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

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

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CERTIFICATE OF INTERESTED PERSONS

Case No. 2006-IA-00047-SCT

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JIMMY OGLESBY d/b/a OGLESBY FARMS **DEFENDANTS/APPELLANTS**

VS.

CURLIE DARNELL HILL **PLAINTIFF/APPELLEE**

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.

A. PARTIES:

Plaintiff/Appellee	Curlie Hill
Defendant/Appellant	Ephen L. Banks
Defendant/Appellant	Jimmy Oglesby d/b/a Oglesby Farms

B. ATTORNEYS:

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C. TRIAL JUDGE: Honorable Kenneth L. Thomas

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

STATEMENT OF THE ISSUE

Where a plaintiff's trial experts have been properly stricken on the dual grounds that: (1) they were designated untimely without reasonable justification and (2) to allow plaintiff's experts to testify at trial would result in undue prejudice to the defendants, can the plaintiff still call experts after the defense rests to offer opinions on the *prima facie* elements of liability and damages under the auspices of "rebuttal" evidence?

STATEMENT PERTAINING TO ORAL ARGUMENT

Defendants/Appellants, Ephen L. Banks and Jimmy Oglesby d/b/a Oglesby Farms, submit that oral argument would assist this Court in its decisional process of resolving an issue of fundamental and broad public importance critical to maintaining the integrity of the interplay between the rules governing disclosure of experts and the rules governing trial procedure.

STATEMENT OF THE CASE

I. Nature of the Case, Course of the Proceedings and Disposition in the Court Below

This appeal arises out of a case which finds its genesis on or about May 20, 2003, when the Plaintiff, Curlie Hill, filed suit against three (3) separate Defendants – Ephen L. Banks, Rice Farm Products d/b/a Quad Farms[1] and Jimmy Oglesby d/b/a Oglesby Farms – alleging that he sustained permanent personal injuries in an automobile wreck occurring on September 18, 2002, in Bolivar County, Mississippi. R.E. 1, 98; D.P.[2] 1; T.H.[3] 75. All Defendants promptly responded to the suit by sharply disputing both liability and damages. R.E. 1; D.P. 1.

Though liability for the wreck and the nature and extent of the Plaintiff's injuries were contested from the outset of the litigation, the Plaintiff inexcusably failed to comply with multiple discovery obligations, including court orders, regarding the timely designation of trial experts. R.E. 27, 102-104; T.H. 4, 79-81. When the Plaintiff belatedly attempted to designate experts without leave to do so, the trial court judiciously struck them by order dated October 31, 2004, finding that the Plaintiff's untimely designation of expert witnesses would result in undue prejudice to the Defendants. R.E. 12; C.P. 4. The Plaintiff never appealed from that order and it stands as the law of the case. R.E. 14; C.P. 6.

What the Plaintiff did instead was to make an unprecedented plea for dispensation to call his stricken experts *in rebuttal*; in other words, after the Plaintiff presented his case-in-chief and rested and after Defendants presented their case-in-chief and rested, the Plaintiff wanted to complete his offer of proof by calling his liability and damage experts in "rebuttal." R.E. 29-30; T.H. 6-7.

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[1] Quad Farms was subsequently dismissed by summary judgment and thus is not a party to this appeal.
[2] "Docket Page" is a part of the Clerk's Papers but bears separate numbers from the Clerk's Papers.
[3] "Transcript of Hearing" also bears its own page numbering.

By order entered on December 21, 2005, the trial court: 1) first ***denied*** Plaintiff's request to call his untimely designated experts in rebuttal; 2) but then ***granted*** the Plaintiff exception to call other qualified experts at trial as rebuttal witnesses, regardless of whether such experts and the opinions they held had been disclosed prior to trial. R.E. 12-13; C.P. 4-5.

On January 11, 2006, the Defendants jointly submitted their petition for interlocutory appeal to this Court, requesting interlocutory review only of the trial court's limited ruling which allowed the Plaintiff to call liability and damage experts under the pretense of "rebuttal" experts, though, by separate ruling, the Plaintiff had been barred from calling experts in his case-in-chief. The Plaintiff perfected no cross-appeal of any issues or rulings of the trial court.

On January 25, 2006, this Court granted Defendants' petition for interlocutory appeal.

II. Statement of Facts Relevant to the Issues Presented for Review

In the fall of 2002, Jimmy Oglesby d/b/a Oglesby Farms ("Oglesby"), a custom harvester, was harvesting soy beans from fields adjacent to Mississippi Highway 8 near Rosedale in Bolivar County. Ephen Banks ("Banks"), who worked for Oglesby, was hauling the harvested beans to the nearby port of Rosedale using a 1978 Freightliner tractor-trailer. The Freightliner was actually owned by Rice Farm Products d/b/a Quad Farms ("Quad Farms") but had been loaned to Oglesby for his company's use. On the afternoon of September 18, 2002, Banks was returning from the port to the field where the harvesting operations were ongoing when he was involved in a collision with a vehicle being driven by the Plaintiff, Curlie Hill.

On May 20, 2003, the Plaintiff filed suit against Banks, Oglesby and Quad Farms, accusing each of certain acts of negligence which the Plaintiff contended were the proximate cause of the collision. R.E. 1; D.P. 1. *A fortiori*, the Plaintiff specifically claimed in his initial pleadings to have sustained permanent and disabling injuries for which he was seeking recovery. R.E. 98; T.H. 75.

Piercing these otherwise bare allegations, each of the three (3) Defendants served discovery

on the Plaintiff. Each set of discovery 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. R.E. 1; D.P. 1. Yet, by October of that year, some seven months after the filing of the lawsuit, the Plaintiff had not designated any experts in response.

So, on October 10, 2003, a scheduling order formulated by and with the agreement of counsel for all parties was entered by the trial court. R.E. 3; D.P. 3. The terms of this first scheduling order required the Plaintiff to designate *all* of his trial experts no later than January 31, 2004. R.E. 47-49; T.H. 24-26. The order did not distinguish between anticipated case-in-chief experts and anticipated rebuttal experts. It should be parenthetically noted that scheduling orders, as a rule, do not ever create a dichotomy between case-in-chief and rebuttal experts as Rule 26(b)(4) is non-discriminating in its requirements that full and fair disclosures be made for any expert to be called by a party at trial.

When that deadline expired without the designation of any experts by the Plaintiff, the parties cooperated and agreed upon a revised scheduling order, and on April 16, 2004, the trial court enlarged the expert designation deadlines by entering an amended scheduling order. R.E. 4, 27; D.P. 4; T.H. 4. This second scheduling order required the Plaintiff to designate *all* expert witnesses no later than April 30, 2004. The amended deadline for the designation of Defendants' expert witnesses was May 31, 2004.

Still, the Plaintiff did not designate any experts prior to the expiration of his April 30, 2004, deadline. R.E. 47-49; T.H. 24-26. Banks and Oglesby on the other hand timely served their Joint Designation of Expert Witnesses on May 25, 2004. R.E. 4, 47-49; D.P. 4; T.H. 24-26. At this time, Banks and Oglesby also fully disclosed to the Plaintiff the subject matter, the facts and the opinions on which each expert was expected to testify, together with the grounds for their opinions. These

defense experts included both liability and damage experts. *Id.* The strategy pursued by Banks and Oglesby in their selection of experts as well as the opinions formulated by the defense experts was driven, *inter alia*, by the fact that the Plaintiff designated no experts for trial. R.E. 49-50; T.H. 26-27. Two months later, on July 26, 2004 – after having the benefit of the defense experts' opinions – the Plaintiff filed with the trial court a *Motion for Status Conference* in which he requested that the Court grant him leave to designate an "additional expert to address and rebut defenses raised or issues raised by the defense in this case." R.E. 5; D.P. 5. The Plaintiff's reference in his motion to an "additional" expert was a misnomer. No expert had been previously designated by Plaintiff.

Then, without obtaining leave of court, the Plaintiff attempted to designate experts on August 25, 2004 – some four (4) months after the appointed deadline and some three (3) months after having the benefit of the opinions of Banks and Oglesby's experts. R.E. 5, 28; D.P. 5; T.H. 5. The Plaintiff identified an accident reconstruction expert, Sammy R. Green, and a vocational rehabilitation expert, C. Lamar Crocker. R.E. 28; T.H. 5.

All Defendants moved to strike the Plaintiff's attempted designation. R.E. 5; D.P. 5. On September 30, 2004, a hearing was held before the Honorable Kenneth L. Thomas on several motions, including the Plaintiff's motion to again extend the deadline of the Amended Scheduling Order to allow leave to designate experts out of time, and the Defendants' joint motion to strike the untimely designated experts.[4] R.E. 9; C.P.1. After consideration of the parties' submissions to the court and receiving considerable oral argument, Judge Thomas denied the Plaintiff's request to designate experts out of time, sustaining the Defendants' motion to strike the designation as being untimely *and* prejudicial. *Id.* By order dated October 31, 2004, Judge Thomas cogently articulated the rationale for this decision, writing:

[4] It was at this hearing that the trial court granted summary judgment to Quad Farms, dismissing it from the case and leaving Banks and Oglesby as the remaining Defendants.

> Specifically, the Court finds that Plaintiff untimely designated expert witnesses outside the deadline mandated by the Agreed Amended Scheduling Order without reasonable justification. The Court further finds that Plaintiff's untimely designation of expert witnesses was made after Defendants' expert witnesses were designated; and thus, to allow Plaintiff's experts to testify at trial would result in undue prejudice to the Defendants.

See Order dated October 31, 2004. R.E. 9-10; C.P. 1-2.

The Plaintiff did not appeal from this ruling. R.E. 45; T.H. 22. However, at the motion hearing and upon being verbally advised by the trial court that the Plaintiff's request to designate experts out of time was to be denied, Plaintiff's counsel made an *ore tenus* request to call the stricken experts *in rebuttal.* R.E. 46; T.H. 23. The trial court, declining to make a ruling at that time, directed the parties to submit briefs on the issue. R.E. 46-47; T.H. 23-24.

On October 26, 2004, Oglesby submitted a *Motion and Brief to Exclude Plaintiff's Stricken Experts from Testifying in Rebuttal.* R.E. 6; D.P. 6. That motion was joined in and expanded upon by Banks through a separate brief to the trial court. *Id.* Only then did Plaintiff submit a brief on the issue titled, *Rebuttal to the Defendant's Brief and Motion to Exclude Plaintiff's Experts from Testifying in Rebuttal. Id.* Thereafter, the Plaintiff filed a notice of hearing which purported to set for hearing "Plaintiff's Motion for Reconsideration" – but the Plaintiff never submitted any such motion for reconsideration. *Id.* at 7.

On July 5, 2005, a second hearing was held before the trial court, this time regarding whether Plaintiff's stricken experts could testify as rebuttal witnesses. Ultimately, the trial court generously allowed the Plaintiff to make an *ore tenus* motion for reconsideration of the prior order striking Plaintiff's experts. R.E. 77, 102; T.H. 54, 79. The trial court again heard considerable oral argument on both motions. During the hearing, the Plaintiff withdrew his request altogether to call an accident reconstructionist, but redoubled efforts at calling his vocational rehabilitation expert, C. Lamar Crocker, to testify in support of Plaintiff's claim of permanent and total disability. R.E. 78;

T.H. 55.

When the lower court was prepared to rule, the following colloquy ensued:

BY THE COURT: The designation rule has its purpose, otherwise it would not exist. And for a good cause shown, the Court can [sic.] overlook that. But, as the Court has earlier stated, there was not one, not two, but three dates that passed by without a designation. So the Court, upon reconsidering the motion for reconsideration, continues to deny the testimony of Lamar Crocker and the Court 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 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.

The Court does not cherish this ruling, but it feels that is has done the legal and just thing.

BY MR. HOLLOWELL: May I get a clarification.

BY THE COURT: Yes, sir.

BY MR. HOLLOWELL: You said the Court allowed the plaintiff to present rebuttal testimony even by other than Lamar Crocker.

BY THE COURT: By expert.

BY MR. HOLLOWELL: In other words, is the Court excluding Crocker and the plaintiff will be allowed to yet 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.

BY MR. HOLLOWELL: Not Crocker.

BY THE COURT: 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. Let me ask you this question while we're here. Does that witness have to be designated? Because this is a rebuttal witness, but it is a rebuttal 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 THE COURT: And I agree with you. I have not seen anything. My staff attorney and I will look into it, and I encourage each of you to do the same.

BY MR. HOLLOWELL: Right.

BY THE COURT: 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 to 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. And I'll be –

BY THE COURT: I recommend that you tender that name.

BY MR. HOLLOWELL: I will.

BY THE COURT: But I don't order it because I don't know if there's cause [sic.] authority for it.

BY MR. HOLLOWELL: Okay.

BY THE COURT: Now if either side wishes to take issue, of course, there's interlocutory appeal.

R.E. 104-107; T.H. 81-84.

On December 21, 2005, the trial court entered its order which contained three rulings:

- First, the trial court ***denied*** Plaintiff's *ore tenus* motion to reconsider the October 24, 2004, order striking Plaintiff's experts;
- Second, the trial court ***denied*** Plaintiff's request to call his untimely designated experts in rebuttal at trial;
- ***But, third, the trial court allowed Plaintiff to call other, non-designated experts to testify in rebuttal at trial.***

See Order entered December 21, 2005. R.E. 12-13; C.P. 4-5.

Specifically, the order stated:

1. Plaintiff's motion, *ore tenus,* for reconsideration is denied and the Order of this Court dated October 24, 2004, stands as entered; and

2. Defendants' motion to call stricken experts in rebuttal is granted in part and denied in part as follows:

   A. The Plaintiff ***shall not be allowed to call his untimely designated experts in rebuttal at trial*** and, thus, to that extent the motion is granted.

   B. ***However, the Court finds that the Plaintiff will be permitted to call other qualified experts at trial as rebuttal witnesses only, though such experts have not been timely designated in accordance with any of the scheduling orders previously entered by this court.*** Such experts' testimony shall be limited to

rebuttal of the Defendants' case in chief. To this *extent, the motion is denied.*

3. The Court is of the further opinion that in regard to its ruling on Defendants' motion to prohibit Plaintiff from calling stricken experts in rebuttal, a substantial basis exists for a difference of opinion on a question of law and, therefore, gives its permission and consent for an interlocutory appeal from this issue.

See Order entered December 21, 2005. *Id.*

It is the ruling in ¶ 2(B) of the order from which this appeal was taken.

SUMMARY OF THE ARGUMENT

This case presents the significant issue of whether a plaintiff can save expert testimony offered to prove *prima facie* elements of his claim until the rebuttal stage of trial, when that plaintiff's experts (who were designated out-of-time and without leave of court during discovery) were already stricken for good cause.

First, a statement of what this appeal does not concern is in order. This appeal does not concern whether the experts which the Plaintiff attempted to designate at the trial level should have been stricken in the first instance. That ruling stands as the law of the case and no appeal was perfected from it, which makes the lower court ruling all the more mystifying. The back-drop to this appeal is a trial court judiciously determining that the Plaintiff did not properly disclose his trial experts and thus would not be permitted to call them at trial, but then, in a very confusing turn of events, declaring that the Plaintiff could call similar experts in his rebuttal case.[5] This incongruous result respects the consequences of violating the rules concerning disclosure of experts, on the one hand, and fully undermines them on the other.

If a plaintiff is required to introduce in his opening case and before he rests all the substantive evidence upon which he relies to establish his demand, and the extent of that demand – which is the current state of the law – the decision crafted by the trial court that permits the Plaintiff to call an expert in rebuttal for the very purpose of establishing his injuries and the extent of them cannot stand without turning the law 180 degrees. Though Twain[6] is attributed with saying, "[a]pparently there is nothing that cannot happen," the law was designed to eliminate such uncertainty. The very existence of our law depends on adhering to established precedent. *Stare decisis et non quieta movere*: security and certainty require that accepted legal principle not be

[5] All the more peculiar in the present case is the added feature that the trial court instructed the Plaintiff that he had to retain a completely different expert or set of experts for his "rebuttal" witnesses.

unsettled.

Authoritative law simply does not reserve room for the Plaintiff to call experts in rebuttal when Plaintiff's proffered experts were prohibited from testifying in the Plaintiff's case-in-chief. Timely, meaningful disclosure of expert opinions is crucial because of the technical nature of expert testimony, which is chiefly why our laws guarantee trial counsel sufficient time prior to trial to meet and prepare for a particular contention that relies on specialized knowledge. The trial court's order denies the Defendants these protections the rules of procedure were meant to guarantee.

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[6] Samuel Langhorne Clemens (1835-1910).

ARGUMENT

Despite the trial court's good intentions, its decision permitting the Plaintiff to call expert witnesses in rebuttal after properly precluding the Plaintiff from calling experts in his case-in-chief is irreconcilable with applicable law and notions of justice on two grounds. First, it is free from doubt that expert testimony offered to prove the truth of the Plaintiff's claims as to liability or damages is not legitimate "rebuttal" evidence. Secondly, the issue joined before this Court does not merely embrace whether the admissibility *vel non* of substantive expert testimony is rebuttal evidence; rather, this specific case involves an undisturbed finding that the Plaintiff's substantive experts should be stricken. To allow the Plaintiff to *admit* evidence in rebuttal which was declared as a matter of law to be *inadmissible* in the Plaintiff's case-in-chief opens the back door to that which could not come in through the front, resulting in a maligning of the rules of procedure and great prejudice to the Defendants.

I. The order of the court below should be reversed as it permits the Plaintiff to repackage substantive expert testimony as "rebuttal" evidence and is an affront to the integrity of the process.

In *Hosford v. State*, this Court instructively wrote, "**the party who has the burden of proof, and the duty to open the case, must in his opening, and 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. . . .**" *Hosford v. State*, 525 So. 2d 789, 791 (Miss. 1988); *citing Roney v. State*, 150 So. 774, 775 (Miss. 1933) (emphasis added). The Court of Appeals, underscoring this basic feature of our judicial system more recently, stated it thusly: "The party bearing the burden should not withhold evidence for rebuttal which properly belonged as part of its case-in-chief." *Dungan v. Presley*, 765 So. 2d 592, 595 (Miss. Ct. App. 2000); *citing Parker v. State*, 691 So. 2d 409, 412 (Miss. 1997).

The principle of a plaintiff having the responsibility of carrying a burden of proof reserves no

space for that evidence which is truly intended to *rebut* – that is, by definition, to discredit evidence presented by the defendant whom, through constitutional safeguards, does not carry the burden of proof. So deeply steeped is our system of justice in this principle that this Court has declared it reversible error for a trial court to admit substantive testimony in rebuttal which should have been offered in a party's case-in-chief. *See Armstrong v. State*, 771 So. 2d 988, ¶ 48 (Miss. 2000); *Dunaway v. State,* 919 So. 2d 67, 74 (Miss. Ct. App. 2005) ("it is reversible error when there is no doubt that evidence admitted in rebuttal should have been offered in the case-in-chief"); *Hosford,* 525 So. 2d at 791-92.

Substantive evidence "is that which is offered to establish the truth of a matter to be determined by a trier of fact." *See* John P. Frank, *Pretrial Conferences and Discovery-Disclosure or Surprise?*, 1965 Ins. Law J. 661, 664 (1965) *cited in Chiasson v. Zapata Gulf Marine Corporation*, 988 F.2d 513, 517 (5th Cir. 1993). As to the Plaintiff in the case, *sub judice*, two general matters which he must establish to the requisite degree of probability are culpability and resulting damages – and as to damages, the extent of them. It defies clear-minded reasoning to suggest that an expert, such as a vocational rehabilitationst, called by the Plaintiff for the very purpose of attempting to corroborate his claim of disability (*i.e.*, claim for monetary damages) is rebuttal evidence.

Generally, "the party bering the burden should not withhold evidence for rebuttal which properly belonged as part of its 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). Substantive evidence, evidence which tends to establish the liability of the Defendant, should be offered as part of a plaintiff's case-in-chief. *Illinois Cent. R. Co. v. Brown*, 115 So. 115, 116 (Miss. 1928). The order at issue in this appeal permits Plaintiff to present substantive evidence of liability and the extent of his damages in rebuttal where that very evidence was properly precluded during Plaintiff's case-in-chief. The order at issue is in error where it allows evidence to be presented at trial in conflict with the rules of

procedure and all notions of fair play.

Hypothetically speaking, what result should follow if a plaintiff notifies a Defendant during discovery for an automobile accident matter, that he has no intention of calling expert witnesses during his case-in-chief, but instead plaintiff identifies two experts, one accident reconstructionist and one expert on vocational rehabilitation and will have the experts attend trial so they may provide opinions during Plaintiff's rebuttal? There is no doubt such procedure is improper. It defies logic that if the order of the court below stands, Plaintiff will be allowed to call experts during rebuttal to present evidence that should have been presented during his case-in-chief, where he had no grounds to seek such a procedure, where such a procedure creates an undue advantage for Plaintiff, and where ironically, Plaintiff is in this situation in the first place as a result of a sanction imposed on him that was determined to be appropriate by the trial court twice and was not appealed. Thus, as a result of what was intended to be a sanction, Plaintiff gains the undue advantage of presenting substantive evidence on rebuttal that should have been presented during his case-in-chief.

Federal courts have often spoken to the issue of plaintiffs attempting to introduce evidence in rebuttal which should have been properly introduced as part of the case-in-chief. *See Russo v. Peikes*, 71 F.R.D. 110, 112-14 (D.C. Pa. 1976), aff'd, 547 F.2d 1163 (3d Cir. 1977) (holding that evidence which could have been offered during plaintiff's case-in-chief would not be received in rebuttal since it did not rebut new matters raised by the defendant and admission during rebuttal would unfairly surprise defendant); *Weiss v. Chrysler Motors Corp.*, 515 F.2d 449, 457 (2nd Cir. 1975) (holding that a trial judge has discretion to exclude rebuttal evidence which would have been admissible if offered as evidence in chief); *Page v. Barko Hydraulics*, 673 F.2d 134, 140 (5th Cir. 1982) (trial court acts within its discretion when it declines to allow plaintiff to remedy a defect in its case-in-chief through rebuttal). In one such matter, *Tramonte v. Fiberboard Corp.*, 947 F.2d 762, 764 (5th Cir. 1991), the Fifth Circuit put a fine point on the general rule by stating that "[t]he trial

court generally admits rebuttal evidence either to counter facts presented in the defendant's case in chief, **or to rebut evidence unavailable earlier through no fault of the plaintiff.**" *Id.*, *citing McVey v. Phillips Petroleum Co.*, 288 F.2d 53, 54 (5th Cir. 1961); *Allen v. Prince George's County*, 737 F.2d 1299, 1305 (4th Cir. 1984) (emphasis added). The *Tramonte* court reasoned that "[t]he potential for unfairness to the opponent and confusion of the issues militates against admitting new or repetitive evidence at the rebuttal stage." *Id.*; referring to 6 John Henry Wigmore, *Wigmore on Evidence* §1873 (James H. Chadbourn ed., 1976). *Tramonte* further pointed out that for a plaintiff to demonstrate a *prima facie* case, he or she must offer evidence on any issue of potential importance to the outcome in the case-in-chief. *Id.* at 765-66; referring to *Russo*, 71 F.R.D. at 113; *see also Morgan v. Commercial Union Assurance Co.*, 606 F.2d 554, 555 (5th Cir. 1979) (holding, "[r]ebuttal is a term of art, denoting evidence introduced by a plaintiff to meet new facts brought out in his opponent's case in chief.")

It can hardly be said that Banks or Oglesby will raise any new matters through their experts which would call for legitimate rebuttal by experts whose true function is to provide substantive proof of the Defendant's alleged liability or the Plaintiff's alleged damages. The very concept of requiring expert disclosures forecloses "surprise" testimony by defense experts. Banks and Oglesby were required to – and in fact did – disclose to the Plaintiff the identity of their experts and the anticipated testimony of those experts. Had Banks and Oglesby not given the Plaintiff the "heads-up" as required by M.R.C.P. 26(b)(4), the defense experts would be prohibited from giving opinions at trial altogether. Thus, because the rules insist on disclosure of expert opinions, the Plaintiff already knows at the time of this appeal the full scope of the testimony to be given by Banks' and Oglesby's experts and any suggestion that the Plaintiff may need "rebuttal" experts to address unanticipated or new matters raised by defense experts rings hollow.

II. The order of the court below should be reversed as it resurrects trial by ambush.

In the case at bar, the trial court held that, "to allow Plaintiff's experts to testify at trial would result in undue prejudice to the Defendants" and struck Plaintiff's expert disclosures. R.E. 10; C.P. 2. In an attempt to reduce any potential harmful effects on Plaintiff's case due to the exclusion of his expert witnesses the trial court ruled that Plaintiff could call experts in rebuttal even if their identities and opinions were not disclosed prior to trial. *See* R.E. 104-105; T.H. 81-82. The court's attempt to lessen the sanction imposed on Plaintiff actually prejudices Defendants more than had the experts not been struck in the first place. As now, Plaintiff gets the benefit of placing expert witnesses on the stand at trial to provide testimony in support of Plaintiff's case and Defendants will not have the benefit of any discovery regarding these "rebuttal" experts. The procedural scheme set up by the order on appeal is error.

Underscoring this error, Judge Thomas visibly wrestled with the incongruity between expert opinion testimony and rebuttal evidence as demonstrated by his on-the-record statement that, while advisable, the court felt it could not order the Plaintiff to identify "rebuttal" experts much-less disclose their anticipated opinions. *See* R.E. 105-107; T.H. 82-84. Incredibly, it was Plaintiff's failure in the first instance to make these required expert disclosures which resulted in his experts being stricken. Yet, in its final analysis, the trial court ultimately reached an ill-fashioned conclusion which operated to relax the rules of expert disclosure and to provide the Plaintiff with the element of surprise.

The Mississippi Supreme Court has previously disallowed the calling of an expert as a rebuttal witness when this witness had not been designated during discovery. *Harris v. General Host Corp.*, 503 So. 2d 795, 798 (Miss. 1986). In *Harris*, the Supreme Court addressed a party's attempt to offer expert opinion testimony in rebuttal, though the expert had not been properly designated.

The *Harris* court insightfully allowed: "General Host's claim that Dr. Allen [a medical expert] was a 'rebuttal witness' profits it nothing. There is nothing in our rules of procedure that authorizes a party to withhold the names of likely expert witnesses on such grounds, except only for the circumstance where the party had no reasonable means of anticipating in advance of trial the need for calling the witness. Certainly the physician who examines and treats a personal injury plaintiff on an occasion immediately following the alleged injury will almost never be the sort of witness whose identity might be withheld with propriety." *Harris*, 503 So. 2d at 797.

The case at bar fits squarely within the *Harris* holding. A back-door effort to get expert testimony (which has been disallowed in the Plaintiff's case-in-chief) into a case under the auspices of "rebuttal" testimony is impermissible. *Id.* at 797. *See also Coates v. State*, 495 So. 2d 464, 466 (Miss. 1986). "There is nothing in our rules of procedure that authorizes a party to withhold the names of likely expert witnesses on such grounds, except only for the circumstance where the party had no reasonable means of anticipating in advance of trial the need for calling the witness." *Harris*, 503 So. 2d 797. No such excuse exists for the Plaintiff in the instant case.

Consistent with the theory expressed in *Harris* that legitimate rebuttal evidence is reserved for discrediting unanticipated facts or testimony and witnesses offering such rebuttal testimony need not be disclosed where there is no reasonable means of anticipating the need for calling the rebuttal witness, a party is typically not required to disclose the identity of rebuttal witnesses or the existence of rebuttal evidence. After all, a party cannot anticipate how to rebut that which is unanticipated. Here, to force the lower court's ruling into that premise, the Plaintiff was relieved of his rule-based obligations governing expert witness disclosures – this after the trial court, following a lengthy deliberative process, already concluded in its order of October 31, 2004, "to allow Plaintiff's experts to testify at trial would result in undue prejudice to the Defendants." R.E. 12; C.P. 4. Thus, Defendants now face the threat of "rebuttal" expert witnesses being called by the Plaintiff with no

information regarding their opinions, qualifications, or the facts used by them to reach their opinions.

Mississippi Rule of Civil Procedure 26 governs discovery and provides the following regarding the identification of trial experts:

> A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

M.R.C.P. 26(b)(4)(A)(i). The Mississippi Supreme Court has stated that the purpose of Rule 26, and generally of the rules of civil procedure is to abolish trial by ambush. *Buskirk v. Elliott*, 856 So. 2d 255, 260 (Miss. 2003), *citing Harris,* supra, at 796. This Court has reasoned that it has "sought procedural justice through a set of rules designed to assure to the maximum extent practicable that cases are decided on their merits, not the fact that one party calls a surprise witness and catches the other with his pants down." *Id.* (*quoting Harris*). When administering and applying discovery rules trial courts must afford defense counsel "ample time before trial to receive the names of all experts who will be called at trial and meaningful information about their proposed testimony." *Nichols v. Tubb*, 609 So. 2d 377, 384 (Miss. 1992) (emphasis in original). Rule 26 requires "that the substance of every fact and every opinion which supports" Plaintiff's claim "must be disclosed and set forth in meaningful information which will enable the opposing side to meet it at trial." *Id.* (emphasis in original).

Timely, meaningful disclosure of expert opinions is crucial because of the nature of expert testimony. *Id.* An ordinary fact not previously disclosed in response to a discovery request is easily recognizable at trial and presents a clear opportunity for objection. *Id.* However, a fact of a technical nature presented by an expert witness "may be hidden in some generalized, non-specific answer, with trial counsel solemnly proclaiming at trial that the question was answered, the other

side just did not recognize it." *Id.* The Mississippi courts must allow trial counsel sufficient time prior to trial to meet and prepare for a particular contention that relies on specialized knowledge. *Id.* It is imperative that trial counsel are fully knowledgeable of the other party's contentions and claims well in advance of trial. *Nichols*, 609 So. 2d at 384.

III. Limiting the scope of the "rebuttal" expert testimony fails to cure the error and actually results in an impermissible shifting of the burden of proof.

The fact the trial court ruled that it would limit the testimony of any rebuttal experts called by the Plaintiff to those matters raised by Banks or Oglesby does nothing to cure the error committed and, respectfully, it overlooks the mechanics of the fair trial process. The trial court seemed to indicate that its ruling was intended to empower Banks and Oglesby with control over whether the Plaintiff was able to call any experts in rebuttal, advising at the hearing that [i]f 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." R.E. 12; C.P. 4 (emphasis added).

The *only* reason, though, the experts called by Banks and Oglesby would ever "cover a particular matter" concerning the Plaintiff's claims of liability and damages in the first instance would be because the trial court had already found that the Plaintiff created a *prima facie* case on those elements sufficient to get him past a motion for directed verdict. Needless to say, neither Banks nor Oglesby would ever call an accident reconstruction expert unless the trial court had already found that the Plaintiff carried his burden of persuasion with respect to the cause of the wreck. Banks and Oglesby would never call any medical or vocational rehabilitation experts to address the Plaintiff's claims of permanent injury and disability unless the court had already found that the Plaintiff demonstrated the nature and extent of his injuries caused by the collision sufficient to survive a directed verdict.

Instead of preserving the integrity of the trial process, the trial court has effectively forced upon these Defendants the Hobson's choice of either 1) not contradicting the Plaintiff's claims of liability or damages – thus allowing those issues to reach the jury virtually uncontested; or 2) contradicting those claims of the Plaintiff which survive directed verdict – at the peril of "opening the door" and thus allowing the Plaintiff to present as "rebuttal," substantive evidence going directly to the heart of his burden of proof; in effect, giving the Plaintiff a second case-in-chief at the end of the trial and shifting the burden of proof from the Plaintiff to the Defendants. This turns trial procedure on its head and actually rewards the Plaintiff with the advantage while unfairly penalizing the Defendants.

If the trial court's ruling is validated as acceptable procedure moving forward plaintiffs would only designate experts for their case-in-chief in those cases where a plaintiff must have expert testimony, such as most medical malpractice cases, to survive the directed verdict stage. From henceforth, a plaintiff could take the stand and testify, for example, to his or her inability to perform certain physical activities. Then, he or she would lay low to see whether the defense dared to call an expert to contest his claim and, if the defense does, the Plaintiff would spring the "rebuttal" expert who would come in after the defense has rested to offer substantive expert opinions to assert that the plaintiff does have physical limitations.

This is inconceivable and it exposes our judicial process to a not-so-subtle danger that, if the ruling of the lower court is affirmed, would make every defendant entering a trial feel as if they were placed under the Sword of Damocles. Admitting at the rebuttal stage expert testimony that is being offered to *prove* a plaintiff's contentions removes the burden of proving the case from the plaintiff's shoulders and rests it squarely upon the shoulders of the defendant to *disprove* those contentions. This is illustrated by considering that a plaintiff's rebuttal case is reserved for discrediting testimony offered by a defendant. If a plaintiff can now reserve the right to present substantive expert

testimony in rebuttal to tell the jury why the defendant's experts are "wrong", the defendant has thus been impressed with the burden of being "right."

The inappropriate shift of the burden caused by withholding of information during the Plaintiff's case-in-chief in the procedure proposed by the trial court is further illustrated by an old 1892 case wherein a plaintiff brought suit because of a shooting. In *Jamison v. Moseley*, 10 So. 582 (Miss. 1892), the Plaintiff and the Defendant got into an argument which ended when the Defendant shot the Plaintiff. *Id.* at 583. The Plaintiff then sued the shooter for battery by gunshot. *Id.* The Mississippi Code at that time provided a legal presumption of fault where a plaintiff could establish a defendant actually shot the plaintiff. *Id.* During his case-in-chief, the Plaintiff presented a witness who testified that the Defendant had admitted to the witness that the Defendant shot the Plaintiff. *Id.* The Plaintiff then rested his case and failed to present evidence of the circumstances of the shooting. *Id.* This made the Defendant be the first party to present all of the circumstances of the shooting during his case-in-chief. *Id.* The Defendant asserted the affirmative defense of justification or self-defense and presented witnesses to establish that the shooting was actually done in self defense. *Id.* The Plaintiff then sought to present witnesses regarding the circumstances of the shooting to dispute the Defendant's witness's version of events. *Id.* The *Jamison* court said, in ruling on the issue of whether proper jury instructions were given as to the burden of proof on the affirmative defense, that: "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 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.*

The *Jamison* court, in 1892, clearly reasoned that it is improper for a Plaintiff to put on proof that a shooting occurred while withholding the circumstances of the event to force the Defendant to

first present the circumstances of the shooting, so that the Plaintiff then can gain an unfair advantage by presenting "rebuttal" evidence that should have been brought during the Plaintiff's case-in-chief. *Id.* That is exactly what will occur in the case at bar if the Plaintiff is allowed 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 an expert reconstructionist to provide the details of the accident and a damages expert to provide specific expert opinions to refute the allegation of disability only supported by Plaintiff's unlearned testimony during his case-in-chief. If the lower court's order stands, the Plaintiff would be permitted to present expert proof of the cause of the accident and the extent of his damages, which clearly should have been presented during his case-in-chief in rebuttal. By developing the evidence as rebuttal, Plaintiff gains an unfair and prejudicial advantage in this case consistent with the undue advantage denounced by the Mississippi Supreme Court in *Jamison*. This court should following the reasoning of the *Jamison* court and hold that the Plaintiff cannot present evidence that should have been presented in his case-in-chief during rebuttal, as such a procedure provides the Plaintiff with an undue advantage.

Our current rules of procedure were designed to eliminate surprise and, necessarily, the most rigidly enforced of these rules is that requiring pre-trial disclosure concerning expert witnesses. The trial court's order retools the design and actually relaxes the rules concerning the disclosure of experts. This is improper and should not stand. Even more significant, the order erroneously permits Plaintiff to present substantive evidence of liability and the extent of his damages in rebuttal where that very evidence is properly precluded from being offered during Plaintiff's case-in-chief. Authoritative Mississippi law simply does not reserve room for the Plaintiff to call experts in rebuttal when Plaintiff's proffered experts were prohibited from testify because of undue prejudice to the Defendants. The order at issue is in error where it allows evidence to be presented at trial in conflict with the rules of procedure and all notions of fair play. The trial court's ruling simply

cannot stand.

CONCLUSION

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

RESPECTFULLY SUBMITTED, THIS, the 20th day of June, 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.
P. O. Drawer 1407
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THIS, the 20th day of June, 2007.

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