2008-CA-01933 T SCT

CERTIFICATE OF INTERESTED PERSONS

I, Bobby Taylor Vance, Counsel for the Appellant Pamela Caldwell, and I, Tommy W. Defer, Counsel for the Appellant Paula Denham, hereby certify that the following individuals have an interest in the outcome of this appeal:

1. Pamela Caldwell, Appellant, Water Valley, Mississippi;

2. Paula Denham, Appellant, Water Valley, Mississippi;

3. Adam Holmes, Appellee, Oxford, Mississippi;

4. Donnie Holmes, father of Appellee, Oxford, Mississippi;

5. Andrew K. Howorth, Circuit Court Judge, Oxford, Mississippi;

6. Tommy W. Defer, Counsel for the Appellant Denham, Water Valley, Mississippi;

7. Bobby Taylor Vance, Counsel for the Appellant Caldwell, Batesville, Mississippi;

8. John L. Bailey, Trial Co-Counsel for the Appellant Caldwell, Batesville, Mississippi; and

9. J. Brian Hyneman, Oxford, Mississippi, Counsel for the Appellee Adam Holmes.

So certified,

This the 3rd day of June 2009.

Tommy W. Defer

Bobby Taylor Vance

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STATEMENT OF THE CASE

PROCEDURAL HISTORY

This case was tried before a jury on June 25-27, 2008, in the Circuit Court of Lafayette County, Mississippi. Prior to trial the Parties stipulated as to the medical records and medical expenses of Appellants and also agreed that investigating Officer Shane Theobald, former Lafayette County Deputy Sheriff, would be permitted to testify out of turn. The Parties also stipulated that Donald Rawson, Appellants' designated accident reconstruction expert, would testify by deposition.

Following the trial in which the jury heard testimony from Paula Denham and Pamela Caldwell "Appellants," Francis Denham (husband of Appellant Denham), John Caldwell (husband of Appellant Caldwell), Shane Theobald, Adam Holmes, "Appellee," and Lee Durham, the jury rendered a verdict in favor of Appellee. Clerk's papers at 28-29. Appellants subsequently filed a Motion for Judgment Notwithstanding the Verdict and a Motion for a New Trial. Clerk's papers at 30-70. The trial court denied Appellants' Motion for Judgment Notwithstanding the Verdict as well as Appellants' Motion for a New Trial. Clerk's papers at 71-72. Appellants subsequently filed a Notice of Appeal to this Court. Clerk's papers at 73-74.

SUMMARY OF TRIAL TESTIMONY

Appellants' lawsuit arose out of an automobile accident that occurred on July 15, 2004, involving a Chevrolet pickup truck driven by Appellee Adam Holmes, and a Pontiac Grand Prix driven by Appellant Paula Denham. Appellant Pamela Caldwell was a passenger in Appellant's automobile. Trial witness Lee Durham was a passenger in Appellee's pickup truck. The accident occurred on University Avenue in Lafayette County, Mississippi, outside the city limits of Oxford when the Denham vehicle was executing a left hand turn from University Avenue into the parking lot of Ken Ash Construction Company, and the Holmes truck struck the Denham car in the passenger side.

The Parties entered into certain stipulations prior to the trial of this case. Specifically, the Parties stipulated that Appellants' designated accident reconstruction expert witness, Donald Rawson, would testify by deposition. The Parties further stipulated that the investigating officer of the accident, then Deputy Sheriff Shane Theobald of the Lafayette County Sheriff's Department, who is now a deputy United States Marshall, would testify out of turn due to his work schedule. The Parties also stipulated that the Appellants' suffered certain physical injuries as a result of the accident and incurred certain medical expenses.

According to testimony presented at trial Appellants at the time of their automobile accident were attempting to open and establish a cleaning service

business for business establishments and residential homes. Appellant Denham was driving and her sister Appellant Caldwell was her passenger in the front seat. Appellants had traveled from their home in Water Valley, Mississippi, to Oxford the morning of the accident for the purpose of soliciting business for their cleaning service. One of the businesses Appellants were to visit was Ken Ash Construction Company, located on University Avenue in Oxford.

While traveling down University Avenue towards Ken Ash Construction Company both Appellants testified as to recalling that traffic passed them in the opposite lane of travel. (University Avenue is two-lane road with no third turning lane). Upon approaching the entrance to the Ken Ash parking lot, Appellants testified to slowing down, stopping, signaling their intent to make a left hand turn into the Ash construction parking lot, and waiting for on-coming traffic to make its way past them before attempting to turn into the parking lot. Both Appellants testified that there was not any visible on-coming traffic traveling in the opposite lane prior to making their turn. After the front wheels and a substantial portion of Appellant Denham's automobile had made contact with the gravel in the Ash parking lot, the vehicle driven by Appellee came over the top of a rise located before the parking lot entrance and collided with the vehicle occupied by Appellants in the passenger side of their vehicle. It was not disputed that the collusion occurred in the construction company parking lot.

It also was not disputed that the resulting impact caused the vehicle occupied by Appellants to be driven back from the parking lot, across both lanes of travel on University Avenue, and come to rest on the opposite side of the road with the front end of the vehicle completely off the road. The pickup truck driven by Appellee came to rest 75 feet inside the Ash parking lot. The rear end of Appellants' vehicle came to rest in the right of way of the road.

Appellant Caldwell in her trial testimony described Appellee as driving "crazy fast" and due to the speed of Appellee's travel she did not have time to warn Appellant Denham of Appellee's approaching vehicle. Appellant Caldwell testified that she did not see Appellee until after Appellant Denham had already begun and had almost completed her turn and that when Appellant Denham began her turn, there was not any on-coming traffic in the opposite lane where the Appellee was traveling. It is undisputed that the Appellant's pick-up truck came to rest some 75 feet inside the parking lot of Ken Ash Construction Company.

Deputy Sheriff Shane Theobald testified as to where the Appellant's Denham's automobile and Appellee's pick-up truck came to rest, which again is not disputed by the Parties. Deputy Theobald also stated that he spoke with Appellee following the accident regarding Appellee's speed of travel at the time of the accident. Appellee stated that he was traveling approximately 45 MPH.

According to Deputy Theobald the posted speed limit for University Avenue is 40 MPH.

Appellant Denham's automobile suffered heavy damage as a result of the accident and was ruled a total loss. Appellee testified as to his pick-up truck also being a total loss having suffered substantial damage including but not limited to the frame of the truck as it was bent and damage to the engine block whereby the motor was knocked a loose from its mount. Appellant described the damage to his truck stating it was "beaten up pretty good."

Appellee and his passenger Lee Durham gave testimony at trial that conflicted not only with Appellants' testimony, but also with each other's testimony. Appellee's and Mr. Durham's discrepancies included but were not limited, to the following examples. Each gave differing accounts as to Appellee's speed of travel at the time of the accident. Appellee testified to traveling at 40-45 MPH, and Mr. Durham testified that the Defendant was traveling at 35-40 MPH and had slowed down to as much as 25 MPH just prior to the point of impact. Appellee gave conflicting accounts as to how long and how far he viewed Appellants before the accident. Mr. Durham testified that he never lost sight of Appellants even after Appellants disappeared below a hill just before the accident. Mr. Durham's testimony also conflicted with Appellee's and Appellants' testimonies as to how many cars were traveling on University Avenue at the time

of the accident. Appellee and the Appellants testified to there being other vehicles on University Avenue before the accident, but according to Mr. Durham's testimony there was not any traffic on University Avenue before the accident other than the Parties. Following the conclusion of all testimony the jury found that Appellee was not in any way negligent in causing the accident with Appellants and therefore found for Appellee.

SUMMARY OF THE ARGUMENT

I. The trial court erred in granting Appellee's *ore tenus* motion at trial to exclude the testimony of Appellants' expert witness Donald Rawson. This deprived Appellants of a fair trial and prejudiced Appellants by depriving the jury of relevant and pertinent testimony by Mr. Rawson as to factual issues that the jury was charged to find per the instructions of the trial court. Further, the jury could not find these facts without the expert testimony of Mr. Rawson to assist them in understanding the issues of the case, namely speed, sight line, and distance, and in Mr. Rawson's expert opinion that if Appellee had been traveling at the posted speed limit, the accident could have been avoided. The trial court therefore committed reversible error by excluding Mr. Rawson's testimony and thereby depriving Appellants of a fair trial and as a result prejudicing their case.

II. 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. When Appellee had the expert witness testimony of Mr. Rawson stricken, and then in closing arguments referred to the lack of expert witness testimony produced by Appellants and alleged the lack of evidence as to speeding by Appellee, Appellants were not able to rebut Appellee's arguments and thereby leaving the jury with the impression that Appellants never had an expert witness despite the promise made in opening statements.

III. The trial court erred in granting Appellee's proposed jury instructions D-4 and D-9. The instructions were not accurate statements of the law, misstated the facts of the case, and as such were confusing and misleading to the jury.

IV. The trial court erred in denying Appellants' motion for judgment notwithstanding the verdict. The sufficiency of the evidence did not support the verdict of the jury.

V. The trial court erred in denying Appellant's motion for a new trial as the verdict of the jury was against the overwhelming weight of the evidence.

ARGUMENT

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

The Parties had stipulated prior to trial that Appellants' properly and timely designated expert witness Donald Rawson, Traffic Collision Re-Constructionist, would testify by deposition. Appellee never challenged or questioned the qualifications of Mr. Rawson. R. at 187 and 209. However, at trial Appellee made an *ore tenus* motion to exclude Mr. Rawson's testimony on the basis that he questioned the reliability of Mr. Rawson's opinions as expressed in his deposition, the basis of the opinions, and whether the opinions would assist the jury in making its decision. R. at 186-192. After hearing arguments from Counsel for both Parties the trial court granted the motion and excluded the deposition testimony of Mr. Rawson. R. at 186-192 and 204-211. Upon making its decision the trial court permitted Appellants to admit Mr. Rawson's deposition and accompanying CV and report, which were included as part of Mr. Rawson's deposition as exhibits, for identification purposes for the record to serve as a proffer of Mr. Rawson's proposed testimony. R. at 211-212. Appellants objected to the trial court's ruling and re-raised the issue in their post-trial motions, which the trial court overruled. R. at 213 and Clerk's papers at 30-42 and 43-55 and 71-72.

"[T]he admission of expert testimony is within the sound discretion of the trial judge.... Therefore, the decision of a trial judge will stand 'unless we conclude that the discretion was arbitrary and clearly erroneous, amounting to an abuse of discretion.'" Miss. Transp. Comm'n v. McLemore, 863 So.2d 31, 34 (Miss. 2003) (citation omitted). "Mississippi law requires the trial court to ensure that proposed [expert] testimony satisfies Rule 702 of the Mississippi Rules of Evidence." Univ. of Miss. Med. Ctr. v. Pounders, 970 So.2d 141, 146 (Miss. 2007) (citing Donald v. Covington County, 846 So.2d 219, 226 (Miss. 2003).

Mississippi Rule of Evidence 702 provides:

> [i]f 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) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods reliably to the facts of the case.

Miss. R. Evid. 702.

Rule 702 "recognizes the gate keeping responsibility of the trial court to determine whether the expert testimony is relevant and reliable." Miss. R. Evid. 702 cmt. However, "a witness need not be a specialist in any particular profession to testify as an expert.... The scope of the witness' knowledge and experience, and not any artificial classification, governs the question of admissibility." Pounders, 970 So.2d at 146. See also Sacks v. Necaise, 991 So.2d 615, 622 (Miss. Ct. App.

2007). The decision of the trial court judge to permit or to exclude expert testimony will be affirmed "[u]nless we can safely say that the trial court abused its judicial discretion in allowing or disallowing evidence so as to prejudice a party in a civil case...." Sacks, 991 So.2d at 623 (quoting Jones v. State, 918 So.2d 1220, 1223 (Miss. 2005)).

The Mississippi Supreme Court in McLemore adopted the federal court test for the admission or exclusion of expert testimony and applied it to Rule 702. McLemore, 863 So.2d at 35-40. Our supreme court in McLemore stated that "whether testimony is based on professional studies or personal experience, the 'gatekeeper' must be certain that the expert exercises the same level of 'intellectual rigor that characterizes the practice of an expert in the relevant field.'" Id. at 37-38. (quoting Kumho Tire Co. v. Carmichael, 526 U.S. 137, 152, 119 S.Ct. 1167, 143 L.Ed2d 238 (1999)).

The trial court before admitting expert testimony must first apply a two prong test by determining whether the proposed expert witness is qualified and whether the proposed testimony is relevant and reliable. Watts v. Radiator Specialty Co., 990 So.2d 143, 146 (Miss. 2008). Whether a proposed expert's testimony is relevant "depends upon whether the reasoning and methodology employed by the expert witness may be properly applied to the facts at hand." Id., 990 So.2d at 147.

Appellants properly and timely designated Donald W. Rawson, Traffic Collision Re-Constructionist, as their expert witness. This is not disputed. Mr. Rawson, as noted in his CV, while serving with the Mississippi Highway Patrol, was the statewide Reconstruction Coordinator for the highway patrol, was the state CRASH team director, and also served as Troop Commander of Troop J. Mr. Rawson during his time as a state trooper personally investigated in excess of 3,000 automobile accidents and personally reconstructed in excess of 500 automobile accidents. Mr. Rawson further conducted experiments and research in accident reconstruction, served as an instructor in training courses that taught accident investigation and reconstruction for the highway patrol, other law enforcement agencies, academies, insurance groups, legal associations, and community colleges.

Mr. Rawson developed the State of Mississippi Accident Re-Construction Certification Program and its proficiency examination. He is certified as an accident re-construction specialist by the University of North Florida and is also certified as an accident re-constructionist by the Mississippi Board of Law Enforcement Standards and Training. Mr. Rawson is also a certified instructor in automobile accident investigation as he taught automobile accident investigation at the Mississippi Law Enforcement Officer's Training Academy from 1980 to 1999 as he taught over 1,000 hours of accident investigation at the academy.

Mr. Rawson has developed, researched, prepared lesson plans, and taught courses in on-scene technical accident investigation and re-construction at the Mississippi Law Enforcement Officer's Training Academy, the Hattiesburg, Mississippi Police Academy, University of Southern Mississippi Training Academy, Hinds Community College, Laurel, Mississippi Academy, and Harrison County Training Academy.

In addition Mr. Rawson has taught seminars on drag sleds, weight shift, traffic homicide investigation, math used in reconstruction, and crush speed estimates. He has instructed and conducted tests for classes and seminars with skidding vehicles to determine speed from skid marks, critical scuffs and weight shift using speed formulas, and conducted tests with airborne vehicles to determine speeds. Mr. Rawson conducted these tests for classes and seminars for various law enforcement agencies, judges, attorneys, insurance companies, safety engineers, and fleet safety companies.

In addition to his numerous teaching duties Mr. Rawson has the following publications to his credit:

- "Skid Marks in Accident Investigation," MS State Trooper Fall 1993 issue.
- "ABS Brakes...Good News...Bad News," MS State Trooper Summer 1993 issue.
- "ABS Brakes...Good News...Bad News," Iowa State Police Officers Council Spring 1994.

- "Truck Accidents Present Special Problems," MS State Trooper Winter 1993 issue.

- Authored "Criminal Traffic Investigation and Reconstruction Training and Reference Manual," 1999.

- Authored the manual for completing the Mississippi Uniform Accident Report 1983.

- Authored the manual for completing the Mississippi Uniform Crash Report 2005.

Mr. Rawson has also been qualified to testify and deliver expert opinions in 51 plus trials and depositions in the state courts of Mississippi and U.S. District Courts in Mississippi, Louisiana, and Georgia.

Mr. Rawson prepared a very detailed accident reconstruction/technical analysis report of the automobile accident herein based upon *inter alia*, among other things, the following:

- Copy of the accident report and statements contained on the report by the Parties;

- Copies of 48 photos of the accident scene and Appellants' damaged automobile;

- Statements made by Appellants;

- Visual statement vehicle data;

- Visual statement analyst;

- Reforms version 6.04;

- Personal inspection of the accident scene on June 9 and 10, 2006;

- Hand calculations.

Mr. Rawson's report, as noted as an exhibit to his deposition, concluded the following expert opinions:

- Appellants' vehicle was able to accelerate to the point of impact in 3.13 seconds before being hit and could have cleared the west bound lane in 3.62 seconds. This opinion was based upon timed cars making a left turn at the collision site.

- Appellee's vehicle was approximately 206 feet from impact with a clear view of the accident scene when Appellants' vehicle entered his lane. This opinion was based upon the accident report in which Appellee's vehicle driver estimated his speed at 45 MPH, opinion above and my observations of the accident scene.

- The speed of Appellee's vehicle was 45 MPH on impact. This opinion is based on the estimated speed of Appellee's vehicle driver per the accident report and the absence of skid marks.

- Using the post speed limit of 40 MPH Appellee's vehicle could have reacted to Appellants' turning vehicle and applied normal braking and Appellants' vehicle would not create an immediate hazard. This would have allowed Appellee's vehicle to slow to 31 MPH and would have allowed Appellants' vehicle to clear the lane in the 3.62 seconds required because Appellee would arrive at the area of impact 3.72 seconds after perception. This opinion is a calculated value using the speed limit of 40 MPH, the normal breaking value, and the standard perception-reaction time.

- From the speed of 40 MPH (posted speed limit) Appellee could have stopped his vehicle in 194 feet by reacting and locking his brakes. This is 12 feet prior to impact. This opinion is a calculated value based upon the road surface's coefficient of friction.

While Appellee never disputed or questioned Mr. Rawson's qualifications, he did however take issue with the fact that Mr. Rawson, in reaching his expert

opinions, did not personally speak with Appellee, Mr. Durham or Deputy Theobald, or personally view the Parties' wrecked vehicles, though Mr. Rawson did view photos of Appellants' damaged vehicle. Appellee further challenged Mr. Rawson's opinion and conclusions based upon Mr. Rawson's review of the accident report prepared by Deputy Theobald.

Deputy Theobald testified that Appellee, based upon his conversation with Appellee following the accident, was traveling at a speed of 45 MPH, and the posted speed limit was 40 MPH. R. at 289-290. Appellee did not dispute that he spoke with Deputy Theobald following the accident or that he told him he was traveling 45 MPH. R. at 226-227.

Based upon Appellee's admission to Deputy Theobald, Mr. Rawson, applying the principles of accident reconstruction and based on his review, study, and investigation of the accident scene, formed his opinions and conclusions as stated herein above.

Admissions by a party opponent are admissible evidence. Miss. R. Evid. 801(d)(2). Appellee admitted to Deputy Theobald that he was speeding and Appellants, through the expert testimony of Mr. Rawson, intended to use Appellee's admission against him. Appellee never challenged the qualifications of Mr. Rawson. His expert testimony would have been very beneficial to the jury as the triers of fact as to the issues of speed, sight line, and distance between

Appellants when turning into the Ken Ash parking lot and Appellee when he first saw Appellants. Therefore, the trial court erred when it excluded Mr. Rawson's testimony. Moreover, Appellants respectfully argue that Appellee waived any challenge to the testimony of Mr. Rawson when Appellee deposed and accepted him as an expert witness.

The jury as a result was deprived of critical facts and opinions that would assisted them in understanding the evidence and to determine facts in issue that only the jury, as the trier of fact, can determine. It cannot be argued that speed, sight line, and distance, the very issues that Mr. Rawson was prepared to deliver his expert opinion on, were not issues in this case when the trial court gave jury instructions as to speed and distance.

> You are instructed that an operator of a motor vehicle has a duty to keep the vehicle under proper control and to drive at a speed that is reasonable and prudent under existing conditions. Therefore, if you find from a preponderance of the evidence in this case that:
> 1. The Defendant Adam Holmes was not driving at a reasonable and prudent rate of speed in view of existing conditions, or did not maintain proper control of the motor vehicle; and
> 2. Such failure was the sole proximate or contributing cause of the Plaintiffs' injuries, then your verdict shall be for the Plaintiffs Paula Denham and Pamela Caldwell....

Appellants' A-P5 jury instruction given at trial. See Clerk's papers at 10.

> You are instructed that the driver of a vehicle intending to turn left shall yield the right-of-way to any vehicle approaching from the opposite direction which is so close as to constitute an immediate hazard. Should you find from a preponderance of the evidence that Paula Denham turned her vehicle into the westbound lane of

> University Avenue Extended at a time when the vehicle driven by Adam Holmes was so close as to constitute an immediate hazard, then Paula Denham failed to yield the right-of-way and is negligent....

Appellee's D-6b jury instruction given at trial. See Clerk's papers at 14.

> 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 or driving at an excessive speed are irrelevant to your decision.

Appellee's D-4 jury instruction given at trial over the objections of Appellant. This instruction was supplemented to the record.

Moreover, Counsel for Appellee, over the objections of Appellants and request for a mistrial and and/or cautionary jury instruction, addressed the issue of speed and the lack of expert witness testimony concerning speed in his closing arguments.

> COUNSEL FOR APPELLEE: **"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."** (emphasis ours).
>
> 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.

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 CLOSING ARGUMENT BY COUNSEL FOR APPELLEE: **"There is 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."** R. at 316-317. (emphasis ours).

Furthermore, speed it would seem to have played a role in the amount of damage suffered by the Parties' respective vehicles. Both Parties testified that their vehicles were total losses as each vehicle had heavy damage. Appellants' vehicle suffered damage on the front passenger side and the rear passenger side as well. Appellee testified that frame of the truck was bent and there was damage to the engine block whereby the motor was knocked a loose from its mount. Appellant described the damage to his truck by stating it was "beaten up pretty good."

Where the Parties' vehicles came to rest following the accident suggests that that speed played a role in the accident. Appellants' vehicle following the impact of the accident came to rest on the opposite side of the road after having been knocked from the construction company parking lot across both lanes of University Road. Appellee's vehicle came to rest 75 feet inside the Ken Ash Construction parking lot.

As a result Appellee was permitted to strike Appellants' expert witness testimony as to speed, sight distance, etc. and then to tell the jury in closing that Appellants failed to prove that Appellee was speeding. In essence, Appellee got to have his cake and eat it too.

This deprived Appellants of a fair trial and prejudiced Appellants by depriving the jury of relevant and pertinent testimony by Mr. Rawson as to factual issues that the jury was charged to find per the instructions of the trial court. See Clerk's papers at 10 and 14. Further, the jury could not find these facts without the expert testimony of Mr. Rawson to assist them in understanding the issues of the case, namely speed, sight line, and distance, and in Mr. Rawson's expert opinion that if Appellee had been traveling the posted speed limit of 40 MPH, the accident could have been avoided.

The trial court therefore committed reversible error by excluding Mr. Rawson's testimony and thereby depriving Appellants of a fair trial and as a result prejudicing their case. Sacks, 991 So.2d at 623 (quoting Jones v. State, 918 So.2d 1220, 1223 (Miss. 2005)).

II. 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 APPELLANTS.

While addressing the jury in his closing arguments, over the objections of Appellants and subsequent request for a mistrial and/or cautionary instruction,

Counsel for Appellee explicitly referred to the lack of expert witness testimony by Appellants in proving their case in regards to the issue of speed.

> COUNSEL FOR APPELLEE: "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.**" (Emphasis ours).
>
> 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.
>
> 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 CLOSING ARGUMENT BY COUNSEL FOR APPELLEE: "There is **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.**" R. at 316-317. (Emphasis ours).

Appellants' Counsel made a contemporaneous, prompt, and timely objection to the said closing arguments by Appellee and asked for a mistrial or in the alternative for the court to instruct the jury to disregard the remarks. Id. The trial court overruled the motion for a mistrial and declined to instruct the jury to disregard Appellee's alleged improper remarks. Id. Appellants objected to the trial court's ruling and re-raised the issue in their post-trial motions, which the trial court overruled. Id. and Clerk's papers at 30-42 and 43-55 and 71-72.

For this Court to reverse a judgment based upon an improper-argument claim, "we must first find an 'abuse, unjustified denunciation or a statement of fact not shown in the evidence"' and "that it was probable that the improper statement had a harmful influence on the jury." Woods v. Burns, 797 So.2d 331, 334 (Miss. Ct. App. 2001).

The standard of review for alleged misconduct during closing arguments is as follows:

> Attorneys have wide latitude in closing arguments. Notwithstanding the wide latitude afforded in closing arguments "[t]he standard of review that appellate courts must apply to lawyer misconduct during opening statements 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." This Court has held that "any alleged improper comment must be viewed in context, taking the circumstances of the case into consideration." The trial judge is in the best position to determine if an alleged objectionable remark has a prejudicial effect.

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)). Moreover, an objection to an improper comment or evidence must be timely made or else the objection is waived for appeal purposes. Edwards v. State, 856 So.2d 587, 598 (Miss. Ct. App. 2003). See also Walker v. State, 913 So.2d 198, 238 (Miss. 2005) ('if no contemporaneous objection is made, the error, if any, is waived.").

In opening statements to the jury Counsel for Appellant Denham stated to the jury "[y]ou will also hear from our expert witness in this case that backs up and supports our position that the defendant was speeding." R. at 71.

Expert witness Donald Rawson was properly and timely designated. Appellee never questioned the qualifications of Mr. Rawson or objected to him testifying at trial by deposition. It was only after the trial had begun, after opening statements were given and several witnesses had testified that Appellee objected to Mr. Rawson's testimony and had his expert testimony stricken.

In sum, it was because of the actions of Appellee as noted herein above that lead to Mr. Rawson's expert witness testimony to be excluded and thereby depriving the jury of hearing the testimony of Appellants' expert witness. After having had Mr. Rawson's expert witness testimony excluded, Appellee in closing arguments argued to the jury the lack of expert witness testimony and how the Appellants allegedly failed to prove that speed contributed to the accident. "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."** R. at 316 (emphasis ours).

"There is **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." R. at 317 (emphasis ours).

Assuming for argument's sake only that Appellee, as part of its trial strategy, could move to strike Mr. Rawson's expert testimony as it was done, it is the respectful argument of Appellants that Appellee nonetheless caused the jury to think that Appellants never produced an expert witness after having stated in opening statements that the jury would hear from an expert witness. While attorneys are permitted wide latitudes in presenting their closing arguments, such latitude is restricted so as not to create an unjust prejudice. Burr, 909 So.2d at 724-725 (quoting Eckman, 876 So.2d at 994).

When Appellee had the expert witness testimony of Mr. Rawson stricken, and then in closing arguments referred to the lack of expert witness testimony and alleged the lack of evidence as to speeding by Appellee, Appellants were not able to rebut Appellee's arguments and thereby leaving the jury with the impression that Appellants never had an expert witness despite the promise made in opening statements.

Appellants objected to Appellee's improper arguments, asked for a mistrial, and/or for a cautionary jury instruction instructing the jury to disregard the Appellee's arguments. The trial court however overruled the objection and

declined the requests for a mistrial or cautionary instruction. This left Appellants without a viable course of action to rebut Appellee's improper closing arguments.

The failure of the trial court to sustain Appellants' objection to Appellee's improper closing arguments and subsequent failure to grant Appellants' request for a mistrial and/or cautionary jury instruction was reversible error due to the prejudice suffered by Appellants. Burr, 909 So.2d at 724-725 (quoting Eckman, 876 So.2d at 994).

III. THE TRIAL COURT ERRED IN GRANTING APPELLEE'S PROPOSED JURY INSTRUCTIONS D-4 AND D-9.

At the jury instruction conference Appellants made specific and timely objections to Appellee's proposed jury instructions D-4 and D-9 on the grounds that the instructions were confusing, misleading, were covered in other instructions and as such conflicted with other instructions, and were not true statements of the law. R. at 281 and 283. The trial court overruled Appellants' objections to the proposed instructions and gave them to the jury. Id.

A new trial must be granted if the jury has been confused by faulty jury instructions. Busby v. Anderson, 978 So.2d 670, 678 (Miss. Ct. App. 2006). Moreover, if there are two or more jury instructions that are in conflict with each other, this grounds for a new trial. Fisher v. Deer, 942 So.2d 217, 219 (Miss. Ct. App. 2006). See also Hillier v. Minas, 757 So.2d 1034, 1039 (Miss. Ct. App. 2000).

When reviewing the granting of a jury instruction the appellate court must read all the jury instructions actually given as a whole. Whitten v. Cox, 799 So.2d 1, 16 (Miss. 2000). If the instructions fairly state the law and do not create an injustice, no reversible error will be found. Id.

Appellee's jury instruction D-4 as given to the jury read as follows:

> 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 or driving at an excessive speed are irrelevant to your decision.

Appellee's D-4 jury instruction was supplemented to the record.

Appellee's D-4 jury instruction may have been a correct statement of the law but for the last sentence of the first paragraph. "Unlawful speed is not a proximate cause of an accident caused by the intervening negligence of another person." Appellant respectfully submits that this sentence made the entire jury instruction inaccurate and as such confused and misled the jury. The instruction implies contributory negligence in that if Appellant Denham was negligent in any way it does not matter whether Appellee was guilty of speeding at the time of the accident. The jury must find for Appellee.

> 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 or driving at an excessive speed are irrelevant to your decision.

Mississippi is a pure comparative negligence state and does not follow the principles of contributory negligence whereby if a Plaintiff is guilty of any fault or a certain percentage of fault the Plaintiff cannot recover any damages.

Mississippi Code Annotated § 11-7-15 states Mississippi's position on the issue of contributory versus comparative negligence:

> In all actions hereinafter brought for personal injuries, or where injuries have resulted in death, or for injury to property, the fact that the person injured, or the owner of the property, or person having control over the property may have been guilty of contributory negligence shall not bar a recovery, but damages shall be diminished by the jury in proportion to the amount of negligence attributable to the person injured, or the owner of the property, or the person having control over the property.

Mississippi Code Annotated § 11-7-15 (1972).

Appellee's said jury instruction D-4 was therefore an incorrect statement of Mississippi law. The instruction clearly implied to the jury that if it found Appellant Denham to be guilty of any amount of negligence, then it was to find for Appellee regardless of what he may have done prior to the accident. As a faulty jury instruction that incorrectly stated Mississippi law, the trial court committed reversible error when it gave the instruction over the objections of Appellants,

thereby depriving Appellants of a fair trial. Busby, 978 So.2d at 678 (Miss. Ct. App. 2006). See also Whitten, 799 So.2d at 16.

Moreover, the instruction directly conflicts with D-10, which is also the form of the verdict, whereby the jury is asked to determine what percentage of fault between the Parties and calculate damages. As such, the trial court committed reversible error in granting the instruction. Fisher, 942 So.2d at 219.

Appellee's jury instruction D-9 as given to the jury read as follows:

> 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.

Appellee's D-9 jury instruction given at trial. (Emphasis ours). See Clerk's papers at 15.

Appellants objected to the giving of Appellee's said jury instruction D-9 on the grounds that the instruction was incorrect and cumulative to other instructions given by the court, namely D-10 as set forth above asking the jury to determine fault and damages. The instruction was further incorrect and misleading to the jury in that it stated that Paula Denham was not a party to the action.

In support of its instruction Appellee argued that the instruction was proper pursuant to Hunter v. General Motors Corp., 729 So.2d 1264 (Miss. 1999).

> COUNSEL FOR APPELLEE: D-9 is Mississippi law. We submit, Hunter versus General Motors. It's the empty chair.

R. at 283.

In Hunter, the Mississippi Supreme Court discussed, among others, the issue of the empty chair. Specifically, the Court discussed how a jury verdict against a defendant is to be adjusted to reflect an earlier settlement with another defendant. However, there is not an empty chair defendant in the instant case. The only defendant named in Appellants' lawsuit was Adam Holmes. There was not a defendant who settled prior to trial. Moreover, as previously stated Appellant Denham is a party to the lawsuit despite what Appellee's jury instruction said.

The trial court hence committed reversible error in granting Appellee's proposed jury instruction D-9 as it misstated the facts of the case and was not applicable to the case. Busby, 978 So.2d at 678 (Miss. Ct. App. 2006). See also Whitten, 799 So.2d at 16. As such, the instruction misled the jury and resulted in an injustice to Appellants by depriving them of a fair trial.

IV. THE TRIAL COURT ERRED IN DENYING APPELLANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT.

A motion for judgment notwithstanding the verdict tests the legal sufficiency of the evidence supporting the verdict and not the weight of the evidence. Tharp v. Bunge Corp., 641 So.2d 20, 23 (Miss. 1994). In considering a motion pursuant to Rule 50(b), a court must consider the evidence in the light most favorable to the party against whom the motion is made, giving the party the benefit of all reasonable inferences therefrom. Mongeon v. A & V Enterprises, Inc., 697 So.2d

1183 (Miss. 1997). A motion for JNOV asks the court to hold as a matter of law that the verdict may not stand. Watts, 990 So.2d at 150-151 (Miss. 2008). Appellants, as apart of their post-trial motions, asked the trial court for a JNOV, but the trial court denied the motion. Clerk's papers at 56-70 and 71-72.

Appellants filed suit alleging that Appellee was negligent in causing the accident. The four elements of negligence are: (1) duty; (2) breach of duty; (3) causation; and (4) damages. Fisher v. Deer, 942 So. 2d at 219. Duty and breach of duty establishes negligence. Id. Causation and damages establish that Appellants are entitled to recover on the basis of that negligence. Id. Appellee therefore owed Appellants a duty of care while operating his motor vehicle. Specifically, Appellee owed Appellants the duty to maintain his vehicle under proper control, to keep the proper look out for other traffic using University Avenue, and to obey the posted speed limit.

Appellee did none of these things in causing the accident with Appellants. Moreover, considering the testimony and evidence presented at trial in the light most favorable to Appellee, including giving Appellee the benefit of all reasonable inferences therefrom, Appellee's and his passenger's versions of what happened in the accident do not support the verdict of the jury and the sufficiency of the evidence presented at trial.

It is undisputed that Appellants' and Appellee's vehicles suffered immense damage, both vehicles were totaled, and Appellants suffered physical injuries as a result of the accident. Appellee does not call into question where Appellants' and his vehicle came to rest following the accident. Mr. Durham testified that the Appellee's vehicle came to rest 75 feet off University Avenue in the Ken Ash Construction Company parking lot. The vehicle occupied by the Appellants was knocked from the outer edges of the said parking lot, across two lanes of traffic on University Avenue and came to rest on the opposite side of the road with the vehicle primarily off the road.

Such injuries and damage to one's vehicle and placement following the accident are not consistent with a low speed impact as suggested by Appellee and Mr. Durham or consistent with someone is keeping a proper lookout for other traffic. Appellee repeatedly testified in his deposition, as pointed out at trial, that he was driving along and "looked up" and saw Appellants. Appellee gave inconsistent accounts as to when and how long he observed Appellants before the accident. Mr. Durham gave testimony that conflicted both Appellee's and Appellants' testimony. Appellee's and Mr. Durham's version of the events did not match as to Appellee's speed of travel or duration of time of seeing Appellants before the accident.

Considering the evidence in the light of most favorable to Appellee and giving him the benefit of all reasonable inferences, does not support the verdict of the jury and the sufficiency of the evidence presented at trial. The trial court therefore erred in denying Appellants' motion for JNOV. Tharp, 641 So.2d at 23.

V. THE TRIAL COURT ERRED IN DENYING APPELLANTS' MOTION FOR A NEW TRIAL.

A motion for a new trial should only be granted when all of the evidence, viewed in the light most favorable to the non-moving party, leads to the conclusion that if the verdict is allowed to stand, it would be a miscarriage of justice. Busby, 978 So.2d at 678. A motion for new trial seeks to set aside the verdict of the jury on grounds related to the weight of the evidence and not sufficiency. Busby, 978 So.2d at 679. A new trial must be granted if the jury has been confused by faulty jury instructions, the verdict is against the overwhelming weight of the evidence, or is the product of bias, passion, or prejudice. Id. It is in the discretion of the court whether to grant a motion for a new trial. Id. Appellants, as apart of their post-trial motions, asked the trial court for a new trial challenging the weight of the evidence, but the trial court denied the motion. Clerk's papers at 30-55 and 71-72.

For the reasons stated here above in issue number 5 the trial court erred and abused its discretion in denying Appellants' motion for a new trial. Id.

CONCLUSION

In conclusion, based upon the foregoing arguments and authorities, Appellants respectfully urge the Court to reverse the verdict of the jury and to render judgment in their favor, or in the alternative, to reverse the verdict of the jury and to remand this case to the lower court for a new trial.

Respectfully submitted,

This the 3 day of June 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 I have this day mailed postage prepaid a true and correct copy of the foregoing *Appellants' Joint 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 3rd day of June 2009.

Tommy W. Defer

Bobby Taylor Vance