IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

No. 2015-TS-01886

HYUNDAI MOTOR AMERICA, ET AL. **APPELLANTS**

v.

OLA MAE APPLEWHITE, ET AL. **APPELLEES**

APPEAL FROM THE CIRCUIT COURT OF COAHOMA COUNTY, MISSISSIPPI

MOTION OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLANTS

The Product Liability Advisory Council, Inc. ("PLAC"), by and through counsel, respectfully moves this Court, pursuant to Rule 29 of the Mississippi Rules of Appellate Procedure, for leave to file an *amicus curiae* brief in support of Appellants Hyundai Motor America and Hyundai Motor Company in the above-entitled appeal. A copy of the proposed *amicus curiae* brief is submitted herewith as an attachment to this motion.[1]

STANDARD FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

As this Court has previously recognized, "[t]he practice of permitting *amicus curiae* participation to inform or advise the court is as old as the common law dating as far back as 1353." *Taylor v. Roberts*, 475 So. 2d 150, 151 (Miss. 1985). In keeping with this longstanding tradition, the Court "generally allows interested persons or organizations the right to appear in

[1] In lieu of filing a separate brief under Miss. R. App. P. 29(b), PLAC sets forth herein why this motion satisfies the requirements of Rule 29(a).

matters of public interest." *Id.* The Court has articulated four different grounds for granting a motion for leave to file an *amicus* brief. Specifically, an *amicus curiae* must demonstrate that:

> (1) *amicus* has an interest in some other case involving a similar question; or (2) counsel for a party is inadequate or the brief insufficient; or (3) there are matters of fact or law that may otherwise escape the court's attention; or (4) the *amicus* has substantial legitimate interests that will likely be affected by the outcome of the case and which interests will not be adequately protected by those already parties to the case.

Miss. R. App. P. 29(a); *see also Taylor*, 475 So. 2d at 152. Notably, "[t]he trend under the modern practice regarding *amicus curiae* participation has been to liberally allow participation to help the court's general understanding and insight central to the court's decision and possible implications of its rulings." *Taylor*, 475 So. 2d at 151; *see also* Comment to Miss. R. App. P. 29 ("Briefs of an *amicus curiae* are allowed under this rule consistent with the accepted view that such briefs, in appropriate cases, are of genuine assistance to the court and facilitate a more thorough understanding of the facts and law."). As shown below, PLAC's motion for leave to file an *amicus curiae* brief should be granted under the third and fourth bases identified in Rule 29 and in *Taylor*.

INTEREST OF *AMICUS CURIAE*

The Product Liability Advisory Council, Inc. is a non-profit association with roughly one hundred corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. A list of PLAC's corporate members is appended hereto as Appendix A. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed more than 1,000 briefs as *amicus*

curiae in both state and federal courts, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability.

A. There Are Matters Of Law That May Otherwise Escape The Court's Attention.

PLAC's proposed *amicus* brief will assist the Court's general understanding of the *Daubert* issues implicated by this appeal and identify potential ramifications if the judgment below is permitted to stand. *See Taylor*, 475 So. 2d at 151 (noting that *amicus* briefs may "help the court's general understanding and insight central to the court's decision and possible implications of its rulings"); Comment to Miss. R. App. P. 29 (commenting that *amicus* briefs "are of genuine assistance to the court and facilitate a more thorough understanding of the facts and law").

First, PLAC's brief provides an analysis of highly relevant case law in which courts applying Mississippi law have excluded accident reconstruction experts who offer opinions that fail to account for—or worse, flatly contradict—uncontroverted eyewitness testimony concerning observable conditions (such as speed and distance) about how a motor vehicle accident occurred. Second, PLAC's brief will also aid this Court's understanding of the law at issue in this case by explaining how Mississippi courts have applied the *Daubert* standard to exclude the opinions of accident reconstruction experts who fail to demonstrate that their theories fit the facts of the case (*i.e.*, by validating their hypotheses through objective, scientific methods such as empirical testing). Third, PLAC's brief will also highlight the adverse effects that would be engendered if the Court were to uphold the judgment below. For example, because expert witnesses possess superior credentials, jurors often mistakenly attribute a "mystic infallibility" to their opinions. *See* Spyridon, *Scientific Evidence vs. 'Junk Science'—Proof of Medical Causation in Toxic Tort Litigation: The Fifth Circuit 'Fryes' a New Test*, 61 MISS. L.J.

287, 305 (1991); *see also Edmonds v. State*, 955 So. 2d 787, 792 (Miss. 2007). Thus, when a trial court fails to discharge its gatekeeping responsibilities under *Daubert* by excluding unreliable expert testimony, a jury may be improperly swayed by opinions lacking any probative value. This is particularly true where, as here, the expert formed his opinion based on assumptions completely at odds with uncontroverted eyewitness testimony.

B. PLAC Has Substantial Legitimate Interests That Will Likely Be Affected By The Outcome Of The Case And Which Interests Will Not Be Adequately Protected By Those Already Parties To The Case.

This Court has previously recognized PLAC's substantial legitimate interests in issues surrounding the expert testimony admitted in this litigation. Notably, PLAC sought and obtained leave to file an *amicus curiae* brief in this case's first visit to the Mississippi Supreme Court. *See* Dec. 29, 2009 Order, *Hyundai Motor Am. v. Applewhite*, No. 2008-CA-01101-SCT (granting PLAC leave to file *amicus curiae* brief). In that prior brief, PLAC argued that the trial court failed to exercise its gatekeeping role by ensuring that plaintiffs' original accident reconstruction expert timely and properly disclosed changes to his calculations as required under Miss. R. Civ. P. 26—a conclusion ultimately endorsed by this Court. *See Hyundai Motor Am. v. Applewhite*, 53 So. 3d 749, 757 (Miss. 2011) (ordering new trial because "the plaintiffs failed timely and properly to disclose changes to Webb's calculations").

PLAC's interests in this second appeal are at least as great as they were in the first. Many of PLAC's members do business in the State of Mississippi and have been defendants in product liability cases tried in this State's courts. These members have a substantial and legitimate interest in the outcome of this case because the judgment below, if allowed to stand, would undermine the vital gatekeeping responsibility vested in trial courts, which this Court recognized when it adopted the *Daubert* standard in 2003. *See Miss. Transp. Comm'n v. McLemore*, 863 So. 2d 31 (Miss. 2003). This, in turn, would subject product manufacturers to

unfair and unpredictable judgments in cases, such as this one, in which the trial court improperly admitted opinion testimony from experts that flouted both basic scientific principles and eyewitness accounts. Many of the issues raised and authorities relied upon in PLAC's *amicus* brief have not been addressed in the parties' briefing. Moreover, because PLAC has represented the interests of a diverse array of product manufacturers both in this State and in jurisdictions across the nation, it can draw upon its prior experience in briefing issues relating to the admission of expert testimony under the *Daubert* standard.[2]

CONCLUSION

For the reasons set forth above, PLAC respectfully requests that the Court grant PLAC leave to file a brief as *amicus curiae* in support of Appellants Hyundai Motor America and Hyundai Motor Company.

RESPECTFULLY SUBMITTED, this the 19th day of September 2016.

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[2] For a sample of prior PLAC briefing concerning the admission of expert testimony, see http://plac.com/plac/issues/Expert%20Evidence.aspx (last visited September 19, 2016).

APPENDIX A

PLAC CORPORATE MEMBERSHIP LIST
(as of 9/12/16)

3M
Altec, Inc.
Altria Client Services LLC
Astec Industries
Bayer Corporation
BIC Corporation
Biro Manufacturing Company, Inc.
BMW of North America, LLC
The Boeing Company
Bombardier Recreational Products, Inc.
Boston Scientific Corporation
Bridgestone Americas, Inc.
Bristol-Myers Squibb Company
C. R. Bard, Inc.
Caterpillar Inc.
CC Industries, Inc.
Celgene Corporation
Chevron Corporation
Cirrus Design Corporation
Continental Tire the Americas LLC
Cooper Tire & Rubber Company
Crane Co.
Crown Equipment Corporation
Daimler Trucks North America LLC
Deere & Company
Delphi Automotive Systems
The Dow Chemical Company
E.I. duPont de Nemours and Company
Emerson Electric Co.
Exxon Mobil Corporation
FCA US LLC
Ford Motor Company
Fresenius Kabi USA, LLC
General Motors LLC
Georgia-Pacific LLC
GlaxoSmithKline
The Goodyear Tire & Rubber Company
Great Dane Limited Partnership
Hankook Tire America Corp.
Harley-Davidson Motor Company
The Home Depot
Honda North America, Inc.
Hyundai Motor America

Illinois Tool Works Inc.
Intuitive Surgical, Inc.
Isuzu North America Corporation
Jaguar Land Rover North America, LLC
Jarden Corporation
Johnson & Johnson
Kawasaki Motors Corp., U.S.A.
KBR, Inc.
Kia Motors America, Inc.
Kolcraft Enterprises, Inc.
Lincoln Electric Company
Magna International Inc.
Mazak Corporation
Mazda Motor of America, Inc.
Medtronic, Inc.
Merck & Co., Inc.
Meritor WABCO
Michelin North America, Inc.
Microsoft Corporation
Mine Safety Appliances Company
Mitsubishi Motors North America, Inc.
Mueller Water Products
Novartis Pharmaceuticals Corporation
Novo Nordisk, Inc.
Pella Corporation
Pfizer Inc. Pirelli Tire, LLC
Polaris Industries, Inc.
Porsche Cars North America, Inc.
RJ Reynolds Tobacco Company
Robert Bosch LLC
SABMiller Plc
The Sherwin-Williams Company
St. Jude Medical, Inc.
Stryker Corporation
Subaru of America, Inc.
Takeda Pharmaceuticals U.S.A., Inc.
TAMKO Building Products, Inc.
Teleflex Incorporated
Toyota Motor Sales, USA, Inc.
Trinity Industries, Inc.
U-Haul International
The Viking Corporation
Volkswagen Group of America, Inc.
Volvo Cars of North America, Inc.
Wal-Mart Stores, Inc.
Western Digital Corporation
Whirlpool Corporation
Yamaha Motor Corporation, U.S.A.

Yokohama Tire Corporation
ZF TRW
Zimmer Biomet

CERTIFICATE OF SERVICE

I, the undersigned attorney of record, do hereby certify that I have this the 19th day of September 2016 filed with the Clerk of the Court using the MEC system, which will deliver copies to all counsel of record:

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and that I have caused a true and correct copy of the foregoing to be delivered to the following by United States Mail, first-class postage prepaid:

Honorable Albert B. Smith, III
Circuit Court Judge
Coahoma County Circuit Court
Post Office Drawer 478
Cleveland, Mississippi 38732

/s/ William L. Durham II
William L. Durham II
Attorney for *Amicus Curiae* Product Liability Advisory Council, Inc.

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BRIEF OF PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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v.

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for *amicus curiae* Product Liability Advisory Council, Inc. certifies that the following listed persons and entities have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and the Judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. Hyundai Motor America, an Appellant/Defendant;

2. Hyundai Motor Company, an Appellant/Defendant;

3. Thomas N. Vanderford, Jr., Assistant General Counsel for Hyundai Motor America;

4. Kevin C. Newsom, Michael J. Bentley, and the law firm of Bradley Arant Boult Cummings LLP, attorneys for the Appellants/Defendants;

5. J. Collins Wohner, Jimmy B. Wilkins and the law firm of Watkins & Eager PLLC, attorneys for the Appellants/Defendants;

6. Bill Luckett and the Luckett Tyner Law Firm, P.A., attorneys for the Appellants/Defendants;

7. Robert W. Maxwell and the law firm of Bernard, Cassisa, Elliott & Davis, APLC, attorneys for the Appellants/Defendants;

8. Walter E. McGowan and the law firm of Gray, Langford, Sapp, McGowan, Gray, and Nathanson, attorneys for the Appellants/Defendants;

9. Ola Mae Applewhite, in her capacity as representative of the Estate of Dorothy Mae Applewhite, an Appellee/Plaintiff;

10. Alecia Shavonne Applewhite, daughter of Dorothy Mae Applewhite;

11. Brandon O'Keith Applewhite, son of Dorothy Mae Applewhite;

12. Latisha Kiara Applewhite, daughter of Dorothy Mae Applewhite;

13. Ceola Wade, in her capacity as representative of the Estate of Anthony J. Stewart, an Appellee/Plaintiff;

14. Kenneth Cordell Carter, as representative of the Estate of Cecilia Cooper, an Appellee/Plaintiff;

15. Ralph E. Chapman, Sara Russo, and the law firm of Chapman, Lewis & Swan, attorneys for the Plaintiffs/Appellees;

16. C. Kent Haney, attorney for the Plaintiffs/Appellees;

17. Dennis Sweet, III and the law firm of Sweet & Associates, PLLC, attorneys for the Plaintiffs/Appellees;

18. Product Liability Advisory Council, Inc., *amicus curiae*

19. Chilton Davis Varner, William L. Durham II, Madison H. Kitchens, and the law firm of King & Spalding LLP, counsel for *amicus curiae* Product Liability Advisory Council, Inc.

20. Honorable Alfred B. Smith, trial judge.

So certified, this the 19th day of September, 2016.

/s/ William L. Durham II
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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTRODUCTION

The Product Liability Advisory Council, Inc. ("PLAC") is a non-profit association with roughly one hundred corporate members representing a broad cross-section of American and international product manufacturers.[1] Many of PLAC's members do business in the State of Mississippi and have been defendants in product liability cases tried in this State's courts. These members have a direct interest in the outcome of this case because the judgment below, if allowed to stand, would undermine the vital gatekeeping responsibility vested in trial courts, which this Court recognized when it adopted the *Daubert* standard in 2003. This, in turn, would subject product manufacturers to unfair and unpredictable judgments in cases, such as this one, in which the trial court improperly admitted opinion testimony from experts that flouted both basic scientific principles and eyewitness accounts.

SUMMARY OF ARGUMENT

This appeal involves the curious case of a "reconstructed" accident reconstruction, in which plaintiffs' expert (1) co-opted a prior expert's conclusory opinion regarding the delta-v (*i.e.*, the sudden change in velocity at impact) produced by a motor vehicle collision;[2] (2) attempted to fix the faulty math underlying that opinion by "backing up" into an impact speed that markedly contradicted eyewitness testimony; and (3) failed to verify his unsubstantiated theory by conducting crash tests or employing any other method to test his opinions.

This Court has recognized that *Daubert* precludes trial courts from admitting "'opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.'" *Watts v. Radiator Specialty Co.*, 990 So. 2d 143, 149 (Miss. 2008) (quoting *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997)). To ensure that *Daubert*'s reliability requirement is satisfied,

[1] A fuller description of PLAC's mission, including a list of PLAC's current corporate membership, is contained in its Motion for Leave to File *Amicus Curiae* Brief, filed contemporaneously herewith.

[2] The higher the delta-v, the more violent—and dangerous—the accident.

a court must exclude expert testimony when "there is simply too great an analytical gap between the data and the opinion proffered." *Id*.

In this case, the "analytical gap" could not have been more profound. The only two eyewitnesses to the crash who testified at trial, Kenny Runions and Roland Jordan, stated (under rigorous cross-examination) that the subject vehicle, a 1993 Hyundai Excel, was traveling *at least* 50 miles per hour at the moment of impact. By contrast, plaintiffs' after-the-fact accident reconstructionist, Mickey Gilbert, told the jury that the Excel's speed at impact was only ***18 miles per hour***. This is a massive difference—between, say, driving down the open highway and driving through a school zone. In fact, Gilbert's posited impact speed was *half* that of plaintiffs' accident reconstruction expert, Andrew Webb, in the first trial of the case. Gilbert's readjustments were intentional and necessary for Gilbert to reach his serendipitous conclusion that the Excel's impact speed was just low enough to "fix" the fatal mathematical flaws in Webb's original calculations, thereby resuscitating Webb's 35-mph delta-v conclusion that was essential to plaintiffs' ability to recover. As explained below, Gilbert's methodology in this case is the antithesis of what *Daubert* requires.

First, a trial court, in discharging its gatekeeping duties under *Daubert*, must ensure that "the facts upon which the expert bases his opinion must permit reasonably accurate conclusions as distinguished from mere guess or conjecture." *Janssen Pharmaceutica, Inc. v. Bailey*, 878 So. 2d 31, 60 (Miss. 2004). Plaintiff's original accident reconstructionist (Webb) arrived at a conclusion that was mathematically impossible: that a collision between an Excel traveling 35 mph and an oncoming Lincoln traveling 55 mph would generate a delta-v of only 35 mph. This Court previously ordered a new trial because "the plaintiffs failed timely and properly to disclose changes to Webb's calculations." *Hyundai Motor Am. v. Applewhite*, 53 So. 3d 749, 757 (Miss. 2011). Rather than make the required disclosures, however, plaintiffs retained a new expert who

parroted the same 35-mph delta-v conclusion as before. *Daubert* requires that an expert objectively assess the facts, wherever they may lead, *before* forming an opinion. Gilbert did the opposite: he adjusted the facts to fit plaintiffs' theory rather than adjust the theory to fit the facts.

Second, the expert's opinion must be formed by sufficient "foundational facts" in the record. *See Int'l Paper Co. v. Townsend*, 961 So. 2d 741, 758 (Miss. Ct. App. 2007) ("[T]he sufficiency of foundational facts or evidence on which an expert bases his opinion is a ***question of law*** which must be determined by the trial judge.") (emphasis added). Gilbert's 18 mph impact-speed assertion simply disregarded highly probative—and consistent—eyewitness testimony that thwarted plaintiffs' ability to prove a delta-v at or below 35 mph. Courts applying Mississippi law have consistently held that a party's accident reconstruction expert cannot proffer causation opinions based on assumptions wholly untethered to the facts as testified by eyewitnesses to the accident. *See, e.g.*, *Chan v. Coggins*, 294 F. App'x 934 (5th Cir. 2008).

Third, Gilbert's manufactured impact-speed hypothesis was rendered all the more unreliable by his failure to test it. The question whether a Hyundai Excel traveling at 18 miles per hour would, in the real world, actually tear apart in a collision with an oncoming Lincoln Continental traveling 50-55 miles per hour is readily testable. In fact, Hyundai *did* test it: live crash tests established that the Excel would have remained *intact* even at impact speeds far greater than the one championed by Gilbert. This, too, rendered Gilbert's opinion incompatible with the *Daubert* standard as applied by this Court. *See Patterson v. Tibbs*, 60 So. 3d 742, 749 (Miss. 2011) ("[E]xpert testimony may be excluded as scientifically unreliable when there is a lack of scientific data supporting the expert's opinion."); *see also Stanczyk v. Black & Decker*, 836 F. Supp. 565, 567 (N.D. Ill. 1993) ("[T]he most important factor [of *Daubert*] is whether the technique (or theory) being advanced by the expert can be or has been tested" because "the history of … science is filled with finely conceived ideas that are unworkable in practice").

Finally, it is evident that Gilbert's unreliable testimony severely compromised the jury's ability to render a just verdict. Because a witness's designation as an expert confers an aura of superior knowledge and trustworthiness, jurors are prone to place exaggerated weight on expert testimony—even when that testimony is not grounded in the facts or the product of reliable principles and methods. That is why this Court requires the trial court to determine whether an expert's opinions bear the hallmarks of scientific reliability identified in *Daubert*. Because the trial court in this case abdicated its gatekeeping responsibilities, the jury rendered a verdict wholly divorced from the actual, hard evidence.[3]

For all these reasons, PLAC respectfully requests that the Court reject this dangerous dilution of the *Daubert* standard by reversing the judgment below.

ARGUMENT

I. Mississippi's Adoption Of *Daubert* Imposes A Gatekeeping Obligation On Trial Courts To Ensure That Expert Testimony Is Both Relevant And Reliable.

"Under the guidelines of the Mississippi Rules of Evidence Rule 702, the trial judge serves as a 'gatekeeper' in ruling on the admissibility of expert testimony." *Apacmississippi, Inc. v. Goodman*, 803 So. 2d 1177, 1185 (Miss. 2002).[4] To fulfill this gatekeeping obligation,

[3] For reasons adequately explained in Hyundai's principal brief, the trial court compounded its error by admitting the testimony of James Mundo, who lacked sufficient scientific data to render a reliable design-defect opinion and, like Gilbert, failed to test his opinion or alternative designs. Earlier this month, the Supreme Court of Virginia reversed and rendered judgment for another automaker on those precise grounds in *Holiday Motor Corp. v. Walters*, No. 150391, 2016 Va. LEXIS 111, at *33-*35 (Va. Sept. 8, 2016).

[4] Rule 702 of the Mississippi Rules of Evidence requires that:

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Miss. R. Evid. 702. This language is identical to the federal analogue. *See* Fed. R. Evid. 702. When this Court adopted the *Daubert* standard in *Mississippi Transportation Commission v. McLemore*, 863 So. 2d 31 (Miss. 2003), it adopted the federal standards as consonant with Mississippi law. *See id*. at 39.

Rule 702 requires courts to ensure that expert testimony is "both relevant and reliable." *Corrothers v. State*, 148 So. 3d 278, 294 (Miss. 2014).

The relevance prong turns on whether the evidence will "assist the trier of fact to understand the evidence or determine a fact in issue," which in turn requires that the evidence must "fit" by being "'sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute.'" *Id.* at 294 (quoting *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 591 (1993)). To satisfy the reliability prong, "the testimony must be grounded in the methods and procedures of science, not merely a subjective belief or unsupported speculation." *Worthy v. McNair*, 37 So. 3d 609, 615 (Miss. 2010). The party offering the expert testimony must prove by a preponderance of the evidence that the testimony is reliable:

> [T]he party seeking to have the … court admit expert testimony must demonstrate that the expert's findings and conclusions are ***based on the scientific method***, and, therefore, are reliable. This requires some ***objective, independent validation of the expert's methodology***. The expert's assurances that he has utilized generally accepted scientific methodology is insufficient.

Moore v. Ashland Chem., Inc., 151 F.3d 269, 276 (5th Cir. 1998) (emphasis added).

The record in this case reveals that plaintiffs came nowhere close to satisfying their burden of showing that Gilbert's accident reconstruction opinions were "sufficiently tied to the facts of the case," "grounded in the methods and procedures of science," and capable of "objective, independent validation." Instead, Gilbert's manipulation of the estimated impact speed of the Excel (the central dispute in the case) was contrary to eyewitness testimony, grounded in a need to achieve the desired delta-v of 35 mph, and unsupported by any objective validation or testing. In other words, his opinion was neither "based on sufficient facts or data" nor "the product of reliable principles and methods." Miss. R. Evid. 702.

The case law is clear that "[m]erely parroting the opinions of others stretches the bounds" of the *Daubert* standard and the rules of evidence. *S.W. v. United States*, No. 3:10CV502-DPJ-

FKB, 2013 WL 1342763, at *5 (S.D. Miss. Apr. 2, 2013) (expert testimony deficient where expert merely adopts the opinions of a prior expert in earlier litigation as his own). On several levels, what Gilbert did in this case was far worse: he appropriated the predetermined conclusion of a prior expert, Webb, while admitting that the mathematics underlying Webb's conclusion (*i.e.*, 55 mph Lincoln impact speed + 35 mph Excel impact speed = 35 mph delta-v) "didn't make any sense." *See* R.1112.

Gilbert's solution to the problem was simply to change the input (impact speed) to derive the same output (delta-v) as Webb. Although *Daubert* required Gilbert to justify his impact-speed estimate by showing that it was both rooted in the facts of the case and confirmed by reliable methods and testing, he did neither. His opinion amounted to nothing more than rank speculation and *ipse dixit*, which this Court's *Daubert* jurisprudence forbids. *See Gulf South Pipeline, Co. v. Pitre*, 35 So. 3d 494, 499 (Miss. 2010) ("[M]erely speculative expert opinions should not be admitted."); *Edmonds v. State*, 955 So. 2d 787, 792 (Miss. 2007) ("[A] court should not give … an expert carte blanche to proffer any opinion he chooses."); *McLemore*, 863 So. 2d at 37 (Miss. 2003) ("[S]elf-proclaimed accuracy by an expert [is] an insufficient measure of reliability."); *Brown v. Ill. Cent. R.R. Co.*, 705 F.3d 531, 537 (5th Cir. 2013) ("[W]ithout more than credentials and a subjective opinion, an expert's testimony that 'it is so' is not admissible.").

II. Mississippi Courts Routinely Exclude Expert Testimony That Disregards—Or Worse, Flatly Contradicts—Eyewitness Testimony.

As noted above, Gilbert's estimate of the Excel's impact speed was one-third as fast as the speed observed by two independent eyewitnesses, one traveling in front of the Excel and one traveling behind it. Yet, courts applying the *Daubert* standard under Mississippi law have repeatedly held that experts—and specifically, accident reconstructionists—cannot simply ignore eyewitness testimony that fails to support their theory of the case.

The Mississippi Court of Appeals' opinion in *Whiddon v. Smith*, 822 So. 2d 1060 (Miss. Ct. App. 2002), is highly instructive. *Whiddon* arose out of a rear-end collision that propelled plaintiff's car into the opposing lane of traffic, whereupon a delivery truck struck plaintiff's vehicle head-on. Plaintiff sued the delivery truck driver and his employer, arguing that he could have avoided the accident had the truck been traveling at a lower speed. *Id*. at 1062. In arriving at his conclusion that the delivery truck driver lacked sufficient time to react, defendants' accident reconstruction expert testified that he had assumed that plaintiff's vehicle was traveling at about 10 mph after being rear-ended—an estimate he developed "from his review of a number of extra-judicial statements given by various individuals and from an interview with the officer who investigated the accident," even though "certain of those facts did not have an evidentiary basis in the record of the trial itself." *Id*. at 1063. The court roundly criticized the expert's approach and underscored the need for accident reconstructionists to formulate their opinions based on the assumed veracity of eyewitness testimony:

> [T]he expert offered no physical evidence to indicate the speed of Whiddon's vehicle as it came across the centerline and into Smith's lane of travel and there had been no testimony at trial indicating that the vehicular speed was ten miles per hour. Therefore, it seems clear that there was no reasonable basis for the expert to make such an assumption in attempting to reconstruct the reaction time available to Smith .... ***Clearly, in the apparent absence of physical evidence of Whiddon's speed, the proper course of the proof, if the speed of Whiddon's vehicle was critical to the expert's opinion testimony, would have been to call a witness to testify to that witness's estimate of speed, and then formulate a hypothetical question to the expert asking him to assume the truth of that witness's testimony.*** To merely accept as fact an extrajudicial estimate of speed not offered into evidence at trial is certainly not the 'type [of facts] reasonably relied upon' to formulate an after-the-fact opinion as to what transpired in an accident. ***To the extent that this expert's opinion as to Smith's reaction time was premised upon a calculation that Whiddon was traveling at the rate of ten miles per hour, then the introduction of his opinion was error***.[5]

[5] While the *Whiddon* court separately concluded that the error did not require reversal of the jury verdict because "both so-called experts who testified at this trial offered little information helpful to the jury," 822 So. 2d at 1064, it is undisputed in this case that the jury's verdict could not stand unless Gilbert's estimate of the Excel's impact speed was both reliable and low enough to keep the delta-v within the "survivable" range.

Id. at 1064 (emphasis added). The court further observed that, in the absence of actual physical data concerning a vehicle's speed, the expert must necessarily accept the eyewitnesses' accounts "because a reconstructionist expert cannot make the ultimate determination as to credibility of those offering their estimates of such variables as time and speed in the moments leading up to a motor vehicle collision." *Id*.; *see also Watkins v. U-Haul Int'l, Inc.*, 770 So. 2d 970, 977 (Miss. Ct. App. 2000) (affirming exclusion of plaintiff's accident reconstructionist where expert "testified at his deposition that he had not spoken with witnesses of the accident").

If anything, Gilbert's opinion in this case was even less reliable than the opinion rejected in *Whiddon*. Gilbert not only failed to accept as true the consistent eyewitness testimony of Runions and Jordan regarding the Excel's impact speed in arriving at his delta-v calculation, as *Whiddon* suggested he must; his opinion *flatly contradicted* that eyewitness testimony by postulating an impact speed over 30 mph slower.

The Fifth Circuit's opinion in *Chan v. Coggins*, 294 F. App'x 934 (5th Cir. 2008), is also squarely on point here. In *Chan*, a homeless man named Randy Lynn Brewer was run over by a tractor trailer operated by defendant Roger Coggins while Brewer was panhandling at an intersection in Jackson, Mississippi. Plaintiff retained an accident reconstruction expert, Victor Holloman, who opined that the defendant acted negligently by failing to allow Brewer sufficient time to traverse the intersection before turning his vehicle. *Id*. at 936. According to Holloman, Brewer was struck from behind by the tractor trailer because Coggins failed to maintain a proper lookout. *Id*. The Fifth Circuit concluded, however, that Holloman's testimony failed to pass muster under *Daubert* because his opinions lacked a scientific basis and conflicted with the uncontested testimony of eyewitnesses at the scene of the accident. *Id*. at 938. Specifically, the court observed that Holloman's testimony contradicted that of Coggins and a third-party motorist, both of whom testified that Brewer was already outside the path of the truck when it

began turning. *Id*. at 940 & n.4. This eyewitness testimony established that "Brewer was on the outside of the cab's turning radius, not inside where he might have been struck by off-tracking wheels of the trailer"—which rendered unreliable Holloman's testimony that driving errors caused the accident. *Id*. at 938 n.2.

Much like Gilbert in this case, Holloman "did not conduct any tests to reconstruct the events of the accident." *Id*. at 936. And, while he purported to rely upon eyewitness testimony (in addition to the accident report and photographs), his opinions deviated entirely from the testimony of those witnesses. For instance, though Holloman opined that Brewer was struck before he had an opportunity to step away from the truck, the eyewitnesses testified that Brewer was out of harm's way when the truck began to turn *and then Brewer stepped into its path*. *See id*. at 936 & 940 n.4. Similarly here, though Gilbert assumed that the driver of the Excel decelerated once the car began fishtailing, the only eyewitnesses to the accident testified that the driver "was out of control," driving "erratic[ally]," and in fact "accelerated" just before impact. *See* Tr. 1254-58, 1296-1300. As in *Chan*, Gilbert did not merely make minor modifications to the impact speeds reported by the eyewitnesses based upon inferences reasonably drawn from their testimony. To the contrary, his testimony is completely irreconcilable with theirs.

Similarly, in *Davis v. Ford Motor Co.*, No. CIV.A. 302CV271LN, 2006 WL 83500, at *1 (S.D. Miss. Jan. 11, 2006), the court granted Ford's post-trial motion for judgment as a matter of law after concluding that the testimony offered by plaintiffs' experts at trial was not reliable because it could not be harmonized with the physical evidence and eyewitness accounts. The plaintiffs in *Davis* sued for injuries sustained in a rollover accident, alleging that their Ford Explorer was defective because it had an unreasonable propensity to roll over on flat, dry pavement. *Id*. at *1. The viability of plaintiffs' design defect theory turned on whether the Ford

Explorer began to roll over while the vehicle was still on the pavement, or whether it instead rolled over only after it entered the grassy median adjacent to the roadway. *Id*. at *4.

Three years after the accident, plaintiffs retained an accident reconstruction expert who concluded that the rollover occurred while the Ford Explorer remained on the roadway. He based this conclusion on (1) his review of the accident report, repair bills, and photographs of the vehicle; (2) conversations with the responding officer; and (3) an investigation of the accident scene. *Id*. at *8. Yet, in arriving at this opinion, plaintiff's expert entirely disregarded the testimony of two eyewitnesses to the accident, who "testified unequivocally that the rollover occurred only after the vehicle left the highway and traveled well into the median." *Id*. at *4, *8. The expert attempted to justify his decision to ignore eyewitness testimony by arguing that perceptions "may not always be true to the facts as they actually exist." *Id*. at *7. Although the expert ultimately persuaded the jury, the court concluded that "the physical evidence, as well as testimony of eyewitnesses, overwhelmingly belie [plaintiff's expert's] conclusion as to how this accident likely occurred." *Id*. at *4. The court thus determined there was a lack of substantial evidence to support the jury's verdict as to liability and entered judgment in favor of Ford. *Id*.

The import of the Mississippi case law is clear: to comply with the reliability requirement of *Daubert*, an accident reconstruction expert cannot simply turn a blind eye to eyewitness testimony that does not support his or her speculative opinions concerning how an accident occurred—particularly, as discussed below, when the expert does no testing or analysis of any kind that would validate his speculative opinion, despite the contrary testimony of persons who actually witnessed the accident.

III. The Reliability Of Gilbert's Counterfactual Impact-Speed Estimate Was Further Undermined By His Failure To Test His Theory.

Moreover, even if Gilbert's estimated impact speed were low enough to produce a *theoretically* survivable delta-v, a more fundamental question remains to be answered: does the

Excel actually break apart under the force-conditions estimated by Gilbert? This question was pivotal in this case because plaintiffs' design defect theory depended on proving their allegation that the accident was such that the car should have remained intact. Thus, if the empirical evidence showed that Hyundai Excels do remain intact under Gilbert's assumptions, plaintiffs' design defect theory dissolves entirely. As explained below, that is precisely what the empirical evidence showed here.

As the Supreme Court recognized in *Daubert*, a fundamental determinant of whether an expert's theory possesses sufficient scientific rigor to assist the jury is whether that theory is capable of generating testable hypotheses, which are then validated or refuted through the crucible of real-world experimentation:

> Ordinarily, a key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested. 'Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry.'

509 U.S. at 593 (citation omitted).

To generate a delta-v low enough to remain survivable, Gilbert needed to assume a wildly implausible impact speed that bore no relationship to the facts in evidence. Although this re-interpretation helped Gilbert skirt the *mathematical* flaws in Webb's original calculations, it engendered an equally vexing *empirical* problem: the lower the impact speed, the less likely it is that a vehicle will tear apart in a simulated crash test. Faced with this Scylla and Charybdis, Gilbert opted to decline testing his hypothesis altogether—a decision particularly indefensible in light of the wide divergence between his estimated impact speed and the speeds observed by the only eyewitnesses in the case.

Of course, any expert could rationalize any desired result if left free to invent the underlying facts accordingly. That is why Mississippi courts have routinely excluded the

opinions of accident reconstruction experts who fail to demonstrate that their theories fit the facts of the case. *See, e.g.*, *Denham v. Holmes*, 60 So. 3d 773, 788 (Miss. 2011) (accident reconstruction expert's opinions properly excluded where expert "failed to connect the dots between the skid marks and the existing physical evidence"); *Mitchell v. Barnes*, 96 So. 3d 771, 778 (Miss. Ct. App. 2012) (reversing trial court's admission of accident reconstruction expert) ("Applying a mathematical formula, such as a coefficient of friction, where the underlying facts relied on by the expert are the product of speculation and conjecture and cannot be substantiated with any degree of reliability, does not pass scrutiny under the modified *Daubert* standard applied in *McLemore*."); *see also Rosado v. Deters*, 5 F.3d 119, 124 (5th Cir. 1993) (accident reconstruction expert properly excluded where "he could not independently establish the necessary physical and mathematical bases for his opinion"); *Watkins v. Telsmith, Inc.*, 121 F.3d 984, 992 (5th Cir. 1997) (same); *Cameron v. Werner Enterprises, Inc.*, No. 2:13CV243-KS-JCG, 2015 WL 4459068, at *6 (S.D. Miss. July 21, 2015) (same); *Patton v. Nissan N. Am., Inc.*, No. 3:13CV474-DPJ-FKB, 2015 WL 518696, at *2 (S.D. Miss. Feb. 9, 2015) (same).

But Gilbert's hypotheses were not simply speculative and unconfirmed. They were *empirically disproved* by Hyundai's accident reconstruction expert, Dr. Geoffrey Germane, who conducted a series of vehicle crash tests that established that the Excel did not tear apart even at an impact speed of 45 mph, let alone the 18-mph figure posited by Gilbert. *See* Tr. 1447-82; Ex. D-15. Accordingly, because Gilbert's hypothesis lacked any scientific basis and was falsified by Hyundai's empirical evidence, the trial court erred by failing to exclude it. *See Gulf Ins. Co. v. Provine*, 321 So. 2d 311, 315 (Miss. 1975) ("It is a well-settled rule of law that testimony of a witness which is contrary to scientific principle as established by the laws of physics or mechanics is of no probative value."); *cf. Twin County Elec. Power Ass'n v. McKenzie*, 823 So. 2d 464, 470 (Miss. 2002) (reversing jury verdict where plaintiff's theory concerning the cause of

a motor vehicle accident was "inconsistent with matters of common knowledge, human experience, and defie[d] Newton's laws of motion and physics").

IV. By Admitting Highly Unreliable Expert Testimony Lacking Any Basis In Fact, The Trial Court Severely Prejudiced Defendants And Committed Reversible Error.

Courts and commentators alike have long recognized that lay jurors have a natural tendency to attribute an exaggerated degree of certainty and infallibility to expert testimony. As this Court has previously observed:

> Juries are often in awe of expert witnesses because, when the expert witness is qualified by the court, they hear impressive lists of honors, education and experience. An expert witness has more experience and knowledge in a certain area than the average person. Therefore, juries usually place greater weight on the testimony of an expert witness than that of a lay witness.

Edmonds v. State, 955 So. 2d 787, 792 (Miss. 2007) (citing Miss. R. Evid. 702); *see also Flores v. Johnson*, 210 F.3d 456, 465-66 (5th Cir. 2000) (Garza, J., concurring) (noting that jurors can be unduly influenced by expert opinions because they are "introduced by one whose title and education (not to mention designation as an 'expert') gives him significant credibility in the eyes of the jury as one whose opinion comes with the imprimatur of scientific fact"); Spyridon, *Scientific Evidence vs. 'Junk Science'—Proof of Medical Causation in Toxic Tort Litigation: The Fifth Circuit 'Fryes' a New Test*, 61 MISS. L.J. 287, 305 (1991) ("The jury may be misled when [untested] theories, which may be based on underlying flawed methodology, are presented by an expert with an endless list of credentials and assume an aura of 'mystic infallibility.'").

It is not surprising, then, that when eyewitnesses and experts disagree, jurors are prone to place greater weight on the testimony of experts. This predilection to overestimate the reliability of expert witnesses (and to discount countervailing eyewitness testimony) comes at a great cost: as courts have recognized, evidence obtained from disinterested witnesses who observed the events contemporaneously is "generally far more probative than after-the-fact opinions offered by paid or interested experts." *Liberty Health & Rehab of Indianola, LLC v. Howarth*, 11 F.

Supp. 3d 684, 686 (N.D. Miss. 2014). For this reason, and "[b]ecause '[e]xpert evidence can be both powerful and quite misleading,' a trial court 'exercises more control over experts than over lay witnesses' under Rule 702." *Mayes v. Kollman*, 560 F. App'x 389, 393 (5th Cir. 2014) (quoting *Daubert*, 509 U.S. at 595); *see also Viterbo v. Dow Chemical Co.*, 826 F.2d 420, 422 (5th Cir. 1987) ("If an opinion is fundamentally unsupported, then it offers no expert assistance to the jury" and "its lack of reliable support may render it more prejudicial than probative ….").

As shown above, the trial court in this case wholly abdicated its gatekeeping obligation by admitting Gilbert's speculation concerning the Excel's impact speed. In formulating his 18-mph estimate, Gilbert simply dismissed the eyewitness accounts because they were unhelpful. But as *Whiddon*, *Chan*, *Davis*, and other courts applying Mississippi law have made clear, the *Daubert* standard does not give accident reconstructionists the license to blow off eyewitness testimony in the absence of clear physical evidence calling that testimony into doubt.

There are salutary reasons why Mississippi law holds that experts must reasonably consider eyewitness testimony in forming their opinions. As this Court has observed, "[t]he jury is the sole judge of … the credibility of witnesses." *Corrothers*, 148 So. 3d at 337-338. Accordingly, trial courts are "'reluctant to allow experts to offer opinions on the credibility of another witness for fear of the expert invading what is considered the exclusive province of the jury.'" *Id.*; *see also Hobgood v. State*, 926 So. 2d 847, 853 (Miss. 2006) (holding that an expert's comment on a witness's credibility "is at best of dubious competency"). A contrary holding would invite the danger that a paid expert—perhaps influenced by his or her stake in the litigation—might offer mere pretexts for why another witness's account should not be credited. At the very minimum, to justify a departure from the general rule that an expert must assume the truth of uncontroverted eyewitness testimony, an expert should be required to support his

contrary opinion by "generating hypotheses and testing them to see if they can be falsified." *Daubert*, 509 U.S. at 593. Gilbert fell woefully short of making such a showing here.

As shown above, Gilbert's testimony in this case appears to have been results-oriented and driven by litigation. First, though he employed entirely different assumptions, Gilbert's 35-mph delta-v conclusion was a carbon-copy of the 35-mph delta-v conclusion proffered by Webb in the first trial. Second, Gilbert ignored eyewitness testimony that did not support his own analysis. Third, he declined to test his theory. Fourth, he failed to revise his opinion even after it was refuted by Hyundai's live crash testing. In short, it is difficult to fathom how an accident reconstructionist's opinion could be more decisively invalidated by the evidence than Gilbert's 18-mph impact speed was in this case. Because the introduction of Gilbert's testimony violated every tenet of *Daubert*, the trial court abused its discretion by failing to exclude it.

CONCLUSION

For the foregoing reasons, PLAC respectfully requests that the Court reverse the judgment below.

RESPECTFULLY SUBMITTED, this the 19th day of September 2016.

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and that I have caused a true and correct copy of the foregoing to be delivered to the following by United States Mail, first-class postage prepaid:

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