IN THE SUPREME COURT OF MISSISSIPPI

THE GOODYEAR TIRE & RUBBER COMPANY and BIG 10 TIRE COMPANY — **APPELLANTS/ CROSS-APPELLEES**

V. — **NO. 2007-CA-00325**

NICHOLAS L. KIRBY, JR., individually and as administrator of the Estate of Travis C. Kirby, Deceased, SHIRLEY S. KIRBY, NICHOLAS L. KIRBY, III, RILEY D. STRICKLAND, and SIDNEY ODOM — **APPELLEES/ CROSS-APPELLANTS**

APPEAL FROM THE DECISION OF THE COPIAH CIRCUIT COURT

REPLY BRIEF FOR APPELLANTS

COMBINED WITH

BRIEF FOR CROSS-APPELLEES

ORAL ARGUMENT REQUESTED

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REBUTTAL ARGUMENT ON DIRECT APPEAL

I. Plaintiffs Offered Insufficient Evidence to Support a Claim for Manufacturing Defect.

Plaintiffs attempt many responses to the arguments in Defendants' brief, but up front, one glaring omission is dispositive of this issue: they presented no evidence to the jury of what allegedly was the "manufacturing defect" in the subject tire, and they failed to rebut the fact that the abuse to the tire rules out any claim based on circumstantial evidence. Without any such evidence, Plaintiffs could not meet the elements of their claim, and the trial court therefore erred in failing to direct a verdict for Defendants.

A. Plaintiffs Never Showed Any Actual Defect in the Tire.

The statute is clear: Plaintiffs must prove "that at the time the product left the control of the manufacturer or seller," the product had a manufacturing defect "because it deviated in a material way from the manufacturer's specifications or from otherwise identical units manufactured to the same manufacturing specifications." Miss. Code Ann. § 11-1-63(a)(1)(I). What was this deviation? Plaintiffs, in their brief, do not say. Instead, they point to "tread separation" or "chunking," neither of which goes any distance to explain *what alleged defect* the tire had when it left Goodyear. Tread separation and chunking are tire failures that may or may not *result from* a defect; Plaintiffs' burden was to offer evidence of a manufacturing defect that actually *caused* those failures, and they failed to do so. Without any such evidence, the jury could not find Defendants liable on this issue.

1. Tread Separation Is Not a Manufacturing Defect.

We are told that three of the four tires on Kirby's Camaro Z28, including the subject tire, "showed early indications of delamination, or tread separation, *indicative of* a defect." Plfs. at

17 (emphasis added).[1] Unhappily, this is the first instance of many where we must ask this Court to check carefully what Plaintiffs claim the transcript shows, versus what the trial transcript actually says. Plaintiffs cite to "T. at 548-550," but this Court will search those pages in vain for any testimony by Robert Ochs, tire expert for Plaintiffs, where he says anything about a delamination's being "indicative of a defect." That is the author of Plaintiffs' brief "testifying," not Ochs. Rather, Ochs was describing the results of his shearographic examination, which supposedly revealed "indications" of incipient tread separations. He did *not*, at those pages cited by Plaintiffs or anywhere else, testify as to what alleged manufacturing defect in the tire was supposedly responsible for the tread separations.

What Ochs did testify to was that the separations noted *were not present when the tires left the manufacturer*, T.641, R.E.28, and that tire failures such as tread separation can occur for many reasons *other than a defect in manufacturing*. T. 639-40, R.E.28. Therefore, the jury could not have reasonably concluded that a tread separation was itself a manufacturing defect under Mississippi law.

In fact, Ochs was perfectly capable of testifying to what manufacturing defect was "indicated by" tread separations, *had he found any such indication.* We know this because, in another reported case, Ochs has done exactly that: testified that a tread separation, *caused by a particular defect*, led to an accident.

> Despite the tire's age and condition, Ochs concluded the tread separation **resulted from** a manufacturing defect. He testified the tire separated **because of** a lack of adhesion between the brass cable and the rubber over the cable . . . .

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[1]We cite the Brief of Appellees and Cross-Appellants as "Plfs." and the initial brief of Defendants as "Defs."

Goodyear Tire & Rubber Co. v. Rios, 143 S.W.3d 107, 114 (Tex. Ct. App. 2004) (emphasis added). Obviously, in *Rios*, Ochs did not hesitate to say what alleged manufacturing defect was supposedly "indicated by" the tread separation.[2] In the present case, by contrast, Ochs admitted that he could not find any such manufacturing defect:

> Q. Now, I believe you testified earlier **you could not point to any specific defect in the tire?**
> A. **That's correct.**

T.640, R.E.28 (emphasis added).

In yet another case involving a tread separation (in a light-truck tire), Ochs testified that "catastrophic failure occurred because, as manufactured, the tire's belt package lacked the necessary durability to resist crack propagation in the belt wedge interface." *Barcenas v. Ford Motor Co.*, 2004 WL 2827249, at *5 (N.D. Cal. Dec. 9, 2004). As in *Rios*, there was no attempt by Ochs in *Barcenas* to pass off "tread separation" as a manufacturing defect in and of itself, rather than as a failure which it was the plaintiff's burden to prove was caused *by* a manufacturing defect.

We note in passing that the district court in *Barcenas* refused to credit Ochs's testimony because Ochs testified about a different light-truck tire from the one on the plaintiff's SUV; his "generally conclusory" claim about the two tires' similarity "lack[ed] specifics," whereas the court was persuaded that the two tires were "essentially different products." *Id.* at *7. Given the amount of effort by Plaintiffs in the present case to argue that light-truck tires are substantially

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[2]The Texas court held that, because Ochs's attempted methodology in that case was unsupported by any evidence that other tire specialists used it, Ochs's testimony "was not reliable and, therefore, amounts to no evidence of a manufacturing defect." *Id.* at 115. (At issue XII below, we will see similar flaws in Ochs's testimony in the present case.) Also, the tire in *Rios* was a light-truck tire. *Id.* at 110.

similar to the passenger car tires on Kirby's Camaro Z28, the holding of the California court is another example of how far off Plaintiffs' argument is from the mainstream. *See* III.B below.

Looking beyond cases where Ochs himself testified, this Court can easily satisfy itself that tread separations have not been recognized by the courts as themselves defects, but rather as tire failures *caused by* alleged defects, which may be due to a multitude of possible causes, such as striking road hazards, underinflation, or — most significantly for this case — abuse or misuse. This Court itself affirmed a jury verdict against a tire manufacturer where the plaintiffs presented evidence that the tire was manufactured with " 'bad stock' which can *cause the tread to separate* because of the improper bonding of the tire and tread." *Cooper Tire & Rubber Co. v. Tuckier*, 826 So. 2d 679, 681 (Miss. 2002) (McRae, P.J.) (emphasis added). That is the kind of proof that Plaintiffs so conspicuously have failed to offer in the present case: *proof that the tread separation occurred because of some manufacturing defect.*

Cases in other jurisdictions are alike in holding that a tread separation is not a manufacturing defect in itself, but rather is a tire failure *caused by* something or other, which may or may not be a defect. *See, e.g., Oliveira v. Bridgestone Americas Holding, Inc.*, 2007 WL 1655842, at *2 (N.D. Ga. June 5, 2007) (plaintiff offered expert testimony "that the poor adhesion between the steel belt cords and the rubber in the subject tire [ ] caused the tread separation") (omission in original); *Armeanu v. Bridgestone/Firestone N. Am. Tire, LLC*, 2006 WL 4060665, at *19 (D.N.M. Sept. 26, 2006) ("imperative the Plaintiffs present direct evidence that a defect caused the lack of adhesion and tread/belt separation"); *Cooper Rubber & Tire Co. v. Mendez*, 204 S.W.3d 797, 805-06 (Tex. 2006) ("cause of the tread separation" must be proved by plaintiff). Indeed, a leading case from the United States Supreme Court on the application of the *Daubert* standard, *Kumho Tire*, itself involved the issue of "the likelihood that a defect in

the tire at issue *caused its tread to separate* from its carcass." *Kumho Tire, Inc. v. Carmichael*, 526 U.S. 137, 154 (1999) (emphasis added).

Plaintiffs never presented any evidence of an alleged defect in the manufacture of the tire that was "indicated by" the tread separation, and thus failed to present evidence on an essential element of their claim. The issue of manufacturing defect should not have been allowed to go to the jury.

2. Chunking Is Not a Manufacturing Defect.

Aware of this hole — or a puncture? — in their case, Plaintiffs try an alternative theory: "the tire failed because of a defect, specifically 'chunking' or the throwing off of pieces from the tire." Plfs. at 19. Here again, Plaintiffs or their counsel are testifying, not their tire expert Ochs, who nowhere claims that chunking itself is a "defect." Rather, as the testimony cited by Plaintiffs (T.613-15) shows, the chunking of the tire was, like the tread separation, part of the failure of the tire, not an explanation for *why* it failed.

Had Ochs claimed that chunking was itself a defect, that would have contradicted his own testimony in another case, where he testified that chunking is merely one *type* of tread separation. *Morris v. Goodyear Tire & Rubber Co.*, 2004 WL 5522851, at *14 (W.D. Okla. Dec. 17, 2004). The *Morris* case is particularly interesting because, discussing a light-truck ("Load Range E") tire, Ochs put forth the same theory urged by Plaintiffs as a design defect in the present case — that the lack of a nylon overlay was a design defect. *Id.* Ochs actually testified, in the *Morris* case, that chunking would have been how the tire separation occurred *if there had been an overlay*, and that if this "more benign method of failure," i.e., chunking, had occurred, then the driver would *not* have lost control of his vehicle. *Id.* Lest this Court have any doubt, we quote the relevant passage of *Morris*:

> In his report, Ochs explains how the use of cap plies reduces the stress and heat on the tire thus reducing the risk of a tire failure (Ochs Expert Report at 19). If, or when, a tire with an overlay fails, it **does not have catastrophic consequences as, instead of a total tread separation, the separation is one of "tread chunking"** (*id.* at 20). Therefore, it was unnecessary for Ochs to perform calculations to determine how long the nylon overlay would have delayed the accident because Ochs' testimony is that, even if the subject tire, equipped with an overlay, were to have failed at the same time, it would not have caused the accident because of **the more benign method of failure**.

Id. (emphasis added). But in the present case, Plaintiffs would have it that the lack of an overlay was a defect — presumably because, had there been a tread separation with an overlay, it would not have been "total" but would have been merely "chunking," *which is exactly how the tread separation happened in the present case, according to Ochs himself.* T.613-15. Somehow, Ochs forgot that chunking is "the more benign method of failure" when it came to the present case.

As we saw with tread separations, chunking is the end result of a failure, which Plaintiffs have to prove was itself caused by some manufacturing defect or other. *See Feinstein v. Firestone Tire & Rubber Co.*, 535 F. Supp. 595, 601 (D.C.N.Y. 1982) (plaintiffs alleged chunking and tread separation was "a result of [tires'] defective conditions"). Chunking is not itself a manufacturing defect. Therefore, the mere fact that a tire chunked its tread is not proof of a manufacturing defect, which is surely why Ochs never testified that it was. Indeed, Ochs conceded that tires fail due to punctures, impacts, and "abuse or misuse." T.640, R.E.28. He could not identify anything which caused the chunking:

> Q. Alright. Can you tell this jury that speed caused this tire to fail?
> A. **I can only provide the jury the sequence** showing that the shoulder and the **chunking** of the tire and the **tread belt detachment** and the relationship to the tire. That's all I can provide.
> Q. What I'm saying is this: What was the relationship to the shoulder that put these sequences in motion?
> A. Other than it failed at a speed below what it should have failed —

— at which point Ochs had no "cause" to offer. T.641, R.E.28. Ochs could "only provide the jury the sequence"; he could only say that one thing happened after another, but not what the *cause* of that sequence was. This Court has "repeatedly held *post hoc ergo propter hoc* (after this consequently by reason of this) is a misplaced argument in modern tort law." *Herrington v. Leaf R. Forest Prods., Inc.*, 733 So. 2d 774, 779 (Miss. 1999). Otherwise, Plaintiffs could attempt to prove their case by *res ipsa loquitur*. They pay lip service to the fact that *res ipsa* is not valid in a tire case, Plfs. at 20, but in reality, their case amounts to nothing else.

The fact that chunking (and tread separation) happened does not prove that they were the result of a manufacturing defect. Therefore, the chunking of the tire could not provide sufficient evidence of any manufacturing defect in the tire, and Plaintiffs failed to meet this essential element of their claim.

B. Plaintiffs Could Not Show a Defect by Circumstantial Evidence.

Although the arrangement of their argument is far from clear, it seems that Plaintiffs attempt to rely in part on a theory that circumstantial evidence sufficed to prove the existence of a manufacturing defect: "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." Plfs. at 18 (emphasis added). In other words, Plaintiffs claim to rely on circumstantial evidence.[3]

We will come back to that "significant abuse" in a moment, but first, we remind this Court of the arguments and authorities in the Brief for Appellants (at 12-17) regarding circumstantial evidence of tire failure. Plaintiffs brush off these authorities as "from other

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[3]Notice that "the serviceman" who testified he found the tires "in good working order" the day before the accident was an oil-change technician, not a tire technician. T.758.

jurisdictions and therefore not controlling." Plfs. at 18. However, this Court should find them highly persuasive because of the unanimity they demonstrate as to the central issue here: "*the mere fact that a tire has a tread belt separation does not mean that the tire is defective.*" *Mendez*, 204 S.W.3d at 807 (emphasis added). "The universe of possible causes for the tire failure is simply too large and too uncertain to allow an expert to prove a manufacturing defect merely by the process of elimination." *Id.*

The *Rios* case discussed above (where Ochs testified about tread separations) was another case where the plaintiffs alleged that the tread separation itself was circumstantial evidence of the tire's being defective, just as do Plaintiffs in the case at bar. The Texas court rejected that theory because the tire's "age and condition" made such circumstantial evidence insufficient as a matter of law. *Rios*, 143 S.W.3d at 111-12.

In the present case, there is no disputing the substantial wear imposed on the tire by the previous owner, Ivan Ostrander, who admitted to spinning out and otherwise abusing the Z28's tires. T.642-43, R.E.28; R.1668-69 (affidavit of Ostrander). Plaintiffs *completely fail to rebut* this evidence of "significant abuse" — abuse so severe that it wore the tires' rear treads down from 10.5/32 of an inch when new, to 3.5/32 of an inch over 10,000 miles of driving, or 88% of the tires' useful tread life, over only 20% of its estimated useful mileage — *because they cannot do so.*

Instead, Plaintiffs blandly state that "evidence was presented by several fact witnesses regarding the lack of any prior puncture *or abuse*," Plfs. at 18 (emphasis added), and then present a string citation of ten separate pages from the record allegedly supporting that claim, without further explanation or quotation. As this Court can readily see from checking the cited pages, *not a single one* contains any evidence to rebut Ostrander's having abused the tires. (We learn

that Kirby did not abuse the tires himself, but that is beside the point — Defendants never alleged that he did.) As we say, this Court must not allow Plaintiffs to substitute their own "testimony" in their brief for what the record actually shows.[4]

In that respect, this case is not on point with *Edwards v. Sears, Roebuck & Co.*, 512 F.2d 276 (5th Cir. 1975), which Plaintiffs cite for the proposition that "conflicting testimony . . . presented as to whether the tire failed due to misuse or a defect" was a jury question. Plfs. at 20. Here, there was *no* conflicting evidence as to whether Ostrander (*and* Ostrander's friends, R.1669) repeatedly abused the tires. Plaintiffs' own expert, Ochs, admitted the spin cuts were present on the tire, and that they were not caused by the manufacturer, but were evidence of abuse. T.642-43, R.E.28. On the other hand, Ochs admitted he could not identify a manufacturing defect. T.641, R.E.28. There were thus no competing theories of causation on which a jury could decide. Plaintiffs offered *no theory of causation at all.*

> Under Mississippi law, "the burden of proving that when the accident occurred there had been no substantial change in the condition in which the product left the manufacturer is upon the plaintiff." **Given the age of the tire and its extensive wear**, the court found that Smith could not carry his burden on causation. **Without . . . testimony as to causation**, . . . we agree with the district court. **Goodyear's expert testimony, that the failure was caused by underinflation or overloading, is essentially uncontroverted.**

Smith v. Goodyear Tire & Rubber Co., 495 F.3d 224, 228 (5th Cir. 2007) (quoting *BFGoodrich, Inc. v. Taylor*, 509 So. 2d 895, 903 (Miss. 1987)) (emphasis added). The tires in the present case were "extensively worn" down to only 12% of useful tread, and Plaintiffs have no theory as to what alleged manufacturing defect caused the accident.

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[4]Even less persuasively, Plaintiffs attempt to bring in the trial judge as a witness: "the trial judge commented, outside the presence of the jury, on the apparent good condition of the tires." Plfs. at 19 n.6. It is not necessary for Defendants to hold the trial court in error here, as he was not the finder of fact, and Plaintiffs neglected to designate the judge as an expert witness.

The present case is therefore not on point with such precedents as this Court's opinion in *Fruehauf Corp. v. Trustees of First United Methodist Church*, 387 So. 2d 106 (Miss. 1980). In *Fruehauf*, the alleged manufacturing defect was in a hydraulic "nipple" which formed part of a tractor/trailer's connection system. *Id.* at 107-08. Unable to point to any particular defect, the plaintiff alleged, successfully at trial and on appeal, that by eliminating other possible causes, "the only logical conclusion for the jury to reach then was that the defect must have been present when the trailer was sold by the defendant Fruehauf." *Id.* at 110. This Court upheld the jury verdict because "the nipple ruptured which ordinarily does not happen if the item is non-defective, and *used in a reasonable manner*," and the plaintiff was able to show that the failure occurred due to "either of three explanations: the nipple was defective, *misused*, or over-pressurized," so that "the jury could find (as it did) that the rupture resulted from a defect in the nipple rather than from either one of the other two explanations." *Id.* at 112 (emphasis added).

While *Fruehauf* might seem to be stronger authority for Plaintiffs than any case which they actually cite, the facts of the present case show that *Fruehauf* can and must be distinguished. There was no evidence of misuse of the nipple in that case, whereas Ochs admitted that the tires in this case were abused.

We have already seen, in the Brief for Appellants, that Ochs's own opinion was that the separation that he noted in the tire did not exist when the tire was manufactured: "I don't believe there was separation when it [the tire] left the plant." T.641, R.E.28.

We have already seen that Ochs admitted finding abuse of the tire consistent with "spinning out" the tire. T.609, 643, R.E.28.

We have already seen that Ochs admitted that such abuse could cause the "separation growth" he observed in the tires. T.643, R.E.28.

We have already seen that Ochs admitted he could point to no specific defect in the tire. T.640-41, R.E.28.

It is sound Mississippi law that "the manufacturer is responsible for the product that it made, not for the product that exists after subsequent changes." *Wolf v. Stanley Works*, 757 So. 2d 316, 319-20 (Miss. Ct. App. 2000) (Southwick, P.J.).

Therefore, rather than having eliminated the alternative possibilities as did the plaintiff in *Fruehauf*, Plaintiffs in the present case *failed to rule out the possibility that the separation growth caused by the abuse was what led to the tread separation that led the tire to fail.* This Court should apply the same principle in this case that it applies in negligence actions:

> ... while inferences of negligence may be drawn from circumstantial evidence, **those inferences must be the only ones which reasonably could be drawn from the evidence presented,** and if the circumstantial evidence presented lends itself **equally to several conflicting inferences**, the trier of fact is not permitted to select the inference it prefers, since to do so would be the equivalent of engaging in **pure speculation about the facts**. Where plaintiff in a negligence action has only presented proof that the actual cause was one of a number of possibilities, **to enable an inference to be drawn that any particular cause is probable, the other causes must be eliminated**. Thus, when the evidence shows that it is **just as likely** that accident might have occurred from causes other than defendant's negligence, the inference that his negligence was the proximate cause may not be drawn.

Miss. Valley Gas Co. v. Estate of Walker, 725 So.2d 139, 145-46 (Miss. 1998) (quoting 57A Am. Jur. 2d *Negligence* § 462) (emphasis added). "Verdicts must rest on probabilities, not on bare possibilities." *Ford Motor Co. v. Broadway*, 374 So. 2d 207, 211 (Miss. 1979) (quoting *Elsworth v. Glindmeyer*, 234 So. 2d 312, 318 (Miss. 1970)).

Plaintiffs should not have been allowed to proceed to the jury on their circumstantial-evidence theory of the case when the tire was undeniably abused by its previous owner and when such abuse could not be ruled out as a cause of the accident — indeed, where Plaintiff's own and only tire expert admitted that such abuse could cause tread separations, and where that was the *only* evidence before the jury, from Plaintiffs, of any *particular* cause for the tread separation.

That is why this case is *not* a "battle of the experts" in which the jury's verdict as to credibility must be affirmed by this Court. Plaintiffs attempt to discuss the testimony of Defendants' expert, Gardner, in their argument (Plfs. at 19-20), but *we* do not — because that testimony, valid though it was, is legally irrelevant to the present issue, which is whether Ochs himself offered sufficient evidence to get Plaintiffs' claim before the jury. He did not.

Where the expert for the plaintiff fails to present any evidence as to one element of the cause of action, the jury cannot choose to credit that expert over the expert for the defendant. Quite honestly, at that point, the testimony of the defendant's expert becomes irrelevant, because the plaintiff has failed to meet his burden of proof, and a directed verdict is proper without any defense testimony at all.

The admissions of Plaintiffs' one and only tire expert, Ochs, make it clear that Defendants were entitled to a directed verdict at trial. The failure of the trial court to grant a directed verdict, or to grant the Rule 59 motion for judgment notwithstanding the verdict, on the issue of manufacturing defect, was reversible error. This Court should therefore reverse and render a judgment in favor of Defendants on that issue.

II. Plaintiffs Offered Insufficient Evidence of Breach of Warranty.

A product warranty must be either express or implied, and Plaintiffs failed to offer sufficient evidence of either at trial. Therefore, they attempt to keep this issue from even arising

on appeal. However, the issue is adequately preserved, and the jury had insufficient evidence of any such warranty.

A. The Issue Is Adequately Preserved on Appeal.

Plaintiffs are mistaken when they hinge their argument (at issue II of their brief, Plfs. at 22 ff.) on the notion that Defendants' case as regards breach of warranty hangs on an objection to one jury instruction. We discussed the jury instruction because "there was no evidence in the record to support any such instruction's existence" (Defs. at 19) — in other words, Defendants' claim on appeal is that there was insufficient evidence to support a jury verdict for Plaintiffs, and that judgment notwithstanding the verdict was therefore proper. Thus, Plaintiffs' tendentious arguments as to whether the issue was preserved for appeal during the jury-instruction phase of the trial are beside the point. Goodyear and Big 10 both moved for a directed verdict on "all claims of all plaintiffs." T.1268-69.

> Judgments as a matter of law, which include **directed verdicts**, peremptory instructions — a procedural equivalent to a directed verdict — and judgments notwithstanding the verdict, all exist to challenge via motion the substance of a party's factual presentation vis-a-vis the law of the case. In essence, when requested by way of a motion to grant one of these judgments as a matter of law, trial courts are provided an opportunity to assess the viability of the cases pending before them. By their very nature, these motions present purely legal questions, and therefore, **once these motions are utilized by the parties and ruled on by a trial court, these issues are preserved for review and directly appealable upon final judgment**.

White v. Stewman, 932 So. 2d 27, 31-32 (Miss. 2006) (emphasis added). Moreover, in Plaintiffs' own quotations from the record of the discussion over Jury Instruction S-2, counsel for Goodyear (Mr. Baxter) objected to the instruction because it allowed the jury to find against Goodyear simply because the tire failed "within the warranty mileage," without any evidence of a manufacturing defect. Plfs. at 25 (quoting T.1500). That is of course just what Defendants argue

at issue II of their brief, on the warranty claim. No such instruction would be proper, without evidence of a manufacturing defect, where no proof was offered of any express or implied warranty that the tire simply would not fail within the warranty mileage. *See Howell v. State*, 860 So. 2d 704, 761 (Miss. 2003) (instruction to be refused where "without proper foundation in the evidence of the case").

B. The Express Warranty Does Not Support Plaintiffs' Claims.

In their rebuttal of Defendants' argument on the merits, Plaintiffs again give the impression of mistaking Defendants' arguments, by digressing upon the law of privity. While that is perhaps one subissue, the principal issue is whether any express warranty, guaranteeing that the tires would not fail under 50,000 miles or 112 m.p.h., *was ever made at all.*

Plaintiffs claim that it was, and cite to T.1453 and 1467, which are from the cross-examination of Defendants' tire expert. At T.1467, the reference is to the federal government's speed rating "S" of the Kelly Charger SR tire, which we have already explained (Defs. at 19) is a rating assigned by the federal government, not by Goodyear or Big 10, and thus not an "express warranty" by Defendants. (Plaintiffs did not sue the United States.) In our initial brief, Defendants challenged Plaintiffs to present any authority from anywhere in the United States that a speed rating was held to be a "warranty." Plaintiffs do not cite to any such authority.[5]

As for T.1453, the reference is to a document produced in discovery, but not made an exhibit at trial, the Limited Warranty Policy and Procedure issued by Kelly-Springfield. Ex. A

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[5]Plaintiffs do cite (at 30) to James Gardner's vague "constant prolonged speed" in his designation, apparently preferring Defendants' expert's approximate recollection to the specific (for once) testimony of their own expert, Ochs: "it did pass ten minutes at 112 miles per hour." T.663.

to this Brief.[6] The limited warranty itself was also produced and is in the record (R.2013-14) (ex. B to this Brief) but it appears likewise was not entered into evidence by Plaintiffs, who had the burden of proof. Obviously, Defendants are bound by what the actual warranty said, not by any summary of that warranty by their expert or by Plaintiffs.

To the extent that Plaintiffs' case has now shifted to the tire's having failed before being driven 50,000 miles, that theory will not survive an inspection of the warranty itself.

- Under the heading "WHAT IS NOT COVERED," the warranty expressly excludes "Tire conditions resulting from . . . *willful abuse*" (emphasis added). As discussed in Defendants' initial brief and at issue I.B. above, willful abuse is exactly what the subject tire in this case experienced: spinning out and other abuse from its original owner, Ivan Ostrander, which wore out 88% of the useful tread in 20% of the tire's estimated life. *That alone voided any express warranty in this case.*
- Further, the only warranty pertaining to *mileage* (as opposed to treadwear) is the one in the Limited Warranty Policy and Procedure issued by Kelly-Springfield (not in the Limited Warranty — read it and see). The Charger SR has a warranty for 50,000 miles, but this is not a warranty against *tire failure*. It is a warranty against "tread wearout for

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[6]See the transcript, where Plaintiff cross-examined Defendants' tire expert Gardner:

> Q. Let's talk about the Charger SR tire a minute. Have you ever seen Kelly Springfield's warranty policy and procedure?
>
> . . . .
>
> Q. I show you a copy that was produced during discovery. It says here on the Kelly Charger SR tire that it was warranted up to a mileage of 50,000 miles. Is that correct?
>
> A. Yes.

T.1452-53. (We will discuss what that warranty did and did not cover.)

the mileage as shown." Plaintiffs are not suing for tread wearout, and their expert did not offer any evidence that the worn treads on the subject tire were due to anything other than their abuse by Ostrander.

- An express warranty is limited to the purchaser who relies upon it. *See Austin v. Will-Burt Co.*, 232 F. Supp. 2d 682, 687 (N.D. Miss. 2002) ("Neither the plaintiffs nor WABG-TV have proved that they relied on Will-Burt's guarantees as a basis for purchasing the mast."); *compare Forbes v. Gen. Motors Corp.*, 935 So. 2d 869, 876 (Miss. 2006) (recognizing holding in *Austin* but distinguishing from case where original purchaser invoked express warranty); Miss. Code Ann. § 11-1-63(a)(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"). There is no proof in the record that Kirby ever relied upon the express warranty, or even that he knew it existed.[7]
- Finally, even without the "willful abuse" exception, the Limited Warranty covers only unserviceability "due to a workmanship or material-related condition." R.2013. That is, Plaintiffs cannot prove any breach of the express warranty *without proving a manufacturing defect*, which we have already seen they could not do at trial.

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[7]This argument must be distinguished from the argument that privity, or the Limited Warranty's express limitation to the original purchaser, bars Plaintiffs' claim. Miss. Code Ann. § 11-7-20 appears to abolish any privity requirement in breach of warranty cases. However, that is not the same as the issue of whether, *in fact*, the purchaser relied upon an express warranty, which is the fact at issue in *Austin*, in *Forbes*, and in the present case. Plaintiffs had the burden of proving such reliance, and they did not do so.

Therefore, to the extent that any express warranty was shown by Plaintiffs at trial, there was no evidence that the tire was guaranteed not to fail below 50,000 miles or 112 m.p.h. Denial of a directed verdict was reversible error, and this Court should reverse and render.

C. Plaintiffs Could Not Show Breach of Implied Warranty Without Proving a Manufacturing Defect.

As already shown in their brief (Defs. at 21-22), Plaintiffs could not rely on any theory of any breach of implied warranty without showing some actual manufacturing defect in the tire. Plaintiffs have not rebutted this argument, though they do refer to their cross-appeal on different warranty issues, which Defendants will refute in their Response Argument below.

Having failed to offer sufficient evidence of a breach of warranty, Plaintiffs should not have been allowed to proceed on that theory, and the trial court committed reversible error in denying a directed verdict and in issuing Instruction S-2. This Court should reverse and render.

If this Court reverses and renders on issues I and II, that is sufficient to decide the present appeal in its entirety. The following issues III through VIII pertain to whether, in the alternative, this Court should reverse and remand for a new trial (or for a remittitur).

III. Neither the Problem Summary Memo nor the Robinson Deposition Was Admissible Evidence.

Plaintiffs attempt to excuse the inexcusable admission of irrelevant and unduly prejudicial evidence concerning light-truck tires by framing it as Defendants' penalty for alleged discovery violations. There were no such violations, and even had there been, that would not have justified the admission of irrelevant and unduly prejudicial evidence.

A. The Problem Summary Memo and Robinson Deposition Were NOT Admitted as Sanctions under Rule 37.

In a remarkable flurry of assertions without support in the record, Plaintiffs alleged that "Goodyear had available but fraudulently concealed and failed to produce evidence regarding the subject tire line." Plfs. at 32. This is not true. There is no such finding by the trial court anywhere in the record of this case. Once again — and all through the eleven pages of their issue III — counsel for Plaintiffs is doing the testifying, trying to substitute imaginary evidence for what the record will show.

Plaintiffs attempt to support their false statement with a blanket citation to *249 pages* of the record, supposedly the deposition excerpts of Beale Robinson. Plfs. at 33. Obviously, if any page in Robinson's deposition actually supported Plaintiffs' claim, they could cite to it specifically. They do not do so, because there is no such support.

As for the alleged "history of defects and failures" of the Kelly Charger SR tire, Plfs. at 32, this was not produced because it did not exist: there was no prior history of comparable accidents or defects on that tire, and Goodyear provided sworn statements to that effect. R.2077-78 (Stroble affidavit); R.1974-75, R.E.9 (Shelton depo.).

Plaintiffs also complain that Defendants "concealed evidence" by failing to produce keys to "alphanumeric codes illegible to anyone who did not have access to the Goodyear computer system to obtain the actual specifications." Plfs. at 33 — note again the lack of any citation to the record by Plaintiffs. Had Defendants actually done such a thing, it would have been easy for Plaintiffs to show the trial court these "illegible" codes and secure a motion to compel. But the trial court never found that any such misconduct occurred. Plaintiffs cite to multiple pages

(T.88-100) without identifying just where the trial court "recognized the Defendants' discovery violations," because the trial court never did any such thing.[8]

The record shows that the trial court *never* issued an order finding any merit in Plaintiffs' motions to compel. The most that the trial court did, in fact, was to state that Plaintiffs were seeking various documents which Defendants contended were irrelevant, and to order that Robinson's deposition and five other deposition transcripts be produced by Defendants to Plaintiffs, under a confidentiality order and "without any admission whatsoever as to relevance or admissibility of anything in the deposition or in the exhibits." T.88. These documents, including Robinson's deposition, concerned light-truck tires, not passenger car tires, which is why Goodyear objected to their production.

Therefore, when Plaintiffs claim that "[t]his 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," Plfs. at 34, that claim is a couple of degrees removed from the truth. First, "for use at trial" is false, as we just showed in the previous paragraph; the trial court expressly reserved any finding as to admissibility. Second, there was not even a hint of a Rule 37 sanction in turning over the documents or in allowing them into evidence. Were there any such evidence in the record, Plaintiffs would cite to it and presumably quote it, but they don't. Because they can't. Because it isn't there.

Plaintiffs quote selectively (Plfs. at 34) from the trial court's "recollection" about the reasons for admitting the Robinson deposition. There, the trial court referred vaguely to "some significant problems with getting meaningful discovery," T.808, which the trial court considered

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[8]As Defendants explained to the trial court, Goodyear provided a witness, Larry Shelton, who "explained in detail what these codes were" at his deposition. T.236.

it had alleviated by "allowing the Plaintiffs access to certain depositions of Defendants' experts in prior or other litigation matters." T.808. This refers to the action by the trial court which appears at T.88 and has already been described above.

The trial court referred to the admission of Robinson's deposition as a "remedy," but did not explain this further. T.808. What Plaintiffs do not quote, of course, is what the trial court said about this "remedy," immediately after Plaintiffs' quotation from T.810:

> But, again, I see no indication in this case whatsoever of any significant smoking gun or, if you will, root cause of some problem about what's been referred to as tread throw in these cases. I've seen no indication of that whatsoever.[9]

In other words, the trial court allowed Robinson's deposition in, but found nothing probative in it as to the cause of the tread separation ("tread throw"). As the trial court explained at T.809, Robinson's deposition would support, at most, that a nylon overlay was considered as a design solution to the problem of tread separation, but that such an overlay was a design trade-off that solved some problems while creating others.

More of this when we come to the cross-appeal on the issue of design defect, but for now, the takeaway is that nothing supports Plaintiffs' rather desperate notion that the admission of Robinson's deposition, and of the Problem Summary memo attached to it, was any kind of discovery sanction. In fact, notwithstanding the trial court's "recollection," what the record shows is simply that the trial court declined to rule *in limine* on it, T.280, but directed Plaintiffs to prepare excerpts on which the court could rule at trial.

The next one hears of Robinson's deposition is at T.410, where Plaintiffs announce (jury out) their intent to read excerpts of the deposition into the record. Defendants renewed their

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[9]We discuss this quotation as regards the prejudice suffered by Defendants in subsection C, below, under this issue.

objections to its admission, T.411, but the trial court said it would be admitted with "a continuing objection as to discovery and admissibility and as to relevancy." T.412. Then, at T.472, the trial court declared that the first page of the Problem Summary memo would be admitted, without explaining how it was relevant, and certainly without presenting it as any kind of "sanction" against Defendants.

In short, despite their repeated assertions *in their brief*, Plaintiffs do not make any showing *from the record* of any "concealment" or "fraud" or other sanctionable conduct by Defendants. Plaintiffs' arguments to the contrary are firmly rooted in nothing but thin air. "This Court has held that cases on appeal must be decided on the facts contained in the record, not on assertions made in the briefs." *McDerment v. Miss. Real Estate Comm'n*, 748 So. 2d 114, 120 (Miss. 1999) (citing cases). If the trial court *had* admitted the deposition and the memo as Rule 37 sanctions, without any express finding of misconduct by Defendants, and without any M.R.E. 403 prejudicial/probative analysis, then Defendants submit that the trial court would have committed reversible error. But there is no record evidence that the trial court imposed any such sanction.

B. There Was No Substantial Similarity Between the Subject Tire and Any Tire in Robinson's Deposition or in the Problem Summary Memo.

Despite their repeated assertions in their briefs, Plaintiffs fail to show that the subject tire in this case was substantially similar to any tire listed on the Problem Summary memo or discussed in Robinson's deposition. Admission of that evidence was therefore reversible error by the trial court.

Plaintiffs assert, without citation to the record, that "The tires involved in this case were similar to those involved in cases in which the deposition testimony of a former Goodyear

employee engineer, Beale Robinson, was taken." Plfs. at 37. By now, this Court has seen enough of how Plaintiffs' argument operates to realize that no such similarity is shown by the record. Plaintiffs do not cite any particular page of Robinson's deposition to support their claim. In fact, Plaintiffs at this point in their brief — from the paragraph beginning "[t]he tires involved . . ." on page 37 to the end of the paragraph beginning "[t]he problem summary showed . . ." on page 38 — make one assertion after another, *without citing any page of Robinson's transcript* or anything else in the record besides the Problem Summary memo itself (Defs. R.E. 32).[10] This Court should disregard these assertions and any other assertion in Plaintiffs' brief for which there is no record evidence. *McDerment*, 748 So. 2d at 120.

Despite their blanket citation to over 200 pages of excerpts (Plfs. at 33), the portion which actually consists of excerpts from Robinson's deposition in the *Garcia* case (the only deposition read into evidence, in part) is only R.6034-85. If this Court will peruse those excerpts, ignoring Plaintiffs' misleading headers, then the Court will see that Robinson discusses Load Range E tires principally, with occasional mentions of tread-separation issues in Load Range C and D tires — *none of which are passenger-car tires*.

Even where Plaintiffs present a portion as being relevant to passenger tires, as at R.6054 — "Robinson mentions testing passenger tires as part of the tread throw team investigation" — the reality in the excerpt itself is very different; at R.6054, for example, Robinson is noting that "the normal passenger [tire] construction" was referred to in studying how best to insert an overlay in a light-truck tire, which is not the same as "testing passenger tires."

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[10]They do cite to the trial court's summary of what it thought Robinson said (T.470-72, 596-97), but wisely do not try to find any support in the record itself for the trial court's apprehension of the facts.

But enough of that. If Plaintiffs cannot be bothered to cite to a single specific page from Robinson's deposition to support their claim that it proved anything about passenger car tires in general, let alone about the Kelly Charger SR tire in the present case, then Defendants — much less this Court — cannot be expected to do Plaintiffs' work for them:

> This Court is not obligated to scour the record on appeal from front to back in an attempt to discover whether there may, in actuality, be facts to support legal arguments made in a party's brief. **It is, rather, the duty of the litigant to cite the Court to specific places in the record** . . . .

Rowlett v. State, 791 So. 2d 319, 324 (Miss. Ct. App. 2001) (McMillin, C.J.) (emphasis added).

The bottom line is this: *nowhere did Beale Robinson testify to performing or knowing of any investigations into tread-throw problems specifically in passenger car tires, and certainly not in Kelly Charger SR tires.* That is why his deposition was not relevant to the present case: as shown in what may be tiresome detail in our previous brief (Defs. at 23-26), light-truck tires are not substantially similar to passenger car tires.

Likewise, despite Plaintiffs' astonishing claim that the Problem Summary memo addressed "passenger automobile and light truck tires," Plfs. at 38, we have already shown by close reading and quotation (Defs. at 27-28) that the Problem Summary memo page admitted into evidence does not refer to *any* passenger car tire *whatsoever*. Every tire that it mentions is an "LT" tire, "light truck."

Plaintiffs' factual claims in their brief are simply not to be trusted without this Court's examining the record itself. This becomes particularly embarrassing for Plaintiffs at page 38, where they attempt to defend the admission into evidence of the Problem Summary memo (Defs. R.E. 32) by pretending that it says what it plainly does not:

- Plaintiffs claim that the Kelly Charger tire in this case was a "high performance" tire (which it was not, T.703-04), and assert that the Problem Summary memo addressed that type of tire. Nowhere do the words "high performance" even appear in the Problem Summary memo. If any of these tires were "high performance," they were high-performance *light truck* tires.
- "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": nowhere does anything about cost appear on the page, and nowhere does the Problem Summary memo say that a nylon overlay added to *any* tire (let alone a passenger tire) "would prevent" a tread separation.
- "Goodyear knew that it had a problem with tread separations in its tires which rendered them defective": again, "in its tires" does not include passenger car tires, and nowhere does the Problem Summary memo identify any defect. Rather, as Robinson's deposition demonstrates, Goodyear knew it had more accidents than usual in its light-truck tires, and was trying to find out why that was so and what it could do about it. That does not even prove liability as to light-truck tires, let alone passenger car tires like the one in the present case.

As the Problem Summary makes clear, the great majority (85%) of the examined claims involved either the LT235/85R16 or its cousin the LT245/75R16. The passenger car tire in the present case was a P245/50R165, not only a different type of tire (passenger vs. light-truck), but a different size (as the above measurements show) that could not have been made out of the same mold as the light-truck tires that were studied by Goodyear. The lack of any substantial similarity could not be more clear.

The record evidence is undisputed that light-truck tires, like those identified in the Problem Summary Memo, are not substantially similar to the Kelly Charger SR passenger tire in this case. They have substantial differences in vehicle applications, load-carrying capacity, and design specifications. They are created from different molds, out of different materials. They are put together differently and must meet different federal regulatory standards. T.666, R.E.28; R.1989-91, R.E.10 (Shelton affidavit).

Plaintiffs misstate the law when they attempt to dismiss this Court's holding in *Forbes v. General Motors Corp.*, 935 So. 2d 869 (Miss. 2006) as "merely *dicta*" and as requiring substantial similarity only in "accidents," not "products." Plfs. at 36-37. This Court plainly stated, in ruling that the proffered evidence was not "carefully qualified," that "both of those cars are a different make and model." *Forbes*, 935 So. 2d at 881. As the other cases Defendants cited (Defs. at 24-25) make equally clear, *evidence regarding substantially different tires is routinely excluded by the courts* in product-liability cases, even where the tires are for similar classes of vehicle (even one SUV tire vs. another SUV tire, for example, as we saw in the *Barcenas* case discussed at I.A.1, above).

All the moreso, then, when the subject tire is a passenger tire and Plaintiffs seek to confuse the case with evidence pertaining only to totally different light-truck tires. With no negative history on the Kelly Charger SR tire on Kirby's vehicle, and faced with having to try a drunk-driving/excessive-speed case, Plaintiffs sought, *and were improperly allowed*, to inject into this case tires that were totally different Load Range E, light-truck tires, and accidents involving *those* tires.

Nothing in Robinson's deposition or the Problem Summary memo provided any assistance to the jury in evaluating Plaintiffs' claims about the passenger car tire at issue in this

case, and neither should have been admitted into evidence. It was reversible error for the trial court to allow the jury to hear this misleading and extremely prejudicial evidence.

C. The Prejudicial Effect of the Irrelevant Testimony Was Obvious, So That It Was Reversible Error to Admit It into Evidence.

Plaintiffs coyly pretend that the evidence they fought so hard to place before the jury, Robinson's deposition and the Problem Summary memo, was not prejudicial.

In fact, as a result of the trial court's rulings, Plaintiffs were allowed to bombard the jury with problems of unrelated, dissimilar tires and accidents involving such tires, and then to suggest that Goodyear therefore had similar problems with the Kelly Charger SR tire, when that was not the case and was not a permissible inference from substantially *dis*similar tires.

However, this Court already has before it the improper statements by Plaintiffs' counsel in this case, as described at issue VI of Defendants' initial brief. Plaintiffs' counsel accused Goodyear of "condemning people to death" by selling them tires it supposedly knew were unsafe because of the studies described in the Robinson deposition and the Problem Summary memo. Those were the *only* evidence before the jury even remotely relevant to such a claim, and while that claim would still have been baseless if this case were about a light-truck tire, it was pure fantasy where, as in the present case, a passenger tire was at issue. If being falsely accused of "condemning people to death" is not prejudicial, then Defendants don't know what prejudice is.

As we've already shown, Defs. at 27, it was unduly prejudicial to give the jury a "Problem Summary" that refers to one light-truck tire as "WORST OFFENDER" and notes "SIMILAR PROBLEMS OBSERVED IN KELLY TIRES," where none of the tires in question was a passenger car tire of any kind, much less the specific Kelly Charger tire involved in the present case.

This Court will observe that Plaintiffs misstate the law on reversible error as regards the improper admission of evidence. We are told that "an alleged error related to the admission or exclusion of evidence must adversely affect a substantial right of a party." Plfs. at 41. Fortunately, Plaintiffs correct themselves in their next sentence, which is a quotation from this Court stating that reversible error hinges upon "prejudice and harm *or* adversely affect[ing] a substantial right of a party." Plfs. at 41 (quoting *Terrain Enters., Inc. v. Mockbee*, 654 So. 2d 1122, 1131 (Miss. 1995)) (emphasis added). Thus, showing prejudice and harm suffices for reversing the trial court, regardless of any "substantial right."

In fact, the admission of evidence of accidents which are "not substantially similar" to the case at bar, has been held by this Court to be *prejudicial in and of itself*:

> Because the Hawkins accident was not substantially similar to the case sub judice, the trial judge erred in allowing such evidence, **and as such, the evidence "result[ed] in harm and prejudice** or adversely affect[ed] a substantial right of [the defendant]."

Irby v. Travis, 935 So. 2d 884, 894 (Miss. 2006) (quoting *Miss. Dep't of Transp. v. Cargile*, 847 So. 2d 258, 263 (Miss. 2003)) (emphasis added).

We would add that the fact that the trial court said that the Beale Robinson deposition was not a "smoking gun" does not demonstrate any absence of undue prejudice. It was unduly prejudicial for the jury to begin the trial by hearing deposition testimony from a different case, involving light-truck tires, that nowhere said anything about passenger car tires in general or the Kelly Charger passenger car tire in particular. Whatever smoke the trial court may not have perceived, the jury may well have concluded that "where there's smoke, there's fire" — if the Robinson deposition did not tend to prove anything against Defendants, then why were Plaintiffs leading off with it?

Without citation, Plaintiffs allege that the trial court did not err in refusing to withdraw the Problem Summary memo from the jury, "because it is relevant to defects in Plaintiffs' express warranty claims." Plfs. at 39. Plaintiffs do not explain this mysterious relevance, or just what "express warranty claims" they have in mind, but given the exclusive focus of the memo on light-truck tires, there obviously is no such relevance.

Finally, we note that Plaintiffs nowhere rebut the argument that Robinson's deposition should not have been read into evidence because, as it was given in a different case involving different tires, *Defendants did not have the opportunity to cross-examine Robinson* as regards the relevance of his testimony (if any) to the present case.

Nor do Plaintiffs rebut the objection by Big 10 that, not having even been a party to the *Garcia* case, it was *especially* prejudiced by its inability to cross-examine Robinson.

Irrelevant evidence about alleged defects in completely different tires is precisely the kind of evidence meant to be excluded under the "substantial similarity" rule, because of the obvious risk of prejudice. The trial court erred in allowing the Robinson deposition and the Problem Summary memo into evidence, and this Court should reverse the jury verdict and remand for a new trial.

IV. The Trial Court Erred in Misapplying Miss. Code Ann. § 85-5-7.

As usual with Plaintiffs' strings of citations to the record, their claim that Defendants "did not want a special interrogatory form" for the verdict, Plfs. at 43, is not borne out by the nine pages they cite. At T.1554, cited by Plaintiffs, the trial court actually said "the special interrogatories set out by Goodyear will not be given as it's stated." Many of the pages cited do not even include any words from Defendants' counsel at all.

In any event, as Defendants showed in their initial brief (Defs. at 32), Defendants' submission of a special verdict form was sufficient to preserve the issue of its denial on appeal. Plaintiffs attempt to argue that Defendants somehow waived the issue by eventually acquiescing in the verdict form arrived at by the trial court, but that makes no sense: the error was preserved by the refusal, and Defendants could scarcely go on to sulk by refusing to cooperate in the creation of *some* verdict form. Continuing to object to every verdict form would have been the "redundancy and nonsense" this Court frowns upon. *Carmichael v. Agur Realty Co.*, 574 So. 2d 603, 612 (Miss. 1990).

Plaintiffs' blanket citation (no pinpointed page) to *DeMyers v. DeMyers*, 742 So. 2d 1157 (Miss. 1999), is not on point here, as that holding referred to a party's objection to evidence that it had introduced itself. *Id.* at 1160. That is not comparable to Defendants' proposing a special verdict form and having it rejected by the trial court.

Regardless of whether juror Russell's affidavit is admissible or not, the fact remains that Miss. Code Ann. § 85-5-7 is mandatory, not optional, and that the faulty instructions used by the trial court failed to allow the jury to assess any fault against Kirby for the damages incurred by Strickland and Odom. That was reversible error.

Plaintiffs' suggestion (at 47) that a reasonable jury could have found Kirby not to be at fault — a minor with a .25 BAC, driving 92 m.p.h. on a country highway at 3 a.m. — is simply laughable. The two and a half pages of single-spaced quotations from Plaintiffs' accident reconstructionist, Plfs. at 48-50, are interesting insofar as they cast doubts on whether any reasonable jury could have found him credible, but they do not seriously rebut the common-sense notion that a sober person driving under the speed limit would have had a better prospect of controlling his car, whether the chunking and ultimate tread separation were "catastrophic" as

Ochs professed to find in the present case, or "more benign," as it appears a chunking-style tread separation was in Ochs's previous testimony for different employers (see issue I.A.1 above).

Regardless, whether or not the jury wanted to assess fault against Kirby for the injuries incurred by Strickland and Odom, they did not have the opportunity to do so, due to the error of the trial court. This Court should reverse and remand for a new trial.

V. Failure to Disclose the Jury Foreperson's Biases Was Reversible Error.

Two subissues arise from Plaintiffs' brief: the Motion Relative to *Voir Dire*, and the concealment of information which would have allowed Ms. King to be stricken for cause.

A. The Motion Relative to Voir Dire *Was Indeed Brought, and Is Anyway Not Essential to the Main Issue.*

Plaintiffs claim that the Motion Relative to *Voir Dire* was untimely filed and that Defendants did not bring it for hearing. Plfs. at 53. Plaintiffs are not correct about the trial court's disposition of it — or rather, non-disposition. Defendants expressly brought on their motion at the October 13, 2007 hearing. T.123. The trial court simply did not address it.

As for the date issue, Plaintiffs err (at 53 n.10) in citing to a "May 8, 2006" scheduling order, which does not exist; the order they cite, R.1429, is the September 25, 2006 "Order Setting Pre-Trial Motions," which merely requires that "any and all pre-trial motions" must "be set for hearing on Friday, October 13, 2006." This order superseded any general requirement that motions be served in advance.

Regardless, however, while granting the motion would have prevented the error cited under this issue, Defendants' argument does not depend upon the Motion's having been argued or granted.

B. King and Counsel Withheld Facts That Would Have Allowed a Strike for Cause.

We cited the controlling law for this issue in Defendants' initial brief:

> Following a jury's verdict, where a party shows that a juror **withheld substantial information or misrepresented material facts**, and where a full and complete response would have provided a **valid basis for challenge for cause, the trial court must grant a new trial, and failing that, we must reverse on appeal. We presume prejudice**.

T.K. Stanley, Inc. v. Cason, 614 So. 2d 942, 949 (Miss. 1992) (quoting *Myers v. State*, 565 So. 2d 554, 558 (Miss. 1990)) (emphasis added) (reversing for new trial).

Plaintiffs have asserted that *all* counsel for Defendants were present *throughout* the *Braddy* trial's *voir dire*. While counsel for Defendants have a different recollection, this dispute evidently goes beyond what the record on appeal can resolve.

What is *not* in dispute is that Plaintiffs failed to disclose that Mr. Kitchens' son Dan, present at trial as counsel for Plaintiffs, served as a pallbearer at the funeral of juror King's son, who perished in an automobile accident. Nothing in the *Braddy* proceeding revealed this.

On that crucial issue, Plaintiffs offer excuses as to why it was supposedly unimportant. These excuses are squeezed into their single-spaced recitations at pages 54-56 of their brief. (Briefs to this Court are to have "double spacing between each line of text, excluding quotations and footnotes." M.R.A.P. 32(a).)

Whatever retrospective rationalizations Plaintiffs may offer, however, the important point remains that *Defendants* did not have those facts before them at *voir dire*, and Defendants should not have had to rely on *Plaintiffs'* unilateral judgment as to whether those facts should have been available to Defendants. For instance, Dan Kitchens stated at the post-trial hearing that he "does not think that Mrs. King knows that he served as a pallbearer." Plfs. at 56. Had the issue been

properly disclosed to Defendants, their counsel could have *asked* Ms. King, rather than having to rely on what Dan Kitchens "thinks" she does or doesn't remember. But Defendants had no such opportunity, because their Motion Relative to *Voir Dire* was not granted, and because Ms. King and Plaintiffs' counsel remained silent about this connection between them.

Dan Kitchens' role in the funeral linked him, and by association, Plaintiffs and their counsel, to a tragic event that continued to influence Ms. King up to the trial of the present case. The extent of that influence was shown in Defendants' initial brief, and in this additional quotation from the *voir dire* in the *Braddy* case, in which Mr. Kitchens represented a driver accused of DUI in a fatal accident:

> Q. . . . Now, is there **anything about the nature of this case** in that it involves an allegation of drinking intoxicating liquors in an automobile accident and a death of a person **that you just couldn't sit on this particular case?** You say, judge, I can sit on another case, but this particular case because of some background, something that happened in your past or some other reason, I just can't sit on that kind of case? Anything about the nature of this case? What juror is that now?
>
> A. **Dorothy King.**
>
> Q. Dorothy King. Okay. Okay. **Something about the nature of something in the past you can't sit on this type of case?**
>
> A. My youngest son was killed 10 years ago.

R.7085 (emphasis added). The *Braddy* panel was asked whether anything about the case's involving a DUI accident and a death — both of which were elements in the *Kirby* case — made it such that a juror "just can't sit on that kind of case," and Ms. King was the first to respond. In other words, she thought that her son's death made her someone who "just can't sit on that kind of case." (None of which she found it necessary to bring up in the present case.)

Plaintiffs admit that "Mrs. King, and all the respective jurors, were asked repeatedly if there was any reason whatsoever why she could not be impartial and fair to all parties in this

matter." Plfs. at 59. Ms. King found such a reason in *Braddy*, but — on substantively identical facts — she suddenly found no such reason in *Kirby*.

Whether or not Dan Kitchens' having helped carry the body of Ms. King's dead son at his funeral was a nuance that seemed unimportant to counsel for Plaintiffs, it was obviously something that Defendants were entitled to know about in evaluating Ms. King, and on which Ms. King and Plaintiffs remained silent.

There is no need for Defendants to show prejudice from Ms. King's sitting on the jury. This Court has stated: "we presume prejudice." *Cason*, 614 So. 2d at 949. This Court should reverse and remand for a new trial.

VI. Plaintiffs Made Improper and Prejudicial Remarks, Inflaming the Jury.

Plaintiffs claim that Defendants did not point out any improper remarks by counsel for Plaintiffs during closing arguments, but that is not the case. Defs. at 38 (quoting T.1676, "It is not proper for Goodyear to tell you they can condemn people to death."). Nor do Plaintiffs address the gravamen of Defendants' argument, i.e., that allegations which are relevant only to punitive damages are improper in the liability phase of the trial.

Remarkably, Plaintiffs try to confuse this Court as to whether their inflammatory comments had any basis in fact:

> 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** [sic] 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.

Plfs. at 65 (emphasis added). The Robinson deposition contained no such evidence regarding passenger car tires, as Plaintiffs' own excerpt (at R.6041-42) demonstrates:

A. Part of our investigation of our team was to look at the design standards for both Europe and Latin America and to compare those with the design standards we had for similar tires in the U.S.

. . . .

Q. And when was that inquiry made? When did people on the team start looking into how are other Goodyear entities around the world **designing Load Range E tires**?

A. My knowledge of it would be in that time frame. Certainly there were other people prior to that who had the **light truck responsibility** that probably had that information.

Q. And what was discovered when the inquiry was made to the question what are Goodyear plants around the world doing with regard to design of **Load Range E tires**?

A. There were some differences. [Goes on to describe harsher roads and higher speed limits outside the U.S.]

Q. And is one of the differences the fact that they were using nylon cap plies **on Load Range E tires** in Europe, Asia and Latin America?

A. That is one of the differences.

(emphasis added). Nowhere did Robinson discuss foreign-made tires other than light-truck tires. Plaintiffs' claim, therefore, that Robinson addressed "tires of this class and category," is simply false — and Plaintiffs knew it when they said it at trial. Apparently, they do not expect this Court to examine the record, simply to trust their brief.

As for the "tread throw problem," we have likewise addressed that in detail by now: the problems that Robinson and Goodyear were investigating were in Load Range C, D, and E tires, none of which are passenger-car tires. Therefore, it was not at all "relevant" to any claims by Plaintiffs concerning a passenger-car tire. Rather, it was a deliberate effort to inflame and prejudice the jury against Goodyear.

Finally, many of the inflammatory remarks, including all of those discussed above, were utterly irrelevant to the case before the jury, because they centered on Plaintiffs' design-defect theory, on which the trial court had already granted a directed verdict. Thus, they were not only prejudicial, but they were also probative of nothing.

Rehashing alleged discovery abuses with the jury present, as Plaintiffs did repeatedly, is completely inappropriate and can have no purpose other than to inflame and prejudice, where the trial court has not ruled that any such abuses actually occurred.

This Court has been increasingly alert to the need for a firewall between allegations pertaining strictly to liability and those pertaining strictly to punitive damages. Attacks on the character and conscience of Defendants were not remotely relevant to the proceedings at trial, and were admissible, if at all, only had the case gone on to a consideration of punitive damages, which Plaintiffs expressly waived after the jury verdict. This Court should reverse and remand for a new trial where Defendants will be tried on the facts.

VII. Cumulative Error Justifies a New Trial.

Plaintiffs rely upon *McFee v. State*, 511 So. 2d 130 (Miss. 1987), which stated that "[a]s there was no reversible error in any part, so there is no reversible error to the whole." *Id.* at 136. This was not, however, a statement that the lack of reversible error in any part meant that no reversible error could be found cumulatively. This Court clarified *McFee* and other cases:

> What we wish to clarify here today is that upon appellate review of cases in which we find harmless error or any error which is not specifically found to be reversible in and of itself, we shall have the discretion to determine, on a case-by-case basis, as to whether such error or errors, although not reversible when standing alone, may when considered cumulatively require reversal because of the resulting cumulative prejudicial effect.

Byrom v. State, 863 So. 2d 836, 847 (Miss. 2003). The present brief and Defendants' initial brief together provide ample evidence of errors which Defendants believe to be cause for reversal, and which even if not singly, together provide this Court with ample justification for reversal and remand for a new trial.

VIII. A Remittitur Should Have Been Granted.

Defendants stand by their arguments in their initial brief. The record is clear that the exorbitant damages awarded, particularly to Kirby and Odom, met the standard for remittitur. Kirby was not entitled to hedonic damages. Odom's alleged proof of future damages was too speculative to support any award, let alone *$1.75 million*. That award, to a young man who can work a full-time job, "shocks the conscience" so that a remittitur (failing reversal) is proper. *Cmty. Bank, Ellisville v. Courtney*, 884 So. 2d 767, 776 (Miss. 2004).

RESPONSE BRIEF ON CROSS-APPEAL

STATEMENT OF THE ISSUES

IX. Whether Plaintiffs' Challenge to the Directed Verdicts Should Be Stricken.

X. Whether Plaintiffs Presented Insufficient Evidence to Support Any Breach of Warranty of Fitness for a Particular Purpose.

XI. Whether Plaintiffs Failed to Present Sufficient Evidence of Any Breach of the Implied Warranty of Merchantability.

XII. Whether Plaintiffs Failed to Make a Case of Design Defect.

XIII. Whether the Trial Court Correctly Denied Plaintiffs' Voluminous and Meritless Motions to Compel.

STATEMENT OF THE CASE

Errors in the Plaintiffs' statement of the case have already been addressed in the course of Defendants' reply argument above, inasmuch as those errors are relied upon by Plaintiffs in their argument, and Defendants follow the same course below — it would be needlessly tedious to address every such error in their statement of facts, and as the foregoing portion of this brief demonstrates, any averment by Plaintiffs must be checked against the record.

SUMMARY OF THE RESPONSE ARGUMENT ON CROSS-APPEAL

Plaintiffs argue three issues on cross-appeal, challenging the trial court's rulings on their implied-warranty claims, their design-defect claim, and their contention that Defendants went unpunished for vague but dire discovery violations. All three issues lack merit. Moreover, their challenges to the directed verdicts are not properly before this Court at all.

Plaintiffs' notice of cross-appeal did not raise the directed verdicts granted by the trial court. Thirty-eight days late, Plaintiffs attempted to appeal those verdicts in an "amended" notice. An amended notice may add for appeal any rulings of the trial court issued *after* the initial notice was filed, but it may not go back and appeal rulings that were issued months before the original notice was filed. Therefore, this Court does not even have jurisdiction over Plaintiffs' challenges to the directed verdicts against them, and this Court should dismiss the cross-appeal on that basis.

Under the rubric of implied warranty, Plaintiffs argue breaches of two different types of warranty: (1) fitness for a particular purpose, and (2) merchantability. We address these distinct claims at issues X and XI below. Because the tires were not sold for any *particular* purpose (as opposed to just plain driving), and because the buyer, Ostrander, expressly refused to rely on the seller's advice and expertise, Plaintiffs did not offer sufficient evidence on that claim for it to go to the jury. As for the implied warranty of merchantability, because the tires were not sold for the "ordinary purpose" of high-performance use, and also because Ostrander abused the tires, Plaintiffs failed to show any breach of that warranty; they also failed to show any particular defect in the tires, as we've already seen at issue I above in the direct appeal.

As for the alleged design defect, Plaintiffs are alleging a failure of the S-rated tire to perform for an alleged purpose, namely "high performance" use, that Defendants never built or sold the tire to perform. Ostrander was told that his Camaro should have high-performance tires, and he refused to pay the higher price for those tires. Regardless, Plaintiffs failed to show that the tires failed to perform properly when they left Defendants' custody, which is a required element under § 11-1-63(f), and more importantly, they failed to show that their nylon overlay was a feasible design alternative, given the absence of any evidence about the performance of

nylon overlays in passenger tires, and given the undisputed evidence that nylon overlays might correct some problems only to give rise to others. Thus, Plaintiffs did not prove that their design alternative was *feasible* as that term is used in Mississippi law, and the trial court properly declined to allow that claim to go to the jury.

Finally, Plaintiffs make a halfhearted swipe at repeating their perennial complaints of alleged "discovery violations," none of which was recognized as such by the trial court. This Court should defer to the trial court's rulings on this issue, as it normally does with regard to discovery issues — particularly since Plaintiffs cannot explain just how they were prejudiced or what relief the trial court supposedly failed to provide.

Therefore, none of Plaintiffs' issues on cross-appeal are well taken.

RESPONSE ARGUMENT ON CROSS-APPEAL

IX. Plaintiffs' Amended Notice of Cross-Appeal Should Be Stricken.

Plaintiffs' cross-appeal as to challenging the directed verdicts granted by the trial court should be stricken by this Court for failure to timely cross-appeal. Plaintiffs filed their original notice of cross-appeal on Monday, March 12, 2007. R.E. 26. This was the last possible day of the 14-day period allotted by M.R.A.P. 4(c), since Defendants' notice of appeal was filed on February 26. "Timely filing of a notice of appeal is jurisdictional." *Busby v. Anderson*, 978 So. 2d 637, 639 (Miss. 2008). This Court has a duty to acknowledge its own lack of jurisdiction due to an untimely notice of appeal (or for any other cause). *Michael v. Michael*, 650 So. 2d 469, 471 (Miss. 1995) (dismissing assignments of error due to untimely appeal). "There is no fudging on this rule." *Id.* at 473 (McRae, J., concurring in part & dissenting in part).

The notice filed by Plaintiffs admitted that "Plaintiffs believe they have a proper verdict and judgment free from error," R.7299. It complained of discovery allegedly not produced by Goodyear (see issue XIII, below), on which Plaintiffs blamed in advance any reversal of the trial court's judgment. Plaintiffs even confessed that they were "not certain if these issues rise to the level of a cross-appeal or whether they are solely defensive pleas." R.7300. Because this notice did not comply with M.R.A.P. 3(c) by specifically identifying a "judgment or order appealed from," Defendants moved on April 2, 2008, to strike the notice. R.7320.

On April 20, 2007, 38 days after their deadline to appeal had run, Plaintiffs filed an "Amended and Supplemental Joint Notice of Cross-Appeal." R.E. 27. This document, while repeating the original notice's statement that "Plaintiffs believe they have a proper verdict and judgment free from error," assigned as error the trial court's "sustaining Defendants' motion for directed verdict during the trial and giving a peremptory instruction to the jury which precluded Plaintiffs' claims, except for breach of warranty, from reaching the jury." R.7344. This assignment was not included in the original notice filed.

Defendants filed a reply memorandum in support of their original motion to strike. R.7354. This pleading acknowledged the amended notice's being filed and asked the trial court to strike it as well because it added a new issue after the time for appeal had expired. R.7355.

The trial court denied Defendants' motions to strike. R.7359.

To appeal a decision of the trial court, a party must file a timely notice that this decision is being appealed. Defendants do not believe that M.R.A.P. 4(c), which provides a 14-day time limit for cross-appeals, allows an "amendment" which changes the subject-matter of the appeal and names a new order or orders appealed from, except in those cases where the amendment is

intended to appeal an order issued after the initial notice of appeal, as in *Favre Property Management, LLC v. Cinque Bambini*, 863 So. 2d 1037, 1042 (Miss. Ct. App. 2004).

If there were no limit on when one could add issues, then presumably a party could "amend" the notice of appeal to add new orders appealed from, even after briefing in the case had begun — an absurd idea. The train must at some point leave the station, and that point is set by M.R.A.P. 4's time limits.

This rule would be in accord with the practice of other states' appellate courts. *See Rainbow Group, Ltd. v. Wagoner*, 219 S.W.3d 485, 492 (Tex. Ct. App. 2007) (amendment of notice may correct technical defect, but may not add or alter order appealed from); *State v. Grant*, 875 P.2d 986, 990 (Kan. Ct. App. 1994) ("appellant is bound by the issues raised in the notice of appeal and cannot amend this notice after the time for an appeal has run simply because counsel or the appellant conclude that the scope of the original notice is too narrow to reach additional appealable issues").

Therefore, Plaintiffs' challenges to the directed verdicts entered by the trial court were not timely filed and should not be heard by this Court. M.R.A.P. 2(a)(1) requires dismissal where notice is not timely filed. *Bank of Edwards v. Cassity Auto Sales, Inc.*, 599 So. 2d 579, 582 (Miss. 1992). "To find otherwise is to invite chaos to a system based on the orderly disposition of appeals. It should be strongly discouraged." *Grant*, 875 P.2d at 991.

X. Plaintiffs Presented Insufficient Evidence to Support Any Breach of Warranty of Fitness for a Particular Purpose.

Plaintiffs made no case for breach of warranty of fitness for a particular purpose under Miss. Code Ann. § 75-2-315, and the trial court correctly ruled against them on this issue.

In pertinent part, § 75-2-315 reads as follows:

> Except as otherwise provided in this section, where the 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.

(emphasis added). Plaintiffs' argument founders on the two portions we have emphasized: there was no "particular purpose," and there was no evidence that the seller "had reason to know" that the buyer relied on the seller's "skill or judgment" — on the contrary.

A. The Tires Were Not Used for Any "Particular Purpose."

Applying § 75-2-315 to a case where the plaintiff had purchased a car from the defendant, this Court held "that § 75-2-315 has no application" on such facts:

> There is no testimony that the plaintiff relied upon the seller's skill or judgment in selecting the car that he purchased from Royal. **Obviously, the purpose of the purchase from the authorized dealer was that of transportation.** Although it can be envisioned that an automobile could be purchased for a particular purpose such as racing, towing a large trailer, or other specialized use, where the ordinary purchaser would need the seller's skill or judgment in making a selection, this was not so in the present case.

Royal Lincoln-Mercury Sales, Inc. v. Wallace, 415 So. 2d 1024, 1027 (Miss. 1982) (emphasis added). In other words, "transportation" is not a sufficiently "particular" purpose to invoke § 75-2-315. Likewise, the tires bought by Ivan Ostrander were bought simply for "transportation." There is nothing in the record to suggest that Ostrander advised Big 10 that he intended to race the Camaro Z28, perform stunts with it, or use it for any "particular" purpose other than getting from point A to point B. Under *Wallace*, therefore, no warranty of fitness for any particular purpose was made.

Applying *Wallace*, the Northern District of Mississippi district court held that a "sport utility vehicle" did not in and of itself qualify as being bought for a "particular purpose" under Mississippi law. *Lee v. Gen. Motors Corp.*, 950 F. Supp. 170, 174 (N.D. Miss. 1996). We

submit that the district court's holding in *Lee* was a correct application of our law, and that the mere fact that the tires were bought for use on a Camaro sports car, without any indication of a particular purpose to which that car would be put, does not qualify as a "particular purpose" any more than did the "sport utility vehicle" in *Lee*.

Other jurisdictions agree with the application of the "ordinary purpose" rule to tires:

> Here, as Defendant points out, **Plaintiff did not use the tires for a non-ordinary purpose**. According to Plaintiff's original petition, **the tire was on his car and he was driving on it, as people customarily do**, when the accident happened. Therefore, the only documents before the court establish Plaintiff was **using the tire in its customary manner and for its ordinary purpose**.

McGown v. Bridgestone/Firestone, Inc., 2005 WL 2662572, at *4 (E.D. Tex. Oct. 18, 2005) (emphasis added). *Accord, Hauck v. Michelin N.Am., Inc.*, 343 F. Supp. 2d 976, 988 (D. Colo. 2004) ("Plaintiff alleges no special purpose for this tire other than for use as an automobile tire."); *Jones v. Marcus*, 457 S.E.2d 271, 272 (Ga. Ct. App. 1995) ("Knowledge by Jones that the tires were to be used on the truck is not knowledge of a 'particular purpose' ").

Therefore, there was no warranty of fitness for a particular purpose in this case, and the trial court's correct ruling to that effect should be affirmed.

B. There Was No Reliance Upon the Seller.

A separate basis for the trial court's ruling is that Plaintiffs failed to meet the essential element of the seller's having reason to know of any reliance by the purchaser upon the seller. "The warranty of fitness for a particular purpose *does not arise* unless there is reliance on the seller by the buyer, and the seller selects goods which are unfit for the particular purpose." *Moss v. Batesville Casket Co.*, 935 So. 2d 393, 399-400 (Miss. 2006) (citing *Garner v. S & S Livestock*

Dealers, Inc., 248 So. 2d 783, 785 (Miss. 1971)) (emphasis added). This language from *Moss* omits the "reason to know" element, which must also be satisfied.

The undisputed evidence showed that Big 10 attempted to sell Ostrander the tires specified for his car, and that Ostrander balked at paying so much.

> A. We talked about price mainly. I did explain to him, or **we talked about high performance versus a performance tire**; and the price of **tires that I priced him originally was a high performance tire**, a ZR tire. It would have had to have been, because I remember we talked about price, and it was almost twice the price of what he ended up paying for these.
> Q. The focus was on the price in the conversation; wasn't it, sir?
> A. That was **his** focus, yes, sir.
> Q. And that's what you talked to him about?
> A. We discussed a little bit the difference between the two, but **he flatly refused to pay for the higher performance tire**.
> . . . .
> A. . . . **I did give him two choices**. I gave him a choice of a high performance Z rated tire. He ended up — would not pay for that, **would not pay that much for a set of tires**. He told me how much money he had to spend, and then I showed him the S rated tire.

T.703-04, 734 (emphasis added). Big 10 told Ostrander the difference between a "high performance" tire and a "performance" tire, and Ostrander chose the latter because it cost less.

Where the purchaser explicitly *rejects* the advice and expertise of the seller, it would be a manifest injustice to hold the seller liable under Miss. Code Ann. § 75-2-315, which expressly requires that the buyer be "relying on the seller's skill or judgment to select or furnish suitable goods." The only record evidence on this issue showed that Ostrander based his purchase solely upon the consideration of price, not upon the advice of Big 10's agent. Certainly, having told Ostrander he should buy the Z-rated tire, Big 10 could have had no "reason to know" that Ostrander was relying upon its "skill or judgment" in buying the S-rated tire. Thus, the warranty issue alleged by Plaintiffs "does not arise."

C. The Alleged Breach Was Not the Proximate Cause of the Injury.

Finally, an argument which applies equally to both of Plaintiffs' implied-warranty claims (at issues X and XI) is that personal-injury suits based on these implied warranties, like those based on the "implied warranty of habitability" in other cases, are really negligence actions. *See Sweatt v. Murphy*, 733 So. 2d 207, 211-12 (Miss. 1999) (implied warranty of habitability). On that theory, the plaintiff "would still be required to show duty, breach, causation, and damages," and the defendant "would be entitled to raise the standard tort defenses, such as contributory negligence, unforeseeability or intervening cause." *Id.* (quoting *O'Cain v. Harvey Freeman & Sons, Inc.*, 603 So. 2d 824, 833 (Miss. 1991) (Sullivan, J., concurring)). The *Sweatt* Court reasoned that "[a]n action to recover for personal injuries resulting from housing defects which may constitute a breach of the implied warranty of habitability is clearly different from an action to recover, for example, the expenses of repairing the property," *id.* at 211, and the same logic applies to the present case — Plaintiffs did not sue for a new tire.

Goodyear raised proximate cause in its answer as an affirmative defense, R.150, and inasmuch as there was any reliance by Kirby on anyone, it was reliance on Howard-Wilson Chrysler Plymouth, an original defendant in this case, which purchased the Camaro from Ostrander with the tires that Ostrander had purchased from Big 10, and then sold the Camaro to Kirby with the same tires, apparently without any warning or counseling on any alleged incompatibility between S-rated tires and speeding down state highways at 3 o'clock in the morning while intoxicated. Howard-Wilson settled with Plaintiffs for half a million dollars, and Defendants submit that, were there any breach of warranty by Defendants (which Defendants by no means concede, for the reasons stated in this brief and in their initial brief), Howard-Wilson's own breaches were intervening and proximate causes which relieve Defendants of any liability.

For the above reasons, this Court should affirm the trial court on this issue.

XI. Plaintiffs Failed to Present Sufficient Evidence of Any Breach of the Implied Warranty of Merchantability.

Plaintiffs attempt to argue that the subject tires were not "fit for the ordinary purpose for which such goods are used" under Miss. Code Ann. § 75-2-314, and thus failed to meet the implied warranty of merchantability ("IWM"). Plfs. at 78. We are told that the purchaser could reasonably expect that the tires were "suitable as high-performance tires." Plfs. at 79. Yet, as shown at issue X above, Ostrander was offered high-performance Z tires by Big 10, and he expressly refused to buy them. There was no evidence to support any expectation by Ostrander that the tires were high-performance — on the contrary, no reasonable jury could have found any such expectation, because nothing in the record could support it.[11]

In any event, Ostrander did not use the tires for their "ordinary purpose" — though he did not tell Big 10 this. He abused the tires by spinning them out and similar misuse. Applying Mississippi law, the federal courts have held that "an improper use" of a product cannot qualify as use for an "ordinary purpose," and thus cannot qualify under § 75-2-314. *Global Truck & Equip. Co. v. Palmer Mach. Works, Inc.*, 628 So. 2d 641, 650 (N.D. Miss. 1986). This Court should hold likewise. *See also Steele v. Encore Mfg. Co.*, 579 N.W.2d 563, 569 (Neb. Ct. App. 1998) ("Misuse of a product is a defense to a breach of warranty claim."); *Scientific Components*

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[11]Also on the "performance tire" issue, Plaintiffs placed in the record some pages from the website of a Florida tire dealer, Gatto's, which include a description of the Kelly Charger SR. Leaving aside the dubious authority of a third-party retailer's descriptions, Gatto's describes the Kelly Charger SR as a "best-selling performance radial." R.2225. Gatto's does mention a "[n]ew high performance tread face" in that description, but (1) "tread face" ≠ "tire," and (2) as the fine print at the bottom left of R.2225 shows, the web page was printed out on September 17, 2006. A "new" tread face in 2006 certainly was not on the Kelly Charger tire at issue in the present case. In short, the Kelly Charger SR was a performance tire, not a high performance tire.

Corp. v. Sirenza Microdevices, Inc., 2006 WL 2524187, at *21 (E.D.N.Y. Aug. 30, 2006) (breach of IWM applies only "absent customer abuse").

The various claims tossed about by Plaintiffs in this section amount to rehashing the issue of manufacturing defect, already addressed at issue I above. As the UCC comment to § 75-2-314 says, "In an action based on breach of warranty, it is of course necessary to show *not only* the existence of the warranty *but [also] the fact that the warranty was broken* . . ." (emphasis added). Here, Plaintiffs must show that the tire was not fit for its ordinary purpose, and they cannot show this merely because the tire underwent a tread separation: as shown repeatedly at issue I of this brief and of Defendants' initial brief, the mere fact of a tread separation does not suffice by itself to prove the existence of a manufacturing defect in the tire, as opposed to some other fault (such as abuse) for which Defendants are not liable.

Therefore, despite Plaintiffs' claim to the contrary, if they are to prove breach of IWM, they must prove a manufacturing defect existed in the tire at the time it left the manufacturer, by direct or circumstantial evidence, and they have not done so. *See Russell v. Ford Motor Co.*, 960 So. 2d 495, 500 (Miss. Ct. App. 2006) (proof of defective component essential to breach of implied warranty); *Davis v. Ford Motor Co.*, 375 F. Supp. 2d 518, 523 (S.D. Miss. 2005) (same); *Farris v. Coleman Co.*, 121 F. Supp. 2d 1014, 1018 (N.D. Miss. 2000) (same). As we have already seen, Plaintiffs' own expert testified that the tread separations he identified were not present when the tires left the factory, and he agreed that abuse such as Ostrander's could produce those separations.

Moreover, the fact that the tires were driven 10,000 miles before any tire failure occurred, in and of itself, should suffice to frustrate any IWM cause of action. *See Carlton v. Goodyear*

Tire & Rubber Co., 413 F. Supp. 2d 583, 591 (M.D.N.C. 2005) (tires driven 2,000 miles not inferred to be defective when leaving manufacturer).

Therefore, the trial court was correct in refusing to let any breach of IWM go to the jury, and this Court should affirm that ruling.

XII. Plaintiffs Failed to Make a Case of Design Defect.

After several years of litigating the present case on theories of manufacturing defect and breach of warranty, and less than a month before October 26, 2006, the first day of trial, Plaintiffs "retooled" their case to present a new theory: the absence of a nylon overlay in the Kelly Charger SR tire was allegedly a design defect. Their tire expert's opinions, provided in July 2006 as part of his expert designation, *had made no mention of any such theory*, as Defendants pointed out at the hearing where Plaintiffs raised this new issue. T.179 (Oct. 13, 2006 hearing); T.265 (Oct. 24, 2006 hearing).[12] Plaintiffs' excuse for their lateness in adding this new theory was that they learned of the nylon overlay issue from the Beale Robinson deposition, T.274-75, but as this Court is well aware by now, Robinson's deposition said nothing about any need for nylon overlays on Kelly passenger car tires. The trial court nonetheless denied Defendants' motion in limine to exclude the nylon-overlay theory, on the grounds that the new claim was "still . . . in the realm of the claims that the tire was defective." T.279. (One defect is much like another, the trial court's reasoning seemed to go.)

That probably would have been reversible error right there, given the irrelevance of the nylon-overlay evidence as regards passenger car tires, and also given the lateness of the new

[12]As this Court will have already noted, the court reporter sometimes puts the wrong years on page headings — for instance, the "10-13-07" motions hearing transcript that was actually from 2006.

literally days before trial, with no opportunity to depose Plaintiffs' tire expert on his nylon-overlay theory. However, the trial court effectively cured this error when it granted a directed verdict on the design-defect issue, holding that Plaintiffs had presented insufficient evidence. T.1393-94.

Plaintiffs argue that the trial court's ruling should be reversed, and in so doing, they continue to misstate what the record actually shows. In fact, the record did not support any jury finding of design defect, so that the directed verdict was proper, for at least six reasons.

(1) Plaintiffs present their expert's supposed opinion that "the subject tire was defectively designed for use as a *high-performance* tire intended to replace a 'Z' speed rated tire," as it would have "require[d] the addition of a nylon overlay" or some other feature. Plfs. at 81 (emphasis added). That is what the alleged design defect is said to be.

Note, yet again, there is no citation to the record; once more, Plaintiffs' counsel are testifying in place of their expert. Halfway into page 82, we finally get a citation — "T. at 593-602" — which, if one takes a look, consists almost entirely of the trial court's colloquy with counsel, outside the presence of the jury! Only at the bottom of T.602 do we finally get to anything said by Ochs, who says nothing there in support of what Plaintiffs' counsel have been "testifying" about on pages 81 and 82 of their brief.

Regardless, the problem here has already been made clear from the discussion of Plaintiffs' implied-warranty claims above. There was no proof that Goodyear designed, or that Big 10 sold, the tire "as a high-performance tire intended to replace a 'Z' speed rated tire." There was no such evidence before the jury.[13] The tires at issue in this case were performance tires, not

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[13]This Court should note that **the patent entered into evidence**, over objection, as trial exhibit no. 2, is for an Eagle GT tire, **not the same tire** as the Kelly Charger tire at issue in this

high-performance. T.735-36. Big 10 tried to sell Ostrander Z-rated tires, and he just wouldn't pay that much, insisting instead on buying less expensive S-rated tires. *The tire cannot be held defectively designed for a purpose that Defendants did not intend it for*, any more than a pistol can be held defectively designed because the owner used it as a hammer.

(2) Plaintiffs repeat their claim that Goodyear produced codes for the subject tire's engineering specifications that Plaintiffs could not interpret. Plfs. at 82. However, as Defendants explained to the trial court, Goodyear provided a witness, Larry Shelton, who "explained in detail what these codes were" at his deposition. T.236. The trial court properly rejected Plaintiffs' longwinded theories of discovery violations, including their post-trial motion to that effect. T.1728.

(3) Once again, Plaintiffs misrepresent to this Court that on other continents, "tire companies are required by law to sell only tires using multiple nylon overlays." Plfs. at 82. They cite to R.6041-42, which we have already quoted at issue VI above: Robinson's testimony was that *light-truck* tires needed nylon overlays, and it is false to cite those pages for some undocumented theory that *all* tires sold in those regions, including passenger tires, were legally required to have nylon overlays.

(4) Plaintiffs claim that Robinson's deposition proves that "implementing multiple nylon overlays into their tire design, particularly high load-bearing and high speed tires, helped correct the [tread-separation] problem." Plfs. at 83 (citing R.6040-45). Leaving aside that Robinson nowhere says at those pages that nylon overlays corrected the problem, the fact remains again that Robinson neither found any tread-throw problem in passenger car tires, nor

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case. T.474-75. The Eagle GT, as exhibit 2 shows, is a "high performance" tire.

found that nylon overlays corrected any such problem. (He also says nothing at R.6040-45 about "high speed tires"; his only discussion of "speed" concerns the higher speeds at which Europeans operate their tires, which create excess wear. R.6042.)

Section 11-1-63(f), which sets forth what a plaintiff must prove in a design-defect case, requires proof by a preponderance of the evidence that

> **at the time the product left the control of the manufacturer or seller** . . .[t]he product failed to function as expected **and** there existed a feasible design alternative **that would have to a reasonable probability prevented the harm**. A feasible design alternative is a design that would have to a reasonable probability prevented the harm **without impairing the utility, usefulness, practicality or desirability of the product to users or consumers**.

(emphasis added). We've seen already that "at the time the product left the control" of Defendants, it did not "fail to function as expected." The tire performed well for 10,000 miles, and when it did undergo a tread separation, that came after abuse which inflicted damage that Plaintiffs' own expert admits was not present when the tire left the factory. Nothing in the record suggests that the abuse was present when Ostrander bought the tire from Big 10.

Thus, Plaintiffs fail to meet one required element of their proof, and their design claim fails on that basis. But it must also fail on the "feasible design alternative" issue.

If this Court will examine the relevant portion of Robinson's deposition, volume 2, pages 162-63 (trial exhibit A) (ex. C to this brief), it's clear that even so far as light trucks were concerned, nylon overlays had pros and cons:

> **One of the concerns we had about the addition of the ny — nylon overlay was wear balance**. It does change the footprint shape. It — it makes a tendency toward more rapid centerline wear, and you could get yourself into an adjustment situation where people are bringing back tires that have a smooth centerline and have four, five, six thirty-seconds [of an inch] left in the shoulder and think they're worn out. They may have still achieved the same ultimate mileage potential, but if they don't wear out evenly, the consumer is going to think they didn't get their — their full value. **So that was a big concern**.

> Um — and **particularly for me, coming from a passenger background**, where I'm used to working with **tires operating at lower inflation pressures.**
>
> Now, **what basically happens with the light truck is that at 80 psi operating pressure**, that sort of stretches the — the carcass and the shoulders and the footprint will flatten out with — with break-in and over time, so we did get some rapid wear complaints back, but not anywhere near what I was afraid we might with that change. That's why I say you have to design the tire for the construction that goes in it.

(emphasis added). Thus, we can see that nylon overlays created tread-wear problems, and that such problems were if anything likely to be more acute with passenger car tires that "operate at lower inflation pressures" than do light-truck tires. The higher inflation pressure possible in the larger light-truck tire (80 psi, say, compared to the typical 32 psi for a passenger car tire) helped mitigate this problem. But without any evidence of unusual numbers of tread-separations in passenger car tires (as opposed to the evidence about light-truck tires in the Problem Summary memo), and given the tread-wear problem at lower inflation pressures, there was no reason for Goodyear to think that the pros outweighed the cons.

The trial court correctly summarized Robinson's testimony regarding light-truck tires and nylon overlays, immediately after hearing it read into evidence: "*It was not a cure-all [for the] problem, and there was definitely some weighing and concern that went into this because by putting this nylon on, it created some other problems.*" T.471 (emphasis added).

The trial court was applying what this Court has recognized: that an alternative design must be *feasible*, which includes not "impairing the *utility, usefulness, practicality or desirability* of the product." *Williams v. Bennett*, 921 So. 2d 1269, 1274-75 (Miss. 2006) (quoting Miss. Code Ann. § 11-1-63(f) & citing cases) (emphasis added). Note the "or" in the italicized language: if the alternative design would impair *any one* of those attributes, then that alone suffices to defeat Plaintiffs' case.

The potential for tread-wear or "wear balance" issues "impairing the utility, usefulness, practicality or desirability" of the tire clearly existed, as shown by the Beale Robinson testimony quoted above; there was no testimony to the contrary. Nor did Plaintiffs' expert, Ochs, ever point to any research on nylon overlays in passenger car tires, by him or anyone else, that would contradict Robinson's findings or explain how they were not applicable to passenger car tires.

Therefore, Plaintiffs failed to meet their burden of proof on design defect.

(5) Plaintiffs would have it that the trial court granted Defendants a directed verdict on the design issue solely because Ochs admitted that the lack of a nylon overlay, "in and of itself," is not a design defect. Plfs. at 83 (quoting T.513). Note however that they do not cite to the trial court's actually saying that was why the directed verdict was granted. All that the trial court stated at the time was that "there is simply not sufficient evidence for this matter and this issue to go before the jury of design problem, design defect." R.1393.

Ochs did mention "possible design features" that would make a tire suitable for a *higher* speed rating, T.613, but as we've seen above, those are beside the point: they do not show that the tire was defectively designed *as an S-rated tire*, which is all that Defendants designed and/or marketed the tire to be. (For that matter, Ochs did not even testify that the absence of those "features" was a defect. T.613.) Claws, stripes, and fangs are possible design features which might make a horse suitable to be a tiger, but their absence does not prove that the horse was defectively designed as a horse.

(6) Finally, another basis for affirming the trial court's ruling, though not on the same grounds, is that Ochs's testimony should have been excluded under the *Daubert* and *McLemore* standards. *Miss. Dep't of Transp. v. McLemore*, 863 So. 2d 31, 35 (Miss. 2003) (adopting *Daubert/Kumho Tire* standard). In *Kumho Tire*, a tread-separation case, the proffered tire expert

gave no basis for determining that "other experts in the industry" used the same analysis, or that "any articles or papers . . . validated [the expert's] approach." *Kumho Tire*, 526 U.S. at 157. Although the expert in that case assured the trial court that "his method was accurate," the Supreme Court held that "nothing . . . requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *Id.* (quoting *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)).

Ochs never did any studies or published any articles regarding nylon overlays in passenger car tires. T.511. He cited no peer-reviewed literature to support his opinion regarding the design of the tire. T.518. His testimony as to design defect involving an alleged failure to use an overlay had been excluded by another court for lack of any qualifications on his part. T.520. Nor did he rely on any studies or conduct any testing for his theory that the accident arose from the Camaro's having S-rated tires rather than Z-rated tires. T.525-26. His opinion as to the two tires arose merely from reading their speed ratings off the sides of the tires. T.533-34. In view of these deficiencies, the trial court erred in overruling Defendants' objections to Ochs's testimony on these alleged issues, which was inadmissible under *McLemore*. T.546-47, 623.

In short, despite being allowed to bring in irrelevant evidence about overlays in light-truck tires, and despite being allowed (improperly) to add a new theory of their case a week before trial, Plaintiffs failed to show that the absence of nylon overlays, or of any other design feature, in the subject passenger car tire (or in any passenger car tire), is a design defect; failed to show that it would result in an overall safer product; failed to show that the tire "failed to function as expected" when it left the control of Defendants; and failed to show that nylon overlays were a feasible alternative design. They failed to offer evidence that any reasonable jury

could find met their burden of proof. The trial court correctly did not allow this claim to go to the jury, and this Court should affirm that ruling.

XIII. The Trial Court Correctly Denied Plaintiffs' Voluminous and Meritless Motions to Compel.

The record in this appeal is swelled beyond reason by Plaintiffs' incorporation of their motions to compel discovery, just one of which extends from record volume 15 to record volume 42. Despite, or perhaps because of, dumping that much paper on the trial court, Plaintiffs failed to carry their motions, for reasons already discussed in part above. The "illegible codes" were explained by Goodyear's witness Larry Shelton. The "prior history" on the Kelly Charger SR tire was not produced because there was no prior history of comparable accidents or defects on that tire. R.2077-78 (Stroble affidavit); R.1974-75 (Shelton depo.).

Faced with this lack of any incriminating evidence on the subject tire, Plaintiffs sought to go fishing for evidence about completely different tires, including light-truck tires, in an effort to "retool" their case (as the trial court put it, T.83). Defendants resisted those requests as seeking irrelevant material not subject to discovery. Without ever expressly disagreeing with Defendants, the hard-pressed trial court finally wore down and allowed Plaintiffs access to some depositions of Goodyear experts in other cases involving other tires. As we saw above, that netted Plaintiffs the Beale Robinson deposition, which was read into the record, prejudiced the jury against Defendants, but failed to support Plaintiffs' design-defect claim. *Nowhere did the trial court issue an order requiring Defendants to produce anything which Defendants then failed to produce.*

The trial court, as Plaintiffs were eager to point out at page 35 of their brief, is vested by this Court with a great deal of discretion in the handling of discovery matters. As this Court

recently reminded the Bar, "it is our trial judges, and not this Court, which need to resolve these pre-trial issues. Our trial judges are charged with this responsibility and are in a much better position to resolve all pre-trial issues, including discovery, and it is not, and should not, be part of our mandated appellate review, to resolve such issues." *Miss. Farm Bur. Mut. Ins. Co. v. Parker*, 921 So. 2d 260, 265 (Miss. 2005).

The trial court had the opportunity, the duty, and the sound discretion to wade through Plaintiffs' arguments, many of which amounted to the baseless allegations that Defendants have repeatedly refuted above. Down to Plaintiffs' post-trial renewal of their motion for sanctions against Defendants, the trial court denied Plaintiffs their unsupported and unmerited requests for actual and punitive relief.

With one exception, Plaintiffs do not actually provide any example in their brief of an alleged discovery violation, and should thus be taken as having waived the issue with respect to the unnamed allegations. Defendants are not obligated to do Plaintiffs' work for them and resurrect those allegations from the record of pleadings in this case, and neither is this Court. (If this Court is inclined to allow Plaintiffs to incorporate their discovery motions as an effective part of their brief, then Defendants ask the same consideration as regards their responses to those motions.)

The one example that Plaintiffs do cite, is the oft-addressed-above issue of the supposedly incomprehensible "retrieval codes" for Goodyear tires. Plfs. at 84. Goodyear provided a witness who could explain the codes to Plaintiffs. T.236.

Regardless, while citing authority for the proposition that evidence may be barred at trial which has not been properly disclosed to a pertinent discovery request, Plfs. at 85, Plaintiffs nowhere tell this Court just what evidence *introduced at trial* they contend should have been

CONCLUSION

For all the reasons stated above and in the Brief for Appellants, Defendants ask that this Court *reverse* the verdict of the trial court and *render* a verdict for Defendants; or, in the alternative, reverse the verdict of the trial court and remand for a new trial; or, in the alternative, reverse the award of damages by the trial court and remand for a remittitur.

As regards the cross-appeal by Plaintiffs, Defendants ask that this Court dismiss that cross-appeal as untimely; or, in the alternative, affirm the rulings of the trial court on those issues.

Respectfully submitted, this the ***11th*** day of July, 2008.

THE GOODYEAR TIRE & RUBBER COMPANY
BIG 10 TIRE COMPANY

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TABLE OF EXHIBITS TO BRIEF

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