IN THE SUPREME COURT OF MISSISSIPPI
NO: 2009-CA-00933

SARAH MANNING — APPELLANT

v.

FRANK GRUICH, JR. d/b/a
GRUICH PHARMACY SHOPPE and
ESTATE OF FRANK GRUICH, SR. — APPELLEES

APPEAL FROM THE CIRCUIT COURT OF HARRISON COUNTY MISSISSIPPI
Second Judicial District
Cause No.: A2402-04-00010

BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel certifies that the following persons or entities have an interest in the outcome of this case. These representations are made in order that justices of this court may evaluate possible disqualification or recusal.

1. Appellant, Sarah Manning
2. Appellee, Frank Gruich, Jr.
3. Honorable Lawrence Bourgeois
4. Counsel for Appellant: Robert W. Smith, Esq.
5. Counsel for Appellee: Brett Williams, Esq. and all members of his law firm, Wilkinson, Williams, Kinard, Smith & Edwards

ROBERT W. SMITH
Counsel for Appellant

ORAL ARGUMENT REQUESTED

While the legal concepts dealing with the evidentiary issue of subsequent remedial measures is not unduly complex, it is respectfully suggested that the court would be greatly assisted by oral argument, as well as presentation and explanation of the photographs at issue.

Oral argument is requested.

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STATEMENT OF THE ISSUES

I.

The sole issue on this appeal is whether the trial court committed reversible error by refusing to allow into evidence pursuant to Mississippi Rules of Evidence, Rule 407 photographic, documentary and oral evidence of post-accident changes to the subject premises.

STATEMENT OF THE CASE

A. NATURE OF THE CASE AND DISPOSITION BELOW

This appeal is being taken because Plaintiff's case at trial was eviscerated by the court's rulings prohibiting introduction of critical documentary, photographic and oral evidence of post-accident changes to the premises.

The civil action was a fairly simple slip and fall case initiated by the filing of a complaint in Harrison County Circuit Court on January 5, 2004. The complaint alleged that Plaintiff, Sarah Manning, a 62 year old female, had fallen at the entrance to Gruich Pharmacy Shoppe in Biloxi, Mississippi on April 2, 2003 and suffered serious permanent injuries. It was alleged that Plaintiff's fall was due to the negligence of Defendant Frank Gruich, Jr. who had personally placed a green indoor/outdoor carpet over the sidewalk at the pharmacy entrance and draped over the lip of the sidewalk down to the asphalt. (CR 16-17)[1]

Defendant filed an answer claiming he had "no information" as to whether a fall had even taken place, and denying any negligence on his part in maintaining the premises if someone did fall. (CR 23-25)

Plaintiff Manning filed interrogatories asking when the building and sidewalk had been constructed and whether any changes had been made to either. Defendant Gruich filed an untruthful answer under oath stating the building and sidewalk were constructed in 1984 and that the only change since then was the addition of a handicap ramp.

Plaintiff later took Gruich's deposition where he again testified under oath that the only changes to the accident scene were the handicap ramp and the addition of a sign. Later in the deposition Gruich then confessed that he and a friend had actually cut off a portion of the carpet,

[1] Abbreviations are as follows: CR-Clerk's Record; TR-Transcript; RE-Record Excerpts.

re-glued the edge and painted the exposed curb yellow shortly after Ms. Manning's fall. Gruich testified he took these actions because he noticed the carpet bulging up, though he claimed the bulging up was not sufficient to cause someone to trip.

Defendant subsequently filed a motion for summary judgment. In opposition, Ms. Manning submitted photos of the changed accident scene with the curb now painted yellow. Defendant then filed a motion to strike the post-change photos. Circuit Judge Stephen Simpson (now the Director of Public Safety for the State of Mississippi) denied the Defendant's summary judgment motion saying there were disputed material fact issues which must be submitted to a jury. (CR 172-173)

Judge Simpson later retired and the case was re-assigned to his replacement, Judge Lawrence Bourgeois. Hurricane Katrina also caused a significant delay.

Just prior to trial, Defendant filed a motion *in limine* seeking to bar introduction of any evidence of post-accident changes pursuant to M. R. of Evid., Rule 407 (Subsequent Remedial Measures). (CR 207-215). At a short hearing on the date trial was to start, Judge Bourgeois granted Defendant's motion, ruling that all evidence of subsequent remedial measures could not be revealed to the jury. (RE 15-18) (TR 20-23)

Trial took place on January 13, 2009 to January 16, 2009. During the course of trial, Plaintiff made a proffer of the evidence which would have been introduced if allowed. (RE 28-33) (TR 108-113) Judge Bourgeois stuck by his pre-trial ruling and refused to allow Plaintiff to cross-examine Gruich on the changes, or on his false interrogatory answers, or on his false deposition testimony, and also refused to allow the post-change photos to be introduced. (RE 28-33) (TR 108-113)

On January 16, 2009, the jury returned a verdict in favor of Defendant Gruich (CR 285) and judgment was subsequently entered by the court. (RE 13)(CR 286)

Plaintiff's motion for new trial, again citing the error of the multiple evidentiary rulings on post-accident evidence, was denied. (RE 14)(CR 308). This appeal followed.

B. STATEMENT OF FACTS

The single issue on this appeal is whether the actions of Defendant Gruich in making post-accident changes to the accident scene should have been allowed into evidence under any of the multiple reasons for admissibility contained in M.R. of Evid., Rule 407. Accordingly, Plaintiff's statement of facts will focus mainly on the topic of Gruich's conduct after the accident and during the course of discovery.

The entrance to Gruich Pharmacy Shoppe on Howard Avenue in Biloxi, Mississippi remained largely unchanged since Gruich constructed the building in 1985. Just in front of the front door, Gruich himself had installed a green indoor/outdoor carpet similar to "astro-turf." The carpet was glued on top of a very rough concrete aggregate surface which was anything but smooth. (Exhibits 15 & 16) (RE 34, 37) About every two to two and a half years, Gruich said he changed the carpet because the section that folds over the lip of the sidewalk would not stay glued and kept coming up. (TR 42-44) In 2001 or 2002, an elderly lady fell on the green carpet at the pharmacy entrance slamming into the glass front door. She was not seriously injured. (TR 87-94) Gruich was aware of this previous incident. (TR 64-66)

On April 2, 2003, Sarah Manning, age 62, was entering the pharmacy when she tripped and fell on the green carpet, breaking her left leg. The extent of her injuries is not material here, but due to extraordinary events she incurred over $654,377.21 in medical bills, and has a

permanently disfigured, non-functional leg which doctors have told her needs to be amputated. Ms. Manning testified at trial that she tripped on the green carpet, that it was not smooth and that the step-up on to the sidewalk was difficult to judge in height due to the solid green color of the carpet over the lip of the sidewalk. (TR 121-122) These hazardous conditions were corroborated by other witnesses. (TR 87-94) (TR 172-219)

In May 2003, within a few weeks after Ms. Manning's fall, photos were made of the entrance which clearly show the green carpet was not smooth and had bulges. (Exhibit 15)(RE 34-36) In addition, the edge of the sidewalk was covered by the carpet so that judging height differential was much like trying to judge the rise and fall of a putting green on a golf course. In contrast, edges of the sidewalk in front of the pharmacy not covered by the green carpet were painted bright yellow. (Exhibit 15) (RE 34-36)

A short time after Ms. Manning's fall, Mr. Gruich and a friend altered the accident scene. They cut off the lip of the green carpet, re-glued the edges which were bulging up and painted the now exposed edge of the sidewalk bright yellow. (Exhibit 16) (RE 37-39) (RE 40-44) Gruich claims this change was made in August 2003. At this point Gruich had no idea photos had already been taken of the accident scene.

Ms. Manning filed suit on January 5, 2004 and soon propounded written discovery. Gruich, not realizing Plaintiff already had photos of the green carpet as it looked close in time to the date of Ms. Manning's fall, chose to be untruthful in his interrogatory response filed April 6, 2004. In his written discovery responses, Gruich replied under oath that the building and sidewalk were constructed in 1984 and that the only change since was to add a handicap ramp. (CR 73-74) Defendant failed to disclose that he and a friend had altered the carpet and repainted the lip of the sidewalk shortly after Ms. Manning's fall.

Subsequent to Mr. Gruich's untruthful interrogatory response filed April 6, 2004, Plaintiff took Gruich's deposition on May 13, 2004. In his deposition, Gruich at first denied any changes other than addition of a handicap ramp. (RE 41-42) (Gruich Deposition, Pg 15, Ln 20) In reply to pointed questioning later in the deposition, Gruich reluctantly confessed to the changes he had made in the carpet by cutting away a section, re-gluing and then painting the exposed sidewalk lip yellow. (RE 41-42) (Gruich, Pgs 16-19; 24)

Gruich testified that he cut the carpet away because it kept bulging up and he could not keep it glued down. (RE 41-42) (Gruich, Pgs 16-17) Even though he made the alterations shortly after Ms. Manning's fall in April 2003, Gruich contended the alterations "had nothing to do with her case." (Gruich, Pg 17) (CR 42)

Gruich also confided he had noticed the bulging up on several occasions, including between Ms. Manning's fall in April and the alteration which he thinks may have been done in August 2003. (Gruich, Pgs 35-36) (RE 45)

Lastly, Gruich also acknowledged that a person had tripped on the carpet prior to Ms. Manning's fall. (RE 42) (Gruich, Pg 20) Gruich stated, "it was a long time ago," "it was a female," and he did not recall any other details. (RE 42) (Gruich, Pg 20)

As trial approached, Defendant filed a motion for summary judgment. Plaintiff responded and attached copies of photos taken before and after the changes, Gruich's sworn answers to written discovery and Gruich's deposition. (CR 54-106)

Defendant filed a motion to strike the post-change photos under the rubric of "subsequent remedial measures." Plaintiff's rebuttal cited the numerous specific avenues of admissibility provided for under the Rule.

On March 5, 2007, Judge Stephen Simpson denied the motion for summary judgment,

but made no mention of the motion to strike or whether he actually considered or did not consider the post-change photos. (CR 172-173)

Due to delays occasioned by Ms. Manning's lengthy hospitalizations and Judge Simpson's retirement, trial was not accomplished until January 13, 2009. Prior to trial, Defendant filed a motion *in limine* seeking to bar any evidence of post-accident changes. (CR 207-215)

Plaintiff's response again cited the numerous reasons for admissibility including to show the nature of the premises, the feasibility and effectiveness of warning, control of the premises and most importantly impeachment of Defendant Gruich's credibility. (CR 220-223)

The newly assigned circuit judge decided that the evidence would be excluded under M.R. of Evid., Rule 407. (RE 15-18) (TR 20-23) The court provided no analysis whatsoever and simply stated "subsequent remedial measure" means the evidence does not come in.

Trial was held January 13 to January 16, 2009, during which Plaintiff was prohibited from introducing the photos and completely prohibited from impeaching Gruich on his claims that the carpet was safe and not bulging up. (TR 108-113) (RE 28-33)

During the trial, the court's zeal to keep out Plaintiff's evidence reached new heights during the examination of Defendant Gruich when the court ruled that Plaintiff's counsel could not even ask any questions whatsoever dealing with bulging up of the carpet unless the questions were limited to observations made two weeks before or two weeks after the subject accident. (TR 78-79) (RE 26-27) The court also instructed Plaintiff's counsel not to ask questions at trial unless the question was asked during Defendant's deposition. (RE 26) (TR 78)

After the jury's adverse verdict, Plaintiff's motion for new trial was denied.

SUMMARY OF THE ARGUMENT

The discretion of a trial judge must be exercised within the boundaries of the Rules of Evidence. *Moody v. State,* 841 So.2d 1067 (Miss. 2003)

Rule 407 expressly allows the admission of evidence of subsequent remedial measures for purposes other than proof of negligence. The proper procedure is to allow the evidence for the other permissible purposes and to then give a limiting instruction to the jury – not to exclude the evidence altogether. *Alexander v. Greer,* 959 So.2d 586 (Miss. 2007); *Martinez v. Grace,* 782 P.2d 827 (Colo. 1989); *Muzyka v. Remington Arms, Co., Inc.,* 774 F.2d 1309 (5th Cir. 1985); *Rimkus v. Northwest Colorado Ski Corp.*, 706 f.2d 1060 (Col. 1983)

Here there were multiple avenues of admissibility. The Defendant testified falsely about post-accident changes and contended the carpet was always safe, yet he cut it off, re-glued it and painted the curb yellow shortly after the accident. Defendant's post-accident changes directly impeached his testimony in multiple aspects.

The post-change photos also showed the effectiveness of a warning by use of a yellow curb which was directly responsive to Gruich's position no warning was needed.

The post-accident changes were also probative of the issue of the condition of the carpet at the time of the accident – why cut off a perfectly safe carpet unless it was bulging up or hazardous?

The timing of the post-accident changes impeached Gruich's testimony that the changes were due just to purely cosmetic reasons and had nothing to do with Ms. Manning's fall.

In short, the exclusion of photographic, documentary and oral evidence on the issue of post-accident changes to the accident scene was reversible error of the first order of magnitude. (M.R. of Evid. Rule 407)

STANDARD OF REVIEW

The standard of review for the admission or exclusion of evidence is abuse of discretion. *Crane v. Kitzinger,* 860 So.2d 1196 (Miss. 2005).

The discretion of the trial judge must be exercised within the boundaries of the Mississippi Rules of Evidence. *Moody v. State,* 841 So.2d 1067 (Miss. 2003). *Henderson v. State,* 732 So.2d 211 (Miss. 1999).

For a case to be reversed on the admission or exclusion of evidence, it must result in prejudice and harm or adversely affect a substantial right of a party. *K-Mart Corp. v. Hardy Ex Rel. Hardy,* 735 So.2d 975 (Miss. 1999).

ARGUMENT

With all due respect, the trial judge's adamant refusal to allow the introduction of evidence which was clearly admissible by the explicit terms of Rule 407 was error which gutted Plaintiff's case. The court refused to allow introduction of photographs, refused to allow introduction of false interrogatory answers and refused to allow any impeachment questioning that related to the post-accident changes. The exclusion of large portions of Plaintiff's case was without doubt a death knell to Plaintiff's theory of the case.

RULE 407

The full text of M. R. of Evid., 407 is as follows:

> RULE 407. SUBSEQUENT REMEDIAL MEASURES
>
> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. **This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving**

ownership, control, or feasibility of precautionary measures, if controverted, or impeachment. (Emphasis added)

While the second sentence of the rule is often referred to as the "exceptions" to the rule, the second sentence is in fact part of the fabric of the rule itself. Many commentators have stated that in practice, the exceptions to Rule 407 have come close to swallowing the rule. See Slough, "Relevancy Unraveled-Part III: Remote and Prejudicial Evidence," 5 Kan.L.Rev. 675, 709 (1956).

As the official comment to the rule makes clear, the factors of ownership, control, feasibility and impeachment are illustrative only and are not meant to be an exclusive list. (*See* Comment, M. R. of Evid. 407)

Our Mississippi Supreme Court has mentioned that not only is Rule 407 more liberal than common law and previous Mississippi practice, the exceptions to the rule are also more liberal. *Alexander v. Greer,* 959 So.2d 586 (Miss. 2007) (held to be reversible error to exclude defendant's post-accident doctor's visit to an ophthalmologist under Rule 407)

This liberal interpretation to the breadth and scope of exceptions to Rule 407 which require admissibility is in part due to court's frequent use of the limiting instruction. Most courts freely grant an instruction that informs the jury that certain evidence is being allowed in for a limited purpose and not for purposes of proving negligence. See *Bickerstaff v. So. Central Bell Telephone Co.,* 676 F.2d 163, 168 (5th Cir. 1982)

If this court wishes to embark on exhaustive research of Rule 407, the article at 15 A.L.R. 5th 119, *Admissibility of evidence or repairs, changes of condition or precautions taken after an accident*, is worth exploring. This A.L.R. 5th article covers almost every conceivable issue that can arise under the rule.

One particular case of note in the A.L.R. 5th article which may catch the alert reader's eye is *Martinez v. Grace,* 782 P.2d 827 (Colo. 1989). In *Martinez*, the plaintiff tripped and fell on asphalt in the defendant's parking lot. Subsequent to the fall, the defendant painted the curb yellow. At trial the defendant's objection to the evidence was sustained under Rule 407. The Colorado Supreme Court reversed holding that the evidence was admissible both for impeachment and also as probative of plaintiff's theory that a color contrast would have produced a safer pedestrian environment. It is notable that the instant case is even stronger on the impeachment exception because the Defendant in *Martinez* did not attempt any deception about the changes.

The *Martinez* case is just the closest example on similarity of facts – we have several Mississippi cases which also illustrate the same legal concepts. (See *Belmont Homes, Inc. v. Stewart,* 792 So.2d 229 (Miss. 2001) (held post-accident video and photos admissible under Rule 407 to causally link actions of tortfeasor to harm); *Alexander v. Greer,* 959 So.2d 586 (Miss. 2007) (held defendant's post-accident doctor visit admissible to impeach claim of unimpaired eyesight).

Other jurisdictions have similar legal authorities. See *Muzyka v. Remington Arms, Co., Inc.*, 774 F.2d 1309 (5th Cir. 1985). (Defendant's position was that Remington model 700 gun was not only fine and safe, it was the standard against which all competition was measured and that it embodied the ultimate in gun safety – held reversible error to refuse to allow evidence that safety was changed within three weeks of the subject accident.) See *Rimkus v. Northwest Colorado Ski Corp.*, 706 F.2d 1060 (Col. 1983) (held reversible error to exclude photos of crossed bamboo poles placed at rock out-cropping shortly after skier crashed into rocks).

Applying these principals to the case at hand, we find numerous solid reasons that the

excluded evidence should have been admitted.

A. IMPEACHMENT

First and foremost, Defendant Gruich chose to intentionally deceive us as to whether changes in the accident scene had even taken place. Plaintiff propounded the following interrogatories and received the following responses:

> Interrogatory No. 3: State the date(s) any changes to the appearance of the building and/or sidewalk leading into the building were completed, the nature and exact description of any changes and the identity of the person making the changes and the reason(s) for any changes.
> Response No. 3: A handicap access ramp was added over 10 years ago by Peter Kuljis.
>
> Interrogatory No. 7: Have any changes been made to the building and/or sidewalk in front of the building's front door since original construction? If yes, describe any such changes in detail.
> Response No. 7: See response to Interrogatory No. 3.

(CR 73-74)

Not only did Gruich file false answers to interrogatories, he continued the deception in his deposition:

> Q. Let's move to the outside of the building since that's what we're concerned with mainly. Tell me what changes may have occurred since 1994 on the outside of the building.
> A. We put in a handicap ramp.
> Q. About what year did you get that done?
> A. It's been over ten years. I don't know the exact date.
> Q. Any other changes to the building outside?
> A. He suggested because of the front windows and all, we put four posts so in case a car would come, it wouldn't hit those windows.
> Q. Any other changes?
> A. Outside, I really can't think of anything. Maybe a new sign for the business.

Gruich Deposition, Pg 14, Lns 8-11; Pg 15, Lns 1-3, 11-14, 19-21. (RE 41) Gruich contended he "always thought [the entrance] was safe." (RE 84)(Gruich Deposition Pg 34, Ln 23; Pg 35, Lns 1-11).

If a party has testified untruthfully, if a party testified he thought a condition or product

was "always" safe, Rule 407 allows contrary evidence to be introduced for impeachment. (See *Muzyka v. Remington Arms, Co., Inc., Supra* on admission of changes to safety on model 700 gun; *Alexander v. Greer, Supra* on admission of post-accident doctor's visit; see also, *Dollar v. Long Mfg. N. Carolina, Inc.,* 561 F.2d 613 (5th Cir. 1977) (where expert testified tractor was safe, subsequent letter to dealer outlining potential dangers could be used to impeach)

In addition, Gruich contended the only reason he cut the carpet off the lip and painted the curb yellow was "for appearance." (i.e. cosmetic reasons) (RE 45) (Gruich Deposition, Pg 35, Lns 12-16). Gruich contended the changes he made had nothing whatsoever to do with Ms. Manning's case. (RE 42) (Gruich, Pg 17, Lns 10-12)

Would it not be important to allow impeachment of such statements? Due to timing alone there is every reasonable inference from the post-accident changes that Gruich's testimony was false, that the carpet was lumpy, and that the solid green color disguised the height of the rise. Why would a man suddenly decide after 20 years that "appearances" would be improved by adding two feet of yellow curb?

B. CONDITIONS AT TIME OF ACCIDENT

Moreover, in addition to impeachment, Rule 407 allows introduction of evidence to show conditions of the premises or product at the time of the accident. See *Bailey v. Kawasaki – Kisen, K.K.,* 455 F.2d 392 (5th Cir. 1972) (evidence that grease was wiped from winch admissible to prove grease was there at time of accident). Gruich put the condition of the carpet at the time of the accident at issue by his on testimony: "That part every now and then wouldn't stay glued too good, but it wasn't bulging out where somebody could trip." (Gruich Deposition, Pg 17, Lns 1-3) (RE 42)

Would it not be relevant to ask Gruich, if everything was the same and safe, if it was not bulging up, why did you cut off the lip of the carpet for the first time in its 20 year existence? The question answers itself. All the jury got to hear was Gruich's testimony that the carpet was

safe and not bulging up. The jury was prevented from hearing testimony that Gruich cut away the "safe" carpet.

This question of whether the carpet was smooth or bulging up enough to trip someone was of course a main issue in the case. The extent of the trial judge's zeal and arbitrary ruling on this issue is exemplified by his, to put mildly, rather unique instructions limiting Plaintiff's counsel to asking questions solely about Mr. Gruich's observations two weeks before and two weeks after the Manning accident. (TR 78) (RE 26)

We have no idea where the court got the idea that all observations outside this arbitrary one month time frame were somehow prejudicial, but of course counsel tried to abide by the court's instructions. The court further instructed Plaintiff's counsel that questions would not be allowed at trial unless they were also asked during Defendant's deposition. (TR 78) (RE 26) Such arbitrary limitations on questioning a witness have no basis under the law of evidence.

C. EFFECTIVENESS OF WARNING

One of the duties of a landowner is to warn an invitee of known hazards on his property. Failure to do so can result in liability. *K-Mart v. Hardy,* 735 So.2d 975, 980 (Miss. 1999). Here, one of plaintiff's main contentions at trial was that the green carpet over the lip of the sidewalk made the height of the step-up hard to judge. Plaintiff contended that the change in height should have been marked by a color transition – i.e. the curb should have been painted yellow. This yellow curb warning is exactly what Gruich did post-accident when he cut away the carpet hanging over the lip and used yellow paint to warn pedestrians.

Whether such a warning was feasible includes the concept of would it be effective. The answer to would it be effective was dramatically demonstrated by post-change photos of the actual sidewalk with the carpet removed and with a bright yellow curb. Unfortunately, the trial judge prevented this critical evidence from being seen by the jury. (TR 111-112)(RE 31-32) (Exhibit P-16) (RE 37-38) Instead of allowing photos of the yellow curb to be introduced, the

court required Plaintiff's counsel to use scissors to cut the photos in two pieces. The court allowed the cropped photos of the top of the sidewalk (sans carpet, thanks to Hurricane Katrina), but excluded the portions of the photos depicting the yellow curb. (TR 74-75) The jury was thus mislead into thinking Katrina removed the carpet when the truth was that Gruich had cut away and removed the part of the carpet over the lip long before Katrina.

Exclusion of these photos showing the exact warning Plaintiff advocated was reversible error. See *Martinez v. Grace, Supra,* (failure to admit photos of yellow curb requires reversal).

D. THE PROFFER

Plaintiff made a clear record of her desire to introduce answers to interrogatories, impeaching deposition testimony, photos depicting the exact warnings of color contrast to show a change in height and to cross-examine Gruich on these matters. This proffer and the court's adamant refusal to allow the evidence is contained in the record at TR 108-113, RE 28-33. No amount of argument or case authority could change the court's mind.

CONCLUSION

The trial court judge did an admirable job in conducting one of his first trials after taking the bench. The court's rulings, though not perfect, passed muster enough that Plaintiff has only assigned one error. Unfortunately, the error was of significant harmful magnitude and requires reversal. Plaintiff's multiple evidence of post-accident changes was admissible, probative on numerous issues and this evidence would have been a game changer in impact.

We respectfully request this case be reversed and remanded for a new trial with instructions to allow the excluded evidence.

Respectfully submitted,

ROBERT W. SMITH, ESQ.
Attorney for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I, ROBERT W. SMITH, do hereby certify that I have this date mailed, postage prepaid, a true and correct copy of the above and foregoing Appellant's Brief to Brett Williams, Esq., P. O. Box 1618, Pascagoula, MS 39568, and Honorable Lawrence Bourgeois, Circuit Court Judge, P. O. Drawer 1461, Gulfport, MS 39502.

SO CERTIFIED, this the 15 day of Feb., 2010.

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CERTIFICATE OF SERVICE
Pursuant to Mississippi Rules of Appellate Procedure Rule 25(a)

I, Wanda Soukup, do hereby certify that I have this day mailed in the United States Mail, first class, postage prepaid, a package containing the original and three (3) copies of the above and foregoing Appellant's Brief which was addressed to Betty Sephton, Clerk of the Supreme Court of Mississippi, P. O. Box 249, Jackson, MS 39205-0249

SO CERTIFIED this the 15 day of February, 2010.

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