IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
CASE NO. 2013-CA-01944

LESLIE TERRY SINGLEY and
BRENDA TAYLOR SINGLEY **APPELLANTS**

v.

TRINITY HIGHWAY PRODUCTS, LLC, KEY, LLC, ATWOOD FENCE COMPANY, INC., BRYSON PRODUCTS, INC., E-TECH TESTING SERVICES, INC., CENTRAL FABRICATORS, INC., ENERGY ABSORPTION SYSTEMS, INC., and JOHN DOES 1-10 **APPELLEES**

On Appeal From the Circuit Court of
Hinds County, Mississippi, Second Judicial District
Cause No. 2009-39

BRIEF OF APPELLEES
Trinity Highway Products, LLC, Bryson Products, Inc., E-Tech Testing Services, Inc., Central Fabricators, Inc. and Energy Absorption Systems, Inc.

ORAL ARGUMENT REQUESTED

W. Thomas McCraney, III (MSB# 10171)
Zachary M. Bonner (MSB# 103153)
McCRANEY MONTAGNET QUIN & NOBLE, PLLC
602 Steed Road, Suite 200
Ridgeland, Mississippi 39157
Telephone (601) 707-5725

Russell Brown, Esq. (Admitted PHV)
Law Office of Russell C. Brown, P.C.
Post Office Box 1780
Henderson, Texas 75653

Attorneys for Trinity Highway Products, LLC, E-Tech Testing Services, Inc., Central Fabricators, Inc. and Energy Absorption Systems, Inc.

Roger Riddick, Esq., (MSB# 5345)
Bradley Kelly, Esq., (MSB# 101243)
Andy Lowery, Esq., (MSB# 100782)
Copeland Cook Taylor & Bush, P.A.
1076 Highland Colony, Suite 100
Ridgeland, Mississippi 39157
Telephone (601) 856-7200

Attorneys for Bryson Products, Inc.

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record for the Appellees certify that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. Leslie Terry Singley, Appellant;

2. Brenda Taylor Singley, Appellant;

3. Nathan Richard Glassman, Todd Britton Murrah and Ronna Diane Kinsella; Glassman, Wyatt, Tuttle & Cox, P.C., attorneys for Appellants;

4. Trinity Highway Products, LLC, Appellee;

5. E-Tech Testing Services, Inc., Appellee;

6. Energy Absorption Systems, Inc., Appellee;

7. Central Fabricators, Inc., Appellee;

8. W. Thomas McCraney, III and Zachary M. Bonner; McCraney Montagnet Quin & Noble, PLLC, attorneys for Appellees Trinity Highway Products, LLC, E-Tech Testing Services, Inc., Energy Absorption Systems, Inc. and Central Fabricators, Inc.;

9. Russell C. Brown; Law Offices of Russell C. Brown, P.C., attorney for Appellees Trinity Highway Products, LLC, E-Tech Testing Services, Inc., Energy Absorption Systems, Inc. and Central Fabricators, Inc.;

10. Atwood Fence Company, Inc., Appellee;

11. Key, LLC, Appellee;

12. George E. Abdo, III, Daniel Coker Horton & Bell, P.A., attorney for Appellees Atwood Fence Company, Inc. and Key, LLC;

13. Bryson Products, Inc., Appellee;

14. Roger Riddick, Bradley Kelly and Andy Lowery; Copeland Cook Taylor & Bush, P.A., attorneys for Appellee Bryson Products, Inc.;

15. Indemnity Insurance Company of North America, Intervening Plaintiff/Appellant;

16. Michael A. Heilman and John William Nisbett; Heilman Law Group, attorneys for Intervening Plaintiff/Appellant Indemnity Insurance Company of North America; and

17. The Honorable William A. Gowan, Jr., Hinds County Circuit Court Judge.

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STATEMENT OF THE ISSUES

A. **Whether the Circuit Court correctly granted Summary Judgment in favor of the Defendants/Appellees?**

B. **Whether the Circuit Court abused its discretion in limiting and/or excluding certain opinions offered by Singley's expert witnesses under *Daubert*?**

C. **Whether the Circuit Court abused its discretion by striking a new liability theory which Singley first raised in response to Defendants' dispositive motions and after the close of the discovery period?**

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Court Below

This case arises out of a single-vehicle accident that occurred on Interstate 20 West near Clinton, Mississippi on February 14, 2008. Plaintiff-Appellant Leslie Terry Singley ("Singley") was driving his Ford F-150 pick-up truck when he lost consciousness, left the roadway and collided with a span of guardrail abutting the Natchez Trace overpass bridge. During the collision, a segment of guardrail penetrated into the cab of the truck and amputated Singley's right leg below the knee.

Singley filed this lawsuit on September 30, 2009, in the Circuit Court of Hinds County, Mississippi, seeking to recover damages for the injuries he sustained in the collision. At the center of this lawsuit is an end-terminal product, the REGENT-C, which was attached to the guardrail Singley hit. As the Circuit Court observed, Singley sued "all private entities that had anything to do with designing, manufacturing, testing and/or installing the REGENT-C under theories of negligence, strict liability, fraud/misrepresentation and the Mississippi Products Liability Act (MPLA)."[1] Although presented under various (and shifting) legal theories, Singley's fundamental contention is that the REGENT-C is defectively designed and uncrashworthy.

By way of an Order dated October 15, 2013, the Circuit Court granted summary judgment in favor of the Defendants and dismissed this case in its entirety with prejudice. The Circuit Court properly ruled that certain opinions offered by Singley's experts were insufficient

[1] R. 7457. Singley's wife also asserted a derivative claim for loss of consortium.

under *Daubert* to establish a genuine issue of material fact. The Circuit Court also correctly found that Singley's last ditch effort to introduce a new legal theory in response to dispositive motions was procedurally improper and that Singley had failed to establish the essential elements of his claims, particularly the elements of feasible alternative design and causation. Singley appeals this adverse judgment.

B. Factual Background

1. The REGENT-C

The guardrail which Singley impacted after losing consciousness was installed as part of a comprehensive federal highway improvement project along Interstate 20. R. 312-14. This project was overseen and directed by the Mississippi Department of Transportation ("MDOT"). R. 3930-3. MDOT, which is not a party in this case, was responsible for specifying the location, type and length of the guardrail. R. 3947-48. Defendant-Appellee Key, LLC ("Key") was the prime contractor hired by MDOT on the project. Defendant-Appellee Atwood Fence Company, Inc. ("Atwood Fence") was the subcontractor hired by Key to install the guardrail. R. 3933, 3940.

The MDOT project plans specified the installation of 112.5 feet of standard "w-beam" guardrail which transitions into the Natchez Trace bridge overpass.[2] This "downstream" portion consists of several twelve (12) foot panels of "w-beam" which are spliced together and supported

[2] R. 314. MDOT publishes the *Mississippi Roadway Design Manual* which sets forth design criteria and procedures for use in connection with highway projects. Chapter 9 of the *Manual* addresses the design criteria and standards for locating and installing guardrails to shield certain roadside hazards, such as bridge piers. R. 316. The *Design Manual* specifies the use of standard AASHTO M-180 "w-beam" guardrail as a roadside barrier. R. 324-27. AASHTO refers to the American Association of State Highway and Transportation Officials.

by metal posts. The MDOT project plans also called for the installation of an "approved" end-terminal device which attaches to and extends "upstream" from the end of the "w-beam" portion.

In this instance, Atwood Fence selected and installed a REGENT-C end-terminal. The REGENT-C spans 37.5 feet and consists of three (3) sections of "slotted" rail panels supported by wooden posts (Posts 1-7).[3] After Post 7, the REGENT-C terminates and connects to the "w-beam" portion. The pictures below depict the guardrail with a REGENT-C end-terminal which was re-installed at the scene following the Singley accident, and which is presently situated at this location:

REGENT-C
Traffic Side View (I-20 West)

[3]The panels used in the REGENT-C are standard AASHTO M-180 "w-bream" panels with engineered slots at certain locations along the rail.

REGENT-C
Non-Traffic Side View (I-20 West)

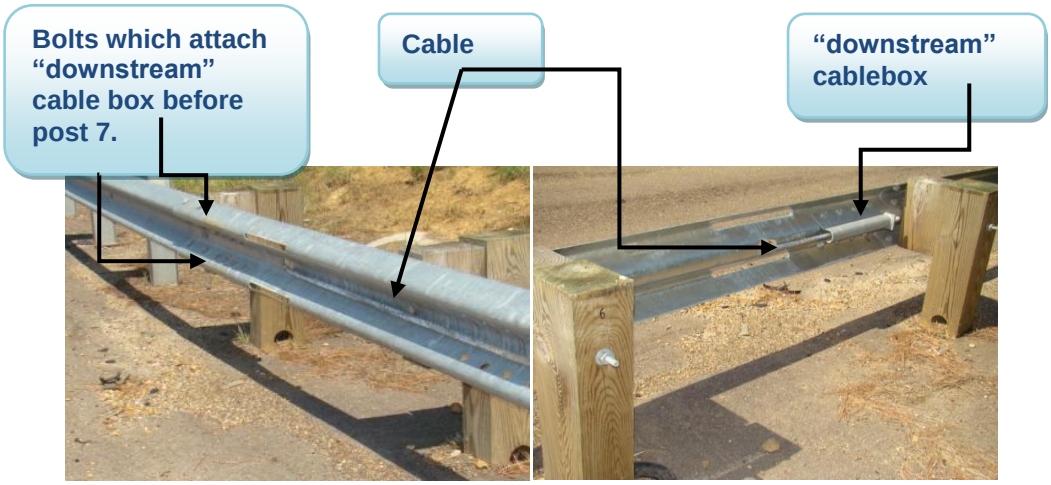
The MDOT plans permitted the subcontractor to select the particular end-terminal to be installed and specified only that the device be accepted for use under NCHRP Report 350. R. 312-15; R. 325; R. 3946-47. Report 350, which is promulgated by the National Cooperative Highway Research Program ("NCHRP"), sets forth the recommended procedures for evaluating the safety performance of highway safety features, including guardrail end-terminals. R. 328-514. The Federal Highway Administration ("FHWA") has adopted Report 350 as the applicable standard for all federal aid construction projects involving the public roadways.[4]

The REGENT-C was designed by Defendant-Appellant Bryson Products, Inc. ("BPI") and manufactured by Defendant-Appellant Central Fabricators, Inc. ("Central") at its facility in Kosciusko, Mississippi. The design for the REGENT-C was based on another Report 350

[4]R. 515. FHWA is an agency within the United States Department of Transportation, which regulates construction and maintenance of the national highway system. NCHRP is a research program sponsored by AASHTO in cooperation with the FHWA. R. 331. The *Mississippi Roadway Design Manual* incorporates and adopts the Report 350 performance standards. R. 325.

accepted device, the Slotted Rail Terminal ("SRT"), manufactured by Defendant-Appellant Trinity Highway Products, LLC ("THP"). R. 4784-85, 3999-4000, 4007.

Both the SRT and the REGENT-C incorporate slotted rail panels as well as a standard anchor assembly and standard wooden posts.[5] The unique feature of the REGENT-C is the incorporation of ¾-inch steel cable which extends the length of the system. The steel cable is weaved through the slotted rail at certain locations and is connected by two (2) cable boxes mounted on the non-traffic side of the system. The photographs below depict the location of the "downstream" cable box which is bolted to the REGENT-C between posts 6 and 7.[6]



Traffic Side View (Posts 6-7) **Non-Traffic Side View (Posts 6-7)**

The name "REGENT" stands for REdirective Gating End-terminal. R. 535-36. The "C" refers to the cable feature. R. 4780. The REGENT-C was designed by BPI to serve a dual function with the capacity to both "gate" and "redirect" under certain impact conditions as specified in Report 350. By incorporating slots at certain points along the rail, the REGENT-C is designed to "gate" (*i.e.*, collapse at the weakened section) if hit by a vehicle between the nose of

[5]The wooden posts have a hole drilled through them at ground level for controlled releasing upon impact. R. 3988, 4754-55; R. 4809-11.

[6]R. 526-34.The "upstream" cable box attaches between posts 1 and 2. *See* photograph, s*upra* page 5.

the device at Post 1 and the beginning of the "length of need" or "LON." The LON portion of the device begins at Post 3 and is designed to redirect a vehicle during a side-impact collision. R. 535. During a side-impact collision within the LON (Posts 3-7), the cable feature provides tension in combination with the rail which in turn transfers the load to the standard anchor assembly. R. 544; R. 4755-56.

Before an end-terminal can be placed on the public roadways, the FHWA and the state transportation departments require that the device undergo performance crash testing in accordance with Report 350. Test Level 3 of Report 350 sets forth the parameters for crash testing both the gating capacity and the re-directive capacity of end-terminal devices.[7] The crash test results are videotaped, analyzed in slow motion and then submitted to the FHWA for review and acceptance. R. 394-401.

BPI engaged Defendants-Appellants E-Tech Testing, Inc. ("E-Tech") and Energy Absorption Systems, Inc. ("EAS") to perform the Report 350 crash-testing and assist with the FHWA acceptance process. R. 4833-35, 4007-08; *see also* R. 3789-90 and 3799. Test 3-35 of Report 350 sets forth the parameters for testing the redirective capacity of an end-terminal device during side-impact collisions, as follows: (1) test vehicle (truck) weighing 4,400 pounds; (2)

[7]End-terminals are treated separately from longitudinal barriers under Report 350, Test level 3. Longitudinal barriers are devices, such as standard w-beam guardrail and median cable barriers, that are designed primarily to redirect an errant vehicle away from a hazard. R. 510. An end-terminal device is "designed to treat the end of a longitudinal barrier" and which functions by: (a) decelerating a vehicle; (b) permitting controlled penetration of the vehicle; (c) containing or redirecting the vehicle, or (d) a combination of these functions. R. 511. A "gating device" is an end-terminal "designed to allow a controlled penetration of the vehicle when impacted between the end and the beginning of the length of need (LON) of the device." A non-gating device is an end-terminal "designed to contain and redirect a vehicle when impacted downstream from the end of the device. R. 510. The REGENT-C incorporates both gating and non-gating features.

speed of 62.5 MPH at impact; and (3) impact angle of 20 degrees.[8] The REGENT-C was tested by E-Tech pursuant to these criteria, and the video crash test results for Test 3-35 demonstrate a successful redirection of the test vehicle during a side impact collision.[9] The following still photographs are from the Test 3-35 crash test video submitted by EAS to the FHWA. R. 559 and 561.

[8]R. 355-56. Report 350 uses the international system of measurements (SI units or metric system), which have been converted to their corresponding standard units herein. The standard units were also used in the briefing before the Circuit Court.

[9]R. 537-610. Because the Singley accident involved a side-impact collision, Test 3-35 is the relevant test under Report 350. Test Level 3 also sets forth the parameters for crash-testing head-on impacts (Test 3-31). Although not directly relevant in this case, the REGENT-C also successfully passed the head-on impact test.

Initial impact of test vehicle near Post no. 4 at a 20 degree angle

Test vehicle (truck weighing 4,385 pounds) traveling at 62 mph at impact

Redirection of test vehicle as REGENT-C goes into tension

No "snagging" observed as vehicle continues redirection along "downstream" W-Beam guardrail

Vehicle continues redirection as it transitions below Post No. 7 to standard W-Beam

Standard anchor "holds" and device remains under tension throughout impact sequence

Test vehicle location after being redirected

Condition of REGENT-C post TEST 3-35 Crash Test

After reviewing the crash test results and submission materials, the FHWA accepted the REGENT-C for use on the public roadways effective September 5, 2002. R. 615-16. The FHWA acceptance letter contains a "length caveat," which specifies a minimum installation length of 45 meters (148 feet) when the REGENT-C is used in combination with standard "w-beam" guardrail to shield a fixed object such as a bridge parapet. *Id.*

Following FHWA acceptance, BPI began marketing and selling the REGENT-C in Mississippi. Central manufactured the REGENT-C, and BPI sold the device to various installation companies, including Atwood Fence. R. 4650, 4653.

On or about August 1, 2007, THP completed a merger with Central. In connection with this transaction, THP also acquired the assets of BPI, which included all rights pertaining to the REGENT-C patent. R. 4758-59. BPI still maintains a separate corporate existence.[10] However, Central ceased to exist following the merger with THP, which was the surviving corporation.[11] In separate and unrelated transactions which occurred in 2010, THP's parent corporation, Trinity Industries, Inc., acquired EAS and E-Tech.

After acquiring the Kosciusko facility and the rights to the REGENT-C, THP continued to manufacture and sell the device utilizing the original design and specifications. Since 2002, thousands of REGENT-C devices have been installed on the roadways of Mississippi. R. 4780-81. There is no evidence of any other incident involving the REGENT-C similar to the Singley accident.

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[10]BPI exists in name only. It has not conducted any business operations, other than collect accounts receivable, since the asset sale to THP. R. 4629.

[11]R. 617-19. Because it no longer exists and cannot be served with process, Singley misjoined Central as a separate defendant in this action. *See Miss. R. Civ. P.* 21; *see also Miss. Code Ann.* § 79-4-11.07(a)(2) (stating that "[w]hen a merger becomes effective … the separate existence of [the] corporation that is merging into the survivor ceases.").

2. The Accident

On the day before the accident, Singley had been travelling on business in Texas. R. 3557. He flew home to Memphis, Tennessee to attend a retirement party for a colleague on February 13, 2008, and then drove three (3) hours late that night to Madison, Mississippi, where he spent the night at a hotel. R. 3557-59. He got up early the next morning, met a co-worker for breakfast at his hotel and then departed in his vehicle for a customer meeting later that day in Louisiana. R. 3559, 3575. Singley was not feeling well that morning and took some cold medication before his departure. R. 3560.

After leaving the hotel, Singley drove west on I-20 and set his cruise control. R. 3576, 3582. While en route, Singley called another co-worker from his cell phone and told him that he felt ill. R. 3576-77. Moments later, Singley "blacked out" while driving. Singley remembers feeling vertigo-like symptoms but has no recollection of actually impacting the guardrail. R. 3579, 3583. When Singley regained consciousness, he was upside down in his vehicle on the side of roadway. R. 3579-80.

Paul Dhaliwal was following in his vehicle closely behind Singley and witnessed the accident. During his deposition, Dhaliwal testified that he was driving at a speed "over 70" mph and that he had been keeping pace behind Singley's vehicle for several miles. R. 5572-73. Dhaliwal's testimony is consistent with Singley's post-accident statements about how fast he was driving. While en route to the hospital in the ambulance, Singley told a paramedic that he had set his cruise control at 77 mph before losing consciousness. R. 5856.

Dhaliwal and Singley were driving in the left lane and in the process of passing a caravan of Entergy trucks which were travelling in the right hand lane. R. 3581-82, R. 5571-72. As they

approached the Natchez Trace overpass bridge, Dhaliwal noticed Singley's vehicle veering over toward the right in the direction of one of the Entergy trucks. R. 5574. Dhaliwal watched Singley's vehicle as it passed in front of the Entergy truck, left the roadway and proceeded at an angle toward the guardrail which it ultimately impacted. R. 5574-75, R. 5580. Dhaliwal saw no steering adjustment or brake lights from Singley's vehicle prior to impact. R. 5576-77, R. 5623-24. Dhaliwal estimated the impact angle at approximately 25-30 degrees and the point of initial impact in the vicinity of post 4. Dhaliwal testified that the guardrail probably saved Singley's life because, if it had not been there, the accident would have been far more severe given the close proximity of the concrete bridge and steep embankment to the north. R. 5579-80.

Prior to impact, Singley was unconscious and obviously had no control of his vehicle, which was traveling at a high rate of speed with the cruise control engaged. The evidence indicates that Singley's vehicle collided with the REGENT-C at a side-impact angle of approximately 25 degrees between posts 4 and 5.[12] The evidence also indicates that upon initial impact the REGENT-C began redirecting Singley's vehicle back toward the roadway. R. 651-52. However, the extreme forces exerted by the speed, weight and impact angle of Singley's vehicle overloaded the redirective capacity of the device. R. 674-75.

The Singley accident involved impact conditions and forces which far exceeded the performance tolerances established by Report 350 for crash-testing end-terminal devices. First, based upon the physical evidence, Singley's vehicle and contents weighed approximately 6,000

[12]R. 5579-80. The exact location of impact is difficult to determine because the guardrail remnants at the scene were not preserved. However, a few photographs were taken of the scene shortly after the accident, which show the extensive debris field as well as the position and condition of some of the remnants. These photographs confirm, and all parties agree, that Singley did not hit the end of the REGENT-C head-on and that the initial side-impact was at an angle somewhere between Posts 4 and 7. For purposes of this appeal, it makes no difference exactly where the impact occurred between Posts 4 and 7.

pounds, which is substantially heavier than the 4,400 pound test vehicle specified by Report 350. Second, based upon Dhaliwal's eyewitness testimony and Singley's own statements, he was probably traveling near 77 mph, which is substantially faster than the 62.5 mph criterion in Report 350. Moreover, based on Dhaliwal's eyewitness testimony and the physical evidence, the impact angle was in excess of twenty (20) degrees. R. 368; 538; 674; and 5579-80.

These conditions combined to exert an overwhelming amount of kinetic energy on the REGENT-C upon impact which overloaded the capacity of the device. By inputting the variables (mass, speed and angle) into the mathematical formula utilized by Report 350 to analyze crash tests, the impact severity of the Singley accident computes to approximately 287.4 KiloJoules (212,000 foot-pounds).[13] In contrast, the nominal impact severity for Test 3-35 is 90.3 KiloJoules (66,451 foot-pounds). R. 367, 558 and 674-75. The Test 3-35 results for the REGENT-C demonstrate a successful redirection of the test vehicle during a crash sequence with an impact severity of 89.3 KiloJoules (65,860 foot-pounds).[14] Thus, the Singley accident involved forces three (3) times greater than the performance tolerances established by Report 350 under which the REGENT-C was successfully tested and accepted by FHWA. This is evident by comparing the photographs of the extensive debris field taken shortly after the accident and the still photographs of the Test 3-35 results.[15]

Within milliseconds of the initial impact, the extreme forces exerted by Singley's vehicle fractured the standard anchor assembly between Posts 1 and 2, causing the device to lose tension

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[13] R. 674-75. The performance tolerances established by Report 350 are defined by the mass (M), speed (V) and angle (Ø) of the impacting vehicle. Impact severity (IS) is measured in Joules and is computed by the formula: $IS=\frac{1}{2}M(V \sin Ø)^2$. R. 367. The corresponding standard unit of a Joule is a foot-pound. One foot-pound equals .0013558 KiloJoules.

[14] R. 559. This is within the acceptable variance of +/- 7 KiloJoules established by Report 350. R. 368.

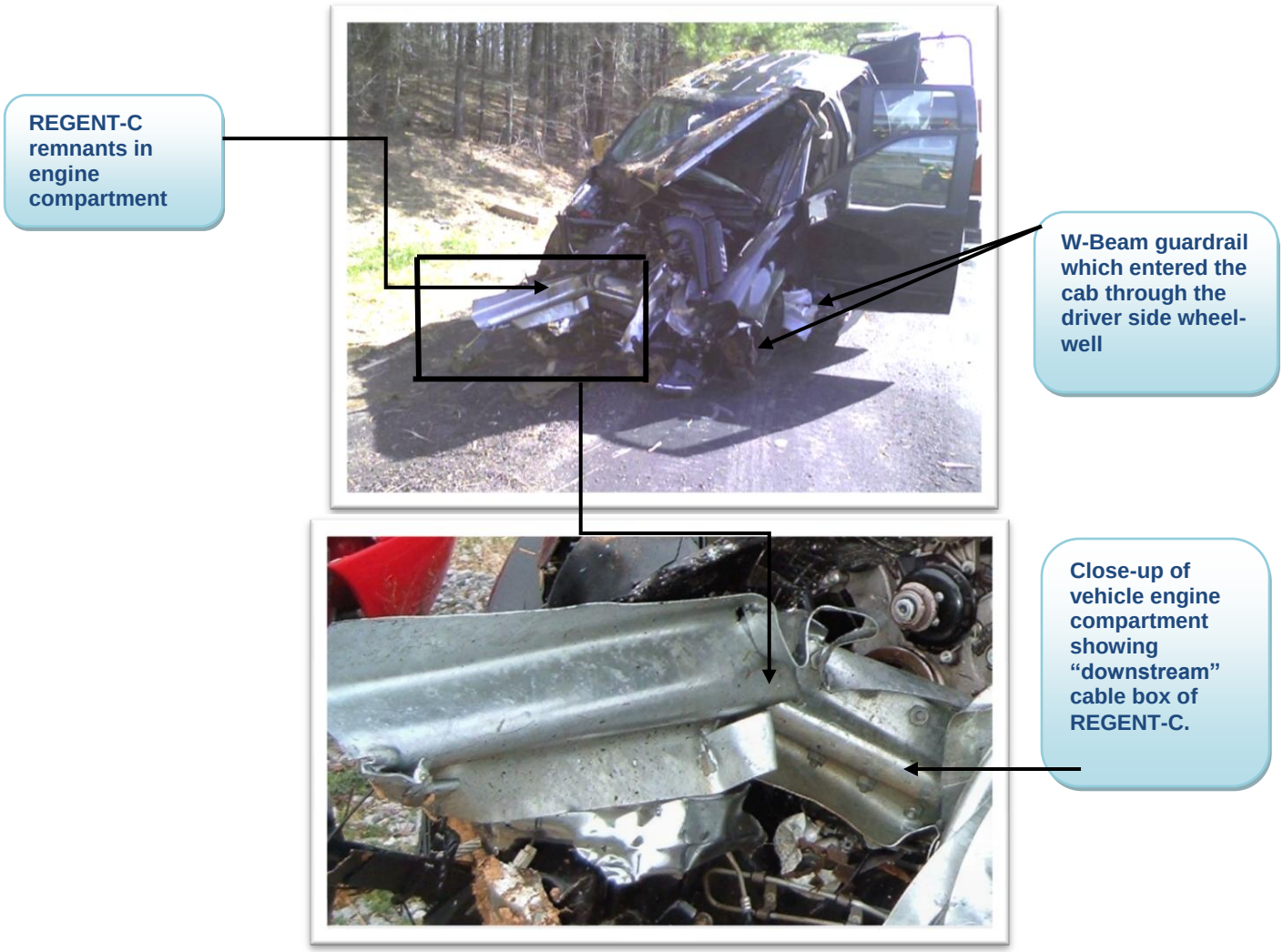
[15] *Compare photographs* at page 9 with photographs at 15.

and its redirective capacity. Consequently, instead of continuing its redirection back toward the roadway, Singley's vehicle barreled into several sections of "downstream" w-beam guardrail which were folded, twisted and bent as the vehicle yawed, rolled and was ultimately brought to a stop on its roof. R. 674-75. The photographs below depict the fractured anchor assembly of the REGENT-C as well as the extensive debris field at the scene post-collision:

Fractured Anchor between Post 1 and 2

Two (2) View of "Upstream" portion of REGENT-C rail

During the crash sequence, a portion of standard "w-beam" guardrail penetrated into the occupant compartment through the driver's side wheel well, amputating Singley's right leg below the knee. **No portion of the REGENT-C entered the occupant compartment of Singley's vehicle.** R. 4213. The photographs below depict the post-collision condition of Singley's vehicle. [16]



[16] In his appeal brief Singley suggests that the guardrail penetrated through the engine compartment and "pierced through the truck's fire wall."Appellants' Brief at p. 16. Although it makes no difference for purposes of this appeal, there is no testimony or physical evidence whatsoever to support this assertion. As the post-accident photographs clearly show, the guardrail entered the vehicle occupant compartment through the exposed driver's side wheel well.

SUMMARY OF THE ARGUMENT

Until faced with dispositive motions, Singley's liability theory as to the "Trinity Defendants" focused entirely on the "LON" of the REGENT-C, which is the re-directive portion of the device between Posts 3 and 7.[17] Attempting to show a design defect in the LON, Singley proffered the opinions of Anne Stodola, an accident reconstructionist and mechanical engineer. Stodola claimed that the LON was defective because its design placed open slots in the rail adjacent to where the "downstream" cable box was affixed between Posts 6 and 7. According to Stodola, this combination created a "flexion point" where, instead of "smoothly" redirecting Singley's vehicle, the REGENT-C "pocketed" and "snagged," causing a segment of guardrail to buckle and spear into the cab. Yet, when deposed, Stodola confessed that she was not qualified to offer and was not offering any expert opinions regarding end-terminal design or a specific feasible alternative design for the REGENT-C. Stodola also admitted that, because she had not performed any testing of her own, she could not state with any scientific certainty whether the device was simply overloaded by the extreme forces in the collision or whether some different configuration of the slots and/or cable box would have prevented Singley's injury.

Singley also advanced a related claim that the Trinity Defendants inadequately tested the LON and that the REGENT-C was not actually Report 350 compliant despite being accepted by the FHWA. On this point, Singley proffered the opinions of another engineer and accident reconstructionist, Doug Head. According to Head, no re-directive end-terminal on the market could be considered Report 350 compliant unless the LON portion had been crash-tested under

[17] In his appeal brief, Singley refers collectively to THP, BPI, Central, EAS and E-TECH as the "Trinity Defendants" and differentiates the claims asserted against these defendants from those asserted against the contractor defendants, Key and Atwood Fence. For convenience purposes only, the collective reference to the "Trinity Defendants" is used herein as well.

the Test 3-11 criteria for "longitudinal barriers" and thereby confirmed to have the same strength as standard "w-beam" guardrail. Head claimed that had the Trinity Defendants performed Test 3-11, in addition to or in lieu of the Test 3-35 criteria for end-terminals, the defective condition of the REGENT-C "would have been readily apparent." Yet, when deposed, Head confessed that no one in the highway safety industry shared his opinion regarding the applicability of Test 3-11 to end-terminals. Head further admitted that he had not performed any actual testing of his own and could not state with any scientific certainty whether the device was simply overloaded by the extreme forces in the collision or what might have been revealed if additional crash-testing had been conducted on the REGENT-C before FHWA acceptance.

Singley's liability theory against the contractor defendants, Key and Atwood Fence, was that a REGENT-C should not have been installed at this particular location because of the "length caveat" contained in the FHWA acceptance letter. Although a gross misinterpretation of the FHWA acceptance letter and related submission materials, Head claimed that the "length caveat" required a minimum installation length of 148 feet of standard "w-beam" guardrail exclusive of the length of the REGENT-C end-terminal. According to Head, since the MDOT plans specified only 112.5 feet of "w-beam," this installation was unsuitable (*i.e*. too short) for a REGENT-C. Yet, when deposed, Head admitted that the combined length of the "w-beam" (112.5 feet) and the REGENT-C (37.5 feet) exceeded the "length caveat." In any event, Head could not state with any degree of scientific certainty what would have happened if Singley had instead impacted some other end-terminal device selected in lieu of the REGENT-C.

After deposing Head and Stodola and fleshing-out the bases for their purported expert opinions, all Defendants moved to exclude their testimony under *Daubert* and filed motions for

summary judgment. In response to the Trinity Defendants' Motion, Singley shifted away from his flawed LON theory and attempted to inject an entirely new liability theory into the case based on the "gating" portion (Posts 1 and 2) of the REGENT-C. Singley's new theory concerned the actual REGENT-C unit that was crash-tested in 2001 under Report 350, and specifically, whether or not a single bolt connected the rail to Post 2 during Test 3-35. In support of this "bolt-two" theory, Singley submitted a new affidavit from Head wherein he opined that a bolt should not have been affixed at Post 2 per the installation manual and that this was a material "alteration," which invalidated Test 3-35 as well as the acceptance of the REGENT-C by the FHWA as a crashworthy device.

Singley also submitted a new expert affidavit from Stodola wherein she directly contradicted her prior deposition testimony on the issue of feasible alternative design and causation. Despite expressly disavowing any such opinions during her deposition, Stodola did a complete "about face" and opined in her hew affidavit that the SRT was, in fact, a feasible alternative design to the REGENT-C which would have prevented Singley's injuries.

The Trinity Defendants moved to strike Head's new "bolt-two" opinions as untimely and improperly disclosed after the close of discovery and only in response to dispositive motions. Likewise, the Trinity Defendants moved to strike Stodola's new opinions because her flip-flop regarding the SRT was a blatant and improper attempt to manufacture a genuine issue of material fact. The Trinity Defendants also addressed the substance of these new opinions and demonstrated to the Circuit Court that, even if considered, they were insufficient to overcome summary judgment.

In addition to reviewing the voluminous briefs and exhibits submitted by the parties, the Circuit Court heard oral argument from counsel during two sessions held on August 15 and October 11, 2013. After thoroughly analyzing the issues, the Circuit Court issued its ruling on October 15, 2013. In its Order, the Circuit Court correctly determined that Singley had failed to present a viable liability theory regarding the REGENT-C as to the Trinity Defendants or the contractor defendants.

As to Singley's theory that the LON was defectively designed, the Circuit Court found that Head and Stodola were generally qualified, but neither had presented competent opinions regarding a feasible alternative design for the REGENT-C as required by the MPLA. As to Singley's theory that the LON was inadequately tested, the Circuit Court correctly disregarded Head's opinions regarding Test 3-11 as unreliable and unsupported by any other expert in the field of highway safety.

Likewise, the Circuit Court properly exercised its discretion in striking Singley's new "bolt–two" theory because it was neither pled in Singley's Complaint nor timely disclosed as part of his expert opinion designations in accordance with the Scheduling Order. In any event, the Circuit Court considered this theory and correctly found evidence of causation to be lacking. Specifically, the Circuit Court noted that, even if a bolt was affixed to Post 2 during Test 3-35, Singley had failed to present any competent proof causally linking this alleged condition to his accident which indisputably involved an impact at or below Post 4. The Circuit Court correctly discounted Head's new opinions as speculative and unreliable because he failed to offer any scientific analysis, demonstrating how the presence of a bolt at Post 2 actually affected the integrity of Test-35 or would have affected the outcome of Singley's accident.

Finally, the Circuit Court correctly rejected Singley's claims against Key and Atwood Fence based on the "length caveat" in the FHWA acceptance letter. The Circuit Court properly discounted Head's distorted and unreliable opinion that a REGENT-C was unsuitable for this particular installation.[18]

In summary, the Circuit Court correctly analyzed the issues in this case under the appropriate legal standards and properly dismissed Singley's claims regarding the REGENT-C. The rulings of the Circuit Court should be affirmed in every respect.

ARGUMENT

A. Singley's Claims based upon the LON of the REGENT-C

Singley filed his Third Amended Complaint on March 4, 2011. R12. The predominant claim in Singley's Complaint is under the MPLA, Miss. Code Ann. § 11-1-63. R. 12-36. The MPLA provides that in any action for damages caused by a product, the plaintiff must prove that at the time the product left the control of the manufacturer or seller: (1) the product was defective; (2) the defect in the product rendered it unreasonably dangerous; and (3) the defective and unreasonably dangerous condition of the product proximately caused the damages for which recovery is sought.[19]

To prove that a product is "defective," the plaintiff must show that: (1) it deviated from the manufacturer's specifications; (2) it failed to contain adequate warnings or instructions; and/or (3) it was designed in a defective manner.[20] There is no claim or evidence in this case that

[18] For the sake of brevity, the Trinity Defendants, pursuant to Rule 28(j) of the *Miss. R. App. P.*, adopt and incorporate the arguments made by Key and Atwood Fence in their separate appeal brief regarding the "length caveat" and the selection of a REGENT-C.
[19] Miss. Code Ann. § 11-1-63(a).
[20] Miss. Code Ann. § 11-1-63(a)(i)-(3).

this particular REGENT-C deviated from the manufacturer's specifications or that it lacked adequate warnings or instructions. Singley's sole contention under the MPLA is that the REGENT-C was designed in a defective manner.

In addition to proving a design defect and causation, the MPLA also requires the plaintiff to prove that, at the time the product left the control of the manufacturer or seller: (1) the manufacturer or seller knew or should have known about the danger that caused the damages for which recovery is sought; (2) the product failed to perform as expected; and (3) there existed a feasible alternative design that would have to a reasonable probability prevented the harm. A feasible alternative design is a design which would have prevented the harm without impairing the utility, usefulness, practicality or desirability of the product.[21]

A design defect claim is highly-technical and requires competent expert testimony.[22] Without such testimony, the plaintiff cannot maintain a products liability claim as a matter of law.[23]

On September 1, 2011, Singley designated his proposed expert witnesses in accordance with the deadline established by the Scheduling Order. R. 9. Singley designated two "liability" experts, Anne Stodola and Doug Head. As required by Miss. R. Civ. P. 26(b)(4), Singley provided a narrative interrogatory response, setting forth the qualifications and opinions of Stodola and Head. R. 643-69.

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[21] *See* Miss. Code Ann. § 11-1-63(f).

[22] *See Moss v. Batesville Casket Co., Inc.*, 935 So. 3d 393, 404 (Miss. 2006) (stating that expert testimony is required to prove a product defect); *see also Grant v. Ford*, 89 So. 3d 655, 675 (Miss. Ct. App. 2012) (citing *Hammond v. Coleman Co., Inc.*, 61 F. Supp. 2d 533, 541 (S.D. Miss. 1999)).

[23] *Grant*, 89 So. 3d at 675.

Stodola is a Professional Engineer who is licensed in Colorado. She possesses a Bachelors and Masters degree in Mechanical Engineering. Her primary occupation is as a litigation consultant in the area of accident reconstruction. Before her involvement in this case, Stodola had no prior professional experience in litigation or otherwise with guardrails or end-terminals. R. 447, 4476.

Singley designated Stodola "as an expert witness in the field of accident reconstruction" to analyze how and why the accident occurred. R. 651-54. According to Singley's interrogatory response, Stodola's pertinent opinions were that: (1) Singley's speed and impact angle were not extreme based on her analysis of the crash conditions; (2) the LON of the REGENT-C was susceptible to "pocketing" because its design placed open slots in the rail adjacent to where the "downstream" cable box was affixed between Posts 6 and 7; (3) the LON failed to redirect Singley because of this allegedly defective combination; and (4) the accident would not have occurred had there been no slotted sections in the LON adjacent to the cable box. R. 651-63.

Head is a Professional Engineer who is licensed in Michigan. R. 4152. Head possesses a Bachelor's degree in civil engineering. Since 1999, Head's primary occupation has been as a litigation consultant. Prior to 1999, Head worked for FHWA and had some involvement with federal aid highway projects. R. 4114, 4159-60 and 4172. However, Head's work with FHWA did not involve reviewing or approving guardrail end-terminals for use on the public highways because "that was not [his] responsibility." R. 4152.

Singley designated Head as a "forensic engineer regarding regulations, standards, guidelines and customs of practice related to the design, testing, approval, manufacture and installation of roadside infrastructure, including . . . guardrail end-terminals." R. 656.

According to Singley's interrogatory response, Head's pertinent opinions were that: (1) the LON of the REGENT-C "should have been tested to comply, at a minimum with the testing parameters set forth in NCHRP 350 Test 3-11;" (2) the LON should have been strong enough to withstand Singley's impact based on his analysis of the crash-conditions; (3) had Test 3-11 been performed on the LON, the defective weakness of the REGENT-C "would have been readily apparent;" (4) because Test 3-11 was not performed on the LON, and the device failed to redirect Singley's vehicle, the REGENT-C "is not [Report] 350 compliant;" and (5) the SRT was a feasible alternative design which would have prevented Singley's injuries. R. 658-63.

After Head and Stodola were deposed, and following the close of the discovery period, all Defendants filed motions to exclude their opinions under *Daubert* and for summary judgment. Defendants urged the Circuit Court to exclude the opinions of Stodola and Head because neither was qualified to testify concerning any aspect of the designing or testing of the REGENT-C. Moreover, in any event, their opinions were insufficient to avoid summary judgment.

During his deposition, Head's opinions regarding Test 3-11 were exposed as unreliable and unsupported by anyone else in the field of highway safety. By asserting without any support that Test 3-11 was required for all re-directive end-terminals on the market, Head fatally undermined his opinion that the SRT or any other end-terminal design tested only to Test 3-35 could serve as a feasible alternative design to the REGENT-C. Head's testimony was particularly problematic for Singley because Stodola unequivocally testified during her deposition that she was not a design expert and had no opinions to offer regarding any feasible alternative design for the REGENT-C. Thus, after his experts were deposed, Singley had no competent proof to offer on the feasible alternative design and causation elements of his MPLA claim.

B. Singley Attempts to Salvage his Case by Offering New Expert Affidavits in Response to Defendants' Dispositive Motions

On June 28, 2013, Singley responded to the Trinity Defendants' dispositive motion. Along with his response, Singley submitted new expert affidavits from both Stodola and Head. Stodola's new affidavit contained opinions which directly contradicted her prior deposition testimony. Head's new affidavit contained opinions which had never been previously disclosed.

1. Stodola's New Affidavit Regarding Feasible Alternative Design and Causation

During her deposition, Stodola was asked whether she had any opinions regarding feasible alternative designs, and specifically, whether she had any opinions regarding the SRT:

> Q: Are you going to be offering any opinions in this case about alternative designs of guardrail treatments that you contend were safer alternative designs to the REGENT-C?
>
> A: Not intentionally R. 4779.

Stodola explained this curious response by stating that, although she had "looked at the design drawings for the SRT design" and noted some "differences," she was "not here to say that the SRT is a better design." R. 4481. This response prompted the following exchange:

> Q: Well, are you going to say that the SRT was a safer alternative design?
>
> A: I have not evaluated that and would not attempt to do that.
>
> Q: … [Y]ou're not going to offer an opinion that the SRT or any other guardrail end treatment system on the market was a safer alternative design to the REGENT-C?
>
> **A: Correct, I would leave that to the experts in the field.** R. 4482.

Stodola testified that she was curious about the design differences between the SRT and REGENT-C and had prepared a composite exhibit comparing the two devices. R. 4478-81.

When asked whether she was basing any expert opinions on this comparison exhibit, Stodola testified as follows:

> Q: But, you're not going to testify that the SRT is a safer or better design than the REGENT-C?
>
> A: No, because I haven't looked at the - - you know, I haven't done - - looked at any of the crash tests on this.
>
> Q: So were you just curious to sort of compare and contrast? Is that why you prepared this [comparison exhibit of SRT and REGENT-C]?
>
> A: You know, here is the thing. . . . Had they followed [the design of the SRT], we **may not** have had this accident.
>
> Q: Had they followed what?
>
> A: Not putting slots in the railing marrying up with the guardrail. The handoff **may have** been smoother because we have no weakened area that allowed the entire section to penetrate the engine compartment?
>
> **Q: You say may have. Can you state that opinion to a degree of accident reconstruction probability that that would have been the result?**
>
> **A: No, because I haven't . . . tested it to that level of detail. . . .**
>
> Q: And you can't state with certainty whether or not this accident wouldn't have happened in the sequence that it did if there were no slots right adjacent to the cable box?
>
> A: I don't know if I agree with that . . . . But having no slots, you know, that would have to be tested, I think.
>
> Q: And you haven't done that?
>
> A: Correct, I haven't done that. *Id.*

After Defendants filed their dispositive motions, Stodola completely changed her tune. Incredibly, in her new affidavit, Stodola opined that the SRT was, in fact, a feasible alternative

design to the REGENT-C and that, "to a reasonable degree of engineering certainty," the SRT design would have prevented Singley's injuries. R. 2022.

2. Head's New Affidavit Regarding the "Bolt-Two" Theory

In response to the Trinity Defendants' dispositive motion, Singley shifted away from his flawed LON theory and attempted to inject an entirely new liability theory into the case based on the "gating" portion (Posts 1 and 2) of the REGENT-C. Singley's new theory concerned the actual REGENT-C unit that was crash-tested in 2001 under Report 350, and specifically, whether or not a single bolt connected the rail to Post 2 during Test 3-35. In support of this "bolt-two" theory, Singley submitted a new affidavit from Head which included an entirely new set of expert opinions that had never been previously disclosed. R. 2014-16.

According to Head's new affidavit, after disclosing his original expert opinions and being deposed extensively thereon, he apparently decided to take another look at the Report 350 crash test videos for the REGENT-C and the related materials submitted to the FWHA. R. 2014. Based on this re-review, Head apparently determined that a bolt was affixed to Post 2 during Test 3-35, and that this bolt should not have been there according to the REGENT-C installation manual.

Attempting to connect the dots between this alleged condition and Singley's accident, Head's affidavit contained the following new expert opinions: (1) that the Defendants improperly altered the original proposed design of the REGENT-C submitted for FHWA approval by attaching the slotted rail to Post 2 during Test 3-35; (2) that, "to a reasonable degree of engineering certainty, by attaching the rail at this location, Defendants were able to transfer at least some portion of the forces exerted upon the terminal to Post 2, assisting the terminal system

as a whole to tension along its length and re-direct the testing vehicle after impact;" (3) that Defendants should have notified the FWHA of this alteration, re-tested the device without a bolt at Post 2 and re-submitted the REGENT-C for FHWA acceptance; and (4) because Defendants did not take these steps, the REGENT-C could not be considered crashworthy under the Report 350 performance guidelines. R. 2014-16.

C. Summary Judgment and *Daubert* Standards

The standard of review of a trial court's grant of a summary judgment motion is *de novo*.[24] Rule 56 (c) of the *Mississippi Rules of Civil Procedure* provides that summary judgment should be granted on claims where there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. Where "the pleadings, deposition, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, the moving party is entitled to judgment as a matter of law."[25] "Where summary judgment evidence establishes that one of the essential elements of plaintiff's cause of action does not exist as a matter of law, . . . *all other contested issues of fact are rendered immaterial*."[26]

In considering a summary judgment motion opposed by expert testimony, the trial court has broad discretion to rule on the admissibility of the expert's evidence.[27] Rule 702 of the Mississippi Rules of Evidence governs the admission of expert testimony. Rule 702 states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify

[24] *Williams v. Bennett*, 921 So .2d 1269, 1271 (Miss. 2006).
[25] *Erby v. North Miss. Med. Center,* 654 So. 2d 495, 499 (Miss. 1995).
[26] *Williams*, 921 So.2d at 1272 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)) (emphasis added).
[27] *Glen v. Overhead Door Co.,* 935 So. 2d 1074, 1080 (Miss. Ct. App. 2006).

> thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.[28]

The Mississippi Supreme Court has adopted and applies the *Daubert* standard for the admission of expert testimony under Rule 702.[29] In *Daubert*, the United States Supreme Court determined that a trial judge is vested with a gatekeeping responsibility concerning the admission of expert testimony. As the gatekeeper, the trial judge must ensure that expert testimony admitted at trial is both relevant and reliable as required by Rule 702.[30]

Relevance is established when the expert testimony is sufficiently tied to the facts of the case such that it will "assist the trier of fact to understand the evidence or to determine a fact in issue."[31] In evaluating reliability, the court's "focus … must be solely on principles and methodology, not on the conclusions that they generate."[32] Expert testimony admitted at trial must be based on scientific methods and procedures, not on unsupported speculation or subjective belief.[33] The *Daubert* Court developed a nonexclusive list of factors to be used to assess reliability: (1) whether the theory or technique can be tested; (2) whether the theory or technique has been the subject of peer review and publication; (3) whether there is a high known or potential rate of error respecting the technique; (4) whether there are standards that control the

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[28]Miss. R. Evid. *702*.
[29]*Daubert v. Merrill Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993); *see also Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999) (holding that *Daubert* applies to technical fields of expertise such as engineering); *see also Miss. Transp. Comm'n v. McLemore*, 863 So. 2d 31, 39 (Miss. 2003) (adopting *Daubert* standard in Mississippi).
[30]*Daubert*, 509 U.S. at 597. Because of the weight that jurors often give to expert testimony, it is imperative that trial judges scrutinize the relevancy and reliability of the proposed testimony. *See Watkins v. Radiator Specialty Co.*, 990 So. 2d 143, 147 (Miss. 2008).
[31]*Daubert*, 509 U.S. at 591.
[32]*Id*. at 595.
[33]*Miss. Dep't of Mental Health v. Hall,* 936 So. 2d 917, 928 (Miss. 2006).

operation of the technique; and (5) whether the theory or technique has been generally accepted within the relevant scientific community.[34]

The burden of establishing the admissibility of an expert's testimony falls on the proponent.[35] The well-settled standard of review for the admission or suppression of evidence is abuse of discretion. The Circuit Court's decision to limit or exclude expert testimony is entitled to deference and will stand unless clearly erroneous.[36]

D. The Circuit Court's Decision should be affirmed because Singley's Liability Experts are Not Qualified

Before allowing expert testimony, the trial court must first determine whether the proposed expert is qualified to render such opinions by knowledge, skill, expertise, training or education. The fact that a proposed witness may be an expert in one area does not *ipso facto* qualify him or her to testify as an expert in all related areas.[37]

Head and Stodola are professional engineers with arguable expertise in certain areas. However, even though a proposed expert is an engineer, this does not necessarily qualify that individual to testify as an expert on any issue within the vast field of engineering. In order for the testimony to be relevant and helpful to the jury, the engineer must possess some special skill,

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[34]*McLemore*, 863 So. 2d at 37 (citing *Daubert*, 509 U.S. at 592-94).
[35]*Mathis v. Exxon Corp.*, 302 F.3d 448, 459-60 (5th Cir. 2002); *Daubert*, 509 U.S. at 592, n. 10.
[36]*Howell v. Holiday*, 2013 Miss. App. LEXIS 134 *8-9 (quoting *Mitchell v. Barnes*, 96 So.3d 771, 776 (Miss. App. 2012)). *Ill. Cen. R.R. v. Brent*, 133 So.3d 760, 780 (Miss. 2013).
[37]*See McKee v. Bowers Window & Door Company, Inc.*, 64 So. 3d 926, 935 (Miss. 2011)(construction expert not qualified to offer opinions on window design and manufacture); *Watkins v. U-haul International, Inc.*, 770 So. 2d 970 (Miss. Ct. App. 2000)(expert in accident reconstruction was not qualified to offer technical opinions regarding design fasteners or control stability on tow dolly combinations); *Moss v. Batesville Casket Co., Inc*., 935 So.2d 393 (Miss. 2006) (forest products expert with expertise in the areas of wood rot and decay was not qualified to offer opinions as to glue adhesives used to manufacturer allegedly defective caskets).

knowledge or experience concerning the particular issue before the court.[38] Numerous courts have precluded engineers from giving expert opinions in product liability cases where they were relying solely on their general engineering background and lacked specialized knowledge or experience regarding the product at issue.[39]

Although Head and Stodola are professional engineers, neither has any specialized knowledge or expertise with regard to the REGENT-C or the design, manufacture, testing or safety of end-terminals in general. Neither has ever designed or tested an end-terminal under the parameters of Report 350,[40] and neither has ever previously testified or served as an expert witness in a case involving an alleged end-terminal failure.[41]

In light of their admitted lack of specialized expertise, the opinions of Head and Stodola are based on nothing more than their general engineering backgrounds and their attempt to apply general engineering principles to a highly technical field regulated by federally-adopted industry standards. This is not sufficient to pass muster under *Daubert*. Nevertheless, the Circuit Court

[38]S*ee Bailey Lumber & Supply Co. v. Robinson,* 98 So. 3d 986, 990 (Miss. 2012)(stating "only if the witness possesses [expertise] on a particular topic will he qualify as an expert on that topic.").

[39]*See Watkins v. Telsmith, Inc.,* 121 F.3d 984, 988-90 (5th Cir. 1997)(excluding testimony of professional engineer who lacked expertise with regard to desiging and manufacturing conveyor system); *Oglesby v. General Motors Corp.,* 190 F.3d 244, 247 (4th Cir. 1999) (testimony excluded of mechanical engineer who lacked specialized experience or expertise in automobile manufacturing processes or the strength of plastic automobile component parts); *Ancho v. Pentek Corp.,* 157 F.3d 512, 517 (7th Cir. 1998)(mechanical engineer with no experience designing or evaluating factories not an expert on industrial plant configuration); *Trumps v. Toastmaster, Inc.*, 969 F. Supp. 247, 252 (S.D. N.Y. 1997)(board certified safety professional and mechanical engineer not qualified to offer expert testimony regarding malfunction of electric grill); *Shreve v. Sears, Roebuck & Co*., 166 F. Supp. 2d 378, 392 (D. Md. 2001)(excluding testimony of mechanical engineer who lacked particular professional experience with product at issue).

[40]R. 4150-51 and 4475. Stodola had never read Report 350 prior to her involvement in this case. R. 4472. Although Head worked for FHWA many years ago and had some peripheral familiarity with Report 350, he was never involved in the process of accepting an end-terminal device for use on the public highways. R. 4152.

[41]R. 4163-64, 4465 and 4471. Neither Head nor Stodola has ever had any coursework or studies regarding guardrail end-terminals as part of their engineering education. R. 4149 and 4471-72. Also, neither has served on any relevant industry task force or committee. R. 4155-58, 4484.

gave Singley the benefit of the doubt and found that Stodola and Head were "generally qualified" to render certain opinions. This Court should affirm the Circuit Court's decision because Singley's experts are clearly unqualified, and it need not consider any other issues raised herein by Singley. In any event, this Court should affirm because the Circuit Court properly analyzed the opinions of Stodola and Head and correctly determined that they were insufficient to demonstrate a genuine issue of material fact.

E. The Circuit Court Correctly Rejected Singley's MPLA Claim that the LON of the REGENT-C is Defectively Designed

1. Singley Failed to Present Competent Proof of a Feasible Alternative Design

In order to prevail under the MPLA, the plaintiff must prove that a feasible alternative design existed which would have to reasonable degree of probability prevented the harm without impairing the utility and safety of the product.[42] As this Court has noted, "demonstrating a feasible alternative design as proof of a design defect is elemental to a claimant's *prima facie* case."[43] If the plaintiff fails to satisfy this element, the trial court has "no choice but to dismiss [the] claims."[44] Even if Head and Stodola are "generally qualified," the Circuit Court correctly determined that neither provided a competent opinion to establish this essential element of Singley's MPLA claim.

a. Head's Opinions Failed to Satisfy the Feasible Alternative Design Element

In his original designation, Head opined that "at the time of the REGENT-C guardrail end-terminal's design and manufacture, there existed reasonable alternative designs which

[42] *Miss. Code Ann.* §11-1-63 (f).
[43] *Williams v. Bennett*, 921 So. 2d. 1269, 1275 (Miss. 2006).
[44] *Id.* at 1277.

would, within a reasonable degree of engineering certainty, have prevented the injuries sustained by Mr. Singley in this case, while maintaining the end-terminals utility and function." R. 633. During his deposition, Head referred to two (2) other Report 350 end-terminal devices as possible alternative designs, the SRT and the SKT.[45] When questioned further about the specific bases for this opinion, Head admitted that his reliance on these other devices as design alternatives for the REGENT-C was misplaced.

In his other opinions, Head took the (unsupported) position that an end-terminal device could not be considered Report 350 compliant unless its LON had been tested under the criteria for "longitudinal barriers" set forth in Test 3-11. [46] Head agreed that it was appropriate to perform Test 3-35 on the REGENT-C between Posts 1 and 3 (*i.e*. the "gating" portion), but in his opinion, Test 3-11 was required for the LON portion (*i.e*. the "redirective portion) between Posts 3 and 7. R. 4352-54.

During his deposition, Head admitted that Report 350 did not call for end-terminals to be tested under Test 3-11. R. 4354. In fact, Head could not identify a single end-terminal on the market that had been tested under both Test 3-35 and Test 3-11. R. 4263-64. Head likewise could not cite a single instance where the FHWA requested a 3-11 crash test on a guardrail end-terminal. R. 4280, 4354. Moreover, Head could not identify a single industry publication or expert in the field that shared his opinion in this regard. R. 4273-74, 4280 and 4354.

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[45]As noted above, the SRT ("Slotted Rail Terminal") is a THP device, upon which the REGENT-C was based. The SKT ("Sequential Kinking Terminal") is another end-terminal device manufactured by Road Systems, Inc. R. 4287. During his deposition, Head referred to a photograph of a third device, but he could not identify what it was. R. 4356-58.

[46]R. 658-59. As noted above, the nominal impact severity for Test 3-35 is 90.3 kilojoules. The nominal impact severity for Test 3-11 is 138.1 kilojoules. The only difference between Test 3-11 and Test 3-35 is a higher angle of impact (20 degrees for Test 3-35 and 25 degrees for Test 3-11), which yields a higher impact severity computation. R. 353, 358 and 368.

In any event, since neither the SRT nor the SKT (nor any other Report 350 end-terminal device on the market) has been tested under Test 3-11, Head realized that he could not credibly rely on these allegedly "non-compliant" devices as safer alternatives to the REGENT-C. R. 4263-64. Thus, during his deposition, Head attempted to "qualify" his opinion by stating that these devices would be safer alternatives to the REGENT-C only if "verified to stand up to the full length of need test" under Test 3-11. R. 4356-59. Of course, Head admitted that he had not bothered to verify whether the SRT or the SKT could "stand up" to Test 3-11.

As the Circuit Court correctly observed, Head is the only person to have ever expressed an opinion that Report 350 requires the LON portion of a guardrail end-terminal to be tested pursuant to Test 3-11. Because Head's opinion clearly lacked general acceptance within the relevant scientific community, the Circuit Court correctly discounted it as unreliable.[47] The Circuit Court also correctly determined that Head's unreliable opinion regarding the applicability of Test 3-11 fatally undermined his opinion regarding feasible alternative design. Specifically, the Circuit Court noted that "the MPLA requires a reasonable alternative design; unfortunately, Head continually connects any possible alternative design such as the SRT or SKT to 3-11. . . R. 7458.

Moreover, Head failed to provide any credible opinions to prove that the SRT, or any other alleged feasible alternative design, would have to a reasonable probability prevented the harm to Mr. Singley in this accident. Head admitted that his opinions were based on pure

[47] In his appeal brief, Singley makes a non-sequitur argument that the Circuit Court erred by applying the *Frye* "general acceptance" standard rather than the *Daubert* standard in analyzing Head's and Stodola's opinions. General acceptance is, of course, one of the *Daubert* factors for assessing reliability. The notion that the trial judge applied a more rigorous *Frye* standard is simply misplaced since *Daubert* emphasized and expanded the gatekeeping role of the trial judge in assessing reliability.

speculation because he had not actually tested these alternative devices (or any other Report 350 device) to determine how they would have performed under the crash conditions involved in the Singley accident. R. 4381-82. For example, when asked specifically about the SRT, Head testified as follows:

> **Q. Is it your opinion as you sit here today, Mr. Head, that if an SRT device had been installed at this location and that Mr. Singley had impacted it under these same conditions, that the SRT device would have performed as intended?**
>
> **A. I have not done that analysis. I don't know.** R. 4283.

Again, the Circuit Court correctly analyzed Head's opinions and found them insufficient to create a genuine issue of material fact as to the feasible alternative design element of Singley's MPLA claim.

b. Stodola's New Opinions as to Feasible Alternative Design were Properly Rejected as Specious

As set forth above, Stodola testified in her deposition that she was not qualified to offer and was not offering any expert opinions regarding feasible alternative designs. She likewise admitted that, because she had not performed any scientific testing or analysis, she could not state whether a different design for the REGENT-C would have prevented Singley's injuries. The Circuit Court correctly rejected Singley's attempt to manufacture a question of fact on this issue by submitting a new affidavit from Stodola in response to Defendants' dispositive motion.[48]

[48] *See Elliot,* 796 F. Supp. 2d at 810 (excluding expert's opinion because he failed to test proposed alternative designs).

It is well-settled that a nonmovant cannot defeat a motion for summary judgment by submitting an affidavit which directly contradicts previous deposition testimony on the same subject matter.[49] "If a party who has been examined at length on deposition could raise an issue of fact simply by submitting the affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact."[50]

Moreover, in any event, Stodola's new opinions are woefully inadequate to create a genuine issue of material fact. Stodola did not furnish any analysis, demonstrating what specific features of the SRT should have been incorporated into the REGENT-C or whether this would have even been feasible. An alternative design is by definition a different method of configuring the product.[51] "When considering technology and alternative designs, the focus is on the present design. 'It is one thing to show that a defendant might have designed a safer product; quite another to show that the product he designed was unreasonably dangerous.'"[52] "There must be a 'basis of comparison from which to determine that the design of the [product] was indeed defective,' and the plaintiff must 'demonstrate the extent of the risk that the alternative design would have avoided or how the alternative design would have affected [the product's] utility.'"[53] Highly relevant to the determination of whether a proposed feasible design alternative satisfies the requirements of §11-1-63 (f)(ii) is the question of whether the proposed alternative would

[49] *See Callicutt v. Prof'l Servs. of Potts Camp, Inc.*, 974 So. 2d 216 (Miss. 2007)(citing *Foldes v. Hancock Bank*, 554 So. 2d 319, 321 (Miss. 1989)).
[50] *Axxiom Manuf., Inc. v. McCoy Invest., Inc.*, 846 F. Supp.2d 732 (S.D. Tex. 2012(quoting *Doe ex rel. Doe v. Dallas Indep. Sch. Dist.*, 220 F.3d 380, 386 (5th Cir. 2000)).
[51] *Watkins v. Telsmith*, 121 F.3d 984, 991 (5th Cir. 1997).
[52] *Glenn v. Overhead Door Corp.*, 935 So.2d 1074, 1083 (Miss. App. 2006) (quoting *Weakley v. Fischbach & Moore, Inc.*, 515 F.2d 1260, 1267 (5th Cir. 1975)).
[53] *Ainsworth v. Cargotec USA, Inc.*, 2014 U.S. Dist. LEXIS 11534, *10 (S.D. Miss.) (quoting *Williams*, 921 So.2d at 1277)).

have been likely to fail and result in accidents.[54] Stodola provided no such analysis through testing or otherwise but instead proferred *ipso facto* opinions that directly contradicted her prior deposition testimony.

2. Singley Failed to Present Competent Proof that a Design Defect in the LON Caused the Alleged Failure of the REGENT-C

Singley argues that the experts disagree about the crash conditions involved in the accident (*i.e.* speed and impact angle), and that this evidentiary dispute presents a genuine issue of material fact for trial.[55] This argument is simply misplaced. Even if the underlying facts concerning the accident are viewed in a light most favorably to Singley, he failed present any competent evidence that the REGENT-C failed because of a design defect.

Singley claims that if he impacted the REGENT-C within the parameters of Report 350, and the device failed to re-direct his vehicle, then *ipso facto* the device must not be crashworthy. The flaw in this logic is that Singley's experts admittedly failed to conduct any scientific testing or analysis to rule out another equally, if not more, plausible explanation for the failure—that Singley impacted the REGENT-C under conditions far exceeding its capacity.

The Mississippi Supreme Court squarely places the burden on the plaintiff to disprove other possible causes, not on the defendant to establish them:

> Where plaintiff in a negligence action has only presented proof that the actual cause was one of a number of possibilities, to enable an inference to be drawn that any particular cause is probable, the other causes must be eliminated. Thus, when the evidence shows that it is just as likely that the accident might have occurred from causes other than defendant's negligence, the inference that his negligence was the proximate cause may not be drawn.[56]

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[54] *Williams*, 921 So.2d at 1276.
[55] In order to reach their contrary opinions regarding Singley's speed and impact angle, Head and Stodola had to disregard Singley's own statements as well as the eyewitness account of Dhaliwal.
[56] *Miss. Valley Gas Co. v. Estate of Walker*, 725 So. 2d 139, 145-46 (Miss. 1998).

It is improper and contrary to Mississippi law to infer or presume that a design defect in the LON caused the REGENT-C to fail, when the evidence in this case shows that it is just as likely that the accident occurred because the collision forces overloaded the capacity of the REGENT-C.

Moreover, in a products liability suit, proof of injury alone is not sufficient to establish liability and "more is needed to satisfy the claimant's burden."[57] Singley failed to satisfy his burden in this case because his experts did not to bother to actually test the theory that the LON was prone to "pocket" and fail if impacted within the parameters of Report 350.

a. Stodola's opinion that a design defect caused the REGENT-C to fail is based on pure speculation and conjecture

Stodola opined that the REGENT-C is a "poorly" designed end-terminal device because the "downstream" cable box is positioned next to an area where slots are located in the rail. R. 4559-60. According to Stodola, it is "common sense" that this design created a "flexion point" and made the REGENT-C susceptible to "pocketing." R. 4548. Stodola's "flexion point" theory is based entirely on the premise that the "mass" of the cable box created a "dramatically stiffened" area of rail that was positioned next to a weakened area of a rail where slots were located. R. 4548-49. However, Stodola admitted that she did not perform any calculations or structural analysis regarding the REGENT-C or its component parts to determine their relative strengths or weaknesses. R. 4549. In fact, Stodola admitted that she did not know the mass of the cable box and could not quantify what "dramatically stiffened" meant. R. 4549.

Stodola speculates that upon impact a "flexion point" caused the REGENT-C to "pocket" and "snag" Singley's vehicle instead of "smoothly" redirecting it. However, even if "pocketing"

[57] *McKee v. Bowers Window & Door Co., Inc*., 64 So.3d 926, 937 (Miss. 2011).

occurred during the crash sequence, Stodola's opinion is not probative as to the existence of a design defect. Stodola admitted that "pocketing" would occur in a crash sequence that overloads the capacity of an end-terminal device. R. 4562. Stodola further admitted that she had reviewed the Test 3-35 crash test video for the REGENT-C and agreed that she did not observe any "pocketing" as the test vehicle interacted with the system. R. 4556.

Stodola did not perform any physical testing or computerized modeling to verify whether the impact severity of the Singley accident was within or far-exceeded the performance tolerances established by Report 350.[58] Stodola's opinions are not reliable or probative because she failed to rule out the most plausible explanation for why severe "pocketing" might have occurred during the Singley accident---that the REGENT-C was simply overloaded by the extreme forces involved in the collision.

Stodola admitted that because she has not performed any testing or analysis she could not say whether or not the placement of the cable box and/or slots had any causal relationship to the Singley's accident:

> **Q: Well, can you say to a degree of engineering certainty that if you removed the slots this accident wouldn't have happened in the way it did?**
>
> **A: No, because I have not done the testing.**
>
> **Q: And can you say within a degree of engineering certainty if you had removed that cable box or put it in a different place that that would have had any impact on this accident sequence?**
>
> **A: Again, the testing has not been done. However, from basic engineering principles, it certainly, in combination, the failure is explained.** R. 4582.

[58] R. 4468-71. Stodola testified that she thought about doing computerized modeling through a utilizing element analysis program. However, the decision was made to forgo this testing because it was perceived as too expensive and unnecessary. R. 4469-70.

Since they are not founded upon any calculations or testing, Stodola's design defect opinions are clearly not the product of reliable scientific methodology. In fact, it is obvious that Stodola's opinions are based on nothing more than her attempt to apply "basic engineering principles" and her version of "common sense" to a product that she otherwise has no prior familiarity with, much less professional expertise. R. 4548, 4551-52. This is, of course, insufficient to pass scrutiny under *Daubert* and likewise insufficient to create a genuine issue of material fact.[59] Of course, without competent evidence to establish the feasible alternative design element, Stodola's opinions regarding a design defect are incomplete and insufficient to sustain a MPLA claim.

b. Head's opinion that a design defect caused the failure of the REGENT-C is based on pure speculation and conjecture

Head opines that the Singley accident involved a maximum impact severity of 57,474 foot-pounds and that the REGENT-C should have redirected his vehicle since this is within the performance tolerances specified by Report 350.[60] Head then concludes *ipso facto* that, since the REGENT-C allegedly "pocketed" and failed in the Singley crash sequence, then it must not have the necessary "beam strength" to meet the crashworthiness requirements of Report 350. R. 658-59, R. 662. Head's analysis and opinions in this regard are based on speculation and conjecture.

Head provided no calculations or analysis whatsoever to explain what, in his view, constitutes "necessary beam strength" or to quantify the extent to which the "beam strength" was

[59] *See Smith* 495 F.3d at 227 (excluding expert who attempted to apply general scientific principles to support a design defect theory regarding a product with which he was otherwise unfamiliar); *see also Glenn*, 935 So.2d at 1080 ("Talking 'off the cuff' --deploying neither data nor analysis—is not an acceptable methodology.").

[60] Head based his impact severity calculation on two unverifiable assumptions regarding Singley's speed and impact angle. Head assumed a maximum speed of 70 mph and a maximum impact angle of 14 degrees. R. 367. These assumptions are refuted by Singley's own statements and Dhaliwal's eye-witness account.

allegedly diminished by the slots or increased by the cable.[61] Without this critical information, it would be impossible for the jury to determine from Head's opinions what, if anything, "beam strength" or the alleged lack thereof, had to do with the Singley accident. Head did not explain whether and what amount of additional "beam strength" would have affected the outcome of the accident. Nor did he explain whether it would have been feasible to increase the "beam strength" of the "downstream" rails without substantially impairing the utility and safety of the "upstream" gating feature of the REGENT-C. Moreover, Head admitted during his deposition that because he did not conduct any crash tests or computerized modeling on the REGENT-C, he did not know what measurable effect, if any, the slots had on the overall strength of the system. R. 4334-35 and 4338-39. In fact, in one of his file notes, Head candidly revealed this flaw in his opinion: "**Without physically testing or perhaps [computerized] finite element modeling, it is unknown if the W-beam, as altered [to include slots] would function as a beam or not."** R. 4334.

Head basically contended that the REGENT-C is unreasonably dangerous because it could have been designed with the capacity to withstand more severe side-impacts. However, as Report 350 expressly recognizes, "[e]ven the most carefully researched device has performance limits dictated by physical laws, crashworthiness of vehicles and limitation of resources." R. 341. This is, of course, consistent with the well-settled notion that manufacturers are not insurers

[61] During his deposition, Head admitted that the term "beam strength" is not a term used in Report 350 and that his use of the term is derived solely from "general engineering knowledge." R. 4295. Head also admitted that he had done no calculations or "quantitative analysis" to determine what effect, if any, the slots had on the overall strength of the system. R. 4292-93.

of their products and are not held to a standard of designing accident proof products. A design is not defective simply because the manufacturer of a product could have made it safer.[62]

The most glaring flaw with Head's impact severity analysis is that it is directly contradicted by the actual Report 350 Test 3-35 results for the REGENT-C. The crash test video for Test 3-35 indisputably demonstrates a successful vehicle redirection without any "pocketing" during a crash sequence with an impact severity of 65,860 foot-pounds.[63] If Head's impact severity calculations were correct, and the REGENT-C did not withstand an impact severity of 57,474 foot-pounds in the Singley accident, then one would expect the Test 3-35 crash test video to show a similar crash sequence with the test vehicle "pocketing" deep into the rail and then completely obliterating the device like Singley's vehicle did.

Head offered no scientific analysis or calculations to explain how the REGENT-C could successfully pass the Test 3-35 accident sequence, and yet somehow fail in the Singley accident sequence, which according to his calculations, involved an even lower impact severity. During his deposition, Head admitted that, although he could have, he did not bother to conduct any actual crash testing or computerized simulation, or any other testing whatsoever, to challenge the Test 3-35 results or to verify his theory that the REGENT-C was prone to "pocket" and fail if impacted within the tolerances established by Report 350. R. 4097-98. In fact, Head admitted

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[62] *Cooper v. General Motors Corp.,* 702 So.2d 428 443 (Miss. 1997) (stating "our law demands that products be reasonably fit, not perfectly so"); *Hall v. Mississippi Chemical Express, Inc*., 528 So.2d 796, 800 (Miss.1988)("It is one thing to show that the defendant might have designed a safer product; quite another to show that the product he did design was unreasonably dangerous."); *Weakley v. Fischbach & Moore, Inc.*, 515 F.2d 1260, 1267 (5th Cir. 1975); *Glenn v. Overhead Door Corp*., 935 So.2d 1074, 1082-83 (Miss. Ct. App. 2006).

[63] R. 4271-72. Head admitted in his deposition that he had reviewed the Test 3-35 crash test video for the REGENT-C and that the video does not reveal any "pocketing" along the rail during the crash sequence. R. 4300.

that he has never performed a Report 350 crash test on any guardrail-end-terminal device for purposes of this case or otherwise. Since Head has performed no testing on the crashworthiness of the REGENT-C (or any other end-terminal device), his opinions fail to rule out the most plausible explanation for the Singley accident—that the REGENT-C was simply overloaded by the severity of the impact, which far exceeded the performance tolerances set forth in Report 350.

During his deposition, Head admitted that end-terminals necessarily have performance limits.[64] As such, if a device is impacted by a vehicle under circumstances which exceed its capacity, then based on the laws of physics, it is likely to "pocket" and fail regardless of any alleged design defect.[65] Thus, without actually testing the REGENT-C to exclude this likelihood, the mere fact that "pocketing" may have occurred during the Singley crash sequence is not probative of anything.

Daubert and Rule 702 require that, in formulating opinions for litigation purposes, proposed experts must "adhere to the same standards of intellectual rigor that are demanded in their professional work."[66] In this case it is undisputed that the applicable "standards of

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[64] Head testified in this regard as follows:

> **Q. Does the term "overloading a system" mean anything to you?**
> **A. Impacting with more energy than its designed for.**
> **A. Right, and you would agree with me that if a system is impacted with more mass, more energy than what its tested for, that that system cannot be expected to work as it was tested, true?**
> **A: True**

R. 4271-72. Head further admitted: "[i]f the impact severity is greater than what's tested, then that device is going to fail." R. 4277-78.

[65] In fact, Head agreed that even non-slotted, standard W-beam guardrail can pocket if impacted with enough force. R. 4304.

[66] *See Watkins*, 121 F.3d at 990; *see also Paterson v. Tibbs*, 60 So.3d 742, 751 (Miss. 2011)(an offered opinion that is contradicted by scientific data must be supported by the same evidence of support and acceptance within the scientific community).

intellectual rigor" are embodied in Report 350, which was drafted by industry leaders in the field of highway safety and adopted by the federal government. To ensure public safety, those standards require rigorous crash testing and analysis before an end-terminal can be placed on the roadways. In formulating his opinions, Head did not adhere to these standards and made no attempt to verify his "pocketing" theory under the parameters of Report 350, which requires actual crash testing.[67]

Because Head did not verify his "pocketing" theory through any testing, and his theory is directly contradicted by the actual Report 350 crash-test results for the REGENT-C, which were submitted to and accepted by the FHWA, his design defect opinions are completely unreliable. Of course, without competent evidence to establish the feasible alternative design element, Head's opinions regarding design defect are incomplete and insufficient to sustain a MPLA claim.

3. Singley Failed to Present Competent Proof that his Accident was Foreseeable

As to the forseeability element, Singley did not present any evidence that the Trinity Defendants knew or should have known that the REGENT-C had the propensity to fail as it did in the highly-unusual context of the Singley accident. It is undisputed that no such "pocketing" failure occurred during the Report 350 testing of the REGENT-C. Moreover, there is no evidence that, since the introduction of the REGENT-C to the market in 2002, a crash sequence similar to the Singley accident has ever occurred. These undisputed facts completely dispel any

[67] *See Elliot v. Amadas Indus., Inc.,* 796 F.Supp.2d 796 (S.D. Miss. 2011) (requesting opinions of expert who failed to test design defect theories). *See also Watkins,* 121 F.3d at 990 (upholding exclusion of plaintiff's engineer because he failed to test his theories regarding the allegedly defective design of a conveyor).

notion that the REGENT-C was unreasonably dangerous or that the Singley accident was foreseeable.

4. Singley Failed to Present Competent Proof that his Injury was Proximately Caused by the alleged Failure of the REGENT-C

Obviously, Singley cannot claim that the REGENT-C caused him to pass out and crash into it. Instead, he claims that the REGENT-C is not crashworthy because it failed to redirect his vehicle as he contends it should have.

In cases where, as here, the manufacturer of an allegedly defective product did not actually cause the accident, but rather the plaintiff claims that the product increased the severity of the injuries sustained in the accident, courts have applied an "enhanced injury" or "crashworthiness" doctrine.[68] Enhanced injury claims are a subset of products liability and impose liability on the manufacturer "not for causing the accident, but rather for failing to minimize the injuries or even increasing the severity of the injuries sustained in an accident brought about by a cause other than the alleged defect."[69] To establish a products liability claim on a theory of crashworthiness, the plaintiff must show what injuries, if any, he would have received had the alternative design been used and how the defective design caused or exacerbated his injuries.[70]

Assuming that the REGENT-C had redirected Singley's vehicle, a gapping hole still remains in Singley's proof. Specifically, Singley did not present any competent proof that his injuries would have been any less severe had the REGENT-C redirected his vehicle. In fact, it is just as likely that his injuries would have been far more severe or even fatal had his vehicle been

[68] *See, e.g., Oddi v. Ford Motor Co.*, 234 F.3d 136 (3d Cir. 2000).
[69] *Habecker v. Clark Equip. Co.*, 36 F.3d 278, 283 (3d Cir. 1994).
[70] *Oddi*, 234 F.3d at 143; *Rapp v. Singh*, 152 F. Supp. 2d 694, 698 (E.D. Pa. 2001).

redirected. Because Singley had passed out behind the wheel of his vehicle while driving at a high rate of speed with the cruise control engaged on a crowded interstate highway near a concrete bridge overpass, it is completely implausible for Singley to suggest that he would have walked away unscathed if only the REGENT-C had redirected his vehicle. Singley's MPLA claim fails because he did not offer any evidence that the REGENT-C enhanced or exacerbated the inevitable injuries he would have sustained as a result of what would have been a catastrophic accident under any imaginable scenario.

F. The Circuit Court Correctly Rejected Singley's Claim that the LON of the REGENT-C was Inadequately Tested

Even if Head's opinions regarding the applicability of Test 3-11 to end-terminals were otherwise reliable, it is still insufficient to create a genuine issue of material fact. Head opined *ipso facto* that had the Defendants "taken the minimal time and expense to run" Test 3-11, the defects in the REGENT-C "would have been readily apparent." R. 662. Head, who has never conducted or directed a Report 350 crash test himself, provided no explanation for how this "split" testing would be accomplished at a crash testing facility "with minimal time and expense" or how the results would be analyzed. Although he claims that this would be a simple and inexpensive process, Head did not bother to conduct his own crash test on a REGENT-C under the parameters of Test 3-11 (or Test 3-35). Because he did not perform any testing, Head could not say with any degree of certainty what, if anything, would have been revealed about the performance of the REGENT-C by Test 3-11 or whether the results would have been any different from Test 3-35, which was conducted and accepted by the FHWA as sufficient. Head's opinion, that an alleged design defect in the REGENT-C, which was not revealed by Test 3-35, would have been apparent if Test 3-11 had been performed, is based on pure speculation.

Singley attempts to side-step his lack of evidence by improperly shifting his burden of proof to the Trinity Defendants. Singley argues that since the LON of the REGENT-C was not tested pursuant to Test 3-11, then the Trinity Defendants cannot prove that the LON possessed strength equal to the standard "w-beam" guardrail. However, it is Singley's burden to prove that the REGENT-C would have failed Test 3-11 or to otherwise prove that the strength of the LON was unreasonably dangerous. Because Singley did not actually run or simulate a Test 3-11 crash test, or perform any other scientific analysis, he offered only rank speculation as to the allegedly inadequate "beam strength" of the LON.[71]

In his appeal brief, Singley makes a number of stray comments attempting to undermine the sufficiency of the crash tests which were conducted on the REGENT-C as well as the FHWA acceptance process. For example, Singley implies in a footnote that Test 3-35 may not have been directed at the "critical impact point" of the REGENT-C.[72] Singley's experts never offered any opinion regarding this particular issue before the Circuit Court, and therefore, he cannot raise this for the first time on appeal. In any event, Singley offered no proof that the Test 3-35 crash test results would have been any different had another side-impact point been selected.

Singley also criticizes the alleged "pass rate" of the crash tests conducted on the REGENT-C. Although accepted as sufficient by the FHWA, Singley implies that not enough successful tests were conducted.[73] This bare allegation is not probative by anything. Singley did

[71] *See Miller v. Genie Indus. Inc.*, 2012 U.S. Dist. LEXIS 5861 (N.D. Miss. 2012) (noting that because Plaintiff bears the ultimate burden of proof in a products liability case, the defendants alleged failure to test the product to disprove Plaintiff's theory is irrelevant.)

[72] Appellants' Brief at pg. 24, n.6.

[73] Appellants Brief at 32.

not present a shred of evidence beyond mere supposition to show that performing more successful tests or some other test would have altered the ultimate outcome.

G. The Circuit Court Correctly Rejected Singley's New "Bolt-Two" Theory

1. The Circuit Court's Decision to Strike Singley's "Bolt-Two" Theory as Untimely and Procedurally Improper was not an Abuse of Discretion

Singley cannot credibly dispute that Head's new opinions regarding the "bolt-two" theory was first presented after the close of discovery and only in response to Defendants' dispositive motions. Nothing was mentioned about this "bolt-two" theory in Singley's 26(b)(4) expert interrogatory response nor revealed in Head's subsequent deposition testimony. According to the Scheduling Order, Singley's expert disclosures were due by August 31, 2011, and all expert depositions were to be completed by October 31, 2011. R. 9. To accommodate scheduling conflicts, counsel for the parties informally agreed to take expert depositions out of time. Head was deposed on November 30, 2011, and Stodola was deposed on December 15, 2011. Defendants' expert, Dr. Malcolm Ray, was the final deposition which was taken on November 9, 2012. Singley did not seek any extensions regarding the expert discovery deadlines. When Singley first raised his "bolt-two' theory in June 2013, the trial of this matter was scheduled for November 12, 2013.

To be clear, Singley's "bolt theory" was not based on any "newly discovered" evidence, and he does not contend otherwise. It is beyond dispute that the Trinity Defendants produced all

of the Report 350 and FHWA submission materials regarding the REGENT-C, including the actual crash test videos, over three (3) years before Singley ever raised the "bolt-two" issue.[74]

Under these circumstances, the Circuit Court correctly struck the new opinions contained in Head's affidavit in considering the Trinity Defendants' dispositive motion. This is exactly the same situation which the trial court faced in *Grant v. Ford Motor Co*.[75] In *Grant*, after the close of discovery and after Ford filed a *Daubert* motion, the plaintiffs submitted new affidavits from one of their experts. The affidavits contained opinions and information that had not been previously disclosed in the expert's designation or revealed through a follow-up deposition. The trial court struck the new portions of the affidavits because this "constituted improper and untimely submission of supposed expert testimony." The Mississippi Court of Appeals affirmed, holding:

> While we recognize that Mississippi law allows for "seasonal supplementation" [of expert opinions during discovery], the trial court in this case knowledgeable of the complexity of the products-liability claims at issue, and of the time and expense required to timely address additional information for trial, concluded that the new information in [the expert's] affidavits should be excluded. We review discovery rulings by the trial court utilizing an abuse-of-discretion standard of review, and in so doing, we find no abuse of discretion by the trial court in excluding the new information in [the expert's] affidavits.[76]

In an attempt to explain away their untimely disclosure, Singley claims that Head did not realize the significance of the "bolt issue" until after he conducted a "frame by frame" analysis of

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[74]Moreover, the FWHA acceptance letter, which includes portions of the crash test results for the REGENT-C, is a matter of public record and is easily accessible on-line. *See* http://safety.fhwa.dot.gov/roadway_dept/policy_guide/road_hardware/listing.cfm. Singley's suggestion that the Trinity Defendants impeded his access to information regarding the "bolt-two" issue and/or concealed such information is completely unsupported. In any event, the Circuit Court's decision in this regard is entitled to deference.

[75] 89 So.3d 655, 663 (Miss. Ct. App. 2012)

[76] *Id.* at 663 (citations omitted).

the Test 3-35 video and after they deposed Dr. Ray.[77] Even if this explanation were credible, Singley cannot escape the fact that he deposed Dr. Ray in November, 2012.[78] Waiting nine (9) months to disclose Head's new opinions and doing so only in response to a dispositive motion hardly qualifies as "seasonable" supplementation.[79] To the extent that Dr. Ray's deposition testimony somehow enlightened Plaintiffs about the "bolt issue," it was incumbent on them to "seasonably" (i.e. "immediately") supplement Head's opinions.

Curiously, Singley's fall-back argument is that Head's new opinions are not really expert opinions which must be "seasonably supplemented." That is, Singley claims that, through his affidavit, Head was simply "stating facts and agreeing with . . . Dr. Ray." However, this is not the proper role of an expert witness. Head's "comments" about the evidence are no more helpful or probative than the observations of any other lay witness would be.

In any event, Head's affidavit goes far beyond simply "stating facts" and "adopting" portions of Dr. Ray's deposition testimony. For example, in his affidavit Head offers an *ipso facto* opinion that **"by attaching the rail [with a bolt at Post 2], Defendants were able to transfer at least some portion of the forces exerted upon the terminal to Post 2, assisting the terminal system as whole along its length and re-direct the testing vehicle after impact."** R. 2015. Dr. Ray never said anything close to this in his deposition.

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[77]Singley failed to explain what was involved in Head's so-called "frame by frame" analysis or why he waited until after his deposition to perform this analysis.

[78]Although Singley did not disclose exactly when Head performed his "frame by frame" analysis, this apparently took place at some point between his deposition in December, 2011, and Dr. Ray's deposition in November, 2012.

[79] *See West v. Sanders Clinic for Women, P.A.*, 661 So.2d 714, 721 (Miss. 1995)("seasonably does not mean several months later; it means immediately.").

Moreover, the Circuit Court also correctly found that Singley's "bolt-theory" was not properly pled per *Miss. R. Civ. P.* 9. Singley's "bolt theory" is premised on allegations that Defendants fraudulently misrepresented the crash test results to the FHWA in order to obtain acceptance and then fraudulently marketed and sold the REGENT-C as a crashworthy device. Singley accuses Defendants of "gross negligence, if not outright fraud" by "intentionally and surreptitiously altering the original design of the REGENT-C" in order to obtain FHWA acceptance and for allegedly failing to notify the FHWA in the application materials that the device was bolted at post-2 during Test 3-35. Appellants' Brief at 79. Aside from being offensive and untrue, the Circuit Court properly rejected these desperate allegations as untimely and procedurally improper.

Rule 9(b) of the Mississippi Rules of Civil Procedure requires a plaintiff to state with particularity the circumstances constituting fraud.[80] To meet this pleading requirement, the plaintiff must "specify the statements contended to be fraudulent, identify the speaker, state when and where the statements were made and explain why the statements were fraudulent."[81] Here, Plaintiffs' Third Amended Complaint contains only general allegations that the REGENT-C did not comply with FHWA requirements and that Defendants made misrepresentations to the FHWA regarding the REGENT-C. Because Singley's Complaint is devoid of any specific allegations regarding a bolt at Post-2, the Circuit Court correctly found that he could not raise this new claim for the first time in response to a dispositive motion. R. 12-36.

[80] *See Miss. R. Civ. P.* 9(b).
[81] *Murray v. General Motors*, 478 Fed. Appx. 175, 180 (5th Cir. 2012)(examining similar heightened pleading requirements under Fed. R. Civ. P. 9(b) and Miss. R. Civ. P. 9(b)).

2. The Circuit Court Correctly Rejected Singley's New "Bolt-Two" Theory because he failed to present competent proof of causation

In any event, the Circuit Court considered Singley's "bolt-two" theory and correctly rejected it because evidence of causation was lacking. Even if a bolt was affixed to Post 2 during Test 3-35, Head offered no competent evidence to prove that this alleged condition had any effect on the validity of Test 3-35 or would have in any way affected the outcome of the Singley accident. Head attempted to "connect the dots" on this point by claiming in his new affidavit "by attaching the rail [with a bolt at Post 2], Defendants were able to transfer at least some portion of the forces exerted upon the terminal to Post 2, assisting the terminal system as whole along its length and re-direct the testing vehicle after impact." R. 2014.

Head offered no scientific data, computations or analysis to explain this hopelessly vague opinion. Likewise, Head conducted no crash testing or computerized modeling to determine whether this alleged "transfer" of forces increased the re-directive capacity of the REGENT-C.[82] Head simply assumed that the REGENT-C would have failed Test 3-35 without a bolt at Post 2, but this assumption was based on nothing more than pure speculation. Because the point of impact for Test 3-35 is below Post 2, it is just as likely that the presence of a bolt at Post 2 had no bearing whatsoever on the crash test results. Singley presented no evidence whatsoever that the bolts which connect the rail to the posts serve any other purpose than to affix the rail at the desired height. It is undisputed that the wooden posts, including Post 2, have a hole drilled in them at ground level and are designed to breakaway upon impact. Thus, the Circuit Court

[82]Head offered no legitimate explanation for the statement in his affidavit that "[a]n exact analysis of the specific amount of force transferred is not possible..." R. 2015. The more accurate explanation is that he simply did not perform any such analysis.

correctly discounted Head's claim that the presence of a bolt at Post 2 measurably increased the tension of the system during Test 3-35.

Singley attempts to side-step the fact that Head conducted no scientific analysis or testing by claiming that the Trinity Defendants' testing of the REGENT-C was invalid and not in strict compliance with Report 350. Relying solely on incomplete and pieced together portions of Dr. Ray's deposition testimony, Head claims that an end-terminal manufacturer is required by Report 350 to notify the FHWA of any changes to a device and, in some instances, the manufacturer must re-test the device after a change is made. Singley claims that if a bolt was present at Post 2 during Test 3-35, then the Trinity Defendants were required to notify the FHWA of this alleged "alteration" and to re-test the device without a bolt at that location. Even if this characterization of Dr. Ray's testimony and Report 350 were correct (which it is not), Singley presented no competent proof that any alleged non-compliance with Report 350 was a proximate cause of Singley's injuries.

Under Mississippi law, regardless of whether the plaintiffs' new claim is premised on common law negligence principles or the MPLA, a product manufacturer's alleged failure to comply with industry or federal standards does not equate to strict liability. To demonstrate a jury issue, the plaintiff must present proof that the alleged non-compliance was a proximate cause of the injury.[83]

[83]*See Utz v. Running & Rolling Trucking, Inc*., 32 So. 3d 450, 465 (Miss. 2010)(in a negligence action, violation of a safety regulation may establish duty and breach but the plaintiff must still prove that such negligence was the proximate cause of injury); *see also McSwain v. Sunrise Medical, Inc*., 689 F. Supp. 2d 835, 846-47 (S.D. Miss. 2010)(allegation that manufacturer failed to adequately test a product in accordance with industry standards failed to state a claim under negligence principles or the MPLA without proof of causation).

Here, Singley failed to present any proof that re-testing the REGENT-C without a bolt at Post 2 would have in any way altered the outcome of Test 3-35. Without such proof, it is just as likely that the REGENT-C would have passed Text 3-35 even without a bolt at Post 2. Likewise, Singley did not present any proof that the REGENT-C would have re-directed Singley's vehicle if Post 2 was bolted to the rail of the particular device he impacted. Since the standard anchor was obliterated during the Singley accident, it is just as likely that the end-result would have been the same if a bolt was affixed at Post-2. Thus, even if Singley's new "bolt theory" implicated a technical compliance issue with Report 350 (which is denied), the Circuit court correctly determined that this was insufficient to avoid summary judgment.

H. The Circuit Court Did Not Err in Dismissing Singley's Other Common-Law Claims

1. Strict Liability

Singley argues that the Circuit Court failed to address his "stand-alone" claim for strict liability. Singley apparently fails to recognize that "with the adoption of §11-1-63, common law strict liability, as laid out in *State Stove Mfg. Co. v. Hodges*, 189 So.2d 113 (Miss. 1996), is no longer the authority on the necessary elements of a products liability action." *Huff v. Shopsmith*, 786 So.2d 383, 387 (Miss. 2001). Since the adoption of the MPLA, "products liability claims have been specifically governed by statute, and a claimant, in presenting his case, must pay close attention to the elements of the cause of action and the liability limitations enumerated in the statute."[84] Accordingly, as a matter of law, Singley cannot pursue a "stand-alone" claim for common law strict liability.

[84] *Williams*, 921 So.2d at 1273

2. General Negligence

Singley makes various, scattered references to the fact that he asserted general negligence claims against the various defendants. However, in his brief, Singley does not set forth any specific arguments addressing such claims and fails to cite any relevant authority in support thereof.[85]

In any event, even if Singley had not waived his negligence claims on appeal, the claims are merely restatements of and subsumed by his MPLA claim. Moreover, the Circuit Court did not err in dismissing any negligence claims because Singley failed to present proof to establish how any alleged breach of duty proximately caused his injuries.

3. Negligent and/or Intentional Misrepresentation

Singley asserts that the Circuit Court improperly granted Defendants' Motion for Summary Judgment as to his claims for negligent and/or intentional misrepresentation. However, in his brief, Singley fails to cite any relevant authority in support of such claims. Even if Singley has not waived these claims on appeal, the Circuit Court did not err in dismissing them on summary judgment.

Singley's claims of negligent and/or intentional misrepresentation fail as a matter of law because there is no allegation or proof that the Trinity Defendants made any representations whatsoever to Singley. Singley alleges that false representations were made to the FHWA during the acceptance process for the REGENT-C, specifically regarding the bolt at post 2 issue.

[85] *Bennett v. State*, 933 So. 2d 960, 963 (Miss. 2006).

However, these are not actionable because there is no proof that Singley relied upon any such information or that any such reliance proximately caused his injuries.[86]

4. Loss of Consortium

The loss of consortium claim asserted by Singley's wife is not an independent claim but is derivative of his claims. Since Singley's substantive claims are untenable as a matter of law, the loss of consortium claim cannot be maintained on its own.[87]

5. Damages

Singley argues that the Circuit Court erred in dismissing his claims for compensatory and punitive damages. Because it disposed of Singley's substantive liability claims on summary judgment, the Circuit Court did not reach the issue of Singley's recoverable damages, if any. Accordingly, any issues regarding Singley's alleged damages are premature and not properly before this Court.

CONCLUSION

For the reasons set forth herein, this Court should affirm the decision of the Circuit Court and assess all cost of this appeal to the Appellant.

[86] *See Johnson Enterprises, Inc. v. FPL Group, Inc.*, 162 F.3d 1290, 1318 (11th Cir. 1998)(noting that a plaintiffs injury is not proximately caused by a defendant's misrepresentation when the injury results only from the detrimental reliance of a third party).

[87] *McCoy v. Colonial Banking Co., Inc*., 572 So. 2d 850, 852 (Miss. 1990).

RESPECTFULLY SUBMITTED, this the 29th day of July, 2014.

TRINITY HIGHWAY PRODUCTS, INC., E-TECH TESTING SERVICES, INC. and ENERGY ABSORPTION SYSTEMS, INC.

/s/ W. Thomas McCraney, III
W. THOMAS McCRANEY, III

OF COUNSEL:

W. Thomas McCraney, Esq. (MSB# 10171)
McCRANEY MONTAGNET QUIN & NOBLE, PLLC
602 Steed Road, Suite 200
Ridgeland, Mississippi 39157
(601) 707-5725
(601) 510-2939 fax

Russell Brown, Esq.
Law Offices of Russell C. Brown, P.C.
Post Office Box 1780
Henderson, Texas 75653

BRYSON PRODUCTS, INC.

By: */s/ Roger Riddick*
ROGER RIDDICK
Roger Riddick, Esq., MSB 5345
Bradley Kelly, Esq., MSB 101243
Andy Lowery, Esq., MSB 100782
Copeland Cook Taylor & Bush, P.A.
1076 Highland Colony, Suite 100
Ridgeland, MS 39157
(601) 856-7200

CERTIFICATE OF SERVICE

I, W. Thomas McCraney, III, do hereby certify that I have this day forwarded, via the ECF online filing system, a true and correct copy of the foregoing document, which sent notification of filing to all counsel of record.

Richard Glassman, Esq.
Todd B. Murrah, Esq.
Ronna D. Kinsella, Esq.
26 North Third Street
Memphis Tennessee 38103

George E. Abdo, III, Esq.
Daniel Coker Horton & Bell, P.A.
4400 Old Canton Road, Suite 400
Jackson, MS 39215

John W. Nisbett, Esq.
Heilman Law Group, P.A.
Meadowbrook Office Park
4266 Interstate 55 North, Suite 106
Jackson, Mississippi 39211

THIS the 29th day of July, 2012.

/s/ W. Thomas McCraney, III
W. Thomas McCraney, III