IN THE COURT OF APPEALS OF MISSISSIPPI

ELIZABETH MARTIN	**APPELLANT**
VS.	**No. 2009-CA-01365**
ST. DOMINIC-JACKSON MEMORIAL HOSPITAL	**APPELLEE**

APPELLANT'S BRIEF

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ELIZABETH MARTIN	**APPELLANT**
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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Miss. R. App. P. 28(a)(1), 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 the Judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. Elizabeth Martin, *Appellant*
2. St. Dominic-Jackson Memorial Hospital, *Appellee*
3. The Honorable W. Swan Yerger, *Senior Circuit Judge, Hinds County Circuit Court*
4. Sharon Bridges, *Counsel for Appellee St. Dominic-Jackson Memorial Hospital*
5. Jonathan Wade, *Trial Counsel for Appellee St. Dominic-Jackson Memorial Hospital*
6. John Werne, *Trial Counsel for Appellee St. Dominic-Jackson Memorial Hospital*
7. Micah Dutro, *Appellate Counsel for Appellant*
8. Ramel Cotton, *Trial Counsel for Appellant*

So CERTIFIED, this the 14 day of June, 2010.

Respectfully submitted,

Micah Dutro
Miss. Bar N[redacted]
Attorney for Appellant Elizabeth Martin

IN THE COURT OF APPEALS OF MISSISSIPPI

ELIZABETH MARTIN	APPELLANT
VS.	No. 2009-CA-01365
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Statement of the Case

This appeal concerns a negligence action by Ms. Elizabeth Martin against St. Dominic's Hospital in which the trial judge granted the defendant's renewed Motion for Directed Verdict pursuant to M.R.C.P. 50(a). The defense's Motion was sustained on the premise that the Plaintiff had not set forth enough evidence to establish the proximate cause of Ms. Martin's injury. A dispute of fact as to the proximate cause of the Ms. Martin's knee injury is at issue and, therefore, the directed verdict should be overturned in order for a jury to settle this factual dispute.

Facts

On September 27, 2005 Ms. Martin attended a group therapy session at St. Dominic's Hospital. *Martin v. St. Dominic Hosp.* Tr. Transcr. vol. 1, 65:19-65:26 (May 5, 2009). The group session that day took place in the small day room and later the group was transferred to the large day room. *Id.* at vol. 2, 197:1-197:8. These sessions include scheduled breaks in order for patients to walk around, get food, or go outside. *Id.* at vol. 1, 66:2-66:6. That day around five o'clock the group session stopped for a break and Ms. Martin was the first one to exit the room and enter the hallway. *Id.* at vol. 1, 65:23-66:14. At trial Ms. Martin stated that as soon as she exited the room she immediately stepped onto a freshly waxed floor causing her to

slip and fall landing directly on both knees. *Id.* at vol. 1, 66:15-66:16. The fall happened so quickly that she did not have time to grab hold of anything or put her hands down to brace herself. *Id.* at vol. 1, 66:11-66:14. Immediately after her fall other patients and nurses came to her aid. *Id.* at vol. 1, 69:5-69:26. St. Dominic's released Ms. Martin from their care the following day. *Id.* at vol. 1, 70:24-70:28. Soon after the fall she sought additional treatment from her primary physician due to continued pain and swelling in both knees. *Id.* at vol. 1, 71:3-71:25.

Ms. Martin's primary care physician did an MRI and continued to treat Ms. Martin but eventually referred Ms. Martin to a specialist in order to better treat her injury. *Id.* at vol. 1, 72:9-72:18. Dr. Gandy, an orthopedic surgeon, received the referral and treated Ms. Martin starting in late 2005. Depo. Dr. David Gandy 5:9-5:16 (May 5, 2005). Dr. Gandy is a member of the medical staff at St. Dominic's Hospital. *Id.* at 4:8-4:12. Dr. Gandy performed arthroscopic surgery on Ms. Martin which revealed both a medial and lateral tear of the meniscus in her right knee. *Id.* at 18:25-19:7. After surgery Ms. Martin entered a rehabilitation program at Sports Medicine South for physical therapy on her right knee. *Martin v. St. Dominic Hosp.* Tr. Transcr. vol. 1, 75:5-75:14. Ms. Martin seeks reimbursement for her medical expenses associated with treatment by her primary physician, treatment by Dr. Gandy and the cost of arthroscopic surgery, and continued treatment through rehabilitation with Sports Medicine South. *Id.* at vol. 1, 73:3-78:2.

The trial for this negligence action commenced on May 4, 2009 in which a last minute video deposition of Dr. David Gandy was taken on the morning of May 5, 2009. *Id.* at vol. 1, 81:3-81:7. This deposition was admitted into evidence as Dr. Gandy's expert testimony as he was unable to appear in person. *Id.* at vol. 1, 108:3-109:4. Dr. Gandy's videotaped deposition was played for the jury in which he was tendered as a medical expert witness and provided his

detailed recollection of Ms. Martin's medical condition, his personal treatment of her injury, and his medical option of the causation of the injury. *Id.* at vol. 1, 124:27-124:29.

Dr. Gandy started treatment of Ms. Martin by reviewing the MRI taken by her primary physician, and then he talked with Ms. Martin about her treatment options. Depo. Dr. David Gandy 14:13-14:19. Based on these options provided by Dr. Gandy, Ms. Martin decided to go ahead with arthroscopic surgery in order to diagnose and treat her knee pain. *Id.* at14:20-14:22. Dr. Gandy stated that the MRI, which he relied on in assessing her condition before surgery, revealed that Ms. Martin suffered from "a mild patella alta with evidence of trabecular injury in the patella suggesting osseous contusion." *Id.* at 7:25-8:3. A trabecular injury suggesting osseous contusion is "basically a bruise to the bone, and that normally would occur from some type of direct blow to the knee." *Id.* at 8:8-8:12. Dr. Gandy also found evidence of a mild ACL sprain in the MRI, which he summarized as a "football type injury" and edema or swelling was found within the bone marrow which he stated "can be attributed to the recent fall or to arthritis." *Id.* at 8:23-8:25.

Dr. Gandy also reviewed x-rays taken at the same time the MRI was taken, which revealed Ms. Martin had "moderate osteoarthritis in the right knee." *Id.* at 9:2-9:4. Dr. Gandy also did his own follow-up x-rays which showed that Ms. Martin had internal derangement of both knees with primary arthritis. *Id.* at 11:18-11:23. Dr. Gandy elaborated that "an internal derangement generally means – it's sort of a catch-all term, it means there's something wrong inside the knee and we're not sure all that's in there." Id. 11:23-12:1. These medical conclusions form the basis for Ms. Martin's need for arthroscopic surgery, which Dr. Gandy stated "serves as a diagnostic tool" *Id.* 15:19-15:25. In elaborating on the purpose of the surgery

Dr. Gandy also conceded that arthroscopic surgery in treating arthritis "may help it a little bit, but it's really not a treatment for it." *Id.* at 15:2-15:4.

This concluded the Plaintiff's evidence, which consequently led to the defense's Motion for Directed Verdict based on the premise that medical causation had not been proven. Tr. Transcr. at vol. 1, 125:19-125:28. This Motion was taken under advisement, and the defense proceeded by presenting their evidence. *Id.* at vol. 1, 136:19-136:24.

A witness on behalf of the defense testified that while working in her capacity as a registered nurse at St. Dominic's Hospital she performed an admissions assessment of Ms. Martin in which she wrote on her chart that Ms. Martin was diagnosed with osteoarthritis in 2004. *Id.* at vol. 1, 140:19-140:24. She also charted that Ms. Martin said she had problems with her knees and on occasion her left knee would give out. *Id.* at vol. 1, 140:28-141:4. Ms. Mangum though did not witness Ms. Martin's slip and fall. *Id.* at vol. 1, 146:13-146:27. Several other witnesses also testified on behalf of the defense before their evidence concluded.

It was at this juncture that Mr. Werne, counsel for the defense, renewed the Motion for Directed Verdict. *Id.* at vol. 2, 226:20-226:24. This Motion was then granted by the court due to the Plaintiff's failure to provide sufficient expert medical testimony in order to establish the proximate cause of the plaintiff's injury. *Id.* at vol. 2, 240:4-240:25.

Statement of the Issues

This case presents one issue to be decided by the Court.

(1) Whether or not the trial judge erred in granting a Motion for Direct Verdict in favor of the Appellee, St. Dominic's Hospital. Appellant contends in support of this position that:

(A) The Appellant provided sufficient evidence at trial to establish the proximate cause of her knee injury. Any dispute of this fact is a question for the jury.

(B) The trial judge misapplied several cases in support of his grant of a directed verdict against Appellant.

Standard of Review

The standard of review for a motion for directed is *de novo*. *Houston v. York*, 755 So. 2d 495, 499 (Miss. App. 1999). The well established standard for deciding whether to grant a motion for a directed verdict is that, "the court should look solely to the testimony on behalf of the opposing party; if such testimony, along with all reasonable inferences, could support a verdict for that party, the case should not be taken from the jury." *Entrican v. Ming*, 962 So. 2d. 28, 32 (Miss. 2007) (citing *White v. Thomason*, 310 So. 2d 914 (Miss. 1975)). Courts have elaborated on this standard of review by holding that "if the favorable inferences have been reasonably drawn in favor of the non-moving party so as to create a question of fact from which reasonable minds could differ, then the motion for directed verdict should not be granted and the matter should be given to the jury." *Houston,* 755 So. 2d at 499. (citing *Sperry-New Holland, a Div. of Sperry Corp. v. Prestage*, 617 So. 2d 248, 252 (Miss. 1993)). In other words "in the light most favorable to the non-moving party and the reasonable inferences drawn therefrom present a question for the jury, the motion should not be granted." *Entrican,* 962 So. 2d at 31.

Argument

A. The Trial Court Erred In Granting Appellee's Motion for Directed Verdict. The Proximate Cause Of Appellant's Injury Is a Question Of Fact To Be Determined By A Jury.

The trial judge erred in holding that the Appellant failed to produce sufficient evidence to establish the proximate cause of her injury. In order "for a particular damage to be recoverable in a negligence action, the plaintiff must show that the damage was proximately caused by the negligence." *Spann v. Shuqualak Lumber Co., Inc.*, 990 So. 2d 186, 190 (Miss. 2008) (see also

Patterson v. Liberty Assoc., 910 So. 2d 1014, 1019 (Miss. 2004)). To prove causation the plaintiff in a civil case must show cause in fact and proximate cause. *Patterson*, 910 So. 2d at 1019. The Supreme Court of Mississippi has defined proximate cause as a "cause which in naturally and continuous sequence unbroken by any efficient intervening cause produces the injury and without which the result would not have occurred." *Entrican*, 962 So. 2d at 32 (citing *Patterson*, 910 So. 2d at 1019)). This Court has held that "when reasonable minds might differ on the matter, questions of proximate cause and of negligence and of contributory negligence are generally for determination of the jury." *Hankins Lumber Co. v. Moore*, 774 So. 2d 459, 464 (Miss. App. 2000).

In the instant case the question of fact is whether or not the Appellant's knee injury was caused by her preexisting arthritis, general wear and tear, or from her slip and fall at St. Dominic's Hospital. Dr. Gandy, the Appellant's treating physician, testified as to the causes of Ms. Martin's knee injury and went into detail as to the results of an MRI taken shortly after her fall. *Martin v. St. Dominic Hosp.* Tr. Transcr. vol. 1, 108:3-109:4; Depo. Dr. David Gandy, 7:25-8:25. (May 5, 2009). When asked about the possible causes of a meniscus tear Dr. Gandy stated "wear and tear or from an acute injury." Depo. Dr. David Gandy, at 27:12-27:20. Dr. Gandy also elaborated that the MRI showed a trabecular injury or bone contusion "being basically a bruise to the bone, and normally this would occur from some type of direct blow to the knee." *Id.* at 7:25-8:12. He stated that her mild ACL sprain can be attributed to "football type injuries," and that the edema or swelling in the bone marrow of her knee is "due to the recent fall or arthritis." *Id.* at 8:13-8:25.

In addressing Ms. Martin's need for surgery, Dr. Gandy acknowledged that the surgery was conducted to "deal with two issues, the arthritis and the meniscus tear." Id. at 26:3-26:9. Dr.

Gandy also stated that "we knew she had arthritis, but arthroscopy really doesn't help arthritis, but it was more for the medical symptoms that she was having." *Id.* at 14:23-15:8. He also stated that he conducted the arthroscopic surgery as a "diagnostic tool" and that this type of surgery is "not normally a treatment for arthritis" because "arthritis pain is usually not benefited much by arthroscopy." *Id.* at 14:23-15:8.

Through the Appellant's firsthand account of her slip and fall at St. Dominic's Hospital and Dr. Gandy's testimony the plaintiff has provided sufficient evidence that a reasonable jury could conclude that because of the direct blow to her knee from slipping on a wet waxed floor, she suffered an injury to her knee requiring arthroscopic surgery and subsequent rehabilitation. The fact that Ms. Martin fell and landed directly on her knees is not in dispute. This evidence is to be viewed in a light most favorable to the Appellant and if in such light a reasonable juror could conclude that the fall caused her injury then the trial court's directed verdict should be reversed. *Entrican*, 962 So. 2d at 31; *Houston*, 755 So. 2d at 499.

B. The Trial Court Erred In Its Application of *Kidd, Catchings,* and *Spann.*

The trial judge erroneously relied on two cases in his Order granting the Appellee's Motion for Directed Verdict, *Kidd v. McRae's Stores Partn.*, 951 So. 2d 622 (Miss. App. 2007) and *Catchings v. State*, 684 So. 2d 591 (Miss. 1996). Or. Granting Defs.' Mot. Directed Verdict, vol. 2, 164-6 (May 14, 2009).

In its holding the trial court stated that "when an expert's opinion is not based on a reasonable degree of medical certainty, or the opinion is articulated in a way that does not make the opinion probable, the jury cannot use that information to make a decision." *Id.* at vol. 2, 165 (citing *Kidd,* 951 So. 2d at 626). In *Kidd,* the issue was whether the deposition testimony of a medical doctor could be limited with regard to future medical expenses. *Id* at 626. This Court

allowed the doctor's testimony as to the Appellant's possible need for surgery on her arm but struck the portion of the deposition in which the doctor estimated future medical costs. *Id.*

In the instant case Judge Yerger allowed the jury to view a video of Dr. Gandy's deposition in its entirety. Tr. Transcr. vol. 1, 124:28-124:29. In his deposition Dr. Gandy was not asked nor did he make any predictions about the Appellant's future medical needs. Depo. Dr. David Gandy (May 5, 2009). In *Kidd* the issue concerned the *admissibility* of the witness's statements. *Kidd,* 951 So. 2d at 626. In the instant case the question was not one of admissibility, but whether or not the testimony was sufficient to establish proximate cause. Tr. Transcr. vol. 2, 240:4-240:14. The Mississippi Supreme Court has stated that "credibility determination, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment *or for a directed verdict.*" *Benjamin v. Hopper Electronic Supply Co., Inc.*, 568 So. 2d 1182, 1187 (Miss. 1990) (emphasis added) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 2513 (1986); see also *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986). As such the trial court erroneously applied the *Kidd* case and the directed verdict should be overturned.

The trial court also relies heavily on *Catchings v. State,* a criminal case. 684 So. 2d 591 (Miss. 1996). In *Catchings* the question was whether a neurologist, who treated the patient from the time of his admission into the emergency room until his subsequent death three weeks later, could testify as to his medical opinion of the decedent's cause of death. *Id.* The Mississippi Supreme Court allowed the testimony and reasoned "that the testimony given, although without the use of the words 'to a reasonable medical certainty' evidences the certainty requisite for admission." *Id.* at 598.

In his Order granting the Appellee's Motion for a Directed Verdict the trial judge quoted *Catchings* as stating that "the intent of the law is that if a physician cannot form an opinion with sufficient certainty so as to make a medical judgment, neither can a jury use that information to reach a decision." *Id.* at 597 (citing *McMahon v. Young*, 276 A. 2d 534, 535 (1971)) Or. Granting Defs.' Mot. Directed Verdict vol. 2, 165. Furthermore, language referenced by the trial court in its Order granting the Appellee's Motion for Directed Verdict concerning the use of phrases such as "probability," "possibility," or even "strong possibility" is attributed to the *Kidd* and *Catchings* cases. *Id.* (citing *Kidd*, 951 So. 2d at 626) (citing *Catchings*, 684 So. 2d 597)). However, a careful examination of the Supreme Court of Mississippi's opinion in *Catchings* shows that the Court is quoting language from a federal case in the Third Circuit Court of Appeals and that it did so because at the time of the *Catchings* decision the Court had not addressed the specific question of the certainty required of medical and expert opinions. *Catchings*, 684 So. 2d at 597.

In fact, the Supreme Court of Mississippi stated that the trial court in *Catchings* did not err when it admitted the neurologist's testimony due to the fact that the neurologist had been the decedent's treating physician and had performed various medical procedures related to the decedent's condition. *Id.* at 598. The *Catchings* court held that the phrase "to a reasonable medical certainty" was not required. *Id.* Eleven years later in *Smith v. City of Gulfport* this Court upheld the ruling in *Catchings* that no magic words are required to establish certainty on behalf of a medical or scientific expert. 949 So. 2d 848, 849-50 (Miss. App. 2007).

The trial court's Order also stated that "a mere 'guess' by a treating physician or expert is insufficient to establish substantial, credible evidence to support damages." *City of Jackson v. Spann*, 4 So. 3d 1029,1039 (Miss. 2009). While this assertion is agreeable, it is not analogous

to the present case. In *Spann*, a physician gave an estimate as to what the cost of fixing a meniscus tear would be in which he stated "Well, I would guess around $20,000. I don't know for sure." *Id.* That particular expert "had not practiced surgery for eight or nine years" and therefore, the Mississippi Supreme Court found his testimony did not rise to the level of medical certainty needed in order to establish the amount of damages or future disability. *Id.* In the instant case, the cost of a medical procedure is not in dispute. The trial judge granted the Appellee's Motion for Directed Verdict because he found that the Appellant had not provided sufficient evidence to establish proximate causation. Tr. Transcr. vol. 2, 240:4-240:13.

Conclusion

The trial court erred in its granting of the Appellee's Motion for Directed Verdict. The directed verdict should be reversed and remanded in order for a jury to weigh both the testimony of the Appellant and Dr. Gandy to reach conclusion as to the proximate cause of Appellant's knee injury. Dr. Gandy's medical testimony sufficiently stated his medical conclusion as to the cause of the Appellant's knee injury and should be weighed by a jury.

Filed this the 9 day of June, 2010.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Micah Dutro, do hereby certify that I have this day sent, via U.S. Mail, a true and correct copy of the above and foregoing document to the following:

Honorable W. Swan Yerger
Hinds County Circuit Court Judge
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Jackson, Mississippi 39205

Honorable Sharon F. Bridges
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Honorable Ramel L. Cotton
Attorney at Law
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Jackson, Mississippi 39201

THIS the 9 day of June, 2010.

Micah Dutro

C

Supreme Court of Mississippi.
Benny T. BENJAMIN, Jr.
v.
HOOPER ELECTRONIC SUPPLY CO., INC., d/b/a Hooper Sound and Kevin Ray Cash.
No. 07-CA-59250.

Oct. 3, 1990.

Patron sued store and store manager for malicious prosecution and intentional infliction of emotional distress. The Circuit Court, Harrison County, Vincent Sherry, J., directed verdict for store manager, and patron appealed. The Supreme Court, Anderson, J., held that whether store manager instituted proceedings for receiving stolen property against patron without probable cause and with malice was question for jury.

Reversed and remanded.

West Headnotes

[1] Trial 388 ⇐178

388 Trial
388VI Taking Case or Question from Jury
388VI(D) Direction of Verdict
388k178 k. Hearing and Determination. Most Cited Cases
When defendant moves for directed verdict at close of plaintiff's case in chief, circuit court must consider evidence before it at time in light most favorable to plaintiff, giving plaintiff benefit of all favorable inferences that reasonably may be drawn from that evidence.

[2] Appeal and Error 30 ⇐866(3)

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k862 Extent of Review Dependent on Nature of Decision Appealed from
30k866 On Appeal from Decision on Motion for Dismissal or Nonsuit or Direction of Verdict
30k866(3) k. Appeal from Ruling on Motion to Direct Verdict. Most Cited Cases

Appeal and Error 30 ⇐927(6)

30 Appeal and Error
30XVI Review
30XVI(G) Presumptions
30k927 Dismissal, Nonsuit, Demurrer to Evidence, or Direction of Verdict
30k927(6) k. Direction of Verdict in General. Most Cited Cases
When reviewing court examines trial court's decision regarding motion for directed verdict, it must do so with great care; in addition, reviewing court must consider motion in light most favorable to party opposing motion.

[3] Trial 388 ⇐139.1(17)

388 Trial
388VI Taking Case or Question from Jury
388VI(A) Questions of Law or of Fact in General
388k139.1 Evidence
388k139.1(5) Submission to or Withdrawal from Jury
388k139.1(17) k. Insufficiency to Support Other Verdict; Conclusive Evidence. Most Cited Cases

Trial 388 ⇐178

388 Trial
388VI Taking Case or Question from Jury
388VI(D) Direction of Verdict
388k178 k. Hearing and Determination. Most Cited Cases
Motion for directed verdict is granted only where facts and inferences considered in light most favor-

able to plaintiff point so overwhelmingly in favor of movant that reasonable men and women could not have arrived at verdict for nonmovant.

[4] Malicious Prosecution 249 ⚿18(1)

249 Malicious Prosecution
249II Want of Probable Cause
249k17 Criminal Prosecutions
249k18 Grounds in General
249k18(1) k. In General. Most Cited Cases
Citizen has privilege to start criminal law into action by complaint to proper officials so long as it is done either in good faith, that is, for a legitimate purpose, or with reasonable grounds to believe that person proceeded against may be guilty of offense charged.

[5] Malicious Prosecution 249 ⚿3

249 Malicious Prosecution
249I Nature and Commencement of Prosecution
249k3 k. Instigation of or Participation in Prosecution. Most Cited Cases
Law allows wide latitude for honest action on part of citizen who purports to assist public officials in their task of law enforcement.

[6] Malicious Prosecution 249 ⚿38

249 Malicious Prosecution
249V Actions
249k38 k. Nature and Form of Remedy. Most Cited Cases
Malicious prosecution is not most favored tort because of public policy in favor of halting and prosecuting crime.

[7] Malicious Prosecution 249 ⚿38

249 Malicious Prosecution
249V Actions
249k38 k. Nature and Form of Remedy. Most Cited Cases
There are two competing interests in all malicious prosecution cases: public policy interest in crime prevention insists that private citizens, when aiding law enforcement personnel, be protected against prejudice that is likely to arise from termination of prosecution in favor of accused, and interest which protects individuals from being wrongly accused of criminal behavior which results in unjustifiable and oppressive litigation of criminal charges.

[8] Malicious Prosecution 249 ⚿30

249 Malicious Prosecution
249III Malice
249k30 k. Motive of Prosecution. Most Cited Cases
Those subjected to criminal proceedings cloaked with malice may recover compensation for their losses.

[9] Malicious Prosecution 249 ⚿15

249 Malicious Prosecution
249II Want of Probable Cause
249k15 k. Necessity. Most Cited Cases
(Formerly 249k16)

Malicious Prosecution 249 ⚿26

249 Malicious Prosecution
249III Malice
249k26 k. Necessity. Most Cited Cases
(Formerly 249k16)
Requiring two essential elements of malice and lack of probable cause in establishing case for malicious prosecution affords adequate protection for public interest in crime prevention and places restriction upon protection of individuals from being wrongfully accused of criminal behavior.

[10] Malicious Prosecution 249 ⚿71(1)

249 Malicious Prosecution
249V Actions
249k71 Questions for Jury
249k71(1) k. In General. Most Cited Cases
In order to show that trial court erred in granting directed verdict for malicious prosecution, there

must have been some direct or circumstantial evidence from which jury could reasonably infer each of the following elements: institution of criminal proceeding, by or at insistence of defendant, termination of such proceeding in plaintiff's favor, malice in instituting proceedings, want of probable cause for proceeding, and suffering of injury or damage as result of prosecution.

[11] Malicious Prosecution 249 ⚿3

249 Malicious Prosecution
249I Nature and Commencement of Prosecution
249k3 k. Instigation of or Participation in Prosecution. Most Cited Cases
In order to show that defendant instigated proceeding, evidence must support conclusion that defendant was proximate and efficient cause of maliciously putting law in motion in original proceeding; it is not necessary that defendant must be one who files direct charge, as defendant may be liable where he communicates subject matter to person who signs complaint and such statement proximately causes prosecution.

[12] Malicious Prosecution 249 ⚿4

249 Malicious Prosecution
249I Nature and Commencement of Prosecution
249k4 k. Institution or Continuation of Prosecution. Most Cited Cases
Liability for malicious prosecution is not limited to those instigating criminal proceedings; continuing to prosecute such proceedings maliciously after learning of their groundless nature will result in liability, even though they were begun in good faith and with probable cause; it is as much a wrong against victim and as socially or morally unjustifiable to take active part in prosecution after knowledge that there is no factual foundation for it as to instigate such proceedings in first place.

[13] Malicious Prosecution 249 ⚿3

249 Malicious Prosecution
249I Nature and Commencement of Prosecution
249k3 k. Instigation of or Participation in Prosecution. Most Cited Cases

Malicious Prosecution 249 ⚿4

249 Malicious Prosecution
249I Nature and Commencement of Prosecution
249k4 k. Institution or Continuation of Prosecution. Most Cited Cases
Idea of proximate cause in malicious prosecution cause of action is to limit legal responsibility to causes which are so closely connected with result and of such significance that law is justified in imposing liability; defendant's conduct is cause of prosecution if it was material element and substantial factor in bringing it about.

[14] Malicious Prosecution 249 ⚿71(1)

249 Malicious Prosecution
249V Actions
249k71 Questions for Jury
249k71(1) k. In General. Most Cited Cases
Whether defendant's conduct was substantial factor in bringing about prosecution, so that it was cause of prosecution, is for jury to determine unless issue is so clear that reasonable persons could not differ.

[15] Malicious Prosecution 249 ⚿71(1)

249 Malicious Prosecution
249V Actions
249k71 Questions for Jury
249k71(1) k. In General. Most Cited Cases
Whether store manager was substantial factor in initiating prosecution of patron for receiving stolen property was question for jury in action for malicious prosecution and intentional infliction of emotional distress where store manager, after overhearing statement of patron about low price he paid for stereo, went outside of store to investigate stereo in patron's automobile, conflicting evidence existed as to whether store manager trespassed to search patron's automobile for stereo, store manager contac-

ted police, and store manager talk with interrogating officer, and immediately thereafter, officer filed affidavit against patron.

[16] Malicious Prosecution 249 ⇐20

249 Malicious Prosecution
249II Want of Probable Cause
249k17 Criminal Prosecutions
249k20 k. Belief in Guilt of Accused. Most Cited Cases
Probable cause for initiating criminal proceeding, in context of malicious prosecution action, is determined from facts apparent to observer when prosecution is initiated; in order to find probable cause there must be concurrence of honest belief in guilt of person accused and reasonable grounds for such belief-one is as essential as the other.

[17] Malicious Prosecution 249 ⇐18(1)

249 Malicious Prosecution
249II Want of Probable Cause
249k17 Criminal Prosecutions
249k18 Grounds in General
249k18(1) k. In General. Most Cited Cases
Unfounded suspicion and conjecture are not proper bases for finding probable cause to initiate prosecution.

[18] Malicious Prosecution 249 ⇐71(2)

249 Malicious Prosecution
249V Actions
249k71 Questions for Jury
249k71(2) k. Probable Cause. Most Cited Cases
It is function of court to determine whether probable cause to initiate prosecution existed; when, however, facts are in dispute, it becomes jury question and it is for it to determine based upon proper instructions.

[19] Malicious Prosecution 249 ⇐56

249 Malicious Prosecution
249V Actions
249k56 k. Presumptions and Burden of Proof. Most Cited Cases

Malicious Prosecution 249 ⇐64(2)

249 Malicious Prosecution
249V Actions
249k64 Weight and Sufficiency of Evidence
249k64(2) k. Probable Cause and Malice. Most Cited Cases
Want of probable cause to initiate prosecution may be proven by circumstantial evidence, but it is ordinarily necessary for plaintiff to show circumstances from which absence of probable cause may be inferred.

[20] Malicious Prosecution 249 ⇐71(2)

249 Malicious Prosecution
249V Actions
249k71 Questions for Jury
249k71(2) k. Probable Cause. Most Cited Cases
If evidence is such that jury could have believed that prosecution was instituted without probable cause, then that issue should go to jury.

[21] Malicious Prosecution 249 ⇐71(2)

249 Malicious Prosecution
249V Actions
249k71 Questions for Jury
249k71(2) k. Probable Cause. Most Cited Cases
Whether store manager had probable cause to initiate proceedings against store patron for receiving stolen property was question for jury in action for malicious prosecution for receiving stolen stereo; even though store manager claimed that, because of his experience in dealing with stereo equipment, he knew that patron could not have paid price he paid in that town, it was just as likely that patron could have gotten amplifier in one of a dozen other cities in at least two other states.

[22] Malicious Prosecution 249 ⇐27

249 Malicious Prosecution
249III Malice
249k27 k. Nature and Elements. Most Cited Cases
Term "malice" in law of malicious prosecution is used in artificial and legal sense and applied to prosecution instituted primarily for purpose other than that of bringing offender to justice.

[23] Malicious Prosecution 249 ⚿29

249 Malicious Prosecution
249III Malice
249k29 k. Implied Malice in General. Most Cited Cases

Malicious Prosecution 249 ⚿64(2)

249 Malicious Prosecution
249V Actions
249k64 Weight and Sufficiency of Evidence
249k64(2) k. Probable Cause and Malice. Most Cited Cases
Malice as element of malicious prosecution action may be proved by circumstantial evidence or jury may infer malice from facts of case.

[24] Malicious Prosecution 249 ⚿32

249 Malicious Prosecution
249III Malice
249k32 k. Inference from Want of Probable Cause. Most Cited Cases
Absence of probable cause for prosecution is circumstantial evidence of malice.

[25] Malicious Prosecution 249 ⚿29

249 Malicious Prosecution
249III Malice
249k29 k. Implied Malice in General. Most Cited Cases
Malice, as element of malicious prosecution action, may be inferred from finding that defendant acted in reckless disregard of other person's rights.

[26] Malicious Prosecution 249 ⚿71(3)

249 Malicious Prosecution
249V Actions
249k71 Questions for Jury
249k71(3) k. Malice. Most Cited Cases
Because question of malice is question of fact, it is to be determined by jury unless only one conclusion may reasonably be drawn from evidence.

[27] Malicious Prosecution 249 ⚿71(3)

249 Malicious Prosecution
249V Actions
249k71 Questions for Jury
249k71(3) k. Malice. Most Cited Cases
Whether store manager instituted criminal proceedings against patron for receiving stolen stereo primarily for purpose other than that of bringing patron to justice was question for jury in malicious prosecution action; malice could be inferred from fact that after overhearing laughter between patron and friend, store manager interjected and said that amplifier must have been "hot," that store manager subsequently sneaked off to search patron's car, that, after patron was taken to police station, store manager came and encouraged police officer to carry forward with investigation, and that store manager may have considered that patron was black.
***1185** Jimmy D. McGuire,McGuire & Cox, Gulfport, for appellant.

David L. Cobb, Bryan Nelson Allen Schroeder Cobb & Hood, Robert W. Atkinson, Bryan Nelson Firm, Gulfport, for appellees.

Before HAWKINS, P.J., and SULLIVAN and ANDERSON, JJ.

ANDERSON, Justice, for the Court:

This is an appeal from the Circuit Court of the First Judicial District of Harrison County wherein the trial judge granted the defendants' motion for a directed verdict at the close of the trial. The appellant, Benny T. Benjamin, Jr. (Benjamin) charged ap-

pellees, Hooper Sound and Kevin Cash (collectively Cash) with malicious prosecution and intentional infliction of emotional distress. Benjamin appeals maintaining that the trial court erred in directing a verdict in favor of Cash. We agree and reverse and remand for a new trial.

STATEMENT OF THE FACTS

On March 14, 1985, Benjamin went to Hudson's Salvage Center in Gulfport and purchased a Yamaha stereo amplifier for approximately $189.00. There were no installation instructions in the package so the following day Benjamin and his friend, John Burts, went to Hooper Sound in Gulfport to get installation instructions.

While Benjamin and Burts were in Hooper Sound, Kevin Cash, the manager, approached them and offered assistance. Benjamin informed Cash that he needed instructions, but Cash told him he could not give him any. Benjamin and Burts remained in the store looking at various items throughout the store. They noticed an amplifier identical to the one that Benjamin had purchased the day before priced at $350.00. Realizing that he had gotten a bargain, Benjamin told Burts, and they began laughing about the price. Cash overheard Benjamin say that he had not paid nearly that amount for his amplifier. At that moment Cash interjected, "Between you and I, it's got to be hot." [FN1] Benjamin responded that it must be one of those direct-from-the-factory deals. Cash did not say anything else, but he sent another salesman over to talk to Benjamin and Burt.

> FN1. Cash testified that because of his experience with the company, he knew that only two companies in Gulfport, Hooper and Sound Advice, were authorized to sell Yamaha products. They executed agreements which prohibited them from advertising or selling the equipment at discounted prices. However, it was not "inconceivable" that the amplifier was purchased in another city (Biloxi, Pascagoula or Ocean Springs, etc.) or out of state (New Orleans or Mobile).

According to the testimony, Benjamin and Burt drove to Hooper Sound in Benjamin's yellow Volkswagen. Its tinted windows were closed; the interior is black; and consequently, it is virtually impossible to see into the car. In addition, one of the windows did not have a handle so it could not be lowered. Benjamin did not lock the doors, but he placed the box containing the amplifier behind the passenger seat on the back. Although the box was not completely concealed, it was not in plain view either.

After Cash summoned the salesman, he went outside with the intent of investigating Benjamin's amplifier. Nobody saw him go into Benjamin's car and Cash vehemently denies doing so. [FN2] According to his testimony, Cash was able to obtain the serial number of the amplifier by looking through the passenger window to see the serial number on the amplifier. This was so although the number was on a yellow tag no larger than 1 1/2 inches by one inch.

> FN2. It is, however, a strong indication that Cash, more likely than not, went into the car because his testimony was contradictory concerning where he found the box. Moreover, two witnesses, other than Benjamin, testified about the tint and dark interior of the Volkswagen, as well as the broken handle for the window. Additionally, some witnesses testified that Cash could not have seen the serial number without opening the car door. And, finally, before dismissing the case, the judge said that he believed that Cash searched the car.

***1186** Cash wrote the tag number of the car, the serial number of the amplifier, a description of the car and a description of Benjamin. He then called the police and gave them the serial number of the amplifier and asked if it were stolen. Later that evening Benjamin was arrested and interrogated concerning the amplifier. [FN3] During the interroga-

tion, Cash walked in and the interrogating officer, Glen Terrell, stopped questioning Benjamin and went to talk to Cash. Cash spent approximately an hour to an hour and a half talking to Terrell. During their conversation Cash gave a recorded statement to the officer. He gave the officer the serial number he had taken, and he informed Terrell of what Hooper Sound would charge for the amplifier. He also told the officer what amount Benjamin said he had paid for his amplifier. Cash, moreover, identified Benjamin from a photographic lineup.

> FN3. The record is somewhat muddled concerning the chronology of the events, but it reflects that as a result of a continuing police investigation, Officer Glen Terrell determined that the amplifier had been stolen in Salt Lake City, Utah. We do know that Cash went to the police headquarters and provided more information during Benjamin's interrogation. The police used the information that Cash had given them and located Benjamin's car. Terrell obtained a search warrant to search the car. As a result of the search, the police recovered a Yamaha amplifier with the same serial number that Cash had reported. From this investigation, Terrell charged Benjamin with receiving stolen property and signed an affidavit for an arrest warrant.

A preliminary hearing was held sometime later, and Cash testified. Henry Wallace, the manager of Hudson's Salvage also appeared and testified on Benjamin's behalf. Wallace testified that Benjamin purchased the amplifier at Hudson's on the day before this entire episode. Following the hearing, Benjamin was bound over to the grand jury which returned an indictment for receiving stolen property. This indictment, however, was appropriately dismissed.[FN4]

> FN4. The indictment was dismissed because it was defective as it did not state the name of the owner of the property. At the conclusion of the trial in the case *sub judice,* the trial judge expressed his distress concerning the conduct of the police and the later obtained indictment.

Benjamin filed this lawsuit for malicious prosecution after the dismissal of the criminal prosecution. In support of this appeal, Benjamin specifically points to Cash's testimony on cross-examination as an adverse witness during the trial. He notes that Cash acknowledged that he could have asked Benjamin where he had bought the amplifier or could have asked him how he got such a good deal. Moreover, Benjamin emphasizes the fact that Cash took it upon himself to initiate the investigation-searching his car and relaying the results of that search to the police. Because of this information, along with Cash's subsequent identifications of Benjamin and his car, Benjamin was arrested and his car towed away and searched. His amplifier was confiscated, and he was interrogated and charged with receiving stolen property. As a result of this activity, Benjamin had to obtain counsel and post bond to be released from jail.[FN5] According to Benjamin's brief, but for Cash's actions at "every essential turn in prosecuting [him]," he would never have been arrested and charged with receiving stolen property.

> FN5. Benjamin provided an elaborate discussion of his damages which included, *inter alia,* damage done to his car when it was towed and the eventual selling of its parts to pay his bondsman. *See,* Vol. II, T. 38-44.

In this appeal, Benjamin alleges the following error:

THE TRIAL COURT MANIFESTLY ERRED IN SUSTAINING THE DEFENDANT'S MOTION FOR DIRECTED VERDICT AT THE CLOSE OF THE DEFENDANT'S CASE AND SHOULD HAVE ALLOWED THE SUBJECT CASE TO BE SUBMITTED TO THE JURY FOR ITS CONSID-

ERATION

At the trial and after Benjamin had presented all of his evidence and rested his case, Cash moved for a directed verdict, which the Court took under advisement and at the same time instructed Cash to present ***1187** his case. After doing so, and resting his case, defense counsel again moved for a directed verdict, at which time the motion was granted.

DISCUSSION OF THE LAW

[1][2][3] When the defendant moves for a directed verdict at the close of the Plaintiff's case-in-chief, the circuit court must consider the evidence before it at that time in the light most favorable to the plaintiff, giving the plaintiff the benefit of all favorable inferences that reasonably may be drawn from that evidence. *Hall v. Mississippi Chemical Express, Inc.,* 528 So.2d 796, 798 (Miss.1988); *see also Dale v. Bridges,* 507 So.2d 375, 377 (Miss.1987); *Jones v. Hatchett,* 504 So.2d 198, 205 (Miss.1987); *Collins v. Ringwald,* 502 So.2d 677, 678-79 n. 1 (Miss.1987); *Paymaster Oil Mill Co. v. Mitchell,* 319 So.2d 652, 657 (Miss.1975). Moreover, when this Court examines a trial court's decision regarding a motion for directed verdict, it must do so with great care. In addition, just as the trial court, this Court must consider the motion in light most favorable to the party opposing the motion. *Guerdon Industries, Inc. v. Gentry,* 531 So.2d 1202, 1205 (Miss.1988); *see also White v. Hancock Bank,* 477 So.2d 265, 269 (Miss.1985). The motion is granted only where the facts and inferences so considered point so overwhelmingly in favor of the movant that reasonable men and women could not have arrived at a verdict for the non-movant. *Guerdon, supra* at 1205; *accord Smith v. Wendy's of the South Inc.,* 503 So.2d 843, 844 (Ala.1987) (If, by any interpretation, the evidence can support a conclusion in favor of the non-moving party, this Court must reverse) (citations omitted). These principles have been repeated in case after case. *See, e.g. Rester v. Morrow,* 491 So.2d 204, 211 (Miss.1986) *and Collins,* 502 So.2d at 678 n. 1.

This Court, moreover, has recognized the constitutional concerns involved in allowing the jury to resolve factual issues brought out during trial. *See City of Jackson v. Locklar,* 431 So.2d 475, 478 (Miss.1983); *see also Rester, supra* at 211-12; Miss. Const. (1890) Art. 3, § 31. Not only has our Court emphasized the jury's role in a trial, but the United States Supreme Court noted the jury's importance as well:

> Credibility determination, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment *or for a directed verdict.* The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202, 216 (1986) (emphasis added); *see also Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Grice v. City of Dothan,* 670 F.Supp. 318 (M.D.Ala.1987).

MALICIOUS PROSECUTION

[4][5][6] Before discussing the evidence involved in this case, it must be clear that "a citizen has a privilege to start the criminal law into action by complaints to the proper officials *so long as* one acts either in good faith, i.e, for a legitimate purpose, or with reasonable grounds to believe that the person proceeded against may be guilty of the offense charged." Harper, James and Gray, *The Law of Torts* § 4.1 at 406 (2d. ed 1986) (emphasis added) [hereinafter Harper & James]. The law allows a wide latitude for *honest* action on the part of the citizen who purports to assist public officials in their task of law enforcement. *Id.* at 407 (emphasis added) *see also Prosser and Keeton on Torts,* § 119 at 871 (5th ed. 1984) (the law encourages honest citizens to bring criminals to justice). Malicious prosecution is not the most favored tort because of a public policy in favor of halting and prosecuting

crime.

[7] There are two competing interests in all malicious prosecution cases. The public policy interest in crime prevention insists that private citizens, when aiding law enforcement personnel, ought to be protected against the prejudice that is likely to arise from the termination of the prosecution in favor of the accused. ***1188***Owens v. Kroger,* 430 So.2d 843, 846 (Miss.1983); *see also State, For the Use and Benefit of Foster v. Turner*, 319 So.2d 233, 235 (Miss.1975). "Large tort judgments against well-meaning individuals, acting *honestly and in good faith,* might seriously inhibit those attempting to perform what they believe a civic duty." *Cates v. Eddy,* 669 P.2d 912, 918-19 (Wyo.1983) (emphasis added). Consequently, any policy that encourages these awards would also have the effect of discouraging community support in investigations.

[8] Equally important is the second interest which protects individuals from being wrongly accused of criminal behavior which results in unjustifiable and oppressive litigation of criminal charges. Consequently, in our orderly society we allow those subjected to criminal proceedings cloaked with malice to recover compensation for their losses. *Kroger, supra; see also* 54 C.J.S. *Malicious Prosecution* § 4, pp. 524-25 (1987).

[9] These two policy considerations are balanced by requiring two essential elements in establishing a case for malicious prosecution. Requiring both malice and lack of probable cause affords adequate protection for the first policy and a restriction upon the second. *Cates,* 669 P.2d at 918.

LAW

[10] In order to show that the trial court erred in granting a directed verdict for malicious prosecution, there must have been some direct or circumstantial evidence from which the jury could reasonably infer each of the following elements:

(1) The institution [or continuation] of a criminal proceeding; (2) by, or at the insistence of, the defendant; (3) the termination of such proceedings in plaintiff's favor; (4) malice in instituting the proceedings; (5) want of probable cause for the proceeding; (6) the suffering of injury or damage as a result of the prosecution.

Parker v. Game and Fish Comm'n, 555 So.2d 725, 728 (Miss.1989) (citations omitted); *see also Edison v. Olin Corp.*, 527 So.2d 1283 (Ala.1988).

INSTITUTION OF CRIMINAL PROCEEDINGS

Cash first asserts that the directed verdict was proper because Benjamin failed to put on evidence that Cash instituted the criminal proceeding.

In earlier Mississippi cases, whether the defendant initiated the proceeding has not been the close question. *See, e.g., Royal Oil Co., Inc. v. Wells,* 500 So.2d 439, 441 (Miss.1986) (defendant initiated a criminal charge of embezzlement against plaintiff by executing and filing an affidavit charging plaintiffs with embezzlement); *Kroger,* 430 So.2d at 845 (store security guard told defendant he was under arrest, and defendant was taken upstairs where they awaited the arrival of the local police); and *Torabi v. J.C. Penney, Inc.,* 438 So.2d 1354, 1355 (Miss.1983) (plaintiff was taken away from store by security guards to the city jail where he was booked, photographed and fingerprinted).

[11][12] In order to show that a defendant instigated a proceeding the evidence must support a conclusion that the "defendant must have been the proximate and efficient cause of maliciously putting the law in motion in the original proceedings." *Winters v. Griffis,* 233 Miss. 102, 108, 101 So.2d 346, 348 (1958) (quoting 54 C.J.S. *Malicious Prosecution* § 14, 966-68 (1948)). Moreover, in order to impose liability "there must be some affirmative action by way of advice, encouragement, pressure, etc., in the institution, or causing the institution of the prosecution, or in affirmatively encouraging its continuance after it has been instituted." *Winters,*

233 Miss. at 108, 101 So.2d at 348-49. It is not necessary that the defendant must be the one who files the direct charge because a defendant may be liable where he communicated the subject matter to the person who signed the complaint and such statement proximately caused the prosecution. ***1189** *See* 54 C.J.S., *Malicious Prosecution* § 18 (1987); *Harper and James, supra,* § 4.3. FN6

FN6. At this point we must emphasize that liability is not limited to instigating criminal proceedings, but continuing to prosecute such proceedings maliciously after learning their groundless nature will result in liability, although they were begun in good faith and with probable cause. *See Harper and James* at 416, n. 13 and (Supp.1990). Without doubt, it is as much a wrong against the victim and as socially or morally unjustifiable to take an active part in a prosecution after knowledge that there is no factual foundation for it, as to instigate such proceedings in the first place. *Id.*

Cash contends that he has instigated nothing. He points to this Court's discussion of the term in the related context of false imprisonment. For him to have instigated this criminal proceeding, Cash argues that he would have had to direct, request, invite or encourage Benjamin's prosecution. *See Godines v. First Guaranty Savings and Loan Asso.,* 525 So.2d 1321, 1324 (Miss.1988); *see also Alabama Power Co. v. Neighbors,* 402 So.2d 958 (Ala.1981). *Restatement (Second) of Torts,* § 45(A). Moreover, "it is not enough for instigation that the actor has given information to the police about the commission of a crime, or has accused the other of committing it, so long as he leaves to the police the decision as to what shall be done about any arrest, without persuading or influencing them." *Godines,* 525 So.2d at 1324 (quoting *Restatement 2d of Torts,* § 45(A)); *see also Larson v. Baer,* 418 N.W.2d 282, 287 (N.D.1988); *Prosser & Keeton* § 119 at 872.

[13][14] Cash's argument concerning whether he, in fact, initiated or instigated the proceedings can be stated best another way. He simply contends that he was not the proximate cause of Benjamin's arrest. The whole idea of proximate cause in our law is to limit legal responsibility to causes which are so closely connected with the result and of such significance that the law is justified in imposing liability. Moreover, "the legal limitation on the scope of liability is associated with policy-with our more or less inadequate ideas of what justice demands, or of what is administratively possible and convenient." *Prosser & Keeton,* (5th ed. 1984) § 411, at 264. Consequently, this Court has insisted that a defendant's conduct is a cause of the event if it was a material element and a *substantial factor* in bringing it about. *See New Orleans and N.E. RR Co. v. Burge,* 191 Miss. 303, 311, 2 So.2d 825, 826 (1941) (emphasis added). Whether it was such a substantial factor is for the jury to determine unless the issue is so clear that reasonable persons could not differ. *Prosser & Keeton, supra,* at 267.

[15] As the facts of this case indicate, Cash was a substantial factor in initiating these proceedings. There is no question that Cash went outside the store to begin his investigation. His acts were not passive or a result of acquiescence or negligence. In fact, they were intentional and deliberate. *See Cates,* 669 P.2d at 919. This point is emphasized further by the fact that there is conflicting evidence as to whether Cash trespassed to search Benjamin's car. Trespass is not the type of behavior that this Court should or would even want to encourage. Cash's extraordinary, and perhaps extra-legal pursuit of this matter, together with the evidence that Cash talked to Terrell in the midst of Benjamin's interrogation, and immediately following that conversation, the officer filed an affidavit against Benjamin, could lead a jury to question Cash's behavior. FN7 Because we have to give all the inferences to Benjamin, there is a jury question whether Cash initiated the prosecution of the charges.

FN7. Credibility was also a concern because there were some conflicts in Officer

> Terrell's and Cash's testimonies regarding at what point they had a discussion concerning this matter. There was another discrepancy which concerned whether Cash was called down to the police station for more information or if he came on his own. Finally, Terrell indicated that Cash informed the police about a "[s]uspicious person [and] suspicious activities."

PROBABLE CAUSE

In addition to insisting that no instigation was proved, Cash maintains that Benjamin ***1190** failed in proving the two remaining elements, malice and want of probable cause.

Unlike the previous element, in prior cases concerning this area of the law, appellants, particularly when attempting to set aside a jury verdict, have come to this Court assaulting plaintiff's proof of lack of probable cause and of malice. *See Royal Oil Co., Inc. v. Wells,* 500 So.2d 439, 443 (Miss.1986); *Owens v. Kroger Co.,* 430 So.2d 843, 846-48 (Miss.1983); *see also Miss. Road Supply Co, Inc. v. Zurich-American Ins. Co.,* 501 So.2d 412, 414 (Miss.1987) (The case at issue turns primarily on the presence of probable cause).

[16][17] Probable cause is determined from the facts apparent to the observer when the prosecution is initiated. *Kroger,* 430 So.2d at 846. In order to find probable cause there must be a concurrence of (1) an honest belief in the guilt of the person accused and (2) reasonable grounds for such belief. One is as essential as the other. *Royal Oil,* 500 So.2d at 443; *see also Harvill v. Tabor,* 240 Miss. 750, 755, 128 So.2d 863 (1961); *Woolfolk v. Tucker,* 485 So.2d 1039 (Miss.1986). Unfounded suspicion and conjecture are not proper bases for finding probable cause. *Miller v. East Baton Rouge Parish Sheriff's Dept.,* 511 So.2d 446, 453 (La.1987); *Prosser & Keeton, supra,* at p. 876.

[18] When the facts are undisputed, it is the function of the court to determine whether probable cause existed. *Kroger,* 430 So.2d at 846. On the other hand, when the facts are in dispute, this Court has proclaimed that it becomes a jury question and it is for them to determine based upon proper instructions. *Id.; accord Wal-Mart Stores, Inc. v. Yarbrough,* 284 Ark. 345, 681 S.W.2d 359, 361 (1984) (Unless both the facts and the reasonable inferences to be deduced from those facts are undisputed, this issue is to be submitted to the jury); *Wainauskis v. Howard Johnson Co.,* 339 Pa.Super. 266, 488 A.2d 1117, 1122 (1985) (where material facts are in controversy it becomes a mixed question of law and fact; therefore, it is the jury's duty, under proper instructions from the court as to what will justify a criminal prosecution, to say whether the plaintiff in the civil action has shown want of probable cause upon the part of the defendant).

[19][20] Want of probable cause may be proven by circumstantial evidence, but it is ordinarily necessary for the plaintiff to show circumstances from which the absence of probable cause may be inferred. *Royal Oil,* 500 So.2d at 444. If the evidence is such that the jury could have believed the prosecution was instituted without probable cause then that issue should go to the jury. *Cf. Royal Oil,* 500 So.2d at 444 (where jury could have believed there was no probable cause, a verdict in favor of the plaintiff could not be set aside).

In maintaining that there was probable cause, Cash says that because of his years of experience of dealing with Yamaha equipment, combined with his knowledge of the agreement between Yamaha and Hooper Sound, he knew that Benjamin could not have paid the price that he paid. Moreover, he believes that because Benjamin said he got it via a direct-from-the-factory deal, probable cause existed.

In response, just because Benjamin had a Yamaha amplifier in the city of Gulfport does not mean that he bought it in Gulfport. Hooper and Sound Advice may very well have been the only companies licensed to sell the equipment in Gulfport. But, it is

just as likely that Benjamin could have gotten the amplifier in one of a dozen other cities in at least two other states. It is not inconceivable that Benjamin could have driven to Biloxi, Ocean Springs, Long Beach, Pascagoula, or Moss Point. He could have driven as far north as Hattiesburg. In any event, a drive to any of these places would not be incomprehensible just as a drive to Mobile or New Orleans is equally conceivable.

[21] Cash simply could have asked Benjamin if he remembered the name of the store where he bought the amplifier. Or he could have at least given Benjamin an opportunity to explain where he bought it instead of surreptitiously going out to the parking lot and searching Benjamin's car. ***1191** *Cf.* Harper and James, *supra,* § 4.5, n. 6 (where a reasonable person would investigate further before instigating a proceeding, the failure to do so is an absence of probable cause); *see also Wainauskis,* 488 A.2d at 1123 (probable cause must not be based upon an inadequate and unreasonable investigation of the circumstances concerning the alleged criminal conduct). Moreover, the fact that Cash did not give Benjamin an opportunity to explain gives the inference that Cash himself was not acting reasonably. *Cf. Harris v. Lewis State Bank,* 482 So.2d 1378, 1382 (Fla.App. 1 Dist.1986) (where it would appear to a "cautious man" that further investigation is justified before instituting a proceeding liability may attach for failure to do so especially where the information is readily obtainable).

Taking all the evidence and giving the proper inferences that should be given, it is clear that the jury should have been given the opportunity to consider the evidence. They very well may have found that there was no probable cause.

Finally, Cash urges this Court to affirm the trial court because there was no malice.

MALICE

[22][23][24][25][26] "Malice" in the law of malicious prosecution is used in an artificial and legal sense and applied to a prosecution instituted primarily for a purpose other than that of bringing an offender to justice. *Royal Oil,* 500 So.2d at 444; *Kroger,* 430 So.2d at 846. It may be proved by circumstantial evidence or the jury may infer malice from the facts of the case. *Kroger,* 430 So.2d at 847 . Moreover, absence of probable cause for the prosecution is circumstantial evidence of malice. *Royal Oil,* 500 So.2d at 444. *See also Fisher v. Beach,* 671 S.W.2d 63, 67 (Tex.App. 5 Dist.1984) (where a fact issue of probable cause exists, a fact issue as to malice necessarily exists). And, malice may be inferred from a finding that the defendant acted in reckless disregard of the other person's rights. *Miller v. East Baton Rouge,* 511 So.2d at 453 (citing *Brown v. United States,* 653 F.2d 196 (5th Cir.1981), *cert. den.* 456 U.S. 925, 102 S.Ct. 1970, 72 L.Ed.2d 440 (1982)). Furthermore, this Court has emphasized that since the question of malice is a question of fact, it is to be *determined by the jury* unless only one conclusion may reasonably be drawn from the evidence. *Kroger,* 430 So.2d at 848 (quoting *Brown v. Watkins,* 213 Miss. 365, 373, 56 So.2d 888, 891 (1952)) (emphasis added).

CONCLUSION

Because this is an appeal from a directed verdict, one can not overemphasize the fact that all inferences should be given to Benjamin. These inferences make it possible for a juror to link several of Cash's actions to support malice. In fact, had Benjamin been allowed to make his closing argument, he may have tied together various things to demonstrate or infer malice. For instance, after overhearing the laughter between Benjamin and Burt, Cash interjected and said that the amplifier must have been hot. He subsequently sneaked off to search Benjamin's car. He was able to shield his disappearance and subsequent illegal act by sending a salesman to assist the customers. After Benjamin was taken to the police station, Cash came and encouraged Terrell to carry forward with the investigation.

Cash admitted that he could have asked Benjamin where he got such a good deal or he could have asked him to show him the amplifier. Instead, he took it upon himself to begin investigating. Because the investigation began so swiftly without any questions being asked and probable cause wanting an inference of malice is clear. This is more evident when there is a suggestion that Cash could have or might have considered Benjamin's race.

For example, on cross-examination, Cash said that although there were other cars in the parking lot, he went to the Volkswagen because "[he] noticed a FOXY 96 bumper sticker on the car ... their basic format tended to black audiences. Not to judge, but their format was black-oriented music, and that led [him] to his Volkswagen." Although he went through those inferences ***1192** to get to Benjamin's car, Cash denied giving the police a description of Benjamin, but he gave the officers the serial number of the amplifier and a description of the vehicle and its tag number.[FN8]

> FN8. In a portion of his testimony he admits giving the officer a description of Benjamin. *See,* (T. 98). In later testimony the following occurred:
>
> [Benjamin]: You are the one that called the police with regard to Benny; correct?
>
> [Cash] In regard to the serial number; correct. I did not know Benny.
>
> [Benjamin]: Well, you didn't tell them that it was some tall, white, skinny guy.
>
> [Cash]: I didn't tell them it was a short, stocky, black guy, either. I gave them the serial number and tag number of the vehicle.
>
> [Benjamin]: You provided a description of Benny.
>
> [Cash]: I described the vehicle.
>
> This obviously raises credibility concerns which should have gone to the jury.

For a person to go through all of those hoops to get to a person's car, it is not likely that any description would have remained incomplete. A reasonable juror could have made its own inferences, and one of those could have been that the investigation began because Cash did not understand or believe that a young black man legally could have bought that amplifier at that particular price. Moreover, he refused to believe that Benjamin could have traveled to any of the nearby cities along the coast or across the state line to buy this amplifier. Since he could not believe these things, he began his own investigation. *Cf. Royal Oil,* 500 So.2d at 444 ("other purpose" suggested here was that plaintiff was the target of defendant's anger because of her marriage to a black man).[FN9]

> FN9. Clearly, the jury should have been given the opportunity to determine if probable cause existed. Inferences are important, and Benjamin could have developed an argument to demonstrate that this entire episode was based on Cash's unjustified suspicions.

[27] Cash initiated Benjamin's nightmare. We are convinced that Benjamin never thought that purchasing a Yamaha amplifier would be so expensive as to require jail time and the loss of his automobile. This was a senseless prosecution initiated by Cash in a reckless manner.[FN10] Whether Cash's involvement was shielded with probable cause and without malice should have been determined by the jury and we reverse and remand for a new trial.

> FN10. Needless to say, we must agree with the trial judge in admonishing the state for bringing this case before the grand jury without a careful investigation. Clearly, whatever harm Benjamin may have suffered was exacerbated by the prosecution's conduct. On retrial, however, it is

Benjamin's responsibility to prove damages.

REVERSED AND REMANDED.

ROY NOBLE LEE, C.J., HAWKINS and DAN M. LEE, P.JJ., and PRATHER, ROBERTSON, SULLIVAN, PITTMAN and BLASS, JJ., concur.

Miss.,1990.
Benjamin v. Hooper Electronic Supply Co., Inc.
568 So.2d 1182

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C Benjamin v. Hooper Electronic Supply Co., Inc., 568 So.2d 1182 (Miss.,Oct 03, 1990) (NO. 07-CA-59250)

History

Direct History

=> 1 **Benjamin v. Hooper Electronic Supply Co., Inc.**, 568 So.2d 1182 (Miss. Oct 03, 1990) (NO. 07-CA-59250)

Supreme Court of Mississippi.
Vernon Ray CATCHINGS
v.
STATE of Mississippi.
No. 93-KA-00741-SCT.

May 16, 1996.
Rehearing Denied Sept. 19, 1996.

Defendant was convicted in the Hinds County Circuit Court, First Judicial District, L. Breland Hilburn, Jr., J., of murder, and he appealed. The Supreme Court, Prather, P.J., held that: (1) giving of deliberate design instruction was harmless error; (2) defendant was not entitled to "stand your ground" instruction; (3) testimony of physician who treated victim from his arrival at emergency room until his death some seven weeks later was admissible; (4) "depraved heart" instruction did not constitute an amendment to indictment charging deliberate design/premeditated murder; (5) denial of instruction defining deliberate design was not reversible error; (6) trial court's denial of "single juror" instruction was not reversible error; and (7) evidence was sufficient to support conviction.

Affirmed.

Banks, J., filed dissenting opinion in which Dan M. Lee, C.J., Sullivan, P.J., and McRae, J., joined.

West Headnotes

[1] Criminal Law 110 ⚿1172.6

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1172 Instructions
110k1172.6 k. Inapplicable to Issue or Evidence. Most Cited Cases
(Formerly 203k340(2))

Homicide 203 ⚿1372

203 Homicide
203XII Instructions
203XII(B) Sufficiency
203k1372 k. Manslaughter in General; Definitions. Most Cited Cases
(Formerly 203k309(3))
Absent evidence that defendant acted in heat of passion, court's manslaughter instruction was not warranted, and therefore giving "deliberate design" instruction and manslaughter instruction was harmless error. Code 1972, § 97-3-35.

[2] Criminal Law 110 ⚿814(2)

110 Criminal Law
110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k814 Application of Instructions to Case
110k814(2) k. Evidence Justifying Instructions in General. Most Cited Cases
Before instruction may be granted, there must be in the record an evidentiary basis for it.

[3] Homicide 203 ⚿799

203 Homicide
203VI Excusable or Justifiable Homicide
203VI(B) Self-Defense
203k798 Duty to Retreat or Avoid Danger
203k799 k. In General. Most Cited Cases
(Formerly 203k118(1))
Defendant is not deprived of right to claim self-defense in a slaying even if he could have avoided the threat to his safety by fleeing.

[4] Homicide 203 ⚿1485

203 Homicide
203XII Instructions
203XII(E) Excuses and Justifications

203k1471 Self-Defense
203k1485 k. Duty to Retreat or Avoid Danger. Most Cited Cases
(Formerly 203k300(7))
Defendant in murder prosecution was not entitled to "stand your ground" instruction where he was the provoker or aggressor.

[5] Criminal Law 110 ⇐483

110 Criminal Law
110XVII Evidence
110XVII(R) Opinion Evidence
110k482 Examination of Experts
110k483 k. In General. Most Cited Cases

Criminal Law 110 ⇐486(5)

110 Criminal Law
110XVII Evidence
110XVII(R) Opinion Evidence
110k482 Examination of Experts
110k486 Basis of Opinion
110k486(5) k. Medical Testimony in General. Most Cited Cases
Opinions formed by medical experts upon basis of credible evidence in the case and which can be stated with reasonable medical certainty have probative value.

[6] Criminal Law 110 ⇐483

110 Criminal Law
110XVII Evidence
110XVII(R) Opinion Evidence
110k482 Examination of Experts
110k483 k. In General. Most Cited Cases
Testimony of physician who treated victim from his arrival at emergency room until his death some seven weeks later was admissible, even though physician failed to use words "reasonable medical certainty"; physician's testimony evidenced the certainty requisite for admission.

[7] Criminal Law 110 ⇐814(5)

110 Criminal Law
110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k814 Application of Instructions to Case
110k814(5) k. Elements and Incidents of Offense in General. Most Cited Cases
"Depraved heart" instruction did not constitute an amendment to indictment charging deliberate design/premeditated murder; the two subsections of murder statute had "coalesced." Code 1972, § 97-3-19(1)(a, b).

[8] Homicide 203 ⇐545

203 Homicide
203II Murder
203k544 Second Degree Murder
203k545 k. In General. Most Cited Cases
(Formerly 203k7)
Act which poses risk to only one individual and which results in that individual's death may be deemed depraved heart murder. Code 1972, § 97-3-19(1)(a, b).

[9] Homicide 203 ⇐545

203 Homicide
203II Murder
203k544 Second Degree Murder
203k545 k. In General. Most Cited Cases
(Formerly 203k7)
Death resulting from injuries inflicted through use of sawhorse was within scope of depraved-heart murder statute. Code 1972, § 97-3-19(1)(a, b).

[10] Criminal Law 110 ⇐829(3)

110 Criminal Law
110XX Trial
110XX(H) Instructions: Requests
110k829 Instructions Already Given
110k829(3) k. Elements and Incidents of Offense. Most Cited Cases
Denial of instruction defining deliberate design was

not reversible error, where elements of murder were sufficiently addressed by other instructions.

[11] Criminal Law 110 ⚿829(1)

110 Criminal Law
110XX Trial
110XX(H) Instructions: Requests
110k829 Instructions Already Given
110k829(1) k. In General. Most Cited Cases
Supreme Court will not reverse for denial of individual instruction when jury has been instructed properly and fully by granting of all the instructions.

[12] Criminal Law 110 ⚿829(1)

110 Criminal Law
110XX Trial
110XX(H) Instructions: Requests
110k829 Instructions Already Given
110k829(1) k. In General. Most Cited Cases
Trial court's denial of "single juror" instruction was not reversible error, where jurors were otherwise instructed not to "surrender their honest convictions" and that they had duty not to change their vote merely to agree with his or her fellow jurors.

[13] Criminal Law 110 ⚿1156(2)

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1156 New Trial
110k1156(2) k. Sufficiency of Evidence. Most Cited Cases
Standard of review of contention that verdict was contrary to overwhelming weight of evidence is whether trial court abused its discretion in denying motion for new trial.

[14] Homicide 203 ⚿1134

203 Homicide
203IX Evidence
203IX(G) Weight and Sufficiency
203k1133 Homicide in General
203k1134 k. In General. Most Cited Cases
(Formerly 203k250)

Homicide 203 ⚿1181

203 Homicide
203IX Evidence
203IX(G) Weight and Sufficiency
203k1176 Commission of or Participation in Act by Accused; Identity
203k1181 k. Eyewitness Identification. Most Cited Cases
(Formerly 203k250)
Conviction of murder was supported by sufficient evidence, including eyewitness testimony that defendant hit victim with sawhorse while victim's back was turned and testimony that witness had done nothing to provoke defendant, and doctors' testimony that it was unlikely that anything besides this blow caused victim's subsequent death.
***592** Donald W. Boykin, Jackson, for appellant.

Michael C. Moore, Attorney General and W. Glenn Watts, Sp. Asst. Attorney General, Jackson, for appellee.

Before PRATHER, P.J., and PITTMAN and JAMES L. ROBERTS, Jr., JJ.

PRATHER, Presiding Justice, for the court:

I. INTRODUCTION

Vernon Ray Catchings was convicted in the Hinds County Circuit Court, First Judicial***593** District, for murder and sentenced to life imprisonment. His motion for judgment notwithstanding the verdict (JNOV), or in the alternative, a new trial, was denied. On appeal, Catchings raises the following issues:

A. WHETHER INSTRUCTION S-5 SHOULD

HAVE BEEN DENIED BECAUSE DELIBERATE DESIGN CANNOT BE FORMED AT THE MOMENT OF THE ACT OF VIOLENCE?

B. WHETHER INSTRUCTION D-12 CONCERNING CATCHINGS' RIGHT TO STAND FIRM AND NOT FLEE SHOULD HAVE BEEN GRANTED?

C. WHETHER THE TRIAL COURT ERRED BY ALLOWING DR. JOHN NEILL TO GIVE AN OPINION AS TO THE VICTIM'S CAUSE OF DEATH AND BY NOT GRANTING INSTRUCTIONS D-14 AND D-15?

D. WHETHER INSTRUCTION S-1 SHOULD HAVE BEEN DENIED BECAUSE IT IN EFFECT AMENDED THE INDICTMENT, OR WAS OTHERWISE IN SIGNIFICANT VARIANCE WITH THE INDICTMENT AND, BECAUSE THERE WAS NO EVIDENTIARY BASIS FOR THAT PART OF THE INSTRUCTION CONCERNING AN ACT DANGEROUS TO OTHERS?

E. WHETHER THE TRIAL COURT SHOULD HAVE GRANTED INSTRUCTION D-17, DEFINING DELIBERATE DESIGN?

F. WHETHER THE TRIAL COURT SHOULD HAVE GRANTED INSTRUCTION D-7, THE "SINGLE JUROR" INSTRUCTION?

G. WHETHER THE EVIDENCE SUPPORTED CATCHINGS' CONVICTION?

II. STATEMENT OF THE FACTS

This case involves an incident which took place outside the Short Stop convenience store on the corner of Corinth Street and Lynch Street in Jackson on November 3, 1990. The appellant, Vernon Ray Catchings, struck the victim, Major Cassidy, in the head with a saw horse. The force of the blow severed the victim's nose and knocked him to the ground. The victim was hospitalized that day and died approximately seven weeks later. The evidence indicated that Cassidy had not provoked or attacked Catchings. However, Catchings testified that he acted in self-defense. The record reflects the following:

Catchings entered the Short Stop that day and ordered some chicken; according to witnesses, he was "rowdy" and "upset," and was talking loudly to the female cook. The victim approached Catchings and told him that he did not have to talk like that. Catchings then "got real loud." The cashier knew the victim; he asked the victim to leave, because Catchings was getting louder. The victim complied, and Catchings ran out of the store behind him.

One witness testified that the victim was not turned toward Catchings and that he was not paying attention to Catchings, when Catchings charged him with the sawhorse. The victim apparently saw Catchings' approach and turned around, but Catchings was too close for him to move out of the way.

As soon as Catchings struck Cassidy, he set the sawhorse down, turned around, and said, "Hey, y'all want some of this, too?" Catchings re-entered the store and asked, "Anybody else want any?" Catchings cursed the cook, snatched up his bag of chicken, and left. He did not try to help the victim.

Two witnesses testified that Catchings never seemed to be afraid of the victim; they stated that the victim was child-like and passive-an "easy mark." They did not see a weapon in the victim's hand, and they did not believe that the victim had done anything to provoke Catchings.

On the other hand, Appellant Catchings testified that he had gone into the store to purchase some food and he was sitting on a stool waiting for his change, when Cassidy ***594** (the victim) approached him. According to the appellant, Cassidy

poked him in the back with a small pocket knife and asked why the appellant was "sitting on his [expletive] stool." Cassidy then went outside. Because Catchings wanted to know why he had been stuck, he followed Cassidy outside to talk. Catchings testified that he had no intention of harming Cassidy.

Catchings said, "Hey, man, what's your problem." According to Catchings, Cassidy then waved the knife and cursed and threatened him. Catchings turned and grabbed the sawhorse to defend himself; he swung, and the sawhorse hit Cassidy in the bridge of the nose.

Catchings stated that he was afraid because there were a lot of people on the street corner and he was new in that neighborhood. He went back inside the store. Catchings did not know why he asked if "anybody want some of this"-he testified that it was a "reaction." He would have liked to have left immediately, because he was afraid; however, he had left a $20 bill on the counter. Catchings later went home; he did not help Cassidy, because Cassidy had tried to take his life.

Cassidy was transported to the emergency room at Methodist Medical Center, where he was treated by Dr. John Neill, a specialist in neurological surgery. Cassidy was awake but would not talk; he was acutely intoxicated and had a blood alcohol level of .299. Dr. Neill ran a computerized axial tomography (CAT) scan, which revealed a skull fracture, as well as blood over the surface of Cassidy's brain. Cassidy was admitted to the hospital for observation. Over the next two days, he became increasingly sleepy. Another CAT scan revealed that Cassidy had a large hemorrhage and blood clot in the frontal portion of his brain on the right side. Dr. Neill operated to remove the clot. After the surgery, Cassidy became paralyzed on the left side of his body. Dr. Neill believed that the blood clot and the paralysis it caused were related to the blow that Cassidy received.

Cassidy was on a ventilator and remained in the intensive care unit for some time. Dr. Neill ordered a second and third CAT scan, which showed that Cassidy was developing a subdural hematoma and hydrocephalus, which is the accumulation of spinal fluid in the brain. On December 21, 1990, Cassidy died. Dr. Neill testified that Cassidy "certainly did not appear to be a very healthy individual" as he had enzyme abnormalities, which could mean that he had liver injury, usually associated with heavy drinking, or because he was taking Dilantin, a seizure medication that can produce abnormalities in liver enzymes.

Dr. Neill did not think that the liver disease was life-threatening or caused his death. Dr. Neill listed the cause of death on the death certificate as " Cerebral hemorrhage, traumatic. Interval between onset and death, weeks," and also testified that "being hit over the head" caused Cassidy to die.

Dr. Stephen Timothy Hayne, a forensic pathologist, testified that he had reviewed Cassidy's medical records and that they revealed that Cassidy had liver disease. Dr. Hayne thought it "unlikely" and "a remote possibility" that Cassidy died from the liver disease. However, Dr. Hayne could not exclude liver disease as Cassidy's cause of death. Dr. Hayne also stated that, without an autopsy, the clinical treatment of Cassidy when he was alive would not be sufficient for someone to render an opinion within a reasonable medical certainty as to the manner of Cassidy's death. Dr. Hayne further testified that it would be a reasonable conclusion, approaching reasonable medical certainty, that Cassidy died from "getting hit on the head or circumstances that emanated from that."

III. LEGAL ANALYSIS

A. WHETHER INSTRUCTION S-5 SHOULD HAVE BEEN DENIED BECAUSE DELIBERATE DESIGN CANNOT BE FORMED AT THE MOMENT OF THE ACT OF VIOLENCE?

[1] The following instruction was given, over

Catchings' objection, as S-5:

> The Court instructs the Jury that malice aforethought does not have to exist in the mind of the slayer for any given length of *595 time; and if at the moment of the act of violence, if any, the defendant Vernon Ray Catchings acted with the deliberate design to take the life of Major Cassidy, and not in necessary self-defense, real or apparent, then it was as truly malice and the act was as truly murder as if the deliberate design had existed in the mind of Vernon Ray Catchings for minutes, hours, days, weeks or even years.

Catchings argues that instruction S-5 conflicts with the holding in *Windham v. State,* 520 So.2d 123 (Miss.1987). In *Windham,* an instruction similar to S-5 was given. *Id.* at 125. This Court held that:

> While it is no doubt true that a deliberate design to kill a person may be formed very quickly, and perhaps only moments before the act of consummating the intent, it is a contradiction in terms to state that a "deliberate design" can be formed at the very moment of the fatal act. Moreover, it is possible for a deliberate design to exist and the slaying nevertheless be no greater than manslaughter. It can thus be seen that **this special murder instruction granted the State rules out manslaughter, and is in hopeless conflict with the manslaughter instruction.**

Id. at 126 (citations omitted) (emphasis added).

In the case at hand, a manslaughter instruction was also given. Where deliberate design and manslaughter instructions are given, and "where under the evidence the jury might reasonably have concluded that the defendant acted in the heat of passion, we will ... ordinarily reverse." *Blanks v. State,* 542 So.2d 222, 227 (Miss.1989)

However, in *Nicolaou v. State,* 534 So.2d 168 (Miss.1988), this Court held that giving the "deliberate design" instruction and a manslaughter instruction was harmless error where the manslaughter instruction was not warranted under the evidence of the case. *Id.* at 173. Thus, whether the giving of the deliberate design instruction constitutes reversible error depends on whether the giving of the manslaughter instruction was warranted by the evidence in this case. *See Blanks,* 542 So.2d at 227; *Nicolaou,* 534 So.2d at 173.

Manslaughter is "[t]he killing of a human being, without malice, in the heat of passion, but in a cruel or unusual manner, or by the use of a dangerous weapon, without authority of law, and not in necessary self-defense." Miss.Code Ann. § 97-3-35. There is no evidence in the record that Catchings acted in the heat of passion. Catchings' own testimony was that he went outside the Short Stop to talk to Cassidy and that he had no intention of harming Cassidy. Catchings also testified that, once outside, Cassidy waved a knife at him, cursed him, and threatened him.

It appears from the record that the defense raised by Catchings at trial was self-defense. In which case,

> there is no reasonable factual scenario under which the jury may reasonably have concluded, [under the deliberate design instruction], that [the appellant's] premeditated design to kill, if any existed in his mind but for an instant before the fatal act. On the prosecution's interpretation of the evidence, the premeditated or deliberate design existed well before the [slaying]. On the defense theory, it never existed. In this context, we declare the granting of [the deliberate design instruction] as harmless error.

Blanks, 542 So.2d at 227. Thus, the manslaughter instruction was not warranted in this case. *See Id.* Therefore, the giving of the deliberate design instruction was harmless error.

B. WHETHER INSTRUCTION D-12 CONCERNING CATCHINGS' RIGHT TO STAND FIRM AND NOT FLEE SHOULD HAVE BEEN GRANTED?

Proposed instruction D-12 was not given:

> Flight, or fleeing the scene, was a means of escaping danger to which Vernon Catchings was not bound to resort. So long as he was in a place where he had a right to be, and was not the immediate provoker or aggressor, he had the right to stand his ground and resist force by force without losing the right of self-defense.

[2] The trial judge found that this instruction was not supported by the evidence. "Before an instruction may be granted, there ***596** must be in the record an evidentiary basis for it." *Neal v. State,* 451 So.2d 743, 761 (Miss.1984).

> The refusal of a timely requested and correctly phrased jury instruction on a genuine issue of material fact is proper, only if the trial court-and this Court on appeal-can say, taking the evidence in the light most favorable to the party requesting the instruction and considering all reasonable favorable inferences which may be drawn from the evidence in favor of the requesting party, that no hypothetical, reasonable jury could find the facts in accordance with the theory of the requested instruction.

Ferrill v. State, 643 So.2d 501, 505 (Miss.1994).

[3] "It has always been the law in this state that a defendant is not deprived of the right to claim self-defense in a slaying even if he could have avoided the threat to his safety by fleeing." *Cook v. State,* 467 So.2d 203, 210 (Miss.1985) (quoting *Haynes v. State,* 451 So.2d 227, 229 (Miss.1984). Furthermore,

> [f]light is a mode of escaping danger to which a party is not bound to resort, so long as he is in a place where he has a right to be, and is neither engaged in an unlawful, nor the provoker of, nor the aggressor in, the combat. In such case he may stand his ground and resist force by force, taking care that his resistance be not disproportionate to the attack.

Id.

[4] In the case *sub judice,* all of the witnesses, except Catchings, testified that the victim did nothing to provoke Catchings. Catchings' own testimony was that he followed the victim from the store and asked, "Hey, man, what's your problem?" Therefore, because Catchings was the provoker or aggressor, the trial judge correctly ruled that Catchings was not entitled to a "stand your ground" instruction.

C. WHETHER THE TRIAL COURT ERRED BY ALLOWING DR. JOHN NEILL TO GIVE AN OPINION AS TO THE VICTIM'S CAUSE OF DEATH AND BY NOT GRANTING INSTRUCTIONS D-14 AND D-15?

Catchings argues that expert opinions which are not "stated to a reasonable medical certainty" are not admissible and cites *West v. State,* 553 So.2d 8 (Miss.1989). At trial, Catchings objected to the form of the question when Dr. Neill was asked about the cause of Cassidy's death. The objection was overruled. Catchings also contends that proposed jury instructions D-14 and D-15 should have been given. D-14 stated, "The testimony of Dr. John Neill is not probative, and you are instructed to completely disregard his testimony." D-15 stated, "Dr. John Neill gave his opinion as to the cause of Major Cassidy's death. His opinion is not probative as to the cause of death, meaning that his opinion as to cause of death has no value. You shall disregard his opinion."

In *West v. State,* the case cited by Catchings, a doctor testified regarding necrophilia generally, and did not discuss whether that specific defendant was a necrophile. This Court held: "Expert opinion testimony not tied to the individual whose behavior is at issue and not stated with reasonable certainty flunks the [admissibility] test." *Id.* at 21. The case at hand varies a bit from *West* in that Dr. Neill treated Cassidy from his arrival at the emergency room until his death some seven weeks later. Thus,

(2) while engaged in the commission of an act eminently dangerous to others and evincing a depraved heart, disregarding the value of human life when the mortal or fatal blow was struck, whether or not he had any intention of actually killing Major Cassidy, then Vernon Ray Catchings is guilty of murder, and it is your sworn duty to so find.

[7] Catchings argues that the instruction was improper because it constituted an amendment to the indictment and because it was not supported by the evidence. Miss.Code Ann. § 97-3-19 defines murder in the following manner:

(1) The killing of a human being without the authority of law by any means or in any manner shall be murder in the following cases:

(a) When done with deliberate design to effect the death of the person killed, or of any human being;

(b) When done in the commission of an act eminently dangerous to others and evincing a depraved heart, regardless of human life, although without any premeditated design to effect the death of any particular individual ...

Miss.Code Ann. § 97-3-19 (1972).

Catchings argues that he was indicted under Miss.Code Ann. § 97-3-19(1)(a), but that the jury was instructed under Miss.Code Ann. §§ 97-3-19 (1)(a) and (b). Catchings argues that this "depraved heart" instruction effectively amended the indictment and cites *Quick v. State,* 569 So.2d 1197 (Miss.1990). In *Quick,* the court reiterated the holdings in a long line of cases and held that "the state can prosecute only on the indictment returned by the grand jury and ... the court ***599** has no authority to modify or amend the indictment in any material respect." *Quick,* 569 So.2d at 1199.

Quick was indicted under subsection (b) of the aggravated assault statute, which requires purposeful, wilful, and knowing actions on the part of the accused. *See* Miss.Code Ann. § 97-3-7(2)(b) (1972). The indictment was apparently amended, and *Quick* was convicted under subsection (a) of the aggravated assault statute, which requires recklessness and extreme indifference to the value of human life. *See* Miss.Code Ann. § 97-3-7(2)(a) (1972).

The *Quick* court held that the jury instructions clearly contained a "new element which was not contained in the original indictment and ... it was evidently this part of the instruction upon which the jury returned its verdict. Under these circumstances we have no alternative but to reverse and remand ..." *Id.* at 569 So.2d at 1200.

However, the case *sub judice* can be distinguished from *Quick.* With regard to the murder statute, subsections (a) and (b) have "coalesced." Indeed,

[t]here is no question that the structure of the statute suggests two different kinds of murder: deliberate design/premeditated murder and depraved heart murder. The structure of the statute suggests these are mutually exclusive categories of murder. Experience belies the point. As a matter of common sense, every murder done with deliberate design to effect the death of another human being is by definition done in the commission of an act imminently dangerous to others and evincing a depraved heart, regardless of human life. Our cases have for all practical purposes coalesced the two so that Section 97-3-19(1)(b) subsumes (1)(a).

Mallett v. State, 606 So.2d 1092, 1095 (Miss.1992). *See also Hurns v. State,* 616 So.2d 313, 321 (Miss.1993). The judgment in this case was issued in February, 1993, well after this Court first interpreted the statute in this manner. Therefore, this argument is without merit.

[8][9] Catchings' second contention regarding this instruction is that the depraved heart instruction was not supported by the evidence. He focuses on the idea that a depraved heart murder is typically an act such as shooting into a crowd, and that Catch-

ings' actions in this case did not involve an act that was "dangerous to others." However, an "act which poses a risk to only one individual and which results in that individual's death may also be deemed depraved heart murder." *Windham v. State,* 602 So.2d 798, 802 (Miss.1992). "More pertinent to the facts of the case sub judice, death which resulted from injuries inflicted through use of an object ... has been deemed to be within the scope of depraved-heart murder statutes." *Id.* at 802-03 (citing other cases where objects such as a "two-by-four piece of wood" and a "heavy wooden stick" were the objects which could validate the use of the depraved heart statutes). Therefore, Catchings' argument on this point is without merit.

E. WHETHER THE TRIAL COURT SHOULD HAVE GRANTED INSTRUCTION D-17, DEFINING DELIBERATE DESIGN?

[10] Proposed jury instruction D-17 was not given; it reads as follows:

> One of the elements of murder which the State must prove beyond a reasonable doubt is "deliberate design". "Deliberate" indicates full awareness of what one is doing, and generally implies careful and unhurried consideration of the consequences. "Design" means to calculate, plan, contemplate.

[11] Catchings contends that, because instruction S-1 regarding deliberate design was given, then his proposed instruction D-17, which defines deliberate design, should have been given as well. This Court will not reverse for denial of an individual instruction when the jury has been instructed properly and fully by the granting of all the instructions. *Collins v. State,* 594 So.2d 29, 35 (Miss.1992). Here the elements of murder were sufficiently addressed by the granting of other instructions. Therefore, this assignment of error is without merit.

***600 F. WHETHER THE TRIAL COURT SHOULD HAVE GRANTED INSTRUCTION D-7, THE "SINGLE JUROR" INSTRUCTION?**

[12] Proposed jury instruction D-7 was not given; it reads as follows:

> The Court charges each juror that it is your sworn duty to vote on each and every ballot of the jury "Not Guilty", unless, after conferring with the other jurors and considering the evidence, your mind is convinced beyond a reasonable doubt of the guilt of the Defendant. You cannot, under your oath as a juror, compromise your honest beliefs or opinions from the evidence, or lack of evidence, as to the guilt or innocence of the Defendant for the purpose of bringing in a verdict. Under your oath and under the law, you should never surrender such beliefs or opinions simply because other members of the jury may disagree with you or insist that you yield to save the time of the Court or prevent a mistrial, or shorten the labors of the jury panel, or because of anything or reason whatsoever, or for any purpose whatsoever. You should vote "Not Guilty" as long as, after consideration of the evidence or lack of evidence in this case, the State has failed to prove Vernon Catchings' guilty beyond a reasonable doubt.

Catchings contends that the trial court committed reversible error by denying this "single juror" instruction. He argues that the "instruction was critical to Catchings in that it would have instructed the jury to, among other things, not change their 'honest convictions' for any reason." However, the record reflects that the jurors were instructed not to "surrender their honest convictions" in instruction C-5. Furthermore, the jurors were also instructed in Instruction D-5 that they had a duty not to change their vote "merely to agree with his or her fellow jurors."

"Regarding the standard for reviewing jury instructions, an instructional error will not warrant reversal if the jury was fully and fairly instructed by other instructions." *Collins v. State,* 594 So.2d 29, 35 (Miss.1992); *Heidel v. State,* 587 So.2d 835, 842

(Miss.1991). The jurors were amply instructed regarding this issue. Catchings' argument on this point, therefore, is without merit.

G. WHETHER THE EVIDENCE SUPPORTED CATCHINGS' CONVICTION?

[13] Catchings' final argument is that the verdict was contrary to the overwhelming weight of the evidence. The standard of review in these cases is whether the trial court abused its discretion in denying the appellant's motion for a new trial. *McClain v. State,* 625 So.2d 774, 781 (Miss.1993) (citing *Wetz, v. State,* 503 So.2d 803, 807-08 (Miss.1987)).

[14] In this case, an eye-witness testified that Catchings hit Cassidy with the sawhorse while Cassidy's back was turned. Two witnesses testified that Cassidy had not done anything to provoke Catchings. Both doctors testified that it was unlikely that anything besides this blow caused Cassidy's subsequent death. Thus, the trial judge did not abuse his discretion by denying Catchings a new trial.

IV. CONCLUSION

The issues raised by the appellant are without merit. Accordingly, the conviction of murder and sentence of life imprisonment is affirmed.

CONVICTION OF MURDER AND SENTENCE OF LIFE IMPRISONMENT IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AFFIRMED.

PITTMAN, JAMES L. ROBERTS, Jr., SMITH and MILLS, JJ., concur.
BANKS, J., dissents with separate written opinion joined by DAN M. LEE, C.J., and SULLIVAN, P.J., and McRAE, J.
BANKS, Justice, dissenting:
Because I believe that the trial court erred with regard to the deliberate design instructions, I dissent.

The majority maintains that the giving of the deliberate design instruction S-5 was "harmless error" based on its conclusion that ***601** the manslaughter instruction S-6 was not warranted. The conclusion that the manslaughter instruction was unwarranted appears to be based on the fact that Catchings's defense at trial was "self-defense." The majority then quotes and relies upon *Blanks v. State,* 542 So.2d 222, 227 (Miss.1989), asserting that, based on Catchings's trial defense strategy, "there is no reasonable factual scenario under which the jury may reasonably have concluded [under the deliberate design instruction], that [the appellant's] premeditated design to kill, if any existed in his mind but for an instant before the fatal act." *Id.*

In *Blanks* we noted that the defendant saw the victims damage the post on his house and "pursued them for several miles, pulled abreast of them and opened fire." *Blanks v. State,* 542 So.2d at 227. Blanks pulled in front of the victims, "stopped his car, loaded his gun, and fired." *Id.* We said that "[u]nder any interpretation, enough time elapsed-close to fifteen minutes-that the law charged Blanks to cool his temper and act reasonably." *Id.*

In the instant case, the facts reveal that Catchings had a verbal confrontation with Cassidy inside the Short Stop restaurant. While leaving the Short Stop, Catchings saw Cassidy outside of a liquor store. Catchings asserts that he called out to Cassidy, saying "Hey, man, what's your problem." According to Catchings, Cassidy then waved a knife and cursed and threatened him. In response, Catchings immediately grabbed a saw horse and struck Cassidy in the head. It is apparent that the trial court felt that this evidence warranted the giving of a manslaughter instruction. I cannot agree with the majority that the trial court was in error.

The deliberate design instruction S-5 is in hopeless conflict with the manslaughter instruction S-6. As we held in *Windham v. State,* 520 So.2d 123, 125 (Miss.1987), "it is a contradiction in terms to state that a 'deliberate design' can be formed at the very moment of the fatal act. Moreover, it is possible for a deliberate design to exist and the slaying never-

theless be no greater than manslaughter." [FN1] This conflict may not be resolved, as the majority suggests, by declaring the manslaughter defense unavailable. On the facts of this case, the manslaughter instruction was properly given.

> FN1. Although I dissented in *Windham v. State,* 602 So.2d 798, 808 (Miss.1992) (*Windham II*), my opinion in that case has no bearing on my application of *Windham v. State,* 520 So.2d 123 (1987) (*Windham I*) in the present case. I continue to adhere to my views as to the "depraved heart" provisions within our murder statute.

Furthermore, the majority asserts that the denial of proposed jury instruction D-17, defining deliberate design, was not error, based on the granting of other instructions which fully and properly instructed the jury. Majority opinion ante p. 16-17. In light of the necessity of S-6, I do not believe that the trial court's failure to grant instruction D-17, which would have aided the jury in considering instruction S-1, can be excused. The denial of instruction D-17 was particularly improper because the trial court erroneously granted the State instruction S-5, further defining "deliberate design."

Because I believe that instructions S-5 and S-6 were in conflict, as in *Windham,* and that the trial court erred in denying proposed jury instruction D-17, I would reverse the judgment and remand this matter for a new trial.

DAN M. LEE, C.J., and SULLIVAN, P.J., and McRAE, J., join this opinion.
Miss.,1996.
Catchings v. State
684 So.2d 591

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Catchings v. State, 684 So.2d 591 (Miss.,May 16, 1996) (NO. 93-KA-00741-SCT)

History

Direct History

=> 1 **Catchings v. State,** 684 So.2d 591 (Miss. May 16, 1996) (NO. 93-KA-00741-SCT), rehearing denied (Sep 19, 1996)

Negative Citing References (U.S.A.)

Distinguished by

2 Williams v. State, 729 So.2d 1181 (Miss. Dec 10, 1998) (NO. 95-CT-01199-SCT), rehearing denied (Mar 11, 1999) ★ ★ ★ ★ **HN: 1,7,10 (So.2d)**

H

Supreme Court of Mississippi.
CITY OF JACKSON, Mississippi
v.
Sharon Trigg SPANN.
No. 2007-CA-01756-SCT.

Jan. 22, 2009.
Rehearing Denied April 2, 2009.

Background: Driver of truck with which patrol car collided during police pursuit filed negligence action against city and another motorist. Following settlement by other motorist, nonjury trial was held in the Circuit Court, Hinds County, Winston L. Kidd, J., which entered judgment against city. City appealed.

Holdings: The Supreme Court, Waller, C.J., held that:
(1) substantial evidence supported finding that conduct of police officers was sole proximate cause of collision; and
(2) evidence supported award of $50,000 for pain and suffering; but
(3) there was not substantial, credible evidence to support awards of $20,000 for future medical expenses, $20,000 for future surgery and $150,000 for future disability.

Affirmed in part, reversed and remanded in part.

Graves, P.J., filed an opinion concurring in part and dissenting in part in which Dickinson, Kitchens and Pierce, JJ., joined.

West Headnotes

[1] Appeal and Error 30 ⇐1008.1(1)

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)3 Findings of Court
30k1008 Conclusiveness in General
30k1008.1 In General
30k1008.1(1) k. In General. Most Cited Cases

Appeal and Error 30 ⇐1010.1(4)

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)3 Findings of Court
30k1010 Sufficiency of Evidence in Support
30k1010.1 In General
30k1010.1(4) k. Competent or Credible Evidence. Most Cited Cases

Appeal and Error 30 ⇐1010.1(5)

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)3 Findings of Court
30k1010 Sufficiency of Evidence in Support
30k1010.1 In General
30k1010.1(5) k. Reasonably Supported Findings. Most Cited Cases

Appeal and Error 30 ⇐1010.1(6)

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)3 Findings of Court
30k1010 Sufficiency of Evidence in Support
30k1010.1 In General
30k1010.1(6) k. Substantial Evidence. Most Cited Cases
The findings of a circuit court judge sitting without a jury will not be reversed on appeal where they are sup-

ported by substantial, credible, and reasonable evidence; however, where a trial judge adopts, verbatim, findings of fact and conclusions of law prepared by a party to the litigation, appellate court analyzes those findings with greater care, and the evidence is subjected to heightened scrutiny.

[2] Negligence 272 ⚿379

272 Negligence
272XIII Proximate Cause
272k374 Requisites, Definitions and Distinctions
272k379 k. "But-For" Causation; Act Without Which Event Would Not Have Occurred. Most Cited Cases

"Cause in fact" means that, but for the defendant's negligence, the injury would not have occurred.

[3] Automobiles 48A ⚿244(36.1)

48A Automobiles
48AV Injuries from Operation, or Use of Highway
48AV(B) Actions
48Ak241 Evidence
48Ak244 Weight and Sufficiency
48Ak244(36) Proximate Cause of Injury
48Ak244(36.1) k. In General. Most Cited Cases

Substantial evidence supported trial court's finding, in negligence action against city by truck driver, that police officers' conduct was a proximate cause of accident at intersection in which patrol car collided with truck; accident would not have occurred but for a high-speed pursuit and manner in which officers proceeded into intersection, there was testimony contradicting officers' assertion that they had activated blue light and siren, and truck driver's expert explained that officers were obligated to stop and ensure that all traffic had stopped before entering intersection. West's A.M.C. § 85-5-7(1, 5).

[4] Automobiles 48A ⚿244(36.1)

48A Automobiles
48AV Injuries from Operation, or Use of Highway
48AV(B) Actions
48Ak241 Evidence
48Ak244 Weight and Sufficiency
48Ak244(36) Proximate Cause of Injury
48Ak244(36.1) k. In General. Most Cited Cases

Evidence 157 ⚿571(9)

157 Evidence
157XII Opinion Evidence
157XII(F) Effect of Opinion Evidence
157k569 Testimony of Experts
157k571 Nature of Subject
157k571(9) k. Cause and Effect. Most Cited Cases

Substantial evidence supported trial court's finding, in assigning no fault to another motorist whose vehicle was struck during multivehicle collision giving rise to negligence action against city by truck driver, that conduct of police officers during high-speed pursuit was the sole proximate cause of collision; truck driver's expert testified that officers' conduct was sole proximate cause, and other motorist testified that she had a green light and did not see any blue lights or hear any siren as she proceeded into intersection where collision occurred.

[5] Automobiles 48A ⚿171(13)

48A Automobiles
48AV Injuries from Operation, or Use of Highway
48AV(A) Nature and Grounds of Liability
48Ak171 Crossing
48Ak171(13) k. Reliance on Care of Others. Most Cited Cases

As a general rule, a motorist's right to assume that the driver of a vehicle proceeding toward an intersection will obey the law of the road, which requires him to stop before entering the intersection, exists only until he knows or in the exercise of ordinary care should know otherwise.

[6] Appeal and Error 30 ⚿1013

30 Appeal and Error
30XVI Review

30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)3 Findings of Court
30k1013 k. Amount of Recovery. Most Cited Cases
The Supreme Court will not overturn a damages award unless the damages are so excessive as to strike mankind, at first blush, as being, beyond all measure, unreasonable, and outrageous, and such as manifestly show the jury to have been actuated by passion, partiality, prejudice, or corruption.

[7] Evidence 157 ⚿555.9

157 Evidence
157XII Opinion Evidence
157XII(D) Examination of Experts
157k555 Basis of Opinion
157k555.9 k. Damages. Most Cited Cases
Any challenges to the reliability of expert opinions supporting damages award in negligence action against city arising from collision at intersection should have been addressed in trial court via a *Daubert* challenge. Rules of Evid., Rule 702.

[8] Evidence 157 ⚿508

157 Evidence
157XII Opinion Evidence
157XII(B) Subjects of Expert Testimony
157k508 k. Matters Involving Scientific or Other Special Knowledge in General. Most Cited Cases

Evidence 157 ⚿555.2

157 Evidence
157XII Opinion Evidence
157XII(D) Examination of Experts
157k555 Basis of Opinion
157k555.2 k. Necessity and Sufficiency. Most Cited Cases
Mississippi follows the modified *Daubert* standard, which requires the trial court to perform a two-pronged inquiry to determine whether expert testimony is admissible under applicable rule of evidence; the trial court must first determine whether the testimony is relevant, then whether the proffered testimony is reliable. Rules of Evid., Rule 702.

[9] Damages 115 ⚿127.13

115 Damages
115VII Amount Awarded
115VII(B) Injuries to the Person
115k127.12 Head and Neck Injuries in General; Mental Impairment
115k127.13 k. In General. Most Cited Cases

Damages 115 ⚿127.28

115 Damages
115VII Amount Awarded
115VII(B) Injuries to the Person
115k127.25 Leg, Foot, Knee, and Hip Injuries
115k127.28 k. Fractures, Sprains, and Connective Tissue Injuries. Most Cited Cases

Damages 115 ⚿127.33

115 Damages
115VII Amount Awarded
115VII(B) Injuries to the Person
115k127.32 Back and Spinal Injuries in General
115k127.33 k. In General. Most Cited Cases

Damages 115 ⚿140.7

115 Damages
115VII Amount Awarded
115VII(E) Mental Suffering and Emotional Distress
115k140.7 k. Particular Cases. Most Cited Cases

Evidence 157 ⚿571(10)

157 Evidence
157XII Opinion Evidence
157XII(F) Effect of Opinion Evidence
157k569 Testimony of Experts

157k571 Nature of Subject
157k571(10) k. Damages. Most Cited Cases

Award of $50,000 for pain and suffering to plaintiff in negligence action against city arising from collision with police patrol car was supported by plaintiff's own testimony about physical and emotional pain she had suffered since accident, as well as testimony by two physicians that plaintiff was diagnosed as having post-traumatic headaches, chronic neck and back pain, left-knee pain, and depression, and that tests indicated a meniscus tear in her left knee.

[10] Damages 115 ⇐127.71(2)

115 Damages
115VII Amount Awarded
115VII(B) Injuries to the Person
115k127.69 Expenses Of, and Loss of Services Performed By, Injured Person
115k127.71 Medical Treatment and Custodial Care
115k127.71(2) k. Future Expenses. Most Cited Cases

Evidence 157 ⇐571(10)

157 Evidence
157XII Opinion Evidence
157XII(F) Effect of Opinion Evidence
157k569 Testimony of Experts
157k571 Nature of Subject
157k571(10) k. Damages. Most Cited Cases

Expert testimony that plaintiff would likely continue to experience ailments and equivocal expert testimony regarding future surgery did not provide substantial, credible evidence supporting $20,000 award for future medical expenses in negligence action against city arising from collision with police patrol car.

[11] Damages 115 ⇐127.71(2)

115 Damages
115VII Amount Awarded
115VII(B) Injuries to the Person
115k127.69 Expenses Of, and Loss of Services Performed By, Injured Person
115k127.71 Medical Treatment and Custodial Care
115k127.71(2) k. Future Expenses. Most Cited Cases

Evidence 157 ⇐571(10)

157 Evidence
157XII Opinion Evidence
157XII(F) Effect of Opinion Evidence
157k569 Testimony of Experts
157k571 Nature of Subject
157k571(10) k. Damages. Most Cited Cases

"Guess," by expert physician who had not practiced surgery for eight or nine years, that cost of surgery to repair meniscus tear in plaintiff's knee would be around $20,000 was not substantial credible evidence supporting damages award of $20,000 for future surgery in action against city arising from collision with police patrol car.

[12] Damages 115 ⇐127.28

115 Damages
115VII Amount Awarded
115VII(B) Injuries to the Person
115k127.25 Leg, Foot, Knee, and Hip Injuries
115k127.28 k. Fractures, Sprains, and Connective Tissue Injuries. Most Cited Cases

Evidence 157 ⇐571(10)

157 Evidence
157XII Opinion Evidence
157XII(F) Effect of Opinion Evidence
157k569 Testimony of Experts
157k571 Nature of Subject
157k571(10) k. Damages. Most Cited Cases

Award of $150,000 for future disability was not supported by substantial, credible evidence in negligence action against city arising from collision with police patrol car; there was no evidence that expert who assigned a

five-percent disability rating to plaintiff because of torn meniscus and resulting loss of function to left knee engaged in a comprehensive evaluation, and expert acknowledged his own uncertainty as to plaintiff's physical limitations.

***1030** Pieter Teeuwissen, Ridgeland, attorney for appellant.

***1031** Joe N. Tatum, Jackson, attorney for appellee.

EN BANC.

WALLER, Chief Justice, for the Court.

¶ 1. Sharon Trigg Spann filed a negligence lawsuit against the City of Jackson and Mary Jenkins in the Circuit Court of the First Judicial District of Hinds County. Before trial, Spann settled with Jenkins, leaving the City as the sole defendant. Following a non-jury trial, the circuit judge awarded Spann $285,595.52 in damages. Both parties agreed to a setoff of $25,000, which reflected the amount of the pre-trial settlement with Jenkins. The circuit judge subsequently entered an amended final judgment in the amount of $260,595.52. Because there is no substantial, credible evidence to support the awards for future surgery and disability, we affirm in part and reverse and remand in part, for entry of a remitted judgment of $70,595.52.

FACTS AND PROCEDURAL HISTORY

¶ 2. From the pleadings, transcript, depositions, and Spann's proposed findings of fact and conclusions of law,[FN1] we glean the following.

FN1. *See infra.*

¶ 3. On October 21, 2003, Officers Reginald Liggins and Rueben Currie (hereinafter collectively "the Officers"), acting in their official capacity, initiated pursuit of a silver Nissan Altima traveling north on Valley Street. According to Officer Liggins, the Altima had run a stop sign[FN2] and had no license plate. When the Officers engaged their blue lights, the Altima fled north on Valley Street and turned west onto Capitol Street at speeds between seventy and eighty miles per hour. The Officers were unable to overtake the vehicle and abandoned their pursuit. Suspecting that the Altima had been stolen, they canvassed a few neighborhoods where stolen cars frequently are left. They eventually resumed their normal patrol.

FN2. Officer Currie stated that he did not see the Altima run a stop sign at that point.

¶ 4. Soon thereafter, the Officers spotted the same Altima at the intersection of St. Charles Avenue and Ellis Avenue. As soon as the driver of the Altima saw the Officers, he ran the red light and sped south on Ellis Avenue. The Officers, in turn, resumed their chase. The Altima traveled past Hardy Middle School, the Jackson Public School's Career Development Center, and Provine High School at speeds in excess of sixty miles per hour, and ran several red lights along the way.

¶ 5. The Officers followed the Altima into the intersection of Ellis Avenue and Lynch Street. As they entered the intersection, the Officers slowed down and checked for oncoming traffic.[FN3] There is conflicting testimony as to whether or not the Officers had on their lights and siren as they entered the intersection.[FN4] Inside the intersection, the Officers' patrol car collided with a Nissan Maxima driven by Jenkins. The force of the collision caused their patrol car to hit a Federal Express truck driven by Spann.

FN3. Officer Currie testified that a termination order was given before the Officers reached the intersection. Officer Liggins, on the other hand, stated that they did not receive the order until after the accident.

FN4. According to Spann, the Officers did not have their sirens on as they entered the intersection. Jenkins also stated that she did not see any blue lights or hear a siren as she approached the intersection. Officer Liggins, however, said that they had their lights and siren on going into the intersection.

***1032** ¶ 6. After the accident, Spann was treated at

Baptist Medical Center in Jackson and released that same day. The next morning, she claimed that she experienced pain throughout her body and could hardly move. In the following months, Spann was examined by several doctors FN5 who offered varying opinions, including Dr. Charles N. Crenshaw, Dr. Dinesh Goel, Dr. James L. Williams, and Dr. George E. Wilkerson.FN6 Spann attempted to return to her job at Federal Express, but she was dismissed and told not to return until her medical restrictions had been removed.

FN5. The names of several different physicians who treated Spann appear throughout the record. However, only the testimony and records of Drs. Crenshaw, Goel, Wilkerson, and Williams were submitted at trial.

FN6. The findings of each of these respective physicians are discussed *infra.*

¶ 7. On June 24, 2004, Spann filed suit against Jenkins and the City in the Circuit Court of the First Judicial District of Hinds County. Jenkins was dismissed with prejudice after settling with Spann for $25,000. After a non-jury trial on December 12, 2005, the circuit judge ruled for Spann in the amount of $285,595.52. The City filed a motion to amend or vacate the judgment, or in the alternative, for a new trial, to which Spann filed a response. The circuit judge denied the City's motion to vacate the judgment and motion for new trial, but entered an amended judgment of $260,595.52 to set off the earlier settlement with Jenkins.

¶ 8. The City now appeals to this Court raising the following two issues: (1) whether the circuit court erred in finding the City one hundred percent liable; and (2) whether the award was against the substantial, credible evidence.

DISCUSSION

I. Whether the circuit court erred in finding the City one hundred percent liable.

[1] ¶ 9. This case was filed pursuant to the Mississippi Tort Claims Act, and therefore, was subject to hearing and determination by a judge sitting without a jury. Miss.Code Ann. § 11-46-13 (Rev.2002). The findings of a circuit court judge sitting without a jury "will not be reversed on appeal where they are supported by substantial, credible, and reasonable evidence." *Donaldson v. Covington County,* 846 So.2d 219, 222 (Miss.2003) (citing *Maldonado v. Kelly,* 768 So.2d 906, 908 (Miss.2000)). However, where a trial judge adopts, verbatim, findings of fact and conclusions of law prepared by a party to the litigation, this Court analyzes those findings with greater care, and the evidence is subjected to heightened scrutiny. *Brooks v. Brooks,* 652 So.2d 1113, 1118 (Miss.1995) (citing *Omnibank v. United Southern Bank,* 607 So.2d 76, 83 (Miss.1992); *Matter of Estate of Ford,* 552 So.2d 1065, 1068 (Miss.1989)). Because the trial judge adopted Spann's findings of fact and conclusions of law substantially verbatim, less minimal superficial editing, the deference normally afforded the trial judge is lessened. *See Brooks,* 652 So.2d at 1118 (citing *Omnibank,* 607 So.2d at 83).

¶ 10. The City does not appeal the circuit court's finding that the Officers acted with reckless disregard in pursuing the Altima.FN7 Rather, the City argues that ***1033** even if the Officers acted with reckless disregard, the circuit court failed properly to establish that their actions were a proximate cause of Spann's injuries, and, even if the Officers were a proximate cause, the circuit court erred by not apportioning fault to Jenkins, who also was a proximate cause.

FN7. Mississippi Code Annotated Section 11-46-9(1)(c) (Rev.2002) states that:

> (1) A governmental entity and its employees acting within the course and scope of their employment or duties shall not be liable for any claim: ...
>
> (c) Arising out of any act or omission of an employee of a governmental entity engaged in the performance or execution of duties or activities relating to police or fire protection *unless the employee acted in reckless disregard of the safety and well-being of any per-*

> *son not engaged in criminal activity at the time of injury;*
>
> Miss.Code Ann. § 11-46-9(1)(c) (Rev.2002) (emphasis added).
>
> This Court has set forth ten factors to consider in determining whether a police pursuit constituted reckless disregard. *City of Ellisville v. Richardson,* 913 So.2d 973, 977-78 (Miss.2005) (citing *Johnson v. City of Cleveland,* 846 So.2d 1031 (Miss.2003)). The City's brief, however, specifically states that "an analysis of the reckless disregard factors in a pursuit context is unnecessary in the case at bar."

[2] ¶ 11. To recover damages in a negligence suit, a plaintiff must establish that the damage was proximately caused by the negligent act of the defendant(s). *Glover v. Jackson State Univ.,* 968 So.2d 1267, 1277 (Miss.2007); Miss.Code Ann. § 85-5-7(1), (5) (Rev.1999) (fault is allocated only to the party(s) which proximately caused the injury to the plaintiff). Proximate cause requires the fact finder to find that the negligence was both the cause in fact and the legal cause of the damage. *Glover,* 968 So.2d at 1277 (citing Dobbs, The Law of Torts, § 180 at 443 (2000)). "Cause in fact" means that, but for the defendant's negligence, the injury would not have occurred. *Glover,* 968 So.2d at 1277. If the plaintiff's injuries are brought about by more than one tortfeasor, cause in fact is based upon whether the negligence of a particular defendant was a substantial factor in causing the harm. *Id.* at 1277 n. 11 (citing Dobbs, The Law of Torts, § 171 at 415). Once cause in fact is established, the defendant's negligence will be deemed the legal cause so long as the damage "is the type, or within the classification, of damage the negligent actor should reasonably expect (or foresee) to result from the negligent act." *Glover,* 968 So.2d at 1277 (citing Dobbs, The Law of Torts, § 180 at 443).

[3] ¶ 12. We find substantial evidence to support the circuit court's finding that the Officers' conduct was a proximate cause of the accident. But for the high-speed pursuit and the manner in which the Officers proceeded into the intersection, the accident would not have occurred. Spann testified that the Officers did not have their sirens on at the time of the wreck. Jenkins, likewise, did not see any blue lights or hear a siren as she approached the intersection. While the Officers testified to the contrary, the circuit judge was entitled to weigh the credibility of this conflicting testimony. Additionally, Spann's expert Dennis Waller [FN8] opined that the Officers went through the intersection much faster than the fifteen-to-twenty miles per hour that they asserted. [FN9] Even if the Officers did in fact slow down and check for oncoming traffic, Waller explained that they were obligated to stop and ensure that all traffic had stopped.[FN10] It also was highly foreseeable that the Officers' conduct could lead to an accident.

> FN8. There is no known kinship between the writing justice and Dennis Waller.
>
> FN9. General Order 600-20 requires that officers not enter a signaled intersection at speeds greater than fifteen miles per hour.
>
> FN10. General Order 600-20 also requires that officers ensure that all traffic has yielded before proceeding through a signaled intersection.

¶ 13. We further find that the circuit court did not fail to address the comparative***1034** fault of Jenkins, but simply assigned one hundred percent fault to the City. The circuit court did not set forth specific percentages of fault either to the City or to Jenkins, but clearly held that the Officers were "*the* proximate cause[ ]" of the accident. By finding only one proximate cause, the circuit court implicitly assigned no fault to Jenkins.[FN11]

> FN11. The City cites *City of Ellisville v. Richardson,* 913 So.2d 973 (Miss.2005), and *Mississippi Department of Public Safety v. Durn,* 861 So.2d 990 (Miss.2003), to support its argument that the circuit court failed to address the comparative fault of Jenkins. Each of these cases, however, is distinguishable from the case before us. In *City of Ellisville,* the trial court's findings on the allocation of fault were ambiguous. *City of Ellisville,* 913 So.2d at 980.

> In *Durn,* the trial court failed to determine if comparative fault should have been assigned to the plaintiff. *Durn,* 861 So.2d at 999.

[4][5] ¶ 14. We also find substantial evidence to support the circuit court's finding that Officers were the sole proximate cause of the collision. As previously noted, Waller testified that the Officers were the sole proximate cause of the wreck. As a general rule, a "motorist's right to assume that the driver of a vehicle proceeding toward an intersection will obey the law of the road, which requires him to stop before entering the intersection, exists only until he knows or in the exercise of ordinary care should know otherwise." *Busick v. St. John,* 856 So.2d 304, 317 (Miss.2003) (quoting *Jobron v. Whatley,* 250 Miss. 792, 168 So.2d 279, 284 (1964)). Certain facts suggest that Jenkins should have realized the need to stop before entering the intersection-all other traffic had halted and she admitted that her eyes were tired. Nevertheless, Jenkins stated that she was observant and focusing straight ahead at the time. More significantly, Jenkins testified that she had a green light and did not see any blue lights or hear any siren as she proceeded into the intersection. This corresponds with Spann's testimony that the Officers did not have their lights and sirens engaged at the time of the accident. While admittedly a close question of fact, we find reasonable evidence to support the circuit court's finding.

¶ 15. For the aforementioned reasons, we find the City's first assignment of error to be without merit.

II. Whether the award was against the substantial, credible evidence.

[6] ¶ 16. As discussed under Issue I, we analyze the evidence in the subject case with heightened scrutiny. *See Brooks,* 652 So.2d at 1118 (citing *Matter of Estate of Ford,* 552 So.2d at 1068). When reviewing an award for damages, this Court will not overturn an award unless the damages are "so excessive as to strike mankind, at first blush, as being, beyond all measure, unreasonable, and outrageous, and such as manifestly show the jury to have been actuated by passion, partiality, prejudice, or corruption." *United States Fid. & Guar. Co. v. Estate of Francis,* 825 So.2d 38, 47 (Miss.2002) (quoting *Biloxi Elec. Co. v. Thorn,* 264 So.2d 404, 405 (Miss.1972)).

¶ 17. The City argues that the trial court simply ignored the testimony of Drs. Williams and Wilkerson. It further submits that the testimony of Drs. Crenshaw and Goel does not reasonably support the circuit court's award of damages. We note that all of the physicians testified by deposition so the trial court was not able to observe their demeanor.

¶ 18. Dr. Crenshaw, who is a family physician at the Reservoir Family Medical Clinic in Flowood, Mississippi, saw Spann on twenty-four occasions from October 22, 2003, through May 25, 2005. He initially determined that Spann had "right posterior***1035** neck muscle and left anterior neck muscle strain and spasm, contusion, possible strain to the left knee,[FN12] lumbosacral strain and spasm and a tension headache." He prescribed some anti-inflammatories and muscle relaxers, and recommended physical therapy.

> FN12. He noted that she had "a little bit of a limp because of the left knee injury."

¶ 19. In her following visits with Dr. Crenshaw, Spann exhibited various other symptoms. In December 2003, she showed for the first time some signs of nerve damage consistent with a L4-5 nerve root compression. In January 2004, she complained of a "band like [sic] headache" and arthritic pain in her hands, arms, feet, and legs. In February 2004, she cited pain in her left arm. Given these odd changes, Dr. Crenshaw referred her to a neurologist, Dr. Wilkerson. In April 2004, Dr. Crenshaw reviewed a magnetic resonance imaging (MRI) report. According to Dr. Crenshaw, the report showed no significant compromise throughout the lumbar spine and a normal distal cord. The report did, however, indicate "some minor arthritic type changes, concentric disk [sic] bulge a[t] L4-5, [and] some facet joint hypertrophy." Dr. Crenshaw believed that the MRI findings lent credibility to Spann's complaints of lower-back pain. He described her condition as "chronic whiplash injury."

¶ 20. While Dr. Crenshaw thought that Spann had embellished some things, his overall opinion was that she did suffer an actual injury as a result of the accident. There were some problems that he could not relate to the wreck, such as arthritic-type pain in her hands, arm, and feet. Nevertheless, he stated that the pain in her right posterior neck and the general area of the L4-5 disc in her lower back was objectively "reproducible every time." He also stated that these particular symptoms would be consistent with the type of collision that she had experienced.

¶ 21. Dr. Crenshaw opined that Spann could have performed some light duty-but no heavy lifting-between October 2003 and May 2005.[FN13] He stated that she probably could have driven a delivery truck and that she needed to move around some, but said that she should not pick up and haul packages until she fully recovered. Because her last visit to him was in May 2005, he presumed that she could have returned to work at that time.

FN13. Dr. Crenshaw stated that one could normally expect to recover from such an injury within six to ten weeks, but that Spann had not responded adequately to his treatments.

¶ 22. Dr. Goel, who practices family medicine at the Medical Clinic of Mississippi in Jackson, Mississippi, saw Spann on about six or seven occasions from March 2005 until November 2005. Dr. Goel stated that he quit practicing surgery about eight or nine years ago, and his principal practice is now family medicine. He also stated that he sees many car accident patients each week.

¶ 23. Dr. Goel diagnosed Spann as having a post-traumatic headache, chronic neck and back pain, and depression. He ordered MRIs on her neck, back, brain, and knee. According to Dr. Goel, these MRIs showed the following: (1) minimal bulging of the C5-6 and C6-7 discs in her neck; (2) L4-5 disc bulging in her lumbar spine; and (3) a torn meniscus in her left knee.[FN14] He further noted degenerative changes in her lumbar spine as well as arthritis. He recommended that she undergo***1036** arthroscopic surgery to repair the torn meniscus. Because of the meniscus tear, he assigned her a five-percent disability rating.[FN15]

FN14. The MRI of Spann's brain showed a small lesion, which Dr. Goel said could have been the result of a small hemorrhage in the past. He acknowledged that this hemorrhage could have been related to something other than the accident.

FN15. The disability rating is discussed at greater length *infra* at pp. 1038-39.

¶ 24. Dr. Williams, who is a physical medicine and rehabilitation specialist at Methodist Rehabilitation Center in Jackson, Mississippi, treated Spann on four occasions from December 8, 2003, until February 3, 2004. In his initial examination on December 8, 2003, Dr. Williams noted that she had tenderness in multiple areas of her neck, back, and buttocks, and exhibited some weakness in the muscles around her left hip joint. Otherwise, she had normal strength in her upper and lower extremities and a normal range of motion in her spine. He expressed skepticism concerning the spread of pain through so many different areas. For example, he could not explain how he could press on one part of her body, and she could experience pain in a totally different part as a result. His overall initial assessment was that "she had neck and low back pain with examination findings that were consistent with exaggerated pain behavior." He prescribed physical therapy and recommended that she discontinue the anti-inflammatories and muscle relaxers. He provided her a return-to-work excuse, recommending that she lift no more than fifty pounds infrequently, and no more than twenty-five pounds frequently.

¶ 25. Dr. Williams's assessment of Spann changed very little in her following visits. He conducted an electromyography (EMG) in January 2004, which revealed no significant nerve root damage. In February 2004, he once again described her condition as "nonspecific mechanical neck, mid, and lower back pain with significant exaggerated pain behavior ... and a history inconsistent with anatomical pathology." He was also of the opinion that "secondary gain issues" were prominent. He explained "secondary gain issues" as presenting

oneself with an illness or condition in order to receive attention and/or favorable treatment. At this point, he recommended that she return to work with no restrictions.

¶ 26. Dr. Wilkerson, a board-certified neurologist at Rankin Medical Center in Brandon, Mississippi, saw Spann twice in February 2004 and in March 2004, upon a referral from Dr. Crenshaw. In March 2004, he reviewed her MRI [FN16] and EMG reports and believed the results of these studies appeared normal. His impression was that Spann had some "musculoskelatal discomfort" but nothing major. He believed that Spann had reached maximum medical improvement and could go back to work immediately.

> FN16. Dr. Wilkerson acknowledged that he did not review the actual MRI film and was not qualified to interpret such film.

¶ 27. The trial occurred on December 12, 2005, and Spann submitted her first proposed findings of fact and conclusions of law on December 30, 2005. Spann then submitted an amended proposed findings of fact and conclusions of law-which contained a significant difference-a few days later on January 3, 2006. [FN17] The final judgment***1037** was entered almost one year later on December 1, 2006, in which Spann was awarded the following damages:

> FN17. In her first proposed findings of fact and conclusions of law submitted December 30, 2005, Spann stated that Dr. Goel had assigned her a five-percent partial permanent loss of function to her left *knee*. For support, Spann correctly cited Dr. Goel's deposition at page twenty-one, lines one through eight. But in her amended proposed findings of fact and conclusions of law, filed just four days later, she asserted that Dr. Goel had assigned a five-percent *whole body* disability. Spann once again cited Dr. Goel's deposition at page twenty-one, lines one through eight. However, as set out below, this portion of Dr. Goel's testimony references only her left *knee*, not the whole body.
>
> [Spann's Attorney]: And before we go to 3/21/05, let me back up. Dr. Goel, in terms of her left knee meniscus tear, did you reach any conclusions as to a disability rating?
>
> [Dr. Goel]: Later on I gave her 5 percent partial permanent loss of function.
>
> [Spann's Attorney]: In her left knee?
>
> [Dr. Goel]: Yeah.
>
> Later in the deposition, on page sixty-six, lines twenty through twenty-five, Dr. Goel assigned a five-percent disability to the body as a whole, without elucidation regarding the discrepancy.

Past Medical Expenses	$ 26,875.53
Future Medical	$ 20,000.00
Lost Wages	$ 18,720.00
Future Surgery	$ 20,000.00
Pain and Suffering	$ 50,000.00
Disability	$150,000.00
	$285,595.53

The total award subsequently was reduced by $25,000, to account for the settlement with Jenkins. Thus, the final judgment totaled $260,595.52.

¶ 28. In its opinion and order, the trial court found that "the expert opinions of Drs. Crenshaw and Goel are very persuading and should therefore be given more weight than the opinions of [Drs. Williams and Wilker-

son]." FN18 This comparative language is enough to indicate that the trial judge considered the testimony before it and merely acted within his province to weigh the credibility of witnesses. *Miss. Dep't of Pub. Safety v. Durn,* 861 So.2d 990, 994 (Miss.2003) (citing *City of Jackson v. Lipsey,* 834 So.2d 687, 691 (Miss.2003)).

FN18. The circuit court's opinion and order refers to Drs. Williams and Wilkerson as the City's experts. In its brief, the City clarifies that these physicians were not hired by the City and were experts only to the extent that all treating doctors are experts.

¶ 29. Yet the City adamantly contests whether Dr. Crenshaw's and Dr. Goel's opinions were sufficient to justify Spann's damages. The City contends that Dr. Crenshaw is not board-certified and that he expressed some doubt about the extent of Spann's injuries; therefore, his testimony does not provide substantial, credible evidence to support her damages. As to Dr. Goel, the City insists that his testimony should be given no weight because it was not based upon sufficient facts or data. The City submits that, among other things, Dr. Goel did not review the records of Spann's other medical providers; did not see Spann until one-and-a-half years after the accident; knew that she had a lien arrangement with Spann's counsel for an outstanding bill of $3,882; and conceded that her lumbar pain was subjectively minimal.

[7][8] ¶ 30. We find that any challenges to the reliability of Dr. Crenshaw's and Dr. Goel's opinions should have been addressed in the circuit court via a *Daubert* FN19 challenge. *See Smith v. Clement,* 983 So.2d 285, 289, 2008 Miss. LEXIS 172, *8 (Miss.2008) (citing *Poole v. Avara,* 908 So.2d 716, 723 (Miss.2005)) (trial judges bear the gate-keeping responsibility for the admission of expert testimony). At Dr. Goel's deposition, the City objected to ***1038** his being tendered as an expert in physical medicine. At trial, however, the City raised no objection to the admission of Drs. Crenshaw's and Goel's depositions.

FN19. *Daubert v. Merrell Dow Pharms., Inc.,* 509 U.S. 579, 587, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Mississippi follows the modified *Daubert* standard, which requires the trial court to perform a two-pronged inquiry to determine whether expert testimony is admissible under Rule 702 of the Mississippi Rules of Evidence. *Miss. Transp. Comm'n v. McLemore,* 863 So.2d 31, 38 (Miss.2003) (citing *Pipitone v. Biomatrix, Inc.,* 288 F.3d 239, 244 (5th Cir.2002)). The trial court must first determine whether the testimony is relevant, then whether the proffered testimony is reliable. *McLemore,* 863 So.2d at 38 (citing *Pipitone,* 288 F.3d at 244; *Mathis v. Exxon Corp.,* 302 F.3d 448, 460 (5th Cir.2002)).

[9] ¶ 31. We find the testimony of Drs. Crenshaw and Goel sufficient to support the award of damages for past medical expenses, lost wages, and pain and suffering. Dr. Crenshaw's assessment of Spann did raise some questions as to the extent of her injuries. But he also clarified that, even if Spann may have embellished some things, this did not detract from the fact that she had experienced an actual injury. His testimony, considered on its own, may well fall short of constituting substantial, credible evidence. But when his testimony is considered alongside Dr. Goel's, there is substantial evidence. According to their testimony, Spann was diagnosed as having post-traumatic headaches, chronic neck and back pain, left-knee pain, and depression. Tests indicated: (1) minimal bulging of the C5-6 and C6-7 discs in her neck; (2) L4-5 disc bulging in her lumbar spine; (3) mild facet joint hypertrophy; (4) and a meniscus tear in her left knee. Because Spann had no prior history of neck or back pain, Drs. Crenshaw and Goel attributed her pain and arthritic changes to the accident.

¶ 32. The amounts for past medical expenses, lost wages, and pain and suffering are supported in the evidence and do not "shock the conscience" of the Court. The $26,875.53 for past medical expenses is equivalent to the total amount of all medical bills agreed by the parties as authentic and admissible at trial.FN20 The award of $18,720 for lost wages was calculated by multiplying thirty-six weeks,FN21 at forty hours per week, at $13 per hour.FN22 The $50,000 amount for pain and

suffering is supported by Spann's own testimony about the physical and emotional pain that she has suffered since the accident, as well as the testimony of Drs. Crenshaw and Goel. Because of the meniscus tear and continuing back pain, Spann also will endure future pain and suffering.

> FN20. Although the Agreed Stipulation as to the Admissibility of Medical Records and Bills states unequivocally that the City "reserves the right to argue against the reasonableness and necessity of the treatment," the circuit court's opinion states that the sum was agreed on by the parties as Spann's "reasonable and necessary medical treatment and bill." The City does not challenge this discrepancy, but contests the award of damages *in toto*.
>
> FN21. The circuit court awarded lost wages from March 7, 2005, until December 12, 2005, which was the date of trial. The circuit court apparently chose to begin its calculation on March 7, 2005, because that was the date on which Dr. Goel first examined Spann and declared her to be temporarily totally disabled.
>
> FN22. Spann testified that she was paid $13.92 per hour at the time of the accident. The trial court, however, based its calculation on $13 per hour.

[10][11] ¶ 33. However, we do not find substantial, credible evidence to support the trial court's $20,000 award for future medical expenses, its $20,000 award for future surgery, or its $150,000 award for disability. Although Dr. Goel testified that Spann would likely continue to experience ailments, there is no testimony establishing future medical expenses, other than the equivocal testimony regarding future surgery. The only support for $20,000 for future surgery comes from the following exchange:

> [Spann's Attorney]: Within a reasonable degree of medical certainty, do you have a reasonable estimation of what the cost would be to surgically repair the meniscus tear?
>
> ....
>
> ***1039** [Dr. Goel]: *Well, I would guess around $20,000. I don't know for sure.*
>
> [Spann's Attorney]: Okay.
>
> [Dr. Goel]: It's the hospital charges.
>
> [Spann's Attorney]: But based on your background as a surgeon, a reasonable estimation would be $20,000?
>
> [Dr. Goel]: *This is my guess.*

(Emphasis added).

¶ 34. Considering that Dr. Goel had not practiced surgery for eight or nine years, we find his mere "guess" insufficient to establish substantial, credible evidence to support the $20,000 award for future surgery. *See Catchings v. State,* 684 So.2d 591, 598 (Miss.1996) (expert medical testimony must evince some level of certainty). Our finding does not imply that Spann did not suffer a torn meniscus. Even though no other testifying physician detected this injury, there is nothing in the record to refute Dr. Goel's finding. But the fact that such an injury existed does not lessen the need for credible evidence to support the costs associated with treatment and/or repair.

[12] ¶ 35. The $20,000 for future surgery and the $150,000 for disability are interrelated. Because of the torn meniscus and the resulting loss of function to her left knee, Dr. Goel assigned a five-percent disability rating to Spann. According to the American Medical Association's *Guides to the Evaluation of Permanent Impairment,* an impairment evaluation should include "a comprehensive, accurate medical history; a review and summary of all patient records; and a comprehensive description of the individual's current symptoms and their relationship to daily activities," as well as a thorough physical examination and review of all the relevant tests. Robert D. Rondinelli, M.D., Ph.D., et al., *Guides to the Evaluation of Permanent Impairment 5* (American Medical Association, 6th ed.2008). The only support in the record for Dr. Goel's assignment of a five-percent loss of function was his notation of a mild

restriction in the range of motion of her left knee, chronic pain, and her inability to put her full weight on the left knee. He further advised Spann to see an orthopedic surgeon, but she said that she could not find one. There is no testimony, report, or other evidence to support that Dr. Goel engaged in a comprehensive evaluation. Tellingly, he acknowledged his own uncertainty as to Spann's physical limitations. When asked whether Spann would be able to return to work, he stated that he did not believe so but added that "[s]he needs to be evaluated by [an] orthopaedic surgeon ... and then we can come to that conclusion."

¶ 36. Because of the lack of evidentiary support for Dr. Goel's findings, we find no substantial, credible evidence to support the $150,000 for disability. *See* Miss. R. Evid. 702 (expert testimony must be the product of reliable principles and methods.)

CONCLUSION

¶ 37. We affirm the circuit court's finding that the City was solely liable for Spann's injuries. Because we find no substantial, credible evidence to support the award for future medical expenses, future surgery, or disability, we reverse the judgment and remand this case to the trial court which is directed to enter a final judgment in the amount of $70,595.52.

¶ 38. **AFFIRMED IN PART; REVERSED AND REMANDED IN PART.**

CARLSON, P.J., RANDOLPH, LAMAR AND CHANDLER, JJ., CONCUR. GRAVES, P.J., CONCURS IN PART AND DISSENTS IN PART ***1040** WITH SEPARATE WRITTEN OPINION JOINED BY DICKINSON, KITCHENS AND PIERCE, JJ.GRAVES , Presiding Justice, concurring in part and dissenting in part.

¶ 39. Because the damages awards for future surgery and disability are supported by the evidence, I dissent in part. As stated by the majority, this Court applies the substantial evidence standard when reviewing the findings of a judge sitting as the factfinder. *Donaldson v. Covington County,* 846 So.2d 219, 222 (Miss.2003). That is, this Court will affirm the findings of the trial judge if they are supported by substantial, credible, and reasonable evidence. *Delta Reg'l Med. Ctr. v. Venton,* 964 So.2d 500, 503 (Miss.2007); *Donaldson,* 846 So.2d at 222. When reviewing awards for damages, this Court will affirm the award, unless it is "so excessive as to strike mankind, at first blush, as being, beyond all measure, unreasonable, and outrageous, and such as manifestly show the jury to have been actuated by passion, partiality, prejudice, or corruption." *Delta Reg'l Med. Ctr.,* 964 So.2d at 506 (citing *United States Fid. & Guar. Co. v. Estate of Francis,* 825 So.2d 38, 47 (Miss.2002)). This Court has held that "[t]he award is not to be set aside unless it is entirely disproportionate to the injury sustained." *Delta Reg'l Med. Ctr.,* 964 So.2d at 506 (citations omitted). Additionally, "the damages must be flagrantly outrageous and extravagant, or the court cannot undertake to draw the line; for they have no standard by which to ascertain the excess." *United States Fid. & Guar. Co.,* 825 So.2d at 47.

¶ 40. As a result of the accident that occurred on October 21, 2003, Spann suffered serious injuries, including a tear to the meniscus in her left knee. Based on the expert testimony presented, the trial judge concluded that it would cost approximately $20,000 to surgically repair the tear in Spann's meniscus and that Spann had suffered a five-percent loss of function in her left knee and her entire body. Accordingly, the trial judge awarded Spann $20,000 for future surgery and $150,000 for her disability.

Award for Future Surgery

¶ 41. There is substantial evidence to support the trial judge's finding that Spann had a tear in her left meniscus and that the surgery to repair it would cost approximately $20,000. Dr. Goel testified that Spann complained of pain in her left knee. He ordered an MRI, which revealed a tear in the medial meniscus in her left knee. Dr. Crenshaw testified that Spann presented with a limp because of an injury to her left knee. Dr. Goel also testified that Spann continued to suffer from knee pain during the period in which he treated her and that the meniscus tear needed to be surgically repaired by an

orthopedic surgeon. He added that Spann had not been able to afford an appointment with an orthopedic surgeon. Dr. Goel estimated that the surgery to repair the meniscus would cost approximately $20,000. This estimate was based on Dr. Goel's past experience as a surgeon.[FN23]

> FN23. Dr. Goel testified that he could no longer perform surgeries because of an injury to his hand, but he remains board-certified in surgery.

¶ 42. The majority concludes that Dr. Goel's "mere 'guess' " does not constitute substantial, credible evidence in support of the trial court's finding that the surgery would cost approximately $20,000. Maj. Op. at ¶ 34. The majority finds that Dr. Goel's testimony on this point did not evince the requisite level of certainty. Maj. Op. at ¶ 34. However, Dr. Goel testified that his opinion was held to a reasonable degree of medical certainty. Also, his ***1041** estimate for the cost of the meniscus surgery was unrebutted. The City of Jackson did not present any evidence that such a surgical procedure would cost less than $20,000. Although Dr. Goel may not have practiced surgery for eight or nine years, that is not necessarily an indication that he is any less aware of the cost of a meniscus surgery. Furthermore, assuming *arguendo* that Dr. Goel's estimate for the surgery is outdated, the cost has most likely increased in the past eight or nine years, further justifying the trial court's award for future medical expenses. Dr. Goel's testimony constitutes substantial, credible evidence in support of the $20,000 award for future surgery. Accordingly, this award should be upheld.

Award for Disability

¶ 43. There is also substantial evidence to support the trial judge's finding that, as a result of the accident, Spann is now disabled. Dr. Goel testified that Spann had a disability rating of "5 percent partial permanent loss of function" to her left knee and her body as a whole. He stated that, in his medical opinion, she was unable to work because of her knee injury, and he agreed that she was "temporarily totally disabled." The majority states that there is no evidence in the record demonstrating that Dr. Goel performed a comprehensive evaluation of Spann to support his conclusion that she suffered a five-percent loss of function. Maj. Op. at ¶ 35. It is worth noting that Dr. Goel treated Spann over the course of nine months, during which period, Spann visited him seven times. In comparison, Dr. Wilkerson, a medical expert for the City, only met Spann once when he interviewed her for approximately thirty minutes. The City's other medical expert, Dr. Williams, saw Spann four times over the course of three months.

¶ 44. The record contains Dr. Goel's notations following each of Spann's visits. The notes indicate that Dr. Goel concluded that Spann had suffered a five-percent loss of function on her fifth visit. The notes also indicate that, over the course of the first five visits, Dr. Goel performed a physical examination; tested the range of motion of different body parts; monitored her pain levels; ordered and reviewed MRIs of her neck, head, spine, and left knee; prescribed medication; and counseled her about physical therapy and surgery for her knee. The note detailing Spann's fifth visit with him states, in relevant part:

> [Patient] at this point needs surgical intervention of [sic] the left knee, for her cartilage.... [Patient], if she does not have surgery, she obtained maximum medical improvement, and has possible loss of function in the entire body especially in areas of the left knee. The [patient] has mild restriction of range of motion of the left knee and keeps a[sic] chronic pain. [Patient] is not able to put full weight on the left knee. Therefore, she is [sic] 5% loss of function as the result of the left knee.... There is possible 5% loss of function of the entire body as a result of the left knee.

¶ 45. The documentation of Dr. Goel's treatment of Spann over the course of nine months demonstrates his basis of knowledge for credibly finding that she suffered a five-percent loss of function as a result of the accident.

¶ 46. The majority also quotes Dr. Goel's statement that Spann needed to be evaluated by other specialists before concluding that she could not return to work. Maj. Op.

at ¶ 35. This concession does not detract from the fact that Dr. Goel assigned Spann a five-percent disability rating, since such a disability rating might not prohibit a person from returning to work. Furthermore, the testimony of Dr. Williams and Dr. Wilkerson stating that Spann could return to work full-time is not necessarily inconsistent with a five-percent disability rating either. To the extent that ***1042** there were inconsistencies between the expert testimony presented by the City and Spann concerning her impairments, this Court has held that "[w]here there is conflicting evidence, this Court must give great deference to the trial judge's findings." *Thompson ex rel. Thompson v. Lee County Sch. Dist.*, 925 So.2d 57, 62 (Miss.2006) (citing *City of Jackson v. Lipsey*, 834 So.2d 687, 691 (Miss.2003)).

¶ 47. In this case, the trial court heard the expert testimony from both sides and found Dr. Goel's testimony more persuasive than that of the City's medical experts. Dr. Goel testified to a reasonable degree of medical certainty that Spann suffered a five-percent loss of function to her entire body and was, therefore, disabled. His testimony constitutes substantial, credible evidence in support of the trial court's finding that Spann was disabled. In turn, this finding of fact supports an award of damages for disability. The award of $150,000 for Spann's disability is not so excessive, extravagant, or outrageous that this Court should reverse the award. Therefore, it should be affirmed.

¶ 48. The trial judge properly relied on the unrebutted testimony of Dr. Goel to find that it would cost $20,000 for Spann to have her torn meniscus surgically repaired. The trial judge also properly relied on Dr. Goel's testimony to find that Spann suffered a five-percent loss of function. The award of $150,000 for Spann's disability is not excessive beyond all measure or flagrantly outrageous and extravagant. Therefore, the trial judge's order granting Spann a total award of $260,595.52 should be affirmed.

DICKINSON, KITCHENS AND PIERCE, JJ., JOIN THIS OPINION.
Miss.,2009.
City of Jackson v. Spann
4 So.3d 1029

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Supreme Court of Mississippi.
Melissa ENTRICAN
v.
Doug MING, Jeremy Campbell and HMA Corporation, Inc. d/b/a Rankin Medical Center Ambulance Services a/k/a REMS.
No. 2006-CA-00669-SCT.

Aug. 2, 2007.

Background: Mother of patient, who was treated by defendants following vehicular accident, brought suit against emergency medical technicians and technicians' employer and doctor, alleging that they failed to recognize that patient was in hypovelemic shock, failed to adequately resuscitate patient by giving blood and intravenous fluids, and failed to transfer patient to another medical facility. The Circuit Court, Hinds County, W. Swan Yerger, J., granted technicians' and employer's motion for a **directed verdict**, and mother appealed.

Holding: The Supreme Court, Smith, C.J., held that issue as to whether technicians and their employer knew or should have known that hospital was not capable of managing patient's condition and whether technicians' and employer's alleged negligence, if any, in taking patient to that hospital was only a remote, and thus not proximate, cause of her death, was question to be determined by the jury.

Reversed and remanded.

West Headnotes

[1] Appeal and Error 30 ⚿893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In General. Most Cited Cases
The standard of review for determining whether a motion for **directed verdict** should be granted is de novo.

[2] Appeal and Error 30 ⚿927(7)

30 Appeal and Error
30XVI Review
30XVI(G) Presumptions
30k927 Dismissal, Nonsuit, Demurrer to Evidence, or Direction of Verdict
30k927(7) k. Effect of Evidence and Inferences Therefrom on Direction of Verdict. Most Cited Cases
When reviewing grant of **directed verdict**, all evidence is considered in the light most favorable to the non-movant, giving that party the benefit of all favorable inferences that may be reasonably drawn from the evidence.

[3] Trial 388 ⚿142

388 Trial
388VI Taking Case or Question from Jury
388VI(A) Questions of Law or of Fact in General
388k142 k. Inferences from Evidence. Most Cited Cases
If the court finds that the evidence favorable to the non-moving party and the reasonable inferences drawn therefrom present a question for the jury, motion for **directed verdict** should not be granted.

[4] Negligence 272 ⚿202

272 Negligence
272I In General
272k202 k. Elements in General. Most Cited Cases
The elements of a negligence suit are duty, breach of duty, causation, and injury.

[5] Health 198H ⚿653

198H Health
198HV Malpractice, Negligence, or Breach of Duty
198HV(C) Particular Procedures
198Hk653 k. Paramedics in General. Most Cited Cases

Health 198H ⚖654

198H Health
198HV Malpractice, Negligence, or Breach of Duty
198HV(C) Particular Procedures
198Hk654 k. Medical Care During Emergency Transport. Most Cited Cases
Under emergency medical services protocol manual, emergency medical technicians and ambulance service, which employed technicians, owed a duty to provide care and treatment to motorist, who was injured in auto accident.

[6] Negligence 272 ⚖373

272 Negligence
272XIII Proximate Cause
272k373 k. Necessity of and Relation Between Factual and Legal Causation. Most Cited Cases
To prove the element of causation, both cause in fact and proximate cause must be shown.

[7] Negligence 272 ⚖422

272 Negligence
272XIII Proximate Cause
272k420 Concurrent Causes
272k422 k. Possibility of Multiple Causes. Most Cited Cases
To be held liable under negligence law, a person need not be the sole cause of an injury; it is sufficient that his negligence concurring with one or more efficient causes, other than the plaintiff's, is the proximate cause of the injury.

[8] Negligence 272 ⚖431

272 Negligence
272XIII Proximate Cause
272k430 Intervening and Superseding Causes
272k431 k. In General; Foreseeability of Other Cause. Most Cited Cases
A "superseding cause" is an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about. Restatement (Second) of Torts § 440 .

[9] Negligence 272 ⚖213

272 Negligence
272II Necessity and Existence of Duty
272k213 k. Foreseeability. Most Cited Cases
Under principles of "foreseeability," a defendant may be held liable for his failure to anticipate an easily-predicted intervening cause and to properly guard against it.

[10] Negligence 272 ⚖431

272 Negligence
272XIII Proximate Cause
272k430 Intervening and Superseding Causes
272k431 k. In General; Foreseeability of Other Cause. Most Cited Cases
If the act complained of is only a remote cause, superseded by an independent, efficient intervening cause that leads in unbroken sequence to the injury, the original negligent act is not a proximate, but a remote, cause, and thus, not being foreseeable, the original cause is not actionable.

[11] Health 198H ⚖825

198H Health
198HV Malpractice, Negligence, or Breach of Duty
198HV(G) Actions and Proceedings
198Hk824 Questions of Law or Fact and **Directed Verdicts**
198Hk825 k. In General. Most Cited Cases

Health 198H ⚖826

198H Health
198HV Malpractice, Negligence, or Breach of Duty
198HV(G) Actions and Proceedings
198Hk824 Questions of Law or Fact and **Directed Verdicts**
198Hk826 k. Proximate Cause. Most Cited Cases
Issue as to whether emergency medical technicians and ambulance service, which employed technicians, knew or should have known that hospital was not capable of managing injured motorist's condition and whether technicians' and ambulance service's alleged negligence, if any, in taking motorist to that hospital was only a remote, and thus not proximate, cause of her death, was question to be determined by the jury.
***29** Alan D. Lancaster, Winona, attorney for appellant.

Kimberly Nelson Howland, Jackson, attorney for appellees.

Before SMITH, C.J., DICKINSON and LAMAR, JJ.

SMITH, Chief Justice, for the Court.

¶ 1. On January 26, 2000, Melissa Entrican filed suit against Doug Ming, Jeremy Campbell, and REMS (sometimes referred to hereinafter as "Ambulance Service Defendants"), along with Frank B. Briggs, M.D., Martha D. Dickens, M.D., Beverly McMillan, M.D., Karl Hatten, M.D., and River Oaks Hospital, alleging that the negligence of these parties caused or contributed to the death of her minor daughter, Alisha Peavy. By stipulation of the parties, River Oaks Hospital and its employee physicians, Dr. Dickens, Dr. McMillan, and Dr. Hatten, were dismissed from the suit with prejudice. After this dismissal, only Entrican's claims against the Ambulance Service Defendants and Dr. Briggs remained.

¶ 2. The trial began on January 17, 2006, and at the close of Entrican's case-in-chief, counsel for the Ambulance Service Defendants moved for a **directed verdict** on the basis that the negligence of River Oaks Hospital, by and through its emergency department physician, Dr. Dickens, superceded any alleged negligence of the Ambulance Service and rendered any alleged negligence of the Ambulance Service Defendants only a remote and non-actionable cause of Alisha's death.

¶ 3. On February 9, 2006, Judge Yerger granted the Ambulance Service Defendants' motion for a **directed verdict**, holding that the negligent omissions of Dr. Dickens in failing to recognize that Alisha was in hypovelemic shock, in failing to adequately resuscitate Alisha by giving blood and intravenous fluids, and/or in failing to transfer Alisha to another medical facility, were not foreseeable by the Ambulance Service Defendants when they decided to transport Alisha to River Oaks, the nearest hospital. He further concluded that the negligence of Dr. Dickens and/or other River Oaks employees was an intervening and superceding cause of Alisha's death, and therefore any negligence on the part of the Ambulance Service Defendants was only a remote and non-actionable cause. Judge Yerger then dismissed the Ambulance Service Defendants with prejudice. Entrican filed a motion for a new ***30** trial, which Judge Yerger denied on March 22, 2006, and she now appeals to this Court for review. On appeal, Entrican asserts the following errors:

I. The Trial Court Committed a Prejudicial Legal Error by Improperly Granting the Motion for Directed Verdict of the Defendant on the Ground That the Negligence of the River Oaks Hospital and its Emergency Room Physician Constituted a Superceding Intervening Cause of the Death of Alisha Peavy.

II. The Trial Court Committed a Prejudicial Legal Error in Granting the Motion for Directed Verdict of Defendants on the Ground That the Negligence of the Defendants Constituted Only a Remote Cause of the Death of Alisha Peavy.

III. The Trial Court Committed a Prejudicial Legal Error in Granting the Motion for Directed Verdict of Defendants on the Ground That the Negligence of the River Oaks Hospital and its Emergency Room Physician and the Negligence of Dr. Briggs Were Not Foreseeable by the Defendants.

IV. The Trial Court Committed a Prejudicial Legal Error in Granting the Motion for Directed Verdict of Defendants in That in Rendering its Decision, the Trial Court Failed to View the Evidence in a Light Most Favorable to the Plaintiff Together With All Reasonable Inferences That Could Be Drawn Therefrom.

¶ 4. However, these issues have been combined and restated by the Court, and therefore we will address only the following issue:

I. Whether the Ambulance Service Defendants Knew or Should Have Known That River Oaks Hospital Was Not Capable of Managing Alisha's Condition, and Whether Their Actions in Transporting Alisha to That Hospital Were Only a Remote Cause of Her Death.

FACTS

¶ 5. Appellant Melissa Entrican is an adult resident citizen of Rankin County, Mississippi, and is the mother of Alisha Peavy, the deceased. Appellees Doug Ming and Jeremy Campbell are adult resident citizens of the State of Mississippi and emergency medical technicians employed by Appellee Rankin Medical Center Ambulance Services (hereinafter "REMS"). At all relevant times, REMS was acting by and through its emergency medical technicians, Ming and Campbell, who were acting within the scope of their employment with REMS.

¶ 6. On January 26, 1998, at approximately 11:30 a.m., Alisha was involved in a motor vehicle collision which occurred at the intersection of Highway 471 and Bay Pointe Road within Rankin County, Mississippi. In response to a call at REMS for emergency assistance at the scene of the collision, Ming and Campbell arrived at the scene in a REMS ambulance. Upon arrival, Ming and Campbell noted massive damage to Alisha's side of the automobile and found Alisha trapped in the passenger seat. They also noted that she was approximately eight (8) months pregnant and had a soft abdomen with bruising. With episodes of decreased responsiveness, a systolic blood pressure in the 80 to 90 range, and signs of internal bleeding, Alisha was classified by Ming and Campbell as a Code 2 case (indicating that she was deteriorating) and taken to the River Oaks Hospital.

¶ 7. At approximately 12: 40 p.m., Alisha was admitted to the emergency department at River Oaks. After this time, Ming and Campbell no longer took care of Alisha*31 but remained at River Oaks Hospital in case the physicians determined that transport to another hospital was needed after initial stabilization. Martha Dickens, M.D., the physician in River Oaks Hospital's emergency department, accepted Alisha as a patient. Dr. Dickens, employed nine years as a full-time emergency physician, testified at trial that she was trained in Advanced Trauma Life Support, which is a system of generally accepted protocols for the treatment of trauma patients. As an ATLS-certified physician, Dickens was trained to recognize the signs and symptoms of hypovolemic shock. Dr. Dickens also testified that when someone is in hypovolemic shock, the correct procedure is to administer fluids to the patient, and then if vital signs continue to deteriorate, to administer blood. Dr. Dickens also testified that she feared Alisha was in hypovolemic shock and proceeded to administer fluids in an attempt to improve Alisha's vital signs. However, the vital signs continued to deteriorate, and, although Dr. Dickens admitted in her testimony that when this happens, it is a "fundamental principle" to then start transfusing blood, she further admitted that she did not do this.

¶ 8. At 1:25 p.m., Alisha was taken to x-ray for cervical spine, and chest x-rays but while she was

waiting to be placed on the CT machine, her respirations became more labored and rapid. Alisha was then returned to the emergency department, and on the way back, she stopped breathing. Her respirations were assisted with a bag valve mask. At 2:35 p.m., Alisha was again taken to CT, where she remained until 3:45 p.m., at which time she was taken to the holding room (preoperative area). At 3:52 p.m., she was taken to the operating room, where surgical procedures were performed by Dr. Briggs and Dr. McMillan. *Id.* During surgery, the decedent's heart stopped, and resuscitation attempts were unsuccessful. *Id.* Alisha was pronounced dead at 5:15 p.m.

DISCUSSION

I. Whether the Ambulance Service Defendants knew or should have known that River Oaks Hospital was not capable of managing Alisha's condition, and whether their actions in transporting Alisha to that hospital were only a remote cause of her death.

A. Standard of Review

[1][2][3] ¶ 9. The standard of review for determining whether a motion for **directed verdict** should be granted is de novo. *Windmon v. Marshall,* 926 So.2d 867, 872 (Miss.2006). All evidence is considered "in the light most favorable to the nonmovant, giving that party the benefit of all favorable inferences that may be reasonably drawn from the evidence." *Forbes v. GMC,* 935 So.2d 869, 872 (citing *Cousar v. State,* 855 So.2d 993, 998 (Miss.2003)). If the Court finds that the evidence favorable to the non-moving party and the reasonable inferences drawn therefrom present a question for the jury, the motion should not be granted. *Pace v. Financial Sec. Life,* 608 So.2d 1135, 1138 (Miss.1992). This Court has also held that "[a] trial court should submit an issue to the jury only if the evidence creates a question of fact concerning which reasonable jurors could disagree." *Vines v. Windham,* 606 So.2d 128, 131 (Miss.1992).

B. Rule 50(a) Motion for a Directed Verdict

¶ 10. M.R.C.P. 50(a) provides guidelines for granting a **directed verdict**. Commentary following the rule states:

> In ruling on the motion for a **directed verdict**, the court should proceed along ***32** the same guidelines and standards that have governed prior peremptory instruction and **directed verdict** practice in Mississippi: the court should look solely to the testimony on behalf of the opposing party; if such testimony, along with all reasonable inferences which can be drawn therefrom, could support a verdict for that party, the case should not be taken from the jury.

See *White v. Thomason,* 310 So.2d 914 (Miss.1975) ; *Ezell v. Metropolitan Ins. Co.,* 228 So.2d 890 (Miss.1969); *Holmes v. Simon,* 71 Miss. 245, 15 So. 70 (1893).

C. Duty and Breach

[4][5] ¶ 11. The elements of a negligence suit, which are well-settled in Mississippi, are duty, breach of duty, causation, and injury. *Patterson v. Liberty Assocs., L.P.,* 910 So.2d 1014, 1019 (Miss.2004) (citing *Miss. Dep't of Transp. v. Cargile,* 847 So.2d 258, 262 (Miss.2003)). The existence of a duty is clear and undisputed in this case. Under the Central Mississippi Emergency Medical Services Protocol Manual ("EMS Protocol"), it is evident that Ming, Campbell, and REMS owed a duty to provide care and treatment to Alisha. Furthermore, under the standard for a Rule 50(a) motion, the trial court looked solely to the testimony on behalf of the appellant, and assumed, for the purposes of this ruling, that the Ambulance Service Defendants breached this duty by taking Alisha to River Oaks Hospital instead of University Medical Center (UMC).[FN1]

FN1. The emergency department UMC has Level I trauma care capability.

D. Proximate Cause

[6][7] ¶ 12. To prove the element of causation, both cause in fact and proximate cause must be shown. *Patterson,* 910 So.2d at 1019 (citing *Jackson v. Swinney,* 244 Miss. 117, 123, 140 So.2d 555, 557 (1962)). Proximate cause has been defined as "cause which in natural and continuous sequence unbroken by any efficient intervening cause produces the injury and without which the result would not have occurred." *Patterson,* 910 So.2d at 1019 (quoting *Delahoussaye v. Mary Mahoney's, Inc.,* 783 So.2d 666, 671 (Miss.2001)). Furthermore, to be held liable, a person "need not be the sole cause of an injury. It is sufficient that his negligence concurring with one or more efficient causes, other than the plaintiff's, is the proximate cause of the injury." *Foster v. Bass,* 575 So.2d 967, 992 (Miss.1990) (*quoting Smith v. Dillon Cab Co., Inc.,* 245 Miss. 198, 205-06, 146 So.2d 879, 882 (1962)).

¶ 13. In her testimony, Dr. Dickens, employed nine years as a full-time emergency room physician, stated that she was trained in ATLS. Dr. Dickens also testified that when someone is in hypovolemic shock, the correct procedure is to administer fluids to the patient, and then if vital signs continue to deteriorate, to administer blood. She went on to admit that she feared Alisha was in hypovolemic shock and proceeded to administer fluids in an attempt to increase Alisha's vital signs. However, the vital signs continued to deteriorate, and although Dr. Dickens admitted in her testimony that when this happens, it is a "fundamental principle" to then start transfusing blood, she further admitted that she did not do this.

¶ 14. Dr. Carl Hauser, a surgeon and specialist in trauma and critical care, also stated on cross-examination that the practice of giving fluids and then blood if vital signs do not improve is "one of the basic tenents of ATLS" and that failing to transfuse blood was "violation of the standard" of care. Therefore, it is clear by Dr. Dickens's own admission, along with *33 Dr. Hauser's testimony, that Dickens was negligent in not transfusing blood in this situation, as a trained ATLS physician who should have known and admittedly did know that such procedures were the accepted standard in the medical community.

¶ 15. Furthermore, Dr. Hauser's testimony made it clear that breaching the generally-accepted medical standard for the treatment of hypovolemic shock, this action became a proximate cause of Alisha's death. Dr. Hauser stated that "the arrest would not have occurred ... had the patient been electively intubated and given blood. He also stated that if blood had been given, Alisha would have tolerated the transfer to UMC for surgery if River Oaks had decided that such a transfer was needed. Furthermore, Dr. Hauser stated that if Alisha had been transported to UMC, she "would have survived with a very high likelihood, greater than ninety percent ... depending upon exact timing and so forth."

¶ 16. Dr. Vernon Henderson, another expert witness offered by the plaintiff-appellant, reiterated Dr. Hauser's statements regarding Dr. Dickens's and River Oak's negligence in their treatment of Alisha. As a general surgeon with a special interest in trauma surgery, Henderson stated that before Alisha arrested, she had a ninety-five percent or better chance of surviving. Taken along with Dr. Hauser's testimony-that but for the failure to give blood, Alisha would not have arrested-it is clear that this failure to follow proper ATLS procedures was a proximate cause of Alisha's death. Furthermore, even if she had arrested and surgery was performed in a timely fashion, Henderson stated that "her chances were better than eighty percent" for survival.

¶ 17. The Ambulance Service Defendants argue that, even assuming they were negligent in transporting Alisha to River Oaks, they escape liability because they could not have foreseen that Dr. Dickens would have deviated from the standard of care. However, Entrican asserts that River Oaks was not

capable of handling Alisha's condition and that everyone in the medical community was well aware of that fact. Therefore, Entrican alleges that any negligence on the part of River Oaks or its physicians was foreseeable.

¶ 18. Several witnesses for Entrican testified that River Oaks did not have trauma care capability and that this was common knowledge in the Jackson area. Steven Eskridge, a paramedic and expert qualified in the field of emergency medical services, stated that River Oaks did not have the personnel on hand to immediately take care of trauma patients. Dr. Reginald Martin, a general surgeon, testified that River Oaks was "certainly not the ideal place for a multi-system trauma patient.... There is only one place in this area where Alisha Peavy belongs, and that's at the University of Mississippi Medical Center. Therefore, Entrican argues that because the Ambulance Service Defendants knew or should have known that River Oaks was not capable of handling the types of injuries that Alisha sustained, negligence on the part of River Oaks's physicians when attempting to treat her injuries was foreseeable and concurrent with the Ambulance Service Defendants' negligence in causing Alisha's death.

¶ 19. In response, the Ambulance Service Defendants assert that when delivering Alisha to River Oaks, they were placing her in the care of a hospital with a twenty-four hour emergency department and a ATLS-trained emergency department physician in Dr. Dickens. Dr. Dickens had been certified three different times in ATLS training and testified that during her time as an emergency department*34 physician, she has seen many patients in shock. The Defendants argue that because ATLS procedures are generally accepted and well-known throughout the medical community and because of the training and years of experience that Dr. Dickens had with shock patients, it was unforeseeable that Dr. Dickens would fail to administer the proper treatment of giving fluids and then blood in response to Alisha deteriorating vital signs.

¶ 20. EMS Protocol includes a section entitled "Choosing a Hospital Destination" which aids paramedics in making a determination as to which hospital a patient should be transported. The Protocol states that severe or multisystem trauma patients with a trauma score of ten or less should be transported directly to a hospital with the equivalent of Level I or II trauma center capabilities. This paragraph also states that the mortality rate for these patients increases dramatically if there is a delay in reaching the trauma center. However, it is undisputed that Alisha's trauma score never reached ten or below while en route to the hospital. Rather, Alisha's initial score was thirteen at the accident scene and dropped to twelve while in the ambulance. Therefore, Ambulance Service Defendants argue that this requirement did not apply to their determination of the proper hospital destination. Ming testified that due to the seriousness of Alisha's condition, UMC was considered when the ambulance initially left the accident scene. However, Alisha's deteriorating condition, as well as traffic flow problems between River Oaks Drive at Lakeland Drive and UMC at noon on a weekday, weighed against the continuing transport to UMC. Ming testified that he noticed that in a short period of time Alisha's mental status and vital signs changed, increasing her need of emergency treatment by a physician. Therefore, they transported Alisha to the closest facility that could stabilize her, which was River Oaks. Ming testified that in making this decision, he knew that River Oaks could do more for her than he could do, as River Oaks would be able to give blood products and stabilize her vital signs.

¶ 21. Dr. Rick Carlton, Medical Director for the Central Mississippi EMS District, who is responsible for writing the protocols, testified that as Alisha's trauma score never reached ten while en route to the hospital, the requirement to transport her to a level I or II trauma center did not apply. Rather, Dr. Carlton testified that the Section of the protocol on "Emergencies" was applicable, which states that "[e]mergency patients should be transported directly to the nearest hospital capable of managing

their emergency condition. However, the patient's (and family's) hospital preference must be considered when making this decision." Dr. Carlton further testified that after reviewing the evidence in this case, it was his opinion that the Ambulance Service Defendants met the standard of care required of them in this situation. Dr. Carlton also testified that the trauma system in 1998 was dramatically different from the system which is in place today. He testified that, at the time of the incident, there was no organized system for accessing hospitals with the proper capabilities for the care of trauma patients. Dr. Carlton stated, at the time of Alisha's accident there was no way to know that a given hospital would have a problem treating a certain category of patient. Dr. Carlton also testified that, at the time of this incident, neither River Oaks nor anyone associated with River Oaks had made a request to the EMS office or online Medical Control regarding not bringing trauma of any kind to River Oaks.

¶ 22. However, in Ming's statement, which was written a couple of hours after *35 Alisha was taken to River Oaks, Ming stated that Dr. Dickens advised him that River Oaks could not handle this type of trauma and that the surgeon (Dr. Briggs) was on call. Ming told Dr. Dickens that the patient's guardian requested the facility and because of Alisha's deteriorating condition, River Oaks was the closest facility to stabilize her. Ming further stated that he thought River Oaks had the capability to stabilize the patient. When Dr. Briggs arrived, he asked which ambulance brought Alisha to the hospital and why it did so. Ming responded as he had to Dr. Dickens. Dr. Briggs told Ming that River Oaks could not handle this type of trauma and that he should have transported Alisha to UMC, as they had the staff to treat this type of patient. Dr. Briggs further stated that Ming "probably did more harm than good for the patient." Dr. Briggs advised Ming to explain to the family that Alisha should have gone to UMC with this type of trauma. Additionally, the EMS protocol states that when making a hospital destination decision, a paramedic should "contact medical control if there is any doubt as to which hospital a patient should be transported to." On cross-examination, Ming stated that he did not call Medical Control prior to transporting Alisha to River Oaks to seek their input as to which hospital she needed to go to.

¶ 23. Additionally, testimony showed that while Ming was primarily responsible for the decision to transport Alisha to River Oaks, Alice Little, Alisha's grandmother, who was with her in the ambulance, concurred with this decision. Acting according to EMS protocol, Ming was required to consult with Little about her wishes for Alisha's treatment. Little advised Ming that she wanted Alisha to be taken to Methodist North, which is where Alisha's baby was to be delivered. Ming explained that Methodist North did not have an emergency room, and therefore, in his opinion, was not a appropriate option considering Alisha's severe condition. Ming advised Little that because Alisha's mental status and vital signs were diminishing, the ambulance should proceed to the closest hospital with an emergency room so emergency treatment could begin. At this point, Little gave her consent to take Alisha to River Oaks. Ming radioed River Oaks to inform the staff of the status of the patient he was bringing to the hospital. At this time, River Oaks made no attempt to divert the ambulance to another hospital or inform Ming that they were not equipped to handle Alisha's condition.

[8][9] ¶ 24. "The law dealing with the duty to foresee the imprudent acts of others appears under the general rubric of the jurisprudence of 'intervening cause.' " *Southland Mgmt. Co. v. Brown by & Through Brown,* 730 So.2d 43, 46 (Miss.1998). The Second Restatement of Torts defines a superseding cause as "an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about." *Id.* (*citing* Restatement (Second) of Torts § 440 (1965)). Under this theory, an original actor's negligence may be superceded by a subsequent act-

or's negligence, if the subsequent negligence was unforeseeable. *Southland Mgmt. Co.*, 730 So.2d at 46. However, merely finding that the negligence of River Oaks, by and through Dr. Dickens, was an intervening cause in the chain of events leading from the Ambulance Service Defendants action in transporting Alisha to River Oaks to Alisha's death is not sufficient to render the Ambulance Service Defendants' earlier actions non-actionable. *Id.* Instead, this Court has held that if "the intervening cause is one which in ordinary human experience is reasonably to be anticipated,***36** or one which the defendant has reason to anticipate under the particular circumstances," the subsequent actor's negligence is foreseeable and does not break the chain of events between the negligence of the first actor and the injury. *Id.* (*citing* W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 44 (5th ed.1984)). As such, under principles of "foreseeability," a defendant may be held liable for his failure to anticipate an easily-predicted intervening cause and to properly guard against it. *Id. See also Pargas of Taylorsville, Inc. v. Craft,* 249 So.2d 403, 408 (Miss.1971) (holding that a defendant is chargeable only with *anticipating reasonable probabilities,* therefore a person is not bound to anticipate the unusual, improbable, or extraordinary occurrence, although such happening is within the range of possibilities (citation omitted)).

[10] ¶ 25. Notwithstanding, this Court also has held that "negligence which merely furnished the condition or occasion upon which injuries are received, but does not put in motion the agency by or through which the injuries are inflicted, is not the proximate cause thereof." *Robison v. McDowell,* 247 So.2d 686, 688 (Miss.1971) (*quoting Hoke v. W.L. Holcomb & Assoc., Inc.,* 186 So.2d 474 (Miss.1966); *Mississippi City Lines, Inc. v. Bullock,* 194 Miss. 630, 13 So.2d 34 (1943)).[FN2] Thus, "[i]f the act complained of is only a remote cause, superseded by an independent, efficient intervening cause that leads in unbroken sequence to the injury, the original negligent act is not a proximate, but a remote, cause. Thus, not being foreseeable, the original cause is not actionable." *Robison,* 247 So.2d. at 689. In *Robison,* a driver pulled a tractor out into a highway and blocked both lanes of travel. As a result, the injured party was required to stop his vehicle. *Id.* While the injured party was stopped, a second vehicle hit him from behind. The driver appealed the judgment entered in favor of the injured party. *Id.* This Court found that although the jury was justified in finding that the driver negligently pulled the tractor out into the highway, his negligence was not the proximate cause of the accident. *Id.* at 688-689. Rather, the intervening negligence of the second operator superceded that of the driver, thus rendering the driver's negligence a remote cause. *Id.* at 688-689. Additionally, this Court stated that "[t]he question of superceding intervening cause is so inextricably tied to causation, it is difficult to imagine a circumstance where such issue would not be one for the trier of fact." *O'Cain v. Harvey Freeman & Sons, Inc.,* 603 So.2d 824, 830 (Miss.1991).

> FN2. Stated differently, these cases hold that "negligence is remote and non-actionable which merely causes a person to be at a particular place at a particular time where such person is injured as a result of the negligent act of another, who puts in motion a different and intervening cause which efficiently leads in unbroken sequence to the injury." *Id.*

[11] ¶ 26. While the trial court ruled that the alleged negligence of the Ambulance Service Defendants in transporting Alisha to River Oaks rather than to another hospital could be only a remote cause of Alisha's death, we find that there is evidence in the record to support the arguments for both sides, thereby creating a question for the jury. Therefore, whether the Ambulance Service Defendants knew or should have known that River Oaks was not capable of managing Alisha's condition and whether their alleged negligence, if any, in taking her to that hospital was only a remote, and thus not proximate, cause of her death, is question to be de-

termined by the jury. We suggest no opinion on the merits of Entrican's claim or her ability to *37 meet the requisites of a negligence action. We find only that the **directed verdict** in favor of the Ambulance Service Defendants was not proper, as the issue of causation in this case is a **jury question**. Accordingly, we remand to the trial court to submit this issue to the jury in accordance with this opinion.

CONCLUSION

¶ 27. For the foregoing reasons, the **directed verdict** is reversed and this case is remanded to the trial court.

¶ 28. **REVERSED AND REMANDED.**

WALLER AND DIAZ, P.JJ., EASLEY, CARLSON, DICKINSON, RANDOLPH AND LAMAR, JJ., CONCUR. GRAVES, J., NOT PARTICIPATING.
Miss.,2007.
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H Entrican v. Ming, 962 So.2d 28 (Miss.,Aug 02, 2007) (NO. 2006-CA-00669-SCT)

History

Direct History

1 Entrican v. Briggs, 2006 WL 6346462 (Trial Order) (Miss.Cir. Jan 09, 2006) (NO. 251-00-98-)

New Trial Denied by

2 Entrican v. Briggs, 2006 WL 5999855 (Trial Order) (Miss.Cir. Mar 22, 2006) (NO. 251-00-98)

AND Judgment Reversed by

=> 3 **Entrican v. Ming,** 962 So.2d 28 (Miss. Aug 02, 2007) (NO. 2006-CA-00669-SCT)

Related References

4 Entrican v. Briggs, 2006 WL 5999854 (Trial Order) (Miss.Cir. Jan 11, 2006) (NO. 251-00-98)

Court Documents

Appellate Court Documents (U.S.A.)

Miss. Appellate Briefs

5 Melissa ENTRICAN, Appellant, v. HMA CORPORATION, INC., d/b/a Rankin Medical Center d/b/a Rankin Medical Center Ambulance Services a/k/a Rems; Douglas Ming and Jeremy Campbell, Appellees., 2006 WL 4749124 (Appellate Brief) (Miss. Oct. 27, 2006) **Brief of Appellant** (NO. 2006-CA-00669)

6 Melissa ENTRICAN, Plaintiff/Appellant, v. HMA CORPORATION, INC., d/b/a Rankin Medical Center d/b/a Rankin Medical Center Ambulance Services a/k/a Rems, Douglas Ming and Jeremy Campbell, Defendants/Appellees., 2007 WL 2589739 (Appellate Brief) (Miss. Jan. 29, 2007) **Brief of Appellees** (NO. 2006-CA-00669)

7 Melissa ENTRICAN, Appellant, v. HMA CORPORATION, INC., d/b/a Rankin Medical Center d/b/a Rankin Medical Center Ambulance Services a/k/a Rems; Douglas Ming and Jeremy Campbell, Appellees., 2007 WL 2589740 (Appellate Brief) (Miss. Mar. 26, 2007) **Reply Brief of Appellant** (NO. 2006-TS-00669)

Trial Court Documents (U.S.A.)

Miss.Cir. Trial Pleadings

8 Melissa ENTRICAN, Plaintiff, v. Frank B. BRIGGS, M.D.; Martha D. Dickens, M.D.; Beverly

McMillan M.D.; Karl Hatten, M.D.; EMT Doug Ming; EMT Campbell; HMA Corporation, Inc., d/b/a River Oaks Hospital; HMA Corporation, Inc., d/b/a Rankin Medical Center d/b/a Rankin Medical Center Ambulance Services a, 2000 WL 35763399 (Trial Pleading) (Miss.Cir. Jan. 26, 2000) **Complaint** (NO. 251-00-98)

9 Melissa ENTRICAN, Plaintiff, v. Frank R. BRIGGS, M.D.; Martha D. Dickens, M.D.; Beverly Mcmillan, M.D.; Karl Hatten, M.D.; Emt Doug Ming; Emt Campbell; Hma Corporation, Inc. d/b/a River Oaks Hospital; Hma Corporation, Inc. d/b/a Rankin Medical Center d/b/a Rankin Medical Center Ambulance Services a/, 2000 WL 35724765 (Trial Pleading) (Miss.Cir. Apr. 28, 2000) **Answer and Affirmative Defenses of Defendant Frank R. Briggs, M.D.** (NO. 251-00-98)

10 Melissa ENTRICAN, Plaintiff, v. Frank R. BRIGGS, M.D.; Martha D. Dickens, M.D.; Beverly McMillan, M.D.; Karl Hatten, M.D.; EMT Doug Ming; EMT Campbell; HMA Corporation, Inc. d/b/a River Oaks Hospital; HMA Corporation, Inc. d/b/a Rankin Medical Center d/b/a Rankin Medical Center Ambulance Services a/, 2000 WL 35763400 (Trial Pleading) (Miss.Cir. Apr. 28, 2000) **Answer and Affirmative Defenses of Defendant Frank R. Briggs, M.D.** (NO. 251-00-98)

Miss.Cir. Expert Testimony

11 Melissa ENTRICAN, v. Frank B. BRIGGS, M.D.; Martha D. Dickens, M.D., et al., 2006 WL 6348796 (Expert Trial Transcript) (Miss.Cir. 2006) **(Transcript of Carl Hauser, M.D.)** (NO. 2510098)

12 Melissa ENTRICAN, v. Frank B. BRIGGS, M.D.; Martha D. Dickens, M.D., et al., 2006 WL 6348797 (Expert Trial Transcript) (Miss.Cir. 2006) **(Transcript of Steven Hayne, M.D.)** (NO. 2510098)

13 Melissa ENTRICAN, v. Frank B. BRIGGS, M.D.; Martha D. Dickens, M.D., et al., 2006 WL 6348798 (Expert Trial Transcript) (Miss.Cir. 2006) **(Transcript of Theodore Tully)** (NO. 2510098)

14 Melissa ENTRICAN, v. Frank B. BRIGGS, M.D.; Martha D. Dickens, M.D., et al., 2006 WL 6348799 (Expert Trial Transcript) (Miss.Cir. 2006) **(Transcript of Glenda Glover, Ph.D.)** (NO. 2510098)

15 Melissa ENTRICAN, v. Frank B. BRIGGS, M.D.; Martha D. Dickens, M.D., et al., 2006 WL 6348800 (Expert Trial Transcript) (Miss.Cir. 2006) **(Transcript of Vernon J. Henderson, M.D)** (NO. 2510098)

16 Melissa ENTRICAN, Plaintiff, v. Frank B. BRIGGS, M.D.; HMA Corporation, Inc., d/b/a Rankin Medical Center d/b/a Rankin Medical Center Ambulance Services a/k/a Rems, Defendants., 2006 WL 5999859 (Expert Trial Transcript) (Miss.Cir. Jan. 17, 2006) **(Transcript of Dr. Frank Bliggs)** (NO. 251-00-98)

17 Melissa ENTRICAN, Plaintiff, v. Frank B. BRIGGS, M.D.; HMA Corporation, Inc., d/b/a Rankin Medical Center d/b/a Rankin Medical Center Ambulance Services a/k/a REMS, Defendants., 2006 WL 5999864 (Expert Trial Transcript) (Miss.Cir. Jan. 17, 2006) **(Transcript of Dr. Glenda Glove)** (NO. 251-00-98)

18 Melissa ENTRICAN, Plaintiff, v. Frank B. BRIGGS, M.D.; HMA Corporation, Inc., d/b/a

Rankin Medical Center d/b/a Rankin Medical Center Ambulance Services, Defendants., 2006 WL 5999865 (Expert Trial Transcript) (Miss.Cir. Jan. 24, 2006) **(Transcript of Dr. Carl Hauser)** (NO. 251-00-98)

40 Melissa ENTRICAN, Plaintiff, v. Frank B. BRIGGS, M.D.; HMA Corporation, Inc., d/b/a Rankin Medical Center d/b/a Rankin Medical Center Ambulance Services a/k/a Rems, Defendants., 2006 WL 5999866 (Expert Trial Transcript) (Miss.Cir. Jan. 24, 2006) **(Transcript of Theodore Tully)** (NO. 251-00-98)

41 Melissa ENTRICAN, Plaintiff, v. Frank B. BRIGGS, M.D.; HMA Corporation, Inc., d/b/a Rankin Medical Center d/b/a Rankin Medical Center Ambulance Services a/k/a Rems, Defendants., 2006 WL 5999867 (Expert Trial Transcript) (Miss.Cir. Jan. 24, 2006) **(Transcript of Dr. Steven Hayne)** (NO. 251-00-98)

H

Supreme Court of Mississippi.
Odell PATTERSON, and Wife, Fannie Patterson and Floyd Patterson
v.
LIBERTY ASSOCIATES, L.P. and Century Management Company.
No. 2003-CA-01167-SCT.

Dec. 9, 2004.
Rehearing Denied Feb. 17, 2005.

Background: Low income tenants brought action against apartment company and its management company after employee mistakenly told tenants that they would be required to move out and tenants incurred expenses in having home built. The Circuit Court, Amite County, Forrest A. Johnson, Jr., entered take-nothing judgment upon jury verdict and dismissed tenants claims with prejudice. Tenants appealed.

Holdings: The Supreme Court, Carlson, J., held that:
(1) low income tenants suffered no damages as proximate result of apartment company employee's negligence, and
(2) apartment company and its management company could not be liable for employee's negligence.

Affirmed.

West Headnotes

[1] Appeal and Error 30 ⇐863

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k862 Extent of Review Dependent on Nature of Decision Appealed from
30k863 k. In General. Most Cited Cases

Appeal and Error 30 ⇐866(3)

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k862 Extent of Review Dependent on Nature of Decision Appealed from
30k866 On Appeal from Decision on Motion for Dismissal or Nonsuit or Direction of Verdict
30k866(3) k. Appeal from Ruling on Motion to Direct Verdict. Most Cited Cases
Standard of review for a directed verdict and for a denial of a judgment notwithstanding the verdict is the same; whether reasonable jurors from the evidence could not have arrived at a contrary verdict.

[2] Appeal and Error 30 ⇐930(1)

30 Appeal and Error
30XVI Review
30XVI(G) Presumptions
30k930 Verdict
30k930(1) k. In General. Most Cited Cases

Appeal and Error 30 ⇐1003(5)

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)2 Verdicts
30k1003 Against Weight of Evidence
30k1003(5) k. Great or Overwhelming Weight or Preponderance. Most Cited Cases
Where an appellant challenges a jury verdict as being against the overwhelming weight of the evidence or the product of bias, prejudice, or improper passion, Supreme Court will show great deference to the jury verdict by resolving all conflicts in the evidence and every permissible inference from the evidence in the appellee's favor.

[3] Appeal and Error 30 ⚖1003(5)

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)2 Verdicts
30k1003 Against Weight of Evidence
30k1003(5) k. Great or Overwhelming Weight or Preponderance. Most Cited Cases
Only when the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice will Supreme Court disturb it on appeal.

[4] Damages 115 ⚖163(1)

115 Damages
115IX Evidence
115k163 Presumptions and Burden of Proof
115k163(1) k. Necessity of Proof as to Damages in General. Most Cited Cases
Burden of proving damages rests upon the plaintiffs.

[5] Landlord and Tenant 233 ⚖132(1)

233 Landlord and Tenant
233VII Premises, and Enjoyment and Use Thereof
233VII(B) Possession, Enjoyment, and Use
233k131 Disturbance of Possession of Tenant
233k132 By Landlord
233k132(1) k. In General. Most Cited Cases
Low-income tenants suffered no damages as proximate result of apartment company employee's negligence in mistakenly telling tenants that they would be required to move out of apartment, after which tenants signed $172,404 deed of trust to purchase newly constructed home; lease's 30-day termination provision restricted tenants rights to remain on property to maximum of 30 days, after four months apartment management still had not yet provided tenants with written notice to vacate, and discovery of mistake provided tenants considerable amount of time to remedy situation.

[6] Negligence 272 ⚖202

272 Negligence
272I In General
272k202 k. Elements in General. Most Cited Cases
A plaintiff in a negligence suit must prove by a preponderance of the evidence: (1) duty; (2) breach of duty; (3) causation; and (4) injury.

[7] Negligence 272 ⚖373

272 Negligence
272XIII Proximate Cause
272k373 k. Necessity of and Relation Between Factual and Legal Causation. Most Cited Cases
To recover in a negligence action, a plaintiff must prove causation in fact and proximate cause.

[8] Negligence 272 ⚖379

272 Negligence
272XIII Proximate Cause
272k374 Requisites, Definitions and Distinctions
272k379 k. "But-For" Causation; Act Without Which Event Would Not Have Occurred. Most Cited Cases

Negligence 272 ⚖384

272 Negligence
272XIII Proximate Cause
272k374 Requisites, Definitions and Distinctions
272k384 k. Continuous Sequence; Chain of Events. Most Cited Cases
"Proximate cause" of an injury is that cause which in natural and continuous sequence unbroken by any efficient intervening cause produces the injury and without which the result would not have occurred.

[9] Negligence 272 ⇐213

272 Negligence
272II Necessity and Existence of Duty
272k213 k. Foreseeability. Most Cited Cases

Negligence 272 ⇐387

272 Negligence
272XIII Proximate Cause
272k374 Requisites, Definitions and Distinctions
272k387 k. Foreseeability. Most Cited Cases
Foreseeability is an essential element of both duty and causation.

[10] Landlord and Tenant 233 ⇐132(1)

233 Landlord and Tenant
233VII Premises, and Enjoyment and Use Thereof
233VII(B) Possession, Enjoyment, and Use
233k131 Disturbance of Possession of Tenant
233k132 By Landlord
233k132(1) k. In General. Most Cited Cases
Apartment company and its management company could not be liable for damages for employee mistakenly telling low-income tenants that they would be required to move out of apartment, after which tenants signed $172,404 deed of trust to purchase newly constructed home; it was not reasonably foreseeable that tenants living under federally approved rent assistance program would sign $172,404 deed of trust or even have means to commit to such financial arrangement in order to purchase newly constructed home as result of negligent act of apartment employee.

***1015** T. Patrick Welch, McComb, attorney for appellants.

Jack W. Land, Anthony A. Mozingo, Hattiesburg, attorneys for appellees.

Before SMITH, C.J., CARLSON and DICKINSON, JJ.

CARLSON, Justice, for the Court.

¶ 1. After a trial in which the jury found that the plaintiffs, Odell and Fannie Patterson, had suffered damages in the amount of $0, the circuit court entered a take-nothing judgment consistent with the jury verdict. Once the circuit court had entered an order denying the plaintiffs' motions for a judgment notwithstanding the verdict, a new trial and an additur as well as a motion for reconsideration, the plaintiffs timely appealed to this Court. Finding no reversible error, we affirm the final judgment of the Circuit Court of Amite County.

FACTS AND PROCEEDINGS IN THE TRIAL COURT

¶ 2. The facts of this case are basically without dispute. Odell and Fannie Patterson had lived since 1995 in Liberty Place Apartments, owned and operated by Century Management Company and Liberty Associates, L.P., under a rent assistance arrangement through Rural Development (RD) (formerly known as Farmers Home Administration) and the Internal Revenue Service (IRS). The rent assistance program operates under regulations established by RD and the IRS and provides assistance to applicants whose income is below an established income level. Odell suffered a stroke in 1995, is unable to communicate, and requires around-the-clock bed care.

¶ 3. The Pattersons were certified to live in Liberty Apartments located in Liberty, Mississippi. As was the practice, the Pattersons were submitted a one-year lease for 2002. The lease was executed by Odell and Fannie as tenants and by Joyan Hughes on behalf of the landlord, which according to the lease was Liberty Associates.[FN1] The term of the lease was from ***1016** January 1, 2002, through December 31, 2002.[FN2] The lease required a thirty-day written notice of termination. On Febru-

ary 6, 2002, Joyan Hughes, who was also the apartment manager, informed Fannie that the Pattersons' income exceeded the maximum amount allowable to maintain eligibility as residents at Liberty Apartments and that they would thus have to move out at the end of the year. This advice by Hughes was clearly wrong inasmuch as she failed to take into consideration an IRS regulation that is commonly referred to as the "once qualified always qualified" rule which would allow the Pattersons to stay notwithstanding an income increase. In fact, Hughes had just attended a managers' meeting earlier that day at which the RD and IRS regulations and income limits were discussed, including the "once qualified, always qualified" rule. On February 15, 2002, Hughes repeated what she had previously told Fannie in the presence of Beth Wicker, Odell's nurse, and a social worker, Cynthia McGehee. Wicker and McGehee offered Fannie assistance in relocating, a service regularly performed by them through their employer, Southwest Mississippi Planning and Development District Medicaid Waiver Program. Their written notes of the conversation indicate that Fannie had "a year to decide" and that the Pattersons had "two acres of land in the country that she could put a trailer or perhaps a house."

FN1. In the lease, the tenant is listed as Odell Patterson, even though the lease is purportedly signed by Odell Patterson as tenant, and Fannie Patterson as co-tenant. However, it appears that the same person signed for both Odell and Fannie, and in comparing the signatures with the signature of Fannie appearing on other documents which were offered into evidence, it would appear that Fannie signed the lease for both herself and Odell. This would be consistent with the assumption that Odell was most likely unable to sign his name due to his incapacitation. In any event, the validity of the lease is not at issue today.

FN2. The blanks were filled in, in longhand, indicating the term of the lease was to begin on January 1, 2002, and end on December, *2003*. This is clearly an error since the terms of the lease clearly set out that the lease period is for one year, and this fact is supported by the record in this case. Again, there is no dispute concerning the one-year lease.

¶ 4. At some point, Fannie went to Southwest Home to purchase a mobile home, but was turned down because of her credit. On March 15, 2002, Floyd Patterson, an adult child of the Pattersons, deeded to his parents two acres of land in Amite County. This property had been previously deeded to Floyd by Odell and Fannie prior to their moving into Liberty Apartments in 1995. On that same day, Fannie and Floyd signed the necessary papers to finance a thirty-year mortgage for a home to be constructed on the two acres of land by Jim Walter Homes of McComb. These papers contained a Notice of Cancellation, giving Fannie the right to cancel the transaction at any time prior to midnight on March 19, 2002. Additionally, Jim Walter had a company practice which allowed Fannie the right to cancel the home purchase at any time prior to the concrete footing being poured.[FN3]

FN3. The concrete footing was poured on April 5, 2002.

¶ 5. On March 20, 2002, Cheryl Jacobs, the general manager for Century and Liberty Associates, along with Hughes, performed the quarterly inspection of the Pattersons' apartment as required by RD. On this day, neither Hughes nor Fannie mentioned to Jacobs that Fannie had previously been told by Hughes that her lease would not be renewed. However, sometime in June, 2002, Fannie relayed a message to Michael Perry of RD that she wanted to "curse him out" for making her move. After learning from Fannie that Hughes told her that she would have to move, Perry called Jacobs. Jacobs was not aware of what Hughes had previously ***1017** told Fannie, so Jacobs called Hughes. Within twenty minutes of the conversation between Fannie

and Perry, Hughes apologized to Fannie and admitted that she had made a mistake. It is without question that under the IRS "once qualified, always qualified" rule, the Pattersons did not have to move from Liberty Apartments due to an income increase.

¶ 6. Odell, Fannie, and Floyd Patterson commenced this negligence action by filing a complaint against Century and Liberty on July 30, 2002, and an amended complaint was filed on August 6, 2002. In the amended complaint, the Pattersons alleged, inter alia, that the negligent acts of the defendants had caused the Pattersons to suffer financial damages in an amount of not less than $150,000, and had caused Fannie to suffer "severe mental anguish, depression and distress" in an amount of not less than $500,000. The record reveals that the Pattersons' claim for damages included: $172,404, representing the total amount of the promissory note (including interest over the life of the thirty-year mortgage) with Jim Walter Homes; $374.49 for the purchase of an electric range; $588.48 for the purchase of a refrigerator; $663.76 for the purchase of a washer/dryer; $2,033.00 for the installation of a septic tank system; $1,200 for painting and woodwork; $2,153.63 for flooring; $123.05 for the installation of a gas heater in Odell's bedroom; $110.21 for an electrical connection to the well pump; $15.60 for the difference between cable and satellite service; and $801.40 per year for thirty years for home insurance. After the suit was commenced in late July, Odell and Fannie Patterson moved into their new home in August, 2002.

¶ 7. This case was tried before a jury in Amite County. After the Pattersons had rested their case-in-chief, the defendants moved for a directed verdict and although the motion for directed verdict was denied as to the claims of Odell and Fannie, the trial court granted the motion for a directed verdict as to the claims of Floyd Patterson, and a final judgment was subsequently entered dismissing Floyd's claims with prejudice. After the defendants presented evidence and rested their case-in-chief, the trial court instructed the jury, inter alia, that the defendants were negligent in telling Fannie that she and Odell would have to move from Liberty Apartments. Thus, the sole issue presented to the jury was what damages, if any, were sustained by the Pattersons as a proximate cause of the defendants' negligence. In fact, the trial court, via Jury Instruction No. 14 (Court's Instruction C-1), instructed the jury that the defendants were negligent and that if the jury found from a preponderance of the evidence that Odell and Fannie had sustained damages as a proximate result of such negligence, then the jury would so find by its verdict the appropriate amount of damages. However, in the same instruction, the jury was also instructed that if it found that Odell and Fannie had suffered no damages as a proximate result of the defendants' negligence, then the jury would so find by its verdict. In due course, the jury returned with its handwritten verdict as follows: "We the jury, find that the plaintiffs sustained no damages." The trial court subsequently entered its final judgment consistent with the jury verdict, dismissing the claims of Odell and Fannie, with prejudice.

¶ 8. Upon the denial of post-trial motions, the plaintiffs timely appealed to this Court arguing that the verdict was against the overwhelming weight of the evidence and that the trial court erred by refusing to grant their post-trial motions as to damages. On the other hand, the defendants argue that the plaintiffs failed to mitigate their damages and that the purchase of a home with a thirty-year mortgage was not ***1018** a reasonably foreseeable consequence of the defendants' negligence in erroneously informing Fannie that she and Odell would have to move from Liberty Apartments.

ANALYSIS

[1] ¶ 9. We must first address the procedural posture of this case. At the close of the plaintiffs' case-in-chief, the trial court directed a verdict in favor of the defendants as to Floyd's claims and after the trial, a judgment was entered consistent with the trial

court's actions. The record reveals that the plaintiffs thereafter filed post-trial motions, and even though Floyd's name remained in the style of the case, the body of the motion requested post-trial relief only in behalf of Odell and Fannie. Likewise, the plaintiffs' motion requesting the trial court to reconsider its initial ruling on the post-trial motions again left Floyd's name in the style of the case, but requested reconsideration only in behalf of Odell and Fannie. The trial court's order denying post-trial motions, including the motion for reconsideration, includes Floyd's name in the style and makes reference in the body of the order only to "the plaintiffs." The notice of appeal contains the name of Floyd, Odell and Fannie both in the caption and in the body of the notice. We thus consider this appeal as to Odell, Fannie, ***and*** Floyd, although the Pattersons, in their briefs, make little mention of Floyd or his claims.[FN4] The focus of the briefs is an attack on the jury verdict and the trial court's failure to grant post-trial motions as to an additur or a new trial on damages.

> FN4. We can quickly conclude from the record and the law that the trial judge quite appropriately granted a direct verdict in favor of the defendants, at the close of the plaintiffs' case-in-chief, as to Floyd's claims. The standard of review for a directed verdict and for a denial of a judgment notwithstanding the verdict is the same-whether reasonable jurors from the evidence could not have arrived at a contrary verdict. *Am. Fire Protection, Inc. v. Lewis,* 653 So.2d 1387, 1390-91 (Miss.1995). The trial court's reasoning in granting the directed verdict consumed more than a page in the transcript. The trial court was correct in finding that there was no evidence as to causation regarding Floyd's damages. No reasonable juror could have differed on that issue.

¶ 10. In turning now to the issues raised on appeal, we combine them for discussion purposes. Succinctly stated, we must now determine (1) whether the jury's verdict was against the overwhelming weight of the evidence, and (2) whether the trial court erred in denying the plaintiffs' motion for an additur, or in the alternative, for a new trial on damages.

[2][3] ¶ 11. The applicable standard of review is set forth in *Venton v. Beckham,* 845 So.2d 676, 684 (¶¶ 26-27) (Miss.2003) (citing *Wal-Mart Stores, Inc. v. Johnson,* 807 So.2d 382, 389 (Miss.2001)):

> Where an appellant challenges a jury verdict as being against the overwhelming weight of the evidence or the product of bias, prejudice or improper passion, this Court will show great deference to the jury verdict by resolving all conflicts in the evidence and every permissible inference from the evidence in the appellee's favor. *Bobby Kitchens, Inc. v. Mississippi Ins. Guar. Ass'n,* 560 So.2d 129, 131 (Miss.1989). "Only when the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice will this Court disturb it on appeal." *Herrington v. Spell,* 692 So.2d 93, 103-04 (Miss.1997).

¶ 12. The evidence at trial revealed that this mature couple (Fannie was 63 years old, and Odell was 72 years old) held a one-year lease from January 1 to December 31, 2002. On February 6, 2002, and ***1019** again on February 15, 2002, the defendants, through Joyan Hughes, negligently told Fannie that she and her bed-ridden, totally disabled husband would have to move out of their apartment by December 31, 2002. In March, 2002, with nine and one-half months still remaining on their lease with Liberty Apartments, Fannie signed a thirty-year mortgage for the purchase and construction of a new home. Fannie learned in June, 2002, that she and her husband would not be required to move from Liberty Apartments.

[4][5] ¶ 13. The burden of proving damages rests upon the plaintiffs. *Adams v. U.S. Homecrafters, Inc.,* 744 So.2d 736, 740 (Miss.1999). The Patter-

sons claim that they have presented uncontroverted evidence of their damages. While it is true that they have presented evidence concerning the expenditures made in connection with the purchase of the new home, and while it is true that the defendants were unquestionably negligent, the jury acted within its province from the evidence before it, when the jury found that the Pattersons had suffered no damages ***as a proximate result of the defendants' negligence.***

[6][7][8][9] ¶ 14. The elements of a negligence action are well-settled in Mississippi. A plaintiff in a negligence suit must prove by a preponderance of the evidence (1) duty, (2) breach of duty, (3) causation, and (4) injury. *Miss. Dep't of Transp. v. Cargile,* 847 So.2d 258, 262 (Miss.2003). To recover, a plaintiff must prove causation in fact and proximate cause. *Jackson v. Swinney,* 244 Miss. 117, 123, 140 So.2d 555, 557 (1962). "Proximate cause of an injury is that cause which in natural and continuous sequence unbroken by any efficient intervening cause produces the injury and without which the result would not have occurred." *Delahoussaye v. Mary Mahoney's, Inc.,* 783 So.2d 666, 671 (Miss.2001). We have observed that in order for a person to be liable for an act which causes injury, "the act must be of such character, and done in such a situation, that the person doing it should reasonably have anticipated that some injury to another will probably result therefrom." *Mauney v. Gulf Ref. Co.,* 193 Miss. 421, 9 So.2d 780, 780-81 (1942). "Foreseeability is an essential element of both duty and causation." *Delahoussaye,* 783 So.2d at 671.

[10] ¶ 15. Given their age and Odell's condition, it was not reasonably foreseeable that this couple living in the Liberty Apartments under a federally approved rent assistance program would sign a $172,404 deed of trust (or even have the means to commit to such a financial arrangement) in order to purchase a newly constructed home as a result of the negligent act of the apartment manager. The Pattersons had only a one-year leasehold interest in the property. Moreover, the lease's thirty-day termination provision restricted the Pattersons' rights to remain on the property to a maximum of thirty days. However, since the mistake was discovered in June and Liberty/Century had not yet provided the Pattersons with the required written notice, a jury could reasonably find that the damages as claimed by the Pattersons are too remote, improbable, or extraordinary. Discovery of the mistake in June provided all parties a considerable amount of time to remedy the situation by the end of December. The learned trial judge was liberal in granting jury instructions to assure that the jury was fairly instructed on all pertinent issues. Included in these instructions was Instruction No. 12 (No. P-17), which informed the jury that the Pattersons' duty to mitigate their damages did not arise until the Pattersons' became aware of the fact (or reasonably should have known) that they had damages which they needed ***1020** to mitigate. The jury was also informed via Jury Instruction No. 7 (No. P-10), that it was within the jury's province to award damages for, among other things, Fannie's mental anguish, depression, and distress.

¶ 16. Our decision today to affirm the trial court judgment entered consistent with the jury's verdict is based on well established law which requires us to give great deference to the jury's verdict and the trial judge's refusal via post-trial motions to set aside the jury verdict or award a new trial. In *Culbreath v. Johnson,* 427 So.2d 705, 708 (Miss.1983), we stated:

> The trial judge saw these witnesses testify. Not only did he have the benefit of their words, he alone among the judiciary observed their manner and demeanor. He was there on the scene. He smelled the smoke of battle. He sensed the interpersonal dynamics between the lawyers and the witnesses and himself. These are indispensable.

Id. at 708.

¶ 17. Although *Culbreath* involved a chancery court action, we have applied *Culbreath's* reasoning in

circuit court cases involving juries. In a circuit court criminal case, in citing *Culbreath,* we stated:

> Were we to substitute our view [of the reasonable inferences that may be drawn from] the facts for the ... [jury's], one thing could be said with certainty: the chances of error in any findings we might make would be infinitely greater than is the case where those findings are made by ... [twelve citizens, peers of the defendant, who are on the scene and smell the smoke of the battle].

Burge v. State, 472 So.2d 392, 396 (Miss.1985). Finally, in the civil arena, we have stated:

> We emphasize that our powers on appellate review are even more restricted. Our institutional role mandates substantial deference to the jury's findings of fact and to the trial judge's determination whether a jury issue was tendered. When a verdict is challenged via appeal from denial of a motion for j.n.o.v., we have before us the same record the trial judge had. We see [on paper] the testimony the trial judge heard. We do not, however, observe the manner and demeanor of the witnesses. We do not smell the smoke of the battle. Cf. *Culbreath v. Johnson,* 427 So.2d 705, 708 (Miss.1983). The trial judge's determination whether, under the standards articulated above, a jury issue has been presented, must per force be given great respect here.

City of Jackson v. Locklar, 431 So.2d 475, 478-79 (Miss.1983).

¶ 18. For the foregoing reasons, we unhesitatingly find that the jury's verdict was not against the overwhelming weight of the evidence.

¶ 19. When confronted with a request to disturb a trial court's ruling on a motion for an additur, we have stated:

> In reviewing a trial court's grant or denial of an additur, this Court's standard of review is limited to an abuse of discretion. *Rodgers v. Pascagoula Pub. Sch. Dist.,* 611 So.2d 942, 945 (Miss.1992); *State Highway Comm'n v. Warren,* 530 So.2d 704, 707 (Miss.1988). The party seeking the additur bears the burden of proving his injuries, loss of income, and other damages. We view the evidence in the light most favorable to the defendant, giving him all favorable inferences that may be reasonably drawn therefrom. *Rodgers,* 611 So.2d at 945; *Odom v. Roberts,* 606 So.2d 114 (Miss.1992); *Copeland v. City of Jackson,* 548 So.2d 970, 974 (Miss.1989); *Hill v. Dunaway,* 487 So.2d 807, 811 (Miss.1986). Awards set by jury are not ***1021** merely advisory and generally will not be "set aside unless so unreasonable as to strike mankind at first blush as being beyond all measure, unreasonable in amount and outrageous." *Rodgers,* 611 So.2d at 945 (*citations omitted*). The amount of damages awarded is primarily a question for the jury. *South Cent. Bell Tel. Co. v. Parker,* 491 So.2d 212, 217 (Miss.1986); *Edwards v. Ellis,* 478 So.2d 282, 289 (Miss.1985). "Additurs represent a judicial incursion into the traditional habitat of the jury, and therefore should never be employed without great caution." *Gibbs v. Banks,* 527 So.2d 658, 659 (Miss.1988).

Maddox v. Muirhead, 738 So.2d 742, 743-44 (Miss.1999).

¶ 20. The applicable statute is Miss.Code Ann. § 11-1-55 (Rev.2002), which states in pertinent part:

> 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.

¶ 21. One could conceivably argue in today's case that since the jury found that "the plaintiffs had sustained no damages," this statute would not apply

since the express language of the statute authorizes our trial and appellate courts to grant an additur or remittitur in cases where "money damages were awarded." The jury in the case sub judice, by its finding that the plaintiffs had suffered "no damages," found the equivalent of "0" damages. However, we have in the past addressed this issue in cases involving verdicts in the amount of "0" damages. *See Horton v. Am. Tobacco Co.,* 667 So.2d 1289, 1292-93 (Miss.1995) (jury was given a comparative fault instruction, and the verdict which was obviously based on a finding of 100% fault on the part of the decedent was justified by the evidence); *Johnson v. Fargo,* 604 So.2d 306, 309 (Miss.1992) (trial court committed error in denying motion for new trial on damages or additur after a jury verdict assessing damages at zero dollars and, thus, case reversed for a new trial on damages only); [FN5] *Russell v. Lewis Grocer Co.,* 552 So.2d 113, 115-17 (Miss.1989) (affirmed trial court's judgment on a jury verdict of zero dollars after the trial court had instructed the jury that the defendant was negligent).

> FN5. This case is distinguishable from today's case because in *Johnson,* the trial judge admitted at trial that the inadmissible testimony had a damaging effect on the jury's verdict. 604 So.2d at 312. Also, in the case sub judice, we are not confronted with an issue of inadmissible testimony.

¶ 22. We have already found that the jury's verdict was not against the overwhelming weight of the evidence. In specifically addressing the additur/new-trial-on-damages issue, we come to the same conclusion. We are not required to get into the heads of the jurors and determine the specific reason for their verdict. Without question, however, when we view the evidence in the case sub judice in the light most favorable to the defendants and afford to them all favorable inferences that may be reasonably drawn from the evidence offered at trial, we reach the unmistakable conclusion that there was more than sufficient evidence before the jury to justify a finding that the plaintiffs had either failed to mitigate their damages, or that their purchase of a home with a long-term mortgage was not a reasonably foreseeable***1022** consequence of Hughes's negligence in telling Fannie that she and her husband would have to move from the apartment complex, or both. Stated differently, the jury was justified from the evidence in finding that the plaintiffs did not sustain any damages "as a proximate result of [the defendants'] negligence." In *Russell,* we found that the evidence supported the jury's verdict in the amount of zero damages, notwithstanding the fact that the trial court instructed the jury that the defendant was negligent. We likewise find today, for the reasons already articulated, that the evidence in the case sub judice supported the jury's verdict that the plaintiffs had suffered "no damages." The jury's verdict is certainly not outrageous, and it certainly is beyond our authority to disturb. *Maddox,* 738 So.2d at 743-44.

¶ 23. We thus find that the trial court was eminently correct in denying the plaintiffs' post-trial motion for an additur, or alternatively, for a new trial on damages.

CONCLUSION

¶ 24. We have carefully reviewed this record and applied our well-settled case law in methodically, logically and reasonably arriving at the decision we make in today's case. To conclude otherwise would be a judicial abrogation of basic tort law regarding the necessity of proving by a preponderance of the evidence the elements of duty, breach of duty, causation and injury. The defendants were wrong when they, through their apartment manager, instructed Fannie Patterson that she and her disabled husband would have to move from the apartment complex at the end of the year. The trial judge told the jury just that in the jury instructions, meaning that the jury had before it only the issue of damages. But the trial judge also quite appropriately via a properly worded jury instruction informed the jury that it could award damages to Fannie and Odell only if

the jury found from a preponderance of the evidence that the Pattersons' damages were sustained "as a proximate result of such negligence." The jury and the judge observed the witnesses and their demeanor-we did not. We refuse to become a thirteenth juror and substitute our judgment for that of the jury when reasonable jurors could differ on the verdict from the evidence presented.

¶ 25. Based upon the foregoing analysis, we find from the record before us and the applicable law that the jury verdict was not against the overwhelming weight of the evidence and that the trial court's denial of an additur, or alternatively, a new trial on damages was not in error. We thus affirm the Amite County Circuit Court's final judgment entered consistent with the jury's verdict finding that the Pattersons suffered no damages as a proximate result of the defendants' negligence.

¶ 26. **AFFIRMED.**

SMITH, C.J., WALLER AND COBB, P.JJ., EASLEY, GRAVES AND DICKINSON, JJ., CONCUR. DIAZ AND RANDOLPH, JJ., NOT PARTICIPATING.
Miss.,2004.
Patterson v. Liberty Associates, L.P.
910 So.2d 1014

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H Patterson v. Liberty Associates, L.P., 910 So.2d 1014 (Miss.,Dec 09, 2004) (NO. 2003-CA-01167-SCT)

History

Direct History

=> 1 **Patterson v. Liberty Associates, L.P.**, 910 So.2d 1014 (Miss. Dec 09, 2004) (NO. 2003-CA-01167-SCT), rehearing denied (Feb 17, 2005)

Court Documents

Appellate Court Documents (U.S.A.)

Miss. Appellate Briefs

2 Odell PATTERSON, Appellant, v. LIBERTY ASSOCIATES, L.P., Appellees., 2004 WL 3080707 (Appellate Brief) (Miss. Feb. 19, 2004) **Appellant's Brief** (NO. 03-CA-01167)

3 Odell PATTERSON and Wife, Fannie Patterson, and Floyd Patterson, Appellants, v. LIBERTY ASSOCIATES, L. P. and Century Management Company, Appellees., 2004 WL 3080709 (Appellate Brief) (Miss. Apr. 21, 2004) **Brief of Appellees** (NO. 03-CA-01167)

4 Odell PATTERSON, Appellant, v. LIBERTY ASSOCIATES, L.P., Appellees., 2004 WL 3080708 (Appellate Brief) (Miss. May 7, 2004) **Appellant's Reply Brief** (NO. 03-CA-01167)

Dockets (U.S.A.)

Miss.

5 ODELL PATTERSON v. LIBERTY ASSOCIATES, L.P., NO. 2003-CA-01167-SCT (Docket) (Miss. Jun. 3, 2003)

H

Supreme Court of Mississippi.
Frances SPANN, Yolanda Thomas and Demetreal Barber
v.
SHUQUALAK LUMBER CO., INC.
No. 2007-CA-00807-SCT.

Sept. 11, 2008.

Background: Occupants of two cars that collided in a dense fog brought personal injury action against a lumber-drying plant that allegedly caused the dense fog or steam and failed to warn of potential driving hazard. The Circuit Court, Noxubee County, James T. Kitchens, Jr., J., entered summary judgment in favor of the plant. Car occupants appealed.

Holding: The Supreme Court, Waller, P.J., held that triable issues existed as to whether emissions from the plant were the cause-in-fact of the collision.

Reversed and remanded.

Graves, J., concurred in result only.

West Headnotes

[1] Appeal and Error 30 ⇐893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In General. Most Cited Cases
The Supreme Court reviews a trial court's grant of summary judgment de novo.

[2] Appeal and Error 30 ⇐863

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k862 Extent of Review Dependent on Nature of Decision Appealed from
30k863 k. In General. Most Cited Cases
In evaluating a grant of summary judgment, the Supreme Court views all evidentiary matters, including admissions in pleadings, answers to interrogatories, depositions, admissions, and affidavits. Rules Civ.Proc., Rule 56(c).

[3] Appeal and Error 30 ⇐934(1)

30 Appeal and Error
30XVI Review
30XVI(G) Presumptions
30k934 Judgment
30k934(1) k. In General. Most Cited Cases
On review of a grant of summary judgment the evidence must be viewed in the light most favorable to the non moving party.

[4] Judgment 228 ⇐181(2)

228 Judgment
228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(2) k. Absence of Issue of Fact. Most Cited Cases
The existence of a genuine issue of material fact will preclude summary judgment.

[5] Judgment 228 ⇐181(2)

228 Judgment
228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(2) k. Absence of Issue of Fact. Most Cited Cases
A fact is "material," so as to preclude summary judgment, if it tends to resolve any of the issues

properly raised by the parties.

[6] Judgment 228 ⚖181(1)

228 Judgment
228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(1) k. In General. Most Cited Cases

Judgment 228 ⚖181(4)

228 Judgment
228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(4) k. Necessity That Right to Judgment Be Free from Doubt. Most Cited Cases
A summary judgment motion should be overruled unless the trial court finds, beyond a reasonable doubt, that the plaintiff would be unable to prove any facts to support his claim.

[7] Automobiles 48A ⚖289

48A Automobiles
48AVI Injuries from Defects or Obstructions in Highways and Other Public Places
48AVI(A) Nature and Grounds of Liability
48Ak289 k. Liabilities of Abutting Owners or Occupiers. Most Cited Cases
For purposes of assessing negligence liability, lumber-drying plant had a duty to refrain from creating an unreasonably dangerous condition, such as the emission of dense steam or fog, that impeded drivers' visibility on road outside the plant.

[8] Judgment 228 ⚖181(33)

228 Judgment
228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(15) Particular Cases
228k181(33) k. Tort Cases in General. Most Cited Cases
Genuine issues of material fact existed as to whether fog or steam released from a lumber-drying plant were actually present at the time of nearby car collision, and if so, whether the fog or steam caused an unreasonably dangerous condition or was the cause-in-fact of the collision, thus precluding summary judgment in car occupants' negligence action against the plant.

[9] Negligence 272 ⚖372

272 Negligence
272XIII Proximate Cause
272k372 k. Necessity of Legal or Proximate Causation. Most Cited Cases

Negligence 272 ⚖373

272 Negligence
272XIII Proximate Cause
272k373 k. Necessity of and Relation Between Factual and Legal Causation. Most Cited Cases
For a particular damage to be recoverable in a negligence action, the plaintiff must show that the damage was proximately caused by the negligence; in order for an act of negligence to proximately cause the damage, the fact finder must find that the negligence was both the cause in fact and legal cause of the damage.

[10] Negligence 272 ⚖379

272 Negligence
272XIII Proximate Cause
272k374 Requisites, Definitions and Distinctions
272k379 k. "But-For" Causation; Act Without Which Event Would Not Have Occurred. Most Cited Cases
A defendant's negligence is the "cause-in-fact" where the fact-finder concludes that, but for the defendant's negligence, the injury would not have occurred.

[11] Negligence 272 ⚖387

272 Negligence
272XIII Proximate Cause
272k374 Requisites, Definitions and Distinc-

tions

272k387 k. Foreseeability. Most Cited Cases

Once established, the cause-in-fact also will be the legal cause of the damage provided the damage is the type, or within the classification, of damage the negligent actor should reasonably expect or foresee to result from the negligent act.

***187** W. Howard Gunn, Aberdeen, attorney for appellants.

Mitzi Leasha George, Timothy Dale Crawley, Ridgeland, Robert Lee Grant, attorneys for appellee.

Before WALLER, P.J., EASLEY and GRAVES, JJ.

***188** WALLER, Presiding Justice, for the Court.

¶ 1. Frances Spann, Yolanda Thomas, and Demetreal Barber appeal the Noxubee County Circuit Court's grant of summary judgment in favor of Shuqualak Lumber Company, Inc. (hereinafter "Shuqualak"). Because Shuqualak had a duty not to cause an unreasonably dangerous condition, and because genuine issues of material fact remain, we reverse the trial court's grant of summary judgment and remand this case for further proceedings.

FACTS AND PROCEDURAL HISTORY

¶ 2. Shuqualak operates a lumber-drying plant in the town of Shuqualak, Mississippi.[FN1] The plant uses a system of boilers and dry kilns to remove moisture from green lumber. W. Anderson Thomas, Jr., who serves as vice president of Shuqualak, described the operation as follows:

> FN1. The briefs of the opposing parties place the company in different locations. Shuqualak places the company in the town of Shuqualak, but Spann uses an address in Macon, Mississippi. This discrepancy is likely due to the fact that Shuqualak's headquarters are located just outside the town of Shuqualak, while the plant is located inside the town. Regardless, neither party disputes the locations of the accident or the plant.

> The process begins by heating water in the boilers to create high volumes of intensely-hot steam. The resulting steam is pushed along through a closed-loop system to heat and dry the lumber in the dry kilns. As the steam is pushed through the kilns, it cools and eventually turns back into water. The water is then transported back to the boilers for re-heating, and the process repeats itself.... *The only moisture that is actually emitted into the atmosphere from the kilns is comprised of water that evaporates out of the lumber during the drying process. The evaporated water builds up inside of the dry kilns, and is released, as needed, through computer-operated vents atop the dry kilns.* The vents are approximately thirty feet above ground level, and they open to release the evaporated water when sensors inside of the dry kiln signify that it is necessary to do so. Our Division operates, and thereby can emit this evaporated water, twenty four hours a day, seven days a week, and all year round.
> (Emphasis added).

¶ 3. Around mid-morning on October 25, 2002, Spann, along with Barber, was driving along Floyd Loop Drive,[FN2] which runs adjacent to Shuqualak's plant. At this same time, Thomas was driving along the same road in the opposite direction. When the two vehicles reached an area in front of the plant, they encountered a "dense fog, steam, and/or smoke" that covered the road. It also had recently rained, and the conditions were foggy, windy, and overcast. The two vehicles then collided, and all three occupants were sent to Noxubee General Hospital in Macon, Mississippi.[FN3]

> FN2. Floyd Loop Drive is not a through road, and has limited residential traffic and no painted lines. The road actually was described as an alleyway without any lines or

markers.

FN3. The record does not indicate the extent of the injuries.

¶ 4. Spann, Thomas, and Barber (hereinafter collectively referred to as "Spann") filed suit in the Circuit Court of Noxubee County on July 11, 2005, asserting that the steam from Shuqualak's plant caused the accident. The complaint named Shuqualak as the sole defendant and claimed it had a duty to warn about the potential driving ***189** hazard and to reasonably abate the problem.

¶ 5. On November 22, 2006, Shuqualak filed a motion for summary judgment on the basis that there is no duty under Mississippi law to warn drivers of potential steam or to abate such conditions. The court heard the parties on motion for summary judgment on March 23, 2007. Charles Henry Thomas, III, a vice president of Shuqualak, was the only witness who testified. He acknowledged that the plant produced steam and conceded the possibility that such steam had crossed over Floyd Loop Drive. Thereafter, on April 17, 2004, the trial court entered an order granting summary judgment for Shuqualak, finding that "under Mississippi law, [Shuqualak] currently has no recognized duty to abate the steam arising from its operation."

STANDARD OF REVIEW

[1][2][3][4][5][6] ¶ 6. This Court reviews a trial court's grant of summary judgment de novo. *Callicutt v. Prof'l Servs. of Potts Camp, Inc.*, 974 So.2d 216, 219 (Miss.2007). In evaluating a grant of summary judgment, this Court views all evidentiary matters, including admissions in pleadings, answers to interrogatories, depositions, admissions, and affidavits. *Glover v. Jackson State Univ.*, 968 So.2d 1267, 1275 (Miss.2007) (citing Miss. R. Civ. P. 56(c)). The evidence must be viewed in the light most favorable to the non moving party. *Simpson v. Boyd*, 880 So.2d 1047, 1050 (Miss.2004) (quoting *Palmer v. Anderson Infirmary Benevolent Ass'n*, 656 So.2d 790, 794 (Miss.1995)). The existence of a genuine issue of material fact will preclude summary judgment. *Massey v. Tingle*, 867 So.2d 235, 238 (Miss.2004). A fact is material if it "tends to resolve any of the issues properly raised by the parties." *Simpson*, 880 So.2d at 1050 (quoting *Palmer*, 656 So.2d at 794). The motion "should be overruled unless the trial court finds, beyond a reasonable doubt, that the plaintiff would be unable to prove any facts to support his claim." *Simpson*, 880 So.2d at 1050 (quoting *Palmer*, 656 So.2d at 796).

DISCUSSION

Whether the trial court erred in granting summary judgment for Shuqualak.

[7] ¶ 7. Spann argues that the trial court erred in finding that no genuine issue of material fact remained as to the negligence of Shuqualak. To survive summary judgment, Spann bears the burden of producing evidence sufficient to establish the existence of the conventional tort elements of duty, breach, causation, and damages.

¶ 8. Spann relies heavily upon *Keith v. Yazoo & M.V.R. Co.*, 168 Miss. 519, 151 So. 916 (1934). In *Keith*, a fire set on the railroad company's right-of-way caused dense smoke to pass over an adjacent highway. *Keith*, 168 Miss. at 522-23, 151 So. 916. The diminished visibility caused by the smoke led to an automobile accident. *Id.* at 23, 151 So. 916. The Court found that "a jury would be warranted in finding that the agent and employees of the railroad company might reasonably foresee that some injury might result to those who had the right to travel the public highway." *Id.* at 523-24, 151 So. 916. The Court noted that the driver had a right to be where he was at the time of the accident, and that a jury could infer that the railroad company was negligent in causing the smoke. *Id.* While the term "duty" is not discussed in *Keith*, the Court implied that the railroad had a duty not to obscure drivers' visibility in such a way as to create an un-

reasonably dangerous condition. *See id.* at 522-24, 151 So. 916.

***190** ¶ 9. We find that Shuqualak had a duty to refrain from creating an unreasonably dangerous condition that impeded drivers' vision. With duty established, we turn to the remaining issues of breach, causation, and damages.

[8] ¶ 10. Spann cites *Warren v. Allgood,* 344 So.2d 151 (Miss.1977), for support. In *Warren,* a motorist alleged that he was struck from behind as he slowed down while entering a cloud of dust on the highway. *Warren,* 344 So.2d. at 152. The motorist claimed that this cloud originated from a liming operation in a nearby field. *Id.* Conflicting evidence was presented at trial as to whether the cloud of dust actually was present at the time of the accident. *Id.* This Court affirmed the jury's verdict that the landowners were "not [ ] responsible in any way for the accident." *Id.*

¶ 11. Likewise, in the instant case, testimony conflicts as to whether the "dense fog, steam, and/or smoke" released from Shuqualak's plant actually was present at the time of the accident. Spann stated that the steam was present at the time of the accident. Shuqualak, while not admitting that the steam was present at that particular time, denied neither that its plant emitted steam nor the potential for this steam to drift across the roadway. Even if such conditions were present, a question of fact remains as to whether the steam caused an unreasonably dangerous condition.

[9][10][11] ¶ 12. Finally, "[f]or a particular damage to be recoverable in a negligence action, the plaintiff must show that the damage was proximately caused by the negligence. In order for an act of negligence to proximately cause the damage, the fact finder must find that the negligence was both the cause in fact and legal cause of the damage." *Glover v. Jackson State Univ.,* 968 So.2d 1267, 1277 (Miss.2007) (quoting Dobbs, The Law of Torts, § 180 at 443 (2000)). A defendant's negligence is the "cause-in-fact" where the fact-finder concludes that, but for the defendant's negligence, the injury would not have occurred. *Id.* Once established, the cause-in-fact also will be the legal cause of the damage "provided the damage is the type, or within the classification, of damage the negligent actor should reasonably expect (or foresee) to result from the negligent act." *Id.* (quoting Dobbs, The Law of Torts, § 180 at 443).

¶ 13. Both parties gave evidence that it was raining and cloudy on the day of the accident.[FN4] Whether the weather or the steam was the cause-in-fact of the accident is a question within the province of a jury. Furthermore, if cause-in-fact is established, Shuqualak might reasonably foresee that an automobile accident could occur. *See Keith,* 168 Miss. at 522-24, 151 So. 916.

FN4. In reviewing pictures taken at the scene of the accident, the trial court commented that it appeared to be raining or misting.

CONCLUSION

¶ 14. Because Shuqualak had a duty to refrain from causing an unreasonably dangerous condition for motorists, and because we find that genuine issues of material fact exist, we reverse summary judgment for Shuqualak and remand this case for trial.

¶ 15. **REVERSED AND REMANDED.**

DIAZ, P.J., EASLEY, CARLSON, DICKINSON, RANDOLPH AND ***191** LAMAR, JJ., CONCUR. GRAVES, J., CONCURS IN RESULT ONLY. SMITH, C.J., NOT PARTICIPATING.
Miss.,2008.
Spann v. Shuqualak Lumber Co., Inc.
990 So.2d 186

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H

Court of Appeals of Mississippi.
HANKINS LUMBER COMPANY, Appellant,
v.
Charles MOORE, Appellee.
No. 1999-CA-00322-COA.

July 18, 2000.
Rehearing Denied Oct. 3, 2000.
Certiorari Denied Dec. 29, 2000.

Motorist filed negligence action against lumber company for personal injuries arising from loose board hitting motorist on roadway due to alleged improper banding of lumber bundle on truck driven by independent contractor. The Circuit Court, Grenada County, C.E. Morgan III, J., entered $80,000 jury verdict for motorist and apportioned 30% damages to contractor and 70% to lumber company. Lumber company appealed. The Court of Appeals, Lee, J., held that: (1) whether accident arose from facts, which constituted succession of events, linked together as whole, and attributable to company, or whether contractor's failure to restack lumber was an independent cause of motorist's injury, were issues for jury; (2) evidence was sufficient to find that company did not act reasonably under circumstances to protect against foreseeable hazard; (3) company was liable notwithstanding the truck driver's status as independent contractor; and (4) damages award of $80,000 to injured motorist was not so unreasonable as to require remitter.

Affirmed.

West Headnotes

[1] Appeal and Error 30 ⇐934(1)

30 Appeal and Error
30XVI Review
30XVI(G) Presumptions
30k934 Judgment
30k934(1) k. In General. Most Cited Cases
In reviewing judgment notwithstanding the verdict (JNOV), appellate court is bound to review the evidence in the light most favorable to the non-moving party, who maintains that the evidence was sufficient to support the verdict.

[2] Judgment 228 ⇐185(2)

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185 Evidence in General
228k185(2) k. Presumptions and Burden of Proof. Most Cited Cases
In motion for judgment notwithstanding the verdict, non-movant must be given the benefit of all favorable inferences that may reasonably be drawn from the evidence.

[3] New Trial 275 ⇐68

275 New Trial
275II Grounds
275II(F) Verdict or Findings Contrary to Law or Evidence
275k67 Verdict Contrary to Evidence
275k68 k. In General. Most Cited Cases
Motion for a new trial may be proper in circumstances where a judgment notwithstanding the verdict (JNOV) should not have been granted.

[4] New Trial 275 ⇐72(1)

275 New Trial
275II Grounds
275II(F) Verdict or Findings Contrary to Law or Evidence
275k67 Verdict Contrary to Evidence
275k72 Weight of Evidence
275k72(1) k. In General. Most Cited Cases
Trial judge should order a new trial only when he is convinced that the verdict is contrary to the sub-

stantial weight of the evidence.

[5] Negligence 272 ⚿1693

272 Negligence
272XVIII Actions
272XVIII(D) Questions for Jury and Directed Verdicts
272k1693 k. Negligence as Question of Fact or Law Generally. Most Cited Cases

Negligence 272 ⚿1713

272 Negligence
272XVIII Actions
272XVIII(D) Questions for Jury and Directed Verdicts
272k1712 Proximate Cause
272k1713 k. In General. Most Cited Cases

Negligence 272 ⚿1717(1)

272 Negligence
272XVIII Actions
272XVIII(D) Questions for Jury and Directed Verdicts
272k1715 Defenses and Mitigating Circumstances
272k1717 Fault of Plaintiff or Third Persons
272k1717(1) k. In General. Most Cited Cases
(Formerly 272k1717)
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 to decide under proper instructions of the court as to the applicable principles of law involved.

[6] Negligence 272 ⚿1692

272 Negligence
272XVIII Actions
272XVIII(D) Questions for Jury and Directed Verdicts
272k1692 k. Duty as Question of Fact or Law Generally. Most Cited Cases

Negligence 272 ⚿1693

272 Negligence
272XVIII Actions
272XVIII(D) Questions for Jury and Directed Verdicts
272k1693 k. Negligence as Question of Fact or Law Generally. Most Cited Cases
Foreseeability and breach of duty are issues to be decided by the finder of fact once sufficient evidence is presented in a negligence case.

[7] Automobiles 48A ⚿245(50.1)

48A Automobiles
48AV Injuries from Operation, or Use of Highway
48AV(B) Actions
48Ak245 Questions for Jury
48Ak245(50) Proximate Cause of Injury
48Ak245(50.1) k. In General. Most Cited Cases

Automobiles 48A ⚿245(65)

48A Automobiles
48AV Injuries from Operation, or Use of Highway
48AV(B) Actions
48Ak245 Questions for Jury
48Ak245(50) Proximate Cause of Injury
48Ak245(65) k. Intervening Efficient Cause. Most Cited Cases
Whether accident arose from facts, which constituted succession of events, linked together as whole, and attributable to lumber company, due to improperly banding of lumber and refusal to assist truck driver in rebanding lumber on truck once driver called company for assistance, or whether driver's failure to restack lumber was an independent cause of motorist's injury were issues for jury in

motorist's action against company arising out of accident occurring when board fell from driver's truck and struck motorist's vehicle.

[8] Negligence 272 ⚖233

272 Negligence
272III Standard of Care
272k233 k. Reasonable Care. Most Cited Cases
Standard of care applicable in cases of alleged negligent conduct is whether the party charged with negligence acted as a reasonable and prudent person would have under the same or similar circumstances.

[9] Negligence 272 ⚖213

272 Negligence
272II Necessity and Existence of Duty
272k213 k. Foreseeability. Most Cited Cases

Negligence 272 ⚖233

272 Negligence
272III Standard of Care
272k233 k. Reasonable Care. Most Cited Cases
If a defendant's conduct is reasonable in light of the foreseeable risks, there is no negligence and no liability; defendant must only take reasonable measures to remove or protect against foreseeable hazards that he knows about or should know about in the exercise of due care.

[10] Automobiles 48A ⚖244(18)

48A Automobiles
48AV Injuries from Operation, or Use of Highway
48AV(B) Actions
48Ak241 Evidence
48Ak244 Weight and Sufficiency
48Ak244(2) Negligence
48Ak244(18) k. Articles Projecting, Falling, or Thrown from Vehicles. Most Cited Cases
Evidence was sufficient to find that lumber company did not act reasonably under circumstances to protect against foreseeable hazard, and breached duty to motorist injured when his vehicle was struck by board that fell from contractor's truck, despite claim that contractor's failure to restack lumber was independent cause, considering contractor's circumstances and ability to restack lumber on own, where lumber facility was less than mile away from place of contractor's telephone call, yet company employee refused to assist contractor, and told him to go back to another facility 50 miles away to reband load that employee knew was not safe.

[11] Automobiles 48A ⚖245(23)

48A Automobiles
48AV Injuries from Operation, or Use of Highway
48AV(B) Actions
48Ak245 Questions for Jury
48Ak245(2) Care Required and Negligence
48Ak245(23) k. Articles Projecting, Falling, or Thrown from Vehicle. Most Cited Cases
Whether lumber company was no longer responsible for lumber load once truck driver, an independent contractor, loaded his truck and left lumberyard was jury issue, which depended on whether lumber company should have foreseen that conditions were ripe for type of accident that occurred when board fell from truck and struck another vehicle, after driver called for help to reband load, and whether company breached duty at that time in refusing driver's request.

[12] Negligence 272 ⚖1011

272 Negligence
272XVII Premises Liability
272XVII(B) Necessity and Existence of Duty
272k1011 k. Ownership, Custody and Control. Most Cited Cases
(Formerly 255k318(1) Master and Servant)
Principal who retains control of a part of the work

entrusted to an independent contractor is subject to liability for physical harm to those to whom he owes a duty to exercise reasonable care caused by his failure to exercise his control with reasonable care.

[13] Automobiles 48A ⚿180

48A Automobiles
48AV Injuries from Operation, or Use of Highway
48AV(A) Nature and Grounds of Liability
48Ak180 k. Articles Projecting, Falling, or Thrown from Vehicle. Most Cited Cases

Automobiles 48A ⚿194(1)

48A Automobiles
48AV Injuries from Operation, or Use of Highway
48AV(A) Nature and Grounds of Liability
48Ak183 Persons Liable
48Ak194 Acts of Independent Contractors
48Ak194(1) k. In General. Most Cited Cases
Truck driver's status as independent contractor did not preclude lumber company from being liable for injury to a motorist, when board fell off truck and struck motorist's vehicle, since company was in control of banding lumber into bundles and loading bundles onto contractor's truck and had duty to exercise reasonable care.

[14] Damages 115 ⚿127.33

115 Damages
115VII Amount Awarded
115VII(B) Injuries to the Person
115k127.32 Back and Spinal Injuries in General
115k127.33 k. In General. Most Cited Cases
(Formerly 115k130.3)
Damages award of $80,000 to motorist injured in motor vehicle accident was not so unreasonable as to require remittitur, though motorist's actual damages were $9,000, in light of evidence as a whole, including medical testimony that motorist's back problems could recur.

[15] Damages 115 ⚿208(1)

115 Damages
115X Proceedings for Assessment
115k208 Questions for Jury
115k208(1) k. In General. Most Cited Cases

New Trial 275 ⚿74

275 New Trial
275II Grounds
275II(F) Verdict or Findings Contrary to Law or Evidence
275k74 k. Amount of Recovery in General. Most Cited Cases
It is the province of the jury to award the amount of damages, and the award will not be set aside unless it is so unreasonable in amount as to strike mankind at first blush as being beyond all measure, unreasonable in amount and outrageous.
***461** Thomas Henry Freeland IV, Oxford, Attorney for Appellant.

Robert J. Dambrino III, Grenada, Attorney for Appellee.

BEFORE McMILLIN, C.J., LEE, AND THOMAS, JJ.

LEE, J., for the Court:

¶ 1. The appellant, Hankins Lumber Company, appeals from the Circuit Court of Grenada County an $80,000 jury verdict which apportioned 70% of the damages to it for injuries sustained by the appellee, Charles Moore, when part of a load of lumber being transported for Hankins Lumber by Carl Morris fell from Morris's truck. The jury apportioned 30% of the damages to Morris. Finding no reversible error,

we affirm the judgment of the lower court.

FACTS

¶ 2. On Friday, October 1, 1993 Carl Morris was traveling on a Grenada County highway in his flatbed truck which was loaded with thirteen bundles of lumber, each bundle containing 96 boards measuring 2 x 8 x 14 feet long. A board from Morris's load hit the hood of Charles Moore's pickup truck as he passed it headed in the opposite direction and shattered the windshield. Though the board itself did not hit Moore, he sustained cuts to his face and neck and later complained of back pain. Moore claimed $7,156.03 in medical ***462** expenses and $1,600 in damage to his truck as a result of the accident.

¶ 3. At the time of the accident Morris was a partner in Black Magic Trucking Company and had contracted with Hankins Lumber to haul a load of lumber from its sawmill in Sturgis to Ashburn, Georgia. It was the responsibility of Hankins Lumber to secure the bundles of lumber together and load them on to Morris's truck. In so doing it utilized a manual bander and placed two steel bands on every bundle, one band on each end of each bundle, and loaded the bundles to the truck with a forklift. It was Morris's responsibility to then secure the banded bundles to his truck utilizing nylon straps. After so doing, Morris then left the lumberyard and, after pulling over just outside the Sturgis city limits for the customary rechecking of his load, proceeded for his destination. Morris chose a circuitous route via his hometown of Holcomb, where he intended to spend the night prior to the delivery of his load on Monday in Ashburn, Georgia.

¶ 4. Morris testified that when he was just outside of Winona he stopped for a school bus and lumber shifted and came out of the top bundle. He stopped and picked it up with the help of two people that he hired. As he continued on to Elliott he noticed that the boards were "walking" back out of the bundle, and he decided to stop at nearby Morgan's Grocery to call the Elliott facility of Hankins Lumber which was less than a half mile away. By this time it was almost 5:00 p.m. on Friday afternoon. Morris said that he wanted the load rebanded, that he told James Jones at the Elliott facility that the bands were loose and that "one had slid off." Morris said that Jones told him to tie the load down and ease on. Jones, on the other hand, testified he told Morris to restack and restrap the lumber and then to move on. Jones said he told Morris that if he wanted his load rebanded that he needed to go back to Sturgis, which was 40-50 miles away, since that is where he loaded. Jones acknowledged that the Elliott facility had the necessary banding apparatus for rebanding Morris's load. Morris said that when Jones would not reband the load, he pushed the boards back and tightened his straps prior to continuing his journey. Two miles down the road 20-25 boards came out of the middle of the top bundle, one of which hit Moore's truck.

¶ 5. Jones testified that he was aware of bundles having come apart or "telescoping" from the middle of a bundle when the truck transporting the lumber had come to a quick stop or "broke fast". He said the bundle would shift and lumber from the middle would slide out. On those occasions Jones had in the past gone out to help the truck driver pick up the lumber and restack it, but the lumber was not rebanded. The testimony of Bill Peden, safety director for Hankins, disclosed that Hankins Lumber had in the past rebanded off-site where bands had come off of lumber on a railroad car. He said that Hankins could not have rebanded Morris's load because Hankins's insurance policy did not provide coverage for employees injured while physically working on another's truck.

¶ 6. Morris testified that neither band was on the top bundle when he got to Moore. Mr. Peden testified that as a general rule, bundles under 12 feet long are banded with two bands and bundles over twelve feet long are banded with three steel bands, one band on each end and one in the middle. Morris said that newly cut lumber is slick and must be ban-

ded tightly in order to be properly secured. He testified that the bands did not break but slid off because they were not banded tightly. He also said that the purpose of the bands is to hold the bundle together and that the purpose of the straps is to hold the load to the trailer. It was his absolute opinion that the problem was in the banding, not the strapping.

¶ 7. Peden said that the amount of tension on the bands depends on the amount of tension applied by the person banding, ***463** that there is no standard for tension. He also stated that the purpose of the banding is to facilitate the movement of the bundles around the yard, not to keep individual pieces of lumber from falling out of the bundle. According to Peden, there is no physical inspection for tightness; however, the bundles are visibly inspected by the forklift driver and if the bundles are not properly banded, they cannot be moved with a forklift without falling apart. On a typical bundle the steel bands are tight enough to prevent sliding up and down and may actually cause indentions into the lumber.

ISSUE AND DISCUSSION

DID THE TRIAL COURT ERR IN FAILING TO GRANT HANKINS LUMBER A JNOV OR, IN THE ALTERNATIVE, A NEW TRIAL?

Standard of Review

[1] ¶ 8. The standard of review for determining whether a trial court should have granted a JNOV is enunciated in *Jesco, Inc. v. Whitehead,* 451 So.2d 706, 714 (Miss.1984) (Robertson, J., specially concurring):

> The motion for j.n.o.v. tests the legal sufficiency of the evidence supporting the verdict. It asks the Court to hold, as a matter of law, that the verdict may not stand. Where a motion for j.n.o.v. has been made, the trial court must consider all of the evidence-not just evidence which supports the non-movant's case-in the light most favorable to the party opposed to the motion. The non-movant must also be given the benefit of all favorable inferences that may reasonably be drawn from the evidence. If the facts and inferences so considered point so overwhelmingly in favor of the movant that reasonable men could not have arrived at a contrary verdict, granting the motion is required. On the other hand, if there is substantial evidence opposed to the motion, that is, evidence of such quality and weight that reasonable and fairminded men in the exercise of impartial judgment might reach different conclusions, the motion should be denied and the jury's verdict allowed to stand. See, e.g., *General Tire and Rubber Co. v. Darnell,* 221 So.2d 104, 105 (Miss.1969); *Paymaster Oil [Mill] Co. v. Mitchell,* 319 So.2d 652, 657 (Miss.1975); *City of Jackson v. Locklar,* 431 So.2d 475, 478 (Miss.1983).

Jesco, Inc., 451 So.2d at 714. We are thus bound to review the evidence in the light most favorable to Moore, the non-moving party, who maintains that the evidence was sufficient to support the verdict which apportioned 70% for Moore's injury to Hankins Lumber.

[2] ¶ 9. A review of the record and trial transcript shows that there is substantial evidence of such quality and weight that reasonable men in the exercise of impartial judgment might reach different conclusions regarding the negligence of Hankins Lumber. In addition, Moore, the non-movant, must be given the benefit of all favorable inferences that may reasonably be drawn from the evidence. We do not find that these facts and inferences so considered point so overwhelmingly in favor of Hankins Lumber that reasonable men could not have arrived at a contrary verdict, thereby requiring that the motion must be granted, *Jesco, Inc.,* 451 So.2d at 714, and therefore find that the motion was properly denied.

[3][4] ¶ 10. We recognize that a motion for a new trial may be proper in circumstances where a JNOV

should not have been granted. *Larkin v. Perry,* 427 So.2d 138, 138-39 (Miss.1983). A trial judge should order a new trial only when he is convinced that the verdict is contrary to the substantial weight of the evidence. *Adams v. Green,* 474 So.2d 577, 582 (Miss.1985). The standard for reviewing the action of a trial court in the granting or refusing of a new trial was set out in the case of *Dorr v. Watson,* 28 Miss. 383 (1854). That case states that though it is ***464** within the sound discretion of the court below whether to grant a new trial, if a new trial is refused it may be reversed when the denial of the motion is manifestly wrong. *Id.* at 395. In reviewing the evidence presented at the trial in this case, we cannot say that the verdict was against the substantial weight of the evidence and therefore cannot find that the denial of the motion for a new trial was manifest error.

Negligence & Questions of Fact

[5][6] ¶ 11. 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. *American Creosote Works of Louisiana v. Harp,* 215 Miss. 5, 12, 60 So.2d 514, 517 (1952). These questions are for the jury to decide under proper instructions of the court as to the applicable principles of law involved. *Smith v. Walton,* 271 So.2d 409, 413 (Miss.1973). Foreseeability and breach of duty are also issues to be decided by the finder of fact once sufficient evidence is presented in a negligence case. *American Nat. Ins. Co. v. Hogue,* 749 So.2d 1254, 1259 (Miss.Ct.App.2000).

[7][8][9] ¶ 12. Hankins Lumber argues that the proximate cause of the accident was Morris's failure to restack the lumber once he knew that his load was unstable. The standard of care applicable in cases of alleged negligent conduct is whether the party charged with negligence acted as a reasonable and prudent person would have under the same or similar circumstances. If a defendant's conduct is reasonable in light of the foreseeable risks, there is no negligence and no liability. A defendant must only take reasonable measures to remove or protect against foreseeable hazards that he knows about or should know about in the exercise of due care. *Donald v. Amoco Prod. Co.,* 735 So.2d 161, 174 (Miss.1999).

[10] ¶ 13. It is a question of fact for the jury to determine whether Hankins Lumber acted reasonably under the circumstances to protect against a foreseeable hazard after Morris called the Hankins Lumber facility in Elliott from Morgan's Grocery. Additionally, it is for the jury to determine if the conduct of Hankins Lumber at that time was reasonable in light of the foreseeable risks, taking into consideration Morris's circumstances and his ability to restack the lumber on his own. If it is found that it was reasonable, then Hankins Lumber was not negligent and it should not have been apportioned liability for damages. The evidence indicated that the Hankins Lumber facility in Elliott was less than a mile away when Morris stopped to call. Jones admitted that he told Morris to go back to the facility in Sturgis, 50 miles away, rather than to the Elliott facility, to reband a load that he knew was not safe. We find that the evidence was sufficient to support the verdict and that the verdict was not contrary to the substantial weight of the evidence in that there was ample evidence presented from which the jury could conclude that Hankins Lumber did not act prudently under the circumstances.

What was the proximate cause of Moore's injury?

¶ 14. An often quoted passage regarding proximate cause is found in *Mississippi City Lines v. Bullock,* 194 Miss. 630, 13 So.2d 34, 36 (1943):

> Although one may be negligent, yet if another, acting independently and voluntarily, puts in motion another and intervening cause which efficiently thence leads in unbroken sequence to the injury, the latter is the proximate cause and the original negligence is relegated to the position of a remote and, therefore, a nonactionable cause.

> Negligence which merely furnishes the condition or occasion upon which injuries are received, but does not put in motion the agency by or through which the injuries are inflicted, is not the proximate cause thereof. The question is, did the facts *465 constitute a succession of events so linked together as to make a natural whole, or was there some new and independent cause intervening between the alleged wrong and the injury?

Id., 13 So.2d at 36.

[11] ¶ 15. Hankins Lumber cites several cases in support of his argument that it was Morris's failure to restack the lumber which was the proximate cause of the accident, not the alleged negligent banding of the lumber by Hankins Lumber. In *Tombigbee Elec. Power Ass'n v. Gandy,* 216 Miss. 444, 62 So.2d 567 (1953), judgment was for the plaintiff where there was evidence that the power company was negligent in the placement of power lines over the roof of the plaintiff's building in violation of a safety code, but there was no evidence that the placement of the power lines had caused the fire. The court reversed for failure to grant a JNOV. *Id.*, 216 Miss. at 457, 62 So.2d 567. In that case the plaintiff relied on an inference that the insulation on the wires had deteriorated to such an extent as to expose the wire, notwithstanding the fact that there was not one word of testimony regarding the insulation of the wires. *Tombigbee Elec. Power Ass'n,* 216 Miss. at 452, 62 So.2d 567. We find this case distinguishable for several reasons. First, there was ample evidence showing that Morris's load was improperly banded and that it could have been the cause of the accident. Second, once Morris became aware that his logs were loose and called Hankins Lumber in Elliott who refused to help, it was for the jury to determine if the conduct of Hankins Lumber at that time was reasonable in light of the foreseeable risks. It is within the province of the jury to decide whether these facts constitute a succession on events, linked together as a whole, or whether Morris's failure to restack the lumber was an independent cause of the injury. *Mississippi City Lines,* 13 So.2d at 36. If the jury found that it was reasonable, then Hankins Lumber should not have been found negligent and should not have been apportioned liability for damages. Hankins Lumber asserts that it was out of the picture once Morris, an independent contractor, loaded his truck and left the lumberyard. Whether this is so is a jury issue and depends on whether Hankins Lumber should have foreseen that conditions were ripe for an accident such as Morris's when Morris called and whether it breached a duty at that time. These are issues for the finder of fact once sufficient evidence is presented in a negligence case. *American Nat. Ins. Co.,* 749 So.2d at 1259. We find that the evidence was adequate to support the jury's conclusion that Hankins Lumber did not act reasonably or prudently under the circumstances.

¶ 16. The appellant also cites *Pargas of Taylorsville, Inc. v. Craft,* 249 So.2d 403, 407 (Miss.1971), to support its argument that the proximate cause of the accident was Morris's failure to restack the lumber. In that case the defendant maintained a propane gas facility near a public highway. The facility was not enclosed by a fence as called for by the state's regulations. The plaintiff's vehicle was hit by another vehicle and was propelled into the propane gas facility, causing a fire in which the plaintiff was severely burned. The verdict was for the plaintiff and Pargas appealed, assigning as error the refusal of the court to grant a JNOV. The supreme court reversed, stating that Pargas's negligence was passive and did not proximately contribute to the damage. *Id.* at 409. This case is easily distinguishable from the case at bar in that the evidence showed that regardless of the fence and other factors discussed in the case, the accident and the injuries would have occurred. The accident was clearly an independent cause intervening between the alleged wrong and the injury. *Mississippi City Lines,* 13 So.2d at 36. Again, it is a question of fact whether improper banding caused the accident and whether Hankins Lumber should have foreseen that conditions were ripe for an accident when Morris called and whether it breached a duty to Morris at that time. It is

within the province of the jury ***466** to decide whether these facts constitute a succession of events, linked together as a whole, or whether Morris's failure to restack the lumber was an independent cause of the injury. *Mississippi City Lines,* 13 So.2d at 36; *American Nat. Ins. Co.,* 749 So.2d at 1259.

¶ 17. Appellant also finds relevant *E.I. DuPont de Nemours & Co. v. Ladner,* 221 Miss. 378, 73 So.2d 249 (1954). In that case Du Pont sold a chemical to Magnolia Soy Products Company which was used in a by-product and sold for animal feed. The chemical had many legitimate uses but Du Pont later learned that the chemical was poisonous to cows and warned Magnolia not to sell the feed for cows. Magnolia continued to sell the feed and Ladner lost several cows after using the feed. Ladner settled with Magnolia, and a jury found for Ladner against Du Pont. On appeal the court reversed, finding that Magnolia's negligence was an independent intervening act which broke the chain of causation, making any negligence of Du Pont inoperative and the negligence of Magnolia the sole proximate cause of Ladner's injury. *Id.* at 403, 73 So.2d 249. The opinion of the court stated that if Du Pont were to be found liable, the liability must be predicated on its failure to exercise due care in warning Magnolia of the dangers incident to the use of the chemical. *Id.* at 400, 73 So.2d 249. The application of this rationale to the case at bar would require a determination of whether Hankins Lumber exercised due care when it responded to Morris's call for help when he was in Elliott. It is within the province of the jury to decide whether these facts constitute a succession of events, linked together as a whole, or whether Morris's failure to restack the lumber was an independent cause of the injury. *Mississippi City Lines,* 13 So.2d at 36; *American Nat. Ins. Co.,* 749 So.2d at 1259.

¶ 18. Hankins Lumber also asserts that it should not have been required to anticipate that Morris might continue his journey after failing to properly secure his load and cites *Capitol Tobacco & Specialty Co. v. Runnels,* 221 So.2d 703 (Miss.1969), in support. In that case the court found that a driver headed north at a high rate of speed was not required to anticipate that a car would drive across the median and jump into the highway causing a collision. Again, the question is whether it was reasonable for Hankins Lumber to have foreseen that conditions were ripe for an accident when Morris called and whether it breached a duty at that time. These are issues for the finder of fact. *American Nat. Ins. Co.,* 749 So.2d at 1259.

Is Hankins responsible to Morris, an independent contractor?

[12][13] ¶ 19. We turn to the general law of torts to determine the duties of an employer toward an independent contractor under the circumstances presented in this case. A principal who retains control of a part of the work entrusted to an independent contractor is subject to liability for physical harm to those to whom he owes a duty to exercise reasonable care caused by his failure to exercise his control with reasonable care. *Moser v. Texas Trailer Corp.,* 623 F.2d 1006, 1015 (5th Cir.1980). The fact that Morris was acting as an independent contractor does not thus automatically relieve Hankins Lumber of liability. Since Hankins Lumber was in control of banding the lumber into bundles and loading the bundles on to Morris's truck, it had a duty to exercise reasonable care and is subject to liability for harm caused by any failure to use reasonable care in banding and loading the bundles.

Remittitur

[14][15] ¶ 20. Though Moore incurred less than $9,000 in actual damages, the jury awarded $80,000 to him, which Hankins Lumber claims to be excessive. It is the province of the jury to award the amount of damages, and the award will not be set aside unless it is so unreasonable in amount "as to strike mankind at first blush as being beyond all measure, unreasonable in amount and outrageous."

467Harvey v. Wall,* 649 So.2d 184, 187 (Miss.1995). We do not find this to be the case, in light of the evidence as a whole, including the medical testimony that Moore's back problems could recur. We therefore do not believe that remittitur is justified.

¶ 21. Having found no reversible error, we affirm.

¶ 22. THE JUDGMENT OF THE GRENADA COUNTY CIRCUIT COURT IS AFFIRMED. STATUTORY DAMAGES AND INTEREST ARE AWARDED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.

McMILLIN, C.J., KING AND SOUTHWICK, P.JJ., BRIDGES, IRVING, PAYNE, AND THOMAS, JJ., CONCUR. MOORE AND MYERS, JJ., NOT PARTICIPATING.
Miss.App.,2000.
Hankins Lumber Co. v. Moore
774 So.2d 459

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Court of Appeals of Mississippi.
Marilyn HOUSTON, Appellant,
v.
Bennett V. YORK and M & N Builders, Inc., Appellees.
No. 97-CA-01415-COA.

May 18, 1999.
Rehearing Denied Jan. 18, 2000.
Certiorari Denied April 27, 2000.

Tenant brought action against landlord and contractor for negligent design and construction of a fireplace mantle and breach of the implied warranty of habitability, for injuries she sustained when mantle fell on her. The Circuit Court, Lafayette County, R. Kenneth Coleman, J., granted directed verdict in favor or defendants. Tenant appealed. The Court of Appeals, Thomas, P.J., held that (1) issue of whether defendants were negligent, under implied warranty of habitability, in mantle's design, construction, and securement, or lack thereof, was jury question, and (2) issue of whether contractor was negligent in designing and constructing fireplace mantle was jury question.

Reversed and remanded.

West Headnotes

[1] Appeal and Error 30 ⚖893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In General. Most Cited Cases
On appeal, appellate court conducts a de novo standard of review of motions for directed verdict.

[2] Appeal and Error 30 ⚖927(7)

30 Appeal and Error
30XVI Review
30XVI(G) Presumptions
30k927 Dismissal, Nonsuit, Demurrer to Evidence, or Direction of Verdict
30k927(7) k. Effect of Evidence and Inferences Therefrom on Direction of Verdict. Most Cited Cases
When deciding whether the granting of a motion for directed verdict was proper by the lower court, appellate court considers the evidence in the light most favorable to the non-moving party and gives that party the benefit of all favorable inferences that may be reasonably drawn from the evidence presented at trial.

[3] Trial 388 ⚖142

388 Trial
388VI Taking Case or Question from Jury
388VI(A) Questions of Law or of Fact in General
388k142 k. Inferences from Evidence. Most Cited Cases
If the favorable inferences have been reasonably drawn in favor of the non-moving party so as to create a question of fact from which reasonable minds could differ, then the motion for directed verdict should not be granted and the matter should be given to the jury.

[4] Landlord and Tenant 233 ⚖169(11)

233 Landlord and Tenant
233VII Premises, and Enjoyment and Use Thereof
233VII(E) Injuries from Dangerous or Defective Condition
233k169 Actions for Injuries from Negligence
233k169(11) k. Questions for Jury. Most Cited Cases

Negligence 272 ⚿1710

272 Negligence
272XVIII Actions
272XVIII(D) Questions for Jury and Directed Verdicts
272k1705 Premises Liability
272k1710 k. Liabilities Relating to Construction, Demolition and Repair. Most Cited Cases
Issue of whether defendants were negligent, under implied warranty of habitability, in mantle's design, construction, and securement, or lack thereof, was jury question in action brought by tenant against landlord and contractor after she was injured when fireplace mantle fell on her.

[5] Landlord and Tenant 233 ⚿125(1)

233 Landlord and Tenant
233VII Premises, and Enjoyment and Use Thereof
233VII(A) Description, Extent, and Condition
233k125 Tenantable Condition of Premises
233k125(1) k. In General. Most Cited Cases
Under the implied warranty of habitability doctrine, the landlord/owner warrants to the tenant that the structure was built in a workmanlike manner and is suitable for habitation.

[6] Landlord and Tenant 233 ⚿125(1)

233 Landlord and Tenant
233VII Premises, and Enjoyment and Use Thereof
233VII(A) Description, Extent, and Condition
233k125 Tenantable Condition of Premises
233k125(1) k. In General. Most Cited Cases
The implied warranty of habitability has shifted a greater burden of responsibility to the landlord/owner requiring him to use reasonable care to provide safe premises fit for human habitation through inspecting, maintaining, and repairing the residential lease unit.

[7] Landlord and Tenant 233 ⚿164(6)

233 Landlord and Tenant
233VII Premises, and Enjoyment and Use Thereof
233VII(E) Injuries from Dangerous or Defective Condition
233k164 Injuries to Tenants or Occupants
233k164(6) k. Liability of Landlord as Dependent on Knowledge of Defects. Most Cited Cases

Landlord and Tenant 233 ⚿168(.5)

233 Landlord and Tenant
233VII Premises, and Enjoyment and Use Thereof
233VII(E) Injuries from Dangerous or Defective Condition
233k168 Contributory Negligence
233k168(.5) k. In General. Most Cited Cases
Tenant is not completely removed from the responsibility of bringing known defects in need of repair to the landlord's attention or making a reasonable inspection of the leased premises for defects or dangerous conditions which are reasonably detectable to the average person.

[8] Landlord and Tenant 233 ⚿164(1)

233 Landlord and Tenant
233VII Premises, and Enjoyment and Use Thereof
233VII(E) Injuries from Dangerous or Defective Condition
233k164 Injuries to Tenants or Occupants
233k164(1) k. In General; Defective or Dangerous Conditions. Most Cited Cases

Landlord and Tenant 233 ⚿168(.5)

233 Landlord and Tenant
233VII Premises, and Enjoyment and Use Thereof
233VII(E) Injuries from Dangerous or Defective Condition
233k168 Contributory Negligence
233k168(.5) k. In General. Most Cited Cases
Making a landlord subject to tort liability merely requires him to act as a reasonable landlord under the circumstances of the case; the tenant would still be required to show duty, breach, causation, and damages, and the landlord would be entitled to raise the standard tort defenses, such as contributory negligence, unforeseeability or intervening cause.

[9] Landlord and Tenant 233 ⚖169(11)

233 Landlord and Tenant
233VII Premises, and Enjoyment and Use Thereof
233VII(E) Injuries from Dangerous or Defective Condition
233k169 Actions for Injuries from Negligence
233k169(11) k. Questions for Jury. Most Cited Cases
Issue of whether contractor was negligent in designing and constructing fireplace mantle, was jury question in action brought by tenant against landlord and contractor after she was injured when fireplace mantle fell on her.

[10] Contracts 95 ⚖198(1)

95 Contracts
95II Construction and Operation
95II(C) Subject-Matter
95k197 Buildings and Other Works
95k198 In General
95k198(1) k. In General. Most Cited Cases
Implied in every building contract, is the notion that the work will be performed in a skillful, careful, diligent and good workmanlike manner; conducting a reasonable inspection is understood to be included in this notion.

*496 David G. Hill, David L. Minyard, Maurie L. White, Oxford, Attorneys for Appellant.

Paul M. Moore, Jr., Calhoun City, T. Swayze Alford, Oxford, Attorneys for Appellees.

BEFORE THOMAS, P.J., LEE, AND SOUTHWICK, JJ.

THOMAS, P.J., for the Court:

¶ 1. Marilyn Houston appeals from the Lafayette County Circuit Court upon grant of directed verdict for Bennett V. York and M & N Builders, Inc. at the conclusion of the her case. Three days of trial, which began on September 15, 1997, had been held. Houston's complaint, filed on September 9, 1992, asserted several claims against York and M & N Builders, two of which were the negligent design and construction of a fireplace mantle and breach of the implied warranty of habitability, both of which, as alleged in the complaint, resulted in personal injury to her person when the mantle fell and struck her in the head on March 8, 1989. From the circuit court's grant of a directed verdict in favor of York and M & N, Houston assigns the following assignment of error:

I. WHETHER THE CIRCUIT COURT ERRED IN GRANTING A MOTION FOR DIRECTED VERDICT FOR THE DEFENDANTS.

Finding error, we reverse and remand for a new trial.

FACTS

¶ 2. In January 1989, Marilyn Houston leased an apartment in a duplex unit owned by Bennett York and located in Oxford, Mississippi. Houston, at the time *497 of the lease and the injury, was a graduate student at the University of Mississippi pursuing a masters degree in southern studies and was employed as a project coordinator with the African-

American studies program. On March 8, 1989, Marilyn Houston was struck in the head by an unsecured fireplace mantle after it fell from its rest atop protruding bricks at both ends of the fireplace while she and her son, Kevin, were attempting to start a fire. Houston was unable to lift a large log alone, so she asked Kevin for assistance. As Kevin bent down to lift one end of the log while Houston readied at the other end, Kevin placed his left hand on the mantle as a brace. The mantle then fell and struck Houston on the head. The mantle was constructed of laminated two by fours nailed together to form a single beam and was not attached in any manner to the fireplace itself.

¶ 3. After the mantle beam fell and struck Houston on the head, Kevin assisted his mother to the couch and called an ambulance. Houston was taken to Lafayette County Hospital, where she was hospitalized for two and a half days as a result of the closed head injury she received. In the weeks that followed her accident, Houston continued to complain of headaches and vision problems as well as difficulty in verbal communication and object identification. Houston eventually returned to work and her academic studies at the University of Mississippi but continued to experience headaches and communication difficulties.

¶ 4. After her studies at the University of Mississippi were completed, Houston moved to New York City to pursue a Ph.D. in anthropology at New York University after receiving a scholarship from the National Science Foundation. While pursuing her Ph.D. at N.Y.U. Houston continued to experience learning difficulties and sought help through the Student Disability Services Office, who provided her with note takers and mechanical readers to help aid in her studies. Houston later contacted a head trauma specialist, Dr. David Kay, to inquire about treatment for her learning difficulties. Doctor Kay referred Houston to VESID, a state funded vocational rehabilitation program in New York. Houston's condition was confirmed under VESID's disability guidelines, and she was referred to Dr. Owen Kieran, M.D. of the New York University Medical Center. VESID funded her treatment with Dr. Kieran at the Rusk Institute of Rehabilitation Medicine.

¶ 5. Dr. Kieran opined that Houston's learning difficulties were attributable to the minor closed head injury she suffered on March 8, 1989. Dr. Kieran testified that the blow the Houston's head caused microscopic changes in her brain including the stretching and tearing of axons and neurofibril. Dr. Kieran also opined that Houston suffers from permanent cognitive brain injury which adversely affects her higher brain functions. Dr. Kieran attributes Houston's learning disabilities to the March 8, 1989 injury. In an effort to combat her learning deficits, Houston, with the aid of the Rusk Institute, was able to develop learning strategies which have increased her ability to function in her academic profession. With the aid of the newly learned strategies, Houston eventually received her Ph.D. from New York University in May 1997 and was shortly hired thereafter as a professor at South Carolina State University and then later, in her current position, at the University of South Carolina as a professor as well. Despite Houston's apparent success, she alleges that as a result of the closed head injury she received in March 1989, she will never attain her previous potential as an academician in her chosen profession. Houston alleges that she will always function on a reduced level of academic proficiency in her field. Houston attributes her diminished capacity to the March 1989 closed head injury.

¶ 6. Houston filed her complaint on September 9, 1992, alleging negligence in the design and construction of the fireplace ***498** mantle which fell and struck her in the head on in March 1989. Following discovery, Houston filed to amend her complaint to reflect suit only against York and M & N Builders on September 16, 1994, and an order was entered to reflect the same on October 25, 1994.

¶ 7. Bennett York is a dentist in Hattiesburg, Mississippi and a commercial and residential real estate

developer. In 1983, York planned to expand his real estate developments into Oxford, Mississippi. York's son would soon be attending the University of Mississippi, so York decided to build several duplexes in Oxford to provide housing for his son and to generate income. York was referred to Rex Marshall, a building contractor and owner of M & N Builders, by a man named Stanton Howard whom York had known for several years. Howard advised York that he had worked for Marshall on several jobs and considered Marshall an experienced contractor. Based on Howard's recommendation, York hired Marshall to construct the duplexes.

¶ 8. Marshall traveled to Hattiesburg to meet with York and to inspect some of York's existing duplexes to get an idea of how York wanted the Oxford duplexes built. Marshall was also provided a basic floor plan from which to construct the duplexes as well as a list of the specifications for their construction. In essence, Marshall was to construct the Oxford duplexes along a similar design as those owned by York in Hattiesburg without the aid of any detailed architectural plans. Marshall was to construct the duplexes based on his experience and knowledge as a contractor provided they met the general floor plan and the specifications provided by York. The specifications for the construction of the fireplace mantle were not included in the specifications provided by York; its construction and design were left to Marshall's discretion with the exception of the actual location of the fireplace.

¶ 9. Marshall admitted, as did York, that the fireplace mantle was not of a good design due to the mantle not being attached to the fireplace in a secure fashion. During the construction of the duplexes, York made sporadic trips from Hattiesburg to Oxford to inspect Marshall's progress. These inspections consisted of a basic "walk through" of the construction site. Marshall also testified that the construction of the fireplace masonry work was subcontracted to a man named Carnell but that he personally did not know who actually placed the mantle atop the protruding bricks. Both Marshall and York deny ever having inspected the completed fireplace mantle.

¶ 10. Houston offered the expert testimony of Kirk Rosenhan, an expert in the general field of engineering. Rosenhan testified that the mantle was not attached in any manner to the bricks of the fireplace. Rosenhan opined that due to the co-efficient of friction between the smooth boards of the mantle and the bricks of the fireplace, the mantle was susceptible to dislodgement with very little force. Rosenhan also testified that the mantle could have very easily been secured to the bricks and that the materials were readily available at many hardware stores. Rosenhan further opined that given the height and weight of the mantle, a fall from its height on the fireplace was well past the threshold limit for damage to a human skull. In short, Rosenhan opined that the mantle was not constructed or secured in a manner consistent with the reasonable methods available in the construction and securement of the fireplace mantle.

¶ 11. After presenting three days of evidence and testimony, Houston rested her case. York and M & N Builders then moved for a directed verdict, which the trial court granted in favor of both defendants. Without any degree of specificity, the trial court concluded that there was insufficient evidence presented to create an issue in need of submission to the jury. We hold otherwise.

***499** ANALYSIS

I.

WHETHER THE CIRCUIT COURT ERRED IN GRANTING A MOTION FOR DIRECTED VERDICT FOR THE DEFENDANTS.

[1][2][3] ¶ 12. On appeal, we conduct a *de novo* standard of review of motions for directed verdict. When deciding whether the granting of a motion for

directed verdict was proper by the lower court, this Court considers the evidence in the light most favorable to the non-moving party and gives that party the benefit of all favorable inferences that may be reasonably drawn from the evidence presented at trial. *Sperry-New Holland, a Div. of Sperry Corp. v. Prestage,* 617 So.2d 248, 252 (Miss.1993). If the favorable inferences have been reasonably drawn in favor of the non-moving party so as to create a question of fact from which reasonable minds could differ, then the motion for directed verdict should not be granted and the matter should be given to the jury. *Id.; Pace v. Financial Sec. Life of Mississippi,* 608 So.2d 1135, 1138 (Miss.1992); *Vines v. Windham,* 606 So.2d 128, 131 (Miss.1992).

[4] ¶ 13. In arguing her appeal, Houston has asked this Court to extend the so called *Whatley* standard of care, *Whatley v. Delta Brokerage & Warehouse Co.,* 248 Miss. 416, 425, 159 So.2d 634, 637 (1964) , to personal injury suits between a tenant and the landlord/owner wherein the injury results from the negligent design or construction of residential rental property buildings or structures. *Whatley* involved a negligence action brought by an independent contractor's employee to recover damages from the owner of the site for injuries sustained when a grain bin constructed by the contractor collapsed. The defendants, Delta Brokerage & Warehouse Company, contracted Bates Metal & Supply Company to construct six large storage bins forty-eight feet high and four smaller bins of the same height. Delta provided Bates with the specifications from which to create to plans. Delta was required to furnish Bates with the concrete foundation upon which the bins were to be constructed. Neither Delta nor Bates were experienced architects or engineers. Further, neither Delta nor Bates employed an architect, engineer, or competent person to study the design or plans to determine if the concrete foundation would support the weight of the bins when filled. *Whatley,* 248 Miss. at 422, 159 So.2d at 635. James Whatley was working at the construction site when the structure's support beams punched through the concrete foundation, collapsed and injured him. Evidence produced at trial revealed that Bates had twice requested Delta, but to no avail, to remove the soy beans which had been placed in the uncompleted bins after Bates noticed bulging in several of the bins. *Id.*

¶ 14. Affirming as to Delta's liability, the supreme court held that:

> [A]n owner is liable for failure to furnish his contractor's employee a reasonably safe place to work when such employee is injured by the collapse of an elaborate or complicated structure because the owner failed to use reasonable care to have an architect or other competent person design the structure and supervise its construction. Stated differently, we hold that where a person who is not competent himself to design and supervise the construction of an elaborate or complicated building or structure, and fails to employ an architect or some other competent person to design and supervise such construction, he is liable for injuries to an employee of his contractor who sustains an injury as a proximate result of faulty design or construction.

Whatley, 248 Miss. at 424, 159 So.2d at 637.

¶ 15. In so arguing that this Court should apply the *Whatley* standard of care in a landlord-tenant situation where the tenant has suffered a personal injury ***500** resulting from the alleged design or construction defect in the residential structure, Houston is asking this Court to disregard our already established standard of care covering landlord-tenant relationships. Additionally, the *Whatley* standard of care has only received reference in a limited and specific number of cases, all of which involved master and servant law. *See Sumrall v. Mississippi Power Co.,* 693 So.2d 359, 363 (Miss.1997); *Mississippi Chemical Corp. v. Rogers,* 368 So.2d 220, 222 (Miss.1979); *Mississippi Power Co. v. Brooks,* 309 So.2d 863, 866 (Miss.1975). Therefore, the *Whatley* standard of care is inapplicable to the facts and circumstances of the case before us today;

however, the issue presented on appeal can be aptly addressed under well settled landlord-tenant law.

¶ 16. Our supreme court has recently revisited this issue in *Sweatt v. Murphy,* 733 So.2d 207 (Miss.1999). In April 1995, Steven Sweatt and his wife began renting a house from Paul and Therese Murphy in Gulfport, Mississippi. On April 30, 1995, Sweatt was injured when the porch swing in which he was sitting fell from the ceiling when one of its support hooks connecting the swing with the ceiling cracked and gave way. As a result of the fall, Sweatt was diagnosed with a lumbar disc herniation. Sweatt brought suit against the Murphys alleging that the Murphys' failure to comply with the Residential Landlord and Tenant Act, Miss.Code Ann. § 89-8-1, et seq. (Rev.1991) equated to negligence per se for all violations of the Housing Code "materially affecting health and safety."

¶ 17. At trial, Sweatt's requests for instructions on the RLTA and/or the Standard Housing Code were denied. The jury returned a verdict in favor of the Murphys on the personal injury claim. On appeal Sweatt unsuccessfully advanced the argument that the Murphy's failure to comply with the RLTA's provision mandating landlords/owners to comply with applicable "housing codes affecting health and safety" was the equivalent of negligence per se or strict liability and relied on *O'Cain v. Harvey Freeman and Sons, Inc. of Mississippi,* 603 So.2d 824 (Miss.1991). The supreme court, in rejecting Sweatt's argument for strict liability, reiterated Justice Sullivan's *O'Cain* concurrence opinion and clarified its previous holding:

> Recognizing that building and housing codes which affect health and safety generally are often governed locally, I advocate that the bare minimum standard for an implied warranty of habitability should require a landlord to provide reasonably safe premises at the inception of a lease, and to exercise reasonable care to repair dangerous defective conditions upon notice of their existence by the tenant, unless expressly waived by the tenant.

Sweatt, 733 So.2d at 210 (citing *O'Cain,* 603 So.2d at 833) (Roy Noble Lee, Prather, Robertson, and Banks also concurred, thus giving the opinion precedential value).

¶ 18. The *Sweatt* court further expounded on the issue addressed in *O'Cain:*

> It is thus apparent that the concurrence in *O'Cain* advocated a general implied warranty of habitability for residential leases, and not the sort of strict liability for all housing code defects advocated by Sweatt herein. These concurring justices did interpret the incorporation of housing code standards into the RLTA as an indication that the Legislature intended to abolish the doctrine of caveat emptor with regard to residential leases in favor of an implied warranty of habitability. This Court has never held, however, that a lessor is strictly liable in tort for each and every violation of housing code provisions, as Sweatt would seem to advocate.

Sweatt, 733 So.2d at 210.

¶ 19. We note that while Houston did not advance the argument of strict liability on appeal as was the case in *Sweatt* and instead elected to advance an argument based on the *Whatley* standard of care, ***501** which we find inapplicable, she did raise the issue of strict liability in her complaint. Houston raised the issue of warranty of habitability as well, alleging that the plaintiff breached said warranty. In so concluding that the implied warranty of habitability is the rule of law in this State in lieu of the once controlling doctrine of caveat emptor as was held in *O'Cain* and in light of the unsuccessful attempt at advancing a strict liability which was rejected in *Sweatt,* the case before us today must be analyzed under the implied warranty of habitability.

¶ 20. In light of the testimony and evidence presented at trial on the issue of the mantle's design, construction, and securement, or lack thereof, we conclude that sufficient evidence was presented by Houston, and by York and M & N Builders for that

matter, in establishing a disputed issue of fact to which reasonable minds could differ as to the issue of negligence under the implied warranty of habitability. Both York and Marshall testified that neither of them had conducted an inspection of the mantle upon its completion or anytime thereafter. The expert testimony provided by Rosenhan further supports the issue of negligence under the implied warranty of habitability in opining that alternative methods for the mantle's securement were readily available at many hardware stores and that its original placement simply atop the protruding bricks was insufficient to prevent the mantle's potential for dislodgement upon the application of very little force.

[5] ¶ 21. Under the implied warranty of habitability doctrine, the landlord/owner warrants to the tenant that the structure was built in a workmanlike manner and is suitable for habitation. In recognizing the implied warranty of habitability in lieu of the doctrine of caveat emptor, Justice Sullivan's concurrence in *O'Cain* further exemplifies the rationale for accepting the implied warranty of habitability as the law of this State:

> The better view is to recognize that landlords are not selling an interest in land, residential tenants do not intend to purchase an interest in land, residential leases are contracts, and landlords have more incentive and opportunity than tenants to inspect and maintain the condition of the premises. See *Becker v. IRM Corp.,* 38 Cal.3d 454, 213 Cal.Rptr. 213, 217, 698 P.2d 116, 120 (1985); *Javins v. First Nat'l Realty Corp.,* 428 F.2d 1071, 1074 & 1079 (D.C.Cir.1970).

O'Cain, 603 So.2d at 832.

[6][7][8] ¶ 22. The advent of the implied warranty of habitability as law in this State has shifted a greater burden of responsibility to the landlord/owner requiring him to use reasonable care to provide safe premises fit for human habitation through inspecting, maintaining, and repairing the residential lease unit. However, this is not to say that the tenant is completely removed from the responsibility of bringing known defects in need of repair to the landlord's attention or making a reasonable inspection of the leased premises for defects or dangerous conditions which are reasonably detectable to the average person. The landlord's tort liability for failure to use "reasonable care to provide safe premises" when the tenant has suffered personal injury as a result is best stated in Justice Sullivan's words:

> This is not to say that a landlord is an insurer of safety. A landlord is not. Making a landlord subject to tort liability merely requires him to act as a reasonable landlord under the circumstances of the case. The tenant would still be required to show duty, breach, causation, and damages, and the landlord would be entitled to raise the standard tort defenses, such as contributory negligence, unforeseeability or intervening cause.

O'Cain, 603 So.2d at 833.

[9] ¶ 23. Turning to the issue of M & N's liability, we are equally persuaded that in light of the evidence and testimony presented at trial, sufficient offerings of ***502** proof were presented from which reasonable minds could differ in their opinions as to M & N's negligence in designing and constructing the fire place mantle. As previously stated, both York and M & N testified that neither of them had ever conducted any type of inspection with regard to the design and construction of the fire place mantle. Further, Marshall, M & N's owner, also admitted that the fireplace mantle was not of a good design due to the mantle not being attached to the fireplace in a secure fashion. This testimony was further supported by Houston's expert, Rosenhan, who opined that the simple placement of the mantle atop the protruding bricks was an insufficient method of securing the mantle.

[10] ¶ 24. In *George B. Gilmore Co. v. Garrett,* 582 So.2d 387 (Miss.1991), our supreme court held that a building contractor who complied with the plans and specifications for building a house over Yazoo

clay could nevertheless be held liable for subsequent damage done to the house as a result of expansions in the clay, despite the fact that the plans did not call for soil tests and that there were no requirements for such tests in the local building trade area. Implied in every building contract, is the notion that the work will be preformed in a skillful, careful, diligent and good workmanlike manner; conducting a reasonable inspection is understood to be included in this notion. *See George B. Gilmore,* 582 So.2d at 395.

¶ 25. In approving the jury's finding of liability against Gilmore, the owner of George B. Gilmore Company, the court noted:

> It is, of course, true that a builder/contractor in an ordinary case should not be required to go beyond the plans and specifications, they after all being part of his contract spelling out his obligations. *Neither should plans and specifications which clearly do not take into account a construction problem of which the builder/contractor, the man with expertise should be well aware, remove from ham all duty to warn. In such case plans and specifications should not constitute an absolute defense.*
>
> * * *
>
> An implied warranty of habitability is that the contractor/builder warrants the house has been built in a safe and workmanlike manner. A contractor/builder who fails to construct a house in a reasonably safe and workmanlike manner is negligent, in any event.
>
> *George B. Gilmore,* 582 So.2d at 396. (citations omitted) (emphasis added).

¶ 26. In the case *sub judice,* the plans and specifications for the mantle, as well as the construction, was left to M & N. The contracted job, as a whole, was essentially a turn-key project consisting of general plans and specifications which were provided to M & N by York, the details of which were left to M & N's discretion with the exception that the completed structure in Oxford conform to the overall design of York's existing rental property in Hattiesburg.

¶ 27. On this note, we return to the issue presented on appeal and our standard of review of motions for directed verdict. Upon a review of the facts presented at trial, we hold as to both York and M & N that reasonable minds could differ after taking into account all favorable inferences which could have been reasonably drawn in favor of the non-moving party, Houston in this case. There is a jury issue as to whether York as a landlord/owner acted as a reasonable landlord should have in similar circumstances in using reasonable care to provide safe premises fit for human habitation through the inspecting, maintaining, and repairing of the residential lease unit. There is also is a disputed issue of fact from which reasonable minds could differ in reaching a verdict as to M & N's liability in whether they were negligent in the design, construction and securement of the mantle which fell and ***503** struck the plaintiff on the head. Having said this, we therefore hold that the trial court was in error in granting a directed verdict in favor of both York and M & N.

¶ 28. THE JUDGMENT OF THE LAFAYETTE COUNTY CIRCUIT COURT IS REVERSED AND REMANDED FOR PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS ARE ASSESSED AGAINST THE APPELLEES.

McMILLIN, C.J., KING AND SOUTHWICK, P.JJ., BRIDGES, COLEMAN, DIAZ, IRVING, LEE, AND PAYNE, JJ., CONCUR.
Miss.App.,1999.
Houston v. York
755 So.2d 495

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Houston v. York, 755 So.2d 495 (Miss.App.,May 18, 1999) (NO. 97-CA-01415-COA)

History

Direct History

=> 1 **Houston v. York,** 755 So.2d 495 (Miss.App. May 18, 1999) (NO. 97-CA-01415-COA), rehearing denied (Jan 18, 2000), certiorari denied (Apr 27, 2000)

Negative Citing References (U.S.A.)

Distinguished by

H 2 Martin v. Rankin Circle Apartments, 941 So.2d 854 (Miss.App. Jun 27, 2006) (NO. 2004-CA-02216-COA), rehearing denied (Nov 07, 2006) ★★ **HN: 4 (So.2d)**

C

Court of Appeals of Mississippi.
Barbara KIDD, Appellant
v.
McRAE'S STORES PARTNERSHIP, Appellee.
No. 2005-CP-01918-COA.

March 13, 2007.

Background: Store patron brought premises liability action against department store for injuries sustained when she tripped on floor tile. The Circuit Court, Lee County, Thomas J. Gardner, III, J., entered judgment on jury verdict in favor of department store, and patron appealed.

Holdings: The Court of Appeals, Barnes, J., held that:
(1) jury determination that 1/16" height differential in department store's floor tile did not create unreasonably dangerous condition was not against overwhelming weight of evidence, and
(2) order excluding treating physician's deposition testimony regarding cost of future shoulder surgeries was not abuse of discretion.

Affirmed.

West Headnotes

[1] Evidence 157 ⚿571(3)

157 Evidence
157XII Opinion Evidence
157XII(F) Effect of Opinion Evidence
157k569 Testimony of Experts
157k571 Nature of Subject
157k571(3) k. Due Care and Proper Conduct. Most Cited Cases

Negligence 272 ⚿1670

272 Negligence
272XVIII Actions
272XVIII(C) Evidence
272XVIII(C)5 Weight and Sufficiency
272k1667 Premises Liability
272k1670 k. Buildings and Other Structures. Most Cited Cases

Negligence 272 ⚿1708

272 Negligence
272XVIII Actions
272XVIII(D) Questions for Jury and Directed Verdicts
272k1705 Premises Liability
272k1708 k. Buildings and Other Structures. Most Cited Cases
Jury determination that 1/16" height differential in department store's floor tile did not create unreasonably dangerous condition was not against overwhelming weight of evidence, in injured patron's premises liability action; jury could reasonably infer that differential between tiles, which was about the height of a dime, did not constitute unreasonably dangerous condition, patron's expert never stated that differential created dangerous condition, there was no record of anyone falling or complaining about floor since installation approximately 11 years prior to patron's fall, and differential of tile complied with all known codes, standards, and requirements for safety.

[2] Pretrial Procedure 307A ⚿202

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(C) Discovery Depositions
307AII(C)5 Use and Effect
307Ak201 Use
307Ak202 k. Admissibility in General. Most Cited Cases
Order prohibiting admission of treating physician's deposition testimony regarding cost of future shoulder surgeries was not abuse of discretion, in premises liability action brought by store patron against department store for injuries sustained in

fall, where physician did not express opinion to degree of medical certainty that surgeries were necessary. Rules of Evid., Rule 702.

[3] Evidence 157 ⇐546

157 Evidence
157XII Opinion Evidence
157XII(C) Competency of Experts
157k546 k. Determination of Question of Competency. Most Cited Cases
The admission of expert witness testimony is within the discretion of the trial judge.

***622** Barbara Kidd, Appellant, pro se.

Robert F. Stacy, Terry Dwayne Little, Oxford, Attorneys for Appellee.

Before LEE, P.J., BARNES and ISHEE, JJ.

***623** BARNES, J., for the Court.

¶ 1. This premises liability action arose after Barbara Kidd tripped and fell at the McRae's Department Store in Tupelo, Mississippi. Kidd, appearing pro se, appeals the judgment of the Circuit Court of Lee County, after a jury found for the defendant, McRae's Stores Partnership ("McRae's"). On appeal, Kidd contends that the verdict was against the overwhelming weight of the evidence and the trial court erred in limiting expert testimony regarding future medical expenses. Finding no error, we affirm the judgment of the circuit court.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

¶ 2. On May 17, 2000, Barbara Kidd went to the McRae's Department Store located in the Barnes Crossing Mall in Tupelo, Mississippi to return a dress she had purchased. While walking through the cosmetics area, she tripped and fell, alleging that the toe of her shoe caught an uneven portion of the tile floor which caused her to fall forward. It is undisputed that as a result of her fall, Kidd suffered a broken left arm.

¶ 3. Kidd was referred to Dr. Kim Stimpson for her broken arm. Beginning on May 19, 2000, Dr. Stimpson proceeded to treat her conservatively with range of motion exercises and physical therapy. Six months after her fall, following an initial period of improvement with her elbow, Kidd began to complain to Dr. Stimpson about shoulder pain, which she stated had been present since the fall. She claimed this pain was inhibiting her ability to give massages, which was part of her business as a cosmetologist.[FN1] Kidd's last visit to Dr. Stimpson about her arm was on November 11, 2002.

FN1. As part of her business, Kidd also performs electrolysis, facials, and applies permanent make-up.

¶ 4. On May 13, 2003, Kidd filed suit against McRae's[FN2] in the Circuit Court of Lee County, claiming the uneven tile in the store created a dangerous condition and caused her to fall. Kidd sought a judgment of $750,000 in compensatory damages and $1,000,000 in punitive damages. Kidd's medical expenses for her arm injury totaled $8,726.26. Additionally, Kidd claimed that her injury caused her emotional distress and further financial harm because she could no longer give massages at her cosmetology business which resulted in a loss of income.

FN2. Kidd initially filed suit against the following defendants: McRae's Store at Barnes Crossing Mall, David Hocker & Associates, R.F. Coffin Enterprises, Barnes Crossing Mall, Inc., unknown defendant A and unknown defendant B. David Hocker & Associates and R.F. Coffin Enterprises were dismissed from the case. Kidd proceeded against McRae's Stores Partnerships, as the proper defendant.

¶ 5. Kidd's case went to trial on September 8, 2005. During Kidd's case-in-chief, she called Dr. Stimpson as a witness via deposition testimony.

The defense, however, moved to exclude certain portions of Dr. Stimpson's testimony which was to be read to the jury. In his deposition, Dr. Stimpson had testified that the cost of two surgical procedures, one on the elbow and one on the shoulder, would be approximately $5,000 to $6,000 each. Defense counsel argued that the necessity of future surgery on Kidd was not stated to a reasonable degree of medical probability. The circuit court agreed that the future need for surgeries was never absolutely indicated as being necessary by Dr. Stimpson. Thus the testimony regarding the cost of the surgeries was found inadmissible and was not read to the jury.

***624** ¶ 6. During the trial, Kidd's expert witness, a flooring consultant named Andrew Holmes, testified that he had measured the height differential between the tiles where Kidd tripped. He found one tile to be in excess of 1/16 of an inch, or about the height of a dime, higher than the surrounding tile.[FN3] Holmes stated this height differential did not conform with the American National Standards Institute ("ANSI") or the Marble Institute of America's ("MIA") standards, both of which allow for only a 1/32 of an inch differential between tiles. However, Holmes was not aware of any definitive scientific study on tile safety and the likelihood of somebody tripping over height differentials of 1/32 of an inch, 1/16 of an inch, or 1/8 of an inch. Nor did he know of any safety studies done on the 1/32 of an inch ANSI and MIA standard. Ultimately, Holmes conceded that the ANSI and MIA 1/32 of an inch height differential standards were merely voluntary, and McRae's had no duty to follow this recommendation.

> FN3. Holmes testified that he measured the tile differential by placing a dime on the lower tile and a credit card across the top of the dime in the area where the adjacent tile is higher.

¶ 7. McRae's' store manager, Steve Cade, was called by the defense as a witness. He testified that the floor where Kidd fell was installed in 1989 and had not been modified since that time. The manager did not believe that the floor presented a dangerous condition. Further, he testified that nobody had ever complained to the store management about the condition of the floor and that there had never been a report of anyone falling in this area since the floor's installation.

¶ 8. McRae's' expert witness, Dr. George Hammitt, a professional flooring engineer, had also measured the floor with a ruler, shims, and a micrometer and found the height differential of the tile where Kidd fell to be 0.062 inches, or a little over 1/16 of an inch. He found the greatest height differential of the tiles surrounding the area where Kidd fell to be 0.071 inches. Regarding the requirements for public safety, Hammitt stated that McRae's must, and does, comply with the International Building Code and the Americans with Disabilities Act ("ADA"). He testified that while there is no height differential requirement stated in the International Building Code, the ADA's maximum height differential is no more than 1/4 of an inch, much greater than the differential presented here. Finally, Hammitt concluded that since the height differential of the tile at the accident's site did not violate any known code and was safe according to several national standards, including the American Society of Testing Materials, ANSI and ADA, the height differential was not unreasonably dangerous.

¶ 9. The jury returned a verdict for McRae's. Kidd now appeals.

LAW AND ANALYSIS

I. Whether the jury verdict was against the overwhelming weight of the evidence.

[1] ¶ 10. When an appellant challenges the jury verdict to be against the overwhelming weight of the evidence, this Court will give great deference to the jury verdict and resolve "all conflicts in the evidence and every permissible inference from the evidence in the appellee's favor." *Wal-Mart Stores, Inc.*

v. Johnson, 807 So.2d 382, 389(¶ 16) (Miss.2001) (citing *Bobby Kitchens, Inc. v. Miss. Ins. Guar. Ass'n,* 560 So.2d 129, 131 (Miss.1989)). The jury is the ultimate arbiter of the weight of the evidence and the credibility of the witnesses. ***625***Breaux v. Grand Casinos of Miss., Inc.,* 854 So.2d 1093, 1098(¶ 14) (Miss.Ct.App.2003) (citing *Jackson v. Griffin,* 390 So.2d 287, 289 (Miss.1980)). This Court will disturb a jury verdict only when it "is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice." *Wal-Mart Stores,* 807 So.2d at 389(¶ 16) (Miss.2001) (citing *Herrington v. Spell,* 692 So.2d 93, 103-04 (Miss.1997)).

¶ 11. In her brief, Kidd, appearing pro se, basically reiterates her argument at the trial level. She argues that McRae's was negligent in failing to repair its uneven floor tiles. Because the area of tile where she tripped was 1/16 of an inch out of alignment with surrounding tiles, she contends this was a dangerous condition. Kidd states that McRae's, under Mississippi law, has a duty to exercise reasonable care to maintain its premises in a reasonably safe condition. *See McGovern v. Scarborough,* 566 So.2d 1225, 1227 (Miss.1990). Kidd concludes that having tile 1/16 of an inch out of plane is not reasonably safe. Since McRae's knew of this height differential since 1989 and did not repair it, Kidd argues that McRae's breached its duty of care to provide a safe floor for its customers.

¶ 12. Kidd's arguments, however, are issues which the jury properly decided at trial. It is the province of the jury to evaluate the weight of the evidence and the witnesses' credibility. *Breaux,* 854 So.2d at 1098(¶ 14). We find, after reviewing the record and evidence presented, with our deferent standard of review for the jury's decision, and resolving all conflicts of evidence and inferences in favor of the appellee, that there was ample evidence presented to justify the jury's verdict for the defendant, McRae's.

¶ 13. First, Kidd's expert, Andrew Holmes, testified that the height differential between two tiles where Kidd tripped was in excess of 1/16 of an inch, or about the height of a dime. A reasonable jury could infer through the evidence presented, not to mention their common sense, that the height differential of a little over a dime between two tiles certainly does not constitute an unreasonably dangerous condition. Further, Holmes never stated that this differential would create a dangerous condition. He stated that the ANSI and MIA standards were installation standards only, and he was unaware of any safety studies done where this height differential would be considered unreasonably dangerous. Holmes conceded that there are no required standards for height differential of tile which McRae's had a duty to follow. A jury could reasonably infer that while tile out of alignment 1/16 of an inch may violated an installation standard, McRae's did not have a duty to comply with these completely voluntary, non-safety standards.

¶ 14. Second, the manager of McRae's, Steve Cade, testified that since the time the floor had been installed in 1989 until Kidd's fall in 2000, there had never been any changes or modifications to it. Further, there was no record of anybody falling or complaining about the floor since its installation, thus a reasonable jury could infer that tiles differing in height by 1/16 of an inch do not create a dangerous condition.

¶ 15. Third, McRae's' expert witness, George Hammitt, a professional engineer, testified that all of the tile measurements he took, whether it be the greatest height differential of 0.071 inches, or the height differential of the tile where Kidd fell of 0.062 inches, complied with all known codes, standards, and requirements for safety. He differentiated between trade association installation standards and safety standards, pointing out that the MIA ***626** and ANSI standards are voluntary. Again, a reasonable jury could rely on Hammitt's testimony as a sufficient basis for finding the tiles were not a dangerous condition and McRae's did not breach its duty of care to Kidd.

¶ 16. Finally, at trial, Kidd even testified that she was looking at the cosmetics counter, not the floor,

when she tripped on the tile. A reasonable jury could infer that not watching where she was going was the proximate cause of Kidd's fall. Through the expert witnesses' and Kidd's own testimony, a reasonable jury could return a verdict for McRae's. Accordingly, this issue is without merit.

II. Whether the trial court erred in limiting deposition testimony regarding future medical expenses.

[2][3] ¶ 17. The well-settled standard of review for the admission or exclusion of evidence is abuse of discretion. *Miss. Transp. Comm'n v. McLemore,* 863 So.2d 31, 34(¶ 4) (Miss.2003) (citing *Haggerty v. Foster,* 838 So.2d 948, 958(¶ 25) (Miss.2002)). The admission of expert witness testimony is within the discretion of the trial judge. *Id.* (citing *Puckett v. State,* 737 So.2d 322, 342 (Miss.1999)). Thus, the trial judge's decisions will stand "unless we conclude that the discretion was arbitrary and clearly erroneous, amounting to an abuse of discretion." *Id.*

¶ 18. Kidd argues that the trial court erred in limiting the deposition testimony of Dr. Stimpson regarding future medical expenses-specifically, the cost of surgeries for injuries sustained during her fall. Maintaining that Dr. Stimpson's opinion was formed with sufficient medical certainty that she would require future surgery, Kidd argues that this testimony should have been heard by the jury concerning her future medical expenses.

¶ 19. Mississippi Rule of Evidence 702 states that if expert testimony "will assist the trier of fact to understand the evidence" and the witness is qualified, the testimony will be admitted. Yet, when an expert's opinion is not based on a reasonable degree of medical certainty, or the opinion is articulated in a way that does not make the opinion probable, the jury cannot use that information to make a decision. *Catchings v. State,* 684 So.2d 591, 597 (Miss.1996) (citing *Schulz v. Celotex Corp.,* 942 F.2d 204, 207 (3rd Cir.1991) (internal citations omitted)). Failure to properly qualify an expert opinion typically occurs in testimony that is speculative, using phrases such as "probability," "possibility," or even "strong possibility." *Id.* (internal citations omitted). It is the intent of the law "that if a physician cannot form an opinion with sufficient certainty so as to make a medical judgment, neither can a jury use that information to reach a decision." *Id.* (internal citations omitted).

¶ 20. In our case, the trial judge allowed the portions of Dr. Stimpson's testimony where he discussed the possibility of two surgeries on Kidd's arm, but disallowed the portion of the testimony regarding the cost of these surgeries-$5,000 to 6,000 each. In his deposition, at two different times, Dr. Stimpson testified regarding surgery:

> Q. And what was your plan of treatment at that time [September 17, 2001]?
>
> A. She was seen again for her elbow and shoulder, left side.... We discussed treatment options, including surgical evaluation of the shoulder, possible surgical treatment of her elbow.
>
> ....
>
> Q. And at that time [November 11, 2002] you did not feel that surgery was indicted for her left shoulder?
>
> ***627** A. We didn't have any plans to perform any surgery on her, no.

We find that the trial court did not err in limiting the deposition testimony of Dr. Stimpson regarding the costs of the surgeries because he never expressed an opinion to a degree of medical certainty that Kidd would ever require these surgeries. Accordingly, this issue is without merit.

¶ 21. THE JUDGMENT OF THE CIRCUIT COURT OF LEE COUNTY IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.

KING, C.J., LEE AND MYERS, P.JJ., IRVING, CHANDLER, GRIFFIS, ISHEE, ROBERTS AND CARLTON, JJ., CONCUR.
Miss.App.,2007.
Kidd v. McRae's Stores Partnership
951 So.2d 622

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Court of Appeals of Mississippi.
Brenda SMITH, Victor Smith, Linda Wilson, Okimo Williams, Randy Enge and Sherri Enge, Appellants/Cross-Appellees
v.
CITY OF GULFPORT, Mississippi, Appellee/Cross-Appellant.
No. 2005-CA-01153-COA.

Feb. 13, 2007.

Background: City residents brought action against city, alleging that city's failure to properly maintain drainage ditch directly and proximately caused their property to flood. Following a bench trial, the Circuit Court, Harrison County, Kosta N. Vlahos, J., granted city's motion for directed verdict. Residents appealed.

Holdings: The Court of Appeals, Lee, P.J., held that:
(1) rule allowing admission of deposition at trial when witness is unable to attend because of imprisonment did not apply;
(2) deposition testimony was not admissible under rule allowing, upon application and notice, use of absent witness's deposition if exceptional circumstances exist;
(3) trial court acted within its discretion when it excluded deposition testimony;
(4) scientific experts are not required to state their opinions to "a reasonable degree of scientific certainty"; and
(5) residents' testimony that vegetation, silt, appliances, and other debris impeded flow of water was not sufficient to reach conclusion that city's failure to remove debris caused neighborhood to flood.

Affirmed.

West Headnotes

[1] Pretrial Procedure 307A ⇨202

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(C) Discovery Depositions
307AII(C)5 Use and Effect
307Ak201 Use
307Ak202 k. Admissibility in General. Most Cited Cases
Admission of deposition testimony is within the sound discretion of the trial court.

[2] Pretrial Procedure 307A ⇨203

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(C) Discovery Depositions
307AII(C)5 Use and Effect
307Ak201 Use
307Ak203 k. Parties Entitled to Use and Availability of Deponent. Most Cited Cases

Trial 388 ⇨43

388 Trial
388IV Reception of Evidence
388IV(A) Introduction, Offer, and Admission of Evidence in General
388k43 k. Admission of Evidence in General. Most Cited Cases
While the admission of evidence is within the discretion of the trial judge, that discretion is not unfettered; it is especially not unfettered where the deposition of an absent witness is sought to be introduced. Rules Civ.Proc., Rule 32(a)(3).

[3] Pretrial Procedure 307A ⇨203

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(C) Discovery Depositions
307AII(C)5 Use and Effect
307Ak201 Use
307Ak203 k. Parties Entitled to Use and Availability of Deponent. Most Cited Cases
Party offering absent witness's deposition into evidence at trial must show that it fits into one of stated

exceptions in rule allowing for admission of deposition testimony. Rules Civ.Proc., Rule 32(a)(3).

[4] Appeal and Error 30 ⇨946

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k944 Power to Review
30k946 k. Abuse of Discretion. Most Cited Cases
Where the exercise of the court's discretion is not supported by the evidence, the Court of Appeals is obligated to find an abuse of discretion.

[5] Pretrial Procedure 307A ⇨203

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(C) Discovery Depositions
307AII(C)5 Use and Effect
307Ak201 Use
307Ak203 k. Parties Entitled to Use and Availability of Deponent. Most Cited Cases
Rule allowing admission of deposition at trial when witness is unable to attend because of imprisonment did not apply to expert witness in residents' negligence action against city to recover for flood damage that occurred as result of city's alleged failure to properly maintain drainage ditch; witness could not testify because he was a party in federal court action that had ongoing trial. Rules Civ.Proc., Rule 32(a)(3)(C).

[6] Appeal and Error 30 ⇨203

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(B) Objections and Motions, and Rulings Thereon
30k202 Evidence and Witnesses
30k203 k. In General. Most Cited Cases

Appeal and Error 30 ⇨766

30 Appeal and Error
30XII Briefs
30k766 k. Defects, Objections, and Amendments. Most Cited Cases
In negligence action against city for alleged failure to properly maintain drainage ditch before it overflowed after tropical storm, Court of Appeals would not decide residents' claim that trial court erred by not taking judicial notice of fact that their expert witness was party in federal trial and thus unavailable to be subpoenaed, for purposes of rule allowing admission of deposition testimony at trial when party has not been able to procure witness's attendance by subpoena; residents asserted no law in support of claim, and residents did not ask trial court to take judicial notice. Rules Civ.Proc., Rule 32(a)(3)(D).

[7] Pretrial Procedure 307A ⇨203

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(C) Discovery Depositions
307AII(C)5 Use and Effect
307Ak201 Use
307Ak203 k. Parties Entitled to Use and Availability of Deponent. Most Cited Cases
In negligence action against city for alleged failure to properly maintain drainage ditch before it overflowed after tropical storm, deposition testimony of residents' expert witness was not admissible at trial under rule allowing, upon application and notice, use of absent witness's deposition if exceptional circumstances exist; witness was a party in federal court action that had ongoing trial, and first notice of record given to city and trial court of witness's unavailability was approximately a week before trial. Rules Civ.Proc., Rule 32(a)(3)(F).

[8] Pretrial Procedure 307A ⇨202

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(C) Discovery Depositions
307AII(C)5 Use and Effect
307Ak201 Use

307Ak202 k. Admissibility in General. Most Cited Cases
Trial court acted within its discretion when it excluded at trial deposition testimony of residents' expert witness, who was civil engineer, in residents' negligence action against city to recover for flood damage that occurred as result of city's alleged failure to properly maintain drainage ditch; atmosphere of deposition indicated that deposition was more for discovery than trial, residents' attorney asked no questions during deposition, and trial court was concerned that witness's opinions were too speculative to prove causation. Rules Civ.Proc., Rule 32(a)(3).

[9] Evidence 157 ⚿547.5

157 Evidence
157XII Opinion Evidence
157XII(D) Examination of Experts
157k547.5 k. Certainty of Testimony; Probability, or Possibility. Most Cited Cases
Scientific experts are not required to state their opinions to "a reasonable degree of scientific certainty" in order that their opinions be given probative value and therefore be admissible as evidence.

[10] Evidence 157 ⚿547.5

157 Evidence
157XII Opinion Evidence
157XII(D) Examination of Experts
157k547.5 k. Certainty of Testimony; Probability, or Possibility. Most Cited Cases
While no specific language, such as "with a reasonable degree of scientific certainty," is required for admitting opinions of a scientific expert witness, the expert witness must still form his or her opinion with scientific certainty.

[11] Evidence 157 ⚿555.4(2)

157 Evidence
157XII Opinion Evidence
157XII(D) Examination of Experts
157k555 Basis of Opinion
157k555.4 Sources of Data
157k555.4(2) k. Speculation, Guess, or Conjecture. Most Cited Cases
To be admissible, an expert witness's opinion cannot be mere speculation.

[12] Appeal and Error 30 ⚿893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In General. Most Cited Cases
Standard of review for application of the wrong legal standard by the trial court is de novo.

[13] Appeal and Error 30 ⚿1177(1)

30 Appeal and Error
30XVII Determination and Disposition of Cause
30XVII(D) Reversal
30k1177 Necessity of New Trial
30k1177(1) k. In General. Most Cited Cases
Court of Appeals does not hesitate to reverse where the trial judge has applied an erroneous legal standard.

[14] Municipal Corporations 268 ⚿845(4)

268 Municipal Corporations
268XII Torts
268XII(D) Defects or Obstructions in Sewers, Drains, and Water Courses
268k845 Actions for Injuries
268k845(4) k. Evidence. Most Cited Cases
In negligence action against city for alleged failure to properly maintain drainage ditch before it overflowed after tropical storm, residents' testimony that vegetation, silt, appliances, and other debris impeded flow of water was not sufficient to reach conclusion that city's failure to remove debris

caused neighborhood to flood; testimony did not indicate that obstructions blocked flow of water.
*846 Ben F. Galloway, Gulfport, attorney for appellants.

Jeffrey S. Bruni, Gulfport, attorney for appellee.

Before LEE, P.J., BARNES and ISHEE, JJ.

LEE, P.J., for the Court.

FACTS

¶ 1. This case involved the flooding in 2001 of several homes in the Faust Drive subdivision in Gulfport, Mississippi. The cause of this flooding, according to the residents, was overflow from a drainage ditch that runs along the northern and western edge of the Faust Drive subdivision and through a culvert under Dedeaux Road to the south.

¶ 2. This area was part of the county until January 1994 when it was annexed into the City. The neighborhood residents testified that while the ditch was under county maintenance, water never rose, even during hard rains, above the banks of the ditch high enough to come into their homes. When the area came under control of the City, the residents noticed that the ditch was not being regularly cleaned, and the build-up was impeding the flow of water and making the area unsightly. The residents testified that the county consistently removed silt and overgrowth from *847 the ditch, but since the area was annexed the ditch was not cleaned.

¶ 3. After complaining to the City about the condition of the ditch, the residents noticed the City picking up some debris, but tree branches, old tires, cans, and appliances were still noticed in the ditch. In some areas, the ditch had once been four to five feet deep but was reduced to less than a foot because of the build up of sand and debris. Some areas began to resemble the rest of the terrain rather than a ditch. Several more calls were made to the City requesting that the ditch be cleaned, but no maintenance was done.

¶ 4. Tropical storm Allison hit the Mississippi Gulf Coast on June 11, 2001. The Civil Defense and National Weather Service recorded 6.36 inches of rainfall in Gulfport on the morning of June 11. During the storm, the homes on Faust Drive were flooded. According to the residents' testimony the City's failure to properly maintain the ditch caused the neighborhood to flood.

PROCEDURAL HISTORY

¶ 5. On October 22, 2001, fifteen residents of the Faust Drive area of Gulfport filed a complaint in the Circuit Court of Harrison County against the City of Gulfport alleging that the City's failure to properly maintain the drainage ditch directly and proximately caused their property to flood. The City responded arguing that it had contracted out all maintenance of the ditch to Operations Technologies, Inc. (Optech), and, thus, Optech was a necessary party. An agreed order was entered to allow an amendment, and on September 9, 2003, plaintiffs amended their complaint to include Optech as a defendant. The trial judge later granted summary judgment in favor of Optech.

¶ 6. Before trial, the City moved for summary judgment. Its motion was denied on February 17, 2005. A bench trial began on February 21, 2005. At the conclusion of the trial on February 23, the residents sought to introduce the deposition testimony of their sole expert witness. The City renewed its previously filed motion to strike the deposition which was granted by the trial judge. The trial court then granted the City's motion for directed verdict pursuant to M.R.C.P. 41(b).

¶ 7. Six residents (hereinafter "Smith") now appeal to this Court asserting the following issues: (1) the trial court erroneously excluded or struck the deposition of the subdivision residents' expert, M.E. Thompson, based on a misapplication of M.R.C.P. 32 and an erroneous requirement on the method of

stating opinions with sufficient certainty; (2) the trial court erred in determining that as a matter of law expert testimony was required to prove causation in a failure to properly maintain drainage flooding case; (3) the trial court applied an incorrect legal standard in regard to proximate causation; and (4) the trial court's finding concerning the absence of testimony of any direct observation of anything blocking the flow of water in the ditch was clearly erroneous. The City of Gulfport cross-appeals asserting: (1) the trial court reviewed the City's summary judgment motion under an incorrect legal standard; (2) improper documents were considered in opposition to the motion for summary judgment and there was lack of evidentiary support for plaintiffs' negligence theory; and (3) alternatively, the plaintiffs' claims were meritless and/or the City was immune from liability under the Mississippi Torts Claims Act.

¶ 8. Finding no error, we affirm.

DISCUSSION

I. DID THE TRIAL COURT ERR IN EXCLUDING THE RESIDENTS' EXPERT'S DEPOSITION?

***848** ¶ 9. M.E. Thompson, a civil engineer, was Smith's sole expert witness concerning the source of flooding on Faust Road. According to Smith's counsel, Thompson was available to testify on the first two dates that this case was scheduled for trial. On the third date, however, when this matter came to trial, Thompson was not available to testify as he was a defendant in a federal trial taking place simultaneously in Gulfport. Smith offered Thompson's deposition in lieu of his live testimony. The City moved to exclude the deposition on the ground that it did not have notice that the deposition was taken for trial purposes.

¶ 10. The trial judge excluded Thompson's deposition as not complying with Rule 32 of the Mississippi Rules of Civil Procedure. When Smith's attorney asked for clarification on the ruling, the judge stated, "I'll go ahead and also incorporate in there that the failure to lay the predicate and heighten the awareness in the witness's mind to give his opinion based on reasonable certainty or scientific proof, and that would give you another basis. I would incorporate that into the ruling." Smith argues to this Court that both of the reasons given by the trial judge are erroneous.

Standard of Review

[1][2][3][4] ¶ 11. The admission of deposition testimony is within the sound discretion of the trial court. *Robinson v. Lee,* 821 So.2d 129, 133(¶ 16) (Miss.Ct.App.2000). While the admission of evidence is within the discretion of the trial judge that discretion is not unfettered. *Id.* at 134(¶ 19). It is especially not unfettered where the deposition of an absent witness is sought to be introduced pursuant to M.R.C.P. 32(a)(3). *Id.* The party offering the deposition must show that it fits into one of the stated exceptions. *Id.* Where the exercise of the court's discretion is not supported by the evidence, this Court is obligated to find an abuse of discretion. *Id.*

Failure to Comply with Rule 32

¶ 12. Mississippi Rule of Civil Procedure Rule 32(a)(3) states:

> (3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (A) that the witness is dead; or (B) that the witness is at a greater distance than one hundred miles from the place of trial or hearing, or is out of the state, unless it appears that the absence of the witness was procured by the party offering the deposition; or (C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or (D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (E) that the witness is a medical doctor or (F) upon application and notice, that such ex-

> ceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be so used.

[5][6] ¶ 13. The only feasible subsection that applies in this case is Rule 32(a)(3)(F). Rule 32(a)(3)(C) is not applicable, although Smith attempts to argue that being a defendant in a federal trial is comparable to being imprisoned. Rule 32(a)(3)(D) is not applicable since no subpoena was issued. Smith argues that the trial court should have taken judicial notice of the fact that their expert was a party in a federal trial and, thus, unavailable to be subpoenaed. Smith asserts no law in support of this argument and did not ask for judicial notice to be taken at the trial level. Therefore, we will not address whether judicial notice should have been taken.

***849** [7] ¶ 14. Rule 32(a)(3)(F) gives the trial court discretion to use a witness's deposition if, upon application and notice, exceptional circumstances make it desirable in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court. Smith argues that the trial court erred by interpreting Rule 32(a)(3) to require that proof, other than counsel telling the court that the witness was unavailable, was needed. Smith argues that proper "application and notice" was given and such exceptional circumstances existed to necessitate the use of Thompson's deposition. The first notice of record given to the City and the trial court of Thompson's unavailability was approximately a week before trial,[FN1] which was to begin on February 21, 2005. Smith's attorney did not ask for the trial to be rescheduled. On appeal, the City accuses Smith of making "a veiled attempt at hiding Thompson from cross-examination."

> FN1. The actual date Thompson's unavailability was noticed is not apparent from the record, and the briefs are in conflict on this issue. It appears to be sometime between February 12 and 17.

¶ 15. Smith also argues that the trial judge erred in his ruling because he believed that ten days written notice of unavailability was required before a deposition could be admitted. Smith provided no cite for this proposition, and we find nothing in the record where the trial judge stated that ten days written notice was required.

¶ 16. Again, the admission of deposition testimony is within the sound discretion of the trial court. The trial court found the City's motion to strike Thompson's deposition well taken, and we find no error in his finding. The burden was on Smith to show that Thompson's deposition fit into one of the stated exceptions. The record before this Court does not establish that any of the Rule 32(a)(3) exceptions were met. The trial court did not abuse its discretion, and the exclusion of the deposition is affirmed.

Failure to Give Expert Opinion Based on Reasonable Certainty or Scientific Proof

[8][9] ¶ 17. Smith argues that the trial court erred by holding, in part, that Thompson's deposition should be excluded for his failure to give opinions based on scientific certainty. This was specifically addressed in *Catchings v. State,* 684 So.2d 591 (Miss.1996). The issue in *Catchings* was "whether medical experts are required to state their opinions 'to a reasonable medical certainty' in order that their opinions be given probative value and therefore be admissible as evidence." *Id.* at 597. In holding that this specific phrase is not required, the supreme court stated that:

> The phrase "with a reasonable degree of medical certainty" is a useful shorthand expression that is helpful in forestalling challenges to the admissibility of expert testimony. Care must be taken, however, to see that the incantation does not become a semantic trap and the failure to voice it is not used as a basis for exclusion without analysis

> of the testimony itself.
>
> Situations in which the failure to qualify the opinion have resulted in exclusion are typically those in which the expert testimony is speculative, using such language as "possibility." ...
>
> Accordingly, while the particular phrase used should not be dispositive, it may indicate the level of confidence the expert has in the expressed opinion. Perhaps nothing is absolutely certain in the field of medicine, but the intent of the law is that if a physician cannot form an opinion with sufficient certainty so as to ***850** make a medical judgment, neither can a jury use that information to reach a decision.

Id. (citations omitted). We note that while *Catchings* applied to medical testimony, this standard is also applicable to scientific testimony.

¶ 18. While the parties to the deposition stipulated that the deposition was to be "taken for discovery and all other purposes, in accordance with the provisions of the Mississippi Rules of Civil Procedure," the trial judge noted that the atmosphere indicated "that it was a casual setting and they were just getting what he was about to testify, more so a discovery than for trial." To the trial judge, the deposition seemed like "pure casual conversation." Counsel for the plaintiffs asked no questions during the deposition. The one hundred eighteen page deposition consisted of questioning by counsel for Optech and counsel for the City of Gulfport.

[10][11] ¶ 19. While no specific language, such as "with a reasonable degree of scientific certainty," is required, an expert witness must still form his or her opinion with scientific certainty. *Miss. Transp. Comm'n v. McLemore,* 863 So.2d 31, 36(¶ 11) (Miss.2003) The expert's opinion cannot be mere speculation. *Id.* The trial judge was concerned after reading the deposition that, even if it was admitted, Thompson's opinions were too speculative to prove causation.

¶ 20. The failure to use the phrase "with a reasonable degree of scientific certainty" is not required, and the trial judge erred in his ruling requiring such specific language to be used. However, since the admission of deposition testimony is within the sound discretion of the trial court and the trial judge gave valid reasons for excluding the testimony, we cannot find error in the exclusion of the deposition.

II. DID THE TRIAL COURT ERR IN DETERMINING THAT AS A MATTER OF LAW EXPERT TESTIMONY WAS REQUIRED TO PROVE CAUSATION IN A FAILURE TO PROPERLY MAINTAIN DRAINAGE FLOODING CASE?

¶ 21. Smith argues that the lay testimony of the residents and photographs of the ditch were enough to find the City liable for negligence in failing to properly maintain the ditch. Under the same heading, Smith also argues that the City was under a non-delegable duty to maintain storm sewers, drains, and ditches in a reasonably safe condition, and therefore, the City is liable to the property owners based on their testimony that the City was given notice and did not correct the problem.

¶ 22. The trial court's findings on causation are as follows:

> It's the position of this Court because of the complex nature of the facts in this case as outlined at this point, in addition to finding that based on the record made at this time that the causation issue has not been met or the breach by the standard required and I'm going to go ahead and go out on a limb and say that in this case, and in the complex nature that I perceive it to be that an expert would be required to testify.
>
> The testimony of the witnesses in this case, again I think the Court has stated that that testimony basically is what they saw, and that they reached a conclusion that it had to be the fact that it was dirty that contributed to the flooding of their homes. The Court judges that testimony in the

> light that that is weak opinion testimony, albeit that it's lay.

¶ 23. Smith cites *City of Meridian v. Bryant,* 232 Miss. 892, 100 So.2d 860 (1958); *Cain v. City of Jackson,* 169 Miss. 96, 152 So. 295 (1934); and ***851***City of Vicksburg v. Porterfield,* 164 Miss. 581, 145 So. 355 (1933), for the proposition that lay witness testimony alone is sufficient to prove causation. None of these cases mention whether expert testimony is or is not required to prove causation. While the cases discuss a municipality's duty to maintain a ditch, none specifically addresses what type of testimony was used in proving the City's failure to maintain the ditch. Further, these cases are distinguishable as each dealt with an alteration to the existing landscape which affected the drainage.

¶ 24. Smith next argues that *Porterfield,* 164 Miss. 581, 145 So. 355, in combination with Mississippi Rule of Evidence 701 provides strong support that lay witness testimony is sufficient to establish causation. Rule 701 states:

> If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to the clear understanding of the testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Returning to the trial court's findings, we find that Smith's argument, even if correct, is unfounded. The trial court did not find that expert testimony was required to prove causation in all cases regarding failure to maintain a city ditch. The trial court instead found that the testimony of the lay witnesses was not helpful or determinative. The trial court found that an expert was needed in this case because all that could be gathered from the lay witnesses's testimony was "guesswork, speculation or conjecture as to what caused the ditch to overflow."

¶ 25. The trial court did not make a blanket statement that expert testimony was required in all drainage cases to prove causation, and thus this argument is without merit.

III. DID THE TRIAL COURT APPLY AN INCORRECT LEGAL STANDARD IN REGARD TO PROXIMATE CAUSATION?

[12][13] ¶ 26. The standard of review for application of the wrong legal standard by the trial court is *de novo. Quitman County v. State,* 910 So.2d 1032, 1035(¶ 6) (Miss.2005). This Court does not hesitate to reverse where the trial judge has applied an erroneous legal standard. *Id.; McClendon v. State,* 539 So.2d 1375, 1377 (Miss.1989).

¶ 27. Smith argues that the trial court erred by suggesting that proof of the extent of flooding caused by the City's negligence was required. Smith cites *Kiddy v. Lipscomb,* 628 So.2d 1355, 1358 (Miss.1993), for the proposition that as long as the defendant's negligence contributed to the injury, it is no defense that the injury would not have resulted from the defendant's negligence alone.

¶ 28. There is no need for this Court to conduct a *de novo* review with regard to causation as we find that the trial court did not apply the wrong legal standard. Although the trial judge stated that there were "multiple reasons that may exist as to why the ditch overflowed," his ruling was that Smith failed to prove that the City's negligence was one of the reasons. No clear evidence existed in the record to show that the City's negligence caused the ditch to overflow.

¶ 29. We find this issue to be without merit as Smith misstates the trial court's findings.

IV. WAS THE TRIAL COURT'S FINDING CONCERNING THE ABSENCE***852** OF TESTIMONY OF ANY DIRECT OBSERVATION OF ANYTHING BLOCKING THE FLOW OF WATER IN THE DITCH CLEARLY ERRONEOUS?

[14] ¶ 30. Smith argues that "the trial court found there was no testimony that the residents actually observed any obstruction in the ditch." Smith further argues that "[t]he trial court also stated there was no testimony that after the water receded anyone observed anything that would have blocked the flow of water." The trial court's actual finding was as follows:

> I think one of the plaintiffs testified that he walked the area, and there was no testimony showing that he observed any obstruction. All he saw was, like I say, a sea of water. There is no testimony after whatever water was there had receded as to anything that would have blocked-I'm not talking about impeded, but have blocked the flow of water.

¶ 31. The trial court recognized that testimony existed that debris impeded the flow of water in the ditch. This is consistent with the residents' testimony that vegetation, silt, appliances, and other debris impeded the flow of water. The testimony regarding these obstructions was not sufficient to reach a conclusion that the City's failure to remove the debris caused the neighborhood to flood.

¶ 32. This issue is without merit.

ISSUES ON CROSS-APPEAL

> I. DID THE TRIAL COURT USE AN INCORRECT LEGAL STANDARD IN REVIEWING THE CITY'S SUMMARY JUDGMENT MOTION?
>
> II. WERE IMPROPER DOCUMENTS CONSIDERED IN OPPOSITION TO THE MOTION FOR SUMMARY JUDGMENT AND WAS THERE WAS LACK OF EVIDENTIARY SUPPORT FOR PLAINTIFFS' NEGLIGENCE THEORY?
>
> III. WERE THE PLAINTIFFS' CLAIMS MERITLESS AND/OR WAS THE CITY IMMUNE FROM LIABILITY UNDER THE PROVISIONS OF THE MISSISSIPPI TORTS CLAIMS ACT?

¶ 33. Having found for the City, there is no need for this Court to rule on whether the denial of summary judgment was improper.

¶ 34. **THE JUDGMENT OF THE HARRISON COUNTY CIRCUIT COURT IS AFFIRMED ON DIRECT AND AFFIRMED ON CROSS-APPEAL. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANTS.**

KING, C.J., MYERS, P.J., IRVING, CHANDLER, GRIFFIS, BARNES, ISHEE, ROBERTS AND CARLTON, JJ., CONCUR.
Miss.App.,2007.
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