I. CERTIFICATE OF INTERESTED PERSONS

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DOCKET NO.: 2008-CA-01933 E

PAULA DENHAM AND PAMELA CALDWELL — APPELLANTS

VS.

ADAM HOLMES, A MINOR BY AND THROUGH DONNIE HOLMES HIS FATHER & NATURAL GUARDIAN — APPELLEE

The undersigned counsel of record certifies that the following listed persons have 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 disqualifications or recusal.

1. Honorable Andrew K. Howorth, Trial Judge
2. Paula Denham, Plaintiff/Appellant
3. Pamela Caldwell, Plaintiff/Appellant
4. Adam Holmes, Defendant/Appellee
5. Donnie Holmes, Father and Natural Guardian for Defendant/Appellee
6. Tommy W. Defer, Counsel for Plaintiff/Appellant Paula Denham
7. Bobby T. Vance, Counsel for Plaintiff/Appellant Pamela Caldwell
8. John L. Bailey, Counsel for Plaintiff/Appellant Pamela Caldwell
9. J. Brian Hyneman, Counsel for Defendant/Appellee Adam Holmes

J. BRIAN HYNEMAN, BAR NO. 99181
Counsel of Record

II. TABLE OF CONTENTS

		Page
I	CERTIFICATE OF INTERESTED PERSONS	i
II	TABLE OF CONTENTS	ii
III	TABLE OF AUTHORITIES	iii
IV	STATEMENT OF THE ISSUES	1
V	STATEMENT OF THE CASE	2
VI	SUMMARY OF THE ARGUMENT	5
VII	ARGUMENT AND AUTHORITY	9
	ISSUE I: Whether the trial court erred in granting defendant's *ore tenus* motion to exclude the testimony of plaintiffs' expert witness, Donald Rawson	9
	ISSUE II: Whether counsel for the defendant engaged in improper closing argument that resulted in a harmful influence upon the jury	14
	ISSUE III: Whether the trial court erred in granting defendant's proposed jury instruction D-4 and D-9	17
	ISSUE IV: Whether the trial court erred in denying plaintiffs' motion for judgment notwithstanding the verdict	22
	ISSUE V: Whether the trial court erred in denying plaintiffs' motion for new trial	24
VIII	CONCLUSION	25
IX	CERTIFICATE OF SERVICE	28

III TABLE OF AUTHORITIES

Case	Page
3M Co. v. Johnson, 895 So.2d 151 (Miss.2005)	7, 22
Amiker v. Drugs For Less, Inc., 796 So.2d 942 (Miss.2000)	24
Berry v. State, 703 So.2d 269 (Miss.1997)	15
Burr v. Mississippi Baptist Med. Ctr., 909 So.2d 721 (Miss.2005)	6
Burton v. Barnett, 615 So.2d 580 (Miss.1993)	20, 21
Daubert v. Merrel Dow Pharms., Inc., 509 U.S. 579, 113 S.Ct. 2786 125 L.Ed.2d 469 (1993)	10, 11
Eckman v. Moore, 876 So.2d 975 (Miss.2004)	6, 14
Estate of Hunter v. General Motors Corp., 729 So.2d 1264 (Miss.1999)	20
Fiddle, Inc. v. Shannon, 834 So.2d 39 (Miss.2003)	24
Fielder v. Magnolia Beverage Co., 757 So.2d 925 (Miss.1990)	16
Ford v. State, 975 So.2d 859 (Miss.2008)	18
Fuselier v. State, 654 So.2d 519 (Miss.1995)	13
Glorioso v. Young Men's Christian Ass'n, 556 So.2d 293 (Miss.1989)	19
Harvard v. State, 800 So.2d 1193 (Miss.Ct.App.2001)	18
Herring v. State, 691 So.2d 948 (Miss.1997)	8, 23, 24
Hill v. Dunaway, 487 So.2d 807 (Miss.1986)	6
Huff v. Boyd, 242 So.2d 698 (Miss.1971)	19
Irby v. Travis, 935 So.2d 299 (Miss.2006)	10

Ivy v. State, 949 So.2d 748 (Miss.2007) 8, 24

Jackson County Sch. Dist. v. South Miss. Workers Compensation Fund, 727 So.2d 727 (Miss.Ct.App.1998) 13

Mississippi City Lines, Inc. v. Bullock, 194 Miss. 630, 13 So.2d 34 (1943) 19

Mississippi Dept. of Trans. v. Johnson, 873 So.2d 108 (Miss.2004) 19

Mississippi Transp. Comm'n v. McLemore, 863 So.2d 31 (2003) 5, 10

Mumford, Inc. v. Fleming, 597 So.2d 1282, 1284 (Miss.1992) 7

New Orleans & N. E. R. Co. v. Burge, 191 Miss. 303, 2 So.2d 825 (1941) 18

Permenter v. Milner Chevrolet Co., 229 Miss. 385, 91 So.2d 243 (1956) 19

Poole v. Avara, 908 So.2d 716 (Miss.2005) 5

Rester v. Lott, 566 So.2d 1266, 1269 (Miss.1990) 18

Richardson v. Norfolk & Southern Ry., 923 So.2d 1002 (Miss.2006) 6

Rowlands v. Morphis, 158 Miss. 662, 130 So.906 (1930) 7, 19

Saucier v. Walker, 203 So.2d 299 (Miss.1967) 19

Sheffield v. State, 749 So.2d 123 (Miss.1999) 8

Shelton v. Kindred, 279 So.2d 642 (Miss.1973) 13

Smith v. Payne, 839 So.2d 482 (Miss.2002) 20

Splain v. Hines, 609 So.2d 1234 (Miss.1992) 18

Troupe v. McAuley, 955 So.2d 848 (Miss.2007) 5, 10

Other Authority

M.R.E. 702 (2007) 10

IV. STATEMENT OF THE ISSUES

ISSUE I

Whether the trial court erred in granting defendant's *ore tenus* motion to exclude the testimony of plaintiffs' expert witness, Donald Rawson.

ISSUE II

Whether counsel for the defendant engaged in improper closing argument that resulted in a harmful influence upon the jury.

ISSUE III

Whether the trial court erred in granting defendant's proposed jury instruction D-4 and D-9.

ISSUE IV

Whether the trial court erred in denying plaintiffs' motion for judgment notwithstanding the verdict.

ISSUE V

Whether the trial court erred in denying plaintiffs' motion for new trial.

V. STATEMENT OF THE CASE

Plaintiffs' cause of action arose out of a motor vehicle accident that occurred on July 15, 2004 in Lafayette County, Mississippi. The accident occurred as Paula Denham attempted to execute a left turn from University Avenue Extended into the private parking lot of Ken Ash Construction. As she attempted to execute her turn, her vehicle was struck by a vehicle driven by Adam Holmes that was proceeding in the opposite direction. Pamela Caldwell was a passenger in the Denham vehicle. Lee Durham was a passenger in the Holmes vehicle.

A. PROCEDURAL HISTORY

Plaintiffs filed their cause of action against defendant in the Circuit Court of Lafayette County, Mississippi on September 29, 2004 alleging to have suffered bodily injury as a direct result of defendant's negligence. The cause of action was tried before a jury on June 25-27, 2008. Upon hearing all testimony and considering all documentary evidence, the jury returned a verdict in favor of the defendant after approximately 40 minutes of deliberation. A final judgment was entered based upon the jury's verdict on July 28, 2008. (R. at 28-29).[1]

Plaintiffs filed their separate motions for new trial and judgment notwithstanding the verdict on August 7, 2008. Plaintiffs' post trial motions were denied through order entered by the trial court on October 30, 2008. (R. at 72). Plaintiffs' appeal followed.

B. STATEMENT OF FACTS

On July 15, 2004, Paula Denham and Pamela Caldwell were traveling on University Avenue in Oxford, Mississippi with the intention to solicit business from Ken Ash Construction as a cleaning

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[1]"R." will denote citations to those documents contained within the Clerk's papers. "TT." will denote those citations contained within the trial transcript.

service. Paula Denham was driving her vehicle, and Pamela Caldwell, her sister, was a passenger. The two were unsure the exact location of Ken Ash Construction and were traveling East on University Avenue Extended in an effort to locate the business. (TT. at 94).

According to Paula Denham, she viewed Ken Ash Construction and stopped with her signal activated to allow traffic to clear. (TT. at 140-141). As she was in the process of completing her turn, the accident occurred. (TT. at 141-142). Paula Denham testified that she never saw the vehicle driven by Adam Holmes at any time before or after the accident. (TT. at 144-145).

The point of impact with her vehicle was the front tire on the passenger side with the remaining damage located from the front tire forward. (TT. at 142). It is undisputed that this portion of her vehicle was accessing the parking lot of Ken Ash Construction and off of University Avenue when the accident occurred.

Pamela Caldwell was a passenger in her sister's vehicle. According to Pamela Caldwell, she does not recall ever seeing the Holmes' vehicle until an "instant" prior to impact. (TT. at 174-179). This sighting was out of the corner of her eye, and the accident occurred almost simultaneously with her sighting. (TT. at 179). In that instant, she was able to determine that the Holmes vehicle was traveling "crazy fast." (TT. at 179).[2] Caldwell, like her twin sister, testified that the point of impact was with the front passenger side tire forward. (TT. at 180). The majority of the Denham vehicle remained in the oncoming lane of traffic. (TT. at 180-181).

Adam Holmes testified that he accessed University Avenue from Highway 6, and as he topped the hill, he first viewed the Denham vehicle. (TT. at 225-226). As he proceeded East along

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[2]It should be noted that this testimony was provided despite the fact that Caldwell had previously provided deposition testimony that she could not visually recall the accident, and the limits of her recollection were only what she recalled hearing. (TT. at 174-175).

University Avenue, he was traveling approximately 45 miles per hour when the Denham vehicle turned in front of him. (TT. at 226-227). According to Holmes, he applied his brakes and steered to the right in an effort to avoid the accident. (TT. at 228).

Lee Durham was a passenger in the Holmes vehicle. Durham testified that he viewed the plaintiffs' vehicle traveling eastbound on University Avenue. (TT. at 257). According to Durham, he saw the plaintiffs' vehicle "coming still" about the same time the Holmes vehicle "reached the peak of the slope." (TT. at 257). As the Holmes vehicle was "almost right on them," the Denham vehicle activated its turn signal and made an abrupt left turn into the parking lot of Ken Ash Construction. (TT. at 257). Upon seeing the Denham vehicle turn in front of them, Durham states that Defendant Holmes applied his brakes and attempted to avoid the accident by veering to the right. (TT. at 258).

Shane Theobold was the investigating officer with the Lafayette County Sheriff's Department. Officer Theobold testified that Holmes indicated to him he was traveling 45 miles per hour at the time of the accident. (TT. at 290). He further testified that the speed limit on University Avenue at the accident scene was 40 miles per hour. (TT. at 289-290).

VI. SUMMARY OF THE ARGUMENT

Plaintiffs bring several issues before the Court for appeal. These issues consist of alleged errors made by the trial court during the trial and the denial of post trial motions for new trial and judgment notwithstanding the verdict.

Plaintiffs appeal the trial court's exclusion of the testimony of Donald Rawson, accident reconstructionist. "The standard of review for the admission or suppression of evidence in Mississippi is abuse of discretion." *Poole v. Avara*, 908 So.2d 716, 721 (Miss.2005) (citing *Miss. Transp. Comm'n v. McLemore*, 863 So.2d 31, 34 (Miss.2003)). An abuse of discretion standard means that the ruling of the trial court will be upheld unless its discretion is found to be "arbitrary and clearly erroneous." *Avara*, 908 So.2d at 721; *See also Troupe v. McAuley*, 955 So.2d 848, 856 (Miss.2007).

The qualifications of Donald Rawson were not in dispute, however his opinions and whether those opinions would assist the trier of fact was the subject of the motion to exclude. Mr. Rawson held two opinions: (1) that Adam Holmes was traveling at an excessive speed; and (2) that Adam Holmes failed to take evasive action. The basis of his opinion that Holmes was traveling at an excessive speed was simply based upon the fact that the speed of 45 miles per hour was listed in the Mississippi Uniform Accident Report, and that speed was over the posted speed limit of 40 miles per hour. Mr. Rawson's second opinion was based upon the lack of skid marks present in photographs supplied to him by plaintiffs' counsel. Plaintiffs' proposed expert simply reiterated information that was readily available to the jury from other means. As such, the testimony was not reliable and/or relevant in that it did not assist the trier of fact pursuant to Mississippi Rule of Evidence 702.

The second issue of plaintiffs' appeal is that the trial court erred in permitting defendant's counsel reference to the lack of expert witness testimony in closing argument. The appellate standard of review in regard to alleged misconduct in closing arguments is "whether the natural and probable effect of the improper argument is to create unjust prejudice" that creates a decision "influenced by the prejudice." *Burr v. Mississippi Baptist Med. Ctr.*, 909 So.2d 721, 724-25 (Miss.2005) (quoting *Eckman v. Moore*, 876 So.2d 975, 994 (Miss.2004)).

Plaintiffs' counsel, in opening statement, informed the jury they would hear expert testimony that supported the plaintiffs' proposition that the defendant was speeding. In closing, counsel for the defendant merely stated that there was no testimony, expert or otherwise, that the speed of the defendant contributed to the accident. Given the conflicting testimony of all witnesses at trial, this isolated statement hardly created unjust prejudice that influenced the jury's decision. "The trial judge is in the best position to determine if an alleged objectionable remark has a prejudicial effect." *Burr*, 909 So.2d at 725. In this case, the trial court did not err.

Plaintiffs' third issue on appeal alleges error upon the trial court in granting jury instructions D-4 and D-9 on the basis that the instructions were not accurate statements of law, misstated the facts of the case, and as a result, mislead the jury. When reviewing the grant or denial of jury instructions, the appellate court is required to view all of the instructions as a whole. *Richardson v. Norfolk & Southern Ry.*, 923 So.2d 1002, 1010 (Miss.2006). No single instruction should be reviewed in isolation. *Burr*, 909 So.2d at 726. The two questions to be asked when reviewing in an instruction are: Does the instruction contain the correct statement of law and is the instruction warranted under the evidence presented? *Hill v. Dunaway*, 487 So.2d 807, 809 (Miss.1986).

Instruction D–4 dealt with the issue of speed, and the jury's consideration of the speed of

defendant's vehicle in relation to proximate cause. "[I]n order for the unlawful speed to be an element of liability for an injury inflicted by an automobile while being driven at an unlawful speed, it must appear that the unlawful speed was a proximate contributing cause of the injury." *Rowlands v. Morphis*, 158 Miss. 662, 130 So. 906, 907 (1930). Instruction D-4 is a correct statement of law, and the granting of said instruction was not error.

Instruction D-9 dealt with the jury's consideration of other parties in addition to the defendant. The purpose of this instruction was to inform the jury that they may consider the negligence of Paula Denham in reaching their verdict. Defendant acknowledges that said instruction states that the jury may consider the negligence of "those who are not parties to this lawsuit," and in fact, Paula Denham was a party to the lawsuit. However, any potential confusion was cured through other instructions given by the trial court.

Plaintiffs' fourth issue on appeal is the denial of their motion for judgment notwithstanding the verdict ("JNOV"). In reviewing the denial of a motion for JNOV, the Court will consider the evidence in the light most favorable to the non-moving party (Defendant Holmes), giving him the benefit of all favorable inferences that may be reasonably drawn from the evidence. *3M Co. v. Johnson*, 895 So.2d 151, 161 (Miss.2005) (quoting *Mumford, Inc. v. Fleming*, 597 So.2d 1282, 1284 (Miss.1992)).

At trial, Paula Denham testified that they never saw the defendant's vehicle prior to the accident. Pamela Caldwell stated that she viewed defendant's vehicle out of the corner of her eye an instant prior to the impact. Both plaintiffs testified that the defendant was traveling at an excessive speed, although neither plaintiff viewed the defendant's vehicle for more than an instant.

Adam Holmes testified that he viewed the plaintiffs' vehicle in their lane of traffic prior

to Paula Denham executing her turn. He further testified that Denham turned directly into his path, and he made all attempts to avoid the accident. It was the position of Defendant Holmes that he could not have avoided the accident as Paula Denham continued into his path.

Lee Durham testified that he, too, viewed the plaintiffs' vehicle in their lane of traffic prior to attempting to turn left. According to Durham, Paula Denham activated her turn signal and turned into the path of the Holmes vehicle almost simultaneously. Durham further testified that the defendant applied his brakes and veered to the right in an effort to avoid the accident, yet it could not be avoided.

Despite the conflicting testimony, there was substantial evidence to support the verdict for the defendant. As such, the denial of plaintiffs' motion for JNOV was proper.

Lastly, plaintiffs bring issue with the denial of their motion for new trial. "A motion for new trial challenges the weight of the evidence." *Sheffield v. State*, 749 So.2d 123, 127 (Miss.1999). The Court will reverse a denial of a motion for new trial only if the rial court abused its discretion. *Ivy v. State*, 949 So.2d 748, 753 (Miss.2007). When considering the issue, "the evidence should be weighed in a light most favorable to the verdict." *Herring v. State*, 691 So.2d 948, 957 (Miss.1997).

When weighing the evidence in a light most favorable to the verdict, it is clear that the trial court did not abuse its discretion in denying plaintiffs' motion. The defendant presented competent evidence that Paula Denham turned her vehicle into the path of the defendant at a distance so close as to make the accident unavoidable. After retiring for approximately 40 minutes, the jury found that the negligence, if any, of the defendant was not a proximate contributing cause of the accident. As such, the denial of plaintiffs' motion for new trial was proper.

VII. ARGUMENT AND AUTHORITY

ISSUE I: Whether the trial court erred in granting defendant's *ore tenus* motion to exclude the testimony of plaintiffs' expert witness, Donald Rawson.

Plaintiffs' expert witness, Donald Rawson, was timely designated as an expert in the field of accident reconstruction. With the trial date approaching, plaintiffs' counsel informed counsel for the deposition of the fact that Mr. Rawson was scheduled for open heart surgery to take place during the trial. Defendant stipulated that this scheduled procedure would allow the Rawson's deposition to be presented pursuant to Rule 32 of the Mississippi Rules of Civil Procedure. At no time did the defendant stipulate that his deposition testimony and/or opinions were admissible at trial. In fact, defendant's counsel addressed this fact prior to the beginning of the trial. (TT. at 6-7).

During the course of the trial, defendant issued a *Daubert* motion, *ore tenus*, seeking the exclusion of Rawson's deposition questioning the reliability of his testimony and whether it would assist the trier of fact.[3] (TT. at 187). Rawson's testimony set forth two opinions: (1) that the defendant was traveling at an excessive speed; and (2) that the defendant failed to take the appropriate evasive action. (TT. at 187).

In the course of defendant's motion, the testimony of Rawsom was quoted as to the basis of his opinion that the defendant was traveling at an excessive speed. Rawsom's testimony reflected that the only basis for this opinion was the fact that the Uniform Accident Report stated the defendant's speed to be 45 miles per hour. (TT. at 187-88, 191). Rawsom's testimony was also quoted as to the basis of his opinion that defendant failed to take the appropriate evasive action. This testimony reflected that Rawsom merely reviewed the photographs taken of the accident scene and

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[3]Defendant did not challenge the credentials of Donald Rawson, and stipulates that he is qualified as an accident reconstructionist.

found no skid marks. (TT. at 188, 191).

After the initial motion, the trial court reviewed the deposition testimony of Donald Rawson and heard from the plaintiffs. At the conclusion of argument, the trial court was of the "decided opinion" that the testimony of Donald Rawson should be excluded pursuant to *Daubert*. (TT. at 210-11).

Defendant's objection was to the relevance and reliability of the opinions issued by Donald Rawson pursuant to Rule 702 of the Mississippi Rules of Evidence and under the *Daubert* standard. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Under Rule 702 of the Mississippi Rules of Evidence, trial courts are charged with the role of gatekeepers in evaluating the admissibility of expert testimony. *Irby v. Travis*, 935 So.2d 884, 912 (Miss.2006). "The trial judge has sound discretion to admit or refuse expert testimony; an abuse of discretion standard means the judge's decision will stand unless the discretion he used is found to be arbitrary and clearly erroneous." *Troupe*, 955 So.2d at 856 (citations omitted).

Rule 702 of the Mississippi Rules of Evidence provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) their testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Rule 702 requires a trial court to apply a two-pronged inquiry when evaluating the admissibility of expert testimony: (1) is the witness qualified, and (2) is the testimony relevant and reliable. *McLemore*, 863 So.2d at 35.

The opinions of plaintiffs' expert were based upon examining the accident report and

photographs of the accident scene. He did not perform any calculations nor derive his opinions through principles of accident reconstruction. Rawson simply issued opinions by examining photographs which were available to the jury, and the statement of speed placed upon the accident report to which Shane Theobald testified. With his failure to make such calculations in accordance with the principles of accident reconstruction, Rawson's opinions do not assist the trier of fact. The jury had this evidence available to them without his testimony.

Further, the opinions were not reliable nor relevant. As to reliability, there must be a "valid scientific connection to the pertinent inquiry as a precondition to admissibility." *Daubert*, 509 U.S. at 592, 113 S.Ct. 2786. Rawson never performed an examination of the evidence using accepted principles of accident reconstruction. He simply reiterated information which was readily available to the jury from other means.

Relevance, as defined by the standard for admitting expert testimony, depends upon whether the reasoning or methodology employed by the expert may be properly applied to the facts at hand. *Id.* at 593. The opinions of Rawson have no relevance to the matter at hand due to the fact that he used no reasoning nor methodology. As stated, Rawson simply reiterated information which was readily available to the jury, and as such, his opinions were not admissible under M.R.E. 702 and *Daubert*.

After boasting the qualifications of Donald Rawson (which are not at issue), Plaintiffs attempt to argue on appeal that the report (rather than his sworn testimony) of Donald Rawson portrays a "very detailed accident reconstruction/technical analysis" of the subject matter accident. His deposition testimony used in support of defendant's motion to exclude and reviewed by the trial judge would differ. Defendant provided the Court with quotes from his deposition in support of his

motion, and said testimony could not have been any clearer. (TT. at 186-192; 204-211). Donald Rawson, despite what information was available to him, rendered two opinions based simply upon reviewing speed indicated on the accident report and photographs of the scene.

Defendant testified that he was traveling between 40 and 45 miles per hour at the time of the accident, and admitted that his responses to interrogatories stated that he was traveling 45 miles per hour. (TT. at 226, 233).[4] Further, defendant did not deny that he was traveling faster than the posted speed limit. (TT. at 252-53). The investigating officer, Shane Theobold, also testified that defendant advised him at the scene that he believed his speed to be 45 miles per hour, and this speed was written on the accident report drafted by him. (TT. at 290). As such, the jury was provided an abundance of testimony regarding the speed of defendant's vehicle, and Rawson's proposed testimony of excessive speed based upon reviewing the accident report would not assist the jury as to the issue of speed.

Plaintiffs counsel also questioned the defendant extensively on photographs of the scene and what said photographs displayed. (TT. at 229-232).[5] Included in the cross-examination of the defendant was questioning regarding skid marks, or the lack thereof. (TT. at 230-233). With the testimony provided and the admission of the photographs into evidence, the jury was free to engage in the exact process performed by Donald Rawson – review the photographs and determine the presence of skid marks. Rawsom's proposed testimony regarding defendant's failure to take evasive action based upon reviewing the photographs of the accident scene would not assist the trier of fact,

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[4]Defendant's responses to interrogatories are not made a part of the record in this case, however were discussed during the trial of this matter.

[5]The photographs were admitted into evidence (TT. at 244), but are not a part of the record on appeal.

and was properly excluded from evidence.

Plaintiffs attempt to support their position on the issue with apparent excerpts from Rawson's "report" on the subject matter motor vehicle accident. While the report is somewhat different from Rawson's sworn testimony, the point is moot. Rawson's report is not a part of the record, and may not be considered. "This Court may not consider matters which do not appear in the record and must confine itself to what actually does appear in the record." *Fuselier v. State*, 654 So.2d 519, 521 (Miss.1995) (citations omitted); *See also Shelton v. Kindred*, 279 So.2d 642, 644 (Miss.1973). The burden of providing a record which contains all materials essential to support the argument for reversal rests squarely upon the appellant. *Jackson County Sch. Dist. v. South Miss. Workers Compensation Fund*, 727 So.2d 727, 730 (Miss.Ct.App.1998). Since plaintiffs failed to provide a copy of Rawson's report or deposition transcript, upon which the argument for reversal is based, the plaintiffs are barred from raising the issue on appeal.

Plaintiffs first issue on appeal is without merit.

ISSUE II: Whether counsel for the defendant engaged in improper closing argument that resulted in a harmful influence upon the jury.

Plaintiffs seek reversal on appeal for what they perceive to be improper argument made defendant's counsel in closing. The argument that is subject of appeal is as follows:

> COUNSEL FOR DEFENDANT: Now, they want to talk about property damage and where the vehicles ended up. There's no evidence. There's no evidence here of how fast what causes what property damage, what speed causes property damage. The plaintiff, Mr. Defer, got up here and told you that you would hear from the witnesses and you would hear from an experts get up and testify.
>
> BY MR. DEFER: Your honor, I object. I object, and he's out of line about the expert based upon what happened in this case.
>
> BY THE COURT: It's closing argument. Overruled.
>
> CONT'D BY COUNSEL FOR DEFENDANT: There's no testimony in this case.
>
> BY MR. DEFER: Your Honor, for the record, not only do I object, I also ask for a mistrial or at least ask the Court to instruct the jury to disregard that.
>
> BY THE COURT: You will get the last word.
>
> CONT'D BY COUNSEL FOR DEFENDANT: There's no testimony regarding what in any way the speed had to deal or in any way contributed to this accident. There's no evidence from anybody, anybody sitting here today, that speed somehow contributed to the accident.

It is the plaintiff's contention that the Court's failure to sustain the objection or instruct the jury to disregard the statement was error.

"The standard of review that appellate courts must apply to lawyer misconduct during opening or closing arguments is whether the natural and probable effect of the improper argument is to create unjust prejudice ... so as to result in a decision influenced by the prejudice so created." *Eckman*, 876 So.2d at 994. "Any alleged improper comment must be viewed in context, taking the circumstances of the case into consideration," and the trial judge sits in the best position to determine

if said comment produced a prejudicial effect. *Id.*

Throughout the trial, plaintiffs harped upon the amount of property damage in reference to the speed of the vehicles. In closing, defendant's counsel was taking the opportunity to inform the jury that there was no learned testimony as to what speed would be required to cause the property damage in this case. In addition, plaintiffs counsel informed the jury that they would "hear testimony from our expert witness" who would support the defendant was speeding. Defendant's counsel should be allowed to comment on the lack of any expert testimony regarding speed, and its contribution to the accident. This Court has consistently held that counsel has broad latitude in closing arguments. *Berry v. State*, 703 So.2d 269, 281 (Miss.1997).

It is not sufficient to simply state that the comments made were improper. Plaintiffs must provide proof that the alleged improper comments had a prejudicial effect. Plaintiffs have produced no evidence that these comments, if improper, had a prejudicial effect upon the jury and influenced the verdict. Speed was an issue in the case, yet defendant would aver that the issue of proximate cause for the accident was the central issue. Plaintiff fully developed the fact that Adam Holmes was, most likely, traveling in excess of the speed limit. However, there was no proof that his speed caused and/or contributed to the accident, expert or otherwise. Defendant should be allowed to comment on the lack of evidence supporting plaintiffs' theory, as well as, the presence of evidence supporting his version of the case.

Furthermore, the trial court instructed the jury prior to closing arguments that "[a]rguments, statements, and remarks of counsel are intended to help you understand the evidence and apply the law, but are not evidence. Any arguments, statements, and remarks having no basis in the evidence should be disregarded by you..." (R. at 1-4; TT. at 295). The only evidence the jury was instructed

to consider was the testimony of witnesses and other evidence produced in open court. (TT. at 67). It is the rule of law in Mississippi that the jury is presumed to follow the instructions of the court. *Fielder v. Magnolia Beverage Co.*, 757 So.2d 925, 937 (Miss.1990). In fact, the oath taken by the jury prior to being impaneled requires that each juror do so. *Id.*

Defendant contends that the argument made was not improper. However, assuming said comment was improper, the trial court did not commit error when considering the latitude granted attorneys in closing arguments and the court's instructions regarding statements of counsel. Plaintiffs' second issue on appeal fails as they do not submit any proof that the statements, if improper, harmfully influenced the verdict.

ISSUE III: Whether the trial court erred in granting defendant's proposed jury instruction D-4 and D-9.

Plaintiffs single out two separate instructions for appeal stating that they were either an incorrect statement of the law or misleading and/or confusing to the jury. The instructions at issue are jury instruction D-4 and D-9. Jury instruction D-4 was given to the jury over objection from the plaintiffs and stated:

> The violation of any posted speed limit or allegations of driving at an excessive speed are only relevant if the plaintiffs have shown, from a preponderance of the evidence, that the speed of Adam Holmes was the sole proximate cause or proximate contributing cause to the accident. Unlawful speed is not a proximate cause of an accident caused by the intervening negligence of another person.
>
> Therefore, should you find from a preponderance of the evidence that the motor vehicle accident of July 15, 2004 was the sole proximate cause of the actions of Paula Denham, then any violation of the speed limit or allegations of driving at an excessive speed are irrelevant to your decision.

(R. at 13). Jury instruction D-9 was given to the jury over the objection from the plaintiffs and stated:

> When considering who is at fault for an accident, and/or injuries, you may take into account the conduct of those who are not parties to this lawsuit. Although not a party to this lawsuit, you may consider the actions or omissions of Paula Denham in reaching your verdict.

(R. at 15).

In the present matter, plaintiffs testified that neither of them viewed the Holmes vehicle for any length time. Paula Denham testified that she never saw the Holmes vehicle, and Pamela Caldwell testified that she only saw the Holmes vehicle an instant prior to impact. (TT. at 144-145; 174-177). The defendant testified that Paula Denham turned left into his lane of traffic at a point where he was approximately 20 feet away or "right on them." (TT. at 226; 248-249). Lee Durham,

the passenger in the Holmes vehicle, testified that Paula Denham did not commence her left turn until the Holmes vehicle was "almost right on them." (TT. at 257).

Defendant's theory of the case was that Adam Holmes' speed, whether excessive or not, was not a proximate contributing cause of the accident. Jury instruction D-4 encompasses that theory. A party is entitled to a jury instruction that presents his theory of the case, although this entitlement is not without limitation. *Ford v. State*, 975 So.2d 859, 863 (Miss.2008). The primary concern is that "the jury was fairly instructed and that each party's proof-grounded theory of the case was placed before it." *Splain v. Hines*, 609 So.2d 1234, 1239 (Miss.1992) (citing *Rester v. Lott*, 566 So.2d 1266, 1269 (Miss.1990)).

Defendant's theory of the case certainly had the evidentiary support for its approval. Plaintiffs do not dispute this. Instead, plaintiffs take issue with the phrase contained within the instruction that "[u]lawful speed is not a proximate cause of an accident caused by the intervening negligence of another person." (R. at 13). Defendant contends that this phrase is, in fact, a correct statement of the law.

Plaintiffs concentrated all their efforts at trial in proving that Adam Holmes was traveling in excess of the posted 40 mile per hour speed limit. However, the violation of a statute or ordinance does not of itself impose liability. *New Orleans & N. E. R. Co. v. Burge*, 191 Miss. 303, 2 So.2d 825, 826 (1941). Plaintiffs were required to take the next step in meeting their burden by proving that Holmes' speed was the sole proximate cause or proximate contributing cause of the accident. "The negligence of speeding or of running a stop sign must still be shown to have been the cause of the accident." *Harvard v. State*, 800 So.2d 1193, 1198 (Miss.Ct.App. 2001). "[I]n order for the unlawful speed to be an element of liability for an injury inflicted by an automobile while being

driven at an unlawful speed, it must appear that the unlawful speed was a proximate contributing cause of the injury." *Rowlands*, 130 So. at 907. In other words, the simple fact that Adam Holmes may have been exceeding the speed limit does not necessarily require a jury to find him liable for the motor vehicle accident and injuries claimed.

Mississippi rule of law has consistently held that where there is an independent, intervening cause which is the sole proximate cause of the accident, the negligence, if any, of the first party becomes remote and non-actionable. *Permenter v. Milner Chevrolet Co.*, 229 Miss. 385, 91 So.2d 243, 252 (1956); *See also Saucier v. Walker*, 203 So.2d 299, 304 (Miss. 1967); *Huff v. Boyd,* 242 So.2d 698, 701-02 (Miss.1971); *Glorioso v. Young Men's Christian Ass'n*, 556 So.2d 293, 296 (Miss.1989); *Mississippi Dept. of Trans. v. Johnson*, 873 So.2d 108, 113-14 (Miss.2004). This Court has repeatedly held the following:

> Although one may be negligent, yet if another, acting independently and voluntarily, puts in motion another and intervening cause which efficiently thence leads unbroken in sequence to the injury, the later is the proximate cause and the original negligence is relegated to the position of remote and, therefore, a non-actionable cause. Negligence which merely furnishes the condition or occasion upon which injuries are received, but does not put in motion the agency by or through which the injuries are inflicted, is not the proximate cause thereof.

Glorioso, 556 So.2d at 296 (quoting *Miss. City Lines, Inc. v. Bullock*, 194 Miss. 630, 13 So.2d 34, 36 (1943)).

In the present case, the negligence of Paula Denham for failing to yield the right of way to Holmes and/or failing to maintain a proper lookout was the intervening action that led to the injury. Had Paula Denham seen the Holmes vehicle, and in response, refrained from turning into his path, the accident would have never occurred. There is no proof to the contrary. Denham's intervening negligence was the sole proximate cause of the accident relegating the negligence, if any, of Adam

Holmes remote. The jury obviously agreed.

Plaintiffs wish to isolate this single phrase as support for the allegations of error without taking the instructions as a whole. When viewing the entire statement of jury instruction D-4, it goes on to instruct the jury that any violation of the posted speed limit or excessive speed is irrelevant should they find the actions of Paula Denham were the **sole proximate cause** of the accident. (R. at 13) (emphasis added). While the phraseology used in instruction D-4 could have been better, this alone does not mandate reversal. Defects in specific instructions will not mandate reversal when all of the instructions, taken as a whole fairly – although not perfectly – announce the applicable law. *Burton v. Barnett*, 615 So.2d 580, 583 (Miss.1993).

When viewing the jury instructions as a whole, this Court will find that the jury was instructed that should they find that defendant was not driving at a reasonable speed under the circumstances and that speed was the sole proximate cause or contributing cause, then they should render a verdict in favor of the plaintiffs. (R. at 10). This instruction, in conjunction with the others given by the trial court, fairly and accurately instructed the jury as to the applicable law.

As a secondary contention, plaintiffs take issue with jury instruction D-9. Plaintiffs seem to take issue with the fact that it misstates that Paula Denham was not a party to the lawsuit. Defendant will concede that the instruction contains this misstatement. However, this misstatement is harmless. The instruction was not improper based upon the applicable law. The jury had the right to consider others at fault for the accident pursuant to Miss. Code Ann. § 85-5-7. Pursuant to Miss. Code Ann. § 85-5-7(7), absent torfeasors who contributed to the injuries "must be considered by the jury when apportioning fault." *Smith v. Payne*, 839 So.2d 482, 486 (Miss.2002) (citing *Estate of Hunter v. General Motors Corp.*, 729 So.2d 1264 (Miss.1999)). It would have been error for the trial court

to refuse this instruction or a better worded version of it.

It is undisputed that Pamela Caldwell held no negligence in the accident. Based upon the evidence and the jury verdict, it is clear that Pamela Caldwell could have pursued a cause of action against Paula Denham for her negligence. Caldwell obviously chose not to pursue this action as Denham was not a named defendant. This, in essence, labels Paula Denham as an absent tortfeasor. Given the fact that Denham's actions and/or omissions led to the motor vehicle accident, an "empty chair" instruction was required. Again, defects in specific instructions do not support reversal when the instructions, as a whole, fairly announce the applicable law. *Burton*, 615 So.2d at 583.

The trial court properly provided a form of the verdict that allowed the jury to consider the negligence, if any, of both Adam Holmes and Paula Denham when rendering their verdict. (R. at 26-27). This instruction cured any misstatements in instruction D-9.

The trial court wholly and fairly instructed the jury on the applicable law when viewing the instructions as a whole. Although there may have existed minor defects in these instructions, the defects were not those that mandate reversal. As such, plaintiffs' issue on appeal is without merit.

ISSUE IV: Whether the trial court erred in denying plaintiffs' motion for judgment notwithstanding the verdict.

As a fifth issue on appeal, plaintiffs claim error upon the trial court for denying their motion for judgment notwithstanding the verdict. (R. at 71-72). The standard of review for a denial of a judgment notwithstanding the verdict requires the Court to consider the evidence in the light most favorable to the non-moving party (Adam Holmes), giving him the benefit of all favorable inferences that may be reasonably drawn from the evidence. *3M Co.*, 895 So.2d at 160. If the facts so considered point so overwhelmingly in favor of the moving party that reasonable jurors could not have arrived at a contrary verdict, then the Court is required to reverse and render. *Id.* However, should there exist substantial evidence to support the verdict, that is, "evidence of such quality and weight that reasonable and fair minded jurors in the exercise of impartial judgment might have reached different conclusions," the Court must affirm. *Id.*

Plaintiffs contend the proof at trial did not support the verdict when considering the evidence in a light most favorable to Adam Holmes and giving him all reasonable inferences drawn from the evidence. Defendant avers that the evidence clearly supported the verdict on its face without the benefit of all reasonable inferences drawn from it.

The evidence regarding how the motor vehicle accident occurred was provided through the testimony of the four individuals involved – Paula Denham, Pamela Caldwell, Adam Holmes and Lee Durham. It is undisputed that Paula Denham never viewed the Holmes vehicle. (TT. at 144-145). It is undisputed that Pamela Caldwell viewed the Holmes vehicle for only "an instant" prior to impact. (TT. at 174-177). On the other hand, Adam Holmes and Lee Durham both testified that they had a clear view of the Denham vehicle from the time their vehicle "topped the hill," and the

Denham vehicle turned into their path when they were "right on them." (TT. at 226; 233; 257-258). The only testimony regarding the distance from the top of the hill to the entrance of Ken Ash Construction was given by Adam Holmes. In his estimation, the distance was 300 feet. (TT. at 235-236).

According to the evidence presented at trial, the only plausible explanation to how the motor vehicle accident occurred was consistent with the testimony of Holmes and Durham even if the defendant was not given the benefit of all reasonable inferences. Otherwise, the Holmes vehicle would have had to appear out of thin air.

Plaintiffs' counsel argues that vehicles' final resting place and property damage suffered by the vehicles are proof positive that Adam Holmes was traveling at a high rate of speed. However, plaintiffs failed to place any evidence before the jury regarding the relationship between speed and property damage, and fail to provide the same to this Court. There was no evidence at trial regarding what speed one would have to travel before causing the property damage suffered by the vehicles. The only proof of speed was the testimony of Adam Holmes and Lee Durham. This testimony placed the speed of Adam Holmes anywhere from 35 to 45 miles per hour prior to impact.

A jury verdict will only be disturbed when it is "so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice." *Herring*, 691 So.2d at 957. Giving the defendant all reasonable inferences that may have been drawn from the evidence, it is clear that there was sufficient evidence before the jury to support its verdict. As such, plaintiffs' appeal on the issue of judgment notwithstanding the verdict fails, and should be denied.

ISSUE V: Whether the trial court erred in denying plaintiffs' motion for new trial.

Plaintiffs' final issue for appeal is that the trial court erred when denying their motion for new trial. The reversal of the denial of a motion for new trial is appropriate "only if the trial court abused its discretion" in its denial. *Ivy*, 949 So.2d at 753. This Court has stated that on a motion for new trial:

> The court sits as a thirteenth juror. The motion, however, is addressed to the discretion of the court, which should be exercised with caution, and the power to grant a new trial should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict.

Amiker v. Drugs For Less, Inc., 796 So.2d 942, 947 (Miss.2000). The evidence should be weighed in the light most favorable to the verdict. *Herring*, 691 So.2d at 957. A motion for new trial should be granted only in "rare cases when there would be injustice either in allowing the verdict to stand or in granting a j.n.o.v." *Fiddle, Inc. v. Shannon*, 834 So.2d 39, 45 (Miss.2003) (citations omitted).

Plaintiffs provide no new argument in support of its assignment of error. Rather, plaintiffs contend that their support for judgment notwithstanding the verdict further supports a new trial. Given this, defendant would not rehash arguments previously presented. Defendants would state that this matter does not present a "rare case" warranting a reversal of the trial court's denial of plaintiffs' motion for new trial.

VIII. CONCLUSION

Plaintiffs seek reversal of the jury verdict in favor of the defendant citing five issues of error on behalf of the trial court. Plaintiffs cite error for the trial court's exclusion of the testimony of Donald Rawson as an expert in field of accident reconstruction. As the second point of error, plaintiffs contend that counsel for the defendant engaged in improper closing argument, and the trial court erred in failing to sustain objection and/or grant a limiting instruction regarding the comment. Third, plaintiffs argue that the trial court erred in granting jury instruction D-4 and D-9 over objection. Fourth, plaintiffs aver that the trial court erred in denying their motion for judgment notwithstanding the verdict. As their last point of error, plaintiffs argue that the trial court erred in denying their motion for new trial.

The exclusion of the testimony of Donald Rawson was not in error. Rawson was submitted as an expert in the field of accident reconstruction. Defendant did not object to Rawson's qualifications, yet objected to his proposed opinion testimony being relevant and/or reliable. The opinions expressed by Rawson were simply based upon review of materials and/or information readily available to the jury at trial. He did not derive his opinions from using calculations or methods encompassed by accident reconstruction. Rawsom simply reiterated information from the accident report and photographs. This information was otherwise available to the jury, and therefore, any opinions of Rawson were properly excluded under Rule 702 of the Mississippi Rules of Evidence and *Daubert.*

Defendant's counsel argued to the jury that the plaintiffs failed to produce evidence, expert or otherwise, regarding the speed of Adam Holmes being the proximate cause of the accident. Such was not improper as the defendant should be allowed to point out the lack of evidence regarding the

allegations against him, in addition to, the evidence supporting his defense. Further the trial court properly instructed the jury that arguments of counsel were not evidence and should not be considered in their deliberations. Assuming said argument was improper, the plaintiffs' contention is without merit as there is no proof these arguments improperly influenced the jury.

The granting of jury instructions D-4 and D-9 were not in error. Said jury instructions were based upon the applicable law and evidence presented at trial. Although defects in a single instruction may have existed, the jury was properly and accurately instructed when viewing the instructions as a whole. Plaintiffs' assignment of error fails as jury instructions D-4 and D-9 properly instructed the jury as to the applicable law.

The trial court did not err in denying plaintiffs' motion for JNOV. When giving the defendant all reasonable inferences taken from the evidence, it is clear that there was sufficient proof to support the jury's verdict. Even without the benefit of these inferences, the overwhelming evidence showed that Paula Denham's actions and/or omissions were the cause of the accident. Therefore, plaintiffs' assignment of error is without merit, and the verdict in favor of the defendant should be allowed to stand.

The trial court, likewise, did not err in denying plaintiffs' motion for new trial. The proof at trial weighed in favor of the defense verdict. The witness testimony displayed that Paula Denham turned in front of the path of Adam Holmes, and her actions were the proximate cause of the accident. Based upon the overwhelming evidence provided at trial, the denial of plaintiffs' motion for new trial was not in error as the trial did not present a "rare case" where a new trial should be ordered.

For all reasons cited above and in the foregoing Appellee Brief, Defendant/Appellee Adam

Holmes respectfully requests that this Honorable Court affirm the rulings of the trial court and allow the jury verdict in favor of the defendant to stand.

RESPECTFULLY SUBMITTED, this the 26th day of June, 2009.

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CERTIFICATE OF SERVICE

I, J. BRIAN HYNEMAN, of Hickman, Goza & Spragins, Attorneys at Law, Oxford, Mississippi, do hereby certify that I have this date mailed by United States Mail, postage prepaid, a true and correct copy of the above and foregoing to:

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Honorable Andrew K. Howworth
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THIS, the 26th day of June, 2009.

J. BRIAN HYNEMAN