IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
APPEAL NO. 2008-CA-00022

DUETT LAND FORMING, INC. **APPELLANT**

VS. **No. 2008-CA-00022**

BELZONI TRACTOR CO., INC., and
DEERE & COMPANY **APPELLEES**

On Appeal from the Circuit Court of Humphreys County Mississippi;
The Honorable Jannie Lewis Circuit Judge
Duett Land Forming Inc. v. Belzoni Tractor Co., Inc and Deere & Company,
Civil Action No. 02-0051

RESPONSE BRIEF OF APPELLEE DEERE & COMPANY

ORAL ARGUMENT REQUESTED

FRANK M. HOLBROOK (MSB #2500)
BUTLER, SNOW, O'MARA, STEVENS & CANNADA, PLLC
6075 Poplar Avenue, Suite 500
Memphis, Tennessee 38119
Telephone: (901) 680-7200
Facsimile: (901) 680-7201
ATTORNEY FOR APPELLEE
DEERE & COMPANY

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that in addition to the interested persons identified in Appellant's opening brief, 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. Deere & Company
   One John Deere Road
   Moline, IL 61265

2. Belzoni Tractor Company
   308 N. Hwy W
   Belzoni, MS

3. Brookie Duett
   Duett Landforming Inc.
   99 Duett Ln.
   Belzoni, MS 39038

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STATEMENT REGARDING ORAL ARGUMENT

Although the facts and law demonstrate that the trial court did not commit any reversible error, Appellee believes that oral argument would benefit the Court should it have questions concerning the proceedings that occurred before the trial court and jury.

STATEMENT OF THE ISSUES

I. Whether the Court Abused Its Discretion by Allowing Scott Cook, Deere & Company's Rule 30(b)(6) witness, to Testify Regarding Problems Involving Tractor Gudgeons when Cook had Been Designated to Testify Regarding "product performance problems . . . involving gudgeons", Plaintiff Had Deposed Cook on This Issue and Submitted Cook's Deposition In Duett Landforming Company's Case-in-Chief?

II. Whether Evidence Establishing that Defendants Completed Every Tractor Repair Requested by Plaintiff, that the Repairs were Not Substantial Given the Type of Work and Hours Logged, and that Plaintiff Used the Tractors for Four Years before Reselling Them, Was Sufficient to Support a Defense Verdict Finding that Defendants Had Not Breached Any Warranty?

STATEMENT OF THE CASE

Over the course of several months, beginning in 1998 and extending into 1999, Plaintiff purchased four John Deere Model 9400 tractors from the Defendant Belzoni Tractor Company. (Tr. 196-197). Before purchasing the four Model 9400 tractors at issue, Mr. Duett rented one of them (Number 11013) and used it for 455 hours and he rented and used a second tractor (Number 11034) for 312 hours before purchasing it. (Tr.199-204; 273-77; Ex. D-31). Each of the Model 9400 tractors shares the same design. For ease of reference, the tractors will be referred to by the last five digits of their Product Identification Number (i.e. a serial number). The delivery date and purchase date for the tractors was as follows:

Tractor Number	Delivered to Plaintiff	Purchased by Plaintiff
11013	July 7, 1998	December 17, 1998
11034	July 21, 1998	December 17, 1998
20007	October 19, 1998	December 17, 1998
20246	January 15, 1999	January 12, 1999

(Trial Ex. D-31 (Rental Agreements); D-2, D-3, D-4, D-5 (Purchase Orders)). As noted, two of the Model 9400 Tractors were delivered to Plaintiff in July of 1998, approximately five months before any of the tractors were purchased and he used those two tractors in his business for over 800 hours before he purchased any of the Tractors. *Id.* The third tractor was delivered to Plaintiff on October 19, 1998, approximately two months before its purchase. (Tr. at 206, Ex. D-4). After delivery, Plaintiff used the three tractors in its business prior to purchasing them. *Id.* The final tractor involved in this case was delivered to Plaintiff in January 1999 at the time of its purchase. (Tr. 207-208, Ex. D-5). Consequently, it is undisputed that Plaintiff had ample time to determine whether the Model 9400 John Deere Tractor was in fact suitable for his purposes **before** he purchased any of the tractors and **before** any implied warranty arose at the time of purchase.

The purchase of the tractors was negotiated by Plaintiff's President, Brookie Duett. (Tr. 253, 256-258). When negotiating for the purchase of the tractors Duett spoke with Larry Shurden, the principal for Defendant Belzoni Tractor, but Duett could not recall anything specifically that Shurden said to him about the tractors. *Id.* Although Duett says he saw a brochure for the tractors he did not recall anything specific that he relied upon in the brochures. (Tr. 315-316). Duett admitted that he could not recall anything that anyone at Belzoni Tractor said that caused him to purchase the Model 9400 tractors. (Tr. at 316). Duett did not speak to anyone with co-Defendant Deere about the Model 9400 Tractors prior to his purchase. (Tr. at 314).

At the time Plaintiff purchased the tractors he signed a purchase order that set forth the terms of the warranties. (Exs. D2, D3, D4, D5). Each purchase order was on an identical form and contained a "repair or replacement" warranty from Defendant Deere. (Id. at ¶A).

The Plaintiff admitted that on each occasion when the tractors broke, Deere repaired or replaced the broken parts. (Tr. at 280, 317-319; *See also Id.* at 525). Moreover, the Plaintiff did not claim at trial that the repairs had been made improperly. (*Id.*) The Plaintiff claimed at trial that the tractors should have been designed differently. Nonetheless, Plaintiff admitted that he was not an expert in tractor design and Plaintiff called no witness who testified concerning tractor design (R. 282). On the other hand, the Plaintiff did offer deposition testimony by Deere employees regarding the design of the tractors at issue. (P-11 Deposition of Cote; P-10, Deposition of Cook).

Plaintiff admits that when he first got the tractors they were not giving him problems (Tr. 205), that his problems started over the summer of 1999. (Tr. at 209). According to Plaintiff there were two major problems with the tractors, the transmissions and the gudgeons (Tr. at 281). Using Plaintiff's definition of the major problems and comparing those to the repair records produced in this case the hours of use for each tractor before a "major problem" occurred are as follows:

Tractor Number	Date and (problem)	Hours of Use on Tractor at time of Problem	Source
11013	December 15, 1999 (gudgeon)	2069	P-1
11034	May 26, 1999 (gudgeon)	904	P-2
20007	October 18, 1999 (gudgeon)	995	P-1
20246	December 15, 1999 (gudgeon)	1286	P-1

Each and every problem that Plaintiff complains about was repaired pursuant to the Warranty.[1] (Tr. at 280, 317-319). Some of the warranty repairs were performed by co-defendant Belzoni Tractor and some of the warranty repairs were performed by non-party Peaster Tractor Company (in Yazoo City). (Tr. at 308). Duett admitted that on each occasion when he sought warranty work the tractors were repaired and that Duett did not have to pay for the repairs, only service items excluded by the warranty. (Tr. 318-19). As Larry Shurden emphasized in his testimony, Duett did not pay "one dime" for these repairs done at Belzoni Tractor Company. (Tr. at 534).

At trial, Duett focused primarily on the gudgeon failures, the evidence having established that the transmissions were the same as those contained in prior tractors he had owned that were not problematic. (Tr. at 297, 558-559). During its case-in-chief, Plaintiff submitted the deposition of Scott Cook, Deere's Rule 30(b)(6) corporate representative. (P-10). In the deposition, Mr. Cook explained his understanding of the gudgeon seal problems experienced by Duett, and testified as to the causes of the those problems. *Id.* Deere also called Mr. Cook to the stand to further testify regarding Deere's understanding of the gudgeon seal problems. (Tr. at 549). Mr. Cook presented uncontested testimony that each of the gudgeon problems identified by Duett had been repaired. (Tr. 573-574).

Duett traded the tractors on March 28, 2002, almost four years after he began using them.[2] At the time they were traded Plaintiff had used them for between 3152 and 4114 hours. (Tr. at 298-300, P-16, 0001-0002). Duett admitted that the amount of hours used on these

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[1] In addition to the major items, other repairs were made pursuant to the warranty.

[2] Larry Shurden, Defendant Belzoni's corporate representative, testified that prior to Duett trading in the tractors, Shurden "made all kinds of offers" to Duett to attempt to satisfy him. Mr. Shurden offered to trade in all of them, trade out one at a time as needed, replace them with used 8970 series tractors, to keep a 9400 tractor in stock to rent if needed, or to purchase a 8970 for Duett's use "rent free" to eliminate downtime. (Tr. at 526). Duett did not take advantage of any of these offers although they would have mitigated his claimed damages.

tractors were about average for his business. (Tr. at 299-301). Duett's expert, Charlie Sanders, admitted that when the tractors were traded by Duett they had far more than the average number of hours normally seen on such tractors. (Tr. 474-475). For example, Sanders testified that when Tractor 11013 was traded in the average tractor of that age would be expected to have 1800 hours, but Tractor 11013 had 4,114 hours, i.e. 2,314 more hours than an average tractor. *Id.* The hours Duett had logged on the tractors was well in excess of the average number of hours generally logged for these types of tractors. (*Id.*; Tr. at 480). Duett did not have a major repair on any of these tractors until they approached 1000 hours. Moreover, Mr. Cook testified that considering the type of work Duett performed and the large number of hours logged on the tractors, the number of repairs needed did not indicate a defect and was not significantly different from the previous tractors owned by Duett. (Tr. at 584-585; P-10 at 36). In fact, Duett never attempted to revoke acceptance of the tractors, (Tr. at 508 (stipulated facts)) and his continued use of the tractors for almost four years clearly and conclusively demonstrates otherwise.

SUMMARY OF THE ARGUMENT

On appeal, Plaintiff argues that the trial court committed reversible error when it permitted Defendant to call Scott Cook to "provide expert witness testimony" from an "engineering standpoint" without being disclosed by Defendants as an expert witness or being qualified as an expert. The trial court's decision on the admission of the testimony, however, is reviewed for abuse of discretion only. While Rule 26 requires that experts be identified and disclosed prior to trial, the purpose of the rule is "that trial by ambush should be abolished." In the present case, Mr. Cook did not testify as an expert because he testified on behalf of Deere as a corporate representative regarding Deere's knowledge of gudgeon failures. He neither

examined Plaintiff's tractors nor did he form or offer an opinion regarding the cause of gudgeon failures. He merely testified as to how the stresses involved in pushing or pulling a tractor would cause the gudgeon seals to open.

Even if Mr. Cook did testify as an expert, however, Plaintiff certainly was not ambushed. Mr. Cook was identified as a witness in the pretrial order and was present throughout the case as Deere's corporate representative. Moreover, Mr. Cook had been designated over two years prior as Deere's corporate representative in response to Plaintiff's Rule 30(b)(6) Notice ("Notice") filed and served October 6, 2005. Importantly, Plaintiff's Notice requested a representative to testify regarding "defects" and "product performance problems" involving gudgeons.

Plaintiff took Mr. Cook's deposition on October 25, 2005 and questioned him regarding these topics in detail. In its case-in-chief, Plaintiff submitted the deposition of Mr. Cook, including substantive testimony regarding the cause of gudgeon failures. Plaintiff did not object to Mr. Cook's qualifications or knowledge regarding these topics at that time he offered his testimony; thus, the Court did not abuse its discretion by allowing Cook to testify live during Deere's defense regarding the same subject.

Moreover, even where a trial court is found to have abused its discretion, reversal is appropriate "only where the error adversely affects a substantial right of a party." Where the discovery violation results in the admission of evidence that is merely cumulative, the error is harmless. The objectionable testimony of Mr. Cook's was in fact cumulative of his deposition testimony and the testimony of Bradley Cote, another Deere engineer whose testimony was offered by the Plaintiff. Both testified at length by depositions offered by the Plaintiff regarding the different forces that can cause gudgeon failure, including the severe oscillation caused by

scraper applications. Perhaps more importantly, Mr. Cook's testimony could not have affected a substantial right of Plaintiff's because the objectionable testimony did not address an issue that was in dispute and thus did not assist the defense in any way. Defendant has never denied that the gudgeon seals could experience problems under certain applications – particularly in heavy scraper applications where tractors become stuck more often and travel on undulated haul roads. Defendant has never asserted that the gudgeon seal breach and resulting damage, whatever the cause, was not covered under warranty. Defendant's argument to the jury and throughout trial was that the damage to Plaintiff's tractors was covered by warranty to replace or repair, and that Defendant did replace and repair every time Plaintiff requested it. Accordingly, Mr. Cook's testimony regarding the cause of gudgeon seal breach could not have harmed Plaintiff.

Plaintiff also asserts on appeal that there was insufficient evidence to support the jury's defense verdict. Yet, the evidence in this case overwhelmingly established that Deere complied with its obligations under the applicable warranties. As at trial, on appeal Plaintiff focuses on the number of repairs performed on the tractors in issue to argue that these "habitual" break downs demonstrate defective products that Duett should not have had to tolerate. What Plaintiff completely ignores is the firm evidence that the number of repairs in issue was not significantly greater than one would expect in light of the extreme conditions in which Duett operated along with the number of hours logged on the tractors over the four years Duett used them. In fact, by the time Duett sold the tractors, he had logged more than twice the average number of hours expected for tractors of this type and age. More importantly, it is uncontroverted that Deere covered every repair Duett requested and Duett never had to pay a dime for the repairs covered by the warranty. Accordingly, the evidence is more than sufficient to support a defense verdict that Deere did not breach the warranties.

ARGUMENT

I. The Court Did Not Abuse Its Discretion By Allowing Scott Cook, Deere & Company's Rule 30(B)(6) Witness, To Testify Regarding Problems With Tractor Gudgeons When Cook Had Been Designated To Testify Regarding "Product Performance Problems . . . Involving Gudgeons", Plaintiff Had Deposed Cook On This Issue And The Plaintiff Submitted Cook's Deposition During Its Case-In-Chief.

A. Plaintiff Was Not Ambushed by Mr. Cook's Testimony Because Mr. Cook was Produced Over Two Years Before Trial Pursuant to Plaintiff's Rule 30(b)(6) Request for a Corporate Representative to Testify Regarding Gudgeon Defects and Was Deposed By Plaintiff On these Topics.

Plaintiff argues that the trial court committed reversible error when it permitted Defendant's corporate representative, Scott Cook, to "provide expert witness testimony" from an "engineering standpoint" without being disclosed by Defendant as an expert witness or being qualified as an expert. Decisions regarding the admissibility of evidence challenged on the basis of alleged discovery violations are reviewed for abuse of discretion. *Buskirk v. Elliott*, 856 So. 2d 255 (Miss. 2003). Accordingly, the trial court is granted "considerable discretion" when addressing alleged discovery violations. *Buskirk*, 856 So. 2d 255 (Miss. 2003)(citing *Robert v. Colson,* 729 So.2d 1243, 1245 (Miss.1999); *McCollum v. Franklin,* 608 So.2d 692, 694 (Miss.1992)).

When determining the difference between lay and expert opinions for purposes of discovery objections, Mississippi jurisprudence has not established a bright dividing line in cases such as the present one where employees testify from first-hand knowledge regarding technical knowledge held by the corporate employer. Pursuant to Mississippi rule of Evidence 701, lay opinions are limited to testimony based on the perception of the witness, helpful to the fact finder, and "not based on scientific, technical, or other specialized knowledge within the

scope of Rule 702." (M.R.E. 702). Conversely, where the witness must possess scientific, technical or other specialized knowledge beyond that of the average adult, the testimony falls under Rule 702 governing expert opinions. M.R.E. 702.

In 1992, the Mississippi Supreme Court explained that:

> A layperson is qualified to give an opinion because he has first-hand knowledge which other lay people do not have. According to Wigmore, a lay witness opinion comes from one who concededly has no greater skill than a juror in drawing inferences from the evidence in question. 7 Wigmore, Evidence § 1924 (1978). By comparison, the expert has "something different" to contribute. 3 McCormick on Evidence 33 (E.Cleary ed. 1984).

Wells v. State, 604 So.2d 271, 279 (Miss. 1992). Decisions consistent with this statement have allowed full-time employees of defendants who were not disclosed as experts to testify regarding their personal knowledge of their employers' technical practices and procedures, as well as compliance with national safety standards. *See McDaniel v. Mississippi Power & Light Company,* 407 So.2d 112, 113-114 (Miss. 1981)(employee testimony allowed regarding compliance with National Electric Safety Standards although not disclosed as expert); *Kern v. Gulf Coast Nursing Home of Moss Point,* 502 So.2d 1198, 1200 (Miss. 1987)(employee nurse allowed to testify regarding practices and procedures and type of care given decedent although not disclosed as expert because testifying from personal knowledge). Yet, in the criminal case of *Sample v. State,* 643 So.2d 524, 532 (Miss. 1994), over strong dissent, the Mississippi Supreme Court held that testimony of an officer expressing opinion regarding intent to distribute based on his experience with valuing and packaging of marijuana was expert opinion and was improperly admitted. The *Sample* dissent sharply criticized the majority opinion for departing from prior case law, noting that the testimony was the officer's first-hand factual knowledge which other laypeople might not posses, but did not require any skill beyond that of the average adult. *Id.*

For evidentiary purposes, it may not matter whether the small portion of Scott Cook's allegedly objectionable testimony is labeled lay or expert opinion. The issue on appeal arises due to the differing treatment for each category of testimony during pre-trial discovery. Where a witness is providing expert testimony, Rule 26 of the Mississippi Rules of Civil Procedure governs discovery and states the following concerning the identification of trial experts:

> 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.

M.R.C.P. 26(b)(4)(A)(i). The purpose of this rule is "that trial by ambush should be abolished, the experienced lawyer's nostalgia to the contrary notwithstanding." *Harris v. General Host Corp.,* 503 So.2d 795, 796 (Miss.1986)("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.'"). Thus the increased disclosure requirements under Rule 702 are "not so much for admissibility, as for notice and opportunity to prepare rebuttal." *Sample v. State,* 643 So.2d 524, 530 (Miss. 1994).

However, the Court has warned that "[e]xclusion of evidence is a last resort." *McCollum v. Franklin,* 608 So.2d 692, 694 (Miss.1992). "Every reasonable alternative means of assuring the elimination of any prejudice to the moving party and a proper sanction against the offending party should be explored before ordering exclusion." Id. Thus, even where a party has failed to disclose expert testimony, the court should consider the reason for the failure to disclose and the effect on the opposing party's ability to meet the testimony. *Buskirk,* 856 So.2d at 263 (¶11). Where the submitting party has made efforts to comply with its discovery

obligations and opposing counsel has had a reasonable opportunity to address the same or similar testimony, no error occurs in admitting the expert testimony. *See McDaniel,* 407 So.2d at 114 (defendant made reasonable discovery responses and testimony merely reiterated other admissible testimony, thus no error occurred); *Buskirk,* 856 So. 2d at 264 ¶25(where the stated subject matter in the discovery response necessarily includes the subject matter testified to at trial, it is an abuse of discretion to exclude the expert's testimony).

In the present case, the trial court did not abuse its discretion by allowing Mr. Cook to testify because Plaintiff was not ambushed by Mr. Cook's testimony. Mr. Cook was identified as a witness in the pretrial order and was present throughout the case as Deere's corporate representative. (Tr. at 17). Moreover, Mr. Cook had been designated over two years prior as Deere's corporate representative in response to Plaintiff's Rule 30(b)(6) Notice ("Notice") filed and served October 6, 2005. (P-3, Ex. 1 to Deposition of Cook). Importantly, Plaintiff's Notice requested a representative to testify regarding the following two relevant topics:

> 1. Defects discovered by Deere and Company in regard to all gudgeons in the John Deere 9400 Series Tractors during the period December 17, 1998 through March 28, 2002.
>
> . . .
>
> 4. All alleged product performance problems involving John Deere 9400 Series tractors including, but not limited to, gudgeons and transmissions.

Id. Plaintiff's Notice was made an exhibit to Mr. Cook's deposition which Plaintiff took on October 25, 2005. (P-10 (Cook Dep.) at 12, Ex. 1). During this deposition Mr. Cook was questioned and testified regarding, *inter alia*: sealing mechanisms and performance issues in the 9000 and 8970 series tractors, (P-10 at 10-11); the functions and differences in bushings and bearings (*Id.* 10, 14); his personal agreement with various technical engineering conclusions set forth in the "Trip Report" prepared by Deere's engineers after reviewing

Duett's tractors, including conclusions regarding bearing damage as a result of seal failure due to oscillation of the tractor (*Id.* at 16-17, 21-22); gudgeon durability in scraper applications, including problems with "undulations in the haul road" causing significant problems for gudgeons (*Id.* at 23-24, 36), and; the attachment of pushbars to the front of tractors and Deere's recommendation against such modifications (*Id.* at 26-27). In its case-in-chief, Plaintiff submitted the deposition of Mr. Cook, including all of the substantive testimony identified above. Plaintiff did not object to Mr. Cook's qualifications or knowledge regarding these topics. Mr. Cook was present when his deposition was presented at trial and could have been called as a witness by the Plaintiff during Plaintiff's case-in-chief.

After Plaintiff rested, Defendant called Mr. Cook as a defense witness. As in his deposition, at trial Mr. Cook testified regarding: the differences and similarities in bushings and bearings and the use of those items in the 8970 tractors versus the 9000 series tractors (Tr. at 560-61); sealing issues in the 8970 and 9000 series tractors (*Id.*); the ways in which debris can enter the seal through oscillation events (*Id.* at 561-562); how seal opening occurs during oscillation allowing debris to enter (*Id.* at 561-566). Plaintiff did not object to the majority of Mr. Cook's testimony, including testimony that oscillation is what causes the seal breach. (*Id.* at 562). However, as Mr. Cook was further illustrating the ways oscillation could occur, namely when a tractor becomes stuck in the mire and is being pushed or pulled out, Plaintiff asserted their first objection:

> Q. [by defense counsel] Okay. Well, let's put aside the cranes because I'm not sure that's applicable here. Let's -- if a tractor pushes -- if another tractor comes up and nose-to-nose pushes this tractor, there will be some forces on the tractor that's stuck, correct?
>
> A. Correct.
>
> Q. Okay. Tell the jury what forces will -- how the forces will affect this tractor that's being pushed.

MR. PARKER: Your Honor, I'm going to have to interrupt and object. May I be heard outside the jury?

THE COURT: You may. You may approach.

(Bench conference out of hearing of jurors.)

MR. PARKER: I would like to object. It appears that we're fixing to have expert testimony by a nondivulged expert. He's giving opinion testimony. He hasn't been qualified as an expert. He hasn't been divulged in discovery that he's going to testify as an expert. We have no idea what he's about to testify to and, clearly, it appears to be expert opinion testimony and it's outside of anything that we've been disclosed.

. . . . [continuing argument of counsel omitted] . . .

THE COURT: Objection is overruled.

(End of bench conference.)

Q. Mr. Cook, you were explaining to the jury, tell us what -- if a tractor is pushing on the front of this tractor, what engineering strains there are on a tractor that is stuck. And if you want to use this model, I'll be glad to hand it to you.

A. Yeah. I'd like to use the model.

Q. I'll take the pointer away from you if it will make it easier.

(Witness referring to tractor model.)

A. When a tractor is pushing on the nose or the front end of the tractor, what tends to happen is, the front of the tractor is pushed up. This tractor has more motion in it than a full-size tractor just because of the model and capabilities. But you tend to load the gudgeon or the spindle area right here and put a bending load on it in this direction where it's in compression on the top side and tension on the bottom side. That's different than it is normally loaded. That's one of the things that pushing causes a different loading than most of the tractors in this application.

Q. Okay. What effect would that pushing and that motion have on the bushing seal?

A. As you can see, the motion here would cause that -- that gap there to change and so it tends to work it and would tend to bring more debris through that seal. As that seal gets breached and you continue to do that, even if it's on an infrequent basis, you tend to pump material into that -- that bearing.

Q. Okay.

MR. PARKER: Your Honor, might I have my objection on a continuing basis?

THE COURT: So noted.

(Tr. 565-568). The testimony to which Plaintiff objected is well within the topics identified in Plaintiff's Rule 30(b)(6) Notice and the topics that were actually examined during Mr. Cook's deposition.[3] Mr. Cook testified both at his deposition and at trial regarding Deere's knowledge regarding the effect oscillation has on gudgeon seals and the resulting damage from seal breach. There is no requirement under any Rule that the exact words of a potential expert's testimony must be disclosed. There will always be some deviation in the pre-trial disclosures and trial testimony. But there can be no question that Plaintiff was not ambushed by this testimony.

The cases Plaintiff relies upon do not support a contrary conclusion. Plaintiff has cited no case, and Defendant has found no case, in which the court excluded testimony because of a discovery violation where Plaintiff had deposed the witness on the same topics that the witness ultimately testified to. In fact in two of the cases cited by Plaintiff, *Aloe Coal Co. v. Clark Equipment*, 816 F.2d 110 (3rd Cir. 1987) and *Kilhullen v. Kansas City Southern Railway,* 2008 WL 852636 (Miss. App. 2008), the appellate courts held that the testimony

[3] While Plaintiff also quotes a portion of defense counsel's closing in its appeal brief as impermissibly introducing a new theory of the case (which it does not), (Brief of Appellant at 8), Plaintiff did not object to counsel's statements at trial. (Tr. at 672). Accordingly, Plaintiff has waived any objection to counsel's closing arguments. It is well settled that to preserve an objection to alleged improper remarks by counsel during closing argument, the complaining party must not only make a contemporaneous and specific objection to the remarks, but must also obtain a definitive ruling from the trial court on his objection and must request corrective action. See *Floyd v. City of Crystal Springs*, 749 So.2d 110, 120 (Miss.1999) (citing *Cole v. State*, 525 So.2d 365, 369 (Miss.1987)). The Mississippi Supreme Court has held that a party waives his objection " where an objection [is] made and a definitive ruling [is] not obtained nor any corrective action requested." *Walters v. State*, 720 So.2d 856, 864 (Miss.1998). See also Floyd, 749 So.2d at 120 (holding that it is the duty of the objecting party to obtain a ruling from the trial court on objections, and that if the record includes no ruling by the trial court, the objections are waived for purpose of appeal). *Rials v. Duckworth*, 822 So.2d 283 (Miss. 2002). In this case, Plaintiff made no contemporaneous objection and obtained no curative instruction from the court. As such, this ground provides no basis for relief for the plaintiff.

should not have been allowed because the witness was not qualified to testify. Moreover, in the *Palmer v. Volkswagen*, 901 So.2d 1077 (Miss. 2005) case cited by Plaintiff, the court stressed that the expert witness had been disclosed for the first time six months after the close of discovery and the plaintiff had not had a reasonable opportunity to depose him. Similarly, in the fourth case relied upon by Plaintiff, *Cotton v. State,* 675 So.2d 308 (Miss. 1996, the State had failed to identify its expert witness "or provide any information regarding the substance of his testimony" prior to trial. These cases do not support exclusion of a corporate representative's testimony when the witness was disclosed prior to trial, designated as testifying regarding the topics that were eventually covered at trial, and where Plaintiff actually deposed the witness on the same topics prior to trial.

Moreover, like the challenged employee witnesses in *Kern* and *McDaniel* who testified from personal knowledge, Mr. Cook is a full-time employee of Deere who testified based on personal knowledge. Mr. Cook had been designated as the corporate representative and had attended all four days of trial in that capacity. (Tr. at 575). When he testified, he explained what Deere had discovered regarding the gudgeon seal problems in general. (Tr. at 561-563). He did not testify that he had conducted any tests or that he had formed opinions regarding the cause of the gudgeon problems on Plaintiff's tractors. In fact, he testified that he never examined the tractors in issue. (Tr. at 561-564). He merely reported what he knew regarding Deere's conclusions in relation to gudgeon failures, including how various applications can cause gudgeon seal breach and failure.

Even if Mr. Cook's testimony were deemed to be expert testimony, he was qualified to give the testimony. Mr. Cook has a bachelor's degree in agricultural engineering from Iowa State. (P-10 Cook Dep.). He has worked for Deere for eighteen years, starting in the drive

train design group. (Tr. 550-51). He has also worked in their vehicle design group and cotton products group as lead engineer for large chassis machines and manufacturing manager for two years in the cotton assembly area. *Id.* In 2002, he began managing a test group and in 2003, he became manager for the four-wheel-drive engineering group. *Id.* As manager of that group he has direct responsibility for the design activities related to all 9000 Series wheel and track tractors, such as the ones at issue in the present case. *Id.* Clearly he is qualified by both education and experience to provide testimony regarding the design challenges and issues related to the 9000 Series tractors. Thus, to the extent Mr. Cook testified based on engineering and design expertise, his testimony in this case that already was in evidence already had established that he was qualified.

Furthermore, if Cook's trial testimony was "expert" testimony, so was Cook's deposition testimony that Plaintiff introduced into evidence at trial. To the extent Mr. Cook relied on specialized or technical knowledge to describe gudgeon failures at trial, the same expertise was needed in his deposition. Mr. Cook testified at length during the deposition regarding gudgeon design and the problems with oscillation which caused seal breach. He was asked about and testified regarding his personal agreement with conclusions made by other engineers. Plaintiff submitted this testimony at trial. Plaintiff cannot on the one hand rely on pre-trial "engineering" testimony, and cry foul when Defendant presents the live witness to further elucidate the same subjects covered in the deposition which Plaintiff has introduced into evidence. By offering the same type of testimony for the same witness, Plaintiff has waived that objection.

If the purpose of Rule 26 disclosure is to assure Plaintiff is not ambushed, the purpose was met through the Rule 30(b)(6) designation and subsequent deposition. No prejudice resulted in allowing the testimony, thus the court did not abuse its discretion.

B. Even If the Trial Court Erred by Admitting Mr. Cook's Live Testimony Regarding Gudgeon Defects, The Error Was Harmless Because the Testimony was Cumulative and Cook Did Not Provide an Opinion Regarding Any Issue Necessary to the Disposition of the Case because Defendants Never Denied Warranty Coverage.

As the Mississippi Supreme Court has candidly explained:

> No trial is free of error; however to require reversal the error must be of such magnitude as to leave no doubt that the appellant was unduly prejudiced. Where error involves the admission or exclusion of evidence, we will not reverse unless the error adversely affects a substantial right of a party.

Busick v. St. John, 856 So.2d 304 (Miss. 2003)(internal citations omitted); *Gibson v. Wright,* 870 So.2d 1250, 1258 (¶ 28) (Miss.Ct.App.2004)(Even where a trial court is found to have abused its discretion, reversal is appropriate "only where the error adversely affects a substantial right of a party."). Moreover, "[w]here the discovery violation results in the admission of evidence that is merely cumulative, the error is harmless." *Prewitt v. State,* 755 So.2d 537, 541(¶ 11) (Miss.Ct.App.1999). *See also, Hobgood v. State,* 926 So.2d 847, 852(¶ 14) (Miss.2006) (holding that statements admitted in violation of criminal procedure that are duplicative of other testimony are harmless error).

In the present case, Mr. Cook's testimony regarding the forces which cause gudgeon seal breach was cumulative evidence of both Bradley Cote's testimony and Mr. Cook's prior deposition testimony. Plaintiff objected when Mr. Cook began testifying regarding various "forces" that cause the gudgeon seals to breach and how those breaches occur. In particular, Mr. Cook was in the midst of describing how gudgeon seal breaches occur when tractors are pushed

"nose-to-nose" by other tractors. However, Bradley Cote, a senior tractor engineer with Deere, provided substantially similar testimony in his deposition, which Plaintiff also introduced at trial. Specifically Mr. Cote testified that

> high loads from the scraper application or heavy ripping for that matter along with high oscillation angles on the order of plus or minus 10 degrees cause the bearing backing material to extrude into a very thin shell similar to a chimney pipe on the back of a wood stove. If the bearing failure is allowed to progress the spindle and gudgeon housing may also be damaged resulting in very high repair costs. . .

(P-10 Cote Dep. Cote); *See also Id.* at 28-29 (undulations in haul roads that are not leveled during scraper application can cause oscillations breaching seal); *Id.* at 30-31 (oscillation when tractor is stuck in mire); *Id.* at 35-36 (concerns with use of pusher bars to assist in freeing tractors stuck in mire). As previously detailed, Mr. Cook's deposition was also substantially similar. Accordingly, the error, if any, created by the admission of the testimony was harmless.

Additionally, Mr. Cook's testimony could not have affected a substantial right of Plaintiff's because the objectionable testimony did not address an issue that was in dispute and thus did not assist the defense in any way. Plaintiff objected to testimony regarding how different forces applied to a pusher bar while pushing a tractor could breach a gudgeon seal. Contrary to Plaintiff's assertion, Mr. Cook did *not* "render an opinion as to how the gudgeons on Brookie's tractors broke . . ." (Brief of Appellant at 13). In fact, Mr. Cook testified that he did not examine Duett's tractors. Instead, Mr. Cook merely delineated various ways the gudgeon seals in the 9000 Series tractors can be breached. He gave no opinion regarding how the damage to Duett's tractors actually occurred.

Moreover, even if Mr. Cook had testified that Duett caused the damage to his tractor, it would not have prejudiced Plaintiff because Defendant never disputed that gudgeon seal breach and the resulting damage, whatever the cause, was covered under warranty. To the contrary, it

was undisputed that for each of the gudgeon failures Deere had repaired or replaced the broken part. (Tr. at 573-574). Contrary to Plaintiff's accusation, Defendant has never argued that Plaintiff voided the warranty by causing the damage. In fact, Defendant's payment for every single repair intrinsically admitted coverage. *Id.*

As emphasized by Deere's counsel in opening and closing, the issue for the jury was whether Defendant met its obligations under the warranty by repairing the tractors when Duett notified them of problems. Specifically in opening counsel stated:

> We did what our contract called for. We made the repairs. But let – have Mr. Parker [Plaintiff's counsel] point you out in that warranty where it says or – where it says you're never going to need repairs. I think one of the questions that was asked in voir dire was, do you agree that mechanical things can break and everybody said yeah. That express warranty doesn't say the tractor won't break, and it doesn't say they won't break if you use your tractor more than twice the average hours in a tough application like building catfish ponds. *These tractors did break. We're not hiding from that. But there's a reason they broke. They were used in a hard application. Wasn't a misuse. It wasn't abuse, but it was a hard application.*
>
> As Mr. Brown said, and I agree with him, that warranty is not an insurance policy. It is for the reason of saying what happens if you need repair. And Duett Landforming got the benefit of that, including the express warranty.

(Tr. at 175-76)(emphasis added); *See also id.* at 184 & 675 (closing argument). Because the cause of the damage was never made an issue, testimony regarding how various forces can damage the gudgeon was harmless.

II. The Evidence Was Sufficient to Support a Defense Verdict Finding that Defendant Had Not Breached Any Warranty Where Evidence Established that Defendants Completed Every Tractor Repair Requested by Plaintiff, that the Repairs were Not Significant Given the Type of Work and Hours Logged, and that Plaintiff Used the Tractors for Four Years before Reselling Them.

Review of the denial of a motion for judgment notwithstanding the verdict (JNOV) is de novo. *Wilson v. Gen. Motors Acceptance Corp.*, 883 So.2d 56, 64(24) (Miss. 2004). A motion

for JNOV tests the legal sufficiency of the evidence. *White v. Yellow Freight Sys. Inc.,* 905 So.2d 506, 510(6) (Miss.2004). On appeal, the court must "consider the evidence in the light most favorable to the non-moving party, giving that party the benefit of all favorable inferences that reasonably may be drawn therefrom." *Wilson,* 883 So.2d at 63(21). Courts must affirm the denial of a motion for JNOV where "the evidence is of such quality that reasonable and fairminded jurors in the exercise of fair and impartial judgment might reach different conclusions." *Poole v. Avara,* 908 So.2d 716, 726(24) (Miss.2005). Reversal is only appropriate "[i]f the facts so considered point so overwhelmingly in favor of the appellant that reasonable men could not have arrived at a contrary verdict." *Wilson,* 883 So.2d at 63(22) (quoting *Corley v. Evans,* 835 So.2d 30, 37(19) (Miss.2003)).

In applying the "overwhelming weight of the evidence" criteria in the present case, the court must determine whether the trial judge abused her discretion in denying the Duett's motion for a new trial. *White v. Stewman,* 932 So.2d 27, 33 (Miss.2006) (citing *White v. Yellow Freight System, Inc.* 905 So.2d 506, 510-11 (Miss.2004)). Plaintiff asserted claims of breach of implied and express warranties. Under Mississippi law, however, the seller of a warranted product is allowed to cure any alleged non-conformity. This legal principle applies to both express and implied warranties and is grounded in the established policy of the common law and the U.C.C. of minimizing economic waste as well as the reality that perfection cannot be expected and should not be required. *See Mercury Marine v. Clear River Constr. Co., Inc.,* 839 So. 2d 508, 512 (Miss. 2003) (discussing policy rationale of minimizing economic waste for opportunity to cure).

Upon review it is clear that the evidence in this case overwhelmingly established that Deere complied with its obligations under the applicable warranties. As at trial, on appeal

Plaintiff focuses on the number of repairs performed on the tractors in issue to argue that these "habitual" break downs in and of themselves demonstrate defective products that Duett should not have had to tolerate. What Plaintiff completely ignores is the firm evidence that the number of repairs in issue was not significantly greater than would be expected in light of the extreme conditions in which Duett operated along with the number of hours logged on the tractors over the four years Duett used them. (Tr. at 584-585). In fact, by the time Duett sold the tractors, he had logged more than twice the average number of hours expected for tractors of this type and age. (Tr. at 474-475, 480). More importantly, it is uncontroverted that Deere covered every repair Duett requested and Duett never had to pay a dime. (Tr. at 280, 317-319, 525). Accordingly, the evidence is more than sufficient to support a defense verdict that Defendant did not breach the applicable warranties nor did they fail in their essential purpose.

In the present case the jury was called upon to consider three types of warranties for each tractor: Deere's express warranty that appeared in the Purchase Order for the tractor and two implied warranties that arose as an operation of law. As stated in *Murray v. Blackwell*, 966 So.2d 901, 902 ¶10 (Miss App. 2007): "Mississippi law recognizes two implied warranties in contracts for the sale of goods: the implied warranty of merchantability and the implied warranty of fitness for a particular purpose. The implied warranty of merchantability arises under Mississippi Code Annotated section 75-2-314, which states in part that: "a warranty that goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." Miss. Code Ann. § 75-2-314(1) (Rev.2002). The implied warranty of fitness for a particular purpose arises under Mississippi Code Annotated section 75-2-315, which provides in part that: "[w]here the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer

is relying on the seller's skill or judgment to select or furnish suitable goods, there is an implied warranty that the goods shall be fit for such purpose."

In the form of the verdict the jury was asked to consider each of these three warranties separately and render verdict as to each type of warranty. The jury did so and found that the evidence supported a verdict that none of the warranties was breached. There was ample evidence to support the jury's conclusion as to each warranty.

A. Sufficient Evidence Existed that the Tractors Were Fit For Their Intended Purpose and Deere Fulfilled Its Obligations Under Miss. Code Ann. § 75-2-314(1).

Plaintiff contends that Deere breached the implied warranty provided under Miss. Code Ann. § 75-2-314(1), arguing that all four tractors were defective and were unfit for the purpose for which they were intended, i.e., dirt moving.

MCA §75-2-314 provides, in part:

> (1) A warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind....
> (2) Goods to be merchantable must be at least such as
> (a) pass without objection in the trade under the contract description; and
> * * *
> (c) are fit for the ordinary purposes for which such goods are used....

In order to establish a breach of implied warranty, however, plaintiff not only must establish that the goods in issue were unmerchantable as defined by MCA § 75-2-314, "*but also establish the defects existed when the [goods] left the defendant's control.*" *Hargett v. Midas International Corp.*, 508 So. 2d 663, 665 (Miss. 1987). As described by the Mississippi Supreme court, this requirement assures that the manufacturer will not be held liable for defects caused by the actions or inactions of intervening parties unrelated to the manufacturer by having access to the goods. *Id.* "If a product conforms to the quality of other similar products in the market, it will

normally be merchantable." *Hargett,* 508 So. 2d at 664.

What Plaintiff ignores, but what the evidence made clear at trial, is that Plaintiff used these tractors for nearly a year for their intended purpose without complaint and without the need for repairs. Moreover, Defendant used these tractors in some of the most challenging conditions putting well in excess of the average number of hours on them before he resold them. (Tr. at 474-475, 480). In fact, Plaintiff originally took control of two of the four tractors in July 1998, (Ex. D-2, D-3) used them for nearly five months, and decided to purchase them in December of 1998. *Id.* As admitted by Plaintiff, there were no problems with the tractors until the summer of 1999. (Tr. at 209). Moreover, Mr. Cook testified that the repairs required were not significantly more in kind or number than Plaintiff had experienced with other tractors he had owned. (Tr. at 584-585; P-10 at 36). Despite the need for repairs, Plaintiff used the tractors for nearly four years and at the end of the four year period traded the tractors.

As supported by the uncontested facts in this case, the jury had ample evidence upon which to base its verdict that Deere did not breach the implied warranty under M.C.A. 75-2-314.

B. Sufficient Evidence Existed that there was no breach of the Implied warranty of Fitness for a Particular Purpose under Miss. Code Ann. § 75-2-315.

Miss. Code Ann. § 75-2-315 provides as follows: "Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skills or judgment to select or furnish suitable goods, there is an implied warranty that the goods shall be fit for such purpose."

In this case it is clear that the implied warranty of fitness for a particular purpose could not, and did not, arise. First, it is undisputed that the particular purpose for which these tractors

were to be used was landforming, also referred to as "building catfish ponds." (Tr. at 208). Second there is no evidence to establish that Deere knew about Duett's intended use at the time Duett purchased the tractors. In fact, Duett could not recall speaking to anyone from Deere. (Tr. at 314-315). Moreover, it is undisputed that Duett did not rely on Mr. Shurden or Deere's skills in selecting these tractors for their use in landforming. (Tr. at 269-270).

Duett testified that before buying the tractors he saw some brochures about the tractors and had conversations with Larry Shurden, Belzoni Tractor Company's president. Duett admitted that he could not recall anything Shurden told him before he purchased the tractors and further admitted that he, not Shurden, was the expert on landforming. Specifically, Duett testified as follows:

> Q Okay. When you bought these, when you got these tractors, and when I, what I'm referring to is when you initially got the first two tractors, the 9400s, Mr. Shurden did not tell you, "Mr. Duett, these tractors will be great for your digging catfish ponds. They'll last just as long as the 8900s. They may even last longer." He didn't say that to you, did he?
>
> A I don't recall that. I don't know why he would have.

(Tr. at 258). The reason why Duett did not know why Shurden would have said that is because Duett also admitted that Duett was the expert on landforming and there was nothing Shurden could tell him about landforming that he didn't already know.

> Q We'll come back to that. You'll agree with me, won't you, that you are an expert in the area of building catfish ponds?
>
> A I think I know about as much as anybody does about it.
>
> Q You have been doing it a long time, haven't you?
>
> A Yes, sir.

Q And when you went to purchase these 9400 tractors from Mr. Shurden in 1998, how long had you been building catfish ponds?

A Since 1976.

Q Okay. So you had been building catfish ponds for 22 years at that time; right?

A Yes, sir.

Q And you were an expert in 1998 on building catfish ponds, weren't you?

A I think so.

Q You knew more about building catfish ponds than Mr. Shurden, didn't you?

A I would think so.

Q You probably knew more about building catfish ponds than anybody around here, didn't you?

A I would think so.

Q Okay. So you were an expert in building catfish ponds. There wasn't a whole lot that Mr. Shurden could tell you about building a catfish pond, was there?

A I'll listen to anything anybody says.

Q But you judge it because you're an expert; right?

A I make my own judgment.

(Tr. 269-70). In fact, Duett admitted that he could not remember "anything that Mr. Shurden said" that caused him to buy the tractors in issue. (Tr. at 258). While Duett also mentioned receiving a videotape regarding Model 9400 tractors, he could not identify anything specific in the video he relied upon regarding landforming. Moreover, Duett admitted that he received the video, which contained nothing about building catfish ponds, before he rented and used the Model 9400 tractors for over 700 hours. (Tr. 270-71). In short, there was no evidence that Duett relied on the brochures, videotapes or conversations with Shurden in purchasing the

tractors. Absent evidence that Shurden or Deere made representations about a fitness for a particular purpose, and absent evidence that Duett relied on such representations in making his purchase the facts do not support a conclusion that the implied warranty of 75-2-325 arose.

Further supporting the lack of reliance is the fact that Duett used the Model 9400 tractors for over 700 hours before he purchased any of the tractors. It is unreasonable to argue or conclude that Duett gave more weight to a brochure or a generalized sales pitch than he did to his experience of using the tractors for over 700 hours before purchase.

The jury had ample evidence to conclude that Duett did not rely on Deere or Shurden when he selected the Model 9400 tractors for use in his landforming business. Even if he could identify anything he relied upon from Deere, he was in fact able to use the tractors for almost four years compiling over double the amount of hours normally seen on such tractors. Consequently, the jury's verdict that there was no breach of the implied warranty under 75-2-315 should not be reversed.

C. Sufficient Evidence Established that Defendant Complied With the Terms of the Express Warranty.

Finally, Plaintiff claims that Defendants breached the express warranty covering the tractors in issue. This limited express warranty which is contained in each of the four purchase orders received and signed by Plaintiff provides that Defendant Deere "will repair or replace, at its option, any covered part which is found to be defective . . . ."(D-2, D-3, D-4 & D-5 (Purchase Orders) at ¶A). Defendant Belzoni, the dealer, did not provide any express warranties and the Court granted a directed verdict on this issue in favor of Belzoni Tractor Company. (Tr. 510). Deere's express warranty is referred to as a "repair or replace" warranty. "A 'repair and replace' warranty is an express warranty that the promise to repair will be honored and ... that if a

product fails or becomes defective, the seller or manufacturer will repair or replace within a stated period." *Progressive Ins. Co. v. Monaco Coach Corp.*, 2006 WL 839520, *4 (S.D. Miss. March 29, 2006). Mississippi courts have repeatedly enforced such warranties. *Mercury Marine,* 839 So.2d at 509 ¶6; *Ford Motor Co., v. Olive*, 234 So.2d 910 (Miss. 1970)(applying common law).

For example, in *Ford Motor Co.* the Supreme Court, in interpreting written warranties, held that Ford's written warranty in that case provided the method by which the warranty was to be fulfilled, i.e. that defective parts were to be "replaced or repaired" by the "selling dealer at his place of business". *Id.* at 912. The court added that the parties were bound by their sales contract and the collateral warranty must be interpreted as written where the terms are clear and unambiguous. *Id.* Thus where the owner drove the subject vehicle for more than 24,000 miles after receiving many repairs, and made no attempt to rescind the sales contract, no breach of warranty occurred. *Id.*

In the present case, pursuant to this limited express warranty, Plaintiff's only remedies were repair or replacement at Defendant Deere's option. The tractors were repaired each and every time Defendant requested repair. (Tr. at 534). Plaintiff does not allege that the repairs were negligent. (Tr. at 280, 317-319). There is no contested fact in that regard. Furthermore, Deere's express warranties did not fail in their essential purpose. *See Mercury Marine,* 839 So.2d at 512 ¶16. Duett continued to use the tractors for almost four years compiling double the average working hours on the tractors. (Tr. at 474-475, 480).[4] Moreover, as stipulated at trial,

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[4] In fact, although Duett complains of "downtime", on at least some occasions (although he could not specify how many) he was able to strategically choose when to send his tractors in for repair by waiting until off-season, the winter, when his outdoor business was the slowest. (Tr. at 289-290). In fact, he was unable to identify how much, if any, true lost work time he had (Tr. at 290). Duett's damage calculation did not consider whether he in fact had any work to do

he never attempted to revoke his acceptance. (Tr. at 590). Thus, Defendant did not breach the warranties.

Nonetheless, Duett ignores hornbook law that there can be no damages where there is no liability and spends three pages in his brief explaining why he deserves to recover consequential damages in the form of damages of loss of reputation, lost profits, lost customers, and lost opportunity resulting from excessive "downtime." Even if the jury verdict was not upheld, which it must be, Duett could not recover these damages because the warranties in issue excluded consequential damages as authorized by M.C.A. §75-2-719(3). (D-2, D-3, D-4, D-5 (Purchase Orders at ¶¶A & E). *See also* M.C.A. §75-2-719(3). This limitation of damages is prominently displayed in all capital lettering on each of the signed purchase orders:

> IN NO EVENT WILL THE DEALER, JOHN DEERE OR ANY COMPANY . . . BE LIABLE FOR INCIDENTAL OR CONSEQUENTIAL DAMAGES. The only remedies the purchaser has in connection with the breach of performance of any warranty . . . are those set forth above.

(D-2, D-3, D-4, D-5 (Purchase Orders at ¶E).[5]

Mississippi law regarding express warranties can be found in Miss. Code Ann. § 75-2-313. While this statute establishes express warranties for consumers, Mississippi law allows manufacturers and sellers to contractually limit or modify buyers' remedies by expressly limiting or altering the measure of damages to the return of the goods and repayment of the price. *See* Miss. Code Ann, § 75-2-719(1) (a) & (3)(allowing the exclusion of consequential damages in the commercial context).

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during the times the tractors needed repairs. (Tr. at 290-294).

[5] By its express terms, this limitation applies to *any* applicable warranty. While limitation or exclusion of consequential damages related to "consumer goods" is prohibited by Section 75-2-315.1, "consumer goods" are not at issue in the present case. Section 75-2-719(3) controls the merchant-to-merchant transactions of commercial goods in the present case.

Specifically, Section 75-2-719(3) provides that:

> Consequential damages may be limited *or excluded* unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable *but limitation of damages where the loss is commercial is not.*

M.C.A. §75-2-719(3)(emphasis added). Other sections of the code are consistent. For example, M.C.A. §75-2-315.1 restricts a seller's ability to limit its warranties in the case of "consumer goods" only. *Id.* (Any . . . language used by a seller of *consumer goods and services*, which attempts to exclude or modify any implied warranties . . . is unenforceable). Moreover, "consumer goods" is defined for purposes of this section as "goods that are used or bought for use primarily for personal, family, or household purposes." M.C.A. § 75-9-102. *See also* M.C.A. § 75-2-103 (for purposes of Title 75 Chapter 2, definition of "consumer goods" is supplied by §75-9-102). The goods in issue, namely four John Deere Model 9400 tractors were designed for commercial business use and were in fact used by Plaintiff for business purposes, namely the "dirt moving business." (Tr. at 188). The tractors were not purchased or used primarily for Plaintiff's "personal, family, or household purposes." *Id.* Accordingly, the tractors are not "consumer goods" for purposes of Section 75-2-315.1, and the limitations provided therein are inapplicable to the transactions between Plaintiff and Defendants.[6]

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[6] No other statute section would cause a different conclusion. For instance, Sections 75-2-314 and 315 merely recognize the existence of implied warranties of merchantability and fitness for purpose. While Section 75-2-715(2) recognizes a buyer's potential entitlement to consequential damages, that subsection does not prohibit the contractual exclusion of consequential damages. In fact, the comment to subsection 715(2) actually states that "[a]ny seller who does not wish to take the risk of consequential damages has available the section on contractual limitation of remedy," which is set forth in Section 75-2-719. Similarly, while the Section 11-7-18 restricts the limitation of remedies and liabilities as to implied warranties, that restriction is explicitly subject to the exception provided in Section 75-2-719. M.C.A. § 11-7-18 ("*Except as otherwise provided in . . . 75-2-719*, there shall be no limitation of remedies or disclaimer of liability as to any implied warranty . . . .")(emphasis added).

The Fifth Circuit, interpreting Mississippi Commercial Code in the case of *Cooper Industries v. Tarmac Roofing Systems,* 276 F.3d 704, 710 (5th Cir. 2002), reached this exact conclusion. In *Cooper*, the plaintiff corporation sued a manufacturer of roofing material for breach of warranty based upon the alleged failure of the material which had been used for roofing of the plaintiff's manufacturing plant. Defendant manufacturer asserted a limitation of warranty clause in defense. In response, the plaintiff argued that the warranty limitation was void as an "unenforceable attempt to limit liability" under M.C.A. § 75-2-315.1. The Fifth Circuit, reversing the contrary holding of the trial court, found § 75-2-315.1 inapplicable because the goods in issue were not consumer goods, and the plaintiff was not a consumer. The court explained:

> By its own terms, M.C.A. § 75-2-315.1(2) does not preclude our giving effect to Section 2 of the warranty because [plaintiff] is a merchant, not a consumer. . . . Further, the goods in question are not consumer goods, i.e., goods "used or bought for use primarily for personal, family, or household purposes." (citations omitted). Consequently, § 75-2-315.1(2) does not prevent the limitation in the warranty from applying.

Id. at 710. Accordingly, the court granted defendant's motion for judgment as a matter of law on the warranty issue.

Thus, not only does the overwhelming weight of the evidence establish that the jury verdict was correct in finding that Defendant did not breach the express warranties, Duett could not recover the damages he seeks even if the warranties were breached. Clearly, when the evidence is considered in the light most favorable to Deere, and Deere is given the benefit of all favorable inferences that reasonably may be drawn therefrom it is beyond dispute that reasonable and fairminded jurors in the exercise of fair and impartial judgment could find for Deere. Duett has not demonstrated that the facts, when considered under the appropriate standard of review, so overwhelmingly favor Duett that "reasonable men could not have

arrived at a contrary verdict." *Wilson,* 883 So.2d at 63(22) (quoting *Corley v. Evans,* 835 So.2d 30, 37(19) (Miss.2003)). Accordingly, the Humphreys County jury's defense verdict, reached after the course of a four day trial, should not be overturned.

CONCLUSION

After a four-day trial, the jury in the present case found upon sufficient and admissible evidence that Defendant Deere had not breached either the implied or express warranties applicable to the tractors in issue. Plaintiff was not prejudiced by the admission of Mr. Cook's testimony regarding the forces affecting gudgeon seals, because Plaintiff knew that Mr. Cook would testify on behalf of Deere regarding gudgeon problems and deposed Mr. Cook on this subject. Plaintiff was not ambushed, and in fact waived any objection he had when Plaintiff presented Mr. Cook's deposition testimony without objection.

Furthermore, there is sufficient evidence to support the jury verdict. The evidence firmly establishes that Defendant complied with its obligations under all warranties. Each time Plaintiff requested repair, Defendants made the repairs. Defendant used the tractors in issue for scraping applications as much as he normally had in the past and traded in the tractors with more the double the average hours logged on them. This fact is dispositive and undisputed. The jury verdict should be upheld.

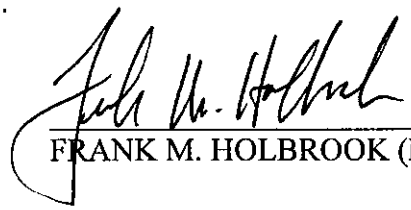
CERTIFICATE OF FILING

I, Frank M. Holbrook, attorney for Defendant Deere and Company do hereby certify that I have this day filed four copies (including an original) and an electronic copy of the Response Brief of Appellee Deere & Company by mailing same via United States Mail with postage fully prepaid thereon to the following:

Clerk of Appellate Courts
P.O. Box 249
Jackson, MS 39205

Attorney for Appellee Deere & Company

THIS, 27th day of October, 2008.



FRANK M. HOLBROOK (MSB #2500)

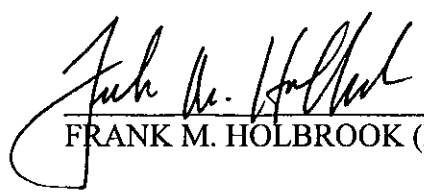
CERTIFICATE OF SERVICE

I, Frank M. Holbrook, attorney for Defendant Deere and Company does hereby certify that I have this day served a true and correct copy of the Response Brief of Appellee Deere & Company by mailing same via United States Mail with postage fully prepaid thereon to the following attorneys:

Merrida (Buddy) Coxwell
COXWELL & ASSOCIATES, PLLC
P.O. Box 1337
Jackson, MS 39215-1337
Attorney for Appellant

Howard Brown
Griffin & Associates
P.O. Box 968
Jackson, Mississippi 39205
Attorney for Appellee Belzoni Tractor Co., Inc.

THIS, 27th day of October, 2008.



FRANK M. HOLBROOK (MSB #2500)