CERTIFICATE OF INTERESTED PERSONS

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

A. Circuit Judge

Vernon R. Cotten
205 Main Street
Carthage, Mississippi 39051

C. Parties

Appellant: Gigi Kilhullen

Appellees: Kansas City Southern Railway Company and Robert W. Lay

D. Attorneys

Appellants:
Barry W. Gilmer
Reid S. Bruce
GILMER LAW FIRM
Post Office Box 919
Madison, Mississippi 39130-0919

Appellees:
Charles E. Ross
Bill Lovett
WISE CARTER CHILD & CARAWAY
401 East Capitol Street, Suite 600
Jackson, Mississippi 39201

SO CERTIFIED, this the 4th day of May, 2007

BARRY W. GILMER, MSB#[redacted]
REID S. BRUCE, MSB#[redacted]

GILMER LAW FIRM
116 Village Boulevard
Post Office Box 919
Madison, Mississippi 39130-0919
(601)956-6616
(fax)856-9329

Appellant
Brief
2001-CV-0332-SCT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

*References to Daubert are made throughout this Brief and occur on almost every page. Therefore, indexing is limited to actual citations.

STATE CASES

NON-MISSISSIPPI STATE CASES

STATE STATUTES AND RULES

REFERENCE MATERIALS

STATEMENT OF THE ISSUES

1. Whether the Circuit Court of Scott County, Mississippi, erred in granting Defendants Kansas City Southern Railway Company And Robert W. Lay's Motion For Summary Judgment on the issue of the obstruction of Thomas Kilhullen's line of sight at the subject railroad crossing.

2. Whether the Circuit Court of Scott County, Mississippi, erred in rejecting the Affidavit of Appellant's licensed Professional Engineer, Jimmy C. Halfacre.

3. Whether the Circuit Court of Scott County, Mississippi, erred in rejecting the Affidavit of preeminent Accident Reconstructionist Brett Alexander.

4. Whether the Circuit Court of Scott County, Mississippi, erred in rejecting the Affidavit of Lay Witness Jimmy Shelton.

5. Whether the Circuit Court of Scott County, Mississippi, erred in disallowing the Appellant to conduct discovery in this matter, including the deposition of the sole eyewitness to the collision, Classie Ward, while at the same time allowing the Defendants to conduct any and all discovery as the Defendants deemed necessary.

STATEMENT OF THE CASE

On June 20, 2000, Thomas D. Kilhullen was operating a tractor-trailer rig within the City of Morton, Mississippi, along Herring Road at the point at which Herring Road intersects the railroad line owned and operated by Kansas City Southern Railway Company leading to a woodyard depot owned and operated by International Paper Company. (Record at 6). While approaching the woodyard depot, Thomas D. Kilhullen attempted to operate his tractor-trailer rig along Herring Road across and over the railroad grade crossing mentioned above. As Thomas D. Kilhullen attempted to pass over the railroad grade crossing, the engine and twenty-seven (27) freight cars operated by the engineer, Robert W. Lay, struck the tractor-trailer rig operated by Thomas D. Kilhullen with great force and violence, thereby causing the death of Thomas D. Kilhullen. (Record at 6). The collision was observed by a witness, Classie Ward, who was approaching the train tracks at the time that Kilhullen was proceeding over them. (Record at 307, Record Excerpts at 15) The collision between the tractor-trailer rig and the Kansas City Southern train was solely and proximately caused by the negligence of the Defendant, Kansans City Southern, in allowing vegetation and a mound of earth to obstruct Kilhullen's view of the oncoming train. (Record at 7). Thomas D. Kilhullen survived the collision for a short while, thereby entitling his estate to the recovery of damages as contemplated by Mississippi law. Thomas D. Kilhullen is survived by his widow, Gigi Kilhullen. (Record at 6).

On December 4, 2001, Gigi Kilhullen filed the instant lawsuit alleging that Kansas City Sourthern and the other named Defendants negligently caused the death of Thomas Kilhullen. (Record at 4). On December 21, 2001, Defendant Illinois Central Gulf Railroad Company, filed its Motion To Dismiss which alleged that Defendant Illinois Central did not exercise any ownership or control over the railroad crossing at the time that Kilhullen was killed by the Kansas City Southern

train. (Record at 31-68). On December 26, 2001, Appellee Kansas City Southern filed its Answer to the Kilhullen's Complaint which denied any liability relative to the subject incident. (Record at 69-76).[1] On January 4, 2002, Defendant International Paper Company filed its Answer which further alleged no liability relative to the Kilhullen's death. (Record at 77-86). Thereafter, the parties engaged in discovery and the Kilhullen agreed to voluntarily dismiss Defendant Illinois Central after it became clear that said Defendant no longer owned the railroad crossing in question, but had instead sold the property to Appellee Kansas City Southern. (Record at 31-68, 92).

The trial of this matter was first continued on May 14, 2002, at the request of Mr. Charlie Ross, counsel for Appellee Kansas City Southern. (Record at 125). On January 6, 2003, Attorney Ross again requested a continuance of the trial of this matter claiming legislative privilege. (Record at 224). This request for continuance was granted by two separate Orders entered on January 8, 2003 and January 10, 2003. (Record at 229, 230). The matter was then continued twice more at Attorney Ross' request on May 29, 2003 and August 11, 2003, with Attorney Ross claiming legislative privilege each time. (Record at 234, 235 and 242). This pattern was repeated yet again on December 1, 2003, April 2, 2004, September 29, 2004, April 4, 2005, July 13, 2005 and March 24, 2006.[2] (Record at 245, 261, 262, 265, 543, 659, 662, 708, 714, 717, 718, 822, 826). All in all, the trial of this matter was continued no less than twelve (12) times at the behest of the Defendants.

On October 22, 2004, the Appellee filed a Motion For Summary Judgment which alleged that

---

[1] Defendant Robert W. Lay, the engineer who was operating the Kansas City Southern train, is represented by the same attorneys as Kansas City Southern. His Answer was filed on March 20, 2002. (Record at 104-111).

[2] Appellant would show that one of these continuances was indeed requested by the Appellant.

the collision in question was caused solely by the failure of Kilhullen to stop, look and listen at the railroad crossing. (Record at 278-331). The Appellee further alleged that Kilhullen "had an unobstructed view up the track and could see the approaching train (had he looked)" (Record at 279). The Appellee further alleged that "warning signs were posted at the crossing, and the topography and weather were not such as would interfere with the train's warnings" (Id).

In support of its Motion For Summary Judgment, Kansas City Southern produced a vague and incomplete Affidavit which was signed by the sole non-party witness to the accident, Ms. Classie Ward of Lena Mississippi. (Record at 307, Excerpts at 15). Ms. Ward stated that she observed Kilhullen's tractor trailer rig "slowly" moving onto the railroad tracks. Ms. Ward did not state whether or not Kilhullen stopped before approaching the railroad tracks and Ms. Ward's Affidavit completely lacked other key details surrounding the collision such as the speed at which Kilhullen was traveling and details concerning the actual impact. (Id). Kansas City Southern also produced other self-serving Affidavits from the train's engineer, Robert Lay, and other investigators which also failed to include key details relative to the collision.

On November 19, 2004, Kilhullen filed a Motion To Hold Motion For Summary Judgment In Abeyance, which stated that the Motion For Summary Judgment was premature given that Kilhullen had just served notice of the depositions of the seventeen (17) individuals and investigators listed as witnesses, including Ms. Classie Ward, the sole non-party witness to the accident. (Record at 329-330, 335). Furthermore, Kilhullen correctly pointed out that Appellee Kansas City Southern had repeatedly failed to properly respond to discovery requests in this matter and that Attorney Ross' repeated legislative absences had hindered both the prosecution of the matter and the completion of discovery (including numerous depositions) in the civil action. (Record at 335).

Kilhullen further provided the Circuit Court with the Affidavit of Jimmy Shelton, an experienced truck driver and an investigator employed by the Gilmer Law Firm, which stated that the obstructions at the railroad crossing prevented Kilhullen from properly visualizing the subject locomotive in a manner which would have allowed Kilhullen to safely move across the railroad tracks. (Record at 340-342, Excerpts at 17) Shelton utilized simple mathematical calculations to determine that the available sight distance at the crossing prevented Kilhullen from apprehending the presence of the train until Kilhullen's fully loaded tractor-trailer rig was already past the point of no return. Shelton therefore concluded that "it was impossible for Kilhullen to move his truck across the tracks and clear the tracks before being struck by the train." (Record at 342, Excerpts at 17).

On November 19, 2004, Kilhullen filed a Motion To Compel which stated that Appellee Kansas City Southern had failed to fully respond to twenty (20) separate Interrogatories and twenty-four (24) Requests For Production which had previously been propounded by Kilhullen on May 14, 2002. (Record at 343-542). The information and documents which were the subject of the Motion To Compel were not merely spurious, but were vital in terms of couching a response to the Defendants' Motion For Summary Judgment. Furthermore, the information and documents which were listed in Kilhullen's Motion To Compel were essential if the Court was to make an unbiased and clearly reasoned determination as to the propriety of the Defendants' Motion For Summary Judgment. The Defendants' failure to properly answer the Appellant's discovery requests is key in this matter since it is clear that the Defendants made a strategic decision to provide only partial and incomplete discovery responses and prevent the depositions of key persons while also filing a Motion For Summary Judgment in an attempt to prevent any further discovery in this matter,

including the deposition of the eyewitness to the accident, Classie Ward. This is particularly important because the main crux of the Defendants' argument as presented in their Motion For Summary Judgment is whether Kilhullen stopped at the railroad crossing. To date, Classie Ward has not yet offered a clear opinion on that key fact.

As to the Defendant's written discovery responses to the Appellant's discovery requests, the majority of the required answers were either grossly incomplete or remained altogether unanswered. For example, in response to Kilhullen's Interrogatory Number 1, Kansas City Southern failed to identify the name, address and telephone number of the person preparing each incident report, accident report and/or other document relating to and/or pertaining to the subject incident. Specifically, Kansas City Southern produced "handwritten notes" and failed to state the name, address, telephone number and place of employment of the person or person(s) who prepared the handwritten notes.[3] (Record at 416). In response to Kilhullen's Interrogatory Number 2, Kansas City Southern failed to provide the work schedule of Gilbert Sharp on June 18, 2000, including the times he came on duty, the time he went off duty, the time he took a break or otherwise rested and his activities during said period. In its Response and Supplemental Response to Kilhullen's Interrogatory Number 2, Kansas City Southern refers Kilhullen to the deposition of Robert Lay at pages 60 and 72-74. (Record at 428). Kilhullen would show that Robert Lay testified in his deposition that he did not remember what activities he participated in on June 19, 2000. Robert Lay did not testify at all regarding his activities on June 18, 2000. (Record at 460-463).

In response to Kilhullen's Interrogatory Number 6, Kansas City Southern failed to state

---

[3]The discovery issues listed herein are not an exhaustive list of defective responses contained within the Motion To Compel. Please refer to the Kilhullen's Motion To Compel for a complete listing of the Defendants' insufficient discovery responses.

whether Robert W. Lay, Gilbert Sharp or any manager, supervisor, official or other employee involved in the accident has ever been warned, suspended, terminated or otherwise disciplined for violations of safety rules, regulations or procedures. (Record at 418). Robert Lay testified in his deposition that he had received several disciplinary actions resulting in suspensions without pay while employed for Kansas City Southern. Particularly, Robert Lay testified that he had been suspended for over 6 months without pay for various violations. However, Robert Lay could not provide the dates upon which the various suspensions had occurred. (Record at 477-487).

In response to Kilhullen's Interrogatory Number 12, Kansas City Southern failed to identify the last time prior to the subject accident that the brakes on the subject train were inspected or otherwise tested by any entity. Kansas City Southern's argument that the engine "was not a Kansas City Southern engine therefore Kansas City Southern does not know when the brakes were last inspected by a mechanic" is without merit in that Kansas City Southern would obviously be entitled to such information regarding the safety and reliability of the engines by virtue of any contract and/or lease agreement with Santa Fe. (Record at 420). In response to Kilhullen's Interrogatory Number 16, Kansas City Southern failed to state whether or not Gilbert Sharp has ever been involved in any accidents either prior to or subsequent to the subject accident. In his deposition, Robert Lay testified that he had been involved in three (3) accidents which occurred in Bolton, Arcadia and Newton. Robert Lay further testified that he could not recall the dates upon which each such accident occurred. Kansas City Southern failed to produce any documentation whatsoever relative to the three (3) accidents. (Record at 421).

In response to Kilhullen's Interrogatory Number 18, Kansas City Southern failed to provide the address, telephone number and place of employment for Jerry Eakin, Mark Redd, G.D. Harmon,

Gene Calrk (sic), L.K. Fultz and K.B. Williams. (Record at 422). Despite this purposeful exclusion, Kansas City Southern attached as Exhibits to its Motion For Summary Judgment, the Affidavits of Mike McDonald, Greg Evans, Larry Parks and Dan Colvin. Kansas City Southern **never identified Larry Parks or Dan Colvin in discovery in this civil action**. Kilhullen was first placed on notice of the identity of Mr. Parks and Mr. Colvin **when served** with the Defendants' Motion For Summary Judgment on or about October 22, 2004. (Record at 317-319). Although Kansas City Southern had previously identified Mike McDonald and Greg Evans as potential expert witnesses, Kansas City Southern did not produce any documents and other tangible things upon which said "experts" supposedly based their opinions and expected testimony.

Given the insufficient discovery responses and given the surprise Affidavits of Parks and Colvin, Kilhullen should have been allowed to depose each individual identified by the Appellees in response to Kilhullen's Interrogatory Number 16, including, but not limited to, Mike McDonald, Greg Evans Larry Parks and Dan Colvin, so as to determine the identity of those persons who had discoverable knowledge relative to the subject accident. Furthermore, Kilhullen should have been allowed to depose those individuals so that Kilhullen could prepare a proper and complete responsive pleading to the Motion For Summary Judgment.

While not an exhaustive listing, the following discovery responses were also inadequately or incompletely answered by Appellee Kansas City Southern prior to said the service of Kansas City Southern's Motion For Summary Judgment:

> 1. In response to Kilhullen's Interrogatory Number 24, Kansas City Southern failed to identify the persons and/or firms which conducted an investigation into the accident. Kansas City Southern has further failed to identify all investigative documents and/or reports generated during the course of the investigation. (Record at 423-424)

2. In response to Kilhullen's Interrogatory Number 25, Kansas City Southern failed to identify each and every person who performed construction, maintenance and/or repair work on the subject grade crossing. (Record at 424).

3. In response to Kilhullen's Request For Production Number 4, Kansas City Southern failed to identify and produce any and all documents and other tangible things relative to construction, repairs, equipment installation, sign installation, warning device installation, painting or other activities performed upon the subject grade crossing from the time the grade crossing was first constructed to the present. (Record at 429).

4. In response to Kilhullen's Request For Production Number 7, Kansas City Southern failed to identify and produce the dispatcher's record of train movements for the subject railroad for the forty-eight (48) hour period prior to and after the subject accident. (Record at 430).

5. In response to Kilhullen's Request For Production Number 8, Kansas City Southern failed to identify and produce all documents and other tangible things relative to the information contained on any event recorder, speed indicator, in-service event recorder, "black box", "hot box" detector, shifting load detector, dragging equipment detector or similar devices installed on the subject train or railroad. (Record at 430).

6. In response to Kilhullen's Request For Production Number 9, Kansas City Southern failed to produce audio recordings, voice tapes and/or other electronic recordings which relate or pertain to rail traffic between Shreveport and Meridian during the forty-eight (48) hours prior to and after the subject accident. (Record at 430). In his deposition, Robert Lay testified that he communicated with the dispatcher on June 20, 2000, and that he attempted to communicate with others after the subject accident had occurred. (Record at 501-505).

7. In response to Kilhullen's Request For Production Number 10, Kansas City Southern failed to identify and produce all documents and other tangible things relative to grade construction, warning sign or system construction and rail construction for one (1) mile east of the subject grade crossing and one (1) mile west of the subject grade crossing. (Record at 430-431).

8. In response to Kilhullen's Request For Production Number 11, Kansas City Southern failed to produce reports of daily inspection and track permits pertaining to the subject locomotives. Kansas City Southern produced "Inspection Reports" generated after the accident, not prior to the accident as requested. (Record at 431). Robert Lay testified in his deposition that he prepared a "Daily Inspection Report" relative to the two (2) engines prior to leaving Meridian. (Record at Kansas City Southern has wholly failed to identify and produce the "Daily Inspection

Report" generated by Robert Lay on June 20, 2000. (Record at 506).

9. In response to Kilhullen's Request For Production Number 14, Kansas City Southern failed to identify and produce documents pertaining to clipping, cutting and removing of vegetation by RWC, Inc., on behalf of Kansas City Southern from the railroad right-of-way between Lake and Meridian, Mississippi, within the twelve (12) months prior to the subject accident. (Record at 431-432). Kansas City Southern has produced no documentation relative to the work performed by RWC, Inc., pursuant to its Contract with Kansas City Southern other than the Contract entered into between RWC, Inc., and Kansas City Southern.

10. In response to Kilhullen's Request For Production Number 16, Kansas City Southern failed to identify and produce all documents relating to or pertaining to any maintenance or construction performed on the subject railroad from Lake to one (1) mile West of Morton within the past ten (10) years. (Record at 432). Furthermore, in response to Kilhullen's Request For Production Number 4, Kansas City Southern failed to identify and produce any and all documents and other tangible things relative to construction, repairs, equipment installation, sign installation, warning device installation, painting or other activities performed upon the subject grade crossing from the time the grade crossing was first constructed to the present. (Record at 429).

11. In response to Kilhullen's Request For Production Number 17, Kansas City Southern failed to identify and produce each and every report, memorandum, letter, e-mail or other document relating to any discipline imposed upon Robert W. Lay, Gilbert Sharp or any other manager, supervisor, official or other employee of Kansas City Southern who was involved in the subject incident within the past five (5) years for violations of safety rules, regulations or procedures. (Record at 432). Robert Lay testified in his deposition that he had received several disciplinary actions resulting in suspensions without pay while employed for Kansas City Southern. (Record at 477).

12. In response to Kilhullen's Request For Production Number 24, Kansas City Southern failed to identify and produce each and every document which relates or pertains to any investigation or inquiry conducted by the Defendant or any other person or entity relating to the subject accident or any accidents which occurred prior to or after the subject accident at the subject grade crossing. (Record at 434). Kansas City Southern produced a "TOH Trespasser Cover Sheet" for two (2) accidents which occurred at the subject grade crossing. One accident involved Kenneth Pope which occurred on October 20, 1995, and the other accident involved Miles Poole which occurred on June 20, 1997. From a review of the "accident reports" furnished by Kansas City, neither accident involved a fatality. Kilhullen is informed and believes that additional documents exist relative to each of the aforementioned accidents having occurred at the subject grade crossing. Additionally, Kansas City Southern

> failed to state whether any accidents have occurred at the subject grade crossing since June 20, 2000, and Kansas City Southern further failed to produce any documents relating to the same. Kilhullen is informed and believes that a fatal accident occurred at the subject grade crossing approximately six (6) months prior to the subject accident (June 20, 2000). Neither the Pope accident, nor the Poole accident involved fatalities. (Record at 522).

On December 7, 2004, Appellee Kansas City Southern filed its Motion To Strike Kilhullen's Motion To Compel arguing that it was procedurally improper given an alleged lack of a good faith attempt to resolve the discovery issues and given the length of time which had passed between the propounding of discovery and the filing of the Motion To Compel. (Record at 547-553). On the same day, Kansas City Southern also filed a Motion To Quash in an attempt to quash the depositions of the seventeen (17) witnesses, including the deposition of Ms. Classie Ward, the eyewitness to the accident. (Record at 593-597).

On December 15, 2004, Appellee Kansas City Southern filed their Reply in further support of their Motion For Summary Judgment and also filed a Motion To Strike the Affidavit of Jimmy Shelton by arguing that Shelton was not acting as a lay witness, but was in fact acting as an unqualified expert witness which should be stricken pursuant to the standard announced in Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993) and Mississippi Transportation Commission v. McLemore, 863 So.2d 31, 35 (Miss.2003). (Record at 626). On January 3, 2005, Kilhullen filed his Response to Kansas City Southern's Motion To Strike arguing that the substance of Shelton's Affidavit did not fall within the purview of a Daubert analysis because Shelton was only testifying as a lay witness. (Record at 641).

Additionally, prior to the hearing on the Kansas City Southern's Motion For Summary Judgment, Kilhullen filed the Affidavit of Jimmy C. Halfacre, P.E., a licensed professional engineer. (Record at 645-650, Excerpts at 20). After becoming employed as an expert in this matter, Halfacre

examined documents and photographs pertaining to the collision, reviewed the site of the train collision, took precise measurements and concluded based upon his training and experience as a professional engineer that the line of sight was insufficient to allow Kilhullen to "visualize the train, comprehend and react to its presence a sufficient distance to the east to allow him to move the tractor-trailer rig across the tracks to a point of safety to the south of the grade crossing or otherwise control the tractor-trailer unit by preventing it from becoming dangerously close to or upon the railroad track". Record at 647, Excerpts at 21-23).[4]

Prior to the hearing on the Motion For Summary Judgment, counsel for Kilhullen, Barry W. Gilmer, also filed an Affidavit stating that certain vital material facts could not be presented to the Court in defense of the pending Motion For Summary Judgment because "discovery is incomplete as a result of time constraints and scheduling problems resulting from a combination of defense counsel's obligations within the Mississippi legislature and Appellant's counsel's other litigation obligations". (Record at 652). Said Affidavit further stated that each time a continuance was sought by counsel for Kansas City Southern, said counsel represented to the Court that discovery was incomplete due to his obligations in the Mississippi legislature. In fact, as late as September 29, 2004, which was less than a month before the filing of the Motion For Summary Judgment and the noticing of the seventeen (17) depositions by Kilhullen, counsel for Kansas City Southern submitted an Order to the Court which stated that "the parties are in agreement that this matter is not ready for trial". (Record at 271). A similar Order containing the same language was also submitted by counsel for Kansas City Southern on April 8, 2004. (Record at 265). This Order was accompanied

[4]A more complete examination of Halfacre's opinion is included in the *Argument* section of this brief.

by a Motion which was filed by counsel for Kansas City Southern on April 2, 2004, which clearly stated that "**discovery is not yet complete**". Yet, despite this representation to the Court, counsel purposefully sought to cut off discovery in this matter even though Kansas City Southern was serving discovery responses upon Kilhullen's counsel as late as October 19, 2004, a mere **two (2) days** before the Motion For Summary Judgment was filed in this matter.

Despite the clear evidence that discovery was ongoing in this matter and that the Defendants Motion For Summary Judgment was not yet ripe considering that said Motion identified witnesses which had been identified prior to the filing of the Motion, that complete discovery responses had not yet served upon Kilhullen, that the deposition of the eyewitness had not yet been taken and despite the fact that discovery was ongoing at the time of filing of the Motion For Summary Judgment, the Trial Judge entered an Order on January 25, 2005, which **absolutely prohibited** Kilhullen from performing any discovery in this matter while at the same time granting the Defendants leave to depose the lay witness and expert witness which had been named by Kilhullen. (Record at 643-644, Record Excerpts at 26). This one sided ruling effectively froze the process of discovery while it was ongoing and provided a material advantage to Kansas City Southern in that Kansas City Southern was allowed to depose those persons named in Kilhullen's Response to the Motion For Summary Judgment, while Kilhullen was **barred** from deposing any of the lay or expert witnesses which were named within Kansas City Southern's Motion For Summary Judgment.

The Trial Judge's January 25, 2005, Order further held all of Kilhullen's pending Motions involving discovery in abeyance pending a hearing on Shelton and Halfacre's Affidavits pursuant to Rules 701 and 702 of the Mississippi Rules of Evidence even though it had been argued that the substance of those Affidavits was hindered by fact that discovery was incomplete in the matter.

(Record at 643, Record Excerpts at 26). This ruling is particularly suspect in light of the fact that the Trial Judge later ruled that Halfacre and Shelton's Affidavits were unreliable because there was **no eyewitness to the accident**, even though Kilhullen's counsel had repeatedly informed the Court that **Ms. Classie Ward had indeed witnessed the accident** and that her information concerning the course of events, together with information held only by the accident investigators (Larry Parks and Dan Colvin) which had not yet been deposed and which were first identified by Kansas City Southern in its Motion For Summary Judgment, were vital to preparing proper lay and expert witness affidavits and testimony in this matter.

Following the entry of the Trial Judge's January 25, 2005, Order, the parties set about scheduling the depositions of Jimmy Shelton and Jimmy Halfacre. At the same time, International Paper Company filed their Motion For Summary Judgment which alleged, among other things, that International Paper was not charged with maintaining the road or railroad track upon which the subject collision occurred. (Record at 669). Thereafter, on August 25, 2005, the parties mutually agreed to release the International Paper Company from the litigation voluntarily. (Record at 715).

On March 28, 2006, following the depositions of Halfacre and Shelton, Appellee Kansas City Southern filed a Motion to exclude Halfacre and Shelton's opinion testimony for failure to comply with the Daubert standard. On May 9, 2006, Kilhullen filed her lengthy Response to Kansas City Southern's Motion which essentially argued that Shelton's lay testimony was not subject to the Daubert standard and that Halfacre, an experienced professional engineer, was indeed qualified to offer expert opinion testimony in this matter. (Record at 827). Additionally, Kilhullen offered the Affidavit of Mr. Brett Alexander, the foremost accident reconstruction specialist in the State of Mississippi and an expert who has been repeatedly accepted as an expert witness by this Court and

in various Mississippi Circuit Courts.[5] Throughout the preparation of both Mr. Shelton and Mr. Halfacre's opinions, Mr. Alexander consulted with counsel for Appellant in order to provide advice concerning railroad crossing "line of sight" calculations. (Record at 994). Furthermore, Mr. Alexander personally examined the railroad crossing and thoroughly reviewed the depositions of Mr. Lay, Mr. Halfacre and Mr. Shelton, together with all photographs and other available data. (Id). Based upon his review of this matter, Mr. Alexander opined that Mr. Halfacre's conclusions regarding Kilhullen's inability to avoid the collision were correct. Mr. Alexander further opined that Kilhullen's line of sight was obstructed and that 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. (Record at 937-940, Record Excerpts at 28).

On May 26, 2006, fearing that the filing of Mr. Alexander's Affidavit would be the nail in the coffin relative to their Motion For Summary Judgment, Kansas City Southern filed a Motion To Strike Alexander's Affidavit. (Record at 943). In effect, Kansas City Southern alleged that since the Alexander Affidavit was not served prior to the January 5, 2005, hearing which resulted in the Trial Court's January 25, 2005, Order, Alexander's Affidavit should not be allowed because it constituted "further discovery". This argument was , however, rendered moot by the fact that the Trial Court's January 25, 2005, Order held Kansas City Southern's Motion For Summary Judgment in abeyance. This argument is also moot since the Court's January 25, 2005, Order further announced that a hearing was to occur on the Motion For Summary Judgment and the Daubert

[5]Kilhullen informed counsel for Kansas City Southern and Robert Lay that Mr. Alexander was acting as a consulting expert in this matter by correspondence on August 19, 2005. Despite this notice, Kansas City Southern and Robert Lay chose not to depose Alexander and further made no effort to exclude Alexander from these proceedings. (Record at 851).

Motion at a later date. (Record at 643, Record Excerpts at 26). Therefore, the deadline for the service of affidavits pursuant to Rule 56(c) of the Mississippi Rules of Civil Procedure had not yet expired since the hearing on the Motion For Summary Judgment and the Daubert Motion had not yet taken place since said Motions were held in abeyance pending the depositions of Halfacre and Shelton and the final briefing of those matters. (Id).

On May 30, 2006, the Trial Court entered its Order Pursuant to Rule 6(b)(2) MRCP Directing Appellant To File Motion For Leave To Engage In Further Discovery. (Record at 973-975, Record Excerpts at 32). This Order was filed on the Trial Court's own directive and was not responsive to a specific pleading and said Order did not arise out of any hearing in which the parties participated. Instead, said Order was clearly intended to place Kilhullen in the situation of applying for needless relief from the Trial Court relative the filing of the Alexander Affidavit. In effect, the Trial Court was commanding Kilhullen to file a motion for leave to conduct additional discovery even though such a motion was both unnecessary and unwarranted. The Court further erred by declaring that the Alexander Affidavit constituted "discovery" on the part of the Kilhullen which had been disallowed by the Court's January 25, 2005, Order which allowed discovery only to Kansas City Southern and not to Kilhullen. In effect, the Trial Court's Order constituted a faulty "show cause" order for the filing of a document which was allowed by the Mississippi Rules of Civil Procedure and which was filed in a timely and acceptable manner.

On May 30, 2006, Kansas City Southern filed yet another Reply in support of their existing Daubert Motions. (Record at 976). Said document further constituted yet another writing which was

filed in support of Kansas City Southern's Motion For Summary Judgment.[6] The filing of this Reply once again exhibits that the Court had not yet conducted a hearing on the Defendants' Motion For Summary Judgment, therefore making Alexander's Affidavit timely. On June 5, 2006, Kilhullen filed her Response to the Court's defective May 30, 2006, "Rule 6(b)(2) Order" which once again familiarized the Court with the numerous discovery issues which had not yet been resolved in this matter and the fact that Kilhullen was wrongfully being barred from deposing certain persons whose testimony was key to obtaining proper expert opinions in the case and further that Kansas City Southern was engaged in a pattern and practice of failing to answer written discovery to the same ends. (Record at 982). Kilhullen further acquainted the Court with the fact that the Alexander Affidavit did not constitute "discovery", but that it was a properly filed pursuant to the clear dictates of Rule 56, which allows for the service of affidavits in opposition to motions for summary judgment up until the day before the hearing. Furthermore, Kilhullen stated that Alexander's Affidavit was also served in response to the Daubert Motion after the Defendants questioned the propriety of Halfacre's conclusions and methodology. Kansas City Southern filed its Daubert Motion on March 28, 2006, more than a year and two months after the Trial Court entered its Order restricting "discovery" and almost a **year and three months** after the January 5, 2006, hearing which held the Motion For Summary Judgment in abeyance.

Following the filing of the "new" Daubert Motion on March 28, 2006, Kilhullen filed the

---

[6]It is quite disingenuous for Kansas City Southern to argue on the one hand that a hearing had already occurred on the Motion For Summary Judgment in order to exclude a timely Affidavit and on the other hand continue to file pleadings in support of a Motion For Summary Judgment which had been held in abeyance and upon which a hearing had not yet occurred. In fact, the filing of this "Reply" effectively estopped the Defendants from claiming that the Alexander Affidavit was not filed in a timely manner.

Alexander Affidavit in an attempt to rebut Kansas City Southern's allegations that Halfacre's testimony should be excluded since it was unrelaible. In an effort to show to the Court that Halfacre is indeed qualified to testify in this matter, the Appellant employed Alexander to check Halfacre's work for both accuracy and the propriety of the methodology used. In doing so, Alexander concluded that Halfacre's conclusions were correct and further concluded that Halfacre utilized the correct methodology in his calculations and measurements. By excluding the Alexander Affidavit, the Court precluded Kilhullen from being able to properly respond to Kansas City Southern's allegations concerning Halfacre's Daubert qualifications. The Court made this ruling even though nothing in the Court's January 25, 2005, Order prevented the filing of additional affidavits in response to the pending Daubert Motion and even though Rule 56(c) clearly allows for the service of affidavits up until the day before a hearing on a Motion For Summary Judgment.

On June 8, 2006, Kansas City Southern filed a "Reply" to Kilhullen's Response to the Trial Court's May 30, 2006, "show cause" Order. (Record at 1046). Kansas City argued that since Kilhullen had made no attempt to "show cause" for the allegedly late filing, that the Alexander Affidavit should be stricken. This argument was put forth even though it was clear that the Court's May 30, 2006, Order was in error given the dictates of Rule 56(c) of the Mississippi Rules of Civil Procedure and even though the Alexander Affidavit was offered in response to a new Motion which had been filed by Kansas City Southern after the entry of the Court's flawed January 25, 2005, Order restricting discovery in the instant matter. In short, this was a last, desperate attempt to pull this matter from the fire since Alexander, whose Daubert qualifications could not be questioned, had concurred with Halfacre's methodology and conclusions and since Alexander had independently concluded based upon his own investigations that Kilhullen's line of sight was obstructed at the

railroad crossing to such a degree that he could not have seen the approaching train.

On June 12, 2006, the Trial Court conducted its hearing on the pending Motion For Summary Judgment and the pending Daubert Motion. During said hearing, the Trial Court stated on the record that:

> There are obviously two issues before the Court. First, the Defendant's Motion for Summary Judgment, and secondly, the discovery problem, which has arisen out of the Brett Alexander Affidavit, that followed my Order. (Record Volume 10, Hearing Transcript, Page 62).

The Court therefore explicitly stated that the June 12, 2006, hearing was, in fact, a hearing on the pending Motion For Summary Judgment and its accompanying Daubert issues. As such, the Brett Alexander Affidavit cannot be considered to be filed in an untimely fashion given that the hearing on the Motion For Summary Judgment and the Daubert issues did not occur until June 12, 2006, more than a month after the service and filing of the Alexander Affidavit.

Unfortunately, the bulk of the June 12, 2006, hearing consisted of the Court stating that it did not require real argument on the pending Motions given the numerous pleadings and memoranda which had been filed by the parties. Instead, the Court utilized the hearing to make certain pronouncements concerning the issue which were before it, several of which bear mention in this Appeal. First, the Court, seeming quite unsure of itself, stated that:

> Now, right or wrong, on May 30th I entered an Order, directing the Appellant, Mr. Gilmer, to do what I just said, under Rule (6)(b) to file for leave to do further discovery [relative to the Brett Alexander Affidavit]. Now, at this point in time, I'm unsettled, and you all will help me. I'm unsettled in my thinking as to whether that Order was proper under the circumstances. Here, if I take the position that the Alexander Affidavit should be stricken, and if it turns out that the Affidavit of Alexander is crucial to the Appellant's case, as far as his testimony in making out a prima facia case, have I [e]ffectively kicked him out of Court. That[s] the query.
> .....
> Now, certainly no judge wants to be reversed for an abuse of discretion. Now that's a two-edged sword. Whatever I do here today, as far as the discovery matter, may be

abuse as you see it, Defendant, or as the Appellant would see it. And I want – I don't' want to be reversed on a discovery violation. Again, that could be both ways.

(Record Volume 10, Hearing Transcript, Page 64, 65).

Following the Court's pronouncements and the questioning of Kilhullen's attorneys and Kansas City Southern's attorneys , the Court ruled that it needed yet another round of briefs on the Daubert issues and thereafter ordered that the parties prepare final briefs for the Trial Court's review.

On June 15, 2006, Kansas City filed their Supplemental Memorandum regarding the Daubert Motion and also in support of the pending Motion For Summary Judgment which was to be heard in the coming weeks. This Supplemental Memorandum was yet another recitation of the issues which were to be argued before the Trial Court. On July 11, 2006, Kilhullen filed his final Supplemental Memorandum in preparation for the hearing on the Daubert Motion and the Motion For Summary Judgment. On July 20, 2006, Kansas City Southern filed its final "Reply", which effectively concluded the Trial Court's post-hearing briefing schedule.

On August 21, 2006, the Trial Court filed its Opinion And Order relative to the Defendants' Motion For Summary Judgment, Daubert Motion and all other pending Motions. In said Opinion And Order, the Trial Court narrowed the issues to the Motion For Summary Judgment and the Plaintiff's Motion To Compel and other discovery issues. The Trial Court commented that:

> A pivotable [sic] date in these proceedings was January 5, 2005, when the Court conducted a hearing on Defendants' Motion For Summary Judgment. [This was the "preliminary hearing]. Up until nearly that date Plaintiff had not designated any expert witnesses, but on the day before said hearing she identified two individuals, Jimmy Shelton and Jimmy C. Halfacre. A goodly portion of that hearing was devoted to Plaintiff seeking to depose thirteen or fourteen fact witnesses, but with Defendant objecting that such discovery was untimely. The Court ultimately ruled by holding in abeyance the quest to depose said fact witnesses, but noted there appeared to be surfacing an issue which would implicate a *Daubert* hearing and determined that in the interest of judicial economy the Court would initially explore whether *Daubert* was implicated herein.

(Record at 1179, Excerpts at 38).

The trial Court went on to examine the Brett Alexander Affidavit, and with no clear explanation other than a short note stating that Halfacre and Alexander had not communicated directly before Halfacre's deposition, declared that:

> ...it appears from the Halfacre deposition that there had been no dialogue between Halfacre and Alexander, all of which requires the Court to give cautions [sic] and limited weight to the Alexander Affidavit.

(Record at 1180, Excerpts at 38-39).

Other than this odd reference, the Trial Court never expounded on the reason why a lack of communication between Halfacre and Alexander warranted giving the Alexander limited weight. The Trial Court did, however, go on to explain that it was basing it's opinion in this matter upon Judge Griffis' dissent in a Mississippi Court of Appeals case, Progressive Casualty Insurance v. All Care, Inc., 914 So.2d 214, (Miss.App.2005).[7] Specifically, the Trial Court declared that:

> In short, the Alexander Affidavit seems to presuppose that Halfacre's methodology was acceptable under the Daubert standards.[8] In a sense it is "bootstrapping in

---

[7] The Trial Court's reliance upon this dissent is perplexing since the dissent is centered around whether an expert in financial damages utilized "unfounded assumptions and speculation" in formulating his opinion. In the case at bar, both Alexander and Halfacre's expert opinions were based upon readily ascertainable data which involved no speculation or unfounded assumptions. In fact, the simple data relied upon by the two experts was collected through the utilization of simple measuring equipment. There was never any allegation that the measurements were in error or that the measurements were speculative. After the required data was collected, it then only became a matter of placing that data into a simple formula to determine the line of sight and travel time.

[8] It is extremely important to note that the methodology used by Halfacre is a universally accepted calculation which has been repeatedly accepted by this Court and other courts throughout the United States. This formula is a well recognized "standard". The only question which was before the Court was whether Halfacre was qualified to correctly utilize this methodology, not whether the methodology is sound since the "time/distance" equation has already been universally accepted.

> reverse". This scenario implicates the relevancy rule as defined in Rule 401, *MRE* and also Rule 403, *MRE*. Regarding said Rule 403, the Court reviewed the case of *Progressive Casualty Insurance vs. All Care, Inc.*, a 2005 COA case cited as 914 So2d 214, this being a case involving a "battle of the experts" in seeking to determine lost profits. Without elaborating, in Progressive there is a very scholarly dissent of Judge Griffith's [sic] which mirrors the cause sub judice insofar as the function of Rule 403. Had the aforementioned flaws[9] been absent, the Alexander affidavit would likely have had probative value as being offered exclusively by one who is a seasoned accident reconstructionist.
>
> (Record at 1186-1187, Excerpts at 45).

The Trial Court failed to elaborate any further on the reasons that Alexander's Affidavit was not given full weight in this matter.

As to the Halfacre Affidavit, the Trial Court first incorrectly stated[10] that said Affidavit was introduced because:

> ...Plaintiff thus recognizing that because there were **no direct eye witnesses to the accident** (other than engineer Robert W. Lay) she would be required to resort to expert testimony to carry the day.
>
> (Record at 1181, Excerpts at 40).

The Trial Court went on to quote directly from Appellees' counsel that there were "dynamics" involved in the accident which required the testimony of an accident reconstructionist. The Court, in its Opinion and Order, never states why this is the case other than to cite dissimilar car collision cases which did not involve line of sight equations or the obstruction of vision at railroad crossings.[11]

---

[9]Despite a reference to certain "flaws" within Alexander's Affidavit, the nature of the alleged "flaws" are not revealed in the Trial Court's Opinion and Order.

[10]As was stated earlier, there was indeed an eyewitness to the accident other than Robert Lay. Ms. Classie Ward of Lena, Mississippi witnessed the accident in it's entirety. The Court, however, prevented the Plaintiff from taking Ms. Ward's deposition when the Court prematurely prohibited the Plaintiff from conducting any other discovery.

[11]Specifically, the Trial Court made reference to Fielder v. Magnolia Beverage, 757 So.2d 925,

In short, the Trial Court made no analysis as to why Halfacre's expert opinion should be disregarded other than to say that Halfacre was not qualified to give testimony in this matter under the Daubert standard.

As to the lay testimony of Jimmy Shelton, the Court rejected his testimony under Rule 701 of the Mississippi Rules of Evidence by stating that Shelton was not an eyewitness to the accident. The Court went on to state that:

> The Court has not expended significant time and space to address the merits of the Jimmy Shelton affidavit, as during the course of the several hearings counsel for Plaintiff readily admitted Shelton's qualifications are limited, so that whatever findings are made against Halfacre would likewise apply to Shelton.
>
> (Record at 1182, Excerpts at 40-41).

Just as with Halfacre, the Court failed to provide any analysis as to why Shelton's experience as a

---

(Miss.1999), which involved the testimony of an accident reconstructionist in a case where a delivery truck impacted a pickup truck. In Fielder, there were questions involving point of impact, angle of travel and other variables which are not present in the instant case. The Trial Court also referred to Jones v. Jitney Jungle Stores of America, Inc. , 730 So.2d 555 (Miss.1998), which involved a situation where a child was struck by a car in a store parking lot. Once again, none of the issues which are present in this case existed in the Jones case. In fact, it is difficult to determine why the Trial Court cited this case since Daubert was not an issue, instead the only issue concerning expert testimony was an expert's use of alleged hearsay evidence which the Supreme Court found to be "harmless error". The Court also relied upon Couch v. City of D'Iberville, 656 So.2d 146, 152 (Miss.1995), which involved the testimony of police officers who had no engineering background which were called to testify in a single care accident. Once again, none of the issues contained within the Couch case are applicable to the case at bar. It is worth noting, however, that the primary reason that the Couch Court disqualified the police officers was that they had no training in engineering. Id. at 152. Clearly, Halfacre's engineering background makes this case moot and may, in fact, help the Appellant's position. The final case relied upon by the Trial Court is Miller v. Stiglet, 523 So.2d 55, 60 (Miss.1988). Miller involved a case where police officers were allowed to testify as accident reconstruction experts in a case where a car skidded on a bridge covered with sand. Once again, not a single issue which is present in the case at bar was present in Miller. [In examining the Trial Court's Opinion and Order, it is evident that the Trial Court mis-cited two out of the four cases examined in this footnote. As such, please use the corrected citations contained herein.]

truck driver should be discounted and why Shelton's observations concerning the line of sight at the railroad crossing should be discounted in their entirety.

In closing, the Court summed up its findings by stating that:

> However, all things being considered and for the reasons shown aforesaid, the affidavits of Jimmy Shelton and Jimmy C. Halfacre are found to have no probative value under the Daubert standard, and the affidavit of Brett Alexander is found to be irrelevant (Rule 402) and is stricken for the reasons shown aforesaid. Due to the nature of the cause, wherein there were no eye witnesses and wherein the Plaintiff's proof was dependent upon accurate accident reconstruction expert testimony the Court finds there to be no genuine issue of material fact, and the Motion For Summary Judgment is sustained.
>
> (Record at 1187, Excerpts at 46).

Therefore, it is clear that the Court's findings in this matter are entirely predicated upon a false assumption, namely that there was no witness to the accident. As was stated previously, Ms. Classie Ward did indeed witness the accident and would be available to testify in this matter. The Court, however, explicitly failed to allow Ms. Ward to be deposed when it prevented the Plaintiff from conducting any further depositions. As such, a material fact witness was excluded from the Court's examination of the Defendants' Motion For Summary Judgment. Presumably, the Court's earlier decision to bar the Plaintiff from deposing Ms. Ward was then forgotten by the Court when the Opinion and Order was drafted. As such, the entire premise of the Court's treatment of the Defendants' Motion For Summary Judgment is flawed and should be discounted due to this major factual error.

SUMMARY OF THE ARGUMENT

The present Appeal unfortunately constitutes a tangled web of interrelated issues which were further muddled by the Trial Court's attempt to hear the Motion For Summary Judgment prematurely. In effect, the Motion For Summary Judgment can be broken down into two main factual issues. First, there is the factual question of whether Kilhullen stopped, looked and listened at the railroad crossing before proceeding over the railroad tracks. As of the writing of this brief, the only person who can testify to that fact, Ms. Classie Ward, has not been deposed and Ms. Ward has not offered a clear opinion on the facts which are necessary to resolve this matter. As such, a clear question of fact exists which cannot be disposed of by way of a Motion For Summary Judgment. Furthermore, the Trial Court made a clear factual error in it's Order granting the Defendants' Motion For Summary Judgment when it declared that there were no eyewitnesses to the collision even though both the Appellant and the Defendants have acknowledged that Ms. Classie Ward observed Kilhullen's movement over the tracks. The Trial Court's failure to acknowledge this key fact clearly constitutes reversible error.

The second factual question which was presented by the Defendants' Motion For Summary Judgment is whether Kilhullen's view of the oncoming train was blocked by vegetation and a mound of earth. This question has both a "lay witness" component and an "expert witness" component. First, there is no requirement in this State's jurisprudence that an expert is required to testify as to an easily discernible fact. In this case, the only question is whether a person who was driving a fully loaded tractor trailer rig could see an oncoming train in time to safely move across the railroad tracks or whether one would see the oncoming train only after he had moved onto the tracks and had no choice but to proceed. In this respect, a lay witness is perfectly capable of creating a question of fact

by testifying that a truck driver could not see an oncoming train. In this matter, a lay witness did indeed testify to that fact. Therefore, a jury question is raised in this matter.

Furthermore, the question of line of sight has an additional expert witness component in this case because, in an effort to provide the Court with absolute surety concerning the line of sight issue, the Appellant submitted the Affidavits of licensed professional engineer Jimmy Halfacre and accident reconstructionist Brett Alexander. Both Halfacre and Alexander both independently concluded that Kilhullen's line of sight was obstructed by vegetation and earth to such a degree that Kilhullen could not have observed the train until after he had moved dangerously close to or onto the tracks and it was too late for him to avoid the collision. It is important to note that even though experts were employed to make this determination, the question of line of sight and the time needed to move across the tracks safely is dictated by a simple mathematical calculation which has been utilized in every railroad case where this question has been presented to a court of law. In fact, this calculation can be easily performed by anyone who is trained in grade-school algebra.

The Defendants, in an attempt to bolster the second prong of their Motion For Summary Judgment, filed a spurious Daubert Motion which sought to exclude the testimony of Halfacre based solely on the fact that Halfacre is not qualified in the field of accident reconstruction. The Appellant, in response, stated unequivocally that training in accident reconstruction is not necessary in this case because the calculations concerning line of sight and transit time do not require any training in accident reconstruction. Instead, the only training which is required is the ability to take measurements and to use those measurements in a simple algebraic calculation. Halfacre, as a licensed professional engineer, was more than qualified to both take the measurements in question and to perform the grade school calculations which were necessary to come to a proper conclusion.

Despite Mr. Halfacre's clear ability to act as an expert in this matter, the Appellant's further submitted the Affidavit of preeminent accident reconstructionist Brett Alexander to the Trial Court. Mr. Alexander has been repeatedly accepted by this Court and other various Mississippi Circuit Court's as an accident reconstructionist who is qualified pursuant to the requirements of Daubert in both railroad accident cases and automobile accident cases. Mr. Alexander is called upon by both defendants and Appellants to reconstruct accidents in situations such as this one. In fact, Mr. Alexander's testimony has been accepted by this Court in at least one identical railroad case which involved the questions of line of sight and transit time.

Mr. Alexander, in preparing his Affidavit in this matter, performed two separate functions. First, Mr. Alexander visited the site in question, took independent measurements and reviewed the facts of this case. After performing this independent investigation, Mr. Alexander concluded that Kilhullen's line of sight was restricted to such a degree that Kilhullen could not have seen the oncoming train until he was dangerously close to or upon the tracks and it was too late to avoid the collision. Second, Alexander reviewed the measurements and calculations which had been made by Halfacre and concluded that Halfacre had indeed made the correct measurements and drawn the correct conclusions relative to the questions of line of sight and transit time. As such, Alexander confirmed that Halfacre's conclusions could, in fact, survive a Daubert challenge. Despite Alexander's unassailable qualifications, the Trial Court chose to give Alexander's opinion no weight in deciding the issue of whether Halfacre was qualified as an expert and, most importantly, the Trial Court chose to ignore Alexander's expert opinion in deciding the line of sight issue in the Defendants Motion For Summary Judgment.

The final issue which is present in this appeal is whether the Trial Court committed reversible

error in this case by failing to allow the Appellant to continue with discovery in this matter even though the Defendants had earlier admitted that discovery was incomplete, several key witnesses (including the eyewitness which the Trial Court later chose to ignore) had yet to be deposed, the Defendants had chosen to conceal the identities of key witnesses until the filing of the Motion For Summary Judgment and the Defendants had not yet fully and completely answered the Appellant's written discovery. The Trial Court, despite being confronted with these facts, chose to prevent the Appellant from completing discovery in this matter even though both the Appellant and the Defendants had stated to the Court that discovery was incomplete and also despite the fact that the Appellant had filed a Motion To Compel discovery responses and had noticed no less than seventeen (17) depositions of key witnesses. Despite these actions, the Trial Court made the errant determination that no further discovery should be undertaken even though it was clear to the parties that discovery was incomplete. This fact is clearly borne out when the Trial Court declared in it's written findings of fact and conclusion of law that there was no eyewitness to the accident despite the fact that the Court had been repeatedly informed that Classie Ward had indeed witnessed the accident and that she should be deposed prior to the Court ruling non the Motion For Summary Judgment. The Trial Court's clear and reversible error exhibits two things. First, because of the Trial Court's unwillingness to allow necessary discovery, the Trial Court was unfamiliar with the facts of this case and therefore could not make an accurate ruling on the Motion For Summary Judgment. Second, it shows that the Trial Court abused its discretion by prematurely ending discovery in this matter before all of the necessary facts had been gathered.

ARGUMENT AND AUTHORITIES

I. Standard of Review

It is well-settled that the Mississippi Supreme Court applies a *de novo* standard of review to the grant or denial of summary judgment by a trial court. Leffler v. Sharp, 891 So.2d 152, 156 (Miss.2004). Summary judgment is appropriate when the evidence is considered in the light most favorable to the nonmoving party, there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. Miss. R. Civ. P. 56(c); Russell v. Orr, 700 So.2d 619, 622 (Miss.1997). *See also*, Hubbard v. Wansley, No. 2005-CA-01055, (Miss.2007). Rule 56(c) of the Mississippi Rules of Civil Procedure allows summary judgment where no genuine issues of material fact exist such that the moving party is entitled to judgment as a matter of law. To prevent summary judgment, the nonmoving party must establish a genuine issue of material fact by means allowable under the rule. Lumberman's Underwriting Alliance v. City of Rosedale, 727 So.2d 710, 712-13 (Miss.1998). When reviewing the granting or the denying of summary judgment, the Supreme Court uses the same standard employed by the trial court under Rule 56(c). The Supreme Court conducts *de novo* review of orders granting or denying summary judgment and looks at all the evidentiary matters before it-admissions in pleadings, answers to interrogatories, depositions, affidavits, etc. The evidence must be viewed in the light most favorable to the party against whom the motion has been made. City of Rosedale, 727 So.2d at 712-13. If any triable issues of material fact exist, the lower court's decision to grant summary judgment will be reversed. Brown v. Credit Ctr., Inc., 444 So.2d 358, 362 (Miss.1984). See also, Clark v. Illinois Cent. R. Co., 794 So.2d 191, 193 -194 (Miss.2001).

II. Whether the Circuit Court of Scott County, Mississippi, erred in granting Defendants Kansas City Southern Railway Company And Robert W. Lay's Motion For Summary Judgment on the issue of the obstruction of Thomas Kilhullen's line of sight at the subject railroad crossing.

The primary issue in the present appeal concerns the Motion For Summary Judgment which was filed by the Appellees. The Appellant would show by way of organization that the issue of lay testimony relative to line of sight, the Daubert issue concerning Halfacre's Affidavit and the procedural and relevance issues concerning Alexander's Affidavit are derivative issues relating to the line of sight prong of the Defendants Motion For Summary Judgment. As to the first issue presented in the Defendants' Motion For Summary Judgment, namely whether Kilhullen stopped, looked and listened at the railroad crossing, it is incontrovertible that a significant issue of fact exists since the Trial Court clearly erred in its judgment by declaring that there were no eyewitnesses to the collision. The sole living witness, Classie Ward, who saw Kilhullen approaching the railroad has not been deposed and has not offered a clear opinion as to whether Kilhullen stopped before proceeding over the railroad tracks. The Affidavit of Classie Ward, which was submitted to the Court by the Defendants, is silent on this issue and other key issues concerning Kilhullen's line of sight.

The witness, Ms. Classie Ward, appears on the accident report and was interviewed by counsel for Appellant prior to the filing of suit. Ms. Ward unequivocally stated that Kilhullen did indeed stop before beginning to move slowly over the railroad tracks. Counsel for Kilhullen recognized that the Appellees took an incomplete and vague Affidavit from Ms. Ward which was submitted in support of Kansas City Southern's Motion For Summary Judgment, hence the request to depose her. Unfortunately, due to the Trial Court's Order which prevented the completion of discovery in this matter, Ms. Ward's testimony was not taken by deposition since the Plaintiff was

barred from engaging in any further discovery. Thus, since the Court clearly ignored Classie Ward's existence in its' judgment by stating that there were no witnesses to the accident and since the Court further barred the Plaintiff from deposing Ms. Classie Ward, it is self evident that the Court committed reversible error by declaring that no issue of fact exists as to Kilhullen's failure to stop, look and listen when a witness to the accident exists. Therefore, it is inescapable that a material issue of fact exists which was wholly and completely purposely ignored or simply overlooked by the Court. As such, it was improper for the Court to grant summary judgment in this matter.

The existence of this omitted and un-deposed eyewitness is particularly important when one examines both prongs of the Defendants' Motion For Summary Judgment. All of the Trial Court's conclusions of law and fact are based upon the Court's errant belief that there was no witness to the accident. As such, the Trial Court's entire decision is called into question by this clear and inescapable error. Furthermore, the question of fact centering around Kilhullen's actions prior to his entry onto the tracks impacts the transit time calculations of both the Plaintiff's experts and the Defendants' experts. In short, in order for an accurate expert opinion to be formulated, and thus the second prong of the Defendants' Motion be addressed by the Court and the parties, it is vital for the experts to know whether Kilhullen was accelerating from a dead stop or not. Thus, the Trial Court's balancing of the Defendants' expert testimony with the Plaintiff's expert testimony is impermissibly tainted by this failure and must be disregarded as a matter of law.

A. Line Of Sight Railroad Jurisprudence

Mississippi jurisprudence concerning summary judgment in line of sight railroad crossing cases is controlled by the Mississippi Supreme Court's decision in Clark v. Illinois Central Railroad Company, 794 So.2d 191 (Miss.2001). The Clark case involved a set of facts which are extremely

similar to the instant matter in that the question presented to the Court was whether the Appellant in the Clark case had presented sufficient proof to create a genuine issue of material fact of a railroad's negligence in allowing excessive vegetation and other physical obstructions to be placed at a railroad crossing.

Just as in the case at bar, a driver (Patricia Martin), was killed by an oncoming train while traversing a railway crossing. Patricia Martin's estate subsequently filed suit claiming that Illinois Central Railroad was negligent in that they allowed excessive vegetation to obstruct Martin's view of the oncoming train. The Martin claim was supported by both photographs and the testimony of Dr. Ken Heathington, a traffic engineer, who opined that the "sight distances from the road looking down the track were 'severely restricted' from all angles." Clark at 194. The Supreme Court, in examining Dr. Heathington's testimony found that:

> Thus, a jury question is presented regarding where clear sight distance down track occurs and whether that amount of space is a reasonable distance to see an oncoming train and stop, given the peculiarities of the crossing. Although Dr. Heathington's report is based upon a slightly elevated train speed, this provides an area ripe for cross-examination by counsel for ICR. Clark at 194.

The Mississippi Supreme Court further announced the standard of care regarding railroad crossings in the Clark ruling and stated that:

> Ordinary care requires the railroad company to meet the unusual conditions of a railroad crossing with unusual precautions, particularly where the dangerous condition results from obstructions of view which prevent a traveler from seeing an approaching train until he is dangerously close to the track. New Orleans & Northeastern R. Co. v. Lewis, 214 Miss. 163, 172, 58 So.2d 486, 489 (1952). The nature of the obstruction and whether one must come dangerously close to the crossing before being able to see the train are factual questions to be resolved by the finder of fact. Badger v. Louisville & N.R. Co., 414 F.2d 880, 882-83 (5th Cir.1969). On point with the factual situation in the case sub judice, it has been held that negligence claims against a railroad that permitted the view at a crossing to become obstructed by trees, bushes, weeds and grass were matters for the jury to decide when a vehicle operator would have to proceed to a point of peril upon or dangerously near

the railroad company's tracks before obtaining an unimpeded view of a train at an appreciable distance. Stacey v. Illinois Cent. R.R., 491 F.2d 542, 544 (5th Cir.1974). Clark v. Illinois Cent. R. Co., 794 So.2d 191 (2001), 194 -195 (Miss.2001).

This holding was echoed a year later in Alabama Great Southern Railroad Company v. Lee, 826 So.2d 1232 (Miss.2002). In Lee, just as in Clark and in the instant case, suit was filed after the occupant of a vehicle was killed as a result of a car-train collision at a railroad crossing. The crossing in question contained vegetation which obscured the line of sight view of the oncoming train. In Lee, the Appellants offered the expert testimony of accident reconstructionist Brett Alexander (the Plaintiff's expert in the instant appeal) who stated that

> ...the vegetation in the southwest quadrant of the crossing obstructed Pigford's view of the tracks and that AGS failed to cut the vegetation to a distance adequate to allow safe crossing. It was the opinion of the Appellants' experts that the sight distance was insufficient to allow Pigford [the driver of the car] enough time to perceive the train and to avoid a collision. Lee at 1235.

The Supreme Court further noted that:

> The Appellants' experts, Al Gonzales and Brett Alexander, testified that the sight triangle at the crossing was inadequate based on the speed of the train and the speed of Pigford's vehicle. Both testified that Pigford did not have enough time, distance, or opportunity to see the train, decide what to do, and carry out that decision. Lee at 1238.

In deciding in favor of the Appellants on a motion for judgment notwithstanding the verdict, both the trial court and the Mississippi Supreme Court concluded that:

> A railroad has a duty to maintain vegetation on its right-of-way and that failure to do so is actionable negligence. Clark, 794 So.2d at 195. The record contains substantial evidence, including a video/audio recording of the accident, which shows the vegetation that allegedly blocked Pigford's line-of-sight. This Court has stated that "[t]he nature of the obstruction and whether one must come dangerously close to the crossing before being able to see the train are factual questions to be resolved by the finder of fact." *Id.* The jury was aware of the requirements of Miss.Code Ann. § 77-9-249, and the jury was left with the sole responsibility of weighing the evidence and determining whether negligence existed. The trial court's refusal to grant AGS an

> instruction on negligence per se did not affect the jury's consideration of the sole or approximate negligence attributable to parties in this case. Lee at 1238.

Similarly, Supreme Court Justice Smith held in Illinois Central Railroad Company v. Hawkins, 830 So.2d 1162 (Miss.2002) that the "issue of whether the train was 'plainly visible' is to be a fact question for the jury". Id. at 1171-1172. In Hawkins, LouBertha Cox and her two sons were killed at a notoriously dangerous railroad crossing in Holmes County which had a line of vegetation that blocked driver's views of oncoming trains. As Cox approached to within 50 to 60 feet of the crossing, she failed to see an approaching locomotive which was traveling at a speed of approximately 52 to 54 miles per hour. As the locomotive approached the crossing, it began sounding its whistle.

Dr. Gary Long, a civil engineer, testified on behalf of the Appellant that when a vehicle is "45 feet from the Mileston crossing that a driver can see approximately 746 feet down the track." Long went on to state that:

> ...it is recommended that at 70 feet a driver should be able to see 715 feet along a railroad track in order to provide adequate time to see a train, and stop if necessary. At the Mileston crossing, however, he noted that at 70 feet from the crossing Cox would have only been able to see 385 feet down the track...
>
> ...the train was traveling at approximately 78 feet per second, which would mean under the laws of physics that it would have had to have been about 664 feet from the crossing when Cox began traveling. If these approximations are true, then when Cox was 70 feet from the tracks, she would have been able to see 385 feet down the track and the train would have only been 373 feet away. Id. at 1170, 1171.

The Supreme Court examined these figures and found, even after questioning whether Cox should have seen the train at this distance, that "[u]nder the case law of this Court, however, whether Cox's sight was obstructed in an unreasonable manner was a fact question for the jury." Id. At 1171. The Supreme Court then went on to affirm the verdict of the trial court in favor of the Appellant.

The statements of law concerning whether obstructions of the line of sight of a driver at a railroad crossing were also echoed by the decision which was handed down by the Mississippi Supreme Court on May 25, 2006, in the case of Irby v. Travis, 935 So.2d 884 , (Miss.2006). Here, a truck and a train collided at the same crossing which was the subject of the Hawkins case, above. The lower court entered a judgment finding that the railroad was 75 percent at fault in the accident and the driver was 25 percent at fault, and awarded damages in the amount of $3,750,000. Following the verdict, the Appellees sought a judgment not withstanding the verdict on nearly identical factual issues concerning the line of sight which was present at the Mileston crossing and the blowing of the train's horn as it approached the crossing. The JNOV motion was denied by the trial court and the Appellees subsequently appealed to the Supreme Court. In Irby, the Supreme Court stated that:

> [B]ased on conflicting testimony as to the existing vegetation at the Mileston crossing on the date of the accident, and the actions of Michael [the Appellant] and the crew members of the train, we are constrained to find, as a matter of well-established law, that there exists in the record evidence of such quality and weight that reasonable and fair-minded jurors, in the exercise of impartial judgment, might have reached different conclusions as to the appropriate verdict. *Id.* Thus, we are unable to find that the trial court committed error in denying Illinois Central's motion for a judgment notwithstanding the verdict; therefore this issue is without merit. Id. at 890.

In the present case, Kilhullen has provided the Court with three witnesses, two expert witnesses and one lay witness, who clearly create material issues of fact relative to the issue of the obstruction of Kilhullen's line of sight. Well settled jurisprudence in the State of Mississippi dictates that the question of whether a driver's sight was unreasonably obstructed by vegetation or other obstructions at a railroad crossing is a jury question which cannot be settled by a ruling on a motion for summary judgment. Despite this jurisprudence, the Trial Court found that no issues of

material fact existed in this case despite the clear precedent which was established in this Court's earlier rulings.

Brett Alexander, Jimmy Halfacre and Jimmy Shelton each provided affidavits and/or deposition testimony to the effect that Kilhullen's line of sight was unreasonably obstructed by the vegetation at the subject railroad crossing and that Kilhullen would not have been able to see the approaching train until it was too late for him to stop his fully loaded tractor trailer rig. The Appellees, in an attempt to discredit Halfacre and Shelton, filed a Motion To Exclude their testimony under the Daubert standard. The Trial Court, in rendering its ruling on the Motion For Summary Judgment, found that both Shelton and Halfacre's testimony was unreliable and should be excluded. Furthermore, the Trial Court completely disregarded the Affidavit of the State's foremost accident reconstructionist, Brett Alexander.

B. The Testimony Of An Accident Reconstruction Expert Is Not Required In The Case At Bar

Contrary to the assertions made by both the Appellee's and the Trial Court, the Mississippi Supreme Court has not yet created a "bright-line" test for cases in which the testimony of an accident reconstructionist is required. Instead, the Mississippi Supreme Court adopted the Daubert standard, which at its core, requires that an expert's principles and methodology "fit" the testimony which is being offered by said expert. Additionally, the proffered expert must obviously be armed with the intellectual capabilities and education to properly apply the principles and methodology which provide the basis for the opinion.

In the case at bar, this determination can be made with relative ease.[12] This civil action does

---

12 Appellant would show that the testimony of an accident reconstruction expert may well be required

not present a situation in which an expert is required to perform numerous, complex calculations concerning the trajectory of multiple vehicles, forces of impact, vehicle damage calculations or other highly complex variables. Instead, the Appellant in the case at bar has based her claim upon a simple and universally accepted formula. In essence, this formula shows that Thomas Kilhullen could not see the oncoming KCS train due to his view being obstructed by vegetation and a mound of earth which was negligently placed beside the railroad crossing by KCS. In order to prove that Kilhullen's view of the oncoming train was obstructed, it is only necessary for the trier of fact to observe the railroad crossing and determine whether Kilhullen's view was indeed blocked by said vegetation and earth.

While it is the Appellant's position that an easily observable condition such as a blocked field of view can be adequately proven by the testimony of lay witnesses and the submission of drawings, measurements and photographs, the Appellant in this matter also offered testimony based upon a simple "line of sight" calculation which is universally accepted in all applicable scientific fields. Unlike an unproven theory, the line of sight calculation is a simple function of trigonometry which can be calculated and understood by anyone with a grade school level education.

The "line of sight" calculation is not the type of computation that requires the use of accident reconstruction techniques or complex fact gathering procedures. Instead, all of the needed data can be gleaned from deposition testimony and the taking of simple measurements at the scene of the

---

in cases which, for example, involve multiple vehicles impacting each other at various rates of speed. In such a case, there are many variables and an expert will be required to "reconstruct" the accident. In the case at bar, there is no need to "reconstruct" the accident in question, instead Halfacre's opinion only relates to sight-distance and transit time, factors which do not require reconstruction of the accident or complicated calculations relating to vehicles impacting one another which would require much more speculation and specialized training.

collision. These measurements can then be inserted into the formula to determine the line of sight visibility and the length of time that it would have taken Kilhullen to move his fully-loaded tractor trailer rig completely through the railroad crossing. The resulting conclusions which are created by the application of the formula to the available data are not "mere speculation" or "theoretical". Instead the conclusions which were reached by utilizing the formula are based upon simple and irrefutable mathematics of the type which the a court can take judicial notice.

It is the Appellant's position that although a formula was used and calculations were performed, an expert is not required to create a question of fact sufficient to cause this matter overcome summary judgment. Instead, the present case is one in which both lay testimony and expert testimony are both relevant and admissible because both personal observations and technical conclusions serve to show that Kilhullen's line of sight was obstructed by vegetation and an earthen mound such that the oncoming train was not visible to him. As such, based upon the jurisprudence cited above including the Clark, Lee, Hawkins and Irby cases, a jury question is presented regarding clear sight distance relative to the subject railroad track.

The Court, in its Opinion and Order, places great emphasis upon the Mississippi Supreme Court's ruling in Jones v. Jitney Jungle Stores of America, Inc., 730 So.2d 555 (Miss.1998) for the proposition that Halfacre's opinion's are only admissible if he is qualified in the field of accident reconstruction. Once again, Appellant would show that the Court stretched its use of Jones and its progeny beyond the breaking point. This line of cases does not provide any sort of analysis as to what does or does not constitute accident reconstruction testimony or in which cases accident reconstruction testimony is required. Instead, these cases merely state that a proposed expert who is offered for the express purpose of providing accident reconstruction testimony must have the

training and experience which is commensurate with the proposed testimony. In Jones, for example, a defendant offered the testimony of a Department of Public Safety Trooper who had witnessed the accident in question. The trial court allowed the untrained trooper to provide both accident reconstruction testimony and hearsay testimony. The Supreme Court, in reviewing the matter, found that no reversible error had occurred by allowing the Trooper to testify as an accident reconstructionist. In fact, the qualifications of an expert are barely mentioned in the Jones case.

The Trial Court further relied upon Fielder v. Magnolia Beverage Co, 757 So.2d 925 (Miss.1999) in support of its Opinion that the testimony of an accident reconstructionist was required in this matter. In Fielder, an expert was called upon to reconstruct an automobile accident where a truck allegedly forced a car into a bridge abutment. The analysis of the accident was particularly difficult because the two vehicles did not even collide with each other. Therefore, there was very little physical evidence which would provide a proper basis for liability. In order to overcome these shortcomings, the defendant employed an expert in an attempt to prove that the Appellants' vehicle was speeding at the time that it ran off of the road at a sharp curve. The Fielder expert was forced to examine a number of highly complex variables and was provided almost no physical evidence. Therefore, said expert was truly required to "reconstruct" the accident in question using his specialized training to determine the cause of the accident.

This situation present in the instant appeal is completely distinguishable from Fielder because in this matter all of the data is available and no speculation or "reconstruction" is required. Instead, the data is provided by measurements and testimony. The data is then subjected to an algebraic process which yields a firm scientific conclusion which shows the line of sight which was available to Kilhullen and the time which was required for Kilhullen to safely move over the tracks after he

stopped his vehicle at the railroad crossing. These conclusions do not require the same sort of intense factual "reconstruction" as was required in Fielder, and therefore, an accident reconstruction expert is not required. Fielder merely stands for the proposition that extremely complex accident reconstruction cases may require an expert that is trained in complex automobile accident reconstruction. Those cases which are less complex, such as the case at bar, would obviously not require an expert which is trained in all aspects of accident reconstruction. Otherwise, this Court would be required to utilize a "one size fits all" level of analysis which would ignore the individual facts of a case. The use of this grossly simple level of analysis would fly in the face of the Daubert requirements.

In short, the Appellant would show that the Court, in finding that accident reconstruction testimony was required in this case, erred attempting to make Halfacre's testimony appear more complicated and convoluted than it really is. The mathematical problem which was presented to Halfacre can be compared to a grade school level algebra equation. Halfacre's opinion does not involve the type of theory or conjecture which gives rise to "accident reconstruction" testimony. Instead it only involves the application of known facts which can easily be measured and ascertained. Those measurements were then applied to an equation so that sight distance and reaction time could be calculated. These conclusions, in turn, show that Kilhullen could not have reacted in time to avoid being hit by the subject train after he stopped his truck within the distance provided by law and began proceeding forward over the tracks. Therefore, within the context provided by Clark, Lee, Hawkins and Irby, the Trial Court erred both in finding that an accident reconstruction expert was necessary in this matter and the Trial Court further erred by finding that Halfacre was not qualified to give an opinion as to the simple calculations performed in this case.

C. The Daubert Standard And It's Application To The Case At Bar

The United States Supreme Court first clarified the federal standard for the admission of expert testimony in Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). In so doing, the Court recognized that the Federal Rules of Evidence had overruled the previous test for the admission of expert testimony, Frye v. United States, 293 F. 1013, 1014 (D.C.Cir.1923). Frye had applied a "general acceptance" test for the admission of expert testimony, whereby "a scientific technique" is inadmissible unless the technique is "generally accepted" as reliable in the relevant scientific community. Daubert, 509 U.S. at 584, 113 S.Ct. 2786. Daubert, by contrast, changed this requirement and held that an expert's testimony should be admissible if it is both relevant and reliable. Id. at 589, 113 S.Ct. 2786.

The United States Supreme Court held that judges must determine the admissibility of expert testimony by applying a two-step inquiry: "the trial judge must determine at the outset...whether the expert is proposing to testify to (1) scientific knowledge [reliability] that (2) will assist the trier of fact to understand or determine a fact in issue [relevance]." Id. In answering this inquiry, the Daubert Court urged judges to use a non-exhaustive list of factors to help determine the admissibility of expert testimony:

(1) whether the theory can be, and has been, tested;

(2) whether the theory has been published or subjected to peer review;

(3) any known rate of error; and

(4) the general acceptance that the theory has garnered in the relevant expert community.

Id. at 593-94, 113 S.Ct. 2786.

In further describing the admissibility of expert testimony, the Daubert Court emphasized that

"[t]he inquiry envisioned by Rule 702 is...*a flexible one.*" Id. at 594, 113 S.Ct. 2786. The Court also stated that "an expert is permitted wide latitude to offer opinions, including those that *are not based on firsthand knowledge or observation.*" Id. at 592, 113 S.Ct. 2786.

In Miss. Transp. Comm'n v. McLemore, 863 So.2d 31 (Miss.2003), the Mississippi Supreme Court adopted the Daubert standard and finally rejected the Frye test. In McLemore, the Mississippi Supreme Court also clarified the role of the trial court as "gatekeeper" and stated that: "whether testimony is based on professional studies or personal experience, the 'gatekeeper' must be certain that the expert exercises the same level of 'intellectual rigor that characterizes the practice of an expert in the relevant field.' " Id. at 37-38 (quoting Kumho Tire, 526 U.S. at 152, 119 S.Ct. 1167).

In summary, McLemore reiterated that the trial court's job is to perform a two-pronged inquiry:

(1) whether the expert's testimony would be relevant, and

(2) whether the proposed testimony is reliable.

Id. at 38. The Court further reiterated Daubert's proclamation that the determination of whether to allow an expert to testify is "flexible." Id.

The Mississippi Supreme Court recently clarified the application of the Daubert test in Tunica County v. Matthews, 2006 WL 948057, 4 (Miss.2006):

> The Court in Daubert adopted a non-exhaustive, illustrative list of reliability factors for determining the admissibility of expert witness testimony. The focus of this analysis "must be solely on principles and methodology, not on the conclusions they generate."

The Mississippi Rules of Evidence, as amended to reflect the Daubert standard, require that a trial judge first determine whether the proposed testimony is relevant and will assist the trier of fact. After relevance is determined, the Court must then determine whether the subject matter of the

testimony is of the type and kind (scientific, technical or specialized) that would require expertise in a certain field. Third, if expert testimony is required, the Court must determine whether expert is qualified to render an opinion based upon said expert's knowledge, skill, experience, training or education. Finally, the Court then determines whether the methodology used by the expert is valid. At no point during the process does the Court test the validity of the conclusion offered by the expert, instead the Court's function is to test the validity of the expert and the validity of the expert's methodology.

Ultimately, the application of the Daubert test in a case such as this one is relatively simple. Unlike the situation which is presented in complex litigation involving a multitude of untested or exceedingly complex scientific theories, the Appellant in the case at bar has based her claim upon a simple and universally accepted formula. Namely, Thomas Kilhullen could not see the oncoming KCS train due to his view being obstructed by vegetation and a mound of earth which was negligently placed beside the railroad crossing by KCS. In order to prove that Kilhullen's view of the oncoming train was obstructed, it is only necessary for the trier of fact to observe the railroad crossing and determine whether Kilhullen's view was indeed blocked by said vegetation and earth.

While it is the Appellant's position that an easily observable condition such as a blocked field of view can be adequately proven by the testimony of lay witnesses and the submission of drawings, measurements and photographs, the Appellant in this matter has also offered testimony based upon a simple "line of sight" calculation which is universally accepted in all applicable scientific fields. Unlike an unproven theory, the line of sight calculation is a simple function of trigonometry which can be calculated and understood by anyone with a grade school level of education.

The "line of sight" calculation is also not the type of computation that requires the use of

accident reconstruction techniques or complex fact gathering procedures. Instead, all of the needed data can be gleaned from deposition testimony and the taking of simple measurements at the scene of the accident. These measurements can then be inserted into the formula to determine the line of sight visibility and the length of time that it would have taken Kilhullen to move his fully-loaded tractor trailer rig completely through the railroad crossing. The resulting conclusions which are created by the application of the formula to the available data are not "mere speculation" or "theoretical". Instead the conclusions which were reached by utilizing the formula are based upon simple and irrefutable mathematics.

It is the Appellant's position that although a formula was used and calculations were performed, an expert was not required to create a question of fact sufficient to cause this matter overcome summary judgment. Instead, the present case is one in which both lay testimony and expert testimony are both relevant and admissible because both personal observations and technical conclusions serve to show that Kilhullen's line of sight was obstructed by vegetation and an earthen mound such that the oncoming train was not visible to him. As such, under both the Clark and Lee cases, a jury question is presented regarding where clear sight distance down a railroad track occurs and whether that amount of space is a reasonable distance to see and react to an oncoming train.

III. Whether the Circuit Court of Scott County, Mississippi, erred in rejecting the Affidavit of Appellant's licensed Professional Engineer, Jimmy C. Halfacre.

In responding to Kansas City Southern's Motion For Summary Judgment, the Appellant offered the testimony of licensed professional engineer Jimmy Halfacre. Halfacre is a Registered Professional Engineer who received his engineering degree from Mississippi State University and subsequently received a Master of Business Administration at Mississippi College. In the past, Halfacre has been responsible for engineering multi-million dollar electrical projects and has

managed various large volume electrical power related businesses. In addition to his highly technical electrical work, Halfacre also owns and operates a successful home inspection business. In the period following the Trial Court's decision in this matter, Halfacre has been retained to render expert opinions in multiple cases involving the devastation wrought Hurricane Katrina. These cases involve complex engineering and mathematical problems relating to the interaction of wind and water and the resulting damage to structures.

The lower court, in examining the propriety of Halfacre's testimony, did not render a detailed opinion as to why Halfacre's expert opinion should be disregarded under the Daubert standard. Instead, the Trial Court made a somewhat conclusory finding that Halfacre's testimony had no probative value because he was not an accident reconstructionist. The Court, in coming to this conclusion, evidently focused only upon Halfacre's background in structural and electrical engineering, while completely ignoring the purpose for which Halfacre's testimony was offered and the methodology used by Halfacre in reaching his conclusions. Pursuant to the Daubert standard, these issues of relevance and methodology are the key components to a determination of whether a person is qualified to give an opinion. In short, the expert must have the capability to render an opinion on the proffered subject matter. If these two factors are considered, it is clear that Halface not only passes the Daubert test, but that his qualifications as an engineer propel him well past the minimum standard given his function in this case.

Although the Court apparently characterizes Halfacre's testimony as an opinion based upon "accident reconstruction", a simple review of Halfacre's observations and calculations reveal that his testimony has little, if anything, to do with traditional accident reconstruction testimony. Instead, Halfacre's opinions concern only the "line of sight", which is the fundamental question in this case.

Once again, this calculation is only a function of trigonometry which involves a widely accepted formula into which certain known (and very basic) measurements are entered to achieve a result. This formula only requires that one investigate and determine the velocity of the train and the distance the passenger vehicle or truck stops from the crossing in order to determine the "minimum sight-triangle leg" or "line of sight" which is required to perceive an oncoming train. This results of this calculation then determine whether or not a sufficient sight distance existed for a person stopped at the crossing to see or react to an oncoming train within the time period required to avoid a collision.

The formula in question is contained within the treatise Train Accident Reconstruction and FELA and Railroad Litigation[13] which was authored by James R. Loumiet, an engineer, and William G. Jungbauer, an attorney. This formula has been utilized in multiple railroad cases which have been litigated in Mississippi and throughout the entire nation. This formula is also the universally accepted scientific method which is utilized in determining whether an adequate line of sight exists at railroad crossings or whether the line of sight is obstructed so as to create an unsafe railroad crossing. The formula is as follows:

$$T=1.47*Vt\ \frac{(Vg)}{a_1 Vg} + \frac{(L+2D+W-d_a)}{} + J$$

T= minimum sight-triangle leg along the railroad tracks needed by a stopped highway driver (in feet).

13

The Appellees have previously made much of the fact that the name of the treatise use by Halfacre is evidence that Halfacre's testimony is "accident reconstruction testimony", the Plaintiff would show that the formula used by Halfacre was not of the type or kind that requires "reconstruction" of the accident or the type of theoretical inquiry for which an accident reconstruction expert would be helpful. Instead, Halfacre's testimony is simply based upon a calculation utilizing readily available information for which no expertise in accident reconstruction is required.

Vt= velocity of train (in miles per hour).

Vg= minimum speed of highway vehicle in first gear (in feet per second).

a_1= acceleration of highway vehicle in first gear (in feet per second, per second).

L= length of highway vehicle (in feet).

W= distance between outer rails (in feet).

D= clearance distance from the front of the highway vehicle to the nearest rail.

J= sum of perception-reaction time of the highway driver and time required to activate the clutch or an automatic shift (in seconds).

Da= distance highway vehicle travels while accelerating to maximum speed in first gear (in feet, $da=Vg*2/2*a_1$).

After thoroughly examining the crossing in question, measuring the required distances and examining photographs of the crossing at the time of the collision, Halfacre stated that:

> I have studied, walked upon, employed instruments to support my calculations and otherwise scrutinized the topographic characteristics of the grade crossing existing at the site of the accident. I observed several trains traveling at varying speeds over the grade crossing, said trains traveling from east to west and west to east. I had the opportunity to position myself and my engineering instruments at the same location the Kilhullen tractor-trailer unit would have been positioned on the day of the subject accident. I physically observed the point at which Kilhullen could have first seen the nose of the engine that Robert Lay was operating when Kilhullen was positioned approximately fifty feet (50') from the railroad crossing, and lesser distances proceeding toward the railroad crossing. I utilized engineering instruments to establish the line of sight and visibility to the east along the railroad track to assist me in calculating the distance one could first visualize the oncoming train approaching from the east. I assumed the speed of the subject train to be fifty (50) miles per hour. I assumed that the Kilhullen truck was situated approximately fifty feet (50') from the grade crossing with a maximum speed of approximately one (1) to two (2) miles per hour as stated in Robert Lay's deposition. I considered the length, weight and other physical characteristics of the road surface and the tractor-trailer rig involved in the accident. I considered the angle of intersection of the grade crossing and Herring Road. I considered and studied the changes in elevation of the right-of-way to the east, north and northeast making up the railroad track and right-of-way. The line of visibility to the east along the north side of the railroad track is obstructed by the natural topography or earth and trees existing upon the right-of-way as a result of the

> railroad bed having been excavated and the natural elevation materially decreased by several feet to accommodate the laying of the railroad track to a level condition. This "mound" of natural earth with medium growth trees and ground vegetation following the natural contour of adjoining land and the right-of-way obscures the presence of an oncoming train from the east until the train is dangerously close to the crossing. By measurements and calculations, I found the line of sight visibility to be approximately four hundred forty-seven feet (447'). Although a train whistle or horn might be audible for a much greater distance, Kilhullen's first opportunity to observe the presence of the train would have been when the train was within four hundred forty-seven feet (447') of the grade crossing. Based upon the facts, measurements and calculations mentioned above, this would have provided Kilhullen approximately six (6) seconds to cause his tractor-trailer rig to move through the distance of fifty feet (50') to the north of the grade crossing to a point completely clearing the railroad track to the south. Based upon my training and experience as a professional engineer, employing sound engineering principles and the laws of physics, it was physically impossible for Kihullen to visualize the train, comprehend and react to its presence a sufficient distance to the east to allow him to safely move the tractor-trailer rig across the tracks to a point of safety to the south of the grade crossing or otherwise control the tractor-trailer unit by preventing it from becoming dangerously close to or upon the railroad track. The obstructions mentioned above prevented Kilhullen from seeing the approaching train until he was dangerously close to the railroad track. (Record Excerpts at 20).

Halfacre, therefore, unequivocally concluded that Kilhullen's line of sight was obstructed to such a degree by the mound of earth and vegetation that he could not have viewed the oncoming train until it was too late to avoid the collision. This testimony is based on a thoroughly tested and published formula which is widely used in the train collision field to determine "line of sight" and reaction time. Additionally, the use of this formula to determine Kilhullen's reaction time and the needed line of sight is clearly relevant in that the negligence of the KCS Appellees hinges (in part) upon whether Kilhullen's line of sight was obstructed at the time of the collision.[14]

---

[14] The Appellees previously argued that there were other variables and factors which were not contemplated by Halfacre in making his determination. The Appellees failed to cite any scientific basis for the necessity of including those factors in the "line of sight" determination. These variables are not necessary for determining line of sight in this case and are not relevant to this Court's determination of the admissibility of Halfacre's testimony under the Daubert standard. Instead, these

The formula in question is not one that poses any rate of error since it is not "theoretical", but is instead firmly grounded in the mathematics which dictate the movement of vehicles and the sight distances required to react to oncoming trains. This formula was tested by the authors of Train Accident Reconstruction and the formula in question has been repeatedly allowed by both state and federal courts throughout the United States. In fact, the Trial Court did not question the propriety of the "line of sight" formula, but instead only questioned Halfacre's qualifications to apply said formula.

Therefore, the only determination which the Trial Court should have been making relative to Halfacre's testimony is whether Halfacre was qualified to use his engineering tools to measure the distances in question and perform a simple calculation. Clearly, Halfacre's extensive engineering background qualified him to measure the distances in question. This was a simple matter of determining lengths and widths. There are no theoretical calculations involved in determining this data. In fact, it is as simple as using a tape measure or other tools to determine distance. Once these distances were determined, Halfacre was only required to use those findings, together with the sworn testimony of the train engineer regarding the speed of the train, and insert those values into the equation. The resulting "minimum sight-triangle leg" value determines the required clear "line of

---

factors amount to potential defenses to Halfacre's conclusions and are therefore not relevant to this Daubert inquiry. The same holds true relative to the Affidavits of Gil Sharp and Classie Ward which the Appellees offered as a basis for summary judgment. The point of a Daubert inquiry is not to attack the conclusions of the expert. Instead the Court must only examine the admissibility of the expert's testimony. The Appellees will presumably have an opportunity to offer this information as a rebuttal to Halfacre and Alexander's testimony at trial just as the Appellees in Clark had an opportunity to dispute the particularities of the calculations used by the Appellant's expert in that case. Furthermore, the only significant variable which would apply in this matter is whether Kilhullen stopped at the railroad tracks or not. As stated earlier, this is a question of fact which the Trial Court purposefully prevented the parties from exploring when the Trial Court prematurely prohibited further discovery and prevented the parties from deposing Classie Ward.

sight" for that railroad crossing. This is then compared with the actual "line of sight" (as measured by Halfacre) to determine if Kilhullen was able to see the train or if the train was blocked by vegetation and earth. Halfacre made the simple determination that Kilhullen could not see the oncoming train because of the presence of the vegetation and the mound of earth.

The Circuit Court, in making its Daubert determination, incorrectly found that Halfacre's expert testimony in this matter as to the sight distance which was present at the subject railroad crossing and the transit times should be considered "accident reconstruction" testimony. The Circuit Court further found that Halfacre was not qualified to provide expert testimony as to sight distance and transit time since Halfacre has not received specific training in accident reconstruction. It is the Appellant's position that training in "accident reconstruction" is not necessary in this case given the nature of the measurements and calculations which provide the basis for Halfacre's opinion and the relative complexity of the factual questions in this case as compared to cases in which accident reconstruction testimony may be required.

The Appellant's expert, Jimmy Halfacre, is a professional civil engineer who received extensive training at a collegiate level in both math and physics and is therefore clearly qualified to offer an opinion relative to a matter involving simply mathematics and measurements. In fact, Appellant would show that Halfacre has received more training in the areas which are at question in this case than most of the accident reconstruction experts who have been allowed to testify in similar cases throughout the State of Mississippi. As was communicated to the Trial Court, an accident reconstructionist is more than likely a retired law enforcement officer with a high school education and the benefit of a six week training course. The training course does not provide the extensive mathematical and physics training which one would receive in order to receive a degree

in engineering and later become qualified as a professional civil engineer. In fact, there can be no question that Halfacre's extensive educational background and experience in the field of civil engineering provide him with a battery of information which would not otherwise be available to one who only received training in accident reconstruction.

Additionally, an examination of Mississippi jurisprudence in the area of train collisions shows that civil engineers are often called upon to testify as to issues concerning railroad crossing safety. In the Hawkins case which is cited above, a civil engineer was allowed to testify in a case which is remarkably similar to the case at bar. Furthermore, an examination of the case of Bowman v. CSX Transp., Inc., 931 So.2d 634, 9-10 (Miss.App.2006), reveals that both the plaintiff and the defendant were allowed to present expert testimony of civil engineers as to the safety of a railroad crossing grade.

Similarly, in Illinois Cent. Gulf R.R. Co. v. Milward, 902 So.2d 575, 578 (Miss.,2005) a civil engineer was allowed to testify as to the safety of a railroad crossing. ("Dr. Kenneth Heathington, of Knoxville, Tennessee, was called by Milward as an expert. Dr. Heathington testified that he was a civil engineer."). A civil engineer was again allowed to testify as to railroad operations and safety in the case of CSX Transp., Inc. v. Miller, 159 Md.App. 123, 176, 858 A.2d 1025, 1056 (Md.App.,2004). In Williams v. Northeast Illinois Reginal Commuter R.R. Corp., 2002 WL 1433724, 6 (N.D.Ill.) (N.D.Ill.,2002), a civil engineer and expert in construction was allowed to testify as to railroad safety. ("Mr. Gebler is a civil engineer and an expert in construction. The Court does not require an expert in the railroad industry where it finds the witnesses' expertise in other areas is relevant and sufficient. Neither Mr. Burg nor Mr. Gebler are required to cite to a statute, rule or regulation to prove their respective points. At the summary judgment stage, the Court must not

make credibility determinations; such a province is for the trier of fact only. Thus, the Court holds that Mr. Williams has provided sufficient expert testimony for the trier of fact to make the decision as to their credibility.")

In Brown v. National Railroad Passenger Co., 221 F.3d 1338, 2000 WL 817673, 3 (7th Cir.(Ill. (C.A.7 (Ill.),2000), the defendant railroad utilized a civil engineer to testify as to the safety of a railroad crossing. In Wightman v. Consolidated Rail Corp., 86 Ohio St.3d 431, 434, 715 N.E.2d 546,549 - 550 (Ohio,1999) a civil engineer was allowed to testify as to railroad crossing grade issues. In Smick v. City of Philadelphia, 161 Pa.Cmwlth. 622, 638 A.2d 287 (Pa.Cmwlth.,1994) a "civil engineer was properly allowed to testify as expert witness, in personal injury action brought against city by trolley operator injured in derailment". In Moore v. County of Scotts Bluff, 1993 WL 70940, 2 (Neb.App.,1993) a civil engineer was allowed to give expert testimony regarding railroad crossings. In Brennan v. Wisconsin Cent. Ltd., 227 Ill.App.3d 1070, 591 N.E.2d 494, 169 Ill.Dec. 321 (Ill.App. 2 Dist.,1992) a civil engineer and land surveyor was allowed to give expert testimony as to the common law standards relating to a safe railroad crossing. In Richard v. Missouri Pacific R. Co., 536 So.2d 755, 759 (La.App. 3 Cir.,1988) a civil engineer and land surveyor was used by a defendant railroad to provide expert testimony as to "sight distance" measurements.

In the Mississippi case of Hales By and Through Williams v. Illinois Cent. Gulf R. Co.,718 F.2d 138, 140 (C.A.Miss.,1983), a plaintiff was allowed to utilize the testimony of a professional civil engineer as an expert witness. ("[The civil engineer] testified that an unobstructed view down the railroad tracks from a distance of just eighty feet from the crossing would not give a motorist traveling twenty to twenty-five miles per hour, in a car similar to that which Hales was driving, time to come to a safe stop, if a train were approaching the crossing."). In the Mississippi case of Young

v. Illinois Cent. Gulf R. Co., 618 F.2d 332 (C.A.Miss., 1980) it was decided that the expert testimony of an experienced civil engineer should have been allowed in a railroad collision case. In South v. National R. R. Passenger Corp. (AMTRAK), 290 N.W.2d 819 (N.D., 1980) an expert's testimony was again allowed in a train-vehicle collision case. ("In action brought by motorist against railroad for damages sustained as result of collision between pickup truck owned and driven by motorist and railroad's train at a city crossing, trial court did not abuse its discretion by admitting expert testimony of a civil engineer as to general standards of construction and design of highways and traffic control devices and various aspects of the accident crossing which rendered the crossing extrahazardous or dangerous.").

Appellant would show that the Trial Court's role as a Daubert "gatekeeper" in this matter only required that the Court examine the proposed expert testimony of Halfacre and then determine if Halfacre was competent to give such testimony. The Appellees attempted to unnecessarily complicate this matter by comparing this case to other dissimilar cases in which more complicated automobile collision issues were examined by experts. Halfacre was being offered for completely different purposes than the experts which were offered in the cases cited by the Appellees and upon which the Trial Court made its determination that Halfacre was not qualified to be an expert in this matter.

In this case, Halfacre was testifying as to the sight distance and transit time of Kilhullen's vehicle. The conclusions reached by Halfacre are based upon a universally accepted formula which only required the entry of easily ascertainable known measurements which Halfacre was able to obtain with his engineering equipment. The Trial Court, in its examination of Halfacre's qualifications to testify in this matter, should only have examined the methodology used by Halfacre

and then determined if Halfacre has the requisite educational background and training to implement said methodology. In essence, the applicable test is a simple examination of whether the proposed expert "fits" the testimony which is given. As such, the Trial Court's Daubert inquiry should have been limited to an inquiry into the specific testimony which is being offered and the relative complexity of that testimony. The Trial Court instead failed to examine Halfacre's testimony in light of his qualifications and made the blanket determination that Halfacre was not qualified to give accident reconstruction testimony. Clearly, this was reversible error given that Halfacre is qualified to make measurements and perform calculations based upon his civil engineering background. As such, he should have been qualified as an expert in this matter.

Although the Appellant would show she unequivocally demonstrated to the Trial Court that Halfacre was indeed independently qualified to offer his expert opinion, Appellant in this matter went one step further by obtaining the Affidavit of Brett Alexander. Alexander's Affidavit was obtained after the Trial Court expressed its desire to perform a Daubert inquiry in this matter. Mr. Alexander was called upon by the Appellant to thoroughly review Mr. Halfacre's measurements and testimony in order to test the sufficiency of the methods used by Halfacre.[15] Alexander was also called upon to make an independent determination as to whether Kilhullen's line of sight was blocked to such a degree as to make the railroad crossing unsafe. Alexander performed independent

---

15

The Appellees, in their filings with the Circuit Court, also repeatedly argued that Halfacre's opinion was not relevant because Kilhullen was performing an unlawful act by trying to "beat" the train. Appellant would show that this argument is fallacious because Halfacre never couched his opinion in this fashion. Instead, Halfacre opined that Kilhullen's vision was blocked to such a degree that he could not safely move his vehicle through the crossing. Halfacre never testified that Kilhullen was attempting to "beat" the train. At any rate, this issue is not one which can be examined in a summary judgment context. It is, instead, a question of fact which must be examined by a jury.

calculations and rendered the opinion that the railroad crossing was indeed unsafe.

Mr. Alexander, who has testified in many railroad crossing cases in the past (including a case which was nearly identical to this one), opined that Halfacre's calculations were correct and further concurred with Halfacre's findings. The sworn Affidavit of Mr. Alexander (who is one of Mississippi's most prominent accident reconstruction experts and who is also a professor of accident reconstruction at the University of Southern Mississippi) clearly shows that Halfacre's conclusions are correct. The Trial Court discounted Alexander's Affidavit and found it irrelevant even though it showed without question that the methodology utilized by Halfacre was correct, therefore completely mitigating any concerns regarding Halfacre's qualifications pursuant to Daubert. In addition, Alexander rendered his own **independent** opinion that Kilhullen "was not provided a clear line of sight adequate to enable Kilhullen to see the approaching train, react to the presence of the train, and safely pass through the grade crossing." Therefore, the Trial Court unquestionably committed a reversible error by ignoring Alexander's affirmation of Halfacre's testimony. The Trial Court further committed reversible error by ignoring the expert opinion of the State's foremost accident reconstructionist.

IV. Whether the Circuit Court of Scott County, Mississippi, erred in rejecting the Affidavit of preeminent Accident Reconstructionist Brett Alexander.

Clearly, standing on its own, Halfacre's affidavit should have been allowed under the precedent listed above. A professional civil engineer who receives extensive training at a collegiate level in both math and physics is clearly more qualified to offer an opinion relative to a matter involving simply mathematics and measurements compared to an average "accident reconstructionist" who is more than likely a retired law enforcement officer with a high school

education and the benefit of a six week training course.[16] Halfacre correctly applied the accepted principles of line of sight as provided by the generally accepted treatise on line of sight measurements, Train Accident Reconstruction and FELA and Railroad Litigation. However, in a further effort to show to the Court that Halfacre correctly applied the principles stated in said treatise, Appellant then offered the Affidavit of Brett Alexander who testified that he reviewed Halfacre's calculations and results and found them to be correct.

As was properly disclosed to KCS Appellees, Brett Alexander was employed as a consultant and expert by the Appellant in order to provide an additional opinion in this matter relative to the line of sight question. After KCS filed their Daubert Motion as to Halfacre, Mr. Alexander was called upon by the Appellant to thoroughly review Mr. Halfacre's measurements and testimony in order to test the sufficiency of the methods used by Halfacre. Mr. Alexander, who has testified in many railroad crossing cases in the past (including one nearly identical to the case at bar), opined that Halfacre's calculations were correct and further concurred with Halfacre's findings. Mr. Alexander stated that:

---

[16]Appellant would show that in the central Mississippi area, there are numerous accident reconstructionists who have been accepted as experts who never received college degrees. Alexander teaches accident reconstruction at the University of Southern Mississippi and most of his students are police officers without college degrees. Alexander has informed the Court by way of his Affidavit that Halfacre is qualified to make the calculations and that Halfacre used the correct methodology in this matter. In fact, Appellant would show that Halfacre can be viewed as more qualified than Alexander by virtue of his experience and college training. By way of analogy, if a cardiovascular surgeon gave an expert opinion regarding surgery upon surgery on the vascular system of one's foot, it could be argued that the cardiovascular surgeon is not qualified because he is not a podiatrist. However, the cardiovascular surgeon's opinion as to the foot would be allowed by virtue of his training and experience in surgery and by virtue of the fact that the surgery on the foot involved the cardiovascular system. It is the same situation with an engineer, who has all of the same training and experience as an accident reconstructionist and who would be qualified (and in fact better qualified) to offer the same expert opinion as an accident reconstructionist.

I have studied the calculations, drawings and deposition of Engineer Jimmy C. Halfacre. I have examined the deposition of the person operating the train, Robert W. Lay. I have examined the grade crossing constituting a part of the subject matter of this civil action. I have observed trains passing over the subject grade crossing. I have examined the photographs of the scene of the accident taken on the day of the accident or shortly thereafter. I have physically examined the topographic nature of the grade crossing, particularly to the east of the accident site.

I rely in part upon the learned treatise, Train Accident Reconstruction and FELA & Railroad Litigation, by James R. Loumiet, an engineer, and William G. Jungbauer, an attorney. The Kilhullen accident involved a passively-controlled crossing with no cross guard to prevent entry upon the railroad track. The subject railroad crossing is a sight restricted crossing.

Engineer Jimmy Halfacre correctly relied upon this proposition in his time-distance, perception reaction time analysis. I have also utilized this proposition as a basis for my opinions stated herein.

Engineer Jimmy Halfacre correctly employed the equation for the sight-triangle leg, T, along the railroad track. I am familiar with the equation that Mr. Halfacre used in his calculations. The equation is uniformly accepted by the academic community as an appropriate method of sight-triangle calculation. I used Mr. Halfacre's drawing and measurements and the equation as a basis for my opinion in this case.

Based upon my training and experience, I agree with the engineering procedures and computations performed by Engineer Jimmy C. Halfacre. I concur in Mr. Halfacre's opinion and it is my opinion that Kilhullen, the operator of the tractor-trailer rig, was not provided a clear line of sight adequate to enable Kilhullen to see the approaching train, react to the presence of the train, and safely pass through the grade crossing.
(Record Excerpts at 28).

The sworn Affidavit of Mr. Alexander (who is one of the most prominent accident reconstructionists in the state and whose testimony is widely accepted) clearly shows that Halfacre's conclusions are correct. Alexander's Affidavit also constituted a second expert report which was relevant in that Alexander made independent measurements at the site and also concluded that Kilhullen's line of sight was restricted by obstructions.

The Trial Court, in examining Alexander's Affidavit, came to the somewhat perplexing conclusion that Alexander's Affidavit should be given reduced weight because of it was filed after the lower court announced that it was going to conduct a Daubert inquiry into Halfacre and Shelton's

testimony. This is particularly strange because, by the Court's own statement, the final hearing on the Defendants' Motion For Summary Judgment had been held in abeyance pursuant to the Trial Court's January 25, 2005, Order. Therefore, the final time for filing Affidavits pursuant to Rule 56 (c) of the Mississippi Rules of Civil Procedure had not yet expired. The Trial Court also erred in finding that Alexander's Affidavit constituted further "discovery" in this matter. Alexander's Affidavit was filed with the Court in support of the Appellant's Response to the Appellees' Daubert motion for the purpose of showing that the methodology used by Halfacre and that the ultimate conclusions which were reached by Halfacre were correct. Additionally, Alexander's Affidavit constituted a properly filed and highly relevant independent expert opinion which also stated that Kilhullen's line of sight was impermissibly blocked by the vegetation and earth present at the subject railroad crossing. In the context of a Daubert Response and in the context of a response to a motion for summary judgment, said Affidavit is fully acceptable and should have been allowed by the Trial Court without any "reduced weight". Additionally, Appellant would show that said Affidavit relates directly to the discovery which was allowed by the Court in it's January 21, 2005, Order, namely the qualifications of Halfacre and Shelton to offer expert testimony.

Appellant would show that the Appellees were previously informed that Alexander would be consulting in this matter as a potential expert. Despite having been informed of this fact on August 19, 2005, the Appellees made no effort to depose Alexander. Furthermore, Appellant would show that when Alexander was approached regarding this matter, Alexander requested additional information regarding the subject collision.[17] The information that Alexander requested was the

---

[17] This additional information was not vital to Alexander's ultimate conclusion, but said information would have been valuable to Alexander and would have provided the basis for additional opinions

same information that the Appellant requested in its original discovery and which was not provided by the Appellees despite repeated good faith requests. The missing information also provided much of the basis for the Appellant's Motion To Compel which the Court ultimately denied. The decision by the Trial Judge to deny the Appellant this discovery placed both the Appellant and the Court in the unenviable position of not having all of the facts available to them despite the pendency of a dispositive motion based upon those very facts. The Appellant would show that nearly seventeen (17) months expired since the Trial Court conducted its preliminary hearing on the Defendants' Motion For Summary Judgment and the time when final briefs were filed before the lower court. During this period, discovery could have been completed by the parties and all of the relevant facts could have been presented to the Court for full consideration. The decision to "cut off" the Appellant's making of discovery, while allowing the Appellees to freely take two depositions constituted clear prejudice against the Appellant and further constituted a violation of the Appellant's right to procedural and substantive due process. In its ultimate Opinion and Order, the Trial Court failed to consider basic material facts of the case, including the existence of an eyewitness which had been repeatedly disclosed to the Court in earlier pleadings.

The Trial Court, in its Opinion and Order, also adopted Kansas City Southern's argument that Alexander's opinions are irrelevant because Alexander opined that Kilhullen could not "beat" the subject train. (Record at 1180, Footnote 2). The Appellant would show that this finding constitutes a blatant mis-characterization of Alexander's opinion relative to this matter and should be rejected outright. Alexander never offered the opinion that Kilhullen could not "beat" the train through the crossing. Instead, Alexander stated that Kilhullen's line of sight was obstructed to such a degree that

---

in this matter.

he could not safely perceive the train and move through the crossing. Alexander's opinion utilizes the same rationale which has been repeatedly accepted by the Mississippi Supreme Court in the cases cited in section II(A), above. Additionally, it is important to note that Alexander has given similar opinions in other cases which were before the Mississippi Supreme Court. In each case, Alexander's opinion has been not only declared relevant, but it has also been accepted pursuant to the Daubert standard. It is incongruous for the Trial Court to find that Alexander's Affidavit should be rejected as irrelevant because it is based upon an allegedly illegal action when there is no evidence that Kilhullen did not comply with the law in stopping his tractor trailer rig. The Trial Court's conclusion in this regard is particularly erroneous because the lower court either chose to ignore the existence of an eyewitness which could have testified as to this matter or the lower court simply failed to apprehend that it had been repeatedly informed that the deposition of a key eyewitness was requested and denied. Therefore, just as in Halfacre's case, the Trial Court's entire rationale for a lack of relevance in this matter, namely the "beat the train" argument, must be rejected because it is based on the errant assumption that there was no witness to the subject collision and that there was no question of fact regarding Kilhullen's actions prior to the collision.

Furthermore, as a matter of law, the Mississippi Supreme Court has stated that a train must be both seen and heard by a person moving his vehicle through a crossing. In Alabama Great Southern R. Co. v. Lee, 826 So.2d 1232, 1237 (Miss.,2002) the Court stated that:

> The dissent would have this Court adopt a rule that states that as long as the train fulfilled its duty in blowing its whistle, then regardless of the train's visibility, the driver's failure to stop is negligence per se. This is dangerous for drivers who approach railroad crossings in which there is no duty to stop. Not only should the driver be able to hear the train, he should also be able to see the train. Miss.Code Ann. § 77-9-249(d).

Therefore, the question of whether Kilhullen could both see and hear the subject train is one for a jury. It is also a jury question as to whether Kilhullen stopped his vehicle between the required 50 and 15 feet and whether Kilhullen could perceive the oncoming train at these stopping points. Given the existence of eyewitness testimony, it was improper for the Trial Court to make a determination of relevance a summary judgment context and it was also improper to attempt to litigate these factual issues in a Daubert context. Furthermore, as a matter of law, the issue of whether Kilhullen attempted to "beat" the train is not one which can be answered by the lower court. This is particularly true in the case at bar where the lower court either ignored or missed key facts which tainted its conclusions in this matter.

V. Whether the Circuit Court of Scott County, Mississippi, erred in rejecting the Affidavit of Lay Witness Jimmy Shelton.

In support of her position, the Appellant also offered the lay testimony of Jimmy Shelton, an experienced truck driver and lay witness who observed the railroad crossing and also measured the vital "line of sight" distances in order to calculate the time within which Kilhullen would have had to cross the railroad tracks given the sight restrictions created by the overgrown vegetation and earthen mound at the crossing. In order to formulate his lay opinion, Shelton physically measured the distance from the position of Kilhullen's truck to the location of the guard device, the distance from the guard device to the north side of the tracks, the distance from the north side of the tracks to the south side of the tracks and the distance to the point his line of sight would have allowed Kilhullen visibility of the oncoming train absent vegetation and the mound of earth. Shelton also personally observed the time that it took for vehicles to clear the crossing and further observed trains passing from east to west and from west to east from Kilhullen's position on two separate occasions. After making his observations, Shelton opined that:

> Considering that the Kilhullen rig was fully loaded with lumber and his rig was approximately fifty feet long, the front bumper of his truck was approximately two feet from the guard device (sixteen feet from the north track), the distance from the guard device to the north side of the tracks is fourteen feet and the distance from the north side of the tracks to the south side of the tracks is eighteen feet, then Mr. Kilhullen's rig would have to move from a dead stop to a distance of eighty-six feet in order to completely clear the south side of the track. In my years of experience of operating tractor trailer rigs and heavy equipment this would require at least fourteen seconds. Therefore, considering the train was traveling at fifty miles per hour (seventy three and one third feet per second) and Kilhullen's first possible visual contact was at three hundred seventy-five feet, it would have been impossible for Kilhullen to move his truck across the tracks and clear the tracks before being struck by the train. (Record Excerpts at 20).

The Court, in its Opinion and Order, summarily discounted Shelton's testimony because Shelton is not a qualified accident reconstructionist and did not witness the Kilhullen accident. The Court in making this determination, wholly failed to provide and explanation as to why Shelton should be disqualified as a witness under Rule 701 of the Mississippi Rules of Evidence. Instead, the Trial Court disposed of Shelton's testimony by declaring that said testimony was subject to the same cryptic reasoning which led to the disqualification of Halfacre under Daubert.

Despite the Trial Court's conclusion, it is clear that Shelton was not offered for the purposes of providing expert witness testimony in this matter. Therefore, it was wholly unnecessary for the Appellant to attempt to qualify him as such. Instead, Shelton's testimony was merely offered to provide the Court with immediately observable facts which any layperson could communicate by simply observing the railroad crossing in question. Shelton's observations are clearly admissible under Rule 701 in that his opinions and conclusions were rationally based upon his observations of the distances at the subject crossing and the movement of vehicles and trains at the subject crossing.

This testimony, while not based upon any scientific or technical study of data, would certainly be helpful to the trier of fact in this matter in determining the actual distances which exist

at the crossing and the time which is required for vehicles to clear the crossing. These are readily observable and measurable facts which do not require any expertise or training to discern. In fact, any person armed with a tape measure and a stopwatch would be able to make these observations and conclude, based upon comparison, that Kilhullen could not have cleared the railroad tracks in time to avoid the train given his restricted line of sight. This testimony is in no way based upon any scientific, technical or other specialized knowledge in that Shelton's measurements and observations are equivalent to those which could be accomplished by any person who observed the scene. Furthermore, Shelton is 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 railroad crossing.

Shelton's observations and conclusions were only offered as lay witness testimony for the limited purpose of describing the crossing, vehicle transit times and the line of sight. The Trial Court, in examining Shelton's testimony, clearly erred by declaring that Shelton could be disposed of pursuant to a Daubert analysis. Contrary to the lower court's findings, all of Shelton's observations and conclusions were based upon his "immediate perception" of the railroad crossing and Shelton's measurements and conclusions are certainly relevant and would assist a jury in determining the facts of this matter. As such, Shelton's lay testimony (which consists merely of readily ascertainable measurements, observations and grade school mathematics) should not have been excluded.

VI. Whether the Circuit Court of Scott County, Mississippi, erred in disallowing the Appellant to conduct discovery in this matter, including the deposition of the sole eyewitness to the collision, Classie Ward, while at the same time allowing the Defendants to conduct any and all discovery as the Defendants deemed necessary.

In the present case, one of the primary errors which was committed by the Circuit Court was the premature cessation of discovery. It is extremely important to note that the Circuit Court only restricted Kilhullen from performing any discovery activities. The Appellees, on the other hand, were given free range to depose Kilhullen's expert witnesses. This prohibition even extended to the Circuit Court's outright denial of a request by Kilhullen to depose Kansas City Southern's expert witnesses after Kansas City Southern had been given permission to depose both Shelton and Halfacre. (Record Excerpts at 26). In responding to Kilhullen's completely reasonable request to be able to depose Appellee's expert witnesses which provided the basis for the pending Motion For Summary Judgment, the Court declared that it had no intention of reopening discovery. Id.

As was previously stated, counsel for Kilhullen, Barry W. Gilmer, filed an Affidavit with the Trial Court after receiving the Appellee's Motion For Summary Judgment which stated that certain vital material facts could not be presented to the Trial Court in defense of the pending Motion For Summary Judgment because "discovery is incomplete as a result of time constraints and scheduling problems resulting from a combination of defense counsel's obligations within the Mississippi legislature and Appellant's counsel's other litigation obligations". (Record at 652). Said Affidavit further stated that each time a continuance was sought by counsel for Kansas City Southern, said counsel represented to the Court that discovery was incomplete due to his obligations in the Mississippi legislature.

Furthermore, an examination of the record in this matter reveals that on September 29, 2004,

which was **less than a month** before the filing of the Motion For Summary Judgment and the noticing of the seventeen (17) depositions by Kilhullen, counsel for Kansas City Southern submitted an Order to the Court which stated that "the parties are in agreement that this matter is not ready for trial". (Record at 271). A similar Order containing the same language was also submitted by counsel for Kansas City Southern on April 8, 2004. (Record at 265). This Order was accompanied by a Motion which was filed by counsel for Kansas City Southern on April 2, 2004, which clearly stated that "**discovery is not yet complete**". The fact that discovery was not yet completed is perhaps made most clear by the fact that Kansas City Southern was still serving discovery responses upon Kilhullen's counsel as late as October 19, 2004, a mere **two (2) days** before the Motion For Summary Judgment was filed in this matter. However, despite these earlier declarations and despite the fact that Kansas City Southern was still actively engaged in answering discovery on the eve of the filing of the premature Motion For Summary Judgment, counsel for Kansas City Southern made a strategic move to exploit the deposition scheduling problems which had occurred in this matter and purposefully sought to cut off discovery in this matter.

The Trial Court, when presented with Attorney Gilmer's Affidavit and when faced with Kilhullen's Motion To Compel and the deposition notices of no less than seventeen (17) key witnesses, including the now forgotten eye witness to the accident, erred by entering its January 25, 2005, which **absolutely prohibited** Kilhullen from performing any discovery in this matter while at the same time granting the Defendants leave to depose the lay witness and expert witness which had been named by Kilhullen. (Record at 643-644, Record Excerpts at 26). The Trial Court entered this Order despite the clear evidence that discovery was ongoing in this matter and despite the fact that overwhelming evidence was presented to the Court which showed that the Defendants Motion

For Summary Judgment was not yet ripe considering that said Motion identified witnesses which had been identified prior to the filing of the Motion, that complete discovery responses had not yet served upon Kilhullen, that the deposition of the eyewitness had not yet been taken and despite the fact that discovery was ongoing at the time of filing of the Motion For Summary Judgment. In short, the Trial Court's entry of its prejudicial discovery order constituted an abuse of discretion since the completely one sided ruling effectively froze the process of discovery while it was ongoing and provided a material advantage to Kansas City Southern in that Kansas City Southern was allowed to depose those persons named in Kilhullen's Response to the Motion For Summary Judgment, while Kilhullen was **barred** from deposing any of the lay or expert witnesses which were named within Kansas City Southern's Motion For Summary Judgment.

The Trial Judge's January 25, 2005, Order further held all of Kilhullen's pending Motions involving discovery in abeyance pending a hearing on Shelton and Halfacre's Affidavits pursuant to Rules 701 and 702 of the Mississippi Rules of Evidence even though it had been argued that the substance of those Affidavits was hindered by fact that discovery was incomplete in the matter. (Record at 643, Record Excerpts at 26). This ruling is particularly suspect in light of the fact that the Trial Judge later ruled that Halfacre and Shelton's Affidavits were unreliable because there was **no eyewitness to the accident**, even though Kilhullen's counsel had repeatedly informed the Court that **Ms. Classie Ward had indeed witnessed the accident**. Clearly, when faced with a summary judgment motion in a case such as this one, the testimony of an eyewitness is key to making a determination of whether factual issues exist for a jury. Furthermore, the Circuit Court was repeatedly informed that information concerning the course of events, together with information held only by the accident investigators (Larry Parks and Dan Colvin) which had not yet been deposed and

which were first identified by Kansas City Southern in its Motion For Summary Judgment, were vital to preparing proper lay and expert witness affidavits and testimony in this matter. In the face of these entreats, the Circuit Court of Scott County ignored each of these key facts and made the premature determination that Kansas City Southern's Motion For Summary Judgment could be decided **without** key pieces of evidence which were vital to Kilhullen's case in chief.

The Mississippi Supreme Court, in examining cases where trial courts end discovery in light of the filing of a motion for summary judgment, has declared that discovery can only be ended where it is clear that all of the facts have been gathered. For example, in the often cited case of Burkhalter & Co. v. Wissner, 602 So.2d 835, 838 (Miss.1992), this Court examined a case where a summary judgment motion was filed in an employment case when discovery was ongoing and in which there was a pending motion to compel. The Supreme Court, in examining the case, declared that:

> We note particularly that the Chancery Court acted promptly, if not precipitously, in granting Wissner and Abacus summary judgment, notwithstanding its failure to rule on Burkhalter's motion to compel. There seems little doubt that the Court provided Burkhalter an inadequate opportunity to complete discovery and was otherwise inappropriately premature in entering summary judgment. *See, e.g.*, Malone v. Aetna Casualty and Surety Co., 583 So.2d 186, 187-88 (Miss.1991); Crain v. Cleveland Lodge 1532, 560 So.2d 142, 145-46 (Miss.1990); Godines v. First Guaranty Savings & Loan Association, 525 So.2d 1321, 1325 (Miss.1988); Smith v. H.C. Bailey Companies, 477 So.2d 224, 233 (Miss.1985).
>
> Without further ado, we hold that the Chancery Court erred when it granted the motion for summary judgment. We reverse the judgment entered below and remand the case to the Chancery Court of Rankin County, Mississippi, for such further proceedings as may be appropriate, had the Court originally denied Wissner's and Abacus' motion for summary judgment.
>
> (Id. at 838).

In examining another case where a party attempted to use a summary judgment motion to gain a tactical advantage by cutting of discovery, the Mississippi Court of Appeals held that

summary judgment was premature where the defendant refused to answer discovery and instead responded to Griffin's request for discovery by filing a motion for summary judgment. The Court of Appeals stated that "before the trial judge examined this issue, he should have addressed the more introductory matter of whether summary judgment was premature because of the lack of discovery." Griffin v. Delta Democrat Times Publishing Co., 815 So.2d 1246, `147 (Miss.Ct.App.2002). In an earlier case, Smith v. Braden, 765 So.2d 546, 556 (Miss.,2000), the Mississippi Supreme Court also found that discovery was prematurely ended in a case involving the immunity of a University of Mississippi Medical Center employee. The Court, in examining the case, found that the plaintiff in the matter had met the requirements of Prescott v. Leaf River Forest Prods., Inc., 740 So.2d 301 (Miss.1999) by demonstrating that there were specific facts concerning the allegedly immune physician's employment which demonstrated that a postponement of a ruling on the pending summary judgment motion which would enable the plaintiff through the use of discovery to rebut the movant's showing of the absence of a genuine material fact. Braden at 554. The Supreme Court further declared that:

> It is a well-established principle that summary judgments should be granted with great caution. Brown v. Credit Ctr., Inc., 444 So.2d 358, 362 (Miss.1983). It appears from the above statements that the trial judge granted summary judgment, not out of an exercise of caution, but rather out of an exercise of frustration. From these statements, it appears that the trial judge granted the motion for summary judgment merely to "pass the buck" to this Court, without making a determination that there was no issue of fact on the issue. The completion of discovery is, in this case, desirable.
> Id. at 556.

In the present matter, this Court is faced with a similar situation where discovery was ongoing at the time of the filing of the Appellees' Motion For Summary Judgment. Furthermore, it is undeniable that the depositions of certain key witnesses, including the sole eyewitness, the

Appellees' accident investigators, persons named as experts by the Appellees in their Motion For Summary Judgment and other persons (totaling seventeen in all), had not yet been taken even though deposition notices had been issued. It is also undeniable that Kilhullen had filed a detailed Motion To Compel which delineated key facts and documents which had not yet been disclosed in response to Kilhullen's discovery requests. These facts, along with the testimony of the eyewitness, accident investigators and Kansas City Southern's experts, were key to Kilhullen rebutting the Appellees' Motion For Summary Judgment. Furthermore, the requested discovery was not merely inconsequential to the issues which were presented in the summary judgment motion. In fact, a review of the Trial Court's Opinion And Order which granted the Motion For Summary Judgment reveals that even the Trial Court did not have all of the facts before it when it made its ruling. This is undeniably proven by the errant declaration that there was "no eyewitness" to the collision even though both of the parties informed the Trial Court that Ms. Ward had indeed observed Kilhullen at the time of the accident. Had the Trial Court allowed the requested depositions to occur, there is no question that the Trial Court would not have misapprehended this key fact since the Court would have been presented with deposition testimony. However, by disallowing key discovery to take place, the Trial Court put itself in the unenviable position of having made a key error which entirely tainted the reasoning contained within its Opinion And Order. In order to prevent a manifest injustice from occurring in this case, this Court need only remand this matter for the completion of discovery and a reexamination of Kilhullen's expert testimony in light of the facts which are revealed during the discovery process. Upon completion of discovery, the Trial Court will then have all of the facts before it and it can make a reasonable and factually correct assessment of the issues which are presented to it. As it currently stands, however, this Court is faced with the task of examining

a factually incorrect Opinion And Order which is undeniably based upon an improper and incomplete treatment of the underlying issues in the case.

CONCLUSION

The present appeal presents a multiplicity of issues which can, in reality, be condensed into a relatively simple question. Namely, did the Trial Court err in granting Kansas City Southern's Motion For Summary Judgment in light of the fact that:

1. the Trial Court's Opinion And Order was based upon a flawed interpretation of the facts;

2. Kilhullen was prevented from completing discovery in the matter;

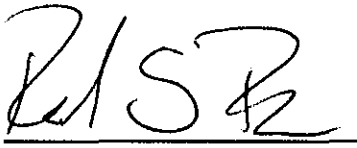
3. Kilhullen submitted the testimony of two expert witnesses, one of whom has already been qualified by this Court pursuant to the Daubert standard, thus creating a genuine issue of material fact as to the sight distance available to Kilhullen;

4. Kilhullen submitted the lay testimony of Jimmy Shelton which shows that an experienced truck driver could not have seen the oncoming train; and,

5. even absent the testimony of a lay witness or expert witnesses, genuine issues of material fact exist in this case.

Each of these facts operates within the nexus of the Motion For Summary Judgment to show that the Trial Court committed reversible error. At a minimum, expert Brett Alexander's expert Affidavit should have prevented the Court from ruling in favor of Kansas City Southern in this matter. Alexander's Affidavit is unquestionably relevant in that it goes to the core issue of this case, namely whether Kilhullen could see the oncoming train before he had already moved onto the track s and it was too late to avoid the collision. Alexander, after performing independent measurements and making independent calculations, answered that Kilhullen's line of sight was impaired to such a degree that he could not have seen the oncoming train because of the overgrowth of vegetation and

because of a mound of dirt that was present at the railroad crossing. This, by itself, was enough to create a genuine issue of material fact in this matter. If one takes the Alexander Affidavit and combines it with the lay testimony in this matter and Halfacre's testimony, together with the fact that it is always a jury question as to whether an obstruction was present at a railroad crossing, it was clearly an error for the Trial Court to grant Kansas City Southern's Motion For Summary Judgment. Finally, if one takes the fact that the Trial Court based the entire premise of its opinion upon an erroneous assumed fact, namely that there was no eyewitness to the accident, and combines this with the decision to cease the discovery process, it is undeniable that the Trial Court made a massive error in judgment in this case. This matter presents the Mississippi Supreme Court with an opportunity to correct a grave miscarriage of justice. Gigi Kilhullen was widowed because of the actions of Kansas City Southern in failing to make the subject railroad crossing safe for passage. The Circuit Court of Scott County, Mississippi, in dealing with this most serious of cases, denied Kilhullen her right to both procedural and substantive due process by wholly preventing her from completing discovery. The Circuit Court also chose to ignore the expert opinion of Brett Alexander, perhaps the most qualified accident reconstructionist in the State of Mississippi. In this most serious of cases, one that involved the death of a hard working and loving husband, the Appellant would respectfully request that this Court correct the errors of the lower court so that she may have an opportunity to seek justice in this matter.



BARRY W. GILMER, MSB# [redacted]
REID S. BRUCE, MSB# [redacted]