IN THE SUPREME COURT OF MISSISSIPPI

KAREN R. THOMPSON — APPELLANT

VERSUS — CASE NO.: 2009-CA-01147

DUNG THI HOANG NGUYEN — APPELLEE

APPELLEE'S BRIEF

APPEALED FROM:

THE CIRCUIT COURT OF JACKSON COUNTY, MISSISSIPPI
(Cause No.: 2004-00162(3))

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record hereby 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 Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1.	Karen R. Thompson 5401 Martin Luther King, Jr., Drive Moss Point, MS 39563	Appellant
2.	Kristopher W. Carter, Esq. DENHAM LAW FIRM, PLLC 424 Washington Avenue Ocean Springs, MS 39564	Attorney for Appellant
3.	Dung Thi Hoang Nguyen 14020 Highway 90 West Grand Bay, AL 36541	Appellee
4.	H. Benjamin Mullen, Esq. Bryan, Nelson, Schroeder, Castigliola & Banahan, PLLC P.O. Drawer 1529 Pascagoula, MS 39568-1529	Attorney for Appellee
5.	State Farm Mutual Automobile Ins. Co. 100 State Farm Parkway Birmingham, AL 35297	Appellee's Insurer
6.	Hon. William T. (Dale) Harkey Jackson County Circuit Court Judge	Trial Judge

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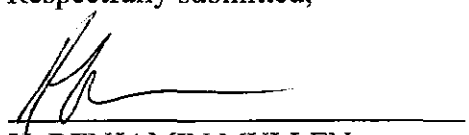
Respectfully submitted,



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STATEMENT OF THE ISSUES

The Appellee, Dung Thi Hoang Nguyen (hereinafter "Nguyen"), submits this Statement of the Issues as a more concise version of the issues on appeal:

1. Whether the Trial Court properly denied the motion for directed verdict of Karen R. Thompson (hereinafter "Thompson") on the issue of causation and submitted this issue to the jury for resolution.

2. Whether the Trial Court correctly denied Thompson's Motion for Additur or in the alternative, for a new trial on damages alone.

3. Whether the Trial Court properly granted Nguyen's proposed jury instruction D-8 and refused Thompson's proposed jury instructions P-1A, P-7A, P-8A, P-9A, P-10A, and P-11A.[1]

[1] Thompson's proposed jury instructions P-1A, P-7A, and P-11A are at their core peremptory instructions, and the trial court's refusal of these instructions was based upon the same reasoning as its denial of Thompson's motion for directed verdict. The issues of law are therefore somewhat, if not entirely, duplicative. However, for the convenience of this Court, Nguyen will address Thompson's arguments in the same order and manner that she presented them in the Appellant's Brief to avoid confusion.

STATEMENT OF THE CASE

A.
Nature of the Case, Proceedings, and Disposition

The Plaintiff, KAREN R. THOMPSON, (hereinafter "Thompson") filed her original complaint on June 17, 2004, alleging that the Defendant, DUNG THI HOANG NGUYEN, (hereinafter "Nguyen") negligently caused her vehicle to collide with Thompson's vehicle. C.P. 8-9. Nguyen answered the complaint on July 28, 2004, admitting fault for the accident but specifically contesting the issues of causation and damages. C.P. 12-14. On October 23, 2006, Thompson filed her Second Amended Complaint increasing her claim for damages but otherwise pleading essentially the same allegations as those originally pled. C.P. 61-63. Nguyen answered the Second Amended Complaint on October 23, 2006, again admitting fault for the accident itself but specifically contesting causation and damages. C.P. 64-66. Nguyen added an additional affirmative defense to her answer to specifically assert that Thompson's alleged injuries were the result of either pre-existing conditions or some cause unrelated to the subject motor vehicle accident. C.P. 65. Discovery was ongoing in fits and starts over the 5-year span of the trial court litigation as the case passed from attorney to attorney within the same law office. Then, finally, this case was tried before a jury on May 11, 2009, through May 13, 2009. C.P. 111.

During the trial, the jury heard testimony from Thompson and her mother as well as deposition testimony from four (4) of Thompson's treating providers. Also, Thompson's medical records and bills were placed in evidence. Exs. P-1 through P-8. And, photographs showing the condition of the involved vehicles immediately following the accident were introduced into evidence. Exs. 1-3 and composite Ex. 4. Lastly, the jury heard testimony from

Nguyen. At the conclusion of Nguyen's case-in-chief, Thompson moved the trial court for a directed verdict contending that because all of her medical experts opined that they thought the subject accident was the source of Thompson's injuries, the issue of causation should be taken from the jury and the case submitted on damages only. Tr. 114-15. After hearing argument from counsel for Nguyen, the trial judge determined that the jury still had to consider the experts' bases for their opinions in conjunction with the facts in evidence such as the photographic evidence of the involved vehicles. Tr. 120-21. Additionally, the trial judge noted that he would be instructing the jury that it can accept or reject, in whole or in part, the testimony of expert witnesses and that the jury was therefore not bound by expert testimony. Tr. 120. With this reasoning, the trial court denied Thompson's motion for directed verdict. Tr. 122.

The trial court then addressed the jury instructions submitted by the parties. Among her proposed jury instructions, Thompson submitted peremptory instructions P-1A, P-7A, and P-11A. C.P. 164-65, 169[2]. These were refused for essentially the same reasons that Thompson's motion for directed verdict was denied. Tr. 128, 131. Thompson's proposed jury instructions P-8A, P-9A, and P-10A were refused as either being incorrect statements of the law, duplicative, and/or improper comments on the evidence. Tr. 128-30. The trial court granted Nguyen's proposed jury instruction D-8 which was the form of the verdict which allowed the jury to either find for the plaintiff in some amount or for the defendant since the trial court submitted the issues of both causation and damages to the jury to consider. Tr. 133.

After closing arguments and deliberation, the jury returned a verdict in favor of the Thompson, and assessed her damages at $9,131.00. Tr. 169. This verdict was a general verdict,

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[2] P-11A is a hybrid special interrogatory/peremptory form of the verdict.

and there is no evidence in the record that this amount was for any particular item of damage claimed by Thompson. When the jury was excused, Thompson immediately attempted, *ore tenus*, to move for an additur. Tr. 170-71. The trial court ultimately determined that the parties should follow the rules and file their post-trial motions after entry of the judgment. Tr. 173. Judgment on the jury verdict was thereafter entered on May 14. 2009. Thompson then filed her motion for additur or, in the alternative, for a new trial on damages only on May 22, 2009. C.P. 179. Nguyen filed her response in opposition to the motion on June 2, 2009, and Thompson filed her reply memorandum on June 9, 2009. C.P. 189, 206. The trial court denied Thompson's motion on June 29, 2009. C.P. 219.

B.
Statement of Facts

This case arose out of a motor vehicle accident wherein Nguyen was stopped behind Thompson, reached in her purse for something, and allowed her foot to slip off the brake pedal. Tr. 108. The result was that Nguyen's car rolled the few feet between her car and Thompson's car and made contact with Thompson's rear bumper. Tr. 108. This was undisputed. Further, Thompson testified that she thought at first her car had just stalled because of the type of movement she felt at the time of the contact between the two vehicles . Tr. 74. She further characterized that what she felt as a "jolt" meaning that her body's only movement inside her car was that her head moved forward a little one time. Tr. 80. The head moving forward was the first and only movement made by Thompson's body in the accident. Tr. 80. She also testified that she did not feel any pain when the vehicles made contact and did not begin to feel any pain of any sort until at least a couple of days after the accident. Tr. 79. In fact, she exited her car and

spoke to Nguyen. Tr. 81. They both observed that there was no damage to either vehicle and neither party was injured at the scene. Tr. 81-82. This was also undisputed. Tr. 82-83. Further confirming the lack of damage was the photographic evidence showing no damage to the rear of Thompson's vehicle. Exs. D-1 through D-3. Those photographs were taken within 8 days after the accident and fairly and accurately depicted the condition of Thompson's vehicle following the accident and demonstrated the lack of damage to the rear of her vehicle.[3] Tr. 82-83. See also date stamps on the photographs. Nguyen specifically asked Thompson if she wanted to call the police to make an accident report, and Thompson declined. Tr. 108 (testimony of Nguyen); Tr. 84 (testimony of Thompson). Thompson went on about her business that afternoon and then went to her parents' home in Moss Point. Tr. 84. Again, Thompson testified that she did not feel pain. Tr. 85-86. According to Thompson, her father insisted that she call Nguyen and have her meet at the Pascagoula Police Department and prepare an accident report. Tr. 85. She did so, and Nguyen agreed to drive over from Grand Bay, Alabama, where she lived, and assist with the report. Tr. 109. When Nguyen arrived, she again inquired as to whether or not Thompson was injured, and Thompson stated that she was not. Tr. 109. This too was not disputed. This was the last Nguyen would hear from Thompson until Thompson sued her.

The pain, according to Thompson, did not arise until a couple days later, and she went to her family physician, Dr. James Martin. Tr. 86; Ex. P-1 (Medical Records of Dr. James Martin). Between the time of the accident and Thompson's visit with Dr. Martin, Thompson sought no

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[3] Thompson tried, through a motion in limine, to keep the jury from seeing these photographs of the rear of vehicle following the accident. C.P. 125. However, counsel for Thompson did not argue that motion, and, in fact, stated the he had no objection to the photographs going in evidence when they were offered. Tr. 83.

medical treatment (presumably because she needed none) and did not even bother to have a general examination at the emergency room. Tr. 84. These facts were also undisputed. Following her visit with Dr. Martin, however, Thompson began a regular course of medical treatment that led to physical therapy, surgery, and ultimately, according to Thompson, total disability.[4,5] Tr. 86.

Thompson presented deposition testimony of her treating physicians and physical therapists. Dr. Martin testified that he felt Thompson had pre-existing conditions that were only aggravated by the accident.

> Q. And degenerative disc disease, particularly being discovered this close in time to the accident, that would–that would have probably been something that preexisted the accident, would it not?
>
> A. Yes.
>
> Q. All right. And so that any problems that she may have developed after the accident, at least that might be connected to the degenerative disc disease, would probably at best be an aggravation, is that right?
>
> A. I think so.

Ex. P-9 for ID, Deposition of Dr. James Martin, p. 22, lines 15-25. Dr. Lee Kesterson, the orthopedic surgeon, testified that with respect to causation, he did not believe that the disc degeneration in Thompson's cervical discs was caused by the accident.

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[4] Strangely, Thompson elected through two of her motions in limine to withdraw any claim for damages for lost wages, loss of wage earning capacity, and mental anguish. C.P. 122, 129.

[5] At this same time, within days of the accident, Thompson had already retained an attorney (not counsel who ultimately tried the case) who began receiving and apparently paying the bills from Dr. Martin.

Q. And were these degenerative discs that she had in there, were they as a result of the accident in your opinion, in terms of reasonable medical probability?

A. I doubt that the degeneration was cause by the accident.

Q. Okay. But when I look at this tear in the disc, the posterior annular fissure, do you have any opinion, in terms of reasonable medical probability, given the onset of the symptoms at the time of the collision, as to whether or not that relates to the collision?

A. I think what's fair to say is, is that probably the anatomy may or may not be related to that accident. But probably if she had no symptoms prior to that, then, you know, **some of her symptoms that developed following that accident is attributable to that event**.

Ex. P-12 for ID, Deposition of Dr. Oliver Lee Kesterson, pp. 16-17, lines 23-25, 1-15 (emphasis added). Dr. Kesterson was clear in his opinion that the degeneration of Thompson's cervical discs was not caused by the accident and at best equivocal in his opinion as to causation with respect to some portion of her subsequent symptomatology. Ex. P-12 for ID. Ruth Bosarge, one of the physical therapists, refused to give an opinion as to causation. Ex. P-14 for ID, Deposition of Ruth Bosarge, p. 23, lines19-20. The other physical therapist, Ann Godfrey, who was least qualified to give an opinion regarding causation, was the only witness offered by Thompson who attempted to relate all of Thompson's medical conditions to the subject accident. Ex. P-15 for ID, Deposition of Ann Godfrey.

Lastly, Thompson testified that she had been in another rear-end collision approximately 12 years prior to the subject accident. Tr. 89. She was struck from behind by a drunk driver, and her vehicle actually sustained damage. Tr. 89. Thompson claimed she had absolutely no injuries in that accident, and further stated in Court that she did not feel that should have to reveal that

accident to the jury. Tr. 89-90. Thompson related every single complaint to the subject accident, and testified that none of her medical treatment over the years had helped her pain symptoms. Tr. 88-89.

SUMMARY OF THE ARGUMENT

While Thompson's arguments on appeal are separated into three categories, Nguyen submits that the two real issues before this Court relate to whether this case involved a jury question regarding causation and damages and whether the amount of the jury's verdict was appropriate based upon the evidence. Nevertheless, this Brief addresses all three points raised by Thompson in her Brief, and in doing so demonstrates Thompson's error regarding and misapprehension of the applicable law and the issues in this case.

First, this negligence case involved a rear-end accident where Nguyen admitted fault for the accident itself but disputed whether Thompson suffered any injury as a result. Therefore, the elements of duty and breach of duty were uncontested. The issues of proximate cause and damages remained viable and disputed issues of material fact for the jury to resolve. The trial court recognized this viable and material dispute, and at the close of the evidence when Thompson moved for a directed verdict on the issue of causation, the trial court reviewed all of the evidence in the light most favorable to Nguyen (as the trial court must). In doing so, the trial court properly denied the motion finding, on the record, disputed issues of fact and submitted the case to the jury.

Second, the lack of contest as to the reasonableness and necessity of Thompson's medical treatment is immaterial to the issues in this case. The jury's task was to determine what was and was not causally related to the subject accident. The jury fulfilled that task, weighing both the credibility of the evidence and considering all of the material disputes, and rendered an appropriate verdict based upon all of the evidence. Thompson has wholly failed to demonstrate that the general verdict in the amount of $9,131.00 is anything other than a general verdict based

upon the evidence presented. Likewise, Thompson has failed to demonstrate that this verdict is against the overwhelming weight of the evidence or that it is the product of bias, passion, or prejudice. Contrary to Thompson's assertions that Nguyen failed to put on any proof to dispute her contentions, the evidence in the record clearly indicates that more than sufficient proof was established by Nguyen to demonstrate that Thompson suffered either no injury or a very minimal injury in this accident. Furthermore, Nguyen was not required to bring forth her own additional witnesses, expert or otherwise, to refute Thompson's witnesses in order to reach the jury on the issue of causation. Both the direct and circumstantial physical evidence as well as the testimony elicited by and presented by Nguyen at trial were sufficient to support the amount of the verdict ultimately returned by the jury. Therefore, the trial court properly denied Thompson's motion for additur, or in the alternative for a new trial on the issue of damages alone.

Lastly, the trial court properly instructed the jury. The peremptory instructions were appropriately refused for the same reason that the motion for directed verdict was denied. The refusal of duplicative and potentially confusing proposed instructions submitted by Thompson was well within the trial court's discretion. And, though the form of the verdict was proper, that issue is moot because Thompson received the best verdict she could have received, that being a verdict in her favor.

For the reasons to be shown in greater detail in the following portions of this Brief, the denial of the motion for directed verdict, the trial court's decisions regarding jury instructions, the jury's verdict, and the denial of the motion for additur, or in the alternative for a new trial on the issue of damages alone should be affirmed by this Court.

ARGUMENT AND CITATION OF AUTHORITY

I. The trial court's denial of Thompson's motion for directed verdict was proper because the evidence adduced at trial created a fact question for the jury to decide.

At the close of Nguyen's case-in-chief, Thompson, *ore tenus*, moved for a directed verdict on the issue of causation. Tr. 114-15. The core of Thompson's rationale for asking the trial court to remove this issue from consideration by the jury was essentially two-fold. First, she contended, as she does in her brief on appeal, that because she, Thompson, testified that she did not have symptoms before the accident but she developed them after accident and this was "unrefuted," the jury must accept that. Tr. 115. Second, Thompson contended that because she submitted multiple opinions from her treating medical providers that they thought the accident caused her problems, this constituted unrefuted and overwhelming evidence that this was actually true. Tr. 115. Both of these contentions represent Thompson's misapprehension of the applicable law and the issues in this case and will be discussed in further detail below.

The standard of review for the grant or denial of a motion for directed verdict is *de novo*. Solanki v. Ervin, 21 So.3d 552, 556, ¶8 (Miss. 2009). On review, an appellate court must determine whether the trial court correctly applied the test for determining whether a directed verdict should have been granted. Solanki, 21 So.3d at 556, ¶8. The Supreme Court of Mississippi has held that test to be:

> [T]he trial judge is to look solely to the testimony on behalf of the party against whom a directed verdict is requested. He will take such testimony as true along with all reasonable inferences which can be drawn from that testimony which is favorable to that party, and, if it could support a verdict for that party, the directed verdict should not be given. If reasonable minds might differ as to this question, it becomes a jury issue.

Id. Additionally, the Supreme Court has held that "[i]n considering the evidence and all reasonable inferences, the court must determine whether the evidence is so overwhelmingly against [the nonmovant] that no reasonable juror could have found in her favor....[T]his Court considers 'whether the evidence, as applied to the elements of a party's case, is either so indisputable, or so deficient, that the necessity of a trier of fact has been obviated.'" Id. (citations omitted). A trial court, therefore, in making its determination on a motion for directed verdict, must consider all of the evidence as a whole in the light most favorable to the non-moving party. This is well-settled law in Mississippi.

In a negligence action such as the case at bar, a plaintiff must prove by a preponderance of the credible evidence duty, breach of duty, proximate cause, and damages. Entrican v. Ming, 962 So.2d 28, 32, ¶11 (Miss. 2007). In the case at bar, Nguyen admitted liability for the accident in question thus removing the elements of duty and breach of duty as disputed issues for the jury. Therefore, with regard to Thompson's motion for directed verdict, the trial court had to consider all of the evidence in the light most favorable to Nguyen, giving her the benefit of all reasonable inferences drawn therefrom, to determine whether or not there remained disputed issues of fact for the jury to resolve pertaining to the elements of proximate cause and damages.

Thompson asserts in her brief at pages 13 and 14 that uncontradicted or undisputed evidence should ordinarily be taken as true. While this is a correct statement of this principle, there are applicable exceptions. Denson v. George, 642 So.2d 909, 914 (Miss. 1994). The Supreme Court has held:

> The rule is that the testimony of a witness which is uncontradicted, and who is not impeached in some manner known to the law, where he is not contradicted by the circumstances, must be

> accepted as true. It is true that the direct evidence of a witness may be contradicted by circumstances, but in such case the circumstances relied on for contradiction must be inconsistent with the truth of the testimony. "When the testimony of a witness is not contradicted, either by direct evidence or by circumstances, it must be taken as true."
>
> **While the aforementioned rule is a valid proposition of law, it is also true that uncontradicted testimony may be so improbable and incomplete under the circumstances of the case as to be bereft of credibility.** It is also well-established that the witness' credibility is for the trial court to determine.

Holloway v. Holloway, 631 So.2d 127, 132-33 (Miss. 1993) (citations omitted) (emphasis by author). Thus, it is through this lens that Thompson's contention regarding her motion for directed verdict must be viewed and studied.

The heart of Thompson's assertion that her motion for directed verdict should have been granted is that she, Thompson, testified that she had not had neck pain before the accident and that she developed it after the accident and that this was "uncontradicted." Appellant's Brief at page 13. Further, Thompson contends that her medical providers also confirmed that this is what Thompson stated to them. Appellant's Brief at page 13-14. Herein lies the flaw in Thompson's argument, however. Thompson's own testimony is purely subjective, and the testimony of her medical providers in this regard flows only from what Thompson subjectively told them about her alleged neck pain. Thompson's testimony cannot be viewed in a vacuum, though. It must be considered in light of all of the evidence and weighed accordingly.

Looking first at Thompson's own testimony, credibility issues abound. In her deposition, Thompson testified that she felt tingling in her left arm along with neck and shoulder pain between the time she left the accident scene and reaching her parents' home the day of the accident. Tr. 79. Yet at trial, she testified that she did not begin to feel any soreness until at least

a couple of days after the accident. Tr. 58; 79; 85-86. And, in fact, Thompson became adamant at trial that she did not express any pain complaints when Nguyen met her on the evening of the day of the accident at the police station to prepare an accident report. Tr. 91. Oddly, Thompson's stated purpose for even having an accident report prepared was "in case [she] end[ed] up stiff or hurting two, three, four, five days later down the line." Tr. 91 (edits by author). That in and of itself is suspicious and becomes even more so when viewed against trial exhibit D-4, the bills from Physical Therapy Solutions, where Thompson's first attorney (not Thompson herself) was actually being billed for her physical therapy treatment beginning only three (3) weeks after the accident. Ex. D-4.

Additionally, in describing the impact and her body's movement in the accident, Thompson testified:

> Q. And you also, I believe, or it's your understanding that the contact between the vehicles was bumper to bumper; right?
>
> A. From my understanding, yes, sir.
>
> Q. All right. And you said it was just a jolt. Correct?
>
> A. To the best of my knowledge, yes, sir.
>
> Q. All right. You didn't hit anything inside the car with any part of your body, did you?
>
> A. No, sir, I didn't.
>
> Q. All right. And I think you testified previously in your deposition – and we'll take a look at it if you don't recall – that the only movement your body made was you felt like your head moved forward a little bit. Is that right?
>
> A. That is the jolt that I was speaking of, yes, sir.

Q. All right. So, your first movement was your head moved forward. Correct?

A. Well, neck, head, yes, sir.

Tr. 80. In conjunction with this testimony of what is most assuredly an impact of very minimal proportion, the trial court had in evidence before it photographs of the rear of Thompson's car showing no damage to the bumper. Exs. D-1 through D-3. The lack of damage was confirmed by Thompson herself. Tr. 82-83.

In addition to Thompson's description of this accident which caused her head and neck to move forward slightly one time and which left no damage to the rear of her car, Thompson testified about another rear-end collision in which she was involved 12 years earlier. Tr. 89. That accident involved being struck by a drunk driver and which left significant damage to the rear of the vehicle she occupied at that time. Tr. 89. Yet, according to Thompson, she suffered absolutely no injury from that accident. Tr. 89-90. Thompson was even so bold as to testify at trial that she did not even feel that she should have had to reveal that prior accident, presumably feeling at liberty to conceal a material fact. Tr. 90. And, Thompson's assertion about not having an injury in that prior accident notwithstanding, something was wrong with her long before the subject accident. Dr. Martin testified that he felt Thompson had pre-existing conditions that were only aggravated by the accident.

Q. And degenerative disc disease, particularly being discovered this close in time to the accident, that would--that would have probably been something that preexisted the accident, would it not?

A. Yes.

Q. All right. And so that any problems that she may have

developed after the accident, at least that might be connected to the degenerative disc disease, would probably at best be an aggravation, is that right?

A. I think so.

Ex. P-13 for ID, Deposition of Dr. James Martin, p. 22, lines 15-25. Dr. Lee Kesterson, the orthopedic surgeon, testified that with respect to causation, he did not believe that the disc degeneration in Thompson's cervical discs was caused by the accident.

Q. And were these degenerative discs that she had in there, were they as a result of the accident in your opinion, in terms of reasonable medical probability?

A. I doubt that the degeneration was cause by the accident.

Q. Okay. But when I look at this tear in the disc, the posterior annular fissure, do you have any opinion, in terms of reasonable medical probability, given the onset of the symptoms at the time of the collision, as to whether or not that relates to the collision?

A. I think what's fair to say is, is that probably the anatomy may or may not be related to that accident. But probably if she had no symptoms prior to that, then, you know, **some of her symptoms that developed following that accident is attributable to that event.**

Ex. P-12 for ID, Deposition of Dr. Oliver Lee Kesterson, pp. 16-17, lines 23-25, 1-15 (emphasis added). Dr. Kesterson was clear in his opinion that the degeneration of Thompson's cervical discs was not caused by the accident and at best equivocal in his opinion as to causation with respect to some portion of her subsequent symptomatology.

The trial court was then left to contrast this evidence against Thompson's other evidence of $234,316.49 in medical expenses that she wanted to relate to the subject accident along with years of ongoing medical treatment, all of which she testified had not helped her one bit. Tr. 88-

89. Applying the standard that the Supreme Court of Mississippi established regarding Thompson's so-called "uncontradicted testimony," then, it becomes quite clear that what Thompson presented at trial was far less than uncontradicted in the sense that she asserts to this Court. Thompson's testimony and that of her medical providers which was premised on information that Thompson herself provided to them falls squarely in that category of being so "improbable and incomplete under the circumstances of the case as to be bereft of credibility." Holloway, 631 So.2d at 133. Without question, the trial court had before it sufficient evidence to submit the issue of causation to the jury to resolve as to whether any of what Thompson presented in the way of testimony was even common sensical when compared to the physical evidence, Thompson's prior history of being in an accident of more significant proportion, and apparently her being beset by significant pre-existing conditions that were wholly unrelated to the subject accident according to her treating physicians.

The trial court had sound bases and substantial evidence before it to determine that there were material facts in dispute about whether or not all or part of Thompson's medical damages were causally related to the accident at issue. In reviewing the evidence during the trial court's consideration of Thompson's motion for directed verdict, the trial judge stated:

> BY THE COURT: Well, then we get into parsing what refuted evidence means, you know, and I see a dispute here. I see common sense. An accident of this – causing all these damages, that's a fact question for the jury. Pure and simple. Whether this accident could have done it. Based upon the history taken from a client, a patient here – excuse me – based upon the history taken from a patient, whether the causation is established for these doctors to say it came from this wreck, they've given their opinion. Whether the basis for that opinion is sufficient in the eyes of the jury is the aspect I have a problem with. Because I can't give them an instruction to say: If you find that their bases aren't any good,

> you can reject everything if you don't like what they based it on. And if you don't find any other expert testimony on the other hand, you know, in opposition, then you have to accept it as true. That scares me.
>
> I'm going to overrule your motion. Deny it. Let's give it to the jury....

Tr. 121-22. The concerns expressed by the trial court were not only legitimate reservations but an expression of the trial court's correct application of Mississippi law to the facts and evidence in this case. The trial court was therefore correct in denying Thompson's motion for directed verdict on the issue of causation and duty-bound to submit the issue to the jury for resolution. The trial court's denial of Thompson's motion for directed verdict was proper and should be affirmed.

II. The Trial Court correctly denied Thompson's motion for additur or in the alternative, for a new trial on damages alone

In her brief, Thompson makes the speculative conclusory statement that the jury verdict in the amount of $9,131.00 represents only the medical bill of Physical Therapy Solutions. Appellant's Brief at page 14. However, a review of the actual jury verdict reveals that this is a general verdict in proper form with no specific item of damage identified. C.P. 177. The mere fact that the jury's award is the same number as one of Thompson's numerous medical bills does not make it a verdict for that bill alone. The jury in this case deliberated for several hours over the course of two (2) days, and it seems unlikely that the only thing they could agree on was one physical therapy bill, a bill that was not for Thompson's first instance of treatment, but rather somewhere in between her various treatments. Regardless, however, Thompson submitted into evidence and sought $234,316.49 in total medical expenses as being causally related to the subject accident, an issue which, as discussed in Section I. of this Brief, *supra*, was very much

disputed based upon the totality of the evidence. The jury, then, then was left with the difficult task of parsing through all of that information and formulating a general verdict which presumably encompasses all of the elements of Thompson's damages that the jury believed was causally related to the accident. There is no evidence in the record or before this Court that the jury failed to award Thompson the medical bills which the jury believed were causally related to the subject accident or that the jury failed to award Thompson pain and suffering.

Thompson devotes the majority of her argument in her motion to the lack of dispute over the reasonableness and necessity of her medical bills. This argument, however, misses completely the main issue determined by the jury: Causation.

To highlight the flaw in Thompson's argument in her motion, a review of Miss. Code Ann. §41-9-119 (1972) is useful. That statute provides, "[p]roof that medical, hospital, and doctor bills were paid or incurred because of any illness, disease, or injury shall be prima facie evidence that such bills so paid or incurred were necessary and reasonable." Miss. Code Ann. §41-9-119 (1972) (edit by author). This statute is devoid of any reference to causation, and it only speaks to the presumption of the reasonableness and necessity of the charges. Reasonableness and necessity of Thompson's medical expenses as they relate to the ***treatment*** provided to Thompson for whatever conditions with which she presented to her providers was not an issue that the jury had to decide in this case. The issue at trial was causation, *vis-a-vis* whether Thompson's medical conditions were the proximate result of or partially the result of Nguyen's negligence, and the jury was so instructed. C.P. 155-163, 171-175.

A. The issue is causation not reasonableness and necessity of medical expenses

Thompson bears the heavy burden of proving that an additur is appropriate, and in

considering this contention, this Court, like the trial court, must view the evidence in the light most favorable to Nguyen, giving Nguyen the benefit of all inferences and conclusions that can be drawn from the evidence. Rodgers v. Pascagoula Public School Dist., 611 So.2d 942, 945 (Miss. 1992). The Supreme Court of Mississippi has held that jury awards are not merely advisory and will not be "set aside unless so unreasonable as to strike mankind at first blush as being beyond all measure, unreasonable in amount and outrageous." Rodgers, 611 So.2d at 945. "The amount of damages awarded is primarily a question for the jury." Boggs v. Hawks, 738 So.2d 742, 743-44, ¶5 (Miss. Ct. App. 2000); South Central Bell Tel. Co. v. Ellis, 491 So.2d 212, 217 (Miss. 1986). "Additurs represent a judicial incursion into the traditional habitat of the jury, and therefore should never be employed without great caution." Gibbs v. Banks, 527 So.2d 658, 659 (Miss. 1988). These are the tight constraints within which Thompson must demonstrate her entitlement to an additur, and on the evidence before this Court, as with the trial court, she cannot meet her burden.

Thompson relies primarily on the Boggs case, *supra*, for her proposition that the jury verdict in this case was inadequate contending that "[t]here could not possibly be a case more on point with the situation here...." Appellant's Brief at page 16. Thompson could not possibly be more mistaken about the application of Boggs to the case at bar. Aside from the fact that the plaintiff in Boggs actually complained of pain on the day of the accident and sought medical treatment for that pain the very next day, the majority opinion does not even discuss any issues of causation and goes straight from duty/breach of duty to damages. Id. at 1086, ¶15. It would seem in Boggs that perhaps causation was admitted at the trial, although this omission of any discussion of causation by the majority opinion was addressed by Justice McMillin in his dissent

where he was joined by Justices Southwick, Moore, and Thomas. Id. at 1088-89, ¶¶23-27. The dissent points out that a jury has the task of determining, among other things, whether the plaintiff has met his or her burden of proving a causal link between the breach of duty and the damages. Id. at 1089, ¶23. If Thompson contends that Boggs stands for the proposition that causation is not an issue in a negligence case (which seems highly unlikely given the Court of Appeals's vast familiarity with the law of negligence in Mississippi), then the Boggs decision would constitute a complete departure from well-settled law in Mississippi and would stand alone as an anomaly. In reality, Boggs, like so many cases of this sort, appears to have been decided based on its particular set of facts and proceedings at the trial of that particular case.

The law in Mississippi is clear that "[a]ll the authorities agree that recoverable damages must be reasonably certain in respect to the efficient proximate cause from which they proceed, and that the burden is on the claimant to show by a preponderance of the evidence that the person charged was the wrongful author of that cause." Blizzard v. Fitzsimmons, 193 Miss. 484, 493, 10 So.2d 343, 345 (Miss. 1942). Following this reasoning, then, and more on point with the case at bar on the issue of causation is the case of Cassibry v. Schlautman, 816 So.2d 398 (Miss. Ct. App. 2001), decided a year after Boggs. In Cassibry, the plaintiff's vehicle was struck from the rear by the defendant's vehicle in what was by all accounts a very minor impact. Cassibry, 816 So.2d at 399, ¶2. Both vehicles sustained only very little visible damage. Id. The plaintiff, however, testified that she felt "a big jolt"[6] in the accident resulting in immediate neck pain. Id. at 400, ¶3. She waited one week before going to see a doctor, though. Id. Two and one half

[6] Compare Thompson's testimony as just a "jolt" moving her head and neck forward a bit only once and having no immediate pain at that time...no pain in fact for at least a couple of days thereafter, allegedly. Tr. 79-80.

months later, the plaintiff was involved in another rear-end collision that did substantial damage to the plaintiff's car and even caused her to have a smashed knee and broken thumb. Id. at ¶4. Yet, the plaintiff insisted that this accident did not cause or aggravate any neck and back injuries. Id. Three years later, the plaintiff had surgery for her back injuries.[7] Id. at ¶8.

After jury deliberations at trial, the plaintiff was awarded $500.00. Id. at 399, ¶1. She sought an additur which was denied by the trial court. Id. On appeal, the plaintiff contended that the defendant failed to rebut the reasonableness and necessity of her medical expenses totaling $65,977.98, and that she should have been awarded the full amount of her medical expenses. Id. In addressing this contention, the Court of Appeals of Mississippi held that:

> [T]he main issue in this case does not pertain to the necessity and reasonableness of [the plaintiff's] medical expenses; rather, it revolves around whether her injuries and resulting medical expenses were caused by [the defendant's] negligence.

Id. at 401, ¶12 (edits by author). In affirming the jury's verdict and the denial of the motion for additur, the Court of Appeals of Mississippi noted that the jury's verdict was not without support and further noted particularly the evidence of the events that occurred during and immediately after the accident. Id. at 402, ¶14. First, the accident occurred "at a low rate of speed and the damage to each vehicle was visibly insignificant." Id. Also, the plaintiff told the defendant that she was fine immediately after the accident.[8] Id. And, the plaintiff waited a week to see a doctor after the accident. Id. The Court went on to observe that the subsequent accidents were much

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[7] By that time, the plaintiff had been in another accident that she admitted caused injuries to her lower back. Id. at ¶8.

[8] Just as Thompson repeatedly told Nguyen she was fine on the day of the accident. Tr. 84, 91, 108-109.

more severe than the one sued upon. Id. at ¶15. Given all of these facts, the Court found that the plaintiff failed to prove that all of her alleged injuries were cause by her accident with the defendant, and the trial court judgment was affirmed. Id. at ¶16. The jury verdict, therefore, was not influenced by bias, passion, or prejudice nor was it so unreasonable as to shock the conscience of the Court.

Likewise, in Kent v. Baptist Memorial Hospital-North Mississippi, Inc., 853 So.2d 873 (Miss. Ct. App. 2003), the Court of Appeals of Mississippi again dealt with the contention by a plaintiff that because the defendant failed to rebut the reasonableness and necessity of medical bills, the jury should have awarded all of the expenses. Kent, 853 So.2d at 880-81, ¶29. Again, the Court of Appeals held that the question is not whether the bills are reasonable and necessary for the treatment but rather whether the injuries and expenses were proximately caused by the defendant's negligence. Id. at 881, ¶29.

In the case at bar, on her motion for additur, Thompson argued extensively that because there was no evidence offered by Nguyen to rebut the reasonableness and necessity of Thompson's medical expenses, the jury should have awarded all the expenses to Thompson. This is simply not correct. The jury was properly instructed to award only those damages proven by a preponderance of the credible evidence to have been proximately caused by the negligence of Nguyen. C.P. 173-74. This is an entirely separate issue from the reasonableness and necessity of medical expenses. There is no law in Mississippi that holds that just because medical bills are reasonable and necessary for the treatment provided, a jury must automatically award those expenses to a plaintiff. In fact, the law, as set forth hereinabove is that the plaintiff must not only prove that her medical expenses are reasonable and necessary **but that they were proximately**

caused to have been incurred by the negligence of the defendant.

Turning to the evidence, then, the jury had ample facts upon which to base its verdict that Thompson failed to prove that all of her damages were caused by the subject accident. Photographs plainly showed that there was no damage to the rear of Thompson's car. Exs. D-1 through D-3. Thompson testified that the photographs fairly and accurately depicted the condition of her vehicle immediately following the accident. Tr. 82. Thompson also testified at trial that she did not feel any pain immediately after the accident and thereafter did not feel pain for at least a couple of days. Tr. 85-86. Nguyen also testified that Thompson related to her twice that she was not injured: once at the accident scene and again at the police station later that evening. Tr. 108-109. In fact, Thompson apparently did not think enough of the accident at the time that it occurred to call the police to the scene to prepare an accident report. Tr. 84. It was only after discussing the matter with her father that evening that she decided to have a report prepared. Tr. 84-85. These facts are even more indicative than the facts in Cassibry, *supra*, that this accident was so minor as to leave no injury to Thompson. Thus, the jury could reasonably infer that Thompson was not injured to the extent she claimed based on this evidence.

Additionally, Thompson testified that she had been in a more substantial accident 12 years earlier. Tr. 89-90. However, she contended that she suffered absolutely no injuries in that accident even though her vehicle was damaged. Tr. 90. She also stated that she did not feel that she should have to reveal that accident to the jury for some reason. Tr. 90. Yet, immediately after the accident sued upon, Thompson's MRI revealed degenerative disk disease as well as bulging disks already in existence in Thompson's neck. Ex. P-13 for ID, Deposition of Dr. James Martin, p. 22, lines 15-25. Both Dr. Martin and Dr. Kesterson agreed that the

degenerative disk disease was not caused by the accident with Nguyen, and at least Dr. Martin was of the opinion that Thompson suffered an aggravation of a pre-existing condition. Ex. P-13 for ID, Deposition of Dr. James Martin, p. 22, lines 15-25; Ex. P-12 for ID, Deposition of Dr. Oliver Lee Kesterson, pp. 16-17, lines 23-25, 1-15. Dr. Martin also opined that herniated disks do not typically show up immediately after an accident of this type but rather manifest much later. Ex. P-13 for ID, Deposition of Dr. James Martin, p. 22, lines 15-25. Nevertheless, there they were right on the films taken less than three (3) weeks later after the accident. The jury certainly had enough evidence to infer that Thompson's condition likely stemmed from her prior accident and not the accident with Nguyen.

The jury returned a general verdict in the form provided by the Court in the amount of $9,131.00 with no specification as to what that amount represented. The mere fact that this figure matches the amount of Thompson's physical therapy expenses is of no consequence. To state that the jury only awarded Thompson her physical therapy expenses is purely conjecture. The jury certainly did not feel that Thompson was entitled to all of her medical expenses, or it would have awarded them. This would have created a different case altogether. But, that is not what happened, and Thompson's contention that the jury only awarded physical therapy expenses is purely speculation and guesswork and is certainly not evidence of bias, passion, or prejudice. Similarly, the jury verdict is not against the overwhelming weight of the evidence since the jury had ample evidence before it from which to infer that Thompson was not injured as she claimed in the accident with Nguyen.

In Clark v. Deakle, 800 So.2d 1227 (Miss. Ct. App. 2001), the plaintiff in that case sought an additur after a jury awarded her $12,000.00 even though her medical expenses totaled

$11,488.45. Clark, 800 So.2d at 1231, ¶17. The Court of Appeals found that the verdict encompassed $511.55 in pain and suffering damages, and the Court did not find this unreasonable even though it may have been different than what the Court itself would have awarded. Id. In the case at bar, the general verdict of $9,131.00 may well encompass some other medical bills and pain and suffering. Unless the jury had awarded the entirety of the exact amount of Thompson's medical expenses with no amount for pain and suffering, and this was evident on the face of the verdict, this Court, just like the trial court, cannot go behind the amount of the verdict and second guess what the jury intended by their figure. To do so would substitute the Court's own judgment for that of the jury, a practice not permitted under Mississippi law.

Thompson's misplaced argument that Nguyen's failure to contest the reasonableness and necessity of Thompson's medical expenses somehow entitles her to have those expenses awarded to her in full is contrary to Mississippi law, has been consistently rejected by Mississippi appellate courts, and should be again rejected by this Court.

B. Nguyen is not required to put on expert proof

Thompson makes mention at several points in her brief that Nguyen did not call any witnesses at trial to refute Thompson's expert witnesses. (i.e. Appellant's Brief at page 14). The Supreme Court of Mississippi has completely dispelled the notion that a defendant is required to retain and offer into evidence expert testimony to properly rebut the proof of a plaintiff. In Fleming v. Floyd, 969 So.2d 868, 878, ¶25 (Miss. 2007), the Supreme Court of Mississippi reversed a Court of Appeals opinion and reinstated a jury verdict for the defendant on this very issue. In Fleming, the plaintiff put on expert opinion evidence through an accident

reconstruction expert whose ultimate conclusion at trial was that the cause of the collision was the negligence of the defendant. Fleming, 969 So.2d at 877, ¶23. The defendant simply cross-examined the plaintiff's expert but did not offer an expert of her own. Id. at 878, ¶24. However, the jury returned a verdict in favor of the defendant. Id. at 873, ¶12.

The Court of Appeals of Mississippi reversed the jury verdict opining that because the defendant did not offer her own expert to rebut the plaintiff's expert, the jury verdict was against the overwhelming weight of the evidence. Id. at 875, ¶20. In reversing the Court of Appeals and reinstating the jury verdict, the Supreme Court of Mississippi held:

> We are constrained to find, from the record before us and the Court of Appeals' opinion, that the Court of Appeals improperly re-weighed the conflicting evidence before the jury, which had the practical effect of improperly invading the province of the jury.
>
> * * * * * *
>
> Thus, we can reach but one conclusion - the Court of Appeals found that because Floyd did not have her own expert to rebut the testimony of Fleming's expert, there was no jury issue as to liability. **Such a conclusion is contrary to the law in Mississippi as to how the jury may consider expert testimony.** In Daniels v. GNB, Inc., 629 So.2d 595, 603 (Miss. 1993), we stated that "judging the expert's testimony and weight to be accorded thereto is the province of the jury." Id. at 603 (citing Ford Motor Co. v. Cockrell, 211 So. 2d 833, 837 (Miss. 1968)). In Chisolm v. Eakes, 573 So.2d 764, 767 (Miss. 1990), this Court stated that **"[t]he jury may consider the expert testimony for what they feel that it is worth, and may discard it entirely."** Id. at 757. In BFGoodrich, Inc. v. Taylor, 509 So.2d 895, 903 (Miss. 1987), this Court stated:
>
> > This Court, of course, is not the jury. The weight and credibility of the witnesses, primarily experts, was for the jury, who were free to accept or reject whatever part of their testimony they chose. See, e.g., Jackson v. Griffin, 390 So.2d 287 (Miss. 1980).

> Id. at 903. See also Tunica County v. Matthews, 926 So.2d 209, 215 (Miss. 2006) (long-standing rule in Mississippi that jury in eminent domain case "may reject or accept any expert testimony it chooses in cases involving land valuation").

Fleming, 969 So.2d at 877-78, ¶¶24-25 (emphasis added). The Supreme Court went on to cite with approval the trial judge's Jury Instruction Number 1 that read "[i]t is your exclusive province to determine the facts in this case and to consider and weigh the evidence for that purpose," and that "[t]he jurors were further informed via this instruction that they were 'required and expected to use your good common sense and sound honest judgment in considering and weighing the testimony of each witness that testifies'; and that the jury had before it the testimony and statements of the witnesses and the exhibits received into evidence, and that they thus were 'permitted to draw such reasonable inferences from the evidence as seem justified in the light of your own experience.'" Id. at 878, ¶26. In conjunction with this instruction, the Supreme Court also cited with approval Jury Instruction Number 2 which read:

> The Court instructs the jury that you must consider all of the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate.
>
> You are the sole judges of the credibility or "believability" of each witness and the weight to be given to his testimony. In weighing the testimony of a witness you should consider his interest, if any, in the outcome of the case; his manner of testifying; his opportunity to observe or acquire knowledge concerning the facts about which he testified; his candor, fairness and intelligence; and the extent to which he has been supported or contradicted by other credible evidence.
>
> Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying as to the existence or non-existence of any fact. You may find that the testimony of a smaller number of witnesses as to any fact is more credible than the testimony of a large number of witnesses to the contrary.

Id. at 878-79, ¶27. Reading these instructions together, the Supreme Court determined that the jury "could believe or disbelieve any part of, or all of, the testimony of any of the witnesses, including [the plaintiff], [the defendant] and [the plaintiff's expert witness]." Id. at 879, ¶28.

Both of the exact same cited jury instructions were given in the case at bar, and the Supreme Court has reiterated the long-standing law in Mississippi that the jury is the sole arbiter of the credibility of all of the witnesses through the Fleming opinion. C.P. 155-157, 172. Therefore, the jury in the case at bar was not required to believe the expert witnesses called by Thompson. Their testimony with respect to causation is merely opinion and may be rejected entirely, accepted in part, or accepted in full by the jury. If the jury rejects the expert witness testimony, then that leaves only the testimony of Thompson, her mother who testified, and Nguyen, and the jury may believe all, part, or none of their testimony. The jury may do this by applying its collective common sense in combination with other facts and exhibits such as the photographs of Thompson's vehicle and thereby reach a verdict. This appears to be exactly what the jury in this case did. It followed the instructions of the Court, considered all of the evidence, and rendered a verdict accordingly, fully within the bounds of clear Mississippi law. Nguyen was not required to call her own expert witness or any other witness to rebut Thompson's evidence as the jury was fully capable of reaching the verdict that it reached based on the factual evidence before it and in accordance with the instructions of law. Therefore, the fact that only Nguyen testified for the defense case-in-chief does not make the jury verdict in this case against the overwhelming weight of the evidence. Other and more persuasive factual evidence such as the photographs of Thompson's vehicle and objective findings of pre-existing conditions in Thompson's spine as testified to by Drs. Martin and Kesterson created both circumstantial and

direct evidence upon which the jury could properly base its verdict. See e.g. Weathersby Chevrolet Co., Inc. v. Redd Pest Control Co. Inc., 778 So.2d 130, 133, ¶9 (Miss. 2001) (circumstantial evidence is proper support for a jury verdict so long as it is beyond the realm of conjecture). There was no conjecture in the case at bar about the very minimal nature of the impact between the vehicles of Thompson and Nguyen nor was there any conjecture about objective findings on Thompson's MRI.

The trial court's denial of Thompson's motion for additur, or in the alternative for a new trial on the issue of damages alone was proper and should be affirmed.

III. The trial court properly granted Nguyen's proposed jury instruction D-8 and refused Thompson's proposed jury instructions P-1A, P-7A, P-8A, P-9A, P-10A, and P-11A

As mentioned in footnote 1 in the Statement of Issues contained in this Brief, Thompson's proposed jury instructions P-1A, P-7A, and P-11A are peremptory instructions or peremptory in nature and effect, and to that extent, the trial court denied those for the same reasons that it denied Thompson's motion for directed verdict. Tr. 127-28. Nguyen submits to this Court her same arguments with respect to Thompson's motion for directed verdict as set forth in Section I of this Appellee's Brief since the standard of review is the same as is the test for determining the propriety of peremptory instructions. White v. Stewman, 932 So.2d 27, 31-32, ¶¶9, 10 (Miss. 2006).

In addition to being peremptory in nature, P-11A was both an improper comment upon the evidence and a special interrogatory verdict, which the trial court so found and refused upon those bases also. Tr. 131-32. Mississippi R. Civ. P. 49 (a) unequivocally states:

> Except as otherwise provided in this rule, jury determination shall

> be by general verdict. The remaining provisions of this rule should not be applied in simple cases where the general verdict will serve the ends of justice.

The remaining provisions of Miss. R. Civ. P. 49 pertain to the use of special interrogatory verdicts. And, the trial court is vested with wide discretion under the rule in deciding whether special interrogatories should be used in cases other than simple cases. Miss. R. Civ. P. 49 (b), (c). There is no doubt that the case at bar is a simple case as is evident from the facts set forth herein, and the trial court correctly found that a general verdict would suffice. Tr. 131. Therefore, the trial court's refusal of P-11A was in compliance with Miss. R. Civ. P. 49 (a) and certainly within the trial court's discretion, if not obligation.

The form of the verdict ultimately granted in this case was Nguyen's proposed jury instruction D-8. Tr. 133; C.P. 175. Thompson appears troubled by the fact that the trial court "initially was inclined to grant [P-7A]" but was somehow talked out of it by defense counsel. Appellant's Brief at page 20. The form of the verdict submitted by Thompson (P-7A) was peremptory in nature, allowing the jury to only find for Thompson and assess damages. C.P. 165. This instruction would have been contrary to the trial court's previous denial of Thompson's motion for directed verdict and refusal of Thompson's proposed jury instruction P-1A, her peremptory instruction. C.P. 164. The trial court had already correctly determined that the issue of causation was disputed in total, and if the jury did not believe that Thompson's claimed injuries were proximately caused by the subject accident, then the jury would have been bound to return a verdict for Nguyen. The trial court was not talked out of or misled by anything stated by defense counsel. In fact, no where in the record did defense counsel misstate the holding of Knight v. Brooks, 881 So.2d 294 (Ct. App. Miss. 2004). Tr. 124-126. In Knight,

causation was established, and the trial court had essentially directed a verdict for Knight, the plaintiff, by refusing to allow the jury to consider finding for the defendant in that case.[9] Knight, 881 So.2d at 297. Defense counsel's argument in support of jury instruction D-8 and against P-7A was entirely accurate, and particularly so in light of Justice McMillin's Concurrence in Knight. Tr. 126. Justice McMillin contemplated a situation where even though duty and breach of duty were conceded, causation (i.e. proof of a compensable injury arising from the breach) was still a disputed issue. Id. at 298-99, ¶¶16, 17. (McMillin, C.J., concurring). In that instance, if the plaintiff's proof of causation fails, then the jury would have to return a verdict for the defendant. Id. at 298, ¶16 (McMillin, C.J., concurring).

As has already been established, both at the trial court level, and in this Brief, the case at bar represents the exact situation to which Justice McMillin's Concurrence referred. In Knight, there was clear evidence that Knight suffered some causally related injury in his accident. Id. at 297-98, ¶12. In the case at bar, the causal connection between Thompson's alleged injuries and the accident was very unclear based on the evidence. It would have been inappropriate to direct a verdict in favor of Thompson as discussed hereinabove, and with that being the case, the jury had to have the option of finding for Nguyen.

In any event, Thompson's argument regarding whether there was a defect in the type of form of the verdict submitted is moot anyway because "[e]rrors in jury instructions are deemed, harmless, moot or immaterial. . . ;[where] the jury verdict on the point at issue gave the appealing

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[9] The trial judge and defense counsel in Knight were the same as in the case bar. Id. at 294. It would certainly be difficult, if not impossible, for defense counsel herein to "fabricate" the holding in Knight since both the trial judge and defense counsel were very familiar with the case having tried it twice.

party the most favorable result he could have received had the trial court handled the point correctly." Pickering v. Industria Masina I Traktora (IMT), 740 So.2d 836, 845, ¶43 (Miss. 1999); Horton v. American Tobacco Co., 667 So. 2d 1289, 1292 (Miss. 1995). In the case at bar, the jury found for Thompson. She could not have received a more favorable verdict. Nevertheless, the instruction D-8 was properly given and did not constitute error as previously discussed.

With respect to Thompson's proposed jury instructions P-9A and P-10A, while they may well be correct statements of the law, they have every potential of confusing the jury and highlighting only parts of the evidence. Therefore, they are both inappropriate comments on the evidence. As the trial court correctly noted, one bootstraps the other. Tr. 130. They are also duplicative of P-2A and P-6A, both of which were given and both of which clearly instructed the jury on how to fix damages and what types of damages could be considered. When considered as a whole, as this Court must do on review, the jury instructions in this case properly instructed the jury as to the law it must apply in reaching its verdict. Hageney v. Jackson Furniture, Inc., 746 So.2d 912, 922, ¶41 (Ct. App. Miss. 1999); Flightline, Inc. v. Tanksley, 608 So.2d 1149, 1157 (Miss. 1992). There was no error in the trial court's refusal of P-9A and P-10A, and neither prejudice nor error has been presented by Thompson here on appeal.

The trial court's refusal of Thompson's proposed jury instructions P-1A, P-7A, P-8A, P-9A, P-10A, and P-11A was proper as was the grant of Nguyen's proposed jury instruction D-8. The trial court's rulings in that regard should be affirmed.

CONCLUSION

The trial court in this case was correct in its denial of Thompson's motion for directed verdict. The totality of the evidence presented at trial created a classic jury question for resolution by the trier of fact. When Thompson's testimony and the testimony of her medical providers (which was based on information provided to them by Thompson herself) about the causal connection between the alleged injuries and the accident was contrasted against the photographs of the damage to the vehicles and the testimony regarding the lack of severity of impact, the trial court wisely submitted the disputed issue of causation to the jury. This is particularly appropriate since both of Thompson's treating physicians, Dr. Martin and Dr. Kesterson, were equivocal at best in causally connecting even a portion of Thompson's alleged injuries to the subject accident. The jury is the ultimate arbiter of both the credibility of the evidence and the disputed issues of fact. There is no question that credibility weighed heavily against Thompson in this case, and her attempt to claim massive amounts of medical treatment and seemingly incurable pain to an impact of almost no significance was highly questionable. It was for a jury to determine whether all that Thompson claimed was actually related to the subject accident. As the trial court aptly noted in denying the motion for directed verdict, "I see a dispute here. I see common sense." Tr. 121. This case was clearly not appropriate for resolution on a motion for directed verdict, and the trial court's denial of that motion should be affirmed.

Likewise, the motion for additur, or in the alternative for a new trial on the issue of damages alone was properly denied. Thompson's continued argument about the reasonableness and necessity of the medical expenses notwithstanding, that was not the primary issue before the jury at the trial of this case. The issue was causation. The jury was properly instructed that if it

found for Thompson, then the jury was only to award those damages proven by a preponderance of the credible evidence to have been proximately caused by Nguyen's negligence. The jury was presented with photographs of Thompson's vehicle immediately following the accident, heard the testimony of Thompson, and in particular that she felt no pain for at least a couple of days following the accident, heard the testimony of the various medical providers for Thompson with their varying and equivocal opinions on causation, and heard the testimony of Nguyen that Thompson stated that she was not injured in the accident. In sum, the jury had ample evidence to reach the verdict it reached, and that verdict should not be disturbed by this Court. Thompson has wholly failed to demonstrate that the verdict was against the overwhelming weight of the evidence or that it was the result of bias, passion, or prejudice. The verdict was a general verdict in proper form and by all accounts, appears to be the collective judgment of the jury.

Similarly, the fact that Nguyen did not call an expert witness of her own is of no consequence. Mississippi law does not require a party to present his or her own expert witnesses, or any other witnesses for that matter, to rebut a plaintiff's witnesses, expert or otherwise. So long as the jury has some credible evidence upon which to base its verdict, the verdict should stand. Therefore, the jury's verdict in this case should be affirmed by this Court.

Lastly, Thompson cannot legitimately complain about the jury instructions. When read together, the jury instructions given properly instructed the jury on the issues that it was tasked to decide: causation and damages. The peremptory instructions were properly refused since, as has already been demonstrated, this case involved a classic jury question on the issue of causation. And, even though the form of the verdict given was the proper verdict form, that issue is moot since Thompson received the best verdict she could have received: a verdict for her, the plaintiff.

This Court should affirm the decisions of trial court regarding the jury instructions given and refused.

Nguyen respectfully requests that this Court affirm the verdict of the jury in this case for all of the reasons set forth herein.

Respectfully submitted,

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BY: _____
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CERTIFICATE OF SERVICE

I, H. BENJAMIN MULLEN, one of the attorneys for the Appellee, **DUNG THI HOANG NGUYEN**, do hereby certify that I have this date mailed, postage prepaid, a true and correct copy of the foregoing Appellee's Brief to:

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THIS the 25th day of March, 2010.

H. BENJAMIN MULLEN

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