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 this Court may evaluate possible disqualification or refusal.

2008-CA-00022-SCT

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ARGUMENT

I. Contrary to the Appellees' Contention, the Court Abused Its Discretion by Allowing Scott Cook, a Rule 30(b)(6) Witness, to Provide Expert Witness Testimony from an Engineering Standpoint

The trial court committed reversible error when the Defendant's corporate representative, Scott Cook, was allowed to provide expert testimony from an engineering standpoint without being disclosed by Defendant as an expert witness or even being qualified as an expert. Specifically, Mr. Cook testified that the gudgeons on the tractors could have been damaged by the tractor being pushed on "the nose or front end of the tractor." Tr. 567. Mr. Cook rendered his opinion even though he had never personally inspected Brookie Duett's tractors. The brief for the Appellee rests on the argument that "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." This simply is not the situation in the instant case. The disputed testimony in this appeal had nothing to do with "employers' technical practices and procedures" nor did it have anything to do with "national safety standards." The testimony in question dealt with the gudgeons on the John Deere 9400 and what caused Mr. Duett's gudgeon problems. An alternative theory to the cause of what happened to the gudgeons was presented through the expert testimony of Mr. Scott Cook. This testimony was not disclosed on the interrogatory submitted by the Plaintiff to the defendants asking for a delineation of any expert testimony expected to be used at trial.

During trial, counsel for the Defendant argued to the trial court that Mr. Cook's testimony was "from an engineering standpoint." An "engineering standpoint" is exactly

the type of testimony this Court sought to differentiate from lay witness testimony when this Court held "There is a bright-line rule. That is, where, in order to express the opinion, the witness must possess some experience or expertise beyond that of the average, randomly selected adult, it is a *Miss. R. Evid.* 702 opinion and not a Rule 701 opinion." *Sample v. State*, 643 So.2d 524, 529-530 (Miss. 1994) (citing *Miss. State Highway Commission v. Gilich*, 609 So.2d 367, 377 (Miss. 1992)).

When this Court had ample opportunity to depart from the *Sample* ruling, as the dissent so strongly urges, this Court decided to not go down that path, and instead restated "If expert testimony is offered from an unqualified witness, there is reversible error." *Cotton v. State*, 675 So.2d 308, 312 (Miss. 1996) (citing *Roberson v. State*, 569 So.2d 691, 696 (Miss. 1990). "A witness must be qualified as an expert under Miss. R. Evid. 702 if her testimony is such that the peculiar knowledge or information to be presented is not likely possessed by a layman." *Hobgood v. State*, 926 So.2d v. 847, 854 (Miss. 2006) (citing *Crawford v. State*, 754 So.2d 1211, 1215-15 (Miss. 2000)); *Sample*, at 529.

For evidentiary purposes, it absolutely matters whether the "small portion" of Scott Cook's objectionable testimony is labeled lay or expert opinion. The brief submitted by the Appellee dutifully reminds this Court once again the purpose of Rule 26 of the *Mississippi Rules of Civil Procedure*: to prevent parties from calling surprise witnesses in order to catch the other "with his pants down." The enhancement of discovery rules provided by Rule 702 is "for notice and opportunity to prepare rebuttal." *Sample v. State*, 643 So.2d 524, 530 (Miss. 1994). Attorney for the Plaintiff never had a chance for any rebuttal with respect to the expert testimony given by Mr. Cook.

Counsel for the Appellee urges this Court to not exclude the expert testimony of Mr. Cook because "exclusion of evidence is a last resort." *McCollum v. Franklin*, 608 So.2d 692, 694 (Miss. 1992). While *McCollum* has been upheld numerous times by this Court, this simply does not mean that all expert testimony should be presumed admissible – the testimony must be relative and reliable. The problem here is with the last portion: reliability. Neither the Plaintiff's counsel nor the trial court had any idea whether the testimony Mr. Cook was giving was reliable. "[T]he trial court is vested with a 'gatekeeping responsibility.'" *Mississippi Transportation Commission v. McLemore*, 863 So.2d 31, 36 (Miss. 2003) (quoting *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 589 (1993)).

McCollum went on to state that "every reasonable alternative means of assuring elimination of prejudice to the moving party and a **proper sanction** against the offending party *should be explored before ordering exclusion.*" *Id.* (emphasis supplied). One of those "proper sanction[s]" is exclusion of evidence. "When a discovery violation occurs, one of the sanctions available under our rules of civil procedure is "an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters into evidence." *Canadian National/ Illinois Central Railroad Company v. Hall*, 953 So.2d 1084, 1097 (Miss. 2007) (citing M.R.C.P. 37(b)(2)(B)). The real issue has been lost, yet again, in an attempt to bury a quotation with a string of citations which do nothing but restate an already exhausted point. A closer examination of those cases this Court has ruled upon will bring to light what actually happened. "[A]n expert should not be allowed to testify concerning a subject matter which is not included in the response to the interrogatory," and allowance

of such would be reversible error. *Id.* (citing *Buskirk v. Elliott*, 856 So.2d 255, 264 (Miss. 2003).

The Appellees further attempt to divert the attention of this Court from the real issue – whether reversible error occurred when Mr. Cook's testimony gave more than lay person opinion when he spoke of how the "forces in the gudgeon area" worked. This testimony regarding "the forces [that] will affect [a] tractor that's being pushed" is the first Duett's attorney had ever heard of this information. Mr. Duett's attorneys propounded interrogatories asking the defense to provide the names and opinions of any expert witnesses. There was no mention of any expert testimony included in their response. The defendant never designated any expert witnesses during discovery. Not even in the pretrial order did the defendant ever assign any witness regarding any expert testimony that may be given at trial. Neither during discovery nor before trial did the defendant ever give Mr. Duett's attorneys any indication that Mr. Cook's testimony would include expert testimony regarding any pushing or pulling that could cause the gudgeons to break. The defense never presented any evidence that the plaintiff, Mr. Brookie Duett, did anything to break the gudgeons in the John Deere 9400 tractors.

Plaintiff's counsel was ambushed by Mr. Cook's testimony because of this violation of discovery rules. Mr. Cook was designated as Deere's corporate representative in response to Plaintiff's Rule 30(b)(6) Notice filed and served October 6, 2005 (P-3, Ex. 1 to Deposition of Cook). Plaintiff's counsel was on notice that Mr. Cook would be testifying regarding "performance problems involving John Deere 9400 Series tractors including, but not limited to, gudgeons and transmissions" *Id.* Plaintiff's counsel was not placed on notice that Mr. Cook would testify concerning ***any factor that may***

have caused Mr. Duett's John Deere 9400 Series gudgeons to malfunction. Plaintiff's counsel not prepared for this type of testimony. Counsel for the Defense never gave anyone any notice that this sort of evidence would be brought out during testimony at trial. Counsel for the defense never gave the Plaintiff's counsel any notice that Mr. Cook would do any inspections to any of Mr. Duett's tractors...because ***Mr. Cook never inspected any of Mr. Duett's John Deere tractors in question.***

Counsel for the Appellees cannot make an "and/or" argument when dealing with trial courts and their responsibility as gatekeepers of expert testimony. In one breath, counsel cannot state that the lay opinion testimony given by Mr. Cook was proper, then in the same breath continue on that the trial court properly allowed this "expert" testimony because Mr. Cook was qualified to give the testimony. Nothing could be further from the truth. No evidence was introduced that provided any previous "expert" testimonial experience Mr. Cook possessed. As a corporate representative of Deere, it would be exceedingly difficult to testify as both a defendant and expert witness simultaneously.

Having revealed that Mr. Cook would testify as a corporate representative, and having represented to Plaintiff's counsel that Mr. Cook's testimony would not exceed the scope of corporate representative, the Defense counsel's continuing duty to supplement required reasonable advance advice of any new areas Mr. Cook would touch upon. As in *West v. State,* the prosecution's failure to apprise the defense of this new testimony effectively deprived the accused of both an effective cross-examination of the expert and greatly restricted his opportunity to present contrary expert opinion. *West v. State*, 553 So.2d 8 (Miss. 1989)

To borrow a tactic of argument from the brief of the Appellees, even if Mr. Cook was considered an "expert", his testimony would never make it to the jury under this state's Rules of Evidence. First, the testimony must assist the trier of fact. Second, the opinion must be based on the witness's firsthand knowledge or observation. The second prong of the test is in accordance with *M.R.E.* 602 requiring that a witness who testifies about a certain matter have personal knowledge of that matter. *Jones v. State*, 678 So.2d 707, 710 (Miss. 1996). And this is where the Appellees' argument resembles a house of cards. Mr. Cook has zero firsthand knowledge or observation about any of Mr. Duett's tractors. Mr. Cook has no knowledge because he did no observation, investigation, inquiry, inspection, or analysis of Mr. Duett's tractors. Mr. Cook may even have trouble picking Mr. Duett's tractor out of a lineup of other John Deere 9400 tractors. Without this firsthand knowledge of the tractors in question, his speculative testimony concerning what caused the gudgeons to no longer work appropriately was clearly improper.

Appellant's trial counsel timely objected to Mr. Cook's testimony on the basis that it was expert testimony. Tr. 566. In response to the objection Defense counsel told the trial judge that Mr. Cook's testimony involved "strains that have-***from an engineering standpoint, the strains that are applied at tractors if they're stuck***. He knows that. ***It's not an opinion; it's a fact.***" (emphasis supplied) Tr. 566. Despite defense counsel's admission that Mr. Cook's testimony involved "engineering" the Court overruled the objection and allowed him to testify as a lay witness. Tr. 567.

Since the defendant did not disclose any expert testimony Cook may give during trial, the plaintiff was severely prejudiced by not having any opportunity to challenge the credentials of the expert. The plaintiff was never given a chance to challenge the expert

or his opinion. When the trial court abuses its discretion by clearly failing to provide a fair opportunity for such a challenge, reversible error occurs. The plaintiff was never on notice of the opinions Cook would give at trial ***concerning the tractors in question***, which prejudiced Duett by not having any opportunity to determine the reliability of Cook's testimony and opinion.

II. Appellees Contention That Evidence Was Sufficient to Support a Defense Verdict is Misplaced.

In denying Appellant's motion for a new trial, the trial court committed error and abused its discretion. The evidence available and presented at the trial of this matter was of such quality and weight that reasonable jurors could not have arrived at a contrary verdict. This is the oft-held standard in this state for reviewing and determining the weight of the evidence. See, *Munford Inc. v. Fleming*, 597 So.2d 1282, 1284 (Miss. 1992). If the substantial weight of the evidence presented is contrary to the verdict that was rendered, then a trial court will be found to have abused its discretion in denying a motion for a new trial and a new trial is appropriate. See, *Eason v. State*, 2008 WL 570447 (Miss.App.)

To counter Appellant's assertion that the substantial and overwhelming weight of the evidence presented was in favor in a Plaintiff verdict, especially with regard to warranty breaches, Appellee Deere contends Mississippi law allowed them to cure their breaches. They rely upon *Mercury Marine v. Clear River Construction, Inc.*, 839 So.2d 508 (Miss.2003) as support for this position. While Mississippi law may allow curing of breach of warranty, the same precedent cited by Appellee Deere is equally as clear regarding the principle that, at some point, it becomes clear that the product cannot be

repaired so that the same is made free from defect. See, *Mercury Marine v. Clear River Construction, Inc.*, 839 So.2d 508 (Miss.2003).

Mercury Marine involved a factual scenario quite different from the one present instantly. In that matter, the case turned on the fact that the complaining party, the purchaser of boat motors, experienced problems with the product three times and failed to give the manufacturer the opportunity to cure the defect after the third breakdown. Due to this factual scenario, this Court opined that the manufacturer was not properly given an opportunity to cure the defects with the product. See, *Mercury Marine*, 839 So.2d 508, 512.

In the same opinion, the Court goes further in explaining that the facts present in *Mercury Marine*, were "readily distinguishable from our prior opinions in which we found that the right to cure was not unlimited in the wake of repeated deficiencies and repeated attempts at repair." *Id.* The facts present here are quite different and more analogous to a "wake of repeated deficiencies and repeated attempts at repair." At the trial of this matter, every fact witness confirmed the nature and amount of problems Appellant had with these model 9400 tractors, including the John Deere representative. Tr. 537-540. Trial records, depositions and evidence illustrate, in great detail, the overwhelming volume of mechanical problems with the tractors in question. There were also repair records and testimony presented regarding the voluminous amount of repair work these machines underwent. Appellant constantly had major problems with transmissions, hydraulic lines and gudgeons on the four products at issue, just to name a few. Tr.210-227. As outlined in Appellant's main brief, this Court has stated in *North River Homes, Inc. v. Bosarge*, 594 So.2d 1153, 1160 (Miss.1992), "there comes a time

when enough is enough – when a consumer no longer must tolerate or endure a seller's repeated attempts to cure the defect". The overwhelming weight of the evidence demonstrated that Appellant reached that level and no reasonable juror could have found differently.

Appellees further contend that the evidence supported a defense verdict due to the fact evidence demonstrated that Appellees did not violate any implied warranties. Contrarily, Appellant contends Appellees violated both the implied warranty of merchantability and the implied warranty of fitness for a particular purpose. Moreover, it is Appellant's contention that the evidence presented at trial was so overwhelmingly in favor of such a finding, that the failure of the trial judge to grant a new trial was abuse of discretion and reversible error.

The implied warranty of fitness for a particular purpose arises under *Mississippi Code Annotated* § 75-2-315, which provides that when the seller, at the time of the contracting, knows the purpose for the goods sold and that the buyer is relying on the seller's skill and judgment to furnish suitable goods, there is an implied warranty that the goods shall be fit for that purpose. See, *Miss. Code Ann.* § 75-2-315. Appellees devote a portion of their brief to a recitation of the testimony of the Appellant in an attempt to illustrate that Brookie Duett knew more about landforming and building catfish ponds than any agent or representative of Appellees could have told him. However, there is nothing presented by Appellees and, indeed scant evidence in the record, explaining that Appellant had any, let alone great, knowledge about *tractors*. Appellant Duett may have thought himself to be an expert on landforming and may have testified that no one could have told him anything on landforming that he didn't already know; however, Brookie

Duett gave no testimony of being possessed of a great knowledge regarding *tractors* and the suitability, merchantability and fitness of *tractors* is what is instantly at issue.

Appellees continue by contending that there is no evidence to establish that they knew about Appellant's intended use for the tractors, at the time he purchased the tractors. However, the record is clear that Larry Shurden, the owner of Belzoni Tractor and the seller of the machines at issue, knew in what business Appellant was engaged, had done business with Appellant before and knew for what purpose he needed the tractors. Tr. 195-196. In addition, Appellant himself testified that before purchasing the equipment he spoke with Mr. Shurden, as well as, reviewed some brochures and materials. Tr. 258-270.

The evidence clearly established that when these products were sold to Appellant, the seller knew for what purpose they were intended. Continuing, as Appellant had purchased tractors from the Appellees prior to the dates and products in question, the evidence illustrated that Mr. Duett relied upon Appellees' skill and judgment in selling him the John Deere 9400 tractors. It is certainly undisputed that the amount and nature of the mechanical problems experienced by Appellant were overwhelming. Whether Appellant knew a great deal about landforming is irrelevant to this cause. The evidence showed that Appellees knew what the tractors were to be used for and that Appellant relied upon their judgment and skill, *regarding tractors*, in making his selection. It necessarily follows that, pursuant to § 75-2-315 of the *Mississippi Code*, the evidence presented at trial was clearly in support of a finding of a breach of the implied warranty of fitness for a particular purpose.

Finally, Appellees' contend that the evidence supported a defense verdict on the alleged breach of the implied warranty of merchantability. They cite as support the fact that the tractors were in use by Appellant for nearly a year prior to problems arising. Appellees contend that the year of use by Mr. Duett prior to mechanical problems is evidence of the merchantability of these tractors. As such, it is seemingly Appellees' contention and argument that commercial and industrial tractors are merchantable as long as they last for 11 or 12 months before becoming so ridden with problems that they are rendered unreliable and practically useless. Not only was there was no evidence presented in support of such a contention, but the very notion that reasonable jurors would come to such a conclusion seems far-fetched at best.

These tractors were not fit for use as intended, they were not fit at the time they were purchased and Appellees were provided with a nearly constant opportunity to correct the problem. This is the standard of implied warranty of merchantability as set out in § 75-2-314 of the *Mississippi Code*. Again, when the weight of the evidence concerning the breakdown and repair history of these machines, and the knowledge of Appellees of what purpose the tractors were to be used is considered, the evidence presented overwhelmingly supported a finding for Appellant on the implied warranty breaches.

CONCLUSION

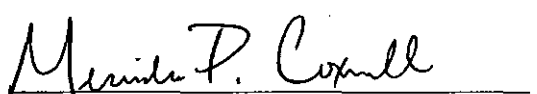
The trial court abused its discretion by allowing Cook to testify about matters reserved for expert opinions under *M.R.E.* 702 without being qualified to render such opinions. Further, the Plaintiff's were ambushed by this testimony because the defense failed to identify Mr. Cook as an expert in discovery and did not respond to any expert

interrogatories. The Plaintiff was clearly prejudiced by Mr. Cook's testimony because it permitted the jury to find that Brookie Duett was the proximate cause of the tractor damage instead of the defendant. Had the trial court adhered to rules regarding expert testimony, Mr. Cook's testimony would have been inadmissible. A new trial is required.

The evidence presented at trial overwhelmingly established that Appellees knew what Appellant intended these tractors for and that Appellant trusted their skill and judgment in furnishing them to him for that purpose. The evidence presented at trial overwhelmingly established that these tractors were not fit for the use they were intended, at the time they were purchased. Finally, the evidence presented at trial overwhelmingly established that Appellees were given numerous opportunities correct the defect, to repair the products, until it became clear that it was not possible for Appellees to cure the constant and problematic failures of these tractors. All of this evidence was of such quality and weight in support of Plaintiff's allegations that the verdict rendered must be viewed as contrary. The trial court erred in denying a new trial and this Court should remedy that abuse.

Respectfully submitted,

DUETT LANDFORMING, INC.



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CERTIFICATE OF SERVICE

I, Merrida P. Coxwell, Jr., attorney for appellant, Duett Landforming, Inc., certify that I have this day filed this Appellant's Brief with the clerk of this Court, and have served a copy of this Appellant's Brief by United States mail with postage prepaid on the following persons at these addresses:

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