IN THE SUPREME COURT OF MISSISSIPPI
2009-CA-01289

VALERIE JACKSON-MILLER — APPELLANT

V.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY — APPELLEE

APPEAL FROM THE CIRCUIT COURT
RANKIN COUNTY, MISSISSIPPI
TWENTIETH CIRCUIT COURT DISTRICT

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# BRIEF OF THE APPELLEE

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VALERIE JACKSON-MILLER — APPELLANT

V.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY — APPELLEE

## CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that all listed persons have an interest in the outcome of this case. The representations are made in order that the Justices of this Court may evaluate possible disqualifications or recusal.

1. Valerie Jackson-Miller,
   Appellant

2. Rocky Wilkins, Esq.,
   Attorney for Appellant

3. Barry W. Howard, Esq.,
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4. State Farm Mutual Automobile Insurance Company,
   Appellee

5. Philip W. Gaines, Esq.,
   Attorney for Appellee

6. Christopher D. Morris, Esq.
   Attorney for Appellee

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY

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## STATEMENT OF THE ISSUES

**Issue I** **THE CIRCUIT COURT DID NOT ERR IN EXCLUDING THE INSURANCE POLICY FROM EVIDENCE IN THIS CASE IN WHICH THE ONLY ISSUE FOR DECISION BY THE JURY WAS THE AMOUNT OF PLAINTIFF'S DAMAGES.**

**Issue II** **THE COURT DID NOT ERR IN DENYING PLAINTIFF'S MOTION FOR J.N.O.V. OR NEW TRIAL.**

**Issue III** **THE CIRCUIT COURT DID NOT ERR IN DECLINING TO GRANT AN ADDITUR.**

**Issue IV** **THE CIRCUIT COURT DID NOT ERR IN REFUSING PROFFERED JURY INSTRUCTION P-3 IN THIS CASE.**

## STATEMENT OF THE CASE

In accordance with the dictates of this Court regarding the statement of the facts of cases on appeal, all disputed facts are, of course, to be properly stated in a light most favorable to the appellee (State Farm). We therefore challenge and dispute the propriety of the detailed Statement of the Case submitted by Mrs. Miller in the Brief of Appellant. State Farm's contentions regarding the appropriate facts in evidence are provided in detail, where appropriate, in this brief. In lieu of duplication, State Farm would refer to those sections of the brief detailing the factual disputes.

## SUMMARY OF THE ARGUMENT

**Issue I** **THE CIRCUIT COURT DID NOT ERR IN EXCLUDING THE INSURANCE POLICY FROM EVIDENCE IN THIS CASE IN WHICH THE ONLY ISSUE FOR DECISION BY THE JURY WAS THE AMOUNT OF PLAINTIFF'S DAMAGES.**

This is a "damages only" case. There was no dispute regarding

the amount of Mrs. Miller's UM Policy Limits. Mrs. Miller claimed damages for past and future medical expenses, past and future pain and suffering, past and future mental anguish, wage loss, permanent bodily injury, and disability. Her UM Policy Limits are wholly irrelevant to the issue presented for decision by the trier of fact in this case - the amount of Mrs. Miller's claimed damages. Even assuming for the sake of argument that the agreed insurance limits could be relevant at all for the issue of dispute at trial, any probative value would obviously be substantially outweighed by the danger of unfair prejudice in presenting that evidence to the jury as part of their consideration and determination of the amount of Mrs. Miller's actual damages. Judge Chapman did not abuse his discretion in refusing to admit the UM policy limits into evidence before the jury.

**Issue II THE COURT DID NOT ERR IN DENYING PLAINTIFF'S MOTION FOR J.N.O.V. OR NEW TRIAL.**

Judge Chapman did not abuse his discretion in overruling Mrs. Miller's Motion for J.N.O.V., nor did he err in denying her Motion for a New Trial. Mrs. Miller, her treating physician, and her physical therapist were severely impeached at trial. This impeachment, along with Mrs. Miller's medical records and a fair, balanced view of the complete evidence, support Judge Chapman's (and the jury's) decision.

**ISSUE III THE CIRCUIT COURT DID NOT ERR IN DECLINING TO GRANT AN ADDITUR.**

Judge Chapman did not abuse his discretion in denying Mrs.

Miller's Motion for Additur. The complete medical documentary evidence and testimony presented at trial, as well as the impeachment of Mrs. Miller and her witnesses, would reasonably support a conclusion of total damages of much less than the $30,000.00 awarded Plaintiff by the jury in this case. Mrs. Miller failed to mitigate her damages as she was consistently late for physical therapy. She was non-compliant with her home exercise program. Her efforts at physical therapy were sporadic. Mrs. Miller was impeached at trial when she gave false/inconsistent testimony regarding her job loss, and claimed bruises. Her testimony showed inconsistencies with and exaggeration with regard to her injury claims. Her physical therapist and doctor experts were also significantly impeached in the aspects of their testimony that most significantly supported her claims, and the medical records and expert doctor's testimony in support of State Farm's provision. Specific positive evidence shows only minor/temporary aggravation of pre-existing injuries. Judge Chapman did not err in denying the Motion for J.N.O.V., or in the Alternative a New Trial.

**ISSUE IV THE CIRCUIT COURT DID NOT ERR IN REFUSING PROFFERED JURY INSTRUCTION P-3 IN THIS CASE.**

Mrs. Miller argues that Judge Chapman should have instructed the jury that if they could not apportion damages between her earlier car accidents and this car accident, the jury should find State Farm liable for her entire damages. In Mississippi, a proposed jury instruction can only be given if it is a fair

statement of the law *and* supported by the evidence at trial. Judge Chapman did not err in refusing this instruction as it would be an improper statement of the law with regard to the issues and evidence in this case. Mississippi law does not place legal responsibility on a tortfeasor for bodily injury and permanent disability that was not caused by an accident, but only for the aggravation of such pre-existing injury, and the jury was correctly and fairly instructed on the damages issues present in this case.

The jury considered the medical records and testimony of Mrs. Miller as well the testimony of Dr. Winkelman and Physical Therapist Swyers. Dr. Winkelman testified that Mrs. Miller's 5% permanent impairment rating was the same prior to the accident in question as it was subsequent to it. The medical records showed a temporary aggravation of pre-existing injuries, and the jury was properly instructed on the damages issue present. Instruction P-3 was an improper statement of law in the factual context of this case and was properly refused.

## ARGUMENT

### I. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING FROM EVIDENCE MRS. MILLER'S UNINSURED MOTORIST POLICY LIMITS.

#### A. STANDARD OF REVIEW

A trial court's evidentiary determination under Miss. R. Evidence 403 is reviewed under an abuse of discretion standard. *Carter v. State*, 953 So.2d 224, 229 (Miss. 2007).

**B. THIS IS A "DAMAGES ONLY" CASE, WHERE THE AMOUNT OF COVERAGE WAS NOT IN DISPUTE. MRS. MILLER'S UM POLICY LIMITS WERE PROPERLY EXCLUDED AS THEY ARE COMPLETELY IRRELEVANT TO THE DETERMINATION AND EVALUATION OF PLAINTIFF'S CLAIMED DAMAGES.**

In this case, the parties stipulated that the insurance policy would be admitted into the Court's records, for appropriate consideration by the Circuit Judge, with such stipulation including agreement on all coverage issues potentially relevant to Plaintiff's UM claim. It was also stipulated that 100% fault for this accident lay with an uninsured motorist, leaving only the issue of damages evaluation to be submitted for decision to the trier of fact.(RE 1; Page 7, Lines 14-21). On this basis, Judge Chapman excluded the UM policy limits under M.R.E. 403 because they would be more prejudicial than probative:

> I do think I probably need to make a record in that there's no bad faith claim pending, and the only issue for the jury to decide is the amount of damages the plaintiff suffered, which State Farm's UM coverage would be responsible for. And I believe the matter of the policy limits is something that they don't need consider. It would be more prejudicial than probative; and so therefore, I'm going to not allow the jury to hear that amount.

(RE 1; Page 8, Lines 19-29).

Mrs. Miller complains that she "...was forced to pick a number out of thin air and hope that the jury found that the amount was not out of line with the amount of insurance she had actually bought", and that "the jury was left wondering if she was asking for an amount far above or far below her policy limits." (*See* Appellant's Brief, Page 9). These arguments ignore the

incontrovertible logical fact that the amount of insurance has absolutely no probative value in determining the amount of personal injury damages a person incurred from a car wreck. The insurance limits were not only properly subject to exclusion under M.R.E. 403, they would not even meet the definition of "relevant evidence" at all under M.R.E. 401. The jury did not have to decide, or even consider, "the amount of insurance she had actually bought," as that issue was not in dispute. Indeed, if the jury in any case were to decide the damages amount based on how much insurance a person bought, that jury would be violating its proper duty. The insurance amount can **only** serve to **detract** from the relevant facts, where the issue presented for decision is merely the amount of damages proximately caused by the accident.

Introducing the UM policy limits before a jury would have a tendency to unfairly influence the jury's evaluation of the plaintiff's damages. "[I]t is a long-standing sentiment that injecting the question of insurance into a case may be prejudicial." *Dobbins v. Vann*, 981 So.2d 1041, 1043 (Miss. Ct. App. 2008). Under M.R.E. 401, evidence lacking any relevance to the issues of dispute is properly excluded. Under Miss. R. Evid. 403, even relevant evidence is properly excluded if its probative value is substantially outweighed by the danger of unfair prejudice.

Judge Chapman was faced with a situation where Mrs. Miller sought to introduce an item of evidence that had no probative value at all, but which did have significant potential to substantially

prejudice the jury in its efforts to honestly consider what Mrs. Millers' actual damages were from this accident. Judge Chapman did not abuse his discretion in ruling that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice under Mississippi Rule of Evidence 403.

## II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN OVERRULING MRS. MILLER'S MOTION FOR J.N.O.V OR NEW TRIAL DUE TO THE EVIDENCE PRESENTED IN THE CASE AND THE SIGNIFICANT IMPEACHMENT OF MRS. MILLER, HER PHYSICIAN, AND HER PHYSICAL THERAPIST.

### A. STANDARD OF REVIEW.

A trial court's denial of a Motion for J.N.O.V will only be reversed if "the facts so considered point so overwhelmingly in favor of the appellant that reasonable men could not have arrived at a contrary verdict." *Morgan v. Green-Save, Inc.*, 2 So.3d 648, 652 (Miss. Ct. App. 2008). The denial of a J.N.O.V. will be affirmed if reasonable and fairminded jurors exercising fair and impartial judgment could have reached different conclusions. *Id.* And, in considering such a request, the evidence must be considered in the light most favorable to the non-movant (here, State Farm). *Id.*

A trial court's denial of a Motion for a New Trial is reviewed under an abuse of discretion standard. *Robinson Property Group, L.P. v. Mitchell*, 7 So.3d 240, 247 (Miss. 2009). At the trial level, a new trial may be granted when "the verdict is against the overwhelming weight of the evidence, or when the jury has been confused by faulty jury instructions, or when the jury has departed

from its oath and its verdict is a result of bias, passion, and prejudice." *Crews v. Mahaffey*, 986 So.2d 987, 998 (Miss. Ct. App. 2007).

We respectfully submit that the characterization and portrayal of the trial evidence in Mrs. Miller's Brief of Appellant is not a fair and balanced reference; it falls short of, and even stands strongly and prejudicially against, the standard of the consideration of the facts in the light most favorable to State Farm that is required, as a matter of law, for Plaintiff's Motion and appeal in this case. Plaintiff seeks to have this Court wholly ignore significant evidence supporting State Farm's position, as well as the significant impeachment of Plaintiff, her expert medical witness, and her expert physical therapy witness.

**B. MRS. MILLER WAS IMPEACHED WHEN SHE FALSELY TESTIFIED THAT SHE LOST HER JOB BECAUSE OF THIS ACCIDENT, AND WAS ALSO IMPEACHED WHEN SHE GAVE CONTRADICTORY TESTIMONY REGARDING HER BRUISING.**

At trial, Mrs. Miller testified on direct examination that she lost her job at Methodist Rehabilitation Center because of this motor vehicle accident:

[By Mr. Wilkins]:Q. Tell the jury what impact this injury has had on your life, on your daily life?

[By Mrs. Miller]:A. Because of my line of work, I'm a social worker, and all the notes that I have to do, first of all, I lost my job at Methodist Rehab Center. I had just helped them, had been a year and a half, helped them open up the new Methodist Specialty Care Center, and I was the go-to person. First of all, they don't like you being laid off. Well, secondly, I couldn't

> keep up with my notes. I had so many responsibilities, and after 23 years, I lost my job.

(RE 1; Page 67 Lines 26-29, Page 68, Lines 1-7). However, on cross-examination, it was shown that Mrs. Miller instead lost her job because she failed to report the physical abuse of a patient. (RE 1; Page 76, Line 29, Pages 77-79).

Mrs. Miller's credibility was further impeached when she gave inconsistent testimony regarding claimed bruises. At her deposition, Mrs. Miller was asked whether she had any bruising from this car accident that could be seen on her body. Her answer was that she did not recall any. (RE 2; Page 14, Lines 1-4). That deposition testimony was consistent with the medical records, which were also in evidence. However, in her trial testimony, Mrs. Miller claimed that she did have bruising from this accident. (RE 1; Page 82, Lines 20-22).

Mrs. Miller was then impeached with her prior inconsistent testimony. When counsel asked whether she testified at the deposition that she did not recall having any visible bruises, Mrs. Miller answered: "Yes. And I thought you meant by bruising, my muscles being bruised. I didn't know you were talking about outward bruises." (RE 1; Page 83, Line 1-11). Mrs. Miller then, in an unconvincing way that would be particularly evident to persons seeing her on the witness stand, attempted to resolve this contradiction by stating that while there was no visible bruising from this wreck, she believed that there was internal bruising. (RE

1; Page 83, Lines 16-28). This of course only contradicted, again, the testimony and explanation that she had just made explaining that she had denied bruising before precisely because she thought the reference was to such internal, rather than outward, visible bruising.

### C. MS. SWYERS, THE PHYSICAL THERAPIST EXPERT WITNESS, WAS IMPEACHED ON HER TESTIMONY REGARDING MRS. MILLER'S ATTENDANCE AND EFFORTS AT PHYSICAL THERAPY.

Mrs. Miller emphasizes in her brief that the testimony of her physical therapist, Ms. Teresa Swyers, supports her case for damages and her demand for a new trial. In doing so, however, Plaintiff completely ignores the degree to which Ms. Swyers' testimony undermined her case, as well as the significant impeachment of Ms. Swyers on those aspects of testimony that may have best supported Plaintiff's contentions.

On cross-examination, Ms. Swyers admitted that when a doctor prescribes physical therapy, it is crucial for that patient to faithfully follow through with the physical therapy regimen. (RE 1; Page 56, Lines 21-25). Ms. Swyers further admitted that a person may not recover from her injuries if she is not motivated to perform the prescribed physical therapy and/or fails to attend her physical therapy sessions. (RE 1; Page 56, Lines 26-29; Page 57 Line 1). Ms. Swyers went on to admit that if a person's physical therapy efforts are sporadic, the patient will not reap the benefits of the therapy. (RE 1; Page 57, Lines 2-6). This testimony was damning to Mrs. Miller's case, as the medical records at trial

clearly indicated that Mrs. Miller was noncompliant with her physical therapy home exercise program, that her efforts at physical therapy were "sporadic", and that she was regularly late to her physical therapy sessions. (RE 3, Pages 3-5).

After Ms. Swyers had explained to the jury that sporadic physical therapy efforts undermined recovery, Ms. Swyers was asked if she would describe Mrs. Miller's efforts at physical therapy as being sporadic. Ms. Swyers answered "No, I would not." (RE 1; Page 59, Lines 8-10). Ms. Swyers was then given an opportunity to correct herself with reference to her notes. She was asked again:

> [Mr. Morris]:Q. Are you sure you wouldn't describe it that way?
>
> [Ms. Syers]:A. Not according to my treatment and my notes. There's pretty well-documented that when we saw her, and there wasn't an overwhelmingly number of inconsistent no-shows, which is what we base our treatment on. If they are consistently no-shows, then we proceed with discharge.

(RE 1; Page 59, Lines 11-18). It was then shown that this same witness *herself* wrote the Physical Therapy Discharge Summary for Mrs. Miller which specifically stated that this "Patient's treatment at times was sporadic...". (RE 3, Page 5). This Physical Therapy Discharge Summary was of course part of the evidence properly considered by the jury, and this discrepancy was furthermore discussed during closing argument. This is in addition to the fact that Ms. Swyers' credibility was further impeached due to the obvious contrast between her attempts to consistently

minimize, in trial testimony, Mrs. Miller's spotty physical therapy history, as compared to the contemporaneously written physical therapy records. These records state, in reference to Mrs. Miller, that "Patient is consistently late to physical therapy..." and "Patient does not appear to be compliant with recommended home program." (RE 3, Pages 3-4). The daily Physical Therapy Clinical Notes indicate over and over again that Mrs. Miller was "late" and "late as usual" for her therapy (RE 3, Pages 6-10).

### D. THE TESTIMONY OF MRS. MILLER'S TREATING PHYSICIAN, DR. WINKELMAN, ASSISTED STATE FARM'S CASE, AND DR. WINKELMAN WAS ALSO IMPEACHED BASED ON HIS HISTORY WITH MRS. MILLER.

Dr. Winkelman and Mrs. Miller have a long history together; such a history is, of course, relevant in the efforts of a trier of fact to determine his objectivity and impartiality as a witness at trial. (RE 1; Page 75, Lines 9-13). Dr. Winkelman testified for Mrs. Miller in one of her previous personal injury cases. (RE 1; Page 75, Lines 25-29, Page 76, Lines 1-6). Dr. Winkelman's own office notes state that he ("we") "will assist her in any way we can with obtaining reimbursement for her therapy through car insurance." (RE 4, Page 1).

Mrs. Miller testified that she expected Dr. Winkelman to assist her in collecting money from her insurance company. (RE 1; Page 76, Lines 7-15). Dr. Winkelman also admitted that, in forming his opinion on Mrs. Miller's injury, he had not reviewed (or been permitted to review, even in his capacity of being provided materials for review in preparation of his proferred expert

opinion) all of Mrs. Miller's pertinent medical records, including those from the day of the accident.(RE 5; Page 48, Lines 16-25, Page 49, Lines 1-4, Page 52, Lines 12-25). Obviously, the contrast in the history given to him and the actual recorded injury reports showed a valid impeachment of any opinion he gave in his efforts to assist Mrs. Miller "in any way [he] can with obtaining reimbursement through her car insurance." (RE 4, Page 3).

Mrs. Miller alleges that this accident caused her to have a 5% permanent impairment rating, and that the jury erred in not awarding her a higher amount of damages in light of that disability. However, Dr. Winkelman testified that this 5% percent permanent impairment rating would also be consistent with Mrs. Miller's condition/injuries that *pre-existed* this accident. (RE 5; Page 48, Lines 1-10).

The underlying condition was also shown to be reasonably present from other causes and factors. Dr. Winkelman testified that "discs bulges are as common as the sand of the sea" and that it is common for people to have bulging discs regardless of whether or not they have ever been in a car accident. (RE 5 Page 27, Lines 21-25, Page 28, Lines 1-2, Pages 53, Lines 23-25, Page 54, Lines 1-9). He testified that bulging discs can be caused by many common things such as sleeping in certain positions, normal housework, bending over a sink, or changing a light bulb. (RE 5; Page 54, Lines 1-25).

Dr. Winkelman further testified that even if Mrs. Miller had

not been involved in the accident at issue in this case, she still would have needed medical treatment. (RE 5; Page 56, Line 1-15). He testified that Mrs. Miller had a history of persistent spinal problems and that the pain radiating down to her legs or buttocks pre-existed this accident. (RE 5; Page 56, Line 21-24, Page 57, Line 4-12). Dr. Winkelman also testified that the disc bulge that was discovered in her test did not cause any pain radiation. (RE 5; Page 62, Line 12-18).

Considering Mrs. Miller's medical history, the evidence supporting State Farm's position, and the significant impeachment of Plaintiff and her expert witnesses on those aspects of testimony claiming greater injury or impairment from this accident, and **especially** considering such evidence in a light in any way favorable to the Defendant, the trial court did not err in denying Mrs. Miller's Motion for J.N.O.V. or her Motion for a New Trial.

## III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING MRS. MILLER'S MOTION FOR ADDITUR, DUE TO THE MEDICAL EVIDENCE PRESENTED AT TRIAL AND THE IMPEACHMENT OF MRS. MILLER AND HER WITNESSES.

### A. STANDARD OF REVIEW

Trial courts have "considerable discretion" in granting or denying motions for additur. *Mississippi State Highway Commission v. Antioch Baptist Church, Inc.*, 392. So.2d 512, 514 (Miss. 1981). A trial court's decision to refuse an additur will not be reversed unless it was an "abuse of discretion." *Dobbins*, at 1045. As the party seeking an additur, Mrs. Miller "bears the burden of proving

her injuries, loss of income, and other damages." *Dobbins*, at 1045. All evidence is required to be viewed in the light most favorable to the non-movant (here State Farm), along with all favorable inferences that may reasonably be drawn therefrom. *Dobbins*, at 1045. Also, an additur should be granted only with "great caution" as it infringes upon "the traditional role of the jury as the fact-finder." *Dobbins*, at 1045.

### B. THE FACTS OF THIS CASE ALONG WITH THE IMPEACHMENT OF MRS. MILLER AND HER WITNESSES SUPPORT JUDGE CHAPMAN'S REFUSAL TO GRANT AN ADDITUR.

Judge Chapman and the jury assessed the credibility of Mrs. Miller and her witnesses by observing their testimony first-hand. Based on the evidence discussed below, the jury's damages evaluation of $30,000 was reasonable and Judge Chapman did not abuse his discretion in refusing to set aside that jury verdict with the grant of an additur.

Mrs. Miller has been in a total of four (4) car accidents. Two accidents occurred before the accident at issue here, and one car accident occurred subsequent to this accident. On cross-examination, Mrs. Miller's own doctor testified that her 5% permanent impairment rating would be consistent with her medical conditions that pre-existed this accident. (RE 5; Page 48, Lines 1-10). Reason therefore requires, on this evidence, a conclusion that Mrs. Miller suffered no permanent injury from this car accident.

Mrs. Miller's claim that she lost her job because of the car accident was shown to be false. Mrs. Miller had only minimal

personal injury/complaints from this accident, and a majority of her medical treatment was shown to be consistent with her pre-existing injuries and permanent impairment that was separate from and pre-existing the accident in question in this case, and which her own medical expert stated she would have still needed even if this accident had not occurred. Mrs. Miller was consistently late to physical therapy, she was not compliant with her prescribed home exercise program, and her physical therapy efforts were sporadic.

The accident in this matter actually involved a fairly light physical impact to Mrs. Miller. Mrs. Miller dramatically described the accident to the jury and repeatedly emphasized that "three separate impacts" occurred. The full context, however, as evident from consideration of all evidence presented, showed a much less dramatic and traumatic event. Mrs. Miller's exaggerations would properly serve as impeachment of Mrs. Miller's credibility before the jury. The undisputed fact is that she was traveling between 15mph and 25mph when she was clipped on the right rear bumper by a pickup truck traveling approximately 5mph, making her swerve to the right to go over a curb and slide up onto a metal posted business sign that bent down as the front of her car slid up onto it. (RE 2, Page 47, Lines 10-25, Page 48 Line 1-17; RE 1 Page 26, Lines 4-9, Page 62, Lines 27-29, Page 63, Lines 1-29, Page 64, Lines 1-6).

Taking into account the impeachment of Mrs. Miller and her witnesses, Mrs. Miller's medical records, and her pre-existing injuries, her failure to mitigate her damages by actively engaging

in physical therapy, the true nature and extent of Mrs. Miller's injuries actually incurred from this accident, and the accident itself, Judge Chapman did not abuse his discretion by refusing to grant an additur over and above the jury's damages evaluation of $30,000. As the Defendant in this case, Appellee is aggrieved by how **high** the jury verdict was; a jury award much less than $30,000 would have been sound, but we do accept the binding validity of the jury's decision on the contradicting evidence present.

## IV. THE CIRCUIT COURT DID NOT ERR IN REFUSING PLAINTIFF'S JURY INSTRUCTION P-3, AS IT WAS NOT SUPPORTED BY THE EVIDENCE AT TRIAL AND WAS BASED ON IRRELEVANT DICTA.

### A. STANDARD OF REVIEW.

Trial courts are granted "considerable discretion" in issuing jury instructions. *Good v. Indreland*, 910 So.2d 688, 693 (Miss. Ct. App. 2005). A trial court's refusal to grant a jury instruction cannot be reversible error if the actual instructions given as a whole were a fair (even if imperfect) expression of the law of the case. *Good*, at 693-94, citing *Fielder v. Magnolia Beverage Co.*, 757 So.2d 925, 929 (Miss. 1999). The jury instructions must be considered as a whole. *Pierce v. Cook*, 992 So.2d 612, 625 (Miss. 2008). Mississippi law holds that, "any proposed instruction can only be given if it is a correct statement of the law *while also supported by the evidence presented at trial.*" *Good*, at 694 (emphasis added).

### B. MRS. MILLER'S PROPOSED JURY INSTRUCTION P-3 IS NOT SUPPORTED BY THE EVIDENCE PRESENTED AT TRIAL.

Mrs. Miller argues that the trial court erred by refusing to instruct the jury that if they were unable to "apportion" damage between Mrs. Miller's pre-existing condition and any damage caused by the accident at issue, then they were required to find State Farm liable for the entire amount of damages. Under the rule of *Good,* that argument fails because the preferred instruction was not supported by the evidence and was an improper characterization and statement of Mississippi law.

After her first automobile accident on December 10, 1997, Mrs. Miller experienced cervical pain and discomfort in her lower lumbar spinal area. (RE 6). Five days after that accident she was diagnosed by Dr. Winkelman with persistent lower back pain. (RE 4, Page 1). On February 12, 1998, Mrs. Miller was diagnosed with mild degenerative disease at L5-S1. (RE 7). After no significant improvement in her lower back pain for over three years since the first wreck, Mrs. Miller underwent another MRI on July 20, 2001. (RE 4, Page 2). This MRI revealed that she had disc desiccation and concentric bulging of the dic at L5-S1, without evidence of focal herniation or central spinal stenosis. (RE 8). Mrs. Miller continued to experience pain and to seek treatment for those injuries at least through the time that she was involved in a second accident, on October 26, 2004.

Mrs. Miller reported an increase in back and neck pain

following the October, 2004, accident. (RE 3, Pages 1-2). She continued with treatment and physical therapy for these injuries right up through the date that the accident at issue in this case occurred, January 13, 2005. In fact, Mrs. Miller attended a physical therapy appointment the day before this accident. (RE 3, Page 6). Mrs. Miller's medical expert, Dr. Winkelman, also testified that she would have still needed to continue with that medical treatment even if this accident had not occurred. (RE 5; Page 56, Line 1-15).

Mrs. Miller urges that Dr. Winkelman testified that she sustained a 5% permanent impairment to her cervical spine as a result of the January 13, 2005, car accident. State Farm does not deny this point; Dr. Winkelman did testify to that effect at one point. However, Dr. Winkelman *also* testified that this 5% impairment was consistent with her condition prior to this car accident. (RE 5; page 48, Lines 1-10). The jury was entitled to believe either of Dr. Winkelman's statements on this point and, based on this statement and Mrs. Miller's extensive medical records entered into evidence, the jury could reasonably have found that Mrs. Miller suffered no permanent or significant injury from the car accident at issue in this case. Indeed, in considering the evidence in a light most favorable to defendant as is mandated here by Mississippi law - we must accept the **absence** of any new, physical degree of impairment, as a binding required fact. Likewise, Mrs. Miller notes that Dr. Winkelman testified at one

point that she would need to continue medical treatment as a result of this accident; however, Dr. Winkelman also testified that Mrs. Miller would have continued treatment even if this January, 2005, accident had never occurred. (RE 5; Page 56, Lines 1-15).

The principle and rule addressed in Jury Instruction P-3 did not fit with the evidence presented at the trial of this case. No real "apportionment" issue was present, and Mississippi law has never held that a defendant owes for damages not caused by his negligence (for this UM case, the legal liability of the negligent underinsured tortfeasor was the issue to be determined). This case instead presented a classic temporary aggravation of a pre-existing condition situation, and the jury was fully and properly instructed on the issues properly presented to them.

### C. MRS. MILLER RELIES ON MERE IRRELEVANT *DICTA*, AND NOT BINDING AUTHORITY, IN HER JURY INSTRUCTION ARGUMENT.

Mrs. Miller cites no relevant on-point authority for her argument that Judge Chapman committed reversible error by refusing to grant Instruction P-3. Mrs. Miller instead relies completely on dicta from *Brake v. Speed*, 605 So.2d 28 (Miss. 1992) which dicta and principle does not reasonably apply to the evidence in this case.

The ruling in *Brake v. Speed* actually comports with Judge Chapman's decision to deny Instruction P-3. In that case, Brake was involved in a motor vehicle accident with Speed. Later that same year Brake was involved in a second motor vehicle accident

with Johnson. Brake sued Speed and Johnson in separate lawsuits. In her lawsuit against Speed, Brake argued that if the jury could not apportion damages between the first accident with Speed and the second accident with Johnson, then the jury must rule that Speed is liable for all the damages. The trial court rejected this instruction. The Mississippi Supreme Court then affirmed the trial court's rejection of this proferred jury instruction.

The Mississippi Supreme Court held that this instruction "erroneously places upon [the defendant] the burden of proving that [the plaintiff's] disability can be apportioned between that caused the collision with [the Plaintiff] and that caused by the subsequent injury..." *Brake*, at 32-33. The Court also held that "...given the law established by this Court...concerning successive accidents, unrelated in time, place, or parties, the circuit court properly refused [the] instruction..." *Brake*, at 33. Mrs. Miller relies on the following *dicta* from *Brake*:

> We distinguish the instant factual scenario from the situation where one suffers from a pre-existing condition. In the latter case, one who injures another suffering from a pre-existing condition is liable for the entire damage when no apportionment can be made between the pre- existing condition and the damage caused by the defendant-thus the defendant must take his victim as he finds her. It is quite another thing to say that a tortfeasor is liable, not only for the damage which he caused but also for injuries subsequently suffered by the injured person.

*Brake*, 33. This dicta is, regrettably, an awkward explanation of the "aggravation of a pre-existing condition" versus the "take your plaintiff as you find him" rule. The rule has never held that a

defendant that temporarily aggravates a pre-existing permanent injury and impairment of a plaintiff thereby owes plaintiff not only for the temporary aggravation, but also for a lifetime of the continuing, same level of, pre-existing permanent impairment.

**D. THE JURY WAS FAIRLY INSTRUCTED ON THE LAW.**

In reviewing whether a trial court erred in denying a proposed jury instruction, the instructions must be read and considered as a whole. *Richardson v. Norfolk Southern Ry. Co.*, 923 So.2d 1002, 1010-11 (Miss. 2006). The instructions should not be taken out of context or read in isolation from each other. *Id.* It is proper for the trial court to refuse to grant an instruction if the theory is fairly covered by another instruction. *Id.* If the instructions, taken as a whole, fairly and adequately instruct the jury (even if imperfectly), then reversible error has not occurred. *Id.*

Viewing the instructions given as a whole, even if it could possibly be said that the trial court erred in denying Instruction P-3, such potential error would still be harmless because the other instructions properly instructed the jury.

Instruction P-2 instructed the jury to consider Mrs. Miller's injuries and their duration, including past, present and future physical pain and suffering and resulting mental anguish. The jury was also instructed in P-2 to consider whether Mrs. Miller had any permanent injury, her past and future reasonable and necessary medical expenses, and her past lost wages.

The jury was also given Instruction P-4 which states exactly

what plaintiff contends is erroneously missing due to the refusal of P-3- that a negligent party takes the injured person as he finds him. Instruction P-4 further elaborates that "the negligent party is liable for all the consequences that result from the exacerbation or aggravation of any pre-existing condition in the injured person, even though the negligent party did not cause the pre-existing injury, and even if the exacerbated or aggravated consequences were not foreseeable." Instruction P-4, unlike the improper language of P-3, then also properly states that the jury is "not to award damages for any injury or condition which [Mrs. Miller] may have had prior to the January 13, 2005, wreck," but the jury could "award damages for each element which has been proven by a preponderance of the evidence to have been caused by the exacerbation or aggravation of such condition, if any." Obviously, Instruction P-4 properly addresses the egg-shell, "take your plaintiff as you find him" rule, and plaintiff's contention of error regarding the rejection of P-3 would therefore be without merit even if P-3 had included a fair - and not misleading - statement of the law (which we respectfully submit that it does not).

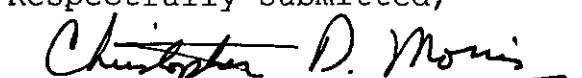
**CONCLUSION**

Insurance coverage limits have no business being admitted into evidence in a trial in which the only issue for a jury to decide is the amount of damages caused by the accident. The insurance limits are irrelevant, probative of nothing, carrying only the potential

and likelihood to unfairly prejudice the jury in its efforts to reach a logically sound verdict. The full damages evidence in this case, especially considering such in a light favorable to defendant, easily confirms the propriety of Judge Chapman's denial of plaintiff's Motions for an Additur, J.N.O.V., or new trial. Viewing the instructions as a whole and in light of the evidence presented at trial, Judge Chapman likewise did not err in refusing Mrs. Miller's proposed Jury Instruction P-3. The jury was fairly and properly instructed on the case that was presented in the evidence before them.

Although the verdict in this case was a bit too high, especially if one views the evidence in a light most favorable to the Defendant, it cannot be properly said that it was not fairly reached and was not within the reasonable conclusory range allowed under the conflicting evidence. The jury lawfully fulfilled its duty and their verdict is not subject to being discarded unless reversible error or unreasonable conclusions are found to be present. Defendant/Appellee respectfully submits that no such reversible error is present, that the Trial Judge did not abuse his discretion in refusing to discard the jury's decision, and that the Court's ruling and resulting Final Judgment of the Trial should be affirmed. State Farm therefore respectfully prays for such an affirmance, and for an Order and Mandate to such effect, with all costs of this appeal to be assessed against the Appellant.

Respectfully submitted,



Philip W. Gaines (MSB# [redacted])
Christopher D. Morris (MSB# [redacted])

**CERTIFICATE OF SERVICE**

I, the undersigned, do hereby certify that I have this day mailed by U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing document to the following:

Rocky Wilkins, Esq.
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Barry W. Howard, Esq.
4273 Interstate 55 North, Suite 100
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This the 14th date of December, 2009.

Christopher D. Morris

Philip W. Gaines (MSB# [redacted]
Christopher D. Morris (MSB# [redacted])

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Mississippi Supreme Court Clerk
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Honorable William E. Chapman, III
Rankin County Circuit Court Judge
P.O. Box 1885
Brandon, MS 39043

This the 14th date of December, 2009.

Philip W. Gaines (MSB# [redacted])
Christopher D. Morris (MSB# [redacted])