IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

HOUSTON HARTLEY — APPELLANT

VS. — CAUSE NO. 2009-CA-01772

OLD VENICE PIZZA COMPANY, INC. — APPELLEE

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

BRIEF OF APPELLEE, OLD VENICE PIZZA COMPANY, INC.

MATTHEW A. TAYLOR (MSB NO. [redacted])
JAMIE L. HEARD (MSB NO. [redacted])
SCOTT, SULLIVAN, STREETMAN & FOX, P.C.
725 AVIGNON DRIVE
RIDGELAND, MS 39157
POST OFFICE BOX 13847
JACKSON, MISSISSIPPI 39236-3847
TELEPHONE: 601-607-4800
FACSIMILE: 601-607-4801

ATTORNEYS FOR APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Books:

Rules:

FACTS

NOTE: *While Hartley did set forth in his brief a detailed version of the events that transpired on the evening of January 6, 2007 at Old Venice Pizza Company, Old Venice is, in response, compelled to provide this Court with a more complete and more accurate account of those events.*

On the evening of January 6, 2007 - a Saturday night - Houston and Amy Hartley and Justin and Parish Malouf visited the Old Venice Pizza Company around 8:30 or 9:00 p.m. (Trial Tr. at 216:16-17.) Some time after their arrival, Houston Hartley and Justin Malouf left their wives at Old Venice and walked next door to the Cherokee - a bar and gill located adjacent to Old Venice - to have some drinks and play pool. (Trial Tr. at 217:28-218:1, 491:14-492:1.) The testimony presented at trial is conflicting as to whether Houston and Justin ate dinner at Old Venice or whether Houston and Justin ate dinner at the Cherokee. (Trial Tr. at 217:12-218:1, 491:14-492:1.) Nonetheless, both Hartley and Malouf testified that while at Cherokee, the two consumed "a beer or two" each. (Trial Tr. at 218:2-8). Eventually, the pair returned to Old Venice to regroup with their wives. (Trial Tr. at 198:24-27.)

The foursome "socialized" and consumed alcohol at Old Venice until "close to closing," i.e., 1:30 to 2:00 a.m. (Trial Tr. at 173:2-5, 207:3-8, 218:21-28, 219:3-17; 447:10-20, 463:23-28; 491:17-27, 522:29-523:25, 524:3.) Approximately 15-20 minutes prior to their exit of the building, a visibly "drunk guy" was escorted out of the building or was asked to leave by Old Venice management and/or security. (Trial Tr. at 174:22-175:8, 200:15-23, 464:21-29.) After being removed from the bar, the "drunk guy" took a seat on the curb between the front door of Old Venice and the parking lot, approximately 5-6 feet from the doorway. (Trial Tr. at 175:19-24, 176:7-13.) While seated on the curb, the young man was surrounded by his own friends and was vomiting. (Trial Tr. at 175:19-24.)

According to the testimony at trial, Parrish and Justin Malouf were the first of their friends to exit the building. (Trial Tr. at 180:12-13;). While making her way to the parking lot, Parrish Malouf paused at the curb at the front of the building in order to snap a picture of the "drunk guy" with her cell phone. (Trial Tr. at 176:22-26, 220:23-26, 441:27-442:3) Justin, however, continued to proceed to his vehicle without any interruption. (Trial Tr. at 177:1-17, 201:2-3, 219:22-220:2.)

Understandably, Parrish's actions in attempting to humiliate or make fun of the "drunk guy" upset the young man's friends, who then began to bicker with Parrish in an attempt to take her cell phone and delete the picture. (Trial Tr. at 176:27-177:5, 177:20-22, 201:4-8, 221:10, 442:4-7.) When Justin heard the commotion involving his wife and the young men, he returned to his wife's side and approached the group of young men. (Trial Tr. at 221:20-222:8.) A heated exchange of words between Justin and the group of young men then took place. (Trial Tr. at 518:7-519:18.)

At about the same time the heated exchange was taking place between Justin and the group of young men, Houston Hartley and his wife exited the building. (Trial Tr. at 518:7-519:18.) According to Houston, the exchange was taking place approximately 25-30 feet away from their location at the front door of Old Venice. (Trial Tr. at 518:7-519:18.) Houston testified that he was aware that the situation between Justin and the group of young men had become heated, but nonetheless, he voluntarily approached the group. (Trial Tr. at 518:7-519:18.) Houston testified that he voluntarily intervened in order to "calm the situation down" and "tell . . . Parrish and Justin[ ] that [the group] needed to go." (Trial Tr. at 520:10-521:3.)

Testimony reflected that at some point, either before or after Houston's interjection into the argument, the young men with whom Justin was arguing called out for someone. Allegedly,

a truck full of young men subsequently pulled into the parking lot and one of the young men "sucker punched" Houston. (Trial Tr. at 180:1-181:29, 202:2-14, 465:25-466:7.) Then, according to Justin, "it was all downhill from there." (Trial Tr. at 202:13-14.) During the course of the fight/physical altercation that followed, Justin and Houston were both hit and stomped. (Trial Tr. at 182:12-15, 493:12-21, 202:20-22 .) The duo eventually broke away from the fight, reported the incident to JPD officers located at the Cherokee and left the premises.[1]

The testimony at trial reflected that Hartley suffered three broken teeth, 8-10 chipped teeth, and swelling in his mouth and jaw area as a result of the fight. (Trial Tr. at 496:26-498:1.) As of the date of trial, Hartley stated that he still experienced intense pain in is teeth as a result of exposure to hot or cold food or drink and pain in his jaw. (Trial Tr. at 498:2-11). He added that he has been told by his dentist that the pain will continue unless his teeth are removed and replaced with implants. (Trial Tr. at 498:11-15.)

Hartley also claimed that as of the date of the trial he still experienced headaches and dizziness as a result of the subject incident. (Trial Tr. at 498:25-499:1). Medical records revealed that Hartley did visit the Baptist ER and obtain an MRI approximately 2 or 3 weeks following the incident. However, Hartley admitted that the MRI revealed absolutely no abnormalities and that he did not see any other physician about his headaches and dizziness until approximately 2 months prior to this trial. (Trial Tr. at 533:8-534:17.) He made other complaints at trial of depression, loss of sleep and weight loss and testified that his medical

---

[1] There was testimony at trial regarding the actions/inactions of the Old Venice security officer over the course of the evening. Specifically, the testimony presented by the Plaintiffs indicated that the security officer failed to *completely* remove the "drunk guy" from the premises (thereby creating the atmosphere which eventually lead to the fight) and failed to subsequently intervene to prevent and/or stop the fight in which Hartley was injured. However, because Old Venice's negligence *vel non* is not at issue in this appeal, those facts are irrelevant and will not be discussed here for the sake of brevity.

expenses incurred as of the date of his testimony totaled approximately $8,241.50. (Trial Tr. at 499:19-21, 500:1-28, 501:10-15.)

While Hartley did testify that he will continue to experience pain and see a physician "[u]ntil [his problems] get better," the Plaintiff's expert physician's testimony regarding future medical treatment was vague at best. (Trial Tr. at 502:7-13). On the stand, Dr. Goel stated that *if* his conditions do not improve, Hartley *may* require future medication, *may* need future diagnostic testing, and *may* need to be referred to a neurologist, psychologist and pain specialist. (Trial Tr. at 365:2-367:25). The testimony reflected that the estimated cost of the treatment for any future medications, doctor's visits and blood work would total at least $3,000.00 per year for the rest of his life, *if necessary*, exclusive of the costs for any treatment by a neurological, dental or psychological specialist or diagnostic imaging. (367:26-369:15.) Hartley testified that he was 31 at the time of trial and, over the objection of defense counsel, suggested to the jury that he will live to be 93 years old. (Trial Tr. at 502:18-22.)

At the close of the Plaintiff's case, counsel for Old Venice moved for a mistrial based on several grounds, including the improper introduction of certain hearsay evidence and the prejudice suffered by the Defendant in light of its countless sustained objections to Plaintiff's counsel's leading of each and every witness. (Trial Tr. at 542:22-543:14.) Counsel for Old Venice also moved for a directed verdict based upon the Plaintiff's voluntary interjection into a heated and hostile altercation. Old Venice argued that Hartley's actions in doing so amounted to an intervening and superceding cause which cut off any and all liability of Old Venice. (Trial Tr. at 543:17-545:16.) Both motions were denied. (Trial Tr. at 543:15-16, 545:17-19.)

Subsequently, however, counsel for the Plaintiff also moved for a mistrial based upon defense counsel's alleged suggestion that the jury should apportion fault to criminal actors.

(Trial Tr. at 545:20-546:4.) In response, as a strategic move, counsel for the defense made no objection and agreed to the mistrial, in light of the Defendant's earlier unsuccessful mistrial motion.[2] (Trial Tr. at 546:13-17.) Nonetheless, Hartley's motion for a mistrial was denied as well. (Trial Tr. at 546:11, 21.)

Arguments regarding to jury instructions were then heard by the Court. With regard to damages, the jurors were instructed:

> C-2: Members of the jury, you have heard all of the testimony and received the evidence and will shortly hear arguments of counsel. I will presently instruct you as to the rules of law which you will use and apply to this evidence in reaching your verdict. When you took your places in the jury box, you made an oath that you would follow and apply these rules of law to the evidence in reaching your verdict in this case. It is therefore, you[r] duty as jurors to follow the law which I shall now state to you. You are not to be concerned with the wisdom of any rule of law. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base your verdict upon any other view of the law than that given in these instructions by the Court. . . . (Enclosed with Appellee's Record Excerpts as *Exhibit A*.)[3]
>
> P-3: The Court instructs the jury that if your verdict be for the Plaintiff Houston Hartley in this cause, in arriving at the amount of your verdict, you may take into consideration any or all of the following elements of damages, if any, which you find from a preponderance of the evidence in this case to have resulted from the negligence, if any, of the Defendant.

---

[2] It must be noted, however, that counsel for the defense did not, as Hartley asserted in his brief, "confess to a mistrial on these grounds." (Appellant's Br. at 20.)

[3] *Exhibit A* is a copy of one of the court's own instructions to the jury in this case. A copy of this particular instruction was not filed with the Circuit Clerk in this case and, therefore, the instruction did not become part of the record on appeal. However, Judge Harrison's law clerk was kind enough to provide counsel for Old Venice with an exact copy of the instruction which was filed in another unrelated case. It is that instruction which is attached as *Exhibit A*.

(A) All pain, suffering and mental anguish, past and future, sustained by the Plaintiff as a result of the injuries, if any, which he sustained.

(C) (sic)The cost of all past, present and future hospital bills, doctors' bills, x-rays, radiologist's fees, prescriptions and medications necessarily incurred and estimated to be occurred (sic) in the future by the Plaintiff for the treatment of his injuries, past and future, if any.

In arriving at the amount of your verdict, you should award the Plaintiff Houston Hartley such an amount of money which you feel will adequately and reasonably compensate the Plaintiff for any and all of the above-listed elements of damages, if any, which you find from a preponderance of the evidence in this case to have resulted from the negligence, if any, of the Defendant. (Enclosed with Appellee's Record Excerpts as *Exhibit B*).

D:10: The Plaintiff is claiming that he has suffered damages as a proximate result of the Defendant, Old Venice Pizza Company, Inc's negligence. While the Plaintiff has the burden of proving, by a preponderance of the evidence, that the Defendant was negligent, he also has the burden of proving his damages and the extent of any losses by a preponderance of the evidence. If you find for the Plaintiff, you must not consider or include in the amount of any verdict you may return, any claim of damages for which the Plaintiff has failed to prove to you, by a preponderance of the evidence, were actually caused or incurred as a proximate result of the subject incident. (Enclosed with Appellee's Record Excerpts as *Exhibit C*).

The following instructions on liability were also granted:

D-8: The Court instructs the jury that "contributory negligence" is conduct on the part of a person contributing as a cause to the harm he or she has suffered and falling below the standards to which she is required to perform in his or her best interests. You are further instructed that Plaintiff is not entitled to recover damages for the harm that they could have avoided by the use of due care, nor from the harm which proximately resulted from his own conduct, if any, which contributed to his damages.

If you find from a preponderance of the evidence that, during the course of the subject events, the Plaintiff failed to act as a reasonably careful person in his own best interests, and such act or omissions were a proximate contributing cause of the Plaintiff's damages, then you shall allocate a percentage of fault to the Plaintiff. (Enclosed with Appellee's Record Excerpts as *Exhibit D.*)

P-2: The Court instructs you that if you find for the Plaintiff and against the Defendant your verdict should be in the following form:

"We, the jury, find for the Plaintiff and against Old Venice Pizza Company Inc., and award compensatory damages in the amount of $\$$_____ to Houston Hartley.

And you will write your verdict upon a separate piece of paper.

If you find against the Plaintiff and in favor of the Defendant, then the form of your verdict shall be as follows:

"We the jury find in favor of the defendant." ®. at 782.)

D-20: The Court instructs the jury that there may be more than one proximate contributing cause of an incident. If you find from a preponderance of the evidence that more than one person was negligent, and such negligence proximately caused or contributed to the incident in this case, and Plaintiff sustained injuries and damages proximately caused by such combined negligence; then you must allocate percentages of fault as follows:

(0-100%)_____%	Plaintiff, Houston Hartley
(0-100%)_____%	Defendant, Old Venice Pizza Company

The total percentages above must equal 100%. If you find that a party or person is not at fault, then you may assign that party or person a percentage of zero (0).

It is not necessary for you, the jury, to reduce the total amount of damages to account for the percentages of fault allocated to the various parties or non-parties to this

lawsuit. This function will be performed by the court, if necessary. ®. at 815.)

After some deliberation, the jury posed the following question to the Court: "On page 28 the jury was given instructions that we could assign a percentage of blame to both parties. How should this verdict be written?" (Tr. Tr. at 663:2-6.) The Court responded by telling the jury to "[f]ill in the blanks as appropriate." (Tr. Tr. at 663:7-10.) Subsequently, the jury reached a verdict finding Old Venice 70% at fault and the Plaintiff 30% at fault for the Plaintiff's damages. (Trial Tr. at 663:27-2; R. at 783, 815, 845.) The jury found compensatory damages suffered by Houston Hartley in the amount of $128,000.00. (Tr. Tr. at 665:6-11, 667:9-12; R. at 782.) A Final Judgment to that effect was filed on June 19, 2009. ®. at 846.)

On June 29, 2009, Hartley filed his *Motion for Judgment Notwithstanding the Verdict, For a New Trial, or in the Alternative for an Additur*. ®. at 848-865.) In the motion, he argued:

- There was no evidence presented at trial of Hartley's contributory negligence and the jury's verdict was, therefore, against the overwhelming weight of the evidence.
- In submitting contributory negligence instructions to the jury where there was no evidence presented at trial of Hartley's contributory negligence, the jury reached their verdict through faulty instructions.
- The court erred in denying Hartley's motion for a mistrial, when the motion was unopposed by Old Venice.
- The court erred in allowing testimony of Hartley's alcohol consumption on the night of the incident and the verdict reached by the jury was the result of bias, prejudice or passion.
- The court erred in allowing testimony regarding the liability of non-party criminal actors and the verdict reached by the jury was the product of confusion.
- The court erred in allowing the testimony of Warren Woodfork, Old Venice's expert, regarding credibility. The testimony invaded the province of the jury and was outside the scope of his designation.

- Because the jury's total damages award presumably did not allow for pain and suffering and was influenced by the errors discussed above, an additur was appropriate.

®. at 848-865.) **He requested relief in the form of a judgment notwithstanding the verdict finding Old Venice 100% liable for Hartley's damages.** *Alternatively*, Hartley requested a new trial or additur.

At the hearing on Hartley's motion, the trial judge pointed out that Old Venice failed to submit an instruction at trial specifically setting forth the facts from which a jury could find Hartley to be contributorily negligent. ®. at 905:20-906:23.) The court stated that such an omission on behalf of Old Venice, along with the erroneous admission of testimony regarding Hartley's comparative negligence (sic), warranted alteration of the *Final Judgment*.[4] ®. at 922:17-923:3.) Accordingly, Hartley's motion was granted in part and denied in part. ®. at 879-880.) In support of its ruling, the trial court stated:

> I have reviewed my notes and my recollection of the testimony in this case on this particular point as to whether or not there was sufficient evidence to give an instruction on comparative negligence. **It's a very close issue**, but in my opinion in hindsight **I was wrong in allowing testimony on this particular point.** For further reasons on the instructions **it was error not to define what acts could be considered negligence on the part of the plaintiff.** . . . [I]n my opinion, the **error of allowing the testimony** and **the failure to give the instruction** could be corrected by reducing the amount that the jury reduced the award, so that will be my decision in that regard. . . . [I]n my opinion **the erroneous admission of the testimony concerning the acts of the plaintiff** would not affect the determination by the jury of the total amount of the damages.

®. at 922:17-923:3, 11-16.)

---

[4] Old Venice is unsure as to which testimony the trial court was referring. Old Venice is of the opinion that the trial court *meant to say* that the testimony presented at trial was insufficient to support a finding of comparative negligence.

The court reversed the *Final Judgment* and ordered that the final verdict in the amount of One Hundred Twenty Eight Thousand Dollars ($128,000.00) remain undisturbed, but that one hundred percent (100%) of fault for the Plaintiff's damages be allocated to the Defendant. ®. at 879-880.) Unsatisfied with the court's ruling, Hartley renewed his motion for a new trial, stating that because the instructions were faulty, the jury's verdict of $128,000.00 was reached improperly. ®. at 923:25-924:8.) The trial court again refused to grant a new trial, holding that "the erroneous admission of the testimony concerning the acts of the plaintiff would not affect the determination by the jury of the total amount of the damages." ®. at 924:19-23.) An order eliminating any allocation of fault to Hartley and affirming Old Venice's responsibility for the full amount of the verdict was entered on September 9, 2009. ® at 879-880.) A motion for reconsideration subsequently filed by Hartley was denied. ®. at 939.)

SUMMARY OF THE ARGUMENT

In his appellate brief, Hartley asks for one thing - a new trial. In support thereof, he alleges the following points of error:

- The trial court erred in allowing the jury to apportion fault to the plaintiff, since there was no evidence of the plaintiff's negligence presented at trial;
- The trial court erred in allowing the jury to apportion fault to the plaintiff because the comparative negligence instructions presented were inadequate and conflicting;
- The trial court's grant of a JNOV was insufficient to cure the error in the admission of faulty instructions and was procedurally an improper remedy;
- The trial court erred in denying Hartley's motion for mistrial;
- The trial court erred in denying Hartley's motion *in limine* to preclude evidence of the plaintiff's alcohol consumption on the night of the incident; and
- The trial court erred in allowing certain testimony of Warren Woodfork, Old Venice's expert.

A new trial, however, was and still is completely unwarranted in this case. First and foremost, each and every error cited by the Plaintiff with regard to whether or not a comparative negligence instruction was proper at the trial court level is *completely irrelevant*, since (a) Old Venice was ultimately found to be 100% liable for Hartley's injuries and (b) the trial court's grant of a JNOV eliminating any comparative fault of the plaintiff and assessing 100% liability for Hartley's damages to Old Venice was not only *exactly* what Hartley asked for in his post-trial motions, but was also within the court's discretion. Therefore, the issues surrounding whether or not the trial court erred in submitting the issue of comparative negligence to the jury are moot. The only real issues for this Court on appeal are the remaining three points - the arguments regarding the mistrial motion, the motion *in limine* and the expert testimony of Warren Woodfork - all of which are reviewed by this Honorable Court for an abuse of discretion.

Because the trial court's rulings on all three of the motions were neither arbitrary nor clearly erroneous, the rulings must stand and the final order[5] of the trial court must be **affirmed**.

[5] When reference is made herein to the "final order" of the trial court, Old Venice is referring to the *Order on Plaintiff's Motion for Judgment Notwithstanding the Verdict, for New Trial or in the Alternative, for an Additur*, i.e. the JNOV, which is found in the record at 879-880.

ARGUMENT

Throughout his brief, Hartley argues that he is entitled to a new trial in light of several errors allegedly committed at the trial court level. Notably absent from his brief, however, is evidence in support a finding that the errors had any prejudicial, negative or adverse affect on the outcome of the trial. As previously recognized by this Honorable Court, "[n]o trial is fee of error." *Fielder and Magnolia Beverage Company*, 757 So.2d 925, 928 (¶ 9) (citing *Davis v. Singing River Elec. Power Ass'n*, 501 So.2d 1128, 1131 (Miss. 1987); *Parmes v. Illinois Cent. Gulf R.R.*, 440 So.2d 261, 268 (Miss. 1983)). Although error may have been committed at the trial level, reversal of a trial court and the ordering of a new trial is not automatically appropriate in every circumstance. Rather,

> [t]o warrant reversal, two elements must be shown: error, and injury to the party appealing. Error is harmless when it is trivial, formal, or merely academic, and not prejudicial to the substantial rights of the party assigning it, and where it in no way affects the final outcome of the case; it is prejudicial, and ground for reversal, only when it affects the final result of the case and works adversely to a substantial right of the party assigning it.

Jefferson v. State of Mississippi, 818 So.2d 1099, 1112 (¶ 36) (Miss. 2002) (citing *Gray v. State*, 799 So.2d 53, 61 (Miss. 2001)). As this Court will see, there has been no such prejudice suffered by Hartley in this case, as none of the errors allegedly committed at the trial court level had an effect on the final outcome of litigation. Accordingly, no point of error cited by Hartley on appeal, even if truly erroneous, warrants reversal of the final order of the trial court.

I. Any error committed by the trial court in allowing the jury to consider Hartley's comparative negligence was completely harmless.

A. *Any error committed by the trial court was cured by the grant of a JNOV.*

In this case, the trial court ultimately found that the jury should not have been allowed to apportion any percentage of fault to Hartley, citing Old Venice's failure to submit a certain jury instruction as the point of error. Particularly, following the hearing on post-trial motions, the trial court held that in order to have properly submitted the issue of Hartley's comparative negligence to the jury, Old Venice was required to submit not only an instruction defining comparative negligence, but also an instruction defining the specific acts or omissions of Hartley which would constitute comparative negligence on his behalf. The trial court found that Old Venice's failure to do so should have been fatal to its affirmative defense of comparative negligence and that the issue should not have been submitted for consideration by the jury at trial. Despite the fact that the issue of Hartley's comparative negligence was erroneously presented to the jury, the trial court subsequently cured the error by eliminating any percentage of fault allocated to Hartley by the jury and by holding Old Venice 100% liable for Hartley's damages.

However, Hartley has argued that the trial court's remedy in simply eliminating any percentage of fault apportioned to Hartley was insufficient to cure the error in the jury's instruction. In articulating exactly how the error was not cured by the Court's grant of a JNOV, Hartley states that "the jury was obviously bias [sic] and prejudiced in this verdict" since "the complete verdict itself. . . does not allow for any addition of pain and suffering, which was an element of the plaintiff's damages submitted to the jury." Stated differently, Hartley has argued that the jury was "bias [sic] and prejudiced" by faulty *comparative negligence* instructions in the

rendering of its verdict for *damages* and reaches this conclusion based solely upon the fact that the award of damages allegedly fails to include an award for pain and suffering.

First, contrary to the assertions of Hartley, it is clear the grant of a JNOV in this case was sufficient to cure any alleged error in the jury instructions, since the allegedly faulty comparative negligence instructions had absolutely zero effect on the amount of damages awarded by the jury. As so aptly stated by the trial court, the jury's damages award was not, in any way, influenced by the faulty instructions, since the allegedly faulty instructions concerned only apportionment of liability, *not the calculation of damages*. In fact, **the jurors were specifically instructed not to take into consideration any allocation of fault between the parties in reaching their damages verdict**. ®. at 815.) In Mississippi, generally speaking, it is presumed that jurors follow the trial judge's instructions, as upon their oaths they are obliged to do." *Young v. Guild*, 7 So.3d 251, 263 (Miss.2009) (citing *Parker v. Jones County Community Hospital*, 549 So.2d 443, 446 (Miss.1989)). As such, it is **presumed** in this case that the jurors calculated their damages award in accordance with the instructions presented and that they did not take into consideration any fault of Hartley in reaching that decision. In order to rebut that presumption, Hartley must come forward with some credible evidence to the contrary.

The only suggestion made by Hartley to the contrary is that the jury was "prejudiced and biased" in reaching its verdict. He bases this conclusion solely upon his own allegations that the jury failed to award him any amount of damages for pain and suffering. His allegations in that regard, however, are not only misplaced, but are also speculative at best, since the damages award in this case was not broken down by the jury into categories, nor did Hartley request that the jury do so at trial.

Here, the jury awarded Hartley approximately $120,000.00 in damages over and above the amount of his medical expenses as of the date of trial. Simply put, Hartley has no actual knowledge of whether the amount of $120,000.00 was meant to compensate him for (1) future medical expenses, (2) for past pain and suffering, (3) for future pain and suffering **or (4) for all or a combination of all three**. In fact, in light of the rather shaky testimony of Hartley's treating/expert physician, it is just as reasonable to conclude that the jury chose to award Hartley $120,000.00 for his past and future pain and suffering as it is to assume that the jury believed Goel and chose to award $120,000.00 for future medical expenses.

The point is that Hartley just doesn't know. In making any argument to the contrary, Hartley ignores one of the most basic principals of a jury trial - that it is primarily the province of the jury to determine the amount of damages to be awarded. In doing so, he disregards the possibility that the jury simply chose not believe some of his own or his physician's testimony with regard to damages. Such guesswork on behalf of Hartley falls woefully short of establishing that the jury was bias and prejudiced and further fails to show that the jury deviated from its oath to follow the trial court's instructions. Accordingly, in this case, the jury is presumed to have found that the amount of $128,000.00 was adequate to compensate Hartley for (1) all past and future "pain, suffering and mental anguish" and (2) all past and future "hospital bills, doctors' bills, x-rays, radiologist's fees, prescriptions and medications" - *at least those which the jury found to have been proven by Hartley* ***by a preponderance of the evidence***. Any arguments to the contrary are based solely upon conjecture and should not be entertained by this Honorable Court.

Second, not only has Hartley failed to draw a connection between the alleged absence of a pain and suffering award and the faulty comparative negligence instructions, his argument for a

new trial based on the alleged "bias [sic] and prejudice" of the jury sounds more like one for an additur rather than for a new trial. As previously stated, Hartley's argument that the JNOV was insufficient to cure the error of the trial court is based solely upon his allegation that the jury was "bias and prejudiced" in its damages award. This argument, however, is the very same argument set forth by Hartley in his post-trial motion for an additur. ®. at 862-863.) Notwithstanding that Hartley has failed to present this issue for the consideration of this Honorable Court, it is clear that the trial court's denial of an additur was proper in this case.

In denying Hartley's motion for an additur, the trial court obviously found that the jury was *not* biased or prejudiced, since an additur is warranted where "the court finds that the jury was influenced by bias, prejudice, or passion , or . . . if the damages were contrary to the overwhelming weight of the evidence." *United States Fidelity and Guaranty Company of Mississippi v. Martin*, 998 So.2d 956, 969 (Miss. 2008) (citing *Rodgers v. Pascagoula Pub. Sch. Dist.*, 611 So.2d 942, 944 (Miss. 1992)). The trial court's ruling on a motion for additur will not be disturbed unless the trial court is found to have acted arbitrarily or its ruling is found to be clearly erroneous. *Poole v. Avara*, 908 So.2d 716, 721 (¶ 8) (Miss. 2005) (citing *Miss. Transp. Comm'n v. McLemore*, 863 So.2d 31, 34 (¶ 4) (Miss.2003)). In deciding whether the trial court's ruling was clearly erroneous or arbitrary, this Honorable Court "must look at the evidence in the light most favorable to the party in whose favor the jury decided, granting that party any favorable inferences that may reasonably be drawn therefrom." *Lewis v. Hiatt*, 683 So.2d 937, 941 (Miss.1996). A jury award should not be disturbed "unless its size, in comparison to the actual amount of damage, shocks the conscience." *Entergy Miss., Inc. v. Bolden*, 854 So.2d 1051, 1058 (Miss.2003) (citation omitted).

In this case, the jury awarded Hartley **over 12 times** the amount of his medical expenses as of the date of trial. By looking at the evidence in the light most favorable to Old Venice, it can reasonably be inferred that the jury chose not to believe Hartley's testimony or the testimony of Goel as to the projected amount of Hartley's future medical expenses. It is also just as reasonable to infer that the jury simply refused to believe that Hartley will incur *any* future medical expenses and that the entire amount of the verdict, over an above the amount of his medical expenses, was meant to compensate Hartley for pain and suffering. Because the amount of the verdict, in comparison with the amount of actual damages, is not unreasonable and because the amount of the verdict is supported by credible evidence, the trial court's denial of an additur was not arbitrary and therefore, should not be disturbed. Moreover, Hartley's request for a new trial based upon the exact same argument must be denied as well.

In summary, regardless of whether or not the damages awarded includes compensation for pain and suffering, the award was not affected in any way by the faulty comparative negligence instructions and the grant of the JNOV cured any error committed in the submission of the issue of the comparative negligence to the jury. Hartley's arguments presented to the contrary are (1) unsupported and (2) misplaced. First, his arguments that the jury failed to include an award for pain and suffering in its final calculation of damages is unfounded, since the award was not categorized by the jury and further, categorization was not requested by Hartley. Second, it is clear that Hartley's real issue here is with the denial of his motion for additur. However, his arguments in support of an additur at the trial level were just as unconvincing there as they are here, since the award was reasonable.

Again, the error committed by the submission of the issue of comparative negligence to the jury was cured by the grant of a JNOV. Because the damages award was completely

unaffected by the faulty instructions, any error committed at the trial court level was harmless. In this case, the end result (i.e. the damages award) would have been the same regardless of whether the trial court properly denied the comparative negligence instructions in the first place. In light of the longstanding rule that this Court will not reverse a case for error where the result would have been the same had the error not been made, Hartley's request for a new trial must, therefore, be denied. *Melton Hardware Co.* v. Heidelberg, 44 So. 857, 858 (Miss.1907). See also *Pickering v. Industria Masina I Traktora*, 740 So.2d 836, 843 (¶ 25) (Miss. 1999) (citing *Dunn v. Jack Walker's Audio Visual Center,* 544 So.2d 829, 831 (Miss.1989) (stating that errors in jury instructions are moot where the plaintiff receives the most favorable result he could have received if the instruction had been given).

B. ***The grant of a JNOV, rather than a new trial, was proper.***

As previously stated, following the trial of this matter, Hartley filed a *Motion for Judgment Notwithstanding the Verdict, For a New Trial, or in the Alternative for an Additur.* **Therein, he specifically requested a JNOV, stating that the "the jury should not have been allowed under law to apportion fault to any party other than the Defendant and that the Defendants should have been found 100% liable in this matter."** ®. at 848-849, ¶ 3.) At the hearing on the post-trial motions, it is clear that this Court gave the Plaintiff exactly what he asked for by (1) finding that as a matter of law, the jury should not have been allowed to allocate any percentage of fault to the Plaintiff and by (2) entering a judgment for the Plaintiff allocating 100% of fault for the Plaintiff's injuries to the Defendant, even though the jury verdict was originally rendered partially in favor of the Defendant. See Definition of *judgment notwithstanding the verdict*, Black's Law Dictionary at 701 (8th ed. 2005). In his appellate brief,

however, Hartley argues that the trial court's error in allowing the jury to hear faulty contributory negligence instructions warranted a new trial, rather than a JNOV.

In Mississippi, judicial estoppel precludes a party from assuming a position at one stage of a proceeding and then taking a contrary stand later in the same litigation. *Dockins v. Allred*, 849 So.2d 151, 155 (¶ 7) (Miss. 2003) (citing *Banes v. Thompson*, 352 So.2d 812, 812 (Miss.1977)); *In re Estate of Richardson*, 903 So.2d 51, 56 (¶ 17) (Miss. 2005) (citing *Dockins*). The same principal applies here to preclude Hartley from asserting on appeal that the relief granted at the trial court level was improper, when the relief granted to him by the trial court is *exactly* the relief he asked for at the trial court level. In other words, Hartley's position on appeal with regard to the JNOV is wholly inconsistent with his position in that regard at the trial level and cannot, therefore, be maintained on appeal.

Notwithstanding that Hartley asked for and actually received a JNOV in this case, Hartley is arguing that instead of simply finding Old Venice to be 100% liable for Hartley's damages, the trial court should have granted a new trial. Contrary to the suggestions of Hartley, however, while the grant of a new trial is one remedy available to cure faulty jury instructions, it was certainly not the **only** remedy available to the trial court in this case. See *New Hampshire Ins. Co. v. Sid Smith & Associates, Inc.*, 610 So.2d 340, 346 (Miss. 1992) (citing *Cone v. West Virginia Pulp and Paper Co.*, 330 U.S. 212, 215 (1947)) (stating that "there are circumstances which might lead the trial court to believe that a new trial rather than a [JNOV] would better serve the ends of justice). Here, an entirely new trial was, and still is, absolutely unnecessary, since the trial court's grant of a JNOV in favor of Hartley was not only sufficient to cure the error at the trial court level, but was also clearly within the discretion of the trial court.

This Court reviews a trial court's grant or denial of a motion for a new trial for an abuse of discretion. *Solanki v. Ervin*, 21 So.3d 552, 569 (¶ 46) (Miss. 2009) (citing *Pierce v. Cook*, 992 So.2d 612, 620 (Miss.2008); *Allstate Ins. Co. v. McGory*, 697 So.2d 1171, 1174 (Miss.1997)). While a new trial **may** be granted where "the verdict is against the overwhelming weight of the evidence, or when the jury has been confused by faulty instructions, or when the jury has departed from its oath and its verdict is a result of bias, passion and prejudice," **a new trial should only by granted where allowing the verdict to stand "would sanction an unconscionable injustice**." *Canadian National/Illinois Central Railroad Co. v. Hall*, 953 So.2d 1084, 1092 (Miss. 2007) (citing *Griffin v. Fletcher*, 362 So.2d 594, 596 (Miss. 1978); *Johnson v. St. Dominics-Jackson Memorial Hospital*, 967 So.2d 20, 23 (Miss. 2007)). In other words, unless error **has caused a legally incorrect or unjust verdict to be rendered**, a new trial is unwarranted. *White v. Stewman*, 932 So.2d 27, 33 (Miss.2006).

In this case, a new trial was not *necessary* at the trial court level, since the error committed at the trial court level could be and was cured by the grant of a JNOV. In light of the nature of the error - i.e. the erroneous submission of the issue of comparative negligence to the jury - not only was the grant of the JNOV the most logical, economical and efficient remedy for all parties involved, the JNOV also produced the **most favorable result** possible for Hartley short of an additur. For the reasons discussed above, however, an additur was improper in this case.

On appeal, as previously stated, Hartley has failed to otherwise demonstrate how the error committed at the trial court level and the subsequent grant of a JNOV caused a legally incorrect or unjust *damages verdict* to be rendered. The simple fact is that Hartley suffered no unconscionable injustice as a result of faulty comparative negligence instructions since Old

Venice was found to be 100% liable for his injuries. Hartley also has not demonstrated how the damages verdict *even might* be different, but for the error committed at trial with regard to the instructions. Again, with all due respect, what Hartley is *really* dissatisfied with in this case is the amount of the verdict. Here, Hartley has simply requested another shot at a greater damages verdict **without substantive evidence of any prejudice suffered by Hartley at the first trial.** As such, a new trial (even if just on damages) is a very tall order and should not be granted.

In summary, the error committed by the trial court in allowing the jury to allocate fault to Hartley at trial was harmless, since it was cured by the grant of a JNOV. Further, the grant of the JNOV was proper, as the grant or denial of a JNOV and/or new trial were both within the court's discretion. Accordingly, each and every one of Hartley's arguments regarding his comparative negligence *vel non* and the jury instructions in that regard are completely irrelevant and should be disregarded by this Honorable Court. The only remaining issues to be considered by this Court, which are discussed below, include:

- Whether the trial court properly denied Hartley's motion for mistrial;
- Whether the trial court properly denied Hartley's motion *in limine* to preclude evidence of the plaintiff's alcohol consumption on the night of the incident; and
- The trial court properly allowed certain testimony of Warren Woodfork, Old Venice's expert, over the objections of Hartley.

II. The trial court was acting within its discretion in denying Hartley's motion for mistrial.

Hartley argues that the trial court erred in denying his *ore tenus Motion for Mistrial*, stating that (a) testimony was presented at trial which suggested that the jury should apportion fault to criminal actors and (b) the motion was unopposed by the Defendant at trial.[6] First and

[6] As stated *supra*, Hartley inaccurately states in his brief that Old Venice "confess[ed] at trial that it was attempting to present evidence that the third party criminals should be liable to the

foremost, the charging instructions to the jury in this case did not allow for the apportionment of fault to any non-party actors, criminal or not. Accordingly, the jury did not apportion any percentage of fault to criminal actors. As previously stated, this Court will not reverse a case for error where the result would have been the same had the error not been made. Here, regardless of whether it was suggested to the jury that it should apportion fault to criminal actors, the result would be the same - 100% liability on behalf of Old Venice and 0% liability on behalf of the criminal actors. Any error in the admission of the testimony, therefore, was harmless and should not serve as a basis for the reversal of the trial court's denial of the motion for mistrial in this case.

More importantly, however, in Mississippi, the decision of whether an error in trial proceedings is incurable and thus, whether a mistrial is warranted, rests within the sound discretion of the trial court. *K.M. Leasing, Inc. v. Butler ex rel. Butler*, 749 So.2d 310, 319 (Miss.App. 1999) (citing *Snelson v. State*, 704 So.2d 452, 456 (Miss.1997)). Therefore, notwithstanding that the Defendant did not oppose the motion at the trial court level, the grant or denial of a motion for mistrial will not be disturbed unless the ruling is found to be arbitrary and clearly erroneous. *Poole v. Avara*, 908 So.2d 716, 721 (¶ 8) (Miss. 2005) (citing *Miss. Transp. Comm'n v. McLemore*, 863 So.2d 31, 34 (¶ 4) (Miss.2003)). In this case, any error in the proceedings could be and was cured by the court's instruction to the jury to disregard the exchange.

Plaintiff for his injuries" and further, "confess[ed] to a mistrial on these grounds." However, the Defendant simply chose not to oppose the Plaintiff's motion, since the Defendant previously moved for a mistrial on the basis of Plaintiff's counsel's pervasive leading of witnesses, but was denied. The decision not to oppose the Plaintiff's motion for mistrial was simply a strategic one and not a confession of the grounds of the motion.

By Mr. Ogden:	Plaintiff objects to the testimony about third party liabilities. [sic] We move that the testimony be stricken from the record and the jury be so instructed to disregard that testimony as improper.
By the Court:	Sustained. **Members of the jury, you disregard the testimony as to the liability of the thirty [sic] parties. Thank you. Move along.**

(Trial Tr. at 571: 1-9.)

Again, "it is presumed that jurors follow the trial judge's instructions, as upon their oaths they are obliged to do." *Young v. Guild*, 7 So.3d 251, 263 (Miss.2009) (citing *Parker v. Jones County Community Hospital*, 549 So.2d 443, 446 (Miss.1989)). Thus, a trial court's admonishment to the jury to disregard an improper question and answer generally is deemed sufficient to cure any taint. *Id.* Here, it is clear that any error on behalf of Old Venice in the allegedly improper line of questioning was cured by this Court's instruction to the jury to disregard the testimony and the court's decision to deny a mistrial predicated upon that error was not arbitrary or clearly erroneous. Accordingly, the trial court's denial of the motion should not be disturbed.

III. The trial court did not err in allowing testimony regarding Hartley's alcohol consumption on the night of the subject incident.

The admission or exclusion of evidence is a matter solely within the trial court's discretion. *Hageney v. Jackson Furniture of Danville, Inv.*, 746 So.2d 912, 918 (Miss. App. 1999) (citing *Thompson Mach. Commerce Corp. V. City of Meridian*, 530 So.3d 1341 (Miss. 1988)). Generally speaking, all relevant evidence is admissible, except as otherwise provided under the Mississippi Rules of Evidence. MISS. R. EVID. 402. "Relevant evidence" is defined as that which has *any* tendency to make the existence of any fact that is of consequence to the action

more or less probable. MISS. R. EVID. 401. Although relevant, some evidence may be excluded where "its probative value is *substantially* outweighed by the danger of unfair prejudice" to the party against whom the evidence is offered. MISS. R. EVID. 403.

In his brief, Hartley first contends that evidence of his own alcohol consumption on the night of the subject attack is irrelevant and in admitting the evidence, the trial court committed reversible error. To the contrary, however, Hartley's state of sobriety was clearly relevant in the jury's assessment of his credibility in relating events surrounding the incident. Additionally, regardless of whether or not the issue was properly submitted for determination by the jury, Hartley's consumption of alcohol on the night of the subject incident was relevant to issue of whether he was contributorily negligent. See e.g., *Hageney,* 746 So.2d at 920 (citing *Mississippi Power v. Lumpkin*, 725 So.2d 721 (Miss. 1988) (stating that evidence of actual consumption of alcohol at the time of the injurious incident was highly relevant to the issues of the Plaintiff's credibility and contributory negligence in causing his own injuries, where the evidence was presented without accompanying testimony that the Plaintiff was actually impaired); *Abrams v. Markin Firearms Company*, 838 So.2d 975, 980 (Miss. 2003) (citing and stating same). As such, the evidence is presumptively admissible.

Hartley also argues, however, that the admission of the evidence was prejudicial in that the evidence implied that Hartley was intoxicated at the time of his assault. He argues that without accompanying evidence presented by Old Venice demonstrating that the alleged intoxication caused or contributed to his assault, the evidence should have been excluded. In support of his proposition that the evidence of Hartley's alcohol consumption should have been excluded, Hartley cites *Accu-Fab & Construction, Inc. v. Ladner*, 778 So.2d 766 (Miss. 2001), *overruled on other grounds*, *Holladay v. Tutor*, 465 So.2d 337, 338 (Miss. 1985) and *Pope v.*

McGee, 403 So.2d 1269, 1271 (Miss. 1981). None of those cases, however, are applicable to the issue at hand.

In each of these cases, there was no evidence presented of the Plaintiff's actual consumption of alcohol or drugs *at the time of or immediately prior to* the injurious incident. Rather, the only evidence presented established that the Plaintiff *possessed* some impairing substance at the time of the incident or that the Plaintiff had consumed the substance *at some possibly remote point in time prior to* the injurious incidents. In those cases, therefore, the fact finder was left to impermissibly speculate as to the Plaintiff's consumption of drugs or alcohol *contemporaneously with* the injurious incident. Conversely, in our case, Hartley himself testified that he had consumed alcohol *the night of and merely hours or minutes before* the physical altercation in which he was involved. As such, those cases have no bearing on the issue at hand and no accompanying evidence of impairment was necessary in this case.

Most importantly, however, in his brief, Hartley has failed to articulate exactly how the admission of evidence of his alcohol consumption on the night of the subject incident caused him to be prejudiced in any way. Instead, Hartley states over and over, in boilerplate language, only that the trial court's decision with regard to the evidence was "unduly prejudicial", "erroneous" and "highly prejudicial." With all due respect, without a substantive explanation by Hartley as to how he contends he was prejudiced by the admission of such evidence, Old Venice is ill-equipped to provide a substantive argument in response. Suffice it to say, then, that Hartley **was not** prejudiced in any way by the admission of evidence of his alcohol consumption on the night of the incident, as evidenced by the award of damages in the amount of over twelve times Hartley's medical expenses and the ultimate finding of 100% fault for those damages on behalf of Old Venice.

As previously stated, Hartley's alcohol consumption on the night of the incident was relevant as to his credibility and comparative negligence. Its probative value as to Hartley's credibility and comparative negligence was not outweighed by the prejudice, if any at all, suffered by the Hartley from its admission and Hartley has failed to establish anything to the contrary. Because the trial court's rulings with regard to the admissibility of evidence of Hartley's alcohol consumption on the night of the incident were not arbitrary or clearly erroneous and did not adversely affect the outcome of the case, the trial court's ruling did not constitute an abuse of discretion and must be affirmed by this Court. *Fielder v. Magnolia Beverage Company*, 757 So.2d 925, 928 (¶ 9) (Miss. 1999) (citing *In re Estate of Mask*, 703 So.2d 852, 859 (Miss. 1997); *Terrain Enters., Inc. v. Mockbee*, 654 So.2d 1122, 1131 (Miss. 1995)) (stating "[w]here error involves the admission or exclusion of evidence, [the appellate Court] will not reverse unless the error adversely affects a substantial right of a party").

IV. The trial court did not err in allowing the expert testimony of Warren Woodfork.

Finally, Hartley has argued that the "trial court erred in allowing Warren G. Woodfork[, Old Venice's premises security expert,] to give testimony outside the scope of his designation." Hartley is specifically aggrieved by Woodfork's testimony with regard to (1) the legal status of the people involved in the subject incident and (2) the liability of criminal third parties.

First, with regard to Woodfork's testimony as to the legal status of the people involved in the subject incident, such testimony was, in fact, properly within the scope of Woodfork's designation. Specifically, Hartley was advised in Old Venice's responses to Hartley's interrogatories that Woodfork would testify as to as to "liability for the events alleged in the complaint." (See *Defendant's Responses to Plaintiff's First Set of Interrogatories and Request for Production of Documents*, enclosed with Appellee's Record Excerpts as *Exhibit E.*) Caselaw

need not be cited for the proposition that in order to testify as to liability in a premises security case, it is necessary that an expert form some opinion as to the legal status of parties involved, since the standard of care owed to a person is wholly dependent on the person's status. Stated differently, regardless of whether Old Venice failed to state specifically that Woodfork would be testifying with regard to the legal status of the parties involved in the subject incident, Old Venice's interrogatory response was sufficient to give Hartley adequate notice of Woodfork's area of expertise and of the general scope of the testimony that could be expected to be offered by him at trial. Because the testimony given with regard to the legal status of the parties involved was such an integral element of Woodfork's testimony as to premises liability in this case, the testimony did not go beyond the scope of his designation and was not, therefore, improper. (See, e.g., *Walker v. Gann*, 955 So.2d 920 (Miss. App. 2007) (holding that an expert's testimony did not go beyond the scope of her designation where the contested testimony followed reasonably from the summary of the expert's opinion in the designation).

Most importantly, regardless of whether or not Woodfork's testimony in either regard was properly within the scope of his designation, Hartley fails to *even imply* that this testimony was prejudicial to his case. In other words, the testimony of Woodfork with regard to both the legal status of the people involved and the liability of criminal third parties had *zero effect* on the outcome of this litigation, since the allegedly improper testimony related solely to *liability* and since liability ultimately fell completely with Old Venice. Again, any error in the admission of the testimony was both (a) cured by the trial court's instructions and (b) completely harmless. Accordingly, the improper testimony, if any, cannot serve as a basis for a new trial or reversal of the final order of the trial court in this case.

CONCLUSION

Again, regardless of whether the trial court erred in allowing the jury to consider the contributory negligence of Hartley at the trial court level, such error was corrected with the grant of a JNOV by the trial court. Accordingly, any error cited by Hartley with regard to the issue of comparative negligence or faulty instructions thereon is completely harmless and does not warrant reversal of the final judgment entered in this case. Moreover, neither of the trial court's rulings with regard to Hartley's motion for mistrial and his motion *in limine* regarding his alcohol consumption on the night of the incident amounted to an abuse of discretion. Therefore, those rulings must stand. With regard to Woodfork, Hartley has clearly failed to show any prejudice caused suffered by him by the allegedly improper testimony. Accordingly, such error, if any error was committed, was harmless. Because Hartley has failed to demonstrate any reversible error in this case, the final order of the trial court allocating 100% fault to Old Venice and affirming the jury's verdict of $128,000.00 must be **affirmed**.

WHEREFORE, PREMISES CONSIDERED, Old Venice Pizza Company, Inc. respectfully requests that the final order of the trial court, i.e. the *Order on Plaintiff's Motion for Judgment Notwithstanding the Verdict, for a New Trial or in the Alternative for an Additur*, be **affirmed**.

RESPECTFULLY submitted this the 9th day of June, 2010.

OLD VENICE PIZZA COMPANY, INC,
APPELLEE

BY: _____
JAMIE L. HEARD

Of counsel:

Matthew A Taylor (MSB No. [redacted]
Jamie L. Heard (MSB No [redacted]
Scott, Sullivan, Streetman & Fox, P.C.
725 Avignon Drive
Ridgeland, MS 39157
Post Office Box 13847
Jackson, Mississippi 39236-3847
Telephone: 601-607-4800
Facsimile: 601-607-4801

Attorneys for the Appellee

CERTIFICATE OF SERVICE

I, Jamie L. Heard, one of the counsel of record for Appellee, Old Venice Pizza Company, Inc., do hereby certify that I have this date caused to be delivered, via United States Mail, postage prepaid, a true and correct copy of the above and foregoing *Brief* to the following:

J. Ashley Ogden, Esq.
James W. Smith, Jr., Esq.
Ogden & Associates, PLLC
500 East Capitol Street, Suite 3
Jackson, MS 39201
Counsel for Appellant

Honorable William F. Coleman, Circuit Court Judge
P.O. Box 27
Raymond, MS 39154

THIS the 9th day of June, 2010.

Jamie L. Heard