IN THE COURT OF APPEALS OF THE
STATE OF MISSISSIPPI

NO. 2006-CA-01564

GIGI KILHULLEN — APPELLANT

V.

KANSAS CITY SOUTHERN RAILWAY
COMPANY AND ROBERT W. LAY — APPELLEES

ON APPEAL FROM THE
CIRCUIT COURT OF SCOTT COUNTY

BRIEF OF APPELLEES

ORAL ARGUMENT IS NOT REQUESTED

CHARLES E. ROSS (MSB NO. [redacted]
BILL LOVETT (MSB NO. [redacted]
WISE CARTER CHILD & CARAWAY
Professional Association
600 Heritage Building
401 East Capitol Street
Post Office Box 651
Jackson, Mississippi 39205-0651
Phone: (601) 968-5500
Facsimile: (601) 968-5593

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2006-CA-01564

GIGI KILHULLEN **APPELLANT**

V.

KANSAS CITY SOUTHERN RAILWAY COMPANY AND ROBERT W. LAY **APPELLEES**

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons may have an interest in the outcome of this case. These representations are made so that the justices of the Court of Appeals may evaluate possible qualification or recusal.

1. The Honorable Vernon. R. Cotten, Circuit Court Judge, Scott County, Mississippi
2. Gigi Kilhullen, Appellant
3. Barry W. Gilmer, Esq., Attorney for Appellant
4. Reid S. Bruce, III, Esq., Attorney for Appellant
5. The Kansas City Southern Railway Company, Appellee
6. Robert W. Lay, Appellee
7. Charles E. Ross, Esq., Attorney for Appellee
8. Bill Lovett, Esq., Attorney for Appellee

THIS, the 10th day of September, 2007.

CHARLES E. ROSS (MSB NO.5683)
BILL LOVETT (MSB NO. 100346)
ATTORNEYS FOR APPELLEES
KANSAS CITY SOUTHERN RAILWAY
COMPANY AND ROBERT W. LAY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

REGULATIONS

TREATISES

STATEMENT OF THE ISSUES

I. Whether the trial court abused its discretion by denying Plaintiff/Appellant Gigi Kilhullen ("Kilhullen") leave to:

(A.) depose fifteen (15) witnesses

(1.) identified by Defendants/Appellees Kansas City Southern Railway Company and Robert W. Lay (collectively "Kansas City Southern") more than two (2) years prior to the filing of their Motion for Summary Judgment and

(2.) whose testimony Kilhullen admitted would not provide her with the evidence needed for summary judgment purposes; or re-new her challenge; and

(B.) re-new an April, 2002 challenge to the sufficiency of Kansas City Southern's written discovery responses when specifically ordered by the trial court in July of 2002 to "timely" renew such a challenge.

II. Whether the trial court abused its discretion by excluding pursuant to Rules 402, 403, 701, 702 and/or *Daubert* the affidavits submitted by witnesses who admitted they were not qualified to render their proffered opinions and/or whose proffered opinion was irrelevant to the sole issue at bar.

III. Whether the trial court abused its discretion by excluding the affidavit submitted by Kilhullen more than a year after the hearing on Kansas City Southern's Motion for Summary Judgment as untimely pursuant to Rules 6 and 56, and irrelevant pursuant to Rules 402 and 702, and *Daubert*.

IV. Whether the trial court erred by granting summary judgment based upon Kilhullen's failure to show through admissible evidence the existence of a genuine issue of material fact.

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2006-CA-001564

GIGI KILHULLEN — **APPELLANT**

V.

KANSAS CITY SOUTHERN RAILWAY COMPANY, ROBERT W. LAY, GULF RAILROAD COMPANY — **APPELLEES**

BRIEF OF APPELLEES KANSAS CITY SOUTHERN RAILWAY COMPANY AND ROBERT W. LAY

STATEMENT OF THE CASE[1]

FACTUAL BACKGROUND

On the afternoon of June 20, 2000, Kansas City Southern Train 608 approached Morton, Mississippi from the east at a speed well below the federal maximum speed limit. (R 6, RE 6) Robert Lay ("Lay"), the engineer, began blowing the train's whistle and ringing the bell at or before the train reached the Herring Road whistle board (situated 1,360 feet to the west of the Herring Road crossing). (R 296-99, RE 89-92) At about the same time, Lay saw a tractor-trailer rig loaded with lumber moving very slowly (at an estimated two (2) miles per hour (R 646, RE 21)) toward the railroad crossing from the north (from the direction of the International Paper Company plant). (*See id.*) Moments later, when it became apparent to Lay that the tractor-trailer was not going to stop, but was instead going to attempt to cross in front of the train, Lay threw the train into emergency in a desperate

---

[1] References to Appellant's Brief will be cited as "A." References to the Record will be cited as "R." References to the Supplemental Record (the Memorandum Brief of Defendants/Appellees in support of their Motion for Summary Judgment, which are herein designated as pages 1204-1221 of the Record) will be cited as"SR." References to the Record Excerpts will be cited as "RE." Pagination of Appellees' Record Excerpts continues that of Appellant's Record Excerpts, beginning with page number 48. Thus, citations to RE 1-47 are to the Record Excerpts of Appellant, and citations to RE 48-130 are to Record Excerpts of Appellee.

attempt to stop the mile-long, 4,332 ton train. (*Id.*) However, given the tractor-trailer's failure to yield the right-of-way, *i.e.*, stop and/or remain stopped prior to entering the crossing under circumstances in which it was not safe to proceed, the collision was unavoidable. (*Id.*; R 307-08, RE15-16) The driver of the tractor-trailer, Thomas D. Kilhullen ("Mr. Kilhullen"), died as a result of injuries sustained in the ensuing accident.[2] (R 6, RE 6)

PROCEDURAL HISTORY

For the Court's reference, and to assist in its understanding of the forthcoming narrative of the procedural history of this case, Kansas City Southern presents the following tabular summary of the dates and events that are important for purposes of appeal:

Date	Event
June 20, 2000	The date of Mr. Kilhullen's accident. (R 4, RE 4)
Unspecified, but prior to December 4, 2001	Counsel for Mr. Kilhullen's widow interviewed Classie Ward, the only eye-witness to the accident not affiliated with The Kansas City Southern Railway Company. (A 30)
December 4, 2001	The date on which Mr. Kilhullen's widow filed her wrongful death suit. (R 4, RE 4)
February 5, 2002	Discovery began with Defendants Kansas City Southern Railway Company and Robert W. Lay (collectively "Kansas City Southern") propounding their written discovery requests to Plaintiff Gigi Kilhullen ("Kilhullen"). (R 87)
April 30, 2002	Kilhullen deposed Defendant Robert W. Lay. (R 309) Kilhullen made no attempt to take any other depositions in the nearly two and a half (2 1/2) years that passed prior to Kansas City Southern filing its Motion for Summary Judgment. (R 278, RE 48)

[2] The crossing was then equipped with reflectorized crossbucks to warn motorists of the presence of the railroad tracks, and a stop sign. (R 306 and 322, RE 76 and 86) At the time of the accident, Mr. Kilhullen had actual knowledge of the track's presence, having already crossed the tracks once that day on his way into the International Paper Company plant to pick up a load of lumber. (R 296-99, 307-08, and SR 1205; RE 88-92, 15-16, and 54) The accident occurred as Mr. Kilhullen was leaving the plant, which was located on the north side of the tracks. On this point, Appellant's statement of fact (on page 2 of her Brief) was simply mistaken. (*See, e.g.*, R 1036, RE 83 (pp. 66-67 thereon) (stating that the tractor-trailer rig was moving very slowly toward the north rail, and that the train, which was westbound, struck the driver's door of Mr. Kilhullen's tractor-trailer rig)).

June 10, 2002	Kansas City Southern served Kilhullen with its written discovery responses, which were timely supplemented on numerous occasions throughout the course of litigation. (R 204)
July 15, 2002	Trial court granted Kilhullen's Motion to Compel (filed in the form of a "Request for Issuance of Subpoena Duces Tecum" on May 21, 2002), ordering Kansas City Southern to supplement its written discovery responses, and providing Kilhullen with leave to "timely" renew her motion to compel if the supplemental responses were not adequate. (R 554-55, RE 93-94)
July 30, 2002	Kansas City Southern served Kilhullen with its court-ordered supplemental discovery responses. (R 208)
September 26, 2003	Kansas City Southern took the deposition of Plaintiff Gigi Kilhullen. (R 239)
October 21, 2004	Kansas City Southern filed its Motion for Summary Judgment. (RE 282, RE 52)
November 17, 2004	Kilhullen noticed the depositions of seventeen (17) witnesses, fifteen (15) of whom had been identified by Kansas City Southern in its July, 2002 discovery responses. (R 598-16, and 620)
November 19, 2004	Kilhullen filed her combined Response to the Motion for Summary Judgment, and Rule 56(f) request for summary judgment-related discovery/stay, submitting therewith an affidavit from Jimmy Shelton (her attorney's paralegal), whom she had not previously identified as a witness, but asserted was a lay witness (despite the fact that Mr. Shelton did not witness the accident and did not visit the accident scene until three years after the accident occurred). (R 818 (p. 9 thereon), RE 125) Although denominated lay testimony, Shelton's proffered opinion was in fact expert accident reconstruction testimony.
December 15, 2004	Kansas City Southern moved to strike Shelton's affidavit, and to exclude any and all opinion testimony therefrom on grounds that he was not a proper lay witness, his testimony was not proper lay witness testimony, and he was not qualified to render the expert accident reconstruction opinions proffered. (R 626)
January 4, 2005	The day before the Hearing on Kansas City Southern's Motion for Summary Judgment. Kilhullen submitted a second affidavit from another previously unidentified witness (Jimmy Halfacre ("Halfacre")), whom she asserted witness was an expert qualified to make give accident reconstruction opinions. (R 645, RE 20). Halfacre's proffered opinion was virtually identical to that of Shelton.

January 5, 2005	The Summary Judgment Hearing. In connection therewith, Kansas City Southern moved *ore tenus* to strike the Halfacre affidavit as untimely and as inadmissible per *Daubert*. Based on Kilhullen's admission to the trial court that she would be "out of court" if Shelton and Halfacre were excluded (R Vol 10, pp. 44 and 55), *i.e.* that the *Daubert* motions could decide the summary judgment motion, the trial court ordered a *Daubert* Hearing. The trial court further ordered the parties to forego all further discovery not directly related to the *Daubert* Hearing. (R 643, RE 26)
August 23, 2005	Kansas City Southern deposed Shelton and Halfacre. (R 789 and 816, RE 95 and 123)
April 20, 2006	Kilhullen served Kansas City Southern and the trial court with a third affidavit in opposition to summary judgment from yet another previously unidentified witness (Brett Alexander ("Alexander")) whom she asserted was an expert in the field of accident reconstruction. (R 937, RE 28) Alexander's proffered opinion was virtually identical to those of Shelton and Halfacre. In an attempt to avoid the time restrictions of Rule 6 and 56, Kilhullen asserted that Alexander's affidavit was not summary judgment evidence, but was instead evidence supporting the legitimacy of Halfacre's proffered opinion.
May 30, 2006	The trial court ordered Kilhullen to show good cause as to why she violated its January 5, 2005 order prohibiting further discovery, and to demonstrate excusable neglect as to why she conducted further discovery without first requesting and receiving leave of court. (R 973, RE 32)
June 12, 2006	*Daubert* Hearing.[3] (R Vol 109, p. 59)
August 18, 2006	Trial court issued its opinion and order granting Kansas City Southern's Motion to Strike the affidavits of Shelton, Halfacre and Alexander, and Motion for Summary Judgment, dismissing Kilhullen's case with prejudice. (R1176, RE 35)

Continuing with Kansas City Southern's statement of the case, Mr. Kilhullen's widow and wrongful death heir, Gigi Kilhullen, filed suit against The Kansas City Southern Railway Company and Lay in the Scott County Circuit court on December 4, 2001. (R 4-14, RE 4-14)

[3] At one point in its August 18, 2006 opinion and order, the trial court referred to the *Daubert* Hearing as the "Final hearing on Motion for Summary Judgment." R 644, RE 27. In every other instance, however, the trial court correctly referred to the June 12, 2006 hearing as the "*Daubert* Hearing."

Kilhullen asserted numerous claims of negligence based on, among other things, the allegedly inadequate sight distance at the crossing.[4] (*Id.*) Kilhullen sought compensatory and punitive damages totaling $15,000,000. (R 14, RE 14)

During the course of written discovery (on the 8th and 25th of July, 2002), Kansas City Southern identified numerous persons who had, or may have had, information relating to Mr. Kilhullen's accident and/or relevant to Kilhullen's claims, including: Classie Ward (the only eyewitness not employed by The Kansas City Southern Railway Company), Johnny Killebrew (Kansas City Southern's claims agent), Greg Evans and Mike McDonald (Kansas City Southern's designated experts), and investigatory personnel.[5] (R 604 and 611-12) Of these, Kilhullen only deposed Robert Lay in the more than two (2) years that passed before Kansas City Southern filed its Motion for Summary Judgment. (R 114) Other than Lay, Kilhullen never sought or requested the depositions of the other witnesses identified by Kansas City Southern in July of 2002.

Following the completion of written discovery, Kilhullen served subpoenas duces tecum on Kansas City Southern, seeking information and documents she had already requested in her interrogatories and requests for production of documents to Kansas City Southern Railway Company. (R 554, RE 93) The trial court ultimately quashed the subpoenas as procedurally improper, but, construing them as a motion to compel,

---

[4] Kilhullen's claims against Kansas City Southern related, in general, to: the speed of the train; the alleged condition of the crossing (alleged visual obstructions and poor grade conditions); the alleged failure of Kansas City Southern's train crew to keep a proper lookout; the alleged failure of the train crew to warn or give adequate warning; their alleged failure to operate the train in a safe manner; and the alleged inadequacy or condition of the warning devices present at the Herring Road crossing. (R 6-10, RE 6-10)

[5] Kilhullen mistakenly represents to the Court that Kansas City Southern did not designate Mike McDonald as an expert until two (2) days prior to the Summary Judgment Hearing. (A 8) In fact, Kansas City Southern Railway Company served Kilhullen with Mike McDonald's expert designation on July 25, 2002. (R 612)

granted Kilhullen's "motion" and ordered Kansas City Southern supplement its discovery responses and production of documents as requested. (*Id.*)

The trial court further granted Kilhullen leave to "timely file" a second motion to compel "(i)n the event (she) contends the (supplemental) discovery responses are still inadequate." (R 555, RE 94) This was on July 15, 2002. (*Id.*) Kansas City Southern served its supplemental discovery responses on July 29, 2002. (R 208)

More than two (2) years later (on October 21, 2004), during which Kilhullen conducted NO additional discovery, Kansas City Southern filed its Motion for Summary Judgment, presenting therewith positive evidence (in the form of affidavits and deposition testimony, per Rule 56(c)) refuting each and every claim asserted by Kilhullen in her Complaint. (R 278, RE 48) Kilhullen responded on November 17, 2004 by noticing the depositions of fourteen (14) witnesses who had been identified by Kansas City Southern in July of 2002, and one (1) fact witness identified by Kansas City Southern in March of 2003.[6-7] (R 620) Two days later, Kilhullen filed a belated Motion to Compel. (R 343) Given the

---

[6] Included in the July 2002 disclosures were the designations of Kansas City Southern's experts Mike McDonald and Greg Evans. (R 611-12) Kilhullen argues herein that, by allowing Kansas City Southern to depose Shelton and Halfacre, but denying her request during the Summary Judgment Hearing to depose these experts, the trial court erred. (A 64) With this argument Kilhullen ignores the fact that she had had more than two (2) years in which to depose Kansas City Southern's experts, but did not. Kansas City Southern, on the other hand, only learned of the identity of Halfacre on the day before the Summary Judgment Hearing. The trial court did not abuse its discretion in denying Kilhullen's request. *See infra* at section "I" (citing caselaw in which such denials were affirmed where, as in this case, the requesting party had ample opportunity to conduct discovery, but was not diligent in doing so).

[7] Kilhullen also noticed the depositions of the investigatory officers, the identities of whom were unknown to Kansas City Southern prior to the summer of 2004. (R 620; R Volume 10, p. 46). As Kilhullen correctly stated, Kansas City Southern failed to provide her with their (Larry Parks' and Dan Colvin's) names and addresses prior to filing its Motion for Summary Judgment. However, this failure to supplement discovery responses was inadvertent and cannot be attributed to any evil scheme as Kilhullen would have this Court believe. (*See, e.g.,* A 5) Once counsel for Kansas City Southern learned of this oversight, they immediately withdrew the affidavits from the trial court's summary judgment consideration. (R Vo. 10, p. 56)

timing of her motion, taken together with Kilhullen's utter failure to pursue discovery in the more than two (2) years prior thereto (or, even to suggest that Kansas City Southern's supplemental responses were less than complete), the Motion to Compel could only be seen as an attempt to buy more time in which to do the discovery she had so long neglected.[8]

On November 19, 2004, Kilhullen also filed a combined Rule 56(f) request for summary judgment-related discovery and Response to the summary judgment motion.[9] (R 335) Therewith, Kilhullen presented evidence to support only one of her many claims against Kansas City Southern, *viz.*, her crossing condition claim relating to the allegedly inadequate sight distance at the subject crossing. (*Id.*) Kilhullen's evidence consisted of an affidavit from her attorney's paralegal Jimmy Shelton, who, although he had not been identified as a potential witness prior to Kansas City Southern's filing of its Motion for Summary Judgment and had not witnessed the accident (or timely visited the accident scene, *see infra*), offered an opinion as to the sufficiency of the sight distance at the crossing and Mr. Kilhullen's ability to safely cross the tracks once Kansas City Southern's train came into view. (R 340, RE 17) Although denominated as a "lay opinion," Shelton's opinion was, in fact, an expert accident reconstruction opinion, which Kansas City Southern moved to strike and/or exclude on grounds that it exceeded the permissible

---

[8] In so doing, Kilhullen acted without regard for the rules of this Court. Kilhullen filed her belated Motion to Compel without first presenting Kansas City Southern with a good faith request for discovery, as required by Uniform Rule 4.04, or making any attempt to resolve the alleged discovery disputes on which she based her untimely Motion to Compel.

[9] Again, Kilhullen gave no regard to procedure. Kilhullen failed to submit the requisite Rule 56(f) affidavit showing why she "cannot . . . present by affidavit facts essential to justify her opposition." Only after Kansas City Southern moved to strike the Rule 56(f) Motion did Kilhullen present the trial court with a woefully insufficient Rule 56(f) affidavit. (R 651 (averring only that additional discovery was needed because "discovery (was) incomplete"))

scope of lay testimony, and was inadmissible as an expert opinion pursuant to Rules 402 and 702, and *Daubert*. (R 626-33)

On the eve of the Summary Judgment Hearing, Kilhullen served Kansas City Southern with a second affidavit from yet another undisclosed witness, Jimmy Halfacre, to support her sight distance claim.[10] (R 645, RE 20) In its argument on the Motion for Summary Judgment, Kansas City Southern moved *ore tenus* to strike the affidavit and/or exclude the testimony of Halfacre on grounds that he was not qualified to give his proffered opinion, and his opinion were both unreliable and irrelevant.

The trial court heard arguments on the Motion for Summary Judgment on January 5, 2005. (R Vol. 10) Kilhullen's discovery-related motions and the *Daubert* Motion were, of course, part and parcel of the Summary Judgment Hearing. With regard to Kilhullen's Rule 56(f) request to take depositions, the trial court considered the amount of time (more than two (2) years) in which Kilhullen could have taken these deposition, but did not. The trial court further considered the anticipated testimony of each witness subject to Kilhullen's discovery request, finding in every instance that the witness' testimony supported Kansas City Southern and would, thus, be of no help to Kilhullen in her opposition to the Motion for Summary Judgment. (*Id.*; *see, also,* R 307, RE 15 (affidavit of Classie Ward in which she averred that she observed the view down the railroad tracks to be clear and unobstructed, and that, even so, she saw Mr. Kilhullen moving very slowly onto the railroad tracks)).[11] The trial court also considered the fact that Kilhullen failed to timely renew her

---

[10] Although stamped "Filed" by the circuit court clerk on February 3, 2005, Kilhullen did not serve Kansas City Southern with a copy of the Halfacre affidavit until noon on the day before the Summary Judgment Hearing. (R Vol. 10, pp. 28-29)

[11] Given this unequivocal testimony for Kansas City Southern on the question of sight distance, and Mr. Kilhullen's failure to yield the right-of-way to the oncoming train, Kilhullen's claim that Classie (continued...)

2002 "motion to compel," as ordered. (R 555, RE 94) Based on these considerations, the trial court denied Kilhullen's request to depose the fifteen (15) witnesses that had been identified years prior to the summary judgment filing.

With regard to the summary judgment-related motions, the trial court denied Kilhullen's Motion for Rule 56(f) discovery, and held Kansas City Southern's Motion for Summary Judgment in abeyance pending resolution of the *Daubert* challenges to Kilhullen's "expert" witnesses (who, as previously stated, were first disclosed only after Kansas City Southern filed its Motion for Summary Judgment). (R 643-44, RE 26-27) To this end, the trial court ordered a *Daubert* Hearing, to be held after Kansas City Southern had had an opportunity to depose Kilhullen's belatedly designated witnesses Shelton and Halfacre, and supplemental *Daubert* briefing submitted in relation thereto. (*Id.*) The trial court made clear that the depositions of Kilhullen's late designated witnesses (Shelton and Halfacre) would be the only discovery allowed prior to the *Daubert* Hearing. (*Id.*)

Kansas City Southern deposed Shelton and Halfacre on August 23, 2005. (R 789 and 816, RE 95 and 123) Both Shelton and Halfacre admitted that they were not experts in the field relevant to their proffered opinions, accident reconstruction. Quoting from Halfacre's

---

[11](...continued)
Ward would have given different testimony had she had the opportunity to depose Classie Ward is disingenuous, at best. If Classie Ward were willing to testify for Kilhullen as she contends, Kilhullen could have obtained an affidavit from Classie Ward during the month in which she prepared her Response to the Motion for Summary Judgment – or, for that matter, at any time since the filing of her lawsuit given her representation that she talked with Classie Ward prior to its filing – but did not. Kilhullen could also have deposed Classie Ward at any time prior to the filing by Kansas City Southern of its summary judgment motion, but made no attempt to do so. Under Mississippi law, it must be presumed that Kilhullen failed to do so because the "evidence . . . was detrimental to (her) case." *Watson v. Johnson*, 848 So. 2d 873, 879 (Miss. Ct. App. 2002) (citing *Herrington v. Leaf River Forest Products, Inc.*, 733 So.2d 774, 779(¶ 19) (Miss.1999)). Regardless, Kilhullen's argument to the contrary is now, as it was during the Summary Judgment Hearing, insufficient to defeat summary judgment. *Id.* (holding that the party opposing summary judgment must be diligent, and " unsubstantiated assertions (are) not enough to prevent summary judgment").

deposition testimony:

Q (Mr. Ross):	Have you ever had any courses as an accident reconstructionist?
A (Mr. Halfacre):	No, sir. . . .I'm not representing myself as being proficient in (the area of accident reconstruction). I'm not an accident reconstructionist. . . .

(R 791 (pp. 8 and 9 thereon), RE 97) Quoting from Shelton's deposition testimony:

Q (Mr. Lovett):	Have you ever . . . received any specialized training specific to accident investigation?
A (Mr. Shelton):	No.
Q:	Have you a traffic or accident investigation school?
A:	No.
Q:	Have you ever testified as an accident reconstructionist?
A:	No.
Q:	How many accidents have you reconstructed for use in (cases) such as th(is) one . . . ?
A:	None.

(R 820 (p. 16 and 17 thereon), RE 127)

Kansas City Southern submitted its court-ordered *Daubert* brief on March 28, 2006, to which Kilhullen responded on May 9, 2006. Perhaps not surprisingly given the frank admissions by both of Kilhullen's witnesses (quoted above) that they were not experts in the field relevant to their testimony, and Kilhullen's admission to the trial court that she would be "out of court" if Shelton and Halfacre's affidavits were deemed inadmissible (R Vol. 10, p. 44), Kilhullen served Kansas City Southern with an affidavit from yet another

previously undisclosed witness, Brett Alexander.[12] (R 937, RE 28) This time, however, Kilhullen contended that her witness was a bonafide accident reconstruction expert, offered to show that Halfacre's methodology was proper. (*See, e.g.*, A 14-15, 27, 55, and 57; R 994, 996, and 1010) By submitting the affidavit of a "bonafide" accident reconstructionist in an effort to save the Halfacre affidavit, Kilhullen effectively conceded that neither Shelton nor Halfacre were qualified to testify as expert accident reconstructionists. Of course, Shelton and Halfacre had already admitted as much. *See supra*.

Given the trial court's January 5, 2005 order that, except as to Shelton and Halfacre, the parties undertake no further discovery until the *Daubert* issues had been ruled upon, Kansas City Southern moved to strike Alexander's affidavit as a violation of the trial court's order. Kansas City Southern also moved to strike the affidavit and/or exclude testimony therefrom pursuant to Rules 56(c) (because it was served after the Summary Judgment Hearing), 6(b)(2) (because it was served without leave of court), 402 (because it was irrelevant), and *Daubert* (irrelevant and thus, not helpful). (R 943) The trial court agreed with Kansas City Southern's assessment of the improper filing, ordering Kilhullen to show cause as to why she conducted further discovery without leave of court, and further ordering Kilhullen to demonstrate why the untimely filing of Alexander's affidavit was the result of excusable neglect. (R 973, RE 32). Kilhullen made no attempt to do either. (R 943)

---

[12] The only previous reference to Alexander was in correspondence dated August 19, 2005, in which Kilhullen's counsel stated that Alexander would be consulting with Shelton and Halfacre, and that he may offer opinions of his own in the future. (R1015, RE 129) This letter was not a designation of expert witness, much less the disclosure of an expert opinion; therefore, Kilhullen's letter regarding Alexander in no way alters Kansas City Southern's arguments to strike Alexander's affidavit as untimely under Rule 56(c) and/or irrelevant under *Daubert*. (*Id.*) Nor can it be considered a supplement to Klhhullen's written discovery responses relating to expert witnesses. Kansas City Southern was under no duty to seek discovery as to a witness whose sole role as of August 19, 2005 was to consult with Kilhullen's other "expert" witnesses.

Instead, she argued that the Alexander affidavit was not summary judgment evidence per se, thereby rejecting the opportunity to provide the trial court with a bases for granting her retroactive leave to conduct discovery and finding the belatedly filed affidavit "timely" pursuant to Rules 6 and 56. (*Id.*)

On June 12, 2006, the trial court conducted a *Daubert* Hearing, the result of which was the exclusion of Kilhullen's affidavits from: Shelton, because he was not proper lay witness and lacked the expertise to give his proffered, but ultimately irrelevant, expert opinion; Halfacre, based on his lack of qualifications in the relevant field, and the irrelevancy of his proffered opinion to any fact at issue; and Alexander, as untimely and irrelevant summary judgment evidence. (R 1186, RE 45) The trial court then ruled that Kilhullen had failed to demonstrate the existence of a genuine issue of material fact on which the case could go forward, and granted Kansas City Southern's Motion for Summary Judgment, dismissing the case with prejudice. *Id.* It is from this order that Appellant seeks relief.

SUMMARY OF THE ARGUMENT

With her long and convoluted brief, Kilhullen attempts to confuse the otherwise straightforward factual, procedural, and legal issues on which the trial court ruled, and which are now before this Court on appeal. This is, in fact, a simple case of a plaintiff's failure to (1) conduct discovery when she had ample time to do so, (2) designate qualified witnesses (lay or expert) through whom she could present evidence sufficient to overcome summary judgment, and (3) present the trial court with relevant evidence on which it could find the existence of a genuine issue of material fact.

Notwithstanding Kilhullen's argument to the contrary, the trial court acted within its discretion in denying her request for summary-judgment related discovery. Kilhullen did

not make then, and cannot make now, a convincing argument as to why she was unable to conduct the requested discovery during the more than two years prior to the filing by Kansas City Southern of its Motion for Summary Judgment. The stated reason, that the legislative duties of Charlie Ross, counsel for Kansas City Southern Kilhullen, prevented her from taking the depositions of fact witnesses, is simply untrue. Charlie Ross was only ever one of multiple attorneys representing Kansas City Southern in this matter, and his presence was not required by Kansas City Southern in order for Kilhullen's depositions to go forward. Truth of the matter is, Kilhullen made no attempt to depose witnesses – not even Classie Ward, whom Kilhullen admits to interviewing prior to filing suit herein and whom Kilhullen argues on appeal would have provided Kilhullen with favorable testimony (even though such testimony would have been in direct contradiction to the favorable testimony Classie Ward gave on Kansas City Southern's behalf) – until after Kansas City Southern filed its Motion for Summary Judgment. Add to this the fact that Kilhullen could not show that the requested discovery would provide her with the evidence she needed to overcome summary judgment, and it becomes abundantly clear that the trial court did not abuse its discretion in denying the requested discovery.

The trial court also acted within its discretion by excluding from consideration on summary judgment the affidavits of Shelton and Halfacre, which it correctly found to be inadmissible. Neither Shelton or Halfacre were qualified to render their proffered opinions as to how the accident occurred, and the purported inadequacy of the sight distance at the subject crossing. Indeed, both Shelton and Halfacre freely admitted they were not qualified to render such accident reconstruction opinions. Moreover, the proffered opinions (that the sight distance was insufficient to allow Mr. Kilhullen to beat a train, once it came into view) were not relevant to the issue at hand (whether the sight distance was

sufficient to allow Mr. Kilhullen to stop once the train came into view, as both state law and federal trucking regulations mandated). Such unreliable and unhelpful opinions are strictly inadmissible under Rules 402, 701 and 702 and under *Daubert*. To have found otherwise would have constituted reversible error.

So, too, did the trial court act within its discretion by excluding the Alexander affidavit. Kilhullen offered the affidavit to, in her words, show that Halfacre's testimony was competent expert testimony. However, even assuming Alexander to be a qualified accident reconstruction expert, Alexander's expertise could not turn Halfacre into an expert qualified to render an accident reconstruction opinion. Additionally, to the extent Kilhullen offered Alexander's affidavit as independent summary judgment evidence, Alexander's proffered opinion (which was identical to Halfacre's) was irrelevant in that it addressed only whether Mr. Kilhullen could have beat the train once it came into view, as opposed to whether Mr. Kilhullen had time to stop before entering the crossing. Regardless, because Kilhullen submitted the Alexander more than a year after the hearing on Kansas City Southern's Motion for Summary Judgment and made no attempt to show excusable neglect for her failure to timely submit the affidavit, the trial court correctly excluded the affidavit from its summary judgment considerations.

Finally, given the trial court's correct rulings on the *Daubert* and other evidentiary matters herein, the trial court's finding that Kilhullen failed to show the existence of a genuine issue of material fact and that Kansas City Southern was therefore entitled to summary judgment as a matter of law, was correct, and should be affirmed.

ARGUMENT

When reviewing an order granting summary judgment, this Court considers *de novo* all evidence in the appeal record. *Bennett v. Madakasira*, 821 So. 2d 794, 797 (Miss. 2002).

However, the standard of review for whether to allow discovery after a motion for summary judgment has been filed and for the admission or suppression of evidence such as at issue herein, *e.g.*, the trial court's decision to strike affidavits based on Rules 56(c), 402, 701, 702 and *Daubert*, is abuse of discretion. *Miss. Transp. Comm'n v. McLemore*, 863 So.2d 31, 34 (Miss.2003). Further, the Court may affirm the trial court's decision on any ground sufficient to sustain the judgment below. *Brocato v. Mississippi Publishers Corp.*, 503 So.2d 241, 244 (Miss. 1987) (quoting FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2716, P. 658 (1983) and (citing *Hickox v. Holleman*, 502 So. 2d 626 (Miss. 1987) *rev'd on other grounds*) (finding, "We are first interested in the result of the decision, and if it is correct we are not concerned with the route - straight path or detour - which the trial court took to get there").

I. THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN DENYING KILHULLEN'S REQUEST FOR RULE 56(F) DISCOVERY

In the more than two (2) years following the completion of written discovery, Kilhullen gave no indication that Kansas City Southern's responses to her written discovery requests were anything other than complete. Nor did Kilhullen make any attempt to depose any of the fact witnesses of whom she had knowledge, or retain/designate expert witnesses to testify to her sight distance claim. Only after Kansas City Southern filed its Motion for Summary Judgment did she designate any expert witnesses or complain that Kansas City Southern's discovery responses were insufficient or seek to depose the witnesses disclosed therein.[13]

---

[13] Chief among Kilhullen's stated reasons why she did not have the opportunity to conduct discovery during these years of inactivity were the number of continuances of trial dates, and the legislative duties of Charlie Ross, counsel for Kansas City Southern. (R 335-38) These are red herrings. Charlie Ross was never, the only attorney representing Kansas City Southern in this matter. (*See, e.g.*, R 110, 281, and 309) During the legislative sessions of which Kilhullen complains, Kansas City Southern's (continued...)

A plea for discovery such as Kilhullen's herein (R 335) need not be granted when, as in this case, the movant has had ample time and opportunity for discovery, and the basis for her request is nothing more than a vague assertion that discovery is needed. *See, e.g., Marx v. Truck Renting and Leasing Ass'n, Inc.*,520 So. 2d 1333, 1343-44 (Miss. 1987) (holding that, when a party opposing a motion for summary judgment has not used of the time available to her in which to conduct discovery, she " may not rely on vague assertions that discovery will produce needed, but unspecified, facts," in her Rule 56(f) motion). Quoting the Supreme Court in *Marx*, "Rule 56(f) is not designed to protect the litigants who are lazy or dilatory. . . ." *Id. See also, Journey v. Berry*, 953 So. 2d 1145, 1160 (Miss. Ct. App. 2007) (holding same); *Stall worth v. Sanford*, 921 So. 2d 340, 343 (Miss. 2006) (holding same); *Partin v. North Mississippi Medical Center, Inc.*, 929 So. 2d 924, 938 (Miss. 2005) (holding same); *Hobgood v. Koch Pipeline Southeast*, 769 So. 2d 838, 845 (Miss. Ct. App. 2000) (holding same); *Prescott v. Leaf River Forest Prods, Inc.*, 740 So. 2d 301, 308 (Miss. 1999); *Holifield v. Pitts Swabbing Co.*, 533 So. 2d 1112, 1117-18 (Miss. 1988). Nor may Rule 56(f) "be used to avoid diligence in pursuing formal discovery." *Partin*, 929 So. 2d at 938.

In each of the above-cited cases, the Supreme Court or Court of Appeals affirmed

---

[13](...continued)
other attorneys of record were at all times available, and Kilhullen never even sought to schedule depositions during the entire two (2) year period. As for the continuances, Kilhullen is simply wrong in asserting that Kansas City Southern sought the continuances as a delaying tactic. Three times each year, Judge Cotton sets every case on his docket for trial, and does so without regard to the status o the case or the availability of the parties or their attorneys. For this reason, the parties requested and were granted thirteen continuances. The reason for requesting some, but not all, of those continuances was that discovery was incomplete. *See, e.g.*, R 226 (asserted by Kilhullen), 234 (joint motion), 262 (joint motion), 261 (asserted by Kansas City Southern), 271 (joint motion), and 332 (asserted by Kilhullen)) The fact that the trial dockets were routinely continued in this case only serves to show that Kilhullen had ample time in which to conduct discovery. This fact in NO way equates with an inability to conduct discovery, however, and cannot serve as a substitute for due diligence for Rule 56(f) purposes. The trial court gave these arguments the weight they deserved when it denied Kilhullen's request for summar y judgment-related discovery. Kansas City Southern urges this Court to give it the same weight, *viz.*, none.

decisions by trial courts to deny requests for Rule 56(f) discovery when the movant failed to conduct discovery within three (3) to five (5) months between the filing of a complaint and motion for summary judgment. *See, e.g., Hobgood,* 769 So. 2d at 845 (finding three (3) months to have been ample time in which to conduct discovery needed to respond to summary judgment); *Journey,* 953 So. 2d at 1160 (finding four (4) months to be enough); *Marx,* 520 So. 2d at 1344 (finding five (5) months to be enough). The more than two (2) years in which Kilhullen could have, but did not, conduct discovery FAR exceeds what has been found to be sufficient time for Rule 56(f) purposes.

Moreover, in cases such as this where the Rule 56(f) movant did not and cannot show that she diligently sought the requested discovery before the filing of the summary judgment motion, the trial court is within its discretion to deny the Rule 56(f) request and grant summary judgment forthwith. *See, e.g., Hobgood,* 769 So. 2d at 846. Add to this the fact that the trial court determined during the Summary Judgment Hearing that the discovery sought would not produce any evidence to support Kilhullen's opposition to summary judgment (R Vol. 10, pp. 46-52), and the only conclusion that can be drawn as to the propriety of the trial court's decision to deny summary judgment-related discovery is that the trial court did not err, or abuse its discretion, in so holding. *See Hobgood,* 769 So. 2d at 846 (holding that a trial court is within its discretion to deny a Rule 56(f) motion when, as in this case, the requested discovery "would avail h(er) nothing").

For these reasons, this Court should affirm the trial court's decision to deny Kilhullen's request fr discovery pursuant to either her Motion to Compel or her Rule 56(f) motion. In so ruling, the trial court clearly acted within its discretion.

II. KILHULLEN PRESENTED THE TRIAL COURT WITH NO ADMISSIBLE EVIDENCE ON WHICH IT COULD RULE IN HER FAVOR ON SUMMARY JUDGMENT

Having failed to depose any of the fact witnesses subject to her Rule 56(f) motion or otherwise pursued discovery in the more than two (2) years between the completion of written discovery and the filing by Kansas City Southern of its Motion for Summary Judgment, Kilhullen attempted to create a genuine issue of material fact by designating her paralegal Jimmy Shelton as a lay witness. (R 340, RE 17) Prior to the issuance of the order on which this appeal is based, she would also submit affidavits from two additional "expert" witnesses. The first, Halfacre, she disclosed on the eve of the Summary Judgment Hearing. (R 645, RE 20) The second, Alexander, she disclosed more than a year after the Summary Judgment Hearing.[14] [15]

The opinions proffered by each of Kilhullen summary judgment witness were virtually

---

[14] In defense of the Alexander affidavit, Kilhullen argues on appeal that the Summary Judgment Hearing was merely a "preliminary hearing," and that the *Daubert* Hearing was, in fact, the Rule 56 hearing. (A 15-17 and 19-20) The fact that the *Daubert* Hearing could ultimately decide the question of summary judgment neither converts the *Daubert* Hearing into a summary judgment hearing, nor downgrades the January, 2005 Summary Judgment Hearing to a "preliminary hearing," as Kilhullen suggests. Nor do Kilhullen's arguments in support of the timeliness of the Halfacre affidavit at the January 5, 2005 hearing support her newly invented "preliminary hearing" theory. She argued then that the Halfacre affidavit was timely filed, and thus admissible under Rule 56(c), because it was submitted on the day before the *Daubert* Hearing. Kilhullen's "preliminary hearing" theory is another red herring.

[15] The Alexander affidavit sets forth, *inter alia*, Alexander's independent opinion as to sight distance at the subject crossing. (R 938 (¶ 5), RE 29; A 57 (so conceding)) For this reason alone, it must be considered evidence in support of Plaintiff's Response to the Motion for Summary Judgment. Add to this, however, its stated purpose – to make the Halfacre affidavit admissible and thus survive summary judgment – and it becomes crystal clear that the affidavit is summary judgment evidence. Kilhullen nevertheless argues that the Alexander affidavit is not subject to Rule 56(c) because it was submitted in support of her *Daubert* Response, only. (A14-17 and 58; *see also* A at n. 5) While attached as an exhibit to Plaintiff's *Daubert* Response, the Alexander affidavit ultimately supports, and is inextricably intertwined with, Plaintiff's Response to the KCS Defendants' Motion for Summary Judgment. As such, the Alexander affidavit is summary judgment evidence, subject to Rule 56.

identical:

- Shelton opined that, given the sight distance at the subject crossing, "it would have been impossible for (Mr.) Kilhullen to move his truck across the tracks and clear the tracks before being struck by the train. (R 342, RE 19)
- Halfacre opined that, given the sight distance at the subject crossing, "it was physically impossible for (Mr.) Kilhullen to visualize the train, comprehend and react to its presence, and . . . safely move the tractor-trailer rig across the tracks to a point of safety (on the other side) of the grade crossing. . . ." (R 647, RE 22)
- Alexander opined that Mr. "Kilhullen . . . was not provided a clear line of sight adequate to enable (him) to see the approaching train, react to the presence of the train, and safely pass through the grade crossing." (R 938, RE 29)

Kansas City Southern challenged the admissibility of each of these opinions on various grounds specific to the individual witness. However, as discussed below, Kansas City Southern raised the same objection to all three of these witnesses (relevancy), and the trial court's correct decision on this one issue is a sufficient basis on which this Court can affirm. *Brocato.*, 503 So.2d at 244; *Hickox*, 502 So. 2d at 626.

The above-quoted opinions of Shelton, Halfacre and Alexander shared a common theme: the sight distance at the subject crossing was not sufficient for Mr. Kilhullen to have safely crossed in front of the train, once he saw it coming, *i.e.* sufficient for him to beat the train.[16] Even if there had been no objection to these witnesses' testimony based on their

[16] Kilhullen makes much ado about Kansas City Southern's use of the term "beat" in summarizing this (continued...)

qualifications, or the timeliness/propriety of their presentation to the trial court, which is not at all the case, their opinions would nevertheless be inadmissible because they were not relevant to any material fact at issue in this case.[17] This is so whether judged according to Rule 402[18] of the Mississippi Rules of Evidence, or *Daubert*. MRE 702 and comments thereto; *McLemore*, 863 So. 2d at 38 (adopting "the federal standards . . . for assessing the reliability and admissibility of expert testimony").

The relevant and material fact with regard to sight distance was whether Mr. Kilhullen had sufficient time to see the train approaching, stop before entering harm's way, and remain stopped until it was safe to proceed. To stop, and then proceed in the face of an oncoming train, was not an option. Consider: Kilhullen's own witnesses testified that Mr. Kilhullen could/did see the train when he was still fifty (50) feet from the crossing at a time when he was only traveling at a speed of one (1) to two (2) miles per hour. (R 646 and 938, RE 21and 29) Under these circumstances, state law and federal trucking regulations prohibited Mr. Kilhullen from passing in front of the oncoming train. Quoting Mississippi law:

> Whenever any person driving a vehicle approaches a railroad grade crossing . . ., the driver of such vehicle shall stop within fifty (50) feet but not less than fifteen (15) feet from the nearest

---

[16](...continued)
opinion during briefing in the trial court. (*See, e.g.,* A 59) The term fits the opinion, as explained below. *Se, e.g., infra* at pp. 21 and 23.

[17] AlthoughHalfacre casually mentioned stopping distance in his affidavit (R 646, 924, and 804 (pp. 66-68 thereon), RE 21, 115, 118), Halfacre's purported opinion on this critical issue was purely speculative, and thus inadmissible per *Daubert*. When asked during his deposition whether he could "really . . . say how long or how much distance it would take to stop that truck," Halfacre testified that he could not, because he had "not measured what the braking distance of the truck would be." (R 926 and 804 (p. 66 thereon), RE 117-18)

[18] Rule 402 provides in pertinent part, "Evidence which is not relevant is not admissible." "Relevant evidence" is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401.

> rail of such railroad, and shall not proceed until he can do so safely.

MISS. CODE ANN. § 77-9-249(1)(c)-(d)[19] (2004). The applicable federal trucking regulation similarly mandated that

> (commercial vehicles) shall, upon approaching a railroad grade crossing, be driven at a rate of speed which will permit said commercial motor vehicle to be stopped before reaching the nearest rail of such crossing and shall not be driven upon or over such crossing until due caution has been taken to ascertain the course is clear.

FEDERAL MOTOR CARRIER SAFETY REGULATION §§ 392.11, 33 CFR 19732 (as amended at 60 CFR 38747) (emphasis added). For this reason, the opinion expressed by each of Kilhullen's witnesses - that the sight distance available to Mr. Kilhullen was insufficient for him to cross in front of an oncoming train (*i.e.*, to beat the train) that he could have/should have seen - is absolutely irrelevant to any material issue of fact herein. Shelton's, Halfacre's, and Alexander's opinions were, therefore, inadmissible under Rules 402 and 702, as well as under *Daubert*. Accordingly, the trial court acted within its discretion by ruling that the opinions of Halfacre, Shelton, and Alexander should be excluded as irrelevant.

III. THE TRIAL COURT PROPERLY EXCLUDED SHELTON'S AFFIDAVIT AS IMPROPER LAY WITNESS TESTIMONY

Beyond their lack of relevance to any issue material to the summary judgment before the trial court, the opinions of Kilhullen's witnesses were properly excluded on other grounds.

Starting with Shelton, Kilhullen unequivocally states in her brief on appeal that Shelton was offered as, and his opinions were solely those of, a lay witness (as, indeed, it

---

[19] The Herring Road crossing was equipped with a stop sign at the time of the accident. (R 306, RE 76)

(1)

is denominated in his affidavit, R 341, RE 18). (A 5 and 23-24) However, to qualify as a lay witness under Rule 701, one must have observed the accident on which he is called to testify and/or have first-hand knowledge thereof. MISS. R. EVID. 701; *Langston v. Kidder*, 670 So.2d 1, 3-4 (Miss. 1995). To be admissible, a lay witness' testimony must be helpful to the trier of fact in resolving a disputed issue, and that testimony cannot be based on technical or specialized knowledge. *Id. See also Wells v. State*, 604 So.2d 271, 279 (Miss.1992) (holding, if particular knowledge is necessary to assist the trier of fact, then such testimony would never qualify as a lay witness opinion under Rule 701); *Mississippi State Highway Comm'n v. Gilich*, 609 So.2d 367, 377 (Miss.1992) (lay opinions are those which require no specialized knowledge however attained).

Although Kilhullen called Shelton a "lay witness," it is clear that Shelton was not. What Kilhullen was, in fact, trying to do, was introduce through Shelton expert opinion testimony, even though Shelton was not qualified to testify as such. Moreover, Shelton was not an eye witness to the accident, and had no knowledge of the accident scene relative to the time of the accident. (R 1181, RE 40; *see also* R 818 (p. 9 thereon) and 819 (p. 10 thereon) (so testifying during his deposition), RE 125-26). Shelton first visited the scene of the accident in 2003, which was approximately three (3) years after the accident occurred. *Id.* Shelton next visited the scene of the accident "a few days before" the date on which he executed his summary judgment affidavit. (R 819 (p. 10 theren), RE 126). The sole purpose of this second and last visit prior to executing his affidavit was to turn himself into a lay witness for Kilhullen.

Such manipulation of the rules relating to lay witness testimony is simply not allowed. Because Sheldon based his opinion on what he saw years after the fact, as opposed to his own observation of either the accident, or the scene of the accident at or about the

time of its occurrence, the trial court correctly found that Shelton was not a proper lay witness. For this reason, alone, the trial court's decision to exclude the Shelton affidavit should be affirmed.

The trial court's decision as to Shelton should also be affirmed based upon Shelton's improper reliance upon specialized knowledge in forming his "lay" opinion. Shelton took numerous measurements at and about the subject crossing and of tractor-trailer rigs such as Mr. Kilhullen's, timed certain types of vehicles as they crossed the tracks, and calculated the time it would have taken Mr. Kilhullen to cross the tracks given his measurements, the speed of the train, and various other factors, including Shelton's purported experience as a truck driver. (R 340-42, RE 17-19; A 63 (asserting that Shelton was "particularly qualified to render a lay opinion regarding his observations given that he is an experienced tractor-trailer truck driver who has first hand knowledge of the time which it would take to move a loaded rig through the subject crossing")) Thus, as the circuit court correctly found, Shelton was "attempting to . . . give an opinion based on (specialized knowledge (*i.e.*, expert accident reconstruction testimony)," in the guise of a lay witness. (R 1181, RE 40) Such was not proper lay testimony, and was properly excluded therefor.

Further, as previously discussed, Shelton's opinions were properly excluded as irrelevant, as well. Shelton opined that, given the sight distance at the subject crossing, "it would have been impossible for (Mr.) Kilhullen to move his truck across the tracks and clear the tracks before being struck by the train. (R 342, RE 19) As set forth in detail above, *see* section "II," the relevant issue was whether Mr. Kilhullen could see the train in time to stop, and not whether he had time to cross in front of the train once the train came into

view.[20]

For all of these reasons, the trial court's decision to strike Shelton's affidavit and exclude any and all testimony by Shelton based thereon, was the right one, was certainly not an abuse of discretion, and should therefore be affirmed.

IV. THE TRIAL COURT PROPERLY EXCLUDED HALFACRE'S AFFIDAVIT BASED ON ITS FINDING THAT HALFACRE WAS NOT QUALIFIED TO RENDER EXPERT ACCIDENT RECONSTRUCTION TESTIMONY

Once it became clear to Kilhullen, upon the filing by Kansas City Southern of its Motion to Strike Shelton's affidavit and exclude his opinion testimony therefrom, that Shelton's testimony was fatally flawed, she retained Jimmy Halfacre, an electrical engineer,[21] to render an opinion virtually identical to Shelton's. (*Compare* R 342 (¶ 5), RE 18 with R 647 (¶ 2), RE 22) Because the expressed opinion required of Halfacre skills and training unique to accident reconstructionists and thus fell outside the scope of Halfacre's field of expertise, Kansas City Southern moved to strike his affidavit and exclude all opinion testimony therefrom, based on *Daubert*. As explained below, the trial court rule correctly

---

[20] Even if this were not the case, *i.e.* if the specialized nature of the knowledge on which Shelton based his opinion did not render it inadmissible as lay witness testimony, Shelton's opinion would still have been inadmissible under this Court's precedent. *See, e.g., Garrett v. State*, 956 So.2d 229 (Miss. Ct. App. 2006). Shelton's opinion that the allegedly inadequate sight distance at the Herring road crossing caused the accident herein is an "opinion on an ultimate issue." *Id.* Rule 701 does not allow lay witnesses to render such opinions. *Id.*

[21] Kilhullen represents to the Court that Halfacre is a civil engineer, presumably to make it appear that Kilhullen has some experience in designing highways or performing surveys (which he doesn't). (*See, e.g.*, A 50) However, a review of his *curriculum vitae*, his deposition testimony, and Kilhullen's brief on appeal, show this to be untrue. (R 649, RE 24; A 44-45) Halfacre is an engineer with specialized training and experience in the field of electric engineering. (*Id.*) Halfacre also has a Master of Business Administration, and has worked in the real estate field and as a home inspector. (*Id.*) His only connection with civil engineering appears to be his membership in the American Society of Civil Engineers ("ASCE"), which is open to any engineer with five years of experience and three references. *See, e.g.*, http://www.asce.org/membership/membership_guidelines.cfm. According to the ASCE, even high school students can qualify for limited membership in their organization. Membership in the ASCE does not, however, qualify either Halfacre or those high school students who enjoy limited membership in the ASCE to testify as accident reconstructionist experts.

in, and did not abuse its discretion by, excluding Halfacre's testimony based upon *Daubert*.

A. Mississippi's "Modified" *Daubert* Standard and Its Application to Accident Reconstruction Testimony

In determining whether the expert opinion testimony is admissible, a trial court must first consider whether the proffered expert testimony is reliable (is the expert witness qualified?), and relevant (will the testimony assist the trier of fact?). MRE 702; *McLemore*, 863 So. 2d at 38; *Sports Page Inc. v. Punzo*, 900 So. 2d 1193, 1200-01 (Miss. Ct. App. 2004) (stating two-prong test for admissibility). Since adopting the modified *Daubert* standard, the Mississippi Supreme Court has stressed that, in applying the new standard, the trial courts should be mindful that:

(a) "the gatekeeping role of (the) trial court (should be) taken seriously"; and,

(b) "the *Daubert* test has effectively tightened, not loosened, the allowance of expert testimony."

McLemore, 863 So. 2d at 38 (citations omitted) (emphasis added). *See, also*, EXPERTS UNDER THE RULES OF EVIDENCE, 1 MS Prac. Civil Proc. § 8:19(b).

Pursuant to MRE 104(a) and 702, a trial judge faced with a proffer of expert testimony must, as gatekeeper, determine at the outset whether:

(a) the subject matter of the testimony is "scientific, technical, or other specialized knowledge,"

(b) the witness is qualified as an expert "by knowledge, skill, experience, training, or education," and

(c) the witness' knowledge will "assist the trier of fact to understand the

evidence or to determine a fact in issue."

MRE 702. *See, also, Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 590-92 (1993); *Wilson v. Woods*, 163 F.3d 935, 937 (5th Cir. 1999). The trial judge must also determine whether the proffered testimony is reliable, *i.e.* whether:

(d) "the testimony is based upon sufficient facts or data,"

(e) "the testimony is the product of reliable principles and methods," and

(f) "the witness has applied the principles and methods reliably to the facts of the case."

MRE 702 (as amended, 2003 (codifying *Daubert*)). Reliability is quite literally the polestar by which the trial judge is guided in determining the admissibility of expert testimony. *Jaurequi v. Carter Mfg. Co.*, 173 F.3d 1076, 1082 (8th Cir. 1999) (citing *Daubert*, 509 U.S. at 594-95).

The Supreme Court in *Daubert* set out the following list of factors for courts to use when determining the admissibility of expert opinion testimony:

(a) whether the technique or theory used by the expert has been subjected to peer review or publication,

(b) the known or potential rate of error of the expert's theory or technique,

(c) the existence and maintenance of standards controlling operation of the expert's technique, such as professional standards of a related organization, and

(d) whether the expert's theory or technique has gained general acceptance in the expert's professional community.

Daubert, 509 U.S. at 593-94. *See, also, Kuhmo Tire Co. v. Carmichael*, 526 U.S. 137, 154 (1999); EXPERTS UNDER THE RULES OF EVIDENCE, 1 MS Prac. Civil Proc. § 8:19(b). By applying these factors, the trial judge determines "whether the reasoning or methodology underlying the testimony is scientifically valid and . . . whether the reasoning or methodology properly can be applied to the facts in issue." *Id.* at 592-93. Thus, he "ensure(s) that an expert's testimony is relevant and 'rests on a reliable foundation.'" *Davis v. ROCOR Intern.*, 226 F.Supp.2d 839 (S.D. Miss. 2002) (quoting *Daubert*, 509 U.S. at 597).

Kilhullen bore the burden of proving that her proffered witness' findings and conclusions adhere to the standards set forth in *Daubert*. *See McLemore, 863 So. 2d* at 36 (citing *Daubert*, 509 U.S. at 590). Kilhullen also bore the burden of proving that her witnesses were qualified to render their proffered accident reconstruction opinions, based on their education and experience in the field of accident reconstruction.[22] EXPERTS UNDER THE RULES OF EVIDENCE, 1 MS Prac. Civil Proc. § 8:19 (citing *Choctaw Maid Farms, Inc. v. Hailey*, 822 So. 2d 911 (Miss. 2002); *Fielder v. Magnolia Beverage Co.*, 757 So. 2d 925 (Miss. 1999); *Hollingsworth v. Bovaird Supply Co.*, 465 So.2d 311 (Miss. 1985). *See, also, Ware v. State*, 790 So. 2d 201, 206-07 (Miss. 2001) (affirming the exclusion of an unqualified accident reconstruction expert).

Testimony as to "how an accident happened, the point of impact, the angle of

---

[22] Kilhullen argues in her Brief that her witnesses did not need to be qualified in the field of accident reconstruction in order to testify in a case such as hers. (A 36) However, as set forth in detail below, the testimony Halfacre proffered was accident reconstruction testimony; therefore, it was the nature of the testimony and not the nature of the case that controlled the question of admissibility. In *this* case, Halfacre was not allowed to render his proffered opinions because he is, by his own admission, not qualified in the field of accident reconstruction.

travel, the responsibility of the parties involved or the interpretation of photographs" taken at the scene of the accident can only be given by an expert qualified in the field of accident reconstruction. *Fielder,* 757 So. 2d at 937-38; *Jones v. Jitney Jungle Stores of America, Inc.,* 730 So. 2d 555 (Miss. 1998); *Couch v. City of D'Iberville,* 656 So.2d 146, 152 (Miss. 1995); and *Miller v. Stiglet,* 523 So. 2d 55, 60 (Miss. 1988). To be qualified under Mississippi law as an expert in accident reconstruction, one must have experience working and investigating accidents, and have specialized training/education in the field of accident reconstruction such as that offered by a police/sheriff's academy or a school for accident reconstruction such as the Traffic Institute Accident Investigation School of Northwestern University. *See, e.g., Poirrier v. Degrande,* 604 So.2d at 270; *Fielder.* 757 So.2d at 937-38; *Miller,* 523 So. 2d at 55; and *Hollingsworth,* 465 So. 2d at 311. *See, also, Rosado v. Deteres,* 5 F. 3d 119 (5th Cir. 1993) (affirming exclusion of proffered opinion testimony of a witness who had previously been accepted in court as an accident reconstruction expert, because witness had not testified as an accident reconstruction expert since 1965, and had not taken any refresher courses since that time); *Ware v. State,* 790 So. 2d at 206-07. As with any other area of expertise, it was the duty of the trial judge in the trial court to determine "whether the witness is legitimately qualified as an expert in the applicable field of scientific knowledge." *Hollingsworth,* 465 So. 2d at 314-15. Opinion testimony from witnesses such as Kilhullen's who are not legitimately qualified in the specific field, *i.e.* accident reconstruction, are rightly found to be inadmissible.

It is important to note that one who is not otherwise qualified by training and experience to testify in a given field cannot become qualified by conferring with experts in that field, or reviewing treatises discussing the subject on which he was proffered to opine. *Cheeks v. Bio-Medical Applications, Inc.,* 908 So. 2d 117, 120 (Miss. 2005). *See, also,*

Wilson v. Woods, 163 F. 3d 935, 938 (5th Cir. 1999) (rejecting the notion that an engineer can, through his review of books on accident reconstruction, become an expert in accident reconstruction); EXPERTS UNDER THE RULES OF EVIDENCE, 1 MS Prac. Civil Proc. § 8.19 (providing that the testimony of an expert whose knowledge is based on collected studies he has read and who has received no formal training in any of the areas on which the witness' testimony is offered, is not admissible under M.R.E. 702). The opinions of such an "expert" are inadmissible and should be excluded.

B. Halfacre's Proffered Testimony Was "Accident Reconstruction Testimony" and Thus, Could Only Be Rendered by One With Expertise in the Field of Accident Reconstruction

Halfacre's testimony as to the cause of the subject accident (allegedly insufficient sight distance) was based on, *inter alia,* his interpretation of certain site-specific data, including the angle of the intersection, photographs taken at the scene of the accident, and time and distance measurements/calculations made by him, and his reconstruction of how the accident happened based thereon. Such testimony is indisputably accident reconstruction testimony. *See, e.g., Fielder,* 757 So. 2d at 937-38; *Jones,* 730 So. 2d at 555; *Couch,* 656 So.2d at 152; and *Miller,* 523 So. 2d at 60. Halfacre's reliance on formulae taken from the book "Train Accident Reconstruction" by Loumiet and Jungbauer only reinforces this fact. (R 794 (p. 20 thereon), 797 (p. 30 thereon) and 800 (p. 43 thereon), RE 100, 103, and 106).

C. Whether Expertise in the Field of Accident Reconstruction Is Required to Render an Opinion Depends on the Nature of the Opinion Proffered, and Not the Nature of the Case

Kilhullen argues in her Brief that expertise in the field of accident reconstruction is not required in cases like hers. She bases this primarily on the fact that the page-long mathematical equation set forth in her Brief (A 46-57) is, by her estimation, "simple,"

requiring no more skill than any engineer has a matter of course. (*See, e.g.*, A 5, 26, 37, 40, 43-44, and 46). With this argument, Kilhullen confuses the ability to do math with the ability to interpret the data derived therefrom and apply it to an accident scene. In this case, the opinion expressed does not go to the product of the mathematical equation, but goes instead to the interpretation of the data derived from the equation and its application to the scene of Mr. Kilhullen's accident. As such, it is accident reconstruction testimony. For this reason, it is the nature of the testimony and not the nature of the case which controls the question of admissibility. In *this* case, Halfacre cannot render his proffered opinions because he is, by his own admission, not qualified in the field of accident reconstruction.

As for Kilhullen's characterization of the "minimum sight-triangle leg" equation used by Halfacre as "simple," the Mississippi Supreme Court would (and has) disagree. In *Mitcham v. Illinois Central Gulf Railroad Company,* 515 So. 2d 852, 858 (Miss. 1987), an expert in the field of traffic control testified as to sight distances at a railroad crossing based on the very equation used by Halfacre and endorsed by Alexander, the application of which the Mississippi Supreme Court found to be quite "complicated." In the only other Mississippi case expressly addressing the sight triangle equation utilized by Halfacre, the expert performing the calculations and testifying thereon was an expert in the field of accident reconstruction. *Alabama Great Southern Ry. Co. v. Lee,* 826 So. 2d 1232, 1238 (Miss. 2002).

Kilhullen bases her "No Accident Reconstruction Expertise Is Needed" theory on the fact that engineers have been allowed to give accident reconstruction opinions in other cases. (A 51-53) Thus, Kilhullen would have the Court believe any engineer can given testimony such as Halfacre's based on their expertise as engineers. However, Kilhullen fails to apprise the Court of critical facts common to each of the cases cited by her, but

missing from the case *sub judice, viz.*: the engineer who gave accident reconstruction testimony had extensive training and experience in accident reconstruction, traffic control, highway and/or railroad crossing design, and other like fields.[23]

As previously stated, it is the nature of the testimony, and not the nature of the case that is determinative as to whether one must have specific expertise to render an opinion.

---

[23] Kilhullen's reliance on the following, factually distinguishable cases, is misplaced. In every single case, the witness had expertisé specific to the field of accident reconstruction and/or extensive training in the field of civil engineering (the design of highways, railroads, railroad crossings, etc.). Halfacre's training is isolated to the fields of electrical power distribution and home inspection. Halfacre does not compare to any of the experts described in her cited cases, hereinafter described:

- ✓ Hales v. Illinois Cent. G. R.R. Co., 718 F. 2d 138 (5th Cir. 1983) (in which a civil engineer whose work consisted primarily of the design and construction of highways gave expert testimony);
- ✓ *Young v. Illinois Cent. G. R. Co.*, 618 F. 2d 332 (5th Cir. 1980) (in which a civil engineer with over 30 years experience in highway construction gave expert testimony);
- ✓ *Brown v. National R.R. Passenger Corp.*, 221 F. 3d 1338 (7th Cir. 2000) (in which a civil engineer specializing in railroad crossings gave expert testimony);
- ✓ *Brennan v. Wisconsin Cent. Ltd.*, 591 N.E.2d 494 (Ill. Ct. App. 1992) (in which a civil engineer with experience as a land surveyor gave expert testimony);
- ✓ *Richard v. Missouri Pac. R.R. Co.*, 536 So. 2d 755 (La. Ct. App. 1988) (in which a civil engineer with experience as a land surveyor gave expert testimony);
- ✓ *CSX Transp., Inc. v. Miller*, 858 A.2d 1025 (Md. Ct. App. 2004) (in which a civil engineer with experience as Chief of Maintenance for the Grand Trunk Railroad gave expert testimony);
- ✓ *Irby v. Travis*, 935 So. 2d 884 (Miss. 2006) (in which a civil engineer with more than 37 years of experience in highway safety, highway design and operations, and accident reconstruction, gave expert testimony);
- ✓ *Bowman v. CSX Transp., Inc.*, 931 So. 2d 344 (Miss. Ct. Ap. 2006) (in which a civil engineer with experience in highway design, traffic engineering and accident reconstruction gave expert testimony);
- ✓ *Moore v. County of Scotts Bluff*, 1993 WL 70940 (Neb. Ct. App. 1993) (in which a civil engineer with experience in railroad crossings and highways crossing railroad trackage gave expert testimony);
- ✓ *South v. National R.R. Passenger Corp.*, 290 N.W. 2d 819 (N.D. 1980) (in which civil engineer who worked as a director of traffic and transportation planning with an architect-engineering planning firm, whose educational background (Yale) consisted of the study of highway traffic, driver reaction, highway design, feasibility analysis, signage, signals, and pavement markings, gave expert testimony); and
- ✓ *Wright man v Consolidated Rail Corp.*, 715 N.E. 2d 546 (Ohio 1999) (in which a civil engineer with experience in the field of grade-crossing safety gave expert testimony).

Kilhullen argued similarly, based upon many of these same cases, in the trial court. (*See, e.g.*, R 1147, RE 130) Kansas City Southern pointed out then, as it does now, that Halfacre's experience and training as an electrical engineer do not equate with that of the engineers allowed to give accident reconstruction testimony in the cases cited by her. (*Id.*)

Halfacre's proffered opinion was, without question, accident reconstruction testimony. The trial court did not err in so finding.

D. Given His Lack of Qualifications in the Relevant Field of Expertise, Halfacre's Opinion Testimony Was Inherently Unreliable, and Thus Inadmissible

Halfacre is a professional engineer who specialized in electrical engineering at Mississippi State University and has since 1991 served as a consultant in the area of "building science." (*Id.*) In other words, he is a home inspector, nothing more. (*Id.*) Neither electrical engineering nor home inspection were at issue in this lawsuit. Nonetheless, based on:

(a) his interpretation of photographs showing the scene of the accident,

(b) measurements taken by him at the subject crossing four (4) years after the accident, and

(c) his review of "Train Accident Reconstruction," a book outlining the procedures for recreating train accidents, which he received from Plaintiff's counsel (R 794 (p. 19 thereon), RE 100),

Halfacre offered an opinion based upon his recreation of the subject accident and interpretation of data derived therefrom. (R 789-806, RE 95-120). In so doing, Halfacre had to, and did, consider the respective speed of the train and tractor trailer rig, the distance each was from the crossing, and how long it took each to reach the crossing given their respective speeds/distances, in order to determine what in his opinion caused the subject accident (*i.e.*, the allegedly inadequate sight distance). (R 645, RE 20) In Halfacre's opinion, Kilhullen did not have time to beat the train across the subject crossing, given his estimation of the sight distance at the subject crossing. (R 924 and 804 (pp. 66-68 thereon), RE 115 and 118). Given the foregoing and this Court's precedent as to how such testimony

must be characterized, Halfacre's opinion is quite obviously accident reconstruction testimony (albeit irrelevant to the sole, material issue - whether the sight distance was sufficient to allow Mr. Kilhullen to stop, and remain stopped, once the train came into view).

When questioned about his opinion, and the bases therefor, Halfacre freely admitted that he is not an accident reconstructionist, and is thus not qualified to testify as an expert in the field of accident reconstruction. (R 791 (pp. 8-9 thereon), RE 97). Quoting his deposition testimony:

> Q: Have you ever had any courses as an accident reconstructionist?
>
> A: No, sir. . . .I'm not representing myself as being proficient in (the area of accident reconstruction). I'm not an accident reconstructionist. . . .
>
> Q: Okay. (Y)ou just testified that you do not consider yourself qualified to testify as an accident reconstructionist.
>
> A: That's correct.

(*Id.*) Halfacre's deposition testimony revealed that, unlike the engineers who were allowed to give accident reconstruction testimony in the cases cited by Kilhullen (*see supra*, note 23):

- ✓ he had no training in the area of accident reconstruction, (R 791 (pp. 8-9 thereon), RE 97);
- ✓ he had never taken a course in accident reconstruction, (*id.*);
- ✓ he had never investigated a traffic accident, or worked for a police department or other organization charged with investigating traffic accidents (R 807-08, RE 121-22).;

- ✓ he had no training or experience in the design of a street, railroad, or railroad crossing, (*see* R 791 (pp. 7- 8 thereon), RE 97);
- ✓ he had never worked for, or served as a consultant to, either a railroad or highway department (R 792 (p. 12 thereon), RE 98); and
- ✓ he had no training or experience in what is or is not a sufficient sight distance at a railroad crossing. (R 796 (pp. 26-27 thereon), RE 102).

An opinion such as Halfacre attempted to give must be based on expertise in accident reconstruction. *Jones v. State,* 918 So. 2d 1220(Miss. 2005) (holding that experts must "possesses peculiar knowledge or information regarding the relevant subject matter which is not likely to be possessed by a layman") (quoting *McLemore,* 863 So. 2d at 36). Testimony from someone like Halfacre, who is not qualified by education or experience to offer an expert opinion in the relevant field, is *inherently* unreliable, and thus inadmissible. *Palmer v. Volkswagen of America, Inc.,* 904 So. 2d 1077, 1089 (Miss. 2005) (holding that, when an otherwise qualified expert offers opinions outside his area of expertise, the opinions and testimony thereon are properly excluded). *See, also, Daubert,* 509 U.S. at 590 (holding, "(T)he requirement that an expert's testimony pertain() to 'scientific knowledge' establishes a standard of evidentiary reliability"); *McLemore,* 863 So. 2d at 41 (finding speculative testimony was "clear(ly) . . . inadmissible and should have been excluded). Halfacre's opinions should therefore be excluded based on his lack of qualifications in the field in which he offered opinions.

Further, to the extent that Kilhullen claims that Halfacre's expertise in the areas of physics and mathematics (based on his degree in engineering) qualified him to offer accident reconstruction testimony (R 647, RE 22 and A 49-51), the Fifth Circuit has rejected this very claim, holding: Accident reconstruction is not "simpl(y) physics. . . .If (it were,) then

anyone who has any background in physics or mathematics, which any engineering graduate of any university in the country would have, would be capable at looking at whatever tables the government publishes and thereby become an expert. I don't think that's what an expert is supposed to be or is supposed to do in order to qualify as an expert." *Wilson v. Woods*, 163 F. 3d 935, 938 (5th Cir. 1999).[24] In *Wilson*, as in this case, the "expert" was an engineer who:

(a) used a book on accident reconstruction – which he professed to be the only reference material reviewed by, or relied upon by, him – to bolster his opinions;

(b) had never conducted any studies or experiments in the field of accident reconstruction; and

(c) was unable to show that his training or experience as an engineer gave him expertise in the field of accident reconstruction that was distinguishable from training received by other mechanical engineers.

Id. As in *Wilson*, Kilhullen's attempt to qualify Halfacre as an expert in accident reconstruction based on Halfacre's engineering background was rejected by the trial court, and Halfacre's opinions excluded as unreliable. And, rightly so.

This Court recently held similarly in *Peebles v. Winston County*, 929 So.2d 385 (Miss.

---

[24] The expert in *Wilson* was a mechanical engineer who had spent most of his career doing fire reconstruction and investigation, and had only recently shifted his professional emphasis to automobile accident reconstruction. As stated above, his testimony was excluded as unreliable and unhelpful based on the expert's lack of qualifications in the area of accident reconstruction. Although Kilhullen would have the Court believe that the testimony in *Wilson* was excluded based upon the methodology used by the expert, *i.e.* whether the issue and/or reconstruction was simple or complex, this ultimately had nothing to do with the district court's decision to exclude the expert, or the Fifth Circuit's decision to affirm the district court's decision.

Ct. App. 2006). In *Peebles*, the Court upheld a trial court's finding that a policeman who was designated/qualified as accident reconstructionist could not offer expert opinion as to police procedures because "he did not have any more training or education regarding police procedures than any other law enforcement officer in the state." *Id.* Like the "expert" in *Peebles*, Halfacre was not allowed to testify outside his field of expertise based on experience and training wholly unrelated to the opinions offered, *i.e.*, his experience in the design of electrical circuits and/or home inspections. *See also, Wilson v. Woods*, 163 F. 3d 935, 938 (5th Cir. 1999) (holding that engineer who never conducted any tests, studies, or experiments in the field in which he offers opinions, has no training in the specific field to which his opinions relate, and who gained his "expertise" in the field by reading a treatise on the subject, was not qualified to offer expert opinions; to hold otherwise would be to allow "anyone who has any background in physics or mathematics, which any engineering graduate of any university in the country would have, would be capable of . . . becom(ing) an expert" by simply looking at a book).

Another factor contributing to the trial court's decision to exclude Halfacre's opinion was Halfacre's failure to consider sufficient facts or data, as required by Rule 702 of the Mississippi Rules of Evidence.[25] Halfacre conceded that he did not know:

- ✓ what type of locomotive was involved in the accident (*i.e.* height of the subject locomotive, number and configuration of lights, etc. – facts essential to any calculation of when, and at what distance from the crossing, the train first became visible to Kilhullen), (R 792 (pp. 12-

[25] MRE 702 provides in pertinent part: "If scientific, technical, or other specialized knowledge will assist the trier of fact to . . . determine a fact in issue, a witness qualified as an expert . . . may testify thereto in the form of an opinion or otherwise, *if . . . the testimony is based on sufficient facts or data.* . . ." (Emphasis added).

13 thereon), RE 98);

- ✓ how high off the ground the locomotive's engineer would have been sitting (a necessary fact for determining how far the engineer could or could not see, and the distance from the subject crossing at which Kilhullen first became visible to the train), (*id.*);
- ✓ the height at which Kilhullen was sitting in his tractor-trailer rig (a necessary fact for determining how far Kilhullen could or could not see, whether vegetation in any way affected Kilhullen's view down the subject tracks, and the distance from the subject crossing at which the train first became visible to Kilhullen), (R 792-93 (pp. 12-13 and 16 thereon), RE 98-99);
- ✓ the weight of the tractor-trailer rig driven by Kilhullen (which directly relates to braking/stopping distance), (R 919, RE 110);
- ✓ the type or condition of the brakes on Kilhullen's tractor-trailer rig, *id.*;
- ✓ how the surface of the subject road would have affected Kilhullen's ability to stop the tractor-trailer rig prior to entering the crossing, had Kilhullen attempted to stop, (R 920, RE 111); or
- ✓ how far it would have taken Kilhullen to stop the tractor-trailer rig once the train became visible to him, had he complied with state and federal law mandating that he stop, look, and listen prior to entering the subject crossing.

(R 926, RE 117) These were all critical factors that should have been considered when reconstructing the sight/stopping distances involved in the subject accident, but which Halfacre admittedly ignored when forming his opinions. (R 792-93 (pp. 12-13, and 16

thereon), RE 98-99 (stating "We didn't make distance measurements relative to height"); and R 920, RE 116 (stating that the above referenced factors are "important" to any determination of how much time it would have taken for Kilhullen to stop before entering the subject crossing)).

And, Halfacre freely admitted that, although the sight distance increased as the tractor-trailer approached the subject crossing, he made no calculations as to any sight distance other than the distance at which Kilhullen could first see the train (from fifty (50) feet away from the first rail), stating: "If you wanted to model this from the standpoint of how does (visibility) change (as Kilhullen approached the crossing,) we'd have to do a lot more research." (*Id.* (pp. 58-61, and 72 thereon)). Halfacre further admitted that he did not know whether Kilhullen even attempted to stop, much less whether Kilhullen could have stopped had he tried. (*Id.* (p. 26 thereon)). Halfacre's admitted failure to consider these "important factors" further demonstrated the unreliability, and thus inadmissability, of his testimony.

Finally, Kilhullen's argument that Halfacre was only offering sight distance testimony, not accident reconstruction testimony, is clearly inconsistent with Halfacre's opinion and the purpose for which Kilhullen seeks to use the testimony. Halfacre testified as to much more than sight distance, *viz.* the sufficiency of the calculated sight distance for causation/liability purposes. It was Halfacre's interpretation of the calculated sight distance that transformed the number derived (450 feet) into accident reconstruction testimony.[26]

---

[26] Beyond this, his sight distance calculations, even if accurate (which Kansas City Southern did not concede, given Halfacre's failure to take into account numerous critical factors relevant to sight distance, *e.g.*, the height at which the train engineer and Mr. Kilhullen were sitting in their respective (continued...)

For these reasons, and as stated above regarding the irrelevancy of Halfacre's proffered opinion, the decision of the trial court to strike Halfacre's affidavit and exclude from the summary judgment analysis any and all opinion testimony therefrom, was the correct decision and should be affirmed.

V. THE TRIAL COURT PROPERLY EXCLUDED THE ALEXANDER AFFIDAVIT, WHICH KILHULLEN SUBMITTED LONG AFTER THE RULE 56(C) DEADLINE HAD PASSED

As set forth in detail, above, the trial court ruled at the January 5, 2005 Summary Judgment Hearing that no further discovery would be allowed (except for the depositions of the "expert" witnesses Kilhullen disclosed on the eve of the Summary Judgment Hearing), and held the summary judgment motion in abeyance pending resolution of Kansas City Southern's *Daubert* Motion. (R 643-44, RE 26-27) Nonetheless, on April 20, 2006, Kilhullen attempted to introduce new evidence (the Alexander affidavit) from a new witness who was not identified prior to the Summary Judgment Hearing and who had not been designated as an expert. (R 937-38, RE 28-29) This was some fifteen (15) months after the Summary Judgment Hearing. The trial court was, therefore, justified in not considering the Alexander affidavit based on its untimely submission, and Kilhullen's failure to justify her

---

[26](...continued)
vehicles, and the fact that Halfacre was not qualified to interpret photographs of the accident scene years after they were taken), were nevertheless insufficient to show the existence of a material, disputed fact. Consider: Halfacre "opines" that the train was visible 450 feet down the track when Mr. Kilhullen was fifty (50) feet from the track (traveling at only two (2) miles per hour) - a distance far exceeding the current statutory standard for sight distances at crossbuck crossings such as involved herein. *See, e.g.,* MISS. CODE ANN. § 77-9-254 (setting the minimum sight distance at such crossings at 300 feet). Even assuming this measurement was accurate, and further assuming Halfacre was qualified to make such a measurement, his calculations, by themselves, show the sight distance to be MORE than adequate under current state law. However, Halfacre's calculation of sight distance is nothing more than a number, without interpretation of which is meaningless. It was Halfacre's interpretation of the calculated sight distance that constituted accident reconstruction testimony, and, given his lack of any expertise or experience in railroad design, road design, or crossing design, and his lack of even basic familiarity with professional or industry standards in this regard, Halfacre was not qualified to say whether this sight distance was adequate or not. *See supra.*

failure to timely submit the summary judgment evidence pursuant to Rule 6.[27-28]

The trial court was further justified in not considering the Alexander affidavit based upon the purpose for which Kilhullen offered it. By her own admission, Kilhullen submitted the Alexander affidavit in an attempt to render Halfacre's accident reconstruction testimony admissible under *Daubert*, and thus avoid summary judgment. What Kilhullen, in truth, hoped to accomplish with the Alexander affidavit, was to qualify an otherwise unqualified witness to give expert accident reconstruction testimony. In other words, Kilhullen tried to make Halfacre an accident reconstructionist expert by having Alexander say that he agreed with Halfacre's proffered opinion. This kind of bootstrapping is not, and has never been, allowed under the plain language of MRE 702 (providing, "a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto. . . .") (emphasis added). An expert witness can only testify based upon his own expertise in the relevant field – not someone else's purported expertise. *See, e.g., Cheeks,*

---

[27] Mississippi law is quite clear on when and under what circumstances affidavit evidence may be submitted for a trial court's review. Rule 56(c) mandates that all affidavits served in opposition to a motion for summary judgment be served ***prior to the day of the hearing*** on the summary judgment motion, which in this case took place on January 5, 2005. This Court has shown time and again in its opinions that the letter of this bright-line rule will be enforced.. *See, e.g., Hariel v. Biloxi HMA, Inc.*, – So. 2d –, 2007 WL 2472557 (Miss. Ct. App. Sept. 4, 2007) (affirming the exclusion of an expert affidavit submitted (without leave of court or a showing of excusable neglect) after to the summary judgment hearing and holding, "Rule 56(f) is not designed to protect litigants who are lazy or dilatory"); *Busby v. Mazzeo*, 929 So. 2d 369, 372 (Miss. Ct. App. 2006) (finding affidavit to be inadmissible because it was not "timely filed with the trial court as required by MRCP 56(c)"). The decision of the trial court to so enforce the rule should, therefore, be affirmed.

[28] It should be noted that the trial court gave Kilhullen the opportunity to avoid exclusion of the Alexander affidavit with its May 30, 2006 show cause order. (R 973, RE 32) All Kilhullen had to do was come into compliance with Rule 6(b), which required her to seek show good cause as to why she needed further discovery, *and*, since the discovery had already been had by Kilhullen without prior leave of court, show excusable neglect as to why she failed to obtain leave prior to conducting further discovery. *Richardson v. APAC-Mississippi, Inc.*, 631 So. 2d 143, 147 (Miss. 1994) (citing Rule 6(b)). Kilhullen made no attempt to avail herself of this second chance, but instead used the briefing opportunity to re-argue her Motion to Compel and *Daubert* Response (R 982), thereby leaving the trial court with "no alternative but to strike (the affidavit)." *Richardson*, 631 So. 2d at 147.

908 So. 2d 120 (holding that a generalist cannot become an expert in a field requiring specialized expertise by talking to someone who is qualified in the specific field, or by reading treatises written by experts in the specific field). To find otherwise will require Alexander to take the stand with Halfacre in order to vouch for Halfacre's answers to each and every question posed. Kilhullen has not, and cannot, direct the Court to any authority supporting such a testimonial arrangement.

The trial court also considered, and found persuasive, Kansas City Southern's argument to exclude Alexander's affidavit on *Daubert* grounds (*e.g.*, relevancy) as set forth above. *See supra* at section "II." For these reasons, the trial court's decision to exclude Alexander's affidavit from the summary judgment proceeding was a correct application of the applicable law and procedure, and should be affirmed.

VI. THE TRIAL COURT PROPERLY GRANTED KANSAS CITY SOUTHERN'S MOTION FOR SUMMARY JUDGMENT, GIVEN KILHULLEN'S FAILURE TO PRESENT THE TRIAL COURT WITH ANY EVIDENCE SHOWING THE EXISTENCE OF A GENUINE ISSUE OF MATERIAL FACT

Having found that the summary judgment-related discovery requested by Kilhullen to be unwarranted given her inability to show that the fruits thereof could produce evidence supporting the existence of a genuine issue of material fact (and, in fact, would only support Kansas City Southern's position on the issues at bar), and having further found that the affidavits submitted by Kilhullen from her various witnesses (Shelton, Halfacre, and Alexander) to be inadmissible for the reasons set forth above, the trial court was left with no evidence on which to rule other than that presented by Kansas City Southern in support of summary judgment. Under the circumstances, Rule 56 and Mississippi appellate court precedent required the trial court to grant the Motion for Summary Judgment based on Kilhullen's failure to show the existence of a genuine issue of material fact. Quoting Rule

56(e):

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue fr trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

See also Massey v. Tingle, 867 So. 2d 235 (Miss. 2004) (finding the failure of a non-movant to come forward with any concrete evidence to support her claims to be insufficient to show the existence of a material, disputed fact, and affirming the trial court's grant of summary judgment therefor); *Powell v. Methodist Health Care-Jackson Hospitals*, 856 So. 2d 353 (Miss. Ct. App. 2003) (holding same); *Roebuck v. McDade*, 760 S. 2d 12 (Miss. Ct. App. 1999) (holding that a party's inability to procure contrary evidence is not sufficient to defeat a motion for summary judgment); *Travis v. Stewart*, 680 So. 2d 214 (Miss. 1996) (quoting and applying that portion of Rule 56(e), quoted above).

In so ruling, the trial court correctly applied this Court's precedent, dismissing the case with prejudice. The trial court's order should therefore be affirmed.

CONCLUSION

For the reasons set forth above, Appellees Kansas City Southern Railway Company and Robert W. Lay respectfully ask that this Court affirm the order of the trial court.

Respectfully submitted,
KANSAS CITY SOUTHERN RAILWAY COMPANY AND ROBERT W. LAY

BY: _____
CHARLES E. ROSS (MSB NO. [redacted])
BILL LOVETT (MSB NO. [redacted])

OF COUNSEL:
WISE CARTER CHILD & CARAWAY
Professional Association
401 East Capitol Street
Suite 600
Post Office Box 651
Jackson, Mississippi 39205
Telephone: (601) 968-5500
Facsimile: (601) 968-5593

CERTIFICATE OF SERVICE

I, Bill Lovett, one of the attorneys for Appellees, The Kansas City Southern Railway Company and Robert W. Lay, do hereby certify that I have this day caused a true and correct copy of the above and foregoing document to be served via United States Mail, postage prepaid, to the following:

Barry W. Gilmer, Esq.
GILMER LAW FIRM, P.A.
Post Office Box 919
Madison, Mississippi 39130-0919

Richard A. Wunderlich, Esq.
500 North Broadway, Suite 2000
St. Louis, Missouri 63102-2147

ATTORNEYS FOR PLAINTIFF

THIS, the 10th day of September, 2007.

BILL LOVETT