IN THE SUPREME COURT OF MISSISSIPPI

No. 2009-CA-00207

SANDRA COLEMAN, AS PERSONAL REPRESENTATIVE OF THE WRONGFUL DEATH BENEFICIARIES OF RANDY COLEMAN, DECEASED — Appellant

v.

FORD MOTOR COMPANY — Appellee

On Appeal from the Circuit Court of Lowndes County, Mississippi

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ORAL ARGUMENT NOT REQUESTED

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Sandra Coleman, as personal representative of the wrongful death beneficiaries of Randy Coleman, deceased, plaintiff/appellant;

2. Ralph E. Chapman and Sara B. Russo of Chapman, Lewis & Swan, Clarksdale, Mississippi, counsel for plaintiff/appellant;

3. Scott T. McArdle of McArdle & Whitman PC, Montgomery, Alabama, counsel for plaintiff/appellant;

4. John M. Montgomery of Liston & Lancaster, Starkville, Mississippi, counsel for plaintiff/appellant;

5. Ford Motor Company, defendant/appellee;

6. Walker W. Jones, III, Barry W. Ford, and Robert F. Walker of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Jackson, Mississippi, counsel for defendant/appellee;

7. J. Tracy Walker, IV, and Perry W. Miles, IV, of McGuire Woods LLP, Richmond, Virginia, counsel for defendant/appellee;

8. Michael B. Wallace and Rebecca Hawkins of Wise Carter Child & Caraway, P.A., Jackson, Mississippi, counsel for defendant/appellee.

SO CERTIFIED, this the 17TH day of March, 2010.

Michael B. Wallace

MICHAEL B. WALLACE

STATEMENT REGARDING ORAL ARGUMENT

Plaintiff Sandra Coleman for the second time asks this Court to create an exception to its holding in Estate of Hunter v. General Motors Corp., 729 So.2d 1264 (Miss. 1999), that comparative fault in a crashworthiness case may be allocated to a plaintiff, such as her late husband, whose blood alcohol level was over twice the legal limit at the time of his fatal collision. This Court summarily rejected her request to present those issues by interlocutory appeal in Coleman v. Ford Motor Co., No. 2005-M-01203-SCT (Miss. July 22, 2005). Because the jury in this case returned a special verdict finding no defect in Randy Coleman's Ford F-150 truck, it never reached the question of allocation of fault, and this Court need not do so either. The remainder of the issues stated in Coleman's brief present routine applications of settled law. All of the dispositive issues have been authoritatively decided, and the facts and legal arguments are adequately presented in the briefs and record, so that the decisional process would not be significantly aided by oral argument, within the meaning of M.R.A.P. 34(a)(2) and (3).

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS i

STATEMENT REGARDING ORAL ARGUMENT ii

TABLE OF AUTHORITIES v

INTRODUCTION 1

STATEMENT OF THE CASE 1

I. Course of the Proceedings 1

II. Statement of the Facts 3

A. The collision 3

B. Evidence regarding Coleman's alcohol levels 5

C. Eyewitness testimony regarding the fire in Coleman's vehicle 6

D. Ford's expert testimony as to the cause of the fire 7

E. Evidence regarding the fuel system in the Ford truck 7

1. General information 7

2. Evidence of fuel system's performance during this collision 9

SUMMARY OF THE ARGUMENT 12

ARGUMENT 14

I. THE JURY'S FINDING THAT NO DEFECT EXISTED IN THE FUEL SYSTEM IS CONTROLLING ON THIS RECORD. 14

A. Coleman does not challenge the sufficiency of the evidence to support the verdict, and she is wrong in her contention that the verdict is contradicted by overwhelming evidence. 16

B. The Court properly conducted voir dire and seated an impartial jury. 18

C. The Court properly excluded irrelevant testimony of Ford's representative. 21

D. The Court, having sustained Coleman's objection to Ford's argument concerning her failure to introduce evidence, did not abuse its discretion by not telling the jury to disregard it. 24

II. COLEMAN'S OTHER ARGUMENTS BEAR NO RELATION TO THE DETERMINATIVE VERDICT OF NO DEFECT AND OTHERWISE LACK MERIT. 26

A. Ford's expert testimony on fire causation was properly admitted....28

B. The Court properly admitted unprivileged evidence of blood alcohol levels. 30

C. The Court properly instructed the jury on comparative fault, which applies to all Mississippi personal injury claims, including crashworthiness. 33

CONCLUSION....43

CERTIFICATE OF SERVICE....45

TABLE OF AUTHORITIES

Cases:

Adcock v. Mississippi Transp. Comm'n, 981 So.2d 942 (Miss. 2008) 29

Andrews v. Harley Davidson, Inc., 796 P.2d 1092 (Nev. 1990) 37

Baine v. River Oaks Convalescent Ctr., 791 So.2d 844 (Miss. App. 2001) 21

Binakonsky v. Ford Motor Co., 133 F.3d 281 (4th Cir. 1998) 33

Black v. M & W Gear Co., 269 F.3d 1220 (10th Cir. 2001) 34

Bobby Kitchens, Inc. v. Mississippi Ins. Guar. Ass'n, 560 So.2d 129 (Miss. 1989) 3

Brown v. Blackwood, 697 So.2d 763 (Miss. 1997),
reh'g denied, 700 So.2d 331 (Miss. 1997) 19

Bynum v. Swiss American of Miss., Inc., 367 So.2d 906 (Miss. 1978) 24

Coca-Cola Bottling Co, Inc. v. Reeves, 486 So.2d 374 (Miss. 1986) 32

Coleman v. Ford Motor Co., No. 2005-M-01203-SCT (Miss. July 22, 2005) ii

D'Amario v. Ford Motor Co., 806 So.2d 424 (Fla. 2001) 37

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) 29

Davis v. Powell, 781 So.2d 912 (Miss. App. 2000) 20

Davis v. State, 18 So.3d 842 (Miss. 2009) 33

Edwards v. Ellis, 478 So.2d 282 (Miss. 1985) 31

Egbert v. Nissan Motor Co., ____ P.3d ___, 2010 WL 565842
(Utah Feb. 19, 2010) 39

Fields v. Volkswagen of America, Inc., 555 P.2d 48 (Okla. 1976) 34

Grenada Living Ctr. LLC v. Coleman, 961 So.2d 33 (Miss. 2007) 25

Hudson v. Taleff, 546 So.2d 359 (Miss. 1989) 19, 20

Estate of Hunter v. General Motors Corp., 729 So.2d 1264 (Miss. 1999) ..... passim

Jahn v. Hyundai Motor Co., 773 N.W.2d 550 (Iowa 2009) 36

Jiminez v. DaimlerChrysler Corp., 269 F.3d 439 (4th Cir. 2001) 37

Johnson v. Ford Motor Co., 988 F.2d 573 (5th Cir. 1993) 24

Johnson v. St. Dominic-Jackson Mem'l Hosp., 967 So.2d 20 (Miss. 2007) 3, 16, 17

Jones v. State, 858 So.2d 139 (Miss. 2003) 30

Jones v. State, 881 So.2d 209 (Miss. App. 2003) 30

Kiddy v. Lipscomb, 628 So.2d 1355 (Miss. 1993) 39

Kirkland v. General Motors Corp., 521 P.2d 1353 (Okla. 1974) 34

Lee v. State, 837 So.2d 781 (Miss. 2003) 26

M & M Pipe & Pressure Vessel Fabricators, Inc. v. Roberts,
531 So.2d 615 (Miss. 1988) 40

Martin v. State, 872 So.2d 713 (Miss. App. 2004) 27

Maxwell v. Ford Motor Co., 160 Fed. Appx. 420 (5th Cir. 2005) 37

Maxwell v. Ford Motor Co., No. 2:02CV308-P-A (N.D. Miss. June 22, 2004) 37, 42

Meekins v. Ford Motor Co., 699 A.2d 339 (Del. Super. Ct. 1997) 36, 40, 41

Milano v. State, 790 So.2d 179 (Miss. 2001) 33

Missey v. Kwan, 595 S.W.2d 460 (Mo. App. 1980) 26

Mississippi Transp. Comm'n v. Highland Dev., LLC, 836 So.2d 731 (Miss. 2002) 19

Mississippi Transp. Comm'n v. McLemore, 863 So.2d 31 (Miss. 2003) 29

Moody v. Ford Motor Co., 2006 WL 3325425 (N.D. Okla. Nov. 14, 2006) 34

Norman v. Fisher Marine, Inc., 672 S.W.2d 414 (Tenn. App. 1984) 33

Pham v. State, 716 So.2d 1100 (Miss. 1998) 21

Pickering v. Industria Mosina I Traktora, 740 So.2d 836 (Miss. 1999) 33

Reed v. Chrysler Corp., 494 N.W.2d 224 (Iowa 1992) 36, 37, 42

Roberts v. State Farm Mut. Auto. Ins. Co., 567 So.2d 1193 (Miss. 1990) 15

Robinson Property Group, L.P. v. Mitchell, 7 So.3d 240 (Miss. 2009) 21

Scott v. Ball, 595 So.2d 848 (Miss. 1992) 20

Scott v. Flynt, 704 So.2d 998 (Miss. 1996),
reh'g denied, 703 So.2d 864 (Miss. 1997) 31

Shields v. Easterling, 676 So.2d 293 (Miss. 1996) 27

Smith v. Dillon Cab Co., 245 Miss. 198, 146 So.2d 879 (1962) 39

Smith v. Parkerson Lumber, Inc., 888 So.2d 1197 (Miss. 2004) 19

Smith v. State, 802 So.2d 82 (Miss. 2001) 19

Smith v. State, 907 So.2d 389 (Miss. App. 2005),
cert. denied, 910 So.2d 574 (Miss. 2005) 26

Tennin v. Ford Motor Co., 960 So.2d 379 (Miss. 2007) 25

Toliver v. General Motors Corp., 482 So.2d 213 (Miss. 1986) 41, 42

Toyota Motor Corp. v. McLaurin, 642 So.2d 351 (Miss. 1994) 19, 20

Vardaman v. State, 966 So.2d 885 (Miss. App. 2007) 27

Venton v. Beckham, 845 So.2d 676 (Miss. 2003) 16

Wells v. State, 698 So.2d 497 (Miss. 1991) 19

Whiddon v. Smith, 822 So.2d 1060 (Miss. App. 2002),
cert. denied, 842 So.2d 578 (Miss. 2003) 15, 27

White v. Yellow Freight System, Inc., 905 So.2d 506 (Miss. 2004) 17

Whitehead v. Toyota Motor Corp., 897 S.W.2d 684 (Tenn. 1995) 36

Willis v. Kia Motors Corp., 2009 WL 2134359 (N.D. Miss. July 14, 2009) 37

Zalut v. Anderson & Associates, Inc., 463 N.W.2d 236 (Mich. App. 1990) 40

Statutes:

MISS. CODE ANN. § 11-1-63 ..... 14, 31, 32, 34

MISS. CODE ANN. § 11-7-15 34

MISS. CODE ANN. § 63-11-30 5

MISS. CODE ANN. § 85-5-7 ..... 34, 37, 38, 40

Rules:

M.R.A.P. 34 ii

M.R.C.P. 30 21

M.R.C.P. 61 15

M.R.E. 103 ..... 15, 24

M.R.E. 502 20

M.R.E. 503 ..... 20, 30

M.R.E. 702 29

U.C.C.C.R. 3.14 27

Other:

Hildy Bowbeer & Bard D. Borkon, Recent Developments in Crashworthiness Litigation, 450 PLI/Lit 9 (1992) 35

CCH Product Liability Reporter § 3030 (1995) 36

Michael Hoenig, The American Law Institute Restatement Draft, 211 N.Y.L.J. 3 (May 9, 1994) 41

William J. McNichols, The Relevance of the Plaintiff's Misconduct in Strict Tort Products Liability, the Advent of Comparative Responsibility, and the Proposed Restatement (Third) of Torts, 47 OKLA. L.REV. 201 (Summer 1994) 35, 36

LUTHER T. MUNFORD, MISSISSIPPI APPELLATE PRACTICE § 3.5 (2006) 16

RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 7 (2000) 39

RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §§ 16, 17 (1998) 36, 39, 41

Heather Fox Vickles & Michael E. Oldham, Enhanced Injury Should Not Equal Enhanced Liability, 36 S. TEX. L.REV. 417 (April 1995) 35, 41

INTRODUCTION

Plaintiff Sandra Coleman sued Ford Motor Company alleging that the injuries and death of Randy Coleman following a head-on collision at highway speeds resulted from a defect in the fuel system of the 1999 Ford F-150 four-wheel-drive truck that he was driving at the time of the accident. The jury, however, determined that there was no defect in the Ford vehicle and thus returned a verdict in Ford's favor.

Most of the eight issues presented by Coleman's brief have nothing to do with the verdict the jury actually reached. Because the truck has no defect, Ford bears no share of the responsibility for Randy Coleman's injuries and death. The jury never reached the question of whether the decedent's undisputed intoxication rendered him comparatively responsible for his own injuries, pursuant to this Court's holding in Estate of Hunter v. General Motors Corp., 729 So.2d 1264 (Miss. 1999). The Circuit Court of Lowndes County, Mississippi, the Honorable James T. Kitchens, Jr., presiding, seated an impartial jury and acted well within its discretion in its evidentiary rulings and its supervision of counsel's arguments. The irrelevant issues with which Coleman seeks to distract this Court's attention do not undermine a jury verdict which is amply supported by the great weight of the evidence. This Court should affirm the judgment dismissing Coleman's claims.

STATEMENT OF THE CASE

I. Course of the Proceedings

Coleman filed suit in 2001 against Ford and other defendants for her husband's injuries and death resulting from a vehicular accident. R.E. 3, 1:37-43.[1] She contended the accident was

[1] Citations to documents within the clerk's papers are as follows: [volume number]:[page(s)]. The transcript pages are cited as Tr. [page(s)]. All citations to items within any of the four supplemental volumes, whether clerk's papers or transcript, are cited as Supp. [volume number]:[page(s)]. The Record Excerpts of Appellant are cited as R.E. [tab number].

caused by Janice Hudson, the driver of the other vehicle in this head-on collision, who died instantly in the crash. R.E. 3, 1:38-39; Tr. 632. Although Hudson never responded to the lawsuit, Coleman voluntarily dismissed her from the action in 2005.[2] 5:688-89.

Coleman also contended that the fire in Randy Coleman's vehicle following the accident resulted from a defect in the fuel system of his Ford truck. R.E. 3, 1:40-41. Ford, however, after investigating the accident and inspecting the vehicle, determined that the fire had originated in the truck's occupant compartment following the ignition of highly flammable liquid electrical tape, a can of which was found ruptured and heavily burned under the driver's seat. Tr. 1613-15, 1622-23.

During the course of its investigation, Ford also discovered that Randy Coleman had a blood alcohol content of .23, over twice the then legal limit of 0.1, at the time of the accident. Tr. 1553-54. The Circuit Court rejected Sandra Coleman's request to exclude evidence of his blood alcohol in this matter, finding such information to be relevant under Mississippi law and any medical privilege to have been waived, R.E. 11, 32:4693-99. Her petition for interlocutory appeal from that order was denied. R.E. 13, 14, 32:4708-09.

Trial was ultimately held over the course of ten days in February, 2008. After hearing all of the evidence, the jury concluded that the Ford truck was not defective and thus returned a verdict in Ford's favor. R.E. 17, 40:5895-96, 40:5909-11. After the Circuit Court denied her post-trial motions, R.E. 19, 41:6047, 41:6051, Sandra Coleman appealed, R.E. 20, 41:6056.

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[2] Coleman also sued Premier Ford Lincoln-Mercury, Inc., but announced after the close of her evidence that no claims against Premier would be pursued, and that defendant was no longer in the case and is not a party to this appeal. R.E. 20, 41:6056; Tr. 1426-27, 1885, 1929-31.

II. Statement of the Facts

Although Coleman has set forth in her brief her version of what happened in this collision, all of the evidence must be viewed in the light most favorable to the jury's verdict and all reasonable inferences from the evidence must be resolved in Ford's favor. Johnson v. St. Dominic-Jackson Mem'l Hosp., 967 So.2d 20, 23 (Miss. 2007); Bobby Kitchens, Inc. v. Mississippi Ins. Guar. Ass'n, 560 So.2d 129, 131 (Miss. 1989). The facts below reflect the evidence supporting the jury's verdict.

A. The collision

The accident occurred on State Route 14, an undivided highway with a single lane going in each direction between Louisville and Macon. Tr. 1326, 1332; Ex. D-9. Hudson was driving her Chevrolet Silverado truck in the westbound lane, heading to work. Tr. 622-23, 1531. Two of her co-workers, Pearlie Mae Ervin and Martha Harris, were passengers in her vehicle. Supp. 1:63 at 17-18; Tr. 622. Randy Coleman, who was drunk, was driving eastbound in his F-150. Tr. 1541, 1552-54.

Ervin, the passenger in the front seat of Hudson's truck, Supp. 1:63 at 17-18, testified that they saw Coleman's vehicle headed toward them in their lane. Supp. 1:64 at 23. Hudson, in an effort to avoid a collision with Coleman, moved over into the eastbound lane. Supp. 1:66 at 31-32, Supp. 1:68 at 39. Harris, riding in the back seat of Hudson's truck, Tr. 622, also testified that Coleman was in the wrong lane as he approached them and that Hudson slowed down upon seeing the truck headed toward them. Tr. 628-30, 645. David Dunaway, driving a log truck about a mile behind Hudson, said that, from his vantage point, both vehicles appeared to be in the middle of the road at the time of impact. Tr. 375-76. He did not see either vehicle until just as the impact occurred, Tr. 376, and he testified that the passengers in Hudson's vehicle would have been in a better position to see what happened prior to the wreck. Tr. 394.

Experts for both sides agreed that the actual impact occurred in the eastbound lane, i.e., Coleman's proper lane of travel. Tr. 725, 1465. However, Ford's accident reconstructionist, Jarrod Carter, testified that, based on his calculations and the evidence available, it was his opinion that Hudson had been traveling in the westbound lane, had slowed to about 10 to 15 miles per hour, and had then steered into the eastbound lane. Tr. 1520-21. At about that same time, Coleman came back from the westbound lane across the center line, and the vehicles collided in the eastbound lane. Tr. 1521.

More specifically, Carter testified that Coleman entered the eastbound lane at about a 15-degree angle. Tr. 1541. State Trooper Louis Morgan confirmed that, from his investigation, it appeared that Coleman was in his eastbound lane, although not exactly straight. Tr. 431. Carter stated that Hudson's Chevrolet was at about a nine-degree angle coming from the westbound lane, and that the left[3] front bumper of the Ford hit just past the center line of the Chevrolet's front bumper. Tr. 1541-42. Thus, most of the deformation to the Ford vehicle was on the driver's side. Tr. 715, 721, 1486-87, 1717.

Carter also testified that Randy Coleman's speed at the time of impact was 50 to 55 miles per hour. Tr. 1504, 1535. According to Sandra Coleman's expert James Hannah, the impact knocked the Hudson vehicle back 57 feet as it also rotated counterclockwise. Tr. 750. Carter agreed with that basic assessment, Tr. 1521 ("60 feet"), and stated that, since the vehicles were similar in weight, the Ford had to have been going substantially faster to knock the Chevy truck back in that manner. Tr. 1517.

[3] Throughout the trial, the experts described the sides of the vehicles from the perspective of one sitting inside the vehicle as opposed to facing it. Thus, the driver's side is generally described as the left side and the passenger side as the right side. See, e.g., Tr. 842, 853, 1198, 1487, 1715.

As a result of the impact, each vehicle suffered severe damage. Indeed, the jaws of life were used on both vehicles. Tr. 463; Ex. P-7. An individual on the scene following the accident described the wreck by saying that you started out with two trucks but ended up with "two half trucks." Ex. P-5 at 59. Dunaway testified that, of the many wrecks he had seen in his career driving trucks, he had never seen one worse than this. Tr. 393-94.

B. Evidence regarding Coleman's alcohol levels

Randy Coleman's erratic driving behavior is, of course, consistent with someone driving under the heavy influence of alcohol, and the medical evidence reflected that he did indeed have extreme levels of alcohol in his system. Specifically, a test of his blood done at the University Medical Center about three hours after the accident showed a blood serum level of 183 milligrams per deciliter which converts to .18% for serum alcohol. Ex. D-3; Tr. 1550. According to Thomas Pittman, a toxicologist who served as head of Mississippi's crime lab section on toxicology for five years, Tr. 1545, this serum alcohol level equates to a blood alcohol reading of .16. Tr. 1550.

The Burn Center records, taken 5½ hours later, Ex. D-14, showed serum alcohol levels at 40 milligrams per deciliter, or 0.04%. Pittman testified that there is a recognized procedure for determining blood alcohol concentrations in an individual at the time of the accident by using all of this background information. Tr. 1552-53. Using the two readings from the medical records, he calculated an elimination rate and thus determined that, at the time of the accident, Coleman's blood alcohol level was 0.23, which was more than double the legal rate at the time of 0.1.[4] Tr. 1552-54.

[4] Since the time of the accident, the legal limit has been reduced to 0.08. See MISS. CODE ANN. § 63-11-30.

Although the highway patrolman responding to the accident stated he did not see any evidence of alcoholic beverages in Coleman's vehicle at the time, Tr. 1346, when the truck was inspected later, three burned Michelob beer bottles were found at the back of the driver's seat. Tr. 1617-20; Ex. D-21 (Picture 8 of 11).

C. Eyewitness testimony regarding the fire in Coleman's vehicle

Dunaway, who saw the impact and was the first person on the scene, testified that he brought his vehicle to a stop, went to the Hudson vehicle first, and then saw smoke when he looked over to the Coleman vehicle that had landed in the ditch on the south side of the road. Tr. 379-80, 394-95. He then ran to the Coleman vehicle and could already see flames inside the cab. Tr. 380. The door could not be opened, Tr. 385, and Coleman could not get out through the window because his foot was trapped, Tr. 380-82.

As bystanders arrived, they attempted to put the flames out with handheld fire extinguishers, but it would come back. Tr. 390-91, 500-01. Michael Bennett, a volunteer fireman who responded to the call, Ex. P-5 at 6, 10, ran the fire truck's hose through the driver's window towards the floor of the vehicle where the fire was coming from, to the "seat" of the fire,[5] and managed to extinguish it. Id., at 11, 21.

No one testified to seeing any flames coming from under the vehicle even though, at its angle in the ditch, the driver's side of the vehicle was slightly elevated. Tr. 482, 504, 508, 988-90, 1602, 1606-09. Indeed, Ford's fire cause and origin expert, Ralph Newell, pointed out that, had there been a fire under the truck as suggested by Coleman's experts, the individuals attempting to extricate her husband would not have been able to stand at the driver's door due to the flames and heat in that area. Tr. 1602.

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[5] Fire investigator Ralph Newell testified that the handheld extinguishers would have done no good unless directed at the seat, or base, of the fire. Tr. 1603.

D. Ford's expert testimony as to the cause of the fire

With experts for both sides present, the Coleman vehicle was inspected in 2003. Tr. 1043-44. At that time, items from the cab of the truck were removed, including a can that was punctured from the outside. Tr. 1613-14. Although it was initially thought that the can contained PVC glue, a lab identified the contents of the can as liquid electrical tape. Tr. 1614. Such material is rated as highly flammable. Tr. 1615. Newell testified that liquid electrical tape contains acetone, which is similar in terms of its ignition potential to gasoline. Id. The can had clearly been through the fire as there was evidence of fire both inside and outside of the can. Tr. 1613-14.

It was Newell's opinion that the can was punctured during the impact and leaked the flammable fluid on to the floor under the driver's seat, and that the liquid was ignited by a spark from either a propane torch or a capacitor, both of which were also found under the seat. Tr. 1597-98, 1614, 1622-23. After that, the seat materials and carpeting caught fire, dripped, and melted, burning out the grommet in the floor of the vehicle, at which point a minor fire resulted under the vehicle, during which time the fuel lines were burned. Tr. 1597-1601.

Newell stated that this was consistent with the testimony of the eyewitnesses, as there is no way that they would have seen flames within the cab of the truck as quickly as they did unless the fire actually started there. Tr. 1601-02. It was also consistent with the burn patterns he observed in the vehicle. Tr. 1608-12.

E. Evidence regarding the fuel system in the Ford truck

1. General information

The only aspects of the fuel lines at issue in this case are the nine-inch sections of flexible lines that ran from the frame of the vehicle to the transmission. Tr. 1223-24, 1232, 1235, 1277. The truck had a fuel-injection engine, so there was a fuel pump which keeps fuel in the supply

line running to the engine from the fuel tank under constant pressure of approximately 30 to 40 pounds per square inch. Tr. 1044-47, 1684. There is also a return line which returns unneeded fuel from the engine to the tank. Tr. 1047-48, 1683. These return lines have very low pressure of only about 2 to 3 pounds. Tr. 1048, 1642. The total amount of fuel in all the lines and fuel filter is about 13½ ounces, with approximately 5½ ounces in the return line and about 8½ ounces in the supply line and fuel filter. Tr. 1048-49, 1194.

In the area of the vehicle at issue in this suit, both the return and supply lines run together from the fuel tank along the driver's side of the frame towards the front of the vehicle and then cross over to the center of the vehicle's under-carriage where they are bracketed to the transmission and eventually plug into the back of the engine. Tr. 1715-16. In that section, flexible lines are required in order to be able to shape the lines over to the engine and also to keep the engine vibrations from causing the fuel line to break as it would if a solid tube were used. Tr. 1682-83, 1691, 1747.

The flexible line is composed of an inner Teflon tube, which has a very high heat resistance, covered by a fiberglass weave which prevents the pressure in the hose from causing the Teflon tube to swell and potentially burst. Tr. 1695. The fiberglass is further reinforced with a rubberized coating, and the entire line is covered by a polymer material that protects the fiberglass from rubbing against anything around it and also provides protection to the hose from rocks flying up from under the vehicle. Tr. 1051, 1188, 1695.

The system is designed to shut down the fuel pump in the event of an accident. First, the computer module is constantly monitoring the engine RPMs, and, if they drop too low, as would be the case in a severe front impact where the engine would instantly stop running, then the computer opens the electrical circuit to the pump and instantly turns it off. Tr. 1688-90; Ex. P-66 at 62. Second, there is an inertia switch in the vehicle which senses changes in the movement of

the vehicle such as when it is involved in a collision, and mechanically opens the circuit and stops the pump from operating. Tr. 1689-90; Ex. P-66 at 57. In either situation, once the fuel pump stops running, the pressure in the supply lines is removed, which ensures that very little fuel is released in the event of any breach.[6] Tr. 1684-85, 1780.

Further, the evidence showed that this vehicle met or exceeded all government standards for fuel system integrity as well as the heightened corporate crash performance standards instituted by Ford Motor Company, Tr. 1707-09; that it was thoroughly tested at the component and full-vehicle levels, Ex. P-66 at 34, Tr. 1707-09; and that its design was safe and consistent with the standard in the industry for fuel systems, Tr. 1695. Ford presented opinion testimony of a fuel system engineer as to the safety of the vehicle, Tr. 1687-97, 1707-09, as well as testing on the subject lines for the purposes of this case showing that the fuel lines at issue are strong and resistant to puncturing, Tr. 1826-47.

2. Evidence of fuel system's performance during this collision

Coleman's sole complaint was that additional guarding should have been used on the nine-inch portion of flexible lines crossing over from the side frame rail to the transmission. Tr. 1223-24, 1232, 1235, 1277. Her expert, Jerry Wallingford, theorized that, as a result of the impact, the thin metal heat shield designed to protect the floor pan and lines from the heat of the catalytic converter was driven up toward the lines, trapping and pinching them against the floor pan. Tr. 1204-09, 1262-65. He further asserted that a sharp folded seam developed in the floor pan as a result of the impact, and that this seam cut the fuel lines as they were crushed up against

[6] The situation is similar to when a mechanic opens a valve on the line in order to work on the system; once the pressure is relieved, although fuel remains in the lines themselves, only a small amount is released. Tr. 1686 (technician would generally just "catch it in his shop rag"). See also Tr. 1088 (plaintiff's expert Miller, in discussing working on fuel lines, refers to using rag to keep fuel from running down arm).

the floor pan by the heat shield. Id. He claimed additional guarding would have prevented any breach, citing a plastic guard used on a General Motors line as an example. Tr. 1227-30. However, he admitted that the GM Chevrolet truck, like Coleman's Ford, did not have such a guard in the area where the fuel lines cross over from the side rail to the transmission.[7] Tr. 1267-68.

Ford, by contrast, presented evidence to the jury that (i) as discussed above, the fire originated in the cab of the truck, not in the area of the fuel lines, Tr. 971-72, 1597-98, 1601-02, 1608-15, 1622-23; (ii) the fuel lines were well designed and reasonably safe, Tr. 1277, 1281-83, 1287, 1847, 1871-72; (iii) the fuel lines were not breached in the crash, Tr. 957, 1249, 1755-56, 1760, 1782, 1831-32, 1845-47; (iv) even if the fuel lines were breached, that does not mean there was a defect as this was a severe crash, and no fuel system is designed to withstand every crash, Tr. 947, 1281, 1287; and (v) even if the fuel lines were breached, the amount of fuel released would not have been sufficient to create a sustained fire, Tr. 1643-44, 1779-80.

First, Coleman's own expert Wallingford agreed with Ford that the Ford's fuel system met all federal standards, as well as Ford's internal testing, which he acknowledged was "admirable." Tr. 1277-79. Wallingford did not contend that there was any problem with the routing, or location, of the lines. Tr. 1235. He agreed that flexible lines were necessary components in a fuel delivery system in order to account for vehicle body movement and vibration, and he had no criticism of the particular materials used in these lines. Tr. 1235, 1277, 1283. Moreover, he admitted "that no fuel system is impregnable in every crash that occurs out on our highways" and that, just because a fire occurs in a vehicle after a crash, the vehicle is not

[7] Wallingford speculated that, due to the type of bracketing used and where the fuel lines crossed over in the Chevrolet, the designers must have not considered this an area likely to be crushed. Tr. 1268.

necessarily defective. Tr. 1281, 1287.[8] Indeed, Wallingford stated that the breach of a line in a test performed by Miller, another of Coleman's experts, does not by itself mean it is defective. Tr. 1271.

In addition, Ford's fuel system expert Larry Ragan designed an extensive model of the Ford F-150 which he used to explain to the jury that, in his opinion, the fuel lines would have ended up behind the fold, or crease, in the floor pan which Sandra Coleman's experts said had breached the fuel line. Tr. 1751-60. Thus, he testified that the lines could not have been breached in the manner she alleged. Tr. 1751, 1760.

Further, in contrast to the "guillotine test" performed by Coleman's expert Miller, which simply placed various fuel lines between two rigid materials, Tr. 1127, 1146-47, 1833-34, Edward Caulfield, Ford's expert in materials science, conducted a test where he crushed together all the actual components at issue (the floor pan with a fold simulating the crash damage at issue here, the fuel line, the heat shield, and the catalytic converter, Tr. 1826, 1834, 1836, 1842), and the fuel line was not breached due to its strength and to the deformable nature of the floor pan and shield components alleged to have breached it in the accident. Tr. 1845-46. Accordingly, even had the fuel lines been in the location suggested by Coleman, they would have withstood the impact. Tr. 1846-47. Caulfield showed the jury photos taken after his test which illustrated by chalk marks how the heat shield had actually wrapped around the fuel line and touched the floor pan on either side of the line without causing damage to the line itself. Tr. 1844, 1846.

Finally, as discussed in Part E above, Ford put on evidence that very little fuel would have been released from the lines even if there had been a breach. Although there was a question in this case as to whether the inertia switch had been triggered in this accident, Tr. 1772-78, the

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[8] Although the transcript says "affected" instead of "defective," that is illogical in the context. Tr. 1281.

computer module would have also turned off the fuel pump only a tenth of a second slower than the inertia switch would have. Tr. 1781. Newell and Ragan both testified that a breach would cause an instant loss of pressure in the line, so that very little fuel would be released. Tr. 1643-44, 1779-80.

SUMMARY OF THE ARGUMENT

This Court must affirm the judgment in Ford's favor because the jury properly found no defect in the fuel system of Randy Coleman's F-150 truck. Coleman's brief emphasizes alleged errors that have no relationship to the jury's resolution of the issue of defect. Coleman is wrong in her contention that the Circuit Court improperly admitted evidence of her late husband's intoxication and improperly allowed the jury to allocate fault to him, but this Court need never reach those issues. Coleman's arguments directed to the jury verdict itself likewise lack merit.

Coleman does not and cannot argue that the record contains insufficient evidence to support the verdict. Her contention that the verdict was against the weight of the evidence is untenable on this record. Her own design expert, Jerry Wallingford, admitted, among other things, that reasonable engineers could differ on whether the fuel line should have had more guarding, as he contended. Tr. 1282-83. He agreed with Ford's expert that the fuel system satisfied all federal standards as well as Ford's stronger internal guidelines. Tr. 1277-79. On the face of this record, then, the Circuit Court did not abuse its discretion in denying Coleman a new trial.

Likewise, the Court did not abuse its discretion in the conduct of voir dire. Coleman complains that the Court seated four jurors who owned a Ford F-150. However, she does not establish that such ownership creates a potential for bias, nor does she cite a single case in which potential jurors have been excused for cause because of their ownership of a vehicle at issue in the case. Moreover, each of the jurors affirmed the ability to act solely on the evidence and the

law presented at trial and Coleman provides no reason why the Court should have disregarded those assurances.

The Court committed no reversible error in excluding limited portions of the deposition of Ford's representative Sunil Sharma. In this case involving a Teflon and fiberglass fuel line, the Court properly excluded as irrelevant testimony concerning fuel tanks and a nylon and plastic fuel line. The Court excluded two other portions of the deposition for lack of a proper foundation. Although the Court said that the evidence might be admitted later if a proper foundation was laid, Coleman made no attempt to do so.

In closing argument, Ford's counsel properly criticized Coleman's failure to introduce any evidence of substantially similar accidents involving the fuel system of the F-150. Ford had properly objected to grossly overbroad discovery requests on this subject, and Coleman never moved to compel. Despite Coleman's failure to pursue such evidence, the Court sustained her objection to the argument of Ford's counsel. There is no authority supporting her argument that the Court should have gone further by instructing the jury to disregard the argument.

Coleman's remaining arguments bear no relation to the issue of defect resolved by the jury. She asserts in a conclusory fashion that these unrelated alleged errors generated bias and prejudice against her, entitling her to a new trial. The Circuit Court did not abuse its substantial discretion in declining to order a new trial.

The Court properly admitted Ford's expert testimony on fire causation. Neither Ford's expert nor Coleman's expert was able to identify with certainty the ignition source which began the fire. The Court admitted the testimony of Coleman's expert that some undetermined source ignited a fire underneath the truck that was fed by leaking fuel. Ford's expert testified that the fire originated in the cab of the truck and was fed by the contents of a can of liquid electrical tape. In treating the two experts equally, the Court committed no error.

Likewise, the Court properly admitted uncontested evidence that the blood alcohol level of Coleman's late husband substantially exceeded the legal limit. The Circuit Court relied on this Court's holding that such medical records are unprivileged in a criminal case, and properly reasoned that they should likewise be admissible in a civil case. In any event, if there was any privilege, Coleman waived it by putting her late husband's medical expenses in issue. The blood alcohol level was also clearly relevant to her late husband's misuse of the vehicle under MISS. CODE ANN. § 11-1-63(i)(Supp. 2009), as well as to the allocation of fault.

Finally, the Court properly instructed the jury on comparative fault. This Court held in Estate of Hunter v. General Motors Corp., 729 So.2d 1264 (Miss. 1999), that the negligence of a plaintiff should be used to allocate fault in a crashworthiness case. Coleman asks this Court to carve out an exception from Hunter so as to permit her to sue only for the so-called "enhanced injuries" allegedly caused solely by the supposed defect in the product. The majority rule recognizes that the jury was entitled to conclude that negligence in driving the truck may be one of the proximate causes of the enhanced injuries. The jury was therefore entitled to assess a share of liability to Coleman's late husband. Of course, in this case, it never had to do so, because the jury properly found that the Ford F-150 truck was not defective in the first place.

ARGUMENT

I. THE JURY'S FINDING THAT NO DEFECT EXISTED IN THE FUEL SYSTEM IS CONTROLLING ON THIS RECORD.

Sandra Coleman argues that Ford Motor Company breached a duty to protect her late husband from the consequences of his own drunk driving. She claims that a properly designed fuel system would have saved his life despite his head-on collision with another truck at highway speeds. The jury, however, never had to determine the cause of Randy Coleman's death,

because it found no defect in the fuel system of his Ford F-150 truck. On this record, that verdict is unassailable.

Most of the errors assigned by Sandra Coleman on appeal bear no relation whatsoever to the jury's actual verdict of no defect. All alleged errors, including the few that may pertain to the verdict itself, must be judged in light of the principle eloquently stated by our Court of Appeals:

> [O]nce a case is fairly – though not necessarily perfectly – tried to a jury and the jury has resolved the disputed issues of fact and arrived at its verdict, that verdict is entitled to substantial deference and may not be upset on appeal absent compelling reasons to do so. Roberts v. State Farm Mut. Auto. Ins. Co., 567 So.2d 1193, 1196 (Miss. 1990).

Whiddon v. Smith, 822 So.2d 1060, 1067 (Miss. App. 2002), cert. denied, 842 So.2d 578 (Miss. 2003). This principle is firmly embodied in M.R.C.P. 61, which declares, "The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." The official comment adds, "No judgment shall be reversed on the ground of misdirection to the jury, or the improper admission or exclusion of evidence, or for error as to the matter of pleading or procedure, unless it shall affirmatively appear, from the whole record, that such judgment has resulted in a miscarriage of justice." An identical rule, applying specifically to evidentiary rulings, is found in M.R.E. 103(a), which begins, "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected ... ."

Coleman does not even argue that the record lacks sufficient evidence to support the jury's verdict; indeed, contrary to her contention in Part H of her argument, overwhelming evidence supports that verdict. She does not claim that the jury was improperly instructed on the issue of defect. She complains in Part C of the exclusion of evidence which was not even identified in her post-trial motion, but she does not explain how its introduction might have affected the jury's verdict. In Part B she acknowledges that the Court sustained her objection to

Ford's absolutely accurate closing argument that she had produced no evidence of other accidents involving the alleged defect, but she asserts with no citation of authority that the Court should have gone farther to instruct the jury to disregard that entirely proper argument. Unable to cast doubt on the evidence, the arguments, or the instructions, Coleman in Part F attacks the jury itself, erroneously contending that the Court abused its discretion in permitting owners of Ford F-150 trucks to serve, despite their unimpeached assurances that they could fairly discharge their duty.

As will be seen, Sandra Coleman received a fair trial, and this Court must respect the jury's decision to reject her claim.

A. Coleman does not challenge the sufficiency of the evidence to support the verdict, and she is wrong in her contention that the verdict is contradicted by overwhelming evidence.

Coleman did not ask the Circuit Court for judgment notwithstanding the verdict but limited her request to a new trial.[9] She thus argues on appeal only that the verdict was against the weight of the evidence. Johnson, 967 So.2d at 23 ("weight of the evidence, rather than the legal sufficiency, is tested in a motion for a new trial").

But a losing litigant's argument on weight on the evidence is reviewed most skeptically on appeal. The evidence must be reviewed in the light most favorable to the jury's verdict which "is given great deference" by the reviewing court. Id. The appellate court will not reverse a trial

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[9] Although her post-trial motion was entitled "Motion for a New Trial and/or for Judgment Notwithstanding the Verdict," 40:5915, nowhere in the motion does Coleman request judgment notwithstanding the verdict or argue that the sufficiency, as opposed to the weight, of the evidence was contrary to the verdict. Likewise, her brief in this Court seeks only a new trial. In a similar situation, where plaintiffs had listed denial of a motion for JNOV as an error in the brief, but had limited their discussion to the weight, as opposed to the sufficiency, of the evidence, this Court limited its review to "the weight of the evidence and new trial issue." Venton v. Beckham, 845 So.2d 676, 684 n.2 (Miss. 2003). See also LUTHER T. MUNFORD, MISSISSIPPI APPELLATE PRACTICE § 3.5 (2006) (legal sufficiency of evidence may not be argued on appeal if no post-trial motion for jnov is filed).

court's denial of a motion for new trial unless the court abused its discretion in so ordering. Id.; White v. Yellow Freight System, Inc., 905 So.2d 506, 510 (Miss. 2004).[10]

Here, as in Johnson, "[t]he jury was free to accept or reject any or all of the testimony and evidence presented" and "chose to accept the testimony that supported [the defendant Ford] and rendered a verdict in its favor." 967 So.2d at 23. As in Johnson, the verdict in Ford's favor "does not . . . shock the conscience or rest upon a complete lack of evidence." Id. As "the overwhelming weight of the evidence is not contrary to the jury's verdict," id., but rather supports the jury's decision, the judgment should be affirmed.

In Part E of the statement of the facts, Ford has described in detail the evidence establishing that the fuel system contained no defect, the only issue addressed by the jury in rendering its verdict. Moreover, the testimony of Coleman's own design expert, Jerry Wallingford, is sufficient to withstand her claim that her evidence overwhelmed Ford's, as he admitted:

- Flexible fuel lines are necessary and are used on nearly all production vehicles. Tr. 1277.
- The testing presented by Coleman's expert Charlie Miller, which Wallingford relied upon (exclusively it appears) in forming his opinion of defect in this case, is a comparative test, but it did not test production fuel lines from any pickup truck other than the F-150, and it did not test any production fuel lines from any non-Ford vehicles. Tr. 1269-70. The test was not based on any published protocol. Tr. 1272.
- The fact that a fuel line was breached in the test conducted by Miller does not mean the line is defective. In fact, one of his proposed alternative designs, woven stainless steel, was breached in the Miller testing. Tr. 1270-71.
- The Ford F-150 meets and exceeds FMVSS 301, the standard developed to ensure vehicles are safe on the nation's highways. Tr. 1251, 1277.

[10] "The existence of trial court discretion, as a matter of law and logic, necessarily implies that there are at least two differing actions, neither of which if taken by the trial judge will result in reversal." Id.

- The Ford F-150 meets Ford's heightened internal guidelines. Tr. 1277-78.
- Ford in designing and proving out its vehicle designs has an admirable test protocol. Tr. 1279.
- No manufacturer tests its vehicles at higher crash speeds than Ford. Tr. 1279.
- The routing on the Ford F-150 was safe and appropriate. Tr. 1235.
- He has no criticism of the use of fiberglass flexible lines, Tr. 1283; other manufacturers use fiberglass lines, id.; he has no criticisms of Ford's engineering specifications (setting forth the strength and component performance standards) for the flexible lines, Tr. 1280-81.
- He knows of no published papers or studies criticizing the use of these fiberglass flexible fuel lines. Tr. 1273.
- The fact of a fuel fed fire, even if it were proven, does not mean a vehicle is defective. Tr. 1281.
- No fuel system is impregnable in all crashes. Tr. 1287.
- Reasonable engineers will differ on whether this line should have had more guarding as he contended. Tr. 1282-83.
- He did no independent testing to support his opinions. Tr. 1255.

When, based on these admissions and other evidence, Ford moved for directed verdict at the close of Coleman's case, the Court expressed its valid concern about the sufficiency of her evidence and took the matter under advisement for further review at the close of all evidence. Tr. 1436-37. The jury's verdict — based on a finding that the vehicle was not defectively designed as Coleman alleged — is amply supported by the evidence presented at trial, and she presents no support for her conclusory claim otherwise. Her motion for new trial should therefore be denied.

B. The Court properly conducted voir dire and seated an impartial jury.

Coleman complains that jurors who owned Ford F-150 trucks should have been excused for cause. However, every member of the venire, including the four seated jurors who owned a Ford F-150, affirmed the ability to act solely on the evidence and the law presented at trial. Tr.

213-14. The Court accepted those representations, Tr. 233-44, and Coleman has a steep hill to climb to demonstrate that the Court acted improperly.

This Court has carefully explained its standard of review in such cases:

> We have noted that "[a] trial court has wide discretion in determining whether to excuse prospective jurors, including those challenged for cause. Smith v. State, 802 So.2d 82, 86 (Miss. 2001). Further, the trial judge "due to his presence during the voir dire process, is in a better position to evaluate the prospective juror's responses ..." Id. (citing Wells v. State, 698 So.2d 497, 501 (Miss. 1991)). Therefore, we will not set aside a determination that a juror is fair and impartial unless the trial judge was clearly wrong. Id. (citing Wells, 698 So.2d at 501).

Mississippi Transp. Comm'n v. Highland Dev., LLC, 836 So.2d 731, 738 (Miss. 2002). The Court does have a "duty ... to see that the jury selected to try any case is fair, impartial and competent," Brown v. Blackwood, 697 So.2d 763, 769 (Miss. 1997), reh'g denied, 700 So.2d 331 (Miss. 1997), but this Court reviews the discharge of that duty for abuse of discretion. As the Court of Appeals has described this Court's precedents, "The selection of jurors is a judgment call peculiarly within the power of the circuit judge, and it will not be disturbed on appeal absent a clear showing of an abuse of discretion." Smith v. Parkerson Lumber, Inc., 888 So.2d 1197, 1205 (Miss. 2004).

The Circuit Court's task, which this Court must review, requires consideration of two factors. As this Court has explained:

> In considering the issue of the impartiality of a juror two competing forces enter into the equation. These two forces are first the factor or circumstance which tends to indicate a potential for bias on the part of that juror and secondly the juror's promise that he or she can and will be impartial.

Toyota Motor Corp. v. McLaurin, 642 So.2d 351, 356 (Miss. 1994). Coleman fails to establish error on either factor.

In seeking to establish "a potential for bias," id., Coleman relies only upon cases in which the jury included patients of a physician who was a party to the case. Brown; Hudson v. Taleff,

546 So.2d 359 (Miss. 1989); Davis v. Powell, 781 So.2d 912 (Miss. App. 2000). Similarly, in Toyota, more than half of the venire who appeared for voir dire had been represented at one time or another by plaintiffs' counsel. 642 So.2d at 355. The relationship between attorney and client, like that between doctor and patient, partakes of a personal and sensitive nature. That is why our law protects the confidentiality of those relationships in M.R.E. 502 and 503. By contrast, this Court has not so far seen the need to create a mechanic's privilege.

Coleman does not claim that there is any 'statistical aberration' of the makeup of the venire." Toyota, 642 So.2d at 357 (quoting Hudson, 546 So.2d at 363). Motor vehicles have been sold in Mississippi for over a century. Throughout that period, our courts have impaneled juries to resolve claims against vehicle manufacturers. At no point has any decision from this Court or any other suggested that the owner of a particular vehicle has "a potential for bias" either for or against its manufacturer. Absent such potential, it cannot be said that "a reasonable challenge has been made" to the seating of these jurors. Scott v. Ball, 595 So.2d 848, 850 (Miss. 1992).

Even if Coleman could have established "a potential for bias," she offers no reason to disregard "the juror's promise that he or she can and will be impartial." Toyota, 642 So.2d at 356. She argues that such jurors "would be more difficult to convince of the defect and would have undue influence on other jurors." Coleman Brief at 30. Regarding the first complaint, the Court accepted the word of each juror "that Ford and the Colemans would start off on an even playing field." Tr. 233. As for influencing other jurors by communicating information learned outside of the trial, the Court said, "I'll instruct them on that issue," Tr. 234, and did so, 39:5761.

Coleman offers no reason to suppose that the Court's actions did not secure the "fair, impartial and competent" jury to which all parties were entitled. Because the Circuit Court did

not abuse its discretion in seating the challenged jurors, this Court must reject Coleman's contentions.

C. The Court properly excluded irrelevant testimony of Ford's representative.

During discovery, Coleman's counsel took the deposition of Sunil Sharma, an engineer at Ford who had been designated, pursuant to M.R.C.P. 30(b)(6), to provide testimony on behalf of Ford. The Court admitted some portions of Sharma's deposition and excluded others.

"This Court reviews a trial judge's decision to admit or deny evidence under an abuse-of-discretion standard." Robinson Property Group, L.P., v. Mitchell, 7 So.3d 240, 243 (Miss. 2009). Even where evidence might be admissible in some circumstances, this Court treats with deference a trial court's decision to exclude it. In Robinson Property, this Court held that collateral-source payments could be introduced to impeach a plaintiff's claim of financial difficulty. However, this Court upheld the exclusion of such evidence in that case because "the circuit court 'did not believe the plaintiff's comment was unduly prejudicial toward the defendant.'" Id., at 246.

Even where a trial court errs in excluding evidence, reversal is not automatic. In Baine v. River Oaks Convalescent Ctr., 791 So.2d 844, 847 (Miss. App. 2001), the Court of Appeals concluded that "the judge erred in excluding the evidence of Mitchell's 1997 conviction." Reversal, however, did not follow. The Court explained:

> Furthermore, "a party must do more than simply show some technical error has occurred before he will be entitled to a reversal on the exclusion or admission of evidence; there must be some showing of prejudice." Pham v. State, 716 So.2d 1100, 1101 (Miss. 1998).

791 So.2d at 847.

Coleman seeks to include two portions of the Sharma deposition which are plainly irrelevant under any circumstances.

First, Coleman's counsel had questioned Sharma about an article written in 1988 by a Ford engineer. The Court admitted Sharma's testimony concerning the article's references to "a pressurized fuel system," Ex. P-66 at 158:2, because the 1999 Ford F-150 has such a fuel system. The excluded portion of Sharma's testimony concerns the article's references to plastic and nylon fuel lines used during the 1980s. The Court properly observed, "I'm having a hard time seeing how discussions in '84 and '85 about nylon fuel lines that are not apparently at issue here in '99, how that's relevant." Tr. 566. Coleman does not even attempt to explain how the exclusion of this irrelevant evidence could have affected the verdict the jury actually rendered on the fuel line at issue here.

Second, Coleman challenges the exclusion of certain portions of Sharma's testimony concerning the training of Ford engineers. The Court admitted Sharma's confirmation that Ford teaches its engineers "to state the facts more than the opinions" when drafting test reports. Ex. P-66 at 122:8. However, the Court excluded his discussions of the application of that principle to the failure of a fuel tank, because "when you're talking about exploding gas tanks, that's not what this is about." Tr. 554. Coleman's current argument concerning "Ford's mental state and/or attitude and knowledge with respect to poor performance or failures of its fuel systems," Coleman Brief at 27, was not even presented to the Circuit Court. In any event, evidence purportedly concerning Ford's knowledge could have had no impact on a jury that found no defect in the fuel system in the first place.

With regard to the two remaining portions of the Sharma deposition, the Circuit Court acknowledged that the testimony might possibly be admitted under proper circumstances with a proper foundation. The Court invited Coleman's counsel to offer the testimony in rebuttal, but Coleman never did so.

First, Coleman's counsel had examined Sharma concerning the fuel line on the Ford Taurus, but Sharma was not sufficiently familiar with the design to respond. Ex. P-66 at 81:18-82:6. The Court observed that counsel's description of the Taurus design was unsupported by the record: "[Y]ou're assuming a fact that's — that's not in evidence at this point in time, is the only way I know to say it. It very well may be relevant, but who said that who's a witness? Not you." Tr. 536-37. Coleman continues to claim that she had requested testimony on that design in her deposition notice to Ford, Coleman Brief at 27, but the deposition notice, R.E. 22, Ex. P-68, contains no such topic. The Court nevertheless invited Coleman's counsel to try again: "The questioning about knowledge of the '97 Taurus may very well become relevant as far as rebuttal goes." Tr. 598. However, Coleman failed to offer testimony on rebuttal. Tr. 1879-80. The Court properly ruled that she had failed to establish a foundation for its reception in her case in chief.

Finally, Coleman sought to introduce Sharma's testimony concerning a survey taken of Ford engineers attending a fuel system design class, in which a small minority expressed reservations concerning some aspects of Ford's testing program. Coleman's design expert, Jerry Wallingford, had not yet testified, and Ford counsel disputed whether he would present any criticism of the testing of the fuel system in question. Tr. 575. The Court expressed some concern about the inability to identify the date of the survey, but the Court also doubted the extent to which testing would become relevant. The Court declared:

> Your objection is sustained insofar as it deals with their case in chief. However, I may revisit it, and it may very well be admissible for rebuttal.
>
> So that any reviewing court will understand what my concerns are about this, I understand the parties, I'm called to try to figure out, one, when this test was conducted, and two, whether there's been any changes in that protocol from '91 to '98.

Tr. 575-76. Coleman's counsel never provided that information to the Circuit Court, and she does not provide it in her brief to this Court.

The Circuit Court carefully considered multiple aspects of the lengthy deposition of Sunil Sharma. The Court allowed Coleman to present the great bulk of that deposition to the jury. The Court acted well within its discretion by excluding the portions challenged in Coleman's brief. She does not and cannot demonstrate that "a substantial right of the party [was] affected" by the exclusion of the evidence, within the meaning of M.R.E. 103(a). No error, much less reversible error, is disclosed by this record.

D. The Court, having sustained Coleman's objection to Ford's argument concerning her failure to introduce evidence, did not abuse its discretion by not telling the jury to disregard it.

Coleman introduced no evidence at trial of any substantially similar accidents involving the fuel system of the Ford F-150 truck. Of course, had sufficiently similar accidents existed, that fact would likely have been admissible, Johnson v. Ford Motor Co., 988 F.2d 573, 579 (5th Cir.1993), but Coleman presented nothing. Accordingly, in closing argument, Ford's counsel observed that "we would have heard loads of evidence about accident after accident. We haven't heard that." Tr. 1979-80. Mississippi law permits counsel to argue an adversary's failure to produce relevant evidence, Bynum v. Swiss American of Miss., Inc., 367 So.2d 906 (Miss. 1978), and the Circuit Court erroneously sustained Coleman's objection. Tr. 1982. Coleman argues to this Court that the Circuit Court should have compounded its error by instructing the jury to disregard the argument. Even had the argument been objectionable, the Court clearly did not abuse its discretion in declining to go further than it did.

Coleman attempts to disguise her own lassitude in discovery as a trial error of the Circuit Court. She complains that Ford should have provided such evidence in discovery, but she knows that her ability to pursue that argument is foreclosed by her failure to file a motion to compel, as

this Court unmistakably held in Tennin v. Ford Motor Co., 960 So.2d 379, 393-95 (Miss. 2007). Having failed to follow the steps provided by our law to secure relevant evidence, she seeks to restrain Ford from reminding the jury of her failure.

Moreover, Ford acted entirely properly in its response to a grossly overbroad discovery request. Coleman asked Ford to designate a witness to testify concerning all suits and claims since 1980 regarding "a propensity for the gasoline tank or fuel lines or components to ignite upon a collision or impact." R.E. 22, Ex. P-68 at 2. Ford timely objected to the overbreadth of the request, but nevertheless produced a list of suits and claims concerning post-collision fuel-fed fires in F-150 trucks for the model years 1997-2003, as well as a list of such claims and suits involving its somewhat similar F-250 truck for the model years 1997-1999. 40:5977 – 41:6025, 41:6028. Ford never agreed to produce a witness who could testify about every incident on the list, and Sunil Sharma did not do so.

Ford presented its corporate representative for examination on September 3, 2004, over three years before trial. Either before or after that deposition, Coleman's counsel could have examined the list of suits and claims to determine which ones it believed sufficiently similar to require further investigation. They could have asked the Court to compel further discovery. They did not do that and instead announced ready for trial on February 19, 2008. Tr. 126. Tennin squarely forecloses their ability to complain about the discovery Ford produced.

Coleman's failure to cite a single case in support of her contention that the jury should have been admonished to disregard the argument demonstrates the peculiarity of her position.[11] Ordinarily, where, as here, "the objection is sustained, it is further the duty of trial counsel to

[11] Indeed, her failure to cite authority is fatal to her claim of reversible error on this issue. "[F]ailure to cite any authority in support of a claim of error precludes this Court from considering the specific claim on appeal." Grenada Living Ctr., LLC v. Coleman, 961 So.2d 33, 37 (Miss. 2007).

move for a mistrial." Smith v. State, 907 So.2d 389, 397 (Miss. App. 2005), cert. denied, 910 So.2d 574 (Miss. 2005). The decision whether to grant a mistrial is reviewed by this Court only for abuse of discretion. Lee v. State, 837 So.2d 781, 785 (Miss. 2003). Coleman, however, made the tactical decision not to seek a mistrial, but to seek only an instruction to disregard the comment to which objection had already been sustained.[12] However, "in most situations, putting the jury on notice of an improper comment by counsel is sufficient to cure any prejudice to a defendant." Smith, 907 So.2d at 397. Moreover, while the Circuit Court in this case did not grant a special instruction at the time, it had already instructed the jury:

> Arguments, statements and remarks of counsel are intended to help you understand the evidence and apply the law, but are not evidence. If any argument, statement or remark has no basis in the evidence, then you should disregard that argument, statement or remark.

39:5762. The Court's decision to sustain the objection was certainly sufficient to advise the jury of the Court's view that it lacked a proper basis. There is no reason to suppose that the jury ignored the instruction to disregard such remarks. The Circuit Court committed no reversible error in declining to tell the jury to disregard the true statement by Ford's counsel.

II. COLEMAN'S OTHER ARGUMENTS BEAR NO RELATION TO THE DETERMINATIVE VERDICT OF NO DEFECT AND OTHERWISE LACK MERIT.

Coleman devotes the vast majority of her argument to issues which have no bearing whatsoever on her claim of defect in the fuel system of the Ford F-150 truck, the theory the jury rejected by its verdict. In Part G of her argument she complains of the admission of the expert opinion of Ralph Newell as to possible ignition sources of the fire that he testified began inside

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[12] In a somewhat similar case, the Missouri Court of Appeals reviewed a trial court that sustained an objection but went no further. That Court declined to reverse absent "a manifest abuse of discretion," and it found "no abuse in the trial court's discretion in refusing to grant a mistrial or to instruct the jury to disregard the comment." Missey v. Kwan, 595 S.W.2d 460, 462 (Mo. App. 1980).

the cab even though she does not claim that any defect ignited the fire. In Part A, she contends at great length that the jury should not have been instructed on principles of comparative fault, nor should it have been told that her late husband's whole blood alcohol concentration was over 0.20%, well over twice the legal limit.

Coleman barely acknowledges that these issues have nothing to do with defect, the fundamental allegation that she failed to prove to the jury. In Part H she asserts in a perfunctory manner that "this aggregate of errors resulted in bias, passion and prejudice against the Appellant/Plaintiff." [13] Coleman Brief at 37. As already noted, however, the jury's "verdict is entitled to substantial deference and may not be upset on appeal absent compelling reasons to do so." Whiddon, 822 So.2d at 1067. A Circuit Court's decision to reject a motion for new trial on the basis of passion and prejudice is reviewed for abuse of discretion. Shields v. Easterling, 676 So.2d 293, 298 (Miss. 1996).

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[13] In Part E of her brief, Coleman also faults the Circuit Court for not reading the preliminary instruction regarding jurors' note taking found in U.C.C.C.R. 3.14(2)(b). Coleman did not object to the Court's allowing the jury to take notes, nor did she fault the Court's comments to the jury at the start of the trial for not quoting verbatim from the rule. Tr. 331 ("you can't share your notes"; "[y]our notes are only for your own recollection"); Tr. 369-70 ("remember my instructions to you about note-taking"; "for your own recollections"; "can only use them to refresh your memory, not each other's memory"; says they will be sealed and kept by the bailiff at the end of each day). See also Tr. 1706 ("And I think I've told them from the beginning they're just for your use, you can't share them, you can't use them to refresh others' recollection, and, you know, I'll give them a similar instruction that says that."). Coleman did raise Rule 3.14 during the discussion of jury instructions, and the Court changed its standard instruction on the issue to conform to the rule. 39:5771, Tr. 1896-98, 1959. However, no error was intimated in the failure to quote the rule's preliminary instruction until Coleman confusingly stated in her post-trial motion that "[t]he Court erred in giving a Preliminary Instruction, as stated in Uniform Circuit and County Court Rule 3.14, before permitting the jury to take notes." 40:5921.

Coleman makes no effort to establish how the Court's variances from the rule's language have resulted in any prejudice so as to require a new trial. See Vardaman v. State, 966 So.2d 885, 890-91 (Miss. App. 2007) (refusing to reverse where judge read instruction regarding note taking during examination of first witness as opposed to earlier because delay was harmless error; "[t]o warrant reversal on an issue, a party must show both error and a resulting injury"; "[a]n error is only grounds for reversal if it affects the final result of the case"); Martin v. State, 872 So.2d 713, 723 (Miss. App. 2004) (although was error at the time of trial to allow jurors to use notes during deliberations, error was harmless; court had instructed jury during jury instructions regarding the use of the notes without objection and the subsequent adoption of Rule 3.14 rendered any error harmless).

Coleman makes no effort to explain how error on any of these issues unrelated to defect could have affected the jury's verdict on that issue. Even if the Circuit Court erred on any or all of these issues, this Court cannot conclude that Circuit Court abused its discretion in denying Coleman a new trial. Accordingly, there is no need for this Court to address these issues at all. Should the Court nevertheless choose to do so, it must necessarily find that, not only did the Court not abuse its discretion, but its rulings were correct in every respect.

A. Ford's expert testimony on fire causation was properly admitted.

Coleman has never claimed that any defect in the Ford F-150 truck ignited the allegedly leaking fuel. Rather, she claims that a spark or some other source, which her expert William Bush could not identify with certainty, ignited a fire underneath the truck that was fed by leaking fuel. Tr. 925-26. Ford's expert, Ralph Newell, offered the contrary opinion that the fire originated in the cab of the truck, not underneath it. The fire was fed by the contents of a can of liquid electrical tape, not by gasoline from breached fuel lines. Newell stated his opinion without equivocation:

> Based on my investigation and training, my opinion, my - - I determined this fire originated under the front seat of the F-150 operated by Mr. Coleman.
>
> It did not - - it did not originate under the vehicle where the fuel lines were. This fire originated as a result as a flammable material in a can that was violated during the impact some way, became ignited. And that's the origin and cause of the fire.

Tr. 1597. Newell identified several possible sources of ignition within the cab of the truck, although, like Bush, he could not specify with certainty which one had caused the fire. Tr. 1622-23.

Coleman here repeats the argument she made before the Circuit Court that the failure to determine with certainty the source of the ignition rendered the entirety of Newell's opinion inadmissible. The Court cogently explained its reasons for rejecting this argument:

> If your objection is that he can't say to a reasonable degree of certainty, based upon his expertise and training, what the origin was within the cab, and I apply that same standard, then I'm about to dismiss this case, because your expert, Wallingford, couldn't say to a reasonable degree of certainty we've got two origins. We've got a potential arcing problem or we've got a potential catalytic converter fire, or something hot, as I recall, and - - and Mr. Bush is the same way.
>
> There's some - - within this, apparently, there's some latitude you have got to give these experts, and I have done that to Mr. Bush and Mr. Wallingford, about ignition sources.

Tr. 1593-94.

This Court has never required absolute certainty in all aspects of an expert's opinion. A trial court principally considers whether the opinion "will assist the trier of fact to understand the evidence or to determine a fact in issue." M.R.E. 702. Applying the rule established by the Supreme Court of United States in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), this Court has stated that expert opinion must be based "on the methods and procedures of science, not merely his subjective beliefs or unsupported speculation." Mississippi Transp. Comm'n v. McLemore, 863 So.2d 31, 36 (Miss. 2003). The decision to admit expert testimony is reviewed for an abuse of discretion. Adcock v. Mississippi Transp. Comm'n, 981 So.2d 942, 946 (Miss. 2008).

Here, a whole host of evidence establishes that Newell's opinion is "based upon sufficient facts or data" and is otherwise reliable within the meaning of M.R.E. 702. Of substantial importance to Newell were the observations of the first witness, who arrived within a minute after the crash. Tr. 1601. That witness immediately saw smoke inside the cab, but none under the truck. Tr. 1602. Had the fire originated under the truck, it would have taken time to burn through the floor into the cab, but the witness saw smoke in the cab right away. Id. Indeed, because the driver's side of the trial was elevated, exposing the underside of the truck, the witness would have been unable to get close enough to see through the window had there been

fire under the truck. Tr. 1602-03. These practical observations, together with Newell's professional analysis, fully supported the opinion he offered the jury. Indeed, Coleman's expert Bush admitted the possibility that an ignition source within the cab could have ignited the liquid electrical tape. Tr. 971-72.

Coleman's counsel conducted a vigorous cross-examination of Newell. The Circuit Court properly trusted the jury to resolve this conflict in testimony. However, because Coleman failed to prove any defect in the F-150 truck, the jury never needed to do so.

B. The Court properly admitted unprivileged evidence of blood alcohol levels.

Coleman complains bitterly that the jury should never have learned that her husband's blood alcohol level at the time of the wreck was 0.23%. She claims that the medical tests on which that testimony was based are protected by the medical privilege of M.R.E. 503 and that she rendered the testimony irrelevant by purportedly limiting her claim to those losses caused by the allegedly defective fuel line, not by the wreck itself. The Circuit Court properly found the evidence unprivileged and relevant to multiple issues in this case, aside from its undoubted relevance to the cause of the collision.

In the first place, the Circuit Court properly found that no privilege attaches to evidence of the crime of drunk driving. Under Jones v. State, 858 So.2d 139 (Miss. 2003), the Court explained that, even if the privilege in this case had not been waived, public policy would demand that it not apply in these circumstances. R.E. 11, 32:4698-99. In Jones, this Court affirmed the decision of the Court of Appeals that, even though no statutory exception nor any of Rule 503's exceptions applied, "to ensure the proper administration of justice, the medical records regarding the analysis of Jones's urine specimen must be removed from the protection of the physician-patient privilege." Id., at 142 (quoting Jones v. State, 881 So.2d 209, 215 (Miss. App. 2003)).

Clearly, then, if Coleman were being prosecuted for negligently causing the death of Hudson, he could not assert privilege. Relying on Edwards v. Ellis, 478 So.2d 282, 285 (Miss. 1985), which found that evidence "admissible against a criminal defendant, to whom the law affords greater protection, ... would certainly be admissible against a civil litigant," the Circuit Court found that evidence of blood alcohol must be admissible here. R.E. 11, 32:4699. If a drunk driver cannot exclude his blood alcohol to stay out of jail, he certainly cannot exclude it so as to extort damages from his victim or any other alleged tortfeasor. The Circuit Court properly found no privilege to attach.

Moreover, even if there were a privilege under these circumstances, it was clearly waived. Coleman admits that any privilege is waived "to the extent to which the plaintiff's condition is put in issue," Scott v. Flynt, 704 So.2d 998, 1003 (Miss. 1996), reh'g denied, 703 So.2d 864 (Miss. 1997). Here, Dr. Lawrence George established that the blood tests are essential to the treatment of burn patients and are performed for every patient that enters the hospital. R.E. 22, Ex. P-62 at 43-44. Because Coleman sought recovery for all medical expenses incurred, 39:5814, Tr. 1381, she placed her late husband's medical condition, including the lab results associated with his medical treatment, directly at issue and waived the physician-patient privilege.

The Circuit Court also properly found this unprivileged evidence to be relevant to additional issues in the case. Like all product liability claims in Mississippi, this case is governed by MISS. CODE ANN. § 11-1-63 (Supp. 2009). Under § 11-1-63(a)(iii), plaintiff must prove that the alleged defect in the Ford vehicle "proximately caused the damages for which recovery is sought." Although Coleman asserts that she is only seeking damages for those "enhanced injuries" allegedly caused solely by a defect in the Ford vehicle, it is up to the jury to decide which injuries resulted from which causes. To do that, the jury must have evidence of all

of the causes contributing to all of Coleman's injuries. Obviously, the jury could reasonably conclude that, had there been no crash, there would have been no injuries.

As this Court held in Estate of Hunter v. General Motors Corp., 729 So.2d 1264, 1273 (Miss. 1999), it would be unfair to allow Coleman to control the causation evidence considered by the jury. Thus, she cannot arbitrarily state that she has already determined which injuries resulted solely from the alleged product defect and that she is suing for those injuries only. Indeed, the amount of medical bills submitted to the jury by stipulation, 39:5814, Tr. 1381, included expenses for all of Coleman's treatment, not just those related to his burn injuries for which Coleman seeks to hold Ford solely responsible.[14]

Further, the Circuit Court properly ruled that, "if the evidence shows that the Decedent herein was operating his 1999 Ford Pickup while under the influence of intoxicating beverages, a jury certainly could find that such activity constituted a misuse of the vehicle in question." R.E. 11, 32:4696. The common law defense of misuse is preserved by § 11-1-63(i).[15] See Coca Cola Bottling Co., Inc., v. Reeves, 486 So.2d 374, 387 n.1 (Miss. 1986) ("It hardly needs saying that any abusive use of a product in a manner unintended by the seller and inconsistent with the customary purpose to which the product is ordinarily put by purchasers of the product will not render the seller liable."). While plaintiff argues that drunk driving is foreseeable misuse as a

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[14] Although the parties ultimately stipulated to the present net value of Randy Coleman's lost wages, 39:5814, Tr. 1382, the Circuit Court also correctly noted that the blood alcohol evidence was relevant as to those issues. Supp. 4:309-10. Coleman's contribution to the cause of an accident resulting in the death of one person and serious injuries to two others would have significant implications for his future. Even if Coleman carried insurance which would cover his liability in tort, his earning capacity would be severely circumscribed in the penitentiary, not to mention the effect of his incarceration on his wife's and children's benefit from his society, an element of damages to which there was no stipulation. The Court observed that, "if you are sent to prison for DUI maiming, your earning potential is a little bit less and also I would think - - probably your quality of life and other matters are also less." Supp. 4:310.

[15] The jury was not instructed on misuse per se, but was instructed with regard to Coleman's intoxication and his driving duties. R.E. 18, 39:5811-12. As a result, the Circuit Court refused Ford's proposed misuse instruction as repetitive. Tr. 1957-58.

matter of law, neither Pickering v. Industria Mosina I Traktora, 740 So.2d 836 (Miss. 1999), nor any other Mississippi case holds that foreseeability shields an injured party from the consequences of his own criminal behavior. The Fourth Circuit has held the question of whether drunk driving constitutes misuse to raise a jury question under Maryland law. Binakonsky v. Ford Motor Co., 133 F.3d 281, 287-88 (4th Cir. 1998). See also Norman v. Fisher Marine, Inc., 672 S.W.2d 414, 421-22 (Tenn. App. 1984) (finding intoxicated operation of a boat to constitute misuse). This Court has never held that a manufacturer has a duty to protect a user of a product from his own crimes.

For each of these reasons, the Circuit Court properly ruled that evidence of decedent's blood alcohol was relevant to the trial of this action.

C. The Court properly instructed the jury on comparative fault, which applies to all Mississippi personal injury claims, including crashworthiness.

In Part D of her argument, Coleman complains of the Circuit Court's approving jury instructions and a verdict form which permitted allocation of fault to Randy Coleman and Janice Hudson. Even though the jury never allocated fault, because it found the Ford F-150 truck not to be defective, Coleman claims that the instructions and the evidence of her late husband's fault somehow prejudiced her claim against Ford. In addressing errors asserted as to jury instructions, this Court reads the instructions "as a whole to determine if the instructions were proper." Davis v. State, 18 So.3d 842, 847 (Miss. 2009). "[I]f all instructions taken as a whole fairly, but not necessarily perfectly, announce the applicable rules of law, no error results." Id. (quoting Milano v. State, 790 So.2d 179, 184 (Miss. 2001)). In fact, the Circuit Court properly applied Mississippi's law of comparative fault and properly allowed the jury to consider decedent's intoxication.

In all cases alleging "fault" which serves as "a proximate cause of injury or death to another person,"[16] our law declares that "a joint tort-feasor shall be liable only for the amount of damages allocated to him in direct proportion to his percentage of fault." MISS. CODE ANN. § 85-5-7(3) (Rev. 1999).[17] See also MISS. CODE ANN. § 11-7-15 (Rev. 2004) ("[i]n all actions hereafter brought for personal injuries, or where such injuries have resulted in death, ... damages shall be diminished by the jury in proportion to the amount of negligence attributable to the person injured") (emphasis added). The Legislature has unmistakably mandated that principles of comparative fault should apply in every personal injury action, including those governed by § 11-1-63.[18]

The Court in Hunter unequivocally held that the comparative fault principles of § 85-5-7 apply in a crashworthiness case. There, the plaintiffs argued that the jury should not have been allowed "to apply principles of comparative negligence with regard to the crashworthiness cause of action" — the exact argument Coleman is making in this case. 729 So.2d at 1271. The Hunter plaintiffs argued that some courts had "distinguished crashworthiness lawsuits from other strict liability cases based on the unique aspects of the crashworthiness cause of action, which is

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[16] This definition from MISS. CODE ANN. § 85-5-7(1) (Rev. 1999) excludes intentional torts.

[17] Because this action was filed in 2002, the newer provisions of MISS. CODE ANN. § 85-5-7 (Supp. 2009) do not apply.

[18] In contrast, Oklahoma law, as applied in Black v. M & W Gear Co., 269 F.3d 1220 (10th Cir. 2001), cited at page 15 of Coleman's brief, does not apply principles of contributory or comparative negligence in product liability cases. Id., at 1235. But see Moody v. Ford Motor Co., 2006 WL 3325425, *4 (N.D. Okla. Nov. 14, 2006) (although stating that jury will be instructed that contributory negligence is no defense in products liability cases, nevertheless allows defendant to present evidence that the decedent was speeding at the time of the accident as "relevant to the issue of causation and the extent of plaintiff's alleged injuries for which defendant should be liable"). The Moody court relied on two Oklahoma cases in which "the Oklahoma Supreme Court permitted the defendant to introduce evidence of plaintiff's alcohol consumption because it was relevant to causation." Id., at *3 (citing Fields v. Volkswagen of America, Inc., 555 P.2d 48, 57 (Okla. 1976); Kirkland v. General Motors Corp., 521 P.2d 1353, 1366 (Okla. 1974)).

concerned with the results of a collision rather than the fault in causing the accident." Id. The Court, however, noted that the plaintiffs' position "represents the clear minority view on this issue." Id.[19]

The Court looked to Mississippi apportionment law to determine "[w]hether comparative negligence principles should apply in crashworthiness cases at all, i.e., should the jury be permitted to consider the fault of parties whose negligence caused the accident in the same formula in which the jury considers the liability of the crashworthiness defendant?" Id., at 1272. The Court determined that "the policy considerations underlying the comparative fault doctrine would best be served by the jury's consideration of the negligence of all participants to a particular incident which gives rise to a lawsuit." Id., at 1273 (emphasis added). See also id., at 1280 ("the jury on remand shall consider the fault of all parties who may have contributed to the plaintiffs' injuries").

This holding is consistent with the majority view that a plaintiff's comparative fault

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[19] The Court quoted Hildy Bowbeer & Bard D. Borkon, Recent Developments in Crashworthiness Litigation, 450 PLI/Lit 9, 37 (1992) ("[w]hile plaintiffs have typically argued that accident-causing factors and injury-causing factors are qualitatively different and must be argued separately, the modern trend rejects this piecemeal approach, focusing the inquiry on the product design as an integrated whole and considering all the factors which contribute to the event which causes the injury") (emphasis added). The Court also noted the changes made to drafts of the RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (hereinafter "RESTATEMENT") in which the debate had focused on the fact that "allowing an exception from apportionment would mean that the drunk driver, whose fault would be relevant as to liability of other negligent persons who caused the initial accident, would recover full enhancement damages against the product defendants," which was considered to be a "major controversy." Hunter, 729 So.2d at 1271 (quoting William J. McNichols, The Relevance of the Plaintiff's Misconduct in Strict Tort Products Liability, the Advent of Comparative Responsibility, and the Proposed Restatement (Third) of Torts, 47 OKLA. L.REV. 201, 275 (Summer 1994)). See also Heather Fox Vickles & Michael E. Oldham, Enhanced Injury Should Not Equal Enhanced Liability, 36 S. TEX. L.REV. 417, 459 n.196 (April 1995) (hereinafter "Vickles, Enhanced Injury") ("[f]urther debate followed this switch in position, prompting additional analysis of the issue, and ultimately resulting in readoption of the majority view allowing comparison of all forms of plaintiff's fault").

should be considered by a jury in a crashworthiness or "enhanced injury" case.[20] The Iowa Supreme Court recently surveyed the law on this issue and decided to overrule its earlier decision, Reed v. Chrysler Corp., 494 N.W.2d 224 (Iowa 1992), in which that court had held that evidence of Reed's intoxication was inadmissible in his crashworthiness case.[21] Jahn, 773 N.W.2d at 558, 560. The Iowa court noted the policy behind the majority view:

> The majority view may be supported in part on the ground that it imposes upon users the responsibility to safely use products and that it would be unfair to impose costs of substandard plaintiff conduct on manufacturers, who would presumably pass on some or all of those costs to users and consumers, including those who use and consume products safely and wisely.

Id., at 554-55 (citing McNichols, supra). Like this Court in Hunter, the Iowa court also looked to the RESTATEMENT, id., at 555-56, and ultimately concluded: "In light of the Restatement (Third), the evolving case law from other jurisdictions, and our duty to interpret Iowa Code chapter 668 in accordance with the legislative intent revealed by its language, we overrule Reed and align our law with the Restatement (Third) and the majority of jurisdictions."[22] 773 N.W. 2d at 560.

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[20] See Jahn v. Hyundai Motor Co., 773 N.W.2d 550, 554 (Iowa 2009) ("majority view is that the principle of concurrent causation applies to cases involving enhanced injuries and, as a result, the principles of comparative fault apply"); Meekins v. Ford Motor Co., 699 A.2d 339, 343-44 (Del. Super. Ct. 1997) ("majority of the reported opinions hold that 'any fault on the part of the plaintiff in causing the initial accident operated to bar or reduce recovery in the enhanced situation'") (quoting CCH Product Liability Reporter § 3030 at 6903 (1995)); Whitehead v. Toyota Motor Corp., 897 S.W.2d 684, 693 (Tenn. 1995) ("majority view among jurisdictions that have considered this question is that comparative fault should be applied to such an enhanced injury case"); RESTATEMENT § 16, Reporters' Note on cmt. f (1998) ("majority of courts, however, allows the introduction of plaintiff's conduct as comparative fault in a crashworthiness context").

[21] See Hunter, 729 So.2d at 1271 ("[t]he Reed decision represents the clear minority view on this issue").

[22] The Jahn court noted that the dissent in Reed, in which the judge "argued that the plaintiff's negligence was a proximate cause of the enhanced injury," "is a clear articulation of the majority view which has prevailed in a number of jurisdictions and which has been embraced in the Restatement (Third) of Torts section 17(b)." 773 N.W.2d at 558.

The cases cited at pages 15 and 16 of Coleman's brief, of course, represent the minority view. See D'Amario v. Ford Motor Co., 806 So.2d 424, 433-36 (Fla. 2001) (discussing minority view; cites Reed as well as cases cited in Coleman's brief, Jiminez v. DaimlerChrysler Corp., 269 F.3d 439 (4th Cir. 2001), and Andrews v. Harley Davidson, Inc., 796 P.2d 1092 (Nev. 1990)).

While Coleman relies heavily on Judge Pepper's decision in Maxwell v. Ford Motor Co., No. 2:02CV308-P-A (N.D. Miss. June 22, 2004), R.E.5, 4:519-21,[23] that Court too has recently taken a new look at the issue and determined that "defendants . . . have the right to present a comparative negligence defense regarding the plaintiff driver's alleged actions or inactions." Willis v. Kia Motors Corp., 2009 WL 2134359, *2 (N.D. Miss. July 14, 2009) (Pepper, J.). The Court relied on Hunter and concluded that "the Mississippi Supreme Court . . . has endorsed the majority view that all alleged contributions to an injury in a crashworthiness claim should be considered by the jury." Id., at *1. The Court specifically rejected plaintiff's argument, like Coleman's herein, "that a plaintiff's comparative negligence has no bearing on a crashworthiness claim since the latter involves an allegation that the manufacturer defectively designed a vehicle that enhanced the plaintiff's injuries without regard to what caused the actual accident." Id.

Coleman seeks to avoid the holding in Hunter by asserting that she is only seeking damages for those injuries allegedly caused by the defective vehicle. Again, such an argument is contrary to Hunter, which rejected an interpretation of § 85-5-7 that "would grant the plaintiff the sole power to control the parties to the lawsuit and thus the evidence considered by the jury." Id., at 1273 n.4. Although, pursuant to § 85-5-7, the jury is to "allocate fault to each party 'alleged to be at fault,'" id., at 1273, the right to allege fault is not limited to plaintiffs:

[23] The Fifth Circuit did not review the Maxwell order excluding alcohol evidence because the jury returned a defense verdict. See Maxwell v. Ford Motor Co., 160 Fed. Appx. 420 (5th Cir. 2005).

> There is no indication that the Legislature intended to reserve for plaintiffs the sole and exclusive right to make allegations of fault before a jury and to deprive defendants of the opportunity to persuade a jury that fault for a given accident lies elsewhere. This State's system of civil justice is based upon the premise that all parties to a lawsuit should be given an opportunity to present their versions of a case to a jury, and the interpretation of § 85-5-7 urged by the plaintiffs would seriously infringe upon a defendant's rights in this regard in many cases.

Id., at 1273-74.[24]

Coleman proceeds on the erroneous notion that the sole proximate cause of the alleged "enhanced injuries" is the alleged defect and that Ford is solely liable for all such damages. Although this Court in Hunter did not decide whether "liability for this enhancement portion of the damages [should] be divided among all the parties or should . . . be the sole responsibility of the crashworthiness defendant," id., at 1272,[25] Mississippi law on proximate causation and the majority view followed in Hunter make clear that the jury should be allowed to conclude that even any so-called enhanced injuries were caused, at least in part, by Randy Coleman's negligence.

Mississippi law follows the majority rule that, if Randy Coleman caused this collision, then a jury could find that he bears at least some responsibility for all of his injuries to which the collision contributed, even if enhanced by an allegedly defective product. Indeed, this follows from Coleman's own allegation that the fire and burn injuries occurred because "a fuel line was breached during the collision and allowed gas to pool and ignite." R.E. 11, 32:4694 n.2 (emphasis added). Had the jury agreed that this is how the fire started, the jury would plainly

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[24] See also id., at 1273 ("would be patently unfair in many cases to require a defendant to be 'dragged into court' for the malfeasance of another and to thereupon forbid the defendant from establishing that fault should properly lie elsewhere"; "[s]uch a procedure invites inequitable results which, in certain cases, could arguably rise to the level of a due process violation").

[25] Plaintiff erroneously states that the Court in Hunter held that a defendant manufacturer is liable for enhanced injuries "without deduction for any other party's fault." Brief at 17.

have been entitled to find that Randy Coleman's negligence in causing the collision was a proximate cause of the fire and burn injuries. Indeed, it was the severity of the crash itself which led to the deformation of Coleman's vehicle such that he was trapped and had to be extricated by the jaws of life, thus causing his injuries to be more severe.

Because the jury found no defect in the fuel line, driver negligence was the sole cause of the burn injuries. Had the fuel line been defective, then Randy Coleman's negligence could be found to have been a concurring cause of the burn injuries — i.e., his negligence and the defect acted concurrently to breach the fuel line and cause the fire. This is nothing more than the ordinary application of proximate cause principles to a particular injury scenario. That is exactly why the vast majority of courts considering this issue have held that the jury must be allowed to apportion fault for any enhanced injuries between the product manufacturer and the person causing the accident.[26]

This Court has often recognized that an injury can have more than one proximate cause. See, e.g., Kiddy v. Lipscomb, 628 So.2d 1355, 1358 (Miss. 1993); Smith v. Dillon Cab Co., 245

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[26] The RESTATEMENT recognizes that there can be more than one cause of enhanced injuries or "increased harm," including the plaintiff's own conduct. Section 16(d) notes that liability for "increased harm" is joint and/or several, depending on "applicable rules of joint and several liability," with other parties "who bear legal responsibility for causing the harm." See also § 16, cmt. e (discussing "the separate causal contributions of those tortfeasors who caused the increased harm"). Section 17 governs plaintiff's fault in "increased harm" cases, *see* § 16, cmt. f, and states that "[a] plaintiff's recovery of damages for harm caused by a product defect may be reduced if the conduct of the plaintiff combines with the product defect to cause the harm and the plaintiff's conduct fails to conform to generally applicable rules establishing appropriate standards of care." See also RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 7, Reporters' Note regarding cmt. e (2000) (gives example of accident in which initial impact causes back injury, defective steering wheel causes hand injury, and treatment for hand injury causes rash; states that "[a]ny negligence of the plaintiff in causing the collision caused all three injuries" and factfinder is to include plaintiff in apportionment).

The Supreme Court of Utah has recently recognized that the RESTATEMENT rules require some modification in a state, like Utah and Mississippi, that has limited joint and several liability by statute. Egbert v. Nissan Motor Co., ____ P.3d ___, 2010 WL 565842 (Utah Feb. 19, 2010). Where a "statute calls for apportionment" in all cases, id., at *8, "the trial court shall instruct the jury that it must apportion fault," id., at *9. Accordingly, both the accident–producing fault and injury–enhancing fault are submitted to the jury for purposes of apportionment.

Miss. 198, 205, 146 So.2d 879, 882 (1962). Furthermore, "the original actor will not be absolved of liability because of a supervening cause if his negligence put in motion the agency by or through which injuries were inflicted." M & M Pipe & Pressure Vessel Fabricators, Inc., v. Roberts, 531 So.2d 615, 618 (Miss. 1988).[27] It is apparent that, even if the fuel line was breached during the collision because it was defective as Coleman alleges, her late husband's negligence set the sequence of events in motion and could be found by a jury to be a contributing proximate cause of any "enhanced injuries" resulting from the fire. Given this fact, § 85-5-7 requires that the jury be permitted to allocate fault to Coleman for all of his injuries.

Based on M & M, if the facts in this case were reversed, and Hudson had been intoxicated, crossed over the line, and ran head-on into Coleman, Hudson would be legally responsible for all of Coleman's injuries, including any alleged enhanced injuries, because she would have "put in motion the agency by or through which injuries were inflicted." M & M, 531 So.2d at 618. As found in Meekins, there is simply no reason that the causation rules should be applied differently in an enhanced injury case when the plaintiff himself is alleged to be at fault for the collision:

> Another logical hurdle inherent in plaintiff's position is this. If a plaintiff negligently crashes his vehicle into a tree and suffers an enhanced injury because of a design defect in his car, plaintiff says that the manufacturer is liable for the enhanced injury regardless of the plaintiff's negligence in causing the collision. But what if a plaintiff collides with another vehicle and the driver of that vehicle is negligent?

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[27] See also Zalut v. Anderson & Associates, Inc., 463 N.W.2d 236, 239 (Mich. App. 1990) (court finds "no merit" in plaintiff's argument "that the cause of the crash is irrelevant to the products liability action against defendants which alleges the failure to adequately protect the driver in the event of a crash"; "[i]f, as the jury found, [plaintiff's] negligent conduct contributed to the crash, then his conduct was one of the causal factors of his injury" and "his conduct was relevant in determining liability for the injuries he suffered"); Meekins, 699 A.2d at 343-44 ("is obvious that the negligence of the plaintiff who causes the initial collision is one of the proximate causes of all of the injuries he sustained, whether limited to those the original collision would have produced or including those enhanced by a defective product in the second collision").

> Assume also that the enhanced injuries caused to the plaintiff by a design defect in his car are clearly identifiable. Under ordinary rules of proximate cause the other driver would have potential liability for all of the plaintiff's injuries, but logically, following the enhanced injury theory of the plaintiff, only the manufacturer should have the liability because the other driver's conduct in causing the initial collision would not have caused the injury absent the design defect. Thus, carrying the theory to its logical conclusion, plaintiff should have no recovery against the other driver for his negligence in causing the collision. This result would run counter to well settled principles of tort law.

Meekins, 699 A.2d at 345.

The Circuit Court recognized that public policy considerations also support this view.[28] He asked at the hearing: "I can be driving at 140 miles an hour, have a blindfold on with a pitcher of martinis, steering my car with my feet and have a head-on collision with somebody and all that doesn't come in.... Let me ask you, under my theory, under my ludicrous example, then a jury wouldn't hear that I had a cinder block on the accelerator, sitting on the back seat of the car, steering it with my feet with a blindfold on drinking martinis? They wouldn't hear that?" Supp. 2:192-93.[29]

Coleman argues that Toliver v. General Motors Corp., 482 So.2d 213 (Miss. 1986), requires such a holding. But that case did nothing more than allow a cause of action for

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[28] See id. at 345-46 ("[p]ublic policy seeks to deter not only manufacturers from producing a defective product but to encourage those who use the product to do so in a responsible manner"); Vickles, Enhanced Injury, at 440 ("public policy dictates that all of the plaintiff's conduct contributing to enhanced injuries be considered in allocating fault"; "[d]river misconduct, such as driving while intoxicated or under the influence of drugs, must be deterred through the application of comparative fault rules, regardless of the type of tortfeasor the plaintiff chooses to pursue") (emphasis added); Michael Hoenig, The American Law Institute Restatement Draft, 211 N.Y.L.J. 3 (May 9, 1994) (not allowing comparative fault of plaintiff to be considered in crashworthiness cases "is unwise from the policy standpoint of deterring driver misconduct").

[29] In light of the Circuit Court's hypothetical, it should be noted that Comment f to RESTATEMENT § 16 cross-references § 17 which "provides that plaintiff's fault is relevant in apportioning liability between the plaintiff and the product seller," and notes that Comment d to that section states that "[t]he seriousness of the plaintiff's fault and the nature of the product defect are relevant in apportioning the appropriate percentages of responsibility between the plaintiff and the product seller."

enhanced injuries to go forward and overruled earlier cases holding "that no liability attaches to an automobile manufacturer in a 'second impact' type case because the alleged defect in the automobile's design or manufacture did not proximately cause or proximately contribute to the collision." Id., at 214. As the Circuit Court correctly noted, plaintiff's comparative fault was not at issue because "there was no fault attributable to Toliver ... since he was struck from the rear by another vehicle." R.E. 11, 32:4695.

Coleman seeks to focus on the language from Toliver that says "the question of causation more properly is addressed to the instrumentality causing the enhanced injury, not that which caused the collision," 482 So.2d at 214 (emphasis in original). But that language merely reflects that Toliver was considering only the liability of the manufacturer — i.e., a manufacturer can be held liable for a design defect in such a case even though it had nothing to do with causing the original accident. See also Hunter, 729 So.2d at 1272 n.3 (requiring jury instruction stating that "a defendant may be liable for enhanced injuries caused by crashworthiness defects, even if the crashworthiness defects did not cause or contribute to the accident in question").[30] Toliver did not consider the role of comparative fault in a crashworthiness case and does not hold that any other proximate causes of enhanced injuries are irrelevant and should not be considered.

In 2005, when Coleman last sought to present her argument to this Court, she relied heavily on Judge Pepper's opinion in Maxwell and the opinion of the Supreme Court of Iowa in Reed. Since then, both of those decisions have been overruled. The majority rule that this Court adopted in Hunter receives the support of an even more overwhelming majority today. Because

[30] The Court further noted that such an instruction "serves to acknowledge the unique nature of the crashworthiness lawsuit, while at the same time permitting the defendant to argue that responsibility for the plaintiffs' injuries should be allocated elsewhere." Id., at 1279-80 (emphasis added). Such an instruction was given in this case. 39:5779.

this Court has already determined in Hunter that the jury is to consider "the negligence of all participants to a particular incident which gives rise to a lawsuit," 729 So.2d at 1273, and because Mississippi law on proximate causation, in accordance with that of numerous other jurisdictions, allows a plaintiff's fault to be considered as a contributing factor to any alleged enhanced injuries, the Circuit Court correctly determined that Randy Coleman's intoxication is relevant, and it properly instructed the jury to allocate liability among all persons alleged to be at fault.

CONCLUSION

For the reasons stated herein, the Circuit Court of Lowndes County committed no error and acted well within its discretion in all respects. The judgment it entered on the jury's verdict must be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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THIS the 17TH day of March, 2010.

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