IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
CASE NO. 2010-CA-01993

KATHERINE THOMPSON **PLAINTIFF/APPELLANT**

VERSUS

ECHOSTAR COMMUNICATIONS CORP. **DEFENDANT/APPELLEE**

BRIEF OF APPELLEE

APPEALED FROM THE CIRCUIT COURT
OF CARROLL COUNTY, MISSISSIPPI
CIVIL ACTION NO. 2000-0027CV1-L

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ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of records certifies that in addition to the named parties the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate potential disqualifications or refusal.

1. **Plaintiff-Appellant**
   Katherine Thompson

2. **Defendant-Appellee**
   Echostar Communications Corporation

3. **Counsel for Plaintiff-Appellant**
   Daniel M. Czamanske, Jr.
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4. **Counsel for Defendant-Appellee**
   Edwin S. Gault, Jr.
   Brian B. Hannula
   Caroline M. Upchurch
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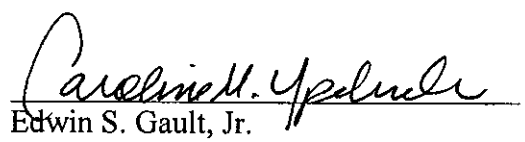
DATED, this the 24th day of August, 2011.

Respectfully Submitted,



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STATEMENT REGARDING ORAL ARGUMENT

The Court is familiar with the law and issues presented in this appeal. Further, the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument. Accordingly, Defendant Echostar Communications Corporation does not request oral arguments in this case.

STATEMENT OF THE ISSUES

1. Whether the trial court's decision to exclude Plaintiff's cause and origin expert, A.K. Rosenhan, was arbitrary and clearly erroneous, amounting to an abuse of discretion.

2. Whether the trial court properly granted summary judgment in favor of Defendant Echostar Communications Corporation.

3. Whether the trial court abused its discretion in ordering sanctions against Plaintiff in light of her failure to prosecute her case for more than three years.

STATEMENT OF THE CASE

A. Proceedings in the Court Below.

On November 6, 2000, Katherine Thompson, along with her husband, Jimmy Thompson, filed this action against Echostar Communications Corporation and Entergy Mississippi, Inc. In the Complaint, Plaintiff alleged among other things that Plaintiff's residence burned to the ground on April 10, 1998, due to improper voltage balance which caused a Houston Tracker V ("HTV") Satellite Receiver in the house to overheat and catch fire. (R. 1-5). Defendant Echostar Communications Corporation ("Echostar") manufactured the HTV receiver. Jimmy Thompson's claim was dismissed on June 6, 2005, for failing to list the claim on his bankruptcy schedules. (R. 118).

Between July 19, 2005, and July 28, 2008, no action of record occurred. On July 28, 2008, more than three years after filing her last action of record, almost eight (8) years after the filing of the Complaint and more than ten (10) years after the fire, Plaintiff filed a Supplemental Designation of Expert. (R. 204-215).

Based on the more than three years of inactivity and delay, Echostar Communications filed a Motion to Dismiss for Failure to Prosecute on November 5, 2008. (R. 152-164). The trial court acknowledged that it "would not be abusing its discretion by dismissing this case, with prejudice." (R. 196). However, the Court instead allowed Plaintiff's claim to proceed subject to the terms set forth in an order entered on April 17, 2009 ("April 2009 Order"). (R. 195-97).

The April 2009 Order requires that "the plaintiff and her attorneys shall pay, exclusive of attorneys fees, all future discovery costs, expert witness fees, and all other costs and expenses incurred by the defendants in defending this action." *Id.* The Order further states that "should the ultimate resolution of this case be unfavorable to the plaintiff," plaintiff and her attorneys

must pay "all attorney fees, from the date of the entry of this order, until a final resolution of this case." *Id.* The Order instructed Plaintiff and her attorneys to notify it and opposing counsel within fifteen (15) days if they found the sanctions to be unacceptable. *Id.* Plaintiff and her attorneys did not object to the terms of the Order.

On April 20, 2010, Echostar filed a motion to compel compliance with the April 2009 Order because Plaintiff, in "total defiance of the order of [the] court," refused to pay Echostar's expert witness fees. (R. 216-21). The Court affirmed the sanctions and ordered that Plaintiff pay Echostar's expert fees or the action would be dismissed. (R. 248-50).

On June 3, 2010, Plaintiff filed a petition for interlocutory appeal with the Mississippi Supreme Court. In her petition, Plaintiff tried yet again to explain her delay and argued that the sanctions were unreasonable. Echostar filed a response in opposition to the petition, and on July 21, 2010, the Mississippi Supreme Court denied Plaintiff's request.

Defendant Entergy Mississippi, Inc. filed a Motion for Summary Judgment on May 26, 2010. Plaintiff did not oppose the motion, which was granted by the Court on June 14, 2010. (R.253). The Court entered final judgment on the claims against Entergy on July 29, 2010.

Plaintiff designated A.K. Rosenhan as a fire cause and origin expert in this case. Rosenhan was deposed in this matter on July 30, 2010. Plaintiff also designated Marvin Lemley to testify about his experience with satellite receivers. Lemley was deposed on February 9, 2010.

Echostar deposed Plaintiff's experts, including Rosenhan and Lemley. After the depositions, Echostar filed the following motions: (1) Motion to Exclude the Opinions of A.K. Rosenhan, (2) Motion to Exclude the Testimony of Marvin Lemley,[1] and (3) Motion for Summary Judgment. (R. 254-94). A hearing on Echostar's motions was held on November 15,

[1] Echostar's Motion to Exclude the Testimony of Marvin Lemley was not heard or ruled upon at the hearing. (T. 17-18).

2010 before Circuit Judge Joseph Loper. At the hearing, the Court granted Echostar's Motion to Exclude the Opinions of A.K. Rosenhan and Echostar's Motion for Summary Judgment. A final judgment dismissing Plaintiff's claims against Echostar was entered on December 2, 2010. (R. 674-75). Plaintiff filed a Notice of Appeal on December 6, 2010. (R. 675A).

After the final judgment, Echostar filed a motion seeking attorneys fees pursuant to the April 2009 Order. The court has not ruled upon this motion.

B. Statement of Facts.

On the night of April 10, 1998, the Carroll County Sheriff's Department was alerted that there was a fire at the Thompsons' residence. By the time the first sheriff's deputy arrived at the scene, the entire house was engulfed in flames. (R. 266). There were no witnesses to how the fire started.

The fire scene was inspected by both the Carroll County Sheriff's Department and the State Fire Marshal's Office. Neither agency was able to determine the cause of the fire. (R. 567).

Jimmy Thompson claims that the HTV receiver in the living room, as well as a television in the kitchen were left on while he and Plaintiff traveled to Memphis for the weekend. (R. 270). The Thompsons purchased the HTV receiver second-hand. Jimmy Thompson cannot recall the name of the man from whom the receiver was purchased, nor can he recall the exact date of purchase although he estimates it was around 1990 or 1991. (R. 268). Jimmy Thompson testified that he never had any problems with the HTV receiver, and although the receiver got warm, Thompson admitted that it never got hot. (R. 268-69).

The Houston Tracker V satellite systems were produced from 1989 to 1993. (R. 458). Approximately six months after the product was released, the power supplies in the HTV

receivers were updated to improve the product's longevity. *Id.* HTV receivers manufactured during those first six months contained the first generation power supply. *Id.* HTV receivers manufactured after the first six months contained the second generation power supply. (R. 459).

STANDARD OF REVIEW

"The admission of expert testimony is within the sound discretion of the trial judge....Therefore, the decision of a trial judge will stand 'unless [the Court] conclude[s] that the discretion was arbitrary and clearly erroneous, amounting to an abuse of discretion.'" *Kilhullen v. Kansas City S. Ry.*, 8 So. 3d 168, 172 (Miss. 2009)(quoting *Miss. Transp. Comm'n v. McLemore*, 863 So. 2d 31, 34 (Miss. 2003)).

The standard of review for a trial court's grant or denial of summary judgment is de novo. *Covington County Sch. Dist. v. Magee*, 29 So. 3d 1, 3-4 (Miss. 2010).

The standard of review for an award of sanctions is abuse of discretion. *Hodges v. Lucas*, 904 So. 2d 1098, 1102 (Miss. Ct. App. 2004).

SUMMARY OF THE ARGUMENT

Plaintiff's claims and the opinions of her rightfully excluded expert, A.K. Rosenhan, are premised on her HTV receiver containing a defective first generation power supply that overheated resulting in a fire that burned Plaintiff's house. Without any evidence to support this contention, everything associated with Plaintiff's claim fails, including the opinions of Rosenhan.

Plaintiff's claims and the opinions of Rosenhan do in fact fail because Plaintiff does not have the necessary evidence to support her theory or Rosenhan's opinions.

- Plaintiff has no evidence that her HTV receiver contained an allegedly defective first generation power supply.
- Plaintiff's experts, including Rosenhan, admittedly did not know whether Plaintiff's HTV receiver contained a first generation power supply.
- Plaintiff's experts, including Rosenhan, admittedly could not identify a specific defect with Plaintiff's HTV receiver.
- Plaintiff's expert Rosenhan admitted that he had no physical evidence that Plaintiff's HTV receiver overheated and/or caught fire.
- Plaintiff has offered no evidence that a single HTV receiver ever caught fire.

These flaws alone are enough for this Court to affirm the trial court's granting of summary judgment and exclusion of Rosenhan's opinions.

In addition, there are other deficiencies in Plaintiff's argument. For instance, Plaintiff cannot prove that her HTV receiver was in the same condition it was in at the time it left the manufacturer. Further, Plaintiff's only evidence of proximate cause is the unreliable and inadmissible expert opinion from Rosenhan. As is set forth in detail below, Rosenhan lacked the facts and data to support his opinions in this case. Further, Rosenhan relied on statements and assumptions which are contradicted by the actual evidence in this case. Most importantly,

Rosenhan relied heavily on the unsupported assumption that Plaintiff's HTV receiver had a propensity to overheat and catch fire. There is simply too great an analytical gap between the facts of the case and Rosenhan's opinions.

Despite these fatal flaws, Plaintiff is insisting that this Court should allow her to use unsupported assumptions, speculation and conjecture to prove her case. Mississippi law is clear that such unsupported assumptions, speculation and conjecture are impermissible to serve as the basis of an expert's opinion and to defeat a motion for summary judgment.

In light of these, and other, deficiencies, the trial court properly excluded Rosenhan's opinions and granted summary judgment in favor of Defendant Echostar. The trial court's rulings should be upheld.

The trial court's sanctions order dated April 17, 2009 should also be upheld. The court had the authority to award sanctions in light of Plaintiff's failure to prosecute her case for more than three years. Plaintiff identified no applicable case law to show that the court's sanctions award was improper or unreasonable. Plaintiff has failed to show that the court abused its discretion in awarding the sanctions.

ARGUMENT

I. Rosenhan's Opinions Were Speculative and Unreliable and Were Properly Excluded by the Trial Court.

Plaintiff must prove that the court abused its discretion when excluding Rosenhan's testimony. "The admission of expert testimony is within the sound discretion of the trial judge...Therefore, the decision of a trial judge will stand 'unless [the Court] conclude[s] that the discretion was arbitrary and clearly erroneous, amounting to an abuse of discretion.'" *Kilhullen v. Kansas City S. Ry.*, 8 So. 3d 168, 172 (Miss. 2009)(quoting *Mississippi Transp. Commission v. McLemore*, 863 So. 2d 31, 34 (Miss. 2003)).

A. The Trial Court's Role As Gatekeeper.

Plaintiff is asking this Court to ignore the trial court's role as "gatekeeper." Plaintiff claims a jury should have been allowed to determine the reliability of Rosenhan's testimony. However, in Mississippi courts, expert opinions are admissible and can be presented to a jury only if the trial court first determines that the opinions are reliable and are not speculative. Miss. R. Evid. 702; *Mississippi Transp. Comm'n v. McLemore*, 863 So. 2d 31 (Miss. 2003)(adopting expert opinion admissibility standards set forth in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993)).

In 2003, the Mississippi Supreme Court adopted the federal standards as set forth in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993) and subsequent decisions for "assessing the reliability and admissibility of expert testimony." *McLemore*, 863 So. 2d at 39. Since then, Mississippi courts have consistently embraced the trial court's role as "gatekeeper" under *McLemore* and *Daubert* to ensure the relevance and reliability of expert opinions. *See,*

e.g., Townsend v. Doosan Infracore Amer. Corp., 3 So. 3d 150 (Miss. Ct. App. 2009)(quoting *Poole ex rel. Poole v. Avara*, 908 So. 2d 716, 723 (Miss. 2005)).

The admissibility of expert opinion testimony is governed by Mississippi Rule of Evidence 702. Rule 702 provides that,

> If 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.

Mississippi courts have been particularly diligent to ensure that an expert's opinion meets the explicit requirement of Rule 702 – that it be based on "sufficient facts and data" as opposed to speculation and conjecture. *See, e.g., Townsend*, 3 So. 3d at 154 (affirming exclusion of expert engineer's opinion regarding defective design of forklift in rollover accident as overly speculative); *Chan v. Coggins*, 294 Fed. Appx. 934, 938-39 (5th Cir. 2008)(affirming exclusion of expert in accident reconstruction on grounds that, among other things, expert failed to "work with concrete facts about positioning, speed, tire direction, etc."). The party offering an expert opinion has the burden of showing that "the expert's opinion is not based on opinions and speculation, but rather on scientific methods and procedures." *Townsend*, 3 So. 3d at 154 (quoting *Webb v. Braswell*, 930 So. 2d 387, 397 (Miss. 2006)). The facts on which the expert's opinion is based "must permit reasonably accurate conclusions as distinguished from mere guess or conjecture," and may not be based on "subjective beliefs or unsupported speculation." *Id.*

Echostar filed a motion to exclude Rosenhan's opinions based on the grounds that the opinions were speculative and unreliable. At the hearing on the motion, the court found that

Rosenhan failed to follow "the correct principles and methods," failed to conduct testing, failed to use "objective standards" and had "insufficient facts and data to support his opinions." (T. 16-17). The court further stated, "[i]t just seems like Mr. Rosenhan who, as I say, he seems willing to give an opinion about any issue that comes down the line as long as somebody's willing to pay for it, and that's not the proper standard to be used." (T. 17). As correctly noted by the trial court, and further discussed below, the facts in the record in this case simply do not support the speculative and subjective opinions offered by Rosenhan. Moreover, as noted in the motion to exclude Rosenhan, Rosenhan cannot locate the notes and photographs he claims he relied upon when forming his opinion. Accordingly, the trial court did not abuse it discretion by excluding them.

B. Rosenhan Has Been Excluded in Other Cases.

As further evidence that the trial court did not abuse its discretion, other courts have previously excluded opinions offered by Plaintiff's expert Rosenhan on the grounds that the opinions are speculative and unreliable. For example, in *McIntosh v. Nissan N. Am., Inc.*, No. 3:07CV60, 2008 WL 4793743 at*2 (S.D. Miss. Oct. 28, 2008), the U.S. District Court for the Southern District of Mississippi excluded Rosenhan's opinions that an airbag should have deployed in an automobile accident. The court found that Rosenhan's opinions "fall well short of Rule 702's standards" and "fail to satisfy any of the non-exclusive *Daubert* criteria." *Id.* at *2. The court noted that Rosenhan lacked relevant factual data, did not know the airbag specifications, could not pinpoint the reason for non-deployment, had not performed tests and acknowledged other potential reasons for non-deployment unrelated to a defect. *Id.*

Similarly, in *Kemp v. Biolab, Inc.*, No. 1:04CV478, 2005 WL 1595669 at *6-7 (S.D. Miss. June 22, 2005), the district court excluded Rosenhan's testimony because of an absence of

physical evidence supporting Rosenhan's opinion, a failure to test his theories and a failure to exclude alternative causes. In *Kemp*, the plaintiff was injured by the explosion of a bucket into which he had poured a pool chemical. Rosenhan offered an opinion that there were two possible causes of the explosion—either that the bucket contained a residue of some other chemical, or that the bottle of chemical was contaminated during manufacture. *Id.* at *5. The court concluded that each theory was speculative and unsupported by facts. *Id.* at *6-7.

C. Rosenhan's Opinions in this Matter Were Speculative, Unreliable and Inadmissible.

Rosenhan's opinions fell far short of the requirements for admissibility under Miss. R. Evid. 702, *McLemore* and *Daubert*, and were properly excluded.

1. Rosenhan lacked sufficient facts and data to support his opinions.

Miss. R. Evid. 702 expressly requires that an expert's opinions be supported by "sufficient facts and data." Rosenhan's opinions cannot satisfy this requirement. Rosenhan's theory was that the HTV receiver in the Thompsons' home overheated and ignited surrounding combustibles. (R. 330). Rosenhan claims to have based these opinions on information from Carroll County Fire Investigator Mike Spellman, Deputy State Fire Marshal Carl Rayfield and Marvin Lemley, as well as conversations with Jimmy Thompson and his own inspection of the fire scene and photographs of the fire scene. *Id.* However, there is insufficient reliable physical evidence and witness testimony to support this theory.

a. Rosenhan lacked important physical data.

During his deposition, Rosenhan conceded there was no physical evidence that the Thompsons' HTV receiver overheated. (R. 347). Rosenhan specifically admitted that he lacked the following information: the types of materials that were inside the Thompsons' HTV

receiver that could have melted or combusted, the amount of that material that was inside the receiver, the flame characteristics of the material inside the receiver, and the temperature the receiver reached in order to purportedly cause an ignition. (R. 330, 333). Moreover, Rosenhan admitted that he could not pinpoint an exact defect in the receiver, nor could he specifically identify which surrounding combustibles were allegedly ignited by the receiver. (R. 330-31). In *McIntosh v. Nissan N. Am., Inc.*, the court excluded Rosenhan's testimony because, among other things, he lacked important factual information and could not pinpoint a specific defect in the product. No. 3:07CV60, 2008 WL 4793743 at*2 (S.D. Miss. Oct. 28, 2008). Similarly, in this case, Rosenhan lacks important information regarding the receiver and cannot pinpoint a specific defect.[2]

Plaintiff suggests in her brief that Rosenhan properly relied upon spalling as evidence of the origin of the fire. Yet, both Rosenhan and Deputy State Fire Marshal Carl Rayfield testified that spalling does not necessarily indicate the origin of the fire in a house that completely burned as Plaintiff's did. (R. 344, 570.) Moreover, Rosenhan's alleged evidence of spalling was contained in photos he allegedly took but is now unable to locate (Rosenhan's testimony should be excluded based on this fact alone), and Rosenhan was unable to point to any spalling in the photos reviewed and discussed at his deposition. (R. 343). Any opinions based on this alleged spalling are clearly unreliable.

b. Rosenhan lacked reliable witness testimony.

Rosenhan also lacked reliable information from other witnesses in this case. There are no witnesses as to how the fire started. Rosenhan claimed his opinions were based on information

[2] Contrary to the representation made in Plaintiff's brief, Echostar has never admitted that Plaintiff's receiver was defective.

he received from Mike Spellman, Jimmy Thompson and Marvin Lemley.[3] However, the actual testimony of these witnesses does not support Rosenhan's theory.

At the hearing on the motion to exclude Rosenhan, the trial court noted that Rosenhan relied upon the location of the origin of the fire identified in a report from Mike Spellman, the Carroll County Fire Investigator, even though Spellman later "backtracked" on that part of his report. (T. 15). Rosenhan testified that his opinion that the fire started in the area adjacent to the fireplace was based on Spellman's report. However, this opinion is not supported by Spellman's testimony in this case. Although Spellman's report indicates the fire started in the chimney area, Spellman later admitted that he did not know why or how that determination was made. (R. 380). Spellman testified that the Thompsons' entire house was engulfed in flames by the time he arrived at the scene. (R. 379). Rosenhan acknowledged during his deposition that Spellman's testimony might affect his opinion that the fire started in the chimney area. (R. 341). In fact, Rosenhan admitted that if Spellman refutes the statement in his report about where the fire started, the portion of Rosenhan's opinion about the origin of the fire would be "null and void." *Id.* Spellman did in fact distance himself from statements in his report.

Plaintiff argues that the notation on Spellman's report is a proper basis for Rosenhan's opinion despite the fact that Spellman later admitted that he did not know why he made that notation and testified that the entire house was engulfed in flames by the time he arrived at the scene. However, Plaintiff does not dispute the fact that Rosenhan failed to review, much less consider, Spellman's deposition testimony about the investigation of the fire scene and basis for this notation in his report. Further, as noted above, even Rosenhan admitted that Spellman's

[3] Echostar filed a motion to exclude the testimony of Marvin Lemley since it was irrelevant. (R. 396-460). However, this motion was not heard or ruled upon by the trial court as it was moot in light of the granting of summary judgment.

deposition testimony might have impacted his opinion. Rosenhan's failure to consider this evidence renders his opinions on the origin of the fire unreliable.

Rosenhan also admitted that he did not read Deputy State Fire Marshal Carl Rayfield's deposition testimony in this case. (R. 341). Had Rosenhan read Rayfield's deposition, he would have seen that Rayfield was unable to determine the origin of the fire or a possible ignition source based on the scene's physical evidence, his investigation of the scene, and scientifically reliable principles. (R. 569-70). Testimony regarding the Fire Marshal's investigation of the fire is clearly relevant to this case, yet Rosenhan failed to even consider it.

The trial court also criticized Rosenhan's reliance on testimony from Plaintiff's husband, Jimmy Thompson:

> [M]ost of his opinions came from Mr. Thompson or most of his facts came from Mr. Thompson, when the first rule of investigation is that you kind of take as suspect the view of somebody that has a personal gain in the finding. But in this case, I just don't see anything to support his - - his conclusion; no facts, not data, nothing there that supports it.

(T. 16-17). Plaintiff claims that the *Denham* case provides that an expert can rely upon witness histories when forming his opinion. Echostar does not disagree with this statement. However, in this case, Rosenhan is not relying upon witness histories. Instead, he is relying upon "facts" that are contrary to Jimmy Thompson's testimony. According to Rosenhan's deposition testimony, Jimmy Thompson observed that the HTV receiver in his house "didn't work right" and "got hot." (R. 338). However, as noted by the trial court, there is no evidence in the record to support these statements. Jimmy Thompson actually testified that he never had any problems with the HTV receiver and that the HTV receiver worked satisfactorily the seven or eight years he owned it. (R. 382-83). Thompson further testified that although the receiver got warm, it never got hot.

Id. This contradiction demonstrates that Rosenhan relied upon unsupported assumptions and not the actual facts in this case when forming his opinions.

Similarly, Rosenhan claimed Lemley's testimony regarding his experience with other HTV receivers shows that the Thompsons' HTV receiver had a propensity to overheat. Again, Rosenhan based his opinions upon assumptions and not the actual facts in this case. The actual evidence in this case pertaining to the Thompson's receiver is as follows:

- Lemley never examined the Thompsons' HTV receiver before or after the fire. (R. 386).
- Any overheating problems Lemley witnessed were limited to the HTV receivers with the first generation power supply. (R. 389-90).
- Lemley did not witness or hear of any problems with the HTV receivers with the second generation power supply. *Id.*
- Importantly, there is no evidence in the record that the Thompsons' receiver contained a first generation power supply. Both Lemley and Rosenhan testified that they did not know whether the Thompsons' receiver contained a first generation or second generation power supply. (R. 388, 339).
- Lemley testified that of the several hundred HTV receivers he serviced during his career, he observed 25 to 30 HTV receivers with signs of heating damage. (R. 389). These receivers, according to Lemley, smoked, leaked tar or other substances and produced an odor. (R. 424).
- There is no evidence that the Thompsons' HTV receiver smoked, leaked any substance or produced an odor. In fact, Jimmy Thompson informed Rosenhan, that they never detected an odor from the receiver. (R. 340).
- Jimmy Thompson testified that their HTV receiver worked satisfactorily for the seven or eight years they owned it. (R. 268-69).

Plaintiff claims that Rosenhan should be able to rely upon circumstantial evidence to conclude that Plaintiff's receiver contained a first generation power supply. However, as noted above, there is no evidence, direct or circumstantial, that the Thompsons' receiver contained a first generation power supply. In fact, the evidence in this case actually suggests that the

Thompsons' HTV receiver did not contain a first generation power supply since it did not demonstrate any of the symptoms described by Lemley. Accordingly, it would be just as easy, if not easier, to assume that the Thompsons' receiver did not contain a first generation power supply. Since there are two conflicting inferences, it is not permissible for Rosenhan, or anyone else, to infer that the Thompsons' receiver contained a first generation power supply or to infer that the Thompsons' receiver was defective. This is speculation, not acceptable circumstantial evidence as Plaintiff claims in her brief. *See Miss. Valley Gas Co. v. Estate of Walker*, 725 So. 2d 139, 145 (Miss. 1998), *implied overruling on other grounds recognized by Adams v. U.S. Homecrafters, Inc.*, 744 So. 2d 736 (Miss. 1999)("[I]f the circumstantial evidence presented lends itself equally to several conflicting inferences, the trier of fact is not permitted to select the inference it prefers, since to do so would be the equivalent of engaging in pure speculation about the facts.").

Further, even if the Thompsons' receiver did contain a first generation power supply, there is absolutely no evidence in the record that a single HTV receiver (first or second generation) has ever overheated to the point of catching fire. Lemley admitted that he never saw a HTV receiver catch fire. (R. 431). Echostar's representatives also testified that they were unaware of any reports of any HTV receiver catching fire. (R. 533-35). Therefore, not only is Rosenhan assuming that the Thompsons' receiver contained a first generation power supply, but he is also assuming that first generation power supplies had a tendency to catch fire. These assumptions are simply not supported by the facts in this case.

c. Rosenhan relied upon assumptions and unsupported speculation.

As noted above, Rosenhan lacked physical evidence and reliable witness testimony to support his opinions. Instead, Rosenhan improperly relied upon assumptions and speculation. *Townsend*, 3 So. 3d at 154 (quoting *Webb v. Braswell*, 930 So. 2d 387, 397 (Miss. 2006))(The party offering an expert opinion has the burden of showing that "the expert's opinion is not based on opinions and speculation, but rather on scientific methods and procedures."). In her brief, Plaintiff is asking this Court to simply assume that Rosenhan's opinions are based on facts and evidence in this case. However, neither Rosenhan nor Plaintiff can bridge the analytical gap between the data in this case and the opinion proffered by Rosenhan.

Plaintiff's brief relies heavily upon the opinion in *Denham v. Holmes*, 60 So. 3d 773 (Miss. 2011). However, this reliance is misplaced since that opinion actually supports the trial court's exclusion of Rosenhan's opinions in this case. In *Denham*, plaintiff's expert opined that based on a lack of skid marks at the accident scene, the defendant was negligent and should have avoided the automobile accident at issue in the case. *Id.* at 784. The trial court excluded the testimony.[4] *Id.* at 780. The Mississippi Supreme Court held that the trial court did not abuse its discretion by excluding the opinions because the testimony was clearly speculative and based on insufficient data. *Id.* at 789. The Court found that there was too great an "analytical gap" between the data and the opinion offered. *Id.* at 788.

Just as in our case, the expert in *Denham* had little physical evidence and did no testing to confirm the statements provided by the parties in the case. *Id.* at 786. If we use the *Denham* analysis in this case, there is simply too great an "analytical gap" between the data in the case

[4] The Court in *Denham* did find that the trial court abused its discretion in excluding the expert's mathematical calculations pertaining to timing and distance, but found that the trial court did not err in excluding the expert's opinions on negligence and the cause of the accident. *Id.* at 789.

and the opinions offered by Rosenhan. As a result, Rosenhan's opinions pertaining to the cause and origin of the fire were properly excluded.

Plaintiff tries to blame this "analytical gap" on Echostar and suggests that the burden is on Echostar to prove that the Thompsons' receiver was not defective or that it did not contain the first generation power supply. It is a basic principle of law that Plaintiff has the burden of proving all of the elements of her case. Plaintiff does not have the evidence to support the theories of Rosenhan. Instead, Plaintiff is simply tossing out baseless accusations against Echostar to distract the Court from the fact that her claims, discussed further below, and Rosenhan's opinions are not supported by the facts in evidence. Echostar takes serious issue with the suggestion in Plaintiff's brief that it is intentionally hiding evidence or making false statements to the parties and the Court pertaining to the Thompsons' receiver.

It should be noted that Plaintiff did not make this argument in the trial court. Plaintiff is asserting these allegations for the first time on appeal. Plaintiff claims she purchased the receiver at issue second-hand in 1990 or 1991. This lawsuit was filed in 2000. Any records pertaining to this particular receiver would have been destroyed prior to the filing of the lawsuit pursuant to Echostar's formal document retention policy. (R. 497-98). At the time this receiver was manufactured, Echostar did not use "smart serial numbers" which would indicate the year the product was manufactured. *Id.*

Further, Plaintiff's assertion that this knowledge is in the exclusive control of Echostar is simply not true. As Plaintiff points out, Echostar provided testimony regarding the changes that were made to the first generation power supply. (R. 458). Plaintiff was in possession of not only the receiver at issue, but also an exemplar receiver which Jimmy Thompson claimed was exactly like the receiver that was in the Thompsons' home. (R. 384). Plaintiff made the decision to not

have any expert examine the Thompsons' receiver or the exemplar receiver to determine whether those receivers contained the second generation design. Plaintiff asserts that it is reasonable to infer that Echostar's alleged dishonest conduct was meant to hide a known problem with the receiver. However, if that is true, this logic could also apply to Plaintiff's conduct. It could be equally inferred that Plaintiff's decision to have no one examine the Thompsons' receiver or the exemplar receiver was an attempt to hide the fact that there was no defect and the receiver was not the cause of the fire. It is disingenuous of Plaintiff to accuse Echostar of dishonesty as a way to make up for Rosenhan's unsupported opinions and her own lack of evidence gathering in this case.

The bottom line in this case is that Rosenhan admittedly had no physical evidence to support his opinion that the HTV receiver overheated and caused the fire. In addition, although Rosenhan claimed to have witness testimony to support his opinion, a review of that testimony shows that is simply not true. Assumptions and speculation cannot be used to fill the expansive analytical gap existing between the actual facts and Rosenhan's opinions. As a result, the trial court did not abuse its discretion by excluding Rosenhan's opinions.

2. Rosenhan failed to test his theory.

A key criterion in a *McLemore/Daubert* analysis is whether the expert's theory can be and has been tested. *McLemore*, 863 So. 2d at 37 (citing *Daubert*, 579 U.S. at 592-94). When excluding Rosenhan's opinions, the trial court noted that Rosenhan had failed to perform testing during his investigation. (T. 17)

Rosenhan admitted that he did not test his theory that the Thompsons' HTV receiver could, and did, overheat and catch fire. (R. 328). Rosenhan explained that it would be a "hassle" to obtain and test an exemplar receiver. (R. 330). Although Rosenhan claims he could

not test his theory because he did not have another satellite receiver to test, Jimmy Thompson testified that he was in possession of an exemplar receiver exactly like the receiver that was in the Thompsons' home. (R. 328; R. 384). However, none of Plaintiff's experts tested the Thompson's receiver or the exemplar receiver to determine whether it was the cause of the fire.

As noted above, testing is a key criterion in the *McLemore/Daubert* analysis. Accordingly, the trial court did not abuse its discretion by using Rosenhan's failure to test as grounds for excluding Rosenhan's opinion.

3. Rosenhan cannot exclude alternative causes of the fire.

Among the other relevant factors that courts have developed in applying *Daubert* in particular cases is whether the expert "has adequately accounted for obvious alternative explanations." Fed. R. Evid. 702, Advisory Committee Notes to 2000 Amendment. Rosenhan's own recognition of and failure to adequately eliminate alternate causes formed the basis for the courts' criticisms of his opinions in previous cases. *See McIntosh*, 2008 WL 4793743 at *2; *Kemp v. Biolab, Inc.*, 2005 WL 1595669 at *6-7.

In this case, Rosenhan acknowledged that he did not eliminate all possible causes for the fire at the Thompsons' house. Specifically, and most notably, Rosenhan failed to exclude the television near the satellite receiver and the wiring in the house. Even though Rosenhan claims the fire started in the area around the satellite receiver and the television, he admittedly failed to exclude the television as a possible source of the fire. (R. 332). This failure is even more concerning in light of Rosenhan's testimony that "you've got to worry about" televisions of that age because they were "instant-on" and had cathode ray tubes. (R. 328).

Additionally, Rosenhan did not eliminate the aluminum wiring of the house as a possible source of the fire even though Jimmy Thompson had complained about electrical problems in the

house prior to the fire and Rosenhan admitted that the dimming lights which Jimmy Thompson complained of could have been the result of inadequate wiring in the house. (R. 326).

Plaintiff suggests that we should laud Rosenhan for truthfully admitting that he was unable to examine damaged wiring. However, it is not Rosenhan's failure to fully examine these possible causes that Echostar finds troublesome. Echostar takes issue with Rosenhan's willingness to offer a conclusion about the cause and origin of the fire despite the fact that he was unable to rule out reasonable alternative causes such as the television near the satellite receiver and the aluminum wiring in the house. Echostar does not deny the difficulty of determining the cause of a fire that burns an entire house. However, this does not excuse Plaintiff's expert from the requirements of Rule 702. Nor does it relieve Plaintiff of the burden of producing evidence to support her case. In light of the lack of physical evidence that the fire started in the Thompsons' receiver, Rosenhan's failure to exclude these alternative causes renders his conclusions speculative and unreliable, and the trial court properly excluded Rosenhan's opinions.

4. Rosenhan failed to follow the accepted scientific method when investigating the fire scene and forming his opinions.

When an expert fails to follow accepted and proven methodologies in forming his opinions and fails to apply the degree of "intellectual rigor" expected in the relevant field, his opinions are unreliable. See *McLemore*, 863 So. 2d at 38 (quoting *Kumho Tire Co. v. Carmichael, 526 U.S. 137, 152 (1999)*). The trial court considered Rosenhan's failure to follow the standard rules of fire investigation when excluding Rosenhan's opinions. (T. 15-17). Rosenhan's deposition testimony demonstrates that Rosenhan failed to follow National Fire Protection Association Section 921 ("NFPA 921") when investigating the fire at the Thompson

house. Plaintiff attempts to characterize NFPA 921 as merely "guidelines" in her brief, but Rosenhan himself testified that NFPA 921 and the scientific method are the recognized standards in the field of fire investigation. (R. 321-33). His failure to follow these standards renders his opinions unreliable.

It was somewhat difficult for Echostar to thoroughly evaluate Rosenhan's methodologies and documentation of evidence since he could not locate the notes and photographs he claims he relied upon when forming his opinions.[5] However, even without this information, it is clear that Rosenhan did not perform a rigorous investigation of the fire. As noted above, he failed to examine and exclude all possible alternative causes of the fire. In addition, Rosenhan admitted that he did not "do a footprint of the house" which he normally does. (R. 328).

NFPA 921 Section 2.3.6 requires an investigator to develop a hypothesis and test that hypothesis based on data and evidence collected by the investigator. (R. 391-95). Rosenhan obviously failed to test his hypothesis that the Thompson receiver overheated and caught fire. As noted above, Rosenhan admittedly lacked evidence that the Thompson's receiver overheated and caught fire, elected to ignore key evidence and confessed that he was unable to rule out alternative causes of the fire. These confessions alone are enough to defeat Rosenhan's hypothesis and opinion in this case. Moreover, had Rosenhan tested his hypothesis, he would have concluded that the source of the Thompsons' fire was undetermined as did Deputy State Fire Marshall Carl Rayfield and every other investigator who analyzed this fire.

NFPA 921 Sections 7.4.5 and 7.4.6 advise a fire investigator to be careful about collecting and relying upon information from persons who have a specific interest in the outcome of the investigation. Yet, in spite of this caution, Rosenhan relied heavily upon information

[5] Rosenhan claims the notes and photographs were misplaced due to the amount of time that has passed since he first investigated this fire. (R. 324, 327).

regarding problems with HTV receivers in general which he claims to have received from Jimmy Thompson, who clearly had an interest in the outcome of the investigation, regardless of whether he is currently a pending party in this litigation. (R. 347). Although Section 7.4.5 directs the fire investigator to verify the validity of any information received from these persons, Rosenhan admitted that he did not verify the validity of the information he claims he received from Jimmy Thompson. (R. 340). Not only did Rosenhan not verify the validity of this information, but he also ignored the actual evidence refuting these statements – such as Jimmy Thompson's deposition testimony that the receiver worked satisfactorily and the lack of any evidence that the Thompsons' HTV receiver experienced any of the problems Marvin Lemley claims occurred in the HTV receivers.

Plaintiff argues that NFPA 921 allows for the use of deductive reasoning and reasonable inferences. However, deductive reasoning and reasonable inferences must be premised on facts, not assumptions and speculation. As discussed above, Rosenhan relied upon purely speculative information and unsupported assumptions. NFPA 921 Section 2.3.4 specifically prohibits the use of subjective or speculative information in the analysis. Yet, Rosenhan, in complete disregard of this prohibition, repeatedly admitted to relying upon subjective observations when forming his opinions regarding the cause of the fire. For example, Rosenhan testified that his observation of spalling and burn patterns in the house was subjective. (R. 326, 330). Rosenhan further testified that Jimmy Thompson's description of the temperature of his HTV receiver was subjective. (R. 339). Yet, in spite of NFPA 921's prohibition against relying upon subjective information, Rosenhan specifically testified that he relied upon Jimmy Thompson's description of the receiver when forming his opinion that the receiver caused the fire. (R. 347). Rosenhan even went so far as to say that the entire process of investigating a complete "grounder" is

subjective. (R. 336). However, instead of finding the cause of the fire in this case to be undetermined (as did the Carroll County Fire Investigator and the Mississippi State Fire Marshal's Office), Rosenhan relied upon incomplete and subjective data to form his purely speculative opinions. Accordingly, the trial court did not abuse its discretion by finding that Rosenhan's opinions were unreliable since he failed to follow the proper standards for fire investigation.

5. Rosenhan's opinions are nothing more than speculation and conjecture.

Plaintiff cannot dispute that Rosenhan could not pinpoint a specific defect in the Thompsons' receiver. Plaintiff cannot dispute that there was no physical evidence that the Thompsons' receiver overheated. Plaintiff cannot dispute that although Rosenhan opined that the HTV receiver in the Thompsons' home overheated and ignited surrounding combustibles, Rosenhan could not identify what material allegedly leaked out of the Thompsons' receiver, nor could he identify which surrounding combustibles were allegedly ignited by this material. Plaintiff cannot dispute that Rosenhan did not eliminate the television on which the HTV receiver was sitting as a possible cause of the fire. Nor can Plaintiff dispute that Rosenhan testified that "you've got to worry about" televisions of that age because they were "instant-on" and had cathode ray tubes.

Due to the lack of information and evidence, absence of rigorous investigation, and the failure to conduct any testing of his theories, Rosenhan's opinions in this case amounted to nothing more than the sort of speculation, conjecture and guesswork that has been deemed unacceptable for admission into evidence. *Townsend*, 3 So. 3d at 154 (quoting *Webb v. Braswell*, 930 So. 2d 387, 397 (Miss. 2006))(The party offering an expert opinion has the burden

of showing that "the expert's opinion is not based on opinions and speculation, but rather on scientific methods and procedures."). Without any physical evidence that the Thompsons' HTV receiver overheated, any evidence of a specific defect in the Thompsons' receiver or any reliable and relevant witness testimony, Rosenhan can only speculate that the Thompsons' HTV was the cause of the fire in this case. Rosenhan's opinions have no proper foundation or indicia of reliability. "Neither *Daubert* nor the Federal Rules of Evidence requires that a court 'admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert' as self-proclaimed accuracy by an expert [is] an insufficient measure of reliability." *McLemore*, 863 So. 2d at 37 (quoting *Kumho*, 526 U.S. at 157). Considering the multitude of problems set forth above, the trial court's decision to exclude Rosenhan's opinions simply cannot be considered arbitrary and clearly erroneous.

II. Summary Judgment was Proper Since Plaintiff Failed to Meet the Requirements Set Forth in Mississippi's Product Liability Statute and Failed to Prove Negligence.

The standard of review for a trial court's grant or denial of summary judgment is de novo. *Covington County Sch. Dist. v. Magee*, 29 So. 3d 1, 3-4 (Miss. 2010). Plaintiff is correct in stating that the exclusion of Rosenhan was a factor considered by the trial judge when granting Echostar's motion for summary judgment. (T. 18). However, the lack of a cause and origin expert is only one of the reasons why Plaintiff's claims in this case fail. The record contains a number of defects fatal to Plaintiff's claims. This Court can, and should, use any or all of these fatal defects to affirm the trial court's ruling.

Summary judgment must be granted when the record evidence "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Miss. R. Civ. P. 56(c). When the movant demonstrates the absence of a genuine issue

of material fact as to an essential element of a plaintiff's claim, the non-moving party has the burden to produce "probative evidence legally sufficient" to show that a genuine issue of material fact does exist." *Stricklin v. Medexpress of Mississippi*, 963 So. 2d 568, 571 (Miss. Ct. App. 2007)(quoting *Shaw v. Burchfield*, 481 So. 2d 247, 252 (Miss. 1985)). The assertions of a non-movant which are conclusory, based on speculation, or which are not material or competent proof on an essential element of a claim are not counted in the summary judgment equation and will not suffice to defeat summary judgment. *Brewton v. Reichbold Chemicals, Inc.*, 707 So. 2d 618 (Miss. 1998).

In her Complaint, Plaintiff claimed Echostar committed one or more of the following acts which proximately caused or contributed to the fire: (1) "designing, testing and manufacturing a satellite receiver which had a propensity to overheat;" (2) "failing to warn consumers about the potential risk of overheating of the subject satellite receiver," and (3) "[a]ll other negligent acts." (R. 1-5).

A. Plaintiff Cannot Meet the Requirements in Mississippi's Product Liability Statute.

In order to prevail on Plaintiff's product liability claims under Miss. Code Ann. § 11-1-63, Plaintiff had to prove that the HTV receiver was defective at the time it left Echostar's control and the defective condition rendered the product unreasonably dangerous and proximately caused Plaintiff's house to burn. See Miss. Code Ann. § 11-1-63(a). *See also, Williams v. Bennett,* 921 So. 2d 1269 (Miss. 2006)(holding trial court properly granted summary judgment because the plaintiff failed to establish the necessary elements of proof specific in Miss. Code Ann. § 11-1-63). According to § 11-1-63, a product can be defective due to a manufacturing defect, a design defect or the presence of an inadequate warning or the lack of an

adequate warning.[6] § 11-1-63(a)(i). Plaintiff alleged the HTV receiver in the Thompson's house at the time of the fire was defective in design, manufacture and because it failed to contain adequate warnings. However, Plaintiff has failed to prove that the Thompsons' HTV receiver was defective.

1. Plaintiff Offered No Proof that the Thompsons' HTV Receiver was Defective.

a. Plaintiff offered no proof of a manufacturing defect in the Thompsons' HTV receiver.

In order to prove a manufacturing defect, Plaintiff had to show that the Thompsons' HTV receiver deviated in a material way from the manufacturer's specifications or from otherwise identical units manufactured to the same manufacturing specifications. § 11-1-63(a)(i)(1). Plaintiff offered no evidence of a manufacturing defect in the Thompsons' HTV receiver. Plaintiff designated two experts to testify regarding the HTV receiver—A.K. Rosenhan and Marvin Lemley. Neither of these experts identified a specific defect in the Thompson's HTV receiver. (R. 348, 421-22).

b. Plaintiff offered no proof that the HTV receiver contained inadequate warnings.

Plaintiff offered no proof as to the issue of inadequate warnings. Neither of Plaintiff's experts offered any testimony regarding the sufficiency or insufficiency of any warnings in this case. (R. 337, 420).

c. Plaintiff offered no proof of a design defect in the Thompsons' HTV receiver.

In addition to the basic proof elements set forth above, in order to maintain her design defect claim, Plaintiff had to prove three additional elements: (1) that at the time the product left

[6] Plaintiff did not make an express warranty claim, and therefore, Echostar is not addressing this point.

the control of the manufacturer, the manufacturer knew or should have known about the danger that caused the damage for which recovery is sought, (2) the product failed to function as expected, and (3) there exists a feasible design alternative that would have to a reasonable probability prevented the harm. § 11-1-63(f). A feasible design alternative is a design that would have to a reasonable probability prevented the harm without impairing the utility, usefulness, practicality or desirability of the product to users or consumers. § 11-1-63(f)(ii). *See also*, *Williams*, 921 So. 2d at 1277 ("Fatal to [plaintiff's] case is that [plaintiff's] expert tenders no proof of a feasible design alternative that could have, to a reasonable probability, prevented the harm").

(i) Plaintiff has presented no evidence of a specific defect.

Plaintiff must do more than make conclusory allegations that a product is defective simply because an accident occurred. Plaintiff must specify the manner in which she contends the product is defective. *See Wolf v. Stanley Works*, 757 So. 2d 316 (Miss. Ct. App. 2000) (affirming trial court's summary judgment in favor of defendants since plaintiff failed to identify a specific defect, failed to produce evidence of an alternative design which would have to a reasonable probability prevented the harm and failed to show the product reached the consumer without substantial change in the condition in which it was sold). In this case, Plaintiff has presented no evidence, direct or circumstantial, of a specific design defect in the Thompsons' HTV receiver.

Neither of Plaintiff's experts provided testimony regarding a specific defect in Plaintiff's receiver. Rosenhan specifically admitted that he is unable to identify a defect:

> Q. So you're unable to point to a specific defect in the receiver at issue in this case.

A. That's correct. Similar to my beehive theory.

(R. 348). Rosenhan further testified that he would not offer any testimony on the manufacture or design of satellite receivers. (R. 337).

Similarly, Lemley admitted he never examined the Thompsons' HTV receiver before or after the fire and could not provide any testimony regarding that specific receiver. (R. 421-22.) Moreover, Lemley not only never repaired the Thompsons' HTV receiver, but he admittedly never repaired any HTV receiver. (R.416). Therefore, he could not identify a specific defect in any HTV receiver, especially not the Thompsons' receiver.

Plaintiff attempts to rely upon Lemley's testimony regarding his observation of HTV receivers with signs of heating damage as evidence of a specific defect. However, there is no evidence in the record that the Thompsons' HTV receiver was the same model and design as the receivers described by Lemley. Lemley's testimony regarding overheating problems in HTV receivers is limited to the HTV receivers which contained a first generation power supply. (R. 423). As noted above, Plaintiff presented no evidence that the Thompsons' receiver contained a first generation power supply. Both Lemley and Rosenhan have specifically testified that they did not know whether the Thompsons' HTV receiver contained a first or second generation power supply. (R.423, 339). Accordingly, Lemley's testimony regarding his observations of receivers with the first generation power supply is not relevant to this case.

As noted in the previous section, the assumption that Plaintiff is asking this Court to make is contrary to the actual evidence in the record about the Thompsons' receiver. The evidence in the records actually suggests that the Thompsons' HTV receiver did not contain a first generation power supply. The receivers described by Lemley smoked, leaked tar or other substances and produced an odor. (R. 424). The Thompsons owned the HTV receiver for about

seven or eight years. There is no evidence that during those seven or eight years the Thompsons' receiver ever smoked. There is no evidence that during those seven or eight years the Thompsons' receiver ever leaked tar or any other substance. And, there is no evidence that during those seven or eight years, the Thompsons' receiver ever produced an odor. In fact, Jimmy Thompson informed Plaintiff's expert Rosenhan that they never detected an odor from the receiver. (R. 340). Jimmy Thompson further testified that he never had any problems with their HTV receiver and that it worked satisfactorily. (R. 382-83). Furthermore, since the Thompson's purchased the receiver second-hand, it is unreasonable to make any assumptions about the date on which the receiver was purchased from the manufacturer.

Accordingly, it would be just as easy, if not easier, to assume based on the evidence that the Thompsons' receiver did not contain a first generation power supply. Plaintiff is asking the Court to simply assume, in spite of the actual evidence, that the Thompsons' receiver contained the first generation power supply. This is speculation, not proper circumstantial evidence. *See Miss. Valley Gas Co. v. Estate of Walker*, 725 So. 2d 139, 145 (Miss. 1998), *implied overruling on other grounds recognized by Adams v. U.S. Homecrafters, Inc.*, 744 So. 2d 736 (Miss. 1999)("[I]f the circumstantial evidence presented lends itself equally to several conflicting inferences, the trier of fact is not permitted to select the inference it prefers, since to do so would be the equivalent of engaging in pure speculation about the facts.").

Plaintiff claims that there was a defect in the design of the first generation power supply. However, Plaintiff simply has no evidence to prove that her receiver contained the first generation power supply. Therefore, Plaintiff cannot prove that her HTV was defective.

(ii) Plaintiff offered no evidence first generation power supply was defective/unreasonably dangerous.

Even if Plaintiff could establish that the Thompsons' receiver contained a first generation power supply, she has presented no evidence to establish that the design of the first generation power supply was defective and unreasonably dangerous.

Plaintiff attempts to use testimony from Echostar representatives, Kirk Lenzie and Dennis Royston, pertaining to Echostar's decision to update the power supply in the first generation receivers to improve the product's longevity, as evidence of a defect in the Thompsons' receiver. Kirk Lenzie simply testified as to what updates were made in the second generation power supply. Lenzie did not testify that the first generation design was defective or unreasonably dangerous. Lenzie also testified that he was not aware of any reports of the first generation power supplies overheating or melting. (R. 458). Similarly, Dennis Royston never testified that the first generation power supply was dangerous. While this testimony may be evidence of a change made to the first generation power supply, Plaintiff failed to show that these alleged problems caused any HTV receiver, much less the Thompsons' receiver, to catch fire. In fact, there is zero evidence in the record that any HTV receiver ever caught fire.

Based on the foregoing, it is unreasonable to assume and conclude that the Thompsons' receiver was defective and caught fire.

(iii) Plaintiff has presented no evidence of a feasible alternative design.

In order to maintain a design defect claim, Plaintiff had to present evidence of a feasible design alternative that would have to a reasonable probability prevented the harm. Miss. Code Ann. § 11-1-63(f). Plaintiff argues that the second generation power supply evidences a feasible design alternative. However, as set forth above, Plaintiff presented no evidence that the HTV

receiver in the Thompsons' house did not already contain the second generation power supply. It is unreasonable to simply assume that Plaintiff's receiver contained the first generation power supply. Based on the evidence in the case, this Court could just as likely infer that Plaintiff's receiver contained the second generation power supply. If that is the case, the design of the second generation power supply cannot be offered as a feasible design alternative.

While not stated directly in her brief, Plaintiff implies that had the Thompsons' receiver been equipped with the second generation power supply, the fire would not have occurred. Yet, once again, Plaintiff failed to produce any evidence to support this claim. As noted above, there was a not a shred of evidence that a single HTV receiver ever caught fire. Plaintiff cannot prove that her proposed "alternative design" would have prevented this fire, or any fire. Further, Plaintiff offered no evidence that the change made in the second generation power supply was an "alternative" design to the design already in Plaintiff's receiver.

2. Plaintiff did not prove that at the time of the fire the Thompsons' HTV receiver was in the same condition it was in when it left the manufacturer.

Even if Plaintiff had proven a specific defect in the Thompsons' HTV receiver, which she did not, summary judgment was properly granted because she could not prove that the receiver was in the same condition it was in when it left the control of the manufacturer. Before a manufacturer can be found liable for a defect in a product, it must be shown that the defect existed at the time the product left the control of the manufacturer. *Wolf*, 757 So. 2d at 320 (affirming trial court's summary judgment in favor of defendants since plaintiff failed to identify a specific defect, failed to produce evidence of an alternative design which would have to a reasonable probability prevented the harm and failed to show the product reached the consumer

without substantial change in the condition in which it was sold). A manufacturer is not responsible for a product after subsequent changes are made. *Id.* at 319.

The Thompsons purchased the HTV receiver second-hand from a man whose name they cannot remember. (R. 382). Therefore, Plaintiff cannot offer any evidence as to what alterations may or may not have been made to the receiver while in the possession of the previous owner.

Moreover, Jimmy Thompson, Plaintiff's husband, admitted to "scrapping" with the receiver after he noticed that it got warm. (R. 624). The fact that Jimmy Thompson scrapped with the receiver is proof that the receiver was not in the same condition it was in at the time it left Echostar's control.

On the day prior to the hearing on Echostar's Motion for Summary Judgment, Plaintiff submitted a supplemental affidavit of Jimmy Thompson which asserts that Thompson did not make any alterations, modifications, or repairs to the Thompson's receiver. (R. 642-44). However, this affidavit conflicts with his previous sworn deposition testimony. The affidavit offers no explanation or clarification of his previous testimony. Mississippi case law is clear that summary judgment cannot be defeated by an affidavit that is in contradiction with the previous sworn statements of a party. *John Mozingo Real Estate & Auction Inc. v. National Auction Group Inc.*, 925 So.2d 14, 148 (Miss. Ct. App. 2006). As such, Jimmy Thompson's affidavit should not be considered.

3. Plaintiff has offered no non-speculative and reliable evidence that a defect in the Thompsons' HTV receiver was the proximate cause of the damages in this case.

In addition to being unable to identify a specific defect in the receiver and being unable to prove that a defect existed at the time the receiver left the control of the manufacturer, Plaintiff offered no reliable evidence that a defect in the receiver proximately caused the fire at the

Thompsons' home. *See Wolf*, 757 So. 2d at 321 (explaining that it was the plaintiff's burden to present some evidence to create a dispute of material fact that a defect proximately led to plaintiff's injury).

Plaintiff offers almost no argument on this issue in her brief. Plaintiff simply states that the expert testimony regarding cause and origin and the observations of Marvin Lemley established proximate cause. As established, Rosenhan's opinions were unreliable and were properly excluded by the trial court. Moreover, Lemley never examined or observed Plaintiff's receiver. Plaintiff cannot prove that the receivers Lemley claims he saw overheat were the same design as Plaintiff's receiver. In addition, Plaintiff's statement (for which Plaintiff does not provide a cite to the record) that Jimmy Thompson observed the same overheating as described by Lemley is contrary to the evidence in the record. As noted above, there is no evidence that the Thompsons' HTV receiver smoked, leaked any substance or produced an odor. In fact, Jimmy Thompson testified that their HTV receiver worked satisfactorily for the seven or eight years they owned it, and although the receiver got warm, Thompson admitted that it never got hot. (R. 382-83).

Plaintiff is relying upon facts not in evidence and Rosenhan's speculative, unreliable and inadmissible testimony to prove proximate cause. Accordingly, Plaintiff cannot satisfy this element of her claim and summary judgment was proper.

B. There is No Evidence Echostar was Negligent.

Plaintiff did not address her negligence claim in her Brief. However, out of an abundance of caution and in light of the de novo review, Echostar will address the flaws in this claim. There is no evidence in the record that a reasonable jury could use to conclude that Echostar negligently designed, manufactured or tested the Thompsons' HTV receiver.

Under Mississippi law, "'[t]he elements of proof required to support a claim for damages for negligence are duty, a breach of that duty, damages and proximate cause.'" *Watson Quality Ford, Inc. v. Casanova*, 999 So. 2d 830, 835 (Miss. 2008)(quoting *Rolison v. City of Meridian*, 691 So. 2d 440, 444 (Miss. 1997)). Plaintiff must present evidence that goes "beyond pure speculation" that Echostar was negligent. *Rudd v. Montgomery Elevator Co.*, 618 So. 2d 68, 73 (Miss. 1993).

Plaintiff failed to identify the duty Echostar owed to Plaintiff, failed to specifically identify how Echostar breached that duty, and failed to offer evidence that the alleged breach proximately caused the Plaintiff's damages. As set forth above, there is no evidence that the Thompsons' HTV receiver was defective in any way. Therefore, Plaintiff did not prove that Echostar breached any duty it may have owed to Plaintiff or that any alleged breach proximately caused Plaintiff's damages.

C. Summary Judgment Was Proper.

Plaintiff presented no evidence that the Thompsons' HTV receiver was defective. Plaintiff is asking this Court to simply assume that her HTV receiver contained a first generation power supply and assume that the first generation power supply caused the receiver to catch fire, despite the fact that Plaintiff produced no evidence to support these assumptions. This failure is fatal to all of Plaintiff's claims. Although the lack of evidence of a defect alone warrants summary judgment, Plaintiff failed to establish several other essential elements of her claims. Plaintiff did not establish that at the time of the fire the Thompsons' HTV receiver was in the same condition it was in when it left the control of the manufacturer. Further, to prove proximate cause Plaintiff relied upon the opinions of A.K. Rosenhan which are nothing more than inadmissible speculation and conjecture based on unreliable and irrelevant facts and data.

Accordingly, Plaintiff is unable to meet her burden of proving the essential elements of her products liability and negligence claims, and the trial court's order granting Echostar's motion for summary judgment should be affirmed.

III. The Trial Court's Sanctions Order Was Reasonable in Light of Plaintiff's Conduct and Should be Upheld.

As set forth above, Plaintiff took no action of record in this case between July 19, 2005 and July 28, 2008—more than three years. As a result, Echostar filed a motion to dismiss for failure to prosecute. It is Echostar's position—and the trial court's position—that the trial court would not have abused its discretion by dismissing Plaintiff's case. (R. 195-97). However, the law requires that the trial court consider lesser sanctions than dismissal, and ultimately, the court decided to impose the lesser sanctions contained in the April 2009 Order. *Id.* The standard of review for an award of sanctions is abuse of discretion. *Hodges v. Lucas*, 904 So. 2d 1098, 1102 (Miss. Ct. App. 2004).

A. The Award of Costs and Expenses Was Reasonable.

Plaintiff asserts that Rule 41(b) does not provide for sanctions. However, Mississippi case law makes clear that lesser sanctions can be imposed instead of a dismissal. *Cox v. Cox*, 976 So. 2d 869, 876 (Miss. 2008). "Lesser sanctions include 'fines, costs, or damages against plaintiff or his counsel, attorney disciplinary measures, conditional dismissal, dismissal without prejudice, and explicit warnings.'" *Id.* (internal citations omitted)(emphasis added). Plaintiff's argument that the trial court had no authority to award costs and expenses is unfounded and without merit.

Plaintiff is unable to point to any case law to support her argument that the sanctions awarded in this case are unreasonable. As stated in the April 2009 Order, the court found that

"the dilatory actions of the plaintiff and her attorneys cannot be allowed to go unpunished. Thus, reasonable sanctions should be imposed on the plaintiff and her attorneys." (R. 195-97). Plaintiff claims that the trial court erred in determining the amount of sanctions to award. However, Plaintiff has been unable to cite to any authority which sets forth a formula or rule for calculating sanctions.

Plaintiff claims the sanctions should be directly related to the costs incurred as a result of the delay. Again, Plaintiff offers no authority in support of this claim. But also, it would be nearly impossible to calculate exactly what costs and prejudice were a direct result of Plaintiff's delay. Plaintiff's assertion that the time spent by Echostar's expert reviewing the file was not the result of Plaintiff's delay is incorrect. It is not unreasonable that after three years of complete inactivity, an expert will need time reacquainting himself with a case involving a fire that occurred more than ten years ago and an accident scene that he inspected more than eight years ago.

The law requires that Plaintiff bear the burden of prosecuting her case. For more than three years, Plaintiff failed to do so. Accordingly, the trial court did not abuse its discretion by imposing sanctions on Plaintiff for this failure.

B. The Award of Attorneys' Fees Was Reasonable.

Plaintiff's reliance on *Grisham v. Hinton*, 490 So. 2d 1201 (Miss. 1986) is misplaced. The *Hinton* case does not contain a sanctions order similar to the one at issue here. In our case, Echostar is not seeking attorneys' fees based solely on the fact that it was the successful litigant. The award of attorneys' fees is based on Plaintiff's dilatory conduct. Pursuant to Miss. R. Civ. P. 41, the trial court could have dismissed Plaintiff's claims with prejudice in light of her three year delay in prosecuting the case. Instead, the court ordered lesser sanctions in the form of

costs and fees. Mississippi courts have held that attorneys' fees are an appropriate sanction for a party's misconduct. *See, e.g., Walton v. Walton*, No. 2009-CA-01615-COA, 2011 WL 208331, at *5-6 (Miss. Ct. App. Jan. 25, 2011)(upholding the award of attorneys' fees as a sanction for filing a frivolous claim). *See also*, Miss. R. Civ. P. 11(b) and Miss. R. Civ. P. 37.

Plaintiff would like to convince this Court that the only action that occurred in this matter between April 17, 2009 and November 15, 2010 was four depositions and the motions to exclude and summary judgment. However, this is simply not true. Below are a few additional things which took place in this matter during this time period that Plaintiff failed to mention:

- Echostar was forced to file a motion to compel compliance with the Court's April 2009 Order.
- Echostar had to prepare and file a response to Plaintiff's petition to the Mississippi Supreme Court for interlocutory review of the April 2009 Order.
- After Plaintiff's appraisal expert was deposed, Plaintiff submitted a supplemental report which differed entirely from the expert's original report. As a result, Echostar had to analyze the new report, consider whether to re-depose the expert, and locate its own expert to rebut the new opinions.
- Defendant prepared for and attended the deposition of Plaintiff's expert, Yerby Hughes, only to learn during the deposition that Hughes was not offering opinions against Defendant despite the fact that his designation/affidavit indicated he would.

Many of the fees incurred by Echostar are directly related to Plaintiff's dilatory conduct, e.g., the motion to enforce compliance and the response to the petition for interlocutory appeal. However, even when undertaking actions which Plaintiff claims "would have been filed anyway," Echostar's counsel had to use additional time to re-familiarize itself with the file in light of the fact that the case laid dormant for over three years. Should this Court uphold the April 2009 Order and the trial court grant Echostar's motion for attorneys' fees, Echostar is willing to produce its billing records for an *in camera* review by the trial court so that the court

can determine the reasonableness of Echostar's requested fees. In light of the above, Echostar's requested fees are not unreasonable and Plaintiff's accusations of bad faith are baseless.

The trial court did not abuse its discretion by awarding costs, expenses and attorneys' fees as sanctions in this matter. Accordingly, the April 2009 Order should be upheld.

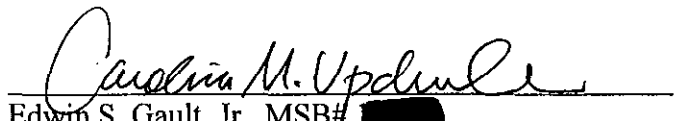
CONCLUSION

Plaintiff failed to show that the trial court abused its discretion by excluding the opinions of A.K. Rosenhan. Rosenhan admittedly lacked evidence that the Thompson's receiver overheated and caught fire, elected to ignore key evidence and confessed that he was unable to rule out alternative causes of the fire. Further, Rosenhan relied upon assumptions and unsupported speculation. There was simply too great an analytical gap between the facts in evidence and Rosenhan's opinions. The trial court's decision to exclude Rosenhan's opinions was proper and should be affirmed.

The trial court's order granting summary judgment in favor of Echostar should also be affirmed. Plaintiff (1) failed to identify a specific defect in her HTV receiver that rendered the receiver unreasonably dangerous, (2) failed to offer a feasible alternative design, (3) failed to show that, at the time of the fire, the receiver was in the same condition it was in when it left the manufacturer, (4) failed to prove that the HTV receiver was the proximate cause of Plaintiff's alleged damages, and (5) failed to prove that Echostar was negligent. Accordingly, summary judgment in favor of Echostar was proper.

Plaintiff also failed to show that the trial court abused its discretion by awarding sanctions for Plaintiff's failure to prosecute her case for more than three years. The court had the authority to awards costs and fees as a sanction, and Plaintiff has failed to show that the sanctions were unreasonable. The sanctions order should be affirmed.

Respectfully submitted, this the 24th day of August.



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CERTIFICATE OF SERVICE

I, Caroline M. Upchurch, do hereby certify that I have this day sent via Hand Delivery the foregoing Brief of Appellee to the Clerk of the Supreme Court and mailed, postage prepaid a true and correct copy to the following:

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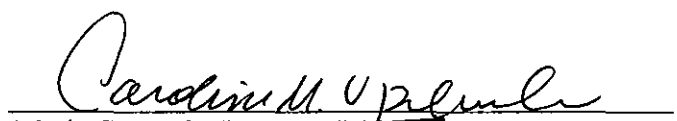
This, the 24th day of August, 2011.



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