IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

ROBINSON PROPERTY GROUP, LIMITED PARTNERSHIP	**Appellant,**
vs.	**NO. 2008-TS-00256**
MARY S. MITCHELL,	**Appellee.**

BRIEF OF APPELLANT

APPEALED FROM THE CIRCUIT COURT
OF TUNICA COUNTY, MISSISSIPPI
CIVIL ACTION 2006-0268

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ORAL ARGUMENT REQUESTED

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

ROBINSON PROPERTY GROUP,
LIMITED PARTNERSHIP,

Appellant,

vs. **CAUSE NO: 2008-TS-00256**

MARY S. MITCHELL,

Appellee.

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certify the following list of persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate potential disqualifications or refusal/recusal.

1. Trial Judge — Honorable Charles Webster
2. Appellant — Robinson Property Group, Limited Partnership
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6. Sharon Grandberry-Reynolds, Circuit Court Clerk, Tunica County
7. Horseshoe Casino and Hotel
8. Vickie Clark

9. Bettie Jolly

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STATEMENT ON ORAL ARGUMENT

The Appellant respectfully requests oral argument. This appeal presents complicated facts and legal issues, and an oral argument would be beneficial to this Court and to the parties. The Appellant, therefore, respectfully submits that oral argument would be appropriate in this case.

I.

STATEMENT OF THE ISSUES

1. Whether the trial court erred by refusing to allow the defendant to introduce evidence regarding the payment of plaintiff's medical expenses in light of her testimony on direct examination that the medical expenses incurred had "financially devastated" her.
2. Whether the trial court abused its discretion in denying Appellant's Motion for a New Trial.

II.

STATEMENT OF THE CASE

This case arises out of an incident at the Horseshoe Casino in Robinsonville, Mississippi on March 29, 2006 when Appellee claims that she was injured when she tripped on a chair in front of a slot machine that had a protruding bar. (Appellant R.E. 8). Ms. Mitchell filed a Complaint for damages on October 5, 2006 against the defendant Robinson Property Group, Limited Partnership. *Id.* The plaintiff alleges that the "chair" that the plaintiff tripped over was a slot stool which had been removed from the front of the slot machine. (Appellant R.E. 6). The plaintiff requested unspecified damages in her original Complaint. (Appellant R.E. 8).

Robinson Property Group, LP filed its Answer on October 23, 2006 denying that it was guilty of any act or omission that proximately caused injuries alleged in the plaintiff's complaint. (Appellant R.E. 9). Defendant further alleged comparative fault against the plaintiff. *Id.*

The matter was set for trial on November 13, 2007, before a jury and the Honorable Charles Webster. (Appellant R.E. 2). The plaintiff's case was supported by the testimony of the plaintiff; by testimony from Betty Jolly, a friend of the plaintiff and a witness to the alleged incident; by deposition testimony of an orthopedic surgeon; and by the testimony of defendant's corporate representative, Vickie Clark, called as an adverse witness. (Appellant R.E. 7). At the close of proof, the jury deliberated and returned a verdict for the plaintiff, assessing total damages of eighty thousand dollars ($80,000.00) and assessing comparative fault against the plaintiff in the amount of (30%). (Appellant R.E. 4). Therefore, the total award was reduced by thirty percent (30%) to fifty six thousand dollars ($56,000.00). *Id.*

Plaintiff filed a Motion for Additur on or about November 20, 2007 and Defendant filed a Motion for New Trial. (Appellant R.E. 12; Appellant R.E. 5). After hearing arguments from

both parties on both motions on January 9, 2008, the trial court entered separate Orders denying both plaintiff's Motion for Additur and defendant's Motion for New Trial on January 15, 2008. (Appellant R.E. 2; Appellant R.E. 14).

Defendant, Robinson Property Group, LP promptly filed its Notice of Appeal on February 8, 2008 and its Appeal Bond and Stay of Appeal on May 1, 2008. (Appellant R.E. 3). The bond and a surety were approved on May 2, 2008. This Honorable Court docketed and assigned a case number to this matter, as well as, provided a briefing schedule on May 5, 2008.

III.

STATEMENT OF THE FACTS

This case involves a trip and fall incident that occurred on March 29, 2006 at the Horseshoe Casino in Robinsonville, Mississippi. (Appellant R.E. 8). The plaintiff stood up out of a chair, walked a short distance before stopping at a barricade and seemingly trying to decide which slot machine she wished to play. (R.Tran. Vol. I, p. 105, Appellant R.E. 6). She then took three steps, obviously lost her balance, and fell heavily on to her left side. (R.Tran. Vol. I, p. 155). The complaint alleges that the plaintiff "tripped on a chair in front of a slot machine that has a protruding bar sticking out." (Appellant R.E. 8). It appears that the "chair" that the plaintiff tripped over was a slot stool which had been removed from the front of a slot machine and stacked with nine other stools in front of the slot machines. (Appellant R.E. 6).

The slot bank at which the plaintiff sought to play was, at the time of the incident, barricaded off by a rope. *Id.* The plaintiff testified insistently that the machine she was going to play was not in an area which was barricaded off and adamantly denied the presence of any rope barricade whatsoever. (R.Tran. Vol. I, p. 106, 108, R. Tran. Vol. I, p. 154, 155, 156). She even denied ever seeing the slot stool that in her complaint she alleges caused her to fall. (R.Tran. Vol. I, p. 155). In her testimony, the plaintiff was unable to state with conviction what caused her fall, but whatever caused the fall, it resulted in a fracture of her left leg. (R.Tran. Vol. I, p. 110). She was transported by ambulance to a local Memphis hospital where she was stabilized and released. *Id.* Several days later she underwent surgery to repair the fracture. (R.Tran. Vol. I, p. 111).

Her surgery was performed in an expert manner by Dr. Andrew Murphy who testified that the treatment which he performed was without complication. (Appellant R.E. 11). He

further testified that the plaintiff's recovery was without complication and that he was "pleased" with her overall postoperative course. *Id.* Dr. Murphy testified that the plaintiff's ultimate outcome was significantly better than it could have been; that her postoperative level pain was part of the usual and expected constellation of symptoms which occurs post-operatively; that she was released to return to her former employment by no later than April 18, 2007; and that he has not seen the plaintiff professionally since April 18, 2007. *Id.* Finally, Dr. Murphy testified that he does not reasonably expect any future medical expenses on the part of the plaintiff. *Id.* The plaintiff has returned to her former activities of daily living. *Id.*

At the trial of this matter, the plaintiff took the stand and testified, as follows:

> 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 physical therapy and all 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 out to be a substantial sum of money, more than the fifty thousand dollars 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 not a problem I'm supposed to bring up, but it has---it's devastated me financially, too."**

(R.Tran. Vol. I, p. 122; see also R.Tran. Vol. I, pp. 139, 140, 142). No supporting documentation was presented to the jury in the form of testimony; in the form of medical records from other physicians; or any other form other than the brief medical bills which were provided as backup to defense counsel but which were not admitted into evidence. (R. Tran. Vol. I, p. 149).

The few backup bills which were provided (but not admitted into evidence) did not support the plaintiff's testimony and created a huge credibility issue for the plaintiff. (R.Tran. Vol. I, pp. 135-149). By way of example, the plaintiff claimed that a bill for a urinary tract infection for which she was treated two months after subject accident was somehow related to the fracture of her ankle. (R.Tran. Vol. I, pp. 143-144). The plaintiff claimed that bills for routine blood work assessing her cholesterol and glucose levels in August 2007 were related to the incident which had occurred seventeen months previously. (R.Tran. Vol. I, pp. 144-145). The 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. (R.Tran. Vol. I, pp. 147-149). The most egregious of all of this was the plaintiff's claim for $10,198.00 allegedly owed to the Sutherland Cardiology Clinic for treatment that dated back to June 1996. (R.Tran. Vol. I, p. 146). Upon being confronted with these inconsistencies, the plaintiff finally admitted that she could not vouch for the truthfulness or accuracy of the medical summary, and although the plaintiff testified repeatedly that true and correct copies of the bills were "in the car," those bills and records never came to the courtroom and never were given to the jury. (R.Tran. Vol. I, pp. 147-149).

No other witnesses testified on behalf of the plaintiff and in support of her damages other than her lifelong friend, Betty Jolly. While it's certainly true that Mrs. Jolly testified concerning the immediate effects of the injury, notably absent from her testimony was any evidence of ongoing problems. (R.Tran. Vol. II, pp. 182-183). Also notably absent from the plaintiff's case in chief was any corroborating testimony from any other sources such as family, work colleagues, other physicians are even medical records custodians. (Appellant R.E. 7).

IV.

STANDARD OF REVIEW

The standard of review for denial of a motion for new trial under Mississippi Rules of Civil Procedure 59 is abuse of discretion. *Poole v. Avara, et al.*, 908 So.2d 716, 726 (Miss. 2005). The "abuse of discretion" standard means that unless the judge's decision is found to be arbitrary and clearly erroneous it will stand. *Id.* at 721, citing *Mississippi Transportation Commission v. McLemore,* 863 So.2d 31, 34 (Miss. 2003). "A new trial may be granted in a number of circumstances, such as when the verdict is against the overwhelming weight of the evidence, or when the jury has been confused by faulty jury instructions, or when the jury has departed from its oath and its verdict is a result of bias, passion, prejudice." *Id.* at 726-727, citing *Shields v. Easterling,* 676 So.2d 293, 298 (Miss. 1996) (quoting *Bobby Kitchens, Inc. v. Miss. Ins. Guar. Ass'n,* 560 So.2d 129, 132 (Miss. 1989)). The Court will not set aside a jury's verdict and order a new trial unless it is "convinced of the verdict was contrary to substantial weight of the evidence so that justice requires the new trial granted." *Id.* at 727, citing *Jesco, Inc. v. Whitehead,* 451 So.2d 706, 713-14 (Miss. 1984).

V.

STATEMENT OF THE ARGUMENT

The trial court abused its discretion by failing to grant the defendant's Motion for New Trial. In considering a Motion for New Trial the trial court should consider and weigh the following factors:

> "(1) whether search for true facts proceeded as far as it reasonably could under the facts of the case; (2) to what extent would it be unfair to the prevailing party to give the adversary a second bite at the apple; (3) considering the evidence, was there a substantial basis for believing that the jury disregarded their oaths and failed to follow instructions; (4) assuming arguendo that the verdict was unjust, was the impact of that injustice upon the party against who the verdict was returned; (5) if a new trial is ordered, will the prevailing party be deprived of some fair advantage he enjoyed in the first trial; and (6) are there any other factors present that would render just or unjust the grant or denial of a new trial."

Janssen Phamaceutica, Inc. v. Bailey, et al., 878 So.2d 31, 60-61 (Miss. 2004), citing *Jesco, Inc. V. Whitehead,* 451 So.2d 706, 715-16 (Miss. 1984). In the instant case, the trial court did not surmount the first hurdle. It failed to allow the "search for true facts" to proceed "as far as it reasonably could under the facts of the case" when it refused to allow the Defendant to introduce evidence which the Mississippi Supreme Court and Court of Appeals has called "relevant," "necessitated by the plaintiff's own testimony," and "unfairly prejudicial" if excluded.

VI.

ARGUMENT

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

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

> "A defendant tortfeasor is not entitled to have damages for which he is liable reduced by reason of the fact 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 (Miss. 1987). At least up until 1992, the "courts of the State of Mississippi has never recognized exceptions the collateral source rule." *McCary v. Caperton,* 601 So.2d 866, 869 (Miss. 1992). That is no longer the case.

In the case *Busick v. St. John,* 856 So.2d 304 (Miss. 2003), the Mississippi Supreme Court reaffirmed and restated the "collateral source rule" as providing that

> "[c]ompensation or indemnity for the loss received by the plaintiff from a collateral source, wholly independent of the wrongdoer, as if from an insurance, cannot be set up by the defendant **in mitigation or reduction of damages.**"

Id. at 309 (emphasis supplied). In *Busick,* the plaintiff was cross-examined at trial regarding the existence of insurance, apparently while plaintiff's counsel napped at the counsel table, and on appeal, the plaintiff complained that the court should have excluded this cross-examination based upon the collateral source rule. The Mississippi Supreme Court rejected this assignment of error based solely upon the fact that plaintiff's counsel failed to make a timely objection, but in rejecting the assignment of error, the Mississippi Supreme Court found that the cross examination was otherwise probative because "the evidence related to [plaintiff's] health

insurance was admitted to impeach her testimony"; that the cross examination "discredited her testimony"; and that "the testimony was not solicited for purposes of mitigating her loss or producing damages" but instead clearly for purposes of impeachment and credibility. *Id.* at 869.

The fact that *Busick* impliedly recognize the impeachment exception to the collateral source rule was made crystal-clear by the Mississippi Court of Appeals in the case *Geske v. Williamson,* 945 So.2d 429 (Miss.Ct.App. 2006) where, under circumstances strikingly similar to those before the Court today, the Court held:

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

Id. at 434-35 (emphasis supplied). In its holding, the *Geske* court took what had been implied and stated very plainly that:

> "the collateral source rule applies only when evidence of other compensation is used for the purpose of mitigating damages. (Citing *Busick*) If the evidence is used for a purpose other than to lessen damages, the collateral source rule is not violated... we agree that the evidence of the mesothelioma settlement was not used to mitigate the damages caused to the Geskes, but was used to prove that the emotional damages did not, in fact, occur. Thus, the evidence was properly admitted."

Id. at 435.

In the case now before the court, the credibility of the plaintiff was directly in issue on all issues, both liability and damages. The plaintiff had already testified, on her oath, that she had incurred in excess of $45,000.00 in medical expenses, all of which were directly and solely related to her fractured ankle, but that testimony, as was later shown on cross-examination, was patently false. She had also testified on her oath that she did not see a barricade which was blocking off the slot machines, nor could she see the ten separate chairs which were "unattached" and "double parked" in front of slot machines, but that testimony, too, was contradicted by a video of the actual event. Because the trial court did not allow the defendant to introduce into evidence the plaintiff's Medicare and supplemental insurance policies, the defendant was deprived of its ability to demonstrate the fact that the plaintiff was also not truthful concerning the "financial devastation" resulting from these medical bills.

The *Geske* court has well said that when a plaintiff testifies to untrue facts, it is **incumbent** upon defense counsel during cross examination to introduce **relevant** evidence to negate the improper inference **necessitated** by the plaintiff's untrue testimony, and that a court which excludes this cross-examination has **unfairly prejudiced** the defense. Robinson Property Group cannot argue its position any better than this court has already held. It was plain error for the trial court to exclude relevant information, necessitated by the plaintiff's testimony when doing so would unfairly prejudice the defense.

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

When considering whether to grant a Motion for New Trial, this Court has held that the following factors should be weighed by the trial court:

> "(1) whether search for true facts proceeded as far as it reasonably could under the facts of the case; (2) to what extent would it be unfair to the prevailing party to give the adversary a second bite at the apple; (3) considering the evidence, was there a substantial basis for believing that the jury disregarded their oaths and failed to follow instructions; (4) assuming arguendo that the verdict was unjust, was the impact of that injustice upon the party against who the verdict was returned; (5) if a new trial is ordered, will the prevailing party be deprived of some fair advantage he enjoyed in the first trial; and (6) are there any other factors present that would render just or unjust the grant or denial of a new trial."

Janssen Phamaceutica, Inc. v. Bailey, et al., 878 So.2d 31, 60-61 (Miss. 2004), citing *Jesco, Inc. v. Whitehead,* 451 So.2d 706, 715-16 (Miss. 1984). In the instant case, 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 Plaintiff's obvious credibility issue during testimony requires that the trial court grant a new trial on the basis of the first factor listed by the *Janssen* court.

When assessing the merits of a Motion for New Trial, the trial court should first consider "whether search for true facts proceeded as far as it reasonably could under the facts of the case." Failure to allow the Defendant to present evidence of the payment of plaintiff's medical bills when faced with her self-contradictory testimony from the stand at the trial did not allow the search for "true facts" to proceed "as far as it reasonably could under the facts of the case." The facts in this case are that the plaintiff submitted a summary of medical bills that she claimed were true and accurate on direct examination but when confronted with inconsistencies on cross-examination admitted that she could not vouch for the accuracy of the summary. The witness's credibility was thus 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. This court has ruled that as an exception to the collateral source rule a party may offer evidence of payment of medical bills if it is not an attempt to mitigate damages related to those

bills and if it is **relevant** evidence to negate the improper inference **necessitated** by the plaintiff's untrue testimony. A court which excludes this cross-examination has **unfairly prejudiced** the defense and failed to permit the search for true facts to proceed as far as reasonably necessary thus a Motion for New Trial should be granted.

While the above consideration alone warrants reversal of the trial court's decision and grant of a new trial, the other factors listed by the *Janssen* court also counsel in favor of reversal. In this case, the grant of a new trial would not be unfair to the plaintiff as the prevailing party. In fact, a new trial would give the plaintiff a "second bite of the apple" by allowing her an opportunity to gather up her medical bills and actually offer proof tending to substantiate their validity. In the trial of this matter, the plaintiff, as discussed above, failed to proffer any evidence tending to support her claims for medical bills. Thus, rather than prejudicing the prevailing party by granting a "second bite at the apple," it is reasonable to argue that the plaintiff would benefit from a new trial. Additionally, the impact of verdict in this case is patently unjust to the defendant. The defendant was not afforded the opportunity to demonstrate to the jury that the witness was entirely lacking credibility. Therefore, rather than reducing the plaintiff's award by a mere 30% the jury may have instead found for the defendant on all issues. The judgment awarded against the defendant is not small and any award in this instance acts as an injustice to the defendant under these facts.

Further, if a new trial is ordered the plaintiff as the prevailing party would not be "deprived of some *fair* advantage... enjoyed at the first trial." Rather the defendant would be granted an opportunity to overcome an *unfair* advantage enjoyed by the plaintiff. The plaintiff was allowed to testify unimpeached by relevant evidence when she brought her own credibility into issue from the stand. Failure to allow the defendant to provide the jury with impeachment

evidence granted the plaintiff an unfair advantage at the trial and with the jury. In this case, justice and fairness counsel in favor of a new trial to remove that unfair advantage enjoyed by the plaintiff at the first trial. Finally, taking the above-enumerated factors as a whole and coupling them with the record on appeal, particularly the transcript of plaintiff's testimony renders the grant of a new trial wholly just.

The trial court abused its discretion by failing to weigh the *Janssen* factors and grant a new trial of this matter. Its error in refusing to admit evidence on the issue of plaintiff's credibility unfairly prejudiced the defendant. Taking into account all the factors set out by the court that error amounts to an abuse of discretion and a new trial in this case is just and warranted.

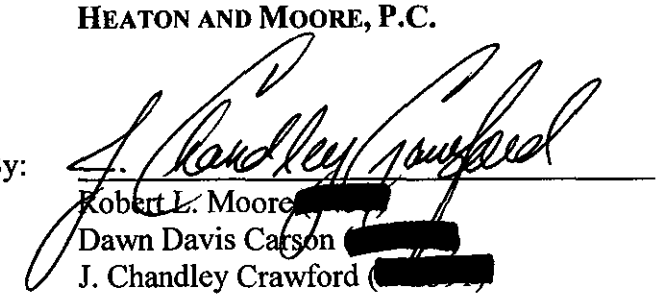
VII.

CONCLUSION

The trial court unfairly prejudiced the defendant by excluding relevant evidence regarding the payment of plaintiff's medical bills when this evidence was necessary to negate an improper inference raised by plaintiff's untrue testimony. The judge's clearly erroneous decision unfairly prejudiced the defendant. In considering the factors set out by the *Janssen* court, the trial court abused its discretion by not finding that a new trial in this matter was just and warranted under the circumstances and considering the substantial weight of the evidence in favor of a granting a new trial. The trial court's ruling should be reversed and this case should be remanded for a new trial on all issues.

Respectfully submitted,

HEATON AND MOORE, P.C.

By: 

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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that a true and exact copy of the Brief of the Appellant has been mailed, by United States mail, postage prepaid, to the following:

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This the 16th day of June, 2008.

AMENDED CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that a true and exact copy of the foregoing document has been mailed, by United State mail, postage prepaid, to the following:

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Honorable Charles Webster
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Clarksdale, MS 38614

Dated this the 16th day of June, 2008.

J. Chudley Crawford