IN THE SUPREME COURT OF MISSISSIPPI

No. 2007-CA-00908

DONNA CALLAHAN and
DONNA HOLST — APPELLANTS

VS.

CALENDAR J. LEDBETTER and
LEE COUNTY SCHOOL BOARD — APPELLEES

APPEAL FROM THE CIRCUIT COURT OF LEE COUNTY

APPELLANT'S REPLY BRIEF

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A. Standard of Review

Plaintiffs believe that no response is necessary to defendant's statement of the standard of review.

B. Failure To Plead Affirmative Defense of Contributory Negligence

The defendants assert that Rule 15 of the Mississippi Rules of Civil Procedure governs this argument. Rule 15(b) states that the pleadings may be amended to conform to the evidence. This amendment may be made at any time, even after the judgment. This has never happened. The Mississippi case law requires that the defendant's plead and prove any affirmative defense that they assert. They failed to plead, failed to move at the close of trial to conform the pleadings to the evidence but more importantly they were able to offer no credible evidence that Donna Callahan was negligent in any way. *Myrick v. Holifield*, 126 So.2d 508 (Miss. 1961).

C. Lack of Evidence of Contributory Negligence

The defendants in this cause assert that this cause is factually similar to *Thompson v. Lee County School Board,* 925 So.2d 57 (Miss. 2006) and in some respects it is. However, the defendants fail to outline the similarities. Both causes were intersection collisions between a school bus and a car. In both cases an occupant of the car was seriously injured. In the *Thompson* case the bus driver was slightly injured when thrown from the driver's seat and the trial court used to justify its finding that the automobile might have been speeding. *Id.* at ¶ 3. In *Thompson*, the driver of the bus never saw the automobile until he got out of the bus and

Thompson, who was brain damaged in the wreck did not testify so it is not known what he saw in respect to the school bus. *Id.* In the case at bar both drivers testified to the exact same fact scenario so that facts are not in dispute as to what either vehicle did.

Donna Callahan was the driver of the 1999 Dodge Intrepid which collided with the Lee County School District bus driven by Calendar Ledbetter. Donna Callahan testified the she was a cautious driver and that she had always been such a cautious driver. Vol. p. 7 ,8. Donna Callahan testified that she was on the Trace, a through highway, that she saw the school bus stopped at the intersection. Donna Callahan is a cautious driver and she took her foot off the gas just because she was being cautious. *Id.*

The school bus did not pull out until the Callahan vehicle was almost to the bus. *Id. at* 8. Calendar Ledbetter passed away before trial so the only record is her deposition which was read into the record (Exhibit 1 in the record) as to what she saw and the report of the federal park ranger as to what Calendar Ledbetter said on the date of the wreck. In her deposition, Ms. Ledbetter said that the Dodge Intrepid was approximately 25 to 30 feet away when she first saw the car. Vol. 1, Exhibit p. 15.

What she did after she saw the car is not at all clear. On the date of her deposition, she said that she slammed on the brakes, but there were not skid marks. *Id.* p. 25-26. On the date of the wreck Ms. Ledbetter told the investigating officer, as shown on the narrative report attached as Exhibit "1" to Ms. Ledbetter's deposition, that when she heard the squeal "I punched it but I got hit." Narrative Report p.1, attached to Ledbetter deposition. On the date of her deposition she denied hearing brakes squeal, denied skid marks on the road, did not remember talking to the park ranger or any policeman, denied "punching it" and said that she thinks she hit her brakes. Vol.1, pp. 24, 25. It should be apparent that Ms. Ledbetter was a totally unreliable witness in that

she contradicted herself on so many occasions.

It seems that Ms. Ledbetter was convinced that she did not have to look to her right because she believed the Trace to be closed. *Id.* pp. 7. However, the Trace was not closed near the intersection where the wreck occurred, it was closed only where they were working on it, there was a detour around that part and then cars could re-enter the trace. *Id.* Ms. Ledbetter did not see the red truck belonging to Mrs. Callahan's brother which passed through the intersection just ahead of Mrs. Callahan's car. *Id. p.* 11. Ms. Ledbetter could not have looked to her right at all and miss not only a red truck with Mrs. Callahan's brother and young son in it and also miss the Callahan Dodge Intrepid.

Donna Callahan did all that she could do. Donna Callahan was proceeding along the Trace at or below the speed limit. Vol. 2, p.16. Donna Callahan saw the bus stopped at the intersection. *Id.* p.7. Mrs. Callahan is a cautious driver who let off the gas, just to be safe. *Id.* at 7, 8. Mrs. Callahan watched the bus. It was completely stopped. *Id.* p.12. When the Callahan vehicle got almost to the bus, the bus just pulled out. *Id.* at 13. Donna Callahan hit her brakes but was unable to stop before she hit the bus. *Id.* Ms. Ledbetter, when she heard the squeal said, "I punched it but I got hit." apparently shooting out in front of the Callahan vehicle. See the narrative report attached as Vol. 1, Exhibit "1" to the Ledbetter depo.

Donna Callahan had a right under the law to assume that the bus driver would comply with the law and not pull out in front of her until she knew, in the exercise of ordinary care, that the driver of the bus would not yield. *Dame v. Estes,* 101 So.2d 644 (Miss. 1958). The trial court found that Ms. Ledbetter failed to keep a proper lookout which caused her to fail to yield the right of way to the Callahan vehicle. R. p. 112. The trial court also found that Ms. Ledbetter was distracted by the children on the bus. *Id.* Ms. Ledbetter was trying to figure out where the

remaining children were supposed to have gotten off the bus since her bus route had ended. Vol.1 p. 6,7. The trial court failed to consider the fact that Ms. Ledbetter "punched it" when she heard the tires squeal thereby propelling the bus into Callahan's lane of travel. Ms. Ledbetter was ticked for failure to yield right of way. Vol. 1, See Stars Report attached to depo. of Ms. Ledbetter. Ms. Ledbetter went to federal court in Oxford and paid the ticket.Vol.1 p. 48. To avoid the wreck, Calendar Ledbetter testified that she should have looked again, before pulling out. Vol. 1 p. 18.

Donna Callahan testified that the bus did not move until she was almost to it,(Vol.2 p. 8.) about two car lengths. *Id.* p. 33. It is worthy of note that Ms. Ledbetter agreed with this distance in her deposition when she testified the car was 25-30 feet from her when she saw it. Vol. 1 p. 15. Donna Callahan was not ticketed for any improper driving. Vol. 2 p.

13. There was no contributory negligence on the part of Donna Callahan based on the overwhelming weight of the evidence. *McKinzie v. Coon,* 656 So. 2d 134 (Miss. 1995)

The defendants make much of M.C.A. § 63-3-805. § 63-3-805 states:

> Vehicle entering through highway. The driver of a vehicle shall stop as required by this chapter at the entrance to a through highway and shall yield the right-of-way to other vehicles which have entered the intersection from said through highway or which are approaching so closely on said through highway as to constitute an immediate hazard. However, said driver having so yielded may proceed and the drivers of all other vehicles approaching the intersection on said through highway shall yield the right-of-way to the vehicle so proceeding into or across the through highway.
>
> **The driver of a vehicle shall likewise stop in obedience to a stop sign as required by this chapter at an intersection where a stop sign is erected at one or more entrances thereto although not a part of a through highway and shall proceed cautiously, yielding to vehicles not so obliged to stop which are within the intersection or approaching so closely as to constitute an immediate hazard, but may then proceed.** (emphasis added)

The defendants and the trial court fail to properly apply this statute to the facts of this case. The statute requires that Ms. Ledbetter first stop at the stop sign, which she did.Vol. 2, p.7. It then requires that Ms. Ledbetter proceed cautiously, which she did not do as she never saw the red truck coming from her right nor the Callahan vehicle which collided with the bus until it was 25 or 30 feet from the bus. Vol. 1 p. 15, § 63-3-805. Ms. Ledbetter admitted that she should have looked in order to avoid the wreck. Vol. 1,p. 18. Ms. Ledbetter failed to yield the right of way to the Callahan vehicle because it was approaching so closely on the through highway to constitute an immediate hazard. Ms. Ledbetter was the sole proximate cause of the wreck that injured Donna Callahan, Jeremy Callahan and Donna Holst because she failed to look to her right thinking the Trace was closed when it was not. *McKinzie v. Coon*, 656 So.2d 134 (Miss. 1995).

The trial court erred when it used statements of witnesses, all laymen, who estimated distances and speeds involved in the wreck which occurred within a matter of seconds and in close quarters to determine that Donna Callahan somehow breached her duty and determined that Donna Callahan was guilty of contributory negligence. *Myrick v. Holifield*, 126 So.2d 508 (Miss. 1961). The trial court's findings are manifestly wrong and clearly erroneous and not supported by the evidence in the record as defendants speak only of a previous Lee County case and never cite any evidence that Donna Callahan was negligent in any way.

II. THE TRIAL COURT ERRED IN REDUCING DONNA HOLST'S RECOVERY BY 35% AS A GUEST PASSENGER

The trial court, without explanation as to how it came to such a conclusion, found that the driver of the vehicle on the through highway, at or below the speed limit, whose

testimony was that she saw the bus, watched the bus, took her foot off the gas because she was a cautious driver and proceeded on the through highway over which she had the right of way was negligent and responsible for 35% of the damages which occurred. R.p.113. The defendants assert that the trial court did not impute Callahan's alleged negligence to Holst in reducing her award of damages.. The defendant asserts that the judge instead applied M.C.A. § 85-5-7 which he never mentioned in his opinion. However, assuming he did apply the provisions of that section, his findings are clearly erroneous and not supported by credible evidence.

There are no pertinent facts in dispute as set forth in the previous section of this brief. The three testifying witnesses pretty much agree as to what happened and that is that the school bus stopped at the stop sign (Vol. 2 p.7) as the Callahan vehicle proceeded up the Trace at or below the posted speed limit (Vol. 2 p. 12) with her foot off the gas after seeing the bus at the intersection (*Id.* p. 7) and when the bus pulled in front of her, Callahan applied her brakes in an attempt to stop. *Id.* p. 8. She was unable to stop before hitting the bus. Vol. 2, p. 7, 8, 16. The bus driver, Calendar Ledbetter said that she looked down the Trace and did not see the red pickup truck in front of the Callahan vehicle nor the Callahan vehicle itself. Vol. 1, p. 7,11. She admitted that she could have avoided the accident if she had looked again. *Id.* p. 18.

Calendar Ledbetter said:

> "I had pulled up, stopped, looked to my right and left. At that time, the Trace was closed because they was putting that overpass on - - on the right side. They was putting that overpass in, and I was waiting for the Tupelo traffic to clear out. When Tupelo traffic cleared out, I proceeded to cross the highway after I - - you know, like I said, it wasn't nothing – I hadn't seen nothing coming. So when I got ready to go across, I turned my head, and this lady was

> right there on me. So she couldn't stop and I couldn't stop, so she collided with the bus."Vol. 1 p.7.

The inference to be drawn from her testimony is that she thought the Trace was closed to the south and that the only traffic she had to worry about was from the Tupelo side of the intersection. This was simply not true as the Trace was not closed, only a detour (Vol. 2 p. 7) and the further inference is that she did not even look to the south. She did not see the red pickup truck that was in front of the Callahan vehicle. Vol.1, p.7. She did not see the Callahan vehicle until she heard brakes squeal and then she looked out her door and the Callahan vehicle was 25 to 30 feet away. *Id.* P. 15. She "punched it" in an effort to clear the intersection before the Callahan got there but was unsuccessful. Vol. 1, Narrative sheet at end of depo. The Callahan vehicle struck the bus just behind the bus door, in the gas tank area. Vol. 1, p. 19.

The Mississippi Supreme Court has given guidance on many intersection collisions. There are some which are similar to this wreck, including the *Thompson* case cited as authority by the defendants. This case came from the same court and the underlying defendant was the same as the case at bar, the Lee County School district. In *Thompson,* the plaintiff was brain damaged and did not testify. Apparently, the school bus driver was the only witness to the wreck. In the case at bar, three people testified about the circumstances surrounding the wreck. Calendar Ledbetter, the bus driver testified, Donna Callahan testified and her mother and passenger Donna Holst testified only that she saw the bus before the collision. There was really no conflicting testimony in this case as to the position of the vehicles, the speed of the vehicles, etc.

All of the testimony of times and distances came from the drivers of the respective vehicles and these are subject to error as the drivers were excited, frightened and under tremendous short term pressure for the seconds preceding the crash. The Mississippi Supreme

Court, citing multiple authorities, said that when witnesses testify concerning distance and speeds were estimates, and no mathematical formula can be applied to laymens' versions of distance, speed, etc., which occur within a matter of seconds and in close quarters. *Myrick v. Holifield,* 126 So.2d 508 (Muss 1961).

This case is factually similar to *McKinzie v. Coon,* 656 So.2d 134 (Miss. 1994). Barbara McKinzie , a resident of Pensacola, Florida visited her daughter who attended the University of Southern Mississippi. On the morning of December 26, she was returning home to Florida from Hattiesburg, in no particular hurry. At the intersection of Highway 98 and Highway 63, a car pulled out in front of Barbara and she hit her the brakes but could not stop. The front right fender of Barbara's car hit the Coon vehicle in the center on the passenger side. Barbara McKinzie estimated her speed as fifty miles an hour at the time of the accident, which is a little faster than the Callahan vehicle was traveling.

Barbara McKinzie testified she stayed in the right lane as she approached the intersection as did Donna Callahan. At the point of impact, McKinzie stated her vehicle was to the right of Coon's vehicle as was the Callahan vehicle to the right of the school bus. McKinzie got out of her vehicle to go check on the other driver. She testified she overhead Coon saying to another person, "I just didn't see her, I just didn't see her." This is exactly what happened in the case at bar and the driver of the school bus testified that she did not see the Callahan vehicle until just before the collision when the Callahan car was only 25 to 30 feet away. Vol. 1 p.15.

Barbara McKinzie said she knew at the time of the accident she was driving about 50 miles per hour or less because she was going up a hill just prior to reaching the intersection. Donna Callahan testified that she may have not even gotten up to 50 miles per hour because she had just gotten back on the Trace and she also testified that she had taken her foot off the gas

because she was a cautious driver having seen the bus at the intersection so that the Callahan vehicle was decelerating even before she applied the brakes. Vol.2 p. 12, 13.

Barbara McKenzie testified that when she reached the top of the hill that Coon pulled out in front of her. Barbara McKinzie said that she skidded both in applying her brakes before striking Coon's car and afterwards when both cars traveled through the intersection. She did not dispute that skid marks photographed at the scene of the accident were hers. Donna Callahan testified that she saw the bus, took her foot off the gas and when she was close to the bus it pulled out in front of her and she was unable to stop before hitting the bus. *Id.* Donna Callahan also testified that she skidded 6 to 10 feet before hitting the bus. *Id.* p. 33.

On redirect, McKinzie testified she tried to avoid Coon's car by applying her brakes and steering to the left, but "it happened too fast. . . ." She estimated she was 75 feet from the intersection when Coon pulled out into it. She did not feel there was anything else she could have done to avoid the accident. Donna Callahan could do nothing to avoid the crash either, especially since the bus driver never saw the Callahan car or the red truck that passed the bus in front of the Callahan vehicle. Vol. 1 p.7. A man by the name of David Prece saw the McKinzie accident. Other than the drivers and the mother of Donna Callahan, there were no testifying witnesses in the case at bar that saw the wreck. Prece said that it "sort of seemed like the driver stopped, but he just pulled out as if he wasn't paying attention." As in the Callahan case, nothing obstructed the view of either driver. Vol. 1 p. 8, Vol. 2 p, 32. Prece said that there was no way the car on the through highway could miss the car coming from the side road. Both drivers agreed in Callahan that Callahan was unable to stop when the bus pulled out in front of her. Vol. 1 p. 7, Vol. 2 p. 13.

As in the Callahan case, the driver of the cross street driver did not see the car coming on the through highway. Billy Coon said "I stopped and looked both ways, you know. Then I

looked again, you know. I started across. Then out of nowhere I just got hit, you know. I heard tires sliding. And I turned to look, and by the time I turned to look the impact had done shattered the glass." This is almost exactly what Callendar Ledbetter, the bus driver said about the Callahan vehicle. She said she stopped and was talking with the children on the bus, waiting for the Tupelo traffic to clear, looked to the right, then to the left twice and then she pulled out. Vol. 1 p. 7.

Applying the law as set forth in § 63-3-805, traffic proceeding on Bissell Road (CR 261), the school bus, when approaching the intersection must first obey the stop sign and may only proceed into the intersection after yielding to any oncoming vehicles which are approaching so closely on the Trace as to constitute an immediate hazard. Donna Callahan's car was that immediate hazard, but Calendar Ledbetter did not yield to that hazard because she testified that she did not even see the Callahan vehicle until it was 25 to 30 feet from the bus. Vol. 1 p. 15. It is logical that at the point she saw the Callahan vehicle she had failed to yield the right of way for which she was issued a ticket. Vol. 1, attachment to Ledbetter depo. Calendar Ledbetter went to Federal Court in Oxford and paid the ticket. Vol. 1 p. 48.

In the *McKinzie* case, the Mississippi Supreme Court cited *Meo v. Miller*, 85 So.2d 568 (Miss. 1956) (at page 139) which also involved an intersection collision where the defendant pulled out in front of the plaintiff. The Supreme Court reversed a jury verdict for the defendant/appellee, Miller, recognizing that the crucial issue in that case as in this case was "whether Miller (Ledbetter in the case at bar) pulled out onto the highway at a time when Meo's (Callahan's in this case) was entirely too close to the intersection and when it constituted an immediate hazard within the meaning of Code Section 8197." The Court concluded:

The great weight of the evidence indicates that Miller did

> this at a time when Meo's car was only 60 to 100 feet from the intersection, and that when appellant's car crossed the intersection appellee's truck was occupying part of the east lane. Although appellee's evidence was sufficient to prevent the granting of a peremptory instruction to the plaintiff on liability, for the above stated reasons we think that the overwhelming weight of the evidence is contrary to the verdict rendered, so the case must be reversed and remanded for a new trial.

Id. In Callahan, the vehicle on the Trace was closer than the vehicle in *Miller*, according to both drivers, so the Callahan vehicle surely constituted an immediate hazard to the school bus.

Also quoted in *McKinzie* at page 141, is the case of *Vines v. Windham,* 606 So.2d 128 (Miss. 1992) which was also an intersection collision. As in this case, the jury, here the court, found both drivers negligent. The Mississippi Supreme Court reviewed the evidence of both drivers and held that the issue of comparative negligence should never have been considered. As in Callahan, the only two drivers who testified on the issue of negligence were the drivers, Windham and Hattie Vines. The Court said that there was no direct evidence that Hattie Vines was speeding or otherwise negligent. In Callahan this is also true, there is no direct evidence that Donna Callahan did anything wrong. The most interesting thing that the Court said was:

> **"Windham certainly had nothing probative to say about Hattie Vines' actions because he never saw her until after the impact. Hattie Vines, on the other hand, testified that Windham pulled out immediately in front of her. This cannot in any way be construed as an admission of negligence.** A driver who approaches an intersection at which he has the right of way is entitled to assume that crossing traffic will obey the stop signs, look for oncoming vehicles before entering the intersection, and yield to through traffic. Neither Windham nor Vines offered any testimony that Vines' conduct was in any way unreasonable or imprudent."
> The only circumstantial evidence of negligence on Hattie Vines' part is Windham's testimony that when he last looked in her direction, he did not see her. **The only way the trial court could have concluded that an**

issue of fact existed concerning Hattie Vines' contributory negligence was by building a tower of inferences on this slender reed of testimony."

The Mississippi Supreme Court in *Vines*, quoting *Goodyear Tire & Rubber Co., v. Brasher,* 298 So.2d 685, 688 (Miss. 1974) ruled that "a presumption may not be based upon another presumption, . . . [and] an inference essential to establish a cause of action may not be based upon another inference." To infer that Donna Callahan was in some way negligent one would have to infer that all of the estimates of time and distance made by both drivers were completely accurate and that Callahan was not traveling the speed she said she was and was not where she said she was, since there is no direct evidence to contradict what Donna Callahan testified to.

The Court said that Windham's bare assertion that he did not see Hattie Vines' vehicle when he last looked to the left does not, by any stretch of the imagination, establish a "safe and dependable probability" that Hattie Vines was driving negligently. Similarly, in Callahan, the assertion by Calendar Ledbetter that she did not see the Callahan vehicle when she looked to the right does not, by any stretch of the imagination, establish a "safe and dependable probability" that Donna Callahan was driving negligently." It went on to say that "Common sense dictates otherwise." The Court also sets out some guidance as to how long it takes for a person to react to a perceived threat. The Court said that it takes at least one and a half seconds' reaction time and also "Once brakes are applied, additional time is required to bring an automobile to a stop. It is highly unlikely, given these facts, that Hattie Vines could have avoided this collision regardless of how carefully she was driving."

For the sake of argument let us reason together regarding these assumptions. Let

us say, simply for the sake of argument, that Donna Callahan had been traveling 50 miles per hour when she saw the bus and that she took her foot off the gas as she testified. The car would have begun to decelerate and let us assume that it was traveling 40 miles per hour, perfectly within the speed limit on the Trace, at the time the bus began to move into the intersection which, according to the assumptions set forth by the Court in *Vines,* would be 58.67 feet per second or for easier math, 59 feet per second.

Let us also assume that Calendar Ledbetter was accurate when she said she never saw the car until the brakes were squealing and it was 25 or 30 feet away before she punched the accelerator. Ms. Ledbetter said it took her 2 seconds to cross the highway to where the wreck happened.. Vol. 1 p 20. Donna Callahan's vehicle, were it not decelerating, would have covered that 30 foot distance in one-half second. Assuming that Calendar Ledbetter is an average driver and also assuming Donna Callahan was an average driver, each with one and a half seconds' reaction times asa set out by the Mississippi Supreme Court in *Vines*, Donna Callahan would not have actually perceived and reacted to the movement of the bus for one and a half seconds. Assuming she was traveling 59 feet per second (40 miles per hour) she would have traveled nearly 90 feet in that time before she would have been able to apply the brake, according to the Supreme Court's logic in *Vines.* Also, she would have applied the brakes and, of course, a 1999 Intreped would have been equipped with anti-lock brakes which would have precluded a skid until a very low speed, so that Donna Callahan may have had her brakes applied for three or more seconds before they squealed to be heard by Calendar Ledbetter. In that time the Callahan vehicle could have traveled, at an average speed of, let us assume thirty miles per hour since brakes were being applied, covering 132 feet in that time. The time

lapse since the bus has started to move is now at least four and a half seconds and assuming Ledbetter traveled at an average of 6 miles per hour, even though she said she "punched it" when she heard the tires squeal, she would have traveled at least 40 feet. Now, as the Supreme Court said, the average width of a lane of traffic is 13 feet, the bus would have had time to cross the road and the front of the bus would be 14 feet past the other side of the road, which is probably further than the bus actually traveled when hit by the Callahan vehicle as all testimony was that the Callahan vehicle hit the bus just behind the door in the gas tank area.

As the Mississippi Supreme Court opined in *Vines* at p. 134, there is not one iota of probative evidence that even suggests that Hattie Vines (in our case Donna Callahan) negligently contributed to the accident in which she and John Vines were injured. In our case, the accident in which Donna Callahan and Donna Holst was injured. Plaintiffs' assertion is that M.C.A. § 85-5-7 does not allow reduction of Donna Holst's recovery by any percentage as there is no credible evidence, other than inferences upon inferences, that Donna Callahan was in any way negligent. The overwhelming weight of the evidence is totally contrary to the verdict rendered. *McKinzie* at 142.

III. THE TRIAL COURT ERRED IN DETERMINING THE AMOUNT OF DAMAGES

A. Damages as to Donna Holst

Defendants argue that Donna Holst applied for disability some seven months after she had surgery. This is totally false and an incredible assertion given the testimony of Mrs. Holst and the social security records in evidence. Donna Holst applied for disability **before** the cervical fusion that she had on February 28, 1997. See Application For

Supplemental Security Income, Vol. 4, Exhibits. Donna Holst applied for social security disability on February 13, 1997, and the disability determination reflects the fact that Mrs. Holst applied because of back pain rather than neck pain. *Id.*

Donna Holst was determined, after psychiatric review, to be mentally impaired, with an anxiety disorder, possible PTSD, moderately limited in her ability to carry out detailed instruction, moderate limited ability to maintain attention and concentration for extended periods, moderately limited in her ability to perform activities within a schedule, moderately limited in her ability to work in coordination with or proximity to others without being distracted by them, moderately limited in her ability to complete a normal work-day and workweek without interruptions from psychologically based symptoms, etc., moderately limited in her ability to respond appropriately to changes in the work setting, she has psychological or behavioral abnormalities associated with a dysfunction of the brain because of memory impairment and a borderline IQ, she has disturbance of mood, accompanied by a full or partial manic or depressive syndrome because of psychomotor agitation or retardation, feelings of worthlessness, difficulty concentrating or thinking as well as personality disorders, and the disability was granted based on these personality disorders and mental disturbances. *Id.* Psychiatric Review and Vol.2, p. 80-84.

The medical evidence showed, the testimony of Mrs. Holst showed, and the trial court found that following the surgery in 1997, Donna Holst was pain free until the accident occurred. Vol. 1, p. 114-115 (Record - judgment of trial court).

Next, the defendants argue that Dr. Michael Currie, the defense expert, testified that Donna Holst suffers from a degenerative disease to the spine, which is true.

However, as set forth above, she had no pain in the cervical region, as the trial court found, after the surgery until the wreck which forms the basis of this action. *Id.* In fact, Dr. Currie testified that she has not had much, if any degeneration since the films taken in 1997 until 2002. Dr. Currie said, "I don't see any real significant degenerative change or advanced changes." Vol. 3, p. 156.

Dr. Currie did not disagree with the plaintiff's treating physician, Dr. Hammitt, that Donna Holst's condition was aggravated by the motor vehicle accident. *Id.* Dr. Currie agreed that Dr. Hammitt was in a better position to know Donna Holst than he was because Dr. Hammitt has actually examined her and interviewed her. *Id.* P. 159. Dr. Currie also testified that Dr. Hammitt would be in a better position to determine the causal connection between the automobile wreck and the pain she suffers today than he was. *Id.*

Dr. Currie testified that he did not dispute that the motor vehicle accident aggravated Donna Holst's symptoms. *Id.* p. 163. Dr. Currie testified that it is not unusual for a patient to have pain that is not explained by radiological studies. *Id.* Dr. Currie, on direct examination volunteered testimony as follows: "But what was very interesting to me as a learning phase was that we would inject in the lumbar spine in a patient complaining of neck pain, and we'd see all of these big nerve root impingements and bone spurs and disformity (sic) of the spinal canal and nerves being pinched and everything else, and I'd ask the patients, "Are you having any problems in your lumbar spine, " and they'd say, "No, its my neck that's hurting. My back doesn't hurt me a bit, **"you know, because it's very difficult to correlate exactly what is occurring with findings radiographically when sometimes it is happening neurologically."** (emphasis

added) *Id.* at 116. In other words, he could not say that Donna Holst's pain was not caused by the wreck simply because he could not identify a specific problem on the x-ray or CT scan..

Dr. Hammitt, one of only seven board certified pain management specialists in the state, testified that "The deceleration that occurs when you have a car wreck causes the facet joints to actually shift slightly in an anterior/posterior direction, which then – a lot of times will then cause arthritis and inflammation to those particular joints. **So the facet disease that she has is very common with car wrecks. The - - other is aggravated, I feel like, from the car wreck as far as her degenerative disc disease diagnosis."** (Emphasis added) Vol. 1, Exhibit, p. 6, 21.

Dr. Hammitt testified on cross examination that Donna Holst was evidently not having pain enough to seek out any type of treatment prior to the wreck so the wreck worsened her condition so that she now has to have facet injections to relieve her pain. *Id.* p. 38. Dr. Currie, the defense's expert testified that he could not tell the court to a reasonable degree of medical certainty that every symptom that Ms. Holst described is not the result of the wreck and every dollar that has been spent to alleviate her pain was not correctly spent. Vol. 3, p. 158.

The defendants agree with the plaintiff that all the plaintiff has to show is that the wreck aggravated a pre-existing condition. Appellee's Brief at 15. The court so found but the trial court failed to state how the damages it found were calculated. The plaintiff's damages in excess of $320,000.00 in medical expenses were proven and not contested at trial and these damages do not even include pain and suffering of having to have needles stuck in her spine every three months or the fact that she can no longer do what she was

able to do before the wreck. The tabulation of damages submitted by the defendants on appeal was not submitted at the trial on the merits and cannot be asserted on appeal. It has long been held that issues not raised at the trial court level cannot be raised on appeal. *Southern v. Miss. State Hosp.*, 853 So. 2d 1212 (¶ 5) (Miss. 2003).

Just because the plaintiff, Donna Holst, had a cervical fusion in 1997 that made her more susceptible to damage in a collision does not mean that she cannot recover. All law students remember the "eggshell rule" from law school. You take your plaintiff as you find her. *Blake v. Clein*, 903 So.2d 710, 729-30 (Miss. 2005). The photographs marked as plaintiff's exhibit no. 3 are graphic evidence of the trauma that Donna Holst suffered as a result of Lee County's negligence. Also instructive is the accident report which shows Donna Holst's injuries as "**incapacitating injury**." Vol. 1, attachment to Ledbetter depo. The trial court was manifestly wrong and clearly erroneous in its finding of the damages suffered by Donna Holst.

B. Damages to Donna Callahan

Donna Callahan was a twenty-seven year old mother at the time of the wreck. She suffered great mental anguish seeing her ten year old son (Vol. 2, p. 10) with a nickle sized hole in his head which was "so deep you could see all the way to his skull."*Id. p. 8.* The hole was right between his eyes. *Id.*

Donna Callahan's physical injuries consisted of chest soreness, as well as hand and finger soreness. *Id.* at 15. Donna could not eat or sleep so her doctor put her on Xanax. *Id.* She lost five pounds in one week because of the trauma of what she witnessed. *Id.*

In addition to the trauma of seeing her ten year old badly injured, she saw her

mother badly injured also. Just after the wreck she looked at her mother and "she was just laying still." *Id.* at 17. Her mother's neck was swelling at that point, it was visibly swollen. *Id.* at 12.

Donna Callahan suffered both mentally and physically and the $3,000.00 in damages which the trial court reduced by 35% are wholly inadequate for the mental and physical trauma that she suffered through. The trial court's assessment of damages was manifestly wrong and clearly erroneous both in the amount of damages assessed and in reducing Donna Callahan's recovery by 35%.

IV. CONCLUSION

The trial court erred in finding that Donna Callahan was conributorily negligent because there was no credible evidence in the record that she did anything wrong. The trial court erred in reducing Donna Holst's recovery by 35% for the contributory negligence of her daughter who was driving the automobile in which she was a guest passenger when it applied an erroneous legal standard after defendants failed to show any negligence on the part of Donna Callahan. The court erred in determining the amount of damages for both Donna Callahan and Donna Holst.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I have on this date have mailed by the United States Mail, postage prepaid, a true and correct copy of the above and foregoing Brief to:

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