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

BRIEF OF APPELLANT DEVINEY CONSTRUCTION COMPANY

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ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

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

1. David Scott Marble, Plaintiff/Appellee;
2. James Ashley Ogden, James W. Smith, Jr., and the law firm of Ogden & Associates, PLLC, counsel for Plaintiff/Appellee;
3. Deviney Construction Company, Inc., Defendant/Appellant ("Deviney");
4. W. Wayne Drinkwater, Justin J. Peterson, and the law firm of Bradley Arant Boult Cummings, LLP, counsel for Deviney;
5. W. Hugh Gillon, IV, and the law firm of Upshaw, Williams, Biggers, Beckham & Riddick, LLP, counsel for Deviney;

So certified, this the 26th day of July, 2010.

Justin J. Peterson
One of the Attorneys for Deviney Construction Company, Inc.

STATEMENT REGARDING ORAL ARGUMENT

Deviney requests oral argument. This appeal involves important questions relating to the admissibility of expert testimony, including the effect of untimely disclosure. The appeal also involves important questions concerning, among other things, the bounds of a trial court's discretion with respect to control of trial proceedings and the order of presentation of witnesses, and the right of a defendant to fully and fairly respond to evidence presented against him. This appeal also presents fundamental questions regarding apportionment of fault and application of the "collateral source" rule.

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INTRODUCTION

A Hinds County jury awarded Plaintiff David Scott Marble $2.5 million based on his claim that Deviney was negligent while performing digging work for BellSouth Corporation ("BellSouth") at the worksite of his employer, Time Warner Cable ("Time Warner"). Marble's claim is that Deviney's negligence was the *sole* cause of his workplace accident, which resulted in lower back and neck problems that rendered him permanently and completely unable to work. The jury reached its verdict despite Marble's pre-accident medical history, which revealed extensive back and neck problems; despite the utter lack of medical evidence supporting Marble's asserted inability to work; and despite the fact that two *other* entities – Time Warner and BellSouth – both played roles with respect to the accident.

The trial was one of misdirection. Critical evidentiary and procedural errors distracted the jury from Marble's failures of proof and deprived Deviney of a fair trial. The trial became infected with error from the outset, when the Circuit Court ruled that no witness could be re-called to the stand, even if called adversely. The effect of this order-of-proof procedure – which apparently applies to *all* cases tried in Judge Green's courtroom – was to force Deviney to present its defense before Marble had made his own case. This deprived Deviney of any meaningful ability to respond to Marble's claims.

The Circuit Court then permitted Marble's expert testimony on damages without ever assessing its reliability, relevance, or foundation. Under this let-it-all-in approach, Marble's key damages expert was allowed to establish that his future-lost-income damages totaled up to $2.6 million, even though that figure was belatedly disclosed and lacked any adequate support. The expert was permitted to assume that, but for the accident, Marble would have worked full-time up until the day he died; and that, because of the accident, he would be completely unable to work for the rest of his life. The former assumption lacked any scientific or statistical

foundation. The latter assumption, which was based solely on Marble's say-so, was directly contrary to his treating physicians, both of whom testified that he was physically capable of working. Even the physician retained by Marble for trial conceded that he was capable of performing work activities.

Although the testimony of his treating physicians was critical, Marble was allowed to falsely – and freely – undermine the testimony by suggesting non-existent bias. The Circuit Court rejected Deviney's attempt to impeach Marble's falsehoods through an improper application of the "collateral source" rule.

These improper rulings enabled Marble to bolster his otherworldly claim for damages. But there is more. The Circuit Court's jury instruction rulings erroneously limited apportionment of fault only between Marble and Deviney, thus ignoring the involvement of Time Warner and BellSouth at the accident site. But for Time Warner's mistakenly cutting a BellSouth telephone line, it would have retained complete control of the site, and Deviney would have never been involved. Moreover, despite Time Warner's duty to provide Marble with a safe place to work, there was no evidence that it had conducted any safety check of the site before Marble's arrival. On the other hand, there *was* evidence that BellSouth performed work at the site after Deviney completed its work. Nevertheless, the jury was prevented from even considering the actions or inactions of Time Warner or BellSouth.

Whether considered individually or collectively, the Circuit Court's errors warrant a new trial.

STATEMENT OF THE ISSUES

The issues presented by this appeal are as follows:

1. Whether the Circuit Court erred by admitting the testimony of Marble's expert economist without ever evaluating its relevance, reliability, or foundation, when that testimony was belatedly disclosed and lacked adequate support.

2. Whether the Circuit Court erred by imposing an order-of-proof procedure that mandated that no witness could be recalled to the stand, thus depriving Deviney of fairly presenting its case and responding to Marble's evidence.

3. Whether the Circuit Court erred by refusing Deviney's proffered verdict forms and related jury instruction, which would have allowed the jury both to consider Time Warner's duty to provide Marble with a safe place to work, and the apportionment of fault to Time Warner and BellSouth based on their actions and inactions at the accident site.

4. Whether the Circuit Court erred by relying on the "collateral source" rule to prevent Deviney from impeaching Marble with respect to his false testimony about a critical issue at trial.

STATEMENT OF THE CASE

I. Course Of Proceedings And Disposition In The Trial Court.

Plaintiff David Scott Marble ("Marble") filed suit against Deviney Construction Co., Inc. ("Deviney") in August 2007. Marble asserted a claim for negligence arising from a June 23, 2005 accident, which occurred while he was working for Time Warner Cable ("Time Warner"). (R. 4-8.)[1]

Before trial, Deviney filed timely pretrial motions to exclude or limit the testimony of two of Plaintiff's damages experts: Dr. Glenda Glover ("Glover"), an economist, and Nathaniel Fentress ("Fentress"), a vocational rehabilitation expert. (R. 106, 211 (Glover); R. 208-09 (Fentress).) The Circuit Court denied one of the two motions regarding Glover, (T. 11, 18), but provisionally granted the other. (T. 17.) The Court declined to rule on the motion concerning Fentress until he was on the stand. (T. 27.) Over objection, the Circuit Court ultimately allowed each expert's testimony without ever ruling on its reliability. (T. 398-400, 409-10 (Glover); T. 488 (Fentress).) These experts were thus permitted to offer unreliable opinions; compounding the error, the opinions were admitted even though they had not been disclosed until less than two weeks before trial.[2] (R. 211-22 (Glover); R. 208-09, T. 19-25 (Fentress).)

The trial spanned five days, and included the testimony of 17 witnesses. (T. 3-6, 806-07.) At the outset of trial, and over Deviney's objection, (T. 32), the Circuit Court imposed the procedure on order of proof that it apparently imposes in *all* cases, ruling that a witness called by one party could not be re-called to the stand. (T. 30, 296.)

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[1] The Clerk's papers are cited "R. ___." The trial transcript is cited "T. ___." Trial exhibits are cited "Ex. ___." Record excerpts are cited "R.E. ___."

[2] Fentress's last supplemental report was not disclosed until April 29, 2009, five days before trial. (R. 208.) Glover's supplemental report was not prepared until April 22, 2009, over a year after her initial report. (R. 110, 214.) Her opinions were supplemented yet again *after* the second day of trial. (T. 395.)

In his case-in-chief, Marble called 14 of the 17 witnesses, including calling Deviney's fact witnesses and corporate representative as adverse witnesses. (T. 274-77, 316-17.) Under the Court's rule, Deviney was forced to conduct the entirety of its examinations of these witnesses at that time. (T. 298, 326.) Over the next two days, Marble called eight more witnesses, including himself. (T. 597.) These witnesses testified to matters to which Deviney would have responded; but because of the Court's order-of-proof ruling, Deviney was unable to address this testimony by re-calling any of the prior witnesses. (T. 738-39.) Deviney was left with only three witnesses to present its case-in-chief, only one of whom was called after Marble rested.[3] (T. 807-08.)

The Circuit Court denied Deviney's motion for directed verdict. (T. 813-14.) Over objection, the Court refused Deviney's proffered verdict forms and a related jury instruction that would have allowed the jury to apportion fault to the other entities involved at the work site. (T. 854-58, 895-900, 909; R.E. 009-14.) Thus, Marble's case went to the jury solely on a theory of Deviney's negligence. (T. 924-25; *accord* 918-20.) The jury found Deviney 100% at fault, and returned a $2.5 million verdict for Marble.[4] (T. 968; R. 308.) Deviney's post-trial motion for JNOV or a new trial or remittitur was denied.[5] (R.E. 006.) This timely appeal followed. (R.E. 007-08.)

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[3] Two of Marble's witnesses testified by deposition. (T. 806-07.) After the conclusion of the live testimony of Marble's witnesses, his case-in-chief was "suspend[ed]" so that Deviney could put on two witnesses before the deposition testimony was read to the jury. (T. 739-40.)

[4] The jury initially left out the word "million" from the verdict form, but corrected the form to read "$2.5 million" after the Court pointed out the omission. (T. 969.) That amount was exactly half of what was requested by Marble's counsel in closing argument. (T. 940.)

[5] The Circuit Court denied the motion only two days after it was filed, and days before Marble filed his response. (*Compare* R. 311 *with* R. 327 *and* R. 328.)

II. Statement Of Facts.

Deviney is a Mississippi construction company. During the relevant time period, it routinely performed digging work for BellSouth Corporation ("BellSouth"), so that BellSouth could repair damaged telephone lines. (T. 300-02, 328-30.)

Marble is a Mississippi resident. In June 2005, he was 35 years old, and had been working for Time Warner for 17 years. (T. 598-99.) He worked the midnight to 9 a.m. shift, and his job primarily was to replace damaged or old cable with new cable. (T. 168-69.)

A. The County Line Road Project, And The Involvement Of Time Warner, BellSouth, And Deviney.

This dispute arises out of work performed in June 2005 in relation to a road widening project on County Line Road in Jackson/Ridgeland, Mississippi. (T. 169-70.) The project required the installation of new cable. Time Warner bored the new cable underneath the road, and dug a three-foot-square hole on the property of an adjacent apartment complex, so that the new cable running from the road could be spliced onto the old cable running from the buildings. (T. 169-71, 194-95, 199, 224.) Assuming no mistakes, this is an operation that Time Warner typically controls from start to finish. (T. 225.) This was not such an instance, however.

While Time Warner was doing its initial work, it accidentally cut a BellSouth telephone line. (T. 302-03.) BellSouth was informed, and on the morning of June 22, BellSouth called Deviney onto the scene in order to widen the hole with a back hoe so that BellSouth could repair the line. (T. 299-300, 328-30; R. 225.) Deviney routinely does such work for BellSouth, and BellSouth usually has a representative at the site to oversee the process, instructing Deviney as to the size of the hole, and when to stop digging. (T. 300-02, 329.)

Deviney employees arrived at the apartment complex property at approximately 10 or 11 a.m. that morning, and worked for three to four hours. (T. 290.) While performing its work,

Deviney unexpectedly dug up a 120-volt electrical wire that was buried approximately six inches underground. (T. 252, 261, 277-78.) After determining that the wire was not energized, Deviney contacted apartment complex personnel and was advised that the purpose of the wire – and what it ran to, if anything – was unknown. (T. 254-55, 279, 285, 305-06.) Even though the wire was "dead", Deviney covered the exposed ends of the electrical line with two pieces of PVC pipe, sticking the pipe straight down into the ground. (T. 306, 315.)

Deviney's employees left the scene at 2:00–2:30 p.m. (T. 290.) Under standard practice, Deviney cannot leave a work site until BellSouth has approved Deviney's work, at which point BellSouth enters the hole to make the telephone line repairs. (T. 301-02, 329-30.) Deviney's general manager and corporate representative testified that, based on photographic evidence from the following morning, he was confident that BellSouth had, in fact, repaired its line. (T. 331-32; Exs. P-2-A, P-2-B; *see also* T. 173-74, 182, 214, 228.)

Unbeknownst to Deviney, the electrical line that it had accidentally dug up supplied power to outside lighting at the apartment complex. Also unknown to Deviney, the lighting was on a timer that energized the line at night. (T. 237, 320.) There was nothing to place Deviney on notice of these facts.

B. Time Warner Dispatches Marble To The Scene At Night, Without First Conducting Any Inspection Of Its Work Site.

Shortly after midnight on that same night, Time Warner sent Marble and his co-worker, Vic Hollifield, to the work site. They were to enter the hole that had been dug, and splice the new cable onto the old cable. (T. 169-70, 175, 604.) Under normal circumstances, Time Warner does not conduct a safety check of a work site prior to the arrival of its night shift workers. (T. 195-96.) There was no evidence that Time Warner had done a safety check in this instance. (*Id.*)

Marble and Hollifield drove to the apartment complex separately, each in his own Time Warner bucket truck. (T. 170, 200, 676.) They arrived between 1:30 and 2:00 a.m. – *i.e.*, 11 to 12 hours after Deviney had left the scene. (*Id.*) Consistent with Deviney's standard practice, the hole had been squared off with yellow tape, and was marked by a number of orange cones. (T. 281, 677-78.)

While Marble was climbing into the hole, he was shocked by the then-energized electrical line, and fell to the bottom of the three-foot-deep hole. (T. 179-80, 606-08, 679-81.) After sitting with Hollifield for approximately 45 minutes, Marble got into his bucket truck and drove back to the Time Warner lot; Hollifield did likewise. (T. 184-85, 187-88, 684-85.)

Marble was treated and released from the hospital that night. He was cleared to return to work the next day. (T. 685-86; Ex. D-9.) After some physical therapy, Marble returned to work, working as much as 60-80 hours per week in his first month back on the job. (T. 694-95, 697-99; Ex. D-10.)

C. The Jury Awarded Marble $2.5 Million, Despite His Extensive And Related Pre-Existing Conditions, And Despite The Testimony Of His Treating Physicians, Which Established That He Was Physically Capable Of Working.

At trial, Marble sought to be compensated for lower back and neck injuries that allegedly resulted from the accident. He claimed that the accident rendered him completely unable to perform any type of work for the rest of his life. (*E.g.*, T. 614, 659, 703.) Marble faced a number of significant hurdles regarding these damages claims.

First, his pre-accident medical history revealed extensive back and neck problems. From 1989 to 2004, he had been diagnosed with multiple lower back injuries. Related X-rays revealed that prior to the accident, Marble had the very same back condition that continued to exist after the accident. (*See, e.g.*, T. 662-65, 673.) In 1994, Marble had undergone surgery on his neck;

his medical records showed that he continued to experience neck problems after that surgery, and before the accident. (T. 614-15, 669-71.)

Marble's claims also ran counter to the opinions of his own treating physicians, Dr. David Collipp and Dr. Michael Winkelmann, each of whom testified at trial. Dr. Collipp was the first doctor to treat Marble in relation to the accident; he began treating him in July 2005. (T. 745-46.) Dr. Collipp testified that Marble's first complaint of neck pain did not occur until well *after* the accident, in October 2005, when Marble reportedly suffered an injury at home. (T. 700, 754-55.) It was this home incident, not the workplace accident, that Dr. Collipp believed was the genesis of Marble's neck problem. (T. 757-59, 763-65, 781.) Dr. Collipp concluded that Marble had reached maximum medical improvement from the workplace accident by October 2005. (*Id.*) Had it not been for the non-accident related neck problem, Dr. Collipp believed that Marble could have returned to full-time work by that point. (T. 764-65.)

Marble ultimately had neck surgery in February 2006. (T. 723.) Nine months later, Dr. Winkelmann, Marble's then-primary treating physician, concluded that Marble was capable of performing medium-level work activities. (Ex. P-15, at 33-38; T. 724-26.) Dr. Winkelmann testified that that he knew of *nothing* that would have prevented Marble from performing medium-duty work, which includes manual jobs requiring lifting of approximately 50 pounds. (Ex. P-15, at 42, 45-47.)

Thus, both of Marble's testifying treating physicians opined that he was physically capable of working after the accident. Even the physician retained by Marble for trial conceded that Marble was capable of performing light-level work activities.[6] (T. 584-85.)

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[6] Deviney's "vocational" expert testified that medium-level work activities encompass about 30% of all jobs; that sedentary and light-level work activities encompass approximately 60% of all jobs; and that Marble could make approximately $33,000 per year given the restrictions of light-duty work. (T. 790, 793.)

Marble attempted to overcome these hurdles in multiple ways. In an apparent effort to minimize the testimony of his treating physicians about his ability to return to work, Marble testified that his employer, Time Warner, hand-picked and paid for all of his doctors, sending him only where Time Warner wanted him to go; and that his own financial position meant that he had no choice to see other doctors. (T. 611-12, 614.) Deviney's attempt to impeach this testimony was limited to a proffer of evidence establishing, among other things, that since 2005, Marble's medical bills had been paid *not* by Time Warner, but by private health insurance. (T. 636-38, 653-54.) The Circuit Court did not permit the jury to hear this evidence. (T. 654-57.) Thus, Marble's suggestion to the jury that he had been forced to use Time Warner's chosen – and by implication, biased – physicians went unrebutted.

In addition, Marble relied upon his damages experts, who offered crucial testimony over Deviney's objections. Nathaniel Fentress, Marble's vocational rehabilitation expert, testified that the present value of Marble's future medical costs from the accident was $690,212.66. (T. 493-94.) Significantly, Fentress also testified that, given Marble's various medications and chronic neck pain, Marble was "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".[7] (T. 495-96; *see also* T. 537-38, 541.) In other words, Fentress opined that, in the future, Marble would be unable to hold a full-time, 40-hour-per-week job. (T. 494.) No actual diagnosis supported this opinion: Fentress is not a medical doctor. He

[7] This opinion, disclosed a mere five days before trial, was an about-face from Fentress's initial opinions, which had been that, as of February 2008, Marble's prognosis of regaining gainful employment was "fair to good". (T. 525-26.) Fentress attributed the drastic change to his understanding that Marble would need to continue taking pain medication indefinitely; and the fact that, four years after the workplace injury, Marble had still not found a job. (T. 526-27, 537.) Although Fentress testified that a prudent job seeker actively applies for 10 to 15 jobs per week, he conceded that Marble had not met that standard, and that Marble had provided him with no details about his job search efforts. (T. 529.) Fentress appeared to recognize that Marble's efforts did not constitute "due diligence as far as searching for alternative employment". (T. 537.)

neither made nor was qualified to make any medical diagnosis of Marble that would have supported his testimony. Rather, he specifically *agreed* with Dr. Winkelmann's testimony that Marble was capable of performing medium-level work activities. (T. 505, 539.) In any event, Fentress did *not* opine that Marble would never work again. He conceded that Marble would "probably make a little money". (T. 537-38.)

Over Deviney's objections, Marble also presented the testimony of his expert economist Glenda Glover, Ph.D. Dr. Glover set the ceiling for Marble's damages for future lost income at $2.6 million. (T. 426-27, 436.) She assumed that, but for the accident, Marble would have worked full-time until the age of 78, which she determined to be his life expectancy. (T. 426-27, 436.) Her calculations were also based on an assumption that even Fentress refrained from making: that Marble would be *completely* unable to work in the future, and thus, he would *never* earn another dollar from working for the rest of his life. (T. 448-49.)

Relying on this testimony, and after approximately an hour of deliberations, the jury awarded Marble $2.5 million. (T. 968; R. 308.)

SUMMARY OF THE ARGUMENT

Multiple errors by the Circuit Court warrant a new trial either independently or collectively. *First*, the testimony of Dr. Glover, Plaintiff's key damages expert, was inadmissible under Mississippi Rule of Evidence 702 and well-settled case law. Dr. Glover's opinion – that Marble would have up to $2.6 million in lost income – was based on two flawed and unsupported assumptions: (1) that, but for his workplace accident, Marble would have worked full-time up until the day he died; and (2) that, because of the accident, he would be completely unable to work for the rest of his life. The former assumption, which was inconsistent with accepted publicly-available data and which Dr. Glover admittedly could not deem probable, had no basis in Marble's individual circumstances; it was based only upon vague and anecdotal

statements lacking any scientific or statistical foundation. The latter assumption was based solely upon the say-so of Marble and his counsel. It had no medical foundation, and was directly contrary to the testimony of Marble's testifying treating physicians, both of whom established that Marble was physically capable of working; even Marble's own vocational expert conceded that Marble would make some income in the future.

In addition to these defects, Dr. Glover's opinion was first revealed less than two weeks before trial, and amended two days *after* trial began. Nevertheless, the Circuit Court admitted it over Deviney's objection without ever evaluating its relevancy, reliability, and foundation; although Judge Green acknowledged that she could not discern the basis for the opinion, she ruled that "I'll have to hear that in conjunction with whatever else comes in."

Second, the Circuit Court's order-of-proof procedure, which mandated that no witnesses could be recalled to the stand, deprived Deviney of fairly presenting its case and adequately responding to Marble's evidence. Over objection, Deviney was forced to conduct the entirety of the examinations of its only fact witnesses and corporate representatives, who were called adversely, during Marble's case-in-chief. The Circuit Court's ruling was contrary to Mississippi case law and fundamental fairness, which required that Deviney be permitted to recall its own witnesses to respond to Marble's evidence – particularly the *eight* plaintiff's witnesses who followed its adversely-called witnesses – and to present its case in a manner that it, not Marble, deemed appropriate.

Third, the Circuit Court erroneously refused to allow the jury to even consider apportioning responsibility for Marble's claimed injuries to Time Warner or BellSouth, despite their roles with respect to his workplace accident. The chain of events leading to the accident began when Time Warner, Marble's employer, accidentally cut a BellSouth telephone line; Time Warner would have otherwise retained complete control over the work site. The experts for *both*

Marble and Deviney agreed that an employer has a duty to provide a safe work site for its employees, which includes making reasonable inspections. But although Time Warner dispatched Marble to the scene in the midnight hour, there was no evidence that it had conducted any safety check of the work site in the 11 to 12 hours between the conclusion of Deviney's work and Marble's arrival.

On the other hand, there *was* evidence of BellSouth's involvement at the work site during those intervening hours. Deviney generally cannot leave a work site until BellSouth approves their work, at which point BellSouth fixes its line. In this instance, Deviney's corporate representative was confident that BellSouth did, in fact, enter the hole and fix its telephone line after Deviney completed its work. In the light of this evidence, Deviney's refused instruction and verdict forms, which were consistent with Mississippi statutory and case law, should have been given.

Fourth, Marble was improperly allowed to bolster his damages claim by falsely suggesting bias on the part of his testifying treating physicians, so as to undermine their testimony that he was physically capable of working. Marble suggested that his financial position limited him to only doctors paid for by – and thus biased in favor of – Time Warner. Through a proffer, Deviney revealed this testimony to be false: since 2005, Marble's doctors were paid *not* by Time Warner, but by other sources including private health insurance. The jury never heard this evidence, however; the Court erroneously concluded that the "collateral source" rule rendered it inadmissible. But Deviney sought to offer this evidence *not* to lessen plaintiff's damages, but to address the limited issue of physician bias that Marble injected into the case. The collateral source rule was thus inapplicable. *Robinson Property Group, L.P. v. Mitchell*, 7 So. 3d 240, 244 (Miss. 2009).

ARGUMENT

I. The Trial Court Reversibly Erred In Admitting The Unsupported, Unreliable, And Untimely Disclosed Testimony of Plaintiff's Economist, Dr. Glenda Glover.

The centerpiece of Marble's damages testimony was Dr. Glover's testimony that the present cash value of his future lost income was $2.6 million, based on the assumption that Marble would never work again.

Dr. Glover's opinion had undergone significant revision before trial. In her initial report, she calculated Marble's lost income as $1,677,235.00, based on a calculated work-life expectancy until age 65. (R. 117; T. 430.) Less than two weeks before trial, however, she amended her report in a fundamental way: she now calculated Marble's lost income assuming that he would continue full-time employment until the age of 85. (R. 220-22.) This assumed future employment not only was 20 years past her earlier-calculated and previously-disclosed work-life expectancy, it was seven years longer than Marble's 78-year *life* expectancy.

Faced with his 11th-hour revision, Deviney filed a timely pretrial motion to exclude or limit Dr. Glover from going beyond Marble's work-life expectancy in this manner. (R. 211-12.) The Circuit Court itself recognized "that's generally not what has been accepted in the courts," and that if this testimony was admitted, it would be "the first time" that the court had allowed an expert to use an estimate that went "beyond the age" [sic] of the Plaintiff. (T. 13.) The Court thus provisionally granted Deviney's motion, holding that unless and until Marble could provide statistical data that supported Dr. Glover's belated change in opinion, her revised testimony would not be allowed. (T. 17.)

By the third day of trial, Dr. Glover had revised her opinion yet again. While no longer assuming that Marble would work until age 85, she nevertheless still assumed that he would work continuously, and on a full-time basis, until the very end of his 78-year life expectancy. In

other words, Dr. Glover assumed that Marble would work full time for 13 years beyond her initially-calculated 65-year work-life expectancy. (T. 395.) Deviney thus renewed its objection. (T. 396, 401-02.)

The Circuit Court permitted Dr. Glover's testimony, over objection, even though it recognized that that those still working at age 78 are "not your average population". (T. 398-400, 409-10.) Contrary to the Court's earlier ruling, however, Marble had submitted no statistical support for equating Marble's *work-life* expectancy with his *life* expectancy. Nor did the Circuit Court require any legal or factual justification before permitting Dr. Glover's revised testimony. Ultimately, Dr. Glover was allowed to testify to damages calculations and assumptions that were first disclosed to Deviney only *after* two full days of trial.

Dr. Glover thus was allowed to testify that, although the present value of Marble's future lost wages would total $1,714,685 through age 65, Marble "could work his full [78-year] life expectancy if he chose to", and if he did, the present value of his lost wages would total $2,653,164 – *i.e.*, almost $1 million more. (T. 426-27, 436; *see also* T. 446 ("He can work as long as he chooses between that 65 and 78 period. That's my opinion.").) In addition, the Circuit Court overruled Deviney's motion in limine and permitted Dr. Glover to testify based on calculations that assumed Marble would be completely incapable of working *at all* in the future. (R. 106-08; T. 11, 18, 449-50.) The admission of this testimony constituted reversible error.

A. The Trial Court Failed To Perform Its Gatekeeper Duty As Required By Rule 702 and *Daubert*.

This Court has made clear that bad or speculative science set forth by an expert should be rejected. *E.g.*, *Hill v. Mills*, 26 So. 3d 322, 331 (Miss. 2010) (characterizing "pre-*Daubert* days" as those "when trials were tainted by unreliable junk science purchased from professional witnesses"); *see also Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 593-94 (1993). Thus, trial

courts must determine whether expert testimony is admissible under Mississippi Rule of Evidence 702, which exists to avoid confusing juries with expert testimony that has an insufficient scientific basis and is thus unreliable.

Juries can easily be impressed and misled by expert credentials. *E.g.*, *Edmonds v. State*, 955 So. 2d 787, 792 (Miss. 2007) ("[J]uries 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"); *id.* (noting that juries often place greater weight on expert testimony than that of lay witnesses); *Watts v. Radiator Specialty*, 990 So. 2d 143, 146-47 (Miss. 2008). Rule 702 requires the trial court to serve as a gatekeeper in order to counteract this risk. *See Miss. Transp. Comm'n v. McLemore*, 863 So. 2d 31, 40 (Miss. 2003) (hereinafter "*McLemore*"). The purpose of this gatekeeping responsibility "is to ensure the reliability and relevancy of expert testimony". *Hill v. Mills*, 26 So. 3d at 330 (citing *Kumho Tire v. Carmichael*, 526 U.S. 137, 152 (1999)).

The Circuit Court thus was required to evaluate the proffered testimony from Marble's experts under Rule 702, to ensure that it was "based on sufficient facts or data", was "the product of reliable principles and methods", and followed from the application of those principles and methods "reliably to the facts of the case".[8] Miss. R. Evid. 702; *McLemore*, 863 So. 2d at 38.

A trial court cannot "admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *McLemore*, 863 So. 2d at 38 (quoting *Kumho Tire*, 526 U.S. at 157) (internal quotation marks omitted). Instead, it must discern any "analytical gap" between the

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[8] In evaluating reliability, the trial court must examine factors including:

> whether the theory or technique can be and has been tested; whether it has been subject to peer review and publication; whether, in respect to a particular technique, there is a high known or potential rate of error; whether there are standards controlling the technique's operation; and whether the theory enjoys general acceptance within a relevant scientific community.

McLemore, 863 So. 2d at 37.

scientific data and the expert's opinion. *Watts*, 990 So. 2d at 149. "Whether or not the opinion of an expert is based on, and supported by, sufficient facts or evidence to sustain it" is a "question of law for the court" – both at trial and on appeal. *Gulf Ins. Co. v. Provine*, 321 So. 2d 311, 314 (Miss. 1975); *see also, e.g.*, *Bullock v. Lott*, 964 So. 2d 1119, 1132 (Miss. 2007) (trial court abused its discretion in allowing expert to testify to facts not supported by the evidence).

Despite the Circuit Court's duty to assess whether Dr. Glover's proffered testimony met Rule 702's requirements, the Court admitted it without conducting *any* analysis of the relevancy or reliability of her opinions, or whether those opinions had a sufficient scientific or factual basis. Remarkably, although the Court acknowledged that Glover's opinion must have an adequate basis, it was the *absence* of foundation that motivated the Court to admit her testimony:

> I can't say that I'm not going to let her give that testimony if she has laid the basis. *And the reason I can't make a decision is because I don't know of any studies that indicate that people work full time at a job the same as 77, 78 ... as they did at 35, 36.* And for both of you, I don't plan to be sitting up here doing a job at that age.
>
> * * *
>
> The 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.*

(T. 400, 409 (emphases added).)

Thus, rather than attempting to validate the basis for Dr. Glover's opinion, the Circuit Court chose to simply allow it without any basis, subject to the jury's "common sense".[9] (T. 400.) Similarly, the Court never analyzed the foundation for Dr. Glover's challenged assumption that Marble would never earn another dollar from employment before permitting her opinion:

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[9] The Court itself appeared to question its ruling, stating that it "d[id]n't know whether that [ruling] gives [counsel] any guidance", (T. 400), and that "it probably didn't make much sense". (T. 401.)

"And I can't tell just from the deposition or the report the basis. *I'll have to hear that in conjunction with whatever else comes in.*" (T.11 (emphasis added).)

Such a practice has long been condemned. *E.g.*, *In re Air Crash Disaster at New Orleans, La.*, 795 F.2d 1230, 1234 (5th Cir. 1986) (stating that expert-admissibility decisions will be reviewed "with a sharp eye, particularly in those instances, hopefully few, where the record makes it evident that the decision to receive expert testimony was simply tossed off to the jury under a 'let it all in' philosophy").

The Circuit Court's complete failure to evaluate Glover's testimony, and to apply the proper legal standards to that review, mandates a *de novo* review of its ruling. *See 3M Co. v. Johnson*, 895 So. 2d 151, 160 (Miss. 2005) ("If the trial court has exercised its discretionary authority against a substantial misperception of the correct legal standards, our customary deference to the trial court is pretermitted, for the error has become one of law." (internal quotation marks omitted)); *Chapman v. Maytag Corp.*, 297 F.3d 682, 686 (7th Cir. 2002); *Mukhatar v. Cal. State Univ.*, 299 F.3d 1053, 1066 (9th Cir. 2002); *Goebel v. Denver & Rio Grande W. R.R. Co.*, 215 F.3d 1083, 1088 (10th Cir. 2000) (reviewing de novo where "[t]here is not a single explicit statement on the record to indicate that the district court ever conducted any form of *Daubert* analysis whatsoever"). But regardless of the legal standard, it was error to admit this testimony.

B. Glover's Opinion Was Unsupported and Unreliable.

Had the Circuit Court properly discharged its role as gatekeeper, Dr. Glover would never have been permitted to testify that Marble "could" have worked until the day he died. Nor could she have testified to a damages calculation that was based on an assumption that Marble would have no earning capacity for the rest of his life. This is because it has long been a requirement under Mississippi law – even before Rule 702 was revised in the light of *Daubert* – that the

foundational facts or evidence upon which an expert bases her opinion must afford a "reasonably accurate basis" for her conclusion, and "reasonably accurate conclusions as distinguished from mere guess or conjecture". *APAC-Mississippi v. Goodman*, 803 So. 2d 1177, 1185 (Miss. 2002) (internal quotation marks omitted); *see also, e.g., Janssen Pharmaceutica v. Bailey*, 878 So. 2d 31, 60 (Miss. 2004). Dr. Glover's testimony failed these requirements and was thus unreliable.

1. There Was No Adequate Basis For Glover's Assumption That Marble Would Have Worked Up Until His Projected Date Of Death.

Dr. Glover typically bases her determination of a person's work-life expectancy on economic information and federal government tables. (T. 420.) But although she used such a table to calculate Marble's life expectancy, and perhaps even initially to estimate that he would work until age 65, (R. 117), her mid-trial revised estimates about his 78-year work-life expectancy had no such support. (T. 435-37.) In fact, she recognized that the most recent publicly-available tables from economists and the United States Department of Labor set forth a work-life expectancy for Marble that would conclude at the age of 60. (T. 443-44.) Had Dr. Glover used a work-life expectancy of 60, her damages calculation would have been no more than $1.4 million pursuant to her report, (R. 221), instead of the $2.6 million figure she was permitted to present to the jury without foundation.

There was no indication that Dr. Glover's opinion – or the work-life-expectancy assumption upon which it relied – had been tested, subjected to peer review or publication, or analyzed for potential rate of error; and there was no valid showing that her assumption enjoyed general acceptance within the economic community. *See McLemore*, 863 So. 2d at 37.

Instead, her "foundation" for her opinion that Marble could reasonably be expected to work until he died consisted solely of: (1) an unspecified "growing body of ... economic literature that just says that people are living longer, and they're working longer", (T. 425); (2) a

conversation with one economist about their observation that "people are just living longer", (T. 431); and (3) her own observations that "[m]any" Wal-Mart greeters are over 65, and about one-third of the faculty at her college are "probably" over 65 as well. (T. 427.)

These vague, anecdotal statements are precisely the sort of wholly unreliable bases that Rule 702 was designed to exclude. *See, e.g., supra* at n.8; *Hill v. Mills*, 26 So. 3d at 329 (to be admissible, expert testimony must proceed from "what is known, and the expert must have knowledge that is more than subjective or unsupported speculation"). If expert testimony that is wholly inconsistent with accepted publicly-available data is to be admitted based on such comments, there will be no limits on what experts will be permitted to say in Mississippi courts.

Nor did Dr. Glover's opinion have any basis in Marble's individual circumstances. Marble was neither a Wal-Mart greeter nor a college professor; he offered no testimony as to how long he would have worked but for the accident.[10] Given these foundational problems, it is not surprising that Dr. Glover conceded that she could not opine as to how long Marble – or any other particular person – would work: "I can't say how long a person is actually going to work, when they're going to retire. It's based on them." (T. 427.) And she was unable to say that it was *probable* – either based on accepted statistical compilations or otherwise – that Marble would, in fact, work until the end of his life. (T. 445 ("I can't answer a question like that.").)

Dr. Glover's opinion was thus in direct violation of Mississippi law, which not only requires a sufficient factual foundation, but also provides that when an expert's opinion "is articulated in a way that does not make the opinion probable, *the jury cannot use that information to make a decision.*" *Kidd v. McRae's Stores P'ship*, 951 So. 2d 622, 626 (Miss. Ct. App. 2007) (emphasis added) (citing *Catchings v. State*, 684 So. 2d 591, 597 (Miss. 1996)); *see*

[10] Fentress described Marble's Time Warner job as "labor intensive". (T. 495.) If anything, Marble's extensive history of pre-existing neck and back problems suggests that he would have worked at that job *less* than the statistical average, not 13 years more.

also id. ("Failure to properly qualify an expert opinion typically occurs in testimony that is speculative, using phrases such as 'probability,' 'possibility,' or even 'strong possibility.'" (quoting *Catchings*, 684 So. 2d at 597)); *cf. Int'l Paper Co. v. Townsend*, 961 So. 2d 741, 752-53 (Miss. Ct. App. 2007) (en banc) (expert's opinion that condition of woodyard "could cause some shifting" was insufficient to sustain jury verdict on issue because it was "only evidence of a possibility" as opposed to a probability).

These probability and factual-sufficiency requirements apply with no less force when the issue is a plaintiff's future earnings. *APAC-Mississippi*, 803 So. 2d at 1184-85 (expert's loss-of-future-income testimony was erroneously admitted because it relied on attorney's "estimate" of plaintiff's past wages and, therefore, did not rely on "reasonably accurate" data; reversing and remanding for new trial); *see also, e.g., Quinones-Pacheco v. Am. Airlines, Inc.*, 979 F.2d 1, 6-7 (1st Cir. 1992) (to fulfill burden of proving claimed loss of earning capacity, plaintiff "must offer evidence from which a jury may reasonable determine the annualized stream of income that the plaintiff, uninjured, would *probably* have earned ...." (emphasis added)); *Gumbs v. Int'l Harvester*, 718 F.2d 88, 98 (3d Cir. 1983) ("[An] expert's testimony [about future earnings loss] must be accompanied by a sufficient factual foundation before it can be submitted to the jury.").

Thus, courts have recognized that, absent evidence that *the particular plaintiff* is likely to live and work a longer, or shorter, period than the statistical average, the determination of work-life expectancy "should be based upon the statistical average." *Madore v. Ingram Tank Ships, Inc.*, 732 F.2d 475, 478 (5th Cir. 1984). Where there is no plaintiff-specific evidence, it is error to admit expert testimony that relies upon a higher figure than the statistical average. *Id.* (error to base future-earnings award on work-life expectancy that exceeded the number set forth in Department of Labor tables by five years); *see also Gumbs*, 718 F.2d at 98 (error to admit expert testimony on future earnings based on plaintiff's remaining *life* expectancy, rather than

remaining *work-life* expectancy); *Muckleroy v. OPI Int'l, Inc.*, 42 F.3d 641, 1994 WL 708830, at *1 (5th Cir. 1994) (unpublished) (clear error in accepting expert testimony that plaintiff's work-life expectancy was 65 years, rather than the 62 years reflected in Department of Labor tables).

Dr. Glover's opinion had an insufficient factual foundation and an insufficient scientific basis. It presented no more than an unsupported possibility, and thus it was far too speculative and unreliable to be presented to the jury. Stated another way, there was a gaping "analytical gap" between Dr. Glover's opinions and the known science. *General Elec. Co. v. Jones*, 522 U.S. 136, 146 (1997); *Watts*, 990 So. 2d at 150. Because Dr. Glover's testimony was based on her own unsupported assumptions, it should not have been allowed.

2. There Was No Adequate Basis For Glover's Assumption That Marble Would Never Again Earn *Any* Income From Working.

The admission of Dr. Glover's testimony was erroneous for an independent reason: her calculations assumed, without foundation, that Marble would be unable to generate *any* income from work in the future.

"[L]oss of earning capacity is an economic concept based upon a *medical* foundation ...." *Quinones-Pacheco*, 979 F.2d at 6 (emphasis added). But the basis for Dr. Glover's assumption did not come from Marble's treating physicians, both of whom testified that Marble was physically capable of working. Nor was her assumption based upon the testimony of Marble's vocational rehabilitation expert, Nathaniel Fentress. Although Fentress testified that Marble was incapable of being "substantially gainfully employed" (T. 537-38, 541), he defined the term to mean that Marble would be prevented from working every day, for a full 40-hour week. (*Id.*; *see*

also T. 494-95.) He did *not* opine that Marble would generate *no* income in the future; in fact, he recognized that Marble would "probably make a little money."[11] (T. 537-38.)

Dr. Glover admitted that the basis for her assumption consisted solely of her conversations with Marble and his attorney. (T. 450 ("[I]f you're asking me if I did a background investigation, no, I didn't. I just checked with [Marble] and [his counsel]."); *see also* R. 106.) Her investigation went no further.[12] Her testimony thus had no legally sufficient factual foundation as a matter of Mississippi law. As this Court has held, it is error for a trial court to admit an expert's loss-of-future-income testimony when it is based upon the unverified assertions of the plaintiff's attorney; such assertions cannot provide a "reasonably accurate basis" for the expert's testimony, and the testimony is thus unreliable. *See APAC-Mississippi*, 803 So. 2d at 1184-85; *cf. Giannaris v. Giannaris*, 960 So. 2d 462, 470-71 (Miss. 2007) (where expert's opinions were "derived from unrecorded sessions with [minor child] without independent verification of the truthfulness *vel non* of the allegations", the opinions lacked sufficient reliability under Rule 702, as they were neither "based upon sufficient facts or data" nor "the product of reliable principles and methods").

Just as opinion evidence cannot be based only upon the *ipse dixit* of the expert, neither can it be based solely upon the *ipse dixit* of the *plaintiff*. *APAC-Mississippi*, 803 So. 2d at 1184-

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[11] In any event, Fentress lacks any qualifications to opine on Marble's physical ability to perform work in the future. Fentress is not a medical doctor; he has not purported to diagnose Marble, and his views on Marble's future physical capabilities cannot support his testimony. In fact, Fentress *agreed* with the testimony of Marble's treating physician that Marble was physically capable of performing medium-duty work.

[12] In explaining her investigation, Dr. Glover stated:

> My role as an economist was to determine whether or not was he [sic] disabled and could not work. And once I ascertained that was the case, I didn't ask to meet with the doctors or anything like that. That was beyond the scope of my job as an economist.

(T. 450.)

85; *see also Benjamin v. Peter's Farm Condominium Owners Ass'n*, 820 F.2d 640, 642-43 (3d Cir. 1987) (where expert relied solely on plaintiff's personal assessment of his ability to re-enter the work force in assuming that he would make only $10,000 a year as a result of the injuries he sustained, expert's opinion lacked "sufficient factual predicates" and was a "castle made of sand"; reversing and remanding). This is particularly so where, as here, the assumption in question is contradicted by the plaintiff's treating physicians.[13] *Cf. Quinones-Pacheco*, 979 F.2d at 6-7 (exclusion of loss-of-income expert's testimony was proper where assumption that plaintiff suffered from a permanent, total disability was unsupported by the record).

This Court has recognized that, absent a total permanent disability, every person has *some* level of earning capacity. *See Walters v. Gilbert*, 158 So. 2d 43 (Miss. 1963) ("[A]ny person who is not a hopeless cripple or permanently helpless has some earning capacity."). Dr. Glover ignored this principle, based solely upon the say-so of Marble and his representative. The admission of her testimony was erroneous.

C. The Untimely Disclosure Of Glover's Opinions Rendered Them Inadmissible.

Dr. Glover's testimony also should have been excluded because Marble did not timely disclose it. Deviney first learned of Dr. Glover's ultimate opinion after the second day of trial.[14] Regarding this issue, Mississippi law is clear: if expert testimony is not timely disclosed, its admission is error. *Hartel v. Pruett*, 998 So. 2d 979, 984-86 (Miss. 2008); *Banks v. Hill*, 978 So. 2d 663, 665-67 (Miss. 2008); *Coltharp v. Carnesale*, 733 So. 2d 780, 786 (Miss. 1999); *Broadhead v. Bonita Lakes Mall, L.P.*, 702 So. 2d 92, 102-03 (Miss. 1997); *Square D. Co. v.*

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[13] Along that line, this Court has repeatedly held that conclusory and self-serving statements that are "unsupported by material fact" are an insufficient basis for summary judgment. *E.g., Dalton v. Cellular South, Inc.*, 20 So. 3d 1227, 1233-34 (Miss. 2009). The impact of such factually-unsupported statements is no different when evaluating the basis for an expert opinion.

[14] Fentress's opinion on Marble's complete inability to hold a full time job suffers from this same defect; it was not disclosed until five days before trial.

Edwards, 419 So. 2d 1327, 1329 (Miss. 1982); *Int'l Paper Co. v. Townsend*, 961 So. 2d 741, 755-57 (Miss. Ct. App. 2007). Even a continuance cannot cure a failure to timely disclose expert information. *E.g.*, *Huff v. Polk*, 408 So. 2d 1368, 1369-72 (Miss. 1982). The proper remedy is to exclude the testimony. *Id.*; *see also Boyd v. Lynch*, 493 So. 2d 1315, 1320 (Miss. 1986).

Here, not only was Dr. Glover's ultimate testimony not revealed in advance of trial, Deviney had specifically sought *and obtained* a pre-trial ruling limiting that testimony. Specifically, the Circuit Court had *granted* Deviney's motion in limine, ruling that it would not permit any testimony by Dr. Glover on Marble's future lost income that relied on data other than established work-life statistics:

> This Court is not prepared to merely go out to an arbitrary year of 85. The Court will at this time grant the motion if all the supplemental report does is extend to 85. I'll grant the motion *until such time as you provide me some statistical data* other than just the case law *that is reliable by which this Court will accept the extension from the work life table* up until the age of 85.

(T. 17 (emphases added).)

This ruling logically also excluded unsupported testimony that Marble would work up until *another* arbitrary age – *i.e.*, for his entire life expectancy through age 78. Deviney was entitled to rely on the Court's preliminary ruling. To allow Marble to present yet another set of previously-undisclosed and unsupported calculations midway through trial simply makes a mockery of the notice requirements of Mississippi law, and ignores the trial court's duty to prohibit "trial by ambush". *E.g.*, *City of Jackson v. Internal Engine Parts Group, Inc.*, 903 So. 2d 60, 65 (Miss. 2005) (trial courts enforce discovery rules to "prevent trial by ambush") (citations omitted).

D. Glover's Opinion Led To An Excessive Damages Award.

The prejudice to Deviney from the admission of Dr. Glover's unsupported, unreliable, and untimely opinions is obvious. After hearing Dr. Glover's expert credentials, the jury heard her testify to $2.6 million as an awardable level of damages to Marble. In closing, Marble's counsel repeatedly referenced this figure, stating that it was one that he "prefer[red]". (T. 933-34, 940.) He further characterized Glover's testimony as "very important", and stated:

> The world we live in now requires that people work till they die. It requires us because of health abilities and because of the environment that we have and because of things as simple as electricity and air conditioning that let's [sic] us live practically forever.

(T. 933-34.)

Marble's counsel relied heavily on the $2.6 million figure – approximately four times the only other itemized component of Marble's damages – in his final argument. (T. 940.) After deliberating for about an hour, the jury returned a verdict for $2.5 million. It is obvious that the jury was influenced by Glover's improperly-admitted testimony in reaching its excessive damages award.

The Circuit Court's error warrants a new trial. *See, e.g., Bailey*, 878 So. 2d at 61 (erroneous admission of expert testimony that "failed to address and account for ... innumerable preexisting conditions and other causative factors" and created a "'substantial basis' to believe that the damages awarded by the jury were based entirely on passion and prejudice"; this issue alone merited a new trial); *Bullock*, 964 So. 2d at 1133 (new trial warranted "so as not to sanction an unconscionable injustice"; errors included improper admission of expert testimony beyond scope of witness's expertise and admission of expert opinions based "on purported facts which are unquestionably not found in the record"); *accord Benjamin*, 820 F.2d at 643 (setting aside jury verdict because of erroneous admission of expert testimony on post-injury earnings

that had insufficient factual basis). This is particularly so where, as here, the jury returned a general verdict, and the specific elements of damage cannot be allocated. *See First Nat'l Bank v. Olive*, 330 So. 2d 568, 573 (Miss. 1976); *Georgia-Pacific Corp. v. Blakeney*, 353 So. 2d 769, 773-74 (Miss. 1978).

II. The Trial Court's Ruling On Order Of Proof Constituted Reversible Error.

At the outset of trial, the Circuit Court imposed the order-of-proof procedure that it apparently imposes in all cases, ruling that no witness could be re-called to the stand:

> Basically, my ruling has been that if they're on the stand and you want them on direct, you can take them on direct in your cross, or you can do your cross and then have them on direct.
>
> But, again, we don't have witnesses back and forth on the stand more than once ....

(T. 30.)

Deviney 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 Court's ruling would effectively allow Marble to dictate the presentation of Deviney's case. (T. 31-32.) The Circuit Court overruled the objection "in order to be efficient". (T. 32.)

Marble went on to call 14 of the 17 witnesses in his case-in-chief. On the third day of trial, Marble began by calling Brian Odom, a former Deviney employee who was present at the scene of the accident, as an adverse witness. (T. 274-77.) Next, Marble called Danny Jones, Deviney's general manager and its corporate representative, adversely. (T. 316-17.) These were Deviney's only fact witnesses. Deviney's renewed objection was not met kindly:

> [COUNSEL FOR DEVINEY]: Your Honor, I was planning to call [Odom] in my case in chief. And I ... would prefer to reserve my questions until my case in chief, but it's my understanding that it's this Court's ruling that if I do not take him now, I waive my right to call him in my case in chief; is that correct?

* * *

> THE COURT: I don't think you have a question about my ruling, Counsel.
>
> [COUNSEL FOR DEVINEY]: No, ma'am. I'm just trying to make a record. I'm trying to --
>
> THE COURT: I asked were you going to take him on direct. *I do not allow witnesses a second time to take the stand.*
>
> Are you going to take him on direct?

(T. 297-98 (emphasis added).)

Having no choice in the light of the Court's ruling, Deviney was forced to conduct the entirety of its examinations of its only fact witnesses and corporate representative *during Marble's case in chief.*[15] (T. 298, 326.)

After the testimony of Odom and Jones, Marble proceeded to call eight more witnesses. These witnesses included Marble himself, (T. 597), as well as Marble's safety expert, who opined that Deviney had committed numerous safety violations, and that there was no evidence that any other entities such as Time Warner did anything to contribute to the accident. (T. 355-56, 393.) Because of the Court's order-of-proof procedure, Deviney was unable to rebut or otherwise address this testimony through its own fact witnesses, since their testimony had already been concluded. (T. 738-39.)

By imposing its across-the-board procedure at the outset of trial, the Circuit Court failed to consider the facts and circumstances of the case, including the resulting prejudice to Deviney. The Court's ruling constituted reversible error.

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[15] Deviney was thus left with only three witnesses for its case-in-chief, only one of whom was called after Marble rested. (T. 807-08.)

A. The Circuit Court Exceeded The Bounds Of Its Discretion Under Mississippi Rule Of Evidence 611(a), And Prevented Deviney From Fairly Presenting Its Case And Adequately Responding To Marble's Evidence.

Mississippi Rule of Evidence 611(a) affords the trial court with control over the mode and order of the presentation of evidence, including the examination of witnesses. Miss. R. Evid. 611(a). But "[d]espite the authority Rule 611(a) gives a judge, it does not give unbridled control over the presentation of evidence." Victoria C. Ferreira, MISSISSIPPI EVIDENCE 191 (4th ed. 2001); *cf. Bell v. City of Bay St. Louis*, 467 So. 2d 657, 661 (Miss. 1985) (discretion "has never meant that the trial judge could do anything he or she wished").

The trial court's control must be "reasonable", and that control must be exercised "so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." Miss. R. Evid. 611(a); *see also id.* at cmt.

The sole asserted basis for the Circuit Court's ruling was to be "efficient". But the ruling was imposed at the outset of trial – *i.e.*, before the Court could properly consider the facts and circumstances of this particular case, including whether efficiency was even a legitimate concern. Deviney was significantly prejudiced by the Court's failure to ensure that the presentation of proof was "effective for the ascertainment of the truth", *id.*, and for "determining the issues". *Id.* at cmt.

Every defendant should have the right to present its own witnesses *after* the conclusion of the plaintiff's case-in-chief. The Circuit Court's procedure deprived Deviney of this fundamental right. Deviney was forced to examine its fact witnesses and corporate

representative – *i.e.*, the only witnesses that could explain Deviney's actions – *without* having heard the testimony of the eight plaintiff's witnesses that followed.[16]

Fairness required that Deviney be permitted to recall its own witnesses to respond to Marble's case-in-chief, and to testify on issues including the allocation of fault to absent parties. As discussed *infra*, a key part of Deviney's defense was the apportionment of fault to Time Warner and BellSouth based on their involvement at the work site. On that issue, Marble's counsel responded to Deviney's motion for directed verdict by arguing that "[t]he question of control over the [work site] was established *by the testimony of the plaintiff*". (T. 812 (emphasis added).) Marble – who testified *after* Deviney's key witnesses had left the stand – spoke to that issue and attributed responsibility for the accident to "whoever is the last one in the hole". (T. 630.) And Marble's "safety" expert – who also testified *after* Deviney's witnesses – said that there was no evidence that BellSouth or anyone else, got into the hole after Deviney finished its work. (T. 355-56.) Deviney was denied the opportunity to address this and other testimony by the trial court's blanket ruling.[17]

Although the trial court has discretion to decide whether to allow a witness to be recalled to the stand, *see Ellis v. State*, 661 So. 2d 177, 179 (Miss. 1995), "[g]enerally, the better course is for the court to *permit* further cross-examination, even when the right to [recall a witness] was not specifically reserved." Ferreira, MISSISSIPPI EVIDENCE 194 (emphasis added); *see also, e.g.*, *Ellis*, 661 So. 2d at 179 (no abuse of discretion in allowing prosecution to recall witness in order to admit evidence).

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[16] The jury was instructed that the testimony of Deviney's adversely-called witnesses was to be considered as if those witnesses had been called in Deviney's case-in-chief. (T. 297-98, 325-26, 739, 808.) Such an instruction could not, and did not, cure the prejudice that resulted from the Circuit Court's approach.

[17] By contrast, the Circuit Court did not infringe on *Marble's* right to call rebuttal witnesses after the close of Deviney's case in chief. (T. 808, 814, 828.)

No Mississippi authority supports the Circuit Court's blanket ruling *preventing* such recall. To the contrary, this Court has held that "[s]ubject to reasonable control by the trial court in order that abuse may not be permitted, the defendant, during the presentation of his defense, should be accorded the right and privilege of calling for further cross-examination, any State witness, who has previously testified." *Chatman v. State*, 145 So. 2d 707, 710 (Miss. 1962) (reversing trial court's decision not to allow defendant to recall State's witness, and remanding for a new trial; "Even if the action of the court could be construed to involve a question of discretion, as a matter of fact, the exercise of discretion, under the particular circumstances, required that counsel be permitted to recall the witness ...."); *accord Patrick v. City of Detroit*, 906 F.2d 1108, 1113-14 (6th Cir. 1990) (trial court exceeded its powers under Rule 611(a) by denying defendants request to recall plaintiff); 28 Charles A. Wright & Victor J. Gold, FEDERAL PRACTICE & PROCEDURE, § 6164, at 374 (1993 ed.) ("Permitting recall may advance truth where the witness can testify as to new matters of significance or even just clarify old testimony.").

This Court's holding in *Chatman* ensures the fair presentation of a defendant's case, and to safeguard the right of a defendant to respond to all of the evidence presented against him.[18] It should apply no differently here, where the witnesses sought to be recalled by the defendant were *its own witnesses*, and its only fact witnesses. The Circuit Court's erroneous ruling warrants a new trial. *Chatman*, 145 So. 2d at 710.

The ruling is reversible error for another independent reason. It goes without saying that the sequence of witnesses is important for the jury to understand the case. Here, Deviney's fact-

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[18] Consistent with other jurisdictions, this Court has held that, in the context of an administrative hearing, due process requires that a party have a full opportunity to present evidence in response to any testimony or other evidence presented against them. *Pub. Employees' Ret. Sys. v. Wright*, 949 So. 2d 839, 843-44 (Miss. 2007) (appeals committee, "by accepting new evidence without providing [claimant] the opportunity to rebut the evidence or supplement her own [evidence], violated [claimant's] procedural due process rights and the concept of fundamental fairness" (collecting cases); reversing and remanding). That right should apply with no less force in the context of a civil trial.

witness testimony concerning the accident was separated from Deviney's accident-related expert testimony by twelve total witnesses, eight plaintiff's witnesses, and two days of trial. (T. 815.) A procedure that allows for multiple days and witnesses to separate a defendant's only fact witnesses from the expert testimony relating to those witnesses impermissibly creates the risk that the jury will discount, or simply forget, the testimony of the earlier witnesses, thus warranting a new trial.

III. The Circuit Court Reversibly Erred In Preventing The Jury From Considering And Apportioning Fault To Time Warner And BellSouth.

A key part of Deviney's trial defense, and thus its proffered jury instructions, focused on the actions – and inactions – of Time Warner and BellSouth. Yet the Circuit Court refused to allow the jury to even consider apportioning any responsibility for Marble's claimed injuries to either entity.

The Circuit Court refused Deviney's request for a jury instruction that would have correctly advised that an employer, such as Time Warner, has a non-delegable duty under Mississippi law to provide its employees with a safe place to work. (T. 899-900.) And it refused Deviney's proffered verdict forms that would have allowed for apportionment of fault not only to Deviney and Marble, but also to Time Warner and BellSouth, if the negligence of either entity were found to have been a proximate contributing cause of Marble's damages. (T. 854-58, 895-900, 909.) These rulings were reversible error.

Ample evidence demonstrated a jury question on whether Time Warner and BellSouth should bear some portion of fault. The chain of events leading to the accident began with Time Warner's accidentally cutting a BellSouth telephone line. (T. 302-03; *accord* R. 204.) Absent that mishap, Time Warner would have retained control of the work site from start to finish. (T. 225.) Because Time Warner cut the line, BellSouth called on Deviney to widen the Time

Warner hole so that BellSouth could perform the necessary repairs. (T. 300, 302-03, 328-30.) Deviney routinely performs such work for Bellsouth, and BellSouth typically controls Deviney's work. (T. 300-02, 329.) Standard practice dictates that Deviney's crew does not leave a work site until BellSouth approves their work, at which point BellSouth proceeds to fix its line. (T. 301-02, 329-30.)

Deviney completed its work and left the scene more than 11 to 12 hours before Marble arrived (T. 170, 200, 290, 676.) There was no evidence that, at any point during those intervening hours, Time Warner conducted any safety inspection of the work site where it had sent its employee to work.

As with rulings controlling the order of proof, a trial court's refusal to provide a requested jury instruction is reviewed for abuse of discretion. *E.g.*, *Etheridge v. Harold Case & Co., Inc.*, 960 So. 2d 474, 484 (Miss. Ct. App. 2006). But that discretion, too, has limits. "[T]his Court will not hesitate to reverse if the instructions, when analyzed in the aggregate, do not fairly and adequately instruct the jury." *Beverly Enters., Inc. v. Reed*, 961 So. 2d 40, 43 (Miss. 2007). Moreover, "[a] defendant is entitled to have jury instructions given which present his theory of the case", so long as they (1) correctly state the law, (2) have evidentiary support, and (3) are not fairly covered elsewhere in the instructions. *Jackson v. State*, 645 So. 2d 921, 924 (Miss. 1994); *see also Beverly*, 961 So. 2d at 43-44 ("A party is entitled to an instruction regarding a genuine issue of material fact when it is supported by the evidence."). Under each criterion, Deviney was entitled to have the Court give the instructions at issue.

A. Deviney's Refused Instructions Were Correct Statements Of The Law.

Deviney's proposed jury instructions D-20, D-21, and D-22 were correct statements of law. Instruction D-22 provided as follows:

> You are instructed that an employer owes its employees a non-delegable duty to provide them with a safe place in which to work. If you find that ... Marble's employer, Time Warner, negligently failed to provide him with a safe place to work, and if you further find that such failure to provide him with a safe place to work was the sole proximate cause of his accident and alleged damages; then, you shall return a verdict in favor of [Deviney].
>
> If you find that ... Marble's employer, Time Warner, negligently failed to provide him with a safe place to work and that such failure was a proximate contributing cause of the accident and the alleged damages; then, you shall apportion the appropriate percentage of fault to Time Warner.

(R.E. 014.)

It cannot be disputed that this instruction was an accurate statement of law. This Court has expressly held that "[a]n employer owes its employees the nondelegable duty to provide its employees with a safe place to work." *Monroe County Elec. Power Ass'n v. Pace*, 461 So. 2d 739, 748 (Miss. 1984). Even the Circuit Court acknowledged this duty. (T. 855.)

Instructions D-20 and D-21 were verdict forms that would have allowed fault to be apportioned between Marble, Deviney, Time Warner, and BellSouth. The instructions provided in relevant part:

> **[Instruction D-20]**
>
> * * *
>
> (5) Do you find from a preponderance of the evidence that Time Warner was guilty of any negligence which was a proximate contributing cause of the accident and the Plaintiff's alleged damages?
>
> _____ Yes
>
> _____ No
>
> (6) If your answer to Question No. 5 is "yes," please indicate the percentage of negligence you assign to Time Warner as compared to all of the contributing factors (including the negligence of others or other factors) which caused the accident and Plaintiff's alleged damages. If your answer to Question No. 5 is "no," please enter a ("0") in the blank below.

_____ %

(7) Do you find from a preponderance of the evidence that BellSouth was guilty of any negligence which was a proximate contributing cause of the accident and the Plaintiff's alleged damages?

_____ Yes

_____ No

(8) If your answer to Question No. 7 is "yes," please indicate the percentage of negligence you assign to BellSouth as compared to all of the contributing factors (including the negligence of others or other factors) which caused the accident and Plaintiff's alleged damages. If your answer to Question No. 7 is "no," please enter a ("0") in the blank below.

_____ %

* * *

[Instruction D-21]

[I]f you believe from a preponderance of the evidence that Deviney ... was negligent and its negligence was a proximate contributing cause of the accident and the Plaintiff's alleged damages, you must further determine whether you believe from a preponderance of the evidence if ... Marble, Time Warner, and BellSouth were negligent and whether their negligence, if any, [was] a proximate contributing cause of the accident and the Plaintiff's alleged damages.

* * *

[P]lease indicate below how you apportion the percentage of negligence:

Deviney Construction Company, Inc.	_____ %
David Scott Marble	_____ %
Time Warner	_____ %
BellSouth	_____ %
	100 %

(R.E. 009-13.)

These verdict forms, likewise, were legally sound. Mississippi's governing statute on comparative fault provides, among other things, that "the trier of fact shall determine the percentage of fault for each party alleged to be at fault without regard to whether the joint tort-feasor is immune from damages". Miss. Code Ann. § 85-5-7. Indeed, "the approach to fault allocation mandated by the legislature in [Miss. Code Ann. § 85-5-7] expanded the comparative negligence doctrine to become a doctrine of comparative fault, because the fault is not limited to negligence and allocation of the fault of each party alleged to be at fault is required." 2 Jeffrey Jackson & Mary Miller, ENCYCLOPEDIA OF MISSISSIPPI LAW § 16:1, at 422 (2001 ed.). The statute defines "fault" as:

> an act or omission of a person which is a proximate cause of injury or death to another person or persons, damages to property, tangible or intangible, or economic injury, including, but not limited to, negligence, malpractice, strict liability, absolute liability or failure to warn.

Miss. Code Ann. § 85-5-7(1).

It is well settled that section 85-5-7 applies regardless of whether the person or entity alleged to be at fault is a party to the lawsuit. *See Estate of Hunter v. General Motors Corp.*, 729 So. 2d 1264, 1273-74 (Miss. 1999) (holding that the term "party" in the statute swept broadly enough to bring in entities which would not or could not have been "parties to a lawsuit"). As this Court stated in *Hunter*, "there is no indication that the Legislature intended to reserve for plaintiffs the sole and exclusive right to make allegations of fault before a jury and to deprive defendants of the opportunity to persuade a jury that fault for a given accident lies elsewhere". *Id.* at 1273-74.

Furthermore, section 85-5-7 applies not only to those *absent* from suit, but also to those *immune* from suit – including an employer, such as Time Warner, which is immune under workers' compensation laws. *Mack Trucks, Inc. v. Tackett*, 841 So. 2d 1107, 1115 (Miss. 2003)

(party which is immune from liability, including an employer immune by virtue of workers' compensation law, may be assessed fault under the allocated fault statute); *see also Coho Resources, Inc. v. Chapman*, 913 So. 2d 899, 912-13 (Miss. 2005) (trial court reversibly erred by failing to instruct jury that plaintiff's employer, although immune from suit under worker's compensation law, should be included in apportioning fault); *Entergy Miss., Inc. v. Hayes*, 874 So. 2d 952, 958 (Miss. 2004) (trial court erred in refusing to allocate fault to employer of decedent in wrongful death action).

B. The Refused Instructions Were Supported By The Evidence, And Their Erroneous Omission Seriously Prejudiced Deviney, Thus Warranting A New Trial.

The Circuit Court's refusal to give these three instructions undoubtedly harmed Deviney, given the ample evidence on whether the actions and inactions of Time Warner and BellSouth had caused or contributed to the accident. For example, the experts for *both* Marble and Deviney agreed that an employer such as Time Warner has a duty to provide a safe work site for its employees, which includes making reasonable inspections. (T. 384-88, 838.) But, as Deviney's expert testified, there was no evidence that Time Warner had conducted any safety check of the work site in the 11 to 12 hours before Marble's arrival. (T. 838.) Time Warner does not conduct such a check "under normal circumstances", (T. 195-96), but these circumstances were far from normal.

As for BellSouth, Marble testified that the responsibility for securing the hole, and thus the fault for the accident, should properly lie on "whoever is the last one there". (T. 630.) On this point, standard practice dictates that Deviney's crew cannot leave a work site until BellSouth approves their work, at which point BellSouth proceeds to fix its line. (T. 301-02, 329-30.) Consistent with that practice, Deviney's corporate representative testified that he was confident

that BellSouth did, in fact, enter the hole and fix its telephone line after Deviney completed its work. (T. 331-32; Exs. P-2-A, P-2-B; *see also* T. 173-74, 182, 214, 228.)

This evidence certainly raised jury issues concerning negligence and comparative fault as to Time Warner and BellSouth.[19] Yet it was ignored by the Circuit Court, which (in ruling that Deviney's instructions were factually unsupported) focused only on the absence of testimony from either entity. (T. 855, 858, 900.) Marble's case thus went to the jury solely on a theory of Deviney's negligence. (T. 924-25; *accord* 918-20.) The Court's instructions on proximate causation and apportionment of fault considered only Deviney and Marble, as did the verdict form. (T. 918-20, 924-25; R. 308.)

Where an accident may have resulted from several causes, any one of which may have contributed to a plaintiff's injury, it is error to instruct the jury in a manner that suggests that there may be only a single proximate cause of the injury. *See Pevey v. Alexander Pool Co.*, 139 So. 2d 847, 851 (Miss. 1962). Further, it is reversible error to refuse to instruct the jury to consider the apportionment of fault to non-parties. *Coho*, 913 So. 2d at 912-13. And there is no question that a party's act or omission justifies allocation of fault if the party could be found negligent. *See Miss. Dep't of Transp. v. Trosclair*, 851 So. 2d 408, 417 (Miss. Ct. App. 2003) (trial court erred in not allocating fault to negligent party; "[t]hose who are negligent and proximately contribute to an injury should be allocated a percentage of fault." (citing Miss. Code Ann. § 85-5-7)); *cf. Pearl Pub. Sch. Dist. v. Groner*, 784 So. 2d 911, 916 (Miss. 2001) (instructing trial court on remand to apportion fault "to the extent that any of these other tort-

[19] This evidence was sufficient foundation for the refused instructions. It was also the only evidence Deviney had the opportunity to present: the Circuit Court's order-of-proof ruling, discussed *supra*, foreclosed Deviney from further developing this evidence in its case-in-chief through its fact witnesses and corporate representative.

feasors is deemed to have been negligent thereby contributing to [plaintiff's] injury and damages"). The Circuit Court ignored these principles in making its jury-instruction rulings.

Under Mississippi law, "*[a]ll* questions of negligence ... shall be for the *jury* to determine." Miss. Code Ann. § 11-7-17 (emphases added); *see also Hankins Lumber Co. v. Moore*, 774 So. 2d 459, 464 (Miss. Ct. App. 2000) ("When reasonable minds might differ on the matter, questions of proximate cause and of negligence and of contributory negligence are generally for determination of jury."). By depriving Deviney of its right to have the jury consider the fault and negligence of Time Warner and BellSouth, the Circuit Court abused its discretion and failed to instruct the jury properly, so that a new trial is warranted.

IV. The Circuit Court Reversibly Erred In Preventing The Impeachment Of Marble's False Testimony Through Evidence Of Collateral Source Payments.

As discussed *supra*, by far the largest category of damages sought by Marble at trial was the value of lost future income, which Dr. Glover calculated to total up to $2.6 million. Because these calculations were based on the assumption that Marble would be completely unable to work *at all*, it was imperative for Marble to minimize the impact of the testimony of his treating physicians, who opined that he was, in fact, capable of performing medium-duty work.

In an apparent effort to explain this disconnect, Marble sought to portray his treating physicians as biased. He testified on direct examination that his employer, Time Warner, sent him to every doctor that he saw; that Time Warner "sent [him] where [it] wanted [him] to go"; and that, although he was unsatisfied with these doctors, he "c[ouldn't] afford to go outside of what [Time Warner] sen[t] [him] to". (T. 611-12, 614.)

Deviney sought to impeach this false and misleading testimony. (T. 633-37, 641, 645.) Through a proffer, Deviney established that since 2005, Marble's medical bills had been paid *not* by Time Warner, but rather by his wife's private health insurance carrier.[20] (T. 653-54.)

This evidence was never considered by the jury, even though Marble's counsel stated "I'm inclined to say, fine, let them talk about it". (T. 637, 639.) The Court concluded that the "collateral source" rule applied, rendering the evidence inadmissible. (T. 636-38, 654-57.) This ruling constituted reversible error.

"[U]nder the collateral-source rule, a defendant tortfeasor is not entitled to have damages for which he is liable reduced by reason of the fact that the plaintiff has received compensation for his injury by and through a totally independent source, separate and apart from the defendant tortfeasor." *Robinson Property Group, L.P. v. Mitchell*, 7 So. 3d 240, 244 (Miss. 2009) (internal quotation marks omitted). Nevertheless, "if the evidence [in question] was introduced for a purpose *other than* to mitigate damages, the collateral-source rule [is] not violated, and the evidence [is] properly admitted." *Wright v. Royal Carpet Servs.*, 29 So. 3d 109, 115 (Miss. Ct. App. 2010) (emphasis added) (where evidence of insurance was offered to show that plaintiff failed to mitigate damages, admission was proper). The evidence adduced in Deviney's proffer was *not* offered to lessen plaintiff's damages; it was offered to address the limited issue of physician bias that Marble injected into the case. The collateral source rule was thus inapplicable. *E.g.*, *Geske v. Williamson*, 945 So. 2d 429, 434-35 (Miss. Ct. App. 2006) (evidence of plaintiff's prior settlement proceeds was properly admitted, notwithstanding the collateral source rule, because it was used to address an issue introduced by plaintiffs; the evidence was "necessitated by [plaintiff's] own testimony at trial").

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[20] Marble explained that in October 2005, after Dr. Collipp opined that he had reached maximum medical improvement from the accident, Time Warner told him they would no longer pay for his medical treatment. (T. 649-50.)

As this Court confirmed in *Robinson*, a defendant may properly cross-examine the plaintiff regarding collateral-source payments "for the purpose of impeaching false or misleading testimony". *Id.* at 245. This Court recognized that, among other things, permitting such inquiry "eliminates the judicial conundrum of allowing known false testimony to be considered by a jury". *Id.* at 246.

Robinson was not overlooked at trial. Deviney brought the decision to the Circuit Court's attention; Marble's counsel conceded its applicability; and the Circuit Court reviewed it and recognized its holding. (T. 635-37, 639, 655-56.) Remarkably, however, the Circuit Court determined that it did not apply because it found that Marble's statements about his doctors were not false:

> I don't find any falsehood in his statement that he was unable to afford to go to doctors other than those that could be provided.
>
> Now, your interpretation of that is that if he was getting money from anywhere else; insurance, mother and father-in-law or from his wife, that meant he could afford it, but I don't interpret that testimony to say that.

(T. 656-57.)

In so finding, the Circuit Court abused its discretion, resulting in obvious prejudice to Deviney. The import of Marble's testimony was that his financial position limited him to only doctors paid for by, and thus biased in favor of, Time Warner. Deviney's proffer revealed that the testimony was false. Contrary to Marble's suggestion, all of the doctors that Marble saw since 2005 were paid for by other sources. Marble saw those doctors of his own choosing, and there was no employer bias. Marble's testimony was not only false, it was certainly misleading, and thus Deviney should have been allowed to impeach it. *See Robinson*, 7 So. 3d at 245; *accord Busick v. St. John*, 856 So. 2d 304, 310 (Miss. 2003) (affirming admission of evidence related to plaintiff's health insurance coverage where, *inter alia*, it was admitted to impeach

plaintiff's testimony that she suffered permanent injuries; "Busick testified that she ceased physical therapy because she could no longer afford it. The fact that she spent only $45 on that therapy discredited her testimony.").

The treating-physician testimony at which Marble's false statements were directed was critical; that testimony seriously undermined Marble's case for damages for future lost income. As discussed *supra*, Marble's economist, Dr. Glover, assumed he would be completely unable to work; his treating physicians disagreed. Specifically, Dr. Winkelmann testified that Marble was capable of performing medium-level work activities; and that he knew of *nothing* preventing Marble from performing medium-duty work. (Ex. P-15, at 33-37, 42, 45-47; T. 724-26.) The Circuit Court permitted Marble to freely suggest to the jury that Winkelmann was hand-picked, paid for, and thus biased in favor of, Time Warner. By prohibiting Deviney from rebutting a suggestion that significantly bolstered Marble's $2.6 million claim for damages, the Circuit Court's ruling constituted reversible error.

V. The Circuit Court's Multiple Errors, Even If Not Reversible When Considered Individually, Mandate A New Trial Under The Cumulative Error Doctrine.

As discussed above, this trial was neither perfect nor fair. Each of the above errors independently mandates reversal and remand for a new trial. But even assuming otherwise, reversal and remand is warranted under the cumulative error doctrine. Even where "individual errors may not have been reversible in themselves, they may combine with other errors to make reversible error". *Blake v. Clein*, 903 So. 2d 710, 718-19 (Miss. 2005); *see also, e.g., Estate of Hunter*, 729 So. 2d at 1279. Considering the Circuit Court's errors on collectively, a new trial is warranted. *Clein*, 903 So. 2d at 732 ("While any of these [multiple] errors standing alone might not require reversal, the cumulative effect of errors deprived the defendants of a fair 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 26th day of July, 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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This, the 26th day of July, 2010.

Justin J. Peterson