IN THE SUPREME COURT OF MISSISSIPPI

2009-CA-02009

APAC-TENNESSEE, INC. — DEFENDANT-APPELLANT/CROSS-APPELLEE

V.

ETHAN BRYANT, ET AL. — PLAINTIFFS-APPELLEES/CROSS-APPELLANTS

Cross Appeal from the Circuit Court of Desoto County

BRIEF OF APPELLEES/CROSS APPELLANTS ETHAN BRYANT, ET AL.

ORAL ARGUMENT REQUESTED

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APAC-TENNESSEE, INC. APPELLANT/CROSS-APPELLEE

V. CASE NO. 2009-CA-02009

ETHAN BRYANT, ET AL. APPELLEES/CROSS-APPELLANTS

CERTIFICATE OF INTERESTED PERSONS

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

1. Ethan Bryant, a minor, and Carey and Kateri Bryant, Plaintiffs in the action below;

2. Robert R. Morris, III, Paul R. Scott, Richard T. Phillips and Jason Nabors from the firm of Smith, Phillips, Mitchell, Scott & Nowak, counsel for Plaintiffs;

3. APAC-Tennessee, Incorporated and its corporate representatives at trial; Julie Arick and Nick Haynes;

4. William O. Luckett, counsel for Defendant APAC-Tennessee, Inc.;

5. Brian L. Yoakum, the Biller Law firm, counsel for Defendant APAC-Tennessee, Inc.;

6. William F. Goodman, Jr., Mark D. Jicka, and J. Collins Wohner Jr. of Watkins and Eager, PLLC, counsel for the Defendant APAC-Tennessee, Inc.

7. Chad McCarty, trial Defendant (not a party to appeal);

8. Everything Wholesale, LLC, trial Defendant (not a party to appeal);

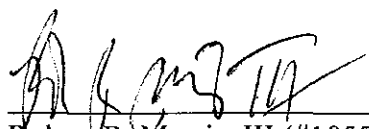
9. H. Richmond Culp, III, counsel for Chad McCarty and Everything Wholesale, LLC;

10. Jim Hood, Mississippi Attorney General;

11. National Union Fire Insurance Company of Pittsburgh, PA, insurer for APAC-Tennessee, Inc.;

12. United Financial Casualty Company/Progressive Insurance, insurer for Everything Wholesale, LLC and Chad McCarty (not a party to appeal).

Respectfully submitted,



Robert R. Morris, III (#10559)
Smith, Phillips, Mitchell
Scott & Nowak

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STATEMENT OF THE ISSUE ON CROSS APPEAL

1. Whether the mandatory cap on non-economic damages imposed by the Legislature usurps the constitutional powers of the Judiciary, and violates the rights of Mississippi citizens, including Ethan Bryant, under the United States and Mississippi Constitutions.

STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs respectfully request oral argument to address the facts which show the Trial Court properly applied the law and instructed the jury, and that the verdict of the Desoto County Jury is supported by the evidence. Plaintiffs request oral argument on the Cross-Appeal to discuss the reasons § 11-1-60 of the Mississippi Code, which legislatively imposes a mandatory cap on the non-economic damages recoverable by Ethan Bryant, is an unconstitutional denial of his rights under the United States and Mississippi Constitutions and is in breach of the Separation of Powers Doctrine.

STATEMENT OF THE CASE

On August 3, 2006, Ethan Bryant was catastrophically injured when an overloaded gravel truck could not stop and broadsided him in the intersection of Malone and Goodman Roads in Desoto County, Mississippi. After a week of trial, a Desoto County jury unanimously found that the Defendant APAC had breached its duty of care to the Plaintiffs. Additionally, the Desoto County jury found that Chad McCarty was an employee of APAC at the time of the collision based upon its control of his conduct.

The evidence established that APAC violated its own policies, as well as state and federal regulations, when: 1) APAC allowed and accepted illegal and overweight loads from McCarty; 2) APAC continued allowing overweight loads even though it was in possession of fifteen overweight load tickets; 3) APAC failed to enforce its own policies to prevent said

overweight loads; 4) APAC hired an unqualified driver, McCarty, to haul its loads; 5) APAC required no minimum level of experience for its driver; 6) APAC failed to inspect the gravel truck, which had "out of service" brakes; and 7) APAC failed to take this dangerous gravel truck out of service. The jury found that APAC's numerous acts of negligence caused Ethan's injuries.

The jury also unanimously found that APAC's driver, McCarty, was not independent of APAC. The truck in question was driven by McCarty and titled in the name of Everything Wholesale, LLC. At the time of the wreck, McCarty was working on behalf of APAC, hauling loads of washed sand from a Memphis Stone and Gravel Pit to an APAC location on Tuggle Road in Memphis, Tennessee. APAC, a construction company, utilized a "renewable trucking agreement" to retain drivers to haul loads for them, using hundreds of these drivers at any given time.

Plaintiffs filed suit against APAC, alleging that it was independently negligent for the injuries to Ethan Bryant, and that it was also responsible for the actions of McCarty at the time of the collision. The jury unanimously agreed with these allegations. Aggrieved of the result, APAC has appealed.

The Trial Court rulings appealed by APAC are supported by law and are not in error. The issues raised by APAC were fully briefed and decided by the Trial Court, through well-reasoned orders based on established law. The case was correctly presented to the jury for a determination of the issues of fact. The Desoto County jury's unanimous verdict should be affirmed on all counts, and new trial is not warranted. Plaintiffs further submit that the application of MISS. CODE ANN. § 11-1-60(2)(b) is unconstitutional in this case, and the non-economic damages award to Ethan Bryant in the amount of $13,758,837.00 should be reinstated.

I. Course of Proceedings and Disposition Below

The Complaint was filed in this case on November 6, 2006. (R 19-36). Defendant APAC filed motion for summary judgment on August 27, 2008, which Plaintiffs opposed. (R 354-355; R 729-733). At the hearing, Circuit Court Judge Robert Chamberlin addressed whether Tennessee law applied as it related to Defendant McCarty's employment status. (T 10, RE 4). All parties agreed that Tennessee law applied to the issue of employment. (T 11-13, RE 4; R 1159-1160, RE 5). There was no objection from APAC as to the choice of law from that point until the conclusion of the trial. On October 31, 2008, the Trial Court overruled APAC's motion for summary judgment, finding that genuine issues of material fact existed based upon the application of Tennessee law. (R 1159-1164, RE 5).

In limine motions were argued, with an order on those motions being issued August 7, 2009. (R 1507-1518, RE 6). At the conclusion of Plaintiffs' case in chief, APAC made a motion for directed verdict, which was denied. (T 705-716, RE 7). On August 14, 2009, after a week long trial on the merits, the case was submitted to the jury. (T 1047). A unanimous Desoto County jury returned a verdict against the Defendants APAC and McCarty. The jury found that all Defendants and Memphis Stone and Gravel were negligent and that Chad McCarty/ Everything Wholesale was an employee of the Defendant APAC. (T 1067-1070, RE 8; R 1577-1578, RE 9). In allocating fault, the jury found the Defendant McCarty was ten percent (10%) at fault, Memphis Stone and Gravel was twenty percent (20%) at fault, and the Defendant APAC was seventy percent (70%) at fault. (R 1578, RE 9). Damages were awarded to the Plaintiffs as follows: (1) Ethan Bryant, economic damages, $15 million; (2) Ethan Bryant, non-economic damages, $13,758,837; (3) and economic damages to Carey and Kateri Bryant in the amount of $1,241,163. (R 1578, RE 9).

Plaintiffs filed a motion to enroll the full judgment, arguing § 11-1-60 of the Mississippi Code was unconstitutional. (R 1662-1664, RE 1). The Trial Court held that the requirements of § 11-1-60 were mandatory, and the cap on non-economic damages had to be applied. (R 1682-1683, RE 2). The Trial Court entered judgment against the Defendants, reducing the non-economic damages award to Ethan Bryant by $12,758,837, pursuant to the statute. (R 1684-1687, RE 3).

APAC filed a motion for judgment notwithstanding the verdict and/or a new trial, upon which a hearing was held on November 16, 2009. (R 1688-1694; T 1074). Plaintiffs and Defendant McCarty/Everything Wholesale opposed APAC's motion for JNOV and/or for new trial. (R 1709-1710). After APAC's motion for directed verdict and/or for new trial was denied, it appealed. (R 1717, 1722; T 1084-1090, RE 10). Plaintiffs have cross-appealed, asserting that the cap on non-economic damages is unconstitutional. (R 1852-1853). Defendant Chad McCarty/Everything Wholesale, LLC, did not appeal the verdict.

II. Statement of the Facts

At the time of Ethan's injury, APAC had a set of policies in place to regulate its truck drivers, regardless of their employment status. (T 816, RE 11; T 882, RE 12). These policies were enacted because APAC acknowledged that safety of the motoring public was important to it. (T 854, 877-878, RE 12). With regard to drivers operating under its "trucking agreement," APAC required that each had to provide a Department of Transportation Number (hereafter "DOT number") and a Commercial Driver's License ("CDL"). (T 754, RE 11; T 855, RE 12). Julie Arick, APAC's "dispatch supervisor" for McCarty, testified that APAC had never allowed someone to sign a trucking agreement without a valid CDL. (T 818-819, RE 11). APAC's corporate representatives testified that APAC did not require McCarty (or any other driver) to

satisfy any minimum levels of experience or training in handling commercial vehicles. (T 878-879, RE 12). APAC made no effort to train these drivers, as they deemed it too challenging. (T 880-882, RE 12).

Nick Haynes, APAC's President, testified that APAC also had a policy against accepting or paying for loads that were overweight or illegal. (T 882, RE 12).[1] This policy was part of its comprehensive "safety has no hierarchy" program. (T 877, RE 12). APAC also had a driver safety agreement stating drivers found to be hauling overweight would be fired. (T 886, RE 12; Exh. 38, RE 13). This was because, according APAC's corporate representative, it knew that the delivery and acceptance of overweight loads posed a risk to the motoring public. (Exh. 55; Section APAC00170-17, 2:00-2:45). At its own plants, APAC made McCarty and other drivers turn around and dump their loads if they were overweight. (T 802-803, RE 11). When APAC was receiving loads, as in this case, it did not have the same requirement. (T 818, RE 11). The only thing at APAC's Tuggle Road location was a "drop box" where drivers stamped their own ticket and left them in APAC's possession for payment. (T 785, 818, RE 11). In essence, APAC chose to ignore loads it was receiving, as it took the position that these loads did not belong to it until they were dumped on APAC property. (Exh. 55).

APAC testified at trial that it obtained McCarty's CDL on July 7, 2006. (T 756, RE 11). McCarty began hauling for APAC on July 17, 2006. (T 761, RE 11). APAC's dispatcher testified that had it allowed McCarty to haul in any capacity without a CDL, it would have been

[1] Mr. Haynes was a 30(b)(6) designee, and his deposition was played in Plaintiffs' case in chief. (Exh. 54). Citations in the brief are to his trial testimony for ease of citation. The testimony was essentially presented in Plaintiffs' case, and then repeated during APAC's case. (Exh. 54).

illegal. (T 821, RE 11).[2] It was then disclosed at trial that APAC did not have a copy of McCarty's CDL, and that he did not have one at the time he began driving for APAC. (T 389, RE 14; Exh. 33, 73, RE 15). This fact was confirmed by Brady McMillen, accident reconstructionist, who noted McCarty was not issued a commercial driver's license until July 31, 2006. (T 897-898, RE 16; Exh. 33, 73, RE 15).

On August 3, 2006, APAC had no procedure in place to enforce its overweight load policy. (T 818, RE 11). The system APAC was using allowed drivers to circumvent its own rule. (T 818, RE 11). By the end of McCarty's first day of hauling from Memphis Stone (July 27, 2006), he had delivered to APAC's plant seven separate loads, each of which violated APAC's policy. (T 816, RE 11; Exh. 43, 44). APAC had possession of each ticket showing the violations had occurred. (T 307, 310-311, RE 14; Exh. 43, 44). The next work day, August 2, 2006, McCarty made an additional eight trips. (Exh. 43, 44). Every load he delivered on APAC's behalf was overweight. (T 816, RE 11).

On the morning of August 3, 2006, APAC had fifteen tickets in its possession showing there had been fifteen separate violations of its policy against hauling overweight. (T 885, RE 12). According to APAC, had anyone looked at these tickets before the wreck, McCarty would have been terminated. (T 817, RE 11; T 885-887, RE 12). Arick, the corporate representative, admitted that had APAC looked at any one of these illegal weight tickets and fired McCarty, the wreck would not have happened. (T 817, RE 11; Exh. 55). APAC also admitted it paid McCarty for each overweight load, even after it knew they were illegal. (T 816, RE 11; T 883, RE 12).

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[2] Ms. Arick was a 30(b)(6) designee, and her deposition was played in Plaintiffs' case in chief. (Exh. 55). Citations in the brief are to her trial testimony for ease of citation. The testimony was essentially presented in Plaintiffs' case, and then repeated during APAC's case. (Exh. 55).

Dane Maxwell, an expert in the field of commercial motor vehicle regulation, testified that it was his opinion that APAC was acting as a dispatcher for the McCarty vehicle. (T 490, RE 17). APAC was therefore required to comply with state and federal trucking regulations for this vehicle. (T 490, RE 17). Based upon his inspection of the dump truck, it was found that three of the six brakes were "out of service" and in violation of the regulations. (T 486, RE 17). Mr. Maxwell testified that under the federal regulations, APAC was not allowed to dispatch commercial vehicles that were out of service. (T 491, RE 17). Regardless of McCarty's employment status, it was his opinion that APAC should have in the least had this vehicle inspected if it were going to use it in hauling operations of any character. (T 490, RE 17). Based upon his inspection of the vehicle, his experience in the field of commercial motor vehicle regulation, and the facts of the case, it was Mr. Maxwell's opinion that APAC was in the best position to make sure the McCarty dump truck was being operated safely. (T 491, RE 17). It was Mr. Maxwell's opinon that if APAC had complied with state and federal regulations, the McCarty vehicle would not have been in operation on the morning of August 3, 2006, and the wreck would not have occurred. (T 489, RE 17). APAC offered no expert witness to contradict this testimony, despite designating an expert in the field of commercial trucking regulation. (R 583-586).

At the time of his hire, McCarty had a ninth grade education, and had never held a commercial driver's license. (T 288-289, RE 14). Defendant McCarty made first contact with APAC through his father-in-law, who called Nick Haynes about McCarty getting work. (T 291-293, RE 14). McCarty testified that he knew he had a job with APAC before he even purchased the dump truck. (T 319, RE 14). During the time leading up to his hire, McCarty never sought employment with any other entity, and had no other existing contracts. (T 319-321, RE 14).

On his first day at work, McCarty was told by APAC that he would be driving for James Harts. (T 301, RE 14; T 763, RE 11). James Harts was a minority driver whom APAC was using to qualify for a state construction project. (T 857, 872-873, RE 12). APAC could not qualify for this contract without drivers like Harts, who were part of a "disadvantaged business owner program." (T 762, RE 11). Because Harts had only one truck, APAC ordered McCarty and other drivers to drive for Harts to satisfy the contract. (T 761-763, RE 11). Not one driver ordered by APAC to drive for Mr. Harts refused. (T 823, RE 11). Essentially, APAC hired McCarty out to Mr. Harts for a week and a half for its own benefit. (T 302, RE 14). APAC testified that it dispatched Mr. McCarty to drive for Harts, and that Mr. Harts never contacted McCarty directly. (T 875, RE 12).[3]

Each day, APAC's dispatch supervisor would prepare a master schedule for all the trucks driving for it, and would then call the drivers that night to advise them where to be the next day. (T 772, 774, 776, RE 11; Exh. 52). McCarty only knew where to go because APAC called him the night before with instructions on what to do the next day; including where to go, what to haul, and where to haul it. (T 295- 296, RE 14). APAC also provided instructions to the drivers in certain circumstances as to the route they should take. (T 801, RE 11). APAC would tell McCarty what hours to work, when to start work, and when to stop work. (T 321, RE 14).

McCarty did not have an account with Memphis Stone, and used APAC accounts to obtain the sand. (T 304-305, 322-323, RE 14; Exh. 44). McCarty was paid "by the ton" for his deliveries, and was paid mileage on top of the load fee. (T 805-806, RE 11). He had no ability to

[3] During her 30(b)(6) deposition in 2008, Ms. Arick testified that McCarty was never used by APAC to satisfy any minority contract. (T 821, RE 11). Furthermore, while Ms. Arick testified at trial that this was a commonly used procedure, she testified during her 30(b)(6) deposition in 2008 that this was the first and only time that it had ever occurred. (T 823, RE 11).

negotiate the terms of payment. (T 312, RE 14). The trucking agreement that he signed was likewise non-negotiable. (T 882, RE 12). McCarty had no control or authority as to where to pick up, haul or take the product. (T 313, RE 14). McCarty testified that had he been told by APAC that it would not accept or pay him for an overweight load, he would have returned his load to Memphis Stone, and not done it again. (T 323-324, RE 14). The trucking agreement between APAC and McCarty required that he (the driver) report any overweight load to APAC. (T 386-387, RE 14; Exh. 38, RE 13). APAC further maintained through its agreement that McCarty could be terminated "at will." (T 322, RE 14; Exh. 36, RE 18).

All told, McCarty made fifteen illegal deliveries to APAC. (T 310, RE 14). The morning of August 3, 2006, the load McCarty picked up weighed 73,580 pounds (21,480 pounds over the limit). (T 401, RE 16; Exh. 45). As McCarty approached the intersection of Goodman Road and Malone Road, he saw the light turn yellow, and attempted to slow his truck. (T 314, RE 14). Realizing he could not stop, McCarty applied his brakes and blew his horn. (T 314, RE 14). He later told police officers at the scene that the load "pushed him through" the intersection. (T 314, RE 14). McCarty testified that when he stepped on the brakes, they locked up, but did not stop the dump truck. (T 354-355, RE 14).[4] Accident reconstruction expert Brady McMillen testified that the weight of the truck was a contributing factor in the collision. (T 426-427, RE 16).[5] APAC did not cross examine Brady McMillen, and did not call any expert to rebut or otherwise

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[4] Subsequent investigation by the Mississippi Department of Transportation found that the brakes on his truck were not properly functioning. (T 315, RE 14). As a result of the circumstances, McCarty was indicted and entered a plea of guilty to aggravated assault against the Plaintiff, Ethan Bryant, and manslaughter of the passenger, Patrick Taylor. (T 316, RE 14).

[5] McMillen testified that the impact took place at the worst possible position on the Bryant vehicle; being the driver side compartment. (T 423, RE 16). Had the vehicle been carrying a legal load, then the stopping time of the dump truck would have been different, and thus the area of impact and the force of the impact would have been different. (T 424-426, RE 16).

contradict this testimony, despite having identified one prior to trial. (T 430, RE 16; R 583-586). As a result of the malfunctioning brakes and the weight of the truck, McCarty was "pushed through" the intersection, and struck Ethan Bryant's vehicle. (T 314, RE 14; Exh. 34).

At the time of the crash, Ethan Bryant was sixteen and preparing to enter the eleventh grade. (T 212, RE 19). Ethan was well rounded, active in his community, enjoyed the outdoors, and was quarterback for his football team. (T 213-214, 222-227, RE 19). He aspired to attend Ole Miss and to own a business someday. (T 225, RE 19). Ethan had two jobs at the time of the crash. (T 229, RE 19). He and his friend Patrick Taylor were on their way to work when the crash occurred. (T 229, RE 19).

Ethan suffered a "severe traumatic brain injury," and was rushed to The Med in Memphis, Tennessee, where he remained for over three weeks before moving to the Shepard Center in Atlanta, Georgia. (T 238-239, RE 198; Exh. 57, pp. 13-14, 32; Exh. 59, p. 6, 17, 39). He was in a coma for approximately eight months. (T 237, RE 19). Because of his injuries, he required a feeding tube for eating. (T 633-634, RE 20; Exh. 57, p. 21; Exh. 59, p. 21). He suffered dangerous weight loss, losing about seventy pounds in three weeks and falling to 106 pounds at one point. (T 240-241, RE 19; T 629, RE 20). He was also unable to move, or sit up straight, without assistance. (T 632, 636, RE 20).

Ethan requires, and will always require, assistance from family and/or medical professionals for even remedial things in his life such as bathing, grooming, shaving and brushing his teeth. (T 630, 632, 635, RE 20; Exh. 57, p. 51). His mother, Kateri Bryant, quit her job to assume full-time care responsibilities for Ethan. (T 243, RE 19). The severity of his injuries resulted in medical bills exceeding One Million Dollars. (T 654, RE 20; Exh. 63). Ethan is still not able to walk, and he has difficulty just sitting in a wheelchair and holding himself up.

(T 537-538, RE 21). It is very difficult for him to go out in public for extended periods. (T 249, RE 19). The brain injury causes spasticity in Ethan's muscles, resulting in spasms, tightness and difficulty moving muscles. (Exh. 57, pp. 41-42, 48; Exh. 59, p. 46). This type of brain injury also causes permanent tremors, similar to those suffered by Parkinson's patients. (Exh. 57, p. 83, 98-99, 121; Exh. 59, p. 31, 37, 46, 48). He is diagnosed with quadraparesis due to the extreme weakness in all four of his limbs. (Exh. 59, pp. 25-26, 31). Ethan has no functional use of his arms or hands and is unable to write or manipulate many objects. (T 527, RE 21). Ethan's doctors have concluded that he will likely never "reach any state of functional independence." (T 552; RE 21; Exh. 57, p. 121; Exh. 59, p. 65).

Ethan's "psychological and cognitive and memory impairments are permanent conditions." (T 553, RE 21). Ethan's ability to speak is "significantly impaired," especially if he has to say more than one word at a time, and he often drools when attempting to speak. (T 535, 543-544, RE 21). Ethan also has "profound memory impairment," "far below . . . the level of Alzheimer's patients." (T 548, RE 21). In addition, he suffers from behavioral problems, such as "impulse control and making judgments." (T 548, RE 21). To worsen matters, in February of 2009, Ethan suffered a "very bad seizure," requiring hospitalization for about seven weeks. (T 647-648, RE 20). He also suffered complete kidney failure, requiring dialysis, in addition to liver failure and a blood disorder. (T 247-248, RE 19; T 649, RE 20). The seizure erased much, if not all, the progress that had been made with his therapy. (T 246, RE 19; T 650, RE 20).

Ethan will require medical treatment for the rest of his life. (T 633, RE 20; Exh. 57, p. 126; Exh. 59, p. 53). Though Ethan wanted to go to college, it proved to be an "unrealistic goal" due to his extreme disabilities. (T 644-645, RE 20). Living a normal life, with typical social interactions, will never be a viable option for Ethan. (Exh. 59, p. 56). As his Neuro Psychologist

testified, Ethan has "significant problems in basically all meaningful areas of his life." (T 555, RE 21). "He's much less likely to have any kind of meaningful intimate relationship, marriage, [or] family." (T 554, RE 21).

With "modern medicine," Ethan will likely live to "old age," and he will require "specialized medical care for the remainder of his life as it relates to his injuries and disabilities from this accident." (Exh. 57, pp. 123-124; Exh. 59, p. 66). The evidence presented at trial established not only the severe injuries and pain and suffering of Ethan Bryant, but said evidence also established that Ethan's life and future were greatly damaged by the injuries sustained in the crash, supporting the non-economic damages award by the jury.

SUMMARY OF THE ARGUMENT

I. THE VERDICT WAS THE RESULT OF A FAIR TRIAL

The parties to the litigation were afforded a fair trial, and the issues were fairly presented to the jury. *Whiddon v. Smith*, 822 So.2d 1060, 1067 (Miss. App. 2002) (citing *Roberts v. State Farm Mut. Auto Ins. Co.*, 567 So.2d 1193, 1196-97 (Miss. 1990)). The Trial Court thoroughly addressed each and every evidentiary and legal issue. The case was properly submitted to a jury to resolve disputed issues of material fact. As such, the verdict in this case is entitled to substantial deference. There are no compelling reasons to now disturb the unanimous verdict of the jury.

II. APAC WAS NEGLIGENT

APAC's negligence was a substantial cause of the injuries sustained by the Plaintiffs in this case. APAC knew that its operations, including the use of agreement haulers like McCarty, posed a risk to the motoring public. Because of this, APAC implemented a set of rules governing the actions of these drivers. APAC's failure to terminate McCarty when it knew or

should have known that McCarty was in violation of its own rules and regulations constitutes negligence in this case. *Doe v. Wright Sec. Services, Inc.*, 950 So.2d 1076, 1079-80 (Miss. App. 2007). Once this duty was established, the issue of negligence was properly submitted to the jury. *Enterprise Leasing Co. v. Bardin*, 8 So.3d 866, 868 (Miss. 2009). APAC should have reasonably foreseen that its failure to properly oversee its own safety rules and regulations would lead to an injury like the one sustained by Ethan Bryant in this case. *Doe*, 950 So.2d at 1079-1080; *Rein v. Benchmark Construction Co.*, 865 So.2d 1134, 1143 (Miss. 2004). As such, the negligence of APAC was a cause in fact and a legal cause of the injuries to Ethan Bryant. *City of Jackson v. Spann*, 4 So.3d 1029, 1033 (Miss. 2009).

III. McCARTY WAS AN EMPLOYEE OF APAC

The independent contractor defense in this case is governed by Tennessee law. All parties agreed that Tennessee law applied. Under Tennessee law, the issue of whether McCarty was an employee is one to be decided by the trier of fact. *Masiers v. Arrow Transfer & Storage Co.*, 639 S.W.2d 654, 656 (Tenn. 1982). Based upon the facts shown herein, there was substantial evidence to support the Desoto County jury's conclusion that McCarty was an employee of APAC rather than an independent contractor.

IV. NEW TRIAL IS NOT WARRANTED

A. THE JURY WAS PROPERLY INSTRUCTED

In this case, the jury was accurately and thoroughly instructed on the law. There is no reversible error as the jury instructions as a whole fairly announced the law of the case and created no injustice. *Etheridge v. Harold Case & Co., Inc.* 960 So.2d 474, 481 (Miss. App. 2006). The failure to make a contemporaneous objection by APAC constitutes a waiver of the issue in this case. *Savory v. First Union Nat. Bank of Delaware*, 954 So.2d 930, 933-934 (Miss.

2007) (citing URCCC 3.07).

B. THE ALLOCATION OF FAULT WAS APPROPRIATE

The jury in this case was not moved by bias, passion or prejudice, but rather took great pains to weigh the evidence, and did not rush to judgment. Unless it is shown that the verdict was against all reasonable probability, the verdict must stand. *Marberry v. Pearl River Farmers Co-Op*, 362 So.2d 192, 194 (Miss. 1978). Both McCarty and the Plaintiffs in this case argued that APAC was in the best position to have prevented the collision. There was evidence presented to the jury which established that had APAC followed any of its procedures in this matter, McCarty would not have been driving for APAC the morning of the collision. It stands to reason that the jury weighed the evidence in case, and that its verdict reflects that it agreed with the argument of *both* the Defendant McCarty and the Plaintiffs who alleged that APAC was the primary party in the case responsible for the wreck and injuries to Ethan Bryant.

C. INSURANCE WAS PROPERLY EXCLUDED

While MISS. R. EVID. 411 allows for the introduction of liability insurance in certain circumstances, that does not warrant its admission in every instance. *Wells v. Tucker*, 997 So.2d 908, 913 (Miss. 2008); *Toche v. Killebrew*, 734 So.2d 276, 283 (Miss. 1999). In this case, Judge Chamberlin determined that the potential for harm, confusion and bias that the issue introduced was far greater than any benefit it would have had for APAC. There was no error in the court's refusal to admit this information after an appropriate weighing test was performed. *Wells*, 997 So.2d at 913; *Toche*, 734 So.2d at 283.

D. DANE MAXWELL'S TESTIMONY WAS PROPER

Dane Maxwell's testimony in this case was based upon his experience, education and training. His opinions were also based upon a detailed investigation conducted in this case. Judge Robert Chamberlin did not abuse his discretion in allowing the testimony of Dane Maxwell on trucking regulations and the standard of care in the industry. *Burnwatt v. Ear, Nose & Throat Consultants of North Mississippi*, 47 So.3d 109, 114 (Miss. 2010).

V. THE CAP ON NON-ECONOMIC DAMAGES IS UNCONSTITUTIONAL

The arbitrary and mandatory cap on non-economic damages imposed by the Legislature usurps the constitutional duties of the judiciary to oversee trials and jury awards, based on the evidence of each case. The cap violates constitutional separation of powers. The rigid caps nullify the jury's constitutional fact finding role, and instead the Legislature has substituted itself as the fact finder on damages in every case exceeding its arbitrary limit, in violation of the right to trial by jury. The mandated caps violate the Open Courts Provision of the Mississippi Constitution. The arbitrary cap on non-economic damages also violates the Equal Protection Clauses of both the Mississippi and United States Constitutions as it discriminates against a class of disabled, young individuals like Ethan Bryant, and also because it interferes with fundamental rights, while not being reasonably related to a governmental interest. Finally, the non-economic damages cap deprives Ethan Bryant of property and fundamental rights without due process of law, in violation of due process clauses in the Mississippi and U.S. Constitutions.

ARGUMENT

I. THE VERDICT WAS THE RESULT OF A FAIR TRIAL

The ultimate issue in this case is whether the parties to the litigation were afforded a fair trial and the issues were presented fairly to the jury. *Whiddon*, 822 So.2d at 1067 (citing

Roberts, 567 So.2d at 1196-97). It is a foundational principle "that once a case is fairly-though not necessarily perfectly-tried to a jury and the jury has resolved the disputed issues of fact and arrived at its verdict, that verdict is entitled to substantial deference and may not be upset on appeal absent compelling reasons to do so." *Id.* at 1067. In this case Judge Robert Chamberlin reviewed all the evidence and determined that a jury should hear the facts, and make a decision after being properly instructed on the law. A unanimous Desoto County jury found APAC was the one Defendant in the best position to have prevented this collision, and therefore assigned the greatest portion of negligence against it directly. The jury likewise determined that APAC had exhibited such control over McCarty that it was responsible for his actions. This verdict is supported by the great weight of the evidence, and is the result of a well administered, fair trial. The verdict should be affirmed.

II. APAC WAS NEGLIGENT

APAC's independent negligence was a substantial cause of the injuries sustained by the Plaintiffs. This was due to the fact that APAC created a safety program requiring it to use drivers who were properly licensed, and take steps to make sure that drivers were not hauling illegal loads. (T 754, 816, 821, RE 11; T 855, 877, 882, RE 12). When APAC failed to fire McCarty for violating these rules, it breached its duty of care which it owed to the Plaintiffs. *Doe*, 950 So.2d at 1079. APAC testified that it implemented these precautions as it was important to prevent people from getting hurt, and to keep from killing people on the road. (T 854, 877-878, RE 12). APAC's corporate representative specifically stated that one of the purposes for the weight restrictions was the safety of the traveling public. (Exh. 55; Section APAC00170-17, 2:00-2:45). Further, APAC admitted that it was unsafe to the motoring public for overweight loads to be hauled or delivered to it. (Exh. 55; Section APAC00170-17, 2:00-2:45). By creating these

policies APAC had a duty to the Plaintiffs, as a duty exists "where a party contracts to undertake or otherwise assumes a duty." *Id.* at 1080. It was for these reasons the Trial Court determined that sufficient evidence existed to warrant submitting the issue of APAC's independent negligence to the jury.

In reviewing the issue of negligence, the courts first look to whether a duty exists and whether that duty has been breached. *Rein*, 865 So.2d at 1144.[6] This first step is a question of law. *Doe*, 950 So.2d at 1079; *Rein,* 865 So.2d at 1144. However, questions of foreseeability and breach of duty are issues to be decided by the finder of fact "once sufficient evidence is presented." *American National Ins. Co. v. Hogue*, 749 So.2d 1254, 1259 (Miss. App. 2000). At the time of this wreck, APAC had a duty to the motoring public which it breached, and which caused the injuries sustained by the Plaintiffs. (T 854, 878, RE 12). This duty was established by APAC's own testimony, which acknowledged that APAC's "safety has no hierarchy" principle was the result of its duty to conduct operations in such a way as to not harm the motoring public. (T 854, 877-878, RE 12). This duty applied to drivers hauling for APAC, regardless of their employment status. (T 816, RE 11; T 877-878, 882, RE 12). At the time of McCarty's hire,

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[6] APAC's reliance on *Chisolm v. Mississippi Dept. of Transportation* is misplaced. *Chisolm v. Mississippi Dept. of Transportation*, 942 So.2d 136 (Miss. 2006). In this case, Plaintiffs argued that APAC was guilty of negligence for its *own* conduct, not for the conduct of McCarty (while obviously still arguing *respondeat superior* liability existed). *Chisolm* deals with whether a principal can be held responsible for the negligence of an independent contractor. *Chisolm*, 942 So.2d at 139-144. Plaintiffs allege APAC was itself negligent. In *Chisolm*, the plaintiff did not prevail in its direct negligence action because of the fact that the plaintiff failed to establish that the MDOT owed any duty to it. *Id.* at 144. Rather, the plan the plaintiffs relied upon was found by the Court to be the responsibility of the independent contractor, who was responsible for implementing the plan. *Id.* at 144. As the independent contractor was responsible for implementing the plan, it was the independent contractor that was deemed to be negligent in failing to comply with it. *Id.* at 144. Said simply, in *Chisolm,* the MDOT did not undertake a duty, and in this case APAC did. *Id.* at 144. APAC was the sole entity responsible for implementing and complying with these safety procedures. *Id.* at 144. Its failure to do so led to the injuries to Ethan Bryant. Thus, the facts of the current case are easily distinguished from those of the *Chisolm* case.

APAC knew it was illegal to use drivers who did not have a CDL, but chose to ignore this fact and use McCarty anyway. (T 754, 821, RE 11). Further, APAC's own policies mandated that any driver, even agreement haulers, were to be fired if they hauled illegal or overweight loads. (T 816, RE 11; T 877, 882, RE 12). Drivers such as McCarty were required to report weight violations directly to APAC rather than their own company. (T 386-387, RE 14; Exh. 38, RE 13). Had APAC reasonably enforced its own policies, this wreck would not have occurred. (T 817, RE 11). APAC's own dispatch supervisor admitted this during trial when asked the following two questions:

> Q. And you will admit that if APAC had known that any one of these tickets were overweight, it would have terminated Mr. McCarty and no longer used him?
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> A. That is correct.
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> Q. And you will agree then that if APAC had looked at any one of these 15 tickets before August 3rd, 2006, and terminated Mr. McCarty, the wreck would not have happened?
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> A. If we had knowledge, yes.

(T 817, RE 11). Clearly, there was evidence in this case to establish that APAC had a duty, and that it breached that duty. *Doe*, 950 So.2d at 1079. As the Trial Court itself noted, the issue presented was whether the Defendant APAC knew or should have known that McCarty was hauling overweight loads in violation of its own rules against it. (T 707-708, RE 7).

Additionally, the undisputed expert testimony in the case established that the condition of the brakes and the weight of the truck were contributing factors to the collision. (T 424-427, 486, 490-491, RE 16). Because of the evidence before it, the Trial Court agreed that a case for

negligence had been presented, and the matter should be submitted to the jury.[7] This was a correct ruling as the Plaintiffs had established "the existence of a duty to 'conform to a specific standard for the protection of others against unreasonable risk of injury.'" *Enterprise Leasing Co.*, 8 So.3d at 868.

Had APAC made any attempt to confirm that McCarty actually had a commercial driver's license, he would not have been hired. (T 821, RE 11). Had APAC reviewed any of the weight tickets it had in its possession before this wreck, McCarty would have been fired. (T 817, RE 11; T 885-887, RE 12). Because APAC also assumed dispatching duties, they were further obligated under federal and state regulations to in the least inspect trucks like the one McCarty was driving. (T 490, RE 17).[8] APAC was obligated to prevent trucks that were out of service from being used by any driver, and were restricted by federal regulations from aiding and abetting the violation of any law or regulation as to commercial drivers. (T 491, RE 17). Had APAC complied with any of these duties, this wreck would not have occurred. (T 489, RE 17). As expert Dane Maxwell testified, APAC was the entity in the best position to make sure that its own safety procedures and state and federal regulations were being complied with. (T 490-491, RE 17).

An "important component of the existence of the duty is that the injury is 'reasonably foreseeable.'" *Doe,* 950 So.2d at 1079; *Rein*, 865 So.2d at 1144. Judge Chamberlin found that a

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[7] Judge Chamberlin, in ruling on the directed verdict motion, noted Plaintiffs had established via evidence an issue for the jury as to whether or not APAC knew or should have known that McCarty was traveling with overweight loads. (T 707-708, RE 7). In fact, McCarty's continued hauling of overweight loads had been "clearly testified to as a contributing factor in this wreck." (T 707-708, RE 7).

[8] Based on the evidence concerning APAC setting schedules, assigning drivers, and giving instructions on what to load, where to haul, etc., Dane Maxwell opined that this made APAC a dispatcher under the federal and state regulations. (T 295-296, RE 14; T 772,774, 776, RE 11; Exh. 52). In light of this, it was a matter for the jury to decide as to the credibility of the evidence as to the dispatching issue. *Rein,* 865 So.2d at 1147.

duty existed based upon the fact that APAC had established minimum standards for hiring drivers like McCarty, and that APAC had created rules and regulations in its contract that required it to supervise drivers like McCarty to make sure they were not hauling illegal loads. (T 707-708, RE 7).[9] Thus the question to be determined was whether APAC could have reasonably foreseen whether its failure to properly oversee its own safety rules and regulations would lead to an injury like the one sustained by Ethan Bryant in this case. *Doe*, 950 So.2d at 1079-1080; *Rein*, 865 So.2d at 1143. For these reasons, the Plaintiffs established, via direct and documentary evidence, that APAC had a duty to the motoring public, including Ethan Bryant, and that it failed to abide by its own policies in such a way as to constitute a breach of those duties. *Rein,* 865 So.2d . at 1143.[10] Had APAC made any attempt to enforce the safety regulations it had enacted prior to the wreck, the wreck would not have occurred. Judge Robert Chamberlin properly determined that APAC had a duty as a matter of law to make sure that its drivers: (a) had commercial driver's licenses; and (b) were not hauling illegal loads, regardless of their driving status. (T 707-708, RE 7). Additionally, there was evidence before the court from expert Dane Maxwell indicating that, regardless of employment status, the federal and state regulations

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[9] *See* footnote 7, *supra.*

[10] In *Rein*, the Court found summary judgment against a pest control agent was not warranted after a nursing home patient was killed by fire ants in her room. *Rein*, 865 So.2d at 1147. Under the terms of its contract, Natural Accents (the pest agent) arguably assumed a duty to inspect and treat ant beds at the nursing home. *Id.* at 1147. This Court determined that "the scope of that duty is a proper question for the trier of fact." *Id.* at 1147. "The foreseeability of Mrs. Rein's injuries and death to Natural Accents is also a jury question." *Id.* at 1147. Causation in that case was also deemed to be a jury issue. *Id.* at 1147. APAC had a contractual duty to oversee its independent haulers and insure they were not driving illegally. (Exh. 38, RE 13). APAC went beyond its contract by creating a policy stating that it would not accept illegal loads, and would terminate any driver hauling them. (T 817, RE 11). The question to be answered by the jury was whether a breach of this duty occurred such that it was a proximate contributing cause of the injuries to Ethan Bryant. APAC's testimony that it had these safety procedures in place because it knew its operations posed a danger to the motoring public confirms this duty, and that Ethan Bryant was part of those persons APAC sought to protect. (T 878, RE 12; Exh. 55).

required APAC to inspect these vehicles to confirm they were not out of service, and to prevent APAC from aiding and abetting the violation of any law. (T 490-491, RE 17).[11]

Having established the duties owed by APAC, the matter next turns to the issue of foreseeability and breach of duty. "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." *Rein*, 865 So.2d at 1144; *American National*, 749 So.2d at 1259. Because of the evidence before it, the Trial Court determined that there was evidence sufficient to warrant the issue of negligence being submitted to the jury. (T 707, RE 7; T 968-969, RE 22). This was a correct application of the law. With regard to foreseeability, the cause of the injury must be of such character and done in such a situation that the actor (APAC) should have reasonably anticipated injury as a probable result. *Id.* at 1144. "[T]he fact that the actor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable." *Id.* at 1144; RESTATEMENT (SECOND) OF TORTS § 435 (1965). The idea that because an injury rarely occurs-or has never occurred before-it is not foreseeable has been expressly rejected by this Court. *Rein*, 865 So.2d at 1144-1145.[12] If *some* harm or injury is reasonably anticipated, then the foreseeability issue is satisfied. *Id.* at 1145. (emphasis added by the Court). In this case, APAC clearly anticipated that the motoring public could be injured or killed by its conduct and its use of contract haulers like McCarty. (T 878, RE 12). As such, the injuries to Ethan Bryant were

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[11] Judge Chamberlin noted that from an evidentiary standpoint there was proof of multiple overweight tickets being placed into APAC's possession days before the wreck, contrary to APAC's own policy. (T 968-970, RE 22). Had APAC known, McCarty would have been fired before the wreck. (T 968-970, RE 22). Thus, the issue to the Trial Court was whether APAC knew or should have known, and a "straightforward negligence instruction" was warranted. (T 968-970, RE 22).

[12] APAC makes this exact argument when it states that McCarty had made "hundreds" of stops with his truck before this wreck and not had any problem with the illegal weights he carried. (APAC, p. 29). This specious argument is expressly rejected by the Court in *Rein*. *Rein*, 865 So.2d at 1144-1145.

foreseeable.

The resolution of causation turns on foreseeability. *Doe*, 950 So.2d at 1085. Unlike duty however, "causation is a question of fact." *Id.* at 1085; *see also Rein*, 865 So.2d at 1143. As such, it was for the jury to decide whether or not the actions of APAC caused or contributed to the injuries of Ethan Bryant. The testimony before the court was that had APAC followed its own hiring procedures, McCarty would never have been allowed to drive in the first place. (T 754, 819, RE 11; T 855, RE 12). Furthermore, had APAC complied with its own weight rules, McCarty would have been fired before this wreck occurred. (T 817, RE 11). Defendant McCarty testified that the weight of the truck "pushed him through" the intersection. (T 314, RE 14). Expert Brady McMillen testified that had the truck been loaded legally, it would have stopped sooner. (T 417, 426-427, RE 16).[13] Also, the McCarty truck struck the Bryant vehicle in the worst possible location. (T 423, RE 16).[14] In his opinion, the illegal weight on the truck was a contributing factor to the collision, and to the type of damages sustained by Ethan Bryant that

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[13] APAC argues weight restrictions are not safety related. However, APAC's own corporate representative testified at trial that one of the purposes for the weight restrictions was the safety of the traveling public. (Exh. 55; Section APAC00170-17, 2:00-2:45). APAC admitted that accepting overweight loads posed a danger to the motoring public. (Exh. 55; Section APAC00170-17, 2:00-2:45) Numerous jurisdictions have held that truck weight regulations were enacted as safety measures both to protect the roadways "and their passengers traveling over the highways." *London v. Stepp*, 405 S.W.2d 598, 604 (Tenn. App. 1966); *Tiller v. Com.*, 69 S.E.2d 441, 420-421 (Va. 1952) (finding purpose of legislature in enacting statute involved was to prevent injury to roads and bridges and to promote safety of persons traveling over highways by prohibiting use of vehicles of excessive weight); *Byers v. Standard Concrete Products Co.*, 151 S.E.2d 38, 40 (N.C. 1966); *Shaffer v. Acme Limestone Co., Inc.*, 524 S.E.2d 688, 702 (W. Va. 1999) (holding weight statute was public safety statute and motorist was member of protected class); *see also Water Control, Inc. v. Tart*, 506 So.2d 286, 287-288 (Miss. 1987) (holding legislature properly exercises its police powers in regulation of weight limits, and this exercise of police power is valid if it has for its object protection and promotion of public health, safety and welfare).

[14] APAC offered no evidence to refute this testimony, called no expert witnesses of its own, and chose not to cross examine Brady McMillen. (T 430, RE 16; R 583-586). As such, the evidence submitted is uncontested and his opinions were correctly submitted to the jury.

morning. (T 426-427, RE 16).[15] Lastly, Dane Maxwell testified that the McCarty truck was "out of service" on the date of the collision, and had APAC inspected it as required by state and federal trucking regulations, it would not have been in use on the date of the wreck. (T 486, 490-491, RE 17).

To prove causation "both cause in fact and proximate cause must be shown." *Entrican v. Ming*, 962 So.2d 28, 32 (Miss. 2007). Proximate cause is 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." *Entrican*, 962 So.2d at 32. Proximate cause requires the *fact finder* to find that the negligence was both the cause in fact and the legal cause of the damage. *City of Jackson*, 4 So.3d at 1033; *Glover v. Jackson State Univ.*, 968 So.2d 1267, 1277 (Miss. 2007) (citing DOBBS, THE LAW OF TORTS, § 180 at 443 (2000)). To be liable, APAC's actions in this case "need not be the sole cause of an injury." *Entrican,* 962 So.2d at 32. Rather, "it is sufficient that (APAC's) negligence concurring with one or more efficient causes, other than the plaintiff's, is the proximate cause of the injury." *Id.* at 32. "Cause in fact" means that, but for the defendant's negligence, the injury would not have occurred. *City of Jackson*, 4 So.3d at 1033; *Glover,* 968 So.2d at 1277. If the 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." *City of Jackson,* 4 So.3d at 1033; *Glover*, 968 So.2d 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

[15] APAC alleges in its brief that these loads would have been legal once they crossed over into Tennessee (the Tuggle location is in Tennessee). This is incorrect. Julie Arick testified that a commercial truck passing through two states must load the truck to satisfy whichever state has the lower weight limits. (T 788, RE 11). In this case, the loads would have been illegal in Tennessee as well, as they originated in Mississippi and were illegal there. (T 788, 817, RE 11).

within the classification, of damage the negligent actor should reasonably expect (or foresee) to result from the negligent act.'" *City of Jackson,* 4 So.3d at 1033; *Glover*, 968 So.2d at 1277 (citing DOBBS, THE LAW OF TORTS, § 180 at 443).[16] But for APAC's negligent hiring of McCarty, the wreck would not have occurred. But for the Defendant APAC's negligence in failing to terminate McCarty when it knew or should have known he was in violation of its regulations, the wreck would not have occurred. Had APAC complied with state and federal regulations and inspected the truck, the wreck would not have occurred. Further, it is clear that APAC anticipated or reasonably expected the type of damages that Ethan Bryant sustained, as APAC admitted at trial that the reasons for the safety rules in the first place were to prevent drivers like McCarty from killing people. (T 854, 878, RE 12). In this case, the negligence of APAC was a substantial factor in causing the harm, and as such was a cause in fact and a legal cause of the injuries to Ethan Bryant. *City of Jackson,* 4 So.3d at 1033.

For the reasons set forth herein, the Plaintiffs in this case established via direct evidence that the actions and omissions of APAC were in and of themselves negligent. The Trial Court was correct in submitting this matter to the jury for a determination as to whether APAC had breached its duties, and whether that breach was a proximate cause, or proximate contributing cause of the injuries to Ethan Bryant. Further, the jury had before it substantial evidence upon

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[16] APAC was allowed to argue the negligence of Memphis Stone and Chad McCarty was a "superceding" cause, and a jury instruction was given on that issue. (T 981). APAC now argues the alleged superceding negligence insulates it from liability. If the intervening cause is reasonably anticipated, the subsequent actor's negligence does not break the chain of events between the negligence of the first actor and the injury. *Entrican.* 962 So.2d at 36. Under the principle 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.* at 36. APAC knew that drivers would be able to obtain overweight loads, as they had a specific policy against it. (T 817, RE 11; T 886-887, RE 12). Clearly, the jury had evidence APAC anticipated drivers would attempt to haul illegally. Questions of superceding cause are "so inextricably tied to causation, it is difficult to imagine a circumstance where such issue would not be one for the trier of fact." *Entrican.* 962 So.2d at 36. This was properly a jury question.

which to rely showing that APAC was in the best position to have prevented the collision from ever happening. For those reasons, the verdict should be affirmed.

III. UNDER TENNESSEE LAW McCARTY WAS AN EMPLOYEE OF APAC

A. TENNESSEE LAW WAS CORRECTLY APPLIED

The independent contractor defense in this case is governed by Tennessee law. The evidence shows that APAC's primary office was located at President's Island in Memphis, Tennessee. (T 727). The documents that were signed between APAC and McCarty were all executed at APAC's Memphis office. (T 741-742). McCarty himself lived in Memphis, Tennessee. (T 286). The truck that was the subject of this agreement was stored and kept in Memphis, Tennessee. (T 373). Additionally, at the time the agreement was signed, McCarty had a Tennessee license (though not a CDL). (Exh. 73, RE 5). In reviewing this matter, Judge Robert Chamberlin conducted a detailed multi-step choice of law analysis to determine which law should be applied to this issue. (T 1159-1160, RE 5). He first determined that the issue of employment status was a substantive issue, which is the first step of analysis. (T 1160, RE 5); *Zurich Am. Ins. Co. v. Goodwin*, 920 So.2d 427, 433 (Miss. 2006). Secondly, the Trial Court determined that, while the basis of the lawsuit was in tort, the issue of independent contractor was a contractual issue. (T 1160, RE 5); *Zurich Am. Ins. Co.*, 920 So.2d at 433. The third, and most important, step of the analysis turns to contract specific portions of the Restatement adopted by Mississippi. *Id.* at 433. In making this analysis, the Trial Court utilized a "center of gravity" test to determine under the Restatement which law will apply. (T 1160, RE 5); *Zurich Am. Ins. Co.*, 920 So.2d at 433-435. In making his analysis, Judge Chamberlin noted that the undisputed facts were that the agreement was "executed in Tennessee, by parties who were citizens of Tennessee, the truck was kept in Tennessee, and McCarty had a Tennessee CDL." (T 1160, RE

5).[17] While the wreck occurred in Mississippi, and the victims were from Mississippi, the Trial Court determined that those factors were not controlling on the choice of law issue. (T 1160, RE 5); *Zurich Am. Ins. Co.*, 920 So.2d at 436 (holding that "the fact that a cause of action arose in Mississippi and that Mississippians are involved does not in itself generate an interest in Mississippi that is superior to that of another state"). Based upon this thorough analysis, Judge Chamberlin found that Tennessee law applied. (T 1160, RE 5).[18]

At the summary judgment hearing, the Trial Court raised this matter with the parties, to determine whether there was a dispute as to the choice of law issue. (T 11-13, RE 4). All parties agreed that Tennessee law applied to the issue of whether or not McCarty was an employee or independent contractor. (T 11-13, RE 4). APAC made no further objection to the application of Tennessee law. Aggrieved of the result, APAC now wishes to ignore its agreement and attempt to apply Mississippi law to the case in hopes of obtaining a better result. To that extent, APAC has waived any objection to the application of Tennessee law in this case. *See APAC Mississippi, Inc. v. Johnson*, 15 So.3d 465, 478 (Miss. App. 2003) (holding failure to raise contemporaneous objections constitutes waiver of issue on appeal). APAC made no further attempt to argue that Mississippi law applied after it agreed on the applicable law at the hearing. APAC is therefore barred from attempting to raise this new issue on appeal. *Copeland v. Copeland*, 904 So.2d 1066, 1073 (Miss. 2004) (citing *De La Beckwith v. State*, 707 So.2d 547, 574 (Miss.1997)). Tennessee law was correctly applied in this case.

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[17] McCarty did not have a CDL, but rather had a regular Tennessee license at the time. (T 389, RE 14; Exh. 33, 73, RE 15).

[18] However, the Trial Court did correctly note that it analyzed the issue under both state's laws and found that its ruling would have been the same under Mississippi law. (T 1160, RE 5).

B. THE JURY PROPERLY FOUND THAT McCARTY WAS AN EMPLOYEE

The Trial Court correctly noted that the controlling Tennessee case on this issue was the case of *Masiers*, 639 S.W.2d at 654. (R 1160-1161, RE 5). In *Masiers*, the Tennessee Supreme Court set out a number of "indicia" which were "to be considered *by the trier of fact* in determining the existence or nonexistence of an independent contractor relationship." *Id.* at 656 (emphasis added); *Galloway v. Memphis Drum Service*, 822 S.W.2d 584, 586 (Tenn. 1991); *Bargery v. Obion Grain Company*, 785 S.W.2d 118, 120 (Tenn. 1990). These factors included "(1) the right to control the conduct of the work, (2) the right of termination, (3) the method of payment, (4) the freedom to select and hire helpers, (5) the furnishing of tools and equipment, (6) self scheduling of working hours, and (7) being free to render services to other entities." *Masiers*, 639 S.W.2d at 656. Throughout the case, the Trial Court consistently instructed the jury that there was no "scoreboard" as to specific factors that had to be included, but that instead the law instructed the courts and the jury to rather look at the totality of the circumstances when reviewing the facts of the case. (T 925-926; RE 23). This was based upon the fact that the Tennessee courts had found that no one factor was "infallible or entirely indicative" and the factors listed in *Masiers* were not to be deemed "absolutes which preclude examination of each work relationship as a whole." *Id.* at 656. The factors referred to were intended as a "means of analysis." *Id.* at 656. It was with this understanding that the evidence was presented, and the matter correctly submitted to the jury for a decision.[19]

Of these factors, two in particular have gained prominence in Tennessee as primary indicators of the individuals status: "right to control" and "right of termination." *Masiers*, 639

[19] In Mississippi, this Court has also held that a question of whether an agency relationship exists, or whether a party is an independent contractor, is a question of fact to be resolved by the jury." *Savory*, 954 So.2d at 933.

S.W.2d at 656. As seen from the factual summary *supra*, there were numerous contested issues of fact as to the control exhibited by APAC over Chad McCarty.[20] In reviewing the evidence, the Trial Court noted that there were disputed factors, some of which seemed to favor APAC, and some of which seemed to favor the Plaintiffs. (T 714-715, RE 7). The Trial Court went on to note that the issues surrounding APAC's use of McCarty to satisfy its minority contract was an issue of control which APAC had continuously failed to address during the trial. (T 713-714, RE 7). The same issue dealing with the minority contract was also relevant evidence concerning the methods in which McCarty was paid by APAC. (*i.e.* indicia (3) of the factors listed in *Masiers*). *Id.* at 656. (T 713-714, RE 7).

Also of note to the court, in light of the applicable case law, was that the contract between McCarty and APAC allowed it to terminate McCarty "at will." (T 710-712, RE 7; Ex. 36, RE 18). This is of importance as the Tennessee Supreme Court has noted that the right of termination "has gained controlling significance" in such cases where the status of employment is in question. *Masiers*, 639 S.W.2d at 656. "The power of a party to a work contract to terminate the relationship at will is contrary to the full control of work activities usually enjoyed by an independent contractor." *Id.* at 657.[21] In light of the issues of control, the power to

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[20] The evidence of control was that APAC: (1) assigned a "dispatch supervisor" to direct McCarty's actions (T 815, RE 11); (2) ordered McCarty to drive for another company to satisfy a minority contract (T 301-02, RE 14; T 761-64, RE 11; T 857, 872, 875, RE 12); (3) created master schedules, and told each driver the night before where to go (T 295, RE 14; T 772, 774, 776, RE 11; Exh. 52); (4) provided instructions on what routes should be taken by the drivers (T 801, RE 11); (5) told McCarty where to go, what to haul, and where to haul (T 296, RE 14); (6) and told him what hours to work, when to start and when to stop (T 321, RE 14). McCarty also used APAC's accounts to get his loads (T 304-305, 322, RE 14).

[21] *See also Wade v. Traxler Gravel Co.*, for the proposition that "[t]he power to fire is the power to control." *Wade v. Traxler Gravel Co.*, 100 So.2d 103, 109 (Miss. 1958). The absolute right to terminate the relationship without liability is not consistent with the concept of independent contract. *Wade*, 100 So.2d at 109.

terminate at will, and APAC's unilateral control over the methods of payment and the use of McCarty to satisfy a minority contract, there was substantial evidence to support the Desoto County jury's conclusion that McCarty was an employee of APAC rather than an independent contractor. For these reasons, the Trial Court correctly noted that it felt that "the issue of whether Mr. McCarty was in fact an employee and/or agent of APAC, Inc. is a jury issue." (T 709, RE 7). As it was for the jury to decide, the verdict in this case should be affirmed as it is supported by substantial evidence.

The only time the issue of employment becomes a question of law is when the facts of the case are undisputed. *Cromwell General Contractor, Inc. v. Lytle*, 439 S.W.2d 598, 600-601 (Tenn. 1969); *Curtis v. Hamilton Block Co.*, 466 S.W.2d 220, 279 (Tenn. 1971); *Mayberry v. Bon Air Chemical Co.*, 25 S.W.2d 148, 150 (Tenn. 1930) ("where the evidence is conflicting and more than one inference can be drawn therefrom, the question as to whether the employee is a servant is one of fact"). In cases that do not involve worker's compensation, the Tennessee courts have consistently held that the question of whether or not a person is deemed an employee or an independent contractor is a question of fact which should be submitted to the jury. *Goodale v. Langenberg*, 243 S.W.3d 575, 582-583 (Tenn. App. 2007) (holding where there is disputed evidence concerning enumerated factors and on issue of control, trial court correctly allowed issue to be submitted to jury, and verdict for plaintiff was upheld).[22]

A factually similar matter was presented to the Tennessee Court of Appeals in 1993. *Donaldson v. Weaver*, No. 02A01-9208-CV0-00249 (Tenn. App. April 7, 1993) (Appendix B).

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[22] In a worker's compensation case, the Tennessee Supreme Court *specifically* stated that whether or not a person is an employee or an independent contractor "is a question for the Chancellor in this particular case [but] [w]hen such matters are tried to a jury it becomes a question of fact for the jury to determine." *Barker v. Curtis*, 287 S.W.2d 43, 46 (Tenn. 1956) (emphasis added).

In that case, a gravel truck owned by a man named Hardin, and being driven by a man named Weaver, struck and injured the plaintiffs. *Donaldson*, No. 02A01-9208-CV-00249, at *1 (Appendix B). During discovery, facts came to light to show that the defendant Martin Paving was involved with the handling of the load. *Id.* at *1. The issue then became similar to that presented in this case (*i.e.* whether *respondeat superior* liability would attach). *Id.* at *1. There was conflicting evidence presented, with the defendant arguing that Weaver selected his own hours, and that Martin did not control the routes. *Id.* at *3. The plaintiffs countered this with evidence that Martin Paving had the right to instruct on where to haul, the amount to haul, where to pick it up and deliver, and the manner of unloading. *Id.* at *4. The Trial Court (and court of appeals) performed a factor based analysis and found that it was apparent that Martin exercised some control and "a finder of fact could decide that Hardin's drivers are more or less turned over to Martin for the hauling operation." *Id.* at *5. As a result, the appellate court stated that where there was uncertainty over disputed evidence, "the duty of the Trial Court is clear . . . [h]e is to overrule any motion for summary judgment . . . because summary judgment proceedings are not in any sense to be viewed as a substitute for a trial of disputed factual issues." *Id.*[23]

There is greater evidence in the case *sub judice* to support that McCarty was an employee than the evidence presented in the *Donaldson* case. *Id.* at *3-4.[24] As there are even more factual issues in dispute than there were in the *Donaldson* case, this matter was correctly submitted to a jury for a decision, since the jury was and is the finder of fact in the case. *Id.* at *5; *Goodale*, 243

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[23] *See also Toothman v. Burns Stone Co*, No. 89-341-II, 01-A-01-9001-CV0012, 01-A-01-9001-CV00035, at *4 (Tenn. App. July 13, 1990) (Appendix C) (holding genuine issues of material fact existed on issue of independent contractor vs. employee issue such that summary judgment was not warranted); *Ascolese v. Misco, Inc.*, No. 88-283-II (Tn. App. March 22, 1989) (Appendix D) (holding an employee's status is generally one of fact unless there is undisputed evidence to the contrary).

[24] *See* footnote 20, *supra.*

S.W.3d at 582-583.[25]

APAC argues that sustaining the jury verdict in this case would somehow upset Mississippi precedent. The current case in no way espouses or "resuscitates" the holding of *W.J. Runyon & Son. W.J. Runyon & Son, Inc. v. Davis,* 605 So.2d 38 (Miss. 1992). In the present case, *Runyon* was neither cited nor relied upon by either the Plaintiffs nor the Trial Court. The basis for the ruling in this case was upon the application of Tennessee law, which all parties agreed was proper. (T 11-13, RE 4). Further, the Trial Court noted that, based upon *Richardson* (not *Runyon*), the outcome would have been the same. (R 1160, 1163, RE 5).

APAC relies on the case of *Webster v. Mississippi Publishers Corp.* for the proposition that scheduling of deliveries at fixed times cannot be used to create a *respondeat superior* servant. *Webster v. Mississippi Publishers Corp.*, 571 So.2d 946, 951 (Miss. 1990). Again, this is not the true holding of *Webster. Webster*, 571 So.2d at 951. The result reached in *Webster* occurred because there it was held that the proof of scheduling *alone* was not sufficient to create a relationship beyond the independent contractor agreement, and the plaintiff did not offer evidence to dispute this fact. *Id.* at 948, 951 (emphasis added). In fact, a contrary result occurred in the most recent case reviewing employment status in Mississippi in 2006. *Walker v. McClendon Carpet Service, Inc.*, 952 So.2d 1008, 1010 (Miss.App. 2006) (citing *Kisner v. Jackson,* 159 Miss. 424, 428-429 (Miss. 1931)); *see also Stewart v. Lofton Timber Co., LLC*, 943 So.2d 729 (Miss.App. 2006). In *Walker*, the Mississippi Court of Appeals found that essentially *one* contested issue on the matter of control that was in dispute was sufficient to preclude a

[25] As in Tennessee, Mississippi states that where the facts are undisputed, the matter can be dealt with summarily, but where the facts are disputed, then the question is ultimately one for the jury. *Richardson v. APAC-Mississippi, Inc.*, 631 So.2d 143, 152 (Miss. 1994); *Savory*, 954 So.2d at 933.

determination as a matter of law. *Walker*, 952 So.2d at 1011 (emphasis added).[26]

Richardson and *Webster* do not stand for the proposition that liability should have been precluded against APAC in this case as a matter of law, especially in light of this Court's ruling in *Savory*. *Savory* 954 So.2d at 933. Rather, what these cases stand for is that the courts must look to each case on its own set of facts, and make a determination as to whether there are questions of material fact as to an independent contractor relationship, or whether the relationship is that of master and servant. *Richardson v. APAC-Mississippi, Inc.*, 631 So.2d 143, 147-148. (Miss. 1994). "[W]hen the facts pertaining to the existence or non-existence of an agency are conflicting, or conflicting inferences may be drawn from the evidence, the question presented is one of fact for the jury, . . . and even though the evidence is not full or satisfactory, it is the better practice to submit the question to the trier of fact." *Savory*, 954 So.2d at 933.[27]

Additionally, APAC's reliance on the argument that the outcome of this case should have been the same as that in *Richardson v. APAC* is misplaced. As Judge Robert Chamberlin noted, based upon the facts of the present case, an application of the same law enumerated by the Court in *Richardson* required that this case be submitted to a jury based upon multiple issues of contested fact. (R 1163, RE 5). In *Richardson*, the relationship was substantially different in that McCandless, as the driver, (1) obtained insurance separate from APAC; (2) APAC had "no control over where McCandless obtained his materials, supplies, or equipment for his hauling

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[26] In *Walker*, because there was conflicting evidence on one issue (whether the defendant had provided insurance coverage), the Court determined that the matter should not have been decided as a matter of law. *Walker*, 952 So.2d at 1010-1011.

[27] Plaintiffs argued at trial an agency issue existed beyond the terms of the agreement as APAC testified it didn't own the load until it was dumped on their lot. (Exh. 55 Section APAC00156-13, 1:33-1:38). Only after it was dumped did APAC have to pay. *Id.* Plaintiffs argued McCarty was therefore an agent of APAC, as his transmittal of the load created a contract obligating APAC to pay Memphis Stone.

business, nor the prices he paid for those items"; (3) APAC did not pay him for mileage; (4) APAC merely notified McCandless of where and when work was available; (5) "APAC did not control how many loads McCandless hauled per day, or how many hours or days he would work"; (6) McCandless chose his own times to work, his own routes and his own methods to complete the job, with no instruction whatsoever from APAC; (7) McCandless held B&P Trucking out to the public as an independent trucking company available for public hire; and lastly (8) that McCandless worked for APAC only on an intermittent basis, also working for other companies during the same period. *Richardson*, 631 So.2d at 145-146. Further, *Richardson v. APAC* did not have the additional evidence that APAC used the driver to satisfy a minority contract, altered the methods of payment as it saw fit, and took the position that the agreement could be terminated at will.[28] As seen by the evidence above, each of these particular issues is contested or subject to questions of material fact such that, under Tennessee law (or even applying the facts of *Richardson v. APAC*), the matter was properly submitted to the jury for a determination of employment status. *Id.* at 152. Based upon the testimony and documents, there was substantial evidence in this case such that a reasonable juror could find that McCarty was an employee of APAC, and therefore that lawful verdict should not now be disturbed.[29]

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[28] *See* footnote 20, *supra*. Additionally, McCarty never looked for work elsewhere and never advertised or performed work for any other company or entity. (T 319-321, RE 14).

[29] "A jury's verdict based on proper evidence and instruction occupies and especially exalted position." *American National*, 749 So.2d at 1259. "No new trial should be granted unless the 'verdict is against the overwhelming weight of the evidence or is contrary to law.'" *Id.* at 1259. A court of review should not "render a verdict contrary to it short of a conclusion on our part that, given the evidence as a whole, taken in the light most favorable to the verdict, no reasonable, hypothetical juror could have found as the jury did." *Id.* at 1258.

IV. NEW TRIAL IS NOT WARRANTED

A. THE JURY WAS PROPERLY INSTRUCTED

In this case, the jury was accurately and thoroughly instructed on the law. (R 1579-1602, RE 24). There is no reversible error if the jury instructions as a whole fairly announce the law of the case and create no injustice. *Etheridge*, 960 So.2d at 481. "If a proposed jury instruction repeats a theory fairly covered in another instruction, incorrectly states the law, or is without adequate foundation in the evidence of the case, a Trial Court may properly refuse to grant the instruction." *Id.* at 481-482. In this case, the jury had substantial instructions before it which accurately set forth the law, and specifically advised the jury to consider elements of control. (R 1590-1591, 1600-1601, RE 24). Further, APAC was allowed to argue its interpretation of the evidence to the jury. As such, there was no error in denial of APAC's proposed instruction, and new trial is not warranted.

The Trial Court ruled that any instruction dealing with control factors to be considered needed to be "general descriptions" of the factor, and should not contain "fact specific criteria that just supports one side or the other." (T 978, RE 23). As to D-3(8), the Trial Court noted that it contained comment on the evidence, which should be removed. (T 977-978, 990, RE 23). APAC was provided an opportunity to amend D-3(8), but chose not to do so. (T 977-978, 990, RE 23; R 1658-1660). Because of this, Judge Chamberlin denied D-3(8) in part and gave an amended version of D-3(8) which took out the improper comments on the evidence. (T 990, RE 23; R 1600).[30]

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[30] The Court gave free reign to the parties to argue any factors they wished before the jury. (T 990, RE 23). Judge Chamberlin specifically instructed the jury that the factors enumerated in the jury instructions were by no means an exclusive list (R 1590, 1601, RE 24). APAC in fact argued to the jury that giving directions to McCarty was not enough to establish control. (T 1030-1031, 1035).

Once the Trial Court amended D-3(8), there was no further objection made by APAC. (T 989-990, RE 23).[31] Rule 3.07 of the Mississippi Uniform Circuit and County Court Rules requires that attorneys "dictate into the record their specific objections to the requested instructions stating grounds for each objection." *Savory* 954 So.2d at 933-934 (citing URCCC 3.07). APAC made no objection to the amendment of D-3(8) contemporaneous with the Trial Court's ruling (T 977-978, 990-992, RE 23). An alleged erroneous instruction will not be heard on appeal unless a contemporaneous, distinct objection is made. *Id.* at 933-934. As APAC failed to make any objection to the amendment of its instruction, it has waived said objection and should be barred from raising this issue now. *Id.* at 934.

There is no basis for error in the refusal of the instruction under Tennessee law. *Bargery v. Obion Grain Co.*, 785 S.W.2d 118, 119-120 (Tenn. 1990).[32] Rather, the factors and tests set forth in Tennessee are intended as a guide to analysis, and are not intended to preclude an examination of the work relationship as a whole. *Masiers*, 639 S.W.2d at 656. The proper method of instructing the jury was for it to be provided the law that control is a prevalent factor in the determination of the employment relationship. *Id.* at 656. The test is not whether or not control was exercised, but "merely whether the right to control existed." *Stratton v. United Inter-Mountain Tel. Co.*, 695 S.W.2d 947, 950 (Tenn. 1985). In *Bargery*, the court *reiterated* that the seven factors listed by it in its instruction were the primary (but not exclusive) indicia in

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[31] Judge Chamberlin ruled the instruction ultimately submitted (Instruction #11) provided a list of factors "straight out of the cases" and represented "repeatedly" the list of factors given under the law. (T 957, RE 25; R 1590, RE 24). The court reiterated willingness to work with APAC to create instructions on particular factors. (T 957, RE 25). APAC did not avail itself of this opportunity. (T 990, RE 23).

[32] In its Motion for Judgment Notwithstanding the Verdict or in the Alternative for New Trial, APAC argued that Tennessee law was applicable. (R 1693). Now on Appeal it argues that Mississippi law should apply.

determining employment status. *Bargery*, 785 S.W.2d at 119-120. The instructions as submitted to the jury were appropriate, and there was no error in this regard.

Finally, APAC objects that it was not allowed to instruct the jury that the contract was evidence that McCarty was an independent contractor. APAC was allowed to argue to the jury that the existence of the written contract was evidence that McCarty was an independent contractor. (T 1033-1034). Under Tennessee law, while the contract may claim it creates an independent contractor relationship, the finder of fact is to look to the facts surrounding the arrangement to determine whether the driver is an employee or an independent contractor. *Boruff v. CNA Ins. Co.*, 795 S.W.2d 125, 126 (Tenn. 1990).[33] APAC's reliance on the case of *Hendrix v. City of Maryville* to support this argument its argument is unfounded. *Hendrix v. City of Maryville*, 457 S.W.2d 292, 296-297 (Tenn. App. 1968). *Hendrix* holds that "[i]n determining whether one is an independent contractor, the language of the contract is always considered but does no[t] [*sic*] necessarily in all instances control." *Hendrix*, 457 S.W.2d at 296. In addition to reviewing the contract, one must also look at the "surrounding facts and circumstances" as well as the subsequent conduct and relations of the parties "to determine the true relationship." *Id* at 296-297. If there is evidence that more than one inference can be drawn from the language of the contract, or there is evidence of circumstances and a relationship outside the written agreement, "the written contract alone cannot be determinative *but a question of fact arises which must be determined by the jury*." *Id.* at 297. (emphasis added). There is no error in the denial of the

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[33] APAC argues that comment "e" to the Restatement (Second) of Agency stands for the premise that its instruction should have been granted. The Restatement itself does not specifically list this issue as one of the controlling elements. Rather, it generally states that one factor is "the extent of control which, by the agreement, the master may exercise over the details of the work." RESTATEMENT (SECOND) OF AGENCY § 220(a). This language concerning control was in the instruction given to the jury. (R 1590, 1600, RE 24).

proposed instruction as, the instruction was an inappropriate statement of the law. *Id.* at 296-297.

The question to be answered is whether the jury was fairly, adequately and properly instructed on the law. *Richardson v. Norfolk S. Ry. Co.*, 923 So.2d 1002, 1010-11 (Miss. 2006). A reading of the jury instructions as a whole show that the jury was properly instructed. *Pierce v. Cook*, 992 So.2d 612, 625 (Miss. 2008); *Richardson*, 923 So.2d at 1010. The instructions as a whole should fairly, not perfectly, announce the *primary* rules of law. *Id.* at 1011 (emphasis added). In this case, the jury was properly instructed and APAC was allowed to argue to the jury that evidence of the contract and giving instruction on where to obtain loads was not sufficient evidence to make McCarty an employee. (T 1030-1031, 1035). The jury disagreed, finding that substantial evidence existed establishing McCarty was an employee of APAC. New trial is not warranted in this case.

B. THE ALLOCATION OF FAULT WAS APPROPRIATE

Defendant APAC argues that the allocation of only ten percent fault to McCarty could only be evidence of passion and prejudice such that a new trial is warranted. To the contrary, the jury in this case was not moved by bias, passion or prejudice, but rather was attentive, took great pains to weigh the evidence, took considerable time in reviewing the evidence, and did not rush to a judgment in the case.

APAC has not presented any evidence of bias, prejudice, passion or confusion, much less "overwhelming weight." *Employers Mutual Casualty Co. v. Ainsworth*, 164 So.2d 412, 419 (Miss. 1964). APAC's reliance on *Ainsworth* for the proposition that a new trial is warranted is again misplaced. The actual language of *Ainsworth* holds that "[t]he Court has the duty to assure litigants the right to trial by jury without abridgment and at the same time protect litigants against

a jury that is partial, biased and prejudiced." *Ainsworth*, 164 So.2d at 419.[34] The question that this Court must consider is "[c]an the Court say with confidence that the verdict is manifestly against *all reasonable probability*; that manifestly it has not responded to reason upon the evidence produced." *Marberry*, 362 So.2d at 194 (emphasis added). Unless it is shown that the verdict was against all reasonable probability, "the verdict must stand, for otherwise there would be only a matter of conflict in the evidence, in which case, if the issues have been fairly submitted to the jury on proper instructions, the verdict is irreversible." *Id.* at 194. Said another way, "a court should not substitute its judgment for a jury's verdict and we [the Supreme Court] acknowledge that principle with great respect." *Id.* at 194; *Ainsworth*, 164 So.2d at 418-420.[35]

In considering whether a verdict is against the overwhelming weight of the evidence, one "must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial." *Lamartiniere v. Jones*, 915 So.2d 1112, 1114 (Miss. App. 2005). Only when the verdict is such that it would sanction an "unconscionable injustice" should the verdict be disturbed. *Lamartiniere*, 915 So.2d at 1114. In this case there was substantial, credible evidence to show that the entity at greatest fault for this wreck was APAC.[36]

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[34] APAC omits from its citation the reference by the Court to the duty the courts have to assure a right to trial by jury. (APAC, p.37). In fact, APAC's entire brief and argument stand for the proposition that the Plaintiffs had no right to a trial by jury on any issue, much less damages.

[35] "Where an appellant challenges a jury verdict as being the product of bias, prejudice or improper passion, great deference is shown to the jury verdict by resolving all conflicts in the evidence and every permissible inference from the evidence in the appellee's favor." *Kent v. Baptist Memorial Hospital North Miss. Inc.*, 853 So.2d 873, 881-882 (Miss. App. 2003).

[36] *See* pages 4 through 12, *supra*.

APAC was in the best position to have prevented the collision. There was evidence presented to the jury which established that had APAC followed any of its procedures in this matter, McCarty would not have been driving for APAC the morning of the collision.[37] It stands to reason that the jury weighed the evidence in case, and its verdict reflects its conclusion that APAC was the primary party responsible for the wreck and injuries to Ethan Bryant. The jury was, and is, in the best position to evaluate the weight and truthfulness of each witness, and each witnesses bearing, tone of voice, attitude and appearance. *Gaines v. K-Mart Corp.* 860 So.2d 1214, 1217-1218 (Miss. 2003).[38] A unanimous Desoto County jury found that the party primarily at fault was APAC. (T 1068-1069, RE 8). There was no evidence of dispute in the jury, nor any holdout juror, nor any evidence that any of the jurors were not fair minded in this case. In order to accept APAC's argument, this Court must find that all twelve of the Desoto County jurors were biased, impassioned and/or confused in this case. To the contrary, the jury was studied, serious, and deliberated fairly. The Trial Court did not abuse its discretion when it determined that a new trial in this case was not warranted.

APAC next argues that the amount of the verdict in and of itself is evidence of bias, passion or prejudice. However, APAC in this case chose *not* to contest the damages, and did not offer one witness to contradict the testimony of the damage experts and testimony presented by the Plaintiffs in this case. (T 724-896). Ethan sustained catastrophic injuries that will require substantial medical treatment for the rest of his life. (Exh. 57, pp. 123-124; Exh. 59, p. 66).

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[37] *See* pages 4 through 12, *supra*.

[38] The Trial Court noted it certainly felt there was sufficient evidence before the jury as to APAC's independent negligence both in their procedures for hiring McCarty and their continued retention of McCarty and their actions surrounding its failure to review weight tickets. (T 1087, RE 10). As such, Judge Chamberlin ruled that there was no evidence that the jury acted improperly in its allocation of fault. (T 1085-1090, RE 10)

Further, the physicians treating Ethan expected him to live to an old age. (Exh. 59, p.66). As a result, Ethan faces a lifetime of medical bills, and a lifetime of living with *severe* physical and mental impairments and limitations.[39] Ethan had a work life expectancy of over thirty years, and a life expectancy at time of trial of fifty seven years. (T 576, 603-604). Ethan's accumulated medical expenses at time of trial exceeded one million dollars, and were submitted without objection. (Exh. 63; T 653-654, RE 20). It was the opinion of the life care planner that Ethan's future anticipated medical expenses would be $10,826,357. (T 589). Dr. Lewis Smith, an economist, testified that Ethan's lost wages would range from $3,155,373.06 to $5,089,120.66 depending on the level of education he obtained.[40] The jury received substantial and sound instruction on how to assess damages, including instruction that it could reasonably estimate damages if the causes of injury were reasonably proper. (R 1591, RE 24). There is no evidence that this jury did not reasonably weigh the evidence, and come to a conclusion based upon a fair application of the law in this case.[41]

What is important to note is that APAC chose *not* to request that the Trial Court (or in fact this Court) correct the alleged mistake in the verdict by way of a remittitur. (R 1688-1694). If a party is truly aggrieved by a jury verdict, it is free under the law to file a motion for a

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[39] *See* pages 10 through 12, *supra*.

[40] Had Ethan completed his bachelor's degree, he would have earned $5,351,487.62, reduced to then present day value was $3,155,373.06. (T 605-606). If Ethan had earned a master's degree, he would have earned $6,474,078.11, reduced to present day value of $3,717,221.73. (T 606-607). Lastly, had Ethan gone on to earn a professional degree, he would have earned $9,198,570.61, which in present day numbers was $5,089,120.66. (T 607).

[41] APAC argues because McCarty was convicted of a crime, a reasonable juror could not have found as this jury did. (APAC, p.37). In fact, the jurors were admonished in the instructions not to let their passions take control in assessment of fault and damages. (R 1599, RE 24). It appears APAC is now arguing that the jury should have been biased and impassioned against McCarty for his conviction, rather than have a fair analysis of the evidence and a result that it does not now agree with.

remittitur. *Causey v. Sanders*, 998 So.2d 393, 408 (Miss. 2008) (citing *Dedeaux v. Pellerin Laundry, Inc.*, 947 So.2d 900, 908 (Miss. 2007)); *also see* MISS. CODE ANN. § 11-1-55 (2008). While the Plaintiffs submit that the verdict was appropriate, if APAC had truly felt that the verdict was excessive, it should have given the Trial Court an opportunity to review the issue.

While APAC does not agree with the verdict, it should not now be allowed to obtain a new trial on damages when it did not challenge the damages at trial. The evidence argued by APAC in its brief allegedly showing bias and passion is not sufficient to rise to the level required by law to overturn a jury's verdict. "Awards set by jury are not 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.'" *Patterson v. Liberty Assocs., L.P.* 910 So.2d 1014, 1020-1021 (Miss. 2004) (quoting *Rodgers v. Pascagoula Pub. Sch. Dist.*, 611 So.2d 942, 945 (Miss. 1992)). There is no unconscionable result in this case, and the verdict is fully supported by the uncontradicted and overwhelming damages evidence submitted by the Plaintiffs. While the verdict is certainly high, the damages in the case are astronomical.[42] As such, the verdict should not now be disturbed. *Patterson*, 910 So.2d at 1018-1019. This is especially true when viewing the evidence in a light most favorable to the Plaintiffs. *Brandon HMA, Inc. v. Bradshaw*, 809 So.2d 611, 616-617 (Miss. 2001) (holding Court should examine all

[42] APAC refers to Plaintiffs' closing arguments concerning the number suggested by Plaintiffs as being $22 million dollars. (APAC, p. 38). That number was an argument to the jury which averaged together the three opinions from the economist as to lost wages. (T 1010). These numbers were made to the jury as "suggestions" and Plaintiffs advised the jury that it had to decide what the right amount was based on the testimony. (T 1011). With regard to the economic damages, Plaintiffs actually asked for more money for the parents ($1,309,873.34) than the jury chose to award to the parents. (T 1008). Actual economic damages are not limited simply to lost income and medical expenses, but also are deemed to include pecuniary damages arising from disabilities, loss of business or employment opportunities, rehabilitation services, custodial care, costs or repair, and other objectively verifiable monetary losses. MISS. CODE ANN. § 11-1-60(1)(b). As such, the verdict is not excessive nor does it evidence sympathy, passion and prejudice on the part of the jury.

evidence supporting verdict as true, and in order to overturn such verdict, Court would have to "find it hopelessly lacking").[43]

APAC next argues that the jury showed bias in asking a question of the court concerning assessment of fault in the case, and that the court's answer was itself flawed. (APAC, p. 38). This argument is without merit. APAC made no objection to question, nor to the answer formulated by the Court. (T 1064-1066, RE 26). Judge Chamberlin correctly pointed out in the ruling on JNOV that had either side requested, the Trial Court would have made the jury aware of a settlement with Memphis Stone. (T 1088, RE 10). Judge Chamberlin went on to note that APAC chose not to request that the jury be informed of the settlement. (T 1088, RE 10). As this was essentially instruction to the jury, APAC has waived this argument as failure to contemporaneously object constitutes a waiver of the issue on appeal. *Marshall Durbin Food Corp. v. Baker*, 909 So.2d 1267, 1278 (Miss. App. 2005).

C. INSURANCE WAS PROPERLY EXCLUDED

Plaintiffs filed a motion *in limine* requesting that the Trial Court exclude mention of insurance at trial. (R 1462-1463). At a hearing on the motion, Defendant McCarty argued against insurance being mentioned as well. (T 86). After hearing the argument, Judge Chamberlin analyzed the probative value versus the potential harm concerning mention of insurance to the jury and determined that references to insurance should be excluded. (R 1510-1512, RE 6). The Trial Court noted that McCarty as well as the Plaintiffs wished to exclude the evidence, and there were still issues of negligence involved such that the injection of insurance could confuse or prejudice the jury. (R 1510-1512, RE 6). While MISS. R. EVID. 411 certainly allows for the

[43] In *Brandon HMA, Inc.*, the Court noted that simply because the Court may have awarded a different figure is not sufficient grounds to overturn a jury verdict as due deference must be given to the jury. *Brandon HMA*, 809 So.2d at 622.

introduction of liability insurance in certain circumstances, that does not warrant its admission in every instance. *Wells*, 997 So.2d at 913; *Toche*, 734 So.2d at 283.[44]

APAC argues that requiring McCarty to obtain his own insurance was evidence of control, and should have been allowed. Even were there some probative value to this, the Trial Court must still conduct a balancing test to determine if the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. *Wells*, 997 So.2d at 913; *Toche*, 734 So.2d at 283. Judge Chamberlin determined that the potential for harm, confusion and bias to McCarty and to the Plaintiffs the issue introduced was far greater than any benefit it would have had for APAC.[45] There was no error in the court's refusal to admit this information after an appropriate weighing test was performed. *Wells*, 997 So.2d at 913; *Toche*, 734 So.2d at 283.[46]

D. DANE MAXWELL'S TESTIMONY WAS PROPER

Dane Maxwell's testimony in this case was based upon his substantial experience, education and training in this field. (T 466-476, 486-488, RE 17). His opinions were also based upon a detailed investigation conducted in this case. (T 466-476, 486-488, RE 17). In addressing

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[44] Generally in the State of Mississippi, the admission of the fact that one or all of the defendants have liability insurance is generally impermissible. *Smith v. Crawford*, 937 So.2d 446, 447 (Miss. 2006). This is because the introduction of evidence of insurance, or lack thereof, is deemed prejudicial and wholly unfair. *Jackson v. Daley*, 739 So.2d 1031, 1039 (Miss. 1999).

[45] Any benefit to APAC from this evidence was offset by the benefit to the Plaintiffs. (T 837, Exh. 71). APAC required McCarty list it as an additional insured on the policy. (T 837). The policy language stated that it would only indemnify APAC if it was found that it was liable for the conduct of McCarty. (T 837). Had this issue been introduced to the jury, the Plaintiffs would have argued to the jury that APAC anticipated being sued for McCarty's conduct, which was relevant both to the issues of negligence (*i.e.* forseeability) and to the issues of control.

[46] APAC incorrectly relies on the case of *Royal Oil Co. v. Wells* to support its argument that insurance should have been admitted. *Royal Oil Co. v. Wells*, 500 So.2d 439, 448 (Miss. 1986). In *Royal Oil*, the word "insurance" was never mentioned at trial, and the objection concerning this issue was deemed "specious." *Royal Oil Co.*, 500 So.2d at 448.

the original motion *in limine* filed by APAC to exclude Mr. Maxwell, the court noted that the motion was "very broad" and merely tracked the criteria of Rule 702 of the Mississippi Rules of Evidence. (R 1514, RE 6).[47]

After reviewing his credentials and noting he had been accepted as an expert in several courts and jurisdictions, Judge Chamberlin ruled that Mr. Maxwell was qualified to render opinions in the area of federal motor carrier safety regulations. (R 1516, RE 6). The court also found that Mr. Maxwell's testimony was relevant in establishing the standard of care in the trucking industry, and whether those standards had been violated. (R 1516, RE 6).[48] When Mr. Maxwell was tendered as an expert in the field of commercial motor vehicle regulations, the only objection noted by APAC was "[o]nly as previously stated." (T 477, RE 17). From that point forward, Mr. Maxwell testified on direct and APAC did not *once* object to the content of his testimony. (T 477-491).[49]

It was Mr. Maxwell's testimony that APAC was a "motor carrier" under the federal regulations. (T 489, RE 17). This meant that APAC was subject to federal and state regulations. (T 489, RE 17). Based upon the evidence, it was Mr. Maxwell's opinion that APAC was "dispatching" McCarty as defined by regulations. (T 490, RE 17). Because of this, APAC was

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[47] As to the issues of vagueness, the Trial Court ruled that those issues would need to be addressed by cross examination, and that the expert's credibility was for the jury to decide. (R 1515, RE 6).

[48] The court ruled that Mr. Maxwell would not be allowed to give an opinion that APAC's actions were grossly negligent, and that testimony was not offered. (R 1515, RE 6). Mr. Maxwell was further instructed *not* to give any opinion concerning whether McCarty was an employee of APAC. (R 1516, RE 6). Mr. Maxwell's did not give an opinion as to McCarty's employment status with APAC. (T 466-510).

[49] APAC objected to leading three times. (T 479, 480, 483). There was one sustained objection on redirect unrelated to any opinion on whether McCarty was an employee. (T 508-509).

obligated to comply with certain safety rules, and restricted from dispatching vehicles that were not in compliance. (T 491, RE 17). Additionally, APAC was responsible for conducting safety inspections on trucks it dispatched. (T 490, RE 17). Neither APAC nor McCarty attempted to comply with the regulations in this regard. (T 486, RE 17). As a result, the truck was "out of service" under the regulations, and should not have been in operation on the morning of the wreck. (T 486, 489, RE 17). Mr. Maxwell testified that, regardless of the driver's employment status, APAC was not allowed under the regulations to aide and/or abet violations such as the ones that occurred here. (T 491, RE 17).

Judge Chamberlin did not abuse his discretion in allowing the testimony of Dane Maxwell. *See Burnwatt*, 47 So.3d at 114. It is the task of the trial judge to act as gatekeeper and make a determination as to whether the testimony is relevant and reliable. *Id.* at 114. If the testimony is relevant and reliable, it is admissible. *Id.* at 114. The trial judge, after limiting the areas of testimony, determined that the remainder of Mr. Maxwell's testimony would be relevant to the standard of care in the industry. (R 1516, RE 6). If the expert's testimony is helpful to the trier of fact, the opinion testimony is allowed so long as the testimony is based upon sufficient facts or data, and the testimony is the result of the application of reliable principles or methods. *Id.* at116; MISS. R. EVID. 702. Further, the Trial Court retained the right to review questions of relevance on a case by case basis during Mr. Maxwell's testimony. (R 1516, RE 6). Judge Chamberlin was not called upon to rule on any questions of relevance however, because APAC did not object during the testimony. (T 477-491, RE 17; R 1516, RE 6).[50] For these reasons, the court's ruling was not an abuse of discretion, and the testimony was relevant and useful to the

[50] APAC designated an expert on the issue of commercial trucking regulation to rebut this testimony, but chose not to call him at trial. (R 583-586).

trier of fact. The testimony was not subject to exclusion, and the presentation of the expert testimony of Mr. Maxwell does not give rise to a need for a new trial in this case.

V. THE CAP ON NON-ECONOMIC DAMAGES IS UNCONSTITUTIONAL

A THE MANDATORY CAP OF § 11-1-60 VIOLATES SEPARATION OF POWERS

The Mississippi Constitution separates governmental powers among the three co-equal branches of government.[51] "Further, this Court has held that '[t]he rule is well settled that the **judicial power cannot be taken away by legislative action. Nor may the Legislature regulate the judicial discretion or judgment that is vested in the courts. Any legislation that hampers judicial action or interferes with the discharge of judicial functions is unconstitutional**.'" *Jones v. City of Ridgeland*, 48 So.3d 530, 536 (Miss. 2010) (citing *City of Belmont v. Miss. State Tax Comm'n*, 860 So.2d 289, 297 (Miss. 2003) (citing 16A AM.JUR.2D CONSTITUTIONAL LAW § 286, at 209-10 (1998))) (emphasis added).[52] The arbitrary statutory cap on non-economic damages imposed by the Legislature in Mississippi Code Annotated § 11-1-60 usurps the constitutional obligation and duty of the judiciary to oversee trials and jury awards, based on the evidence of each case.[53] Consequently, said cap violates the constitutional

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[51] "No person or collection of persons, being one or belonging to one of these departments, shall exercise any power properly belonging to either of the others. MISS. CONST. art. 1, § 2.

[52] *See also Lawson v. Jeffries*, 47 Miss. 686, 704 (Miss. 1873); *Magyar v. State*, 18 So. 3d 807, 810 (Miss. 2009).

[53] *See* Mississippi Code Annotated § 11-1-60 (Appendix A). This section was enacted in 2002 and revised in 2004. It establishes a statutory cap on non-economic damages for medical malpractice actions, for the purpose of solving a medical malpractice insurance crisis that was perceived prior to enactment of this tort reform legislation. The Statute, after 2004, also caps non-economic damages for all other cases: "in the event the trier of fact finds the defendant liable, they shall not award the plaintiff more than One Million Dollars ($1,000,000.00) for noneconomic damages." MISS. CODE ANN. § 11-1-60(2)(b). The Statute orders that "the judge shall appropriately reduce any award of noneconomic damages that exceeds the applicable limitation." MISS. CODE ANN. § 11-1-60(2)(c).

separation of powers.[54]

B. THE CAP VIOLATES THE CONSTITUTIONAL RIGHT TO TRIAL BY JURY

The Mississippi Constitution guarantees that "[t]he right of trial by jury shall remain inviolate." MISS. CONST. art. 3, § 31. Other courts have held similar caps to be a violation of the right to trial by jury. The Supreme Court of Georgia recently invalidated non-economic damages caps as violating the right to a jury trial, holding that said statute "nullifies the jury's findings of fact regarding damages and thereby undermines the jury's basic function." *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 691 S.E.2d 218, 223 (Ga. 2010); *see also State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1091 (Ohio 1999). The rigid caps nullify the jury's constitutional fact finding role, and instead, the Legislature has substituted itself as the fact finder on damages in every case exceeding its arbitrary limit, in violation of the right to trial by jury.

C. THE CAP VIOLATES THE OPEN COURTS PROVISION

The Mississippi Constitution's Bill of Rights, art. 3, § 24, entitled "Open courts; remedy for injury," provides: "All courts shall be open; and every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice shall be administered without sale, denial, or delay." MISS. CONST. art. 3, § 24.[55] The mandated caps violate the Open Courts Provision of the Mississippi Constitution.

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[54] Statutory caps on non-economic damages similar to those arbitrarily imposed by the Mississippi Legislature have recently been invalidated by the Illinois Supreme Court as violating separation of powers. *See Best v. Taylor Mach. Works, Inc.*, 689 N.E.2d 1057 (Ill. 1997); *see also Lebron v. Gottlieb Memorial Hosp.*, 930 N.E.2d 895 (Ill. 2010).

[55] Other courts have held damages caps to be unconstitutional violations of open courts provisions. *See Lucas v. U.S.*, 757 S.W.2d 687, 690 (Tex. 1988); *Smith v. Department of Ins.*, 507 So.2d 1080, 1088-1089 (Fla. 1987).

D. THE CAP VIOLATES CONSTITUTIONAL EQUAL PROTECTION

The arbitrary cap on non-economic damages – in non-medical malpractice cases involving young, disabled person – violates the Equal Protection Clauses of both the Mississippi and United States Constitutions, by: 1) discriminating against certain classes of individuals (young, permanently disabled Mississippians) while not being reasonably related to the governmental interest behind said Statute, and 2) interfering with the fundamental rights to a trial by jury, open courts and due process.[56] The cap fails under any level of constitutional scrutiny because it discriminates against a class of disabled, young individuals like Ethan Bryant, and also because it interferes with fundamental rights, while not being reasonably related to a governmental interest. Thus, said cap violates equal protection.

E. THE CAP VIOLATES DUE PROCESS

The non-economic damages cap deprives Ethan Bryant of property and fundamental rights without due process of law, in violation of due process clauses in the Mississippi and U.S. Constitutions. *See* MISS. CONST. art. 3, § 14; U.S.CONST. amend. XIV.[57] The State may not deprive an individual "of life, liberty, or **property** by an act that has **no reasonable relation** to

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[56] Multiple states have struck down statutory caps as violative of equal protection. *See Ferdon v. Wisconsin Patient Compensation Fund*, 701 N.W.2d 440, 456 (Wis. 2005) (citing *State v. Annala*, 484 N.W.2d 138 (Wis. 1992) (citing *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976))); *see also Brannigan v. Usitalo*, 587 A.2d 1232, 1234 (N.H. 1991) (quoting *Carson v. Maurer*, 424 A.2d 825, 831 (N.H. 1980)); *see also Arneson v. Olson*, 270 N.W.2d 125, 136 (N.D. 1978); *see also Moore v. Mobile Infirmary Ass'n*, 592 So.2d 156, 166-67 (Ala. 1991).

[57] Courts in other states have held statutory caps to violate due process. *See State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 715 N.E. 2d 1062 (Ohio 1999) (holding caps to violate due process); *see also Knowles ex rel. Knowles v. United States*, 544 N.W.2d 183 (SD 1996) (holding statutory cap violates due process, and "[t]his legislation does not bear a real and substantial relation to the objects sought to be attained and it violates many rights in the process. The fact that certain fringe benefits may result to the public in general is insufficient to save this statute."); *see also Arneson v. Olson*, 270 N.W.2d 125, 135-136 (N.D. 1978) (holding statute violates due process and equal protection).

any proper governmental purpose, **or** which is so far beyond the necessity of the case as to be an **arbitrary exercise of governmental power**." *Albritton v. City of Winona*, 181 Miss. 75, 96, 178 So. 799, 804 (1938) (emphasis added). The statutory cap at issue violates due process because: 1) said cap is an arbitrary exercise of government power, 2) the cap bears no reasonable relation to a governmental purpose, and 3) the cap deprives Ethan Bryant of property rights without any due process of law. All damages above the statutory ceiling are arbitrarily placed on the victim of wrongdoing, not the tortfeasor, which results in an unconstitutional shifting of responsibility to the injured party, as well as an unconstitutional taking of property without due process. Therefore, the statutory cap is unconstitutional, in violation of due process.

CONCLUSION

The unanimous verdict of the citizens of Desoto County, Mississippi, was fully supported by the evidence in this case. The rulings of trial Judge Robert Chamberlin were studied, thorough, detailed, and supported by law. All parties to the litigation were provided a fair trial on the merits. The verdict in this case should be affirmed.

Dated: February 25, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert R. Morris, III, one of the attorneys for the Appellees/Cross-Appellants in the above styled and numbered cause, do hereby certify that I have this served via U.S. Mail a true and correct copy of the foregoing Brief of Appellees/Cross-Appellants to:

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This the 25 day of February, 2011.

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