

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BELEVIA POTTS

APPELLANT

VS.

CAUSE NO. 2008-CA-00092

**LARRY BLACK AND
MISSISSIPPI DEPT. OF TRANSPORTATION**

APPELLEE

BRIEF OF APPELLANT

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

ORAL ARGUMENT REQUESTED

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Dated: May 27, 2008

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CERTIFICATE OF INTERESTED PARTIES

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

- | | |
|---|--|
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SO CERTIFIED this the 27th day of May 2008.

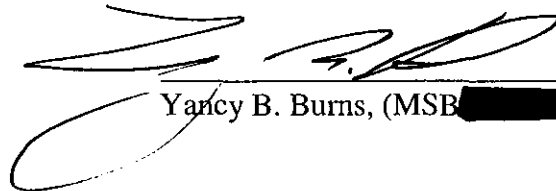

Yancy B. Burns, (MSB [REDACTED])

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I. STATEMENT OF THE ISSUES

The issues for decision before the Court are:

1. Whether the trial court erred in finding that Potts' proof of damages concerning future medical care and expenses was insufficient as a matter of law
2. Whether the trial court erred in finding that Potts' proof of damages concerning loss of wage earning capacity was insufficient as a matter of law
3. Whether the court's assessment of Potts' non-pecuniary damages was unreasonable
4. Whether the trial court's denial of Potts' request for continuance was "manifestly unjust and prejudicial"

II. STATEMENT OF THE CASE

A. Nature of the Case

Appellant, Belevia Potts, filed a civil action seeking compensatory damages for bodily injuries against the Mississippi Department of Transportation ("MDOT") and its employee pursuant to the Mississippi Tort Claims Act. The complaint alleged that MDOT created a hazardous condition by slinging rocks into the vehicle occupied by Potts which further caused serious bodily injury and other damages.

B. Course of Proceedings and Disposition of the Case Below

Five days before this bench trial was scheduled to commence, Appellant requested a continuance on the grounds of recently obtained medical evidence that was material to her claim for loss of wage earning capacity. The medical evidence suggested that Potts was an imminent candidate for a total knee replacement that was causally connected to the subject occurrence. The circuit judge denied the requested relief on the grounds that the case had been pending for in excess of 270 days and should proceed to trial as scheduled.

On the day of trial, the parties stipulated that MDOT's negligence proximately caused the occurrence in question. The sole issue before the circuit judge was whether Potts' claimed damages were proximately caused by the negligent conduct of MDOT. Potts damages included

permanent injury to her right knee resulting in reconstructive surgery and related medical expenses in the amount of \$28,502.00; future medical expenses associated with an anticipated total knee replacement procedure; past, present and future pain and suffering; permanent impairment and disability caused by the injury; and loss of wage earning capacity.

The lower court specifically found that the uncontradicted medical evidence established that the accident in question exacerbated or accelerated Potts pre-existing conditions in her right knee. The court characterized Potts as the classic “eggshell skull” plaintiff that must be taken in the condition that she was found. (TR. P. 119). The Court ruled that Potts was entitled to judgment in the amount of \$28,502.82 for incurred medical expenses related her initial treatment and reconstructive surgery, and \$5000 in pain and suffering. The Court declined to award any compensation for future medical costs associated with the recommended knee replacement or loss of wage earning capacity. The Court found that the prospect of the future surgery was totally speculative on the grounds that conservative treatment utilized in conjunction with weight loss may eliminate the need for the surgery. (TR. P. 119). Similarly, the court declined to award damages for loss of wage earning capacity and characterized the evidence in support thereof as speculative. The lower court entered a judgment in accordance with its ruling from the bench on November 30, 2007.

On December 7, 2007, Potts filed a Motion for New Trial and/or Amendment of Judgment pursuant to M.R.C.P 59. The Court denied the post trial motion without the benefit of a response by MDOT or argument on December 12, 2007. Potts timely filed her Notice of Appeal to this Honorable Court on January 7, 2008.

C. Statement of Facts

On June 16, 2003, an MDOT employee was bush-hogging along the MS State Highway 12 when the mower blades projected a rock into the vehicle operated by Carter and occupied by Belevia Potts. Carter slammed on the brakes after the impact causing Potts to strike her right knee on the dashboard. (TR. P. 62-63). The parties stipulated to the liability of MDOT for the occurrence. The sole issue for the Court was whether Potts' claimed damages were proximately caused by the negligent conduct of MDOT. Potts claimed damages included incurred medical expenses in the amount of \$28,502.82, future medical expenses associated with a total right knee replacement, past, present and future pain and suffering associated with both procedures, permanent disability, as well as present and future loss of wage earning capacity caused by this injury.

On September 19, 2006, Potts underwent reconstructive knee surgery to address three interrelated diagnoses: (1) chondromalacia which was described as damage to the articular cartilage behind the kneecap; (2) meniscal tear; and (3) replacement of a torn and unstable anterior cruciate ligament. Todd Smith, M.D., the orthopedic surgeon who performed the procedure, testified that her ACL tear was chronic insofar as it was torn some time ago and replaced by loosely organized scar tissue. (TR. P. 54). Dr. Smith replaced the ACL for the purpose of stabilizing the knee. (TR. P. 55). During the procedure, he also debrided or shaved away the torn portions of her meniscus. Dr. Smith explained that the meniscus is the shock absorbers between the two bones of the knee. (TR. P. 55, lines 5-18). The diagnosis of chondromalacia, while surgically repaired, would continue to disrupt the structural environment of her knee.

Potts' pain response was not drastically improved by the reconstructive procedure due to inflammation caused by articular cartilage changes in her right knee. Dr. Smith explained that due to these changes, the normal environment of the knee is disrupted which produces inflammation which dilutes the normal thick fluid in the knee. This dilution of the knee fluid reduces the lubrication or cushioning of the joint. Dr. Smith's recommendation to counteract this inflammatory state was a series of five injections of fluid that replace the normal joint fluid. (p. 18). Potts began the series of injections on or about August 6, 2007, and received the fifth injection on October 8, 2007. The efficacy of the treatment is typically judged some eight to ten weeks after the fifth injection. If the injections have not improved the patient's pain, the immediate options are intermittent injections of an anti-inflammatory and pain reliever or consideration for a total knee replacement. Dr. Smith testified within a reasonable degree of medical probability that Potts would require a total knee replacement within her life expectancy. (TR. P. 19 and deposition transcript p. 17, lines 11-21). He further testified that the occurrence in question accelerated the inflammatory process of the knee environment which in turn accelerated the medical necessity of the future knee replacement. (TR. P. 19-20).

Dr. Smith testified that while he does not place restrictions on any patient, he does provide the following recommendations for patients who undergo this procedure: avoid heavy lifting, standing for long periods of time, stooping, bending and any other activity that might aggravate the knee. He testified that Potts' condition was permanent and that she would likely experience intermittent pain due to this condition for the rest of her life. (TR. P. 22-23)

Potts' social, educational and vocational history is quite limited and places her at a distinct disadvantage even if she were able bodied. She is a forty-one (41) year old divorced mother of two, with one child residing in her household. She did not obtain a high school

degree, nor did she obtain a general equivalency diploma. Her past employment includes working 60-70 hours per week as a driver for LeFleur Transportation and convenience store clerk. Potts testified that while some degree of right knee arthritis pre-existed the occurrence, it did not limit her social activities or the scope of her employment duties in any manner whatsoever. (TR. P 72-73). Before the occurrence, Potts was capable of working 72 hours per week if necessary. (TR. P 72). In 2005, she obtained employment with the Choctaw County School system as a bus driver and was employed in this capacity at the time of trial. She stated that she sought this occupation due to her limitations and her belief that she could perform "light" work. Her current wages are less than \$500.00 per month.

Potts testified that constant pain limits her activities on a daily basis and prevents her from walking. (TR. P. 77). Constant right knee pain prompted her to undergo the recent reconstructive surgery performed by Dr. Smith. Potts stated that her pain was not abated by the series of injections recommended by Dr. Smith. Potts explained that walking as well as long periods of sitting cause severe pain, and that she can hardly move on some days. (TR. P. 77). Potts was scheduled to return to Dr. Smith on November 5, 2007, for the purpose of evaluating the efficacy of the injections. Potts testified that "If the injections didn't do any good, he's going to talk about doing a whole knee replacement." (TR. P. 75, lines 1-3). Potts testified that the cost of the knee replacement was approximately \$75,000. (TR. P. 75, lines 13-23).

Innie Pearl Carter testified that she had first hand knowledge of Potts condition before the occurrence. Carter's testimony established that Potts had the ability to walk and maintain regular employment before the occurrence. Carter testified that Potts couldn't walk well after the incident and was no longer able to work as a convenience store clerk due to her condition.

III. SUMMARY OF THE ARGUMENT

The expert medical testimony clearly established that the occurrence aggravated Potts' underlying chondromalacia (articular cartilage damage) which accelerated changes within the structural environment of the knee. The expert testimony further established within reasonable medical probability, that this aggravation accelerated the unstable environment within the knee which will necessitate an inevitable total knee replacement.

The lower court committed fundamental legal error by rejecting the uncontradicted expert medical testimony offered by Potts's treating physician in favor of no evidence at all. The court's ruling from the bench, while couched in terms of possibilities and facially deficient, is not supported by any medical evidence. If there was any evidence contained in the record that the current treatment regimen could foreclose the option of surgery, then the lower court's ruling would possess an indication of substantial evidence. However, there is no evidence within the record to support the finding that any form of conservative medical treatment will reverse the ongoing changes within the structure of Potts' right knee. The only evidence available for the court's consideration established that Potts would more than likely require a total knee replacement within her life expectancy.

The lower court committed legal error by declining to award any damages for loss of wage earning capacity occasioned by her injury. Potts, an unskilled laborer, presented persuasive evidence of her vocational capacity before the occurrence. Her vocational capacity and previous good health was corroborated by Carter as well as previous income tax returns. Potts also presented the requisite evidence of a permanent medical impairment coupled with limitations that are supported by medical testimony.

The evidence established within reasonable certainty that her ongoing disability rules out a number of vocational opportunities such as production factory work, long distance driving, convenience store clerk, or even working as a greeter at Wal-Mart. Unfortunately, the lower court required a heightened burden of proof for the recovery of loss of wage earning capacity when all that is required is permanent impairment and the willingness to enter the labor market.

The lower court's damages award is not in harmony with the medical evidence concerning disability and vocational loss, future medical expenses in the amount of \$75,000, as well as ongoing pain and suffering. The court's award fails to compensate Potts for her full spectrum of damages that is supported by uncontradicted expert medical evidence as well as lay testimony that is consistent with the medical evidence.

Potts unsuccessfully sought a continuance for the sole purpose of determining if the future knee replacement was imminent and if so, when was it likely to occur. If such was the case, then justice would require that the court allow her sufficient time to fully develop her claim for partial or total loss of vocational capacity. The requested continuance, if granted, would not have prejudiced MDOT in any manner. Potts, who was forty one years old at the time of trial, could have presented a strong case for permanent total disability if the knee replacement was imminent. But the court denied the continuance in favor of docket management on the one hand, while characterizing the best evidence available as speculative and insufficient to award damages on the other. The court's denial of the requested continuance was manifestly unjust and prejudicial in light of its findings on damages. While docket management is important, docket management should be enforced as means to affect justice for all parties.

IV. ARGUMENT

A. Standard of Review

This case was brought under the Mississippi Tort Claims Act, which allows negligence actions against state agencies under certain circumstances. Simpson v. City of Pickens, 761 So.2d 855, 860 (Miss.2000). There is also a requirement that, if the matter comes to trial, it will be conducted as a bench trial. *Id.* In this situation, “the trial court sits as finder of fact and, when the court's factual determinations are challenged on appeal, 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.” City of Newton v. Lofton, 840 So.2d 833, 835 (Miss.2003); Ezell v. Williams, 724 So.2d 396, 397 (Miss.1998); Mississippi State Hosp. v. Wood, 823 So.2d 598, 601 (Miss.Ct.App.2002). “The findings of the trial judge will not be disturbed unless the judge abused his discretion, was manifestly wrong, clearly erroneous or an erroneous legal standard was applied.” City of Newton, 840 So.2d at 835-36 ; Stanton v. Delta Reg'l Med. Ctr., 802 So.2d 142, 145 (Miss.Ct.App.2001). Stated another way, this Court should and generally will affirm a trial court sitting without a jury on a question of fact unless, based upon substantial evidence, the court was manifestly wrong. Ezell v. Williams, 724 So.2d 396, 397 (Miss. 1998). “This Court reviews errors of law, which include the proper application of the Mississippi Tort Claims Act, de novo.” City of Newton, 840 So.2d at 836 .

B. The Uncontradicted Expert Medical Testimony Established the Necessity of a Future Knee Replacement

A plaintiff has the burden of proving damages, injuries, and loss of income. When determining whether that burden has been met, the evidence is to be viewed in the light most favorable to the party in whose favor the jury decided. Odom v. Roberts, 606 So.2d 114, 118

(Miss. 1992) (citing Motorola Communications & Elecs., Inc. v. Wilkerson, 555 So.2d 713, 723 (Miss.1989)). That party is given all favorable inferences that can reasonably be drawn from that evidence. *Id.* If that evidence is contradicted, the appellate court “will defer to the [factfinder], which determines the weight and worth of testimony and the credibility of the witness at trial.” *Id.*

The analysis begins with the basic rule that Potts, as the injured party, has the burden of going forward with sufficient evidence to prove her damages by a preponderance of the evidence. TXG Intrastate Pipeline Co. v. Grossnickle, 716 So.2d 991, 1016 (Miss.1997); Boling v. A-1 Detective & Patrol Serv., Inc., 659 So.2d 586, 590 (Miss.1995). In addition “[t]here are some damages, such as medical expenses and loss of income, which must be proved with reasonable certainty, but there are also some damages, such as pain and suffering, that are not susceptible of proof as to monetary value, and these items must be left to the discretion of the [factfinder] as long as the amount thereof, under all the evidence, is just and reasonable.” Holmes County Bank & Trust v. Staple Cotton Co-op., 495 So.2d 447, 451 (Miss.1986) (quoting GRANT, SUMMARY OF MISSISSIPPI LAW, Sec. 980.1 (Supp.1984)).

The court’s consideration of Potts’ ongoing medical treatment may have colored its impression of whether the future knee replacement was proven within reasonable certainty. Admittedly, Potts had not consulted with Dr. Smith concerning the efficacy of the series of injections, but the court’s denial of the continuance foreclosed that possibility. In any event, the court’s finding that the need for the future surgery is not reasonably certain to occur is not supported by substantial evidence. The circuit judge ignored Dr. Smith’s uncontradicted testimony that the collision related injuries accelerated her need for a total knee replacement within her life expectancy. The Court’s finding that “the shots may still work” does not rise to

the level of reasonable medical probability and is not sufficient to negate the uncontradicted proof that Potts will require a total knee replacement within her life expectancy. Dr. Smith, the only medical expert who testified, never stated that the injections would more likely than not eliminate Potts' need for a knee replacement. On the contrary, Dr. Smith testified that the likelihood of a future knee replacement was greater than 50%.

C. The Evidence Clearly Established a Loss of Wage Earning Capacity

The general principle for the recovery of damages for loss of wage earning capacity has been stated 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.”

25A C.J.S. Damages 162(8)b at 103-104 (1966)

Decisions of this Court have previously held that, in order to recover for permanent loss of wage-earning capacity, there must be a showing of permanent physical impairment. Dogan v. Hardy, 587 F.Supp. 967, 970 (N.D. Miss. 1984). This principle also applies to loss of wage-earning capacity in a temporary situation. The Plaintiff need not have been gainfully employed at the time of injury in order to recover for loss of earning capacity. Mississippi Central Railroad Company v. Smith, 176 Miss. 306, 168 So. 604, Cert. den'd. 299 U.S. 518, 57 S.Ct. 313, 81 L.Ed. 382 (1936); Walters v. Gilbert, 248 Miss. 77, 158 So.2d 43 (1963); and Kincade & Lofton v. Stephens, 50 So.2d 587 (Miss. 1951).

The lower court erroneously characterized the evidence in support of Potts' loss of wage earning capacity as speculative. How much evidence of loss of wage earning capacity is enough to exceed speculation and conjecture? At a minimum, the law requires that the Plaintiff (1) must not be totally disabled from the competitive labor market by a non-compensable pre-existing condition; (2) evidence of a permanent impairment; (3) resulting in the loss of vocational capacity. *Kitchens v. Jerry Vowell Logging*, 874 So.2d 456 (Miss.Ct.App.2004). Admittedly, the court's fact finding role is more complicated in the case of a minimum wage employee who has limited education and vocational skills. In the case of a disadvantaged worker such as Potts, even a slight impairment could result in total occupational disability, and what must be compared for workers' compensation benefits purposes, are the actual wages before the injury and the earning *capacity* after the injury. Any other approach to evaluating the entitlement to benefits would ignore "the temporary and unpredictable character of post-injury earnings." *Cox v. International Harvester*, 221 So. 2d 924, 927 (Miss. 1969)

Loss of wage earning capacity is by design a nebulous concept that cannot be reduced to a mathematical certainty insofar as the computation of damages are concerned. It is apparent from the record that the lower court required proof within a mathematical certainty of future lost wages that is inconsistent with years of established precedent. The lower court has an obligation to consider the factors that comprise Potts' loss of wage earning capacity in accordance with established precedent and to quantify the loss in accordance with the evidence. The lower court failed to recognize that reasonable certainty is all that is required. To state it another way, does the evidence establish that more likely than not, Potts sustained a loss of wage earning capacity as a result of her knee injury, and if so, in what amount. The evidence suggests that Potts is precluded from performing her past relevant occupations of convenience store clerk and driving

long periods and distances. The remainder of the labor market is not even available to Potts due to her lack of education and training. Therefore, there is substantial evidence in the record for the court to assess damages for loss of wage earning capacity.

D. The Court's Assessment of Non-Pecuniary Damages was Unreasonable

Potts' motion to amend judgment requested the lower court to reconsider all aspects of its damages award. The court considered the motion and declined to amend its decision. Damages for personal injuries are not set by any fixed rule and rest largely within the discretion and judgment of the trier of fact. However, this discretion must be exercised reasonably and intelligently to the end that the plaintiff may recover reasonable compensation for the loss sustained. Kinnard v. Martin, 223 So.2d 300 (Miss.1969). Some of the factors which the trier of fact may take into consideration in arriving at reasonable compensation for losses occasioned because of personal injuries are: reasonable medical expenses incurred and those that are reasonably certain to be incurred in the future; the amount, type, and duration of injuries and the effect they have on the quality of life expected to be enjoyed by the plaintiff; mental and physical pain; present and future impairment; and the effect the injuries have on earning capacity. *Id.*

This Court reviews a trial court's decision on a motion for additur for abuse of discretion. Teasley v. Buford, 876 So.2d 1070, 1075 (Miss.Ct.App.2004). Because damage awards are within the traditional domain of the [factfinder], we will only order an additur with great caution, when the award is "so unreasonable in amount as to strike mankind at first blush as being beyond all measure, unreasonable in amount and outrageous." *Id.* (quoting Rodgers v. Pascagoula Pub. Sch. Dist., 611 So.2d 942, 945 (Miss.1992)).

The court failed to apply the appropriate standard of causation for the recovery of future medical expenses related to the future knee replacement. The court valued the remaining in the amount of \$5000.00. If this amount of compensation was distributed over the course of the date of injury until the date of trial, her past pain and suffering related to the progressive knee pain that required surgical intervention was valued at roughly \$3.25 per day. If this amount of compensation was distributed over the course of her life expectancy, it would be less than \$1.77 per day. The lower court's assessment of Potts' non-pecuniary damages is terribly low even in light of Renfro v. Berryhill, 910 So.2d 624 (Miss.Ct.App.2005). However, the facts of the instant case are distinguishable from Renfro as Potts suffered constant knee pain for over three years before the painful reconstructive surgical procedure. She testified that the injury limits her daily activities and causes constant pain. Potts condition is permanent and requires ongoing medical care, as well as a future knee replacement. The credibility of her testimony is enhanced by the expert medical testimony.

When reviewing the extended course of Potts' medical treatment, the invasive procedures performed, the resulting pain and disability, as well as the injury's impact on her vocation, the court's assessment of damages unreasonably insufficient to compensate Potts for her injuries.

E. The Court's Denial of Continuance was Manifestly Unjust and Prejudicial

The grant or denial of a continuance is within the discretion of the trial court. McDonald v. McDonald, 850 So.2d 1182, 1188 (Miss.Ct.App.2002). The only time this Court will overturn the denial for a continuance is when manifest injustice has occurred. Hatcher v. Fleeman, 617 So.2d 634, 639 (Miss.1993). Prejudice must result from the denial in order to have that decision reversed. Dew v. Langford, 666 So.2d 739, 746 (Miss.1995); Ekornes-Duncan v. Rankin Med.

Ctr., 808 So.2d 955, 959 (Miss.2002). The trial court is accorded reasonable latitude in the setting and continuing of cases.” Morgan v. Greenwaldt, 786 So.2d 1037, 1045 (Miss. 2001). Further, we acknowledge that the trial court judge possesses the authority to control his or her own docket. Willie C. Johnson v. Brandy N. Thomas, By and Through Her Next Friend, John Polatsidis, No. 2006-CT-01210-SCT (Miss. 2008).

M.R.C.P. 6 requires a motion to be served five working days before it is to be heard. Potts served the motion upon MDOT via electronic mail on October 15, 2007, which provided sufficient notice to counsel opposite. The basis for the requested continuance was the uncertain efficacy of Potts ongoing conservative medical treatment as prescribed by Dr. Smith, and its impact on her loss of wage earning capacity.

Potts knee pain significantly increased on August 6, 2007, and shortly thereafter, she began a treatment regimen of injections to restore the synovial fluid in her knee as discussed above. Potts underwent the final injection on October 17, 2007, and the trial of this matter was conducted on October 22, 2007. Therefore, Plaintiff’s request for continuance was based upon recent and unanticipated medical developments that severely impacted her degree of disability and corresponding loss of wage earning capacity.

The circuit judge’s refusal to grant the continuance resulted in manifest injustice insofar as Potts 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. Prejudice is clearly shown by the court’s ruling that characterized her loss of wage earning capacity and need for a future surgery and lost wages as “totally speculative.” If the lower court had granted the requested continuance, Potts could have presented testimony regarding the likely timing of the knee replacement, the length of convalescence following the surgery, and whether she would retain

the functional capacity to maintain any employment whatsoever. Although Potts presented proof of a permanent impairment that resulted in the inability to perform a number of vocational tasks, it was apparent that Potts was an imminent candidate for a knee replacement that would cause temporary total disability, and a much greater degree of permanent partial or permanent total disability.

V. CONCLUSION

It should be noted that the circuit court judge considered an enormous amount of complex medical evidence in the span of a four hour bench trial. Dr. Smith testified live as well as by deposition. A number of medical reports were received into evidence that addressed the issue of the future surgery. The court would have been well served by taking the matter under advisement and requesting the submission of proposed facts and findings of law by the parties to gain a better understanding of the probability of the future knee replacement. The lower court, when considering the medical evidence concerning the future surgery, failed to recognize the significance of the following: (1) Dr. Smith testified without qualification that Potts would undergo a knee replacement within her life expectancy; (2) Dr. Smith's medical reports revealed that the series of injections failed to offer Potts relief which made her an imminent candidate for a knee replacement; and (3) There is no medical evidence to suggest that Potts obesity was a substantial contributing cause for the conditions necessitating the knee replacement. The court improperly supplanted the expert medical testimony with purported facts that are not contained in the record. The court's employment of this decision-making process is plain error.

The lower court also failed to apply the proper legal standard for the consideration of Potts' claim for loss of wage earning capacity. The elements of proof for such a claim are the extent of the physical impairment, together with the duration thereof, determines the amount of loss of wage earning capacity. The expert medical and lay testimony established that Potts medical condition was permanent and resulted in vocational loss. No evidence was offered to the contrary. Therefore, the court was obligated to award some measure of compensation for loss of wage earning capacity.

The lower court's denial of the requested motion for continuance prejudiced Potts' claim for loss of wage earning capacity. On August 8, 2007, Dr. Smith's deposition testimony revealed that the timing of Potts' future knee replacement was unknown. Therefore, the surgery could have been performed during or after her work life expectancy of age 65. However, after Potts' condition continued to deteriorate, the medical evidence suggested that the future knee replacement would occur during her work life expectancy. The court's denial of the continuance more than likely prevented Potts from claiming future lost wages in the amount of \$200,000.00.

The lower court's assessment of Potts' pecuniary damages was unreasonable on its face. The court's incredibly low valuation of Potts' permanent and life altering injuries may be a by-product of the complexity of the medical evidence; i.e. pre-existing conditions. Potts' case should be judged on its own merits without to dormant pre-existing conditions that may have influenced the court's valuation on damages. It is difficult to ascertain whether the court was not impressed with her injuries or unreasonably apportioned her damages based upon her status as an "eggshell skull" plaintiff. Regardless of the court's rationale which is not stated in the ruling, the amount awarded is not consistent with the proof of damages.

For the reasons stated herein, the Appellant respectfully requests that this Honorable Court reverse the findings of the lower court on the issues raised herein and remand this action to the lower court for a new trial on damages only, including the amount of pecuniary and non-pecuniary damages to which Potts may be entitled.

Respectfully submitted this the 27th day of May 2008.

BELEVIA POTTS

By: 

Yancy B. Burns

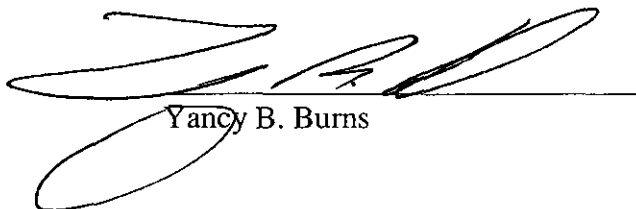
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CERTIFICATE OF SERVICE

I, Yancy B. Burns, attorney for the Appellant, Belevia Potts, do hereby certify that I have this day served a true and correct copy of the foregoing Appellant's Brief by mailing a true and correct copy thereof by United States Mail, with postage fully prepaid thereon, to the following attorney:

Julie P. Ratliff, Esq.
Latham & Burwell
618 Crescent Blvd, Suite 200
Ridgeland, MS 39157

SO CERTIFIED this the 27th day of May 2008.



Yancy B. Burns

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BELEVIA POTTS

APPELLANT

VS.

CAUSE NO. 2008-CA-00092

**LARRY BLACK AND
MISSISSIPPI DEPT. OF TRANSPORTATION**

APPELLEE

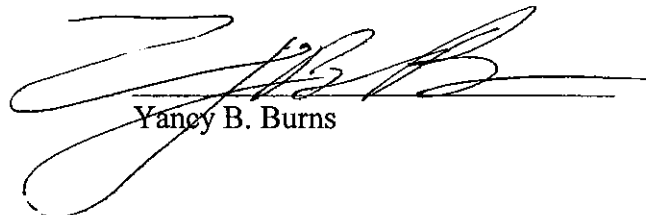
AMENDED CERTIFICATE OF SERVICE

I, Yancy B. Burns, attorney for the Appellant, Belevia Potts, do hereby certify that I have this day served a true and correct copy of the foregoing Appellant's Brief by mailing a true and correct copy thereof by United States Mail, with postage fully prepaid thereon, to the following attorney:

Julie P. Ratliff, Esq.
Latham & Burwell
618 Crescent Blvd, Suite 200
Ridgeland, MS 39157

Honorable Joseph H. Loper, Jr.
Circuit Court Judge District 05
P. O. Box 616
Ackerman, MS 39735-0616

SO CERTIFIED this the 6th day of June, 2008.


Yancy B. Burns