IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

RONALD PAYNE AND THOMAS PAYNE INDIVIDUALLY AND ON BEHALF OF THE WRONGFUL DEATH BENEFICIARIES OF MARIE PAYNE, DECEASED	APPELLANTS/PLAINTIFFS
V.	CAUSE NO.: 2010-TS-01929
CLEVELAND GOWDY, INDIVIDUALLY AND AS AN EMPLOYEE OF SCHNEIDER NATIONAL CARRIERS, INC., SCHNEIDER NATIONAL CARRIERS, INC. AND JOHN DOES # 1-10	APPELLEES/DEFENDANTS

APPEAL FROM THE CIRCUIT COURT OF LAUDERDALE COUNTY, MISSISSIPPI
HONORABLE LESTER F. WILLIAMSON, JR., CIRCUIT JUDGE

BRIEF OF APPELLANTS RONALD AND THOMAS PAYNE WRONGFUL DEATH BENEFICIARIES OF MARIE PAYNE, DECEASED

Oral argument is 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. Ronald and Thomas Payne, Appellants/Plaintiffs

II. Cleveland Gowdy, Appellee/Defendant

III. Schneider National, Appellee/Defendant

IV. Rocky Wilkins, Counsel for Appellants/Plaintiffs

V. Henry W. Palmer, Counsel for Appellants/Plaintiffs

VI. Justin S. Cluck, Counsel for Appellee/Defendant Cleveland Gowdy

VII. David C. Dunbar, Counsel for Appellee/Defendant Schneider National

RESPECTFULLY SUBMITTED, this the 14th day of July, 2011.

BY: _____
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ATTORNEYS FOR APPELLANTS

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STATEMENT OF THE ISSUES

Appellants/Plaintiffs Ronald Payne ("Ronnie") and Thomas Payne ("Tommy") appeal a defense verdict rendered against them in the Circuit Court of Lauderdale County, Mississippi. Their case stems from a vehicle/pedestrian collision that resulted in the death of Ronnie and Tommy's seventy-eight year old mother, Marie Payne. Marie Payne was run over by Cleveland Gowdy while she was walking in the parking garage at Jeff Anderson Hospital in Meridian, Mississippi. Mr. Gowdy, late for his company physical, missed a parking spot. While backing up his truck, Mr. Gowdy struck and then ran over Marie Payne. Ms. Payne died about three hours later. Mr. Gowdy admitted at the scene that he saw Ms. Payne walking in the parking garage prior to backing up. Three independent witnesses corroborated this evidence. Thus, the jury should have found Mr. Gowdy negligent. The issues on appeal are:

I. **Did the trial court err when it allowed unfairly prejudicial evidence that Marie Payne allegedly fell down in May 2008, more than four months prior to the September 5, 2008 incident?**

II. **Was the verdict against the overwhelming weight of the credible evidence?**

III. **Did the trial court err in refusing to grant the Plaintiffs' jury instructions and failing to instruct the jury that Cleveland Gowdy had a duty to see what he should have seen?**

IV. **Did the trial court err in limiting testimony from Plaintiffs' expert Tim Corbitt while allowing Defendants' expert Dr. Joey Parker to give opinions that were speculative?**

STATEMENT OF THE CASE

A. Nature of the Case

Marie Payne was a seventy eight year old loving mother and grandmother who lived an active life until September 5, 2008. This case involves the tragic story of Marie Payne's preventable death and her family's search for accountability. On the morning of September 5, 2008, Ms. Payne was walking in the parking garage of the Jeff Anderson Regional Medical Center in Meridian, Mississippi when Cleveland Gowdy drove right by her. Ms. Payne was headed towards her white Ford Taurus after dropping off a glucose monitor at the hospital. As fate would have it, Mr. Gowdy was not paying attention and missed an open parking space on his left/driver's side. Since Mr. Gowdy was running late for his company physical, he quickly shifted into reverse to snag the open parking spot before anyone else could get it. While backing up, Mr. Gowdy struck and rolled over Marie Payne with his truck. The impact of the bumper striking her legs knocked Ms. Payne to the pavement and literally broke her body to pieces. Ms. Payne did not die instantly. Instead, she lived for over three hours and endured excruciating pain before she finally could fight no more. Shortly after 12 noon, Ms. Payne died from massive internal injuries caused by the truck. As a result, Marie Payne's adult sons, Ronald and Thomas Payne, brought a wrongful death suit under the Mississippi Wrongful Death Statute against Cleveland Gowdy for his negligence. (1 R. at 2-7).[1] After discovering that Mr. Gowdy was attending his company ordered physical at the time of the incident, the Plaintiffs amended the Complaint to add Schneider National trucking company as a Defendant under the theory of vicarious liability. (1 R. at 51-60).

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[1] The trial transcript will be referred to as "T. at ___ (pg. no.)" and the court file of thirteen volumes containing the Clerk's papers/record other than the trial transcript will be referred to as "___ (vol. no.) R. at ___ (pg. no.)."

B. Course of Proceedings and Disposition in the Court Below

The trial of the case *sub judice* was originally held before a jury of twelve (12) commencing on Monday August 9, 2010 and ending Friday August 13, 2010. The case was submitted to the jury on instructions delivered by the Court. After approximately two and a half hours, the jury voted 9-3 and found in favor of the Defendants. The Circuit Court of Lauderdale County Mississippi, Judge Lester F. Williamson, Jr. presiding, subsequently entered a Final Judgment on August 19, 2010. (RE 2; 13 R. at 1776-1777). Feeling aggrieved by the jury's verdict, the Plaintiffs filed a Motion for a Judgment Notwithstanding the Verdict (JNOV) or for a New Trial. (RE 3; 13 R. at 1757-1775). A hearing was held on these post trial motions. (T. at 987-1007). Although the trial court denied the Appellants' post trial motions, the court found that the evidence of Cleveland Gowdy's negligence made the result "troubling." (T. at 1006-1007). Devastated by the jury's verdict, Ronnie and Tommy Payne filed a timely Notice of Appeal. Their search for justice is now before this Honorable Court and they respectfully ask that the jury's verdict be reversed.

STATEMENT OF THE FACTS

On September 5, 2008, at approximately 9:01 a.m., Cleveland Gowdy was driving in the parking garage of Jeff Anderson Hospital. Mr. Gowdy was late for his 9:00 a.m. company physical. In a rush, the Defendant drove past pedestrian Marie Payne and an empty parking space which were both on Mr. Gowdy's left/driver's side. Placing his truck in reverse, Mr. Gowdy started to back up to get the parking spot. Mr. Gowdy then struck and rolled over Marie Payne with his truck. This caused severe injuries to Marie Payne and her death three hours later. At the scene, Mr. Gowdy actually admitted seeing Ms. Payne just before running over her. Three people corroborated this statement being made. Thus, there was overwhelming evidence presented at trial regarding Cleveland Gowdy's negligence. However, the jury somehow found that he was not at fault. As

shown below, to reach such a bizarre conclusion, the jury failed to consider the overwhelming evidence presented at trial.

In the Plaintiffs' case in chief, Officer Darreal Thompson of the Meridian Police Department testified regarding the layout of the third floor of the Jeff Anderson Hospital parking garage. (T. at 217-218; Trial Ex. 2). He said that the parking garage has one lane of traffic with spaces for cars to park on the left and right side. He identified a photograph that showed a clear view from the area of impact to the far end of the parking garage. (T. at 216-218; Trial Ex. 2). Officer Thompson said that he was the first one on the scene and arrived just a few seconds after Ms. Payne was run over. (T. at 212). After calling 911, Officer Thompson spoke to Mr. and Mrs. Gowdy. **Cleveland Gowdy and his wife, Diane Gowdy, both admitted that while driving forward they saw Marie Payne walking in the parking garage.** (T. at 214-215, 240-241). In fact, Mr. Gowdy admitted that Ms. Payne walked by him on the driver's side of his truck just before he started backing up. (T. at 214-215).

> Q. Where did he [Cleveland Gowdy] say he saw her [Marie Payne] walking?
> **A. He said he saw her walk past his truck.**
> Q. In the parking garage?
> A. Yes, sir.
> **Q. And did Mr. Gowdy say at what point in time he saw her walking in the parking garage?**
> **A. When he was moving forward.**
>
> (T. at 214-215)(Emphasis added).

Officer Thompson got down on his knees so he could talk to Ms. Payne. Ms. Payne's body was underneath the truck, and located between the front and rear tires. Her head and body were completely under the truck and her feet were slightly sticking out from under the left/driver's side. (T. at 213, 215-216, 218-219). The victim was in immense pain and Officer Thompson

tried to comfort her. (T. at 213).

Metro Ambulance emergency medical technician Howard Elkins testified that he was dispatched at 9:01 a.m. (T. at 247). Upon arrival, Mr. Elkins said that Marie Payne's feet were sticking out of the left/driver's side of the pickup truck. (T. at 250). She was conscious and responded to questions. (T. at 252). Ms. Payne had injuries from head to toe, including deep tissue lacerations, cuts, bruises, skin tears, and a tire tread mark across her abdomen. (T. at 253-256, 264). One of Ms. Payne's legs was shorter than the other, and this is indicative of a broken leg or hip. (T. at 253).

Mike Mitchell is the Security Director at Jeff Anderson Hospital. (T. at 282). He came to the scene within minutes of the incident. Mr. Mitchell testified that traffic is one way in the parking garage, and that there is not a designated area for pedestrians to walk. (T. at 283, 284-285). Mr. Mitchell confirmed Officer Thompson's testimony regarding Cleveland Gowdy admitting that he saw Ms. Payne just before backing up. (T. at 294-295).[2] Mr. Mitchell also reviewed the video surveillance footage for the parking garage but it did not show Ms. Payne walking in or out of the side entrance to Meridian Medical Associates. (T. at 295; Trial Ex. 2). It was determined that Ms. Payne exited the elevators at the far end of the parking garage and walked along the left side of the parking lane towards the area of impact. (T. at 296-297; Trial Ex. 12). Thus, Ms. Payne would have been in clear view of anyone driving through this area of the parking garage.

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[2] Later, in Defendant Schneider's case in chief, Assistant Chief of Police Jeff Lewis also confirmed Officer Thompson's statement that Mr. Gowdy admitted seeing Marie Payne walking in the parking garage. (T. at 757). Thus, two independent witnesses corroborated Officer Thompson's testimony.

The Plaintiffs' accident reconstructionist, Tim Corbitt, was tendered and accepted by the court as an expert. (T. at 304-307). Mr. Corbitt testified that he reconstructed the incident and prepared several to-scale diagrams. (Trial Ex. 18B, 18C, 18D, and 18E). He explained that Ms. Payne exited the elevators at the far end of the parking garage, walked on the side of the parking lane facing traffic for over 100 feet, passed by the left/driver's side of Mr. Gowdy's truck, and then walked behind Mr. Gowdy's truck and across the open traffic lane to get to her white Ford Taurus. (T. at 318-319, 329-332; Trial Ex. 16; Trial Ex. 18C). When Mr. Gowdy backed up, the truck's rear bumper struck Ms. Payne's leg area first and then she was knocked down to the ground. (T. at 324-325). Thus, Ms. Payne was upright at impact and was first hit by the truck's bumper and then run over by the tire. (T. at 324-325). As the truck moved over Ms. Payne's body, her skin was ripped by the metal trailer hitch and under carriage. (T. at 326-327; see also T. at 435). Mr. Corbitt's diagrams and photographs show that as Ms. Payne walked down the parking lane towards Mr. Gowdy she was clearly visible. (T. at 332, 334).

Further, Mr. Gowdy initially admitted that he saw Marie Payne prior to backing up, but he later changed his story. (T. at 335-336, 393). Mr. Corbitt found that Marie Payne was visible at all times while Mr. Gowdy was backing up because she standing upright when hit and was 9-10 inches taller than the tailgate of the truck. (T. at 327-328). Without question, Mr. Gowdy should have seen Ms. Payne going forwards and backwards. (T. at 335-337). In fact, it is physically impossible for a pedestrian to get behind the truck without being visible at some point. (T. at 413-414). Moreover, the fact that Mr. Gowdy missed the parking space on his left is proof that Mr. Gowdy was not paying attention. (T. at 338, 416). Therefore, it was Mr. Corbitt's opinion that Mr. Gowdy did not see what he should have seen, was not keeping a proper lookout, was not keeping his vehicle under proper control, and failed to yield the right of way. (T. at 327,

334, 338, 339, 340, 355, 415).

The Plaintiffs' retained medical expert, Dr. Ralph Bell, has over thirty years experience and has treated thousands of pedestrians injured in car wrecks. (T. at 420-421). Dr. Bell agreed with the EMT Report, the Jeff Anderson Hospital nurses' notes, and Dr. William Billups' medical records that state Marie Payne's injuries were caused when she was struck by the pickup truck. (T. at 425-428; Trial Ex. 22). The medical records show Ms. Payne was injured from head to toe, including bilateral open knee injuries to the tibia/fibia area, lacerations on the arms and breast, hematoma of the entire face, her right calf skin and muscle was torn from the bone, and she had a tire tread mark across her entire abdomen. (T. at 431-434; Trial Ex. 22 (SNC/Payne:244)). Dr. Bell also agreed with the Death Certificate that states Marie Payne died of massive chest trauma and was struck by a truck. (Trial Ex. 23; T. at 435-436). Dr. Bell opined that Ms. Payne's bilateral knee injuries were caused from being struck by the bumper of the truck. (T. at 435). The Defendants had no expert, medical or otherwise, to refute this testimony.

There was a great deal of testimony from friends and loved ones about the impact that the death of Marie Payne had on her family. Marie Payne was a widow and lived in Dekalb, Mississippi in Kemper County. Ms. Payne had a loving relationship with her family and was well respected in the church and the community. (T. at 556-560, 562-563; Trial Ex. 32-34). Her granddaughter, Tamisha Anderson, testified that Ms. Payne was very active and they talked often. (T. at 556). In fact, one week before the incident, Ms. Payne traveled to Illinois for Tamisha's wedding. Ms. Payne was in good spirits and danced at the reception. (T. at 557-558; Trial Ex. 34). Ronnie and Tommy testified that their mother was seventy eight years old at the

time of her death and was very sharp mentally. (T. at 569, 589).[3] Their mother was independent and did her own gardening, banking, cooking, and driving. (T. at 569). Ms. Payne was also a member of the "Red Hat Society," which is a civic club of elderly women that participate in community programs. (T. at 557). Ronnie and Tommy had a loving relationship with their mother and they suffered a tremendous loss due to their mother's death. (T. at 570-574; 587-593). The fact that Ms. Payne had conscious pain and suffering while laying under the truck hurt them deeply. Ronnie Payne also testified that $34,177.30 in medical and funeral bills had been incurred due to the death of his mother. (T. at 593; Trial Ex. 35). Without question, Marie Payne was a fine Christian woman that will be missed.

Finally, the Plaintiffs presented testimony that Cleveland Gowdy was in the course and scope of his employment with Schneider at the time of the incident. (T. at 454-456). The Plaintiffs' trucking expert, Dane Maxwell, testified that Mr. Gowdy is required to have physical exam to drive for Schneider and that Schneider directed Mr. Gowdy's actions by choosing time, place, doctor, and clinic (T. at 473-476). Interpretation No. 32 to the Federal Motor Carrier Safety Regulations states that if the carrier directs the employee, then the employee is on duty and the employer is responsible (T. at 508-509; Trial Ex. 27). Thus, Mr. Gowdy's time should have been logged as "on duty" under the Federal Motor Carrier Safety Regulations (T. at 477).

In its case in chief, Defendant Schneider called Mike Van Eperen as the corporate representative. Mr. Van Eperen admitted Schneider's Company Policy regarding driver re-certification by the 15th of the previous month was violated by Mr. Gowdy. (T. at 653).

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[3] The U.S. Department of Labor Table for Life Expectancy was admitted into evidence and showed that Marie Payne had a life expectancy of approximately 11 more years. (Trial Ex. 37).

Schneider denied directing Mr. Gowdy on September 5, 2008 even though the company chose the time, place, clinic, and paid for the examination and wrote it off on taxes as a business expense. (T. at 655-657).

Defendant Schneider designated and called Dr. Joey Parker as an expert in accident reconstruction. Dr. Parker tried to justify why Mr. Gowdy did not see Ms. Payne before backing over her. However, Dr. Parker later testified that he did not perform an actual accident reconstruction and was not taking a position as to what happened that day. (T. at 707). In fact, on cross examination, Dr. Parker admitted that he could not dispute Tim Corbitt's opinions. (T. at 718, 740). The defense expert agreed that Marie Payne walked by the left/driver's side of Mr. Gowdy's truck in the parking garage. (T. at 720-721). More importantly, **even though Mr. Gowdy claimed that he never saw Ms. Payne, Dr. Parker said that Ms. Payne likely passed by his left/driver's side to end up walking behind the truck.** (T. at 723-724). Dr. Parker marked Mr. Gowdy's field of view in the parking garage on a diagram and agreed that the view ahead was not restricted in any way. (T. at 741; Trial Ex. 41-Diagram 3). **Thus, Dr. Parker admitted that Marie Payne would have walked through Mr. Gowdy's forward field of view prior to being struck.** (T. at 724, 734, 742-744; Trial Ex. 41-Diagram 3). Dr. Parker also admitted that if you are keeping a proper lookout, you see what you can see or what is available. (T. at 741-742). Finally, Dr. Parker's pretrial experiment showed that a five foot tall "pocket rod" was visible out of Mr. Gowdy's driver's side rear view mirror. (T. at 732-733). Thus, a person of Marie Payne's height would have been visible above the tailgate or in the left rear view mirror had Mr. Gowdy been looking.

Defendant Schneider called Marie Payne's treating doctor, Dr. Rhonda Wilson, by

videotaped deposition. Dr. Wilson treated Ms. Payne for the last six years of her life. Over objection, Dr. Wilson testified regarding an unrelated May 2008 fall by Marie Payne. (T. at 761-764). **On cross examination, Dr. Wilson said that mention of a prior fall should not in any way be used to conclude that Marie Payne fell on September 5, 2008 and said it was impossible for anyone to say that such a fall occurred.** (T. at 798). Regardless of any prior medical conditions, Dr. Wilson had not placed any restrictions on Marie Payne or limited her activities in any way prior to September 5, 2008. (T. at 797). Like Howard Elkins and Dr. Ralph Bell, Dr. Wilson testified that Marie Payne suffered injuries from head to toe, including probable leg fractures, from being struck by the pickup truck. (T. at 796).

Defendant Cleveland Gowdy testified on his own behalf in his case in chief. He testified that there were no obstructions to his view out of the front windshield. (T. at 866). Still, Mr. Gowdy denied seeing Marie Payne when he was driving forward. (T. at 849, 866). In fact, Mr. Gowdy claimed that he never saw Marie Payne at any time in the parking garage until after the impact. (T. at 847). Mr. Gowdy admitted that he was not looking to the left when he missed the parking spot. (T. at 844). While going in reverse, he felt an impact on the back left tire and got out of his truck and looked underneath it. (T. at 868-869). Ms. Payne was under the truck by the back left wheel laying straight across. (T. at pp. 873, 875). **Mr. Gowdy gave inconsistent testimony about where he was looking while backing up.** At trial, Mr. Gowdy testified that he was looking over his right shoulder when backing up. (T. at p. 869). However, in his deposition, Mr. Gowdy previously stated that he was looking to his left when he started to back up. (T. at 869-872). Mr. Gowdy testified under oath in his deposition that he "looked on my left side to see when I was backing." (T. at p. 869-872; RE 5 - April 23, 2009 Deposition of Cleveland Gowdy, pp. 18-21). Finally, Mr. Gowdy admitted that he wished he had looked better before backing up.

(T. at 885).

SUMMARY OF THE ARGUMENT

The jury rendered a defense verdict and did not find the Defendants negligent. Ronnie and Tommy Payne respectfully ask this Court to not let Cleveland Gowdy and Schneider walk away from the killing of their mother without taking any responsibility. The Plaintiffs raise several arguments that warrant reversal. First, the jury was provided with very prejudicial evidence of a prior fall by Marie Payne. This improper evidence made the jury think that Marie Payne fell prior to being run over by Cleveland Gowdy on September 5, 2008. Second, the jury's verdict was not based on the credible evidence and was the product of bias or prejudice. Third, the trial court erred in denying the Plaintiffs' jury instructions. Specifically, the court did not instruct the jury that Mr. Gowdy had a duty to see what he should have seen. Without such guidance, the jury was allowed to find that Mr. Gowdy was not liable if he did not see Ms. Payne before running over her. However, the real question is whether he should have seen the decedent. Fourth, the testimony of Plaintiffs' expert Tim Corbitt was improperly limited while at the same time Defendants' expert Dr. Joey Parker was allowed to give opinions that were not reliable.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT ALLOWED UNFAIRLY PREJUDICIAL EVIDENCE OF AN UNRELATED PRIOR FALL BY MARIE PAYNE

The trial court erred in allowing unfairly prejudicial evidence of an unrelated prior fall by Marie Payne that occurred four months prior to the September 5, 2008 incident. It is important to note that no one witnessed Marie Payne fall on September 5, 2008. No one testified that she was incoherent or was unsteady on her feet that day. Still, the Defendants used a

reported May 2008 fall to argue that Ms. Payne had a propensity to fall and this contributed to her own demise.[4] This infected the jury with tainted evidence and is the most likely reason that the Plaintiffs did not prevail at trial. After trial, even the trial court acknowledged that prior falls were "clearly prejudicial." (T. at 1006-1007).

The Plaintiffs filed a pretrial Motion *in Limine* to exclude any evidence of prior falls by Marie Payne. (10 R. at 1369-1378). There were only three reported falls during Marie Payne's seventy eight year life. Any alleged falls that occurred months or years prior to the September 5, 2008 incident were not relevant under Rule 402. M.R.E. 402. Even if relevant, the evidence was unfairly prejudicial. M.R.E. 403. Moreover, it is improper to use evidence of past acts to show that someone acted in conformity with that act on the date in question. Thus, prior falls were improper character or propensity evidence under Rule 404(b). M.R.E. 404. Further, there was no showing of substantial similarity between the prior falls and any alleged fall on September 5, 2008. The trial court granted the Plaintiffs' Motion *in Limine*. (12 R. at 1679-1682).

The medical records of Marie Payne only reference three unrelated falls during her life. On July 17, 2007, the records state that Ms. Payne was gardening and fell into her rose bushes. (Trial Ex. 20 (SNC/Payne:73-74)). On February 7, 2008, the records state that Ms. Payne fell about two weeks earlier. (Trial Ex. 20 (SNC/Payne:67)). On May 20, 2008, the records state that Ms. Payne fell since her last office visit. (Trial Ex. 20 (SNC/Payne:59-60)). No other

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[4] The Defendants are attempting to use the Rules of Evidence as a shield and a sword. On one hand, they did not want the jury to hear that Mr. Gowdy had been in four prior wrecks because a jury would automatically conclude that Mr. Gowdy was negligent for this, his fifth wreck. (9 and 10 R. at 1278-1279; T. at 1679-1680). On the other hand, the Defendants wanted to use evidence of prior falls to show that Ms. Payne was subject to falling and contributed to her own death. This Honorable Court should find that either all the prior falls and prior wrecks come into evidence, or that they should all be excluded.

factual details of the prior falls were provided in the medical records. However, it is undisputed that none of the falls occurred in a parking garage or involved Ms. Payne getting knocked off her feet by a pickup truck.

Marie Payne's longtime treating physician, Dr. Rhonda Wilson, gave a pretrial deposition. **Dr. Wilson testified that it could not be insinuated that Ms. Payne fell on September 5, 2008 simply because of reported falls in the past.** (T. at 798; Trial Ex. 42 (ID Only), p. 29, lines 3-8). No one testified otherwise. Thus, there was no evidence, witness, or expert to show that Marie Payne fell down on September 5, 2008 before getting run over. (12 R. at 1685). Clearly, the "falling grandmother" theory was nothing but raw speculation, conjured up by an imaginative attorney.

Despite having no proof that Ms. Payne fell on September 5, 2008, the Defendants offered several reasons to persuade the trial court that the jury should hear evidence of Ms. Payne's prior falls. (12 R. at 1671). The Defendants' evolving arguments as to why evidence of prior falls was necessary included the following:

1) To show that Ms. Payne was a fall risk (12 R. at 1679);

2) **To show that Ms. Payne had "a tendency" or "predisposition to falling"** (12 R. at 1679-80)(emphasis added);

3) To show that Ms. Payne had "either fallen, stumbled, or was otherwise unable to get out of the way of Gowdy's backing pickup" (12 R. at 1698).

4) To show whether or not Ms. Payne could "walk well" (12 R. at 1697);

5) **To show that "certain medical conditions...make it more likely that Ms. Payne fell** behind Mr. Gowdy's backing pickup truck" (12 R. at 1695)(emphasis added);

6) To show Ms. Payne's "presently existing"..."physical health condition" (12 R. at 1697); and

7) To show Ms. Payne's damages were diminished (12 R. at 1699)

Over and over, the trial court rejected these arguments and held that the unfairly prejudicial evidence was not admissible.

> BY THE COURT: Yes, I agree here that – just like prior wrecks, I don't think come in. I don't think prior fall[sic] days or months away should. **The issue is what happened that day. And it would be prejudicial.** And it is – I will grant the motion in limine on that...
>
> . . . . .
>
> BY THE COURT: ...I think in this case prior falls is out of bounds. **I just think it is prejudicial and it is not particularly instructive about what happened that day...**
>
> (12 R. at 1679-1680, 1682)(Emphasis added).

The court excluded unrelated prior falls because they were not relevant to the incident on September 5, 2008. M.R.E. 402. The trial court also held that such evidence was extremely prejudicial under Rule 403 of the Mississippi Rules of Evidence and barred any mention of Marie Payne's alleged prior falls. (12 R. at 1679-1682).

Realizing that the court was not going to allow prior incidents to show that Ms. Payne had the propensity to fall on September 5, 2008, Defendant Schneider completely flip-flopped its argument. The Defendant filed a Motion to Reconsider alleging several new reasons why the evidence should be allowed. The Defendant claimed that the prior falls showed Ms. Payne's quality of life was diminished and argued that Rule 404(b) did not apply. (12 and 13 R. at 1694-1720). The Motion for Reconsideration was properly denied.

The Defendant also made several attempts during trial to elicit evidence of prior falls. The trial court repeatedly sustained the Plaintiffs' objections and even said that prior falls "...are remote in time. **And there is no evidence here that I have heard that would support that Ms.**

– **anyone saw Ms. Payne fall on that day.**" (T. at 346-347, 766)(emphasis added). Shot down again, defense had an epiphany and decided that the evidence was no longer needed to show that Ms. Payne had the propensity to fall. Rather, defense counsel said it was for "impeachment" of the wrongful death beneficiaries. (T. at 768-770). Unfortunately, the trial court bought into this argument and reversed itself. The trial court ruled that an unrelated May 2008 fall was admissible only for impeachment purposes of the wrongful death beneficiaries and only if the beneficiaries said Ms. Payne had not fallen before the incident. (T. at 769-771).

However, close review of the wrongful death beneficiaries' testimony reveals that they were not asked about prior falls on direct examination. During the cross examination, defense counsel failed to ask about Tommy's knowledge of his mother's prior falls. (RE 6; T. at 580-582). During cross examination of Ronnie Payne, there were no questions about prior falls. (RE 7; T. at 597-599). So, even though the trial court allowed using prior falls for impeachment, the wrongful death beneficiaries were not questioned about this issue. Regardless, the trial court allowed evidence of a prior fall later in the trial.

In Schneider's case in chief, the Defendant used Dr. Rhonda Wilson's videotaped deposition to elicit testimony regarding prior falls. Without question, the sole purpose for which Dr. Wilson's deposition was used was to bring out evidence of prior falls under the guise of impeaching Ronnie Payne. (T. at 768-769). Plaintiffs' objected and pointed out that defense counsel failed to lay any predicate or show any inconsistent testimony regarding prior falls that could impeach Tommy or Ronnie Payne. (T. at 769). Regardless, the trial court allowed testimony of a May 2008 fall that caused a shoulder injury.

> BY THE COURT: I don't know. The way I recall, I said that if there is affirmative information that's presented that you feel like is inconsistent with the truth, you can impeach on that issue. And he

> asked Mr. Payne about that; he denied that. Evidently, that's the truth.
>
> I'm going to allow the – that issue about her shoulder. Now as to other instances and falls prior to – let me see. I don't know how to – I mean, as to that shoulder injury, if you can edit that in a way that deals with that particular incident, I'm going to – I feel like it is appropriate to allow it.
>
> (T. at 769-770).

The trial court attempted to fashion a question from the deposition transcript of Dr. Wilson that would not incorporate prior falls and would only address the shoulder injury. (T. at 769-770). Over the Plaintiffs' objection, the trial court allowed the following testimony to be read to the jury.[5]

> Q. Okay. Well, do you know whether in May of 2008 Ms. Payne had complained of having fallen?
>
> A. There was – ***in May of 2008, there, the note indicates that she said she had fallen at that point since I saw her last*** and had sustained a fracture to her right shoulder. But – so she said she was progressing okay from that standpoint.
>
> (T. at 786; Trial Ex. 42 (ID Only), p. 14, lines 4-18 as modified by trial court and read to jury)(emphasis added).

This testimony was devastating to the Plaintiffs' case and was used by the Defendants in closing to argue that Ms. Payne spontaneously fell before Mr. Gowdy backed over her. (T. at 957, 960).

Although the trial court has broad discretion on evidentiary matters, allowing evidence of a prior unrelated fall constitutes reversible error because a substantial right of the Plaintiffs was

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[5] Plaintiffs' counsel also contemporaneously objected to the testimony during Dr. Wilson's deposition, giving defense counsel an opportunity to cure the objection. (T. at 770-771). This was not done. Since the Defendant failed to call Dr. Wilson live, it should have been procedurally barred from eliciting testimony that was improper under the Rules of Evidence. *See* M.R.C.P. 32(a).

affected. *See* M.R.E. 103(a). Clearly, the trial court erred by admitting evidence of Marie Payne's alleged May 2008 fall. It is well known that the standard of review for a trial court's decision to either admit or exclude evidence is abuse of discretion. *Robinson Prop. Group, L.P. v. Mitchell*, 7 So.3d 240, 243 (Miss. 2009); *Beverly Enters., Inc. v. Reed*, 961 So.2d 40, 44 (Miss. 2007). A case shall be reversed on the admission or exclusion of evidence if said evidence results in prejudice and harm or adversely affects a substantial right of a party. *Accu-Fab & Const. v. Ladner Ex Rel. Ladner*, 970 So.2d 1276, 1284 (Miss. Ct. App. 2000); *citing Terrain Enter., Inc. v. Mockbee*, 654 So.2d 1122, 1131 (Miss. 1995). Further, even if 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..." M.R.E. 403.

In *Accu-Fab*, a family filed a wrongful death suit against the defendant after the deceased fell through a hole cut in the roof while performing his job as a metal fabricator. *Accu-Fab v. Ladner*, 970 So. 2d at 1278. A marijuana cigarette was found in the deceased's pants pocket. *Id.* at 1284. The trial court entered an order excluding this evidence, holding that such evidence was irrelevant to the incident and there was no evidence to suggest the decedent suffered from an impairment that contributed to his injuries. *Id.* at 1285. *See also Pope v. McGee*, 403 So.2d 1269, 1271 (Miss. 1981)(excluding evidence of two six packs of beer and an unidentified white powder found in defendant's car because they offered no proof on proximate causation of the collision, and its prejudicial value greatly outweighed its probative value).

As stated above, defense counsel originally argued that evidence of prior falls showed that Marie Payne had a "tendency" to fall. After losing this argument, the Defendant said that the prior falls were relevant for damages. After losing this argument, the Defendant finally came up with the idea of using the prior falls for impeachment even though there was no testimony to

impeach. Even if inconsistent testimony was given by the beneficiaries, this does not change the fact that the primary purpose for the evidence was to show Ms. Payne's propensity to fall, not impeachment. The admission of even one unrelated prior fall by the trial court was highly prejudicial and caused substantial harm to the Plaintiffs' case. Worse, once admitted under the guise of impeachment, defense counsel actually used the prior fall as substantive proof that Marie Payne had a tendency to fall down and caused her own death. In fact, defense counsel argued in closing that Marie Payne spontaneously fell down prior to being hit by Mr. Gowdy.

> BY MR. DUNBAR: We have shown you through Mr. Parker and the physical evidence out there that there was certainly very reasonable circumstances where Mr. Gowdy could not have seen her as she crossed his path **or had fallen behind his truck.**
>
> . . . . .
>
> Remember...that she had broken her shoulder **when she had fallen in May of 2008.**
>
> (T. at 957, 960)(emphasis added).

Even though the trial court ruled that Marie Payne was not negligent as a matter of law, defense counsel still argued that Ms. Payne fell on September 5, 2008 just like she had done so in the past. (T. at 896-898, 957, 960). Thus, prior falls were used for substantive evidence and not for impeachment.

The Mississippi Supreme Court has reversed a defense verdict in a similar situation. In *Martindale*, a defendant in a personal injury case used a Chancery Court Petition to Settle a Doubtful Claim to impeach the plaintiff. *Martindale v. Wilbanks*, 744 So.2d 252 (Miss. 1999). The Court found that use of a prior inconsistent statement as substantive evidence instead of impeachment was reversible error.

> The Court in *Parker* noted the rule that prior, inconsistent statements admitted for impeachment purposes cannot be used as substantive evidence. *Parker v. State*, 691 So.2d 409, 413 (Miss. 1997). It appears that Wilbanks did argue the prior inconsistent statements as substantive evidence. As such, the trial court erred in allowing Mr. Alford to use the petition as substantive evidence.
>
> *Martindale*, 744 So.2d at 254-255.

As the Defendant stated in pretrial Motions, the primary purpose of prior falls was for substantive evidence that Ms. Payne had a tendency to fall down. (12 R. at 1671, 1679-1680). The Defendant was eventually able to admit this evidence by flip-flopping and calling it impeachment. However, defense counsel committed reversible error by arguing in closing that Marie Payne fell down prior like she had done before. *See Cooper v. State Farm Fire & Casualty Company*, 568 So.2d 687, 691 (Miss. 1990)(If defendant was attempting to use the prior statements under the guise of impeachment for the primary purpose of placing before the jury substantive evidence which is not otherwise admissible as a device to avoid the hearsay rule the admission of the testimony was error). Moreover, evidence of prior falls did not suddenly become relevant simply because one of Ms. Payne's sons may or may not have known about a shoulder injury in the past. *See Washington v. Kelsey*, 990 So.2d 242 (Miss.Ct.App. 2008)(statement that plaintiff had sped in the past violated 404(b) since it was offered to show that the plaintiff was speeding on the day of the accident). Finally, there was no suggestion that May 2008 prior fall was substantially similar to the alleged fall on September 5, 2008. *Yoste v. Wal-Mart Stores, Inc.*, 822 So.2d 935 (2002)(evidence of prior accidents is admissible only upon a showing of substantial similarity of conditions). Accordingly, the admission of the unrelated May 2008 fall was irrelevant and unfairly prejudicial was thus inadmissible.

II. THE TRIAL COURT ERRED WHEN IT OVERRULED THE PLAINTIFFS' MOTION FOR J.N.O.V., OR IN THE ALTERNATIVE, FOR A NEW TRIAL BECAUSE THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE

The trial court erred when it overruled the Plaintiffs' Motion for J.N.O.V. or new trial because the verdict was against the overwhelming weight of the evidence.[6] On appeal from the denial of a Motion for J.N.O.V, a reviewing court, considering the evidence in the light most favorable to the nonmovant, will reverse and render a lower court's denial "[i]f the facts so considered point so overwhelmingly in favor of the appellant [movant] that reasonable men could not have arrived at a contrary verdict." *White v. Stewman*, 932 So. 2d 27, 32 (Miss.2006). Simply stated, "[judgments notwithstanding the verdict] go to the very heart of a litigant's case and test the legal sufficiency of that litigant's case." *Id.* Thus, the issue of granting or denying a Motion for J.N.O.V. should be reviewed by the Court under the de novo standard, therefore, applying the same criteria as that of the trial court. *Id.*

Alternatively, Rule 59(a) of the Mississippi Rules of Civil Procedure provides that "A new trial may be granted...in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted..." M.R.C.P. 59(a). Although motions for a new trial are employed in rare cases, a new trial may be granted when "the verdict is against the overwhelming weight of the evidence, or when the jury has been confused by faulty jury instructions." *Crews v. Mahaffey*, 986 So. 2d 987, 998 (Miss. Ct. App. 2007)(citing *Fiddle, Inc. v. Shannon*, 834 So. 2d 39, 45 (Miss. 2003)). The issue of whether to grant or deny a new trial, on motion of a party, should be reviewed by this Court under the abuse of discretion standard. *White v. Stewman*, 932 So. 2d 27, 33 (Miss. 2006).

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[6] (13 R. at 1757-1775).

The motion for a new trial affords trial courts with an alternative to a grant of a J.N.O.V., and provides judges with the opportunity to remedy trial error before an appeal is commenced. *White*, at p. 33 (Miss.2006). The Court in *White* explained that new trials are granted whenever courts are "convinced, from the evidence, that the jury has been partial or prejudiced, or has not responded to reason upon the evidence produced." *Id.* A new trial is necessary for several reasons: (1) when the verdict is against the substantial or overwhelming weight of the evidence; (2) when mistakes were made in conduction of the trial; or (3) when mistakes where made in applying the law. *Id.*

In *Janssen Pharmaceutica, Inc. v. Bailey*, the Mississippi Supreme Court reiterated the following factors a trial court should weigh when considering a motion for a new trial:

> 1. Has the search for the true facts proceeded as far as it reasonably may under the peculiar facts and circumstances of the case?
>
> 2. To what extent would it be unfair to the party in whose favor the verdict was returned in effect to give that party's adversary a second bite at the apple?
>
> 3. Considering the evidence, is there a substantial basis for believing that the jury disregarded their oaths and failed to follow the instructions of the Court in reaching its verdict? Put another way, is it substantially apparent that the jury's verdict is the product of passion, prejudice or any other arbitrary factor?
>
> 4. Assuming arguendo that the verdict is unjust (by reference to the underlying facts of the transaction or occurrence, the complete truth of which we will never know), what is the impact of that "injustice" upon the party against whom the verdict has been returned?
>
> 5. If a new trial is ordered, will the party in whose favor the verdict has been returned be deprived of some fair advantage he enjoyed in the first trial?
>
> 6. Are there any other factors present, peculiar to the particular case or the parties, that would render just or unjust the grant or

denial of a new trial?

Janssen, 878 So. 2d 31, 60-61 (Miss. 2004).

The *Janssen* Court, after applying the abovementioned factors, found that the trial court did abuse its discretion by not granting Janssen's motion for a new trial because the verdict was "so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice on this Court." *Id.* at 61 (citing *Baker v. State*, 802 So. 2d 77, 81 (Miss. 2001)).

Even giving the Defendants the benefit of the reasonable inferences, there was overwhelming evidence presented in the Plaintiffs' favor at trial. Clearly, Marie Payne walked down the parking lane on the left/driver's side of Cleveland Gowdy's truck before being struck. Mike Mitchell testified that there was no other route from the elevators at the far end of the parking garage to Marie Payne's car. (T. at 294-297). This placed the decedent in full view of Mr. and Mrs. Gowdy for several seconds.[7] (Trial Ex. 12; T. at 296-297). Thus, the jury ignored the fact that Ms. Payne had to be visible at some point before she wound up under the truck. The Defendants' own expert, Dr. Joey Parker, admitted that Marie Payne had to walk through Mr. Gowdy's field of view and passed by the left/driver's side before the incident. (T. at 721, 723-724, 734, 742-744; Trial Ex. 41-Diagram 3). In fact, only one witness at trial, Defendant Cleveland Gowdy, testified that Ms. Payne was not visible while he was driving forward.[8] (T. at

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[7] Although in opening statement defense counsel claimed that the two living witnesses to the incident would testify about the wreck, Diane Gowdy was not called as a witness and did not offer testimony to support her husband's version of the incident. (T. at 206).

[8] Cleveland Gowdy's claim at trial that he did not see Marie Payne does not make it so. For example, in a hypothetical product liability case about a defective map, if a map maker claimed that the earth was flat, that claim alone would not be enough

845). Not surprisingly, Mr. Gowdy disputed Officer Thompson's testimony about seeing Marie Payne and claimed that he never saw Ms. Payne in the 8-10 seconds while driving forward in the parking garage. (T. at 848). Even assuming that Mr. Gowdy did not see Ms. Payne before hitting her, the real issue is whether or not he should have seen her. He should have. If Mr. Gowdy is allowed to escape liability in this situation, other defendants will try to avoid responsibility in the future by simply claiming that they did not see the person before they ran over them. That is not the law in Mississippi or any other state.

Officer Darreal Thompson, Mike Mitchell, Asst. Chief Jeff Lewis, Tim Corbitt, defense expert Dr. Joey Parker, Dr. Parker's Field of View Diagram, and the photographs show that Marie Payne should have been visible while Mr. Gowdy was driving forward and that Ms. Payne walked right by Mr. Gowdy's left/driver's side prior to impact. (T. at 214, 294-295, 327, 720-721, 757; Trial Ex. 2; Trial Ex. 41-Diagram 3). This testimony was not rebutted by the Defendants. In fact, defense expert Dr. Joey Parker admitted that he could not dispute Tim Corbitt's opinion and further showed by his own "field of view" diagram that Mr. Gowdy's straight ahead view when driving was unrestricted. (T. at 718, 733-734, 740; Trial Ex. 41-Diagram 3). Dr. Parker also testified that his investigation showed that a five-foot tall "pocket rod" was visible above the tailgate of Mr. Gowdy's truck and out of Mr. Gowdy's driver's side rear view mirror.[9] (T. at 733). Thus, the Defendants' best case was that the Plaintiff was visible

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to support a jury verdict in a case involving a defective map. Such an unsupported claim would not be enough to overcome witnesses, experience, and satellite photographs showing that the earth is indeed round. The same principle should apply in this case - Mr. Gowdy's claim is not supported and should be rejected.

[9] The photograph referenced in Dr. Joey Parker's report was previously labeled "SNC-2223" and is mentioned on page 733 of the trial transcript.

if Mr. Gowdy was looking and following the rules of the road. Mr. Gowdy's self-serving denial is not enough to overcome the substantial evidence in this case from all other witnesses, the defense expert, physical evidence, and simple logic.

The Plaintiffs also provided extensive testimony regarding Marie Payne's injuries and conscious pain and suffering. The Plaintiff's medical expert, Dr. Ralph Bell, testified that Marie Payne was alive for several hours after being struck and run over by Mr. Gowdy with severe injuries from head to toe, including bilateral open knee injuries to the tibia/fibia area, lacerations on the arms and breasts, hematoma of her entire face, right calf skin and muscles torn from the bone, and a tire tread mark across her entire abdomen. (T. at 431-434; Trial Ex. 22 (SNC/Payne:244)). Ms. Payne had exposed bone in her left knee and both tibias. (T. at 423). More importantly, Dr. Bell explained that the bilateral knee injuries were caused from the bumper striking Ms. Payne's knees. (T. at 431-434). Testimony by Metro Ambulance emergency medical technician Howard Elkins showed that Ms. Payne was in severe pain when the paramedics responded at the parking garage. (T. at 253). The Defendants did not offer any medical experts to refute this evidence.

Lastly, during Tommy Payne's testimony about his mother, Mr. Gowdy was unable to control himself and had an emotional outburst in front of the court and the members of the jury. (T. at 575-576). The outburst caused such a commotion that the jury was dismissed and the proceedings were forced to recess until the situation could be resolved. (T. at 575). The only words picked up by the court reporter from the outburst were "Come on, man. Come on, man. I – (inaudible)" while Mr. Gowdy pounded his fist on the table and started crying. (T. at 575, 577). This unrestrained emotional outburst, whether staged or not, obviously caused the jury to feel

sympathy towards Mr. Gowdy. (T. at 577-578).[10]

This case is the very situation where a jury fails to use reason based on the evidence presented, and a J.N.O.V. or new trial should have been granted to remedy the injustice dealt to the Payne family. The *Janssen* Court held, "If the facts and inferences so considered point so overwhelmingly in favor of the movant that reasonable jurors could not have arrived at a contrary verdict, granting the motion is required." *Janssen*, 878 So. 2d 31, 54. Taking the overwhelming evidence presented at trial and then comparing it to the trial court's adverse ruling regarding Mr. Gowdy's duty to see what he should have seen, the trial court's reversal of its ruling to exclude prior falls, and the startling emotional outburst of Mr. Gowdy in front of the jury, it becomes clear that the jury's verdict was influenced by factors other than the credible evidence. The harsh verdict shows that they were influenced by bias, prejudice, or passion. In light of the overwhelming testimony referenced above, the jury's verdict should be reversed.

III. THE TRIAL COURT ERRED IN DENYING PLAINTIFF'S JURY INSTRUCTIONS P-1 AND P-14 AND NOT INSTRUCTING THE JURY REGARDING THE DUTY TO SEE WHAT ONE SHOULD HAVE SEEN

At the close of the evidence, the Plaintiff moved for a directed verdict against the Defendants. The Plaintiffs also submitted Jury Instruction P-1, which instructed the jury that Defendant Cleveland Gowdy was negligent as a matter of law. (13 R. at 1778). At the jury instruction conference, the trial court ruled that Marie Payne was not negligent as a matter of law. (T. at 896-898) ("...I didn't think that there was any evidence that would justify a conclusion of negligence on the part of Ms. Payne..."). However, the court still denied the oral motion for

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[10] It will never be known if Cleveland Gowdy's bout of weeping during trial was planned to allow defense counsel to evoke sympathy from the jury during closing. (T. at 968). However, it should be pointed out that Mr. Gowdy was deposed about this incident two times and never lost his composure like he did in court.

directed verdict and Jury Instruction P-1. (T. at 901).

Respectfully, the trial court erred in denying the Plaintiffs' oral motion for directed verdict and Jury Instruction P-1. Had the court excluded evidence of a prior fall, the overwhelming evidence of Mr. Gowdy's negligence would have justified a directed verdict for the Plaintiffs. This situation is analogous to *Dennis by and Through Cobb v. Bolden*, 606 So.2d 111, 113-114 (Miss. 1992). In *Bolden*, the Supreme Court reversed and remanded a defense verdict for a driver that hit a child that was standing near the street. *Id.* at p. 112. The defendant alleged that the child darted into the street, causing the collision. Although there was conflicting evidence about the accident, the Court in *Bolden* found that "because there was no substantial, credible evidence supporting the theory that [the child] suddenly 'ran' or 'darted' in front of a car, the instruction should not have been given." *Id.* at p. 113. In the case at bar, since the court allowed prejudicial evidence of a prior fall and did not grant a directed verdict against Mr. Gowdy, this constitutes reversible error.

Further, Plaintiffs' Proposed Jury Instruction P-14 should have been given. (RE 9; 13 R. at 1779-1780). Proposed Jury Instruction P-14 stated the following:

> **You are instructed that a motorist has a duty and is responsible for seeing what he should have seen under the circumstances.** Failure to do so is negligence.
>
> Therefore, if you find from a preponderance of the evidence in this case that the Defendant, Cleveland Gowdy, was driving his vehicle and failed to see Marie Payne before striking her and that such failure to see Marie Payne was negligence and this negligence was a proximate cause or proximate contributing cause of Marie Payne's injuries, then your verdict shall be for the Plaintiffs.
>
> (RE 9; 13 R. at 1779-1780(emphasis added).

At the jury instruction conference, Defendant Schneider objected and claimed the instruction was

peremptory. (RE 10; T. at 903-904). The real reason that the Defendants objected is that their own expert said Marie Payne would have been visible while walking in the parking garage. In any event, the trial court denied the instruction as cumulative and this was error. (RE 10; T. at 903-904).

Jury Instruction P-14 is taken almost verbatim from *Utz v. Running and Rolling Trucking, Inc.*, 32 So.3d 450 (Miss. 2010) and *Tippit v. Hunter*, 205 So.2d 267 (Miss. 1967). It is a correct statement of Mississippi law, and the Plaintiffs were severely prejudiced by not being able to provide this instruction to the jury. In *Utz*, the proposed instruction stated that "[you] are instructed that under the law of this state a motorist has an absolute duty to see that which is in plain view or open and apparent..." *Utz*, at p. 481. The Supreme Court approved this jury instruction and said:

> The driver of a car is charged with the duty of keeping a proper lookout and being on alert for vehicles, objects and persons ahead in the highway. *Fowler Butane Gas Co. v. Varner*, 244 Miss. 130, 141 So.2d 226 (1962); *Belk v. Rosamond*, 213 Miss. 633, 57 So.2d 461 (1952). ***The driver is charged with the absolute duty of seeing what he should have seen.*** *Tippit v. Hunter*, 205 So.2d 267 (Miss.1967); *Campbell v. Schmidt*, 195 So.2d 87 (Miss.1967); *Layton v. Cook*, 248 Miss. 690, 160 So.2d 685 (1964). He is also required to have his car under proper control, to be on the alert on the highway, and avoid striking plain objects. *Barkley v. Miller Transporters, Inc.*, 450 So.2d 416 (Miss.1984); *Shideler v. Taylor*, 292 So.2d 155 (Miss. 1974).
>
> *Utz*, at p. 481 (citing *Dennis by and Through Cobb v. Bolden*, 606 So.2d 111, 113-114 (Miss. 1992)(emphasis added).

The case at bar involved very unique facts and hinged on whether or not Marie Payne was visible at any time while Mr. Gowdy was driving in the parking garage. Proposed Jury Instruction P-14 was crucial to the Plaintiffs' case since there was testimony from Officer Darreal Thompson, Mike Mitchell, Tim Corbitt, and Dr. Joey Parker that Cleveland Gowdy either

admitted seeing Marie Payne or that Mr. Gowdy should have seen Ms. Payne while she was walking in the parking garage.

In closing, defense counsel took full advantage of the trial court's denial of Jury Instruction P-14 and argued that Mr. Gowdy was keeping a reasonable lookout by simply looking to the left, right, and behind.

> BY MR. CLUCK: ...And [the jury instruction] says that a driver backing a car has a duty to do three things: To look to their left, to look to their right, to look behind them. And you heard from Mr. Gowdy that he did all three of those things. **And because he did all three of those things, there is no way he can be negligent.** He did everything the laws [sic] require him to do...
>
> (T. at 967).

The only way to overcome the self-serving testimony by Cleveland Gowdy that he looked left, right, and behind but still never saw Ms. Payne at any time, was an instruction that said he had a duty to see what one should have seen. Such an instruction would have allowed the jury to find liability on the Defendant whether they believed Officer Darreal Thompson, Dr. Joey Parker, or even Cleveland Gowdy. In *Bolden*, the Mississippi Supreme Court charged the driver with "the absolute duty of seeing what he should have seen," and reversed a defense verdict even though the defendant claimed they never saw the pedestrian before impact. *Bolden*, at p. 113-114. Thus, the denial of this instruction constitutes reversible error and was not cured by other instructions.

Further, the trial court erred in excluding Jury Instruction P-14 as being cumulative.

> BY MR. WILKINS: Your honor, this is straight out of the *Utz* case and the *Tippit vs. Hunter* case that the motorist does have a duty to see what he should have seen under the circumstances.
>
> .....

> BY THE COURT: I think in this case we have given – **these other instructions are set out that he's got a duty to keep a reasonable and proper lookout** to the front, back, and sides, and if he didn't do that, he is negligent...[Jury Instruction] 14, I'm going to refuse.
>
> (RE 10; T. at 903-904).

It is well settled that a duty to see what one should have seen is a completely separate theory of liability from the duty to keep a reasonable lookout or the duty to keep a vehicle under proper control. In *Utz*, instructions based on a duty to keep a reasonable lookout, duty to keep a vehicle under proper control and a duty to see what should have been seen were allowed. *Utz*, at p. 482. These duties are completely different and separate instructions for each theory have been repeatedly affirmed by this Honorable Court. *Utz*, at p. 481-482. *Bolden*, at pp. 113-114; *See also Church v. Massey*, 697 So.2d 407, 411-412 (Miss. 1997)(holding that failure to yield the right of way and failure to maintain a proper lookout are two separate theories of liability). A litigant is entitled to have jury instructions that present his theory of the case. *Young v. Guild*, 7 So.3d 251, 259 (Miss. 2009). Thus, the fact that the jury may have been given an instruction on keeping a proper lookout or reasonable control, without adequately informing the jury that a driver must see what is readily apparent, does not cure the error. The court's failure to grant Jury Instruction P-14 clearly constitutes error.

IV. THE TRIAL COURT ERRED IN LIMITING THE TESTIMONY OF PLAINTIFFS' ACCIDENT RECONSTRUCTIONIST TIM CORBITT

The Court erred in not allowing the Plaintiffs' accident reconstruction expert, Tim Corbitt, to testify regarding the body movements of Marie Payne when she was struck by Cleveland Gowdy's truck. Defense counsel objected when Mr. Corbitt attempted to give his opinion as to the natural movement of someone struck in the back of the leg by the bumper of a truck similar

to Cleveland Gowdy's.[11] (T. at 321). The trial court sustained the objection, finding that the testimony was absent from Mr. Corbitt's expert report, and ruled that the expert could not explain to the jury his conclusions regarding how Ms. Payne's body fell. (T. at 320, 323).

Rule 26(b)(4) of the Mississippi Rules of Civil Procedure outlines the standards for expert witness disclosure. M.R.C.P. 26(b)(4). The Rule requires a party to identify each expert who will testify at trial, to state the subject matter and substance of the facts and opinions of which the expert will testify, and to give a summary of the grounds for each opinion. *Id.* In their expert designation before trial, the Plaintiffs gave specific notice to defense counsel that Mr. Corbitt would testify regarding the cause of the incident and would testify consistent with his reports and diagrams. (4 R. at 464-466). Mr. Corbitt submitted a signed report stating that the tire rolled over Ms. Payne's abdomen and gave the measurements of the accident scene itself. (4 R. at 464, 477-487). Mr. Corbitt opined that Mr. Gowdy was backing up when his vehicle struck Ms. Payne, traveled more than the rear overhang, which is approximately 3.4 feet, when the rear tire rolled over her mid torso to chest area prior to stopping. (4 R. at 481-2). Thus, the Defendants were provided with Mr. Corbitt's opinions in his accident reconstruction report which specifically address Ms. Payne getting struck by the Defendant's truck with the tire rolling over her torso. (4 R. at 482). Defense counsel was put on fair notice that Mr. Corbitt would testify as to the movements of Ms. Payne as the truck moved over her body. In fact, defense counsel did not object to Mr. Corbitt's expert designation during discovery, nor did they depose

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[11] Trial testimony from Darreall Thompson established that Ms. Payne was walking across the driving lanes to her car behind the Defendant's truck when she was struck. (T. at 214-215). Medical evidence also established that Ms. Payne was first hit by the truck's bumper, then run over by the tire. (T. at 324-325). Mr. Corbitt was in the courtroom and relied on this trial testimony.

him. As such, the expert testimony is admissible, and the defense cannot object to the offering of those conclusions at trial. *See Canadian National v. Hall*, 953 So. 2d 1084, 1094 (Miss. 2007)(finding no error in admitting expert testimony when the plaintiff complied with discovery requirements under M.R.C.P. 26(b)(4)); *Mississippi Valley Gas Co. v. Estate of Walker*, 725 So. 2d 139, 148 (Miss. 1998)(holding that defendant cannot claim prejudice by expert's testimony where it was afforded the opportunity to depose the expert witness but chose not to do so). The trial court therefore improperly sustained the Defendant's objection and erroneously limited Mr. Corbitt's expert testimony at trial.

Without Mr. Corbitt's explanation, the Plaintiffs were not able to explain the way in which Ms. Payne's body fell, thus allowing the jury to speculate on the issue. The ability to prove how Ms. Payne was first struck by the truck and then fell was particularly important to the Plaintiffs in this case, given the Defendants' use of medical records and prior falls to show that Ms. Payne fell down before being run over. Limiting testimony on this issue gravely prejudiced the Plaintiffs and was reversible error. Also, as discussed in Section V. below, this error was compounded when the trial court allowed defense expert Dr. Joey Parker to testify regarding how Ms. Payne was struck and to criticize Mr. Corbitt's opinions when Dr. Parker did not do a complete accident reconstruction. (T. at 707).

V. THE TRIAL COURT ERRED IN ALLOWING ACCIDENT RECONSTRUCTION TESTIMONY FROM DEFENSE EXPERT DR. JOEY PARKER

The trial court committed error in allowing Dr. Joey Parker to testify as an accident reconstruction expert and to offer conclusions as to the position and body movement of Ms. Marie Payne. Dr. Parker testified that he did not perform a complete accident reconstruction and was not taking a position as to what happened that day. (T. at 707, 719). Dr. Parker only

conducted a "visibility analysis." (Trial Ex. 41). Nevertheless, over the Plaintiffs' objection, Dr. Parker was allowed to rebut Tim Corbitt's opinions regarding Ms. Payne's body position, which led to improper speculation that Ms. Payne fell down or was not visible before being struck.[12] (T. at 683-684, 688-689, 748). Worse, the trial court allowed Dr. Parker's unsupported testimony after limiting the testimony of Plaintiffs' expert Tim Corbitt, who had conducted a full accident reconstruction.[13] Considering the prejudice to the Plaintiffs that resulted from the trial court's error, reversal is warranted.

When reviewing a trial court's decision on evidentiary rulings, including expert testimony, the proper standard is abuse of discretion. *Robinson Prop. Group, L.P. v. Mitchell*, 7 So.3d 240, 243 (Miss. 2009). A trial court's decision to allow expert testimony will be reversed only on a showing of prejudice. *Canadian National v. Hall*, 953 So. 2d 1084, 1094 (Miss. 2007); *citing Jones v. State*, 918 So. 2d 1220, 1223 (Miss. 2005).

Here, the admission of Dr. Joey Parker's testimony on Ms. Payne's body movements was unfairly prejudicial to the Plaintiffs because it allowed the defense expert to speculate that Ms. Payne may have been out of view or had fallen behind the truck before she was struck. No medical witness or eyewitness testimony supported this conclusion. In fact, the only medical expert that testified on the issue said that Ms. Payne's injuries confirmed that the initial contact

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12 The Plaintiffs also objected to Dr. Parker's designation as an expert at trial, citing limited expertise and experience in accident reconstruction. (T. at 671-680). The court overruled the objection. (T. at 680).

13 During Mr. Corbitt's testimony, the court prevented Mr. Corbitt from testifying as to the body movements of Ms. Payne as she was struck by Cleveland Gowdy's truck. (T. at 319-321).

was from the truck's bumper hitting Ms. Payne's leg.[14] (T. at 324-325, 435-437). In other words, Ms. Payne was standing upright with 9-10 inches of her head sticking over the tailgate when she was hit by the truck in the leg. Also, in an effort to avoid giving damaging testimony against Cleveland Gowdy, Dr. Parker said that he could not establish the exact position of Ms. Payne after she was run over. (T. at 729). Yet, the Court still allowed Dr. Parker to rebut the testimony of Tim Corbitt, who conducted a full reconstruction.

Respectfully, the trial court erroneously allowed Dr. Joey Parker to testify as an accident reconstruction expert in this case. The admission of his testimony was significantly prejudicial to the Plaintiffs and warrants reversal by this Court.

CONCLUSION

Through no fault of her own, Marie Payne was killed by Cleveland Gowdy on September 5, 2008. This caused Ronnie and Tommy Payne to lose their mother and friend on September 5, 2008. Since that time, the Payne family has lived through the terrible feeling of knowing that their mother suffered in agonizing pain underneath Cleveland Gowdy's truck. Worse, this entire ordeal could have been avoided if Mr. Gowdy had been paying attention. The Payne family has also endured a trial with a verdict that completely ignores the facts. The Appellants/Plaintiffs respectfully request that this Honorable Court use its power to reverse and remand the case for a new trial with instructions to the trial court to exclude any evidence of prior falls. This will allow the Paynes to obtain justice for the loss of their mother. With any other result, however, justice will be denied.

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[14] During the pretrial Motion *in Limine* hearing, the court ruled that Dr. Parker could not talk about the cause of any of Ms. Payne's injuries from a medical standpoint. (12 R. at 1677-1678).

RESPECTFULLY SUBMITTED, this the 14th day of July, 2011.

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CERTIFICATE OF SERVICE

I, Rocky Wilkins, of counsel for the Appellants/Plaintiffs in the above-referenced matter, do hereby certify that I have this day served, via United States mail, postage pre-paid, the foregoing document to the following:

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This the 14th day of July, 2011.

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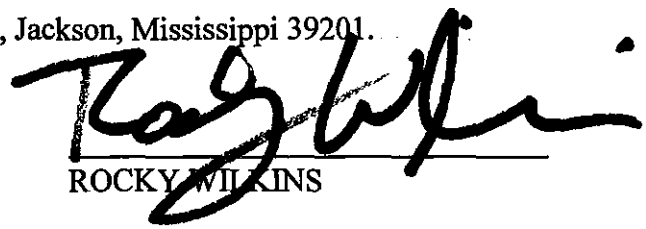
CERTIFICATE OF FILING

I, Rocky Wilkins, of counsel for the Appellants/Plaintiffs in the above-referenced matter, that I have hand delivered the original and four copies of the brief of Appellants/Plaintiffs and an electronic diskette containing the same on July 14, 2011, addressed to Ms. Kathy Gillis, Clerk, Supreme Court of Mississippi, 450 High Street, Jackson, Mississippi 39201.



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