

**IN THE SUPREME COURT OF THE MISSISSIPPI**

**BELEVIA POTTS**

**APPELLANT**

**V.**

**CAUSE NO. 2008-CA-00092**

**LARRY BLACK and THE  
MISSISSIPPI DEPARTMENT  
OF TRANSPORTATION**

**APPELLEES**

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**BRIEF OF APPELLEES**

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**APPEAL FROM THE CIRCUIT COURT  
OF ATTALA COUNTY, MISSISSIPPI**

**ORAL ARGUMENT REQUESTED**

**COUNSEL FOR APPELLEES  
LARRY BLACK and THE  
MISSISSIPPI DEPARTMENT  
OF TRANSPORTATION**

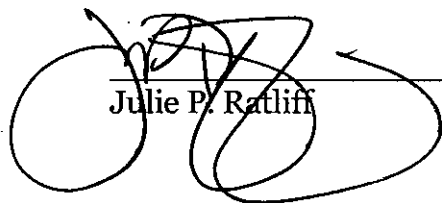
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### **CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record for Appellees Larry Black and The Mississippi Department of Transportation certifies that the following listed persons have an interest in the outcome of this case. This representation is made in order that the Justices of the Supreme Court and/or Court of Appeals may evaluate possible disqualification or recusal.

1. Belevia Potts ("Potts"), Appellant;
2. Yancy Burns and Carolyn Moore of The Crawley Law Offices, PLLC, counsel for Appellant;
3. Larry Black, Appellee;
4. The Mississippi Department of Transportation ("MDOT"), Appellee;
5. G. Todd Burwell and Julie P. Ratliff of Latham & Burwell, PLLC, counsel for Appellees; and
6. Hon. Joseph H. Loper, Jr, Circuit Court Judge, District 5

So certified, this the 29<sup>th</sup> day of August, 2008.

  
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Julie P. Ratliff

## TABLE OF CONTENTS

### Page No.

CERTIFICATE OF INTERESTED PERSONS.....	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES.....	iii
I. SUMMARY OF ARGUMENT.....	1
II. STATEMENT OF THE CASE.....	2
A. Nature of the Case.....	2
B. Statement of Facts, Course of Proceedings, and Disposition of Case.....	2
1. Statement of Facts Supported by Record.....	2
2. Course of Proceedings and Disposition of Case.....	9
III. ARGUMENT.....	11
A. Standard of Review and Legal Standard.....	11
B. The Lower Court's Judgment was Correct.....	12
1. There was insufficient evidence to establish the necessity of a future knee replacement procedure.....	13
2. Potts failed to clearly establish loss of wage earning capacity.....	14
3. The trial court's assessment of Potts' alleged non-pecuniary damages was reasonable.....	17
4. The trial court's denial of Potts' eleventh-hour request for a continuance was fair and reasonable.....	19
IV. CONCLUSION.....	22
CERTIFICATE OF SERVICE.....	23

## **TABLE OF AUTHORITIES**

<b>CASES</b>	<b>PAGE NO.</b>
<i>American Fire Protection, Inc. v. Lewis</i> , 653 So.2d 1387 (Miss. 1995).....	12
<i>Barnett, et al v. Lauderdale County Board of Supervisors</i> , 880 So.2d 1085 (Miss.Ct.App. 2004).....	11, 12
<i>Bender v. North Meridian Mobile Home Park</i> , 636 So.2d 385 (Miss. 1994).....	20
<i>Casey v. Texgas Corp.</i> , 361 So.2d 498 (Miss. 1978).....	15, 17
<i>Cherry v. Hawkins</i> , 243 Miss. 392, 137 So.2d 815 (1962).....	19
<i>City of Greenville v. Jones</i> , 925 So.2d 106, 109 (Miss. 2006).....	12
<i>City of Jackson v. Brister</i> , 838 So.2d 274 (Miss. 2003).....	12
<i>City of Jackson v. Lipsey</i> , 834 So.2d 687 (Miss. 2003).....	12
<i>City of Newton v. Lofton</i> , 840 So.2d 833 (Miss.Ct.App. 2003).....	11, 12
<i>Cox v. International Harvester</i> , 221 So.2d 924 (Miss. 1969).....	15
<i>Dedeaux v. Pellerin Laundry, Inc.</i> , 947 So.2d 900 (Miss. 2007).....	13
<i>Dew v. Langford</i> , 666 So.2d 739 (Miss. 1995).....	20
<i>Dogan v. Hardy</i> , 587 F.Supp. 967 (N.D.Miss. 1984).....	15
<i>Holmes County Bank &amp; Trust Co. v. Staple cotton Cooperative Association</i> , 495 So.2d 447 (Miss. 1986).....	13
<i>Jackson Public School Dist. v. Smith</i> , 875 So.2d 1100 (Miss.App.2004).....	17
<i>Jones v. Mississippi Transp. Comm'n.</i> , 920 So.2d 516 (Miss. 2003).....	15
<i>Kight v. Sheppard Bldg. Supply, Inc.</i> , 537 So.2d 1355 (Miss. 1989).....	11
<i>Kitchens v. Jerry Vowell Logging</i> , 874 So.2d 456 (Miss.Ct.App.2004).....	15
<i>Morgan v. Greenwaldt</i> , 786 So.2d 1037 (Miss. 2001).....	22
<i>Motorola Communications &amp; Elecs., Inc. v. Wilkerson</i> , 555 So.2d 713 (Miss. 1989).....	13

<i>Odom v. Roberts</i> , 606 So.2d 114 (Miss. 1992).....	13
<i>Phillips v. Miss. Dept. of Public Safety</i> , 978 So.2d 656 (Miss.Ct.App. 2008).....	12
<i>Pool v. Pool</i> , 2008 WL 131713 (Miss.App.2008).....	19
<i>Scott v. State</i> , 878 So.2d 933 (Miss. 2004).....	20
<i>Smith v. State</i> , 572 So.2d 847 (Miss. 1990).....	12
<i>Univ. of Miss. Med. Ctr. v. Pounders</i> , 970 S.2d 141 (Miss. 2007).....	11
<i>Watts v. Pennington</i> , 598 So.2d 1308 (Miss. 1992).....	19
<i>Williams v. State</i> , 684 So.2d 1179 (Miss. 1996).....	20
<i>Woods v. Nichols</i> , 416 So.2d 659 (Miss. 1982).....	17, 18, 19

## **STATUTORY PROVISIONS**

Miss. Code Ann. Sections 11-41-1 <i>et seq</i> (Rev. 2004).....	12
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## **OTHER**

25A C.J.S. Damages Section 162(8)b (1966).....	15
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## **I. SUMMARY OF THE ARGUMENT**

The lower court's ruling as to Potts' claims from the June 16, 2003, incident (the "Incident") was supported by substantial, credible and reasonable evidence. Potts' medical treatment was spotty at best, and her medical records do not indicate a good-faith attempt to participate in physical therapy. Her own expert, Dr. Todd Smith ("Smith"), repeatedly (and only) acknowledged odds were "more likely than not" or "more than fifty percent (50%)" that Potts would need a total knee replacement.

Smith discharged Potts with no work restrictions and no impairment rating. Potts was unemployed at the time of the Incident. No vocational expert was produced to support a claim for lost wages or loss of earning capacity, and even Potts' own testimony regarding "pre-incident" income was for a time period ten (10) years prior to trial (1997). Potts has not applied for workers' compensation benefits or disability, and testified she was not in any danger of losing her current job with the school district.

The trial court: had reviewed the file prior to trial; heard and reviewed a four (4) year span of medical records, the majority of which indicated Potts was ambulatory, and had a full range of motion relating to her knee; heard both counsel's lengthy examinations of Potts' only expert, Smith; examined Smith himself; heard testimony from both (original) plaintiffs in this case; reviewed the trial exhibits during recess after closing arguments; took ample time in making its decision; and made a detailed record of the basis for its award. Further, the trial court properly denied Potts' last-minute request for a continuance, as the case had been pending for almost four (4) years, Potts had petitioned the court for a trial date, Potts had entered into an Agreed Order setting

the October trial; and Potts had announced to the trial court she was present and ready to proceed with trial on October 22, 2007.

The focus of Potts' argument is misplaced, and is merely an attempt to divert this Court's attention from the fact that much of her argument is through unsupported statements and mere allegations. In the end, the trial court's decision has ample support in the record, through testimony, medical records and exhibits, and should be upheld.

## **II. STATEMENT OF THE CASE**

### **A. Nature of the Case**

This is an appeal of the Attala County Circuit Court's October 22, 2007, ruling awarding Potts a judgment against Appellees in the amount of \$32,502.82 (\$28,502.82 for actual medical expenses incurred and \$5,000.00 for pain and suffering). The trial court's ruling related to the Incident wherein a rock was thrown from a lawnmower being operated by MDOT, and cracked the window of the van in which Potts was riding. Potts' claimed she hit her right knee upon the dashboard when the driver, Innies Carter ("Carter"), slammed on the brakes after the rock hit the van, and sought relief concerning her damages arising from same.

### **B. Statement of Facts, Course of Proceedings, and Disposition of Case**

#### **1. Statement of Facts Supported by the Record**

The trial court had read the file prior to commencement of the October 22, 2007, trial. (Rec. Vol. 2 of 2, Page 2, Lines 24-25). Potts was present and ready to proceed with her case against Defendants. (*Id.* at Lines 10-12 and 18-21; Page 5 at Lines 21-23).

The parties stipulated to liability. (*Id.* at Page 3, Lines 1-2). Specifically, the

parties stipulated to MDOT's liability for a rock, or rocks, that were slung from under a bush hog that went in, or penetrated, the plaintiff Innie Carter's vehicle. (*Id.* at Lines 2-5). Potts was a passenger in Carter's vehicle when the incident occurred. (*Id.* at Lines 5-7).

The only issue for the trial court's consideration was whether Potts' knee problems were caused by the June 16, 2003, incident. (*Id.* at Lines 9-17).

Potts was unemployed at the time of the June 16, 2003, incident. (Trial Exhibit D-3, Potts' Response to Interrogatory No. 14 and Rec. Vol. 2 of 2, Page 65, Line 29 and Page 66, Lines 1 and 12-20).

Potts claimed the following specific damages from the June 16, 2003, incident in her Complaint: (a) past, present and future medical expenses; (b) past, present and future physical pain and suffering; (c) past, present and future mental and emotional distress; (d) inconvenience and discomfort; (e) past, present and future lost wages/income; and (f) any and all property damage. (Rec. Vol. 2 of 2, Complaint, ¶ 5).

On June 16, 2003, Potts went to Montfort Jones Memorial Hospital after the Incident for treatment. (Trial Exhibit D-1, Tab 1, Bates Pages 0067-0077). There was no evidence of trauma and no abnormalities identified. (*Id.*)

On June 19, 2003, Potts went to North Mississippi Medical Clinics ("NMM Clinics"). (*Id.* at Tab 2, Bates Page 0080). No swelling of her legs was noted. (*Id.*)

On June 26, 2003, Potts went to NMM Clinics. (*Id.* at Tab 3, Bates Page 0081). NMM Clinics file noted Potts had been treated in the clinic on prior occasions prior to the incident for right knee pain. (*Id.*) Potts was ambulatory with a steady gait, no limp, and full range of motion of her right knee. (*Id.*)

On July 15, 2003, Potts went to the Mississippi Sports Medicine & Orthopaedic Clinic ("MS Sports Med") at the request of the Crawley Law Office. (*Id.* at Tab 4, Bates Pages 0078-0079 and MDOT 0007-0012). Potts had a full range of motion of her right knee, which was also found to be stable. (*Id.*) MS Sports Med's Dr. Shelton specifically found the degenerative arthritis in Potts' right knee superseded the Incident, and that if Potts did not loose weight, she would be looking at a knee replacement very young in life. (*Id.*)

On July 18, 2003, Potts went to NMM Clinics to follow up on her arthritis in her right knee. (*Id.* at Tab 5, Bates Page 0082).

On July 18, 2003, Potts went to the Ackerman Family Medical Clinic, where her diagnosis was noted as arthritis of the right knee. (*Id.* at Tab 6, Bates Page 0145).

On July 24 and 28, 2003, Potts went to GT Physical Therapy. (*Id.* at Tab 7, Bates Page 0141 and Tab 8, Bates Page 0142).

On August 6, 2003, Potts went to GT Physical Therapy, where she had a normal gait and stated she had no new complaints— her knee had been doing very well. (*Id.* at Tab 9, Bates Page 00143).

On August 14, 2003, Potts went to GT Physical Therapy, and was discharged with her file noting she no longer complained of pain in her right knee. (*Id.* at Tab 10, Bates Page 0144). Potts' gait was normal, her posture was upright without deviation, and she showed no signs of pain during manual muscle testing. (*Id.*)

On **November 5, 2003**, Potts went to MS Sports Medicine & Orthopaedic Clinic due to her left knee beginning to hurt while her right one was still giving her a good bit of trouble. (*Id.* at Tab 15, Bates Pages MDOT 0005-0006). Potts was assessed

to have degenerative arthritis in both knees, and instructed to lose at least 100 pounds. (*Id.*)

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On **June 26, 2006**, Potts had her first appointment with Smith, who noted Potts had a full range of motion on her right knee and early degenerative changes could be seen. (*Id.* at Tab 24, Bates Page 0122).

On July 5, 2006, Potts saw Smith, who sent her to physical therapy, noting she could return to him as scheduled. (*Id.* at Tab 26, Bates Pages 0121 & 134).

From July 6, 2006, through August 15, 2006, Potts's medical records show approximately six (6) to seven (7) visits to GT Physical Therapy. (*Id.* at Tab 27, Bates Page 0133 and Tab 28, Bates Page 0132).

On August 16, 2006, Potts returned to Smith for follow up on her right knee, and scheduled surgery for September 14, 2006. (*Id.* at Tab, Bates Page 0119).

On September 14, 2006, Smith performed surgery on Potts' right knee and issued a post-operative diagnosis of ACL-deficient knee, chondromalacia, and medial meniscus tear. (*Id.* at Tab 31, Bates Pages 00029-0030, 0065-0066, and -135-0136).

On September 18, 2006, Smith saw Potts post-op for follow up on a right knee arthroscopy with ACL reconstruction using allograft and a partial medial meniscectomy. (*Id.* at Tab 32, Bates Pages 0117-0118). Potts told Smith she was doing well, and denied any complaints. (*Id.*) Smith noted Potts' incisions were healing well, and she had minimal effusion. (*Id.*) Smith referred Potts to physical therapy. (*Id.* at Bates Page 0131).

On September 19, 2006, Potts went to Starkville Physical Therapy ("Starkville PT"). (*Id.* at Tab 33, Bates Page 0130). Starkville PT recommended Potts be treated three (3) times a week for four (4) weeks. (*Id.*)

On October 10, 2006, Potts went to Starkville PT, at which time her treatment recommendation was changed to two (2) times a week for four (4) weeks. (*Id.* at Tab 34, Bates Page 0129).

On October 11, 2006, Potts returned to Smith, at which time she stated she was doing well and denied any complaints. (*Id.* at Tab 35, Bates Pages 0014-0015). Pott's only request was when she could return to work. (*Id.*) Smith's examination noted Potts had a stable Lachman with no motor or sensory deficits. (*Id.*)

On November 17, 2006, Potts returned to Starkville PT. (*Id.* at Tab 36, Bates Page 0128). The record indicates a total of fourteen (14) visits, and that Potts was pleased with the functional abilities she had regained since Smith's surgery. (*Id.*) Potts was ambulatory with a normal gait pattern with minimal verbal cues, was able to perform straight leg raises without a quad lag, and had normal patellar MOB of the right knee. (*Id.*)

On November 20, 2006, Potts returned to Smith, at which time she stated she was doing well overall and denied any complaints. (*Id.* at Tab 37, Bates Pages 0112-0113). Potts had been able to return to work, and had already been discharged from physical therapy with a home exercise program. (*Id.*) Potts informed Smith's office she was satisfied overall. (*Id.*) Smith stressed the importance of her home exercise program to her at this appointment, as well. (*Id.*)

On December 11, 2006, Potts returned to Starkville PT for visit fifteen (15). (*Id.*)

at Tab 38, Bates Page 0127). Potts reported she was continuing to improve in her balance, stability, and ability to ascend/descend steps. (*Id.*)

On January 24, 2007, Potts returned to Smith, at which time he discharged her. (*Id.* at Tab 39, Bates Page 0111). Potts told Smith she was doing well overall, and had been able to return to work without any difficulty. (*Id.*) Smith placed no work restrictions or impairment ratings on Potts. (Rec. Vol. 2 of 2, Page 41 at Lines 28-29 and Page 29 at Lines 1-5).

On August 6, 2007, Potts returned to Smith, approximately one (1) year out from Smith's surgery. (Trial Exhibit D-1 at Tab 40, Bates Pages 0109-0110). Smith noted Potts had a stable Lachman, and recommended visco supplementation treatment. (*Id.*)

On September 10, 2007, Potts returned to Smith for her first visco supplementation injection. (*Id.* at Tab 41, Bates Pages 0107-10108). The record notes no motor or sensory deficits. (*Id.*)

On September 17, 2007, Potts got her second visco supplementation injection. (*Id.* at Tab 42, Bates Pages 1015-1016). Potts denied any complaints at the time, and showed no motor or sensory deficits. (*Id.*)

On September 25, 2007, Potts got her third visco supplementation injection. (*Id.* at Tab 43, Bates Pages 0103-1014).

On October 1, 2007, Potts got her fourth visco supplementation injection, and reported she had fallen over the previous weekend. (*Id.* at Tab 44, Bates Pages 0101-0102). Potts showed no signs of motor or sensory deficits. (*Id.*)

On October 8, 2007, Potts returned for her fifth, and final, visco supplementation injection. (*Id.* at Tab 45, Bates Pages 0097-0098). Potts showed no signs of motor or

sensory deficits. (*Id.*)

On October 17, 2007, Potts went not to Smith, but to Eupora Family Medical Clinic, where she presented chronic pain in the lower back and right knee and reported she had undergone surgery on her right knee for torn ligaments. (*Id.* at Tab 46, Bates Pages 0093-0096). Potts received multiple new medications and/or prescriptions at this visit, and was, ultimately, referred back to Smith. (*Id.*)

At trial on October 22, 2007, Potts put on evidence through the testimony of 3 witnesses: Smith; Carter; and herself. (Rec. Vol. 2 of 2, Pages 6-59; Pages 59-105; and Pages 105-108, respectively). Smith had no true knowledge of Potts' medical history from before the Incident. (*Id.* at Pages 8, Lines 8-12; Page 32, Lines 3-6; and Page 36, Lines 18-26).

Smith confirmed chondromalacia and patella femoral syndrome are recognized to encompass a large group of medical conditions that do not necessarily have a specific explanation of a patient's pain, and that other things could explain a patient's pain (i.e.: bursitis, overuse, malignment, and core instability). (*Id.* at Pages 38, Lines 26-29 and Page 39, Lines 1-8).

Smith testified he typically provides two (2) different options to patients who return to him feeling like the series of injections has not improved their pain: intermittent injections of anti-inflammatory or a total knee replacement. (*Id.* at Pages 18-19, Lines 27-29 and 1-3). Smith assessed Potts' likelihood of needing an additional surgery to be only "more than 50%" or "more likely than not." (Trial Exhibit P-1, Smith's Deposition Page 17, Lines 15-21 and Rec. Vol. 2 of 2, Pages 19, Lines 17-29 and Page 20, Lines 1-2).

Smith was, however, unable to assign the Incident as the only possible cause for any additional surgery Potts may have to have, stating “I think it’s a multifactorial cause, meaning I don’t think there’s one specific cause. It could be related to her obesity. It could be genetic predisposition. It could be her altered mechanics inside of her knee due to her ligamentous tear. I just don’t think you can assign one specific cause.” (Trial Exhibit P-1, Smith’s Deposition at Pages 28-29, Lines 17-25 and 1-3). Such other factors include diabetes, heart disorders, thyroid disorders, and family history. (Rec. Vol. 2 of 2, Page 21, Lines 4-6). Smith’s testimony confirmed it was possible, over the course of Potts’ life, due to her obesity and other health issues, her problems with her right knee could have independently developed over time. (*Id.* at Page 44, Lines 2-8). Smith also confirmed his patients who complained of constant pain— pain affecting and impacting daily life— usually returned to see him much sooner than four (4) to six (6) to twelve (12) months between visits. (*Id.* at Page 44, Lines 16-23).

Following lengthy examination by both counsel, the trial court independently questioned Smith regarding his treatment and assessment of Potts. (*Id.* at Pages 54-57). During the trial court’s examination, Smith, again, verified he could not definitively state his treatment/surgery of Potts was required because of the Incident. (*Id.* at Pages 55, Lines 19-29 and Page 56, Lines 1-27).

Smith released Potts— without any work restrictions or an impairment rating— on January 24, 2007, discharging her back to work, to return to him as she felt like she needed to. (*Id.* at Pages 21, Lines 18-22; Page 22, Lines 1-2; Page 41, Lines 28-29; and Page 41, Lines 1-5.)

## **2. Course of Proceedings and Disposition of Case**

Potts filed her Complaint on September 24, 2004. (Rec. Vol. 1 of 2, Page i of Attala County Circuit Clerk's Index). Defendants filed their Answer and Defenses on October 22, 2004. (*Id.*) Potts filed her Motion for Trial Setting on March 22, 2007. (*Id.*)<sup>1</sup> An Agreed Order Setting Trial was entered on April 11, 2007. (*Id.* at Page iv and Footnote 1). Potts filed her Motion for Continuance of the October 22, 2007, trial date on October 18, 2007. (*Id.* at iii and Footnote 1) A telephonic hearing was held on Potts' Motion for Continuance, which was denied, same being memorialized in the trial court's Order Denying Motion for Continuance entered on October 22, 2007. (*Id.* at iv and Footnote 1)

Trial commenced on October 22, 2007, at which time Potts' confirmed she was present and ready to proceed. (Rec. Vol. 2 of 2, Page 2, Lines 10-12 and 18-21). Potts did not renew her motion and/or request for a continuance of the trial. (*Id.*) At trial, Potts put on evidence through the testimony of 3 witnesses: Carter; and herself. (*Id.* at Pages 6-59; Pages 59-105; and Pages 105-108, respectively).

Trial recessed following closing arguments, and, upon his return the trial judge issued his ruling based upon (1) the testimony heard during trial and (2) review of all the exhibits that had been submitted. (*Id.* at Page 118, Lines 22-26). The trial court awarded Potts a judgment of \$32,502.82, which was comprised of \$28,502.82 for actual

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<sup>1</sup> The undersigned filed her Notice of Compliance with Rule 10(b)(5) on March 5, 2008, stating she believed the trial transcript to be incomplete. The trial transcript was later supplemented, but still contains errors such as the date of the trial (listed at March 12, 2007) and the date of certification (listed as February 27, 2004). Potts also referenced and relied upon her Motion for Continuance filed on October 18, 2007, and the trial court's ruling/order denying same in her Brief. (See Potts' Brief at Page 1). Neither of these items were designated by Potts as part of the appellate record. Based upon the ongoing errors to the trial transcript and Potts' utilization of pleadings not initially designated in the record, the parties have entered into, executed and filed a Stipulation of Supplementation of Record, with Exhibit A (Motion for Trial Setting); Exhibit B (Agreed Order Setting Trial); Exhibit C (Motion for Continuance); and Exhibit D (Order Denying Motion for Continuance) attached thereto and incorporated therein.

medical expenses incurred and \$5,000.00 for pain and suffering. (*Id.* at Page 119, Lines 17-20). The trial court refused to award any future medical or lost earnings, and found Potts' need for future surgery to be totally speculative. (*Id.* at Page 119, Lines 20-24). A Final Judgment was issued by the trial court on November 13, 2007, and filed of record with the clerk of the court on November 30, 2007. (Rec. Vol. 1 of 2, Page iv of Attala County Circuit Clerk's Index).

Potts filed her Motion for New Trial and/or Amendment of Judgment on or about December 7, 2007. (*Id.* at iii and Footnote 1). The trial court issued its Order Denying Motion for New Trial and/or Amendment of Judgment on December 12, 2007, same being filed of record with the clerk of the court on December 14, 2007. (*Id.* at iv and Footnote 1). Potts filed her Notice of Appeal in this matter on January 7, 2008. (*Id.* at iii).

### **III. ARGUMENT**

#### **A. Standard of Review and Legal Standard**

"In bench trials, a circuit judge's findings are subject to the same standard of review as those of a chancellor." *Univ. of Miss. Med. Ctr. v. Pounders*, 970 S.2d 141, 145 (Miss. 2007)(citing *Kight v. Sheppard Bldg. Supply, Inc.*, 537 So.2d 1355, 1358 (Miss. 1989)). The reviewing court "must consider the entire record and is obligated to affirm where there is substantial evidence in the record to support the trial court's findings." *Barnett, et al v. Lauderdale County Board of Supervisors*, 880 So.2d 1085, 1088 (Miss.Ct.App. 2004)(citing *City of Newton v. Lofton*, 840 So.2d 833, 835-36 (Miss.Ct.App. 2003)). "The findings of fact by a circuit court judge, sitting without a jury, will not be reversed on appeal where they are supported by substantial, credible,

and reasonable evidence.” *Phillips v. Miss. Dept. of Public Safety*, 978 So.2d 656, 660 (Miss.Ct.App. 2008) (citing *City of Greenville v. Jones*, 925 So.2d 106, 109 (Miss. 2006)(internal citations omitted)). In short, the lower court’s ruling “will not be disturbed unless the judge abused his discretion, was manifestly wrong, clearly erroneous or an erroneous legal standard was applied.” *Barnett*, 880 So.2d at 1088 (quoting *City of Newton*, 840 So.2d at 833).

Errors of law, including the proper application of the Mississippi Tort Claims Act (“MTCA”), Miss. Code Ann. sections 11-41-1 *et seq.* (Rev. 2004), are reviewed *de novo*. *Id.* (citing *City of Newton*, 840 So.2d at 836). See *Phillips*, 978 So.2d at 660 (citing *City of Jackson v. Brister*, 838 So.2d 274, 278 (Miss. 2003)). Additionally, “the trial judge, sitting in a bench trial as the trier of fact, has the sole authority for determining the credibility of the witnesses.” *Id.* (citing *City of Jackson v. Lipsey*, 834 So.2d 687, 691 (Miss. 2003)). And, “where there is conflicting evidence, this Court must give great deference to the trial judge’s findings.” *Id.*

This Court, however, “may not act upon or consider matters which do not appear in the record and must confine itself to what actually does appear in the record.” *American Fire Protection, Inc. v. Lewis*, 653 So.2d 1387, 1391 (Miss. 1995)(internal citations omitted). “As a matter of fact, it is an appellant’s duty to justify his arguments of error with a proper record, which does not include mere assertions in his brief, or the trial court will be considered correct. *Id.* (citing *Smith v. State*, 572 So.2d 847, 849 (Miss. 1990)).

## **B. Lower Court’s Judgment Was Correct**

**1. There was insufficient evidence to establish the necessity of a future knee replacement.**

Even if you view the evidence in the light most favorable to Potts, she did not meet her burden.<sup>2</sup> Potts did not prove the need for a future knee replacement by either reasonable evidence or reasonable certainty. The only evidence Potts presented regarding a total knee replacement was Smith, who testified in both his deposition and at trial that Potts' likelihood of needing such a surgery was "more than fifty percent (50%)" or "more likely than not." (Trial Exhibit P-1, Smith's Deposition Page 17, Lines 15-21 and Rec. Vol. 2 of 2, Page 19, Lines 17-29 and Page 20, Lines 1-2). The only other medical evidence supporting the need for a knee replacement surgery was from Dr. Shelton of MS Sports Med, who in July of 2003, determined Potts' degenerative arthritis in her right knee superseded the Incident, and that if Potts did not loose weight, she would be looking at a knee replacement very young in life. (Trial Exhibit D-1, Tab 4, Bates Pages 0078-0079 and MDOT 0007-0012).

Potts then alleges the trial court was in some way tainted by considering "Potts' ongoing medical treatment." (Potts' Brief at Page 9). The trial court's consideration of Potts' ongoing medical treatment was a requisite. A trial judge should consider the totality of the evidence before him in making his award. *Homes County Bank & Trust Co. v. Staple Cotton Cooperative Association*, 495 So.2d 447, 451 (Miss. 1986). In its ruling, the trial court specifically noted it based its decision on (1) the testimony heard during trial and (2) review of all of the exhibits that had been submitted during trial.

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<sup>2</sup>Potts cites *Odom v. Roberts*, 606 So.2d 114, 118 (Miss. 1992) as her primary source for this standard. *Odom* was overruled on other grounds by *Dedeaux v. Pellerin Laundry, Inc.*, 947 So.2d 900 (Miss. 2007), but the internal citation, *Motorola Communications & Elecs., Inc. v. Wilkerson*, 555 So.2d 713, 723 (Miss. 1989), and the cited standard itself are good and correct.

(Rec. Vol. 2 of 2, Page 118, Lines 22-26). Clearly, the trial court reviewed the totality of the evidence before it, and Potts' allegation that the "uncontradicted proof that [she] would *require* a total knee replacement within her life expectancy" is an incorrect summary of Dr. Shelton's findings and Smith's testimony. (Potts' Brief at Page 10)(emphasis added). "More than fifty percent (50%)" and "more likely than not" do not equal a required need.

Potts began visco supplementation injections with Smith on September 10, 2007. (Trial Exhibit D-1 at Tab 40, Bates Pages 0109-0110). Potts then had additional injections on: September 17, 2007; September 25, 2007; October 1, 2007; and October 8, 2007. (Id. at Tab 42, Bates Pages 1015-1016; Tab 43, Bates Pages 0103-1014; Tab 44, Bates Pages 1010-1012; and Tab 45, Bates Pages 0097-0098). Further, Potts did not have any credible evidence as to the cost of the alleged total knee replacement, as Smith did not testify at trial regarding what his costs would be, and specifically stated in his deposition he did not know what the costs would be. (Rec. Vol. 2 of 2, Smith's Deposition at Page 75, Lines 13-16). Potts, herself, admitted she had not checked on what the costs of a knee replacement surgery would be. (Id. At Page 75, Lines 10-12). If Potts— or Smith since she was seeing him again— had any reservation that there may be some question regarding proceeding with the agreed trial date of the October 22, 2007, Potts had more than ample time to do so prior to than the Thursday before the Monday trial.

**2. Potts failed to clearly establish loss of wage earning capacity.**

As previously stated, Mississippi appellate courts will not disturb a trial judge's findings upon review if same are supported by substantial, credible and reasonable

evidence. *Jones v. Mississippi Transp. Comm'n*, 920 So.2d 516, 518(¶ 11) (Miss.2003).

Stated alternatively, the appropriate standard of review for this issue is whether the trial judge abused his discretion, was manifestly wrong, clearly erroneous or applied an erroneous legal standard. (*Id.*)<sup>3</sup>

The general principle for establishing a loss of earning capacity claim, as found in the *Corpus Juris Secundum*, and cited in its entirety by the Mississippi Supreme Court in *Casey v. Texgas Corp*, is as follows:

A claim for damages for a lost or diminished earning capacity must be supported by satisfactory proof of the fact of such impairment, the extent thereof, and, in the case of a claim for permanent impairment of earning power, by satisfactory evidence of the permanency of the injury; and the proof should be made by the best evidence available. Proof with certainty or mathematical exactness is not required, nor need the proof be clear and indubitable; but *such damages must be established by substantial evidence and cannot be left to mere conjecture.*

*Casey v. Texgas Corp.*, 361 So.2d 498, 499 (Miss.1978), citing 25A C.J.S. Damages §162(8)b at 103-104 (1966) (*emphasis added*).<sup>4</sup> In *Casey*, the Supreme Court noted the, "[d]ecisions of this Court previously have held that, in order to recover for permanent loss of wage-earning capacity, there must be a showing of permanent physical impairment." (*Id.*) The main issue here is, therefore, whether the trial judge abused his discretion in choosing not to award damages for loss of future earning capacity; the record supports he did not.

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<sup>3</sup>*Kitchens v. Jerry Vowell Logging*, 874 So.2d 456 (Miss.Ct.App.2004) and *Cox v. International Harvester*, 221 So.2d 924, 927 (Miss.1969), which are cited and discussed in Appellant's brief, involve loss of wage earning capacity analyses within the framework of the Mississippi Workers' Compensation statutory scheme and are inapplicable to the issues before this Court.

<sup>4</sup>Appellant incorrectly cites to *Dogan v. Hardy*, 587 F.Supp. 967, 970 (N.D. Miss. 1984). This case is not on point and in fact does not discuss the issues before this Court. The appropriate citation, and the case from which the first two paragraphs of Appellant's brief are taken, is *Casey v. Texgas Corp.*, 361 So.2d 498, 499 (Miss.1978).

In electing not to award damages for loss of earning capacity, the trial judge considered all the evidence, including the testimony of Smith and Potts, and decided Potts' claim for a loss of earning capacity was purely speculative. (Record Vol. 2 of 2, Page 119, Lines 16-29). The trial court directly addressed this issue with Potts' counsel during Potts' direct examination. (*Id.* at Pages 65-69). Even after this exchange, however, Potts failed to offer any testimony as to how the injury at issue affected her future capacity to earn.

In fact, the trial court noted, and Potts' counsel agreed, Potts' own expert never testified regarding any loss of earning capacity. (Record Vol. 2 of 2, Page 68, Lines 5-11). Smith also testified that he never restricted her ability to work. (Record Vol. 2 of 2, Page 41, Lines 28-29; Page 42, Lines 1-2). And even assuming, *arguendo*, Smith had given Potts some work restrictions, they would have existed regardless due to Potts' other, clearly non-causally related health related issues, such as anemia and obesity. (Record Vol. 2 of 2, Page 54-57; Page 68, Lines 15-29). Potts failed to present any evidence regarding her future abilities and/or work options, as no vocational reports, information and/or experts were presented at trial. Further, the only "income" testimony was lay testimony from Potts regarding her occupation in 1997...a time period six (6) years prior to the Incident and a full decade prior to trial. (Rec. Vol. 2 of 2, Page 72, Lines 2-22). Add that to the fact Potts was unemployed at the time of the Incident, and Potts truly presented no credible, reasonable evidence regarding an alleged loss in earning capacity. (Trial Exhibit D-3, Potts' Response to Interrogatory No. 14 and Rec. Vol. 2 of 2, Page 65, Line 29 and Page 66, Lines 1 and 12-20).

Whether Potts established a loss of earning capacity claim is a question of fact,

and the trial judge is charged with making this determination in a claim brought under the MTCA. Furthermore, the amount of: physical injury; mental and physical pain, present and future; temporary and permanent disability; medical expenses; loss of wages and wage-earning capacity; and the sex, age and health of the injured plaintiff are all variables to be considered by the fact-finder in determining the amount of damages awarded. *Woods v. Nichols*, 416 So.2d 659, 671 (Miss.1982). As a general rule in Mississippi, appellate courts affirm trial judges on fact questions unless, based upon substantial evidence, the court was manifestly wrong. *Jackson Public School Dist. v. Smith*, 875 So.2d 1100 (Miss.App.2004).

In an effort to divert this Court's attention from the lack of requisite evidence, Potts next argues the trial judge applied the inappropriate standard of "mathematical certainty," and failed to weigh the sufficiency of the loss of earning capacity evidence accordingly. (Potts' Brief, Pages 11-12). Based on the Mississippi Supreme Court's ruling in *Casey v. Texgas Corp.*, Potts was not required to establish her claim to a mathematical certainty, but proof of such damages must rise above the level of speculation. *Casey v. Texgas Corp.*, 361 So.2d at 499. As discussed above, and as evidenced by the record, Potts failed to meet this burden, and the trial court based its decision on the evidence, or lack thereof, presented at trial.

**3. The trial court's assessment of Potts' alleged non-pecuniary damages was reasonable.**

Potts also attempts to make the "points at issue" appear larger by separating out the trial court's assessment of Potts alleged non-pecuniary damages. As previously noted in *Woods*, there are multiple factors to be considered when a fact-finder

determines a damage award. *Woods*, 416 So.2d at 671. The trial court considered all of these factors in his computation of the \$32, 502.82 award.

The trial court's award is more than reasonable in light of the aforementioned *Woods* factors. **Physical injury:** Potts' medical records with regard to her claim are spotty at best, and repeatedly show she denied complaints and was ambulatory with a steady gait. (Trial Exhibit D-1 at Tab 3, Bates Page 0081; Tab 9, Bates Page 00143; Tab 10, Bates Page 0144; Tab 35, Bates Pages 0014-0015; Tab 36, Bates Page 0128; Tab 37, Bates Pages 0012-0013; Tab 38, Bates Page 0127; and Tab 39, Bates Page 0111).

**Mental and physical pain:** Again, Potts' medical records are not consistent over the almost four (4) years since the Incident, and Potts repeatedly denied complaints. *Id.*

**Temporary and Permanent disability:** Potts was unemployed at the time of the Incident. (Trial Exhibit D-3, Potts' Response to Interrogatory No. 14 and Rec. Vol. 2 of 2, Page 65, Line 29 and Page 66, Lines 1 and 12-20). Smith released Potts without any work restrictions or an impairment rating. (Trial Exhibit P-1, Smith's Deposition at Pages 21, Lines 18-22; Page 22, Lines 1-2; Page 41, Lines 28-29; and Page 41, Lines 1-5). Potts never made a claim for workers' compensation or disability benefits in relation to the Incident. (Trial Exhibit D-3, Potts' Responses to Interrogatory Nos. 19, 23, and 24). Potts was not in danger of losing her job with the school district. (Rec. Vol. 2 of 2 at Page 75, Line 29 and Page 76, Lines 1-2). **Medical expenses:** The trial court's award was for the full amount of proven medical expenses as of the date of the trial. (*Id.* at Page 119, Lines 16-18). **Loss of wage earning and wage-earning capacity:** (See the above Section 2). **Sex, age and health of plaintiff:** At all times relevant hereto, Potts was obese. (Trial Exhibit D-1 at Tab 4, Bates Pages 0078-0079 and MDOT 0007-

0012 and Tab 15, Bates Pages MDOT 0005-0006; Trial Exhibit P-1, Smith's Deposition at Pages 28-29, Lines 17-25 and 1-3; and Rec. Vol. 2 of 2 at Page 117, Lines 9-10). Her own expert's testimony was that it was possible, over the course of Potts' life, due to her obesity and other health issues, such as diabetes, heart disorders, thyroid disorders, and family history, her problems with her right knee could have independently developed over time. (Trial Exhibit P-1, Smith's Deposition at Page 44, Lines 2-8 and 16-23).

*Woods*, 416 So.2d at 671.

In short, any way you look at Potts' medical records, the trial transcript and the trial exhibits, the trial court's award was reasonable, and took into consideration all of the relevant factors.

**4. The trial court's denial of Potts' eleventh-hour request for a continuance was fair and reasonable.**

As Potts properly notes, whether to grant or deny a motion for continuance is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion resulting in manifest injustice. *Pool v. Pool*, 2008 WL 131714 (Miss.App.2008). Mississippi appellate courts recognize the need of trial judges to control their dockets. *Watts v. Pennington*, 598 So.2d 1308, 1312 (Miss.1992). In *Cherry v. Hawkins*, the Mississippi Supreme court announced, "[we] will not reverse the denial of a continuance unless [we are] satisfied that prejudice resulted." *Cherry v. Hawkins*, 243 Miss. 392, 397, 137 So.2d 815, 816 (1962). Potts' arguments against the trial court's denial of her request for a continuance fail on all grounds.

The trial court held a telephone conference regarding Potts' Motion for Continuance, at which time it overruled the same. (Rec. Vol. 1 of 2, Page iv of Attala

County Circuit Clerk's Index and Footnote 1). An Order Denying Potts' Motion for Continuance was entered on October 22, 2007. (*Id.*) Potts did not timely appeal the October 22, 2007, Order. As such, her appeal on this issue is not properly before this Court. Miss. Rules Civ. Pro. 59 and 60 . Miss. Rules of Appellate Procedures 4 and 5.

Potts filed her Motion for Trial Setting on March 20, 2007, indicating "all discovery [was] complete[] and the matter [was] ready for trial." (Record Vol. 1 of 2, Page i of Attala County Circuit Clerk's Index and Footnote 1). On April 11, 2007, the trial court approved an Agreed Order Setting Trial, which was signed by all counsel. (*Id.* at Page iii and Footnote 1). In *Dew v. Langford*, the Mississippi Supreme Court held the trial court did not abuse its discretion in denying a motion for continuance after the appellant signed an agreed order setting trial. *Dew v. Langford*, 666 So.2d 739, 746 (Miss.1995). As discussed above, not only did Potts sign an Agreed Order Setting Trial, she was also the moving party on the Motion for Trial Setting, filed some seven (7) months prior to the trial date. (*Id.* at Page i and Footnote 1). Accordingly, this Court should affirm the trial court's denial of Potts' Motion for Continuance.

Potts' arguments on this issue are procedurally barred since she did not raise this issue at trial. (Rec. Vol. 2 of 2, Page 2, Lines 10-12 and Lines 18-21). It is well-settled Mississippi law that an issue not presented to the trial court for consideration cannot be raised for the first time on appeal. *Scott v. State*, 878 So.2d 933, 963 (Miss.2004) (citing *Williams v. State*, 684 So.2d 1179, 1203 (Miss.1996)). Failure to raise an issue at the trial court level is a procedural bar to appellate review. *Id.* Mississippi appellate courts will not find error in a trial judge when a matter is not presented to him for decision. *Bender v. North Meridian Mobile Home Park*, 636 So.2d 385 (Miss.1994). In

the case at bar, the trial court never had an opportunity to consider the continuance issues raised in Potts' brief. Accordingly, Potts waived any claims to the continuance issue when she failed to raise it at trial.

Potts' Motion for Continuance informed the trial court of an unresolved issue relating to whether the Incident aggravated her pre-existing knee condition and proximately-necessitated Smith's surgery. (Record Vol. 1 of 2, Motion for Continuance and Footnote 1). Potts urged Smith's recently-retained correspondence set forth a causal connection that would "likely **resolve** the remaining disputed issue in this action." *Id.* Potts' Motion for Continuance made no mention of a loss of wage earning capacity or a possible future knee replacement surgery. (*Id.*)

On the other hand, Potts now claims she was prejudiced by the trial court's denial of her continuance because she "was not permitted to fully develop her claim for loss of wage earning capacity in light of her deteriorating condition and likely future knee replacement." (Potts' Brief, Page 14). This injustice, Potts argues, is "clearly shown" by the trial court's decision not to award damages for the same. (*Id.*) Potts claims she could have presented more specific testimony regarding: (1) the knee replacement surgery; (2) the anticipated recovery therefrom; and (3) the extent to which the surgery would affect her wage earning capacity. (*Id.* at Pages 14-15). The arguments in Potts' brief are neither found in her Motion for Continuance nor can they be reasonably derived therefrom, and the trial court, therefore, never considered same. As such, this Court should summarily affirm the trial court's denial of her Motion for Continuance.

Even assuming, *arguendo*, that Potts properly raised this issue in either her Motion for Continuance or at trial, her arguments fail substantively since she cannot

establish the trial court abused its discretion, resulting in a manifest injustice. In *Morgan v. Greenwaldt*, the appellant argued the trial court abused its discretion by denying her motion for a continuance, thereby preventing her from securing additional evidence to support her claim. *Morgan v. Greenwaldt*, 786 So.2d 1037, 1045 (Miss.2001). In that case, the Mississippi Supreme Court found no prejudice or abuse of discretion when the action was pending for three (3) years prior to the scheduled trial date. *Id.* The facts of the instant case are similar, insofar as Potts filed her Complaint on September 29, 2004, and the trial was held more than three years later on October 22, 2007. (Record Vol. 1 of 2, Page i of Attala County Circuit Clerk's Index). Similarly to *Morgan v. Greenwaldt*, Potts had more than three (3) years from the date of her Complaint to secure all evidence necessary to support her damages claim and this Court should affirm the trial court's denial of her Motion for Continuance.

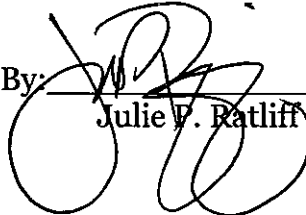
Potts' own expert, Smith, was at trial and failed to testify to anything supporting Potts argument she had, or would have, a loss in earning capacity; Smith only confirmed he had released Potts with no work restrictions and no impairment rating. (Rec. Vol. 2, of 2, Page 41, Lines 28-29 and Page 42, Lines 1-5). In sum, Potts' claim regarding her Motion for Continuance fails both procedurally and substantively, and this Court should affirm the trial court's denial of same.

#### **IV. CONCLUSION**

For the foregoing reasons, the trial court's October 22, 2007, trial ruling and its resulting Judgment should be affirmed and Potts' appeal of same denied.

**RESPECTFULLY SUBMITTED**, on this the 29<sup>th</sup> day of August, 2008.

LARRY BLACK and THE  
MISSISSIPPI DEPARTMENT  
OF TRANSPORTATION

By:   
Julie P. Ratliff

OF COUNSEL:

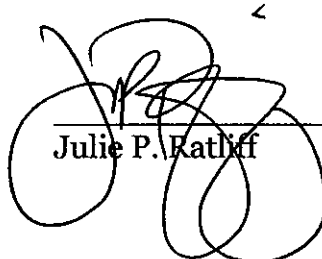
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**CERTIFICATE OF SERVICE**

I, Julie P. Ratliff, one of the attorneys for Appellees Larry Black and the Mississippi Department of Transportation, do hereby certify that I have this day served a true and correct copy of the above and foregoing document by United States Mail, first-class, postage prepaid, to the following:

Yancy B. Burns  
The Crawley Law Offices, PLLC  
P.O. Box 13849  
Jackson, MS 39236-3849

THIS, the 29<sup>th</sup> day of August, 2008.

  
Julie P. Ratliff

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

**BELEVIA POTTS**

**APPELLANT**

**vs.**

**CASE NO. 2008-CA-00092**

**LARRY BLACK and  
MISSISSIPPI DEPARTMENT OF TRANSPORTATION**

**APPELLEES**

**AMENDED CERTIFICATE OF SERVICE**

I, Julie P. Ratliff, one of the attorneys for Appellees Larry Black and the Mississippi Department of Transportation, do hereby certify that I have this day served a true and correct copy of the Brief of Appellees by United States first-class mail, postage prepaid, to the following:

Yancy B. Burns  
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Hon. Joseph H. Loper, Jr.  
Circuit Court Judge  
P.O. Box 616  
Ackerman, MS 39735

THIS, the 2<sup>nd</sup> day of September, 2008.

LARRY BLACK and THE MISSISSIPPI  
DEPARTMENT OF TRANSPORTATION

By: \_\_\_\_\_

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