IN THE SUPREME COURT OF MISSISSIPPI

THE CITY OF JACKSON APPELLANT

VS. CAUSE NO. 2007 CA-01756

SHARON TRIGG-SPANN APPELLEE

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

Rebuttal Brief of Appellant City of Jackson

ORAL ARGUMENT NOT REQUESTED

PIETER TEEUWISSEN
SPECIAL ASSISTANT TO THE CITY ATTORNEY

OFFICE OF THE CITY ATTORNEY
CITY OF JACKSON, MISSISSIPPI
455 East Capitol Street
Post Office Box 2779
Jackson, Mississippi 39207
Telephone: 601-960-1799

COUNSEL FOR APPELLANT

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THE CITY OF JACKSON **APPELLANT**

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

SHARON TRIGG-SPANN **APPELLEE**

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
   455 East Capitol Street
   Jackson, Mississippi 39201
   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: _____
PIETER TEEUWISSEN, MSB #[redacted]
Special Assistant to the City Attorney

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STATEMENT OF THE ISSUES

The issues that this Court should resolve on this appeal are:

1. The Trial Court erred in finding the City 100% liable.

2. The Trial Court's damage award was against the substantial, credible evidence.

STATEMENT OF THE CASE

A. PROCEEDINGS BELOW

This action was filed July 24, 2004 against Defendants Mary Jenkins and the City of Jackson. R. at 6. Plaintiff Sharon Trigg Spann alleged that she was injured as a result of a motor vehicle accident on October 21, 2003 wherein Mary Jenkins negligently collided with a City of Jackson Police car operating with reckless disregard. R. at 7-9. The City of Jackson filed its Answer and Affirmative Defenses on September 15, 2004. R. at 12. Jenkins filed her Answer and Defenses on September 15, 2004. R. at 17. The normal course of discovery ensued, and on March 4, 2005, the Hinds County Circuit Court set this matter for trial beginning December 12, 2005. R. at 36. Plaintiff settled with Defendant Jenkins prior to trial[1].

A bench trial took place on December 12, 2005 with respect to the Plaintiff's remaining claim against the City of Jackson. Pursuant to the trial court's instructions at the close of evidence, both parties submitted proposed findings of fact and conclusions of law. T. at 254. Thereafter, on December 1, 2006, the trial court issued its Opinion and Order finding the City of Jackson 100% liable and awarding $285,595.93 to Plaintiff. R. at 185. The City of Jackson timely filed on December 8, 2006 its Motion to Amend and/or Vacate Judgment or, in the Alternative, for a New Trial. R. at 196. The trial court then entered a Final Judgment on December 18, 2006. R. at 200.

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[1] A Judgment of Dismissal with Prejudice was entered on December 20, 2005. R. at 151. However, Plaintiff's settlement with Defendant Jenkins occurred before trial; while Jenkins was a witness at trial, she was no longer a party at that time.

Pursuant to a May 23, 2007 Order, the trial court subsequently granted in part and denied in part the City's Motion. R. at 219. That Order reduced Plaintiff's recovery by the amount paid by previously dismissed Defendant Mary Jenkins ($25,000) but denied all other relief. Thereafter, an Amended Final Judgment was entered on June 11, 2007. R. at 221. From there, the City of Jackson timely filed its Notice of Appeal on June 27, 2007. R. at 222.

B. STATEMENT OF THE FACTS

On October 21, 2005, Jackson Police Department Officers Rueben Currie and Reginald Liggins were attempting to pull over a stolen Nissan Altima and ultimately ended up in a multi-vehicle collision which allegedly injured Plaintiff Sharon Trigg-Spann. While liability and damages are vigorously contested by the parties, the underlying facts are not in dispute.

At approximately 2:30 or 3:00 p.m., Officers Liggins and Currie were on patrol in West Jackson when they noticed a silver Nissan Altima (Altima) on Valley Street near Capitol Street[2]. The Altima was heading in the opposite direction when the officers noticed that it did not have a license plate. T. at 108. Officer Currie subsequently saw the Altima run a stop sign at Valley and Capitol Streets. T. at 109. The officers turned around and proceeded onto Capitol Street behind the path of the Altima, only to have the Altima speed off once the officers activated blue lights and sirens. T. at 109, 110. The officers then lost the vehicle in the area of Capitol Street and Ellis Avenue. T. at 110.

[2] Officer Liggins was driving the patrol car, and Officer Currie was a passenger. T. at 105.

Having lost sight of the vehicle, the officers canvassed the area, as these neighborhoods are areas where criminals normally abandon stolen cars. T. at 111, 154. After searching ten to fifteen minutes without success, the officers returned to regular patrol. T. at 154. While on regular patrol at the intersection of St. Charles and Ellis Avenue, the officers once again spotted the Altima. T. at 155, 156. The driver of the Altima likewise spotted the officers, ran a red light at the intersection of St. Charles and Ellis Avenue and proceeded South on Ellis Avenue. T. at 156. The officers turned South from St. Charles onto Ellis Avenue, once again in the direction of the Altima. T. at 156.

As the vehicles proceeded South on Ellis Avenue, several important activities occurred. First, the vehicles proceeded through a school zone; thus, Officer Liggins did not initiate blue lights and siren until ***after*** he made it past the school zone. T. at 156. Once past the school zone, Officer Liggins activated the blue lights and siren, while Officer Currie started radio communication. T. at 156. The Altima continued South on Ellis Avenue at an estimated speed of 55-70 miles per hour[3]. As the Altima continued South on Ellis Avenue crossing Robinson and then Lynch Streets, the officers were unable to close the distance between the patrol car and the Altima. T. at 190. The entire distance between the point where the officers spotted the Altima at the intersection of St. Charles and Ellis Avenue until the accident at the intersection of Lynch and Ellis Avenue was a mile or a mile and a half. T. at 164.

[3] Officer Liggins estimated the Altima's speed at 55-60 miles per hour. T. at 161. Officer Currie estimated 60-70 miles per hour. T. at 127, 128.

With blue lights and siren still activated, officer Liggins approached the intersection of Ellis and Lynch Streets. T. at 165. Officer Liggins checked for oncoming vehicles, and having noted all vehicles had stopped, slowed down and started to proceed through the intersection. T. at 165, 166. Officer Liggins was proceeding through the intersection via the left turn lane at approximately 15-20 miles per hour, and his view was unblocked. T. at 167, 169. Officer Liggins turned his head to check for on-coming traffic. T. at 169. At the same time, Mary Jenkins[4] was travelling East on Lynch Street behind "four or five maybe" other vehicles. T. at 95. Mary Jenkins did not see any blue lights, hear any sirens, see the police car prior to impact or see the silver Altima. T. at 96, 101. Mary Jenkins conceded that her eyes were tired that day. T. at 100. She was "observing" and "focusing" on going straight ahead, and never saw the Federal Express truck operated by Plaintiff Trigg-Spann or a red Mustang, other vehicles damaged in the collision. T. at 102.

The upshot of Mary Jenkins' inattention was a collision between her vehicle and the patrol car of Officers Liggins and Currie. As a result, Plaintiff Trigg-Spann, who was sitting in a Federal Express truck facing North on Ellis Avenue, was struck first by the red Mustang and second by the patrol car. T. at 27. Plaintiff Trigg-Spann, when asked at trial who was at fault for causing the collision, responded that she "couldn't say". T. at 52. Upon cross-examination with her Answers to Interrogatories, Plaintiff Trigg-Spann's testimony revealed that:

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[4] Mary Jenkins also sued the City of Jackson, but ultimately abandoned her claim. T. at 98. Mary Jenkins was sued by the Plaintiff, Trigg-Spann, and settled with Plaintiff prior to trial. T. at 99.

> I [Trigg-Spann] left Smith Rouchon traveling north on Ellis Avenue towards Capitol Street. I stopped my vehicle at the red light at the intersection of Ellis Avenue and Lynch Streets. I could hear a police siren and two Jackson Police Department vehicles were in pursuit of a small gray vehicle which was traveling south on Ellis Avenue, attempting to allude the two police vehicles. All traffic at the Lynch Street and Ellis Avenue intersection except Mary Jenkins' vehicle stopped to allow the police vehicles to pass. Period. Ms. Jenkins continued into the intersection and collided into one of the Jackson police pursuit vehicles which caused the police car to hit a red Mustang stopped next to me and then eventually the police car Ms. Jenkins hit collided into my vehicle.
>
> Q. Did I read that correctly?
>
> A. Yes, you did.
>
> Q. Do you remember giving us this answer during discovery?
>
> A. Yes, I did.

T. at Page 53, Line 16 through Page 54, Line 6.

Plaintiff acknowledged that the patrol car slowed down as it approached the Ellis Avenue and Lynch Street intersection, though she disputes whether the patrol car's lights and siren were activated[5]. T. at 56. Plaintiff further stated that she did not know whether Mary Jenkins slowed down as Jenkins approached the intersection. T. at 63. It is undisputed that it was Jenkins' white Nissan Maxima that struck the patrol car in the intersection. T. at 193.[6]

Plaintiff Trigg-Spann's injuries are in serious dispute. While Plaintiff Trigg-Spann contends, and the Court found, all manner of injuries, Plaintiff Trigg-Spann went to the Mississippi Baptist Medical Center's Emergency Room the day of the accident and was treated and released. T. at 63. She did not

[5] Plaintiff Trigg-Spann stated in deposition that she heard sirens, but tried to retreat or "clarify" this at trial. T. at 59.
[6] Jenkins herself could not recall what vehicle she struck first. T. at 102, 103.

sustain any broken bones, internal injuries, breaks of her skin or physical scars. T. at 64. Plaintiff Trigg-Spann saw, among others, Drs. Williams and Wilkerson, who opined that Trigg-Spann reached maximum medical improvement within a few months[7]. T. at 65, 68-70. Nevertheless, the trial court relied instead on the two doctors chosen by Plaintiff and awarded over $285,000 in damages. R. at 215-218.

[7] This testimony is addressed in detail, ***infra***.

SUMMARY OF THE REBUTTAL ARGUMENT

The City of Jackson has raised two issues on appeal. The first issue is whether the trial court was correct in assessing 100% liability against the City. The second issue is whether the trial court's assessment of damages was proper. In her reply brief, Appellee Spann provides only passing analysis of these issues, choosing instead to re-argue whether the pursuit constituted reckless disregard. As discussed *infra*, Spann's brief not only fails to adequately address the issues raised, it mis-states facts and takes both evidence and argument out of context. Accordingly, not only are the City's assignments of error inadequately challenged, they merit reversal of the trial court's decision.

REBUTTAL ARGUMENT

Spann "bears the burden of producing evidence sufficient to establish the existence of the convential tort elements of duty, breach proximate causation and damages." *Tentoni v. Slayden*, 968 So.2d 431, ¶16 (Miss. 2007) (internal citations omitted). Predictably, Plaintiff/Appellee's brief mostly addresses whether the actions of Jackson Police Officers Reginald Liggins (Liggins) and Reuben Currie (Currie) with respect to pursuing the Nissan Altima were proper. In fact, nine of 13 pages in Appellee's Statement of Facts focus on the pursuit. Likewise, Spann begins her argument with this issue and addresses it on some seven other pages. The decision to pursue, however, is not an issue on appeal.[8] Rather, this is an

[8] The City's brief listed two issues on appeal: 1) whether the City was 100% liable for the collision; and, 2) whether the damage award was proper. Spann agreed these were the only two issues (See Appellee's brief at 1.)

attempt by Spann to cover for the weak elements of her case: causation and damages.

Indicative of Spann's veracity, Spann misrepresents the City's position with respect to the pursuit by stating in the first paragraph of her Summary of the Argument that "the City of Jackson has conceded that the trial court was correct in finding that its patrol officers acted with reckless disregard...". (Appellee's brief, p. 16). On the contrary, the City has clearly stated its position with respect to the reckless disregard issue: the City did not raise this issue, as it is unnecessary to the analysis on appeal. (City's brief, p. 10). Spann's misplaced reliance on the pursuit issue results in her inability to provide a meaningful response to the City's causation and damages arguments. In other words, even if the officers' decision to pursue was against a general order and determined reckless, that has nothing to do with proximate cause or the questionable nature of alleged damages.

I. The trial court erred in finding the City of Jackson 100% liable.

A close examination of Spann's assertion that "but for" the police car entering the intersection of Lynch Street and Ellis Avenue the collision would not have occurred finds that the supporting facts are not as Spann alleges. For example, Spann contends that as the patrol car entered the intersection, the vision was obstructed. (Appellee's brief, pp. 23-24). Spann relies solely on the testimony of the ***riding*** officer [Currie] for this assertion. However, the ***driving*** officer [Liggins] testified that his view was not obstructed. T. at 168. Spann similarly relies on the riding officer's testimony as to whether he saw the Jenkins vehicle, but never cites to any testimony of the driving officer. It is common

sense that two individuals, even two in the same vehicle, may not make the same observations.

Spann attempts a similar misleading argument with respect to whether the police car had its lights and sirens activated. (Appellee's brief at 23). This is important because apparently all traffic except Jenkins stopped for the police car—regardless of which direction had the green light. T. at 53. Jenkins' testimony was that she never heard any siren or observed any blue lights. T. at 96. On this, Spann and the City agree. Spann then attempts to bolster Jenkins' testimony through her own trial testimony (Appellee's brief at 23). Unfortunately for Spann, her testimony bolstering Jenkins was manufactured at trial. Spann, when cross-examined with her sworn interrogatory answers, responded as follows:

> ...I could hear a police siren and two Jackson Police Department vehicles were in pursuit of a small gray vehicle...all traffic at the Lynch Street and Ellis Avenue intersection except Mary Jenkins' vehicle stopped to allow the police vehicles to pass. Period. Ms. Jenkins continued into one of the Jackson police pursuit vehicles...R. at 53.

Spann acknowledges in sworn discovery responses that she heard sirens and Ms. Jenkins failed to keep a proper lookout, thus causing the accident. Jenkins' testimony similarly supports Spann's previous position (and the City's current position) that Jenkins failed to keep a proper lookout. City's brief, p. 11. Even Spann's expert concedes that whether lights or sirens were active is a credibility issue "beyond [his] purview". R. at 221.

At trial, though, Spann doesn't hear sirens and it is the police officers' fault. Spann fails to explain her change of heart as to who she believes actually

caused the accident anywhere in her brief. Spann admitted that she filed a lawsuit against Mary Jenkins. T. at 52. See also, Complaint, ¶8 (R. at 8). But now, she wants a 100% recovery from the City. Since Spann fails to explain her changed position on liability, the reasonable inference is that she is now seeking a complete recovery from the proverbial "deep pocket."

Assuming, *arguendo*, that the officers' actions were a proximate cause, Spann fails to address the City's apportionment argument. The City has called to this Court's attention MISS. CODE ANN. §85-5-7, the apportionment statute. Further, the City has cited on-point precedent that where a trial court in a bench trial fails to properly apportion liability, such is grounds for reversal. *City of Ellisville v. Richardson*, 913 So.2d 973 (Miss. 2005). Spann does not even attempt to refute this case. Moreover, in the case Spann cites repeatedly for support of the non-issue of whether the pursuit was proper, *City of Jackson vs. Brister*, 838 So.2d 274 (Miss. 2005), the trial court ***did*** apportion liability between the City of Jackson and another driver 50-50 (*Id.* at 279). Spann again wholly fails to address this caveat.[9] Where a trier of fact is not instructed to apportion fault between joint tortfeasors, it is reversible error. *Beverly Enterprises, Inc. v. Reed*, 961 So.2d 40 (Miss. 2007) (while *Reed* was a jury trial, the principle was the same: the trier of fact should apportion liability among joint tortfeasors).

Notwithstanding her failure to address the citations raised in the City's brief, Spann further asserts that assignment of 100% liability to the City was proper because of the "unopposed expert testimony" (Appellee's brief at 27).

[9] It is of interest that Spann's 31 page brief contains only four case law citations.

Again, Spann's assertion is misleading. Spann fails to disclose that this "unopposed expert testimony" was by a police procedures expert as opposed to an accident reconstructionist. T. at 202, 231. Moreover, Spann fails to disclose that the testimony she cites for this assertion was outside the scope of the expert's designation and area of expertise, and admitted over the City's objections. T. at 207-209; 217-218. Beyond the City's objections, the expert's conclusory statement that Jenkins was not at fault is not admissible evidence under Mississippi law. *Edmonds v. State*, 955 So.2d 787, 742 (Miss. 2007) (expert testimony based on opinion or speculation rather than scientific methods is inadmissible).

If anything, Spann's changing position on liability was actually eroded by her expert's testimony. The expert testified that he was never provided with Spann's interrogatory answers which placed fault on Jenkins. T. at 239, 243. Likewise, the expert had never seen his designation. T. at 243. The expert was aware of a statement given by Spann to the Jackson Police Department on the day of the accident, where she placed blame on Jenkins, but he discounted that statement. T. at 237-238, 241. All told, Spann's expert mimics her loose approach to fault, picking and choosing facts to support the theme of the moment.

Spann has failed to adequately refute the City's argument that the trial court erred in assessing 100% liability to the City of Jackson. This failure is evidenced by the lack of direct argument in response to the City's citations and lack of credible testimony for the conclusion that Jenkins bears no fault.

II. The Trial Court's damage award was against the substantial, credible evidence.

Spann relies on only two of her many treating physicians in support of her damages claims. Spann needs expert testimony to support her damages claim as she testified that she did not suffer any broken bones, internal injuries, breaks in her skin or scars. T. at 64. Moreover, Spann testified that since the accident she was affected emotionally by "the death of a family member". T. at 74. As in one of the four cases cited by Spann, a case involving the same trial judge, a review of the evidence leads to the conclusion that the trial court's award of damages "is so high as to be unreasonable at first blush and is contrary to the overwhelming weight of the credible evidence." *Jackson Public School Dist. v. Smith*, 875 So.2d 1100, 1105 (Miss. App. 2004) (and contrary to Spann, the minor plaintiff in *Smith* actually underwent three operations, had "significant scarring and permanent disfigurement" and experienced symptoms of discomfort).

The first physician on which Spann relies is Dr. Charles Crenshaw, a non-board certified family physician. (Deposition of Dr. Crenshaw at 4 (Crenshaw or *Id.* at ____)). Dr. Crenshaw initially saw Spann the day after the accident, although she was not a pre-existing patient of Dr. Crenshaw. (*Id.* at 54). While Spann conveniently cites to helpful portions of Dr. Crenshaw's testimony, she omits testimony which questions the extent of her injuries. With respect to Spann's overall post-accident health, Dr. Crenshaw offered some interesting opinions:

- He noted that Spann's "findings did not seem consistent from visit to visit...", so he referred her to a board certified neurologist, Dr. Wilkerson (*Id.* at 39);

- Dr. Crenshaw has referred patients to Dr. Wilkerson both before and since Spann (*Id.* at 41);

- In treating Spann over a year and a half period, he "did not get the impression that she was psychiatrically impaired in any way." (*Id.* at 46);

- With the type of injuries Spann had, it was better to keep moving than sit still (*Id.* at 49);

- That Spann's back pain was related to "arthritic changes in her back" which could have been attributable to multiple sources (*Id.* at 53); and,

- That Spann would not have any permanent disability (*Id.* at 58).

Spann had the burden of presenting the trial court with substantial, credible evidence to justify a damage award of $280,000. Dr. Crenshaw simply does not get Spann to that threshold. Moreover, it was Dr. Crenshaw who sent Spann to Dr. Wilkerson—a board certified specialist who Spann attacks on appeal. See Appellee's brief, p. 31. Specifically, Spann contends that the medical testimony offered by the City should receive "no credence". Appellee's brief, p. 31.[10] Spann's position is, therefore, that the non-specialist, Dr. Crenshaw, is believable, but that the board-certified specialist to whom Dr. Crenshaw referred her, Dr. Wilkerson, should receive "no credence". That position is non-sensical.

Spann also relies on the opinions of Dr. Dinesh Goel to support her damages claim. Appellee's brief, pp. 30-31. One can only wonder, though, how Dr. Goel's testimony received ***any*** credence from the trial court when his testimony was that he:

[10] Spann contends that the medical testimony offered by the City came from "defense" experts. Again, this is misleading. The medical testimony offered by the City came from two of Spann's early treating doctors who she elected to see. The City did not pay either doctor to act as an expert. The trial court made the same error in its Opinion at p.10. (R. at 194).

- Has seen accident patients of Spann's counsel for the "last few years". (Goel deposition at 35);
- Never reviewed the records of Dr. Wilkerson (*Id.* at 36);
- Never reviewed the records of Dr. James Williams (*Id.*);
- Never reviewed the records of Dr. Headley (*Id.*);
- Never reviewed the physical therapy records of Sylvia McCandles (*Id.* at 37);
- Never reviewed the records of Dr. Crenshaw (*Id.*)
- Never reviewed the records of Dr. Tarver (*Id.*); and,
- Never reviewed the records of Southern Physical Medicine and Rehabilitation (*Id.*)

Instead of reviewing the objective records of these seven providers who treated Spann, Dr. Goel instead relied on an oral history from Spann and assumed the history was reasonably accurate and complete. (*Id.* at 41). And, Dr. Goel saw Spann for the first time some one and a half years after the accident. (*Id.* at 44). Upon initially seeing Spann, Dr. Goel didn't even bother to review any post-accident records. (*Id.*) Or any pre-accident records. (*Id.* at 39). But Dr. Goel knew Spann had an outstanding bill of $3,882 and had a lien arrangement with Spann's counsel (*Id.* at 33, 34).

Dr. Goel's testimony is further undercut by his admission to not knowing specific pertinent facts. For example, in arguing she sustained substantial damages, Spann contends that she was affected "mentally and emotionally" and that sexual relations with her husband "had virtually ceased due to pain from the collision". Appellee's brief, p. 31. When Dr. Goel was questioned about such matters, he was "unaware" that since the accident Spann was diagnosed with

syphilis. (*Id.* at 38). Likewise, Dr. Goel was "not aware" that Spann's husband was involved in other litigation. (*Id.*) Similarly, when questioned as to the basis that vehicles were totaled, i.e., the amount of force involved in the accident, Dr. Goel replied that he did not know the basis for his contention that the vehicles were totaled. (*Id.* at 63).

Not surprisingly, then, when Dr. Goel was questioned about ***objective*** matters, his testimony was less favorable to Spann. For example, he conceded that a small hemorrhage he opined was the cause of Spann's headaches could have occurred at any time. (*Id.* at 50, 51). Likewise, with respect to Spann's alleged lumbar spine pain, Dr. Goel conceded it was subjectively minimal and objectively did not involve a rupture and did not impact her spinal cord. (*Id.* at 55-58).

As with Dr. Crenshaw, Dr. Goel's testimony cannot reasonably support the damages Spann alleges. Miss. Rule Evid. 702(1) requires an expert's opinion to be "based upon sufficient facts or data." Where there is insufficient factual basis for an expert's opinion, especially where the opinion is conclusory in nature, the court should disregard the opinion. *Davis v. Christian Broth. Homes*, 957 So.2d 390, 409 (Miss. App. 2007). Moreover, the facts upon which the expert bases his opinion or conclusion must permit reasonably accurate conclusions as distinguished from mere guess or conjecture. *Miss. Trans. Comm'n v. McLemore*, 863 So.2d 31, 36 (Miss. 2003). Dr. Goel's testimony was that he relied on suspect subjective statements of Spann while never reviewing the large body of known objective medical history. His opinions and conclusions should receive the appropriate weight under the circumstances: "no credence".

CONCLUSION

For the above reasons, the City of Jackson requests that this Court reverse the lower Court's judgment in this action. Specifically, the City respectfully submits that reversing and rendering the judgment is proper as Mary Jenkins was the sole proximate cause of the accident which injured Trigg-Spann. Alternatively, the City of Jackson submits that the judgment should be reversed with instructions to the trial court to properly apportion fault and, further, reduce the damages award to an amount consistent with the substantial, credible evidence. And the City of Jackson prays for such other relief as this Court deems appropriate.

Respectfully submitted this the 8th day of May, 2008.

THE CITY OF JACKSON, MISSISSIPPI

SARAH O'REILLY-EVANS, CITY ATTORNEY

By: _____

PIETER TEEUWISSEN, MSB#[redacted]
Special Assistant to the City Attorney

OF COUNSEL:
Office of the City Attorney
455 East Capitol Street
Post Office Box 2779
Jackson, Mississippi 39207-2779
Telephone: 601-960-1799
Facsimile: 601-960-1756

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 Rebuttal Brief to the following:

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

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

So certified, this the 8th day of May, 2008.

PIETER TEEUWISSEN