IN THE SUPREME COURT OF MISSISSIPPI

CITY OF JACKSON, MISSISSIPPI **APPELLANT**

VS. **CAUSE NO. 2008-TS-01997**

EMMA WOMACK, ET AL. **APPELLEE**

On Appeal From The Circuit Court
of Hinds County, Mississippi
Cause Number351-98-816CIV
Honorable Winston Kidd

Brief of Appellant City of Jackson

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Miss.R.App. 28(a)(1), the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal:

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Respectfully submitted,

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This is the third appeal in this matter. The issue before the Court on appeal is whether the lower court failed to follow this Court's instructions on remand (***Stewart II***) by failing to limit the damages to those injuries that arose from Mrs. Stewart's fall on a curb on August 11, 1997. The record in this matter is voluminous, and there is considerable medical testimony regarding Mrs. Stewart's fall, the declining health of Mrs. Stewart, and an alleged second stroke. The City is of the position that oral argument will aid the Court in determining whether the lower court failed to properly access damages based on the fall on the curb on August 11, 1997. The Plaintiff's position is that the fall caused her declining health that eventually led to her death. However the evidence in the record indicates that Mrs. Stewart did not receive a traumatic brain injury; rather, the only injury sustained from the fall was a scalp abrasion. For these reasons, the City requests oral argument.

STATEMENT OF THE ISSUES

The issue that this Court should resolve on this appeal is:

- Whether the lower court erred in failing to limit damages to those from the fall on the curb.

STATEMENT OF THE CASE

A. PROCEEDINGS BELOW

On August 7, 1998, Mrs. Stewart sued the City, Doris Spiller (a City employee), and University of Mississippi Medical Center for injuries resulting from a parking lot fall that occurred while Mrs. Stewart was exiting a City of Jackson van in the parking lot of an adult day care center. ***City of Jackson v. Stewart ex rel. Womack***, 908 So.2d, 703, 706-07 (Miss. 2005). On November 23, 1998, a conservatorship was established for Mrs. Stewart, and her daughter, Emma Womack, was appointed conservator of the person and estate of Mrs. Stewart. ***Id.*** On December 18, 1998, Womack, in her capacity as Mrs. Stewart's conservator was substituted as the plaintiff. ***Id.*** The Plaintiff filed suit and lengthy litigation has ensued. This is the third time this Court has visited this matter on appeal.

1. Stewart I

During the first phase of litigation in this matter, the City, the Hospital and Spiller filed motions for summary judgment, and on September 1, 1999, the trial court denied the Hospital's motion and granted summary judgment to the City and Spiller. ***Id.*** Plaintiff filed an interlocutory appeal of the summary judgment granted to the City and Spiller. ***Id.*** This Court reversed the summary judgment, holding that the

City was obligated under its contract with the Central Mississippi Planning and Development District Area Agency (CMPDD) to provide safe delivery of patrons to the day care center, and that Mrs. Stewart was a third-party beneficiary of that contractual obligation. ***Stewart ex rel. Womack v. City of Jackson***, 804 So.2d 1041 (Miss. 2002) (hereinafter "***Stewart I***").

2. Stewart II

On September 25, 2002 there was a three day bench trial in this matter. ***City of Jackson v. Stewart ex rel. Womack***, 908 So.2d at 707 (hereinafter referred to as "***Stewart II***"). Mrs. Stewart died on November 4, 2002, and her estate was substituted as plaintiff on January 30, 2003. ***Id.*** On April 1, 2003 the trial court entered its order, finding that the City and the Hospital were jointly liable for the tort claim and found that Stewart was a third party beneficiary of the contract between the City and CMPDD. ***Id.*** The trial court awarded Mrs. Stewart's Estate $500,000 on the tort claim and $500,000 on the breach of contract claim. ***Id.*** at 708. The trial court then added these two sums together to reach a final verdict for Mrs. Stewart in the amount of $1,000,000. From this judgment, the City and the Hospital appealed.

This Court affirmed in part, reversed and rendered in part, and reversed and remanded in part the trial court's ruling. ***Id.*** Specifically, this Court found, *inter alia,* that Stewart's estate was entitled to one maximum

recovery of $250,000 against the City, and that the estate failed to show that Stewart's stroke was a foreseeable consequence of the fall in the parking lot. This Court remanded this matter with directions to the trial court that the "Estate may not recover damages related to the stroke, whether or not it was caused by the fall on August 11, 1997." ***Id.*** at 715.

3. Stewart III

On September 9, 2007, a bench trial was held solely on the issue of damages. The only new testimony in this trial was given by Dr. Steven Hayne, who was designated as an expert by the Plaintiff. This Court instructed the lower court to find on the issue of damages, and explicitly stated that the Estate may not recover from damages related to the stroke. However, on May 14, 2008, contrary to this Court's instructions, the lower court entered its Opinion and Order finding that Mrs. Stewart's striking her head injured her brain and led to the continuous decline of her cognitive and physical abilities until her death on November 4, 2002. R. at 41. The lower court awarded damages to the Plaintiff in the amount of $250,000 for the City's breach of care of its duty of care owed to Plaintiff. On June 6, 2008, the City timely filed its Notice of Appeal.

B. STATEMENT OF THE FACTS

The University of Mississippi Medical Center operated a day care center, and the City provided a regular driver and van to pick up Mrs. Stewart, who regularly attended. ***Stewart II***, 908 So.2d 703, 706. On August 11, 1997, Doris Spiller, an employee of the City, was substituting for the regular van driver. ***Id.*** She picked Mrs. Stewart up at her home and proceeded to the day care center where she helped Mrs. Stewart off the van. ***Id.*** The day care center is located in a business park environment where several businesses share a parking lot which is owned and operated by the owner of the business park. ***Id.***

After assisting Mrs. Stewart off the van and "stabilizing" her, Spiller turned to assist another passenger from the van. Mrs. Stewart took a few steps toward the center and began to fall. ***Id.*** When Spiller saw Mrs. Stewart begin to fall, she reached out for Mrs. Stewart and attempted unsuccessfully to break the fall. ***Id.*** Mrs. Stewart hit her head on the pavement. ***Id.***

Mrs. Stewart was taken to the emergency room where she had no swelling, her blood pressure was normal, and she seemed fine. ***Id.;*** See also T.T. at 206.[1] Mrs. Stewart was released from the hospital and returned to the adult day care center two days later. ***Id.;*** See also T.T. at 207. While

[1] This reference refers to the Trial Transcript from the original trial held on September 25, 2002.

in the bathroom at the day care center the next day, Mrs. Stewart feel again, but her fall was not considered serious. ***Id.;*** See also T.T. at 207.

Later that night, while at home, Mrs. Stewart complained of her head, and the next morning she regurgitated her breakfast and was disoriented. ***Id.*** Mrs. Stewart was taken to the emergency room where she was examined, given prescriptions for pain and muscle relaxers, and she was returned home. ***Id.*** Mrs. Stewart continued to have problems, and her daughter took her to see Dr. Ramsey a few days later. ***Id.*** Dr. Ramsay referred her to Dr. Gipson, who admitted Mrs. Stewart to the hospital for further tests. ***Id.*** Womack testified at trial that Dr. Gipson told her that Mrs. Stewart had suffered another massive stroke, "far worse than the one she had in the 70's." ***Id.***

In ***Stewart II,*** this Court found that the Plaintiff may not recover for damages related to the stroke that occurred four days after the fall. ***Stewart II,*** 908 So.2d at 715. However, at the second trial on damages in this matter, the lower court awarded the Plaintiff $250,000 in damages. This is against the overwhelming weight of the evidence produced during the first and second trials. As such, the City appeals this matter due to the fact that the lower court erred in failing to limit damages to those that arose from the fall only.

SUMMARY OF THE ARGUMENT

The circuit court erred in failing to limit the damages in this matter to those damages that arose from the fall on the curb. The Plaintiff fell and hit her head on August 11, 1997. S.T.T. at 23.[2] At the time of the fall, Mrs. Stewart was 72 years of age. She previously suffered a massive stroke in 1978 and suffered from paralysis on one side of her body, limited speech, limited mobility, and hypertension and was limited from a neurologic standpoint. T.T. at 203-204.

During the first trial in this matter, Dr. Thiel, a board certified neurologist, testified that the only injury that resulted from the August 11, 1997 fall on the curb was a scalp abrasion. She further testified that there is no indication that Mrs. Stewart suffered from a traumatic brain injury. The Plaintiff's original theory of liability was that the fall on the curb resulted in Mrs. Stewart suffering from a second stroke. The lower court awarded $1,000,000 to the Plaintiff in the first trial, and the City appealed. This Court affirmed in part, reversed and rendered in part, and reversed and remanded the lower court's ruling, finding that Stewart's estate was entitled to a maximum recover of $250,000 against the City, and that the purported stroke was not a foreseeable consequence of the fall in the parking lot.

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[2] This reference refers to the Supplemental Trial Transcript from the bench trial on September 9, 2007, which was supplemented into the record on September 28, 2009.

The second trial in this matter addressed the sole issue of damages against the City. Realizing that the stroke theory was foreclosed in the first trial, the Plaintiff attempted to rename the same damages as a traumatic brain injury for the second trial. The only testimony offered by the Plaintiff in the second trial was Dr. Steven Hayne, who opined that a traumatic brain injury was the cause of Mrs. Stewart to enter her "final common pathway" of declining health and eventual death.

Dr. Hayne is a forensic pathologist who does not diagnose traumatic brain injury in a living person. He acknowledged that he had not been involved in diagnosing a traumatic brain injury in "quite a while," and that a neurosurgeon would be the proper specialist to determine a traumatic brain injury in a living person. Dr. Hayne gave no consideration to the previous falls that Mrs. Stewart suffered, to the massive stroke she suffered in 1978 or to the fact that Mrs. Stewart previously suffered from many of the alleged symptoms that were part of the purported "final common pathway" when he made his determination. Importantly, Dr. Hayne acknowledged that the MRI taken after Mrs. Stewart's fall did indicate a traumatic brain injury. Dr. Hayne also acknowledged Mrs. Stewart's prior medical problems and symptoms, yet, he somehow still concluded that the August 11, 1997 fall caused Mrs. Stewart to enter the "final common pathway" of her declining health. This determination is against the overwhelming weight of the evidence.

At the end of the second trial, the lower court awarded the Plaintiff $250,000 and found that the August 11, 1997 fall led to the decline of Mrs. Stewart's cognitive and physical abilities. However, this finding is contrary to the overwhelming evidence produced at both trials and against the overwhelming weight of the evidence that Mrs. Stewart did not suffer a traumatic brain injury. Rather, she suffered a scalp abrasion that was not causally related or proximately caused by the fall in the parking lot. As such, the City respectfully requests this Court to reverse the lower Court's ruling and render damages for those injuries that resulted from the fall.

STANDARD OF REVIEW

This action was brought under the Mississippi Torts Claims Act, which permits actions against a municipality, but requires a bench trial with the circuit judge sitting as finder of fact. In ***Ezell v. Williams***, 724 So.2d 396 (Miss.1998), this Court enunciated that the standard of review in such cases requires that when a trial judge sits without a jury, this Court will not disturb his factual determinations where there is substantial evidence in the record to support those findings.

Furthermore, the Mississippi Supreme Court has recently reiterated the standard of review employed when examining a fact-finder's award of damages for error as follows:

> In ***Lewis v. Hiatt***, 683 So.2d 937, 941 (Miss. 1996) this Court reasoned that "it is primarily the province of the jury [and the judge in a bench trial] to determine the amount of damages to be awarded and the award will normally not be set aside unless so unreasonable in amount ***as to strike mankind at first blush as being beyond all measure, unreasonable in amount and outrageous***." ***Id.*** (quoting ***Harvey v. Wall***, 649 So.2d 184, 187 (Miss. 1995)).

Thompson v. Lee County School District, 925 So.2d 57, 72 (Miss. 2006) (emphasis added). Further, a trial court's decision as to damages will not be disturbed so long as the ruling is supported by substantial, credible, and reasonable evidence. ***De Priest v. Barber***, 798 So.2d 456, 459 (Miss. 2001).

ARGUMENT

I. Whether the lower court erred in failing to limit damages to those that arose from the fall on the curb.

Simply put, the lower court failed to apply the directions of this Court by failing to limit the damages in this matter to those that arose from the fall on the curb. In ***Stewart II,*** this Court remanded "this case for a new trial on damages consistent with this opinion, with instructions to the trial court to limit any damage award against the City to $250,000, ***and to exclude from its award any damages attributable to the stroke***." ***Stewart II,*** 908 So.2d at 716. (emphasis added). The lower court failed to follow the instruction to exclude damages attributable to the

stroke. Rather, the lower court summarily awarded the Plaintiff the maximum amount that this Court found the estate was entitled, which was $250,000, without any consideration as to the testimony of Dr. Clara Thiel. The lower court relied on the unfounded testimony of Dr. Steven Hayne, and awarded an amount that is beyond all measure and unreasonable in amount.

The mandate of this Court in the prior litigation falls under the law of the case doctrine. This doctrine has been explained as follows:

> The doctrine of the law of the case is similar to that of former adjudication, relates entirely to questions of law, and is confined in its operation to subsequent proceedings in the case. ***Whatever is once established as controlling legal rule of decision, between the same parties in the same case, continues to be the law of the case***, so long as there is a similarity of the facts.

Simpson v. State Farm Fire & Cas. Co., 564 So.2d 1374, 1376 (Miss. 1990) (emphasis added). The law of the case doctrine dictates that the damages in the case *sub judice* be limited to those that arose from the fall on the curb, not from the stroke that the Plaintiff purportedly suffered days later.

A. Testimony of Dr. Clara Thiel

During the first trial in this matter, Dr. Thiel testified the only injury that resulted from the August 11, 1997 fall on the curb was an abrasion on the scalp. T.T. at 206. Dr. Thiel is a board certified neurologist at River Oaks Hospital in Flowood, Mississippi. T.T. 198 – 99. Dr. Thiel testified

that she treats patients with head injuries, patients that have suffered strokes and elderly patients. T.T. at 200. It has been established though the pleadings and trial testimony that Mrs. Stewart fell and hit her head on August 11, 1997, that she suffered a significant stroke in 1978 and that she was 72 years of age when she fell on the curb. As such, Dr. Thiel was admitted in the first trial to testify as an expert in the field of general medicine in neurology. T.T. at 202.

Dr. Thiel also testified to Mrs. Stewart's condition ***before*** the fall on August 11, 1997. She stated that Mrs. Stewart had a significant stroke 20 years prior to the fall, that Mrs. Stewart had paralysis on one side of her body, limited speech, limited mobility, and hypertension and was limited from a neurologic standpoint. T.T. at 203 – 04. Dr. Thiel testified that the long-term prognosis for someone who had a significant stroke is limited and "for a large stroke to be alive 18 to 20 years later is probably exceeding what would be expected." T.T. at 204 – 05.

When asked about the injuries that Mrs. Stewart sustained after the fall on August 11, 1997, Dr. Thiel stated:

> The only definite injury, if you will, is an abrasion on the scalp which is listed as a minor abrasion. There's not anything else to indicate that she had any other injuries. Her x-rays were normal. ***And so it's my impression that she had no serious injury because of her fall***.

T.T. at 206 (emphasis added). Dr. Thiel also testified that she did not observe any evidence of concussion, fracture, bruising, swelling to the brain in the medical records. T.T. at 207. Moreover, the diagnosis from St. Dominic's hospital at the time of discharge on August 11, 1997 was "minor head injury." *Id.*

Dr. Thiel explained what occurred over the next week and how Mrs. Stewart's medical condition changed. She testified that the medical records demonstrated that Mrs. Stewart went back to day care the next day and did not have any problems during the next three days. T. T. at 207. On August 15, 1997, Mrs. Stewart fell in the bathroom of the daycare center, but had no injury and did not require medical attention. *Id.* Mrs. Stewart then went to the emergency room at St. Dominic's on August 16, 1997 and was treated for neck strain. T.T. at 208. On August 19, 1997, Mrs. Stewart went back to the emergency room because she was lethargic and could not walk. *Id.* The Plaintiff claimed in ***Stewart II*** that Mrs. Stewart suffered a second stroke at this time; however, this Court found that Dr. Thiel's testimony established that stroke is not a foreseeable consequence of the alleged negligence which led to Mrs. Stewart's fall, and the Estate may not recover damages related to the stroke, whether or not it was caused by the fall on August 11, 1997. ***Stewart II,*** 908 So.2d at 715. Therefore, Plaintiff can recover damages from the injuries sustained in the fall on the curb on

August 11, 1997 until she was admitted to the hospital for the alleged stroke on August 19, 1997.

Based on the overwhelming weight of the evidence, the Plaintiff is not entitled to $250,000 in damages. Dr. Thiel testified that the fall on August 11, 1997 did not have anything to do with her admission into the emergency room on August 19, 1997. T.T. at 211. Dr. Thiel based this opinion on the fact that Mrs. Stewart had no injury other than an abrasion immediately following the fall. *Id.* Mrs. Stewart returned to her normal activity for several days, which was "the strongest piece of evidence" according to Dr. Thiel. *Id.* More importantly, the MRI taken on August 19 did not show any change in the brain from a previous MRI taken in 1996. Dr. Thiel testified at trial that she did not find evidence of a new stroke, and these findings were based on her review of an MRI film that was taken in 1996 and comparing it to the MRI film taken on August 19, 1997. Mrs. Stewart did not suffer a traumatic brain injury or any other neurological defect. Therefore, based on expert testimony, the only damages suffered my Mrs. Stewart as on August 11, 1997 were a minor abrasion on the scalp.

B. Testimony of Dr. Steven Hayne

Realizing that the stroke theory was foreclosed by ***Stewart II***, Plaintiff attempted to rename the same damages as a traumatic brain injury. However, the evidence from the first and second trials does not

indicate such an injury. During the second trial in this matter, in which this Court instructed the lower court to limit damages from those that arose from the fall on the curb, the only testimony that Plaintiff offered was from Dr. Steven Hayne. Dr. Hayne is a forensic pathologist and was formerly employed at the Medical Examiner's Office with the Department of Public Safety. S.T.T. at 7. He does not specialize in neurology. S.T.T. at 12. Dr. Hayne testified that the had not been involved in the diagnosis of a traumatic brain injury in a living individual in "quite a while," and that a neurosurgeon would be the proper specialist to determine a traumatic brain injury in a living person.[3] S.T.T. at 14 and 16.

Dr. Hayne was designated as an expert witness by the Plaintiff and opined that the fall on August 11, 1997 eventually caused the "final common pathway," i.e., the decline of her health that eventually caused her death.[4] S.T.T. 33. However, Dr. Hayne's findings are contrary to the overwhelming weight of the evidence that Mrs. Stewart suffered a scalp abrasion and not a traumatic brain injury. Furthermore, Dr. Hayne's findings give no consideration to the previous falls that Mrs. Stewart suffered, to the massive stroke she had in 1978 or to the fact that Mrs.

[3] Shortly after the ***Stewart III*** trial, Dr. Hayne's credibility was attached by various medical and governmental organizations and questioned by this Court in ***Wilson v. State,*** ---So.3d---, 2009 WL 3031076 (September 24, 2009). The City of Jackson respectfully requests that this Court take judicial notice of Dr. Hayne's discrepancies.

[4] The Plaintiff is not pursuing a wrongful death claim against the City.

Stewart previously suffered from many of the alleged symptoms that were part of the "final common pathway."

Dr. Thiel testified in the first trial that the medical records indicated that Mrs. Stewart had a couple of falls prior to August 11, 1997. The medical records indicated that Mrs. Stewart fell and had a hip fracture that required hospitalization. T.T. at 214. Mrs. Stewart also had a previous fall where she hit her head. *Id.* However, Dr. Hayne found the fall on August 11, 1997 caused the decline in her health, notwithstanding the fact that she was 72 years old, suffered a major stroke in 1978 and had previous falls requiring hospitalization. In fact, Dr. Hayne did not take into consideration these previous falls in making his determination. S.T.T. at 37 – 38.

Importantly, Dr. Hayne testified that Mrs. Stewart's loss of mobility, loss of ability to feed herself and decrease mental capacity were all causally related to the August 11, 1997 fall. S.T.T. at 28. However, the record establishes that Mrs. Stewart was paralyzed on one side of her body, had limited speech, limited mobility and was limited neurologically ***prior to*** the fall. During trial, Dr. Hayne acknowledged that the medical records demonstrate that Mrs. Stewart had the following impairments ***prior to*** the August 11, 1997 fall:

- impaired thinking;
- confusion and disorientation;

- short term memory loss;
- anxiety and impatience;
- impaired socialization due to her dysphasia of Aspasia;
- hypertension; and
- gall bladder problems.

S.T.T. at 41 – 42. Yet, Dr. Hayne still somehow concluded that the August 11, 1997 fall caused Mrs. Stewart to enter the "final common pathway" of her declining health.

Moreover, Dr. Hayne acknowledged that this "final common pathway" can occur in individuals that have suffered a stroke, such as Mrs. Stewart. S.T.T. at 34. As previously mentioned, Mrs. Stewart suffered a major stroke in 1978. *Id.* After the stroke, Mrs. Stewart did not return to work, suffered the loss of motor and sensory functioning on the right side of the body, had to uses a four prong cane to walk and had difficulty in speech, i.e., dysphasia. S.T.T. at 34 – 36.

Dr. Hayne testified that Mrs. Stewart was never diagnosed with a traumatic brain injury after the August 11, 1997 fall. S.T.T. 42 – 43. Dr. Hayne also testified that a neurologist or a neurosurgeon would be better qualified to diagnosis a traumatic brain injury, rather than a forensic pathologist, such as himself. S.T.T. at 43. He also testified that it is beyond his field of expertise to diagnose a traumatic brain injury in a living individual due to the fact that Dr. Hayne only performs autopsies. *Id.* Dr.

Hayne further acknowledged that the MRI that was taken on August 19, 1997 did not reference a traumatic brain injury. S.T.T. at 44. Rather, the scans referenced the presence of an old stroke and degenerative changes in the area around the old stroke. S.T.T. at 44 – 45. Dr. Hayne also acknowledged that more than one neurologist examined Mrs. Stewart after the August 11, 1997 fall, and that no neurologist who saw Mrs. Stewart made the diagnosis of a traumatic brain injury. S.T.T. at 47.

The lower court found that the Plaintiff striking her head on August 11, 1997 injured her brain and "led to the continuous decline of her cognitive and physical abilities until her death on November 4, 2002." R. at 13. However, the record is void of any credible evidence that Mrs. Stewart's health issues and declining health were proximately caused by her fall. It is the Plaintiff's burden to demonstrate that the injuries were proximately caused by the fall on the curb, and the Plaintiff failed to meet this burden. In order to recover damages in a negligence suit, "a Plaintiff must establish that the damage was proximately caused by the negligent act of the defendant(s)." ***City of Jackson v. Spann,*** 4 So.3d 1029, 1033 (Miss. 2009); ***Glover v. Jackson State Univ.***, 968 So.2d 1267, 1277 (Miss.2007); Miss.Code Ann. § 85-5-7(1), (5) (Rev.1999) (fault is allocated only to the party(s) which proximately caused the injury to the plaintiff). The testimony of Dr. Hayne does not demonstrate that the fall proximately caused Mrs. Stewart to enter a "final common pathway" to her declining

health. Moreover, Dr. Hayne's testimony is not supported by credible evidence, and his findings are against the overwhelming weight of the evidence produced at the trials in this matter. As such, the lower court's award of $250,000 is against the overwhelming weight of the evidence, and the City respectfully requests that this Court reverse the lower court's ruling and render appropriate damages of $25,000.[5]

CONCLUSION

For the above reasons, the City of Jackson requests that this reverse the lower court's ruling and render appropriate damages to the Plaintiff in the amount of $25,000. The overwhelming weight of the evidence demonstrates that Mrs. Stewart did not suffer a traumatic brain injury when she fell on the curb. This injury did not lead to her declining health. As such, the amount of $250,000 is unreasonable and against the overwhelming weight of the evidence. And the City of Jackson prays for such other relief as this Court deems appropriate.

Respectfully submitted this the 24 day of November, 2009.

THE CITY OF JACKSON, MISSISSIPPI

[5] At the second trial in this matter, the City estimated that Mrs. Stewart is entitled to $25,000 in damages for the injuries suffered from the fall on the curb on August 11, 1997.

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CERTIFICATE OF SERVICE

The undersigned does certify that he has this date mailed, via United States mail, postage pre-paid, a true and correct copy of the above and foregoing Appellee's Brief to the following:

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So certified, this the 24 day of November, 2009.

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