IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2006-IA-00047-SCT

EPHEN L. BANKS AND
JIMMY OGLESBY d/b/a OGLESBY FARMS **DEFENDANTS/APPELLANTS**

v.

CURLIE DARNELL HILL **PLAINTIFFS/APPELLEES**

On Appeal from the First Judicial District of the Circuit Court of Bolivar County, Mississippi; Civil Action File No. CV-2003-7

BRIEF OF APPELLEE

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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 and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Curlie Darnell Hill, Plaintiff/Appellee
2. Ephen L. Banks, Defendant/Appellant
3. Jimmy Oglesby d/b/a Oglesby Farms, Defendant/Appellant
4. Honorable Kenneth L. Thomas
5. George F. Hollowell, Jr., Attorney for Appellee
6. Bradley F. Hathaway, Attorney for Appellant, Ephen L. Banks
7. Jennifer M. Bermel, Attorney for Appellant, Jimmy Oglesby d/b/a Oglesby Farms

GEORGE F. HOLLOWELL, JR.
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STATEMENT OF ISSUES

Whether the trial court abused its discretion in entering an order allowing Plaintiff to hire and designate a different expert to be used solely as a rebuttal witness after excluding the Plaintiff's original expert as a sanction for late designation in violation of a scheduling order and also granting Defendant's motion to allow a Rule 35 medical examination of Plaintiff by Defendant's designated physician after the scheduled close of discovery and exclusion of Plaintiff's experts.

STATEMENT OF THE CASE

Hill filed suit in this automobile accident case in March of 2003. (D.P. 1; R.E. p. 1) Hill's counsel missed the deadlines for designating expert witnesses. On October 31, 2004, the trial court entered an order granting the defense motion to strike Hill's experts as a sanction for untimely designation. That same day, the trial court also granted a defense motion to allow a medical examination of Hill by a doctor and vocational rehabilitation expert designated by the defense under newly adopted M.R.C.P. 35. (R.E. pp. 1-3; R at 9-11). After the Rule 35 medical examination was conducted, additional opinions of the defense experts based on those examinations were disclosed on December 6 and December 14, 2004. Hill's counsel made a motion to be allowed to use the vocational rehabilitation expert who was disclosed late as a rebuttal expert which was heard on July 5, 2005 at which time Hill's counsel also asked the court to reconsider the October 31, 2004 order. (Tr. pp. 9-10, 12-15; R.E. p. 32-33, 35-38) At this point, a trial date had not yet been set. (Tr. p. 18; R.E. p. 41) At the conclusion of the hearing, the court ruled from the bench that Hill would not be permitted to use the late designated vocational rehabilitation expert as a rebuttal expert. However, the court also ruled that Hill should be permitted to present rebuttal evidence through a new and different expert who would be

permitted to attend the trial, listen to the evidence presented in the defense case in chief, and then be allowed to testify in rebuttal with the testimony strictly limited to offering rebuttal testimony to the evidence actually presented in the defense case in chief. (Tr. pp 79-89; R.E. pp. 102-122) The bench ruling was reduced to a written order on November 21, 2005 and entered on December 5, 2005. (R. at 12-13; RE pp. 4-5)

STATEMENT OF FACTS

This is an automobile accident case in which the extent of Curlie Hill's injuries caused by a collision in September of 2002 is at issue. The facts of the collision are not really relevant to this appeal except to state that the extent of Hill's damages from injuries actually resulting from the collision is a contested issue.

Hill's attorneys missed the deadlines for designating expert witnesses. Under the third agreed amended scheduling order[1], Hill's experts were be designated by April 30, 2004. Hill's attorneys had received the vocational rehabilitation expert's report in the fall of 2003 and each of Hill's attorneys believed the report had been disclosed to the defense prior to April 30, 2004. On May 24, 2004, the defense designated their experts and provided disclosures of their initial opinions.[2] In late June of 2004, the defense filed motions seeking to compel Hill to submit to a medical examination by a physician of their choosing pursuant to M.R.C.P. 35. (Tr. pp. 4-6; D.P.

[1]Neither party designated experts under the deadlines set in the first two orders and both voluntarily agreed to the extensions setting the deadlines in the third order. (Tr. pp. 25-26; R.E. pp. 48-49)

[2]Contrary to the statement on p. 6 of Appellant's brief, pages 26-27 of the hearing transcript (R.E. pp. 49-50) do not support the proposition that the defense strategy in selection of experts and formulation of their opinions in this case was in any way driven by the fact that Hill had designated no experts for trial as of May 24, 2004. On those pages, the defense stated "there is nothing you have to wait to be told by the other side" in order to know what will be needed in the way of experts in a car wreck case. The argument the defense made at that point in the hearing was that the defense would always be prejudiced by allowing the designation of any plaintiff's experts after the defense experts were designated because the plaintiff would have the unfair advantage of knowing what type of experts the defense had designated when the plaintiff made his own designations.

4-5; R.E. pp. 4-5, 27-29)

Hill objected to the motion for medical examination. Believing their expert designations had been filed, in connection with his objection to the medical examination, Hill's attorneys filed a motion requesting a status conference on July 27, 2004 in which they requested leave to designate an additional expert to rebut defenses and issues raised by the defense in the case. Hill's attorneys also filed an expert witness supplement on August 24, 2004. (D.P. 5; R.E. p. 5)

In late August or very early September, it was discovered through conversations between Mr. Hollowell (one of Hill's attorneys) and defense counsel that defense counsel had not received the initial designation of Hill's vocational rehabilitation expert or his 2003 report although copies of these documents were in the case files in Mr. Hollowell's office. (Tr. pp. 4-6; D.P. 4; R.E.pp. 4, 27-29) At that time in late August or very early September, 2004, Mr. Hollowell sent the report and designation to defense counsel. (Tr. p. 8; R.E. p. 31)

In response to Hill's late expert disclosures, the defense filed motions to strike the Plaintiff's August 24, 2004 supplemental designation of experts. (D.P. 5; R.E. at 5) On September 30, 2004[3], the court held a hearing on the motion for a Rule 35 medical examination, the motion for status conference, and the motion to strike Hill's supplemental expert designation. As a result of that hearing, the trial court issued the October 31, 2004 order which found that Hill had not timely designated his experts and that the defense would be prejudiced at trial by allowing the plaintiff to use experts designated after the defense had designated its experts. The court granted the motion striking Hill's two experts and also granted the motion ordering Hill to submit to a medical examination by the physician chosen by the defense under newly adopted M.R.C.P. 35. (R.E. pp. 1-3; R at 9-11).

[3]Attorney Susan Smith, a young attorney newly associated with Mr. Hollowell, appeared and argued Hill's case at this an many of the earlier hearings.

After the Rule 35 medical examination was conducted, the defense experts reviewed that new evidence and disclosed additional opinions based on that examination on December 6 and December 14, 2004. Hill's remaining counsel, Mr. Hollowell[4], brought a motion to be allowed to use the late experts as rebuttal experts which was heard on July 5, 2005 at which time Hill's counsel also asked the court to reconsider the October 31, 2004 order. Hill's counsel argued it was unfair to allow the defense experts to examine new evidence and develop and testify about entirely new opinions developed on the basis of the Rule 35 examination after they knew that the plaintiff's experts had been excluded without permitting the plaintiff some means of rebutting the newly developed opinions based on new evidence from the Rule 35 examination. Hill's counsel asked the court to reconsider and allow him to use one of the experts whose opinions were disclosed in September of 2004 solely on rebuttal to rebut the newly developed opinions of the defense experts, requesting the court to find a way to penalize counsel rather than the client. (Tr. pp. 9-10, 12-15; R.E. pp. 32-33, 35-38)

Hill's counsel specifically stated that he accepted full responsibility for the failure to see to it that the expert designations were timely filed, regardless of where or by whom the error occurred in his office. He stated it would be appropriate for him to have pay the costs of additional depositions that might be necessary to ameliorate any possible prejudice to the defense. But he asked the court to penalize him and not his client who was not at fault, especially since no trial date had yet been set. (Tr. pp. 17-20, 51; R.E. pp. 40-43)

The court suggested an appropriate resolution might be to allow Hill to hire a different expert from the ones excluded, to be used solely as a rebuttal expert to rebut the defense expert's new opinions based on their actual testimony at trial. The court asked both sides to respond to

[4]By this point, Attorney Susan Smith was no longer associated with Mr. Hollowell's office.

that possibility concerning its feasibility and any claim of prejudice that might or might not be addressed by such a solution. (Tr. pp. 16-17; R.E. pp. 39-40) Hill's counsel responded that the trial court's suggestion would be a workable solution. (Tr. p. 17; R.E. p. 40)

Defense counsel responded that the trial court's suggestion would not ameliorate the prejudice, because the horse was already out of the barn in the sense that the plaintiff had already seen the defense trial strategy when they initially disclosed their experts and requested the IME before Hill disclosed his experts. He also argued that Hill's failure to timely designate his experts in the first place completely eliminated any right Hill might have otherwise had to respond to the supplementation of the defense expert opinions based on the IME. Although he stated that additional discovery would have to be allowed if the court permitted Hill to respond to the defense supplemental opinions based on the IME with any expert, existing or new, defense counsel clearly acknowledged that there would be no real prejudice as a result of the extension of discovery and the additional costs, as Mr. Hollowell had offered to pay those costs. Defense counsel kept coming back to trial tactics, the plaintiff's access to the defense trial strategy and the claim that the trial court's solution would result in the loss of tactical advantage to the defense and would allow the plaintiff the benefit of tactical advantage which should be reserved for the defense, saying

> And that is a plaintiff who has now had an opportunity to see the map, the battleground map of the defendant when they had a court-impose duty themselves to come up with a ap and a trial strategy to show the other side. They now have the benefit of saying, we don't have to act like plaintiffs. We get to be defendants and we get to see how you're going to attack my case and then I get to sneak around you and, and come after those attacks.... So the prejudice has already occurred ... that has eroded the integrity of the defendant's rights ... . And that was, again, us coming out, give the plaintiff what our, what we believe their weak points to be, and then them going around us trying to plug holes with untimely designated experts.

(Tr. pp. 38-39, 43-44, 57-58, 44 line 5-46, line 1; R.E. pp. 61-62, 66-67, 80-81, 66, line 5 - 68,

line 1) Defense counsel made it clear later in the hearing, however, that he was not suggesting in any way that Hill's counsel had wrongfully and intentionally withheld their expert designations. (Tr. p. 73, lines 20-28; R.E. p. 96, lines 20-28)

The trial court asked defense counsel to reconcile his tactical advantage theory of prejudice with the concept of wide open discovery and the opportunity for each side to learn of and respond to the other. (Tr. p. 45; R.E. p. 68) In response, Defense counsel argued only that the judge should follow M.R.C.P. 16 and claimed discovery could become so wide open as to prejudice one party. But then he admitted that if the roles were reversed, he would be arguing that wide open discovery only provides a level playing field. (Tr. pp. 45-46; R.E. pp. 68-69)

Hill's counsel pointed out that no trial was even scheduled yet and there was no Rule 16 pre-trial order. Furthermore, there was no tactical prejudice to the defense since they had the report of the excluded expert, revealing the plaintiff's "trial strategy" before the Rule 35 examination was conducted by the doctors the defense selected. He pointed out the point of the discovery rules is to avoid the very kind of trial by ambush timing tactical advantage that the defense was claiming it would be prejudiced by losing. The point of discovery is not to provide either side with an advantage but to have a process that lends itself to justice by providing an opportunity to respond to any newly developed or disclosed evidence such as the opinions based on the Rule 35 examination. (Tr. pp. 47-52; R.E. pp. 70-75)

Hill's counsel argued a plaintiff should not lose his right to respond to or rebut the opinions coming out of a defense Rule 35 examination solely because he was in the position of not having timely designated initial experts when the court order allowing the examination and the exam itself occurred long after the deadline for designating initial experts. He pointed out a plaintiff had a right to object to the request for medical examination under Rule 35 and should

not be penalized for not agreeing to the request when he had a good faith argument against it. Moreover, Rule 35 was a new rule and a new procedure foreign to Mississippi practice, and there was insufficient experience with it to for counsel to be familiar enough with it to know in advance that a vocational expert would be needed to rebut the evidence developed from the exams. The newness of the procedure and the timing of the court's hearing schedule and ruling on the plaintiff's objection to the Rule 35 hearing was such that the defense had the opportunity to conduct examinations by both a medical doctor and a vocational expert and to supplement their expert opinions based on those examinations after seeing the opinions of the plaintiff's excluded vocational expert. To allow this without allowing the Plaintiff any means of responding to the additional evidence developed through the Rule 35 exams would clearly give the defense an unfair advantage. (Tr. pp. 47-56; R.E. pp. 70-79)

After hearing the arguments of all counsel, and in particular their arguments concerning what prejudices would arise from different rulings, the trial court gave his ruling, his reasons and answered questions clarifying his intent, saying:

> There is one part of the law that says a party should not suffer because of the mis-doings or failure to do of the attorney. On the other hand, we have the contention that if the Court will ... allow an expert to testify during the case in chief of the plaintiff, that would unduly prejudice the defense side of the case. So, I am at a weigh point here. I have to weigh the rights of the plaintiff, which should not be adversely affected by the inadequacy, for lack of a better term, of plaintiff's counsels against the right of the defendant not to have his or their case in chief unduly prejudiced. ... The Court has labored very much over the right of the plaintiff to have his full case in chief presented during the course of his trial compared with the defendant's right to receive a timely designation.
>
> ... So the Court, upon reconsidering the motion for reconsideration, continues to deny the testimony of Lamar Crocker [Plaintiff's late designated vocational expert] and the Cout will deny any offering of his report into evidence as well.
>
> The Court does hereby grant the defendant's motion to the extent that it strikes the expert from testifying, that particular expert, in rebuttal. And, as the Court has already stated, the Court will not allow admission of that expert's report.

What the Court will do, however, is to allow the plaintiff to present rebuttal testimony, even from an expert, but other than Lamar Crocker. The Court agrees that he should not be able to get in the back door what has been disallowed through the front door.

But that rebuttal evidence that may be put on by an expert will be limited to that testimony which would have been presented during the *defendant's case in chief. If the defendant's case in chief does not cover a particular matter, then that matter cannot be addressed during the course of rebuttal evidence presented by the plaintiff. ...*

BY MR. HOLLOWELL: May I get a clarification. ... In other words, is the Court excluding Crocker and the plaintiff will be allowed to retain another expert, is that what the Court is saying, or may I use Crocker. ...

BY THE COURT: You may not use Crocker. Nor his report. But if you want some other expert sitting in the courtroom, listening to the evidence, then that person may testify, but his testimony will be limited to those issues addressed by the defense during its case in chief.

BY MR. HOLLOWELL: Yes, sir. ... Does that witness have to be designated. Because this is a rebuttal witness, but it is a rebuttal expert witness and nobody has ever told me what the real rule is. I know the rule to laypersons is, they do not have to be designated.

BY MR. HOLLOWELL: [sic - should by BY THE COURT]: And I agree with you. I have not seen anything. My staff attorney an will look into it, and I encourage each of you to do the same. ... But it would be a very cautious thing on your part to tender that name to the other side.

BY MR. HOLLOWELL: Yes, sir. But not a report or anything because all he's going t be doing is –

BY THE COURT: He doesn't know what he's going to testify to.

BY MR. HOLLOWELL: That's right. Thank you, Your Honor. I'll do that.

BY THE COURT: I recommend that you tender that name. ... But I don't order it because I don't know if there's cause [sic - should be case] authority for it. ... Now, you must remember now, I am disallowing that Lamar Crocker altogether and his report. ... I'm allowing testimony in rebuttal, but it shall be limited in the same respect as in all other cases. You know, you can only go over in rebuttal what has been produced during the case in chief ... [a]ny issue that is testified to during the defense's case in chief. ... [H]is, her or their testimony will be limited thereto.

(Tr. pp. 72, line 18 to p. 73, line 8, p. 80, line 28 to p. 83, line 28, p. 86, line 12-21, line 28 to p. 87, line 5; R.E. pp. 95, line 18 to p. 96, line 8, p. 103, line 28 to p. 106, line 28, p. 19, line 12-21, line 28 to p. 110, line 5)

SUMMARY OF ARGUMENT

Appellants arguments are based on the faulty assumption that the sanction fashioned by

the trial court in this case through the exercise of his discretion somehow establishes a new procedure or a particular result that future plaintiffs would somehow have a right to insist upon or at least count upon in future cases. There are several fallacies in their arguments.

First, it ignores the trial court's discretion in matters concerning control of discovery, sanctions, and the admission of evidence. As no judge is required to follow any other in exercising his discretion or fashioning sanctions, no plaintiff could possibly count on the any other judge exercising his discretion in the future in this particular manner.

Second, part of the analysis and balancing that led to the particular result in this case was the fact that the failure to designate and disclose the opinions of the plaintiff's vocational expert was not intentional. Other case law not applicable to the present case would preclude the same approach in cases where a plaintiff intentionally chose not to designate and reveal the opinions of his experts and instead withheld his experts to be used solely as rebuttal experts, or intentionally did not hire any experts at all until discovering that experts were needed to rebut defense experts. Thus, this factor would prevent plaintiff's from intentionally seeking the result that occurred in this case in the future.

Third, it ignores the extra factor in this case of the development of new defensive evidence through the Rule 35 examination by a physician and vocational expert chosen by the defense after the initial order excluding all of the plaintiff's experts and the right of the plaintiff to respond to that development. This factor, which played a substantial role in the trial court's balancing of fairness and justice, is unlikely to be present in many cases and certainly could not be sufficiently controlled by plaintiffs to turn the result in this case into a general litigation tactic.

Moreover, the defense always has the open of following the proper procedure recommended by the case law and filing a motion to compel designation of experts and

disclosure of their opinions an obtaining an order to compel such disclosure prior to moving for exclusion of evidence or the ultimate sanction of dismissal where experts are absolutely required. If the plaintiff then defies an order to compel, a proper record would have been made to support the extreme sanction of exclusion of evidence despite any detriment to a party's case and the need to employ lesser sanctions first.

Finally, Appellants arguments ignore the fact that in the circumstances of this case, it would have been within the discretion of the trial court not to exclude Hill's late designated vocational expert at all and to have allowed Hill to use Lamar Crocker in both his case in chief and to rebut any matters raised by the defense. Given that the court had that discretion, as well as the discretion to modify his earlier sanction order on his own motion or at the request of a party until final judgment, it necessarily follows that the trial court had the discretion to employ the lesser sanction that he finally devised after the Rule 35 examination. In fact, Appellants do not address the standard of review anywhere in their brief or acknowledge that the rulings in this case are subject to review only under the abuse of discretion standard.

ARGUMENT

I. Standard of Review[5]

A trial court has considerable discretion in managing discovery and the pre-trial process including scheduling orders, and an abuse of discretion standard of review applies to such orders. *City of Jackson v. Presley*, 942 So.2d 777, ¶7 (Miss. 2006) Similarly, the admission and exclusion of evidence, including expert testimony, is generally committed to the sound discretion of the trial court, reviewed only for abuse of discretion. *Burnham v. Stevens*, 734 So. 2d 256, ¶¶ 43-47 (Miss. Ct. App. 1999) An abuse of discretion standard also applies to a decision of a trial

[5]Appellants do not appear to have addressed the standard of review anywhere in their brief.

court as to what sanctions to impose for violation of an order. *Brennan v. Webb*, 729 So. 2d 244, ¶ 11 (Miss. Ct. App. 1998). Thus, an abuse of discretion standard clearly applies to all the issues in this appeal. *Burnham* at ¶¶ 43-47.

II. The Circuit Court Did Not Abuse Its Discretion in Permitting Plaintiff to Hire an Additional Expert After the Discovery Deadlines Had Passed to be Used Solely as a Rebuttal Expert After Excluding Plaintiff's Original Expert and Prohibiting Plaintiff of Using Any Expert on a Particular Issue as a Sanction for Not Designating the Expert Within the Deadline Set by the Scheduling Order

A. The Trial Court's Earlier Order Was Subject to Change Regardless of Whether a Proper Motion to Reconsider Was Timely Made

There is no time limit on motions to reconsider or a trial court's reconsideration of an order relating to discovery as discovery orders are not final. *Trilogy Communs., Inc. v. Thomas Truck Lease, Inc.*, 733 So. 2d 313, ¶ 11 (Miss. Ct. App. 1998) Moreover, the trial court always has the

> entire control of his orders and decrees and authority to modify or vacate any of them on motion of any party, or on his own, prior to final judgment. The rules of Civil Procedure do not change this basic authority which rests in any chancellor or circuit judge as to any case in his court.

In re Enlargement of Corporate Limits, 588 So. 2d 814, 828 (Miss. 1991). It is undisputed that the October 31, 2004 order was an interlocutory order. Appellants' arguments concerning the time that Hill allowed to pass before asking the court to reconsider it speak of Hill's failure to seek an interlocutory appeal of that order. There had been no final judgment in this case and the matter was not even set for trial. Thus, neither the passage of time or the existence of the October 31, 2004 order in any way affects the authority or discretion of the trial court to decide upon the terms of and to make the decision made at the end of the July 5, 2005 hearing or to enter the interlocutory order which is the subject of this appeal.

B. Severity of the Sanction for Violating Scheduling Order

The Mississippi Supreme Court has held that exclusion of evidence or exclusion of a witness as a sanction for a discovery violation is a drastic sanction of last resort which should be used only in extreme cases. *Thompson v. Patino*, 784 So.2d 220, 223-24, ¶25 (Miss. 2001); *Mississippi Power & Light Co. v. Lumpkin*, 725 So. 2d 721, 733 (Miss. 1998); *McCollum v. Franklin*, 608 So. 2d 692, 694 (Miss. 1992); *Brennan v. Webb*, 729 So. 2d 244, ¶ 11 (Miss. Ct. App. 1998). Such a sanction is particularly harsh when the plaintiff's only expert on an element crucial to his case is excluded. At times, when a party's only expert on a crucial issue has been excluded as a discovery sanction, it has been found to be an abuse of discretion. See *Brennan* at ¶¶ 5-11 (abuse of discretion to exclude expert designated a week before trial when rule required designation 60 days before trial).

In *Robert v. Colson*, 729 So. 2d 1243 (Miss. 1999), the defendant moved to compel the plaintiff to dismiss or name her experts 13 months after suit was filed. Trial was set for a date more than nine months after the defense filed its motion to compel. The plaintiff supplemented her discovery by providing expert disclosures the day after the motion to compel was filed. The appellate court held that it was an abuse of discretion for the trial court to strike the discovery supplementation including the expert disclosures as a discovery sanction, explaining

> ¶25 In Caracci v. International Paper Co., 699 So. 2d 546 (Miss. 1997), this Court addressed the effect of an alleged discovery violation due to the failure of the plaintiff to furnish a sworn answer to an expert interrogatory. The defendant made no pre-trial motions with regard to the alleged deficiency. Caracci, 699 So. 2d at 547. We stated
>
> > Under our rules of civil procedure, failure to make or cooperate in discovery should first be resolved by making a motion in the proper court requesting an order compelling such discovery. See M.R.C.P. 37(a)(2). The remedy for failing to comply with the discovery requests when the trial court grants an order to compel falls under M.R.C.P. 37(a)(4) in the form of awarding the moving party the expenses for such motion. See M.R.C.P. 37; January v.

> Barnes, 621 So. 2d 915, 922 (Miss. 1992). After such an order to compel has been granted under M.R.C.P. 37(a)(2), and the party ordered to answer fails to respond, then the remedy may be sanctions in accordance with M.R.C.P. 37(b). See 8 Wright & Miller, Federal Practice and Procedure: Civil § 2050 (1970).

699 So. 2d at 557.

> ¶26 Colson made no early motions to compel Robert to answer his first set of interrogatories. Colson agreed to give Robert more time to respond and Robert did so soon there after. Colson moved the court to compel Robert to name an expert or alternatively to dismiss the case. The next day on March 25, 1997, Robert named an expert and gave the substance of his proposed testimony. ... 'Lower courts should be cautious in ... refusing to permit testimony . . . . The reason for this is obvious. Courts are courts of justice not of form. The parties should not be penalized for any procedural failure that may be handled without doing violence to court procedures.'" Caracci, 699 So. 2d at 556 (quoting Clark v. Mississippi Power Co., 372 So. 2d 1077, 1078 (Miss.1979)). See Pierce v. Heritage Properties, Inc., 688 So. 2d 1385, 1388 (Miss. 1997) ... Robert's and Colson's conduct in this case is the type of conduct contemplated by Caracci. Discovery proceedings were controlled and managed by the parties and the trial court was involved only when Colson could not through a good faith effort persuade Robert to comply with his request to name an expert.

729 So. 2d at 1247-1248.

Similarly, in *Thompson v. Patino*, the court found abuse of discretion where the trial court excluded expert testimony as an initial sanction even though there were early motions to compel because there was no violation of a court order on the motion to compel. The case was filed in February of 1994. The defense filed two motions to compel three and four months after suit was filed. The plaintiff identified his experts in June of 1994 but did not disclose their opinions. Discovery was extended by agreement until December of 1995. The plaintiff's request for a further extension of discovery in 1996 was denied after which the plaintiff identified Dr. Wilson and Dr. Ferrari as experts in February, 1997. A trial date had not been set although there was some discussion of January, 1998, being the earliest possible date for trial. Again, the court found the sanction of striking the plaintiff's experts too drastic and an abuse of discretion, saying:

> Thompson's counsel was more neglectful of her case than the attorney in *Robert*. However, we find that the penalty should have been something less drastic than striking Thompson's supplemented responses and Dr. Ferrari's affidavit. See Mississippi Power & Light Co. v. Lumpkin, 725 So. 2d 721, 733 (Miss. 1998) exclusion of evidence due to discovery violation is extreme measure). One significant factor in Robert and other cases decided by this Court is the substantial length of time between supplementation and a trial date, or lack of a trial date altogether. The circuit court, in making its ruling, gave a detailed recitation of the events of the case and obviously felt that the failure of Thompson's counsel was deliberate or at least seriously negligent. Sanctions were appropriate, but the exclusion of medical expert evidence ... amounted to an abuse of discretion under the facts of this case.

784 So.2d at 223-24, ¶25.

While this case does not involve the exclusion of expert testimony in a case where a required element of the plaintiff's case cannot be established by law without the use of an expert, these cases and more recent ones continue to quote from *Caracci*, 699 So. 2d at 556 and *Clark v. Mississippi Power Co.*, 372 So. 2d 1077, 1078 (Miss.1979) stating that the same principles apply to the exclusion of testimony as a sanction for discovery violations, including disclosures concerning experts. See e.g., *Beck v. Sapet*, 937 So. 2d 945 (Miss. 2006) (proper procedure for imposing harsher sanction followed where party failed to comply with two orders to compel).

Furthermore, *McCollum v. Franklin*, 608 So. 2d 692 (Miss. 1992) also clearly holds that exclusion of testimony as a sanction for a discovery violation is extreme and a measure of last resort. Although the error was not properly preserved, it was so fundamental, the court stated:

> Before we amended Rule 26, providing the names of trial witnesses was thought invasive of work product and the thought processes of opposing counsel. During discovery, a party was, therefore, not entitled to a list of trial witnesses. Kern v. Gulf Coast Nursing Home of Moss Point, Inc., 502 So.2d 1198, 1200 (Miss. 1987). ... Ignoring for the moment that McCullom wholly failed to preserve this issue ..., it is clear that the trial court failed to properly respond to the objection based on lack of discovery. Exclusion of evidence is a last resort. Every reasonable alternative means of assuring the elimination of any prejudice to the moving party and a proper sanction against the offending party should be explored before ordering exclusion.

608 So. 2d at 694. Thus, *McCollum* makes it clear both that lesser sanctions, including every

reasonable alternative of lesser sanctions should be considered. It also makes it clear that under our current rules, the sort of advantage or disadvantage as to timing of disclosure of theory of the case prejudice the defense relies on in the present case is not the kind of prejudice that justifies total exclusion of evidence at least where there is sufficient time before trial to prepare to meet the evidence.

Later decisions continue in the same vein, requiring a careful balancing of factors before a decision is made to exclude testimony based on a discovery violation. In *Buskirk v. Elliott*, 856 So. 2d 255, 260, ¶ 11 (Miss. 2003), the court held:

> the trial court is to consider four factors before excluding evidence based upon a discovery violation: the explanation for the transgression, the importance of the testimony, the need for time to prepare to meet the testimony, and the possibility of a continuance. Miss. Power & Light Co. v. Lumpkin, 725 So. 2d 721, 734 (Miss. 1998) (citing Murphy v. Magnolia Elec. Power Ass'n, 639 F.2d 232, 235 (5th Cir. 1981)). With regard to each factor, this Court has stated:
>
> > The first consideration involves a determination whether the failure was deliberate, seriously negligent or an excusable oversight. The second consideration involves an assessment of harm to the proponent of the testimony. The third and fourth considerations involve an assessment of the prejudice to the opponent of the evidence, the possibility of alternatives to cure that harm and the effect on the orderly proceedings of the court.
>
> Id. This Court has further stated:
>
> > Exclusion of evidence is a last resort. Every reasonable alternative means of assuring the elimination of any prejudice to the moving party and a proper sanction against the offending party should be explored before ordering exclusion.
>
> McCollum, 608 So. 2d at 694.

After stating the factors to be considered, *Buskirk* went on to hold, even though the discovery violation was the result of serious negligence for which there was no excuse, one factor is not controlling even though it weighs against the proponents of the testimony. The exclusion of the evidence need not be automatically fatal to a party's case for the second factor to weigh against exclusion. The fact that the exclusion of the expert testimony is simply harmful to a

party's case is sufficient for the second factor to weigh against exclusion. In regard to timing and tactical decisions, the court held that where a substantial amount of time remained until trial to prepare, the fact that the other party, believing they would be able to get certain expert testimony excluded based on an incorrect statement in interrogatory responses about the witnesses qualifications, made tactical decisions (including whom to interview or take depositions from and whom to voluntarily dismiss, as well as where to concentrate their trial preparation) was not the kind of prejudice contemplated by the rules in regard to the harsh sanction of excluding evidence for discovery violations.

There is not even an allegation in the present case that the failure to disclose Hill's vocational expert in a timely manner was intentional or a tactical decision or the result of bad faith. Defense counsel made it clear to the court at the hearing, that he was not suggesting anything of the kind. (Tr. p. 73, lines 20-28; R.E. p. 100, lines 20-28) On the other hand, Hill's counsel does not contend that the factors which caused the error were excusable. To the contrary, he accepted responsibility for the actions of his staff and his failure to make sure the disclosures were timely filed regardless of how they happened. (Tr. pp. 17-20, 51; R.E. pp. 40-43, 74) There may be negligence beyond excusable neglect, but there clearly is no intentional nondisclosure, tactical nondisclosure, or bad faith in this case.

On the second factor, the present case does not involve a situation where exclusion of evidence amounts to dismissal because the only expert has been excluded where expert testimony is required by law to establish and element of the plaintiff's case. It is, nevertheless, clear that it is very important to Hill's case to be allowed to use some sort of expert testimony to rebut the use by the defense of the Rule 35 examinations conducted by the doctor and vocational expert selected by the defense after Hill's late disclosed vocational expert was excluded. These

examinations were done under a rule new to Mississippi which the bench and bar does not yet have much experience with. Hill's counsel exercised his right to object to the request for a Rule 35 examination, which was not requested until late June 17, 2004[6] and not ruled upon until October 31, 2004. The trial court allowed not only an examination by a medical doctor but also an examination by a vocational expert.[7] The timing of the two rulings resulted in the defense having the opportunity to have Hill examined by both a physician and a vocational expert of their choosing to develop new evidence after they had obtained an order excluding Hill's own vocational expert. The importance of rebuttal evidence to rebut the evidence developed by the defense after the issuance of an order excluding the plaintiff's vocational expert is obvious.

Because a party with a specific good faith objection to a discovery request has every right to rely on its specific objection until such time as the trial court rules against him, Hill should not be penalized for his refusal to submit to the Rule 35 examinations prior to the October 31, 2004 order. *Ford Motor Co. v. Tennin,* NO. 2003-IA- 02546-SCT, 2007 Miss. LEXIS 201, ¶ 45 (Miss. Apr. 5, 2007) The hearing and ruling were delayed as a result of the court's busy calendar. The result of the timing is that the defense was permitted to develop new medical and vocational evidence based on an examination of Hill by the physician and vocational expert the defense chose knowing that Hill's experts had already been excluded. Its experts then revised their opinions after that examination. Prohibiting Hill from using any expert testimony to rebut

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[6]D.P. 4; R.E. 4

[7]There is a split of authority among federal courts as to whether Rule 35 encompasses an examination by a vocational expert. See *Storms v Lowe's Home Ctrs., Inc.*, 211 FRD 296 (WD Va. 2002) (vocational assessment not within scope of Rule 35); *Stanislawski v Upper River Servs.* 134 FRD 260 (DC Minn 1991) rev'd on other grounds 6 F.3d 537 (8th Cir. Minn. 1993) (Rule 35 does not includes vocational examinations); *Acocella v Montauk Oil Transp. Corp.*, 614 F Supp 1437 (SDNY 1985) (no authority for including vocational examinations under Rule 35), *Fischer v Coastal Towing*, 168 FRD 199 (ED Tex 1996) (licensed examiner under Rule 35 includes a vocational rehabilitation expert); *Massey v Manitowoc Co.*, 101 FRD 304 (ED Pa. 1983) (vocational exams included in Rule 35)

that newly developed evidence would amount to penalizing Hill for exercising his right to make a good faith objection under a newly adopted procedural rule which is contrary to *Ford Motor Co. v. Tennin.*

Because no trial date has been set, there is time available before trial and nothing to prevent continuances. Defense counsel clearly stated to the court that time is not the issue in this case[8] which makes sense as nearly a year passed between the discovery of the error promptly followed by provision of the late disclosure and the hearing generating the order at issue in this appeal. More than a year passed before the order that is the subject of this appeal was issued. Meanwhile, the case has continued on with additional discovery and a removal to federal court followed by remand to state court. (D.P. 7-8; R.E. 7-8) Furthermore, the kind of tactical prejudice relied on by the defense in this case as justifying an extreme sanction has been rejected by both *McCollum* and *Buskirk.*

As in *Robert*, the present case is one where discovery proceedings were managed by agreement of the parties through agreements and agreed orders and the trial court was really only actively involved when the defense filed the motion to strike Hill's experts. The defense made no early motions to compel. And like both *Robert* and *Thompson,* and some of the other cases finding abuse of discretion, there were no orders to compel disclosure of expert witnesses that were violated prior to the imposition of the harshest sanction of exclusion. There does not even appear to have the consideration of lesser sanctions prior to imposing the sanction of striking Hill's experts.

It follows from the cases discussed above, the rule that exclusion of evidence or a witness is an extreme sanction of last resort, and the factors courts are to consider prior to reaching the

[8]Tr. pp. 43-44; R.E. pp. 66-67.

sanction of last resort, that the party seeking exclusion of evidence or testimony as a sanction has no "right" to have any evidence excluded as a sanction. The trial court will always have the discretion to impose a lesser sanction, particularly were there has been no previous motion to compel followed by a violation of an order to compel. The fact that the court may have the discretion to impose such a harsh sanction in appropriate circumstances does not mean that the court is ever required to impose that sanction or prohibited from modifying an order imposing such a sanction in order to lessen the impact on an innocent party of a sanction for the mistakes of his counsel which were neither wilful nor a trial tactic. It also follows from these cases that a trial court may consider under the second factor the impact of other issues such as the timing of the Rule 35 examination occurring after the plaintiff's initial experts were disclosed late and excluded in deciding to impose a lesser sanction or to modify an earlier impose harsher sanction.

There can be no doubt that the trial court's solution is still a sanction that disadvantages Hill. He is required to make his case without the use of vocational or medical experts. Although he thinks he can survive a directed verdict, whether he can in fact do so without experts, remains to be seen. The defense in now in the driver's seat in regard to what happens if Hill does survive a directed verdict. They have it entirely within their control to determine what expert evidence Hill will or will not be permitted to present. For example, if there were parts of the Rule 35 exams that they find unfavorable, they can pick and choose as to what their experts will testify to and by not mentioning the areas favorable to Hill, preclude him from offering any expert testimony on those issues. The trial court has been very clear that the modified sanction will still exclude all expert testimony on Hill's behalf unless it is directly related to what the defense voluntarily brings up by limiting the rebuttal expert to the defense case in chief.

The bottom line, however, is that this case squarely falls within those where our appellate

courts have clearly held that lesser sanctions than exclusion of testimony for failing to disclose experts on time should be employed. It follows from the case law in the cases finding that total exclusion of expert evidence was an abuse of discretion, that it is not, and cannot be, an abuse of discretion for a trial court to modify a sanction so that the result is something less than the total exclusion of all expert evidence on behalf of a party, particularly where there was no motion to compel prior to the order striking the evidence, the discovery violation was not intentional or in bad faith, and no trial date has yet been set.

C. The Trial Court Fashioned a Revised Sanction that Limited the New Expert Plaintiff Would Be Allowed to Use In a Manner that Balanced the Requirement for a Plaintiff to Present His Case in Chief With the Right to Respond to Evidence Presented by the Defense

The trial court clearly considered, balanced, and used his discretion to fashion an order that balances the competing interests of the parties and the court including the defense's right to require the plaintiff to prove his case in his case in chief, the right of the plaintiff to respond to and rebut evidence developed and raised by the defense, the imposition of some sanction for the plaintiff's failure to timely disclose initial experts, and the goal of serving justice through an open discovery and trial process which decides cases based on the merits and full evidence rather than errors of counsel and tactical maneuvering.

The trial court very clearly limited his ruling so that Hill will be limited to using the allowed expert solely for true rebuttal purposes. The gist of Appellant's argument is that there is no such thing as true rebuttal evidence where the other side has the burden of proof, at least when it comes to experts. In making this argument, Appellants rely upon *Hosford v. State*, 525 So.2d 789, 791 (Miss. 1988); *Dungan v. Presley*, 765 So.2d 592, 595 (Miss. Ct. App. 2000) citing *Parker v. State*, 691 So.2d 409, 412 (Miss. 1997). These cases do not support the proposition that there is no role for rebuttal evidence, or even expert rebuttal evidence, where the party

offering the rebuttal evidence has the burden of proof. Nor do they support the proposition that all evidence available to a party with the burden of proof is necessarily substantive evidence upon which he relies to establish his demand.

Much more recently than any of these cases, in addressing rebuttal evidence presented by way of expert testimony on a claim of failure to properly disclose the expert testimony prior to trial, the court in *Rubenstein v. State*, 941 So. 2d 735, ¶¶ 146, 150 (Miss. 2006) stated:

> P146. Rubenstein also argues that rebuttal testimony cannot be used to avoid the obligation to disclose evidence about the State's case-in-chief, and that Dr. Bass and Dr. Rodriguez presented improper rebuttals. However, the record does not support this allegation. ...
> P150. This Court "has encouraged liberal application of the rebuttal evidence rule. . . . The determination of whether evidence is properly admitted as rebuttal evidence is within the trial court's discretion." Powell v. State, 662 So.2d 1095, 1098-99 (Miss. 1995) (citations omitted). Likewise, in McGaughy v. State, 742 So.2d 1091, 1095 (Miss. 1999), a capital murder case, we reiterated our support for a liberal application of the rebuttal evidence rule, stating, "[t]he time and manner of introducing evidence is committed to the sound discretion of the trial judge." Accordingly, we "will not reverse unless the exercise of discretion appears arbitrary, capricious or unjust." Id. There is no evidence to support Rubenstein's claim the trial court abused its discretion in allowing the rebuttal testimony.

The State had the burden of proving the time of death and used some entomology evidence in its case in chief. The defense disagreed with the State's theory as to the timing of the death and presented experts whose testimony tended to show based on the "bug" evidence that the bodies had been dead for a much shorter time than the State claimed when they were discovered. The State then called an expert entomologist it had not offered in its case in chief to rebut the defense theory that the bodies had not been dead as long as the State claimed.

Based on *Rubenstein*, it is clear that there are matters that could be raised in the defense case in chief after Hill has properly offered his substantive evidence to establish his theory of total disability resulting from the collision that were not necessarily a part of his case in chief and which could be true rebuttal evidence. Perhaps the most obvious would be evidence on the issue

of some form of an apportionment issue. Apportionment of damages, including claimed injuries, is an affirmative defense in negligence cases on which the defendants bear the burden of proof. *Pearl Pub. Sch. Dist. v. Groner*, 784 So. 2d 911, ¶ 20 (Miss. 2001) Another example would be evidence related to claims that Hill contributed to his own disability by his own neglect in regard to his own physical condition or by negligently failing to seek follow-up treatment or to follow his physicians' instructions which would fall within a contributory negligence defense on which Appellants' would have the burden of proof. *Reikes v. Martin*, 471 So. 2d 385, 389 (Miss. 1985).

Equally as important, Appellants ignore half the definition of proper rebuttal evidence from *Tramonte v. Fiberboard Corp.*, 947 F.2d 762, 764 (5th Cir. 1991). The portion of *Tramonte* relied upon by Appellants' says:

> The scope of rebuttal testimony is ordinarily a matter to be left to the sound discretion of the trial judge. ... The trial court generally admits rebuttal evidence either to counter facts presented in the defendant's case in chief, McVey v. Phillips Petroleum Co., 288 F.2d 53, 54 (5th Cir. 1961), or to rebut evidence unavailable earlier through no fault of the plaintiff, Allen v. Prince George's County, 737 F.2d 1299, 1305 (4th Cir. 1984).

After quoting this language from *Tramonte*, Appellants then proceed to completely ignore the first type of rebuttal evidence, focusing instead solely on the second type despite the fact that the Rule 35 examination presents a strong likelihood of the first type of rebuttal evidence being necessary in this case.

In meeting his burden of proof, a plaintiff is not required to raise the defendant's defenses for him or to make his case. The plaintiff's burden is only to make his own case. If the defendant's theory of the facts and what happened differs from the plaintiff's theory of the facts, then the defense is entitled to present factual evidence of its theories of what happened. That is what is meant by the defendant's case in chief. The plaintiff is then entitled to offer evidence to

rebut the defendant's evidence as to his version of the facts. That is the normal order of a case. The evidence offered by the plaintiff to counter the defendant's version of the facts is true rebuttal evidence, especially if it is on a factual point not necessary to establish the plaintiff's theory of the case. Appellants' arguments, however, turn that normal order on its head and require the plaintiff to raise the defendant's version of the facts in the plaintiff's case in chief. That is not an has never been the law.

While there are situations where a certain piece of evidence is clearly direct substantive evidence of an essential element of the plaintiff's prima facie case which should not be held until rebuttal, it does not necessarily follow that all evidence which a plaintiff might in one case elect to present in his case in chief is necessarily required to be presented in another plaintiff's case in chief. As the court succinctly explained in *Farmers Union Grain Terminal Asso. v. Industrial Electric Co.*, 365 N.W.2d 275, 278 (Minn. Ct. App. 1985)

> We agree that it is unnecessary to require anticipatory rebuttal of defense theories. In the normal course of litigation the defense may assert several theories before trial. Its final position may well depend on seeing the plaintiff's case as presented in court. It would unnecessarily lengthen trials and increase the expense of litigation to require rebuttal of each possible defense theory in the plaintiff's case-in-chief.

Following Appellants' logic, however, every plaintiff would be required to present in his case in chief all evidence he might have on every defense brought to light through discovery that a defendant might raise so long as it was somehow related to duty, breach, causation or damages. In regard to causation of damages, for example, assume the plaintiff claimed he was totally disabled at the time of trial as the result of a back injury from an automobile collision where he had surgery fusing six discs two days after the collision. Further assume the discovery revealed that ten years before he switched jobs after complaining of back pain, that a Rule 35 examination also revealed that he had risks factors for heart disease that may shorten his

expected work life span and that he was going through a divorce and had situational severe depression, and also that his ex-wife had given the defense a statement that when she kicked him out, he carried a heavy trunk of possessions out to the car. The plaintiff should not have to put on evidence in his case in chief to refute all these potential facts that the defense might raise as possibly having some bearing on his future potential to engage in gainful employment. The defense might decide in the course of trial not to present evidence on any one or more of these factual points or theories of other contributing causes of disability or lack of disability for any number of reasons. It would needlessly string out trials and unfairly hamper the plaintiff with more than his burden of proof to require him to raise all these factual possibilities which he considers irrelevant and to disprove any negative inferences they might raise until the defense actually puts on its case. Yet that is what Appellants' arguments on this appeal would require.

In this case, the defense developed new evidence through the Rule 35 hearing. They may or may not decide to present evidence of certain facts allegedly bearing on Hill's ability to engage in some sort of gainful employment based on that evidence developed late in the discovery process. They may or may not choose to present evidence on all the points their experts raised after reviewing the results of those examinations. They may pick one or two facts out of that examination to focus on. Or they may rely on some points raised in those examinations while totally ignoring others. Those choices are their prerogatives. But just because they prevailed on their motion and were allowed to conduct the Rule 35 examinations, it does not necessarily follow that Hill should be required to refute every possible negative statement or inference the might flow from those examinations in his case in chief.

Hill's counsel pointed out to the trial court that in *Hosford v. State*, the court held that no party should be permitted as a *deliberate trial tactic* to decide in advance of trial to withhold part

of his case in chief and then offer that evidence in rebuttal. However, in this case, there was no such deliberate intent by the plaintiff. Hill's original vocational expert wrote his report in 2003 and Hill's attorneys thought it had been disclosed. When they produced his report late, they made no effort to alter it. If there had been a deliberate intent to withhold evidence, Hill's counsel would not have disclosed their expert's report late. Instead they would not have disclosed it at all.

Moreover, as Hill's counsel pointed out to the trial court, the Rule 35 examination is entirely defensive evidence. It is defensive opinions based on examinations by doctors and vocational experts chosen by the defense. The response to it is not part of plaintiff's case in chief.

The trial court clearly recognized that the plaintiff has a right to rebut the issues and evidence raised by the Rule 35 exam. The trial court also made sure that Hill's counsel was aware he would have to make his case in chief without the use of the expert rebuttal testimony and that it was clear to everyone that the testimony he was allowing would be confined to true rebuttal testimony.

> BY THE COURT: Are you saying that the plaintiff does not have a right to respond to the defendant's supplementation?
> BY MR. HATHAWAY: That's correct. ... They are, we don't even have to call, this case may never get to the defendant's case. It may be dismissed on directed verdict, for example. The plaintiff has to say, as we all know, here is my case in chief, and I've created a prima facie case on both liability and damages. ...
> BY THE COURT: ... I'd like to ask Mr. Hollowell ... on this limited matter. You are required to establish a prima facie case-in-chief during the presentation of your witnesses. ... Can you do that?
> BY MR. HOLLOWELL: Yes, sir.
> BY THE COURT: Without going to the defense side as far as the IME is concerned?
> BY MR. HOLLOWELL: Yes sir. The, I can prove liability by the testimony of fact, which witness did what and I've got live witnesses that saw what happened. We've got different persons that are going to say that the defendant driver, Ephen Banks, pulled left as my, the plaintiff was passing a number of cars. That's a question.
> BY THE COURT: What about the key matter of damages?

BY HOLLOWELL: Okay, the treating physician, who is now, who's still treating him by the way. I didn't designate him because a treating physician doesnot have to be designated under case of Nole vs. Harris, 1715 [sic] So.2d 174, if he's going to testify as to diagnosis and treatment. And that's what he was going to testify to.
BY THE COURT: All right. Thank you.
(Tr. p. 39, line 3 to p. 40, line 25)
BY THE COURT:... What the Court will do, however, is to allow the plaintiff to present rebuttal testimony, even from an expert, but other than Lamar Crocker. The Court agrees that he should not be able to get in the back door what has been disallowed through the front door.

But that rebuttal evidence that may be put on by an expert will be limited to that testimony which would have been presented during the *defendant's case in chief. If the defendant's case in chief does not cover a particular matter, then that matter cannot be addressed during the course of rebuttal evidence presented by the plaintiff. ...*
You may not use Crocker. Nor his report. But if you want some other expert sitting in the courtroom, listening to the evidence, then that person may testify, but his testimony will be limited to those issues addressed by the defense during its case in chief. ... ... Now, you must remember now, I am disallowing that Lamar Crocker altogether and his report. ... *I'm allowing testimony in rebuttal, but it shall be limited in the same respect as in all other cases. You know, you can only go over in rebuttal what has been produced during the case in chief... [a]ny issue that is testified to during the defense's case in chief. ... [H]is, her or their testimony will be limited thereto.*
(Tr. pp. 72, line 18 to p. 73, line 8, p. 80, line 28 to p. 83, line 28, p. 86, line 12-21, line 28 to p. 87, line 5; R.E. pp. 95, line 18 to p. 96, line 8, p. 103, line 28 to p. 106, line 28, p. 19, line 12-21, line 28 to p. 110, line 5))

D. Hill's Failure to Take an Interlocutory Appeal from the Earlier Order Has No Effect

Appellants have argued to the trial court and on appeal that somehow a party loses his right to raise the issues in a prior interlocutory order and becomes firmly bound to that order if he fails to elect to take an interlocutory appeal from that interlocutory order in the time allowed by M.R.A.P. 5. There is no duty or requirement to seek an interlocutory appeal of an interlocutory order. To the contrary, except in very specific circumstances such as the denial of a motion to compel arbitration, there is no "right" at all to an interlocutory appeal. The right to an appeal of an interlocutory order does not arise until the judgment becomes final. M.R.A.P. 4 and 5. The reason for the lack of a right to immediate appeal of interlocutory orders is simple. Those orders

are not final and are subject to change by the trial court. See *In re Enlargement of Corporate Limits*, 588 So. 2d 814, 828 (Miss. 1991), supra. Thus the failure to timely file a petition for interlocutory appeal has no effect other than to deprive the aggrieved party of the option to seek an earlier decision on that particular order by an appellate court. It does not, and cannot, result in any sort of waiver or preclusion of the issue.

CONCLUSION

Much of Appellants argument is based on its hypothetical assumptions of what might happen if other courts made rulings similar to that of this trial court in other hypothetical cases without the same fact situation. This court does not decide hypothetical cases. Nor does the exercise of discretion by one judge in one case at the trial level set a rule or a precedent that can be exploited by future plaintiffs who intentionally decide to withhold discovery to gain some hypothetical tactical advantage at trial.

What this case is really about is whether the trial court abused its discretion when it carefully considered all the facts in the situation before it, and decided that the extreme sanction of precluding Hill from having any possibility of using any expert evidence to rebut the expert opinions of the defense experts formed after Hill's experts were excluded on the basis of a defense Rule 35 exam after Hill's experts were excluded because of his counsel's mistake before the Rule 35 exam was even requested was too harsh. The relevant factors include the fact that while Hill's counsel may have been at fault at a level beyond excusable neglect, his failure to timely disclose was not intentional or the result of tactics or bad faith. They also include the fact that while there were agreed scheduling orders, there was not motion to compel or order to compel prior to the imposition of the sanction of exclusion of all Hill's experts. Perhaps most importantly, they include the fact that Hill and his counsel had a right to raise a good faith

objection to the Rule 35 examination, and Hill should not be penalized for his counsel not giving in to the defense demand until the court ruled on the defense motion to order the exam.

What the trial court did is still a sanction. It takes away from Hill the choice of how to present his case. It hamstrings his use of expert evidence and gives the defense extraordinary control over what Hill's experts can testify to. If Hill's counsel is wrong and he is not able to make out a prima facie case without experts, he may lose his case on directed verdict not because of the merits, but because of his counsel's error. If he does survive directed verdict, he will be limited to offering evidence on the points raised by the defense to attack his proof of damages. The defense will already know what his vocational theory of the disability case would have been from the late disclosures of the expert who was excluded. With that forewarning, and the Rule 35 examination, they have the opportunity and the time to figure out how best to present their case while at the same time avoiding reference to anything favorable to Hill. As to the claim that they will not have the opportunity to prepare for whatever the rebuttal expert will say, that claim ignores all the information they already have as well as the statements made in the hearing which indicate that they will also have the name of the rebuttal expert well in advance of trial so they can prepare to attack his credentials.

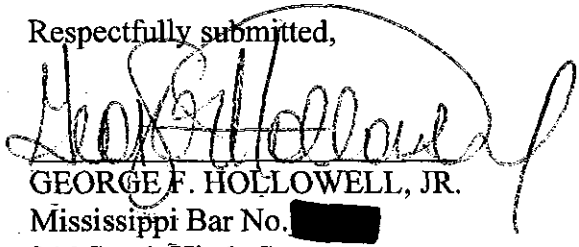
As to the claim that they are more prejudiced by the trial court's latest order than if he had allowed Hill to use his original vocational expert in rebuttal, that argument was not raised to the trial court. It also ignores the fact that the trial court could have modified its order and allowed Hill to use his original expert in his case in chief based on the facts in this case. They are certainly in a more advantageous position with Hill being prohibited from using any expert testimony in his case in chief than they would have been in had the court imposed only the lesser sanction of some additional discovery with Hill's counsel bearing the costs of the additional

discovery associated with late disclosure of Hill's original vocational expert and use of his opinions to rebut the Rule 35 examination evidence.

The bottom line, though, comes down to the fact that Appellants have no "right" to havea any particular sanction imposed. They have no "right" to have Hill's late disclosed vocational expert stricken. The issues in this appeal are all ones within the sound discretion of the trial court. The careful consideration of all the arguments and all the factors shown in the hearing transcript as well as the reasons for the trial court's decision demonstrate that there was no abuse of discretion in this case. They may have been some leniency shown for Hill who was not at fault in what happened. There may have been some consideration granted as a result of Hill's counsel's acceptance of his responsibility for the errors made and his plea to penalize him instead of his innocent client. There clearly was a respect for the principle that cases should be tried fairly on their merits in a quest for fair justice based on the evidence. But there was no sign of anything outside the bounds of the broad discretion granted to trial courts to manage discovery, determine sanctions and decide upon the admission, exclusion and order of evidence.

Accordingly, the judgment of the trial court should be affirmed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

Pursuant to M.R.A.P. Rule 25(a), I hereby certify that I have mailed the original and three (3) true and correct copies of the above and foregoing Brief of Appellees via First Class U.S. Mail to:

Hon. Betty W. Sephton
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I further certify that I have mailed a true and correct copy of the above and foregoing Brief of Appellees via First Class U.S. Mail to:

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I further certify that pursuant to M.R.A.P. 28(m), that I have also mailed an electronic copy of the above and foregoing on an electronic disk and state that this brief was written in Adobe Acrobat format.

This the 19 day of July, 2007.

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