IN THE SUPREME COURT OF MISSISSIPPI

NO. 2009-CA-00554

SHENANDOAH H. CLARK AND CHRISTIE CLARK — PLAINTIFFS-APPELLANTS

V.

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

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

BRIEF OF APPELLANTS SHENANDOAH H. CLARK AND CHRISTIE CLARK

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

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

1. Shenandoah H. Clark, Plaintiff-Appellant
2. Christie Clark Johnson, Plaintiff-Appellant
3. Wayne E. Ferrell, Jr., Counsel for Plaintiffs-Appellants
4. Lundy, Lundy, Soileau & South, LLP, Counsel for Plaintiffs-Appellants
5. J. Ashley Ogden, Counsel for Plaintiffs-Appellant
6. Toyota Motor Sales U.S.A., Inc., Defendant-Appellee
7. Toyota Motor Company, Ltd., Defendant-Appellee
8. Toyota Motor Distributors, Inc., Defendant-Appellee
8. Roper Toyota, Inc., Defendant-Appellee
9. David L. Ayers, Counsel for Defendants-Appellees

10. J. Collins Wohner, Jr., Counsel for Defendants-Appellees

11. Jimmy B. Wilkins, Counsel for Defendants-Appellees

12. Jennifer Rogers, Counsel for Defendants-Appellees

13. Hon. Winston L. Kidd, Hinds County Circuit Court Judge

Respectfully submitted, this the 30th day of December 2010.

Hunter W. Lundy

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REQUEST FOR ORAL ARGUMENT

Plaintiffs request that the Court hear oral argument from the parties on this case pursuant to Mississippi Rule of Appellate Procedure 34(a). Plaintiffs believe that the issues will be presented to the Court more clearly on oral argument and that oral argument will significantly assist the Court in rendering its decision.

STATEMENT OF ISSUES

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.

STATEMENT OF THE CASE

I. Nature of Case and Course of Proceedings.

This matter concerns the claims of Plaintiffs who contend the 2000 Toyota Tundra TRD truck[1] driven by Shenandoah Clark was defective and caused enhanced, severe and permanently disabling injuries that he sustained in the early hours of July 12, 2001. [R. Vol. 1, 19-28.] Clark was

[1]The subject vehicle was particularly a Toyota Racing Development Off-Road truck.

driving the Tundra along Highway 305 in DeSoto County, when the truck went off the road in a curve near the intersection of Highway 305 and Vaiden Road resulting in Clark's hitting an embankment and the Tundra's rolling over. The truck's roof integrity failed, causing it to inappropriately invade the truck's cabin, crushing Clark's neck. After the accident, Clark was found held in the truck by his seatbelt upside down, air bag engaged, with a later-confirmed quadriplegic injury. Plaintiffs' claims are supported by the fact that the roof on the passenger's side of the Tundra did not fail and did not collapse and the passenger walked away without significant injuries.

Plaintiffs, Shenandoah H. Clark and Christie Clark, filed suit against Defendants, Toyota Motor Sales U.S.A., Inc., Toyota Motor Company, Ltd., Toyota Motor Corporation, Toyota Motor Distributors, Inc. and Roper Toyota, Inc. on December 28, 2001. [R. Vol. 1, 19-28.] The District Court submitted this case to the jury on Monday, October 20, 2008. The jury returned a verdict for Defendants and the clerk entered judgment on October 21, 2008. [R. 208-13; R.E. 2.] Plaintiffs filed their Combined Motion and Memorandum for J.N.O.V. or, In the Alternative, for a New Trial October 31, 2008; however, the District Court entered its order denying the motion on March 2, 2009. [R. 214-27, 250; R.E. 3.] Aggrieved by this decision, Plaintiffs timely filed their Notice of Appeal. [R. 251-53.]

II. Statement of the Facts.

Shenandoah Clark ("Clark"), on the evening of July 11, 2001, went to Buster's with his friend Jonathan to shoot pool. [R. Vol. 8, 853:22-29, 892:6-11.] Earlier that day he had been working at home on a honey- do list, including yard work and removing wallpaper, at the house he and his wife had recently purchased. [R. Vol. 8, 853:12-17.][2] While at Buster's, Clark saw Kevin

[2]His wife, Christie, had come home late that afternoon from work after getting a Phenergan shot for nausea and went to bed to rest. [R. Vol. 8, 853:20-22.]

Knight ("Knight") and Grant Roper who talked with Clark about going to Tunica. [R. Vol. 8, 854:10-13.] Clark, deciding to make the trip with them went to Knight's to meet the group, but only Clark and Knight ultimately left for Tunica. [R. Vol. 8, 854:13-16.] The two went in Knight's 2000 Toyota Tundra TRD with Knight driving, but as they started down the road he was feeling tired and asked Clark if he would mind driving. [R. Vol. 8, 854:18-28.] Knight pulled over, Clark got in the driver's seat, buckled his seat belt and they began traveling down Highway 78. [R. Vol. 8, 854:28-855:1.]

Clark normally took Highway 302 to Tunica, but decided to take Exit 305 because it was shorter. [R. Vol. 8, 855:6-13.] He had learned of this route when he delivered goods to Tunica in his capacity as a truck driver when the 18-wheeler's computer system provided the alternate directions. [R. Vol. 8, 855:7-13.] At some point, Knight laid back his seat and went to sleep. [R. Vol. 8, 893:1-27.]

As the truck rounded the corner of the curve near the intersection of Highway 305 and Vaiden Road, the truck went off the road as Clark reached down for a cd. [R. Vol. 5, 329:2-3; Vol. 8, 855:16-20.] The vehicle exited the west side of Highway 305, 200 feet (200') south of Vaiden Road, then intersected with the north side of Vaiden Road, striking the raised embankment area, and came to rest overturned in a field in the southwest corner of the intersection. [R. Vol. 5, 329:3-5, 329:16-330:1. *See also* Tr. Ex. 5, Tr. Ex. D-106 (id) (Accident Report); Tr. Ex. D-94 (id) (Rollover Dynamics).] The driver's side roof collapsed, crushing Clark's neck, rendering him a paraplegic.

The life-altering accident occurred at approximately 12:52 a.m., July 12, 2001. [Tr. Ex. D-106 (id) (Accident Report).] Knight awoke upside down in the Tundra, finding Clark unconscious, "sitting" in his seat upside down, air bag engaged and the roof of the Tundra pushing his head down. [R. Vol. 8, 671:19-20, 672:26-675:1.] Knight crawled out of the broken window and immediately

saw the blue lights of a police car. [R. Vol. 8, 671:20-21, 675:15-17.] Both Clark and Knight were flown to Memphis Medical Center by helicopter where Knight was released with "just bruises, scratches and cuts." [R. Vol. 8, 675:19-21, 24-29.] Clark, on the other hand, was informed that he would never walk again. [R. Vol. 8, 858:5-7.]

SUMMARY OF THE ARGUMENT

A motion for a judgment notwithstanding the verdict tests the legal sufficiency of the evidence. *White v. Yellow Freight Sys., Inc.*, 905 So. 2d 506, 510(¶ 6) (Miss. 2004) (citing *Tharp v. Bunge Corp.*, 641 So. 2d 20, 23 (Miss. 1994)). The trial court must consider all the evidence in a light most favorable to the nonmoving party. *Id.* (citing *Janssen Pharmaceutica, Inc. v. Bailey*, 878 So. 2d 31, 54 (¶ 107) (Miss. 2004)). "If the facts and inferences so considered point so overwhelmingly in favor of the movant that reasonable jurors could not have arrived at a contrary verdict," then the circuit court must grant the motion. *Id.* In the matter *sub judice*, the evidence was insufficient to uphold the verdict. Plaintiffs contend that the verdict was also against the overwhelming weight of the evidence and, as such, request that this Court remand this matter for a new trial.

Pursuant to Rule 59 of the Mississippi Rules of Civil Procedure, a trial judge may grant a new trial when justice so requires. According to the Mississippi Supreme Court, "a new trial becomes appropriate when a trial court determines that error within the trial mechanism itself has caused a legally incorrect or unjust verdict to be rendered." *White v. Stewman*, 932 So. 2d 27, 33 (Miss. 2006). Stated differently, the Court has held that:

> A new trial may be granted in a number of circumstances, such as when the verdict is against the overwhelming weight of the evidence, or when the jury has been confused by faulty jury instructions, or when the jury has departed from its oath and its verdict is a result of bias, passion, and prejudice.

Poole ex rel. Wrongful Death Beneficiaries of Poole v. Avara, 908 So. 2d 716 (¶ 25) (Miss. 2005). *See also Coho Resources, Inc. v. Chapman*, 913 So. 2d 899 (¶ 28) (Miss. 2005).

Plaintiffs respectfully submit that the Court should grant a new trial as permitted for the following reasons: (1) 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; (2) the trial court erred in submitting the special verdict sheets to the jury without the Court-ordered modifications, thereby prejudicing Plaintiffs; (3) the trial court abused its discretion in disallowing Plaintiffs' motion to strike the opinions of Lee Carr ("Carr")[3] and further abused its discretion when it prohibited Plaintiffs from calling a rebuttal witness regarding the recently disclosed testimony of Carr, specifically that testimony concerning the Exponent test; and (4) Defense counsel in closing made arguments which circumvented the prior rulings of the trial court, caused jury bias and unfairly prejudiced Plaintiffs. As discussed more fully below a new trial may be granted for any of the above-stated reasons individually, keeping in mind, however, that the cumulative effect of these errors is particularly prejudicial to Plaintiffs warranting a reversal and a remand for new trial.

STANDARD OF REVIEW

I. Motion for J.N.O.V./Motion for New Trial.

This Court's standard of review in considering a lower court's denial of a motion for judgment notwithstanding the verdict is de novo. *Wilson v. Gen. Motors Acceptance Corp.*, 883 So. 2d 56, 64 (Miss. 2004). This Court applies an abuse of discretion standard of review to a trial court's grant or denial of a motion for a new trial. *White v. Yellow Freight Sys., Inc.*, 905 So. 2d 506, 510 (Miss. 2004) (citing *Green v. Gant,* 641 So. 2d 1203, 1207 (Miss. 1994)). The Court reviews the

[3]Defendants' accident reconstructionist.

evidence in the light most favorable to the nonmoving party and will reverse "only when, upon review of the entire record, we are left with a firm and definite conviction that the verdict, if allowed to stand, would work a miscarriage of justice." *Id.* at 510-11 (citing *Green,* 641 So. 2d at 1207-08).

II. Admission or Exclusion of Evidence.

"The standard of review regarding admission or exclusion of evidence is abuse of discretion. Where error involves the admission or exclusion of evidence, this Court will not reverse unless the error adversely affects a substantial right of a party." *Whitten v. Cox,* 799 So. 2d 1, 13 (Miss. 2000) (quoting *Floyd v. City of Crystal Springs,* 749 So. 2d 110, 113 (Miss. 1999)).

III. Jury Instructions.

Jury instructions are generally within the discretion of the trial court, so the standard of review for the denial of jury instructions is abuse of discretion. *Davis v. State,* 18 So. 3d 842, 847 (Miss. 2009) (citing *Higgins v. State,* 725 So. 2d 220, 223 (Miss. 1998)). The Mississippi Supreme Court has explained that jury instructions must be considered together:

> In determining whether error lies in the granting or refusal of various instructions, the instructions actually given must be read as a whole. When so read, if the instructions fairly announce the law of the case and create no injustice, no reversible error will be found. There is no error if all instructions taken as a whole fairly, but not necessarily perfectly, announce the applicable rules of law.

Rubenstein v. State, 941 So. 2d 735, 784-85 (Miss. 2006) (internal quotations and citations omitted).

IV. Inappropriate Argument.

"The standard of review that appellate courts must apply to lawyer misconduct during opening statements or closing arguments is whether the natural and probable effect of the improper argument is to create unjust prejudice . . . so as to result in a decision influenced by the prejudice so created." *Burr v. Mississippi Baptist Med. Ctr.,* 909 So. 2d 721, 724-25 (¶ 7) (Miss. 2005) (quoting *Eckman v. Moore,* 876 So. 2d 975, 994 (¶ 73) (Miss. 2004)). The Supreme Court has held

that "any alleged improper comment must be viewed in context, taking the circumstances of the case into consideration." *Id.*

ARGUMENT

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

In considering a lower court's denial of a motion for judgment notwithstanding the verdict, the standard of review is de novo. *Wilson v. Gen. Motors Acceptance Corp.,* 883 So. 2d 56, 64 (Miss. 2004). The trial court must view the evidence in the light most favorable to the non-moving party and look only to the sufficiency, and not the weight, of that evidence. *Id.* at 63. If such evidence were insufficient to uphold the verdict when considering all of the evidence in the light most favorable to the non-moving party, the trial court must grant the motion for a j.n.o v.

Here Plaintiffs submit the evidence, when taken as a whole and when viewed in the light most favorable to Defendants, established Defendants' negligence. Particularly, the evidence was insufficient to uphold the verdict when removing from consideration the objectionable evidence posited by Defendants, *i.e.* Carr's second reconstruction and the Exponent test. *See Poole ex rel. Wrongful Death Beneficiaries of Poole v. Avara*, 908 So. 2d 716, 727 (¶ 24) (Miss. 2005).

Further, Plaintiffs submit to the Court that the verdict was also against the weight of the evidence. At the trial of this matter, Plaintiffs presented evidence that the 2000 Toyota Tundra TRD was not a safe vehicle and, as a result, caused and/or enhanced the injuries sustained by Shenandoah Clark, including paraplegia. The vehicle, designed for off-road use and known by Toyota to have a higher ground clearance and to be more likely to roll,[4] was *lacking* in its ability to protect occupants from roof crush.

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[4]*See* Tr. Ex. 29 (2000 Toyota Tundra Owner's Manual, p. iv).

The Tundra, with its access cab , did not have sufficient strength and/or support to keep the roof from crushing in on Clark during the rollover, despite his being belted. [R. Vol. 6, 488:26-489:3.] In designing the access cab, Toyota removed the middle post (B-pillar) that four-door trucks and cars have and created a door that latched. [R. Vol. 6, 486:14-487:24; Tr. Ex. 30.] Toyota inserted steel for reinforcement to meet the government standard; however, alternative designs were available and being implemented by other automobile manufacturers, providing stronger, safer vehicles. [R. Vol. 6, 476:20-481:7; 486:1-8.]

Plaintiffs evidence showed the accident, as well as Clark's injuries, occurred in phases as Clark's body moved within the cabin of the truck , despite being belted. *See* R. Vol. 9, 955:3-958:6. *See also* Tr. Ex. P-78 (id); Tr. Ex. D-94 (id) (Rollover Dynamics).

Defendants' argued that Clark's paraplegia was the result of a one-time "diving injury" which would have occurred regardless of the strength of the roof. Violent force and speed were needed to convince the jury of such a position.[5] The theory of this type of injury hinged on the opinions of Lee Carr, whose second accident reconstruction and last-minute Exponent test were not only unscientific, unreliable, and inadmissible, but also prejudicial, particularly when the trial court refused to allow Plaintiffs to put on testimony to rebut the testimony of Carr that was disclosed to Plaintiffs just days before the discovery deadline.

II. 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.

Although the decision to conduct a view or inspection is discretionary, the manner in which one is obtained and/or conducted is not. Mississippi enacted legislation setting forth the specific

[5]Notably, Carr's first reconstruction, showed speeds lower than Plaintiffs' reconstructionist Jerry Wallingford.

criteria for a jury's trial viewing. Pursuant to Mississippi Code Annotated § 13-5-91 (1972):

> 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). While a trial court has discretionary authority to allow a jury to view property or a material object or thing in any way connected with the case, that authority is not boundless. The court does not have the discretion to *not* attend, supervise or control the jury view. Section 13-5-91 specifically states:

> [T]he 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 . . . .

In disregard of Section 13-5-91, the "organized court" did not attend the view, nor were witnesses utilized at the view to point out and/or explain any details regarding the vehicles.

In addition to the statutory guidelines, the Court has held that a request for a view should not be granted unless it is reasonably certain that it will be of essential aid to the jury in reaching a correct verdict, and not merely of some aid, and that it is impracticable and inefficient to present

material elements to the jury by photographs, diagrams or measurements. *Floyd v. Williams*, 198 Miss. 350 (1945), 22 So. 2d 365 (Miss. 1945).

As the Supreme Court has explained, "[t]he request for a view may be made orally, in the absence of the jury, and transcribed into the court reporter's record; but the request must state the facts which bring the application within the rule heretofore and hereinabove laid down, and if the other party object or challenge the facts, the court must hear evidence or sworn statements, touching those facts which must be reported in the transcript otherwise no order for a view can be validly made." *Poteete v. City of Water Valley*, 207 Miss. 173, 42 So. 2d 112, 115 (Miss. 1949) (quoting *Great Atlantic & Pacific Tea Co.*, 177 Miss. 562, 171 So. 550, 552 (Miss. 1937)). *See also Leflore v. State*, 196 Miss. 632, 18 So. 2d 132, 134 (Miss. 1944).

The view in the instant matter failed to meet the statutory requirements, as well as this Court's long-established criteria . First, Defendants failed to provide facts in support of their request for a view. The exchange among the trial court and counsel is provided below:

> Mr. Ayers: . . . And then we were going to ask you for a jury view and then move to an expert witness. And just so - - on the jury view, I think we got it down to something where it's pretty straight forward. We would bring the accident vehicle, the subject Tundra would be out here in front of the courthouse in an area that's been blocked off adjacent to an undamaged 2000 Tundra. And there would be no testimony. In fact, what I've done in the past is the bailiffs take the jury out, the jury looks for whatever period of time Your Honor approves, and the bailiffs bring them back and the lawyers don't go, and whether the court goes is up to the court. But no testimony, no opportunity for anybody to influence or suggest or anything. And then they would come back in and then we would move to our next witness.
>
> The Court: All right.
>
> Mr. Ayers: And the only reason I'm bringing it up now is I need to get it out there if you approve.
>
> The Court: All right. I'll let you know at the break.

Mr. Ayers: Thank you.

The Court: All right.

Mr. Lundy: And my response to that, Your Honor, would be until they lay a foundation with Mr. Carr, the jury should not view anything.

The Court: Until they lay a foundation?

Mr. Lundy: That's right.

The Court: In terms of the - - what is this, the subject vehicle?

Mr. Lundy: The subject vehicle.

Mr. Ayers: Yes, it'll be the subject vehicle. They jury view of the accident vehicle and an undamaged vehicle.

The Court: All right.

Mr. Ayers: And that's it at this point.

The Court: All right. Anything, else, Mr. Ayers. I'll let you know at the break regarding the - -

Mr. Ayers: And we got some law with us if we need to argue.

The Court: No, I don't need anything else.

[R. Vol. 9, 1050:24-1052:14.]

* * *

The Court: . . .The defendant made a request for the jury to view the subject Tundra in front of the courthouse. The court has decided to allow that jury view. The court will allow the jury to go out with the bailiffs. The court will not allow any comment to the jury, no testimony to be taken. The court will allow one attorney from the plaintiff and one attorney from the defendants to go out with the other bailiff.

Mr. Lundy: May I address that, Your Honor?

The Court: You may.

> Mr. Lundy: Because I didn't get a chance to argue. Mississippi Code Annotated 13-5-91 addresses the view by a jury, but there are cases that interpret that, Green versus State and Floyd versus Williams. Your Honor, we're going to have evidence that this product has been altered since it's been in the possession of Toyota. That they have a problem with the chain of custody. They clearly damaged it in June of 2002 when it was in their possession, and we don't know what else they did. And that's the reason why the plaintiffs wanted the foundation laid before any viewing takes place. But plaintiffs ask that there not be a viewing under the case law which says where there is intentional or accidentally - - if the product has been changed in some form or fashion since the accident, then they're not entitled to view it. They can prove their case by photographs, diagrams and measurements. That's what the Floyd versus Williams case says, 22 So. 2d 365, and that predates the statute but it's on point, Your Honor, and I don't believe there should be a viewing because of those reasons.
>
> The Court: All right.
>
> Mr. Ayers: You have ruled, your Honor, have you not?
>
> The Court: I did rule.

[R. Vol. 10, 1154:8-1155:21.]

Defendants provided *no* basis for their request and the trial court made no inquiry into the facts to make a determination of the requisite necessity. This Court has found error where the trial court allowed a viewing with no justifiable reasons for the inspection stated. *Green v. State*, 614 So. 2d 926 (Miss. 1992). [6]

In *Poteete v. City of Water Valley*, the plaintiffs brought suit in equity for a mandatory injunction to compel the city to alter work allegedly performed by the city on Eckford Street so as to prevent the diversion of surface water from the street on to their residence lot. *Poteete v. City of Water Valley*, 207 Miss. 173, 42 So. 2d 112 (1949). The chancery court granted the requested

[6]While it is expected Defendants will submit to the Court that the proximity of the viewing is a factor which supports their position, Defendants' striving to make the viewing "convenient" did not render it proper, "in order to reach the ends of justice," nor did it prevent it from prejudicing the jury. See *Leflore v. State*, 196 Miss. 632, 18 So. 2d 132 (1944).

injunction and upon appeal this court reversed the decree for injunction and remanded the cause with directions that it be transferred to the circuit court for trial upon the alleged cause of action for damages. *Id.* at 113. At the trial on damages, counsel for the city requested that the jury be allowed to inspect the plaintiffs' property:

> If the court please, I think it would result in saving a great deal of time, and I know the court and jury would understand and appreciate the testimony much better, if the jury be permitted to go to the house and lot in question. And now, before the introduction of any testimony, the defendant asks that the jury be allowed to go and inspect the premisses.

Id. at 114. Plaintiffs' counsel objected, stating the conditions had been changed since the filing of the action. *Id.* Despite the city's failure to offer any proof of necessity of a jury view and acknowledging counsel's objection with "That is a matter of proof," the trial court directed the jury to proceed to the premises. *Id.*

This Court stated plainly that the city's counsel failed not only to make any showing, but also to even state that the view was necessary in order to meet the ends of justice. *Id.* At a disadvantage, the plaintiffs were forced to make their objection[7] at a time when no showing had been made that a view was necessary in order to reach the ends of justice. *Id.* at 115. The *Poteete* Court further provided:

> According to the record before us, not one witness was produced at the scene to point out the place and its boundaries or to explain anything about the case notwithstanding the fact that the statute provides that the property, object or thing to be viewed 'shall be pointed out and explained to the court and jury by the witnesses in the case.'

In the instant matter, at the first mention of any type of out-of-courtroom demonstration

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[7]The Plaintiffs stated as a ground for their objection to the view that the conditions had been changed. *Id.* at 115.

and/or view, Plaintiffs objected, 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, 902:6-15.]

Despite Plaintiffs' objections based upon the more than adequate number of photographs available for the jury to view of the subject Tundra and Defendants' exemplars,[8] the jurors were sent outside the courtroom to view both vehicles, unfairly prejudicing Plaintiffs. The jurors were taken to the subject vehicle which had been retained in the custody of Defendants and was presented to the jurors in an altered fashion. As noted hereinabove, ample photographs were available to jurors, making a "field trip" outside the courtroom to the vehicles unnecessary.

In addition to the damage that occurred while in storage,[9] the subject vehicle was not in the same condition as it had been immediately prior to the accident. For example, the guest passenger seat had been moved to a different position from that which was reflected in photographs entered into evidence and as described in trial testimony. [R. Vol. 2, 243-44.] Additionally, the exemplar provided by Defendants for the jurors' viewing was not a true exemplar in that it was not a Toyota Racing Development ("TRD") truck.[10]

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[8][R. Vol. 8, 900:18 - Vol. 9, 903:18; Vol. 9, 1050:24 - Vol. 10, 1052:10; Vol. 10, 1154:8 - 1157:1.]

[9][R. Vol. 10, 1200:17-23.; Vol. 11, 1208:7-20.]

[10]Incidentally, after the view, the trial court and Plaintiffs' counsel were informed that rather than being procured by Toyota, the "exemplar" belonged to an attorney in Defendants' counsel's firm. Although not a true exemplar, Defendants' counsel stated "[h]e had a 2000 Toyota Tundra Access Cab and we felt like the jury needed to see an undamaged vehicle especially in regard to the roof." Regardless of any potential objections, it was too late – the view had already occurred. [R. Vol. 11, 1206:28-1207:13.]

While it was the roof structure at issue in the matter at hand, rather than the suspension,[11] perception goes to the crux of the issue where a view and/or inspection is concerned. Arguably it was the jury's perception of and comparison between the two vehicles that ultimately assisted the jurors in reaching the verdict. As such, the difference between the vehicles was significant and, thus prejudicial, particularly considering the additional anomalies surrounding the view.

Further, while the trial court approved the jury to *view* the subject vehicle and the exemplar, such viewing was to occur with no testimony or discussion by any party or counsel allowed. [R. Vol. 10, 1180:1-7.] However, "[d]uring the course of the viewing of the exemplar vehicle, jurors took the liberty to sit in the seats, touch the vehicle, and open the glove box." [R. Vol. 2, 243.] As to the subject 2000 Toyota Tundra TRD truck, "jurors leaned over the subject vehicle, touched the vehicle, touched the roof, and touched the interior of the truck." [R. Vol. 2, 244.] By so doing, jurors conducted an investigation into the facts of the case on their own and in direct conflict with the court' s allowed view. As a result, Plaintiffs suffered prejudice and are entitled to a new trial.

It is well-established that unauthorized visits to the scene of a case as well as independent experiments or private investigations conducted by jurors qualify as "extraneous prejudicial information" under Rule 606(b) of the Mississippi Rules of Evidence. *Schmiz v. Ill. Central Gulf Railroad Co.*, 546 So. 2d 693, 696 (Miss. 1989); *Crawley v. Ill. Central Gulf Railroad Co.*, 248 So. 2d 774, 776-777 (Miss. 1971). As such, a new trial is appropriate, according to Mississippi jurisprudence, when the jury receives "extra record" facts that concern a material issue in dispute and they are qualitatively different from the evidence admitted at trial. *Schmiz,* 546 So. 2d at 696; *Salter v. Watkins,* 513 So. 2d 569, 571 (Miss. 1987).

In *Schmiz*, Robert Schmiz , on the afternoon of March 31, 1981, drove south on Highway 51

[11]Toyota provided with its "TRD" models a different suspension.

out of Canton and turned west onto Ragsdale Road. As he traveled along Ragsdale Road, there were no markings or signs to warn him of the upcoming Ragsdale Road/Illinois Central Gulf ("ICG") railroad grade crossing. Also, trees and other vegetation along the northern boundary of the roadway and eastern boundary of the railroad right-of-way obstructed Schmiz's vision of the crossbuck and the grade crossing. An oncoming ICG train was unable to stop before broadsiding Schmiz who died as a result of the injuries sustained in the accident. *Schmiz*, 546 So. 2d at 694-95.

Schmiz's father filed suit against ICG and the train's engineer in the Circuit Court of Madison County, with the trial resulting in a verdict for ICG. Schmiz filed a motion for a new trial following the jury verdict. Three jurors were called to testify regarding several jurors' unauthorized, as well as unsupervised,[12] inspection of the subject crossing. *Id.* at 695.

The jury foreman testified he and a fellow juror drove over the railroad crossing at issue. Thereafter, the foreman advised the other jurors of his inspection and the impression he gained from the inspection, *i.e.* the crossing was in worse shape at the time of his inspection than it was in at the time of the collision. *Id.* at 695-96.

In *Crawley v. Ill. Central Gulf Railroad Co.,* the Supreme Court determined that if the testimony divulges that the inspection was casual, or of such a nature as not to be calculated to influence the verdict of the jury, a new trial should not be granted. *Crawley,* 248 So. 2d 774, 776-777 (Miss. 1971). In *Schmiz*, however, the Court held:

> In the instant case the railroad was the predominant issue. Where the inspection was of such a nature as to relate to a vital issue in dispute and calculated to influence members of the jury - and which probably did influence the jury verdict - a new trial should be granted.

Id. at 697-98.

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[12]While the jury's view in the matter at hand was *authorized* (although in error), Plaintiffs submit it was effectively *unsupervised* by the trial court in that the trial judge was not in attendance and, therefore, unable to halt the inappropriate actions of the jurors.

Plaintiffs do not suggest the jurors' misconduct was intentional; however, similar to *Schmiz*, the 2000 Toyota Tundra, without question, was the predominant issue. Further, the view was requested by Defendants to illustrate damage caused to the subject vehicle as a result of the July 12, 2001 accident in contrast to their "exemplar." Also, as stated previously, no witnesses were present to point out any particular points, markings and/or variations between the two vehicles despite the requirement of Section 13-5-91. Thus "extra record" facts were gathered and potentially shared between and among jurors.

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

A new trial should be granted ". . . when the jury has been confused by faulty jury instructions . . . " *Crews v. Mahaffey*, 986 So. 2d 987, ¶ 40 (Miss. Ct. App. 2007); *Bobby Kitchens, Inc. v. Miss. Ins. Guar. Assn.*, 560 So. 2d 129, 132 (Miss. 1989). Plaintiffs orally moved to amend the special verdict sheets in an effort to clarify the jury's deliberations inasmuch as the issue before the jury was liability as to "enhanced injuries." The trial court, nonetheless, maintained the originally submitted language. [R. Vol. 15, 1827:17-1828:5; Vol. 15, 1835:16-22.]

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.

[R. Vol. 2, 210-13.] Because this was an enhanced injury case, Plaintiffs orally 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.

The use of "negligence of the Defendants," gave an inference of an all-or-nothing determination and Plaintiffs had already openly admitted to Clark's being responsible for the Tundra's going off the highway on the night of the accident. [R. Vol. 4, 277:7-9; Vol. 8, 893:29-894:3.] Clark's admission and counsels' concerns were further discussed in the jury instruction conference.[13] The issue was whether or not the Toyota Defendants were responsible/liable/negligent as to Clark's "enhanced injuries" (and Mrs. Johnston's resulting injuries). However, this is a difficult concept to impart to twelve jurors and by retaining the "negligence" language the verdict sheets were confusing with the other given instructions and, therefore, faulty.

In reviewing jury instructions, this Court's standard of review is as follows:

> In determining whether reversible error lies in the granting or refusal of various instructions, the instructions actually given must be read as a whole. When so read, if the instructions fairly announce the law of the case and create no injustice, no reversible error will be found.

Whitten v. Cox, 799 So. 2d 1(¶ 39) (Miss. 2000) (citing *Fielder v. Magnolia Beverage Co.*, 757 So. 2d 925, 929 (¶10) (Miss. 1999)). While Plaintiffs bring particularly to the Court's attention the special verdict sheets, reading them in conjunction with the instructions as a whole[14] did not lessen their prejudice against Plaintiffs. Instead, the instructions pointed to negligence and injury

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

[14][R. Vol. 15, 1836:28-1855:24.]

throughout and provided little to no information regarding "enhanced injury."[15] Plaintiffs' counsel made a point to the trial court their preference in using the phrase "enhanced injury" in an effort to distinguish the concept and lessen jury confusion, but no further amendments were made by the court. [R. Vol. 15, 1819:4-5 ("Again, Your Honor, we prefer to use enhanced injury.").]

This Court in *Carr v. State*, 655 So. 2d 824, 847 (Miss. 1995), held that it will not reverse for an error created by a party's own error. Carr, the complaining party, made no specific objection at the time of trial regarding the jury instruction upon which his appeal was based. *Id.* Unlike Carr, Plaintiffs in the instant matter requested on the record that the verdict sheet be amended prior to its submission to the jury, but to no avail. [R. Vol. 15, 1827:17-1828:5; Vol. 15, 1835:16-22.]

Accordingly, Plaintiffs submit that the trial court committed error in maintaining the original verdict sheets and as such Plaintiffs should be granted a new trial.

IV. The Trial Court Abused its Discretion in Disallowing Plaintiffs' Motion to Strike the Opinions of Defendants' Expert, Lee Carr, and Further Abused its Discretion in Disallowing Plaintiffs' Rebuttal Witness.

Prior to trial in this matter, Plaintiffs filed their Motion to Strike the Testimony and to Challenge Under *Daubert* the Opinions of Lee Carr, and/or, in the Alternative to Limit the Testimony of Lee Carr, in connection with Toyota Defendants' designated expert in accident reconstruction. [R. Vol. 1, 29-74.] Succinctly, Plaintiffs moved to strike Carr for his failure to respond to questions during his deposition and based upon the unscientific methodology and

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[15]Only one (1) jury instruction mentioned enhanced injury: Plaintiffs have alleged that the 2000 Toyota Tundra driven by Shenandoah Clark was uncrashworthy. That is, plaintiffs have alleged that Shenandoah Clark's injuries were caused and/or enhanced as a result of defects in the design of the roof or roof structure components of the 2000 Toyota Tundra. You are hereby instructed that a defendant, such as the defendants in this case, may be liable for enhanced injuries caused by crashworthiness defects, even if the crashworthiness defects did not cause or contribute to the accident in questions. If you find from a preponderance of the evidence that the roof and/or roof structure components were uncrashworthy and caused and/or enhanced the injuries sustained by Shenandoah Clark, then you should find for plaintiffs and assess damages. [R. Vol. 15, 1849:13-1850:2.]

unreliable opinions concerning Carr's reconstructions of the subject accident. In the alternative, Plaintiffs, requested that the trial court exclude Carr's testimony with respect to a test performed by Exponent days before his deposition as not only unscientific, unreliable, and inadmissible, but also prejudicial.

A. Carr Resisted Discovery, Generating Not Only Questions as to His Credibility, but Also Rule 26 and/or Rule 37(e) Grounds to Strike His Testimony.

At his deposition Carr failed to respond to questions of Plaintiffs. No protective order had been filed by Defendants and Plaintiffs were attempting to solicit relevant and discoverable information over Carr's refusal to respond to the same. Rule 26(b) of the Mississippi Rules of Civil Procedure states:

> Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
>
> *In General*
>
> 1. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the issues raised by the claims or defenses of any party.

Miss. R. Civ. P. 26 (b). Furthermore, pursuant to Rule 37 of the Mississippi Rules of Civil Procedure entitled "Failure to Make or Cooperate in Discovery":

> In addition to the application of those sanctions, specified in Rule 26(d) and other provisions of this rule, the court may impose upon any party or counsel, such sanctions as may be just, including the payment of reasonable expenses and attorney's fees, if any party or counsel
>
> (i) fails without good cause to cooperate in the framing of an appropriate discovery plan by agreement of the Rule 26(c) or;
>
> (ii) otherwise abuses the discovery process in seeking, making or resisting discovery.

Miss. R. Civ. P. 37(e).

In Carr's file produced at his August 28, 2008 deposition, there were letters arranging a meeting with Dr. Schneider (Toyota's designated biomechanical engineer), Toyota's Los Angeles, California counsel, Toyota's Jackson, Mississippi counsel, and Carr to be held at "Lee Carr's facility in Santa Barbara."[16] Carr had already testified that he had only one (1) telephone conversation and one (1) meeting with Dr. Schneider.[17] Dr. Schneider, however, testified he had two (2) meetings with Carr.[18] During the course of Carr's deposition, in connection with the above-mentioned correspondence, he was asked about his owning property in Santa Barbara, California. Carr refused to answer any questions about property he owned or any residence or locations in Santa Barbara.[19]

The dates and times of Carr's meetings with Dr. Schneider and the formulation of the opinions of Carr were extremely relevant to Carr's theory of the reconstruction, as well as to his credibility. In the instant case, Toyota, through Carr, resisted discovery in accordance with the rules.[20] His refusal to answer questions was inexcusable and merited the trial court's discretion under Rule 26 and/or Rule 37(e) to strike him.

B. Both Carr's Accident Reconstruction and his Exponent Test Were Subject to *Daubert* and Should Have Been Excluded by the Trial Court.

Carr's second accident reconstruction was based upon unscientific and unreliable underlying data. The Supreme Court in *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 Ld 2nd 469 (1993), focused upon the disability of scientific expert testimony. Under the

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[16]*See* Tr. Ex. P-125 *See also* Exhibit 26 to Carr's deposition. [R. Vol. 1, 45.]

[17]*See* Tr. Transcr. [R. Vol. 12, 1384:11-1385:19.] *See also* Depo. Lee Carr 65:19-24 (Aug. 28, 2008). [R. Vol. 1, 40.]

[18]*See* Tr. Transcr. [R. Vol. 14, 1731:7-26.] *See also* Depo. Dr. Dennis Schneider 136:20; 137:5; 138:12-25; 139:8-12 (Aug. 19, 2008). [R. Vol. 1, 48-51.]

[19]*See* Depo. Lee Carr pp. 118 and 120 (Aug. 28, 2008). [R. Vol. 1, 42-43].

[20]Striking a witness is well within the authority of the trial court's discretion. *Dupont v. Strong*, 968 So. 2d 410 (Miss. 2007).

landmark case of *Daubert v. Merrell Dow Pharmaceuticals,* the trial court's task is to ensure that expert opinion testimony is relevant and reliable. *Daubert,* 509 U.S. at 589. Thus, the trial court must determine whether or not proffered expert witness testimony is based upon (1) scientific knowledge and (2) will be of assistance to the trier of fact in determining a fact at issue. *Id.* at 592. "[T]he trial judge, when faced with the proffer of expert testimony in any field of study, must determine whether the reasoning or methodology underlying the testimony is valid under the principles of the discipline involved." *Id.* at 589.

In arriving at a determination as to the proffered expert testimony, the trial court must consider a number of factors, including:

1. whether the theory, technique or conclusion can be tested;
2. whether the theory, technique or conclusion can be subject to peer review and publication;
3. consideration of known or potential error rates;
4. whether they are controlling standards for the methodology used to reach the conclusion proffered, and whether such controlling standards were appropriately followed; and
5. whether the methodology or conclusion is generally accepted in the relevant scientific discipline.

In further expounding upon *Daubert*, the Supreme Court in *Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 119 S.Ct. 1167 (1999), stated that the trial court's gatekeeper's role encompasses proposed testimony of all designated experts and applies not only to testimony based upon scientific knowledge, but also to testimony based upon technical and other specialized knowledge. Thus, it is the proponent of the expert witness who must prove by "the preponderance of the evidence" that

the testimony is reliable. The proponent must show "some objective, independent validation of the expert's methodology."

Additionally, Rule 702 states that a qualified expert witness may testify if:

1. the testimony is based upon sufficient facts or data;

2. the testimony is the product of reliable principles and methods; and

3. the witness has applied the principles and methods reliably to the facts of the case.

Miss. R. Evid. 702.

1. Carr's Second Accident Reconstruction Was Unscientific, Unreliable and Not Based on Reliable Facts, Resulting in Carr's Presenting Unscientific, Unreliable and Misleading Opinions to the Jury.

The trial court abused its discretion when it denied Plaintiffs' motion and, as a result, Carr was allowed to present unscientific, unreliable and misleading opinions to the jury. June 9, 2008, Defendants were provided photographs taken by Clark's family members shortly after the accident. [R. Vol. 1, 80.] At trial, Carr explained to the jury that he needed to reconstruct the accident a second time due to the provision of the "family photos"[21] to him. However, the family photos provided little information to Carr which he had not already learned from Mississippi Highway Patrol Officer Juan Jones ("Trooper Jones") who arrived at the scene of the accident within fourteen (14) minutes of the accident.[22, 23] Defendants' July 16, 2008 expert designation as to Carr noted

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[21] Tr. Ex. 2.

[22] *See* Tr. Ex. D-106 (id) (Accident Report) prepared by Trooper Jones.

[23] Q. . . . let me ask you about this photograph. What did it tell you about the path of travel of the vehicle in regard to the culvert that you did not have previously?

A. It allowed me to actually quantify the position. I was using the estimate from Trooper Jones that it came about two feet. But when I went back and used these photographs I concluded that it's about four feet. His memory is about *two feet off.*

[R. Vol. 11, 1284:3-11 (emphasis added).]

". . . 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, 2321-22 (emphasis added).][24] Thus, the photographs provided nothing fundamentally new.

Regardless, Carr was allowed to explain away his unsupportable and unscientific changes to the first half of his reconstruction (that which took place on the north side of Vaiden Road) based upon this "new information." In addition, Carr was allowed to explain away changes to vehicle speed as an error of his underling, Robb Liebbe,[25] (which had nothing to do with the family photos) thereby achieving the speed in his second reconstruction needed for the vehicle to fly the distance and at the height required to make Defendants' case bear merit.

Carr explained away photographic evidence that the vehicle's wheels reached Vaiden Road as well as the testimony of Trooper Jones that the vehicle reached the edge of Vaiden Road[26] (during which he ignored the family photos, the evidence which *necessitated* his second reconstruction, which clearly show the vehicle reached Vaiden Road) so that he could justify the Tundra's elevation from the ground some fifteen feet (15') before striking the embankment on the north side of Vaiden Road (to achieve the height needed to support Dr. Schneider's and Mr. Orlowski's[27] opinions).

Carr testified at trial as follows:

> Q. (By Mr. Lundy) In response to Mr. Ayers question you said you had looked at part of the accident report or considered the accident report?

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[24]*Cf.* Defendants' May 19, 2008 Designation of Experts. [R. Supp. Vol. 15, filed 9/13/10, 2231-32.]

[25][R. Vol. 12, 1413:6-1415:7; R. Vol. 12, 1371:15-1373:6; Tr. Ex. 124]

[26][R. Vol. 10, 1174:9-27.]

[27]Offered as an expert witness by Defendants in the areas of vehicle roof design and construction.

A. Yes, I did.

Q. And you talked to the officer?

A. Yes, sir, I did.

Q. And one of the things that he told you was that the front of the vehicle collided into the curve; did he not?

A. He did not say that verbally to me but those words are contained within his report.

Q. Okay. You just disregarded that, huh?

A. No, sir, I did not.

Q. Well, you actually have the vehicle in your second reconstruction going airborne 15 feet from the road, don't you?

A. Yes, from the pavement edge of Vaiden Road.

Q. Fifteen feet from the pavement edge it's getting airborne; is that correct?

A. Yes, sir.

[R. Vol. 12, 1382:7-26.]

As discussed above, in his second accident reconstruction, Carr depicts the Clark vehicle launching into the air fifteen feet (15') from the embankment. Not only is this second reconstruction unscientific and unreliable, contrary to Rule 702 of the Mississippi Rules of Evidence, but it is contrary to the law of physics, the law of gravity and common sense. [R. Vol. 5, 335: 4-20.] For a vehicle to launch, it must have something from which to ramp or launch. No "ramping" could occur fifteen feet (15') away from the roadway. Jerry Wallingford testified there was no physical evidence from the vehicle or photographs that would indicate the vehicle took off in the air 15 feet (15') from the intersection, stating:

> After being at the accident site and walking through that ground repeatedly, 15 feet is down about here, this far back. Obviously, the

> soil has been scalped all the way up in that area indicating and if I scraped it out - - something has to scrape it out. It had to be life [sic] here. We see that information on the front of the vehicle. We see the information in the photograph. The vehicle had to make contact at that area; could not have just started to levitate at some point 15 feet prior to reaching Vaiden Road. I have walked this, we have surveyed it with electronic equipment. There were no humps or bumps that are going to make a vehicle suddenly jump five, ten feet into the air.

[R. Vol. 5, 360:26-361:14. *See also* Tr. Ex. 2.]

The variances are more than a difference in expert opinion to be weighed by the jury. Here the lower court was presented with Defendants' accident reconstructionist who prepared an implausible second reconstruction to which he testified and yet failed to strike his reconstruction and/or limit his testimony. The second reconstruction was nothing more than an attempt by Carr to create a scenario of speed and vertical drop height to support the biomechanical expert's opinion as to when the spinal cord injury occurred with Defendants arguing that the injury occurred in the first roll from a high vertical drop.

As stated hereinabove, the opinions of the biomechanical expert will fall upon the premise of the accident reconstructionist. Carr has stepped out with a vehicle flying before it reaches a launch position. No indications are provided from the photographs or from the slope angle evaluation, from any of the surveys performed either by Carr or by Jerry Wallingford that there was anything that could cause this vehicle to launch into the air short of the embankment. Accordingly, Carr's second accident reconstruction opinion should be stricken as unscientific, unreliable and certainly not based upon the facts of the case.

There are two videos of Carr's accident reconstruction utilizing his styrofoam model – one representing the first reconstruction and the other the second reconstruction. However, only the first half of the first video (the portion of the vehicle traveling before it reached Vaiden Road) was altered by Carr as a result of his second reconstruction, while the second half of the video (the portion

depicting the vehicle's landing past Vaiden Road) remained the same. [R. Vol. 12, 1366:22-29.] Carr changed the speed of the vehicle and the position of launch, but amazingly the vehicle's landing place on the south side of Vaiden Road remained the same in each of his reconstruction scenarios.

In summation, Carr was allowed to present unscientific, unreliable, reverse-engineered and patchwork reconstruction opinions. Without Carr's opinions, the opinions of Defendants' other experts fail. The result of the trial court's denial of Plaintiffs' motion to strike Carr's opinions was the admission of misleading evidence and prejudice to Plaintiffs.

2. Carr Should Have Been Prevented from Discussing the Exponent Test Performed Merely Days Prior to His Deposition.

Days before Carr's deposition of August 28, 2008, without notice to Plaintiffs, Carr had a roof crush test performed by another automobile consulting company, Exponent. The Exponent test data was not made part of Defendants' expert designations until August 27, 2008, while the undersigned was traveling to Houston, Texas, to take Carr's deposition. With no knowledge of Carr's test until the very eve of the discovery deadline, Plaintiffs had limited opportunity to review, prepare and/or respond to the Exponent test. Plaintiffs were not afforded time to consult with their experts and certainly had no time to perform their own follow-up testing as suggested by Defendants in light of the discovery deadline.[28, 29]

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[28]Carr had the Exponent test performed August 25, 2008; the test data was forwarded to Plaintiffs' counsel via e-mail August 27, 2008, while counsel was traveling; Carr's deposition was scheduled for August 28, 2008; and the discovery deadline was August, 29, 2008. [R. Vol. 11, 1209:10-12; R. Vol. 12, 1394:28-1395:1.] *See also* Tr. Ex. D-98 (id).

[29] Q. (By Mr. Ayers) And this is kind of a silly question, but would you agree with me that they had from August 28 or 29 to this good day to run their own test?

A. (Mr. Carr) Yes, sir...

[R. Vol. 12, 1407:18-21.]

The test performed by Exponent was based upon a protocol that Carr drafted.[30] Carr's protocol - one that he wrote for this litigation - has not been peer reviewed and is not accepted scientific methodology.[31] Although Carr had been retained by Toyota in more than 100 other cases, half of which were rollovers, he stated that he had never performed this test in another Toyota case.[32] Carr testified that he had performed a similar test only one (1) time before, in a case involving a Land Rover Discovery vehicle.[33]

Carr further testified that, taking the dimensions of an exemplar 2000 Toyota Tundra C Cab and those of the crushed vehicle, with the aid of a software program, he created a plane which he applied in crushing the exemplar vehicle to demonstrate the forces necessary to cause that plane of damage. It is important to note that the damage to the Clark vehicle was damage sustained in a dynamic rollover event. The test that Carr performed was a static test whereby the vehicle's position was held constant while pressure was applied to particularly crush the roof, and in no way was reflective of what occurred on July 12, 2001, when the vehicle rolled. Carr testified to that point as follows when questioned by Toyota's counsel:

> Q. Now in the test that you ran, if I'm understanding it correctly, when you had the vehicle mounted and you brought the force down on it, is it correct to say that basically the force is operating in one direction?
>
> A. Yes.
>
> Q. All right. And we'll get to this in a little bit more detail, but on the night of this accident, were there other forces acting on Mr.

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

[31]*See* Tr. Transcr. [R. Vol. 11, 1229:25-1230:22.]; Depo. Lee Carr 31:13-22, 50:17-23 (Aug. 28, 2008). [R. Vol. 1, 37-38.]

[32]*See* Tr. Transcr. [R. Vol. 12, 1389:17-24.] Depo. Lee Carr 60:1-11 (Aug. 28, 2008). [R. Vol. 1, 39.]

[33]*See* Depo. Lee Carr 60:16-17 (Aug. 28, 2008). [R. Vol. 1, 39.]

Clark's vehicle than the ones that are represented just in the test on the roof?

A. Almost, but not quite. Can I explain that?

Q. Yes.

A. This vehicle didn't just be suspended in the air and dropped down and hit the ground. That isn't all that happened to it. And so it's not fair to look at this as if it just was suspended in the air and dropped. And it doesn't matter whether you drop it one foot or you drop it 13 feet, that doesn't tell the story about how forces were introduced. This vehicle did, in my view, get airborne and it did drop. And so some part of the damage is due to it dropping.

The vehicle also is travelling at a substantial speed forward when it hit and that also deforms things so that the front bumper it pushed rearward, the fender is pushed rearward, the windshield pillar is pushed rearward, the B-pillar is pushed rearward, the C-pillar is pushed rearward. And so that reflects the fact that not only it has just dropped vertically, but it's got a forward speed when it hits down into the ground and that makes it get damaged as well . . . .

[R. Vol. 11, 1247:26-1248:28.]

Further distinguishing the Exponent test from the subject accident, Carr responded to Plaintiffs' counsel as follows:

Q. Now you actually mashed the engine of that vehicle, didn't you?

A. Yes.

MR. LUNDY: Would you show that comparative photo of that.

Q. (By Mr. Lundy) So you just didn't crush the roof, you crushed the engine of the exemplar; am I correct?

A. The engine was affected by the force through the hood, it was affected by the force through the fenders.

Q. Of course, there's so much more resistance when you're pushing down on the engine; am I correct?

A. Of course.

Q. And so you're measuring more force; am I correct?

A. I'm sorry?

Q. You're measuring a larger force to crush it at that point?

A. Yes, sir . . . .

[R. Vol. 12, 1395:2-21.]

In his 2004 reconstruction, Carr showed a vertical drop height of approximately 5.3 feet (5.3') from an apex flight. [Vol. 12, 1380:23-1381:1.] However, he based the Exponent test on a 13 foot (13') drop, taking the position that was an "equivalent drop height."[34] [R. Vol. 12, 1381:5-7.] The Exponent test was a gross misrepresentation of the loads and deformations that the Clark Tundra sustained. [R. Vol. 14, 1780:4-6.] Forces were applied in the wrong directions - they were applied in a single average direction rather than two separate directions, they were applied in the wrong locations, and they included loads that simply never occurred in the Clark accident. [R. Vol. 14, 1780:9-14.]

The amount of crush caused by the initial touch down was significantly less than the 19 and 22 inches (19" and 22") achieved during the Exponent test, so the loads involved in the initial touch down were also significantly less than were achieved in the Exponent test. [R. Vol. 14, 1782:22-27.]

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[34]At trial Carr explained equivalent drop height as follows:

> If you wanted to replicate the damage on this vehicle, you can do it two ways. One is you can do it the way that it happened in this crash where the vehicle has got a forward speed of about 44 miles per hour, and it's got a vertical speed coming down toward the ground, and it has a rotation speed in pitch and it has a rotation speed in roll as it hit, add all those together and then you would create this damage.
>
> In the alternative, you could ignore that it had a forward speed. You could ignore all these other speeds, simply drop it from a height and have that speed that we talked about, and then you would create that damage...

[R. Vol. 11, 1406:2-14.]

The Exponent test is being offered to suggest that the maximum test loads and the maximum crush all occurred during the initial touch down which is totally contrary to the science, the facts and the physical evidence in this case. [R. Vol. 14, 1782:27-1783:3.]

Photographs taken of the exemplar vehicle toward the end of the Exponent test, indicate the loads to the test vehicle were applied in an effort to match those of the accident vehicle. [R. Vol. 14, 1783:4-8; Tr. Ex. D-98 (id).] However, the platen was applying significant loads to the passenger side A-pillar, as well as the passenger side hood. [R. Vol. 14, 1783:8-11.] The damage to the accident vehicle establishes that significant loads were applied only to the driver side of the vehicle during the rolling motions. [R. Vol. 14, 1783:11-14.]

The Exponent test loads never occurred in the subject accident. [R. Vol. 14, 1783:15-1784:5.] The high loads produced in the Exponent test were the result of (1) loading the passenger side structures as well as the engine itself and (2) limitations of the Exponent test and/or equipment. *Id.*

The Supreme Court has clearly stated that it is the trial judge's task to insure that an expert's testimony rests both on reliable foundation and is relevant to the task at hand. This test set up by Carr and performed by a third party is one that cannot be tested, cannot be challenged and is not reflective of the events that occurred during the accident of July 12, 2001.

Additionally, the trial court must insure that any testimony admitted meets the basic, foundation of the standard of admissibility set forth in Rule 104(a) of the Mississippi Rules of Evidence. The proponent of the proposed testimony continues to have the burden of establishing admissibility under Rule 104(a) by preponderance of the evidence. The court in *Daubert* noted that Rule 403 provides the trial court with an important safeguard to limit otherwise relevant evidence.[35] Rule 402 of the Mississippi Rules of Evidence specifically states that evidence which is not relevant

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[35]*Daubert* at 595.

is not admissible. In Rule 403, it further provides that even if evidence is relevant, it can nonetheless be excluded if "it's probative value is substantially outweighed by the danger of unfair prejudice or confusion of the issues."

It is respectfully represented that the test performed by Exponent is unreliable, is not relevant and should not be allowed. However, should the Court disagree, Plaintiffs suggest that the prejudicial effect of Carr's stating that it took 93,000 pounds of force to crush the roof nineteen inches (19") and 116,000 pounds of force to crush the roof twenty-two inches (22") is prejudicial and confusing. [R. Vol. 11, 1244:1-10.]

Finally, as discussed above, the admission of the Exponent test data is further prejudicial in that the data was not made available to Plaintiffs until the eve of the discovery deadline, leaving Plaintiffs with limited opportunity to review, prepare and/or respond to the Exponent test.

C. The Trial Court Abused its Discretion in Disallowing Plaintiffs' Rebuttal Witness, Dr. Terence Honikman, to Address the Exponent Test Once Such Testimony Was Permitted in Light of Its Prejudicial Effect, Both In Its Submission to Plaintiffs at the End of Discovery and to the Jury at Trial.

The trial court abused its discretion in disallowing rebuttal testimony when Plaintiffs submitted Dr. Terence Honikman[36] as a rebuttal witness to address the testimony of Carr as to the Exponent test. [R. Vol. 14, 1756:23-1764:3.] In April 2008, the Mississippi Supreme Court held in *Banks v. Hill* that the plaintiff's experts could offer opinions to rebut the defendants' experts' opinions which were not disclosed in discovery and not reasonably anticipated by the plaintiff. *Banks v. Hill*, 978 So. 2d 663 (Miss. 2008).

Prior to trial, Plaintiffs were unsure what information from the Exponent test Defendants would present and how that data would be used at trial. Defendants provided nothing disclosing the

[36] Dr. Honikman was tendered and accepted as a witness in Plaintiffs' case-in-chief in connection with design and crashworthiness of vehicles with a subspecialty in accident reconstruction. [R. Vol. 5, 446:21-29.]

context in which the Exponent test would be utilized. Because the test was scheduled at such a late date and without Plaintiffs' knowledge, and then results were provided without ample time to prepare for Carr's deposition, Plaintiffs could not adequately question Carr regarding the Exponent test. Additionally, despite Defendants' suggestion, Plaintiffs' performing a similar test thereafter would have been moot in light of the discovery deadline and any findings from such testing would be inadmissible.

Even in limiting the rebuttal testimony to that regarding "opinions not disclosed in discovery" and "not reasonably anticipated," the Supreme Court pointed out that there are circumstances in which undisclosed expert testimony may be permissible:

> Our holding today should not be read always to prohibit a party from calling undisclosed experts to offer opinions in rebuttal. We cannot predict what might happen at a trial, and if one party's expert offers opinions which were not properly disclosed, then the trial court certainly should consider whether to allow opinions from undisclosed experts to rebut this unexpected evidence. We note, however, that such circumstances should be a rarity, since all experts and expert opinions should be disclosed prior to trial, eliminating the prospect of unexpected opinions at trial.

Banks v. Hill, 978 So. 2d at ¶ 16.

Where there is doubt as to whether the evidence is properly case-in-chief or rebuttal evidence, the court should resolve the doubt in favor of reception in rebuttal if: (1) its reception will not consume so much additional time as to give an undue weight in practical probative force to the evidence so received in rebuttal, and (2) the opposite party would be substantially as well prepared to meet it by surrebuttal as if the testimony had been offered in chief, and (3) the opposite party upon request therefor is given the opportunity to reply by sur rebuttal. *Smith v. State*, 646 So. 2d 538, 543-44 (Miss. 1994).

Here, Defendants' expert's opinions were not properly disclosed as to the Exponent test. The information was made part of Defendants' expert designations on August 27, 2008, one (1) day prior

to Carr's deposition, two (2) days prior to the discovery deadline, and only forty (40) days prior to trial.

In comparison, Defendants were aware of Dr. Honikman's status as an expert witness and certainly would not have been prejudiced by his testifying as a rebuttal witness. Defendants had full knowledge of his opinions and had deposed Dr. Honikman at length. No trial by ambush was afoot; if anything, Plaintiffs were ambushed by Defendants' orchestrated timing of the Exponent test in conjunction with Carr's deposition and the discovery deadline. Dr. Honikman would simply have been providing testimony as to Defendants' own test – which was not "new" evidence to them. Furthermore, when asked by the trial court, counsel acknowledged that Plaintiffs wished to call only one (1) rebuttal witness whose testimony would take fifteen (15) to twenty (20) minutes. [R. Vol. 14, 1756:23-1764:3.]

Plaintiffs' having an opportunity to rebut such evidence would have been appropriate and without undue prejudice to Defendants. Plaintiffs should have been given some leeway regarding the calling of a rebuttal witness based alone upon the questionable timing of the Exponent test and its disclosure to Plaintiffs on the eve of Carr's deposition.

Instead, late Friday afternoon, October 17, 2008, the trial court, after Defendants rested, denied Plaintiffs the opportunity to put one (1) rebuttal witness on the stand. That witness, who Plaintiffs had flown in from California to rebut the misleading information, would have provided opinions to the jury as to why the Exponent test was unreliable, unscientific and not indicative or representative of the forces that acted upon the Toyota Tundra in question during the accident. *See* R. Vol. 14, 1779:13-1784:6.

Plaintiffs requested a full *Daubert* hearing as to Carr, but none was allowed by the trial court. While Plaintiffs never received any formal order, the court ostensibly denied Plaintiffs' motion to

strike Carr, allowing him to testify unfettered at trial and Plaintiffs were afforded no opportunity to rebut his testimony.

The Exponent test, which failed to illustrate the Clark accident, succeeded in providing to Defendants a vehicle for discussing the "big forces" required to support their diving injury theory. However, Plaintiffs were left with no opportunity to rebut the same. Plaintiffs respectfully submit that the lower court abused its discretion in failing to strike Carr and committed further error when it refused to allow Plaintiffs' rebuttal witness to testify. "A new trial can and must be granted if justice so requires." *Bullock v. Lott*, 964 So. 2d 1119, 1133 (Miss. 2007); *Blossman Gas v. Shelter Mut. General Ins.*, 920 So. 2d 422, 424 (Miss. 2006) (citing *White v. Yellow Freight Sys. Inc.*, 905 So. 2d 506, 510 (Miss. 2004)). As such, Plaintiffs should be granted a new trial.

V. Defense Counsels' Closing Improperly Circumvented the Trial Court's Ruling Regarding Alcohol, Resulted in Jury Bias and Unfairly Prejudiced Plaintiffs.

At the outset of trial, Plaintiff, Shenandoah Clark, admitted his fault in steering the vehicle off of the road. He did not, however, accept fault for his enhanced injuries caused by the defective nature of the Tundra. The lower court ruled during the pre-trial motion hearing on October 6, 2008, that based upon Clark's admission of liability, the cause of his running off of the road on the night in question was irrelevant and any reference to alcohol or alcohol usage on that night was to be excluded from trial.

The Supreme Court in, *Shell Oil Co. v. Pou*, finding that the cumulative effect of the errors denied the appellants a fair trial and required the case be reversed and remanded for a new trial, held particularly as to counsel's closing:

> The only legitimate purpose of the [closing] argument of counsel in a jury case is to assist the jurors in evaluating the evidence and in understanding the law and in applying it to the facts. Appeals to passion or prejudice are always improper and should never be allowed.

Shell Oil Co. v. Pou, 204 So. 2d 155, 157 (Miss. 1967). Applying *Shell Oil*, the Court of Appeals in *Woods v. Burns,* 797 So. 2d 331, 334 (Miss. Ct. App. 2001), determined that in order to reverse a judgment based on an improper argument claim, the court must first find "an 'abuse, unjustified denunciation or a statement of fact not shown in the evidence.' " (citing *Brush v. Laurendine,* 168 Miss. 7, 13-14, 150 So. 818, 820 (1933)), and then must find that it was "probable that this improper argument had a harmful influence on the jury." *Id.*

Similarly, in *Eckman v. Moore*, 876 So. 2d 975 (Miss. 2004), a medical malpractice action where the plaintiff's counsel argued in closing that physicians "think they are above the law," the Court held the lower court erred in overruling the objection made by the defendant and in finding that this improper argument did not exceed the bounds of the evidence. The purpose of this argument was not to assist the jurors in evaluating the evidence , but rather to excite their passions and prejudices and, thus, improperly influence them. *Id.* at 987.

Throughout the trial of this matter, Defendants repeatedly sought a reversal of the lower court's ruling so as to allow evidence of alcohol into trial. While defense counsel did not speak the word "alcohol" aloud in closing, counsel took every effort during trial to create an inference thereto. Particularly during closing, counsel opposite intentionally drew the jury's attention to aspects of the case that would suggest the use of alcohol and inferred alcohol was involved.

First, counsel discussed this case's reminding him of a preacher talking to a group in a graduation-type setting and their now having to make life choices.[37] Counsel also repeatedly stressed

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[37] This case reminds me of when I heard a preacher talk to some college graduates when they were getting ready to go out into the world. And he told them, we can control our choices, we can control or decisions. However, if we make a bad choice or a bad decision, we cannot always control our consequences. Unfortunately, Mr. Clark made some bad choices and some bad decisions on the night of July 11th and the early morning hours of July 12th, 2001.

[R. Vol. 15, 1878:23-1879:5.]

lapses in time and Clark's going out with his friend at the "pool hall."[38] As with the cases discussed hereinabove, the intent of Defendant's arguments were not to aid the jurors in evaluating the evidence, but to excite their passions and prejudices. Such inferences circumvented the ruling of the trial court, placed questions in the jurors' minds as to why Clark may have driven off of the road (evidence of which was rendered irrelevant), caused jury bias and prejudiced Plaintiffs. Accordingly, the Court should grant Plaintiffs' motion for a new trial.

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

Plaintiffs contend each individual alleged error makes this case reversible, but surely should, when combined with other errors, make reversible error. *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.

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[38] Mr. Clark went to shoot pool with a friend. Now we don't know -- there's a lot of unknowns here that we weren't able to piece together. We don't know when they left to go shoot pool, we don't know how long they shot pool, we don't know what time they left the pool hall to go to Kevin Knight's house, we don't know how long they were at Kelvin Knight's house. We don't know what time they left Kevin Knight's house to go to Tunica on the other side of the State of Mississippi at about midnight. But there are a few things we think we know beyond that. At some point they switched drivers. I'm not sure when, it's unclear, but they switched. They were in a hurry according to Kevin Knight, and they were taking a very unusual route. There's a direct route -- and probably a couple of them, but 305 is not a direct route.

[R. Vol. 15, 1897:8-27.]

> . . . he told them that he fell asleep at the wheel. And that actually makes more sense as you think about it today -- working, shooting pool, and then late at night, a bad decision to drive to Tunica.

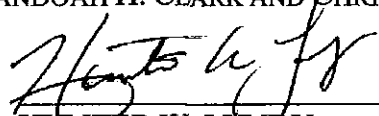
[R. Vol. 15, 1898:26-1899:1.]

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 30th day of December, 2010.

SHENANDOAH H. CLARK AND CHRISTIE CLARK

By: 

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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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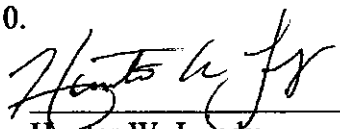
DATED this 30th day of December 2010.



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.

Mississippi Rules of Civil Procedure

Rule 37. Failure to Make or Cooperate in Discovery: Sanctions

(a) Motion for Order Compelling Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) *Appropriate Court.* An application for an order may be made to the court in which the action is pending.

(2) *Motion.* If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rules 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(d).

(3) *Evasive or Incomplete Answer.* For purposes of this section, an evasive or incomplete answer is to be treated as a failure to answer.

(4) *Award of Expenses of Motion.* If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party of the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expense unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to Comply With Order.

(1) *Sanctions by Court.* If a deponent fails to be sworn or to answer a question after being directed to do so by the court, the failure may be considered a contempt of court.

(2) *Sanctions by Court in Which Action Is Pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rules 30(b)(6) or 31(a) to testify in behalf of a party fails to obey an order to provide or permit discovery, including an order made under subsection (a) of this rule, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) an order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) in lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders.

In lieu of any of the foregoing orders or in addition, thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) Expenses on Failure to Admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable under Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rules 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subsections (A), (B), and (C) of subsection (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the

failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subsection may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order under Rule 26(d).

(e) Additional Sanctions. In addition to the application of those sanctions, specified in Rule 26(d) and other provisions of this rule, the court may impose upon any party or counsel such sanctions as may be just, including the payment of reasonable expenses and attorneys' fees, if any party or counsel (i) fails without good cause to cooperate in the framing of an appropriate discovery plan by agreement under Rule 26(c), or (ii) otherwise abuses the discovery process in seeking, making or resisting discovery.

Rule 606. Competency of Juror as Witness

(a) At the Trial. A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.