IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DEVINEY CONSTRUCTION COMPANY, INC. — APPELLANT

VS. — Cause No.: 2009-CA-01166

DAVID SCOTT MARBLE — APPELLEE

APPEAL FROM THE CIRCUIT COURT OF
HINDS COUNTY, MISSISSIPPI, FIRST
JUDICIAL DISTRICT

BRIEF OF APPELLEE

Oral argument is not requested

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CERTIFICATE OF INTERESTED PERSONS

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 judges of the Court of Appeals may evaluate possible disqualification or recusal.

I. David Scott Marble, Appellee

II. Deviney Construction Company, Inc., Appellant

III. Honorable Tomie T. Green, Circuit Judge

IV. Honorable W. Hugh Gillon, IV, Esq. and the law firm of Upshaw, Williams, Biggers, Beckham & Riddick, LLP, attorneys for Appellant

V. Honorable W. Wayne Drinkwater, Justin J. Peterson, and the law firm of Bradley, Arant, Boult, Cummings, LLP, attorneys for Appellant

VI. Honorable J. Ashley Ogden, Esq. and James W. Smith, Jr., Esq. and the firm of Ogden & Associates, attorneys for Appellee

RESPECTFULLY SUBMITTED, this the 28th day of September, 2010.

BY: J. Ashley Ogden
J. Ashley Ogden

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiff/Appellee does not request oral argument. The issues having been full briefed are sufficient for the Court to rule upon. Oral argument is unnecessary and would be a needless use of judicial time and resources. The issues in this appeal are not such that oral argument is necessary.

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2. **Whether the trial court was within the bounds of its discretion in its ruling on order of proof that the parties should call witnesses only once for testimony at trial.**

3. **Whether the trial court properly denied Defendant's proposed jury instructions regarding appointment of fault to Time Warner and BellSouth.**

4. **Whether the trial court properly applied the "collateral source" rule at trial.**

STATEMENT OF THE CASE

This case is an action for damages by David Scott Marble ("Marble") against defendant Deviney Construction Company, Inc. ("Deviney") for negligently cutting, failing to secure and ultimately failing to warn plaintiff of an unsecured electrical line which caused bodily injury to Marble on June 23, 2005.

The trial was held before a jury of twelve (12) commencing on May 4, 2009. The case was submitted to the jury on instructions delivered by the lower court. The 12 jurors found the issues in favor of the Plaintiff Marble and against the Defendant Deviney Construction Company, Inc. The jury found Marble to be 0% negligent and Deviney Construction Company, Inc. to be 100% negligent. The jury assessed the Plaintiff's total damages of two million five hundred thousand dollars ($2,500,000.00).

STATEMENT OF THE FACTS

Plaintiff David Scott Marble ("Marble") was a level 3 maintenance tech for Time Warner Cable. T. 599:17. He had been working for Time Warner for approximately 17 years. T. 599:16. At the time of the incident Marble was working nights for Time Warner. T. 604:16-18. On June 23, 2005 Marble arrived at work and was sent with co-worker, Vic Holifield ("Holifield"), to a job site off of County Line Road. T. 604:11-14. They went to splice in some cable at the road widening project on County Line Road in front of an apartment complex. T. 604:11-14. The job was to connect the south side cable with the north side cable where it ran under the road on the North Hampton Apartments property. T. 170:3-23. A trench had been dug earlier that day by Deviney Construction for the men to work in. T. 275:26-277:11

During the day Deviney Construction was digging the trench to make it bigger. T. 278:1-4. Deviney worked starting about 10:00 am and worked for about 3-4 hours digging the trench. T. 290:16-27. Deviney employee Brian Odom was the spotter while the other employee operated the digger. T. 276:13-15. At some point during the dig Deviney cut the underground electrical wire and dug it up. T. 278:1-17. Deviney employees were able to identify the electrical line when they pulled it up. T. 278:1-29. Deviney assumed the electrical line was dead. T.279:6-13.

In the field it is the responsibility of whoever cuts a line to mark it, tag it, cap it off, tape it up, and notify the cut line's owner. T. 186:3-13. Odom did not cap the electrical line on either end. T. 280:22-24. Odom did not tape or flag either end of the line. T. 280:25-28. He did not use any type of voltage meter or any type of machinery to verify the electrical line was on or off. T. 281:25-281:1. Normally Deviney trucks carry flagging and caps on the truck, but they did not flag or cap this wire. T. 282:19-283:3. Instead Odom's co-employee called their boss and they allegedly claim that they may have put a piece of white PVC pipe over the two

exposed electrical lines on each side of the trench. T. 279:10-14. According to Odom it was not the proper way to secure the line. T. 287:21-24. Odom thinks he put PVC pipe on the cut electrical line, but he cannot remember. T. 280:11-14. None of the photographs of the scene taken hours after the injury occurred show PVC pipe on or around the cut electrical line. Exhibit P-2 A-F. Odom had no explanation as to why or how the PVC pipe vanished from the time he thinks he placed in on the line and the time the photos were taken in the morning. T. 295:2-7.

According to Odom, the proper way to secure the electrical line was to put a cap on it, but he did not do that. T. 288:9-17. An alternative method that could have been taken would be to tape the line. T. 289:20-24. He also agreed that if it is unknown whether a line is hot or not a warning should be placed on the wire. T. 289:25-290:2. But, Deviney did not do any of those things. They did not cap, tape or flag the cut electrical wire to warn there was a cut line. T. 290:3-6. Instead, Odom went to the apartment manager at the apartment complex property were they were digging and informed the manager of the cut line and then they left it until someone from Deviney could come repair it. T. 285:3-12. Deviney's policy is to contact an electrical company to fix a break in the line. But, in this case they did not, they merely notified the apartment complex of a broken electrical line. T. 322:1-15.Later that night the apartment complex called Deviney and complained all the lights were off on the outside of the apartment complex. T. 284:21-27. Again, Deviney did nothing, despite knowledge they received.

At about 1:30 a.m. Marble and co-worker Holifield arrived at the work site on County Line Road. T. 170:12. They parked their trucks near the edge of the trench where their work was going to be performed. T. 605:2. They had company bucket trucks, halogen lights and hand tools to perform their work. T. 172:2-8. They got the tools off the truck and positioned the lights so they could see inside the trench. T. 605:3-8. Marble extended the arm of his

bucket truck over an iron fence so that it was close to the hole. They plugged in halogen flood lights to the bucket trucks to provide light in the hole. T. 172:13-22; 177:4-6. Then Marble and Holifield assessed the work area looking for "hazards, anything that might be marked, secured anything that might be dangerous in there." T. 605:15-18. There were no tags or any markings indicating any kind of danger. T. 605:19-20. The hidden electrical line had nothing covering it, no PVC pipe on it, and nothing to warn it was a live electrical line. T. 183:8-28; 214:3-16; 610. When Marble stepped into the hole there was nothing that indicated in the hole there was a live electrical wire or the danger of electrical shock. T. 185:23-186:2. The electrical wire was blended in with the tree roots that were sticking out of the side of the dirt wall. T. 227:21-29; 182:10-20.

Marble and Holifield were not warned by anyone about the live electrical line in the trench. T. 183:22-25. The only way you would know the electrical line was there was if someone told you about it or if it was marked. T. 608:21-24. Marble stepped down into the trench to do his work and while getting into the trench he felt a strange sensation and fell into the trench head first. T. 606:1-607:3. As Marble was bending over the exposed electrical line touched his neck. T. 621:10-11. Holifield saw Marble step into the trench and all of a sudden Marble just fell over like dead weight (T. 179:19-29) landing in the trench on his head. T. 192:1-4. Holifield yelled at Marble and heard Marble saying something about being shocked. T. 180:1-11. Holifield climbed into the hole with Marble to let him "get his consciousness back together." T. 180:9-19. Marble could not get up and was "real dazed" so they stayed in the hole "a good while." T. 180:16-25. Marble was dazed and could not move for some time due to shock. T. 180:16-25. Marble was disoriented and confused. T. 187:12-13. He complained of his body being numb and his joints hurting badly. T. 187:13-14. Holifield got Marble out of the hole and set him on a pile of dirt to let Marble get his senses back together. T. 184:27-185:1.

After Holifield got Marble out of the hole they looked around the area to find what had shocked Marble. T. 181:17-25; 608:6-10. They located a wire blending in with the roots. T. 181:20-182:1; 608:17-24. The electrical wire did not have any markings. It was just bare wire that blended in with the roots because it was the same color and texture as the roots. T. 182:8-13; T. 610:-17-28. Marble tried to call his supervisor, but could not physically dial the phone so Holifield called and explained what had happened. T. 185:1-6. After about 45 minutes Marble was able to stand up, move on his own and at that time Marble went to the emergency room. T. 185:7-13.

Marble was diagnosed with injuries including electric shock injury (electrocution), rhabdomyolysis, dysrhythmia, and a disk bulge. The disk bulge ultimately resulted in an anterior fusion. T. 549:14-550:25. Marble is still seeing doctors for his injuries. T. 613:22-24. He is a chronic pain patient now taking three antidepressants, two muscle relaxers, an anti-anxiety medication, sleep medication, and nerve pain medication. T. 580:17-21. He can no longer work. T. 621:28-625:4. He is now at risk for the need of another future neck fusion surgery. T. 581:21-26.

SUMMARY OF THE ARGUMENT

The trial court properly allowed Plaintiff/Appellee's expert economist, Dr. Glenda Glover to provided testimony at trial. She was properly designated and qualified to give expert testimony in this matter. The trial court properly controlled the mode and order of interrogating witnesses and presenting evidence at the trial of this matter. It was within the trial court's authority, under Miss. R. Evid. 611(a), to control the presentation of evidence to avoid needless consumption of time. The trial court properly denied Defendant's proposed jury instructions regarding appointment of fault to Time Warner and BellSouth. The evidence presented at trial did not support an apportionment of fault jury instruction to Time Warner

and/or BellSouth. Apportionment is only available as an affirmative defense and must be proven at trial. Finally, the trial court properly applied the "collateral source" rule at trial of this matter.

STANDARD OF REVIEW

The standard of review for evidentiary rulings by the trial court is abuse of discretion. "A district court abuses its discretion if it: (1) relies on clearly erroneous factual findings; (2) relies on erroneous conclusions of law; or (3) misapplies the law to the facts." *In re Volkswagen of Am., Inc.* 545 F.3d 304, 310 (5th Cir. 2008) (quoting *McClure v. Ashcroft*, 335 F.3d 404, 408 (5th Cir. 2003) (citation omitted). Abuse of discretion is defined as creating a prejudice to the party's case. *Edwards v. State*, 737 So. 2d 275 (Miss. 1999).

The standard of review for questions of law is *de novo*. *Morgan v. West*, 812 So. 2d 987, 990 (Miss. 2002).

"The standard of review for challenges to jury instructions is as follows: Jury instructions are to be read together and taken as a whole with no one instruction taken out of context. A defendant is entitled to have jury instructions given which present his theory of the case, however, this entitlement is limited in that the court may refuse an instruction which incorrectly states the law, is covered fairly elsewhere in the instructions, or is without foundation in the evidence." *Harris v. State*, 861 So. 2d 1003, 1012-1013 (Miss. 2003).

ARGUMENT

I. The Trial Court Properly Admitted the Testimony of Plaintiff's Economist, Dr. Glenda Glover

Deviney seeks a new trial because the trial judge allowed plaintiff's economist to provide a future lost wages amount from two options: One if Marble worked to his work-life expectancy to age 65(T. 14-17) and second if Marble worked to age 78(T. 426:18-21). The age 65 figure came from the economic literature (T. 445:17-21) and the federal government work-life

expectancy tables. T. 436:29-437:29. Deviney is not entitled to a new trial based on the trial court allowing Dr. Glenda Glover to testify to Plaintiff's full time disability and future lost wages. Dr. Glover was qualified under the Rules to give expert testimony regarding the Plaintiff's economic loss and there was no error in allowing her to give such testimony. A qualified expert witness may testify to opinions if [1] the testimony is based upon sufficient facts or data, [2] the testimony is the product of reliable principles and methods, and [3] the witness has applied the principles and methods reliably to the facts of the case. Miss. R. Evid. 702. Dr. Glover's testimony was based upon sufficient facts or data. Dr. Glover relied on the testimony of witnesses that Marble is no longer able to work and he is disabled. "[A]s a predicate to an expert testimony, it is not required that the predicate fact be proved beyond a reasonable doubt, only that it be available in some colorable form." *Flight Line, Inc. v. Tanksley*, 608 So. 2d 1149, 1165 (Miss. 1992).

A. Defendant Waived Its Objection

Deviney claims the court erred in allowing the testimony because Defendant did not have access to Dr. Glover's testimony until the middle of the trial. This is incorrect. Dr. Glover's evidence was supplemented before the trial started. During the trial Deviney did not object to the timeliness of the submission, but rather objected to any work life expectancies not backed up by actuary tables. T. 401:22-402:7. Deviney waived any claim that they were prejudiced from receiving the updated numbers two weeks before the trial began (T. 431:1-29), but now attacks the credibility of the opinions.

B. The Trial Court was Provided a Sufficient Basis for Dr. Glover's Opinions

The trial court denied Deviney's request to limit Dr. Glover from testifying to Marble's lost wages if he worked to the age of 78 (T. 410:1-3), because as she stated, " The case law is pretty clear that if there's data to substantiate it, then that should be put before the jury.."

T.409:20-22. The trial court stated Glover could testify "because the law is pretty clear that she has to lay some foundation by a suggestion that this plaintiff would be working at 77 or 78 at a job. The jury can then discard that in terms of their evaluation of the testimony and develop some idea of her credibility. So again, my ruling is the same. We'll be working with the actuarial table. And if she wants to come in and give that kind of testimony, it is subject to your cross-examination." T. 399:4-11. The weight and credibility of expert testimony are matters for determination by trier of fact. *Univ. Med. Ctr. v. Martin*, 994 So. 2d 740, 747 (Miss. 2008). Based on this ruling Glover took the stand and gave her explanation on how she could give the opinion that Marble could work to age 65 and 75. Glover first testified that the outdated work-life expectancy table for Marble could go to the age of 65. T. 424:17-29. She testified that if Marble worked to age 65 his future lost wages would be $1,714,685. T. 426:14-17. She used the work life expectancy from the federal government (T. 437:24-28) for the years 2003 or 2004. T. 437:24-28.

Glover explained that people do not retire at age 65 anymore. They are working much longer and choosing to work longer. "There's a growing body of literature in economic literature that just says that people are living longer, and they're working longer." T. 424:21-425:18. Glover's testimony that Marble could work until age 75 was given because other economists along with Glover argue that due to people living longer and working longer they need to consider more than just stopping everyone at the age of 65. The model Glover used and the calculation are the same. The numbers just increased. T. 431:1-29. She also explained that the there is no work life expectancy table to follow. "There is not a current work life expectancy table. What has happened with work life expectancy is that because people are living longer and working longer, economists have relied on their experience, they've relied on economic literature and not so much the federal government tables because those tables are very far behind." T. 437:

10-21. She testified the economic literature does not support everyone retiring at age 60 anymore. T. 442:17-26. The change in the workforce, people being healthier, living longer working longer are factors she considered. T. 443:1-22. She also testified there is both social literature and economic literature that show people do not retire early. T. 455:15- 456:6. She testified that the work life expectancy report Deviney's attorney was using to show Marble would only work until the age of 60 was created from work force figures in 1979 and not published until 1986. T. 455:2-14. These tables were extremely outdated.

Glover presented her expert opinion that the economic literature supports that Marble could be expected to work the rest of his life. T. 445:17-21. She testified the life expectancy of Marble was to age 78 and he could choose to work to age 75, or as long as he wants.

> I'm not guessing on the economic tables that say how long he's expected to live. He's expected to live to age 78. He may beat the odds and live longer. He may die before that. I can't say that because I'm not dealing in what is possible can happen to him. I'm just saying the probability based on economic literature, and that's what these guys do and ladies do with the government; they sit there and crunch those numbers and make those estimates on a daily basis, and they update them. **So based on their estimates, he's expected to live until age 78. He can work as long as he chooses between that 65 and 78 period. That's my opinion.** T. 446:12-26.

Glover testified that it was probable that Marble would work until age 78 if he choose to. T. 458:14-19. Glover then gave some examples of how this is manifested. Greeters at Wal-Mart are usually past retirement age. From her experience probably about one-third of the faculty at Jackson State are over 65. T. 427:11-29. There are two Jackson City Counsel members working who are over age 75. T. 444:26- 445:1. Based on the testimony given by Glover the trial court was correct in allowing Glover to testify as she did. Prior to Glover's testimony the trial court was not completely sure about the testimony. T. 409:20-23. After the testimony the trial court did not strike the testimony or instruct the jury to disregard it. The trial court directed Glover to not

use age 85, but, allowed age 65 and 78. More importantly, Deviney did not renew its original objection and did not ask the court to strike the testimony, nor did Deviney object period to ages 65 or 78. Deviney's failure to raise the objection to the changed testimony as required by the trial judge as submitted after it was ultimately allowed is a waiver of the argument. *Clark v. State*, 40 So. 3d 531(Miss. 2010) (citing *Ross v. State*, 954 So. 2d 968, 987 (Miss. 2007)) (failure to make a contemporaneous objection operates as a waiver of the issue on appeal. An objection must be made with specificity; failure to articulate the grounds for the objection operates as waiver of the issue on appeal). Marble presented the proper numbers at 65 and 75. If this Court should determine that the estimate number of 75 is not supported by the evidence then the Court should adopt the reduced amount as presented in the work-life expectancy to age 65.

C. The Evidence Supported David Scott Marble's Contention He Could Not Work

The evidence presented showed Plaintiff was not able to work. Marble testified he had applied for jobs but, due to his physical condition, he was not able to find a job. He testified he had too many restrictions and he had tried to work over the last 3 to 4 years, but was unable, due to the physical limitations, pain and amount of pain medication he now takes.

> Q. Physical problems, tell this jury whether or not you can go to a 9:00 to 5:00 job.
> A. No, there's no way possible.
> T. 621:28-622:1.
>
> Q. [H]ave you made an effort to try to find something that you could do that will accommodate the problems you're having?
> A. There's actually several jobs that I've tried to get.
> Q. Would you run the jury through the list of various things you've tried to do to get yourself employed?
> A. Sure. One, a friend of mine owns a electronic fence deal, and they travel all over the southeast United States putting up fences, security systems and whatnot. We had a talk about him needing somebody to keep an eye on his guys to kind of keep them from tripping – not tripping, but stealing time, you know, taking free time away from work. But when he told me that I was going to have to drive three – two, three, four hours a day,

that was just something that, you know, I could not do. **You know, I can't sit that long driving.**
My next job that I went to try, which I thought would have been my ideal job was MC. I applied to be a security officer. I wanted to work the night shift so it'd be, you know, quite, less stress, less that I'd have to do. And I figured I could get in a golf cart, ride around a little bit, walk a little bit, you know. And if it got to hurting, you know, maybe lay down 10 to 15 minutes on my back and, you know, get to going.
The man told me that the only thing that I was required to do would be to stand up for three to four hours during football games, and I can't do that. **My lower back won't take that pressure. My neck can't – I can't hold my neck up long without causing a lot of pain to it.**

T. 622:6-623:13.

Marble testified he had attempted to clean for Meg Myers, but could only do it for about half an hour. T. 623:14-20.

Q. How about Hunt Brothers Pizza?
A. A buddy of mine is a manager for Mississippi Hunt Brothers Pizza. They put these little pizza places in convenient stores. We had talked about me working for him doing something like that.
And one of the qualifications was with their machinery and thief food that I would have to be able to maneuver three to 500 pounds worth of stuff at the time and, of course, **that's just out of my range.**
Q. All right. Steve Russell, your next door neighbor?
A. Right. A friend of mine up the street was going to do a little foundation work on his house. And he told me – asked me if I wanted to come help for a couple extra dollars because he knew that it's something we needed. So I went down there to try to help him, grabbed a shovel and took it nice and easy. And after about an hour, **I couldn't do it at all.** I broke out in a hot sweat, so he sent me back to the house. And I was thinking that there was one more.
Q. Mowing yards?
A. Huh?
Q. Mowing yards?
A. That's right. I've even tried to mow my next door neighbor's yard to get a little extra cash to spend. And it was on a riding lawn mower. But by the time you hit so many bumps, it jars the lower spine. And it actually – I got off of it, but it hit me so hard that it just about took my breath away. When I was walking I was having to hold my breath. And then I'd let it out

and hold it again while I was walking until I could get inside and lay down and take the **pain off my low back.**

T. 623:21-625:2.

Marble described his pain, "If chronic is the strongest word for pain, yes." T. 625:8-9. "Right now my lower back is hurting, my neck is hurting and, of course, I've got the shakes." T. 628:6-8. "Now I do have bad days and good days. But **my good days is mild pain**, and that's most of the time when I'm laying down." T. 628:11-14. Marble testified that he tried to go back to work, but even though he was no longer doing the same physical labor job, he still could not do it due to the pain. T. 737:1-4.

Q. And after two or three months of that, where were you as far as whether or not you're going to get any better?
A. I couldn't. I mean I tried to go on. I tried to make the best of it, but it just got to where every little thing I did just hurt. You know, it got so bad to where I just couldn't do anything.
Q. Okay. Now, as far as your abilities now, and I said this before, now you're not in a wheelchair, are you?
A. No. I'm not in a wheelchair.
Q. And I've watched you, you're able to get around, aren't you?
A. Yes, sir, I can.
Q. But explain to this jury the difference between your ability to get up and down and come over to this seat as opposed to getting up at 9:00 in the morning and showing up somewhere and staying there till 5:00 all day doing something?
A. Yes. With the problem that I have, back problems, I have a hard time sitting down for any length of time. I have to keep re-adjusting myself. I need to really take the pressure off my spine. Neck-wise I can't look down for any length of time, and I can't walk any kind of distances.
If I went back to my old job or to another job, I can pick up 50 pounds. That would be no problem, maybe more. But if I picked it up, then I'd spend the next two or three days in bed recovering from the pain.

T. 737:1-738:4.

Witness Marie Gulley testified she has known Marble for a number of years and before the accident he was a very active man and that now he cannot support his family since he was electrocuted.

A. Scott and I, we have sons that play in soccer. And they've been playing soccer over ten years, so we've been around together for a long time. And we spend most of our time on the soccer filed mostly every weekend.
And Scott is they type of person he was energetic, fun. His son played goalie, which is the guy that's inside the goal that catches all the balls to keep it from hitting the net if y'all know anything about soccer, which means Scott used to warm him up before games. He would throw the ball, kick the ball, roll the ball which means he had to move in all directions to warm his son up. Now that's before the accident. And Scott was a great athlete himself; had a scholarship to play soccer and baseball. So now he kind of enforces things on his son to do the same thing.
Well after the accident, you don't see him at the field much. And when you do, he tried to be there. He'll stand around for a couple of minutes, 15, 20 minutes and he'll leave. I mean he went from an energetic type of person; fun, laugh, family man to almost nothing. I mean when you see him walking on the field – I don't know if y'all know Tim Conway. **He kind of walks like him with like a shuffle, I mean barely getting around.** He's just not the same person anymore.

T. 461:12-462:11.

Q. So tell this jury one incident where you were able to see Scott since his injuries how you perceived him physically; something he was trying to do or you said well, that don't look right.

A. Well, I mean like we have high school soccer. They go to the same – our boys go to the same high school. So Scott would try to come to the game. And you've got to come up some steps, which he has a hard time doing. And at a football stadium, all the seats are metal, so he would stand up. And if I look around, he's gone. **I mean he just can't be there anymore. I mean he wants to support his family, but he can't anymore.**

T. 462:18-463:3

According to Marie Gully, since the accident Marble is not the same man.

Witness Meg Myers testified Marble attempted to work for her and was unable. Meg Myers testified she gave Marble a job cleaning and had him vacuuming for $10 per hour. T. 411:16-18.

A little over an hour later, he finished the one building. I sent my other workers on to the other buildings, and I asked him. I said, "Scott, I'm sorry, but it's not going to work because you're hurting too bad." **He could barely vacuum pushing and pulling the**

vacuum cleaner back and forth. And I handed him the money, and I said, "Thank you, but it's just not going to work out."
T. 411:20-29.

Q. Tell the jury the usual time span to clean the area that he was supposed to clean?
A. It usually took about 20 minutes to vacuum that one area.
Q. How long did it take Scott?
A. About an hour and five minutes.
Q. Did you go watch him or keep an eye on him to see how he was doing?
A. Yes, sir, I did without him knowing I was – you know, because I always kind of pretend that I'm working and that, and to see if a person is going to work out. And he would be vacuuming, and you would see him, you know, just kind of stop for a minute and almost have tears running—you know, going to his eyes because he was in that much pain.
He never complained to me. He never said anything. And when I let him go that night, all he could do was say, "Thank you. I appreciate what you've done." I wish it would have been able to work out because he did want to work.
T. 412:1-22.

Jill Lovell also testified that since his injury in June 2005, Marble is not able to physically get around or to go to work. Lovell testified prior to the accident Marble's scheduled consisted of working nights and spending time with his family in the afternoons. He was very involved with the family they participated in sports, camping, fishing, and hunting. T. 470:18-29. "Before I mean he could mow the yard. He could stand in the kitchen and cook, do the dishwasher; anything like that." T. 471:12-14. After this injury Lovell testified that Marble's physical abilities, "**slowly deteriorated to where he could do nothing.**" T. 472:28-29.

Q. What about things like cooking and cleaning and mowing the yard?
A. None of that. He can't do any of that.
Q. Why can't he do that?
A. **Well, he can't stand. He can't push. He can't lift.** He can't – you know, required to move a mower and stuff and cooking, just the effort of lifting stuff.
Q. How about his work ability, what do you know about that, or his ability to work since the injury?
A. Well, I know **he's in a lot of pain and hasn't been able to work** not the way he was before anyway. There's no –

Q. I'm sorry, go ahead.
A. I mean he just can't stand. He can't lift. He can't climb. It's just completely different.
Q. Have you seen him in the last four years attempt to get any jobs?
A. I know **he's tried**. There was a position at MC I believe which required standing, a security guard. **He couldn't do that.** Several friends he tried to get jobs with their companies and wasn't able to do that because it was lifting and one was digging holes and carrying heavy equipment, **not possible.**
T. 473:5 -474:3

Nathaniel Fentress testified that Plaintiff was not able to work.

Q. Okay. Tell the jury or explain to this jury whether or not you have any opinions regarding Scott's ability to find a job or function in a job that he can either have that would be gainful as far as employment?
A. Yes, I have an opinion.
Q. What is that opinion?
A. Well, fist of all, he'll need to find employment. And for the Court's benefit, employment is the capacity to go out and be what's called substantially gainfully employed. It's written all through the literature in vocational rehabilitation. It's the ability to be able to show up every day for a job, to be able to go out and work 40 hours per week which is typically categorized in the United States work economy and be able to show up and work, be productive. Because in the society we live in, if you can't show up and be productive, you're probably not going to have a job very long.
And so what we do – what we have to do is compare it to his age. First of all, Scott is 38 years old. He's a middle age worker. It's an okay factor. He's been a working class blue collar manual laborer all of his life. He's a cable installer, and that involves climbing ladders, stooping, bending. I believe he was climbing into a manhole when he got the electric shock injury. So, it's a labor intensive job.
So you compare that to someone with his skills and what his transferable skills are for you guys to look at is he's got a lot of manual – what we would call manual transferable skills in electrical and the electronics area. So, what can he do in that area. I mean on the amount of medication he's on, do you want him fooling with live wires or cable wires. And so, no, he can't go back to that work.
Now he can do other work? A year ago I thought he was a good candidate for it, but his condition has continued to deteriorate. And I base my opinion on his total disability in substantial gainful employment or the capacity to work

everyday and show up on the fact **that he's taking eight different medications**. Medication for muscle spasms, medication for chronic pain, medication for depression, medication for chronic anxiety, medication for referred nerve pain. And medication for sleep.
So that compared to his capacity to go out and show up and work everyday, I think he's a very poor candidate to do that.
And from an administrative prospective and based on my training and experience and expertise, I've assessed Scott at the present time as **totally and permanently vocationally disabled from significant gainful employment or being able to be consistently employed throughout his work life expectancy and/or his life expectancy**.

T. 494:2-496:4

Dr. Howard Katz testified to David Scott Marble's functional capacity. Dr. Katz stated, "From this injury, he had developed another disk bulge causing problems in his hands, particularly his left arm and to some extent his left leg, and he had to have surgery on that. He had to have another fusion. What's called anterior fusion." T. 550:19-24. Marble has ongoing neck pain and weakness with pain in his left arm. T. 550:28-551:1. He has a 34% impairment rating to the body as a whole. T. 560:8. Marble cannot work with his arms above shoulder height over five percent of the day. T. 589:18-21.

Q. So what are the final results of the surgery that David Marble has?
A. What he has is he has this metal plate that holds those three vertebra in place because it's a two-level fusion. So, it's three vertebra in place. And unless there's some good reason, we don't' take out the plate. It stays there for the rest of his life.
And those six screws stay in place for the rest of his life.
As long as a screw doesn't break or there's no particularly bad problem, we leave it in place because the surgery is worse than taking out the plate. The plate is a good thing. It helps the bones fuse.

T. 557:7-22.

Dr. Katz testified that the rehabilitation counselor decides whether a person is employable. T. 563:13-15.

Q. So the vocational rehabilitation is the guy we talk to about his employability?

A. In this case that was [Nat] Fentress I believe.
T. 563:16-19

Q. You agree he can do light level activity?
A. I don't agree. I believe that Mr. – hold on. I'll read it to you exactly. "Mr. Marble is capable of light and sedentary work activities as defined by the Department of Labor. However he does this under "—"he does any of this under duress, and that is quite painful. He's also taking a lot of medication."
T. 584:20-29.

The above referenced testimony is just some of the evidence which supports Dr. Glover's basis for Marble being disabled and unable to work. There are more than sufficient facts in evidence to support Dr. Glover's opinions. It is not required that predicate fact to expert testimony be proved beyond reasonable doubt, but only that it be available in some colorable form. *Flight Line, Inc. v. Tanksley*, 608 So. 2d at 1166. Since the evidence presented allowed Dr. Glover to opine it was reasonable that the Plaintiff was not able to work she would be able to submit her calculations on lost wages for the jury. Expert opinions are not obligatory or binding on the trier of fact, but are advisory in nature, and the jury may credit them, or not, as they appear entitled, weighing and judging the expert's opinion in context of all evidence in the case. *Flight Line* at 1166.

1. The Trial Court Properly Preformed Its Gatekeeper Duty as Required by Rule 702 and Daubert

The trial court evaluated Dr. Glover's testimony and found it was relevant. This was not an abuse of judicial discretion. This Court reviews the admissions of expert testimony for abuse of discretion. *Franklin v. Tedford,* 18 So. 3d 215, 233 (Miss. 2009). A trial court's decision constitutes an abuse of discretion if the decision was arbitrary and clearly erroneous. *Kilhullen v. Kansas City So. Ry.*, 8 So.3d 168, 172 (Miss. 2009). "In evaluating reliability, the court's 'focus...must be solely on principles and methodology, not on the conclusions that they generate.'" *Hubbard v. McDonald's Corp.*, 41 So. 3d 670 (Miss. 2010) (quoting *Daubert*, 509

U.S. 579, 595 (1993)). Dr. Glover's opinions were formed using sound principles and methodologies in economics and accounting. Deviney did not object to Glover's qualifications, they only objected to her conclusions.

Marble offered Dr. Glover as an expert in the filed of economic analysis. T. 419:24-26. Defendant choose not to *voir dire* the witness on her qualifications or on her opinions and did not object to Dr. Glover being admitted to testify in her field. T. 420:1-2. The defendant's counsel has hired Dr. Glover in the past. T. 11:5-9. The trial court accepted Dr. Glover as an expert. T. 420:3-5. There was no indication the jury was confused by the testimony presented by Dr. Glover. Expert opinions are not obligatory or binding on the jury, but are advisory in nature, and the jury may accept or reject the opinion, weighing and judging expert's opinions in context of all evidence in the case and they jury's own general knowledge. *Flight Line, Inc. v. Tanksley*, 608 So. 2d at 1166. Deviney presented evidence by its expert, Bruce Brawner, claiming Marble could work doing medium work tasks. T. 791:1-13. Deviney argued Marble was able to be gainfully employed despite his alleged injuries so he could make $33,000.00-$49,000.00 a year. T. 793:3-794:16. In effect making his past and future lost wages zero. Marble presented testimony from expert Dr. Glover that his past and future lost income was in a range of between $1,714,000.00 if he worked to the age of 65 and up to $2,653,164.00 if he worked to the age of 78. T. 425:1- 426:29. The jury considered the evidence and awarded an amount it deemed reasonable. The weight of the evidence supports the damages awarded for lost income. Dr. Glover's testimony was admissible. Any discrepancy in the testimony or the range would go to its weight and credibility and be decided by the jury. *Hubbard* at 675.

2. Dr. Glover's Opinion that Marble Could Work Past the Age of 60 was Supported and Reliable

Glover's testimony was supported and reliable. "In evaluating reliability, the court's 'focus...must be solely on principles and methodology, not on the conclusions that they

generate.'" *Hubbard v. McDonald's Corp.*, 41 So.3d 670 (Miss. 2010) (quoting *Daubert*, 509 U.S. 579, 595 (1993)). Dr. Glover had sufficient facts to base her expert opinion. It is not required that predicate fact to expert testimony be proved beyond reasonable doubt, but only that it be available in some colorable form. *Flight Line, Inc. v. Tanksley*, 608 So. 2d at 1166. Dr. Glover's numbers were based on Marble's prior work history and pay stubs from Time Warner. T. 422:28- 423:29. Dr. Glover's conclusions on the range of wages was based on the economic models. T. 420:17-25. The life expectancy ranges came from the federal government Department of Health and Human Services life expectancy tables. T.435:28-436:24. And she relied on the growing amount of economic literature in her field showing people are working and living longer or beyond the available charts to support Marble working past the age of 60. T.424:17-425:18.

A. Dr. Glover had an Adequate Basis for Her Assumption that Marble Would Work Until Age 78

Dr. Glover offered a high and low range of economic numbers for the jury to consider. She figured the lost wages if Marble was to work to age 65 (T.425:19-25) and if he was to work until age 78(T. 426:18-22). Dr. Glover testified that today with the market as it is, people are not retiring, but now working until they die.

> Q. But can you explain to the jury why you are going to substantiate that Scott could have worked past the age of 65, or in general why most people nowadays work past the age of 65?
> A. Now, there was a time when it was expected that people just retire. They would stop working at 65, some as early as 62. Some would even use 68 or 70. Economists will use 65, 67 were the middle numbers that they would use. **But there's a growing body of literature in economic literature that just says that people are living longer, and they're working longer.**
> **The average person does not stop and retire. They work and just have the date of mind they're going to retire. They can barely get to their day. People just don't retire. In economic conditions sometimes there are single parents.**

There's just different circumstances, but people don't just retire early. People work as long as they choose to work.

It's just people are not – and other economists and I discuss this and economic associations. It's just a growing thinking now is people just work much, much longer. They don't' retire as often as early as they use to retire.

T. 424:21-425:18.

Dr. Glover cited findings that people are living longer and choosing to work longer.

Q. Do you know anybody over the age of 65 today that is still working?

A. I can say probably in the College of Business probably about one-third of the faculty is over 65.

T. 427:24-28

A. [I] had talked with different economists – well, at least one more economist, and it was the think that we would employ the theory that people just don't retire at 65. That one assumed that he would retire at the age 65, and that is not totally the complete assumption. It's just part of the assumption. The Assumption is that he can retire at 65 or work until he chooses to retire later.

T. 431:5-14

A. Right. That's what I'm saying because of the age of the tables like this, because this table says a person will work until 60. I don't know people in my circle who are just waiting to turn 60 and retire. It just doesn't happen like that anymore. It used to be years ago people retired much earlier. **But at age 60 to retire, that's almost unheard of. Economic literature does not support that; that people retire that early, not any more.**

T. 442:17-26

Q. I'm asking you is it your opinion **that it is probable that Scott Marble would work up until the day he died;** not possible, but probable?

A. **It's my opinion that economic literature supports that a person like Mr. Marble can work – can retire at 65, or he can work as long as he chooses, which could be the rest of his life if he wants to.**

T. 445:13-21

Q. Now as an economist, how much literature is out there? How much actual information has come about in the last 20 years to substantiate whether or not the average American black/white,

male/female, Mexican, anybody living in this country is quitting at the age of 60?

A. **I mean it's just a lot of literature that just shows – first of all, there's social literature that shows that people are eating better and living longer, and they're more medically fit. And secondly the economists have literature that shows that people don't' just retire that early.** That even suggested I think it was 59 something. You can round up to 60. I'm just saying people just – the literature is just full of that. People don't just retire that early. I don't know how else to put it. **And they may have done that 30 years ago, but they whole workforce has changed. People don't retire at age 60.**

Q. So what you've provided us is the ball park numbers somewhere between 65 and 78 for the jury to consider; is that correct?

A. Yes. I gave them two things to consider. Age 65 which is a little more common – which is more common 65, 68, and then I gave him the 78 because people are working as long as they possibly can.

T. 455:15-456:14

Q. **Would you agree with me that it's probable that Scott Marble if he wants to work and can work till the age of 78, that he will work till the age of 78?**

A. **If he chooses to work till 78. That's the probability is he can work till 78.**

T. 458:14-19

Dr. Glover based her opinions on current economic literature available. Expert economist's opinions are not obligatory or binding on the triers of fact. *Flight Line, Inc. v. Tanksley*, 608 So. 2d at 1166. Dr. Glover relied on reasonably accurate facts and evidence found in a colorable form from the economic literature to base her opinion that Marble could have a work life expectancy past the age of 60. Dr. Glover presented two different ages calculating future income based on facts for the jury to consider. See, *Classic Coach, Inc. v. Johnson*, 823 So. 2d 517 (Miss. 2002). In *Classic Coach*, the expert economist presented three different averages for the jury to consider. *Id.* at 528. The calculations in *Classic Coach* is analogues to the case at bar. Here, Dr. Glover presented lost income based on two different ages. The jury was free to accept or reject either age. Deviney had an opportunity to cross-examine Dr. Glover and could have

presented an expert economist to refute Dr. Glover's testimony and to provide alternate numbers. Deviney choose not to present an economist, but simply attacked Dr. Glover's findings in cross examination. Dr. Glover was accepted as an expert by the trial court. Her opinions submitted to the jury were based on facts. The accuracy or truthfulness of facts is a issue solely for the jury to sort out. *Davis v. Temple*, 91 So. 689, 690 (Miss. 1922). See also, *Flight Line v. Tanksley*. In cross examination, Deviney focused on presenting a second theory of work life expectancy tables from the *Journal of Forensic Economists* (T. 437:29-440:4), to indicate that its table shows a work life expectancy to the age of 60. T. 440:2. Deviney also presented the U.S. Department of Labor Bureau of Labor Statistics report from 1979, 1980 (T. 440:9) to show that Marble's work life expectancy under the 20 year old table was to age 60. T. 443:23-27. The report the defendant relied on was an outdated 1979 report, not published until 1986. T. 455:3-14. Deviney's trial strategy to not call their own economist to rebut Dr. Glover and their reliance on cross-examination to prove their point is not sufficient and is not grounds for a new trial. There was no prejudice to the Deviney since Glover's testimony was supported by colorable facts.

B. Dr. Glover had an Adequate Basis for Her Assumption that Marble Would Never Again Earn Any Income from Working

Dr. Glover had a more than adequate basis for her assumption that Marble would never work again based on the testimony provided at trial by the witnesses and the Plaintiff. See, above arguments and testimony. Vocational Rehabilitation expert Nathaniel Fentress testified Marble was not able to work.

> Q. Okay. Tell the jury or explain to this jury whether or not you have any opinions regarding Scott's ability to find a job or function in a job that he can either have that would be gainful as far as employment?
> A. Yes, I have an opinion.
> Q. What is that opinion?
> A. Well, fist of all, he'll need to find employment. And for the Court's benefit, employment is the capacity to go out and be what's called substantially gainfully employed. It's written all

through the literature in vocational rehabilitation. It's the ability to be able to show up every day for a job, to be able to go out and work 40 hours per week which is typically categorized in the United States work economy and be able to show up and work, be productive. Because in the society we live in, if you can't show up and be productive, you're probably not going to have a job very long.

And so what we do – what we have to do is compare it to his age. First of all, Scott is 38 years old. He's a middle age worker. It's an okay factor. He's been a working class blue collar manual laborer all of his life. He's a cable installer, and that involves climbing ladders, stooping, bending. I believe hes was climbing into a manhole when he got the electric shock injury. So, it's a labor intensive job.

So you compare that to someone with his skills and what his transferable skills are for you guys to look at is he's got a lot of manual – what we would call manual transferable skills in electrical and the electronics area. So, what can he do in that area. I mean on the amount of medication he's on, do you want him fooling with live wires or cable wires. And so, no, he can't go back to that work.

Now he can do other work? A year ago I thought he was a good candidate for it, but his condition has continued to deteriorate. And I base my opinion on his total disability in substantial gainful employment or the capacity to work everyday and show up on the fact that he's taking eight different medications. Medication for muscle spasms, medication for chronic pain, medication for depression, medication for chronic anxiety, medication for referred nerve pain. And medication for sleep.

So that compared to his capacity to go out and show up and work everyday, I think he's a very poor candidate to do that. And from an administrative prospective and based on my training and experience and expertise, I've assessed Scott at the present time as **totally and permanently vocationally disabled from significant gainful employment or being able to be consistently employed throughout his work life expectancy and/or his life expectancy.**

T. 494:2-496:4

David Scott Marble testified that he could no longer work.

Q. Physical problems, tell this jury whether or not you can go to a 9:00 to 5:00 job.
A. No, there's no way possible.
T. 621:28-622:1.

Q. But explain to this jury the difference between your ability to get up and down and come over to this seat as opposed to getting up at 9:00 in the morning and showing up somewhere and staying there till 5:00 all day doing something?

A. Yes. With the problem that I have, back problems, I have a hard time sitting down for any length of time. I have to keep re-adjusting myself. I need to really take the pressure off my spine. Neck-wise I can't look down for any length of time, and I can't walk any kind of distances.
If I went back to my old job or to another job, I can pick up 50 pounds. That would be no problem, maybe more. But if I picked it up, then I'd spend the next two or three days in bed recovering from the pain.

T. 737:1-738:4.

Marble testified about various jobs he tried to do after the incident over the years, but was unable to do so because of his injuries. T. 622:9- 625:4. Other witnesses testified about Marble's inability to work. See Meg Myers testimony T. 410:20-417:17. This testimony provides more than sufficient facts to support Dr. Glover's expert opinion. It is not required that predicate fact to expert testimony be proved beyond reasonable doubt, but only that it be available in some colorable form. *Flight Line, Inc. v. Tanksley*, 608 So. 2d at 1166. There is a colorable form or basis for Dr. Glover's opinion that Marble will not work in the future from the testimony presented.

Deviney tries to claim that the basis for Dr. Glover's opinion is unfounded, because she testified she received this information from Marble, thus, his attorney and just receiving the information from the attorney and plaintiff means the findings are not legally sufficient. This issue was never raised at trial or objected to by the defendant, so this issue is waived. *Clark v. State*, 40 So. 3d 531(Miss. 2010) (citing *Ross v. State*, 954 So. 2d 968, 987 (Miss. 2007)) (failure to make a contemporaneous objection operates as a waiver of the issue on appeal. An objection must be made with specificity; failure to articulate the grounds for the objection operates as waiver of the issue on appeal). Also, this assertion is misleading. Dr. Glover testified that she gathered her information from Marble, his attorney and from doctor's reports sent to Dr. Glover

by the attorney. T. 450:2- 451:4. Based on her review of Marble, the medical doctors' records, and the testimony of expert Fentress, Dr. Glover had a legally factual foundation for her opinions.

3. Dr. Glover's Opinion was Timely Provided to the Defendant

Dr. Glover's opinions were timely provided to the Defendant. Plaintiff provided an expert report and the Defendant took the deposition of Dr. Glover well in advance of the trial. See, R. 65-74-Plaintiff's Supplemental Designation of Expert Witnesses; R. 110-117-Economic Loss Analysis David Scott Marble; R. 118-127-Deposition of Dr. Glenda Glover; R. 214-222-Updated Economic Loss Analysis David Scott Marble submitted April 22, 2009 (submitted 12 days before trial). See, *Choctaw Maid Farms, Inc. v. Hailey*, 822 So. 2d 911 (Miss. 2002) (Delivery of data compilation six days before trial admissible where party's expert familiar with this type of data compilation). See also, *Robert v. Colson,* 729 So. 2d 1243 (Miss. 1999) (seasonable supplementation means soon after new information is known and far enough in advance of trial for other side to prepare). Defendant only filed a motion in limine to limit the testimony. R. 211. It did not move for a continuance or move to strike the information, thus it has waived its argument that the information was not timely provided.

Under Mississippi Rule of Civil Procedure 26(b)(4) a party is required to state the "subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and the summery of the grounds for each opinion." Plaintiff clearly provided the required information in his designation of Dr. Glover. R. 65-74 Plaintiff's Supplemental Designation of Expert Witnesses.

> Glenda B. Glover, Ph.D., J.D., CPA, 1031 Whitsett Walk, Jackson, Mississippi 39206. Economist Glenda B. Glover is expected and/or anticipated to testify to all things in her evaluations and opinions regarding the valuation of the life of Scott Marble and as to other things regarding the life expectancy, baseline wage, present value calculations and potential economic value and profitability of Scott

> Marble's life and the lost value of his inability to work and support himself and his family due to his injuries along with his inability to work his former cable television maintenance technician job due to his injuries. Glenda B. Glover will also testify to the extent of Plaintiff's injuries and the resulting costs and losses economically.

On or about February 15, 2008 Plaintiff provided Defendant Dr. Glover's Economic Loss Analysis for David Scott Marble. R. 110-117 Economic Loss Analysis David Scott Marble. The Analysis includes the description of assignment, summary of assumption, and conclusions. The Analysis explains her methodology. In addition to the written report, Dr. Glover provided a Deposition on April 30, 2008. R. 118-127 Deposition of Dr. Glenda Glover. In her deposition she further explained her methodology.

Mississippi Rule of Civil Procedure 26 further provides that a party is under a duty to seasonably supplement discovery. Plaintiff complied with Rule 26 by seasonably supplementing his discovery and expert report of Dr. Glover when he received the information. R. 65-74 Plaintiff's Supplemental Designation of Expert Witnesses. The supplement did not change the methodology or subject matter on which Dr. Glover testified. The supplement did not change the substance of the facts or opinions of Dr. Glover. The only difference was that the supplement added the costs of lost wages if the age was figured at 85, instead of just 65; Dr, Glover's methodology was not altered. Defendant admits that "[Glover] supplemented and her report substantially is unchanged with the exception of the fact that she added – there's a small change." T. 12:6-9. The supplemental report did not materially alter Dr. Glover's opinions and it did not prejudice the Defendant. Defendant could have easily responded to the altered opinion and, in fact, did respond. This was not "trial by ambush." Defendant had already prepared its defense to Dr. Glover's opinions and that defense was not altered by the supplement, because the substance of Dr. Glover's opinions did not change. The supplemental opinion was provided far enough in advance of trial for the defendant to be able to adequately respond.

Deviney did not timely object to the court's ruling to allow Marble to submit evidence of work life expectancy to age 78. T. 17:13-18:15. It did object to the Court allowing the original supplement to allow Glover to use the age 85 and the court ruled in its favor. T. 13-17. See, *Clark v. State*, 40 So. 3d 531(Miss. 2010) (citing *Ross v. State*, 954 So. 2d 968, 987 (Miss. 2007)) (failure to make a contemporaneous objection operates as a waiver of the issue on appeal. An objection must be made with specificity; failure to articulate the grounds for the objection operates as waiver of the issue on appeal). See also, *Laughter v. Williams*, 23 So. 3d 1055 (Miss. 2009); *Derouen v. State*, 994 So. 2d 748 (Miss. 2008); *Haggerty v. Foster*, 838 So. 2d 948 (Miss. 2002); *Barnett v. State*, 725 So. 2d 797 (Miss. 1998).

Defendant argued in motions in limine that Dr. Glover's supplement which provided future loss income for the Plaintiff until the age of 85 was improper because the actuarial tables provide that a white male will only live to the age of 78. T. 12:13-16. However, the trial court ruled that Plaintiff could not present future work life lost wages beyond the Plaintiff's life expectancy according to the actuarial tables, age 78. T. 17:15. The actuarial tables reflect that a white male's average life span would be until the age of 78. Based on the trial court's ruling, Dr. Glover reduced her opinion to include loss future income only to the age of 78 and did not testify that Marble could have a work life expectancy to the age of 85. When the Court limited the testimony from age 85 to age 78, Deviney accepted the ruling and did not object to the Court using the age of 78. T. 17:13-18:15. Deviney's failure to timely object to the Court allowing the Plaintiff to submit the reduced work life expectancy at age 78 now estoppes Deviney from raising this issue. *Clark v. State*, 40 So. 3d 531(Miss. 2010) (citing *Ross v. State*, 954 So. 2d 968, 987 (Miss. 2007)) (failure to make a contemporaneous objection operates as a waiver of the issue on appeal).

Deviney now claims allowing Dr. Glover to provide future lost income to the age of 78 was included in the trial court's ruling on motions in limine and should have been excluded. This argument also is not true. The trial court ruled that there had to be a basis for the extension of the work life up to age 85. T. 17:13-22. The trial court also excluded the testimony of work life expectancy to age 85. T.17:13. Marble did not present evidence to age 85. Marble presented evidence in conformity with the trial court's ruling, reducing the number to age 78, which was the number supported by the actuary tables. T. 436:1-25. Dr. Glover provided a basis for the extension of the work life and Defendant cross-examined her on this issue.

> Q. Now as an economist, how much literature is out there? How much actual information has come about in the last 20 years to substantiate whether or not the average American black/white, male/female, Mexican, anybody living in this country is quitting at the age of 60?
> A. I mean it's just a lot of literature that just shows – first of all, there's social literature that shows that people are eating better and living longer, and they're more medically fit. And secondly the economists have literature that shows that people don't' just retire that early. That even suggested I think it was 59 something. You can round up to 60.
> I'm just saying people just – the literature is just fully of that. People don't just retire that early. I don't know how else to put it. And they may have done that 30 years ago, but they whole workforce has changed. People don't retire at age 60.
> Q. So what you've provided us is the ball park numbers somewhere between 65 and 78 for the jury to consider; is that correct?
> A. Yes. I gave them tow things to consider. Age 65 which is a little more common – which is more common 65, 68, and then I gave him the 78 because people are working as long as they possibly can.
> T. 455:15-456:14

Deviney claims the court specifically denied the use of Glover's testimony and specifically limited it to the age of 65. This too is wrong. Instead, the trial court ruled it would allow the plaintiff to use the age 78, but would not allow the use of the age 85 unless "you show me at some subsequent time something other than the case where there's data and statistics that suggest

that your arguments are correct." The trial court then told Deviney to deal with it on cross-examination. T. 18:3-13. At no time did the court's ruling "logically also exclude unsupported testimony that Marble would work up until another arbitrary age- i.e. for his entire life expectancy through age 78"(Appeal Brief pg. 25, ¶ 3) as Deviney claims. Deviney's argument is wholly unsupported by the record and should be denied.

4. Dr. Glover's Opinion did Not Cause Excessive Damages to be Awarded

Dr. Glover's opinion did not cause excessive damages to be awarded to Marble. Marble's past and future medical bills, his impairment rating and his physical pain and impairments were more than sufficient to substantiate the verdict without considering lost wages. The jury was polled and the verdict was unanimous. A jury is not required to justify to the trial court how they determined their verdict. Instead, the trial court must "defer to the jury, which determines the weight and worth of testimony and the credibility of the witness at trial." *Odom v. Roberts*, 606 So. 2d 114, 118 (Miss. 1992) (citing *Stubblefield v. Walker*, 566 So. 2d 709, 712 (Miss. 1990)). Marble presented incurred medical expenses of approximately $111,000.00. T. 612:29-613:2; Exhibit P-7. Nathaniel Fentress testified Plaintiff's continued care would conservatively be $690,212.66. T. 524:2-13. Marble's expert, Dr. Howard Katz, testified that the Marble is 34% impaired. T. 560:1-8. Witness, Marie Gulley, testified Marble walks with a shuffle and is barely getting around. T. 462:9-10. Witness, Jill Lovell, testified Plaintiff is impaired and sluggish due to all the medications he is required to take. T.475:17-28. Dr. Winklemann, testified that the Plaintiff has chronic pain that will need to be managed indefinitely. T. 807; Exhibit P-15. Vocational Rehabilitation expert, Nathanial Fentress, testified that the Plaintiff would not be able to work the rest of his life. T. 495:28-496:4. The court has no authority to alter a verdict unless it is so contrary to the weight of evidence that it may not be "reasonably explained." *Flight Line, Inc. v. Tanksley*, 608 So. 2d at 1161. Dr. Glenda Glover testified Plaintiff's lost wages would be

in a range from $1,700,000.00 and $2,600,000.00. T. 426:27-29. Marble presented testimony that he had attempted to work but was unable to due to his injuries. T. 621:28-622:1. Witnesses testified about Marble's inability to work and function. See Meg Myers. T. 412:1-22; T. 473:5 - 474:3. In addition testimony was presented that the Plaintiff has suffered greatly due to his injuries. T. -616-620. The jury weighing the all of the evidence allowed, returned a verdict of $2,500,000.00. T.968:10-18. R. 308. This amount is clearly reasonable considering the facts and evidence presented at trial.

"A trial court may never *substitute* its own valuation of damages for that of the jury's verdict." *Stewart v. Gulf Guar. Life Ins. Co.*, 846 So. 2d 192, 206 (Miss. 2002) (citing *Holmes County Bank & Trust Co. v. Staple Cotton Coop. Ass'n*, 495 So. 2d 447, 451 (Miss. 1986)); *see also, Moore v. M/V ANGELA*, 353 F.3d 376, 383 (5th Cir. 2003).). The court has no way of knowing what is in the jury's mind. *Gladney v. Clarksdale Beverage Co.*, 625 So. 2d 407 (Miss. 1993). Likewise, the Defendant has no way of knowing what was in the jurors minds and cannot substitute its own valuation of damages. The jury is the trier of facts and determines weight of evidence, not the Plaintiff, Defendant, or trial court. Plaintiff would have preferred a larger verdict conforming to all the evidence he presented. Obviously, Defendant would have preferred a $0 verdict, but the jury determines the amount of damages. The court must "defer to the jury, which determines the weight and worth of testimony and the credibility of the witness at trial." *Odom v. Roberts*, 606 So. 2d 114, 118 (Miss. 1992) (citing *Stubblefield v. Walker*, 566 So. 2d 709, 712 (Miss. 1990)). The jury verdict here is clearly based on the evidence presented and not the result of bias, prejudice or passion.

Deviney argues that the Plaintiff made reference several times in closing to the $2.6 million figure and that these references adversely influenced the jury. First, closing statements are not evidence and the court allows attorneys wide latitude in closing arguments. *Alpha Gulf*

Coast, Inc. v. Jackson, 801 So. 2d 709, 727 (Miss. 2001). Second, the Defendant did not timely object to the statements during closing argument, so its claim is waived. In fact, the Defendant made no objections to any statements during Plaintiff's closing argument. T. 928-942 and 960-966. *Burr v. Ms. Baptist Med. Center.*, 909 So. 2d 721 (Miss. 2005) (appeal issue to waived where during closing statement party did not make contemporaneous objection to prejudicial effect of statement). There is no evidence that the jury relied on the lost wages amount. In fact if you add up the numbers- past lost wages of $111,000.00. T. 612:29-613:2; Exhibit P-7; future medical cost of $690,212.66. T. 524:2-13; and a pain and suffering cap of $1,000,000.00 that totals $1,801,212.66. If you subtract that total from the verdict of $2,500,000.00, that leaves only $698,787.40 that was allocated by the jury for lost wages. This number is far below even the lowest number offered by Dr. Glover at $1,700,000.00. Since the trial court and parties can not second guess the jury's verdict absent some plain error or proof of prejudice the plaintiff receives the benefit of the doubt that the jury followed the jury instructions. Deviney's accusation that Dr. Glover's testimony led to an excessive damages award is unsubstantiated and should be denied.

II. The Trial Court's Ruling on Order of Proof was Not Reversible Error

A. The Trial Court did Not Exceed Its Discretion Under Mississippi Rule of Evidence 611(a), Nor Did the Trial Court Prevent Deviney from Fairly Presenting Its Case and Adequately Responding to Marble's Evidence

Deviney argues that it should have been allowed to reserve questioning its witnesses until its case-in-chief. Miss. R. Evid. 611 gives a trial judge "great discretion in making evidentiary ruling and in controlling the manner in which witnesses will be questioned." *Redhead v. Entergy Mississippi, Inc.*, 828 So. 2d 801, 810 (Miss. Ct. App. 2001) (citing Miss. R. Evid. 611). "This rule allows a trial judge to 'avoid needless consumption of time.'" *Id.* (citing Miss. R. Evid. 611(a)). "It is within the sound discretion of the trial judge as to whether or not a witness for an adverse party may be re-called as the witness of the party who introduced him originally, or as a

witness for the party recalling the witness unless, of course, it is for the purpose of impeachment." *McMullen v. State*, 291 So. 2d 537, 538 (Miss. 1974). The trial court's decision to require both the Plaintiff and Defendant call the witnesses only one time was discretionary and proper.

Deviney arguably waived the issue by agreeing to the court's ruling. The court went through its procedure in how it was going to allow witnesses to be called. Deviney stated, "But we would argue that the defense shouldn't be handcuffed....But I understand your ruling and will respect it. " T. 32:5-12. This acquiescence to the court acted as a waiver.

The two Deviney employees called were not exclusive witnesses only to the defendant. They were fact witnesses needed for plaintiff's case-in-chief. Plaintiff was required to call Deviney employees Brian Odom and Danny Jones to prove the elements of his negligence claim. Plaintiff must present all elements of his case in his case in chief or be subject to a directed verdict. In this case it was necessary that Plaintiff put on Deviney employees to establish the negligence of the Defendant. Deviney was allowed to examine in depth the witnesses when they were called and offer information to rebut or refute facts in support of its case in defense. T. 298:10-16.

Both Plaintiff and Defendant were prohibited from reserving testimony when a witness was called to the stand. T. 29: 25-29; 30:18-31:9. Plaintiff tried to call Marble just for liability purposes and wanted to call him at a later time for damages, but the court refused. T. 29:10-30:2. The court applied its ruling evenly to both parties.

Deviney was not prejudiced by two fact witnesses being called by plaintiff. When the witnesses were called, Deviney was given and accepted the opportunity to fully address all its testimony as if it was calling the witnesses in its case in chief. T.32:11-12. The court did not limit Deviney's questioning of the witnesses. Deviney claims the court's order of calling

witnesses prejudiced its ability to rebut the Plaintiff's expert. But, the witnesses could have given testimony to blame someone else. They were never asked by the Defendant to answer that question. The witnesses could have also testified on "allocation of fault to absent parties" at the time that they were called to the stand to testify. Again, they chose not to ask that question.

Deviney claims it was denied the right to call rebuttal witnesses. Again, this is also not true. The trial court's ruling did not address recalling rebuttal witnesses as Defendant now asserts. The limited ruling went solely to calling case-in-chief witnesses. Deviney never requested to call rebuttal witnesses. Deviney states it needed to rebut safety expert David Monistere, who testified there was no evidence that Bell South or anyone else caused the incident. T. 355-56. Deviney was well aware of Monistere's testimony long before trial. It knew Plaintiff's expert was going to say only Deviney was at fault. Nothing prevented Deviney's witnesses from testifying and blaming BellSouth or anyone else. They did not testify to that because they could not do so. The order they were called had no effect on their substantive testimony. Deviney seems to be arguing "we needed to go last so we could figure out how to change our testimony to rebut the plaintiff's witnesses." Deviney's expert, Eric Jackson, testified Marble was at fault for not properly securing the hole before entering. T. 843:7-13. But, he said NO ONE else other than Marble was at fault. T. 844:3-7. So, there is no basis to now claim these two witnesses had something they needed to say to rebut plaintiff's expert Monistere. Deviney was required to object and make a proofer of the evidence it intended to submit that it says it was not allowed to present. Deviney did neither. Without an objection and proffer the appellate court can not determine if the evidence allegedly left out would have been material or relevant and whether its exclusion constituted prejudicial error. *Hammers v. Hammers*, 890 So. 2d 944 (Miss. Ct. App. 2004); *Gray v. Pearson*, 797 So. 2d 387 (Miss. Ct. App. 2001). Deviney submitted no evidence about what particular testimony it was not allowed to submit and how Deviney was

prejudiced. Without this evidence the issue of witness order and Deviney's alleged prejudice is waived. The assertion that the trial court's ruling prevented the Defendant from calling rebuttal witnesses is not supported by the Record.

Deviney called three experts in its case-in-chief. It was allowed to present any and all necessary evidence and it did so. There was no prejudice in the order of the witnesses.

Any problem with the trial court's ruling not covered by Miss. R. Evid. 601 was alleviated by the trial court instructing the jury what it was doing. The trial court instructed the jury that witnesses were called adverse by the Plaintiff and the jury should view the witness' testimony "just as if he had been called in the Defendant's case when the defendant got up because he's now taking him on direct, even though the Plaintiff called him earlier as an adverse witness." T. 325:23-28. The trial court instructed the jury:

> Ladies and gentlemen of the jury, earlier this morning you heard plaintiff ask about the witness being an adverse witness. And that basically means it's not a witness that he would have normally called in his case other than adversely.
> The defendant sometimes will also call the plaintiff's witness in their case in chief. The defendant, Deviney, has asked or indicated they would call Mr. Odom in their case in chief.
> As you recall, I told you plaintiff went first and then defendant goes. Now, we could let this witness testify and bring him back a second time when the defendants get ready for their case in chief. It is my policy and my option as a judge to require that the defendant move forward and take the witness that he would have had in chief on direct at a time outside of where he normally would. That saves the Court time, and it saves the parties time. **Mr. Odom is now to be considered a witness for the defendant, so his testimony is to be perceived just as if he were called in chief on behalf of the defendant and will be cross-examined by the plaintiff.**
> So with these kind of witnesses, you have to take his testimony for all purposes. The same person, but he's called twice or once, and you are to develop and determine that ability just like you would any other witness.
> On direct he would be able to ask him questions just like he would ask him if he called him as a witness in the defense case. The plaintiff will then get to cross-examine the witness. He will get to redirect his examination, and the Court has ruled as such.

T. 297:3-298:16 (emphasis added)

The trial court asked if the juror's understood. T. 325:28-29. The juror's all answered affirmatively. T. 326:1-11. The testimony presented by the Defendant's witnesses was not limited by the trial court's ruling on order of proof. It was not an abuse of judicial discretion to have a witness' direct examination for the Defendant to be done at the same time as the witness' testimony presented when called adverse by the Plaintiff. The trial court's ruling was reasonable and helped to avoid needless consumption of time by calling witnesses at a later time for Defendant's direct examination. The calling of the same witness in Plaintiff's case in chief and Defendant's case in chief would have resulted in the presentation of repetitive testimony. There is no prejudice to the Defendant.

III. The Trial Court Properly Refused Defendant's Apportionment of Fault Jury Instructions

Deviney claims it was entitled to a jury instruction allowing apportionment of fault to Marble's employer, Time Warner and/or BellSouth. However, no evidence established Time Warner or BellSouth had a duty to Plaintiff, violated the duty, or that their actions were a proximate cause of Marble's injury. It is elementary that Deviney is not entitled to jury instructions which are without foundation in the evidence. *Harris v. State*, 861 So. 2d 1003, 1012-13 (Miss. 2003) (citations omitted). Apportionment of fault is an affirmative defense which Defendant has the burden of proving. *Eckman v. Moore*, 876 So. 2d 975, 989 (Miss. 2004). In *Eckman* the court stated, "it is fundamental that the burden of affirmative defenses rests squarely on the shoulders of the one who expects to avoid liability by the defense." *Id.* (citing *Marshall Durbin Co. v. Warren*, 633 So. 2d 1006, 1009 (Miss. 1994)). A comparative negligence defense requires the Defendant to show all the elements of negligence: duty, breach, cause and injuries. No evidence established a duty to Marble by Time Warner or BellSouth. There was no evidence

Deviney did not tape or flag either end of the line. T. 280:25-28. Deviney did not use any type of voltage meter or any type of machinery to verify the electrical line was on or off. T. 281:25-281:1.

Third, the party creating the hazard was responsible for correcting and warning others. Plaintiff's electrical expert, Jim Cowden, testified Deviney "would be responsible for securing the wire which consisted of capping it, taping it, tagging it and possibly bending it back up out of the trench if they could." T. 235:1-4. If a line is cut it should be treated as if it were hot and the proper precautions taken to secure it. T. 238:3-9. The key question here was who was responsible for severing the line and warning others of the hidden dangers created from cutting the line? The answer is Deviney. Cowden testified that Deviney "didn't cap it off and tape it or flag it or tag it out or anything is what they did wrong." T. 238:21-13. David Monistere testified Deviney "violated recognized standards, the OSHA standard industry practices, recognized safe work practices in that they did not secure that line properly, didn't identify it, didn't tag it, didn't mark it, didn't make it conspicuous prior to leaving the site." T. 349:1-6. Only Deviney could have warned Marble and Time Warner of the severed line. Time Warner was unaware of the severed line and BellSouth was unaware of the cut line. T. 324:1-21. Although it was Deviney's policy and procedure to contact the owner of the line they break, or cut, and insure that it is fixed, this did not happen until after Marble was injured by the cut line. T. 318:16-319:1.

Fourth, **Deviney's own expert testified Time Warner was not at fault.** Deviney presented Eric Jackson as an expert in electrical engineering. He testified that no other third party, including Time Warner and Bellsouth, was at fault.

> Q. Are you also blaming, or you're alleging or saying your testimony to be blaming anybody else who may or may not have got into this hole between the time the line was broken and the time Scott Marble got in there? Are you making accusations about those people doing something wrong too or not?

A. Did somebody else get in the hole before then? Was there another—
Q. There's been no testimony that anybody else got in the hole, but there's a generic question posed to you?
A. Okay.
Q. **And I want to make sure that I'm not missing something. Are you saying that there's somebody else out there that Deviney is saying is responsible for what occurred?**
A. No.
T. 843:19- 844:7 (emphasis added)

Fifth, the jury was allowed to consider Marble' fault, if any, and they found him not at fault. R.308. Deviney's expert, Jackson, testified Marble was at fault for not properly securing the hole before entering. T. 843:7-18. Jackson also testified Marble could have entered the work hole from another side. T. 846:26-847:8. Based upon this testimony the court gave Jury Instruction 10 (D-12) (R. 296), which asked the jury to find Marble failed to maintain reasonable lookout for his own safety. The jury was also given a form of the verdict to apportion fault to Marble. R. 308. Yet, the jury found Deviney to be solely at fault. Marble was working in the scope and course of his employment at the time he was electrocuted. T. 604:16-18. Marble's negligence, if any, is imputed to his employer Time Warner. *Commercial Bank v. Hearn,* 923 So. 2d 202 (Miss. 2006); *Sandifer Oil Co. v. Dew,* 71 So. 2d 752, 758 (Miss. 1954). If Marble's actions were deemed appropriate by the jury then Time Warner is also not at fault.

In order for the jury to consider apportioning fault Defendant must prove (1) negligence by a preponderance of the evidence, and (2) show that such negligence contributed to the cause of the Plaintiff's injury. *Breaux v. Grand Casinos of Miss,* 854 So. 2d 1093, 1097 (Miss. Ct. App. 2003); *Carpenter v. Nobile*, 620 So. 2d 961, 964 (Miss. 1993). Deviney presented no evidence Time Warner and BellSouth acted negligently or that any alleged negligence caused or contributed to Marble's injuries. In the trial court's words:

> I've heard allegations and questions, but I find no evidence to substantiate any instruction that would be a question of fault other

> than between Mr. Marble and Deviney. Everything else is speculative. We've not had any testimony from any one of the other entities.
> T. 858:10-17.

Time Warner did not control the work site, did not cut the electrical wire, and was not notified by Deviney that Deviney had cut the electrical wire. Time Warner was only one of several companies working on various mini projects at the overall site which was part of the county expanding County Line Road in Hinds County. There was no testimony that Time Warner did anything wrong.

Sixth, no evidence supports fault on BellSouth. There was no testimony that BellSouth did anything wrong. Plaintiff's safety expert, Monistere, testified that there was no testimony that BellSouth did anything wrong. Tr. 355:22-356:6. Deviney's expert, Jackson, testified that no third party was at fault. T. 843:19- 844:7. Based on the evidence at trial no duty, breach or causation was established against BellSouth. Thus, the court properly refused Deviney's request to consider BellSouth for an apportionment of fault instruction.

A. Deviney's Refused Instructions Were Incorrect Statements of the Law

Defendant argues proposed jury instructions D-20 (R.278-280), D-21 (R.281-282), and D-22 (R. 283) were incorrectly excluded. These instructions all attempt to apportion fault to Time Warner and/or BellSouth. The instructions could not be given because they were incorrect statements of law in relation to the facts of the case. Deviney is not entitled to jury instructions which are without foundation in the evidence. *Harris v. State*, 861 So. 2d 1003, 1012-13 (Miss. 2003) (citations omitted). Apportionment of fault is an affirmative defense Defendant has the burden of proving. *Eckman v. Moore*, 876 So. 2d 975, 989 (Miss. 2004). ("it is fundamental that the burden of affirmative defenses rests squarely on the shoulders of the one who expects to avoid liability by the defense.") *Id.* (citing *Marshall Durbin Co. v. Warren*, 633 So. 2d 1006, 1009 (Miss. 1994)). The instructions would only be admissible if Deviney had shown duty,

breach, and causation. It did not present these elements of the legal duties for Time Warner or BellSouth.

There was no law presented showing Time Warner had a non-delegable duty to secure the work site. There were no facts in evidence that would support the instructions. Marble's expert, Monistere, addressed this issue. The general duty standard testified to was that OSHA requires employers provide a **workplace that's free from serious recognized hazards.** T. 3849-12. The standard of providing a safe workplace only applies to the physical office site, not to each individual off-campus work site. T. 387:5-11. As Monistere explained the intent of the standard was that an employee who goes to a work site is responsible for making an examination to make sure the site is safe. T. 387:20-28. Prior to entering the hole Marble assessed the work area looking for "hazards, anything that might be marked, secured anything that might be dangerous in there." T. 605:15-18. There were no tags or any markings indicating any kind of danger. T. 605:19-20. The hidden electrical line had nothing covering it, no PVC pipe on it, and nothing to warn it was a live electrical line. T. 183:8-28; 214:3-16; 610. There was no evidence presented showing Time Warner failed to exercise due, ordinary or reasonable care. T. 186:3-13. Time Warner did not cut the electrical line. Deviney cut the electrical line and did not notify Time Warner of the problem. T. 183:22-28. Time Warner was an independent contractor, so Deviney would have been responsible for securing the hole before it left the hole. T. 186:3-13. The argument by Deviney that Time Warner is magically charged with knowing what it is never notified about is an improper legal argument. Marble and Holifield inspected the worksite and did not see any hazards. T. 201:26; 205:1-28; T. 213:14-27. They found nothing indicating any danger T. 605:14-20. Deviney did not warn them of the hidden peril. T. 183:22-28. There was nothing in the hole that indicated there was a cut electrical wire in the hole. T. 185:24-27; 214:15-16; 227:15-25. There was no testimony Time Warner had been to the hole

before Marble arrived. There was no testimony establishing what Time Warner did wrong. Deviney merely makes a general allegation about generically providing a safe work place. There was no testimony the cause of Marble's injury was from any negligence of Time Warner. Therefore, the trial court did not commit error in denying Defendant an instruction allocating fault to Time Warner.

B. Deviney's Refused Instructions Were Not Supported By the Evidence

Defendant argues proposed jury instructions D-20 (R.278-280), D-21 (R.281-282), and D-22 (R. 283) were incorrectly excluded when they were supported by the facts. Deviney did not present evidence at trial proving any negligence of Time Warner and/or BellSouth. All instructions must be based upon testimony introduced in case. *Pevey v. Alexander Pool Co.*, 139 So. 2d 847, 851 (Miss. 1962).

Apportionment of fault is an affirmative defense and the Defendant must present evidence that a third party is negligent and liable for the damages sustained by the Plaintiff. *Eckman v. Moore*, 876 So. 2d 975, 989 (Miss. 2004). Deviney simply can not offer some random speculation about anyone who could possibly have come near the trench, such as some children, before Marble entered and expect to establish fault on the part of third parties.

Deviney admitted cutting the electrical line, failing to secure it, and failing to warn about it. T. 183:22-28; 310:13-28. There was no testimony that BellSouth or Time Warner were negligent, or that any alleged negligence was the proximate cause of Plaintiff's injury. Deviney did make vague references to BellSouth working at the site and to Time Warner working in the hole before Deviney came and cut the electrical line. Deviney employee Odom testified that the standard practice when they dig the hole, to have BellSouth on site at the same time. T. 301:5-10. But, he could not remember if anyone from Bellsouth was there when they dug the hole the day of the incident. T. 300:29- 301:4; 301:28- 302:3. He testified there were only two guys at the site

digging the hole, both Deviney employees. T. 275:26-276:5. Odom also claimed it was "possible" the wire could have been cut when the hole was first dug, but he "did not really know for sure." T. 3030:17-23. He did remember that when he and his co-worker, Keith White, were digging with the track hoe he saw the wire sticking up at both ends (T. 303:24-28) and that the track hoe cut it while they were digging. Tr. 310:13-28. This random speculation is not sufficient.

Next, Deviney had its general manager, Danny Jones, look at a photograph and try to insinuate that BellSouth had been in the hole. But, he subsequently admitted he could not testify in the affirmative to that.

> Q. And so from having looked at these types of jobs before, you can look at this picture and tell **that before this picture was taken BellSouth was in the hole and fixed that line?**
> Mr. Ogden: I'm going to object to that. That's speculation. He doesn't know what they did. He's just guessing what the picture shows.
> The Court: Objection. I'll allow him to answer if he can.
> A. I can pretty much say that is a repair that AT&T did. **Now, whether that is the repair they did that day I can't say,** but I can say we were there digging that cable up so Bellsouth could repair it.
> T. 331:29- 332:14 (emphasis added)
>
> Q. And you don't have any testimony, and you're not a Bellsouth representative, so you're not testifying about what Bellsouth did or didn't do, are you?
> A. No, sir, I'm not.
> Q. As a matter of fact, your not testifying on behalf of Bellsouth, are you?
> A. No, sir, I'm not.
> T. 334:26- 335:4 (emphasis added)

Deviney dances around the accusation that someone else could have been there and may have been in the hole before Deviney got in. But, they never offered proof that someone other than Deviney cut the line. The argument is nothing more than speculation and conjecture. No

testimony established that anyone other than Deviney cut the line and knew the line was unsecured.

The rule only allows for submission of other persons for fault if there is evidence of negligence. The Court allowed the Defendant a form of the verdict where the jury could have placed 100% fault on the Plaintiff and zero percent fault on the Defendant. See, Jury Instruction 10 (D-12) R.296 which instructed the jury to consider if the Plaintiff failed to maintain a reasonable lookout for his own safety. R. 296; T. 919:15-22. Also, Jury Instruction 18 (C-14) was an apportionment of fault instruction submitted to the jury. R. 304; T. 924-925. Jury Instruction 19 (C-15), the form of the verdict, allowed the jury to apportion negligence between the Plaintiff and Defendant by a percentage. R. 308; T. 925. There was a choice of fault based on the evidence submitted and the jury still found Deviney 100% at fault. R. 308. Since no evidence was presented or established as to fault of any other entity it was proper for only the Plaintiff and Defendant to be on the jury verdict form. Defendant has presented no grounds to warrant a new trial. The weight of the evidence supports the verdict and there has been no injustice.

Deviney cites several cases claiming these cases show that all possible parties must be considered in the apportionment of fault issue. See, *Coho v. Resources, Inc. v. Chapman*, 913 So. 2d 899 (Miss. 2005); *Pevey v. Alexander Pool Co.*, 139 So. 2d 847, 851 (Miss. 1962). But, these cases are distinguishable in that they all continue to reiterate that apportionment of fault must be supported by the evidence to a reasonable degree.

IV. The Trial Court Ruling on Collateral Source Payments was Correct

Defendant argues that collateral source should have been allowed to impeach the Plaintiff's testimony regarding medical treatment. The defendant did not object when the question and answer were presented to the jury so the issue is waived for no timely objection. T. 614:7-11. Next, Defendant improperly asserts that collateral source payments should have been

presented to the jury to explain Marble's contention that he could not afford some medical treatment. This position is not supported by the law. A trial judge's decision to admit or deny evidence is reviewed under an abuse-of-discretion standard. *See, Whitten v. Cox*, 799 So. 2d 1, 13 (Miss. 2000). The Mississippi Supreme Court has stated when determining whether a witness may be cross-examined on collateral-source payments there must be a fact-specific inquiry. *Robinson Property Group, L.P. v. Mitchell*, 7 So. 3d 240, 247 (Miss. 2009). In *Robinson* this Court determined the trial court did not abuse its discretion when it denied the defendant the chance to cross-examine the plaintiff regarding collateral source payments of medical bills to impeach for alleged false testimony. The Court determined a defendant can cross-examine a plaintiff for the narrow purpose of impeaching false testimony but held that the plaintiff's testimony that she had to borrow money to live after her injury did not clearly show her financial difficulties were directly related to medical bills. The defendant sought to introduce evidence that the medical bills incurred by plaintiff were substantially paid by insurance and wanted to impeach her statements that she was devastated financially for having to borrow money to live. This Court found the collateral source exception did not apply to these facts.

In Mable the collateral source issue stems from this question and answer:

> Q: And have you attempted to find doctors that could treat you and help you get better?
> A: I've hired a few, but I can't afford to go outside of what my employer sends me to.
> T. 614:7-11

Deviney argues it should have been able to question Marble to ask who and what was paying his bills now. Deviney wanted to question Marble about his wife's insurance and his own insurance with Time Warner that at one time was paying his bills. T. 641:10-29. Deviney wanted to ask "isn't it true that you can afford to go to doctors of your own choosing because you've got medical insurance through your wife's employment that allows you to do so." T. 647:18-23. The

trial court held a fact-specific inquiry on the record regarding this statement and made a valid determination that the Plaintiff's comments did not constitute an exception to the collateral source rule. T. 640:27-657:26. The issue was whether Marble's statement was false. The trial court held the statement was not false. 641:2-29. "I find nothing in his statement to be false or misleading to the jury. That is the basis by which this case says I must first find in order to overturn the collateral source rule." T. 657:19-25.

In the proofer to the trial court Marble explained he was sent to the doctors by his workers comp. T. 648:23-649:20. Some time in 2005 his employer quit paying for his treatment. T. 649:21- 650:4. Since 2005 his medical treatment has been paid by private insurance and a little help from his in-laws. T. 650:18-28. He stated that once he lost his job all his work benefits ceased and there was no way his family could survive on one income. T. 654:11-17. Marble has and continues to see physicians that he was referred to by his employer. T. 613:23-28; 651:15-29. Marble continues to see his primary treating doctor, Dr. Winkelmann. T. 726:20-22; 648:27-649:5. He is no longer receiving workers' compensation, so some of the bills may have been partially paid on by his wife's private insurance policy. T. 650:23-27. At the point that Plaintiff's wife's insurance began to incur cost for some of the medical treatment, Marble had been released to pain management. T. 652:24-653:29; 654:11-17. The fact that Plaintiff's wife has insurance which may be paying on some of Plaintiff's medical expenses does not mean that Plaintiff's statement about not being able to afford to go to other doctors is inaccurate. T. 650:26-27; 654:11-17. Most insurance does not pay for an insured to go to any doctor of their choice especially if they have been referred for treatment to a specific provider. Plaintiff testified he has not been able to work since he received his injuries and insurance does not pay for all medical expenses incurred. T. 649:6-8; 650:26-27; 654:11-17. Defendant was not prejudiced by the

exclusion of this testimony. The Defendant had to prove Marbles statement was false. The proffer by Deviney proved that the statement was accurate

Deviney also claims the statement "undermined Marble's case for damages for future lost income." There is no evidence to support this. Whether Marble chose the doctor, or the doctor was referred by his employer, does not alter the testimony that Marble cannot work and will continue to see doctors in the future. The evidence supported Marbles injuries and damages.

Deviney asserts the damages assessed by the jury were somehow heavily predicated on this collateral source argument for future medical bills. There is no basis for that argument. The jury assessed a single amount for lost wages past and future; medical bills past and future; and pain and suffering. T. 968:10-18; R. 308. There was no break-down of what amount was allocated to which element of damages. The damages were clearly supported by the evidence presented and should not be altered.

In addition, whether Marble can afford to go to other treatment providers is not probative or relevant to the facts in this case. This was another qualification set out in *Robinson Property. Id.* For evidence to be admitted under evidence rule of impeaching a witness the court must first deem the evidence relevant and then determine if the probative value of the evidence is substantially outweighed by danger of unfair prejudice. *Robinson Property* at 245.

Assuming for argument sake that the proffer is admissible under Mississippi Rule of Evidence 607 it would have to be deemed relevant and then filtered through Rule 403. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by needless presentation of cumulative evidence." Miss. R. Evid. 403. The trial court conducted a review under Miss. R. Evid. 403. T. 656:4-657:26. The trial court did not abuse its discretion in

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CERTIFICATE OF SERVICE

I, the undersigned counsel of record, hereby certify that I have this day forwarded, by U.S. Mail, postage prepaid, a true and correct copy of the foregoing Appellee's Brief to:

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So certified, this the 28th day of September, 2010.

J. Ashley Ogden