IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CHARLES N. JAMES — APPELLANT

VERSUS — NO. 2006-CA-02024

RACHEL M. CARAWAN — APPELLEE

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

APPELLANT'S REPLY BRIEF

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

APPELLANT'S REPLY BRIEF

COMES NOW, the Defendant/Appellant, Charles N. James, by and through his undersigned counsel of record, Allen, Cobb, Hood & Atkinson, P.A., and files this, his Reply Brief of Appellant, and in support thereof would show unto this Honorable Court the following, to-wit:

STATEMENT OF THE CASE

A. Procedural History:

On numerous occasions throughout the Brief of Plaintiff/Appellee, Defendant is accused of misrepresenting the record; specifically as to the April 6, 2005 trial, "Plaintiff's counsel (and not the trial court as misrepresented by Defendant), promptly moved for mistrial." Although the mistrial of the earlier trial has little if anything to do with the issues on appeal, for clarification purposes only, the Final Judgment (1st Day), executed by the trial court on the very day of the mistrial, April 6, 2005 and filed on April 11, 2005, as cited in Appellant's Brief and provided in the Appellant's Record Excerpts, states "the Court proceeded and during the testimony, on the Court's own motion a Mistrial was declared." (R.E. 232) (emphasis added). Undersigned counsel would submit that reliance on the unambiguous Judgment language is reasonable, whether said Judgment is consistent or inconsistent with the record of the actual trial proceedings, given that the transcript was not received until well after the Appellee's Brief was submitted. Said reliance does not rise to the level of "misrepresentation" as perceived and alleged by Plaintiff. Regardless of Plaintiff's perceptions, the trial court did not "believe" that

counsel for the Defendant "intentionally violated the Court's order," and the mistrial was contributed to what the trial court described as a "failure of the Court to adequately instruct the attorneys, I accept that responsibility." (Tr. 4/6/05, p. 44, 48).

ARGUMENT

THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING A MOTION *IN LIMINE* ON THE VIDEO SURVEILLANCE TAKEN OF THE PLAINTIFF ON JULY 31, 2003.

Plaintiff moves to strike any reference by Defendant to the content of the July 31, 2003 surveillance as she claims that the video surveillance tape "cannot be considered by this Court" as part of Defendant's appeal as it is not part of the Record on Appeal. Plaintiff does not object to or express disagreement with the manner or context of Defendant's characterization or description of the content of the subject video. The subject tape was proffered at trial and the trial court ruled that "it's not going to the jury," so the tape was marked for identification only as "Defendant's Exhibit 5" at trial. (Tr. 309-10, Defendant's Exhibit 5). Exhibits are considered part of the record; according to § 9-13-31 of the Miss. Code Ann.: "in all cases tried either in the circuit or chancery court in which the evidence is taken down by an official court reporter, all pleadings and all papers ***filed or introduced in the case***, all orders of the court entered on the minutes, all instructions and a copy of the court reporter's notes shall constitute the record and no bill of exceptions shall be necessary in order to make any of the above matters part of the record." (emphasis added). The Defendant's Designation of Record filed November 30, 2006 designates as being necessary as part of the appeal: "all Clerk's papers, pleadings, trial transcripts and ***exhibits filed, taken or offered in this case***." (R. 677-678) (emphasis added). Based on information and belief, the subject surveillance video is part of the Record on Appeal; if the surveillance was not forwarded with the remaining nine (9) exhibits offered or entered into evidence at trial as alleged by Plaintiff, it was, presumably, an oversight. With the Court's approval, Defendant, pursuant to Rule 30(b) of the Mississippi Rules of Appellate Procedure,

stands ready to supplement his Record Excerpts with a copy of the subject surveillance tape as the surveillance "exhibit" is "essential to an understanding of the issues raised." Accordingly, the surveillance tape as a proffered exhibit at trial should have been included in the Record of the Court and is proper for review and consideration by this Court.

Plaintiff cites *Ross v. State*, 603 So.2d 857 (Miss. 1992) as support for striking the July 31, 2003, video from consideration by the Court as well as any issues raised pertaining to the Defendant's Motion to Compel deposition of Plaintiff prior to the production of the subject surveillance video prior to deposition. (R. 405-407). The *Ross* decision does not apply to the issues present in this case. First, the *Ross* Court does not address the consideration of an exhibit allegedly "not part of the Record on Appeal" which is what the Plaintiff claims in this case. Secondly, *Ross* was a criminal case and addressed the criminal defendant's failure to move in writing to quash an indictment. *Ross*, at 861. Nevertheless, the *Ross* court held that "under Mississippi law, if an appellant raises for review an issue not raised in the ***pleadings***, transcript, or ruling, the appellant must have preserved the issue by raising it in a motion for new trial; the rational for this rule is based on the policy of giving the trial judge, prior to appellate review, the opportunity to consider the alleged error." *Id.* (emphasis added). Defendant by pleading, namely the subject Motion to Compel, appropriately raised the issue pertaining to the method of production, and once the surveillance was produced the prejudice to the Defendant was complete and irreversible in that it allowed for conformance of testimony. The trial court in this case had the opportunity prior to the respective trials to address and correct the alleged error as to the manner of production by admitting the subject video into evidence. Further, Defendant filed a Motion for Reconsideration of Judge Simpson's rulings including the request for a supplemental deposition, the subject Motion to Compel and the ruling excluding the Six Flags surveillance video, and the same was denied by Judge Simpson in the summer prior to the subject trial. (R.

605-607, R.E. 245-247). Contrary to Plaintiff's assertions otherwise, this issue is preserved for consideration by this Court by prior pleadings and prior review by the trial court judges.

Plaintiff asserts that she "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." To support that claim, Plaintiff asserts that Defendant "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." Presumably, though never affirmatively stated or denied by the Plaintiff, this assertion is made to refute any indication that she conformed her claim for damages to avoid the admission of the surveillance of July 31, 2003. In effect, Plaintiff wishes to place the burden of proving a negative upon the Defendant. To the contrary, it is important to note the Plaintiff submits no pleading, prior deposition testimony or anything from the record indicating that she placed anyone on notice prior to the hearing of April 5, 2005, that she would forgo her claim for future pain and suffering, medical expenses and lost wages beyond July 29, 2003. To the contrary, the record is clear that a year earlier on April 2, 2004, eight (8) months after the July 29, 2003, epidural injection and surveillance video and after Plaintiff was provided a copy of said surveillance, Plaintiff filed a Motion *in Limine* seeking to preclude admission of "surveillance films or photographs of Plaintiff, that have not been produced by discovery," in addition to "mention of a second vehicular accident by Ms. Carawan, as ***she is not claiming any injury as a result of this wreck beyond November 3, 2003***." (R. 553-558, R.E. 226-231) (emphasis added). Clearly this pleading is part of the record and contradicts Plaintiff's current assertion that she "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." (emphasis added). The date of the wreck referenced in this Motion *in Limine,* November 3, 2003 obviously is

beyond July 29, 2003. If Plaintiff felt then that she was cured in July 2003, as is alleged, then why would she not have stated so in that pleading rather than use the date of the second car wreck. Plaintiff's attempt to avoid evidence of a subsequent more severe car wreck by limiting her claim of damages is yet another example, supported by the record, of the Plaintiff tailoring her claims to avoid the admission of unfavorable evidence. Again, it was not until April 5, 2005, during proceedings held before Judge Stephen B. Simpson, Circuit Court Judge, regarding pending motions in preparation for the trial date that Plaintiff moved the November 2003 date backward and indicated for the first time that Plaintiff would not make any claims for future lost wages or future pain and suffering and future medical bills past July 29, 2003. (Tr. 4/5/05 p. 3, 36-49). Defendant is not relying on "innuendo and supposition" as alleged, but the record clearly supports the blatant and undeniable pattern of maneuvering on the part of the Plaintiff to avoid the admission of authenticated and accurate evidence contradicting her claims of injury and damages.

Plaintiff argues that *Williams v. Dixie Electric Power Association*, 514 So.2d 332 (Miss. 1987) is "distinguishable to the facts in the instant case." While admittedly no precedence will have identical facts as are addressed in the instant case, the guidance and principals set forth in the *Williams* decision do apply to cases where the use of impeachment material, specifically surveillance video, is sought. Regardless of the distinction of facts of either case, Plaintiff has formerly acknowledged the application of *Williams* as precedence to this case in her aforementioned Motion *in Limine* of April 2, 2004 as she cited that decision as authority pertaining to her request to preclude surveillance and photographs that have not been produced through discovery. (R. 553-558, R.E. 226-231). As set forth above, Defendant contends that as of the date of the subject surveillance, July 31, 2003, Plaintiff had not placed Defendant on notice that she was no longer asserting damages or injury related to the subject car wreck. Thus,

like the *Williams* case, the subject surveillance was taken during the time period which Plaintiff was continuing to assert damages and injury. Further, the *Williams* court does not limit the application of its decision in the manner asserted by Plaintiff. In fact, the *Williams* court anticipated fact scenarios such as those presented in the subject case when they suggested the "procedure" to "forestall most conforming testimony." *Williams v. Dixie Electric Power Association*, 514 So.2d 332, 336 (Miss. 1987), *citing* Cooper, *Work Product of the Rulesmakers*, 53 Minn.L.Rev. 1269, 1318 (1969), quoted in C. Wright & A. Miller, *Federal Practice and Procedure*, § 2015 (1970) (emphasis added). The *Williams* procedure was not followed in this case, and the Defendant was denied his request to question Plaintiff prior to receipt of the surveillance as to the damages and injuries she continued to relate to the subject accident. Thus, there was no opportunity afforded to the Defendant to see if Plaintiff would "attempt to meet the impeaching material in untruthful ways," and this allowed the Plaintiff to much later decide to forgo damages in order to avoid the use of surveillance at trial. *Id.*

The same can be said for the Plaintiff's criticism of the application of *Congleton v. Shellfish Culture, Inc.*, 807 So.2d 492 (Miss. Ct. App. 2002) to the facts of this case. As asserted in an attempt to distinguish the facts of the subject case from that in *Congleton*, the Plaintiff in *Congleton* had reached maximum medical improvement yet continued to allege injury at the time of the surveillance. Admittedly this fact scenario does differ from the subject case; in the subject case Plaintiff was not working due to her injuries, was under the care of a neurosurgeon and a pain specialist, had a return appointment scheduled for a third epidural injection, and had not been described as reaching maximum medical improvement when the subject surveillance was conducted. Thus, the facts of the subject case provide stronger support for the advocated discovery "procedure" and use of surveillance as impeachment material than even those set forth in *Congleton*. While the facts of the subject case are consistent with an individual continuing to

assert or allege medical expenses and injury, the manner in which the surveillance was disclosed allowed Plaintiff to much later assert otherwise, given that Defendant's request for a supplemental deposition of Plaintiff limited to her physical activities since her initial deposition of January 30, 2002, was denied contrary to procedures set forth in *Congleton* and *Williams*. Thus, as set forth in the Appellant's Brief, the manner to which the surveillance was produced opened the door for further prejudice to the Defendant in that once Plaintiff received the video and saw that she had been caught acting inconsistently with the claimed injuries, she tailored her testimony and case in order to avoid the introduction of this relevant evidence at trial.

Despite the assertion otherwise, Plaintiff's counsel never filed a written objection to the video surveillance nor does Plaintiff's Motion *in Limine* of April 2, 2004, refer to or specify that it includes the July 31, 2003, surveillance despite the fact that the surveillance had been produced to Plaintiff well in advance of preparation of this Motion *in Limine*. (R. 553-558, R.E. 226-231). Instead Plaintiff waited twenty months until two days prior to scheduled trial to move *ore tenus* to exclude the July 31, 2003, surveillance video; which is unquestionably an integral and probative piece of evidence. The timing and *ore tenus* nature of the Plaintiff's motion *in limine* was clearly a tactical decision on the part of the Plaintiff which left Defendant at a disadvantage on the morning of trial when Judge Simpson granted Plaintiff's Motion *in limine*; thus resulting in prejudice. This ruling not only made the tape in admissible, but any reference to Plaintiff's plans to attend the amusement park were inadmissible as well.

In sum, the surveillance video of the Plaintiff in a personal injury action riding amusement park rides just two days after receiving an epidural injection is relevant. To argue otherwise merely because Plaintiff decides to cut off her quest for damages two days prior is disingenuous. Contrary to Plaintiffs assertion otherwise, her testimony that after the epidural, "I felt so much better, I mean it was great, ...I felt full of life...I just wanted to run all over," was

rebutted by the fact that at the time this video surveillance was taken, it is undisputed that the Plaintiff was still undergoing medical treatment by Dr. Bazzone and Coastal Chronic Pain Services. (Tr. 127). At the time of the video surveillance, Plaintiff was working only two days a week with very limited duties pursuant to Dr. Bazzone's orders. (R. 465, R.E. 186). It is further undisputed that Plaintiff continued treatment following the July 31, 2003, trip to Six Flags, specifically, on August 12, 2003, Dr. Bazzone noted that Plaintiff's "symptomatology ***has not really changed since I last saw her***, and he released her to work three days per week, eight hours a day," with those restrictions to last for approximately 3 months, at which time, he would re-evaluate her. (R. 469, R.E. 189) (emphasis added). Plaintiff also continued to receive treatment following her so-called cure as on August 19, 2003, Plaintiff returned to Coastal Chronic Pain Services for re-evaluation, and as her pain was "tolerable," she did not receive a third epidural, however, she was prescribed Quinamm, a new medication, for her "nocturnal leg cramps," and was to be seen in follow up. (R. 470, R.E. 190). This evidence, the Plaintiff's assertion in her Motion *in Limine* of April 2, 2004, limiting her claims of injury ***after November 3, 2003***, and her failure to assert her "cure" until 20 months later, contradicts the Plaintiff's testimony as well as the testimony of Pamela Liles, Carolyn Englebretsen and Mary Schustz. The Defendant should have been allowed to introduce the Six Flags video to refute Plaintiff's allegation of injury and to impeach her credibility as she was clearly acting contrary to how a reasonable person would act having just had a needle placed in her back for treatment of an alleged herniated or ruptured disk. Thus, the manner in which the videotape was produced and its unjustified exclusion resulted in prejudice to the Defendant, therefore, the Defendant requests that the Court reverse the trial court's rulings and order a new trial that includes this video as evidence.

THE TRIAL COURT ABUSED ITS DISCRETION IN NOT ADMITTING EVIDENCE PREVIOUSLY SUBMITTED PURSUANT TO MISSISSIPPI EVIDENTIARY RULES 803 AND 902

A. Plaintiff's Grand Casino Employment Records

On March 19, 2003, Defendant filed a Notice of Intent to Offer Rachel M. Carawan's Employment Records that fully complied with Miss. R. Evid. Rule 902. (R. 307-357, R.E. 65-115). While Plaintiff did in fact file an Objection to Defendant's Notice of Intent to Offer Employment Records, said objection did not comply with the mandate of Miss. R. Evid. Rule 902(11)(C)(ii) in that Plaintiff did not state with specificity why she objected to the subject work records other than that they "have no probative value pursuant to Rule 401 and 403 of the Miss. R. Evid. and will not outweigh prejudicial effect." (R. 361-362). The Defendant would argue that this objection was insufficient, nevertheless, Judge Simpson did hear arguments on April 5, 2005 and the Plaintiff's "employment records," "Grand Casino" records, "work file," "work records," and "employment file," all meaning the Plaintiff's employment file, were addressed in connection with the medical records from Dr. Dix and Plaintiff's Motion *in Limine*, and Plaintiff's counsel referenced in that hearing that he "properly objected within the time frame of the rules to that even being an authentic record." (4/5/05 Tr. 13-17). As Plaintiff did not file an objection to the Notice of Intent pertaining to the medical records, he could only have been referencing the work records. This hearing took place the day before the trial and the cited discussions pertained to not only medical records but also the employment records, and Judge Simpson ruled prior to beginning trial the next day that he would allow Defendant "to introduce records, rehab records, as well as the report, I believe, from Dr. Dix." (4/5/03 Tr. 48). Given the context of the arguments the day before, and Plaintiff's reference to his objection to the Notice of Intent, one could infer that Judge Simpson included the employment records in his ruling. It is clear that there were varying understandings as to whether this issue was ruled upon prior to trial as there was much discussion and debate between the parties; with Judge Vlahos ultimately

finding: "certainly the notices of intent were filed by defense, but I don't know if there was a hearing in which any judge decided them...so I am going to find that 902 (sic) was not complied with, and we'll move on." (Tr. 145-157).

Regardless of whether the objection to the Defendant's Notice of Intent to Offer Plaintiff's Employment Records was resolved prior to trial, said records were admissible on cross examination of Plaintiff to impeach her inconsistent testimony. This is a personal injury case where Plaintiff denied that any of her injuries were caused or aggravated by her employment albeit there was reference to Plaintiff suffering an on the job injury in a medical record history. The physical requirements of her employment were at issue at trial and along those lines, Plaintiff denied being employed with the Grand Casino as a busser. (Tr. 136). This testimony was contrary to the Grand Casino employment records of Plaintiff which contains at least two Personnel/Payroll Action Notice documents that indicate that Plaintiff's job title was "busser" in June 2001. (R. 317, 319, R.E. 75, 77). Further, Plaintiff also testified regarding her claim for lost wages that she was off of work from December 2000 until March 2001 at the direction of Dr. Wilensky, who gave her a doctor's note excusing her from work for that period of time which she in turn provided to her employer. (Tr. 139, 140). Nevertheless, Plaintiff's employment records do not contain a letter from Dr. Wilensky. Thus the employment records were relevant to the Plaintiff's claims of lost wages, her credibility, mitigation of damages, and causation of the alleged injuries. The employment records were admissible pursuant to M.R.E. 803(6), the business record exception and those authorities previously cited in Appellant's Brief. Plaintiff does not dispute the authorities cited and relied upon in Appellant's Brief, nor the application of those cases to the facts of the subject case. Defendant was prejudiced as a result of not being allowed to introduce or refer to the properly authenticated employment records therefore, he requests that the Court reverse the trial court's evidentiary ruling and order a new

trial that includes the admission of the Grand Casino records.

B. Plaintiff's Certified Medical Records

On cross examination of the Plaintiff, the Defendant attempted to introduce into evidence the records from the Hancock Medical Center Emergency Department, which were subject to a Notice of Intent that was filed March 17, 2003, along with an authenticating Affidavit of the Director of Medical Records for the hospital. (R. 261, 269-277, R.E.33, 41-49). Plaintiff argues in Appellee's Brief that her objection to the proffered medical records was that the records were not the entire or complete set of hospital records contrary to Miss. R. Evid. 106 and § 41-9-109 of the Miss. Code Ann. as authority for that proposition. This is inconsistent with the record in that Plaintiff's initial objection is "it hasn't been properly authenticated." (Tr. 142). Further, the record indicates that the entire Notice of Intent with the authenticating affidavit was offered along with the records as Defendant's Exhibit 2. (Tr. 146, Defendant's Exh. 2 for Id). Plaintiff's counsel did mention at trial that Defendant's Exhibit 2 did not "have the affidavit required by statute." (Tr. 169). Plaintiff's counsel in making this argument fails to recognize that "the statute," § 41-9-109 of the Miss. Code Ann., is not the only acceptable method of securing records that satisfy authenticity. *See Buel v. Sims*, 798 So.2d 425, ¶ 17 footnote 1 (Miss. 2001). Another acceptable method is that which was utilized by the Defendant in this case, namely self-authentication through M.R.E. 902(11). As mentioned in the Appellant's Brief, in *Buel*, Judge Vlahos properly admitted results of a motorist's blood alcohol test authenticated under M.R.E. 902(11), without a sponsoring witness, at the trial of her personal injury action against a trucker and his employer. *Id.* at ¶ 17.

The medical records sought to be introduced were subject to Notices of Intent that were filed along with authenticating Affidavits from the Directors of Medical Records for the various medical providers. (R. 261, 269-277, R.E.33, 41-49). Pursuant to Miss. R. Evid. 902(11), once

the proponent gives notice to adverse parties of the intent to offer the records as self-authenticating, "objections will be waived unless, within fifteen days after receiving the notice, the objector serves written specific objections or obtains agreement of the proponent or moves the court to enlarge the time." The trial court based his ruling on the false assurance of the Plaintiff that she served "written specific objections" within 15 days of the filing of the Notice of Intent to the admission of the medical records, and the failure of the Defendant to schedule a hearing on the objections before the trial. (Tr. 157-158). Nevertheless, Plaintiff in her Appellee's Brief does not dispute that she failed to serve written objection to the introduction of these medical records into evidence within the 15 day period, nor did she request additional time to file such an objection. (Tr. 146-147, 186). The trial court was absolute in his ruling that: "and not having called them up before the trial I'm going to go with the ruling that 902(11)(c)(1) was not complied with, and ***therefore the witness is not to be examined about them.***" (Tr. 157-158) (emphasis added). When questioned as to whether the trial court would allow the admission of other medical records, the trial court indicated that "none of them will be admissible." (Tr. 159). Despite the succinct ruling, Plaintiff now argues that Defendant was given the opportunity to "cure his previous errors" and Defendant failed to take advantage of this opportunity. To be clear, during recess, in an attempt to clarify the issue to the trial court, the Defendant reviewed his file and confirmed that Plaintiff did not object to the notices of intent pertaining to the medical records of the Plaintiff. (Tr. 179). On the third day of trial, after Defendant had cross examined the Plaintiff, the trial court acknowledged that pursuant to Miss. R. Evid. 902, once the notice is filed, "objections will be waived unless 15 days after receiving the notice the objector serves specific objections or obtains an agreement of the proponent or moves the Court to enlarge the time." (Tr. 188-189). Nevertheless, Plaintiff's counsel continued to assert that there were objections filed, though he admits, "I haven't look[ed] at it." (Tr. 185-186). The trial court

requested that counsel look in the court file for written objections, however, the trial court did not correct his ruling to allow for the admission or reference to of these records. (Tr. 193). As such, there was no opportunity afforded to Defendant to utilize the medical records given the trial court's rulings. The trial court controls the "mode and order of interrogating witnesses and presenting evidence." Miss. R. Evid. 611(a). As such, there was no true "opportunity to cure," as alleged by Plaintiff, and the Defendant did not waive his objections by proceeding under the mandate of the trial court's succinct rulings. The Defendant had already cross examined Plaintiff during her case in chief; and it is surprising that Plaintiff now criticizes Defendant for failing to call her during his case in chief, presumably for a second cross examination. The cases cited by the Plaintiff to support that a "defendant cannot complain on appeal of alleged errors invited or induced by himself," are distinguishable from the facts in the subject case as the errors that were supposedly "invited or induced" by counsel – for which courts will not thereafter hear complaints – were affirmative in nature. *See Singleton v. State*, 518 So.2d 653 (Miss. 1988); *Browning v. State*, 450 So.2d 789 (Miss.1984); *Jones v. State*, 381 So.2d 983 (Miss. 1980). In other words, in those cases the errors resulted from some action that counsel took – such as opening the door to otherwise objectionable testimony – as opposed to the situation argued in the subject case – an alleged failure to introduce evidence, which is inaction. Given that Defendant did not create this error, but instead the error was due to Plaintiff's continuing objection and misrepresentation to the trial court that written objections to the Notices of Intent were timely filed, Defendant should not be now called upon to pay the price for the Plaintiff's prejudicial trial tactics.

The Defendant has not, as alleged, misconstrued the intent and application of Miss. R. Evid. 902(11), as that is succinctly set forth in the comment to said rule: "it is intended to allow, in proper cases, the introduction of these records without the expense, trial time consumption and

inconvenience to witnesses who are called to provide what is often purely formalistic and undisputed predicate evidence." Plaintiff fails to cite any authority in support of her assertion that "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." Whether the exhibits were taken apart and then put back together and offered in total with the supporting affidavit and notice of intent is of no matter. Miss. R. Evid. 902(11) does not contain the same requirements of form as is set forth in § 41-9-103 *et seq.* as to sealing the records and certification as to "all the records described." Plaintiff also fails to identify why this act would nullify the authenticity of the documents. Nevertheless, Defendant attempted to introduce the records *in toto* to no avail.

Having been authenticated through the proper means, the Hancock Medical Center records were clearly relevant to the issues at hand and thus were admissible. The subject records pertained to the visit of the Plaintiff to the Emergency Department on December 20, 2000, the day following the subject accident. (R. 275, R.E. 47). The statements made by the Plaintiff to her treating medical providers are clearly relevant to the subject litigation, specifically, as to the Plaintiff's trial testimony pertaining to the facts of the accident and the extent of her alleged injuries as that testimony varied considerably from that information that was documented in contemporaneous medical records. The history provided by the Plaintiff to her treating medical providers varied from "was pumping gas in her car when it was hit from behind throwing her into gas pump," to she was "hit by car." (R. 275, 277, R.E. 47, 49). The inability to question Plaintiff pertaining to her statements documents in contemporaneous medical records clearly resulted in great prejudice to the Defendant as he was unable to use those statements to impeach or call into question testimony given by Plaintiff and her treating physician, Dr. Bazzone.

Contrary to Plaintiff's assertion otherwise, regardless of the reasoning behind the trial court's ruling, Miss. R. Evid. 803(6) and the authorities cited in the Appellant's Brief support the

introduction of the medical records as substantive evidence and impeachment evidence through cross examination of the Plaintiff and her treating physician. In this case, the Defendant was not allowed to attempt to authenticate the records through the Plaintiff, who admitted that she had seen the Emergency Department record, due to Plaintiff's objection and the trial court's admonition that the "witness is not to be examined about them." (Tr. 141, 158). In sum, the medical records containing the statements of Plaintiff were admissible pursuant to the aforementioned evidentiary rules, and Defendant requests a new trial based on the trial court's exclusion of this relevant evidence.

THE TRIAL COURT IMPROPERLY DENIED DEFENDANT'S JURY INSTRUCTION, D-12, REGARDING MITIGATION OF DAMAGES

Admittedly the medical records which were not allowed to be introduced at trial are replete with instances showing that Plaintiff failed to heed or follow the recommendations of her medical providers. In addition to those records, despite Plaintiff's assertion otherwise, there was evidence introduced at trial that would support a mitigation of damages instruction. The Plaintiff did not comply with Dr. Longnecker's advice as she continued her job as a bartender and claimed that because she had a helper she could still do that job. (Tr. 166). After Plaintiff began treating with Dr. Bazzone in February 2002, there were occasions when Dr. Bazzone would observe her on the job, and during the time frame she was "supposed to have a helper; supposed to do all those chores with her; lift the cases of liquor, dump the ice," Dr. Bazzone admits that he may have observed the Plaintiff dump ice from a bucket and may or may not have seen her "lift cases of liquor." (Tr. 239-240). Though Dr. Bazzone discussed the "necessity for surgery," with Plaintiff on April 11, 2003, Plaintiff testified that she chose to forgo surgery as recommended by Dr. Bazzone "because her father was very ill." (Tr. 214). None of the case law cited by the Plaintiff stands for the position that it is necessary for a Defendant to call an expert witness in his case in chief to support a mitigation instruction. The above referenced testimony

of the Plaintiff and her treating physician, Dr. Bazzone, is sufficient in and of itself to support a mitigation instruction. The medical records and surveillance video that should have been allowed into evidence merely complete the picture of a patient who habitually failed to heed the recommendations of her providers and/or intentionally places herself in situations likely to cause aggravation or additional injury.

Plaintiff cites *Hubbard v. Canterbury*, 805 So.2d 545 (Miss. App. 2000) in criticism of Defendant not offering any expert witnesses to rebut the necessity and reasonableness of Plaintiff's medical bills and to support the failure to mitigate damages argument. The *Hubbard* decision does not address the issue of mitigation and does not stand for the proposition that an expert is required to show that the Plaintiff failed to mitigate damages. Proof of mitigation can come in many forms; medical records, treating physician testimony and testimony of the Plaintiff and other witness, all of which were presented at trial in this case. With regard to rebutting the reasonableness and necessity of the medical bills, a Defendant is required "to present proper evidence." *Id.* at ¶ 11. This case is factually distinguishable from the *Hubbard* case as Hubbard was involved in a rear end car wreck resulting in hospitalization for five days immediately after the accident. *Id.* Hubbard only stayed under a doctor's care for six weeks after his release from the hospital, and he fully recovered from the neck injury. *Id.* at ¶ 11. Hubbard's treating physician was of the opinion that Hubbard had sustained a muscle spasm in his neck and this diagnosis was supported by the x-ray. *Id.* Further, Canterbury relied solely upon speculation and argument of counsel to call into question the reasonableness of Hubbard's medical bills. These facts are distinguishable from this case: Plaintiff was not in an actual "car wreck" but rather was outside of the car at the time of the subject accident, which she described as not forceful enough to throw her into the gas pump; Plaintiff did not complain of pain or appear injured at the scene and suffered no bruising; she did not immediately go to the hospital and was never hospitalized

for her alleged injuries; Plaintiff's claim of injury and sporadic treatment lingered for years as opposed to weeks; there was disagreement between Plaintiff's treating physicians, Dr. Lowry and Dr. Bazzone, as to the appropriate method of treatment, Dr. Bazzone did not give a definitive diagnosis and periodic radiographic studies were interpreted by the treating medical providers as "normal." Given the facts and proof at trial, it is clear that the reasonableness and necessity of the alleged medical treatment was contradicted by the Defendant through proper means, without necessity of an expert witness.

Clearly there was sufficient evidence to support that Plaintiff failed to heed or follow recommendations of her medical providers and thus the requested jury instruction should have been allowed. (R. 640, R.E. 248). The jury instruction would have allowed the jury to consider the Plaintiff's part in contributing to her own medical costs and treatment due to her continued employment as a bartender, as well as her failure to comply with doctor's orders and recommendations. The case law cited in the Appellant's Brief supports that the Defendant was entitled to an instruction regarding his theory of the case, namely that Plaintiff is required by law to take reasonable steps to mitigate her damages.

In this case, the trial court refused the Defendant's jury instruction on mitigation of damages, despite ample evidence to support this accurate statement of the law. As such, the Defendant was prejudiced in that his theory of the case was not allowed to be considered by the jury and the Plaintiff was allowed to recover the full extent of her alleged damages despite her indifference to the doctors' orders, therefore, the Defendant respectfully requests that the Court reverse the verdict and remand this case for a new trial with the appropriate instruction on mitigation of damages.

THE TRIAL COURT IMPROPERLY GRANTED AN ADDITUR AND IMPROPERLY DENIED DEFENDANT'S REQUEST FOR A NEW TRIAL DUE TO THE COURT'S EVIDENTIARY ERRORS

On review of an additur award, the Court must view the evidence in the light most favorable to the party against whom the additur is sought and must give him the benefit of all favorable inferences that may be reasonably drawn therefrom. *Cassibry v. Schlautman*, 816 So.2d 398, ¶¶ 10, 14 (Miss.App. 2001). The Plaintiff did not meet her burden of proof for an additur, and viewing the evidence in the light most favorable to the Defendant, and giving the Defendant the benefit of all favorable inferences that may be reasonably drawn there from, the Plaintiff was not entitled to an additur. Through Defendant's testimony and that pertaining to surveillance conducted on Plaintiff prior to July 29, 2003, and through cross examination of the Plaintiff and her witnesses, Defendant presented evidence that contradicted Plaintiff's claims of injury and damages.

Plaintiff cites as authority the case of *Moody v. RPM Pizza,* 659 So.2d 877 (Miss. 1995) to support the award of an additur in this case. In *Moody*, the Court acknowledged several cases where it was held that the trial court did not err in refusing to grant an additur. *Id.* at 881, *citing Brake v. Speed,* 605 So.2d 28, 31, 34 35 (Miss.1992)(damages in the amount of $5,600.00 with total alleged medical bills amounting to $11,560 and plaintiff involved in subsequent car accident with extensive medical treatment and plaintiff failed to produce verification of employment or rate of pay); *Leach v. Leach,* 597 So.2d 1295, 1296, 1298 (Miss.1992)(jury award of $2,000 appropriate given $2085.90 submitted in medical bills with contributory negligence at issue and plaintiff's failure to follow doctor's orders); *Green v. Grant,* 641 So.2d 1203, 1209 (Miss.1994) (reasonableness and necessity of medical expenses and lost income were seriously contested). As indicated earlier, these cases are similar to the subject case in that the Plaintiff failed to support her lost wages claim for December 2000 to May 2001, there was an issue of fact as to whether alleged pain and suffering was due to the subject accident or other injuries, and Plaintiff failed to heed the recommendations of her treating physicians. The *Moody*

decision is factually distinguishable from the instant case as the pain and suffering testimony presented by Moody was never contested and it was uncontested that Moody suffered from a permanent disabling condition; which is not the case in the subject litigation. *Moody*, at 882. Likewise, *Maddox v. Muirhead*, 738 so.2d 742 (Miss. 1999) can be distinguished from the case at hand in that there was no dispute as to what caused Maddox's injuries which resulted from an altercation in a bar and there is no reference in the opinion as to other potential causes of pain and potential injury as was presented in this case. Further, *Winston v. Cannon*, 430 So.2d 413 (Miss. 1983) is distinguishable to the facts at hand despite this being an admitted liability case as that factor in and of itself does not support a claim of additur. To the contrary, Defendant throughout this pending litigation and at trial denied that the minor accident caused the injuries that Plaintiff alleged, and as stated before, there was a factual dispute as to the actual nature and diagnosis of said injury. With regard to *James v. Jackson*, 514 So.2d 1224, 1227 (Miss. 1987), it should be noted that the verdict amount coupled with the $2,000 additur still resulted in an award less than the alleged damages where there was conflicting proof of plaintiff's injury and causation and Plaintiff claimed future disability. In this case, Plaintiff decided to forgo her claim for future disability and pain and suffering, thus those factors are not at issue.

In sum, the facts of the accident were contested, however, even Plaintiff admitted the she did not feel that the force of the impact was violent enough to slam her into the pump, and Plaintiff did not have any bruising to her body following this accident. (Tr. 161, 162). The Plaintiff's medical treatment was sporadic and there are numerous references of other injuries in the contemporaneous medical records. Based on this alone, it can not be said that the verdict was "so inadequate under the facts in the case as to strike mankind, at first blush, as being beyond all measure, unreasonable." As set forth in the Appellant's Brief, other than Plaintiff's testimony that a doctor recommended that she not work, the Plaintiff did not have any

corroborating testimony or documentary evidence to support her lost wages claim from December 2000 to May 2001. Regarding pain and suffering, the physical therapy records were replete with references that Plaintiff was in pain, sore, or stiff from lifting her father, excessive lifting, moving a chair, and work related injury, but the records lacked reference to the subject accident of December 2000 as a source for this pain. When questioned about this contemporaneous evidence, Plaintiff without exception denied any such injuries, leaving an issue of fact for the jury to determine. The Plaintiff's duties as a bartender/banquet server were strenuous and this resulted in recommendations of her treating physician to cease or limit that line of work; said recommendation was ignored by the Plaintiff. As far as the nature and diagnosis of the alleged injury, there was conflicting testimony by Dr. Bazzone as to whether it was muscular in nature, a bulging disk or herniated disk. Dr. Lowry looked at the same radiographic studies as Dr. Bazzone, and noted "I find that these studies appear normal to me." This conflicting evidence created an issue as to the amount of damages for the jury to decide. The Defendant respectfully submits that the trial court abused his discretion in the instant case by his decision to deny the Defendant's Motion for New Trial and in granting the additur in the amount of $30,000.00. Thus, the Defendant requests that the case be reversed and remanded for new trial.

THE JUDGMENT SHOULD BE REVERSED AND RENDERED, IN THE ALTERNATIVE REVERSE AND REMAND FOR A NEW TRIAL ON THE MERITS

Without dispute, it is the jury's duty to discern the truth from the various versions of evidence and testimony that are presented. However, in this case it was unfortunate for the Defendant that the jury was not allowed to hear all the relevant and credible evidence available pertaining to the issues in dispute. The relevant, credible and uncontested medical records, Grand Casino employment records, as well as the surveillance videotape of Plaintiff at Six Flags on July 31, 2003, were all acceptable forms of evidence to impeach credibility and to challenge

the extent and nature of the alleged injuries and alleged physical limitations. Due to objection by Plaintiff, relevant and credible evidence was not allowed to be presented by the Defendant. Because of these evidentiary rulings and the failure to properly instruct the jury, the resulting verdict was inconsistent and contrary to the evidence that was presented. The Defendant did not create the evidentiary errors by any affirmative action on his part, therefore, he should not be penalized for any alleged failure to cure said errors especially where the trial court never affirmatively overruled its decision. This so called opportunity to cure came rather late in the trial and the Defendant utilized those records allowed by the trial court, without objection by Plaintiff, in his cross examination of Dr. Bazzone.

For the reasons set forth herein and for those reasons set forth in the Appellant's Brief, Defendant respectfully requests relief from the Judgment of the jury and the additur of the trial court. Defendant submits that the Judgment of the Circuit Court should be reversed and Judgment rendered in Defendant's favor. In the alternative, Defendant requests that the Court reverse the Judgment and remand the case for a new trial on the merits.

CONCLUSION

The alleged errors deprived Defendant of a fair trial and cannot be considered harmless. Under the facts present in this case, it is respectfully submitted that the trial court abused its discretion in ruling to exclude the Six Flags surveillance and properly authenticated employment and medical records, and also in improperly denying the requested mitigation of damages jury instruction. While abuse of discretion is the legal threshold for determining error as it applies to evidentiary matters, the Defendant in no way infers through this Reply or the Appellant's Brief that the honorable trial court judges acted unprofessionally or in an improper manner regarding this litigation. Any inference otherwise based on the choice of wording is regrettable given that the common synonym of "adoption" and "endorsed" is "accepted." Based on the conflicting

evidence that was presented to the jury, the trial court erred in denying Defendant's Motion for New Trial, and in granting an additur to the Plaintiff. Therefore, the Defendant respectfully requests the relief he is entitled to, namely a new trial on all issues.

RESPECTFULLY SUBMITTED, this the 4th day of January, 2008.

Respectfully submitted,

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Attorneys for Defendant/Appellant,

CHARLES N. JAMES

MELINDA O. JOHNSON [redacted]

CERTIFICATE OF SERVICE

I, Melinda O. Johnson, attorney for Defendant/Appellant, Charles N. James, certify that I have this day forwarded the above and foregoing ***Appellant's Reply Brief*** to the Clerk of this Court and have served a copy of same by U.S. Mail with postage prepaid on the following persons at these addresses:

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This, the 4th day of January, 2008.

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