IN THE SUPREME COURT OF MISSISSIPPI

NO. 2009-CA-00554

NANCY CLARK, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF SHENANDOAH H. CLARK AND CHRISTIE CLARK — PLAINTIFFS-APPELLANTS /CROSS-APPELLEES

V.

TOYOTA MOTOR SALES U.S.A., INC., ET AL. — DEFENDANTS-APPELLEES /CROSS-APPELLANTS

ON APPEAL FROM THE CIRCUIT COURT OF HINDS COUNTY
HONORABLE WINSTON L. KIDD, CIRCUIT JUDGE
CIVIL ACTION NO. 251-01-1486CIV

REPLY BRIEF OF APPELLANTS & RESPONSE BRIEF OF CROSS-APPELLEES

ORAL ARGUMENT REQUESTED

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Plaintiffs filed their original brief, submitting to the Court for its review the following points for appeal:

I. Whether the Trial Court Abused its Discretion in Failing to Grant Plaintiffs' Motion for Judgment Notwithstanding the Verdict and/or Motion for New Trial.

II. Whether the Trial Court Abused its Discretion in Allowing Jurors to View the Subject Vehicle and Defendants' "Exemplar" Vehicle Outside the Courtroom at an Inspection Not Attended, Supervised, or Controlled by the Court.

III. Whether the Trial Court Erred in Submitting Special Verdict Sheets to the Jury Without the Court-Ordered Modifications, Thereby Prejudicing Plaintiffs.

IV. Whether the Trial Court Abused its Discretion in Disallowing Plaintiffs' Motion to Strike the Opinions of Defendants' Expert, Lee Carr, and Further Abused its Discretion When it Prohibited Plaintiffs from Calling a Rebuttal Witness Regarding the Testimony of Lee Carr.

V. Whether the Trial Court Abused its Discretion in Denying Plaintiffs' Motion for New Trial in Light of the Fact That Defense Counsel in Closing Made Arguments Which Circumvented the Prior Rulings of the Trial Court, Caused Jury Bias and Unfairly Prejudiced Plaintiffs.

VI. Whether the Trial Court Abused its Discretion, Taking the Above-listed Errors *in Toto*, in Denying Plaintiffs' Motion for New Trial.

Plaintiffs briefed each of these issues in their December 30, 2010 brief; however, they reply to particular points made in the Brief of Appellees as follows:

I. The Trial Court Abused Its Discretion in Granting a Jury View Not Attended, Supervised or Controlled by the Court.

In Mississippi, the specific criteria for a jury's trial viewing is controlled by statute pursuant to Mississippi Code Annotated § 13-5-91 (1972) and failure to comply with the mandatory

requirements is reversible error.

> When, in the opinion of the court, on the trial of any cause, civil or criminal, it is proper, in order to reach the ends of justice, for the court and jury to have a view or inspection of the property which is the subject of litigation, or the place at which the offense is charged to have been committed, or the place or places at which any material fact occurred, or of any material object or thing in any way connected with the evidence in the case, the court may, at its discretion, enter an order providing for such view or inspection as is herein below directed. After such order is entered, the whole organized court, consisting of the judge, jury, clerk, sheriff, and the necessary number of deputy sheriffs, shall proceed, in a body, to such place or places, property, object or thing to be so viewed or inspected, which shall be pointed out and explained to the court and jury by the witnesses in the case, who may, at the discretion of the court, be questioned by the court and by the representative of each side at the time and place of such view or inspection, in reference to any material fact brought out by such view or inspection. The court on such occasion shall remain in session from the time it leaves the courtroom till it returns thereto, and while so in session outside the courtroom it shall have full power to compel the attendance of witnesses, to preserve order, to prevent disturbance and to punish for contempt such as it has when sitting in the courtroom. . . .

Miss. Code Ann. § 13-5-91 (1972) (emphasis added). *See also* Miss. Code § 1800 (1942); Miss. Code § 2066 (1930). Thus, while the decision to conduct a view or inspection is discretionary, the manner in which one is obtained and/or conducted is not.

Plaintiffs strongly opposed any type of out-of-courtroom demonstration and/or view, stating:

> Our position is that anything that they want to do can be done by video, can be done by demonstrative exhibit. They do it in this courtroom. We just risk the sanctity of the process when you take the jury outside the courtroom, and that's what they want to do. And I believe they can demonstrate whatever they want to demonstrate by video, photographs, demonstratives, whatever, in the courtroom.

[R. Vol. 9, p. 902:6-15.] Plaintiffs were concerned about the "sanctity of the process" by removing the jury from the courtroom and rightfully so. While Plaintiffs did not precisely state at that time that the trial judge must walk to the curb, the objection is nevertheless directly on point in that it speaks to the breakdown of the statutory requirements.

In *Green v. State* the prosecution requested the inspection so that the jurors could see the

location of bullet holes within the vehicle where a law enforcement officer had been shot. *Green v. State*, 614 So. 2d 926 (Miss. 1992). While such details (bullet holes) would be difficult to depict in a photograph, adequate photographs, diagrams, measurements and models were presented to the jury in the instant cause. The Court's requirement that the requested viewing be beyond "merely of some aid" was not met here. *See Floyd v. Williams*, 198 Miss. 350 (1945), 22 So. 2d 365 (Miss. 1945). Thus, the trial court abused its discretion in granting the view. Further, the lower court erred in allowing the view to proceed contrary to statutory requirements.

II. The Trial Court Erred in Submitting the Special Verdict Sheets to the Jury Without Modifications, Thereby Prejudicing Plaintiffs.

Plaintiffs do not contend that the jury did not know how to "mark the forms" as suggested by Defendants.[1] Plaintiffs submit to the Court, as discussed in their original brief, that the use of "negligence of the Defendants," gave an inference of an all-or-nothing determination and Plaintiffs had already openly admitted to Shenandoah Clark's (sometimes hereinafter referred to as "Clark") being responsible for the Tundra's going off Highway 305 on the night of the accident. [R. Vol. 4, p. 277:7-9; Vol. 8, pp. 893:29-894:3.] Clark's admission and counsels' concerns were discussed in the jury instruction conference.[2]

The verdict sheets stated as follows:

(1) We the jury find from a preponderance of the evidence that Shenandoah Clark has proven by a preponderance of the evidence that his injuries were the proximate cause of the negligence of the Defendants.

(2) We the jury find that Christie Johnston proved by a preponderance of the evidence that her injuries were caused by the negligence of the Defendants.

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[1]Nor are Plaintiffs bringing to the attention of the Court a typographical error.

[2]"They're accepting responsibility for causing the accident. There's just no question that Mr. Clark's negligence caused the accident." [R. Vol. 15, p. 1818:1-4 (jury instruction conference). *See also* R. Vol. 15, p. 1819:4-5 ("Again, Your Honor, we prefer to use enhanced injury.").]

[R. Vol. 2, 210-13.] Because this was an enhanced injury case, Plaintiffs requested that the language of the special verdict sheets be changed as follows:

(1) Do you find the Defendants liable for the injuries sustained by Shenandoah Clark?

(2) Do you find the Defendants liable for the injuries sustained by Christie Johnston?

See Id.

Plaintiffs orally moved to amend the special verdict sheets in an effort to clarify the jury's deliberations; however, the trial court maintained the originally submitted language. [R. Vol. 15, pp. 1827:17-1828:5; Vol. 15, p. 1835:16-22.] The question before the jury was whether or not the Toyota Defendants were responsible/liable/negligent as to Clark's "enhanced injuries" (and Mrs. Johnston's resulting injuries). Because this is a difficult concept to impart to twelve jurors, by retaining the "negligence" language the verdict sheets were confusing with the other given instructions. Thus, the instructions were faulty.

Plaintiffs submit that the lower court committed error in denying Plaintiffs' request to amend the verdict sheets and as such Plaintiffs should be granted a new trial.

III. The Trial Court Abused its Discretion in Denying Plaintiffs' Motion to Strike the Opinions of Defendants' Expert, Lee Carr.

As more fully discussed in Plaintiffs' original brief, Carr was allowed to present unscientific and unreliable reconstruction opinions to the jury.[3] Further his Exponent test and testimony thereon was unreliable, irrelevant and prejudicial. While Carr testified that he made a determination of the amount of energy required to crush a Tundra as much as the subject Tundra was crushed, his determination was based on a static test whereby the engine of the exemplar was also crushed, in

[3]Contrary to Defendants' position, Plaintiffs' reconstruction, is both reliable and complete. The fact that Defendants' reconstruction was presented by one (1) expert, whereas Plaintiffs' reconstruction was prepared by multiple experts, all of which were qualified, does not make it any less complete.

no way replicating the events that actually occurred during the accident of July 12, 2001.

Additionally, Plaintiffs were prejudiced by the admission of the Exponent test data in that the data was not provided to Plaintiffs until the eve of the discovery deadline, leaving Plaintiffs with limited opportunity to review, prepare and/or respond to the Exponent test.

After Plaintiffs filed their appeal brief, the Supreme Court handed down its February 2011 opinion in *Hyundai Motor America v. Applewhite* which is relevant to both Carr's reconstruction opinions as well as his Exponent test. There the plaintiff estates failed to timely amend discovery responses to reflect that their expert, Webb, had altered four variables used to calculate change in velocity if the subject car had remained intact during the accident. As a result, the Court held that the manufacturer was entitled to a new trial. *Hyundai Motor America v. Applewhite*, 53 So. 3d 749 (Miss. 2011).

One of Webb's main contentions was that had the decedents' vehicle, a Hyundai Excel, remained intact, the vehicle would have experienced a delta-v of no more than thirty-five (35) mph. On December 18, 2007, Hyundai deposed Webb at which time he gave a detailed explanation of his calculations. Webb signed an *errata* sheet on February 6, 2008, in connection with his deposition testimony, changing four variables that he had used to make his calculations. However, Webb did not alter his ultimate conclusion that the car would have sustained a delta-v of only thirty-five (35) mph had it remained intact during the accident. *Id.* at 757-78 (¶30).

Webb testified at trial about the *errata* sheet, explaining that he had to change several variables because he realized he had made some mistakes in his initial analysis. It was undisputed that the *errata* sheet was not provided in its normal manner to correct errors made in transcribing or to clarify Webb's testimony. Rather, Webb noted on the sheet "range not asked" as the reason for the changes. *Id.* at 758 (¶31).

While Hyundai claimed it never received the *errata* sheet and moved to strike Webb's testimony, the plaintiffs contended that the changes were not material because Webb's ultimate conclusion remained unaltered. Further, the plaintiffs produced a letter enclosing the *errata* sheet to one of Hyundai's attorneys dated February 11, 2008, arguing they had no duty to amend their discovery responses because the letter demonstrated Hyundai was provided the sheet and therefore had notice of the changes. *Id.* at 758 (¶¶ 32, 34). The Supreme Court stated "[e]ven if Hyundai did receive the *errata* sheet, simply giving the defendant this document did not relieve the plaintiffs of their duties under Mississippi Rule of Civil Procedure 26(f)." *Id.* at 758 (¶34).

Pursuant to Mississippi Rule of Civil Procedure 26(f)(1), parties are required to supplement interrogatory responses with respect to "the identity of each person expected to be called as an expert witness at trial, the subject matter on which the person is expected to testify, and the substance of the testimony." As such, the Court held that it did not condone trial by ambush and that Hyundai was entitled to full and complete disclosure to the plaintiffs' expert testimony.

The events surrounding the submission of Carr's testimony occurred as follows:

(1) Defendants served their Consolidated Designation of Trial Experts and Answer to Expert Witness Interrogatory on May 19, 2008.[4]

(2) Defendants served their Consolidated Supplemental Designation of Trial Experts and Second Supplemental Answer to Expert Witness Interrogatory on July 16, 2008.[5]

(3) Carr had the Exponent test performed August 25, 2008;

(4) The test data was forwarded to Plaintiffs' counsel via e-mail August 27, 2008, while counsel was traveling;

(5) The deposition of Lee Carr was taken August 28, 2008;

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[4][R. Supp. Vol. 27, filed 9/13/10, pp. 4046-48.]

[5][R. Supp. Vol. 24, filed 9/13/10, pp. 3519-23.]

(6) The discovery deadline was August 29, 2008; and

(7) Trial was set for October 6, 2008.

[R. Vol. 11, p. 1209:10-12; R. Vol. 12, pp. 1394:28-1395:1.] *See also* Tr. Ex. D-98 (id).

Defendants provided their Supplemental Designation of Trial Experts and Answer to Expert Witness Interrogatory on August 27, 2008,[6] responding simply as to Lee Carr as follows:

> Mr. Carr has now participated in a Horizontal Platen Roof Crush Test on an exemplar 2000 Toyota Tundra, the results of which are attached hereto. This testing further supports his opinions in this matter and Mr. Carr will be prepared to explain the test and the results at his deposition.
>
> In addition, Mr. Carr has returned to the scene of the subject crash in order to position the Styrofoam Tundra at locations confirmed by the photographs[7] recently produced by plaintiffs. Mr. Carr expects to utilize this demonstration in his accident reconstruction, and he will be prepared to testify about this at his deposition. His notes and photographs from this inspection and demonstration are attached.

[R. Supp. Vol. 22, filed 9/13/10, pp. 3230-31.] At his deposition Carr confirmed he made a final visit on August 21, 2008, to the accident site and when asked about previous expert designation(s) Carr stated that:

> I determined that there was no reason to modify the words as they existed in the disclosures; that is, the distinctions were so small between the original work and the modified work that I didn't see any need to update the disclosure.

Q. So you believe these distinctions were so small and so different that

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[6]*See also* Defendants' Consolidated Designation of Trial Experts and Answer to Expert Witness Interrogatory served May 19, 2008 [R. Supp. Vol. 27, filed 9/13/10, pp. 4046-48] and Defendants' Consolidated Supplemental Designation of Trial Experts and Second Supplemental Answer to Expert Witness Interrogatory served July 16, 2008. [R. Supp. Vol. 24, filed 9/13/10, pp. 3519-23.]

[7]The "family photographs" were made available to Defendants by the undersigned's office upon his learning that they had not yet been provided to counsel. The undersigned was not previously involved in the litigation and was unaware that copies of the photographs had not been forwarded to Defendants.

you didn't need to disclose that information in the court's disclosure?

A. I agree, yes.

[R. Vol. 12, p. 1380.] In Defendants' Consolidated Designation of Trial Experts and Answer to Expert Witness Interrogatory dated May 19, 2008, Plaintiffs were informed that Carr was of the opinion that:

> [T]he 2000 Tundra drifted off Highway 305 to the right, and down into a deep ditch. The vehicle was traveling at approximately 48 mph while in the ditch. After traveling down the ditch, the Tundra struck a bank created by an intersecting road . . . The right front frame and suspension of the vehicle collided with the embankment, producing an 18 mph change in speed front to rear. After striking the embankment, the front of the vehicle began to rise, so that the vehicle began to ramp up the embankment. Reaching the top of the embankment, the vehicle became airborne, passing over the pavement . . . traveling at approximately 30 mph in the air.

[R. Supp. Vol. 27, filed 9/13/10, p. 4048.] Carr testified, however, that Clark's speed was likely 67 mph when he left the highway, slowing probably to 66 mph coming down over the embankment. [R. Vol. 12, p. 1343:13-20; p. 1344:4-8.][8] He testified further that he believed the travel speed of the truck while it was in the air was 48 mph. [R. Vol. 12, p. 1356:1-6.] The photographs provided nothing fundamentally new,[9] yet Carr made significant changes to his opinions prejudicing Plaintiffs.

Moreover, as shown above, the August 27, 2008 designation attached the results of the Exponent test, but no further modifications to Carr's opinion were made as to the results of that test.

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[8]Carr testified in his deposition that the exit speed of the Tundra was "probably 62 or 63" mph. [R. Supp Vol. 26, filed 9/13/10, pp. 4165-66.]

[9]Defendants' July 16, 2008 expert designation as to Carr noted ". . . photographs *confirm* that Toyota departed the roadway . . . ," " . . . photographs *confirm* substantial engagement of the right front corner . . . ," " . . . photographs *confirm* that the Toyota rotated first counterclockwise . . . " [R. Supp. Vol. 16, filed 9/13/10, pp. 2321-22 (emphasis added).]

Additionally, the data was not made available to Plaintiffs until the day before Carr's deposition, leaving counsel limited time to prepare for thorough questioning regarding that data and/or Carr's opinions thereon.

While Plaintiffs do not suggest that an expert designation is equivalent to an *errata* sheet, the Court's holding in *Hyundai* is clear – trial by ambush will not be condoned. *Hyundai v. Applewhite*, 53 So. 3d at 759 (¶36). By simply forwarding data from the Exponent test the day before Carr's deposition and never further supplementing his designation, Defendants' failed to provide the required information. As in *Hyundai*, Plaintiffs were entitled to full and complete disclosure of Carr's expert testimony. *Id.*

Plaintiffs' maintain that Carr's varied reconstruction opinions are unscientific, unreliable and misleading as more fully briefed in Plaintiffs' original paper. In addition, however, although not specifically argued, the since-handed-down *Hyundai* opinion is also relevant to Carr's reconstruction opinions as shown above should the Court consider reviewing the same.

IV. The Cumulative Effect of the Errors at the Trial Court Below Is Sufficient to Warrant a Reversal and a Remand for a New Trial.

While Plaintiffs have not addressed each of the appeal issues in this reply, Plaintiffs maintain each individual alleged error as provided in the original brief makes the instant case reversible. *Blake v. Clein*, 903 So. 2d 710 (¶ 16) (Miss. 2005). *See also E.I. DuPont de Nemours and Co. v. Strong*, 968 So. 2d 410 (Miss. 2007); *Geske v. Williamson*, 945 So. 2d 429 (Miss. Ct. App. 2006); *Shell Oil Co. v. Pou*, 204 So. 2d 155 (Miss. 1967). If the Court does not determine that the asserted errors, individually, are indicative of reversal, Plaintiffs respectfully submit that the aggregate of these errors are, in fact, sufficient to warrant a reversal and remand for a new trial.

RESPONSE TO CROSS-APPEAL

STATEMENT OF THE CASE

The First Judicial District of Hinds County, Mississippi was an appropriate venue for this cause of action. Despite the allegations of Defendants, there was no fraudulent joinder of Toyota Motor Distributors ("TMD") in this action for purposes of fixing venue and TMD was served through its registered agent for service of process within the First Judicial District of Hinds County.[10]

Shenandoah Clark (sometimes referred to hereinafter as "Clark") sustained severe debilitating injuries on July 12, 2001, when the 2001 Toyota Tundra which he was operating rolled over. Clark, along with his then wife, Christy, filed suit against various Toyota Defendants alleging claims of products liability, strict negligence, negligence, breach of warranty and punitive damages. Specifically, one of the claims alleged by Plaintiffs is that the roof structure (and its support components) of the C cab Tundra model in question and the access door structure were defectively and unnecessarily dangerously designed and did not withstand the forces (which were reasonably anticipated) applied when the subject vehicle rolled.

Inasmuch as Defendant, TMD, listed a Hinds County address - Prentice Hall Corporation System, 506 South President Street, Jackson, MS - as designated agent for service of process, Plaintiffs filed the instant action on December 28, 2001, in the Circuit Court of Hinds County. Plaintiffs served Prentiss Hall on behalf of TMD on January 15, 2002.

Early in this litigation, TMD sought dismissal of Plaintiffs' claims and the other Defendants moved for transfer of venue. An order denying those motions was entered June 21, 2002. [Supp.

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[10] *See* R. Supp. Vol. 2, filed 9/13/10, pp. 226-28.

RE 1.] TMD sought summary judgment and the other Defendants again moved to transfer venue. Those motions were denied by the lower court with orders entered on March 4, 2003[11] and April 22, 2003.[12] Prior to trial, on September 5, 2008, TMD filed yet another motion for summary judgment and the other Defendants moved again for transfer of venue based on the same. The trial court denied TMD's motion at the pretrial hearing. [R. Vol. 3, pp. 50-51.]

Plaintiffs filed their motion *in limine* as to alcohol on September 18, 2008. [R. Supp. Vol. 23, filed 9/13/10, p. 3397 - Supp. Vol. 24, p. 3485.] The trial court heard arguments at the pretrial hearing on October 6, 2008 and ruled that testimony regarding alcohol should be excluded. [R. Vol. 4, pp. 151-52.]

ARGUMENT

I. Venue was Proper in the First Judicial District of Hinds County, Mississippi.

While agreeing that DeSoto, Lee and Rankin Counties were available venues, Plaintiffs contend Hinds County was also proper and Plaintiffs made their choice from all available venues. Further, there was no question that TMD could be found in the First Judicial District of Hinds County, Mississippi, by and through its agent for service of process which was located within that venue.

A. The Standard of Review.

The venue statute applicable to this case is Mississippi Code Annotated § 11-11-3 (Supp. 2001) which provides as follows:

> Civil actions of which the circuit court has original jurisdiction shall be commenced in the *county in which the defendant* or any of them

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[11] *See* R. Supp. Vol. 5, filed 9/13/11, pp. 663-64, order denying TMD's Motion for Summary Judgment and the other Toyota Defendants' Motion for Summary Judgment and Motion to Transfer.

[12] *See* R. Supp. Vol. 5, filed 9/13/11, p. 666, order denying TMD's Motion for Summary Judgment.

> *may be found* or in the county where the cause of action may occur or accrue and, if the defendant is a domestic corporation, in the county in which said corporation is domiciled or in the county where the cause of action may occur or accrue . . .

Miss Code Ann. 11-11-3 (Supp. 2001) (*emphasis added*). A plaintiff may select from all available venues. *Austin v. Wells*, 919 So. 2d 961, 964 (Miss. 2006). Further, it is the rule of this Court that where venue is appropriate for one defendant, it is appropriate for all. Miss. R. Civ. P. 82 (c). The choice of venue belongs to the Plaintiff and:

> His choice must be sustained . . . unless in the end there is no credible evidence supporting the factual basis of the claim of venue . . . Put otherwise, the court at trial must give the plaintiff the benefit of the reasonable doubt . . .

Clark v. Luvel Dairy Products, Inc., 731 So. 2d 1098, 1106 (Miss. 1998) (citing *McMillan v. Puckett*, 678 So. 2d 652, 656 (Miss. 1996) (quoting *Flight Line v. Tanksley*, 608 So. 2d 1149, 1155 (Miss. 1992)).

> An application for change of venue is addressed to the discretion of the trial judge, and his ruling thereon will not be disturbed on appeal unless it clearly appears that there has been an abuse of discretion or that the discretion has not been justly and properly exercised under the circumstances.

Guice v. Miss. Life Ins. Co., 836 So. 2d 756, 758 (Miss. 2003) (citations omitted).

B. Venue Was Appropriate Under the Three-Prong Test Set Forth in *New Biloxi Hosp., Inc. v. Frazier*, 146 So. 2d 882 (Miss. 1962).

Venue was appropriate in Hinds County, Mississippi, pursuant to Mississippi Code Ann. § 11-11-3 because: (1) Plaintiffs asserted a negligence claim in good faith in the bona fide belief that they had a claim against TMD; (2) joinder of TMD in the action was neither fraudulent nor frivolous for the purpose of fixing venue in Hinds County; and (3) Plaintiffs asserted a reasonable claim of liability against TMD. *See New Biloxi Hosp., Inc. v. Frazier*, 146 So. 2d 882, 885 (Miss. 1962).

TMD, from 1958 until 1995, was a wholly owned subsidiary of Toyota Motor Sales, U.S.A.

("TMS") and was one of several distributors of Toyota Vehicles in the United States. In 1995, TMD was merged into its parent company, TMS, and TMD employees merely became TMS employees.[13] During TMD's thirty-seven years as a stand-alone entity, it investigated warranty claims and reported that information to TMS.[14] TMS, in turn, reported claim and field investigation information to Toyota Motor Corporation ("TMC"), the entity which designed, developed and manufactured the 2000 Toyota Tundra (and the predecessor vehicles upon which the 2000 Toyota Tundra is based).[15]

Plaintiffs alleged in this action that the defective design of the roof and roof structure components caused Shenandoah Clark to sustain injuries resulting in paraplegia on the night of June 12, 2001. FMVSS 216 is the federally approved (and required) test which sets the standard for roof strength. The federal government, with industry influence, implemented a less stringent test than that which was originally proposed. As a result, the compliance test as it exists today is much less effective at preventing rollover injuries and deaths.[16] The test merely demonstrates what happens when a force is applied to a specific section of the vehicle's roof. For example the 216 test does not show what happens when one of the vehicle's roof supports buckles (as it did in this rollover event).

In light of the shortcomings of the FMVSS 216 test, it is logical to assume that information learned from real-world accidents/incidents is of help to automobile manufacturers, such as TMC. It is likewise logical to assume that information learned from past production vehicles is a benefit in the design of new vehicles. For example, accident investigation may result in appropriate warnings being generated and provided to consumers regarding the true strength of a vehicle's

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[13]Depo. Pamela Boyd pp. 11-12 (Aug. 29, 2008). [R. Supp. Vol. 21, filed 9/13/10, pp. 3120-21.]

[14]Depo. Pamela Boyd p. 13 (Aug. 29, 2008). [R. Supp. Vol. 21, filed 9/13/10, p. 3122.]

[15]Depo. Barry Hare pp. 25, 26, 31, 32, 34, 35, 43 (Aug. 1, 2008). [R. Supp. Vol. 21, filed 9/13/10, pp. 3127-33.]

[16]Depo. T. Honikman pp. 205-206 (Aug. 4, 2008). [R. Supp. Vol. 21, filed 9/13/10, p. 3138.]

roof.[17]

A manufacturer has a duty to warn of any dangerous condition known to it, or that should be known to it, at the time it leaves its control. *See* Miss. Code Ann. § 11-1-63(c). In the present case, TMC had a duty to produce a vehicle reasonably free of defects and warn the public (including Shenandoah Clark) of any known defects in the 2000 Toyota Tundra (including those associated with the roof and roof structure). Plaintiffs assert the position that TMD had a duty to reasonably collect information regarding accident, incidents, consumer claims and warranty claims and report that data to TMC. Based upon the testimony of Pamela Boyd and Barry Hare, TMD had no mechanism for reporting any warranty information directly to TMC. Thus, Plaintiffs claim that TMD breached its duty to reasonably report information regarding Toyota motor vehicles to TMC.

Plaintiffs brought suit against TMD with the good faith belief that the Defendant had some involvement in the development of vehicles which resulted in the 2000-2001 Toyota Tundra.

II. The Trial Court's Exclusion of Alcohol Evidence Was Neither Error, Nor Abuse of Discretion.

A. Clark Caused the Accident Whereas Defendants Caused His Enhanced Injuries.

Plaintiffs stipulated that Defendants did not cause Shenandoah Clark to leave the roadway; Clark was responsible for the truck's veering off Highway 305. The question before the jury was whether the roof of the 2000 Toyota Tundra that Clark was driving was crashworthy.

The Eastern District of Texas, in a crashworthiness case particularly relevant here, *Frazier v. Honeywell International, Inc.*, 518 F.Supp. 2d 831 (2007),[18] excluded evidence of alcohol where parties stipulated the responsible driver was one hundred percent (100%) the cause of the accident. The wrongful death crashworthiness case arose out of the death of eighteen-year-old Lauren Frazier

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[17]Depo. T. Honikman pp. 230-32 (Aug. 4, 2008). [R Supp. Vol. 21, filed 9/13/10, p. 3140.]

[18]See Appendix "A-3."

("Lauren") who had allegedly been wearing her seatbelt at the time of the August 18, 2004 accident. *Id.* at 834-35. The plaintiffs argued the defective design permitted the belt to spontaneously unlatch during the subject accident, allowing Lauren Frazier to be ejected from the vehicle and killed. *Id.* at 835.

The day before she was to start Baylor University, Lauren and her parents rode with Lauren's friend Brady Ross to get ice cream in his Tahoe with Lauren's mother in the front passenger seat, her father in the back right passenger seat, and Lauren in the left back passenger seat. *Id.* at 834. On the return trip, another car (driven by Natalie White) coming from the opposite direction turned left into the Fraziers' lane colliding with the Tahoe. *Id.* Following the initial impact, the Tahoe spun around and impacted Natalie White's car again before rolling down an embankment. *Id.* at 834-35. During the accident, Lauren was ejected from the Tahoe, while her parents and Brady Ross remained in the vehicle. *Id.* at 835.

Both parties stipulated Natalie White ("White"), who was later determined to have been intoxicated at the time of the accident, was one hundred percent (100%) the cause of the accident. *Id.* at 835. Honeywell argued, however, that the jury was unable to consider White's actions because the court excluded statements about White's talking on her cell phone as well as testimony related to her intoxication. *Id.* at 840. The district court was clear that the jury did consider, however, that White was one hundred percent (100%) the cause of the accident. Because this was a crashworthiness case, the Fraziers did not allege their daughter's injuries were caused by the accident, but instead alleged her injuries were caused by her seatbelt's failure to restrain her during the accident. The questions before the jury, therefore, focused on "cause of the injury," not "cause of the accident." The court determined a stipulation as to White's conduct in relation to the accident was sufficient for the jury to determine her proportionate responsibility. *Id.* at 840.

Honeywell further argued that because White was the cause of the accident, the jury was

erroneous in assigning her zero percent (0%) responsibility. The district court, however, stated that because this was a crashworthiness case, the jury was asked to apportion responsibility for the "cause of the injury" to Lauren, not the "cause of the accident ." As explained by the court, despite the stipulation regarding White's cause of the accident, a jury could still have found White not at fault for Lauren's fatal injuries, particularly since her parents and Brady Ross were also in the same accident caused by White, but did not suffer the fatal injuries Lauren did, because they were not ejected from the Tahoe. Thus, Honeywell's argument was without merit. *Id.* at 40.

Similarly in the instant matter, both Clark and Knight were flown to Memphis Medical Center ("The Med") by helicopter for treatment following the accident. However, Knight was released with "just bruises, scratches and cuts." [R. Vol. 8, p. 675:19-21, 24-29.] Clark, on the other hand, as a result of the roof failure, was informed that he would never walk again. [R. Vol. 8, p. 858:5-7.]

Plaintiffs provided testimony to the jury explaining that Clark *caused the accident* separate and apart from putting on their case regarding Defendants' *causing Clark's injuries*. As such, in evidence of Clark's having drunk alcohol and/or Clark's blood alcohol level on the night of the incident in question was correctly deemed inadmissible pursuant to Mississippi Rules of Evidence 401 and 402. Rule 401 provides that "'[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Miss. R. Evid. 401. Evidence which is irrelevant is inadmissible. Miss. R. Evid. 402.

In the case *sub judice*, whether Plaintiff drank alcohol and/or tested positive for alcohol is irrelevant in that it does not make the fact that the 2000 Toyota Tundra roof design was defective and that Plaintiffs sustained injuries and damages any less or more probable. Therefore, the trial court properly granted Plaintiffs' motion *in limine* prohibiting Defendants from making any

reference to such evidence, either directly or through any trial witness, in front of the jury.

B. The Alcohol Evidence Was Properly Excluded Pursuant to Miss. R. Evid. 403.

Regardless of whether Plaintiff had drunk alcohol and/or tested positive for alcohol was relevant (which it was not), the evidence should still have been excluded under Rule 403 of the Mississippi Rules of Evidence. Miss. R. Evid. 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Miss. R. Evid. 403. Introduction of or reference to alcohol would serve no purpose but to inflame the jury, or bias the jury – it would be unduly prejudicial to Plaintiffs, and of limited or no probative value.

The Fifth Circuit in 2008, held that the district court appropriately excluded testimony regarding the plaintiff's use of marijuana and in finding "that the danger of unfair prejudice by the evidence substantially outweighed its probative value under Fed. R. Evid. 403." *Foradori v. Harris*, 523 F.3d 477, 509 (Miss. 2008). Additionally, in *Ill. Central RR. Co. v. Gandy*, the Mississippi Supreme Court held the evidence of drug use was unduly prejudicial, stating "the danger of prejudice far outweighed any probative value the evidence held." *Ill. Central R.R. Co. v. Gandy*, 750 2d 527, 532 (Miss. 1999).

C. *Abrams v. Marlin Firearms Co.* and *General Motors Corp. v. Myles* are Distinguishable.

Whereas the plaintiffs in both *Abrams v. Marlin Firearms Co.*, 838 So. 2d 975 (Miss. 2003) and *General Motors Corp. v. Myles*, 905 So. 2d 535 (Miss. 2005) asserted that the defendants' defective products led to the accidents/incidents which caused their injuries, Plaintiffs in the instant matter asserted that Defendants' vehicle was not safe and, as a result, caused and/or enhanced the injuries sustained by Clark. Both *Abrams* and *General Motors* are distinguishable from the case *sub*

judice.

According to Abrams, after shooting his new Marlin Model 336 lever action 30-30- caliber hunting rifle, he cycled a live round into the chamber and uncocked the hammer. Thereafter he attempted to place the gun across the backseat of his truck, when while he sat on the driver's seat and swung the Marlin between the front seats, the rifle struck the headrest post on the passenger seat, hitting the closed hammer and causing the rifle to fire, sending the bullet into Abrams knee and through his calf. As a consequence of the injury, Abrams' leg had to be amputated above the knee and he filed suit alleging the bump firing was a result of defective design of the Model 336 rifle.

General Motors Corp. v. Myles, 905 So. 2d 535 (Miss. 2005), was a wrongful death action brought in connection with a single-vehicle accident wherein a severe impact to the upper control arm ball joint attached to the right front wheel of the decedent's 1997 Chevrolet Silverado 2500 truck broke the ball stud, as well as other suspension parts, and caused the truck to roll over. The plaintiffs' expert testified that had General Motors' product not been defective, the accident would not have occurred. *General Motors Co. v. Myles*, 905 So. 2d at 538 (¶ 6).

D. The Blood Evidence Obtained in Connection with the Accident is Unreliable.

The procedure followed by The Med when a blood test is ordered by a physician includes the following: (1) a phlebotomist (or person assigned to collect the sample) verifies the patient identifiers including medical record number, account number, patient's name, date of birth, etc.; (2) the phlebotomist matches the identifiers to the patient wrist band; (3) the phlebotomist draws the blood into a collection tube; (4) the phlebotomist labels the blood at the patient's bedside; (5) the sample, along with the requisition, is sent to the laboratory; (6) the sample and requisition are verified at the laboratory; (7) "the sample is centrifuged, spun down, placed on the instrument, and the instrument runs the test as ordered by the physician"; and (8) the results are verified by the

performing technician and released to the medical record.[19] While there are various checks along the way, as indicated above, the entire process of identifying the sample begins with the person who draws the blood. *Id.* at 13:2-5. [R. Supp. Vol. 24, filed 9/13/10, p. 3452.] Here, the medical records are void of that critical information. *Id.* at 13:11. [R. Supp. Vol. 24, filed 9/13/10, p. 3452.]

> Q. Okay. So - - so correct me if I'm wrong - - the entire process of identifying the sample begins with the person who draws the blood?
>
> A. Yes.
>
> Q. And in this case - - correct me if I'm wrong - - again, we don't know who drew the blood?
>
> A. It's not noted in the record. No, sir.

Id. at 13:1-12. [R. Supp. Vol. 24, filed 9/13/10, p. 3452.] The lacking initial link in the chain of custody further weakens the probative value of both the medical records denoting the blood level, as well as any expert testimony Defendants may attempt to present in a future trial based thereon. Expert testimony introduced under Rule 702 of the Mississippi Rules of Evidence must be based upon sufficient facts or data. Miss. R. Evid. 702. The data at issue here, however, is not evidence upon which to rely at all inasmuch as it is devoid of crucial information.

Dr. Joseph E. Manno, R.Ph., Ph.D. when deposed in this matter stated as follows:

> A. . . . I want to see if this laboratory sample is a forensic sample. What I want to see really is I want to see the name of the nurse that drew the sample. I want to see the police officer's report. I really want to see the police officer tell me that, yes, he saw the sample drawn from him and the chain of custody that they get with their report. I want a forensic sample. Because I have a situation where that sample becomes the sole focus of our judgment in making a decision whether or not he was at fault from alcohol or, you know, whatever reason he was at fault based on the reconstruction without alcohol.
>
> Q. Okay.

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[19]Depo. Terry Talarico 9:15-10:15 (Aug. 29, 2008). [R. Supp. Vol. 23, filed 9/13/10, pp. 3448-49.] Terry Talarico testified as a laboratory specialist in laboratory administration in charge of quality management for The Med. *Id.* at 5:13-17; 8:14-16. [R. Supp. Vol. 23, filed 9/13/10, pp. 3444, 3447.]

A. That information is not available and that's what I want to see. And typically, whether I'm defense or not, I go for that information and I go for that. It is not there. Now, in the hospital records, they have names of technologists in the medical records, so you probably can identify them. But the phlebotomist is unknown. And it's my understanding that his [Shenandoah Clark's] friend [Kevin Knight] was also in the hospital. So there's - - in a trauma center or in an emergency room situation, you have different patients around and you may have somebody with alcohol. The dynamics of emergency rooms is that you can collect the sample form the wrong person, identify it with a different person. In a hospital, once that sample is identified with a patient, it becomes permanent.

In other words, if the sample is collected from Patient A - - and usually they get a computer printed label. They put it on that, that goes to the laboratory, the laboratory matches it up based on that number and everything else is perfect. The laboratory runs the analysis, you know, they control it, they do everything else. In terms of quality, yeah, everything is okay, but the chain of custody is not correct. We don't have the people to ask do you remember, can you identify, you know, Mr. Clark? Yes, I drew the sample, like you do in a forensic case. That's where the problem is in this case.

Depo. Dr. Joseph E. Manno 47:7-48:22 (July 23, 2008) [R. Supp. Vol. 24, filed 9/13/10, p. 3485.]

In such circumstances, the judge must "act as a gatekeeper, ensuring that expert testimony is both relevant and *reliable*." *Poole ex rel. Wrongful Death Beneficiaries of Poole v. Avara*, 908 So. 2d 716, 723 (Miss. 2005) (citing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999)); *Miss. Transp. Comm. v. McLemore*, 863 So. 2d 31, 36 (Miss. 2003) (emphasis added).

Any testimony regarding Shenandoah Clark's alleged blood alcohol level has little to no probative value and, yet, is highly prejudicial. Therefore, Defendants were appropriately prohibited from making any reference to such evidence.

E. Defendants Had an Opportunity to Clarify any Alleged Misrepresentations.

Plaintiffs did not misrepresent facts through expert Jerry Wallingford. Defendants' counsel upon cross examination of Wallingford asked about a braking analysis to which Wallingford replied:

> ... If he would have applied brakes we may have had a different event. But he did not and in my opinion it is not typical for drivers

that run off the road to brake but to pull back onto the roadway.

[R. Vol. 5, p. 409.] Defendants' expert, Lee Carr, also testified that evidence supported Clark's attempting to return to the roadway.[20] Wallingford explained "I have to look at the physical evidence and then interpret what it's telling me." *Id.* at 410.

> It would be the norm when I go off-road and see a need to pull my vehicle back on the road not to accelerate a vehicle but put all of my attention to slowing the vehicle down as I steer without braking.

Id. Wallingford did not hide the fact from the jury that Clark's removing his foot from the accelerator was an assumption in his reconstruction.

Shenandoah Clark did not conceal the truth by testifying that he "just reached down real quick for a CD, and . . . was off the road." [R. Vol. 8, p. 855.] Further Toyota took full advantage of its opportunity in cross examining Clark, inquiring as to his speed, his recollection of posted speed limits, his attentiveness to the road and the position of his hand(s) on the steering wheel. As such, Toyota thoroughly countered any alleged "misrepresentation."

Plaintiffs did not seek to excuse Clark's negligence in causing the accident by leaving the roadway. Nor, however, did Plaintiffs wish to allow Defendants to prejudice the jury with testimony regarding alcohol when the crashworthiness of Defendants' vehicle was in question. While the Supreme Court in *Estate of Hunter v. General Motors Corp.*, 729 So. 2d 1264 (Miss. 1999), did, in fact, state that "the policy considerations underlying the comparative fault doctrine would best be

---

[20]"...the driver had to have put in some amount of steering to the left...the way that the path is and the way the tire marks are, it's necessary to put in some amount of steering to the left roughly in the area where the incline is." [R. Vol. 11, p. 1317.] *See also* R. Vol. 11, pp. 1318-19.

Carr discussed Clark's steering to the left, but explained as follows that any efforts were ultimately futile:

> The trouble is that this ditch is so steep and it's so bumpy and it has grass on it that will be poor traction, that the vehicle is basically trapped in that ditch once you get in it. Once you're there, you can't get out of it. It's like a bowling ball going down the gutter. It's too late. No matter what you do that vehicle is going to follow the ditch line and it did.

[R. Vol. 11, pp. 1318-19.]

served by the jury's consideration of the negligence of all participants to a particular incident which gives rise to a lawsuit," its statement was specific to matters involving absent parties and/or defendants. *Estate of Hunter v. General Motors Corp.*, 729 So. 2d at 1273 (¶32).[21] Further, Plaintiffs do not contest the viability of *M&M Pipe & Pressure Vessel Fabricators, Inc. v. Roberts*, 531 So. 2d 615, in that Clark was the original actor, leaving Highway 305. Plaintiffs maintain, however, that the alcohol exclusion was proper based on the stipulation as to the cause of the accident, the prejudicial effect of testimony regarding alcohol and/or the unreliability of the evidence.

CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that this Court REVERSE the trial court's Order denying Plaintiffs' motion for judgment notwithstanding the verdict. In the alternative, Plaintiffs respectfully request that this Court REVERSE and REMAND this matter for a new trial.

Respectfully submitted, this the 6th day of June, 2011.

NANCY CLARK, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF SHENANDOAH H. CLARK AND CHRISTIE CLARK

By: _____

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[21]The *Hunter* Court particularly noted that it had no need to address enhanced injuries in that such issues only become relevant in cases in which the jury had found that enhanced injuries due to crashworthiness defects were present. *Estate of Hunter v. General Motors Corp.*, 729 So. 2d at 1271 (¶28). Thus, the Supreme Court did not create an enhanced-injury exception to comparative negligence in crashworthiness cases as a result of *Hunter*.

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CERTIFICATE OF SERVICE

This is to certify that I have this day caused to be served a true and correct copy of the above and foregoing document to the following listed person(s):

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Hon. Winston L. Kidd
Hinds County Circuit Court Judge
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DATED this 6th day of June 2011.

HUNTER W. LUNDY

Miss. Code Ann. § 13-5-91. View by Jury.

When, in the opinion of the court, on the trial of any cause, civil or criminal, it is proper, in order to reach the ends of justice, for the court and jury to have a view or inspection of the property which is the subject of litigation, or the place at which the offense is charged to have been committed, or the place or places at which any material fact occurred, or of any material object or thing in any way connected with the evidence in the case, the court may, at its discretion, enter an order providing for such view or inspection as is herein below directed. After such order is entered, the whole organized court, consisting of the judge, jury, clerk, sheriff, and the necessary number of deputy sheriffs, shall proceed, in a body, to such place or places, property, object or thing to be so viewed or inspected, which shall be pointed out and explained to the court and jury by the witnesses in the case, who may, at the discretion of the court, be questioned by the court and by the representative of each side at the time and place of such view or inspection, in reference to any material fact brought out by such view or inspection. The court on such occasion shall remain in session from the time it leaves the courtroom till it returns thereto, and while so in session outside the courtroom it shall have full power to compel the attendance of witnesses, to preserve order, to prevent disturbance and to punish for contempt such as it has when sitting in the courtroom. In criminal trials all such views or inspections must be had before the whole court and in the presence of the accused, and the production of all evidence from all witnesses or objects, animate or inanimate, must be in his presence.

Mississippi Rules of Civil Procedure
Rule 26. General Provisions Governing Discovery

(a) Discovery Methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; and requests for admission. Unless the court orders otherwise under subdivisions (c) or (d) of this rule, the frequency of use of these methods is not limited.

(b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the issues raised by the claims or defenses of any party. The discovery may include the existence, description, nature, custody, condition and location of any books, documents, electronic or magnetic data, or other tangible things; and the identity and location of persons (i) having knowledge of any discoverable matter or (ii) who may be called as witnesses at the trial. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) *Insurance Agreements.* A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

(3) *Trial Preparation: Materials.* Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including that party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of that party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. Rule 37(a)(4) applies to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is: (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof,

which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) *Trial Preparations: Experts.* Discovery of facts known and opinions held by experts, otherwise discoverable under subsection (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

(ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subsection (b)(4)(C) of this rule, concerning fees and expenses, as the court may deem appropriate.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial only upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subsections (b)(4)(A)(ii) and (b)(4)(B) of this rule, and (ii) with respect to discovery obtained under subsection (b)(4)(A)(ii) of this rule, the court may require, and with respect to discovery obtained under subsection (b)(4)(B) of this rule, the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(5) *Electronic Data.* To obtain discovery of data or information that exists in electronic or magnetic form, the requesting party must specifically request production of electronic or magnetic data and specify the form in which the requesting party wants it produced. The responding party must produce the electronic or magnetic data that is responsive to the request and is reasonably available to the responding party in its ordinary course of business. If the responding party cannot-through reasonable efforts-retrieve the data or information requested or produce it in the form requested, the responding party must state an objection complying with these rules. If the court orders the responding party to comply with the request, the court may also order that the requesting party pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information.

(c) Discovery Conference. At any time after the commencement of the action, the court may hold a conference on the subject of discovery, and shall do so if requested by any party. The request for discovery conference shall certify that counsel has conferred, or made reasonable effort to confer, with opposing counsel concerning the matters set forth in the request, and shall include:

1. a statement of the issues to be tried;

2. a plan and schedule of discovery;

3. limitations to be placed on discovery, if any; and

4. other proposed orders with respect to discovery.

Any objections or additions to the items contained in the request shall be served and filed no later than ten days after service of the request.

Following the discovery conference, the court shall enter an order fixing the issues; establishing a plan and schedule of discovery; setting limitations upon discovery, if any; and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the case.

Subject to the right of a party who properly moves for a discovery conference to prompt convening of the conference, the court may combine the discovery conference with a pretrial conference authorized by Rule 16.

The court may impose sanctions for the failure of a party or counsel without good cause to have cooperated in the framing of an appropriate discovery plan by agreement. Upon a showing of good cause, any order entered pursuant to this subdivision may be altered or amended.

(d) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending, or in the case of a deposition the court that issued a subpoena therefor, may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) that the discovery not be had;

(2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

(5) that discovery be conducted with no one present except persons designated by the court;

(6) that a deposition after being sealed to be opened only by order of the court;

(7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;

(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court;

(9) the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, oppression or undue burden or expense, including provision for payment of expenses attendant upon such deposition or other discovery device by the party seeking same.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. Rule 37(a)(4) applies to the award of expenses incurred in relation to the motion.

(e) Sequence and Timing of Discovery. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(f) Supplementation of Responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement that party's response with respect to any question directly addressed to (A) the identity and location of persons (i) having knowledge of discoverable matters, or (ii) who may be called as witnesses at the trial, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the person is expected to testify, and the substance of the testimony.

(2) A party is under a duty seasonably to amend a prior response if that party obtains information upon the basis of which (A) the party knows that the response was incorrect when made, or (B) the party knows that the response, though correct when made, is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

518 F.Supp.2d 831

(Cite as: 518 F.Supp.2d 831)

C

United States District Court,

E.D. Texas,
Marshall Division.
Carol Wayne FRAZIER and Tonya R. Frazier, Individually and as Representative of the Estate of Lauren M. Frazier, Deceased, Plaintiffs
v.
HONEYWELL INTERNATIONAL, INC., f/k/a Allied-Signal, Inc., Defendant.
No. 2-05CV548.

Oct. 3, 2007.

Background: Parents of passenger killed in motor vehicle accident brought wrongful death action against seatbelt buckle manufacturer. After jury verdict in plaintiffs' favor, manufacturer moved for judgment as matter of law, or alternatively motion for new trial and for remittitur.

Holdings: The District Court, Leonard Davis, J., held that:

(1) there was sufficient evidence to support jury's determination that passenger's death was caused by defective seatbelt;
(2) jury's determination that motorist was not liable for passenger's death was not inconsistent with parties' stipulation that motorist was 100% cause of accident; and
(3) award of $24 million for parents' past and future loss of companionship and mental anguish was excessive.

Motion granted in part and denied in part.

West Headnotes

[1] Federal Civil Procedure 170A ⚖2608.1

170A Federal Civil Procedure

170AXVII Judgment
170AXVII(E) Notwithstanding Verdict
170Ak2608 Evidence
170Ak2608.1 k. In general. Most Cited Cases

Jury's verdict is afforded great deference, and post-judgment motion for judgment as matter of law should be granted only when facts and inferences point so strongly in movant's favor that rational jury could not reach contrary verdict. Fed.Rules Civ.Proc.Rule 50(a), 28 U.S.C.A.

[2] Federal Civil Procedure 170A ⚖2602

170A Federal Civil Procedure

170AXVII Judgment
170AXVII(E) Notwithstanding Verdict
170Ak2602 k. Necessity for motion for directed verdict. Most Cited Cases

Party may not base motion for judgment as matter of law on ground that was not included in prior motion for directed verdict. Fed.Rules Civ.Proc.Rule 50(a), 28 U.S.C.A.

[3] Federal Civil Procedure 170A ⚖2313

170A Federal Civil Procedure

170AXVI New Trial
170AXVI(A) In General
170Ak2313 k. Discretion of court. Most Cited Cases

Federal Civil Procedure 170A ⚖2333.1

170A Federal Civil Procedure

170AXVI New Trial
170AXVI(B) Grounds
170Ak2333 Trial Errors
170Ak2333.1 k. In general. Most Cited Cases

Motion for new trial is addressed to trial court's discretionary authority, and great latitude is given to trial court when motion cites errors in conduct of trial because

trial court occupies best vantage from which to estimate error's prejudicial impact on jury. Fed.Rules Civ.Proc.Rule 59, 28 U.S.C.A.

[4] Federal Civil Procedure 170A ⚿2377

170A Federal Civil Procedure

170AXVI New Trial
170AXVI(C) Proceedings
170Ak2377 k. Remittitur. Most Cited Cases

Remittitur is appropriate when damages award is excessive or so large as to appear contrary to right reason.

[5] Federal Civil Procedure 170A ⚿2377

170A Federal Civil Procedure

170AXVI New Trial
170AXVI(C) Proceedings
170Ak2377 k. Remittitur. Most Cited Cases

New trial, not remittitur, is appropriate when jury's award resulted from passion and prejudice.

[6] Federal Civil Procedure 170A ⚿2343

170A Federal Civil Procedure

170AXVI New Trial
170AXVI(B) Grounds
170Ak2343 k. Amount of recovery in general. Most Cited Cases

When evaluating whether jury award of damages in personal injury action is proper, court reviews awards in cases with similar injuries in relevant jurisdiction.

[7] Federal Civil Procedure 170A ⚿2377

170A Federal Civil Procedure

170AXVI New Trial
170AXVI(C) Proceedings
170Ak2377 k. Remittitur. Most Cited Cases

If remittitur is appropriate, amount of remittitur is calculated in accordance with maximum recovery rule if applicable, which mandates that jury's verdict be reduced to maximum amount that jury could properly have awarded.

[8] Death 117 ⚿17

117 Death

117III Actions for Causing Death
117III(A) Right of Action and Defenses
117k12 Grounds of Action
117k17 k. Proximate cause of death. Most Cited Cases

Evidence 157 ⚿571(9)

157 Evidence

157XII Opinion Evidence
157XII(F) Effect of Opinion Evidence
157k569 Testimony of Experts
157k571 Nature of Subject
157k571(9) k. Cause and effect. Most Cited Cases

Products Liability 313A ⚿209

313A Products Liability

313AIII Particular Products
313Ak202 Automobiles
313Ak209 k. Seat belts and occupant restraint systems. Most Cited Cases
(Formerly 313Ak83.5)

Products Liability 313A ⚿390

313A Products Liability

313AIV Actions
313AIV(C) Evidence
313AIV(C)4 Weight and Sufficiency of Evidence
313Ak389 Proximate Cause
313Ak390 k. In general. Most Cited Cases
(Formerly 313Ak83.5)

There was sufficient evidence to support jury's determination that passenger's death was caused by defective seatbelt buckle, in light of plaintiffs' expert's

testimony that passenger would not have been ejected and killed if her seatbelt buckle had not unlatched in accident, physician's testimony that passenger would not have suffered serious injury if buckle had not unlatched, and seatbelt manufacturer's expert's testimony that passenger would not have been killed had her seatbelt remained latched and she had not been ejected from vehicle. V.T.C.A., Civil Practice & Remedies Code § 82.005.

[9] Evidence 157 ⚿571(6)

157 Evidence

157XII Opinion Evidence
157XII(F) Effect of Opinion Evidence
157k569 Testimony of Experts
157k571 Nature of Subject
157k571(6) k. Nature, condition, and relation of objects. Most Cited Cases
Products Liability 313A ⚿209

313A Products Liability

313AIII Particular Products
313Ak202 Automobiles
313Ak209 k. Seat belts and occupant restraint systems. Most Cited Cases
(Formerly 313Ak83.5)
Products Liability 313A ⚿387

313A Products Liability

313AIV Actions
313AIV(C) Evidence
313AIV(C)4 Weight and Sufficiency of Evidence
313Ak387 k. Design defect. Most Cited Cases
(Formerly 313Ak83.5)
Products Liability 313A ⚿391

313A Products Liability

313AIV Actions
313AIV(C) Evidence
313AIV(C)4 Weight and Sufficiency of Evidence
313Ak389 Proximate Cause
313Ak391 k. Design defect. Most Cited Cases
(Formerly 313Ak83.5)

There was sufficient evidence for jury to find there was safer alternative design for seatbelt buckle and that defect was producing cause of passenger's fatal injury during motor vehicle accident, in light of expert's testimony that seatbelt buckle violated applicable industry standards, that it violated automobile manufacturer's internal performance requirements of staying latched 100% of time, and that buckle had no internal blocking device to prevent inertial release, and that there were numerous alternative designs that did not unlatch when tested under same conditions present when buckle unlatched, and manufacturer's expert's testimony that alternative designs were economically and technically feasible. V.T.C.A., Civil Practice & Remedies Code § 82.005.

[10] Evidence 157 ⚿150

157 Evidence

157IV Admissibility in General
157IV(E) Competency
157k150 k. Results of experiments. Most Cited Cases
Evidence 157 ⚿359(6)

157 Evidence

157X Documentary Evidence
157X(C) Private Writings and Publications
157k359 Photographs and Other Pictures; Sound Records and Pictures
157k359(6) k. Motion pictures. Most Cited Cases

Videotapes of crash tests were admissible in action alleging that passenger was killed in motor vehicle accident as result of defective seatbelt buckle, despite manufacturer's contention that videos were not similar to accident itself, where evidence was relevant to demonstrate what happened during impact if buckle came unbuckled and to show that it could unbuckle due to

inertia during impact, and buckles in videos were substantially similar to those in vehicle. Fed.Rules Evid.Rules 401, 402, 28 U.S.C.A.

[11] Federal Civil Procedure 170A ⚖2019

170A Federal Civil Procedure

170AXV Trial
170AXV(C) Reception of Evidence
170Ak2017 Objections
170Ak2019 k. Failure to object; waiver. Most Cited Cases

Seatbelt manufacturer waived its right to object to admission of expert's testimony in products liability action, where expert was deposed well before deadline for filing *Daubert* motions, expert testified at his deposition about material manufacturer complained of, but manufacturer failed to file *Daubert* motion to exclude testimony.

[12] Federal Civil Procedure 170A ⚖2336

170A Federal Civil Procedure

170AXVI New Trial
170AXVI(B) Grounds
170Ak2333 Trial Errors
170Ak2336 k. Instructions. Most Cited Cases

When moving for new trial based on improper jury instruction challenger must demonstrate that charge creates substantial doubt as to whether jury was properly guided in its deliberations. Fed.Rules Civ.Proc.Rule 59, 28 U.S.C.A.

[13] Products Liability 313A ⚖209

313A Products Liability

313AIII Particular Products
313Ak202 Automobiles
313Ak209 k. Seat belts and occupant restraint systems. Most Cited Cases
(Formerly 313Ak81.5)

Products Liability 313A ⚖369

313A Products Liability

313AIV Actions
313AIV(C) Evidence
313AIV(C)3 Admissibility of Evidence
313Ak368 Proximate Cause
313Ak369 k. In general. Most Cited Cases
(Formerly 313Ak81.5)

Stipulations 363 ⚖14(7)

363 Stipulations

363k14 Construction and Operation in General
363k14(7) k. Stipulations as to evidence. Most Cited Cases

Evidence of motorist's intoxication was not relevant to issue of causation in products liability action against seatbelt buckle manufacturer, and thus evidence was not admissible, where parties stipulated that motorist was 100% cause of accident, and complaint did not allege that passenger's injuries were caused by accident, but instead alleged that injuries were caused by her seatbelt's failure to restrain her during accident.

[14] Federal Civil Procedure 170A ⚖2342

170A Federal Civil Procedure

170AXVI New Trial
170AXVI(B) Grounds
170Ak2338 Verdict or Findings Contrary to Law or Evidence
170Ak2342 k. Tort actions. Most Cited Cases

Jury's determination that motorist was not liable for passenger's death in motor vehicle accident was not inconsistent with parties' stipulation that motorist was 100% cause of accident, and thus new trial was not warranted in products liability action against seatbelt buckle manufacturer, where other persons involved in accident did not suffer comparable injuries, arguably because their seatbelts remained buckled.

[15] Constitutional Law 92 ⚖3994

92 Constitutional Law

92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3991 Trial
92k3994 k. Course and conduct of trial. Most Cited Cases
Federal Civil Procedure 170A ⚿2011

170A Federal Civil Procedure

170AXV Trial
170AXV(C) Reception of Evidence
170Ak2011 k. In general. Most Cited Cases
Jury 230 ⚿31.2(1)

230 Jury

230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k31.2 Rights of Action and Procedure in Civil Cases
230k31.2(1) k. In general. Most Cited Cases
Court's limitation of trial time to nine hours per side for presentation of evidence in products liability action against seatbelt buckle manufacturer did not violate its due process and Seventh Amendment rights, where manufacturer did not object to court's proposed trial time limits as to presentation of evidence, did not request extension or more time during trial, and did not use its entire nine-hour allotment for presentation of evidence. U.S.C.A. Const.Amends. 5, 7.

[16] ⚿1951.9

170A Federal Civil Procedure

170AXV Trial
170AXV(A) In General
170Ak1951.9 k. Time limitations. Most Cited Cases
(Formerly 170Ak1951)
Court has inherent right to place reasonable limitations on time allotted for trial.

[17] Federal Civil Procedure 170A ⚿2335

170A Federal Civil Procedure

170AXVI New Trial
170AXVI(B) Grounds
170Ak2333 Trial Errors
170Ak2335 k. Argument. Most Cited Cases
Plaintiffs' counsel statement during rebuttal closing arguments in products liability case that jury should "go kick [manufacturer]'s butt" was not so egregious that it rose to level of plain error requiring new trial, where court instructed jury that it was to decide case based solely upon evidence, warned jury to perform its duties without bias, prejudice, or sympathy, and instructed jury that counsels' arguments were not evidence.

[18] Federal Civil Procedure 170A ⚿2345.1

170A Federal Civil Procedure

170AXVI New Trial
170AXVI(B) Grounds
170Ak2345 Excessive Damages
170Ak2345.1 k. In general. Most Cited Cases
In applying maximum recovery rule to assess propriety of damages awarded by jury, court should only consider officially reported awards.

[19] Death 117 ⚿99(5)

117 Death

117III Actions for Causing Death
117III(H) Damages or Compensation
117k94 Measure and Amount Awarded
117k99 Excessive Damages
117k99(5) k. Allowance to relatives other than surviving husband, wife, or children. Most Cited Cases
Federal Civil Procedure 170A ⚿2377

170A Federal Civil Procedure

170AXVI New Trial

170AXVI(C) Proceedings
170Ak2377 k. Remittitur. Most Cited Cases
Jury's award of $24 million for parents' past and future loss of companionship and mental anguish was excessive in products liability action against manufacturer of seatbelt buckle that failed during motor vehicle accident, causing their 18-year old daughter to be ejected from vehicle and die, and thus remittitur of $9.75 was warranted, where parents were in vehicle and witnessed daughter's death.

***834** E. Todd Tracy, Tracy & Carboy, Dallas, TX, Melissa Richards Smith, Gillam & Smith, LLP, Marshall, TX, for Plaintiffs.

Richard White Crews, Jr., Hartline Dacus Barger Dreyer & Kern, Corpus Christi, TX, Scott Patrick Stolley, Thompson & Knight, Dallas, TX, for Defendant.

MEMORANDUM OPINION AND ORDER

LEONARD DAVIS, District Judge.

Before the Court is Defendant Honeywell International, Inc.'s ("Honeywell") Motion for Judgment Notwithstanding the Verdict, or Alternatively Motion for New Trial and for Remittitur (Docket No. 86). After considering the Motion, the Court **GRANTS** the motion in part and **DENIES** the motion in part.

BACKGROUND

This wrongful death crashworthiness case arises out of the death of eighteen year old Lauren Frazier. On August 18, 2004, Carol Wayne Frazier and his wife Tonya R. Frazier ("the Fraziers") were preparing for Lauren Frazier, the youngest of their three daughters, to start college at Baylor University. The Fraziers were planning to take Lauren to Waco the next day, where her sister, a recent Baylor graduate waited to show her around campus. After Lauren, her mother and father, and a friend, Brady Ross, finished packing the car, Lauren's father, Carol, suggested the family go for ice cream-one of their favorite things to do together-one last time before Lauren left for college. Brady Ross, a friend of Lauren's, drove his Tahoe because the Fraziers' car was fully packed with Lauren's belongings.

Carol Frazier sat in the front passenger seat. Lauren sat in the left rear passenger seat behind Brady Ross and next to her mother, Tonya Frazier, who sat in the right rear passenger seat. On the way home from getting ice cream, another car coming from the opposite direction turned left into the Fraziers' lane colliding with the Tahoe. This car was driven by Natalie White.[FN1] After the initial impact, the Tahoe ***835** spun around and impacted Natalie White's car a second time before rolling down an embankment. During the dynamics of the accident, Lauren Frazier was ejected from the Tahoe, while her parents and Brady Ross were not ejected. Lauren Frazier died as a result of her injuries, while her father and Brady Ross suffered only minor injuries, and her mother more serious, but not life threatening injuries.

FN1. White was later determined to have been intoxicated at the time of the accident. Both parties stipulated that Ms. White was 100 percent the cause of the accident.

While acknowledging that Ms. White was 100 percent the cause of the "accident," the Fraziers alleged that Lauren's "injuries" from the ejection caused her death and that her ejection was due to the defective design of the Tahoe's JDC seatbelt, which had been designed, manufactured and sold by Honeywell. The Fraziers alleged Lauren had been wearing her seatbelt at the time of the accident, but the seatbelt's defective design permitted it to spontaneously unlatch during the dynamics of the accident, allowing Lauren to be ejected from the Tahoe and killed. Honeywell alleged that its seatbelt design was not defective, but that Lauren Frazier was not wearing her seat belt at the time of the accident. While the design of the seatbelt was certainly an issue, the central contested issue at trial was whether or not Lauren was wearing her seatbelt at the time of the accident.

After a four day jury trial in February 2006, the jury returned its verdict finding that Lauren had been wearing her seatbelt at the time of the accident and that the seatbelt had been defectively designed by Honeywell. The jury found that neither Natalie White nor Brady Ross proximately caused Lauren's injuries, but that Honeywell was 95% responsible for her fatal injuries, and GM, the Tahoe's manufacturer, 5% responsible. The jury awarded Lauren's parents, Carol and Tonya Frazier, $4,000,000.00

each for past loss of companionship and mental anguish and $8,000,000.00 each for future loss of companionship and mental anguish, for a total damage award of $24,000,000.

Honeywell timely filed this motion for judgment not withstanding the verdict, or in the alternative for a new trial, and remittitur. Following extensive briefing by both parties and a hearing on the motion, the Court **GRANTED** the motion in part, and **DENIED** it in part without a formal written opinion, which the Court now enters.

APPLICABLE LAW

a. Motion for JNOV/JMOL

[1] A motion for judgment as a matter of law should be granted if "a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." FED. R. CIV. P. 50(a). The jury's verdict is afforded great deference, and a post-judgment motion for judgment as a matter of law should be granted only when " 'the facts and inferences point so strongly in favor of the movant that a rational jury could not reach a contrary verdict.' " *Pineda v. United Parcel Serv., Inc.*, 360 F.3d 483, 486 (5th Cir.2004) (quoting *Thomas v. Tex. Dep't of Criminal Justice*, 220 F.3d 389, 392 (5th Cir.2000)).

[2] A party may not base a motion for judgment as a matter of law on a ground that was not included in a prior motion for a directed verdict. *Smith v. Louisville Ladder Co.*, 237 F.3d 515, 526 (5th Cir.2001); *see also McCann v. Tex. City Ref., Inc.*, 984 F.2d 667, 672 (5th Cir.1993) (holding "a party may not base a motion for JNOV on a ground that was not included in a prior motion for a directed verdict; and (2) It would be a constitutionally impermissible re-examination of the jury's verdict for the district court to enter judgment***836** n.o.v. on a ground not raised in the motion for directed verdict").

b. Motion for New Trial

[3] Federal Rule of Civil Procedure 59 permits a motion for new trial by any party and on all or any of the issues within ten days after judgment is entered. FED. R. CIV. P. 59. The district court may grant a new trial pursuant to this rule "where necessary to 'prevent an injustice.' " *United States v. Flores*, 981 F.2d 231, 237 (5th Cir.1993) (quoting *Delta Eng'g Corp. v. Scott*, 322 F.2d 11, 15-16 (5th Cir.1963), *cert. denied*, 377 U.S. 905, 84 S.Ct. 1164, 12 L.Ed.2d 176 (1964)). A motion for new trial is addressed to the trial court's discretionary authority, and great latitude is given to the trial court when the motion cites errors in the conduct of trial because the trial court "occupies the best vantage from which to estimate the prejudicial impact of the error on the jury." *Cruthirds v. RCI, Inc.*, 624 F.2d 632, 635 (5th Cir.1980).

c. Remittitur

[4][5] Remittitur is appropriate when the damages award is "excessive or so large as to appear contrary to right reason." *Laxton v. Gap, Inc.*, 333 F.3d 572, 586 (5th Cir.2003). A court does not "reverse a jury verdict for excessiveness except on the strongest of showings." *Caldarera v. Eastern Airlines, Inc.*, 705 F.2d 778, 784 (5th Cir.1983). Fifth Circuit precedent demonstrates that the court "will not disturb the jury's award unless it is entirely disproportionate to the injury sustained." *Wellborn v. Sears, Roebuck & Co.*, 970 F.2d 1420, 1427 (5th Cir.1992). A new trial, not remittitur, is appropriate when the jury's award resulted from passion and prejudice. *Whitehead v. Food Max of Miss., Inc.*, 163 F.3d 265, 275 (5th Cir.1998) (citing *Caldarera*, 705 F.2d at 782).

[6][7] When evaluating whether a jury award is proper, the Court reviews awards "in cases with similar injuries in the relevant jurisdiction." *Vogler v. Blackmore*, 352 F.3d 150, 156 (5th Cir.2003). The relevant jurisdiction in a state law claim is the state providing the substantive law for that claim. *Id.* Accordingly, in a wrongful death case, "Texas wrongful death cases and Fifth Circuit cases applying Texas wrongful death law comprise the relevant jurisdiction." *Id.* If remittitur is appropriate, the amount of remittitur is calculated in accordance with the maximum recovery rule if applicable,[FN2] "which mandates that the jury's verdict be reduced to the maximum amount the jury could properly have awarded." *Wellborn*, 970 F.2d at 1428. However, "because the facts of each case are different, prior damages awards are not always controlling; a departure from prior awards is merited if unique facts are present that are not reflected within the controlling caselaw."

Lebron v. United States, 279 F.3d 321, 326 (5th Cir.2002).

FN2. The maximum recovery is calculated as follows: amount of similar award + 50% of similar award = maximum recovery. *Id.* at 156.

ANALYSIS

A. Motion for Judgment

In its motion, Honeywell asserts several new grounds in support of the motion that were not originally raised in a motion for judgment as a matter of law. The law requires all grounds asserted in a later filed motion for judgment to have been raised prior to the verdict. Accordingly, Honeywell has waived the following arguments: (1) the rebuttable presumption of Texas Civil Practice and Remedies Code section 82.008(a), (2) the component supplier defense under Texas law, and (3) the length of the mounting stalk argument. ***837** The Court turns to Honeywell's preserved arguments.

1. Producing Cause

Honeywell argues that the Fraziers failed to prove specific causation. Texas Civil Practice and Remedies Code section 82.005 requires the plaintiff to prove that the alleged defect was "a producing cause of the personal injury, property damage, or death for which the claimant seeks recovery." TEX. CIV. PRAC. & REM.CODE § 82.005. To demonstrate producing cause, the Fraziers' expert, Steve Syson, was asked the following question at trial: "from an automotive crashworthiness standpoint, if Lauren Frazier's seatbelt buckle had not unlatched in this accident, would she have been ejected and killed?" Syson responded "no." Dr. Marc Krouse was also asked "if Lauren Frazier's seatbelt buckle had not unlatched in this accident, would she have been seriously injured?" He responded "no." In addition, on cross-examination, Honeywell's expert admitted that Lauren Frazier would not have been killed had her seatbelt remained latched and she had not been ejected from the vehicle. Finally, extensive physical evidence including photographs regarding seatbelt bruising and injury patterns, the Tahoe wreckage, and accident reconstruction scenarios were all presented to the jury by both sides.

[8] The testimony of three separate expert witnesses went before the jury regarding producing cause, and they all reached the same conclusion: if the seatbelt had remained latched, Lauren Frazier would not have died. Additionally, the physical evidence of the injuries and accident wreckage were all before the jury. Accordingly, the facts and inferences on this issue point in favor of the Fraziers, and a rational jury could have reached the verdict that was reached in this case.

2. Magnitude of Risk and Alternative Designs, Safety, and Feasibility

Honeywell's next few arguments go to the Fraziers' ability to prove their prima facie case. First, Honeywell argues that the Fraziers failed to establish the magnitude of risk allegedly associated with the JDC buckle or any of their proposed alternative designs. Second, Honeywell argues the Fraziers failed to demonstrate that proposed alternative designs were safer than the JDC buckle. Third, Honeywell argues the Fraziers failed to produce evidence regarding the feasibility of the alternative designs.

The Fraziers must demonstrate that there was a safer alternative design that either would have prevented or significantly reduced the risk of injury. *See* TEX. CIV. PRAC. & REM.CODE § 82.005. Regarding the risk analysis, Honeywell contends this means the Fraziers should have produced specific empirical data demonstrating that the G forces necessary to cause inertial release of the seat belt were present in this case. This is perhaps an advantageous jury argument, but it is simply not what the law requires. The Fraziers were required to establish (1) that there was a safer alternative design (meaning a design that would have prevented or significantly reduced the risk of injury that was economically and technically feasible) and (2) that the defect was the producing cause of the injury. TEX. CIV. PRAC. & REM.CODE § 82.005.

[9] In order to satisfy prong one, the Fraziers put on evidence through Mr. Syson and on cross examination of Mr. Davee that the JDC buckle failed to provide proper restraint because it unlatched, that it violated FMVSS 209 and SAE J4C, that it violated GM's internal performance requirements of staying latched 100% of the time, and that the buckle had no internal blocking device to prevent inertial ***838** release. Additionally, Syson testified as to numerous alternative designs that did not unlatch when

tested under the same conditions present when the JDC buckle unlatched. Syson then testified that use of any of these alternative designs would have prevented Lauren Frazier's ejection and death because those buckles would have remained latched in the accident. The Fraziers also showed the jury testing on these alternative buckles, and Honeywell's own expert admitted that each of these alternative designs was economically and technically feasible during the relevant time period. Accordingly, the Fraziers produced sufficient evidence for a jury to find there was a safer alternative design and the defect was a producing cause of the fatal injury to Lauren Frazier.

3. General Motors's responsibility

Honeywell's final argument states that Honeywell can have no liability because it offered a safer buckle to GM for use in its vehicles and GM chose the buckle at issue instead. Honeywell contends that as a sophisticated purchaser, GM-not Honeywell as the supplier-had the duty to exercise reasonable care in choosing the buckle. Honeywell argued this to the jury, and through the apportionment of liability question, the jury considered GM's responsibility for Lauren Frazier's injuries and found GM five percent responsible. The Fraziers put on sufficient evidence for a reasonable jury to find for the Fraziers on the issues raised in this motion.

Thus, Honeywell's Motion for Judgement Notwithstanding the Verdict is **DENIED.**

B. Motion for New Trial

Honeywell's arguments for a new trial are centered around alleged errors by the Court during trial. Honeywell asserts the following grounds for its motion for new trial: (1) the Fraziers' expert testimony should have been stricken under *Daubert,* (2) the Court erred in admitting "crash and sled test videos" without proper predicate, (3) the Court's instructions to the jury regarding proportionate responsibility and allocation of fault were erroneous, (4) the Court improperly excluded evidence of Natalie White's intoxication, (5) the jury's verdict that Natalie White was not at fault was contrary to the Fraziers' stipulation that she caused the accident, (5) the Court limited the parties' trial time to nine hours, which violated Honeywell's due process rights, and (6) the Fraziers' counsel made an improper jury argument.

1. The Fraziers' expert testimony and crash test videos

Honeywell's first two grounds for new trial are interrelated. Honeywell argues that the Court improperly admitted crash test videos into evidence. Honeywell argues the videos were not similar to the accident itself and claims the Court should have required a showing of substantial similarity between the tests on the videos and the conditions of the accident.

Honeywell's arguments go to the weight of the evidence and not its admissibility. The threshold for admissibility of evidence is a low one. Under Federal Rule of Evidence 402, "all relevant evidence is admissible," and under Rule 401, relevant evidence "means evidence having *any* tendency to make the existence of fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED.R.EVID. 401 (emphasis added).

[10] The evidence was relevant to demonstrate to the jury what happens during impact when a JDC buckle comes unbuckled and to show that it can unbuckle due to inertia during impact. The buckles in the videos were substantially similar to those in Brady Ross's Tahoe, and Honeywell was free to-and did in fact-cross examine ***839** the Fraziers' expert on the level of similarity between the videos and the conditions of the accident.

In its last sentence in the brief on this issue, Honeywell further claims the videos should have been excluded under Rule 403 because they were more prejudicial than probative. *See* FED.R.EVID. 403. However, Honeywell does not demonstrate that the probative value was substantially outweighed by the danger of misleading or confusing the jury as required by the rule.

Next, Honeywell argues that the Fraziers' expert, Steve Syson's, testimony and underlying data should have been stricken because it did not fit the facts in question as required by *Daubert. See Daubert v. Merrell Dow Pharm., Inc.,* 509 U.S. 579, 591-92, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Syson testified in conjunction with the crash test videos, and Honeywell argues that Syson did not present test reports or other data supporting his analysis of

the videos.

[11] First, Syson was deposed well before the deadline for filing *Daubert* motions, and he testified at his deposition about the very material Honeywell now complains. At no time did Honeywell file a *Daubert* motion to exclude this testimony. Honeywell did not even seek leave from the Court to file a late *Daubert* motion. Accordingly, Honeywell has waived its right to object to the testimony.

Second, Honeywell's briefing indicates that its major opposition to Syson's testimony is in conjunction with the videos discussed above. Honeywell objected to the videos, and the Court overruled its objection. After considering the briefing and reviewing the decision, the Court stands by its ruling. Honeywell has not demonstrated how Syson's testimony was unreliable.

2. The Court's instructions to the jury regarding proportionate responsibility

[12] Honeywell next argues that the Court erred in failing to define the term "percentage of responsibility" under Texas Civil Practice and Remedies Code section 33.003(a). Honeywell argues that this failure constituted an improper comment on the evidence. When moving for new trial based on improper jury instruction:

> First, the challenger must demonstrate that the charge creates substantial doubt as to whether the jury was properly guided in its deliberations. Second, even if the jury instructions were erroneous, we will not reverse if we determine, based upon the entire record, that the challenged instruction could not have affected the outcome of the case.

Green v. Admin. of Tulane Ed. Fund, 284 F.3d 642, 659 (5th Cir.2002). The Court used the proportionate responsibility instructions directly from the Texas Pattern Jury Charge, which instruct the jury to assign percentages to each named person and the percentages must total 100%. In ruling on Honeywell's objection during the charge conference, the Court determined that defining the term "proportionate responsibility" would not be helpful to the jury and would not add anything meaningful to the instruction. Honeywell has failed to demonstrate that the Court's charge created substantial doubt as to whether the jury was properly guided in its deliberations and has failed to show how the instruction would have affected the outcome of the case.

3. The Court's exclusion of evidence of Natalie White's intoxication

Honeywell claims the Court erred in excluding certain evidence related to Natalie White, the driver of the vehicle that caused the accident. Honeywell bases its ***840** argument on the ground that Texas Civil Practice and Remedies Code Chapter 23 requires introduction of evidence of all conduct that may contribute to causing the harm for which a claimant seeks recovery.

[13] Honeywell argues that the jury was unable to properly consider Natalie White's actions at the time of the accident because the Court excluded statements about Ms. White talking on her cell phone as well as testimony related to her intoxication. However, the jury did consider, and in fact had to take as true, that Ms. White was 100 percent the cause of the accident. The parties stipulated to this at trial. Honeywell could cite to no case law that said intoxication evidence is relevant when the parties have stipulated that the person was the cause of the accident. Since the parties stipulated that Natalie White caused the accident, her intoxication was not relevant to any issue in the case.

This was a crashworthiness case. The Fraziers did not allege Lauren's injuries were caused by the accident, but instead alleged Lauren's injuries were caused by her seatbelt's failure to restrain her during the accident. As such, the jury questions focused on "cause of the injury" not "cause of the accident." A stipulation as to Ms. White's conduct in relation to the accident was sufficient for the jury to determine her proportionate responsibility. Furthermore, during closing argument Honeywell never argued that any percentage of responsibility for Lauren's injuries should be assigned to either Ms. White or Mr. Ross, so it is not surprising that the jury assigned none. When the jury apportioned responsibility, the jury obviously concluded that her fatal "injuries" were a result of her ejection from the Tahoe. Honeywell's argument regarding exclusion of evidence of White's intoxication and cell phone use is without merit.

4. The jury's verdict that Natalie White was not at fault

[14] Honeywell's argument is essentially that because the parties stipulated that Ms. White was 100 percent the cause of the "accident," the jury was erroneous in assigning her zero percent responsibility. However, as discussed above, this was a crashworthiness case and the jury was asked to apportion responsibility for the "cause of the injury" to Lauren Frazier, not the "cause of the accident." Regardless of whether the parties stipulated that Ms. White was 100 percent the cause of the accident, a jury could still have found Ms. White not at fault for Lauren Frazier's fatal injuries. In fact, Carol Frazier, Tonya Frazier and Brady Ross were in the same accident caused by Natalie White, but they did not suffer the significantly fatal injuries Lauren Frazier did, because they were not ejected from the Tahoe, arguably because their seatbelts remained buckled. Honeywell's argument is without merit.

5. Trial time limits

[15] Honeywell next argues that the Court's limitation of trial time to nine hours per side for presentation of evidence violated its due process and seventh amendment rights.[FN3] However, Honeywell did not object to the Court's proposed trial time limits as to presentation of evidence, nor did it request an extension or more time during trial. In fact, Honeywell did not use its entire nine-hour allotment for presentation of evidence.

> FN3. In addition to each party being allowed nine hours for presentation of evidence, each side was allowed 30 minutes for voir dire, 10 minutes for opening statements, and 40 minutes for closing arguments.

[16] The Court has an inherent right to place reasonable limitations on the time ***841** allotted for trial. *Deus v. Allstate*, 15 F.3d 506, 520 (5th Cir.1994). Because Honeywell failed to object and request more time, it has waived this argument. Further, Honeywell has made no showing of how it was prejudiced by the time limits, especially since it did not exhaust the time it was given.

6. The Fraziers' jury argument

Finally, Honeywell contends that the Fraziers' counsel improperly argued the jury should "go kick Honeywell's butt" in their rebuttal closing argument. Honeywell failed to object to this argument during trial, but argues that the statement is so egregious that it rises to the level of plain error thus requiring reversal.

"The plain error rule is 'not a run-of-the-mill remedy.' " *Rojas v. Richardson*, 703 F.2d 186, 190 (5th Cir.1983) (quoting *United States v. Gerald*, 624 F.2d 1291, 1299 (5th Cir.1980), *cert. denied*, 450 U.S. 920, 101 S.Ct. 1369, 67 L.Ed.2d 348 (1981)). It is invoked "only in exceptional circumstances to avoid a miscarriage of justice" *Id.* (quoting *Eaton v. United States*, 398 F.2d 485, 486 (5th Cir.1968), *cert. denied*, 393 U.S. 937, 89 S.Ct. 299, 21 L.Ed.2d 273 (1968)). For example, in *Rojas*, the court found that counsel committed plain error when he referred to Mr. Rojas as an illegal alien, a charge undocumented in the record. *Id.*

[17] The determination of clear error rests on the facts of each case. *Id.* Unlike the highly prejudicial nature of the statement in *Rojas*, the Fraziers' counsel's statement does not rise to the level necessary to find plain error. The Court instructed the jury that it was decide the case based solely upon the evidence, warned the jury to perform its duties without bias, prejudice or sympathy, and instructed the jury that counsels' arguments were not evidence. Charge of the Court at 1, 3, 8 (Docket No. 80); *see Dixon v. Int'l Harvester Co.*, 754 F.2d 573, 585-586 (5th Cir.1985). Further, the Court instructed the jury that only compensatory damages were recoverable and compensatory damages are not allowed as a punishment against a party. Charge of Court at 6. If Honeywell felt prejudiced by the Fraziers' closing argument, it should have objected during trial so the Court could have had the opportunity to order the argument stricken and correct any potential error through an additional jury instruction. Honeywell has failed to show that a new trial is necessary to avoid a miscarriage of justice under the plain error standard.

Accordingly, Honeywell's Motion for New Trial is **DENIED.**

C. Remittitur

For remittitur analysis, the relevant jurisdiction outlined in *Vogler* includes wrongful death cases in Texas state court and Fifth Circuit cases applying Texas law. The Fraziers cite to many Texas cases, which they claim are similar awards.[FN4] Honeywell argues that most of ***842** these cases fail to differentiate between past and future damages as required by *Vogler*. *See* 352 F.3d at 156-57. However, in *Vogler* the defendants did not object to the past damage award, only to the future damage award. *See id.* Therefore, the court in *Vogler* had to rely only on cases where past and future damages were explicitly designated. *Id.* In this case, Honeywell objects to the entire $24,000,000.00 award. Accordingly, it is not necessary for the Court to seek out only those verdicts that separate past and future damages. *See id.* However, the Court does note that some of the cases cited by the Fraziers had aggravating factors not present in this case, such as punitive damages and malice. Accordingly, the Court is not considering those cases in its analysis.

FN4. *See Martin v. Med. City Hosp.*, XXX-XX-XXXX (Dallas County, Nov. 10, 2000); *Mongrain v. Hendrick Med. Ctr.*, XXX-XX-XXXX (Dallas County, July 12, 2002); *Bosworth v. Westwind Enters.*, 348-193000-02 (Tarrant County); *Alexander v. Corr. Servs. Corp.*, 236-187481-01 (Tarrant County, Sept. 12, 2001); *Sanchez v. Brownsville Sports Ctr.*, 51 S.W.3d 643 (Tex.App.-Corpus Christi 2001, no pet.); *Gen. Chem. Corp. v. De La Lastra*, 852 S.W.2d 916 (Tex.1993); *Cresthaven Nursing Residence v. Freeman*, 134 S.W.3d 214 (Tex.App.-Amarillo 2003, no pet.); *Iracheta v. Gen. Motors Corp.*, 97-CV-E-01382 (Webb County, Nov. 3, 2000); *Wellisch v. United States Auto. Ass'n*, 98-CI-17487 (Bexar County, Feb. 17, 2000); *Garcia v. Ford*, 03-07-10755 (Zavala County, Mar. 1, 2005); *Marroquin v. Ford*, 04-61218-2 (Nueces County, May 23, 2004); *Ibarra v. LG Elecs.*, C-1077-03-F (Hidalgo County, Nov. 1, 2004); *Rodriquez v. Cook Portable Warehouses*, 24,885 (Bastrop County, Oct. 4, 2005); *Garcia v. Ford*, 2004-04-2099-A (Cameron County, Oct. 3, 2005).

[18] Honeywell likewise relies on a laundry list of cases attached as Exhibit A to its motion for remittitur listed in a table summary titled "Texas wrongful death awards for the loss of a child." *See* Honeywell's Mot. for Remittitur, n.10 and Exhibit A. Like most of the Fraziers' cited cases, every case in the table except *Vogler* is an unreported state case. The parties agreed at the hearing on this motion that the cases submitted by both parties constitute the relevant body of case law for the jurisdiction and that the statements of these cases as stated in the briefing properly reflected the facts of each case. However, the Fifth Circuit has declined to rely on unreported decisions as benchmarks for the maximum recovery rule. *Lebron v. United States*, 279 F.3d 321, 326 (5th Cir.2002) ("None of these awards is officially reported, except for one that was reversed on appeal in a reported decision, on which we therefore do not rely."). The Fifth Circuit has stated the rationale for this policy:

> ... from a practical standpoint, the comparability of unreported decisions is hard to judge from the records available. The Lebrons offer a mix of summary reports of verdicts from an unofficial publication, The Blue Sheet of Texas, and attorney affidavits. Use of such hearsay would create more problems than it would solve by provoking irrelevant disputes over the comparability of unreported decisions.

Id. As in *Lebron*, the parties submitted tables and summary charts of the cases they cited, but the Court was unable to do a thorough independent analysis of the records for these cases. Accordingly, although the cases may be relevant for comparison in the remittitur analysis, the Court is not bound to use them as boundaries under the maximum recovery rule.

No reported case is wholly similar to the facts of this case, thus the maximum recovery rule is not mandated here. However, due to the size of the verdict in this case the Court is of the opinion that a remittitur analysis is appropriate. The three most relevant cases for remittitur analysis are: *Vogler*, *Souza v. Cooper* (Bexar County, 2006), and *Logan v. City of Houston* (Harris County, 2006).

a. *Vogler v. Blackmore*

In *Vogler,* the plaintiff brought a wrongful death action against the driver of a tractor-trailer and the driver's employer after his wife and three-year-old daughter were killed when the truck driver crossed the center line and struck the wife's vehicle. *Vogler,* 352 F.3d at 152-53. The jury awarded Vogler $200,000.00 for past loss of companionship and society and mental anguish sustained for the loss of his daughter, and $1,300,000.00 for future loss of companionship and society and mental anguish. *Id.* at 153. Following the verdict in the Eastern District, Judge Hannah denied defendants' motions for new trial or remittitur. *Id.* The Fifth Circuit cited to ***843** the maximum recovery rule, but held that the rule was not applicable with respect to the death of Vogler's child because there were no similar awards cited by the parties to apply the rule to. *Id.* at 157-58.

Using *Vogler,* the maximum recovery analysis would be as follows: *Vogler* awarded $1.5 million to one parent. In this case, both parents survived, thus the recovery would be $1.5 million per parent, or $3 million total, plus 50% of that total equals $4.5 million. However, Honeywell said at the hearing that under its analysis of *Vogler,* appropriate damages would be $4 million per parent, totaling $8 million.[FN5]

> FN5. MR. CREWS: I think *Vogler* is a good guideline. I think we put in our brief a number that comes out somewhere in the neighborhood of about $4 million per parent.
>
> THE COURT: 4 million per parent?
>
> MR. CREWS: Yes, Your Honor.
>
> THE COURT: A total of 8 million?
>
> MR. CREWS: Yes, Your Honor.

Although *Vogler* is a similar case in the relevant jurisdiction on some levels, it is not a wholly similar situation as the Fifth Circuit requires in order to mandate the maximum recovery rule. *See id.* at 157-58. *Vogler* dealt with one parent's loss of a child. In this case, both parents survived and each suffer for the loss of their child. In *Vogler,* the surviving parent did not witness the accident. In this case, the Fraziers were involved in the accident and were bystanders when their daughter died. Tonya Frazier was seated right next to Lauren when the accident occurred and Lauren was ejected from the vehicle. Carol Frazier, who was only minimally injured in the accident, was seated in the vehicle's front passenger seat, saw Lauren on the ground immediately after the accident, and watched the medical personnel try to save her life. Accordingly, the recovery under *Vogler* is relevant for purposes of comparison, but the Court is not bound by the maximum recovery figures calculated using *Vogler.*

b. Souza v. Cooper

In *Souza,* a husband and wife were struck by a drunk driver while repairing their vehicle on the side of the road. The husband later died, and his mother was awarded $6 million for her past and future loss of companionship and mental anguish. Using *Souza,* the maximum recovery analysis would be as follows: *Souza* awarded $6 million to one parent, so in this case the award would be $12 million for both parents, plus 50% of that total equals $18 million dollars.

Although Honeywell brought this case to the Court's attention, Honeywell later distinguished the case in its reply because in *Souza,* the jury was allowed to hear evidence regarding the driver's intoxication. Honeywell argues that intoxication evidence often heightens the culpability of the wrongdoer thus leading to potentially larger verdicts. The accident in this case was also caused by a drunk driver, but because this was a crashworthiness case, the Court did not allow evidence of the driver's intoxication before the jury. Accordingly the facts of *Souza* are not wholly similar to the case at bar.

c. Logan v. City of Houston

In *Logan,* a thirteen-year-old boy drowned in a drainage culvert during a flood in Houston, Texas. The boy's mother sued the City of Houston and recovered $2.5 million in past and future loss of companionship and mental anguish. Using *Logan,* the maximum recovery analysis would be as follows: *Logan* awarded $2.5 million to one parent, so in this case the award would be $5 million for both parents, plus 50% of that total equals $7.5 million dollars.

***844** In its reply, Honeywell distinguishes this case by noting that the jury's $2.5 million dollar verdict was subject to a statutory cap of $250,000, but even surviving such a cap, $7.5 million dollars is a far smaller award than the jury's $24 million. Regardless of the statutory cap this verdict was later subject to, this is a relevant case for remittitur analysis purposes.

[19] Because these three cases in the relevant jurisdiction lack several of the unique characteristics of the present case, the Court is not bound by the maximum recovery rule, yet the Court is of the opinion that a remittitur is appropriate in this case. While the death of a child, at any age, is a life changing and devastating blow to any parent, an award of compensatory damages is still subject to review in light of similar awards in other cases. A review of cases with the most similar injuries in the relevant jurisdiction demonstrates that jury verdicts in Texas vary greatly and are fact intensive. The three most similar cases, *Vogler, Souza,* and *Logan,* would yield verdicts of $4.5 million, $18 million, and $7.5 million respectively.

In ordering a remittitur, the Court does not in any manner minimize or lessen the personal loss the Fraziers have suffered as a result of the loss of their daughter. The Court heard the compelling testimony of Carol Frazier: what he and his wife went through at the time of the accident; the kind of daughter Lauren had been; her exceptional academic and athletic record, her work ethic, her unique personality; the unfortunate timing of her death, the night before she was leaving for college at Baylor University; instead of moving Lauren to Waco, having to call Baylor to let them know their youngest daughter would not be attending classes in the fall; instead of helping Lauren unpack her things at college, having to shop for a burial dress for Lauren; instead of receiving an exuberant phone call about Lauren's first day of college, they had to bury her; the continuing effect it has had on their family; and all of the future events in Lauren's life that they had expected to see, but will not be able to see.

Carol Frazier's testimony about his daughter's death and the impact it has had on their family, was as compelling and moving as any this judge has heard in over 30 years as a civil trial attorney and judge. During his testimony many female jurors were in tears and several male jurors seemingly could not bring themselves to look at him. Nevertheless, it is this Court's duty order a remittitur when it finds a verdict to be excessive, and this Court finds this verdict in the amount of $24 million to be excessive.

At the same time, retrying this case-even on damages alone-would only serve to cause this family more pain and anguish which this Court does not want to see them endure. Accordingly, this Court after conducting a thorough remittitur analysis is of the opinion than a remittitur amount near the middle of the three verdicts in the relevant jurisdiction with the most similar injuries is appropriate in this case. Accordingly, the Court offers the Fraziers a remittitur in the total amount of $9.75 million dollars ($4,875,000 each for past and future loss of companionship and mental anguish) in lieu of a new trial.

CONCLUSION

The Fraziers put on sufficient evidence for a reasonable jury to find for the Fraziers on the issues raised in Honeywell's motion for judgment. Thus, the motion is **DENIED.** Because Honeywell's arguments for new trial are without merit, the motion is **DENIED.** Honeywell's motion for remittitur is **GRANTED in part** and remittitur in the amount of $9.75 million dollars is appropriate. If the Fraziers do not accept the remittitur, a new trial on ***845** damages is ordered. The Fraziers are to file a notice of their decision within 30 days.

So ORDERED.

E.D.Tex.,2007.

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