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

**Supreme Court Docket No. 2008-TS-00256**

ROBINSON PROPERTY GROUP,
LIMITED PARTNERSHIP — APPELLANT

vs.

MARY S. MITCHELL — APPELLEE

Appeal from the
Circuit Court of Tunica County, Mississippi
Civil Action Number: 2006-0268

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# BRIEF OF APPELLEE MARY S. MITCHELL

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***Oral Argument Requested***

ROBERT Q. WHITWELL (MS [redacted]
*Attorney for Appellee*
*MARY S. MITCHELL*

ROBERT Q. WHITWELL
Farese, Farese & Farese, P.A.
1308 North Lamar Boulevard, Ste. 8
Oxford, Mississippi 38655
Telephone: 662-281-5884
Facsimile: 662-232-8074

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## CERTIFICATE OF INTERESTED PERSONS

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The undersigned counsel of record, as attorney for Plaintiff-Appellee Mary S. Mitchell, certifies that the following listed persons have an interest in the outcome of this case. These representations are made pursuant to Rule 28 of the Mississippi Rules of Appellate Procedure in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal:

***Trial Judge:***

Honorable Charles Webster
Circuit Court Judge
Post Office Box 998
Clarksdale, Mississippi 38614

***Attorneys for Defendants-Appellants*:**

Honorable Robert L. Moore
Heaton & Moore, P.C.
100 North Main Building, Suite 3400
Memphis, Tennessee 38103

***Defendants-Appellants*:**

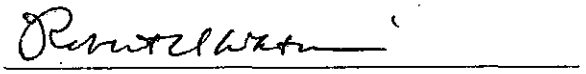
Robinson Property Group, Limited Partnership,
d/b/a Horseshoe Casino and Hotel

***Plaintiff-Appellee*:**

Mary S. Mitchell
5041 Welchshire Avenue
Memphis, Tennessee 38117

***Attorney for Plaintiff-Appellee*:**

Robert Q. Whitwell (MS #7176)
Farese, Farese & Farese, P.A.
1308 North Lamar Boulevard, Ste. 8
Oxford, Mississippi 38655
Telephone: 662-281-5884
Facsimile: 662-232-8074



ROBERT Q. WHITWELL (MS #7176)
*Attorney for Plaintiff-Appellee*
*Mary S. Mitchell*

Robert Q. Whitwell
Farese, Farese & Farese, P.A.
1308 North Lamar Boulevard, Ste. 8
Oxford, Mississippi 38655
Telephone: 662-281-5884
Facsimile: 662-232-8074

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## TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES

**CASES**:

## STATEMENT REGARDING ORAL ARGUMENT

The Appellant is Robinson Property Group, Limited Partnership, d/b/a Horseshoe Casino & Hotel, which was the Defendant in the trial court below. The Appellee is Mary S. Mitchell, who was the Plaintiff in the trial court below.

Defendant Horseshoe Casino argues in this appeal that the Mississippi Supreme Court's decision in *Busick v. St. John*, No. 2002-CA-01011-SCT, 856 So.2d 304 (Miss. 2003), and the decision of the Mississippi Court of Appeals in *Geske v. Williamson*, No. 2004-CA-01730-COA, 945 So.2d 429 (Miss. App. 2006), have created an impeachment exception to the collateral source rule. Previously, *McCary v. Caperton*, 601 So.2d 866 (Miss. 1992), specifically denied any such exception to the collateral source rule, and *Busick* clearly states that the Mississippi Supreme Court had not recognized an impeachment exception to the collateral source rule.

If the Mississippi Supreme Court should be inclined to recognize an impeachment exception to the collateral source rule, such action would be a major change in the existing evidentiary law of Mississippi. Oral argument should be granted so as to assist this Court in determining whether the facts of this appeal warrant such a radical departure from existing law. Oral argument should also be granted to assist this Court in determining under what circumstances a plaintiff would "open the door" to impeachment by evidence of payments from a collateral source.

* * * * * *

## I. STATEMENT OF ISSUES

Defendant Horseshoe Casino, in its *Brief for Appellant* (at p. 9), sets forth its first assignment of error as follows, to-wit:

> THE TRIAL COURT ERRED IN REFUSING TO ALLOW DEFENDANT TO SUBMIT EVIDENCE ON THE PAYMENT OF PLAINTIFF'S MEDICAL EXPENSES.

Under this assignment of error, Defendant Horseshoe Casino claims that the trial court erred by failing to recognize an impeachment exception to the collateral source rule and allow the Defendant to introduce evidence (for impeachment purposes) that the Plaintiff's medical bills had been paid by a third-party payor.

Defendant Horseshoe Casino, in its *Brief for Appellant* (at p. 11), sets forth its second assignment of error as follows, to-wit:

> THE TRIAL COURT'S ERROR AMOUNTED TO ABUSE OF DISCRETION WHEN IT FAILED TO GRANT DEFENDANT'S MOTION FOR NEW TRIAL

As presented to the trial court, the basis for the motion for a new trial was that the Defendant had been limited in its ability to impeach the Plaintiff's testimony because the trial court refused to recognize an impeachment exception to the collateral source rule. Thus, if the Defendant's first assignment of error is without merit, the Defendant's second assignment of error is also without merit; conversely, if the Defendant's first assignment of error has merit, the second assignment of error need not even be discussed.

* * * * * *

## II. STATEMENT OF THE CASE

### A. *THE NATURE OF THE CASE*

Mary S. Mitchell (the Plaintiff in the trial court and the Appellee here, and who may herein after also be referred to as "Mrs. Mitchell") brought a premises liability action in the Circuit Court of Tunica County against Robinson Property Group, Limited Partnership, d/b/a Horseshoe Casino & Hotel (the Defendant in the trial court and the Appellant here, and which hereinafter may be referred to as "Defendant Horseshoe Casino" or "Defendant casino"), for injuries Mrs. Mitchell received in a fall at the Horseshoe Casino in Tunica County on March 29, 2006.[1] [C.P. 8-11; R.E. Tab 8]

Mrs. Mitchell broke her left ankle in the fall. [T. 106]

* * *

### B. *THE COURSE OF THE PROCEEDINGS*

This civil action came on for a jury trial on Tuesday-Wednesday, November 13-14, 2007, before Tunica County Circuit Court Judge Charles E. Webster.

* * *

[1]Throughout this brief, the "Clerk's Papers" (or "Record") will be cited as "C.P." followed by the appropriate page number (as assigned by the Clerk). The *Appellant's Record Excerpts* prepared by Defendant Horseshoe Casino are not paginated, but are instead tabbed; therefore, in this brief the record excerpts will be cited as "R.E." followed by a designation of the appropriate tab. The transcript will be cited herein as "T." followed by the appropriate page number from the transcript.

## C. *DISPOSITION IN THE COURT BELOW*

The jury returned a verdict in favor of Mrs. Mitchell. [C.P. 128] The jury assigned contributory negligence to Mrs. Mitchell in the amount of thirty percent (30%), and fixed Mrs. Mitchell's total damages at the amount of $80,000.00. [C.P. 128-129; T. 270-271]

The trial judge entered a judgment upon the jury verdict in favor of Mrs. Mitchell in the amount of $56,000.00 (calculated as $80,000.00 less 30%). [C.P. 133; R.E. Tab 4]

Mrs. Mitchell sought an additur, which was denied. [C.P. 136, 171; R.E. Tab 12; R.E. Tab 14]

Defendant Horseshoe Casino brought a motion for a new trial in which it was principally asserted that the trial court had erred during Mrs. Mitchell's cross-examination when the trial court refused to allow the Defendant to introduce evidence, for impeachment purposes, that Medicare and an insurer (Blue Cross Blue Shield) had paid Mrs. Mitchell's medical bills. [C.P. 139-140; R.E. Tab 5]

The trial judge conducted a full hearing on the Defendant's *Motion for New Trial* on January 9, 2008, and on January 14, 2008, the trial judge entered an eleven-page order denying the Defendant's motion for a new trial. [C.P. 160-170; R.E. Tab 2]

Defendant Horseshoe Casino filed its *Notice of Appeal* on February 8, 2008, in which it stated it was appealing the trial court's *Order Denying Defendant's Motion for New Trial.* [C.P. 175; R.E. Tab 3]

* * *

## D. *STATEMENT OF FACTS RELEVANT TO THE ISSUES FOR REVIEW*

Mary S. Mitchell (who hereinafter may be referred to simply as "Mrs. Mitchell" or "Mitchell") was the Plaintiff in the trial court and is the Appellee here. Mrs. Mitchell, who was 72-years-old at the time of the trial, is a resident of Memphis, Tenn.[2] [T. 102]

On March 29, 2006, Mrs. Mitchell and three friends traveled in Mitchell's car from Memphis to the casinos in Tunica County, where they intended to"cash in" casino coupons at the Horseshoe Casino before meeting other friends and visiting other casinos. [T. 103-104] Mrs. Mitchell testified that she "played a machine, a 50 cent machine, for about ten minutes" and then went to "get a sandwich and meet the rest of the people." [T. 104] Mrs. Mitchell met one of her friends, Bettie Jolly, at the snack bar, ordered a hamburger, and began talking to Jolly while she waited for her food. [T. 104, 177] Mrs. Mitchell had a "50 cent coupon left over" and told Jolly, "I believe I'll go play this before we leave." [T. 177-178] Mrs. Mitchell left Jolly, who was sitting at a table in the snack bar area, and walked toward some slot machines to play her coupon and, as she was approaching the slot machines, Mitchell tripped and fell backward. [T. 105, 178] Mrs. Mitchell testified:

> ... I'm walking over and – to put [the 50 cent coupon] in the machine, and really that's about all I remember except that I hit something with my foot, my heel or my shoe caught on something, and my foot snapped.

[T. 105] Mrs. Mitchell fell and was injured at approximately 4:24 o'clock, p.m., on Wednesday, March 29, 2006. [T. 91]

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[2]The incident which gives rise to this civil action occurred on March 29, 2006. Mitchell was 71-years-old on that date, and was in excellent health. [T. 103]

The object which caused Mrs. Mitchell to trip was a metal plate affixed to stools for the slot machines which are normally attached to the base of the slot machines but which were not attached to the slot machines at the time Mrs. Mitchell was injured. [T. 78, 79, 86, 149, 155, 158, 159] The metal plate includes a "lip" which projects up from the plate approximately two inches, and at the time of Mrs. Mitchell's injury the two-inch lip was sticking up from the floor and out into the aisle. [T. 80, 179] At the time of Mrs. Mitchell's injury, the metal plate was black in color, and the carpet at the place where Mrs. Mitchell was injured contained a good deal of black color. [T. 79, 149] During the trial, Vickie Clark, an employee (a "Claims Administrator") of Horseshoe Casino who was familiar with the incident involving Mrs. Mitchell, testified that a person walking through the area could trip and fall because of the projecting two-inch lip. [T. 80, 90] On the day Mrs. Mitchell was injured, the slot stools (including the black metal base with the two-inch lip) had been detached from the slot machines and turned sideways by employees of Horseshoe Casino. [T. 79, 93]

Following her injury, Mrs. Mitchell was transported by ambulance to the emergency room at Baptist Memorial Hospital-DeSoto in Southaven and then was sent on to Methodist Le Bonheur Germantown Hospital in Germantown, Tenn., where, Mrs. Mitchell testified, "... they put me to sleep and set [the ankle] as best they could and put a soft cast on and sent me home." [T. 110] On Friday, March 31, 2006, Mrs. Mitchell saw a board certified orthopedic surgeon, G. Andrew Murphy, M.D., who diagnosed Mrs. Mitchell with "a dislocated bimalleolar ankle fracture" and who scheduled surgery for Mrs. Mitchell on April 5, 2006.

[R.E. Tab 11, p. 5-7][3] The surgery required full anesthesia, and Mrs. Mitchell was hospitalized for six days. [R.E. Tab 11, p. 8; T. 111] During the surgery, Dr. Murphy repaired Mrs. Mitchell's ankle with a rod and screws, which, at the time of the trial, had not been removed. [T. 111]

Although the surgery went well, Mrs. Mitchell's ankle was slow to heal, and five weeks after the surgery the ankle was still not healed enough to bear more much weight. [R.E. Tab 11, pp. 8-9] In late June, Dr. Murphy noted that Mrs. Mitchell's ankle continued to have "persistent swelling." [R.E. Tab 11, p. 9] In August 2006, Dr. Murphy noted that Mrs. Mitchell's ankle continued to have some swelling, and Mrs. Mitchell also had "a fair amount of muscle wasting in her leg ...." [R.E. Tab 11, p. 10] Almost six months after Mrs. Mitchell's injury, Dr. Murphy noted "she was still having a fair amount of swelling and limited mobility" with "some popping and catching in the ankle," and because her ankle was "persistently swollen" and "persistently painful" Mrs. Mitchell had not been able to "properly rebuild the muscles in her calf" which led to "persistent wasting of the muscle in the calf." [R.E. Tab 11, p. 12]

Dr. Murphy testified that, using the American Medical Associations' Guides to the Evaluation of Permanent Impairment (Fifth Edition), he assigned Mrs. Mitchell a "28 percent impairment to her foot" which equated to a "20 percent impairment of her leg" and an "8 percent impairment" to her body as a whole. [R.E. Tab 11, p. 13] Dr. Murphy testified:

> The things that she had that would lead to her to have impairment include loss of ankle motion, calf weakness or atrophy, pain, swelling and popping and catching of the joint.

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[3]Dr. Murphy testified via deposition, which was read into the record. [T. 173-174]

[R.E. Tab 11, p. 14] Dr. Murphy expressed an opinion, based upon a reasonable degree of medical certainty, that, due to the injury Mrs. Mitchell suffered at the Horseshoe Casino on March 29, 2006, Mrs. Mitchell was temporarily unable to work at her usual work between the date of the injury and December 6, 2006 (a period in excess of eight months). [R.E. Tab 11, pp. 14-15]

Dr. Murphy testified that he last examined Mrs. Mitchell on April 18, 2007, and noted:

> She was still having some ankle pain. She had a few days before she came to see me, an episode of sharp pain in the ankle that was bad enough that made her get up and walk around in the middle of the night. But that she was reasonably functional with the ankle. I examined her. She did have some mild swelling in the ankle. She could extend the ankle 10 degrees which is a little bit improved over the previous visit and flex to 50 degrees.

[R.E. Tab 11, p. 15] Normal ankle extension is "20 to 30 degrees and flexion of the ankle is about 60 degrees." [R.E. Tab 11, p.16]

Dr. Murphy noted that x-rays taken during the April 18, 2007, examination "were suggestive of some joint space narrowing or loss of the cartilage space which was – which would be interpreted properly as mild post-traumatic arthritis or arthritis after a fracture." [R.E. Tab 11, p. 16] Dr. Murphy testified that Mrs. Mitchell "will have some ongoing disability with the ankle" (including "arthritic symptoms, aching, some popping and catching"), and that Mrs. Mitchell will be "very limited" in her ability to bend, stoop, stand, walk, and lift and carry weight. [R.E. Tab 11, p. 17] Dr. Murphy testified that in his opinion, based upon a reasonable medical probability, Mrs. Mitchell will require future medical treatment such as cortisone injections, other medication, and possibly a brace. [R.E. Tab 11,

p 18] Dr. Murphy also testified that in his opinion, based upon a reasonable medical probability, that Mrs. Mitchell suffered pain and will continue to suffer pain in the future as a result of the injury she suffered at the Horseshoe Casino on March 29, 2006, and that Mrs. Mitchell reached maximum medical improvement in December 2006. [R.E. Tab 11, p. 19]

As a result of the medical treatment and hospitalization, Mrs. Mitchell contracted a rather severe staph infection which affected her eye, her arms, and even her breathing.[4] [T. 112] Mrs. Mitchell testified:

> Well, from all of the trauma and everything I went through, I couldn't breathe, so I was sent to a lung specialist, and my heart was carrying on, and they sent me to a heart specialist, and then depression set in, and I was sent to the psychiatrist, and I've had the rounds.

[T. 112]

At the time of Mrs. Mitchell's injury, she was working in retail sales at a Memphis gift shop, where she worked eight hours a day, three days each week, but because of her injury she was unable to work for several months. [T. 102, 113] Mrs. Mitchell testified:

> I was six weeks that I couldn't put any weight on this, and it was hard to get around. I couldn't do anything. So ... I had to hire somebody for three weeks.

[T. 113] Mrs. Mitchell testified that she was confined to using a wheel chair for six weeks during the time she had a cast on her ankle, after which her ankle was in a brace and she used crutches and a walker. [T. 114-115] From the time of the injury until December 2006 (when Dr. Murphy testified she reached maximum medical improvement), Mrs. Mitchell testified

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[4]Defendant Horseshoe Casino, in its *Brief of Appellant* (at p. 4), states that Mrs. Mitchell's surgery was performed "without complication." This statement may be both accurate and misleading, since there were no complications during the surgery, but Mrs. Mitchell did acquire a severe post-operative staph infection. [T. 112]

that she was often in "unbearable pain." [T. 115] Mrs. Mitchell testified that the calf on her left leg had "gotten very small" due to the wasting, and that she had purchased an exercise bicycle to help her rebuild her calf muscle. [T. 113] Mrs. Mitchell testified that she had to have "bars put in the tub and different things to help me" in the bathroom. [T. 114]

At the time of the trial (which was conducted November 13-14, 2008), Mrs. Mitchell was working only a half-day (*i.e.*, four hours) three days each week because of her inability to stand on her ankle. [T. 113] Mrs. Mitchell testified:

> ... just sitting here [in the witness stand], [the ankle] hurts when it hangs down for long, and yesterday it hurt, and I – it swells after I work my four-hour shift at work. I go home, and I prop it up, and, you know, eat my lunch and prop the foot up, and it's just a constant something to take care of.

[T. 116]

During the testimony of Mrs. Mitchell, Exhibit P-2 (described as "Summary Sheet of Expenses") was introduced into evidence without objection by Defendant Horseshoe Casino. [T. 119] Exhibit P-2 was a summary of expenses incurred by Mrs. Mitchell as a result of her injury, which (in addition to medical expenses) included expenses for such things as lost wages, special shoes, the helper she had hired, the special bathroom fittings (handrails, etc.), the exercise bicycle, etc. [T. 119, Exhibit P-2] Mrs. Mitchell testified that her medical bills incurred following her injury on March 29, 2006, totaled $45,260.50, and that, together with her other expenses, her expenses totaled $53,581.50. [T. 119]

Mrs. Mitchell testified:

Q. Ms. Mitchell, as a result of this accident and injury, are there certain things that you can't do now that you could do before the accident?

A. Yeah, there are a lot of things I can't do.

Q. Tell the jury what basically – how this has disrupted your normal activities and lifestyle.

A. Oh, there's so many ways. Well, first of all, I can't work full time like I was, and I can't – because I can't go up the steps, and I can't stand up that long. I can't do gardening like I used to do and rake the leaves, and I can't – mainly I can't get down in my bathtub. I have to take a shower, and I can't play with the grandchildren like I did. I can't play golf. Did I say that? I love golf, and I was playing, you know, once a week before this happened, and just it has just limited – I hate to say it's ruined my life because I know there are people who are terminally ill that are worse off, but ***it has devastated me and changed my life***.

[T. 120 (emphasis added)]

Mrs. Mitchell further testified:

Q. You have told the jury what expenses you have incurred. What are you asking the jury to give you in the way of compensation to compensate you for this injury?

A. Well, I just want the jury to determine that, except I would like to have the medical bills and my expenses, and, of course, that's really just partial expenses. I couldn't even think of everything that I have spent and the gas and the cost of everything, the going back and forth to the physical therapy and all of that, but I think the jury would be fair in awarding whatever they feel would be right for something as serious as this.

Q. Do you think that ought to be a substantial sum of money, more than the $50,000 medical expenses you have?

A. Well, I would hope so. ***I had to – I borrowed money to live on. I refinanced my house.*** I know that's probably not a problem I've supposed to bring up, but it has – ***it's devastated me financially, too***.

[T. 122 (emphasis added)]

Here it is important to emphasize what Mrs. Mitchell actually said in her testimony, which is that she was unable to work for several months and, when she did return to work,

her wage earning ability had been reduced by fifty percent (50 %) because she was only able to work four-hour days after the injury (instead of the eight-hour days she was working before the injury). [T. 102, 113] Mrs. Mitchell's financial position obviously deteriorated, first due to her inability to work for many months, and then from her inability to work more than four hours in a single day. Mrs. Mitchell testified that she refinanced her house and "borrowed money to live on," which is not surprising because of her lost income and lost wage earning ability. When Mrs. Mitchell stated in her testimony that her injury had "devastated me financially" she ***was not*** claiming that her medical expenses had "devastated" her.[5]

After Mrs. Mitchell's testimony, and outside the presence of the jury, the attorney for Defendant Horseshoe Casino addressed the Court:

| | |
|---|---|
| BY MR. MOORE: | While it's still fresh in everyone's mind, when the witness testifies that because of the huge medical expenses that she has incurred, she has been financially devastated, to the point where she has had to refinance her house and these other things, all of which she would like the jury to believe is on account of the accident, the injuries, the medical bills incurred – |
| BY THE COURT: | Yes, sir. |
| BY MR. MOORE: | – then I am entitled to be able to demonstrate that those bills were paid by Blue Cross Blue |

[5]Defendant Horseshoe Casino, in its *Brief for Appellant* (at p. 5), states that Mrs. Mitchell "has returned to her former activities of daily living." This statement is simply not true, and ignores Mrs. Mitchell's trial testimony. Mrs. Mitchell specifically testified that, because of the injury, she is no longer able to do gardening, rake leaves, get down in the bathtub, play with her grandchildren, or play golf (Mrs. Mitchell testified she played golf once a week prior to the injury). [T. 120] As Mrs. Mitchell testified, the injury "devastated" and changed her lifestyle.

| | |
|---|---|
| | Shield and not by her. She couldn't have said it better herself when she said, "I ought not be saying this," yet she did. |
| BY THE COURT: | Mr. Whitwell? |
| BY MR. WHITWELL: | Well, your Honor, I think the collateral source rule blocks what he's talking about. I don't think he's entitled to bring up that Blue Cross Blue Shield paid these bills. |
| BY THE COURT: | Well, I tend to agree with you. I mean certainly it's something that falls under the collateral source rule, although it seemed to be – she did testify that she was financially devastated. |

[T. 123-124][6]

After a short recess, the trial judge ruled that Defendant Horseshoe Casino could not go into evidence that Mrs. Mitchell's medical bills had been paid by a third-party, collateral source (*i.e.*, Blue Cross Blue Shield). [T. 130] The trial judge then allowed the Defendant to make a proffer on this issue, and Mrs. Mitchell was cross-examined outside the presence of the jury. During this process, Mrs. Mitchell's attorney pointed out to the trial judge that the reason the Mrs. Mitchell had tendered a summary of her medical expenses into evidence (*i.e.*, Exhibit P-2, described as "Summary Sheet of Expenses") was because much of the documentation was in the nature of explanation of benefits forms which indicated Medicare had paid the bill and which would have indicated the payor (such as Medicare) as a collateral source. [T. 135]

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[6]During the trial, as well as in this appeal, Defendant Horseshoe Casino was represented by Robert L. Moore (MS #3458), while Mrs. Mitchell was represented by Robert Q. Whitwell (MS #7176).

Mrs. Mitchell, in her direct testimony, relied upon Exhibit P-2 when she testified that her medical bills incurred following her injury on March 29, 2006, totaled $45,260.50. [T. 119] On cross-examination, during the Defendant's proffer, Mrs. Mitchell testified that while she did not pay the entire $45,260.50 out of her own pocket, she had paid "several medical bills out of my pocket" and that she thought she still owed the ambulance service. [T. 136-137] Defendant Horseshoe Casino offered Exhibit D-2 (described as the "backup data to medical expenses") as evidence, which the trial judge denied as being inadmissible. [T. 137-138]

After Defendant Horseshoe Casino concluded the proffer, the jury was returned to the courtroom and the Defendant began its cross-examination of Mrs. Mitchell. The trial began on Tuesday, November 13, 2007, and the Defendant pointed out to Mrs. Mitchell that some of the medical bills contained in Exhibit D-2 (the "backup data") had been faxed "to somebody" on November 11 and November 12, 2007 (which were the Sunday and Monday prior to the trial). [T. 140-141] The Defendant questioned whether a bill from Memphis Dermatology Clinic, where Mrs. Mitchell was treated for "candidiasis albicans folliculitis in the urogenital tract," was treatment received by Mrs. Mitchell because of her injury at the Horseshoe Casino:

Q. Candidiasis, folliculitis, urogenital.

A. Well, what is that? What does that mean?

Q. I'll be glad to tell you if the Judge would let me.

A. All right.

Q. It's not a broken leg, is it?

A. I never said it was a broken leg. I said it was a staph infection that I got at the hospital while I was recuperating from surgery, from the broken ankle.

[T. 143-144]

The Defendant noted that Mrs. Mitchell's medical bills included a bill for $10,198.00 from Sutherland Clinic for treatment dating as far back as June 1996, some ten years before Mrs. Mitchell's injury at the Horseshoe Casino. [T. 146] Mrs. Mitchell readily agreed that, with regard to the $10,198.00 bill from Sutherland Clinic which had been included in Exhibit P-2 (the "Summary Sheet of Expenses"), a mistake had been made, and Mrs. Mitchell explained:

> I had bills from the Sutherland Clinic from the fall. They thought, you know, from the anesthesia and all I was having heart problems, so I went. I did do the thallium. But I think what happened is when they called to get the records to print this out, that they gave them the whole – my whole history from – and this is the first I've seen of this.

[T. 148]

It was later explained to the trial judge, outside the presence of the jury, that the office of Mrs. Mitchell's attorney flooded a few days prior to the trial. The office of Mrs. Mitchell's attorney (*i.e.*, Robert Q. Whitwell) occupies a ground-floor, basement-type area underneath some retail businesses located at 1308 North Lamar Boulevard in Oxford, Mississippi. Water leaking from the "1308 Salon and Spa" retail premises, which is directly above the personal office of Robert Q. Whitwell, inundated the office and ruined many documents in the office (late in the business day, employees in the spa unknowingly caused a water supply line to come loose which caused water to flow continually overnight into Whitwell's office below). In preparation for the trial, which began on Tuesday, November

13, 2007 (which was the day after the Veterans' Day holiday was observed on Monday, November 12), Mrs. Mitchell's attorney had to obtain replacement copies of her medical records. It was during this frantic process, where documents were being faxed the day before the trial, that Mrs. Mitchell's entire medical history from Sutherland Clinic was inadvertently incorporated in with Mrs. Mitchell's post-March 29, 2006 (the date of the fall at the Horseshoe Casino), medical bills. [T. 289] On re-direct examination, Mrs. Mitchell testified:

> Q. Ms. Mitchell, I take responsibility for this $10,000 bill. I got that yesterday, and I'm the one that prepared that [*i.e.*, Exhibit P-2, the "Summary of Expenses"] for you; is that correct?
>
> A. Yes.
>
> Q. And if that's incorrect, you would like to take that $10,000 off of that $45,000 that you are showing there to be accurate about it and be fair to the Horseshoe and to the jury?
>
> A. Well, I think we should take off anything prior to, you know, the fall, ....

[T. 164][7]

During the Defendant's cross-examination of Mrs. Mitchell, the Defendant raised a question of whether Mrs. Mitchell ignored a barricade when she left the snack bar to play her

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[7]Defendant Horseshoe Casino, in its *Brief for Appellant* (at p. 6), states "[t]he plaintiff had no answer for why the amount of the bills listed on the summary sheet was thousands of dollars greater than was shown on the supporting documentation." This statement is incorrect. As demonstrated by Mrs. Mitchell's re-direct testimony, her attorney prepared the summary sheet (*i.e.*, Exhibit P-2) and Mrs. Mitchell readily agreed that any medical expense incurred prior to her injury should not have been included.

last 50 cent coupon and subsequently tripped and fell over the black metal plate attached to the slot stools.[8] Mrs. Mitchell testified:

> Q. ... is it true that when you got up from back where you were with Mrs. Jolly, you walked seven or eight steps forward and came to a stop, within an arm's lengths of where a barricade was located;
>
> A. I never saw a barricade. I have said that numerous times, that there was no barricade that I saw.

[T. 154][9]

Mrs. Mitchell further testified:

> Q. What I've understood you to tell the jury is that you couldn't see from three steps away, slot stools that were turned side by side, up against the left-hand row of slot machines.
>
> A. I saw – no, that's not correct.
>
> Q. I beg your pardon. Why don't you correct me.
>
> A. That is not correct. I saw about three chairs in a little bit of disarray. The chair was turned, and I think I said that in my other deposition. I tried to tell you exactly how it was, and I walked over, looking at the machine to put my coupon in. I was not looking at the floor. I was looking – because it just two or three lady steps, not your big steps.
>
> Q. So you were even closer than my big steps?
>
> A. To the machine.
>
> Q. And to the chairs you tripped over?

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[8]Defendant Horseshoe Casino maintains, in the "Statement of Facts" set forth in the Defendant's *Brief of Appellant* filed herein, that "[t]he slot bank at which the plaintiff sought to play was, at the time of the incident, barricaded off by a rope." *Brief of Appellant* (p. 4).

[9] Exhibit D-3-A and Exhibit D-3-B were received into evidence and are, respectively, a VHS and a DVD video-recording of Mrs. Mitchell's fall which was recovered from security cameras at the Horseshoe Casino (the content of both the VHS and the DVD are identical). The jury viewed the video and made its own determination of whether any barricade was present and whether Mrs. Mitchell ignored a barricade.

A. Yeah, and I tripped on it. My heel caught on the – on that metal part, but I didn't know the chairs had a metal part.

[T. 155]

Mrs. Mitchell testified assertively during her cross-examination that the slot machines she was approaching when she tripped and fell "were open and being played" and maintained that "[i]f there was a barricade there, I was focused on the machine and did not see it." [T. 156-157] Mrs. Mitchell testified that while some machines may have been barricaded, the area containing the machines she approached "was wide open, and the machines had been played."[10] [T. 157] Mrs. Mitchell testified:

> ... when I was ...at the snack bar, I said, "I have this little 50 cent coupon. I want to go play it in those 5 cent machines. Let's see what's open."
>
> And they were renovating the whole place back there. I think even new carpet and everything and new machines, and all of these rows of machines were barricaded. They had a little strip of tape across each one, and the ones on this side were barricaded, if that's the word, and they had tape. This row was open. The lights were on the machines. They had been played before, and I merely walked up to the ones I saw over there. ....

[10]In Mrs. Mitchell's pretrial deposition, a portion of which was introduced into evidence during the trial, Mrs. Mitchell testified that there was nothing to prevent her from approaching the slot machines she was approaching when she fell, and Mrs. Mitchell stated emphatically: "I mean, I wouldn't have gone past a rope or a barricade for 50 cents." [T. 210] Again, the jury was able to fully evaluate Mrs. Mitchell's testimony on this issue during the trial when the jury viewed a video-recording (Exhibit D-3-A and Exhibit D-3-B) of Mrs. Mitchell's actions.

[T. 158][11]

Bettie Jolly, a life-long friend of Mrs. Mitchell, testified she had accompanied Mrs. Mitchell to the Horseshoe Casino on the day Mrs. Mitchell broke her ankle. [T. 175-176] Mrs. Jolly testified that there were no barricades to keep Mrs. Mitchell from approaching the slot machines from the snack bar area, nor where there any barricades to keep someone from approaching the machines from the other end of the aisle. [T. 178, 180, 183, 186, 191]

On cross-examination, Mrs. Jolly testified:

> Q. So if the video shows that [Mrs. Mitchell] stopped right at that barricade, that's something you just don't remember; is that true?
>
> A. That's something I did not see.

[T. 185] Upon re-direct, Mrs. Jolly testified:

> ... I know I had no trouble walking right to her. Nothing in my way, and when she went down, I could see her all the way down to the floor.

[T. 191]

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[11]During closing argument, Mrs. Mitchell's attorney, addressing the question of whether the slot machines Mrs. Mitchell was approaching when she fell were open for play, called the jury's attention to the video of the event:

> Now the next question some of you might ask today ... [is] were those machines operable? Were they really supposed to be played that day? Did you notice that her and Ms. Jolly's friend, Mr. Bolton, got his money out while she's lying on the floor and played that slot machine, and I'm thinking, "What is he thinking?" He's playing that slot machine right there in front of her while she's lying on the floor, ailing with a bad leg. But the point I'm trying to make there, these machines were being operated. They were being played. Yeah, the lights are blinking on all of them, too. You can see that. You saw that in the video. So these machines were being played. ....

[T. 250]

Mrs. Jolly testified that she saw Mrs. Mitchell fall and that when she went to Mrs. Mitchell's assistance, she did not have to go around any barricades to get to Mrs. Mitchell. [T. 179] Mrs. Jolly testified that when she reached Mrs. Mitchell, her eyes were "rolling back in her head" and she was almost going into shock [T. 182]

Mrs. Jolly testified that, in the weeks after the accident, Mrs. Mitchell was in "terrible suffering" and testified:

> ... she couldn't get up. She couldn't move. She couldn't do anything. She couldn't even hardly get in the wheelchair. She couldn't hardly use the walker. She finally got to where she could, but it was ***devastating*** on her at the time.

[T. 183 (emphasis added)][12]

After Mrs. Mitchell (the Plaintiff) rested her case, the Defendant's entire case consisted of presenting a video of the accident to the jury, and the introduction of a portion of Mrs. Mitchell's pre-trial deposition.[13] [T. 197, 209]

The jury returned a verdict in favor of Mrs. Mitchell, but which assigned contributory negligence to Mrs. Mitchell in the amount of thirty percent (30%). [T. 270] Mrs. Mitchell's damages were fixed by the jury in the amount of $80,000.00. [T. 271, C.P. 128-129] The trial judge entered a judgment upon the jury verdict in favor of Mrs. Mitchell in the amount of $56,000.00 (calculated as $80,000.00 less 30%). [C.P. 133; R.E. Tab 4] Mrs. Mitchell

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[12]Because of arguments made by the Defendant in its *Brief of Appellant*, the Plaintiff-Appellee would point out that the use of the word "devastated" by Mrs. Jolly has no discernable reference whatsoever to Mrs. Mitchell's financial position.

[13]The video-recording of the incident was taken by the casino's security cameras, and two formats of the video were received into evidence: a VHS tape, marked as Exhibit D-3-A, and a DVD, marked as Exhibit D-3-B. It was stated to the trial court that both exhibits contain identical video content, and that the VHS tape was introduced for use during the trial (with equipment available at the trial) while the DVD was introduced since it was thought a DVD would be a preferred format for use by the Mississippi Supreme Court. [T. 197]

sought an additur, which was denied. [C.P. 136, 171; R.E. Tab 12 & 13] Defendant Horseshoe Casino brought a motion for a new trial in which it was principally asserted that the trial court had erred during Mrs. Mitchell's cross-examination when the trial court refused to allow the Defendant to introduce evidence, for impeachment purposes, that Medicare and an insurer (Blue Cross Blue Shield) had paid Mrs. Mitchell's medical bills. [C.P. 139-140; R.E. Tab 5] The trial judge conducted a full hearing on the Defendant's *Motion for New Trial* on January 9, 2008, and on January 14, 2008, the trial judge entered an eleven-page order denying the Defendant's motion for a new trial. [C.P. 160-170, R.E. Tab 2; T. 274-312]

Defendant Horseshoe Casino filed its *Notice of Appeal* on February 8, 2008, in which it stated it was appealing the trial court's *Order Denying Defendant's Motion for New Trial.* [C.P. 175; R.E. Tab 3]

* * * * * *

## III. SUMMARY OF THE ARGUMENT

Defendant Horseshoe Casino argues (as its first assignment of error) that the trial court erred by failing recognize an impeachment exception to the collateral source rule and by failing to allow the Defendant to introduce evidence (for impeachment purposes) that Mrs. Mitchell's medical bills had been paid by a third-party payor. Defendant Horseshoe Casino also argues (as its second assignment of error) that the trial court abused its discretion by failing to grant the Defendant's *Motion for New Trial.* The basis for the motion for a new trial was that the Defendant had been limited in its ability to impeach the Plaintiff's (Mrs. Mitchell) testimony because the trial court refused to recognize an impeachment exception to the collateral source rule. Thus, if the Defendant's first assignment of error is without merit, the Defendant's second assignment of error is also without merit; conversely, if the Defendant's first assignment of error has merit, the second assignment of error need not even be discussed.

A thorough review of Mississippi case law indicates that no Mississippi court has yet recognized an impeachment exception to the collateral source rule; therefore, the Defendant's first assignment of error is wholly without merit, and the Defendant's appeal should be dismissed, the trial court's judgment should be affirmed.

* * * * * *

## IV. ARGUMENT

### A. *STANDARD OF REVIEW*

The *Notice of Appeal* filed herein by Defendant Horseshoe Casino recites that the Defendant is appealing "the court's order denying defendant's motion for new trial entered with the clerk on January 15, 2008." [C.P. 175; R.E. Tab 3] The Defendant's *Motion for New Trial* had alleged that "the court committed reversible error in two specific respects" which were identified as (1) "denying the defendant's motion for directed verdict" (at both the close of the Plaintiff's case-in-chief and at the close of all evidence), and (2) "refusing to allow the defendant to introduce evidence of the fact that the plaintiff's medical expenses had been paid in their virtual entirety by Medicare and Blue Cross Blue Shield supplemental health insurance." [C.P. 139-140; R.E. Tab 5]

"The standard of review on a motion for a new trial is abuse of discretion." *Johnson v. St. Dominics-Jackson Memorial Hosp.*, No. 2006-CA-01696-SCT, 967 So.2d 20, 23 (¶ 8) (Miss. 2007). See also *Smith v. Crawford*, No. 2004-CT-00257-SCT, 937 So.2d 446, 447 (¶ 5) (Miss. 2006) ("The standard of review for considering a trial court's decision denying a motion for a new trial is whether the trial court abused it discretion."); *Poole v. Avara*, No. 2004-CA-01000-SCT, 908 So.2d 716, 726 (¶ 25) (Miss. 2005) ("The standard of review in considering a trial court's denial of a motion for a new trial is ... abuse of discretion."); and, *Bobby Kitchens, Inc. v. Mississippi Ins. Guar. Ass'n*, 560 So.2d 129, 132 (Miss. 1989) ("This Court will reverse a trial judge's denial of a request for new trial only when such denial amounts to a [sic] abuse of that judge's discretion.").

Abuse of discretion occurs where the decision of the trial judge "was arbitrary and clearly erroneous." *Mississippi Transportation Commission v. McLemore*, No. 2001-CA-01039-SCT, 863 So.2d 31, 34 (¶ 4) (Miss. 2003).

As noted, the Defendant's *Motion for New Trial* alleges the trial court erred by "denying the defendant's motion for directed verdict." With regard to denial of motions for directed verdict, the Mississippi Supreme Court has stated:

> Our standards of review for a denial of a judgment notwithstanding the verdict and a directed verdict are ... identical. [Citation omitted.] Under this standard, this Court will:
>
> > consider the evidence in the light most favorable to the appellee, giving that party the benefit of all favorable inference that may be reasonably drawn from the evidence. If the facts so considered point so overwhelmingly in favor of the appellant that reasonable men could not have arrived at a contrary verdict, we are required to reverse and render. On the other hand if there is substantial evidence in support of the verdict, that is, evidence of such quality and weight that reasonable and fair minded jurors in the exercise of impartial judgment might have reached different conclusions, affirmance is required.
>
> [Citation omitted.]

*Sperry-New Holland, a Div. of Sperry Corp. v. Prestage*, 617 So.2d 248, 252 (Miss. 1993). See also *Steele v. Inn of Vicksburg, Inc.*, 697 So.2d 373, 376 (Miss. 1997) (quoting *Sperry-New Holland*). See also *Johnson v. St. Dominics-Jackson Memorial Hosp.*, No. 2006-CA-01696-SCT, 967 So.2d 20, 23 (¶ 9) (Miss. 2007) ("Evidence is weighed in the light most favorable to the verdict."), and *Cash Distributing Co., Inc. v. Neely*, No. 2004-CT-01124-SCT, 947 So.2d 286, 296 (¶ 34) (Miss. 2007) ("... we must leave the jury

verdict undisturbed unless we find that, viewing the evidence in the light most favorable to [the appellee], no reasonable, rational juror could have reached the same conclusion.").

* * *

## B. *THE TRIAL COURT DID NOT ERR IN REFUSING TO ALLOW DEFENDANT HORSESHOE CASINO TO SUBMIT EVIDENCE ON THE PAYMENT OF PLAINTIFF'S MEDICAL EXPENSES*

Defendant Horseshoe Casino, in its *Brief for Appellant* (at p. 9), sets forth its first assignment of error as follows, to-wit:

> THE TRIAL COURT ERRED IN REFUSING TO ALLOW DEFENDANT TO SUBMIT EVIDENCE ON THE PAYMENT OF PLAINTIFF'S MEDICAL EXPENSES.

Defendant Horseshoe Casino then begins its argument (in its *Brief for Appellant*, at 9), as follows:

> Presumptively, the trial court denied the defendant's motion and did not allow the jury to consider the proper [sic] of evidence based upon that [sic] the "collateral source rule."

Without making any presumptions at all, the "collateral source rule" is the reason the trial judge prohibited Defendant Horseshoe Casino from putting evidence before the jury that most of Mrs. Mitchell's medical bills had been paid by a third party (either Medicare or Blue Cross Blue Shield insurance), which is a "collateral source." When the matter first came up in the trial, as Mrs. Mitchell was tendered for cross-examination, the attorney for Defendant Horseshoe Casino argued that:

> ... when the witness testifies that because of the huge medical expenses that she has incurred, she has been financially devastated, to the point where she has had to refinance her house and these other things, all of which she would like the jury to believe is on account of the accident, the injuries, the medical

> bills incurred ... then I am entitled to be able to demonstrate that those bills were paid by Blue Cross Blue Shield and not by her.

[T. 123] Whereupon, Mrs. Mitchell's attorney stated to the trial judge that "the collateral source rule blocks what he's talking about," to which the trial judge agreed, stating, "... certainly it's something that falls under the collateral source rule, although it seemed to be – she did testify that she was financially devastated. [T. 123-124] Following a short break in the trial, the trial judge stated to the attorneys that he had reviewed some case law and had found one case which he stated "I would have to construe as evidence of collateral source for purposes of impeachment," but another case stated emphatically "that there was no impeachment exception to the collateral source rule" and allowing impeachment by way of such evidence "constituted reversible error." [T. 129-130] The trial judge then specifically ruled:

> ... I'm not going to permit you to go into collateral source. I'm going to say that you're not entitled to, and that's going to be my ruling on it.

[T. 130][14]

The "collateral source rule," as applied by the trial court in the case *sub judice*, has been enunciated and applied many times by the Mississippi Supreme Court, to-wit:

> Under the issues presented in this cause, the fact that the loss of either of the parties was covered by insurance was not proper to be admitted in evidence. In 25 C.J.S., *Damages*, § 99, page 647, it is provided:
>
> > 'The wrongdoer is not entitled to have the damages to which he is liable reduced by proving that plaintiff has received or will receive compensation or indemnity for the loss from a collateral source,

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[14]One of the cases reviewed by the trial judge during the break during the trial was *McCary v. Caperton*, 601 So.2d 866 (Miss. 1992).

> wholly independent of him. Under this general rule, insurance in behalf of the injured person cannot be set up by the wrongdoer in mitigation of the loss.'

*Ward v. Mitchell*, 216 Miss. 379, 385, 62 So.2d 388, 391 (Miss. 1953).[15]

When the trial court denied Defendant Horseshoe Casino's *Motion for New Trial*, the trial judge issued a well-considered and well-reasoned eleven-page order in which the trial court reviewed Mrs. Mitchell's testimony and in which the trial court discussed the decisions of the Mississippi Supreme Court and the Mississippi Court of Appeals in *McCary v. Caperton*, 601 So.2d 866 (Miss. 1992), *Busick v. St. John*, No. 2002-CA-01011-SCT, 856 So.2d 304 (Miss. 2003), *Burr v. Mississippi Baptist Medical Center*, No.

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[15]See also, *e.g.*, *Coker v. Five-Two Taxi Service*, 211 Miss. 820, 826, 52 So.2d 356, 357 (Miss. 1951) (citing 25 C.J.S., *Damages*, § 99, and 15 Am. Jur., *Damages*, § 201); *Clary v. Global Marine, Inc.*, 369 So.2d 507, 510 (Miss. 1979) ("Mississippi has a 'collateral source' rule under which compensation received by a plaintiff from a collateral source wholly independent of wrongdoer cannot be set up in mitigation or reduction of damages."); *Preferred Risk Mut. Ins. Co. v. Courtney*, 393 So.2d 1328, 1331 (Miss. 1981) (Under the collateral source rule, "a tort feasor is not entitled to have the damages for which he is liable reduced by proving that an injured party has received compensation from a collateral source wholly independent of the tort feasor."); *Star Chevrolet Co. v. Green by Green*, 473 So.2d 157, (Miss. 1985) (Under "the collateral source rule ... an adverse party is not entitled to have the damages to which he is liable reduced by proving that the plaintiff has received or will receive compensation or indemnity for the loss from a collateral source."); *Central Bank of Mississippi v. Butler*, 517 So.2d 507, 511-12 (Miss. 1987) ("Under [the collateral source] rule, a defendant tortfeasor is not entitled to have damages for which he is liable reduced by reason of the fact that the plaintiff has received compensation for his injury by and through a totally independent source, separate and apart from the defendant tortfeasor."); *Eaton v. Gilliland*, 537 So.2d 405, 408 (Miss. 1988) ("Mississippi has adopted and follows the 'collateral source rule.'"); *McCary v. Caperton*, 601 So.2d 866, 869 (Miss. 1992) ("Mississippi has adopted and follows the 'collateral source rule.'"); *Gatlin v. Methodist Medical Center, Inc.*, No. 1999-CA-00269-SCT, 772 So.2d 1023, 1033-34 (¶ 32) (Miss. 2000); *Brandon HMA, Inc. v. Bradshaw*, No. 2000-CA-00735-SCT, 809 So.2d 611 (Miss. 2001) (in which it was held that Medicaid payments are subject to the collateral source rule); *Wal-Mart Stores, Inc. v. Frierson*, No. 2000-CA-00364-SCT, 818 So.2d 1135. 1139-40 (¶ 7) (Miss. 2002) (Medicaid benefits are subject to the collateral source rule); *Coho Resources, Inc. v. McCarthy*, No. 97-CA-01447-SCT, 829 So.2d 1, 18-19 (¶ 53) (Miss. 2002); and, *Burr v. Mississippi Baptist Medical Center*, No. 2003-CA-01551-SCT, 909 So.2d 721, 729 (¶ 23) (Miss. 2005).

2003-CA-01551-SCT, 909 So.2d 721 (Miss. 2005), and, *Geske v. Williamson*, No. 2004-CA-01730-COA, 945 So.2d 429 (Miss. App. 2006).

After discussing the aforesaid decisions, the *Order Denying Defendant's Motion for New Trial* states: "Historical precedence [sic] suggest that there is no impeachment exception to the collateral source rule." [C.P. 169; R.E. Tab 2] The trial judge, in the order, also stated that "this court is of the opinion that even if the denial of the impeachment evidence was error, it does not rise to the level as to require a new trial." [C.P. 169; R.E. Tab 2] The trial judge stated that "this court is of the view that the plaintiff's credibility was significantly impeached" due to the inclusion of the $10,198.00 bill from Sutherland Clinic which predated the incident at the casino, and the trial judge noted "the size of the verdict compared to the plaintiff's claimed medical expenses suggest [sic] that plaintiff's credibility had been called into question." [C.P. 170; R.E. Tab 2] The trial judge stated:

> This court is of the opinion that the added impeachment of the plaintiff by the introduction of evidence regarding the insurance payments would have added only minuscule more injury to the plaintiff, if any. For these reasons, the Motion for New trial [sic] will be denied.

[C.P. 170; R.E. Tab 2]

Defendant Horseshoe Casino, in its *Brief for Appellant* (at p. 10), claims that the Mississippi Supreme Court, in its opinion in *Busick v. St. John*, No. 2002-CA-01011-SCT, 856 So.2d 304 (Miss. 2003), implied that there is an "impeachment exception to the collateral source rule," and that the Mississippi Court of Appeals (which hereinafter may be referred to as the "COA"), in its opinion in *Geske v. Williamson*, No. 2004-CA-01730-COA, 945 So.2d 429 (Miss. App. 2006), specifically recognized an impeachment exception to the

collateral source rule. Therefore, Defendant Horseshoe Casino argues the trial court committed error by refusing to allow the Defendant to impeachment Mrs. Mitchell's testimony with evidence demonstrating that most of her medical bills had been paid by a third-party payor (either Medicare or Blue Cross Blue Shield). As will be shown herein, *infra*, the Defendant's argument is wrong.

As noted, *supra*, the trial judge specifically reviewed the cases of *McCary v. Caperton*, *Busick v. St. John*, *Burr v. Mississippi Baptist Medical Center*, and *Geske v. Williamson* before denying Defendant Horseshoe Casino's motion for a new trial; thus, those cases should be reviewed here. First, in *McCary* (a 1992 case), where the plaintiff was seeking recovery for injuries alleged to have been suffered in an automobile accident, the plaintiff was claiming lost wages even though the plaintiff had been granted sick leave and had received sick pay while off of work. The defendant put evidence of the plaintiff's receipt of sick pay before the jury, arguing that the plaintiff was engaged in a "scam" by trying to collect for injuries the plaintiff never actually suffered. The Mississippi Supreme Court held that it was reversible error for the trial court to have allowed such evidence:

> We have never recognized such an exception to the collateral source rule, and we refrain from doing so here. It is true that the rule as stated in [*Central Bank of Mississippi v. Butler,* 517 So.2d 507 (Miss.1987)] does not squarely fit this case. McCary did not "receive" compensation from an independent source since she never filed an insurance claim. However, *Ward v. Mitchell,* 216 Miss. 379, 62 So.2d 388 (1953), states that the collateral source rule applies not only where a claimant has already received compensation from an independent source but also where the potential for such compensation exists. ***We hold that the trial court committed reversible error in allowing the defendant to introduce evidence of McCary's insurance coverage or benefits of sick leave.***

*McCary*, 601 So.2d at 869 (emphasis added).

Next, in *Busick* (a 2003 case), the case which Defendant Horseshoe Casino claims the Mississippi Supreme Court implied it would recognize an "impeachment exception to the collateral source rule," the plaintiff (Busick) testified that she was not able to continue physical therapy for injuries caused by the accident because she could not afford it and the defendant (St. John), as impeachment evidence, introduced evidence that Busick had paid only $45.00 as her part of those medical expenses. On appeal, Busick argued that it was error to allow St. John to impeach her by eliciting testimony in which she was forced to make reference to payments made by her health insurance provider, but St. John pointed out that Busick made no objection to the testimony at the time. The Mississippi Supreme Court held that Busick's argument had no merit, in part because her attorney failed to either make a timely objection or a timely motion for a mistrial; furthermore, Busick's attorney asked for, and was granted, a limiting instruction, which the attorney indicated was a satisfactory cure of the problem. Notably, the Court observed:

> The evidence related to Busick's health insurance was admitted to impeach her testimony that she suffered permanent injuries as a result of the accident. Busick testified that she ceased physical therapy because she could no longer afford it. The fact that she spent only $45 on that therapy discredited her testimony. Further, the specific testimony was not solicited until after a long line of questioning during which Busick's attorney ***failed to object***.

*Busick*, 856 So.2d at 310 (¶ 16) (emphasis added).

Again, Defendant Horseshoe Casino claims *Busick* implies that an "impeachment exception to the collateral source rule" exists in Mississippi, but it is more likely that had the collateral source evidence been admitted over a timely objection from Busick's attorney the

Mississippi Supreme Court would have found reversible error.[16] This is especially true in light of explicit language contained in the *Busick* opinion, to-wit:

> We were asked to rule on the issue of whether an impeachment exception should be recognized under the collateral source doctrine. ... Our decisions have not recognized an exception to the collateral source rule.

*Busick*, 856 So.2d at 309 (¶ 15). Major changes in law (such as recognizing an impeachment exception to the collateral source rule) are never pronounced by silence, so it is notable that at no point in the Court's opinion did the Court return to the aforesaid language and comment, in any way, that it might (under similar or other facts) recognize an impeachment exception to the collateral source rule.

In *Burr* (a 2005 case), a widow (and her children) brought suit against a public hospital alleging negligence by nurses caused the death of the husband/father. Prior to the trial, the defendant hospital brought a motion *in limine* to prohibit the plaintiff from introducing evidence regarding the decedent's "financial status, Medicare, Social Security reimbursement or any issue concerning payment" which the hospital apparently feared would be construed by a jury as indicating that the decedent was given a reduced level of care. The trial court granted the motion, with the exception that the plaintiff could put on proof that the decedent "was on Medicare." During the trial, the plaintiff widow testified her husband had received $980.00 per month from Social Security disability and she also made reference to

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[16]Other aspects of *Busick* cast serious doubt upon the interpretation given to the case by Defendant Horseshoe Casino. First, Busick, the plaintiff, was found by the jury to have been one hundred percent (100 %) responsible for the accident and assigned no negligence at all to the defendant. Next, Justice McRae, the author of the Court's opinion in *McCary*, concurred (without a written opinion) with the result in *Busick*. It is very unlikely that Justice McRae would have been silent if the Court, in *Busick*, was truly creating an impeachment exception to the collateral source rule.

the fact that her husband was on Medicare; the matter of the decedent's disability income was raised by the plaintiff to show loss of income as a portion of the plaintiff's claim for damages. On cross-examination, the plaintiff admitted that in a pretrial deposition she had testified that the decedent's monthly disability income was $921.00, from which a Medicare insurance premium was deducted, so that the decedent actually received only $868.00 per month (instead of $980.00). The Mississippi Supreme Court, reviewing this set of facts and without any citation to any authority, stated: "The Hospital was entitled to cross-examine Patricia Burr on the net amount of her husband's monthly Social Security check, particularly given that her direct testimony differed from her deposition testimony." *Burr*, 909 So.2d at 729 (¶ 25). The plaintiff's trial testimony apparently inflated claimed lost income by more than $100.00 per month from what she had previously claimed in her deposition. The Court also observed:

> None of the attorneys or witnesses discussed which particular bills Medicare paid, and the Hospital made no attempt to persuade the jury that payments from Medicare should serve to reduce the amount of damages awarded. Consequently, the collateral source rule does not apply. Additionally, since Patricia Burr mentioned Medicare in her direct testimony and the only use of Medicare in the Hospital's cross examination was to clear up the amount of lost monthly income, the trial judge did not abuse his discretion in allowing this testimony.

*Burr*, 909 So.2d at 729 (¶ 26). Again, there was no citation of any authority, and, rather that enunciate an exception to the collateral source rule, the Mississippi Supreme Court merely stated "the collateral source rule does not apply" to the particular set of facts presented in *Burr*.[17]

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[17] *Burr* was heard by a three-judge panel which included Justice Smith, who was the author of the Court's opinion in *Busick*. The opinion in *Burr* was written by Justice Dickinson.

In *Geske* (a 2006 COA case), the family of Jerald Geske, a truck driver who had contracted mesothelioma, sued his former employer (a trucking company, MBTC), an insurance company, and an insurance agent, alleging that the defendants had unlawfully terminated the Geske's health insurance benefits and not properly replaced them. The factual background presents a sad tale in which Jerald Geske contracted mesothelioma while employed by MBTC. After becoming unable to work due to the illness, Jerald Geske maintained his medical insurance coverage through MBTC's group insurance plan via COBRA.[18] MBTC considered dropping its group insurance plan because it was becoming too expensive, and a local insurance agent (Williamson) convinced MBTC to submit an application for a new group insurance plan from a different insurance company. MBTC instructed Williamson to assistant the Geske family in maintaining or obtaining insurance coverage. MBTC dropped its existing group insurance plan and purchased a new plan from a different company. When MBTC dropped its existing plan, COBRA coverage for the Geske family ended, and, when a member of the Geske family acted contrary to instructions from Williamson, the Geske family was left without any insurance coverage. The Geske family brought suit.[19]

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[18]COBRA, the acronym for the Consolidated Omnibus Budget Reconciliation Act of 1986, refers to a provision included the federal law which provides that an employee who is an active participant in the employer's health plan may continue health insurance coverage for the employee (and family) for up to 18 months after the employee leaves the employment relationship for any reason. The *Geske* opinion never sets forth when the 18-month period began to run for Jerald Geske.

[19]The Geske family sued the insurance agent (Williamson), Jerald Geske's former employer (MBTC), and the company which was providing the new group insurance plan for MBTC. The case was removed to federal court (probably as an ERISA case). The federal court retained the case against MBTC and the insurance company, but the case against Williamson was returned to state court.

The COBRA coverage for the Geske family ended on May 15, 2001. Jerald Geste died from mesothelioma on September 30, 2001. During the trial, the Geske family put on testimony showing medical expenses of $30,000.00, and Jerald Geste's adult children testified that Jerald had declined medical services, including a CT scan, because of lack of insurance and inability to pay for the services. Jerald Geste had, however, received a sum of $20,000.00 from a mesothelioma settlement from an asbestos company.[20] The Geske family, in a pretrial motion *in limine*, sought to have any evidence of the $20,000.00 mesothelioma settlement held inadmissible, but evidence of the settlement was presented before the jury. The jury found for Williamson (the defendant).

On appeal, the Geske family argued that the trial court had committed reversible error by admitting evidence of collateral sources of recovery (*i.e.*, the $20,000.00 settlement). The COA observed that "[t]he collateral source rule applies only when the compensation received is for the same injury as the current damages being sought" and stated:

> ... in this case, the compensation at issue was for the injury of Jerald's mesothelioma due to asbestos exposure, and not for the damages caused by the alleged unlawful termination of insurance benefits. ***Since this source of damages is derived from separate and distinct alleged torts, the collateral source rule is inapplicable.***

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[20]The COA opinion makes the observation: "At trial, there was no explanation by the Geskes as to why this money was not used for Jerald's medical services." *Geske*, 945 So.2d at 433 (¶ 14). The evidence demonstrated that Jerald Geste was unable to work (and, thus, was not earning any income) but was maintaining his health insurance through COBRA. This means Jerald Geske was paying a large monthly insurance premium from his own pocket (COBRA coverage is not paid by the employer) at a time when Geske was not earning any income. Under these circumstances, the Geske family was most likely in an extremely dire financial situation, and it does not take much imagination to see why the $20,000.00 was not available to be applied to medical treatment.

*Geske*, 945 So.2d at 434 (¶ 21) (emphasis added).[21]

The COA also stated:

> Throughout the trial, Geske's counsel and witnesses ***made numerous reference to their dire financial situation because of the lack of financial means to pay for necessary medical services for Jerald.*** At one point, the Geskes's son, under direct examination, suggested to the jury that Jerald might have had a different outcome if he had had a CT scan which "he was denied ... because he did not have insurance." It follows that because of the supposed dire financial situation and the lack of health insurance, ***this situation caused the emotional distress damages sought by the Geskes.*** Thus, it was incumbent on the defense counsel to show the jury that the Geskes could actually afford these medical procedures, even without insurance. Therefore, the evidence that the Geskes had received asbestos settlement proceeds was relevant to the issue of whether the Geskes suffered emotional distress as a result of the lack of insurance coverage, and necessitated by Geske's own testimony at trial.

*Geske*, 945 So.2d at 434-35 (¶ 22) (emphasis added).

The COA, having stated that because the $20,000.00 settlement was "derived from separate and distinct alleged torts" wholly apart from the termination of the insurance coverage (which was the basis of the Geske family's action against Williamson), and having stated that the collateral source rule was inapplicable to the $20,000.00, the COA found no error in the admissible of evidence regarding the $20,000.00 settlement for impeachment purposes.[22] The COA did, however, specifically point out (in a footnote in its opinion):

> We note that the Mississippi Supreme Court has not allowed evidence of collateral sources introduced for impeachment purposes. *See Busick*, 856

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[21]The COA cited as authority its own decision in *Baugh v. Alexander*, No. 98-CA-00758-COA, 767 So.2d 269, 272 (¶ 11) (Miss. App. 2000) ("The collateral source rule applies only when the indemnity or compensation is for the same injury for which damages are sought.").

[22]It is worth noting that after the COA's decision in *Geske* was released on December 12, 2006, the Geske family did not file a motion for rehearing or seek a writ of certiorari.

> So.2d at 309 (¶ 15) (stating that there is no impeachment exception to collateral source rule recognized in Mississippi but allowing in testimony of collateral source, with limiting instruction, because testimony was not solicited for purposes of mitigating loss or reducing damages).

*Geske*, 945 So.2d at 435 (n. 6).

The $20,000.00 mesothelioma settlement received by Jerald Geske was not compensation from a "collateral source" with regard to the injuries the Geske family alleged were caused by Williamson's alleged tortious acts; Williamson was sued for causing the Geske family to lose its medical insurance, whereas the $20,000.00 settlement was for Jerald Geske's mesothelioma. Because the $20,000.00 settlement was not related to the damages alleged to have been caused by Williamson, the settlement does not fit within the definition of compensation from a collateral source:

> ... a defendant tortfeasor is not entitled to have ***damages for which he is liable*** reduced by reason of the fact that the plaintiff has received compensation ***for his injury*** by and through a totally independent source, separate and apart from the defendant tortfeasor.

*Central Bank of Mississippi v. Butler*, 517 So.2d 507, 511-12 (Miss. 1987) (emphasis added).

Defendant Horseshoe Casino, in its *Brief for Appellant* (at p. 10), argues: "The fact that *Busick* impliedly recognized the impeachment exception to the collateral source rule was made crystal-clear by the Mississippi Court of Appeals in the case of *Geske v. Williamson* ... where, under circumstances strikingly similar to those before the Court today ...." Defendant Horseshoe Casino then quotes portions of the *Geske* opinion it believes demonstrates that the COA recognized an impeachment exception to the collateral source rule; however, it is simply wrong to read the COA's opinion in *Geske* as creating such an exception. Unlike the situation in *Geske*, all compensation Mrs. Mitchell received fits well

within the definition of compensation from a "collateral source," since Defendant Horseshoe Casino is alleged to be directly responsible for Mrs. Mitchell's injuries; thus, there really aren't any facts in the case *sub judice* which are "strikingly similar" to the facts of *Geske*. Furthermore, the COA specifically noted, without further comment, "that the Mississippi Supreme Court has not allowed evidence of collateral sources introduced for impeachment purposes." *Geske*, 945 So.2d at 435 (n. 6). It appears most likely that had the COA classified the $20,000.00 mesothelioma settlement as compensation from a "collateral source," it would have held that evidence of the settlement was inadmissible even for impeachment. Certainly, if the COA was announcing a new rule of law which contradicted established precedent from the Mississippi Supreme Court, the Supreme Court's precedent would have be given more comment than a footnote. Defendant Horseshoe Casino is wrong: the COA did not recognize an impeachment exception to the collateral source rule because the $20,000.00 settlement in *Geske* did not fit within the rule to begin with.

Anytime a litigant seeks to introduce otherwise inadmissible evidence for purposes of impeachment, the particularized facts of the individual case must be considered, and the determination of admissibility, even for impeachment purposes, of such evidence can only be determined on a case-by-case basis. Under the facts of the case *sub judice*, even if it is assumed that the Mississippi Supreme Court would allow an impeachment exception to the collateral source rule, there is no basis for using evidence of compensation from a collateral source to impeach Mrs. Mitchell's testimony. In fact, under the facts of this case, the only real purpose that could be served by allowing Defendant Horseshoe Casino to put on evidence that Mrs. Mitchell's medical bills were paid by a third-party payor (such as

Medicare or Blue Cross Blue Shield) would be for Defendant Horseshoe Casino to confuse the jury so that the jury might reduce the damages for which Defendant Horseshoe Casino is liable. This, of course, would be a clear-cut violation of the collateral source rule.

Again, reviewing Mrs. Mitchell's testimony, she never testified she was "financially devastated" by the medical bills as Defendant Horseshoe Casino alleges. What Mrs. Mitchell actually said in her trial testimony is that she was unable to work for several months and, when she did return to work, her wage earning ability had been reduced by fifty percent (50%) because she was only able to work four-hour days after the injury (instead of the eight-hour days she was working before the injury). [T. 102, 113] Mrs. Mitchell's financial position obviously deteriorated, first due to her inability to work for many months, and then from her inability to work more than four hours in a single day. Mrs. Mitchell testified that she refinanced her house and "borrowed money to live on," which is not surprising because of her lost income and lost wage earning ability. When Mrs. Mitchell stated in her testimony that her injury had "devastated me financially" she ***was not*** claiming that her medical expenses had "devastated" her. Furthermore, Mrs. Mitchell testified that, because of the injury, she is no longer able to do gardening, rake leaves, get down in the bathtub, play with her grandchildren, or play golf (she had played golf once a week prior to the injury). [T. 120] The impact of the injury on her life and lifestyle led Mrs. Mitchell to testify: "... I hate to say

it's ruined my life because I know there are people who are terminally ill that are worse off, but ***it has devastated me and changed my life.***"[23] [T. 120 (emphasis added)]

When Mrs. Mitchell's testimony is viewed objectively, her testimony did not come anywhere close to 'opening the door' for impeachment by introduction of evidence that her medical bills had been paid by a third-party payor. Defendant Horseshoe Casino's assignment of error on this issue is wholly without merit.

* * *

## C. *THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN THE TRIAL COURT DENIED DEFENDANT HORSESHOE CASINO'S MOTION FOR A NEW TRIAL*

Defendant Horseshoe Casino, in its *Brief for Appellant* (at p. 9), sets forth its second assignment of error as follows, to-wit:

> THE TRIAL COURT'S ERROR AMOUNTED TO ABUSE OF DISCRETION WHEN IT FAILED TO GRANT DEFENDANT'S MOTION FOR NEW TRIAL

Defendant Horseshoe Casino, in its *Brief for Appellant* (at p. 12), argues:

> ... the trial court's error in failing to allow the Defendant to proffer evidence regarding the payment of Plaintiff's medical bills when faced with the Plaintiff's obvious credibility issue during testimony requires that the trial court grant a new trial ....

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[23]Similarly, Mrs. Bettie Jolly testified that, in the weeks after the accident, Mrs. Mitchell was in "terrible suffering" and testified:

> ... she couldn't get up. She couldn't move. She couldn't do anything. She couldn't even hardly get in the wheelchair. She couldn't hardly use the walker. She finally got to where she could, but it was ***devastating*** on her at the time.

[T. 183 (emphasis added)] Again, the use of the word "devastated" by Mrs. Jolly has no discernable reference whatsoever to Mrs. Mitchell's financial position.

As articulated by Defendant Horseshoe Casino in its *Brief for Appellant*, for there to be any error under the Defendant's second assignment of error, there first must be a finding of error under the Defendant's first assignment of error; in other words, if the trial court did not err when it refused to allow Defendant Horseshoe Casino to introduce evidence (for impeachment purposes) that Mrs. Mitchell's medical bills had been paid by a third-party payor, then there is also no error under the Defendant's second assignment of error.

Assuming, *arguendo*, that the trial court did err when it refused to recognize an impeachment exception to the collateral source rule and allow Defendant Horseshoe Casino to introduce evidence (for impeachment purposes) that Mrs. Mitchell's medical bills had been paid by a third-party payor, such error, under the specific facts of the case *sub judice*, does not rise to the level of reversible error.

Defendant Horseshoe Casino argues in its *Brief for Appellant* (at p. 12):

> [Mrs. Mitchell's] credibility was ... an issue and, therefore, her attempt to play to the jury's sympathy with a claim that she was "financially devastated" by the medical bills warranted further exploration at trial.

It has been thoroughly demonstrated previously in this brief, *supra*, that Mrs. Mitchell never testified that she was "'financially devastated' by the medical bills." Again, Mrs. Mitchell testified that the injury "devastated me and changed my life." [T. 120] Mrs. Mitchell also testified:

> I had to – I borrowed money to live on. I refinanced my house. I know that's probably not a problem I've supposed to bring up, but it has – it's devastated me financially, too.

[T. 122] As stated, *supra*, Mrs. Mitchell had testified that she was unable to work for several months and she testified that when she did return to work her wage earning ability had been

reduced by half (because she could only work a four-hour day and not an eight-hour day). Under these facts, Mrs. Mitchell's statement that "it's devastated me financially" did not 'open the door' to introduction of evidence that her medical bills had been paid by a third-party payor.

Defendant Horseshoe Casino argues that it "was not afforded the opportunity to demonstrate to the jury that [Mrs. Mitchell] was entirely lacking credibility." [*Brief for Appellant*, p. 13] The trial court, in considering the Defendant's motion for a new trial, thoughtfully assessed the Defendant's argument on this point. The trial court noted that Mrs. Mitchell's credibility was seriously affected when the Defendant demonstrated that Mrs. Mitchell had included a claim for over $10,000.00 for services from the Sutherland Clinic which predated her injury at the casino, to-wit:

> ... because of the debacle involving the errant $10,000 of medical expenses appearing in the plaintiff's medical expense summary and defense counsel's immediate and vigorous attack thereon, this court is of the view that the plaintiff's credibility was significantly impeached. Further, the size of the verdict compared to the plaintiff's claimed medical expenses suggest [sic] that plaintiff's credibility had been called into question. This court is of the opinion that the added impeachment of the plaintiff by the introduction of evidence regarding the insurance payments would have added only minuscule more injury to the plaintiff, in any. For these reasons, the Motion for New Trial will be denied.

[C.P. 170; R.E. Tab 2]

Again, the standard of review in considering a trial court's denial of a motion for a new trial is ... abuse of discretion. See, *e.g.*, *Bobby Kitchens, Inc. v. Mississippi Ins. Guar. Ass'n*, 560 So.2d 129, 132 (Miss. 1989) ("This Court will reverse a trial judge's denial of a request for new trial only when such denial amounts to a [sic] abuse of that judge's

discretion."). And, again, abuse of discretion occurs where the decision of the trial judge "was arbitrary and clearly erroneous." *Mississippi Transportation Commission v. McLemore*, No. 2001-CA-01039-SCT, 863 So.2d 31, 34 (¶ 4) (Miss. 2003). A manner of determining whether a trial judge has acted arbitrarily in denying a motion for a new trial is considering whether the verdict of the jury it is so contrary to the overwhelming weight of the evidence that to allow the verdict to stand would sanction an unconscionable injustice. See, *e.g.*, *Adcock v. Mississippi Transportation Commission*, No. 2007-CA-00078-SCT, 981 So.2d 942, 950 (Miss. 2008). Evidence is viewed in the light most favorable to the verdict, and a new trial is warranted only if the verdict is contrary to the substantial weight of the evidence. See, *e.g.*, *Blossman Gas, Inc. v. Shelter Mutual General Insurance Co.*, No. 2004-IA-01364-SCT, 920 So.2d 422, 424 (¶ 10) (Miss. 2006).

In the case *sub judice*, there is no question that Mrs. Mitchell broke her ankle in a fall at Defendant Horseshoe Casino. The video-recording (Exhibit D-3-A and Exhibit D-3-B) of Mrs. Mitchell's fall does not indicate that Mrs. Mitchell ignored a barricade, as is claimed by Defendant Horseshoe Casino; in fact, the video demonstrates the Defendant's failure to put a sufficient barricade in place. Mrs. Mitchell presented evidence that she had incurred losses of approximately $40,000.00.[24] The jury verdict of $80,000.00 awarded Mrs. Mitchell only twice her expenses, and the jury assigned thirty percent (30%) of the fault to Mrs. Mitchell. Mrs. Mitchell was awarded a judgment of only $56,000.00. Under the specific

[24]This does not include the $10,000.00 charge from Sutherland Clinic which was initially erroneously included in Exhibit P-2.

facts of the case *sub judice* it cannot be said that allowing the verdict to stand would 'sanction an unconscionable injustice.'

This assignment of error is without merit.

* * * * * *

## V. CONCLUSION

Defendant Horseshoe Casino argues (as its first assignment of error) that the trial court erred by failing recognize an impeachment exception to the collateral source rule and by failing to allow the Defendant to introduce evidence (for impeachment purposes) that Mrs. Mitchell's medical bills had been paid by a third-party payor. Defendant Horseshoe Casino also argues (as its second assignment of error) that the trial court abused its discretion by failing to grant the Defendant's *Motion for New Trial*. The basis for the motion for a new trial was that the Defendant had been limited in its ability to impeach the Plaintiff's (Mrs. Mitchell) testimony because the trial court refused to recognize an impeachment exception to the collateral source rule. However, as shown herein, the trial court allowed the Defendant a wide-open cross-examination of the Plaintiff related to the medical bills, which more than offset any perceived prejudice the Defendant claims here. Thus, if the Defendant's first assignment of error is without merit, the Defendant's second assignment of error is also without merit; conversely, if the Defendant's first assignment of error has merit, the second assignment of error need not even be discussed.

A thorough review of Mississippi case law indicates that no Mississippi court has yet recognized an impeachment exception to the collateral source rule; therefore, the Defendant's first assignment of error is wholly without merit. The Defendant's appeal should be dismissed, the trial court's judgment should be affirmed, and the Defendant should be ordered to pay to the Plaintiff the costs of her appeal.

RESPECTFULLY SUBMITTED, this, the 9th day of JULY, 2008.

**MARY S. MITCHELL,**
***Plaintiff-Appellee***

By: _____
ROBERT Q. WHITWELL (MS[redacted]
*Attorney for Mary S. Mitchell*

OF COUNSEL:

ROBERT Q. WHITWELL
Farese, Farese & Farese, P.A
1308 North Lamar Boulevard, Suite 8
Post Office Box 1789
Oxford, Mississippi 38655
Telephone: 662-281-5884
Facsimile: 662-232-8074

## CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I have, this date, served a true and correct copy of the above and foregoing *Brief of Appellee Mary S. Mitchell* upon the below named parties by placing same in the regular United States Mail, postage pre-paid, addressed as stated, to-wit:

***Trial Judge:***

Honorable Charles Webster
Circuit Court Judge
Post Office Box 998
Clarksdale, Mississippi 38614

***Attorneys for Defendants-Appellants:***

Honorable Robert L. Moore
Heaton & Moore, P.C.
100 North Main Building, Suite 3400
Memphis, Tennessee 38103

THIS, the 9th day of JULY, 2008.

ROBERT Q. WHITWELL (MS [redacted]
*Attorney for Mary S. Mitchell*

OF COUNSEL:

ROBERT Q. WHITWELL
Farese, Farese & Farese, P.A
1308 North Lamar Boulevard, Suite 8
Post Office Box 1789
Oxford, Mississippi 38655
Telephone: 662-281-5884
Facsimile: 662-232-8074

## CERTIFICATE OF MAILING

I, the undersigned, hereby certify that I have, this date, placed the original of the above and foregoing *Brief of Appellee Mary S. Mitchell*, together with three (3) copies of same and an electronic disk containing the text of the brief in Word Perfect 9.0 format (or higher), in the regular United States Mail, postage pre-paid, addressed to:

Honorable Betty W. Sephton
Office of the Clerk
Mississippi Supreme Court
Post Office Box 249
Jackson, Mississippi 39205-0249

THIS, this 9TH day of JULY, 2008.

ROBERT Q. WHITWELL (MS [redacted]
*Attorney for Plaintiff-Appellee*
*Mary S. Mitchell*

Robert Q. Whitwell
Farese, Farese & Farese, P.A
1308 North Lamar Boulevard, Suite 8
Post Office Box 1789
Oxford, Mississippi 38655
Telephone: 662-281-5884
Facsimile: 662-232-8079