IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2016-CA-01290

GARY DILLON and SHAWNA DILLON — **APPELLANTS**

VERSUS

PICO, INC. — **APPELLEE**

APPEAL FROM THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI CAUSE NO. A2401-15-0080

BRIEF OF APPELLANTS

(ORAL ARGUMENT REQUESTED)

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CERTIFICATE OF INTERESTED PARTIES

1. Gary Dillon and Shawna Dillon, Plaintiffs/Appellants

2. PiCo, Ins., Defendant/Appellees

3. Honorable Judge Christopher Schmidt, Circuit Court of Harrison County, First Judicial District, Gulfport, Mississippi

4. James K. Wetzel, Esquire, counsel for Plaintiffs/Appellants

5. Garner J. Wetzel, Esquire, counsel for Plaintiffs/Appellants

6. Joseph F. Gaar, Jr., Esquire, counsel for Plaintiffs/Appellants

7. Kathryn Platt, Esquire, counsel for Defendant/Appellee.

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II. Whether the Court erred as a matter of law when it granted the comparative negligence instruction without defining for the jury what the standard of care was of the Plaintiff and whether or not same had been breached.

III. Whether the Court erred as a matter of law when it failed to give an instruction for the Jury to determine each party's percentage of comparative negligence.

IV. Whether the Court erred as a matter of law when it denied the Plaintiff's Motion Notwithstanding the Verdict and/or Motion for New Trial.

STATEMENT REGARDING ORAL ARGUMENTS

Oral arguments are requested so that this Honorable Court will have the fullest opportunity to understand Plaintiffs' fundamental argument that the Circuit Court erred as a matter of law and fact in granting Defendant's Motion to Reconsider and MRCP Rule 56 Motion for Summary Judgment, dismissing this cause of action.

STATEMENT OF THE CASE

This appeal originates from the dismissal and judgment from the Circuit Court of Harrison County, Mississippi, First Judicial District. Appellant/Plaintiff, Gary Dillon, hereinafter referred to as "DILLON," was involved in an automobile collision on July 22, 2014 wherein his vehicle collided with the rear of commercial tractor-trailer, paralyzing Dillon from the waist down.

The crux of this appeal is the Circuit Court's granting of PiCo's summary judgment and dismissing this claim. The grounds for the summary judgment ruling were based upon the tardiness of Dillon's Responses to Admissions filed by PiCo. Further, Dillon would submit the Circuit Court erred by withdrawing the Court's own MRCP Rule 78 Order and granting PiCo's Motion to Reconsider and dismissing this claim. The Circuit Court finally erred by denying Dillon's Motion to Amend/withdraw or Strike Tardiness of Plaintiff's Answer to Admissions pursuant to MRCP Rule 36(b).

Feeling aggrieved, Dillon filed this appeal to the Mississippi Supreme Court requesting this Honorable Court to reverse and remand this matter to the Circuit Court of Harrison County, First Judicial District for the continuation of discovery and trial on the merits.

STATEMENT OF THE FACTS

A rear-end collision occurred on an unlit county road on Highway 603 in Hancock County, Mississippi at approximately 5:30 a.m. on July 22, 2014. The collision occurred just south of intersecting road of Highway 603 and Texas Flat Road. David Rogers, the driver of PiCo's tractor-trailer, was traveling north on Highway 603 at the time of the collision at issue. Gary Dillon was also traveling north on Highway 603 at the time of the collision behind the PiCo tractor-trailer. The collision occurred when Dillon collided with the rear of the PiCo tractor-trailer. The PiCo tractor-trailer had slowed to make a left handed turn onto Texas Flat Road. The PiCo driver was "gearing down" his tractor-trailer to slow down to make the turn. The PiCo driver did not properly use his turn signal lights/blinkers or his brakes, and due to improper illumination the tractor-trailer was not conspicuous to Gary Dillon.

Because the crux of this appeal is based on the Circuit Court's rulings in regards to procedural issues, Dillon will outline the chronology of the filings below in order to help this Honorable Court analyze the arguments made in this brief. The timeline of filings is as follows:

4-8-15	Dillion filed a Complaint against PiCo, Inc.
4-13-15	Summons returned, personal service on PiCo, Inc.
5-7-15	PiCo, Inc. filed its Answer, Defenses and Counter-Claims.
5-7-15	PiCo filed its Interrogatories, Requests for Production of Documents, and Requests for Admissions propounded to Dillion.
6-26-15	Dillion filed Interrogatories and Request for production of Documents Propounded to PiCo, Inc.
7-14-15	Dillon filed Responses to Request for Admissions (69 days)
8-12-15	PiCo filed its responses to Interrogatories and Requests for Production

8-20-15	Dillion filed Responses to Interrogatories and Requests for Production
10-20-15	Dillion filed Notice of Deposition of David Simmons and David Rogers on November 19, 2015
10-20-15	PiCo's Notice of Deposition of Gary and Shawna Dillion on November 19, 2015
1-21-16	PiCo's Request for issuance of Subpoena to various entities
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2-1-16	Dillon's Re-Notice of Deposition of David Simmons and David Rogers
3-2-16	Dillon's Responses to PiCo's 2nd set of Interrogatories and Requests for Production of Documents
3-2-16.	Dillon's 2nd set of Interrogatories and Requests of Production of Documents submitted to PiCo
3-7-16	Dillon's Motion to Compel Additional Discovery and Motion for leave of the court to ask additional interrogatories.
3-9-16	Dillon's Notice of Hearing on 4/21/16 to Compel Additional Discovery
3-29-16	Dillion's Notice of MRCP 30(b)(6) deposition of PiCo, Inc.
3-30-16	PiCo's Counter Motion for Protective Order and Notice of Hearing on 4/21/16
3-31-16	PiCo's Responses to 2nd set of interrogatories and Requests for production of documents
4-1-16	PiCo's Motion for Summary Judgment, for Partial Summary Judgment on Punitive Damages and Motion for Attorney fees and Costs
4-1-16	PiCo's Motion to Compel Dillon to fully respond to Interrogatories and Requests
4-4-16	PiCo's First Supplemental Responses to Interrogatories

4-15-16	Dillon's MRCP Rule 56(f) Motion for additional time to complete discovery and to Respond to PiCo Motion for Summary Judgment and MRCP Rule 16 Motion for Scheduling Order; and Motion Compelling PiCo to answer additional discovery
4-20-16	PiCo's Response in Opposition to Dillon's MRCP Rule 56(f) Motion
4-28-16	Dillion's Affidavit and Statement of Undisputed Facts
5-12-16	Hearing wherein Circuit Court enters MRCP Rule 78 Order allowing 5 days for the parties to submit additional Motions
5-13-16	PiCo's Motion to Reconsider Circuit Court MRCP Rule 78 Order
5-13-16	Harrison County Notice of Hearing on 6/10/16 at 9:00 am before Judge Schmidt on Dillions' Motion Compelling discovery responses; PiCo's Motion for Summary Judgment and Motion to compel discovery; and Dillions' MRCP Rule 56(f) Motion for time to complete discovery to respond to Defendant's Motion for Summary Judgment
5-16-16	MRCP Rule 78 Order entered by the Circuit Court allowing time for both parties to submit additional Motions
5-17-16	Dillon's Motion to Amend/withdraw or strike tardiness of Answers to Admissions pursuant to Rule 36(b)
5-17-16	Dillion's Response in Opposition to Motion for Summary Judgment filed by PiCo
5-26-16	PiCo's combined opposition to Dillion's Motion to withdraw and Motion to strike affidavits
6-2-16	Dillon's Response to Motion to Strike Affidavits
6-10-16	Hearing on all motions pursuant to 5-16-16 MRCP Rule 78 Order
7-11-16	PiCo's Notice of supplemental authority in support of opposition to Motion to reconsider, motion to withdraw and motion to strike untimely responses
8-11-16	Circuit Court's Order granting PiCo's Motion to Reconsider
8-11-16	Circuit Court's Order granting PiCo's Motion for Summary

	Judgment; denying Dillon's MRCP Rule 56(f) Motion for time to complete discovery; Denying Dillon's MRCP Rule 36(b) Motion to Amend/Withdraw or strike admissions.
8-11-16	Circuit Court's Judgment dismissing Dillon's Cause of Action on Summary Judgment; denying Dillon's MRCP Rule 56(f) Motion for Time to complete discovery
9-6-16	Dillion's Notice of Appeal to Mississippi Supreme Court

STANDARD OF REVIEW

This Court reviews orders granting motions for summary judgment *de novo*. *Mantachie Natural Gas v. Mississippi Valley Gas Co.*, 594 So.2d 1170, 1172 (Miss. 1992). Summary Judgment may be granted only "if the pleadings, depositions, answers to interrogatories and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Webb v. Jackson*, 583 So.2d 946, 949 (Miss. 1991) (quoting *Mink v. Andrew Jackson Cas. Ins. Co.*, 537 So.2d 431, 433 (Miss. 1988), *see also*, Miss.R.Civ.P. 56(c). The "[a]dmissions, and pleadings, answers to interrogatories, depositions, affidavits are viewed in light most favorable to non-moving party, as he is given the benefit of every reasonable doubt." *Spartan Food Systems, Inc. v. American Nat'l Ins. Co.*, 582 So.2d 399, 402 (Miss. 1991) see also, *McFadden v. State*, 580 So.2d 1210, 1213 (Miss. 1991). The moving party bears the burden of showing that no genuine issue of material fact exists. *Tucker v. Hinds County*, 558 So.2d 869, 872 (Miss. 1990).

The Circuit Court "does not try issues; rather [it] only determines whether there are issues to be tried." *Burkes v. Fred's Stores of Tennessee, Inc.*, 768 So.2d 325 (Miss. 2000). The Circuit Court should deny a motion for summary judgment "unless it is established beyond a **reasonable doubt** that the plaintiff would be unable to prove **any facts** to support the issues presented in the complaint." *Branch v. State Farm Fire and Casualty Co.*, 759 So.2d 430 (Miss. 2000) (emphasis added). To that end, "[a]ll motions for summary judgment should be viewed with great skepticism and if the trial court is to err, it is better to err on the side denying the motion." *Ratliff v. Ratliff*, 500 So.2d 981, 981 (Miss. 1986).

This Court reviews a grant of summary judgment *de novo*, as they raise a question of law. *Price v. Park Mgmt., Inc.*, 831 So.2d 550, 551 (Miss. Ct. App. 2002) (citing *Carter v. Harkey*,

774 So.2d 392, 394 (Miss. 2000)). "When evaluating a motion for summary judgment, the court must view all of the evidence in the light most favorable to the nonmoving party." *Id.*

ARGUMENT

I. Whether the Court erred as a matter of law and fact in granting PiCo's MRCP Rule 56 Motion for Summary Judgment and dismissing this cause of action.

II. Whether the Court erred as a matter of law and fact by denying Dillion's MRCP 56(f) Motion for Additional Time to Complete Discovery and Enter a Scheduling Order under MRCP Rule 16.

III. Whether the Court erred as a matter of law and fact in withdrawing the Court's MRCP Rule 78 Order and granting PiCo's Motion to Reconsider.

IV. Whether the Court erred as a matter of law and fact by denying Dillion's Motion to Amend/Withdraw or Strike Tardiness of Plaintiff's Answer to Admissions pursuant to MRCP Rule 36(b).

Dillon is going to address these issues in one argument. Dillon respectfully requests this Honorable Court to find error in the Circuit Court's granting of: 1) PiCo's Motion for Summary Judgment due to procedural circumstances; and 2) abused its discretion and should have granted Dillon's Motion to Withdraw/Amend or Strike the Requests for Admissions. The dismissal should be reversed and remanded to the Circuit Court for a trial on the merits and a scheduling order to complete discovery.

The threshold issue for this Honorable Court is whether the trial court abused its discretion when granting PiCo's Motion for Summary Judgment based upon Dillon's tardy filing of their answers to admissions by 39 days. Further, Dillon would respectfully submit that the Circuit Court misapplied this Honorable Court's MRCP 36(b) "two prong test" when asked by Dillon to amend/withdraw the admissions.

As previously mentioned, Dillon has provided this court with the chronology of procedural filings. The chronology and procedural timing of the filings is vitally important for the court to understand the Circuit Court's ruling.

Gary Dillon was paralyzed from the waist down from this vehicular collision on July 22,

2014. A Complaint was filed against PiCo, Inc. on April 6, 2015. Service was procured and an answer was filed by PiCo along with their discovery which including Interrogatories, Requests for Production of Documents and Requests for Admissions on May 7, 2015. Plaintiffs filed their Responses to Admissions on July 14, 2015 (39 days tardy) wherein they **denied all of the salient requests**. PiCo undoubtedly received the denial of admissions and was well aware of Dillon's position on the denial of admissions. If PiCo was going to rely on tardiness as an admission to all of the salient requests, they could have filed their dispositive Motion to dismiss or summary judgment at that juncture, however, over the next 8 (eight) months PiCo participated in substantial discovery.

Over the next 8 months Dillon filed their answers to interrogatories and responses for production of documents on August 20, 2015. Subpoenas were issued to various entities seeking discovery items through September, October and November 2015. Depositions of PiCo's two drivers were set and taken on February 18, 2016 by Dillon's counsel. Additional discovery was submitted on behalf of Dillon and PiCo following the depositions. Dillon filed a Motion for Leave of the Court asking for additional interrogatories and requests for production of documents, which was objected to by PiCo, as well as a Motion to Compel discovery responses and production of documents on March 7, 2016. Dillon filed a Notice of MRCP 30(b)(6) deposition of PiCo, Inc. on March 9, 2016. Eight months went by wherein PiCo participated in substantial discovery and never once insinuated or postured that they were treating Dillon's denial of admissions as admitted for tardiness.

Much to the surprise of the Dillon, PiCo filed a Motion for Summary Judgment on April 1, 2016. Therefore, Dillon immediately filed a MRCP Rule 56(f) Motion for time to complete discovery to respond to PiCo's Motion for Summary Judgment and for a Scheduling Order under

MRCP Rule 16 on April 15, 2016. Dillon filed their MRCP 56(f) Motion for Time to explain to the Court the difficulties the Dillon was having with the discovery schedule and requests. Dillon was attempting to resolve the various outstanding discovery disputes such as Dillon's: Motion to Compel discovery and production of PiCo's driver's manuals; Motion for leave of the court to ask more interrogatories; Notice for a MRCP 30(b)(6) deposition; and finally Dillon needed more time to further investigate and develop Dillon's case on liability. Because Dillon had been stonewalled on various discovery requests, he was forced to file at MRCP 56(f) Motion for time in response to PiCo's MRCP 56 Motion for Summary Judgment.

A hearing was held on May 12, 2016 before the Circuit Court wherein Dillon argued their MRCP Rule 56(f) motion that they needed more time to fully develop discovery to respond to PiCo's Motion for Summary Judgment. The Court inquired into the untimeliness of Dillon's admissions and Dillon explained to the Court that they would file a Motion to withdraw/amend or strike admissions the next day. The Circuit Court agreed and ordered that all parties have five (5) additional days to file any additional motions.

Importantly, on May 16, 2016 the Circuit Court entered its Rule 78 Order wherein the Court ordered "that on or before May 19, 2016, Dillon **may file any additional motions relative to the pending Motion for Summary Judgment**." The Court requested that Dillon brief the issue of the request for admissions tardiness prior to ruling on the Rule 56(f) Motion for time to complete discovery.

On May 17, 2016, Dillon filed a Motion to Amend/Withdraw or Strike Tardiness of Answers to Admissions pursuant to MRCP 36(b). In the motion, Dillon argued this Court's two prong test under MRCP Rule 36(b) that the presentation of the merits of the action would be served and PiCo would not be prejudiced.

The Circuit Court Judge abused its discretion when it decided to withdraw or rescind its MRCP Rule 78 Order. The purpose of that Court's Order was to allow Dillon an opportunity to file a Motion to withdraw the admissions. Upon filing of the Order and the Motion to withdraw admissions, the Circuit Court Judge was to evaluate the totality of the circumstances under the two prong test under MRCP Rule 36. The Circuit Court failed to address the 2 prong test and never applied the facts and circumstances in the case at bar to the requirements under the rule. This decision by the Circuit Court was in violation of this Court's prior legal precedents regarding Rule 36 admissions.

Dillon argued that MRCP Rule 36 – ADMISSIONS states in pertinent part:

> **(b) Effect of Admission.** Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions governing amendment of a pre-trial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission by him for any other purpose nor may it be used against him in any other proceeding. *(emphasis added).*

The Advisory Committee Note states:

> **The purpose of Rule 36 is to identify and establish facts that are not in dispute**. *DeBlanc v. Stancil*, 814 So.2d 796, 802 (Miss. 2002). "[T]he requests must be reasonable and must be unambiguous. A request is ambiguous if the request is subject to more than one reasonable interpretation. **The purpose of requests for admissions is to narrow and define issues for trial."** See *Haley v. Harbin*, 933 So.2d 261, 262-63 (Miss. 2005). "Requests for admissions 'should not be of such great number and broad scope as to cover all the issues [even] of a complex case, and [o]bviously ... should not be sought in an attempt to harass an opposing party.'" See *Haley*, 933 So.2d at 263.
>
> Rule 36 will be enforced according to its terms; matters admitted or

> deemed admitted upon the responding party's failure to timely respond are conclusively established unless the court, within its discretion, grants a motion to amend or withdraw the admission. "Any admission that is not amended or withdrawn cannot be rebutted by contrary testimony or ignored by the court even if the party against whom it is directed offers more credible evidence." *DeBlanc*, 814 So.2d at 801 (citing 7 James W. Moore, et al., Moore's Federal Practice ¶36.03[2], at 36 (3d ed. 2001)). However, in the matter of child custody, the trial court may, as justice requires, allow the withdrawal of the issue admitted. *Gilcrease v. Gilcrease*, 918 So.2d 854 (Miss. Ct. App. 2005).
>
> The rule sets out a two-pronged test that trial courts may use when determining whether to grant a motion to withdraw or amend an admission. Courts may consider whether "presentation of the merits ... will be subserved [by amendment or withdrawal] and whether the party who obtained the admission has satisfied the court that withdrawal or amendment would prejudice him or her ... [A] trial court 'may,' but is not required to, consider the two-pronged test in denying a motion to withdraw or amend." See *Young v. Smith*, 67 So.3d 732, 740 (Miss. 2011).
>
> Generally, a party has no knowledge concerning the authenticity or admissibility of the opposing party's medical records and, therefore, has no obligation to admit the authenticity or admissibility of such documents absent proper authentication of such records in accordance with M.R.E. 901 or 902 and proper demonstration that such records are records of regularly conducted activity pursuant to M.R.E. 803(6). See *Rhoda v. Weathers*, 87 So.3d 1036 (Miss. 2012).
>
> [Advisory Committee Note adopted effective July 1, 2001]

Dillon would request this Honorable Court to consider the following relevant language:

> "Rule 36 will be enforced according to its terms; matters admitted or deemed admitted upon the responding party's failure to timely respond are conclusively established unless the court, within its discretion, grants a motion to amend or withdraw the admission."

Further, there had been no prior Scheduling Order entered by the Circuit Court when discovery ensued, after suit was filed.

When this Honorable Court applies the two prong test that the Circuit Court must apply, Dillon is confident that this Court will be persuaded to find that 39 day tardiness under the

circumstances was negligible and not prejudicial to PiCo. As stated, the rule sets out a two pronged test that trial courts may use when determining whether to grant a motion to withdraw or amend an admission. Courts must consider whether "presentation of the merits ... will be subserved [by amendment or withdrawal] and whether the party who obtained the admission has satisfied the court that withdrawal or amendment would prejudice him or her."

With respect to the first prong of the test, i.e., whether "the presentation of the merits of the action would be subserved" by allowing the withdrawal of the requests for admissions goes to the heart of Dillon's claims. Dillon has alleged that the PiCo driver was comparatively at fault for his injuries. Specifically, Dillon has alleged that the Defendant's driver did not use his turn signal nor apply his brakes when he was slowing to make a left turn, and the tractor-trailer being towed did not have sufficient rear reflective material to be seen at night. These circumstances caused Dillon to collide with the back of PiCo's tractor-trailer driven by its driver, David Rodgers. Thus, the merits of the case will not be adjudicated if the issue continues to be deemed admitted. Therefore, for the merits of the case to be advanced this Court should allow the admissions to be withdrawn and/or amended. It is obviously clear that Dillon never intended to admit to the admissions because they denied the requests a mere 39 days into the discovery period. Counsel for Dillon filed their denials to the requests as soon as they could locate, discuss and have Gary Dillon verify the denials and admissions. PiCo knew of and received the denials of the admissions and were very aware of Dillon's position.

In the case at bar, PiCo submitted its Request for Admissions on May 7, 2015 along with their Answer, Defenses and Counter-Claims, Interrogatories and Requests for Production of Documents. Dillon responded to these requests on July 14, 2015, (39 days) past the date to respond to the admissions. Dillon would remind the Court that Gary Dillon is a paraplegic who

has been forced to move to Louisiana to live with family and that his wife, Shawna Dillon, is also disabled and unemployed. Dillon was not in the course and scope of his work at the time of the accident and as such, is not receiving any workers' compensation medical or indemnity benefits. The Dillons are living off of welfare and food stamps as well as the kindness of friends and family. They do not have transportation and their telephones are routinely disconnected due to their financial inability to pay their bill.

At the time of receiving the discovery, local counsel herein immediately forwarded same, including the Requests for Admissions, to co-counsel in Lafayette, Louisiana, who in turn had a difficult time locating and getting in touch with Dillon to review and respond to the admission requests. The Dillons had to move from location to location and cell phone contact was difficult. (See Affidavit of Joseph F. Gaar, Jr., attorney for Plaintiffs, attached as Exhibit #1 to Dillon's Motion to Amend/Withdraw Admissions). As a result, this took more time than expected. Dillon responded to the admissions as soon as counsel was able to locate and verify same. It took a month or more to coordinate a trip to Slidell to meet with the Dillons and complete the remaining discovery requests. Dillon then made his appropriate admissions and denials.

This Honorable Court should also note that PiCo's counsel never once took issue to the tardiness of the responses to the admissions. Counsel for PiCo received the filing of the denials to admissions and never once questioned the validity of the denials. Counsel for PiCo never sent an email or letter or mentioned that she was intending on contesting the denials. Counsel for PiCo also received Dillon's interrogatory responses in August, 2015 that supported the denials of the admissions and in fact, counsel for PiCo noticed the Dillons' depositions for November 16, 2015, where the "admissions" would and could have been denied by Dillon. **Never during the 40 plus discovery related emails and correspondence exchanged between the parties herein**

did defense counsel ever once raise the issue of Dillon's "tardy" admissions. Yet nine months later, on April 1, 2016, counsel for PiCo grounded her Motion for Summary Judgment on the tardy admissions as the primary basis for dismissal.

The merits of the case would ultimately need to be decided by a jury as to any comparative negligence on behalf of PiCo's driver. Genuine issues remain, especially with the further discovery sought by Dillon as to whether the PiCo driver was comparatively negligent in the operation of his tractor-trailer and whether the tractor-trailer was illuminated to industry standards.

This Court should note that in David Simmons' deposition, PiCo's co-employee and eyewitness, he testified that essentially he was travelling behind co-employee and driver, David Rodgers, who immediately prior to the collision at issue had been speeding down I-10. (See deposition of David Simmons taken on 2/18/16 - Pages 29-31, attached hereto as Exhibit #2) Simmons further testified that at the moment of impact between Dillon and Rodgers, there was "a quarter of a mile" behind Rodgers and he was in a position to see Rodgers' truck and he never at any time saw Rodgers' turn signal or brake lights. (See deposition of David Simmons taken on 2/18/16 - Page 49, lines 21-25, attached hereto as Exhibit #3).

David Rodgers, PiCo's driver, also testified that his CDL driver's license had been revoked and suspended for numerous speeding violations by both the Mississippi DMV and the Louisiana DMV and that these moving violations and suspensions were reported to PiCo, Inc. (See deposition of David Rodgers taken on 2/18/16 - Pages 8, 9, and 24, attached hereto as Exhibit #4).

Of equal importance, with respect to the second prong of the two part test to withdraw admissions, whether the party who obtained the admission has satisfied the Court that

withdrawal or amendment would prejudice him or her, the Mississippi Supreme Court has not squarely addressed what constitutes prejudice with respect to MRCP Rule 36(b) motions. However, cases interpreting the Federal Rules of Civil Procedure have held that "the reference to 'prejudice' in Rule 36(b) is to the prejudice stemming from reliance on the binding effect of the admission." 8B Charles Alan Wright, et al., *Federal Practice and Procedure* § 2264, at 387-95 (3d Ed. 2010). For example, the Fifth Circuit Court of Appeals, construing Rule 36 of the Federal Rules of Civil Procedure, has stated that "the prejudice contemplated by Rule 36(b) relates to special difficulties a party may face or cause by a sudden need to obtain evidence upon withdrawal or amendment of an admission." *American Auto. Ass'n, Inc. v. AAA Legal Clinic of Jefferson Crooke*, 930 F.2d 1117, 1120 (5th Cir.1991) (citing *Brook Village N. Assocs. v. General Elec. Co.*, 686 F.2d 66, 70 (1st Cir.1982)). This understanding of prejudice, in this context, is not inconsistent with this Court's ruling that prejudice, with respect to amendment of pleadings, results "where allowance of the amendment would burden the adverse party with more discovery, preparation, and expense, particularly where the adverse party would have little time to investigate and acquaint itself with the new matter." *TXG Intrastate Pipeline Co. v. Grossnickle*, 716 So.2d 991, 1011 (Miss.1997) (citing *Natural Mother v. Paternal Aunt*, 583 So.2d 614, 617 (Miss.1991)).

It is abundantly clear that prejudice does not exist with respect to PiCo in this case. PiCo did not argue in the motion hearing and cannot show that they relied on the default admissions either entirely or in part **because they knew and received Dillon's denials in their responses to admissions filed on July 14, 2015 (39 days tardy).** They cannot argue that they were unaware of the denials. The responses and denial to admissions had been filed for over 9 months, therefore, they knew the admissions were denied during the entire discovery period by

Dillon. It is not like Dillon neglected to respond to admissions at all and did not respond to the admissions for 6 months after they were due. The answers which were filed 37 days late was negligible and did nothing to affect PiCo's actions in defending this case or defending the case on the merits going forward.

Most importantly, "the purpose of requests for admissions is to narrow and define issues for trial. Properly used, requests for admissions serve the expedient purpose of eliminating the necessity of proving essentially undisputed and peripheral issues of fact." *Haley v. Harbin*, 933 So.2d 261, 262–63 (Miss.2005). Moreover, "[d]iscovery methods, including but not limited to, interrogatories and requests for admissions, **are not to be used as a ruse or stratagem to obfuscate the truth or to trick an opposing party into admitting a disputed fact**." Id. at 262 (internal citations omitted)(emphasis added). Allowing the deemed admissions to stand, clearly forecloses a decision on the merits and subverts the purpose of the rule.

The plain language of Rule 36(b) of the Mississippi Rules of Civil Procedure provides that a trial court may permit withdrawal or amendment of admissions, where to grant the motion would subserve the presentation of the merits of the case, and the party who obtained the admissions cannot show that withdrawal would prejudice his or her ability to present his or her position on the merits. Once a party has properly entered a motion to withdraw or amend admissions, the trial court should evaluate that motion according to the terms of the two-pronged test outlined in Rule 36(b). In the present case, because both prongs weigh heavily in favor of Dillon and because PiCo clearly did not rely on these deemed admissions while engaging in ongoing litigation, this Honorable Court should recognize the error made by the trial court and allow a withdrawal of the admission.

PiCo relied entirely in its Motion to Reconsider upon the Mississippi case of *Young v.*

Smith, 67 So.3d 732 (Miss. 2011), a case readily distinguishable from the case at bar. In *Young*, having received NO RESPONSES whatsoever to admissions, the defendant filed its summary judgment motion, which was granted by the Circuit Court. In this case before the Court, the facts are distinguished because Defendant DID RECEIVE RESPONSES, albeit 39 days tardy, and was well aware of the denials 9 months prior to its Motion for Summary Judgment. Active discovery was taking place and Dillions' depositions were noticed, scheduled and cancelled due to Dillons inability to travel. Other depositions were noticed and taken, which testimony raised additional discovery issues, namely PiCo's driver's previous CDL suspensions and the way in which he "geared down" and did not apply his brakes to activate his brake lights at the time of this injury.

In this case, Dillon immediately filed a MRCP Rule 56(f) Motion for time to complete discovery in order to respond to Defendant's Motion for Summary Judgment. As previously mentioned, there were numerous discovery issues outstanding. Dillon had filed various motions to compel because they were being stonewalled on discovery attempts! In March 2016, following PiCo's drivers' depositions, Dillon submitted more interrogatories and requests for documents upon PiCo. Dillon was attempting to get the driver's manual from PiCo that had not been produced. PiCo objected to the production of the document and also objected to the additional interrogatories. Therefore, Dillon filed a Motion to Compel on March 7, 2016. Dillon filed a Notice of MRCP 30(b)(6) deposition on March 29, 2016. Dillon filed these motions prior to PiCo's filing its Motion for Summary Judgment. The point is, Dillon was not being lazy and was acting timely in the prosecution of his claim. Dillon was taking steps to obtain access to the information that was discoverable.

The dissenting opinion in *Young v. Smith*, states "while the trial court generally has broad

discretion over pretrial discovery matters, matters conclusively established are not necessarily "irrevocably admitted."" *Educ. Placement Servs. v. Wilson*, 487 So.2d 1316, 1318 (Miss.1986). MRCP Rule 36 places a firm deadline on filing responses to requests for admission but is notably silent as to the timing of motions to withdraw deemed admissions. In evaluating motions to withdraw or amend deemed admissions, this Court has pronounced:

> "While Rule 36 is to be applied as written, **it is not intended to be applied in Draconian fashion. If the Rule may sometimes seem harsh in its application, the harshness may be ameliorated by the trial court's power to grant amendments or withdrawals of admissions in *proper circumstances*.** The trial court's ruling in this regard is subject to review for abuse of discretion. The purpose of the rule is to determine which facts are not in dispute. [7 James W. Moore, et al., Moore's Federal Practice ¶ 36.02[1] at 36–37) (3d ed. 2001)]. *It is not intended to be used as a vehicle to escape adjudication of the facts by means of artifice or happenstance*. Just as a matter admitted is "conclusively established" by the express terms of the Rule, the trial court is likewise directed to carefully examine a Rule 36(b) motion under the two-prong test there provided." *(Emphasis added).*

DeBlanc v. Stancil, 814 So.2d at 801–802.

The dissenting opinion further states: "Thus, while Rule 36 grants discretion to the trial court in considering a motion to withdraw or amend, "**it is the policy of our system of judicial administration to favor disposition of cases on their merits**."" *Bell v. City of Bay St. Louis*, 467 So.2d at 661 (citing *Manning v. Lovett Motor Co.*, 228 Miss. 191, 195, 87 So.2d 494, 496 (1956); *S.W. Sec. Ins. Co. v. Treadway*, 113 Miss. 189, 197, 74 So. 143, 145 (1917))(emphasis added).

Because Mississippi Rules of Civil Procedure are modeled after the Federal Rules of Civil Procedure, Dillon would point out to this Honorable Court other jurisdictional supporting case law. The U.S. District Court in *ADM Agri-Indus., Ltd. v. Harvey*, 200 F.R.D. 467, 471 (M.D. Ala. 2001)., stated: "Both the case law and the Advisory Committee Note to Rule 36

suggest that courts should be reluctant to deny motions to withdraw or amend when final disposition of the case may result from mere discovery noncompliance rather than the merits." See, e.g., *Smith v. First National Bank of Atlanta*, 837 F.2d at 1577 ("It would be manifestly unfair and grossly unjust to permit the plaintiff to obtain a judgment of the magnitude she is seeking due to the inadvertence of the defendant which is at most excusable neglect."); *id.* ("**In a proper case ... such as when an admission has been made inadvertently, Rule 36(b) might well require the district court to permit withdrawal**."); Fed.R.Civ.P. 36 Advisory Committee's note ("This provision [for withdrawal or amendment of an admission] emphasizes the importance of having the action resolved on the merits, while at the same time assuring each party that justified reliance on an admission in preparation for trial will not operate to his prejudice.").

The United States Court of Appeals for the Ninth Circuit in the case of *Conlon v. U.S.*, 474 F.3d 616, 622 (9th Circ. 2007) stated:

> "Admissions are sought, first, to facilitate proof with respect to issues that cannot be eliminated from the case and, second, to narrow the issues by eliminating those that can be. *Id.* advisory committee note. The rule is not to be used in an effort to "harass the other side" or in the hope that a party's adversary will simply concede essential elements. *Perez v. Miami–Dade County*, 297 F.3d 1255, 1268 (11th Cir.2002). Rather, the rule seeks to serve two important goals: truth-seeking in litigation and efficiency in dispensing justice. See Fed.R.Civ.P. 36(b) advisory committee note. Thus, a district court must specifically consider both factors under the rule before deciding a motion to withdraw or amend admissions."

The Court further stated: "The first half of the test in Rule 36(b) is satisfied when upholding the admissions would practically eliminate any presentation of the merits of the case." *Hadley v. U.S.*, 45 F.3d at 1348. The party relying on the deemed admission has the burden of proving prejudice. *Id.* "The prejudice contemplated by Rule 36(b) is 'not simply that the party

who obtained the admission will now have to convince the factfinder of its truth. Rather, it relates to the difficulty a party may face in proving its case, e.g., caused by the unavailability of key witnesses, because of the sudden need to obtain evidence' with respect to the questions previously deemed admitted." *Id.*

PiCo has yet to argue that they would be prejudiced by a withdrawal of the admissions wherein they would have to defend the claims on the merits. At the hearing on this matter, counsel for PiCo only argued "Yes, I have been prejudiced because I did my defense around that. Originally I was going to take Plaintiff's deposition. I decided, well why do I need the deposition. I have admissions." *Circuit Court Hearing Transcript*, Pg. 42, Line 15-19 (June 10, 2016). PiCo attempts to make this argument despite having received the actual denials to the admissions 39 days after they were due. PiCo was well aware of the stance that Dillon was taking. The important point for this Court to see is that PiCo has not submitted any set of facts under the prejudice analysis of the two prong test to deny the setting aside of the admissions. Going further, PiCo has not provided the Court with any circumstances or facts how it would be prejudiced or how its defense would be hindered if the admissions were withdrawn.

Because justice would be subserved and PiCo can show no actual prejudice, the totality of the circumstance under the test weigh heavily in favor of allowing the admissions to be withdrawn.

Additionally, the Circuit Court erred by withdrawing its order wherein it granted both parties additional time to submit further briefing. See Exhibit "5" Circuit Court's Rule 78 Order. That order states:

> "Before the court are several motions, including discovery motions by both parties 51, 62, 63, 69, a Motion for Summary Judgment 66 filed by Defendant, PiCo, Inc., and a Rule 56(f) Motion 75 filed by Plaintiffs. The

> Motions were originally set for hearing on April 21, 2016, with said hearing date being moved to May 12, 2016. Issues were raised by the court on May 12, 2016, which have led the Court to enter this Order pursuant to Rule 78. It is therefore
>
> ORDERED, ADJUDGED AND DECREED that on or before **May 19, 2016**, Plaintiffs may file any additional motions relative to the pending Motion for Summary Judgment 66; that on or before **May 26, 2016**, Defendant may file any response to the additional motions filed by Plaintiffs; that on or before **June 2, 2016**, Plaintiffs may file any rebuttal or reply relative to the additional motions; and no late submissions will be considered. It is further
>
> ORDERED that all pending motions and an motions filed on or before May 19, 2016 are hereby set for hearing before Judge Christopher L. Schmidt on **June 10, 2016 at 9:00 a.m. in Hancock County, Mississippi** at the Courthouse located at 152 Main Street, Bay St. Louis, Mississippi, 39520."

As this Court can readily ascertain, the Circuit Court awarded both sides an opportunity to file additional motions. Dillon filed its additional motions and supporting brief. The Court erred and abused its discretion by withdrawing this order in reliance upon *Vicksburg Healthcare, LLC v. Dees*, 152 So.3d 1171 (Miss. 2014).

The facts in this case are readily distinguishable from that in *Vicksburg Healthcare, LLC v. Dees, supra.* In *Dees,* a medical malpractice action was brought and the plaintiff never listed an expert. Mississippi Law requires an expert to be listed and give expert opinion in regards to any potential malpractice claim. The plaintiff in that matter simply never listed an expert or provided any testimony whatsoever. The court granted the plaintiff 60 days to find an expert. This Honorable Court found that to be an abuse of discretion and granted the Defendant's summary judgment motion. This Court reasoned that in *Vicksburg Healthcare, LLC v. Dees, supra,* the plaintiff was not diligent in her efforts to oppose summary judgment, *Dees* failed to comply with discovery demands and failed to establish a prima facie case.

The factual and procedural circumstances in this case before this Honorable Court are totally different from that in *Vicksburg Healthcare, LLC v. Dees, supra*, as relied upon by the Circuit Court. For starters, this is a negligence claim and not a malpractice claim; there are no experts that have to testify to establish a claim. Secondly, in this matter, Dillon did respond to the requests for admissions and denied the salient requests, albeit late, they were not wholly ignored. Thirdly, Dillon filed a MRCP Rule 56(f) Motion for time to complete discovery. There were various motions to compel and other discovery disputes before the Circuit Court at the time of the dismissal. Dillon was still diligently pursuing his case from a liability standpoint. Dillon was conducting copious amounts of discovery through written means, depositions, requested a MRCP 30(b)(6) deponent, filed motions to compel PiCo to produce documents and answer more interrogatories. The record supports that Dillon was actively and aggressively pursuing his case.

Lastly, Dillion was diligent and acting in good faith at all times. Dillon answered his discovery on time and responded to the admissions as soon as it was possible. Dillon actively pursued discovery of liability and damages. Dillon took a diligent and good faith effort to develop his cause of action on liability and damages. This is precisely why Dillion filed the MRCP 56(f) Motion for time to complete discovery in response to PiCo's Motion for Summary Judgment.

Assuming *arguendo*, that if the Court were to find that the admissions are all deemed admitted, there are still genuine issues of material fact. In his Affidavit, Gary Dillon states that the driver in front of him did not apply his brakes nor did he use a turn signal. Dillon stated that he did not see any illumination on the rear of the tractor-trailer and that he did not see the rear of the truck until just a few seconds prior to impact. (See Gary Dillon's Affidavit attached as Exhibit #5).

PiCo's driver, David Rogers, was deposed and in his deposition he was asked:

Q. All right. Do you actually put your foot on the brake pedal and apply – apply the brakes?

A. Yes

Q. Anything else that you would have done to slow down?

A. Yes.

Q. What else?

A. Downshift to a lower gear.

David Rogers Deposition, pg. 78, line 18-25, (February 18, 2016).

Q. Was your foot on the – was your foot on the brake pedal?

A. I don't recall.

Q. All right. Did you – did you apply your foot to the brake pedal after you were struck by Mr. Dillon?

A. I don't recall.

Id. at pg. 89, line 19-25.

Q. That – that you had – and that you were down shifting; correct?

A. Yes.

Q. Okay. And I believe that you had – that you said that you believe that you – that your speed at the exact moment that you were hit by Mr. Dillon was about maybe five miles an hour. Correct?

A. Yes.

Q. Okay. You were not at a stop when you were hit by Mr. Dillon; correct?

A. I don't recall. No. I don't think so.

Q. Okay. Is your – is your standard driving habit when you're – when you're slowing to make a turn that you do downshift?

A. Yes.

Q. Okay. As a matter of fact, that's – that's kind of the – that's standard for all commercial drivers, that if you're driving a big rig that you're going to downshift; correct?

A. Yes.

Q. It assists you in slowing your speed?

A. Yes.

Q. What speed would you be going – or what – what gear would you be in if you were, say, going five miles an hour? Would you be in first speed or second speed, or do you know?

A. I would say fist gear.

Q. First gear. All right. And as far as for your brakes you said you applied your brakes. Did you apply your brakes initially before you started downshifting or at what point?

A. It's a sequence.

Q. Right.

A. Apply the brakes. Downshift. Apply the brakes again. Downshift. Apply the brakes. It's back and forth.

Q. Back and forth?

A. Yes.

Q. Okay. You're not riding your brakes, I take it.

A. No.

Id. at pg. 92 line 10 – page 94 line 1.

Therefore, assuming *arguendo*, that all the admissions were deemed admitted there is still a genuine issue of material fact as to whether or not the driver of the PiCo, Inc. vehicle properly used his brakes, gave proper turn signals, and if the trailer was properly illuminated in

accordance with Federal and State regulations. The factual questions the jury must answer are whether the driver used his brakes properly, whether there was proper signalization and whether the vehicle had proper illumination which may have caused or contributed to wreck that paralyzed Gary Dillon. The PiCo driver says he did use his brakes, Gary Dillon said he did not use his brakes.

Therefore, this Honorable Court should be persuaded to allow Dillon to amend/withdraw the admissions and should reverse and remand this matter to the trial court for further proceedings and the continuation of discovery and trial on the merits, to do otherwise would be a gross miscarriage of justice.

CONCLUSION

For the above foregoing reasons, good cause exists in this action for reversing the Circuit Court's Order dismissing this cause of action and this matter should be remanded to the Circuit Court for further proceedings.

RESPECTFULLY SUBMITTED this the 10th day of January, 2016.

GARY DILLON and SHAWNA DILLON,
Appellants

By: s:/JAMES K. WETZEL

CERTIFICATE OF SERVICE

I, undersigned counsel, hereby certify that I have this day electronically filed the foregoing pleading or other paper with the Clerk of the Court using the MEC system which sent notification of such filing to the following: Kathryn Platt, Esquire, attorney for Defendant and by regular mail to the Honorable Christopher Schmidt, Circuit Court Judge, at his usual mailing address of Post Office Box 1461, Gulfport, MS 39502.

DATED this the 10th day of January, 2016.

s:/JAMES K. WETZEL

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