IN THE SUPREME COURT FOR THE STATE OF MISSISSIPPI

GLEN "TREY" MARTIN	**PLAINTIFF-APPELLANT**
v.	**CIVIL ACTION NO. 2008-CA-01581**
FRANKLIN COUNTY MISSISSIPPI	**DEFENDANT-APPELLEE**

ON APPEAL FROM THE CIRCUIT COURT
OF FRANKLIN COUNTY, MISSISSIPPI

BRIEF OF APPELLANT

(Oral Argument Not Requested)

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IN THE SUPREME COURT FOR THE STATE OF MISSISSIPPI

GLEN "TREY" MARTIN	**PLAINTIFF-APPELLANT**
v.	**CIVIL ACTION NO. 2008-CA-01581**
FRANKLIN COUNTY MISSISSIPPI	**DEFENDANT-APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of records 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 Supreme Court and/or Judges of the court of Appeals may evaluate possible disqualification or recusal.

Plaintiff/Appellant At Issue in This Appeal:

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Defendant/Appellee's Counsel:

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2. Lane B. Reed, Esq.
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Trial Judge:

1. Honorable Forrest A. Johnson, Trial Court Judge
   Franklin County Circuit Court Judge
   Post Office Box 1372
   Natchez, Mississippi 39121

Respectfully Submitted,

GLENN "TREY" MARTIN

By: _____
J. KEVIN RUNDLETT, [redacted]
Attorney for Glenn "Trey" Martin

STATEMENT REGARDING ORAL ARGUMENT

Appellant does not believe that the facts and legal arguments encompassed in this appeal necessitate oral argument, but instead assert that this matter should be decided based on the briefs which have been submitted to the Court.

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STATEMENT OF JURISDICTION

On August 21, 2008, the Circuit Court of Franklin County, Mississippi, Honorable Forrest A. Johnson, presiding, granted final judgment in favor of Defendant/Appellee.

Pursuant to Mississippi Rule of Civil Procedure, Plaintiff/Appellant filed his Notice of Appeal on September 18, 2008.

STATEMENT OF THE ISSUES

Glenn "Trey" Martin, Plaintiff-Appellant herein, being aggrieved by the judgment of the Circuit Court of Franklin County, Mississippi, as rendered in civil action number 05CV109, hereby prosecutes this, his Appeal, to the Supreme Court of Mississippi.

The Appellant respectfully submits the following issues for review by the Court:

I. **WHETHER THE TRIAL COURT ERRED BY FINDING THAT FRANKLIN COUNTY ADEQUATELY WARNED THE PLAINTIFF OF THE EXTREMELY DANGEROUS CONDITION OF THE BRIDGE AT ISSUE**

   A. **Whether Franklin County Had Clear Notice of the Dangerous Condition of the Bridge at Issue**

   B. **Whether the Trial Court Erred by not Admitting an Important Article Proving that Franklin County Did not Take Proper Steps to Protect the Public**

   C. **There Were No Signs Present on the Date the Bridge Abutment Caved in and Injured Trey Martin**

   D. **Piles of Dirt and Non Permanent Signs Were not Adequate Warnings of the Dangers Associated with the Bridge at Issue**

II. **WHETHER THE PROXIMATE CAUSE OF THE INJURIES SUSTAINED BY TREY MARTIN WAS FRANKLIN COUNTY'S FAILURE TO ADEQUATELY WARN. HOWEVER, EVEN IF TREY MARTIN WAS PARTIALLY AT FAULT WHETHER HE WAS ONLY CONTRIBUTORILY NEGLIGENT, AND SUCH IS NOT A BAR TO RECOVERY**

III. **WHETHER THE TRIAL COURT ERRED IN FAILING TO LEVY SANCTIONS ON DEFENSE COUNSEL AFTER LEARNING OF EXTREME UNETHICAL CONDUCT DURING TRIAL**

STATEMENT OF THE CASE

A. Nature of the Case and Course of Proceedings and Disposition in the Court Below.

This is a personal injury action filed by Glenn "Trey" Martin, III pursuant to the Mississippi Tort Claims Act against Franklin County, Mississippi and the Franklin County Board of Supervisors. The course of proceedings in this civil action is briefly summarized below:

May 29, 2004	-	Trey Martin was severely injured when the bridge abutment at issue collapsed, causing him to fall approximately 30 feet.
May 13, 2005	-	Martin serves statutory Notice of Claim letter. (CP 11-12).
November 8, 2005	-	Martin files the Complaint. (CP 04-10).
November 30, 2005	-	Franklin County files Motion to Dismiss claims against the individual board members and claims for punitive damages. (CP 14-18).
December 16, 2005	-	Franklin County files its Answer. (CP 28-35).
March 13, 2006	-	Judgment of Dismissal as to individual Board members entered. (CP 43).
January 8, 2007	-	Franklin County Files Motion to Dismiss based upon Plaintiff failing to obtain alternate counsel. (CP 143-145).
February 14, 2007	-	Order allowing Plaintiff 7 days to obtain counsel or inform Court of intent to proceed *pro se.*
March 8, 2007	-	Brad Oberhousen, Esq. and J. Kevin Rundlett, Esq. enter an appearance on behalf of Plaintiff. (CP 158-159).
December 11-12, 2007-		Bench trial on the merits before the Honorable Forrest A. Johnson in the Circuit Court of Franklin County.
August 8, 2008	-	Erroneous order finding in favor of the Defendant. (CP 517-518).
August 25, 2008	-	Final Judgment Dismissing Defendant with Prejudice. (CP 519)
September 18, 2008	-	Notice of Appeal filed by Plaintiff. (CP 521)

B. Statement of the Facts.

At the time of the incident at issue in this case, there was a substantial bridge, constructed and maintained by Franklin County, Mississippi, on Garden City Road between Liberty Road and Highway 33 in Franklin County. The bridge crossed an approximate 30 foot deep ravine and creek. Trey Martin's family owns a hunting camp on Garden City Road. On May 29th, 2004 the Plaintiff and several of his friends and children traveled from their home in Louisiana to the hunting camp for a vacation. Mr. Martin had not been to the camp since the 2003 hunting season.

As early as February of 2004, Franklin County became aware that the bridge at issue was a serious danger to the public. The County ordered that the bridge be closed and did nothing more than place piles of dirt in front of the bridge. Prior to the accident, the County also became aware that the piles of dirt were not keeping the public from crossing the bridge. Instead of following any of the mandates of the Mississippi Department of Transportation or the Manual on Uniform Traffic Control Devices, it simply put out more dirt. Had the County taken appropriate steps to close the bridge and warn the public, Mr. Martin would not have been severely injured, and Ms. Allen would still be alive.

Martin and his friends arrived at the camp on the evening of May 29th, 2004 and proceeded to unload their gear and four wheelers. After unloading, several members of their group decided to go for a ride on the ATV's. Jennifer Allen drove the ATV owned by Trey Martin, and Trey Martin rode as a passenger. David Hedzinger was operating an ATV and Trey's son was driving another. The group then proceeded North on Garden City Road and approached the bridge at issue that crosses Wells Creek.

David Hedzinger crossed the bridge abutment first with no problem. There was a small dirt hump in front of the bridge, but there were no warning signs present. Jennifer drove the ATV over

the hump. As she did so the ground connecting the road and the bridge suddenly collapsed, causing Trey Martin, Jennifer Allen, and the ATV to plunge approximately 30 feet and violently crash into the bed of the creek. As a result of this tragic incident Jennifer Allen was killed and Trey Martin suffered extensive injuries including, but not limited to, severe lacerations to his scalp, post-concussive syndrome, traumatic brain injury, memory loss, speech problems, emotional distress, and disability as a result of this tragic incident.

SUMMARY OF THE ARGUMENT

The Trial Court's ruling in favor of Franklin County is against the overwhelming weight of the evidence. The Plaintiff proved by a preponderance of the evidence that Franklin County was on notice that the bridge at issue was a serious danger to the public. Franklin County had a duty to adequately warn the public, including Trey Martin, of the danger of the potential for the failure of the bridge abutment. The County further knew that the method it was using to attempt to close the bridge was not keeping the public from crossing, yet it made no changes. Furthermore, the method used to attempt to close the bridge increased the danger of failure of the abutment and was not in any way in compliance with the Manual on Uniform Traffic Control Devices. The Trial Court erred in ruling that Franklin County took substantial precautionary steps in closing the bridge.

The Trial Court further erred in ruling that the sole proximate cause of the Plaintiff's injuries was the Plaintiff and other individual's decision to proceed past the dirt piles. Even if the Plaintiff were contributorily negligent, it was error not to attribute some negligence to the County.

The Trial Court erred in not sanctioning Defense counsel for highly unethical behavior during trial.

STANDARD OF REVIEW

In a claim based on the Mississippi Tort Claims Act, the trial judge sits as the finder of fact. Miss.Code Ann. §11-46-13(1) (Rev. 2002). A circuit judge sitting without a jury is accorded the same deference with regard to his findings as a chancellor, and his findings should not be reversed on appeal where they are supported by substantial, credible, and reasonable evidence. ***Donaldson v. Covington County,*** 846 So. 2d 219, 222 (Miss. 2003). The circuit judge's findings of fact and conclusions of law will not be disturbed unless the judge abused his discretion, was manifestly wrong, clearly erroneous, or an erroneous legal standard was applied. ***Miss. Dep't of Transp. v. Trosclair,*** 851 So. 2d 408, 413 (Miss. Ct. App. 2003).

ARGUMENT

I. THE TRIAL COURT ERRED BY FINDING THAT FRANKLIN COUNTY ADEQUATELY WARNED THE PLAINTIFF OF THE EXTREMELY DANGEROUS CONDITION OF THE BRIDGE AT ISSUE

The Trial Judge properly ruled that Franklin County was not provided immunity pursuant to the Mississippi Tort Claims Act. (T.R. at 196), and See ***Newton v. Lofton,*** 840 So. 2d. 833 (Miss. Ct. App. 2003). The Court further correctly ruled that the ultimate question was whether or not the County was negligent in failing to warn the public of the dangers associated with the bridge. **Id.** The Mississippi Tort Claims Act provides that a governmental entity may be liable for injury caused by a dangerous condition on government property if it was caused by the negligent or other wrongful conduct of an employee or the governmental entity **or** if there was actual notice of the dangerous, non obvious condition, and the government failed to protect or warn the public within a reasonable time. **Miss. Code Ann. § 11-46-9(1)(v).**

A. Franklin County Had Clear Notice of the Dangerous Condition of the Bridge at Issue

The Garden City Bridge abutment collapsed and severely injured Trey Martin on or about May 29, 2004. Franklin County was made aware of the dangerous condition of the bridge as early as February 9, 2004, some 3 ½ months earlier. (R.E. at 42). Notification was provided by a bridge inspection report addressed to the Franklin County Board of Supervisors. ***Id.*** It stated that "[v]ery serious bank erosion is taking place on the creek banks. A NRCS project is planned for correction of this problem. The creek banks are threatening to undermine the west abutment....Recommend starting construction of this repair project as soon as possible." ***Id.*** As a result of the notification, the Board of Supervisors voted to close the bridge.

In February, 2004, Franklin County placed piles of dirt in front of the bridge in an attempt to stop traffic from crossing in an effort to close the bridge. (R.E. at 42). Said measures did not work. Not only was the County aware that the bridge was in a dangerous condition, it was also aware that the piles of dirt were not stopping the public from using the bridge. During trial, a document entitled "County Road/Bridge Improvement Report" was entered into evidence. **Id.** Said document is dated March 12, 2004, and stated "Garden City Rd.SW-Hauling dirt to Block road off, **truck going over dirt.**" Tellingly, Jimmy Jones, Chancery Clerk for Franklin County, testified at trial that the board of supervisors knew on **March 12, 2004,** that vehicles were still crossing the bridge despite the dirt, and its solution was to simply put out more dirt. (T.R. at 276). Thereafter, the Board of Supervisor's president, Woodrow Wilson, also testified that the board knew the dirt piles did not keep vehicles off of the bridge. (T.R. at 295).

During trial, a newspaper article from the *Franklin Advocate* dated March 18, 2004, was admitted into evidence. (R.E. at 55). The article quotes a discussion from a board of supervisors meeting and stated, "Board President George Collins asked Wilson: 'We(county) have that road

closed, don't we Woody?', 'Yeah, but that still don't keep them from going through,' Wilson answered." If the County knew the bridge was a danger to the public and that the steps it had taken were not working, it had a duty to choose an alternative method to alert the public. **Id.**

B. The Trial Court Erred by not Admitting an Important Article Proving that Franklin County Did not Take Proper Steps to Protect the Public

During the testimony of George Hammitt, Plaintiff's expert civil engineer, a newspaper article dated March 29th was not allowed into evidence. (T.R. at 137). The Trial Court erred in not allowing said article into evidence. The Mississippi Court of Appeals has stated that the decision of a trial judge not to admit or exclude evidence is not reversible error unless the error adversely affects a substantial right of a party. ***Alpha Gulf Coast, Inc. v. Jackson,*** 801 So. 2d 709, 729 (Miss. 2001.

Said article was relied upon by Mr. Hammitt in formulating his opinion and preparing for trial and was offered to further prove the County was on notice that its methods of closing the bridge were inadequate. **Id.** The Court allowed the article to be read into evidence as a proffer for appellate purposes. The proffer states in pertinent part as follows:

> Franklin County supervisors and Chancery Clerk Jimmy Jones paid a visit to the Well's Creek bridge, Garden City District One Monday morning and found out what they knew to be true. The bridge cannot be repaired by the county, and steps must be completed to keep any traffic out of the area....The board agreed to take steps necessary in closing the road to traffic....Franklin County supervisors will shortly begin the steps listed above to keep people off the bridge. **Shown on the bridge** are supervisor Jerry Lynn Howell, supervisor Chad Smith, Ingram Thompson, supervisor Woodrow Wilson, supervisor M. George Collins.

(T.R. at 220)(R.E. at 53).

Trial testimony absolutely proves that the County was on notice that people were still crossing the bridge. This goes to the heart of the Plaintiff's case. Furthermore, the 2007 newspaper article proved that three years after the original engineering report that warned of bridge's dangers

that the bridge needed to be closed and additional steps needed to be taken to keep people off the bridge. The County breached its duty to act reasonably and keep the public safe. Failure of the Trial Court to Consider this evidence substantially and adversely affected the rights of Trey Martin.

C. There Were No Signs Present on the Date the Bridge Abutment Caved in and Injured Trey Martin

The County had a duty to warn the public, including Trey Martin, of the bridge's dangerous condition. David Hedzinger was with Mr. Martin on the night the bridge abutment collapsed. He testified at trial that he drove a separate vehicle to the camp and saw no warning signs on Garden City Road. (T.R. at 13). He further testified that he was sure there were not dirt piles present as depicted in a photograph provided by the defense. (T.R. at 22-23). When asked whether there were any dirt mounds present, he responded "[t]he two on the left definitely were not there...and I know that because I had to drive Trey's truck to the edge of that to pull out the four-wheeler." (T.R. at 23). Mr. Hedzinger further testified that he saw no warning signs whatsoever when he drove back to the camp in broad daylight after visiting Trey Martin in the hospital. (T.R. at 24). In response to the Court's questioning, Mr. Hedzinger stated that there was about two feet of dirt sloping up to the bridge, and that it provided no warning to him that there was any problem with the bridge. (T.R. at 49).

Trey Martin testified that when he and Ms. Allen approached the bridge, there were small mounds of dirt and evidence of other vehicles crossing onto the bridge. (T.R. at 55). He stated it just looked like work or construction had been done. **Id.** Trey also testified that when he and his friends traveled into the camp from the West, he saw no road closed or bridge out signs. (T.R. at 56).

Glenn Martin, Trey's father, testified that he traveled from Jackson to the camp as soon as

he got word Trey had been injured. (T.R. at 177). He stated, "...there was no signs. Nothing to tell a prudent person, including myself - - in fact, it gave me chills because if I had been riding through there, I would have went off. There was nothing at all to tell you to stop." **Id.** Glenn Martin also testified that he traveled the entire Garden City Road and did not see a road closed or bridge out sign. **Id.** He testified that the route traveled on the way to the camp was from the West, from highway 33. **Id.** The bridge was further east from the camp. When asked to describe the dirt in front of the bridge, Mr. Martin answered as follows:

> Well, I heard it called a hill before, but I was- - my grandparents and everything were from - - they had dirt roads and - - you know - - like ruts and stuff. There was really a hill. There was some dirt laying there, like, I guess three or four inches high, but there was nothing- - there was no hill. There was no- - there was some stuff on the sides - - you know- - to the right and the left of where the bridge- -where the stuff went to the bridge, but there was no hills. There was like a - - like little mounds. Like if you was driving along what you expect on a gravel road.

(T.R. at 178).

Mr. Martin also testified that there was evidence of other vehicles traversing onto the bridge and no warning signs whatsoever. (T.R. at 179). Trey Martin, Glenn Martin, and David Hedzinger's testimony clearly evidenced the lack of warning signs or advanced warning to give the public notice of the dangerous condition.

D. Piles of Dirt and Non Permanent Signs Were not Adequate Warnings of the Dangers Associated with the Bridge at Issue

The Manual of Uniform Traffic Control Devices (hereinafter "MUTCD") is a guide to proper warning signs. The MUTCD was adopted by the Mississippi Department of Transportation and was applicable at the time of the incident at issue in this cause. (T.R. at 112-116). It is well settled in our state that the failure to follow the mandates of the MUTCD is evidence of negligence. ***Donaldson v. Covington County,*** 846 So. 2d 219 (Miss. 2003); ***Jones v. Panola County,*** 725 So. 2d 774 (Miss. 1998).

John Smith, Mississippi's assistant state traffic engineer, testified that the MUTCD does not allow the use of dirt for the closing of a road or bridge. (T.R. at 117). George Hammitt was qualified as an expert in the field of civil engineering and allowed to testify as to the adequacy of the warnings in this matter. (T.R. at 127). Mr. Hammitt testified there are five basic requirements, per the MUTCD, for effective traffic control devices. (T.R. at 140). The requirements are to fulfill a duty, command attention, convey a clear and simple meaning, command respect from the road users, and give adequate time for proper response. **Id.** Mr. Hammitt testified that dirt piles do not meet any of the five requirements for closing the bridge. **Id.** He also testified that nowhere in the MUTCD is dirt barricades a sanctioned method of closing a bridge. **Id.**

Supervisor President Woodrow Wilson admitted at trial that he had not ever heard of the MUTCD until after the tragic bridge abutment failure in May, 2004. (T.R. at 302). The following exchange occurred at trial:

Q. You had heard of it after the accident. How did you hear of it after the accident?

A. Because we read it in the manual where we went back to close it off properly.

Id. The President of the Board of Supervisors admits that he was not even aware of the MUTCD at the time of the accident. It is a safe assumption that if the Board of Supervisors did not know of the manual, it could not be followed.

Mr. Hammitt testified that not only did Franklin County not follow any of the mandates of the MUTCD, but it also failed to follow any of the information put out by the Mississippi Department of Transportation and the National Association of County Engineers. (T.R. at 143-144). The County failed to put up detour signs, it failed to put up a permanent barricade with reflective tape, and it failed to have letters sent out to the public. **Id.**

The dirt piles at the abutment of the bridge actually increased the danger of failure. Mr.

Hammitt testified that if there is dirt that won't support itself(at the abutment), that placing more dirt on top of it is not a very prudent or reasonable solution. (T.R. at 147). Woodrow Wilson, president of the Board of Supervisors, testified that he knew the dirt might cause the abutment to fail. (T.R. at 290). Yet, the piling of dirt is the solution the supervisors chose to take to close the dangerous bridge.

If warning signs were placed on Garden City Road, which is disputed, they were temporary and it was common knowledge that the signs were stolen. Doreen Norris, an EMT with Franklin County, testified that it was a joke that the bridge out sign was frequently stolen. (T.R. at 213). Jimmy Jones, Chancery Clerk of Franklin County testified that he had heard the jokes about the signs being stolen, and had reordered them many times. (T.R. at 268). If Franklin County erected temporary warning signs, and knew that the signs were being stolen, it should have erected permanent signs to ensure the safety of the public. Franklin County was at least on constructive notice of the removal of the sign by third parties and failed to take appropriate precautions. **Miss. Code Ann. § 11-46-9(1)(v) and (w) (Rev. 2002).**

II. THE PROXIMATE CAUSE OF THE INJURIES SUSTAINED BY TREY MARTIN WAS FRANKLIN COUNTY'S FAILURE TO ADEQUATELY WARN. HOWEVER, EVEN IF TREY MARTIN WAS PARTIALLY AT FAULT HE WAS ONLY CONTRIBUTORILY NEGLIGENT, AND SUCH IS NOT A BAR TO RECOVERY

Based upon the arguments presented herein, the sole proximate cause of Trey Martin's injuries was Franklin County's failure to adequately warn of a dangerous condition known to it. However, even if Trey Martin is found to have been partially at fault, he was only contributorily negligent. The Mississippi Supreme Court has stated that there may be more than one proximate cause to a negligent act. ***Newton v. Lofton,*** 840 So. 2d 833 (Miss. Ct. App. 2003). In ***Lofton,*** the Plaintiff was injured near a construction area at a public school. ***Id. at 834.*** Despite testimony from state witnesses that warning signs were in place and as to the complete absence of hazards, the Court found the city to be liable and awarded $155,054.25 to the Plaintiff. ***Id. at 835.*** The Court further found that the Plaintiff was 5% at fault and the city was 95% at fault, thereby reducing the Plaintiff's award. ***Id.*** The Mississippi Supreme Court affirmed the decision. ***Id at 838.***

The Defense went to great lengths to show that the Plaintiff and Ms. Allen were intoxicated. However, the Defense's own expert admitted that intoxication had nothing to do with the collapse of the bridge. (T.R. at 259).

> BY MR. RUNDLETT: Let me ask you this, Doctor. Assuming a person has an alcohol level of somewhere around .1, how in your opinion would that affect their reaction time if hypothetically a bridge collapsed underneath them?
>
> A. If a bridge collapsed underneath them, obviously reaction time really doesn't mean a whole lot. I mean, it depends on the distance that you're up in the air and what falls around you and on top of you.

(T.R. at 259). Whether or not Mr. Martin or Ms. Allen were intoxicated is wholly irrelevant in this situation. The bridge could have collapsed if a child were walking over the abutment. The proximate cause of the Plaintiffs injuries was the failure of Franklin County to adequately warn the

public of an extremely dangerous situation.

III. THE TRIAL COURT ERRED IN FAILING TO LEVY SANCTIONS ON DEFENSE COUNSEL AFTER LEARNING OF EXTREME UNETHICAL CONDUCT DURING TRIAL

The trial court erred in not citing Franklin County Attorney, Lane Reed for highly unethical conduct during the trial of this matter. Our Supreme Court has taken notice of the problem of increased sharp practices in our legal system:

> We address today a problem that, though of relatively recent origin, is so pernicious that it threatens to delay the administration of justice and to place litigation beyond the financial reach of litigants. With alarming frequency, we find that valuable judicial and attorney time is consumed in resolving unnecessary contention and sharp practices between lawyers. Judges and magistrates of this court are required to devote substantial attention to refereeing abusive litigation tactics that range from benign incivility to outright obstruction. Our system of justice can ill-afford to devote scarce resources to supervising matters that do not advance the resolution of the merits of a case; nor can justice long remain available to deserving litigants if the costs of litigation are fueled unnecessarily to the point of being prohibitive. As judges and former practitioners from varied backgrounds and levels of experience, we judicially know that litigation is conducted today in a manner far different from years past. Whether the increased size of the bar has decreased collegiality, or the legal profession has become only a business, or experienced lawyers have ceased to teach new lawyers the standards to be observed, or because of other factors not readily categorized, we observe patterns of behavior that forebode ill for our system of justice. We now adopt standards designed to end such conduct...We think the standards we now adopt are a necessary corollary to existing law, and are appropriately established to signal our strong disapproval of practices that have no place in our system of justice and to emphasize that a lawyer's conduct, both with respect to the court and to other lawyers, should at all times be characterized by honesty and fair play.

Mississippi Farm Bureau Mutual Insurance v. Parker, 921 So. 2d 260, 263 (Miss. 2005)(Citing ***Dondi Properties Corp. v. Commerce Savings & Loan Ass'n,*** 121 F.R.D. 284 (N.D.Tex.1988), (en banc).

In preparation for trial of this matter, the undersigned attorney met with John Smith, the Assistant State Traffic Engineer for the Mississippi Department of Transportation prior to trial. (T.R at108). The undersigned represents to this Court that the purpose of meeting with the witness was to discuss his testimony and make sure he could testify on the date of trial if subpoenaed. Counsel for Plaintiff went to the time and expense of having a subpoena issued and served on Mr. Smith. On

the first day of trial, the Plaintiff announced to the Court that the next witness would be Mr. Smith. The following took place:

> BY MR. RUNDLETT: The plaintiff would call John Smith. He may be right out there.
>
> BY BAILIFF SPRING: Your Honor, I've called for John Smith three times, he's not in the courthouse.
>
> BY THE COURT: Has anybody seen him today?
>
> BY MR. RUNDLETT: Jeremy just said he saw him walk - - just saw him standing by the stairs.
>
> BY THE COURT: Let's go check again make sure he's not - - go ahead and see.
> (After the witness is attempted to be located, the following was made of record, to-wit:)
>
> BY MR. RUNDLETT: Your Honor, we'll call him a little bit later and try to figure out where he is.

(T.R. at 50).

Plaintiff's counsel was forced to change the order of his witnesses and called the Plaintiff. **Id.** During a break, Plaintiff's counsel contacted John Smith and was advised that Lane Reed had contacted Tom Coleman, general counsel for MDOT and arranged for Mr. Coleman to advise Mr. Smith to leave the courthouse. (T.R. at 66). The Court questioned Mr. Reed about what happened and he admitted to unethical behavior. (T.R. at 66-71).

> BY THE COURT: Mr. Reed, I am not - - this smells bad. It smells real bad, and I want to give you the full opportunity to explain this, but all I know is the man was down here. You make a phone call, and then all of a sudden, he's gone. He's out of here apparently just shortly before they called him.
>
> - - - - - -
>
> BY THE COURT: Did you ever discuss anything else about this? Are you saying Mr. Coleman just took it on his own - -
>
> BY MR. REED: No, sir.
> BY THE COURT: - - once you called him - -
>
> BY MR. REED: No, sir. I am not. I am saying that Franklin County, Mississippi, did not want him to voluntarily testify in the event that he was not under subpoena.

(T.R. at 70). There is no question Mr. Reed unethically tampered with a witness for the Plaintiff that was under subpoena to testify. Mr. Smith eventually returned to the courthouse and was questioned by the Court. (T.R. at 106). The Court stated the following in pertinent part:

I tell you what. Professionalism is something that is severely lacking in our profession nowadays, and it means something, professionalism, and one of the main things about professionalism is that to me it's you wouldn't want to treat somebody else the way you wouldn't want to be treated. You know, this just may be this day and time the way things are done, but this is not some little game. It's not some kid's game. This is serious business. This is a court of law, and I am a little bit offended by the way this whole thing went down, but let's go ahead and proceed on, and you can go ahead and - - yes, sir. Mr. Currie?

(T.R. at 107). Counsel for Plaintiff then reminded the Court of his Motion for Sanctions, which was denied. (T.R. at 108).

M.R.C.P. 37(e) states that "the court may impose upon any party or counsel such sanctions as may be just, including the payment of reasonable expenses and attorneys' fees, if any party or counsel . . . otherwise abuses the discovery process in seeking, making or *resisting* discovery." (Emphasis added). In addition, the *comment* to M.R.C.P 37 discusses the great flexibility of the trial court in its form of a general grant of power which would enable it to deal summarily with discovery abuses, whenever and however the abuse is brought to the attention of the court:

> For example, for the failure of a party to have made *proper* discovery, or for the misuse of the various discovery vehicles, the court may...impose monetary penalties according to the unnecessary expense to which the adverse party was put. It is significant that Rule 37(e) does not enumerate the sanctions available to the court; courts should have considerable latitude in fashioning sanctions suitable for particular applications.

Based upon the statements by the Court, Sanctions should have been levied on Lane Reed.

CONCLUSION

The Trial Court properly ruled that the Plaintiff was severely injured in the incident at issue in this case. Special damages in the amount of approximately $26,000 and the deposition of Dr. Davis were submitted to the Court. (R.E. at) However, the Trial Court's ruling that Franklin County took adequate steps to close the bridge and warn the public is clearly erroneous and against the weight of the evidence. It took Franklin County over three years from the time they had notice to properly protect the public from the dangerous bridge. The proximate cause of the injuries sustained by the Plaintiff was the breach of Franklin County's duty to adequately warn and close the bridge. In the alternative, Trey Martin was only contributorily negligent and fault should be apportioned appropriately. Plaintiff respectfully requests that this Honorable Court will reverse and render the decision of the Trial Court.

RESPECTFULLY SUBMITTED, this the 26TH day of May, 2009.

GLEN "TREY" MARTIN

By: 

J. KEVIN RUNDLETT, [redacted]
Attorney for Glen Trey Martin

CERTIFICATE OF SERVICE

This is to certify that I have caused the above document to be served upon the person or entity identified below at their usual place of business.

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SO CERTIFIED this the 26TH day of May, 2009.

J. Kevin Rundlett