IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
Case No. 2006-IA-00047-SCT

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

VS.

CURLIE DARNELL HILL — PLAINTIFF/APPELLEE

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

REPLY BRIEF OF APPELLANTS
EPHEN L. BANKS AND JIMMY OGLESBY d/b/a OGLESBY FARMS
(Oral Argument Requested)

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Plaintiff's brief fails to effectively deal with the heart of the issue on appeal and the legal principles controlling that issue. The greater volume of Plaintiff's argument is split between matters not properly before this Court and matters immaterial to the issue on appeal. Most significantly, Plaintiff offers no authority which demonstrates the trial procedure crafted by the order of the court below is anything but erroneous as a matter of law.

I. The Order of the Court Below is Error and Constitutes an Abuse of Discretion as it is Contrary to Numerous Well-Settled Principles of Procedure.

If there is any one thing in our law upon which the decisions, the texts and the opinions of the bench and bar are in agreement, it is the firmly-settled proposition that a plaintiff suing for personal injuries bears the burden of proving the very fact of his injury, the nature and extent of his injury and any decreased earning powers.[1] *Kincade & Lofton v. Stephens*, 50 So.2d 587, 593-94 (Miss. 1951); *Index Drilling Co. v. Williams*, 137 So.2d 525, 531 (Miss. 1962); *Savage v. LaGrange*, 815 So.2d 485, ¶14 (Miss. App. 2002). It is equally-settled that the party bearing the burden "should not withhold evidence for rebuttal which properly belonged as part of [his] case-in-chief." *Smith v. State*, 646 So. 2d 538, 543-44 (Miss. 1994) (citing *Parker v. State*, 691 So. 2d 409, 412 (Miss. 1997)). *This* is the law, and none of Plaintiff's subjective suppositions that the order of the trial court was some sort of discretionary act of equitable relief designed to soften the striking of his experts alters the state of the law a whit. Calling the clearly impermissible admission of substantive evidence in Plaintiff's rebuttal case a "balancing of fairness and justice" does not make it so any more

[1] It is axiomatic that Plaintiff also bears the burden of proving the liability elements of his claim; however, from Plaintiff's briefing, he has evidently abandoned his attempt to call any expert in rebuttal other than a vocational rehabilitation expert for the purpose of bolstering his damage claim. Needless to say, the law and arguments presented by Defendants would apply equally to any expert the Plaintiff was to call in rebuttal under the specific facts of this case.

than calling a swine-eared purse silken. In nearly 30 pages of briefing, the Plaintiff does not cite to even one case where a plaintiff was permitted to call an expert witness in rebuttal to prove the nature and extent of the injuries being sued upon and the resulting decreased earning powers of the plaintiff. Indeed, none exists for the self-evident reason that the law does not allow room for the measure granted by the trial court.

This appeal is from an erroneous order empowering the Plaintiff to offer substantive expert testimony on *prima facie* elements of his claims in rebuttal after the striking of Plaintiff's experts for failure to designate. With citations to applicable authorities, Defendants demonstrated with clarity that the order of the trial court: 1) erroneously permitted the Plaintiff to repackage substantive expert testimony as "rebuttal" evidence, constituting an affront to the integrity of the trial process; 2) erroneously shifted the burden of proof from Plaintiff to Defendants by allowing Plaintiff to reserve the presentation of substantive expert testimony in rebuttal to tell the jury why Defendants' experts are "wrong" – thus impressing Defendants with the burden of being "right"; and 3) resurrected trial by ambush by undermining the rules governing disclosure and pre-trial discovery of experts since a legitimate rebuttal witness would not be able to anticipate what he or she would be rebutting prior to trial. Plaintiff offered no applicable law or reason challenging the correctness of these points of error.

Either rules, law and procedure mean something or they do not. Either "the party who has the burden of proof, and the duty to open the case, must . . . before he rests in his proof, introduce all the substantive evidence upon which he relies to establish his demand, and the extent of that demand" or he does not. *See Hosford v. State*, 525 So. 2d 789, 791 (Miss. 1988). Either a plaintiff must disclose for each of his experts "the substance of *every* fact and *every* opinion which supports" Plaintiff's claim and in a manner "which will enable

the opposing side to meet it at trial" (*Id.*) or not. For the controlling principles of procedure to have any meaning, the trial court's order cannot stand.

It is respectfully submitted that even the Plaintiff appreciates the extraordinary nature of the court's ruling, evidenced by Plaintiff's notable statements in his brief that the current condition of this case was caused by "negligence beyond excusable neglect." While the Plaintiff is not on trial in this appeal nor are value judgments being sought, these grave statements would not be necessary if the trial court's ruling was everyday, acceptable courtroom procedure. This level of contrition, at a minimum, reflects Plaintiff's acknowledgment that something has gone judicially awry, which Plaintiff ineffectively attempts to justify.

II. The Order of the Court Below Should be Reversed where throughout the Majority of Plaintiff's Brief he Fails to Address the Issue on Appeal, Lending no Support to the Lower Court's Order.

In the absence of supporting legal authority, the Plaintiff lodges a number of arguments through which he weaves the generic theme of the trial court's discretionary authority to fashion and modify orders concerning discovery, experts and sanctions. Plaintiff also launches a lengthy attack on the alleged "severity" of the trial court's order striking his experts in the first instance; devoting considerable argument to the proposition that his experts should not have been excluded and virtually blaming the defense for not moving to compel the Plaintiff to meet obligations which he was bound to meet on his own accord. These arguments are of no effect to the issue on appeal.

The ultimate issue for disposition by this Court is not whether the trial court had the authority to act in making orders, amending orders, or reversing orders but, rather, whether the trial court's order at issue was erroneous. *See Dunaway v. State,* 919 So. 2d 67, 74 (Miss. Ct. App. 2005) ("it is reversible error when . . . evidence admitted in rebuttal should have

been offered in the case-in-chief"). Moreover, this controversy does not involve an appeal from any sanction imposed on the Plaintiff. The only arguable sanction imposed – striking the Plaintiff's experts – was not contested by the Plaintiff on direct or cross-appeal and he cannot stand to be heard on that matter now. "In order for the appellee to gain reversal of any part of the decision of a trial court about which the appellant brings no complaint, the appellee is required to file a cross-appeal." *Delta Chemical and Petroleum, Inc. v. Citizens Bank of Byhalia*, 790 So. 2d 862, ¶52 (Miss. App. 2001) (citing *Brock v. Hankins Lumber Company*, 786 So. 2d 1064 (Miss. App. 2000)); *Board of Trustees v. Knox*, 688 So. 2d 778, 782 n. 1 (Miss. 1997) (declining to consider "points of error" raised by appellee who did not file cross-appeal); *Reynolds v. State*, 585 So.2d 753 (Miss.1991) (refusing to address an allegation of error raised by the State regarding the appellant's sentence when no cross-appeal had been filed); *Beck Enterprises, Inc. v. Hester*, 512 So.2d 672, 678-79 (Miss.1987) (Court will not consider issues not raised on direct appeal or on cross-appeal). That the Plaintiff, in connection with his attempt to rationalize the present error of the trial court, has invited implicit review of the consequences of his violation of court order after court order regarding designation of experts is improper and irrelevant.[2]

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[2] The legitimate threat of having experts stricken after ample opportunity to do so is not a novel concept, in any event. One of the better-reasoned cases standing as fair warning of this is *Bowie v. Montfort Jones Memorial Hospital,* 861 So.2d 1037, ¶14 (Miss. 2003), in which this Court held:

> Our trial judges are afforded considerable discretion in managing the pre-trial discovery process in their courts, including the entry of scheduling orders setting out various deadlines to assure orderly pre-trial preparation resulting in timely disposition of the cases. Our trial judges also have a right to expect compliance with their orders, and when parties and/or attorneys fail to adhere to the provisions of these orders, they should be prepared to do so at their own peril. *See, e.g., Kilpatrick v. Miss. Baptist Med. Ctr.*, 461 So.2d 765, 767-68 (Miss.1984) (held that trial court did not abuse discretion in dismissing case due to failure to comply with pre-rules discovery statutes relating to timely designation of expert witnesses); *Mallet v. Carter*, 803 So.2d 504, 507-08 (Miss.Ct.App.2002) (held that trial court did not abuse discretion in dismissing case for failure to timely designate expert witness within the time allowed by the trial court's scheduling order). The provisions of Miss. R. Civ. P. 37(d)(2) clearly provide that the sanctions for failure to answer Rule 33 interrogatories [Miss. R. Civ. P. 33] are the same as set out in subsections (A), (B), and (C) of Miss. R. Civ. P. 37(b)(2), which provide, *inter alia*, for sanctions by way of dismissal of a case. In a case wherein we

Likewise, Plaintiff's suggestion that Defendants bear some sort of responsibility in this matter because they did not obtain a court order compelling Plaintiff to comply with *previously* disregarded court orders concerning designations of experts is immaterial to this appeal and runs afoul of the law. This Court has held, "[w]e cannot agree that parties who file appropriate interrogatories seeking expert information acquire the additional burden of filing a motion to compel, where they are provided an answer which promises supplementation."[3] *Palmer v. Volkswagen of America, Inc.*, 904 So.2d 1077, ¶55 (Miss. 2005) (also holding that trial court was well within its discretion in disallowing the testimony of expert based upon the failure of plaintiffs to timely provide expert information in response to either the expert interrogatory filed by defendants or the trial court's scheduling order). Plaintiff's suggestion shifting to the Defendants the obligation of compelling him to comply with court orders seems very inconsistent with the conciliatory tone struck in other parts of Plaintiff's where his brief attests that the failure to designate experts was inexcusable error. Plaintiff's argument that Defendants should have moved to compel amounts to no more than an irrelevant bemoaning of the striking of his experts based on his repeated failures to comply with extension after extension of the court-ordered deadlines, which is an issue that has not been joined for appellate review.

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upheld the trial court's refusal to set aside a default judgment, we stated:

> It may be that people will miss fewer trains if they know the engineer will leave without them rather than delay even a few seconds. Although we are not about to inaugurate a policy of entering irrevocable defaults where no answer has been filed by the thirty-first day, we are equally resolved that people know that the duty to answer must be taken seriously. At some point the train must leave. *Guaranty Nat'l Ins. Co. v. Pittman*, 501 So.2d 377, 388-89 (Miss.1987).

[3] All three (3) of the original Defendants served written discovery on the Plaintiff, which included an interrogatory calling on the Plaintiff to identify trial experts and to disclose M.R.C.P. Rule 26(b)(4) information for each expert identified. The earliest of these interrogatories was served on or about June 23, 2003. Plaintiff responded to all three interrogatories in like manner, stating that he would supplement with expert disclosures.

III. The Order of the Court Below Should be Reversed where Plaintiff offers no Credible Argument or Authority that Condones the Trial Court Procedure Established by the Court Below.

After peeling back the immaterial arguments advanced by Plaintiff, we are left with the only contention of the Plaintiff that addresses the issue of what constitutes proper rebuttal; namely, Plaintiff argues that the trial court's order "balanced the requirement for a Plaintiff to present his case in chief with the right to respond to evidence presented by the Defense." In making this argument, the Plaintiff re-engineers Defendants' position to be more broad than it actually is and then asserts that Defendants cannot support this position (as mis-stated by Plaintiff) with the law. Contrary to the assertions of Plaintiff, Defendants do not suggest that there could *never* be a proper case for legitimate rebuttal evidence offered by an expert. Rather, it is free from doubt that this is not such a case.

Here, the order below authorizes the Plaintiff to attempt to present to the jury, through lay witness testimony, a theory of total disability during his case in chief and then, after the defense rests, allows Plaintiff to offer substantive evidence in the form of expert testimony as to the nature, extent and duration of his injuries and any resulting decreased earning powers in rebuttal – by an expert who was never properly disclosed pursuant to Rule 26(b)(4) – *and* after Plaintiff's trial experts were stricken because they were not timely disclosed in the first instance. This does violence to the mandate of *Hosford v. State, supra*, that "the party who has the burden of proof, and the duty to open the case, must . . . before he rests in his proof, introduce all the substantive evidence upon which he relies to establish his demand, and the extent of that demand."

For all of the arguments and authorities presented by Plaintiff, not for a moment is it demonstrated that such procedure is appropriate. The cases cited by Plaintiff all involved situations where the plaintiffs initially called experts during their case in chief and, only then,

called rebuttal experts to rebut matters not critical to the case in chief of those plaintiffs. These cases are neither analogous nor controlling of the issue for disposition herein.

In one such instance, Plaintiff quotes excerpts from *Rubenstein v. State*, a Mississippi Supreme Court opinion regarding a capital murder trial, for the general proposition that Mississippi courts employ liberal application of the rebuttal evidence rule. (Pl.'s Br. at 21, *citing Rubenstein v. State*, 941 So. 2d 735, ¶¶ 144, 145 (Miss. 2006)). Plaintiff then provides a limited statement of the facts in *Rubenstein* necessary to the extent needed to indicate that the State, who was the party bearing the burden of proof, was permitted to call in its rebuttal case an expert who had not been offered during the State's case in chief. (Pl.'s Br. at 21). However, Plaintiff failed to point out the distinguishing reasons why the *Rubenstein* Court ruled that the expert evidence presented on rebuttal was proper.

In *Rubenstein*, the criminal defendant argued that the admission of the State's expert rebuttal evidence constituted error, because the expert was not properly disclosed to the Defendant prior to trial. *Rubenstein*, 941 So. 2d at ¶¶ 144, 145. The court found, though, that the State had in fact properly disclosed the identity of the expert at issue. *Id.* at ¶ 145. The Defendant also argued that expert rebuttal testimony should have been excluded, because the rebuttal testimony violated the obligation to disclose evidence about the State's case in chief and that the experts presented improper rebuttal, claiming they lied. *Id.* at ¶¶ 136-146. The *Rubenstein* court similarly found that these assignments of error were too without merit. *Id.* at ¶ 146. The *Rubenstein* case has no bearing on the issue presented herein. The fact that expert testimony was admitted during the State's rebuttal in *Rubenstein* proves nothing more than that expert testimony was admitted during rebuttal in that case. *Rubenstein* did not involve expert rebuttal evidence to be offered to establish a demand for monetary damages and the extent of that demand. *Rubenstein* affords no assistance for

Plaintiff's contention that the trial court's order appropriately achieves some delicate balancing act protecting the interest of the Plaintiff and the Defendant in the case at bar.

Another case offered in support of Plaintiff's argument that he has a right to present substantive expert testimony in rebuttal is *Farmers Union Grain Terminal Ass'n. v. Industrial Elec. Co.*, 365 N.W. 2d 275 (Ct. App. Minn. 1985). *Farmers Union* is a Minnesota Court of Appeals case in which appears the proposition that rebuttal experts are proper because a plaintiff need not anticipate rebuttal of defense theories during his case in chief. (Pl.'s Brief at 23). First and foremost, *Farmers Union* provides no support to Plaintiff herein because it does not stand for the proposition that expert rebuttal evidence is properly admitted where such evidence was necessary to the plaintiff's *prima facie* case, as it is in this case. *Farmers Union* is further dissimilar to the case at bar, as it did not involve an antecedent exclusion of expert witnesses from the plaintiff's case in chief. *See generally Farmers Union Grain Terminal Ass'n.*, 365 N.W. 2d 275 (Ct. App. Minn. 1985).

The *Farmers Union* case involved a fire in a grain tunnel. *Id.* at 276-77. The plaintiff asserted the fire was caused by the act of the defendant's electrician and presented expert proof in support of this theory during its case in chief. *Id.* The defendant, during its case in chief presented conflicting expert testimony to show the fire was caused by a totally different source, which had nothing to do with the acts of defendant's electrician. *Id.* The trial court refused to allow the plaintiff to put on expert proof to rebut the defendant's theory of how the fire started. *Id.* The appellate court, reasoning that the resolution of the issue regarding the cause of the fire depended largely on the outcome of the battle of the experts, held that the trial court's refusal to allow the plaintiff to present rebuttal testimony regarding the defendant's theory of the cause of the fire was prejudicial error, when that testimony was "unnecessary" to the plaintiff's *prima facie* case. *Id.* at 278. Actually, upon closer inspection,

the *Farmers Union* court took the approach toward rebuttal evidence that is widely accepted – that is, that rebuttal is used to "cut down" a defendant's case as opposed to "confirm[ing] that of the plaintiff." *Id.* at 277. For instance, reasoned the *Farmers Union* court, a defendant may assert several theories of how an event occurred before trial and the plaintiff is not required to fully anticipate which of those theories the defense ultimately will present at trial. *Id.* at 278. That is a far cry from what we have in the present case, where there is no "battle of the experts" as it is the lay testimony of the Plaintiff, himself, who will support the theory of his disability, forcing Defendants to respond to his theory. In such a case, even the *Farmers Union* court recognized the impropriety of presenting evidence, necessary to the Plaintiff's case in chief, in rebuttal. *Id.* (*citing Skogen v. Dow Chemical Co.*, 375 F.2d 692 (8th Cir.1967), and *Russo v. Peikes*, 71 F.R.D. 110 (E.D.Pa.1976)).

Plaintiff follows his reliance on *Farmers Union* with an unrealistic and disconnected hypothetical in an attempt to argue that perhaps the situation could arise where he might need to call an expert witness during rebuttal to address an issue concerning any pre-existing conditions from which he might suffer. Plaintiff, though, offers nothing from the record whatsoever to suggest that his proffered expert testimony will relate to apportionment of damages or to rebut a claim of pre-existing condition. The record supports the undeniable fact that Plaintiff intends to use substantive expert testimony to bolster – indeed, *prove* -- his own lay opinion that he has suffered total disability as a result of his car accident with Defendants.

By the same token, it stretches credulity for Plaintiff to suggest that the issue of his contributory negligence *vel non* somehow relieves him of his requirement to introduce in his opening case all substantive evidence upon which he intends to rely to establish his claim for damages against Defendants. This proposition by the Plaintiff is superficial and ignores

reality. A requisite element of Plaintiff's claim which must be presented in his case in chief is, after all, Defendants' negligence. This case involves a car accident; it is not possible for Plaintiff to present a theory in his case in chief that the automobile accident was the Defendants' fault without demonstrating that he was acting as a reasonably prudent driver at the time of the accident. This misguided argument by Plaintiff only solidifies that the proffered expert testimony at issue can, in fairness, only be presented during Plaintiff's case in chief.

Throughout the abstract hypotheticals presented by Plaintiff, he fails to deflect the undeniable fact that his vocational rehabilitation expert will provide testimony that could only be properly presented in his case in chief, if he were to present it at all. Further, Plaintiff has failed to point this court to any case where a party was allowed to provide rebuttal expert testimony in support of his case where his experts had been stricken from his case in chief for cause. Contrast that with the ample authorities presented by Defendants which demonstrate the bedrock of the law and the impropriety and reversible error of the order below allowing Plaintiff to present the most minimal, vague evidence possible to avoid a directed verdict, forcing the Defendants to be the first to present any specific scientific evidence to refute Plaintiff's claim that the Defendants' negligence caused the automobile accident; inflicting significant disabling injuries from which he alleges he continues to suffer total disability. *Jamison v. Moseley*, 10 So. 582 (Miss. 1892), instructs this court that such a procedure is error.

It is error to force a Defendant be the first party to present all of the specific circumstances of a car accident or of a Plaintiff's injury during Defendant's case in chief. *Id.* at 583. Contrary to Plaintiff's contentions, it is necessary in some circumstances for a plaintiff to anticipate a defendant's affirmative defense and address it during Plaintiff's case

in chief. *See id.* "A plaintiff may not invoke the principle [that a defendant bears the burden of proof to establish an affirmative defense] as an aid to him in making out his case, and more especially may he not, by withholding his evidence which should be put in chief, and developing it as rebutting the defendant's case, gain an advantage by indirection to which he would not be entitled if he had proceeded in the ordinary method of disclosing his case." *Id.* Just as it was improper to reverse the order of proof and allow the Plaintiff to gain advantage by presenting the specific facts of his lawsuit on rebuttal in *Jamison* in 1892, the court below's order cannot stand as it establishes a procedure that is clearly in error.

The trial court's order in the case at bar encourages Plaintiff to present vague proof as to the cause of the accident and the extent of his injuries forcing the Defendants to be the first to present details of the accident and a damages expert to refute the lay opinions of disability only supported by Plaintiff's un-learned testimony during his case in chief. The procedure established by the trial court's order encourages this Plaintiff (and others, should it stand) to present as little factual information and testimony as is possible to avoid a directed verdict so he may later argue, after the defense rests, that the specific facts and circumstances presented by the Defendants during their case in chief were "new" and unanticipated, requiring "rebuttal."

IV. The Rule 35 Examination of Plaintiff does not Make the Procedure Crafted by the Order at Issue any Less Improper or Unfair for Defendants.

Finally, Plaintiff's argument that his right to call rebuttal experts is inextricably tied to the Rule 35 examinations which Plaintiff was compelled to undergo is devoid of merit. Defendants requested and then moved for Plaintiff to submit to examinations for conditions *he* placed at issue pursuant to Rule 35 of the *Mississippi Rules of Civil Procedure* – a rule which went into effect in Mississippi state courts in January of 2003, and which had been in

effect in the federal courts of this state since 1937 (*see* F.R.C.P. 35, cmt.).[4] It was Plaintiff who claimed, "I can no longer work because of my injuries." It was Plaintiff who asserted Defendants owed him money for this claim. And, it was also Plaintiff who aggressively resisted Defendants' motion for an examination to have these claims verified. (Transcript of Hearing pp 31-34). It is inconceivable that Plaintiff now uses his resistance to Defendants' efforts to test his otherwise naked claims of disability as an excuse for needing "rebuttal" evidence. If Plaintiff had not asserted a claim of total disability, he would not have been subjected to an examination to verify the veracity of such a claim.

A Plaintiff must offer evidence on any issue of potential importance to the outcome of his case during his case in chief to demonstrate a *prima facie* case. *Tramonte v. Fiberboard Corp.*, 947 F.2d 762, 765-66 (5th Cir. 1991) (*citations omitted*). There is no logical reason to suggest that new evidence would be discovered during a Rule 35 examination of a Plaintiff regarding his claim for total disability that would require rebuttal by Plaintiff, because any such "rebuttal" evidence should be offered under Plaintiff's case in chief under *Tramonte* and the cases upon which it relies. Rule 35 examinations are not intended to create "new" evidence. They are intended to verify and/or test the credibility of the evidence presented by Plaintiff. The notion that it was Defendants who created "new evidence" through the Rule 35 examinations defies reason and in no way relaxes Plaintiff's burden of proof during his case in chief at trial.

Where a plaintiff makes the claim that he is permanently disabled from working due to a permanent condition he suffers from as a proximate cause of a defendant's negligence, and he claims past wages and diminished future wage earning capacity without designating

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[4] Moreover, the undersigned counsel for Defendant Banks also litigated the right to a Rule 35 examination with Plaintiff's counsel some eight (8) years ago in *Luvenia Lindsey v. Dalcor Mgt., Inc.*, In the United States District Court for the Northern District of Mississippi, Greenville Division; Cause No. 4:99CV172-D-B. The implication that Rule 35 was a novel creature to Plaintiff is specious.

any medical expert proof or vocational rehabilitation expert to corroborate his claims, a Rule 35 examination is the mechanism which enables that defendant to test the legitimacy of the claim. There should be no "new" evidence which is created by it. In this case, Plaintiff's premise assumes that he can float out any sort of trial balloon theory of a claim of disability and see if it flies without being seriously questioned or tested. The rules of procedure were not intended to afford a plaintiff the luxury of alleging any shape, form or fashion of an injury, unsupported, that when tested and called into question, that plaintiff then gets to go back to the expert community and shop for a new "rebuttal expert" who will back up Plaintiff's prior unsubstantiated claim after it has been called into question through the Rule 35 examination. Such an outcome would result in further shifting of the burden to the defendant to *disprove* plaintiff's claims, as opposed to keeping the burden squarely on the plaintiff to *prove* his claims in the first instance. Further, such a procedure provides for the admission of new or repetitive evidence in support of Plaintiff's alleged disability at the rebuttal stage, which is improper as it has the potential for unfairness to the defendant and confusion of the issues by the jury. *See Tramonte v. Fiberboard Corp.*, 947 F.2d 762, 764 (5th Cir. 1991) (*citations omitted*). Therefore, Plaintiff's argument regarding the Rule 35 examinations does not suggest that the Order at issue was not in error. The procedure set out in the lower court's order is contrary to numerous bedrock principles of law and procedure, constitutes an abuse of discretion and should be reversed.

CONCLUSION

On the foregoing grounds, Defendants pray that this Court reverse the ruling of the lower court expressed in paragraph 2(B) in the order of December 21, 2005, and render a decision striking that paragraph from said order.

RESPECTFULLY SUBMITTED, THIS, the 5th day of September, 2007.

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CERTIFICATE OF SERVICE

We, Bradley F. Hathaway and Jennifer M. Bermel, attorneys of record for Defendants/Appellants herein, do hereby certify that we have this day served via *U. S. Mail* postage prepaid a true and correct copy of the above and foregoing document to:

Honorable Kenneth L. Thomas
Bolivar County Circuit Judge
P. O. Box 548
Cleveland, MS 38732

George F. Hollowell, Jr., Esq.
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THIS, the 5th day of September, 2007.

Bradley F. Hathaway w/per

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