IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
2009-CA-01289

VALERIE JACKSON-MILLER — APPELLANT

V.

STATE FARM MUTUAL INSURANCE COMPANY — APPELLEE

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

BRIEF OF APPELLANT

Oral argument is requested

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VALERIE JACKSON-MILLER **APPELLANT**

V.

STATE FARM MUTUAL INSURANCE COMPANY **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

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

I. Valerie Jackson-Miller, Appellant

II. State Farm Mutual Automobile Insurance Company, Appellee

III. Rocky Wilkins, Counsel for Appellant

IV. Barry W. Howard, Counsel for Appellant

V. Philip W. Gaines, Counsel for Appellee

RESPECTFULLY SUBMITTED, this the 13th day of November, 2009.

BY: Rocky Wilkins
ROCKY WILKINS

OF COUNSEL:

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STATEMENT OF THE CASE

A. Nature of the Case

On January 13, 2005, Appellant Valerie Jackson-Miller (hereinafter "Valerie Miller" or "Mrs. Miller") was injured in a motor vehicle collision with Walter Duncan (hereinafter "Mr. Duncan") at the intersection of Lakeland Place and Lakeland Drive in Flowood, Rankin County, Mississippi. It is not disputed that Mr. Duncan's negligence was the sole proximate cause of the collision. However, Mr. Duncan carried a minimum limits insurance policy with USAA with only $25,000.00 in liability coverage. Mrs. Miller's damages exceeded this amount, and she pursued an underinsured motorist claim against her own insurance company, State Farm Mutual Insurance Company (hereinafter "State Farm").

B. Course of Proceedings and Disposition in the Court Below

Mrs. Miller filed suit against Mr. Duncan and State Farm in the Circuit Court of Lauderdale County, Mississippi, for damages resulting from injuries she sustained in a motor vehicle crash with an underinsured motorist. After settling with USAA for $25,000.00, Mr. Duncan was dismissed, and the case was transferred to the Circuit Court of Rankin County, Mississippi.[1] The case proceeded with discovery and pretrial motions.

Mrs. Miller carried an underinsured motorist insurance policy with State Farm with a $250,000.00 policy limit. (R. at 139; RE 3). State Farm filed a Motion *in Limine* to exclude the amount of the Mrs. Miller's underinsured motorist policy. Appellant's counsel argued that the jury should be allowed to hear evidence of the entire contract between Mrs. Miller and State Farm. However, State Farm stipulated that Mrs. Miller was an insured covered by its underinsured motorist

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[1] State Farm also tendered $5,000.00 in medical payments insurance coverage to Mrs. Miller.

contract at the time of the wreck, and that this policy provided coverage for the subject collision. (T. at 22). Thus, the trial court found that the only issue for determination in the case was the amount of damages. (T. at 22-24). Following a one-day jury trial on damages only, the jury awarded Mrs. Miller $30,000.00 in damages. (R. at 89-90; RE 2). The Circuit Court of Rankin County, Mississippi for the Twentieth Circuit Court District, Judge William E. Chapman, III presiding, entered a Final Judgment on April 13, 2009. (RE 2).

Aggrieved by the jury's verdict, Mrs. Miller subsequently filed a motion for judgment notwithstanding the verdict ("J.N.O.V."), or in the alternative new trial, or in the alternative additur. (R. at 91-101; RE 4). A hearing was held on these post trial motions, and the trial court denied all of Mrs. Miller's motions. (T. at 106-112; RE 5; RE 6). She subsequently filed a timely Notice of Appeal.

STATEMENT OF THE FACTS

On January 13, 2005, Walter Duncan and the Appellant, Valerie Miller, were involved in a motor vehicle collision in Flowood, Mississippi. Mr. Duncan was driving a 2500 Dodge pick-up truck and ran through a stop sign and hit Mrs. Miller. Mrs. Miller was driving a small, black BMW at the time of the crash. (T. at 24). Shortly after the wreck, Officer Sheryl Poole, with the Flowood Police Department, arrived at the scene of the crash. (T. at 24). After speaking with Mrs. Miller, Officer Poole estimated that Mrs. Miller was traveling approximately twenty-five miles per hour when she was struck by Mr. Duncan's pick-up truck. (T. at 26). Mr. Duncan admitted that he failed to yield the right-of-way and that he was solely responsible for the wreck. (T. at 26).

As a result of the impact, the bumper on the back of Mrs. Miller's vehicle was knocked off and her car was pushed off the street, over the curb, and into a metal pole supporting an advertising sign. (T. at 41, 63, 81). Officer Poole classified the damage to Mrs. Miller's vehicle as "heavy," and

that the damage was from the obvious result of a large truck crashing into a "small four-door vehicle." (T. at 27). The repair estimate for Mrs. Miller's car was $3,208.61, causing it to be totaled out. (T. at 64).

During the investigation of the crash, Mrs. Miller informed Officer Poole that she was experiencing back pain. (T. at 26). Officer Poole specifically remembered Mrs. Miller "holding the top of her back area, possibly the lower part of her neck." (T. at 27). Officer Poole recommended that Mrs. Miller be transported to the hospital by ambulance, but Mrs. Miller wanted to have her husband pick her up and take her home. (T. at 29).

Shortly after the crash, Harold Miller, the Appellant's husband, arrived at the scene to assist his wife. (T. at 41). Mr. Miller testified that his wife's vehicle was lodged on top of a sign, and that Mr. Duncan and his passenger assisted with the efforts to free the vehicle from the sign. (T. at 41). Mr. Miller testified that his wife was experiencing a "burning sensation in the back of her neck," and that he transported his wife to the emergency room within an hour or two after the crash. (T. at 41).

Mrs. Miller arrived at Rankin Medical Center's emergency room shortly after the collision. (T. at 65). She was treated and released that night, but over the next few days, Mrs. Miller's pain continued to increase. (T. at 65). Unable to get an appointment with Dr. Michael Winkelmann, Mrs. Miller went to physical therapy for treatment. (T. at 65).

Dr. Michael Winkelmann testified at trial by videotaped deposition regarding Mrs. Miller's injuries. (T. at 36; R. at 140-163; RE 7 (Trial Exhibit P-106 for Identification Only)). He was tendered and accepted as an expert in physical and rehabilitation medicine. (RE 7, at p. 10:8-10). Dr. Winkelmann has been Mrs. Miller's treating physician since the late nineties. (RE 7, at p. 15:11-13). He treated Mrs. Miller for her two car wrecks that she had prior to the subject incident. (RE 7, at p. 15:14-16). The first time Dr. Winklemann treated Mrs. Miller for the subject incident was

on March 17, 2005. (RE 7, at p. 17:25). At that time, Dr. Winklemann reported that Mrs. Miller was suffering from myofascial pain and sacroilitis. (RE 7, at p. 18:24-25). According to Dr. Winklemann, the January 13, 2005 car wreck exacerbated her upper trapezius and neck pain. (RE 7, at p. 21:7-11).

Over the course of Dr. Winklemann's treatment, Mrs. Miller's pain did not improve as well as Dr. Winkelmann hoped. (RE 7, at p. 22:21-25). On September 19, 2005, Dr. Winklemann's nurse practitioner found that over the "last several weeks [Mrs. Miller] had a significant increase in her neck pain. Additionally she states that she's been waking up around 3:00 every morning feeling short-winded. Has to sit up to catch her breath. During that period she states that her neck is throbbing." (RE 7, at p. 23:11-25). This pain was present over eight months after the January 13, 2005 wreck. (RE 7, at p. 24:12-13). Following this evaluation, Dr. Winkelmann ordered an MRI of the cervical spine. (RE 7, at p. 24:22-25).

The results of this MRI showed that Mrs. Miller had a small posterior C4-5 disc bulge and that it was abutting the thecal sac. (RE 7, at p. 25:15-18). Dr. Winklemann testified that the disc bulge was consistent with the symptoms that Mrs. Miller exhibited and explained the worsening of her discomfort. (RE 7, at p. 26:1-10).

Further, Dr. Winklemann testified that Mrs. Miller sustained permanent injury to her cervical spine and left hip, specifically a 5% permanent impairment to her cervical spine, as a result of the January 13, 2005 car wreck. (RE 7, at p. 34:1-35:13). Dr. Winklemann opined that Mrs. Miller's injuries resulting from the subject car wreck will continue to bother her in the future, and that she may need to continue physical therapy and take medications. (RE 7, at p. 35:19-36:25).

Mrs. Miller's treatments rendered by Dr. Winklemann totaled $15,305.00. (RE 7, at p. 37:1-15). According to Dr. Winklemann, these treatments were reasonable and necessary, and related to

the January 13, 2005 wreck. (RE 7, at p. 37:1-15). All of Dr. Winklemann's expert opinions were made to a reasonable degree of medical certainty. (RE 7, at p. 38:1-10). Even after defense counsel's lengthy cross-examination of Dr. Winklemann, the doctor stated on re-direct that his opinions regarding Mrs. Miller's injuries and her permanent impairment had not changed. (RE 7, at p. 88:6-89:1).

Moreover, testimony from Mrs. Miller's physical therapist, Teresa Swyers, provided additional proof of the extent of Mrs. Miller's injuries that resulted from the January 13, 2005 wreck. Ms. Swyers treated Mrs. Miller before and after the January 13, 2005 wreck. She testified that Mrs. Miller's condition was much worse after the January 13, 2005 wreck, and that she was experiencing more pain in her neck, back, and hip than before the wreck. (T. at 47, 60). In fact, on January 17, 2005, Mrs. Miller was in so much pain that she could not complete her physical therapy that day, and this was documented in Ms. Swyers' treatment note. (T. at 47; Trial Exhibit P-14). Ms. Swyers also indicated that Mrs. Miller had pain on her entire right side after the January 13, 2005 wreck, which was inconsistent with any prior injury. During treatment, Mrs. Miller exhibited subjective and objective findings of injury to Ms. Swyers. (T. at 51). Finally, Ms. Swyers explained that Mrs. Miller complied with the demands of her physical therapy treatment schedule. (T. at 59).

Valerie Miller also provided extensive testimony regarding her permanent injuries, medical bills, lost wages, and pain and suffering. The Appellant testified that she suffered painful injuries to her neck, lower back, and right side due to the January 13, 2005 wreck. (T. at 65). Her pain continued to worsen over the next few days. (T. at 65). She also experienced problems with her arm jumping, which was not present before January 13, 2005. (T. at 66). Mrs. Miller has complained of sleep problems and severe headaches in her neck area since the subject wreck. (T. at 66). Mrs. Miller testified that Dr. Winklemann diagnosed her with a disc bulge at C-4, C-5, and that she had

never had a disc bulge prior to the January 13, 2005 wreck. (T. at 67). This back injury prevents her from doing household chores and from being intimate with her husband. (T. at 69)

Mrs. Miller testified that she had been in two wrecks prior to the January 13, 2005 wreck, but that the pain she currently experiences, specifically, the pain in her back, neck, and hip, resulted from the January 13, 2005 wreck. (T. at 68, 71). She also testified that the January 13, 2005 wreck was much worse than the October 2004 wreck. (T. at 63). Mrs. Miller still suffers pain every day in her neck. (T. at 71).

Mrs. Miller testified that she incurred $23,281.83 in medical bills from January 13, 2005 to May 16, 2007. (T. at 72). The Appellant lost her job at Methodist Rehab Center because of the wreck, and incurred $2,184.00 in lost wages. (T. at 67-68, 70-71). Finally, Mrs. Miller's vehicle was totaled from the January 13, 2005 wreck.

Admittedly, Mrs. Miller was involved in four car wrecks over the course of ten years. (T. at 72-74). In 1997, she was struck by a vehicle and injured her knee, lower back, and her hips. (T. at 73). In 2004, she was involved in minor car crash, which resulted in little damage to her car and minor soreness in her neck and back. In 2005, she was involved in the subject incident, and finally, in 2007, she was again struck by another vehicle. (T. at 73-74). Mrs. Miller was not at fault for any of these wrecks. (T. at 74).

At the time of the crash, Valerie Miller was a State Farm insured and maintained an underinsured motorist policy with policy limits up to $250,000.00. (T. at 22; RE 3). At trial, State Farm and the Appellant stipulated before the jury that Mrs. Miller was insured under this policy, that Mr. Duncan qualified as an owner or operator of an underinsured motor vehicle, and that Mr. Duncan was at fault for the wreck. (T. at 22-23). Over the Appellant's objection, the trial judge excluded the $250,000.00 policy limit amount from the jury, limiting the jury's knowledge of all the

facts in the case. (T. at 6-8).

SUMMARY OF THE ARGUMENT

The first issue on appeal asks whether the trial court below abused its discretion when it excluded evidence of Appellant, Valerie Miller's contract with Appellee, State Farm, specifically, the $250,000.00 policy limits Mrs. Miller was contractually allowed to recover in the event she was injured by an underinsured motorist. Appellant contends that excluding said evidence prejudiced her ability to present her case, infringed on her contractual rights under her underinsured motorist insurance policy, and improperly denied the jury of relevant information. The Mississippi Supreme Court has remained silent on this issue, and the trial court's exclusion of this evidence is not supported by Mississippi case law. Thus, Mrs. Miller asks this Court to grant her a new trial and provide the lower court clear guidance allowing the admissibility of Mrs. Miller's policy limits contained in her uninsured motorist contract.

The second issue on appeal asks whether the trial court below erred when it refused to grant Mrs. Miller a J.N.O.V., or in the alternative a new trial on the issue of damages. Appellant contends that the $30,000.00 jury verdict was unjust and contrary to the substantial weight of the evidence presented at trial regarding her permanent injuries, medical bills, lost wages, and pain and suffering. Mrs. Miller also contends that the exclusion of significant evidence, specifically, the $250,000.00 insurance contract she maintained in the event she was injured by an underinsured motorist, prejudiced her ability to present her case. Mrs. Miller thus asks that this Court grant her a new trial and remand this matter back to the trial court with instructions to allow the $250,000.00 policy limits contained in her insurance contract with State Farm to be presented to the jury.

The third issue on appeal asks whether the trial court erred when it refused to order the requested additur after the jury awarded damages incomparable to the permanent injuries, medical

bills, lost wages, and the pain and suffering she experienced as a result of the underlying car wreck. Mrs. Miller contends that the jury verdict was not reasonably adequate and that the jury failed to apply the proof presented at trial. Thus, Mrs. Miller asks that this Court grant the Appellant's request for an additur.

The final issue on appeal is whether the trial court committed error by refusing to grant Valerie Miller's Jury Instruction P-3. This jury instruction correctly stated Mississippi law on the issue of apportionment of damages pursuant to *Brake v. Speed*, and should have been given.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT EXCLUDED EVIDENCE REGARDING THE POLICY LIMITS CONTAINED IN VALERIE MILLER'S INSURANCE CONTRACT WITH STATE FARM, SPECIFICALLY, THE $250,000.00 AMOUNT OF COVERAGE PROVIDED IN VALERIE MILLER'S UNDERINSURED MOTORIST INSURANCE CONTRACT

The trial court erred in excluding evidence of the amount of the underinsured motorist insurance contract to the jury. (RE 3). The underinsured motorist insurance contract provided $250,000.00 in coverage by State Farm for Valerie Miller. (RE 3). The trial court excluded this evidence at trial, apparently agreeing with State Farm that the evidence would be more prejudicial than probative. (T. at 6-8). Although the trial court has broad discretion on evidentiary matters, this ruling constitutes reversible error because a substantial right of the Appellant was affected. *See* M.R.E. 103(a).

The amount of underinsured motorist coverage is relevant and an essential element of the contract between Valerie Miller and State Farm. Black letter law states that a contract is a promise, or set of promises, for breach of which the law gives a remedy, or the performance of which the law in some way recognizes a duty. 1 Williston, Contracts § 1. At trial, it was stipulated that Valerie

Miller was insured by a State Farm underinsured motorist policy at the time of the January 13, 2005 car wreck. The contracted amount of damages available to the Appellant was $250,000.00. (RE 3). However, over Mrs. Miller's counsel's objection, the trial court excluded evidence of the amount of coverage. (T. at 6-8). This ruling by the trial court prevented Mrs. Miller from introducing the entire contract into evidence. State Farm cited no Mississippi case law to bar such an exclusion. Without the amount of coverage in evidence, the jury was given no guidance whatsoever on the issue of the amount of insurance purchased for Mrs. Miller.

The Appellant was severely prejudiced by not being able to introduce this evidence to the jury. The trial court's ruling prevented Mrs. Miller from presenting the whole picture to the jury. Basically, Mrs. Miller was only allowed to argue that she had purchased insurance and that State Farm should compensate her for her injuries. However, she was not allowed to tell the jury how much insurance she purchased. Thus, the jury was left wondering if she was asking for an amount far above or far below her policy limits. Appellant's counsel was prevented from arguing that the jury should award Mrs. Miller all of the damages that she was legally entitled to: $250,000.00. Instead, the Appellant 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 that she had actually bought. Clearly, this prejudiced Mrs. Miller's ability to present her case to the jury.

The only reason that State Farm sought exclusion of this evidence was that it considered $250,000.00 to be a large dollar amount. Had the amount of coverage been only $25,000.00 or $50,000.00, State Farm likely would not have objected to admission of the evidence. This allows State Farm and other insurance companies to pick and choose what policies they will agree to place into evidence on a case by case basis. It is important to note that counsel for State Farm did not state that admission of the policy limits were *always* inappropriate. Rather, State Farm's counsel implied

that sometimes the Appellee would not object to admission of the policy limits.

State Farm is attempting to make the policy limit a shield and a sword.[2] The Appellee should not be allowed to have it both ways. On one hand, State Farm does not want the jury to hear how much coverage was available to Mrs. Miller because State Farm fears that a jury will automatically award her the policy limit. On the other hand, State Farm wants to invoke the protection of the policy limit if a verdict is rendered above the policy limit amount. (T. at 8). This Honorable Court should find that either the amount of coverage should be admitted in every underinsured motorist case, or it should be excluded.

State Farm has previously allowed evidence of the amount of uninsured motorist coverage when it benefits its position. *State Farm Mutual Insurance Company v. Bishop*, 329 So. 2d 670 (Miss. 1976). The *Bishop* case involved an action brought by an insured against her own insurance company under two uninsured motorist policies. The case was tried before the circuit court without a jury. It was stipulated that both policies provided for $10,000.00 in coverage. *Bishop*, 329 So. 2d at 672. State Farm argued that the policies could not be stacked in an attempt to limit the plaintiff's recovery. *Id.* Thus, State Farm does not object to the admission of policy limit amounts when it will help its case.

The Court of Appeals has previously held that admission of evidence of insurance policy limits is not error. *Brennan v. Webb*, 729 So. 2d 244 (Miss. Ct. App. 1999). The *Brennan* case involved a claim by insureds against their agent for negligence in accepting an application for

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[2]One can only imagine State Farm's reaction if a policy holder from the Mississippi Gulf Coast in a Hurricane Katrina lawsuit attempted to exclude the amount of dwelling or personal property insurance coverage from the jury and instead sought recovery for millions of dollars in excess of the policy limits. This would basically allow the jury to decide the case in a vacuum, with no guidance whatsoever. Of course, in such a situation, State Farm would object.

insurance. State Farm eventually tried to deny the insureds' claim based on material representations in the application. *Id.* The Court found that the State Farm policy, showing the dollar amount of coverage of both the dwelling and contents, was made an exhibit at trial. *Brennan*, 729 So. 2d at 251.

Moreover, even when the amount of damages are disputed, the policy limits are not excluded in other types of insurance cases. For instance, the policy limits are routinely admitted in hurricane and property damage cases. In *Fonte v. Audubon Insurance Company*, the Mississippi Supreme Court reversed a trial court that had granted summary judgment in a Hurricane Katrina case. *Fonte v. Audubon Insurance Company*, 8 So. 3d 161 (Miss. 2009). The Fontes had $400,000.00 in limits for their dwelling and $30,000.00 in limits for their contents. *Id.* at 164. The insurance company paid the plaintiffs only $171,402.21, which was a portion of their policy limit for their home. *Id.* at 164. The Fontes then sued their insurance company for full payment under their insurance policy. A unanimous Mississippi Supreme Court reversed the lower court and found that summary judgment was improper. *Id.* at 168. Since the Fontes purchased insurance of $400,000.00, they will be allowed to present evidence of this amount at trial. The evidence of the Fontes' policy limits is clearly relevant and probative to their insurance contract and the amount of damages legally obtainable by the Fontes. Accordingly, the *Fonte* case is analogous to Mrs. Miller's situation. Here, State Farm disputes that Mrs. Miller is entitled to her $250,000.00 policy limit. Thus, the Appellant should be allowed to present evidence of the policy limits and let the jury decide if her damages warrant the entire policy amount.

In *Cherry v. Anthony, Gibbs, Sage*, the Mississippi Supreme Court found that a policy insuring a tractor trailer rig was admissible. *Cherry v. Anthony, Gibbs, Sage*, 501 So. 2d 416 (Miss. 1987). The plaintiff sued, claiming that the $35,000.00 policy limit should have been paid after a

fire loss. *Id.* at 417. The defendant insurance company argued that the policy limit "was only a ceiling and the coverage was for the actual cash value of the truck." *Id.* at 417-418. This is yet another example of an insurance company invoking the protections of the policy limits when it benefits their position.

The only other guidance on the issue of insurance comes from Mississippi Rule of Evidence 411, which addresses the admission of liability insurance. M.R.E. 411. The Rule excludes evidence that a person was or was not insured to show negligence. *Id.* There are no other specific prohibitions against evidence of insurance in the Mississippi Rules of Evidence. In fact, evidence of insurance may be admitted for other purposes, such as proof of agency, ownership, or bias. *Id.* Accordingly, in the case *sub judice*, the Court erred in excluding evidence of the amount of coverage as there is no Rule specifically barring admission of the same.

In the end, in any case involving a dispute over insurance proceeds, the fact that the jury may hear that an insured had a certain amount of coverage does not mean that the jury will automatically award that amount. It simply means that the jury knows the maximum amount of the insurance contract between the plaintiff and their insurance company. There is simply no rational basis to allow the evidence of policy limits in hurricane and property cases and exclude it in the case at bar. Accordingly, the Appellant asks this Honorable Court to grant a new trial with the instructions to the trial court to allow the admission of the $250,000.00 underinsured policy limits.

II. THE TRIAL COURT ERRED WHEN IT OVERRULED VALERIE MILLER'S MOTION FOR J.N.O.V., OR IN THE ALTERNATIVE, FOR A NEW TRIAL

It is well settled that Judgments Notwithstanding the Verdict are judgments as a matter of law. *White v. Stewman*, 932 So. 2d 27, 31 (Miss.2006). A Motion for J.N.O.V. challenges, by motion, the substance of a party's factual evidence regarding the law of the case. *Id.* On appeal from

the denial of a Motion for J.N.O.V, a reviewing court, considering the evidence in the light most favorable to the nonmovant, will reverse and render a lower court's denial "[i]f the facts so considered point so overwhelmingly in favor of the appellant [movant] that reasonable men could not have arrived at a contrary verdict. *Id.* at 32. Simply stated, "[judgments notwithstanding the verdict] go to the very heart of a litigant's case and test the legal sufficiency of that litigant's case. *Id.* Thus, the issue of granting or denying a Motion for J.N.O.V. should be reviewed by the Court under the de novo standard, therefore, applying the same criteria as that of the trial court. *Id.*

Alternatively, Rule 59(a) of the Mississippi Rules of Civil Procedure provides that "A new trial may be granted...in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted..." M.R.C.P. 59(a). Although motions for a new trial are employed in rare cases, 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." *Crews v. Mahaffey*, 986 So. 2d 987, 998 (Miss. Ct. App. 2007)(citing *Fiddle, Inc. v. Shannon*, 834 So. 2d 39, 45 (Miss. 2003). The issue of whether to grant or deny a new trial, on motion of a party, should be reviewed by this Court under the abuse of discretion standard. *White v. Stewman*, 932 So. 2d 27, 33 (Miss. 2006).

The motion for a new trial affords trial courts with an alternative to a grant of a J.N.O.V., and provides judges with the opportunity to remedy trial error before an appeal is commenced. *White v. Stewman*, 932 So. 2d 27, 33 (Miss.2006). The Court in *White* explained that new trials are granted whenever courts are "convinced, from the evidence, that the jury has been partial or prejudiced, or has not responded to reason upon the evidence produced." *Id.* A new trial is necessary for several reasons: (1) when the verdict is against the substantial or overwhelming weight of the evidence; (2) when mistakes were made in conduction of the trial; or (3) when mistakes where made in applying

the law. *Id.*

In *Janssen Pharmaceutica, Inc. v. Bailey*, the Mississippi Supreme Court reiterated the following factors a trial court should weigh when considering a motion for a new trial:

> 1. Has the search for the true facts proceeded as far as it reasonably may under the peculiar facts and circumstances of the case?
>
> 2. To what extent would it be unfair to the party in whose favor the verdict was returned in effect to give that party's adversary a second bite at the apple?
>
> 3. Considering the evidence, is there a substantial basis for believing that the jury disregarded their oaths and failed to follow the instructions of the Court in reachig its verdict? Put another way, is it substantially apparent that the jury's verdict is the product of passion, prejudice or any other arbitrary factor?
>
> 4. Assuming arguendo that the verdict is unjust (by reference to the underlying facts of the transaction or occurrence, the complete truth of which we will never know), what is the impact of that "injustice" upon the party against whom the verdict has been returned?
>
> 5. If a new trial is ordered, will the party in whose favor the verdict has been returned be deprived of some fair advantage he enjoyed in the first trial?
>
> 6. Are there any other factors present, peculiar to the particular case or the parties, that would render just or unjust the grant or denial of a new trial?
>
> *Janssen*, 878 So. 2d 31, 60-61 (Miss. 2004).

The *Janssen* Court, after applying the abovementioned factors, found that the trial court did abuse its discretion by not granting Janssen's motion for a new trial because the verdict was "so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice on this Court." *Id.* at 61 (citing *Baker v. State*, 802 So. 2d 77, 81 (Miss. 2001)).

Using either standard, the trial court committed error, and the Appellant should live to see

to see another day in court. As stated above, Dr. Winklemann testified that Mrs. Miller sustained permanent injury to her cervical spine and left hip, specifically a 5% permanent impairment to her cervical spine, as a result of the January 13, 2005 car wreck. (RE 7, at p. 34:1-35:13).

> [BY. MR. WILKINS]: Q. And it's your opinion then and it is today that Ms. Jackson, Ms. Valerie Jackson-Miller, suffered a permanent injury to her cervical spine and her hip in the January 13, 2005 wreck, is that correct?
>
> [BY DR. WINKELMANN]: A. She had an injury that she sustained that continued to give her chronic pain and chronic problems, and that is the definition that I prefer, actually, for that. And, yes, I do believe that that is related.
>
> Q. And the disk bulge that we saw, the C-4, C-5, that was caused by the January 13, 2005 wreck more likely than not in your opinion, is that correct?
>
> A. I did not have any previous clear MRI record to show me any pre-existing condition in that respect, so when I evaluated her with the MRI at that time I did believe that it was related to the motor vehicle crash as her symptoms corresponded with that.
>
> (RE 7, at p. 34:8-35:2).

Dr. Winklemann opined that Mrs. Miller's injuries resulting from the subject car wreck will continue to bother her in the future, and that she may need to continue physical therapy and take medications. (RE 7, at p. 35:19-36:25).

Moreover, testimony from Mrs. Miller's physical therapist, Teresa Swyers, provided additional proof of the extent of Mrs. Miller's injuries that resulted from the January 13, 2005 wreck. Ms. Swyers treated Mrs. Miller before and after the January 13, 2005 wreck. She testified that Mrs. Miller's condition was much worse after the January 13, 2005 wreck, and that she was experiencing more pain in her neck, back, and hip than before the wreck. (T. at 47, 60).

> [BY. MR. WILKINS]: Q. So based on your observation, actually working with Valerie, how was she before January 13, 2005, as opposed to after January 13, 2005?
>
> [BY. MS. SWYERS]: A. She had regressed or gotten worse.
>
> Q. So if somebody suggests that she didn't complain about having severe or worse neck pain right after this wreck, you would disagree based on your January 17 findings, wouldn't you?
>
> A. Correct.
>
> (T. at 47).

This testimony was not rebutted by State Farm.

Valerie Miller also provided extensive testimony regarding her permanent injuries, medical bills, lost wages, and pain and suffering. The Appellant testified that she suffered painful injuries to her neck, lower back, and right side due to the January 13, 2005 wreck. (T. at 65). Her pain continued to worsen over the next few days. (T. at 65). She also experienced problems with her arm jumping, which was not present before January 13, 2005. (T. at 66). Mrs. Miller complained of sleep problems and severe headaches in her neck area since the subject wreck. (T. at 66). Mrs. Miller testified that Dr. Winklemann diagnosed her with a disc bulge at C-4, C-5, and that she had never had a disc bulge prior to the January 13, 2005 wreck. (T. at 67). This back injury prevents her from doing household chores and traveling long distances in a car. (T. at 69)

In light of the above, a verdict of $30,000.00 ignores that fact that Valerie Miller suffered a permanent injury. It also ignores the fact that she still continues to suffer pain from this wreck. Interestingly, the linchpin in State Farm's defense was that Mrs. Miller did not suffer a significant increase in pain immediately after the January 13, 2005 wreck. Their defense was to muddy the water and basically attribute a majority of Mrs. Miller's injuries to her prior wrecks. However, Teresa Swyers and Mrs. Miller testified that the Appellant had significantly more pain after the

January 13, 2005 wreck. Dr. Winklemann testified that Mrs. Miller has a 5% permanent impairment because of the wreck. This testimony was not rebutted by State Farm. The Appellee did not even offer any experts to refute this evidence. Obviously, State Farm could not find a competent doctor that would testify for them in this case or it would have hired one for trial. Regardless, the jury did not factor in the above-referenced testimony. This is the very situation where a jury fails to use reason based on the evidence presented, and a J.N.O.V. or new trial should have been granted.

III. THE TRIAL COURT ERRED WHEN IT DENIED VALERIE MILLER'S MOTION FOR ADDITUR

In the alternative, the trial court erred when it denied Valerie Miller's Motion for Additur. Mrs. Miller entered approximately $23,281.83 in medical bills and $2,180.00 in lost wages into evidence. (T. at 70, 72). Yet, the jury only awarded Valerie Miller $30,000.00 in damages. The overwhelming weight of evidence presented at trial showed that Mrs. Miller's permanent injuries, medical bills, lost wages, and pain and suffering warranted a damage award significantly higher than the amount awarded by the jury.

The trial court or the Supreme Court has the authority to grant an additur. Mississippi Code Annotated Section 11-1-55 (Supp. 1986) reads as follows:

Miss. Code Ann. § 11-1-55. Authority to impose condition of additur or remittitur

> The Supreme Court or any other court of record in a case in which money damages were awarded may overrule a motion for new trial or affirm on direct or cross appeal, upon condition of an additur or remittitur, if the court finds that the damages are excessive or inadequate for the reason that the jury or trier of the facts was influenced by bias, prejudice, or passion, or that the damages awarded were contrary to the overwhelming weight of credible evidence. If such additur or remittitur be not accepted then the court may direct a new trial on damages only. If the additur or remittitur is accepted and the other party perfects a direct appeal, then party accepting the additur or remittitur shall have the right to cross appeal for the purpose of reversing the action of the court in regard to the additur or

remittitur.

Miss. Code Ann. § 11-1-55.

The Mississippi Supreme Court has held that the determination of inadequate jury awards are "determined on a case-by-case basis, and that a [reviewing court] will not disturb a jury award unless the amount, in comparison to the actual damages, "shocks the conscience" of the court. *APAC Mississippi, Inc. v. Johnson*, 15 So. 3d 465, 479 (Miss. Ct. App. 2009)(citing *Entergy Miss., Inc. v. Bolden*, 854 So. 2d 1051, 1058 (Miss. 2003). Thus, the question is whether the verdict is so inadequate as to indicate that "the jury failed to respond to reason." *Id.* (citing *Walker v. Gann*, 955, 955 So.2d 920, 931 (Miss. Ct. App. 2007).

Here, the jury only awarded Mrs. Miller approximately $4,500.00 for pain and suffering. As discussed thoroughly in Section II above, Mrs. Miller should be afforded an additur because the jury rendered an inadequate verdict. Apparently, the jury did not take into account Mrs. Miller's permanent injuries, medical bills, lost wages, and her continued pain and suffering.

This Honorable Court has not hesitated to grant an additur when appropriate. In *Gaines v. K-Mart*, the plaintiff fell off of a ladder and had $610,000.00 in medical bills. *Gaines v. K-Mart Corporation*, 860 So. 2d 1214 (Miss. 2003). The jury awarded $10,000.00, but found the plaintiff 95% at fault. *Id.* at 1216. Thus, the total damages award was only $500.00. *Id.* The trial court granted an additur of $20,491.00 because the jury's verdict shocked the conscience. *Id.* The Supreme Court affirmed the trial court's granting of an additur.

> The jury award went against the overwhelming weight of the evidence. It is hard to imagine, after reviewing the record in this case, how the jury could have come up with such a paltry amount...It is not an abuse of discretion for the trial judge to have given credence to the expert testimony presented by Gaines regarding her medical expenses...

Gaines, at 1221.

In *Scott Prather Trucking v. Clay*, the plaintiff had $24,000.00 in past medical bills and $24,000.00 in future medical bills and a permanent impairment. *Scott Prather Trucking v. Clay*, 821 So. 2d 819 (Miss. 2002). The jury's verdict was for only $35,800.00. *Id.* at 822. The trial court granted an additur to $150,000.00 and the Mississippi Supreme Court affirmed. *Id.* at 822. The Court found that the verdict was contrary to the overwhelming weight of the credible evidence, and that the jury's verdict "clearly left out" any compensation for pain and suffering. *Id.* at 822.

In light of the above, the Appellant requests that this Honorable Court grant an additur to the amount awarded by the jury since the amount of $30,000.00 was contrary to the overwhelming weight of credible evidence. The verdict should be raised to an amount to compensate Valerie Miller for her permanent injury and continued pain and suffering. The Appellant suggested an additur of $70,000.00 to bring the total damages to $100,000.00, but the trial court denied this request. In any event, the amount should be substantially more than the amount awarded at trial based on the evidence. The verdict of the jury shows that they were influenced by bias, prejudice, or passion, and that they did not consider the overwhelming credible evidence.

IV. THE TRIAL COURT ERRED IN DENYING VALERIE MILLER'S JURY INSTRUCTION P-3

State Farm's defense was essentially to argue that Mrs. Miller suffered from pre-existing injuries from her prior wrecks. At trial, State Farm tried repeatedly to muddy the water and attribute Valerie Miller's neck, back, and hip injuries to anything but the January 13, 2005 car wreck.

> [BY MR. GAINES]: Q. You've treated her as far back as the 1990s, correct?
>
> [BY DR. WINKLEMANN]: A. Yes, sir.
>
> . . . . .

Q. And that's before she had this accident in January, 2005?

A. Yes, sir. And that was pertaining to the hip injury that she had and the low back injury, I believe.

Q. The types of problems that she had before–

A. Yes, sir.

Q. –With the persistent hip and low back problems, and the trapezius problems, cervical spine problems, neck pains that she complained of at that time, would those be things that also would be consistent with a 5 percent permanent impairment rating?

A. Yes, sir.

. . . . .

Q. As she goes through her life, this is a lady who had an onset of problems from 1998 that you're familiar with?

A. Yes, sir.

(RE 7, at p. 46:23-25; 47:21-48:10; 55: 5-8).

A tactic similar to State Farm's "pre-existing injury" defense was addressed in *Brake v. Speed.* The Court stated that "one who injures another suffering from a pre-existing condition is liable for the entire damage when no apportionment of fault 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." *Brake v. Speed*, 605 So.2d 28, 33.

In light of the above, the trial court erred in denying Valerie Miller's proposed Jury Instruction P-3. (RE 8). Jury Instruction P-3 stated the following:

JURY INSTRUCTION P-3

One who injures another suffering from a pre-existing condition is liable for the entire damage if no apportionment can be made between the preexisting condition and damage caused by a Defendant.

> Thus, if you find from a preponderance of the evidence that no apportionment can be made from Valerie Jackson Miller's injuries in the October 26, 2004 collision to the January 13, 2005 collision, then the Defendant is liable for the entire amount of damages after January 13, 2005.
>
> (RE 8).

The language in Jury Instruction P-3 is taken directly from *Brake v. Speed*, which is the seminal case on apportionment of damages. *Brake v. Speed*, 605 So.2d 28 (Miss. 1992).

During the jury instruction conference, State Farm's counsel tried to explain away the clear holding of *Brake v. Speed*. The following exchange took place.

> MR. WILKINS: Your Honor, P-three is from *Brake versus Steed* [sic], where it says, one who injures another suffering from a pre-existing condition is liable for the entire damage if no apportionment can be made between the pre-existing condition and the damage caused by the defendant in this case. Of course, State Farm stepped into the shoes of Duncan. But if they're going to try to say that October 26, 2004, put her in this injured condition, but they've offered no testimony to separate out what portion, and there's no guidance from any expert, then *Brake versus Steed* [sic] says that she's allowed to recover.
>
> THE COURT: First of all, Mr. Wilkins, you can remain seated during this if you wish. Mr. Gaines, do you have any response to that?
>
> MR. GAINES: I do. That case is B-R-A-K-E, *Brake versus Steed*. And Judge, in there, they tried to offer an instruction kind of like this. They tried to get the case reversed because the Judge wouldn't let it in. And only Justice McRae said that that should be allowed. The rest of the court said it's not allowed. They do made [sic] a statement that talks about, if you got something, a person that causes injury is liable for the entire damage...
>
> THE COURT: And the Judge in that case did not give this instruction and the Supreme Court affirmed not giving this instruction?
>
> MR. GAINES: Correct. But there is a paragraph, but then turns around and makes a statement that as sometimes happens, they make a statement of law. Rocky is not misinterpreting anything. They make a statement that sounds like what he says, in the opinion...

> THE COURT: All right, I think that, while Mr. Gaines did say correctly that the language you quoted out of the actual case is in there, I think that it doesn't fit this factual situation, so P-three will be refused...
>
> (T. at 96-99).

Thus, Valerie Miller's Proposed Jury Instruction P-3 was crucial to her case because State Farm offered no expert testimony to separate out which injuries were attributable from the January 13, 2005 wreck and which injuries were attributable to prior wrecks. Thus, the Appellant should have been allowed to recover for all damages she suffered after January 13, 2005, without any reduction in damages for her prior medical problems.

CONCLUSION

In conclusion, the Appellant requests that this Honorable Court grant a J.N.O.V., or in the alternative, a new trial, or in the alternative, an additur.

CERTIFICATE OF SERVICE

I, Rocky Wilkins, of counsel for the Appellant in the above-referenced matter, do hereby certify that I have this day served, by United States mail, postage pre-paid, the foregoing to the following:

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THIS the 13th day of November, 2009.

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