**IN THE SUPREME COURT OF MISSISSIPPI**

**THE CITY OF JACKSON** **APPELLANT**

**VS.** **CAUSE NO. 2007 CA-01756**

**SHARON TRIGG-SPANN** **APPELLEE**

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**On Appeal From The Circuit Court**
**of Hinds County, Mississippi**
**Cause Number 251-04-598CIV**
**Honorable Winston Kidd**

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# Appellant City of Jackson's Reply to Appellee's Motion for Rehearing

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**VS.** **CAUSE NO. 2007 CA-01756**

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## CERTIFICATE OF INTERESTED PERSONS

Pursuant to Miss.R.App. 28(a)(1), 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 Judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. City of Jackson
   *Appellant*

2. Pieter Teeuwissen, Special Assistant to the City Attorney
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   *Counsel for Appellant*

3. Sharon Trigg-Spann
   *Appellee*

4. Joe Tatum, Esq.
   Tatum & Wade
   124 East Amite Street
   Post Office Box 22688
   Jackson, Mississippi 39225-2688
   *Counsel for Appellee*

5. Hon. Winston Kidd, Presiding Judge
   Hinds County Circuit Court
   407 East Pascagoula Street
   Jackson, Mississippi 39201

Respectfully submitted,

CITY OF JACKSON

By: Peter Teeuwissen
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## SUMMARY

Plaintiff/Appellee Sharon Trigg Spann (Spann), feeling aggrieved by the January 22, 2009 Opinion and Order of this Court, has filed her Motion for Rehearing. The motion raises three issues which are, in essence, one: Spann takes issue with the majority's determination that her proof was insufficient to obtain damages for future surgical costs and alleged permanent disability. Contrary to the purpose of M.R.A.P. 40(a), the motion is simply mere repetition of argument already considered by this Court. As explained *infra*, the motion does not raise specific errors of fact or law which warrant either rehearing or a substituted opinion.

## ARGUMENT

### Plaintiff Spann's proof simply does not support the trial court's award of damages.

This Court determined that the City of Jackson (City) was solely liable for Spann's injuries but that there was "no substantial, credible evidence to support the award for future medical expenses, future surgery or disability" and, therefore, reduced the damages award accordingly. Maj. Op. ¶¶ 37-38. It is this reduction in damages for which Spann seeks rehearing by asserting that this Court improperly evaluated the testimony of Dr. Goel. Of the four medical doctors who treated Spann and provided deposition testimony, Dr. Goel was the only one on which Spann relies for her substantial, speculative future damages award. In support of her future damages award, Spann, in her Motion for Rehearing, urges this Court to take an expansive view of Dr. Goel's testimony.

The factual flaw in Spann's argument is that Dr. Goel's testimony does not support her assertions. The legal flaw in Spann's argument is that it was she who had the burden of ***proving*** her case at trial. Hence, since Dr. Goel's testimony falls short, it is axiomatic that Spann's legal proof falls short. Taking an expansive view of Dr. Goel's testimony solves neither problem.

Examining Spann's arguments in her motion for rehearing reveals that this Court's majority opinion is, indeed, correct. First, Spann contends that this Court was incorrect in concluding that "there is not testimony, report or other evidence to support that Dr. Goel engaged in a comprehensive exam." Op. ¶35. Spann attempts to construe her proof to support her contention that Dr. Goel performed an impairment evaluation. Motion for Rehearing, pp. 3-5. The proof is simply not there:

- Dr. Goel did not have a comprehensive, accurate medical history. (He did not review any medical records before 2003, instead relying on an oral history by Spann, of which he did not know the accuracy or completeness). (Goel's Deposition, pp. 39, 41)

- Dr. Goel did not review all patient medical records. (Dr. Goel had not reviewed records from Dr. Wilkerson, Dr. Williams, Dr. Headley or Dr. Tarver, all of whom treated Spann as a result of the incident, nor had he reviewed the original x-rays from Mississippi Baptist Medical Center, the records of Physical Therapist Sylvia McCandless or of Southern Physical Medicine and Rehabilitation). (Goel Deposition pp. 36-37).

- Dr. Goel did not offer a comprehensive prescription of Spann's current symptoms and their relationship to daily activities. (The testimony cited by Spann in her motion, pp. 18-19 of Dr. Goel's deposition, only offers a conclusory, "she would have trouble walking...". A conclusory statement is not the same as a comprehensive description which forms the basis of an expert opinion).

- Spann concedes that, at best, Dr. Goel offered testimony in only three of the four recommended actions. Motion at p. 4. Upon review, however, the purported proof in the other areas is weak at best.

Spann next takes issue with the majority opinion's determination that Dr.Goel's testimony regarding future medical costs was speculative. Maj. Op. ¶¶ 33-34. As the majority correctly determines, it is Dr. Goel himself who couches his testimony as a ***guess***. A ***guess*** does not need rebuttal by the City, as a ***guess***, by definition, cannot rise to a preponderance of the evidence necessary to prove something. The case cited by Spann in her motion, Jessco, Inc. v. Shannon, 451 So.2d 694 (Miss. 1984) does not stand for the proposition that an expert's guess will prove an element of damages.[1] The distance between a guess and certainty is great, and it is here that Plaintiff's proof failed.

The majority's determination that a guess will not support recovery of damages is in accord with well-settled Mississippi damages law. As early as 1938, this Court articulated the difference between testimony of a possibility and a probability. *See* Teche Lines v. Bounds, 179 So.2d 747, 748, 750-51 (Miss. 1938) ("We have distinctly heretofore held that medical testimony that a certain thing is possible is not substantial testimony at all...). While creative, Spann's assertion that a guess later blessed by the words "to a reasonable degree of medical certainty" is not testimony on which any trier of fact can rely in awarding damages. It was, without question, Spann's burden to provide credible evidence in support of each element of damages. *See generally*, Graves v. Graves, 531

[1] Jessco stands for the proposition that certainty is not required. The distance between a guess and certainty is great, and it is in this great distance that Plaintiff's proof fails.

So.2d 817, 821-22 (Miss. 1998) (reversing a jury verdict where a jury was instructed on elements of damages for which plaintiff had offered insufficient proof).

Finally, Spann contends this Court has acted as an advocate for the City by going outside the record. Motion, p. 7. This is an interesting contention. Here, Spann had the burden of proof at trial, yet offered only weak proof, if any, of her "disability." Spann had the opportunity, both during discovery and at trial, to prove her damages to the required burden. It was Spann's obligation to make a record which supported her claims. Instead of doing so, Spann offered proposed findings of facts and amended proposed findings which contain significantly different disability ratings. As the trial court adopted Plaintiff's amended findings, *in toto*, this Court affords less deference to those findings on appeal. Less deference opens the door for an appellate court to consult other learned authority. It is not this Court that is in error, but, rather, Spann as failing to bring forth the necessary proof from the multitude of medical providers who examined her. Perhaps Spann failed because the proof to support her changing alleged disability simply doesn't exist.

## CONCLUSION

For the above reasons, the City of Jackson requests that this Court deny Plaintiff's Motion for Rehearing. Specifically, the City respectfully submits that reinstating the trial court's damages for disability in the amount of $150,000 and for future surgery in the amount of $20,000 is inconsistent with the substantial, credible evidence. And the City of Jackson prays for such other relief as this Court deems appropriate.

Respectfully submitted this the 2nd day of March, 2009.

THE CITY OF JACKSON, MISSISSIPPI

SARAH O'REILLY-EVANS, CITY ATTORNEY

By: _____
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## CERTIFICATE OF SERVICE

The undersigned does certify that he has this date mailed, via United States mail, postage pre-paid, a true and correct copy of the above and foregoing Appellant's Reply to Motion for Rehearing to the following:

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*Counsel for Plaintiff*

Honorable Winston L. Kidd,
Hinds County Circuit Court Judge
407 East Pascagoula Street
Jackson, Mississippi 39201

So certified, this the 2nd day of March, 2009.

_____
PIETER TEEUWISSEN