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STATEMENT OF REBUTTAL ISSUES

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REBUTTAL ARGUMENT

PROPOSITION NUMBER ONE

THE TRIAL COURT ERRED IN GRANTING APPELLEE'S *ORE TENUS* MOTION AT TRIAL TO EXCLUDE THE TESTIMONY OF APPELLANT'S EXPERT WITNESS.

Appellee in his brief makes the argument the trial court was correct in excluding the testimony of Appellants' expert witness, Donald Rawson, on the basis that Mr. Rawson's testimony "simply reiterated information readily available to the jury from other means. As such, the testimony was not reliable or relevant in that it did not assist the trier of fact pursuant to Mississippi Rule of Evidence 702." Appellee's brief at 5.

Appellants maintain that Donald Rawson's testimony as to distance, time, speed, as it relates to causation, was not available to the jury by other means since no one else had this expertise or knowledge or means to testify; thereby, making such testimony not only reliable but also relevant to the core issue of negligence in the case. No other witness identified by either party was qualified to give such opinions, and Mr. Rawson's qualifications are undisputed to express an expert opinion, based upon his calculations and findings from those calculations, as to whether Appellee was speeding, and whether he had sufficient time to avoid the accident, provided Appellee was actually traveling the speed limit. As such, Mr. Rawson was qualified to give his opinions, which were relevant to the issues in the

case, namely speed, distance, time, etc. and were reliable and could have assisted the jury in determining whether Appellee was negligent. After all, the trial court instructed the jury as to these very issues when it came time for the jury to deliberate. See Clerk's papers at 8, 9, 10, and 14.

Appellee states in his brief at page 9 that he did not stipulate at trial that Mr. Rawson's deposition testimony was admissible. However, according to the trial transcript the following exchange took place between the trial court judge and Counsel regarding Mr. Rawson's deposition testimony.

> By the Court: Is there going to be an objection about him testifying?
>
> By Mr. Hyneman: No, sir. We would like to take up a matter before his deposition is read.
>
> By the Court: Just an objection about something within his deposition?
>
> By Mr. Hyneman: Correct. As far as reading his deposition --.

R. at 7.

As indicated by the record Appellee waived any objection to Mr. Rawson testifying. However, assuming for the sake of argument that Appellee did not waive his right to challenge the admission of Mr. Rawson's deposition testimony, Appellee nonetheless on more than one occasion stipulated as to Mr. Rawson's qualifications as accident reconstruction expert. "Defendant did not challenge the

credentials of Donald Rawson, and stipulates that he is qualified as an accident reconstructionist." See Appellee's brief at page 9 footnote 3.

However, in spite of Appellee's stipulation that Mr. Rawson was qualified, the trial court excluded the entire deposition testimony of Mr. Rawson based upon Appellee's Daubert *ore tenus* motion. R. at 211-212. There cannot be any question that Mr. Rawson's testimony was scientifically valid due to the stipulation of his qualifications as an accident reconstructionist. The facts in issue involved an automobile accident between two drivers that Rawson reconstructed. The facts at issue were distance, time, speed, sight line, point of impact, etc. Mr. Rawson was prepared to deliver his expert opinions as to whether the accident could have been avoided and which party was negligent in causing the accident.

One of the themes to Appellants' case, as noted in Appellee's brief, was that Appellee was speeding and thereby caused the accident with Appellants. While it is true in Mississippi that the violation of a statute does not itself impose liability, again as noted by Appellee in his brief, Appellants in order to establish liability must also prove that Appellee's speed was the sole proximate cause or proximate contributing cause of the accident. See New Orleans & N. E. R. Co. v. Burge, 191 Miss. 303, 2 So.2d 825, 826 (1941) and Harvard v. State, 800 So.2d 1193, 1198 (Miss. Ct. App. 2001).

Appellee further argues in his brief that "[h]ad Paula Denham seen the Holmes vehicle, and in response, refrained from turning into his path, the accident would never have occurred. There is no proof to the contrary." Appellee's brief at 19.

The purpose of Mr. Rawson's testimony was to dispute Appellee's said claims and to prove that Appellee's rate of speed, along with the other contributing factors of distance, sightline, time, etc., contributed to and caused the auto accident with Appellants. The exclusion of Mr. Rawson's testimony deprived the jury of hearing the entire case, especially as to the central important issue of causation. There is not any doubt that Mr. Rawson's reconstruction could have been applied to the facts in issue as reliable and relevant in particular since the trial court instructed the jury as to the same issues. See Clerk's papers at 8, 9, 10, and 14.

Moreover, no one disputed the qualifications of Mr. Rawson to give such opinions. The trial court should have admitted Mr. Rawson's deposition testimony under the standard that "[t]o be relevant and reliable, the testimony must be scientifically valid and capable of being applied to the facts at issue." Tunica County v. Matthews, 926 So.2d 209, 213 (Miss. 2006) citing Miss. Trans. Comm'n v. McLemore, 863 So.2d 31, 36 (Miss. 2003). See also Investor Resource Services, Inc., v. Cato, 2009 WL 1798618 Miss. June 25, 2009 (No. 2007-IA-

01458-SCT). The trial court therefore committed reversible error in granting Appellee's *ore tenus* motion to strike the deposition testimony of Mr. Rawson. Id.

PROPOSITION NUMBER TWO

THE TRIAL COURT ERRED OVER THE OBJECTION OF APPELLANTS IN PERMITTING APPELLEE IN CLOSING ARGUMENTS TO REFER TO THE LACK OF EXPERT WITNESS TESTIMONY BY THE APPELLANTS.

Appellee asserts in his brief that he was correct in challenging the lack of expert witness testimony by Appellants when giving his closing arguments, especially in light of the fact that Appellants informed the jury in opening statements that the jury would hear from an expert witness as to speeding and how it contributed to the accident. Appellee further asserts that Appellants have failed to show any prejudice as a result of his closing arguments.

At the time of Appellants' opening statement it was the agreement of Counsel for all Parties that expert witness Donald Rawson was to testify by deposition. Appellants' Counsel thus informed the jury in opening statements that they would hear from an expert based upon this agreement. Appellee made his *ore tenus* motion to exclude Mr. Rawson's testimony during the trial at the point in time just prior to when Mr. Rawson would be testifying, and therefore after opening statements had been made.

While is true that attorneys in Mississippi are permitted a wide latitude in presenting closing arguments, such latitude is not unlimited or unrestricted. Wide

latitude in closing arguments is not permitted if the arguments create an unjust prejudice to the opposing Party. Burr v. Mississippi Baptist Med. Ctr., 909 So.2d 721, 724-725 (Miss. 2005) (quoting Eckman v. Moore, 876 So.2d 975, 994 (Miss. 2004).

Appellee's reference to the lack of expert witness testimony in closing was at a minimum misleading to the jury when the points of speed, distance, time, and fault were argued through out the case. There cannot be any doubt that the improper argument by Appellee created an unjust prejudice and improperly influenced the jury by leading the jury to believe Appellants never had an expert witness and could not prove their case. Due to the circumstances Appellants did not have a viable course of action to rebut Appellee's arguments, which left the jury with the feeling that Appellants misspoke in their opening statements when they said the jury would hear from an expert witness.

While Appellee certainly as part of his trial strategy could ask the trial court to exclude Mr. Rawson's testimony, Appellee was outside the permissible bounds of closing arguments when he attacked Appellants for the lack of expert witness testimony. Appellants did not have a way to refute this argument by Appellee no doubt leaving the jury with the impression that Appellants did not speak truthfully to them in opening statements. As such, Appellants suffered unnecessary and

unjust prejudice thereby requiring a reversal of this case and a remand for a new trial. Id.

CONCLUSION

Based upon the foregoing arguments, cited authorities, and Appellants' previous brief, Appellants respectfully urge the Court to either reverse the judgment of the trial court or render judgment in favor of Appellants, or in the alternative to reverse the trial court's judgment and remand for a new trial.

Respectfully submitted,

This the 11th day of August 2009.

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CERTIFICATE OF SERVICE

I, Tommy W. Defer, Counsel for the Appellant Paula Denham, and I, Bobby Taylor Vance, Counsel for the Appellant Pamela Caldwell, do hereby certify that we have this day mailed postage prepaid a true and correct copy of the foregoing *Appellants' Joint Reply Brief* to Hon. Andrew K. Howorth, Circuit Court Judge, and J. Brian Hyneman, Counsel for the Appellee, at their usual business mailing addresses.

This the 11th day of August 2009.

Tommy W. Defer

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