IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

WACKENHUT SECURITY AND
ROZIVITO HOSKINS, INDIVIDUALLY AND AS
AN EMPLOYEE OF WACKENHUT SECURITY — APPELLANTS

VS. — CAUSE NO.: 2010-CA-00480

ERNIE FORTUNE — APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF THE
FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

BRIEF OF APPELLANTS, WACKENHUT SECURITY AND ROZIVITO HOSKINS, INDIVIDUALLY AND AS AN EMPLOYEE OF WACKENHUT SECURITY

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

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

I. G4S Secure Solutions Inc. f/k/a The Wacknhut Corporation, Appellant

II. Rozivito Hoskins, Appellant

III. Ernie Fortune, Appellee

IV. Honorable Winston Kidd, Circuit Judge

V. Honorable Matthew A. Taylor, Honorable Michael Wolf and Honorable Smith Boykin, Attorneys for Appellants

VI. Honorable J. Ashley Ogden, Esq. and James W. Smith, Jr., Esq. of Ogden & Associates, PLLC, Attorneys for Appellee

VII. Robert F. Wilkins, Esq. of Rocky Wilkins Law Firm, Attorney for Appellee

RESPECTFULLY SUBMITTED, this the 6th day of May, 2011

BY: _____
Matthew A. Taylor

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Appellants request oral argument before this Court as the trial court's errors involve several issues of fact regarding the admission and exclusion at trial of certain evidentiary evidence and matters of law which are not settled under Mississippi law and present unique issues before this Court.

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STATEMENT OF THE CASE

This is an action for damages by Ernie Fortune against Defendants The Wackenhut Corporation, Rozivito Hoskins, individually and as employee of Wackenhut, My Joy, Inc.d/b/a McDonald's, Tracey Luckett, individually and as an employee of My Joy, Inc. d/b/a McDonald's, and McDonald's Corporation for failing to keep the premises in a reasonably safe condition; failing to supervise and regulate the conduct and activities so as to protect guests from physical harm; failing to exercise ordinary care in the discharge of their responsibility to prevent and protect patrons from incidents; allowing an atmosphere of violence to exist or develop on its premises; negligently hiring a person whom the Defendants knew or should have known was a person of violent propensities; negligence in failing to adequately train the personnel employed and on duty at the restaurant; negligence in retaining employees whom the Defendants knew or should have known were persons of violent propensities; assault and battery of the Plaintiff through the ratification due to the Defendants' failure to discharge employees responsible for attack and subsequent injury; failing to remedy a dangerous condition which the Defendants caused to exist or of which the Defendants knew or should have been aware of; and failing to render aid to the Plaintiff.

Plaintiff sought damages for past, present and future medical and other expenses; loss of income and wages; past, present and future physical pain and suffering; past, present and future emotional distress and mental anguish; permanent physical impairment, scarring and disfigurement; permanent loss of the use of his right arm; and other damages.

The trial was held before a jury of twelve (2) commencing on November 30, 2009 and ending on December 7, 2009. The case was submitted to the jury on instructions delivered by the lower court. The jury found in favor of Plaintiff. The jury found Defendants, Wackenhut and

Hoskins to be 75% negligent and Defendants, My Joy, Inc. and Luckett to be 25% negligent. The jury assessed Plaintiff's total damages to be one million dollars ($1,000,000.00). On February10, 2010, the trial court issued its Order Denying Defendants' Various Motions for Judgment Notwithstanding the Verdict, or in the Alternative, for a New trial, or in the Alternative, for Remittitur. Appellants perfect this appeal from the lower court's judgments.

STATEMENT OF FACTS

On July 27, 2008, Plaintiff entered the McDonald's restaurant located at 2465 Highway 80 West in Jackson, Mississippi, for the purpose of filling a cup with ice from the fountain drink machine. (Tr. 602:11-22). Plaintiff did not intend to purchase any food at the restaurant, but rather intended to take ice from the drink machine without payment. (Tr. 602:11-22). Plaintiff brought in a cup from off the premises, which he alleges to have been purchased at an earlier time at the McDonald's. (Tr. 601:6-17). On the date in question, the owner of the McDonald's location, My Joy, Inc., was under contract with The Wackenhut Corporation to provide security services at the restaurant. (Tr. 472:5-13). The security officer on duty at the time that Plaintiff entered the restaurant was Defendant, Rozivito Hoskins. (Tr. 551:28 to 552:4).

Upon entering the restaurant, Plaintiff walked straight to the fountain drink machine, without first purchasing any items, and attempted to dispense ice into his cup, without paying for same. (Tr. 517:19-25). Upon being noticed by the McDonald's manager on duty, Tracy Luckett, she instructed him, from behind the counter, that he could not bring a cup into the restaurant and take ice from the drink machine. (Tr. 517:19-25; 526:25 to 528:8; 531:2-8). McDonald's corporate policy does not permit the giving away of cups, ice or water without purchase. (Tr. 523:3-9). Plaintiff alleges that he was told that bringing in a cup from off the restaurant premises was unsanitary. (Tr. 574:26 to 575:12). Upon receiving the instruction that he could not proceed to use the cup from off premises to dispense ice from the machine, Plaintiff became agitated and began cursing at Ms. Luckett. (Tr. 576:22-26; 516:14 to 519:21). Plaintiff was asked to leave the premises and left the building. (Tr. 516:16-26).

Moments later, Plaintiff returned and entered the restaurant, again, and proceeded to throw a dollar bill at Ms. Luckett, who was still standing behind the counter. (Tr. 516:16-26).

At this point, Rozivito Hoskins approached Plaintiff and asked him to leave. (Tr. 551:28 to 553:20; 559:25 to 560:6). Plaintiff then brandished a knife at Mr. Hoskins. (Tr. 552:3-11). Upon receiving a threatening arm motion from Plaintiff, Mr. Hoskins moved toward Plaintiff, pushing him through the restaurant door and onto the ground. (Tr. 552:3 to 560:25).

Following the incident, the Jackson Police Department recovered a knife at the scene. (Tr. 209:12-17).

SUMMARY OF THE ARGUMENT

The trial court erred in allowing Plaintiff's expert witness economist, Dr. Glenda Glover, to utilize the earnings capacity approach in calculating her estimate for Plaintiff's alleged future lost wages/loss of earnings capacity. The methodology has been found by this Court to be unreliable pursuant to the *Daubert* standard of admissible expert testimony. Dr. Glover relied on assumptions in rendering her opinions which have been rejected by this Court, and the trial court's admission of such testimony and opinions was error warranting reversal and remand.

The trial court erred in excluding relevant evidence of Plaintiff's alcohol use throughout his lifetime. Plaintiff alleged damages for future medical treatment and future lost wages/loss of earning capacity. Plaintiff's alcohol use is relevant to all of his claims for damages as it is interrelated and an element of not only his medical condition, but also his ability to seek employment and remain employed. His alcohol use is also relevant to his life expectancy and work life expectancy. The probative value of such evidence far outweighs its prejudicial effect and the trial court's error in excluding the relevant evidence deprived Defendants of their ability to conduct thorough cross examination of Plaintiff and his expert witnesses and rebut any of his claims for damages.

Notwithstanding the relevant and probative nature of Plaintiff's alcohol use which was excluded in error by the trial court, the court also committed error warranting reversal and remand by prohibiting inquiry of the issue after the Plaintiff opened the door to such evidence through the testimony of his expert witnesses and by introducing documents into evidence which reference his alcoholism and its effect on his medical condition, work history and employment status.

The trial court erred in allowing testimony of Plaintiff's need for future surgeries.

Plaintiff's medical expert did not opine, to a reasonable degree of medical certainty, that Plaintiff would require future surgeries related to the alleged incident and testified that his opinions were speculative, at best. Additionally, Plaintiff's medical expert could not opine that Plaintiff would ever be a viable candidate for any future surgeries due to his diminished physical condition brought about by his chronic alcoholism. The trial court's admission of testimony regarding Plaintiff's need for future surgeries warrants a reversal and remand.

The trial court committed error in allowing substitution of Plaintiff's expert witness economist at trial, when the expert was unavailable to testify. In discovery, Plaintiff refused to allow the Defendants to depose his expert economist. The expert was then unavailable for trial. Rather than exclude the testimony, the trial court allowed a substitute economist to adopt the expert's opinions and testify, out of turn, at trial. Plaintiff proceeded at his own peril by not preserving his expert witness' testimony for trial. As there is no authority under Mississippi law to permit the substitution of Plaintiff's expert witness, the trial court erred in allowing the substitute expert to testify at trial. Any testimony or opinions as to future lost wages/loss of earning capacity should have been excluded, and a reversal and remand is warranted.

The trial court erred in allowing Plaintiff to introduce Plaintiff's medical bills into evidence and then permitting the bills to be redacted to remove references to alcohol related treatment following admission. The trial court ordered that no evidence or testimony of Plaintiff's alcohol use would be permitted during trial. However, Plaintiff introduced evidence referencing alcohol treatment, and Plaintiff asserted that the bills associated therewith were claimed as an element of his damages. Rather than allow cross examination and additional evidence related to the alcohol treatment and Plaintiff's alcohol use, the trial court allowed the evidence to be redacted following admission into evidence during trial. The trial court's error

warrants reversal and remand.

The trial court erred in refusing Defendant's proposed jury instructions as to contributory negligence of the Plaintiff and the use of force and perceived threat by the Wackenhut security officer. The proposed jury instructions are supported by the testimony of witnesses at trial, and should have been properly given to the jury.

The trial court erred in excluding evidence of Plaintiff's prior bad acts, including criminal convictions, which were relevant to his claim for economic damages for future lost wages/loss of earning capacity. Plaintiff's criminal history is relevant not only to his work history, but also his employability and work life expectancy. The trial court's exclusion of such relevant evidence warrants reversal and remand.

The trial court erred in excluding references to Plaintiff's status as "homeless" as such evidence is relevant to his claim for economic damages for future lost wages/loss of earning capacity. Additionally, the court excluded documents, prepared by the Plaintiff, which define his socioeconomic status in that light. The trial court's exclusion of such relevant evidence warrants reversal and remand.

Finally, the trial court erred in excluding evidence of collateral sources when the Plaintiff opened the door to cross examination and evidence on the issue by testifying that he was unable to pay for additional medical treatment. The trial court's exclusion of such relevant evidence warrants reversal and remand.

This Court has repeatedly held that while litigants are not entitled to a perfect trial, they are entitled to a fair trial. *Blake v. Clein*, 903 So.2d 710, 718 (Miss. 2005) (citing *Ekornes - Duncan v. Rankin Med. Ctr.*, 808 So.2d 955, 959 (Miss. 2002). *See also Parnes v. Ill. Cent. Gulf R.R.*, 440 So.2d 261, 268 (Miss. 1983). Where individual errors at the trial level, including the

exclusion of relevant witnesses and evidence may not be reversible in themselves, they may combine with other errors to make reversible error. *Id.* at 719 (citing *Estate of Hunter v. Gen. Motors Corp.*, 729 So.2d 1264, 1279 (Miss. 1999). Defendants submit that while any of the errors of the trial court noted herein warrant reversal and remand, in the alternative, the evidentiary rulings, taken together, deprived Defendants of a fair trial. Reversal and remand for a new trial on the merits is warranted.

ARGUMENT

I. The Trial Court Erred in Allowing Plaintiff's Expert Witness, Glenda Glover, Through the Testimony of James Henley, to Use the Earnings Capacity Approach to Calculate Loss of Future Earnings

The trial court erred in denying Defendant's Motion to Strike Expert Testimony and Motion in Limine to Prohibit Reference to the Opinions of Dr. Glenda Glover and Any Alleged Loss of Income. (R. 2515; R.E. 6). During trial, Dr. Glover, through the testimony of James Henley, provided opinions related to loss of income which utilize methodology which has been held as unreliable by this Court. (Tr. 772:22 to 811:25). The trial court committed reversible error in allowing the testimony.

In 2003, Mississippi adopted the *Daubert/Kumho Tire* rule as the standard for admissibility of expert witness testimony. *Miss. Transp. Comm'n v. McLemore*, 863 So.2d 31, 35-40 (Miss. 2003). *See also, Kumho Tire Co., Ltd v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999); *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Under Mississippi Rule of Evidence 702:

> [i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Miss.R.Evid. 702.

The issue of methodology used by Dr. Glover in calculating loss of future earnings has recently been settled by this Court. *Rebelwood Apartments RP, LP v. English*, 48 So.3d 483, 494 (Miss. 2010). Mississippi law requires a trial court to ensure that proposed expert testimony satisfies Mississippi Rule of Evidence 702. *Rebelwood Apartments*, 48 So.3d 483 at 494 (citing

Kilhullen v. Kansas City s. Ry., 8 So.3d 168, 172 (Miss.2009) (quoting *Univ. of Miss. Med. Ctr. v. Pounders*, 970 So.2d at 141,146 (Miss.2007). In *Rebelwood Apartments*, the defendant sought pretrial to exclude Dr. Glover's opinion, arguing that permitting her to base her calculations on national-average and an "earnings capacity approach" did not satisfy *Daubert* standards in that her proposed opinion was not based on "sufficient facts or data..." *Id.* This Court held that Glover's opinion, as presented in this case, was not based on accurate, truthful facts. *Id.*

In the instant case, Glover used the same methodology as she did in the *Rebelwood Apartments* case in calculating future lost earnings:

> Damages are based on the discounted present value of lost earnings. Any other economic losses as well as other allowable expenses may be added to these damages at a later date. This earnings capacity approach requires that the future earnings of an individual be estimated and discounted.

(R. 1247).

As addressed in Defendant's Motions, Dr. Glover's opinion is unreliable and should be excluded under *Rebelwood Apartments*. (R. 1239-1264; 2215-2219; R.E. 9, 10) In her report, Dr. Glover states that "[l]osses included in this report are based on the earnings capacity approach, and assumes that [Plaintiff] could have had a normal employment throughout his work life expectancy." Further, Dr. Glover includes six elements in her methodology: (1) base-year earnings or initial earnings estimate; (2) income growth rate; (3) life expectancy; (4) work life expectancy; (5) discount rate; and (6) taxes. (R. 1247; R.E. 9). In clarifying her purported methodology, Dr. Glover adds that her calculation of the "projected base year income includes the individual's regular compensation consisting of salary, bonuses, and commissions; second-job compensation; and fringe benefits." (R. 1247; R.E. 9). She further notes that "[f]uture earnings depend not only on the income level and growth, but on the probable length of time a

person is expected to live, as well as the length of time a person is expected to work, known as the life expectancy, and work life expectancy, respectively. (R. 1247; R.E. 9). However, Dr. Glover fails to adhere to her own professed methodology and fails to properly support her assumptions.

The evidence presented at trial through the testimony of Plaintiff and his medical expert witness, Dr. Howard Katz, along with the records of the Mississippi Department of Human Services, Office of Disability and Social Security Administration, included in Defendant's Exhibit D-3 For Identification following proffer, clearly demonstrate that Plaintiff did not have normal employment prior to the subject incident. Rather, Plaintiff's prior employment history is completely lacking. Therefore, Dr. Glover's methodology and assumptions are fundamentally flawed.

As a preliminary matter, Plaintiff's only recorded income between 2001 and 2008 is Labor Ready Southeast Inc. ($49.00 in 2001) and Stuart C. Irby ($2091.38 in 2001). (Exhibit D-3 For Identification). The evidence presented at trial confirms minuscule and sporadic work history, at best. As noted by Dr. Katz:

> Mr. Fortune works for Furniture Zone holding a sign up for them eight hours per day. He sits holding the sign with PVC pipe with his left hand. He began in February 2009. He is very proud of this job. He says he has kept this job longer than any other job he has ever had.

(R. 2154, R.E. 11).

This was further confirmed by Plaintiff's own testimony:

Q. So in the last ten years the only reported income with the federal government you had was from Stuart Irby. Correct?
A. Yes sir.

(Tr. 638:26-29).

Dr. Glover provides no support for her assumption that Plaintiff could have had a normal employment throughout his work life expectancy. Moreover, any such assumption is undercut by the fact that Plaintiff's IRS and SSA documentation demonstrate that he did not have normal employment prior to the subject incident. (Exhibit D-11 For Identification). Dr. Glover also provides no support for her assumptions underlying her base-year earnings or initial earnings estimate. In her calculation, Dr. Glover utilizes alternative base figures for yearly earnings - $13,624 (minimum wage) and $40,405 (wages based on national index). (R. 1247-48; R.E. 9). However, she provides no support for the utilization of either assumption, and the use of each is undercut by Plaintiff's demonstrated lack of pre-incident employment. Dr. Glover further fails to announce and/or consider Plaintiff's work life expectancy. Instead, she calculates wages based upon Plaintiff's alleged full remaining life expectancy. (R. 1247-48; R.E. 9). Finally, Dr. Glover fails to account for Plaintiff's actually earned post-incident wages. (R. 1247-48; R.E. 9). Plaintiff was employed as a sign holder for Furniture Zone for 7 ½ months making $7.50 per hour. (Tr. 673:16-19). This is not reflected in her methodology or calculations.

Without accounting for Plaintiff's lack of normal pre-incident employment, the lack of support for base-year or an initial earnings estimate, work life expectancy, and post incident wages, Dr. Glover's methodology and calculations are fundamentally flawed. As pointed out in *Rebelwood Apartments*, Dr. Glover's testimony as to her calculation of future lost earnings does not meet the *Daubert* standard of admissibility of expert testimony. In the instant case, Dr. Glover does not base her opinions on any facts or data regarding Plaintiff's lack of pre-incident employment, the lack of support for base-year earnings or an initial earnings estimate, work life expectancy and/or post-incident wages. Instead, as she did in the *Rebelwoods Apartments* case, she simply uses the earnings capacity approach to calculate Plaintiff's future lost earnings. As

such, Dr. Glover's methodology and/or calculations are fundamentally flawed. Accordingly, she fails to reasonably express an opinion which would be supported by reasonable accounting and economic principles. For these reasons, the lower court erred in allowing her testimony and opinions in this regard.

II. The Trial Court Erred in Excluding Evidence and Testimony of Plaintiff's Alcohol Use

The trial court erred in excluding evidence and testimony of Plaintiff's alcohol use, as the evidence was relevant to his claim for past and future medical treatment and lost wages. Additionally, the trial court erred in continuing to exclude such evidence when Plaintiff "opened the door" to the issue through the testimony of his own expert witness, Dr. Howard Katz, and by introducing evidence of administration of alcohol and alcohol by his medical providers, and asserting damages for treatment by Dr. Kwentus.

A. Evidence of Plaintiff's Alcohol Use is Relevant to His Claims for Damages

Plaintiff submitted a Motion in Limine to Exclude Irrelevant Information in Medical Records, which was granted by the trial court. (R. 2500-01; R.E. 7) In the hearing on the Motion in Limine, the trial court stated "With respect to past alcohol use that would not be admissible during this trial". (Tr. 69:5-9; R.E. 4). This ruling prohibited reference to and introduction of medical records of the Plaintiff containing reference to alcohol. In their arguments before this Court in Motions in Limine, Defendants attempted to explain the relevancy of Plaintiff's alcohol use as follows:

THE COURT:	Well, would that be relevant to the incident herein? How would it be relevant?
MR. WOLF:	He's made a claim for wages, Your Honor. By making a claim for wages he's saying that he had a pre-existing wage earning capacity. By saying he has a pre-existing wage earning capacity, these

experts have assume that he has periods of sobriety where he works, that there are occasions of getting employed. They also have an assumption with regard to he makes a claim for medical damages, pain and suffering.

Your Honor, when this man walked into that McDonald's in the night of question, he had a series of pre-existing injuries and a pre-existing history of alcohol use which may have put him on a downward slope such that this injury is not a disabling event in and of itself. He was previously claimed to be disabled as a product of his own medical history, also which was part and parcel of his alcoholic and substance abuse history. You can't separate this man from his alcohol use. We're talking every time he goes to the hospital, whether it be broke bones, hips, things like that, there is alcohol on board. This man's entire medical history, his very person is part and parcel of his alcohol use throughout his life. So if he's going to come in here and claim I can't work now, we're in a position where we have to say wait, and you could work before? But wait a second, you were physically injured as a result of alcohol related drinks. You were under the influence - -

THE COURT: So you can't prove he wouldn't work before without showing that he was an alcoholic before?

MR. WOLF: That was part and parcel of his workability. Your Honor, we through the Social Security Administration, before this event, he was claiming to be disabled. Those records on his disability are with references to the effect of alcoholism in relation to his recovery. Also the wage issue is huge. He wants $1.3 million on loss wages, based on the premise that this is a man who could work beforehand at something other than a minimum wage job. Well, that's real problematic when you are a raging alcoholic, when your life, the only employment you have is ten years prior, based on a period of sobriety and occasional moments of sobriety. This man's entire wage - -

THE COURT: Well, I don't think I limited you in proving that the plaintiff has not worked in the past ten years. I don't think I ruled that you could not get into that issue. I ruled that past alcohol use was not admissible.

MR. WOLF: And if I'm real clear on this, and I apologize for not being, Your Honor, the reason he didn't work in the past was because of - - in part because of the alcoholism. He's been able to work during periods of sobriety postaccident. So it's not the injuries that keeps him from working.

And we have expert testimony. There own expert, Dr. Katz, in his report they have put in issue the alcoholism through the report of Dr. Katz.

(Tr. 72:3 to 74:7; R.E. 4).

Generally speaking, all relevant evidence is admissible, except as otherwise provided under the Mississippi Rules of Evidence. Miss. R. Evid. 402. "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. M.R.E. 401. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. M.R.E. 403. In this case, Plaintiff sought damages for past and future medical treatment and expenses and lost wages/loss of earning capacity. The proffered evidence establishes that, throughout his lifetime, Plaintiff had a long-standing addiction to alcohol, which affected not only his medical condition prior and subsequent to the subject incident, but also his ability to maintain past and future employment and his life expectancy. The pattern of alcoholism and behavior adversely affect all aspects of Plaintiff's life and are vital elements of his claims for damages. The proffered evidence shows that Plaintiff has had and would continue to have alcohol related medical problems, a below-average ability to maintain employment and work life expectancy, the inability to undergo certain medical treatments and a below-average life expectancy. Defendants are entitled to full cross examination of these issues and the jury should have properly considered his alcoholism in its consideration of damages. Clearly then, his alcohol use is relevant, and its probative value outweighs any prejudice to Plaintiff.

Defendants were prohibited from introducing into evidence any medical records of the Plaintiff which contain any reference to alcohol use. To preserve the appellate record, Defendants made an evidentiary proffer of the medical records. (Exhibit D-3 For Identification).

During the proffer, Plaintiff's own medical expert witness, Dr. Howard Katz, confirmed the relevancy of the alcohol reference in the records:

> Q. Doctor, would you agree that with very few exceptions Mr. Fortune's entire medical history is filled with references to alcohol and alcohol abuse?
> A. I would say there - - I don't know about the way you said it, but there's a lot of evidence in there of alcohol and alcohol abuse, yes.

(Tr. 412:10-15).

When questioned directly about the administration of alcohol to the Plaintiff as part of a detoxification procedure during his treatment at University Medical Center, the trial court prohibited Defendant from eliciting any testimony from Dr. Katz:

> Q. And just so we're real clear on the night of this incident, he was first taken in at CMMC and then transferred over to UMC. Is that correct?
> A. Yes.
> Q. All right. And what I'm looking at here appears to be a chemistry report. Correct?
> A. Yes.
> Q. Now, towards the bottom third of the page there is an indication for alcohol ethyl serum - - source, and what is the number that's given there?
> A. 276.
> Q. And when you see that number, what does that number mean to you, as a doctor?
> MR. OGDEN: Objection. I think the court has dealt with this in motion in limine already. He's asking for an opinion. This doctor is not supposed to be rendering those types of opinions and the court has excluded them.
> THE COURT: That's sustained. You can approach if you need to.

(Tr. 400:1-20).

The medical records were marked as Defendants' Exhibit D-3 For Identification.

Plaintiff's alcohol use, prior alcohol treatment and alcohol abuse are relevant to his claim for damages. The evidence was not offered on the issue of liability, but rather to rebut Plaintiff's claims for lost wages/loss of earning capacity. Although this Court has not directly addressed the relevancy of alcohol use to claims for damages, several other jurisdictions have provided support

for the proposition that such evidence is relevant and should be admitted. *See Smith v. Southland Corporation*, 738 F.Supp.923 (E.D.Penn.1990); *see also Caroll v. Morgan*, 17 F.3d 787 (5thCir.1994). Because Plaintiff sought future damages, life expectancy and medical condition are pertinent and relevant issues. *Dembinski v. Thomas,* 48 Pa. D. & C.4th 353, 358 (2000). In *Dembinski*, the Pennsylvania court noted that evidence of drug or alcohol use is relevant to evaluating future loss of earnings. *Id. (*citing *Kraus v. Taylor*, 710 A.2d 1142 (Pa. Super.1998). Such evidence "strongly suggests that [a party's] life expectancy deviates from the average." 710 A.2d at 1144. This evidence is relevant regardless of whether plaintiff introduces expert testimony or life expectancy tables. *See Aiello v. SEPTA*, 687 A.2d 399, 405 (Pa. Commw. 1996).

In this case, Plaintiff's alleged loss of income, as opined by Dr. Glover through James Henley, was calculated using the earnings capacity approach and assumes that he could have had a normal employment throughout his work life expectancy. (R. 1247; R.E. 9). Further, Plaintiff's expert states that her methodology involves six elements: (1) base-year earnings or initial earnings estimate; (2) income growth rate; (3) life expectancy; (4) work life expectancy; (5) discount rate and (6) taxes. (R. 1247; R.E. 9).

Plaintiff's own counsel, Jim Smith, has addressed the relevancy of drug use to work-life and life expectancy during his tenure on the Mississippi Supreme Court. *Brandon HMS, Inc. v. Bradshaw*, 809 So.2d 611, 625-6 (Miss. 2002). In *Bradshw*, Mr. Smith issued a separate dissent wherein he disagreed with the majority's conclusion that a plaintiff's drug use was relevant. *Id.* In his dissent, he states:

> This Court has held that standard mortality tables reflecting life expectancy are admissible only if the individual in question was in good health prior to an injury and not prone to conduct likely to impair their health. *Tucker v. Gurley*, 179 Miss. 412, 176 So.

> 279 (1937). Evidence regarding the plaintiff's health before an injury is admissible to question the figures on mortality tables. *Pharr v. Anderson*, 436 So.2d 1357, 1360 (Miss.1983) (defendant physician in medical malpractice action had right to show deceased was not healthy because of diabetes). *Thus, in my view, Bradshaw's drug use was relevant to her work-life and life expectancies.*

Id. Emphasis added.

In this case, a significant component of Plaintiff's claims are related to his prior and subsequent medical condition and alleged future lost wages/loss of earning capacity. By prohibiting evidence of alcohol use, by exclusion of medical records and testimony of Plaintiff and his expert witnesses, Defendants were denied an opportunity to legitimately rebut Plaintiff's damages and explore the basis for damages calculations. *See Blake v. Clein*, 903 So.2d 710, 726-7 (Miss. 2005). Had Plaintiff only alleged pain and suffering, Defendants's analysis of the relevant of evidence of alcohol use would be no different. The issue is the damages Plaintiff alleges. Plaintiff alleged damages for future lost wages/loss of earning capacity. Therefore, Plaintiff's alcohol use is relevant and its probative value outweighs its prejudicial effect. In *Carrol v. Morgan*, 17 F.3d 787, on appeal before the U.S. District Court for the Southern District of Mississippi, the trial court allowed the plaintiff's medical records to be admitted into evidence. The records included the plaintiff's admission to a treatment center for drug and alcohol abuse. The plaintiff argued that the records should have been excluded as they were not relevant and were highly prejudicial. The Court stated:

> The [treatment facility] records were also admissible on the issue of damages. [The defendant] was entitled to show that [the plaintiff] was not a healthy person and that his intemperance might have resulted in a reduced life expectancy. *See e.g., Smith v. Southland Corp.*, 738 F.Supp. 923, 925-26 (E.D.Pa.1990); *Pharr v. Anderson*, 436 So.2d 1357 (Miss.1983).

Id. at 791.

In his report, Plaintiff's own medical expert, Dr. Howard Katz, notes the severity of his

alcohol use and the impact and relevancy of the condition on every phase of his life:

> Mr. Fortune states mostly he has been drinking constantly since he was thirteen years old and never stopped drinking. He has been hit twice by cars that were hit and run while he was walking down the street intoxicated and walked off a platform into a concrete floor while he was intoxicated which caused multiple fractures. Mr. Fortune has difficulty remembering most of his life because he spent most of his life intoxicated.

(R. 2158; R.E. 11).

Certainly it cannot be concluded that based upon Plaintiff's own statement that he has not stopped drinking since age thirteen, such alcohol use is not relevant to his lack of employment, employability and future employment opportunities and wage earning capacity.

Additionally, it is proper for courts to allow evidence of a plaintiff's alcohol consumption, intoxication, and/or dependence as the same concern numerous issues at this trial, including the credibility of a witness and/or his recollection of events, causation and contributory negligence. *See Abrams v. Marlin Firearms Co.*, 838 So.2d 975, 981 (Miss.2003); *Miss. Power & Light Co. v. Lumpkin*, 725 So.2d 721, 731-33 (Miss. 1998); *Hageney v. Jackson Furniture of Danville, Inc.*, 746 So.2d 912, 920 (Miss. Ct. App. 1999) (cert. denied). Based upon Plaintiff's documented chronic alcoholism, as noted by his own expert, all are applicable in this case and demonstrate the probative value of the evidence, as weighed against its prejudicial effect.

B. Plaintiff opened the door to evidence of prior alcohol use

Notwithstanding the relevance of Plaintiff's prior alcohol use to his claims for damages and otherwise, the trial court also erred in excluding evidence of alcohol use, as the Plaintiff opened the door to inquiry on the issue by admission of unredacted medical bills and summary into evidence.

Evidence, even if otherwise inadmissible, can be properly presented where a party has "opened the door." *Blake v. Clein*, 903 So.2d 710, 726 (Miss.2005) (citing *Crenshaw v. State*,

520 So.2d 131,134 (Miss.19988)). The trial court correctly noted this evidentiary rule by stating:

> "[w]ell, if they put it in issue, then, of course, I will change my ruling. If the plaintiff gets on the stand or if the plaintiff submits something that opens the door, then quite obviously I will change my ruling.

(Tr. 74:9-13; RE 4).

Plaintiff opened the door to inquiry regarding his alcohol on three separate occasions: (1) through the expert testimony of Dr. Howard Katz; (2) by introducing records into evidence which contain reference to treatment for alcohol abuse; and (3) by referencing medical treatment by his own treating physician Dr. Kwentus.

1. Plaintiff opened the door to evidence of alcohol use through the opinions of Dr. Katz

Plaintiff opened the door to evidence of alcohol use through the opinions of his medical expert witness, Dr. Howard Katz. Plaintiff's alcohol use is a significant consideration of Dr. Katz' opinions and the trial court's exclusion of the evidence resulted in manifest prejudice to Defendants by not allowing full cross examination on the issue. In his report, Dr. Katz notes:

> Although he is at increased risk of requiring additional surgery to his right upper extremity in particular, removal of hardware and/or surgery to try to improve range of motion to the right shoulder I cannot anticipate any of those to a reasonable degree of medical certainty.

(R. 2164; R.E. 11).

During the voir dire of Dr. Katz, he confirmed that his opinion as to Plaintiff's ability to undergo future surgery is directly tied to his lifestyle choices, and specifically, his ability to refrain from alcohol consumption:

> Q. And so in fact whether or not he's a candidate for future surgery is really depending on his lifestyle choices. Correct?
> A. There's some truth to that.
> Q. And if this man shows that he has maladaptive behavior and that he has chronic - - and we're out of the jury - - chronic alcoholism and that he has failed to assist in

his own recovery, that he ignores medical advice under those circumstances, a doctor in good faith would have great pause to perform surgery in the future for the removal of hardware?

A. What he really needs is - - first off, my answer to your question directly is certainly you would have great pause and you would - - I mean, if I were the doctor who was making these decisions, I would first of all have a certain period of time that I would have expected him to no longer be drinking and have the AA to approve it. I also would have his medical, you know, do a complete function test and make sure that I though that it was safe. Lastly, though there wouldn't just be a removal of hardware, it would be arthroscopic capsular release, release the capsule.

Q. Bust just so we're clear on this, your opinion that he might benefit from surgery requires as a condition foreseen to that surgery is that he shall appear in sobriety and a token from AA. Correct?

A. I would say yes.

(Tr. 347:29 to 348:27).

During Defendant's proffer of Plaintiff's medical records, Dr. Katz continued to address the relevancy of the medical records and Plaintiff's alcohol use to his opinions regarding future medical treatment:

Q. Doctor, would you agree that with very few exceptions Mr. Fortune's entire medical history is filled with references to alcohol and alcohol abuse?

A. I would say there - - I don't know about the way you said it, but there's a lot of evidence in there of alcohol and alcohol abuse, yes.

(Tr. 412:10-15).

As clearly evident from the testimony of Dr. Katz, Plaintiff's alcoholism is interrelated and cannot be separated from his medical history and his possible future medical treatment. Indeed, whether or not Plaintiff can even be a candidate for any future medical treatment is an issue which was addressed through the opinions of Dr. Katz. As such, Plaintiff opened the door to the issue and the trial court erred in not reversing its ruling excluding evidence of alcohol use.

2. Plaintiff opened the door to inquiry and evidence of alcohol use by introducing medical bills and summary into evidence which included medical expenses for administration of beer for alcohol detoxification treatment

Plaintiff also opened the door to inquiry and evidence of his prior alcohol use by introducing his medical summary and bills into evidence, which included medical expenses for alcohol detoxification treatment. On the date of the incident which is the subject of this lawsuit, Plaintiff was administered beer while undergoing treatment at the University of Mississippi Medical Center. (Tr. 655:14 to 658:7; 32:6-20; R.E. 4; Exhibit D-3 For Identification). Despite the trial court's error in excluding the evidence, the court further erred in continuing to exclude same following Plaintiff's admission of the medical bills and summary.

In *Blake v. Clein*, 903 So.2d 710, 726 (Miss. 2005), the trial judge ordered that certain words could not be used or referred to during trial because of the alleged prejudicial effect that the words might have on the jury. Nevertheless, medical records were introduced into evidence by the plaintiff which contained entries referencing the prohibited words. *Id.* This court held that the plaintiff "opened the door" to this inquiry by offering into evidence his medical records, without redacting the wording from the records. *Id.*

Over Defendants' objection, Plaintiff introduced Exhibit P-10, a medical bill summary with attached bills:

> Q. Now, I'm going to try this one more time. I'm showing you a summary of your total medical bills that we've been able to find with the attached bills. At this point, would you tell this jury whether or not you agree that these are the bills you've incurred so far?
> A. Yes, sir.
> Q. Would you like to claim these bills as part of your damages in this case?
> A. Yes, sir.
>
> * * *
>
> THE COURT: ...It can be admitted.

(Tr. 592:28 to 593:22).

During cross examination, Defendants attempted to illicit testimony regarding the specific bill of

University of Mississippi Medical Center, wherein Plaintiff received $145 worth of beer for alcohol detoxification:

Q. Now, you also have asked us to pay for some bills from University Mississippi Medical Center. Correct? I was looking through this bill and you have asked us to pay for about $145 worth of beer, didn't you?

MR. OGDEN: Objection. May we approach?

THE COURT: You can.

(OFF-THE-COURT BENCH CONFERENCE)

* * *

THE COURT: All right. Mr. Ogden, are you claiming for that? What he just asked this witness, is that a claim that Mr. Fortune is making?

MR. OGDEN: No, Mr. Fortune is not making a claim. At the time, based on Mr. Fortune's condition, UMC actually prescribed that he be given beer, because of I guess the shakes or whatever have when you have alcohol in your system and you're coming down from it and that's what UMC prescribed, but we are not claiming that and we are not asking for that as part of damage. That's why we filed the motion in limine to exclude it, because it gets into the history of this man's alcoholism, which we don't feel is relevant to that case.

MR. WOLF: Well, Your Honor, if that had been the case that they were not claiing any portion of that bill, then they should not have put the beer in the bill, submit it to their client, and announce to the jury that this is part of the bill. In fact, I even went so far this morning, plaintiff's counsel came to me and said there are some drug, some pharmacy bills from Dr. Kwentus that's unrelated. I say I thought you put it in but I'll stay away from that, and I asked Mr. Wilkins is there anything else and he says no. Now, they are the ones that opened this door, and I am allowed, Your Honor, to have any evidence regarding the reasonableness or the relevance of particular medical bill to the surgery provided. So, Your Honor, they opened the door, and now it would be completely unfair if - -

THE COURT: Well I haven't opened the door opened about beer until you mentioned it, so I haven't heard it. I didn't hear them talking about it, so it was not opened on direct until you mentioned it. In terms of the medical bills, if you're claiming that he's entitled to money for the beer, and then they'll be allowed to cross-examine on it.

MR. WILKINS: No, we're not.

THE COURT: And if that was in the document that was tendered, so it needs to be taken out, and - -

MR. WOLF: Well, now, we've got a phenomenally dishonest record, Your Honor, because their portion of this entire bill is related to the

detoxification. They've asked the jury to pay for the entire stay at University Medical Center. If they are going to go ahead and redact, I would ask them to get with the doctors and figure out what's relevant and what's not relevant. It think this is completely --

THE COURT: On day one of this trial both parties or both sides indicated that some record was put into evidence that you would redact. I'm not sure which exhibit that was, so we need to stop doing that. When an exhibit is offered and when I admit it, I don't want it touched again. Now, everybody agreed to whatever document that was, that they would go back later and redact it. But in the future, when one is submitted and when it's admitted by the court, don't mess with it. Now, with respect to this one, it needs to be changed.

MR. WOLF: We lodge our objection, with all due respect, Your Honor, I object to the entire record being provided when they were offered. I feel like, Your Honor, this creates undue prejudice to my client.

THE COURT: It's not, it's not prejudice, not even prejudice at all. Go ahead and redact it.

(Tr. 655:14 to 658:7).

As in *Blake*, the trial court rendered its ruling, in limine, to exclude reference to Plaintiff's alcohol use. Defendants did not violate the court's ruling and did not elicit testimony, through cross examination or otherwise, until after the Plaintiff introduced his own documents into evidence which violated the court's ruling of exclusion. By doing so, Plaintiff opened the door to the evidence, and the trial court's continued exclusion was error. Defendants were entitled, at the moment that Plaintiff opened the door, to full cross examination and introduction of additional evidence of Plaintiff's alcohol use.

3. Plaintiff opened the door to inquiring regarding treatment for behavioral problems, including alcoholism by reference in testimony to treatment by Dr. Kwentus

Plaintiff also opened the door to inquiry regarding treatment for subsequent behavioral problems, including his alcoholism by referencing treatment by Dr. Kwentus:

Q. Yesterday, you talked about medications and things like that. You mentioned Neurontin. Now, you don't want us to pay for that, that's not on your list because

that has to do with prior conditions. Correct?

A. The Neurontin is the pain that was caused by this incident, not only Neurontin, but it's Prozac, not only Prozac, it's Buspar, and there's a sleeping aid, which is Trazodone. There is medicine I have to buy over the counter.

Q. So you're saying that the Trazodone, the Buspar, the Neurontin is all related to this event?

A. All of this medication that I just mentioned has had to have higher dosage completely. I don't I even want to get into - - the person that evaluates me on that is the one that gave me the medicines.

Q. And who was that?

A. Dr. Kwentus.

Q. And Dr. Kwentus, he's not a doctor for your arm, is he?

A. No sir, go ahead.

Q. I'm going to have to come back to this because we're going to have to have a conference with the judge on that issue.

(Tr. 651:27 to 652:20).

Following Plaintiff's statement, Defendants sought to offer the testimony of Dr. Kentus regarding Plaintiff's continued alcohol relapses and treatment following the alleged incident which is the subject of this lawsuit:

MR. WILKINS: Your honor, Rocky Wilkins for the plaintiff. Three times Michael Wolf counsel for the defendant has intentionally violated this court's order on the motion in limine to exclude alcohol. The first time was in opening statement when he said he was three times the legal limit, which is an the improper statement, according to the court's ruling, because there was no limit for Mr. Fortune to be walking around with alcohol. The second time was during Kim Morgan's cross examination where he said, well would it surprise you to learn he was drunk, which was a clear violation of the motion in limine number 4 which, excluded the words, quote, drunk, which he intentionally violated again. The third time was just a moment ago on the medical bills where he asked him so are you charging us for beer. Because Mr. Wolf cannot follow the court's rules, intentionally cannot follow the court's rules, we would ask that the court order him to approach the bench anytime he even thinks he's going to get around an issue that touches on alcohol or any of the court's prior motions in limine, because he cannot follow this court's repeated order to avoid alcohol except for the narrow purposes you've allowed and it's happened over and over and over.

MR. WOLF: You want me to address that?

THE COURT: (Nods head.)

MR. WOLF: Your honor, I think that is a gross mischaracterization of my efforts here. I'll also highlight the fact that those issues that have previously been addressed and we've moved on. This beer issue is one that they brought up, but for interest in the economy, every time I believe we're going to venture into something like this, I will approach the bench and we'll just handle it that way from here on out. I have no problem with that.

THE COURT: All right. Go ahead with your issue that you want to talk about.

MR. WOLF: All right. On the proffer, Your Honor, with respect, we would offer, and I think this is worth it. We were going to venture into criminal history. We know there is a motion in limine. We would simply offer a summary and the supporting documentation and records behind Ernie Fortune's criminal history, and we'll submit those to the court under a separate offer of proof at the break under our next for identification only number, and it would simply be the criminal history of Ernie Fortune along with the supporting documents there.

THE COURT: All right. You can offer them. You want to submit them to be marked for identification?

MR. WOLF: For identification only, yes, sir.

THE COURT: All right. Did I rule on that motion?

MR. WOLF: You did, yeah, there's no prior bad acts and ther's criminal arrest, and so I believe that obviously there's some objection on the front end, but I think that just making the offer because he has a substantial criminal history and those documents will support it. All right. Additionally, Your Honor, on a separate offer of proof and anticipating, I guess, Mr. Wilkins' recent suggestion to the court when Ernie Fortune unilaterally despite his own attorney's efforts to remove Dr. Kwentus from the claim for damages, Ernie Fortune unilaterally announced to this court that he was seeking payments for Dr. Kwentus and the medication therein. Your Honor, I believe he's opened the door for me to address Dr. Kwentus and all the subsequent behavioral health issues, but knowing that that's a fix that can be done the same way it appears that the other fixes have been done in this case I need some direction from the court regarding Dr. Kwentus and whether or not I can get into the subsequent behavioral health issues of Ernie Fortune and his treatment with Dr. Kwentus. He raised the name. He requested it from the jury. I just need to know some direction at this point.

THE COURT: What's the question?

MR. WOLF: Can I talk about Dr. Kwentus and subsequent mental health issue after the fact with Ernie Fortune and it's alcohol related, recovery related?

THE COURT:	Well, I've ruled on that issues, so...
MR. WOLF:	Okay. We make then an offer of proof on that issue that with respect to Dr. Kwentus if allowed to have testified in that direction we would have shown that Ernie Fortune had continuing medical -- or continuing psychiatric and rehabilitation treatment for Dr. Kwentus including indications of relapses into his drinking over the course of the year since this event.
THE COURT:	Okay. Well, I ruled that it was not admissible and I don't understand how it could be relevant in any way. I know you want to change the whole concept of the case based on alcohol, but the court is not going to allow that, so its not relevant, not admissible, so let's move on for some hearings that would be relevant, that's admissible.

(Tr. 658:20 to 662:6).

III. The Trial Court Erred in Denying Defendant's Motion in Limine to Exclude Evidence of Future Surgeries

The trial court erred in denying Defendant's Motion in Limine to Exclude evidence of future surgeries. (Tr. 67:13-15; R.E. 4). This Court has noted that opinions concerning the need for future surgeries and/or the cost for same must be supported by expert medical opinions evidencing some level of scrutiny. *City of Jackson v. Spann*, 4 So.3d 1029, 1039 (Miss. 2009); see also *Flight Line v. Inc. v. Tanksley*, 608 So.2d 1149, 1164 (Miss. 1992) (damages must be proven with reasonable certainty).

Mississippi has adopted the *Daubert* standard to determine the admissibility of expert testimony. *Vanlandingham v. Patton*, 35 So.3d 1242, 1247 (Miss.2010); see also *Walker v. Gann*, 955 So.2d 920, 930 (Miss.Ct.App.2007). The *Daubert* test consists of a two-prong inquiry: (1) the trial court must establish whether the expert testimony is relevant, meaning that it will aid the fact-finder; and (2) the trial court must determine whether the expert testimony is reliable. *Id.*

Medical opinions as to the requirement of future surgeries must be expressed to a degree

of medical certainty. *Kidd v. McRae's Stores Partnership*, 951 So.2d 622 627 (Miss.2007). Likewise, this Court has affirmed the exclusion of medical expert testimony on the issue of future surgeries where the expert did not state that the surgical intervention was planned by the plaintiff. *Id.* Such an opinion, this Court found, was not expressed to a reasonable degree of medical certainty. *Id.*

In *Kidd*, the trial court disallowed the portion of the medical expert's testimony related to the cost of a possible future surgery based upon the physician's testimony:

> Q. And what was your plan of treatment at that time [September 17, 2001]?
> A. She was seen again for her elbow and shoulder, left side...We discussed treatment options, including surgical evaluation of the shoulder, possible surgical treatment of her elbow.
>
> * * *
>
> Q. And at that time [November 11, 2002] did you not feel that surgery was indicted for her left shoulder?
> A. We didn't have any plans to perform any surgery on her, no.

Id. at 627-28. Based upon that testimony, this Court found that the trial court did not err in limiting the testimony of the medical expert because he never expressed an opinion to a degree of medical certainty that the plaintiff would ever require these surgeries.

In the instant case, Plaintiff claimed damages for future medical treatment, including surgery. The cost estimated for the future surgery was $25,000. (Tr. 506:15-18). In his report, Plaintiff's medical expert, Dr. Howard Katz, stated:

> Although [plaintiff] is at increased risk of requiring additional surgery to his right upper extremity in particular, removal of hardware and/or surgery to try to improve range of motion to the right shoulder, I cannot anticipate any of those to a reasonable degree of medical certainty.

(R. 2164; R.E. 11).

Defendants sought, in limine, to exclude any testimony as to future surgery or the cost

associated with same as an element of his damages. (R.E. 11). The trial court denied the Motion in Limine. (Tr. 67:13-15: R.E.4). During voir dire of Dr. Katz, he established to the trial court that his opinions were entirely speculative. Specifically, Dr. Katz testified that, he could not opine that Plaintiff was a candidate for future surgeries, based upon his use of alcohol, nor could he opine that Plaintiff would even benefit from future surgeries, unless he met several conditions precedent relating to his personal alcohol consumption and habits.

Q. And so in fact whether or not he's a candidate for future surgery is really depending on his lifestyle choices. Correct?
A. There's some truth to that.
Q. And if this man shows that he has maladaptive behavior and that he has chronic - - and we're out of the jury - - chronic alcoholism and that he has failed to assist in his own recovery, that he ignores medical advice under those circumstances, a doctor in good faith would have great pause to perform surgery in the future for the removal of hardware?
A. What he really needs is - - first off, my answer to your question directly is certainly you would have great pause and you would - - I mean, if I were the doctor who was making these decisions, I would first of all have a certain period of time that I would have expected him to no longer be drinking and have the AA to approve it. I also would have his medical, you know, do a complete function test and make sure that I though that it was safe. Lastly, though there wouldn't just be a removal of hardware, it would be arthroscopic capsular release, release the capsule.
Q. Bust just so we're clear on this, your opinion that he might benefit from surgery requires as a condition foreseen to that surgery is that he shall appear in sobriety and a token from AA. Correct?
A. I would say yes. And also that the - - again, if I were the doctor that he made a verbal commitment to and that I believed that commitment from him that he would continue to be sober for a minimum of another ten weeks and that he was willing and would assure me that he would participate in physical therapy for at least ten weeks.
Q. For ten months?
A. Ten weeks.
Q. Ten weeks. And so based on your review of this medical records, again, you cannot state to a reasonable degree of certainty that he would satisfy any of these conditions proceeding surgery?
A. Well, you can see in my report that I was hesitant, and what I said was that to a reasonable degree of medical certainty he would benefit from surgery; however, to a reasonable degree of medical certainty - - well, I didn't say it quite that way. Let's see what I said. "Although he's at increased risk requiring additional

surgery to his right upper extremity, to try to improve the range of motion to right shoulder, I cannot anticipate any of those to a reasonable degree of medical certainty." For one thing, Mr. Fortune choosing to have surgery, it would take him to choose, and when I say choose that includes all those things that would've talked that he has to agree to remain sober and that we have a strict plan as far as how he's going to handle the pain, etc. I do believe he could benefit from shoulder surgery at some point to improve range of motion, meaning that if he agrees to all those things, then he can benefit from surgery, but without that, he cannot.

(Tr. 347:29 to 349:27).

Based upon the behavioral patterns of the Plaintiff, his medical condition directly related to that condition and his alcohol use, Dr. Katz could not state to a reasonable degree of medical certainty that Plaintiff could undergo any future surgeries, and the trial court committed error in allowing such testimony before the jury:

Q. ...Do you have any indication based on his history that he has a point where he would be compliant with those conditions proceeding?
A. It seems that he has turned that corner. I mean, I saw him this one day on June 18, 2009, and he - - at that time he had been clean for several months. And sees him here he's not intoxicated. He's not going through DT. So I think that would be ok for him to have it, but I'm not prepared to state that to a reasonable degree of medical certainty. I haven't examined him today. I don't have all that information.

(Tr. 350:9-19).

Additionally, Dr. Katz acknowledged the speculative nature of his opinions:

Q. And so as you sit there today, you couldn't rely on his own historical accounting and are not in a position to say that he is at this point in time a candidate or would ever be a candidate based on his history for future surgeries. Correct?
A. I would say that's true. The only thing I could say is that he would benefit from that surgery if he had all those things.
Q. And again, that speculates as to a number of issues including his recovery and his compliance with the doctor's orders?
A. That would be correct. And it would require probably about in addition to the period of time that he's sober prior to surgery, a good ten weeks after surgery, but I'd say a good 12 weeks of compliance, three solid months of compliance, of doing things just as he's told to do from a medical perspective.
Q. And again, this is speculation at this point, Correct?

A. I guess so. I'm just answering your question.

MR. WOLF: Okay. Your Honor, that's all I would have of this witness. I can make my motion and let some additional examination - -

THE COURT: You have a motion you said?

MR. WOLF: Yeah, Your Honor, based upon his testimony, I would move the court to exclude any testimony as testimony as purely speculative and not to a reasonable degree of medical certainty, based on the testimony of Dr. Katz regarding future surgeries. He's indicated that he might benefit, but specifically that he is not - - whether or not he'll ever be able to do these future surgeries is pure speculation at this point.

* * *

THE COURT: All right. That motion will be denied.

(Tr. 351:12 to 352:15; 355:20-21).

IV. The Trial Court Erred in Allowing Substitution of Plaintiff's Expert Witness Economist at Trial

Defendants re-assert their arguments and authorities as to the trial court's error in allowing Plaintiff's expert witness economist to testify as to future lost wages of the Plaintiff as set forth above. Defendants further address the trial court's error in allowing substitution of said expert witness below.

The trial court erred in allowing Plaintiff, during trial, to substitute his expert witness economist as to future lost wages, Dr. Glover, with economist James Henley. (Tr. 712:12 to 720:13; 753:10 to 762:19). The deposition of the expert witness was refused by the Plaintiff. Subsequently, the trial court denied Defendant's motion to compel the deposition[1]. At trial, Dr. Glover was unavailable to testify due to illness, and the trial court allowed substitution of the

[1]On August 9, 2009, Defendant Rozivito Hoskins filed his Motion to Compel requesting, in addition to other relief, the deposition of Glenda Glover. On October 7, 2009, this Court entered its Order denying the Motion to Compel. Said Order is attached as Record Excerpt 5. The Order incorrectly references the Motion as Defendant's Motion to Compel a Medical Examination of Plaintiff.

expert with another economist, James Henley, over Defendants' objection. (Tr. 712:12 to 720:13; 753:10 to 762:19). As Plaintiff did not preserve the witness' testimony, via deposition, prior to trial, he is afforded no relief under Mississippi law for the unavailability of his witness, and Defendants were subject to not only manifest prejudice, but also "trial by ambush". The procedural history of the pretrial discovery phase of this lawsuit is of utmost importance to the trial courts error and the prejudice to the Defendants.

During the course of discovery, Defendants requested Plaintiff's cooperation in and agreement to the depositions of his expert witnesses, including Dr. Glover. (R.E. 8). Plaintiff declined that request, noting that retained expert witness depositions are not required under the Mississippi Rules of Civil Procedure. (R.E. 8). Subsequently, Defendants made a good faith effort to resolve this dispute by reiterating their request to depose Plaintiff's experts. Defendants also made a good faith request for supplementation of Plaintiff's Designation of Expert Witnesses to cure certain deficiencies regarding the designation of each of the Plaintiff's designated experts. (R.E. 8). Plaintiff refused to offer his retained experts for deposition, and Defendants filed their Motion to Compel on or about August 7, 2009, requesting that the trial court order Plaintiff to offer his retained experts for deposition and to otherwise supplement his discovery responses to comply with the Mississippi Rules of Civil Procedure. (RE 8). The trial court denied Defendant's Motion to Compel and refused to allow Defendants to take the depositions of any of Plaintiff's expert witnesses, including Dr. Glover. (Tr. 761:28 to 762:19; R.E. 5).

During trial, Plaintiff's counsel announced to the trial court that Dr. Glover had been diagnosed with Bird Flu. Based upon her absence from trial, Plaintiff proposed substituting James Henley to adopt her testimony and opinions as to alleged future lost wages. Over

Defendants' objection, the trial court ruled that James Henley would be allowed to be substituted as an expert for Dr. Glover. (Tr. 712:12 to 720:13; 753:10 to 762:19). While the trial court has discretion over matters of the admission of testimony at trial, there is no Mississippi authority, by Rule of Civil Procedure or otherwise, which permits the substitution of an expert witness under such circumstances.

Dr. Glover's testimony was not preserved for trial purposes, at the Plaintiff's own insistence. (R.E.8). By not preserving the testimony for trial, Plaintiff ran the risk of not having such testimony available, in the even that the expert could not appear for trial. Parties are allowed to substitute expert witnesses in certain circumstances. *See Coltharp v. Carnesale*, 733 So.2d 780,782 (Miss.1999)[2]. Additionally, there is no requirement under the Mississippi Rules of Civil Procedure which requires parties to make designated expert witnesses available for deposition. Rather, parties are only required to adhere to the disclosure requirements of Miss. R. Civ. P. 26(b)(4). Specifically, Rule 26(b)(4) mandates:

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

Miss. R. Civ. P. 26(b)(4). Notwithstanding, the sole protection of a party in preserving a witness' testimony, including, in the event that the witness is unavailable for trial, rests with the availability of deposition transcripts. This procedure has no distinction between lay witnesses and expert witnesses. *See Smith v. City of Gulfport*, 949 So.2d 844, 848 (Miss. 2007).

Mississippi Rule of Civil Procedure 32 governs the use of depositions at trial. When such

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[2] In *Coltharp*, the defendant's designated expert witness was scheduled to be out of the country during when the trial date was set. Upon a denial of defendant's motion for a re-setting of the trial date, the trial court allowed the defendant to obtain a substitute expert witness for trial.

depositions are allowed, the admission of the deposition testimony is within the sound discretion of the trial court under the situations pronounced in Mississippi Rule of Civil Procedure 32(a)(3):

> The deposition of a witness, whether or not a party may be used by any party for any purpose if the court finds: (A) that the witness is dead; or (B) that the witness is at a greater distance than one hundred miles from the place of trial or hearing, or is out of state, unless it appears that the absence of the witness was procured by the party offering the deposition; or (C) *that the witness is unable to attend or testify because of age, illness, infirmity or imprisonment*; or (D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (E) that the witness is a medical doctor or (F) upon applicationa dn notice that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be so used.

Miss.R.Civ. P. 32(a)(3). If the testimony of Dr. Glover had been preserved by testimony, the Plaintiff could have, at the discretion of the trial court offered her deposition for use under subsection (C) due to illness. In the instant case, however, such deposition testimony was refused by the Plaintiff and the trial court, at the Plaintiff's insistence; and therefore, was not available for use at trial. By proceeding to trial without the testimony preserved, Plaintiff ran the risk that the testimony could not be offered at trial if Dr. Glover was not available. *Simply put, the Plaintiff proceeded to trial at his own peril,* and the trial court erred in allowing a substitution of experts which is not allowed under any Mississippi Rules of Civil Procedure or law.

It is well settled Mississippi law that trial judges "have a right to expect compliance with their orders, and when parties and/or attorneys fail to adhere to the provisions of these orders, they should be prepared to do so at their own peril." *Beck v. Sapet*, 937 So.2d 945, 1043 (Miss. 2006). While in the case at bar, there was no deposition of Dr. Glover available at trial, the order of the trial court was in favor of Plaintiff's refusal to allow the deposition to be taken. Therefore, Plaintiff exercised the right no refuse to preserve the expert witness' testimony "at his own peril", and the trial court erred in allowing a substitute expert witness to testify in her place at

trial.

V. The Trial Court Erred in Allowing Documents in Evidence to be Redacted Following Admission and Publication to the Jury and Prohibiting Defendants from Eliciting Any Testimony Regarding the Redacted Portions

As discussed herein, the trial court permitted Plaintiff to redact evidence of medical bills and summary to be redacted following introduction into evidence. (Tr. 655:14 to 658:7; 32:6-20; D-3 for identification; RE). Defendant incorporates all argument and authority cited herein and incorporates same by reference. Additionally, Defendant affirmatively states that in introducing evidence, Plaintiff acted at his own peril regarding the contents of such evidence. Defendant was prohibited from cross examination on evidence which was not only relevant and admissible, but had already been admitted into evidence, over the objection of Defendant:

MR: OGDEN:	Having stumbled through that, Judge, We'd offer this as plaintiff's next exhibit subject to any objections.
THE COURT:	All right. Your objections, Mr. Wolf.
MR. WOLF:	Yeah, I need to object. It lacks personal knowledge, calls for speculation, and it's hearsay, and that will be it, Your Honor.
THE COURT:	All right. Go ahead and give them to the court reporter, and they can be admitted.
MR. WOLF:	And also I'd add for the record we object on the basis it's an improper summary not done by this witness.
THE COURT:	All right. Okay. The objection is noted. It can be admitted.

(EXHIBIT P-10/MEDICAL BILLS/ADMITTED)

(Tr. 593:8-23).

VI. The Trial Court Erred in Refusing Proposed Jury Instruction D-11 Regarding Plaintiff's Contributory Negligence

The standard of review for jury instructions is as follows:

> [T]he instructions are to be read together as a whole, with no one instruction to be read alone or taken out of context. A defendant is entitled to have jury instructions given which present his theory of the case. However, the trial judge may also properly refuse the instructions if he finds them to incorrectly state the law or to repeat a theory fairly covered in another instruction or to be without proper foundation in the evidence of the case.

Blake v. Clein, 903 So.2d 710, 719 (Miss. 2005) (citing *Thomas v. State*, 818 So.2d 335, 349 (Miss.2002)).

The trial court refused jury instruction D-11:

> The Court instructs the jury that "contributory negligence" is conduct on the part of a person contributing as a cause to the harm he or she has suffered and falling below the standards to which she is required to perform in his or her best interests. You are further instructed that Plaintiff is not entitled to recover damages for the harm that they could have avoided by the use of due care, nor from the harm which proximately resulted from his own conduct, if any, which contributed to his damages.
>
> If you find from a preponderance of th evidence that, in coming on to the subject premises, attempting to obtain MyJoy products without payment, engaging in a verbal altercation with the employees of MyJoy, Inc. and/or Wackenhut Corporation, remaining on the subject premises after being asked to leave, or brandishing a weapon-like object before, during or after the subject incident, the Plaintiff failed to act as a reasonably careful person in his own best interests, and that such acts or omissions on the part of the Plaintiff were a proximate contributing cause of the Plaintiff's damages, then you shall allocate a percentage of fault to the Plaintiff.

(R.E. 12).

During trial, evidence was presented supporting the contributory negligence instruction. Plaintiff testified that he brought a cup into McDonald's which was not purchased on the day in question to fill with ice. (Tr. 601:6-17). Plaintiff testified that he did not enter the restaurant to purchase food, but rather to fill his cup, which was brought in, with ice. (Tr. 602:11-22). McDonald's manager, Tracey Luckett testified that, upon entry, Plaintiff went straight to the fountain drink machine and did not attempt to purchase any items, but rather attempted to dispense ice into his cup. (Tr. 517:19-25). McDonald's policy does not permit the giving away of cups, ice or water without purchase. (Tr. 523:3-9).

Tracey Luckett testified that she told Plaintiff that he could not bring a cup into the restaurant and go to the drink machine. (Tr. 517:19-25; 526:25 to 528:8; 531:2-8). She further testified that he began cursing at her and was asked to leave the premises. (Tr. 574:26 to

575:12). Ms. Luckett testified that Plaintiff left the restaurant, but returned, and threw a dollar bill at her. (Tr. 516:16-26). Rozivito Hoskins testified that he asked the Plaintiff to leave the premises. (Tr. 551:28 to 553:20; 559:25 to 560:6). Mr. Hoskins further testified that upon asking him to leave, he approached Plaintiff. (Tr. 551:28 to 553:20; 559:25 to 560:6). Upon his approaching the Plaintiff, Mr. Hoskins testified that Plaintiff brandished a knife. (Tr. 552:3-11). Jackson Police Department officer, Reginald Cooper, testified that upon investigation of the incident, a knife was recovered at the scene. (Tr. 209:12-17). This testimony supports the contributory negligence instruction D-11.

VII. The Trial Court Erred in Refusing Proposed Jury Instruction DH-26 Regarding Use of Reasonable Force

The trial court refused jury instruction DH-26:

> The Plaintiff has alleged that Rozivito Hoskins used a level of force which was unreasonable under the circumstances. However, the decision to use any amount of force must be judged from the perspective of the security officer or other citizen involved and not with the advantage of 20/20 hindsight. Any person may use that amount of force which is reasonably perceived under the circumstances to be necessary to eliminate a threat. In this instance, Rozivito Hoskins alleges that he perceived a level of threat and that his response was consistent with a response of other reasonable security officers. Judge not with the advantage of hindsight, but from the position of an officer at that time under those same set of conditions.

(R.E. 13).

During trial, Rozivito Hoskins testified as follows:

Q. Now, the gist of this whole thing is you claim that Ernie Fortune lunged at you with a knife and you were so threatened you had to use force to put him down. Is that correct?
A. I wouldn't say lunged at me. When I approached him, that's when I recognized the threat.
Q. Okay. Let me give you a chance, to make this real short. He really didn't have a knife at that point, did he?
A. That's not correct.
Q. Okay. Did he have a knife that was sizable enough that you though was a threat to you?

A. Yes sir.
Q. And was there any other thing you could have done besides touch him to resolve that problem?
A. It was a split second decision I made. It was either I engage or disengage at that point.
Q. From the time you got up from the one side of the building to cross all the way to the other side of the building, did you not think Wackenhut's policy is I can't touch this guy, so maybe I should try to talk to him?
A. Like I said before, it was a split second decision I made.

(Tr. 551:28 to 552:21).

Wackenhut Human Resource Manager, Richard Patrick testified as follows.

Q. And it is Wackenhut's policy that the determination to use force or not in those situations, which you have described, rests with the officer. Correct?
A. That is correct.
Q. You can't make that call right now, can you?
A. No sir.
Q. That is the officer's call at the instance that the situation arises. Correct?
A. That's correct.

(Tr. 462:26 to 463:6).

The testimony supports the use of force jury instruction DH-26.

VIII. The Trial Court Erred in Excluding Evidence of Plaintiff's Prior Bad Acts

The trial court erred in excluding evidence of Plaintiff's prior bad acts. Plaintiff filed a Motion in Limine to exclude evidence of Plaintiff's prior bad acts, including criminal convictions, which was granted. (Tr. 68:18-21; R.E. 4)

Mississippi Rule of Evidence 404(b) states:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

The comments to Rule 404(b) further state that the exceptions listed are not exclusive.

In the instant case, Plaintiff sought damages for future lost wages/loss of earning capacity.

The methodology employed by Dr. Glover utilized various facts, including prior employment and employability, thus making his criminal record relevant, as it affects employment. Plaintiff was convicted for business burglary and is relevant both to his credibility and to rebut the assumptions utilized by Dr. Glover in her calculation of lost wages. (Tr. 28:27 to 30:7; D-11 For Identification; R.E. 4). Indeed, Plaintiff's last recorded earnings date back to 2001, when he was required to work for Stuart C. Irby Co., as restitution for that conviction. (D-11 For Identification). In addition, Plaintiff's numerous arrests/convictions for alcohol related offenses are probative of his alcohol abuse/dependence and, thus, relevant to his claim for damages.

Defendants made their proffer of evidence as follows:

MR. WOLF: On the proffer, Your Honor, with respect, we would offer, and I think this is worth it. We were going to venture into criminal history. We know there is a motion in limine. We would simply offer a summary and the supporting documentation and records behind Ernie Fortune's criminal history, and we'll submit those to the court under a separate offer of proof at the break under our next for identification only number, and it would simply be the criminal history of Ernie Fortune along with the supporting documents there.

THE COURT: All right. You can offer them. You want to submit them to be marked for identification?

MR. WOLF: For identification only, yes, sir.

THE COURT: All right. Did I rule on that motion?

MR. WOLF: You did, yeah, there's no prior bad acts and there's criminal arrest, and so I believe that obviously there's some objection on the front end, but I think that just making the offer because he has a substantial criminal history and those documents will support it.

* * *

MR. WOLF: This is the proffer for identification.

THE COURT: Mark it for ID as the next exhibit. Eleven?

COURT REPORTER: D-11, yes, sir.

THE COURT: Okay.

(EXHIBIT D-11/PROFFER DOCUMENTS/MARKED FOR ID)

(Tr. 659:29 to 660; 676:8-14).

Evidence of Plaintiff's prior bad acts, criminal convictions and criminal history evidence should have been allowed and admitted by the trial court. The trial court erred in excluding such evidence as same is relevant to Plaintiff's claim for lost wages and damages.

IX. The Trial Court Erred in Excluding References to Plaintiff's Status as "Homeless"

The trial court erred in granting Plaintiff's Motion in Limine to exclude evidence of Plaintiff's homelessness. (Tr. 68:24-29; R.E. 4). Based upon the trial court's ruling, Defendants included Plaintiff's Mississippi Department of Human Services Application for Temporary Assistance for Needy Families in its offer of proof as Exhibit D-3 For Identification. In Plaintiff's application, he lists his residence as "Homeless" (Exhibit D-3 For Identification; see HOSKINS 4333). Plaintiff's own testimony at trial confirms his application for benefits with the State of Mississippi in the form of food stamps. (Tr. 644:18-23). As Plaintiff has described and identified himself as "homeless", such evidence is relevant to the issue of damages, and specifically, his claim for lost wages. Any prejudicial effect is substantially outweighed by the probative value of the evidence.

X. The Trial Court Erred in Excluding Evidence of Collateral Sources

In its ruling on Motions in Limine, the trial court excluded reference or evidence of any collateral sources. (Tr. 68:22-23; R.E. 4). However, during the course of his cross examination, Plaintiff opened the door to inquiry into his ability to pay his medical bills:

Q. All right. So whatever continuing injury that arm or pain in that arm is causing you, you haven't gone to see any doctors apart from Dr. Katz in over a year?
A. The pains that I have on the right side of my body has been because of this incident. I have not seen a doctor. I do not have the money to go get the right side of my body x-rayed. So I live with me, and I have to live with it, and it's getting worst.
Q. I'm trying to get this clear. You're saying that cost has stopped you from getting medical attention?

MR. OGDEN: Objection. Let me stop this right now. Can I approach?

* * *

MR. WOLF: A couple of items here. They started to invoke the notion of collateral source when approaching the question of the plaintiff's ability to get medical care if he needs it. The plaintiff has testified that he has not been able to seek medical treatment in mitigation of his injury as a result of his inability to pay or for the cost. Your Honor, under circumstances such as this it is our right then to address the ability or availability of medical care because it is no later a collateral source issue.

(Tr. 613:26 to 614:8; 615:11-21).

Based upon the Plaintiff's own testimony regarding his inability to seek continued medical care due to the cost associated with same, Plaintiff opened the door to inquiry and cross examination on the subject, and the trial courts continued exclusion of evidence of medical payments resulted in error.

CONCLUSION

Based upon the errors of the trial court presented herein and the arguments and authorities cited, Appellants respectfully request that this case be remanded to the trial court for a new trial on the merits.

RESPECTFULLY submitted this the 6th day of May, 2011.

WACKENHUT SECURITY AND
ROZIVITO HOSKINS, INDIVIDUALLY
AND AS AN EMPLOYEE OF
WACKENHUT SECURITY,
APPELLANTS

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CERTIFICATE OF SERVICE

I, Matthew A. Taylor, one of the counsel of record for Appellants, Wackenhut Security and Rozivito Hoskins, individually and as an employee of Wackenhut Security, do hereby certify that I have this date caused to be delivered, via hand delivery, a true and correct copy of the above and foregoing *Appellants' Brief* to the following:

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P.O. Box 327
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THIS the 6th day of May, 2011.

Matthew A. Taylor