IN THE SUPREME COURT OF MISSISSIPPI

No. 2009-CA-01166

DEVINEY CONSTRUCTION COMPANY, INC., **APPELLANT**

V.

DAVID SCOTT MARBLE, **APPELLEE**

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

REPLY BRIEF OF APPELLANT DEVINEY CONSTRUCTION COMPANY

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ORAL ARGUMENT REQUESTED

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INTRODUCTION

Deviney Construction Company ("Deviney") demonstrated in its opening brief that the trial court committed multiple reversible errors at trial.

The trial court wholly failed to exercise its gatekeeping duty to prevent unsupported, unreliable expert opinions from reaching the jury. As a result, Marble's expert economist was allowed to calculate an astronomical damages figure based on the wholly speculative assumption that, but for his injury, Marble would have worked on a full-time basis until the day he died, which the expert opined would occur at the age of 78.

Then, the trial court's arbitrary, blanket ruling that no witness could be recalled to the stand prevented Deviney from presenting its case in a coherent manner and allowed Plaintiff David Scott Marble ("Marble") to call Deviney's own witnesses adversely, before most of Plaintiff's witnesses. The effect was to require Deviney to present its defense before Marble had offered his own claims, precluding Deviney from responding to the evidence against it.

The trial court also prohibited the jury from considering the relative fault of Time Warner and BellSouth, despite factual and legal support for allocation of fault to those nonparties.

Finally, the trial court allowed Marble falsely to suggest that his treating physicians (whose testimony was unfavorable to Marble) were biased because they were controlled by his employer. Deviney was prohibited from impeaching this false testimony by the trial court's misapplication of the collateral source rule.

These multiple reversible errors, either considered independently or cumulatively, require a new trial.

ARGUMENT

I. The Trial Court Reversibly Erred in Admitting the Testimony of Dr. Glenda Glover.

A. The Trial Court Failed to Perform its Gate-Keeping Duty to Keep Unsupported, Unreliable Opinions From the Jury.

In its principal brief, Deviney demonstrated that the trial court failed to exercise its gate-keeping role by conducting the required *Daubert* analysis of Dr. Glover's opinions. The trial court made no effort to ensure that Dr. Glover's opinions were based upon sufficient facts and data and that she applied reliable scientific principles to those facts.

Marble's response points to no *Daubert* analysis by the trial court. Rather, Marble states that the trial court found Dr. Glover's testimony "was relevant", that Dr. Glover's expert credentials were unquestioned, that Dr. Glover was subject to cross-examination, and that it was the jury's province to evaluate Dr. Glover's credibility. Marble's Brief at 18-19. This argument ignores the purpose of *Daubert* and the trial court's gatekeeping function.

Mississippi law is clear that an expert's opinion is not admissible based on relevance alone, and that trial courts have a duty to evaluate the reliability and supporting facts and data underlying an expert's opinion *before* that opinion is disclosed to the jury. *See, e.g., Edmonds v. State*, 955 So. 2d 787, 792 (Miss. 2007); *Watts v. Radiator Specialty Company*, 990 So. 2d 143, 146-47 (Miss. 2008). Although Dr. Glover's credentials were not in question, this fact alone does not make her opinions admissible. Instead, Dr. Glover's credentials highlight one of the key "dangers of unreliable expert testimony":

> Juries are often in awe of expert witnesses because, when the expert witness is qualified by the court, they hear impressive lists of honors, education and experience. An expert witness has more experience and knowledge in a certain area than the average person. Therefore, juries usually place greater weight on the testimony of an expert witness than that of a lay witness.

Watts, 990 So. 2d at 146-47 (quoting *Edmonds v. State,* 955 So.2d 787, 792 (Miss.2007)). Dr. Glover's resume serves to emphasize one of the primary reasons that this Court has held that an expert's opinions must be found reliable *before* they are presented to the jury: to keep the jury from being misled by unfounded testimony from an expert with impressive credentials. *Id.*

Here, it is undisputed that the trial court conducted *no* gatekeeping analysis of Dr. Glover's opinions. In fact, the trial court acknowledged that it did not know if there was data to substantiate Dr. Glover's opinions: "[t]he case law is pretty clear that if there's data to substantiate it, then that should be put before the jury, but right now I don't know." (Tr. 409.) Instead of evaluating whether any data *actually* existed to substantiate Dr. Glover's opinion, the trial court instead decided to allow the opinions into evidence and let the jury's "common sense" determine if the opinions were credible. (Tr. 400, 409.)

The Comment to Rule 702 makes clear that it is solely the duty of the trial court to determine if an expert's opinion has sufficient factual support:

> By the 2003 amendment of Rule 702, the Supreme Court clearly recognizes the gate keeping responsibility of the trial court to determine whether the expert testimony is relevant and reliable. This follows the 2000 adoption of a like amendment to Fed.R.Evid., 702 adopted in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

Miss. R. Evid. 702, Cmt. It was the duty of the trial court, not the jury, to ensure that Dr. Glover's testimony was "based on sufficient facts or data," was "the product of reliable principles and methods, and that it applied those principles and methods "reliably to the facts of the case." Miss. R. Evid. 702; *Miss. Dep't of Transp. v. McLemore*, 863 So. 2d 31, 38 (Miss. 2003). The trial court wholly abdicated its gatekeeping role to the jury, in clear violation of Rule 702. Thus, its admission of Dr. Glover's opinions into evidence is subject to *de novo* review. *See 3M Co. v. Johnson*, 895 So. 2d 151, 160 (Miss. 2005).

B. Dr. Glover's Opinions Were Inadmissible Under *Daubert.*

Had the trial court properly fulfilled its gatekeeping duty, it would have excluded Dr. Glover's testimony under *Daubert.* To be admissible, an expert's opinions must have a "reasonably accurate basis" in foundational facts or evidence, and the opinions must be "reasonably accurate conclusions as distinguished from mere guess or conjecture." *APAC-Mississippi v. Goodman*, 803 So. 2d 1177, 1185 (Miss. 2002). Here, Dr. Glover calculated Marble's future lost income based on two foundational assumptions: (1) that Marble was incapable of earning another dollar for the rest of his life; and (2) but for his injury, Marble would have worked until the day he died. Based on these assumptions, she calculated his future lost earnings at $2.6 million dollars. As discussed below, neither of these assumptions is supported by reliable data; each is squarely belied by the facts of this case. Dr. Glover's opinions were therefore unreliable and the circuit court reversibly erred in admitting them into evidence.

1. Dr. Glover's Opinion that Marble Would Work Until He Died Was Unsupported and Unreliable.

Dr. Glover's opinion assumed that, but for his injury, Marble would have worked full time until his death. Marble claims that this opinion had adequate factual support because Dr. Glover testified that she had observed co-workers and greeters at Wal-Mart working past the age of 65. Marble claims that Dr. Glover relied on a "growing amount of economic literature" supporting her astonishing theory that people no longer retire. He also cites a conversation that Dr. Glover had with one other unnamed economist that led Dr. Glover to believe that people now work until they die. Marble's Brief at 20-22. However, Dr. Glover did not identify *any* specific "economic literature" or name any other single economist that agrees with her position.

Dr. Glover's opinion that "people don't just retire early. People work as long as they choose to work" was based on nothing more than vague, anecdotal evidence and her own unsupported conjecture. Marble presented no evidence that Dr. Glover's opinion was subjected to peer review or publication, or was generally accepted within the economic community. *See McLemore*, 863 So. 2d at 37. Indeed, there was no evidence that her "retirement no longer exists" hypothesis has been accepted by any other recognized authority. Rather, it was based solely on Dr. Glover's unsupported speculation.

In apparent recognition that Dr. Glover's opinion on this subject lacks any scientific underpinnings, Marble argues that the evidentiary support underlying Dr. Glover's opinion that people no longer retire is an "issue solely for the jury to sort out", and claims that any flaw in Dr. Glover's opinion is cured through Dr. Glover's alternate opinion based on an assumption that Marble would retire at age 65. Marble's Brief at 22-23. This argument fails to recognize the purpose and importance of the trial court's gatekeeping duty. By admitting both opinions, one based on a retirement age supported by published data and one supported only by Dr. Glover's say-so, the trial court equally blessed both opinions with the gravity given to expert testimony. It was the duty of the trial court to ensure that Dr. Glover's unreliable, unsupported opinion that Marble would work full-time until his death passed *Daubert* muster before it was admitted.[1]

Further, Dr. Glover's opinion was unsupported by the facts of this case. Dr. Glover admitted that she could not testify that *Marble*, as opposed to some hypothetical person, would have worked until he died. Contrary to Marble's assertions in his brief, Dr. Glover did *not* opine that it was a probability Marble would have worked until his death, but for his accident. In fact, Dr. Glover expressly admitted that she could not testify to any such probability. (Tr. 445.)

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[1] Neither *Daubert* nor the Mississippi Rules of Evidence permit a party to offer plainly inadmissible evidence so long as the party also offers at least some admissible testimony on the same subject.

Even Marble refrained from claiming that, but for his injury, he would have worked until his death. Thus, Dr. Glover's opinion had no demonstrated factual basis in Marble's individual circumstances. In a case such as this, where there is no evidence that this particular plaintiff is likely to work beyond the statistical average, the plaintiff's work-life expectancy "should be based upon the statistical average." *Madore v. Ingram Tank Ships, Inc.*, 732 F.2d 475, 478 (5th Cir. 1984) (error to base plaintiff's future earnings on work-life expectancy that exceeded the Department of Labor tables by five years); *see also Gumbs v. Int'l Harvester*, 718 F.2d 88, 98 (3d Cir. 1983) (error to admit expert opinion on plaintiff's future earnings until his *life* expectancy, rather than his statistical *work-life* expectancy).

Dr. Glover's opinion that Marble would work until the day he died had no factual foundation. Her opinion was not based on published statistical averages. Nor was it based on any testimony that Marble himself would have never retired, but for his injury. The only "foundation" for this opinion was Dr. Glover's own unsupported assumptions, and it was reversible error for the trial court to admit it.

2. No Evidence Supported Dr. Glover's Opinion that Marble Had No Future Earning Capacity.

Deviney also demonstrated in its opening brief that Dr. Glover had no reliable basis to opine that Marble's injuries would prevent him from earning another dollar in his life. Marble's own treating physicians testified that he was not permanently disabled. (Tr. 724-26; Ex. P-15 at 42, 45-47.) Even Marble's vocational rehabilitation expert witness Nathaniel Fentress agreed Marble was capable of performing some work. (Tr. 537-38.)

In response, Marble claims that Dr. Glover's opinion that he was totally unable to work was supported by Marble's own testimony that he could not find a job, the testimony of a former employer who observed him in pain while vacuuming, and the testimony of a family friend who

observed him attend fewer soccer games than he had in the past. Marble's Brief at 11-15. This evidence is a clearly insufficient factual foundation for Dr. Glover's testimony that Marble would have absolutely no earning capacity for the rest of his life. "[L]oss of earning capacity is an economic concept based upon a *medical* foundation. . . ." *Quinones-Pacheco v. Am. Airlines, Inc.*, 979 F.2d 1, 6 (1st Cir. 1992). Dr. Glover did not base her opinion that Marble was forever incapable of working on the testimony of Marble's *physicians*, who all agreed Marble had some future earning capacity. Rather, she based her opinion on the claims of Marble and his attorneys.

Marble points to the testimony of his friends and a former employer as evidence that supports Dr. Glover's conclusion that he was unable to work. Like Marble and his attorneys, Marble's friends are unqualified to testify that Marble was permanently disabled and has no future earning capacity. Dr. Glover's reliance on this testimony renders unreliable her opinion that Marble is forever unable to work.

Finally, Marble claims that the testimony of Nathaniel Fentress supports Dr. Glover's conclusion that he had no future earning capacity. First, Fentress is not a medical doctor, and he is unqualified to testify as to Marble's physical ability to perform work in the future. In any event, Fentress did *not* testify that Marble had no future earning capacity. He recognized that Marble would "probably make a little money", and he agreed with the testimony of Marble's treating physician that Marble was physically capable of performing medium-duty work. (Tr. 537-38).

Despite clear evidence that Marble had some wage-earning capacity, Dr. Glover calculated his future lost income as if he would never work again. This false assumption allowed Dr. Glover to inflate her calculation of Marble's future loss earnings, with no evidentiary support. Because Dr. Glover's opinion that Marble had no future earning capacity was unsupported by any testimony of a medical doctor capable of assessing his future physical ability

to work, it lacked sufficient factual foundation. The trial court reversibly erred in submitting Dr. Glover's opinion.

C. Dr. Glover's Opinions were Untimely Disclosed, Causing Prejudice to Deviney.

Marble argues that Dr. Glover's opinions, which were last supplemented *after* the second day of trial, were timely disclosed. Marble claims that he seasonably supplemented his discovery responses because he relayed Dr. Glover's new opinions to Deviney "when he received the information". Marble's Brief at 27. Marble offers no justification for his own failure to obtain Dr. Glover's opinions until the last minute. It is every party's duty to timely obtain and disclose his expert's opinions so that the opposing party will have a fair opportunity to respond to them. Marble's failure to obtain Dr. Glover's opinions from Dr. Glover in a timely manner does not excuse a failure to timely disclose those opinions to Deviney. Marble's untimely disclosure of Dr. Glover's opinions made them inadmissible. *Hartel v. Pruett*, 998 So. 2d 979, 984-86 (Miss. 2008).

Marble next contends that Dr. Glover's eleventh-hour supplemental reports did not "materially alter" Dr. Glover's opinions, and that Deviney was therefore not prejudiced by the admission of the untimely opinions. This fantastic assertion does not survive analysis.

In her initial report, Dr. Glover had based her calculation of Marble's lost wages on actuarial tables predicting that Marble would retire at age 65. (R. 117; Tr. 430.) Marble admits that Dr. Glover's first supplemental opinion, disclosed *less than two weeks* before trial, "added the costs of lost wages if the age was figured at 85, instead of just 65." Marble's Brief at 27. Dr. Glover's supplemental opinion *doubled* her calculation of Marble's future lost income, hardly an insignificant revision.

Dr. Glover's supplemental opinion not only significantly increased her calculation of Marble's future lost income, it fundamentally changed the basis on which she calculated Marble's future earning capacity. Rather than base her opinions on published actuary tables that predicted Marble's work-life expectancy, Dr. Glover now claimed that Marble would work until age 85 – seven years longer than Marble's 78-year *life* expectancy. Until two weeks before trial, Deviney had no notice that Marble intended to claim that he should be compensated for lost wages until the day he died. Deviney had no opportunity to investigate the basis of Dr. Glover's opinion that Marble would work past the age of 65, and it had no opportunity to obtain and designate its own expert witness to rebut Dr. Glover's brand new opinion that work-life expectancy tables are essentially meaningless. Marble's contention that the "substance" of Dr. Glover's opinions did not change is laughable. Dr. Glover's opinion radically changed, both in the amount of her final calculation and the methodology she used to perform it. The trial court's admission of Dr. Glover's untimely opinion into evidence was prejudicial, and it was reversible error.

Marble also claims that Deviney did not preserve for appeal its objection to Dr. Glover's testimony that Marble would work until the day he died. He claims that once Dr. Glover complied with the trial court's ruling to reduce her calculations based on Marble's actual life expectancy, Deviney failed to renew its objection to that testimony. This argument is belied by the record. Deviney moved *in limine* to exclude Dr. Glover's opinion that Marble would work beyond his work-life expectancy. (R. 211-12.) Deviney's motion was not based *only* on the fact that Dr. Glover claimed Marble would continue to work for seven years after he died. Deviney also objected to Dr. Glover's new opinion that Marble would work past his work-life expectancy of 65, because that opinion was unsupported by any data. *Id.* While Dr. Glover further revised her opinion during trial to calculate Marble's damages only up until his estimated age of death,

she continued to opine that he would work beyond his work-life expectancy. (Tr. 395.) This testimony was squarely the subject of Deviney's motion *in limine*. In addition, contrary to Marble's assertions, Deviney explicitly renewed its objection to Dr. Glover's ultimate opinion that Marble would work until the age of 78. (Tr. 396, 401-02.) Marble's waiver argument is without merit.

II. The Trial Court Reversibly Erred in Prohibiting Deviney From Calling its Witnesses in its Own Case in Chief.

Deviney demonstrated in its opening brief that it suffered unfair prejudice through the trial court's blanket ruling prohibiting any party from recalling a witness to the stand. Because of this ruling, which the trial court claimed it applied in *all* cases, Deviney had no control over the order of presentation of the evidence in its case in chief. Thanks to the trial court's ruling, Marble was able to call Deviney's only two fact witnesses – its corporate representative and its former employee who was present at the scene of the accident – near the outset of trial. (Tr. 274-77; 316-17.) Deviney was forced to conduct its direct examination of these two key witnesses during Plaintiff's case in chief, before hearing the testimony of Marble himself and Marble's safety expert who opined that Deviney had committed numerous safety violations. (Tr. 597, 355-56, 393.) The trial court's ruling prevented Deviney from recalling its employees to respond to Marble's evidence, and forced Deviney to present its defense before Marble had even put on his proof.

Marble claims that Deviney failed to preserve its objection to the trial court's order of proof ruling. This argument lacks merit. From the outset of trial, Deviney objected to the trial court's blanket rule that no party may be recalled to the witness stand. On the first day of trial, the trial court announced its order of proof rule. (Tr. 30.) Deviney immediately objected on the grounds that it should be allowed to reserve the examination of its witnesses until the close of

Marble's case in chief, and that the trial court's ruling would effectively allow Marble to dictate the presentation of Deviney's case. (Tr. 31-32.) The trial court overruled Deviney's objection. (Tr. 32.)

Deviney renewed its objection when Marble called Brian Odom and Danny Jones, Deviney's only fact witnesses, as adverse witnesses. As Deviney demonstrated in its opening brief, the trial court treated Deviney's renewed objection with open hostility. (Tr. 297-98.) Through these timely objections, Deviney made clear its opposition to the trial court's order of proof procedure, and preserved the issue for appeal. Deviney also preserved this issue for appeal by raising it in its motion for new trial. (R. 311.) In its motion for a new trial, Deviney argued that the court "unfairly prejudiced Deviney and forced it to ask questions of its fact witnesses before hearing Plaintiff's case in its entirety", as Deviney could not "rebut or refute facts and matters set forth during the Plaintiff's case in chief". (R. 321-22.)

Marble claims that Deviney waived this issue by failing to request to recall every witness that Marble called adversely and failing to make an offer of proof. Marble also claims that Deviney's counsel waived this issue by stating during trial that "we would argue that the defense shouldn't be handcuffed. . . . But I understand your ruling and will respect it." Marble's Brief at 33. However, this Court has made clear that a counsel's show of respect for the trial court's authority after an objection has been overruled does not amount to a waiver of the objection:

> When the trial judge makes a ruling adverse to a litigant, and where that litigant's lawyer has properly noted his objection, that litigant and his lawyer are entitled to try the rest of the case on the assumption that the trial judge's ruling will not be disturbed on appeal. And, when the litigant reaches this Court, we will not imply a waiver from the subsequent conduct which does nothing more than show the lawyer's obligatory respect for the trial judge while at the same time continuing as best can be done the advancement of his client's cause.

Strong v. Freeman Truck Line, Inc., 456 So. 2d 698, 711 (Miss. 1984); *accord United States v. Greenwood*, 974 F.2d 1449, 1471 n.23 (5th Cir. 1992) ("Any further objection by the

Government would have been futile; therefore, the Government was not required to re-object for each co-defendant since an identical issue was raised with respect to each methamphetamine co-defendant's sentence."). Here, the trial court made it clear that it would not permit Deviney to recall any witness, for any reason. After making two objections to the trial court's arbitrary order of proof ruling, Deviney was not required to continue provoking the trial court's ire by renewing its objection at every possible turn.

III. The Trial Court Reversibly Erred in Refusing to Allow the Jury to Apportion Fault to Time Warner and BellSouth.

The trial court refused to allow the jury to consider the comparative fault of Time Warner and BellSouth, despite ample evidence to create a jury question on this issue. Marble argues that Deviney was not entitled to a jury instruction which allowed the jury to consider the comparative fault of Time Warner and BellSouth, claiming that there was no evidence either of these non-parties was at fault. In support of his argument, Marble lists evidence showing only that the fault of Time Warner and BellSouth was a *disputed* issue at trial. Of course, under Marble's theory of the case, Deviney was the sole party responsible for Marble's alleged injuries. However, Deviney presented evidence that the actions and inactions of Time Warner and BellSouth led to the accident. While the evidence on this point was disputed, Deviney presented more than sufficient evidence to present to the jury the issue of the comparative fault of Time Warner and BellSouth.

"[A] defendant is entitled to have jury instructions given which present his theory of the case" when that theory is supported by the law and the evidence. *Jackson v. State,* 645 So. 2d 921, 924 (Miss. 1994). In determining whether a jury instruction is supported by the evidence, the appellate court must evaluate "the evidence from the view of the party requesting the instruction." *Brown v. State*, 768 So. 2d 312, 315 (Miss. Ct. App. 1999).

As an initial matter, Marble incorrectly assumes that section 85-5-7 of the Mississippi Code requires proof meeting the elements of a claim of negligence against a nonparty in order to have that party's fault assessed. He states that "no evidence established Time Warner or Bell South had a duty to Plaintiff, violated the duty, or that their actions were a proximate cause of Marble's injury." Marble's Brief at 36. Without citation to any authority, Marble equates Mississippi's comparative *fault* statute with a comparative *negligence* rule. As Deviney explained in its opening brief, section 85-5-7 contains a broader definition of "fault", and does not require proof of a party's negligence for the jury to assess that party's fault. *See* Deviney's Brief at 36.

It is undisputed that Marble was injured during the course and scope of his work as an employee of Time Warner. Marble first defends the trial court's decision to refuse to allow the jury to consider Time Warner's fault by claiming that OSHA standards requiring an employer to provide a safe workplace apply only to office locations, not off campus worksites. Marble's Brief at 37. However, under Mississippi law, Time Warner, as Marble's employer, owed Marble a non-delegable duty to provide a safe *workplace*. This duty arises not from federal OSHA regulations, but from longstanding Mississippi common law. *See Monroe County Elec. Power Ass'n v. Pace*, 461 So. 2d 739, 748 (Miss. 1984) (citing *Finkbine Lumber Company v. Cunningham*, 101 Miss. 292, 57 So. 916 (1911)). Marble cites no authority, and Deviney is aware of none, that limits a Mississippi employer's common law duty to its employees *only* to the office building context. Rather, an employer has a duty under Mississippi law to provide a safe working environment, including off campus worksites.

Marble next contends that Time Warner did not have exclusive control over the worksite where Marble was injured. *See* Marble's Brief at 37. Marble focuses on the fact that there was no evidence that Time Warner entered the worksite during the 10 to 12 hours from the time that

Deviney's employees left until Marble arrived. However, this very inaction by Time Warner was evidence that Time Warner failed to inspect the worksite before Marble reported for duty, and it is sufficient evidence to support Deviney's proposed jury instruction.

The experts for *both* Marble and Deviney testified that Time Warner had a duty to provide a safe work site for its employees, which includes making reasonable inspections. (Tr. 384-88, 838.) Time Warner owed Marble a non-delegable duty to provide a safe workplace, and there was no evidence Time Warner performed any safety inspections of the worksite prior to Marble entering the site. The jury should have been informed that Time Warner owed Marble a non-delegable duty to provide a safe workplace and allowed to consider Time Warner's failure to inspect Marble's worksite in its apportionment of fault. The trial court's refusal of Deviney's proposed instructions D-20 and D-22 was reversible error.

Deviney also presented evidence that was sufficient to allow the jury to consider Bell South's fault. Marble himself stated that the responsibility for securing the worksite lies with "whoever is the last one there". (Tr. 630.) Deviney presented evidence that it is standard practice for BellSouth to inspect and approve Deviney's work before Deviney leaves the work site. (Tr. 301-01, 329-30.) Deviney presented evidence that BellSouth did, in fact, enter the hole and repair its telephone line *after* Deviney completed its work. (Tr. 331-32; Exs. P-2-A, P-2-B; Tr. 173-74, 182, 228.) The jury should have been allowed to consider the evidence that BellSouth entered the worksite after Deviney left, and apportion fault to BellSouth accordingly. The trial court's refusal of Deviney's proposed jury instruction D-21 was reversible error.

Deviney presented evidence that supported its proposed jury instructions that would allow the jury to consider the relative fault of Time Warner and to BellSouth. In refusing to allow the jury to consider the relative fault of these nonparties, the trial court impermissibly substituted its opinion regarding the fault of Time Warner and BellSouth for the jury's opinion.

Under Mississippi law, the comparative fault of Time Warner and BellSouth was a question solely for the jury. *See Hankins Lumber Co. v. Moore*, 774 So. 2d 459, 464 (Miss. Ct. App. 2000). The trial court abused its discretion in failing to instruct the jury that it could consider the relative fault of Time Warner and BellSouth, and Deviney is entitled to a new trial.

IV. The Trial Court Reversibly Erred in Prohibiting Deviney From Impeaching Marble's False Testimony Regarding the Bias of his Treating Physicians.

As discussed above, Marble's treating physicians testified that Marble was medically capable of performing medium-duty work. This testimony conflicted with Marble's claim that he was completely unable to perform any work for the rest of his life. In an effort to discount his treating physicians' testimony and portray them as biased, Marble testified that he could not afford to see doctors other than those provided by his employer. He stated that Time Warner "sent [him] where [it] wanted him to go"; and that, although he was not happy with the doctors Time Warner sent him to, he "c[ouldn't] afford to go outside of what [Time Warner] sen[t] [him] to." (Tr. 611-12, 614.) This testimony was untrue. In fact, Marble's medical bills from October 2005 forward were paid by his wife's insurer, not by his employer. Deviney demonstrated in its opening brief that it sought to impeach Marble's false testimony by proving that Marble's physicians were not provided only by his employer, but by his wife's insurer. The trial court refused to admit this impeachment evidence, holding that the collateral source rule prohibited Deviney from questioning Marble regarding his wife's insurance.

In response, Marble first claims that Deviney failed to timely object to Marble's testimony that he could not afford to see doctors other than those paid for by his employer. Marble's Brief at 44. However, Deviney does not argue that Marble's testimony is inadmissible. Rather, Marble's testimony was demonstrably *false*, and it opened the door on the issue of the multiple collateral sources that paid for Marble's treatment. The trial court refused to allow

Deviney to impeach Marble's false testimony. Deviney presented an offer of proof of the evidence it would have used to impeach Marble's false testimony, properly preserving the issue for appeal. (Tr. 653-54.)

Marble next claims that his testimony was, in fact, true. He acknowledges that Mississippi law allows a defendant to cross-examine a plaintiff regarding collateral source payments "for the purpose of impeaching false or misleading testimony." *Robinson Property Group, L.P. v. Mitchell,* 7 So. 3d 240, 244 (Miss. 2009). Marble claims that "[t]he 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." Marble's Brief at 46. However, the untruth that Deviney sought to debunk was *not* whether Marble could have paid for his medical treatment out of pocket. Instead, Deviney sought to impeach Marble's testimony that Time Warner alone selected his physicians.

Marble insinuated that his treatment was under Time Warner's control in order to discredit his physicians' testimony that Marble was able to work. In truth, Marble's expenses were paid by his wife's insurer after October 2005. The issue was not whether Marble could afford to pay out of pocket, but whether Marble's treating physicians were biased in favor of his employer. Marble was allowed to falsely lead the jury to believe that Marble's employer controlled and paid for his treatment, and that his physicians were therefore biased in their testimony that he was able to return to work. Deviney was entitled to impeach Marble's false testimony, and the trial court reversibly erred in excluding the impeachment evidence.

Finally, Marble claims that admission of testimony regarding the collateral source of Marble's wife's insurance would have been unfairly prejudicial under Rule 403. This argument ignores that Marble himself had already informed the jury that a different collateral source – his employer – was paying for his treatment. Thus, Marble opened the door on the collateral sources

that were paying for his medical bills. Deviney's proffer would have merely identified the *correct* collateral source that was actually paying for Marble's treatment. Marble would not have been unfairly prejudiced by the admission of the impeachment evidence, as the jury was already aware that Plaintiff was not paying his own medical bills.

Marble's testimony that his employer controlled his treatment, and his suggestion that his treating physicians were biased, was untrue. The circuit court committed reversible error in denying Deviney the opportunity to impeach Marble's testimony through evidence of his wife's insurance. This error warrants a new trial.

CONCLUSION

For the reasons stated above, Deviney respectfully requests that this Court reverse the jury's verdict and remand this case for a new trial. Deviney further requests all other relief to which it may be entitled.

This the 12th day of November, 2010.

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CERTIFICATE OF SERVICE

I, the undersigned, one of the attorneys for Appellant, do hereby certify that I have this day served a true and correct copy of the above and foregoing document by sending the same by United States Mail with postage fully prepaid to the following:

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Hon. Tomie T. Green
Circuit Court Judge
Post Office Box 327
Jackson, MS 39205
Trial Court Judge

This, the 12th day of November, 2010.

Mary Clay W. Morgan