IN THE SUPREME COURT OF MISSISSIPPI

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

V. — **NO. 2007-CA-00325**

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

APPEAL FROM THE DECISION OF THE COPIAH CIRCUIT COURT

BRIEF FOR APPELLANTS

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IN THE SUPREME COURT OF MISSISSIPPI

No. 2007-CA-00325

NICHOLAS L. KIRBY, JR., ET AL **PLAINTIFFS**

VS. **CAUSE NO.: 2002-0619**

BIG 10 TIRE CO., INC., THE GOODYEAR TIRE & RUBBER COMPANY **DEFENDANTS**

And

RILEY STRICKLAND **PLAINTIFF - INTERVENER**

Consolidated With

SIDNEY ODOM **PLAINTIFF**

VS. **CAUSE NO. :2002 - 0620**

BIG 10 TIRE CO., INC., THE GOODYEAR TIRE & RUBBER COMPANY **DEFENDANTS**

NOTICE OF INTERESTED PERSONS

COMES NOW, Defendant, Big 10 Tire Company, and files this its Notice of Interested Persons, and would state unto this Honorable Court as follows:

1.

On December 27, 2007, Big 10 Tire Company ("Big 10") and Goodyear Tire and Rubber Company ("Goodyear") filed their Brief of Appellants.

2.

The Defendants inadvertently failed to notify the Court that Justice Michael K. Randolph was a member of Bryan Nelson P.A., the law firm representing Big 10, at the time this lawsuit was filed.

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THIS, the 29th day of January, A.D. 2008.

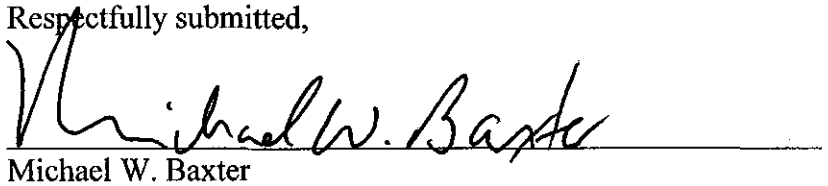
OF COUNSEL

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons or entities have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualifications or recusal.

1. The Goodyear Tire & Rubber Company (appellant).
2. Michael W. Baxter, Barry D. Hassell, and Andy Lowry of Copeland, Cook, Taylor & Bush, P.A., counsel for The Goodyear Tire & Rubber Company and Big 10 Tire Company.
3. Big 10 Tire Company (appellant).
4. Rick Norton and Mark Norton, counsel for Big 10 Tire Company.
5. Nicholas L. Kirby, Jr., Shirley S. Kirby, and Nicholas L. Kirby, III (plaintiffs).
6. James W. Kitchens and Margaret P. Ellis, Kitchens and Ellis, counsel for the Kirby plaintiffs.
7. Riley D. Strickland (plaintiff).
8. John W. Christopher, Christopher & Ellis, counsel for Riley D. Strickland.
9. Sidney Odom (plaintiff).
10. Michael S. Allred, The Allred Law Firm, counsel for Sidney Odom.
11. The Honorable Forrest A. "Al" Johnson, Jr., trial judge.

Respectfully submitted,



Michael W. Baxter
Attorney of record for The Goodyear Tire & Rubber Company and Big 10 Tire Company

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases:

Page (cont'd)

Statutes and Rules:

STATEMENT OF THE ISSUES

I. Whether Plaintiffs Failed to Present Any Evidence of a Manufacturing Defect.

II. Whether the Jury Had Insufficient Evidence of Any Breach of Warranty.

III. Whether Irrelevant and Prejudicial Evidence Was Improperly Presented to the Jury.

IV. Whether It Was Reversible Error for the Trial Court to Disregard the Mandatory Language of Miss. Code Ann. § 85-5-7.

V. Whether Misconduct Regarding the Jury Foreperson Requires a New Trial.

VI. Whether the Jury Was Inflamed and Prejudiced by Improper Remarks of Plaintiffs' Counsel.

VII. Whether Cumulative Error Requires a New Trial.

VIII. Whether the Trial Court Erred in Denying Defendants' Motion for Remittitur.

STATEMENT OF THE CASE

I. Course of Proceedings Below

In this drunk-driving case disguised as a products-liability action, Plaintiffs sued The Goodyear Tire and Rubber Company ("Goodyear"), Big 10 Tire Company ("Big 10"), and Howard-Wilson Chrysler-Jeep, Inc. ("Howard-Wilson"). Howard-Wilson settled with Plaintiffs for $495,000.00 after failing to compel arbitration, T.285, R.E.30, and is not a party to this appeal.

Two of the Plaintiffs (Odom and the Estate of Kirby) sued in separate complaints on November 20, 2002, then consolidated their cases. R.57, R.E.4.[1] The third Plaintiff, Strickland, intervened as Plaintiff shortly thereafter. R.77, R.E.5. The First Amended Complaint, R.114, R.E. 6, theorized that the single-vehicle accident in this case was the fault of defective tires; it alleged negligence, gross negligence, and product liability, as to the last alleging specifically that the passenger-car tire at issue in this case was "in a dangerous and defective condition" when sold. R.128, R.E.6.

The Honorable Lamar Pickard originally was assigned the case, but recused himself on January 26, 2004. R.231, R.E.7. The Honorable Forrest A. Johnson was assigned by this Court on May 3, 2004. R.244, R.E.8.

The discovery period in this case became perhaps more contentious than usual, due to Plaintiffs' insistence on conducting discovery with regard to unrelated light-truck tires, despite

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[1]The transcript is cited as "T."; the record volumes are cited as "R."; trial exhibits are cited as "Trial Ex." All pages cited are provided in the Record Excerpts, which are cited by tab number ("R.E. _"). The page number in the Record Excerpts is the same as the page number in the transcript or record volumes; thus, "R.128, R.E.6" directs the Court to page 128 at tab 6 of the Record Excerpts.

the subject tire's being a passenger-car tire. In brief, Plaintiffs sought to argue that Goodyear should have designed the passenger-car tire in the present case to include a nylon overlay that Goodyear used in its light-truck tires but not its passenger tires. Goodyear pointed out that light-truck tires are not substantially similar to passenger-car tires (see issue III, below). The trial court ultimately allowed Plaintiffs limited discovery in this regard.

The case went to trial in late October 2006. After Plaintiffs' tire expert admitted that the absence of a nylon overlay in a tire was not a design defect, the trial court granted Goodyear and Big 10 ("Defendants") a directed verdict on the issue of design defect, T.1393-94, R.E.30, and on any separate cause of action against Big 10 for alleged failure to warn the tires' purchaser that they were rated "only" up to 112 m.p.h., T.1397-98, R.E.30, but allowed the case to proceed on the other causes of action pleaded by Plaintiffs.

The result of the trial was a verdict that awarded damages of $733,333.40 for Kirby, $117,963.34 for Strickland, and $1,754,800.00 for Odom. R.6884, R.E.2. After crediting the Howard-Wilson settlement, the final award was $518,333.40 for Kirby, $67,963.34 for Strickland, and $1,524,800.00 for Odom, yielding a total verdict of $2,111,096.74 against Defendants. R.6885, R.E.2. Plaintiffs did not request that the case proceed as to any claim for punitive damages. T.1752, R.E 31.

Goodyear and Big 10 filed a Rule 59 motion for judgment notwithstanding the verdict, or a new trial, or a remittitur, or an amended verdict, all of which was denied by the trial court on February 9, 2007. R.7278-79, R.E.3. Defendants' notice of appeal was timely filed on February 26, 2007. R.7280-81, R.E.24. Plaintiffs cross-appealed on March 12, 2007, R.7299-7300, R.E.25, and filed an amended notice of cross-appeal on April 20, 2007. R.7344-45, R.E.26.

II. Statement of Relevant Facts

Travis Kirby ("Kirby"), age 20, and Riley Strickland ("Strickland"), age 18, had a favorite pastime in the summer of 2000: on weekends, they would drink beer and ride the roads of Copiah County in Kirby's red Camaro Z28 that his mother had helped him buy. T.822, R.E.29; T.967, R.E.30 . Kirby would buy the beer, even though he was underage, and Strickland would pay his part. T.822, R.E. 29. Strickland would drink six to eight beers and Kirby would drink 12 to 18 beers — in other words, a case of beer between them. T.823-25, R.E.29. As Strickland explained at trial, in his view, "most teenager[s] now-a-days, what they do is they go out on the weekends, drive fast and drink beer." T.837, R.E.29. Speeding was evidently part of the fun; Strickland found nothing to disapprove of in Kirby's driving over 90 m.p.h. in a 55-m.p.h. zone. T.838, R.E.29.

On the night of Friday, August 4, 2000, Kirby took Strickland's 12-year-old brother with him to buy the case of beer for that night's entertainment. T.825-26, R.E.29. Kirby and Strickland iced the beer down and started drinking it in the car about 7:00 p.m., having nothing to eat but this "liquid diet" for the rest of the night. T.827-28, T.830, R.E. 29. The boys picked up Sidney Odom ("Odom"), age 19, at some point to visit a bar, where Kirby went in and had an unknown number of drinks while Strickland and Odom drank beers in the car. T.829, R.29;T.881-82, R.E.30. Later, hanging out at a gas station with some friends, Strickland's parents stopped by, but the boys hid their beer quickly until the coast was clear. T.828, R.E.29.

The single-vehicle accident that gave rise to this case occurred later that night, on Saturday, August 5, 2000, at about 3 a.m. on Highway 27 in Copiah County, when Kirby lost control of his Camaro while driving about 92 m.p.h. (in a 55-m.p.h. zone) and crashed into several trees. T.1229, 1255, 1274, R.E.30. Kirby died instantly; Strickland and Odom, passed

out at the time of the accident and unable to remember it afterwards, were injured. T.791-92, 833, R.E.29. Kirby's blood-alcohol level ("BAC") at the time of the accident was .25, more than three times the legal limit. Trial Ex. 46, R.E.35. Strickland's BAC was .103 when tested four and a half hours after the accident. T.832, R.E.29.

The right rear tire of Kirby's Camaro was flat after the accident, with a portion of the tread separated. All four of the tires were Kelly Charger[2] P245/50R165 passenger-car tires that came with the used Camaro when Kirby and his mother bought the sports car from Howard-Wilson. T.700, R.E.30. The tires were purchased by the Camaro's previous owner, Ivan Ostrander, who admitted to such mistreatment of the tire as "spinning out" and causing the back tires to smoke. T.642-43, R.E.28. Plaintiffs' tire expert at trial, Robert Ochs, admitted at trial that he saw the marks on the tire caused by such treatment. T.609, R.E.28. At the time of the accident, the tread depth on the rear tires was worn to 3.5/32 of an inch, down from the tread depth of 10.5/32 when new. T.1442-43, R.E.30. A tire should be replaced no later than when its tread depth reaches 2/32 of an inch. T.1442, R.E.30. The subject tire had an estimated useful life of 50,000 miles and had been driven somewhat over 10,000 miles at the time of the accident. T.559, R.E.28; T.1453, R.E.30. Thus, in only 20 percent of its estimated useful mileage (10,000 out of 50,000), the tire had been used and abused to the point that it had worn through 88 percent of its useful tread life. T.1443, R.E.30.

What caused the tread separation in the right rear tire was the central focus of this case. Although Plaintiffs' only tire expert, Ochs, claimed that he could find no evidence of a puncture to the tire, T.644, R.E.28, the tire expert for Defendants actually showed the jury the puncture

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[2]The tire was marketed as a Kelly Charger and was manufactured at the Kelly Springfield plant, but Goodyear is the successor in interest to Kelly Springfield.

in the tire that was produced by an impact shortly before the accident occurred. T.1425-26, 1431, R.E.30. The puncture was at the same spot where the tire began to come apart, making it highly likely they were related. T.1432, R.E.30.

Strickland and Odom recovered dramatically from their injuries. Odom now works full-time in a line job at the Nissan plant. T.867-68, R.E.30. Nine months after the accident, Odom wrote on a job application that he was fully recovered with no disabilities and could work overtime and weekends. Trial Exs. 24 & 25, R.E.33 & 34; T.922-24, 932, R.E.30. Since the accident, he has married and fathered a child. T.867, R.E.30. As for Strickland, he was back at work in less than four months, and he sought no medical attention for his injuries after 2001. T.840-41, R.E.29.

SUMMARY OF THE ARGUMENT

The judgment should be reversed and rendered for Defendants because Plaintiffs won a manufacturing-defect verdict without ever offering any proof of the existence of any manufacturing defect in the subject tire. While circumstantial evidence may be used to prove such a defect, that evidence must amount to more than "the tire failed, therefore it was defective" — and exactly such a *res ipsa loquitur* argument is all that Plaintiffs' tire expert could offer in this case. The jury had insufficient evidence of any manufacturing defect, and this Court should therefore reverse and render for Defendants.

Another basis to reverse and render is that, although Plaintiffs also went to the jury on a breach-of-warranty theory, they should not have been allowed to do so, because there was no evidence of any guarantee that the subject tire would not fail below the federally-assigned speed rating of 112 m.p.h. We doubt that any tire seller or manufacturer in the history of this State has sold a tire with the guarantee that it would not fail if driven under 112 m.p.h., and Defendants certainly were not the first.

Alternatively, there are several grounds for a new trial. First, Plaintiffs were improperly allowed to introduce prejudicial and irrelevant evidence regarding design issues and other, unrelated accidents involving light-truck tires, even though such tires are not substantially similar to the passenger-car tire at issue in this case, and even though the trial court granted a directed verdict to Defendants on Plaintiffs' design-defect theory.

Second, the trial court disregarded the mandatory language of § 85-5-7 requiring allocation of fault to all tortfeasors. Despite the fact that Travis Kirby was driving drunk and in gross excess of the speed limit, his negligence per se was not taken into account in determining

liability for damages to the other two plaintiffs. This denied Defendants a just verdict and requires a new trial.

Third, when Goodyear during *voir dire* asked the jury pool which of them had experienced the injury of a family member in an alcohol-related car accident, juror Dorothy King said nothing — even though she had just stated, during her *voir dire* in a DUI case, that she had lost her son in a DUI accident, and that she could not avoid giving her sympathies as a juror to the bereaved mother of a young man killed in such circumstances. King went on to become the jury's foreperson, and under the prior rulings of this Court, her concealment of the truth, together with the failure of Plaintiffs' counsel to disclose that his son had been a pallbearer at the funeral of King's son, entitles Defendants to a new trial.

Fourth, it was reversible error for Plaintiffs' counsel to continually make statements before the jury pertaining to punitive-damages liability during their opening statements and in the guise of "objections" during trial. Bifurcation of trial proceedings is meaningless if plaintiffs are allowed to poison the jury's minds with insinuations about "evidence" that would be admissible, if at all, only during a punitive-damages phase.

Even if none of the foregoing were taken individually to require a new trial, the cumulative error surely did so. If this Court will not reverse and render for insufficient evidence, then a new trial should be granted.

Alternatively and finally, the judgment of over $2 million against Defendants is grossly excessive, given the obvious fault of all three Plaintiffs. A remittitur is proper and should be ordered, particularly in view of Plaintiffs' repeated efforts to inflame the passion and bias of the jury against Defendants with improper statements and prejudicial, inadmissible evidence.

ARGUMENT

A judgment notwithstanding the verdict must be granted, and its denial is reversible error, where the evidence is legally insufficient to allow the verdict:

> The standard of review in considering a trial court's denial of a motion for judgment notwithstanding the verdict is de novo. The trial court must view the evidence in the light most favorable to the non-moving party and look only to the sufficiency, and not the weight, of that evidence. * * * When determining whether the evidence was *sufficient*, the critical inquiry is whether the evidence is of such quality that reasonable and fairminded jurors in the exercise of fair and impartial judgment might reach different conclusions.

Poole ex rel. Poole v. Avara, 908 So. 2d 716, 726 (Miss. 2005) (citations omitted). The evidence is "legally sufficient" only if there is substantial evidence to support the verdict. *Johnson v. St. Dominic-Jackson Mem'l Hosp.*, 967 So. 2d 20, 22 (Miss. 2007). "Substantial evidence is much more than conjecture, speculation, or suspicion." *Miss. State Bd. of Examiners for Social Workers & Marriage & Family Therapists v. Anderson*, 757 So. 2d 1079, 1086 (Miss. Ct. App. 2000).

A new trial is proper where the verdict is against the overwhelming weight of the evidence, or where other considerations dictate a new trial:

> A new trial may be granted in a number of circumstances, such as when the verdict is **against the overwhelming weight of the evidence**, or **when the jury has been confused by faulty jury instructions**, or when the jury has departed from its oath and its **verdict is a result of bias, passion, and prejudice**.

Poole, 908 So. 2d at 726 (quoting *Shields v. Easterling*, 676 So. 2d 293, 298 (Miss. 1996)) (emphasis added). Insofar as the weight of the evidence is concerned, the trial court should order a new trial when "convinced that verdict was contrary to the substantial weight of the evidence so that justice requires that a new trial be granted." *Id.* (citation omitted).

I. Plaintiffs Failed to Present Any Evidence of a Manufacturing Defect

The trial court correctly granted a directed verdict on Plaintiffs' design-defect claim, but denied Defendants' motion for directed verdict on the manufacturing-defect claim. This was error, because Plaintiffs were unable to show any actual deviation in the tire from the manufacturer's specifications, as required at Mississippi law. Judgment notwithstanding the verdict was therefore proper, and this Court should reverse and render for Defendants.

A. There Was No Evidence of Any Material Deviation in the Tire

The Mississippi statute creating a cause of action for a manufacturing defect requires the plaintiff to prove "that *at the time the product left the control of the manufacturer* or seller . . . [t]he product was defective 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) (emphasis added).

Plaintiffs, however, were unable to come forward with any evidence of a "material way" in which the subject tire "deviated in a material way from the manufacturer's specifications." On cross-examination by Goodyear, Plaintiffs' only tire expert, Robert Ochs, admitted that after examining the subject right rear tire, he could not point to any actual defect in the tire, as evidenced by the following testimony:

> 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); *see also* T.641, R.E.28 ("can't say one specific thing" was defective). Ochs also admitted that there was no evidence of prior separation in the components of the subject tire that existed at the time of the subject tire's manufacture, as follows:

Q. You said in your opinion — written opinion that there was no evidence prior of any component of separation?
A. That's correct.
Q. There was no separation component, correct?
A. **I don't believe there was separation when it left the plant.**

T.641, R.E.28 (emphasis added). Ochs further admitted that the subsequent abuse of the rear tires by the previous owner (Ivan Ostrander) would cause "separation growth." T.643, R.E.28. He found damage to the rear tires consistent with that abuse. T.609, R.E.28. On these facts, the jury did not have sufficient evidence to find that, "at the time the product left the control" of Defendants, there was any defect in the tire.

Put another way, Ochs could point to *no* deviation in a material way from Goodyear's specifications in the subject tire. The best that Ochs could do was to opine that this tire was speed rated at a speed of up to 112 m.p.h. and, because the tire failed at a speed less than 112 m.p.h., it therefore must be defective. As he stated under direct examination for Plaintiffs:

Q. Well, Mr. Ochs, if it wasn't inflation, or speed above the speed-rating of the tire, or underinflation or overinflation, do you know what caused the failure? Why did the tire fail at twenty-two miles below, approximately, its rated speed?

. . . .

A. The tire failed to achieve the necessary speed that it was rated for. **At this point I do not have sufficient information to be able to point to one specific characteristic of the tire** to be able to say that, in fact, the problem was in the compounding, problems in curing.

T.617, R.E.28 (emphasis added).

But Ochs also admitted on cross-examination that tires routinely fail due to any number of things, including punctures, road-hazard impacts, and "misuse or abuse" (T.639-40, R.E.28), that are not manufacturing defects.

Ochs presented no *expert* evidence for the proposition that a tread belt separation at 92 m.p.h., in and of itself, is any sort of evidence of a manufacturing defect. Nor did he provide any

basis for his opinion that tire failure at a speed below the speed rating is evidence of a defect. As discussed at issue II, below, the "speed rating" is assigned by the federal government (not Goodyear) simply to denote that it has tested a tire of that model, at that speed, for all of ten minutes without incident.

There was thus no testimony as to which of the "manufacturer's specifications" the tire failed to meet, or of how the subject tire allegedly differed from another identical tire built to those specifications. If Miss. Code Ann. § 11-1-63(a)(1)(i) is not to be completely disregarded, then Plaintiffs failed to make their case. As it stands, Defendants are in the position of being held liable for a judgment of more than two million dollars, *without anyone's having been able to demonstrate to them what was allegedly wrong with the subject tire.*

B. Plaintiffs' "It Was Defective Because It Failed" Argument Is **Res Ipsa Loquitur,** *Not Circumstantial Evidence*

What the jury was asked to believe, and evidently did believe, was that it could find for Plaintiffs merely on the evidence that a tread belt separation occurred. That was error.

Circumstantial evidence is admissible in a manufacturing-defect case, as regards the existence of the alleged defect at the time when the product left the factory, because "direct proof of a defect at the time the product left the possession of the manufacturer is seldom available to a plaintiff." *BFGoodrich, Inc. v. Taylor*, 509 So. 2d 895, 903 (Miss. 1987). But that is not the same as "proving" *the existence of a defect itself* by circumstantial evidence. *See Farris v. Coleman Co.*, 121 F. Supp. 2d 1014, 1018 (N.D. Miss. 2000) ("Federal courts in Mississippi have observed that the Mississippi Supreme Court has not permitted recovery on mere proof that damage occurred following the use of a product."). "*Absent proof of a defect, plaintiff's claim must fail.*" *Id.* (emphasis added). Any other rule would be an example of the logical fallacy *post*

hoc ergo propter hoc, "after this, therefore because of this," whose "flawed logic" has been rejected by this Court. *See Cuevas v. E.I. Dupont de Nemours & Co.*, 956 So. 2d 1306, 1311 (S.D. Miss. 1997) (citing Mississippi cases).

Where, as here, the plaintiffs' own expert admits that he can find no defect in the product, the *existence* of a defect cannot be proved, only guessed at. Generally, circumstantial evidence is insufficient to sustain a verdict where the factual circumstances do not "take the case out of the realm of conjecture and place it within the field of legitimate inference." *K-Mart Corp. v. Hardy ex rel. Hardy*, 735 So.2d 975, 981 (Miss. 1999) (emphasis added). Where a jury "necessarily ha[s] to resort to speculation, guess and conjecture as to the cause" of a product's failure, "[t]his is not sufficient to sustain the judgment." *Crocker v. Sears, Roebuck & Co.*, 346 So. 2d 921, 924 (Miss. 1977).

Without strict application of the foregoing rule, what should be a "circumstantial evidence" burden risks being changed into merely a case of *res ipsa loquitur*: because there was an accident, "therefore" a defect exists. In essence, that is all that Ochs' testimony amounted to. "Other than it failed at a speed below what it should have failed," T.641, R.E.28, Ochs could point to no evidence that the tire had a manufacturing defect.

The doctrine of *res ipsa loquitur*, however, is not applicable in a tire blowout case. *Edwards v. Sears, Roebuck & Co.*, 512 F 2d 276, 287 (5th Cir. 1975) (applying Mississippi law). Nonetheless, Ochs inferred a "defect" from the mere fact that a blowout occurred. That is the essence of *res ipsa loquitur*, and that was not a sufficient inference on which the jury could rest a verdict of a "material deviation from the manufacturer's specifications."

The bottom line is that proof of a tire failure is *not* in and of itself proof of a manufacturing defect, at least in cases like the present one where the tire was neither new nor

used properly by its successive owners. This Court has allowed a jury to find a manufacturing defect by circumstantial evidence where the tire was *new* and where a *specific* defect was found; on those facts, the jury could infer that the defect had been in the tire when it was made. *Taylor*, 509 So. 2d at 903 (allowing jury verdict on circumstantial evidence to stand in case of *new* tire where *specific* defect identified). But in *Taylor*, a specific defect was alleged and proved, unlike in the case at bar, where Plaintiffs could not identify any actual defect.

In the case at bar, the burden was also on Plaintiffs to prove that no substantial change occurred in the tire's condition since it left Goodyear's custody. *Id.* But the undisputed evidence was that the tire was *not* in a substantially similar condition, given the unrebutted evidence that (1) its tread depth was worn to 3.5 thirty-seconds of an inch in the center, down from the manufactured tread depth, new, of 10.5 thirty-seconds of an inch, and (2) the tire admittedly had been abused (spinning out the tires, fast starts, scratching out, etc.) by its previous owner. Ochs admitted seeing the spin cuts in the tire from its abuse, and admitted that they were *not* present when the tire left the factory. T.642-43, R.E.28.

Even the mileage driven was sufficient to place this tire beyond the bounds of substantial similarity to its new condition. *Cf. Carlton v. Goodyear Tire & Rubber Co.*, 413 F. Supp. 2d 583, 591 (M.D.N.C. 2005) (where tire driven 2,000 miles of 50,000-mile expected life, "substantial" distance increased likelihood that mfg. defect not cause of blowout). If two thousand miles was a "substantial" distance in the federal court's decision in *Carlton*, what does that make 10,000 miles in the present case?

Ochs admitted that a tire's failure before the end of its useful life does not mean it has a manufacturing defect. T.646, R.E.28. And where, as here, the tire had been worn and abused such that 88% of its useful life was gone, T.1443, R.E.30, it defies reasonable belief that any

manufacturing defect would not have revealed itself earlier, before the tire had been worn so heavily.

A thorough and carefully-reasoned opinion by the Texas Supreme Court in a tire-blowout case, while not controlling on this Court, is factually similar and persuasive. In *Cooper Tire & Rubber Co. v. Mendez*, 204 S.W.3d 797 (Tex. 2006), the Texas high court reversed a manufacturing-defect verdict based, like the present verdict, on the mere fact of the tire's failure. The court in *Mendez*, relying in part on the Restatement (Third) of Torts, stated the following:

> Moreover, we have noted that Texas law does not generally recognize a product failure standing alone as proof of a product defect. **"The inference of defect may not be drawn . . . from the mere fact of a product-related accident."** *Ridgway*, 135 S.W.3d at 602 (quoting RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 3 reporters' note to cmt. d (1998)). **The mere fact that the tire failed would amount to evidence of a manufacturing defect "so slight as to make any inference a guess [and] is in legal effect no evidence."** *Id.* at 601. As we discussed in *Hopkins*, circumstantial evidence of a product defect may be offered, but where, in another case, **"[t]he record contained no proof of the [product's] defect except the malfunction itself,"** and the product had been in use for years and subjected to many adjustments and changes, **the cause of the product failure and proof of original defect "could not be answered except by speculation."** 548 S.W.2d at 349-50. Grogan too conceded at trial that "**the mere fact that a tire has a tread belt separation does not mean that the tire is defective.**"
>
> Nor do we think that plaintiffs' expert testimony **attempting to eliminate other causes of the tire failure** is legally sufficient to establish a manufacturing defect. **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.**
>
> Without deciding whether section 3 accurately reflects Texas law, we held that **even if such an inference of a product defect can be made, "it would generally apply only to new or almost new products."** *Ridgway*, 135 S.W.3d at 601. In the pending case, **the tire had 30,000 miles on it** and had a hole from a nail that had penetrated completely through the tire. Further, section 3 by its terms would only apply if a tire failure is an incident "that ordinarily occurs as a result of a product defect." **Tire failures, like the fire at issue in *Ridgway*, "ordinarily occur for all sorts of reasons."** *Id.* at 604 (Hecht, J., concurring).

Mendez, 204 S.W. 3d at 807-08 (emphasis added).

Mendez is quoted at length because of its obvious application to the present case. Like the tire expert in *Mendez*, Plaintiffs' tire expert Ochs admitted in the case at bar that the mere presence of a tread belt separation, standing alone, is not evidence of a manufacturing defect in the tire in question:

> Q. And you would agree with me, sir, that just because the tire may sustain a tread belt detachment or a separation and failed before the entire usefulness of its tread life that that by itself does not mean that the tire had a factory defect in it, correct?
> A. That's correct.

T.646, R.E.28.

Moreover, just as with the plaintiff's tire expert in *Mendez*, Ochs' attempt to eliminate other causes of tire failure was not legally sufficient to establish a manufacturing defect in a tire. Put another way, Ochs could not prove a manufacturing defect merely by the process of elimination — "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." This is especially true in a tire that was not new and that had been mistreated. The tire in the case at bar had been driven approximately 10,000 to 11,000 miles and its useful tread life had been worn down from 10.5/32 of an inch, new, to 3.5/32 of an inch as of the date of the accident. T.1442-43, R.E.30. At 2/32 of an inch, the tire is considered to be completely worn out and must be removed from the vehicle. T.1442, R.E.30. In such a case as this, and given the complete failure of Plaintiffs' expert Ochs to find *anything actually wrong with the tire*, the jury simply had no basis to find that a manufacturing defect existed. A directed verdict should have been entered for Defendants, and this Court should therefore reverse and render a verdict for Defendants.

Similar reasoning to that in *Mendez* prevailed in a Pennsylvania case, where the court granted summary judgment on the basis that "the plaintiff cannot depend upon conjecture, speculation or guesswork to meet these evidentiary requirements because '*the mere fact that an accident happens*, even in this enlightened age, does not take the injured plaintiff to the jury.'" *Walters ex rel. Walters v. General Motors Corp.*, 209 F. Supp. 2d 481, 487 (W.D. Pa. 2002) (citation omitted & emphasis added). "The mere fact that an accident happened," similarly, should not have sufficed to take the present case to the jury — but that was all that Plaintiffs had to offer.

Likewise, Louisiana's courts have long held that "[t]he law on the issue consistently holds that the fact that a blowout occurred may not be considered evidence of a manufacturing defect." *Clement v. Griffin*, 634 So. 2d 412, 429-30 & n.5 (La. Ct. App. 1994) (citing cases back to 1958). This is also the rule in other states, such as Alabama and Illinois. *Sears, Roebuck & Co. v. Haven Hills Farm, Inc.*, 395 So. 2d 991, 996 (Ala. 1981) ("mere fact of a tire blowout does not demonstrate the manufacturer's negligence, nor tend to establish that the tire was defective. Blowouts can be attributed to myriad causes ....") (citing *Shramek v. Gen. Motors Corp.*, 216 N.E.2d 244, 247 (Ill. Ct. App. 1966)). *See also Plouffe v. Goodyear Tire & Rubber Co.*, 373 A.2d 492, 496 (R.I. 1977) ("The mere fact of a tire blowout does not tend to establish that the tire was defective . . . the determination of why the tire blew out could be gained only by engaging in *pure speculation*") (emphasis added). *Accord, Jolley v. Gen. Motors Corp.*, 285 S.E.2d 301, 304 (N.C. Ct. App. 1982).

The law is clear: in the final analysis, where Plaintiffs' expert could not find a defect, neither could the jury, which did not have sufficient admissible evidence before it to find any cause of the subject tire's failure that did not rest upon "speculation, guess and conjecture." The

trial court should have held, as it did with Plaintiffs' design-defect claims, that the jury did not have sufficient evidence to find for Plaintiffs on any manufacturing-defect claim. Its failure to so hold was reversible error, and this Court should reverse and render for Defendants.

II. The Jury Had Insufficient Evidence of Any Breach of Warranty.

Plaintiffs' awareness of the weak nature of their expert's testimony and of their manufacturing-defect claim is perhaps best exhibited by their arguments against Defendants' Rule 59 motion, where all three hung their hat on the breach of warranty claim in this case, not the manufacturing-defect claim. Counsel for Kirby even went so far as to say that the jury could have found for Plaintiffs *without any expert testimony at all*: "the jury found for the plaintiffs on breach of warranty claim purely and simply. *Mr. Ochs' testimony in the end was actually superfluous in that regard. The jury could have found that same thing had Ochs not even testified.*" T.1734, R.E. 31 (emphasis added). Unfortunately for Plaintiffs, that was incorrect, and this case should not have gone forward on breach of warranty at all.

Under Mississippi law, a plaintiff arguing breach of express warranty must show that such a warranty was actually made and that the plaintiff relied upon it. *Forbes v. Gen. Motors Corp.*, 935 So. 2d 869, 873 (Miss. 2006) (citing Miss. Code Ann. § 11-1-63(a)). If the product fails to perform as warranted, that is a "defect" for purposes of § 11-1-63(a). Plaintiff continues to bear the burden of proving that the "defect" rendered the product unreasonably dangerous and that it was the proximate cause of the injury. *Id.* at 879-80.

Plaintiffs were granted an instruction (S-2, no. 7 as granted), R.6762-63, R.E.20, on the theory of a breach of warranty, over the objections of Defendants. T.1500-01, R.E.30. The jury instruction was objectionable in the following part:

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

R.6762, R.E.20 (emphasis added). This instruction was objectionable because, as Defendants pointed out to the trial court, it allowed the jury to find against Defendants even if there was no defect, simply on the basis of the tire's having failed. T.1500-01, R.E.30. In other words, the jury was told that it could find against Defendants on the basis of a *guarantee* that "the tire would be safe" if driven under 112 m.p.h. and fewer than 50,000 miles.

This was reversible error because there was no evidence in the record to support any such warranty's existence, so that the instruction assumed facts not in evidence. What Plaintiffs were getting at here was their argument based on the subject tire's having an "S" speed rating. The "up to 112 miles per hour" in the erroneous instruction comes from that S-rating. The speed rating, assigned by the federal government, is based on the tire's being operated at that speed *once* for *ten minutes*. T.662-64, R.E.28. It is *not* a guarantee that the tire will never fail below that speed, and the jury had no evidence to support a finding of any such guarantee. As the U.S. Department of Transportation says on its website,[3] the speed rating is a "maximum speed capability" — and that simply is not the same as a guarantee of non-failure below that speed. It means, "don't go *faster* than this rating." That is what "maximum speed capability" means in plain English.

Further, there was no evidence presented to the jury that anyone at Goodyear or at Big 10, where the tire was purchased, made any express representations that the tire would not fail

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[3]*See* http://www.nhtsa.dot.gov/cars/rules/TireSafety/ridesonit/brochure.html.

below 112 miles per hour — *or* that the purchaser relied on such. The man who sold the tire recalls that he first offered the Z-rated tires that were recommended by the Camaro's manufacturer, but that Ostrander absolutely refused to pay that much for his tires and bought the less expensive S-rated tires instead, even though he was told that the Z-rated tires had a higher speed maximum. T.703-04, 734, R.E.30. There was no evidence that anyone told Ostrander that an S-rated tire would not fail under 112 m.p.h., or indeed, that anyone told Ostrander what speeds the tires were rated for. T.734, R.E.30 (did not mention specific speed maximums).

Note that the jury instruction in question did not raise any issue as to whether Ostrander should have been sold Z-rated tires, which is not relevant to the liability issues in this case. As the trial court noted in granting a directed verdict on failure to warn, there was no factual issue that the Z-rated tires might have prevented the accident, because the car was not operated at a speed higher than the S-rating but lower than the Z-rating. T.1397-98, R.E.30.

Again, saying that one should not drive *over* 112 m.p.h. on a given set of tires, is not the same as saying that the tires *will not fail below that speed.* There is no record evidence that Ostrander understood any such misrepresentation to have been made, and to concoct such a ridiculous guarantee out of the federal speed rating is a perversion of language and of justice. As stated above in the Summary of the Argument, we doubt very much that any tire manufacturer or seller in this State has ever guaranteed that a tire would not fail, and there is no record evidence that Goodyear and Big 10 did so in this case.

No case law supports the proposition that a speed rating is a warranty of non-failure below the rated maximum speed. We find no reported opinion in the federal or state courts of the United States even addressing such a theory.

Therefore, there was no evidence on which the jury could find, in the words of the jury instruction, that

> the defendant represented that the tire would be safe at speeds up to 112 miles per hour for 50,000 miles and that the defendants' claims amounted to an express warranty or other express factual representation upon which the purchaser relied in selecting the use of the Charger SR tire,

and thus the jury should not have been instructed on breach of express warranty. Nor was there evidence that the tire was "unreasonably dangerous" — as we saw at issue I, there was no evidence of anything wrong with the tire at all, other than the mere fact of the tread separation, which Plaintiffs' own tire expert testified was not proof of a defect in and of itself. T.646, R.E.28.

If this Court sustains the verdict in this case, tire sellers in Mississippi will be in the position of having to refuse to sell any tire that is rated for a lower speed than the manufacturer's recommendation . . . *even though* the maximum safe speed of the tire is more than 40 miles above the maximum speed limit on the highways of this State. Defendants respectfully submit that such policy-making is better left to the Legislature than to the courts.

As granted, therefore, Instruction No. 7 amounted to an improper *res ipsa loquitur* instruction, allowing the jury to find against Defendants merely from the fact that the tire failed. This Court is "required to find reversible error" when the jury instructions, taken together, "do not fairly and adequately instruct the jury." *Richardson v. Norfolk S. Ry. Co.*, 923 So. 2d 1002, 1011 (Miss. 2006). The error in Instruction No. 7 was not cured by any other of the instructions, and thus was reversible error.

To the extent that Plaintiffs may seek to rely on a theory of *implied* warranty of merchantability, that theory must fail for the reasons set forth at issue I, above. Such a theory

has the same requirement as does a theory of manufacturing defect — "that the defect was present when the product left the defendant's control." *CEF Enters., Inc. v. Betts*, 838 So. 2d 999, 1003 (Miss. Ct. App. 2003) (citing *Vince v. Broome*, 443 So. 2d 23, 26 (Miss. 1983) and *Crocker v. Sears, Roebuck & Co.*, 346 So. 2d 921, 923-24 (Miss. 1977)). We would add to our foregoing discussion that Mississippi's federal courts, in granting summary judgment on claims for breach of implied warranty of merchantability in the automotive context, have correctly held that some particular defect must be proved:

> In other words, **plaintiffs insinuate that . . . they need not prove a specific defect**, and that it is instead **enough merely to show that something must have been defective**, for otherwise Mrs. Davis would not have been thrown from the vehicle. **Their position is rejected**. . . . [P]laintiffs cannot prove the existence of a defect at the time the vehicle left the manufacturer **merely by showing that the seatbelt and the door somehow came unlatched or otherwise failed** during the accident. They **need expert proof** that these systems were defective, and this, they obviously lack.

Davis v. Ford Motor Co., 375 F. Supp. 2d 518, 523 n.7 (S.D. Miss. 2005) (emphasis added). As this Court can see, the theory properly rejected by Judge Lee in *Davis* is exactly the theory relied upon by Plaintiffs in this case.

For these reasons, this Court should reverse and render on Plaintiffs' claim of breach of express warranty, as no such warranty was made.

III. Irrelevant and Prejudicial Evidence Was Improperly Presented to the Jury.

No evidence was presented at trial of any negative history for the Kelly Charger passenger-car tire at issue in this case. No evidence was presented of other accidents, other claims or lawsuits, or any government recalls or investigations concerning the Kelly Charger passenger-car tire in question. This was for the excellent reason that there *was* no such evidence. R.1974-75, R.E.9 (deposition of Goodyear engineer Larry Shelton).

With no negative history on the model of passenger-car tire on Kirby's Camaro, and faced with having to try a drunk-driving, excessive-speed case, Plaintiffs sought — and were improperly allowed by the trial court — to inject Load Range E *light-truck* tires, and accidents involving these *light-truck* tires, into the case. Light-truck tires are a totally different type of tire from the Kelly Charger passenger-car tire involved in this case. Passenger-car tires are governed by totally different federal regulations from a light-truck tire. T.665, R.E.28. Light-truck tires are not substantially similar to the Kelly Charger passenger-car tire in question; they have substantial differences in vehicle applications, load carrying capacity and design specifications, are created from different molds and out of different materials, are put together differently, and are required to meet different federal regulations. T.666, R.E.28; R.1989-91, R.E.10 (affidavit of Shelton).

Plaintiffs were nevertheless allowed to inject light-truck tires into this case and insinuate that that the same alleged problems existed in the Kelly Charger passenger-car tire when there was not a shred of evidence to support such a claim. Evidence of issues involving light-truck tires and accidents involving light-truck tires was completely irrelevant to the present case, and in light of the trial court's grant of a partial directed verdict, was positively misleading and prejudicial, as no design-defect claim was even allowed to go to the jury. Nevertheless, the jury was subjected to irrelevant and misleading testimony, including a "Problem Summary" about light-truck tires that Plaintiffs leaped to introduce as their Exhibit 1 (R.E.32), and which the jury was allowed to carry in to its deliberations. This Court should therefore grant a new trial at which the trial court will follow the law and exclude any and all evidence about light-truck tires, or any other tires which are not substantially similar to the passenger-car tire at issue in this case.

In the recent case of *Forbes v. General Motors Corp.*, 935 So. 2d 869 (Miss. 2006), this Court held that evidence of other accidents must always pass the "substantial similarity" test, and where offered for any purpose other than to show that the manufacturer had notice, the proponent must meet the additional burden of showing that the accidents were "closely similar." *Forbes*, 935 So. 2d at 881 (quoting *Johnson v. Ford Motor Co.*, 988 F.2d 573, 579 (5th Cir. 1993)). Applying the "closely similar" test to an automotive product liability case — which was the applicable test in the *present* case, because evidence of the other accidents was offered to explain the alleged defect in the tire — this Court held that pictures of the same allegedly defective portions of different *makes and models* of automobiles did *not* come anywhere near the "closely similar" requirement. *Id.*

This Court further applied the rule that evidence of prior accidents must be "carefully qualified." *Id.* (quoting *Sawyer v. Ill. Cent. Gulf R.R. Co.*, 606 So. 2d 1069, 1075 (Miss. 1992)). In the present case, where the evidence at issue not only was *not* about the same model tire at issue, but about *light-truck* tires built to entirely different specifications, there can be little doubt that evidence regarding light-truck tire incidents, problems or claims is neither "carefully qualified" nor meets the "closely similar" test in a case involving a passenger-car tire.

Applying Mississippi law, the United States District Court for the Northern District of Mississippi excluded evidence pertaining to the *same model tire* where that tire's specifications had changed over the years, and where the plaintiffs sought to introduce evidence regarding the subject model remote in time from when the subject tire was manufactured: "Consideration of evidence regarding tires produced under different specifications of a time remote from the production of the accident tire would unnecessarily confuse the issue before the court." *Fowler v. Firestone Tire & Rubber Co.*, 92 F.R.D. 1, 4 (N.D. Miss. 1980). Because light-truck tires have

completely "different specifications" from passenger-car tires, it was error in the present case to let light-truck tire evidence go to the jury.

Authority from other states is both similar and persuasive. In *Cooper Tire & Rubber Co. v. Crosby*, 543 S.E.2d 21 (Ga. 2001), the plaintiff sought to introduce data concerning a wide range of tires manufactured by the defendant, but the Georgia high court held that, where the plaintiff "made no showing before the trial court that all of the tires reflected in the adjustment data were the *same make and model* as the tire involved in the accident at issue," and could not show that the other tires suffered from "the *same defect* as the defect alleged in her suit," that evidence was inadmissible. *Crosby*, 543 S.E.2d at 24 (emphasis added). Obviously, Plaintiffs in the present case pointed to no specific defect whatsoever, and offered no evidence of defects in tires of the same make and model as the subject Kelly Charger passenger-car tire. The "barest hint of possible similarity between the prior occurrence and the occurrence at issue" is not enough for substantial similarity. *Id.*

The reasoning of the *Crosby* court is especially persuasive because, otherwise, manufacturers are stuck in a catch-22. If they manufacture a given tire badly, there will be a history of defects in that make and model of tire upon which plaintiffs may argue product liability. But if they manufacture the tire properly, then plaintiffs can try to bring in evidence of *different* tires which were allegedly defective. Such a "proof" is no proof at all, and the introduction of this irrelevant, prejudicial evidence is sufficient basis for a new trial.

In another suit alleging tire-tread separation, a Florida federal district court ruled to exclude evidence of other such failures in *other light trucks/SUVs*, where particulars such as wheel-base size and "other substantial vehicle differences" were not the same. *Miller ex rel. Miller v. Ford Motor Co.*, No. 2:01cv545-FTM-29DNF, 2004 WL 4054843, at *14 (M.D. Fla.

July 22, 2004). Obviously, where not even different versions of the same *model* (Ford Explorer) were necessarily "substantially similar," *id.*, it was error to allow the jury to hear prejudicial and inflammatory allegations of tire failures in light-truck tires with completely different specifications, design considerations, and intended use from the passenger-car tire in the case at bar.

Likewise, an Oregon trial court's directed verdict for the tire manufacturer was upheld where the trial court excluded evidence relating to passenger-car tires in a case involving a *light-truck* tire. *Watts v. Rubber Tree, Inc.*, 848 P.2d 1210, 1213 (Or. Ct. App. 1993).

Thus, this Court can see that evidence regarding a completely different kind of tire, installed on completely different types of vehicle than the Camaro Z28 at issue in this case, should have been excluded. But it was not. Besides countless references by Plaintiffs' counsel at trial, there were two principal avenues by which Plaintiffs introduced their improper evidence: the "Problem Summary" memo of accidents involving different, dissimilar tires, and the deposition transcript of Beale Robinson taken in a light-truck tire case.

A. The "Problem Summary" Memo

The very first exhibit introduced into evidence at trial in this case, over Defendants' objections, was a "Problem Summary," Trial Ex. 1, R.E. 32, which dealt solely with tread throw issues in light-truck tires. T.468-72, R.E.30. The introduction into evidence of even the first page of this document was extremely prejudicial to Defendants. This "Problem Summary" does not reference or deal with passenger-car tires in general, or the Kelly Charger passenger-car tire involved in this case in particular. To the contrary, the memo discloses problems with certain light-truck tires and identifies adjustments and unrelated claims or accidents that occurred primarily in states in the Southwest United States in the hot, dry summer months. The record

at trial bears out that Plaintiffs never made any effort to show that the tires, or the vehicles, or the accidents identified in the "Problem Summary," were even remotely similar to the subject Kelly Charger *passenger-car* tire, or to Kirby's Camaro sports car, or to Kirby's running off the road at 92 m.p.h. while intoxicated to more than three times the legal limit.

The "Problem Summary" simply had no relevance whatsoever to any issue in the case at bar, and it was error to allow the jury to consider it at the beginning of the trial — and even more so once Plaintiffs' design-defect claim was dismissed.

The "Problem Summary" was an inadmissible compendium of hearsay and should have been excluded on that ground alone. *See Johnson v. Ford Motor Co.*, 988 F.2d 573, 579 (5th Cir. 1993) (excluding *summary* of previous alleged accidents). It professed to recite numerous cases of tire failure — *all* of which concerned light-truck tires, and *none* of which concerned passenger-car tires, *let alone the model of passenger-car tire at issue in this case*. Goodyear light-truck tires and Kelly Springfield passenger-car tires are apples and oranges, and the jury had no evidence before it from which to conclude otherwise.

The jury did, however, have a highly prejudicial document with it during its deliberations, one which contained the following statements:

> • VEHICLE DAMAGE CLAIMS INCREASING - (302) TOTAL
>
> . . . .
>
> – LT235/85R16 (LR-E) **WORST OFFENDER**
>
> . . . .
>
> • **SIMILAR PROBLEMS** OBSERVED IN **KELLY TIRES**
> – (84) VEHICLE DAMAGE CLAIMS '95 YTD FOR LT235/85R16 AND LT245/75R16 LR-E (75% OF TOTAL VEHICLE DAMAGE CLAIMS
> • THROWN-TREAD ISSUE RECEIVING CONSIDERABLE PUBLIC ATTENTION

Trial Ex. 1, R.E.30 (emphasis added). *All* of the tires designated in this memorandum are load range E (LR-E) tires, made for light trucks, as shown by the "LT" at the beginning of each tire

size. Nowhere in the "Problem Summary" does one find the tire in the present case, a Kelly Charger P245/50R16S — "P" for "passenger-car." Indeed, there is *no* passenger-car tire identified anywhere in the "Problem Summary."

What was this document doing being allowed into evidence over Defendants' objections? How could the jury not be prejudiced by seeing that "Kelly tires" had "similar problems" to the "worst offender"? None of the Kelly tires referenced by the memo was the same as the subject tire in the present case, which as we've seen had no negative history, and which was not a light-truck tire. Therefore, it was reversible error to allow Plaintiffs to inject light-truck tires into a passenger-car tire case, and thus to admit evidence which was not only prejudicial, but lacked any probative value and was likely to "confuse the issues" and "mislead the jury." M.R.E. 403.

At the very least, after the design-defect claim was dismissed, the "Problem Summary" should have been expressly withdrawn from the jury, as was requested by Defendants. T.1579-81, R.E.30. Failure to do so was highly prejudicial error, as it allowed the jury to consider evidence in no way related to the manufacturing-defect or breach-of-warranty claims on which they were to confine their deliberations. Counsel for Plaintiffs did not hesitate to dwell on this document in their closing argument, even though the only possible legal theory to which it could apply, design defect, had been foreclosed by the trial court's directed verdict. T.1601-03, 1612-13, R.E.30. M.R.E. 402 expressly requires that irrelevant evidence be excluded.

By allowing the Problem Summary to be admitted, and then to be provided to the jury for its deliberations, the trial court virtually invited the jury to commit error. Even after the Problem Summary was admitted, it could and should have been withdrawn from the jury, or the jury expressly instructed to disregard it, once the design-defect claim was dismissed. *See Niles v. Sanders*, 218 So. 2d 428, 432 (Miss. 1969) (jury instructed to disregard objectionable portion

of photograph). The failure of the trial court to withdraw the exhibit as requested by Defendants, or to expressly instruct the jury to disregard it, constitutes reversible error.

B. Beale Robinson Deposition Excerpts

Likewise, the jury was allowed to hear deposition excerpts of a former Goodyear employee, Beale Robinson, which were read into the record, despite the fact that this deposition was taken in a different case,[4] which was filed in a different state, involving the same light-truck model of tires that we have seen were irrelevant to the present case — and thus did not meet the test for substantial similarity. See R.2008-09, R.E.12 (motion in limine); T.280, R.E.30 (denial of motion). That deposition should have been disallowed as covering issues pertaining to light-truck tires alone, as no specific passenger-car tires (let alone the Kelly Charger passenger-car tire in the present suit) were discussed in that deposition. This too was irrelevant, prejudicial evidence that could only serve to confuse and mislead the jury.

Robinson's deposition should also have been excluded under M.R.E. 804(b)(1). Although that rule allows the use of deposition testimony from previous cases under certain limited circumstances, the prior deposition testimony of Goodyear's now-retired employee should have been excluded at trial because neither Goodyear nor Big 10 had any opportunity at his deposition to develop his testimony in the context of the current litigation.

The Mississippi Court of Appeals reached just such a conclusion as regards Rule 804(b)(1) in *Gibson v. Wright*, 870 So. 2d 1250 (Miss. Ct. App. 2004). In *Gibson*, the court affirmed the exclusion of the deposition testimony of an accomplice to an attempted robbery. *Id.* at 1258-59. The premises owner objected to the plaintiffs' attempt to read into the record the

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[4]*Garcia v. Kelly-Springfield Tire Co.*, No. 99-1611-CIV-T-17B (M.D. Fla.). Trial Ex. B, R.E.36 (excerpt including case caption).

deposition testimony of the accomplice, Anthony Boone, who was unavailable for trial. *Id.* The owner argued that Boone's deposition was taken without his knowledge and he had no opportunity to cross-examine Boone as to his allegations. *Id.* The trial court's exclusion of Boone's testimony was upheld because the owner "had no opportunity to cross-examine Boone" and "[a]s a result, the deposition fails to meet the requirements under Mississippi Rule of Evidence 804(b)(1)." *Id.* at 1259.

In the present case, although Goodyear had the opportunity to examine Robinson in the unrelated *Garcia* case, and had the opportunity to question Robinson about light-truck tires, Goodyear had no opportunity to question Robinson in the *Garcia* deposition on the present issues involving a Kelly Charger passenger-car tire, thus creating a real danger of statements being taken out of context or misapplied without Goodyear having the opportunity to cure any such statements on redirect. This argument applies all the more strongly to Goodyear's co-defendant, Big 10, which was not even a party to the previous *Garcia* litigation and did not attend Robinson's deposition at all, and thus did not ever have the opportunity to cross-examine Robinson. In fact, Big 10 was never provided with a copy of the Robinson deposition transcript read into evidence in the case at bar until the trial itself. T.411, R.E.30.

None of the evidence regarding light-truck tires should have been allowed before the jury. None of it was relevant to any alleged manufacturing defect in a Kelly Charger passenger-car tire. This issue alone presents sufficient grounds for reversal of the verdict and a new trial.

IV. It Was Reversible Error for the Trial Court to Disregard the Mandatory Language of Miss. Code Ann. § 85-5-7.

Another basis for a new trial in this case is that the trial court erred by not either accepting Goodyear's special interrogatory verdict form, R.6756-60, 6594, R.E.19, or using its

own form that would have allowed the jury to set forth the percentages of fault allocated to each of the parties. T.1554, R.E.30 (refusing interrogatories to jury).[5] The instructions that were granted instead by the trial court are included at R.6744-55, R.E.13-18 (nos. 41-46).

As this Court can see, Interrogatory No. 6 of Goodyear's special-verdict form would have required the jury to assess fault against Kirby, Strickland, Odom, Big 10, and/or Goodyear for each of those found to be liable. R.6593, R.E.19. Refusing that form of verdict, the trial court substituted its own Instructions No. 42 and 43 (R.E.14 & 15), which merely instructed the jury that it could allocate fault for Strickland's damages to Strickland himself, and for Odom's damages to Odom himself. In other words, there was no opportunity given to the jury to assess *any* fault for Strickland's and Odom's injuries against Kirby, the drunk driver who was going 92 m.p.h. at the time of the accident. That was reversible error by the trial court.

Miss. Code Ann. § 85-5-7 states that in cases where liability may be assessed against more than one tortfeasor, "the trier of fact *shall* determine the percentage of fault for each party alleged to be at fault" (emphasis added). Miss. Code Ann. § 11-7-157, while requiring "no special form" of verdict, does require that there be "substantial compliance with the requirements of the law in rendering a verdict," and the "shall" language of § 85-5-7 shows that allocation of fault by percentage is a "requirement" of the law. "Miss. Code Ann. § 85-5-7 *requires* the trier of fact to apportion fault." *City of Ellisville v. Richardson*, 913 So. 2d 973, 980 (Miss. 2005) (emphasis added). This was simply not done in the present case, despite Goodyear's having

[5]The trial court also wrote "Not Given - Covered by other instructions" on its copy of the special verdict form at R.6756, R.E.19. Note that this copy accidentally omits the last page of the form, which however is reproduced at R.6594; this omitted page is included at R.E.19.

requested that the law be complied with. The trial court's refusal to instruct the jury to allocate Kirby's fault in determining liability for Strickland's and Odom's damages was reversible error.

Note that a special verdict form is simply a particular manner of instructing the jury. *Missala Marine Servs., Inc. v. Odom*, 861 So. 2d 290, 296 (Miss. 2003). When a jury instruction is offered to the trial court but refused, "there is no reason why we should thereafter require an objection to the refusal unless we are to place a value upon redundancy and nonsense." *Carmichael v. Agur Realty Co.*, 574 So. 2d 603, 612 (Miss. 1990). Thus, the submission of the special verdict form by Defendants sufficed to preserve this issue on appeal.

Whether Strickland and Odom chose to sue Kirby or not is beside the point. It has been the law since *Estate of Hunter v. General Motors Corp.*, 729 So. 2d 1264, 1276 (Miss. 1999), that fault under § 85-5-7 *shall* be assessed against *all* participants to an occurrence. The failure to clearly instruct the jury that this was the law, and to reject Goodyear's verdict form which would have done , was reversible error and merits a new trial.

Given that Kirby was both heavily intoxicated (.25 BAC, three times the legal limit) and driving 92 m.p.h. (37 miles over the speed limit) at the time of the accident, his negligence is inescapable, and no reasonable jury could have found that it was not the cause, in part or in whole, of the accident. Therefore, Kirby's fault should have been allocated in determining the fault for all of Plaintiffs' injuries, including Strickland's and Odom's injuries. But the jury never had the opportunity to do so, because the trial court rejected Goodyear's proposed verdict form and substituted its own, legally inadequate jury instructions.

While the foregoing suffices to demonstrate reversible error by the trial court, this Court may find it useful to see how the consequence of failing to properly instruct the jury on § 85-5-7 is illustrated by the affidavit of juror Rebecca Hall Russell, R.6919-20, R.E.22, which was

offered into evidence at the Rule 59 hearing and stricken by the trial court on motion of Plaintiffs. Russell explains that the jury found Kirby 81% at fault and Defendants 19% at fault, and allocated damages accordingly. But when it came to the other Plaintiffs, although the jury assessed each surviving Plaintiff's comparative negligence against him, *the jury did not further reduce the verdict by that percentage of fault allocated to Kirby.* In other words, even though Kirby was found to be 81% at fault for the single accident that killed him and injured Strickland and Odom, Defendants ended up bearing, and having to pay for, *all* of Kirby's fault for the injuries to his passengers. Thus, the failure to provide the necessary verdict form to the jury was not harmless error, but resulted in actual prejudice to Defendants.

Granting a new trial on this ground would also allow this Court to address the jury's improper use of the "quotient" method for determining both liability and damages: each juror wrote down his or her figure for each plaintiff, and the numbers were totaled and divided by the number of jurors. *See* R.6919-20, R.E.22. This Court has held that the use of a quotient verdict is "reversible error," and yet that a jury verdict may not be reversed on that ground alone, without "a threshold showing of external influences." *APAC-Miss., Inc. v. Goodman*, 803 So. 2d 1177, 1186 (Miss. 2002). Where there exists an independent basis to overturn the verdict and allow a new trial, as here, the trial court would also have the opportunity to warn a future jury against any quotient method.

Thus, Defendants are entitled to a new trial in which the jury can be properly instructed on the allocation of fault between the parties.

V. Misconduct Regarding the Jury Foreperson Requires a New Trial.

The trial court denied Goodyear's *Motion Relative to Voir Dire* (R.E.11) of the jury pool with regard to their personal relationships *vel non* with counsel for the Kirby plaintiffs, James

Kitchens, and members of his law firm. Due to the denial of Goodyear's Motion Relative to *Voir Dire* and the deliberate silence of the Kirby plaintiffs' attorneys, a juror was seated whose personal connection to Plaintiffs' counsel was not disclosed. Moreover, the juror failed to answer honestly at *voir dire*, concealing facts that would have allowed Defendants to strike her for cause and which, by her own admission, prejudiced her in favor of Plaintiffs.

As the affidavits of defense counsel Barry Hassell, R.6921, R.E.23, and Rick Norton, R.6923, R.E.24, attest, John Christopher, counsel for plaintiff Strickland, told Mr. Hassell and Mr. Norton, at the conclusion of the trial and for the first time, that Mr. Kitchens' son and law partner, Dan Kitchens, *was a pallbearer at the funeral of juror Dorothy King's son*, who passed away *in a DUI accident*. Dan Kitchens was present and in the courtroom for much of the trial in this case. *See, e.g.,* T.415, R.E.30. He was of course well aware of his connection with the potential juror, yet said nothing to defense counsel or to the trial court, while evidently making sure that his fellow counsel knew all about it.

Before the trial in this cause, counsel for Goodyear had presented the trial court with a Motion Relative to *Voir Dire*, R.1993, R.E.12, in which Goodyear asked the trial court to identify and excuse for cause those jurors with "close ties to Mr. Kitchens or other members of his law firm," including (paragraph 1(h)) those jurors who were "friends, social acquaintances, [or] members of the same club or church" as Mr. Kitchens and the other members of his firm. Her son's apparent relationship with Dan Kitchens would have left King with no choice but to acknowledge that relationship upon being asked the question by the trial court. But the trial court declined to hear the Motion Relative to *Voir Dire*, which had the same effect as denying that motion.

In *Marshall Durbin, Inc. v. Tew*, 381 So. 2d 152 (Miss. 1980), this Court held that an attorney at trial has an affirmative duty to disclose to the trial court any relationship between himself and a juror:

> A lawyer's duties are not confined alone to serving his clients. **He is an officer of the Court and as such is called on to do and say whatever is necessary to promote the fair administration of justice.** Mr. Lewis should have called the court's and opposing counsel's attention **to his relationship to the juror.**

Id. at 154 (reversing for new trial) (quoting *Miss. Power Co. v. Stribling*, 191 Miss. 832, 3 So. 2d 807, 810 (1941) (reversing for new trial)) (emphasis added). Defendants contend that the affirmative duty of candor set forth in *Tew* and *Stribling* required Plaintiffs' counsel to disclose the fact that attorney Dan Kitchens had served as pallbearer at the funeral of juror King's son. The attorneys for Strickland and Odom had the same duty of disclosure once they learned of this fact.

As it turns out, the problems with King ran much deeper than the relationship issue, serious though that is. Opposing the Rule 59 motion for new trial, James Kitchens told the trial court that, prior to the trial in the present matter, and in the course of his defending a DUI case before the same jury pool, Mr. Kitchens had already engaged in *voir dire* of King:

> **Mrs. King was among those who was asked whether they had anybody in a similar case**, and she raised her hand and indicated that **her son was killed in an automobile accident ten years earlier in 1996**. . . . She was questioned more specifically about it and I asked her in the voir dire in the criminal case things to the affect [sic] of **whether she could put that out of her mind that her son had been killed. She said she could not. That she thought about it every day of her life**. I asked her whether she would tend to identify more with my client, Travis Braddy, in the criminal case or with the mother of the young man who was killed in the Braddy case. **She said she would tend to identify more with the mother of the young man who was killed**. Both cases, Your Honor, involved alcohol, both the Braddy case and the case at bar . . . .

T.1769-70, R.E.31 (emphasis added). Therefore, King's tragic loss of her son in a DUI accident and her stated tendency gave her a self-confessed bias to identify with the mother of another son who died the same way. (Note that Travis Kirby's mother testified at trial.)

However, during *voir dire* in the present case, when Goodyear's counsel asked, "How many of you have either yourself or had a family member of yours or a friend of yours that was injured in an automobile accident where the driver had been drinking alcohol?" (T.361-62, R.E.30), *King remained silent.* She responded to the "anybody in a similar case" question in the DUI trial, and was stricken for cause on that basis, T.1770, R.E.31, but she kept silent in this trial and was seated on the jury rather than stricken for cause, as she surely would have been had she admitted to a bias in favor of Plaintiffs.

Regarding a juror's duty of candor during *voir dire*, this Court has said:

> 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)) (reversing for new trial). Had King answered honestly and told the trial court what Mr. Kitchens reports that she said in the earlier *voir dire*, there can be no doubt that she would have been stricken for cause — as she was in the DUI case. But for whatever reason, she remained silent. Indeed, she ended up as the *foreperson* of the jury, was evidently respected and looked up to by her fellow jurors, and was thus in a unique position to directly or indirectly advance Plaintiffs' interests, whether consciously or unconsciously. Under this Court's precedent in *T.K. Stanley*, this Court *can and should* reverse on appeal.

At the beginning of the trial, the trial court gave the jury this admonition: "What's very important is you not go in this case with somebody not starting out on an even playing field." T.356, R.E.30. Unfortunately, due to the lack of candid disclosure by juror King and by counsel for Kirby, that is exactly where Defendants found themselves at trial: on an uneven playing field. Therefore, the verdict should be reversed and a new trial should be granted.

VI. The Jury Was Inflamed and Prejudiced by Improper Remarks of Plaintiffs' Counsel.

A new trial should also be granted on the basis of the improper and prejudicial statements made by Plaintiffs' attorneys during opening statements and throughout the trial, including the closing arguments, made over the objections of Goodyear's counsel, regarding matters irrelevant to the issue of liability and pertinent only to a punitive-damages hearing.

Counsel for Plaintiffs repeatedly made inappropriate remarks, over the repeated objections of Defendants' counsel and admonishments of the trial court, intended to allege malevolent intentions and nonexistent discovery violations, and thus to bias the jury against Goodyear:

- "Now I believe the proof is going to show that Goodyear is going to make the best effort it can to hide the evidence of this tread throw problem." T.422, R.E.30 (Plaintiffs' opening).
- "Goodyear did make a choice, and they chose to do the wrong thing, the dangerous thing, to sell them to make a dollar or two." T.424, R.E.30 (Plaintiffs' opening).
- "Because Goodyear willfully refused any documents —" T.640, R.E.28 (objection overruled).

- "Your Honor, may I have a continuing objection then that Goodyear has absolutely concealed all of —" T.661, R.E.28 (objection overruled).
- "It is not proper for Goodyear to tell you they can condemn people to death." T.1676, R.E.30 (Plaintiffs' closing; trial court disregards Goodyear's request to instruct jury to disregard that statement, T.1677, R.E.30).
- ". . . and I find this shocking, Goodyear chose to save money by putting the American people's lives at risk by selling these high performance tires without these improvements that make them safer and stronger exactly like the ones they use in Europe and South America, and if I'm pointing right, Asia." T.421, R.E.30 (Plaintiffs' opening).

Whether in opening or framed as an "objection," all of these remarks were completely irrelevant to any issues of negligence or strict liability, and thus would have gone solely to the issues of punitive damages, which was never put to the jury. In fact, they were deliberately couched to poison the jury's mind against Goodyear. This Court has recently emphasized the bright line between evidence relating to liability for fault and evidence relating to liability for punitive damages:

> Our punitive damages statute **mandates the bifurcation of the issues of liability/compensatory damages and punitive damages**. The statute requires that evidence concerning punitive damages **be presented separately** at a subsequent evidentiary hearing to take place, if and only if, the jury has awarded some measure of compensatory damages. Thus, the detailed procedure which is outlined above must be meticulously followed because, **without an evidentiary buffer at trial, juries will ultimately confuse the basic issue of fault or liability and compensatory damages with the contingent issue of wanton and reckless conduct** which may or may not ultimately justify an award of punitive damages.

Bradfield v. Schwartz, 936 So. 2d 931, 938 (Miss. 2006) (emphasis added). "[E]vidence which does not pertain to compensating the plaintiff but only pertains to proof that a punitive damages award is appropriate, should not be heard by the jury until liability is determined." *Id.* The perils of violating this rule are self-evident:

> **To try a case any other way would allow a jury to consider punitive damages evidence while determining the compensatory damage award.** This is a troubling scenario when one considers that under such procedure, not only is the jury subject to **possibly returning an inflated compensatory damage award based on consideration of the wrong evidence,** it may also **forego a finding for the defendant altogether in those situations where the jury may have otherwise seriously considered finding for the defendant,** by considering only the appropriate evidence as to fault/liability.

Id. (emphasis added). The present case is an example of what this Court had in mind in *Bradfield.* Unable to make out their case on a design defect, Plaintiffs resorted to impugning Goodyear.

The United States District Court for the Northern District of Mississippi has interpreted Mississippi's law of bifurcating actual and punitive damages proceedings to prohibit opening statements that invoke claims going only to punitive damages. *Beck v. Koppers, Inc.*, No. 3:03CV60-P-D, 2006 WL 2228876, at *1 (N.D. Miss. Apr. 3, 2006). However wide counsel's latitude during opening or closing statements may be, it certainly does not extend to prejudicial remarks, and there can be no doubt that assertions going solely to punitive damages are prejudicial. *See MIC Life Ins. Co. v. Hicks*, 825 So. 2d 616, 625 (Miss. 2002) (prejudicial remark in closing statement in punitive-damages phase, which taken with other errors "clearly require[d] reversal").

VII. Cumulative Error Requires a New Trial.

In the event that this Court finds error in some or all of issues III through VI, above, but does not consider that any single error rises to the level of reversible error, Defendants submit that the combined effects of these errors led to a patently unjust verdict of over $2 million against Defendants. *See Blake v. Clein*, 903 So. 2d 710, 732 (Miss. 2005) ("While any of these errors standing alone might not require reversal, the cumulative effect of errors deprived the defendants of a fair trial."). Defendants therefore urge this Court to reverse and remand for a new trial on the merits.

VIII. The Trial Court Erred in Denying Defendants' Motion for Remittitur.

In the alternative to a verdict rendered for Defendants or a new trial, Defendants sought a remittitur of the damages in this case on the basis that the damages awarded were "excessive or inadequate for the reason that the jury . . . was influenced by bias, prejudice, or passion, or that the damages awarded were contrary to the overwhelming weight of credible evidence." Miss. Code Ann. § 11-1-55.

A. Kirby's Actual Damages Were Excessive

In an accident where the driver's blood-alcohol level was 0.25% and the uncontradicted evidence is that the car was being driven at 92 m.p.h., it is clear that to assess Defendants' share of the driver's damages at $733,333.40 is simply outrageous, particularly when the numerous issues discussed above make it clear that the jury was improperly presented evidence which was irrelevant to the issues of liability and actual damages, as well as inflammatory, and proper only to a hearing on punitive damages. Kirby had no medical expenses, and there was no evidence of any conscious pain or suffering. Plaintiffs' own

economist found a loss of future earnings, the only substantial actual damages in Kirby's case, of only $343,525.00, T.580, R.E.30, yet Defendants were assessed twice that amount.

B. The Jury Was Improperly Instructed That It Could Award Kirby Hedonic Damages

Moreover, despite the fact that Miss. Code Ann. § 11-1-69(2) disallows hedonic damages in wrongful-death suits, the jury was given Instruction No. 13, R.6769, R.E.21, as regards all "Plaintiffs," which told the jury they "must award damages for . . . loss of capacity for enjoyment of life that the Plaintiffs experienced in the past." This was error, as it did not distinguish the Kirby wrongful death claim, and the grossly excessive award of what were supposedly "actual" damages strongly implies that the jury took this factor into account, not to mention the other factors improperly placed before them at trial. T.1577-78, R.E.30 (overruling objection to instruction).

C. Odom's Damages Were Clearly Unsupported by the Evidence

Also, given the comparative negligence that must be assessed against the passengers, who willfully chose to ride with a driver who could not have been anything but obviously intoxicated, and given the driver's clear preponderance of fault, Odom's award in the amount of $1,754,800.00 against Defendants is likewise contrary to the overwhelming weight of the evidence. As was seen in the Statement of Relative Facts above, Odom holds a full-time job earning over $20.00 an hour, and since the accident has gotten married and has fathered a child. Odom represented in a job application and health questionnaire nine months after the accident that he was completely recovered, released from all doctors, had no disabilities, and willing to travel and to work overtime and weekends. Trial Exs. 24, 25 (R.E. 33, 34).

D. The Jury's Verdict Resulted from Bias and Prejudice

Additionally, Plaintiffs' tire expert violated the trial court's instruction against any counsel or witness's mentioning the recall of non-Goodyear tires, such as the notorious Firestone recall. T.568, R.E. 28. Counsel for Goodyear's motion for mistrial on that basis was denied. T.569-70, R.E.30. When this, plus the grossly improper remarks going to punitive damages that have been treated at issue VI above, plus the irrelevant and prejudicial "Problem Summary" that was improperly allowed to go to the jury, are taken together into account, it is abundantly clear that the jury had plenty of opportunity for "bias, passion, or prejudice," which helps to explain the grossly inflated damages awards in this case.

Bearing in mind the extent to which the jury was presented with evidence which was not only irrelevant but prejudicial and inflammatory, a remittitur is therefore proper under § 11-1-55, in the event that this Court declines to reverse and render the jury's verdict or to grant a new trial.

CONCLUSION

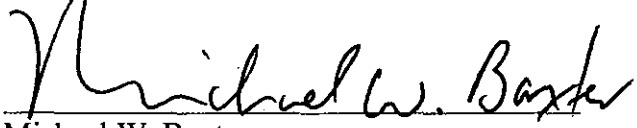
The death of Travis Kirby, and the injuries of Riley Strickland and Sidney Odom, were a tragedy for all three young men. The fact that Mr. Kirby passed away after having chosen to drive 92 m.p.h. in the middle of the night on a country highway, with a .25 BAC, and that Mr. Strickland and Mr. Odom chose to risk their own lives by riding with him under those conditions, does not make the accident any less of a tragedy. It does, however, suggest that what was at fault here was *not* a tire that was defective when it left the factory.

Plaintiffs had their opportunity to demonstrate a manufacturing defect, and failed to do so. Nonetheless, due to the multiple errors in the trial of this matter, a faulty verdict was awarded, and Defendants have a judgment against them for over two million dollars. This miscarriage of justice can and should be corrected by this honorable Court.

For all the foregoing reasons, Defendants ask that this Court reverse the final judgment of the Copiah Circuit Court in this matter, and render a verdict for Defendants, or, in the alternative, grant a new trial for Defendants, or, in the alternative, grant a remittitur to Defendants as set forth above.

Respectfully submitted, this the ***27th*** day of December, 2007.

THE GOODYEAR TIRE & RUBBER COMPANY
BIG 10 TIRE COMPANY

By: 

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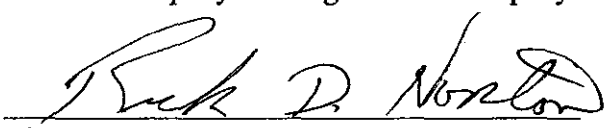

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CERTIFICATE OF SERVICE

I, Michael W. Baxter, attorney for The Goodyear Tire & Rubber Company and for Big 10 Tire Company, hereby attest that I have caused a true and complete copy of the foregoing document to be served via United States mail, postage prepaid, upon the following:

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