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
Hon. Lisa Dodson, Circuit Judge

Appellant's Brief

Submitted by:

Robert Homes Jr.
P. O. Box 500
Gulfport, MS 39502
(228) 863-8888
fax (228) 864-4982
Miss. Bar [redacted]
Attorney for Appellant

ORAL ARGUMENT

Appellant requests oral argument.

INTERESTED PERSONS

I, Robert Homes, Attorney for Appellants, certify that the following persons or entities have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

Edward M. O'Keeffe, Appellant

Mrs. Edward O'Keeffe, Appellant's wife

Biloxi Casino Corp. dba Casino Magic, Appellee

Robert Homes Jr., Attorney for Plaintiff-Appellant

Kim Rosetti, Attorney for Defendant-Appellee

Karen Sawyer, Attorney for Defendant-Appellee

Cook, Taylor & Bush Law Firm, Attorneys for Defendant-Appellee

JURISDICTION

The Court has jurisdiction of this appeal from a final judgment rendered by the Circuit Court of the Second Judicial District of Harrison County, Mississippi, under Mississippi Code §9-3-9, and Rules 3 & 4 of the Mississippi Rules of Appellate Procedure (hereinafter MRAP).

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REFERENCES

"Plaintiff" or "O'Keeffe" means the Appellant
"Defendant," "Casino Magic," or "the Casino" means the Appellee
"R-#" refers to a page of the Appeal Record
"E-#" refers to an item of the Appellant's Record Excerpts
"MRCP" means the Mississippi Rules of Civil Procedure
"MRE" means the Mississippi Rules of Evidence
"URCC" means the Uniform Rules of Circuit and County Court

ASSIGNMENT OF ERRORS

1. Whether the trial court improperly excluded Dr. Bratton as an expert witness for Plaintiff at trial.

2. Whether the trial court improperly excluded Dr. Bratton's report and any reference to Dr. Bratton from Dr. Dyess's testimony at trial.

3. Whether the trial court's instructions to the jury, in particular instruction 6, was improper.

UNDERLYING FACTS

This is a suit by Plaintiff-Appellant, Edward O'Keeffe, against Defendant-Appellee, Biloxi Casino Corp. dba Casino Magic (hereinafter referred to simply as CASINO MAGIC), for damages resulting from O'Keeffe's fall in the shower stall of his room at the Defendant's hotel in Biloxi on October 15, 2003.

On the date of the accident the Plaintiff and his wife were guests of the Defendant's Casino Magic Hotel in Biloxi, staying in Room 1616. While taking a shower Mr. O'Keeffe slipped and fell, severely injuring his low back.

The defects in the shower stall which resulted in the fall, and of which O'Keeffe complained, included the following:

- maintaining a shower stall that lacked any hand-holds, hold-bars, or other grips to hold onto or grab hold of
- having a tile bench in the shower stall with an unnecessarily sharp edge
- maintaining a shower stall with a base that was unduly slippery
- having a shower stall with a base that had a sharp and slippery slope around the edges

- not providing a shower mat in the bathroom
- providing a sign advising that a shower mat could be requested that was either missing or too small to be easily noticed
- allowing mildew to accumulate on the base of the stall

(R-1221-1222, T-503:18 et seq.)

A former employee of the Hotel testified (contrary to the Defendant's claim of no prior shower accidents) that during the period of time when she had cleaned the hotel rooms, she encountered numerous instances of guest complaints of accidents occurring in the hotel's shower stalls. (T-153:27, T-165:7) See her affidavit, Plaintiff's Trial Exhibit 5 (T-157, 159)

According to Dr. Bratton, O'Keeffe's injuries resulting from the accident included a disc injury at L2-3 and another at L4-5, along with related injuries to his spine. O'Keeffe had a "decompression diskectomy for a herniated and extruded disc," and a subsequent "secondary decompression" for the L2-3 injury. (R-783) Less than four months prior to December 8, 2008, when the case was at one time scheduled to go to trial, O'Keeffe underwent another surgery, a "hemilaminotomy" at the same L2-3 level, and a revision laminectomy at the L4-5 level by Dr. John Steck. (R-536)

Mr. O'Keeffe's general physician, Dr. James Dyess, testified by deposition. His opinions as to the nature and severity of O'Keeffe's injuries were largely based on Dyess's review of Bratton's report and a telephone conference he had with Dr. Bratton prior to his deposition, but the Circuit Judge struck all references to Dr. Bratton and his report from Dyess's deposition prior to it being read to the jury.

PROCEEDINGS BELOW

Plaintiff's Complaint was filed on June 1, 2005. (R-20) After delays due to Hurricane Katrina and its aftermath, and a period during which the parties engaged in pre-trial discovery, notice of the first trial setting was issued on February 15, 2007, setting the trial for December 3, 2007. (R-28) Later, due to events described in part 1(d) of our Argument, a new trial notice was issued on November 27, 2007 rescheduling the trial for December 8, 2008. (R-80) On November 7, 2008, the Circuit Judge again continued the trial -- to February 2, 2009 (Transcript of November 7, 2008 hearing, T-I, p. 17, and Docket Note of 12/8/08) The trial began on February 2, 2009. (T-I, p. 113)

A full review of the proceedings below is unnecessary for this appeal, the issues in which are limited to exclusion of Dr. Bratton and his expert report, and an improper jury instruction. Proceedings discussed below are related to those issues.

Preliminarily, it should be noted that the jury was selected on February 2, 2009 and the trial actually began on February 3, 2009 (T-113), the jury returned its verdict on February 9, 2009 (E-13), the Judgment appealed from was entered on February 12, 2009 (E-15), and Plaintiff's two motions for new trial were denied by Order dated June 19, 2009. (E-16)

(a) Proceedings related to the exclusion of Dr. Bratton

Mr. O'Keeffe suffered from the injuries he received in the subject accident continuously from the date of the accident in 2003 until trial in February, 2009. During most of that time his general physician was Dr. Dyess. However, O'Keeffe was treated

and underwent several surgeries at various times by specialists for his back injury. Those specialists included Dr. M. F. Longnecker, an orthopedic surgeon in Biloxi, and Dr. James Doty, an orthopedic surgeon in Gulfport.

Well before the trial, Dr. Longnecker retired and Dr. Doty moved away from the area, and when further surgery was recommended by Dr. Dyess, O'Keeffe saw Dr. John Steck, a neurosurgeon in Louisiana. He first saw Dr. Steck on August 11, 2008, and Steck performed surgery (a laminectomy at L4-5, and a hemilaminectomy at L2-3) on O'Keeffe's lumber spine on August 19, 2008 at West Jefferson Hospital in Marrero, Louisiana.

Due to the foregoing, Plaintiff's fitness and preparation for a trial on December 8, 2008 was called into question. After a period during which Plaintiff's counsel tried unsuccessfully to obtain input from Dr. Steck (T-12) regarding his medical findings and O'Keeffe's fitness for trial, Plaintiff's counsel filed a Motion on October 30, 2008 to continue the December 8, 2008 trial (R-239, E-2) on the grounds that Plaintiff was not physically fit for trial, and that his counsel needed time to obtain Steck's report and deposition in preparation for trial.

While Plaintiff's counsel was still attempting to secure Dr. Steck's cooperation, a discussion took place between the parties' counsel, in which Defendant's counsel informed undersigned counsel that she would object to Plaintiff calling any of his experts because the experts had not been "designated" at least 60 days prior to trial (which at that time was scheduled for December 8, 2008). At that point, on October 23, 2008 - some 47

days before the December 8 trial date - Plaintiff's counsel immediately filed his first "expert designation", designating various experts including Dr. Steck, along with a Motion to Allow the experts to testify. Previously, Plaintiff's counsel had been unaware of URCC Rule 4.04(A) and its requirement for filing expert designations 60 days before trial.

At the November 7, 2008 hearing on Plaintiff's motions the Circuit Judge granted the motion to continue, rescheduling the trial for February 2, 2008 (T-17). On November 26, 68 days before the February 2, 2009 trial date, Plaintiff's counsel – with Dr. Steck still being extremely uncooperative (T-12, 14, 20, 31-34, 36-37, 42, 44, 46, 59-60, 62-64) – filed an expert designation of Dr. Bratton. (R-352, E-3-4)

It was essential for Plaintiff to call Dr. Bratton for several reasons. First, as just noted, Dr. Steck proved to be totally uncooperative. He refused to provide any report of his treatment and findings regarding Mr. O'Keeffe, and even resisted giving his deposition; the deposition was finally taken - long after the time allowed by the Court for doing so - but he refused the urgent requests of Plaintiff's counsel to meet with him beforehand to prepare for it. Second, the Defendant had its own neurosurgeon expert, Dr. Quindlen, and Plaintiff had no one other than Dr. Bratton to offer neurosurgical testimony regarding O'Keeffe's injuries and Dr. Quindlen's opinions. Third, Dr. Bratton's opinions were based on personal examination and treatment of Mr. O'Keeffe, whereas Dr. Quindlen based his

opinions solely on a review of medical records, without examining or interviewing the Plaintiff.

Despite Plaintiff's urgent need for the expert testimony of Dr. Bratton and despite Plaintiff's compliance with the substance and procedure of URCC Rule 4.04(A), the Circuit Court excluded Dr. Bratton as an expert at trial. (R-1205)

Even after the Circuit Court's initial ruling excluding Dr. Bratton - in a long and involved series of pleadings, hearings, and conferences - Plaintiff's designation of Dr. Bratton as a trial expert was continuously and repeatedly opposed by the Defendants and quashed by the Circuit Judge. Plaintiff filed several requests seeking a reversal of those rulings, with the Defendant continuing to oppose the request, and the Circuit Court holding hearings and conferences on same but continuing to uphold the Defendant's position excluding Bratton. (See T-1, T-19, R-484, R-492, R-514, R-1205, E-5, E-6, E-7, E-8, E-9)

As a result of the foregoing, at the trial in February, 2009, the Defendant had the support of its neurosurgeon expert, Dr. Quindlen, who testified live that Plaintiff did not sustain serious injury as a result of the subject accident (see Part 3(a) of our Argument below) whereas Dr. Bratton, who would have contradicted Dr. Quindlen's testimony, was not allowed to testify, and (as noted in the next section) even Dr. Dyess's references to Dr. Bratton were stricken.

(b) Proceedings related to exclusion of Bratton report

Meanwhile, Dr. Dyess's deposition was taken to perpetuate his trial testimony. Dr. Dyess conferred by telephone with Dr.

Bratton prior to the deposition, and his deposition testimony was based in large part on his review of Dr. Bratton's report and his telephone conference with Dr. Bratton. Dyess referred to Dr. Bratton's report and his personal discussion with Dr. Bratton during his deposition. Dr. Dyess further testified in his deposition that, as a general physician, his customary practice is to confer with specialists who have treated his patients, including neurosurgeons such as Dr. Bratton, in forming his opinions and testimony regarding the patient's injuries. (R-853)

At trial, all parts of Dr. Dyess's deposition in which he mentioned Dr. Bratton, or Dr. Bratton's report, or any of Dr. Bratton's opinions - or in which even the name of Dr. Bratton was mentioned - were excluded by the Circuit Judge. (T-320)

(c) Proceedings related to Jury Instruction No. 6

Jury Instruction No. 8 (E-12), requested by the Defendant and given by the Court, correctly stated that the jury's verdict should be for the Plaintiff if the jury found (among other things), that "the condition of the shower . . . constituted a dangerous or hazardous condition." (R-1217) Jury Instruction No. 8 would have been sufficient to properly instruct the jury regarding the liability issues in this case. However, the Court also granted Defendant's requested instruction 6 which falsely defined "hazardous condition" as follows:

> "As used in these instructions, a 'danger' or 'hazardous' condition is defined as a condition which is likely . . . to cause injury to a patron who is exercising reasonable care for his own safety." (R-1268, E-11)

As discussed in part four of our Argument below, this had the effect of negating the "comparative negligence" rule, and

applying the old "open and obvious" rule, preventing the Plaintiff from any recovery if he was not "exercising reasonable care for his own safety."

ARGUMENT

Appellants' argument will be in four parts, roughly corresponding to Plaintiff's three assignments of error: (1) The Circuit Court's exclusion of Dr. Bratton as an expert witness, (2) The Court's exclusion of any mention of Dr. Bratton or his report and opinions during Dr. Dyess's testimony, (3) the harmful nature of those two errors, and (4) The Court's improper Jury Instruction No. 6. These errors are errors of law, and the standard of review should be "de novo" review by this Court.[1]

SUMMARY

The trial Court's exclusion of Dr. Bratton as an expert for Plaintiff violated the letter and spirit of URCC Rule 4.04(A) as well as Rule 1 of the Mississippi Rules of Civil Procedure (MRCP). The trial began on February 2 or 3, 2009. (T-113) Plaintiff designated Dr. Bratton on December 2, 2008, 68 days prior to February 2, 2009. Under Rule 4.04(A), the designation of Dr. Bratton was timely, and there was no reason, even based on the technicalities of the Rule, to exclude Bratton as an expert. Equally important, his exclusion also violated the substance and spirit of the Rules in general, expressed in MRCP Rule 1, that the rules should be "construed to secure the just, speedy, and

[1] The Circuit Court's rejection of Dr. Bratton and his report was a matter within that Court's "discretion," but abuse of such discretion is also a matter of law.

inexpensive determination of every action". The exclusion of Dr. Bratton as an expert is discussed in part 1 of this Argument.

The trial court, after excluding Dr. Bratton's expert testimony, should at least have allowed the jury to be told of his report, under MRE Rule 703, since Dr. Dyess relied on Dr. Bratton's opinions in giving his own testimony. This issue is covered in part 2 of the Argument.

The errors involving the exclusion of Dr. Bratton and his report were not "harmless", because they both *affected* the jury's verdict, and *caused* that verdict, as discussed in part 3.

The Court's erroneous Jury Instruction No. 6 is discussed in part 4. This case involved hazardous conditions in the shower stall in which Plaintiff fell while a guest at the Defendant's hotel. Defendant claimed that those conditions, which Plaintiff claimed were hazardous, were "open and obvious," that Plaintiff was not "exercising due care for his own safety," and that Plaintiff should be precluded from recovery for that reason alone. Although the old "open and obvious rule" was discarded and overruled by the Supreme Court in ***Tharp***, *supra*, the Circuit Court supported the Defendant's claims by falsely instructing the jury, in Instruction No. 6, that a "hazard" exists only when the Plaintiff is not "exercising due care for his own safety."

1. Exclusion of Dr. Bratton as Plaintiff's expert

The exclusion of Dr. Bert Bratton as an expert for the Plaintiff was a severe blow which prejudiced the Plaintiff's entire case, and constituted a serious, unnecessary, and insupportable error on the part of the Circuit Court.

(a) URCC Rule 4.04(A)

Dr. Bratton's exclusion was based on the Circuit Court's application (or mis-application) of Rule 4.04(A), which states:

> All discovery must be completed within ninety days from service of an answer by the applicable defendant. Additional discovery time may be allowed with leave of court upon written motion setting forth good cause for the extension. Absent special circumstances the court will not allow testimony at trial of an expert witness who was not designated as an expert witness to all attorneys of record at least sixty days before trial. (emphasis added)

There was no scheduling order in this case, thus no specific time limit had been set for disclosing experts or filing expert reports. Plaintiff's undersigned counsel was unaware of the Rule's requirement for filing expert designations 60 days prior to trial, and only became aware of it some 47 days before the then upcoming trial date of December 8, 2008.

In a telephone conversation with Defendant's attorney at that time, the attorney stated she would object to Plaintiff calling any expert witnesses at trial because we hadn't filed expert designations 60 days before trial. Undersigned counsel immediately filed motions seeking to allow his experts to be designated late, or to continue the trial.

Undersigned counsel had, prior to that time, never tried a case in which no scheduling order had been issued, or in which any dispute or issue had ever arisen involving Rule 4.04(A)'s 60-day requirement for expert designations. We did know, however, that while there was a rule purportedly limiting discovery to 90 days, that rule was utterly disregarded.[2]

[2] A good example of this is presented by this very case, in which none of the parties or the Court raised any issue regarding the timeliness of discovery, while proceeding with discovery for two years after filing of the Complaint.

(b) Plaintiff's designation of Dr. Bratton was timely

What makes Dr. Bratton's exclusion particularly egregious is that Plaintiff actually filed his expert designation of Dr. Bratton 68 days prior to trial, thus complying fully with the letter of Rule 4.04(A). The way this happened, and the manner in which the Circuit Court justified Bratton's exclusion, serve as textbook examples of how unjust it can be when a rank technicality, rather than the substance of a rule, is allowed to control a case, without considerations of fairness and prejudice.

As discussed in our review of the proceedings regarding this issue (part (a) of the Proceedings Below), Plaintiff's designation of Dr. Bratton was impelled by the total lack of cooperation shown by Dr. John Steck, the neurosurgeon who had operated on Mr. O'Keeffe three months earlier, in August, 2008. When we filed Plaintiff's Motion to Allow Expert Testimony in October, 2008, it was primarily to give Plaintiff time to obtain reports and testimony from Dr. Steck. And, as previously noted, the Circuit Judge actually granted our request to continue the trial - to February 2, 2009.

However, the difficulties of obtaining Dr. Steck's cooperation continued on, and we were never able to obtain any narrative report from him, nor allowed to consult with him. We finally took his deposition, but he even refused to cooperate in that, refusing to meet with counsel ahead of time, postponing his deposition past the time allowed by the Court for taking it, and past the time for filing his expert designation. (See discussion

of these problems in our motions and memoranda filed during that time, listed in part (a) of our summary of Proceedings Below).

Meanwhile, it became obvious that if Plaintiff was going to have a neurosurgeon at trial to rebut the testimony of the Defendant's neurosurgeon, Quindlen, it would have to be someone other than Dr. Steck. That is why, in November, 2008, Plaintiff's counsel asked Dr. Bratton to examine the Plaintiff, review Dr. Quindlen's deposition and report, and furnish a report so that he could be designated as an expert for Plaintiff. Dr. Bratton not only examined Mr. O'Keeffe, he at least partially assumed a role as a treating physician of the Mr. O'Keeffe. (T-34)

Plaintiff mailed the Clerk's office an expert designation for Dr. Bratton on November 26, 2008 (R-352) to protect Plaintiff's ability to have an expert neurosurgeon testify for him live at trial. A copy of the Bratton designation was both mailed and faxed[3] to Defendant's counsel the same day, 68 days before the new February 2, 2009 trial date. At that time, Dr. Steck was still refusing to cooperate with Plaintiff's counsel, and his deposition still had not been taken, and was not taken until January 5, 2009, more than a month later.

To summarize the foregoing, the Plaintiff's expert designation for Dr. Bratton was filed and served 68 days before the new trial date of February 2, 2009, which is when the trial actually began. Thus, the Plaintiff had, in fact, complied fully with the 60-day requirement of URCC Rule 4.04(A).

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[3] The certificate of service stated that the designation was "mailed" to Defendant's counsel; but a copy was also faxed that day, as shown by counsel's fax verification, a copy of which is attached as **Exhibit 1**.

Nevertheless, the Circuit Judge still refused to allow Dr. Bratton to testify at trial. She ruled that, because the Plaintiff had not designated Dr. Bratton 60 days before the previous trial date of December 8, 2008, he was precluded from calling Bratton at the February 2, 2009 trial.

This left the Defendant with an expert neurosurgeon, Dr. Quindlen, who testified personally at trial, and the Plaintiff with no one to contradict that testimony. This was so, even though Dr. Bratton had examined Mr. O'Keeffe (and was then his treating physician) while Dr. Quindlen testified solely based on the Plaintiff's medical records. Dr. Bratton's Expert Designation was on file with the Court and in the hands of the Defendant's attorneys 68 days before the trial.

The Circuit Court's exclusion of Dr. Bratton was therefore based, not on the "technicality" of the 60-day provision of Rule 4.04(A), but rather on what you could call "a technicality on top of a technicality." While Plaintiff had failed to file his designation of Dr. Bratton more than 60 days before the prior trial date of December 8, 2008, that trial date had been continued; yet Bratton was still excluded – not because the Plaintiff failed to designate him before the *actual* trial date, but because the Plaintiff failed to designate him before a prior trial date that had already passed!

We will discuss in the next section the fact that there was no prejudice caused to Defendant by Dr. Bratton's designation. That would have been arguably true, even if the designation had been filed within the 60 days preceding February 2, 2009; but it

was certainly and uncontestably true considering that the Bratton designation was filed before Rule 4.04(A)'s 60-day deadline.

While resulting in no prejudice to Defendant, the exclusion of Dr. Bratton worked great prejudice to the Plaintiff. If the Circuit Court was going to use a rank technicality to allow such injustice to occur, you would think the Court would at least have applied the technicality of the Rule itself – recognizing that the Bratton designation was filed *timely* under the Rule – rather than applying the Rule's technical requirement to be expanded so broadly as to exclude experts who were in fact timely designated.

This might have had some basis – though virtually impossible to justify – if there had been any substantive reason for excluding Dr. Bratton, such as prejudice to other parties. But there was no such prejudice, and no reason whatsoever for applying the Rule in such a harsh fashion other than the Circuit Judge's concentrated effort to allow technicalities to overrule substance. It was almost as if the Judge were "punishing" Plaintiff's counsel for a past oversight which no longer had any bearing on anything of any substance whatever.

(c) Prejudice issues

It is impossible to overemphasize the importance of this issue; without some prejudice to other parties, the application of a rank technicality causing real prejudice to the Plaintiff should never be justified.

There was no prejudice to Defendant in allowing Plaintiff to designate Dr. Bratton, or in allowing Dr. Bratton to testify at trial. Several factors lead to this conclusion.

First, the Defendant already had its own expert neurosurgeon – Dr. Quindlen, who was already prepared to, and did, testify personally at trial. Second, Dr. Quindlen was given a copy of Dr. Bratton's report prior to his own deposition which was taken before trial, and commented on it during his deposition. Third, Defendant's counsel was informed of Dr. Bratton well in advance of trial, and could easily have taken his deposition had the Court allowed his designation. In fact, as noted above, Dr. Steck's deposition was finally taken only 28 days before trial, and Dr. Dyess's 4 days before trial. Plaintiff's counsel cooperated in scheduling those depositions, and made it clear that he would make Dr. Bratton available at any time Defendant's counsel wished to depose or question him. They didn't do so only because the Circuit Judge refused to allow Plaintiff to use him, not because they were inconvenienced or prevented from doing so.

Finally, Dr. Bratton's opinions didn't cover any territory that the Defendant's expert, Dr. Quindlen, hadn't already covered himself, in his report and deposition. There was no "surprise" involved with Dr. Bratton's opinions, and they raised no issues that weren't already "on the table" through Dr. Quindlen.

Why, then, when there would have been no prejudice to the Defendant in allowing Bratton to testify, and great prejudice to the Plaintiff in disallowing Bratton, did the Circuit Court still insist on perversely applying Rule 4.04(A) to exclude him? The Rule itself didn't exclude him, because his designation was filed more than 60 days before trial. Even if the Court had been justified in "punishing" the Plaintiff for not designating

Bratton more than 60 days before the prior trial date of December 8, 2008, what would be the basis for applying the 60-day technicality in the first place?

The Defendant points to the wording of Rule 4.04(A), which states that "absent special circumstances" experts not timely designated will not be "allowed." Does that wording alone justify the application of a rank technicality (or, as we've said, a "technicality on top of another technicality") in the face of (a) prejudice to the Plaintiff, and (b) lack of prejudice to the Defendant? It simply does not, as is clear from a review of the Mississippi appellate cases discussed in subpart (e) below.

The Circuit Court's application of URCC Rule 4.04(A) to this case overlooks the mandate of MRCP Rule 1, which requires that the rules of procedure be applied justly and fairly.

Another factor bearing on how harshly Rule 4.04(A) should be applied, is that the Rule does not appear within the Mississippi Rules of Civil Procedure, but within the separate disorganized provisions of the "Uniform Rules of Circuit and County Court", which are mainly directed to setting procedures for criminal cases and appeals from administrative agencies.

Another factor in considering the application of Rule 4.04(A) to this case is the interpretation of the Rule's wording, "absent special circumstances." Surely, this wording is designed to cover the very situation we have in this case — a situation in which prejudice would result to one party if the technicality of the rule is blindly enforced, and no prejudice to the other party if it isn't. In this case, "special circumstances" certainly did

exist for allowing Dr. Bratton to testify – i.e., Mr. O'Keeffe's recent surgery, the refusal of the neurosurgeon, Dr. Steck, to cooperate in Plaintiff's trial preparation, the lack of any prejudice to Defendant, and the resulting prejudice to Plaintiff from a blind application of the Rule's technicality.

Another factor to consider in determining whether Rule 4.04 should have been applied as harshly and technically as it was, is the "trap" aspect of the Rule, which is discussed in the next section of this Argument.

A final factor which should be considered is the availability of sanctions less than the "nuclear" sanction of complete exclusion of Dr. Bratton from the trial, as discussed in the cases reviewed in subpart (e) below. Lesser sanctions could have included monetary penalties against Plaintiff and his counsel, payment of additional legal expenses incurred by Defendant resulting from any designation found to be "late," continuation of the trial for a couple of weeks to provide for the 60 days buffer in Rule 4.04(A). It is certainly ironic that the Circuit Court (a) did in fact continue the trial date – not to provide for the 60-days required by the Rule, but for other reasons – while at the same time prohibiting Plaintiff from designating Dr. Bratton 60 days prior to the actual trial date. The result was the opposite of what is required by the case law.

The cases discussed in subpart (e) below require that lesser sanctions at least be considered; however the Circuit Judge gave no consideration whatever to same. That alone should be a ground for finding "abuse of discretion" by the Circuit Court in

excluding Dr. Bratton for what amounts to no reason whatever, and with no consideration by that Court of any other factors that should be considered in the proper exercise of whatever "discretion" that Court may have had.

(d) Rule 4.04(A) as a "trap"

URCC Rule 4.04(A) is unknown to many Mississippi lawyers. Hidden away in the "Uniform Rules of Circuit and County Court", which are themselves poorly organized, and divorced from what all practitioners routinely rely on – the Mississippi Rules of Civil Procedure – it is no wonder that Rule 4.04(A) is often overlooked. These days Scheduling Orders are customarily used, making it even more unlikely that there would be occasion for lawyers to encounter any reference to the Rule. The first sentence of the Rule, which limits discovery to 90 days, is generally disregarded; it certainly has had no application known to undersigned counsel, who has practiced in this area for more than 30 years, in the Circuit Court district encompassing Hancock County and the two districts of Harrison County.

Undersigned counsel, after being told of the Rule by opposing counsel after it was too late to comply with the Rule's 60-day limitation prior to the earlier trial date of December 8, 2008, spoke with other attorneys about this. Some told us that they had "caught" several opponents who weren't aware of the Rule and used that to great advantage.

The Defendant's attorneys did in fact attempt to use Rule 4.04(A) as a trap in this very case. This occurred prior to the first trial setting of December 3, 2007. Plaintiff's counsel had

sent to Defendant, in response to discovery, one expert report, that of an engineer, regarding the liability issues involved with the hazardous shower conditions, but (not knowing then about Rule 4.04(A)) had never filed an expert designation of that expert or any others. The parties engaged in a mediation on October 2, 2007, 62 days before the December 3, 2007 trial date. Prior to the mediation – and as of 62 days before trial – the Defendants had disclosed no expert reports, had filed no expert designations, and in discovery responses had not even indicated that they had retained any experts for trial.

During the mediation, defense counsel for the first time disclosed, through the mediator, that they had an expert engineer who had inspected the shower stall in question and found it to be safe. Plaintiff asked to see the engineer's report, but the Defendant's attorneys refused to produce it during the mediation. It also appeared that, since the accident in suit, the Defendant's hotel had been sold to another Casino which was completely renovating the hotel, and had probably already removed or destroyed the shower stall. (R-67)

Plaintiff's counsel, upon learning of this surprise expert witness and wanting to (a) obtain his report, (b) find out if the shower stall was still available for inspection, and (c) have his own engineer re-inspect it if possible, withdrew from the mediation and filed a motion to continue the trial. (R-239)

Meanwhile, on Thursday, October 4, 2007, 2 days after the mediation – on the 60th day prior to trial – the Defendant's attorneys *mailed* to Plaintiff's counsel a comprehensive "Expert

Designation" (R-209) revealing two experts, the engineer they had mentioned during mediation (to comment on liability issues) and a neurosurgeon, Dr. Quindlen (to discuss medical and damage issues). The Defendant's Expert Designation was mailed, not faxed or emailed, and was received by Plaintiff's counsel on Monday, October 8, 2007, 56 days prior to the then pending trial date of December 3, 2007. Under MRCP Rule 5(b)(1), service of pleadings is "complete upon mailing", making the Defendant's Expert Designation "timely" under Rule 4.04(A), and leaving the Plaintiff no time under the Rule to submit expert designations to rebut those of the Defendant.[4]

An interesting aspect of the foregoing is that two further indicators of the Defendant's "trap" strategy appeared in the Defendant's designation of its engineer expert, Fred Vanderbrook: (1) Vanderbrook's report stated that his inspection had been conducted 17 months prior to the date of the report, and (2) the report itself was dated October 3, 2009, one day prior to the date of the Defendant's Expert Designation.

At that time, undersigned counsel did not realize the significance of the fact that the Defendant had couched its expert disclosures in the form of an "Expert Designation", nor did we realize the significance of the fact that the Defendants had waited until the very last day allowed by Rule 4.04(A) to mail it. All we knew at that time was that we needed a

[4] See ***Banks v. Hill***, 978 So.2d 663 (Miss. 2008), discussed in subpart (e) below, requiring all experts, including those to be used in rebuttal, to be designated prior to the same 60-day time limit.

continuance of the trial to find out if the shower was still available, and if possible to have our own engineer inspect it.

The trial was in fact continued, and undersigned counsel then spent several months trying to obtain permission of the hotel's new owner (Harrah's Casino) to enter the premises, which was at that point under heavy construction, to see if the shower was still there, and if so to inspect it in the light of the Defendant's expert engineer's report which had by then been received. Eventually, by filing a separate petition in Chancery Court requesting entry on the hotel premises (**Exhibit A**, attached), we were able to enter the hotel, accompanied by one of Harrah's construction workers, found the shower was still there, and got it re-inspected. Because of the sequence of these events, no issue or dispute ever arose at that time regarding Rule 4.04(A), and Plaintiff's counsel remained unaware of it.

With the hindsight we've acquired along with knowledge of Rule 4.04(A)'s 60-day provision, it now seems obvious that the Defendant fully intended to use Rule 4.04(A) as a trap in this very case, and almost succeeded. The Defendant's attorneys got an expert engineer to inspect the shower stall before the Defendant sold the hotel to Harrah's, had him delay writing his report until just before Rule 4.04(A)'s 60-day cutoff period, and mailed the report (along with Dr. Quindlen's report) in such a way that the Plaintiff would not receive the reports until after the 60-day deadline – making it impossible for Plaintiff, under a strict application of Rule 4.04(A), to counter the Defendant's expert

reports with any of his own.[5] The strategy would have worked, except for the fact that the December, 2007 trial date was continued to give Plaintiff time to reinspect the hotel premises.

An overly strict application of the technicalities of Rule 4.04(A)'s 60-day provision – as opposed to a more realistic approach of considering the substantive aspects, the existence or lack of prejudice on one side or the other, and the possibility of lesser sanctions – invites this kind of "trap" strategy, and violates the letter and spirit of MRCP Rule 1.

(e) Rule 4.04(A) case law

URCC Rule 4.04(A) was adopted 15 years ago, becoming effective May 1, 1995. (See ***Brennan***, *infra*, at ¶7) From the first, the Rule was not applied as strictly as the Circuit Court's decision in this case might imply.

The first case we have found to mention the Rule following its adoption in 1995 is ***Brennan v. Webb***, 729 So.2d 244 (Miss. App. 1998). There the Plaintiffs did not designate their insurance expert until *one week* prior to trial. *Ibid.* at ¶5. The Court did not apply Rule 4.04(A) rigidly by automatically excluding the Plaintiff's expert, but rather held that a violation of the Rule would call into play a consideration of appropriate "sanctions." The Court held (based on its review of possible sanctions, including the "nuclear" sanction of excluding the expert from testifying) that, despite the extremely late

[5] Under the Supreme Court's opinion in ***Banks v. Hill***, 978 So.2d 663 (Miss. 2008), it is irrelevant whether the expert is to be called in a party's case "in chief", or on rebuttal. All experts, including those to be used in rebuttal, must now be designated 60 days prior to trial, under a technical application of URCC Rule 4.04(A).

designation of Plaintiff's expert, the Circuit Judge abused his discretion in excluding the expert, saying:

> "The decision to sanction a party for discovery violations rests with the discretion of the trial court. . . . We will not reverse on this issue absent an abuse of that discretion. While we are dealing with a particularly strict standard of review, we rule that there was an abuse of discretion here. The decision to exclude the Brennans' expert effectively prohibited them from recovering any damages in the event that they were successful on the merits of their case, and in our opinion, the absence of a damages instruction may have confused the jury and led its members to return a defendant's verdict. . . . [T]he Brennans were unduly prejudiced when [Plaintiffs' expert] Moler's testimony was totally excluded. We agree with the supreme court's decision in ***McCollum v Franklin*** that exclusion of a witness for a discovery violation is a sanction of last resort. ***McCollum, 608 So. 2d at 694.*** In this case, either a continuance or allowing Webb time to interview [Plaintiff's expert] Moler would have been more appropriate. We hold that there were special circumstances in this case and that the trial court abused its discretion in excluding Moler as an expert witness for the Brennans." *Ibid.* at ¶11 (emphasis added)

In addition to the importance of considering lesser sanctions, the above quotation also hints at the importance of considering prejudice, or lack thereof, to the opposing party, when the Court said "either a continuance or allowing [Defendant] time to interview [Plaintiffs' expert] would have been more appropriate."

In ***Thompson v. Patino***, 784 So.2d 220 (Miss. 2001), the Supreme Court held that the striking of an expert designation was "too harsh a sanction for a discovery violation." Cf. ***Bowie v. Montfort Jones Memorial Hospital***, 861 So.2d 1037 (Miss. 2003) at ¶12, which refers to the ***Thompson*** ruling.

In ***International Paper Co. v. Townsend***, 961 So.2d 741 (Miss. App. 2007), the Court approved a trial continuance as the proper remedy for the untimely designation of an expert. "Prejudice" for or against the parties was seen as an critical factor.

Our review of the cases involving Rule 4.04(A)'s expert designation provision has disclosed no case in which the "death

penalty" or "nuclear sanction" of exclusion of the expert was approved except in the most egregious situations, and where there was prejudice to the opposing party.

An example of an extreme situation, in which Rule 4.04 was strictly applied, is ***Miss. Dept. of Wildlife, Fisheries and Parks v. Brannon***, 943 So.2d 53 (2006). There the Court excluded an expert who was never listed or disclosed as such prior to trial. You can't argue with that result, but it represents a proper sanction only for the extreme situation involved in that case, which certainly isn't close to being present in the case at bar.[6]

In ***City of Jackson v. Perry***, 764 So.2d 373 (Miss. 2000) – referred to in the preceding footnote – the Supreme Court did not rigidly apply Rule 4.04(A), even where a party's experts had not been designated at all prior to trial. In its ruling, the Court said (similar to the Court of Appeals' discussion in ***Brennan***, *supra*) that URCC Rule 4.04(A) should be interpreted and applied in conjunction with the discovery provisions of the main rules of procedure contained in the Mississippi Rules of Civil Procedure:

> "The City's reliance on Rule 4.04A is misplaced. Rule R.04A does not stand alone. In order for there to be a violation of a discovery request, there must first be a discovery request. Here, neither party made a discovery request pursuant to Rule 26(b)(4) of the Mississippi Rules of Civil Procedure." *Ibid.* at ¶52 (emphasis added)

Applying URCC Rule 4.04(A) compatibly with the Mississippi Rules of Civil Procedure, as the Court required in ***Perry***, entails several things. First, it requires that MRCP Rule 1's command

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[6] One passage in ***Brannon*** should be noted as misleading. The Court's statement that In ***City of Jackson v. Perry***, the Supreme Court held "absent special circumstances, the court will not allow expert testimony at trial of an expert witness who was not designated . . . at least 60 days before trial" was incorrect. The ***Perry*** case, discussed below, did not "hold" that, but was only

that the rules be interpreted and applied with justice in mind be honored. Second, it requires that considerations of prejudice (pro and con) be considered. Third, it implies that lesser sanctions must be considered before applying the "death penalty" of completely excluding the expert from testifying. If such matters are given any consideration in the case at bar, the harsh application of Rule 4.04(A) to the Plaintiff in this case by the Circuit Court – by excluding an expert designated more than 60 days before trial because he wasn't designated 60 days before a previous trial date, where absolutely no prejudice to the Defendant was involved, and where great prejudice to the Plaintiff himself *was* – must be reversed.

One category of cases involving exclusion of undesignated experts is that in which scheduling orders have been entered prior to trial. One such case is ***Banks v. Hill***, 978 So.2d 663 (Miss. 2008), mentioned above, in which the Court held that designation of experts must include, not just a party's witnesses in chief, but also his rebuttal witnesses.

An important aspect of cases such as ***Banks***, involving scheduling order deadlines, is that they don't involve Rule 4.04(A) at all. Once a scheduling order is issued, the schedule replaces Rule 4.04(A)'s arbitrary deadline. Such a scheduling order, by its very existence, means that its expert designation deadlines haven't been overlooked by either party, since all the parties have participated with the Court in setting them.

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quoting that language from Rule 4.04(A). In fact, in ***Perry*** the court excused a party's utter failure to designate his experts prior to trial.

Another special category of cases involving undesignated, or untimely designated, experts is that involving motions for summary judgment. These involve situations in which the Plaintiff has failed to timely designate his or her experts – either under a scheduling order specifically setting the deadline, or under Rule 4.04(A)'s 60-day provision – and then the Defendant files a Motion for Summary Judgment which is heard before trial. There are four cases falling into this category.

The facts in ***Bowie v. Montfort Jones Memorial Hospital***, 861 So.2d 1037 (Miss. 2003) give an indication of how egregious the untimely designation may need to be in order to call down the "nuclear" sanction of exclusion of the expert. There, a scheduling order provided that Plaintiff designate experts by December 31, 2000. Defendant filed a Motion for Summary Judgment in January, 2001, which was heard on February 28, 2001. The Plaintiff did not file his expert designation until the very date of the hearing; the Plaintiff's designation was in the form of an affidavit from his expert. *Ibid.* at ¶11-15. The Court excluded the affidavit, while strongly implying that it was called for only by the egregious delays in that case.

The situation in ***Bowie*** was, like that in ***Brannon*** discussed above, an egregious violation by Plaintiff of the duty to designate experts. There can be little argument that the failure to designate, not just on time, but on the very date of the trial or hearing involved, would have to result in exclusion of the expert for purposes of that hearing or trial, simply because of the obvious prejudice to the opposing side.

Two aspects should be noted regarding ***Bowie*** and the other cases involving Rule 4.04(A) where motions for summary judgment are involved. First, where a motion for summary judgment is involved, it is not enough to "designate" an expert (where the expert is needed to defeat the motion). The proper response is the filing of a sworn affidavit, at the very latest on the day before the hearing. In ***Bowie***, it was not just the egregious nature of the untimeliness of the Plaintiff's expert designation, but rather his failure to file the sworn affidavit on time rebutting the Defendant's motion, which resulted in the exclusion of the expert from consideration at the summary judgment hearing.

A second aspect of this category of decisions is the fact that all four of them were medical malpractice actions, in which there is a special, specific, requirement that the Plaintiff's claim be supported by a medical expert report. The failure to have an affidavit from such an expert prior to the summary judgment hearing must be fatal in such a case. The case at bar, which is not a medical practice action and does not share this aspect of ***Bowie*** and the other cases just mentioned, removes the major reason for the Courts' stricter application of the rules for expert designations in such cases.

Scales v. Lackey Memorial Hospital, 988 So.2d 426 (Miss. App. 2008), and ***Johnson v. Lee***, 17 So.3d 1140 (Miss. App. 2009), like ***Bowie***, were medical practice actions, in which summary judgment was granted because the Plaintiff had not just failed to timely "designate" experts, but failed to produce a sworn medical expert affidavit that would defeat the motion.

Estate of Deiorio v. Pensacola Health Trust, Inc., 990 So.2d 804 (Miss. App. 2008), another medical malpractice case, is similar to the three discussed above. The Plaintiff's experts were retained in 2003 or 2004. *Ibid.* at ¶7. Trial was set for January 22, 2007. Despite having retained the experts 4 years previously, Plaintiff didn't designate them until December 11, 2006, 42 days before trial. Defendant then filed a Motion for Summary Judgment which was heard on January 12, 2007. Plaintiff counsel's excuse for the untimely designation was that "it was Christmas and he had other concerns at the time." *Ibid.* at ¶7.

The Circuit Court granted summary Judgment for two reasons, one being the untimely expert designation, the other being that the Plaintiff's medical expert's affidavit was insufficient to establish a medical malpractice claim to defeat the motion. *Ibid.*

An interesting aspect of ***Deiorio*** is that the Circuit Judge in ***Deiorio*** was the same one who excluded Plaintiff's expert, Dr. Bratton, in this case. This particular judge appears to have adopted the strictest possible interpretation and application of URCC Rule 4.04(A), beyond anything that can be found in the other cases discussed in this Brief. Her ruling in ***Deiorio***, with respect to the Rule 4.04(A) issue, failed to consider issues of prejudice to or against either of the parties and lesser sanctions (as required by the cases discussed above).

The feature of ***Deiorio*** which makes the foregoing considerations somewhat beside the point is that the Court's first reason for summary judgment and its discussion of Rule 4.04(A) were really *dicta*, unnecessary to the final decision,

since the Court's second, substantive, reason for summary judgment was that Plaintiff failed to respond to the Defendant's Motion by filing an adequate affidavit from his medical expert. *Ibid.* at ¶9. In a medical malpractice case, that is fatal.

(f) Summary

Circuit Courts have "discretion" with respect to discovery deadlines. But that discretion can't be exercised in a vacuum. There is an abuse of discretion when the Court does not consider the important substantive factors bearing on its decision.

In this case, the Circuit Judge applied, in the strictest possible sense, the bare technicality of Rule 4.04(A)'s 60-day provision, without considering the issue of prejudice to the parties involved, or lack thereof, and without considering any lesser sanctions other than the "nuclear" sanction of excluding the Plaintiff's expert entirely. By blindly applying a "super technicality", based not upon an actual violation of the Rule, but applying it retroactively, as "punishment" for an earlier omission, the Court violated the principles discussed in the Mississippi appellate decisions discussed in subpart (e) above.

2. Exclusion of Dr. Bratton's report

Preventing Dr. Bratton from testifying as an expert for Plaintiff was a serious error, as discussed in part 1 of our Argument above. The Court multiplied that error by committing another in connection with Dr. Bratton – refusing to allow Plaintiff's family physician, Dr. Dyess, to mention Dr. Bratton and his report during his own testimony. (T-341, T-359, E-10)

That issue was a completely separate one, not involving URCC Rule 4.4(A), but rather MRE Rule 703.

Dr. Dyess was not a neurosurgeon or other back specialist. He reviewed Dr. Bratton's report of Bratton's examination of and opinions regarding Mr. O'Keeffe, and also conferred with Dr. Bratton about O'Keeffe prior to giving testimony in this case.

Although Dr. Bratton was prevented from testifying by the trial Court, Dr. Dyess was not; his testimony was taken by deposition prior to trial and was intended to be read to the jury at trial. Dr. Bratton's report is one of the materials Dr. Dyess relied on in giving his own opinions regarding the Plaintiff's condition. This was permitted by MRE Rule 703, which states:

> **Rule 703. Bases of Opinion Testimony by Experts.** The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion . . . to be admitted. . . ."

MRE Rule 703 allows one physician to rely on the opinion of another physician in forming his own opinion, even though the second physician's opinion is inadmissible in evidence. Thus, in ***Alexander v. State***, 759 So.2d 411 (Miss. 2000), the Court said:

> "Alexander . . . contends that the trial court erred in allowing Dr. Hayne to testify using Dr. Ward's autopsy report. Alexander claims that the autopsy report is hearsay for which no exception exists and that Dr. Hayne should not have been allowed to use the report to form his own medical opinion. This contention is without merit. Rule 703 of the Mississippi Rules of Evidence states:
>
> > 'The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.'
>
> Furthermore, the Comment to Rule 703 expressly states that an expert witness may use data that is presented to the expert

'outside of court and other than by his personal observation.'" ***Ibid.*** at ¶29-¶30.

In this case the probative value of Bratton's report, and the assistance it would give the jury in evaluating Dr. Dyess's testimony, outweighed any potential prejudicial effect from the disclosure of the Bratton report during Dyess's testimony.

Dr. Dyess is not a neurosurgeon, orthopedic surgeon, or other back specialist. He should have been allowed to base his opinions on those of Dr. Bratton and Dr. Bratton's report. Moreover, the jury should have been allowed to know that Dr. Dyess had the input of a neurosurgeon such as Dr. Bratton, in forming his own opinions. Without that information, the jury could easily have – and obviously did in this case – undervalue the weight of Dr. Dyess' testimony. Even if the trial Court had been correct in refusing to allow Dr. Bratton to testify, Dr. Dyess should have been allowed, under MRE Rule 703, to give his own testimony, and use and refer to Dr. Bratton's report, unaffected by the Court's ruling under URCC Rule 4.4(A).

Moreover, there would have been no prejudicial effect in allowing the jury to know the substance of Dr. Bratton's opinions as relied on by Dr. Dyess, for the same reasons that there would have been no prejudice in allowing Bratton himself to testify at trial. The Defendant already had the assistance of its own chosen neurosurgeon, Dr. Quindlen, who testified in person at trial.

3. "Harmful" Error

If this Court takes cognizance of our arguments above, demonstrating that the Circuit Court erred either (1) in excluding Dr. Bratton as an expert for Plaintiff, and/or (2) in

excluding Dr. Bratton's report from Dr. Dyess' deposition, then the next question to be answered in this appeal is whether one or both of those errors was "harmless" in view of the fact that the jury's verdict was against the Plaintiff in any event.

In response to Plaintiff's two Motions for New Trial (R-1299, 1317), the Defendant argued that since the errors involved issues of damages, they became "harmless" once the jury's verdict was returned against the Plaintiff on what the Defendant (incorrectly) referred to as "liability". (R-1322) The Defendant's argument was not, and is not, well placed. The exclusion of Dr. Bratton and his report were not "harmless." There is every reason to believe that the errors excluding his testimony and report, prejudicial as they were, not only influenced the jury's verdict but directly caused it.

(a) The errors influenced the jury's verdict

This was not a case where the Plaintiff's injuries were freely admitted by the Defendant and the only issues were "liability" and "quantum". The Defendant, and its neurosurgeon expert Dr. Quindlen, claimed that the Plaintiff had suffered little or no injury in the subject accident.

Dr. Quindlen, while denying 90% of the Plaintiff's alleged injuries, did at times admit that one of the Plaintiff's alleged injuries -- a ruptured disc at L2-3 -- was "related" to the accident, but said it was not "caused" by it. (T-537). Moreover, at other times he contradicted that, saying he found no ruptured discs (T-522), or minimized it in relation to the majority of the

Plaintiff's complaints which he said were completely unrelated to the accident. For example, he testified

- he disagreed with the medical records which described four ruptured discs following the accident (T-521-523, 547-553),
- that stenosis in O'Keeffe's spine found after the accident was unrelated to it (T-528),
- that the spondylosis in O'Keeffe's spine was unrelated (T-528),
- that the osteophytes in Plaintiff's spine were unrelated (T-528),
- that the disc at L-3-4 was not herniated (T-523),
- that the surgery performed by Dr. Steck (at L4-5) was unrelated to the accident (T-557-558)
- that almost all of Plaintiff's complaints, including the L2-3 disk herniation, were due to "degenerative disk disease" unrelated to the accident (T-517-520)

This testimony impugned Mr. O'Keeffe's testimony to the effect that he was doing well for months prior to the accident and that all of his complaints arose at the time of the accident. (T-257, 265, 291, 296)

Dr. Bratton's report contradicted Dr. Quindlen, showing that the Plaintiff sustained two ruptured lumbar discs which were caused by the accident, and Bratton was prepared to testify to the pain and disability resulting from same, and the stenosis, spondylosis, and disk degeneration resulting from the accident itself and the surgeries O'Keeffe needed because of the accident.

The Circuit Judge did not allow the jury to hear Dr. Bratton, or even learn of his findings and report. The only neurosurgeon to testify fully, or to testify in the jury's presence, was Dr. Quindlen.

Defense counsel, supported by the Court's complete exclusion of Dr. Bratton, took advantage of that in their closing argument, pointing out that Dr. Quindlen was the only physician to testify

at trial (T-729), and that Mr. O'Keeffe was simply not injured in the accident and that all of his damages were "pre-existing conditions unrelated to this accident." (T-730)

After the trial, the Plaintiff obtained the affidavit of one of the jurors, who stated under oath that the jury's verdict was predominantly based on the fact that they were greatly impressed with Dr. Quindlen and his testimony to the effect that the Plaintiff was not injured in the accident. (R-1337, E-14)

The Circuit Judge rejected the juror's affidavit, ruling that such affidavits of jurors obtained after trial are inadmissible. We cannot seriously contest the Judge's ruling on that point, as the case law clearly supports it. However, the juror's statement is little more than a recognition of what is already obvious anyway, and the obvious could and should have been recognized by the Circuit Judge.

Corpus Juris Secumdum, in §966 of the topic Appeal and Error, states with respect to "harmless error" in general:

> "An error is not harmless, and is a ground for reversal, only if a different result might have been reached in the absence of the error, or probably would have been reached, or with reasonable certainty might have been reached, or there is a reasonable likelihood that the result would have been different without the error, or the court is in doubt as to whether the same result would have been reached in the absence of the error, or the error was likely to affect the result, or is reasonably calculated to, and probably did, cause the rendition of an improper judgment, or is of such magnitude as to leave no doubt that the appellant was unduly prejudiced." 5 C.J.S. Appeal and Error §966, pp. 334-335.

The quoted statement simply expresses, in a variety of ways, as discussed by a variety of courts, the general rule that an error is not "harmless" if it is *likely to have affected* or *influenced* the jury's verdict.

In this case, the jury's verdict was against the Plaintiff. What is important in determining whether exclusion of Dr. Bratton and his report was "harmless" is asking whether such exclusion was likely to have affected or influenced that adverse verdict. That inquiry is not satisfied, and would not be satisfied, simply by reviewing the verdict itself – even if the jury's verdict had been one of no liability on the Defendant's part at all.[7] To decide whether Bratton's exclusion affected the verdict you must look at the totality of the circumstances involved.

Applying these principles means recognizing that the jury's verdict was indeed influenced greatly by the errors of the Circuit Court in excluding Dr. Bratton and his report. This is actually pretty obvious, when you think about it.

When damage issues are seriously contested, a jury verdict of "no liability" may be virtually the same as a verdict of "no damages".

It is easy to see that the jury in this case, highly impressed with Dr. Quindlen and his testimony – unrebutted by any of Dr. Bratton's excluded testimony – would enter the jury room to begin deliberations and almost immediately conclude that the Plaintiff suffered no damages, and that they should therefore simply and quickly return a verdict against the Plaintiff – such as "no liability" or some other version thereof.

[7] As discussed in the second subpart below, the jury's verdict was really not one of "no liability" despite the Defendant's claim to the contrary; but, even if it had been, it would still be necessary to ask whether that verdict may have been affected or "influenced" by the errors in excluding Plaintiff's witness on damages.

It stretches the imagination to believe that the jury, immediately finding little or no damages, would sit down carefully and precisely to discuss the liability issues in the case. It is much more likely that the jury, finding "no damages, and therefore no liability for any damages," would not discuss liability issues at all, check "no liability" on the verdict form (if such an option *were* on the verdict form), and be finished. It strains credulity to think that they would, after concluding there were no damages worthy of an award, continue to sit and debate liability issues, possibly for hours, and then dutifully check "liability, yes", and "damages, no."

Once the decision of "no damages" was made — and it was made very quickly (T-740,741) — there is every reason to believe that the jury verdict represented that finding, and was thus heavily influenced by the Circuit Judge's erroneous exclusion of Dr. Bratton and his report.

The foregoing may only be common sense, but that common sense has been expressly recognized as such by the Mississippi Supreme Court in ***Harris v. General Host Corp.***, 503 So.2d 795 (Miss. 1986). In that case, the defendant failed to disclose the name of its medical expert on damages prior to trial. *Ibid.* Part I. But the Circuit Court allowed Dr. Allen, the Defendant's expert, to testify anyway, and he testified that he had examined the Plaintiff after the accident and was "unable to find much wrong" with him. *Ibid.*, Part II. The jury returned a verdict of no liability, and Plaintiff appealed. Justice Robertson, writing

for the majority, reversed the jury verdict, and remanded the case for trial, saying:

> "Ordinarily, we would not consider reversal by reason of an error regarding a damages witness in the face of a jury verdict for defendant on liability. In the case at bar, however, the defense strongly urged that Harris simply wasn't injured, and indeed, Dr. Allen's testimony was offered to support that defense view. In the present context, the jury's verdict may as easily have represented a conclusion on the part of the jurors that Harris was not damaged as well as that General Host was without liability." Ibid., Part II, n. 1. (emphasis added)

Also see the ***Brennan*** case, discussed in part 1(e) of our Argument above, in which the Court reversed a jury verdict of no liability because the lower Court, relying on URCC Rule 4.04(A), had excluded the Plaintiff's damages expert due to his untimely designation. Part of the Court's comment in ***Brennan*** quoted previously, stated:

> "The decision to exclude the Brennans' expert effectively prohibited them from recovering any damages in the event that they were successful on the merits of their case, and in our opinion, the absence of a damages instruction may have confused the jury and led its members to return a defendant's verdict. See Jury Instruction P-3 which stated that if the Brennans failed to prove any essential element of their claim by a preponderance of the evidence, the jury 'should find for the defendant.'"

What the Courts said in ***Harris*** and ***Brennan*** is true here. The jury was instructed in the same manner as in ***Brennan***, and the jury verdict in this case was "influenced" or "affected" by the error in excluding the Plaintiff's damages expert.

Another reason to conclude that the exclusion of Dr. Bratton "influenced" the jury's verdict is that it must also have had the effect of destroying the Plaintiff's credibility, and once that credibility was destroyed, it had to affect liability issues as well as damage issues.

In ***Kucza v. Stone***, 230 A.2d 559 (Conn. 1967), the Court reversed a jury verdict of no liability based on an error

regarding damages for that very reason. In that case, as in this one, the only witness to the accident in suit was the plaintiff himself. The Plaintiff in this case, Mr. O'Keeffe, testified to devastating damages, numerous and serious low back injuries, and pain and suffering over a period of many years, all resulting from the accident. Dr. Quindlen's testimony, unrebutted by that of Dr. Bratton, was that the Plaintiff had actually suffered almost no injury that was caused by the accident. Such testimony was a direct attack, not only on Plaintiff's claim of damages, but on Plaintiff's credibility in general. It undermined, at one and the same time, O'Keeffe's testimony regarding his injuries (the "damage" issue) as well as his testimony regarding the accident (the "liability" issue).

Again, even had the verdict form isolated the "liability issue" (without merging the damages issue with it, as discussed below), a clear verdict of "no liability" or "no negligence" would still have been influenced by Dr. Quindlen's testimony to the effect of "little or no injury" by forcing the jury to conclude that all of the Plaintiff's testimony – regarding liability, as well as damages – lacked credibility. Thus, the prejudicial effect of the wrongful exclusion of Dr. Bratton was multiplied, affecting both aspects of the jury's decision.

(b) The errors caused the jury's verdict

The Circuit Court's errors regarding Dr. Bratton did more than just "influence" the jury verdict, they actually caused it. This is so for the simple reason that the verdict form asked the jury for a decision on damages, not just liability. Thus, the

jury's verdict could well have been, not "no liability", but rather "no damages."

The "special verdict" form which the Defendant requested as part of its requested Instruction No. 23 (R-1294) and which the Circuit Court gave the jury (R-1295) to use in deciding its verdict (contained in and forming part of Jury Instruction No. 23) asked the jury to answer the following question:

> "Do you find from a preponderance of the evidence in this case that the Defendant was negligent and that its negligence, if any, was either the sole proximate cause, or a contributing cause of damages, if any, of the Plaintiff? ____ YES _____ NO"

The jury checked NO to this and returned that as its verdict. (R-1294, E-13, E-15)

However, note how the question in the verdict form ties damages to liability in such a way as to make them inseparably one and the same issue. If the jury found "no damages", then they had to answer the above question "No" – even if they found the Defendant negligent! The jury's "No" was, or could have been, in effect, "Defendant's negligence caused no damages to Plaintiff."

Thus, the verdict form itself conclusively shows – even apart from the "obvious conclusion" of Justice Robertson discussed above – that the Court's errors regarding damages prejudiced the jury and not only "influenced" it to return a defense verdict, but may have directly caused that verdict.

In this connection, see ***Gormley v. GTE Products Corp.***, 587 So.2d 455 (Fla. 1991) in which a similar verdict form resulted in reversing a jury verdict of "no liability for any damages" due to a trial court error regarding damages.

(c) Summary

The errors of the Court below in excluding Dr. Bratton and his report were serious and prejudicial to the Plaintiff. They not just "influenced" but actually caused, the jury's verdict of "no liability for any damages to Plaintiff."

But even if the jury verdict form had isolated the liability issue, and the verdict had been one simply of "no negligence", it was still affected by the errors related to damages, as discussed by Justice Robertson in the ***Harris*** opinion, and by the Connecticut Court's opinion in the ***Kucza*** case.

4. Jury instruction No. 6

The jury charges to be discussed in this part of our Argument are marked in the Appeal Record as "No. 6" (R-1215, E-11) and "No. 8" (R-1217, E-12). Instruction No. 6 incorrectly instructed the jury to, in effect, disregard the comparative negligence rule, and apply the old "open and obvious" rule which was discarded by the Supreme Court several years ago.

(a) Jury Instructions 6 and 8

Jury Instruction No. 8 was a modification of a charge requested by the Defendant which was originally identified as D-6 then D-6B, and then C-10 after being redrafted by the Circuit Judge, and finally identified as "Jury Instruction No. 8" when it was granted. It correctly stated that the jury's verdict should be for the Plaintiff if the jury found (among other things) that "the condition of the shower in room 1616 constituted a dangerous or hazardous condition of the property." (R-1217)

The instruction stated in pertinent part that

> "if [Plaintiff] has failed to show [that] (3) The condition of the shower in Room 1616 constituted a dangerous or hazardous condition on this property . . . then your verdict should be for the Defendant . . . ." (emphasis added)

That instruction was sufficient to properly instruct the jury regarding the liability issues in this case. However, the Court also granted Defendant's requested instruction 7A (identified as Jury Instruction No. 6 when it was granted) which falsely defined "hazardous condition" as follows:

> "As used in these instructions, a 'danger' or 'hazardous' condition is defined as a condition which is likely to cause injury to a person who is exercising reasonable care for his own safety." (emphasis added)

The instruction further stated:

> "Therefore, if you find . . . that there was no condition present which was reasonably likely to cause injury to a patron who was exercising reasonable care for his own safety, then there was no 'danger' or 'hazard' and the Plaintiff may not recover from the Defendant." (R-1215)

(b) The problem with Instruction No. 6

The above quoted wording had the effect of (1) eliminating *ab initio*, the comparative negligence rule, and (2) wrongfully applying the old "open and obvious" rule, preventing the Plaintiff from recovery if he was not "exercising reasonable care for his own safety."

The jury returned a verdict holding the Defendant was not liable for any damages to Plaintiff. That verdict at the very least could have been based on a jury finding, under Instruction No. 6, that the shower conditions Plaintiff complained of were "not likely to cause injury to one exercising reasonable care for his own safety" — or, in other words, that the conditions were not "hazardous" as defined by the Instruction.

Instruction No. 6, by purporting to define the terms "danger" or "hazard" in Instruction No. 8, changed the meaning of "danger" and "hazard" as used in Instruction No. 8. Thus, the jury could not find for the Plaintiff under Instruction No. 8 unless it found that the danger complained of met the definition in Instruction No. 6, was "likely to cause danger to one exercising reasonable care for his own safety."

In short, under jury instructions 6 and 8, if the jury found that the Plaintiff was not exercising reasonable care – in other words, that the Plaintiff was contributorily negligent – the jury could not find the Defendant negligent for any "hazard" in the first place. But under our comparative negligence rule the Plaintiff was not legally required to show he was free from negligence himself in order to hold the Defendant negligent. Thus, Instruction No. 6 was improper and contrary to law.

Instruction No. 8 appeared to be drawn from Mississippi Model Jury Instruction 16:09. However, the model instruction only uses the word "danger" which requires no definition. Instead of sticking to the wording of the model instruction, the Court incorporated some of the wording from the Defendant's requested definition of "danger or hazardous condition". If the Court had simply used Model Jury Instruction 16:09 as worded, no definition would have been necessary. Moreover, even with the added wording, no definition was necessary. All the "definition" in Instruction No. 6 did in this case was drag back into play the improper wording "likely to cause injury to one exercising due care."

The definition of "danger or hazardous condition" contained in Jury Instruction No. 6 is simply wrong *ab initio*. A condition is "dangerous" or "hazardous" if it is likely to cause injury to someone – whether that person is "exercising reasonable care for his own safety" or not.

The issue for the jury is to determine whether the Defendant was negligent in creating or allowing a "hazardous" condition on its premises. If the Defendant was negligent in maintaining it then the Plaintiff may recover for injury caused by the hazard, even where the Plaintiff himself may have been negligent in NOT exercising reasonable care for his own safety, or overlooking the hazard even if it was "open and obvious".

(c) The comparative negligence rule

Under our "comparative negligence" rule (as modified by the apportionment statute, Miss. Code §85-5-7), where both Plaintiff and Defendant are at fault, Plaintiff's recovery is not eliminated, but only reduced by the percentage of his fault in comparison with the fault of others contributing to the accident.

Instruction No. 6 had the effect of canceling out, *ab initio*, the comparative negligence rule. By defining a "hazard" as one which would exist only if the Plaintiff were "exercising reasonable care for his own safety," the court in effect told the jury that it could not find the Defendant at fault for the "hazard" unless the Plaintiff was not negligent himself.

It is true that the Court's instructions also included Instruction No. 11 requested by Defendant on "comparative

negligence" (R-1274). But that didn't solve the problem with Instruction 6 for two reasons.

First, the jury's first task was to determine whether or not there was an unreasonable "hazard". They wouldn't even get to a discussion of "comparative negligence" if they found there was no "hazard" to begin with. But since the Court defined "hazard" to exist only where the Plaintiff was "exercising reasonable care", they could have stopped their deliberations if they found the Plaintiff was not "exercising reasonable care" – that there was therefore no "hazard" to begin with – and might never have reached a consideration of comparative negligence at all.[8] This is why we used the term *"ab initio"* above – the effect of erroneous Instruction No. 6 would have been felt at the very beginning of any consideration of "liability,", and thus could have completely bypassed any alleged "correction" incorporated in a subsequent instruction.

Second, (again assuming that the jury reached liability issues rather than stopping when finding "no damages") even if the jury had fully comprehended the instruction on "hazard" and the one on "comparative negligence", this would only have confused the jury with two contradictory instructions, a situation which is, by itself, grounds for reversal and a new trial. See ***Sandefer v. State***, 952 So.2d 281 (Miss. App. 2007):

> "Ultimately, the court's reason for reversing and remanding the conviction was due to the conflicting and irreconcilable jury instruction on the issue of Holderfield's consent to enter the building, rendering it impossible for the court to

[8] All this assumes that the jury even reached the liability issues in the case, rather than ending their deliberations when they found "no damages", as discussed in Part 3 of our Argument.

> determine whether the jury based its verdict on the proper jury instruction." *Ibid.* at n. 8

In ***Fisher v. Deer***, 942 So.2d 217 (Miss. App. 2006), the Court reversed a jury verdict for defendant because of conflicting jury instructions, with the following statement:[9]

> "because of the conflicting jury instructions, we cannot tell whether the jury verdict found the appellees were not negligent or whether they simply found Fisher did not incur damages as a result. *Ibid.* at ¶13

The Court in ***Fisher*** explained:

> "The fact that [in addition to the instruction on the elements of negligence] Fisher was also granted a peremptory instruction on negligence does not cure this error. ***McCary v. Caperton,*** 601 So.2d 866, 869 (Miss. 1992). . . . The reason is that the contradiction 'creates a clear potential for confusion.' *Id.* It is error for the court to grant instructions which are likely to mislead or confuse the jury as to the applicable law. *Id.* The effect of the negligence instruction in this case was to countermand the peremptory instruction and confuse the jury. ***Griffin v. Fletcher,*** 362 So.2d 594, 596 (Miss. 1978)." **Ibid.** at ¶10-11.

(d) The old "open and obvious" rule

The "open and obvious" rule held that where a danger is "open and obvious", the Defendant is not liable for injuries that may result to a Plaintiff from it, regardless of whether the Plaintiff was "exercising due care" or not. That rule was discarded by the Mississippi Supreme Court in ***Tharp v. Bunge Corp.***, 641 So.2d 20 (Miss. 1994). ***Tharp's*** rejection of the "open and obvious" rule has been reaffirmed time and again by the Supreme Court up to the present time, at least as to claims for hazardous conditions created or maintained by a defendant.

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[9] This statement has a special application to the case at bar, where you can't tell whether the jury found "no liability" or "no damages" - though not because of conflicting jury instructions as in ***Fisher***, but because of the wording of the verdict form, as discussed in part 3(b) above.

In ***Mayfield v. The Hairbender***, 903 So.2d 733 (Miss. 2005), the Supreme Court pointed that out some decisions since ***Tharp*** have misinterpreted its holding and continued to apply the old "open and obvious" rule to situations where it no longer applies.

In ***Mayfield***, the Court explained that a plaintiff might make two types of claims about hazardous conditions – (1) that the defendant created or maintained them, or (2) that the defendant failed to warn the plaintiff about them. Since ***Tharp***, the Court has held that the old open and obvious rule still applies to "failure to warn" cases, but not to cases where the hazard was created or maintained by the defendant.[10]

Under ***Tharp*** and ***Mayfield***, a Plaintiff may still recover for a dangerous condition on the Defendant's property, where the Plaintiff is himself negligent and the danger is "open and obvious", if the Defendant created it or allowed it to continue.

In this case, the Plaintiff's claims regarding the hazardous shower conditions were based only on the fact that the Defendant created them and/or allowed them to continue; Plaintiff's claims were not based on any allegation that the Defendant "failed to warn" him of the hazards. (R-1221)

(e) The Breaux and Nolan cases

In requesting Jury Instruction No. 6, Defendant relied on ***Breaux v. Grand Casinos of Miss.***, 854 So.2d 1093 (Miss. App. 2003), in which a charge similar to the one at issue in this case

[10] The reason the rule still applies to "failure to warn" claims is that a warning is superfluous where the hazardous condition is open and obvious. (It is not really that the "open and obvious" rule still applies to such cases, but rather than there never was a failure to warn to begin with where the condition is so open and obvious as to be a warning in and of itself.)

was given. However, the ***Breaux*** case was a "failure to warn" case, not one in which the Defendant was claimed to be negligent for maintaining a "hazardous" condition. The condition involved was an "expansion joint" in a parking lot, which was something that was required to be there. In effect, it was not an "unreasonably" hazardous condition, since it HAD to be there to secure the integrity of the parking lot building. The Defendant could not have been "negligent" for maintaining the condition, but only for failing to warn customers about it.

The present case is not a "failure to warn" case. (see Underlying Facts above, (R-1221-1222) Plaintiff's claim is that the Casino created the defects and hazardous conditions in the first place, and then maintained them by failing to fix them. No "failure to warn" claim was advanced at trial.

To apply the "***Breaux*** Charge" to this case – in the definition of "danger" and "hazard" in Jury Instruction 6 – where there is no "failure to warn" claim, would in effect reinstate the old "open and obvious" defense in a case which only involves a claim of negligent creation or maintenance of a hazard.

The decision of the Court of Appeals in ***Breaux*** was not appealed to the Supreme Court. However, the type of charge given in ***Breaux*** was later criticized by the Supreme Court in connection with a case similar to ***Breaux*** – ***Nolan v. Brantley***, 767 So.2d 234 (Miss. App. 2000). There, the trial court had given a charge similar to the "***Breaux*** charge" containing this language:

> "You may return a verdict for the plaintiff in this case only if all of the following are true: (5) The plaintiff did not know about the dangerous condition." 767 So.2d at 240, ¶14.

The Court of Appeals upheld the giving of this instruction by the trial court, and apparently, as in ***Breaux***, no certiorari writ was sought by Plaintiff. However, the Supreme Court in ***Mayfield*** discredited the ***Nolan*** instruction for the very reason the ***Breaux*** charge should be – it violates the ***Tharp*** abandonment of the open and obvious rule. In ***Mayfield***, Justice Dickinson said:

> "In analyzing ***Nolan's*** assignment of error [regarding the above quoted jury instruction] the Court of Appeals stated: 'There is no liability for injuries where the condition is, or should be, known or obvious to the invitee. ***King v. Dudley***, 286 So.2d 814, 816 (Miss. 1973).' ***Nolan v. Brantley***, 767 So.2d at 240.
>
> "It is true that in 1973 when ***King v. Dudley*** (cited by the Court of Appeals in ***Nolan***) was decided the 'open and obvious' defense served as a complete bar to recovery by the plaintiff. . . . Thus, regarding this point of law, reliance on . . . ***Nolan v. Brantley*** is misplaced, as Tharp has not been overruled by this Court." ***Mayfield***, 903 So.2d at ¶23 (emphasis added)

Also see ***Wood v. RIH Acquisitions MS***, 2009 U.S.App. LEXIS 1059 (5th Cir. 2009), which stated:

> "Because an open and obvious condition can be an unreasonably dangerous condition, an owner is not exonerated simply because the dangerous condition was obvious. (n. 9) The defendant's brief fails to recognize this *post-**Tharp*** reality, that the openness of a hazard is not in itself an exoneration from liability. That error was also made by the intermediate state court in a case cited by Bally's, but which it fails to note was overruled on this very point. ***Nolan v. Brantley**, 767 So. 2d 234, 240 (Miss. Ct. App. 2000), overruled by **Mayfield**, 903 So. 2d at 738.* The failure of many *pre-**Tharp*** precedents to be overruled formally makes research by courts and litigants somewhat hazardous." ***Wood*** at pp. 20-21.

(f) Summary

We can summarize the error in Jury Instruction No. 6 as follows. It erroneously told the jury that a "danger or hazardous condition" maintained by Defendant can only exist if the Plaintiff was "exercising due care for his own safety." This eliminated the comparative negligence rule *ab initio*. It also, contrary to ***Tharp*** and ***Mayfield***, allowed the jury to apply the

"open and obvious" rule to a situation in which the Defendant had maintained the hazard and "failure to warn" was not involved.

Conclusion

This case presents three errors by the Circuit Court which call for reversal and remand of this case for a new trial. The exclusion of Dr. Bratton and his opinions prejudiced Plaintiff with respect to the medical, damage, and liability issues. The erroneous jury instruction prejudiced Plaintiff with respect to the liability issues. Based on the foregoing, Plaintiff-Appellant Edward O'Keeffe respectfully prays that the verdict and judgment below be reversed and the case remanded for trial, and for such further relief as may be proper under the circumstances.

Respectfully submitted,

ROBERT HOMES JR.
P. O. Box 500
Gulfport, MS 39502
(228) 863-8888
ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I certify that I have this day served a copy of the foregoing Brief by first class mail, postage prepaid on counsel for Defendant-Appellee, Kim Rosetti, P. O. Box 10, Gulfport, Ms 39502.

This 18th day of June, 2010.

ROBERT HOMES JR.

IN THE CHANCERY COURT OF HARRISON COUNTY, MISSISSIPPI

SECOND JUDICIAL DISTRICT

FILED
OCT 24 2007
JOHN McADAMS, CHANCERY CLERK
By _____ D.C

EDWARD O'KEEFFE

VERSUS

CIVIL ACTION
NO. C2402 07-796(3)

HARRAH'S ENTERTAINMENT, INC.,
aka HARRAH'S OPERATING COMPANY, INC.,
aka HARRAH'S CASINO

PETITION TO INSPECT PREMISES

COMES NOW Edward O'Keeffe, through undersigned counsel, and files this Petition for inspection of property owned by Harrah's Entertainment, Inc., aka Harrah's Operating Company, Inc., aka Harrah's Casino in Biloxi, Mississippi, and in support thereof respectfully represents:

1. Plaintiff is an adult resident of the State of Louisiana, residing in New Orleans, Louisiana; Defendant is a corporation doing business in this State, County, and Judicial District.

2. The Defendant is the owner of property located at 195 Beach Boulevard, Biloxi, Mississippi, and/or 167 Beach Boulevard, Biloxi, Mississippi formerly known as the Casino Magic Hotel.

3. Prior to Defendant's acquisition of the aforesaid property, and while it was owned by Casino Magic, the Plaintiff sustained an injury in the shower stall of a room he occupied as a guest of the Hotel.

4. It is urgent that Plaintiff and his expert be allowed to inspect the aforesaid premises, specifically Room 1616 thereof, where the aforesaid accident occurred.

5. Plaintiff has been informed and therefore avers that the subject premises is currently being renovated, but that the room in question has not yet been altered.

6. Plaintiff has sought the cooperation of the Defendant for the inspection he seeks, but Defendant has refused to cooperate, and refuses to permit Plaintiff or his expert to enter the premises.

7. This action is authorized by Rule 34(c) of the Mississippi Rules of Civil Procedure.

WHEREFORE, Plaintiff prays:

1. For an injunction or other appropriate order directing Defendant to permit Plaintiff and/or his expert to inspect the aforesaid premises and conduct appropriate tests and take photographs of same;

2. For a temporary restraining order, preliminary injunction, or other appropriate relief enjoining Harrah's from making any alterations to the bathroom of Room 1616 of the subject Hotel pending Plaintiff's inspection of same;

3. For such further relief to which Plaintiff may be entitled at law or in equity.

Respectfully submitted,

Robert O. Homes Jr.
P. O. Box 500
Suite E, 368 Courthouse Rd.
Gulfport, Ms 39502
(228) 863-8888
fax (228) 896-8272
Ms Bar 2597, La 6979
Attorney for Plaintiff

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EXHIBIT 4