IN THE SUPREME COURT OF MISSISSIPPI
CAUSE NO. 2007-CA-01153

MIKE TOWNSEND — APPELLANT

V.

DAEWOO HEAVY INDUSTRIES AMERICA, CORP.,
and BURKE HANDLING SYSTEMS, INC. — APPELLEES

REPLY BRIEF OF APPELLANT

(Oral Argument Requested)

COUNSEL FOR APPELLANT

John F. Hawkins, Esquire (MS Bar [redacted])
HAWKINS, STRACENER & GIBSON, PLLC
129B South President Street
Post Office Box 24627
Jackson, Mississippi 39225-4627
Telephone: (601) 969-9692
Facsimile: (601) 914-3580

John Griffin Jones, Esquire
JONES, FUNDERBERG, SESSUMS, PETERSON & LEE
901 North State Street
Post Office Box 13960
Jackson, Mississippi 39286-3960

IN THE SUPREME COURT OF MISSISSIPPI
CAUSE NO. 2007-CA-01153

MIKE TOWNSEND — APPELLANT

V.

DAEWOO HEAVY INDUSTRIES AMERICA, CORP.,
and BURKE HANDLING SYSTEMS, 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. Michael Townsend - Appellant
2. Daewoo Heavy Industries America Corp., and Burke Handling Systems, Inc. - Appellees
3. John F. Hawkins, Esquire; Hawkins, Stracener & Gibson, PLLC – Attorneys for Appellant Michael Townsend
4. John Griffin Jones, Esquire, Jones Funderburg, Sessums, Peterson & Lee– Attorneys for Appellant Michael Townsend
5. Robert a. Miller, Esquire, Michael E. McWilliams, Esquire, Butler, Snow, O'Mara, Stevens & Cannada, PLLC– Attorneys for Appellees
6. Michael H. Bai, Esquire, Wilson, Elser, Moskowitz, Edelman & Dicker, LLP- Attorneys for Appellees
7. James Holland, Esquire, Pelecia Everett Hall, Esquire, Page, Kruger & Holland, P.A. – Attorneys for Appellees
8. Bridgette Thomas, Esquire, Markow Walker – Attorney for Intervenor
9. Honorable W. Swan Yerger, Hinds County Trial Court Judge

John F. Hawkins
Attorney of record for Appellant

TABLE OF CONTENTS

TABLE OF CASES, AUTHORITIES AND TREATISES

CASE **PAGE**

AUTHORITIES

of which demonstrate that this is clearly not a case where the plaintiff offers an expert who provided nothing more than a bottom line opinion without basis; rather, Mr. Berry's opinions are based on his own personal examination of the machine, the underlying facts and methodologies generally accepted in his field of engineering – indeed, his own qualified "experience and examination." *Dennis v. Prisock*, 221 So. 2d 706, 711 (Miss. 1969).

The Defendants and trial Court rely heavily on the case of *Glenn v. Overhead Door Corp.*, 935 So. 2d 1074, 1079-80 (Miss. App. 2006). This case is different. Here, Mr. Berry personally examined and inspected the subject machine, including but not limited to noting its degree of backtilt, its weight (9,502 lb with attachment 9,669 lb), number of hours on the forklift meter, the F-N-R lever location, movement of the F-N-R lever approximately two inches from neutral to forward – that the lever must move 1 ½ inches forward from the neutral position before the forklift begins to move forward, that a force of only two to five pounds is required to shift the FNR lever from neutral to forward, that the F-N-R lever can be bumped into forward while getting off the forklift without the operator being aware this has occurred, that the forklift begins moving one to two seconds of shifting the forklift into forward or reverse, the location of the park brake, that the forklift was not equipped with an operator presence sensing (deadman) system and that the accident site is nearly level along the dock. (ARE tab 2) Mr. Berry furthermore reviewed and considered depositions of numerous witnesses in this case, including depositions of the plaintiff and defendants' engineering expert Kevin Smith, Daewoo's expert designation, depositions of employees with knowledge of the machine, the Daewoo incident report, Burke Handling accident report form, photographs of the accident scene, Daewoo Operation and Maintenance Manual, Daewoo Specifications Systems Operation Testing and Adjusting, and multiple training and equipment

Defendants seek to avoid the design flaws in the subject forklift – mainly, that it can operate under power without an operator in the seat and, has no deadman switch (OPS system) by alleging incorrectly that Mr. Berry's testing and opinions are without basis. These design flaws are, according to Mr. Berry, exacerbated by the fact that the F-N-R lever can be easily moved from neutral to forward gear, even inadvertently (and that the lever does not lock into neutral). Please see ARE tab 3, pg. 3 of Mr. Berry's written report). Defendants are correct that Mr. Berry testified in this case that the machine functioned as designed – as ***defectively*** designed. However, to the extent that defendants argue that Mr. Berry has testified or agreed that the machine functioned as "expected," that is absolutely not the case – please see Berry expert report at ARE tab 3 in which Mr. Berry stated in the report attached to his affidavit incorporating the same that "operators would not have appreciation for the inability to protect themselves either by their strength or by their quickness should the machine begin to move without an operator at the controls" and "operators of the forklift would not have expected the machine to be as dangerous as it was."

At bottom, the Defendants primary critique of Mr. Berry's opinions is one underlying factual portion of his testing where he demonstrated the ease with which the shift lever could be moved from neutral to forward. However, *defendants' own expert Kevin Smith* concluded that essentially the same pounds per square inch were required to move the lever from neutral to forward. Thus, there is no dispute that the lever can be easily moved into forward gear. Additionally, it is undisputed that the machine can and does travel under power without an operator at the controls – the primary dangerous hazard presented by the defective design of the subject forklift. The ease with which the lever moves into forward gear exacerbates the dangerous condition – that the machine moves under power without an operator in the seat or at the controls – a condition that is unreasonably dangerous

and should not exist in a forklift any more than it should in a riding lawnmower (riding lawnmowers are equipped with OPS systems to avoid this very design flaw). The Trial Court's ruling should be reversed.

B. Argument

Mr. Berry worked for Mr. Sevart's engineering firm and was the professional engineer who originally inspected and tested the subject forklift, which inspection, testing and report provided a substantial portion of the bases for Mr. Sevart's expert opinions in this matter. (Please see C.P. 483 to 501, Mr. Berry's original Inspection Report and attached photographs). Mr. Berry is a licensed professional engineer with over 24 years of experience in his field. Mr. Berry obtained his B.S. in mechanical engineering, graduating *cum laude* from Wichita State University in 1981, was licensed as a professional engineer in 1986 and obtained a Master of Science in Mechanical Engineering with a 4.0 G.P.A. from Wichita State University in May of 1990. The lower court was provided with Mr. Berry's detailed inspection report, a signed expert report with his attached *curriculum vitae*, deposition testimony – taken on two separate occasions – and an affidavit in which Mr. Berry further explained the methodology he utilized in forming opinions in this matter. All of these items were attached to Plaintiff's opposition to the Defendant's motion to exclude Mr. Berry's testimony. (Please see C.P. at pages 696 to 713 consisting of Mr. Berry's affidavit, *curriculum vitae* and expert report provided in this matter. Please see generally C.P. 456-713, consisting of Plaintiff's opposition tothe underlying dispositive motions and attached exhibits provided to Judge Yerger).

Judge Yerger excluded Plaintiff's expert engineer, Mr. Tom Berry, under MRE 702, *Daubert* and Mississippi law concluding, in the face of all the record evidence to the contrary, that Mr. Berry was unqualified to render opinions. Despite the fact that Mr. Berry is a highly qualified professional

engineer and based his opinions on his own testing and inspection of the forklift and accepted engineering principles, the trial court concluded that his opinions were based on mere "speculation and conjecture." (Please see Judge Yerger's Opinion and Order at C.P. 748 and ARE tab 5)

The substantial record evidence in this case compels the conclusion that Mr. Berry is a highly qualified professional engineer who based his reports, opinions and testimony in this case on reliable data, testing, inspection of the forklift, education, training, experience and widely accepted engineering methodology. His testimony should be allowed in this case and the lower court's conclusion that he is unqualified under *Daubert* and MRE 702 constitutes reversible error. Further, after determining that Mr. Berry was unqualified, the trial court ruled that plaintiff was unable to present genuine issues of material fact in support of his claims because he lacked expert testimony to substantiate his claims in this case. The lower court committed reversible error in granting summary judgment and this case should be reversed and remanded for a trial on the merits.

Mr. Berry obtained his B.S. in mechanical engineering in 1981 from Wichita State University, graduating *cum laude*. Mr. Berry had a 4.0 G.P.A. during his graduate studies at Wichita State University, obtaining a Masters degree in mechanical engineering in 1990. Mr. Berry has over 24 years experience as a licensed, professional engineer. He is eminently qualified to render engineering opinions in this case. He personally inspected and tested the subject forklift truck. He also reviewed multiple depositions in this case and relied on his education, training and experience in his field.

Mr. Berry did perform real life testing to determine whether in fact an individual could exit the forklift truck in question and inadvertently bump the gear shift mechanism moving it from neutral into forward gear to see if it was more likely than not that is what occurred in this case.

Please see paragraphs 8 and 9 of Mr. Berry's affidavit. Mr. Berry was able to perform this real life testing and bump the gear shift mechanism into forward gear while exiting the vehicle. He concluded that being able to do that was consistent with Plaintiff's testimony as to how he was injured on January 17, 2000.

Mr. Berry's determination in this respect is also based on his testing of the gear shift control and the pounds of pressure required to shift the lever from neutral to forward gear, a test also performed by Defendan't expert, Kevin Smith. Defendant's argument that this one underlying factual aspect of Mr. Berry's inspection of the subject machine fails to meet *Daubert* is a meritless point and the trial court's ruling granting defendant's motion to strike should be reversed. Clearly, this scientific test performed by both experts is reliable.

Defendants also assert the misplaced argument that Mr. Townsend's failure to set the park brake under the emergency circumstances upon exiting the forklift truck somehow compels the conclusion that the case should be dismissed in its entirety under MRCP 56. Defendants' argument is no more than a comparative negligence argument that Mr. Townsend "misused" the product. The Supreme Court has made it clear that the comparative negligence defense and issue of a plaintiff's alleged "misuse" of a product is a question of fact for the jury. Defendant's contention that this one fact should result in dismissal of the case is simply incorrect under the law.

Defendant's expert witness also performed an inspection of the subject machine and also reached conclusions with respect to the amount of pressure it takes to move the gearshift mechanism from neutral to forward gear. In essence, it is testing performed by both of the mechanical engineers in this case that defendant claims to be unreliable and on which the trial court apparently based it's conclusion that Mr. Berry's testimony is nothing but "speculation and conjecture" and must be

excluded in its entirety.

This Court has interpreted *Daubert* and its progeny and has made it clear that the *Daubert* factors are *not an exhaustive list* of considerations a court must undertake upon determining the admissibility of an expert witnesses testimony. Rather, the *Daubert* factors are guidelines and not every aspect of an expert witness's opinion should be subject to rigid *Daubert* scrutiny. In this case, Mr. Berry has provided affidavit testimony, deposition testimony, a detailed inspection report and a detailed expert witness report under M.R.C.P. 26 explaining that the methodology he utilized regarding the gearshift mechanism and the opinions in this case, including the ultimate opinion that the forklift is unreasonably dangerous and defective by design, are based on widely accepted methodologies employed by experts in his area of expertise – mechanical engineering. This is not a case where an expert has engaged in guess work or speculation – rather this is a case in which Mr. Berry, with twenty four years of experience and a masters in mechanical engineering, performed testing and an inspection of the subject machine and reviewed other data including deposition testimony and facts that have been discovered in this case, leading him to the conclusion that the subject forklift is defective and unreasonably dangerous.

For these reasons and all the reasons set forth below, it is respectfully submitted that the Trial Court committed reversible error in excluding Mr. Berry's testimony. The Trial Court's decision to exclude Mr. Berry's testimony also resulted in the Trial Court wrongly concluding that summary judgment was proper. The Court based it's conclusion in this respect on it's determination that Mr. Berry was not qualified to testify and therefore plaintiff was unable to present expert testimony presenting genuine issues of material fact to be tried in this products liability case. Mr. Berry's testimony should not have been excluded and when Mr. Berry is permitted to testify, his opinions

will be subject to cross-examination. However, his opinion testimony clearly presents genuine issues of material fact to be tried before the jury in this case.

In this case, both Daewoo and Plaintiff tendered expert witnesses for deposition after inspecting the subject forklift, examining facts surrounding the accident and plaintiff's injuries and employing methodology in the engineering community which, in Tom Berry's case, has wide acceptance. The experts have different opinions about whether the subject forklift was defectively designed, unreasonably dangerous and thus proximately caused injury to the plaintiff. This is, quite simply, not a summary judgment case. This case is a "battle of the experts" case to some extent with engineers from both sides giving opinion testimony contradicting one another.

***Daubert* Standard**

The Mississippi Supreme Court has recognized that the ***Daubert*** Court considered four general questions in determining the admissibility of expert testimony; namely, 1) whether the theory or technique can be tested; 2) whether the theory or technique has been subjected to peer review and publication; 3) the known or potential rate of error; and 4) whether the theory or technique has general acceptance. 509 U.S. at 593-94. Mississippi Supreme Court adopted the rule in ***Daubert*** in the case of ***Mississippi Transportation Commission v. McLemore*** , 863 So. 2d 31, 35 (Miss. 2003).

It is significant to note that "the list provided in ***Daubert*** is *not* exhaustive." ***Poole v. Avara, M.D.***, 908 So. 2d 716 (Miss. 2005). This Court stated the following in ***Poole***: "It is important to note . . . that the factors mentioned in ***Daubert*** do not constitute an exclusive list of those to be considered in making a determination: ***Daubert***'s single 'list of factors was meant to be helpful, not definitive.'" 908 So. 2d at 723 (quoting***McLemore***, 863 So. 2d 39). The Court in ***Poole*** observed

further that: "The ***Daubert*** court itself did not claim it was rigidly defining elements required for expert testimony to be admissible but rather providing only 'general observations' it deemed appropriate." ***Id.*** (quoting ***Daubert***, 509 U.S. at 593). Thus, this Court has made it clear that "many factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test." ***Id.*** A later look at ***Daubert*** by the U. S. Supreme Court provided the same result, concluding that "[w]e can neither rule out or rule in, for all cases and for all time the applicability of the factors mentioned in Daubert . . . . Too much depends on the particular circumstance of the particular case at issue." ***Kumho Tire v. Carmichael***, 526 U.S. 137, 150 (1999). That Court went on to state that "it might not be surprising in a particular case, for example, that a claim made by a scientific witness has never been the subject of peer review." ***Id.*** at 151.

At bottom, "[t]hough the ***Daubert*** factors are meant to be helpful, the application of those factors "depends on the nature of the issue, the expert's particular expertise, and the subject of the testimony." ***McLemore***, 863 So. 2d at 37. The question is whether the testimony at issue is both reliable and relevant.

It is submitted that the testimony and bases supporting the testimony of Thomas Berry clearly pass muster under the ***Daubert*** standard and MRE 702 and the trial court committed reversible error in concluding otherwise. Defendant's motion, as will be argued in more detail below, focused on Mr. Berry's real-life testing of the shift control lever and specifically the ease with which the control lever may be moved from neutral into forward gear – this is merely one underlying factual component supporting Mr. Berry's overall opinion that the subject forklift is defectively designed and unreasonably dangerous.

Both plaintiff's expert, Tom Berry, P.E., ***and*** Defendants' expert Kevin Smith offered

opinions and performed underlying testing regarding the ease with which the shift control lever may be moved from neutral to forward. Please see the expert witness report of Thomas Berry (ARE tab 3). In essence, both engineers performed the same testing of the amount of pressure had to be applied to the gear shift mechanism to switch the gear from neutral to forward and from neutral to reverse. Mr. Berry concluded that only two to five pounds of pressure is required to move the gear shift from neutral to forward gear. This, coupled with his real-life testing to see if one could bump the gear shift upon exiting the forklift and thereby inadvertently shift the control from neutral to foward gear constitute some of the underlying factual bases upon which Mr. Berry's ultimate opinions and testimony are premised in this action.

The trial court would have had the opportunity either in considering pretrial motions *in limine* or at trial upon testimony being offered by both sides – as the gatekeeper – to determine whether the opinion testimony of the experts in this case is relevant, reliable and admissible. Defendants' reliance on ***Daubert*** and motion to exclude plaintiff's expert witness on one expert-contested underlying factual basis should have been denied and the trial court erred in granting the defendant's motion to exclude Mr. Berry's testimony.

Left with the inability to challenge Mr. Berry's qualifications, Defendants focus on one factual aspect of Mr. Berry's investigation and claim that it fails to meet the ***Daubert*** standard. It is interesting to note that Defendant's expert performed, in essence, the same testing of the gear shift lever during his inspection of the machine. Mr. Berry concluded that more likely than not Mr. Townsend inadvertently bumped the gear shift control from neutral into forward gear when he exited the forklift to stop the buggy from rolling off the dock – that is but one underlying basis for Mr. Berry's overall opinion which is that the subject forklift is unreasonably dangerous for numerous

reasons as set forth in his detailed expert designation, reports and testimony.

Taking into account Mr. Berry's testimony regarding his qualifications, background, experience and training, including human factors and experience he has gained over the many years he has performed testing as a design and consulting engineer as set forth in his *curriculum vitae*, the affidavit attached to the response in opposition to the instant motion and Mr. Berry's deposition testimony, the lower court should have denied the defendant's ***Daubert*** motion. Mr. Berry is clearly qualified to render opinions in this case and the trial court should be reversed.

Methodology Employed by Plaintiff's Expert is Appropriate and Meets *Daubert* and Mississippi Standards Under the Mississippi Rules of Evidence

It is submitted that Mr. Berry's methodology is appropriate and his factual investigation and inspection of the subject machine providing some of the bases for his opinions in this matter pass the ***Daubert*** and Mississippi Rules of Evidence standards. As set forth above, the guidelines set forth in ***Daubert*** are not to be applied rigidly but rather constitute general guidelines. Indeed, in the ***Poole*** case, supra, one of the expert opinions being offered had not been the subject of peer review and this Court recognized that was "simply not enough to exclude expert testimony." This Court stated specifically that "[s]imply because no author had written specifically on bursting an anastamosis seen through CPR does not mean it is truly groundbreaking medical history. Besides, Poole's beneficiaries had the benefit of attacking the evidence at trial. 'Vigorous cross-examination, presentation of contra-evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.'" ***Poole***, supra citing ***Daubert***, 509 U.S. at 596.

The same is true here – the engineers on both sides of this case will be subject to cross-

examination on all aspects of their opinion testimony at trial, including the issue raised in defendant's motion to exclude. As in the***Poole*** case, an engineer's testing of the pounds of pressure required to move a gear shift from neutral to forward gear is certainly not "groundbreaking" and the fact that Mr. Berry cannot point to an article where this real-life testing methodology has been discussed in engineering literature does not warrant excluding his testimony and dismissing this case. The result reached by the trial court is wrong and this case should be reversed and remanded for a full trial on the merits – the experts may well disagree as to how, more likely than not, the accident occurred. However, the methodology utilized by Mr. Berry to inspect the subject forklift has wide acceptance in the engineering community and he has performed this type testing for many years. The trial court's ruling excluding Mr. Berry's testimony under *Daubert* should be reversed.

In the case of ***Tassin v. Sears, Roebuck and Co.***, 946 F.Supp. 1241 (M.D. La. 1996) that district court stated:

> [T]his Court does not believe that the ***Daubert*** factors are irrelevant to a case involving alternative product designs. If an engineering expert can demonstrate that his proposed design has been tested, peer reviewed, or is generally accepted, then so much the better. On the other hand, this does not mean that engineering testimony on alternative designs should be excluded automatically if it cannot withstand a strict analysis under ***Daubert***. The inquiry is case specific. It may well be that an engineer is able to demonstrate the reliability of an alternative design without conducting scientific tests, for example, if he can point to another type of investigation or analysis that substantiates his conclusions. For example, an expert might rely upon a review of experimental, statistical or other technical industry data, or on relevant safety studies, products surveys, or applicable industry standards. He could also combine any one or more of these methods with his own evaluation and inspection of the product based on experience and training in working with the type of product in issue. The expert's opinion must, however, rest on more than speculation, he must use the types of information, analyses and methods relied on by experts in his field, and the information that

> he gathers and the methodology he uses must reasonably support his conclusions. If the expert's opinions are based on facts, a reasonable investigation, and traditional technical/mechanical expertise, and he provides a reasonable link between the information and procedures he uses and the conclusions he reaches, then rigid compliance with ***Daubert*** is not necessary.

Tassin, 946 F.Supp. at 1247-48.

As Mr. Berry points out in his affidavit and his expert witness report, the methodology that he employs has been widely accepted in his field of expertise. Defendants take issue with the factual real-life inspection that Mr. Berry performed of the forklift when he tested the ease with which the gear shift mechanism may be knocked from neutral into forward gear. Mr. Berry tested how much pressure was required and concluded that the gear shift mechanism could very easily be moved from neutral to forward. He also performed a real-life test where he exited the machine to see if it was possible to brush the gear shift mechanism inadvertently and thereby move the gear shift mechanism from neutral into forward gear. He determined through this real-life testing and inspection of the machine itself that it could in fact be done. That there is not an article to point to on this exact issue in the engineering literature is not a proper basis on which to exlude Mr. Berry's testimony and dismiss Mr. Townsend's entire cause of action.

While certainly Mr. Berry's opinions and bases upon which he reaches his conclusions will be the subject of cross-examination at trial, it is submitted that it is inappropriate for Defendants to have moved to strike Mr. Berry's testimony in its entirety based on one underlying factual basis supporting his opinions – an underlying factual issue that finds its basis in generally accepted practices in Mr. Berry's field. The trial court's ruling, opinion and order excluding Mr. Berry's testimony in its entirety based on the court's finding that his opinions are mere "speculation and

conjecture" should be reversed.

Summary Judgment is Inappropriate in this Case

Employing the standard of review on summary judgment as set forth above, there are genuine issues of material fact that preclude judgment as a matter of law and defendant's motion is without merit. MRCP 56. The trial court's grant of summary judgment was based on the court's conclusion on the *Daubert* issue that plaintiff was unable to present competent expert testimony to support his claims. Should this Court reverse on the Daubert issue, clearly the lower court's ruling on summary judgment should be reversed as well so this case may proceed to a trial on the merits.

Should this Court consider defendant's underlying "misuse" argument, the following is offered in support of plaintiff's opposition to the motion for summary judgment: Due to the circumstances at the time plaintiff exited the subject forklift truck immediately prior to being injured, he did not lower the forks or apply the park brake. Plaintiff did testify that he believes he neutralized the transmission before exiting and that he stopped the forklift truck. However, he admits he did not lower the forks to the ground and did not apply the park brake.

This Court held in the case ***Pickering v. Industria Masina I Tracktora (IMT)***, 747 So. 2d 836 (Miss. 1999), that a defendant may be entitled to a comparative negligence instruction in a design defect strict liability case. This Court also held that assumption of the risk is subsumed in the comparative fault doctrine in a strict liability case. This Court has also previously held that "misuse as a bar to recovery for products liability is a question of fact for the jury." ***Materials Transportation Co. v. Newman***, 656 So. 2d 1199, 1202 (Miss. 1995).

Mr. Townsend testified that he stopped the forklift, neutralized the transmission and got off the forklift truck in question under emergency circumstances - namely, to stop a very large, heavy

"buggy" from rolling off the loading dock and potentially causing damage or injury to others. Under those circumstances, plaintiff concedes he did not lower the forks or set the park brake. Plaintiff's expert witness, Tom Berry, has testified in this matter based on his education, training, experience and investigation that Mr. Townsend used the subject forklift truck in a safe and foreseeable manner under the circumstances. The primary danger and hazard presented in this case is that the subject forklift truck can in fact motivate under power down the loading dock without an operator in the seat. The risk of this danger or hazard is severe injury or death. Defendants argue that Mr. Townsend "misused" the subject machine and that position forms a large part of Daewoo's expert testimony in this matter. Mr. Berry's opinions on those points counter Mr. Smith's opinions. The alleged "misuse" by plaintiff, which is a defense on which defendants bear the burden of proof at trial, is a factual dispute and specifically a question for the jury as held in the ***Pickering*** case.

Like in the ***Pickering*** matter, Defendants in this case may be entitled to an instruction that the would allow the jury to conclude that plaintiff failed to use reasonable due care, making him responsible for some amount of negligence. If the defendants are entitled to such an instruction and if the jury finds that the plaintiff was negligent in some amount, the jury may consider whether plaintiff's negligence, if any, proximately contributed to his injuries. Please see instruction B-9 set forth in ***Pickering***, 740 So. 2d at 840. While evidence of Plaintiff's alleged "misuse" may be relevant and admissible on the question of comparative fault, those are questions of fact to be resolved by the jury and summary judgment is inappropriate. The trial court's ruling to the contrary should be reversed and this cause remanded for a full trial on the merits.

CONCLUSION

For all of the foregoing reasons, and the reasons set forth in Plaintiff's principal brief on appeal (incorporated herein by reference) it is respectfully submitted that the rulings of the trial court granting Defendants' Daewoo's (Doosan's) Motion to Exclude and/or Strike Plaintiff's Expert and thus granting Defendant's Motion for Summary Judgment should be reversed and this cause remanded for a jury trial.

Respectfully submitted, this the 29th day of May, 2008.

MIKE TOWNSEND, PLAINTIFF

By: _____
John F. Hawkins

OF COUNSEL:

John F. Hawkins, Esquire (MS Bar [redacted])
HAWKINS, STRACENER & GIBSON, PLLC
129 B South President Street (39201)
Post Office Box 24627
Jackson, Mississippi 39225-4627
(601) 969-9692

John Griffin Jones, Esquire
JONES, FUNDERBERG, SESSUMS, PETERSON & LEE
901 North State Street
Post Office Box 13960
Jackson, Mississippi 39286-3960

CERTIFICATE OF SERVICE

I, John F. Hawkins, attorney for the Plaintiff, Michael Townsend, herein do hereby certify that I have this day mailed, by United States mail, postage prepaid, a true and correct copy of the above and foregoing document to:

Robert a. Miller, Esquire
Michael E. McWilliams, Esquire
Butler, Snow, O'Mara, Stevens &
Cannada, PLLC
210 E. Capitol Street, Ste. 1700
Post Office Box 22567
Jackson, Mississippi 39225-2567

Michael H. Bai, Esquire
Wilson, Elser, Moskowitz, Edelman & Dicker, LLP
140 E. 42nd Street
New York, NY 10017-5639

COUNSEL FOR DAEWOO HEAVY INDUSTRIES
AMERICA CORPORATION
James Holland, Esquire
Pelecia Everett Hall, Esquire
Page, Kruger & Holland, P.A.
10 Canebrake Blvd Ste 200
Post Office Box 1163
Jackson, Mississippi 39215-1163

COUNSEL FOR BURKE HANDLING SYSTEMS, INC.

Bridgette Thomas, Esquire
Markow Walker
599 Highland Colony Pkwy., Ste. 100
P. O. Box 13669
Jackson, MS 39236-3669

COUNSEL FOR INTERVENOR

Honorable W. Swan Yerger
Hinds County Circuit Court Judge
407 E. Pascagoula Street
Post Office Box 327
Jackson, Mississippi 39205-0327

This the 27th day of May, 2008.

JOHN F. HAWKINS