

IN THE CIRCUIT COURT OF MADISON COUNTY, ALABAMA

LISA SMITH;

Plaintiff,

v.

CIVIL ACTION NO.: CV2014-901583

WAL-MART ASSOCIATES, INC.;

Defendant.

PLAINTIFF'S PRE-TRIAL BRIEF

This is a workers' compensation case. The primary issue at trial is the extent of plaintiff's vocational disability. Plaintiff suffers injuries which have left her with a fused and largely incapacitated dominant hand as well as functional limitations in her hip. Plaintiff contends she is permanently and totally vocationally disabled.

I. BACKGROUND FACTS

1. Lisa Smith worked for Walmart as a cashier. The position required constant movement. Physical requirements included using both hands constantly to grasp and manipulate objects as well as to lift merchandise. (Dep. Corp. Rep. p.20).

2. Lisa Smith could fully perform all duties of her Walmart employment prior to the work-related accident and injuries in this case. (Dep. Corp. Rep. p.13).

3. Walmart received notice of Lisa Smith's accident the same day it occurred. (Dep. Corp. Rep. p.21).

4. According to Walmart, Plaintiff's average weekly wage was \$252.45.¹

5. Based on physical restrictions following medical care, Lisa Smith does not meet the requirements of Walmart's cashier position. (Dep. Corp. Rep. pp.39-40).

II. LISA SMITH'S WORK-RELATED ACCIDENT

¹ This amount was listed by Walmart in the First Notice of Injury. A print-out of pre and post injury wages is compatible. Prior to trial, Plaintiff hopes Walmart will stipulate wage amounts.

Plaintiff, Lisa Michelle Smith, is almost 51 years old. Lisa possesses a high school degree. She does not possess a college degree. However, she has studied sign language and medical transcription – both of which require repetitive hand activities she can no longer perform due her primary injury. Lisa was even unable to complete recently administered academic testing due her inability to write for long periods of time as a result of this work-related injury.

In the last 20 years prior to Walmart, Lisa worked primarily in (1) early childhood education using her sign language skills; and, (2) office/transcriptionist related clerical work. Earlier in her work life, Lisa also worked several restaurant jobs. Lisa's vocational background is significant in that she can no longer perform her past work as a result of her work-related injuries. Lisa can no longer use her dominant right hand over the course of a normal work day (or for any extended period of time) as required for any past clerical, sign language, or transcriptionist work.

Lisa Smith could fully perform her work when hired by Walmart as a cashier. Lisa accepted Walmart's cashier job, in part, because the schedule allowed her time to study and obtain desired education for a certificate in sign language teaching/interpreting.

As a Walmart cashier, Lisa used her hands/arms constantly to move, scan, and lift merchandise. She used her hands constantly to hold a hand scanner and to type on the cash register. She stood throughout her shift and frequently bent to lift items across the counter and to place items into bags/carts. Again, Lisa Smith could fully perform all required duties of her employment when hired. As such, Alabama law is clear she had no pre-existing condition for purposes of our workers' compensation laws. *See, Oberkor v. Central Alabama Home Health Care Services, Inc.*, 716 So.2d 1267 (Ala.Civ.App.1998).

In discovery, Walmart produced video of Lisa Smith performing her cashier job prior to the accident. As that video indisputably shows, the job was fast-paced, required constant hand movements, and could be fully performed by Lisa before being hurt.²

On September 30, 2012, Lisa suffered a work-related accident while helping a customer. Lisa was working her normal cashier job. She was working in a fast-paced checkout line requiring constant movement.

A customer approached and put a large case of packaged water bottles on the counter. The case was wrapped in cellophane.³ Lisa scanned the case. The customer requested she carry it to his cart. She lifted the heavy case. As she was lifting and

² Following her injury, Lisa made significant efforts to continue working with accommodations. Walmart produced **none** of the videos showing her unsuccessful attempts to continue working.

³ The case was a heavy case of 24-36 bottles.

carrying the case, the cellophane began to pull away. Lisa felt a sudden “pop” in her dominant right hand. Her wrist began hurting.

Video from the day of the accident shows the customer placing the case of water on Lisa’s counter. Video then shows Lisa lifting and carrying the case.⁴ According to the video time stamp, the water lifting event occurred around 4:14pm.⁵ After lifting the water, Lisa continued to try and perform her job. Yet, over the next few minutes, the video shows Lisa now stretching or pumping/squeezing (like a fist) the injured hand several times between movements. Lisa’s hand was hurting but she continued to work for the remaining few minutes until her allowed break time. Less than 15 minutes after the accident (approximately 4:26), Lisa was relieved for a normal allotted break.

Lisa returned from her normal break around 4:47. After returning, Lisa could only continue working a few minutes. Tellingly, in that short period of time a customer approached with an item that was not light (pumpkin). Lisa was unable to lift the item normally with her hands. Instead, the video shows her using her right forearm to hold the object. (approximately 4:55). Beginning at 5:00 (just 13 minutes after returning to the register), the video shows Lisa’s supervisor approach. The video then shows the two talking while Lisa points to her hand. Lisa is given permission to close her register after completing the line of customers and does so (leaving approximately 5:08).⁶

III. LISA SMITH’S LONG COURSE OF MEDICAL TREATMENT INCLUDING MULTIPLE SURGERIES

Following her accident, Walmart first sent Lisa to the company physicians at OHG. When Lisa continued to suffer severe problems from her injury, OHG referred her to The Orthopedic Center (TOC) for specialized care.

At TOC, Dr. Maddox began treating Lisa. Lisa first saw the surgeon November 2, 2012. After examining her, Dr. Maddox “gave the patient [Lisa] a steroid injection into the first dorsal extensor compartment of the right wrist.” (Dep. Dr. Maddox, p.10). The steroid injection did not help. Lisa continued to be unable to use her dominant hand. She continued to require a brace.⁷

Following his November 16, 2012, examination, Dr. Maddox recommended surgery, “a release of the first dorsal extensor compartment.” (Dep. Dr. Maddox, p.11).

⁴ To carry the water around the counter to the customer’s buggy, she moves off the specific register video. Walmart did not produce the other videos.

⁵ Times are based on the video and approximate rather than down to the second.

⁶ This short duration is important as the position normally requires 2 hour time periods between breaks/stoppages.

⁷ Walmart did not produce any of the store (cash register) videos showing Lisa’s effort to continue working with her injury and severe limitations.

On November 29, Dr. Maddox performed surgery at Huntsville Hospital under general anesthesia. **(FIRST SURGERY)**. The surgery included the dorsal extensor compartment release and “an arthroscopy of the carpal/metacarpal joint of her thumb.” (Dep. Dr. Maddox, p.12).

Post-surgery, Lisa continued to suffer intractable hand pain and disability. She also suffered numbness around her thumb. (Dep. Dr. Maddox, p.15). Dr. Maddox performed more steroid injections. (Dep. Dr. Maddox, p.16). The doctor continued to restrict Lisa from any activity over 5 pounds with her hand. (Dep. Dr. Maddox, p.17). Lisa also underwent physical therapy at TOC in an effort to rehabilitate her injured hand.⁸ In follow-up visits, Dr. Maddox continued to inject steroids directly into the hand.

On May 20, 2013, Dr. Maddox again operated on Lisa. **(SECOND SURGERY)**. (Dep. Dr. Maddox, pp.20-21). This surgery was a carpal/metacarpal arthroplasty. (Id.).

Q And can you tell the Court in layman's terms what that procedure was?

A Basically, a bone removed called the trapezium. It's the bone that connects to the thumb; in other words, it's the wrist bone that connects to the thumb. And by removal of that bone, it removes an area where the thumb can develop pain because of pressure at that particular joint.

Q Do you replace it with any hardware?

A It's not replaced, in terms of hardware. What is done is that a drill hole is made at the base of the thumb and a tendon is pulled through that drill hole and secured using a screw. And that helps stabilize the basal joint of the thumb, but the void that's left by the bone removal is not filled.

Q Are there any issues with future mobility or related to that type of procedure where you remove a bone?

A This particular procedure probably, if you look at mobility, sometimes the patients have difficulty regaining their

⁸ On the eve of trial, Walmart moved to strike/exclude the FCE performed at TOC. Yet, TOC is the clinic where the authorized physician practiced and the authorized therapists performed all rehabilitation on Lisa. These professionals were in the best position to treat and assess Lisa. If Walmart truly wanted to force Lisa elsewhere for a non-medical test (FCE), the proper course of action would have been a motion to compel. Walmart did not take that action because there was no other qualified hand therapist to truly evaluate Lisa elsewhere.

retropulsion, not only from the procedure, but also from arthritis itself.

(Dep. Dr. Maddox, pp.21-22). As Dr. Maddox explained, the second surgery involved removing bone integral to thumb function, movement of a tendon, and placement of a screw.

Lisa continued to suffer pain and incapacity following the two hand surgeries. Dr. Maddox continued to treat her and perform injections to reduce inflammation. Likewise, TOC therapists continued to perform physical therapy. (Dep. Dr. Maddox, p.24).

On August 27, 2013, Dr. Maddox discussed the possibility of a fusion surgery with Lisa. (Dep. Dr. Maddox, pp.25-26). At that time, Lisa elected to wait. She hoped to heal and did not immediately want another surgery. In a September 24 follow-up visit, Dr. Maddox again recommended surgery – “[m]y suggestion for was a carpal/metacarpal fusion, which is to make bones grow together at the base of her thumb.” (Dep. Dr. Maddox, pp.27-28).⁹ Lisa agreed to let Dr. Maddox perform the fusion surgery.

On December 5, 2013, Dr. Maddox performed hand fusion surgery on Lisa Smith. **(THIRD SURGERY)**. In this surgery, Dr. Maddox again opened Lisa’s injured hand and cleared scar tissue from the injury and earlier surgeries. (Dep. Dr. Maddox, p.31). Then, Dr. Maddox roughened remaining bones to expose them for fusion. (Id.). After preparing the hand, Dr. Maddox surgically cut and opened an area of Lisa’s pelvis. He cut and removed bone from her pelvis and placed it into her hand. (Id.).

Lisa Smith continued to see Dr. Maddox following the fusion. On December 17, Lisa was still suffering hand pain and problems. Moreover, she was suffering pain in the pelvis where the bone graft was taken. (Dep. Dr. Maddox, p.34). She continued to follow-up with the surgeon for several months.¹⁰

On March 17, 2014, Dr. Maddox performed another surgery on Lisa’s injured hand. **(FOURTH SURGERY)**. This surgery involved removal of pins placed during the prior fusion. Thereafter, Dr. Maddox continued to perform needed treatment on Lisa for both her hand and pelvic problems. This treatment included epidural injections to the hand and pelvis. (Dep. Dr. Maddox, p.39).¹¹

⁹ Surgery was not immediately approved by the insurance carrier. Instead, the carrier had a causation question due an unrelated fall suffered by Lisa around the summer of 2013. When asked, Dr. Maddox responded the unrelated fall would not have created a need for the surgery. (Dep. Dr. Maddox, p.30). After answering the question, surgery was approved.

¹⁰ Walmart wrongly argues this is a scheduled injury case limited to the hand. Walmart ignores Dr. Maddox’s restrictions during treatment that Lisa should sit due pelvic problems and the accommodating stool she needed to do so.

¹¹ Again, medical treatment shows an injury beyond the hand that required care.

In follow-up on April 22, 2014, Dr. Maddox concluded Lisa had reached MMI for her hand injury. He continued in place hand restrictions of no use greater than 10 pounds. Although Lisa had reached a plateau with her hand, her pelvis continued to require treatment. According to Dr. Maddox:

Q. And, as far as her pelvis, was it your opinion that she may have scar tissue issues related to her surgery?

Mr. Russell: Object to the form.

A. Yes.

(Dep. Dr. Maddox, p.40). Following his May 21, 2014, examination, Dr. Maddox specifically prescribed physical therapy for Lisa Smith's injured pelvis. (Dep. Dr. Maddox, pp.40-41).

Q. Did you suggest physical therapy tailored to the pelvis problem she was having?

A. Yes.

(Dep. Dr. Maddox, p.41). At that time, Dr. Maddox also recommended a functional capacity examination. (Dep. Dr. Maddox, p.42).¹²

Lisa subsequently underwent an FCE at TOC, the clinic authorized to perform all her care. In deposition, Dr. Maddox reviewed the FCE recommendations and placed the following restrictions:

...And in the summary on the first page of this document that you have handed me, there is something called FCE results. And in that particular paragraph, it shows limitations of the patient on the right side, which was her operative side.

Q. Okay.

¹² Walmart wrongly seeks to strike the validly performed FCE at TOC. (where all treatment, therapy, and surgeries, was authorized). Walmart wrongly contends Lisa should have performed an FCE at a new clinic chosen by it. Alabama law does not allow Walmart to dictate care or change the previously authorized clinic. Walmart also fails to mention the other facility lacked a dedicated hand specialist and was likely an effort to not fully test Lisa. The time and place for a dispute (if Walmart believed it genuine) was a motion to compel – not the eve of trial. Walmart raised no dispute. In deposition, Dr. Maddox also testified he has worked with the TOC therapists on FCEs and finds them credible. (Dep. Dr. Maddox, p.44).

A. And limits the patient to about 5 pounds occasional, which I think is fairly reasonable for this patient.

(Dep. Dr. Maddox, p.45).

...It does mention she has difficult[y] with squatting and with some kneeling. I take that back. It seems like it was just kneeling. And that was secondary to some of her pain in the pelvis. And, also, yes, it was squatting with some limitations of range of motion. And that would probably be reasonable, too.

(Dep. Dr. Maddox, pp.45-46).¹³

In the case at bar, Lisa Smith suffers painful and permanent injuries with severe restrictions. Her hand and pelvis hurt severely. Her hand is fused in the area of the thumb. The authorized surgeon has clearly indicated the following are reasonable and expected limitations – (1) Lisa’s hand is limited to OCCASIONAL use with a 5 pound weight limit; and, (2) Lisa’ pelvis/hip is limited in squatting, kneeling, and range of motion.

IV. WALMART RAISED TWO DEFENSES CONTRARY TO ALABAMA LAW ON THE EVE OF TRIAL

A. WALMART INCORRECTLY SEEKS TO LIMIT LISA SMITH’S CLAIM TO SCHEDULED MEMBER PROVISIONS OF THE ACT.

In its Motion *in Limine* filed just days ago, Walmart falsely asserts “[t]here is no evidence that the injury to hand and/or wrist has extended to any non-scheduled body parts and/or interfered with their efficiency.” (Walmart motion, Par.4). Walmart’s contention is simply wrong.

It is undisputed Lisa Smith suffered a debilitating hand injury. She tried to keep working but ultimately required FOUR hand surgeries. These surgeries included a fusion. The evidence also overwhelmingly reveals Lisa’s injuries extend beyond her hand. As such, this is not a scheduled member case. What is Alabama law on this issue?

Based on the holding in *Ex parte Jackson, supra*, in order to prove that the effects of the injury to the scheduled member

¹³ Walmart assails the pelvis injury because Dr. Maddox did not place an “impairment” rating. Dr. Maddox did not give an arbitrary impairment rating. That is not an issue. Dr. Maddox found the pelvis injured and agreed with functional restrictions. If an area outside the initial scheduled member is impaired in efficiency, the case is outside scheduled member provisions.

‘extend to other parts of the body and interfere with their efficiency,’ the employee does not have to prove that the effects actually cause a permanent physical injury to nonscheduled parts of the body. Rather, the employee must prove that the injury to the scheduled member causes pain or other symptoms that render the nonscheduled parts of the body less efficient.

American Cast Iron Pipe Co. v. Blackmon, 152 So.2d 361, 365 (Ala.Civ.App. 2014). Lisa Smith must simply show the hand injury resulted in symptoms elsewhere that reduced the efficiency of the nonscheduled (hip/pelvis) body part. That’s all. Here, the evidence goes far beyond that requirement.

Alabama law is long-settled on this issue. In *Blackmon*, the Court reiterated the accepted test:

In *Ex parte Drummond Co.*, 837 So.2d 831, 834 (Ala.2002), our supreme court restated the test for determining when an injury to a scheduled member may be treated as a nonscheduled injury to the body as a whole: ‘ “[I]f the effects of the loss of the member extend to other parts of the body and interfere with their efficiency, the schedule allowance for the lost member is not exclusive.” ’ (Quoting 4 Lex K. Larson, *Larson’s Workers’ Compensation Law* § 87.02 (2001).) ‘To “interfere” means “to interpose in a way that hinders or impedes.” See *Merriam–Webster’s Collegiate Dictionary* 652 (11th ed.2003). “Efficiency” refers to effective functioning. Id. at 397.’ *Boise Cascade Corp. v. Jackson*, 997 So.2d 1042, 1045 (Ala.Civ.App.2008).

Blackmon, supra.

Here, the evidence is clear and undisputed. Lisa Smith underwent four hand surgeries. One of those surgeries involved the removal of a significant piece of bone from her pelvis/hip. If Lisa suffers any problems in her hip as a result of this surgery which interfere, at all, with its efficiency then the scheduled member provisions do NOT apply.

What is the evidence here? The following is a short list.

1. Dr. Maddox specifically opined Lisa has scar tissue in her pelvis/hip from the fusion surgery. (Dep. Dr. Maddox, p. 40);

2. Dr. Maddox specifically opined permanent pelvic/hip restrictions concerning squatting and kneeling were reasonable. (Dep. Dr. Maddox, pp.45-46);
3. Dr. Maddox specifically opined Lisa suffers a loss of mobility in her pelvis/hip due the surgery. (Dep. Dr. Maddox, pp.45-46);
4. During the course of authorized treatment, Dr. Maddox performed steroid injections on Lisa's injured pelvis/hip. (Dep. Dr. Maddox, p.39);
5. During the course of authorized treatment, Dr. Maddox specifically ordered physical therapy for Lisa's injured pelvis/hip. (Dep. Dr. Maddox, pp.40-41);
6. During the course of authorized treatment while Lisa tried to continue working prior to MMI, Dr. Maddox issued temporary restrictions prohibiting Lisa from standing continuously during a long shift;
7. During her efforts to continue working post-injury, Lisa needed a stool due her pelvic/hip injury so she did not have to stand throughout her shift;
8. Lisa continues to suffer substantial pain in her hip/pelvis in addition to the physical scar tissue, loss of function, and reduced mobility¹⁴; and,
9. Walmart post-injury surveillance video shows Lisa walking with an altered gait (at times her balance appears unsteady).

Walmart should not be heard to argue the case simply as a "pain exception" case. The law differs significantly for cases where pain is the only factor claimed as a limitation outside the scheduled member. This case involves actual physical injury (scar tissue) and actual physical loss of mobility resulting in limitations. And, the evidence is undisputed Lisa suffers injury which extends outside her hand and to her hip/pelvis.¹⁵¹⁶

¹⁴ Although Lisa's hip/pelvis pain is severe, the undersigned has focused on actual physical problems (like scar tissue) and physical limitations (like loss in mobility). This is an important distinction as this is not a simple pain case requiring scrutiny of pain levels.

¹⁵ Walmart cannot argue a lack of injury simply because an impairment or impairment rating was not placed on Lisa's injured pelvis/hip. The *AMA Guides* used for impairment ratings is not exhaustive and does not cover many conditions.

¹⁶ Lisa Smith suffered substantial depression/anxiety requiring an increase in her medications for pre-existing bipolar disorder. This also presents a reason why the scheduled member provisions are inapplicable. However, Walmart has not raised this issue at present.

In the case at bar, the scheduled member provisions are not exclusive. Lisa Smith's injury clearly falls within the whole body provisions allowing an evaluation of her true disability.

B. WALMART INCORRECTLY SEEKS TO STRIKE A VALID FUNCTIONAL CAPACITY EVALUATION (FCE).

In its recent motions, Walmart generally assails the TOC FCE with misplaced arguments the test considered other body parts or was not ordered by Dr. Maddox. These arguments are misplaced.

First, during the long course of this case, Walmart has not brought any dispute concerning FCEs before this Court. It is undisputed Lisa Smith underwent an FCE at the clinic of her one and only authorized surgeon. If Walmart truly contends she should have gone elsewhere (outside the purview of the doctor), then it should have brought the dispute before the Court with a motion to compel. It did not because Alabama law does not support its position.

As background, an injured worker can refuse a FCE where the test is "not expected to improve the worker's condition" and would simply "do no more than provide additional evidence regarding the workers' ability to perform certain tasks." *See, Musgrove v. Malley*, 912 So.2d 227, 248 (Ala.Civ.App.2003). In other words, Lisa would be completely justified in refusing to attend any FCE in this case. After all, any FCE here was simply a mechanism to test physical tasks and not provide treatment insight.

Yet, that is not what Lisa Smith did. She did not refuse an FCE. Lisa underwent an FCE at the authorized physician's clinic which was also the same clinic where she had undergone all her physical therapy. And, in deposition, the authorized surgeon (1) discussed the FCE's validity; and, (2) expressly opined which restrictions were applicable to Lisa's two injured areas of her hand/wrist and hip/pelvis.

What Walmart really wanted was to remove Lisa's testing from the qualified and authorized therapists at TOC who would fully test all her injuries. Walmart wanted a different therapy practice (1) which actually lacked a hand specialist; and, (2) where it could limit testing. If Walmart believed otherwise, the proper course of action would have been to raise the issue on a motion to compel. Walmart's effort on the eve of trial to eliminate the FCE conducted by its authorized therapists, is due to be denied.

V. LISA SMITH IS PERMANENTLY AND TOTALLY DISABLED UNDER ALABAMA'S WORKERS' COMPENSATION ACT.

John McKinney, a vocational counselor, evaluated Lisa Smith. After interviewing Lisa, testing her, examining the labor market and evaluating the impact of her severe physical limitations due the injury, Mr. McKinney concluded:

Ms. Smith sustained a significant injury to her right, dominant upper extremity during the course of her employment with Wal-Mart in 2012. Dr. Maddox has performed four different operative procedures since that time, including a fusion of the CMC joint requiring bone grafting from the pelvic area. Despite the procedures performed, she continues to suffer marked pain and extensive functional limitations involving the affected areas. Further, she has experienced increased psychiatric concerns, at least in part to her chronic pain, functional limitations, inability to maintain employment, and associated concerns from her work-related injury.

A Functional Capacities Evaluation was performed in February, 2015, which recommended a limited Sedentary exertional demand level with marked restrictions involving the right, dominant upper extremity. Dr. Maddox concurred with those residual limitations during depositions testimony.

Based on the physical limitations alone, Ms. Smith would be unable to return to her previous employment and has no transferable job skills to accommodating occupations. Overall, she has lost access to more than 95% of the employment opportunities previously available to her in the local labor market.

Secondary to a combination of her severe loss of access to job opportunities, chronic pain, psychological distress, extended absence from the labor market, obvious appearance of having a marked physical disability, and other negative employability factors, there is no reasonable expectation she could acquire, perform, or consistently maintain any form of full-time gainful employment in the competitive labor market. Therefore, she is considered to be 100% vocationally disabled from any and all competitive occupations within the regional or national occupational bases.

(Report of John McKinney).¹⁷ The report and opinions of McKinney were disclosed to Walmart within the applicable deadlines. Thereafter, Lisa Smith voluntarily appeared for an interview and evaluation by Walmart's vocational evaluator. After evaluating Lisa, Walmart chose not to produce a report and not to designate its evaluator as a witness. Thus, the properly disclosed opinions of John McKinney are not disputed by any other vocational evidence.

It is clear from the evidence Lisa Smith is permanently and totally disabled. According to well-established law, the test for total disability is the inability to perform one's trade, and if so unable, then the inability to obtain other reasonably gainful employment. Plaintiff is not required to be completely helpless or to suffer total physical disability. *Asplundh Tree Expert Company, Inc. v. Latham*, 656 So. 2d 839 (Ala.Civ.App. 1995); *Whitsett v. BAMSI, Inc.*, 652 So. 2d 287 (Ala.Civ.App. 1994). The Court stated in the *Whitsett* case as follows:

Our appellate courts have consistently held that "permanent total disability" does not mean absolute helplessness or entire physical disability, but, instead, means the inability to perform one's trade or to obtain reasonably gainful employment. *Wright v. Goodyear Tire & Rubber Company*, 591 So. 2d 518 (Ala.Civ.App. 1991); *W.Y. Shugart and Sons, Inc. v. Cox*, 578 So. 2d 1332 (Ala.Civ.App. 1990). We hold that this well-established principle of law was not changed by the new Act.

652 So. 2d at 294. Based on all the evidence, the undersigned respectfully contends Lisa Smith is permanently and totally vocationally disabled as a result of her work-related accident and injuries.

WHEREFORE, PREMISES CONSIDERED, plaintiff requests this Honorable Court assess workers' compensation benefits for a permanent and total disability.

Respectfully submitted,

JEFFREY G. BLACKWELL (BLA070)
Attorney for Plaintiff

¹⁷ Incredibly, Walmart challenges McKinney's disclosure. The intention to use McKinney was disclosed months ago. After Dr. Maddox testified on restrictions, McKinney completed his report. The report was disclosed within Court deadlines. McKinney was then made available for deposition. Walmart scheduled but later cancelled it with no request for alternative dates.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon counsel of record on this the 26th day of May, 2015, by hand delivery in open Court.

P. Vaughan Russell, Jr.
WEBSTER HENRY
2 Perimeter Park South
Suite 445 E
Birmingham, Alabama 35243

OF COUNSEL