IN THE MISSISSIPPI SUPREME COURT

APPEAL NO. 2009-CA-01185

EDWARD M. O'KEEFFE,

Plaintiff-Appellant

VERSUS

BILOXI CASINO CORP. dba CASINO MAGIC-BILOXI

Defendant-Appellee

Appeal from the Circuit Court
for Harrison County,
Second Judicial District
Cause No. A2402-05-86

Appellant's Reply Brief

Submitted by:

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ARGUMENT

The first half of Defendant-Appellee's Brief is an extensive review of underlying facts and the proceedings below. In the Introduction, Defendant charges that Plaintiff "egregiously misrepresents the proceedings in this case . . . ." (Appellee's Brief, p. 2) In this Reply, the Plaintiff will address this charge and other issues raised in Defendant's review of the proceedings below, but we will do so, where appropriate, in the context of each legal issue involved.

1. Exclusion of Dr. Bratton's Testimony

Defendant's Brief mentions two issues with respect to the Circuit Court's exclusion of Dr. Bratton as Plaintiff's trial expert. The first issue Defendant discusses is the way in which the Circuit Judge held, in advance, that Plaintiff could not designate new experts prior to the February 2, 2009 trial date. The second issue Defendant discusses deals with the "factors" the Court should consider when deciding whether to penalize a party for discovery infractions.

(a) The Circuit Judge's "advance" ruling

The most significant point - which, however, missed the only important point - raised by Defendant regarding the Circuit Judge's exclusion of Dr. Bratton as an expert for Plaintiff is set forth in the Introduction to Defendant's Brief, where Defendant states that the Circuit Judge continued the trial from December 8, 2008 to February 2, 2009 to allow the Plaintiff to take Dr. Steck's deposition and supplement opinions of previously designated experts, but that

> "The Circuit Judge made clear that the continuance was not for the purpose of allowing any further attempted designation of completely new experts for trial." (Appellee's Brief, p. 3)

What the Defendant's Brief says in the statement just quoted is basically true. By implication, the Judge made that point at the hearing on November 7, 2008, when she granted Plaintiff's motion to continue the trial, but at the same time excluded Plaintiff's designation of Guy Walker as a vocational expert. The point was driven home after the November 7 hearing, by the Circuit Judge's continued denial of the various attempts by Plaintiff to get her to change her mind about the Plaintiff's Expert Designation of Dr. Bratton.

Plaintiff's motion to continue the trial was joined with a request to designate two new experts for the then current trial date of December 8, 2008, Dr. Steck, and Guy Walker. As just stated, while granting Plaintiff's request to continue the trial, the Judge made the puzzling ruling that Plaintiff would be allowed to designate Dr. Steck, but not Guy Walker, even though the continuance made the additional expert designations timely.

It is appropriate to remember why the Judge continued the trial from December, 2008 to February, 2009. It was not, as Defendant claims, to allow Plaintiff to supplement the designations of Plaintiff's experts, but to give Plaintiff time to depose Dr. Steck, the surgeon who had recently operated on the Plaintiff. Plaintiff had never "designated" any experts prior to late October, 2008, but the Court could have easily allowed Plaintiff to designate, out of time, experts already known to Defendant, without continuing the trial. The main, if not only, reason the Judge continued the trial was to allow Dr. Steck to be deposed. Because Steck had performed back surgery recently on the Plaintiff, his testimony was obviously necessary.

The upshot of the foregoing was that the Court continued the trial, and then, 68 or 69 days before the new trial date, Plaintiff filed his Designation of Dr. Bratton. As Defendant points out, the Judge indicated (at the November 7, 2008 hearing, when she continued the trial to February, 2009) that she would not allow Plaintiff to designate new experts other than Dr. Steck, and this was confirmed by the several hearings afterwards. The Defendant drives this point home repeatedly in its Brief. But in doing so, the Defendant misses the more essential point - i.e., what possible, legitimate reason could the Judge have had to justify the refusal, in advance, to allow Plaintiff to timely designate any expert prior to the new February 2, 2009 trial? There was none.

As long as Plaintiff complied with the applicable time limits for designating experts, he should have been allowed to do so. There was no scheduling order in this case setting any cutoff date for designating experts. In the absence of such, URCC Rule 4.04(a) unequivocally allowed designation of experts 60 days prior to trial. Once the trial was continued to February 2, 2009, Plaintiff's designation of Bratton, filed on November 26, 2008, was timely and in full compliance with Rule 4.04(a). The Judge had no right to suspend the operation of the Rule by some sort of "ex post facto" ruling that supposedly cancelled the application of the rules of court to this case.

The foregoing is true with respect to any experts the Plaintiff might have wished to designate, including Guy Walker. But Dr. Bratton was far more important to Plaintiff's case than Dr. Walker. We therefore concentrated all our efforts to allow the Bratton designation, and abandoned Walker's.

The Defendant's Brief claims that "Plaintiff's Brief and Record Excerpts omit a full disclosure of what occurred in regard to the trial court's November 7, 2008 hearing and order regarding expert witnesses." (Appellant's Brief, p. 2) This is an obvious reference to the fact that we didn't fully explain in our Appellant's Brief how the Circuit Judge decided in advance to suspend the operation of Rule 4.04(a) and to deny, in advance, Plaintiff's right, under that Rule, to designate expert witnesses 60 days prior to trial.

It is true that our Brief did not go into much detail regarding how the Judge rejected Dr. Bratton in advance - long before the 60-day cutoff date for designating experts prior to the February 2, 2009 trial. But we certainly hid nothing in our Record Excerpts, which as far as we know were complete with respect to this issue.[1] Nor was it Plaintiff's intention to confuse anyone.

The important point regarding the issue under discussion is that the Circuit Judge suspended the operation of Rule 4.04(a), and actually violated the letter as well as the spirit of that Rule in refusing to allow Plaintiff to designate Dr. Bratton more than 60 days prior to the February, 2009 trial date. Whether the Judge did so later, or in advance, doesn't change the situation. Moreover, after the November 7 hearing, the Judge was given several opportunities (which she declined) to abate her "advance" approach while still

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[1] We explained the basic situation in our original Brief without going into great detail regarding the November 7 hearing. When arguing a legal issue, it's usually best to present one's arguments, let the opponent present theirs, and then reply to theirs. That is what we did, and are doing now. When you try to anticipate the opponent's arguments within your own argument, and reply to their arguments in advance, the Court can lose sight of your own argument. Regardless of whether the Circuit Judge excluded Bratton "in advance" or later makes no difference: Dr. Bratton was excluded, even though he was designated timely under URCC Rule 4.04(a).

allowing a fair application of the rule without prejudice to anyone.

All of the Rules should be interpreted and applied with fairness and justice, as MRCP Rule 1 dictates. The Circuit Court in this case took another approach - adopting the attitude of a rather vindictive school teacher, parent, or harsh disciplinarian who can't seem to overlook a child's mistake even when the mistake is corrected. In continuing the trial, the Judge altered the application of time periods under Rule 4.04(a). Under the express terms of that Rule, Plaintiff was authorized to make expert designations 60 days prior to the new trial date, and did so in compliance with the Rule, which provided the only scheduling limits applicable in the absence of a Scheduling Order. Yet, the Judge just couldn't seem to let go of the idea that Plaintiff had been "late" before, and for no reason whatever continued to hold the Plaintiff to the old scheduling as if the December 8, 2008 trial had never been continued.

As we pointed out in our original Brief, applicable case law under URCC Rule 4.04(a) does not support such a harsh application of that Rule - certainly not to the extent of permitting a Judge to suspend the Rule, or apply it in such a way that the Rule itself is actually violated. We ask the Court to look again at our review of the case law (in part 1(a) of Appellant's Brief) to verify what we say here. The Court will find there discussion of several cases in which expert designations were accepted well after the Rule's 60 day cutoff and as late as the day before trial, where no prejudice was involved to opposing parties.

(b) The "factors" in adjudicating discovery infractions

Defendant argues that four factors (discussed in ***Moore***, infra) must be

considered by the Court when determining whether to penalize discovery infractions. Defendant claims that the "Circuit Court noted that it properly considered the factors set out in ***Moore v. Delta Reg. Med. Center*** in determining whether exclusion of Dr. Bratton was the appropriate course." (Appellee's Brief, p. 32)

The Defendant's claim regarding the "four factors" mentioned in ***Moore v. Delta Reg. Med. Center***, 23 So.3d 541 (Miss. App. 2009) is false, and in the case of the last factor, absurd. In the first place, the Circuit Judge didn't consider ***Moore*** at all - that opinion was issued on June 16, 2009, after the hearing of November 7, 2008 and even after the trial of February, 2009.[2]

The contention that the Circuit Judge considered any four factors, whether enumerated in ***Moore*** or otherwise, is also false. The only "factor" (but not one of the four mentioned in ***Moore***) which the Circuit Judge considered in excluding Dr. Bratton was that Plaintiff had failed to designate him more than 60 days prior to the December 8, 2008 trial date. That was a possible "violation", not a factor to be considered for excusing it! The Court did not consider any of the "***Moore*** factors" - (1) Plaintiff's "explanation for the transgression", (2) the "importance of [Dr. Bratton's] testimony", (3) the "need for time [for Defendant] to prepare to meeting [sic] the testimony", or (4) the

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[2] The Defendant's claim that the Judge "noted" that she had "properly considered" the ***Moore*** factors is technically correct, but misleading. The Judge did *not* consider the ***Moore*** factors at the time she made her rulings excluding Dr. Bratton prior to trial or even "note" then that she did so. The Judge's claim that she had considered ***Moore*** factors was made long after the trial, in her order denying Plaintiff's Motion for New Trial (T-1340) issued on July 2, 2009, 16 days after ***Moore*** was decided.

"possibility of a continuance."

Of course, whether the Circuit Judge "noted" that she had considered any of these factors is beside the point anyway; the important questions are (a) whether she actually did consider them, and (b) whether she fairly balanced the factors when "considering" them. She did neither.

As far as the first "factor" is concerned - the explanation of the "transgression" - there was no "transgression" of Rule 4.04(a) in the first place with respect to the trial date of February 2, 2009. Insofar as Plaintiff's failure to designate Dr. Bratton 60 days prior to the *previous* trial date of December 8, 2008, Plaintiff's "explanation" was pretty clear. Mr. O'Keeffe had undergone recent surgery and the neurosurgeon who performed it, Dr. Steck, flatly refused to cooperate with us as discussed elsewhere.

Plaintiff served (by mail) an "amended" Expert Designation naming Dr. Bratton as an additional expert on November 20, 2008. On November 26, 2008[3], Plaintiff served an expanded, full, and detailed Expert Designation of Dr. Bratton (R-353; E-3); that was about two weeks before December 8, 2008, the original trial date. Since (as of the November 7, 2008 hearing) the trial had been continued to February 2, 2009, the filing of the expanded Bratton designation turned out to be 68 days prior to the February 2, 2009 trial date.[4]

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[3] Plaintiff's Expert Designation of Dr. Bratton was mailed to defense counsel and the Circuit Clerk on November 26, 2008; the Clerk didn't stamp it "filed" in the record until December 2. Service was complete as of November 26 under MRCP Rule 5(b)(1) the last sentence of which states that "service by mail is complete upon mailing."

[4] Although the final trial date had been scheduled for February 2, 2009, the trial actually began the following day, February 3. (See cover page of Trial Transcript)

Even if the Court had been correct in finding a "transgression" in the Plaintiff not designating Bratton 60 days before the old December 8 trial date, Plaintiff had a reasonable explanation for that also - i.e., the fact that the Plaintiff had recently been operated on by Dr. Steck, who refused to cooperate with us.

The second factor - the "importance" of Dr. Bratton's testimony - was never considered by the trial Judge. At the time she made her "advance" ruling, Plaintiff had not even designated Dr. Bratton. Later, when she rejected Bratton's timely designation under URCC Rule 4.04(a), the Judge didn't consider Bratton's importance to Plaintiff's case. Bratton's participation was crucial for Plaintiff, as discussed in Appellant's Brief and part 3 of this Reply.

The third factor - Defendant's alleged need for time to prepare to meet Dr. Bratton's testimony - wasn't considered by the Judge and was also in Plaintiff's favor. Despite Defendant's claim to the contrary, the Defendant needed no additional time (other than the 68 or 69 days from the designation of Dr. Bratton on November 26, 2008 to the new trial date of February 2 or 3, 2009) to prepare for Bratton's testimony; it already had the services of Dr. Quindlen on all the issues Bratton would have testified to, and it also had more than 60 days to depose Bratton or do anything else it may have desired in reaction to Dr. Bratton's designation; and Plaintiff's counsel was giving defense counsel his full cooperation in all matters related to their trial preparations.

The fourth factor - the "possibility of a continuance" to avoid the need to penalize a discovery violation - is the most favorable to Plaintiff, and in fact "trumps" any other factor, however large or small, that might have favored

Defendant. The truth is that the Circuit Judge did in fact continue the trial from December 8, 2008 to February 2, 2009, thus removing any prejudicial effect the designation of Bratton might have had, even had that designation been late (which it wasn't!) Saying that the Circuit Court "considered" possible continuance as a factor for relieving Plaintiff of a late designation of Bratton prior to the December 8 trial date is the height of irony, since the Circuit Judge did in fact grant the very continuance which Defendant claims was considered and rejected. This was not only a case of "not considering" factor four, but of actually doing the exact opposite of what that factor required and violating the letter and spirit of the ***Moore*** opinion in the process.

2. Exclusion of Dr. Bratton's Report

The Circuit Judge's exclusion of Dr. Bratton as Plaintiff's expert was based solely on URCC Rule 4.04 - actually, on a mis-application of that Rule - by applying the 60 day deadline of the Rule to the prior trial date of December 8, 2008, rather than to the actual trial date of February 2, 2009. Regardless of whether it was an application or mis-application of the Rule, the ultimate "authority" for the Judge's decision to exclude Dr. Bratton was Rule 4.04(a).

Having attempted repeatedly but unsuccessfully to change the Judge's mind about her exclusion of Dr. Bratton's testimony, Plaintiff's counsel then sought to at least introduce either (a) Dr. Bratton's report, and/or (b) confirmation of Dr. Bratton's opinions, through the deposition of Plaintiff's general physician, Dr. James Dyess. Dr. Dyess's deposition was read to the jury at trial. In his deposition, Dyess explained that he read Bratton's report,

and even spoke personally with Bratton prior to his deposition, and that he relied on Dr. Bratton's opinions as a neurosurgeon in forming his (Dr. Dyess's) own opinions about the Plaintiff's disability. (See E-10)

The Circuit Judge refused to allow the jury to hear any of Dr. Dyess's deposition testimony mentioning either (a) Dr. Bratton's report, (b) Dr. Dyess's conversation with Dr. Bratton, (c) Dr. Bratton's opinions on which Dr. Dyess relied, or even (d) Dr. Bratton's name! The Judge found that her ruling under URCC Rule 4.04(a) excluding Dr. Bratton from testifying as Plaintiff's expert at trial also prevented Dr. Dyess from mentioning Dr. Bratton's name, report, conversation, or opinions to the jury. In fact, the Judge threatened Plaintiff's counsel with contempt for even attempting to bring Dr. Bratton's name or opinions before the Jury in the context of Dr. Dyess's deposition. (E-10)

This ruling, and the Judge's threat of contempt, are significant for two reasons. First, the ruling was simply incorrect, since Dr. Dyess's mention of Dr. Bratton and his opinions was perfectly proper under MRE Rule 703. Second, it illustrates the underlying injustice of the Circuit Judge's attempt to exclude Dr. Bratton from the trial of this case even though he had been designated timely under URCC Rule 4.04(a). We'll discuss each of these issues separately, in light of what Defendant had to say about them in the Appellee's Brief.

(a) Dr. Dyess's reliance on Dr. Bratton was proper

Even if Dr. Bratton had been properly excluded as an expert witness for Plaintiff, that did not mean that Dr. Dyess's testimony regarding him and his opinions was improper. Dr. Bratton was excluded by the trial Judge as

Plaintiff's expert pursuant to URCC Rule 4.04(a). That Rule has nothing to say about whether Dr. Dyess should be allowed to mention Dr. Bratton and rely on his opinions in forming his own. If Dr. Bratton had been excluded as Plaintiff's trial expert, it was because of the Judge's (incorrect) ruling that Plaintiff's designation of Bratton was untimely under URCC Rule 4.04(a) and that Dr. Bratton's testimony was therefore "inadmissible".

That ruling did not prevent Dr. Dyess from mentioning Dr. Bratton and relying on his opinions under MRE Rule 703. Why? Because the very purpose of MRE Rule 703 is to allow an expert (such as Dyess) to base his opinions on opinions from other experts which are otherwise excluded from evidence. That is exactly what MRE Rule 703 says: "The facts or data need not be admissible in evidence." In many cases, MRE Rule 703 is used to permit use of excluded expert opinion because the excluded expert's opinion is "hearsay." But it really makes no difference why the excluded expert's opinion is "inadmissible" - whether because of the hearsay rule, or a discovery violation, or a problem under URCC Rule 4.04(a), or any other reason. The important thing under MRE Rule 703 is that one expert (in this case, Dr. Dyess) is allowed to rely on the (otherwise) excluded opinions of another expert (Dr. Bratton).

We pointed all this out in our original Appellant's Brief, though perhaps not as clearly as we have tried to do above, in this Reply. The Defendant has several responses to the foregoing.

First, Defendant claims that Dr. Bratton's report and opinions did not constitute "facts" or "data" within the meaning of MRE Rule 703. That

argument is rebutted by the case law cited in our original Brief, and even by the case Defendant cites, the ***Koestler*** decision, *infra.* Opinions of other experts are unquestionably within the meaning and ambit of MRE Rule 703.

Second, the Defendant claims that MRE Rule 703 does not apply to opinions of other (excluded) experts which were rendered "for litigation purposes," citing ***Koestler v. Koestler***, 976 So.2d 372 (Miss. 2008). This argument is not supported by either Rule 703 or the ***Koestler*** opinion.

In ***Koestler*** one expert (Dr. Powers) used a letter from another expert (Dr. Cook) to abdicate his own opinion and "defer" to the excluded expert, Dr. Cook. The Court stated: "Dr. Powers could have used Dr. Cook's letter as a basis to form his own independent opinion, but he did not do so." (emphasis added) Ibid. at ¶37. As the Court expressly pointed out, "[I]nstead of forming his own opinion, Dr. Powers deferred his opinion to that of Dr. Cook's." Ibid. at ¶34. That was the reason the Court found Rule 703 inapplicable, not because Dr. Cook's letters were written for "litigation purposes."

It is true that the Court's opinion in ***Koestler*** points out that Cook's letter was "written specifically for litigation purposes." (Ibid. at ¶29) But, as stated in the preceding paragraph, the Court did not find MRE 703 inapplicable for that reason. The Court's only purpose for mentioning that Cook's letter was written for litigation purposes was to nail down the fact that it was hearsay, and thus inadmissible *ab initio.* As the Court expressly stated: "[L]etters that are written specifically for litigation purposes . . . are hearsay . . . ." (Ibid. at ¶29) But the Court's express statement, quoted in the preceding

paragraph, makes it clear that, while Cook's letter was hearsay (because written for litigation purposes), MRE 703 would still have allowed Powers to rely on it - if he had really relied on it rather than abdicating his own opinion and deferring completely to Dr. Cook.

(b) The Circuit Judge's threat of contempt was improper

As mentioned above, the Circuit Judge not only excluded Dr. Dyess's reliance on Dr. Bratton's opinions, but threatened Plaintiff's counsel with contempt merely because he attempted to use MRE Rule 703 to confirm Dr. Dyess's reliance on Dr. Bratton. Defendant's Brief joins the Judge in censuring Plaintiff's counsel for this, saying "Plaintiff willfully attempted to circumvent the trial court's order excluding Dr. Bratton's opinions." (Appellee's Brief, p. 36)

Here again we confront the Circuit Judge's overly strict, "disciplinary" approach to everything having to do with Dr. Bratton. Because the Judge decided that Plaintiff had not designated Dr. Bratton prior to the December 8, 2008 trial date, she wrongfully applied URCC Rule 4.04(a) to exclude him as a witness at the February 2, 2009 trial. Then, continuing with the same "disciplinarian" approach, she refused to recognize MRE Rule 703, which authorized Dr. Dyess to rely on Dr. Bratton's opinions. Dr. Bratton's testimony had indeed been "excluded" by the Judge under URCC Rule 4.04(a). But that very exclusion is what made MRE Rule 703 applicable.

Plaintiff's counsel would have been derelict in his duty to his client if he had not sought other authority to allow the jury to hear of Dr. Bratton and his opinions. MRE Rule 703 provided that authority. The Judge's threat of

contempt was unfair; it illustrated, again, the Judge's unjust determination to "punish" Plaintiff for an old offense which had become irrelevant when the trial was continued to February, 2009, in the face of MRE Rule 703 as well as URCC Rule 4.04(a), both of which allowed Bratton's opinions, at the very least, to be mentioned to the jury.

3. Harmful Error

In our Appellant's Brief, under the heading "Harmful Error", we pointed out that the special interrogatory instruction/form the jury used to return its verdict (which form was prepared and submitted by Defendant, not Plaintiff) made it impossible to tell whether the jury found "no liability" or "no damages." We argued that it therefore had to be interpreted as a verdict of "no damages." Defendant's response presented several arguments on this issue, while omitting one important issue, which we identify and discuss below.

(a) The wording of the verdict form

The special interrogatory or verdict form on which the jury returned its verdict, by combining both liability and damages in one question, made it impossible to tell whether the jury found "no liability" or "no damages". (E-13) The verdict could be interpreted either way, and as such should be interpreted as a verdict of "no damages" for the reasons discussed in our original Brief. Such a verdict made it clear that the Circuit Court's exclusion of Dr. Bratton as Plaintiff's expert was not "harmless error."

The Defendant's Brief did not face the foregoing issue head-on. In fact, the Defendant avoided dealing with it in any direct way, repeating the self-

serving mantra that "the jury answered a special interrogatory indicating that it found Casino Magic was not negligent." (Appellee's Brief, p. 37) This is simply false, for the reason stated in the preceding paragraph and explained in detail in Appellant's Brief.

While not directly facing the obvious problem with the wording of the verdict form, the Defendant does deal with it obliquely, making two claims: first, it claims that Plaintiff presented no evidence of liability on the Defendant's part, thereby concluding that the verdict "must" have been one of "no liability." Second, Defendant claims that Plaintiff did, even without Dr. Bratton's assistance as a trial expert, present evidence of damages, concluding from that that the jury verdict could not have been "no damages."

(b) Defendant's claim of "no liability"

Defendant's Brief states that "Plaintiff chose not to call [an expert on liability]. Therefore the case went to the jury with nothing more than allegations and arguments . . . that the shower was hazardous . . . ." (Appellee's Brief, p. 38) This statement is without merit.

Expert testimony is not needed to prove facts which any lay person can observe. The only claim we know of in which an expert is required by law is one for medical malpractice. This was not a medical malpractice case, but a simple case of hazardous premises conditions in the Defendant's shower stall. Those hazardous conditions were readily apparent to anyone based on the physical evidence in the case, not to mention the Plaintiff's own testimony, and the Plaintiff did not need an expert to establish them.

The permanent hazardous shower conditions, mentioned repeatedly in numerous places in the record and trial transcript, included:

- no hand grip or anything to hold on to whatsoever
- a seat at the rear of the shower with a very sharp edge
- a sharp incline around the edges of the flooring

The hazardous conditions also included the following condition that could be clearly seen in the photographs of the shower taken after the accident:

- heavy accumulation of mildew at the bottom of the stall (T-392, 503-505, 708)

The evidence in this case included the introduction of the actual flooring of the shower stall, extensive photographs (including blow-ups) of the shower stall, and the Plaintiff's testimony regarding his personal observations of the stall. That evidence was very compelling in showing the hazardous conditions.

It is true that Defendant produced an engineering expert who claimed to have tested the surface of the shower flooring and found it was not unduly "slippery" when dry. Not only did Defendant's expert (Mr. Vanderbrook) agree that there was a sharp incline all around the edges of the shower floor with nothing to hold on to, his claim that the floor was not slippery (when dry) was undermined by Plaintiff's cross examination of him, which virtually destroyed his credibility and demonstrated that his findings on several key points were not supported by his own inspection. (At least that is the humble opinion of undersigned counsel; we submit that a reading of Mr. Vanderbrook's cross examination, at T-451-506, will confirm this.) Due to the effectiveness of that cross-examination, Plaintiff's counsel made a reasonable decision that his own engineering expert was unnecessary. The hazardous conditions simply did not

need an engineer to confirm them.

Based on the foregoing, the Defendant cannot establish "no liability" as a matter of law, and as such the Court must find that the jury could have found liability in this case based on the evidence. And since a verdict of "liability" was possible, it is equally possible that the jury's verdict was based on a finding of "no damages" rather than "no liability."

(c) Medical evidence other than Dr. Bratton

Defendant's Brief points out that Plaintiff had the depositions of Dr. Longnecker, Dr. Doty, Dr. Steck, and Dr. Dyess which, except for certain portions excluded by the parties or the Court, were read to the jury at trial. Defendant also claims that its own expert, Dr. Quindlen, testified that Plaintiff sustained at least one injury in the accident in suit. Based on this, Defendant claims that there was ample medical evidence to show at least some damages, and therefore that the jury's verdict could not have been "no damages."

The Defendant's arguments on this issue grossly exaggerate the Plaintiff's proof of damages in the absence of Dr. Bratton, mis-states the opinion of its own expert, Quindlen, and overlooks the serious prejudice resulting from the Defendant having Dr. Quindlen to testify live at trial while the Plaintiff was left without any medical expert to rebut Dr. Quindlen.

The Plaintiff, Mr. O'Keeffe, was treated initially and very briefly after the accident by Dr. M. F. Longnecker, whose deposition was taken early on in the discovery phase of the case. Longnecker had little of value to add to the case, and by the time of trial had retired and moved to Hawaii.

Dr. Doty had operated on the Plaintiff about a year after the accident and his deposition was also taken, but there were two problems with respect to Dr. Doty. The first was that he utterly failed to prepare for his deposition, and spent the entire deposition stating facts and details incorrectly and having to be corrected by Plaintiff's counsel. Moreover, Dr. Doty also left the area before the trial in this case and he was not available to testify live either.

Dr. Dyess was Mr. O'Keeffe's "family" or "general" physician. He had no specialty or expertise in orthopedics or neurology. He attempted to form his own opinions regarding O'Keeffe's back injuries by relying on Dr. Bratton's opinions, but that was disallowed by the District Judge. Dr. Dyess is from Louisiana and was also not available to testify at trial.

Dr. Steck, a neurosurgeon from Louisiana, was the last surgeon to treat Plaintiff prior to trial. He performed back surgery on Mr. O'Keeffe on August 19, 2008. Plaintiff's request for a continuance of the trial was originally based in large part on the fact that O'Keeffe had not had sufficient time to recover from the surgery to properly prepare for and participate in the December 8, 2008 trial. Later, it became apparent that Dr. Steck was extremely uncooperative. He refused to have any contact with Plaintiff's counsel, cancelled, then delayed his deposition despite the Court's order that it be taken immediately, and refused to send any narrative report to Plaintiff's counsel.

None of the foregoing physicians were retained experts. They had all treated O'Keeffe at various times for various aspects of his injuries; but none of them possessed, or had considered, the medical evidence as a whole, none of

them was able or willing to come to trial, none of them could give the kind of assistance Plaintiff needed to present an overview of his injuries, or rebut the testimony of Dr. Quindlen, the Defendant's retained expert.

Finally, lacking any help from Dr. Steck, we realized that we needed a retained medical expert specially to give live testimony at trial, provide the help necessary to properly present the entire range of Plaintiff's evidence of his damages at trial, and rebut the testimony of Dr. Quindlen. We thought Dr. Steck, Plaintiff's treating neurosurgeon, would serve that purpose, but his obstinate refusal to cooperate quashed that notion.

Perhaps only an experienced trial attorney can appreciate the "bind" Plaintiff's counsel was left in without the assistance of Dr. Bratton under the foregoing circumstances. We had depositions from Plaintiff's treating physicians, but they were incomplete, ill-prepared, erroneous in some respects, and worst of all had to be read to the jury in the absence of the doctors themselves (a boring and tedious process). This left Defendant with the only medical expert to testify at trial, Dr. Quindlen, who was specially retained and willing and able to give all the aid and comfort to the defense they desired. Meanwhile, Plaintiff had no one to rebut anything Quindlen chose to say.

Defendant claims that its expert, Dr. Quindlen, testified that Plaintiff sustained some injury in the accident in suit. This is misleading, and an exaggeration of Dr. Quindlen's testimony. Dr. Quindlen said only that part of Plaintiff's injury was "related" to the accident; he did not say that any of Plaintiff's injuries were "caused" by the accident or "causally" related to it.

Moreover, he testified to a long list of what he claimed were injuries and surgeries that predated the accident, and made it sound like anything that might have "related" in some way to the accident was miniscule in relation to the massive pre-existing injuries he discussed. Defendant now, in its Appellee's Brief, claims that Quindlen testified that the accident "caused" some injury to Mr. O'Keeffe. That was not true, nor was it the Defendant's position at trial. Based on Quindlen's testimony, defense counsel argued in closing that

> "With regard to Dr. Quindlen, he testified regarding spondylosis and stenosis. He was very clear, got down from the witness stand and showed you on the diagram that's in evidence and showed you on the MRI which levels were related to stenosis and why it was not a herniation as Dr. Dyess says it is. He explained that clearly. He's the only physician to come live and testify regarding those facts. . . . He specifically testified that what is found on that MRI and what Mr. O'Keeffe is experiencing and the reasons for Dr. Steck's surgery is unrelated to the accident at Casino Magic." (T-729)

Only Dr. Bratton could have rebutted such testimony and such claims.

The Defendant's Brief mentions Dr. Longnecker, Dr. Doty, Dr. Dyess and Dr. Steck, but doesn't explain the stark reality of the situation discussed above. But as trial attorneys, defense counsel well knew the critical importance of having at least one expert who can appear at trial, assist in the presentation of all of the medical evidence, and rebut the testimony of the opponent's expert(s). In discussing the procedural background in their Brief, they make this revealing statement: "If Plaintiff had desired a retained expert on causation, as opposed to just experts who were his treating physicians, there was no reason he could not have obtained one long before October 9, 2008." (emphasis added) (Appellee's Brief, p. 32) They could and should have added - "and there was no reason Plaintiff could not have obtained one 60 days prior to

the February 2, 2009 trial date, and Plaintiff did just that, and Plaintiff timely filed his designation of Dr. Bratton more than 60 days before trial."

Based on the foregoing, the jury could have concluded that Plaintiff sustained "no damages" or that any "miniscule" injury he suffered warranted no damages.[5] Again, as with the "no liability" issue discussed previously, the jury's verdict could well have represented a finding of "no damages." The Circuit Judge's exclusion of Dr. Bratton was not "harmless error."

4. Jury Instruction No. 6

Plaintiff-Appellant's original Brief presented two reasons why Jury Instruction No. 6 prejudiced the Plaintiff. The first was that it contradicted the comparative negligence rule, requiring the jury to find that the Plaintiff was free from negligence before it could find the shower stall "dangerous." The second was that the instruction, in effect, wrongfully applied the old "open and obvious" rule which was nullified by the Supreme Court in ***Tharp v. Bunge Corp.***, 641 So.2d 20 (Miss. 1994). The Defendant-Appellee's Brief responded to these issues with three arguments, which we identify and discuss below.

(a) It violated the comparative negligence rule

Actually, the Defendant's Brief doesn't respond directly to the problem Plaintiff described in our Brief, whereby Instruction No. 6 contradicts or nullifies the comparative negligence rule. Instead, the Defendant claims that,

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[5] Compare the situation in ***Harris v. General Host. Corp.***, 503 So.2d 795 (Miss. 1986), discussed in Appellant's Brief at p. 36, where the Court found a verdict of "no liability" may really have represented a verdict of "no damages" even where a medical expert testified that when he examined the Plaintiff shortly after the accident in that case, he found something - but "not much" - wrong with him.

because another instruction later on presented the comparative negligence rule, the instructions "as a whole" were okay. That argument overlooks the black letter case law cited in Appellant's Brief, that two jury instructions saying opposite things about an important legal issue constitute reversible error. This is adequately discussed in Plaintiff's original Brief, and nothing in Defendant's Brief contradicts what we said there or even addresses that issue.

(b) It applied the old "open and obvious" rule

Plaintiff's original Brief argues that Jury Instruction No. 6 had the effect of applying the old and overruled "open and obvious" rule. The Defendant's Brief tries to rebut this by saying: "That is not so. Nowhere does that jury instruction mention the 'open and obvious' rule." (Appellee's Brief, p. 38)

It is certainly true that Instruction No. 6 doesn't contain the phrase "open and obvious rule" but that doesn't have anything do to with whether it had the effect of applying the substance of that rule to this case.

By stating that a "hazardous" condition is one likely to cause injury to one "exercising reasonable care for his own safety", the instruction did, in fact, apply the substance of the old "open and obvious rule." That rule held that a premises owner is not liable for "open and obvious" dangers on the theory that such conditions would be noticed by a plaintiff exercising due care for his/her own safety. The Defendant's position in this case at trial was that the (allegedly) dangerous condition of the shower stall should have been noticed by the Plaintiff, and that he was negligent for not exercising reasonable care when confronted with such open and obvious conditions. That was really the only

against a governmental entity, and ***Dow***, a 1934 decision, was rendered decades before the "open and obvious" rule was discarded by ***Tharp***.

The Defendant's "definition" argument is "circular" and self-defeating. It attempts to "win" a victory by defining terms to its own liking - falsely defining the terms "danger" and "hazardous condition" so that the definition itself requires a verdict for the Defendant. A "hazardous condition" is one that is likely to cause injury, both to those exercising due care and also to those who are not. That is what the comparative negligence rule states. That is what the law is in premises condition cases, now that the "open and obvious" rule has been discarded. Telling the jury otherwise was a serious error.

CONCLUSION

Based on the foregoing, Plaintiff respectfully requests that this Court reverse the verdict and judgment of the Circuit Court below and remand the case for the trial on the merits, and for such further relief as may be proper under the circumstances.

This 7th day of October, 2010.

Respectfully submitted,

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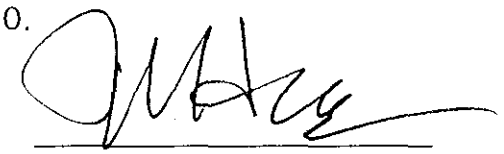
CERTIFICATE OF SERVICE

I certify that I have this day served a copy of the foregoing Reply Brief by first class mail on: Kim Rosetti, P. O. Box 10, Gulfport, Ms 39502, and Hon. Lisa Dodson, Circuit Judge, Harrison County Courthouse, Gulfport, Ms 39501.

This 7th day of October, 2010.



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