IN THE SUPREME COURT
OF THE STATE OF MISSISSIPPI

Case No. 2010-CA-00036

Leigh Mitchell — APPELLANT

VS.

David Barnes — APPELLEE

BRIEF OF APPELLANT

On Appeal from the Circuit Court
of Hinds County, Mississippi

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

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

1. Leigh Mitchell; Appellant,
2. Michael F. Myers, Esq.; Attorney for Appellant,
3. David Barnes, Appellee, and
4. Don H. Evans, Esq.; Attorney for Appellee.

MICHAEL F. MYERS
ATTORNEY FOR APPELLANT

STATEMENT REGARDING ORAL ARGUMENT

While the Appellant believes that the legal issues may not require oral argument, the issue regarding the admissibility of Mr. Hannah's testimony, because it is somewhat technical in nature, could be assisted by oral argument should the court so desire.

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B. The Court failed in its gatekeeping role by allowing James Hannah to offer opinions that had no factual basis.

C. It was error to allow Officer Michelle Foster to offer opinions as to fault and how the accident occurred and to allow introduction of those portions of her Report that contained these opinions.

STATEMENT OF THE CASE

Course of Proceedings Below

This action arises out of an automobile accident that happened July 11, 2004. Suit was filed August 14, 2004. The case was set for trial and continued numerous times, with one of those occasions being September 11, 2006. On that day, the parties appeared for trial, at which time the Defendant attempted to bring forth her Motion *in Limine* (R. 46) to prohibit the testimony of Plaintiff's accident reconstructionist, James Hannah. The court declined to hear the motion at that time, stating that the issue of the reliability of an expert's opinion was to be handled during trial during the cross-examination of the proffered expert (R. 23), and therefore did not hear that motion at that time.

The Defendant further moved the court for a continuance of the trial based on the fact that the Plaintiff had, less than thirty days before trial, identified an alleged eyewitness to the accident, but could never provide any contact information for that witness, Gustavo Delarosa.[1] The first time the Defendant had an opportunity to speak with Mr. Delarosa was the morning of that scheduled trial. The trial court conducted a hearing, at which time testimony from Mr. Delarosa was taken. Because of the

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[1] The Defendant's Motion *in Limine* to prohibit his testimony was denied. (R. 15).

late notice, the trial court continued the trial, but ordered the parties to take Mr. Delarosa's video deposition later that afternoon. (Ex. P-7).

Following other trial settings and continuances, the case finally proceeded to trial on October 12, 2009. The Defendant again moved the court for a hearing on her motion to exclude the testimony of James Hannah (R. 213), which the trial court initially refused (R. Ex. F, T. 115-16), but later granted to some extent in the middle of trial (R. Ex. F, T. 263). After hearing arguments and testimony outside the presence of the jury, the court allowed Mr. Hannah to testify. Since Plaintiff's counsel represented to the court that he could no longer locate Delarosa, the court permitted the use of the deposition it had previously ordered. The trial of the matter lasted three days, and resulted in a verdict for the Plaintiff in the amount of $150,000.00. (R. 361).

The Defendant filed a motion for judgment notwithstanding the verdict, or in the alternative, for a new trial, on November 25, 2009. The court denied the motion without a hearing on December 8, 2009. (R. Ex. C, R. 364). The Defendant timely noticed her appeal to this court on December 30, 2009 (R. 370) and designated the entire record in this matter, including the record of all proceedings held. When the record was finally certified by the trial court and made available to the parties

for review in October, 2010, the Defendant discovered that the transcript of the September 11, 2006 hearing was not a part of the record, and timely notified the trial court of this omission. Despite this, the trial court certified the record and transferred it to this court without the transcript of the September 11, 2006 hearing being made a part of the record. The Defendant had a partial transcript of that hearing, having requested that the court reporter provide the Defendant with a transcript of Mr. Delarosa's testimony to be available when his deposition was taken later that day. That partial transcript has now been made a part of the record, but does not include all of the matters discussed at that hearing.

STATEMENT OF THE FACTS

Shortly after noon on Sunday, July 11, 2004, Leigh Mitchell left her home to go to work, stopping on the way to get gas at the station located in front of what was at one time a Jitney Premier and, later, a Wynn Dixie on Old Canton Road, just north of its intersection with Pear Orchard Road in Jackson.[2] Also at that station were several people getting fuel for their four-wheel ATV's, which they were going to ride in the large field that now houses Christ United Methodist Church. They witnessed the accident in question. None of them knew Leigh Mitchell.

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[2] The gas station which was located in the parking lot is no longer there, and neither grocery store is now in business.

After Leigh finished fueling, she pulled up to one of the exits from the parking lot and stopped before entering Old Canton Road to check for traffic. She looked to her left and saw a man on a racing motorcycle (R. Ex. J, Ex. D-4-I) approaching her in the inside northbound lane of Old Canton Road. He was traveling at a high rate of speed and had popped a "wheelie," in which he was riding the motorcycle only on the back tire, with the front tire off the ground. Apparently frightened by the appearance of Leigh's car, the rider of the motorcycle, David Barnes, dropped the motorcycle, which he had owned for approximately four months, onto the front tire and lost control, swerving to the right toward Leigh's stopped vehicle and skidding along the front bumper of her car, ripping the plastic bumper cover from it as he did so. (R. Ex. K, Ex. P-3-I, P-3-K). Depending upon whether you believe Barnes or his "witness," Barnes either became separated from the motorcycle and rolled down the road in one direction while the motorcycle went in the other (T. 203), or he stayed on the motorcycle until its stopping point and then limped on his broken ankle to the other side of the road. (Ex. P-7-A, p. 54).

Barnes, of course, had a different version of events from Leigh Mitchell. He claimed that he was riding his Honda Interceptor at twenty-five to thirty miles per hour when Mitchell simply pulled out onto Old Canton Road and hit him.

Some of the witnesses who were fueling their four-wheelers came to Barnes' aid, however the officer who arrived to investigate the accident, Michelle Foster, noted none of them in her report. Foster prepared a report of her investigation which included a drawing she prepared which included no landmarks, measurements, or other identifying data from which anyone could determine where Barnes or his motorcycle ended up. (R. Ex. H, P-2). The officer's report did, however, record the speed limit in that area as thirty-five miles per hour. When Barnes went to the hospital to be treated for his broken ankle, he described the accident and gave his speed as forty-five miles per hour (which was still lower than his actual speed as testified to by witnesses). (P-5, pp. 16, 21) (P-5, p. 22). Likewise, the ambulance personnel who transported Barnes checked the box on their report indicating that his speed was in excess of forty miles per hour. (P-5, p. 5). Despite this, the trial judge refused to give a jury instruction regarding the Plaintiff's speed. (R. Ex. D, T. 395-98).

Suit was filed in this matter approximately one month after the accident. Over one year after the accident, Plaintiff's counsel retained James Hannah to perform an accident reconstruction. Although Hannah did not visit the scene until September 17, 2005, (T. 303) and agreed that it would be improper for him to reach any conclusions until he had visited the scene

and concluded his investigation, Hannah was designated on August 31, 2005, more than two weeks before he ever saw any evidence, to testify that Leigh Mitchell pulled out in front of the Plaintiff, that the Plaintiff could not have been operating his motorcycle on one wheel, and that the Defendant was the sole cause of the accident. (R. 65). Mr. Hannah's ability to divine the way the accident happened without conducting any investigation is not surprising, though, since there was nothing to investigate. At trial, Hannah admitted that there was no physical evidence at the scene; indeed, no physical evidence at the scene that an accident had even occurred. (T. 318). Hannah never saw either Leigh Mitchell or David Barnes' vehicles in person. Although he did view photographs of Leigh Mitchell's vehicle, he never even viewed photographs of David Barnes' motorcycle after the accident. (T. 319). Despite the lack of any physical evidence upon which to base a reconstruction, Hannah continued undaunted to offer opinions at trial on the speed of David Barnes' vehicle, based on a formula used by accident reconstructionists that requires them to take into consideration the distance the vehicle traveled after impact and coefficient of sliding friction between the vehicle and the pavement surface. The problem with Hannah's opinions in this area were that (1) nobody knew exactly where Barnes' vehicle ended up, and thus how far it slid and (2) nobody knew how far the vehicle continued on its wheels and how far it

slid, information critical to determining the appropriate coefficient of sliding friction. Hannah did not let the lack of information stop him, though. He met with the investigating officer, with whom he had worked during his time on the Jackson Police Department, and had her show him approximately where the accident occurred. She showed him an area of approximately where she believed the motorcycle had stopped, but as admitted at trial, could probably say within only fifty to one hundred feet whether the position she gave was accurate. (T. 167). Since Hannah determined that the motorcycle traveled one hundred-eighty feet after impact (R. 103), this significant disparity is important.

And with regard to whether the vehicle was upright or on its side as it traveled down the road, Hannah simply "picked a number" assuming that it slid on its side halfway, as a basis for reducing the coefficient of friction by half, and then reducing it by half again by assuming fifty percent of maximum braking. All of this was a guess. (R. 102-103).

Prior to the trial of this matter that was originally scheduled September 11, 2006, the Defendant filed a Motion *in Limine* to prohibit the testimony of Mr. Hannah on the basis that there was simply not enough evidence upon which an accident reconstructionist could base a reconstruction. To that end, the Defendant submitted the affidavit testimony of a certified

accident reconstructionist with Mississippi Highway Patrol, Cecelia Kazery, who confirmed that there was no physical evidence upon which to base a reconstruction, that Hannah's methodology was not accepted within the field of accident reconstruction, and that his opinions were not based upon reliable data and did not utilize acceptable methodology within the field. (R. 112). On the morning of the September 11, 2006 trial, the Defendant attempted to bring this motion for hearing forward, but was advised by the trial court that as long as Mr. Hannah was qualified as an accident reconstructionist, the validity of his opinions was a matter for cross-examination and not for initial scrutiny by the trial court. (R. 213). When this matter was actually tried on October 12, 2009, the court again refused to consider this motion prior to trial (R. Ex. F, R. 115-116) but then, after the second day of trial, abruptly agreed to give the Defendant a hearing (R. Ex. F, R. 263), at which point the trial court denied the motion and allowed Mr. Hannah to testify.

The trial court, also over the Defendant's objection, pursuant to a Motion *in Limine* presented at trial (R. 151, R. Ex. G, T. 116-17), allowed officer Michelle Foster, to offer opinions as to who was at fault in the accident and allowed introduction of the accident report she prepared which contained inadmissible conclusions and those same opinions about who was and was not at fault. (R. Ex. H, P-2). Officer Foster is not an accident

reconstructionist and was not qualified or offered as an expert at trial.

Barnes gave different versions of how the accident happened, first testifying in his deposition in 2005 that he saw Mitchell pulling out of the parking lot as he was stopped at the light on Old Canton Road and that she was pulled out into the right-hand lane, blocking approximately half of it. (T. 219-220). In that version of his sworn testimony, he stated that as he left the light, he moved into the left northbound lane and was in approximately the middle of that lane when Mitchell just pulled out and hit him. But at trial, four years after the accident, his testimony deviated sharply, as he then testified that Barnes had not in fact pulled out into the road and was not blocking any part of the right lane when he left the light at the intersection. (T. 218). In this second version of sworn testimony, Barnes stated that as he got very close to Mitchell's vehicle and was still in the right lane, but perhaps to the dotted line separating the two lanes, that at that point, she suddenly pulled out from the parking lot and hit him.

While this extreme deviation in his testimony might seem puzzling at first, it comes into focus in light of the sudden appearance of Mr. Barnes' witness, after Mr. Barnes had already given his deposition testimony, and on the morning of the first scheduled trial of September 11, 2006. That is when Mr.

Delarosa[3], who said he was on a roof across the street from the accident scene, first appeared in the case. Mr. Barnes had provided sworn interrogatory responses one year after the accident in which he stated that he knew of no witnesses, but then, less than thirty days before the September 11, 2006 trial setting, first identified Mr. Delarosa. While Mr. Delarosa supported some aspects of Mr. Barnes' story, he contradicted others, including whether Leigh Mitchell had pulled out into the road before Barnes approached the area where she was stopped and which lane Barnes was in when the accident occurred. Barnes apparently "adjusted" his story to try to match up with that of his witness. Barnes admitted at trial that parts of his sworn testimony had changed (T. 229) and that his prior sworn testimony about the location of Mitchell's vehicle "was not true." (T. 220)

But Mr. Delarosa's testimony was not without its own contradictions. Mr. Delarosa had given sworn testimony on the record in Judge Green's courtroom on the morning of September 11, 2006, before she continued the trial and ordered that his deposition be taken later that day. (Supplemental Transcript). In the short span between the morning session when Mr. Delarosa

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[3] We have only Mr. Delarosa's word as to who he actually is. At the hearing before the court on September 11, 2006, Mr. Delarosa admitted, under questioning from the court, that he was an undocumented immigrant. He had no identification either at the hearing or at his deposition with which to establish his identity.

testified in Judge Green's courtroom, and that afternoon, when he gave a deposition in the office of Plaintiff's counsel, his story changed. In the hearing before the court that morning, Mr. Delarosa testified that Barnes never came off the motorcycle up until the time that it came to a stop, but in his deposition, played to the jury, he admitted that he changed his testimony from the morning when he said that Barnes did come off the motorcycle. (Ex. P-7, p. 54-5). Incredibly, Delarosa also testified that after Barnes came to a stop, he got up and hobbled across four lanes of traffic to the same side of the road from which Leigh Mitchell had been emerging, rather than move the relatively short distance of one lane from where Delarosa said Barnes came to rest to the side of the road from which Delarosa claims to have witnessed the accident. (Supp. T. 64-5). This is of course contradicted by Barnes, who had a broken ankle requiring surgery, and who testified that his body came to rest on the northbound side of the road (T. 199), not the southbound side Delarosa claimed.

Three of the witnesses who had been gassing up their four-wheelers testified on behalf of the Defendant. Greg Parsons, Lorna Owens, and Mike Williams all confirmed that Barnes was doing a "wheelie" just before the accident (T. 340, 354, 372), and that he lost control of his motorcycle and ran into Mitchell's stopped vehicle. (T. 341, 354, 372-73). Parsons

estimated Barnes' speed at seventy to eighty miles per hour (T. 346) while Owens estimated "way over fifty or sixty." Mitchell's car was not out in the road at the time of impact. (T. 341, 373).

After the evidence in the matter was concluded, the court conducted a jury instruction conference in which the court announced that it had already made decisions on most of the instructions to grant or deny. Without objection from the Plaintiff, the court stated that it was refusing the Defendant's proffered instruction D-2 (R. Ex. E), which concerned Plaintiff's duty to operate his vehicle within the posted speed limit. The court first refused the instruction, stating that no one said anything about the posted speed limit. (R. Ex. D, T. 397-98). However, the investigating officer testified to this and her report, which showed the posted speed limit, was also introduced into evidence (over the Defendant's objection). (R. Ex. H, P-2). But, despite being reminded of the testimony of witnesses and of the statements in the medical records, all establishing that Mr. Barnes was traveling in excess of the posted speed limit, the court still refused to instruct the jury on this issue.

SUMMARY OF THE ARGUMENT

A new trial is required in this matter because of three separate, yet interrelated, substantial errors that occurred in the previous trial. First, despite witness testimony and admissions made by Mr. Barnes that he was speeding on his

motorcycle at the time of this accident, the court refused to give the jury any instruction on the issue of the Plaintiff's speed, even though the Plaintiff did not object to the Defendant's proffered instruction. This error was further compounded by the fact that the court allowed, over objection, the testimony of James Hannah, an accident reconstructionist who was allowed to testify about, among other things, the Plaintiff's speed and his opinion that it did not exceed the speed limit. The problem with Mr. Hannah's testimony is that there was absolutely no physical evidence upon which he could base any of his opinions. He first visited the scene more than a year after the accident; there was no evidence of the accident still at the scene when he left; the officer who investigated the accident the day of it made no measurements and noted no landmarks from which any of the critical distances could be determined and, most egregiously, Mr. Hannah grabbed out of thin air some of the numbers he used to "calculate" Mr. Barnes' speed. Finally, the court erred in allowing the investigating officer, who is not a qualified accident reconstructionist and was not qualified or tendered as an expert at trial, to offer her opinions about how the accident happened, her opinion that the Defendant failed to yield the right-of-way, and her opinion that the Plaintiff was not guilty of any improper driving. This same inadmissible opinion testimony was allowed through the introduction of the

officer's accident report, to which the Defendant had also objected.

On each of these three points Mississippi law is clear. The court was absolutely required to instruct the jury on an issue about which there had been substantial evidence and as to which there was a significant conflict. The court's refusal to instruct the jury on the issue of speed, in and of itself, requires reversal.

The court also abdicated its gatekeeping responsibility under *Daubert* by failing to weigh the factual basis, and thus the reliability, of Mr. Hannah's proffered opinions. A review of the basis for those opinions leaves no doubt that he based them upon what can only charitably be termed "speculation." By allowing Mr. Hannah to testify that the Plaintiff's speed was below the posted speed limit, the court further exacerbated its error by not instructing the jury on this contested issue.

Mississippi law is also clear that a police officer may not offer expert opinions unless qualified as an accident reconstructionist, which Officer Foster was not. The law is equally clear that although some parts of an accident report may be admissible in evidence, the portion which contained opinions which would not be admissible if uttered by the author of the report in court are not thereby admissible just because they were included in the accident report.

Each of these three errors would, individually, justify reversal. Taken together, they add up to a hugely unfair trial for the Defendant. A new trial is therefore necessary at which none of these errors are repeated.

ARGUMENT

The individual errors discussed below each served to deprive the Defendant of a fair trial and, taken individually, each justify reversal of the judgment entered by the trial court. But these errors were also interrelated and, as such, each compounded the prejudicial effect of the others. There is no doubt that the cumulative and compounding effect of these errors deprived the Defendant of a fair trial, and require the grant of a new trial free from these errors. See *Blake v. Clein*, 903 So.2d 710, 731 (Miss. 2005). (cumulative affect of errors denied Defendant a fair trial)

A. Despite Substantial Evidence from Witnesses, and Admissions by the Plaintiff That He Was Exceeding the Speed Limit, the Court Erroneously Refused to Grant the Defendant an Instruction on the Plaintiff's Speed.

At trial, the Plaintiff claimed that he was going twenty-five to thirty miles per hour when this accident occurred. (T. 197). As will be discussed further, *supra*, the Plaintiff was allowed to present expert testimony from the Plaintiff's accident reconstructionist, James Hannah, that the Plaintiff's speed was approximately thirty miles per hour. (T. 312). And again, over

the Defendant's objection, the investigating officer, who was not qualified or offered as an expert witness, was allowed to testify that in her opinion the Plaintiff was not guilty of any improper driving (T. 155) and was allowed to introduce her report containing this notation, as well as a notation for Mr. Barnes' speed showing that he was doing thirty miles per hour (T. 156), (R. Ex. H, Exhibit P-2)

In contrast, the Defendant offered the testimony of eyewitnesses to the accident who testified that not only was Mr. Barnes doing a "wheelie" just before the accident, but that he was traveling at an excessive speed. Greg Parsons estimated his speed at seventy to eighty miles per hour (T. 346) while Lorna Owens estimated that he was going "at a high rate of speed, very high. I would say way over fifty or sixty." (T. 361). And of course this was a motorcycle designed for high speeds, a Honda VFR Interceptor equipped, according to Mr. Barnes, with a Two Brothers' racing pipe. Mr. Barnes even admitted that he had ridden the motorcycle at speeds up to ninety miles per hour, which he didn't consider to be "really fast." (T. 215).

But the evidence of Mr. Barnes' excessive speed on the day of the accident is borne out not just by the eyewitnesses, but by the statements Mr. Barnes himself made.[4] In the ambulance report

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[4] Although Mr. Barnes would not admit that he made the statements contained in his medical records, he had admitted that any information the medical personnel got about the accident

prepared the day of the accident, there was a place for the ambulance personnel to indicate the mechanism of injury. One possible option to check was "speed 40+ mph." This was checked on Mr. Barnes' form. (Exhibit P-5, page 5). And in the history taken from Mr. Barnes when he first came to the hospital, as well as in the discharge summary when he left the hospital, his records indicate that he gave a history of traveling at forty-five miles per hour at the time of the accident. (Exhibit P-5, pages 16 and 21). This was confirmed further by the deposition testimony of Mr. Barnes' treating physician, Dr. George Russell, which was read at trial. (Exhibit P-9, page 22).

Before trial, the Defendant had submitted a proposed jury instruction, D-2 (R. Ex. E), which stated as follows:

> Under the laws of the State of Mississippi, the operator of a motor vehicle, including a motorcycle, has a duty to operate his vehicle at a speed at or below the posted speed limit. Therefore, if you find from a preponderance of the credible evidence in this case that David Barnes was operating his motorcycle at a speed in excess of the posted speed limit at the time of the accident in question, then David Barnes was guilty of negligence. If you find that David Barnes' negligence, if any, was the sole proximate cause of the accident in question, then you must return a verdict for the Defendant, Leigh Mitchell.

At a jury instruction conference conducted after the close of the evidence, the court announced that it had already reviewed the instructions and could tell the parties which instructions

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would had to have come from him. (T. 241).

the court was going to give and which the court would refuse. (T. 386). Without any objection from the Plaintiff, the court refused instruction D-2, first stating that there was no evidence of the posted speed. (R. Ex. D, T. 397). Upon being reminded that the investigating officer had testified to the posted speed limit, the court then stated ". . .it's not anything that I've found that led any credible evidence that anybody was speeding. I just didn't or that there was a posted speed limit that was being exceeded. And even though you say that, the officer did not indicate that there was any speeding." (R. Ex. D, T. 397-398).

"A party is entitled to a jury instruction so long as it concerns a genuine issue of material fact and there is credible evidence to support the instruction." *Mariner Healthcare, Inc. v. Edwards*, 964 So.2d 1138, 1155 (Miss. 2007). This court put it another way in *Beverly Enterprises, Inc. v. Reed*, 961 So.2d 40, 43 (Miss. 2007), when it said, "when analyzing the grant or refusal of a jury instruction, two questions should be asked: does the instruction contain a correct statement of law and is the instruction warranted by the evidence?"

Did Mr. Barnes' speed concern a genuine issue of material fact? He and Mr. Hannah both gave testimony that his speed was below the posted speed limit. Officer Foster was allowed to testify, over objection, that Mr. Barnes was not guilty of any improper driving and was allowed to put into evidence her

accident report showing his speed at thirty miles per hour. There was certainly conflicting evidence offered by the Defendant, both from the eyewitnesses and from the statements made by Mr. Barnes and reflected in his records and in the testimony of his doctor. Under no stretch of the imagination can it be argued that there was not a genuine issue as to Mr. Barnes' speed. And it was certainly material to the question of whether it was Mr. Barnes' negligence which caused the accident.

Was there credible evidence to support the instruction or, as stated in *Beverly Enterprises*, was the instruction warranted by the evidence? Again, look only to the testimony of the witnesses and the admissions made by Mr. Barnes. There was credible and substantial evidence to show that Mr. Barnes was speeding. And as to whether the instruction contained a correct statement of the law, the Plaintiff did not object to the point of the instruction nor did the court indicate that there was anything improper about it. Indeed, this court has approved similar instructions on speed. *Utz v. Running and Rolling Trucking, Inc.*, 32 So.3rd 450, 483 (Miss. 2010).

This court has noted that it is "required to find reversible error if the instructions in any given case, when considered together as a whole, do not fairly and adequately instruct the jury." *Richardson v. Norfolk Southern Railway Co.*, 923 So.2d 1002, 1011 (Miss. 2006). There was no instruction given by the

court on the issue of the Plaintiff's speed, a critical issue in the case. The jury was not fairly and adequately instructed on the law, and this point alone requires reversal and the grant of a new trial. However, unless the other errors discussed below, each of which also justify reversal, are addressed and rectified, the Defendant will still not receive a fair trial on remand of this case.

B. The Court Failed in Its Gatekeeping Role by Allowing James Hannah to Offer Opinions That Had No Factual Basis.

The Defendant moved *in limine* prior to trial to prohibit the testimony of the Plaintiff's accident reconstructionist, James Hannah, and supported this motion with the affidavit of a qualified reconstructionist, Cecilia Kazery of the Mississippi Highway Safety Patrol. (R. 46). While the motion is lengthy and detailed, the gist of it was this: By the time James Hannah became involved in this case, there was not enough evidence for James Hannah, or <u>any</u> accident reconstructionist to attempt a reconstruction of the accident. Before both the September 11, 2006 trial (which was continued because of the surprise appearance of Mr. Delarosa) and the October 12, 2009 trial, the Defendant attempted to bring forth for hearing this motion *in limine*, both times being advised by the trial court that the issue of the reliability of Mr. Hannah's testimony, as opposed to his qualifications, was one for cross-examination. (R. 213-14, R. Ex. F, T. 115-16). This of course is clearly contrary to the law

in Mississippi. After adoption of the *Daubert* standard by this court, it noted in *Mississippi Transportation Commission v. McLemore*, 863 So.2d 31 (Miss. 2003), that in exercising the "gatekeeping responsibility" of determining whether to allow the jury to even hear expert testimony, the trial court must determine whether the proffered testimony is reliable. *McLemore* at 38.

For reasons not explained by the court, on the second day of trial, after the jury had been excused for the day, the court brought up the Defendant's motion, but failed to recognize the court's gatekeeping function to determine the credibility of Mr. Hannah's testimony before allowing him to appear before the jury. The court said, "I'll let you make a proffer, but what I will submit to you that that is a basis for cross-examination, and for you to provide your expert who has different conclusions than him." (R. Ex. F, T. 266). The court then allowed counsel to ask Mr. Hannah some questions, although limiting the scope of those questions. (T. 269-285).

With regard to opinions Mr. Hannah intended to offer regarding the speed of David Barnes' motorcycle, Hannah admitted that in order to determine the speed he needed to know the distance the motorcycle traveled from the area of impact with the car to the point of final rest, and admitted that he did not have an exact location, although he had made a measurement from which

he determined that the motorcycle traveled one hundred-eighty feet. This was of course based upon what the officer showed him when she met with him more than a year after the accident at the scene, and could give him a location of the motorcycle's final rest only within fifty to one hundred feet. Hannah also admitted that there was no physical evidence of any area of impact or of the motorcycle's final rest. (T. 275, 310, 318).

Another number that Hannah admitted he would need in order to calculate the speed of Barnes' motorcycle was a constant known as the force of friction (or the coefficient of friction). He admitted that depending upon which number is used, it would have a big effect on how fast he determined the motorcycle was going. A low number would result in a lower speed and, conversely, a higher number for the force of friction would result in a higher speed. Hannah admitted that he used a low force of friction (T. 279), but had no scientific or factual basis for doing so. Mr. Hannah was asked if there was any scientific basis for using the coefficient of friction he used, or whether he just "picked a number," he admitted that he "picked a number." (T. 281-282, R. 91).

Mr. Hannah further admitted that there was no physical evidence left behind from the accident (T. 318), no measurements or landmarks recorded by the officer to show where anything was at the time of the accident (T. 323-24), and that he had never

seen either of the vehicles involved in the accident (T. 319-20) and had not even seen pictures of the motorcycle. Despite the utter dearth of reliable factual information upon which to base any opinions, the court improperly allowed Mr. Hannah to get up in front of the jury and express these baseless opinions and argue the Plaintiff's case for him.

As set forth in the affidavit of Cecilia Kazery, presented to the court, Mr. Hannah's methodology simply did not meet the standards required of an accident reconstructionist. With regard to the distance the motorcycle traveled after impact, Kazery noted that accurate information had to be recorded of where the impact occurred and where the motorcycle ended up. "Without accurate information as to these two points, any attempt to determine the speed of the motorcycle is, at best, a guess." (R. 114). She further noted that the education and training that both she and Mr. Hannah received (they were trained by the same instructor) required that they base their calculations on valid and accurate data, and that in the absence of such data, a speed calculation should not even be attempted. *Id.* She further took issue with Mr. Hannah's methodology in determining the coefficient of friction. She stated as follows:

> Mr. Hannah's methodology is further flawed in that he makes wild guesses regarding the proper coefficient of friction to apply in his slide to stop formula which are based on no published data, but rather only on his own alleged independent tests and his approximations of how long the motorcycle was upright and how long it was

> sliding on its side, despite the fact that he has absolutely no facts upon which to base his guess. The accepted methodology for determining the speed of a sliding object requires the use of published and generally accepted data regarding the coefficient of friction for such objects, which he did not use. Using his assumptions, which again are not based on any documentable fact, regarding the distance the motorcycle traveled after impact, and using the well accepted and published range for the coefficient of friction for motorcycles sliding on their side, the actual speed for Mr. Barnes' motorcycle would range form 49.295 miles per hour to 64.482 miles per hour, both far in excess of the invalid calculation done by Mr. Hannah.

Mr. Hannah was also allowed to give other general observations about the accident, again none of which are based on any data, but which were mainly simply Mr. Hannah's regurgitation of the Plaintiff's version of the facts. As Kazery again noted in her affidavit,

> The other opinions and conclusions of Mr. Hannah are not based on based on any calculations, but are merely his subjective opinions based upon the testimony of witnesses. The proper role of an accident reconstructionist is to take physical evidence and make any determinations that that physical evidence permits, without regard to the statements of any parties. Mr. Hannah's mere repetition of David Barnes' version of the accident is not an 'expert opinion' and does not represent the application of any valid methodology employed by accident reconstructionists. This would be true, for example, regarding his opinion as to where on the roadway the accident occurred. (R. 115).

It is precisely this kind of junk testimony that the trial courts of this state are required to keep from the presence of the jury. "Because of the weight that is given to expert testimony, it is imperative that trial judges remain steadfast in

their role as gatekeepers under the *Daubert* standard." *Watts v. Radiator Specialty Co.*, 997 So.2d 143, 147 (Miss. 2008).[5]

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[5] Other courts have disallowed Mr. Hannah's testimony, finding that his opinions had no evidentiary basis and/or are not the product of reliable principles or methods. The trial court in this case cut off Defendant's cross-examination of Mr. Hannah before being allowed to go into those specific instances (T. 302), two of which are in Mississippi state courts. However, two decisions by federal trial courts are available on Westlaw. In one of those, Judge Tom Lee granted the Defendant's request for judgment notwithstanding the verdict following a trial which resulted in a verdict for the Plaintiff. In granting the motion, Judge Lee specifically discussed Mr. Hannah's opinions and stated,

> There is no question, in the court's view, that based on his 'investigation' prior to offering his initial opinion in this case, Hannah could not possibly have validly offered a legitimate, supportable opinion as to the *specific* facts or cause of this accident. He could only have concluded that the vehicle rolled over; he could not have determined *specifically* where, and certainly not *why* that might have happened and yet he was willing to offer an opinion that the accident resulted from a defect in the Explorer.

Davis v. Ford Motor Company, 2006 WL 83500 (S.D. Miss., Jan. 11, 2006).

More recently, Judge David Bramlette held a *Daubert* hearing and prohibited part of Mr. Hannah's testimony, stating,

> Specifically, the court concluded that the lack of forensic evidence, i.e. the lack of skid marks, scuff marks, or other physical evidence, made Hannah's opinions regarding the pre-impact maneuvers of the vehicles speculative.
>
> . . .
>
> The court also finds that there is insufficient evidence to support Hannah's opinion that the Defendant. . .was in a better position than the Plaintiff to avoid the collision. Formulation of this opinion requires knowledge of the pre-impact positions

Rule 702 of the Mississippi Rules of Evidence governs the admission of expert testimony and states as follows,

> 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 principals and methods and (3) the witness has applied the methods and principals reliably to the facts of the case.

While accident reconstruction is a recognized field of expert testimony in this state, it is subject to *Daubert*, *McLemore* at ¶16, which, as this court has noted, has "tightened, not loosened, the allowance of expert testimony." *Id* at ¶17.

The trial court in this case simply abdicated its gatekeeping responsibilities to keep out the testimony of James Hannah, which was not based upon sufficient facts or data (and which, by implication, did not result in the application of reliable principals and methods reliably to the facts of the case). Again, the trial court seemed to believe that this was all a matter for the jury to sort out, not recognizing the trial court's critical role in closely examining the basis for Mr. Hannah's opinions, and taking into consideration the testimony of

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> and maneuvers of the vehicle, which this court already has decided are not discernable from the physical evidence.

Johnson v. Willbros Construction, 2009 WL 1635756 (S.D. Miss.) June 10, 2009.

Officer Kazery that Mr. Hannah's methodology was fatally flawed. This court stated in *Hill v. Mills*, 26 So.3rd 322, 333-34 (Miss. 2010) that when "the reliability of an expert's opinion is attacked with credible evidence that the opinion is not accepted within the scientific community, the proponent of the opinion under attack should provide at least a minimal defense supporting the reliability of the expert. The proponent of the expert cannot sit on the sidelines and assume the trial court will ignore the un-rebutted evidence and find the expert's opinion reliable." The court in this case did not require the Plaintiff to offer anything to rebut the testimony of Officer Kazery that Mr. Hannah's methodology was flawed and that accepted practice within the field required more data than Mr. Hannah had. But even without Kazery's testimony, it is clear that the court erred in allowing Mr. Hannah to testify.

> This court, however, has held that 'the sufficiency of foundational facts or evidence on which to base an opinion is a *question of law.*' As part of the trial court's gatekeeping role, it must 'examine the reliability' of the expert's opinion and must determine whether the facts afford a 'reasonably accurate basis' for the expert's conclusion.

Patterson v. Tibbs, 2009-CA-01037 (March 17, 2011).

Again, the Defendant presented definitive evidence that the "data" upon which Mr. Hannah was basing his opinions was, at

best, speculative and, at worst, sheer fabrication.[6] How in the

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[6] While initially allowing Mr. Hannah to testify with the caveat that "defense counsel will be given full rein to cross-examine," (T. 288) the court in fact severely limited counsel's cross-examination of Mr. Hannah. (T. 302, 316, 327, 332-34) The court did not allow counsel to get into detail regarding Mr. Hannah's calculations at trial, but these were discussed in his deposition, which was part of the defendant's motion in limine.

Hannah agreed that the formula used for determining "slide to stop" or the speed of a vehicle, is the square root of the following: the distance from impact to final rest - times - the coefficient of friction - times-a constant of 30 (representing an approximation of the force of gravity, which Mr. Hannah incorrectly stated was somewhat lower than 30 when it is in actuality somewhat higher. (T. 325-326))

Hannah used 180 feet for the distance traveled, based on the guess of Officer Foster as to the location of the motorcycle. He used a coefficient of friction of .4, which is much lower than the published number of .75 for the coefficient of a motorcycle sliding on its side, because he assumed (based on no evidence) that the motorcycle only slid halfway, while rolling on its wheels the other half. He stated that he did this "Because we don't know what it did. We don't see any evidence of skidding, or if it did skid, we don't know." (R. 102) He reduced the coefficient of friction because he didn't "know if the bike was on its side or on its wheels." (R. 103) This in and of itself was improper speculation, but Hannah then took it a step further by reducing the coefficient of friction by half yet again for a "percent of braking", stating that he assumed half of maximum braking ability, because "again, he's not on - we don't know when he came off the motorcycle. And that's what we used." (R. 103) Mr. Hannah's attempts to explain his basis for these numbers was sheer sophistry.

The formula he ultimately used was the square root of the following: 30 (the constant for gravity) times 180 (the alleged distance traveled by the motorcycle) times .4 (or .375, depending on which part of his testimony you read, representing half of the coefficient of friction) times .5 (representing his manufactured "braking factor"). (R. 101) That results in a speed of 32.86 mph, conveniently just under the speed limit. It is obvious that Mr. Hannah had to finagle the numbers to make it appear that Mr. Barnes wasn't speeding. "Q. If you use a very low number for the force of friction, then you're going to end up with a very

world can any opinion about the speed of the motorcycle be reliable, when it is based on the assumption that the motorcycle traveled one hundred-eighty feet after impact, an assumption that is itself based on Officer Foster's approximate location of the vehicle that she admitted could be off by as much as one hundred feet, and on the assumption that it rolled halfway and skidded halfway when that assumption was contracted by Barnes himself?[7]

If the *Daubert* standard adopted by this court is to mean anything; if the integrity of evidence presented to juries in this state means anything; if, indeed, the integrity of decisions rendered by the courts of this state are to mean anything, paid witnesses must not be permitted to cloak advocacy in the form of opinions that have no basis in fact. This court should not, indeed must not, permit the sort of "expert testimony" that was allowed in this case where the old reliable expert is only a speed dial away.[8] It was egregious error to allow James Hannah to testify in this matter, and a new trial should be ordered in

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low speed? A. That is correct." (T. 279)

[7] Although Barnes' testimony is also dubious, he stated that the motorcycle went five or six yards, not thirty, before following on its side.

[8] Mr. Hannah testified that he had worked 20-25 cases just for this one attorney (T. 335) and as noted, the expert designation for Mr. Hannah that was served before he ever conducted any investigation, indicated that he would be testifying that the accident was all the Defendant's fault and that the Plaintiff did nothing wrong. (T. 65)

which he is not allowed to testify.

C. It Was Error to Allow Officer Michelle Foster to Offer Opinions As to Fault And How the Accident Occurred And to Allow Introduction of Those Portions of Her Report That Contained These Opinions.

The Defendant moved *in limine* before trial to prohibit any testimony from Officer Foster about any opinions from Officer Foster (R. 121, R. Ex. G, T. 116) and had objected to introduction of the accident report in the pretrial order and at trial on the basis that it contained inadmissible opinions and heresay. Officer Foster is not an accident reconstructionist, was listed in the pretrial order only as a fact witness[9], and was not tendered or qualified as an expert at trial. Nonetheless, the court allowed Officer Foster to testify to numerous opinions and allowed her to introduce her accident report containing those same opinions. Over objection, including the objection that she was offering a legal conclusion, Officer Foster was allowed to testify that she determined that Leigh Mitchell was guilty of "failure to yield the right-of-way" (which was the notation she made on the accident report) and that as to David Barnes she found "no apparent improper driving." She also put down thirty miles per hour as David Barnes' estimated speed and testified to

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[9] The Plaintiff's discovery responses in which he designated experts in August 2005, did include Officer Foster who was expected to testify "consistent with the Mississippi Uniform Accident Report. . ." (R. 64-65), but again, Officer Foster is not an expert, was not listed in the pretrial order as an expert, and was not tendered or qualified as an expert at trial.

that. She was also allowed to introduce a diagram she drew on the accident report showing her impression of how the accident happened along with her written description of her conclusions.[10]

The allowance of Officer Foster's opinion testimony was a clear violation of Mississippi law. In *Roberts v. Grafe Auto Co.*, 701 So.2d 1093, 1099 (Miss. 1997), this court stated as follows:

> It is well entrenched in Mississippi law that a qualified expert's opinion testimony regarding accident reconstruction may be admitted. Further, it is clear that a police officer's testimony as to the cause of the accident based on training, experience, and investigation, etc. would be considered accident reconstruction testimony, allowable as expert testimony under Rule 702, *if the officer is properly qualified.*
>
> In following many years of Mississippi case law, we find that the trial court committed reversible error in allowing Officer Bitowf give expert testify[sic] without first being tendered an[sic] accepted as an expert witness in accident reconstruction. Because the public hold police officers in great trust, the potential harm to the objecting party requires reversal where a police officer gives expert testimony without first being qualified as such. Bitowf was not tendered as an expert, further, he stated he was not an expert in accident reconstruction. (underline added)

This court's decision in *Roberts* is directly applicable in this case, where Officer Foster was not listed as an expert witness in the pretrial order, was not offered as an expert at

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[10] Officer Foster claimed at trial, which occurred five years after the accident, that this written description was based on statements that Leigh Mitchell made to her, although she admitted that her report did not say that. Mitchell denied making any such statements. Officer Foster admitted that she spoke to David Barnes at the hospital about his version of the accident.

trial (and indeed is not one), and no attempt to qualify her as an expert was made. It was categorical, undeniable error to allow her to offer these opinions.

The error of allowing Officer Foster to offer these opinions was compounded by allowing her to put into evidence the accident report she prepared, which repeated these same opinions. The trial court's rationale for allowing the accident report was that it constituted a business record under Mississippi Rule of Evidence 803(6). Here again, the court simply erred in failing to recognize that not everything contained in a business record is automatically admissible. As this court noted in *Copeland v. City of Jackson*, which dealt directly with the admissibility of accident reports,

> In holding such report admissible, we should not be understood as holding all the contents of the report were necessarily admissible. For example, there may be notations in such a report which are recitations of statements of others, and would be inadmissible even though the officer were present in court testifying. The report is simply a substitute for the officer appearing in person and testifying.

Copeland v. City of Jackson, 548 So.2d 970, 975-76 (Miss. 1989). (emphasis added)

The flaw in the trial court's analysis is the failure to recognize that putting inadmissible evidence into a business record does not render that same evidence admissible. As discussed above, Officer Foster was not qualified to offer these opinions as an expert in court, and the fact that she recorded

those inadmissible opinions in her accident report did not suddenly make her opinions admissible. Even the language of Rule 803(6) and its comment require the information contained within a business record to be trustworthy before it is admissible. The unqualified opinions of Officer Foster do not meet that test. Indeed, in discussing this court's decision in *Copeland*, the court of appeals, in *Bingham v. State*, 723 So.2d 1189 (Miss. App. 1998), recognized the distinction raised in *Copeland* that not everything in a report prepared by the police as a part of their regular duties is admissible, stating that "statements and information contained within the report that are factual in nature would be admissible and qualify as information routinely obtained in the regular course of business under Rule 803(6)." The court specifically recognized that it was improper to try to use a report to get into evidence information that the officer who prepared the report could not have testified to, *Bingham* at 1192, which is exactly the case here. Rule 806(6) is not intended as a backdoor method of admitting otherwise inadmissible evidence. *U.S. v. Bentley*, 875 F.2d 1114, 1117 (5th Cir. 1989).

Just as it was error for Officer Foster to offer opinions about fault and how the accident happened, things which she did not personally witness, it was likewise error to allow the introduction of her report containing those same inadmissible opinions. As with the other assignments of error set forth

above, this one requires reversal and the grant of a new trial, a trial untainted by this improper evidence.

CONCLUSION

The Appellant respectfully submits that each of the three issues addressed herein constitute clear violations of Mississippi law and that each, individually, justify reversal of the judgment below and the grant of a new trial. Taken together, they leave no doubt that the Defendant was not allowed a fair trial in this case. Even though any one of these errors would justify reversal, the Appellant respectfully asks the court to address each of these three errors so that, upon retrial, none of them will be repeated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that I have this day mailed, via United States Mail, postage prepaid, the original and three copies of the Appellee's Brief to the clerk of the court and have further mailed a true and correct copy of the above and foregoing instrument to:

The Honorable Tomie T. Green
Hinds County Circuit Court Judge
P. O. Box 327
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This the 22nd day of March, 2011.

MICHAEL F. MYERS