IN THE SUPREME COURT OF MISSISSIPPI

THE GOODYEAR TIRE & RUBBER COMPANY and BIG 10 TIRE COMPANY — **APPELLANTS**

V. — **NO.: 2007-CA-00325**

NICHOLAS L. KIRBY, JR., Individually and as Administrator of the Estate of TRAVIS C. KIRBY, Deceased, SHIRLEY S. KIRBY AND NICHOLAS L. KIRBY, III, RILEY D. STRICKLAND and SIDNEY ODOM — **APPELLEES CROSS-APPELLANTS**

BRIEF OF APPELLEES AND CROSS-APPELLANTS

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Oral Argument Requested

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons or entities 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 disqualifications or recusal.

1. Nicholas L. Kirby, Jr., Shirley S. Kirby and Nicholas L. Kirby, III (Plaintiffs)
2. James W. Kitchens and Margaret P. Ellis, Kitchens and Ellis, Counsel for Kirby Plaintiffs.
3. Riley D. Strickland (Plaintiff)
4. John W. Christopher, Christopher & Ellis, Counsel for Plaintiff Riley D. Strickland.
5. Sidney Odom (Plaintiff)
6. Michael S. Allred and Ronald E. Stutzman, Jr., The Allred Law Firm, Counsel for Plaintiff Sidney Odom.
7. The Goodyear Tire & Rubber Company (Defendant)
8. Michael W. Baxter, Barry D. Hassell and Andy Lowry, Copeland Cook, Taylor & Bush, P.A., Counsel for Goodyear Tire & Rubber Company
9. Big 10 Tire Company (Defendant)
10. Rick Norton and Mark Norton, Bryan Nelson, P.A., Counsel for Defendant Big 10 Tire Company
11. The Honorable Forrest A. Johnson, Trial Judge.

Respectfully submitted,

Michael S. Allred, On Behalf of the Plaintiffs

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STATEMENT OF THE CASE

I. Course of Proceedings Below

Plaintiffs in the trial court, who are jointly the Appellees on direct appeal, are the Estate of Travis Kirby, deceased, Riley Strickland and Sidney Odom, a young man killed and two young men seriously injured as a result of an automobile accident following the failure of a defective tire. Plaintiffs pleaded, discovered, tried and proved multiple claims and causes of action for negligence, product liability arising out of tort, and several kinds of breach of warranty. When the Plaintiffs rested, the trial court quite correctly overruled and denied Defendants' motions for directed verdict on all of the claims pleaded, discovered and proven and gave a very sound rationale of decision. (T. at 1268-1279.)[1]

Inexplicably, the following morning, the trial judge *sua sponte* reconsidered all of his rulings and belatedly sustained Defendants' motions for directed verdict on all claims pleaded and proven except for Plaintiffs' claims for breach of warranty. (T. at 1392-1406.) Accordingly, the Plaintiffs were allowed to go to the jury on only a single one of the well-pleaded, discovered and proven causes of action against the Defendants.

Despite these severe handicaps upon the Plaintiffs, the verdict of the jury and judgment in the trial court was for the Plaintiffs and against the Defendants Goodyear and Big 10 Tire Company, two parties who actually appear as one entity because a comprehensive indemnity agreement extends in favor of Big 10 Tire Company from Goodyear. The tires in question were manufactured, labeled

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[1] For the Court's convenience, the record is cited herein as in the brief of the Defendants-Appellants: the transcript is cited as "T."; the record volumes are cited as "R."; trial exhibits are cited as "Trial Ex."; and, the Record Excerpts are cited by tab number ("R.E. __") with numbers beginning where Defendants' Record Excerpts left off.

and named Kelly-Springfield, which is a trade name of Goodyear. The real party in interest is Goodyear.

On direct appeal, the Plaintiffs, as Appellees, will demonstrate that they have a good and sufficient verdict and judgment as against the Defendants on the basis of the defectiveness of the tires in question predicated upon breach of warranty. In support of the direct appeal, Plaintiffs will demonstrate that Defendants failed to adequately respond to discovery and produce relevant, non-privileged documents. Furthermore, the trial court admitted important evidence as a discovery sanction, making the Defendants' arguments about admissibility and prejudice of such evidence of no merit.

On cross-appeal, Plaintiffs will prove three things: *First* the Plaintiffs made out a prima facie case on two breach of implied warranty claims, breach of the implied warranty of fitness for a particular purpose and breach of the implied warranty of merchantability. The trial court erred in failing to submit these issues to the jury. *Second*, the trial court sustained the Defendants' motion for directed verdict on Plaintiffs' design defect claims. The trial court incorrectly interpreted the testimony of Plaintiffs' expert witness, thereafter sustaining Defendants' motion for directed verdict. This ruling was in error. *Third*, the trial court erred in failing to compel Defendants to make discovery.

Defendants inaccurately label this action as a "drunk-driving case disguised as a products-liability action. . ." (Defendants' Brf. at 2.) Clearly, however, Plaintiffs pleaded and proved to both the trial court and the jury that this case was about Defendants' negligence, defective products and breaches of warranties, not alcohol or speed, and that Defendants' conduct directly and proximately caused the tragic death of one young man and serious, permanent injuries to two others.

Defendants also understate the contentiousness of discovery in this matter. (Defendants' Brf.

at 2-3.) As described in detail in Plaintiffs' Cross-Appeal herein, Defendants' willful failure to produce documents and discovery required Plaintiffs to file three separate motions to compel and for discovery sanctions and to expend significant resources and time to prove Defendants' misconduct and unjustified failure to identify and produce documents. Ultimately, shortly before trial, the trial judge required Defendants to produce a limited amount of relevant evidence to Plaintiffs which the trial judge, as an appropriate sanction for the Defendants' misconduct and because of the relevance of the evidence to Plaintiffs' claims, properly allowed Plaintiffs to use at trial.

Additionally, Defendants represent to this Court that "Plaintiffs' tire expert admitted that the absence of a nylon overlay in a tire was not a design defect. . . ." (Defendants' Brf. at 3.) This is a gross mischaracterization of Robert Ochs' testimony. Mr. Ochs testified that the absence of a nylon overlay is not *in and of itself* a design defect. (T. at 513, 514.)

The testimony which Mr. Ochs offered was that the tire was defective because it did not have a sufficient strength of its "shoulder architecture," or the strength of the design at the shoulder or edge of the tread next to the side wall, which had to be strengthened by a cap ply or some other alternative design feature such as edge strips which would correct the problem. A cap ply would have corrected the problem. Mr. Ochs did not say that a design with no cap ply, and also with no alternative feasible design to strengthen the shoulder architecture, would be adequate.

As noted above, the trial judge required Defendants to produce belatedly a limited amount of evidence relevant to Plaintiffs' product liability claims which included several depositions of Mr. Beale Robinson, an expert witness for Goodyear in prior litigations. (R. at 2437.) Mr. Robinson's depositions make it clear that Goodyear knew of a "tread throw" problem in their passenger automobile and light truck tires, and it was unable to determine the root cause of the problem.

However, they noted through their testing that when a nylon overlay was added to the design of the tire, the "tread throw" problem was alleviated. Mr. Ochs, Plaintiffs' tire expert, stated that the absence of a nylon overlay *in and of itself* is not a design defect but that as shown by Goodyear's previous testing, the addition of the nylon overlay could alleviate the problem. (T. at 598.) Mr. Ochs' proposed testimony regarding the nylon overlay was predicated in part upon the prior testimony of Goodyear's expert witness, Beale Robinson.

During the trial of this matter, the trial court erroneously sustained the objections of Defendants regarding testimony of a feasible alternative design and the role which nylon overlays played. (T. at 528, 529, and 531.) Because of this, the record is left with the statement "the absence of a nylon overlay in a tire is not in and of itself a design defect" without further explanation which has resulted in the Defendants' mischaracterization of this testimony.

An accurate statement of Ochs' testimony would be "the absence of a nylon overlay or some other feasible alternative design feature to strengthen the shoulder architecture of the tire, is in and of itself a design defect."

II. Statement of Relevant Facts

This is an appeal by a single party, Goodyear/Big 10,[2] as against three parties, one wrongful death Plaintiff, the Estate of Travis Kirby, and two personal injury Plaintiffs, Sidney Odom and Riley Strickland.[3] Travis Kirby, Sidney Odom and Riley Strickland (hereinafter Kirby, Odom and

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[2] Agreements between the Defendants required Goodyear to indemnify Big 10 against liability and damages. Said agreements continue on appeal, and Goodyear has entire control over the appeal. However, Big 10 was allowed to act as a separate party during the trial by conducting its own *voir dire*, questioning witnesses, giving opening statements and closing arguments, etc.

[3] Although all three Plaintiffs filed separate causes of action, they were consolidated for trial, and Plaintiffs' counsel each contributed to the trial of the action. Additionally, Plaintiffs' counsel

Strickland) were occupants of a high-performance automobile at the time of an accident which was directly and proximately caused by the catastrophic and sudden failure of a defective tire which was manufactured by Kelly-Springfield, a trade name of Goodyear and sold by Big 10.

The accident occurred on August 5, 2000, on one of the straightest sections of road in Copiah County, Mississippi, Mississippi Highway 27, between Crystal Springs and Hopewell. (T. at 837, 1209, 1232, 1275, 1364.) Although the portion of the road where the accident occurred was very straight, Highway 27 contains many curves in advance of the accident scene, none of which the driver had any problems negotiating. The accident occurred at approximately three o'clock in the morning; however, the accident and the young men were not discovered until around dawn. All three were ejected from the vehicle. Odom's injuries included, *inter alia*, a closed head injury, trauma, fractured radius/ulnar, scalp laceration, fractured left tibia/fibula and periorbital edema, pumonary confusion, and an intracranial hemorrhage. Mr. Odom remained hospitalized for three weeks, remaining in a coma for the majority of this time.

After being discharged from the hospital, Mr. Odom spent approximately eight and one-half months participating in the QUEST rehabilitation program for his head injuries. Additionally, he underwent a neuropsychological evaluation which suggested mild to moderate cognitive dysfunction effecting primarily his executive functioning. Due to the head injury he sustained, Mr. Odom showed deficits in the areas of proactive interference, information processing, vigilance and complex attention, and some sporadic working memory problems.

Mr. Odom incurred significant medical expenses totaling $162,020.34. A summary of his medical expenses was admitted at trial as exhibit P-23. Additionally, Mr. Odom will require lifelong

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collaborated on the preparation of this brief.

followup medical treatment and prescriptions projected to total $158,060.44.

Strickland's injuries included, *inter alia*, a compound fracture to his right femur, a crushed wrist, broken hand and finger, and required several surgeries. He was in the hospital for two weeks, and required lengthy and painful physical therapy. His medical expenses admitted at trial were $56,689.21, and he proved at trial approximately $4,200.00 in lost wages.

Tragically, Travis Kirby, who was twenty years old, was killed in the accident. Testimony was presented by an economist regarding the net cash value of his life expectancy, and his mother testified for his Estate regarding, *inter alia*, the closeness of the Kirby family, the joy he brought to his family and everyone around him, and the extreme suffering and loss his death inflicted upon his heirs.

Plaintiffs admittedly had been drinking alcohol before the accident, and their own accident re-constructionist determined that the vehicle was traveling between 88-92 miles per hour at the time the tire fell apart. (T. at 560, 1230.) Though Defendants try on appeal, as they did at trial, to label this case as a "drunk driving and speed case," Plaintiffs presented significant evidence proving that the tragic accident, injuries, and loss of life in this case was caused solely by the sudden, catastrophic failure of the right rear tire of the vehicle in which Plaintiffs were traveling.

Plaintiffs filed suit based on several valid claims and causes of action including negligence, failure to warn, product liability arising out of tort, and breach of various warranties, including an express warranty, an implied warranty of merchantability and an implied warranty of suitability for a particular purpose. (*See* Plaintiffs' complaints, R. at 24-32, 33-44, 63-76, 94-108, 114-130.) Defendants' failure to identify and produce documents in discovery required Plaintiffs to file three separate motions to compel and for discovery sanctions, and to expend significant sums of money and time to obtain evidence related to other litigations which proved Defendants' failure to produce.

(R. at 394, 572, and 1247.)

At trial, Plaintiffs proved every element necessary to their claims. They proved that the Defendants manufactured, warranted and sold a product which was defective, failed to conform to applicable warranties, which was the proximate cause of Plaintiffs' damages, and that Defendants knew the tire was unsafe yet failed to warn Plaintiffs of same.

It is beyond dispute that Goodyear manufactured the subject tire, that Big 10 sold it, that the tire was represented and warranted by Defendants as suitable for use on the high performance automobile and to travel safely at a speed of up to 112 miles per hour for 50,000 miles (T. at 556-57; 616; R.E. at 56), that the tire failed at a speed of approximately 88-92 miles per hour after only approximately 10,000 miles of use (T. at 559, 1230; R.E. at 56,62), and that the Plaintiffs suffered substantial damages as a direct result of the failure of the tire.

Though Defendants argue that the tire had been abused, evidence was presented that the decedent, Travis Kirby, took great care of the vehicle, and its tires, and did not abuse either. (T. at 564, 755, 781, 821, 967, 968, 969, 987, 988, 1276; R.E. at 56,57,58,60,61,63). Further evidence was presented that the vehicle was serviced and the tires inspected on August 4, 2000, the day before the accident, and the serviceman testified that the tires were in good working order. (T. at 753-56; R.E. at 57.) The trial judge also commented on the apparent good condition of the tire as follows: "[c]learly all the tire wasn't at three 30 seconds of a inch [3/32] in depth of tread. I am looking at tread that looks fairly good to the Court. It looks like a fairly good tire. It doesn't look like a worn out tire. I have seen worn out tires." (T. at 1481.)

Though Defendants' theory based only upon opinion evidence was that the tire failed because it ran over something in the road, Plaintiffs' experts disputed this fact (T. at 564, 630-33, 1253), and testified that two of the other tires on the vehicle had early evidence of tread separation (T. at 549),

providing a conflict in the evidence solely in the province of the jury to decide. Additionally, the only item the person who first discovered the accident testified that he saw in the roadway was the Defendants' faulty tire. (T. at 765-66.) The surviving Plaintiff with memory of the events before the accident testified that he had no recollection of running over anything. (T. at 821.)

Plaintiffs' proof of the Defendants' liability and the Plaintiffs' resulting extensive damages also consisted of, *inter alia*, the following: the deposition testimony of a former Goodyear tire engineer, Beale Robinson (T. at 466), the live testimony of an expert in the areas of the design, development, manufacture and performance of steel belted tires such as the one that failed, Mr. Robert Ochs (T. at 482-568, 602-668), an expert accident re-constructionist and engineer, Mr. Gilbert Lannie Rhoades (T. at 1172-1265), an expert in the field of economics with emphasis on economic loss analysis, Dr. Glenda Glover (T. at 571-592), an expert in the field of vocational rehabilitation and life care planning, Mr. Nathaniel Fentress (T. at 1124-1172), and an expert in the field of neurology, closed cranium and brain and spine injuries, Dr. Howard Katz (T. at 997-1082.)

Additionally, numerous fact witnesses testified for the Plaintiffs, including, *inter alia*, the Big 10 salesman who sold the tire that failed, Mr. Clay Stodghill (T. at 682-739), an oil-change technician who serviced Kirby's vehicle, including checking the tires, *the day before the accident*, Mr. William Walker (T. at 751-759), the person who first discovered the accident and found the separated tire lying in the roadway, Mr. Sandy Adams (T. at 763-774), Plaintiff Riley Strickland (T. at 775-846) and his mother, Kathy Strickland (T. at 846-864), Plaintiff Sidney Odom (T. at 865-942) and his mother, Brenda Odom (T. at 943-961), and the mother of decedent, Travis Kirby, Mrs. Shirley Kirby (T. at 961-991.)

After Plaintiffs rested their case, the trial judge, Honorable Forrest A. Johnson, Jr., made a very comprehensive and correct ruling denying Defendants' motions for a directed verdict, wherein

he properly described in detail the valid claims and causes of action which Plaintiffs had presented with sufficient particularly to the jury. (T. at 1273-79; R.E. at 63.)

In particular, Judge Johnson described the valid defective design claims that Plaintiffs had adequately presented. The next morning, however, Judge Johnson inexplicably *sua sponte* reconsidered his ruling, and erroneously dismissed Plaintiffs' defective design claims. (T. at 1392-1399; R.E. at 65.) Despite this very contradictory and erroneous ruling, the judge correctly did recognize that Plaintiffs had "very clearly" presented sufficient evidence on the breach of express warranty claims, and it was that claim he allowed to go to the jury.[4]

In their case-in-chief, Defendants presented the testimony of only two witnesses: an accident re-constructionist, Mr. James Hannah (T. at 1301-1391), and an tire expert, Mr. James Gardner (T. at 1407-1474.)

Testimony and evidence in this case were presented to the jury for over five days. The jury then deliberated for over a day and a half. Verdicts were rendered for the Plaintiffs. (R. at 6729-6731, R.E. at 40.) The Defendants post-trial motions properly were denied following a lengthy hearing. (T. at 1725-1805; R. at 7278-79.)

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The trial judge specifically found, *inter alia,* that the "jury very clearly from the evidence in this case could find that it was defective because it catastrophically failed in the manner set out by the witness Ochs in detail at a speed much lower than that, and that it did not perform to the express factual representations of the speed of the tire." (T. at 1394.) And that: "Plaintiff has very clearly presented substantial evidence from which a jury could find this tire was defective and that it did not perform as factually represented . . ." (T. at 1398.)

SUMMARY OF THE ARGUMENT

This is a case involving breach of warranties. The Defendants have tried, both at the trial level and now on appeal, to present it as a case alcohol and speed in an attempt to prejudice both the jury and this Court on the real issues. However, the contentions of the Defendants are merely a smokescreen and do not address the real issue at hand, to which the jury found Defendants had no defense: tires which left Goodyear's Kelly Springfield plant in an unreasonably dangerous condition in breach of express warranties made by the Defendants which resulted in serious injury and death.

At trial, Plaintiffs presented significant and credible evidence to support three warranty claims: breach of an express warranty, breach of the warranty of merchantability, and breach of the warranty of fitness for a particular purpose. Additionally, Plaintiffs presented sufficient evidence on their product liability, failure to warn and negligence claims. However, after denying the Defendants' motion for directed verdict, the trial judge erroneously *sua sponte* reconsidered and dismissed all of Plaintiffs' claims except for the breach of warranty claim. Breach of the express warranty was the only claim that went to the jury on Plaintiffs' instructions, and it was upon this claim that the jury properly found for the Plaintiffs. *See Argument on Cross-Appeal.*

The trial judge committed no error regarding admission of evidence. The evidence of which Defendants complain, the "problem summary" memo and the deposition testimony of Goodyear engineer, Beale Robinson, was highly relevant to Plaintiffs' design defect claims because the evidence proved that Defendants knew they had a problem with their tires, including high performance tires, around the same time the subject tire was manufactured, and that Goodyear knew that a different design (addition of a nylon overlay or cap ply) would have prevented the tire failure in this case.

At the time the evidence was admitted, Plaintiffs' design defect claims had not been

dismissed by the trial judge and were still viable, so the evidence was properly admitted and Defendants failed to request the trial judge to instruct the jury not to consider said evidence after the design defect claims were improperly dismissed. The only claim upon which the jury was instructed through Plaintiffs' instructions was the breach of warranty claim.

The trial judge properly allowed the admissibility of the Robinson deposition as a sanction against the Defendants for their failure to identify and produce available, relevant, nonprivileged, documents in discovery. Such an order was well within the judge's discretion and was entirely proper under the circumstances. The Defendants are estopped from asserting any error related to the admission of this evidence due to their bad faith in failing to produce evidence requested by Plaintiffs in pretrial discovery.

Defendants waived any alleged error regarding the jury instructions submitted as to apportionment of the alleged negligence of the driver by failing to object to the instruction provided by the Court and by stipulating that Defendants wished to use a general jury verdict form. The jury was properly instructed by the Court regarding apportionment.

The only evidence offered by the Defendants in support of their contentions that the jury found negligence on the part of the driver of the vehicle or that the jury failed to apportion that negligence, if any, is an improper affidavit of a juror. Because Defendants are absolutely precluded by law from impeaching a jury verdict through the affidavit of a juror, their affidavit was stricken by the trial court, and should be disregarded.

Significant evidence was presented that the catastrophic and sudden failure of the right rear tire of the vehicle caused the accident, and that there was nothing that the driver could have done to avoid the accident. Whether the negligence of the vehicle's driver should have been apportioned was a question of fact that the Defendants obviously failed to prove to the satisfaction of the jury.

Defendants' arguments regarding alleged misconduct of a juror and Plaintiffs' counsel are full of misrepresentations, and are completely without support in the record. The record supports the conclusion that, with the exception of Dan Kitchens being a pallbearer at the funeral of one juror's son, Defendants were fully aware of everything regarding this juror which they claim on appeal was a surprise.

There was no relationship between the juror and counsel for the Kirby Plaintiffs, considering the juror herself did not request that Dan Kitchens be a pallbearer, and the evidence supported the conclusion that she did not know that he served as such, the funeral was over ten years before the instant trial, none of the attorneys for the Plaintiffs recall ever having a conversation with the juror, Plaintiffs' counsel did not want the juror to serve and thought Defendants would strike her, and the trial judge ruled that he would not have allowed a strike for cause on the juror based on the alleged relationship.

Defendants abandoned their motion regarding *voir dire* by not calling same up for hearing. Finally, Defendants have failed to show that they suffered any prejudice as a result of the juror's service, considering her stated stance as a "crusader against alcohol," her stated feelings after six and a half hours of deliberation that further deliberations would not change her mind, and the lack of any proof that she actually voted in favor of Plaintiffs.

Defendants waived any alleged improper remarks of Plaintiffs' counsel by either failing to make a contemporaneous objection or by failing to request the trial judge to instruct the jury to disregard same, or to request a mistrial.

All of the remarks complained of by Defendants were relevant to Plaintiffs' design defect claims, and they were supported by the evidence adduced at trial. Further, the jury was properly instructed that the remarks of counsel are not evidence, and given the wide latitude allowed counsel

in arguments to the jury, it cannot be said that the remarks made by counsel rise to reversible error.

Defendants' cumulative error argument lacks any merit whatsoever, considering that none of the independent issues they raise amount to reversible error.

The trial judge did not abuse his discretion in denying Defendants' motion for a remittitur. An abuse of discretion is found only where the Court is convinced that the jury was influenced by bias, prejudice, or passion, or when the damages were contrary to the overwhelming weight of the evidence. Neither situation is present here.

Significant and appropriate evidence was presented in support of all the Plaintiffs' damage awards, through the testimony of the two Plaintiffs who survived this terrible accident, fact and expert witnesses, and the mothers of all the victims in this case. The jury, which is presumed to follow the Court's instructions, was properly instructed, *inter alia*, to base its decisions only on the evidence presented and the law upon which they were instructed, and not to allow prejudice or sympathy or public opinion to influence it, and all the jurors swore to follow the court's instructions and to be impartial.

Plaintiffs won this case on the basis of the only cause of action which the trial judge submitted to the jury and are entitled to keep the verdict and judgment which was hard won. Plaintiffs have prosecuted a cross-appeal because the trial court overruled and denied the Defendants' motions for directed verdict on several additional causes of action and *sua sponte* reconsidered his ruling and subsequently dismissed all causes of action except for breach of warranty. Therefore, in the event of a reversal, there must be a remand giving the Plaintiffs all of their claims and causes of action.

Defendants committed willful, bad-faith discovery abuses and other wrongs which put the trial court in error on Plaintiffs' design defect claim, and Defendants cannot claim the benefit of their

own wrongs by assigning errors on appeal based upon Defendants' bad faith conduct. Specifically, Defendants largely predicate their appeal on the alleged failure of Plaintiffs to prove a specific defect in the tire, but it is uncontradicted that the Defendants' deceitfully and willfully failed to produce Goodyear's design and manufacturing specifications. However, regardless of Defendants' position to the contrary, the Plaintiffs did not have the burden of proving a specific defect. *Price v. Admiral Corp.*, 527 F. 2d 412, 415 (5th Cir. 1976). Plaintiffs made the best available proof of defect in the absence of such documents.

In the event this Honorable Court determines that Plaintiffs' verdict and judgment predicated upon breach of express warranty is insufficient or subject to error for some reason, this Honorable Court must remand this suit for trial on all of the claims and causes of action well pleaded and proven by the Plaintiffs.

Plaintiffs will ask this Honorable Court to affirm the verdict and judgment and to dismiss the Defendants' appeal at Defendants' cost. Plaintiffs have a sufficient verdict and judgment free of error, except for errors induced by the Defendants which resulted in the dismissal of other claims on which the jury verdict and judgment are not predicated.

ARGUMENT ON DIRECT APPEAL

The standard of review for denial of a motion for judgment notwithstanding the verdict (JNOV) is *de novo* as to the law applied by the trial court judge as well as the evidence presented during trial. The legal sufficiency of the evidence, and not the weight of the evidence, is tested in a motion for JNOV. *White v. Yellow Freight Systems, Inc.*, 905 So. 2d 506, 510 (Miss. 2004) (citing *Tharp v. Bunge Corp.*, 641 So. 2d 20, 23 (Miss. 1994)). If there is substantial evidence in support of the verdict the denial of the JNOV must be affirmed. *Natchez Elec. Supply Co. v. Johnson*, 2007 Miss. LEXIS 512 at *8, 2007 WL 2495311 *1, *3 (Miss. Sept. 6, 2007). "'Substantial evidence' is information of such quality and weight that reasonable and fair-minded jurors in the exercise of impartial judgment might have reached different conclusions." 2007 Miss. LEXIS 512 at *8, [WL] at *4. All evidence must be viewed by this Court in a light most favorable to support the verdict. *Canadian Nat'l/Ill. Central R. Co. v. Hall*, 953 So. 2d 1084, 1089 (Miss. 2007); *Natchez Elec. & Supply Co.*, 2007 Miss. LEXIS 512, 2007 WL 2495311 at *4.

The standard of review on a motion for a new trial is abuse of discretion. *Steele v. Inn of Vicksburg, Inc.*, 697 So. 2d 373, 376 (Miss. 1997). The weight of the evidence, rather than the legal sufficiency, is tested in a motion for a new trial. "When reviewing a denial of a motion for a new trial based on an objection to the weight of the evidence, [this Court] will only disturb a verdict when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice." *Bush v. State*, 895 So. 2d 836, 844 (Miss. 2005) (citing *Herring v. State*, 691 So. 2d 948, 957 (Miss. 1997)); *see Lift-All Co. v. Warner*, 943 So. 2d 12, 15 (Miss. 2006).

The evidence reviewed, however, ought to be weighed in the light most favorable to the verdict. *Herring v. State*, 691 So. 2d 948, 957 (Miss. 1997). The appellate Court can "reverse a trial

judge's denial of a request for new trial only when such denial amounts to a [sic] abuse of that judge's discretion." *Steele v. Inn of Vicksburg, Inc.*, 697 So. 2d 373, 376 (Miss. 1997) (quoting *Shields v. Easterling*, 676 So. 2d 293, 298 (Miss. 1996) (further quoting *Bobby Kitchens, Inc. v. Miss. Ins. Guar. Ass'n*, 560 So. 2d 129, 132 (Miss. 1989)).

A jury's verdict must be given great deference by this Court, and "conflicts of evidence presented at trial are to be resolved by the jury." *Lift-All Co. v. Warner*, 943 So. 2d at 16; *Blossman Gas, Inc. v. Shelter Mut. Gen. Ins. Co.*, 920 So. 2d 422, 426 (Miss. 2006); *Venton v. Beckham*, 845 So. 2d 676, 687 (Miss. 2003) (citing *Jackson v. Griffin*, 390 So. 2d 287, 289 (Miss. 1980)). "[I]f the jury verdict is supported by the substantial weight of the evidence, it should not be set aside." *Lift-All Co. v. Warner*, 943 So. 2d at 15.

The authorities cited above require the Defendants to meet a very high burden to warrant this Court's setting aside the proper and much deliberated verdict of the jury in this case. The Defendants have failed to meet the high burdens imposed, and this case must be affirmed.

I. Plaintiffs Presented More Than Sufficient Evidence of a Manufacturing Defect

Plaintiffs' tire expert, Mr. Robert Ochs, testified that when the other three tires which were on the Camaro at the time of the accident were tested, two of the three showed early indications of delamination, or tread separation, indicative of a defect. (T. at 548-550.) The fact that three of the four tires suffered a tread separation, or were in the early stages of a tread separation, is clearly sufficient evidence from which the jury could have concluded that there was in fact a manufacturing defect and clearly a breach of warranty in the tire which failed because of tread separation.

This issue did not go before the jury on Plaintiffs' instructions; rather, all of the instructions on this theory were submitted by the Defendants. (T. at 6829, 6830, 6832, 6834, and 6842.) They cannot now complain of instructions which they themselves requested go to the jury. *See Planters*

Bank v. Garrett, 239 Miss. 248, 266, 122 So. 2d 256, 262 (1960).

The Defendants claim that Plaintiffs failed to prove that tire deviated in any material way from the manufacturer's specifications as required by Section 11-1-63(a)(1)(i),[5] and that Plaintiffs' case was based solely on *res ipsa loquitur*. However, the *res ipsa loquitur* cases and arguments cited by Defendants, most of which are from other jurisdictions and therefore not controlling, are based on causes other than defectiveness that can lead to the failure of a product. In the majority of cases cited by Defendants, the Plaintiffs failed to prove any defect or any causal connection between the defect and their injuries. Such is not the case here.

Plaintiffs did not, as Defendants argue, rest their defectiveness claim on "speculation, guess and conjecture as to the cause of a product's failure." (Defendants' Brf. at 13.) The facts adduced by Plaintiffs at trial were that none of the common things, such as significant abuse, prior punctures, or excessive mileage, that can lead to tire failures occurred. It is true that Defendants presented testimony that the tire must have hit something or that the tire was abused; however, Plaintiffs presented significant conflicting evidence.

Plaintiffs' expert Mr. Ochs testified that the tire was not underinflated, was not punctured, and was properly maintained. (T. at 561-64; 608-10, 631, 632-33; *see also* testimony of Plaintiffs' accident re-constructionist, T. at 1253.) In addition, evidence was presented by several fact witnesses regarding the lack of any prior puncture or abuse. (T. at 564, 755, 781, 821, 967, 968, 969,

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It is noted here that Defendants also cite selected portions from the testimony of one of Plaintiffs' experts, Mr. Robert Ochs, to the effect that Mr. Ochs found no defect in the tire. The selections by the Defendants are not illustrative of Mr. Ochs' actual opinion, as argued herein, which was that the absence of a nylon overlay was not a defect *in and of itself*, and any limitation on his opinions are the product of Defendants' bad faith failure to produce information that would have enabled him to form such opinions. *See* Plaintiffs' Cross-Appeal, *infra*.

987, 988, 1276.) Further, evidence was presented that the vehicle was serviced and the tires inspected on August 4, 2000, the day before the accident, and the serviceman testified that the tires were in good working order. (T. at 753-56.)[6]

Mr. Ochs also testified that, *inter alia*, the tire failed because of a defect, specifically "chunking" or the throwing off pieces of tread from the tire (T. at 613-15), that the tire clearly failed at a speed well within the range of its warranty (T. at 602-03), and that the two of the other three tires showed early signs of the same type of separation that caused the subject tire to fail (T. at 548). This testimony clearly created a question of fact regarding whether the failure was caused by material deviation from the manufacturer's specifications. Such conflict is aptly demonstrated from the mouths of Defendants' own counsel, as follows:

> Mr. Ochs came and testified. And on the issue a puncture he was asked specifically, "Did you find a puncture anywhere in the tire." "No." Gardner said, "Yes," and he showed you the puncture. "Was there any impact damage"? Mr. Ochs said, "No." . . . Mr. Gardner said yes . . . "Melted torques?" Mr. Ochs said, "No, no melted torques." Mr. Gardner said, "Yes," and showed you a puncture.
>
> (T. at 1623-1624.)

Defense counsel also stated, "I submit to you that we have one issue on the tire, and that's an argument between Mr. Ochs and Mr. Gardner." (T. at 1626.) Counsel continued describing the dispute in the evidence as follows: "Even if the tread came off, even if you think it was a problem in the manufacturing, and you don't believe Mr. Gardner, and you don't believe the hole in the tire, and you don't believe the description he gave for what happened . . ." (T. at 1638.) Counsel for

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See also T. at 1481, where the trial judge commented, outside the presence of the jury, on the apparent good condition of the tires; and T. at 545, where the trial judge asked Defendants' counsel, outside the presence of the jury: "There seems to be an obvious tire failure in this situation. The issue is this: What caused it?" Defendants' counsel answered in the affirmative.

Goodyear stated: "this case comes down to who you gonna believe?" (T. at 1656.) Counsel continued: "It's one to one what happened to the tire. It's Mr. Ochs versus Mr. Gardner; and I submit to you that Mr. Garner is the more credible witness, and he gave you what happened to this tire." (T. at 1663.) Defendants requested and were granted Instruction No. 40 which allowed the jury to find that the accident was caused by "impact damage from a road hazard object and not due to any manufacturing defect." (R. at 6842, R.E. at 51.)

In *Edwards v. Sears, Roebuck & Co*, 512 F. 2d 276, 288 (5th Cir. 1975), a case cited by Defendants, the Plaintiff, who had been drinking alcohol, was killed in an automobile accident at high speed after one of his tires failed. As in the case at bar, conflicting testimony was presented as to whether the tire failed due to misuse or a defect. The Fifth Circuit correctly declined to decide such issues. In doing so, it cited the Mississippi Supreme Court's rule that "the important issue of misuse is a question of fact" appropriate for resolution by the jury, not a reviewing court. *Edwards*, 512 F. 2d at 289 (citing *Early-Gary, Inc. v. Walters*, 294 So. 2d 181, 186 (Miss. 1974)). The same result must be reached here. If the evidence on one side or the other was beyond question, the case would not have been tried. However, there was conflicting proof.

Also in the *Edwards* case, cited by Defendants, the 5th Circuit did agree with the Defendants that the doctrine of *res ipsa loquitur* had no place in a tire case. However, the Court disagreed that such a recovery was permitted in that case, finding that the trial judge correctly instructed the jury that *res ipsa loquitur* was not a basis for recovery.

In *Edwards*, the instruction approved by the Fifth Circuit stated:

> The Court instructs you for the defendant Sears and Michelin that the mere fact that the accident occurred and George Edwards was killed of itself alone constitutes no evidence of any negligence or breach of any other duty by the defendants Sears and Michelin, and does not raise a presumption that it was due to any act of negligence or other breach of duty by the defendants Sears and Michelin, but the law casts the

> burden on the plaintiff to prove her case by a preponderance of the credible evidence and if she has failed to do so then and in that event it will be your sworn duty to find for the defendants Sears and Michelin.

Edwards, 512 F. 2d 276, 288 (5th Cir. 1975).

Similarly, in the case at bar, Judge Johnson granted the following instruction submitted by the Defendants:

> The Court instructs the jury that the defendant, The Goodyear Tire & Rubber Company, had no duty to distribute or manufacture a tire which was totally accident proof or that would not fail under any circumstances. The Court further instructs the Jury that the defendant, The Goodyear Tire & Rubber Company, is not an insurer against the possibility of an accident or injury arising out of the use of its product, nor is it the guarantor of the driving of plaintiffs. The duty of defendant, The Goodyear Tire & Rubber Company, was to manufacture a tire that was safe when maintained and used in the proper manner for which it was intended.
>
> The fact that the accident occurred and that the plaintiff sustained injury constitutes no evidence whatsoever that the tire was defective or unsafe and raises no presumption that the accident was due to any failure by the defendant, The Goodyear Tire & Rubber Company.

(Instr. No. 34, D-22 R, 6684-86, R.E. at 39) Similarly, Instruction No. 31 (D-17, R. at 6828, R.E. at 45) provides as follows:

> The Court instructs the Jury that evidence which tends only to show a possibility is not evidence at all. Should you find that there is evidence in this case which goes to prove nothing more than a possibility, then, in reaching your verdict, such evidence, if any, should be disregarded by you.

Instruction No. 32 (D-19, R. at 6829, R.E. at 46) provides as follows:

> The Court instructs the Jury that the term "defective" as used in these instructions is defined as the failure of a product to meet the reasonable expectations of the ordinary consumer of that product as to safety. A product can be deemed to be in a defective condition only if the plaintiffs prove by a preponderance of the credible evidence that the product was, at the time it left the manufacturer, in a condition not contemplated by the ordinary consumer of that product, and which would be unreasonably dangerous to them or to their property.

Thus, as in *Edwards*, the jury in the case at bar clearly was instructed that *res ipsa* could not be the basis of a recovery. It is presumed to follow the Court's instructions, and the Defendants have

not presented any evidence to the contrary. *See Hobbs Auto., Inc. v. Dorsey*, 914 So. 2d 148, 164 (Miss. 2005).

Plaintiffs' experts were able to identify the failure of the tire due to the delamination of the tire. Such testimony, when compared to the Defendants' proof, established a question for the jury as to whether the tire deviated in a material way from the manufacturer's specifications. The jury, as was within its rightful discretion, chose, on the Defendants' instructions, to believe the Plaintiffs' proof. Its decision was supported by the evidence adduced at trial, and must not be disturbed on appeal.

II. Plaintiffs Presented More Than Sufficient Evidence of Breach of Warranty

As noted in the Statement of Relevant Facts, following Plaintiffs' case-in-chief, the trial court made a very comprehensive and correct ruling denying Defendants' motions for a directed verdict. However, the next morning, Judge Johnson *sua sponte* reconsidered his ruling, erroneously dismissing some of Plaintiffs' claims. As a result, Plaintiffs' case was greatly pared down and was presented to the jury on a claim of breach of express warranty. Defendants now contend that *one* instruction pertaining to Plaintiffs' breach of warranty claim was erroneous, resulting in reversible error.

The Defendants argue that the trial court committed reversible error in giving a jury instruction on breach of express warranty (S-2, no. 7 as granted; R. at 6762). The jury instruction as given reads as follows:

> You are instructed that a manufacturer or seller of a product is liable for damages caused by that product, other than commercial damages to the product itself, if you find from a preponderance of the evidence:
>
> 1. That Kelly Springfield/Goodyear Tire & Rubber Co. was in the business of selling automobile tires and did in fact sell a Charger SR tire; and

2. That at the time the Charger SR tire left the control of Kelly Springfield/Goodyear Tire & Rubber Co., the defendant represented that the tire would be safe at speeds up to 112 miles per hour for 50,000 miles and that the defendants' claims amounted to an express warranty or other express factual representation upon which the purchaser relied in selecting the use of the Charger SR tire; and

3. That the warranty or other expressed factual representation was breached or false, which made the product defective; and

4. The defective condition rendered the product unreasonably dangerous to the user or consumer; and

5. The defective and unreasonable and dangerous condition of the product was the proximate cause of the plaintiffs' damages; then your verdict should be for the plaintiff.

However, if the plaintiff has failed to prove any of these elements by a preponderance of the evidence in this case, then your verdict shall be for the defendant.

In determining issues raised on appeal regarding jury instructions, the appellate Court does not isolate an instruction or take instructions out of context, but rather, reads the instructions together as a whole. Moreover, a Defendant is entitled to have jury instructions presenting its theory of the case. However, if the proposed instruction incorrectly states the law, is duplicative of other instructions, or lacks a foundation in the evidence, the trial court may properly refuse the proposed instruction. *Canadian National/Illinois Cent. R. Co. v. Hall*, 953 So. 2d 1084, 1099-1100 (¶57) (Miss. 2007) (citing *Spicer v. State*, 921 So. 2d 292, 313 (Miss. 2006)). In reading the instructions as a whole, the jury was properly instructed as to Plaintiffs' claims and the Defendants' defenses to those claims.

Defendants have failed to acknowledge to this Court that they were granted five jury instructions which directly pertain to the alleged defect in the instruction at issue. Specifically, the trial court granted Defendants' jury instruction defining the term "defective." (D-19, No. 32 as given;

R. at 6829; R.E. at 46.)

The trial court granted the Defendants' jury instruction specifying the defective condition the tire must have been in when it left their factory before the jury could find for the Plaintiffs. (D-20, No. 33 as given; R. at 6830-31; R.E. at 47.) The trial court granted the Defendants' jury instruction instructing the jury that the jury must find a specific defect in order to find for the Plaintiffs. (D-22, 34 as given; R. at 6832-33; R.E. at 48.) The trial court granted Defendants' jury instruction which instructed the jury on very specific findings the jury must reach in order to determine that the tire was defective. (D-24, no. 35 as given; R. at 6834-6836; R.E. at 49.) Additionally, the trial court granted Defendants' jury instruction which instructed the jury that if they found that the resulting tire failure was due to impact damage rather than a design defect, which was the Defendants' theory of the case, then they must return a verdict for the Defendants. (D-40, no. 40 as given; R. at 6842; R.E. at 51.)

Defendants erroneously present this issue to this Court focusing on a very limited scope of *one* jury instruction and ask this Court to disregard the jury instructions as a whole. In taking this approach, the Defendants are asking this Court to substitue its own judgment for that of the jury. The law of Mississippi is well-settled on this issue, stating that:

> Unless it can be demonstrated that the jury abandoned its duty to act as the disinterested finders of fact and, instead, decided the case based on bias, passion, or prejudice, an appellate court asked to review the jury's verdict is not permitted to substitute its own judgment for that of the jury; rather, we are obligated to afford substantial deference to the jury's findings of fact.

Redmond v. Breakfield, 840 So. 2d 828, 831 (¶9) (Miss. Ct. App. 2003) (citing *Bridges v. Kitchings*, 820 So. 2d 42, 51 (¶37) (Miss. Ct. App. 2002)).

As a preliminary matter in addressing this issue, the Defendants have failed properly to preserve this issue for appeal. "To preserve an objection to a jury instruction, the specific ground for the objection must be stated in the original objection. The issue raised on appeal may not be

based on a different legal theory." *Fitch v. Valentine*, 959 So. 2d 1012, 1023 (¶28) (Miss. 2007) (quoting *Shields v. Easterling*, 676 So. 2d 293, 296 (Miss. 1996)).

When arguing the propriety of the jury instruction at issue, the Defendants made very generalized objections which failed to properly place the issue now on appeal before the trial court for ruling. The argument on this instruction took place as follows:

> ON INSTRUCTION S-2: BY THE COURT: S-2. S-2 appears to be a proper instruction on the plaintiff's basic theory of the case that the Court has allowed them to proceed on, and it's the Court's intention to grant this instruction. At this time, I will hear objections by the defendants.
>
> BY MR. BAXTER: Your Honor, this, I don't think, is proper but to give an instruction here where there clearly has been evidence submitted and the jury could conclude that this tire failed within the warranty mileage for some reason other than a manufacturing defect.
>
> BY MR. NORTON: Your Honor, I think that the warranty information specifically says that it does not apply if there's been misuse or abuse of the tire, and that's our theory of the case is that there - -
>
> BY THE COURT: And also there's testimony about whether or not the condition as it left the factory or the seller, and all instructions are to be read together, and I'm going to fully allow that. Those objections, the Court will grant this over those objections.
>
> BY MR. BAXTER: One other objection, Your Honor, is that the warranty doesn't apply to either the driver nor the occupants because the limited warranty was limited to the original purchaser of the tires expressly stated in the documents - -
>
> BY MR. ALLRED: Your Honor, there's a statute in Mississippi that says that's not so. Privity is not a defense under the warranty claim in Mississippi by statute.
>
> BY THE COURT: This is going to be granted over those objections.
>
> (T. at 1500-1501.)

The Defendants' objections to the trial court state nothing regarding a guarantee of non-failure if kept at a speed below 112 miles per hour for fewer than 50,000 miles. Further, there was no mention of an "S" speed rating nor representations made to the purchaser of the tire. Their

objection was simply "we presented an alternate theory of this case which we think is more believable, so we don't like this instruction." The Appellants have failed to raise their arguments which they now voice on appeal and are estopped from doing so at this juncture.

If this Court finds that the Defendants did adequately preserve this issue for appeal, Plaintiffs nonetheless made a *prima facie* case for breach of an express warranty pursuant to Miss. Code Ann. § 11-1-63(a) (Rev. 2002). However, in appealing to this Court seeking reversal of the jury's verdict, the Defendants have mischaracterized facts and made misleading statements in their arguments.

First, looking at the merits of the Plaintiffs' claims and cause of action for breach of an express warranty, in order to recover for such breach the following must be proven:

> (a) The manufacturer or seller of the product shall not be liable if the claimant does not prove by the preponderance of the evidence that at the time the product left the control of the manufacturer or seller:
> (i)(4) The product breached an express warranty or failed to conform to other express factual representations upon which the claimant justifiably relied in electing to use the product; and
>
> (ii) The defective condition rendered the product unreasonably dangerous to the user or consumer; and
>
> (iii) The defective and unreasonably dangerous condition of the product proximately caused the damages for which recovery is sought.

Forbes v. General Motors Corp., 935 So. 2d 869, 873 (¶5) (Miss. 2006) (quoting Miss. Code Ann. § 11-1-63(a) (Rev. 2002)).

The first element which must be proven is that "the product breached an express warranty or failed to conform to other express factual representations upon which the claimant justifiably relied in electing to use the product." Defendants mischaracterize the case *sub judice* and the reliance element of the statute by arguing that privity has bearing on the issue. However, what the Defendants have failed to mention to this Court is that the Mississippi Legislature has seen fit to remove the privity requirement in actions such as this. Miss. Code Ann. § 11-7-20 provides:

> In all causes of action for personal injury or property damage or economic loss brought on account of negligence, strict liability or breach of warranty, including actions brought under the provisions of the Uniform Commerical Code, privity shall not be a requirement to maintain said action.

Mississippi's jurisprudence is replete with case law on breach of warranty claims holding that the court "must look to the facts of the case to determine if the injury was foreseeable and if the Plaintiff detrimentally relied." MS Prac. Encyclopedia MS Law § 52:18 (citing *Hosford v. McKissack*, 589 So. 2d 108 (Miss. 1991); *May v. Ralph L. Dickerson Const. Corp.*, 560 So. 2d 729, 730 to 731 (Miss. 1990); *Hicks v. Thomas*, 516 So. 2d 1344, 6 U.C.C. Rep. Serv. 2d 105 (Miss. 1987); *Touche Ross & Co. v. Commercial Union Ins. Co.*, 514 So. 2d 315, 321 (Miss. 1987); *Noyes v. Guy Bailey Homes, Inc.*, 439 So. 2d 670, 673 (Miss. 1983)).

In this instance, the facts establish that neither Plaintiff Sidney Odom, nor Plaintiff Riley Strickland were the owner or purchaser of the vehicle or tires at tissue. Rather, these Plaintiffs were innocent passengers. As a manufacturer of tires, Goodyear Tire & Rubber Company warrants every one of its tires to be free of defects and to last for the period of its warranty.

These warranties are within the public domain and the existence of such are common knowledge to the general public. Logic dictates that since tires are installed on vehicles, the purpose of which is to transport the driver and his passengers, it is reasonably foreseeable that if one of Goodyear's tires suffers a catastrophic failure such as the one at issue, there is a likely chance that multiple parties will be injured, not solely the purchaser of the tire. In becoming passengers in the vehicle, the Odom and Strickland Plaintiffs reasonably relied upon the tires to perform as warranted. Due to the failure of these tires to perform under the terms of their warranty, the Plaintiffs suffered reasonably foreseeable injuries.

Turning to the Kirby Plaintiff, again privity is not at issue. The Camaro involved in this

accident was purchased used from automobile dealer, Howard Wilson Chrysler-Plymouth, Inc. It is highly unlikely that any used car salesman in the nation could look at each and every make and model of tire with which a used car is equipped and explain to the purchaser the exact terms of the warranty that the tire carries.

Defendants attempt to muddy the water on this issue by addressing what Big 10 represented to Ivan Ostrander, the original purchaser of the tires, as an express warranty issue. Big 10 received from Goodyear a directive not to sell lower speed rated tires to replace OEM (original equipment manufacturer) specified tires on high performance automobiles and sold Ostander tires described, specified, advertised and sold as high performance tires. These specifications, descriptions and advertisements were express warranties which followed the tires into the hands of Plaintiff Kirby despite Kirby not being in privity with Big 10.

To their detriment, both by operating and riding in the vehicle equipped with these tires, each Plaintiff relied on these tires to perform as warranted. One such tire failed to function as warranted (not suitable as a high performance tires, not good for 50,000 miles at 112 mph) which resulted in reasonably foreseeable severe injuries and death. The fact remains that the tires carried an express warranty for a distance of 50,000 miles, to safely travel at the speed of 112 miles per hour. (T. at 1453 and 1467, R.E. at 66.) The failed tire suffered a catastrophic failure after approximately 10,000 miles of use while it was being operated at the time of failure below the tire's speed rating 112mph specification 40,000 miles below its durability specification, thereby breaching the express warranty carried by the product. Therefore, the first prong of the three-part test has been met.

The jury heard evidence from Plaintiffs' expert, Robert Ochs, which stated that the subject tire suffered a catastrophic failure which resulted in tread detachment within one revolution of the tire, or less than one-tenth of a second. (T. at 565.) Additionally, Mr. Ochs testified that two of the

three intact tires were beginning to separate at the edge of the upper and lower belt and the crown of the tire along one of the edges of the upper belt. In other words, the tires were beginning to fall apart between the two steel belts. (T. at 549-550.) This necessarily establishes that the cause of the failure was intrinsic to the strength and durability of the tires rather than a single, external factor, e.g. striking a road hazard.

Defendants presented an alternate theory of the case. Their theory was that the failed tire suffered impact damage which triggered the tire's failure. This was a classic case of competing testimony, and the jury serving as fact-finder resolved this issue in favor of the Plaintiffs. The jury reasonably concluded that the defective condition rendered the product unreasonably dangerous to the user or consumer, thus meeting the second prong of this three-part test.

Last, the jury heard testimony from both Mr. Ochs as well as Plaintiffs' accident re-constructionist Lannie Rhoades, that the vehicle became uncontrollable due to the catastrophic tire failure. (T. at 1204, 1206, and 1208.) This failure resulted in a wreck which took the life of Plaintiff Kirby and seriously injured Plaintiffs Odom and Strickland. The jury heard competing testimony on the alternate theories presented by the parties regarding the ability to control a vehicle after sustaining a sudden loss of tread on the right rear tire of a vehicle. The jury resolved this issue in favor of the Plaintiffs. It is evident that the jury concluded that due to the almost instantaneous delamination, the failed tire proximately caused Plaintiffs' damages. All three prongs were proven, and the jury found in favor of the Plaintiffs. The jury's verdict must be affirmed.

Without rehashing the previous arguments, Plaintiffs presented evidence of each element of their claim. As stated above, however, in arguing this issue on appeal the Defendants would lead this Court to believe several misrepresentations, and the Plaintiffs would like to take the opportunity to clarify these issues for the Court.

The Defendants would lead this Court to believe that the jury did not hear evidence of the warranty at issue. However, Defendants' own expert witness, James Gardner, testified that the subject tire carried a warranty of 50,000 miles. (T. at 1453, R.E. at 66.) Additionally, Mr. Gardner testified that the tire was "rated and tested to withstand the constant prolonged speed of 112." (T. at 1467, R.E. at 66.)

Also, the Goodyear Defendant's corporate representative, A.L. Finley, stated the same specification to which Mr. Gardner referred. (T. at 1468-69, R.E. at 66.) Goodyear's corporate position throughout the litigation was that the tire was "rated and tested to withstand the prolonged speed of 112" though they recant from that position on appeal. The jury heard clear evidence of the failed tire's warranty and any contentions to the contrary are misleading at best. These designations (high performance) advertisements (112 mph for 50,000 miles) and warnings (not replace Z rated tires as specified by OEM) constitute breaches of warranty.

The Defendants next contend that there was no "defect" in this tire. However, this is not the Plaintiffs' burden of proof. *Price v. Admiral Corp.*, 527 F.2d at 415. Although Defendants are incorrect about the Plaintiffs' burden of proof, they are correct when they state in their brief on this issue that "If the product fails to perform as warranted, that is a 'defect' for purposes of § 11-1-63(a)." (Defendants' Brf. at 18.) As stated above, the jury heard testimony from the Defendants' own expert witness and corporate representative stating that the tires at issue were warranted for a period of 50,000 miles and that they were rated and tested to withstand the prolonged speed of 112 miles per hour, thereby giving the jury full knowledge of the warranty the tires carried. The jury also was presented evidence of the tire's failure after approximately 10,000 miles of use at a speed between an estimated 88 to 92 miles per hour, well below the speed rating carried by the tire. The tire's catastrophic failure within this warranty period and within the tire's speed rating was a "defect"

for purposes of § 11-1-63(a), and Defendants contentions to the contrary are inaccurate and misleading.

The Defendants continue to address the 112 mile per hour "S" speed rating as though Plaintiffs were traveling at or above that speed at the time of the tire's failure. The record in this matter is abundantly clear that Plaintiffs were traveling in excess of the posted speed limit at the time of the tire failure, and the jury was instructed by the trial court that it is negligence as a matter of law to drive in excess of the posted speed limit. (Jury Instruction no. 5, R. at 6739.) However, the issue as it applies to a breach of warranty claim is that the tire was being operated at a speed well below the tire's advertised speed and durability ratings. To indicate otherwise is again, very misleading to this Court.

As addressed in Plaintiffs cross-appeal, Plaintiffs made out a *prima facie* case of breach of implied warranties of merchantability and fitness for a particular purpose and the trial court was in error by not allowing these claims to be presented to the jury. Although the jury was not instructed on these claims and did not return a verdict on these claims, the Defendants are now attempting to interject this issue into their appellate argument. In doing so, the Defendants now appeal to this Court seeking to place the trial court in error on an issue which the jury never considered. Their arguments on this issue should be disregarded by this Court.

The Defendants make a superfluous argument regarding Big 10 Tire Company and its liability on this issue. It should be noted that it is *Goodyear* who bears the brunt of the verdict due to the indemnity agreement which is in place between the two companies. Big 10 is merely a pawn in this suit which has been offered up by Goodyear in an attempt to forecast dismal future policies of tire sellers if this Court affirms the jury's verdict. This is simply argument of counsel calculated to prejudice this Court and does nothing to address the issue at hand.

In summary, the Plaintiffs set forth a *prima facie* case for breach of express warranty, and the jury returned a verdict accordingly. Though Defendants have raised many red herrings in an attempt to get the verdict against them overturned, the jury's verdict must be affirmed.

III. The Trial Judge Did Not Err in Admitting Evidence

The Defendants complain of the admission of evidence regarding light-truck tires. Specifically, they assert error in the admission of a one page "problem summary" memo and the reading of portions of a deposition transcript of one of Defendant Goodyear's former engineers named Beale Robinson.

The admission of testimony at trial is left to the sound discretion of the trial court, and error will be found only where the trial court has abused that discretion. *Lynch v. State*, 877 So. 2d 1254, 1281 (Miss. 2004) (citation omitted). Furthermore, the Supreme Court will not reverse a trial judge's decision on the admissibility of testimony offered at trial unless prejudice amounting to reversible error resulted from such a decision. *Alexander v. State*, 610 So. 2d 320, 329 (Miss. 1992).

Defendants argued at trial and on appeal, that Plaintiffs presented no evidence of "other accidents, other claims or lawsuits, or any government recalls or investigations concerning the Kelly Charger passenger-car tire in question" . . . because the defense alleges that "there was no such evidence." (Defendants' Brf. at 22.) However, the record undeniably shows that the alleged lack of evidence on the history of defects and failures of the Kelly-Springfield Charger S2 tire line was the direct result of the Defendants' bad faith failure to identify and produce documents in discovery. *See argument on cross-appeal.*

Goodyear's Rule 30 (b) (6) depositions clearly indicated that Goodyear had available but fraudulently concealed and failed to produce evidence regarding the subject tire line, and Plaintiffs' counsel learned, through sources totally unrelated to the Defendants, that Goodyear employees,

including Mr. Beale Robinson, a former engineer with Goodyear, had given depositions in tread throw cases similar to the case at bar. (*See* Plaintiff's Exhibit 2 -- Deposition Excerpts, R. at 5916-6165.)

Despite the obvious existence and relevance of the evidence, Defendants concealed and refused to produce relevant documents and information regarding the development, design, testing, manufacture, and marketing of the Kelly Charger SR high performance tire that was the subject of the litigation, despite Plaintiffs' repeated and urgent requests for same in motions to compel. The documentary evidence of engineering specifications produced by Defendants consisted solely of alphanumeric codes illegible to anyone who did not have access to the Goodyear computer system to obtain the actual specifications. Such methods of concealing evidence have repeatedly been condemned by the appellate courts of this state. *See, e.g., Vicksburg Refining, Inc. v. Energy Resources, Ltd.*, 512 So. 2d 901 (Miss. 1987), *Herrington v. Herrington*, 660 So. 2d 215 (Miss. 1994), and MISS. R. CIV. P. 37.

Due to Defendants' deliberate refusal to identify and produce documents in discovery, Plaintiffs were forced to bring three separate motions to compel in an attempt to obtain information about the subject tire. (R. at 361-426, 572-663, 1247-1258; 1358-1360; *see also* Plaintiffs' Motion to Strike, for Discovery Sanctions and Other Relief, R. at 1722-49.) Finally, during the hearing on the third motion to compel (and in close proximity to the trial date, whereas Plaintiffs were not given adequate time to develop the evidence), the trial judge recognized the Defendants' discovery violations and ordered the Defendants to turn over limited deposition transcripts, including those of Beale Robinson, and exhibits from previous litigations involving defective Goodyear tires, which discussed the tread throw problem analyses conducted by Goodyear in an effort to prevent its automobile and light truck tires from delaminating, which is precisely what happened to the tire at

issue in this litigation. (T. at 88-100; R.E. at 54.)

This order to turn over documents related to other litigations for use at trial was a sanction by the trial judge on the Defendants for failure to identify and produce documents in discovery. During the trial, Judge Johnson reaffirmed the rationale for his ruling as follows:

> It's the Court's recollection that the Court did note that the Plaintiffs had encountered some significant problems with getting meaningful discovery. At some point in the pretrial the Court took the rather extraordinary step - - or the Court would call that more of an efficient step - - at that stage of the proceedings of getting right to the heart of the matter and allowing the Plaintiffs access to certain depositions of Defendants' experts in prior or other litigation matters. This was done. This resulted in the testimony of the engineer expert witness for Goodyear, Beale Robinson, being presented by way of deposition.
>
> Significantly, the Court very clearly denied the motion to the extent of striking the pleadings. I found no basis to do so. The Court left the motion open as to other remedies the Court would take, and one of those was allowing the deposition of Beale Robinson to be presented to this jury, which the Court allowed to do so.

(T. at 808; R.E. at 59.) The Court further stated:

> Mr. Allred, I understand your concerns about the discovery. The Court is trying to remedy a - - to fashion a proper remedy, primarily, which I feel like I've done by way of access to the Beale Robinson deposition and use of the Beale Robinson deposition.

(T. at 810; R.E. at 59.)

Because this evidence was relevant to Goodyear's design, manufacturing and quality control, and because the Defendants' continued to refuse to produce any significant discovery on the subject tire, specifically the design and manufacturing specifications (deviation from which is the definition of a "particular defect") the Plaintiffs were allowed to introduce very limited evidence related to Goodyear's previous problems with defective automobile and light truck tires. Such an order was well within the trial judge's prerogative to control his court. "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 . . . 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." *Bowie v. Montfort Jones Mem'l Hosp.*, 861 So. 2d 1037, 1042 (Miss. 2003) (citations omitted).

The control of discovery is a matter committed to the sound discretion of the trial judge. *Barnes v. A Confidential Party*, 628 So. 2d 283, 290 n.7 (Miss. 1993); *Dawkins v. Redd Pest Control Co., Inc.*, 607 So. 2d 1232, 1235 (Miss. 1992). A trial court's decisions concerning discovery matters are reviewed for an abuse of discretion. *DeBlanc v. Stancil*, 814 So. 2d 796 (Miss. 2002) (citing *Earwood v. Reeves*, 798 So. 2d 508, 514 (Miss. 2001)). Rule 37 applies to discovery matters generally and affords the trial court a great deal of discretion in determining how to sanction a party for failure to comply with discovery orders and deadlines. *Prime Rx, LLC v. McKendree, Inc.*, 917 So. 2d 791, 797 (Miss. 2005). The trial court has need of great flexibility in dealing with abuses of the discovery rules, and trial courts have considerable discretion in the imposition of sanctions under Miss.R.Civ.P. Rule 37. *Cunningham v. Mitchell*, 549 So. 2d 955, 958 (Miss. 1989); *White v. White*, 509 So. 2d 205, 207 (Miss. 1987).

The trial judge's order in the case at bar to allow this tread throw evidence was made after extensive arguments outside the presence of the jury, and he made a thoughtful and detailed ruling regarding its admission. The order was well within his discretion and was entirely proper under the circumstances.

The Defendants, by concealing relevant documents and information related to the subject tire, put Plaintiffs in the position of being forced to use the evidence the admission of which Defendants now complain. The law is very clear that the Defendants are estopped because of their own error, bad faith and illegality to assert that the introduction of this evidence was erroneous or prejudicial.

See Planters Bank v. Garrott, 239 Miss. 248, 122 So. 2d 256, 266 (Miss. 1960) (holding that "one may not complain on review of errors for which he was responsible"); *see also HWCC-Tunica, Inc. v. Jenkins*, 907 So.2d 941 (Miss. 2005); *Busick v. St. John*, 856 So.2d 304 (Miss. 2003); *DeMyers v. DeMyers*, 742 So.2d 1157 (Miss.1999).

The Defendants cite *Forbes v. General Motors Corp.*, 935 So. 2d 869 (Miss. 2006) in support of their arguments for exclusion of the light truck (actually passenger automobile and light truck) tire evidence. In *Forbes*, however, the Supreme Court reversed the Court of Appeals affirmance of the trial court's grant of a directed verdict *to the defense* in an express warranty case. The Court found that the Plaintiffs had presented evidence sufficient to go to the jury on that claim. *Forbes*, 935 So. 2d at 878.

Forbes was an air bag failure case. An issue was whether the collision was hard enough to deploy the air bag. In *dicta*, the *Forbes* Court addressed the Plaintiffs' desire to introduce photographs of vehicles of different makes and models from the vehicle at issue. The Court did not, as Defendants argue, make the blanket holding "that pictures of the same allegedly defective portions of different '*makes and models*' of automobiles did *not* come anywhere near the 'closely similar' requirement." (Defendants' Brf. at 24.) (Emphasis in original.)

Rather, the Court simply reaffirmed the principle that "evidence, in order to be admissible, must be 'carefully qualified.'" *Id.* at 881 (citing *Sawyer v. Illinois Central Gulf Railroad Co.*, 606 So.2d 1069, 1075 (Miss.1992)). The Court affirmed the denial of admission of the photographs because no proof was offered that the photographs depicted an accident that occurred under similar circumstances as the accident at issue in the lawsuit. The Court stated:

> We simply cannot find that the evidence of photographs in this case was carefully qualified. The Forbeses did not offer any testimony on speed or weather conditions of the accidents involving the Pontiac and Chevrolet, and both of those cars are a

> different make and model than the one involved this case. Additionally, neither car in the proffered photographs were involved in this type of rear-end accident. The Pontiac collided with another in its side, and the Chevrolet ran off the road and hit a clay bluff. The trial court and Court of Appeals were both correct in holding that the Forbeses did not meet their burden to show a substantial similarity in conditions existed between the accidents in the photographs and the one in which their car was involved. We cannot find that the facts and circumstances of these other accidents were closely similar to the facts and circumstances at issue here.

Id. The holding of *Forbes* relied upon by the Defendants, which was merely *dicta*, stands for the proposition that, for evidence of other accidents or product failures to be admissible for a purpose other than notice to the Defendant, the Plaintiffs must show that the accidents, not the products, were similar. Plaintiffs in the case at bar clearly proved both. The comprehensiveness of Plaintiffs' proof is solely attributable to Defendants' active concealment of relevant documents.

The tires involved in the case at bar were similar to those involved in cases in which the deposition testimony of a former Goodyear employee engineer, Beale Robinson, was taken. The trial court in the case at bar required Defendants to provide Plaintiffs said depositions as a result of their discovery abuses. Mr. Robinson had been involved in comprehensive studies done by the Defendant Goodyear in an attempt to find the cause of tire tread separations similar to what occurred in the case at bar. Both cases involved delamination, an event that results in almost instant separation of the tread from the defective tires, and the delamination in the automobile and light truck tires studied by Mr. Robinson was similar to what occurred in the case at bar, and, the solution which resulted from the studies -- the addition of a nylon overlay or cap ply to the design -- was the same solution Plaintiffs' expert opined would have prevented the tire failure in the case at bar.

The tires were all manufactured by the same manufacturer, Goodyear, under similar conditions, in the same facilities described by Mr. Robinson, and the testing and problem analysis and solutions found which are described by Mr. Robinson were relevant both to light truck tires and

high performance automobile tires such as the ones in the case at bar. Further, the only changes in the tires from the time of Mr. Robinson's work to the time the subject tires were manufactured were largely cosmetic.

The "Problem Summary" memo, which was an exhibit to the Beale Robinson depositions, showed that Goodyear was attempting to address the issue of tread separations, or tread throws, in its passenger automobile and light truck tires. (Trial Exhibit 1.) This document proved that Goodyear was aware of tread separation failures in certain of its tires, particularly high stress tires due to heavy load bearing and high performance parameters, and was attempting to solve the problem. Remember that the entire Charger SR line of tires was designed, manufactured, advertised, warranted and sold as a "high performance" tire line. This is highly relevant because Plaintiffs' injuries and damages were directly caused by the catastrophic tread separation of a Goodyear tire sold into a high performance application.

The problem summary showed that Goodyear knew that a different design (addition of a nylon overlay or cap ply at a cost of $1.00 - $2.00 per tire) would have prevented the tire failure in this case, and was, therefore, highly relevant to Plaintiffs' design defect theory. It is relevant to show that Goodyear knew that it had a problem with tread separations in its tires which rendered them defective. Thus, despite Defendants' claims to the contrary, the evidence of which they complain was admissible to prove defectiveness of Charger SR tires, notice to the Defendants of the tread problem, and Defendants failure to correct it despite this knowledge.

Defendants also complain that Plaintiffs were allowed to read into the record excerpts from Mr. Robinson's deposition. The deposition was taken in another case involving a Goodyear tire, defective as a result of a tread throw, and like the problem summary memo, was highly relevant to Plaintiffs' design defect claim because it tended to show that Goodyear knew of defects leading to

tread separation failures in certain of its high performance automobile and light truck tires and was attempting to solve the problem. Moreover, this deposition testimony demonstrated the similarity between the problem summary memo and the evidence in the case at bar. Plaintiffs' counsel showed during trial, outside the presence of the jury, that the Robinson deposition testimony related both to Goodyear's automobile and light truck tires, not just light truck tires, and the trial judge correctly found these arguments compelling, specifically summarizing the deposition testimony and noting that Mr. Robinson's testimony dealt with both Defendants' automobile and light truck tires, not just light-truck tires, and allowed the testimony. (T. at 470-72, 596-97; R.E. at 56.)

Plaintiffs' design defect theories applicable to *Restatement § 402(a),* negligence and implied warranties claims was dismissed by the trial court pursuant to Defendants' motions for a directed verdict.[7] Following the Court's ruling, Plaintiffs did not argue these claims in closing arguments, and the jury was not instructed to consider same. However, because the problem summary memo was clearly relevant and admissible at the time it was introduced and because it is relevant to defects in Plaintiffs' express warranty claims, the suggestion of error regarding its admissibility is without merit and should be disregarded, particularly considering admissibility was allowed as a sanction for Defendants' failure to identify and produce documents in discovery.

Although the trial judge did, as Defendants point out, deny their motion to withdraw the problem summary memo from the evidence that went into deliberations with the jury, such a decision was well within the trial court's discretion, and the trial judge made a thoughtful and well-

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See infra, Plaintiffs' argument on Cross-Appeal, which discusses the reasons why the trial judge erred in dismissing these viable claims. The significant specific documents Goodyear concealed and failed to produce were Goodyear's design and manufacturing specifications, the very thing necessary to define and develop evidence of "particular defects."

reasoned order regarding his decision at the time it was made (T. at 1580-1582), and at the hearing on Defendants' motion for a new trial (T. at 1743-47), where the trial judge ruled, *inter alia*, as follows:

> What the Defendants were asking the Court to do was for this Court to say, well, this particular piece of evidence no longer has any relevancy to what you're letting this go to the jury on. Therefore, we want you to remove this. Now, in considering my decision, my thinking process was this. The way this has always been done is it's done by jury instructions. The Court has to determine what legal theories, what the Court is going to allow the jury to proceed on, and that's what the Court did. The Court did not allow the jury to consider this nylon overlay argument, and essentially I did, I think, grant a directed verdict on that particular issue. This is the way that we've always conducted matters with a jury. We do it by way of jury instructions which limit or focus the jury on what they are to consider under the law. This is what you consider. These are the elements you have to find and things of this nature. First of all, it has always been my understanding that jurors are presumed to follow the instructions of the Court. The Court did not allow this to go to a jury on the nylon overlay issue. The jury was very clearly instructed with numerous instructions about what they could consider to find liability on behalf of the Plaintiffs against the Defendant and what they had to . . . It's been with this Court that you're not to comment on particular evidence with the jury. It struck me that this could be confusing. This could be misleading to have to get in and start withdrawing things of evidence that have already been presented to a jury because it may not - - no longer go to the specific issues that the Court is instructing the jury on. I think this would be a very dangerous practice to engage in to try to redo the evidence, in essence, after you get to the jury instructions and decide what issue the jury is going to be able to decide on. I think the better practice is the way it's always been done in the state which is to limit the issues that the jury can consider and decide the case on, and again the jury is presumed to follow those instructions, and they were not allowed in any way to consider this nylon overlay issue.

(T. at 1744-45.)

Moreover, although they assert his failure to do so as error, the Defendants never requested that the trial judge instruct the jury to disregard the problem summary memo or the Beale Robinson deposition testimony. Indeed, their failure to do so was correctly recalled by the trial judge during the post-trial motion hearing as follows:

> Now, first of all, Mr. Baxter, you mentioned something else about a limiting instruction, and I will certainly defer to the record, but my recollection is I was never

> at any point requested or there was any instruction submitted to limit this . . . my recollection is I was not at any time requested or submitted an instruction that they should only consider the issue submitted or anything of that nature . . .

(T. at 1746; R.E. at 72.)

The trial judge's recollection is correct. Nowhere in the record does the defense request that the jury be instructed not to consider the issues related to design defect. Accordingly, Defendants clearly waived the issue and cannot now complain on appeal. *See Haggerty v. Foster*, 838 So. 2d 948, 954 (Miss. 2002).[8]

In order to warrant reversal, an alleged error related to the admission or exclusion of evidence must adversely affect a substantial right of a party. *Floyd v. City of Crystal Springs*, 749 So. 2d 110, 113 (Miss. 1999). "For a case to be reversed on the admission or exclusion of evidence, it must result in prejudice and harm or adversely affect a substantial right of a party." *Terrain Enters., Inc. v. Mockbee*, 654 So. 2d 1122, 1131 (Miss.1995). Despite their protestations to the contrary, the Defendants have failed to show how the admission of the problem summary memo and the deposition testimony prejudiced them.

The trial judge dismissed Plaintiffs' claims for defective design, which were the claims for which this evidence was admitted, and the jury was not instructed to consider such claims. Instead, the jury specifically was instructed in the Court's first instruction to the jury that they were "to disregard all evidence which was excluded by the Court from consideration during the course of the trial." (R. at 6737.)

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[8] Defendants also argue that the evidence should have been excluded as hearsay. (Defendants' Brf. at 27 and 29.) However, they cite this Court to nowhere in the record where they made a hearsay objection to the admissibility of the evidence, and counsel has found none. Their failure to offer such an objection clearly waives appellate review on such grounds. *See* Miss. U.R.C.C.R. 3.07.

The Defendants could have requested limiting instructions regarding this evidence, but they failed to do so. The only claim that went to the jury on Plaintiffs' instructions was Plaintiffs' breach of warranty claim, for which there was more than sufficient evidence. The jury is presumed to follow the Court's instructions. *Hobbs Auto., Inc. v. Dorsey*, 914 So. 2d 148, 164 (Miss. 2005) (citing *Fielder v. Magnolia Beverage Co.*, 757 So. 2d 925, 937 (Miss. 1999)).

The Defendants' claims of prejudice are simply speculation. They argue that the evidence allowed the jury to infer that Goodyear had problems with the tire at issue because it had problems with other tires. (T. at 1742.) However, the alleged differences between the evidence presented and the tire at issue was pointed out to the jury by defense counsel, through testimony of Defendants' witnesses and through the arguments of counsel. (T. at 1631, 1655.) Defense counsel made sure that the jury was aware that design defect was no longer an issue for them to decide. In closing, counsel stated:

> When we had opening statements there was a lot of discussion about a Z tire and an S tire, and with the Court's approval I'm going to tell you that you will not find that issue in any of these (indicating the instructions). It's not an issue. The Court has resolved that issue, so it's not here any more. So all those thing in voir dire, and all those things in opening, and some of the testimony, including Mr. Ivan Ostrander's, it's not an issue. The only issue that the Court is asking you to resolve is the issue that involves Big 10 as a seller of this tire, and not any other tire, the seller of this tire, and the warranty that goes with this tire.

(T. at 1631; R.E. at 69.)

The jury had ample evidence upon which to base its verdict even without the evidence complained of by the Defendants and, given the Court's instructions, it is clear that the jury's verdict was not based on the allegedly improper evidence. Given the harmless error standard and (1) the Defendants' inability to show that the evidence complained of had any prejudicial effect on the jury; (2) the relevancy of this evidence when it was offered; (3) the Court's instructions to the jury; (4)

the fact that the evidence was admitted in part as a sanction for Defendants' misconduct; and (5) the fact that the Defendants' concealed and refused to produce discovery documents directly caused any perceived deficiency in Plaintiffs' proof, this issue clearly is without merit and should be disregarded.

IV. The Trial Judge Committed no Error Regarding Miss. Code Ann § 85-5-7

Defendants argue that the trial judge erred by declining to use the special interrogatory form they submitted or by declining *sua sponte* to use the Court's own form that would have "allowed the jury to set forth the percentages of fault allocated to each of the parties." (Defendants' Brf. at 30-31.)

Initially, it is noted that the trial judge drafted his own form of the verdict instruction that would have reduced the recovery of the other Plaintiffs by the negligence, if any, of Kirby found by the jury. (T. at 1490-91, 1493; R.E. at 67). However, the Defendants objected to the Court's instruction (T. at 1494-97) and stipulated that they wished to use a general jury verdict form and that they did not want a special interrogatory form. (T. at 1522, 1554, 1556, 1557, 1565, 1568, 1572; R.E. at 67, 68.) (*See also* T. at 1762, R.E. at 72, By Judge Johnson: "I want the record to reflect that there was the consensus, opinion, and agreement . . . that everyone felt a general verdict would be proper . . ."; (T. at 1758, R.E. at 72). By Plaintiff's counsel: "The fact is that the Court tried the case on general jury verdicts by stipulation of the parties, and these general jury verdicts were offered to the Court by agreement".) The record reflects that the only objection offered by the Defendants to the Court's general jury verdict form instructions was they felt it was confusing. (T. at 1569.) Such an objection is insufficient to preserve this issue on appeal, particularly considering the Defendants' acquiescence in the judge's general verdict instruction.

The Defendants not only agreed with the correct damage instructions given to the jury, they failed to make specific, contemporaneous objections to the trial judge regarding the apportionment

issues Defendants now belatedly seek to raise. As recognized by the trial judge, the Defendants cannot claim error on an issue they failed to bring to the Court's attention. In denying the Defendants' post-trial motion on this issue, the trial judge stated:

> if I am faulted for not doing something, I want to make sure I was told to do something or asked or given an opportunity to do it . . . [a] trial judge must be given an opportunity to make the right decision before you can be put in error for doing the wrong thing . . .

(T. at 1761.)

> When we got to the instructions about the Court's specific rulings on the instructions about the specific objections that were made at that time which is my understanding of the law that someone is not pleased with an instruction as being granted, there [sic] to set out their specific objections on the record . . . I do not recall there being a problem with how this jury was instructed on these issues.

(T. at 1763; R.E. at 72.)

The trial judge's memory of the Defendants' lack of objections, and of the law requiring contemporaneous, specific objections to instructions was correct. *See* Miss. U.R.C.C.R. 3.07 (requiring attorneys to "dictate into the record their specific objections to the requested instructions stating the grounds for each objection"); MISS. R. CIV. P. 51(b)(3) (requires that objections to jury instructions be stated distinctly into the record before the instructions are presented to the jury); *also see, Ducker v. Moore*, 680 So.2d 808, 810 (Miss. 1996) (holding that an alleged erroneous instruction will not be considered on appeal unless a contemporaneous objection was made at trial) and *Oates v. State*, 421 So. 2d 1025, 1030 (Miss. 1982) (holding that "[e]rrors based on the granting of an instruction will not be considered on appeal unless specific objections stating the grounds are made in the trial court") (internal citations omitted).

Defendants' claims that the alleged error was preserved simply by the filing of the instruction are not well-taken. Defendants may have filed their instructions; however, their stipulation to a

general verdict form, and their agreement with the instructions given by the trial judge without any statements or arguments regarding apportionment, clearly waived objections to this issue. If there was an error in the instruction that was given by the trial court, which the Plaintiffs do not concede, it was an error made, caused, contributed to, adopted and ratified by the Defendants who cannot now complain of it on appeal. *See, e.g., DeMyers v. DeMyers*, 742 So.2d 1157 (Miss.1999).

Another significant reason why the Defendants' argument here is without merit is because it is based in large part on the affidavit of a juror, Rebecca H. Russell, which purports to explain the method used by the jury to calculate damages. (Defendants' Brf. at 32-33.) The same argument was raised before the trial court in Defendants' post-trial motions, and was properly stricken by the trial judge. (T. at 1797-1801; R. at 7278-79; R.E. at 72, 53.)

Defendants are absolutely precluded by law from impeaching a jury verdict by the affidavit of a juror. Rule 606 (b) of the Mississippi Rules of Evidence addresses this issue very clearly as follows:

> **(b) Inquiry Into Validity of Verdict or Indictment**. Upon inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would precluded from testifying be received for these purposes.

Rule 606(b) has been interpreted by the Supreme Court as prohibiting consideration of any evidence from a juror by affidavit or any other form of communication that would invite the Court to examine the deliberations of a jury. *Gladney v. Clarksdale Beverage Co., Inc.*, 625 So. 2d 407, 412 (Miss. 1993). The Mississippi Supreme Court has held that Rule 606 (b) "prevents a juror from

impeaching a verdict unless extraneous prejudicial information was improperly brought to the jury's attention, or an outside influence improperly influenced one or more members of the jury." *APAC-Mississippi, Inc. v. Goodman*, 803 So. 2d 1177 (Miss. 2002). In *Johnson v. St. Dominics - Jackson Mem'l Hosp.*, 967 So. 2d 20, 26 (Miss. 2007), the Supreme Court held that "[s]peculation as to how the jury did or did not interpret its instructions is not a question properly before this Court, being precluded by Mississippi Rules of Evidence, common law, and the overarching principles of *res judicata*."

In the case at bar, Goodyear obtained an affidavit from a juror addressing the way the jury allegedly calculated the award of damages. Notably absent from the affidavit is any statement that the jury was exposed to extraneous prejudicial information or outside influence during its deliberations, which, as stated above, is the only permissible basis for such evidence. Accordingly, the trial court properly struck the affidavit and refused to consider it, stating, *inter alia*, that such proof is in violation of a longstanding prohibition established by clear precedent and reasoning, and is "not proper under the law. It's not competent evidence to go into what it seeks to attack." (T. at 1797-1801; R.E. at 72.)

The same fate must befall the Defendants' attempt to use the affidavit in this Court. It simply is not permissible under the Rules of Evidence and the precedent of this Honorable Court. *See Puckett v. State*, 879 So. 2d 920 (Miss. 2004) (holding that Mississippi law is well-settled on this point, "jurors may not impeach their own verdicts on the basis of their mental processes or deliberations.") The affidavit must not be considered by this Court. It simply is not permissible under Mississippi jurisprudence.

The Defendants also throw in the argument that the jurors used an improper "quotient" method for determining both liability and damages. (Defendants' Brf. at 33.) However, Defendants

rightly acknowledge that this Court has clearly held that a jury verdict may not be reversed on that ground alone, without a "threshold showing of external influences." *APAC-Miss., Inc.* at 1186. Since the Defendants have failed to show any such external influences, despite their having questioned at least one juror regarding what occurred during the jury's deliberations, their argument on this point is without merit.

Other than the improper affidavit of the juror, the Defendants have no proof that the jury failed to assess Kirby's alleged negligence against him, or that it failed to diminish the Kirby Estate's recovery by the percentage his negligence allegedly played in the damages to the other Plaintiffs. Therefore, because the affidavit must not be considered, the Defendants have failed to provide any support for this proposition, and it should be denied on that basis alone. *McClain v. State*, 625 So. 2d 774, 781 (Miss. 1993); *Baine v. State*, 604 So. 2d 249, 255 (Miss. 1992).

"The allocation under section 85-5-7(7) should be solely to the at-fault parties." *Dawson v. Townsend & Sons, Inc.*, 735 So. 2d 1131, 1142 (Miss. Ct. App. 1999). Defendants argue that, given Kirby's intoxication and the speed at which the vehicle was traveling, "his negligence is inescapable, and no reasonable jury could have found that it was not the cause, in part or in whole, of the accident." (Defendants' Brf. at 32.)

Although Defendants continually mention alcohol and speed, they neglect to describe the other facts that were squarely before the jury that indicate that Travis Kirby did everything possible to maintain the vehicle after the defective tire fell apart. It was uncontradicted that the accident occurred on one of the straightest sections of road in Copiah County (T. at 1209, 1232, 1364) and that there was no evidence of improper driving before the accident. There was significant and credible testimony that an accident was unavoidable, regardless of speed or intoxication.

Mr. Lannie Rhoades, who testified as an expert witness for the Plaintiffs in the field of

accident reconstruction and engineering, provided, *inter alia*, the following testimony:

> When the driver loses a front tire he still has some ability to control, because he's got the steering wheel. Even though he's got a flat tire, there's opportunity for control. You don't have the input to the rear; and the problem is that once the vehicle takes one direction or the other, without any lateral stability the driver can't correct that, and that's what happened here.

(T. at 1204.)

> When the driver steers, once the belt is gone from the tire, which occurs instantly, the car can't respond because the rear wags one direction or the other; and the suspension in the tire properly inflated won't stop it. So once it starts, the driver can't control it . . .

(T. at 1206.)

> [w]hat I'm trying to communicate . . . is if the driver wants to fix that, he can't fix it on the right rear . . . if he makes the steer input, he can't get the appropriate response from his suspension and geometry because it's not loaded equally any more, it's not responsive equally any more, and he has no sidewise stability.

(T. at 1208.)

> Nothing surprises me about the dynamic path of the car in this case.

(T. at 1209.)

> Do you have an opinion, sir, as to whether there was anything the driver reasonably could have done upon the failure of that right rear tire to prevent this accident?
>
> No, he lost control. Reasonable inference from the facts of the accident is that this driver wouldn't have wanted to leave the road. He'd been traveling down a straight and narrow highway under control until this even, which was a sudden failure of the right rear tire. So if you look at the facts, on the approach to the point of loss of control and the markings on the roadway after the point of loss of control, the only reasonable answer is that this car was in control prior to the loss of the right rear tire; and but for that, it would have continued on down the highway in its proper lane of travel.

(T. at 1231-32.)

> [i]f the car had been doing 55, and it had left the roadway and hit the tree line further up the roadway before the energy is depleted, because it wouldn't have had the same

projectory, then the roof damage could have been just as or more severe.

(T. at 1234.)

> And it's not true that if you have a right rear tire failure that you're going to automatically lose control of the vehicle; are you?
>
> Not in every case. It's very common more often than not that you do.

(T. at 1243.)

> [t]he only reasonable answer as to the car's performance prior to the time of the right rear failure is that he was traveling down the lane in a proper fashion, because when it failed, when the tire failed, it's in the exact position to put him in the proper left/right orientation in his lane. So there's absolutely no indication of unusual dynamic activity from the car prior to the tire failure . . . so there would be absolutely no reason to take the position that the car was out of control prior to the failure.

(T. at 1248.)

> He's got three quarters of a second to perceive and three quarters to react, or a second and a half. He really doesn't have much more than that available to him, so the absence of a brake mark in an accident like this is not peculiar to people who have consumed alcohol.

(T. at 1250.)

> I'm telling [the jury] that if you have a tire failure like this at posted speeds you can have an accident that's just as severe. That's what I'm telling them. And I'm telling them that there's no reasonable inference from the facts of this accident to say that there was a loss of control here for any reason other than the right rear tire, because you don't know any of those other things.

(T. at 1253-54.)

> [Y]ou have such a short distance between the time that the markings on the roadway are laid down and the time that the vehicle leaves the roadway. It's a sudden event . . .
>
> Is there any indication to you that the person driving this car had any advance notice that his tire was fixing to separate?
>
> No, sir.

(T. at 1262.)

Would a second, an extra second, have been of any benefit to these people in this car in this case?

No.

(T. at 1263.)

Would braking, applying the brakes, have been a helpful thing to do in this situation in this case?

At most a very moderate brake application would have been appropriate.

All right. Why do you say that, sir?

Well, because you could throw the car fully out of control if you have a dramatic or sudden force of the brake application.

Could braking have contributed to the problem rather than being a solution?

Oh, it could have; but there's no evidence that the driver applied - - he certainly didn't apply - - if he applied brakes, he did it in a proper fashion.

(T. at 1263-64.) (Compilation of foregoing testimony at R.E. at 62.) In addition, the jury heard evidence from Plaintiffs' tire expert, Mr. Robert Ochs, who stated that the subject tire suffered a catastrophic failure which resulted in tread detachment within one revolution of the tire, or less than one-tenth of a second. (T. at 565.)

Despite Defendants' self-serving conclusions to the contrary, ample facts were presented from which a reasonable jury could conclude that the driver of the automobile was not negligent, or that his negligence, if any, was not a significant contributing cause of the accident. The jury heard evidence regarding alcohol[9] and speed, and the Court granted Defendants' instructions requiring the

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It is noted here that there was an issue at trial regarding the potential contamination of the sample of Travis Kirby's blood used in the determination of his blood alcohol, upon which the Defendants so heavily rely. Plaintiffs' objections to the admission of said result were well founded given the coroner's admission regarding contamination; however, the results were improperly admitted, the jury was instructed that Kirby was negligent *per se* for being

jury to consider same in its deliberations. (Instr. 36, T. at 6837; Instr. 36, T. at 6838-39; Instr. 38, T. at 6840; Instr. 39, T. at 6841).

The Defendants, and their two witnesses, mentioned alcohol at trial even more than they have on appeal; however, the jury, faced with conflicting evidence, clearly determined that the cause of the accident was the Defendants' faulty tire, not speed, alcohol, or any alleged negligence of the Plaintiffs. There was, therefore, no negligence to apportion, and the Defendants have presented no credible evidence to the contrary.

The Supreme Court has stated that "[i]f other instructions granted adequately instruct the jury, a party may not complain of a refused instruction on appeal." *Purina Mills, Inc. v. Moak*, 575 So.2d 993, 996 (Miss. 1990). The trial court has considerable discretion in instructing the jury. *Southland Enter. v. Newton County*, 838 So.2d 286, 289 (Miss. 2003). A review of the instructions in this case shows that the jury was properly instructed. For example, Instruction No. 4, submitted by the Defendants, instructed the Jury as follows:

> The Court instructs the Jury that if you find from a preponderance of the evidence in this case that the defendant, The Goodyear Tire & Rubber Company, manufactured a defective tire and that such action, if any, proximately contributed to the happening of the accident in this case and to the injuries, if any, which plaintiffs sustained, then ***you must, in arriving at your verdict, reduce plaintiffs' damages, if any, by that percentage which plaintiffs' own negligence, if any, proximately contributed to the happening of the accident and the injuries, if any sustained by them.***

(R. at 6820, R.E. at 43.) (Emphasis added.)

Instruction No. 37, also submitted by the Defendants, instructed the jury, *inter alia,*

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intoxicated, and Plaintiffs were improperly prohibited from questioning the Defendants' witnesses about the contamination and from arguing the questionable credibility of Kirby's blood alcohol level of the result to the jury. Such rulings clearly were erroneous. (T. at 1376, 1378-1386, 1545, 1550; R. at 6838-39; R.E. at 64, 50.)

> [i]f you find by a preponderance of the evidence in this case that the intoxication of Travis Kirby was a proximate cause of the accident or that such intoxication combined with other negligence on the part of Travis Kirby in the operation of his vehicle, if any, then you must assign fault to Travis Kirby in such percentage as you find the [sic] Travis Kirby's negligence caused or contributed to the accident.

(R. at 6838-39; R.E. at 50.) Despite their arguments to the contrary, the Defendants requested and received instructions which told the jury to reduce the award to any of the Plaintiffs by the negligence, if any, of the other Plaintiffs, specifically that of Travis Kirby.

The jury's decision was well-within its prerogative as the finder of fact, it was supported by sufficient and credible evidence, and must not be disturbed on appeal. *See, e.g., Steele v. Inn of Vicksburg, Inc.*, 697 So. 2d 373, 376 (Miss. 1997) (holding that when there is evidence of such quality and weight that reasonable and fair minded jurors in the exercise of impartial judgment might have reached different conclusions, affirmance is required.)

V. There was No Misconduct Regarding the Jury Foreperson

Defendants argue that Juror Dorothy King and counsel for the Plaintiffs intentionally failed to disclose a personal relationship between a lawyer in the firm of Kitchens & Ellis, Dan Kitchens, the son of one of the trial attorneys for the Kirby Plaintiffs, James Kitchens, and the juror. Defendants assert that the failure to disclose the "relationship" was willful misconduct, and an attempt by the Plaintiffs and Mrs. King to prejudice them by creating an "uneven playing field." (Defendants' Brf. at 37.) Defendants' assertions in this assignment of error are baseless, objectionable, and entirely without merit.

Defendants point to their Motion Relative to *Voir Dire* (Defendants' R.E. 11; R. at 1993-1997; Plaintiffs' Response, R. at 2059-2064; R.E. at 38.) wherein Defendants requested that the trial judge allow them to strike for cause every juror in Copiah County who essentially had any knowledge of James Kitchens or members of his family and/or law firm. Defendants then

erroneously represent to this Court that the "trial court declined to hear the Motion Relative to *Voir Dire*, which had the same effect as denying that motion." (Defendants' Brf. at 34.) However, Defendants did not timely file their motion,[10] and they never requested a hearing or a ruling on their motion, which, under the plain law of this state, was clearly an abandonment of it.[11] This point was correctly described by Plaintiffs' counsel at the hearing on Defendants' post-trial motions, as follows:

> [t]heir motion asking that we disclose relationships, Your Honor was not timely filed. It was not filed within the time you set for filing pre-trial motions . . . [t]hey never called their motion up. They abandoned their motion, Your Honor, and you never ruled on it one way or the other, and that's why we brought the court file down here so you can see that there's no order in there.

(T. at 1774.) It is the movant's burden to ensure that the motion is heard, ruled upon, and an appropriate order is entered by the trial court. *See* Miss. U.C.C.R. 2.04. Defendants clearly failed to do so.

The Defendants, however, go further than frivolously asserting error to the trial judge; they accuse both the juror and Plaintiffs' counsel of misconduct and unethical behavior, alleging that the so-called "relationship" between Attorney Dan Kitchens and the juror was concealed and that this alleged concealment prevented the Defendants from knowing the true facts and striking her for cause. However, once again, the facts simply do not support the Defendants' blatant

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See May 8, 2006, Scheduling Order, R.at 1429; R.E. at 37; *see also* M.R.C.P. 6 (d) (requiring service of motions "not later than five days before the time fixed for the hearing . . .")

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"The affirmative duty rests upon the party filing the motion to follow up his action by bringing it to the attention of the trial court. A motion that is not ruled upon is presumed abandoned." *Cossitt v. Alfa Ins. Corp.*, 726 So. 2d 132, 135 (Miss. 1998) (internal citations omitted). A trial court cannot be put in error on a matter which was not put to it for decision. *Crenshaw v. State*, 520 So. 2d 131, 134 (Miss. 1988); *Howard v. State*, 507 So. 2d 58, 63 (Miss. 1987).

misrepresentations to this Court.

A hearing was conducted following the trial on Defendants' laundry list of alleged trial errors, including this issue. At the hearing, James Kitchens, counsel for the Kirbys, advised the Court and defense counsel that Plaintiffs were prepared to adduce testimony from witnesses relevant to the accusations of defense counsel. The witnesses included John Christopher (counsel for Plaintiff Riley Strickland), Dan Kitchens, James Kitchens (counsel for the Kirby Plaintiffs), Mike Allred (counsel for Sidney Odom), and Jennifer Eckerson, the former girlfriend of Mrs. King's late son, Patrick Heard.

Because neither the Court nor defense counsel desired for the witnesses to testify, the witnesses' proposed testimony, was proffered into the record by James Kitchens. While this Court is encouraged to read the entire proffer, the more important parts are summarized as follows:

(a) Kitchens & Ellis represented a criminal Defendant, Travis Braddy, in a vehicular homicide case immediately before the instant case.
That case had many similarities factually to the instant case.

(b) The same jury panel was summoned for that trial as for the instant case, and extensive *voir dire* was conducted on the panel.[12]

(c) All counsel for the Defendants were present during the Braddy *voir dire*.

(d) Mrs. King was one of the jurors who was questioned, and one of the areas in which she and the entire venire were questioned was whether anyone close to them had been involved in the same sort of case as the Braddy case, which involved young men who were in an automobile accident at night and one of them was killed. Mrs. King answered that her son was killed in an automobile accident ten years earlier in 1996.

(e) She said that she could not put her son's death out of her mind, and that she thought

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Counsel requested, and the trial judge permitted, the transcript of the *voir dire* from the Braddy case to be admitted as an exhibit to the hearing. Said transcript can be found at R. at 7077-7171 and R.E. at 52. The portions relevant to Mrs. King are located at pages 7085, 7101, 7148, and 7160, and R.E. at 52.

about it every day of her life. She stated that she would tend to identify more with the mother of young man who was killed than with Mr. Braddy.

(f) Both the Braddy case and the instant case involved alcohol, and Mrs. King said in the Braddy *voir dire* that she did not drink at all, and that Mrs. King responded in the presence of all the lawyers, including defense counsel in this case, that she was a crusader against alcohol and she would be in favor of prohibition if it were available today.

(g) Mrs. King also said in the Braddy *voir dire* that she was not compensated for her son's death.

(h) Mrs. King was challenged and excused for cause in the Braddy case because of her comments during the *voir dire*.

(i) The judge in the Braddy case did not limit the attorneys time to conduct *voir dire*, whereas the judge in the case at bar did. For that reason, many of the issues that were inquired into during the Braddy *voir dire* were not inquired into during the instant case. Also, it was obvious that discussing her son's death was painful for Mrs. King, and counsel did not think it necessary to ask her the same questions in the instant case, particularly since he and all the other attorneys already knew what she would answer in response.

(j) The death of Mrs. King's son was an event about which almost everyone in Copiah County knew, because he was one of three young men, all about the same age, who were killed in an automobile accident. There were three big funerals for these young men during Thanksgiving weekend of 1996.

(k) Defense counsel's claims in their post-trial motion that Mrs. King attended the same church as the Kitchens's family is incorrect. She is not a member of that church.

(l) He, James Kitchens, does not recall ever having a conversation with Mrs. King.

(m) He, James Kitchens, did attend her son's funeral, as did hundreds of other Copiah County citizens, but he did not speak with her, did not see her, and did not know or remember until after the Kirby jury was seated that his son, Dan, had been a pallbearer.

(n) The former girlfriend of Patrick Heard, Mrs. King's late son, was present at the hearing and prepared to testify that she, not Mrs. King, asked Dan Kitchens to be a pallbearer.

(o) That Mrs. King did not know Dan Kitchens. He had never been in her home, and she had never been in the Kitchens's home. Dan Kitchens only knew who she was because he went to the same college as her son and was friends with her son's

girlfriend, who was prepared to testify to same.

(p) Dan Kitchens was prepared to testify that he does not know Mrs. King. That he had never had a conversation with her and had never been in her home.

(q) That Plaintiffs' counsel did not want Mrs. King on the jury. They did not exercise a challenge for cause because there was no foundation in the record in the Kirby case to support same, and did not exercise a peremptory challenge because they thought that the defense would do so because they heard her statements regarding identifying with the mother in the criminal case, and because the Plaintiffs were more concerned with another juror who was further down the list than Mrs. King.

(r) None of Plaintiffs' counsel contacted Mrs. King or any of the jurors after the trial.

(T. at 1768-77, R.E. at 72.)

Following this proffer, Judge Johnson asked Dan Kitchens a few questions His responses are summarized below:

(a) He was a pallbearer at the funeral of Mrs. King's son, Patrick Heard.

(b) Mrs. King's son died in 1996, over a year after Dan Kitchens had graduated from USM and moved back to Copiah County.

(c) He and Mrs. King's son were friends, but he would not have been asked to be a pallbearer but for his relationship with Jennifer Eckerson, Patrick Heard's girlfriend. Mrs. King asked her to find pallbearers, and she chose Dan Kitchens as one. He does not think that Mrs. King knows that he served as a pallbearer.

(d) He did not know Mrs. King at the time of her son's death.

(e) He could not have picked Mrs. King out of a lineup until she appeared for jury duty.

(T. at 1777-78, R.E. at 72.)

Plaintiffs' counsel Mike Allred also testified by way of proffer, advising the Court that, in summary, he was involved in all aspects of jury selection for the Plaintiffs, and, at no time in counsels' deliberations regarding the jury, was it stated that Dan Kitchens was a pallbearer, that Mrs. King went to church with the Kitchenses, or that Plaintiffs or their attorneys wanted Mrs. King on

the jury, and that, in fact, Plaintiffs' counsel did not want her on the jury and believed that Defendants' counsel would strike her. (T. at 1779, R.E. at 72.)

Plaintiffs' counsel John Christopher, who the Defendants allegedly quoted in their affidavits (Defendants' R.E. at 23, 24), also testified by way of proffer. In summary, he testified that the Defendants' affidavit misstated what he told them; that he did not say Plaintiffs were not concerned about Mrs. King; that Plaintiffs were always concerned about her because of her statements during the Braddy *voir dire*; that she was not stricken by Plaintiffs because of other jurors behind her with whom Plaintiffs were more concerned; and, that he did not learn until after both sides rested that Dan Kitchens had been a pallbearer.[13] (T. at 1780-81, R.E. at 72.)

Clearly, the testimony described above demonstrates that the alleged relationship between Juror King and Dan Kitchens was not of a type that should have been disclosed. Quite simply, there was no relationship between them. The only connection between them occurred over ten years before the trial in this cause, was not a result of any action by Dan Kitchens or the juror, was not a product of any prior relationship between them, and they did not have a conversation at that time or at any time since.

Defendants point in their brief, in bold print, to James Kitchens's description at the post-trial motion hearing of a portion of Mrs. King's answers during *voir dire* in the *Braddy* case. In that case, Mrs. King stated, *inter alia*, that her son had been killed *in an automobile accident* ten years earlier, that she thought about it every day, and that she would tend to identify more with the mother of the

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At the conclusion of the proffers, counsel for the Plaintiffs again offered for themselves and the layperson witness, Jennifer Eckerson, to take the stand and be subject to cross-examination by the defense. Both the Court and defense counsel, by their silence, accepted the proffers without the witnesses taking the stand. (T. at 1788-1790, R.E. at 72.)

young man who was killed than the Defendant in the criminal case. (Defendants' Brf. at 35.) Defendants then state that when the venire was asked in the instant case if they, a family member, or a friend had ever been injured in an automobile accident *where the driver was drinking alcohol*, the juror remained silent. (Id. at 36; emphasis added; R. at 7241; R.E. at 52.) The Defendants then represent to this Court that "had [the juror] answered honestly and told the trial court what Mr. Kitchens reports that she said in the earlier *voir dire*, there can be no doubt that she would have been stricken for cause . . ." (Id.)

First, the two *voir dire* questions are very different. There is nothing in the record of the instant case or the *Braddy* case that suggests that Mrs. King's son was killed in an accident *where the driver had been drinking alcohol*, the question asked by the defense in the instant case; rather, she responded in the *Braddy* case that her son tragically was killed *in an automobile accident*. Thus, there is nothing to suggest that the juror withheld this information. The fact is that the defense simply asked a question which required no response from the juror.

Second, and most important, however, is the fact that, despite Defendants' representations on appeal, *all defense counsel were present at the voir dire of the criminal case*. They personally observed the *voir dire* questions and responses of this juror, and of all of the prospective jurors in the criminal case: the same jurors, including Mrs. King, who were summoned to the Kirby case. Their presence was confirmed by James Kitchens and the trial judge during the post-trial motion hearing and not disputed by the Defendants. (T. at 1768,1770,1771, 1776.)[14]

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See also R. at 7264, by counsel for Big 10: "I was here Monday when they had the voir dire also because I was hoping that the criminal case would go away and we could get this one started then and I wouldn't have to stay around two or three days waiting . . . [w]hen I watched the voir dire Monday . . ." (R.E. at 53.)

Nothing about Mrs. King's responses as reported by James Kitchens at the post-trial motion hearing was new to the Defendants. They were aware of all of her responses which they now argue would have led them to strike her for cause. The Defendants' clear misrepresentations to this Court regarding this issue are further evidence of the deceitful and manipulative way that Defendants conducted themselves during this matter, which they apparently have no qualms about continuing on appeal.

Moreover, as recognized by the trial judge,[15] Mrs. King, and all the prospective jurors, were asked repeatedly if there was any reason whatsoever why she could not be impartial and fair to all parties in this matter, to which she and all of the jurors answered in the negative, and she and all of the jurors were instructed that their decision could only be based upon the law and evidence that was presented in Court. (*See, e.g.,* T. at 296, 297, 302, 304, 317, 372, 379, 396.)

Such oaths are to be given great deference. *See Scott v. Ball*, 595 So. 2d 848, 850 (Miss. 1992) (holding that "jurors take their oaths and responsibilities seriously, and when a prospective juror assures the court that, despite the circumstance that raises some question as to his qualification, this will not affect his verdict, this promise is entitled to considerable deference.") The trial judge also instructed the jurors that "[t]he fact that you may know one of the attorneys, know who they are, has got nothing to do with this case, should have nothing to do whatsoever with this case." (T. at 312.)

Additionally, the trial court asked the jurors: "[i]s there anybody that has any close personal

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See T. at 1785, by Judge Johnson: "This juror and all the other jurors at some point I know at least one time stated to the Court under their oath that they could be fair in this case. The Court asked this in a number of different ways and a number of different times, and this juror stated that she could."

relationship with either one of these two attorneys [James W. Kitchens and his law partner, Margaret P. Ellis], would you please raise your hand and let the court know about it." (T. at 313.) Mrs. King did not raise her hand because she had no relationship with the Kitchens family.

Considering that there was no relationship which was required to be disclosed, Judge Johnson correctly pointed out at the post-trial motion hearing that he would have refused to dismiss Mrs. King for cause had the Defendants requested same on the basis of the alleged relationship, stating:

> [v]ery clearly the information that's before this Court would not rise to the level of a challenge for cause . . . [t]here's all kind of cases where a connection is a whole lot stronger than this where it doesn't rise to a challenge for cause, and as long as that juror tells the Court they can be fair, that does not rise - - something of this nature does not rise to a level of a challenge for cause.

(T. at 1786; R.E. at 72.) Thus, the trial court correctly held that the alleged relationship would not have risen to the level of a challenge for cause, and such a decision was well within his discretion.

The Defendants have not shown any prejudice resulting from Mrs. King being seated on the jury. Though they argue throughout their brief that the jury's verdict was unanimous, the record just does not support such a conclusion. After the jury had been deliberating for almost six and a half hours, the trial judge brought them back in the courtroom to see how their deliberations were going. Mrs. King, the foreperson, told the judge that the jury was split, seven to five, without indicating which way they were split.

Mrs. King also told the judge that she did not believe further deliberations would be helpful, indicating that her mind was made up. Four other jurors told the judge the same thing, while the remaining seven jurors said that they believed further deliberations would be helpful. (T. at 1708-09; R.E. at 70.) At the post-trial motion hearing, counsel for the Kirby Plaintiffs, James Kitchens, pointed out to the trial judge, *inter alia*, the following regarding the alleged unanimity of the verdict:

> At the conclusion of this trial when that verdict was brought in, read by the clerk, the Court did inquire of them as to whether each of them agreed to the verdict. That was the language that I clearly recall Your Honor using. If I had to bet and I am not a betting man, but if I had bet, I do not believe this was a unanimous verdict. I think the way that the Court asked the question they were saying that they agreed that they were saying that each one of them agreed that the verdict - - that it was his or her personal verdict that was what they brought in. If I had to guess, I'd say Mrs. King was probably against us but that's an inquiry we cannot make, but I just think that the way the Court asked the question, and I am not criticizing your question. I am just saying I don't think that they were telling you that each and every one of them assented to that verdict, but they did agree that it represented a consensus, nine or more of the jurors brought in that verdict.

(T. at 1790; R.E. at 72.)

A review of the record shows that counsel's recollection of the trial judge's question to the jury was correct. After the verdict was read, the trial judge asked:

> All right. Now, ladies and gentlemen of the jury, it's necessary that I do what's known as polling ***just to make certain that nine or more of you agree upon these verdicts***. Now, if these are your verdicts, if these are what you voted for, you don't have to say anything, but just nod your head, yes, give me some type of affirmative sign. If these are not your verdicts, if this is not what you voted for, then give me some type of negative sign, shake your head, no.

(T. at 1720-21; R.E. at 71.) (Emphasis added.)

Thus, the record not only supports the conclusion that there was no improper relationship between Juror King and the Kirby attorneys, it also fails to support the conclusion that Mrs. King even voted for the Plaintiffs. Such a conclusion is mere speculation that finds no support in the record. Rather, the record in this case, and in the *voir dire* for the Braddy case, shows that Mrs. King was a "crusader against alcohol" and would be in favor of prohibition, and that Plaintiffs' counsel, for that reason, did not want her on the jury in this case.

Quite simply, there was no relationship between Mrs. King and counsel for the Kirbys that warranted disclosure, and the Defendants know it. This issue is baseless, replete with misrepresentations and unwarranted accusations, and should be summarily denied.

VI. There Were No Improper Remarks by Plaintiffs' Counsel

Here, the Defendants complain about remarks made by Plaintiffs' counsel during the trial. Defendants argue that the remarks by Plaintiffs' counsel constituted punitive damages evidence that should not have been permitted during the compensatory phase of the trial. Though Defendants argue that Plaintiffs' counsel made improper remarks "during opening statements and throughout the trial, including the closing arguments" (Defendants' Brf. at 37), they fail to point this Court to any allegedly improper remarks made in closing arguments. Accordingly, that argument, if one is in fact made, is waived. *McClain v. State*, 625 So. 2d 774, 781 (Miss. 1993); *Baine v. State*, 604 So. 2d 249, 255 (Miss. 1992).

With the exception of the two instances cited by Defendants wherein counsel objected due to Defendants' failure to provide discovery documents,[16] the instances Defendants complained of occurred during the opening statements, well before the trial judge had dismissed Plaintiffs' design defect claims. Further, despite their representations to the contrary, Defendants did not offer a contemporaneous objection to counsel's statements located at page 421 of the transcript, so any alleged error regarding that statement was waived. *See* M.R.E. 103(a)(1); *see also Mariner Health Care, Inc. v. Estate of Edwards*, 964 So. 2d 1138, 1150 (Miss. 2007) (internal citations omitted) (holding that "[f]ailure to make a contemporaneous objection at trial constitutes a waiver of any error subsequently assigned.")

Counsel is permitted, both during *voir dire* and during opening statements, to make reference to all the theories of the case which have been pleaded and are expected to be proved. *Wood v.*

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As argued elsewhere herein, Defendants' failure to identify and produce discovery documents bars their complaints on appeal of any perceived error directly resulting from their misconduct.

Burns, 797 So. 2d 331, 334 (¶10) (Miss. Ct. App. 2001). The Mississippi Supreme Court has repeatedly held that counsel has wide latitude in arguments to the jury, both in closing arguments and opening statements. The Supreme Court has held that:

> any alleged improper comment must be viewed in context, taking the circumstances of the case into consideration. The trial judge is in the best position to determine if an alleged objectionable remark has a prejudicial effect. As such, [reversal is warranted] only where a trial judge abuses his or her discretion in overruling the contemporaneous objection raised by opposing counsel.

Burr v. Miss. Baptist Med. Ctr., 909 So. 2d 721, 724-725 (Miss. 2005).

The statements Defendants complain of were proper based on the Plaintiffs' theories of the case and the evidence presented at trial, and the trial judge did not consider them objectionable in the heat of battle, and he again considered and denied the Defendants' arguments at the hearing on their post-trial motions as follows:

> I recall there were numerous objections in this case. I ruled on these the best I could. Thank goodness under the law the trial judge such as myself is not required to render a perfect trial where every single ruling on the evidence is absolutely perfectly correct. I did the best job that I could under the circumstances . . . the Court in reviewing this matter does not find where there's any evidence of this nature that was injected into this trial that would amount to any level that this Court would be required to set this verdict aside and to order a new trial in this matter.

(T. at 1754.)

Such a conclusion was clearly within his discretion. Additionally, none of the isolated comments urged by the Defendants were erroneous, and they certainly do not rise to the level of reversible error. Indeed, the Defendants cite no case where such comments resulted in the reversal of a case, obviating the necessity of this Court addressing the matter. *See, e.g., Huff-Cook, Inc. v. Dale*, 913 So. 2d 988, 991 (Miss. 2005) (citing *Williams v. State*, 708 So. 2d 1358, 1362-63 (Miss. 1998)).

Also, as this Court is well aware, remarks of counsel are not evidence, and the jury was so

instructed.

Jury Instruction No. 1 provided in part as follows:

> Arguments, statement and remarks of counsel are intended to help you understand the evidence and apply the law, but are not evidence. If any argument, statement or remark has no basis in the evidence, then you should disregard that argument, statement or remark.

(R. at 6736.) Jury Instruction No. 9 properly instructed the jury as follows:

> Remember that any statement, objections or arguments made by the lawyers are not evidence in the case. The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case, and in so doing, to call you attention to certain facts or inferences that might otherwise escape your notice. In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding upon you.
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> So, while you should consider only the evidence in the case, you are permitted to draw such reasonable inference from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established by the testimony and evidence in the case.

(R. at 6765.) Instruction No. 28 provided, in part, as follows: "You are not authorized to award any damages in the nature of a penalty . . ." (R. at 6825.)

Further, prior to opening statements the Court instructed the jury as follows:

> Now, I want you to keep in mind what the attorneys tell you is not evidence. What they say is not evidence in the case. You will hear the evidence by way of the sworn testimony of the witnesses from the witness stand and also any documents or exhibits that the court allows to be introduced into evidence . . . [s]o again, keep in mind this is what each side is telling you that from their perspective what they feel like the evidence is going to show in this case, but again, what they tell you is not evidence in this case.

(T. at 413-14.) The jury is presumed to follow the instructions of the Court. *Hobbs Auto., Inc. v. Dorsey*, 914 So. 2d 148, 164 (Miss. 2005) (citing *Fielder v. Magnolia Beverage Co.*, 757 So. 2d 925, 937 (Miss. 1999)).

In *Bradfield v. Schwartz*, 936 So. 2d 931(Miss. 2006), the Mississippi Supreme Court acknowledged it is not at all uncommon for issues to be relevant under issues of liability and punitive damages. The Court stated:

> We readily acknowledge that it is hardly uncommon for cases to involve "mixed facts" which would be relevant on both the issues of liability and punitive damages. For example, while a Defendant driver's intoxication would no doubt be an issue for the jury to consider in making a determination on punitive damages, evidence of the intoxication would likewise be relevant on the issue of liability.

Bradfield, 936 So. 2d at 939, Fn. 9.

Similarly, in the case at bar, the evidence complained of by the Defendants was clearly relevant and admissible in the liability phase of this trial, considering that one of Plaintiffs' theories was that the Defendants' failure to use a nylon overlay or cap ply on a high performance tire advertised to withstand speeds up to 112 miles per hour for 50,000 miles was a design defect and a breach of Defendants' warranties.

The Beale Robinson deposition testimony contained evidence that the Defendant's standards for making and selling tires of this class and category in Europe, South America and the Orient is different than it is in the United States. This testimony substantiated counsel's remarks that Defendants knew they had a tread throw problem, which was relevant to the negligence and other tort claims brought by Plaintiffs. The testimony proved that the Defendants were actually and constructively aware that their tires were not performing safely, which is also relevant to the product liability claims brought by Plaintiffs. At the time the comments were made, they were relevant and admissible to Plaintiffs' pending claims, and they were supported by the evidence adduced during the trial. Any error, which Plaintiffs do not concede, was harmless.[17]

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See Sanders v. State, 801 So. 2d 694, 704 (Miss. 2001) (finding that "[t]he statements made by

The Defendants clearly waived any alleged error by failing to request the trial judge to instruct the jury to disregard any alleged misstatements of Plaintiffs' counsel,[18] and they did not feel so aggrieved by any of the comments or arguments of counsel to move for a mistrial. The Defendants objected to remarks of Plaintiffs' counsel they felt were inappropriate, and the jury heard their objections and was appropriately instructed by the Court. Any alleged error in counsel's statements is harmless considering all the circumstances.

VII. The Cumulative Error Doctrine Has No Application Because There was No Reversible Error

The Supreme Court has held that individual errors, not reversible in themselves, may combine with other errors to make up reversible error. *Hansen v. State*, 592 So. 2d 114, 142 (Miss. 1991); *Griffin v. State*, 557 So. 2d 542, 553 (Miss. 1990). The question under these and other cases is whether the cumulative effect of all errors committed during the trial deprived the Defendant of a fundamentally fair and impartial trial. However, where there is "no reversible error in any part, . . . there is no reversible error to the whole." *McFee v. State*, 511 So. 2d 130, 136 (Miss. 1987).

The cases are legion where the Defendant, usually a criminal Defendant, as a last-ditch effort for relief from a proper jury verdict, throws in the cumulative error doctrine as an issue. However, such relief is very rarely warranted or granted. In a decision refusing to apply the cumulative error doctrine, the Supreme Court stated that "the verdict of the jury is to be given great weight. No trial is free of error; however, to require reversal the error must be of such magnitude as to leave no doubt

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the prosecutor in the opening statement and closing arguments were no more than deductions and conclusions that could reasonably flow from the facts and evidence presented. Even if we found these arguments to be in error, this error would be harmless because there does not appear to be any resulting unjust prejudice against Sanders from these statements.")

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See Snider v. State, 755 So. 2d 507, 510 (Miss. Ct. App. 1999).

that the appellant was unduly prejudiced." *Burr v. Miss. Baptist Med. Ctr.*, 909 So. 2d 721, 731 (Miss. 2005) (internal citations omitted).

"The cumulative error doctrine stems from the doctrine of harmless error . . . [which] holds that individual errors, which are not reversible in themselves, may combine with other errors to make up reversible error, where the cumulative effect of all errors deprives the Defendant of a fundamentally fair trial." *Ross v. State*, 954 So. 2d 968, 1018 (Miss. 2007) (quoting *Byrom v. State*, 863 So. 2d 836, 847 (Miss. 2003)). However, where there is no error in part, there can be no reversible error to the whole. *Gibson v. State*, 731 So. 2d 1087, 1098 (Miss. 1998) (citing *McFee v. State*, 511 So. 2d 130, 136) (Miss. 1987)). Because there were no significant harmful errors regarding the trial which would warrant reversal, this issue is completely without merit and should summarily be dismissed.

VIII. The Trial Court Correctly Denied the Defendants' Motions for a Remittitur

Continuing their laundry list of complaints, the Defendants assert error in the trial judge's failure to grant their motion for a remittitur. Their basic argument amounts to no more than saying, in effect, because the jury ruled against them and for the Plaintiffs, the verdict must have been influenced by bias, passion or prejudice.

The standard of review for damages is as follows:

> The supreme court or any other court of record in a case in which money damages were awarded may overrule a motion for new trial or affirm on direct or cross appeal, upon condition of an additur or remittitur, if the court finds that the damages are excessive or inadequate for the reason that the jury or trier of the facts was influenced by bias, prejudice, or passion, or that the damages awarded were contrary to the overwhelming weight of credible evidence . . .

MISS. CODE ANN. § 11-1-55 (1991); *see also Flight Line, Inc. v. Tanksley*, 608 So. 2d 1149, 1160-61 (Miss. 1992) (holding that Court has no authority to vacate damage awards merely because it

believes jury erred or because, had it been trier of fact, it would have awarded greater or lesser sum). The Supreme Court has stated that "[a]bsent either of these findings,[19] the trial court abuses its discretion[,]" in ordering a remittitur. *State Highway Commission of Miss. v. Warren*, 530 So.2d 704, 707 (Miss. 1988) (quoting *McIntosh v. Deas*, 501 So.2d 367, 369-70 (Miss. 1987)).

When reviewing the action of the jury after the trial court has refused to grant a new trial on the question of damages, the question is whether the verdict was either so excessive or inadequate as to shock the conscience and to indicate bias, passion and prejudice on the part of the jury, or, whether the jury failed to respond to reason. *Dorris v. Carr*, 330 So. 2d 872, 874 (Miss.1976). Where an appellant challenges a jury verdict as being against the overwhelming weight of the evidence or the product of bias, prejudice or improper passion, the Supreme Court must show great deference to the jury verdict by resolving all conflicts in the evidence and every permissible inference from the evidence in the appellee's favor. *Bobby Kitchens, Inc. v. Mississippi Ins. Guar. Ass'n*, 560 So. 2d 129, 131 (Miss. 1989). "Only when the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice will [the Supreme Court] disturb it on appeal." *Herrington v. Spell*, 692 So. 2d 93, 103-04 (Miss. 1997).

Initially, it is noted that the jury was properly instructed by the Court that its verdict was to be based on the evidence and the law, not bias or prejudice. Specifically, Instruction No. 1 provides in part as follows: "You should not be influenced by bias, sympathy or prejudice. Your verdict should be based on the evidence and not upon speculation, guesswork or conjecture." (R. at 6735,

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The findings referred to are "(1) the jury or trier of fact was influenced by bias, prejudice, or passion, or (2) the . . . damages were contrary to the overwhelming weight of the evidence[,]" *Entergy Miss., Inc. v. Bolden*, 854 So.2d 1051, 1058 (Miss. 2003),

R.E. at 41.) Instruction No. 15 provides, in pertinent part, as follows:

> In deciding the facts of this case you must not be swayed by bias or prejudice or favor as to any party. Our system of law does not permit jurors to be governed by prejudice or sympathy or public opinion. Both the parties and the public expect that you will carefully and impartially consider all of the evidence in the case, follow the law as stated by the Court, and reach a just verdict regardless of the consequences.

(R. at 6771; R.E. at 44.) Mississippi law presumes that jurors follow the instructions given them by the trial judge. Indeed, their oaths require them to do so. *Hobbs Auto., Inc. v. Dorsey*, 914 So. 2d 148, 164 (Miss. 2005) (citing *Fielder v. Magnolia Beverage Co.*, 757 So. 2d 925, 937 (Miss. 1999)).

The Defendants' first argue that Kirby's damages were excessive. They argue that "Kirby had no medical expenses, and there was no evidence of any conscious pain or suffering. Plaintiff's own economist found a loss of future earnings, the only substantial actual damages in Kirby's case, of only $343,525, yet Defendants were assessed twice that amount." (Defendants' Brf. at 40-41.) Once again, however, Defendants either misstate or neglect to mention the evidence presented at trial. There was ample evidence presented to support Kirby's damage award.

The record reveals that the jury was properly instructed as follows regarding the types of damages for which the Kirby Plaintiffs could be compensated. Jury Instruction No. 23 properly instructed the jury that it could consider, *inter alia*, the following:

1. The value of any burial costs, including funeral expenses and monument costs, incurred by the Estate of Travis Kirby;

2. The present net cash value of the life expectancy of Travis Kirby; and,

3. The value of any mental anguish, loss of society, companionship, love, or pain and suffering experienced by Nicholas L. Kirby, Shirley Kirby, and Nicholas L. Kirby, III, as a result of the loss of their son and brother.

The instruction also provides as follows:

> There is no certain standard or method of calculation prescribed by law by which to fix reasonable compensation for mental anguish, loss of society, companionship, love

> or pain and suffering. A person is not deprived of the right to recover damages because of his inability to prove with absolute certainty the mathematical value of damages sustained. If the cause of the damages is reasonably certain, you may reasonably estimate the amount of damages in dollars and cents. A Plaintiff must give you a reasonable basis upon which to base your verdict, however, the lack of a perfect measure does not preclude recovery of damages.

(R. at 6775-76.)

The evidence offered at trial, when reviewed under the standards and appropriate instructions described above, clearly supports the jury's damage award to the Estate of Travis Kirby. The record reflects testimony by Dr. Glenda Glover, whose expert qualifications in the field of Economics with emphasis on economic loss analysis were stipulated by the defense. (T. at 572.)

Dr. Glover testified that she had mistakenly calculated the net cash value for the life expectancy of Travis Kirby based on him being an African American male, rather than a Caucasian male, and that the $343,525.41 figure she provided was lower than Travis Kirby's actual net cash value life expectancy (R. at 579-580). The figure was low because, as Dr. Glover testified, Travis Kirby had a life expectancy of fifty-six years, and not the fifty years that she used in her calculations (which was the average life expectancy for an African-American male) (*Id.*). She testified that the actual figure for a Caucasian male would be approximately twenty-four thousand dollars higher than the $343,525.41 figure. (*Id.*)[20]

Mrs. Shirley Kirby, the mother of Travis Kirby, deceased, also testified on behalf of the Kirby Estate as to the extreme damage the survivors suffered as a result of his tragic death. (T. at 961-991.) In summary, Mrs. Kirby testified to the following facts regarding her family's close relationship with her son Travis: (a) he lived with her and his father and brother; (b) the family spent lots of time

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20 The Kirbys, however, accepted the number given by Dr. Glover for an African-American male. (T. at 1593.)

together; (c) they attended together a family reunion shortly before his death; (d) they fished together, rode four-wheelers together; (e) his grandparents reside next to his immediate family and they thought of Travis as a son; (f) Travis was happy all the time; (g) he made his family very happy; (h) he had lots of friends; (i) he hunted and fished with his father; and (j) he and his brother were very close (T. at 973-77). Photographs were introduced that showed Travis Kirby with various members of his family and his girlfriend. (T. at 976, Ex. P-26; 977, Ex. P-27.) Additionally, funeral expenses of $6,426 were introduced (T. at 980; Ex. P-30), as were the expenses for a headstone for Travis's grave, which equaled $4,718.70. (T. at 981; Ex P-31.)

Mrs. Kirby also testified that the loss of Travis was devastating and that not a day went by that he was not thought of or missed; that he planned to continue to live in Copiah County near his parents for the rest of his life (T. at 982); that he was making $7.50 an hour at the time of his death; and, that her family was not allowed to open the casket at his funeral. (T. at 983.)

In short, Mrs. Kirby testimony provided extensive testimonial evidence of the relationship each of his heirs had with Travis Kirby and their suffering as a result of his death in support of their damages claim for loss of love, society, and companionship. Such testimony was uncontradicted, and clearly supports the verdict rendered by the jury.

Defendants also argue that the jury was improperly allowed to consider hedonic damages as they related to all the Plaintiffs, which the Defendants argue the jury must have perceived also to apply to the wrongful death claim of the Kirby Plaintiffs. However, as noted above, Instruction No. 23 applied specifically to the Kirby Plaintiffs, and it clearly and succinctly instructed the jury regarding the damages that could be awarded to the Kirby Plaintiffs, which did not include compensation for hedonic damages.

This Court must consider the instructions as a whole, not in isolation. *See Fielder v.*

Magnolia Beverage Co., 757 So. 2d 925, 929 (Miss. 1999) (holding that "no reversible error will be found so long as the instructions actually given fairly announce the law of the case and create no injustice when read as a whole.") (Internal citations omitted.)

Defendants simply contend that Odom's damages are not supported by the record and that the jury failed to consider comparative negligence in determining their award of damages. However, the Defendants' jury instruction on this issue was given to the jury. (D-25, no. 4 as given, R. at 6820.) Instruction No. 4 stated that the jury "must, in arriving at your verdict, reduce plaintiffs' damages, if any, by that percentage which plaintiffs' own negligence, if any, proximately contributed to the happening of the accident and the injuries, if any, sustained by them." The jury was further instructed that they could consider six factors to determine the amount of compensatory damages to award the Odom Plaintiff. These factors are contained with Jury instruction No. 18 as follows:

> 1. The types of injuries, if any, and their duration.
>
> 2. Past, present and future physical pain and suffering and resulting mental anguish, if any.
>
> 3. Reasonable and necessary medical expenses already incurred and those which are reasonably probable to be incurred in the future, if any.
>
> 4. Any future disability that is reasonably probable to occur, its duration and its effect, if any, on Sidney Odom's future earning capacity.
>
> 5. In arriving at the amount of your award, if any, for loss of future earning capcity, you should consider what Sidney Odom's health, physical ability, age and/or earning power were before the subject accident and the effect of Sidney Odom's injuries, if any, upon them.
>
> 6. Past loss of wages.

(R. at 6773-74.)

The jury was well instructed on what factors they could consider in determining their verdict and the jury's verdict is well-supported by the evidence adduced at trial. The jury heard testimony

regarding Plaintiff Odom's long, debilitating injuries affecting his head, face, arm, shoulder, and leg. (T. at 884, and 886-89.) The evidence illustrated that Odom's injuries required prolonged physical therapy, brain injury rehabilitation, speech therapy, and occupational therapy. (T. at 891-94.) Further, the jury heard testimony regarding the limitations Mr. Odom still suffers from his injuries and how these limitations affect his opportunity for career advancement. (T. at 898-99.) Additionally, evidence was admitted at trial demonstrating that Odom suffered one hundred sixty-two thousand, twenty dollars and thirty-four cents in medical expenses and has future medical needs in the amounting one hundred fifty-eight thousand, sixty dollars and forty-four cents. (T. at 898 and 1136-41.) Accordingly, the jury's verdict in favor of the Odom Plaintiff is supported by the evidence and must be affirmed.

The verdict of the jury is supported by good, sufficient oral and documentary evidence to support the claims and causes of action which the trial court submitted to the jury for decision. Given the actual damages of the Plaintiffs, including the death of one Plaintiff and the serious permanent impairment of another, the amount of damages awarded was eminently reasonable.

The facts and circumstances presented by this case do not rise to the level required to reverse on this basis because the jury had ample evidence before it to find for the Plaintiffs and to award the damages it did.

ARGUMENT AND AUTHORITIES ON CROSS-APPEAL

Following the Defendants' filing of their notice of appeal, Plaintiffs properly and timely filed a Notice of Cross-Appeal, (R. at 7299-7302) and an Amended and Supplemental Joint Notice of Cross-Appeal. (R. at 7343-7346.) While Plaintiffs believe that they have a proper verdict and judgment on the breach of warranty issue that was presented to the jury, in the unlikely event this Court is persuaded by one or more of Defendants' arguments for reversal, Plaintiffs offer the following significant trial court errors which are relevant to the issues cited by Defendants and to any trial on remand.

IX. The trial court erred in dismissing Plaintiffs' breach of implied warranty claims.

Plaintiffs' evidence against the Defendants proved all required elements constituting (i) breach of the implied warranty of fitness for a particular purpose and (ii) breach of the implied warranty of merchantability. Rather than arguing this evidence in detail, Plaintiffs designate the satisfactory summary of Judge Johnson outlining the sufficiency of this evidence. (T. at 1273-79; R.E. at 63.)

1. Breach of the implied warranty of fitness for a particular purpose

At trial the Plaintiffs presented evidence to the jury which clearly supported well-pleaded claims for breach of the implied warranty of fitness for a particular purpose. The trial court comprehensively summarized the evidence and erroneously refused to submit this issue to the jury.

Miss. Code Ann. § 75-2-315 (Rev. 1998) provides that such an implied warranty of fitness for a particular purpose arises "where a seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is an implied warranty that the goods shall be fit for such purpose." In order successfully to recover for breach of the implied warranty of fitness

for a particular purpose, a plaintiff must produce sufficient evidence to the jury that "(1) the seller at the time of the contracting had reason to know the particular purpose for which the goods were required; (2) the reliance by the plaintiff as buyer upon the skill or judgment of the seller to select suitable goods; and (3) the goods were unfit for the particular purpose." *Moss v. Batesville Casket Co., Inc.*, 933 So. 2d 393, 399 (¶20) (Miss. 2006) (quoting *Garner v. S & S Livestock Dealers, Inc.*, 248 So. 2d 783, 785 (Miss. 1971)).

The first element that must be proved is that "the seller . . . had reason to know the particular purpose for which the goods were required." In this instance, a Camaro Z28 high performance vehicle capable of speeds in excess of 150 miles per hour was brought into Big 10 Tires' Hattiesburg location for replacement tires.

The original equipment manufacturer, General Motors, equipped the subject Camaro Z28 with "Z" rated tires. The "Z" rating specification was carried on a placard affixed to the inside of the drivers door (T. at 704 and 712) and was found in the owner's manual which came with the vehicle from General Motors. (T. at 705 and 712.) The salesman who sold the subject tires was aware that a "Z" rated tire was OEM specified equipment for this vehicle (T. at 704-705), and he was aware that Goodyear had published service bulletins stating that replacement tires should be equal to or better than original equipment manufacturer specifications. (T. at 708.)

"Z" rated tires have a speed rating above 149 miles per hour, (T. at 695) whereas "S" rated tires, the ones manufactured, sold, and installed by Defendants on this high performance automobile have a speed rating of 112 miles per hour. (T at 694.) "S" speed rated tires are the lowest speed rating commonly used on passenger automobiles. This was clearly a high performance vehicle which required a high performance tire carrying one of the highest speed ratings available though the tires were replaced with tires carrying the lowest speed rating commonly used on passenger

automobiles. And the Kelly Springfield Charger SR tires installed on the car by Big 10 were designated, described, advertised and sold as "high performance" tires, in violation of the General Motors and Goodyear safety directives. The facts of this case and the supporting testimony clearly meet the requirements of the first prong of this three-part test.

In order to prove the next requirement for a *prima facie* case of breach of the implied warranty of fitness for a particular purpose, the Plaintiff must demonstrate reliance by the Plaintiffs' predecessor as buyer upon the skill or judgment of the seller to select suitable goods. The record clearly demonstrates such reliance by Mr. Ivan Ostrander, the original purchaser of the subject tires.

As noted previously in Plaintiffs' arguments supporting the jury's award of damages for Defendants' breach of express warranty, privity is not required in breach of warranty cases. (*See* Topic II, *supra.*) The fact that Travis Kirby was not the original purchaser of the subject tires is not a defense to this claim. Clay Stodghill, the manager for Big 10's Hattiesburg store, sold the subject tires to Mr. Ostrander and was responsible for providing information about the tires as well as delivering the "sales pitch." (T. at 702-703) At the time of the sale, Mr. Stodghill was aware that he was selling replacement tires for a 1998 Chevrolet Camaro which came from the manufacturer equipped with tires with a "Z" speed rating. (T. at 698 and 704-705).

Mr. Stodghill knew that replacement tires should be as good or better than OEM equipment. (T. at 708). Mr. Stodghill was aware that the customer's Camaro could exceed speeds of 112 miles per hour, which is the maximum speed rating of the selected "S" rated tire. (T. at 707). Mr. Stodghill specified, sold, and installed tires, although designated high-performance tires, with capabilities which were much less than the original OEM equipment.

In delivering his "sales pitch," Mr. Stodghill did not address with Ostrander, the safety difference between the two tires, did not address speed ratings and did not tell the purchaser anything

regarding the suitability of the replacement tires. (T. at 710-712). Ivan Ostrander relied upon Big 10 and its agent, Mr. Stodghill, to select a suitable replacement tire. In its haste to complete a sale, Big 10 breached its duty to recommend a suitable replacement which would not compromise the purchaser's safety, or at a minimum warn the purchaser of the danger, thereby meeting the second prong of this three-part test. Additionally, Big 10 sold Kelly Springfield Charger SR tires designated, labeled and advertised as high-performance tires, nominally equivalent to the "Z" rated tires being replaced.

In order to make a successful claim for breach of the implied warranty of fitness for a particular purpose, Plaintiffs must prove that the goods were unfit for the particular purpose. In this instance, a similarly named, apparently high-performance, tire was selected by the seller in express violation of the OEM directives of General Motors and Goodyear to replace a tire designed for speeds in excess of 149 miles per hour.

The trial court ruled that the Plaintiffs could not present this issue to the jury because the failed tire was being operated within its designated speed rating. This was error. Though the vehicle was being operated within the 112 mph "S" speed rating, as the Plaintiffs' expert witness testified, the dynamics of an improper tire on a high performance vehicle affect that vehicle's entire range of performance. (T. at 623-624.)

Mr. Ochs testified that the vehicle's handling and other aspects of performance would be compromised by the "S" rated tire. The tires which Big 10 selected, sold and installed as replacement tires handled the much greater amount of torque applied by a high performance automobile in a manner inconsistent with a tire with a "Z" speed rating. (T. at 629.) As a result, a vehicle designed and engineered to performance specifications of both General Motors and Goodyear which specified a "Z" rated high performance tire was placed on Mississippi's highways in an

unsafe condition.

In placing a lower rated tire on the vehicle, the strength and durability of the tires were compromised and the lesser rated tire, although designated and named high performance, caused a catastrophic failure. The Kelly Springfield Charger SR tires were unsuitable for the particular purpose for which they were sold, as determined by General Motors and Goodyear among others, thereby meeting the final prong of this three-part test.

Should this Court remand this matter for a new trial, Plaintiffs claims for breach of the implied warranty of fitness for a particular purpose should be submitted to the jury.

2. Breach of the implied warranty of merchantability

The jury also heard evidence applicable to Plaintiffs' claims of breach of the implied warranty of merchantability. The Plaintiffs offered an instruction on this claim, which was refused by the trial court pursuant to the court's incorrect directed verdict ruling. (Instruction S-3 as offered, R. at 6811, R.E. at 42.) Mississippi's case law states that in order for Plaintiffs to successfully prosecute a claim for breach of the implied warranty of merchantability the Plaintiffs must prove the following applicable parts of Miss. Code Ann. § 75-2-314(1):

> (1) [A] warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind . . .
>
> (2) Goods to be merchantable must be at least such as . . .
>
> (3) Are fit for the ordinary purpose for which such goods are used."

Jacob Hartz Seed Co., Inc. v. Simrall & Simrall, 807 So. 2d 1271, 1274 (¶10) (Miss. Ct. App. 2001).

The record of this matter is replete with facts upon which the jury could have found that Defendants breached the implied warranty of merchantability, yet the trial judge erroneously refused to submit the claim to the jury. Looking at each required element individually, clearly both

Goodyear and Big 10 are merchants of tires, meeting the requirements set forth by Miss. Code Ann. § 75-2-314(1) (Rev. 2000). Additionally, in order for the tires which are the subject of the case *sub judice* to be considered "merchantable" as used in section 75-2-314(1), they must be "fit for the ordinary purpose for which such goods are used." *Id.* These goods brought with them an implied covenant they were fit to replace "Z" speed rated tires and to travel safely 50,000 miles at up to 112 mph, even if the Court adopts the lower speed rating as the standard. To be merchantable, it is beyond argument that the tires had to be "Z" rated, making the higher performance parameters applicable.

The purchaser of the tires had a reasonable expectation that the tires were reasonably fit and suitable as high-performance tires to replace "Z" rated tires specified both by the automobile and the tire manufacturers. When used within the warranted speed and durability parameters, as in the case *sub judice*, the warranty of merchantability specified that the tires would not suffer a catastrophic failure.

In this case, the Plaintiffs were driving between 88-92 miles per hour on the subject tires, well within the 112 mile per hour speed which the tires were marketed and warrantied to be capable of handling. To be merchantable, the tires were required to be reasonably suitable to function at the level of "Z" rated tires, up to 150 mph. While being operated within Goodyear's warrantied guidelines, a sudden catastrophic failure occurred resulting in a complete loss of tread in less than one-tenth of a second. (T. at 606-607.) This in turn resulted in a vehicle which was uncontrollable, causing Plaintiffs' damages.

In arguing against the jury's finding of Defendants' breach of express warranties, the Defendants have represented to this Court that there was no "evidence that the tire was 'unreasonably dangerous.' " (Defendants Brf. at 21.) Appellants' argument is simply untrue and is mentioned in

Plaintiffs' cross-appeal because it directly addresses what Plaintiffs must prove in order to successfully prove their claim. The jury heard expert testimony from the Plaintiffs' expert, Mr. Robert Ochs, stating that during the course of his investigation a shearographic analysis of the three tires which were intact was performed. Two of the three intact tires showed that they were in the process of delamination, that is to say that two of the three tires, the right-front and back-left tires, had separations located between the belts. (T. at 548-550.) The intact tires were beginning to separate at the edge of the upper and the lower belt and the crown of the tire along one of the edges of the upper belt, or in other words, between the two belts. (T. at 548-550.) These tires were self destructing to the point of tread separation.

The fact that two of the three intact tires, or three-fourths of the tires on the automobile, showed signs of delamination, the same problem which caused the accident, is substantial evidence that delamination in the subject tire caused this accident, considering that the shearographic tests can only be completed on intact tires and the necessarily circumstantial nature of a tire failure case. *See, e.g., BFGoodrich, Inc. v. Taylor*, 509 So. 2d 895, 903 (Miss. 1987.)

Although Plaintiffs proved by a preponderance of the evidence that the tire failed due to delamination, it is unnecessary for Plaintiffs to prove a *specific* defect in a cause of action based upon product defect. *Price v. Admiral Corp.*, 527 F. 2d at 415. In the case *sub judice*, there was abundant evidence, both direct and circumstantial, from which the jury could reasonably infer that a defect existed in the subject tire without pinpointing the specific defect, allowing Plaintiffs to carry their burden of proof. *Id.* In fact, Plaintiffs proved specific defects and breaches of warranties beginning with installing tires on a high performance automobile against the instructions of the OEM automobile and OEM tire manufacturer.

As clearly evidenced by the testimony of Mr. Ochs, the jury could return a verdict in favor

of the Plaintiffs based upon Defendants' breach of the implied warranty of merchantability. The trial court's dismissal of this viable claim was error and, should this Court remand this matter for a new trial, Plaintiffs' claims for breach of the implied warranty of merchantability should be submitted to the jury.

X. The trial court erred in dismissing Plaintiffs' design defect claims.

Miss. Code Ann. § 11-1-63 (Rev. 2004) provides that in order to recover in a products liability cause of action based upon a design defect, the Plaintiff must prove that at the time the product left the control of the manufacturer or seller: (1) the product was designed in a defective manner; (2) the defective condition rendered the product unreasonably dangerous to the user or consumer; and (3) the defective and unreasonably dangerous condition of the product was a proximate cause of the Plaintiff's damages. *3M Co. v. Johnson*, 895 So. 2d 151, 161 (¶32) (Miss. 2005). Plaintiffs were prepared to prove these requirements, but were precluded by the trial court from admitting such evidence.

Plaintiffs' expert witness, Mr. Robert Ochs, offered the opinion that the subject tire was defectively designed for use as a high-performance tire intended to replace a "Z" speed rated tire because of inadequate strength and durability, to which objection was sustained by the trial court. A high performance tire used for such purposes requires the addition of a nylon overlay or an alternative addition to the tread – sidewall interface, or the shoulder architecture, in order strengthen the tire to sustain the increased forces at the high speeds for which the tire is intended. As a result of this defective design, the tires were subject to delamination at an early stage, rendering the product unreasonably dangerous to the user. It was the unsafe design of the subject tire which triggered delamination of the tire resulting in the Plaintiffs' death and severe injuries.

As discussed in Issue XI of Plaintiffs' cross-appeal, Goodyear identified and produced no

engineering specifications in discovery containing information about the design of the subject tire except for codes referring to a corporate database, which was not identified and not produced, which codes Goodyear's Rule 30(b)(6) witnesses testified would be impossible for anyone outside of Goodyear, not having access to the corporate database, to interpret.

Based upon the basic design of the tires and other feasible alternative strengthening mechanisms, Mr. Ochs offered the opinion that the subject tire would have been safer for high performance use with an alternative design which utilized a nylon overlay, to which objection an was also sustained. (T. at 593-602.) Without burdening the Court with the intricacies of nylon overlays and their implementation into a tire's design, these overlays serve to strengthen and increase the strength and durability of a tire, especially those used in high-performance applications.

For instance, in Europe, South America and Asia where the road system is not as advanced as those found in the United States, tire companies are required by law to sell only tires using multiple nylon overlays. (R. at 6041-42.) This is done to strengthen the tires so that they are suitable to these roadways. This is not some form of new cutting edge technology, but rather, common practice for overseas tires. Two or more nylon overlays are a cost effective method of strengthening a tire for high-performance use. The tires in question were illegal for sale outside the United States.

Plaintiffs made repeated, urgent efforts to obtain the identification and production of discovery documents from Goodyear. As a result, the trial court compelled the Defendants to produce certain depositions to the Plaintiffs for use in support of their claims for design defect. Of the depositions which the Defendants were compelled to produce, the depositions of Beale Robinson addressed nylon overlays in detail. At the time of his deposition, Beale Robinson was a former Goodyear senior tire design engineer, currently serving as a consultant who was retained as an expert witness. As Mr. Robinson testified, and the trial court found, Goodyear had a problem with tread

throw in its tires during the relevant period. (T. at 596-597; R. at 6037 an 6047-48.)

In conducting in-house testing, Goodyear found that implementing multiple nylon overlays into their tire design, particularly high load bearing and high speed tires, helped correct the problem. (R. at 6040-45.) Predicated upon this testimony by Goodyear's former chief engineer, Plaintiffs' expert witness, Mr. Ochs, offered to testify that an alternative design for the subject tire using nylon overlays among other things as part of the design would result in a safer tire.

However, during voir dire of the expert witness, Mr. Ochs was asked a very pointed, misleading question. He was asked "That's your testimony: The absence of a nylon overlay in a tire does not in and of itself constitutes (sic) a design defect, correct?" (T. at 513.) Because tires exist which do not use nylon overlays in their design, but rather the addition of various other strengthening mechanisms, Mr. Ochs answered truthfully by stating "That's correct." (T. at 513.)

Mr. Ochs attempted to explain that in and of itself, the absence of a nylon overlay would not constitute a design defect considering other feasible alternatives. However, when the issue of design defect was presented to the trial court for directed verdict, Judge Johnson incorrectly interpreted Mr. Ochs' testimony and dismissed Plaintiffs' causes of action for design defect.

Should this Court remand this matter for a new trial, Defendants should be compelled to identify and produce documents constituting design and manufacturing specifications, as discussed in Issue XI *infra*, on Plaintiffs' claims for design defect, and this issue should be submitted to the jury. The jury is entitled to decide whether tires which are so unsafe that they are illegal for sale in Europe, South America and Asia, in which the feasible alternative design costs about one dollar per tire, constitute safe and reasonable tires for the people of Mississippi and America.

XI. The trial court erred in failing to compel Defendants to make discovery.

As previously referenced, Plaintiffs were unsuccessful in obtaining the identification and

production from Goodyear of discovery documents known to exist. Plaintiffs filed two motions to compel. (R. at 394 and 572.) After continuing to receive no meaningful discovery documents, Plaintiffs independently, at a great cost, investigated Goodyear's discovery responses. The findings from this process required the Plaintiffs to file an Urgent and Necessitous Motion to Compel Goodyear to Respond to Plaintiff Odom's Discovery on August 15, 2006. (R. at 1247.) The trial was less than two months away.

Goodyear responded to said motion on August 17, 2006, continuing to deny the existence of relevant, nonprivileged documents which had not been produced (R. at 1275.) The trial court conducted a hearing on this motion and ordered Goodyear to produce deposition testimony and exhibits which would evidence that Goodyear had readily available and had not produced relevant documents. The trial court allowed Plaintiffs to take the deposition of Goodyear pursuant to Rule 30(b)(6). This process caused Plaintiffs to incur well over $20,000 worth of unnecessary expense, not including attorney's fees.

The Goodyear depositions revealed several key facts which are addressed in Plaintiffs' Motion to Strike, for Discovery Sanctions and Other Relief. (R. at 1722.) Said motion addressed thirteen separate discovery related issues which were fully addressed with cited authorities and supporting documentation. Most notable of these thirteen issues, the documents produced by Goodyear purporting to be engineering design criteria and specifications were nothing more than retrieval codes which would allow a Goodyear engineer to retrieve engineering specifications from a corporate database which was not identified and not produced.

The 30(b)(6) deponents stated multiple times that unless an individual worked at Goodyear, and had access to the Goodyear computer database and the legend to decipher the codes, he would be unable to get any meaningful information from the paper copies of specification codes, which is

the only thing Goodyear produced. (R. at 5934-357.) Obviously, these unintelligible codes leading back to design specifications deceitfully concealed and not produced placed Plaintiffs in a precarious position in trying to prove a *prima facie* case of design defect.

Goodyear designated a witness for these 30(b)(6) depositions on design who denied knowledge of the subject of tire design and could not testify on the subject meaningfully, as well as revealing that many requested documents were readily available but were not produced.

Due to the misconduct of Defendants during discovery, Plaintiffs moved the Court to bar Defendants from introducing any proof about which they refused to identify and produce documents in discovery. (R. at 1730.) Of course, this is universally supported by the authorities. *See Ladner v. Ladner*, 436 So. 2d 1366, 1370 (Miss. 1983); *State Hwy. Comm'n of Miss. v. Jones*, 649 So. 2d 201, 203-04 (Miss. 1995); *Prestridge, et al. v. City of Petal, Miss.*, 841 So. 2d 1048, 1061 (¶61) (Miss. 2003). Nevertheless, the trial court did not assess any type of sanction against Goodyear beyond allowing the Plaintiffs at trial to read portions of the Beale Robinson deposition and portions of his tread throw study.

In summary, in the unlikely event that this Court shall reverse the jury's verdict in this matter, this case must be remanded for trial after full and proper discovery. Should this matter be reversed, the case should be remanded to Judge Johnson with instructions to assess the costs of the aforementioned discovery abuses to Defendant Goodyear with all proper discovery to be had in advance of retrial.

CONCLUSION

The litigation in this matter was complex, lengthy, and hotly contested. As the trial judge stated at the hearing on Defendants' post-trial motions: "I understand one of the parties to a litigation - - this was some very serious, hard fought litigation, and I understand one of the parties that now finds out that they're not happy with the verdict is wanting to attack it in any way it can be . . " (T. at 1801.) The Plaintiffs set forth substantive and credible evidence to support every element of their *prima facie* case, despite being thwarted by Defendants' lack of production and the trial judge's exclusion of relevant evidence and dismissal of viable claims. Plaintiffs provided a credible basis for the jury to render a verdict in their favor, which is the legal standard of sufficiency and weight that is required of it.

The jury was free to accept or reject any or all of the testimony and evidence presented by the Plaintiffs and by the Defendants. It chose to accept the testimony that supported the Plaintiffs and rendered a verdict in their favor. The overwhelming weight of the evidence is not contrary to the jury's verdict for the Plaintiffs, and a reversal of the judgment denying the Defendants' motion for a new trial is not warranted. This being the case, the Defendants' request that this Court undo the jury's verdict and the learned trial judge's rulings is without merit. This Court should not disturb the jury verdict in favor of the Plaintiffs; the jury's verdict should stand; and the trial court's denial of the Defendants' motion for JNOV, or in the alternative, for a new trial, should be affirmed.

Respectfully submitted, this the 7th day of April, 2008.

NICHOLAS L. KIRBY, JR., individually and as administrator of the Estate of Travis C. Kirby, Deceased, SHIRLEY S. KIRBY, and NICHOLAS L. KIRBY, III, and RILEY D. STRICKLAND and SIDNEY ODOM.

BY: _____
One of the Attorneys for the Plaintiffs-Appellees

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CERTIFICATE OF SERVICE

I, Michael S. Allred, one of the attorneys for the Plaintiffs-Appellees, hereby certify that I have caused a true and correct copy of the foregoing document to be served via U.S. mail, postage prepaid, to the following:

Honorable Forrest A. Johnson, Jr.
Circuit Court Judge
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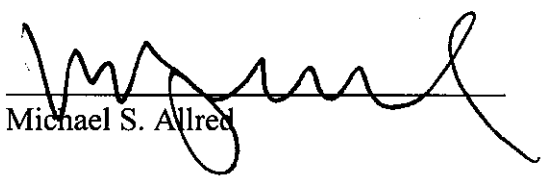
This the 7th day of April, 2008.



Michael S. Allred