IN THE SUPREME COURT OF MISSISSIPPI

UNION CARBIDE CORPORATION	**PETITIONER**
v.	**No. 2011-M-00874**
THOMAS BROWN, Jr.	**RESPONDENT**

SUPPLEMENTAL BRIEF IN OPPOSITION OF RESPONDENT THOMAS BROWN, Jr. to UNION CARBIDE CORPORATION'S PETITION FOR DISQUALIFICATION OF TRIAL JUDGE PURSUANT TO MRAP 48B

On Petition for Interlocutory Appeal from the
Circuit Court of Smith County, Miss.
No. 2006-196

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THOMAS BROWN, Jr. **RESPONDENT**

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Miss. R. App. P. 28(a)(1), the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Union Carbide Corporation, *Petitioner-Defendant*
2. Chevron Phillips Chemical Company LP, *Petitioner-Defendant*
3. Thomas C. Brown, Jr., *Respondent-Plaintiff*
4. Honorable Eddie H. Bowen, *Smith County Circuit Court*
5. Marcy B. Croft, Laura D. Goodson, of Forman Perry Watkins Krutz & Tardy, LLP, *Trial & Appellate Counsel for Union Carbide*
6. Michael G. Terry, Kevin Jordan, *Trial Counsel for Union Carbide*
7. Alex Cosculluela, Jeffrey Trotter, Bernard H. Booth, IV, of Adams and Reese, LLP, *Trial & Appellate Counsel for Chevron Phillips Chemical Company LP*
8. Michael Terry, of Hartline, Dacus, Barger, Dreyer & Kern LLP, *Trial Counsel for Defendants*
9. Kevin Jordan, of Baker Botts, L.L.P., *Trial Counsel for Defendants*
10. G. David Garner, *Trial Counsel for Defendants*
11. David Neil McCarty, *Appellate Counsel for Thomas Brown, Jr.*
12. D. Allen Hossley, Dawn M. Smith, Raymond J. Turcotte, of Hossley Embry, *Appellate & Trial Counsel for Thomas Brown, Jr.*
13. Gregory N. Jones, Trial Counsel *for Thomas Brown, Jr.*
14. S. Robert Hammond, Jr., *Trial Counsel for Thomas Brown, Jr.*
15. Eugene Tullos, *Trial Counsel for Thomas Brown, Jr.*

So CERTIFIED, this the 1st day of August, 2011.

Respectfully submitted,

____

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Restatement of the Issues Presented for Review

Must a trial judge recuse from a case when his family members once asserted a similar claim twenty years earlier?

Statement Regarding Oral Argument

Pursuant to MRAP 34(b), oral argument would greatly assist the Court in resolving this case. Union Carbide seeks to create a wholly new rule of recusal in Mississippi, one not authorized by the Constitution of 1890, state statute, or the Canons of Judicial Conduct. The Court should allow oral argument to fully consider the radical proposal to disqualify a judge because his parents once were involved in a similar lawsuit decades before.

Facts and Procedural History

This case involves a suit by a Brookhaven resident, Mr. Thomas Brown, Jr., against two oil companies, Union Carbide Corporation and Conoco Phillips.[1] Mr. Brown alleged that the two companies carelessly exposed him to asbestos while he worked in oilfields. On a daily basis, Mr. Brown would dump 50 to 100 bags of the companies' products, which contained over 90% crushed raw asbestos. *See* Respondent's Exhibit A, at 808:7-8.[2]

Mr. Brown started in the oilfields after he dropped out of high school at age 16. R.E. 2 at 905:2-19. He continued to support his family until he developed severe lung problems. Now 49 years old, Mr. Brown will be on oxygen for the rest of his life because of asbestos damage to his lungs. R.E. 2 at 897:22-898:8.

At trial, Union Carbide denied that Mr. Brown had been exposed to their products, and instead argued that his obesity was the cause of his breathing problems. R.E. 2 at 377:8-12; 400:10-15. It also claimed he did not deserve full protection under Mississippi's products

[1] Throughout this brief the defendants may be collectively referred to as "Union Carbide."

[2] Respondent's Exhibits will be referred as "R.E."

liability statute because Mr. Brown testified he did not read their warnings. R.E. 2 2185:17-23; 2186:23-2187:1. Mr. Brown could not read the warnings on the packaged asbestos because he cannot read or write. R.E. 2 at 810:18-23.

The jury found in favor of Mr. Brown. R.E. 2 at 3281:3-3284:22. Afterwards, Union Carbide challenged the jury's verdict for a peculiar reason—that the trial itself was tainted because Judge Bowen's parents had once had asbestos claims against another company, decades before.

What Judge Bowen Knew about His Family and When He Knew It

This case was set for trial in Smith County, in the heart of the Thirteenth Circuit Court District. The case had been fought for seven years before trial, with a docket at the courthouse reaching almost 30 pages. R.E. 1. On the first day of trial the parties began jury selection and Judge Eddie H. Bowen presided over the process. Judge Bowen had allowed a jury questionnaire and summoned a large venire at defendants' request. R.E. 4; R.E. 3 at 4:2-15:15; R.E. 2 at 12:17-25, 13:13, 23-16:4. With the information in the questionnaires, which included partial Social Security numbers and family members' names, Union Carbide's large trial team accessed its immense data base on asbestos claims to collect data for cause challenges. R.E. 5.[3] Union Carbide was then allowed to use the information to question certain individuals on the venire outside of the presence of the other members. R.E. 2 at 42:6-43:5, 44:15-45:4; 178:1-337:7; *see also* R.E. 5 par. 4-6; R.E. 6.

After extensive questioning was permitted by Judge Bowen, Union Carbide struck or attempted to strike *all* potential jurors who had filed claims for asbestos exposure, or even had family members with possible claims. R.E. 2 at 44:15-45:4; 522:4-548:20.

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[3] The Juror Questionnaire attached to R.E. 4, the Special Master's Report & Recommendation, contained 28 questions (many with sub-parts) crammed into the Court's 2-page restriction.

At that point, according to the Judge, he "remembered that his father had gone to the Mississippi Gulf Coast in the late 1980s and had x-rays made regarding asbestos exposure," and he told the lawyers for all parties. R.E. 6 par. 4. Judge Bowen also remembered that he talked about his father and his potential asbestos exposure to the lawyers several times. *Id.*

There was no hidden information: "This was all the information this Judge ever had regarding his father's possible claim" for asbestos exposure. Judge Bowen also said that he didn't know if his mother ever had an asbestos claim, and that she'd died a decade before. *Id.*

One of Mr. Brown' s lawyers also heard these comments, recalling that "Judge Bowen stated that his father had worked down on the Mississippi Gulf Coast in a shipyard and may have been exposed to asbestos and tested for asbestos exposure." R.E. 5 at par. 8.

Neither side requested that Judge Bowen recuse from the case, or even indicated that anything unusual had happened. A jury was empanelled, and the case was tried.

The Events Leading up to Trial, the Trial Itself, and the Result

Mr. Brown's journey towards trial was long and hard fought. He filed suit in 2004, and the case was severed and transferred to Smith County in 2006. Judge Robert Evans presided over the case until he passed away in 2010. In September of 2010 Judge Bowen was appointed to fill the vacancy on the court, and he assumed responsibility for the case.

During the trial Judge Bowen ruled against both sides. Before trial, he granted summary judgment greatly limiting Mr. Brown's damages and claims. R.E. 7. Mr. Brown argued that his expected future medical expenses exceeded $450,000, but Judge Bowen reduced them by hundreds of thousands of dollars, down to $45,000. R.E. 3 at 82:10-84:10; R.E. 7. The judge also limited Mr. Brown's evidence at trial in over thirty ways, repeatedly ruling in favor of Union Carbide. R.E. 8.

On April 11, 2011, the parties convened at the courthouse in Raleigh to begin trial preparation. Even before trial even began, the court granted a Union Carbide's demand for a mistrial. R.E. 2 at 9:11-15, 9:16-11:13, 16:17-22. In the midst of a packed courtroom, one of Mr. Brown's attorneys had been approached by a juror about moving a chair, which had been placed in the way of his assigned seat during a lunch break. R.E. 2 at 6:12-7:24. The lawyer moved the chair for the juror. R.E. 2 at 7:7-16.

Union Carbide protested that this was an improper conversation with a possible juror, and insisted on a mistrial. R.E. 2 at 8:9-9:15. The juror told the judge that he had just asked about the chair, and that he had not asked about the case. R.E. 2 at 7:7-16. Even so, the court granted a mistrial, and excused the entire jury panel at Union Carbide's request. R.E. 2 at 9:22-24, 11:10-12. The jury selection process was then restarted, with the trial court sending out *hundreds* of new jury summons. R.E. 2 at 12:15-13:13.

Putting a jury together after the mistrial took over another week. R.E. 2 at 569:1-12. The trial court again allowed Union Carbide to scour the personal histories of *all* the new potential jurors, asking whether their brothers or cousins or other family members had *ever* had a claim against an asbestos company. TT, Vol. IV at 51:19-68:2; R.E 5. The information within the questionnaires also allowed Union Carbide to find out *within hours* about claims the potential jurors did not disclose. R.E. 5 par. 4. Specifically, Union Carbide compiled lists with individuals who had the same last name of the potential jurors who were within their asbestos-claim data base. R.E. 5 at par. 5.

While Union Carbide and Conoco Phillips had six lead attorneys at trial, they also had about ten more specialists who comprised their trial research team. This team initially set up a make-shift office in the grand jury room doing research on all the potential jurors. R.E. 5 at par. 3. The trial court then let Defendants strike 28 jurors based on their answers to the

questionnaires, Defendants' trial research team, and individual questioning by the Court. R.E. 2 at 42:9-15, 44:15-20, 47:21-25; 158:14-23.

Once Union Carbide finally agreed on a jury—after a week of arguing and going over each juror's personal life—the trial finally started. R.E. 2 at 584:21. The trial judge sustained many of Union Carbide's objections to evidence, but after seven years Mr. Brown's case finally made it to the jury. R.E. 8.

The jury ruled that Mr. Brown had been harmed by Union Carbide's actions, and awarded him damages. R.E. 2 at 3281:3-3284:22.

The Full Story Behind Judge Bowen's Family and Its Connection with Union Carbide

After Mr. Brown's victory at trial, Union Carbide filed a series of motions to attack the jury's verdict. It also filed a motion to disqualify Judge Bowen, arguing that he should have never been on the case. The motion was not about Judge Bowen personally, but about his family.

It turns out that in 1990, twenty-one years before Thomas Brown's trial, Judge Bowen's father had a lawsuit involving an asbestos claim. The lawsuit was not against Union Carbide or Conoco Phillips, the two defendants in Mr. Brown's case. In 1990, Mr. and Mrs. Bowen signed a boilerplate release in favor of Union Carbide, for which they received one American dollar. R.E. 9.

In exchange for that dollar, Mr. and Mrs. Bowen said they would not pursue any claims against Union Carbide for asbestos exposure.

Because of that dollar, tendered twenty one years ago to Judge Bowen's parents, Union Carbide said the trial was corrupted by bias and impartiality.

Judge Bowen ruled that he did not know about his parents' suit, or the one dollar they received, and that he was not biased.[4] Union Carbide appealed, arguing that he was so biased they could not have received a fair trial.

Standard of Review

"The Supreme Court will not order recusal unless the decision of the trial judge is found to be an abuse of discretion." MRAP 48B. "The decision to recuse or not to recuse is one left to the sound discretion of the trial judge . . . ." *Tubwell v. Grant*, 760 So.2d 687, 689 (Miss. 2000) (internal quotations and citation omitted); *see Hunter v. State*, 684 So.2d 625, 630 (Miss. 1996) ("When a judge is not disqualified under the constitutional or statutory provisions the propriety of his or her sitting is a question to be decided by the judge and is subject to review only in case of manifest abuse of discretion") (internal citations and quotations omitted).

Further, the Supreme Court "presumes that a trial judge is qualified and unbiased, and this presumption may only be overcome by evidence which produces a reasonable doubt about the validity of the presumption." *Id*. (internal quotations and citation omitted).

Argument

For four reasons Union Carbide's request to create a new rule of recusal must be denied.

First, because the request for recusal was untimely presented to the trial court, and therefore waived.

Second, the request for recusal must be denied because Canon 3E does not require recusal when a judge's family member once had a similar claim decades before.

Third, the request to disqualify Judge Bowen must be denied because he is presumed to be impartial and unbiased, and his rulings show that he acted without prejudice, and therefore Union Carbide has failed to overcome the presumption of integrity.

[4] Judge Bowen's order was issued days after Union Carbide had filed their Petition with this Court.

Last, this Court must deny Union Carbide's request to create a new rule of recusal because it would invert our trial court's presumption of integrity, and ensnare our trial courts in near-endless litigation based on the lives and actions of their family members.

I. Union Carbide Waived its Right to Seek Recusal.

Because Union Carbide failed to request that Judge Bowen recuse himself prior to trial, it is now procedurally barred from asserting that he should not have heard this [multi-day] trial. The Mississippi Constitution and a century of precedent forbid an untimely recusal motion.

A. *The History of the Recusal Waiver Rule.*

The Recusal Waiver Rule is enshrined in the state constitution. The Constitution of 1890 provides: "No judge of any court shall preside on the trial of any cause where the parties or either of them shall be connected with him by affinity or consanguinity, or where he may be interested in the same, *except by the consent of the judge and of the parties*." Miss. Const. 1890 art. 6, Section 165 (emphasis added).[5]

The Supreme Court "has consistently held that failing to object to a trial judge's appearance in a case can result in a waiver." *Tubwell v. Grant*, 760 So.2d 687, 689 (Miss. 2000). Indeed, there is a longstanding hostility to late-filed motions to recuse, as the "Court has been quick to point out that it will not allow a party to take his chances with a judge about whom he knows of grounds for recusal and then, after he loses, file his motion." *Id*. Accordingly, "[w]here the party knew of the grounds for the motion or with the exercise of reasonable diligence may have discovered those grounds, and where that party does not move timely prior to trial, the point will be deemed waived." *Id*.

[5] Section 171 provides identical language for cases in justice court: "no justice court judge shall preside at the trial of any cause where he may be interested, or the parties or either of them shall be connected with him by affinity or consanguinity, except by the consent of the justice court judge and of the parties."

In other words, if a litigant knew or should have known about an alleged basis for recusal, it should raise it immediately. Waiting until after trial and an adverse result establishes waiver through consent.

After the adoption of our modern Constitution in 1890, and throughout a century of jurisprudence, the Supreme Court has found that parties could waive their objection to a trial judge. This is true *even if* the basis for recusal was based on a per se disqualification due to blood relation or a financial interest in the case. As Professor Jeffrey Jackson has written, "[a] party who with knowledge of grounds for judicial recusal, fails to file a timely motion may waive any error based on the failure of the judge to recuse." MS Prac. Encyclopedia MS Law Judicial Recusal § 10. Further, "[a] party effectively acquiesces to a judge hearing the case when he or she brings up the issue of disqualification only after receiving an adverse ruling." 46 Am. Jur. 2d Judges § 211 (citing Mississippi law).

In 1910, the Supreme Court first determined that failing to raise a motion for recusal resulted in "consent" by waiver under Section 165 of the Constitution. *Nimocks v. McGehee*, 97 Miss. 321, 52 So. 626, 626-27 (Miss. 1910).[6] In that case, a justice of the peace (now called justice court judge) had ruled on a case where he was a "stockholder in, and director and president of, the [defendant] corporation," and therefore "was for all practical purposes a party to the suit." *Id*. at 626. "Besides his pecuniary interest as stockholder, he was the managing head of the corporation." *Id*. As a result, the Supreme Court determined that under the clear dictates of the Constitution, he "was disqualified under this constitutional provision" as he was "interested in the same." *Id*. at 626-27.

However, that was not the end of the inquiry in the *Nimocks* case. "Appellant, not having made objection to the justice of the peace, on account of his disqualification during the pendency

[6] Pinpoint citations to pre-1967 cases found in the Mississippi Reports will only be provided to the Southern Reporter.

of the suit on which the judgment was rendered, is deemed to have waived such disqualification, even though unknown to him at the time." *Id*. at 627. "At his peril he was required to exercise the necessary diligence to ascertain such disqualification, and, not having done so, he is precluded from attacking the judgment collaterally on that ground." *Id*. For "[u]nder the Constitution the disqualification *may be waived*, *and such waiver may be express or implied*, and under the facts of this case it is implied." *Id*. (emphasis added). The *Nimocks* Court therefore denied the motion to recuse as untimely filed, decrying "the evil results" of allowing the judgment to be attacked in this way. *Id*.

A few years after the *Nimocks* decision in 1910, the Recusal Waiver Rule came before the Court again—this time with a Supreme Court Justice in the mix. *Shireman v. Wildberger*, 125 Miss. 499, 87 So. 657, 658 (Miss. 1921). A judgment had been affirmed by the Supreme Court, and afterwards a motion to vacate was filed arguing that one of the attorneys for the appellee "is a son of Judge Sam C. Cook of this court, a member of the division which rendered the judgment of affirmance," and that as a result they were seeking "the disqualification of Judge Sam C. Cook and asking that the judgment be vacated." *Id*. at 658. "Prior to the submission of the case and for some time past" Justice Cook had informed the Court that his son was a practicing attorney, "and his relation was known to the members of the court." *Id*.

The *Shireman* Court then quoted the state Constitution and noted that even when disqualification was mandated due to blood relation, or "consanguinity," the parties could still waive recusal. *Id*. The Court was not pleased with the request to vacate the judgment: "The record shows that the attorneys now making the motion knew as much about the matter prior to the argument and submission of the cause as they know now." *Id*. Nonetheless, "with the full facts disclosed to them they elected to proceed before this division of the court and take their chances on winning or losing their suit." *Id*.

The Supreme Court ruled that "[i]t ill becomes counsel to take chances and after the judgment is rendered to then for the first time undertake to raise disqualification where they knew, if there was any disqualification at all, that it existed prior to the argument and submission of the case." *Id*. at 658-59. For "such a proceeding is utterly unfair to a judge and to the opposing litigant, and where no suggestion of disqualification is made the party will not be heard after judgment to raise the question, unless he shows that at that time he had no knowledge thereof." *Id*. at 659. Denying the motion as "utterly without merit," the *Shireman* Court further emphasized the strength of the Recusal Waiver Rule.

For the next seventy years, the Rule was applied regularly and without change, specifically finding that the Constitution allowed the waiver of recusal or even mandatory disqualification of a trial judge. *See Bryant v. State*, 146 Miss. 533, 112 So. 675, 676 (Miss. 1927) (appellant consented "as he had the right to do . . . to the trial of the charge against him before the justice of the peace who tried him, notwithstanding the alleged disqualification of the justice of the peace"); *McCune v. Commercial Pub. Co*., 148 Miss. 164, 114 So. 268, 269 (Miss. 1927) (motion to recuse "was made after the case had been heard by the chancellor," and would be denied despite trial court's relationship to one of the parties "because the motion to recuse should have been filed before the case was heard by the chancellor, or as soon as counsel knew of the fact of relationship to one of the parties"); *Brown v. State*, 149 Miss. 219, 115 So. 436, 437 (Miss. 1928) ("under section 165 of the Constitution, a party may waive a disqualification of a judge and proceed to trial before him; and, if he so proceeds without objection, such procedure constitutes a waiver"); *City of Biloxi v. Cawley*, 332 So.2d 749, 750 (Miss. 1976) (motion to recuse would be denied where trial court made allegedly biased statement, but "[t]he statement attributed to the chancellor was made before the case was tried but the [party] did not file a motion suggesting that he recuse himself until after the final decree was entered," and therefore

the party was "bound by its election").

In 1990, the Supreme Court for the first time elaborated on the intricacies of the Recusal Waiver Rule. Before the Court was a motion to rehear the case filed after its deeply divided opinion on riparian rights in *Ryals v. Pigott*, 580 So.2d 1140 (Miss. 1990). The motion for rehearing asked whether Justice Edwin Pittman should have sat on the case, since he was previously the state's Attorney General, and that Office had appeared as amicus curie in the case. *Id*. at 1174-75.[7]

The Court did not welcome the argument, as "[a]t the very least, parties are expected to know the Court's composition and reveal any information which might warrant a justice's recusal from the case." *Id*. at 1175. Invoking the Recusal Waiver Rule, the Court held that "[a] party who fails, through wilful ignorance or otherwise, to timely apprise itself of such critical information waives the right to have the issue addressed on the merits." *Id*. This was a "principle of well-entrenched law." *Id*.

In a footnote, the six-person majority explained how the Recusal Waiver Rule should work. *Id*. at 1175 n.1.[8] The Court explained that "[w]hether a party's action or inaction constitutes a waiver of the right to request recusal—is an issue which must be resolved on an *ad hoc* basis." *Id*. at 1175. n.1. Although the Constitution of 1890 was silent on the issue, the 1990 *Ryals* Court speculated on four factors which could guide the determination:

> For example: (1) Did the party know, but fail to timely reveal, purported facts which might lead to a judge's recusal? (2) Assuming the party did not actually know the facts, should the party have known? (3) Does good cause exist for the party's failure to timely reveal the facts, or (4) Are the facts indicative of some other reason—an unacceptable reason—for the untimely revelation (*e.g.,* untimely revelation due to employment of dilatory tactics)?

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[7] The section entitled "On Denial of Petition for Rehearing" begins at page 1174.

[8] While the underlying *Ryals* case resulted in a 5-4 divide, the vote to deny the Petition on the basis of recusal was 6-1, with two justices recused. *Id*. at 1177-78.

Id. at 1175 n.1.

Because the party seeking rehearing "decided to 'rest on their oars' until *after* this Court rendered its judgment," the Court determined that "the issue is deemed untimely and therefore waived." *Id*. at 1177 (emphasis in original).[9]

After *Ryals*, the Recusal Waiver Rule continued to hold steady in Mississippi precedent. *See Buchanan v. Buchanan*, 587 So.2d 892, 897 (Miss. 1991) ("on remand, the Court is directed to inquire carefully whether [the party] may have waited too late to assert" recusal, as recusal motion was not filed "until after the merits had been decided adversely to him"); *Tubwell*, 760 So.2d at 689 (when a party "failed to object or file a motion asking for [the trial judge] to recuse himself," it "procedurally bars [him] from arguing the issue," as the Court "will not allow a party to take his chances with a judge about whom he knows of grounds for recusal and then, after he loses, file his motion"); *Wilbanks v. Gray*, 795 So.2d 541, 547 (Miss. Ct. App. 2001) (where "motion for recusal was made after the appellants received an adverse ruling," it would be denied, as "their motion for recusal should have been filed at the beginning of the action rather than after receipt of an adverse ruling"); *Watts v. Watts*, 854 So.2d 11, 17 (Miss. Ct. App. 2003) (party did not seek timely recusal of the trial court and since she "brought up the issue of recusal only after the case was decided against her, we find she effectively acquiesced to the judge hearing her case").

B. The Recusal Waiver Rule Serves Important Public Policy.

Throughout the past century of application, the Supreme Court has repeatedly described the vital policy supporting the Recusal Waiver Rule.

[9] The *Ryals* Court hinted that even if they had not found waiver then the request would have been denied as a matter of course. *Id*. at 1177 n.2 (citing Turner v. State, 573 So.2d 657, 678 (Miss. 1990), where the party had "fail[ed] to overcome the presumption that Justice Pittman is qualified and unbiased").

There are two major reasons why the Rule continues to operate: first, to guard against improper trial tactics; second, to conserve the massive time and financial costs of trial.

In 1990, the *Ryals* Court condemned the use of deceitful tactics to pursue after-trial recusal. 580 So.2d at 1175. It held that the Rule was "designed particularly to nullify the 'rewards' of 'sandbagging' through employment of dilatory tactics." *Id*. "[A] litigant cannot experiment with the judge and, upon encountering an adverse ruling, file an affidavit of prejudice." *Id*. at 1176 (internal citation and quotation omitted). Quoting the 1927 case of *McCune*, the Court held that "Courts are not to be trifled with in such matters," since abandoning the Rule "might result in an unfair advantage being taken in a case where an attorney, who moves against a judge, might wait until after he could ascertain whether the decision would be for or against him; and, if against him, he would file a motion to recuse, but if for him, he would accept it without complaint." *Id*. at 1176 (internal quotation and citation omitted).

In addition to the dilemma of improper tactics, there was the practical reality that "Judges do not have any desire to sit in cases where they are disqualified for any reason, and it is only fair that notice be given the judge of any such disqualification before he hears the case so that he may recuse himself." *Id*. (internal quotation and citation omitted); *see also Cawley*, 332 So.2d at 750.

Practically speaking, this bars litigants from losing a case and then attempting a "do-over" to refine their arguments. This exhaustion technique destroys the resources of the other party and lays waste to the increasingly finite and scant resources of the public by consuming a place on the docket, the time of the venire, and months of court time in motion hearings, trial, and deliberation. In 2000, the Court held that it "will not allow a party to take his chances with a judge about whom he knows of grounds for recusal and then, after he loses, file his motion." *Tubwell*, 760 So.2d at 689. The costs are simply too great.

C. The Recusal Waiver Rule Applies to This Case.

The well-settled Recusal Waiver Rule applies to this case. Each of the four non-binding factors as set out in *Ryals* will be examined. First, Union Carbide failed to timely pursue its request for the trial court's recusal, even though the underlying facts were known or should have been known. Second, Union Carbide has long known of Judge Bowen's role as the trial judge in this case, and failed to seek his recusal.

Third, Union Carbide does not have good cause for only now requesting recusal. Last, the facts surrounding this request for recusal are indicative of Union Carbide's improper dilatory tactics.

1. Union Carbide Failed to Timely Pursue Recusal.

Because Union Carbide did not timely pursue recusal, it has waived its argument that Judge Bowen should not have presided over this case.

Judge Bowen was appointed to fulfill his predecessor's role in September of 2010—almost a *year* before this trial. It was amply demonstrated during pretrial that Union Carbide and its Research Squad could procure intimate private data about nearly any person within 24 hours—as it did for *hundreds* of potential jurors during the jury selection process.

Not only did Union Carbide know for several months that Judge Bowen would preside over this trial, he disclosed what little information he knew about his father's asbestos exposure before a jury was empanelled and days before opening statements. As will be amply discussed below, Mississippi law is clear that a judge does not have to recuse simply because his or her parents once had a parallel claim decades before. But if Union Carbide thought this was a valid basis for recusal, it should have raised at *the moment* Judge Bowen disclosed that he thought his father had asbestos exposure—before

the days-long trial, before the massive expense borne by the parties in trying the case, before hundreds of Smith County citizens were brought to the courthouse and their personal histories scoured by Union Carbide. By failing to raise the recusal then, they have waived the right to raise this argument now.

Even though Union Carbide knew Judge Bowen would preside over this trial months before it occurred, and knew that Judge Bowen's father might have had asbestos exposure, it waited until after trial to request his recusal. This constitutes waiver.

Union Carbide, in their supplemental brief, now tries to portray the trial court as intentionally concealing information. Yet in their original petition they set out the facts of what Judge Bowen disclosed as follows:

> On or about April 27, 2011, Judge Bowen made a casual, off-the-record comment in chambers suggesting that his own father may have been exposed to asbestos during his employment at Ingalls Shipbuilding in Pascagoula, Mississippi. (UCC's Petition for Disqualification at 2, citations omitted.)

This is *exactly* what Judge Bowen ruled in his Order Denying Motion for Recusal. Further, it is exactly what one of Mr. Brown's lawyers also testified occurred.[10] However, Union Carbide now tries to reframe the facts as if this disclosure never occurred. It attempts to shift the factual basis of what Judge Bowen did or did not disclose from the fact that his father had been exposed to asbestos at work to his father's potential diagnoses and claims against defendants unrelated to the present action stemming from that exposure. Specifically, Union Carbide states that:

> …the basis for UCC's recusal request was not discovered until May 10-11, 2011. At that time, UCC determined through diligent and independent research that Judge Bowen's father has lived with a diagnosis of asbestosis for over 20 years and has filed not one – but *two* – asbestos personal injury lawsuits alleging that he developed asbestosis through exposure in the workplace and joining with other

[10] Surprisingly, in an Exhibit to its Supplemental Brief, one of Union Carbide's six lawyers now affirms that he did not hear Judge Bowen's statements. *See* Affidavit of Michael Terry, attached as Exhibit "8" to Union Carbide's Supplemental Brief. This affidavit directly ignores that Union Carbide had already admitted in its original Petition to having heard Judge Bowen's offhanded disclosure regarding his father. Indeed the original Petition was firmly based on that disclosure. Therefore the affidavit it is contrary to Union Carbide's own position and must be disregarded.

> plaintiffs in naming as defendants, manufacturers of products to whom UCC supplied asbestos. …[I]n both cases, the judge's father asserts the same claims for asbestos personal injury (design defect, warnings defect, and fear of cancer) based on the same disease process (asbestosis) as the plaintiff in the instant action. (UCC Supp. Br. In Suppt. Of Pet. at 3, citations omitted)

However, Judge Bowen in fact had no knowledge of these suits filed by his father, and we cannot impute knowledge to him that he did not have to overcome the presumption of his impartiality.

Nor did these suits name Union Carbide as a defendant; in fact and unbeknownst to Judge Bowen, his father simply released Union Carbide from liability for his asbestos exposure in exchange for one dollar. The Honorable Judge Bowen disclosed the extent of his knowledge, and Union Carbide is now directly challenging the honor and integrity of the court.

Further, it seems fantastically unbelievable that Union Carbide's defense team needed 14 days to uncover the information about Judge Bowen's father. Union Carbide had six lawyers and a Research Squad of another ten people, armed with a database containing hundreds of asbestos claims filed in the State of Mississippi. They were able to rapidly find similar information about literally hundreds of potential jurors who hailed from the same rural Mississippi County, often in a matter of minutes, yet now claim that they were unable to find the information related to Judge Bowen's father for two weeks. This attempt to reframe the facts must be disregarded by the Court.

This is clearly untimely, and under clear case law is *itself* enough of a reason to find waiver. The motion to recuse must be denied as untimely.

2. Union Carbide Knew or Should Have Known the Facts Supporting its Motion for Recusal.

Because Union Carbide knew or should have known the facts supporting its motion to recuse, it waived its request for Judge Bowen to recuse.

Before a jury was fully empanelled, and before a trial even started, Judge Bowen told the lawyers for all parties that he dimly recalled that his father might have had asbestos screening. In his Order, Judge Bowen says that was the extent of his knowledge. He also declared he had no knowledge that his mother might have had a derivative claim, and made clear that she had passed away a decade before Mr. Brown's trial.

Union Carbide was given these facts *before* trial. Despite the fact that Union Carbide and Conoco Phillips had six lawyers in Raleigh, along with a Research Squad laden with laptops, printers, and a comprehensive database which managed to track down detailed private data of several hundred venire members, they claim they were unable to determine *anything* about Judge Bowen's parents until after trial. In light of the presence of the Research Squad, a half-dozen lawyers, and seemingly infinite resources to scour the data of Smith County residents, this argument is not credible.

Nor does any of this matter. The supposed "facts" supporting the Motion to Recuse are absolutely meaningless to the case at hand, and do not add anything more than what Judge Bowen had already disclosed. We cannot presume to hold a trial judge to know that which he does not know. Judge Bowen told Union Carbide and all parties what he knew about his father—which was that he might have had an asbestos screening in the late 1980s. Judge Bowen ruled that he had no idea that his mother had once asserted a derivative claim. The only real "facts" are Judge Bowen's recollections of his father, which he timely disclosed to Union Carbide.

This case has *nothing* to do with this case that Judge Bowen's parents once asserted a similar claim against different defendants over twenty years ago, and signed a boilerplate release against Union Carbide for one dollar.

Because Union Carbide knew or should have known any of the alleged facts supporting its Motion to Recuse, it waived its right to pursue disqualification after trial.

3. Union Carbide Did Not Have Good Cause for Failing to Timely Pursue the Recusal.

Perhaps uniquely, Union Carbide does not have good cause for failing to timely pursue the recusal.

Union Carbide treads a delicate line by asserting that it was simply overwhelmed by the pressures of trial to dig into Judge Bowen's background. Yet the defendants had six lawyers at trial, assisted by nearly a dozen-person Research Squad—so many people that they had taken over a room at the courthouse. Within 24 hours the Research Squad could determine whether any given person in Smith County had ever made an asbestos claim, or if anybody in their family had.

Nor was this massive trial team alone in the wilderness. The lawyers of Union Carbide and their Research Squad were just the tip of a enormous legal iceberg. The law firms of those lawyers comprise *thousands* of other lawyers and staff. The Adams & Reese website lists 279 attorneys. Baker Botts boasts on its site that it "is a global law firm with over 725 lawyers and 13 offices." Forman Perry Watkins Kurtz & Tardy has over 80 lawyers in six cities.

The resources of Union Carbide were vast, and strongly used at Mr. Brown's trial. It is beyond belief that it had good cause for failing to file the motion before the trial.

4. Union Carbide Seeks Only to Delay the Finality of Trial in Contravention of Public Policy.

Because Union Carbide has only unacceptable reasons for late-filing its Motion to Recuse, it must be deemed waived.

As shown amply above, the facts in this case demonstrate that Union Carbide has made this untimely "revelation" only because of dilatory tactics. Despite the fact that Judge Bowen was appointed to preside over this case several months before trial, Union Carbide did not ask him to recuse. Despite the fact that Judge Bowen told the parties *before trial* and before a jury was empanelled that his father might have had an asbestos screening, Union Carbide did not ask him to recuse. Despite the fact that the defendants had six lawyers at trial, and a Research Squad with almost double that, Union Carbide did not ask him to recuse. Despite that the actual resources of the defense trial team are composed of over a thousand lawyers and untold staff members, Union Carbide did not ask him to recuse.

It was only *after* Union Carbide had lost this seven year old case at trial that it decided the trial court needed to recuse.

This is a transparently dilatory tactic and as a result the motion must be dismissed as untimely.

Conclusion to Waiver Section

Reviewing this case through the lens of *Ryals*, the consent section of the Constitution, and the history of the Recusal Waiver Rule, Union Carbide's waiver is conclusively established.

Before trial, Union Carbide knew but failed to timely pursue its tenuous arguments that Judge Bowen should have recused from this case. Likewise, Union Carbide not only knew the full extent of relevant facts prior to trial, but could or should have known through its Research Squad the fact that Judge Bowen's parents had asserted prior claims for asbestos exposure. There is no reason why Union Carbide waited to pursue the motion to recuse. The only purpose to now assert this motion is for the unacceptable reason of delaying the certification of the jury's

verdict and as a corollary attack on the trial. These are improper trial tactics and should not be allowed.

For these reasons, Union Carbide has waived its right to now seek Judge Bowen's disqualification.

II. No Reasonable Person Would Question Judge Bowen's Impartiality.

Because no reasonable person would question Judge Bowen's impartiality in ruling on asbestos cases, and because Union Carbide cannot point to a single case where a judge was disqualified because a family member once had a similar case, the Petition must be denied.

"It is clear that the standard for recusal is a reasonable person knowing all the circumstances." *Dodson v. Singing River Hosp. System*, 839 So.2d 530, 533 (Miss. 2003). Yet a person seeking recusal faces a heavy burden, as "[i]t is also clear that judges are presumed to be qualified and unbiased." *Id*. To surpass that burden, once must show "reasonable doubt": "[R]ecusal is required when the evidence produces a reasonable doubt as to the judge's impartiality." *Id*. We look to the Code of Judicial Conduct, which enjoys the status of law, to determine what conduct is prohibited. *Hunter v. State*, 684 So.2d 625, 630 (Miss. 1996).

The Code of Judicial Conduct sets out that "Judges should disqualify themselves in proceedings in which their impartiality might be questioned by a reasonable person *knowing all the circumstances* or for other grounds provided in the Code of Judicial Conduct or otherwise as provided by law . . . ." Code of Jud.Conduct, Canon 3E (emphasis added). Professor Jackson notes that "Canon 3E is in part redundant with the Miss. Constitution Article VI, § 165," in that it prohibits a judge from sitting on a case "where the judge or a member of the judge's family residing in the judge's household has a financial interest in the controversy or in a party to the proceeding that could be substantially affected by the proceeding's outcome." MS Prac. Encyclopedia MS Law Judicial Recusal § 33.

Canon 3E then goes on to describe situations where a reasonable person would have concerns. It sets out that a judge required to recuse if she or her family has a financial interest in a case, "or any other interest that could be substantially affected by the outcome of the proceeding." Canon 3E(c).

There are also four instances a judge should recuse when a family member is directly involved in a case. A judge must also recuse when a family member is a party, is a lawyer, has a substantial interest in the case, or is likely to be a material witness. Canon 3E(d)(i)-(iv).[11]

Union Carbide brings its claim for disqualification under Canon 3E. However, it does not argue that Judge Bowen has a financial interest in this case. It does not argue that his father has a financial interest in this case. It does not argue that Judge Bowen has a family member directly involved here. Union Carbide has not alleged that a family member of Judge Bowen is a party, or a lawyer before the court in this case, has a substantial interest in a case, or is likely to be a witness of any sort.

Yet nothing in the Canon can be read so broadly as to reach the facts in this case. Nor is there any Mississippi case that has forced disqualification when a judge's parent once had a similar case.

Union Carbide relies almost exclusively on the unusual case of *Dodson v. Singing River*, where plaintiff sought recusal of a judge after a non-jury trial. 839 So.2d at 531-32. After the

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[11] The full language of Canon 3E(d) requires disqualification when:

> [T]he judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
>
> (i) is a party to the proceeding, or an officer, director, or trustee of a party;
>
> (ii) is acting as a lawyer in the proceeding;
>
> (iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
>
> (iv) is to the judge's knowledge likely to be a material witness in the proceeding.

trial, the judge took the case under advisement, and "there came to light evidence of a prior relationship between [the trial judge] and the law firm" representing the defendant hospital. *Id*. Unlike the case at hand, waiver was not a factor, because "[t]here [was] no indication in the record that [the plaintiff] had any prior knowledge of the relationship" before the trial. *Id*. at 531 n.2.

The information the plaintiff discovered was stunning. First, a partner from the law firm representing the hospital served as the judge's treasurer in his campaign for office. Id. at 534. Another attorney from that firm had handled the estate of the trial judge's mother. *Id*. The law firm had represented the judge and his wife personally in a tort matter—and the law firm did not charge the judge for their services. *Id*. In a similar case, the trial judge had recused, even though he refused to recuse in that matter. *Id*.

In the end, the judge ruled for the defendant hospital—represented by the law firm he was closely tied to—and the plaintiff sought review. *Id*.

The Court held that "a reasonable person knowing all the circumstances here would have a reasonable doubt regarding Judge Harkey's impartiality in this case." *Id*. at 533-34.

This case is unlike *Dodson* in almost every way. First, in that case there was no evidence or showing that the plaintiffs had knowledge of the trial court's relationship with defense counsel until *after* trial. Here, during jury selection and prior to trial Judge Bowen disclosed that he thought his father had once had an asbestos screening some decades before. In *Dodson*, there was more than a hint that the judge and defense counsel had worked to conceal the closeness of their relationship. That type of conduct is not present here, where Judge Bowen voluntarily and off-handedly remarked prior to trial about his father's possible asbestos exposure.

Also unlike *Dodson*, Judge Bowen did not have a personal connection with anyone on either the plaintiff's or the defendant's side of the case. In Dodson, the judge had a personal

connection with defense counsel and had admittedly received campaign donations. This is nothing like the *Dodson* case.

Nor did Judge Bowen refuse to recuse in this case while recusing in similarly-situated cases. In one recent case involving Georgia-Pacific, Judge Bowen issued a recusal. R.E. 10. In his recusal order, he noted that he was a plaintiff against that company in a separate case. R.E. 10. Accordingly, because a reasonable person might think he was biased against Georgia-Pacific, he recused.

In this case, Judge Bowen does not have a claim against Union Carbide, nor has he ever asserted a claim against them. Decades before his parents asserted claims against another company for asbestos exposure, which Judge Bowen did not know about. Over twenty years ago they signed a boilerplate release in favor of Union Carbide, and received a dollar as consideration. This case is unlike *Dodson* in every possible way.

In another recusal case, a family filed a malpractice case against a hospital. *In re Moffett*, 556 So.2d 723, 723-24 (Miss. 1990). The brother of the judge was "a senior partner in the defending law firm," even though he was not actively participating in the defense of the case before the court. *Id*. at 724.

The Supreme Court noted the Canon only requires recusal when a close family member "is acting as a lawyer *in the proceeding*." *Id*. (quoting Canon 3E(d)(ii)) (emphasis added).[12] The hospital argued that the judge's brother was not a lawyer in the proceeding, and that he actually did not undertake trial practice at all, so therefore the judge should not be recused. *Id*.

The Court scoured the language of the Canon, and determined that "[t]he fact that a lawyer in a proceeding is *affiliated* with a law firm with which a lawyer-relative of the judge is affiliated *does not of itself disqualify the judge*." *Id*. at 725 (emphasis added). To disqualify the

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[12] The Canons have been renumbered since *In re Moffett*, but the relevant language is the same.

trial judge, the Court required more proof; it determined that the judge's brother's position "*coupled with* . . . allegations and testimony that the medical community in Forrest County assisted in electing the judge" in years prior was sufficient. *Id*. (emphasis added).

In the *Moffett* matter, it was not enough that the judge's brother was a member of the law firm representing the defendant. It was only that fact *conjoined* with the fact that the judge was directly supported in the community by the defendant hospital which led the Court to its reluctant and "distasteful" conclusion that he should be disqualified. *Id*. at 726.

The case at hand does not feature the "relative *plus*" facts of *In re Moffett*. Like that case, the Supreme Court should start here with the presumption that simply because a family member once had a similar case does not *inherently* disqualify a judge. Disqualification can only occur when there is something more. While Judge Bowen's parents both once had claims for asbestos exposure, they were decades prior to Mr. Brown's trial. Further, unlike the judge and his brother in *Moffett*, nobody in Judge Bowen's family stood to benefit in any way from a decision in Mr. Brown's trial. Put bluntly, Judge Bowen's family just has nothing to do with this case.

Of the cases in Mississippi, this one bears closest resemblance to the strained, almost cartoonish arguments for recusal in *Hunter v. State*, 684 So.2d 625, 629 (Miss. 1996). There a defendant sought recusal of the trial judge because "the trial judge's [former] law firm had represented the victim . . . in his divorce from his wife." *Id*. "Specifically, the trial judge's nephew . . . had represented [the victim] in the divorce," and the defendant in the criminal case was alleged to have had an affair with the victim's wife. *Id*. The judge's nephew had also represented the victim's estate and his daughter, and the daughter was a witness in the criminal trial. *Id*.

The trial judge refused to recuse, and in doing so stated: "I fail to see how a case involving a victim of an offense, a domestic case involving a victim of an offense, and another

person, raises the appearance of impropriety in the case where a paramour is being tried for the murder of his friend's husband." *Id*. at 630.

The Supreme Court was quick to rule that Canon 3 was not implicated. First, while "Mississippi has an objective test in determining when a judge should recuse himself," one must also overcome the presumption that the trial court "is qualified and unbiased." *Id*. at 631. The defendant failed to overcome this presumption, because there was no indication of prejudice to the defendant, "nothing in the record regarding any financial arrangements of the trial judge with his former law firm," and no actual prejudice—the defendant "only argues that the trial judge's relations gave the appearance of impartiality." The Supreme Court quickly decided that "[o]n this record, there was no evidence of prejudice or impropriety that would require the trial judge's recusal." *Id*.

Like *Hunter*, there is nothing in the record here that shows Judge Bowen stands to reap any financial incentive from Mr. Brown's case, nor is there any *actual* connection between the decades-old claims of the Judge's parents and this case. Like *Hunter*, no reasonable person would consider the judge biased under these facts. Further like that case, there is no evidence of prejudice and impropriety from Judge Bowen's actions.

One thing is important to note: Union Carbide did not cite *one case* where a judge was disqualified from a case because a family member once had in a factually similar claim.[13] They did not cite a case from Mississippi, nor a case from any other state. They cited no constitutional provision, state law, or precedent that would require recusal. They did not do so because there is no such law.

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[13] To the extent that it failed to support his argument with citations, Union Carbide waived its argument. See *U.S. v. Upton*, 91 F.3d 677, 684 (5th Cir. 1996) (Fifth Circuit refused to consider arguments "because claims made without citation to authority or references to the record are considered abandoned on appeal"); *U.S. v. Martinez*, 263 F.3d 436, 438 (5th Cir.2001) ("A defendant waives an issue if he fails to adequately brief it"). Failure to cite to the record or legal authority is also a violation of the Mississippi Rules of Appellate Procedure. *See* MRAP 28(a)(6) ("The argument *shall* contain the contentions of appellant with respect to the issues presented, and the reasons for those contentions, *with citations to the authorities, statutes, and parts of the record relied on*") (emphasis added).

Mississippi has required the disqualification of judges when a reasonable person knowing all the circumstances would doubt their impartiality. Yet no reasonable person would doubt the integrity of a judge simply because his parents once had a similar claim twenty years earlier. Such a remote connection to a case is simply not grounds for recusal or disqualification in Mississippi, nor does any constitutional provision, statute, Canon, or precedent stand for that radical proposition.

III. Judge Bowen Is Presumed to be Impartial and Without Bias.

In Mississippi we presume that the trial court acts with integrity. Because Judge Bowen is presumed to act without bias and to rule impartially, and Union Carbide fails to point to actual bias in the record, the Petition must be denied.

As a matter of course, the state of Mississippi trusts that judges will execute their duties with integrity. A trial judge takes an oath enshrined in our Constitution that she "will administer justice without respect to persons, and do equal right to the poor and to the rich, and . . . faithfully and impartially discharge and perform all the duties incumbent upon me," under both federal and state constitutions and state law. Miss. Const. 1890 art. 6, Section 155. Accordingly, "the law presumes that the judge is qualified and unbiased." *Washington Mut. Finance Group, LLC v. Blackmon*, 925 So.2d 780, 785 (Miss. 2004); *Payton v. State*, 897 So.2d 921, 943 (Miss. 2003). The presumption that a judge is not biased can only be overcome by evidence which produces a reasonable doubt about the validity of the presumption. *Id.*; *Robinson v. Burton*, 49 So.3d 660, 667 (Miss. Ct. App. 2010). "Indeed, the burden of proving allegations that a judge's hostility toward attorneys is such as to require recusal in their clients' cases is a particularly heavy one." *Blackmon*, 925 So.2d at 785.

Before a judge can be disqualified, a litigant must first hurdle the presumption of impartiality. *See Hunter*, 684 So.2d at 631 (in Canon 3 case, defendant "ha[d] not overcome the

presumption that the trial judge was qualified and unbiased," and therefore recusal was unwarranted).

Union Carbide strains mightily to argue that *only* the reasonable person standard under Canon 3 is in play. Yet the case law is clear that a litigant must also overcome the presumption of impartiality.

Nor can Union Carbide simply point to rulings of the trial court to challenge the presumption of honor. Under the Canons, a judge must recuse when she "has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." Code of Jud.Conduct, Canon 3E9(a). Yet "[i]It is important to note that judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." *Farmer v. State*, 770 So.2d 953, 958 (Miss. 2000); *see also Mingo v. State*, 944 So.2d 18, 31 (Miss. 2006) (same; judicial rulings alone are not a valid basis "[f]or the purposes of recusal"). As Professor Jackson writes, "[r]ulings adverse to a party generally will not constitute evidence of bias." MS Prac. Encyclopedia MS Law Judicial Recusal § 39.

To defeat the presumption of impartiality, and that there is sufficient legal basis for any ruling, one must provide more than personal attacks. The Court of Appeals has held that "[m]ere speculation is insufficient to raise reasonable doubt as to the validity of the presumption that the trial judge was qualified and unbiased." *Jackson v. State,* 962 So.2d 649, 663 (Miss. Ct. App. 2007). In that case, the Court rejected a bullet-pointed list containing allegations of bias. *Id*. 664. Defendant Jackson alleged that the trial court was biased against him. *Id*. Yet the heavy burden of showing bias was impossible to prove given that "[t]here [were] numerous instances in which Judge Johnson ruled *in Jackson's favor*." *Id*. (emphasis added). It was therefore impossible to find evidence of bias when the defendant had actually benefited from the trial

court's rulings. *Id*. As a result, the Court ruled the allegations of bias were "entirely without merit." *Id*.

In the case at hand, the learned trial court repeatedly ruled in favor of Union Carbide. The trial court granted dozens of requests from Union Carbide to limit evidence, restrict testimony, or otherwise confine the presentation of Mr. Brown's case. Before trial, the trial court granted Union Carbide's motion for summary which eliminated one of Mr. Brown's claims against the defendants. Further, the trial judge limited Mr. Brown's future medical expenses from over $450,000 to $45,000.

Prior to trial, and at Union Carbide's request, the judge also granted a mistrial, which resulted in even greater delay of trial. The trial court then allowed Union Carbide to voir dire a massive number of Smith County residents, permitting them to scour the personal and family history of the venire.

Of course the trial court ruled at times for Mr. Bowen. Under clear Mississippi law, *these rulings alone do not constitute bias.* Yet under *Farmer*, *Mingo*, and *Jackson*, the fact that Judge Bowen ruled repeatedly in favor of Union Carbide eviscerates their claim that his rulings demonstrated bias in favor of Mr. Brown.

We must presume that Judge Bowen acted impartially and without bias, and nothing in his rulings shows that he was biased in favor of Mr. Brown. Indeed, many of his rulings dealt great damage to Mr. Brown's case. Regardless of the effect, we must presume that at their core the rulings are impartial.

Because Union Carbide failed to overcome this great presumption, their motion must be denied.

IV. Union Carbide's Proposed Recusal Rule Would Devastate the Mississippi Judiciary.

Because Union Carbide seeks to impose a radical new rule of recusal on the Mississippi judiciary that would paralyze the judicial system and damage our system of justice, the motion to disqualify Judge Bowen must be denied.

Union Carbide wishes to cast aside a century of case law and implement a wholly new, absolutely unworkable new rule of recusal. Union Carbide's rule would require a judge to recuse when her family member once had a similar suit to the one before the trial—no matter that no Canon, statute, or Constitutional provision demands such hair-trigger disqualification.

In essence, Union Carbide seeks to have a new recusal rule implemented in the state of Mississippi—one not based in the Constitution, state law, or the Canons. This rule would abandon the presumption of impartiality and lack of bias, and would require judges to *prove* that they are impartial. This would abandon a century of precedent and presume that our judiciary is not worthy of the public trust. This is not the law in Mississippi, nor in any jurisdiction in America, and such a ruling would decimate the ability of our judiciary to hear cases and effectively cripple a branch of government.

The Court has previously rejected similar attempts that would cause harm to our judiciary. In a landmark recusal case in 2004, the Supreme Court quoted with approval a lengthy portion of ruling from the Nevada Supreme Court. *Blackmon*, 925 So.2d at 787 (citing *City of Las Vegas Downtown Redev. Agency v. Hecht*, 940 P.2d 127, 129 (1997)). In the *Hecht* case, the Nevada Court discussed that "[i]n a small state . . . with a concomitantly limited bar membership, it is inevitable that frequent interactions will occur between the members of the bar and the judiciary." At 129. Because of how small the legal world was, "if a litigant could successfully challenge a judge based upon allegations of bias . . . it would bid fair to decimate the bench." *Id*.

(internal quotations and citations omitted). To routinely disqualify judges in such a small area would enable parties and lawyers to create "a license under which the judge would serve at their will." *Id*. (internal quotations and citations omitted).

Much of that language was culled from the Fifth Circuit, which held that "[r]ead broadly," challenges of this type "would bid fair to decimate the bench." *Davis v. Board of School Com'rs of Mobile County*, 517 F.2d 1044, 1050 (5th Cir. 1975). Therefore "[l]awyers, once in controversy with a judge, would have a license under which the judge would serve at their will." *Id*.

The same threat is present with *litigants* as the Fifth Circuit and the Supreme Courts of Mississippi and Nevada warned could happen with *lawyers*. Just as no rule requires the automatic recusal of a judge simply because she knows an attorney on a case, or has some general knowledge about a case. For "as community members, judges may be generally familiar with facts that give rise to criminal prosecution or civil litigation," but "[s]uch general knowledge or familiarity, shared by all informed members of the community, is not disqualifying." MS Prac. Encyclopedia MS Law Judicial Recusal § 22.

No rule should require automatic recusal if a judge's family member once had a suit against a litigant, or was subject to a similar suit. In small states like Mississippi, creating a hair-trigger recusal rule would render our judiciary impotent. If we take Union Carbide's request for a new rule to heart, then any time a judge has a family member with a suit against a litigant, the judge must recuse.

While the case at hand involves claims for asbestos exposure, it could easily involve automobile accidents. There would be no limit to the attempts made by plaintiffs *or* defendants to seek recusal if a judge's family member had ever filed or defended a lawsuit involving an auto collision. Trial courts would be forced to "voir dire" *themselves* prior to trial, and disclose the

results to litigants. Any jury verdict could be attacked on the theory that a judge should have recused simply because she had a brother or cousin who once had a similar claim. Under our current judicial system, we presume that our trial judges come in impartial and free of bias unless there is reason to think otherwise. The system Union Carbide would create would invert that decades-old world. It would require a trial judge to *prove* before a case commences that she were not biased.

Judge Bowen sits as Circuit Judge over four counties in the Thirteenth Circuit District, and he is the *only* Circuit Judge. He is elected by the citizens of Covington, Jasper, Simpson, and Smith Counties. According to the Mississippi Secretary of State's *2011 Judiciary Directory and Court Calendar*, that area covers 2,325.2 square miles, and holds within its boundaries 82,230 Mississippians. Union Carbide fails to even cite to *one case* in this vast nation where this immensely broad recusal rule has been used. It cannot because there is no such case, because such a case would immediately disrupt a state's judiciary to the extent it would render justice immobile.

Further, Union Carbide's proposed recusal rule would create a perverse incentive for litigants and lawyers to invade the personal lives of trial judges *and their families*, all in order to gain a tactical advantage at trial. This cannot be allowed.

Union Carbide's proposed rule would also require affirmative, resource-consuming actions by our trial courts that are not mandated by state law. It is uncontested in this case that Judge Bowen did not know about his parents' claims for asbestos exposure, yet his lack of knowledge is meaningless in Union Carbide's analysis. The company would require him to recuse regardless of the fact that he did not know his parents ever had this decades-old claim.

Because Union Carbide's proposed recusal rule would snarl our judiciary in litigation, and inverts the presumption of impartiality, it must be rejected.

CONCLUSION

For four reasons Union Carbide's request to create a new rule of recusal must be denied.

First, because the request for recusal was untimely presented to the trial court, and therefore waived.

Second, the request for recusal must be denied because Canon 3E does not require recusal when a judge's family member once had a similar claim decades before.

Third, the request to disqualify Judge Bowen must be denied because he is presumed to be impartial and unbiased, and his rulings show that he acted without prejudice, and therefore Union Carbide has failed to overcome the presumption of integrity.

Last, this Court must deny Union Carbide's request to create a new rule of recusal because it would invert our trial court's presumption of integrity, and ensnare our trial courts in near-endless litigation based on the lives and actions of their family members.

As a result, the Respondent Mr. Thomas Brown, Jr., respectfully requests that this Honorable Court DENY the Petition seeking to disqualify Judge Bowen.

Filed this the 1st day of August, 2011.

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CERTIFICATE OF SERVICE

I, David Neil McCarty, attorney for Appellants, certify that I have this day filed this *Motion* with the Clerk of this Court, and have served a copy of this *Motion* by United States mail with postage prepaid on the following persons at these addresses:

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