IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2006-CA-02024

CHARLES N. JAMES — APPELLANT

VERSUS

RACHEL M. CARAWAN — APPELLEE

APPEAL FROM
THE CIRCUIT COURT OF HANCOCK COUNTY, MISSISSIPPI
HONORABLE KOSTA N. VLAHOS, CIRCUIT COURT JUDGE
DOCKET NO. 01-0373

BRIEF OF THE PLAINTIFF/APPELLEE

RACHEL M. CARAWAN

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Rachel M. Carawan, Appellee and Plaintiff in the trial court proceeding;
2. Charles N. James, Appellant and Defendant in the trial court proceeding;
3. Mariano J. Barvié, Esq., counsel for Plaintiff/Appellee;
4. Melinda O. Johnson, Esq., counsel for Defendant/Appellant;
5. Jeffrey G. Pierce, Esq., counsel for Defendant/Appellant;
6. The Honorable Stephen Simpson, Circuit Court Judge, Hancock County; and
7. The Honorable Kosta N. Vlahos, Circuit Court Judge (retired), Hancock County.

MARIANO J. BARVIE [redacted]

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STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

This is a personal injury lawsuit that was filed on September 20, 2001 by Plaintiff/ Appellee, Rachel M. Carawan (hereinafter "Plaintiff") against Defendant / Appellant, Charles N. James (hereinafter "Defendant") in the Circuit Court of Hancock County. Plaintiff sustained injury when Defendant negligently backed into Plaintiff's vehicle, while she pumped gas at the Chevron Gas Station in Diamondhead, Mississippi, on the night of December 19, 2000. Plaintiff in her Complaint, filed on September 20, 2001, alleged that as a result of Defendant's negligence, she suffered "severe personal injuries to her body, including but not limited to, her head, neck, and back, which have rendered her temporarily and totally disabled." Plaintiff also alleged that said injuries caused her to "suffer a decline in health, being unable to get her natural sleep. . . , loss of enjoyment of life. . . , in the future will spend sums of money for hospital bills, medical expenses, doctor's care, therapy and treatment, medication and drugs, lost wages, and in the future will cause Plaintiff to suffer physical pain and mental anguish, to be permanently disabled and weakened." (R. 5-8, R.E. 5-8). On or about, October 22, 2001, Defendant answered the Complaint denying Plaintiff's allegations. (R. 12-16, R.E. 9-13).

Subsequently, discovery commenced, including the taking of the depositions of Plaintiff and Defendant on January 30, 2002 (R. 27-28, R.E. 14-15). In addition, Plaintiff's fact witness, Pam Liles was deposed on December 19, 2002. (R. 160-161, R.E. 18-19). Plaintiff received initial treatment at the emergency room(s) of Hancock Medical Center and Memorial Hospital, and followed up treatment for back pain with Dr. Michael Wilensky, physical therapy with Total Rehab Plus, M. F. Longnecker, and continued treatment with Dr. Victor T. Bazzone, whom Plaintiff saw from February 14, 2002 through August, 2003. (TR. Vol. 7, pp. 197-253). In addition, Dr. Bazzone

was designated as Plaintiff's expert witness on August 8, 2002 (R. 114-115, R.E. 16-17) and was deposed on March 11, 2004 (R. 417-418, R.E. 91-92). Defendant designated no expert witnesses in preparation for trial. Instead, he filed various Notice(s) of Intent to Offer Records in the following order: Video Surveillance Records and video conducted on Plaintiff from August 3-17, 2001, filed on March 13, 2003 (R. 246-258, R.E. 20-32); Memorial Hospital and Gulfport and Hancock Medical Center medical records, filed on March 17, 2003 (R. 261-277); Open MRI's medical records, filed on March 19, 2003 (R. 290-295); Plaintiff's Grand Casino employment records, filed on March 21, 2003 (R. 307-357, R.E.38-88); Dr. Longnecker's medical records, filed on April 7, 2003 (R. 370-376); Total Rehab Plus medical records, filed on April 10, 2003 (R. 377-395); Video Surveillance Records and video conducted on Plaintiff from August 3-17, 2001, filed on March 29, 2004 (R. 422-434); Hancock County Accident Report of December 19, 2000, filed on March 29, 2004 (R. 435-438); Dr. Bazzone's medical records, filed on March 29, 2004 (R. 439-473); Video Surveillance Records and video pertaining to July 22-31, 2003, filed on March 31, 2004 (R. 474-482); Warfield's Body Shop repair records regarding repair of damage to Plaintiff's vehicle, filed on March 31, 2004 (R. 483-486); Mississippi Highway Patrol Accident Report of November 3, 2003, filed on April 2, 2004 (R. 503-506) Coastal Chronic Pain Services – Brian Dix D.O. medical records, filed on April 2, 2004 (R. 507-514); and AMR records for Plaintiff's November 3, 2003 treatment, filed on April 2, 2004 (R. 530-538).

Plaintiff timely filed her Objection to Defendant's Notice of Intent to Offer Surveillance Records on March 20, 2003 (R. 296-300, R.E. 33-37) and Objection to Defendant's Notice of Intent to Offer Employment Records, filed on March 31, 2003 (R. 361-362, R.E. 89-90). These objections were not resolved by the trial court prior to trial on April 5, 2005. On April 2, 2004, Plaintiff filed her Motion *In Limine*, which requested "that should Defendant wish to introduce any motion picture

file into evidence, the same be tendered to Court outside the presence of the jury, and shown or exhibited to determine its relevance and suitability for introduction into evidence. . .". (R. 553-558, R.E. 96-101). Defendant also filed a Motion *In Limine*, that requested among other things that "no testimony be given regarding future medical expenses and lost wages" and that "no testimony be given nor solicited, directly or indirectly, in any manner whatsoever, pertaining to Plaintiff, Rachel Carawan's father or other family member being sick or dying of cancer or other disease". (R. 515-517, R.E. 93-95).

B. TRIAL COURT'S DISPOSITION

Trial was scheduled to commence on the morning of April 6, 2005. The day before trial, the trial court held hearing on the parties' respective motions *in limine*. At the hearing, Plaintiff, in support of her motion, urged the trial court to exclude the July 31, 2003 Six Flags video surveillance, as she was not introducing any evidence of lost wages or future pain and suffering or future medical bills past July 29, 2003 (the date of her second epidural treatment) and that said video was "wholly irrelevant, and it certainly would be severely prejudicial to introduce something that a video of a day that we're not even claiming as part of injury or damages." (TR. Supplemental Vol. 1, pp. 31-32). In addition and in response to Paragraph 3 of Defendant's Motion *In Limine* (R. 515-517, R.E. 93-95), Plaintiff also stipulated that "[A]s to future wage loss and future medical expenses, we're not going to make any claims past July 25, 2003" (TR. Supplemental Vol. 1, p. 3, R.E. 127). Judge Simpson, after due consideration of the motions and oral argument, ruled that "given that no damages in the form of medical expenses, future lost wages, or future medical expenses are being sought from and after July 29 of 2003, I'm of the opinion that the prejudicial value of that outweighs its probative value given your plaintiff is seeking no relief after that date." (TR. Supplemental Vol. 1, p. 49, R.E. 131). After *voir dire* was completed, the jury seated and opening statements made,

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Plaintiff called her first witness, Pamela Liles who was examined by Plaintiff's counsel regarding the events of December 19, 2000 and her knowledge of Plaintiff, both prior to and subsequent to the accident of December 19, 2000. (TR. Supplemental Vol. 2, pp. 25-33). On cross-examination, however, Defendant's counsel attempted to illicit information from the witness regarding Plaintiff's visit to Six Flags. Plaintiff's counsel (and not the trial court as misrepresented by Defendant), promptly moved for mistrial, and the trial court, recognizing the highly prejudicial nature of Defendant counsel's query, declared a mistrial. (TR. Supplemental Vol. 2, pp. 39-51). Trial was rescheduled and held from August 14, 2006 through August 16, 2006. At trial the Trial court made numerous evidentiary rulings which properly excluded evidence previously submitted for authenticity by Defendant, pursuant to Miss. R. Evid. 902, as said evidence was improperly attempted to be introduced into evidence by Defendant. Ultimately, Defendant was again given the opportunity to introduce these medical and employment records correctly. (TR. Vol. 7, pp. 225-226). However, Defendant failed to introduce this evidence when cross-examining Dr. Bazzone, after being given a chance by the trial court to do so and therefore, any objections he had were waived. (TR. Vol. 8, pp. 360-361). The court also refused a jury instruction offered by Defendant (D-12) regarding mitigation of damages on Plaintiff's part. In refusing the mitigation of damages jury instruction, Judge Vlahos properly found that the lack of evidence, presented by Defendant, did not support such an instruction. (TR. Vol. 8, pp. 316-319). Following deliberation, the Jury returned a 9-3 verdict in favor of Plaintiff, awarding Plaintiff damages in the amount of $33,484.52, the exact amount of medical bills and lost wages. Judgment was entered on August 16, 2006. (R.646-647, R.E. 103-104).

In response, Defendant filed a motion for new trial, while Plaintiff filed a motion seeking an additur for Plaintiff's pain and suffering. (R.656-664, R.E. 105-113). Post-trial motions were heard

by Judge Vlahos in Biloxi, Mississippi on October 23, 2006, and decision was rendered, wherein Defendant's motion for new trial was denied, while Plaintiff's motion for additur was granted in the amount of $30,000.00. In so granting the additur in the amount of $30,000.00 for a total verdict of $65,484.52, the trial court, in his order, properly found that "evidence of physical pain and suffering by the Plaintiff was never contradicted by the Defendant" and further found that "the medical bills incurred by the Plaintiff in this case were uncontradicted and no allowance was made for pain and suffering on the part of the jury. As such, this Court finds that the jury verdict was contrary to the overwhelming weight of the credible evidence and so inadequate as to shock the conscience of the court." (R. 671-674, R.E. 114-131). Aggrieved, Defendant appealed the Court's decision. (R. 675-676, R.E. 118-131).

C. STATEMENT OF FACTS RELEVANT TO THE ISSUES PRESENTED ON APPEAL

The un-rebutted facts of this case, show that on the night of December 19, 2000, Plaintiff, Rachel Carawan, Pamela Lilies and Liles' three year old daughter stopped at the Diamondhead Chevron Gas Station in Diamondhead, Mississippi to get gas while returning from a night of Christmas shopping in Slidell, Louisiana. (TR. Vol. 6, p. 97). Defendant, Charles N. James, a security guard working in Diamondhead at the time was also stopped at the Chevron Gas Station to get gas for his 1996 Ford Crown Victoria and a cup of coffee. (TR. Vol. 7, pp.288, 295). Plaintiff got out of her 1996 Honda Civic, inserted the pump into the nozzle, and began to pump gas, leaning against her car with her backside and holding the nozzle with her left hand. (TR. Vol. 7, p.160). As Plaintiff continued to pump gas, Liles began to scream. Plaintiff turned her torso with her back still against the car. As she looked into the car, it was impacted by Defendant's vehicle. The impact had occurred as a result of Defendant backing into Plaintiff's vehicle. Plaintiff was thrown forward and into the gas pump. (TR. Vol. 7, p.160). Contrary to Defendant's assertions, the impact was strong

enough to throw Liles (inside the vehicle) to the left towards the driver's seat even though she had braced herself in anticipation of the impact. (TR. Vol. 6, p.98). In addition, the impact damaged the rear bumper of Plaintiff's car. (R. 486). After the impact, Defendant, who admitted he had not seen Plaintiff's car, then went back into the Chevron Station to refill his cup of coffee, as he apparently had spilled his previous cup of coffee upon impact.(TR. Vol. 7, pp. 289; 298-300) (Emphasis added). Initially, Plaintiff felt only a little soreness as a result of the accident. However, the next morning, she felt "really, really stiff and really tight" (TR. Vol. 6, p.110). At the time of the accident, Plaintiff was employed by Grand Casino, who had a strict attendance policy. As a result, Plaintiff checked in first with her employer, was "dismissed" and then went straight to Hancock Medical Center where she was treated with pain medication. (TR. Vol. 6, p.111). Plaintiff continued to feel pain, specifically, tightness and pain, and as a result she could not lift anything.

Regarding Plaintiff's immediate post-accident pain, fact witness, Liles testified that "The next morning was – yes, she was having a hard time getting out of bed. She was complaining of back pain and just being sore and stiff." (TR. Vol. 6, pp. 99-100). Liles further testified that in addition to going to the emergency room that day, Plaintiff after the accident and the days to come afterwards had "decreased energy. She (Plaintiff) wasn't able to do before physically. She used to jog a lot, she danced. My daughter is her God-daughter so they used to play a lot and pick up, you know, and play like you do with a kid and she just wasn't able to do that". (TR. Vol. 6, p. 100). In addition, it hurt Plaintiff to breathe, and she was experiencing wheezing, so she sought treatment at Memorial Hospital at Gulfport only a week later. (TR. Vol. 6, p.112). Plaintiff was instructed to follow-up with a physician if she was not better in five days. She did not get better, so Plaintiff sought treatment with Dr. Michael Wilensky, beginning in January, 2001. Dr. Wilensky prescribed Celebrex and physical therapy. (TR. Vol. 6, p.112). Dr. Wilensky also provided Plaintiff with a

doctor's note, explaining her work absence from December 19, 2000 through April, 2001 (TR. Vol. 7, pp.139-140).

Concurrent with her treatment by Dr. Wilensky, Plaintiff was still attempting to attend school and tend to her father who was dying of cancer. Contrary to Defendant's assertions, Plaintiff did not re-injure herself, while helping her bedridden father, nor did Plaintiff re-injure herself while moving a chair. Rather, Plaintiff explained that she was experiencing pain as a result of the accident -- pain that she had never experienced prior to the accident. (TR. Vol. 6, pp.113-116; Vol. 7, pp.167-168). Plaintiff returned to work at Grand Casino in late April, 2001 (four (4) months after the accident), even though she was in pain, as her failure to do so would have resulted in termination. Grand Casino accommodated Plaintiff (a Bartender) by providing a helper to bring her ice and liquor (TR. Vol. 6, pp.116-117). In addition and contrary to Defendant's assertions that Plaintiff re-injured herself while working a banquet, Plaintiff did not sustain a work-related injury, but rather felt tightness caused by the ordinary and repetitive lifting of her arms (which caused her no problems before this accident). (TR. Vol. 6, p.117). As there was no relief to her pain, Plaintiff sought the services of Dr. M.F. Longnecker (an orthopaedic surgeon) who treated Plaintiff from June, 2001 through July, 2001. Dr. Longnecker performed an MRI on Plaintiff's cervical and thoracic spine, and identified Plaintiff's problems as being muscular in nature. As a result, aquatherapy and exercise was prescribed, as was anti-inflammatory medicine and muscle relaxers. Contrary to Defendant's assertions, Plaintiff testified that Dr. Longnecker recommended she not continue as a bartender if she "still had to lift the ice and do all the lifting" (TR. Vol. 7, pp. 165-166) and as previously stated, this was not the case as Grand Casino accommodated Plaintiff by providing a helper to bring her ice and liquor. Ultimately Dr. Longnecker released Plaintiff as he felt Plaintiff was "as good as you're going to get. You have to live with it" (TR. Vol. 8, p. 333).

As a result, Plaintiff attempted to get on with her life but her continued to persist and affect her everyday activities, so she sought the services of Victor T. Bazzone, a neurosurgeon in practice for thirty-two (32) years. Plaintiff's treatment by Dr. Bazzone came about as a result of Plaintiff complaining of ongoing pain to Dr. Bazzone, whom Plaintiff met while working at her place of employment, LB's (a restaurant at the Grand Casino in Gulfport, Mississippi). Bazzone had observed Plaintiff working in pain, and displaying difficulty walking and doing her job. After being told by Plaintiff of the December 19, 2000 accident and the failure of the previous doctors to properly diagnose her injury, Dr. Bazzone suggested that he perform an evaluation of Plaintiff. (TR. Vol. 7, p. 169). Initial treatment began on February 14, 2002, a little over a year after Plaintiff's December 19, 2000 accident (and not the "two years and almost two months" after her accident as misrepresented by Defendant to this Court). (TR. Vol. 7, p. 198). At the time of this initial evaluation, Plaintiff complained of back pain increased by walking, bending, twisting and sitting in position "for any long period of time", that had resulted when she was thrown "forward and to the right against the gasoline pump" while leaning against her car pumping gas. (TR. Vol. 7, p. 198). Dr. Bazzone, Plaintiff's designated expert witness, testified at length as to how Plaintiff's injury occurred, and how he determined the true nature of her injury. Dr. Bazzone's testimony was heard by the jury and never rebutted by Defendant, who failed to designate any expert witnesses whatsoever (R. 1-4, R.E. 1-4; Supplemental Vol. 1, R. 1-5, R.E. 120-124).

Dr. Bazzone, initially, entertained two diagnosis' regarding Plaintiff: a "ruptured disk" in Plaintiff's back and "myofascial disease", which has to do with "an irritation to muscles and the coverings of the muscles in the body". He testified that it is common to have different diagnosis', what he defined as a "differential diagnosis", wherein a treating physician works through "the particular problems with this particular patient". (TR. Vol. 7, p. 203). At the end of Dr. Bazzone's

initial examination and diagnosis, an MRI was recommended and then performed on May 28, 2002. The MRI covered the last bone of the chest area and "all five bones and areas of the low-back. It showed between the fifth bone and the sacrum, which we call L5-S1 are." (TR. Vol. 7, p. 207). There was a small focal central bulge/protrusion, which fit the symptoms of Plaintiff's back pain, and which Dr. Bazzone diagnosed as a ruptured disk. (TR. Vol. 7, p. 207, pp. 232-233). Dr. Bazzone testified that it was his medical opinion that based on Plaintiff's history, that Plaintiff "rotated her body to the right" and was "thrown forward into a flexed position",and that this was the "classic maneuver for rupturing a disk is somebody who bends forward to lift something and they rupture a disk". (TR. Vol. 7, p. 221).

Dr. Bazzone also testified at length as to what a herniated or ruptured disc presented, and likened a disc to a jelly donut, which as long as the crust "stays intact, meaning it retains it's strength, its rigidity, the jelly stays where it is supposed to be". . . and if however, . . . "there's a weakness in the crust then the jelly can fall outward, and if the crust breaks open the jelly can squirt out completely". (TR. Vol. 7, p. 206). The consequence of the jelly (i.e. disk fluid) leaking out is that it can hit the nerve and this is what causes pain. Dr. Bazzone also testified that ruptured disks in most instances "do not start as a full, horrendous pain. They may be a bad pain but usually subsides for a little while, and then the constant nagging pain that people get gradually builds up and becomes worse and worse and worse", with the end result being that the individual not being able to sit a certain way, or having to shift their weight "from one side to the other" or not being able to sit at all. (TR. Vol. 7, pp.206-207).

Because of the results of the MRI, and the fact that the resolution of MRI images is generally limited, Dr. Bazzone had Plaintiff undergo a myelogram and a CT scan in October, 2002. The mylelogram was described as a diagnostic test wherein dye is inserted "into the area where the spinal

fluid is that surrounds the spinal cord." (TR. Vol. 7, p.209). Combined with the CT scan, and covering Plaintiff's spine, Dr. Bazzone was able to "visualize all these areas to make sure how big the problem is down here". (TR. Vol. 7, p.209). After performing the MRI, myelogram, CT scan, and after going through the evaluation with Plaintiff, Dr. Bazzone explained that he thought the major problem was that Plaintiff was having a "myofascial injury, that is injury to the muscle. I still thought she had a ruptured disk, but I didn't think it was causing her as much problem as her myofascial problems." (TR. Vol. 7, p.209).

As a result, Dr. Bazzone elected to treat Plaintiff with anti-inflammatory medicine, ibuprofen (400 milligrams per day), resistance training, weightlifting, three times per week, and one and one half miles of walking, each day, six days a week. As Dr. Bazzone testified, after October, 2002, he instructed Plaintiff to follow-up and "to schedule an appoint to return should she show deterioration, that is should she get worse". (TR. Vol. 7, pp.211, 238). Despite the regimen prescribed by Dr. Bazzone, Plaintiff's back pain persisted, extending into the low back and resulting in numbness in her big toe. Plaintiff was seen again by Dr. Bazzone on March 31, 2003, who related this numbness in her toe to the nerve serving this area being hit by the "bulging disk, ruptured disk, protruded disk". (TR. Vol. 7, p.212). Dr. Bazzone ordered a new MRI, which was performed on April 8, 2003 and testified that this MRI revealed that Plaintiff "showed bulges in the same area where she had before, that was at L5-S1, and that was down here. However, you could see that the disk had moved out to the side a little bit more." (TR. Vol. 7, p.213). Also significant was the fact that this second MRI "was a lot clearer", and Dr. Bazzone "could definitely see that there was some evidence for the disk having moved out to the side." In addition, the consistence and persistence of the defect at L5-S1 explained why Plaintiff was getting worse even though the disk was small. (TR. Vol. 7, pp.213, 241). Plaintiff was consulted by Dr. Bazzone as to possibly undertaking back surgery. Dr. Bazzone

took into consideration the fact that Plaintiff's condition had not improved over the previous two years and had, in fact, deteriorated from February, 2002 to March, 2003. Plaintiff, in school, and degree (working toward her degree in sign language for deaf people,) elected not to have surgery until she finished school, so Dr. Bazzone prescribed the anti-inflammatory, Bextra, 10 milligrams, twice a day. (TR. Vol. 7, pp.213-214). Plaintiff's pain continued to persist, however, so Dr. Bazzone saw her again on May 2, 2003. Plaintiff's condition had gotten worse, and although Plaintiff wanted to have surgery, she opted to delay the surgery as her father was now near death and Plaintiff was trying to spend as much time with him as possible. (TR. Vol. 7, p.214). In view of Plaintiff's pain, Dr. Bazzone prescribed Percocet, a pain medication, and also took Plaintiff off work. In addition, Dr. Bazzone referred Plaintiff to Neurosurgeon, Dr. Michael Lowery, for a second opinion regarding potential back surgery. As Plaintiff, who was 28 years old at the time, testified, "once I got the back injury everyone was scaring me with all the stories. And as soon as he (Dr. Bazzone) said back surgery I wanted a second opinion". (TR. Vol. 6, p.178). Dr. Lowery upon review of the MRI Scan, myelogram and examination of Plaintiff, while deferring to Dr. Bazzone's prior treatment of Plaintiff, did not believe there was anything he could offer "in the way of surgery" that would help Plaintiff.

Contrary to Defendant's assertion, Dr. Bazzone was not adverse to alternative methods of treatment for Plaintiff. As he testified: "the older I've gotten the less I want to operate on a disk if I don't have to. I'll try anything in the world to try to get a patient over an injury of this sort without going to surgery because I think they are better off. So steroids, epidural steroids is part of our regimen of treatment" (TR. Vol. 7, p.215). Dr. Bazzone relied on Dr. Lowery's record to give him a "second opinion and a new look at things", which led him to order epidural steroid injections for Plaintiff. (TR. Vol. 7, p.247). To this end, Plaintiff was referred to Dr. Bryan Dix, an

anesthesiologist located in Gulfport, Mississippi in July, 2003. Dr. Dix, was described by Dr. Bazzone as not only being an anesthesiologist, but as also having "a subspecialty in pain management and pain control". (TR. Vol. 7, p.244). Defendant attempts to make issue of the fact that Plaintiff purportedly related to Dr. Dix that in addition to the December 20, 2000 accident, she had also sustained a work-related injury. Defendant did not call Dr. Dix as a witness, however, and contrary to Defendant's assertion, Dr. Bazzone testified that Dix had clarified Plaintiff's condition, via followup correspondence, and that Plaintiff had incurred no such work-related injury. (TR. Vol. 7, pp. 246-250).

Plaintiff was initially evaluated on July 15, 2003, and according to the report Dr. Bazzone received from Dr. Dix, Plaintiff "had about a 20 percent relief from her symptomatology, which was good because that's the main reason for having them is to try to get some relief. As a result, she was scheduled for a second one". (TR. Vol. 7, p.215). As Plaintiff testified, the improvement in her condition was tremendous: "I had the biggest smile on my face. I was really taken back by the fact that I felt so much better. I mean it was great. When I saw Dr. Bazzone, he immediately saw the difference right when I went through the door. I felt full of life. I just wanted to go like run. I just wanted to run all over. I was just happy. Bottomline is I was really, really, happy after the first epidural". (TR. Vol. 6, p.127). After the first epidural, Plaintiff requested and received from Dr. Bazzone, clearance to return to work. Plaintiff had been kept off work by Dr. Bazzone since May, 2003. (TR. Vol. 7, p.252). Upon returning to work on July 25, 2003, Plaintiff was restricted to working two (2) days only (Fridays and Saturdays) at six hours per day. (TR. Vol. 7, p.216). Plaintiff, after the second epidural treatment, on July 29, 2003, required no further epidurals and in fact never returned to Dr. Dix for a third epidural treatment (TR. Vol. 6, p.132). This was no surprise to Dr. Bazzone, who explained that "[U]sually most people will get two injections. At the

end of the second infection (sic) if they're showing improvement, getting better, we hold off on the third. . . Well as it turns out in her case she, after two injections, was well enough that she wanted to go back to work". (TR. Vol. 7, p.217). As a result of her improvement, Plaintiff returned to work full time shortly thereafter, and as such, Plaintiff claimed no injuries, future medicals or lost wages beyond the date of her second and final epidural treatment on July 29, 2003. (TR. Supplemental Vol. 1, pp. 17-18, 31).

Recognizing this, Defendant filed a Motion *In Limine* on April 2, 2004, attempting to restrict Plaintiff's ability to claim damages into the future. Defendant requested from the trial court that Plaintiff not be able to ask for future medical treatment and future loss of wages. (R. 515-517, R.E. 93-95). At the hearing before Judge Simpson on April 5, 2005, Plaintiff agreed that she would not claim any damages past July 29, 2003, the date of Plaintiff's second epidural treatment and the date of her return to work. (TR. Supplemental Vol. 1, p. 3, R.E. 127).

II.

SUMMARY OF THE ARGUMENT

This matter was originally scheduled for trial before the Honorable Stephen Simpson beginning on April 6, 2005. Prior to trial, Judge Simpson held hearing on the parties respective motions *In Limine*, and after oral argument, properly excluded surveillance video taken of Plaintiff after July 29, 2003, the date of her second and final epidural treatment. The trial court held that since Plaintiff was not claiming injury, future lost wages or future medical expenses, Defendant's counsel could not to go into the circumstances regarding either the surveillance video, or Plaintiff's activities on July 31, 2003 (the date of the video). Instead, Defendant's counsel violated the trial court's instruction and examined one of Plaintiff's witnesses regarding the excluded evidence. As a result, Plaintiff (and not the trial court as misrepresented by Defendant) moved for an immediate mistrial,

which was granted by the trial court. Hurricane Katrina intervened and this matter was subsequently re-set and tried before the Honorable Kosta Vlahos on August 14, 15 and 16, 2006 in the Circuit Court of Hancock County, Mississippi. The evidence presented by Plaintiff certainly warranted a jury verdict for Plaintiff, as Defendant failed to offer any evidence whatsoever (including expert witness report(s) and/or testimony), to rebut the evidence put forth by Plaintiff. The jury returned a verdict for Plaintiff in the amount of $33,484.52 for lost wages and medical expenses.

The lack of evidence presented by Defendant, particularly, Plaintiff's medical records and employment records, was due to Defendant's own actions, specifically, his failure to properly offer said records into the trial record, as Defendant attempted to break apart the records and introduce only piecemeal portions of the records, so as to present a picture of Plaintiff's medical and employment history out of context, and attempting to put forth an incomplete version of the medical records. When Plaintiff made proper objection, pursuant to Miss. R. Evid. 106 and Miss. Code Ann. § 41-9-109 (1972), the trial court properly sustained Plaintiff's objection and excluded the evidence. Defendant erroneously argued for admission of the records, based on Miss R. Evid. 902, and later during trial, Miss. R. Evid. 803. Defendant completely misconstrued and misapplied the rules (at trial and now in this Appeal), taking the erroneous position that all evidence introduced at trial comes in (regardless of admissibility), so long as he has filed notice(s) of intent pursuant to Rule 902. In fact, the trial court went so far as to explain to Defendant the method for properly introducing the records into the trial record and even afforded Defendant the opportunity to cure his error, when cross-examining Plaintiff's expert witness, Dr. Bazzone. Defendant, however, did not take advantage of the opportunity, nor did he seek to call Plaintiff during his case in chief, and/or to use the excluded evidence at that time. As a result, Defendant waived any arguments regarding the exclusion of Plaintiff's medical and employment records, and, as such, any alleged error was waived.

In addition, because there was no evidence in the Record supporting Defendant's mitigation of damages jury instruction, it was also properly denied by the trial court.

In response, Defendant filed a motion for new trial, while Plaintiff filed a motion seeking an additur for Plaintiff's pain and suffering. The post-trial motions were heard by Judge Vlahos in Biloxi, Mississippi on October 23, 2006, and decision was rendered, wherein Defendant's motion for new trial was denied, while Plaintiff's motion for additur was granted in the amount of $30,000.00. Aggrieved, Defendant has appealed the trial court's decision and has set forth four (4) assignments of error for review.

Finally, Defendant's counsel, throughout these proceedings, has repeatedly crossed the line of "zealously" advocating Defendant's case, by making unsubstantiated assertions in his Brief that Judge Simpson's ruling (regarding exclusion of Defendant videotape evidence) "was an adoption of Plaintiff's argument" and that "Plaintiff's plan was endorsed by the trial court". Plaintiff would respectfully request that any disrespectful language by Defendant regarding the trial court be stricken from Defendant's Brief by this Court, pursuant to the Mississippi Rules of Appellate Procedure. In addition, and repeatedly throughout these proceedings and his Brief, Defendant has also implied that an inappropriate relationship existed between Plaintiff and her treating physician and expert witness, Dr. Bazzone. Plaintiff would submit that rather than casting dispersions upon individuals of unquestioned integrity and professionalism, Defendant would be better served by focusing on the merits of his case.

A. Defendant's First assignment of error is without merit as neither Judge Simpson nor Judge Vlahos abused their discretion and/or commit reversible error in by granting Plaintiff's Motion *In Limine.*

With respect to Defendant's first assigned error for review, it is abundantly clear that Judge

Simpson made the proper ruling in granting Plaintiff's motion. Judge Simpson recognized the highly prejudicial nature of the video, particularly with respect to the fact that the video depicted Plaintiff at a time (July 29, 2003), subsequent to the time during which Plaintiff is alleging injury and seeking relief. As the Court explained, ". . . whether or not it's real and probative evidence of the absence of an injury or evidence of the severity of the of the injury would indeed be helpful to the jury if it had to assist them in the value of the claim to be made." (TR. Supplemental Vol. 1, p. 40, R.E. 129). The Court, in so ruling, further explained that "[G]iven no damages in the form of medical expenses, future lost wages, or future medical expenses are being sought from or after July 29th of 2003. I'm of the opinion that the prejudicial value of that (the video) outweighs its probative value given your plaintiff is seeking no relief from and after that date." (TR. Supplemental Vol. 1, p. 49, R.E. 131). Furthermore, the primary cases cited by Defendant as being contrary to Judge Simpson's ruling, *Williams v. Dixie Electric Power Association*, 514 So.2d 332 (Miss.1987) and *Congleton v. Shellfish Culture, Inc.*, 807 So.2d 492 (Miss. Ct. App. 2002), are both distinguishable to the facts in the instant case. Specifically, both appellant, Williams and appellant Congleton, were alleging injury up to and including the time during which the surveillance video was taken, whereas Plaintiff is asserting no injury and/or claiming any damages whatsoever for the period of time (and beyond) that Defendant's video surveillance was taken.

Defendant argues that as a result of the filing of his Notice of Intent, pursuant to Miss. R. Evid 902, combined with Plaintiff's failure to timely respond (i.e. object) to said Notice, Plaintiff has waived any argument as to the video's *admissibility*. Defendant's argument is misplaced. As previously stated, Defendant completely misconstrues and misapplies Miss. R. Evid. 902, taking the erroneous position that all evidence introduced at trial comes in (regardless of admissibility), so long as he has filed notice(s) of intent pursuant to Rule 902. Miss. R. Evid. 902 speaks to "authenticity

as a condition precedent to admissibility", not admissibility based on relevance and probativeness, which is what Plaintiff's Motion *In Limine* was based upon and what Judge Simpson based his ruling. Furthermore, Defendant filed a Motion *In Limine* on April 2, 2004, attempting to restrict Plaintiff's ability to claim damages into the future, and requesting that Plaintiff not be able to ask for future medical treatment and future loss of wages. At the hearing before Judge Simpson on April 5, 2005, Plaintiff agreed that she would not claim any damages past July 29, 2003, the date of Plaintiff's second epidural treatment and the date of her return to work. (R. 515-517, R.E. 93-95; TR. Supplemental Vol. 1, p. 3, R.E. 127). While on the one hand, Defendant asked the court to prevent Plaintiff from making claims of future damages, Defendant wanted to use surveillance film after the period of time Plaintiff was claiming damages. For these reasons and additional reasons, as will be set forth below, Defendant's argument has no merit and must be denied.

B. Defendant's second assignment of error is without merit as Judge Vlahos did not abuse his discretion and/or commit reversible error by excluding improperly offered evidence.

As to Defendant's second argument regarding Judge Vlahos' refusal to allow Defendant to offer into evidence, and/or cross examine Plaintiff, using her employment records and medical records, Defendant's arguments are again misplaced and without merit. Defendant frames his argument as one in which Judge Vlahos abused his discretion by improperly excluding evidence previously submitted pursuant to Miss. R. Evid. 902(11) and Miss. R. Evid. 803. However, with respect to Plaintiff's Grand Casino employment records, the Record is clear that Defendant's Notice of Intent to Offer Plaintiff's Employment Records was timely objected to, but never ruled on prior to trial. Therefore, the records were not self-authenticated, and as a result, the trial court was correct in sustaining Plaintiff's timely objection, raised at trial, when Defendant attempted to improperly

Emp. recs not ruled on prior to trial

admit said un-authenticated records without a sponsoring witness. As to the medical records, and contrary to Defendant's assertions, Defendant continually attempted to have Plaintiff's hospital records improperly admitted into evidence, by offering singular document exhibit(s) culled from the cumulative and complete medical records. Counsel for Plaintiff made proper and timely objection(s) and the Court sustained the objection(s). (TR. Vol. 6, pp. 137-139). In fact the Court went so far as to explain to Defendant's counsel the proper method for introducing this evidence into the Record. (TR. Vol. 6, p.141 - Vol. 7, p.159). For these reasons, Defendant's arguments are without merit and must be denied.

C. Defendant's third assignment of error is without merit as Judge Vlahos did not abuse his discretion and/or commit reversible error by refusing to allow Defendant's mitigation of damages jury instruction.

As to Defendant's third argument regarding Judge Vlahos' refusal to allow Defendant's mitigation of damages jury instruction, while Mississippi jurisprudence does state that a party is entitled to a jury instruction regarding his/her theory of the case, there must be some credible evidence in the record which would support the instruction. *Purina Mills, Inc. v. E.R. Moak, et al.*, 575 So.2d 993 (Miss. 1991)(Emphasis added). Furthermore, this Court has held that the Circuit Court enjoys "considerable discretion regarding the form and substance of jury instructions." *Splain v. Hines*, 669 So.2d 1234, 1239 (Miss. 1992) citing *Rester v. Lott*, 556 So.2d 1266, 1269 (Miss. 1990). Judge Vlahos, in denying Defendant's jury instruction made the proper ruling, as the Record is clear that Defendant put forth no evidence in the form of expert testimony, and/or other evidence to support such an instruction. (TR. Vol. 8, pp.315-319; R 671-674, R.E. 114-117).

D. Defendant's fourth assignment of error is without merit as Judge Vlahos did not abuse his discretion and/or commit reversible error by denying Defendant's Motion for New Trial, and granting Plaintiff's Motion for Additur.

Finally, Defendant's argument regarding Judge Vlahos's denial of Defendant's Motion for New Trial, and granting of Plaintiff's Motion for Additur in the amount of $30,000.00, is likewise misplaced and without merit. As Defendant accurately states, in determining whether to grant a motion for new trial, the credible evidence "must be viewed in the light most favorable to the non-moving party". *Green v. Grant*, 641 So.2d 1203, 1207 (Miss 1994). In addition, "[T]he grant or denial of a motion for a new trial is and always been a matter largely within the sound discretion of the trial judge." *Green*, 641 So.2d at 1207. In the instant cause, the credible *admissible* evidence (i.e. the entire Record) was, in fact, reviewed by Judge Vlahos, who, in holding that all favorable inferences are granted in favor of the non-moving party (i.e. the Plaintiff), pursuant to Mississippi jurisprudence, properly denied Defendant's Motion for New Trial (R. 671-674, R.E. 114-117).

As to Plaintiff's Motion for Additur in the amount of $30,000.00, this Court has previously ordered an additur of $10,000.00, where the plaintiff had incurred medical bills of $2,831.25. The Court held that where medical bills were uncontradicted, no allowance was made for pain and suffering on the part of the jury, the jury award was so inadequate as to shock the conscience and against the overwhelming weight of the evidence. *Maddox v. Muirhead*, 738 So.2d 742 (Miss. 1999). Judge Vlahos in the instant cause found that the jury had awarded the exact amount of medical bills and lost wages submitted by Plaintiff, but failed to award any damages for pain and suffering. Judge Vlahos also found that Defendant never contradicted any of the evidence of physical pain and suffering put forth by Plaintiff, nor did Defendant contradict any of the medical bills put forth by Plaintiff. As a result, Judge Vlahos in granting the additur properly found that the jury verdict "was contrary to the overwhelming weight of the credible evidence and so inadequate as to shock the conscience of the court", and further properly found, that "the medical bills incurred by the Plaintiff in this case were uncontradicted and no allowance was made for pain and suffering on the part of the

jury. As such, this Court finds that the jury verdict was contrary to the overwhelming weight of the credible evidence and so inadequate as to shock the conscience of the court." (R. 671-674, R.E. 114-117).

III.

ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION AND/OR COMMIT REVERSIBLE ERROR BY GRANTING PLAINTIFF'S MOTION *IN LIMINE* AS TO THE VIDEO SURVEILLANCE TAKEN OF PLAINTIFF ON JULY 31, 2003.

The standard of review for the trial court's admission or exclusion of evidence is the abuse of discretion standard. *Thompson Mach. Commerce Corp. v. Wallace*, 687 So.2d 149, 152 (Miss. 1997); *Wade v. State*, 583 So.2d 965, 967 (Miss. 1991). As previously summarized above, it is abundantly clear that Judge Simpson made the proper ruling by granting Plaintiff's motion *In Limine* on April 5, 2005, regarding video surveillance taken of Plaintiff on July 31, 2003. (R. 553-558, R.E. 96-101; TR. Supplemental Vol. 1, pp. 39-40, 49, R.E. 128-129, 131). Judge Simpson recognized the highly prejudicial nature of this video, particularly in light of the fact that this video depicted Plaintiff at a time (July 29, 2003), subsequent to that time during which Plaintiff was seeking relief. Defendant argues that Judge Simpson abused his discretion, first by denying Defendant's Motion to Compel, and then by subsequently granting Plaintiff's Motion *In Limine*, with the end result being that Defendant's centerpiece evidence, the videotaped surveillance of Plaintiff riding amusement park rides at Six Flags, New Orleans, Louisiana on July 31, 2003 was improperly excluded. Plaintiff would submit that the arguments raised by Defendant are a smokescreen, and that the law and the Record clearly support Judge Simpson's ruling.

Plaintiff, first and foremost, moves to strike any and all specific references made by

Date of Brief 11/19/07, it was not!

Defendant as to any content of said July 31, 2003 videotape as, based on Plaintiff's information and belief, said videotape is not part of the Record on Appeal, is not before this Court, and as such cannot be considered by this Court as part of Defendant's Appeal. See *Ross v. State*, 603 So.2d 857, 861 (Miss. 1992)(citing *Collins v. State*, 594 So.2d 29 (Miss. 1992); *Mason v. State*, 440 So.2d 318, 319 (Miss. 1983); *Branch v. State*, 347 So.2d 957, 958-59 (Miss. 1977)). Secondly, Plaintiff moves to strike any argument made by Defendant regarding the trial court's denial of his Motion to Compel on September 15, 2003 (R.405-407), as denial of said motion was not cited by Defendant as a basis for new trial in his Motion for New Trial (R. 656-664, R.E. 105-113), and as such is not part of the Record on Appeal, is not before this Court, and, likewise, cannot be considered by this Court as part of Defendant's Appeal.

Plaintiff's Complaint was filed on September 20, 2001 (R. 5-8, R.E. 5-8). In her Complaint, Plaintiff alleged that as a result of Defendant's negligence, she suffered "severe personal injuries to her body, including but not limited to, her head, neck, and back, which have rendered her temporarily and totally disabled." Plaintiff also alleged that said injuries caused her to "suffer a decline in health, being unable to get her natural sleep. . . , loss of enjoyment of life. . . , in the future will spend sums of money for hospital bills, medical expenses, doctor's care, therapy and treatment, medication and drugs, lost wages, and in the future will cause Plaintiff to suffer physical pain and mental anguish, to be permanently disabled and weakened." (R. 5-8, R.E. 5-8). Defendant cites from Plaintiff's Complaint to support his argument that Defendant should have been allowed to introduce the July 31, 2003 videotaped surveillance, as Plaintiff has presented "differing accounts regarding her claimed injury". However, nothing Defendant cites from Plaintiff's Complaint is inconsistent with what has transpired procedurally and factually in this cause, and particularly the fact that Plaintiff asserts no claims of future pain and suffering, medical expenses and lost wages beyond July 29,

relevant to value of the claim in the time period

2003. Likewise, while Defendant also generally refers to Plaintiff's deposition testimony of January 30, 2003 to support his argument of "differing accounts" by Plaintiff, Defendant again offers no specific testimony in the Record to contradict the fact that Plaintiff was and is claiming no future pain and suffering, medical expenses and lost wages beyond July 29, 2003.

Finally, Defendant offers nothing from the Record to refute the fact that Plaintiff's testimony at trial is also clearly consistent with the position she asserted in her Complaint, her subsequent deposition testimony, and the deposition and/or trial testimony of Plaintiff's expert and fact witnesses. In fact, Defendant has put forth no evidence whatsoever, expert or otherwise in the Record to rebut Plaintiff's claims. As such, the only evidence Defendant can offer now is innuendo and supposition. While video surveillance evidence may be admissible to test an opponent's case, Defendant has misstated the law as applied by Mississippi jurisprudence with respect to the instant cause. For instance, Defendant cites the *Williams v. Dixie Electric Power Association*, 514 So.2d 332 (Miss.1987) opinion as being contrary to Judge Simpson's ruling regarding Defendant's Motion to Compel (R. 405-407). As previously stated above, the *Williams* opinion is distinguishable to the facts in the instant cause. Specifically, appellant, Williams was seeking damages up to and including the time during which the surveillance video was taken (trial). William's attorney, in his opening statement, had stated to the jury that "Williams was too injured to sit through the entire trial". *Williams*, 514 So.2d at 334. Unbeknownst to either Williams or his attorneys, however, the defense had been following Williams, prior to, and during trial and filming his activities covertly. *Id.* Ultimately, the Court held that the surveillance films obtained by the defendant cooperative were not admissible, as defendant, Dixie had a duty to seasonably produce the surveillance film and that since Dixie had obtained the film so close to trial, "it should have given Williams' attorneys notice of them and an opportunity to view them prior to trial". *Id. at* 336,337. Of import to Plaintiff's argument,

however, and in distinction to the facts of the instant cause, it is clear from a reading of *Williams* that the time period during which the surveillance occurred included that time period during which appellant, Williams was asserting damages and alleging injury.

This is also true of the *Congleton v. Shellfish Culture, Inc.*, 807 So.2d 492 (Miss. Ct. App. 2002) opinion, also relied upon by Defendant. In *Congleton*, the appellant, claimant, having been found to have reached maximum medical improvement, continued to allege injury and seek treatment from non-authorized medical providers. *Congleton*, 807 So.2d at 494, 495. Again, as in *Willams*, the circumstances in *Congleton* are distinguishable to the facts in the instant case, as the video surveillance at issue in *Congleton* was taken during the same period of time that the appellant, claimant was alleging injury and seeking treatment from non-authorized medical providers. *Id.* Therefore, based on the above caselaw, in order to give Defendant's argument any viability, Plaintiff would have to conform her claims to allege future pain and suffering, medical expenses and lost wages past July 29, 2003, thus creating the ironic situation where, in order to have his evidence introduced, Defendant is asserting that Plaintiff was injured for a longer period of time than she alleges, and has more lost wages than claimed, as well as more future medical expenses than claimed.

Defendant's argument regarding the Miss. R. Evid. 902 Notice of Intent, filed on March 29, 2004 is likewise without merit. In this instance, whether or not Plaintiff filed an objection to Defendant's Notice of Intent is of no moment with respect to the video's ultimate admissibility at trial or with respect to Judge Simpson's ruling on April 5, 2005. Miss. R. Evid. 902 specifically speaks to "authenticity as a condition precedent to admissibility". Miss. R. Evid. 902 (Emphasis added). The purpose of Rule 902 is to list "situations in which authenticity is taken as sufficiently established for purposes of admissibility without extrinsic evidence". See Miss. R. Evid. 902

comment. Throughout this case, including trial, Defendant's counsel has equated the meaning and intent of Rule 902 with admissibility rather than authenticity. Counsel opposite has clearly misinterpreted and/or misrepresented the meaning of Rule 902. Obviously, if failing to object to a Notice of Intent constituted a waiver of a party's arguments regarding *admissibility*, pre trial motions, motions *in limine*, and objections to evidence during trial, would be rendered moot.

This Court has held that "Motions *in limine* are properly granted 'only when the trial court finds two factors are present: (1) the material or evidence in question will be inadmissible at a trial under the rules of evidence; and (2) the mere offer, reference, or statements made during trial concerning the material will tend to prejudice the jury'". *Nunnally v. R.J. Reynolds Tobacco Company*, 869 So.2d 373 (Miss. 2004)(citing *Tatum v. Barrentine*, 797 So.2d 223, 228 (Miss. 2001)(quoting *Whittley v. City of Meridian*, 530 So.2d 1341, 1344 (Miss. 1988)). In addition, Miss. R. Evid. 403 states that "[A]lthough relevant, evidence may be excluded, if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Miss. R. Evid. 403 (Emphasis added). Furthermore, other Courts have likewise held that "'evidence in the form of moving pictures or videotapes must be approached with great caution because they show only intervals of the activities of the subject, they do not show rest periods, and do not reflect whether the subject is suffering pain during or after the activity.'" *Quinn v. Wal-Mart Stores, Inc.*, 774 So.2d 1093, 1098 (La. App. 2 Cir. 2000)(citing *Orgeron v. Tri-State Road Boring, Inc.*, 434 So.2d 65 (La. 1983)(Emphasis added)).

First and contrary to Defendant's argument, Plaintiff's Motion *In Limine* does urge that should Defendant wish to tender any motion picture film into evidence, that the evidence be tendered to the Court outside the presence of the jury and be shown or exhibited to determine its relevance

and suitability for introduction into evidence. (R. 557, R.E. 100). Furthermore, Defendant offers no citation to any Mississippi Rule of Civil Procedure and/or Mississippi Rule of Evidence, that would preclude Plaintiff's counsel from moving *ore tenus* to exclude this evidence, as Defendant argues. In fact, Plaintiff's oral argument at the hearing before Judge Simpson on April 5, 2005 is clearly consistent with the substance of her Motion *In Limine*. As stated previously, at the hearing, Plaintiff moved for exclusion of the July 31, 2003 video, arguing that she was not introducing any evidence of lost wages or future pain and suffering or future medical bills "past July 29, 2003" (the date of her second epidural treatment) and that said video was "wholly irrelevant, and it certainly would be severely prejudicial to introduce something that a video of a day that we're not even claiming as part of injury or damages." (TR. Supplemental Vol. 1, pp. 31-32). Finally, and in response to Paragraph 3 of Defendant's Motion *In Limine* (R. 515-517, R.E. 93-95)(also heard on April 5, 2005 by Judge Simpson), Defendant requested no testimony be given regarding future medical expenses and lost wages. Plaintiff stipulated that "[A]s to future wage loss and future medical expenses, we're not going to make any claims past July 25, 2003". (TR. Supplemental Vol. 1, pp. 3, R.E. 127).

Therefore, Judge Simpson's ruling is consistent with both Mississippi caselaw regarding the granting of motions *in limine* and with Miss. R. Evid 403, regarding exclusion of prejudicial evidence. Judge Simpson, after due consideration of Plaintiff's motion and oral argument, ruled that "given that no damages in the form of medical expenses, future lost wages, or future medical expenses are being sought from and after July 29 of 2003, I'm of the opinion that the prejudicial value of that outweighs its probative value given your plaintiff is seeking no relief after that date." (TR. Supplemental Vol. 1, p. 49, R.E. 131)(Emphasis added). It is clear from Judge Simpson's ruling that after balancing the video's probative value versus its prejudicial value, Defendant's evidence was excluded, pursuant to the Mississippi Rules of Evidence, as Judge Simpson found that

the mere offer, reference, or statements made during trial, concerning the videotape evidence would prejudice the jury, and that any probative value of the videotape evidence was substantially outweighed by the danger of unfair prejudice.

It should also be noted to this Court that Defendant asserts in his Brief that Judge Simpson's ruling "was an adoption of Plaintiff's argument" and that "Plaintiff's plan was endorsed by the trial court". Is Defendant inferring improper conduct by Judge Simpson? Plaintiff would respectfully move that any disrespectful language by Defendant regarding the trial court be struck by this Court, pursuant to the Miss. R. App. P. 28(k). In addition, this is not the only instance in this case where Defendant implies improper conduct and/or bias by a professional of impeccable integrity and credentials, as Defendant repeatedly throughout these proceedings and his Brief, also implies that an inappropriate relationship existed between Plaintiff and Dr. Bazzone (TR. Supplemental Vol. 2, pp. 21-22; TR. Vol. 7, pp. 169-177).

post-29 visits irrelevant

Defendant also attempts to make issue of the fact that Plaintiff saw both Dr. Bazzone and Coastal Chronic Pain Services (Dr. Dix), post-July 31, 2003 (the day of her visit to Six Flags). This argument is totally irrelevant as no claims were made by Defendant on this date. On the one hand, Defendant, via his own Motion *In Limine*, moved to have the trial court limit the duration of Plaintiff's claim and the trial court granted that request (R. 515-517, R.E. 93-95; TR. Supplemental Vol. 1, p. 3, R.E. 127). However, now when said request precludes admissibility of a surveillance tape made outside of the time for which the Plaintiff claims damages, Defendant wishes this Court disregard his previous request to preclude Plaintiff from making claims past a certain period of time, and that the Court now allow Defendant to introduce evidence past that period of time, so long as it benefits Defendant. First, the standard of review is not "we did not like the trial court's ruling, and because he would not let us have the proverbial 'cake and eat it too', this matter should be reversed".

video went to
1) end of injury
2) when she had injured

Secondly, the trial court allowed evidence of relevant surveillance for the jury to see. The trial court was absolutely right in excluding evidence clearly prejudicial just as it was absolutely right in allowing in that evidence it did not find to be prejudicial. Curiously, and deceptively missing from Defendant's Brief, is the fact that the jury got the opportunity to view a surveillance tape made during the relevant time (in August, 2001) that Plaintiff was making claims for damages and that the jury also had the opportunity to weigh this evidence during their deliberations. (TR. Vol. 7, p. 279). The jury was given ample chance to judge Plaintiff's injuries and extent of same. The jury saw the surveillance video of August, 2001 (the relevant time of injuries claimed) and also heard testimony on cross-examination that Plaintiff had been followed for a period of approximately twenty-four (24) hours of surveillance over several days and that Defendant only produced less than five (5) minutes of video surveillance. (TR. Vol. 7, pp. 279-283).

un-rebutted test. of improved condition

Furthermore, Plaintiff's un-rebutted trial testimony, regarding her improved condition after this second and final epidural, is clearly consistent with the un-rebutted trial testimony of her expert witness (and treating physician), Dr. Bazzone, who testified that "[U]sually most people will get two injections. At the end of the second infection (sic) if they're showing improvement, getting better, we hold off on the third. . . Well as it turns out in her case she, after two injections, was well enough that she wanted to go back to work". (TR. Vol. 7, p.217). In addition, Plaintiff's testimony regarding her post-epidural condition is also clearly consistent with the un-rebutted testimony of Plaintiff's fact witnesses: Pamela Lilies (TR. Vol. 6, pp.101-103); Carolyn Englebretson (TR. Vol. 7, p.258); and Mary Schustz (TR. Vol. 7, pp.263, 264). Therefore, Plaintiff would assert that Defendant's argument on this issue is also without merit.

Finally, as to Defendant's arguments regarding Judge Vlahos' alleged error in allowing Plaintiff to refer to Defendant's July 31, 2003 surveillance during her cross-examination of private

investigator, Melinda Dubuisson, any arguments raised by Defendant in his Brief, regarding the impact on the jury are pure conjecture, as Defendant cites nothing in the Record to back up his allegations. Furthermore, and as readily conceded by Defendant, there is nothing in the Record evidencing any objection raised by Defendant at trial to this line of examination by Plaintiff. Therefore, Defendant has waived any objections on this issue, and as such this Court may not consider it on appeal. See *Roche v. State*, 913 So.2d 306, 314 (Miss. 2005) citing *Box v. State*, 610 So.2d 1148, 1154 (Miss. 1992).

In conclusion, Plaintiff is and never was claiming any injury, lost wages and/or medical expenses on July 31, 2003, or any period beyond July 29, 2003, the date of Plaintiff's second and final epidural treatment. Judge Simpson and Judge Vlahos, pursuant to Mississippi jurisprudence, properly exercised sound judicial discretion, in ruling that the prejudicial value of the videotape Defendant sought to have admitted far outweighed any probative value this evidence might have had. For this reason, Plaintiff respectfully request that this Honorable Court deny Defendant's argument and affirm the trial court's ruling.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION AND/OR COMMIT REVERSIBLE ERROR BY EXCLUDING DEFENDANT'S EVIDENCE.

As stated above, Defendant's argument regarding Judge Vlahos' refusal to allow Defendant to either offer into evidence, and/or cross examine, Plaintiff, using her employment records and medical records, is without merit. Defendant in his Brief, is not only attempting to re-argue his case, using the various evidence that due to his own errors, he was unable to have admitted, but in so doing, grossly misrepresents both the Record and the law. Plaintiff's response and argument may be summarized as follows: As to Plaintiff's Grand Casino employment records, the Record is clear that Defendant's Notice of Intent to Offer Plaintiff's Employment Records, objected to by Plaintiff,

was never ruled on prior to trial. Therefore, these employment records were not self-authenticated, and as such, the trial court was correct in sustaining Plaintiff's timely objection, raised at trial, when Defendant attempted to improperly admit said un-authenticated records without a sponsoring witness. As to the medical records, and contrary to Defendant's assertions, Defendant continually attempted to improperly offer Plaintiff's hospital records into evidence, by offering singular document exhibit(s) culled from the complete hospital records. Counsel for Plaintiff made proper and timely objection in each instance and the Court sustained the objection(s). (TR. Vol. 6, pp. 137-139). The trial court even went so far as to explain to Defendant's counsel the proper method for introducing this evidence into the Record (TR. Vol. 6, p.141 - Vol. 7, p.159), but Defendant failed to cure his error. For these reasons, Defendant's arguments have no merit and must be denied.

1. Plaintiff's Grand Casino Employment Records.

The Record is clear that Defendant Filed his Notice of Intent to Offer Plaintiff's Employment Records on March 19, 2003 (R. 307-357, R.E. 38-88), and that Plaintiff timely filed her objection to said Notice (R. 361-362, R.E. 89-90). The Record is also clear, however, that, notwithstanding Defendant's assertions, neither Judge Simpson nor Judge Vlahos ever ruled on Defendant's Notice of Intent to Offer Plaintiff's Employment Records, prior to trial. Therefore, any argument raised by Defendant as to the merits of Plaintiff's objections to Defendant's Notice of Intent are of no moment to Defendant's argument on Appeal. Defendant, in support of his argument, erroneously cites page(s) fifty-five (55) and fifty-six (56) from the transcript of the April, 2005[1] proceedings before Judge Simpson, as proof that Judge Simpson had allowed the Grand Casino employment records to

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[1] At the time of the filing of Appellant's Brief, the cited April, 2005 transcript was not part of the Record on Appeal. Subsequently, the Record has been supplemented by Trial court Order (Supplemental Vol 1, R. 79-80, R.E. 125-126), and the referenced pages are now part of the Record on Appeal and included as Transcript, Supplemental Vol. 1, pp. 48-49, R.E. 130-131.

be introduced. A review of the relevant transcript clearly shows that such is not the case. (TR. Supplemental Vol. 1, pp. 48-49, R.E. 130-131). Defendant also states that "the Grand Casino employment records were discussed during the hearing." The hearing, Defendant refers to, however, and by Defendant's own concession, regarded the parties' respective motion(s) *In Limine*, neither of which addressed Plaintiff's Grand Casino employment records. Miss. R. Evid. 902(11)(C)(iii) is clear: "The proponent will be responsible for scheduling a hearing on any objections and the court should hear and decide such objections before the trial or hearing at which they will be offered. If the court cannot rule on the objections before trial or hearing, the records will not be self-authenticating." Miss. R. Evid. 902(11)(C)(iii)(Emphasis added). The Record on Appeal and Rule 902 make clear that because Plaintiff's objection to Defendant's Notice of Intent to Offer Plaintiff's Employment Records was not resolved prior to trial, the employment records were not self-authenticated, and as such, could only be authenticated (and offered into evidence), via a sponsoring witness, at which time, any argument as to the records' *admissibility* could have been raised by Plaintiff. Therefore, Plaintiff's objection at trial (TR. Vol. 6, p.137) was proper and timely, as Plaintiff's Grand Casino employment records were not in fact, "properly authenticated". That Judge Vlahos properly followed the law, in sustaining Plaintiff's objection is evidenced by the following transcript excerpt from the August, 2006 trial:

> I'm saying that Rule 9.02(11)(c) (sic) requires, 'if the Court cannot rule on the objections before the trial or hearing the records will not be self-authenticated'. I understand that Judge Simpson, in the transcript that you have, this was not before trial, this was during trial. There was a mistrial there. And there has been no ruling prior to the trial concerning the records or concerning your notices. . . I'm ruling that you didn't call these up before trial. . .

(TR. Vol. 7, p.157). Plaintiff would submit that the actions taken by the trial court were proper, in light of the Record and the law, and would further submit that if there is any error to be assigned regarding admission of Plaintiff's Grand Casino employment records, said error should be

assigned solely to Defendant for failure to timely follow up on his Notice of Intent to offer said employment records, and additionally for not taking the appropriate alternative steps to have these records authenticated, via a sponsoring witness, once it should have become apparent that these records were not self-authenticated. For this reason, Plaintiff respectfully requests that this Honorable Court deny Defendant's argument and affirm the trial court's ruling.

2. Plaintiff's Certified Medical Records.

Regarding Plaintiff's certified medical records, Defendant argues that Judge Vlahos erroneously excluded the records, in spite of Defendant's compliance with Miss. R. Evid. 902(11), Plaintiff's failure to file an Objection, and notwithstanding Defendant's right under Miss. R. Evid. 803(4) to cross-examine Plaintiff using hearsay evidence as to statements made regarding medical diagnosis and treatment and/or to use Plaintiff as an authenticating witness, pursuant to Miss. R. Evid. 803(6). Defendant's arguments fail on all counts.

At trial in August, 2006, Defendant, while and for the purpose of cross-examining Plaintiff, attempted to introduce into evidence, certain Hancock Medical Center hospital records regarding post-accident treatment of Plaintiff. (TR. Vol. 6, pp. 140-141). Plaintiff made proper objection as to the manner in which Defendant sought to have these hospital records introduced into evidence. The basis of Plaintiff's objection was Defendant's improper introduction of evidence, not properly authenticated. (TR. Vol. 6, p. 142). Specifically, rather than introducing the complete Hancock Medical Center hospital records, as required by statute and the Mississippi Rules of Evidence, Defendant sought to introduce only partial records. His intent was clearly to "cherry pick" these records, so as to present Plaintiff's post-accident medical treatment without context and to mislead the jury. Miss. R. Evid. 106 requires that "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or

any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." Miss. R. Evid. 106. (Emphasis added). In addition, the statute controlling admission of hospital records, Miss. Code Ann. § 41-9-109 requires that:

> The records shall be accompanied by an affidavit of a custodian stating in substance: (a) that the affiant is a duly authorized custodian of the records and has authorit to certify said records, (b) that the copy is a true copy of all the records described in the subpoena, (c) that the records were prepared by the personnel of the hospital, staff physicians, or persons acting under the control of either, in the ordinary course of hospital business at or near the time of the act, condition or event reported therein, and (d) certifying the amount of the reasonable charges of the hospital for furnishing such copies of the record. If the hospital has none of the records described, or only part thereof, the custodian shall so state in the affidavit and file the affidavit and such records as are available in the manner described in sections 41-9-103, 41-9-105. The filing of such affidavit with respect to reasonable charges shall be sufficient proof of such expenses shall be sufficient proof of such expense, which shall be taxed as costs of court.

Miss. Code Ann. § 41-9-109 (1972) (Emphasis added). In sustaining Plaintiff's objection, Judge Vlahos made a record of his reasons for excluding Defendant's evidence, and also stated, for Defendant's benefit, the proper method for introducing said records. (TR. Vol. 6, pp. 142-144). Of particular relevance and import to Plaintiff's argument is the following transcript excerpt from Judge Vlahos: "[F]actually, I'm not making any judgments on it. Whether it's fair or not doesn't make any difference, but the statute calls for a certain certificate to be attached to the hospital records. If you have that you dump the whole record in there. If you don't have that I can't go anywhere with that." (TR. Vol. 6, p. 144)(Emphasis added). Defendant's counsel, obviously confused by the trial court's ruling, persisted in attempting to introduce only partial records into evidence, citing his previously filed Notice of Intent as the basis for admission of the records. Again, the trial court spoke to the issue: "All I ask is that you show me what the statute requires that's in the file or in your records and then I'll consider it. Otherwise, just move on to something else, but we can't have taking the packet of the custodial record apart. It has to be like it came from the hospital". (TR. Vol. 6, p.

145)(Emphasis added). This statement by the trial court is key because it cuts right to the issue of what Defendant was attempting to do. However, Defendant digressed into whether and which Notices of Intent did Plaintiff file objections to, pursuant to Miss. R. Evid. 902. (TR. Vol. 6, p. 145 through Vol. 7, p. 159, pp. 179-193).

As previously asserted, Defendant has misconstrued the intent and application of Miss. R. Evid. 902, and again, whether or not Plaintiff filed an objection to Defendant's Notice of Intent is of no moment with respect to the Hancock Medical Center hospital records, as said records, as introduced by Defendant, were not in the form as has been offered for self-authentication, via Defendant's Notice of Intent, and as such, not self-authenticating and thus, could only be introduced through a sponsoring witness. Miss. R. Evid 902(C)(iii). Because Defendant took apart the exhibits, he had originally offered, via his Notice(s) of Intent, they could only be introduced through a sponsoring witness. In addition, by attempting to introduce the records piecemeal, Defendant was not offering an accurate picture as to the totality of Plaintiff's treatment, and Plaintiff, pursuant to Miss. R. Evid. 106, an as adverse party, had every right to have the complete records introduced. To further clarify her position, in light of Defendant's continuing attempts to raise the Rule 902 issue, Plaintiff made the following arguments for the Record, including the fact that authentication was but one consideration as to the ultimate issue of admissibility: "But I think for other purposes means they have to be authenticated properly first under the rules to come in, then you can get into whether or not that one page from Memorial Hospital is admissible at this time." (TR. Vol. 7, p. 153)(Emphasis added) See also (TR. Vol. 7, p. 188); (TR. Vol. 7, p. 192).

As to Defendant's argument regarding Miss. R. Evid. 803(4), said argument is without merit as the trial court did not exclude the hospital records on this basis and, in fact, made his reasons for exclusion clear and on the Record, when Defendant attempted to raise his Rule 803(4) argument on

the following day of trial:

> I just want to make sure you understand the records were not admitted not because of the hearsay exception. Rule 8.03 talks about hearsay exception, so I don't think we need to hear any argument on it. You made your motion and the record is going to speak as to the reasons that the court denied the admissibility of the records.

(TR. Vol. 7, p. 183). Defendant also argues that the records should not have been excluded as they are admissible, pursuant to Miss. R. Evid. 803(6). Defendant, however, again argues past the reasons both for Plaintiff's objection and Judge Vlahos' ruling at trial, which, by the trial court's own statement "were not admitted not because of the hearsay exception". (TR. Vol. 7, p. 183). To reiterate, Defendant attempted to introduce hospital records previously offered as a complete set with custodial affidavit, in piecemeal fashion, and contrary to both Miss. Code Ann. § 41-9-109 (1972) and Miss. R. Evid. 106. In addition, whether the *Blake v. Clein*, 903 So.2d 710 (Miss. 2005), *Cassibry v. Schlautman*, 816 So.2d 398 Miss. App. 2002), *Buel v. Sims*, 798 So.2d 425 (Miss. 2001), and *Jones v. State*, 856 So.2d 285 (Miss. 2003) opinions, cited by Defendant in his Brief, are proper statement(s) of the law regarding authentication of records are of no moment to Defendant's argument in his Brief, as at no time during trial did Defendant seek introduction of said records, by using Plaintiff as a source of authenticity, pursuant to Miss. R. Evid 803(6). Finally, prior to Defendant's cross-examination of Plaintiff's expert witness, Dr. Bazzone, the trial court again afforded Defendant the opportunity to cure his previous errors with respect to introduction into the trial record of various medical records regarding the medical treatment of Plaintiff. (TR. Vol. 7, pp. 225-226, Vol. 8, pp. 311-313). Defendant, however, failed to take advantage of this opportunity. He failed to introduce any evidence whatsoever into the Record (TR. Vol. 7, pp. 226-253). He also failed to call Plaintiff as a witness during his case in chief, which Defendant clearly had opportunity to do, but did not. As a result, Plaintiff would assert that not only was Judge Vlahos' initial ruling

correct, but that Defendant has waived any assignments of error he had with respect to Plaintiff's certified medical records. As previously stated, the Record shows that prior to Defendant's cross-examination of Plaintiff's expert witness, Dr. Bazzone, the trial court again afforded Defendant the opportunity to cure his previous errors with respect to introduction into the trial record of various medical records regarding the medical treatment of Plaintiff. (TR. Vol. 7, pp. 225-226; Vol. 8, pp. 311-313). Defendant, however, failed to take advantage of this opportunity. He failed to introduce any evidence whatsoever into the Record (TR. Vol. 7, pp. 226-253). He also failed to call Plaintiff as witness during his case in chief, which Defendant clearly had opportunity to do, but did not.

Moreover, this Court has held that a "defendant cannot complain on appeal of alleged errors invited or induced by himself." *Singleton v. State*, 518 So.2d 653, 655 (Miss. 1988)(citing *Davis v. State*, 472 So.2d 428 (Miss. 1985); *Browning v. State*, 450 So.2d 789 (Miss. 1984); *Jones v. State*, 381 So.2d 983, cert den. 449 U.S. 1003, 101 S. Ct. 543, 66 L.Ed. 300 (Miss. 1980)(Emphasis added). In taking this position, this Court has also held that "an appellant cannot assail as prejudicial his own trial tactics, because it would fasten a propensity in litigants to create error to enhance the possibility of reversal and repeated trials. This he is not permitted to do." *Jones*, 381 So.2d at 991 (citing *Simpson v. State*, 366 So.2d 1085 (Miss. 1979)(Emphasis added). The Record is clear that any prejudice brought upon Defendant was of his own making, particularly, when one considers that Defendant was given multiple opportunities to cure his error yet did not. For this reason, and those reasons stated above, Plaintiff respectfully requests that this Honorable Court deny Defendant's argument and affirm the trial court's ruling regarding Plaintiff's Grand Casino employment records, Plaintiff's hospital records, and medical records.

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION AND/OR COMMIT

REVERSIBLE ERROR BY DENYING DEFENDANT'S MITIGATION OF DAMAGES JURY INSTRUCTION.

This Court has held that a circuit court enjoys "considerable discretion regarding the form and substance of jury instructions." *Splain v. Hines*, 669 So.2d 1234, 1239 (Miss. 1992)(citing *Rester v. Lott*, 556 So.2d 1266, 1269 (Miss. 1990)). As stated above, Judge Vlahos' did not abuse his discretion by denying Defendant's mitigation of damages jury instruction, as there was no credible evidence in the Record which would support the instruction. *Purina Mills, Inc. v. E.R. Moak, et al.*, 575 So.2d 993 (Miss. 1991)(Emphasis added). Defendant argues at length in his Brief as to the evidence existent to support such an instruction, but as with Defendant's previous arguments above, there remains one constant: Defendant is retrying his case before this Court, and in the process, is attempting to "spin" the evidence so as to support his argument. None of the evidence which Defendant cites, with the exception of the trial testimony of Plaintiff and her expert witness, Dr. Bazzone, is in the trial record, a situation brought about solely through Defendant's own errors, as shown above. Judge Vlahos, in so ruling, recognized that the trial record is clear that Defendant put forth no evidence in the form of expert testimony, and/or other any other testimony or evidence to support such an instruction. (TR. Vol. 8, pp.315-319; R 671-674, R.E. 114-117). As this Court has previously stated "[W]e read the jury instructions as a whole, our focus upon what the jury heard and not what was kept from it. We see how full the glass, not how empty. . . ." *Splain*, 669 So.2d at 1239 (Emphasis added)(citing e.g. *Payne v. Rain Forest Nurseries, Inc.*, 540 So.2d 35, 40-41 (Miss. 1989); *Detroit Marine Engineering v. McRee*, 510 So.2d 462, 465 (Miss. 1987); *Tippit v. Hunter*, 205 So.2d 267, 271 (Miss. 1967); and *Walker v. Poles*, 248 Miss. 887, 896 162 So.2d 631, 634 (1964)). Such is the case here. Defendant, in his Brief, first states that "there was evidence introduced at trial that Plaintiff failed to heed or follow recommendations of her medical providers",

could just [illegible]

and then repeatedly cites to medical and physical therapy records not in the trial record, and thus not heard by the jury. In addition, Defendant combines citation to these records not in the trial record with trial testimony in the trial record (Plaintiff and Plaintiff's expert witness, Dr. Bazzone's testimony) in order to present the facts of this cause, out of context, yet, at the same time, analogous to the *Herring v. Porrier*, 797 So.2d 797 (Miss. 2000) opinion, upon which Defendant relies on in his Brief as support for his argument of improper exclusion by Judge Vlahos of this mitigation of damages instruction. Furthermore, while the jury instruction may be an accurate statement of the law, as Defendant asserts, Plaintiff did, in fact, make record of her objection as to that portion of the instruction that reads "Nor the harm which proximately resulted from her own conduct". (TR. Vol. 8, p. 318). Plaintiff argued that "in order to bring that in front of the jury, he (Defendant) would have had to put on some type of medical testimony as to the causation of any new injury, if that's what they're saying happened. I believe that requires some medical expert testimony. There was no testimony from any doctor as to that." (TR. Vol. 8, p. 318)(Emphasis added). The fact that Defendant called no expert witnesses in support of his case, combined with the trial record, further distinguishes the instant cause from *Herring*.

In *Herring*, the evidence, at trial, consisted not only of appellant, Herring's expert and treating physician, Dr. Harry Danielson, but also appellee, Poirrier's expert, orthopaedist, Dr. Ronald Graham. *Herring*, 797 So.2d at 799. Porrier, through expert testimony, re-butted appellant Herring's claims as to medical causation and as such, to the necessity and reasonableness of the medical bills incurred by Herring. *Id.* at 809. By distinction, Defendant, in the instant cause, relies upon speculation and argument of counsel to call into question Plaintiff's medical condition, treatment and by extension the necessity and reasonableness of the bills she incurred. This Court has held that an "opposing party may, if desired rebut the necessity and reasonableness of the bills by proper

evidence. The ultimate question is then for the jury to determine." See *Green*, 641 So.2d at 1209(Emphasis added)(citing *Jackson v. Brumfield*, 458 So.2d 736, 737 (Miss. 1984)). Regarding the question of "proper evidence", in *Hubbard v. Canterbury*, 805 So.2d 545 (Miss. App. 2000), the defendant, Canterbury offered no expert witnesses and only herself to rebut the necessity and reasonableness of the plaintiff, Hubbard's medical bills. The Court, relying on *Jackson*, held that the lack of expert testimony was not "proper" testimony for rebutting the necessity and reasonableness of a party's medical bills. *Hubbard,* 805 So.2d at 550. As stated above, Defendant, relied upon no expert testimony to either rebut Plaintiff's claims and/or to otherwise present his case, including his failure to mitigate damages argument. Furthermore, the appellant in *Herring* failed to seek treatment for his injury for two weeks after his accident, whereas, in the instant cause, Plaintiff sought treatment the following day, immediately after notifying her employer (TR. Vol. 6, p.111). There is no evidence in the Record that Plaintiff did nothing less than abide by the instructions given by her treating physicians, nor is there any evidence in the Record that Plaintiff was somehow injured due to some intervening cause, at work, as Defendant alleges, but cannot support, through evidence. In fact, Defendant again attempts to has have "his cake and eat it too", having moved previously in his Motion *In Limine*, that "no testimony be given nor solicited, directly or indirectly, in any manner whatsoever, pertaining to Plaintiff, Rachel Carawan's father or other family member being sick or dying of cancer or other disease" (R. 515-517, R.E. 93-95), yet alleging now in his Brief that Plaintiff failed to mitigate her damages by "lifting her father", but not allowing Plaintiff a full chance to explain why or how. Finally, and in distinction to *Herring*, there is no evidence or testimony in the Record that indicates Plaintiff gave an incomplete medical history to Dr. Bazzone and/or that Plaintiff failed to carry out any of Dr. Bazzone's instructions regarding treatment and physical therapy. . . merely innuendo by Defendant's attorney.

Therefore, Plaintiff would assert that based on the Record, Judge Vlahos did not abuse his discretion and/or commit reversible error by denying Defendant's mitigation of damages jury instruction, and for this reason, and those reasons stated above, Plaintiff respectfully requests that this Honorable Court deny Defendant's argument and affirm the trial court's ruling.

D. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION AND/OR COMMIT REVERSIBLE ERROR BY GRANTING PLAINTIFF'S MOTION FOR ADDITUR AND DENYING DEFENDANT'S MOTION FOR NEW TRIAL.

1. Plaintiff's Motion for Additur

Plaintiff would show that this matter was tried before a jury on August 16, 2006, and a jury verdict was returned in open Court as follows:

"We the jury find for the plaintiff, and assess her damages in the amount of $33,484.52."

(TR. Vol. 8, p.342). Contrary to Defendant's assertions, Plaintiff submits that the jury award in the amount of $33,484.52 was so inadequate both as to indicate bias, prejudice, or passion on the part of the jury and was contrary to the overwhelming weight of the evidence, and that the trial court's additur was appropriate, as evidence by oral argument of the parties and the trial court's findings of fact in the Record. (TR. Vol. 8, pp. 346-363; R. 671-674, R.E. 114-117). As this Court is well aware, the grant or denial of a Motion for Additur is always and has been a matter largely within the sound discretion of the trial judge. The court's authority to order an additur is found in Miss. Code Ann. § 11-1-55 (1972), which reads as follows: § 11-1-55 Authority to Impose Conditions or Additur or Remittitur:

> The Supreme Court or any other Court of record in a case in which money damages were awarded may overrule a motion for New Trial or affirm on direct or cross appeal upon condition of an additur or remittitur if the Court finds that the damages are extensive or inadequate for the reason that the jury or trier of fact was influenced by bias, prejudice, or passion, or that the damages awarded were contrary to the overwhelming weight of credible evidence. If such additur or remittitur be not accepted, then the Court may direct a new trial on damages only. If the additur or remittitur is accepted and the other party perfects a direct

> appeal, then the party accepting the additur or remittitur should have the right to cross appeal for the purpose of reversing the action of the Court in regard to the additur or remittitur.

Miss. Code Ann. § 11-1-55 (1972). Therefore, pursuant to the above statute, an additur can be awarded by the Circuit Court, if it finds either: (1) the jury or trier of fact was influenced by bias, prejudice or passion; or (2) the damages awarded were contrary to the overwhelming weight of the evidence. See *Rogers v. Pascagoula Public School District*, 611 So.2d 942, 944 (Miss. 1992); *Leach v. Leach*, 597 So.2d 1295, 1297 (Miss. 1992). The Mississippi Supreme Court in *Leach*, stated that "each case involving the issue of additur must "necessarily be decided on its own facts." Leach, 597 So.2d at 1297. Further, according to *Rogers*, "the only evidence of corruption, passion, prejudice or bias on the part of the jury is an inference, if any, to be drawn from contrasting the amount of the verdict with the amount of damages." *Rogers*, 611, So.2d at 944-45 (citing *Pham v. Welter*, 542 So.2d 884, 888 (Miss. 1989); *Matkins v. Lee,* 491 So.2d 866, 888 (Miss. 1986); *City of Jackson v. Ainsworth,* 462 So.2d 325, 328 (Miss. 1984); and *Biloxi Electric Co. v. Thorn,* 264 So. 2d 404, 405 (Miss. 1972)). The trial court is empowered by virtue of the statutory authority vested in him by Miss. Code Ann. § 11-1-55 to grant an Additur upon the existence of one (1) of two (2) conditions. Condition two is that the damages awarded were contrary to the overwhelming weight of credible evidence adduced at the trial of this cause.

In *Winston v. Cannon,* 430 So.2d 413 (Miss. 1983), the Mississippi Supreme Court granted an additur to the appellant. In *Winston,* the jury awarded the appellant $364.60. The Supreme Court granted an additur and increased the judgment to $3,000.00. The Court held: The jury apparently declined to believe that appellant sustained any substantial injuries as a result of the accident. However, upon admitted liability, damages awarded in the sum of $364.60 are inadequate and are contrary to the weight of the evidence. Therefore, we enter an additur increasing the judgment of

A/10 jds to extent of pain + suffrs

Three Thousand Dollars ($3,000.00). *Winston,* 430 So.2d at 417. In the instant cause, Judge Vlahos instructed the jury that the liability issue was decided as a matter of law and that the jury must return a verdict in favor of Plaintiff. (R. 628, R.E. 102; TR. Vol. 8, p. 305). In addition, in *Moody v. RPM Pizza*, 659 So.2d 877 (Miss. 1995), the Mississippi Supreme Court held that a jury verdict awarding only the amount of medical expenses and the jury failing to award any damages for pain and suffering, was against the overwhelming weight of the evidence. In *Moody*, the Court, citing the *Rogers v. Pascagoula Public School District*, opinion held that:

> "The Plaintiff was entitled to an additur when the jury awarded the Plaintiff the exact amount of his medical expenses, $11,762.50, and the Plaintiff had put on proof that his damages included not only medical expenses but also some pain and suffering."

Moody, 659 So.2d at 881 (citing *Rogers*, 611, So.2d at 944-45). In *Moody*, as in the instant cause, the jury awarded the exact amount of medical bills. In *Moody,* the jury was instructed they could consider damages for past physical pain and suffering resulting from the injury as well as mental anguish and any reasonable doctor, hospital expenses incurred as a result of the accident as well as lost wages. In addressing the issue of whether or not the plaintiff was entitled to an additur, the Court held that the plaintiff was entitled to an additur because (1) there was no evidence that the Plaintiff had contributed to the car accident, and (2) evidence of physical pain and suffering was never contested or contradicted. The testimony from the plaintiff's wife and chiropractor all reflected that plaintiff, Moody suffered pain and discomfort as a result of his injuries.

Analogously, in this cause, evidence of pain and suffering by Plaintiff was never contradicted. Defendant in his Brief makes issue that the fact that the impact between Defendant and Plaintiff's vehicles was minor. Plaintiff, however, would submit that Defendant's assertion is yet another "red herring" as the Record is clear that Plaintiff was standing outside her vehicle and her injury, and resultant pain and suffering was due to her body being thrown forward as a result of said

impact. Additionally, the jury not only heard testimony from Plaintiff (TR. Vol. 6, pp. 107-125; 132-142; Vol. 7, pp. 160-178), but also her mother, Mary Schustz (TR. Vol. Vol. 7, pp. 263-264); fact witnesses, Pamela Lilies (TR. Vol. 6, pp. 100-102); and Carolyn Englebretson (TR. Vol. 7, pp. 254-257; 259-262), as well as expert witness, Dr. Victor T. Bazzone (TR. Vol. 7, pp. 194-247) regarding the pain Plaintiff endured from December 19, 2000 up until her second epidural treatment. More specifically, it was un-rebutted that Plaintiff endured physical pain and suffering from December 19, 2000 through July 29, 2003. Plaintiff would submit unto this Honorable Court that it was proper and within Judge Vlahos' discretion to hold, as the Supreme Court held in *Moody,* that once the jury found Defendant liable for Plaintiff's medical expenses and lost wages, yet failed to award any damages to Plaintiff for pain and suffering, particularly where, as here, the evidence for pain and suffering was never contested or contradicted at trial, then the verdict was against the overwhelming weight of the evidence.

In *Maddox v. Muirhead*, 738 So.2d 742 (Miss. 1999), the Supreme Court ordered an additur of $10,000.00 where the Plaintiff had incurred medical bills in the amount of $2,831.25. The Court held that where the medical bills was uncontradicted, and no allowance was made for pain and suffering on the part of the jury, the jury verdict was against the overwhelming weight of the evidence and a new trial should be granted unless the Defendant accepted the additur of $10,000.00. In *James v. Jackson*, 514 So.2d 1224 (Miss. 1987), the Supreme Court granted an additur of $2,000.00 in an automobile negligence action for personal injuries. In *James*, the Court added a consideration of the elements of damages is needed to determine if there was any indication of bias, prejudice, or passion on the part of the jury. *Winston,* 430 So.2d at 417.

In the instant cause, the jury was instructed to consider:

1. The type of injuries sustained by the Plaintiff, the length of their duration, and the

effects such injuries, if any, have had on the Plaintiff;

2. The past physical pain and suffering and resulting mental anguish and emotional distress, and loss of enjoyment of life, if any;

3. Reasonable medical expenses already incurred; and

4. Loss of wages to Plaintiff;

a. Past Pain And Suffering

In arguing past physical pain and suffering, Plaintiff introduced evidence that her back caused her severe pain and furthermore as a result of that pain, caused her headaches, continued aggravation and discomfort. The jury was presented with un-rebutted evidence that Plaintiff experienced severe pain as a result of the December 19, 2000, and as a result she was seen at the emergency room of Hancock Medical Center on December 20, 2000, with x-rays taken at that time. (TR. Vol. 6, p. 111) Furthermore, Plaintiff was treated at the emergency room of Memorial Hospital at Gulfport on December 28, 2000, wherein she underwent additional x-rays of her back. (TR. Vol. 6, p. 112).

Plaintiff received initial treatment for back pain from with Dr. Michael Wilensky (TR. Vol. 6, pp. 112), physical therapy with Total Rehab Plus, M. F. Longnecker (TR. Vol. 7, p. 166), and continued treatment with Dr. Victor T. Bazzone, whom Plaintiff saw from February 14, 2002 through July, 2003 for follow up treatment, which involved epidural steroid injections from Dr. Brian Dix with Coastal Chronic Pain Services. (TR. Vol. 7, 215, 244). At trial, it was undisputed that as a result of her injuries from the December 19, 2000, Plaintiff incurred reasonable and necessary medical expenses in the amount of $22,200.52 and lost wages in the amount of $11,284.00. (TR. Vol. 6, p.125). Plaintiff's testimony and Dr. Bazzone's testimony reflected that Plaintiff required medical treatment as a result of the December 19, 2000 collision. As Dr. Bazzone testified regarding Plaintiff's pain and suffering: "The problem was primarily pain in the back which

was increased by walking, by bending, by twisting, and often times just by sitting in one position for any long period of time." (TR. Vol. 7, pp. 221-222). As stated above, Plaintiff received emergency room treatment form Hancock Medical Center and Memorial Hospital. Plaintiff testified that she initially saw Dr. Michael Wilensky, received physical therapy, saw Dr. M. F. Longnecker, and further treated with Dr. Victor Bazzone who referred her to Dr. Brian Dix with Coastal Chronic Pain for epidural steroid injections. The evidence further revealed that for a period of several months after the accident, Plaintiff was not able work full time or enjoy any of the activities that she once did prior to the accident, as the un-rebutted testimony showed that from December 19, 2000 through April, 2001 Plaintiff was not able to work as a result of her injury. (TR. Vol. 6, pp.116-117). In addition, the jury heard extensive testimony, from Dr. Bazzone regarding the type of injury sustained by Plaintiff, and the fact that his diagnosis of dorsal facet syndrome and lumbar disc herniation at L-5,S-1 were directly related to the automobile accident of December 19, 2000:

> I think she (Plaintiff) was leaning against the car and turned this way. Well what she has done is she's rotated her body to the right and she has been thrown forward into a flexed position. When you read medical textbooks about what causes a rupture disk the classic maneuver for rupturing a disk is somebody who bends forward to lift something and they rupture a disk. . . the fact that she did have reproducible pains in her back. She had a finding on the MRI scan which was in the area where it should be produced, the type of symptoms which she was having.
>
> (TR. Vol. 7, pp. 221-222).

b. Past Medical Expenses and Lost Wages

As proof of past medical expenses, Plaintiff offered into evidence medical bills totaling $22,200.52. (TR. Vol. 6, p.125). Miss. Code Annotated § 41-9-119 (1972) provides that proof that medical bills were incurred because of an injury is a prime facie evidence that the bills were necessary and reasonable . . . . *James* at 1226. Plaintiff further offered into evidence lost wages in the amount of $11,284.00. (TR. Vol. 6, p.125). Furthermore, Defendant neither designated and/or

would relat presumption?

otherwise relied upon, any expert testimony to rebut the necessity and reasonableness of Plaintiff's medical bills. See *Hubbard*, 805 So.2d 545 (citing *Jackson*, 458 So.2d at 736, 737). The Record is clear that Defendant did not overcome the presumption that the medical bills incurred and lost wages were reasonable and necessary.

c. Loss of Enjoyment of Life and Past Pain and Suffering

The jury heard ample evidence regarding the severe pain that Plaintiff experienced with her back for two and a half-plus years after the accident. The jury heard ample evidence that Plaintiff was not the same after the collision inasmuch as she began to experience many changes, losing her ability to work full time and to enjoy physical activities as she did prior to the accident. The jury heard unrebutted testimony that prior to December 19, 2000, Plaintiff never had any problems with her back, and furthermore it was unrebutted that prior to December 19, 2000 Plaintiff never had any problems performing her work and other activities prior to the wreck. The jury further heard testimony regarding Plaintiff's condition, prior to and after the December 19, 2000 wreck regarding the loss of strength, loss of ability to work full time, loss of ability to enjoy activities as she did prior to December 19, 2000, and severe pain and suffering as a result of her back injury. Plaintiff's mother, Mary Schustz, testified that after the accident, Plaintiff:

> [C]ouldn't smile, she couldn't get out of bed, she couldn't do anything for herself. She was working at – she was doing internship at Pass High for the deaf. She couldn't stand long enough to do that. She couldn't sit to do that. She couldn't dance anymore. She couldn't do all the things she enjoyed doing, so it stopped, the music stopped.

(TR. Vol. 7, p. 263). Likewise, witness Pamela Liles testified that:

> [A]fter the accident and the days to come afterwards just decreased energy. She (Plaintiff) wasn't able to do before physically. She used to jog a lot, she danced. My daughter is her God-daughter so they used to play a lot and pick up, you know, and play like you do with a kid and she just wasn't able to do that.

(TR. Vol. 6, p. 100). And witness, Carolyn Englebrelsen testified that Plaintiff:

unable to walk, get joy to the FJs — credibility

> [C]ouldn't do much of anything. She couldn't even like do simple tasks of even lifting – to get a cup out of the cupboard or anything like that. Whenever she would anything like that you could just hear the pain because she would like wheeze and everything, and there would be times like she would just like – simple movements of getting off the couch and that's obviously that you can see that someone is in pain.

(TR. Vol. 7, p. 256). Based on the Record, it is obvious by the award of all the amount of medical expenses and loss of wages that the jury believed that Plaintiff's injuries lasted at the very least from a period of December 19, 2000 through July 29, 2003. Therefore, Plaintiff requests that this Honorable Court, deny Defendant's argument and affirm Judge Vlahos' ruling, pursuant to the holdings in *Maddox, Moody, Winston* and *James*, granting the additur to the Plaintiff for the two and half years, plus, of pain and suffering.

2. Defendant's Motion for New Trial.

As previously stated, in determining whether to grant a motion for new trial, the credible evidence "must be viewed in the light most favorable to the non-moving party". *Green*, 641 So.2d at 1207 (Emphasis added). In addition, "[T]he grant or denial of a motion for a new trial is and always been a matter largely within the sound discretion of the trial judge." *Id.* at 1207. (Emphasis added). As Defendant's arguments are repetitive in nature, Plaintiff, in support of her response, incorporates by reference, her previous arguments made above regarding the trial court's proper exclusion of the Six Flags surveillance video; the trial court's proper exclusion of Plaintiff's Grand Casino employment records; the trial court's proper exclusion of Plaintiff's hospital and other medical records; and the trial court's proper denial of Defendant's mitigation of damages jury instruction. Furthermore, in addition to putting forth no evidence whatsoever, to rebut Plaintiff's allegations, Defendant neither designated and/or otherwise relied upon, any expert testimony to rebut the necessity and reasonableness of Plaintiff's medical bills. See *Id.* at 1209 (citing *Jackson*, 458 So.2d at 737); See also *Hubbard*, 805 So.2d 545 (Miss. App. 2000)(citing *Jackson*, 458 So.2d at

737). As with his previous arguments, Defendant is once again re-arguing his case, again making arguments as to Plaintiff's credibility -- a fact (i.e. jury) issue. Defendant is reminded that there *was* a jury seated in this cause, that weighed the credible evidence in the trial record, and then rendered a 9 to 3 verdict in favor of Plaintiff. (R.646-647, R.E. 103-104; TR. Vol. 8, pp. 341-345).

In his Order, Judge Vlahos states as follows:

> As to the Defendant's issue regarding the trial court improperly denying the Defendant's request to offer any evidence records already admitted pursuant to Rule 902 of the Mississippi Rules of Evidence, it is the trial Court's recollection that the Defendant was afforded an opportunity to present said evidence to the jury during the cross examination of Dr. Victor Bazzone. Furthermore, the Defendant did not present any evidence at trial that the Plaintiff failed to mitigate the damages, and therefore no instruction was allowed as no evidence existed that the Plaintiff failed to mitigate her damages.

(R. 673-674, R.E. 116-117)(Emphasis added). As previously stated, "an appellant cannot assail as prejudicial his own trial tactics, because it would fasten a propensity in litigants to create error to enhance the possibility of reversal and repeated trials. This he is not permitted to do". *Jones*, 381 So.2d at 991 (citing *Simpson v. State*, 366 So.2d 1085 (Miss. 1979)(Emphasis added)). It is clear that the credible *admissible* evidence in the trial entire record was reviewed by Judge Vlahos, who, in holding that all favorable inferences are granted in favor of the non-moving Plaintiff (and pursuant to Mississippi jurisprudence), properly denied Defendant's Motion for New Trial (R. 671-674, R.E. 114-117).

IV.

CONCLUSION

As illustrated by Plaintiff throughout her Brief, Defendant has failed to set forth any facts or supporting legal authority that would show that either Judge Simpson and/or Judge Vlahos abused their discretion regarding: exclusion of the Six Flags surveillance video; exclusion of Plaintiff's Grand Casino employment records; exclusion of Plaintiff's hospital and other medical records;

denial of Defendant's mitigation of damages jury instruction; the granting of Plaintiff's Motion for Additur; and the denial of Defendant's Motion for New Trial. Furthermore, in addition to setting forth no evidence whatsoever to rebut Plaintiff's allegations, Defendant relied upon no expert testimony to rebut the necessity and reasonableness of Plaintiff's medical bills.

Finally, the Record is clear that any prejudice brought upon Defendant was of his own making, as the trial court went so far as to explain to Defendant the proper method for introducing the excluded medical records into the trial record and to likewise afford Defendant the opportunity to cure his error, during the cross-examination Plaintiff's expert witness, Dr. Bazzone. Defendant, however, failed to take advantage of this opportunity. He also failed to call Plaintiff during his case in chief, and thus missed an additional opportunity to properly introduce the excluded evidence at that time. Therefore, Defendant cannot complain now on appeal of alleged errors invited or induced by himself, and, as such, has waived any argument as to the excluded medical records; and the subsequent lack of evidence that gave rise to denial of his jury instruction and motion for new trial.

For the reasons stated above, Plaintiff, Rachel M. Carawan, respectfully prays that this Honorable Court enter an Order denying Defendant's Appeal, and further prays that the Court order that all costs of court, including attorney's fees, be assessed against Defendant in the above-referenced claim and that this Honorable Court grant such other and further relief as may be proper in the premises.

RESPECTFULLY SUBMITTED, this 19th day of November, 2007.

RACHAEL M. CARAWAN, Plaintiff/Appellee

BY: _____
MARIANO J. BARVIE

CERTIFICATE OF SERVICE

I, Mariano J. Barvié, the undersigned attorney, do hereby certify that I have delivered by U.S. Mail, postage prepaid, a true and correct copy of the foregoing pleading to the following:

Honorable Stephen B. Simpson, Circuit Court Judge
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This the 19th day of November, 2007.

MARIANO J. BARVIE

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