IN THE COURT OF APPEALS 12/17/96

OF THE

STATE OF MISSISSIPPI

NO. 93-CA-01261 COA

NANCY SWAN AND CHARLES SWAN

APPELLANT

v.

CARBOLINE COMPANY

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. JERRY OWEN TERRY SR.

COURT FROM WHICH APPEALED: HARRISON COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANT:

JUDY M. GUICE

PAUL S. MINOR

ATTORNEYS FOR APPELLEE:

HARRY R. ALLEN

RODNEY D. ROBINSON

NATURE OF THE CASE: TORT: PRODUCT LIABILITY

TRIAL COURT DISPOSITION: DIRECTED VERDICT FOR DEFENDANT ON CAUSATION

BEFORE FRAISER, C.J., KING, AND PAYNE, JJ.

KING, J., FOR THE COURT:

The Circuit Court of Harrison County granted Carboline a directed verdict after Swan had introduced evidence relating to her product liability claim. Aggrieved, Swan appeals contending the following:

I. The trial court erred in directing a verdict in favor of the Defendants on the issue of causation;

II. Swan's cause of action should be reassigned to another judge upon remand because the views of the trial judge regarding the merits of Swan's claims are stalemated;

III. Swan should be awarded prejudgment interest or some other suitable remedy.

In addition, Carboline has cross-appealed and assigned for our review the following issues:

I. Were Swan's treating physicians qualified to give testimony concerning polyurethane exposure?

II. Did the trial court err when it compelled Carboline to produce surveillance videotapes when Carboline did not intend to use the tapes as evidence?

III. Did the trial court err when it permitted Swan to introduce into evidence material safety data sheets and products which were not in issue?

IV. Should Swan be required to disclose the amounts received in settlement of her claim against MIRI and I.P.?

V. Did the court err in denying Carboline the opportunity to cross-examine Swan on why she refused to submit to an independent medical examination?

FACTS AND PROCEDURAL HISTORY

In 1986, Swan sued MIRI Inc., I.P., Inc., and Carboline for injuries resulting from Swan's exposure to fumes and spray of polyurethane foam and coating, which were used to roof the Long Beach Junior High School where Swan was a teacher. Three years later, the court granted MIRI, I.P., and Carboline's motion for summary judgment, and Swan appealed to the supreme court. The supreme

court reversed the court's grant of summary judgment favoring each of the Defendants and remanded the case to the trial court. Swan settled her claims against MIRI and I.P.

Trial of Swan's case against Carboline commenced on October 11, 1993, but the court declared a mistrial because of alleged improper voir dire by Swan's counsel. Thereafter, Swan's counsel filed a motion requesting Judge Terry's recusal. The motion was denied, and trial commenced again on October 18, 1993. Following the presentation of Swan's case in chief, Carboline moved for a directed verdict. The court granted Carboline's motion for directed verdict reasoning:

> (1) The Plaintiffs failed to make out a prima facie case that the Plaintiff, Nancy Swan, sustained injury as a direct proximate result of exposure to vapors, particulates or fumes from defendant, Carboline's coating product, as opposed to having sustained injury from exposure to polyurethane foam manufactured by former defendant, I.P., Inc., and (2) That MIRI Inc., previously a defendant herein was an experienced applicator of Carboline's coating product, and that the plaintiffs had failed to establish a prima facie case that applicator, MIRI, Inc., had no knowledge of any hazards associated with the coating process, or that MIRI, Inc., was not adequately warned as to any hazards associated with such coating process so as to constitute a defect which would make the Carboline coating product unreasonably dangerous for strict liability purposes.

ANALYSIS OF THE ISSUES AND DISCUSSION OF THE LAW

I.

> DID THE TRIAL COURT ERR IN GRANTING CARBOLINE'S MOTION FOR A DIRECTED VERDICT?

The trial court granted Carboline's motion for directed verdict because it was of the opinion that Swan had not adduced sufficient evidence showing that she was exposed to Carboline's product and that the exposure was a proximate cause of her injuries. When a defendant moves for a directed verdict at the close of the plaintiff's case in chief, the circuit court must consider the evidence before it at that time in the light most favorable to the plaintiff, giving the plaintiff the benefit of all favorable inferences that reasonably may be drawn from that evidence. *Benjamin v. Hooper Elec. Supply Co.,* 568 So. 2d 1182, 1186 (Miss. 1990) (citations omitted). We too must consider the motion in the light most favorable to the party opposing the motion. *Benjamin,* 568 So. 2d at 1187 (citations omitted). The motion is granted only where the facts and inferences considered point so overwhelmingly in favor of the movant that reasonable men and women could not have arrived at a verdict for the nonmovant. *Id.* If by any reasonable interpretation, the evidence supports an inference of liability, which the non-moving party seeks to prove, the motion must be denied. *Fulton v. Robinson Indus. Inc.,* 664 So. 2d 170, 176 (Miss. 1995).

When Carboline moved for a directed verdict, the following evidence and testimony was before the court:

> 1. Dr. Egilman's testimony that Swan was exposed to chemicals containing toluene

diisocyanate (TDI) and methylene diphenyl isocyanate (MDI);

2. Dr. Egilman's testimony that Swan suffered conjunctivitis, sinusitis, headaches, and neurological problems as a result of being exposed to chemicals containing TDI and MDI;

3. Victor Flack's testimony that Carboline's product Chem-Elast 2819S contained TDI in its formulation;

4. Carboline's sales representative, Van Rusling's testimony that he witnessed Jim English apply Chem-Elast 2819S to the roof of the Long Beach school during school hours;

5. Van Rusling's testimony that Chem-Elast 2819S had a gray coloration;

6. Nancy Swan's testimony that she saw chemicals ranging in coloration from orange, yellow, and pale gray being sprayed during school hours;

7. Charles Swan's testimony that he saw a light gray substance in his wife's hair when he arrived home one night.

When we review the aforementioned evidence in a light most favorable to Swan, giving Swan the benefit of all reasonable inferences, we find that the facts and evidence support a conclusion favoring Swan. Evidence indicated that Swan's health problems were precipitated by exposure to chemicals containing TDI and MDI, and Carboline admitted that its product, which contained TDI was applied to the roof of the school, where Swan taught during school hours. From this evidence, one may reasonably infer that Swan was exposed to TDI when Carboline's product was applied to the school's roof and that as a result of the exposure, Swan sustained injury. Moreover, the court's rationale for granting the directed verdict intimated that Swan was required to establish with absolute certainty that Carboline's product, not I.P.'s product caused the injuries. A plaintiff is not required to eliminate with certainty all other possible causes or inferences, which would mean that he must prove a civil case beyond a reasonable doubt. *Read v. Southern Pine Elec. Power Ass'n*, 515 So. 2d 916, 920 (Miss. 1987) (citation omitted). The burden of proof to establish causation may be met by showing sufficient facts to allow a jury to infer defective quality and that such defective quality was a substantial element in producing the injury complained of. *William Cooper & Nephews, Inc. v. Pevey*, 317 So. 2d 406, 408 (Miss. 1975). Thus, Carboline's liability is not affected by Swan's failure to eliminate with certainty I.P.'s product as the harm producing agent.

In addition to concluding that Swan had failed to establish that Carboline's product caused her

injuries, the court reasoned that MIRI was an experienced applicator of Carboline's product, which necessitated a showing by Swan that MIRI lacked knowledge of the hazard's of Carboline product or that Carboline had failed to warn MIRI of the product's hazards. The court's rationale was premised upon its application of the learned intermediary doctrine.

The learned intermediary doctrine provides that a manufacturer's duty to warn may be discharged by providing information to a third person upon whom the manufacturer can reasonably rely to communicate the information to the ultimate users of the product or those who will be exposed to its hazardous effects. *Swan v. I.P., Inc.* 613 So. 2d 846, 851 (Miss. 1993) (citations omitted). However, the learned intermediary doctrine does not relieve the manufacturer of its duty to warn unless the manufacturer's reliance on the intermediary is reasonable. *Swan,* 613 So. 2d at 856. An intermediary's education, training, knowledge, and experience should be considered in determining whether a manufacturer has reasonably relied upon the intermediary. Consideration should also be given to whether the intermediary is familiar with the product's properties and safe methods of handling and whether the intermediary is capable of passing this knowledge to the consumer or those likely to be exposed to the product's hazards. *Cf. Little v. Liquid Air Corp.,* 952 F.2d 841, 851 (5th Cir. 1992) (discussing the bulk seller doctrine and stating that a bulk seller fulfills its duty to the ultimate consumer only if it ascertains (1) that the distributor to which it sells is adequately trained, (2) that the distributor is familiar with the properties of the product and the safe methods of handling it, and (3) that the distributor is capable of passing this knowledge to the consumer).

In *Wyeth Laboratories, Inc. v. Fortenberry,* the Mississippi Supreme Court recognized the learned intermediary doctrine as a defense to product liability cases based on failure to warn. *See Wyeth Lab., Inc. v. Fortenberry,* 530 So. 2d 688, 693 (Miss. 1988). In *Wyeth,* a pharmaceutical manufacturer escaped liability for plaintiff's injuries because the court determined that a package insert adequately warned the prescribing physician of the risks asssociated with the pharmaceutical manufacturer's vaccine. Although the *Wyeth* decision concerned the application of the learned intermediary theory to manufacturers of pharmaceutical products, we find that it is appropriate to expand the decision's import to manufacturers of products other than pharmaceuticals.

In the present case, the learned intermediary doctrine could eviscerate Carboline's liability if the fact finder determined that adequate warnings were given to an intermediary, and Carboline's reliance upon the intermediary was reasonable. Because Carboline sought to avoid liability for Swan's injuries by application of learned intermediary principles, it bore the burden of establishing that it had provided adequate warnings to an intermediary and that its reliance upon the intermediary was reasonable. *Hinton v. McKee,* 329 So. 2d 519, 520 (Miss.1976) (explaining that the burden is on a defendant to prove matters in avoidance, special or affirmative defenses, and other new matter urged by him as ground for denying a plaintiff relief).

The court noted that MIRI was an experienced applicator of Chem-Elast 2819S. According to Van Rusling, Carboline determined that MIRI was qualified to apply Chem-Elast 2819S because it had previously applied Chem-Elast 2819S to the Gulf Coast Coliseum and a school in Vicksburg. Prior use and application are appropriate factors to consider when determining one's status as a learned intermediary; however prior use and application should not be viewed as conclusively establishing MIRI's status as a learned intermediary. The intermediary's awareness of the hazard and capacity to disseminate its knowledge of the hazard also factors into the consideration. *See Swan,* 613 So. 2d at

856.

Although, Carboline had not introduced evidence establishing that it could reasonably rely upon MIRI to communicate its awareness of the product's hazards, the court recognized MIRI as a learned intermediary and required Swan to show that MIRI lacked knowledge concerning the product's hazards or alternatively, that Carboline had failed to adequately warn MIRI of the product's hazards. The court's recognition of MIRI as a learned intermediary was equivalent to the taking of judicial notice.

A court may take judicial notice of facts which are generally known within the territorial jurisdiction of the trial court or which are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. M.R.E. 201; *see also Ditto v. Hinds County*, 665 So. 2d 878, 880 (Miss. 1995). MIRI's status as a learned intermediary was not a fact generally known within the court's jurisdiction, nor could it be verified by resort to sources of unquestionable accuracy such as public records. Indeed, the supreme court recognized MIRI as an experienced applicator of polyurethane roofing products, but it did not conclude that MIRI had acquired the status of learned intermediary. *Swan v. I.P., Inc.*, 613 So. 2d 846, 855-56 (Miss. 1993) (noting that the facts were in dispute as to whether MIRI was knowledgeable about the hazards and also noting that the evidence was insufficient to conclude that MIRI was a sophisticated user). MIRI's status as a learned intermediary was not a fact susceptible to the taking of judicial notice; therefore, absent proof by Carboline that MIRI was a learned intermediary, the court should not have required Swan to prove that MIRI lacked knowledge of the hazard or that Carboline failed to warn MIRI of the hazards.

In conclusion, we find that Swan adduced sufficient evidence from which a jury could reasonably infer that Swan's injuries were caused by exposure to Carboline's product. In addition, we find that Swan was not required to produce evidence negating MIRI's awareness of the hazard absent proof by Carboline that MIRI was a learned intermediary. Therefore, the court erred in granting the motion for directed verdict.

II.

SHOULD THIS CASE BE REASSIGNED TO ANOTHER TRIAL JUDGE UPON REMAND?

Swan argues that this case should be reassigned to another trial judge on remand because the trial judge is biased. Swan's argument is premised primarily on the fact that our opinion represents the second occasion upon which the trial judge's application of the learned intermediary theory has served as a predicate for reversal. We look to the Code of Judicial Conduct for guidance in resolving this issue.

Cannon 3C of the Code of Judicial Conduct requires a judge to recuse himself from proceedings whenever his impartiality might reasonably be questioned. The requirements of Cannon 3C apply when the judge harbors a personal bias or prejudice concerning a party, or has personal knowledge of disputed evidentiary facts concerning the proceeding. *See* Code of Judicial Conduct Cannon 3C(1)(a)

(1995).

We presume that a judge is qualified and unbiased. *Bryan v. Holzer,* 589 So. 2d 648, 654 (Miss. 1991). The presumption may only be overcome by evidence showing beyond a reasonable doubt that the judge was biased or not qualified. *Holzer,* 589 So. 2d at 654. Therefore, in determining whether a judge should recuse himself, we ask, "Would a reasonable person, knowing all the circumstances, harbor doubts about the judge's impartiality?" *Aetna Casualty & Surety Co. v. Berry,* 669 So. 2d 56, 74 (Miss. 1996) (citation omitted).

In the instant case, we recognize that the judge's rulings have twice prevented the jury from deciding Swan's case; however, at present we decline to find partiality. However, upon remand, we would urge the trial court to reconsider the applicability of Cannon 3 of the Code of Judicial Conduct.

III.

SHOULD PREJUDGMENT INTEREST OR ADDITIONAL REMEDIES BE AWARDED?

Swan contends that final disposition of the case has been substantially delayed because Carboline and its attorneys urged the court to grant the motion for directed verdict despite the trial court's rejection of the defense as a basis for summary judgment. As a result of the delay, Swan argues that she has sustained additional injuries, which justify the awarding of pre-judgment interest. Therefore, Swan has asked this Court to direct the trial court to award pre-judgment interest on any judgment recovered against Carboline.

The decision to award pre-judgment interest is within the discretion of the trial judge. *Terex Corp. v. Ingalls Shipbuilding, Inc.*, 671 So. 2d 1316, 1324 (Miss. 1996) (citing *Warwick v. Matheney,* 603 So. 2d 330, 342 (Miss. 1992)). Because the trial judge may exercise discretion in deciding to award pre-judgment interest, we are without liberty to direct the court to award pre-judgment interest.

In the alternative, Swan argues that attorney's fees and/or expenses under the Litigation Accountability Act should be imposed against Carboline. Before attorneys fees and/or expenses are awarded pursuant to the Litigation Accountability Act, the court must first find either of the following: (1) that Carboline or its attorney asserted a defense, which was without substantial justification, or (2) that Carboline's defense was interposed for delay or harassment, or (3) that Carboline or its attorney unnecessarily expanded the proceedings by other misconduct. Miss. Code Ann. § 11-55-5 (Supp. 1995); *Will of Fankboner v. Jones,* 638 So. 2d 493, 498 (Miss. 1994).

If proved, the learned intermediary defense may shield Carboline from liability for Swan's injury. The motion for directed verdict was granted before Carboline presented its case in chief; therefore, Carboline has yet to introduce evidence establishing the learned intermediary defense. Until Carboline has been afforded an opportunity to present evidence regarding the learned intermediary defense, we cannot say that Carboline asserted the learned intermediary defense without substantial justification or for the purpose of delay or harassment. Thus, attorney's fees and expenses pursuant to the Litigation Accountability Act are not warranted.

CROSS APPEAL

I.

WERE SWAN'S TREATING PHYSICIANS QUALIFIED TO GIVE TESTIMONY ON POLYURETHANE EXPOSURE?

Carboline argues that the trial court erred when it failed to exclude the opinions of Dr. Jackson and Dr. Smith regarding the cause of Swan's condition because the opinions were based solely upon Swan's alleged history of exposure to roofing products. Carboline further argues that Dr. Jackson and Dr. Smith were not qualified to give testimony concerning the cause of Swan's injuries because they were not familiar with the toxicology of the product and could not identify which product caused the harm.

This Court will not reverse a trial court's admission of expert testimony unless there has been an abuse of discretion. *Materials Transp. Co. v. Newman*, 656 So. 2d 1199, 1203 (Miss. 1995). The sufficiency of foundational facts or evidence on which to base an opinion is a question of law. *Newman*, 656 So. 2d at 1203 (citation omitted). These facts must afford a "reasonably accurate basis" for the expert's conclusion. *Gulf Ins. Co. v. Provine*, 321 So. 2d 311, 314 (Miss. 1975).

Despite lacking knowledge of the product's toxicology, Dr. Jackson indicated that he had read articles relating the effects of exposure to TDI and was aware of TDI's neurological effects. In addition, Dr. Jackson testified that he conducted EMG, brain wave, toxic, and metabolic studies of Swan, and the results of the studies suggested that exposure to toxic chemicals precipitated the onset of Swan's neurological deficits.

Dr. Smith described Swan's upper respiratory ailment and opined to a reasonable degree of medical probability that Swan's condition was caused by exposure to toxic chemicals. Dr. Smith based his opinion upon the history related by Swan, the medical reports and records of other physicians, his examination and treatment of Swan, and literature he had read concerning isocyanates.

Clearly, the opinions of Dr. Jackson and Dr. Smith were not based solely upon Swan's history of chemical exposure. Dr. Jackson and Dr. Smith relied upon Swan's history, literature, and the results of personal examinations in forming their opinions. The facts and data predicating an expert's opinion are sufficient if "of a type reasonably relied upon by experts in the particular field. . .." *Flight Line, Inc. v. Tanksley*, 608 So. 2d 1149, 1165 (Miss. 1992); *see* M.R.E. 703. Physicians frequently rely upon a patient's history, literature, and the results of personal examinations in diagnosing and treating the ills of their patients. Therefore, sufficient facts and data predicated the opinions of Dr. Jackson and Dr. Smith.

II.

DID THE TRIAL COURT ERR IN COMPELLING CARBOLINE TO PRODUCE SURVEILLANCE VIDEO TAPES, WHICH WERE NOT INTENDED TO BE USED BY CARBOLINE AS EVIDENCE?

Carboline argues that the court erred when it compelled Carboline to produce surveillance video tapes, which Carboline did not intend to use at trial. Specifically, Carboline argues that the tapes qualified as work product because they were not intended for use at trial. Carboline further contends that the court erred by failing to employ the work product analysis before compelling disclosure of the tapes.

In regard to matters relating to discovery, the trial court has considerable discretion. *Dawkins v. Redd Pest Control Co.*, 607 So. 2d 1232, 1235 (Miss. 1992). The discovery orders of the trial court will not be disturbed unless there has been an abuse of discretion. *Id.* (citations omitted).

The record before us indicates that in response to Swan's motion to compel disclosure of any surveillance objects, regardless of the surveillance tapes' intended use, the trial judge ordered the defendants to identify and produce copies of any surveillance, which they intended to use at trial. In this order, the judge indicated that he would further consider authorities cited by Swan supporting her request for disclosure of surveillance regardless of the intended use. Approximately one month later, the court determined that Swan had shown good cause for requesting production of the surveillance tapes and ordered the defendants to produce any and all audio tapes, photographs and/or videotapes depicting Swan and her residence. The trial judge's reluctance to compel production of any surveillance irrespective of its intended use suggests that he considered carefully the issue of work product. Therefore, we are unable to find that the trial court abused its discretion when it compelled production of the surveillance tapes. This assignment of error lacks merit.

III.

DID THE TRIAL COURT ERR IN ALLOWING SWAN TO INTRODUCE INTO EVIDENCE PRODUCTS AND MATERIAL SAFETY DATA SHEETS OF PRODUCTS NOT AT ISSUE?

Carboline argues that the court erred when it permitted Swan to introduce the container and label of a product other than the product used at the Long Beach School System because the evidence was prejudicial and misleading. In addition, Carboline contends that the material safety data sheets of products other than Chem-Elast 2819S should have been excluded.

The admission or suppression of evidence is within the discretion of the trial judge and will not be reversed absent an abuse of discretion. *General Motors Corp. v. Jackson*, 636 So. 2d 310, 314 (Miss. 1992) (citations omitted). The discretion of the trial judge must be exercised within the boundaries of the Mississippi Rules of Evidence. *Century 21 Deep South Properties Ltd. v. Corson*, 612 So. 2d 359, 369 (Miss. 1992) (citations omitted).

Rule 403 of the Mississippi Rules of Evidence addresses Carboline's assignment of error. The rule

provides that relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading of the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." M.R.E. 403. This Court does not weigh the Rule 403 factors anew, rather we determine whether the trial court abused its discretion in weighing the factors and deciding to admit or exclude the evidence. *Jackson,* 636 So. 2d at 314.

When Swan sought to introduce the container and label of a product other than Chem-Elast 2819S, the court opined:

> Well, if this product that is contained in this particular exhibit is not one of the products that was utilized or shipped to the--I should not say shipped, was not utilized in the roofing application, either Part A or Part B at the Long Beach Junior High School, then the shipping labels and the labeling would be irrelevant and immaterial excepting for the possibility of showing if this does contain an isocyanate and the same ingredients as contained in Part A or Part B, then it would only go to show the awareness on the part of Carboline that a warning should be issued.

Thereafter, the court emphasized that it was sustaining Carboline's objection to the introduction of the container and shipping order into evidence; however it stated that it would permit Swan to examine Carboline on whether it was aware of the necessity of providing the warning contained within the excluded exhibit. We find that the court exercised its discretion within the rules of evidence. In addition, we find the assignment of error groundless because the evidence was excluded.

IV.

> SHOULD SWAN BE COMPELLED TO DISCLOSE THE SETTLEMENT AMOUNTS REACHED WITH MIRI AND I.P. AND SHOULD CARBOLINE BE PERMITTED TO REVEAL TO THE JURY THAT SWAN FILED AND SETTLED CLAIMS AGAINST MIRI AND I.P.

Carboline argues that it should have been permitted to disclose to the jury that Swan had pursued and settled claims against MIRI and I.P. Carboline also argues that Swan should have been required to disclose to it amounts received in settlement of the claims against MIRI and I.P. because pleading the amount received by Swan is a necessary prerequisite for obtaining offset against any judgment entered favoring Swan.

In *Garcia v. Coast Electric Power Ass'n*, the supreme court described two procedures for determining damages due a plaintiff where co-defendants are involved and one co-defendant settles with the plaintiff. The first procedure allows the defendant to show by plaintiff or proper witnesses that a settlement has been made with one or more of the defendants and amount of that settlement. The jury is then instructed that if it returns a verdict for the plaintiff, the amount returned would be reduced by the amount of the settlement made with plaintiff. *Garcia v. Coast Elec. Power Ass'n,* 493

So. 2d 380, 385 (Miss. 1986) (citations omitted).

In the second procedure, the parties stipulate, outside the presence of the jury, that a settlement has been made, or is being made by one or more of the defendants, and the amount of the settlement. The jury is not informed of the settlement or the payment, and if a verdict were returned for the plaintiff, the trial judge would reduce the amount of the award by the amount of the settlement. *Garcia,* 493 So. 2d at 385.

The *Garcia* court indicated that the use of either method would not constitute reversible error; however, the court said that the second procedure was more logical and resulted in a fairer disposition of the case. *Id.* The supreme court later modified its position.

In *Whittley v. City of Meridian,* the court determined that the first procedure, which permitted a jury to be advised of the amount of settlement was unacceptable because informing a jury of the amount of settlement prior to its returning a verdict for a joint tort feasor or co-defendant would certainly unnecessarily influence the jury's decision. *Whittley v. City of Meridian,* 530 So. 2d 1341, 1346 (Miss. 1988). In order to remedy the problem presented by advising the jury of the amount of settlement, the court suggested that the jury be advised of the existence of the settlement but not the amount; however, if settlement occurred after the commencement of trial, the jury should be advised as to why the defendants were no longer present. *Whittley,* 530 So. 2d at 1346. If the jury returns a judgment in excess of the settlement, the judge could adjust the judgment by the amount of the settlement. *Id.*

Disclosure of the settlement amount is inherent in the second procedure and would support Carboline's contention that Swan should be required to disclose the settlement terms. However, the trial court was concerned about breaching the requirement that the settlement terms remain confidential; therefore, it chose to follow the *Whitley* directives by advising the jury of the existence of the settlements but not the settlement amounts. We dare not find error when a trial judge has followed the directives of the supreme court. This assignment of error lacks merit.

V.

DID THE TRIAL COURT ERR IN RESTRICTING CARBOLINE'S CROSS-EXAMINATION OF SWAN?

In the previous appeal, the supreme court determined that the trial court did not have the authority to order Swan to submit to an independent medical examination. *Swan v. I.P., Inc.,* 613 So. 2d 846, 859 (Miss. 1993). Now, Carboline attempts to circumvent the import of the supreme court's holding by arguing that it should be permitted to cross-examine Swan on her refusal to submit to an independent medical examination. We find that permitting defense counsel to cross-examine a plaintiff on the plaintiff's refusal to submit to an independent medical examination is tantamount to ordering the plaintiff to submit to the independent medical examination--the plaintiff is compelled to submit to the examination in order to avoid adverse credibility implications. Therefore, we find that the trial court acted properly in prohibiting the cross-examination. This assignment of error lacks merit.

In conclusion, we find that the court erred when it granted Carboline's motion for directed verdict; therefore, we reverse and remand for proceedings consistent with this opinion.

THE JUDGMENT OF THE CIRCUIT COURT OF HARRISON COUNTY IS REVERSED ON DIRECT APPEAL AND AFFIRMED ON CROSS APPEAL. COSTS OF THIS APPEAL ARE TAXED EQUALLY TO THE PARTIES.

FRAISER, C.J., BRIDGES, P.J., BARBER, COLEMAN, DIAZ, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.

THOMAS, P.J., NOT PARTICIPATING.