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 BRIEF

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CERTIFICATE OF INTERESTED PARTIES

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

1. Charles N. James, Defendant/Appellant
2. Rachel M. Carawan, Plaintiff/Appellee
3. Melinda O. Johnson, Jeffrey G. Pierce, of the law firm of Allen, Cobb, Hood & Atkinson, P.A., counsel for Defendant/Appellant, Charles N. James
4. Mariano Barvie of the law firm Hopkins, Barvie & Hopkins, counsel for Plaintiff/Appellee, Rachel M. Carawan
5. The Honorable Kosta Vlahos, Hancock County Circuit Court Judge
6. The Honorable Stephen Simpson, Hancock County Circuit Court Judge

ALLEN, COBB, HOOD & ATKINSON, P.A.
Attorneys for Defendant/Appellant,

CHARLES N. JAMES

MELINDA O. JOHNSON [redacted]

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

APPELLANT'S 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 Brief of Appellant, and in support thereof would show unto this Honorable Court the following, to-wit:

STATEMENT OF THE ISSUES

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

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

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

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

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

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY:

This is a personal injury lawsuit that was filed by the Plaintiff/Appellee, Rachel M. Carawan, against the Defendant/Appellant, Charles N. James, in the Circuit Court of Hancock County, in which Plaintiff claims injury as a result of a minor impact with her vehicle. Plaintiff initiated this lawsuit by filing her Complaint in the Circuit Court of Hancock County on September 20, 2001. (R. 5-8, R.E. 5-8). In her Complaint, Plaintiff alleges that on or about December 19, 2000, her vehicle was parked at the Diamondhead Chevron, Diamondhead, Mississippi, where she was pumping gas in her car, and she was injured when Defendant backed into the other side of her car from his parking space. As a result of this accident, Plaintiff claimed "severe personal injuries to her body, including but not limited to, her head, neck, and back, which have rendered her temporarily and totally disabled... physical pain, ..now and in the future...excruciating pain in the neck, head and back..., caused Plaintiff 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 October 22, 2001, Defendant answered the lawsuit denying these allegations. (R. 12-16, R.E. 9-13).

The deposition of Plaintiff was taken on January 30, 2002. (R. 27, R.E. 14). Prior to that time, on August 16-17, 2001, the Defendant had obtained video surveillance on the Plaintiff which was produced to Plaintiff's counsel following the deposition of the Plaintiff. Plaintiff's counsel would periodically submit medical reports from Plaintiff's treating physician, neurosurgeon, Dr. Victor Bazzone. On August 8, 2002, Dr. Victor T. Bazzone was designated by Plaintiff as an expert and it was anticipated that he would testify regarding his treatment of

1st video after depo.

her, that his treatment is causally related to the subject accident, and regarding her physical limitations, medical prognosis and diagnosis. (R. 114-115, R.E. 16-17). Dr. Bazzone's video deposition was taken March 11, 2004. (R. 417-418, R.E. 147-148). It is during this deposition that the Defendant first learned of Dr. Bazzone's referral of Plaintiff to neurosurgeon, Dr. Michael W. Lowry.

In preparation for trial, counsel for the Defendant filed the following Notices of Intent to Offer Records Pursuant to Miss. R. Evid. Rule 902: Dr. Bazzone's medical records (R. 439-452, R.E. 167-180); Dr. Longnecker's medical records (R. 370-376, R.E. 118-124); Total Rehabilitation Physical Therapy medical records (R. 377-395, R.E. 125-143); Hancock Medical Hospital medical records (R. 261-277, R.E. 33-49); Open MRI's medical records (R. 290-295, R.E. 50-55); Memorial Hospital's medical records (R. 261-277, R.E. 33-49); Coastal Chronic Pain Services -- Brian Dix, D.O. records (R. 507-514, R.E. 209-216); Plaintiff's Employment Records from Grand Casino (R. 307-357, R.E. 65-115); Warfield's Auto Body Shop, Inc. estimate of repair totaling $386.49 for the Plaintiff's 1996 Honda Civic (R. 483-486, R.E. 201-204); Accident Report of November 3, 2003 (R. 503-506, R.E. 205-208); Hancock County Accident Report of December 19, 2000 (R. 507-514, R.E. 209-216); and AMR records for November 3, 2003 treatment (R. 530-538, R.E. 217-225). On March 31, 2003, Plaintiff filed her Objection to Defendant's Notice of Intent to Offer Employment Records on the basis that they have "no probative value" and will not "outweigh the prejudicial effect as to the employment records." (R. 361-362, R.E. 116-117). This was the only objection filed by the Plaintiff in response to the aforementioned Notices of Intent.

On March 11, 2003, Defendant filed his Notice of Intent to Offer Surveillance Records and videotape pertaining to surveillance conducted of the Plaintiff from August 3-17, 2001. (R. 246-258 or R 244, R.E. 20-32). In response, Plaintiff filed Objections to Defendant's Notice of

Intent to Offer Surveillance Records (R. 296-304 or R 244, R.E. 56-64). The Plaintiff's basis for the objection to the video surveillance was that it was not self authenticated and she should have "the right to first examine the proponent of this document as to the completeness of same." *Id.* Plaintiff does not dispute that the surveillance video was produced almost a year earlier, and an eight page Insight Investigation report of Melissa Dubisson, Operative II, "Summary of Surveillance" was produced in July 2002. (R. 299, 303, R.E. 59, 63). Plaintiff did not request a discovery deposition of Melissa Dubisson nor did she file a Motion to Compel pertaining to said surveillance prior to her Objection in March 2003. On July 31, 2003, the Defendant again obtained video surveillance on the Plaintiff, this time capturing the Plaintiff at Six Flags in New Orleans riding roller coasters and various other amusement park rides. As it had been over a year and a half since the initial deposition, counsel for the Defendant wrote requesting a supplemental deposition of Plaintiff to explore her physical limitations. The Plaintiff refused to submit to another limited deposition and counsel for Defendant filed a Motion to Compel on September 11, 2003. (R. 405-407, R.E. 144-146). Defendant disclosed in said Motion that he had video surveillance of Plaintiff and was entitled to take a supplemental deposition regarding her physical limitations prior to production of same. During a hearing of September 15, 2003, the trial court denied the Motion to Compel and ordered the immediate production of any supplementary video surveillance, and this video surveillance was produced to Plaintiff's counsel. In March 2004, Plaintiff subpoenaed both Scott Dubuisson and Melinda Dubuisson of Insight Investigations to attend the trial scheduled to begin April 5, 2004. (R. 420-421, R.E. 149-150). On March 26, 2004, Defendant again filed his Notice of Intent to Offer Surveillance Records pertaining to the August 3-17, 2001 surveillance videotape. (R. 422-434, R.E. 151-163). On March 29, 2004, Defendant filed his Notice of Intent to Offer Surveillance Records pertaining to the July 22-31, 2003 surveillance record and unedited videotape. (R. 474-482, R.E.

9/15/03 video produced

192-200). On April 2, 2004, Plaintiff filed a Motion *in Limine* seeking to preclude admission of "surveillance films or photographs of Plaintiff, that have not been produced by discovery, or reference to a second vehicular accident by Plaintiff as "she is not claiming any injury as a result of this wreck beyond November 3, 2003." (R. 553-558, R.E. 226-231). On April 5, 2003, proceedings were held before Honorable Stephen B. Simpson, Circuit Court Judge, regarding pending motions in preparation for the trial date of April 7, 2003. Plaintiff indicated at that hearing that Plaintiff would not make any future lost wage claims past July 25, 2003. (Tr. 4/5/05 p. 3). Though it was not in the subject Motion *in Limine*, the Plaintiff indicated at the hearing that she would not introduce any evidence of future lost wages or future pain and suffering and future medical bills past July 29, 2003, and for that reason moved to exclude the surveillance tape of July 31, 2003 of the Plaintiff at Six Flags Amusement Park as being irrelevant. (Tr. 4/5/05 p. 36-49). Counsel for the Defendant stressed to Judge Simpson that despite the Plaintiff's assertions, she was still undergoing medical treatment, and in fact continued to seek medical treatment and was on work restriction due to her alleged medical condition on and following July 29, 2003. (Tr. 4/5/05 p. 40-44). Furthermore, the amusement park video was relevant to the Defendant's position in the case; that the Plaintiff was not injured as a result of the accident of December 19, 2000. (Tr. 4/5/05 p. 47-48). Judge Simpson took the motion under advisement, and on the morning of the first day of trial, he sustained Plaintiff's Motion *in Limine* to exclude evidence of the surveillance tape of July 31, 2003, "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, 2003." (Tr. 4/5/05 p. 56). Trial began, however, following a question by defense counsel inquiring as to when Plaintiff began making plans to go to Six Flags, Judge Simpson, by his own motion, declared a mistrial. (R. 587, R.E. 232).

Following the mistrial, on May 20, 2005, Defendant Noticed the Video Deposition of Dr.

Spelling of Lowry? See rec.

Michael Lowery. (R. 588-589, R.E. 233-234). In response, Plaintiff filed her Motion for Protective Order on May 24, 2005 claiming that allowing the deposition to go forward would reward the Defendant for causing the mistrial. (R. 592-593, R.E. 235-236). As set out in the Defendant's Reply to Motion for Protective Order, the trial court had previously overruled Plaintiff's Motion *in Limine* to exclude Dr. Lowery's records, and the exclusion of the amusement park surveillance video was made solely because of the date it was taken. As Defendant had only recently learned on March 11, 2004 of Dr. Lowry's involvement in the Plaintiff's treatment, it was imperative for the Defendant to depose Dr. Lowery to understand the full extent of his opinion regarding the nature of the Plaintiff's condition, if any, whether the medical treatment recommended by Dr. Bazzone and received by Plaintiff was reasonable and necessary, as well as any pain and suffering issues. (R. 595-598, R.E. 238-241). The trial court found that "in 2003, Dr. Michael Lowery provided a second opinion regarding Rachel Carawan's medical condition, he is not a treating physician," and at the time the April trial began, "Defendant did not intend to introduce or have any testimony from Dr. Lowery," and therefore, the Plaintiff's Motion for Protective Order was granted. (R. 601, R.E. 244). Defendant filed a Motion for Reconsideration of this ruling as well as the ruling excluding the Six Flags surveillance video. (R. 605-607, R.E. 245-247). The Motion for Reconsideration was denied.

Mot. for Recons. - Lowry - Six Flgs

B. TRIAL COURT'S DISPOSITION

On the morning of trial on April 6, 2005, the trial court granted Plaintiff's Motion *in Limine* regarding the introduction of the Six Flags video surveillance and instructed counsel for the Defendant to not mention the video to the jury. The Plaintiff's first witness testified concerning Plaintiff's condition prior to the December 2000 accident compared to her present condition, and during cross-examination of that witness a question was asked by counsel for Defendant about whether she was aware of Plaintiff's plans to visit Six Flags; a question which

excluded on morn. of trial

did not mention any video and fell within the relevancy time period of the trial court's instruction. On the trial court's own motion, a Mistrial was declared. (R. 587, R.E. 232).

Trial was rescheduled for August 2006 and this time was presided over by the Honorable Kosta Vlahos. During *voir dire*, counsel for the Plaintiff inquired as to potential bias of the jury venires regarding surveillance. (Tr. 52-53). Defense counsel also made inquiry in *voir dire* as to the potential venires' objectivity as far as video surveillance that was taken by "Linda Dubuisson who was associated with Insights Investigation." (Tr. 58). At trial, the trial court made numerous evidentiary rulings as detailed herein which prevented the Defendant from having a fair trial; rulings which excluded evidence and testimony regarding documentation which had appropriately been submitted pursuant to Rule 911 of the Mississippi Rules of Evidence. While Defendant admitted fault for the accident of December 19, 2000, he strongly contested the extent to which, if any, Plaintiff was injured as a result of the minor accident. Plaintiff was allowed to testify that she incurred $22,200.52 in medical expenses and lost wages in the amount of $11,284.00. (Tr. 124, 125, Plaintiff's Exhibits 1 and 2). Additionally, Judge Vlahos refused a jury instruction offered by Defendant, D-12, on the mitigation of damages issue despite evidence that Plaintiff failed to heed or follow recommendations of her medical providers. (R. 640, R.E. 248, Tr. 316-319). Following deliberation, the Jury returned a 9-3 verdict in favor of Plaintiff and assessed damages in the amount of $33,484.52. (R. 646-647, Tr. 345, R.E. 249-250). Judgment was entered on that date, August 16, 2006, in favor of the Plaintiff in that amount. *Id.* On August 28, 2006, Plaintiff filed a Motion for Additur as she claimed that "it was unrebutted that she endured physical pain and suffering from December 19, 2000 through July 29, 2003." (R. 648-655, R.E. 251-258). Defendant filed his Motion for a New Trial and Response to Plaintiff's Motion for Additur on August 28, 2006. (R. 656-670, R.E. 259-273). On October 19, 2006, Judge Vlahos entered an Order denying Defendant's post trial motion for a new trial and

Does video impeach physical pain & suffering?
- C was ok at the time

granted Plaintiff an additur in the amount of $30,000.00 for a total verdict of $64,484.52. (R. 671-674, R.E. 274-277). The trial court noted in his order that "evidence of physical pain and suffering by the Plaintiff was never contradicted by the Defendant." *Id.* Defendant filed his Notice of Appeal on November 20, 2006. (R. 675-676, R.E. 278-279).

C. STATEMENT OF THE FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW

On December 19, 2000 at approximately 9:40 PM, the Defendant/Appellant, Charles James, who was 63 years old at the time, traveled a short distance to the Diamondhead Chevron from his job as a security guard with Gulf Coast Security at Diamondhead. (Tr. 288). The purpose of his trip to Chevron was to fill his personal car up with gasoline and to get a cup of coffee. (Tr. 289). After getting gas, Defendant pulled his vehicle, a Ford Crown Victoria, into a parking spot outside of the convenience store. (Tr. 295). Shortly thereafter, Plaintiff/Appellee, Rachel Carawan, who was 25 years old at the time, pulled up to a gasoline pump in her vehicle, a 1996 Honda Civic, which was occupied by her best friend, Pamela Liles and Ms. Liles' three year old child. (Tr. 103-104, 178). Plaintiff exited her vehicle and was pumping gas, leaning against the vehicle with her backside to the car holding the pump handle in her left hand. (Tr. 160, 163). As she was filling her vehicle with gasoline, Defendant exited the convenience store with a cup of coffee, put it in his vehicle's cup holder and proceeded to back up, as he was doing so he was turning his steering wheel to angle his vehicle towards his planned path of exit. (Tr. 292). Defendant was backing his vehicle out of a parking space that was essentially perpendicular to Plaintiff's vehicle and, although he looked behind him and in both mirrors, he did not see Plaintiff's vehicle behind him. (Tr. 289, 292). Defendant was looking in his rear view mirror as he was backing up and saw Plaintiff "waving her hands," at the time he felt the bump. (Tr. 293). He applied his brakes at impact. (Tr. 293). Defendant's rear bumper ended up bumping the right rear bumper area of Plaintiff's vehicle, and he "felt a slight bump." (Tr. 289).

Defendant estimated that he was traveling probably 2 miles per hour when he felt his vehicle bump Plaintiff's vehicle. (Tr. 290).

Prior to the impact, Ms. Liles saw Defendant's vehicle backing up towards their car and she banged on the window to alert Plaintiff. (Tr. 160). Plaintiff claims that this banging noise alerted her; "I turned my torso with my back still against the car and looked in and then at time" my vehicle was struck. (Tr. 160). Plaintiff's account of the accident varied during her testimony. She was "thrown forward into the pump," making physical contact with the gas pump, which was two or three feet from her prior to impact, though she "didn't slam into it." (Tr. 160-162). She didn't feel that the force was violent enough to slam her into the pump; however, she testified that it was "a little bit of force behind it, enough force to push me off my car." (Tr. 162). Plaintiff could not recall what part of her body made contact with the pump as "everything happened really fast." (Tr. 161). She also could not recall how she caught herself on the pump or whether she turned as she was moving towards the pump. (Tr. 163). Plaintiff denied receiving any bruises as a result of the accident. (Tr. 161).

Following this minor accident, Defendant got out of his vehicle and Plaintiff said, "didn't you see me," to which he replied, "no, I did not." (Tr. 289). Plaintiff "appeared to be all right," and Defendant checked both cars for damages, but didn't find any. (Tr. 289). He did observe that Plaintiff's vehicle had "some paint flakes on her rear end passenger's side," but no dents or damage. (Tr. 290). Plaintiff's vehicle sustained $386.00 in property damage to the right rear bumper cover as a result of this accident. (Tr. 161). A photograph depicting the scuff mark to the Plaintiff's bumper was introduced into evidence. (Tr. 163-164, D's Ex. 3). Defendant also looked at the Plaintiff's rear tire and pavement to see if the impact had pushed or moved the Plaintiff's vehicle, and he believed that the car had not been pushed or moved. (Tr. 290-291). Plaintiff did not report any injury or complain of pain to Defendant or to the investigating officer

small area had paint in the end

at the scene. (Tr. 110, 165, 291). Plaintiff did not appear to be in any kind of pain according to Defendant's observation of her at the scene. (Tr. 291). Neither Ms. Liles nor her small child was injured in the accident. (Tr. 103-104). Ms. Liles testified that she did not see what happened to Plaintiff during the accident as she was not looking in her direction. (Tr. 104). Ms. Liles was seated in the front passenger seat when the accident occurred, and the impact, according to her, did not move her from her seat; "my bottom was never pushed out of the seat." (Tr. 106). Defendant testified that the impact was so minor he did not spill a single drop of coffee which was in a Styrofoam cup located in the cup holder in the ashtray area, and was filled "about a quarter of an inch from the top." (Tr. 289-290). The impact was minor and resulted in no damage to Defendant's car. (Tr. 291).

Despite the minor impact, Plaintiff claims to have experienced back pain the day following the accident. (Tr. 110). She was seen and released the same day from Hancock Medical Center Emergency Department. (Tr. 111, R. 275-276, R.E. 47-58). A week later Plaintiff went to Memorial Hospital Emergency Department for mid-back pain "following a MVA." (Tr. 112, R. 268, R.E. 40). Plaintiff did not work from December 19, 2000 until April 2001. (Tr. 111). Plaintiff followed up with Dr. Wilensky who prescribed Celebrex and physical therapy. (Tr. 112). Plaintiff participated in some physical therapy from April 20, 2001 until she was discharged from physical therapy for "noncompliance" for a second time on July 23, 2001. (R. 377-395, R.E. 125-143). During that timeframe, she was seen by Dr. M. F. Longnecker who prescribed electrical stimulation, exercises, and obtained an MRI of Ms. Carawan's thoracic and cervical regions, which he reviewed, and documented, "in my opinion they are normal." (R. 374, R.E. 122).

The Plaintiff knew neurosurgeon, Dr. Victor Bazzone, as on most every Friday, he would come to LB's Restaurant at the Grand Casino in Gulfport where the Plaintiff worked as a

bartender. (Tr. 169, 197). On one occasion, the Plaintiff told Dr. Bazzone that she had been to different doctors for pain that she was having. (Tr. 169). Dr. Bazzone suggested that she schedule and appointment to see him. (Tr. 169, 198). Plaintiff first saw Dr. Bazzone on February 14, 2002, two years and almost two months following the subject accident of December 19, 2000. (Tr. 198). The history Plaintiff gave Dr. Bazzone was that she was standing outside of her vehicle, partially leaning against the car, rotated to the right, when the other vehicle backed into her car, and she was "struck by her vehicle as a result of the impact and then she was thrown, I believe, forward and to the right against the gasoline pump." (Tr. 199). At the time of this initial visit with Dr. Bazzone, Plaintiff's problem was pain to her 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. 199). Dr. Bazzone speculated based on this history that that "Plaintiff rotated her body to the right and she has been thrown forward into a flexed position," and that was a "classic maneuver for rupturing a disk is somebody who bends forward to lift something and they rupture a disk." (Tr. 221). Dr. Bazzone thought that the Plaintiff either had a ruptured disk in her back or myofascial disease which is the irritation of the muscles and coverings of the muscles in the back. (Tr. 203). Dr. Bazzone testified at length pertaining to a herniated or ruptured disc, comparing it to a jelly donut, and "if the crust breaks open the jelly can squirt out completely." (Tr. 205-207). With regard to pain or limitation that accompanies a ruptured or herniated disc, Dr. Bazzone testified that "the constant nagging pain that people get gradually builds up and becomes worse and worse, and pretty soon they say, 'I can't sit down on that part of my butt because it hurts too much'...or they say ' I can't sit at all.'" (Tr. 206-207).

Three months after the initial visit, Dr. Bazzone ordered a MRI scan which was performed on May 28, 2002, which he testified the findings were "not outstanding," but showed a "small bulging of disks," which fit with her symptoms. (Tr. 207-208). The radiologist's report

of this MRI notes his impression as: "normal lumbar MR other than a small central bulge/protrusion at the L5S1 level which does not displace the dural sac." (R. 445, R.E. 173). As opposed to a herniated or ruptured disc, using the same jelly donut analogy, a bulge is where "there is a little bit of a bulging through the crust of the jelly, it's not come out and it's not very big but it's there and you can see it." (Tr. 231). According to Dr. Bazzone, he diagnosed "this as a ruptured disk." (Tr. 233). Four months went by with no visits from Plaintiff to Dr. Bazzone until September 12, 2002. (Tr. 234). Nevertheless, Dr. Bazzone decided to "make sure that this was not an error in the test," and ordered a myelogram and a CT in October 7, 2002. (Tr. 208, 231). The myelogram and CT did not "show us anything additional," but revealed annular bulges which are uniform bulging of all the disks, and they were not of the size to allow Dr. Bazzone to say that any one of those bulges "represented the true disc herniation." (Tr. 234-235). The radiologist's report pertaining to the myelogram and CT revealed "relatively mild" defects or annular bulges of L2-3, L3-4, L4-5 and L5-S1, with no nerve root impingement seen. (R. 449-450, R.E. 177-178). On October 22, 2002, after doing the MRI and myelogram and CT, Dr. Bazzone saw the Plaintiff and documented in his office record that they discussed the myelogram and CT scan and "they are normal," and didn't show the bulge from the prior MRI. (Tr. 236, R. 452, R.E. 180). Dr. Bazzone at this time thought the problem was myofascial injury or "injury to the muscle and covering of the muscle," though he still thought she had a ruptured disc. (Tr. 210). He prescribed two over-the-counter ibuprofen tablets a day, and that Plaintiff start resistance training, a weightlifting program three days a week and walking 1-11/2 miles six days a week. (Tr. 210-211, R. 452, R.E. 180).

During this time frame, Dr. Bazzone continued to have drinks and eat at L.B.'s on Fridays and would see Plaintiff behind the bar doing different jobs. (Tr. 238). At one time, the provision for Plaintiff returning to work was that she was "supposed to have a helper,

...supposed to do all those chores with her; lift the cases of liquor, dump the ice." (Tr. 239). Dr. Bazzone did not recall specifically as his "recollection of that is not that good," though he admits that he may have observed Plaintiff dump ice from a bucket, as he previously testified to in his discovery deposition of March 11, 2004, and may or may not have seen her lift cases of liquor. (Tr. 239-240). Dr. Bazzone did not follow Plaintiff's exercise program to insure that she was engaging in the prescribed treatment. (Tr. 240).

Dr. Bazzone did not see Plaintiff again in his office until 5 months later, March 31, 2003 when she returned for persisting back pain. (Tr. 211, R. 455, R.E. 181). At this time, she had a new finding upon physical exam, numbness of the great toe which Dr. Bazzone related to the "bulging disc, protruded disk." (Tr. 211-212). Dr. Bazzone ordered another MRI that was performed April 8, 2003 and showed, according to Dr. Bazzone, a "bulge in the same area where she had before," but the disc had "moved out to the side a little bit more." (Tr. 213). The radiologist's report for that MRI indicates that the radiologist compared this study to the prior study of May 28, 2002, and the "minimal diffuse annular bulge is again present, ...this level does not appear significantly changed when compare to the previous study, however, the quality of the current study is markedly improved, allowing better resolution, due to less patient motion," and the radiologist's impression notes, "mild annular bulges at L4-5 and L5-S1." (R. 456, R.E. 181(A)). Dr. Bazzone discussed surgery with the Plaintiff which she declined as she wanted to "finish school." (Tr. 213-214). Dr. Bazzone prescribed an anti-inflammatory, Bextra. The Plaintiff returned to Dr. Bazzone on May 2, 2003 and had "a lot of complaint of pain," and as she still wanted to forgo surgery due to her father's illness, Dr. Bazzone prescribed Percocet. (Tr. 214). According to Dr. Bazzone's office records, he gave Plaintiff an off-work excuse on that date. (R. 461, R.E. 182). According to Dr. Bazzone, he asks the patient "do you feel that

you can continue working in the same capacity without hurting yourself," and if the answer is "no," he will say "we need to keep you off work." (Tr. 252).

Plaintiff testified that she requested a second opinion and Dr. Bazzone referred her to Dr. Michael W. Lowry, neurosurgeon, for a second surgical evaluation. (Tr. 177-178). Plaintiff brought her radiological studies to Dr. Lowry on May 19, 2003 and Dr. Lowry told her that she "didn't need surgery." (Tr. 178). Dr. Lowry saw Plaintiff in his office on that date, and according to his letter to Dr. Bazzone of June 2, 2003, he reviewed the MRI scan, myelogram, and conducted a physical examination of the patient, and "I find that these studies appear normal to me." (R. 462, R.E. 183). Further, "at this time I do not see anything that I could offer in the way of surgery that would help this young lady." (R. 462, R.E. 183). Dr. Bazzone admits that he took Dr. Lowry's second opinion into consideration, "Dr. Lowery felt that Ms. Carawan did not need surgery and stated so in a letter." (Tr. 242, 247). Dr. Bazzone then referred Plaintiff to Dr. Bryan Dix, an anesthesiologist in Gulfport for pain control through epidural steroid injections, or "spinal tap." (Tr. 214-215).

According to the contemporaneous medical records, on July 15, 2003, Brian Dix, D.O. of the Coastal Chronic Pain Services, PLLC, at the referral of Dr. Bazzone, evaluated Plaintiff for low back pain. (R. 463-464, R.E. 184-185). Plaintiff's chief complaint on that date was low back pain, and she gave Dr. Dix the history of being "involved in an injury when she was hit by a car at a gas pump while pumping gas and have her body turned." (R. 463, R.E. 184). She also told Dr. Dix that she "had a work-related injury," and was a bartender at the Grand Casino and "has not been working since April 27, 2003." (R. 463-464, R.E. 184-185). On a scale of zero to ten, Plaintiff described her pain to be 6 out of 10 and reported that her sleep habits were significantly disrupted. *Id.* An epidural steroid injection was given in the lumbar area. Plaintiff described the procedure as, "you sit on a bed and you take a pillow and you lean over and he

takes a needle probably about this long and he goes between your disk, and you cannot move at all, and they he gives you a steroid." (Tr. 123). She testified that after the first epidural, "I felt so much better, I mean it was great, ...I felt full of life...I just wanted to run all over." (Tr. 127). According to the records, a week after the first epidural injection, on July 22, 2003, Dr. Bazzone wrote Plaintiff's employer and indicated that she had recuperated sufficiently to return to part-time work as of July 25, 2003, with restrictions of working only 2 days per week, for some reason just Friday and Saturday, and limited to only 6 hours per day. (R. 465, R.E. 186). The limitation was for 3 weeks, at which time she would be re-evaluated by Dr. Bazzone. (R. 465, R.E. 186, Tr. 216). Dr. Bazzone wanted to see if any relief from the epidural injections would be a "temporary thing which was going to be flared up," and further, the "response to steroids is variable." (Tr. 216-217).

On Tuesday, July 29, 2003, Plaintiff returned to Coastal Chronic Pain Services requesting second epidural injections be performed, and reported that the first epidural provided her with "approximately 20% alleviation of her back and leg pain." (R. 467-468, R.E. 187-188). Plaintiff received a second and, possibly a third set of steroid injections. *Id.* Surveillance video was taken of Plaintiff two days later, on Thursday, July 31, 2003, which shows that she traveled to Six Flags New Orleans. Throughout the 6 ½ hours that Plaintiff was at Six Flags, she was videoed riding various rides including, swings, the *Zydaco*, the *Mine Coaster*, the *Mega Zeph* roller coaster, a ride that turns up side down several times (she rode it twice in a row), walked back over the *Mega Zeph* roller coaster and rode it a second time. (R. 481, R.E. 199). The attested report pertaining to the surveillance of that date indicates that Plaintiff was then observed "running towards the *Bat Man* ride." (R. 482, R.E. 200). The video shows Plaintiff riding various rides, some of which the investigator notes had warnings to those with back and neck problems, and the video itself shows her entering the rides with no hesitation and exiting

swings + various roller coasters

the rides with no grimace or other expression of pain on her face or deviation in gait. (R. 477, R.E. 195).

Through proffer examination at trial, Plaintiff admitted that she received her second epidural injection on July 29, 2003, and two days later she accompanied her then boyfriend and his daughter to Six Flags where she rode roller coasters including a pretty rough wooden roller coaster. (Tr. 128-129). She testified that after riding the wooden *Mega Zeph* coaster, "I sat on the bench for like two hours because I could feel that it aggravated me." (Tr. 128). This is contrary to the video which is time stamped and does not show a two hour stretch where Plaintiff sat on a bench. Curiously, the Plaintiff claims that she didn't go on all the rides, "I went on a couple of them and that was it because I didn't want to go too far with it." (Tr. 130). She did not recall seeing signs at the park warning visitors with back or neck problems to not ride certain rides and admitted that had she seen such a sign it would cause her fear. (Tr. 130). Plaintiff claims that she discussed going to the theme park with Dr. Bazzone, but does not recall if that discussion was before or after July 31, 2003. (Tr. 129). Plaintiff admitted that she followed up with Dr. Bazzone in August 2003, but did not recall following up with Dr. Dix. (Tr. 131-132).

On August 12, 2003, Dr. Bazzone again saw Plaintiff and noted that her "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). 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. (R. 470, R.E. 190). Instead, Plaintiff was prescribed Quinamm for her "nocturnal leg cramps," and she was to be seen in follow up, at which time "further epidural steroid injections may be performed her behalf." *Id.* On November 10, 2003, Dr. Bazzone prepared a Narrative Report indicating that "she has been doing well until a recent

motor vehicle accident dated November 2, 2003," traveling at approximately 50 mph when her vehicle was struck on the left rear by another motor vehicle going approximately 100 mph. (R. 471, R.E. 191). Following that accident, Plaintiff had pain in the head going down posteriorly in the cervical area, the interscapular area, and to the level of her mid-lower back. *Id.*

At the time of the December 19, 2000 accident, Plaintiff was working as a banquet server. (Tr. 133). As part of her duties, Plaintiff would set up the room by rolling in carts full of linen, would lay the linen out and set the tables with silverware, plates, and glasses. *Id.* She would then deliver the food to the various tables by using big serving trays that she would carry over her shoulder. (Tr. 133-134). She would bend down next to the tray and lift it upon her shoulder, would carry it loaded with plates of food, then would again bend down using her knees and back to place the tray on a tray stand beside the table. (Tr. 134-136). She would carry the tray approximately 20-25 feet from the food cart to the tables. (Tr. 137). The plates, glasses, silverware and leftover food were removed from the table in the same manner; by trays which were "really heavy." (Tr. 136). Plaintiff denied bussing these trays and denied being employed with the Grand Casino as a buser. (Tr. 136). She estimated serving food in this matter on hundreds of occasions prior to December 19, 2000. (Tr. 134).

SUMMARY OF THE ARGUMENT

This matter was tried before Honorable Kosta Vlahos on August 14, 15, and 16, 2006 in the Circuit Court of Hancock County, Mississippi. The jury returned a verdict in the amount of the medicals and lost wages for $33,484.52. Defendant filed Motion for a New Trial and Plaintiff filed a motion seeking an additur. The post-trial motions were heard in Biloxi before Judge Vlahos, and on October 23, 2003 he rendered his decision, and granted a $30,000 additur and denied the Defendant's Motion for a New Trial. For review by this Court, Defendant submits four issues pertaining to several evidentiary rulings of the trial court, a proposed

mitigation of damages jury instruction, as well as the post-trial rulings allowing an additur and denying a motion for new trial.

The first error for review in this matter is the granting of Plaintiff's Motion *in Limine* as to the Six Flags video surveillance taken of Plaintiff riding roller coasters and other rides at on July 31, 2003. At the time this video surveillance was taken, Plaintiff was still undergoing medical treatment by Dr. Bazzone, who had just two days prior sent Plaintiff to have a second of three scheduled epidural steroid injections. Upon receipt of the surveillance, counsel for Defendant requested a supplemental deposition of Plaintiff, limited to her physical activities since her first deposition on January 30, 2002, and after being refused this request, filed a Motion to Compel. The motion was heard before Judge Simpson on September 15, 2003. Judge Simpson denied the request for a supplemental deposition, and ordered the immediate production of any video surveillance not yet produced. This ruling was contrary to *Williams v. Dixie Electric Power Association*, 514 So.2d 332 (Miss. 1987). Defendant complied with the trial court's order and immediately produced the video to Plaintiff. On March 26, 2004, a Notice of Intent to Offer the Video Surveillance and Records pursuant to Rule 902 of the Mississippi Rules of Evidence was filed with the trial court. Plaintiff's counsel never filed an objection to the video surveillance. Instead, on the day prior to trial, Plaintiff announced that she would not seek damages beyond July 29, 2003, the day Plaintiff received her second of three scheduled epidural injections and two days prior to the Six Flags trip. Judge Simpson granted the Plaintiff's Motion *in Limine* and directed counsel for the Defendant to not to mention the video to the jury; the basis of the court's ruling was an adoption of Plaintiff's argument, that it was irrelevant what the Plaintiff did on July 31, 2003, as she was not making a claim for medical specials after that date. Obviously Plaintiff's argument was crafted after the trial court ordered production of the video, eliminating Defendant's ability to question Plaintiff's credibility, and to make true inquiry as to

what she was and was not able to do physically at that given time. This ruling also allowed Plaintiff to curtail her claim of damages around a very damning piece of evidence, which was excluded from the jury's consideration altogether. The Six Flags video is relevant evidence as Plaintiff claims to have sustained severe and disabling injuries as a result of negligence on the part of Defendant. The inability of Defendant to introduce the Six Flags video adversely affected his right to cross examine Plaintiff and to introduce relevant evidence supporting his allegation that Plaintiff was not injured as a result of this minor accident.

The second issue for review is Judge Vlahos' refusal to allow Defendant to offer into evidence or cross examine the Plaintiff using her employment records and medical records. These records had been properly offered pursuant to Rule 902 with a supporting affidavit. While the Plaintiff did object to the employment records, she did not file a written objection to any of the medical records proffered. The medical records are a hearsay exception pursuant to Rule 803(4) of the Mississippi Rules of Evidence, as they contained statements of the Plaintiff given for purposes of medical diagnosis or treatment. Both the medical records and the employment records were offered to impeach the Plaintiff regarding her statements as were documented contemporaneously therein. The trial court's ruling was based on error in that he was informed that Plaintiff did file written objection to the introduction of these records, when the docket proves otherwise. These rulings adversely affected Defendant's right to cross examine Plaintiff and to introduce relevant evidence pertaining to other injuries of Plaintiff.

The third issue for review is the refusal of Judge Vlahos to allow the mitigation of damages jury instruction submitted by Defendant, D-12, which would have given the jury the ability to consider the Plaintiff's part in contributing to her own medical costs and treatment due to her failure to follow the recommendations of her medical providers by her continued employment as a bartender, as well as her failure to comply with doctor's orders,

recommendations and failure to attend all physical therapy appointments. Mississippi law is clear that a Defendant is entitled to an instruction regarding his theory of the case. *Triplette v. State*, 672 So.2d 1184 (Miss. 1996); *Woodham v. State*, 800 So.2d 1148 (Miss. 2001), *Burr v. Miss. Baptist Med. Ctr.*, 909 So.2d 721 (Miss. 2005). Defendant was not entitled to present this theory of his case despite a wealth of evidence to support this instruction and no objection to the wording of the instruction.

Further, Judge Vlahos committed error when he denied Defendant's Motion for New Trial, and granted Plaintiff's Motion for an Additur in the amount of $30,000. The Mississippi Supreme court has held that Motions for an Additur should be granted sparingly and only when the trial judge is convinced that the jury has wholly departed from its oath to follow the law and has been actuated by bias, passion and prejudice. The evidence as viewed in the light most favorable to Defendant, giving Defendant the benefit of all favorable inferences that may be reasonably drawn therefrom do not support an additur and the trial court was in error by allowing the additur and denying Defendant's Motion for New Trial.

ARGUMENT

STANDARD OF REVIEW

The standard of review for considering a trial court's decision denying a motion for a new trial is whether the trial court abused it discretion. *Smith v. Crawford*, 937 So.2d 446 (Miss. 2006), *citing Poole ex rel. Poole v. Avara,* 908 So.2d 716, 726 (Miss.2005); *Janssen Pharmaceutica, Inc. v. Bailey,* 878 So.2d 31, 55 (Miss.2004), *as modified on denial of rehearing* (Aug. 2004):

> The grant or denial of a motion for new trial is and always has been a matter largely within the sound discretion of the trial judge. The credible evidence must be viewed in the light most favorable to the non-moving party. The credible evidence supporting the claims or defenses of the non-moving party should generally be taken as true. When the evidence is so viewed, the motion should be granted only when upon a review of the entire record the trial judge is left with a firm and definite conviction that the verdict, if allowed to stand, would work a

> miscarriage of justice. Our authority to reverse is limited to those cases wherein the trial judge has abused his discretion.

Dorrough v. Wilkes, 817 So.2d 567, ¶ 22 (Miss. 2002), *citing Green v. Grant,* 641 So.2d 1203, 1207-08 (Miss.1994) (citing *Anchor Coatings, Inc, v. Marine Indus. Residential Insulation, Inc.,* 490 So.2d 1210, 1215 (Miss.1986)).

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

The standard for review of regarding admission or exclusion of evidence is abuse of discretion. *Payne v. Whitten*, 948 So.2d 427, ¶ 7 (Miss. 2007), *citing Floyd v. City of Crystal Springs,* 749 So.2d 110, 113 (Miss. 1999). Where error involves the admission or exclusion of evidence, the Court may reverse if the error "adversely affects a substantial right of a party," or the exercise of discretion appears arbitrary, capricious or unjust. *United Plumbing & Heating Co.,* 835 So.2d 88, ¶ 9 (Miss.App. 2002); *Whitten v. Cox*, 799 So.2d 1, ¶ 27 (Miss. 2000); *Floyd,* 749 So.2d at 113. Defendant contends that the trial court's ruling granting Plaintiff's Motion *in Limine* as to the video surveillance taken of the Plaintiff riding various rides and roller coasters at Six Flags on July 31, 2003 adversely affected his right to present relevant evidence to support his case, in addition to his right to fully cross examine Plaintiff as to the extent and nature of her alleged injuries. "Clearly, a defendant's videotaped surveillance of a plaintiff, who claims to have been injured as a result of the defendant's negligence, is 'relevant' to the subject matter of the lawsuit." *Thompkins v. VanOrden*, 62 Pa.D. & C.4th 353, 355 (2003).

A viewing of the video shows that Plaintiff accompanied a male companion a small child to an amusement park, Six Flags New Orleans. The rides begin at 3:35 PM with the Plaintiff entering a ride requiring shoulder and upper torso bar restraints, which as the ride begins elevates and spins around pushing the individual cars out and, at times, flipping the cars end over end for a period of several minutes. At 3:50 PM, Plaintiff is seen drinking a soda. At 3:56 PM, Plaintiff

rel. for truth or untruth?
- jury left w/ impression that she was fine & gradually returned to work
- short period of time

gets onto a swing ride and while seated, she twists to assist a child getting secured into her swing. This ride spins around, the canopy moving up and down, and propels the riders out on long chain swings with their legs dangling unsupported and their swings twisting side to side for several minutes. At 4:05 PM, the Plaintiff is seen walking away from the swing ride with a large handbag hanging across her shoulder. Three minutes later, she is seen entering the line for "*The Jester*," which is a large steel roller coaster with steep inclines, drops, corkscrew turns, spiral curves and large loops. At 4:14 PM, the Plaintiff is seen exiting the ride, again with the large bag hanging over her shoulder. At 5:13 PM she is seen sitting at a table with an umbrella, possibly having a meal or snack. At 5:42 PM she is walking with the gentleman and young child from game booth to game booth, standing with her hands on her hips, smiling from time to time. At 5:49 PM, she enters another line for a ride and is shown in the car going backwards up a steep incline, the car is released and is dropped down the steep incline and does two loops with a spiral and ascends another steep incline, only to be released and propelled backwards through the same two loops and spiral. Plaintiff exits that ride at 5:59, and is shown on a smaller jerky roller coaster that turns makes quick turns to the left and right while going up and down inclines quickly. At 6:14 PM, Plaintiff is seen sitting on a bench adjusting her hair. At 6:53 PM, Plaintiff is walking to a large roller coaster, the "*Mega Zeph*," which is a wood track roller coaster. At 7:24 PM, she is seen with her companions standing in line at the *Mega Zeph* snowball concession. At 7:34 PM she gets on another ride, again requiring bar shoulder and upper torso bar restraints, that lifts an entire platform into the air, flipping it end over end and on several occasions the platform pauses for several seconds while suspending the occupants upside down, only to resume spinning end over end. At 7:39 PM, Plaintiff switched seats and rode this particular ride again. At 7:44 PM, Plaintiff exits this ride and is seen walking away with her

male companion and the child. At 9:24 PM, Plaintiff is seen walking across the parking lot, smiling and holding a conversation with her male companion as they leave the park.

Upon receipt of the surveillance, counsel for Defendant requested a supplemental deposition of Plaintiff, limited to her physical activities since her initial deposition was taken on January 30, 2002. After Plaintiff's counsel refused this request, Defendant filed a Motion to Compel requesting "an Order Compelling a supplemental discovery deposition of the Plaintiff prior to the production of the video surveillance and prior to the deposition of Dr. Victor Bazzone." (R. 405-407, R.E. 144-146). The purpose of the requested supplemental deposition was to commit Plaintiff to updated testimony about her physical abilities and inabilities. The motion was heard before Judge Simpson on September 15, 2003, and he denied the request for a supplemental deposition, and ordered the immediate production of any video surveillance not yet produced. Defendant complied with the trial court's order.

This ruling by Judge Simpson is contrary to *Williams v. Dixie Electric Power Association*, 514 So.2d 332, 336 (Miss. 1987), and opened the door for further prejudice to Defendant in that once Plaintiff received the video and saw that she had been caught acting inconsistent with the claimed injuries, she tailored her testimony and case in order to avoid the introduction of this relevant evidence at trial. In *Williams v. Dixie Electric Power Association*, the Mississippi Supreme Court acknowledged the likelihood of "conforming testimony" in the face of impeachment material, and suggested a method to avoid said risk while protecting the Defendant's right to use video surveillance for impeachment purposes:

> The values of surprise could be largely preserved by providing discovery or pretrial revelation of impeachment material which falls within the present category only at a time shortly before trial, ***and only after the party asked about the existence and nature of such material had been given an opportunity-ordinarily by deposition-to commit the inquiring party to a final version of the events and claims related to the impeachment material.*** This procedure should forestall most conforming testimony, and would afford a reasonably effective means of embarrassing those who might still attempt to meet the impeaching

> material in untruthful ways. At the same time, it would be possible to prepare to meet impeaching material which is susceptible of honest explanation or refutation. Having preserved the values of surprise, there would be no remaining reasons to deny discovery * * * *Id. 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).

In *Congleton v. Shellfish Culture, Inc.*, 807 So.2d 492, ¶ 10 (Ct. App. 2002), an employer hired a private investigator to conduct surveillance on their employee who was claiming an on-the-job injury. The private investigator videotaped the employee doing work related activities such as squatting, supervising construction, tying materials to trucks, and getting down on his back under a truck. *Id.* The employer disclosed the existence of the videotapes and the employee filed a motion to compel the production of the videotapes so he could see them prior to his giving a second scheduled deposition. *Id.* The administrative law judge held that the employer could take an update deposition prior to the employee seeing the surveillance tapes, but the employer was to produce the tapes after the deposition. *Id.* at ¶ 11. The Court affirmed the administrative law judge's ruling as he "controlled the way evidence was discovered in such a way as to be fair to both parties." *Congleton*, 807 So.2d at ¶ 13. The employer provided notice of the videotapes soon after they came into existence, and they were produced immediately following the second deposition, well in advance of the actual trial. *Id.* The employee complained that the depositions of his treating physicians, coincidently including Dr. Bazzone, had been taken prior to the tapes production and it might have been useful for his doctors to view the tapes in preparing for their deposition. *Id.* at ¶ 9. The Court rejected this argument as the tapes were produced sufficiently in advance of trial to allow the employee to allow his doctors to see the tape and re-depose them. *Id.*

Not unlike the Defendants in the *Williams* and *Congleton* cases, Defendant placed Plaintiff on notice that he had surveillance video, but requested a limited supplemental deposition prior to production of the video. This method would have been fair to both parties, as

Defendant would have been allowed the opportunity to question both Dr. Bazzone and Plaintiff regarding her physical abilities and prognosis without the risk of conforming testimony to the video. Further, no prejudice would have resulted to Plaintiff as she would have had the video well in advance of trial. As such, the trial court's ruling in response to Defendant's Motion to Compel was in error and is grounds, in and of itself, for reversal and a new trial.

Nevertheless, the error was compounded when the video surveillance was not allowed into evidence. On March 29, 2004, Defendant filed a Notice of Intent to Offer the Video Surveillance and Records pursuant to Rule 902 of the Mississippi Rules of Evidence with the trial court. (R. 474-482, R.E. 192-200). Plaintiff's counsel never filed a written objection to the video surveillance. Plaintiff did file a Motion *in Limine* on April 2, 2004, however, this motion did not specifically include the July 31, 2003 surveillance. (R. 553-558, R.E. 226-231). It was not until the hearing of April 5, 2005, the day before the scheduled trial was to begin, that Plaintiff announced to the Defendant and the trial court that "we're not going to introduce any evidence of future lost wages or future pain and suffering or future medical bills past July 25 -- July 29, 2003, which is when Ms. Carawan went and had the second epidural injection...so we would move to exclude the surveillance tape of July 30, 2003...it's 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 an injury or damages." (4/5/03 Tr. 36). Unfortunately, Judge Simpson sustained Plaintiff's Motion *in Limine* to exclude evidence of the surveillance tape of July 31, 2003, "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, 2003." (Tr. 4/5/05 p. 56). Clearly the trial court's ruling was an adoption of Plaintiff's argument that it was irrelevant what the Plaintiff did on July 31, 2003, as she was not making a claim for medical specials after that date. This was an obvious contrivance made at the last hour of protracted litigation by Plaintiff

eliminating Defendant's ability to provide both substantive of impeachment evidence pertaining to her prior claims of disabling and severe injuries. Plaintiff's plan was endorsed by the trial court and a very damning piece of evidence that was relevant not only to credibility but also as to Defendant's theory that Plaintiff was never injured due to the minor incident was excluded from the jury's consideration altogether. Judge Vlahos refused to overrule Judge Simpson's exclusion of the admission of the subject surveillance tape. (4/5/03 Tr. 56, Tr. 266). Plaintiff does not dispute the authenticity of the July 31, 2003 surveillance video (Tr. 266). The subject tape was proffered and is identified as Defendant's Exhibit 5. (Tr. 266-267).

This is a personal injury matter and the video surveillance of July 31, 2003 taken of Plaintiff while she is at the amusement park unquestionably relates to the physical condition, disability and credibility of the Plaintiff. This evidence is directly relevant to Plaintiff's claim for damages. Clearly video surveillance is admissible to test an opponent's case. *Williams*, 514 So.2d at 336, *citing Trapp v. Cayson,* 471 So.2d 375, 380-381 (Miss.1985); *Jesco, Inc. v. Shannon,* 451 So.2d 694, 702 (Miss.1984); *Burnham v. Nowell,* 243 Miss. 441, 138 So.2d 493 (1962). Plaintiff has presented throughout the duration of this lawsuit differing accounts regarding her claimed injury, therefore, Defendant should have been entitled to introduce evidence which tended to show that Plaintiff's testimony had changed over time. Plaintiff initiated this action in September 2001 claiming, as a result of this accident, that 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... physical pain, ..now and in the future...excruciating pain in the neck, head and back..., caused Plaintiff 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). Plaintiff was deposed January 30, 2003, and testified further as to limitations of her physical abilities that she claimed were related to the subject accident. After the July 2003 video surveillance was filmed and provided to Plaintiff's counsel in September 2003 at Judge Simpson's behest, Plaintiff waited another six months until April 5, 2005, the day before the scheduled trial was to begin, to announce to the Defendant and the trial court that "we're not going to introduce any evidence of future lost wages or future pain and suffering or future medical bills past July 25 -- July 29, 2003, which is when Ms. Carawan went and had the second epidural injection." (4/5/03 Tr. 36). This change in claims, circumstances and the over 7-month delay in bringing this so called cure to the Defendant and trial court's attention is, in and of itself, relevant to Plaintiff's credibility and is supportive to Defendant's claim that she was not injured as a result of this accident.

To justify exclusion of this evidence, Plaintiff argued that it was irrelevant as she testified that after the first epidural, "I felt so much better, I mean it was great, ...I felt full of life...I just wanted to run all over." (Tr. 127). Nevertheless, at the time this video surveillance was taken, it is undisputed that Plaintiff was still undergoing medical treatment by Dr. Bazzone and Coastal Chronic Pain Services, and Plaintiff had only just two days prior undergone a "spinal tap" to her back. She was also working only two days a week with very limited duties pursuant to Dr. Bazzone's orders. (R. 465, R.E. 186). It is undisputed that Plaintiff continued treatment following the July 31, 2003 trip to Six Flags. Specifically, on August 12, 2003, Dr. Bazzone saw the Plaintiff and noted that her "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). Apparently Plaintiff was not sharing her joy and pain free desire to "run all

not very well be able to justify video due to short

over," with her treating physician even after her amusement park trip. (Tr. 127). 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, but instead was prescribed Quinamm for her "nocturnal leg cramps," and was to be seen in follow up, for possible future epidural injections (R. 470, R.E. 190). The evidence does not support Plaintiff's claims and the Defendant should have been allowed to introduce the Six Flags video to refute her 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 their back for treatment of an alleged herniated or ruptured disk.

To further add to the error committed regarding this surveillance, Plaintiff was allowed to (3) refer to the July surveillance on cross examination of one of the Defendant's witnesses. The Defendant actually obtained two different sets of surveillance on the Plaintiff. The Defendant was allowed to introduce the August 2001 surveillance through the testimony of private investigator, Melinda Dubuisson. (D's Ex. 6, Tr. 279). Plaintiff did not object to the admission of the August 2001 surveillance video. Nevertheless, on cross examination of Ms. Dubuisson, Plaintiff's counsel asked the following questions pertaining to surveillance that was taken in July 2003:

> Q. Were you and your husband asked by Mr. Pierce again in 2003 to do surveillance on Ms. Carawan?
>
> A. Yes.
>
> Q...I'm going to ask you about some specific dates in July of 2003, okay, to see if you have don't surveillance on Ms. Carawan. (Tr. 283).
>
> Q. Okay. Now that your recollection has been refreshed, Mrs. Dubuisson, you don't dispute that on July 22, 2003, while you or your husband were doing surveillance of Ms. Carawan that she went to Dr. Bazzone's office and there was -

A. Yes, she did. She did go to the doctor. I assumed that she went to doctor. I didn't necessarily video her going in the doctor's. I didn't see her going in. I couldn't find a place to videotape, and I did not see her leave either. (Tr. 285).

Q. Did you on July 29, 2003 do any videotaping of Ms. Carawan leaving Dr. Dix's office?

A. I guess that I did. I don't know if I did or not. I don't remember. (Tr. 285-286).

This line of questioning was clearly improper given that Plaintiff was allowed to refer to surveillance that Defendant was not allowed to introduce or even mention the existence to the jury. This line of questioning left the jury with the misperception that Defendant chose not to introduce all of the surveillance, particularly that occurring in July 2003, and left the jury the misconception that all that was observed or obtained during this July surveillance was Plaintiff going to and from her doctor's appointments. This conduct was highly prejudicial and improper and permitted the jury to speculate about what the July surveillance depicted and permitted the jury to infer that if the tapes had been introduced, they would have supported the Plaintiff's contentions. Defendant objected to this line of questioning, but this conference occurred at the Judge's bench and is therefore not on the record. (Tr. 283-284). Nevertheless, Plaintiff's counsel was allowed to pursue this line of questioning without limitation by the trial court. Based on these compounding errors, it is clear that the manner in which the videotape was produced, and its unfair and unjustified exclusion resulted in prejudice to Defendant, therefore, he 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

Defendant attempted to introduce into evidence and/or have witnesses refer to several self authenticated records pursuant to Miss. R. Evid. 803 and 902(11). The "business records" exception to the hearsay rule provides:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinion or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness ***or self-authenticated pursuant to Rule 902(11)***, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.
> Miss.R Evid. 803(6) (emphasis added).

Accordingly, Rule 902(11) of the Miss. R. Evid. addresses Certified Records of Regularly Conducted Activities:

> (C)(i) Records so certified will be self-authenticating only if the proponent gives notice to adverse parties of the intent to offer the records as self-authenticating under this rule and provides a copy of the records and of the authenticating certificate. Such notice must be given sufficiently in advance of the trial or hearing at which they will be offered to provide the adverse party a fair opportunity to consider the offer and state any objections. (ii) ***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. (iii) 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 the trial or hearing, the records will not be self-authenticating. (iv) If in a civil case, on motion by the proponent after the trial or hearing, the court determines that the objections raised no genuine questions and were made without arguable good cause, the expenses incurred by the proponent in presenting the evidence necessary to secure admission of the records shall be assessed against the objecting party and attorney. (emphasis added).

The Comment to Rule 902(11) of the Miss. R. Evid. states:

> This method of self-authenticating the records of regularly conducted activities is suggested by Rule 902(11) of the Uniform Rules of Evidence. 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. Part (A) permits proof by affidavit of the qualifications of the witness and the usual predicates of authenticity, the Best Evidence Rule and the Rule 803(6) hearsay exception. Part (B) explains the required certification. Part (C) requires that the proponent have early anticipation of the use of this method so there is time before trial for notice, objections and a hearing. If objections are not decided before the trial, the proponent must plan to call the witness. The sanction for frivolous objections in civil cases is based on the M.R.C.P. 37(c) sanction for failure to admit.

The trial court's refusal to allow the introduction of the certified, authenticated, medical

records and work records of Plaintiff took away Defendant's ability to introduce the totality of the relevant and credible medical and factual evidence including personnel records and medical records which appear contradict or bring into question the Plaintiff's testimony and that of her treating physician, Dr. Victor Bazzone.

A. PLAINTIFF'S GRAND CASINO EMPLOYMENT RECORDS

On March 19, 2003, Defendant filed his Notice of Intent to Offer Plaintiff's Employment Records. (R. 307-357, R.E. 65-115). An executed Records Affidavit accompanied said Notice and set out that the records produced with the affidavit was "without exception, ...a true and complete copy of the employment records for Rachael M. Carawan and that the records were prepared by the personnel of Grand Casino of Mississippi, LLC – Gulfport, members of its staff or persons acting under the control of either, in the ordinary course of business of Grand Casino.... at or near the time of the act, condition, or event." (R. 309, R.E. 67). As required by Miss. R. Evid. Rule 902, this notice was given sufficiently in advance of the trial to give Plaintiff time to object, and Plaintiff did in fact file an Objection to Defendant's Notice of Intent to Offer Employment Records. (R. 361-362). However, 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." *Id.* This objection does not go to the authentication of said records. Judge Simpson heard arguments on April 5, 2005, the day before the trial, pertaining to Motions *in Limine* filed by both Defendant and Plaintiff dealing with the admission of various records. The Grand Casino employment records were discussed during the hearing, and Judge Simpson ruled that he would allow Defendant "to introduce records, rehab records, as well as the report, I believe, from Dr. Dix." (4/5/03 Tr. 55-56).

At trial in August of 2006 before Judge Vlahos, Plaintiff testified that as part of her duties

as banquet server at Grand Casino she would carry loaded trays of plates with food balancing upon her shoulder for 20-25 feet to the tables, and would have to bend down using her knees and back to either pick up or place the loaded tray upon a tray stand beside the table. (Tr. 134-136). She testified that the plates, glasses, silverware and leftover food were removed from the table in the same manner; by trays which were "really heavy," however, she denied bussing these trays and denied being employed with the Grand Casino as a busser. (Tr. 136). To contradict this testimony during cross examination of Plaintiff, Defendant attempted to offer into evidence the Grand Casino employment records of Plaintiff which contain 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). This is relevant as Plaintiff was not supposed to be lifting heavy objects pursuant to her physician's orders and her physical therapy records indicate during this time frame that she was injured on the job due to excessive lifting.

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. (Tr. 139). She testified that she received a doctor's note from Dr. Wilensky excusing her from work for that period of time and she gave that note to her employer, Lynn Hill, Human Resources. (Tr. 140). Contrary to this assertion, Plaintiff's employment records do not contain a letter from Dr. Wilensky. When counsel for Defendant attempted to introduce into evidence the employment records, Plaintiff's counsel objected to this evidence as not being "properly authenticated," though no specifics were given for the basis of this objection. (Tr. 137). The trial court sustained the objection and allowed the employment records to be marked for identification purposes only. (Tr. 139, Ex. D-1).

Plaintiff's employment records were admissible pursuant to the business record exception and were self-authenticated pursuant to a timely Notice of Intent. In *McClinton v. Mississippi*

Dept. of Employment Sec., 949 So.2d 805, ¶ 63 (Miss.App. 2006), the Court of Appeals in reviewing whether it was error to admit into evidence a personnel file, noted that "credible and probative evidence existed of the kind generally relied upon when reviewing the history of a person's employment." *Id.* This credible evidence was hearsay, but it was the kind of hearsay evidence that would have been admissible in court in that the personnel file was a record from a "regularly conducted activity," offered through "testimony of the custodian or other qualified witness" at the hearing. *Id. citing* M.R.E. 803(6); *Todd v. Schomig,* 283 F.3d 842, 853-54 (7th Cir.2002) ("Todd's employment records ... with marginally additional foundation could have qualified under the business records exception to the hearsay rule. Fed.R.Evid. 803(6)"); *Martin v. Funtime, Inc.,* 963 F.2d 110, 116 (6th Cir.1992) ("it is certain the personnel records would be admissible under Fed.R.Evid. 803(6) as business records, the records were compiled by Funtime or its employees; were kept in the course of a regularly conducted business activity, i.e. personnel management; and, it was the regular practice of Funtime to keep such records."). Not unlike the employment records in the aforementioned authorities, the Grand Casino records were authenticated by the custodian of said records by sworn Affidavit pursuant to Miss. R. Evid. 902, and the records contained therein reflect the personal knowledge of the preparer. The employment records were relevant to the Plaintiff's claims of lost wages, her credibility, mitigation of damages, and causation of the alleged injuries. Defendant was prejudiced in not being allowed to introduce or refer to the properly authenticated documents, 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

Plaintiff was allowed to submit bills associated with her medical treatment as part of her damages in the case, however, Defendant was not allowed to utilize the medical records

documenting the treatment and documenting the Plaintiff's own statements to her providers on cross examination. (Tr. 125, 157, Plaintiff's Exhibit 1). On cross examination of Plaintiff, 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 stating that the copies were "true and complete, ... were prepared by personnel of the hospital in the ordinary course of hospital business at or near the time of the act, condition or event reported." (R. 261, 269-277, R.E.33, 41-49). As set forth in 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." Counsel for Plaintiff represented to the trial court otherwise, however, the docket reveals that the Plaintiff did not serve written objection to the introduction of these records into evidence with the 15 day period, nor did she request additional time to file such an objection. (Tr. 146-147, 186). Nevertheless, while some medical records were subject to discussion with Judge Simpson in a prior hearing on April 5, 2005, the day before the trial was scheduled to start on April 6, 2005, the pertinent medical records were not the subject of a Motion *in Limine*, and the Plaintiff admitted that the Notice of Intent to Offer Medical Records Pursuant to Miss. R. Evid. 902 was not brought up to Judge Simpson during that hearing. (Tr. 154).

Defendant should have been allowed to develop facts into evidence by using Plaintiff's medical records on cross examination. In *Blake v. Clein*, 903 So.2d 710, ¶ 41 (Miss. 2005), the Court found that the defendant was entitled to utilize plaintiff's admissions in his medical records, as "plaintiff's prior statements are certainly probative regarding the origin and/or source, cause, and extent of his claimed mental and emotional problems, including pre and post

surgery," and the trial court erred in prohibiting the defendant from developing facts through the cross-examination of the plaintiff and other witnesses, and in prohibiting documentary evidence, regarding the cause and extent of those claimed damages. *Id.*

The Hancock Medical Center 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 Plaintiff to her treating medical providers are clearly relevant to the subject litigation. Specifically, Plaintiff's trial testimony pertaining to the facts of the accident and the extent of her alleged injuries varied considerably from that information that was documented in the contemporaneous medical records. Specifically, the "chief complaint/Mechanism of Injury/Onset" is documented in the Emergency Department Nursing Record as: "2230 12/19/00 was pumping gas in her car when it was hit from behind throwing her into gas pump," and she complained of "pain in back from neck down." (R. 275, R.E. 47). The Radiology Report from that visit indicates "clinical information includes hit by car." (R. 277, R.E. 49). And despite the history given to her medical providers, the Emergency Room Encounter Record documents that on physical exam, there was "no evidence of trauma." (R. 271, R.E. 43). Plaintiff objected to the admission of the Hancock Medical Center records on the basis that they had not been "properly authenticated," and Judge Vlahos sustained the objection. (Tr. 142-158). The trial court based his ruling on the assurance of 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 Defendant to schedule a hearing on the objections before the trial. (Tr. 157-158). The trial court stated: "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. 158) (emphasis added). When questioned as to whether the trial court would allow the admission of other medical records, the trial court

Which med. recs are objctd?

excluded all!

indicated that "none of them will be admissible." (Tr. 159). This clearly resulted in great prejudice to Defendant as he was unable to use contemporaneous statements of Plaintiff to impeach or call into question testimony given by Plaintiff and her treating physician, Dr. Bazzone. Because Plaintiff did not file any written objections as required by the rules and did not give Defendant any indication that she would object to the admission of said records based on authenticity, Defendant was left without the use of said evidence where he could have otherwise made arrangements to authenticate the records through other means.

Clearly the trial court was in error in ruling that Defendant had not complied with Miss. R. Evid. 902(11). The record and docket sheet confirms that no written objection was ever filed by the Plaintiff to any of the Notices of Intent pertaining to medical records. Thus, the Plaintiff waived her objections and the certified records should have been admitted pursuant to Miss. R. Evid. 902(11). During recess, in an attempt to clarify the issue to the trial court, Defendant reviewed his file and confirmed that Plaintiff did not object to the notices of intent pertaining to the medical records of Plaintiff. (Tr. 179). 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, he did not correct his ruling to allow for the admission or reference to the records. (Tr. 193).

The Mississippi Supreme Court has addressed the issue of whether medical records fall under the 803(6) exception. *See Cassibry v. Schlautman*, 816 So.2d 398, ¶ 17, 18 (Miss.App. 2001), *cert. denied,* 821 So.2d 128 (Miss. 2002), *citing Jones v. Hatchett,* 504 So.2d 198, 202 (Miss.1987). In *Jones,* the court rejected the appellant's argument that a doctor's memorandum

written to an attorney fell under the protections of M.R.E. 803(6), however, the Court concluded that any other medical records that the doctor "prepared as part of his regularly conducted business activity [would] be admissible on remand." *Jones,* 504 So.2d. In *Cassibry*, the Plaintiff contended that the medical records of her treating physician, Dr. Parks, should have been excluded from evidence because their introduction denied her the opportunity to cross examine Dr. Parks on the content of the records, and the Defendant failed to properly authenticate them. *Cassibry,* 816 So.2d at ¶ 17. Unlike the *Jones* case, Cassibry did not argue that Dr. Parks' records were prepared for her attorneys, therefore, "the medical records were admissible as business records kept in the regular course of business." *Id.* at ¶ 19. Further, the records were authenticated, not by affidavit, but by Cassibry who the Court found was a proper source of authentication for her own medical records, provided by her during discovery, and used against her during cross-examination. *Id.* at ¶ 22. "Cassibry had a detailed, first hand knowledge of the records, even possessing them at one time, and could testify to their accuracy." *Id.* In this case, the Plaintiff admitted that she had seen the Emergency Department record, however, due to Plaintiff's objection and the trial court's admonition that the "witness is not to be examined about them," the Defendant was prevented from attempting to authenticate the records through the Plaintiff. (Tr. 141, 158).

The trial court has on prior occasion allowed the admission of hospital records without a sponsoring witness. *See Buel v. Sims*, 798 So.2d 425, ¶ 17 (Miss. 2001). In *Buel*, Judge Vlahos properly admitted results of a motorist's blood alcohol test, without a sponsoring witness, at the trial of her personal injury action against a trucker and his employer although there was no statutorily prescribed procedure for such admission in civil matters. *Id.* The Supreme Court on review held that the blood alcohol test results that were maintained in Buel's medical records were no different from other medical records. *Id.* At trial, the trucker and his employer

produced a certified copy of Buel's medical records, together with the affidavit of the custodian of those records. *Id.* at ¶ 14.

Furthermore, the medical records contained numerous prior inconsistent statements of Plaintiff; not only as to the extent and type of injuries she alleged, but also as to how she allegedly sustained these injuries. In *Jones v. State*, 856 So.2d 285, ¶ 20 (Miss. 2003) *rehearing denied* (Oct. 2003), witness Glenn Marshall, who had been shot in the hip, was treated by Dr. William M. Barr, and in his medical record it reported that Glenn stated his brother Tracy had gone on a "rampage." When Glenn took the stand to testify, he repeatedly denied making the statement, and defense counsel sought to introduce the medical record and have Glenn read from it. *Id.* The State objected on the basis of hearsay, untrustworthiness, and lack of proper predicate for the entry of a medical record/prior inconsistent statement, and the judge denied the record's admission. *Id.* The defendant appealed and argued that the refusal of the court to allow the statement hindered his ability to impeach Glenn's credibility, which would have assisted Jones's self-defense claim. *Id.* at ¶ 21. Upon examination of the record the Court concluded that the judge could have allowed the record for impeachment purposes rather than as substantive evidence. *Jones,* 856 So.2d at ¶ 21. The defendant further argued that the medical report prepared by Dr. Barr qualified as a hearsay exception under Mississippi Rules of Evidence 803(4) regarding "Statements for Purposes of Medical Diagnosis or Treatment;" therefore under Rule 806, Glenn's statements can be used to attack his credibility as they are prior inconsistent statements. *Id.* at ¶ 22. Rule 803(4) provides a hearsay exception for "Statements for Purpose of Medical Diagnosis or Treatment," and specifically provides that:

> Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment, regardless of to whom the statements are made, or when the statements are made, if the court, in its discretion, affirmatively finds that the proffered statements were made under circumstances

> substantially indicating their trustworthiness. For purposes of this rule, the term "medical" refers to emotional and mental health as well as physical health ...

M.R.E. 803(4). Further, the comment to Rule 803(4) provides, in relevant part, that:

> Rule 803(4) represents a deviation from previous Mississippi practice in three significant ways. First, Rule 803(4) permits statements of past symptoms as well as present symptoms. Second, the rule allows for statements which relate to the source or cause of the medical problem whereas Mississippi courts formerly disallowed such statements. *See Field v. State,* 57 Miss. 474 (1879) and *Mississippi Cent. R.R.Co. v. Turnage,* 95 Miss. 854, 49 So. 840 (1909), for pre-rule Mississippi law. While statements about cause are permissible, statements concerning fault are still excluded.

Although the "rampage" statement was determined by the *Jones* Court to constitute a statement concerning fault, the statements attributed to Plaintiff in this case as are documented in her records were statements about the facts of the accident or source or cause of the symptoms, and past and presents symptoms. Thus, 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

The Court has established the following standard of review for challenges to jury instructions:

> The Court does not single out any instruction or take instructions out of context rather, the instructions are to be read together as a whole. A defendant is entitled to have jury instructions given which present his theory of the case. This entitlement is limited, however, in that the Court is allowed to refuse an instruction which incorrectly states the law, is covered fairly elsewhere in the instructions, or is without foundation in the evidence.

Canadian National/Illinois Cent. R. Co. v. Hall, 953 So.2d 1084, ¶ 57 (Miss. 2007), *citing Spicer v. State,* 921 So.2d 292, 313 (Miss.2006), *cert. denied,* 127 S.Ct. 493, 166 L.Ed.2d 364, 75 U.S.L.W. 3233 (U.S. Oct. 30, 2006), *citing Parks v. State,* 884 So.2d 738, 746 (Miss.2004). The trial court did not find that the proposed instruction, D-12, was an incorrect statement of the law or was covered elsewhere in the instructions. Instead, the trial court was of the opinion that

"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. 276-277) (emphasis added).

Defendant respectfully disagrees with the trial court in that there was evidence introduced at trial that Plaintiff failed to heed or follow recommendations of her medical providers. Admittedly, there was additional evidence in the form of employment, medical records and video surveillance that Defendant was not allowed by the trial court's ruling to introduce, however, clearly that evidence did in fact exist. The testimony at trial revealed that Plaintiff treated with Dr. M. F. Longnecker in June and July 2001. Dr. Longnecker's records reflect in June and September 2001 his doubt that "she should continue with her job as a bar tender with the bending, lifting, and standing required; she needs to avoid heavy lifting, bending, and stooping." (R. 373-374, R.E. 121-122). Dr. Longnecker "suggested to her that she continue with avoidance with things that seem to bother her." (R. 374, R.E. 122). Plaintiff did not comply with Dr. Longnecker's advice as she continued her job as a bartender. Plaintiff's testimony was inconsistent with Dr. Longnecker's record in that she testified that she did not recall Dr. Longnecker specifically telling her to give up her bartending job, however, she claims he said that since she had a helper she could still do that job. (Tr. 166). Plaintiff was prescribed physical therapy for diagnosis of a disc bulge in April 2001, and in the treatment note of April 27, 2001, it indicates that "patient reported she was feeling better but had hurt her back again today when she picked up her father." (R. 383, R.E. 131, Tr. 166-167). Again, Plaintiff's testimony was inconsistent with the contemporaneous medical record in that she denies that she injured her back from assisting her father. (Tr. 114, 167). The physical therapy records also note on May 7, 2001, Plaintiff "reported her pain had increased during the weekend with moving a chair by sliding it; she stated it was so intense she couldn't stand up but had borrowed a back

brace which helped." (R. 385, R.E. 133). On May 17, 2001, the physical therapy records indicated that "patient reported she had bartended over the weekend which required excessive cervical check; resulted in increased pain and spasms." (R. 386, R.E. 134). On July 20, 2001, the physical therapy notes indicate "patient reported she had worked at a banquet on 7/17/01 which required excessive lifting which accounted for increased tightness 7/18/01." (R. 394, R.E. 142). This note occurs the month following Dr. Longnecker's recommendation that she "needs to avoid heavy lifting." Again, despite the contemporaneous statements attributed to Plaintiff, she denied injuring her back at work. (Tr. 117, 168-169). The therapy records have numerous documented missed appointments and cancellations. (R. 387, 389, 390, 392, 395, R.E. 135, 137,138,140, 143). On June 22, 2001, Plaintiff was a "no show" for her appointment and when contacted her excuse was that her "alarm clock hadn't gone off secondary to electricity going off briefly this AM," and with that the therapist discontinued her therapy for "being out of compliance with script." (R. 392, R.E. 140). On July 11, 2001, however, Plaintiff was reinstated to therapy "per request of Mariano Barvie." (R. 393, R.E. 141). Despite the second chance, Plaintiff again was a "no show" on July 23, 2001, and when contacted she said "she had forgotten," and she was again discontinued from therapy "due to previous agreement regarding noncompliance." (R. 395, R.E. 143). Plaintiff stated she would "inform her attorney and try to find another therapy clinic." (R. 395, R.E. 143). To Defendant's knowledge, Plaintiff did not follow through with this statement as she never sought other physical therapy clinic. Again, at trial Plaintiff's testimony was inconsistent with the contemporaneous medical records, as she testified that she went to physical therapy in April 2001 through July 2001, "as much as I could," as her father was ill at the time and was in the hospital. (Tr. 113, 119). Plaintiff did not elaborate as to why her father's illness prevented her from attending physical therapy sessions.

failed to prove due to no med recs!

While the physical therapy records document numerous excuses for her missed appointments the records do not refer to her father's illness as a reason.

Thereafter, there was another delay in medical treatment until Plaintiff began seeing Dr. Bazzone in February 2002. From time to time, Plaintiff would see Dr. Bazzone while she was working as he would have drinks and eat at L.B.'s on Fridays. During these occasions, Dr. Bazzone observed Plaintiff behind the bar doing different jobs. (Tr. 238). At one time, the provision for Plaintiff returning to work was that she was "supposed to have a helper; supposed to do all those chores with her; lift the cases of liquor, dump the ice." (Tr. 239). Dr. Bazzone did not recall specifically as his "recollection of that is not that good," though he admits that he may have observed Plaintiff dump ice from a bucket, as he previously testified to in his discovery deposition of March 11, 2004, and may or may not have seen her "lift cases of liquor." (Tr. 239-240). Dr. Bazzone did not follow Plaintiff's exercise program to insure that she was engaging in the treatment that he prescribed. (Tr. 240). After another 5 month delay in treatment, Dr. Bazzone next saw Plaintiff in his office on March 31, 2003 when she returned for persisting back pain. (Tr. 211, R. 455, R.E. 181). At this time, she had a new finding upon physical exam, numbness of the great toe which Dr. Bazzone related to the "bulging disc, protruded disk." (Tr. 211-212). The MRI that was performed April 8, 2003 and showed, according to Dr. Bazzone, a "bulge in the same area where she had before," but the disc had "moved out to the side a little bit more." (Tr. 213). At least according to Dr. Bazzone, there was a progression of the Plaintiff's symptomatology and a change in her radiographic studies during this period when she continued to work; a full three years and four months after she claimed this accident caused her injuries. Though Dr. Bazzone discussed the "necessity for surgery," with Plaintiff on April 11, 2003, he suggested she wait "until after she finishes school in May before she makes any decisions." Again, inconsistent with the records, the trial testimony was Plaintiff

chose to forgo surgery as recommended by Dr. Bazzone "because her father was very ill." (Tr. 214).

The evidence revealed a clear pattern of behavior on the part of Plaintiff where she did not follow the recommendations of her treating physicians, and though allegedly coping with a back problem, Plaintiff engaged in reckless conduct that resulted in pain, spasm and a progression of symptomatology. Defendant submitted instruction D-12, which states:

> You are instructed that the plaintiff was under a duty after suffering harm, if any, to exercise due care and take reasonable steps to avoid or diminish the damages resulting from that harm. You are further instructed that the plaintiff is not entitled to damages for the harm that she could have avoided by the use of due care, nor the harm which proximately resulted from her own conduct, if any, which contributed to her damages. (R. 640, R.E. 248).

Although there was no objection to this instruction regarding it being an accurate statement of the law, Judge Vlahos refused to allow this jury instruction offered on the mitigation of damages issue. Clearly there was sufficient evidence to support that Plaintiff failed to heed or follow recommendations of her medical providers. This jury instruction would have given the jury the ability to consider 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, recommendations and failure to attend all physical therapy appointments. According to Mississippi law, a Defendant is entitled to an instruction regarding his theory of the case. *Triplette v. State*, 672 So.2d 1184 (Miss. 1996); *Woodham v. State*, 800 So.2d 1148 (Miss. 2001), *Burr v. Miss. Baptist Med. Ctr.*, 909 So.2d 721 (Miss. 2005).

In *Herring v. Poirrier,* 797 So.2d 797, 806(¶ 26) (Miss.2000), the Court held that an individual who fails to mitigate his or her damages by ignoring a doctor's orders, may not recover the full extent of his or her damages. Much like the case *sub judice,* Herring was involved in a car accident in which he was rear-ended by Poirrier at a stop light, and was then struck a second time, as a car driven by Raymond Jefferson struck Poirrier, causing it to strike

Herring once more. *Id.* At the time of the accident, Herring claimed to not feel any effect from the wreck, but two weeks after the accident, he began to experience pain in his lower back, left hip, and left leg. *Id.* When Herring initially began experiencing complications, he sought treatment for his injuries, and his physician prescribed physical therapy sessions as well as an MRI. *Herring,* 797 So.2d at ¶ 26. Herring later underwent a percutaneous diskectomy for pain he was experiencing in his right leg. *Id.* At the time the surgery was conducted, Herring's physician was unaware that Herring had failed to follow the previously prescribed physical therapy treatments, and had he been aware of Herring's failure to comply with his orders, he would not have conducted the surgery. *Id.* The jury was properly instructed on the Plaintiff's duty to mitigate damages, and, as such, were allowed to consider his failure to follow his physician's prescribed treatment, and returned a verdict of $0 in favor of Herring. *Id. see also Flight Line, Inc. v. Tanksley*, 608 So.2d 1149, 1162, 1163 (Miss. 1992) (injured party required to take reasonable steps to "mitigate his damages, and this, at the very least, includes giving attention to doctor's orders regarding his course of recovery").

In this case, the trial court refused to follow the guidance offered in *Herring* and refused Defendant's jury instruction on mitigation of damages, despite ample evidence to support this accurate statement of the law. As such, Defendant was prejudiced in that his theory of the case was not allowed to be considered by the jury and Plaintiff was allowed to recover the full extent of her alleged damages despite her indifference to the doctors' orders. For this reason, 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 October 19, 2006, Judge Vlahos entered an Order denying Defendant's post trial motion for a new trial and granted Plaintiff an additur in the amount of $30,000.00 for a total

verdict of $64,484.52. (R. 671-674, R.E. 274-277). The burden of proving injury and other damages falls to the party seeking the additur. *Cassibry v. Schlautman*, 816 So.2d 398, ¶¶ 10, 14 (Miss.App. 2001)(no additur necessary where accident occurred at a low rate of speed, damage to each vehicle was visibly insignificant, immediately after accident plaintiff told defendant she was fine, doctor ordered physical therapy sessions but she ignored his advice, none of the x-rays revealed any kind of injury to neck or back); *McNair Transport, Inc. v. Crosby,* 375 So.2d 985, 986 (Miss.1979). On review, 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. *Id.* "Awards set by jury are not merely advisory and generally will not be 'set aside unless so unreasonable as to strike mankind at first blush as being beyond all measure, unreasonable in amount and outrageous.' " *Maddox v. Muirhead*, 738 So.2d 742, ¶5 (Miss. 1999) *citing Rodgers v. Pascagoula Pub. Sch. Dist.,* 611 So.2d 942, 945 (Miss.1992). "Additurs represent a judicial incursion into the traditional habitat of the jury, and therefore should never be employed without great caution." *Maddox*, 738 So.2d at ¶ 8. The Mississippi Supreme court has held that, "[s]uch motions should be granted sparingly and only when the trial judge is convinced that the jury has wholly departed from its oath to follow the law an has been actuated by bias, passion and prejudice. *City of Jackson v. Copeland*, 490 So.2d 834, 837 (Miss. 1986). 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." When the evidence is so viewed, "the motion should be granted only when upon a review of the entire record the trial judge is left with a firm and definite conviction that the verdict, if allowed to stand, would work a miscarriage of justice." *Green v. Grant*, 641 So.2d 1203, 1207 (Miss. 1994)(in light of conflicting evidence and award of damages less than the amount of claimed

medical expenses does support an additur); *Clark v. Columbus and Greenville Railway Company*, 473 So.2d 947, 950 (Miss. 1985).

In absence of a specific finding by a trial judge that a jury is influenced by "bias, prejudice, or passion," or that the damages were contrary to the overwhelming weight of credible evidence, it is error to order a new trial or to grant an additur. Miss. Code Ann. § 11-1-55. Stated differently, before allowing an additur, the court must find 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 and outrageous and such as to manifestly show the jury to have been actuated by passion, partiality, prejudice or corruption." *Brake v. Speed*, 605 So.2d 28, 34 (Miss. 1992). See also, *Maddox v. Muirhead*, 738 So.2d 742 (Miss. 1999); *Haywood v. Collier*, 724 So.2d 1105 (Miss.App. 1998). The Court may not award an additur based upon facts which are not in evidence, and the Supreme Court has warned that a trial judge should not commit a judicial incursion into the traditional habitat of the jury. *Maddox*, 738 So. 2d at 742; *Flight Line, Inc. v. Tanksley*, 608 So.2d 1149, 1161 (Miss. 1992); *Gibbs v. Banks*, 527 So.2d 658, 659 (Miss. 1988).

The trial court's Order granting the additur states that "the medical bills incurred by the Plaintiff in this case were uncontradicted," and "trial evidence of physical pain and suffering by the Plaintiff was never contradicted by the Defendant." (R. 672, R.E. 275). This is clearly not accurate. The main issue in this case did not pertain to the necessity and reasonableness of Plaintiff's medical expenses, or whether she had pain and suffering; rather it revolved around whether the alleged injuries, if any, and resulting pain and suffering and medical expenses were caused by the negligence of Defendant. *See Cassibry v. Schlautman*, 816 So.2d 398, ¶ 12 (Miss.App. 2001); *Quinn v. President Broadwater Hotel, LLC*, 2007 WL 1247983 ¶ 8 (Miss.App. 2007)("our supreme court has refused to grant an additur where there is conflicting

evidence before the jury concerning the claimed damages"). Defendant disputes that Plaintiff was entitled to any amount for damages due to this minor accident, and had the jury been allowed to consider the credible and relevant evidence in the case, the Defendant is confident the jury's verdict would have reflected a more just disposition of the case. Nevertheless, based on the facts the jury was allowed to consider, 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 therefrom, the Plaintiff was not entitled to an additur. Given the facts of this minor accident, minimal damage to the vehicle which Plaintiff was standing beside, no injuries of the occupants of both vehicles, no bruising to Plaintiff's body, Plaintiff did not complain of injury to Defendant or the investigating officer at the scene of the accident, the irregular medical treatment sought by Plaintiff, her failure to follow her physician's advice and recommendations as to treatment and therapy, normal x-rays, MRI and myelogram studies, and numerous references of other injuries in the contemporaneous medical records, 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." Other than her 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. As far as 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. Clearly Plaintiff's duties as a bartender, banquet server, and depending upon whether you believe the records or the Plaintiff, busser, were strenuous even by Plaintiff's admission. As far as the nature her 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 studies as Dr. Bazzone, and noted "I find that these studies appear normal to me." Dr. Bazzone also testified and documented in his office record that he discussed the myelogram and CT scan with Plaintiff and "they are normal," and didn't show the bulge from the prior MRI. (Tr. 236, R. 452, R.E. 180). This conflicting evidence created an issue on the nature and amount of damages for the jury to decide. 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. The credible evidence supports that the alleged injuries, if any, were not caused by the negligence of Defendant and if the verdict is allowed to stand would "work a miscarriage of justice." 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

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," a motion for new trial should be granted only when upon a review of the entire record the trial judge is left with a firm and definite conviction that the verdict, if allowed to stand, would work a miscarriage of justice." *Green v. Grant*, 641 So.2d 1203, 1207 (Miss. 1994). As stated above, the credible evidence in this case supports that if the verdict is allowed to stand it would work a miscarriage of justice given the abuse of discretion evidenced by the trial court's rulings. Based on the aforementioned evidentiary rulings and instruction of the jury, the 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. Defendant was prejudiced as a result of the trial court's rulings and relevant and credible evidence was not allowed to be considered by the jury, and the Defendant's attempts to cross examine Plaintiff and her witnesses were hampered by the evidentiary rulings.

Plaintiff's credibility was clearly at issue throughout the trial. During the course of the proceeding, the jury was presented with different versions of the Plaintiff's alleged accident and the circumstances surrounding it. In summary, there were discrepancies as to how the accident occurred; how she was standing, the force of impact, what happened to her after impact; the nature of her injuries, whether she had a bulge or protrusion, a herniation or rupture, a muscular injury or no injury at all based on physical examination and the diagnostic studies; whether Plaintiff was complying with her doctor's recommendations as far as work related activities, attending and participating in prescribed physical therapy, recommendation for surgery, or even whether surgery was truly reasonable or necessary; and whether Plaintiff was injured by other incidences as was documented in the medical records, on-the-job injury, moving a chair, lifting her father, excessive lifting. Clearly, there was a controversy regarding the extent of Plaintiff's alleged injuries, if any, and whether those injuries were caused by the very minor accident.

Although the jury was not allowed to consider the Six Flags surveillance, that evidence clearly calls into question the credibility of Plaintiff, and causes one to question what, if anything, her treating physician knew regarding her conduct. It goes against all commonsense and reason for an individual who claims to have a herniated disk in their low back, who is unable to perform their regular work related activities, is in the middle of litigation where they claim severe and disabling injury, have been recommended surgery as a treatment, and had only two days earlier had a needle placed in their spine as treatment for a so called chronic condition to go to an amusement park and ride the type of rides Plaintiff is depicted and freely admits to riding. No reasonable physician would agree or condone such conduct, especially where that physician does not believe the patient should be working more than six hours a day, two days a week, and should be refraining from bending, stooping, or heavy lifting. How could one with such injuries, even if they are having a good day, be acting reasonable in voluntarily submitting their bodies to

being suspend upside down, subjected to G-Forces, thrust forward, backward, sideways, and end over end. One would think Plaintiff would be more cautious given her claim that she was severely injured just leaning her rear-end against a car that was bumped and received little property damage where the occupants of the vehicles received no injuries. Unfortunately, the Defendant was not able to question Plaintiff or Dr. Bazzone about this conduct or whether that conduct could be construed as reasonable. It was the jury's duty to determine the truth from the various versions that were presented to them; unfortunately they were only presented with information that was carefully crafted to paint Plaintiff's conduct in the most flattering of light. So flattering the jury was led to believe that the July 2003 surveillance only documented Plaintiff coming and going to her doctor's visits. Cross examination and impeachment serves to reach the ultimate truth, and the jury as the fact finders in this trial should have been presented with all of the relevant facts and credible evidence and an instruction as to mitigation of damages so they could fulfill their duty in determining what actually happened and render a fair disposition.

CONCLUSION

The errors set forth above, alone and taken together deprived Defendant of a fair trial and cannot be considered harmless. Where error involves the admission or exclusion of evidence, the Court may reverse if the error "adversely affects a substantial right of a party," or the exercise of discretion appears arbitrary, capricious or unjust. Under the facts present in this case, the trial court abused its discretion in ruling to exclude the Six Flags surveillance, properly authenticated employment and medical records, and improperly denying the requested mitigation of damages jury instruction. 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 Plaintiff. Therefore, the Defendant respectfully requests a new trial on all issues.

RESPECTFULLY SUBMITTED, this the 25th day of June, 2007.

Respectfully submitted,

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CHARLES N. JAMES

MELINDA O. JOHNSON (9498)

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 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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Hancock County Circuit Court
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Honorable Stephen Simpson
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This, the 25th day of June, 2007.

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