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

KATHERINE THOMPSON **PLAINTIFF/APPELLANT**

VERSUS

ECHOSTAR COMMUNICATIONS CORP. **DEFENDANT/APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record 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. The Honorable Joseph H. Loper, Jr.

2. Brian B. Hannula, Esq.
Foreman, Perry, Watkins, Krutz & Tardy, LLP.

CHAPMAN, LEWIS & SWAN, PLLC
Attorneys for Appellant
Post Office Box 428
Clarksdale, MS 38614

Daniel M. Czamanske, Jr.
MSB No. [redacted]

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF POSITION REGARDING ORAL ARGUMENT

The Appellant respectfully requests oral argument. This appeal presents complicated facts and legal issues, and an oral argument would be beneficial to this Court and to the parties. The issues herein include the underlying issues regarding the trial court's exclusion of an expert witness as well as issues regarding the award of legal fees and expenses both during the cases as well as legal fees and expenses sought subsequent to the appeal for which counsel for Appellant has never been provided the opportunity to address in any oral argument. The Appellant therefore respectfully submits that oral argument would be appropriate and beneficial in this case.

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

BRIEF OF APPELLANT

COMES NOW, the Plaintiff/Appellant, Katherine Thompson (hereinafter "Thompson"), by and through counsel, and files this her Brief of Appellant. The Appellant would state unto the Court that factual issues remain which must be resolved by a jury. Therefore, the granting of summary judgment was improper.

I.

STATEMENT OF ISSUES

First, did the trial court err in granting the Motion to Exclude Opinions of A. K. Rosenhan filed by the Defendant/Appellee Echostar Communications Corporation (hereinafter "Echostar"). The second but related issue is whether the trial court erred in granting summary judgment based on Appellant's failure to have an expert. The third issue is whether the trial court erred in assessing Appellant with costs and expenses of discovery, and awarding attorney fees contingent on the outcome of the case.

The standard of review is abuse of discretion.

II.

STATEMENT OF THE CASE

Appellant Thompson and her husband Jimmy Thompson filed suit in the Circuit Court of Carroll County on or about November 1, 2000, with regard to damages as a result of a fire which destroyed their home and belongings. Record on Appeal, Civil Cover sheet page V. The Complaint was originally filed against a number of Defendants, however it was eventually paired down to Defendant Entergy Mississippi and Defendant Echostar. An Agreed Scheduling Order was entered on September 13, 2001. Record on Appeal, page 16. An Order setting the case for trial on

November 16, 2004 was entered on December 17, 2003. Record on Appeal, page 18.

On March 24, 2005, Defendant Entergy filed a Motion to dismiss the claims of Jimmy Thompson on the basis that he had filed bankruptcy and not listed this cause of action as an asset in the bankruptcy proceeding. Record on Appeal page 23. Appellant and Plaintiff Jimmy Thompson opposed the Motion to dismiss on April 7, 2005. Record on Appeal, page 64. On June 2, 2005, the trial court granted the Motion to Dismiss with regard to Plaintiff Jimmy Thompson. On July 28, 2008, Appellee filed a supplemental designation of expert identifying Gene Fincher of Fincher Antiques to give an appraisal with regard to personal property destroyed in the fire. On October 2, 2008, Appellant notified Appellee and Defendant Entergy she would be requesting a trial setting. Record on Appeal, page 168.

On November 5, 2008, Appellee Echostar filed a two page Motion to Dismiss for Failure to Prosecute. Record on Appeal, page 152. Appellant filed a Response in Opposition to the Motion to Dismiss for Failure to Prosecute on November 17, 2008. On April 9, 2009, Appellant filed a Motion for Trial Setting and Scheduling Order. Record on Appeal 193. On April 15, 2009, the trial court denied Appellee's Motion to Dismiss, but ordered sanctions which included costs and possible attorney fees if Appellee were successful in this litigation. Record on Appeal, page 195. On October 8, 2009, Appellant filed a Supplemental designation of expert witness, substituting David Pitts for Gene Fincher to testify with regard to the value of the contents which were destroyed in the fire which was the subject of the Complaint. Record on Appeal, page 204.

On April 20, 2010, Appellee filed a Motion to Dismiss or in the alternative, a Motion to Compel Compliance with the April 17, 2009, order of the trial court. Record on Appeal, page 216. Appellant filed a Response to Defendant's Motion to Dismiss. Record on Appeal, page 240. On May 14, 2010, the trial court entered an Order Directing Payment of Expert Witness Expenses.

Record on Appeal, page 248. Appellant filed a Notice of Payment on May 21, 2010. Record on Appeal, page 251. On June 14, 2010, and Agree Order Granting Summary Judgment as to Entergy Mississippi, Inc., was entered. Record on Appeal, page 253. On September 27, 2010, Appellee filed a Motion for Summary Judgment. Record on Appeal, page 254. Also on September 27, 2010, Appellee filed a Motion to Exclude Opinions of A. K. Rosenhan. Record on Appeal, page 295.

On October 15, 2010, Appellant filed her response in opposition to Appellee's Motion for Summary Judgment. Record on Appeal, page 477. On November 11, 2010, Appellant filed her response in opposition to Appellee's Motion to Exclude the Opinions of A .K. Rosenhan. Record on Appeal, page 635. On November 15, 2010, a hearing was held with regard to the Appellee's Motions to Exclude the Opinions of A.K Rosenhan and Appellee's Motion for Summary Judgment. Both Motions were granted by the trial court by way of an Order of Final Judgment on December 2, 2010. Record on Appeal, page 674. Appellant's Notice of Appeal was timely filed on December 6, 2010. Record on Appeal, page 675A.

III.

STATEMENT OF FACTS

It is undisputed that Appellant owned the residence and contents of their home in Carroll County, Mississippi, which on April 10, 1998, burned to the ground destroying the entire residence and its contents. All occupants of the house were out of town at that time. There were no witnesses with regard to how the fire started. Appellant's husband testified that when they left the house, the only appliance that was on in the house was a Houston Tracker V satellite receiver manufactured by Appellee Echostar. Record on Appeal, page 270, deposition page 40. The fire was investigated by the County Fire Department. Investigating Officer Michael Spellman completed the Fire Investigative Report. Record on Appeal, pages 593-597. The report reflects, "Physical evidence indicated the fire originated in the following location: Around the Chimney Area." Record on Appeal at page 596. The report goes on to note that the "Area of concentrated fire: Chimney Area." Record on Appeal, page 597. The Echostar receiver was the only appliance in this area that was energized or on.

Carl Rayfield, the Deputy Fire Marshall, has investigated 1,800 fires. Record on Appeal, page 576, deposition page 61. He was called in to investigate this fire and inspected and photographed the scene. He did not make a determination as to the cause and origin of this fire other than it was accidental. Deputy Rayfield testified that he did not see any evidence that the fire was caused by the natural gas at the home, the electrical or breaker boxes, the stove, the hot water heater, clothes dryer, melted or fused wires, or shorted wires. Record on Appeal, pages573-577, deposition pages 32-39, and deposition pages 57-58. He also tested for hydrocarbons around the premises to see if the fire had been intentionally set, ie arson. There was no evidence of arson. Record on Appeal, page 569 and 581-582, deposition pages 19-20 and pages 76-77. With regard to the dryer,

he looked for improper maintenance and found no evidence of that here. Record on Appeal page 579, deposition page 60. He also looked for things like over loaded extension cords and sockets, but found no evidence of that either. Record on Appeal, page 582, deposition page 77. Also as to the wiring, Deputy Rayfield looked for improper splicing or splices that occur outside of a junction box, there was no evidence of this either. Record on Appeal, page 582, deposition page 79. One of the most important factors in determining the origin of the fire, according to Deputy Rayfield, is who saw the fire first and what did they see. Record on Appeal, page 581, deposition page 74.

Appellant hired an expert in the area of fire cause and origin, A. K. Rosenhan. Mr. Rosenhan's credentials as a fire investigator were not disputed in this matter and are set forth in his curriculum vitae. See Record on Appeal, page 314. Mr. Rosenhan inspected the scene of the fire on May 8, 1998. Record on Appeal, page 324, deposition page 27. He observed many of the same things as the fire investigators, that is an absence of any evidence that the fire started in any of the most common and potential areas of the house such as the water heater (Record on Appeal, page 325, depo page 30) and the electrical system (Record on Appeal, page 325, depo page 29). Mr. Rosenhan further observed that the initial Fire Investigation Report indicated that the origin of the fire and the hottest area of concentration of the fire was near the chimney. Record on Appeal, page 328, depo page 44. The observations recorded (though later not remembered) on the Fire Investigation Report were supported by the physical evidence observed by Mr. Rosenhan which included spalling on the chimney (Record on Appeal, page 325, depo page 32) and a lack of rafters attached to the tin roof in the area of the chimney. Record on Appeal, page 329, depo page 47.

Additionally, Mr. Rosenhan had the benefit of the testimony and observations of Marvin Lemley, a satellite receiver installer and repairman whose testimony will be discussed below. Mr. Lemley testified that the Houston Tracker V model satellite receiver was the only satellite receiver

in his 20 years experience that had a history of smoking and overheating to the point where it had to be unplugged, or it would catch on fire. See Record on Appeal, page 420, depo pages 59-60. The Appellant had in place a silent recall for the Houston Tracker V models, such that when any Houston Tracker V was sent in, they would replace the power unit whether there was a problem with it or not. Additionally, the undisputed testimony by Jimmy Thompson was that his Tracker V satellite receiver was the only appliance that was on in the area of the origin of the fire, as noted previously.

Based on the inspection of the fire scene, the official Fire Investigation Report, the elimination of other potential sources of ignition, the lack of any evidence of arson, his experience in the field, Mr. Rosenhan determined that the most reasonable ignition source for the subject fire was the Houston Tracker V satellite receiver. It was in a position near the chimney consistent with the origin of the fire, it was the only energized appliance in that area, and it had the capability to ignite the fire. Record on Appeal, page 331, depo page 56.

Marvin Lemley was designated not as a retained expert, but as a witness who has experience beyond that of an ordinary juror in the area of electronics having worked in that field for over 50 years. Record on Appeal, page 415, depo page 37. Mr. Lemley owned a family business called Satellite Resources from about 1995 through 2006. Record on Appeal, page 413, depo page 32. During that time he estimates he sold and installed 1500 satellite receivers. Record on Appeal page 415, depo page 40. He had approximately 3,500 customers. Record on Appeal, page 415, depo page 40. He repaired probably 100 Houston Tracker system satellite receivers, including the Tracker V. Record on Appeal, page 416, depo page 41. He inspected or diagnosed several hundred Tracker V satellite receivers. Record on Appeal, page 422, depo page 68. The two primary models of Houston Tracker system receivers he inspected or diagnosed were Houston Tracker V and Houston Tracker

VII. It was the Houston Tracker V that had the power supply problems. Record on Appeal, page 422, depo page 67. He personally has observed 25 to 30 Tracker V's with obvious heat damage to them. Record on Appeal, page 423, depo page 71. He described the satellite receivers as occasionally getting so hot that if they were not unplugged, they would have caught on fire. Record on Appeal, page 420, depo pages 59-60. Unfortunately in this case, the Appellant and her family were not home to unplug the Houston Tracker V before it got hot enough to catch on fire.

The subject satellite receiver is called, by Appellee, the "Tracker System V." See the Installation and Operation Manual produced by Appellee Echostar, Record on Appeal page 651, bates stamped ECH 103. The Technical Service Manual produced by Appellee refers to the unit as the "Tracker V Receiver." Record on Appeal, page 653. The same is true for the service manual and brochures produced by Appellee, see Record on Appeal, pages 654 through 656. Dennis Royston was produced by Appellee in response to a Rule 30(b)(6) notice of deposition, Record on Appeal 496. The deposition occurred on September 3, 2004. Mr. Royston had been provided the model and serial number of the subject Houston Tracker V satellite receiver, however he testified that he despite looking for the information, he could find no repair history for this receiver and further could not even tell us the date or year of manufacture. Record on Appeal, 497 through 498. He did testify that this model was made between 1989 and 1993, id. Jimmy Thompson testified he purchased the receiver in a like new condition in 1990, or possibly early 1991. The unit was in working order and did not appear to have been modified in any manner. See Record on Appeal, page 644. The Appellee who manufactured the receiver could not testify as to even the year it was made.

Mr. Royston admitted that he was familiar with complaints concerning "frequent" problems with the power supply of the Houston Tracker V. Record on Appeal at 499. In response thereto the company changed the power supply, but he could not say when the change was made. Id. We know

that the change was to put in a higher temperature capacitor and a circuit was added to reduce the voltage stress on the components. See deposition of Kirk Lenzie, Record on Appeal pages 485-486. Essentially, if a Houston Tracker V came to the manufacturer for repairs, regardless of the type of repair that was being made, the power supply was changed or updated if it was a unit manufactured prior to the unknown date when the manufacturing change took place. Record on Appeal, page 500. While the distributors were made aware that the power supply of the Houston Tracker V should be updated if they got a unit in, the consumers were never notified of the of this problem. Record on Appeal page 502. When the power supplies were replaced by the manufacturer, there was no marking made on the unit itself to designate whether a new power supplied had been installed. Record on Appeal, page 504. To determine that, you would have to look at the configuration of the components. Id. No one from the manufacturer could or would identify whether the Houston Tracker V in Appellant's house had the updated power supply.

Both Marvin Lemley and A.K. Rosenhan were experts identified by Plaintiff in 2002, before the initial trial setting in November of 2004. No objection was ever made by any Defendant, and specifically the Appellee, as to the timeliness of their disclosure. The only expert identified after the initial trial date was an expert with regard to the value of the contents of the house. Though not part of this appeal, by way of background the Appellant herself in deposition testified that she did not have an opinion with regard to the value of the contents of the house. Plaintiff Jimmy Thompson did testify as to the value of the contents, however when he was dismissed as a party, the Appellant sought the services of an appraiser to estimate the value of the contents.

In the trial court's order of April 15, 2009, the trial court found that the delay in this litigation, from the time Plaintiff Jimmy Thompson was dismissed on June 2, 2005, until the Appellant named an appraisal expert on October 2, 2008, could potentially cause the defendant to,

"have to secure new experts, engage in additional discover, and incur attorney fees and costs *that would not have been required* had this litigation been timely pursued." Record on Appeal, page 202, emphasis added. The trial court then sanctioned the Appellant and "her attorney's to pay, exclusive of attorney's fees, all future discovery costs, expert witness fees, and all other costs and expenses incurred by the defendant in defending this action." Id. The trial court went on to hold that, "should the ultimate resolution of this case be unfavorable to the plaintiff, this court finds that all attorney's fees, from the date of the entry of this order, until a final resolution of this case, should be paid by the plaintiff and her attorneys." Id. Pursuant to the trial court's order, Appellant paid the deposition charges for expert A. K Rosenhan and David Pitts, the appraiser. Appellant also paid the costs of an electrical expert witness that was deposed by then Defendant Entergy. Witness Marvin Lemley who was deposed also after this order by the trial court did not charge any fees. Plaintiff also paid for the court reporting and copying costs of these depositions taken by Appellee.

Appellee then submitted to the Appellant a one page bill for their expert, Charles Manning, in the amount of $4,675.00 for 17 hours of reviewing the file. The only description on the bill was "Analysis; file review; prepare questions." Appellant objected to this bill noting her counsel had paid for all experts, even those who were timely designated, but that this type of bill was out of Appellant's control and it was not reasonable to allow the Appellee who controls their own costs to then incur any and all costs with out limit at the expense and burden of the Appellant. Record on Appeal page 240. The trial court ordered Appellant to pay the bill and a notice of payment was filed reflecting same.

The trial court held a hearing on November 15, 2010, in which it granted the Appellee's Motion to Exclude the Opinions of A .K Rosenhan and Apellee's Motion for Summary Judgment. At that time, anticipating the Appellee would be seeking an exorbitant amount of attorney fees for

allegedly achieving a successful outcome, counsel for the Appellant brought up the issue with the trial court and noted that the entire basis for the motions to strike and for summary judgment were based on disclosures that had been made back in 2002. Oral argument was made that there was no just reason to penalize the Appellant with attorney fees when the actions of the Appellee to depose these experts and file their motions were in no way impeded by any action of the Appellant. See Transcript pages 19 through 23. The trial court at that time noted that it would revisit its view on attorney fees and even commented that attorney fees might not even be "appropriate as sanctions, so I'm certainly taking into very much consideration your argument." Transcript page 23, lines 10 through 25. Subsequent to this appeal, but not within 30 days from the date of the trial court's final order, Appellee submitted a motion for Attorney fees in an amount in excess of $70,000.00, to which the Appellant has objected. The trial court, as of this date, has not ruled on the motion.

IV.

SUMMARY OF THE ARGUMENT

The trial court erred in excluding the opinions of A. K. Rosenhan in that his opinions with regard to the cause and origin of the fire were sufficient pursuant to M.R.E. 702. Further, the trial court erred in granting summary judgment based on the exclusion of the opinions of A. K. Rosenhan in that A. K. Rosehan's opinions should not have been excluded. Further the trial court erred in its order of April 15, 2009, awarding unreasonable sanctions in that they were without authority and not reasonably related to any delay in the proceedings. Additionally the award of future attorney fees in the absence of a contract or statutory provision allowing an award of attorney fees to the successful litigant likewise is unsupported by the law and unreasonable.

V.

ARGUMENT

A. EXCLUSION OF OPINIONS OF A. K. ROSENHAN

The well settled standard of review for the admission or exclusion of expert testimony is abuse of discretion. Denham et. al. v. Holmes, 2011 Miss. LEXIS 192, page 23-24 (Miss. 2011), and citations therein. Recently in Denham the Supreme reiterated these often quoted statements: "an expert's testimony is presumptively admissible when relevant and reliable." Id. at page 25, citations omitted; "The weight and credibility of expert testimony are matters for determination by the trier of fact." Id. at page 25-26, citations omitted; and, "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." Id., citations omitted. In Denham, the trial court had excluded the testimony of an accident reconstructionist finding it to be unreliable. In particular the trial court had found that the expert's testimony as to timing and distance were not based on sufficient facts and data to make them reliable, as they were derived only from the drivers estimated speed on the accident report and some photographs. Id. at page 10. The Court of Appeals and Mississippi Supreme Court both agreed that questions concerning the underlying facts of an experts opinion "are a credibility determination for the jury." Id. at page 31, citing Treasure Bay Corp. v. Ricard, 967 So.2d 1235, 1240 (Miss. 2007). "Experts in many fields, including medicine, accident reconstruction and forensic pathology, frequently rely upon histories provided by patients and witnesses." Id. at page 32, citations omitted.

The trial court in the case sub judice erred in holding that A. K. Rosenhan did not have sufficient facts and data to support his opinion. Transcript page 14, lines 27-29. The trial court discounted the fire investigation on the basis that Michael Spellman "backtracked" on his report that

the fire originated around the chimney. In fact, Mr. Spellman did not backtrack at all, he simply said he did not remember why he put that in his report. Record on Appeal page 589. Mr. Spellman went on to note in his deposition that the purpose of the report is to record information so it won't be lost or forgotten. Record on Appeal page 588. There were numerous blanks on the report and Mr. Spellman noted that if at the time of his report he was not able to make a determination he would have left the section for origin of the fire blank. Record on Appeal pages 589-590. But it was not blank, it was completed in the ordinary course of business for the deputy fire marshal whose duty it is to fill out a report and who is trained to do so. He was one of the first persons on the scene at the time of the unwitnessed fire, his report has not been objected to by anyone, and to suggest that because he does not remember how he came to that conclusion years later (his deposition was taken in 2004) somehow voids the fire investigation report and therefore it cannot be one part of the basis for Mr. Rosenhan's opinions is an erroneous analysis of the evidence. It may be proper cross examination or impeachment material, but to hold that it cannot serve as one of several bases for a fire experts opinion is error.

Moreover, the inspection by Mr. Rosenhan confirmed what was reported in the County Fire Investigation. He described spalling of the chimney and a lack of wooden rafters attached to the tin roof in the area of the chimney as additional bases for the conclusions in the County Fire Investigation. So the findings therein were not just taken at face value, but further supported by the inspection of the scene.

The trial court then commented that Mr. Rosenhan's statement that he didn't investigate those things he could not investigate was not a proper way to do an investigation. Mr. Rosenhan testified that much of the wiring had burned into ashes and therefore could not be inspected or investigated. Again this was not all the wire, but some of it. Far from being an improper way to

investigate, this is a candid admission that he did not examine that which could not be examined. Some experts may have simply stated they investigated and found no evidence to suggest the missing wire destroyed in the fire caused the fire. Mr. Rosenhan rather than play word games simply stated the obvious, you cannot investigate that which no longer exists. There is no basis for the trial court to find that this was an improper manner to investigate, since doing anything else would be to engage in speculation.

The trial court then went on to note that Mr. Rosenhan improperly relied on the testimony of Jimmy Thompson who bought the satellite receiver in determining that the receiver had the ability to overheat, without verifying this independently. Transcript page 15, line 25 through page 16, line 3. Again this is simply an incorrect analysis. As noted in Denham, witness histories can certainly be the basis (in this case only one of many bases) for an experts opinion. Moreover, in addition to Jimmy Thompson, there was evidence from the Appellee as manufacturer that the Houston Tracker V had frequent power supply problems, so frequent that they initiated a recall among their distributors to replace all the original power supply for the units as they came in, regardless of why the units came in. Then there was testimony from an independent witness who worked in the satellite field, Marvin Lemley, who noted that among all the receivers he worked with, the Houston Tracker V had a problem with overheating to the point where if you did not catch it in time, it would catch fire. The trial court, then, was incorrect to conclude that the statements of Jimmy Thompson where the sole basis on which the expert relied in giving his opinions, and the trial court was further incorrect to hold that Jimmy Thompson's testimony was not reliable and should not be considered because he was (although not at the time of the motion) once a party to the litigation.

The trial court further noted that there were no facts to indicate the type of power supply this particular receiver had. In fact this issue has been the primary point on which the Appellee relied

in seeking to have this case dismissed. In other words, Appellee has taken the position throughout this litigation that despite inspecting the Houston Tracker V receiver and knowing the serial and model number of the receiver, it is impossible to tell which power supply was on it and therefore the Appellant's case must fail. The very information, or lack of information, on which they principally rely for their defense is information within their exclusive possession. Conveniently, they claim ignorance as to which power supply is on the subject receiver, but direct evidence is not the only source of evidence in a case such as this. Circumstantial evidence is allowable and just as compelling as direct evidence. See Sherrell v. State, 622 So.2d 1233, 1238 (Miss. 1993) citing Guilbeau v. State 502 So.2d 639, 641 (Miss. 1987). The circumstantial evidence is that the receiver was purchased used in 1990 or early 1991, and the Houston Tracker V was manufactured from 1989 through 1993. Therefore it is more likely an early version based on the purchase date (and it was bought used). It was the earlier versions of the Tracker V that had the defective power supply, though Appellee (who possesses the information) cannot state when the change in power supplies occurred. There is also the testimony of Jimmy Thompson that the receiver would run noticeably and overly warm. The county fire report puts the origin of the fire in the same location as the Houston Tracker V and it was the only appliance that was on in the area. All this circumstantial evidence can lead to only one reasonable conclusion, that is the Houston Tracker V bought in 1990 or early 1991 had the original power supply that was later recalled silently by Appellee. At a minimum, as in Denham, these underlying facts should be weighed by the jury and not the trial court.

Along these lines as well, Appellant would argue that the credibility of the Appellee comes into question regarding just how believable their position is. Despite knowing the model and serial number, and despite inspecting the subject Houston Tracker V, they do not know even the year this unit was manufactured or if it has the re-designed power supply. As a party, Appellee stands to

benefit from taking the position that it is undeterminable, after all, who can question there position since they are the only one who posses the information. They certainly did not make their consumers aware of the power supply problem, and now they use their claimed ignorance as a sword to try and defeat a claim with regard to an admitted problem for the Houston Tracker V by arguing there are different versions of the same model. Such a position, if allowed to stand, would defeat the purpose of a jury whose job it is to weigh all the evidence including the credibility of the parties. It is a valid inference that Appellee's claimed lack of knowledge and information is not believable. If it is not believable, why would they do it other than to attempt to deny and hide a known problem with this specific model receiver. Appellant is not arguing that the trial court is bound by such an inference, but rather by ignoring it the trial court has over stepped its gate keeping authority and invaded the jury's function of determining what is most reasonable.

In sum, this fire burned the entire house and all its contents. By its nature a fire is going to destroy much of its own evidence. But just because the fire burned the entire residence it does not conversely mean that a reasonable expert opinion cannot be given as to the cause and origin of the fire. If that were the case then a complete burn would never be the subject of opinion expert testimony on cause and origin because not every single possibility could be eliminated. Every component and appliance in the house that is completely burned cannot be recreated and examined for any possible defect, and to create such a burden would effectively be to set the bar so high no one could ever reach it, just by the very nature of the case. NFPA 921 guidelines (not rules) does not require this, rather it allows for reasonable inferences and deductive reasoning.

In Colburn v. State, 990 So.2d 206 (Miss. Ct. App. 2008) the defendant appealed the introduction of expert testimony from a deputy state fire marshal with regard to the cause and origin of the subject fire. Specifically, the defendant argued that the expert testimony concerning the cause

and origin of the fire was based on insufficient evidence because the tests (similar to the hydrocarbon test referred to previously) conducted on the debris were negative and did not support the expert's opinion that arson using flammable liquids was the cause. Id at 215. The Court of Appeals noted that, as here, the experts qualifications were not objected to. Id. The Court of Appeals further noted, as here, that potential sources such as appliances and heaters in the house had been excluded as causes of the fire. Id. The expert testified that based on pour patterns on the floor, he determined that a flammable liquid had been poured on the floor and thus started the fire. The Appellate Court held that the trial court's acceptance of the expert's testimony was not error.

In the case sub judice and unlike the Colburn case, no ones life or liberty is at stake. Yet exclusion of common causes, a personal inspection of the scene and an opinion contrary to an objective test was sufficient to deprive a person of their liberty. Here in this civil case with an admittedly defective receiver, a personal inspection and support for his opinion from the Fire Investigation Report, Appellant's expert A.K Rosenhan was erroneously excluded from offering his opinions. The testimony of A. K. Rosenhan should not have been excluded and a jury should have been allowed to weigh the credibility of the underlying facts which from the bases of his opinion.

B. MOTION FOR SUMMARY JUDGMENT

The trial court's ruling on the motion for summary judgment is directly related to it's ruling on the motion to exclude the opinions of A. K. Rosenhan. Without an expert as to the cause and origin of the fire, the Appellant's case fails. See Transcript page 18, lines 8-11. Therefore, it is Appellant's position that the opinion of A. K. Rosenhan should be allowed and the case then would be for a jury to decided. Because the trial court erred in excluding Appellant's cause and origin expert, the trial court erred in granting summary judgment. The latter was based on the former.

However the trial court did mention that it thought even with the testimony of A. K.

Rosenhan, Appellant would have an almost impossible task of showing that there was a design defect or anything of that nature. Transcript page 18, lines 11-21. Therefore, out of an abundance of caution, the Appellant will address this concern as well. The Mississippi Product Liability Act sets forth the elements for a product claim, Miss. Code Section 11-1-63.

The first requirement is proof that the product was designed in a defective manner. There was ample proof that the Tracker V had a defective power supply. By admission, the power supply of the early Tracker V's were a "frequent problem" in that over time, the components would wear out due to excessive heat. This problem was confirmed by Marvin Lemley who observed the over heating and the affects of over heating that were unique to the Tracker V. The manufacturer/Appellee was aware of this defect before the production of the model ended in 1993 and they instituted a silent recall, unknown to customers, in which they replaced the power supplies with components that would withstand greater heat and not fail over time.

In addition to the defect and the manufacturer's awareness of the defect, there existed at some point before 1993, and well before the fire in 1998, a feasible design alternative that would not impair the utility, usefulness, practicality or desirability of the product to consumers. Again evidence of this comes from the Appellee itself. The design alternative consisted of components with a higher capacity for electricity that would withstand the heat generated therein and cure the defect. The evidence of its feasibility is the fact that it was implemented by the manufacturer sometime before 1993, and in fact replaced by way of silent recall on all prior units that came in for repair, regardless of the purpose of the repair. The alternative design was not noticeable to consumers, in fact they were not even alerted to the fact that an upgrade had occurred, and therefore this design alternative did not affect the usefulness or desirability or utility of the product itself. Apparently its affect on the product was so minute that even the manufacturer could not tell if the upgrade had been installed

on the subject receiver. By all accounts and pursuant to the testimony of Mr. Lemly, the alternative design was successful.

With regard to the last element, that is whether the defect proximately caused the damaged alleged and whether the design alternative would have prevented it, this goes back to the prior discussion regarding the admissibility of Appellant's cause and origin expert as well as the testimony of Marvin Lemley. If their testimony is allowed as suggested by Appellant, then the defect noted by Marvin Lemley of over heating (and observed by Jimmy Thompson on the subject receiver) combined with the expert testimony regarding the cause and origin of the fire there at the location of the receiver by the chimney, would meet the requirement of the last element of a product claim.

C. REASONABLE SANCTIONS

The standard of review for sanctions when the trial court has employed correct legal standards is abuse of discretion. Nationwide Mutual Insurance Co. v. Evans, 553 So.2d 1117, 1119 (Miss. 1989). Where the trial court has not employed the correct legal standard, it is an error of law for which the Appellate Court need not defer to the discretion of the trial court. Id. (Citations omitted).

Two types of sanctions were ordered by the trial court, sanctions for costs and expenses regarding discovery, and sanctions in the form of attorney fees based on the outcome of the case. These will be addressed separately.

1. COSTS AND EXPENSES

The first issue, as noted in the standard of review, is upon what basis did the trial court award Appellee costs and expenses. The Motion to Dismiss filed by Appellee did not seek any costs or expenses, but rather a dismissal pursuant to M.R.C.P. 41(b), which provides that the defendant may move for a dismissal for failure to prosecute or comply with a court order. It was

not alleged in the motion, nor the trial court's order, that the Appellant failed to comply with any court order. Rule 41(b) does not provide for sanctions. M.R.C.P 11 allows for sanctions for frivolous pleadings filed for purposes of harassment or delay, but no such allegation has been made here. Appellant's initial position would be there is simply no authority for the trial court to award costs and expenses to the Appellee in the absence of a violation of a court order or at least some civil rule. Therefore the award of costs and expenses should be reversed and rendered. Appellant should be awarded a refund for the costs and expenses paid to date pursuant to the trial court's order.

While generally an Appellant must cite authority to support his or her position, in this instance the lack of authority to support such sanctions is what is compelling. Appellant has been unable to locate any authority in which costs and expenses were discussed as sanctions, other than those cases (such as Nationwide) where the sanctions were in the context of violation of court orders or the Mississippi Rules of Civil Procedure.

Appellant would further argue that if the trial court does have some inherent authority to award sanctions or costs due to inactivity, such sanctions must be reasonably associated to the inactivity. The trial court even noted as much in its order stating that the Appellee may incur costs as a result of the delay that *it would not have otherwise incurred.* This is where the disconnect occurs. Rather than the trial court award costs and expenses associated with the delay, it ordered all costs and expenses from that point forward be transferred from one party to another. The costs and expenses incurred after that order were for the depositions of four expert witnesses and the costs of Appellee's expert to review the file and prepare questions presumably for their lawyer to question the Appellant's experts. With regard to the late designated expert, David Pitts, Appellant's position is that if the trial court does have authority to award sanctions, it would be reasonable to award those

sanctions for the cost and expense of deposing the late designated expert. However experts A. K. Rosenhan, the electrical engineer (deposed by defendant Entergy) and Marvin Lemley had been designated since 2002. Any delay in taking their depositions, or preparing for them by consulting their own expert, was not caused by the Appellant. There was nothing that prevented the Appellee from deposing these witnesses at any time of their choosing. At no time was a request made for their depositions which was in any way delayed by Appellant. An award of expenses and costs associated with these depositions was not reasonable, was an abuse of discretion, and did not result from any delay by Appellant.

As for the 17 hours of file review and preparing questions charged by Appellee's retained expert Charles Manning (fire cause and origin expert), this too was not occasioned by the Appellant. His deposition was not requested, and any trial preparation time or time to assist Appellee's counsel to depose A. K. Rosenhan (designated since 2002) was not reasonably related to any delay that occurred in this case. Appellee would have had to incur these costs and expenses for trial regardless of the conduct of the Appellant.

2. ATTORNEY FEES

The award of attorney fees based on the outcome of litigation, like the costs and expenses above, is not supported in the order or the Motion to Dismiss by any rule or authority. The standard of review, Appellant would contend, is de novo without any deference to the trial court.

As noted above, the trial court ordered in its April 15, 2009 order, that attorney fees should be paid if Appellant did not ultimately prevail. Also as noted above, the trial court backed off this position somewhat and said it would revisit the issue if a motion for attorney fees was presented. Such a motion was presented after the notice of appeal was filed on February 15, 2011. Record on Appeal, page XX. Appellee is seeking to assess the undersigned counsel and his client over

$70,000.00 in fees incurred during the time that the four depositions were taken and the motions to exclude and summary judgment were filed.

The award of fees in this case is based upon the "ultimate resolution" of the matter in favor of Defendant. In Grisham v. Hinton, 490 So.2d 1201 (Miss. 1986) the Mississippi Supreme Court addressed whether it was appropriate for the trial court to award attorney fees in favor of the winning litigant against the losing litigant because the trial court felt the losing litigant "needlessly" asserted a "spurious" claim yet did not "offer one iota of evidence" to support the charges. Id at 1203. Though not termed sanctions, the attorney fees awarded by the trial court and being reviewed by the Supreme Court in Hinton were based on the conduct of one litigant which the trial court felt imposed an undue burden on another litigant, essentially the same as is being asserted in the case subjudice.

In Hinton the Supreme Court held:

> With the sole exception of punitive damages cases, in the absence of contractual provision or statutory authority therefor, this Court has never approved awarding trial expenses and attorney fees to the successful litigant. Id. at 1205.

The Supreme Court in Hinton cites a number of cases and discusses in detail the reason why attorney fees should not be awarded on the basis of success. First and foremost among the reasons is that access to the courts and justice should not have a price. While it may not seem that it would result in denied access to the courts in this matter, in fact that is exactly the result. Numerous attempts have been made by Defendant to force Plaintiff to abandon the case and abandon the appeal due to the threat (ie the order of the trial court) of having to pay for the fees of counsel she did not contract with and does not control. Our Supreme Court has noted that access to the courts and justice should not be intimidated by the threat of having to pay exorbitant fees.

In fact, because the party being penalized does not contract or control the attorney, it also

provides an opportunity for extortion through the use of exorbitant fees. The historical analysis of the Hinton decision is reflected on page 1207 where the Supreme Court quotes a Michigan Law Review article, in part follows:

> Furthermore, there is the fear that attorney's fees would tend to become exorbitant if they could be charged to the losing party and that there would be administrative difficulty in determining what amount is "reasonable."

The Supreme Court not only quoted this concern, they specifically recognized it themselves stating, "Also, the time, expense and difficulties of proof inherent in litigating the question of what constitutes reasonable attorney fees would pose substantial burdens for judicial administration." Id. At 1207, citing Oelrichs v. Spain, 15 Wall. 211, 82 U.S. 211 (1872). In this case, an award of attorney fees would first require discovery with regard to the amount, relation and reasonableness of the fees. For example, at $200 per hour, $70,000.00 gets you 350 hours. That is a lot of hours considering there were only four depositions since the subject order (compared to fourteen before the order). All but one of the motions (the motion to dismiss with regard to Charles Manning's bill) filed were motions that the Defendant would have filed anyway, rather than motions or pleadings related to any delay. Further, the bills to the insurance company and their agreement with counsel will need to be discovered and reviewed, together with a review of all bills submitted prior to the subject order and the amounts paid on those to compare consistency in charges and billing. The depositions of those who billed and paid the bills would also be required. Documents and e-mails will have to be reviewed. It will essentially amount to another civil case with discovery on the issue of the $70,000.00 to determine reasonableness and good faith. Any bad faith discovered will be the subject of sanctions as well. Plaintiff will request attorney fees for the time and expense associated with any discovery that leads to proof of bad faith with regard to the claimed attorney fees.

In sum, the award of attorney fees is against the law and authorities, it is fraught with the potential for abuse and bad faith because the party incurring the bills has no control over them, and the party billing has incentive to increase the bills to make more fees and to use as an added threat to force a party to abandon their case because it is cost prohibitive. The award of attorney fees is also unreasonable because the attorney fees are not related to any delay and are for conduct and trial preparation and motion practice that would have occurred anyway. In fact, if the Appellant had timely deposed the experts designated in 2002 at or near the time they were designated and then filed their motions to exclude and for summary judgment following the depositions, and assuming the trial court would have ruled the same way it did in the case sub judice, there would have been no delay in the final judgment of the trial court. The award of attorney's fees should be reversed and rendered.

VI.

CONCLUSION

The trial court erred in striking Appellant's expert A.K Rosenhan in that the trial court invaded the jury's province by weighing the underlying evidence rather than the opinions and credentials of A.K Rosenhan. With no objections to his qualifications, the trial court improperly discounted the multiple bases on which this expert's opinion relied. As is customary for experts in this field, numerous possible and most common causes for the fire were ruled out. Relying on the Fire Investigation Report and his own inspection of the scene, the area of origin of the fire was determined. The known defect in the Houston Tracker V and the undisputed fact that it was the only appliance on at the time and location of the fire combined with an exclusion of other common causes should have been sufficient to withstand a Daubert challenge. The trial court erred in excluding Appellant's expert.

Because the Summary Judgment was based upon the erroneous exclusion of Appellant's expert, the summary judgment should be reversed and the case remanded to the trial court for trial on the merits.

The trial court's award of costs and expenses was without authority or support. Other than the deposition of the late designated expert David Pitts, none of the costs and expenses were associated with any delay in the case. The trial court's award of costs and expenses should be reversed and rendered.

The trial court's original order awarding attorney fees based on the outcome of the case is not only without authority or support, it is contrary to the common law in this state. Though not yet confirmed or granted because the trial court quite correctly was hesitant in deciding whether it had the authority to make such an award, the original order should nonetheless be reversed and rendered.

Respectfully submitted,

CHAPMAN, LEWIS & SWAN, PLLC
Attorney for Appellant
501 First Street
P. O. Box 428
Clarksdale, MS 38614
(662) 627-4105

By: _____
Daniel M. Czamanske, Jr.
MSB [redacted]

CERTIFICATE OF SERVICE

I, Daniel M. Czamanske, Jr., do hereby certify that I have this day sent by Federal Express the original and three copies of the foregoing Brief of Appellant to the Clerk of the Supreme Court and mailed, postage prepaid a true and correct copy to the following:

Bryan Hannula, Esq.
Forman, Perry, Watkins, Krutz & Tardy, PLLC
P. O. Box 22608
Jackson, MS 39225-2608

Hon. Joseph H. Loper, Jr.
Circuit Court Judge
P.O. Box 616
Ackerman, MS 39735-0616

This, the 1st day of June, 2011.

_____
Daniel M. Czamanske, Jr.