IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2009-CA-00207

SANDRA COLEMAN — PLAINTIFF- APPELLANT

VS.

FORD MOTOR COMPANY — DEFENDANT-APPELLEE

BRIEF OF APPELLANT

APPEALED FROM THE CIRCUIT COURT
OF LOWNDES COUNTY, MISSISSIPPI

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ORAL ARGUMENT 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 this Court may evaluate potential disqualifications or recusal.

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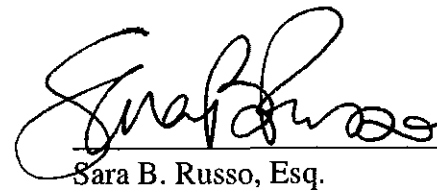

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STATEMENT OF POSITION REGARDING ORAL ARGUMENT

The Appellant respectfully requests oral argument. This appeal presents numerous legal issues, and an oral argument would be beneficial to this Court and to the parties.

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF OF APPELLANT

COMES NOW, the Appellant /Plaintiff, Sandra Coleman, by and through counsel, and files this her Brief of Appellant. The Appellant would state unto the Court that the trial court incorrectly applied the law to the facts presented at trial, which resulted in an unjust trial and injustice in the verdict. Therefore, the final judgment should be reversed and the case remanded for a new trial.

I.

STATEMENT OF ISSUES

1. Error occurred by the introduction of irrelevant evidence to establish the cause of the initial accident, and allowing the privileged medical records of Appellant's / Plaintiff's decedent over the objection of and assertion of the physician-patient privilege by Appellant / Plaintiff.

2. Error occurred in allowing evidence concerning the underlying fault and/or negligence of Appellant's / Plaintiff's decedent and the driver of the other vehicle, Janice Hudson, as it related to the first collision, which resulted not only in confusion, but created bias, passion and prejudice against the Appellant / Plaintiff, contrary to the crashworthiness doctrine. Appellant / Plaintiff sought recovery under the crashworthiness doctrine and law and sought only damages for enhanced injuries and death, related to a post-collision fire, which occurred minutes after the accident crash between Appellant's / Plaintiff's decedent Randy Coleman and Janice Hudson.

3. Error occurred in failing to instruct the jury to disregard remarks made by counsel for Appellee / Defendant in the closing argument after sustaining Appellant's / Plaintiff's objection to inflammatory comments. Those remarks concerned the inability of Appellant / Plaintiff to point out and/ or describe other incidents or accidents, which, when coupled with Appellee's / Defendant's counsel's previous objectionable statements and remarks in opening, to the same

effect, resulted in the Appellant / Plaintiff being denied an opportunity to obtain a fair trial and resulted in bias, passion and prejudice against the Appellant / Plaintiff.

4. Error occurred by the denial of the introduction of testimony and admissions contained therein of Appellee's / Defendant's M.R.C.P. 30(b)(6) corporate representative, Mr. Sunil Sharma, which testimony was excluded.

5. Error occurred by the granting of certain Appellee's / Defendant's instructions, which were contrary to the crashworthiness doctrine and in granting Appellee's / Defendant's instruction, D-3 and in the denial of instruction Appellant's / Plaintiff's jury instruction, P-20. Error was also created by not giving a Preliminary Instruction, as stated in Uniform Circuit and County Court Rule 3.14, before permitting the jury to take notes.

6. Error occurred by Appellant / Plaintiff being denied challenges for cause and in allowing current Ford F-150 owners to remain on the jury panel despite the availability of substantial available jurors.

7. Error occurred in the denial of Appellant's / Plaintiff's objection to the expert testimony of Ralph Newell, Appellee's / Defendant's fire cause and origin expert, whose testimony was speculative and was not based on reasonable certainty and was based on a claim that a propane torch or an air conditioner / capacitor could or might have somehow ignited a can of electrical tape which had been punctured by a hunting knife and this was the cause of the fire - not the defective fuel lines.

8. The verdict of the jury was against and contrary to the overwhelming weight of the evidence, the result of an aggregate of errors and the introduction of inadmissible, privileged and inflammatory evidence and objectionable statements of counsel, and the result of bias, passion and/or prejudice as against the Appellant / Plaintiff, and justice requires a new trial be granted.

STATEMENT OF THE CASE

I. Course of Proceedings and Disposition Below

The crash occurred March 23, 2001, when the deceased, Randy Coleman was operating his vehicle, a 1999 Ford F150 4x4 pickup truck in an easterly direction on and along Mississippi Highway No. 14 in Noxubee County, Mississippi. (Tr. Ex. P-11, Id) Appellant / Plaintiff filed suit on or about December 30, 2002, alleging that after the impact, the Appellant's / Plaintiff's decedent's vehicle caught fire, as a result of a breached fuel line, poorly routed and largely unprotected, leading from the tank to the fuel rail of the subject vehicle, which resulted in the decedent's severe burn injuries and eventual death on April 20, 2004. (R. 37 -43). The Coleman family is not seeking damages for the decedent, Randy Coleman's rib, ankle and traumatic damages from the accident itself, only the post-accident/collision fuel fed fire injuries and eventual death of Randy Coleman from the burn injuries. *Id.*

The trial was originally set for February 22, 2005, and was continued over Appellant's / Plaintiff's objection until March 28, 2005, and again continued to May 9, 2005. (R. 3638, 3695). The matter was stayed on April 19, 2005, on the basis of a forthcoming petition for interlocutory appeal to this Court on evidentiary rulings by the trial court on the issues of comparative fault principles in an enhanced injury case and the allowing of evidence of decedent's blood alcohol content during the trial of the matter. (R. 4267-4268, 4693-4699, 4705). A petition for interlocutory appeal was filed with this Court, and the petition and subsequent motion for rehearing were denied. (R. 4708, 4709). The trial in this matter commenced on February 19, 2008, at the Lowndes County Courthouse, Columbus, Mississippi before Honorable Circuit Court Judge James Kitchens. (R. 4712).

Previously, on or about January 4, 2005, Appellant /Plaintiff filed her Motion in Limine to

Exclude Blood Alcohol Test Results and Evidence Relating to Alcohol Consumption and her Motion in Limine to Exclude Any Reference to Randy Coleman's Comparative Fault, if Any. (R. 516-521, 680-682). These motions were heard at a pretrial conference on April 12, 2005, and a written Opinion and Order by the trial court denying these motions was filed on or about June 3, 2005. (R. 4693-4699). In this order, the trial court acknowledge that "[t]he Plaintiff herein is not seeking damages for the injuries sustained by the decedent during the actual collision of the two pickup trucks. Instead, the Plaintiff seeks recovery from the Defendants for the burn injuries the decedent suffered as a result of the fire that occurred after the initial collision." (R. 4694-4695). Despite this finding, the trial court still did not find that *Toliver v. Gen. Motors Corp.*, 482 So. 2d 213 (Miss. 1986) nor *Hunter v. Gen. Motors Corp.*, 729 So. 2d 1264 (Miss. 1999) dictated a per se exclusion of evidence regarding whether or not the decedent, Randy Coleman, was driving under the influence at the time of the subject accident. (R. 4695-4697). The trial court also refused to apply the medical privilege laws of Mississippi to the testimony and evidence regarding the blood alcohol content of Randy Coleman. (R. 4697-4699). Testimony and evidence regarding the blood alcohol content of Randy Coleman and his alleged comparative fault by the Appellee / Defendant was elicited throughout the trial of this matter from the opening statements made by counsel for Appellee / Defendant through their closing arguments. Appellee/ Defendant's expert accident reconstructionist, Jarrod Carter, went into detail regarding the fault of Randy Coleman in causing this accident despite the lack of physical evidence in any other lane of travel besides Coleman's lane of travel. (Tr. 1517, 1520-1522). Another one of Appellee's / Defendant's expert witnesses, Dr. Thomas Pittman, an expert in the field of forensic toxicology, provided extensive opinions regarding Randy Coleman's blood alcohol content at the time of the subject accident, irrespective that this blood alcohol content

played no role in the enhanced injuries that Randy Coleman received. (Tr. 1550-1554, 1558-1560).

Voir dire began on the morning of February 19, 2008, and by the end of the afternoon, the twelve member jury panel plus alternate jurors were selected. During the selection process, several jurors (total of 20 out of a venire of 55 jurors) responded in the affirmative when Mr. Chapman, counsel for Appellant / Plaintiff, asked "How many of you here drive or have driven a Ford F-150 pickup truck?". (Tr. 184-196). When Mr. Chapman requested that the trial court excuse these juror from the panel, the request was refused. (Tr. 233-238). One venire member, number 54, responded in the affirmative to this response, and when addressed by the trial court as a challenge for cause for this reason and for her responses regarding there being too many lawsuits, the trial court responded as follows:

> I know Ms. Dunn, and if she told you she's going to do something, she'll do it. If this was a medical malpractice lawsuit, I probably would not keep her on there, but I believe her, and I take her at her word. I know her well enough to know that. So I'm not going to remove her for cause . . . .

(Tr. 232).

Afer voir dire, Mr. Chapman, again challenged the individuals who currently own a Ford F-150, which were a total of fifteen individuals, including jurors number 8, 11, 12, 15, and 16, and four of these individuals (numbers 8, 12, 15 and 16) who were on the twelve panel jury, and this request was again refused. (Tr. 233-238; R. 5758-5760).

The jury retired to deliberate around noon on Saturday, March 1, 2008. Juror William Bryant stood up as foreman and delivered the verdict to the clerk of the court to publish the verdict wherein the jury found for the Appellee / Defendant. (R. 5895-5896; Tr. 2034).

Appellant's / Plaintiff's post- trial motions were denied by the trial court, (R. 6047, 6051)

and the matter was timely appealed to this Court. (R. 6056-6066).

II. Statement of Facts

The subject accident occurred at about 1:30 in the afternoon when the deceased Randy Coleman was traveling east on Highway 14 and Ms. Hudson was traveling west. (Tr. 420, 427). The fire occurred post accident after several minutes. Coleman was trapped in his vehicle and was trying to get out with assistance. (Tr. 379-380). As stated throughout, the cause of the accident is irrelevant for this enhanced injury / crashworthiness case wherein the Appellant / Plaintiff sought only damages for the burn injuries and resulting death of Randy Coleman. Despite this fact and based on the trial court's previous rulings on allowing comparative fault, testimony regarding the accident was elicited at trial. The only eyewitness, Mr. David Dunaway, to seeing the two trucks impacting one another was coming out of a curve a considerable distance away from the accident (approximately 5000 feet) traveling in the opposite lane of travel from the deceased. (Tr. 375). Mr. Dunaway did not see either vehicle make any type of steering maneuver prior to the impact. (Tr. 377-378). When Mr. Dunaway arrived at Randy Coleman's vehicle, Mr. Coleman was alive trying to climb out of the window, and he observed flames coming out of the floorboard area around the right foot area. (Tr. 379-380). Mr. Coleman remained in the burning vehicle until the emergency personnel arrived with the proper equipment to remove him from the truck despite multiple efforts to remove him before they arrived along with efforts made to stop the fire which kept blazing up. (Tr. 386).

Two Mississippi Highway Patrol officers arrived at the accident scene. (Tr. 420). These officers made note that all three gouge marks from the accident were in the eastbound lane, which was Randy Coleman's lane of travel. (Tr. 427). No gouge marks, skid marks or yaw marks were

found in the westbound lane of travel, which was Ms. Hudson's lane of travel. (Tr. 428). No evidence was found from the accident that any part of the collision occurred in Ms. Hudson's lane of travel. (Tr. 431). There was also no evidence that Mr. Coleman made any type of abrupt move from a westbound lane into the eastbound lane. (Tr. 431-432).

Officer Vernon Hathcock arrived at the accident scene within eleven minutes from receiving the call. (Tr. 1325-1326). Officer Hathcock was within four to five feet of Mr. Coleman in the vehicle, and he did not smell any alcohol and no one else stated they smelled alcohol on Mr. Coleman. (Tr. 1329). Officer Hathcock also did not order a blood alcohol on Mr. Coleman due to their being no probable cause for such a test. (Tr. 1243, 1351). Blood alcohol information was introduced by Mr. Coleman's treating physician at the Delta Burn Center over objection by the Appellant / Plaintiff from a blood test taken over six hours after the accident and after several liters of fluids and other medicines had been given to Mr. Coleman. (Tr. 1357, 1359). In allowing this testimony by Dr. George, the trial court made unnecessary comments that Mr. Coleman should have been charged with vehicular manslaughter. (Tr. 1363).

> At the time, around this time, the law changed about 63-11-8, but had Ms. Ervin and Ms. Harris been interviewed by law enforcement authorities, quite frankly, I fully expect that Mr. Allgood would have been presenting a case, had Mr. Coleman survived this, on a vehicular manslaughter, 63-11-30, and I can't remember back then [sic], I think it was subsection (5). It might have been subsection (6). But there would have probably very well been a case presented to a grand jury in Noxubee County on a DUI maiming or a DUI manslaughter.

Id. Then, the trial court proceeded to give its interpretation of the gouge marks and/or skid marks found at the accident site. (Tr. 1364-1365).

Appellant/Plaintiff's accident reconstructionist provided the following opinions regarding the accident:

- Based on the evidence documented by the troopers, documented from their photographs and their measurements taken, the impact occurred in the eastbound lane (Randy Coleman's lane of travel).
- No physical evidence, such as scuffs, slides, yaws or gouge marks that either of these two vehicles swerved in the westbound lane (Ms. Hudson's lane of travel).

(Tr. 725-726).

Mr. William Bush, Appellant/ Plaintiff's fire cause and origin expert, performed two detailed examinations of the subject vehicle. (Tr. 838). These inspections plus studying the police photographs provides the most information to an expert like Mr. Bush. (Tr. 839). Mr. Bush thoroughly studied the fire patterns and the oxidation patterns on the subject vehicle. A closeup photograph of the driver's seat depicting the rail where the seat slides showed the burned pattern and how the fire was coming from underneath and going up and out. (Tr. 872). The heavy fire damage was confined to the right side of the driver's seat and underneath this seat. (Tr. 876). Underneath this right hand portion of the driver's seat is located a grommet hole. (Tr. 878). The purpose of the grommet is for the wiring for the four-wheel drive to pass through it, and the grommet is made of rubber and has a lip on it. (Tr. 883). During a joint inspection of the subject vehicle, the underside parts were removed so a better view of the area around the grommet could be obtained. (Tr. 885). The supply and delivery fuel lines run underneath this grommet area. (Tr. 887). Mr. Charlie Miller, Appellant / Plaintiff's expert in the field of automobile mechanics, noted that the supply fuel line is pressurized between 34 and 42 pounds per square inch, and the return fuel line runs at a pressure between 2 to 3 pounds per square inch. (Tr. 1045, 1048). Both of the flexible portions of these two fuel lines is comprised of a fiberglass weave material with a covering simply to protect the inner line

from stone pecking; it isnot designed to prevent the line from being breached or severed. (Tr. 1188, 1193). A total of thirteen and a half ounces of gasoline is present in these two fuel lines during normal operation–eight ounces in the supply line and five and a half ounces in the return line. (Tr. 1049). A heat shield is located underneath these fuel lines, and a crease in this shield was created during the accident. (Tr. 1067-1068). The floor pan also had a fold caused by the accident in the area of the fuel lines and point of entry into the occupant compartment *Id.*

The fire patterns in the area of these fuel lines allowed Mr. Bush to opine to a reasonable degree of certainty that the fire began in the area of these fuel lines. (Tr. 908). The fire originated in this area under the floor pan and burned upward as it attacked the floor pan and rubber grommet, and once the grommet burned loose, the fire went up through the floor of the truck and attacked the driver's seat. (Tr. 913, 919). Evidence of a break was still present on one of these fuel lines in this area. (Tr.918). Contrary to the Appellee / Defendant's position, there is no evidence that the fire began inside the vehicle. (Tr. 923). Electrical arcing and sparking exist in the area of these fuel lines, and electrical arcing was more likely the ignition source of the gasoline contained in these breached fuel lines. (925-926).

Mr. Miller evaluated several fuel lines to compare them to the flexible fuel lines found in the subject vehicle. This comparative analysis revealed that the subject fuel lines located in the 1999 Ford F-150 were not nearly as strong as other alternative lines such as those found in the 1988 Chevrolet C-1500 pickup comprised of a braided steel material, or the supply and return line found in a 1997 Ford Taurus, which was a three part line of an inner tube, a rubber coating and a rocker/chafing guard on the outside, or the same fuel line as found on the 1999 Ford F-150 but with the plastic shield from the 1988 Chevrolet pickup. (Tr. 1124-1126, 1130-1131). No leaks occurred

in testing with any of these alternative fuel lines. (Tr. 1134).

Appellant's/Plaintiff's automotive design engineer, Mr. Jerry Wallingford, from inspecting the subject vehicle and performing evaluations of the bracket holding these two fuel lines, was able to opine that the pressurized supply line developed at the minimum a hole during the accident from which fuel escaped under pressure in a spraying pattern. (Tr. 1208, 1213). Appellee/ Defendant Ford knew or should have known about placing fuel lines in a hostile area as noted by their 1998 Fuel System Engineering Class and their corporate representative, Sunil Sharma. (Tr. 1215). The design hierarchy recognized by the automotive engineering community and by Ford first states that the problem needs to be identified and designed out, if it cannot be designed out, then guard it, and if cannot guard it, warn of the hazard, and if cannot do any of the above, then do not make the product. (Tr. 1216). One document recognized that a customer wants to have "protection from harm, no fire, collision and non-collision". *Id.*

A guard and/or shield to protect the flexible portions of the fuel lines was not only feasible but already in use by Ford and General Motors. (Tr. 1217). Extra protection should have been applied to the area of these flexible fuel lines that were breached, and this extra protection, as identified above, would have prevented this subject fire and Randy Coleman's death from occurring. (Tr. 1223-1224). Due to these failures by Appellee / Defendant Ford to provide adequate protection, the subject Ford F150 was in a defective condition and unreasonably dangerous. (Tr. 1232).

SUMMARY OF THE ARGUMENT

The verdict of the jury was against and contrary to the overwhelming weight of the evidence, the result of an aggregate of errors and the introduction of inadmissible, privileged and inflammatory evidence and objectionable statements of counsel, and the result of bias, passion and/or prejudice as against the Appellant / Plaintiff, and justice requires a new trial be granted.

Numerous errors occurred during the trial of the present case which warrant the reversal of the trial judge's denial of Appellant's / Plaintiff's motion for new trial. First and foremost, the trial court incorrectly admitted evidence of the decedent's, Randy Coleman's, blood alcohol content and incorrectly allowed comparative fault principles as to the cause of the accident in an enhanced injuries, post-collision fuel fed fire case, which is in contravention of the law as stated in *Toliver v. General Motors Corp.*, 482 So. 2d 213 (Miss. 1986) and *Hunter v. General Motors Corp.*, 729 So. 2d 1264, 1271-72 (Miss. 1999).

The trial court also erred in denying the introduction of testimony and admission of Appellee's /Defendant's M.R.C.P. 30(b)(6) corporate representative. Although the trial court did state that certain portions of this excluded testimony was relevant, the trial court still excluded it from the trial. Error was further created in the trial when certain jury instructions regarding comparative fault were granted and in denying the limiting instruction relevant to enhanced injuries and in failing to give the preliminary note taking instruction.

To further culminate error, the trial court denied Appellant's /Plaintiff's challenges for cause regarding Ford F-150 owners and drivers and allowing said individuals to remain as part of the venire, and several of these venire members became part of the twelve-person jury. These jurors drove to court in a vehicle Plaintiff claimed to be dangerously defective and placed their families in such vehicle. This Court has recognized that an undue influence over other jurors can occur in situations like this. *See Hudson v. Taleff*, 546 So. 2d 359 (Miss. 1989).

Error also occurred when speculative expert testimony by Appellee / Defendant Ford's expert, Ralph Newell, was allowed regarding the possible ignition sources for the subject fire. Miss. R. Civ. P. 59 governs when a new trial may be granted. "A new trial may be granted in a number of circumstances, such as when the verdict is against the overwhelming weight of the evidence, or

when the jury has been confused by faulty jury instructions, or when the jury has departed from its oath and its verdict is a result of bias, passion, and prejudice. This Court will reverse a trial judge's denial of a request for new trial only when such denial amounts to a abuse of that judge's discretion." *Shields v. Easterling,* 676 So.2d 293, 298 (Miss. 1996) (citations omitted).

This Court has recognized the importance of new trials when error has occurred in the trial process.

> A new trial becomes appropriate when a trial court determines that error within the trial mechanism itself has caused a legally incorrect or unjust verdict to be rendered. The motion for a new trial affords trial courts with an alternative to a grant of a J.N.O.V., and provides judges with the opportunity to remedy trial error before an appeal is commenced.

White v. Stewman, 932 So. 2d 27, 33 (Miss. 2006).

The Court in *White* noted that "[w]hether jury error or otherwise, our law has long recognized the importance of this remedial device." *Id.* The Court quoted to a1935 case, *Beard v. Williams,* 161 So. 750 (1935), wherein the Court held the following:

> We are conscious of the fact that the verdict of a jury is to be given great weight, and is the best means, when fair, of settling disputed questions of fact. Nevertheless, throughout the entire history of jury trials, the courts have exercised a supervisory power over them, and have granted new trials whenever convinced, from the evidence, that the jury has been partial or prejudiced, or has not responded to reason upon the evidence produced. The duty of the court in supervising trials by jury is such a vital part thereof that no court may refuse to exercise such power whenever fully convinced of its duty so to do.

Beard, 172 Miss. at 884, 161 So. at 751.

As shown in detail below with respect to each of these issues of error, the trial judge did abuse his discretion in the trial of this matter, and as a result, this matter should be reversed and remanded for a new trial.

ARGUMENT

A. The Trial Court Incorrectly Admitted Evidence of the Decedent's, Randy Coleman's, Blood Alcohol Level and Comparative Fault Principles, as to the Cause of the Collision, and Applied it to a Case Involving only Enhanced Injuries Received Post Collision

As noted throughout this brief, the present cause of action is a crashworthiness / enhanced injury action that arises out of an accident when a 1994 Chevrolet Silverado and a 1999 Ford F-150, driven by Randy Coleman, were involved in a near head on collision. The Deceased suffered extensive burns, which resulted in his death twenty-eight (28) days later on April 20, 2001. Appellant / Plaintiff commenced this lawsuit against Appellee / Defendant Ford for enhanced injuries Randy Coleman received as a result of the defective fuel system. Appellant / Plaintiff alleges in this suit that Randy Coleman's enhanced injuries, which ultimately caused his death, were caused by defective fuel lines and that if the subject fuel lines were adequately shielded or if alternative fuel lines already used by Ford and General Motors were present in the subject Ford F-150 then the post collision fuel fed fire would not have occurred. Appellant / Plaintiff is not seeking damages for the injuries the Deceased received as a result of the actual collision. Appellant / Plaintiff is only seeking damages from Appellee / Defendant Ford for the injuries that resulted from the post collision fuel fed fire–thermal and burn injuries which caused his death.

Subsequent to the accident, the Deceased, Randy Coleman, was taken by ambulance to the Winston Medical Center in Louisville and then he was airlifted by helicopter to the University Medical Center in Jackson. Thereafter, he was transferred to the Delta Regional Medical Center (a/k/a Greenville Burn Center). For the purposes of medical treatment, two blood alcohol tests were run, one at the University Medical Center in Jackson at 4:18 p.m., over

two and one half (2 ½) hours after the accident occurred, and the second at the Greenville Burn Center at 9:45 p.m., almost eight (8) hours after the accident. (Tr. Ex. P-62, ID). On the Mississippi Uniform Accident Report, it is noted that the highway patrol did not request a test be given to Randy Coleman for alcohol, nor did the officer at the scene smell or suspect the existence of alcohol. Appellee / Defendant Ford has presented no other evidence of the Deceased's alcohol consumption.

After hearing argument by both parties on Appellant's / Plaintiff's motion in limine regarding the exclusion of evidence of blood alcohol, the trial court denied this motion in limine and allowed evidence of the blood test results if the proper predicate is laid. The trial court found the evidence of the Deceased's alleged comparative fault to be relevant to this enhanced injury case and that the medical privilege does not afford protection to the Appellant / Plaintiff. The medical privilege was never waived and the record reflects the extensive efforts to preserve their medical privilege.

1. **Whether or not evidence of blood alcohol and/or blood alcohol test results, taken for medical treatment purposes only, are admissible as evidence of the cause of an automobile accident in a case involving only enhanced injuries from a post accident fuel fed fire.**

The Mississippi Supreme Court adopted the enhanced injury doctrine in *Toliver v. General Motors Corp.*, 482 So. 2d 213 (Miss. 1986), and in so doing, the Court stated the following:

> The sole issue on appeal is whether Edward Toliver, who was injured in a collision between his Vega and another automobile, may assert a cause of action against the manufacturer of his Vega because his injuries were proximately caused or enhanced by the alleged defective design or construction. We hold that Toliver has asserted a cause of action and overrule *Walton v. Chrysler Motor Corp.*, 229 So. 2d 568 (Miss. 1969), and the subsequent cases based on *Walton* . . . . [W]e are convinced that ***the question of causation more properly is addressed to the instrumentality***

> ***causing the enhanced injury, not that which caused the collision. 'That the design defect does not cause the initial collision should make not difference if it is a cause of ultimate injury.'***

Toliver, 482 So. 2d at 214 (internal citations omitted) (emphasis added). This Court's decision in *Toliver* is still good law. As previously stated, the crashworthiness doctrine proceeds from the belief that a motor vehicle manufacturer has a duty to minimize the injurious effect of a crash (no matter how the crash is caused); any participation by the injured party in bringing about the accident is not relevant and hearing evidence on that issue would impermissibly confuse the relevant issues. Based on this Court's decision in *Toliver*, comparative fault is not at issue and the issue of whether or not the Deceased was intoxicated is irrelevant to Appellant / Plaintiff's product liability claims against Appellee / Defendant Ford. The application of *Toliver* to comparative fault and blood alcohol evidence in a crashworthiness case was recognized in the United States District Court for the Northern District of Mississippi by Judge Allen Pepper, wherein, the district court granted the motion in limine excluding evidence of blood alcohol based on the established Mississippi law in the court's June 18, 2004 Order, *Maxwell v. Ford Motor Co.*, Northern District of Mississippi, Delta Division, Civil Action No. 2:02CV308-P-A. Following the established law in Mississippi, the trial court should have granted Appellant's / Plaintiff's Motion in Limine to Exclude Blood Alcohol Test Results and Evidence Relating to Alcohol Consumption and not allow the introduction of this evidence at the trial of this matter.

Other jurisdictions follow this same rationale. *See Jimenez v. DaimlerChrylser Corp.*, 269 F.3d 439, 452-53 (4th Cir. 2001) (affirming district court's conclusion "that in light of crashworthiness principle, the cause of the original accident was not relevant to proving claim for enhanced injury"); *Black v. M&W Gear Co.*, 269 F.3d 1220, 1235 (10th Cir. 2001) (finding that evidence of plaintiff's alcohol consumption, as well as his "inattention and conduct of driving,"

was irrelevant, immaterial and inadmissible in a crashworthiness case); *Andrews v. Harley Davidson, Inc.* 796 P.2d 1092, 1095-96 (Nev. 1990) (holding "contributory negligence is not a defense in a strict liability case where the issue is whether the design of a vehicle is crashworthy . . . . jury should focus on whether the manufacturer produced a defected product not on the consumer's negligence" therefore evidence of plaintiff's intoxication is not relevant).

The Florida Supreme Court has held that "principles of comparative fault concerning apportionment of fault as to the cause of the underlying crash will not ordinarily apply in crashworthiness or enhanced injury cases." *D'Amario v. Ford Motor Co.*, 806 So. 2d 424, 426 (Fla. 2001). In its adoption of this position, the court concluded that allowing a manufacture to apportion fault in a claim where only its fault was at issue would effectively allow it "to avoid liability for designing and manufacturing a defective product, and would thus undermine the essential purpose for which the crashworthiness doctrine was established." *D'Amario*, 806 So. 2d at 434.

The trial court mistakenly relied on *Hunter v. General Motors Corp.*, 729 So. 2d 1264, 1271-72 (Miss. 1999) to support its decision to deny Appellant's / Plaintiff's motion in limine. The trial court cites *Hunter* as stating the Mississippi Supreme Court "has held evidence of blood alcohol levels to be admissible in *automobile negligence cases*." *Id.* (citing *Allen v. Banks*, 384 So. 2d 63, 67 (Miss. 1980)) (emphasis added). This statement in *Hunter* is not only dicta, but it is also distinguishable from the case *sub judice*. In *Hunter*, this Court was careful to point out that the evidence of alcohol consumption in dispute in that case was not a blood alcohol test result. *Id.* at 1277. Furthermore, the issue regarding blood alcohol test results was rendered moot since the defendant, General Motors, did not attempt to introduce any blood alcohol test results. *Id.*, n.9. In fact, it was the plaintiff who first introduced evidence of his own alcohol

consumption, and no medical privilege was claimed by the plaintiff. Similarly, *Allen* did not involve a blood alcohol test result, a claim of statutory medical privilege and was not a crashworthiness case.

Hunter stands only for the proposition that in an automobile collision case where there are multiple parties alleged to be at fault in causing a plaintiff's injuries, including those plaintiff contends caused his motor vehicle accident as well as the car's manufacturer whose design defects resulted in enhanced injuries as a result of the accident, ***it is not error to permit the jury to allocate fault among the parties who are alleged to have caused the accident.*** However, the *Hunter* court further explained, that even where the defendant manufacturer had nothing to do with the cause of the accident, it is *still liable for the enhanced injuries caused by the design defect* without deduction for any other party's fault in causing the accident to occur. *Id.* at 1272, fn 3 ("[a] defendant may be liable for enhanced injuries caused by crash-worthiness defects, even if the crash-worthiness defects did not cause or contribute to the accident in question"). In other words, since the instant case is purely a crash-worthiness/enhanced injury one, and since Appellee / Defendant Ford, under *Hunter,* is responsible for Randy Coleman's enhanced injuries even if the jury were to find that Randy Coleman and/or other parties were 100% at fault in causing the accident, evidence of Coleman's fault in causing his truck to wreck, is simply not relevant, is confusing, prejudicial and constitutes hearsay, and it should have been excluded.

Other cases decided by this Court are also distinguishable from *Toliver* and the present case. *See General Motors Corp. v. Myles*, 905 So. 2d 535 (Miss. 2005) (holding reversible error to strike testimony of toxicologist regarding effect of alcohol consumption on causing accident since plaintiff sued defendant manufacture for all injuries including those caused by accident); *Abrams v. Marlin Firearms Co.*, 838 So. 2d 975 (Miss. 2003) (suing for injuries from self-

inflicted gunshot wound and plaintiff's own negligence and misuse of gun relevant to cause of injuries). *See also Buel v. Sims*, 798 So. 2d 425 (Miss. 2001) (suing truck driver for injuries she suffered in collision); *Miss. Power & Light v. Lumpkin*, 725 So. 2d 721 (Miss. 1998) (plaintiff suing defendant driver, who admitted to drinking, for cause of accident); *Hughes v. Tupelo Oil Co., Inc.*, 510 So. 2d 502, 505 (Miss. 1987) (pedestrians blood alcohol content relevant to cause of accident since pedestrian was running straight into path of tractor-trailer) and *Hageney v. Jackson Furniture of Danville, Inc.*, 746 So. 2d 912 (Miss. Ct. App. 1999) (suing for injuries sustained as result of defect causing accident and plaintiff's consumption of alcohol relevant to issue of whether he was contributorily negligent by leaning back on two legs of stool). There is simply no Mississippi authority to support the introduction of blood alcohol test results in a crashworthiness / enhanced injury case as proof of the driver's negligence in causing an accident.

Under Mississippi law, for a defendant to assert misuse of a product as a defense, the misuse must be unforeseeable. *See Pickering v. Industria Masina I Traktora*, 740 So. 2d 836, 845 (Miss. 1999). The misuse that the trial court refers to in its June 2, 2005 Order is foreseeable misuse and does not absolve Appellee / Defendant Ford of its liability. Further, as expressed in *Toliver*, the Deceased's negligence is not at issue in an enhanced injury case like the case *sub judice*.

2. Whether or Not the Deceased's Blood Alcohol Content is Protected by the Medical Privilege Laws of Mississippi.

The second prong on which the trial court denied Appellant's / Plaintiff's motion in limine is on the issue of the medical privilege. It is important for this Court to note that many cases regarding the admissibility of blood alcohol test results did not rely on or cite whether the medical privilege was even asserted. *E.g., Buel v. Sims*, 798 So. 2d 425 (Miss. 2001); *Hunter v. General Motors Corp.*, 729 So. 2d 1264 (Miss. 1999); *Allen v. Banks*, 384 So. 2d 63 (Miss.

1980).

The medical privilege is specifically provided for by Mississippi law. First, Miss. Code Ann . § 13-1-21(1) states as follows:

> All communications made to a physician, osteopath, dentist, hospital, nurse, pharmacist, podiatrist, optometrist or chiropractor by a patient under his charge or by one seeking professional advice are hereby declared to be privileged, and such party **shall not be required** to disclose the same in any legal proceeding except at the instance of the patient or, in case of the death of the patient, at the instance of his personal representative or legal heirs in case there be no personal representative, or except, if the validity of the will of the decedent is in question, at the instance of the personal representative or any of the legal heirs or nay contestant or proponent of the will. (Emphasis added).

Second, Rule 503 of the Mississippi Rules of Evidence provides:

> PHYSICIAN AND PSYCHOTHERAPIST-PATIENT PRIVILEGE
>
> (b) General Rule of Privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing (A) knowledge derived by the physician or psychotherapist by virtue of his professional relationship with the patient, or (B) confidential communications made for the purpose of diagnosis or treatment of his physical, mental or emotional condition, including alcohol or drug addiction, among himself, his physician or psychotherapist, and persons who are participating in the diagnosis or treatment under the direction of the physician or psychotherapist, including members of the patient's family.
>
> (c) Who May Claim the Privilege. The privilege may be claimed by the patient, his guardian or conservator, or the personal representative of a deceased patient. The person who was the physician or psychotherapist at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the patient.

Appellant / Plaintiff has not waived the medical privilege by bringing the instant lawsuit. Certain medical information derived during the treatment is privileged and is not relevant to the

facts in this case. The trial court quotes *Edward v. Ellis*, 487 So. 2d 282 (Miss. 1985), for the proposition that blood test results are admissible in civil litigation despite the medical privilege. However, since its decision in *Edwards,* the Mississippi Supreme Court has upheld the exclusion of confidential medical information on the basis of the medical privilege.[1] *See Scott v. Flynt*, 704 So. 2d 998 (Miss. 1996); *Sessums v. McFall*, 551 So. 2d 178 (Miss. 1989) (stating plaintiff did not waive medical privilege as to information disclosed to doctor regarding how accident occurred by his filing lawsuit and submitting evidence on injuries). *Scott* and *Sessums* stand for the proposition that a patient's privilege of medical confidentiality is of paramount importance, outweighing need for judicial expeditiousness and that the privilege must be protected. In *Scott*, this Court held that if a suit is filed which places the plaintiff's medical condition in issue, the medical privilege is only waived "to the extent to which the plaintiff's condition is put in issue". *Scott*, 704 So. 2d at 1003. This Court further stated that "under no circumstances should a court order or [sic] require a person to release medical information *unconditionally* . . . [s]uch disregard for a patient's right to confidentiality will not be tolerated by this Court". *Id.* (emphasis in original).

Appellant / Plaintiff did not waive the medical privilege by filing this lawsuit. In *Scott*, this Court discussed the scope fo the medical waiver as contemplated by Miss. Rule of Evid. 503(f). This Court held that the scope of the waiver under M.R.E 503(f) is limited and not unconditional and that the waiver is limited to relevant information only. *Scott*, 704 So. 2d at 1000. In rendering its decision, the Court again affirmed its earlier decision in *Sessums*, which in essence states that filing suit and submitting evidence on injuries only waives the medical

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[1] The trial court also cites to *Buel v. Sims*, 798 So. 2d 425 (Miss. 2001), but there is no discussion of the medical privilege in this case.

privilege to the extent of those injuries. *Id.*; *see also Sessums*, 551 So. 2d at 180-81.

The trial court also cites to *Jones v. State*, 858 So. 2d 139 (Miss. 2003) to support its decision that the Deceased's blood alcohol test results are admissible despite the medical privilege; however, *Jones* is a criminal case concerning the use of the physician-patient privilege to exclude incriminating evidence. The present case is distinguishable because it is a civil matter regarding the cause of the Deceased's enhanced injuries only. Interestingly, neither party cited this case to the trial court, but it was selected by the court as the basis for a ruling without discussion of the case to the contrary. Based on the precedent established by Mississippi law, the Deceased's blood alcohol test results are within the medical privilege and are not waived by the Appellant's / Plaintiff's mere filing of a lawsuit to recover for the enhanced injuries the Deceased sustained as a result of a design defect in a Ford vehicle.

The evidence of blood alcohol carries so much weight and prejudice that this inflammatory evidence prejudiced the entire outcome of the trial. This evidence is so prejudicial that it inflamed and biased the jury to such a high degree that the jury only addressed the first question on the special verdict form. The prejudicial evidence of blood alcohol level overwhelmingly biased the jury against the Appellant / Plaintiff.

B. The Trial Court Erred in Allowing Appellee / Defendant Ford to Make Remarks Concerning the Inability of Appellant / Plaintiff to Point Out and/or Describe Other Incidents or Accidents

Appellee / Defendant Ford attempts to down play its failure to produce and its decision not to produce discoverable information to the Appellant / Plaintiff during the course of this case. As a matter of fact, Appellee/ Defendant Ford goes a step further and makes references during the course of the trial that Appellant / Plaintiff cannot point to a single other similar accident. Appellant / Plaintiff's counsel properly objected to Appellee/ Defendant Ford's repeated

statements to other accidents, but the trial court failed to instruct the jury to disregard remarks made by counsel for Ford in the closing argument after sustaining Plaintiff's objection to inflammatory comments.

> BY MR. JONES: Now, I think it's – all you need do is; look at the blood alcohol evidence, and we know we've got a violation of the law, and we know that Mr. Coleman did that voluntarily, apparently, and so we – we have eyewitness testimony of how this horrific accident occurred, and, you know, the - - Ralph would make you think that this – this vehicle is defective, and that's what they're hanging their hat on, but where is the proof that an F-150 4 x 4 1999 vehicle is a defective design?
>
> If it was, we would have heard loads of evidence about accident after accident. We haven't heard that.
>
> BY MR. CHAPMAN: Your Honor, I'm going to object to this argument. We discussed this earlier in Exhibit 1 of the - - the Sharma deposition.
>
> May we approach, Your Honor?
>
> BY THE COURT: You may.
>
> BY MR. CHAPMAN: Your Honor, we had a discussion early on about this, and – and he brought this up, and so I'm going to have to – I'm going to have to –he's talking about negative evidence about which they've had the opportunity to produce to us, and how they've opened it up, and so we have Exhibit 1 to Sharma's deposition, and I'm going to – I'm going to respond to what he said, because we –we –we carefully tried to avoid this point
>
> BY THE COURT: Was there any evidence ? Was there any evidence that this brake line in any other vehicle caused a similar fire?
>
> BY MR. CHAPMAN: You recall, Your Honor, this was one we asked for the evidence of the – of the – all the other fuel lines. He said I didn't do anything about that. These are just the ones I personally know about. This is a corporate representative. We have already had a discussion about this, and the analogy you used, they fired a shot across the bow.
>
> We tried to avoid this coming up in this case, and now Mr. Jones has opened – opened a wound that I thought had been done.
>
> BY THE COURT: All right.
>
> BY MR. CHAPMAN: So I'm going to have to give a fair response to it.
>
> BY THE COURT: The correct response is you've got no evidence that there was any other –
>
> BY MR. CHAPMAN: Your Honor, they didn't produce

any. We asked them for it, and the would not produce the evidence. That's what they – exactly what happened.

BY THE COURT: I think we all need to move along, and I think if there's - - if there's evidence of it, then I think I would have heard about it from y'all

BY MR. CHAPMAN: Right, and they should have produced it for us. That was a issue that Mr. Jones – I just move to strike – I –

BY THE COURT: Let's move along.

BY MR. CHAPMAN: – mean I object , and

BY THE COURT: Sustained. Let's move along.

BY MR. CHAPMAN: Could you instruct the jury to disregard the comment?

BY THE COURT: Ladies and gentlement, I have sustained the objection. Let's move along, please.

(Tr. 1979-1982).

To set the background better for this Court, reference to other instances, or lack of, was mentioned by the Appellee / Defendant's counsel during opening statement.

BY MR. WALKER: There are no studies, there are no papers, there are no reports. No one is saying that we shouldn't use this kind of fuel lines. They won't pont you to any other instance where something like this has occurred.

BY MR. CHAPMAN: Your Honor, I –excuse me, I would object. May we approach.

***

BY MR. CHAPMAN: Your Honor, plaintiff would object to the opening statement, and with this caveat. Now, Counsel had just said we can't point to any case where this has happened. There are numerous cases in Mr. Sharma's deposition. We have agreed to edit that out in our case in chief. We have reserved the right to bring it in, in the event they have opened the door. He's challenged us to come forward and show where fuel lines have been breached. We understand what the standards are, and counsel has just told this jury we can't point to anything. We can point to any number of situations where this has occurred. There's one standard, when it comes in, to put it in our case in chief. It's another one to come in and contradict and impeach them. Now, whether they have gotten to that stage or not, but I want to – I want the Court and I want counsel to be aware that while we took it out of our case in chief in Mr. Sharma, we fully intend to bring forward

> other incidents that have occurred, in the event that – that Ford opens the door.
>
> ***
>
> BY THE COURT: All right. Just – I think Mr. Chapman is firing a shot across the bow telling you to be careful, that you may open door.

(Tr. 358-361).

By taking this position during opening statement, Appellee's / Defendant's counsel challenged Appellant / Plaintiff to come forward with evidence of other incidents. By the Appellee's / Defendant's counsel opening the door to evidence of other incidents, a different standard applies for impeachment evidence than when evidence of other incidents is in the Appellant's / Plaintiff's case in chief.

Appellee / Defendant Ford throughout the case was not forthcoming in evidence of other incidents when such information was specifically requested of its 30(b)(6) representative, Sunil Sharma. (Tr. Ex. P-68). To begin, in the deposition of Mr. Sharma, page 11, line 22 through page 12, line 25, Mr. Sharma admitted that he had testified in other fire cases involving the same platform vehicle, PN-96, as the subject Ford F-150. (Tr. 526- 531). This is not only background information, but testimony regarding other incidents involving a fire in the Ford F-150 was specifically requested in the notice for deposition. Appellee/ Defendant challenged the Appellant / Plaintiff to provide evidence of other incidents during opening statements, and now the trial court prohibited Appellant / Plaintiff from meeting this challenge. The trial court also excluded another portion of Mr. Sharma's deposition wherein other incidents were referenced on page 191-194 of his deposition. (Tr. 577- 589, 598-599).

> Q. All right. Are you familiar with any of the other Ford F-150 vehicles wherein there was an allegation of a fuel fed fire associated with an intrusion, leaking, interruption, cutting,

> laceration, tearing, pulling apart of one or more of the fuel lines including the supply line or the return line?
> A. I recall one. We talked about the fuel ones I recall only one now.

(Tr. Ex. P-66, ID only).

When asked further about these other incidents and the list referenced, Mr. Sharma was not prepared to discuss the list but only the one in which he was involved. However, the deposition notice in item three specifically requests information and documents regarding any and all lawsuits claims made by any predecessor about an F-150 giving it a propensity for the gasoline tank or fuel lines or components to ignite upon collision or impact. (Tr. Ex. P-68). Item four of the same deposition notice also requested information and documents about F-150 pickup trucks of substantially the same body design igniting, catching fire, exploding upon impact, etc. Despite these requests, Appellee / Defendant produced a corporate representative who only knew about one incident, and then at trial, Appellee / Defendant ambushed the Appellant / Plaintiff with statements that there are no other incidents involving these fuel lines. The injustice occurred when these statements were repeatedly made from the beginning to the end of the trial, and the trial court prohibited the Appellant/ Plaintiff from addressing the issue with this testimony by Mr. Sharma of other fires involving the F-150 to impeach the statements made by Appellee / Defendant. Clearly, with the MRCP 30(b)(6) deposition notice and the specific categories and the decision by Sharma not to gain any knowledge that this was a calculated effort to set up remarks to be made at opening and closing statements.

Appellee / Defendant Ford's failure to provide a 30(b)(6) deponent with knowledge of other accidents was properly objectionable, and when Ford had advance notice or warning that this was an issue, and an important one, their failure to even request that the deponent become familiar with the other accidents is inexcusable and should not be condoned. They should not be

allowed to take advantage of this and use their disregard of the rules for the basis of their defense for failing to produce documents with the requested information and then to misrepresent the evidence and mislead the jury. Appellee / Defendant Ford is the one with the possession of this information, and it failed to provide it to the Appellant / Plaintiff, and as such, Appellant / Plaintiff was unable to refute these statements by Appellee / Defendant. In its response, Appellee / Defendant tries to state that it complied with the discovery request of Appellant / Plaintiff, but this is simply not true. Appellee / Defendant Ford sent thousands of pages with little to no information regarding other claims and/or lawsuits. When Appellant / Plaintiff asked Ford's corporate designee, Sunil Sharma, about these other claims/lawsuits, he informed the Appellant / Plaintiff at that time that he had not reviewed the information, and due to this, Mr. Sharma was unable to answer any questions about other accidents/litigation.

The trial court incorrectly excluded the above testimony, and despite Appellee / Defendant Ford's contention, Appellant's / Plaintiff's argument is not procedurally barred. Appellant / Plaintiff properly brought this issue of error before the trial court for its consideration under MRCP 30(b)(6). The failure of the designated witness to even attempt to respond to a written and noticed area of inquiry should not be condoned, and the failure of the trial court to allow the testimony concerning this glaring failure particularly prejudiced the Appellant / Plaintiff. More so, given Appellee/Defendant counsel's erroneous argument, the trial court allowed Appellee/ Defendant to take advantage of its own circumvention of MRCP 30(b)(6).

The trial court's failure to instruct the jury to disregard these statements by Appellee / Defendant Ford was highly prejudicial to the Appellant / Plaintiff and denied the Appellant / Plaintiff her right to a fair trial.

C. The Court Erred in Denying the Introduction of Testimony and Admissions Contained Therein of Ford's M.R.C.P. 30(b)(6) Corporate Representative, Mr. Sunil Sharma, which Testimony was Excluded

Appellant / Plaintiff submitted portions of Mr. Sharma's testimony regarding the Ford Taurus fuel lines, which was one of Appellant's / Plaintiff's proposed alternative designs, which was excluded by the trial court. (Tr. 532-542, 595-598; Tr. Ex. P-68 at p. 80, line 19 - p. 82, line 6). Mr. Sharma had knowledge of the Taurus fuel lines, and at the time of his deposition, he knew that this was one of Appellant's / Plaintiff's proposed alternative designs and that Appellant / Plaintiff was seeking corporate testimony on this fuel line. This testimony was relevant and not prejudicial. Appellant's /Plaintiff's experts went into great detail during the trial regarding the proposed alternative design of the Taurus fuel lines for the subject vehicle, and testing regarding these lines was discussed, and as such, this testimony by Ford's corporate designee should have been allowed.

The trial court also improperly excluded testimony from Mr. Sharma regarding materials from a Ford taught fuel systems engineering class. (Tr. 550-555; Tr. Ex. P-66 at p. 122, line 9 - line 22 and p. 123, line 3 - line 25). This class material was taught to Ford's fuel system engineers, and it instructed them on how to improve statements when a vehicle performed poorly or failed a test. This material shows the Appellee / Defendant Ford's mental state and/or attitude and knowledge with respect to poor performance or failures of its fuel systems. The trial court also erred in excluding Mr. Sharma's testimony regarding a treatise written by one of Ford's employees. (Tr. 559-568; Tr. Ex. P-66 at p. 158 line 8 - p. 161, line 18). This treatise discusses plastic fuel lines, shielding, cost considerations and customer expectations, both of which were relevant to this case.

Additional testimony regarding the fuel systems engineering class was improperly

excluded by the trial court. (Tr. 569-576; Tr. Ex. P-66 at p. 163, line 2 - p. 169, line 15). The testimony concerns the fuel system design final report from the last class and it showed concerns by Appellee's / Defendant's own fuel system engineers about the testing not reflecting real life scenarios, not testing the total fuel system, lack of testing facilities, suppliers not capable of good component designs, and a need to put function ahead of cost and weight. The trial court seemed to indicate that this material might be relevant; however, it still decided to exclude this relevant testimony.

D. The Trial Court Erred in Granting and/or Denying Certain Jury Instructions.

The trial court erred in granting and /or denying certain jury instructions. First, the trial court erred in granting Appellee's /Defendant's jury instructions to which Appellant /Plaintiff objected and the granting of these instructions is contrary to the crashworthiness doctrine. These specific instructions were D-13, D-14, and D-17 (R. at 5811-5813). Additionally, it was error to give the Verdict Form wherein it allowed included allocation of fault for Randy Coleman and Janice Hudson. (R. at 5895-5896). Based on this Court's decision in *Toliver*, comparative fault is not at issue, and the issue of whether or not the deceased was intoxicated is irrelevant to Appellant / Plaintiff's product liability claims against Ford. Further, as expressed in *Toliver*, the deceased's negligence is not at issue in an enhanced injury case like the case subjudice, and it was error for the trial court to allow these instructions and justice requires a new trial. This issue of comparative fault as well as the issue of blood alcohol content was discussed thoroughly above in subsection A.

Instruction D-3, which the trial court erred in granting, stated the following: "The fact that an accident occurs does not mean that the product involved was defective or that the manufacturer is liable for resulting injuries". (R. at 5806). With respect to an almost identical

instruction, the Mississippi Supreme Court stated that it "caution[s] against the use of this instruction for it is useful only in very unusual circumstances". *Sugg v. Sanderson*, 515 So. 2d 909, 911 (Miss. 1987).

Instruction P-20, which the trial court did not give, stated the following: "You are instructed that Ford Motor Company 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". (R. at 5805). This instruction comes directly from the *Hunter v. General Motors Corp.*, 729, So. 2d 1264, 1272 (Miss. 1999). As previously stated, this Court in *Hunter* recommended the use of this limiting instruction to be given during the course of the trial and at such time the evidence of fault was introduced; however, the trial court erred by not reading the instruction to the jury.

E. The Trial Court Erred by Failing to Give Preliminary Note Taking Instruction

Rule 3.14(2)(b) of the Uniform Circuit and County Court Rules provides as follows:

> *(b) Preliminary Instruction:* Note Taking Permitted
> If you would like to do so, you may take notes during the course of the trial. On the other hand, you are not required to take notes if you prefer not to do so. Each of you should make your own decision about this. If you decided to take notes, be careful not to get so involved in the note taking that you become distracted from the ongoing proceedings.
>
> Notes are only a memory aid and a juror's notes may be used only as an aid to refresh that particular juror's memory and assist that juror in recalling the actual testimony. Each of you must rely on your own independent recollection of the proceedings. Whether you take notes or not, each of you must form and express your own opinion as to the facts of this case. An individual juror's notes may be used by that juror only and may not be shown to or shared with other jurors. . . .

The trial court did not give this instruction prior to allowing the jury to take notes during

the trial of this matter. The trial court erred by failing to give this Preliminary Instruction, as stated in the Rules, before permitting the jury to take notes.

F. Error occurred when Appellant / Plaintiff was Denied Challenges for Cause and in Allowing Current Ford F-150 Owners to Remain on the Jury Panel Despite the Availability of Substantial Available Jurors.

The trial court erred in allowing Ford F-150 owners on the jury and by denying Appellant's / Plaintiff's challenges for cause in allowing current Ford F-150 owners to remain on the jury panel despite the availability of substantial available jurors. This is similar, if not identical, to the case of *Hudson v. Taleff,* 546 So. 2d 359 (Miss. 1989), where the judge allowed jurors who were patients of the doctor's clinic to remain on the jury. Allowing Ford F-150 owners to remain on the jury panel is and was prejudicial and they would be more difficult to convince of the defect and would have undue influence on other jurors.

During voir dire, Mr. Chapman, counsel for Appellant / Plaintiff, asked "How many of you here drive or have driven a Ford F-150 pickup truck?". (Tr. 184). Twenty (20) jurors out of a venire of 55 jurors responded to this question in the affirmative. (Tr. 184 - 196). Immediately after this response, Mr. Chapman approached the trial court on how to best address this problem. (Tr. 196-203). The trial court declined to excuse these jurors from the panel. (Tr. 233-238).

Afer voir dire, Mr. Chapman, challenged the individuals who currently own a Ford F-150, which were a total of fifteen individuals, including jurors number 8, 11, 12, 15, and 16, and four of these individuals (numbers 8, 12, 15 and 16) who were on the twelve panel jury. (Tr. 233-238; R. 5758-5760).

Under Appellant's / Plaintiff's theory of the case, these jurors who owned F-150 trucks could be sitting just above the unprotected fuel line which Appellant / Plaintiff criticized. The Mississippi Supreme Court explained the "strong likelihood that the opportunity for undue

influence over other jurors in this case was too great...the court holds that the trial jury was not impartial." *Hudson v. Taleff*, 546 So. 2d 359, 363 (Miss. 1989).[2] The statistics in the present case are similar to those in *Hudson*. First, nearly half of the venire had experience with a Ford F-150, the vehicle at issue in the case *sub judice* and the only defendant in this matter was Ford Motor Company. Second, like the trial judge in *Hudson*, not a single one of Appellant's / Plaintiff's challenges for cause regarding Ford F-150 owners was granted. As noted on the jury list, the twelve person jury panel plus alternate jurors only went through number 28 out of a 55 person venire. Ample potential jurors existed in the venire for the trial judge to grant Appellant's / Plaintiff's challenges for cause on this issue. This precedent established in *Hudson* has been reaffirmed in *Brown v. Blackwood*, 697 So. 2d 763 (Miss. 1997) (holding trial court acted properly to insure fair and impartial trial for both parties by allowing challenges for cause of all venire members who had connection with physician's clinic which involved excusing 43 out of 90 prospective jurors) and *Davis v. Powell*, 781 So. 2d 912, 915-16 (Miss. Ct. App. 2000) (finding that plaintiff was denied her fundamental right to trial by fair and impartial jury due to trial court's failure to grant challenges for cause regarding jurors whose family physician was the defendant even though jurors indicated that their situations, views or relationships would not affect their vote)).

"The circuit judge has an absolute duty . . . To see that the jury selected to try any case is fair, impartial and competent". *Brown*, 697 So. 2d at 769. "Trial judges must scrupulously guard

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The Mississippi Court of Appeals decision in *Heaney v. Hewes*, 8 So. 3d 221, 227 (Miss. Ct. App. 2008), is distinguishable from the present case. It was noted by that court that "no member of the venire had an ongoing doctor/patient relationship with one of the defendants, and there was no risk that a member of the venire would be influenced by the possibility of future treatment by one of them." Furthermore, at the time of the trial the defendant doctors were retired and no longer had any current patients. *Id.* at 228. Additionally, the high statistical number of affected jurors that existed in *Hudson* was not present in *Heaney*. *Id.* at 227.

the impartiality of the jury and take corrective measures to insure an unbiased jury." *Id.* (quoting *Hudson v. Taleff*, 546 So. 2d 359, 363 (Miss. 1989)). Appellant / Plaintiff utilized and exhausted all of her peremptory challenges and was denied a fair and impartial jury panel from which to select her jury. The trial judge's actions of not striking any of the individuals who had owned and/or driven Ford F-150s and by not allowing extra peremptory challenges to the Appellant / Plaintiff was a clear abuse of discretion, and a new trial should be granted.

These jurors selected the Ford F150, paid or were paying for it, have the benefit of their "inspection" of it, rode to court in it, and could convey this information to the other jurors. This does not equate with fundamental fairness.

G. Appellee / Defendant Ford's Expert, Ralph Newell's, Testimony was Speculative and Should Have Been Excluded

The trial court erred in denying Appellant's / Plaintiff's objection to the expert testimony of Ralph Newell, Ford's fire cause and origin expert, whose testimony was speculative and was not based on reasonable certainty and was based and supported on a claim that a propane torch or an air conditioner capacitor could or might have somehow ignited a can of electrical tape which had been punctured by a hunting knife and this was the cause of the fire. (Tr. 1589-1597; R.597).

Since the time of his expert designation and his deposition in this matter, Newell has only testified as to possibilities of what caused the hole in the can and what ignited the contents of the can. (R. 597-598). Newell simply states that there are two possible sources of ignition—hand-held plumber's tool or an air conditioning capacitor. *Id.* When asked about these two primary sources, Newell testified as follows:

> Q: Of the two primary possibilities, are you prepared to state to a reasonable degree of certainty that, for example, the torch was the ignition source?
> A: In the forming of the hypothesis as to the origin and cause of the fire, it is a real possibility. I cannot eliminate it. . . . I can say

that without being able to eliminate it I certainly would have to keep it in the ball park with me.
Q: It is a possible cause?
A: A very possible cause, because it's there. . . .
Q: The same answer would be applicable to the air conditioner capacitor?
A: Yes, sir.

Id.

By the time of trial, Newell had even added a third possible ignition source. During direct examination, Newell testified as follows:

Q. All right, Mr. Newell. Have you done an analysis and determined within a reasonable degree of certainty some candidates as to ignition source of this fluid?
A. Yes, I have done that.
Q. Okay, sir. If you could explain for the jury how you believe this fluid was ignited.
A. This fluid was ignited, in my opinion, based by a spark generated either by the torch or the capacitor, and I can't eliminate smoking. That's the only three that I came up with.

(Tr. 1622-1623).

Interestingly, Newell acknowledge during cross-examination that sequence of events had to occur for the propane torch to even work. To operate a propane torch the gas valve has to be opened and a button has to be mashed. (Tr. 1634 -1635). Newell also did not know whether or not the capacitor that he claimed to be one of the possibilities as an ignition source even had a charge on it at the time of the accident. (Tr. 1635).

Fire causation goes to the heart of the case *sub judice*–whether or not the subject Ford F-150 was defective or not, which was the first thing the jury had to decide in answering the special verdict form. In reaching this decision, the jury had to consider where and how the subject fire began. This was not the first time for Ralph Newell to provide speculative opinions. The district court in West Virginia excluded his speculative opinion and held that he could "not

render an opinion that the cause of the fire was flammable alcohol as there is no evidence of any flammable alcohol in the 1999 Mustang GT, and his speculation as to the presence of high alcohol content liquor is as unduly prejudicial as it is baseless." *Tunnell v. Ford Motor Co.*, 330 F. Supp. 2d 731, 734 (W.D. Va. 2004).

Appellant's/ Plaintiff's fire cause and origin expert, William ("Chip") Bush, identified the ignition source as electrical arcing and stated his opinion to a reasonable degree of probability. (Tr. 925-926). On the contrary, Newell, could only speculate as to what he believed the ignition source may be. In fact, his speculative possibilities were even eliminated. Newell was unable to state to any reasonable degree of engineering certainty what the ignition source was but was allowed to throw out speculative possibilities.

The governing standard for expert testimony is Miss. R. Evid. 702, which provides as follows:

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

For an expert to provide opinion testimony, he must be qualified and his testimony must be reliable. Miss. R. Evid. 702 and Fed. R. Evid. 702 are identicial, and in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the Supreme Court of the United States began providing guidelines for expert testimony in accordance with Rule 702.[3]

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[3]The Supreme Court of Mississippi adopted the *Daubert* standard and analysis for admission of expert testimony contained in Rule 702 in *Mississippi Transportation Commission v. McLemore*, 863 So. 2d 31 (Miss. 2003).

Rule 702 imposes a special obligation upon a trial judge to "ensure that any and all scientific testimony . . . is not only relevant, but reliable." *Daubert,* 509 U.S. at 589. The Court established that the trial court is to determine "whether the expert's testimony reflects 'scientific knowledge,' whether their findings are 'derived by the scientific method,' and whether their work product amounts to 'good science.' *Id.* at 590. This "gatekeeping" obligation applies to all expert testimony, and to assist the trial court, several factors were set forth for determining whether a scientific theory or technique constitutes scientific, technical or other specialized knowledge as required by Rule 702. *Id.* at 593-94. The following factors do not constitute an all inclusive list but should be applied with flexibility. *Id.* These factors include:

(1) Whether a theory or technique can be and has been tested;

(2) Whether the theory or technique has been subjected to peer review and publication;

(3) Whether there is a known or potential rate of error; and

(4) Whether the theory is generally accepted within the relevant scientific community. *Id.* at 593.

The proponent of expert testimony must establish by a preponderance of the evidence that it comports with the requirements of Rule 702. *Bourjaily v. United States*, 483 U.S. 171 (1987); *Moore v. Ashland Chem. Inc.*, 151 F.3d 269, 276 (5th Cir. 1998).

Additionally, speculation, even by an expert, is prohibited by Rule 702 and *Daubert.* The subject of an expert's testimony must be "scientific knowledge", and "knowledge" connotes more than subjective belief or unsupported opinion. *Daubert*, 509 U.S. at 590. *See also, Diviero v. Uniroyal Goodrich Tire Co.*, 114 F.3d 851, 853 (9th Cir. 1977) (Scientific, technical or specialized knowledge under F.R.E. 702 does not include unsubstantiated speculation and subjective beliefs); *Comer v. Am. Elec. Power*, 63 F.

Supp.2d 927, 934 (N.D. Ind. 1999) (An expert opinion that lacks a proper factual foundation is little more than unscientific speculation offered by a genuine scientist, and thus is both unreliable and inadmissible). The Mississippi Supreme Court, with respect to speculation, stated an expert's testimony must be based "on the methods and procedures of science, not merely his subjective beliefs or unsupported speculation." *McLemore*, 863 So. 2d at 36.

Mississippi law has longed required that an expert opinion must be stated with reasonable certainty and not in terms of mere possibilities. *See West v. State*, 553 So. 2d 8, 19 (Miss. 1989); *Wansley v. Wansley*, 2002 WL 31954393 (Miss. Cir. 2002). Therefore, Newell's testimony regarding the can should be excluded.

Appellant / Defendant Ford's expert, Newell made these three assumptions based purely on speculation; however, the trial court struck portions of Appellant's / Plaintiff's accident reconstructionist expert, James Hannah, based on his making one assumption. (Tr. 68-72; 117-120). The standard the trial court applied to Hannah is not the same standard applied to Newell, and as such, a new trial should be granted based on this error. Rule 702 and *Daubert* prohibit expert testimony based on speculation, and as such, the trial court erred by not excluding this speculative testimony of Ralph Newell.

H. The Verdict of the Jury was Against and Contrary to the Overwhelming Weight of the Evidence, the Result of an Aggregate of Errors and the Introduction of Inadmissible, Privileged and Inflammatory Evidence and Objectionable Statements of Counsel, and the Result of Bias, Passion and/or Prejudice as Against the Appellant / Plaintiff, and Justice Requires a New Trial be Granted.

As shown in detail above with respect to each of these issues of error, the trial judge did abuse his discretion in the trial of this matter, and as a result this matter should be reversed and remanded for a new trial. This discretion was abused by allowing comparative fault principles apply to this enhanced injury post-collision fuel fed fire case, by allowing the introduction of evidence of the deceased's blood alcohol content, by letting Appellee/ Defendant state at least twice that no other similar accidents had

occurred despite the fact that Ford prevented Appellant/Plaintiff from obtaining evidence of other accidents from their corporate representative, by allowing speculative testimony from Appellee's / Defendant's fire cause and origin expert, and by allowing individuals that owned and /or drove Ford-F150s be part of the jury. These errors as discussed thoroughly above prevented the Appellant / Plaintiff from obtaining a fair trial and this aggregate of errors resulted in bias, passion and prejudice against the Appellant / Plaintiff. These multiple errors mandate a new trial.

This Court has recognized that a new trial can be granted under several circumstances.

> "A new trial may be granted in a number of circumstances, such as when the verdict is against the overwhelming weight of the evidence, or when the jury has been confused by faulty jury instructions, or when the jury has departed from its oath and its verdict is a result of bias, passion, and prejudice. This Court will reverse a trial judge's denial of a request for new trial only when such denial amounts to a abuse of that judge's discretion."

Shields v. Easterling, 676 So.2d 293, 298 (Miss. 1996) (citations omitted).

This Court has recognized the importance of new trials when error has occurred in the trial process.

> A new trial becomes appropriate when a trial court determines that error within the trial mechanism itself has caused a legally incorrect or unjust verdict to be rendered. The motion for a new trial affords trial courts with an alternative to a grant of a J.N.O.V., and provides judges with the opportunity to remedy trial error before an appeal is commenced.

White v. Stewman, 932 So. 2d 27, 33 (Miss. 2006).

The Court in *White* noted that "[w]hether jury error or otherwise, our law has long recognized the importance of this remedial device." *Id.* The Court quoted to a1935 case, *Beard v. Williams,* 161 So. 750 (1935), wherein the Court held the following:

> We are conscious of the fact that the verdict of a jury is to be given great weight, and is the best means, when fair, of settling disputed questions of fact. Nevertheless, throughout the entire history of jury trials, the courts have exercised a supervisory power over them, and have granted new trials

> whenever convinced, from the evidence, that the jury has been partial or prejudiced, or has not responded to reason upon the evidence produced. The duty of the court in supervising trials by jury is such a vital part thereof that no court may refuse to exercise such power whenever fully convinced of its duty so to do.
>
> *Beard,* 172 Miss. at 884, 161 So. at 751.

For all these reasons, Appellant / Plaintiff respectfully requests this Court to reverse this matter and remand it for a new trial.

CONCLUSION

This Court should reverse the trial court's denial of Appellant Coleman's Motion for Judgment Notwithstanding Jury Verdict, and Motion for New Trial and remand this matter for a new trial. The trial judge did abuse his discretion in the trial of this matter, and as a result this matter should be reversed and remanded for a new trial. This discretion was abused by allowing comparative fault principles apply to this enhanced injury post-collision fuel fed fire case, by allowing the introduction of evidence of the deceased's blood alcohol content, by letting Appellee/ Defendant imply that no other similar accidents had occurred despite the fact they prevented Appellant/Plaintiff from obtaining evidence of other accidents from their corporate representative, by allowing speculative testimony from Appellee's / Defendant's fire cause and origin expert, and by allowing individuals that owned and /or drove Ford-F150s be part of the jury. These errors as discussed thoroughly above prevented the Appellant / Plaintiff from obtaining a fair trial and this aggregate of errors resulted in bias, passion and prejudice against the Appellant / Plaintiff. These multiple errors mandate a new trial.

WHEREFORE, PREMISES CONSIDERED, Appellant / Plaintiff respectfully requests this Court reverse the trial court and remand this matter for a new trial, together with such other relief as this Court deems just and proper.

Respectfully submitted,

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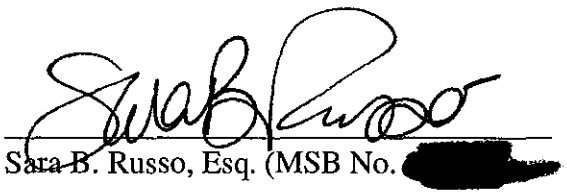

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CERTIFICATE OF SERVICE

I, Sara B. Russo, one of the attorneys for Appellant / Plaintiff, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing document to:

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THIS the 14th day January, 2010.

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