IN THE SUPREME COURT OF MISSISSIPPI

ESTATE OF BRANDON BOLDEN, BY AND THROUGH MARILYN BOLDEN, ADMINISTRATRIX — **APPELLANT**

V. — **CASE NO.: 2007-CA-01121**

CEDRIC WILLIAMS AND AUTOZONE MISSISSIPPI, INC. — **APPELLEES**

BRIEF OF APPELLEES - ORAL ARGUMENT REQUESTED

KEITH D. OBERT, ESQ. ([redacted])
WILLIAM F. BROWN, ESQ. ([redacted])
OBERT LAW GROUP, P.A.
599 B STEED ROAD
RIDGELAND, MISSISSIPPI 39157
TELEPHONE: (601) 856-9690
FACSIMILE: (601) 856-9686

ATTORNEYS FOR CEDRIC WILLIAMS AND AUTOZONE MISSISSIPPI, INC.

IN THE SUPREME COURT OF MISSISSIPPI

ESTATE OF BRANDON BOLDEN, BY AND THROUGH MARILYN BOLDEN, ADMINISTRATRIX	**APPELLANT**
V.	**CASE NO.: 2007-CA-01121**
CEDRIC WILLIAMS AND AUTOZONE MISSISSIPPI, INC.	**APPELLEES**

CERTIFICATE OF INTERESTED PERSONS

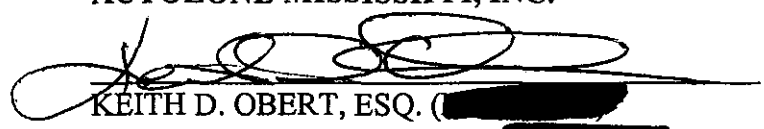
The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Estate of Brandon Bolden
2. Marilyn Bolden, Administratrix of the Estate of Brandon Bolden
3. Artis Bolden
4. Singletary & Thrash, P.A.
5. Cedric Williams
6. AutoZone Mississippi, Inc.
7. Obert Law Group, P.A.

8. Honorable W. Swan Yerger

Respectfully submitted,

CEDRIC WILLIAMS AND
AUTOZONE MISSISSIPPI, INC.



KEITH D. OBERT, ESQ. ([redacted]
WILLIAM F. BROWN, ESQ. ([redacted]
ATTORNEY OF RECORD FOR APPELLEES,
CEDRIC WILLIAMS AND
AUTOZONE MISSISSIPPI, INC.

TABLES OF CONTENTS

TABLE OF AUTHORITIES

CASES PAGE

STATUTES

RULES

STATEMENT OF ISSUES

1. WHETHER PLAINTIFF IS PROCEDURALLY BARRED FROM RAISING THE EXCLUSION OF HIS EXPERT WITNESSES AND QUESTIONABLE MEDICAL BILLS AS ERRORS ON APPEAL WHEN HE FAILED TO MAKE AN OFFER OF PROOF, OR PROFFER OF EVIDENCE, AS TO THE TESTIMONY HE SOUGHT TO HAVE ADMITTED OR OFFER THE TRANSCRIPT OF ANY WITNESS AT TRIAL?

2. WHETHER THE TRIAL COURT WAS WITHIN ITS DISCRETION IN STRIKING PLAINTIFF'S DESIGNATION OF EXPERTS BASED UPON PLAINTIFF'S FAILURE TO COMPLY WITH THE DISCLOSURE REQUIREMENTS OF RULE 26(b)(4) OF THE MISSISSIPPI RULES OF CIVIL PROCEDURE?

3. WHETHER THE TRIAL COURT WAS WITHIN ITS DISCRETION IN STRIKING PLAINTIFF'S MEDICAL BILLS, EXHIBITS 3-10, AND EXCLUDING SAME FROM EVIDENCE WHEN PLAINTIFF FAILED TO ESTABLISH THAT THE MEDICAL BILLS WERE PROXIMATELY CAUSED BY THE SUBJECT ACCIDENT?

STATEMENT OF THE CASE

The genesis of this action is a pedestrian-automobile accident that occurred on or about December 20, 2002, on North Mill Street in Jackson, Mississippi. Appellant's decedent, Brandon Bolden (hereinafter referred to as "Bolden")[1], was attempting to cross North Mill Street between West Monument Street and West Church Street when he darted into the street, outside of a crosswalk, *i.e.*, "jaywalking," failing to yield the right-of-way to oncoming traffic and collided with the vehicle driven by Appellee, Cedric Williams, who was operating same in the course and scope of his employment with Appellee, AutoZone Mississippi, Inc., (hereinafter sometimes referred to as "AutoZone"). As noted, Bolden failed to cross North Mill Street at a marked cross-walk or at an unmarked cross-walk at the intersection of either North Mill and West Monument Streets or North Mill and West Church Streets.

Bolden filed his civil action against Williams and AutoZone on August 12, 2004. On or about October 7, 2004, Williams and AutoZone propounded their First Set of Interrogatories and Request for Production of Documents to Bolden. Included with the Interrogatories was a standard "expert witness interrogatory" requesting that Bolden identify the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (R.E. at No. 1, p. 20.) Bolden

---

[1] Brandon Bolden died in a one car traffic accident in the early morning hours of June 15, 2007. Pursuant to applicable Mississippi law, his mother, Marilyn Bolden, was named Administratrix of his Estate and is prosecuting this appeal as the representative of the Estate of Brandon Bolden.

In order to clearly and simply identify the parties on appeal, Williams and AutoZone will refer collectively to Marilyn Bolden, administratrix of the Estate of Brandon Bolden, and Brandon Bolden, Plaintiff herein, as "Bolden." If other, more specific, clarification is needed with particular regard to Appellant Marilyn Bolden, same will be made at the specific point herein.

did not identify any expert, whether treating physician or otherwise, and stated only that when a decision was made as to whom will testify as experts, Bolden would provide a report from each such expert as supplementation to his Interrogatory response. *Id.* As of May 7, 2007, the date the trial of this matter began, Bolden had not produced any reports for any expert, had not properly supplemented his Interrogatory Responses accordingly, nor had any medical opinions been identified.

The initial Scheduling Order entered herein provided that Bolden would designate his experts on or before July 14, 2006. In Bolden's First Designation of Expert Witnesses, Bolden designated four (4) medical experts, J. Randall Ramsey, M.D., Rahul Vohra, M.D., Richard Weddle, M.D., and Howard T. Katz, M.D. Bolden stated that each expert would ". . . render his expert opinions with a reasonable degree of medical certainty." (Appellant's R. E. at No. 3, pp.1-3.) Yet, Bolden never set forth what those expert opinions might be. Rather, he stated that each expert's anticipated testimony "is set forth in the medical summaries previously provided to Defendants." *Id.* However, Bolden neither produced any such summaries nor produced medical records pertinent to said experts' purported opinions.

On August 22, 2006, Williams and AutoZone filed their Motion to Extend Time within which to Designate Experts and Motion to Strike Plaintiff's Designation of Experts. (R.E. at No. 1). In said Motion, Williams and AutoZone argued that, because Plaintiff's Designation was so insufficient, they were unable to designate their own experts or even determine whether experts were needed, and thus, an extension of time for filing Defendants' designation of experts was sought. Further, Williams and AutoZone requested the trial court to strike Plaintiff's Designation of Expert Witnesses.

Subsequent to the filing of Williams and AutoZone's Motion, counsel for the parties reached

an agreement whereby Bolden would supplement his designation, setting forth the required information, and AutoZone would have additional time within which to designate its experts, once Bolden's supplemental designation was received. On October 30, 2006, Bolden filed his Supplemental Designation of Expert Witnesses, which did not set forth any additional information regarding two (2) of the four (4) experts that were previously designated. (Appellant's R. E. at No. 4). Bolden only stated that the opinions of Drs. Ramsey and Vohra were contained within their medical records. *Id.* With regard to the remaining two (2) experts from the original designation, Drs. Weddle and Katz, Bolden did not list either of them in the supplemental designation and never even mentioned same. Thus, despite such supplementation, Bolden still had not complied with Rule 26(b)(4) of the Mississippi Rules of Civil Procedure, nor adequately apprised Williams and AutoZone as to the expected testimony of any expert at trial. The Designation did not specify which, if any, of Bolden's injuries were caused, contributed to or exacerbated, by the subject accident. Furthermore, Bolden failed to supplement his response to the expert interrogatory which Williams and AutoZone had propounded in October, 2004, properly and fully identifying any expert witness he anticipated calling at trial. At no time prior to the trial of this matter did Bolden identify any expert witness, treating physician or otherwise, that he expected to call at trial, who would testify that Bolden's injuries were proximately caused by the subject accident.

Williams and AutoZone moved to strike Bolden's expert witnesses inasmuch as Bolden had neither provided the subject matter on which the expert was expected to testify, stated the substance of the facts and opinions to which the expert was expected to testify, nor provided a summary of the grounds for each such opinion. (R.E. at No. 1). Prior to trial, on April 27, 2007, the trial court issued its Order striking the expert witnesses which Bolden had attempted to designate for Bolden's failure to comply with Rule 26(b)(4) of the Mississippi Rules of Civil Procedure, in addition to

striking the expert witnesses whom Williams and AutoZone had designated. (Appellant's R. E. at No. 7).

In the same Order, the trial court granted Williams and AutoZone's Motion for Summary Judgment, in part, and found that Bolden was negligent as a matter of law for violating Miss. Code Ann. §63-3-1105 (1972), as amended, when he "jaywalked," *i.e.*, failed to cross North Mill Street at a marked cross-walk or at an unmarked cross-walk at the intersection of either North Mill and West Monument Streets or North Mill and West Church Streets. *Id.*

This matter proceeded to trial on May 7-9, 2007. Bolden did not call any expert witness or offer any medical testimony which established that his injuries were proximately caused by the subject accident. Furthermore, Bolden never introduced the first medical record, whether or not same had been provided to Defendants, whereby any causal connection could possibly be found. In fact, Bolden failed to even make a proffer of any testimony which may have putatively addressed the proximate causation of his injuries and the relationship, *vel non*, of any claimed medical expenses. At the end of Bolden's case-in-chief, and again at the end of Defendants' case, Williams and AutoZone requested that the trial court grant a directed verdict on two grounds. (Appellant's R. E. at No. 7). First, Williams and AutoZone argued that Bolden had not presented any evidence which, taking into account all reasonable inferences in Bolden's favor, a reasonable jury could find that Williams and /or AutoZone had acted negligently. Second, inasmuch as Bolden had not presented any medical testimony whatsoever, or introduced into evidence any medical records[2], which related the causation of the claimed injuries and medical expenses to the subject accident, Bolden had failed

---

2 Bolden did not introduce into evidence any medical record for any medical treatment he received, he only introduced medical bills for treatment he allegedly received as a result of injuries he claimed to have sustained in this accident.

to establish that the injuries and damages of which he complained were proximately caused by any negligence of Williams or AutoZone.

The trial court granted said Motion in part and denied it in part. *Id.* The trial court found a jury issue existed with regard to the negligence of Cedric Williams and AutoZone, and denied that portion of the Motion for Directed Verdict. However, the trial court found that there was ". . . a serious issue relating to causation" of Bolden's injuries and damages. (*Id.* at p. 9, lines 17-18). The trial court ruled that because no medical expert or opinion was available to determine whether any treatment was required after that received on the day of the subject accident, the jury did not have ". . . a proper guide as to what the medical injuries are other than the mere fact that plaintiff claims injuries. . . ." (*Id.* at p.14, lines 6-9). Noting that Bolden was not competent to testify as to his own medical prognosis and treatment, (*Id.* at p. 13, lines 23-25), the trial court struck Exhibits 3-10, which were medical bills for treatment Bolden received after the date of the subject accident, finding that Bolden had not established proximate cause as to any medical treatment received after the day of the subject accident. (*Id.* at p. 14, lines 15-19, pp. 15-17).

Thereafter, the trial court submitted the case to the jury which returned a verdict for Plaintiff, therein finding that Bolden was sixty percent (60%) negligent in causing the subject accident and Cedric Williams and AutoZone were forty percent (40%) negligent. The jury found the Bolden had suffered Five Hundred Ninety-One and 44/100 Dollars ($591.44) in damages. The trial court then reduced the damages in proportion to Bolden's own negligence and entered judgment against the Defendants for Two Hundred Thirty-Six and 58/100 Dollars ($236.58).

STATEMENT OF FACTS

On December 20, 2002, Bolden was attempting to cross North Mill Street between West Monument Street and West Church Street when he, while admittedly jaywalking, darted into the street, failing to yield the right-of-way to oncoming traffic, and collided with the vehicle driven by Cedric Williams, who was in the course and scope of his employment with AutoZone. Bolden failed to cross North Mill Street at a marked cross-walk or at an unmarked cross-walk at the intersection of either North Mill and West Monument Streets or North Mill and West Church Streets. At the scene of the accident, Bolden complained of a minor injury to his head and shoulder. Bolden was transferred via ambulance to and treated at University Medical Center on December 20, 2002. He was released the same day, with no specific instructions for any further medical care.

Bolden maintained that he suffered other injuries for which he did not seek treatment on the day of the subject accident. According to his testimony, he sought treatment for said injuries in the months and years subsequent to the subject accident. At trial, Bolden testified that he incurred Sixteen Thousand, Five Hundred Five and 06/100 Dollars ($16,505.06) in actual, total past medical expenses as the result of the subject accident. Of the total medical expenses claimed as being proximately related to the subject accident, only Two Thousand, Three Hundred Twenty-Eight and 56/100 Dollars ($2,328.56) were incurred on the date of the subject accident. Bolden did not offer any testimony from his treating physicians or any other expert, or offer of medical proof whatsoever that any injury he allegedly sustained, or medical expenses incurred, whether on the day of the accident or otherwise, was proximately caused by the subject accident.

As a result of Bolden's "jaywalking," the trial court, prior to the trial of this matter, based upon Bolden's admissions in his deposition, had found Bolden was negligent as a matter of law for violating Miss. Code Ann. §63-3-1105 (1972), as amended, for Bolden's failure to cross North Mill

Street at a marked cross-walk or at an unmarked cross-walk at the intersection of either North Mill and West Monument Streets or North Mill and West Church Streets. Further, the trial court excluded Exhibits 3-10, medical bills related to medical treatment Bolden allegedly received after the date of the subject accident, because Bolden had not presented evidence or testimony that established the treatment was proximately related to the subject accident.

After the trial court submitted the case to the jury, the jury returned with a verdict finding that Bolden was sixty percent (60%) negligent in causing the subject accident and Cedric Williams and AutoZone were forty percent (40%) negligent. The jury found that Bolden had suffered Five Hundred Ninety-One and 44/100 Dollars ($591.44) in damages. The trial court then reduced the damages in proportion to Bolden's own negligence and entered judgment against the Defendants for Two Hundred Thirty-Six and 58/100 Dollars ($236.58). It is from this judgment that Bolden brings this appeal.

SUMMARY OF ARGUMENT

Appellant contends that the Circuit Court of Hinds County, Honorable W. Swan Yerger presiding, erred when it: (1) struck Brandon Bolden's treating physicians, who were designated as expert witnesses to testify at trial; and, (2) struck from evidence all of Bolden's medical expenses incurred after the date of the accident, as Bolden had failed to establish that said medical expenses were proximately caused by the subject accident.

To be successful on appeal, Bolden must demonstrate that the trial court abused its discretion in reaching its decision to strike the expert witnesses and medical evidence offered at trial and, only then, if a substantial right of a party was affected. *In Re Estate of Mask*, 703 So. 2d 852, 859 (Miss. 1997); *West v. Sanders Medical Clinic for Women, P. A., et al.*, 661 So. 2d 714, 720 (Miss. 1995)(citing Miss. Rule Evid. 103). Furthermore, the error must be of such magnitude as to leave no doubt whatsoever that the appellant was unduly prejudiced. *Davis v. Singing River Electrical Power Association*, 501 So. 2d 1128, 1131 (Miss. 1987); *Parmes v. Illinois Central Gulf Railroad*, 440 So. 2d 261, 268 (Miss. 1983). Finally, "when a party objects to the exclusion of evidence, he must make an offer of proof to the court, noting on the record for the benefit of the appellate court what evidence the trial judge excluded." *Nunnally v. R. J. Reynolds Tobacco Company*, 869 So. 2d 373, 382 (Miss. 2004)(quoting Comment to Miss. Rule Evid. 103).

Prior to trial, and pursuant to Williams' and AutoZone's Motion to Strike, the trial court struck Bolden's expert witnesses, inasmuch as Bolden had failed to provide required information in the form of "the subject matter on which the expert was expected to testify, the substance of the facts and opinions to which the expert was expected to testify and a summary of the grounds for each opinion." Miss. R. Civ. P. 26(b)(4). In designating his experts, Bolden did nothing more than identify the treating physicians and state that their opinions were contained within their medical

records. Bolden did not state what said opinions were or whether the physicians would causally relate his claimed injuries to the subject accident. No medical records produced by Bolden provided the requisite causal relation between the claimed injuries and the subject accident. Moreover, Bolden failed to introduce any such medical records at the trial of this matter.

Bolden argues that his experts were properly designated as said experts were not "hired guns," but rather, were Bolden's treating physicians. It matters not, as the purported designation was woefully insufficient. In an attempt to bootstrap this argument, Bolden argues that the principles of the Federal Rules of Civil Procedure, with regard to discovery of information held by expert witnesses, should be applied, particularly as same may apply to treating physicians. Bolden, generally, is only partially correct in such position.

The Federal Rules require a written and signed report from designated experts employed or specially retained for trial. Treating physicians, however, are viewed with more latitude and are allowed to testify as to the opinions contained within their records, so long as the facts known and opinions held by the physician are provided along with the summary of the grounds therefor. See Rule 26.1(A)(2)(f), Uniform Local Rules of the Northern and Southern Districts of Mississippi. Although the Mississippi Rules of Civil Procedure were patterned after their federal counterpart, the Mississippi Rules do not provide the same disclosure requirements for expert testimony or any distinction for treating physicians. Nonetheless, neither the Federal Rules nor Mississippi Rules require a defendant to glean a treating physician's opinions from medical records or to otherwise ascertain that which is a plaintiff's burden of production and proof. Bolden's reliance on said federal authorities, and cases interpreting their application, is not well-founded and does not relieve Bolden of his obligation to comply with the applicable rules of procedure, whether Federal or State. Clearly, Bolden's argument cannot stand and certainly does not establish that the trial court herein abused

its discretion, when Bolden failed to provide any expert opinions whatsoever.

Further, Bolden claims that the exclusion unduly prejudiced him at trial, as the trial court could have imposed sanctions less severe than the exclusion of the witnesses, such as continuing the trial to allow Williams and AutoZone to depose the physicians, if they so wished. However, such a contention presupposes that Bolden had properly disclosed the facts and opinions of his experts, as well as a summary of the grounds therefor, which were offered to establish medical causation. He did not. Moreover, Appellant's theory would simply allow a plaintiff to identify his treating physicians and where any opinions, related or unrelated to a subject injury, may be found and then enjoy not only freedom from rule mandated summary disclosure of said opinions but also a gift in the form of transferring the burden of going forward with the evidence onto a defendant. The defendant would then bear the burden of ascertaining which, if any, opinions the physician might offer and whether same supported causation of plaintiff's injuries.

In other words, Bolden's theory of assumption of proper disclosure and proximate causation would force a defendant, who bears no burden of going forward with evidence in regard to an element of a plaintiff's cause of action, to not only discover information supportive of plaintiff's claims but also to put the doctor's causation opinions into evidence itself, thereby establishing an element of plaintiff's proof before defendant could even begin to defend against plaintiff's claims. Essentially, a plaintiff would be given a "mulligan" as to his burden of proof in the form of assumed sufficiency/causation and, when challenged as to said failure to disclose properly discoverable information, a defendant then would be required to discover and prove whether a plaintiff's injuries and damages were proximately related to the subject accident. Such a presumptive shifting of the burden of proof is wholly unprecedented in Mississippi jurisprudence, which does not support Bolden's claims that the trial court abused its discretion in excluding Bolden's expert witnesses.

Next, Bolden contends that the trial court erred when it struck, after Plaintiff rested, all medical bills incurred after the date of the accident, for which no causal connection had been established. At trial, Bolden did not offer any testimony of any physician or even introduce the first medical record substantiating a single medical bill, whether incurred on the day of the accident or thereafter. The stricken medical bills are replete with treatment for conditions which had no bearing on the subject accident, other than Bolden's claim of relation. Plaintiff did not establish any medical need for any treatment beyond that which was received on the day of the subject accident. The trial court's ruling was based upon the obvious lack of any causal connection between those medical expenses incurred after the date of the subject accident and the subject accident itself. The trial court heard the testimony of Bolden as to the injuries suffered on the day of the accident, and considered the absence of any medical records or testimony whatsoever that somehow related, proximately or otherwise, any need for medical treatment after the day of the subject accident. Given the complete failure of proof as to Bolden's burden, the trial court did not abuse its discretion in excluding the questioned medical bills and said decision should be affirmed.

In support of Bolden's claim that the medical expenses should have been submitted to the jury, he relies upon Miss. Code Ann. § 41-9-119 (1972) which provides:

> Proof that medical, hospital, and doctor bills were paid or incurred because of any illness, disease, or injury shall be prima facie evidence that such bills so paid or incurred were necessary and reasonable.

Bolden's argument again presupposes satisfaction of an element on which he bore the burden of proof at trial, *i.e.*, that the accident proximately caused the injuries and damages for which he sought medical treatment. Bolden did not offer any evidence to establish the need for any follow-up care, or any evidence of the medical care given after the day of the subject accident and the medical reasons for same. The medical bills contain no evidence whatsoever as to why the care was sought

or given, and no medical findings proximately relating the injuries and treatment to the subject accident whatsoever. Clearly, Bolden should have offered some proof of medical causation, by introduction of medical records, testimony of treating physicians as to his diagnosis, prognosis, treatment, etc..., or otherwise, which he did not.

Mississippi law is patently clear that while a plaintiff may testify as to his pain and suffering and describe his injuries, he is not competent to testify as to his own medical treatment and prognosis. A plaintiff must offer the testimony of his physician(s) for same. Appellant did not offer any medical testimony or medical records which described the medical treatment received, which even hinted as to why it was needed or which proximately related the medical treatment received and its causal connection to the subject accident, in support of the medical bills.

The vast majority of reported cases which have interpreted the statute, and analyzed its application, have involved cases in which the plaintiff submitted his medical records and expenses in addition to the testimony of his treating physician(s). Nevertheless, the Court has emphasized that causation is not presumed and causation of the injuries, and treatment of same, is the matter at issue, not whether the charges incurred for same were reasonable and necessary.

Inasmuch as Bolden failed to properly disclose Rule 26(b)(4) information as to experts he expected to call at trial of this matter, and failed to establish that his injuries and damages were proximately caused by the subject accident, the trial court did not abuse its discretion in excluding Bolden's improperly designated experts or striking medical expenses incurred after the date of the subject accident. Further, Bolden did not make any proffer of the expected testimony of the excluded expert(s), nor has he even provided a transcript of Bolden's own testimony in the record on appeal, purporting to provide any causal connection for injuries claimed to be related to this accident. Therefore, he has not preserved same for appellate review and, therefore, any arguments

related to the exclusion of the expert(s) and/or medical bills are not properly before this Court. Having failed to demonstrate by the record on appeal, by transcript or other materials to prove the substance of the issues on appeal, this Court must presume that the rulings of the trial court were correct. Accordingly, Bolden's appeal must fail.

ARGUMENT AND AUTHORITIES

APPELLANT'S BURDEN ON APPEAL

Appellant contends that the Circuit Court of Hinds County, Honorable W. Swan Yerger presiding, erred when it: (1) struck Brandon Bolden's treating physicians, who were designated as expert witnesses to testify at trial; and, (2) struck from evidence all of Bolden's medical expenses incurred after the date of the accident, for which no causal connection was proven. A trial court's decisions in managing discovery and excluding evidence or witnesses is reviewed under an abuse of discretion standard.

To be successful on appeal, Bolden must demonstrate that the trial court abused its discretion in reaching its decision to strike the expert witnesses and medical evidence offered at trial and said exclusion affected a substantial right of Bolden. *In Re Estate of Mask*, 703 So. 2d 852, 859 (Miss. 1997); *West v. Sanders Medical Clinic for Women, P. A., et al.*, 661 So. 2d 714, 720 (Miss. 1995)(citing Miss. R. Evid. 103). The error must be of such magnitude as to leave no doubt whatsoever that an appellant was unduly prejudiced. *Davis v. Singing River Electrical Power Association*, 501 So. 2d 1128, 1131 (Miss. 1987); *Parmes v. Illinois Central Gulf Railroad*, 440 So. 2d 261, 268 (Miss. 1983). The trial court will be affirmed unless ". . . there is a definite and firm conviction that the court below clearly erred in reaching its conclusion after weighing the relevant factors." *Busick v. St. John*, 856 So. 2d 304, 319 (Miss. 2003). Finally, a trial court's decision will not be disturbed with regard to allowing or disallowing a witness' testimony "unless we conclude

that the [decision] was arbitrary and clearly erroneous, amounting to an abuse of discretion." *Mississippi Transportation Commission v. McLemore*, 863 So.2d 31, 34 (Miss. 2003)(quoting *Puckett v. State*, 737 So.2d 322, 342 (Miss. 1999). In other words, the standard is deferential to the trial court's familiarity with the proceedings and evidence before it, as well as for its insights and sound judgment in controlling the litigation before it.

Finally, "when a party objects to the exclusion of evidence, he must make an offer of proof to the court, noting on the record for the benefit of the appellate court what evidence the trial judge excluded." *Nunnally v. R. J. Reynolds Tobacco Company*, 869 So. 2d 373, 382 (Miss. 2004)(quoting Comment to Miss. R. Evid. 103).

1. WHETHER PLAINTIFF IS PROCEDURALLY BARRED FROM RAISING THE EXCLUSION OF HIS EXPERT WITNESSES AND QUESTIONABLE MEDICAL BILLS AS ERRORS ON APPEAL WHEN HE FAILED TO MAKE AN OFFER OF PROOF, OR PROFFER OF EVIDENCE, AS TO THE TESTIMONY HE SOUGHT TO HAVE ADMITTED OR OFFER THE TRANSCRIPT OF ANY WITNESS AT TRIAL?

When the trial court struck Plaintiff's expert witnesses for failure to comply with the disclosure requirements of Rule 26(b)(4) of the Mississippi Rules of Civil Procedure, as well as the trial court's own Scheduling Order deadline, Plaintiff did not make an offer of proof as to the expert testimony of any physician so excluded. Mississippi law is well established that before a party may predicate error upon the exclusion of a witness or his testimony, he must preserve said putative error by making an offer of proof as to what the anticipated testimony would have been. *Nunnally v. R. J. Reynolds Tobacco Company*, 869 So. 2d 373, 382 (Miss. 2004); *Harris v. Shields*, 568 So. 2d 269 (Miss. 1990). If no offer of proof is made, then this Court may not reverse the trial court's decision, even if an error was made, as the excluded testimony may not be said to have affected the party's substantial right. *Harris, supra* at 272.

Rule 103(a) of the Mississippi Rules of Evidence provides in part:

> **Error may not be predicated upon a ruling which admits or excludes evidence** unless a substantial right of the party is affected, and . . .
>
> **In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context**.

Miss. R. Evid. 103(a)(emphasis added). Further, the Comment to Rule 103 clearly explains any ambiguity that may exist:

> "when a party objects to the exclusion of evidence, he must make an offer of proof to the court, noting on the record for the benefit of the appellate court what evidence the trial judge excluded. See *Brown v. State*, 338 So.2d 1008 (Miss. 1976); *King v. State*, 374 So.2d 808 (Miss.1979)."

Cmt., Miss. R. Evid. 103 (emphasis added).

The cases interpreting the evidentiary rule's requirement of an offer of proof before error may be predicated upon the exclusion of evidence are numerous. *See e.g., Nunnally, supra*; *Knotts v. Hassell*, 659 So.2d 886 (Miss. 1995); *Gifford v. Four-County Electrical Power Association*, 615 So. 2d 1166 (Miss. 1992);*Wirtz v. Stewart*, 586 So. 2d 775, 784 (Miss. 1991); *Harris, supra*; *Hammond v. Grissom*, 470 So. 2d 1049 (Miss. 1985); *Arrow Food Distributors v. Love*, 361 So. 2d 324 (Miss. 1978); *Redhead v. Entergy Mississippi, Inc.*, 828 So. 2d 801 (Miss. Ct. App. 2001);*Bridges v. Kitchings*, 820 So. 2d 42 (Miss. Ct. Ap. 2002); *Kleyle v. Burril*, 807 So. 2d 481 (Miss. Ct. App. 2002). In each, the Court refused to consider on appeal, or reverse, a trial court's exclusion of testimony, where the party claiming error had failed to preserve the claimed error by making a proffer as to what the excluded testimony would have been.

In *Knotts v. Hassell*, 659 So.2d 886 (Miss. 1995), the Supreme Court held that it would not place the trial court in error when plaintiff failed to make an offer of proof which would have

allowed the trial court an opportunity reconsider its ruling excluding the witness. *Id.* at 891(citing *Wirtz v. Stewart*, 586 So. 2d 775, 784 (Miss. 1991)(exclusion of evidence will not be a basis for reversal in absence of proffer)(overruled on unrelated ground). In *Wirtz*, the Supreme Court noted that although the trial court erred in disallowing certain testimony, the issue was not preserved for appeal because the offended party failed to make an offer of proof as to the substance and nature of the testimony. *Id.* at 784. In *Hammond v. Grissom*, 470 So. 2d 1049 (Miss. 1985), the Court stated:

> When a party seeks reversal because of excluded testimony, he must either place the witness on the stand, ask questions, and have the answers made of record, or else the witness must be presented and there must be a specific statement of what the answers or testimony of the witness would be.

Id. at 1052 (quoting *Dazet v. Bass*, 254 So. 2d 183 (Miss. 1971). In *Kleyle v. Burril*, 807 So. 2d 481 (Miss. Ct. App. 2002), the Court of Appeals held that not only must some statement be dictated into the record as to what the excluded evidence would have been, but also "our rule is that in making a profert[sic] of testimony rejected by the trial court, counsel must cause the record to clearly reflect what he intended to prove by such testimony." *Id.* at 484 (quoting *Martin v. Wadlington*, 337 So. 2d 706, 708 (Miss. 1976); *see also, Mason v. State*, 440 So. 2d 318, 319 (Miss. 1983). "Without more than mere assertions, it must be presumed that the rulings of the trial court were correct." *Shelton v. Kindred*, 279 So. 2d 642, 644 (Miss. 1973).

Moreover, in his Brief, Bolden claims that Plaintiff testified at trial regarding the relationship between the questionable medical bills excluded by the trial court and the subject accident. However, Bolden has clearly failed to provide this Court with any basis for overturning the trial court's decision to disallow same. Conspicuously missing from the trial court's record is any testimony, live or by deposition, which supports Bolden's naked assertions as to what transpired at trial, and what was or was not proven by such testimony. As a result, Bolden's record on appeal is

not sufficient to allow this Court to reverse the trail court's decision.

It is clear that the Mississippi Supreme Court "has recognized many times that each case must be decided by the facts shown in the record and not by mere assertions in the brief." *Kleyle, supra* at 483 (citing *Mason v. State*, 440 So.2d 318, 319 (Miss.1983)). Furthermore, "without more than mere assertions, it must be presumed that the rulings of the trial court were correct." *Id.*; *Shelton, supra* at 644 (emphasis added). Thus, without testimony at trial or by deposition in the record that Bolden sufficiently related the claimed injuries and medical treatment to the accident, so as to form the requisite causal connection between same, the trial court's decision must be presumed to be correct and Bolden's appeal must fail.

It is well-settled that preservation of an error for appeal is basic first-year law student hornbook law. In this case, Bolden failed to make a proffer for the record as to what the testimony of Plaintiff's treating physicians would have been, if same had been allowed to testify. Despite the trial court's significant and well-reasoned discussion of the exclusion of said witnesses, Plaintiff did not put the physicians on the stand and question them regarding their opinions or otherwise read into the record what their anticipated testimony would have been, so as to complain about said exclusion on appeal. Similarly, Bolden failed to include the trial transcript in the record on appeal such that a determination as to whether the causal connection had been established at trial. Based upon long standing and well established Mississippi law, Plaintiff did not preserve these claimed errors for appeal. Accordingly, Plaintiff's claims of error regarding the exclusion of his expert witnesses or treating physicians and medical bills are not properly before this Court. Said proclaimed errors should not be considered and the trial court should be affirmed on these issues for procedural reasons, if for no other.

2. WHETHER THE TRIAL COURT WAS WITHIN ITS DISCRETION IN STRIKING PLAINTIFF'S DESIGNATION OF EXPERTS BASED UPON PLAINTIFF'S FAILURE TO COMPLY WITH THE DISCLOSURE REQUIREMENTS OF RULE 26(b)(4) OF THE MISSISSIPPI RULES OF CIVIL PROCEDURE?

Bolden seemingly argues that the trial court abused its discretion not only in striking Plaintiff's expert witnesses, but also in striking those of Defendants. Relying upon an extensive timeline, Bolden attempts to show that he expended great effort and exercised diligence in attempting to disclose his expert witnesses to Williams and AutoZone. Regretfully, effort and diligence are not the standards by which disclosure of expert testimony is measured, as the record is clear that Bolden's claimed disclosures provided no substantive information even remotely in compliance with the discovery and designation requirements under Mississippi procedural law.

Pursuant to Rule 26 of the Mississippi Rules of Civil Procedure,

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

Miss. R. Civ. P. 26(b)(4). On or about October 7, 2004, Williams and AutoZone propounded such an Interrogatory to Bolden. (R.E. at No. 1, p. 20). In response to same, Bolden stated that no decision had been made as to experts whom he expected to call and stated only that when a decision was made as to whom Bolden expected to testify as experts, he would provide a report from each such expert as supplementation to his Interrogatory response. As of May 7, 2007, the date the trial of this matter began, Bolden still had failed to supplement his Response to this Interrogatory in order to produce any substantive information related to any expert witness he expected to call at trial, whether by supplementation of the interrogatory answer, by providing the medical records

purportedly containing such opinions, or by providing a report which he indicated he would provide once a decision on said expected expert witness testimony was made. He did none of the above.

Furthermore, the parties entered into a scheduling order which provided that Plaintiff would designate his experts on or before July 14, 2006. In Bolden's First Designation of Expert Witnesses, Bolden identified four (4) expert witnesses: J. Randall Ramsey, M.D., Rahul Vohra, M.D., Richard Weddle, M.D., and Howard T. Katz, M.D, by providing only their names and addresses. Bolden did not identify any opinions held by any of the identified experts; however, he stated that each expert "... will render his expert opinions with [sic] a reasonable degree of medical certainty." Continuing, he stated that each expert's anticipated testimony "is set forth in the medical summaries previously provided to Defendants." (Appellant's R. E. at No. 4). Bolden never produced to Williams and AutoZone any such summaries or any medical records pertinent to any expert's unidentified and undisclosed opinion, as was pointed out to and clearly argued before the trial court, and nothing contained within this record on appeal suggests otherwise.

In an effort to address the sufficiency of Bolden's "designation," on August 22, 2006, Williams and AutoZone filed their Motion to Extend Time within which to Designate Experts and Motion to Strike Plaintiff's Designation of Experts. In said Motion, Williams and AutoZone argued that, because Plaintiff's Designation was so wholly insufficient, they were unable to designate their own experts or even determine whether any such experts were needed to defend against Plaintiff's claims. (R.E. at No. 1). Further, and in the alternative, Williams and AutoZone requested the trial court to strike Plaintiff's Designation of Expert Witnesses, for the same insufficiencies. *Id.*

Subsequent to the filing of Williams' and AutoZone's Motion, counsel for the parties reached an agreement whereby Bolden would supplement his designation, setting forth the required information, and Williams and AutoZone would then have additional time within which to designate

their experts, once Bolden's supplemental designation was received by defense counsel. On October 30, 2006, Bolden filed his Supplemental Designation of Expert Witnesses, which did not provide any opinions and which only set forth additional information regarding two (2) of the four (4) experts that were previously "designated." Bolden again merely stated that the opinions of Drs. Ramsey and Vohra were contained within their medical records. With regard to the remaining two (2) experts from the original designation, Drs. Weddle and Katz, Bolden did not list either of them in the supplemental designation and never even mentioned same.

Thus, despite a second opportunity at such supplementation, and after his insufficiencies in disclosure had been pointed out to him, Bolden still did not comply with Rule 26(b)(4) of the Mississippi Rules of Civil Procedure nor adequately disclose to Williams and AutoZone the expected testimony of any expert witness he expected to call at trial. The original and supplemental designations did not specify which, if any, of Bolden's injuries were caused, or exacerbated, by the subject accident. In fact, neither designation set forth any opinion as to Bolden's medical condition whatsoever. Furthermore, Bolden failed to supplement his response to the expert interrogatory which Williams and AutoZone had propounded in October, 2004, thereby properly identifying any expert witness he anticipated calling at trial, and no report was provided as supplementation, as represented in his original discovery response. At no time prior to the trial of this matter, by any means, did Bolden provide the Rule 26(b)(4) required information and identify any expert witness, treating physician or otherwise, that he expected to call at trial, who would testify that Bolden's injuries were proximately caused by the subject accident. Accordingly, on April 26, 2007, Williams and AutoZone filed their Motion in *Limine* requesting exclusion of any expert witnesses whom Bolden had not properly designated or for whom Bolden had not properly disclosed the opinions of same, pursuant to Miss. R. Civ. P. 26(b)(4). Prior to trial, on April 27, 2007, the trial court issued

its Order striking the expert witnesses which Bolden had improperly and incompletely designated.

Mississippi law is clear that the trial court enjoys broad discretion in discovery matters. Our law is equally clear that a party who propounds interrogatories or requests for production of documents seeking identities of witnesses, documents or other evidence which may be utilized at trial, gains an invaluable procedural right that the responding party must disclose the requested information if the responding party intends to use same at trial. *Harris v. General Host Corporation*, 503 So.2d 795, 796 (Miss.1986). The *Harris* case and Rule 26 acknowledge that an "I don't know" response may, at times, be appropriate. However, it is not *carte blanche* for the responding party to withhold expert opinions. When a plaintiff responds that he or she is uncertain as to whom will be called as an expert witness, he or he is then obligated to seasonably supplement their discovery responses providing the requested information, when new information renders the initial response inadequate. *Id.* at 798; *West, supra* at 721; *Square D. Co. v. Edwards*, 419 So. 2d 1327, 1329 (Miss. 1982).

When a party, as Bolden in the case at bar, fails to supplement his response **at all**, then said party is subject to the harsh result of exclusion of expert witnesses not properly identified in discovery. More specifically, when a breach of the discovery rules occurs, one of the sanctions authorized under our rules is "an order ... prohibiting [the defaulting party] from introducing designated matters in evidence." *In re Conservatorship of Stevens*, 523 So.2d 319, 320-21 (Miss. 1988); Miss. R. Civ. P. 37(b)(2)(B) and (d). Furthermore, "trial courts 'are committed to the discovery rules because they promote fair trials. Once an opponent requests discoverable material, [a party] has a duty to comply with the request regardless of the advantage a surprise may bring.'" *Busick, supra* at 320-21 (quoting *Williams v. Dixie Electric Power Association*, 514 So. 2d 332, 335 (Miss. 1987)). Bolden was under an obligation to supplement his response to the expert witness

interrogatory. He did not supplement the response at all, let alone sufficiently supplement same in advance of trial to afford Williams and AutoZone a reasonable opportunity to prepare to meet the evidence via cross-examination or with an expert, or experts, of their own.

The trial court's authority to issue an order excluding a witness is most important when the testimony of experts is offered without proper disclosure under Rule 26(b)(4) of the Mississippi Rules of Civil Procedure. The Supreme Court has stated:

> Rule 26 requires a respondent to an expert interrogatory to "state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion." M.R.C.P. 26(b)(4)(A)(I). ... "**Vague or unresponsive answers to interrogatories cannot be tolerated if the process of discovery is to survive as a reasonable method of discovering the information requested in the interrogatories.**" *Square D Co. v. Edwards*, 419 So.2d 1327, 1329 (Miss.1982). The information provided in the response must be more than what is contained in a pleading. *Nichols v. Tubb*, 609 So.2d 377, 385 n. 5 (Miss.1992). An expert should not be allowed to testify concerning a subject matter which is not included in the response to the interrogatory.

Buskirk v. Elliott, 856 So.2d 255, 264 (Miss. 2003)(emphasis added). Although Plaintiff attempted to respond to Defendants' expert interrogatory, he fell woefully short of the minimal guidelines provided in Rule 26(b)(4). Such vague and facially deficient responses are precisely the type that the Mississippi Rules of Civil Procedure have sought to prevent.

> We have long been committed to the proposition that trial by ambush should be abolished, the experienced lawyer's nostalgia to the contrary notwithstanding. We have sought procedural justice through a set of rules designed to assure to the maximum extent practicable that cases are decided on their merits, not the fact that one party calls a surprise witness and catches the other with his pants down. One of the most obviously desirable and rigidly enforced of these rules is that requiring pretrial disclosure of witnesses.

Harris, 503 So.2d at 796-97; See also, *Conservatorship of Stevens*, 523 So.2d at 320-21. Despite

Bolden's plea that Defendants knew of the opinions held by Bolden's treating physicians as Williams and AutoZone had subpoenaed Bolden's medical records, Williams and AutoZone were not under any obligation to discover what Bolden's expert's opinion might be, and nothing in the appeal record confirms what opinions, if any, were contained within any claimed medical records. The obligation to produce the requested information rested with Bolden, not with Defendants. Despite the fact that Williams and AutoZone advised Bolden that his expert interrogatory response and expert designation were vastly insufficient, they had no duty to cure any deficiency in Bolden's discovery responses or expert designation by discovering that which Bolden would not disclose, despite his clear obligation to disclose. The error from which Bolden seeks relief in the form of this Court's reversal of the trial court's ruling is his very own error in failing to properly disclose information which he was required, but failed, to divulge according to the most basic and plain terms of Rule 26. Plaintiff's voluntary and informed decision **not** to supplement his response to the expert interrogatory, when he knew that Defendant's had filed a Motion to Strike his designation of experts as insufficient under the rules, does not amount to a trial court error, let alone one that constitutes an abuse of discretion.

Seemingly, Bolden would also have this Court rewrite Rule 26, after the fact, such that his failure to disclose required expert information may be excused in this instance. He argues that his experts were "properly designated" as said experts were not "hired guns," but rather, were his own treating physicians. In his transparent effort to bootstrap this argument, Bolden argues that the principles of the Federal Rules of Civil Procedure, with regard to discovery of information held by expert witnesses, should be retroactively applied, particularly as they apply to treating physicians. Notwithstanding the immutable fact that this a Mississippi state court case subject to the Mississippi Rules of Civil Procedure, Bolden's argument for such a result rests upon the erroneous assumption that he did, in fact, properly provide the facts and opinions known to the physicians he expected to

call at trial. The record is quite clear that he did nothing more than identify the physicians who treated him for some malady without regard to whether said malady and treatment for same was related to the subject accident. As set forth herein, any claim that his disclosures are proper under the Federal Rules is simply wrong.

For instance, the Federal Rules require a written and signed report from designated experts employed or specially retained for trial, among other items not required by the Mississippi Rules of Civil Procedure. See Rule 26.1(A)(2), Uniform Local Rules of the Northern and Southern Districts of Mississippi. Treating physicians, however, are viewed with more latitude under the Federal Rules. Local Rule 26 provides that "[a] party **shall** designate treating physicians as experts pursuant to this rule, but is **only required to provide the facts known and opinions held by the treating physician(s) and a summary of the grounds therefor**." See Rule 26.1(A)(2)(f), Uniform Local Rules of the Northern and Southern Districts of Mississippi (emphasis added).

Although the Mississippi Rules of Civil Procedure were patterned after their federal counterpart, the Mississippi Rules do not provide the same disclosure requirements for expert testimony or note a distinction of a lesser standard for treating physicians. See Miss. R. Civ. P. 26(b)(4). Nonetheless, neither the Federal nor Mississippi Rules require a defendant to glean a treating physician's opinions from medical records or to otherwise ascertain that which is a plaintiff's burden of production and proof. Bolden's reliance on said federal authorities, and cases interpreting their application, is not well-founded and does not relieve Bolden of his obligation to comply with the applicable rules of procedure, whether Federal or State. Clearly, Bolden's argument does not establish that the trial court herein abused its discretion, and nothing contained within the appellate record suggests otherwise.

Bolden relies upon *Robbins v. Ryans' Family Steak Houses East, Inc.*, 223 F. R. D. 448 (S.

D. Miss. 2004) to support his contention that his experts were properly disclosed pursuant to Local Rule 26. Unfortunately, a closer review of this case reveals that the facts in *Robbins* are not helpful to Bolden's argument. There, the plaintiff designated her experts and provided nothing more than the names and addresses of six (6) physicians. Further, there as here, the designation did not provide their opinions or proposed testimony. The District Court noted the lesser standard for disclosure of a treating physician's opinion under the Local Rules, and found plaintiff's designation to be woefully inadequate, inasmuch as she did not set forth the facts and opinions known to her physicians and ultimately, as did the trial court here, struck said expert witnesses. Considering that Bolden's expert designation and expert interrogatory response amount to nothing more than providing the names and addresses of Bolden's physicians, *Robbins* provides no help and, indeed, would likely result in the same conclusion the trial court reached herein, that said designation was inadequate.

Next, Bolden claims that the exclusion unduly prejudiced him at trial as the trial court could have imposed a sanction less severe than the exclusion of the witnesses, such as continuing the trial to allow Williams and AutoZone to depose the physicians, if they so wished. Bolden offers a Texas Federal Court case, *Hamburger v. State Farm Mutual Automobile Insurance Co.*, 361 F. 3d 875 (5th Cir. 2004), in support of his contention that a lesser sanction was appropriate for his failure to properly disclose expert opinions. However, in a nutshell, the *Hamburger* case supports Defendants' position in this case, not Plaintiff's. The relevant facts from *Hamburger* are that plaintiff designated his treating physician as an expert on causation, three (3) months after the court imposed deadline, without any disclosure of the facts held by the physician or the opinions known by him, taking the position that no such disclosure was required for a treating physician. Ultimately, the district court struck the treating physician, finding the plaintiff did not timely disclose the witness and produce a written report setting forth the required information under Rule 26(a)(2)(B) of the Federal Rules of

Civil Procedure. *Id.* at 879.

On appeal, the Fifth Circuit in *Hamburger* followed a four (4) step test to determine whether the district court's decision in striking or excluding a witness was an abuse of discretion: (1) the explanation for the failure to identify the witness; (2) the importance of the testimony; (3) potential prejudice in allowing the testimony; and (4) the availability to cure such a continuance. *Id.* at 883. In that case, the Fifth Circuit found that the plaintiff had no reason for failing to timely designate or disclose the facts and opinions known to the physician who was to offer testimony on causation. Further, while the testimony was essential to the plaintiff's case, the Court emphasized that the same import underscored how critical it was to properly designate the physician. On the third prong, the Court noted that prejudice was apparent in that defendant had no reason to know the issues on which the physician would testify, despite defendant being in possession of the physician's records for plaintiff.[3] And finally, the Fifth Circuit found that a continuance "would have resulted in additional delay and increased expense of defending the lawsuit." *Id.* (quoting *Geiserman v. MacDonald*, 893 F. 2d 787, 792 (5th Cir. 1990). Noting that the first and third factors militated against allowing the testimony, the Fifth Circuit held the district court was not obligated to continue the trial. "Otherwise, the failure to satisfy the rules would never result in exclusion, but only in continuance." *Id.* at 884. The same would be true in this instance.

Applying the four (4) factors of *Hamburger* to the case at bar, even assuming *arguendo* that this Court should do so, it is quite clear that the trial court herein did not abuse its discretion, and as in *Hamburger*, the end result should have been exclusion of the experts in this case. Bolden's failure

---

3

The Fifth Circuit explained that the physician's opinion as to causation of the plaintiff's injuries was absent from the medical records. Quite similarly, any opinions at to causation of Bolden's injuries are notably absent from his medical records as well.

to timely identify and properly designate the treating physicians he expected to call as witnesses, as well as specifying the putative opinions and areas of testimony each would offer, weigh significantly in favor of striking the witnesses. Next, any testimony the physicians would have offered is unknown as Bolden failed to make an offer of proof as to any of the physicians, and, therefore, the unknown substance of any testimony militates against allowing the testimony, as Plaintiff here, as in *Hamburger*, apparently did not place any importance on same. The prejudice to Williams and AutoZone in preparing for undisclosed opinion testimony is stark and clearly weighs heavily in favor of striking the witnesses. Finally, although the first three (3) factors of the test substantially favor striking the expert witnesses, upon considering the fourth prong of the test to determine whether a continuance would have ameliorated the lack of disclosure, a continuance would have clearly resulted in additional delay and increased expense in defending the lawsuit. Suffice it to say, Mississippi Appellate Courts have long supported the notion that continuances often result in denied justice via delay.

Bolden's claim that a lesser sanction is somehow appropriate in the circumstances strains credulity. Bolden's argument presupposes he had properly disclosed the facts and opinions of his experts, as well as a summary of the grounds therefor, which were offered to establish medical causation. He did not. Moreover, Bolden's theory would simply allow a plaintiff to identify his physicians and the records which contained said physician's opinions, related or unrelated to a subject accident, and then not only enjoy freedom from rule mandated summary disclosure of the facts and opinions known to his physician, but also receive a bonus or gift in the form of transferring the burden of going forward with such medical evidence onto Williams and AutoZone, via cross-examination of said expert witness in deposition. Following this argument to its obvious, illogical conclusion, a plaintiff's disclosures would be assumptively proper and defendant would bear the

burden of assuming plaintiff's burden of proof and production as to whether plaintiff had suffered an injury related or unrelated to the alleged tortuous conduct. Bolden's theory would effectively force a defendant to establish an element of plaintiff's proof before defendant could begin to defend against plaintiff's claims. Essentially, a plaintiff would be given a "mulligan" as to his or her burden of proof in the form of assumed sufficiency of expert disclosure and proximate causation. Such a presumptive shifting of the burden of proof and production is wholly unsupported in Mississippi jurisprudence. For the foregoing reasons, the trial court did not abuse its discretion in striking Bolden's treating physicians as expert witnesses, no matter which argument Bolden levies.

3. WHETHER THE TRIAL COURT WAS WITHIN ITS DISCRETION IN STRIKING PLAINTIFF'S MEDICAL BILLS, EXHIBITS 3-10, AND EXCLUDING SAME FROM EVIDENCE WHEN PLAINTIFF FAILED TO ESTABLISH THAT THE MEDICAL BILLS WERE PROXIMATELY CAUSED BY THE SUBJECT ACCIDENT?

Plaintiff's next claims that the trial court erred when it struck Exhibits 3-10, which were medical bills for treatment Bolden received after the date of the subject accident, based upon the trial court's finding, after weighing all the evidence and testimony, that Bolden had failed to establish proximate cause, or any relationship for that matter, as to any medical treatment received after the day of the subject accident. As discussed herein, no record on appeal provides the actual testimony by which Bolden purportedly established proximate cause. Nevertheless, although Bolden presumably testified, and the evidence presented in the light most favorable to Plaintiff supposedly provided, that he incurred Sixteen Thousand, Five Hundred Five and 06/100 Dollars ($16,505.06) in medical expenses, only Two Thousand, Three Hundred Twenty-Eight and 56/100 Dollars ($2,328.56) of which were incurred on the date of the subject accident, prior to discharge from the hospital that same day, the trial court properly found that Bolden was not competent to testify as to his own medical prognosis and treatment. (Appellant's R. E. at item 7, p. 13, lines 23-25).

Accordingly, the trial court ruled that because no medical expert or opinion was available to determine whether any treatment was required after that received on the day of the subject accident, the jury did not have "... a proper guide as to what the medical injuries are other than the mere fact that plaintiff claims injuries..." and thus, excluded Exhibits 3-10 from evidence. (*Id.* at p. 14, lines 6-9, pp. 15-17)

Bolden did not call any expert, offer any medical testimony, lay or expert, or present a single medical record which established that his injuries, for which the medical records were incurred, were caused by the subject accident. In fact, Bolden failed to make a proffer of any testimony from the stricken treating physicians which would have putatively addressed the causation issue and the relationship of the subject accident to his injuries. Moreover, the record on appeal is devoid of any such testimony supporting proximate cause. Instead, Bolden chose to merely rely upon Miss. Code Ann. § 41-9-119 (1972) in an attempt to "connect the dots" between his claimed medical treatment, and expenses for same, and the subject accident. Section 41-9-119 provides:

> Proof that medical, hospital, and doctor bills were paid or incurred because of any illness, disease, or injury shall be prima facie evidence that such bills so paid or incurred were necessary and reasonable.

Miss. Code Ann. § 41-9-119 (1972), as amended. Bolden's argument again presupposes satisfaction of an element on which he bore the burden of proof at trial, *i.e.*, that the accident proximately caused the injuries and damages for which he sought medical treatment. Bolden did not offer any evidence, in the form of medical testimony, to establish the need for any follow-up care, or any evidence that medical care given after the day of the subject accident was proximately related to the subject accident. The medical bills contain no evidence whatsoever proximately relating the injuries and treatment to the subject accident whatsoever. Finally, and most telling, there is no testimony in the record on appeal from Bolden stating that he incurred said treatment, and related expenses, as the

result of the subject accident.

In *Patterson v. Liberty Associates*, 910 So. 2d 1014, 1019 (Miss. 2004), the Supreme Court stated:

> The elements of a negligence action are well settled in Mississippi. A plaintiff in a negligence suit must prove by a preponderance of the evidence (1) duty, (2) breach of duty, (3) causation, and (4) injury. *Miss. Department of Transportation v. Cargile*, 847 So. 2d 258, 262 (Miss. 2003). To recover, a plaintiff must prove causation in fact and proximate cause. *Jackson v. Swinney*, 244 Miss. 117, 123, 140 So. 2d 555, 557 (1962). "**Proximate cause of an injury is that cause which in natural and continuous sequence unbroken by any efficient intervening cause produces the injury and without which the result would not have occurred**." *Delahoussaye v. Mary Mahoney's, Inc.*, 783 So. 2d 666, 671 (Miss. 2001).

(emphasis added). Section 41-9-119 does not provide a substitute for proof of causation in a negligence action. In fact, both the Supreme Court and the Court of Appeals have held that a finding, pursuant to §41-9-119, that medical bills are reasonable and necessary, does not equate to a finding that those bills were incurred as a result of a defendant's negligence. *Herring v. Poirrier*, 797 So. 2d 797, 809 (Miss. 2000); *Callahan v. Ledbetter*, _____ So. 2d _____, NO. 2007-CA-00908-COA at ¶ 31 (Miss. Ct. App. 2008).

In *Herring*, the plaintiff offered the testimony of her treating physicians, who testified that her injuries were proximately caused by the accident in question, in support of her claims for damages. On appeal, the Supreme Court affirmed a verdict in favor of plaintiff, but awarding no damages, and held ". . . even if, pursuant to §41-9-119, [plaintiff's] medical bills were reasonable and necessary, §41-9-119 does not mandate a finding that those medical bills were incurred as a result of the accident in question." In the case at bar, Plaintiff did not offer any medical evidence, in the form of opinion testimony from his treating physicians, which causally related the medical

expenses that Bolden incurred after December 20, 2002, to the subject accident.[4] The trial court below, in weighing all the evidence and testimony it heard, found that Bolden had not met his burden of proving that the medical expenses he incurred were proximately related to the subject accident, and no such testimony is before the Court to provide any such causal connection. Thus, it must be presumed that the rulings of the trial court were correct. *Kleyle*, 807 So. 2d at 483; *Shelton*, 279 So. 2d at 644.

In *Cassibry v. Schlautman*, 816 So. 2d 398 (Miss. Ct. App. 2001), Cassibry contended that Schlautman had failed to rebut the §41-9-119 presumption of necessity and reasonableness of the medical bills she entered into evidence and the jury should have awarded her the full amount of her medical bills, approximately Sixty-Six Thousand and no/100 Dollars ($66,000.00). Cassibry not only offered her own testimony, but also that of her treating physicians. The Court of Appeals affirmed a plaintiff's verdict of Five Hundred Dollars ($500.00), and denied an additur based upon the presumption created by §41-9-119, finding "the main issue in this case does not pertain to the necessity and reasonableness of Cassibry's medical expenses; rather, it revolves around whether her injuries and resulting medical expenses were caused by Schlautman's negligence." *Id.* at 401. Further, "recoverable damages must be reasonably certain in respect to the efficient cause from which they proceed, and that the burden is on the claimant to show by a preponderance of the evidence that the person charged was the wrongful author of that cause." *Blizzard v. Fitzsimmons*, 193 Miss. 484, 10 So.2d 343, 345 (1942). Put simply, a plaintiff's injuries and damages must be proven to be proximately caused by defendant's negligence.

In *Walker v. Gann*, 955 So. 2d 920 (Miss. Ct. App. 2007), plaintiff appealed a jury verdict

---

4

It must be remembered that Plaintiff failed to make an offer of proof as to any testimony from the stricken treating physicians that he sought to be considered.

assessing her damages in the amount of Fourteen Thousand Dollars ($14,000.00) , as well as the trial court's denial of an additur sought by plaintiff. Walker relied upon §41-9-119 to support her claim that she was entitled to the full amount of her medical expenses, approximately Forty-Four Thousand Dollars ($44,000.00), inasmuch as defendant did not contest the entry of said medical bills into evidence. *Id.* at 932. In denying the additur, the Court of Appeals stated: ". . . as the defendants point out in their brief, '[t]he fact that the medical bills were authenticated, not hearsay and, therefore, admissible, has absolutely no relevance to the reasonableness and necessity of those charges.'" *Id.* The Court held "the statute cited by Walker provides no relief to her for the simple reason that she did not conclusively prove that the bills in question were incurred as a result of her injury. It is that very causation that was contested by the defendants and their evidence." *Id.* (emphasis added). Applying the Court of Appeal's finding to the case at bar, the trial court did not abuse its discretion in excluding the medical expenses that Bolden incurred after December 20, 2002. The trial court herein carefully analyzed the evidence before it and determined that Bolden had not met his burden with regard to the causation of said medical expenses as a result of the subject accident, and that determination is presumed to be correct.

The proof of Bolden's medical treatment after December 20, 2002, despite an absence of same in the record, may have been sufficient to establish that Bolden received medical treatment because of some injury, condition or malady. However, any such proof was not sufficient to establish that Bolden incurred the medical expenses set forth in Exhibits 3-10 as a proximate result of the subject accident and Williams' and AutoZone's purported negligence. The issue of proximate cause is not the same as that contemplated in §41-9-119 which provides only a presumption of authenticity, not causation.

The cases on which Bolden relies for the proposition that §41-9-119 provides the only proof needed as to Bolden's medical bills involve situations in which a treating physician or physicians

testified at trial on the issue of causation of plaintiff's injuries and medical expenses or the medical treatment plaintiff received which was reflected in the medical bills. *Purdon v. Locke*, 807 So. 2d 373 (Miss. 2002)(medical malpractice action where defendant treating physician testified as to treatment plaintiff received and amount of said medical bills); *Moody v. RPM Pizza, Inc.*, 659 So. 2d 877 (Miss. 1995)(treating physician testified as to cause of injuries, medical treatment and amount of medical expenses); *Green v. Grant*, 641 So. 2d 1203 (Miss. 1994)(treating physicians testified that injury and treatment was caused by accident with defendant, thereby requiring the medical treatment for which medical expenses were incurred); and, *Stratton v. Webb*, 513 So. 2d 587 (Miss. 1987)(treating physician's testimony sufficient to trace causation of injuries to collision).

Bolden also argues that he is a proper witness to establish that he incurred medical expenses and could testify as to his injuries and pain. In and of itself, this contention is correct and the trial court recognized same. See *Kroger v. Scott*, 809 So. 2d 679 (Miss. Ct. App. 2001). However, a plaintiff cannot testify as to his own medical prognosis and treatment. *Haggerty v. Foster*, 838 So. 2d 948, 959 (Miss. 2002); *Graves v. Graves*, 531 So.2d 817, 822 (Miss. 1988)(citing *Temple Construction Co. v. Naylor*, 351 So.2d 1350, 1352 (Miss. 1977)). In *Haggerty*, a plaintiff was prohibited from testifying as to her understanding of the results of an MRI, as said understanding was outside her comprehension. *Graves, supra* at 959. Mississippi law is clear that expert testimony is required where the claims require specialized knowledge beyond the scope of a layman. *Haggerty, supra* at 959. In the case at bar, the issue of proximate causation of Bolden's injuries, not the pain and suffering arising from said injuries, required expert testimony in the form of medical testimony as his claimed injuries were beyond the understanding of a layman. Bolden did not offer any medical testimony whatsoever regarding the need for any medical treatment as the proximate result of the subject accident. Accordingly, the trial court did not abuse its discretion in excluding Exhibits 3-10, and the trial court's decision should be upheld.

CONCLUSION

For all the foregoing reasons, Cedric Williams and AutoZone Mississippi, Inc., respectfully request that this Court affirm the judgment which the trial court entered in this matter as the trial court did not abuse its discretion in excluding Brandon Bolden's expert witnesses or Plaintiff's Exhibits 3-10, medical bills incurred after the date of the accident. Moreover, Plaintiff has procedurally failed to protect the record on appeal so as to give this Court any basis for overturning the lower court's findings.

THIS, the 1st day of October, 2008.

Respectfully submitted,

CEDRIC WILLIAMS and AUTOZONE MISSISSIPPI, INC., APPELLEES

BY: _____

KEITH D. OBERT, ESQ. ([redacted]

WILLIAM F. BROWN, ESQ. ([redacted]

OF COUNSEL:

OBERT LAW GROUP, P.A.
599 B Steed Road
Ridgeland, Mississippi 39157
Post Office Box 2081
Madison, Mississippi 39130-2081
Telephone: (601) 856-9690
Facsimile: (601) 856-9686

CERTIFICATE OF SERVICE

I, **KEITH D. OBERT**, do hereby certify that I have this day forwarded, via U.S. Mail, a true and correct copy of the foregoing *Brief of Appellees* to:

GARY D. THRASH, ESQ.
JOHN N. SATCHER, ESQ.
SINGLETARY & THRASH, P.A.
Post Office Box 587
Jackson, Mississippi 39205-0587

ATTORNEYS FOR APPELLANT

THIS, the 1st day of October, 2008.

KEITH D. OBERT

AMENDED CERTIFICATE OF SERVICE

I, **KEITH D. OBERT**, do hereby certify that I have this day forwarded, via U.S. Mail, a true and correct copy of the *Brief of Appellees* to:

GARY D. THRASH, ESQ.
JOHN N. SATCHER, ESQ.
SINGLETARY & THRASH, P.A.
Post Office Box 587
Jackson, Mississippi 39205-0587

ATTORNEYS FOR APPELLANT

Honorable W. Swan Yerger
Post Office Box 327
Jackson, Mississippi 39205

THIS, the 1st day of October, 2008.

KEITH D. OBERT