Case No. 2008-CA-01187

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DONALD KOGER,
APPELLANT

v.

AUSTIN ADCOCK,
APPELLEE

Appeal from the Circuit Court of the First Judicial District
of Hinds County, Mississippi

BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

Submitted by:

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DONALD KOGER **APPELLANT**

v. **CASE NO. 2008-CA-01187**

AUSTIN ADCOCK **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

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

I. Donald Koger, Appellant;

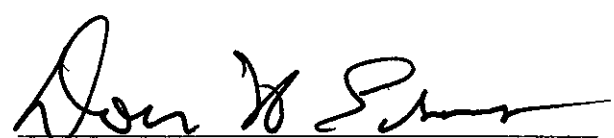
II. Austin Adcock, Appellee;

III. Honorable Winston L. Kidd, Circuit Court Judge of Hinds County, Mississippi;

IV. Honorable Don H. Evans, Attorney for Appellant; and

V. Honorable Laura Hill, Attorney for Appellee.

RESPECTFULLY SUBMITTED, this the 2ND day of MARCH, 2009.

BY: 

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STATEMENT OF THE CASE

A. Nature of the Case

This case is submitted to the Supreme Court of Mississippi to determine (1) whether the lower court erred in failing to grant Koger's Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial on Damages Only or, in the Alternative, for a New Trial on Liability and Damages or, in the Alternative, for Additur; (2) whether the verdict of the jury was so against the overwhelming weight of the evidence as to evince bias and prejudice on the part of the jury, or would show confusion and misunderstanding of the law and facts on the part of the jury, and would render an unconscionable injustice to Koger; (3) whether the lower court erred in granting Adcock's jury instruction, Jury Instruction No. 16, in regards to pre-existing conditions of Koger prior to the motor vehicle accident in question; (4) whether the lower court erred in not granting a new trial on the issues of liability and damages; (5) whether the lower court erred in not granting a new trial on the issue of damages only; and (6) whether the lower court erred in not granting Koger's peremptory instruction at the close of trial?

The trial of the case sub judice was held before a jury of twelve (12) commencing on October 8-9, 2007. The case was submitted to the jury on instructions delivered by the Court. The jury found in favor of the Appellee, Austin Adcock, and against the Appellant, Donald Koger. On November 2, 2007, Koger filed a Motion for Judgment Notwithstanding the Verdict or, in the Alternative, New Trial or, in the Alternative, Additur. Said Motion was denied by the trial court on June 5, 2008. Koger intends to prove that the trial court erred in denying that Motion.

B. Course of Proceedings and Disposition of the Court Below

This case is an action for damages by the Appellant, Donald Koger [hereinafter referred to as "Koger"], against the Appellee, Austin Adcock [herein after referred to as "Adcock"], for injuries

that Koger suffers from as a result of an automobile collision that occurred on June 3, 2002. Koger filed a civil action against Adcock in the Circuit Court of the First Judicial District of Hinds County, Mississippi on January 27, 2004.

The trial of the case sub judice was held before a jury of twelve (12) commencing on October 8, 2007. At the close of trial, jury instructions were addressed. The lower court refused some of Koger's proposed jury instructions, including, but not limited to P-1. P-1 was a peremptory instruction. With regard to Adcock's proposed jury instructions, Koger objected to Adcock's proposed instruction regarding pre-existing conditions of Koger, which was D-4. After Koger stated his objection to D-4, Adcock informed the lower court that he would be "happy to alter the instructions and limit it to the first two sentences." Tr. Transcr. vol. 4, 187 (Oct. 8-9, 2007). Koger also objected to the alteration of D-4. However, D-4 was given with modification as Jury Instruction No. 16. D-4 was modified just as Adcock had requested. The first two sentences of D-4 were given as Jury Instruction No. 16. Also, with regard to Adcock's proposed jury instructions regarding contributory negligence, the trial judge stated that he had "determined that this was not a case to submit to the jury to consider apportionment of fault." Tr. Transcr. vol. 4, 190 (Oct. 8-9, 2007).

After the attorneys made their objections to said proposed jury instructions, the case was submitted to the jury on instructions delivered by the Court. The jury returned with a verdict in favor of Adcock and against Koger. A *Final Judgment* was entered by the lower court on October 26, 2007.

The judgment resulted in Koger bearing the financial burden of the payment of all his past, present and future medical costs. Feeling aggrieved by the inadequacy of the jury's verdict, Koger filed a Motion for Judgment Notwithstanding the Verdict or, in the Alternative, New Trial or, in the Alternative, Additur on November 2, 2007. On November 8, 2007, Adcock filed his Response to

said Motion. Koger filed his Reply to Adcock's Response on November 16, 2007. Oral arguments were heard on said Motion on February 11, 2008. Koger's Motion was denied by the lower court on June 5, 2008. Koger now appeals the rulings of the lower court.

C. Statement of the Facts

On June 3, 2002, Koger was driving his vehicle in a northerly direction on Terry Road and was proceeding through a green light when Adcock, who was traveling in a westerly direction on Highway 80, suddenly ran a red light and collided with Koger's vehicle with great force. During the trial of this matter, Adcock claimed that the light was yellow the last time that he saw it. However, two (2) unbiased witnesses testified that Adcock ran the red light. In addition to their testimony, Adcock testified that he could not deny telling two (2) different individuals that he knew that the light was red when he proceeded through it. Also, Adcock testified that he could not swear that he did not run a red light. Furthermore, Koger and his wife, Patricia Koger, testified that they were certain that their light was green as they proceeded through the intersection.

The evidence showed that the force of the collision was so great that Adcock's vehicle flipped over, landing bottom-side up. During trial, Adcock admitted that it was a serious lick. Also, Officer Melvin Bender testified that both vehicles involved suffered heavy damage.

The evidence presented at trial revealed that Koger suffered serious injuries as a result of the collision. The most serious injury that Koger suffered was a back injury, which caused pain to radiate down his leg. In addition to the back injury and leg pain, Koger also had hip pain as a result of the accident in question. With regard to Koger's back and leg pain, he has undergone treatment, such as physical therapy and steroid injections. However, those remedies only gave him temporary relief. Today, Koger still suffers back and leg pain. At trial, he testified that he can't walk or stand like he used to. He also has trouble sleeping. As a result of the accident in question, Koger incurred

medical bills in the amount of $18,996.66 and lost wages in the amount of $4,567.64.

Koger testified that he has not sought more treatment because his only options are surgery and pain medication. He testified that surgery is expensive, and he would have to take off a lot of time from work. Therefore, Koger has not undergone surgery yet. As far as pain medication goes, Koger testified that he has "seen too many people that get hooked on pain medicine." Tr. Transcr. vol. 4, 154 (Oct. 8-9, 2007). However, Koger testified that Dr. Caple informed him that he would have to undergo back surgery somewhere down the line or else he would eventually get to the point where he can't walk or put weight on that leg. Koger testified that he does intend to have the surgery some day, but he needs to work for as long as he can before doing so.

At trial, Adcock focused on Koger's degenerative disc disease and implied that degenerative disc disease was the only issue to be decided in this case. However, the fact that Koger had degenerative disc disease prior to the accident in question was never even an issue. Koger admitted that his doctor had informed him that the degenerative disc disease was something that he had before the accident. The issue to be decided by the jury was whether the pain Koger was suffering in his back and leg was directly caused by the accident. Three (3) witnesses testified that the pain was caused by this accident. First, Koger testified that he had never had back pain prior to this accident. Second, Patricia Koger, Donald Koger's wife, testified that she had never heard him complain of back pain prior to this accident. Finally, Dr. Jeffrey Summers testified, by video deposition, that he could state, to a reasonable degree of medical probability, that the pain that Koger was suffering in his back and leg were caused by the accident in question. He testified that all of the treatment that Koger received from him was a direct result of said accident.

The only person that claimed that Koger's pain was not caused by the accident in question was Adcock's father, Eugene Adcock, and he could not keep his story straight. During the Plaintiff's

case-in-chief, Koger called Eugene Adcock to testify as an adverse witness. Eugene Adcock initially testified that Koger told him at the accident scene that he was not hurt at all. However, when Koger brought up a prior statement that Eugene Adcock had given, Eugene Adcock changed his story and said that Koger did tell him at the scene that his back was hurting but that it was not because of this accident.

The next day, Eugene Adcock was questioned during the Defendant's case-in-chief. Once more he, initially, claimed that Koger said he was not injured at all. However, on cross-examination he had to admit, again, that Koger did mention something about his back.

SUMMARY OF THE ARGUMENT

Koger argues that the lower court erred when it denied his Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial on Damages Only or, in the Alternative, for a New Trial on Liability and Damages or, in the Alternative, for Additur. The lower court's failure to rule in Koger's favor was reversible error. In considering the lower court's failure to correctly rule on said Motion, Koger asks this Court to address the following issues: (1) whether the evidence was of such quality that reasonable and fairminded jurors in the exercise of fair and impartial judgment might reach different conclusions; (2) whether the verdict was against the overwhelming weight of the evidence; (3) whether the jury departed from its oath and its verdict was the result of bias, passion, and prejudice; (4) whether the verdict was so inadequate as to shock the conscience and to indicate bias, passion, and prejudice on the part of the jury; and (5) whether the jury failed to respond to reason.

Also, Koger argues that the lower court should not have given Jury Instruction No. 16, a peremptory instruction regarding pre-existing conditions of Koger. Allowing said instruction to be given was reversible error and warrants a new trial.

Additionally, Koger argues that the lower court's failure to give P-1, Koger's proposed peremptory jury instruction, was reversible error and warrants a new trial.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT DENIED KOGER'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE, FOR A NEW TRIAL ON DAMAGES ONLY OR, IN THE ALTERNATIVE, FOR A NEW TRIAL ON LIABILITY AND DAMAGES OR, IN THE ALTERNATIVE, FOR ADDITUR.

A. The trial court erred when it denied Koger's Motion for Judgment Notwithstanding the Verdict.

Koger was entitled to a judgment notwithstanding the verdict. More specifically, the evidence supporting the verdict for Adcock fails the legal sufficiency test because reasonable and fairminded jurors would not have returned with a verdict in his favor. During the trial of this matter, Koger proved by a preponderance of the evidence all of the elements of a negligence action. See *Davis v. Christian Broth. Homes of Jackson, Mississippi, Inc.*, 957 So. 2d 390, 398 (Miss. App. 2007). The evidence clearly showed that Adcock's actions were the sole proximate cause of the accident in question and that Koger's back injury and leg pain were a direct result of Adcock's negligence.

1. Standard of Review

The standard of review is de novo when considering a trial court's denial of a motion for judgment notwithstanding the verdict. *Poole v. Avara*, 908 So. 2d 716, 726 (Miss. 2005) (citing *Wilson v. Gen. Motors Acceptance Corp.*, 883 So. 2d 56, 64 (Miss. 2004)). "The trial court must view the evidence in the light most favorable to the non-moving party and look only to the sufficiency, and not the weight, of that evidence." *Poole*, 908 So. 2d at 726 (citing *Wilson*, 883 So. 2d at 63). "When determining whether the evidence was *sufficient*, the critical inquiry is whether the evidence is of such quality that reasonable and fairminded jurors in the exercise of fair and impartial judgment might reach different conclusions." *Poole*, 908 So. 2d at 726 (citing *Jesco, Inc.*

v. Whitehead, 451 So. 2d 706, 713-14 (Miss. 1984)).

A motion for judgment notwithstanding the verdict "asks the Court to hold, as a matter of law, that the verdict may not stand." *JESCO, Inc.*, 451 So. 2d at 713. "If the facts and inferences so considered point so overwhelmingly in favor of the movant that reasonable men could not have arrived at a contrary verdict, granting the motion is required. *Id.*

2. Elements of a Negligence Action in Mississippi

In Mississippi, there are four (4) elements that a plaintiff must prove by a preponderance of the evidence in a negligence suit. They are as follows: (1) duty, (2) breach of duty, (3) causation and (4) injury. *Davis*, 957 So. 2d at 398.

When dealing with a negligence action, an individual is held to a "reasonable person standard" with regard to "duty" and "breach of duty." The following instruction was given during the trial of this matter as Jury Instruction No. 9: "The Court instructs the jury that the word 'negligence' used in these instructions means the doing of something which a reasonably prudent person would not have done under like circumstances, or the failure to do something which a reasonably prudent person would have done under like or similar circumstances." Supplemental Record, Volume 1 at page 10.

According to *Davis*, "proximate cause is a concept which is more accurately defined by reference to the distinct concepts of which it is comprised, which are '(1) cause in fact; and (2) foreseeability.'" 957 So. 2d at 404 (quoting *Johnson v. Alcorn State Univ.*, 929 So. 2d 398, 411 (Miss. App. 2006)). "Cause in fact means that the act or omission was a substantial factor in bringing about the injury, and without it the harm would not have occurred." *Id.* "Foreseeability means that a person of ordinary intelligence should have anticipated the dangers that his negligent act created for others." *Id.*

The following was given as Jury Instruction No. 10 during the trial of this matter:

> The Court instructs the jury that an element, or test, of proximate cause is that an ordinarily prudent person should reasonably have foreseen that some injury might probably occur as a result of his or her negligence. It is not necessary to foresee the particular injury, the particular manner of the injury, or the extent of the injury.

Supplemental Record, Volume 1 at page 11.

With regard to damages, a plaintiff must prove that the defendant's negligent act caused him to be injured. He does not have to prove the monetary value of the various elements with "reasonable certainty." *Amiker v. Brakefield*, 473 So. 2d 939 (Miss. 1985). He may rely on reasonable inferences to prove that an injury was sustained. Moreover, the plaintiff may meet his burden of proof with testimony that the symptoms appeared after the accident and did not exist before the accident. *Barkley v. Miller Transports, Inc.*, 450 So. 2d 416 (Miss. 1984).

3. Evidence Presented at the Trial of this Matter

During the trial of this matter Koger proved by a preponderance of the evidence all of the elements of a negligence action, which are duty, breach of duty, causation and injury. *Davis*, 957 So. 2d at 398.

a. Adcock's actions were the sole proximate cause of the accident in question.

On June 3, 2002, Koger was driving his vehicle in a northerly direction on Terry Road and was proceeding through a green light when Adcock, who was traveling in a westerly direction on Highway 80, suddenly ran a red light and collided with Koger's vehicle with great force. Tr. Transcr. vol. 3, 34-37; 41; 46-50; 60-61; 67-73; 99-107; 110-111;135-140; 142 (Oct. 8-9, 2007). During the trial of this matter, two (2) unbiased witnesses testified that Adcock ran the red light. Tr. Transcr. vol. 3, 34-37; 41; 67-73 (Oct. 8-9, 2007). Those two witnesses were Officer Melvin Bender and Brenda McCabe. The first witness to testify that Adcock ran the red light was Officer Melvin

Bender. He testified that Adcock told him that he had a red light. Officer Bender's testimony was as follows:

Q. **So Austin Adcock over here told you he had the red light?**
A. **Yes.**

Tr. Transcr. vol. 3, 35:5-7 (Oct. 8-9, 2007).

Officer Bender also testified that a witness to the accident, Brenda McCabe, told him that Adcock ran the red light.

Q. And the witness that you have down here on part of the accident report where it has witnesses and you listed a person's name down there. Read that name.
A. Brenda L. McCabe.
Q. And why did you put her down?
A. She stayed on the scene and gave the information that she saw it.
Q. She said she saw it?
A. Yes.
Q. Now is she the person who said she was behind Austin Adcock and saw him look like he hit his brakes?
A. Yes.
Q. Now did she tell you whether or not he ran the red light?
A. She said he couldn't stop, that he did go through the red light, through the intersection.
Q. **She said he run through the intersection on the red light.**
A. **Yes.**

Tr. Transcr. vol. 3, 35:16-36:11 (Oct. 8-9, 2007).

In addition to the aforementioned testimony of Officer Bender, he also testified that there was no issue of whether or not Adcock had run the red light. His testimony to the same was as follows:

Q. But when you left there, there was no issue that he had gone through the red light, was it?
A. No citation, you mean.
Q. **No issue? No question of whether he run the red light?**
A. **No.**

Tr. Transcr. vol. 3, 36:23-37:3 (Oct. 8-9, 2007).

Even when Adcock asked Officer Bender whether or not Adcock's light could have been

yellow, Officer Bender testified as follows:

Q. If my client testifies that the light was actually yellow when he went under, would you have any reason to disagree with that?
A. Well, according to my report, it said that he saw the red light and was trying to stop properly and he just didn't stop properly. That's what he -- **he said red**.

Tr. Transcr. vol. 3, 41:18-24 (Oct. 8-9, 2007).

The second witness that testified that Adcock ran the red light was Brenda McCabe who testified as follows:

Q. I want to direct your attention to the date of June 3rd, 2002, and ask you if you recall seeing an accident on Highway 80 and Terry Road intersection?
A. Yes, I do.
Q. Tell us where you were going that day?
A. I was heading west on 80, not quite to the intersection yet, probably several car lengths before the intersection taking my son to the orthodontist.
Q. And what lane were you traveling in?
A. The left lane.
Q. And do you recall Austin Adcock being ahead of you?
A. I don't know who that is. I know there was a small truck several car lengths before me, yes.
Q. The truck. Okay. Now tell me in your own words what you saw?
A. It appeared as we were coming to the light it did turn yellow, but the young man that was in the pickup appeared to be trying to stop. I did see brake lights but then went through and the light was already red when he went through. There were people in the left turn lane so, of course, I never saw the black car or dark car until it hit the side of the smaller pickup and it flipped.
Q. And that pickup was going west at that time on 80; is that correct, at that intersection?
A. Yes, sir.
Q. And the car that you saw hit was going north on Terry Road?
A. Yes.
Q. So it would have been coming from your left?
A. Correct.
Q. **Now was there any question that when he went through that light his light was red?**
A. **No, sir.**
Q. And did you tell the officer that at the scene?
A. To the best of my knowledge, yes.

Tr. Transcr. vol. 3, 67:11-69:1(Oct. 8-9, 2007).

Furthermore, Brenda McCabe testified that Adcock appeared to speed up, rather than slow down at the traffic light. She testified as follows:

Q. After you saw his brake lights come on, did he appear to stay his speed, slow up or speed up, which --
A. It looked like he sped up and I guess swerved like he saw the car maybe.
Q. **When he sped up, was that before the light?**
A. **No, I think it was turning probably then or had turned.**
Q. **And he appeared to speed up at that point to go through it?**
A. **Yes, sir.**

Tr. Transcr. vol. 3, 69:2-13 (Oct. 8-9, 2007).

. . .

Q. (By Mr. Evans) Okay. Did he ever appear to slow down as he got to the intersection?
A. The only thing I remember seeing is brake lights.
Q. **So could you say whether he did slow or didn't slow or you just don't know?**
A. **I don't remember him slowing, no.**

Tr. Transcr. vol. 3, 72:13-19 (Oct. 8-9, 2007).

In addition to Brenda McCabe testifying as to what all Adcock did wrong, she also testified that, as far as she could tell, Koger did nothing wrong. Her testimony regarding the same was as follows:

Q. As far as you can tell did you see Donald Koger do anything wrong?
A. No, sir.

Tr. Transcr. vol. 3, 73:12-14 (Oct. 8-9, 2007).

Donald and Patricia Koger's testimony was also evidence that Adcock ran the red light. Patricia Koger is Donald Koger's wife, and she was a passenger in his vehicle at the time of the accident in question. She testified as follows with regard to the color of her and her husband, Donald Koger's, light:

Q. All right. I'm going to back up to the wreck just a little before I move on to all his medical. Is there any question what color your light was when y'all left?
A. Absolutely not.

Q. What color was it?
A. It was green when we went through.

Tr. Transcr. vol. 3, 110:10-16 (Oct. 8-9, 2007).

Donald Koger testified as follows with regard to the color of his light:

Q. So on that particular morning tell me what happened as you came to that intersection of Highway 80 and Terry Road?
A. As we approached the light it turned red on our side. We were in the left lane -- it's four lanes each direction with a turn lane. We were in the left lane - not in the turn lane, going north on Terry Road; sit there while the light was red. The light turned green for us. We glanced both ways, and I noticed that the traffic was stopped. And my light turned green so I proceeded to move through the intersection. And as I accelerated through the intersection, out of the corner of my eye I caught a glimpse of something moving, some movement, and I looked that way and it was a pick-up truck. I could tell by the speed that the driver was not going to be able to stop. I immediately applied my brakes and braced myself for an accident, and we collided.

Tr. Transcr. vol. 3, 135:21-136:13 (Oct. 8-9, 2007).

. . .

Q. Did you ever tell the officer that you had the green light?
A. I don't remember if I did or not, but I'm sure I did because I had a green light.

Tr. Transcr. vol. 3, 142:20-23 (Oct. 8-9, 2007).

The fact that Koger was in the left lane and not the turn lane is relevant, due to the fact that his light would only need to be a solid green light for him to proceed through the intersection, rather than a green arrow. Therefore, there was no issue of whether Koger's light was a green arrow or a solid green light. Koger and Patricia Koger's testimony regarding the fact that they had a green light furthers the evidence that Adcock's light was red.

At trial, Adcock claimed that his light was yellow the last time that he saw it; however, Adcock testified that he could not deny telling two (2) different individuals that he knew that the light was red when he proceeded through it. Tr. Transcr. vol. 3, 47-48; 60-61 (Oct. 8-9, 2007).

Adcock testified as follows with regard to the color of his light as he proceeded through the intersection and with regard to statements that he had made regarding whether or not he had run a red light:

Q. Now you're going west, are you and Brad talking or anything?
A. No, Sir.
Q. So as you proceeded in that direction when did you first notice anything at the intersection of Highway 80 and Terry Road that got your attention?
A. Just the light started turning yellow.
Q. About how far back were you?
A. I don't recall exactly.
Q. Four hundred feet back?
A. I doubt I was that far.
Q. Do you recall testifying 200 to 400 feet back in your deposition?
A. Not totally, no, sir, I can't remember exactly.
Q. Okay. So you saw the light turn yellow?
A. Yes, sir.
Q. And so what did you do?
A. Tried to apply my brakes.
Q. And what happened?
A. They didn't seem to be stopping properly.
Q. Were they slowing down?
A. They didn't seem to be slowing me down.
Q. So about how fast had you been traveling going west on 80?
A. At that point probably 40 miles an hour.
Q. And so you come up to the light, what happened at the light?
A. It changed yellow.
Q. Changed yellow at that point?
A. Like before I got to it, it was turning yellow. The last time I saw it, it was yellow, so.
Q. But you said it turned yellow way back there when you started stopping?
A. Yes, sir.
Q. So as you were going up to the light it didn't change again to yellow?
A. No, sir. It didn't change again. It was yellow the last time I saw it.
Q. So you're saying that you went under a yellow light?
A. I'm saying the last time I saw it, it was yellow.
Q. Well, the last time you saw it could you not -- when did you look up last?
A. Right at the intersection.
Q. **Did you tell this police officer that you ran a red light?**
A. **I don't recall that.**
Q. **So you're not saying you didn't, are you?**
A. **No, sir.**

Tr. Transcr. vol. 3, 46:3-48:4 (Oct. 8-9, 2007).

. . .

Q. But I'm trying to get straightened out. Are you saying you didn't stop because your brakes wouldn't work or you didn't stop because you still had a yellow light?
A. I usually stop on yellow lights but the brakes didn't feel proper, so.
Q. So your story today is that you had a yellow -- you went on through a yellow light?
A. The last time I saw the light it was yellow.

Tr. Transcr. vol. 3, 57:14-23 (Oct. 8-9, 2007).

. . .

Q. (By Mr. Evans) Have you ever given a statement where you said the light was red when you went through it?
A. Sir?
Q. **Have you ever given a statement where you said, "Yes, ma'am, it changed yellow, I stopped, just as I got to the light, it changed to red and I swerved out across the intersection to try to keep from hitting anyone, maybe I could hit the curb or something to stop it." Did you ever recall saying that?**
A. **I don't recall.**
Q. **You deny you said it?**
A. **No, sir.**

Tr. Transcr. vol. 3, 60:20-61:8 (Oct. 8-9, 2007).

. . .

Also, Adcock testified that he could not swear that he did not run a red light.

Q. All right. And I also asked you in that deposition -- Is it your contention at this time that you ran a red light or that Donald Koger ran a red light, and you said -- I don't know?
A. No, sir. I can't swear to either one.

Tr. Transcr. vol. 3, 58:7-11 (Oct. 8-9, 2007).

A reasonably prudent person would not have run a red light. A reasonably prudent person would have stopped. It is obviously foreseeable that someone may sustain injuries if a person runs a red light. Adcock was negligent in running the light.

Furthermore, Adcock's claim that his brakes were not working properly was not substantiated by the evidence presented at trial regarding the same. Adcock testified as follows with regard to the

condition of his brakes just before the wreck in question.

Q. As you went down Highway 80 you had to stop at various lights, didn't you?
A. Yes, sir.
Q. And did you have any trouble with your brakes anytime then?
A. Not that I noticed.
Q. Then you got to Gallatin Street which is just the street before Terry Road?
A. Yes, sir.
Q. And you had to stop at that one?
A. I don't remember stopping at Gallatin or not.
Q. But you didn't have any problems any place you stopped at, though, did you?
A. Not that I can recall.

Tr. Transcr. vol. 3, 45:13-46:2 (Oct. 8-9, 2007).

. . .

Q. And you recall saying that you had just stopped at the red light before that intersection?

MR. MARTIN: Object to the question. I believe the witness has answered the question before.

THE COURT: He can answer it. Go ahead and repeat it.

Q. (By Mr. Evans) All right. Do you recall saying that in your deposition?
A. No, sir, I cannot remember completely.
Q. My question to you at that time on page 11, "How fast were you going before you applied your brakes?" You said, "25, that I had just stopped at the red light before." You're not denying that you testified to that, are you?
A. No, sir, I'm not denying.

Tr. Transcr. vol. 3, 58:22-59:12 (Oct. 8-9, 2007).

Brad Blackwell was a guest passenger in Adcock's vehicle at the time of the accident. He testified that he had never known a time when the brakes were not functioning properly. His testimony was as follows:

Q. And I believe you said you don't know whether the brakes were working or not, do you?
A. I have no clue. I didn't drive the vehicle.
Q. And you don't know from any action there whether the brakes were working or not, do you?
A. No, sir.
Q. So you're not here to testimony at all about the brakes, are you?
A. No, sir, I have no clue about that.

Q. But as y'all had been driving before in that truck the brakes had worked, hadn't they?
A. Yes, sir.
Q. And you've never known it not to work, have you?
A. No, sir.

Tr. Transcr. vol. 3, 88:23-89:13 (Oct. 8-9, 2007).

Eugene Adcock is the father of Austin Adcock and was the owner of the truck that was being driven by Austin Adcock at the time of the accident in question. Eugene Adcock testified as follows with regard to the condition of the brakes prior to the accident in question:

Q. Now I believe that you said you hadn't had any problems with the brakes on that truck, had you?
A. Not to my knowledge.

Tr. Transcr. vol. 3, 81:10-13 (Oct. 8-9, 2007).

. . .

Q. Okay. As far as you know, y'all hadn't put brakes on that truck, had you?
A. The truck had 200 plus thousand miles on it, and I've forgot what model it was but it was an old truck, a Toyota, and it was, you know, it could have needed brakes it could not have, but they hadn't complained about it prior to that.

Tr. Transcr. vol. 3, 82:24-83:5 (Oct. 8-9, 2007).

There was no testimony corroborating that the brakes were actually defective. To the contrary, the evidence showed that the brakes were fine. Appellee, Adcock, testified as follows:

Q. Okay. Was your truck -- you never had it checked out yourself to see if the brakes weren't working, did you?
A. Not recently.
Q. I mean, after the accident?
A. No, sir.
Q. Your dad, in fact, at a later time went and mashed the brakes and determined in his opinion it would have stopped if you were mashing the brakes?
A. I don't know. I wasn't there.
Q. Did you hear him say that?
A. He may have said that. I don't recall.

Tr. Transcr. vol. 3, 52:19-53:5 (Oct. 8-9, 2007).

Eugene Adcock testified that the truck still appeared to have brakes and that, in his opinion, his son could have stopped the truck. Eugene Adcock's testimony regarding the same was as follows:

Q. And at the wreck you found out Austin was saying they didn't work good?
A. Well, he said something, they got spongy or something and he didn't want to stomp hard enough to try to -- the light turned yellow on him and he didn't want to stomp hard enough to try to -- he was afraid they might not hold. And I checked the brakes later on -- I didn't drive the truck enough to know whether they were or weren't. They were a little spongy, but it appeared to still have some brakes, yes, sir.
Q. And I believe you said in your deposition you thought if he had mashed down on it, it would have stopped the truck, didn't you?
A. I don't remember what I said there but the truth of it was I checked and he thought it might not have stopped the vehicle. And to the best of my knowledge that's what he said. And I checked the brakes later on and they were spongy but I couldn't tell if that's the way they normally were or not. I just couldn't answer that.
Q. But you had brakes, though, didn't you, on the truck when you checked it?
A. Well, it appeared to. I didn't drive the truck but just mashing the pedal it appeared to have.
Q. **But after you checked it, according to your deposition on page 11, that you took in our office on September 5th, 2007, just about a month ago -- and when I hit the pedal, the best of my knowledge that the pedal went down further than mine did, but it looked to me like it would, you know, if he had got on in park it would have stopped the truck?**
A. **I probably said that. That would be what I thought, yes, sir.**

Tr. Transcr. vol. 3, 81:14-82:23 (Oct. 8-9, 2007).

Furthermore, Brad Blackwell did not recall Adcock saying anything regarding the brakes not working at the time of the accident. He testified as follows:

Q. Okay. Tell me what happened the best you can?
A. The best I can tell you, I can tell you my side of the story. I mean, I was asleep. It was early. It was between seven and eight maybe, 8:15, around in there. I was asleep in the passenger seat. We were on our way to work on Highway 80, and the only thing I remember, I was -- I had my head laid back to the left looking towards him. And the only thing I heard was -- Austin woke me up screaming -- they're going to hit us? So I opened my eyes and I was facing that way and they hit us -- their car hit us in the rear on the back left tire, and we flipped over and skidded down the road.

Tr. Transcr. vol. 3, 86:4-17 (Oct. 8-9, 2007).

. . .

Q. And the comment that they're going to hit us is what woke you up?
A. Yes, sir.

Tr. Transcr. vol. 3, 87:2-4 (Oct. 8-9, 2007).

. . .

Q. But that's the only thing you remember is him hollering they're going to hit us and you getting hit and flipped?
A. Yes, sir.

Tr. Transcr. vol. 3, 87:16-19 (Oct. 8-9, 2007).

The evidence showed that, on the date of the accident in question and shortly thereafter, Adcock admitted that he had run a red light but claimed that his brakes would not work properly. However, at trial, Adcock changed his story by claiming that the last time that he saw his light it was yellow. Nonetheless, he still admitted that he could not deny telling two (2) people that he did run a red light.

Reasonable and fairminded jurors in the exercise of fair and impartial judgment could not have arrived at a conclusion that Adcock did not run the red light. However, this jury panel arrived at that conclusion in complete contradiction to the evidence presented. Clearly, they were not reasonable or fairminded.

b. Koger's back injury and leg pain were a direct result of Adcock's negligence.

The evidence showed that the force of the collision was so great that Adcock's vehicle flipped over, landing bottom-side up. During trial, Adcock admitted that it was a serious lick. Also, Officer Melvin Bender testified that both vehicles involved suffered heavy damage.

Officer Bender testified to the following:

Q. And when you showed the damages for the vehicles, what did you show the damages for Austin Adcock's vehicle?

A. It was the vehicle that was overturned.
Q. Okay. There's a column that says estimated property damage and it says none, light or heavy, and you marked what?
A. Heavy.
Q. Okay. Same question on Donald Koger. Which column did you mark?
A. Heavy.
Q. Heavy. So they are both heavily damaged?
A. Yes.

Tr. Transcr. vol. 3, 37:10-22 (Oct. 8-9, 2007).

Austin Adcock's testimony was as follows:

Q. Now you heard your lawyer just say in opening statement that Donald Koger hit you so hard it knocked you bottom-side upward?
A. It did.
Q. It did?
A. Yes, sir.
Q. It was a serious lick, wasn't it?
A. Yes, sir.

Tr. Transcr. vol. 3, 49:21-50:3 (Oct. 8-9, 2007).

Koger suffered serious injuries as a result of the accident in question. The most serious injury that Koger suffered was a back injury, which caused pain to radiate down his leg. At trial, Koger testified that he felt a burning pain in his back, immediately following the impact. He testified as follows:

Q. And what did it do to you when you had the impact?
A. Just immediately I felt this burning pain in by back and I'm sure it jerked me, you know, at that point, and I felt the burning pain.

Tr. Transcr. vol. 3, 139:22-140:1 (Oct. 8-9, 2007).

However, because his wife had just had back surgery two weeks prior to the accident in question, Koger chose not to take the ambulance because he was concerned for her well-being. His testimony was as follows:

Q. Now once the wreck was over, what's the first thing you did?
A. I just sit there for a moment, and I was concerned about my wife because the purpose

for that trip was to take her to the doctor to have the staples removed after her surgery two weeks prior. I asked her if she was okay and she was just shaking. And I was concerned for her welfare. We sit there just a minute and I kept checking on her and she asked me how I was doing and I said, well, I've got this burning in my back, you know, but I'm more concerned about you because you had this incision. We sat there -- I don't know, I sort of lost track of time. I might have sit there a minute or two in the car. I remember getting out and walking around and by that time I think the people from the ambulance were there and one of the people from EMT had come over to our car. And they were checking on my wife, and I just squatted down there in the open door and watched them check her to see how she was doing.

Tr. Transcr. vol. 3, 140:23-141:19 (Oct. 8-9, 2007).

Q. So why didn't you go in the ambulance when it came?
A. My back was hurting but I felt the seriousness of my wife's condition and that I wanted be with her and make sure that she could get back home and that she was okay. She was the one that had had the surgery, and I was just really concerned about her welfare because she was just shaking like she was going to pass out.

Tr. Transcr. vol. 3, 144:7-15 (Oct. 8-9, 2007).

Koger went on to testify that his wife did not want to be transported by ambulance because an emergency room physician would not know her surgery history. He stated that she wanted to see her own doctor. Tr. Transcr. vol. 4, 158:7-159:11 (Oct. 8-9, 2007). Furthermore, Koger testified that his wife's doctor rescheduled her appointment for the next day and that it was very difficult to get appointments with him because his wife would usually have to wait a week or two to get in to see him, unless it was something that he thought was serious. Tr. Transcr. vol. 3, 144:16-145:4 (Oct. 8-9, 2007).

When asked about what his condition was like the rest of that day, Koger testified as follows:

A. My back was really hurting. I believe I took something like Alleve or Ibuprofen or something and just sat in the recliner. I checked on my wife occasionally to make sure she was okay. Just stayed at home, basically, the rest of the day and tried to rest my back. I went to bed that night and couldn't sleep because laying would hurt my back, standing would hurt my back. So the next day my wife had her appointment and I took her and I came back home and I said, I'm going to the doctor. My back will not stop hurting. I'm going to go find out what's wrong with it.

Transcr. vol. 3, 145:8-19 (Oct. 8-9, 2007).

Patricia Koger testified as follows regarding Donald Koger's condition on the date of the accident:

Q. So tell us Donald's condition during the day after he got home.
A. Don was in pain. He said his back burned and stung. He stayed in his recliner most generally the whole day.
Q. Was it because of his back?
A. Because of his back hurting.

Transcr. vol. 3, 110:3-9 (Oct. 8-9, 2007).

Q. Okay. Now that night tell me what Donald's condition got like?
A. Because he was restless. He got up, he went back to his recliner, tried to sit in it. He said he was hurting. He took some over-the-counter pain medication. I believe it was Ibuprofen.

Transcr. vol. 3, 111:14-21 (Oct. 8-9, 2007).

The day after the accident in question, Donald Koger went to the MEA Clinic and saw Dr. Hale Byrd. Transcr. vol. 3, 145:20-21 (Oct. 8-9, 2007). He testified that, prior to the accident, he had been seeing Dr. Byrd for hypertension or high blood pressure; however, he testified that he had never seen him or any other physician for any kind of back pain, prior to this wreck. Transcr. vol. 3, 145:22-146:9 (Oct. 8-9, 2007). Donald Koger testified as follows:

Q. Had you ever seen him for any kind of back pain?
A. No, sir.
Q. Have you seen any doctor before for any kind of back pain?
A. Not before that day, no sir.
Q. In all these years, you've never been to a doctor anywhere for back pain?
A. No, sir.
Q. Now you have said that - back when you were 22 years old that the army, the military turned you down as you were going into the service. Now what was your understanding that was for?
A. My understanding was that it was something to do with my back but they wouldn't tell me what it was. And it didn't bother me so being 22 years old I just didn't worry about it.
Q. Have you ever had pain in your back before?
A. No, sir.

Q. Have you had any pain before?
A. No, sir.
Q. Have you had any pain after until this wreck?
A. No, sir.
Q. And nobody could produce a doctor anywhere saying that you had ever been to a doctor for your back?
A. That's absolutely correct.

Transcr. vol. 3, 146:1-147:4 (Oct. 8-9, 2007).

Koger's wife, Patricia Koger, also testified that Donald Koger had never complained of back pain prior to the accident in question. She testified as follows:

Q. Okay. Let me ask you about his back problem. During the time that you were married to him or around him, have you ever heard of him having back problems before the date of this accident?
A. Never.
Q. As far as you know had he ever gone to a doctor anywhere for back pain.
A. Absolutely not.
Q. Had you ever heard him complain in the way of his back before the date of that accident which was June 3rd, 2002?
A. No.
Q. And would you have known if he had had any kind of back problem before that time?
A. Yes.
Q. And when I say back problem, one that would affect him and cause him pain, you would have known that, right?
A. It would have.

Transcr. vol. 3, 118:8-119:1 (Oct. 8-9, 2007).

Donald Koger testified as follows with regard to the treatment that he received, the costs of said treatment and the wages that he lost as a result of the accident in question:

Q. So when you got to doctor Byrd, what did he do?
A. I told him what had happened, that I was involved in an automobile accident, and I told him my back was hurting, and the first thing he ordered was an x-ray. I'm assuming he read the x-ray, we discussed it. He told me that he saw some bulging discs.
Q. Let me -- we introduced by agreement some medical records here, which is P-11, and I want to use those for just a moment. When you went to Dr. Byrd, what all did you tell him was wrong with you? What complaints were you having?
A. That day?
Q. Right, that first day.

A. Pain in my back and sort of a burning down the side of my right leg.
Q. I'm going to show you in that history up there. Chief complaint, something pain, back, hip left, from motor vehicle accident. Is that what you told him?
A. Yes.
Q. So describe where all the pain was that affected you that first day that you went.
A. In my lower back more over to my right hip down through my thigh and to the outside of my calf and then some numbness in my foot.
Q. Now did he do an MRI for you too?
A. He didn't do one there. He later sent me for an MRI.
Q. And the MRI is the one test -- it doesn't show bone, does it? It shows the disc and so forth, problems, doesn't it?
A. Yes.
Q. And once he saw the results of that what did he do with it?
A. He sent me to -- referred me to a neurosurgeon, Dr. Winston Caple.
Q. And why did he send you there as opposed to him treating you?
A. Winston Caple was a neurosurgeon and was I guess more trained in that area because Dr. Byrd is a general practitioner.
Q. Did he tell you you needed one, a neurosurgeon?
A. Needed a neurosurgeon, yes.
Q. So did you go to Dr. Winston Caple?
A. Yes, I did.
Q. And did he study the MRIs or have performed?
A. Yes. Well, he studied the one I already had. I just had the one.
Q. And what did he at that time do?
A. I believe the first thing he recommended was physical therapy, leg aquatic therapy where you exercise in a small pool. They would tell you what type of exercises to do, leg lifts and that type of stuff. And he said that was less pressure on the joints was the reason he wanted me to go for the aquatic physical therapy. And then in returning to him I told him that that wasn't helping that much and that's when he referred me to Dr. Jeffrey Summers.
Q. And what did Dr. Summers do?
A. He did two series of injections, steroidal injections over a several month period there. They were spaced about two to three weeks apart.
Q. So about how long did you have treatment from the time you had that accident to the time you left or ceased getting treatment?
A. From any doctor?
Q. Right.
A. The accident was in June of 2002. I believe March or April 2003, and then I moved to Tennessee in the summer of 2003.
Q. Also we have already offered into evidence a composite list of your medical bills. Can you look at those right there which is listed as Exhibit P-10. Now did you help with those to make sure they were the right number of bills and the amounts?
A. Okay. You just want me to use this or glance through these or --
Q. You have already glanced through them before we did this?
A. Yes, okay.

Q. Okay.
A. So just look at this.
THE COURT: What is your question, Mr. Evans. Ask the question.
Q. **(By Mr. Evans) Okay. That's all your bills together, isn't it? Just yes or no.**
A. **Yes.**
Q. **Okay. Now how much did they come to?**
A. **$18,996.66.**
Q. **Okay. And did you incur those as treatment from the car correct?**
A. **That's correct.**
Q. **Now did you have to miss work from time to time?**
A. **That's correct.**
Q. **And how much did you miss?**
A. I know at one point Dr. Caple recommended that I take 30 days off to do the physical therapy and to rest my back. Then there were various other days that I missed due to doctor's appointments, pain, so I don't really know exactly how many days it was.
Q. Did the Forrest service fix up a document that told you exactly what days and so forth?
A. Yes, that's correct.
Q. All right. Would you look through that document. And who prepared the document on the front to start with?
A. Her name was Kaye Kiker.
Q. And what is she?
A. She was my supervisor at the time in Rolling Fork, Mississippi.
Q. At the Forrest Service?
A. Correct.
Q. Okay. Now on the front page it says -- To Whom It May Concern: Attached is a breakdown of time that Mr. Koger was absent from work; is that correct?
A. That's correct.
Q. Now on the next page it tells you how many days you missed; is that correct?
A. That's correct.
Q. **So how many days did it say -- how many hours does it say you missed?**
A. **A total of 296.**
Q. **And what does it show you were making per hour?**
A. **$15.39 per hour. That was for one year. Each year we get a cost of living raise so there was some hours in 2003. So the total was $4,567.64.**
Q. In the next page on these documents, what were those two pages?
A. The next page is the salary scale for a federal employee at my grade level which was GS-5 step 10 showing what I earned per hour. The following page is the salary scale for the government employees, GS-5, step 10, which was $16.00 an hour at that time.
Q. And on the last two pages, does it have in the large caps showing that?
A. That's correct, yes.

Transcr. vols. 3 & 4, 147:5-153:1 (Oct. 8-9, 2007).

In addition to Donald and Patricia Koger's testimony regarding Donald Koger's treatment

of his injuries from the accident in question, Dr. Jeffrey Thomas Summers also testified regarding the same. Dr. Summers' evidentiary videotaped deposition was presented to the jury as evidence during the trial of this matter. Dr. Summers testified that Koger was referred to him for consideration of epidural steroid injections by Dr. Winston Capel, a neurosurgeon. Exhibit P-7(ID), Transcr. Depo. Dr. Jeffrey Thomas Summers 12:20-23 (Sept. 20, 2007). Dr. Summers testified that he treated Koger on the following dates: July 11, 2002; July 31, 2002; August 16, 2002; September 12, 2002; October 28, 2002; February 7, 2003; February 28, 2003; and March 21, 2003. Exhibit P-7(ID), Transcr. Depo. Dr. Summers 8:9-10; 14:6-10; 14:23-24; 15:18-19; 16:13-14; 17:13-14; 18:4-5; 18:22-24; 19:5-6.

Dr. Summers testified that Koger complained of leg and back pain that he had developed after a motor vehicle accident that occurred on June 2, 2002. Exhibit P-7(ID), Transcr. Depo. Dr. Summers 8:14-20. He then testified as to how he treated Koger for his leg and back pain. According to Dr. Summers' testimony, he treated Koger by way of epidural steroid injections, which are considered "invasive treatment" because the injections do go into your body. Exhibit P-7(ID), Transcr. Depo. Dr. Summers 12:20-13:15; 14:4-16:12; 18:4-19:12. Dr. Summers testified that, after having an epidural steroid injection, his patients are given "normal postoperative instructions that tell people not to drive or go back to work for the next day or so to get over any soreness from the procedure and any sedative effects that they might have from what we might have used to relax them during the procedure." Exhibit P-7(ID), Transcr. Depo. Dr. Summers 15:1-13. Dr. Summers also testified that he recommended that Koger undergo physical therapy, take Neurontin, do a Williams' flexion program and take an anti-inflammatory medication called Lodine. Exhibit P-7(ID), Transcr. Depo. Dr. Summers 16:21-19:4.

Dr. Summers testified that he believes, to a reasonable degree of medical certainty, that

the leg and back pain for which he treated Koger were related to and/or caused by the automobile accident in question. Dr. Summers testimony to the same was as follows:

Q. All right. Doctor, based upon the history that you took of Donald Koger having been involved in an accident on or about June 2nd or 3rd of 2002, and based upon the other medical records and charts that you reviewed and based upon your examination and treatment of him, do you have an opinion which you can state with a reasonable degree of medical probability as to the relationship, if any, there is between the injuries, what you found and treated and the car accident of June 2nd or 3rd of 2002?
A. I feel that it's a reasonable certainty that they were related.
Q. And you can say that to a reasonable medical probability?
A. Yes, sir.

Exhibit P-7(ID), Transcr. Depo. Dr. Summers 19:15-20:4.

. . .

Q. In the x-rays that was taken, MRI's rather, I notice at numerous levels you have found bulging discs, is that true?
A. Yes, sir.
Q. What's the significant finding of bulging discs?
A. In his age it's probably not a significant finding.
Q. Now, would you explain to the jury the situation whereby you take an x-ray or MRI of someone and you find they have degenerative disc disease or have these problems that you know that were there before the accident but they weren't having any pain or any problem and after the accident they're having severe pain, could you explain or interpret that for the jury?
A. Some people can have a terrible looking MRI with disc bulges and have no pain, none whatsoever, and some people can have a fairly normal looking MRI with severe pain.
So you have to match those findings to the patient's physical examination. That's the most important thing and then you add the history in on top of that.
When I say the bulges weren't significant, they weren't significant in themselves, but if a particular bulge was the cause of his pain, and that one was more significant.
But I can't state that the disc bulge was causing his pain because it could have been the tightness in the nerve foramen, which is the hole where the nerve comes out.
It could have been degenerative changes exacerbated by his injury. I can't tell you structurally which of those problems was causing his pain.
Q. All right. When you say exacerbated, what do you mean by that? If he didn't have pain before and he has a car wreck and he has pain, is that what you mean?
A. Well, yes, but those changes weren't caused by the car wreck, but they could have predisposed him to an injury. I think somebody with foraminal stenosis is more likely to have an injury that is symptomatic.
In other words, develops back and leg pain in somebody that doesn't. But even

somebody that doesn't have degenerative changes can develop a back and leg pain after an accident.

Q. **All right. In looking at his situation in regard to -- his disease wasn't caused by the accident.**

A. **Correct.**

Q. **But the pain developed, could you say to a reasonable degree of medical probability was caused from the accident?**

A. **Yes, sir, I believe it was.**

Q. **And without the accident you wouldn't have had to do all what you did ordinarily, would you, treatment-wise?**

A. **Correct. Most people with this condition are asymptomatic. In other words, they don't have any problems.**

Exhibit P-7(ID), Transcr. Depo. Dr. Summers 22:23-25:8.

Adcock continuously implied that the only issue to be considered, regarding Koger's injuries, was whether Koger had degenerative disc disease prior to the accident in question. One of his statements regarding the same, which was a question directed towards Donald Koger during cross examination, was as follows:

Q. The only evidence that this jury is going to consider when it goes back is degenerative disc disease, isn't that right?

Transcr. vol. 4, 165:22-24 (Oct. 8-9, 2007).

This was never an issue. All throughout the trial of this matter, Koger's attorney put on evidence that Koger did, in fact, have degenerative disc disease prior to the accident in question. The true issue was whether the wreck caused the **pain** that Koger was suffering in his back and leg, and Dr. Summers testified that the wreck did cause that pain. Dr. Summers also testified that Koger would not have had to receive treatment for the same had it not been for this accident. Adcock presented no evidence to the contrary. No doctor testified that Dr. Summers' opinion was incorrect.

The only person that claimed that the pain was not caused by the accident in question was Adcock's father, Eugene Adcock. During the Plaintiff's case-in-chief, Koger called Eugene Adcock to testify as an adverse witness. Eugene Adcock initially testified that Koger told him at the accident

scene that he was not hurt at all. However, when Koger brought up a prior statement that Eugene Adcock had given, Eugene Adcock changed his story and said that Koger did tell him at the scene that his back was hurting but that it was not because of this accident.

The next day, Eugene Adcock was questioned during the Defendant's case-in-chief. Once more he, initially, claimed that Koger said he was not injured at all. However, on cross-examination he had to admit, again, that Koger did mention something about his back. His testimony regarding the same, during the Plaintiff's case-in-chief, was as follows:

Q. **So did you ask him if he was hurt?**
A. **I did.**
Q. **And what did he tell you?**
A. **He said he wasn't hurt.** In fact, I asked him about three times I believe or maybe more. I remember that and he and his wife both. He had started to take her to the doctor. He was going to the doctor with her for an ailment that she already had, and all three times he told me he was not hurt.
Q. Did you ever tell anybody that he said his back was hurting but it wasn't from this?
A. I believe -- I believe he commented on that, that he had a back problem or something but he wasn't hurt at this time.
Q. **But he did tell you his back was hurting but it wasn't from this?**
A. **I believe he did, yes, sir. When I think back on it he commented that he had had some problems but he didn't think this had anything to do with it. I don't remember what he said was wrong with his back. He might have told me at that time but I don't remember it. It's been four years ago.**

Tr. Transcr. vol. 3, 80:5-81:1 (Oct. 8-9, 2007).

His testimony regarding the same, during the Defendant's case-in-chief, was as follows:

Q. Did you ask Donald Koger was he injured as a result of the accident?
A. Yes, sir, I did.
Q. And what was his response to you?
A. He said he didn't appear to be injured.

Tr. Transcr. vol. 4, 174:11-15 (Oct. 8-9, 2007).

Q. Now you again said that you asked him, Donald Koger, if he was injured and he said no. And yesterday when I was talking about a statement that you had given that -- where you said that he had previously -- he told you that his back was hurting but it wasn't from this accident?

A. Sir, he mentioned that he had had back problems but it wasn't -- this didn't seem to -- the accident didn't seem to affect it.
Q. He told that you?
A. That's right.
Q. But yesterday you said he said his back was hurting but it wasn't affected by this accident.
A. I don't remember if he said his back was hurting. I remember him saying he had back problems but he didn't seem to be injured in this accident. That's all I remember on it.

Tr. Transcr. vol. 4, 176:10-177:1 (Oct. 8-9, 2007).

A reasonable and fairminded jury would have taken into account the fact that Eugene Adcock could not keep his story straight about what Koger said regarding his injuries, as he gave four (4) different versions of Koger's statements. Furthermore, Dr. Summers is an unbiased witness who is specialized in the field of pain management. The jury obviously disregarded all of Dr. Summers' testimony.

In addition to the aforementioned testimony of Dr. Summers, he also testified as follows with regard to Koger's medical bills:

Q. And for these treatments, I believe your office furnished me some medical bills from your office from out here and I see -- let me start with your office from out here and I see -- let me start with the first one, and if you can tell me -- they consist of three pages, tell me what that is?
A. These are the professional component charges for the injections which would be my charges.
Q. All right. What is the total, the last page over there?
A. $2,911.
Q. All right. I would like to offer -- were those bills necessary and reasonable for the services you rendered?
A. Yes, sir.
MR. EVANS: All right. I would like to have those marked as an exhibit.
THE WITNESS: It doesn't sound right.
Q. Is it supposed to be more or less?
A. I wouldn't think it would be less. I mean, it says the individual injection is $700 including the fluoroscopy and the two level injection, and assuming he had six, two separate series of three, that would be a minimum I would think of -- my opinion is that these two charges should be added together.

MR. EVANS: What do you say I get a more correct bill from them and we'll go over it. I'll submit this one but we'll correct it.

MR. MARTIN: I don't have any objections to you submitting a supplemental exhibit to attach to the deposition of Dr. Summers.

MR. EVANS: Okay, All right. Go ahead and just introduce that with that understanding.

(Exhibit 3, medical charges, was marked for identification)

NOTE: When Koger's attorney checked with the billing department, that department said that the bill **was** correct.

Q. And the other bill here, can you identify that?
A. Yes, sir. This is the bill from the facility.
Q. That's here where you are here?
A. Correct. That's not my bill. It's the nurses and the x-ray equipment and the medication and recovery room.
Q. And you help decide the prices of that are?
A. Yes, sir. There is a fee schedule that most people have adopted.
Q. All right. Is that fair and reasonable for the treatment that was rendered to him?
A. Yes, sir.

MR. EVANS: I would like to offer that bill into evidence and have it marked as an exhibit to his testimony.

(Exhibit 4, medical charges, was marked for identification.)

Q. And how much was that bill? Look back at it rather.
A. $8,370.

Exhibit P-7(ID), Transcr. Depo. Dr. Summers 20:12-22:22.

Therefore, there was clear and convincing evidence that, at least, $11,281.00 of Koger's medical bills were directly related to the accident in question. Moreover, all of his other medical bills would also be related, as he was seen at the other medical clinics for the same injuries for which Dr. Summers treated him and was eventually referred to Dr. Summers after seeing each of the other physicians. Dr. Hale Byrd, with the MEA Clinic, referred Koger to Dr. Winston Capel. Dr. Capel, a neurosurgeon, referred Koger to Dr. Jeffrey Summers, a pain management specialist. Obviously, there is a direct link in the chain of treatment, as the MEA Clinic was the first place that Koger went, which was on the day following the accident in question. As previously stated, the law only requires

the plaintiff to rely on reasonable inferences to prove that an injury was sustained. Furthermore, he may meet his burden of proof with testimony that the symptoms appeared after the accident and did not exist before the accident. See *Barkley*, 450 So. 2d at 416.

With regard to the current status of his injuries, Koger testified that he continues to suffer with back and leg pain. As a result of that pain, Koger testified that he can't walk or stand like he used to. Tr. Transcr. vol. 4, 153:10-24 (Oct. 8-9, 2007). He also testified that he has trouble sleeping. Tr. Transcr. vol. 4, 156:3-7 (Oct. 8-9, 2007). Koger testified that he has not sought more treatment because his only options are surgery and pain medication. He testified that surgery is expensive, and he would have to take off a lot of time from work. Therefore, he has not undergone surgery yet. As far as pain medication goes, Koger testified that he has "seen too many people that get hooked on pain medicine." Tr. Transcr. vol. 4, 154:19-155:1 (Oct. 8-9, 2007).

Nevertheless, Koger testified that Dr. Caple informed him that he would have to undergo back surgery somewhere down the line or else he would eventually get to the point where he couldn't walk or put weight on that leg. Tr. Transcr. vol. 4, 155:2-12 (Oct. 8-9, 2007). Koger did testify that he intends to have the surgery some day, but he needs to work for as long as he can before doing so. Tr. Transcr. vol. 4, 155:13-15 (Oct. 8-9, 2007). As Patricia Koger stated at trial, Donald Koger is the sole household provider. Patricia Koger no longer works. She has retired. Therefore, if Donald Koger does not work, then no one in their household would be providing a living for the two of them. Tr. Transcr. vol. 3, 119:18-21 (Oct. 8-9, 2007).

Furthermore, Patricia Koger testified a follows with regard to Koger's current condition.

Q. Okay. As far as him, what can he not do now that he used to could do?
A. He can't walk for any distance, he can't stand for an extended period of time, he can't sit for an extended period of time without moving and adjusting his position. He has difficulty doing things around the house that he's always done such as the yard work, the mowing, the leaf raking, weed eating, getting upon a ladder to paint the portions

of the house that needs repainted.

Transcr. vol. 3, 119:2-11 (Oct. 8-9, 2007).

The following was given as Jury Instruction No. 12 during the trial of this matter, which addresses the law with regards to driving a motor vehicle on Mississippi roads:

> The Court instructs the jury that the law of the State of Mississippi requires a driver of a motor vehicle to drive at a reasonable rate of speed for the conditions then and there existing; to keep and maintain a proper lookout for other vehicles using the roadway; to maintain his vehicle under free and reasonable control; and to stop at a red light; and if you believe from a preponderance of the evidence that Austin Adcock, while approaching the intersection of U.S. Highway 80 and Terry Road, either drove his vehicle at a greater speed than was reasonable under the conditions then and there existing, and/or that he failed to keep and maintain a proper lookout for other vehicles using the roadway, and/or that he failed to maintain his vehicle under free and reasonable control, and/or that he failed to stop at a red light when lawfully required to do so, then he is guilty of negligence, and if you further believe from a preponderance of the evidence that such negligence, if any, was the proximate cause or a proximate contributing cause of the accident in question and the injuries suffered by Donald Koger, if any, then you should find for the Plaintiff, Donald Koger, against the Defendant, Austin Adcock.

Supplemental Record, Volume 1 at page 13.

Adcock's negligent act of running the red light was a substantial factor in bringing about Koger's back injury and leg pain. Had Adcock not run the red light, the harm would not have occurred. Moreover, Adcock should have anticipated the dangers that his negligent act created for others.

4. The evidence supporting the verdict for Adcock fails the legal sufficiency test because a reasonable and fairminded jury would not have returned with a verdict in favor of Adcock.

A motion for judgment notwithstanding the verdict "tests the legal sufficiency of the evidence supporting the verdict." *JESCO, Inc.*, 451 So. 2d at 713. In the instant case, the evidence supporting the verdict for Adcock fails the legal sufficiency test because a reasonable and fairminded jury would not have returned with a verdict in favor of Adcock. Adcock's actions were clearly the

sole proximate cause of the accident in question and Koger's Injuries were a direct result of Adcock's negligent act.

The evidence presented at trial clearly showed that Adcock ran the red light. First, two (2) unbiased witnesses testified that Adcock's light was red as he proceeded through the intersection. Officer Bender testified that Adcock told him that he had a red light. Brenda McCabe testified that the light was red as he went through it. She testified that she was behind Adcock and could actually see his light. Second, both Donald and Patricia Koger testified that their light was green as they proceeded through the intersection. Finally, Adcock could not deny that he had told two individuals that he had run a red light. Also, he testified that he could not swear that he did not run a red light. Clearly, all of the evidence showed that Adcock ran the red light. Therefore, a reasonable and fairminded jury would not have found in favor of Adcock with regards to liability.

With regard to Koger's injury to his back and the pain in his leg, Dr. Summers testified that he could state, to a reasonable degree of medical certainty, that the pain that Koger was experiencing in his leg and back was a direct result of the accident in question. Moreover, Koger testified that he had never had pain in his back prior to the accident in question, and his wife testified that she had never heard him complain of back pain prior to the accident. Also, Adcock's attorney could not produce any medical documents where Koger had complained of back or leg pain prior to the accident in question, because no such documents exist. Furthermore, Adcock's attorney failed to present any evidence showing that Dr. Summers' opinion was inaccurate. No other physicians testified at trial. Dr. Summers is a credible witness who's specialties are in anesthesiology and pain management. Dr. Summers has years of experience in the field of pain management. The jury panel totally dismissed all of Dr. Summers' testimony. Likewise, they also dismissed everything that Donald and Patricia Koger testified to. Adcock put on no evidence proving that Koger's injuries

were not caused by the accident in question. The only person claiming that Koger's pain was not from this accident was Adcock's father, who is extremely biased and could not keep his story straight. Obviously, these jurors were not reasonable or fairminded when they found in favor of Adcock.

Clearly, the evidence supporting the verdict for Adcock fails the legal sufficiency test. Moreover, since the facts and inferences, in the case at hand, pointed so overwhelmingly in favor of Koger that reasonable and fairminded jurors in the exercise of fair and impartial judgment could not have arrived at a contrary verdict, the trial court was required to grant Koger's Motion for Judgment Notwithstanding the Verdict. *JESCO, Inc.*, 451 So. 2d at 713. Therefore, the trial court erred when it denied the same.

B. The trial court erred when it denied Koger's Motion for a New Trial on Damages Only.

The evidence clearly showed that Adcock's actions were the sole proximate cause of the accident in question. Therefore, Koger was entitled to a new trial on damages only because (1) the verdict was against the overwhelming weight of the evidence; (2) the jury was confused by a faulty jury instruction; and (3) the jury departed from its oath and its verdict was the result of bias, passion, and prejudice.

1. Standard of Review

When considering a trial court's denial of a motion for a new trial, the standard of review is "abuse of discretion." *Poole*, 908 So. 2d at 726.

> A new trial may be granted pursuant to Miss. R. Civ. P. 59. A new trial may 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, and prejudice.

Poole, 908 So. 2d at 726-727 (quoting *Shields v. Easterling*, 676 So. 2d 293, 298 (Miss. 1996)).

"A motion for a new trial goes to the weight of the evidence and not its sufficiency." *Harris v. Lewis*, 755 So. 2d 1199, 1203 (Miss. 1999). In *Herrington v. Spell*, 692 So. 2d 93, 103-104 (Miss. 1997), the Mississippi Supreme Court held that:

> In determining whether a jury verdict is against the overwhelming weight of the evidence, this Court must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial. Only when the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice will this Court disturb it on appeal.

Harris, 755 So. 2d at 1203 (quoting *Herrington*, 692 So. 2d at 103-104).

2. Evidence Presented at the Trial of this Matter

Koger hereby incorporates all of the facts, laws and arguments made under section "I-A" above to the argument herein and to each of the arguments and laws set out hereafter in this Brief.

3. The verdict was against the overwhelming weight of the evidence.

With regard to the issue of "overwhelming weight of the evidence," Koger hereby incorporates all of the facts, laws and arguments made under section "II" below to the argument herein. Section "II" lays out this argument in great detail.

Clearly, all of the evidence showed that Adcock ran the red light. Also, the evidence showed no negligence on Koger's part. Hence, the verdict in this case was against the overwhelming weight of the evidence.

4. The jury was confused by Jury Instruction No. 16, which was a faulty jury instruction.

Koger hereby incorporates all of the facts, laws and arguments made under section "III" below to the argument herein with regard to a faulty jury instruction that was given during the trial of this matter. Section "III" lays out this argument in great detail.

Clearly, the jury was confused by Jury Instruction No. 16, and the lower court erred in giving said instruction.

5. The jury departed from its oath and its verdict was the result of bias, passion, and prejudice.

The evidence clearly showed that Adcock was the sole proximate cause of the accident in question. Therefore, the jury obviously departed from its oath when it found in favor of Adcock. If the jury was not confused by Jury Instruction No. 16, then there is no question that the verdict in this case was the result of bias, passion, and prejudice.

6. Because this verdict was so contrary to the overwhelming weight of the evidence, a new trial on damages only should be granted in order to prevent unconscionable injustice.

"A Motion for a new trial addresses the weight of the evidence and should be granted to prevent unconscionable injustice." *Wall v. State*, 820 So. 2d 758, 759 (Miss. 2002) (citing *Daniels v. State*, 742 So. 2d 1140 (Miss. 1999)). Clearly, the weight of the evidence, with regard to liability, was in Koger's favor. Therefore, the trial judge abused his discretion when he denied the Plaintiff's Motion for a New Trial on Damages Only. Because this verdict was so contrary to the overwhelming weight of the evidence, a new trial on damages only should be granted in order to prevent unconscionable injustice.

C. The trial court erred when it denied Koger's Motion for a New Trial on Liability and Damages.

Koger hereby incorporates all of the facts, laws and arguments made under sections "I-A" and "I-B" above to the argument herein. Koger also hereby incorporates all of the facts, laws and arguments made under section "II" below to the argument herein.

Clearly, the weight of the evidence was in Koger's favor. The evidence showed that Adcock's actions were the sole proximate cause of the accident in question and that Koger's injury

was a direct result of Adcock's negligence. Therefore, the trial judge abused his discretion when he denied the Plaintiff's Motion for a New Trial on Liability and Damages. Because this verdict was so contrary to the overwhelming weight of the evidence, a new trial should be granted in order to prevent unconscionable injustice.

D. The trial court erred when it denied Koger's Motion for an Additur.

1. Standard of Review

Miss. Code Ann. § 11-1-55 provides, in part:

> The supreme court or any other court of record in a case in which money damages were awarded may overrule a motion for new trial or affirm on direct or cross appeal, upon condition of an additur . . ., if the court finds that the damages are . . . inadequate for the reason that the jury or trier of facts was influenced by bias, prejudice, or passion, or that the damages awarded were contrary to the overwhelming weight of credible evidence. If such additur . . . be not accepted then the court may direct a new trial on damages only.

Miss. Code Ann. § 11-1-55 (1972).

Therefore, pursuant to this statute, there are two ways in which a court can award an additur. "The overwhelming weight of credible evidence standard is objective and applied by reference to the law on recoverable damages when applied to the evidence in the case." *Cade v. Walker*, 771 So. 2d 403, 407 (Miss. 2000). "Such matters are reviewed on appeal for abuse of discretion." *Id.* Because the appellate courts have no way of knowing what was in the jury's mind, the bias, prejudice or passion standard is purely a circumstantial standard. *Id.* (citing *Odom v. Roberts*, 606 So. 2d 114, 119-120 n.5 (Miss. 1992)). Once the appellate court reviews the action of the jury after the trial court has refused to grant a new trial on the question of damages, the question then becomes "whether the verdict was [] so . . . inadequate as to shock the conscience and to indicate bias, passion and prejudice on the part of the jury, or whether the jury failed to respond to reason." *Id.* (citing *Dorris v. Carr*, 330 So. 2d 872, 874 (Miss. 1976)). "Evidence of corruption, passion, prejudice or

bias on the part of the jury is an inference, if any, to be drawn from contrasting the amount of the verdict with the amount of the damages." *Id.* at 407-408 (citing *Rodgers v. Pascagoula Pub. Sch. Dist.*, 611 So. 2d 942, 944-945 (Miss. 1992)).

"The trial judge's decision on the denial or acceptance of an additur . . . is reviewed by [the appellate court] for abuse of discretion." *Fitch v. Valentine*, 959 So. 2d 1012, 1029 (Miss. 2007) (citing *Ross-King-Walker, Inc. v. Henson*, 672 So. 2d 1188, 1193-94 (Miss. 1996)).

"The plaintiff bears the burden of establishing [his] claim by a preponderance of the evidence." *Baugh v. Alexander*, 767 So. 2d 269, 271 (Miss. 2000) (citing *Fells v. Bowman*, 274 So. 2d 109, 111 (Miss. 1973)). "An essential part of that claim in a personal injury tort case is to demonstrate, not only the extent of the injury, but that the negligence of the defendant was the proximate cause of the injury." *Id.* "When the evidence is in conflict, the matter is submitted to the jury for resolution and, barring some indication that the jury disregarded its sworn duty, the jury and not the trial court is permitted to determine where the preponderance of the credible evidence on the matter of causation lies." *Baugh*, 767 So. 2d at 271 (citing *Donald v. Amoco Prod. Co.*, 735 So. 2d 161 (Miss. 1999)).

2. Evidence Presented at the Trial of this Matter

Koger hereby incorporates all of the facts, laws and arguments made under section "I-A" above to the argument herein.

3. This verdict was so inadequate as to shock the conscience and to indicate bias, passion and prejudice on the jury's part, and this verdict also shows that the jury failed to respond to reason.

Koger proved, by a preponderance of the evidence, that Adcock's actions were the sole proximate cause of the accident in question and that his injuries were a direct result of Adcock's negligence. Koger also proved that he incurred $18,996.66 in medical bills and $4,567.64 in lost

wages, as a result of this accident in question. The jury awarded Koger zero dollars. Koger was entitled to at least $23,564.30. That amount, of course, does not include pain and suffering, which he was also entitled to. This verdict was so inadequate as to shock the conscience and to indicate bias, passion and prejudice on the jury's part. This verdict also shows that the jury failed to respond to reason. Therefore, the trial court erred when it denied Koger's Motion for an Additur.

E. Conclusion

The trial court erred when it denied Koger's Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial on Damages Only or, in the Alternative, for a New Trial on Liability and Damages or, in the Alternative, for Additur. Therefore, Koger requests that this court reverse the verdict of the jury and grant a new trial on damages only or grant an entirely new trial on all issues.

II. THE VERDICT OF THE JURY WAS SO AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE AS TO EVINCE BIAS AND PREJUDICE ON THE PART OF THE JURY, OR WOULD SHOW CONFUSION AND MISUNDERSTANDING OF THE LAW AND FACTS ON THE PART OF THE JURY, AND WOULD RENDER AN UNCONSCIONABLE INJUSTICE TO KOGER.

A. Standard of Review

The standard of review for jury verdicts is well established in Mississippi. *Harris*, 755 So. 2d at 1203. "Once the jury has returned a verdict in a civil case, [the appellate courts] are not at liberty to direct that a judgment be entered contrary to that verdict short of a conclusion on [their] part that, given the evidence as a whole, taken in the light most favorable to the verdict, no reasonable, hypothetical juror could have found as the jury found." *Id.* (citing *Starcher v. Byrne*, 687 So. 2d 737, 739 (Miss. 1997).

B. Evidence Presented at the Trial of this Matter

Koger hereby incorporates all of the facts, laws and arguments made under section "I-A" above to the argument herein.

The verdict in this case was against the overwhelming weight of the evidence. The evidence presented at trial clearly showed that Adcock ran the red light. First, two (2) unbiased witnesses testified that Adcock's light was red as he proceeded through the intersection. Officer Bender testified that Adcock told him that he had a red light. Brenda McCabe testified that she was certain that the light was red as he went through it. She testified that she was behind Adcock and could actually see his light. Second, both Donald and Patricia Koger testified that their light was green as they proceeded through the intersection. Finally, Adcock could not deny that he had told two individuals that he had run a red light. Also, he testified that he could not swear that he did not run a red light. Clearly, all of the evidence showed that Adcock ran the red light and that his actions were the sole proximate cause of the accident in question.

With regard to Koger's injury to his back and the pain in his leg, Dr. Summers testified that he could state, to a reasonable degree of medical certainty, that the pain that Koger was experiencing in his leg and back was a direct result of the accident in question. Moreover, Koger testified that he had never had pain in his back prior to the accident in question, and Patricia Koger testified that she had never heard him complain of back pain prior to the accident. Also, Adcock's attorney could not produce any medical documents where Koger had complained of back or leg pain prior to the accident in question, because no such documents exist. Furthermore, Adcock's attorney failed to present any evidence showing that Dr. Summers' opinion was inaccurate. No other physicians testified at trial. Dr. Summers is a credible witness who's specialties are anesthesiology and pain management. Dr. Summers has years of experience in the field of pain management. The jury panel totally dismissed all of Dr. Summers' testimony. Likewise, they also dismissed everything that

Donald and Patricia Koger testified to. Adcock put on no evidence proving that Koger's injuries were not caused by the accident in question. Clearly, Koger's injuries were a direct result of Adcock's negligence.

C. No reasonable, hypothetical juror could have found in favor of Adcock.

The evidence undeniably showed that Adcock's actions were the sole proximate cause of the accident in question and that Koger's injuries were a direct result of Adcock's negligence. Therefore, the jury obviously departed from its oath when it found in favor of Adcock, unless it was confused by Jury Instruction No. 16. If the jury was not confused by this faulty jury instruction, then there is no question that the verdict in this case was the result of bias, passion, and prejudice. No reasonable, hypothetical juror could have found in favor of Adcock. Therefore, a new trial should be granted in order to prevent unconscionable injustice.

III. THE LOWER COURT ERRED IN GRANTING ADCOCK'S JURY INSTRUCTION, JURY INSTRUCTION NO. 16, IN REGARDS TO PRE-EXISTING CONDITIONS OF KOGER PRIOR TO THE MOTOR VEHICLE ACCIDENT IN QUESTION.

The lower court erred when it allowed a faulty jury instruction to be given to the jury during the trial of this matter. As such, Koger should be granted a new trial.

A. Standard of Review

When determining whether the jury was properly instructed, the appellate courts read jury instructions as a whole, rather than in isolation. *Harris*, 755 So. 2d at 1204. "Accordingly, defects in specific instructions do not require reversal 'where all instructions taken as a whole fairly-although not perfectly-announce the applicable primary rules of law.'" *Id.* (citing *Starcher*, 687 So. 2d at 742-43). Trial courts have "considerable discretion in instructing the jury." *Fitch*, 959 So. 2d at 1023 (citing *Southland Enter. v. Newton County*, 838 So. 2d 286, 289 (Miss. 2003)).

B. Jury Instruction No. 16 was a faulty jury instruction.

A faulty jury instruction was given during the trial of this matter. The lower court gave Jury Instruction No. 16, which was peremptory, extremely misleading, a misstatement of the law and a misstatement of the facts. Koger's attorney objected to said instruction; however, it was still given. Tr. Transcr. vol. 4, 186-187 (Oct. 8-9, 2007). This instruction was extremely prejudicial to Koger and may have been the reason for the jury finding in favor of Adcock. Jury Instruction No. 16 read as follows:

> A pre-existing condition is a condition that may have caused or contributed to the injury claimed by Donald Koger, but is also a condition from which Donald Koger suffered before his motor vehicle accident with Austin Adcock. Therefore, Austin Adcock is not responsible for the injuries of Donald Koger which are the sole proximate result of his pre-existing conditions.

First, Jury Instruction No. 16 was a peremptory instruction, meaning that the Court explicitly directed that the jury return a verdict for Adcock if they found that Koger suffered from any pre-existing condition. Koger did suffer from a pre-existing condition, which was degenerative disc disease. However, that was absolutely irrelevant due to the fact that Dr. Summers, the only doctor who testified in this trial, testified to a reasonable degree of medical certainty that, had it not been for this wreck, Koger would not have suffered the **pain** in his back and leg and would not have had to receive treatment for the same. Exhibit P-7(ID), Transcr. Depo. Dr. Summers 24-25. The law dealing with peremptory instructions is well established. The Supreme Court of Mississippi has held that:

> The rule is well established when considering a request for peremptory instruction 'all evidence with reasonable inferences flowing therefrom must be accepted as true in favor of the party against whom the peremptory instruction is requested, all evidence in conflict therewith is disregarded, and, if such evidence is sufficient to support a verdict for the party against whom the peremptory instruction is requested, then it should be denied.'

Butler v. Lott Furniture Company of McComb, 482 So. 2d 1134, 1135 (Miss. 1986) (quoting *Barkley*, 450 So. 2d at 416).

Pursuant to this rule, Jury Instruction No. 16 should have been denied since the evidence was sufficient to support a verdict for the party against whom the peremptory instruction was requested.

Second, Jury Instruction No. 16 was extremely misleading, and any juror would have believed that he must find in favor of Adcock if he found that Koger had degenerative disc disease prior to the accident in question. As previously stated in this Brief, the issue in this case was not whether Koger had the pre-existing condition of degenerative disc disease. The issue was whether the back and leg pain that Koger was suffering from was caused by this accident. Dr. Summers testified that although Koger's degenerative disc disease was a pre-existing condition, this did not mean that Koger had pain due to that condition prior to the accident in question. He stated that the accident brought about the back and leg pain which Koger was suffering. Dr. Summers also testified that: "even somebody that doesn't have degenerative changes can develop back and leg pain after an accident." Exhibit P-7(ID), Transcr. Depo. Dr. Summers 24. During the trial, Adcock was misleading the jury in continuously arguing that Koger's condition, degenerative disc disease, was something that he had prior to this accident and that the jury should bring back a verdict in favor of Adcock if they found that Koger had degenerative disc disease prior to this accident. Jury Instruction No. 16 also implied that if the jury found that Koger had the condition of degenerative disc disease prior to this accident, then Adcock should not be held responsible for Koger's injuries. Obviously, this instruction was very misleading to the jury.

Third, Jury Instruction No. 16 was a misstatement of the law, and the Supreme Court of Mississippi has held that "the granting of an instruction which misstates the law is reversible error." *Harrah's Vicksburg Corp. v. E. L. Pennebaker, Jr.*, 812 So. 2d 163, 173 (Miss. 2001). In his

Response to Koger's post trial Motions, Adcock argued that it "is not genuinely disputed that [Jury Instruction No. 16] is in line with current Mississippi law and Mississippi Model Jury Instruction 15:4." Clerk Papers vol. 2, 162. Koger strongly disputes that Jury Instruction No. 16 is in line with current Mississippi law and Mississippi Model Jury Instruction 15:4.

Adcock contended in said Response that Jury Instruction No. 16 represents Mississippi Model Jury Instruction 15:4. However, Mississippi Model Jury Instruction 15:4 and Jury Instruction No. 16 are vastly different. Mississippi Model Jury Instruction 15:4 reads:

> In order to be a proximate cause, the negligence of the defendant must be a substantial factor in producing plaintiff's injury. If the plaintiff would have been injured even if the defendant had not been negligent, the defendant's negligence is not a substantial factor and not a proximate cause.

There is a significant difference between using the word "injury" and using the words "pre-existing condition." If Adcock truly believed that Jury Instruction No. 16 and Mississippi Model Jury Instruction 15:4 were so similar, then he would have used said model as it was written. Adcock chose not to use Mississippi Model Jury Instruction 15:4 because it would not benefit him in any way.

Fourth, Jury Instruction No. 16 was a misstatement of the facts. Again, Adcock tried to imply that there was an issue of whether Koger had degenerative disc disease prior to the accident in question; however, this was never an issue. All throughout the trial of this matter, Koger's attorney put on evidence that Koger did, in fact, have degenerative disc disease prior to the accident in question. The true issue was whether the wreck caused the **pain** that Koger was suffering in his back and leg, and Dr. Summers testified that the wreck did cause that pain. No doctor testified that Dr. Summers' opinion was inaccurate. Furthermore, Koger hereby incorporates all of the facts, laws and arguments made under section "I-A" above to the argument herein.

C. Jury Instruction No. 16 was peremptory, misleading, a misstatement of law and a misstatement of the facts.

For the reasons stated above, Jury Instruction No. 16 was peremptory, misleading, a misstatement of law and a misstatement of the facts. Moreover, the jury was not properly instructed, and the instruction should have been denied. As such, Koger should be given a new trial.

IV. THE LOWER COURT ERRED IN NOT GRANTING A NEW TRIAL ON THE ISSUES OF LIABILITY AND DAMAGES.

Koger hereby incorporates all of the facts, laws and arguments made under section "I-C" above to the argument herein. Section "I-C" lays out this argument in great detail.

V. THE LOWER COURT ERRED IN NOT GRANTING A NEW TRIAL ON THE ISSUE OF DAMAGES ONLY.

Koger hereby incorporates all of the facts, laws and arguments made under section "I-B" above to the argument herein. Section "I-B" lays out this argument in great detail.

VI. THE LOWER COURT ERRED IN NOT GRANTING KOGER'S PEREMPTORY INSTRUCTION AT THE CLOSE OF TRIAL.

A. Standard of Review

The Mississippi Supreme Court has held that "a request for a peremptory instruction is the functional equivalent of a motion for a directed verdict under Rule 50(a)." *Walker v. Reed*, 773 So. 2d 374, 376 (Miss. 2000) (citing *Wilner v. Miss. Export R.R. Co.*, 546 So. 2d 678, 681 (Miss. 1989)). Therefore, the appellate courts "appl[y] the same standard to a request for a peremptory instruction and a directed verdict." *Id.* "The standard requires the trial court to consider the evidence in the light most favorable to the non-moving party, giving that party the benefit of all reasonable inferences that may be derived from the evidence, as well as contemplating any uncontradicted evidence presented by the moving party." *Walker*, 773 So. 2d at 376-377 (citing *Pickering v. Industria Masina I Traktora*, 740 So. 2d 836 (Miss. 1999)). "[A]n issue should only

be presented to the jury when the evidence creates a question of fact on which reasonable jurors could disagree." *Walker*, 773 So. 2d at 377 (citing *Herrington*, 692 So. 2d at 97).

B. Refused Peremptory Instruction

Koger submitted the following proposed Jury Instruction as P1 to the trial judge:

> We, the jury, find for the Plaintiff, Donald Koger, and against the Defendant, Austin Adcock, and assess his damages in the sum of $ _____.
> and you will write your verdict upon a separated piece of paper.

Supplemental Record, Volume 1 at page 20.

C. The evidence did not create a question of fact on which reasonable jurors could disagree.

P1 was refused by the trial judge, even though the Plaintiff proved, by a preponderance of the evidence, that Adcock's actions were the sole proximate cause of the accident in question and that Koger's injuries were the direct result of Adcock's negligence. There was no evidence that Koger did anything wrong. There was a tremendous amount of evidence against Adcock, proving that he did in fact run the red light. Koger hereby incorporates all of the facts, laws and arguments made under section "I-A" above to the argument herein.

Obviously, in the case at hand, the evidence did not create a question of fact on which reasonable jurors could disagree. Therefore, the trial judge erred when he failed to grant Koger's peremptory instruction, which as the law states, is the functional equivalent of a motion for a directed verdict.

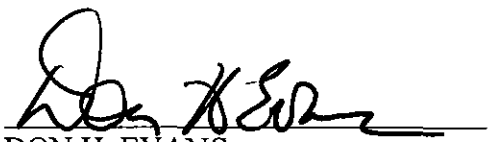
CONCLUSION

Koger would show that the lower court erred when it denied his Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial on Damages Only or, in the Alternative, for a New Trial on Liability and Damages or, in the Alternative, for Additur.

Furthermore, Koger would show that the trial court erred when it denied P1, which was Koger's peremptory instruction and gave Jury Instruction No. 16, which was a faulty jury instruction. Therefore, Koger respectfully requests that this Court reverse the verdict of the jury and grant a new trial on damages only or grant an entirely new trial on all issues. If Koger has prayed for improper relief, then he asks that this Court grant him the appropriate relief.

RESPECTFULLY SUBMITTED,

DONALD KOGER

BY: 
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CERTIFICATE OF SERVICE

I, Don H. Evans, attorney for Appellant, do hereby certify that I have served, via U.S. Mail, postage prepaid, a copy of the foregoing Appellant's Brief to the following:

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On this the 2ND day of MARCH, 2009.

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