1999 WL 539548, at \*1 (E.D.La.1999); see also *Joe v. Minnesota Life Ins. Co.*, 272 F.Supp.2d 603, 604 (S.D.Miss.2003).

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<sup>1</sup> The plaintiffs filed the entire deposition transcript of Mr. Buchert, as if they were presenting something new. However, the court has had the entire transcript since the Fall of 2012. The court will recall that plaintiffs Kelly and Brunelle moved the court to continue the hearing on the motions for summary judgment set for September 13, 2012. The GAW/Ingram defendants filed the entire Buchert transcript for the court's consideration. Additionally, on August 30, 2012, in its opposition to plaintiffs' motion to continue, PCS invited the most exacting scrutiny of Mr. Buchert's transcript.

Under Federal Rule of Civil Procedure 59(e), there are ‘only three possible grounds for any motion for reconsideration: (1) an intervening change in controlling law, (2) the availability of new evidence not previously available, and (3) the need to correct a clear error of law or prevent a manifest injustice.’ *Nationwide Mut. Fire Ins. Co. v. Pham*, 193 F.R.D. 493, 494 (S.D.Miss.2000) (quoting *Atkins v. Marathon LeTourneau Co.*, 130 F.R.D. 625, 626 (S.D.Miss.1990)).”

### **Kenan Bel Buchert’s Deposition Testimony, Correctly Read**

Before highlighting the plaintiffs’ misreading of Mr. Buchert’s deposition testimony, there are a few matters with which plaintiffs take no issue. The plaintiffs did not contest the fact that Mr. Buchert knew the navigation lights were out long before he reached the bridge. Nor do the plaintiffs contest that Mr. Buchert chose to navigate his boat as best he could with some alternate means of navigation that did not include red and green navigation lights. Our plaintiffs do not contest the fact that Mr. Buchert knew the bridge was in front of him by virtue of the illuminated highway lights. Finally, plaintiffs do not contest the fact that Mr. Buchert knew he was rushing headlong into a wall of darkness. These facts alone support the court’s finding that Mr. Buchert’s actions were “the sole proximate cause” of the subject accident. What follows is an explanation of how the plaintiffs’ misreading of Mr. Buchert’s deposition testimony fails to demonstrate a *genuine* issue of material fact for a jury to consider.

In plaintiffs’ motion, just as they did at oral argument before the court, they cling to Mr. Buchert’s testimony that his *goal* was to pass under the bridge in the channel, under the highest part of the bridge. (Deposition of Kenan Bel Buchert at pages 76-77). All along, however, the defendants conceded that that may have been Mr. Buchert’s original intention. Also, Mr. Buchert testified that he was depending on his GPS to get him to the channel. (Deposition of Kenan Bel Buchert at pages 84-85). The plaintiffs go off track and misread Mr. Buchert’s deposition

testimony when they assert that defense counsel abused, bullied, intimidated and repeatedly questioned Mr. Buchert until he finally knuckled under and gave favorable testimony (see footnote #1 at page 8 of Plaintiffs' Motion). In fact, a review of Mr. Buchert's transcript reflects that defense counsel treated Mr. Buchert respectfully and professionally despite his profanity, insults and evasion.

An example of plaintiffs' misconstruing Mr. Buchert's transcript is found at page 5 of their motion concerning page 210 of Mr. Buchert's transcript. After already having heard that Mr. Buchert's *goal* was to find the channel, defense counsel wanted to know what made Mr. Buchert think that he had actually found the channel since he did not have the benefit of the red and green navigation lights. That was a first question, not a repetition of some prior question:

“Q. What made you think you had found the channel if you didn't have a red or green light to tell you that you were there?

A. Intuition.”

(Deposition of Kenan Bel Buchert at page 210). If Mr. Buchert thought he was in the channel, he must have had rational grounds. The plaintiffs rightly noted that cross-examination on the subject continued because the “intuition” answer would be unsatisfactory to anyone who wanted a real answer. Since Mr. Buchert was not known to be an honest bat and was not known to be a veracious hummingbird, then the “intuition” answer begged for another question. Since defense counsel had no reason to believe that our commercial crab fisherman had that God-given capacity for echolocation enjoyed by those nocturnal, flying mammals, and since we intuitively knew that the 40-year mariner lacked that built-in migratory precision of the Ruby-throated hummingbird, a respectful follow-up question was in order:

“Q. Intuition and a GPS that steered you wrong, correct?”

MR. BUCK:

Object to the form.

THE WITNESS:

What the fuck, man.”

(Deposition of Kenan Bel Buchert at pages 210-211). Mr. Buchert’s profane reference to the most intimate acts of mankind was just another example of his unwillingness to answer legitimate questions and suggested that counsel was getting at the truth. Since the question of intuition versus a rational ground for belief was still unanswered, cross-examination continued:

“BY MR. COLLIER:

Q. Sir? Intuition and a GPS made you think you were in a channel when you weren’t correct?

MR. BUCK:

Object to the form.

THE WITNESS:

What does that mean?

MR. BUCK:

That means it’s a silly question, but you can answer it if you understand it.

THE WITNESS:

I wouldn’t have proceeded if I didn’t think I was where I was supposed to be.”

(Deposition of Kenan Bel Buchert at page 211). Mr. Buchert’s refusal to give a substantive answer continued, therefore cross-examination continued:

“BY MR. COLLIER:

Q. What made you think you were in the channel?

MR. BUCK:

Objection, asked and answered.

THE WITNESS:

I take the Fifth.”

(Deposition of Kenan Bel Buchert at page 211). Here Mr. Buchert unsuccessfully attempted to hide behind the criminal defendant’s bulwark. That providing no protection, Mr. Buchert turned to insult:

“THE WITNESS:

It’s really ridiculous. Did you finish school?”

(Deposition of Kenan Bel Buchert at page 212). Convinced that the much-evaded question may yet shine light on the boater’s fateful decision and course, the Ole Miss law graduate continued with the same unanswered question:

“BY MR. COLLIER:

Q. Do you think you were in the channel just because you felt like it, or do you have some rational or reasonable basis to feel you were in the channel? That’s the question.

MR. BUCK:

Objection, asked and answered.

THE WITNESS:

I had a rational and reasonable thought that I was going to proceed underneath the bridge safely.”

(Deposition of Kenan Bel Buchert at page 212). At last, Mr. Buchert hinted that he intended to pass under the bridge safely, albeit not necessarily through the channel. All along, *why* Mr. Buchert thought he was in the *channel* had been the thrust of the questions. Therefore, cross-examination continued:

“BY MR. COLLIER:

Q. Did you expect to go under the bridge in a location other than the channel?

A. I refuse to answer the rest of these questions with you.

MR. BAGWELL:

You better think long and hard about that.

THE WITNESS:

Well, what is he asking me, sir? How many times do you ask the same question, get an answer, and keep on asking the question?

BY MR. COLLIER:

Q. If you would just tell me why you thought you were in the channel, I'll move on.

A. I never said I thought I was in the channel because the channel wasn't marked. I thought I was in a passageway that didn't have a God damn concrete piling in it.”

(Deposition of Kenan Bel Buchert at pages 212-213). Finally, on the fourth page of the same line of questions, Mr. Buchert admits for the first time that he did not expect to be the channel but in one of the many passageways under the bridge. Mr. Buchert did not think he was heading through the channel, despite his original goal. Mr. Buchert thought he was heading through one of many openings:



“Q. Do you know you were not headed toward the channel on October 26, 2008?

A. No, sir.

Q. So you thought you were headed through the channel?

A. No. I thought I was headed through the bridge.

Q. Through an opening?

A. Yes, sir.

Q. You didn't know whether it was channel or not?

A. I knew it was damn close to it. I knew there was water to get me through it. You know what I'm saying?"

(Deposition of Kenan Bel Buchert at page 230). Then, Mr. Fransen led the witness and further proved the point:

“Q. If they were all on, right. Now, you have talked about the navigational lights, but the problem is - - no. The question I ask is, it's not necessary for a little boat like yours to go through the channel in the navigational lights?

A. You got it.

Q. In other words, the boat can go virtually an unlimited number of portals - -

MR. MCRANEY:

Object to the form.

THE WITNESS:

As long as there is enough water to flow through.”

(Deposition of Kenan Bel Buchert at pages 266-267). On re-cross, Mr. Buchert confirmed that despite his original intention to go through the channel, by the time he reached the bridge on a prior GPS heading, Mr. Buchert had no expectation of being in the channel:

“Q. You agree with Mr. Remy [Fransen] about small boats can go through in locations other than the channel, right?”

A. Right.

Q. And on this particular occasion that night, that is what you thought you were doing, correct?

A. That’s correct.

MR. COLLIER:

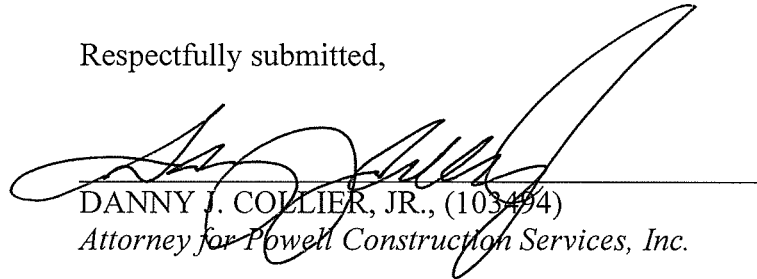
That’s all. Thank you.”

(Deposition of Kenan Bel Buchert at pages 272-273). The plaintiffs are unable to demonstrate any “interior inconsistency” in Mr. Buchert’s testimony. Mr. Buchert’s deposition transcript establishes without dispute that he knew he was following a prior GPS course taking the fishing party through some location other than the channel. Regardless the portal through which Mr. Buchert was escorting his party, the portal was a known wall of total darkness. The wall of darkness had as its ceiling an illuminated place for automobile traffic and had as its vertical framing members concrete pilings. The Court did not have to sift facts and weigh evidence. The Court had only to endure profanity, insults and evasion. Having waded through that quagmire, the Court rightly determined that Mr. Buchert was the sole proximate cause of the accident. The very idea suggested by the plaintiffs (at page 11 of their Motion) that Mr. Buchert thought he was in the channel based on “intuition” establishes, without more, that the plaintiffs have no

*genuine* issue of material fact to present to a jury. Unable to present a genuine issue of material fact, the plaintiffs are unable to establish a clear error of law or manifest injustice.

WHEREFORE, premises considered, POWELL CONSTRUCTION SERVICES, INC., respectfully opposes the Plaintiffs' Motion to Alter or Amend Judgment of the Court, Or in the Alternative, for Rehearing, and asserts that the same is due to be denied.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I do hereby certify that I have on this 4<sup>th</sup> day of April, 2013 served a copy of the foregoing pleading on counsel for all parties to this proceeding by:

- Electronic Court Filing
- United States mail, first class postage prepaid
- Electronic Mail
- Confirmed Facsimile
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- Overnight Courier

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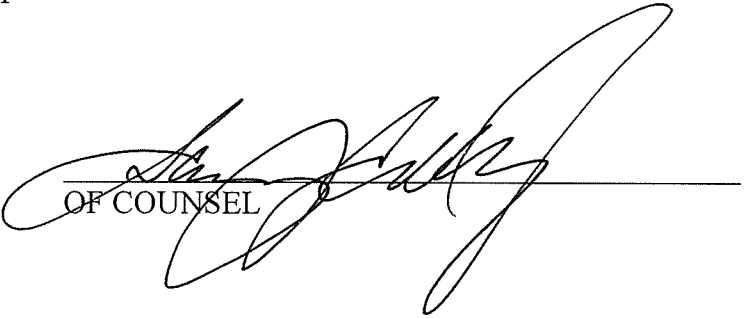
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