IN THE SUPREME COURT OF MISSISSIPPI

2009-CA-0554

SHENENDOAH H. CLARK AND CHRISTIE CLARK	**PLAINTIFFS-APPELLANTS /CROSS-APPELLEES**
V.	
TOYOTA MOTOR SALES U.S.A., INC., ET AL.	**DEFENDANTS-APPELLEES /CROSS-APPELLANTS**

Appeal from Circuit Court of Hinds County

RESPONSE BRIEF OF APPELLEES & BRIEF OF CROSS-APPELLANTS

ORAL ARGUMENT NOT REQUESTED

David L. Ayers (MSB[redacted])
J. Collins Wohner, Jr. (MSB[redacted])
Jimmy B. Wilkins (MSB#[redacted])
Jennifer A. Rogers (MSB[redacted])
Watkins & Eager PLLC
400 East Capitol Street (39201)
P. O. Box 650
Jackson, MS 39205
Phone: 601-965-1900
Fax: 601-965-1901

ATTORNEYS FOR TOYOTA MOTOR CORPORATION, TOYOTA MOTOR SALES, U.S.A, INC., TOYOTA MOTOR DISTRIBUTORS, INC., AND ROPER TOYOTA, INC.

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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 or the judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. Shenandoah H. Clark, Plaintiff;
2. Christie Clark Johnston[1], Plaintiff;
3. Wayne E. Ferrell, Jr., Counsel for Plaintiffs;
4. Lundy, Lundy, Soileau & South, LLP, Counsel for Plaintiffs;
5. J. Ashley Ogden, Counsel for Plaintiffs;
6. Toyota Motor Sales U.S.A., Inc., Defendant;
7. Toyota Motor Company, Ltd., Defendant;

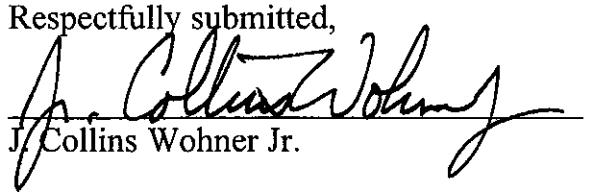
[1] Christie Clark Johnston's name is spelled "Johnson" in plaintiffs' certificate of interested persons and at some places in the transcript. It is spelled "Johnston" at other places in the record, including in the transcript of her testimony and on her verdict form. The latter spelling is used in this brief.

8. Toyota Motor Distributors, Inc., Defendant;

9. Roper Toyota, Inc., Defendant;

10. Watkins & Eager PLLC, Jackson, MS, Counsel for Defendants.

Respectfully submitted,



J. Collins Wohner Jr.

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument should not be needed to affirm this just judgment. The appeal's lack of merit should be apparent from the briefs and record, as should the merit of the cross-appeal.

STATEMENT OF THE CASE

The jury correctly found for the defense in this case. The evidence favored the defense so overwhelmingly that a verdict for plaintiffs, if returned, could not have stood. Plaintiffs failed to establish a legitimate question of fact on any one of multiple necessary elements of their claim (a product liability claim for enhanced injury in an automobile crash). The jury's well-justified rejection of plaintiffs' baseless claim should not be disturbed.

Plaintiffs had a more-than-fair chance to present their baseless claim to a jury. In fact, plaintiffs had a material unfair advantage in significant respects, which are the subject of the cross-appeal:

First, plaintiffs were allowed to try the case in an improper venue of their choosing, which they obtained by the device of naming a Toyota entity that ceased to exist before the subject truck was made, and that had nothing to do with its design, manufacture or distribution.

Second, plaintiffs were granted *in limine* exclusion of the truth regarding Shenendoah Clark's extreme intoxication, which probably caused the crash. In support of exclusion, plaintiffs represented that Clark would accept responsibility for causing the crash. Instead, Clark told the jury that he was driving carefully and legally, and plaintiffs'

expert downplayed crash severity by stating that Clark was a "normal" driver. The *in-limine* exclusion was kept in force even after these abuses, unfairly depriving Toyota[2] of its right to bring out the truth. Plaintiffs do not deserve another trial.

A. Clark Crashed Upside Down into a Bean Field.

Plaintiffs' "Statement of the Case" resembles their story at trial, but like their story at trial, it is contradicted by overwhelming evidence.

At trial, Clark did indeed represent to the jury – under the protection of the erroneous alcohol ruling – that "the truck went off the road as [he] reached down for a CD" (Brief at 3), implying that his inattention was minimal and insignificant.[3] Clark also claimed that he kept one eye on the road while reaching for the CD and was "obeying the law." T 890, 894. These representations were obviously not true.

The physical evidence shows that Clark's truck did not just veer off of the highway in a momentary loss of control consistent with a driver reaching for a CD. Rather, the truck tracked gradually off of the pavement as the highway began to curve to the driver's left. In essence, the truck continued straight instead of following the left-hand curve.

The straight track took the truck first onto the shoulder of the highway and then down a 5-foot embankment into a deep ditch. The truck continued to travel in this deep ditch, tracking generally straight, at highway speed and without braking, until – roughly

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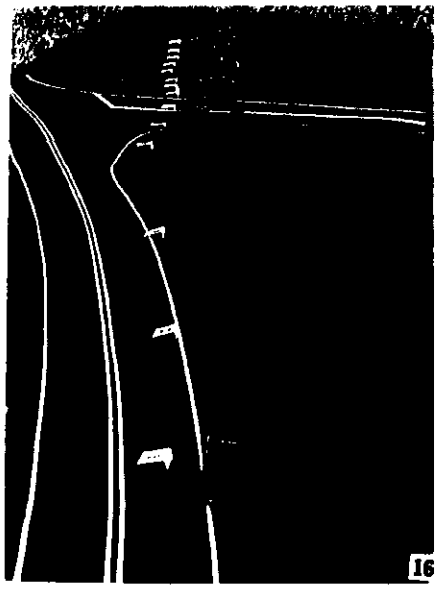
[2] Unless otherwise indicated, "Toyota" is used collectively herein to include all four defendants: Toyota Motor Corporation, Toyota Motor Sales, U.S.A, Inc., Toyota Motor Distributors, Inc., and Roper Toyota, Inc.

[3] T 855. Citations to the record are abbreviated as follows: Clerk's Paper – CP; Supplemental Clerk's Papers – Supp CP; Transcript – T; Exhibits – Ex. Plaintiffs' Record Excerpts are cited RE. Defendants' Supplemental Record Excerpts are cited Supp RE.

200 feet from where it first started leaving the pavement – it reached a 7-foot embankment created by the intersecting Vaiden Road. Plaintiffs' own reconstruction modeling shows such a track:



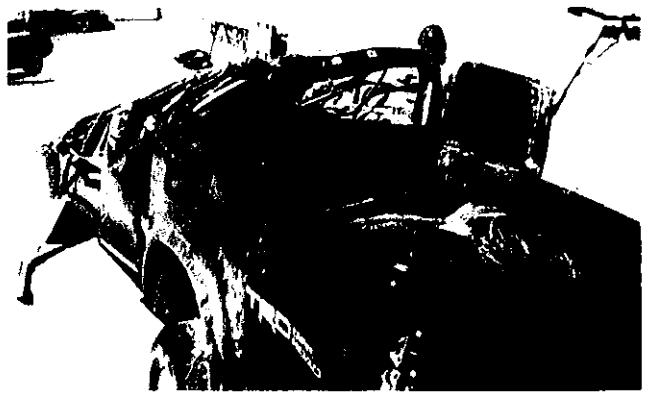
Ex. P-14 (Supp RE Tab 4)

The truck's long trip in the deep tree-lined ditch and the lack of braking that continued even as a steep embankment loomed ahead show a driver asleep or in a stupor from intoxication, fatigue, or both, not one just quickly reaching for a CD. The record supports no other conclusion.

Plaintiffs' sanitized description of what happened after the truck struck the Vaiden Road embankment glosses over additional facts. This crash was not just a matter of "hitting an embankment and . . . rolling over," or "striking the raised embankment area, and [coming] to a rest overturned in a field." Brief at 2 & 3.

Missing from plaintiffs' description is the undisputed fact that the truck went completely airborne after hitting the Vaiden Road embankment and remained airborne

until it had traversed Vaiden Road and reached the lower-lying bean field on the other side. The steep Vaiden Road embankment functioned as a launching ramp, propelling the truck upward and causing it to roll in air. The rolling airborne truck cleared the elevated surface of Vaiden Road completely. After a flight of some 60 feet, the truck landed upside down in the bean field at a point significantly lower than the surface of Vaiden Road. The physical consequences of the resulting massive impact are obvious. *See, e.g.*:



Ex. P-2(9) (Supp RE Tab 3)

After the initial impact, the truck rolled repeatedly deep into the bean field. It came to final rest well south of Vaiden Road.

There is no dispute that the truck flew over Vaiden Road, crashed upside down, and rolled deep into the bean field. Plaintiffs and Toyota were in basic agreement on that much.[4]

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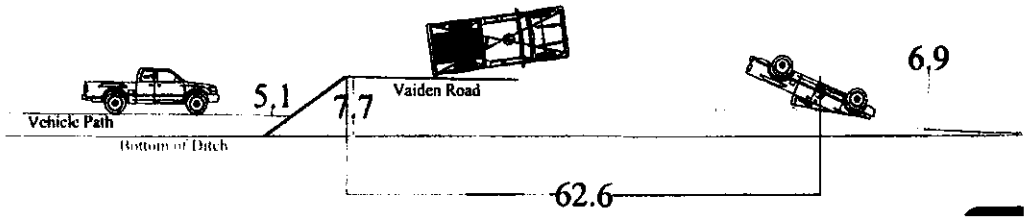
[4] *Compare* Ex. P-14 (Supp RE Tab 4) (photos of plaintiffs' reconstruction model) *with* D-116 (id) (Supp RE Tab 5) (photo of Toyota's reconstruction model) *and* Ex. 132 (id) (video animation CD using life-size foam model truck) (Supp RE Tab 6 (sample screen shots from video animation CD)).

Plaintiffs and Toyota disagreed about how far and how high the truck flew and about the resulting vertical drop. Toyota proved that the truck was airborne for some 60 feet and that it experienced a vertical drop of nearly 7 feet. A cross-section prepared by Toyota's reconstruction expert shows the likely trajectory:

Including Vehicle Crush
Vehicle drops 6.9 ft. from apex of flight.
Lands with a forward velocity of approximately 44 mph.



Ex. D-105 (Supp RE Tab 7)

Plaintiffs contended that the truck did not fly as high or as far and that the vertical drop was less. Their accident reconstruction expert Jerry Wallingford based this contention on his acceptance of Clark's explanation for leaving the road, and on his related assumption that after leaving the road, Clark did what a "normal" or "typical" driver would do in the same circumstances. T 410-11.

According to Wallingford, a "typical" or "normal" driver in Clark's circumstances would let off the accelerator but would not brake – not even as a steep embankment loomed ahead. *Id.* Wallingford's insistence that a "normal" driver having veered into a deep tree-lined ditch in the middle of the night would continue to drive in the ditch

without hitting the brakes, even as a steep embankment loomed ahead, was reason enough for the jury to reject his opinion and plaintiffs' case.[5]

Plaintiffs and Toyota also disagreed about how the truck landed. Toyota proved that the truck crashed into the ground on the driver's side, producing the massive driver's side crush evident in photographs.[6] Plaintiffs denied that this massive crush happened on impact. They theorized that the truck came down on the *passenger's* side and that the massive crush to the driver's side happened gradually during the subsequent rolls. T 360. Wallingford, who modeled the crash that way for plaintiffs, admitted that he could not say when or how such a crush occurred during the subsequent rolls. T 424. He said that it was not his job to know. *Id.* ("The roof design expert will address that").

B. Toyota Proved that Even a Hypothetical Super-Roof Would Have Made No Difference in Clark's Injuries.

Plaintiffs' description of how Clark's injuries occurred is no more accurate than their description of the crash. It was not the truck's roof "invad[ing] the truck's cabin" (Brief at 2), but Clark's head-first impact with the ground that caused his injuries.

When describing the result of an upside-down impact with the ground, it is misleading and ultimately erroneous to think of the roof "invad[ing] the truck's cabin" or "collaps[ing]" and causing the injury. Brief at 2 & 3. All the roof actually does in these circumstances is to stop moving – instantly, on impact with the immovable earth. Objects

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[5] Wallingford's admitted assumptions would also have been reason enough for a directed verdict for Toyota, for reasons Toyota explained in detail in its motion at the close of plaintiffs' case. T 1143.

[6] *See, e.g.*, Ex. P-2(9) (Supp RE Tab 3) (shown on p. 4 above).

inside the vehicle, including human bodies, continue moving until they, too, hit ground, by hitting the roof which has been stopped by the ground.

A driver like Clark who is sitting upright in the vehicle when it rolls upside down will be aligned so that the first part of his body to stop moving is the head. The head stops instantly on impact with the roof (and indirectly with the ground, which already stopped the roof, and on which the roof rests). After the head stops, the rest of the body continues moving toward the head, compressing the neck and causing paralysis or death. The effect is like that of any other head-first collision with the ground, such as from a dive into shallow water.

The vehicle itself continues moving toward its roof in a similar manner. The roof hits ground first and stops; the larger mass of the vehicle deforms downward toward the roof until the available energy is exhausted. This vehicular deformation happens more slowly, relatively speaking, than the near-instantaneous neck compression in a human passenger.[7]

It is doubtful that a "feasible" automotive roof design could be devised that would resist substantial deformation in an impact as powerful as this upside-down crash into the

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[7] *See, e.g.*, Ex. D-141(id) (Supp RE Tab 10) (chart comparing near-instantaneous peak neck load following roof-ground contact with much slower progress of roof crush). Toyota expert Kenneth Orlowski explained extensive scientific evidence documenting the mechanics of neck loading in such crashes in support of his opinion that even a totally non-deforming roof would not have changed Clark's injury exposure in this crash. T 1518-1602. This evidence included slow-motion video documenting and comparing neck loading and roof crush in vehicles with production roofs and vehicles with reinforced roofs. Ex. D-148(id) (CD), Ex. D-149 (report), Ex. D-150(id) (print-out of powerpoint).

bean field.[8] Plaintiffs did not address that issue (that and other failures of proof are addressed in the next section).

But even if such a non-deforming super-roof were feasible, it would not have prevented the injury, because it would not have altered the basic physics of Clark's head-first crash into the roof and ground. The head-strike occurs almost instantaneously, and much faster than the deformation of the vehicle structure. Toyota's experts offered well-documented scientific proof of this reality at trial, including slow-motion side-by-side video comparing the results of dummy tests with production and reinforced roofs.[9] A stronger roof would have made no difference.

C. Plaintiffs Failed to Establish Any One of Multiple Necessary Elements of an Enhanced Injury Product Liability Claim.

Plaintiffs' failed to show that the Tundra design was defective by any standard, much less by the standards required by Mississippi's Product Liability Act.[10]

Plaintiffs did not identify a design defect much less prove one. Just saying the Tundra roof should have been strong enough to prevent injury, which is all they did, states no claim, because an auto maker is not an insurer. Plaintiffs never said how strong a roof must be, in their view, to be non-defective. Without that, they have no claim.

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[8] To qualify as a "feasible" alternative design under the Mississippi's Product Liability Act, an alternative design must "have to a reasonable probability prevented the harm without impairing the utility, usefulness, practicality or desirability of the product to users or consumers." MISS. CODE ANN. § 11-1-63(f)(ii).

[9] T 1528-38. *See also* evidence summarized above in n.7.

[10] MISS. CODE ANN. § 11-1-63 (2002).

Plaintiffs' defect theory rested on opinions offered by their design expert Terence Honikman. Honikman opined that all automotive roofs should be stronger, but he could not say how much stronger the Tundra roof needed to be, in his opinion, to be reasonably safe.[11] Honikman's random criticisms of Toyota and automakers generally did not state a design defect theory, much less prove one.

And as previously noted, plaintiffs never addressed the statutory issue of feasible alternative design, either through Honikman or otherwise.[12] Honikman's unquantified assertion that the roof should have been stronger does not begin to satisfy the Mississippi statute.

SUMMARY ARGUMENT

This just judgment for Toyota should be affirmed. There is no basis for new trial, let alone a JNOV for plaintiffs. A JNOV for plaintiffs on a personal injury products claim is practically impossible, even where evidence of liability is overwhelming. Here, in contrast, plaintiffs could not make out a liability case for a jury because the evidence will not support any one of multiple necessary elements of a product liability claim under Mississippi law. Plaintiffs' argument for a JNOV is frivolous.

Either singly or collectively, there is no merit to plaintiffs' new trial points:

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[11] *See, e.g.,* T 531 (Honikman admitting that access door concept was not *per se* defective and could not be considered defective without a strength analysis), T 536-37 (admitting lack of strength analysis of Tundra design, and lack of an analyzed alternative design), T 539 (admitting ignorance of the strength of the steel used in Tundra design), T 560 (admitting that the Tundra design surpassed federal standard by 193%), T 567 (admitting that Tundra design passed proposed rule that he had advocated on direct), T 572-73 (admitting that Tundra design strength surpassed design strength that he had admitted to be sufficient in previous cases).

[12] *See, e.g.,* T 536 (Honikman admitting lack of an analyzed alternative design).

The trial court acted well within its discretion in allowing the jury to inspect the subject vehicle and exemplar vehicle outside the courthouse. The inspection was closely supervised and enhanced the search for truth. There was no error.

With respect to the verdict form, plaintiffs are attempting to exploit their own typographical error on a form they insisted upon, which was given over Toyota's objection. A defense verdict should not be reversed on plaintiffs' own error. In any event, there is no reason to believe that the jury misunderstood how to return a verdict for plaintiffs, if it had any intention of doing so. The jury's intention *not* to do so was clear. Nothing more was required. Moreover, if the jury's intention had been unclear, the proper remedy would have been further deliberation by the same jury to clarify its intent, not another trial. Plaintiffs did not ask for such a clarification. Having waived what would have been the only proper remedy when it was available (had it been needed, which it was not), plaintiffs have no basis for seeking a new trial now. The point is baseless and waived.

Admission of Lee Carr's valid reconstruction opinion was no abuse of discretion. Carr's opinions were timely disclosed, including the Exponent test. The reliability of Carr's work is thoroughly documented in the record.

The trial court was correct to reject plaintiffs' rebuttal witness ruse with Honikman. The Exponent test provided no grounds for allowing rebuttal, because it was both timely disclosed and reasonably anticipated. Plaintiffs have not identified anything

that Honikman could have added on rebuttal that had not already been said. Their rebuttal ruse was just a ploy to get in the last word.

In closing argument, Toyota argued only facts in evidence. Drinking and alcohol, evidence of which had been improperly excluded, were not mentioned. Nothing more could have been required even if plaintiffs had objected, which they did not. The point is baseless and waived.

ARGUMENT

I. The Trial Court Was Correct To Reject Plaintiffs' Motion for Judgment Notwithstanding the Verdict or New Trial.

Plaintiffs argue their first issue as if the burden of proof at trial were on Toyota instead of on them. A JNOV for plaintiff would require every element of the claim, including the damages amount, to be proved beyond refute and found by the court as a matter of law, leaving no issue for a jury to decide.[13] It is practically impossible for this standard to be satisfied in a personal injury action, where, among other things, causation is almost always for the jury, and the damages award is subject to jury discretion.[14]

Here, Toyota successfully contested every element of plaintiffs' liability case. Plaintiffs' baseless defect and causation contentions were completely refuted, to a degree

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[13] *See, e.g.*, MRCP 50 comment ("[I]t is the law in Mississippi that questions of fact are for the jury . . . . Rule 50 is a device for the court to enforce the rules of law by taking away from the jury cases in which the facts are sufficiently clear that the law requires a particular result.").

[14] *See, e.g., Illinois Cent. Gulf R.R. Co. v. Milward*, 902 So. 2d 575, 582 (¶ 38) (Miss. 2005) ("The question of whether the defendant's negligence was a proximate contributing cause of the plaintiff's injuries is ordinarily one for the jury"); *Gatewood v. Sampson*, 812 So. 2d 212, 223 (¶ 28) (Miss. 2002) ("It is primarily the province of the jury to determine the amount of damages to be awarded").

that would have entitled defendants to JNOV had the jury found for plaintiffs.[15] The jury reached the only result that the law and evidence could sustain when it returned a verdict for defendants. A JNOV for plaintiffs on this record is out of the question.

Plaintiffs' motion for new trial was also meritless. Plaintiffs demonstrated no error at all, much less any clearly erroneous decision adversely affecting their substantial rights.[16]

II. The Jury View Was Proper and Aided the Search for Truth.

The trial court acted well within its discretion in allowing the jury to inspect the subject vehicle and an exemplar in front of the courthouse. The subject vehicle and exemplar were too large to be brought into the courtroom. They were placed by the curb just outside. The court instructed the jury to walk outside with the bailiffs and view them briefly, without any comment to the jury or testimony. T 1154. One lawyer for plaintiffs and one lawyer for defendants were allowed to observe, escorted by another bailiff. *Id.*

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[15] *See* T 1143-49 (detailed argument for directed verdict).

[16] "[A] trial court should grant a motion for a new trial 'only when upon a review of the entire record the trial judge is left with a firm and definite conviction that the verdict, if allowed to stand, would work a miscarriage of justice.'" *Ford Motor Co. v. Tennin*, 960 So. 2d 379, 390 (¶ 37) (Miss. 2007). To demonstrate error in the admission or exclusion of evidence, the movant must show that the decision was an abuse of discretion. *Troupe v. McAuley*, 955 So. 2d 848, 856 (¶ 19) (Miss. 2007). To amount to an abuse of discretion, the decision must have been, not just mistaken, but "arbitrary and clearly erroneous." *Id.* 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." *Thorson v. State*, 895 So. 2d 85, 126 (¶ 93) (Miss. 2004). "'[F]or a case to be reversed on the admission or exclusion of evidence, it must result in prejudice and harm or adversely affect a substantial right of a party." *Id.* (quoting *Terrain Enter., Inc. v. Mockbee*, 654 So. 2d 1122, 1131 (Miss. 1995)). *See also* MRCP 61 (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"); MRE 103(a) ("Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected").

Plaintiffs' case attacked the structural design of the Tundra as defectively weak, faulting in particular the allegedly weak double-door structure. Viewing the exemplar allowed the jury to see for itself the structure that plaintiffs' witnesses had complained about, to better understand the testimony.

Plaintiffs' case also required the jury to hear and consider testimony about the interior space of the Tundra and how a human body would move within that space as the vehicle rolled.[17] Viewing the exemplar allowed the jury to see the interior space of a Tundra to better understand that testimony.

Finally, plaintiffs' case described the massive crushing of the driver's side of the subject Tundra as a roof "failure." Plaintiffs denied that the crush occurred on the initial impact with the ground after the flight across Vaiden Road. To assess those assertions, the jury deserved to see the subject vehicle for themselves side-by-side with an undamaged model.

In all these respects, the inspection assisted the jury in understanding the facts and ascertaining the truth, which is the purpose of trials and of the rules. *See* MRE 102. Photographs are no substitute for inspecting the actual object at issue, especially a large and complex object like a motor vehicle. *See, e.g., Seal v. Miller*, 605 So. 2d 240, 248 (Miss. 1992) ("We disagree with Seal's assertion that the photographs in this instance were enough to allow the jury an adequate view of the inside of the car"); *Hutchins v. Page Contractors, Inc.*, 513 So. 2d 944, 946 (Miss. 1987) ("within the sound discretion of

[17] *See* evidence summarized above in n.7.

the trial judge"). Plaintiffs offer not the slightest credible reason to think that the inspection compromised the search for truth.

Plaintiffs' argument does not demonstrate error or prejudice, much less substantial prejudice sufficient to warrant a new trial.[18] Plaintiffs' contention that the "'organized court' did attend the view" (Brief at 9) just because the trial judge chose to remain in the courthouse instead of walking outside with the jury and bailiffs is not supported. The court remained fully organized and highly supervised throughout the inspection, which was carried out in accordance with the judge's explicit instructions. T 1179. This point is also not supported by a contemporaneous objection.[19]

Plaintiffs' contention that Toyota "failed to provide facts" in support of its request for the view is also unsupported. Plaintiffs' argument assumes that the colloquy they cite (Brief at 10-11, quoting from T 1050-52) can or should be viewed in isolation, as if no other record existed. But that is not the case.

The jury view did not take place until after Toyota had started putting on its case. T 1179. By then, plaintiffs' entire case was of record – encompassing almost 5 days of testimony and dozens of exhibits. Extensive pre-trial proceedings were also of record,

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[18] MRCP 61 ("No error in either the admission or the exclusion of evidence . . . or in anything done or omitted by the court or by any of the parties is ground for granting a new trial . . . or otherwise disturbing a judgment . . . , unless refusal to take such action appears to the court inconsistent with substantial justice")

[19] The "*specific* ground of objection" must be stated unless it is apparent from the context. MRE 103(a) (emphasis added). "[T]he trial court will not be held in error unless it has had an opportunity to pass on the question. *Wilson v. General Motors Acceptance Corp.*, 883 So. 2d 56, 73 (¶ 78) (Miss. 2004). Plaintiffs opposed any jury view at all, but they never objected that the trial judge had to walk to the curb with the jury.

including multiple motions. The trial court could not possibly have needed more record to understand why the jury might benefit from viewing the vehicles; nor could the jury have needed any further explanation of what they were about to see.

The cases plaintiff cite do not support the result they seek. *Floyd v. Williams* (cited Brief at 9-10) was the defendant's appeal from a jury verdict awarding plaintiffs the value of ornamental trees cut in violation of reservations in a timber deed. 198 Miss. 350, 22 So. 2d 365 (1945). The trial court deemed a jury view unnecessary, and this Court agreed, finding no grounds for reversal. The case is no precedent for the result sought here.

Poteete v. City of Water Valley (cited Brief at 10, 12-14) was the plaintiffs' appeal from a jury verdict for the city on plaintiffs' claim that the city had improperly diverted surface water from the street onto plaintiffs' lot. 207 Miss. 173, 42 So. 2d 112 (Miss. 1949). The jury view was allowed "[i]mmediately when the jury was impaneled, and before the [plaintiffs] had even called their first witness," without a record, and over the plaintiffs' objection that the site had substantially changed. 42 So. 2d at 114. Subsequent testimony indicated that defendants had altered the site deliberately and materially in anticipation of the jury view.[20] The record now before the Court is not remotely comparable to *Poteete*.[21]

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[20] *Potetee*, 42 So. 2d at 114-15 ("all of the [plaintiffs'] proof thereafterward offered was to the effect that upon the very next day after filing of the suit the city began work on the street, restored its former level, and opened the ditches, and that thereafterward there had been no surface water drained from the street upon plaintiffs' lot").

[21] Technically, *Poteete* was reversed because of an erroneous jury instruction that improperly shifted to plaintiffs the burden of proof on one of the city's defenses. 42 So. 2d at 113. The jury view

The capital murder case *Green v. State* (cited Brief at 12) is authority *against* reversal here. 614 So. 2d 926 (Miss. 1992). *Green* found that allowing a jury view of a shot-up police car was *not* an abuse of discretion. 614 So. 2d at 935-36. *Green* stressed the breadth of trial court discretion to allow and supervise a jury view. *Id.* at 936 ("this Court will reverse only in the event of a clear abuse of discretion"). *Green* held that normal deterioration from transportation and storage at least as severe as that plaintiffs complain of here, which is easily explained to and understood by the jury, was irrelevant. *Id.*[22]

Plaintiffs' contention that the exemplar was not a true exemplar, because it was not a TRD model, is a red herring. It was not disputed that the roof structures of the two vehicles were identical. T 1361-62, 1434. The design differences were all in the suspension and completely irrelevant to this crash and to plaintiffs' defect theories. *Id.* The jury was informed about what the differences were, and the view gave the jury an opportunity to see those differences for themselves, by comparing the exemplar to the subject vehicle, further promoting the search for truth.

Plaintiffs' final tack on this issue is to equate jurors' alleged touching of the vehicles during the inspection to an unauthorized independent experiment or private investigation. There is no merit to the argument.

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was an additional issue.

[22] *Leflore v. State*, 196 Miss. 632, 18 So. 2d 132 (1944) (cited Brief at 10) is distinguishable and irrelevant for reasons explained in *Green*. 614 So. 2d at 936 (noting that *Leflore* involved "a viewing with no justifiable reasons for the inspection stated, and where the scene was 20 miles from the courthouse, ranged over distance of a quarter of a mile, and the viewing took place at a different time of year").

First, there is no comparison between the minimal touching alleged here and the unauthorized independent investigations addressed in the cases cited plaintiffs. It strains credulity to suggest that the minimal touching alleged here was in any way unfairly prejudicial to plaintiffs' case. Except for their conclusory assertion, plaintiffs offer no reason to think that it was.

Second, if they believed that some prejudice had occurred, plaintiffs should have raised the issue contemporaneously so that the trial court could have determined the facts and taken corrective action, such as a cautionary instruction, if warranted. Since plaintiffs did not raise this point by contemporaneous objection, they did not give the trial court a chance to determine the facts or to give a cautionary instruction, if needed. The only factual record of this alleged touching is an affidavit prepared by their counsel weeks after the trial, and after the hearing on plaintiffs' post-trial motions, in belated support of assertions made in their motion for new trial. CP 239 (¶ 1) (plaintiffs' 11/26/08 "supplemental" post-hearing submission of evidence in support of post-trial motion) & CP 243-44 (11/25/08 affidavit of plaintiffs' counsel). That is insufficient. A specific contemporaneous objection is required. MRE 103(a)(1).

This issue cannot justify another trial.

III. Although Plaintiffs Should Not Be Heard to Complain of Their Own Verdict Form, the Jury's Intentions Were Perfectly Clear.

With the issue of the verdict form, plaintiffs are exploiting a typographical error of their own making on a verdict form they tendered, which was used over Toyota's objection.[23] Plaintiffs should not be allowed to use an error they created to avoid a defense verdict. *See Carr v. State*, 655 So. 2d 824, 847 (Miss. 1995) ("This Court has previously held that it will not reverse for an error created by [a party's] own instruction").

Plaintiffs also should not be heard to say that the jury's intent was unclear when they did not say so before the jury was dismissed. Had there been any question about the jury's intent (which there was not), the proper remedy would have been additional deliberations by the same jury to clarify its intent, not a new trial.[24] Plaintiffs did not ask for clarification because the jury's intent was perfectly clear. This point should be deemed waived.

In any event, the jury could not possibly have misunderstood how to use plaintiffs' verdict forms to return a verdict for plaintiffs, had the jury had any intention of doing so. Plaintiffs used a projector during closing to display their verdict forms to the jury and to show the jury exactly how to mark the forms to return a verdict for plaintiffs – by checking "Yes" in response to question 1, and then filling in the numerous lines of

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[23] CP 182 (Toyota's written objections to plaintiffs' verdict forms), T 1826-29.

[24] *See* MRCP 49(c) (authorizing continued deliberations to clarify ambiguity); URCCC 3.10 (same, where "a verdict is so defective that the court cannot determine from it the intent of the jury").

question 2 with dollar amounts for various categories of damages. T 1872-73. Plaintiffs did this not once but twice – first for Clark (T 1872-73) and then again for Clark's ex-wife, Christie Clark Johnston (T 1873-74). (The typographical error appeared on Clark's verdict form only, not on Johnston's.[25]) The trial court also read and explained both verdict forms to the jury. T 1853-54.

After briefly deliberating, the jury marked both verdict forms by checking "No" in response to question 1 and by leaving the numerous damages lines blank. CP 210-13 (RE Tab 4).

The jury's intention to return a verdict for the defense could not have been clearer. Nothing more was required. "No special form of verdict is required, and where there has been a *substantial compliance* with the requirements of the law in rendering a verdict, *a judgment shall not be . . . reversed* for mere want of form." MISS. CODE ANN. § 11-7-157 (1972) (emphasis added).

"[T]he test of whether a verdict is sufficient as to form 'is whether or not it is an intelligent answer to the issues submitted to the jury and expressed so that the intent of the jury can be understood by the court.'" *White v. Stewman*, 932 So. 2d 27, 37 (¶ 28) (Miss. 2006) (quoting *Sentinel Indus. Contracting Corp. v. Kimmins Indus. Serv. Corp.*, 743 So. 2d 954, 969 (¶ 40) (Miss. 1999)).

The jury's verdict easily satisfied this standard. There are no grounds for upsetting the jury's clear verdict.

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[25] *Compare* CP 210 (Clark's verdict form) *and* CP 212 (Johnston's)(RE Tab 4).

IV. The Trial Court Acted Well Within Its Discretion in Admitting Lee Carr's Reconstruction Opinion.

Admission of expert opinion is not grounds for a new trial unless the opinion is so unreliable and prejudicial that the decision to admit it is an abuse of discretion compromising the opponents substantive rights. MRE 103(a)(1); *Troupe*, 955 So. 2d at 856 (¶ 19) ("The trial judge has the sound discretion to admit or refuse expert testimony; an abuse of discretion standard means the judge's decision will stand unless the discretion he used is found to be arbitrary and clearly erroneous"). That cannot possibly be said of Lee Carr's reconstruction opinion. The reliability of Carr's opinion was thoroughly documented in the record and has not been subject to legitimate question. CP 35-41, T 1183-1362, Exs. D-96 - D-122. Excluding Carr's opinion would have been serious error.

Only Carr made a determination of the amount of energy required to crush a Tundra as much as the subject Tundra was crushed in this crash. The Exponent test that plaintiffs complain of was designed to do just that. Plaintiffs should not be heard to complain that Toyota's expert did something their own experts should have done themselves before they formed opinions about the crash.[26]

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[26] Carr's reconstruction is the only reliable, and only complete, reconstruction in the record. Plaintiffs' reconstruction expert Wallingford admitted that his reconstruction was incomplete, because he did not attempt to determine when the massive crush to the top of the truck occurred, or the amount of energy required to produce it. T 424. To obtain his results, Wallingford also admitted relied on the assumption that Clark was driving like "normal" or "typical" driver during the event, even though he knew that Clark was severely intoxicated. T 409-11. Either one of these admissions was sufficient to disqualify Wallingford's opinion.

Plaintiffs' contention that what they call Carr's "second" reconstruction demonstrated unreliability is completely unsupported. What plaintiffs call a "second" reconstruction is a slight refinement that Carr made to his opinion after plaintiffs belatedly produced improperly withheld evidence just four months before trial.[27] The improperly withheld "family photographs," taken at the scene about a week after the crash, show the truck's tracks in the ditch north of Vaiden Road. *See, e.g.*, Ex. P-2(21) & (28) (Supp RE Tab 3). This evidence allowed Carr to fix the truck's path north of Vaiden Road slightly more accurately than before. Carr's methodology for doing so is thoroughly documented in the record, further establishing the reliability of his opinion. *See, e.g.*, T 1286-90, Ex. D-111(A-C).

Plaintiffs' attempt to make an issue of where Carr believed the truck went airborne (Brief at 24-27) relies on a distortion of Carr's testimony and is not supported. Carr's testimony was precise – the 15 foot measurement he gave ran specifically from the "*pavement edge*" of Vaiden Road.[28] Plaintiffs' argument wrongly equates the "pavement edge" with the embankment itself.[29] Plaintiffs have no basis for asserting that the measurement Carr actually testified to (as opposed to their caricature thereof) is anything

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[27] T 66-69.

[28] T 1382 (emphasis added), 1405 ("the tires ceased marking meaning it was airborne about 15 feet from the pavement edge of Vaiden Road").

[29] Brief at 25 ("Carr depicts the Clark vehicle launching into the air fifteen feet (15') from the embankment").

less than completely correct.[30] It is just not true to say that Carr believed the truck went airborne before it reached the embankment. To the contrary, Carr stressed that the truck experienced a significant impact with the steep embankment that helped launch it and that affected its flight.[31] In any event, the jury heard the testimony and agreed with Carr. Plaintiffs' failed attempt at misleading cross-examination is no grounds for a new trial.

A. There Was No Discovery Violation by Toyota.

Carr's alleged failure to "respond to questions" in discovery (Brief at 20) boils down to a single argumentative deposition colloquy, during which plaintiffs pried into personal affairs immaterial to Carr's opinion – i.e., Carr's ownership interests in property in Santa Barbara, California.[32] Carr finally "decline[d] to describe it any further" in response to plaintiffs' harassment.[33] There was no discovery violation.

Plaintiffs' lack of any legitimate interest in the Santa Barbara property is confirmed by their few questions about the property at trial, all of which were answered. T 1385-87. Plaintiffs raised the topic in the context of questions about Carr's invoice and

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[30] Wallingford's isolated answer, which plaintiffs quote in their brief, provides no basis for disputing Carr's measurement, because Wallingford was not asked about a measurement from the "pavement edge," and there is no record that he ever made one. Brief at 25-26 (quoting T 360-61).

[31] *See, e.g.*, T 1285, 1299 ("And then about halfway up at that embankment, in a line about equivalent to where the concrete culvert pipe is where the tire mark cease, the right front wheel has to be broken free from it's suspension. ... And it's going so fast it can't just drive up the embankment. It collides with the embankment. All or most of the force is taken on the right side, the passenger side").

[32] CP 43 ("Q. So what is your residence in Santa Barbara?" A. "I don't have a residence in Cal – in Santa Barbara, and I'm -- I would decline to describe it any further than that." Q. "That's just a second home?" A. "I decline to describe it . . . ").

[33] *Id.*

hourly rate, in an apparent attempt to incite regional and economic prejudice. T 1387. No real relevance was suggested, and none exists.

Moreover, if plaintiffs truly believed that they were denied discoverable information during Carr's deposition, their proper remedy would been a motion to compel. If such a motion had resulted in an order compelling disclosure and that order had been ignored, plaintiffs might thereafter have sought exclusion of related evidence or some other remedy. MRAP 37. There was no such motion and no such order. Lacking that record, plaintiffs have no basis for claiming that discoverable information was improperly withheld or for seeking the draconian remedy of exclusion here.

B. Plaintiffs Violated Discovery Rules by Concealing their "Family Photographs" for 5 Years.

Plaintiffs' conduct with the "family photographs" was brazenly improper, as was (and is) their attempt to convert their own discovery misconduct into criticism of Carr and a pretext for another trial. Plaintiffs did not just fail to produce scene photographs – they denied under oath that photographs of the scene were taken and then failed to correct those sworn misrepresentation for 5 years. Four months before trial, the photographs were produced suddenly, without explanation. T 66-69. No credible or innocent explanation for the concealment was ever offered.

Plaintiff Christie Clark Johnston was at the scene when the family photographs were taken about a week after the crash and appears in them repeatedly. Ex. P-2 (RE Tab 3); T 1134-35. The photos were turned over to plaintiffs' counsel before suit was filed. T 1137. The photos were not produced to Toyota in response to discovery. When

Johnston was deposed just over a year after the crash, she testified that no photographs were taken and she had not seen any photographs. *Id.* The counsel who had possession of the photographs was present when Johnston gave this false testimony, *id.*, but did not correct it, either then or later. Plaintiffs' intentional concealment of this evidence did not end until June 2008, four months before trial. CP 77-78.

When Carr surveyed the crash scene for Toyota a year after the crash, tire marks in the ditch north of Vaiden Road were no longer visible. To determine the truck's track north of Vaiden Road, Carr met with the investigating trooper (Jones) at the site and interviewed him regarding his recollection of evidence of the truck's track north of Vaiden Road.[34] South of Vaiden Road, Carr was able to map extensive debris remaining in the bean field to determine the truck's track and impact points after crossing Vaiden Road. T 1276-80, 1408-09; Ex. 115(id) (debris map).

When the wrongfully withheld family photographs were belatedly produced in June 2008, Carr was able to see tire marks in the ditch north of Vaiden Road. Using photogrammetry to pinpoint the track precisely, he refined his model slightly by shifting the track a couple of feet to the left.[35] This slight difference in the track north of Vaiden

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[34] T 1267, 1280. Trooper Jones photographed the scene as part of his investigation and submitted the film with his report, but the film was lost en route to the printing shop and was therefore unavailable. T 1168.

[35] T 1281-90. When Carr interviewed him, Trooper Jones recalled that the track came within a couple of feet of the culvert under Vaiden Road, which Carr interpreted as two feet. T 1381. After studying the family photos, Carr concluded that two feet was too small (*id.*) and that the actually track was two feet further left from the culvert. T 1341.

Road did not change any significant aspect of the reconstruction. T 1341. There was no error in the admission of this valid and reliable evidence.

C. The Exponent Test Was Timely Disclosed and Valuable.

Plaintiffs admit in their brief that Carr's Exponent test results were disclosed during the discovery period and before Carr was deposed. Brief at 27. Carr was questioned about the test during his deposition, and he answered plaintiffs' questions.[36] Nothing more is required to dispose of plaintiffs' frivolous objections to the test.

Plaintiffs' assertion that they "had no time to perform their own follow-up testing" is false on its face. Plaintiffs admit in their brief (at 27) and that Carr's test was disclosed within the discovery period and before Carr's deposition. Plaintiffs had over 5 weeks to perform rebuttal testing, if needed, before trial. So far as has been revealed to defendants, they made no attempt to do so.

Plaintiffs' underlying assumption that they were entitled to wait for Toyota to perform such a test before undertaking something like it on their own is also erroneous. The Exponent test was designed to measure the energy required to deform a Tundra as extensively as the subject Tundra was deformed in this crash. If they had been engaged to apply real science in evaluating the facts of the case, instead of fake science to create an illusion of support for a claim, plaintiffs' experts would have made such a measurement on their own – *before* they declared the Tundra defective. That plaintiffs' experts *never* made such a measurement cannot be blamed on Toyota. Plaintiffs' feigned

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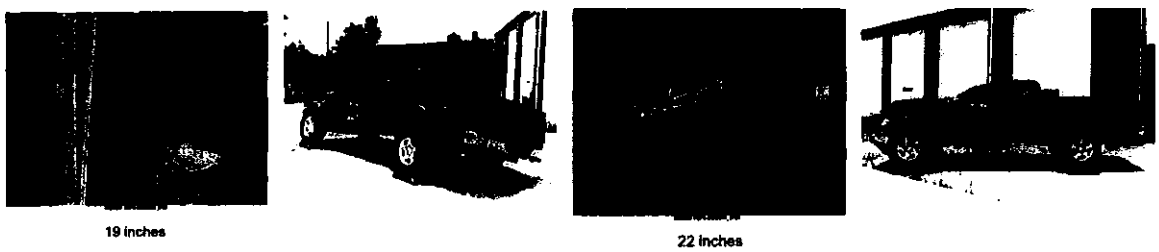
[36] *See* Brief at 27-28 text & nn. 32 & 33 (repeatedly citing Carr's August 2008 deposition testimony about the test, excerpts of which are in the record at CP 37-39).

surprise that Toyota would make a measurement they should have made themselves is as false as their experts' opinions.

Carr designed the Exponent test to replicate the truck's orientation with the ground at the instant of impact and to measure the energy required to produce a comparable amount of deformation. The test methodology is thoroughly documented in the record.[37] The accuracy of the test is obvious from this documentation. *See, e.g.*:



Ex. D-101(id) (Supp RE Tab 8)

The Exponent test confirmed the accuracy of Carr's determination of the truck's orientation at impact. The energy measurement obtained from the test confirmed that the truck experienced a vertical drop on the higher end of Carr's estimates. T 1350-58; Ex. D-105 (Supp RE Tab 7).

Mississippi law encourages the use of actual measurements as a form of proof and prefers expert opinion based on actual measurements to opinion founded on mere theory and conjecture.[38] Carr's work was authentic science of the type the law encourages. Carr

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[37] T 1229-51; Ex. D-98(id) (test report), Ex. D-101 (Supp RE Tab 8) (photos comparing Exponent test vehicle to subject vehicle).

[38] *See, e.g., Janssen Pharmaceutica, Inc. v. Bailey*, 878 So. 2d 31, 61 (¶ 135) (Miss. 2004) ("Expert testimony must be consistent with scientific principles 'as established by the laws of physics or mechanics'"); *Smith v. Commercial Trucking Co., Inc.*, 742 So. 2d 1082, 1085-86 (Miss. 1999) ("Opinion

was properly allowed to testify about the test to document the quality of his work and the reliability of his methodology and opinion. There was no error.

D. The Trial Court Was Absolutely Correct to Reject Plaintiffs' Attempted Rebuttal "Ruse."

The trial court correctly refused to allow plaintiffs to recall Honikman in rebuttal, which plaintiffs sought to do for the purported purpose of "rebutting" the Exponent test. Plaintiffs were attempting to use the "rebuttal witness ruse" as a ploy to get in the last word. Use of the rebuttal ruse may be a common practice in Louisiana, where plaintiffs' lead counsel is based. But it is not allowed in Mississippi. There was no excuse under Mississippi law for the purported rebuttal, and the court properly rejected it.

In cases like *Banks v. Hill*, on which plaintiffs purport to rely (Brief at 32), this Court has firmly denounced the "rebuttal witness ruse"[39] as a tactic for avoiding expert disclosures and for getting in the last word. *Banks v. Hill*, 978 So. 2d 663, 666 (¶¶ 12-13) (Miss. 2008). As this Court observed, "[i]f the rules allowed the strategy argued by plaintiffs, we fail to see why plaintiffs would designate and disclose experts." *Id.* (¶ 13). "Plaintiffs would be free simply to wait until trial, and then call undesignated experts to 'rebut' the defendant's case-in-chief." *Id.*

As cases like *Banks* make clear, expert rebuttal is permissible only to respond to "opinions from the defendants' expert not disclosed in discovery, and *not reasonably*

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evidence of an unproven fact must therefore give way to actual mechanical or scientific proof of fact").

[39] *Harris v. General Host Corp.*, 503 So. 2d 795, 797 (Miss. 1986) ("We have effectively dispatched the 'rebuttal witness' ruse for non-disclosure of witnesses in the context of criminal cases. [Citations omitted] We ascertain no reason on principle why we should credit such a ploy in the context of [expert testimony in] a civil action").

anticipated."[40] Under expert disclosure rules, all "opinions should be disclosed prior to trial, eliminating the prospect of unexpected opinions at trial." *Banks*, 978 So. 2d at 667 (¶ 16).

As shown in the preceding section, the Exponent test *was* timely disclosed to plaintiffs during discovery. It also should reasonably have been anticipated by plaintiffs, since the test made a measurement that plaintiffs should have made themselves but did not. Plaintiffs had no excuse for rebuttal.

In addition, plaintiffs have never identified anything Honikman could have said in rebuttal that was not already said elsewhere at trial, either by Honikman during plaintiffs' case, or during plaintiffs' cross-examination of Carr, or both. In their brief, plaintiffs do not identify anything new Honikman could have said rebuttal. At trial plaintiffs went through the pretense of a lengthy proffer (T 1779-84), but the material proffered was redundant, repeating things that plaintiffs had already said, either directly through Honikman or by cross-examining Carr.

Plaintiffs' detailed, vigorously prosecuted pre-trial motion proved that plaintiffs were well informed about the Exponent test in advance of trial and were not at all surprised during trial. CP 29-74 (9/18/08 motion), T 53-62 (arguing same). Their Honikman proffer shows that the rebuttal ploy was a ruse to get in the last word and to

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[40] *Banks*, 978 So. 2d at 667 (¶ 17) (emphasis added). The basic concept also applies with lay witnesses. *See McBride v. Chevron USA*, 673 So. 2d 372, 381 (Miss. 1996) (rejecting use of rebuttal witnesses where plaintiffs knew from discovery that "this issue would arise at trial" and "could have presented [his response] in his case-in-chief").

engage in undue repetition. The trial court's refusal to allow this ploy was the only lawful option. There was no error.

V. Toyota Had a Right to Argue that Clark Fell Asleep at the Wheel.

Plaintiffs' final point attempts to make after-the-fact error of Toyota's closing argument that Clark likely fell asleep at the wheel. There was no contemporaneous objection, and no error.

Toyota had every right to argue the facts in evidence. *Jordan v. State*, 786 So. 2d 987, 1014 (¶ 88) (Miss. 2001) ("attorneys have a *right and duty to deduce and argue reasonable conclusions based upon the evidence*, which are favorable to their clients, and they may do so whether the conclusions are weak or strong so long as they are legitimate") (emphasis added) (quoting *Harvey v. State*, 666 So. 2d 798, 801 (Miss. 1995)). The evidence was overwhelming that Clark likely fell asleep.

Toyota was equally entitled to argue that Clark was responsible for his own choices and that poor choices led to his misfortune. *Id.* By reasonable standards, Clark's decision to leave his hometown at midnight after a full day of errands and chores and a full evening with friends to drive across the state to a casino with a buddy sound asleep in the passenger seat was a poor choice. It would be reasonable to conclude that the decision to take such a midnight trip led to a lack of driver attention midway through the long drive, causing the crash.

Toyota's legitimate argument of facts in evidence could not be construed to be a violation of the trial court's alcohol ruling even if that ruling itself were defensible, which

it is not, and even if plaintiffs had made a contemporaneous objection, which they did not.[41] The trial court's alcohol ruling excluded evidence of Clark's drinking and intoxication only – nothing more. That evidence was in fact excluded. Toyota never mentioned any excluded evidence in closing. Nothing further could have been required.

Toyota would have been within its rights even if Clark had admitted responsibility for causing the crash, as plaintiffs represented to the trial court that Clark would do, and as plaintiffs argue in their brief that Clark did (Brief at 35). But Clark did not accept responsibility and was not truthful at trial.

Shielded by the erroneous alcohol ruling, Clark told the jury that he was driving carefully and legally when the crash occurred.[42] And Wallingford justified his accident reconstruction with the assumption that Clark was driving like a "normal" driver. T 409-11.

Toyota had a right to respond to these falsehoods by arguing facts in evidence that indicated the truth, i.e., that Clark was not being careful or reasonable because he was making an ill-advised midnight trip when he was likely fatigued. The fact that the truth won out over plaintiffs' attempts to conceal it (and over plaintiffs' successful

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[41] The lack of contemporaneous objection is independently fatal to an objection based on closing argument. *See Burr v. Mississippi Baptist Medical Center*, 909 So. 2d 721, 725 (¶ 7) (Miss. 2005) ("we reverse [for improper argument] only where a trial judge abuses his or her discretion in overruling the contemporaneous objection raised by opposing counsel"). The error of the alcohol ruling is addressed further on the cross-appeal.

[42] T 890 ("But I was obeying the law so I'm sure I wasn't doing much more than over 40. ... I can't recall, but I do go by the law), T 894 ("I did not take my eyes off the road, no, sir).

concealment of Clark's heavy drinking and extreme intoxication) is no grounds for a new trial. The judgment should be affirmed.

CROSS-APPEAL

STATEMENT OF CROSS-APPEAL ISSUES

1. Whether Hinds County was a proper venue where it was obtained by naming an entity that ceased to exist years before the truck was made and that had no role in the truck's design, manufacture, distribution or sale.

2. Whether it was error to exclude evidence of Clark's drinking and intoxication.

CROSS-APPEAL CASE STATEMENT

The judgment should be affirmed for the reasons addressed above in response to the direct appeal. While affirmance would moot the cross-appeal issues ordinarily, here plaintiffs have demonstrated an intention to multiply proceedings in the trial court despite the adverse judgment. The threat of renewed trial court proceedings regardless of the judgment gives continuing vitality to the cross-appeal.[43]

[43] Between the filing of their notice of appeal and the transmission of the record to this Court, plaintiffs filed two Rule 60(b) motions in the trial court, taking advantage of a Rule 60(b) provision allowing such motion to be filed without leave before the record is transmitted. *See* MRCP 60(b). Plaintiffs' first motion was denied after plaintiffs moved this Court to stay this appeal in deference to their trial court motion. 1/13/10 Motion in 2009-CA-0554 (this case); Supp CP 4359 (trial court motion), 4615 (trial court order). Plaintiffs did not appeal the order denying their first motion. Instead, they filed a second Rule 60 motion in the trial court on essentially the same grounds, which was never brought up for hearing.

A. Plaintiff Obtained a Hinds County Venue By Naming a No-Longer-Existing Entity that Had No Role in the Case.

Plaintiffs obtained a Hinds County venue for their case by the device of naming Toyota Motor Distributors, Inc. ("Toyota Motor Distributors"), as a defendant, even though it was a matter of public record that Toyota Motor Distributors ceased to exist in 1995, years before the subject Tundra was sold. Plaintiffs alleged no plausible grounds for naming this dissolved entity as a defendant, and no such grounds exist. All defendants promptly objected to the improper venue. Motions pressing the objection were repeatedly denied.

Toyota Motor Distributors was never a designer, manufacturer, or assembler of vehicles. Supp CP 67 (Supp RE Tab 9) (also Supp CP 351).

Before October 1995, Toyota Motor Distributors was a distributor of Toyota vehicles in some parts of the United States. *Id.* In October 1995, Toyota Motor Distributors ceased to exist as corporation when it merged into Toyota Motor Sales, U.S.A, Inc. Supp CP 66-70 (Supp RE Tab 9).

Confirmation of the merger and of the resulting dissolution was filed with the Mississippi Secretary of State in 1995. Supp CP 72 (Supp RE Tab 9). The Secretary of State's records thereafter described the status of Toyota Motor Distributors as "revoked due to merger of foreign corporation." *Id.*

Counsel for plaintiffs obtained actual knowledge of Toyota Motor Distributors' dissolved status in 1997. Supp CP 365-70.

The Tundra model involved in this case was introduced in United States in 2000 – five years after Toyota Motor Distributors ceased to exist. Supp CP 67 (Supp RE Tab 9). Clark's friend and passenger on the night of the crash bought the subject Tundra in 2000 from defendant Roper Toyota in Lee County. The crash occurred in July 2001 in DeSoto County.[44] The complaint was filed in late December 2001. CP 19. Plaintiffs' purported service of Toyota Motor Distributors through Prentice-Hall did not occur until 2002, six-and-a-half years after Toyota Motor Distributors ceased to exist.

The only connection to Hinds County alleged in the complaint is the contention that Toyota Motor Distributors could be served in Hinds County through Prentice-Hall. CP 21. Apart from this contention regarding service, no allegations specific to Toyota Motor Distributors are to be found in the complaint.

Defendants promptly moved to dismiss as to Toyota Motor Distributors and to transfer to a proper venue. Supp CP 62 (Supp RE Tab 9). The motions were summarily denied. Supp CP 239 (Supp RE Tab 1).

After discovery confirmed that plaintiffs never had a basis for a claim against it, Toyota Motor Distributors moved for summary judgment. Supp CP 500. The other defendants joined the motion and again moved to transfer the case to a proper venue. Supp CP 336. Relief was again summarily denied. Supp CP 663-65 (Supp RE Tab 1). Defendants' right to a proper venue was reasserted at every subsequent juncture through

[44] Ex.-106 (id) (The complaint mistakenly identifies the accident year as 2000. *See* CP 22.)

trial.[45] Plaintiffs never provided a scintilla of evidence that Toyota Motor Distributors had any role in the design, manufacture, assembly, distribution or sale of the subject Tundra, and they cannot do so in this Court. The naming of Toyota Motor Distributors was never anything more than a fraud to fix venue in violation of the defendants' right to a lawful venue.

B. Evidence of Clark's Drinking and Intoxication Was Excluded on Plaintiffs' Motion *in Limine*.

Plaintiffs moved *in limine* to exclude evidence of Clark's heavy drinking and extreme intoxication on the night of the crash, including medical records noting that Clark had been found to have a blood alcohol level of 0.16 on arrival at The Med.[46] Toyota opposed the motion, demonstrating that Clark's heavy drinking was relevant to the truth about the nature of the crash and to Clark's comparative negligence. Supp CP 4082-97.

In support of their motion, plaintiffs assured the trial court that Clark would admit fault for causing the crash.[47] The court recognized that "defendant would be entitled to a comparative negligence instruction as to how much liability the plaintiff would have for his own injuries." T 152 (Supp RE Tab 2). But plaintiffs' motion was granted anyway, on grounds that "the issue of the cause of them running off the road has been admitted to by the plaintiffs." T 151-52 (Supp RE Tab 2).

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[45] T 18-24 (argument), 50-51, 148 (summary denials), 1770-78 (argument and summary denials).

[46] Supp CP 3397-99. Clark was airlifted to the Regional Medical Center in Memphis (the "Med") from the crash scene. Supp CP 3397.

[47] T 85 ("THE COURT: Are you going to admit that it was his fault that he ran off the road? MR. FERRELL: Yes, sir").

Under the protection of this ruling, plaintiffs' accident reconstruction expert Wallingford minimized crash severity by stating that Clark was driving like a "normal" or "typical" driver during the event. T 409-11. The alcohol ruling prohibited Toyota from exposing these intentional misrepresentations by Wallingford. Toyota moved for reconsideration of the alcohol ruling to allow the truth to be brought out, or to strike Wallingford's opinion as unreliable. T 431, 437. The motions were denied.

Also under the protection of the ruling, Clark downplayed his responsibility for the crash. He testified that he "just reached down real quick for a CD, and . . . was off the road," implying that his inattention was minimal. T 855. Clark assured the jury that he never took his "eyes off the road," and that he "was obeying the law."[48]

Toyota included these knowing misrepresentations as grounds in its motion for directed verdict. T 1144. After directed verdict was denied (T 1154), Toyota again sought reconsideration of the alcohol ruling, to allow the truth to be brought out during Toyota's case. T 1157. All relief was denied. T 1159.

SUMMARY ARGUMENT

Lawful venues for this action include DeSoto County, where the accident occurred, or Lee or Rankin Counties, where properly joined defendants are domiciled or may be found, but not Hinds County. There was no basis for venue in Hinds County. The only connection to Hinds County alleged in the complaint was the contention that Toyota Motor Distributors could be served in Hinds County through the registered agent

[48] T 890 ("But I was obeying the law so I'm sure I wasn't doing much more than over 40. ... I can't recall, but I do go by the law), T 894 ("I did not take my eyes off the road, no, sir).

it had there during its existence. But Toyota Motor Distributors ceased to exist years before the vehicle was introduced and had no role in the design, assembly, manufacture, distribution or sale of the vehicle at issue.

A single defendant fixes venue only where the venue-fixing defendant is properly joined. Such a defendant is properly joined only where a "reasonable claim of liability" is asserted against it. No such claim was possible against Toyota Motor Distributors.

Evidence of Clark's drinking and intoxication was indispensable to a fair determination of the cause of injury, the amount of contributory negligence, Clark's credibility, and the basic facts of the crash. It was an abuse of discretion to exclude it.

It was an even more extreme abuse of discretion to maintain the exclusionary ruling after plaintiffs misrepresented related facts. Mississippi permits wide-open cross-examination, meaning that any relevant matter may be probed. The right of cross-examination includes the right to fully examine the witness on every material point relating to the issue to be determined or on credibility. Toyota was unfairly deprived of that basic due process right.

ARGUMENT

I. Hinds County Was Not a Proper Venue.

Hinds County was not a proper venue for this case. Venue is controlled by statute, and the controlling statute does not authorize a Hinds County venue for this case. Lawful venues for this action would have included DeSoto County, where the crash occurred; or Lee or Rankin Counties, where properly joined defendants are domiciled or may be found; but not Hinds County.

This Court's description of the pre-2002 venue statute in *Penn Nat. Gaming, Inc. v. Ratliff* applies equally to this case:

> "[a]t the time [plaintiffs] filed [this 2001] suit, Mississippi's venue statute read, in relevant part:
>
> > Civil actions of which the circuit court has original jurisdiction shall be commenced *in the county where the defendant resides* or in the county where the alleged act or omission occurred or where the event that caused the injury occurred. Civil actions against a nonresident may also be commenced in the county where the plaintiff resides or is domiciled.

Penn Nat. Gaming, Inc. v. Ratliff, 954 So. 2d 427, 433 (¶ 14) (Miss. 2007) (quoting MISS. CODE ANN. § 11-11-3 (2002) (emphasis added by Court)).

"In *Snyder v. Logan*, this Court applied the older version of the venue statute and found that a foreign corporation was deemed to 'reside' in the county where that corporation maintained a registered agent for service of process." *Id.* (citing *Snyder v. Logan*, 905 So. 2d 531, 532-34 (Miss. 2005)).

Plaintiffs' complaint assumes that Toyota Motor Distributors continued to "reside" in Hinds County even after it was dissolved and its registered status was "revoked due to

merger." Supp CP 72 (Supp RE Tab 9). Whether that would be a reasonable interpretation of the old venue statute is doubtful, but that question need not be resolved here. Hinds County was not a proper venue for this case either way.

Regardless whether Toyota Motor Distributors continued to "reside" in Hinds County even after it was dissolved, plaintiffs never had a reasonable claim of liability against it. In suits with multiple defendants, a single defendant may fix venue only where the venue-fixing defendant is properly joined. *Penn Nat. Gaming*, 954 So. 2d at 433 (¶ 14). A defendant is properly joined for fixing venue "only where (1) the action was begun in good faith in the bona fide belief that plaintiff had a cause of action against the resident defendant; (2) the joinder of the local defendant was not fraudulent or frivolous, with the intention of depriving the non-resident defendant of his right to be sued in his own county; (3) and there was a reasonable claim of liability asserted against the resident defendant." *Id.* (citing *New Biloxi Hosp., Inc. v. Frazier*, 245 Miss. 185, 192, 146 So. 2d 882 (1962)).

No "reasonable claim of liability" ever existed against Toyota Motor Distributors in this case. *Id.* Plaintiffs' cause of action was for alleged product liability. A product liability claim arises only against a commercial "seller" of a defective product.[49] Toyota Motor Distributors was indisputably never a "seller" of this product. It was a matter of

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[49] *See, e.g., Scordino v. Hopeman Bros., Inc.*, 662 So. 2d 640, 645 (Miss. 1995) ("a contractor [or] subcontractor is not a seller, . . . and is therefore not liable for any component parts it may supply in compliance with the performance of a job or service"); *Harrison v. B.F. Goodrich Co.*, 881 So. 2d 288, 290 (Miss. App. 2004) (one who licenses a trademark not a "seller" of the product that bears the mark, and § 11-1-63 "by its explicit terms, confines product liability claims to manufacturers or sellers of products").

public record that Toyota Motor Distributors ceased to exist years before the subject model Tundra was introduced in the United States. Supp CP 66-70 (Supp RE Tab 9). Toyota Motor Distributors had no role in the design, assembly, manufacture, distribution or sale of the Tundra. *Id.* Plaintiffs never produced a scintilla of evidence to the contrary.

Plaintiffs never stated a factual basis for a claim against Toyota Motor Distributors. "[F]ailure to state a reasonable claim means that the third prong of *Frazier* is not met." *Penn Nat. Gaming*, 954 So. 2d at 434 (¶ 16) (citing *Austin v. Wells*, 919 So. 2d 961, 968 (Miss. 2006)).

Plaintiffs also failed to establish a factual basis for a claim against Toyota Motor Distributors in response to a motion for summary judgment. "[F]ailure to withstand a motion for summary judgment means that *Frazier*'s third prong is not met." *Penn Nat. Gaming*, 954 So. 2d at 434 (¶ 16) (citing *Wayne Gen. Hosp. v. Hayes*, 868 So. 2d 997, 1003 (Miss. 2004)). Here, as in *Penn National*, "the trial court therefore erred in denying the motion to transfer venue, as there was no reasonable basis to keep [Toyota Motor Distributors] in the suit." *Id.*

Where the third prong of *Frazier* is not met, subjective good faith cannot justify venue. But this record also precludes a finding of subjective good faith. It demonstrates that in 1997 plaintiffs' counsel were placed on actual notice of the dissolution Toyota Motor Distributors. Supp CP 365-70. Through their counsel, plaintiffs had actual notice before this suit was filed that Toyota Motor Distributors could have had no role in the sale. The record shows that this Hinds County action was not "begun in good faith in the

bona fide belief that plaintiff had a cause of action against the resident defendant." *Penn Nat. Gaming*, 954 So. 2d at 433 (¶ 14).

Hinds County was and is an improper venue for plaintiffs' claims. Plaintiffs are not entitled to pursue any further proceedings there.

II. The Alcohol Exclusion Was Serious Error.

The *in-limine* exclusion of evidence of Clark's heavy drinking before the crash and extreme intoxication at the time of the crash was serious error, especially after plaintiffs exploited the exclusion to intentionally misrepresent the facts. The refusal to reconsider the ruling so that Toyota could expose plaintiffs' outright misrepresentations through cross-examination and contrary proof was egregious, depriving Toyota of the most basic form of due process.

Even at the outset, there was no rational basis for the ruling. The *in-limine* ruling correctly recognized that Clark's comparative negligence would be an issue for the jury and that Toyota would be entitled to a comparative negligence instruction.[50] Exclusion was nevertheless granted on the assumption that "the cause of them running off the road has been admitted to by the plaintiffs." T 152 (Supp RE Tab 2).

Even if plaintiffs' purported admission of cause had been genuine, the purported admission could not have justified the exclusion. Comparative negligence requires jury determination of the *amount* of negligence. *See* MISS. CODE ANN. § 11-7-15 (1972) ("damages shall be diminished by the jury *in proportion to the amount of negligence*

[50] T 152 (Supp RE Tab 2). *See also* T 1853 (comparative negligence instruction requiring jury to "determine the amount of Mr. Clark's negligence," as read to jury).

attributable to the person injured") (emphasis added). Plaintiffs' supposed admission as to cause did not even purport to determine the *amount* of Clark's negligence. That question remained sharply in dispute. The court's stated reasoning thus embodied a fundamental misperception regarding the applicable law and was therefore erroneous as a matter of law.[51]

The exclusion was also an abuse of discretion on the facts, since the truth about Clark's drinking and intoxication was indispensable to a fair determination of the cause of injury, the amount of contributory negligence, and the basic facts of the crash. *See, e.g.*, *Abrams v. Marlin Firearms Co.*, 838 So. 2d 975, 980 (¶ 18) (Miss. 2003) ("In our opinion, evidence of possible alcohol consumption just prior to the accident was highly relevant and probative as to Abrams' credibility, his recollection of the accident since there were no other witnesses, and his contributory negligence"); *General Motors Corp. v. Myles*, 905 So. 2d 535, 541 & 546 (¶¶ 12 & 30) (Miss. 2005) (reversible error to exclude evidence of plaintiff's intoxication in crash case, which was "critical to GM's central disputes as to how the accident occurred and what caused the accident"; jury should have been instructed that plaintiff "was legally intoxicated on the night of the accident when he was driving his truck and that it was negligence as a matter of law to drive while legally intoxicated").

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[51] *3M Co. v. Johnson*, 895 So. 2d 151, 160 (¶ 30) (Miss. 2005) (Where "the trial court 'has exercised its discretionary authority against a substantial misperception of the correct legal standards, our customary deference to the trial court is pretermitted, [citations omitted] for the error has become one of law'") (quoting earlier cases, citations omitted).

The trial court's refusal to rescind its ruling after plaintiffs abused it by misrepresenting related facts was an even more extreme abuse of discretion, since it effectively deprived Toyota of the right of cross-examination. "Mississippi permits 'wide-open cross-examination,' meaning that any relevant matter may be probed." *Teston v. State*, 44 So. 3d 969, 975 (¶ 39) (Miss. 2010) (Dickinson, J., objecting to order dismissing writ of certiorari) (quoting MRE 611 cmt). "[T]he right of cross-examination . . . includes the right to fully cross-examine the witness on every material point relating to the issue to be determined that would have a bearing on the credibility of the witness and the weight and worth of his testimony." *Id.* (quoting *Myers v. State*, 296 So. 2d 695, 700 (Miss. 1974). "To entertain this testimony which was not subject to cross-examination, and to render judgment based on the information obtained therefrom violates the appellant's procedural due process rights." *Pulliam v. Chandler*, 872 So. 2d 752 (¶ 7) (Miss. App. 2004).

Plaintiffs misrepresented material facts when they told the jury, through Wallingford, that Clark was driving like a "normal" or "typical" driver at the time of the crash. T 409-11. Clark personally concealed the truth when he assured the jury that he "just reached down real quick for a CD, and . . . was off the road," that he never took his "eyes off the road," and that he "was obeying the law."[52] Toyota was denied its fundamental rights when it was prohibited from countering those misrepresentations.

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[52] T 855; T 890 ("But I was obeying the law so I'm sure I wasn't doing much more than over 40. . . . I can't recall, but I do go by the law); T 894 ("I did not take my eyes off the road, no, sir).

Even where any probative value is incidental rather than central as it is here, a party has a right to address subjects raised by an opponent in order to clarify or cure misrepresentations. *See, e.g.*, *Martin v. State* 970 So. 2d 723, 725 (¶ 11) (Miss. 2007) ("It is well-settled that a defendant who 'opens the door' to a particular issue runs the risk that collateral, irrelevant, or otherwise damaging evidence may come in on cross-examination"). Toyota was unfairly deprived of that right on a subject that was central to the case.

Finally, plaintiffs cannot rely on the concept of enhanced injury to justify the alcohol exclusion. The trial court rejected that contention when it recognized that Clark's comparative negligence would remain an issue. That much of court's ruling was correct.[53]

Nothing in the concept of enhanced injury law excuses a plaintiff's own negligence in causing a crash. Enhanced injury allows a manufacturer to be held jointly liable for that portion of crash injury that could have been prevented by a reasonably safe product. But the concept does not excuse the fault of the tortfeasor whose original fault sets the crash in motion. *Estate of Hunter v. General Motors Corp.*, 729 So. 2d 1264, 1273 (¶ 32) (Miss. 1999) ("the policy considerations underlying the comparative fault doctrine would best be served by the jury's consideration of the negligence of all participants" in automotive enhanced injury case).

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[53] The case was given to the jury as a comparative negligence case. Plaintiffs did not appeal that issue, and they should not be heard to question it now.

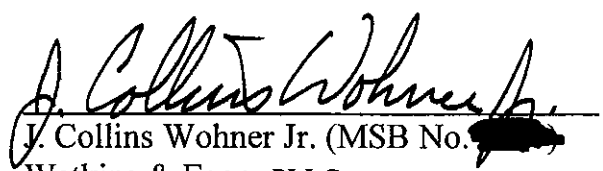
That is the majority view,[54] and it is the only view that is consistent with general principles of proximate cause. *See M&M Pipe & Pressure Vessel Fabricators, Inc. v. Roberts*, 531 So. 2d 615, 618 (Miss. 1988) ("the original actor will not be absolved of liability because of a supervening cause if his negligence put in motion the agency by or through which injuries were inflicted"). Plaintiffs cannot rely on enhanced injury law to justify the exclusion of alcohol evidence.

CONCLUSION

The judgment should be affirmed on appeal. With respect to the cross-appeal, the case should be remanded with instructions to dismiss any further Hinds County proceedings by plaintiffs for lack of proper venue.

Dated: March 3, 2011.

Respectfully submitted,



J. Collins Wohner Jr. (MSB No. [redacted])
Watkins & Eager PLLC

ATTORNEYS FOR TOYOTA MOTOR CORPORATION, TOYOTA MOTOR SALES, U.S.A, INC., TOYOTA MOTOR DISTRIBUTORS, INC., AND ROPER TOYOTA, INC.

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[54] 3 Louis R. Frumer & Melvin I. Friedman, PRODUCTS LIABILITY § 21.02[1] at 21-41 (2001) ("Frumer & Friedman") ("With respect to the issue of the applicability of comparative fault principles to a strict liability claim based upon enhanced injury, the vast majority of jurisdictions have found in favor of its application. As explained by the Tennessee Supreme Court: 'The majority view is based on the belief that the fault of the defendant and of the plaintiff should be compared with each other with respect to all damages and injuries for which the conduct of each part is a cause in fact and a proximate cause'").

OF COUNSEL:

David L. Ayers (MSB[redacted]
Jimmy B. Wilkins (MSB[redacted]
Jennifer A. Rogers (MSB#[redacted])
Watkins & Eager PLLC
400 East Capitol Street (39201)
P. O. Box 650
Jackson, MS 39205
Phone: 601-965-1900
Fax: 601-965-1901

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused a true and correct copy of the above and foregoing paper to be delivered by United States mail, postage prepaid, to the following:

Hunter W. Lundy
Lundy, Lundy,
Soileau & South, LLP
501 Broad Street
Post Office Box 3010
Lake Charles, Louisiana 70601

Kristie M. Hightower
Lundy, Lundy,
Soileau & South, LLP
713 South Pear Orchard Rd.,
Suite 301
Ridgeland, Mississippi 39157

Wayne E. Ferrell, Jr.
405 Tombigbee Street
Post Office Box 24448
Jackson, MS 39225-4448

J. Ashley Ogden
Ogden & Associates, PLLC
500 E. Capitol Street Ste 3
Jackson, MS 39201-2703

Counsel for Plaintiffs

The Honorable Winston L. Kidd
Hinds County Circuit Court Judge
P.O. Box 327
Jackson, MS 39205

THIS, the 3rd day of March, 2011.

J. Collins Wohner Jr.