# IN THE SUPREME COURT OF MISSISSIPPI

**2009-CA-02009**

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| **APAC-TENNESSEE, INC.** | **DEFENDANT-APPELLANT/ CROSS-APPELLEE** |
| **V.** | |
| **ETHAN BRYANT, ET AL.** | **PLAINTIFFS-APPELLEES/ CROSS-APPELLANTS** |

Appeal from Circuit Court of DeSoto County

# BRIEF OF APAC-TENNESSEE, INC., REPLYING IN SUPPORT OF ITS APPEAL AND RESPONDING TO PLAINTIFFS' CROSS-APPEAL

**ORAL ARGUMENT REQUESTED**


William O. Luckett, Jr. (MSB #[redacted])
Luckett Tyner Law Firm, P.A.
P. O. Drawer 1000
143 Yazoo Avenue
Clarksdale, Mississippi 38614
Telephone: 662-624-2591
Facsimile: 662-627-5403

Brian L. Yoakum (TBN #[redacted])
The Biller Law Firm
6000 Poplar Avenue, Suite 250
Memphis, Tennessee 38119
Telephone: 901-261-5454
Facsimile: 901-261-5457

William F. Goodman, Jr. (MSB #[redacted])
Mark D. Jicka (MSB #[redacted])
J. Collins Wohner Jr. (MSB #[redacted])
Watkins & Eager PLLC
400 East Capitol Street (39201)
Post Office Box 650
Jackson, Mississippi 39205
Telephone: 601-965-1900
Facsimile: 601-965-1901

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# REPLY IN SUPPORT OF APPEAL

This Court's landmark *respondeat superior* / independent contractor cases[1] leave no question for jury determination on the facts of this case – they require judgment for APAC-Tennessee, Inc. ("APAC"). Plaintiffs' response, which goes out of its way to avoid discussion of the independent contractor rule or its source principles, does not and cannot excuse the judgment, or the upsetting of precedent and of long-settled expectations that affirmance of the judgment would require.

A conflict with this Court's landmark rulings cannot be avoided by invoking Tennessee law. Tennessee law is the same. The law at issue is common law. An interpretation of *common* law from this Court will be precedential in Mississippi no matter which state's cases are cited as the source thereof. This Court's landmark cases are not factually distinguishable. Plaintiffs' *respondeat superior* theories cannot be accepted without upsetting those cases and the long history of precedent on which they are based.

Plaintiffs' "independent" negligence theory is not a valid alternative for sustaining the judgment. A principal has no duty to supervise independent contractor activity as ordinary (i.e., not inherently dangerous) as the act of driving a truck. Imposing such a new duty would disrupt settled law and expectations as badly as acceptance of plaintiffs' misguided view of *respondeat superior* would. Plaintiffs cite no precedent for such a result, and they fail to distinguish the controlling precedent in APAC's brief. *Stare*

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[1] *Richardson v. APAC-Mississippi, Inc.*, 631 So. 2d 143 (Miss. 1994) (Hawkins, C.J., *en banc*); *Webster v. Mississippi Publishers Corp.*, 571 So. 2d 946 (Miss. 1990) (Blass, J., *en banc*).

*decisis* requires like cases to be treated alike.[2] "Like cases" to this one – *Richardson*, *Webster* and the long line of precedent on which those cases rest – require judgment for APAC.

In the alternative, APAC is entitled to a new trial for all the reasons argued in APAC's opening brief.

## ARGUMENT

### I. The Independent Contractor Rule Requires the Judgment to Be Reversed and Rendered.

Plaintiffs' response cannot alter the fact that APAC's only connection to this crash was through the negligence of independent contractor Chad McCarty. This case does not involve any recognized basis for imputing contractor negligence to the contract principal. As a result, both of plaintiffs' theories for imputing McCarty's negligence to APAC ("independent" negligence and *respondeat superior*) violate the independent contractor "rule."[3]

McCarty's negligent driving caused his truck to enter an intersection against a red light and thereby caused the resulting crash. Plaintiffs cite no precedent for allowing a driver's negligent driving to be imputed to another defendant based upon an agreement to

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[2] *See, e.g., Jones v. Jones*, 19 So. 3d 775, 780 (¶ 14) (Miss. App. 2009) ("According to the theory of *stare decisis*, 'absent powerful countervailing considerations, like cases ought to be decided alike,' and 'long-established legal interpretations ought not lightly be disturbed'") (quoting *State ex rel. Moore v. Molpus*, 578 So. 2d 624, 634 (Miss. 1991)).

[3] The term independent contractor "rule" is used as a short-hand reference for the "well settled" understanding that "one who contracts with an independent contractor to perform certain work or service which is not illegal, dangerous or harmful, is not liable for torts committed by him." *Alexander v. Brown*, 793 So. 2d 601, 606 (¶ 20) (Miss. 2001). An "independent contractor" in this context is "any person who does work for another under conditions which are not sufficient to make him a servant" for purposes of the *respondeat superior* doctrine. RESTATEMENT (SECOND) OF TORTS § 409 comment a (1979).

deliver goods without proof that the driver was a *respondeat superior* servant. Nothing plaintiffs have cited or argued can justify imputing to a contract principal liability for physical negligence as ordinary as that of a driver running a red light. None of the recognized circumstances under which a principal may be liable for independent contractor negligence (e.g., inherently dangerous activity, non-delegable duty) are involved. Under either of plaintiffs' theories, affirmance would be an unprecedented and disruptive result, upsetting long-settled rules and expectations.

### A. A Principal Has No Duty to Supervise Independent Contractor Activity as Ordinary as the Act of Driving a Truck And Does Not Assume Such a Duty by Contracting for the Use of Care and Skill in Accomplishing Results.

Plaintiffs do not dispute that allegations of negligence may create a question of fact for a jury *only* where the court finds, as a matter of law, that a relevant legal duty exists. Brief at 17. The existence of duty is always a question of law for the court. *See, e.g., Enterprise Leasing Co. v. Bardin*, 8 So. 3d 866, 868 (¶ 7) (Miss. 2009).

To support their contention that a duty existed for APAC with respect to this crash, plaintiffs rely primarily upon *Doe v. Wright Sec. Services*, 950 So. 2d 1076 (Miss. App. 2007), and to a lesser degree upon *Rein v. Benchmark Constr. Co.*, 865 So. 2d 1134 (Miss. 2004). Brief at 13 & 16-20 (*Rein* cited but not discussed).

Plaintiffs' reliance is misplaced. *Doe* and *Rein* are not independent contractor rule cases. They were *not* concerned with a *principal's* liability for the acts of a *contractor*. They dealt instead with a *contractor's* liability for its *own* negligence in the performance of duties the *contractor* had expressly assumed by contract *and* as to which the plaintiff

was a third-party beneficiary.[4] Even then, *Rein rejected* as a matter of law claims against two of three named contractors, allowing a claim to proceed against only one who had contractually assumed an especially pertinent duty.[5] Cases like that do not apply to the facts of this case and cannot support the claim plaintiffs make against APAC.

The cases that properly apply here, like those cited in APAC's opening brief,[6] show that a principal who contracts for *ordinary* (i.e., not inherently dangerous) services *does not* assume a duty to ensure that the contractor uses reasonable care. *See also, e.g.*, *Alexander v. Brown*, 793 So. 2d 601, 606 (¶ 20) (Miss. 2001) ("It is well settled that one who contracts with an independent contractor to perform certain work or service which is not illegal, dangerous or harmful, is not liable for torts committed by him") (quoting *Hester v. Bandy*, 627 So. 2d 833, 841 (Miss. 1993)). This is age-old, well-settled law, and plaintiffs have not shown any grounds for evading or changing it.

Plaintiffs have not even attempted to invoke traditional grounds for imputing contractor negligence to a contract principal, such as inherently dangerous activity or non-delegable duty, none of which apply here. Plaintiffs depend instead on the

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[4] In *Doe*, the defendant contractor was a security company that contractually assumed the duty of protecting students at a specific bus stop from violence by other students, and the injured plaintiff, a student injured while under the security company's supervision, was a third-party beneficiary of the company's agreement. *Doe*, 950 So. 2d at 1080 (quoting *Rein*).

[5] *Rein*, 865 So. 2d at 1147-48 (¶¶ 42-44) (rejecting claims against contractors as to whom plaintiff did not have "third-party beneficiary status" and allowing claim only against "Natural Accents [which] obligated itself, by its own express terms, to some duty to inspect and treat ant beds at [nursing home]").

[6] APAC Brief at 28 (discussing *Chisolm v. Miss. Dep't of Transp.*, 942 So. 2d 136 (Miss. 2006); *Enterprise Leasing Co. v. Bardin*, 8 So. 3d 866 (Miss. 2009); *Laurel Yamaha, Inc. v. Freeman*, 956 So. 2d 897 (Miss. 2007); and *Heirs of Branning v. Hinds Community College Dist.*, 743 So. 2d 311 (Miss. 1999)).

contention that APAC assumed a duty by "implement[ing] a set of rules governing the actions of [independent] drivers" and then allegedly failing "to properly oversee its own safety rules and regulations." Brief at 13.

This Court has repeatedly rejected comparable contentions, which contradict settled law and sound public policy. Plaintiffs' response does not confront that adverse authority, including the multiples examples cited in APAC's opening brief.[7]

Plaintiffs do not fairly confront the authority of *Chisolm v. Miss. Dep't of Transp.*, 942 So. 2d 136, 141 (Miss. 2006) (discussed in APAC's opening brief at 28), which is not distinguishable, despite plaintiffs' footnote attempt to say otherwise.[8] *Chisolm* rejected the contention that contract safety requirements created a duty for the contract principal.[9] It held that safety standards "*cannot be used* to create a legal obligation under Mississippi law" and that standards "become[] a tool for assessing a breach of duty only after a legal duty has already been [otherwise] established." 942 So. 2d at 143 (¶ 15) (emphasis added). The Court recognized that existing law would have to be "radically alter[ed]" for plaintiffs' theory to be accepted as grounds for imputing liability to a contract principal. *Id.* (¶ 14). That observation applies equally here.

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[7] APAC Brief at 28 (also *supra* n.6).

[8] Plaintiffs' Brief at 17 n.6.

[9] The *Chislom* plaintiffs sought to hold contract principal MDOT liable for dangerous road conditions created by its contractor Great River by pointing to the *Manual on Uniform Traffic Control Devices* (MUTCD), which this Court has accepted as evidence of the standard of care in appropriate cases, and to the Traffic Control Plan that MDOT developed for the project and that it required Great River to implement.

Plaintiffs never mention *Heirs of Branning v. Hinds Community Coll. Dist.*, 743 So. 2d 311, 316 (¶ 28) (Miss. 1999) (discussed in APAC's opening brief at 28), which also rejected comparable contentions as a matter of law. The *Branning* plaintiffs contended that a contract principal (an airport owner) had failed to supervise and to monitor an airport management contractor for compliance with safety requirements and that these failures "set into motion events which could have been anticipated."[10] *Heirs of Branning* found that plaintiffs' multiple allegations of failure to monitor and supervise *did not* take that cause out of the "general rule . . . that the employer of an independent contractor has no vicarious liability for the torts of the independent contractor . . . in the performance of the contract." 743 So. 2d at 318 (¶ 36). The same is true here.

Plaintiffs never confront the analogies presented by *Enterprise Leasing*, 8 So. 3d 866 (insurance statutes did not impose on rental car company a duty to refuse to rent to a driver who failed to produce proof that he was insured), and *Laurel Yamaha*, 956 So. 2d 897 (licensing statutes did not impose a duty on motorcycle dealer to determine that buyer was licensed to operate motorcycle).

The settled law of this issue was reiterated recently in *Hodges v. Attala County*, 42 So. 3d 624 (Miss. App. 2010) – an opinion noteworthy for its review of other states' law and for its recognition of the perverse public policy implications of plaintiffs' theory. *Hodges* applied *Chisolm* to reject the contention that the County "took on an independent

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[10] 743 So. 2d at 315 (¶ 21) *Heirs of Branning* refused to allow the negligence of the independent contractor that managed a small airport to be imputed to the contract principal/airport owner. The airport management contract contained multiple specifications regarding safety.

duty" by including safety requirements in its contract, or by conducting safety inspections of its contractors' work that detected, but failed to eliminate, dangerous conditions that contributed to the crash.[11]

Canvassing the law of other states, *Hodges* found agreement that a principal *does not* assume liability by contracting to "to ensure that safety precautions are observed and that work is done in a safe manner." *Hodges*, 42 So. 3d at 627 (¶ 11) (quoting *Ross v. Dae Julie, Inc.*, 341 Ill. App. 3d 1065, 793 N.E.2d 68, 72 (2003), and citing several other cases). *Hodges* recognized that a contrary rule would be bad public policy. *Id.* at 628 (¶ 14) ("it would be unsound public policy to punish Attala County for including these additional safety measures") (citing and quoting public policy analysis in *LaChance v. Michael Baker Corp.*, 869 A.2d 1054, 1064 (Pa. 2005)).

The Court of Appeals is correct. Plaintiffs' theory would punish contract principals who require safety by making them insurers of the safety of independent contractor operations, imposing on them a liability that other contract principals do not have. Such a regime would punish safety-conscious principals and discourage safety. As *Hodges* observed:

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[11] *Hodges*, 42 So. 3d at 625 (¶ 4). *Hodges* arose from a fatal crash at a road construction site in Attala County. The *Hodges* plaintiffs sought to hold the County liable for the contractor's failure to maintain traffic barricades at the site. They relied on the fact that the County's contract incorporated a Traffic Control Plan requiring the installation and maintenance of traffic signs and devices. *Id.* (¶ 2). The contract "designated" the County engineer "as the responsible person to ensure that the Contractor constructs, installs, and maintains the devices called for in the traffic control plan." *Id.* In the weeks before the crash, multiple weekly inspections by the County found deficiencies in the contractor's installation and maintenance of traffic barricades. *Id.* Barricades in the decedent's lane were missing at the time of the crash. *Id.* (¶ 3).

> To find liability simply because [the contract principal] addresses the issue of safety in its construction contracts would only encourage [contract principals] to disregard safety in its contracts. Sound public policy, however, dictates that [contract principals] monitor . . . safety . . . .

*Hodges*, 42 So. 3d at 629 (¶ 14) (quoting *LaChance*, 869 A.2d at 1064).

Like the plaintiffs in *Hodges*, plaintiffs here have used the label "independent" to suggest that their negligence allegations are actionable under general negligence principles without regard to independent contractor law. But the cases show that labels do not trump facts.[12] Where the defendant's connection to the injury is through the act or omission of a non-servant doing service for the defendant, the claim is one of "vicarious liability for the torts committed by [an] independent contractor," regardless of how the claim is labeled.[13] Plaintiffs' use of the label "independent" does not change the fact that what plaintiffs seek to do with this theory is to impose on APAC vicarious liability for McCarty's negligent driving without *respondeat superior*.

Plaintiffs cite no case anywhere that has ever allowed a driver's negligent driving to be imputed to another defendant based upon an agreement to deliver goods without proof that the driver was a *respondeat superior* servant. The cases on which plaintiffs rely do not involve negligent driving at all, nor otherwise analogous facts. As already

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[12] *See also, e.g.*, *Howard v. Wilson*, No. 2010-IA-01181-SCT (¶ 6) (Miss. May 26, 2011) ("the mere refusal to style the cause brought in a recognized statutory category" ineffective to circumvent applicable law) (quoting *Dennis v. Travelers*, 234 So. 2d 624, 626 (Miss. 1970)).

[13] *Chisolm*, 942 So. 2d at 141. *See also, e.g., Crawford Logging, Inc. v. Estate of Irving*, 41 So. 3d 687, 691 (¶ 17) (Miss. 2010) (Waller, C.J., concurring) ("Thomas's independent-contractor status defeated *respondeat superior* and vicarious liability, anyway"); RESTATEMENT (SECOND) OF TORTS § 409 comment a (1979) (an "independent contractor" is "any person who does work for another under conditions which are not sufficient to make him a servant" for purposes of the *respondeat superior* doctrine").

noted, plaintiffs' purported duty cases do not concern *principal* liability for *contractor* acts at all; they involve a *contractor's* liability for its *own* acts. Those cases are not precedent for plaintiffs' claim.

The relevant precedents for this case are cases that have dealt with whether a driver's *negligent driving* may be imputed to another defendant whose connection to the driver is through a delivery contract. This Court has a long history of cases addressing that precise issue. It is no coincidence that those are the same cases that have been briefed to the Court on the *respondeat superior* issue, including especially *Richardson* and *Webster*, and the long line of precedent on which those decisions rest.

Cases like *Richardson* and *Webster* address the precise issue this case presents, i.e., whether a driver's negligent driving may be imputed to another defendant whose connection to the driver is through a contract to deliver ordinary (i.e., not inherently dangerous) goods. These cases establish that such a shipper is *not liable* for the negligent driving of a driver who is *not* a *respondeat superior* servant. The only exception this Court has recognized for such cases is where the facts show that the agreement is no more than a "legal fiction" or sham to conceal a *servant* with no real independence from the master.[14] There is a total absence of such evidence in this case.

The principle of *stare decisis* requires that "absent powerful countervailing considerations, like cases ought to be decided alike." *Jones*, 19 So.3d at 780 (¶ 14) (citation omitted). "*Stare decisis* is necessary, inter alia, so that trial courts can make

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[14] *Richardson*, 631 So. 2d at 150 (quoting *Hobbs v. International Paper Co.*, 203 So. 2d 488, 490 (Miss. 1967)). *See* APAC opening brief at 19-20 & at 32 discussing same.

correct decisions and lawyers can properly advise their clients." *United Services Auto. Ass'n v. Stewart*, 919 So. 2d 24, 30 (¶ 21) (Miss. 2005) (refusing to overrule a "long line of cases," noting that "such action on our part would understandably create chaos for the trial bench and bar, which have a right to expect consistency from this Court"). *Stare decisis* requires judgment as a matter of law for APAC in this case, just as it did for the defendants in *Webster* and *Richardson.*

Finally, although the lack of legal duty renders plaintiffs' extended fact argument immaterial as a matter of law,[15] some factual points should be made.

First, it remains unrefuted that McCarty did not know that his load, which was legal in Tennessee, was overweight in Mississippi. T 327, 352. McCarty knew the weight of his load, but he did not know that the weight limit for his truck was lower in Mississippi than in Tennessee, where he had been hauling (and stopping with) loads of the same weight for weeks. T 328, 353. No rational person could rely on the existence of a weight limit of which McCarty was completely ignorant at the time to conclude that McCarty was surprised by his truck's response when he belatedly braked for this red light. The lower Mississippi weight limit could not have made the truck any harder to stop in Mississippi than it had been in Tennessee. Weight limits can change at the state line, but the laws of gravity and physics do not.

More importantly, it also remains unrefuted that *no one at APAC knew* before the crash of McCarty's overweight loads (T 788, 885), or of any of the other alleged

[15] *E.g.*, *Enterprise Leasing Co.*, 8 So. 3d at 868 (¶ 7) (lack of legal duty terminates claim).

deficiencies in his truck or paperwork. T 756-57. Plaintiffs' presentation tends to blur this distinction, but the fact remains that plaintiffs' theory rests entirely on things they say APAC *should have discovered*, by inspecting, verifying, supervising, etc. Plaintiffs' claim assumes the existence of a duty to inspect and ensure contractor safety in the ordinary activity of driving a truck. There is no such duty. The law would have to be "radically alter[ed]" to hold otherwise. *Chisolm*, 942 So. 2d at 143 (¶ 14).

### B. Like Mississippi, Tennessee Has Rejected Plaintiffs' Simplistic View of "Control" and Provides No Basis for Affirmance.

Plaintiffs argue that the judgment can be affirmed on the basis of *respondeat superior* by applying Tennessee law without regard to *Webster* and *Richardson* or the Mississippi precedent on which those cases rest. Plaintiffs are incorrect. Tennessee law is the same, and like Mississippi law, it precludes plaintiffs' claim.

Tennessee follows common law and the Restatement.[16] Like the Restatement, Tennessee rejects a simplistic view of "control" that obliterates the distinction between the "control" created by a contractual right to expect results and the complete control over time and physical activity that a master demands of a servant. *See, e.g., Bargery v. Obion Grain Co.*, 785 S.W.2d 118, 120 (Tenn. 1990) ("An instruction on where to deliver grain is a control over the end result of a job. It is a basic type of control that is consistent with the contractor-contractee relationship."); *Masiers v. Arrow Transfer & Storage Co.*, 639 S.W.2d 654, 656 (Tenn. 1982) ("a party to a contract can exercise direction and control

[16] Tennessee courts routinely cite the Restatement as an authoritative guide to common law. *See, e.g., Banks v. Elks Club*, 301 S.W. 3d 214, 222-23 (Tenn. 2010).

over the results of the work without destroying the independence of the contract or creating an employer-employee relationship"). *Compare* RESTATEMENT (SECOND) OF AGENCY § 220 comment e (the "*important distinction*" for *respondeat superior* "is between service in which the actor's physical activities and his time are surrendered to the control of the master, and service under an agreement to accomplish results or to use care and skill in accomplishing results") (emphasis added).

Common law requires this "important distinction" (*id.*) to be recognized and emphasized, not blurred into oblivion – which is what plaintiffs ask this Court to do.

To support their contention that Tennessee law is different, plaintiffs depend on two unpublished, interlocutory, intermediate decisions that do indeed blur this "important distinction" into oblivion. Brief at 29-30 (discussing *Donaldson v. Weaver* and citing *Toothman v. Burns Stone Co.*[17]). Plaintiffs' two unpublished cases are in fact different. As plaintiffs have done throughout this case, *Donaldson* (and *Toothman*[18]) rely on a simplistic view of "control" that obliterates the distinction between the "control" created by a contractual right to expect results and the surrender of time and physical activity that a master demands of a servant. This simplistic view cannot be reconciled with the published views repeatedly espoused by the Tennessee Supreme Court.

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[17] *Donaldson v. Weaver*, No. 02A01-9208-CV-00249 (Tenn. App. April 7, 1993) (1993 Tenn. App. LEXIS 267). Plaintiffs also cite *Toothman v. Burns Stone Co.*, No. 89-341-II, 01-A-01-9001-CV-0012, 01-A-01-9001-CV-0035 (Tenn. App. Jul 13, 1990) (1990 Tenn. App. LEXIS 472).

[18] *Toothman*'s analysis is effectively the same as *Donaldson*'s. For brevity we may refer hereafter simply to *Donaldson.*

*Donaldson* indicates that *any* "control" by a contract principal over a contractor's performance can be grounds for holding the principal liable for the contractor's negligence.[19] *Donaldson* therefore accepted instructions to drivers about "what products to haul, the amount to be hauled, where the product was to be picked up [and] . . . delivered" as probative of "control." *Id.* This simplistic view of "control" would obliterate the "important distinction" that is central to common law understanding of the difference between a servant and an independent contractor. RESTATEMENT (SECOND) OF AGENCY § 220 comment e. Since every contract by definition confers "control" over what is contracted for, this simplistic view of "control" leaves no room for distinction.

This simplistic view is irreconcilable with the law as repeatedly stated by the Tennessee Supreme Court in published cases, and as recognized by the Restatement. The Tennessee Supreme Court specifically rejected such a simplistic view of "control" in *Bargery*, where the court cautioned that "[a]n instruction on where to deliver . . . is a control over the end result of a job" and a "type of control that is consistent with the contractor-contractee relationship." 785 S.W.2d at 120. *Bargery* found as a matter of law that such an independent hauler was *not* a servant – even though the claim was one for

[19] *Donaldson*, 1993 Tenn. App. LEXIS 267, *12 (deeming even "*some* control over the drivers hauling the gravel and paving materials for use by [the principal]" sufficient to deny summary judgment) (emphasis added).

workers' compensation entitling plaintiff to a presumption in his favor and shifting the burden of proof to the defense.[20]

The Tennessee Supreme Court made the same point in *Masiers*, 639 S.W.2d 654, which plaintiffs describe as "the controlling Tennessee case" (Brief at 27). *Masiers* affirmed summary judgment *for the defendant shipping company* – even though the claim (as in *Bargery*) was one for workers' compensation entitling plaintiff to a presumption in his favor and shifting the burden of proof to the defense. Even in the face of that presumption, *Masiers* found as a matter of law that a driver was *not* a servant where the driver owned and maintained his own vehicle, was not covered by the shipping company's insurance, picked up cargo at his discretion, could refuse a job without penalty, and had a contract with the shipping company. *Masiers*, 639 S.W.2d at 656. The facts here are the same, and they require the same result.

*Masiers* observed "that a party to a contract can exercise direction and control over the results of the work without destroying the independence of the contract or creating an employer-employee relationship." *Id.* *Masiers* shows that Tennessee law is the same in that it requires judgment for APAC in this case.

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[20] "Decisions construing Tennessee's worker's compensation laws should be applied with some caution in vicarious liability cases. The worker's compensation statutes are to be liberally construed in favor of the employee seeking coverage. . . . No similar liberal construction rule applies in vicarious liability cases." *Ascolese v. Misco, Inc.*, 1989 Tenn. App. LEXIS 236, *7 n.1. *See Clawson v. Burrow*, 327 S.W.3d 638, 643 (Tenn. App. 2010) (courts required to "liberally construe the Workers' Compensation Law in order to secure benefits for injured workers") (quoting *Building Materials Corp. v. Britt*, 211 S.W.3d 706, 713 (Tenn. 2007)); *Galloway v. Memphis Drum Service*, 822 S.W.2d 584, 586 (Tenn. 1991) (in a Tennessee workers' compensation case, "the burden is on the employer to prove the worker was an independent contractor rather than an employee"); *Wolney v. Emmons*, 1997 Tenn. App. LEXIS 118, *7 (1997) ("The [Workers' Compensation Act] is given a construction that favors a finding that a worker is an employee rather than an independent contractor").

Another compensation case cited by plaintiffs – *Curtis v. Hamilton Block Co.*, 466 S.W.2d 220 (Tenn. 1971) – shows that what is required of a servant in Tennessee, as in Mississippi, is a *complete surrender of time and physical activity* to the service of the master.[21] *Curtis* affirmed that a deceased driver was an "employee" rather than an independent contractor, but on facts dramatically different from the facts of this case. Among other things, the decedent had been a regular employee-driver of a corporate spin-off of the defendant corporation until three months before his death. His status was nominally changed to that of "contract hauler" when he agreed to purchase a truck from another driver in a sale financed by the defendant. The defendant took title to the truck in its name and deducted payments on the truck from the decedent's weekly check. As a "contract hauler," the decedent reported to work at defendant's plant every day and remained there during normal working hours. He was expected to be available when needed and could be terminated for being "unduly absent when needed." Even on these facts, the court stressed "the broad or liberal view we are required to take in regard to the factual situation here" under the compensation law in affirming the judgment for plaintiff. 466 S.W.2d at 222.[22]

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[21] *See, e.g.*, RESTATEMENT (SECOND) OF AGENCY § 220 comment e (the "important distinction" for *respondeat superior* "is between service in which the actor's *physical activities and his time are surrendered* to the control of the master, and service under an agreement to accomplish results or to use care and skill in accomplishing results") (emphasis added).

[22] Other published Tennessee decisions cited by plaintiffs are no better for them: *Galloway v. Memphis Drum Service*, 822 S.W.2d 584 (Tenn. 1991), is a workers' compensation case brought by laborer injured while repairing an overhead door at the defendant's place of business. The facts have no similarity to this case, and the finding that plaintiff was an employee is expressly predicated on the *statutory presumption favoring compensation awards* and shifting the burden of proof regarding employment status to the defendant. *Cromwell General Contractor, Inc. v. Lytle*, 439 S.W.2d 598 (Tenn. 1969), a workers' compensation case, found as a matter of law that plaintiff, a brick washer at

More recent published Tennessee cases also reject a simplistic view of "control" that obliterates the distinction between the "control" conferred by contract and the subserviency required of a servant to a master. *See, e.g.*, *Givens v. Mullikin*, 75 S.W.3d 383, 394 & 397 (Tenn. 2002) (rejecting *respondeat superior* allegations since "an insurer in Tennessee clearly possesses no right to control the methods or means chosen by an attorney to defend the insured" and likewise "the client does not generally possess the right to control the 'the time, place, methods and means' by which the representation is accomplished"); *Tucker v. Sierra Builders*, 180 S.W.3d 109, 120 (Tenn. App. 2005) ("in Tennessee, it is not the right to control the result that is determinative of the existence of an agency relationship; it is the right to control the actual conduct of the work").

Published Tennessee authority is in accord with the Restatement. The Restatement makes clear that "control" is not a catch-all for imputing liability regardless of what is controlled. The Restatement does not speak of "control" in the abstract, which could be confused with control over results or over contractual performance standards, but of control of "physical conduct" in the course of "service in [a master's] affairs." RESTATEMENT (SECOND) OF AGENCY § 2 (*see* APAC's opening brief at 16-18, quoting

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construction site, was an independent contractor rather than an "employee" (the correct term in a workers' compensation context, because it is the term used by the compensation statute). The trial court's compensation award was revered and rendered. *Mayberry v. Bon Air Chemical Co.*, 26 S.W.2d 148 (Tenn. 1930), a workers' compensation case, affirmed a compensation award to an illiterate unskilled laborer who was paid by the cord to cut wood under the direction of a superintendent. The facts have no similarity to this case. *Goodale v. Langenberg*, 243 S.W.3d 575, 582-583 (Tenn. App. 2007), was procedurally complex fraud claim seeking rescission of a contract to purchase real property based on misrepresentations by the real estate agent. A judgment was entered for plaintiffs against the agent, but against plaintiffs on their *respondeat superior* theory against the agency. The verdict rejecting plaintiffs' *respondeat superior* claim was affirmed. The facts have no similarity to this case.

and discussing § 2 definitions). The Restatement emphasizes that "service in which the actor's *physical activities and his time are surrendered* to the control of the master" must be distinguished from "service under an agreement to accomplish results or to use care and skill in accomplishing results." RESTATEMENT (SECOND) OF AGENCY § 220 comment e.

Plaintiffs' two unpublished Tennessee cases (*Donaldson* and *Toothman*) conflict with the Restatement and with published Tennessee law. In contrast with the latter, *Donaldson* and *Toothman* accept "control" in the abstract as catch-all for imputing liability, without distinguishing control over the results or over contractual performance standards, which is part of every contract, from the control of "physical conduct" and time that a master exerts over a servant. This view, if accepted, would not just confuse the "important distinction" emphasized by the Restatement[23] (and Tennessee and Mississippi law); it would obliterate it – just as the *Webster* dissent and the rejected *Runyon* analysis[24] would have done 20 years ago, if not overruled.

*Donaldson* and *Toothman* are 20-year-old unpublished, interlocutory, intermediate decisions. The decisions were not reviewed by the Tennessee Supreme Court, and in the 20 years since they appeared, no reported decision has ever cited either as authority. These opinions are in irreconcilable conflict with common law as recognized by the

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[23] RESTATEMENT (SECOND) OF AGENCY § 220 comment e.

[24] *W.J. Runyon & Son, Inc. v. Davis*, 605 So. 2d 38 (Miss. 1992) (Robertson, J.), *overruled by Richardson*, 631 So. 2d at 152, *and by J & J Timber Co. v. Broome*, 932 So. 2d 1, 6-7 (¶ 21) (Miss. 2006).

Tennessee Supreme Court, by the Restatement, and by this Court. They cannot support the judgment.

### C. Since Tennessee Law Is the Same, There Is No Basis for a Choice of Law Allowing This Court's Cases to Be Ignored; and APAC Never Agreed Otherwise.

Since Mississippi and Tennessee law are in accord, there is no basis for a choice of law that would allow this Court's independent contractor / *respondeat superior* jurisprudence to be disregarded. Plaintiffs erroneously assert that "all parties agreed that Tennessee law applied" on this issue to the exclusion of Mississippi law. Brief at 13. But there was no such agreement, and this Court's controlling precedent cannot and should not be ignored.

APAC has never agreed that this Court's dispositive *respondeat superior* / independent hauler jurisprudence can be ignored. To the contrary, from the outset of this case, APAC has asserted this Court's cases as controlling, dispositive authority entitling it to judgment as a matter of law. CP 1742-48 (summary judgment motion arguing Mississippi law); CP 1689 (JNOV motion incorporating summary judgment motion).

The trial colloquy cited by plaintiffs was no waiver of that position. To the contrary, APAC stated that choice of law was *irrelevant* because Tennessee law was the same. T 10 & 12 ("the law is virtually the same in both states") (Plaintiffs' RE tab 4). APAC's position was an accurate statement of choice-of-law principles and cannot be considered a waiver of this authoritative guidance of this Court's cases or of Mississippi law.

A "[c]hoice of law analysis arises *only* when there is true conflict between the laws of two states, each having an interest in the litigation." *South Carolina Ins. Co. v. Keymon*, 974 So. 2d 226, 230 (Miss. 2008) (quoting *Zurich Am. Ins. Co. v. Goodwin*, 920 So. 3d 427, 432 (¶ 8) (Miss. 2006)) (emphasis added). "In the absence of a true conflict, [courts] need not undertake a choice-of-law analysis" and the law of the forum applies.[25]

There is no true conflict between Mississippi and Tennessee law on which a choice of law can rest, or that would prevent the affirmance of this judgment from upsetting Mississippi precedent.

### D. Affirmance Would Revive the Erroneous View of "Control" That *Webster* and *Richardson* Correctly Rejected.

When they finally address them, plaintiffs say that *Webster* and *Richardson* are distinguishable. But *Webster* and *Richardson* are not distinguishable, and their holdings fully encompass this case.

Plaintiffs say that *Webster* is about proof of scheduling considered *in isolation*, without any other supporting facts, and that "plaintiff did not offer evidence to dispute this fact."[26] But this characterization is simply not valid. The facts of *Webster* were much more favorable to plaintiff than in this case in many respects – such as the duration of the relationship, the defendant's total dependence on independent contractors, the

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[25] *Bailey v. Shell Western E & P, Inc.*, 609 F.3d 710, 723 (5th Cir. 2010) (quoting Texas law). *See also* 19 Fed. Prac. & Proc. Juris. § 4506, text at n.43.1 (2d ed.) ("Wright & Miller")("many circuits have found that if the laws of the states do not conflict, a choice-of-law analysis is rendered unnecessary and the federal court may use the law of the forum state").

[26] *See* Brief at 31 ("*Webster* . . . held that proof of scheduling *alone* was not sufficient . . .) (plaintiffs' emphasis ).

defendant's extreme control over schedules and routes, and the defendant's complete disavowal of contractor safety. *Webster*, 571 So. 2d at 947-49. *Webster* accepted *all these facts as undisputed in plaintiff's favor*, but still found plaintiffs' claim precluded as a matter of law. *Webster* establishes that even highly specific and extreme control over scheduling cannot create a jury issue, even when combined with other undisputed facts like the foregoing.

Plaintiffs insist that *Richardson* involved a "substantially different" relationship (Brief at 32), but they identify no material difference, and none exists. Plaintiffs' enumerated list of purported differences (Brief at 32-33) is a smokescreen. On virtually every point listed, the facts of this case are the same. *See Richardson,* 631 So. 2d at 144-46. Any difference is irrelevant – especially the fact that McCarty made some hauls as an independent contractor for a "minority" independent contractor. The fact the McCarty was offered, and accepted, a sub-contractor relationship with a minority contractor for some earlier hauls did not make him a *respondeat superior* servant of APAC at any point in time, much less on the day of the crash.

Plaintiffs' suggestion that more recent Mississippi cases contradict *Webster* and *Richardson* and would sustain the judgment (Brief at 31-32) is also mistaken. The cases cited by plaintiffs do not support this judgment. Only one involves an independent hauler, and it affirms summary judgment *for the defense*. *Stewart v. Lofton Timber Co.*,

943 So. 2d 729 (Miss. App. 2006). The other cases involve neither independent haulers nor otherwise analogous facts.[27]

Finally, plaintiffs deny that their claim "espouses or 'resuscitates'" the rejected reasoning of *Runyon* (or by implication, of the *Webster* dissent). Brief at 31. This is so, they say, because "*Runyon* was neither cited nor relied upon by the Plaintiffs or the Trial Court." *Id.*

This lack of attribution is irrelevant. The fact that plaintiffs have cited two unpublished intermediate Tennessee cases (*Donaldson* and *Toothman*) instead of *Runyon* or the *Webster* dissent does not matter – the theory espoused is the same. An affirmance here would endorse erroneous views that *Webster* and *Richardson* rejected *en banc*, upsetting those landmark cases and the long line of precedent on which they rest.

Like *Donaldson* and *Toothman*, *Runyon* and the *Webster* dissent advocated accepting *any* "control" by a contract principal over a contractor's performance – specifically including freight hauling instructions – as grounds for holding a principal liable for contractor negligence. Since such instructions are inherent to hauling contracts (and since every contract by definition confers "control" over what is contracted for), this simplistic view of "control" would have obliterated the "important distinction . . . between service in which the actor's physical activities and his time are surrendered to the control of the master, and service under an agreement to accomplish results or to use care

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[27] *Walker v. McClendon Carpet Service*, 952 So. 2d 1008, 1009 (¶ 4) (Miss. App. 2006) (de facto joint venturers in a carpet cleaning business split fees 50-50 and shared supplied and maintenance); *Savory v. First Union Nat. Bank*, 954 So. 2d 930, 933 (Miss. 2007) (mortgage broker fraud).

and skill in accomplishing results," which is essential to the common law concept of *respondeat superior*. RESTATEMENT (SECOND) OF AGENCY § 220 comment e.

To rationalize this result, *Runyon* and the *Webster* dissent disparaged over 100 years of precedent. The *Webster* dissent faulted over 100 years of precedent for not taking the law "seriously" and paying only "lip service" to the concept of "control."[28] *Runyon* faulted it for asking the wrong question.[29]

Rejecting these views, *Richardson* and *Webster* affirmed that decades of precedent cannot be dismissed as mere "lip service" or for allegedly asking the wrong question. They affirmed that common law is fixed by factual holdings, not by isolated terms removed from the factual context of the cases in which they appear.

*Richardson* and *Webster* recognized that over 100 years of precedent establishes that independent hauling agreements like APAC's agreement with Everything Wholesale cannot be disregarded without evidence that the agreement was nothing more than a sham or legal fiction concealing total economic dependence on and subservience to the principal. *Richardson*, 631 So. 2d at 150 (quoting *Hobbs v. International Paper Co.*, 203 So. 2d 488, 490 (Miss. 1967)). They recognized that those holdings establish that "control" over the results contracted for – specifically including control over delivery schedules and routes – is no such evidence and thus *cannot be used* to convert an independent hauler into a *respondeat superior* servant. *Webster,* 571 So. 2d at 951

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[28] *Webster*, 571 So. 2d at 951 ("Today's appeal challenges that we take seriously a rule of law we have long given lip service") (Robertson, J., dissenting). *See also Webster*, 1989 Miss. LEXIS 519, *1 (original opinion, withdrawn on rehearing).

[29] *Runyon*, 605 So. 2d at 45 ("The trick is to ask the question right").

(control over routes and schedules will not "convert the hauler and his employees into employees of the owner of the freight under the decisions of this Court"). Affirmance of this judgment would unavoidably upset those holdings and revive the dissenters' erroneous and disruptive views.

## II. The Trial Was Not Fair.

Alternatively, a new trial is required for all the reasons addressed in APAC's opening brief.

### A. The Jury Instruction Errors Were Fully Preserved and Grossly Prejudicial.

With respect to jury instructions, plaintiffs' principal response is an unsupported assertion of waiver. According to plaintiffs, it was not enough that APAC tendered a proposed written instruction, which the trial court refused and marked "denied." CP 1659 (RE tab 15) (refused instruction DIII-8). They say that APAC was also required to *object* to the refusal, or to tender proposed amendments, or both. Brief at 34.

Plaintiffs' waiver contention is baseless. "It is well established that when error is predicated upon the denial of a jury instruction requested by the defendant, the defendant need not make a contemporaneous objection to the denial in order to preserve the error for appeal." *Neal v. State*, 15 So. 3d 388, 408 (Miss. 2009). *See also Carmichael v. Agur Realty Co.*, 574 So. 2d 603, 613 (Miss. 1990) ("there is no reason why we should thereafter require an objection to the refusal unless we are to place a value upon

redundancy and nonsense"). Plaintiffs cite no legal support for their contention that the refusal of a proffered instruction is insufficient to preserve error for appeal.[30]

The law provides that a proposed instruction may be refused if it "is an incorrect statement of the law, repeats a theory covered in other instructions, or has no proper foundation in the evidence before the court." *Utz v. Running & Rolling Trucking, Inc.*, 32 So. 3d 450, 474 (¶ 78) (Miss. 2010). None of these grounds excuse the refusal of APAC's proffered instruction DIII-8. "A litigant is entitled to have jury instructions that present his theory of the case." *Id. See also Young v. Guild*, 7 So. 3d 251, 259 (¶ 23) (Miss. 2009) ("A party is entitled to a jury instruction if it concerns a genuine issue of material fact and there is credible evidence to support the instruction"). APAC was denied that right.

Plaintiffs argue in conclusory fashion – citing multiple instructions generally, without specifying, or attempting to defend, the parts they have in mind – that other instructions adequately covered APAC's theory of the case. The record shows otherwise.

To the extent they addressed "control," the given instructions endorsed *plaintiffs'* erroneous theory that instructions about where to pick up and deliver materials are proof of *respondeat superior* servant status. *Compare* CP 1589 (RE tab 16) *with* CP 1659 (RE tab 15). That erroneous contention – which plaintiffs made a central theme of their case and of their closing – is the opposite of what the law actually says. Thus the given instructions affirmatively misled the jury about what the law actually says on that issue.

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[30] Plaintiffs' reliance on *Savory v. First Union Nat. Bank*, 954 So. 2d 930 (Miss. 2007), is misplaced. *Savory* did not involve the refusal of a proffered instruction.

The same is true with respect to the contract. Refused instruction DIII-8 would have correctly informed the jury that an independent contractor agreement is evidence of independent contractor status.[31] Plaintiffs' proposed instruction, which was given, told the jury otherwise.[32] Plaintiffs obviously understood that their instruction told the jury that the contract was meaningless – that's what they told the jury themselves. T 998 ("The instructions and the Court tell you that just because there's a piece of paper that says there is a contract doesn't make that a contract"). The instructions thus affirmatively misled the jury about what the law actually says on this issue, too. "It is error for the court in any case to grant instructions which are likely to mislead or confuse the jury as to the principles of law applicable to the facts in evidence." *Savory v. First Union Nat. Bank*, 954 So. 2d 930, 934 (¶ 15) (Miss. 2007).

Finally, while the refusal of APAC's proffered instruction is fully sufficient to preserve these issues, during the instructions conference, APAC also repeatedly objected to the inadequacy of plaintiffs' proposed instructions on these specific issues.[33] The trial

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[31] *Richardson*, 631 So. 2d at 150 ("the right of parties to contract as they please is a constitutionally- protected right"); *Hendrix v. City of Maryville*, 431 S.W.2d 292, 296 (Tenn. App.1968) ("In determining whether one is an independent contractor, the language of the contract is always considered").

[32] CP 1589 (RE 16) (proposed instruction P-3, given as instruction 10) ("A contract *purporting* to establish a driver as an "independent contractor" is not sufficient . . .) (emphasis added).

[33] T 978 (raising control factor ("you could still tell somebody where to pick a load up or where to send it without showing control"), and importance of "what the parties themselves felt their relationship to be"); T 989 ("the Tennessee courts do not consider it control, to give direction to the delivery point of a load").

court specifically overruled APAC's objections.[34] Thus these issues were brought repeatedly to the trial court's attention, and the court definitively ruled on them, siding with plaintiffs' erroneous views of the law, and rejecting APAC's correct ones. Nothing more is required to preserve error.

### B. The Verdict Demonstrated Passion and Prejudice.

Plaintiffs' response regarding the verdict is no response at all. Plaintiffs do not attempt to describe a rational factual or legal basis for the jury's allocation of only 10% fault to McCarty, who pled guilty to manslaughter and aggravated assault for causing the crash. No rational juror could possibly believe that APAC was "in the *best* position to have prevented this collision" – better even than the *driver*, as plaintiffs argue. Brief at 39 (emphasis added). The fact that the jury absolved a driver who ran a red light from almost all fault is irrational – it shows passion, prejudice and confusion mandating a new trial.

Plaintiffs are also silent on the minimal 20% allocation to Memphis Stone & Gravel, the entity that overloaded McCarty's truck moments before the crash. If overloading is accepted as an independent cause giving rise to separate fault,[35] permissible inferences from evidence still cannot explain that minimal allocation. APAC did not load the truck and did not know that McCarty was accepting loads that exceeded the Mississippi limit for his truck. It is irrational to conclude that the entity that actually

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[34] T 978 (responding to APAC's argument with the ruling, "I'm not going to entertain any fact specific criteria that just supports one side or the other").

[35] As noted in its opening brief, APAC submits that the overloading cannot be accepted as an independent cause giving rise to separate fault and that it is entitled to judgment on that basis.

overloaded the truck just minutes before the crash is substantially less at fault than APAC.

Nor do plaintiffs offer a rational justification for the jury's decision to award 130% of the damages plaintiffs asked for in an obviously calculated attempt to neutralize (as to APAC) the effect of the fault allocation. Defiance of instructions "evidence[s] bias, passion and prejudice" mandating new trial. *Dendy v. City of Pascagoula*, 193 So. 2d 559, 564 (Miss. 1967).

Plaintiffs try to change the subject to the amount of their damages, but the point here is not the size of the award *per se*. It is the irrationally skewed fault allocation and the jury's obviously calculated manipulation of the award to cancel the effect of what little fault was allocated to parties other than APAC. The jury's improper concern with the ultimate outcome is confirmed by its notes. CP 1570, 1573. The irrational fault allocation, the deliberate manipulation of the award, and the result-oriented preoccupation made obvious in their notes all demonstrate improper sympathy, passion and prejudice mandating a new trial.

### C. There Were *No* Grounds for Excluding APAC's Highly Relevant Insurance Evidence.

APAC's excluded insurance evidence was highly relevant and probative to a central issue that plaintiffs placed sharply in dispute – Everything Wholesale and

McCarty's independence from APAC. Separate insurance is well-recognized evidence of independence.[36]

Rule 403 balancing cannot justify excluding highly relevant evidence on a sharply disputed central issue in any circumstances, much less here, where there was *no* countervailing improper prejudice to be balanced. The *only* issue to which the insurance exclusionary rule applies – "whether [the insured] acted negligently or otherwise wrongfully" (MRE 411) – was *not* a consideration for balancing, because it was *not an issue in the case*. The "insured" (Everything Wholesale and McCarty) *removed* that issue from the case by *admitting* negligence and wrongful conduct. *See, e.g.*, T 191.

The fact that Everything Wholesale and McCarty joined plaintiffs in urging exclusion, on which plaintiffs rely in their response (Brief at 42), is no justification for the exclusion. If anything, it is an illustration of the way Everything Wholesale and McCarty actively (and successfully) colluded with plaintiffs throughout the trial to incite irrational passion and prejudice against APAC. That active collusion made the exclusion of material evidence of Everything Wholesale and McCarty's operational and financial independence from APAC all the more harmful and unfair.

*Wells v. Tucker*, 997 So. 2d 908 (Miss. 2008), and *Toche v. Killebrew*, 734 So. 2d 276 (Miss. App. 1999), on which plaintiffs rely, are not analogous and offer no support for the exclusion. In *Wells* and *Toche*, the insured's negligence remained very much in

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[36] *See, e.g., Richardson*, 631 So. 2d at 144 ("McCandless was required by . . . contract with APAC to furnish his own liability insurance . . . [and] APAC paid no [such] insurance"); *Bargery*, 785 S.W.2d at 120 ("truck, gas, and insurance were all purchased by [independent contractor]).

dispute – it was in fact the key issue in those cases (which involved medical malpractice). By contrast, the proposed relevance of the proffered insurance evidence on defendant's expert's possible bias was attenuated and remote. There is no similarity to this case.

### D. Maxwell's Unfounded Testimony, Especially About "Control," Flouted the Law And Was Grossly Prejudicial.

Plaintiffs do not even attempt to defend the legality of Maxwell's thinly disguised advocacy of legal conclusions in plaintiffs' favor, and in wholesale disregard of independent contractor law, such as, especially, his remarkable "opinion" that APAC had "control" of McCarty's truck during the crash. T 491. Maxwell's advocacy of plaintiffs' desired result cannot be defended as the product of any reliable expert methodology or "investigation," nor can it be reconciled with the prohibition of opinion based on "inadequately explored legal criteria." MRE 704 comment ("A question *may not be asked* which is based on inadequately explored legal criteria since the answer would not be helpful") (emphasis added). Maxwell basically told the jury that federal regulations made APAC liable for the crash. This "opinion" is not just unsupported by law; it is in flagrant conflict with the law. *See, e.g,. Chisolm*, 942 So. 2d 136. Maxwell's testimony deprived APAC of any semblance of a fair trial.

Instead defending the propriety of Maxwell's "opinions," plaintiffs change the subject, arguing that Maxwell was personally qualified, and that APAC's motion *in limine* was somehow inadequate to preserve its objections. Maxwell's personal qualifications are beside the point. The deficiency is that Maxwell's *opinions* are not

qualified under the rules. In response to that question, plaintiffs offer nothing more than conclusory assertions and paraphrases of the rules.

The balance of plaintiffs' response hints at waiver without ever using the term. Plaintiffs acknowledge that APAC's motion *in limine* was heard before trial and in all material respects *denied*. Plaintiffs recognize that in denying the motion, the court "determined that the remainder of Mr. Maxwell's testimony would be relevant to the standard of care in the industry." Brief at 45. Plaintiffs nevertheless suggest, without citing any authority for such a result, that APAC was required to make additional objections throughout Maxwell's testimony in order to preserve its rights for appeal. That is not the law.

A motion *in limine* preserves error for appeal. *Goff v. State*, 14 So. 3d 625, 640 (¶ 46) (Miss. 2009) ("a defendant's motion in limine regarding the introduction of evidence properly preserved the issue for appeal, and an objection was not necessary"). Subsequent objections undermine the purposes of *in limine* proceedings, which are meant "to expedite trials, eliminate bench conferences, avoid juror annoyance and permit more accurate rulings." *Id.* (citation omitted). In this instance, APAC *did* renew its objection, discretely adopting its motion by reference in keeping with the purpose of the court's *in limine* proceedings. T 477. Nothing more was required.

Plaintiffs hint that APAC's motion was too "broad," but Maxwell's testimony was broadly objectionable, and APAC opposed all of it. The motion was no broader than Maxwell's opinions were sweeping and conclusory. A party is never required to belabor a position that the court already understands and rejects. MRE 103(a)(1) (specificity

required only to extent "not apparent from the context"). Especially with the context of the denial of summary judgment and other rulings, the detailed denial of APAC's motion *in limine* left no doubt that the court was well-aware of APAC's position and rejected it. It defies credulity to suggest that another objection from APAC might have changed the court's mind and resulted in Maxwell's testimony being excluded. Anything less than exclusion would not have prevented the error. There was no waiver.[37]

## RESPONSE TO CROSS-APPEAL

APAC is entitled to judgment as a matter of law on its appeal, mooting plaintiffs' cross-appeal of the constitutionality of the noneconomic damages limitation of MISS. CODE ANN. § 11-1-60. Accordingly, the cross-appeal should be dismissed as moot. In the alternative, the cross-appeal should be denied as baseless.

### SUMMARY ARGUMENT

The statutory limit on noneconomic damages is constitutional. The limit falls well within the constitutional authority of the Legislature to make law, including law that alters or repeals tort remedies. As a matter of judicial interpretation, the Legislature's constitutional authority to alter or repeal tort remedies is not an open question. This Court has repeatedly and unequivocally recognized that there is no vested right in any remedy for torts yet to happen, and that except as to vested rights a state legislature has

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[37] The purpose of the contemporary objection requirement is to prevent sandbagging with errors that could be avoided or corrected if brought promptly to the attention of the court or the opposing party. *Kettle v. State*, 641 So. 2d 746, 749 (Miss. 1994) (requirement "designed to prevent a party from obtaining an unfair advantage by failing to give the trial court an opportunity to rule on the objection and thereby correct potential error") (quoting with approval, citation omitted). That purpose is not served by requiring parties to repeat and belabor objections that the court has already recognized and rejected.

full power to change or to abolish common-law remedies. That correct and well-settled view of constitutional law controls this case.

Legislation is presumed to be constitutional. A statute can be struck down only where it is shown beyond all reasonable doubt that the statute violates the clear language of the constitution. Plaintiffs' cursory challenges to § 11-1-60 cannot satisfy the standard. Each of their arguments has been soundly rejected before as a challenge to the Legislature's authority to alter or repeal unvested common-law rights. Although the wisdom of legislation is not a legitimate question for the courts, the wisdom of statutes like § 11-1-60 has been widely recognized and the policy embodied therein is reasonable and sound.

## ARGUMENT

### I. The Statutory Limit on Noneconomic Damages Falls Easily Within the Legislature's Core Constitutional Authority to Make Law.

Section 11-1-60 limits recovery of "noneconomic" damages to one million dollars ($1,000,000.00) in general civil cases.[38] MISS. CODE ANN. § 11-1-60(2)(b). Noneconomic damages are "subjective, nonpecuniary damages." *Id.* § 11-1-60(1)(a). Noneconomic damages are defined to exclude all "actual economic damages," the latter being defined to include all "objectively verifiable pecuniary damages" or "other objectively verifiable monetary losses." *Id.* § 11-1-60(1)(b). It is the expressly stated intent of § 11-1-60 to limit "noneconomic" damages only. Other damages, including all

[38] In cases "for injury based on malpractice or breach of standard of care against a provider of health care," recovery of noneconomic damages is limited to Five Hundred Thousand Dollars ($500,000.00). MISS. CODE ANN. § 11-1-60(2)(a).

"objectively verifiable" pecuniary damages or monetary losses, remain unlimited and fully recoverable.

The Legislature's decision to place an outer limit on inherently *subjective* and *unverifiable* nonpecuniary damages falls well within the constitutional authority of the legislative branch to make law, including law that alters or limits rights or remedies existing in common law.

"Legislative power" is "the authority to make laws." *Moore v. Board of Sup'rs*, 658 So. 2d 883, 887 (Miss. 1995). "The legislative department alone has the duty of making the laws." *Presley v. Mississippi State Highway Com'n*, 608 So. 2d 1288, 1295 (Miss. 1992) (quoting federal case, citation omitted). "The power to declare what the law shall be belongs to the legislative branch of the government." *Id.* at 1294 (quoting same). The common law, by contrast, "does not grant courts the authority to make gradations and exceptions which can only be made by statute." *Id.*

"The legislative branch sets public policy." *Pinnell v. Bates*, 838 So. 2d 198, 202 (Miss. 2002) (en banc). Issues that cannot be determined by a "judicially discoverable and manageable standard" or "without an initial policy determination of a kind clearly for nonjudicial discretion" are quintessentially matters of public policy. *Vieth v. Jubelirer*, 541 U.S. 267, 277-78 (2004) (discussing "nonjusticiable" or "political questions," quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

Subjective and unverifiable damages, by definition, cannot be determined by reasoned distinctions or rational rules. They call out for "gradations and exceptions which can only be made by statute." *Presley*, 608 So. 2d at 1294. They are therefore

especially appropriate for regulation by the legislative branch. "Laws promulgated by the Legislative Branch can be inconsistent, illogical, and ad hoc." *Vieth*, 541 U.S. at 278. "[L]aw pronounced by the courts must be principled, rational, and based upon reasoned distinctions." *Id.* "One of the most obvious limitations" on *judicial* power in the American tradition "is that judicial action must be governed by *standard*, by *rule*." *Id.* (original emphasis). Questions that cannot be reliably determined by such a standard are especially, and exclusively, appropriate for legislation. *Id.*

Such public policy determinations are the core and exclusive province of the Legislature. "Our Constitution provides that if there is a public policy issue to be addressed, it is for the Legislature, not this Court." *Falco Lime, Inc. v. Mayor and Aldermen of Vicksburg*, 836 So. 2d 711, 725 (¶ 65) (Miss. 2002) (attribution omitted). "[T]his Court does not concern itself with political questions but leaves such matters to the electorate." *Peterson v. City of McComb*, 504 So. 2d 208, 211 (Miss. 1987).

"[J]udges – who have no constituency – have a duty to respect legitimate policy choices made by those who do." *Barbour v. State ex rel. Hood*, 974 So. 2d 232, 243 (¶ 23) (Miss. 2008) (quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 866 (1984)). "The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones . . . ." *Id.* "Our Constitution vests such responsibilities in the political branches." *Id.*

As a result, "[t]his Court has a 'constitutional mandate to faithfully apply the provisions of constitutionally enacted legislation.'" *Tallahatchie General Hosp. v. Howe*,

49 So. 3d 86, 92 (¶ 17) (Miss. 2010). "The courts have no right to add anything to or take anything from a statute, where the language is plain and unambiguous." *Wallace v. Town of Raleigh*, 815 So. 2d 1203, 1208 (¶ 17) (Miss. 2002) (quoting *Hamner v. Yazoo Delta Lumber Co.*, 100 Miss. 349, 56 So. 466, 490 (1911)).

In Mississippi, explicit judicial recognition of the Legislature's plenary authority over common-law rights dates to the early years of statehood. As early as 1844, this Court had expressly rejected the notion that common law was in any way fixed by the constitution. In *Noonan v. State*, this Court rejected the contention "that at the adoption of our constitution, there was included the common law, as a part of the law of the land, and that it would now be an unconstitutional act to *alter or repeal* by legislature, *any principle, rule, or law, that was then a part of the common law*." *Noonan v. State*, 9 Miss. 562, 1 Smedes & M. 562, 573 (1844) (quoted in *Clark v. Luvel Dairy Prods., Inc.*, 731 So. 2d 1098, 1105 (Miss. 1998)) (emphasis added). This long-settled understanding of legislative power defeats plaintiffs' contentions.

Legislative predominance over common law is so basic to our system that it is how common law has been defined. Thus, common law was always understood to be nothing more than sum of decisions rendered in the absence of applicable legislation. *Yazoo & M.V.R. Co. v. Scott*, 67 So. 491, 492, 108 Miss. 871 (Miss. 1915) ("The common law includes those principles, usages, and rules of action applicable to the government and security of persons and property, which do not rest for their authority *upon any express and positive declaration of the will of the Legislature*" (quoting 1 Kent's Commentaries

471) (emphasis added). *See also, e.g., Boutwell v. Sullivan*, 469 So. 2d 526, 528 (Miss. 1985) ("Where there is no statute pertaining to a subject, the common law prevails").

Since common law is nothing more than the sum of decisions rendered in the absence of controlling legislation, the full history of legislative change to common law would be difficult or impossible to catalog. Such a history would have to account for, among other things, the entire code of *criminal* law, all of which supersedes common law.[39] Legislative power over life and liberty stands so far above question that the notion of common-law crime can now seem obsolete.[40] A legislative power that encompasses control over life and liberty in this fashion surely also includes the power to limit state-sponsored transfers of private wealth for purposes of compensating *subjective* and *unverifiable* damages.

Given their ubiquity, it is reasonable to assume that many legislative changes to common law have gone unnoticed and unchallenged as such. In those instances where challenges have been made, theories such as those advanced by plaintiffs in this case have been properly and emphatically rejected, often out of hand. *E.g.*, *Noonan*, 9 Miss. at 573 (quoted *supra*, affirming legislative power to criminalize some liquor sales).

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[39] Common law defines crime until superseded by statute. *See, e.g., State v. Allen*, 505 So. 2d 1024, 1025 (Miss. 1987) ("Our legislature has entered the field and prescribed the elements of the criminal offense of false pretense, displacing any common-law notions of such a crime"); MISS. CODE ANN. § 99-1-3 (1972) ("[e]very offense not provided for by the statutes of this state shall be indictable as heretofore at common law); HUTCHISON'S MISS. CODE CH. 64, § 48 (1848) ("Every felony, misdemeanor, or offense whatsoever, not provided for by this, or some other act of the General Assembly, shall be punished as heretofore, by the common law").

[40] *See, e.g., Nicholson v. State*, 672 So. 2d 744, 753 n.3 (Miss. 1996) (noting confusion about continuing existence of common-law crime).

This Court has repeatedly stated: "Clearly, there is no vested right in any remedy for torts yet to happen, and except as to vested rights, the state legislature has full power to change or abolish existing common-law remedies . . . ." *Smith v. Fluor Corp.*, 514 So. 2d 1227, 1231-32 (Miss. 1987) (quoting *Anderson v. Fred Wagner & Roy Anderson Jr., Inc.*, 402 So. 2d 320, 324 (Miss. 1981)). *See also Wells v. Panola County Bd. of Ed.*, 645 So. 2d 883, 890 (Miss. 1994) ("[T]here is no vested right in any remedy for a tort yet to happen which the Constitution protects. Except as to vested rights, the legislative power exists to change or abolish existing statutory and common-law remedies.") (quoting *Walters v. Blackledge*, 220 Miss. 485, 71 So. 2d 433, 441 (1954)).

This Court has repeatedly specifically recognized that legislative power to alter common law includes the power to *limit the damages recoverable for torts* – even *actual, objectively verifiable pecuniary damages* recoverable for personal injuries. *Wells*, 645 So. 2d at 890 (the fact that legislation "limits the amount of damages recoverable does not render it constitutionally suspect") (citing, *e.g.*, *Brown v. Estess*, 374 So. 2d 241 (Miss. 1979) (officer or agent immunity under compensation act not constitutionally suspect)). Plaintiffs' challenge to the Legislature's decision to limit pecuniary recovery for a category of damages that are by definition *subjective, unverifiable and nonpecuniary* cannot possibly be reconciled with these holdings.

Plaintiffs' challenge to the Legislature's power to limit recovery of subjective, unverifiable noneconomic damages cannot be reconciled with universally recognized legislative authority to terminate common-law claims completely through statutes of limitation and repose. Familiarity with limitations as a concept should not obscure the

reality that such statutes represent arbitrary limits on common-law claims of all types – limits which extinguish those rights completely, entirely subject to "legislative grace." *Phipps v. Irby Const. Co.*, 636 So. 2d 353, 356 (Miss. 1993) (quoting *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945)).

"Statutes of limitations by their very nature are arbitrary." *Phipps*, 636 So. 2d at 355. "[T]heir operation does not discriminate between the just and the unjust claim, or the avoidable and unavoidable delay." *Id.* at 356 (quoting *Chase*, 325 U.S. at 314). "They represent a public policy about the privilege to litigate." *Id.* The unavoidably arbitrary nature of limitation statutes has been no impediment to their clear constitutionality. *Id.* If anything, the unavoidably arbitrary nature marks such questions as especially appropriate for legislation. *See Presley*, 608 So. 2d at 1294; *Vieth*, 541 U.S. at 278.

This inherently arbitrary legislative power over common-law claims of all types is so broad that, absent a specific constitutional prohibition, it would, for example, even include the power to revive lapsed claims. "[A] state constitution does not grant specific legislative powers, but limits them." *State v. Board of Levee Com'rs*, 932 So. 2d 12, 21 (Miss. 2006) (quoting *Farrar v. State*, 191 Miss. 1, 2 So. 2d 146, 148 (1941)). "[T]he lawmaking department possesses all legislative powers not prohibited or restricted by the state or federal constitution, and certainly the power extends to circumstances not covered by the constitutions at all." *Id.*

The Mississippi Constitution includes a specific provision explicitly withholding from the Legislature the power "to revive any remedy which may have become barred by

lapse of time."[41] No comparable provision limits legislative power to alter or abolish remedies. The lack of such an explicit limitation is reason enough for § 11-1-60 to be upheld. The exceptionally high standard for overturning legislation cannot be met without a comparably explicit provision withholding legislative power. "A Mississippi court may strike down an act of the legislature 'only where it appears beyond all reasonable doubt' that the statute violates the *clear language of the constitution*." *PHE, Inc. v. State*, 877 So. 2d 1244, 1247 (¶ 6) (Miss. 2004) (emphasis added). *See also, e.g., State v. Board of Levee Com'rs*, 932 So. 2d at 19-20 ("under Mississippi law a party challenging the constitutionality of a statute must prove unconstitutionality beyond a reasonable doubt"; thus a statute may be "properly adjudged unconstitutional only if it directly conflict[s] with 'the clear language of the constitution'") (citations omitted). Plaintiffs cannot meet this standard.

Plaintiffs' superficial challenge to § 11-1-60 cannot be reconciled with recognized legislative authority to sharply limit and closely control tort claims of all types asserted against the state, or state-owned entities and employees. MISS. CODE ANN. § 11-46-1 *et seq*. These limitations extend to all damages, including objectively verifiable pecuniary damages. *See* MISS. CODE ANN. § 11-46-15. This Court did not simply accept legislative control of such claims; it insisted upon it, disclaiming power to further regulate such claims under common law. *See Presley*, 608 So. 2d at 1294 ("common law does not grant courts the authority to make gradations and exceptions").

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[41] MISS. CONST. ART. 4, SEC. 97 ("The Legislature shall have no power to revive any remedy which may have become barred by lapse of time, or by any statute of limitation of this state").

Plaintiffs' challenge to § 11-1-60 cannot be reconciled with recognized legislative authority to completely abrogate work-related common-law claims of employees, remove the substituted claims from the judicial system, and delegate them to a commission under the Workers' Compensation Law. MISS. CODE ANN. § 71-3-1 *et seq.* The effect of the Compensation Law was to substantially limit even objectively verifiable pecuniary damages that would have been available to some so as to make more limited compensation available to others.

The Compensation Laws were subjected to the same sort of constitutional attacks now made against Miss. Code Ann. § 11-1-60. *Walters*, 71 So. 2d 439. Those attacks were rejected in the strongest of terms. *Walters*, 71 So. 2d at 446 ("It is well settled that there is no vested right in any remedy for torts yet to happen, and except as to vested rights a state legislature has full power to change or to abolish existing common law remedies or methods of procedure"). *See also McCluskey v. Thompson*, 363 So. 2d 256, 264 (Miss. 1978) (finding coworker immunity by implication, noting that "throughout the history of this state we have received statutes into the body of the law both as a rule to be applied and as a principle from which to reason"; "we have consistently applied this principle in construing statutes in derogation of the common law"). The same result is required here.

Plaintiffs' challenge to § 11-1-60 cannot be reconciled with recognized legislative authority to alter common-law rights and remedies by abolishing the common-law defense of contributory negligence and replacing it with a statutory regime of comparative negligence. MISS. CODE ANN. § 11-7-15. The effect of this statute was to

diminish the recovery of even objectively verifiable damages by some who might otherwise have recovered fully and to impose on defendants liability toward others who would have recovered nothing at common law. The Legislature's power to alter common-law rights and remedies in this fashion was regarded as beyond question. *Natchez & S.R. Co. v. Crawford*, 99 Miss. 697, 55 So. 596, 599 (1911) ("clearly within the police power of the state" to do so). The same is true here.

Plaintiffs reference five conclusory constitutional theories in their four-page cross-appeal as purported grounds for voiding § 11-1-60. All five have been tried before and repeatedly and firmly rejected as reasons for overruling legislation altering or repealing common-law rights. For example, all five were asserted and rejected when *Walters v. Blackledge* affirmed the constitutionality of workers' compensation. 71 So. 2d 433 (rejecting argument based on separation of powers (*id.* at 439), trial by jury (at 444), open courts (at 445), due process (at 440), and equal protection (at 443) as grounds for interfering with the Legislature's prerogative to alter or repeal unvested common-law rights). *See also, e.g., Arceo v. Tolliver*, 949 So. 2d 691, 697 (¶ 12) (Miss. 2006) ("There is no absolute right of access to the courts. All that is required is a reasonable right of access to the courts – a reasonable opportunity to be heard."); *Natchez & S.R. Co.*, 55 So. at 598 ("the common-law jury, guaranteed by section 31, is a jury with power alone to try issues of fact, and not of law").

Plaintiffs' superficial, repeatedly rejected theories come nowhere near establishing "'beyond all reasonable doubt' that [§ 11-1-60] violates the clear language of the

constitution." *PHE, Inc.*, 877 So. 2d at 1247 (¶ 6). They cannot justify interference with the Legislature's authority to make law.

The wisdom of § 11-1-60 is not a question for the courts. *See, e.g., State v. Board of Levee Com'rs*, 932 So. 2d at 19 ("Statutes cannot be declared invalid on the ground that they are unwise, unjust, unreasonable, immoral, or because opposed to public policy, or the spirit of the Constitution") (citation omitted).

But the wisdom of limiting subjective, unverifiable noneconomic damages has been widely recognized. Commentators have documented how awards for this subjective and unverifiable type of damages have expanded out of all proportion to the remedies originally known at common law.[42] The legislatures of 37 states have passed comparable statutes, many imposing limits lower than those of § 11-1-60.[43] This movement demonstrates a broad consensus regarding the wisdom of placing an outer limit on the recovery of noneconomic damages. The Mississippi Legislature (and Governor[44]) are hardly alone or out of step in their agreement about the wisdom of this public policy.

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[42] Philip L. Merkel, *Pain and Suffering Damages at Mid-Twentieth Century: A Retrospective View of the Problem and the Legal Academy's First Responses*, 34 Cap. U.L. Rev. 545, 560-65 (2006); Paul V. Niemeyer, *Awards for Pain and Suffering: The Irrational Centerpiece of Our Tort System*, 90 Va. L. Rev. 1401, 1405-07 (2004); Louis L. Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 Law & Contemp. Probs. 219, 222 (1953); Stanley Ingber, *Alternative Compensation Schemes and Tort Theory: Rethinking Intangible Injuries: A Focus on Remedy*, 73 Calif. L. Rev. 772, 799-805 (1985).

[43] *See* Appendix (National Survey of Damages Cap Statutes).

[44] *State v. Board of Levee Com'rs*, 932 So. 2d at 19 (¶ 13) ("[w]hen a party invokes our power of judicial review, it behooves us to recall that the challenged act has been passed by legislators and approved by a governor sworn to uphold the selfsame constitution as are we") (citation omitted); *Claypool v. Mladineo*, 724 So. 2d 373, 381 (¶ 27) (Miss. 1998) (same).

## II. Any Threat to the Constitution Lies Not in § 11-1-60 But in Plaintiffs' Theories for Judicial Usurpation of Core Legislative Power.

Plaintiffs rely on conclusory constitutional assertions, especially those about separation of powers, to argue that § 11-1-60 poses a threat to state or federal constitutional rights. In reality, the threat lies the other way round. Plaintiffs' constitutional theories are all insupportable under the constitution and have all been previously and soundly rejected by this Court – repeatedly and in indistinguishable contexts. Reviving any of those theories as a pretext for a judicial veto of the Legislature's public policy determination imposing an outer limit on noneconomic damages would be a usurpation of core legislative power and a serious offense against the Constitution.

"The fundamental question the Court considers when confronted with a separation of powers problem" is whether "the power being exercised by members of one branch [is] *at the core* of the other's power." *Moore v. Board of Sup'rs*, 658 So. 2d at 887 (original emphasis). It is encroachment upon core powers of another branch that poses the real threat to separation of powers. *Id.*; *Myers v. City of McComb*, 943 So. 2d 1, 4 (Miss. 2006) ("[t]he accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny. *The Federalist No. 47*, at 324 (James Madison)") (emphasis omitted).

The power to make law is core legislative power. *E.g.*, *Moore*, 658 So. 2d at 887; *Presley*, 608 So. 2d at 1294. A judicial veto of legislation strikes at core legislative power. By contrast, statutes like § 11-1-60, which prescribe the substantive law for future cases, are no encroachment at all on core *judicial* power, which lies in the power to render final judgments in individual cases. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 223 (1995) ("The Judiciary would be, 'from the nature of its functions, . . . the [department] least dangerous to the political rights of the constitution,' not because its acts were subject to legislative correction, but because the binding effect of its acts was limited to particular cases and controversies") (citation omitted).

"The power to declare what the law shall be belongs to the legislative branch of the government; the power to declare what the law is, or has been belongs to the judicial branch of the government." *Presley*, 608 So. 2d at 1294 (attribution omitted). "The courts declare and enforce the law, but they do not make the law." *Id.*

"The essential balance created by [separation of powers] was a simple one." *Plaut*, 514 U.S. at 222. "The Legislature would be possessed of power to 'prescrib[e] the rules by which the duties and rights of every citizen are to be regulated,' but the power of '[t]he interpretation of the laws' would be 'the proper and peculiar province of the courts.'" *Id.* (quoting *The Federalist No. 78*, pp. 523, 525).

As a result, core judicial power is not encroached upon until legislation attempts to "retroactively command[] the . . . courts to reopen final judgments." *Plaut*, 514 U.S. at 219. Legislation that does *not* attempt to "reverse a determination once made, in a particular case" does not encroach on judicial power. *Id.* at 222 ("'A legislature without

exceeding its province cannot reverse a determination once made, in a particular case; though it may prescribe a new rule for future cases'") (quoting *The Federalist No. 81*). *See also Miller v. French*, 530 U.S. 327, 344 (2000) (Congress may "alter the prospective effect of previously entered injunctions").

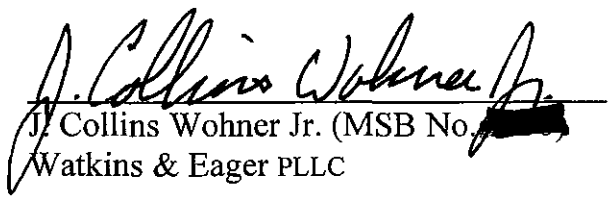
Section § 11-1-60 thus poses no threat to judicial power. Plaintiffs' theories for voiding § 11-1-60, by contrast, pose a serious threat to core *legislative* power, by rationalizing a judicial usurpation of "[t]he power to declare what the law shall be" (*Presley*, 608 So. 2d at 1294) with respect to an issue as to which, by definition, a "judicially discoverable and manageable standard" (*Vieth*, 541 U.S. at 277-78) is not possible. Such an intrusion on legislative power could be justified only by "clear language of the constitution" establishing a violation "beyond all reasonable doubt." *PHE, Inc.*, 877 So. 2d at 1247 (¶ 6). Plaintiffs can point to nothing of the sort. Interference with core legislative power cannot be justified in this case.

## CONCLUSION

The judgment should be reversed and rendered. In the alternative, the judgment should be reversed and the case remanded for new trial. The cross-appeal should be dismissed as moot or denied on the merits, recognizing the constitutionality of MISS. CODE ANN. § 11-1-60.

Dated: June 13, 2011.

Respectfully submitted,



J. Collins Wohner Jr. (MSB No. [redacted])
Watkins & Eager PLLC

**ATTORNEYS FOR APAC-TENNESSEE, INC.**

OF COUNSEL:

William F. Goodman, Jr. (MSB #[redacted])
Mark D. Jicka (MSB #[redacted])
Watkins & Eager PLLC
400 East Capitol Street (39201)
Post Office Box 650
Jackson, Mississippi 39205
Telephone: 601-965-1900
Facsimile: 601-965-1901

William O. Luckett, Jr. (MSB #[redacted])
Luckett Tyner Law Firm, P.A.
P. O. Drawer 1000
143 Yazoo Avenue
Clarksdale, Mississippi 38614
Telephone: 662-624-2591
Facsimile: 662-627-5403

Brian L. Yoakum (TBN #[redacted])
The Biller Law Firm
6000 Poplar Avenue, Suite 250
Memphis, Tennessee 38119
Telephone: 901-261-5454
Facsimile: 901-261-5457

## CERTIFICATE OF SERVICE

I hereby certify that I have this day caused a true and correct copy of the above and foregoing paper to be delivered by United States mail, postage prepaid, to the following:

Robert R. Morris
Smith, Phillips, Mitchell, Scott &Nowak
P.O. Drawer 1586
Batesville, MS 38606

Paul R. Scott
Smith, Phillips, Mitchell, Scott & Nowak
P. O. Box 346
Hernando, MS 38632

*Counsel for Plaintiffs*

C. R. Montgomery
Montgomery McGraw Collins & O'Cain, PLLC
3350 N. Liberty St., Suite A
Post Office Box 1039
Canton, MS 39046

Mark A. Behrens
Cary Silverman
Shook, Hardy & Bacon LLP
1155 F Street N.W., Suite 200
Washington, D.C. 20004

*Counsel for Amici Curiae Mississippians for Economic Progress et al.*

H. Richmond Culp III
Mitchell, McNutt & Sams, P.A.
150 S. Front Street
Tupelo, MS 38802

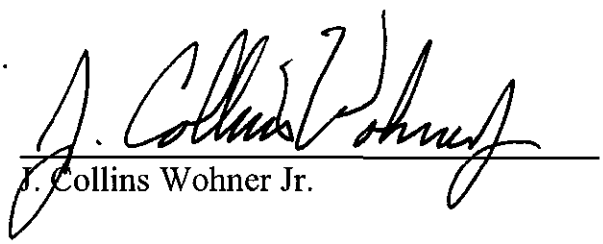
*Counsel for McCarty and Everything Wholesale*

Hon. Harold E. Pizzetta, III
Assistant Attorney General
Civil Litigation Division
Office of the Attorney General
Post Office Box 220
Jackson, Mississippi 39205

*Counsel for the State of Mississippi*

The Honorable Robert P. Chamberlin, Jr.
DeSoto County Circuit Court
P. O. Box 280
Hernando, MS 38632

THIS, the 13th day of June, 2011.



J. Collins Wohner Jr.

## Appendix: National Survey of Damage Cap Statutes

| STATE | APPLICABILITY | STATUTORY CITATION | PROVISIONS | CONSTITUTIONALITY |
|---|---|---|---|---|
| **Alabama** | Invalidated - Medical liability | Ala. Code § 6-5-544(b) | Medical malpractice cap of $400,000. | Struck down by *Moore v. Mobile Infirmary Assoc.*, 592 So. 2d 156 (Ala. 1991). ***But see*** *Mobile Infirmary Med. Ctr. v. Hodgen*, 884 So. 2d 801 (Ala. 2003) (noting erosion of support for *Moore*). |
| **Alaska** | Personal injury | Alaska Stat. § 09.17.010 | Noneconomic damages cap of approximately $1,000,000. | **Upheld.** *L.D.G., Inc. v. Brown*, 211 P.3d 1110 (Alaska 2009); *C.J. v. Dep't of Corrections*, 151 P.3d 373 (Alaska 2006); *Evans ex rel. Kutch v. State*, 56 P.3d 1046 (Alaska 2002). |
| | Medical liability | Alaska Stat. § 09.55.549 | Medical malpractice cap of $400,000. Not applicable to reckless or intentional misconduct. | |
| **Arizona** | None | | | **Constitution prohibits enacting a limit.** Ariz. Const. Art. 2, § 31 ("No law shall be enacted in this state limiting the amount of damages to be recovered for causing the death or injury of any person."). |
| **Arkansas** | None | | | **Constitution prohibits enacting a limit.** Ark. Const. Art. 5, § 32 ("No law shall be enacted limiting the amount to be recovered for injuries resulting in death or for injuries to persons or property."). |
| **California** | Medical liability | Cal. Civ. Code § 3333.2(b) | Medical malpractice cap of $250,000. | **Upheld.** *Fein v. Permanente Med. Group*, 695 P.2d 665 (Cal. 1985); *see also Hoffman v. United States*, 767 F.2d 1431 (9th Cir. 1985). |
| **Colorado** | Personal injury | Colo. Rev. Stat. § 13-21-102.5(3)(a) | Noneconomic damages cap of $366,250 ($936,030 if clear and convincing evidence exists). | **Upheld.** *Garhart v. Columbia/Healthone, L.L.C.*, 95 P.3d 571 (Colo. 2004); *Scholz v. Metro. Pathologists*, 851 P.2d 901 (Colo. 1993); *Scharrel v. Wal-Mart Stores, Inc.*, 949 P.2d 89 (Colo. Ct. App. 1998); |
| | Medical liability | Colo. Rev. Stat. § 13-64-302 | Medical malpractice cap of $1,000,000 total liability of which only $300,000 may be noneconomic damages. | **Upheld.** *Garhart v. Columbia/Healthone, L.L.C.*, 95 P.3d 571 (Colo. 2004); cholz v. Metro. Pathologists, 851 P.2d 901 (Colo. 1993). |
| **Connecticut** | None | | | |
| **Delaware** | None | | | |
| **District of Columbia** | None | | | |
| **Florida** | Medical liability | Fla. Stat. Ann. § 766.118 | Medical malpractice cap of $1,000,000. | **Upheld.** *Estate of McCall v. United States*, 2011 WL 2084069 (11th Cir. May 27, 2011); *M.D. v. United States*, 745 F.Supp.2d 1274 (M.D. Fla. 2010). |
| | Medical liability | Fla. Stat. Ann. §§ 766.207(7)(b), 766.209 | Medical malpractice cap of $350,000 if parties arbitrate. | **Upheld.** *Univ. of Miami v. Echarte*, 618 So. 2d 189 (Fla. 1993); *HCA Health Services of Florida, Inc. v. Branchesi*, 620 So.2d 176 (1993). |
| **Georgia** | Invalidated - Medical liability | Ga. Code Ann. § 51-13-1 | Medical malpractice cap of $1,050,000. | Struck down by *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 691 S.E.2d 218 (Ga. 2010). |
| **Hawaii** | Personal injury | Haw. Stat. § 663-8.7 | "Pain and suffering" cap of $375,000. | |

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| STATE | APPLICABILITY | STATUTORY CITATION | PROVISIONS | CONSTITUTIONALITY |
|---|---|---|---|---|
| **Idaho** | Personal injury | Idaho Code § 6-1603 | Noneconomic damages cap of $250,000. Not applicable to willful or reckless conduct or felonious acts. | **Upheld.** *Kirkland v. Blaine County Med. Center*, 4 P.3d 1115 (Idaho 2000). |
| **Illinois** | Invalidated - Medical liability | 735 Ill. Comp. Stat. 5/2-1706.5 | Medical malpractice cap of $1,000,000. | Struck down by *LeBron v. Gottlieb Mem. Hosp.*, 930 N.E.2d 895 (Ill. 2010); *Best v. Taylor Mach. Works, Inc.*, 689 N.E.2d 1057 (Ill. 1997). |
| **Indiana** | Medical liability | Ind. Code § 34-18-14-3 | Economic and noneconomic damages cap of $1,250,000. | **Upheld.** *Johnson v. St. Vincent Hospital, Inc.*, 404 N.E.2d 585 (Ind. 1980); *Indiana Patient's Compensation Fund v. Wolfe*, 735 N.E.2d 1187 (Ind. Ct. App. 2000). |
| **Iowa** | Motor vehicle accidents | Iowa Code § 613.20 | Complete noneconomic damages bar for certain motor vehicle cases. | |
| **Kansas** | Personal injury | Kan. Stat. Ann. § 60-19a02(b) | Noneconomic damages cap of $250,000. | **Upheld.** *Samsel v. Wheeler Transp. Servs., Inc.*, 789 P.2d 541 (Kan. 1990), *overruled in part on other grounds, Bair v. Peck, 811 P.2d 1176 (Kan. 1991); McGinnes v. Wesley Med. Ctr.*, 224 P.3d 581 (Kan. App. 2010); *see also Patton v. TIC United Corp.*, 77 F.3d 1235 (10th Cir. 1996); *Estate of Sisk v. Manzanares*, 270 F. Supp. 2d 1265 (D. Kan. 2003). |
| **Louisiana** | Medical liability | La. Rev. Stat. Ann. § 40:1299.42 | Economic and noneconomic damages cap of $500,000. | **Upheld.** *Butler v. Flint Goodrich Hosp. of Dillard Univ.*, 607 So. 2d 517 (La. 1992); Monistere v. Engelhardt, 896 So.2d 1105 (La. Ct. App. 2005); *see also Owen v. United States*, 935 F.2d 734 (5th Cir. 1991). *But see Oliver v. Magnolia Clinic*, 2010 WL 4703880 (La. Ct. App. Nov. 17, 2010), *vacated* 57 So. 3d 308 (La. 2011); *Arrington v. ER Physicians Group, APMC*, 940 So.2d 777 (La. Ct. App. 2006), *vacated* 947 So.2d 719 (La. 2007). |
| **Maine** | Medical liability | 24-A Me. Rev. Stat. Ann. § 4313(9)(b) | Medical malpractice cap of $400,000. | |
| | Wrongful death | 18-A Me. Rev. Stat. Ann.§ 2-804(b) | Noneconomic damages cap, in wrongful death actions, of $500,000. | |
| | Seller of alcoholic beverages | 28-A Me. Rev. Stat. Ann. § 2509 | Noneconomic damages cap, in negligent or reckless service of liquor actions, of $350,000. | **Upheld.** *Peters v. Saft*, 597 A.2d 50 (Me. 1991). |
| **Maryland** | Medical liability | Md. Cts. & Jud. Proc. Code Ann. § 3-2A-09 | Medical malpractice cap of $695,000. | **Upheld.** *Lockshin v. Semsker*, 987 A.2d 18 (Md. 2010) (applying limit). |
| | Personal injury | Md. Cts. & Jud. Proc. Code § 11-108 | Noneconomic damages cap of $725,000. | **Upheld.** *DRD Pool Serv., Inc. v. Freed*, 5 A.3d 45 (Md. 2010); *Green v. N.B.S., Inc.*, 976 A.2d 279 (Md. 2009); *Murphy v. Edmonds*, 601 A.2d 102 (Md. 1992); *see also Simms v. Holiday Inns, Inc.*, 746 F. Supp. 596 (D. Md. 1990); *Franklin v. Mazda Motor Corp.*, 704 F.Supp. 1325 (D. Md. 1989). |

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| STATE | APPLICABILITY | STATUTORY CITATION | PROVISIONS | CONSTITUTIONALITY |
|---|---|---|---|---|
| **Massachusetts** | Personal injury | Mass. Ann. Laws. ch. 231, § 60H. | Noneconomic damages cap of $500,000 unless the jury determines that+D25 special circumstances warrant more relief. | |
| **Michigan** | Medical liability | Mich. Comp. Laws § 600.1483 | Medical malpractice cap of $280,000. The limit is increased to $500,000 in severe cases. | **Upheld.** *Jenkins v. Patel*, 688 N.W.2d 543 (Mich. Ct. App. 2004); *Wessels v. Garden Way, Inc.*, 689 N.W.2d 526 (Mich. Ct. App. 2004); *Kenkel v. Stanley Works*, 665 N.W. 2d 490 (Mich. Ct. App. 2003); *Wiley v. Henry Ford Cottage Hosp.*, 668 N.W.2d 402 (Mich. Ct. App. 2003); *Zdrojewski v. Murphy*, 657 N.W.2d 721 (Mich. Ct. App. 2002); *see also Smith v. Botsford Gen. Hosp.*, 419 F.3d 513 (6th Cir. 2005). |
| **Minnesota** | None | | | |
| **Mississippi** | Medical liability | Miss. Code Ann. § 11-1-60(2)(a) | Medical malpractice cap of $500,000. | |
| | Personal injury | Miss. Code Ann. § 11-1-60(2)(b) | Noneconomic damages cap of $1,000,000. | |
| **Missouri** | Medical liability | Mo. Rev. Stat. § 538.210 | Medical malpractice cap of $350,000. | **Upheld.** *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898 (Mo. 1992). |
| **Montana** | Medical liability | Mont. Code Ann. § 25-9-411 | Medical malpractice cap of $250,000. | |
| **Nebraska** | Medical liability | Neb. Rev. Stat. § 44-2825 | Economic and noneconomic damages cap of $1,750,000. | **Upheld.** *Gourley v. Neb. Methodist Health Sys., Inc.*, 663 N.W.2d 43 (Neb. 2003). |
| **Nevada** | Medical liability | Nev. Rev. Stat. Ann. § 41A.035 | Medical malpractice cap of $350,000. | |
| **New Hampshire** | Invalidated - Medical liability | N.H. Rev. Stat. Ann. § 507-C:7 | Medical malpractice cap of $250,000. | Struck down by *Brannigan v. Usitalo*, 587 A.2d 1232 (N.H. 1991); *Carson v. Maurer*, 424 A.2d 825 (N.H. 1980). |
| **New Jersey** | None | | | |
| **New Mexico** | Medical liability | N.M. Stat. Ann. § 41-5-6 | Medical malpractice cap, excluding punitive damages, of $600,000. | **Upheld.** *Federal Express Corp. v. United States*, 228 F. Supp. 2d 1267 (D. N.M. 2002). |
| **New York** | None | | | |
| **North Carolina** | None | | | |
| **North Dakota** | Medical liability | N.D. Cent. Code § 32-42-02 | Medical malpractice cap of $500,000. | |
| **Ohio** | Personal injury | Ohio Rev. Code Ann. § 2315.18 | Noneconomic damages cap of $350,000 except in special circumstances where no limit applies. | **Upheld.** *Arbino v. Johnson & Johnson*, 880 N.E.2d 420 (Ohio 2007). |

## Appendix: National Survey of Damage Cap Statutes

| STATE | APPLICABILITY | STATUTORY CITATION | PROVISIONS | CONSTITUTIONALITY |
|---|---|---|---|---|
| **Oklahoma** | Personal injury | 23 Okla. Stat. § 61.2 (as amended by H.B. 2128 (2011)) | Noneconomic damages cap of $350,000 except in special circumstances where no limit applies. | |
| **Oregon** | Invalidated - Personal injury | Or. Rev. Stat. Ann. § 31.710 | Noneconomic damages cap of $500,000. | Struck down by *Lakin v. Senco Prods. Inc.*, 987 P.2d 463 (Or. 1999). |
| | | Or. Rev. Stat. Ann. § 31.715 | Complete noneconomic damages bar for certain motor vehicle cases. | **Upheld.** *Lawson v. Hoke*, 119 P.3d 210 (Or. 2005). |
| **Pennsylvania** | None | | | |
| **Rhode Island** | None | | | |
| **South Carolina** | Medical liability | S.C. Code Ann. § 15-32-220 | Medical malpractice cap of $1,050,000 except in special circumstances where no limit applies. | |
| **South Dakota** | Medical liability | S.D. Codified Laws § 21-3-11 | Medical malpractice cap of $500,000. No limit on "special damages." | **Upheld.** *Knowles v. United States*, 544 N.W.2d 183 (S.D. 1996) ($500,000 limit on noneconomic damages "remains in full force and effect"). |
| **Tennessee** | Personal injury | H.B. 2008 (2011) (to be codified at Tenn. Code Ann. § 29-39-102) (applying to actions accruing on or after October 1, 2011) | Noneconomic damages cap of $1,000,000 except in special circumstances where no limit applies | |
| **Texas** | Medical liability | Tex. Civ. Prac. & Rem. Code Ann. § 74.301-303. | Medical malpractice cap of $500,000. | **Upheld.** *Rose v. Doctors Hosp.*, 801 S.W.2d 841 (Tex. 1990). |
| **Utah** | Medical liability | Utah Code Ann. § 78B-3-410 | Medical malpractice cap of $450,000. | **Upheld.** *Judd v. Drezga*, 103 P.3d 135 (Utah 2004). |
| **Vermont** | None | | | |
| **Virginia** | Medical liability | Va. Code Ann. § 8.01-581.15 | Medical malpractice cap of $2,000,000. | **Upheld.** *Pulliam v. Coastal Emer. Servs. of Richmond, Inc.*, 509 S.E.2d 307 (Va. 1999); *Etheridge v. Med. Ctr. Hosp.*, 376 S.E.2d 525 (Va. 1989). |
| **Washington** | Invalidated - Personal injury | Wash. Rev. Code § 4.56.250 | Noneconomic damages cap of no more than an amount determined by multiplying 0.43 by the average annual wage and by the life expectancy of the plaintiff (minimum fifteen years). | Struck down by *Sofie v. Fibreboard Corp.*, 771 P.2d 711 (Wash. 1989). |

## Appendix: National Survey of Damage Cap Statutes

| STATE | APPLICABILITY | STATUTORY CITATION | PROVISIONS | CONSTITUTIONALITY |
|---|---|---|---|---|
| **West Virginia** | Medical liability | W. Va. Code § 55-7B-8 | Medical malpractice cap of $250,000 except in special circumstances where the limit is raised to $500,000. | **Upheld.** *Estate of Verba v. Ghaphery*, 552 S.E.2d 406 (W. Va. 2001); *Robinson v. Charleston Area Med. Center*, 414 S.E.2d 877 (W. Va. 1991). |
| **Wisconsin** | Invalidated - Medical liability | Wis. Stat. § 893.55 | Medical malpractice cap of $750,000. | Struck down by *Ferdon v. Wisconsin Patients Comp. Fund*, 701 N.W.2d 440 (Wis. 2005). |
| | Medical liability / wrongful death | Wis. Stat. § 895.04(4) | Medical malpractice cap of $500,000 (deceased minor) or $350,000 (deceased adult). | **Upheld.** *Czapinski v. St. Francis Hosp.*, Inc., 613 N.W.2d 120 (Wis. 2000). |
| **Wyoming** | None | | | **Constitution prohibits enacting a limit.** Wyo. Const. Art. 10, § 4 ("No law shall be enacted limiting the amount of damages to be recovered for causing the injury or death of any person."). |