

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

Case No. 2010-CA-00036

LEIGH MITCHELL

APPELLANT

VS.

DAVID BARNES


APPELLEE

BRIEF OF APPELLEE

On Appeal from the Circuit Court
of Hinds County, Mississippi

ORAL ARGUMENT REQUESTED

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LEIGH MITCHELL

APPELLANT

VS.

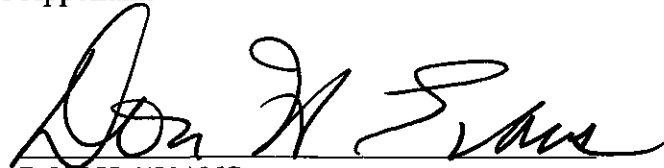
DAVID BARNES

APPELLEE

CERTIFICATE OF INTERESTED PERSONS

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

1. David Barnes, Appellee;
2. Don H. Evans, Esq., Attorney for Appellee;
3. Leigh Mitchell, Appellant; and
4. Michael F. Myers, Esq., Attorney for Appellant.

A handwritten signature in black ink, appearing to read "Don H. Evans", is written over a horizontal line.

DON H. EVANS
ATTORNEY FOR APPELLEE

STATEMENT REGARDING ORAL ARGUMENT

Appellee submits that the facts and legal arguments are adequately presented in the briefs and the record, but this Court's decisional process would be significantly aided by oral argument.

M.R.A.P. 34(a)(3).

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STATEMENT OF THE ISSUES

1. Whether the trial Court properly refused to grant Mitchell's proposed Jury Instruction No. D-2, which was an instruction regarding Barnes' speed?
2. Whether the trial Court properly allowed Hannah to testify as an accident reconstructionist and offer opinions in this case?
3. Whether the trial Court properly allowed the testimony of Officer Michelle Foster regarding statements made by the parties to this lawsuit and properly allowed the introduction of her report which included the same?

STATEMENT OF THE CASE

A. Nature of the Case and Course of Proceedings Below

This is a personal injury case that was tried in the Circuit Court of the First Judicial District of Hinds County, Mississippi, before the Honorable Tomie Green on October 12, 2009 through October 14, 2009. A unanimous verdict was rendered for the Appellee, David Barnes, in the amount of one hundred fifty thousand dollars (\$150,000.00). (R. 361.)

On November 25, 2009, the Appellant, Leigh Mitchell, filed a Motion for Judgment Notwithstanding the Verdict, or in the Alternative, for a New Trial. (R. 364-366.) Subsequently, the Court denied said motion and Mitchell, on December 30, 2009, noticed her appeal. (R. 370 and 371-372.) In her brief, Mitchell assigned three grounds of error. Barnes does not feel that Mitchell's assigned errors are valid; however, in the event that they are, said errors should be considered to be completely harmless, as they had no bearing on the verdict of the jury. The facts in this case were so overwhelmingly in favor of Barnes that one could easily see why the jury ruled in his favor.

B. Statement of the Facts

On Sunday, July 11, 2004, David Barnes, the Appellee, left his house, which was just down the hill from Pear Orchard Road in Jackson, Mississippi. Barnes and his fiancé, who is now his wife, had one car, as well as a used motorcycle that he had recently purchased to ride with his friends on the weekends. His fiancé had to work that morning. Therefore, she took the car to work. Since Barnes needed to change the oil in the car, his plan was to ride his motorcycle to his fiancé's place of employment; leave his motorcycle there; drive the car to have the oil changed; and return the car to his fiancé. Tr. Transcr. vol. 5, 194-195, 201, 216 (Oct. 12-14, 2009).

Soon after leaving his house, Barnes came upon a four-way stop, stopped and turned right onto Pear Orchard Road. After making said stop and right-hand turn, Barnes traveled to the

intersection of Pear Orchard Road and Old Canton Road. As he approached that intersection, the light was red; therefore, Barnes stopped. When the light turned green, Barnes made a left-hand turn onto Old Canton Road and proceeded into the right-hand lane of travel. Barnes then traveled to the next intersection, which is Old Canton Road and Northtown Drive. The light was red, so Barnes stopped. Barnes recalls being stopped at the light for a minute or two. While he was stopped there, Barnes noticed that, off to his right, the front bumper of Mitchell's car was pulling up from behind the bushes from one of the entrance ways to Old Canton Road from the Winn-Dixie parking lot. When the light turned green, Barnes proceeded through the light and gave his signal to move over into the left-hand lane of travel. As he was doing so, Barnes looked over his left shoulder to see if there was any oncoming traffic that would prevent him from safely moving into the left-hand lane. By the time Barnes turned around, he realized that Mitchell, without any warning, was pulling out onto Old Canton Road right in front of his motorcycle. At that time, Barnes stated that he was a car length or half a car length away from Mitchell's car and, therefore, he did not have time to take any type of action in order to avoid a collision. According to Barnes, he also recalls seeing Mitchell's face just before the impact. He testified that she was looking north, apparently to see if any vehicles were coming from that direction instead of his direction. As Barnes went to pass Mitchell, the front of her vehicle hit the side of the motorcycle and Barnes' leg. Barnes claims that he was traveling at a speed of approximately thirty miles per hour at the time of the wreck. Tr. Transcr. vol. 5, 197 (Oct. 12-14, 2009). Tr. Transcr. vol. 5, 195-198, 202, 210. The impact caused Barnes' motorcycle to wobble, causing Barnes to be thrown therefrom. Both Barnes and his motorcycle continued traveling north for several feet up to where Delarosa was on the building.

According to Barnes, immediately following the accident, Mitchell backed her car out of the street, into the Winn-Dixie parking lot, made a ninety degree turn backwards and backed all the way

up to the Backyard Burger parking lot. Barnes thought that Mitchell was leaving the accident scene. In fact, she did leave the scene by backing her car completely out of the street and parking it in the Backyard Burger parking lot, which was way north of the accident scene. If he had not been in a position to see her, Barnes feels that Mitchell may have left the scene. Tr. Transcr. vol. 5, 199, 205-206.

Officer Foster, the investigating officer, spoke with Mitchell immediately following the accident. Tr. Transcr. vol. 4, 136. Officer Foster tried to speak with Barnes at the hospital; however, Barnes was in no condition to give a statement. Tr. Transcr. vol. 4, 143-144. Therefore, most of the information contained on the accident report was supplied to the officer by Mitchell. Tr. Transcr. vol. 4, 144. Officer Foster, basically, testified that Mitchell told her that she caused the subject accident. Tr. Transcr. vol. 4, 137-138; vol. 5, 154-155. While Officer Foster testified that Mitchell told her that she pulled out into the road and clipped Barnes' vehicle, Mitchell completely changed her story after Barnes filed his lawsuit. Tr. Transcr. vol. 4, 137-138; vol. 5, 154-155. At trial, Mitchell testified that she was stopped at the entrance to Winn-Dixie and did not, at any time, pull out onto Old Canton Road. Tr. Transcr. vol. 5, 171-172. Mitchell claims that Barnes was riding on one wheel (otherwise known as popping a wheelie), lost control of his motorcycle and then moved over and hit Mitchell's car. Tr. Transcr. vol. 5, 170-173, 175-176. While this story may sound plausible, at first glance, the evidence clearly proved otherwise. After hearing the testimony of the parties, the investigating officer, the accident reconstructionist, and the witnesses, it is easy to see that Mitchell's version is simply not probable, notwithstanding the fact that the accident report fails to mention anything about Barnes riding on one wheel or speeding. Moreover, Officer Foster testified that Mitchell did not mention anything to her regarding Barnes riding on one wheel or doing anything wrong that would have caused or contributed to the subject accident. Tr. Transcr. vol. 4,

138. As emotions tend to run high in a stressful situation like a motor vehicle accident, it is hard to imagine that Mitchell would not have mentioned to the officer that Barnes was popping a wheelie at the time of the accident. It is unimaginable that this critical information, if true, would not have been reported by Mitchell to the officer. Barnes testified that he had never done a wheelie and testified that he did not even know how to do one. Tr. Transcr. vol. 5, 200. Barnes further testified that, prior to purchasing his motorcycle, he had only ridden a motorcycle approximately fifteen (15) times before. Furthermore, Mitchell admitted that she did not tell the officer that Barnes was riding on one wheel, or that he did anything wrong. Tr. Transcr. vol. 5, 182. In fact, Mitchell, according to Officer Foster, told the officer that she was easing out into the road when she, Mitchell, clipped Barnes. Tr. Transcr. vol. 4, 137-138. Of course, Mitchell testified that she never told the officer anything regarding how the accident occurred. She claimed that Officer Foster never asked her how the accident happened. Tr. Transcr. vol. 5, 182. It is understandable that a jury would not have believed that an officer, who is trained to investigate accidents and has done so for ten (10) years, failed to ask Mitchell what had happened. Considering the fact that the Officer was not able to speak to Barnes regarding the accident at the scene, the facts regarding the accident occurrence had to come from somewhere. It is highly unlikely that Officer Foster simply took it upon herself to make up how the accident occurred. It is more probable that the information came from Mitchell, as Officer Foster has testified. Basically, from the evidence and testimony, it is clear that Mitchell was not a credible witness.

Barnes called an accident reconstructionist, James Hannah, to testify at the trial of this matter. Tr. Transcr. vol. 5, 269. Hannah testified that, from his training, experience and expertise, it was very obvious that this was an accident of a sideswiping nature. Tr. Transcr. vol. 6, 309. Moreover, the damages are not consistent with damage that would have occurred had Barnes been riding on one

wheel, lost control of his motorcycle and turned right, hitting the middle of Mitchell's front bumper with his front wheel.

One independent witness, Gustavo Delarosa, a Mexican, testified that he saw the entire accident, including the several seconds leading up to the accident. Delarosa, who was working as a laborer on a roof, testified that he was working on a house located directly on Old Canton Road, positioned in front of the Backyard Burger. This was approximately forty to fifty feet from the accident scene. Delarosa was laying down on his back up on the roof when he saw Barnes a few seconds after Barnes crossed the intersection of Old Canton Road and Northtown Drive. Delarosa testified that Barnes was traveling at approximately twenty miles per hour when he first saw him and that Barnes never, at anytime, rode on one wheel. Delarosa also testified that he witnessed Mitchell pulling her car out onto Old Canton Road, into Barnes' lane of travel and into the right side of David Barnes' motorcycle. Delarosa added that, at the time of impact, Barnes was traveling at a speed of approximately thirty to thirty-five miles per hour. Delarosa further stated that, after the accident, Barnes was ejected from the motorcycle and both Barnes and his motorcycle came to a rest just beside where he was working. Delarosa testified that he was not able to go to the accident scene, because he would have had to come off of the roof and walk around the large fence that incases the subdivision in which he was working. However, Delarosa did go downstairs to inform the property owner's wife of what he had witnessed. Furthermore, later that night, Delarosa had his friend, Jeanette, call the local hospitals to see if she could locate the driver of the motorcycle to find out what condition he was in and to inform him that he, Delarosa, had witnessed the accident. Jeanette told one of Barnes' family members, who was at the hospital with Barnes, that her friend, Delarosa, had witnessed the entire accident. This is how Barnes was, eventually, able to identify Delarosa as a witness. Supp. Transcript 5-19, 25, 27-30, 38, 39, 46.

However, it did take Barnes quite some time to locate Delarosa after filing his lawsuit. This was mainly due to the fact that Delarosa, a vagrant, had no permanent place of residency. Also, lending to the difficulty in locating Delarosa, was the fact that Barnes only knew the first name of Delarosa's friend, Jeanette. Eventually, however, through reverse skip-trace searches of the phone number left by Jeanette, Barnes was able to locate and identify Jeanette Reed Knight, who put Barnes in contact with Delarosa. Barnes immediately supplied this information to Mitchell. Within days of locating Delarosa, Hannah and the witness traveled to the accident scene so that Delarosa could provide Hannah a first-hand account of what he witnessed on the date of the accident, including, Delarosa's location on the roof, the first place that Delarosa saw Barnes on his motorcycle, the location of the impact of Barnes' motorcycle and Mitchell's car, along with the resting places of Barnes and his motorcycle.

Additionally, there were three other witnesses who came forward after the filing of Barnes' lawsuit. Each of them also claim to have witnessed the accident. However, after hearing their absurd recounts of the accident at trial, it is easy to see why the jury did not lend any credibility to their testimony. All three witnesses were allegedly on four wheelers at the gas pumps in the Winn-Dixie parking lot at the time of the accident. Each, basically, testified that he/she heard Barnes' motorcycle as he was traveling on one wheel on Old Canton Road. After that, each of their testimony takes its own bizarre turn, yet each is as ridiculous as the other. Their testimony was so outrageous and impossible that the jury had yet another layer of absurdity added to the defense's implausible and unbelievable story.

Greg Parsons was the first of the three witnesses to testify. He claimed that he was at the gas pump when he heard Barnes riding by on his motorcycle, traveling at a speed of 70 to 80 miles per hour. Tr. Transcr. vol. 6, 345-346. Although the jury would have a hard time believing from the

damages to Barnes' motorcycle, his person and Mitchell's car that Barnes was actually traveling at that speed, Parsons adds another awkward twist to the story by stating that, after hearing the motorcycle, he decided to run to the street to see what was going to happen. Furthermore, Parsons claims that he was able to run from the gas pump to the street before the accident actually occurred.

His testimony to the same was as follows:

Q. Greg, where were you parked when you first heard the motorcycle?

A. At the gas station.

Q. What pump were you at?

A. The one closest to the street.

Q. Closest to which street?

A. Old Canton Road.

...

Q. And were you on a four wheeler when you heard it, or were you still pumping gas?

A. I had already got through pumping gas. I was just there waiting for everybody else to fill up.

Q. Okay. When you heard it, what did you do at that point?

A. I ran up to the street to look.

Q. You started running in that direction?

A. Yes. When I heard the motorcycle screaming, I wanted to see what he was doing.

Q. And so you physically struck out running up to the street?

A. Yes.

Q. And when you got up to the street, you turned and you could see him collide with her?

A. No, I saw him come by me. I looked at him. He hit the brake, and then I looked and seen the young lady was coming out just on the other curb to look. And he hit the brakes, and he lost control and he ran right into her.

...

Q. How fast was he going?

A. Faster than you should.

Q. You have any - -

A. 70, 80 miles an hour.

Q. 70 or 80 miles an hour?

A. Yes.

Q. But you was able to make it up there to the road to look back?

A. Look at him?

Q. Right.

A. Yes

Q. Now, you know there's trees there, bushes up that - -

A. I know.

Q. And you couldn't see through that, could you?

- A. That's why I ran up the street.
- Q. That's the reason you ran over and got on Old Canton Road. And when you got on Old Canton Road, all you had to do then is just look up there?
- A. That's correct.
- Q. And you could see it happen then?
- A. Uh-huh (affirmative). I saw him come by. I saw him hit the brakes. I saw the little girl trying to pull out to look, see what was going on, and he hit the brakes. I guess he saw her when he come by, hit the brakes like any normal person would do.
- Q. **Well, if he's going 70 or 80 miles an hour - -**
- A. **Yes.**
- Q. **- - how are you going to run from this spot over here by this gas station all the way to Old Canton Road and then look up and you're going to be able to see them have that wreck?**
- A. **You ought to come run with me one day.**
- Q. **Do what now?**
- A. **Shoot, come run with me one day. I can run pretty fast.**
- Q. **I still didn't understand what you - -**
- A. **Come run with me one day. I can run fast.**
- Q. **You run fast?**
- A. **Yes.**

Tr. Transcr. vol. 6, 342:17-347:14.

It is standard knowledge that a vehicle, or motorcycle, traveling at 60 miles per hour will travel 88 feet per second. Although Parsons claims to be an avid runner, it is unfathomable that he was able to run from the gas pumps to the road and then able to witness the accident as he claims he did.

Furthermore, it has been established that Mitchell did, in fact, move her vehicle into the Backyard Burger parking lot **after** the accident occurred. Tr. Transcr. vol. 5, 180, 199, 205-206. Parsons testified that he did not believe that Mitchell ever moved her vehicle. Tr. Transcr. vol. 6, 350 (Oct. 12-14, 2009). His testimony to that effect was as follows:

- Q. All right. Now, you went forward. You went up there where she [Mitchell] was. Where was her [Mitchell's] car at that time?
- A. Still parked.
- Q. Still parked?
- A. I guess she put it in park.
- Q. And when did she move?

- A. I don't know that she ever moved it.
Q. It stayed there, huh?
A. Yes.
Q. And did it stay there while the police came and all?
A. Well the police came, and we left. They didn't ask us any questions.
Q. You didn't tell them you saw the wreck?
A. They never asked me.
Q. You didn't think it's important to tell the officer?
A. That's why I gave somebody my card. Here, y'all call me if you need a witness.
Q. Who did you give that to?
A. I don't know if it's - - just some man there or something. I can't remember. I just knew that someone was going to need a witness of some sort, you know, and the police hadn't asked us. I think they were just basically trying to take care of that man right there. He was hurt.

Tr. Transcr. vol. 6, 350:19-351:17.

Although Parsons did not state where Mitchell's vehicle was parked, it is clear from his testimony above that the place in which he was referring was the Backyard Burger Parking lot. Mitchell's vehicle was parked in the Backyard Burger parking lot when Officer Foster arrived at the accident scene. Tr. Transcr. vol. 5, 180, 199, 205. As is indicated above, Parsons was right there near the investigating officer when she arrived at the scene. We know this because Parsons testified that the police officer never asked him any questions regarding this accident. Therefore, Parsons was clearly referring to the Backyard Burger parking lot when he testified that Mitchell put her vehicle in park and never moved after the accident. This was absolutely false and indicated that Parsons did not actually see the accident and may not have even been there. Moreover, it is strange that Parsons testified that he believes that the police officer never asked him any questions because she was trying to take care of Barnes. Said testimony is strange because Officer Foster testified that she never spoke to Barnes at the scene, because he was in the ambulance. Tr. Transcr. vol. 4, 133-136. Therefore, how could she be taking care of him? These bizarre accountings of events lend no credibility to Greg Parsons.

Lorna Ann Owens was the next witness to testify, and her story was the most illogical of all. Owens also testified that she was at the gas pumps when she heard Barnes' motorcycle nearing their location. She began her testimony by claiming that she witnessed Barnes riding on one wheel at a high rate of speed. Tr. Transcr. vol.6, 353. She then goes on to add that, "[A]nd I guess when the light changed, I assume he panicked and he tried to stop because I heard the brakes. And then that's when the motorcycle flipped, and he fell off and all that." Tr. Transcr. vol. 6, 359:24-28. While Barnes' counsel was cross-examining Owens, it was easy to see that she seemed to be describing a different accident altogether. Owens failed to discuss what relation Mitchell had to the subject accident. In fact, Owens testified that Mitchell's car was never in the entrance way, but was always parked in the parking lot way up at the Backyard Burger. Owens testified that Mitchell never moved her car after the impact. Tr. Transcr. vol. 6, 365. Owens exclaimed, "[S]he wasn't even up there. She was not near the road at all, not even near the entrance, near the sidewalk." Tr. Transcr. vol. 6, 369:27-370:1. Barnes' counsel, trying to clarify the witness' testimony, asked Owens, "Oh, he [Barnes] went off down in the parking lot and hit her; is that right?" Tr. Transcr. vol. 6, 370:2-3. Owens then stated, **"I don't know. I thought maybe it was a part of his motorcycle that might have hit the car. I didn't even know the car had been touched to begin with. He was in the road."** Tr. Transcr. vol. 6, 370:4-7.

Not only did the witness admit that Barnes was traveling on the road and did not travel into Mitchell's car after he allegedly lost control of his motorcycle from riding on one wheel, as Mitchell and Parsons had testified, but Owens actually stated that Mitchell's car was in the parking lot the entire time and never out in the roadway or in the entrance way leading to Old Canton Road. As would be expected, after Owens gave such a peculiar account of events, Barnes' counsel asked, "Did you actually see the wreck." Tr. Transcr. vol. 6, 370:8. Owens replied, "Yes, I saw the wreck." Tr.

Transcr. vol. 6, 370:9. Then Barnes' counsel asked, "And she was hit down in the parking lot?" Tr. Transcr. vol. 6, 370:10-11. Owens remarked, "No, I didn't see him hit her, no, sir." Tr. Transcr. vol. 6, 370:12-13. Barnes' counsel, still trying to make sense of her testimony, stated, "But you're leaving out where he hit her," **to which Owens threw up her hands and admitted, "I don't know that he hit her. I never saw him hit her."** "That's what I'm saying. **I don't know what she [Mitchell] has to do with it to begin with. . . .**" Tr. Transcr. vol. 6, 371:2-10. This proved that Owens' whole story was fabricated. Clearly, Owens was not a credible witness, as she did not even know that Mitchell was involved in this accident. Obviously, Owens did not witness this accident.

Mike Williams, the last of the three witnesses to testify, also had a very strange story to tell, although not as entertaining and quite as outrageous as the first two witnesses. Nevertheless, Williams claims that he too heard Barnes' motorcycle coming down Old Canton Road and riding on one wheel. He then goes on to add that Barnes lost control of the motorcycle and hit Mitchell's car in the center of the bumper. Williams was adamant that the motorcycle came in at an angle and hit the center of the bumper. "And did the front of his bike hit the dead center of the front of her car." Williams replied, "Yes. I mean give or take a few inches, but yes." Tr. Transcr. vol. 6, 379:13-16. This testimony is not credible, as the damage to Mitchell's vehicle was to the front left driver side of the bumper. Basically, there is no way that the accident occurred the way Williams testified that it did. Furthermore, Williams also testified that Mitchell never moved her vehicle. He stated that, "The car didn't move. The car stayed in the same spot it was from the time of the accident till we left." Tr. Transcr. vol. 6, 381:6-8.

Neither Mitchell nor Williams ever testified that Barnes was speeding. This is a critical point. The facts in this case were overwhelmingly in favor of Barnes. One can easily see why the jury ruled in his favor.

SUMMARY OF THE ARGUMENT

The trial court properly denied Mitchell's Motion for Judgment Notwithstanding the Verdict, or in the Alternative, for a New Trial. In her brief, Mitchell assigned three grounds of error. Barnes does not feel that Mitchell's assigned errors are valid; however, in the event that they are, said errors should be considered to be completely harmless, as they had no bearing on the verdict of the jury. The facts in this case were so overwhelmingly in favor of Barnes that one could easily see why the jury ruled in his favor.

Mitchell argues that the trial court erroneously refused to grant the Defendant an instruction on the Plaintiff's speed. The instruction to which Mitchell is referring was Mitchell's proposed Jury Instruction No. D-2. Barnes believes that said instruction was improper, as it was peremptory and did not allow apportionment of fault. Also, there was not adequate testimony that Barnes was speeding. Hence, Barnes is of the opinion that the trial court properly refused the same. However, if this Court feels that said instruction should have been given, then failure to grant the same was harmless error because the instruction was cumulative. The trial court gave Jury Instruction No. 9, which was almost identical to the speed instruction at issue in this case.

Mitchell claims that the trial Court erred in allowing Barnes' accident reconstructionist, James Hannah, to offer opinions regarding the subject accident. Mitchell's argument to the same is without merit. Hannah was clearly qualified to testify as an expert in this matter. Hannah used a slide-to-stop formula to determine the speed of Barnes' vehicle. Hannah testified that the formula was one of his "checks and balances" to determine whether this was a high speed or a low speed. He went on to testify that he uses the formula to determine speed from impact to final rest. Hannah testified that he also looked at what Barnes and Mitchell had to say about how this accident happened. Tr. Transcr. vol. 6, 324:11-26.

Hannah's opinions were not baseless, as Mitchell claims. Hannah testified that he reviewed the accident report; visited the accident scene; had a survey conducted at his direction; reviewed photographs of Mitchell's car; took and reviewed photographs of the accident scene; spoke to Barnes; spoke to the witnesses, including, but not limited to, Delarosa; spoke to and met with the investigating officer; listened to testimony in the courtroom; reviewed medical records of Barnes; and read depositions. Tr. Transcr. vol. 6, 303, 305-306, 308-310, 319, 321-323. Hannah testified that Officer Foster was able to show him approximately where the motorcycle was when she arrived at the scene, which was, of course, the area in which the motorcycle came to a rest. Hannah further testified that Officer Foster was also able to tell him that the car had pulled into the parking lot. According to Hannah, Officer Foster remembered landmarks, such as Backyard Burger, and remembered a particular lane. Tr. Transcr. vol. 5, 272, 273; vol. 6, 322-323. Hannah saw photographs of Mitchell's car and spoke to Officer Foster and Barnes about where the damage was on the motorcycle. Hannah testified that Barnes told him that he had damage down the right side of his motorcycle. Tr. Transcr. vol. 6, 319:2-24.

Mitchell's argument, that Hannah was not qualified to give opinions in regards to this matter, was based solely on an Affidavit, prepared by Cecilia Kazery, **who did not testify at trial**. As stated in Mitchell's brief, the trial court ruled that Hannah's testimony was a basis for cross examination. Tr. Transcr. vol. 5, 266. The court further held that Mitchell could provide her expert who had different conclusions than him. Barnes would show that Mitchell chose not call Kazery or any other accident reconstructionist as a witness at trial to refute the testimony of Hannah.

Hannah's testimony was reliable. Hannah's opinions were based on the scientific methods and procedures he used. Certainly James Hannah was qualified to give an opinion as to the speed of the motorcycle and as to which side of the motorcycle sideswiped the front bumper of the car.

In her final assignment of error, Mitchell argues that the trial court should not have allowed Officer Foster to offer opinions as to fault and how the accident occurred. Said assignment of error lacks merit, because Officer Foster never offered any opinions. Moreover, Officer Foster was not offered as an accident reconstructionist, was never asked to give expert testimony and was never asked to give any opinions as to how the accident in question occurred. She simply took the information that Mitchell provided to her on the date of the accident and converted that information into language that was applicable on the report that she was filling out. Officer Foster testified at trial that, in filling out her report, she relied mostly upon the information and facts that were provided to her by Mitchell on the date of the accident in question. Tr. Transcr. vol. 4, 144:3-5. She testified that, for the most part, the main facts about how the accident occurred came from Mitchell. Tr. Transcr. vol. 4, 144:3-5. Furthermore, Officer Foster testified that she obtained some of the information on the police report by observing the scene of the accident. Tr. Transcr. vol. 4, 138.

Also, in her final assignment of error, Mitchell argues that the admission of certain portions of the accident report into evidence was error. Again, said assignment of error lacks merit. Mitchell alleges that the information in the accident report contained inadmissible opinions and hearsay. Officer Foster testified that she asked if there were any witnesses, and testified that no witnesses appeared out at the scene. Tr. Transcr. vol. 4, 144:6-10. Therefore, the only individuals mentioned in the accident report are Mitchell and Barnes. As such, Mitchell is basically arguing that Officer Foster should have been prohibited from testifying as to what Mitchell and Barnes had told Officer Foster. However, Mitchell and Barnes are both parties to this lawsuit; therefore, anything that they would have told Officer Mitchell would not have been hearsay, but would have been an admission. Mitchell admitted to Officer Foster that she had failed to yield the right of way when she informed her that she clipped Barnes' vehicle. Under the law, this is failure to yield the right of way and is not

an opinion of the officer. Said statement qualified as an admission and was not hearsay. Officer Foster never gave any opinions or expert testimony in this case. She only testified as to the information that she was given by the parties, primarily the facts that were provided to her by Mitchell. Basically, Mitchell admitted to the Officer that the wreck was her fault and then changed her story after the lawsuit was filed.

Clearly, Mitchell's assignment of errors lack merit. Therefore, the trial court properly denied Mitchell's Motion for Judgment Notwithstanding the Verdict, or in the Alternative, for a New Trial.

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED MITCHELL'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, OR IN THE ALTERNATIVE, FOR A NEW TRIAL.

A. Standard of Review for a Motion for Judgment Notwithstanding the Verdict

The standard of review is de novo when considering a trial court's denial of a motion for judgment notwithstanding the verdict. *Poole v. Avara*, 908 So. 2d 716, 726 (Miss. 2005) (citing *Wilson v. Gen. Motors Acceptance Corp.*, 883 So. 2d 56, 64 (Miss. 2004)). "The trial court must view the evidence in the light most favorable to the non-moving party and look only to the sufficiency, and not the weight, of that evidence." *Poole*, 908 So. 2d at 726 (citing *Wilson*, 883 So. 2d at 63). "When determining whether the evidence was *sufficient*, the critical inquiry is whether the evidence is of such quality that reasonable and fairminded jurors in the exercise of fair and impartial judgment might reach different conclusions." *Poole*, 908 So. 2d at 726 (citing *Jesco, Inc. v. Whitehead*, 451 So. 2d 706, 713-14 (Miss. 1984)).

B. Standard of Review for a Motion for a New Trial

When considering a trial court's denial of a motion for a new trial, the standard of review is "abuse of discretion." *Poole*, 908 So. 2d at 726.

A new trial may be granted pursuant to Miss. R. Civ. P. 59. A new trial may be granted in a number of circumstances, such as when the verdict is against the overwhelming weight of the evidence, or when the jury has been confused by faulty jury instructions, or when the jury has departed from its oath and its verdict is a result of bias, passion, and prejudice.

Poole, 908 So. 2d at 726-727 (quoting *Shields v. Easterling*, 676 So. 2d 293, 298 (Miss. 1996)).

1. THE TRIAL COURT PROPERLY REFUSED TO GRANT MITCHELL'S PROPOSED JURY INSTRUCTION NO. D-2, WHICH WAS AN INSTRUCTION REGARDING BARNES' SPEED.

In her brief, Mitchell argues that the trial court erroneously refused to grant the Defendant an instruction on the Plaintiff's speed. The instruction that Mitchell is referring to was Mitchell's proposed Jury Instruction No. D-2, which read as follows:

Under the laws of the State of Mississippi, the operator of a motor vehicle, including a motorcycle, has a duty to operate his vehicle at a speed at or below the posted speed limit. Therefore, if you find from preponderance of the credible evidence in this case that David Barnes was operating his motorcycle at a speed in excess of the posted speed limit at the time of the accident in question, then David Barnes was guilty of negligence. If you find that David Barnes' negligence, if any, was the sole proximate cause of the accident in question, then you must return a verdict for the Defendant, Leigh Mitchell.

(R. 340.)

Barnes believes that Mitchell's proposed Jury Instruction No. D-2 was improper, as it was peremptory and did not allow apportionment of fault. Also, there was not adequate testimony that Barnes was speeding. Hence, Barnes is of the opinion that the trial court properly refused the same. However, if this Court feels that said instruction should have been given, then failure to grant the same was harmless error because the instruction was cumulative. The trial court gave Jury Instruction No. 9, which was almost identical to the speed instruction at issue in this case. Jury Instruction No. 9 is set forth below.

In Mississippi, the appellate courts' standard of review for jury instruction issues is well-established. When determining whether the jury was properly instructed, the appellate courts read jury instructions as a whole, rather than in isolation. *Harris v. Lewis*, 755 So. 2d 1199, 1204 (Miss. 1999). "Accordingly, defects in specific instructions do not require reversal 'where all

instructions taken as a whole fairly-although not perfectly-announce the applicable primary rules of law.” *Id.* (citing *Starcher v. Byrne*, 687 So. 2d 737, 742-43 (Miss. 1997)). In *Burr v. Miss. Baptist Med. Ctr.*, 909 So. 2d 721, 726 (Miss. 2005), the Supreme Court of Mississippi stated that:

[A] defendant is entitled to have jury instructions given which present his theory of the case. **However, the trial judge may also properly refuse the instructions if he finds them to incorrectly state the law or to repeat a theory fairly covered in another instruction or to be without proper foundation in the evidence of the case.**

Burr, 909 So. 2d at 726 (quoting *Nunnally v. R. J. Reynolds Tobacco Co.*, 869 So. 2d 373, 378 (Miss. 2004)). Trial courts have “considerable discretion in instructing the jury.” *Fitch v. Valentine*, 959 So. 2d 1012, 1023 (Miss. 2007) (citing *Southland Enter(s), Inc. v. Newton County*, 838 So. 2d 286, 289 (Miss. 2003)).

In this case, the trial court, after hearing all the evidence, properly concluded that Mitchell’s instruction on speed should not have been given. Mitchell’s proposed Jury Instruction No. D-2 was peremptory and did not allow apportionment of fault. Also, there was not adequate testimony that Barnes was speeding.

Mitchell claims that Barnes admitted that he was speeding. However, this is simply not true. In regards to speed, David Barnes testified that he was traveling approximately thirty [30] miles per hour at the time of the wreck. Tr. Transcr. vol. 5, 202. The accident report showed his speed at thirty [30] miles per hour, and Officer Foster testified that Barnes told her he was traveling 30 miles per hour at the time of the accident. Tr. Transcr. vol. 5, 156. James Hannah also testified that Barnes was going approximately 30 miles per hour when the accident occurred. Tr. Transcr. vol. 6, 312. Delarosa, the independent witness on the roof, testified that Barnes was traveling at a speed of thirty to thirty-five miles per hour at the time of impact. Supp. Transcript 17, 28. Officer Foster further testified that the speed limit was thirty-five [35] miles per hour. Tr. Transcr. vol. 5, 156.

Additionally, Barnes denied telling anyone, including ambulance and medical personnel, that he was speeding. Tr. Transcr. vol. 5, 242.

Furthermore, Mitchell did not tell Officer Foster at the scene of the accident that Barnes was speeding. If Barnes had been speeding, there is no question that Mitchell would have told the officer this critical information. In fact, no witnesses came forward at the accident scene, and no one told Officer Foster that Barnes was speeding. Although two of the three witnesses at the gas pump testified that Barnes was speeding, there are major discrepancies in their testimonies that, when viewed as a whole, all depict a different accident scene, notwithstanding the fact that each of their testimony is absurd and illogical and does not reflect a cohesive account of the facts.

Greg Parsons was the first of the three witnesses to testify. He claimed that he was at the gas pump when he heard Barnes riding by on his motorcycle, traveling at a speed of 70 to 80 miles per hour. Tr. Transcr. vol. 6, 345-346. Although the jury would have had a hard time believing from the damages to Barnes' motorcycle, Barnes' person and Mitchell's car that Barnes was actually traveling at that speed, Parsons adds another awkward twist to the story by stating that after hearing the motorcycle, he decided to run to the street to see what was going to happen. Furthermore, Parsons claims that he was able to run from the gas pump to the street before the accident actually occurred. His testimony to the same was as follows:

Q. Greg, where were you parked when you first heard the motorcycle?

A. At the gas station.

Q. What pump were you at?

A. The one closest to the street.

Q. Closest to which street?

A. Old Canton Road.

...

Q. Okay. When you heard it, what did you do at that point?

A. I ran up to the street to look.

Q. You started running in that direction?

A. Yes. When I heard the motorcycle screaming, I wanted to see what he was doing.

Q. And so you physically struck out running up to the street?
A. Yes.
Q. And when you got up to the street, you turned and you could see him collide with her?
A. No, I saw him come by me. I looked at him. He hit the brake, and then I looked and seen the young lady was coming out just on the other curb to look. And he hit the brakes, and he lost control and he ran right into her.

...

Q. How fast was he going?
A. Faster than you should.
Q. You have any - -
A. 70, 80 miles an hour.
Q. 70 or 80 miles an hour?
A. Yes.
Q. But you was able to make it up there to the road to look back?
A. Look at him?
Q. Right.
A. Yes
Q. Now, you know there's trees there, bushes up that - -
A. I know.
Q. And you couldn't see through that, could you?
A. That's why I ran up the street.
Q. That's the reason you ran over and got on Old Canton Road. And when you got on Old Canton Road, all you had to do then is just look up there?
A. That's correct.
Q. And you could see it happen then?
A. Uh-huh (affirmative). I saw him come by. I saw him hit the brakes. I saw the little girl trying to pull out to look, see what was going on, and he hit the brakes. I guess he saw her when he come by, hit the brakes like any normal person would do.

Q. Well, if he's going 70 or 80 miles an hour - -
A. Yes.
Q. - - how are you going to run from this spot over here by this gas station all the way to Old Canton Road and then look up and you're going to be able to see them have that wreck?
A. You ought to come run with me one day.
Q. Do what now?
A. Shoot, come run with me one day. I can run pretty fast.
Q. I still didn't understand what you - -
A. Come run with me one day. I can run fast.
Q. You run fast?
A. Yes.

Tr. Transcr. vol. 6, 342:17-347:14.

It is standard knowledge that a vehicle, or motorcycle, traveling at 60 miles per hour will travel 88 feet per second. Although Parsons claims to be an avid runner, it is unfathomable that he was able to run from the gas pumps to the road and then able to witness the accident as he claims he did.

Furthermore, it has been established that Mitchell did, in fact, move her vehicle into the Backyard Burger parking lot **after** the accident occurred. Tr. Transcr. vol. 5, 180, 199, 205-206. Parsons testified that he did not believe that Mitchell ever moved her vehicle. It was his impression that Mitchell just put her car in park after the wreck had occurred. Tr. Transcr. vol. 6, 350. Although Parsons did not clearly state where Mitchell's vehicle was parked, it is clear from his testimony that the place in which he was referring was the Backyard Burger Parking lot. Mitchell's vehicle was parked in the Backyard Burger parking lot when Officer Foster arrived at the accident scene. As is indicated in Parson's testimony, which is set forth above in the Statement of Facts, Parsons was right there near the investigating officer when she arrived at the scene. We know this because Parsons testified that the police officer never asked him any questions regarding this accident. Tr. Transcr. vol. 6, 350, 351. Therefore, Parsons was clearly referring to the Backyard Burger parking lot when he testified that Mitchell put her vehicle in park and never moved after the accident. This was absolutely false and indicates that Parsons did not see the accident and may not have even been there. Moreover, it is strange that Parsons testified that he believes that the police officer never asked him any questions because she was trying to take care of Barnes. Tr. Transcr. vol.6, 351. Said testimony is strange because Officer Foster testified that she never spoke to Barnes at the scene, because he was in the ambulance. Tr. Transcr. vol. 4, 133-136. Therefore, how could she be taking care of him? These bizarre accountings of events lend no credibility to Greg Parsons.

Lorna Ann Owens was the next witness to testify, and her story was the most absurd of all. Owens also testified that she was at the gas pumps when she heard Barnes' motorcycle nearing their location. She began her testimony by claiming that she witnessed Barnes riding on one wheel at a high rate of speed. Tr. Transcr. vol. 6, 353. She then goes on to add that, "[A]nd I guess when the light changed, I assume he panicked and he tried to stop because I heard the brakes. And then that's when the motorcycle flipped, and he fell off and all that." Tr. Transcr. vol. 6, 359:24-28. Owens failed to discuss what relation Mitchell had to the subject accident. In fact, Owens testified that Mitchell's car was never in the entrance way, but was always parked in the parking lot way up at the Backyard Burger. Owens testified that Mitchell never moved her car after impact. Tr. Transcr. vol. 6, 365. Owens exclaimed, "[S]he wasn't even up there. She was not near the road at all, not even near the entrance, near the sidewalk." Tr. Transcr. vol. 6, 369:27-370:1. Barnes' counsel, trying to clarify the witness's testimony, asked Owens, "Oh, he [Barnes] went off down in the parking lot and hit her; is that right?" Tr. Transcr. vol. 6, 370:2-3 (Oct. 12-14, 2009). Owens then stated, **"I don't know. I thought maybe it was a part of his motorcycle that might have hit the car. I didn't even know the car had been touched to begin with. He was in the road."** Tr. Transcr. vol. 6, 370:4-7.

Not only did the witness admit that Barnes was traveling on the road and did not travel into Mitchell's car after he allegedly lost control of his motorcycle from riding on one wheel, as Mitchell and Parsons had testified, but Owens actually stated that Mitchell's car was in the parking lot the entire time and never out in the roadway or in the entrance way leading to Old Canton Road. As would be expected, after Owens gave such a peculiar account of events, Barnes' counsel asked, "Did you actually see the wreck." Tr. Transcr. vol. 6, 370:8. Owens replied, "Yes, I saw the wreck." Tr. Transcr. vol. 6, 370:9. Then Barnes' counsel asked, "And she was hit down in the parking lot?" Tr.

Transcr. vol. 6, 370:10-11. Owens remarked, "No, I didn't see him hit her, no, sir." Tr. Transcr. vol. 6, 370:12-13. Barnes' counsel, still trying to make sense of her testimony, stated, "But you're leaving out where he hit her," to which Owens threw up her hands and admitted, **"I don't know that he hit her. I never saw him hit her."** "That's what I'm saying. **I don't know what she [Mitchell] has to do with it to begin with. . . .**" Tr. Transcr. vol. 6, 371:2-10. This proved that Owens' whole story was fabricated. Clearly, Owens was not a credible witness, as she did not even know that Mitchell was involved in this accident. Obviously, she did not witness this accident.

Mike Williams, the last of the three witnesses to testify, also had a very strange story to tell. Williams claims that he too heard Barnes' motorcycle coming down Old Canton Road and riding on one wheel. Tr. Transcr. vol. 6, 372. He then goes on to add that Barnes lost control of the motorcycle and hit Mitchell's car in the center of the bumper. Tr. Transcr. vol. 6, 378. Williams was adamant that the motorcycle came in at an angle and hit the center of the bumper. "And did the front of his bike hit the dead center of the front of her car." Williams replied, "Yes. I mean give or take a few inches, but yes." Tr. Transcr. vol. 6, 379:13-16. This testimony is not credible, as the damage to Mitchell's vehicle was to the front left driver side of the bumper. In fact, there is no way that the accident occurred the way Williams testified that it did. Furthermore, Williams also testified that Mitchell never moved her vehicle. He stated that, "The car didn't move. The car stayed in the same spot it was from the time of the accident till we left." Tr. Transcr. vol. 6, 381:6-8. Clearly, there is no indication or credible evidence to show that Barnes was speeding at the time of impact.

Moreover, the proposed instruction was improper in that even if the jury concluded that Barnes was speeding, the jury would not have to find that Barnes was the sole proximate cause of the subject accident. The speed instruction that was denied did not take into account the fact that Mitchell allegedly pulled out into Barnes' lane of travel as all credible evidence has shown.

Furthermore, the instruction did not provide an alternative as would a comparative negligence instruction. The refused instruction basically states that if you think Barnes was exceeding the speed limit, then you must return a verdict for the Defendant, Leigh Mitchell. Also, the jury had no definition of "sole proximate cause" and would have been confused as to what all it entailed.

Nevertheless, the trial court gave Mitchell a more acceptable instruction that was almost identical to the speed instruction. Said instruction was Jury Instruction No. 9 and read as follows:

Under the laws of the State of Mississippi the driver of a motor vehicle, including a motorcycle, has a duty to maintain control over his vehicle at all times. Therefore, if you find from a preponderance of the evidence in this case, that at the time of the accident, David Barnes was operating his motorcycle on one wheel and failed to maintain control of his motorcycle and struck the vehicle of the Defendant, then David Barnes was negligent. If you further find by a preponderance of the evidence that David Barnes' negligence, if any, was the sole proximate cause of the accident in question, then you must return a verdict for the Defendant, Leigh Mitchell.

(R . 352.)

The granting of Jury Instruction No. 9 clearly covered Mitchell's position with regards to speed, as it was an all-inclusive type of instruction. Although this Instruction does not actually include the word "speeding," said Instruction encompasses the same, in that Mitchell's position was that Barnes lost control of his vehicle because he was speeding. Therefore, Jury Instruction No. 9 took care of any negligence on the part of Barnes, if any. It certainly would cover any error that the trial court may have if this Court feels that the speed instruction should have been given. Jury Instruction No. 9 would, in essence, cover any question of speed because that would be reason, if any, for Barnes losing control of his motorcycle. Also, Jury Instruction No. 9 actually helped Mitchell because it did not include a comparative negligence instruction in regards to Mitchell pulling out onto Old Canton Road in Barnes' lane of travel.

As to whether or not the instruction on speed should have been given, Barnes would show that there was no credible evidence to support said instruction. The failure to grant the same is certainly not reversible error, as the jury was fairly and adequately instructed as a whole. This Court has said numerous times that failure to give an instruction is not reversible error when all of the instructions given, when considered together as a whole, fairly and adequately instructed the jury.

The trial court refused D-2 because there was no evidence to justify that the issue of Barnes speeding, if any, was the sole proximate cause of this accident. D-2 was a negligence per se instruction and a sole proximate cause instruction combined. Mitchell's proposed Jury Instruction No. D-2 with regards to Barnes' speed would not have had any bearing on this case. However, if this Court feels that the proposed instruction should have been given, the refusal of said instruction would have been harmless error because Mitchell was given the "failure to control" instruction. "Failure to maintain control" would include the issue of speeding.

The jury instructions, considered as a whole, fairly and adequately instructed the jury, and the jury was not confused. Mitchell's proposed Jury Instruction No. D-2 did not contain a correct statement of law and was not warranted by the evidence.

2. THE TRIAL COURT PROPERLY ALLOWED HANNAH TO TESTIFY AS AN ACCIDENT RECONSTRUCTIONIST AND OFFER OPINIONS IN THIS CASE.

Mitchell claims that the trial Court erred in allowing Barnes' accident reconstructionist, James Hannah, to offer opinions regarding the subject accident. Mitchell's argument to the same is without merit. Hannah was clearly qualified to testify as an expert in this matter. Hannah testified that he had worked for the Jackson Police Department for almost twenty years. He further testified that "[f]or the latter 16 years of [his] career, [he] was with the accident traffic unit. [He] rode motorcycles everyday for about three years, and then [he] was an accident reconstructionist for the

last 13 years.” Tr. Transcr. vol. 5, 295:1-5. Today, Hannah owns and operates JJ Investigations, where he does accident investigations and reconstruction. He also does a lot of consulting. Tr. Transcr. vol. 5, 293:25-294:1. Hannah testified that he has “easily done over a thousand” accident reconstructions. Tr. Transcr. vol. 5, 298:5-11. According to Hannah, he received his training through the Mississippi Safety Responsibility Bureau. Tr. Transcr. vol. 5, 295:26-296:13. Moreover, Hannah testified that he received his certification in accident reconstruction and is a certified accident reconstructionist. Tr. Transcr. vol. 5, 297:4-19.

In regards to motorcycle crashes, Hannah testified that he has had extensive training and experience in the same. His testimony was as follows:

Q: And now in regard to testing of motorcycles and their crashes, have you had training in that?

A: Yes, I have. I had training in it before I worked them, and then I’ve worked many, many because my job entailed working serious accidents within the city of Jackson prior to me becoming JJ Investigations, also any accidents that may involve criminal prosecution or death.

So on a yearly basis, I was called to a 100, 150 accidents to gather the information and then possibly testify at Court pertaining to if it was a DUI or if someone was going too fast or these type issues came into play.

Tr. Transcr. vol. 5, 297:29-298:4.

When asked specifically regarding his experience in motorcycle crash testing, Hannah testified:

Q: [W]hat kind of testing did you do on the motorcycles that might pertain to this case?

A: We actually went out with motorcycles, and we slid them. We got off our gas at a known speed where no one else knew, and we take them and let them coast to a stop. We would apply front, back, rear brakes, identify what the marks left were, were they skid marks, were they not skid marks, put our known formulas to that to see if everyone came up to the similar calculations that resulted in the correct answer.

The formulas that we were using did reveal these type things. We also took motorcycles, dropped them off the back of trucks at 20 miles an hour, 30 miles an hour to see what would happen in a slide if at a known speed what the known distance would be so we could go back and apply this to real life situations. And on top of that I’ve worked many, many accidents and seen video of what happens within

motorcycle accidents at various facilities all over the nation. An example would be when a person on a motorcycle hits something - -

Tr. Transcr. vol. 5, 298:13-299:8.

Mitchell's argument, that Hannah was not qualified to give opinions in regards to this matter, was based solely on an Affidavit, prepared by Cecilia Kazery, which stated that there was not enough evidence for Hannah to attempt a reconstruction of this accident. In said Affidavit, Kazery , **who did not testify at trial and who was not an accident reconstructionist in this case**, stated that Hannah's methodology did not meet the standards required of an accident reconstructionist. She noted that accurate information had to be recorded of where the impact occurred and where the motorcycle ended up. Kazery further took issue with Hannah's methodology in determining the coefficient of friction and with his opinion as to where on the roadway the accident occurred.

Mitchell's claim that there was not enough evidence for Hannah to attempt a reconstruction of this accident, by the time he became involved in this case, is without merit. During the trial of this matter, Hannah testified that he was hired by Barnes as an accident reconstructionist. Hannah further testified that Barnes supplied him with several documents to review, including, but not limited to, the accident report, medical records of Barnes, photographs of the accident scene and photographs of Mitchell's car. In September of 2005, Hannah stated that he met Officer Foster and two surveyors, Richard Davis and Johnny Martin, at the accident scene. Tr. Transcr. vol. 6, 302:25-305:27. According to Hannah, Richard Davis is a "nationally certified accident reconstructionist also." Tr. Transcr. vol. 6, 303:16-17. A survey was conducted that day. Hannah used Officer Foster's landmarks to conduct the survey. Tr. Transcr. vol. 5, 272- 273; vol. 6, 322-323. Hannah testified as follows with regards to said survey, which was drawn to scale:

Q. And did you do a survey out there at that time?

A. Yes, it was done. The survey was done at my direction. The two young men I just

mentioned were operating the prism and the total station. They achieved the measurements that were things such as the width of the travel lanes, where certain driveways were, where certain buildings were, where the red lights were, and this is all done to scale so that we can make measurements from it today, last year, next year, whatever. And it's done to scale of that area.

Tr. Transcr. vol. 6, 303:22-304:5.

Hannah also testified that he took pictures of the accident scene that day. Tr. Transcr. vol. 6, 306.

According to Hannah's testimony, the longest view of the survey showed "an area from the Christ United Methodist Church's driveway . . . on south eastern side of Old Canton Road all the way to an area roughly 150 feet north of the Backyard Burger, which would encompass the area that this particular accident unfolded." Tr. Transcr. vol. 6, 304:17-23. The testimony regarding Hannah's opinion as to how this wreck occurred was as follows:

Q: Now, did you look at the picture to make a decision of what happened?

A: Yes. This [Exhibit P-3-I] is one of the photographs of the front of the car that I was discussing earlier. We were able to look at this particular photograph and glean the information that this particular car, whatever struck it, in this case we know it was a motorcycle, hit it in a sideswiping angle. It wasn't an angle into the car because the hood of the car is a flimsy material. Normally when they're damaged they replace them. They rarely repair them, and it would show damage if the object striking object, in this case which was a motorcycle, came into it at an angle. **It's very obvious that this was an accident of a sideswiping nature** that was passing in front of this particular car that it were - the principle direction of force for the other vehicle was not into this particular car.

Q: Now, did you form an opinion as to where you thought where the accident - - the impact actually occurred?

A: The impact on the two different vehicles or the area on the roadway?

Q: Well, the area on the roadway.

A: The area on the roadway based on where the vehicle came to rest, the known vehicle which was a motorcycle, which was identified by the officer. She showed me where she remembered it coming to rest.

And it also was an area I found through my investigation stayed consistent with most people of where the motorcycle came to rest on Old Canton Road north of the particular area where this driveway was, but not past the Backyard Burger. No one ever puts it past the Backyard Burger.

That information afforded me to determine that this was an accident as a motorcycle was going by, a vehicle pulled out and struck it to force it that direction.

If the rider of the motorcycle was coming back into the car, the rider would have come across and ended up off the roadway in to the parking lot.

Q: Now, as to the location of her car out in the road, did you form an opinion of that?

A: Well from the facts, there was never a fact of a skid mark, a gouge mark that would give us a specific area of impact. What we did have was all of the information I've heard even by sitting in the courtroom, reading depositions, talking to the officer has the car in that driveway area.

...

Yes. The location of that car has never been disputed either that it was in that driveway. The only dispute has been what location, was it in the street, was it out of the driveway. The location at final rest of these objects where the driver of that motorcycle - - where the motorcycle came to rest helps us to determine was that car in motion or where was that car sitting.

Q: And did you make a determination as to where the motorcycle could have wound up over to the left, all the way over if he had been going to the right like she testified at one point?

A: No, that wouldn't be possible. And the reason being is simple laws of physics. Objects in motion remain in motion unless they're acted upon by something. And if he is going in that angular back towards the parking lot, once he leaves his motorcycle, he has to end up in the parking lot.

Q: Is it any indication on the vehicle to indicate there was any lick whatsoever other than a straight clipping or a sideswipe?

A: Well, on the particular motorcycle, there was never any information that I was able to obtain that stated any damage to the front forks or anywhere other than down the passenger side, which is the right side of the motorcycle, which would have been the side that would have been exposed as he was passing the driveway.

Q: Was there any evidence that you could tell about from the distance he went down there as to the speed of the vehicle?

A: Well, it was actually two areas that I looked at in that. Was that to travel that distance and given the information that was provided and me knowing how motorcycles act after they're impacted, that they don't just hit the ground; that they do continue on until they get to a slower speed. Normally then they hit the ground. That's normally what happens when motorcycle accidents happen. I've been in them myself, so I know it even personally.

But what I did find was that there has been numerous testimony pertaining to what happened prior to getting to this area where the car was and the motorcycle was. So in putting both before and after, I was able to make a determination, yes.

Q: And what was that determination?

A: That the speed was in the 30 mile per hour range.

Q: Now, as a police officer investigating accidents, do you ordinarily accumulate all the facts that you could get from the scene?

A: Absolutely. And the most important fact is the scene itself so that we can look at what that evidence may be if we find any, or just what is afforded two different drivers from different angles at a scene of an accident so we can talk about what can happen in different areas.

Q: Now by drawing that survey, having the survey, what would that tell you?

A: That would give me the range of distances from the driveway to the red light, the range of distances from the driveway to the Backyard Burger. And if someone was to show me based on a to scale diagram of this area, not just pulling information from just what they remember, they could look at it and maybe reference it to a business, a driveway or a red light.

And then we can talk about known distances from that. Maybe we have to use the south edge, north edge and it may add 10 or 20 feet, but we still have a range that we can input our formulas and our information into.

Q. In doing your evaluation, was it important to talk to various witnesses?

A. Yes.

Q. And did you talk to what is supposed to be the other eyewitnesses that would be for the defense side?

A. Yes, I did . I spoke to them on the phone.

Q. You talked to them. And did anything they said cause you to form an opinion different from what you said?

A. No, it did not.

Tr. Transcr. vol. 6, 308:20-314:1.

Hannah used a slide-to-stop formula to determine the speed of Barnes' vehicle. Hannah testified that the formula was one of his "checks and balances" to determine whether this was a high speed or a low speed. He went on to testify that he uses the formula to determine speed from impact to final rest. Hannah testified that he also looked at what Barnes and Mitchell had to say about how this accident happened. Tr. Transcr. vol. 6, 324:11-26. Hannah testified that he "inputted time and distance formulas in there to see if it was possible for them to be going faster than that." Tr. Transcr. vol. 6, 324:27-29. Hannah then testified that he "found out no . . . based on perception and reaction and the amount of distance from the red light to where the impact occurred." Tr. Transcr. vol. 6, 324:29-325:3. According to Hannah, the formula that he used is a constant of 30, which is a pull of gravity. He stated that 30 was a rounded up figure, as the real figure is 29.736. Hannah stated that 30 is the standard that all accident reconstructionist use. He also stated that that is accident reconstruction 101, the minimum slide-to-stop formula. Tr. Transcr. vol. 6, 325:4-17.

Mitchell argues that Hannah admitted that he needed to know the distance the motorcycle

traveled from the area of impact with the car to the point of final rest in order to determine Barnes' speed. Barnes is uncertain as to why Mitchell is arguing this point, because Hannah testified that he did know the distance the motorcycle traveled from the area of impact with the car to the point of final rest. The testimony to which Mitchell is referring was as follows:

Q. Another figure that you have to have in order to use this formula is the distance that the vehicle traveled from the area of impact, the area of final rest, correct?

A. That is correct, the distance that it traveled with braking.

Q. Well, it doesn't matter whether it's braking or not because you have to be able to figure out whether braking was applied or whether it was skidding or whatever the vehicle was doing?

A. It matters when you're trying to get an accurate figure in this particular -- well, I'm sorry. Are we talking about this case, or we're talking about the book?

Q. In this case we're talking about did you have to use the distance that the motorcycle traveled as your understanding was from the area of impact to where you thought the area of final rest was?

A. **I used the distance from where the driveway was to where I was shown. And it was discussed that this is the approximate area where the vehicle -- the motorcycle came to rest. Within that distance there's been testimony -- and I also know from being a reconstructionist that the motorcycle was not on its side the entire time, that it was upright, a portion of that. And that's how they react in accidents.**

So in this particular case I could not use the entire distance. It would not be accurate. At some point it fell over, but initially it wasn't. And that's why I said what I said; that you have to know when it was in contact in sliding on the ground.

Q. And you don't know that, do you?

A. I never said I did.

Q. You don't have any idea where from the point of -- the area of impact to the final resting where it started sliding on its side?

A. I do not. **But I do know the area where it impacted and the area that it came to rest. Within that area it was upright, then it was on its side.**

Q. You did hear testimony. You were here yesterday when Mr. De La Rosa said it slid on its side the whole way or within just a few feet of the impact?

A. Yes, I heard him say that. But at another point I heard him say that he couldn't really say. After numerous questions he said that.

Tr. Transcr. vol. 6, 327:9-329:3.

Furthermore, Hannah testified that he met Delarosa at the accident scene, where Delarosa identified his location on the roof, as well as the place in which he first saw Barnes' motorcycle, the place in which the impact between Barnes' motorcycle and Mitchell's car occurred, and where

Barnes and his motorcycle came to rest. Moreover, Delarosa identified the place of rest directly in front of him. Supp. Transcript 7:16.

Another figure that Hannah had to use in his formula was the coefficient of friction. Mitchell argues that Hannah admitted that depending upon which number is used, it would have a big effect on how fast he determined the motorcycle was going. Mitchell further argued that Hannah admitted that he used a low force of friction, but had no scientific or factual basis for doing so. This is completely false. Hannah did have a scientific and factual basis for doing so. Hannah's testimony to the same was as follows:

- Q. The second number that you needed for this slide and stop formula is the force of friction, the force that acts on something sliding across the surface to slow it down?
- A. That is correct.
- Q. And the force of friction has a big affect depending on which number you use on how fast you determine that the motorcycle was going?
- A. That is correct.
- Q. If you use a very low number for the force of friction, then you're going to end up with a very low speed?
- A. That is correct.
- Q. Now the opinions that you gave in this case, you didn't give a range of speeds, you used the low end for the force of friction and assumed a low speed because of that?
- A. Well, the answer to your question is yes, I used a low force of friction or coefficient of friction. You're using a different word. And it was determined by me doing these type things, reconstructing accidents, especially a motorcycle accident, and actually having been in motorcycle accidents and having reconstructed it and worked them as a Jackson police officer and see what happens with motorcycles, I know that they don't immediately fall over; that they stay upright for some time before they fall over. So the common practice has been is that we do not use the entire number because you don't know when it's sliding or when it's upright.
- Q. And when it's sliding and when it's upright and what period of time it's sliding versus the period of time that it's upright makes a big difference on the coefficient of friction?
- A. The coefficient of friction won't really affect it until you can identify that it's sliding or sliding on the ground, or if the wheels are not free to rotate.
- Q. And in this case, you reduced the coefficient of sliding friction by half because you assumed that the motorcycle slid half way and rolled half way?
- A. No, I did not do that. That's not what I said.
- Q. Actually - -
- A. I said I reduced it, but I never said it - -

Q. All right. I asked you if there was any scientific basis for reducing the coefficient of friction by half, and you said that you simply picked a number, didn't you?

A. No, I didn't say that.

Q. Mr. Hannah, let me show you Page 54 of your deposition. I asked you, "Where did you come up with the number of using half of the coefficient of friction?" You said, "Again I was trying to give the benefit of the doubt. I don't really go with the extreme. I always play devil's advocate because I do accidents for everybody, criminal, civil, both sides and always like to come up with numbers that give us every benefit of the doubt."

And I said, "Is there any scientific basis for using half, or did you just pick a number." And you said, "Well, I picked a number because this is proven to be true over the years, but it has to be less than this. What I'm giving is the absolute number." But you said you just picked a number?

A. Can I see that if I can?

Q. You sure can.

A. I see. I'm a couple pages over. And I explained it to you at that time is that the reason I did that is because there was no evidence of any braking. We know the motorcycle stopped. We did not know at any point where there was braking or where it fell over on its sides or any of that.

So in doing this and actually taking motorcycles, letting them fall over on their side, and we've actually dropped them on their side, and they actually go back up and roll again, then fall over on their side, we've reduced the coefficient of friction just to get an accurate number, something closer. Its' still going to be high, but it's closer.

Q. Well, actually .2 is not high. This is what you ended up using.

A. I used .2. Can you show me that here 'cause I don't know of anywhere?

Q. If you used .4 and cut it in half, it gives you .2?

A. That is not what I did. If you show that to me, I can correct you on that also.

Tr. Transcr. vol. 5, 279:4-284:9.

Q. **Is it your testimony that the methods that you used in this case give you the highest possible speed that the vehicle could be going?**

A. Yes.

Q. You would agree that the published data for sliding motorcycles coefficient of friction ranges from .4 to .75?

A. No. The published data that I've seen, it stays around .4 to a .5.

Tr. Transcr. vol. 5, 285:7-18.

Hannah's opinion as to Barnes' speed was formed from the information that he had gathered and from the knowledge that he possessed on how motorcycles act after they are impacted.

According to Hannah, motorcycles don't just hit the ground. He testified that they "continue on until they get to a slower speed," and then "they hit the ground." Tr. Transcr. vol. 6, 312:2-17.

Mitchell further argues that Hannah admitted that there was no physical evidence left behind from the accident to show where anything was at the time of the accident and that Hannah had never seen either of the vehicles involved in the accident. Hannah did agree that there was no physical evidence at the scene when he went to observe the same; however, Hannah also explained that he had been to many scenes where he was the first person there and there was no physical evidence. Hannah testified as follows regarding this issue:

Q. Now, in this case when you went to the scene of the accident on September the 17th, 2005 there was nothing there?

A. Yes, there was something there.

Q. Well, the scene was there. The road was there. But there were no marks, no physical evidence from this accident at all, was there?

A. There was no physical marks from the accident, but there was plenty there. I thought you said there was nothing there.

Q. Well, obviously the road was there. The Backyard Burger was still there, but there was no physical evidence that this accident had occurred, correct?

A. **As I stated earlier, there was no physical evidence this accident occurred, but the berm was still. The trees on the side of the road was still there. The red lights were there, and the way the road was made. Even the home that this witness was on was still there and the gas pumps some other witnesses said they were at were still there.**

Q. **You never saw any oil spots, gouges, skid marks, scratches, no physical evidence in the road?**

A. **I did not. And I've been to many scenes where I've been the first one there and didn't see that.**

Q. Now, you testified about the damage to my client's car. You never actually saw her car, you just saw pictures?

A. Yes, just saw photographs of it as everybody has.

Q. You also testified a minute ago about the damage on the motorcycle where it was and where it wasn't. You never actually saw the actual motorcycle either, did you?

A. I did not, but I've heard testimony and asked the person that was there where was the damage to the motorcycle.

Q. That person being Mr. Barnes?

A. And the officer.

Tr. Transcr. vol. 6, 318:3-319:15.

Hannah's opinions were not baseless, as Mitchell claims. Many accidents lack physical evidence, such as skid marks; however, that does not mean that an accident reconstructionist lacks the ability to reconstruct that type of accident. Hannah testified that he reviewed the accident report; visited the accident scene; had a survey conducted at his direction; reviewed photographs of Mitchell's car; took and reviewed photographs of the accident scene; spoke to Barnes; spoke to the witnesses, including, but not limited to, Delarosa; spoke to and met with the investigating officer; listened to testimony in the courtroom; reviewed medical records of Barnes; and read depositions. Tr. Transcr. vol. 6, 303, 305-306, 308-310, 319, 321-323. Hannah testified that Officer Foster was able to show him approximately where the motorcycle was when she arrived at the scene, which was, of course, the area in which the motorcycle came to a rest. Hannah further testified that Officer Foster was also able to tell him that the car had pulled into the parking lot. According to Hannah, Officer Foster remembered landmarks, such as Backyard Burger, and remembered a particular lane. Tr. Transcr. vol. 5, 272, 273; vol. 6, 322-323. Hannah saw photographs of Mitchell's car and spoke to Officer Foster and Barnes about where the damage was on the motorcycle. Hannah testified that Barnes told him that he had damage down the right side of his motorcycle. Tr. Transcr. vol. 6, 319:2-24.

Mitchell complains about Hannah's opinion as to where on the roadway the accident occurred and states that he based such opinion on Barnes' version of the accident. Although Hannah did testify that "there was never a fact of a skid mark, a gouge mark that would give us a specific area of impact," he also testified that the location of Mitchell's car, being in the driveway, has never been disputed. The only dispute, per Hannah, was whether Mitchell's vehicle was in the street or out of the driveway. Tr. Transcr. vol. 6, 310:10-311:1. Hannah testified that "[t]he location at final rest of these objects . . . where the motorcycle came to rest helps us to determine was that car in

motion or where was that car sitting.” Tr. Transcr. vol. 6, 311:1-5. Hannah further testified that the information that he had obtained had parameters. According to Hannah, no one ever put the rider of the motorcycle any further than Pear Orchard. Tr. Transcr. vol. 6, 307:1-4. Therefore, in order to be able to discuss the case more accurately, Hannah wanted to go a little farther south. Hannah’s testimony to the same was as follows:

So in order to be able to discuss the case and talk about it accurately, I wanted to go a little farther south of there just so we could show this is an area that’s south of there, and that it all began in this particular area and he was always - - there’s never been a dispute about whether he’s going north, south, east or west. He was going in a northbound direction. . . .

Tr. Transcr. vol. 6, 307:5-13.

As previously mentioned, Hannah testified that Officer Foster showed him the area in which the motorcycle came to a final rest. Tr. Transcr. vol. 6, 309:17-21. Hannah further testified that “it was an area that [he] found through [his] investigation stayed consistent with most people of where the motorcycle came to rest on Old Canton Road north of the particular area where this driveway was, but not past the Backyard Burger.” Tr. Transcr. vol. 6, 309:22-27. According to Hannah, no one ever put the motorcycle past Backyard Burger. Tr. Transcr. vol. 6, 309:27-28.

The trial court did not allow Hannah to testify as to who he believed was at fault in this accident. Tr. Transcr. vol. 6, 314:2-7. As stated in Mitchell’s brief, the trial court ruled that Hannah’s testimony was a basis for cross examination. Tr. Transcr. vol. 5, 266. The court further held that Mitchell could provide her expert who had different conclusions than him. Barnes would show that Mitchell chose not call Kazery as a witness at trial to refute the testimony of Hannah.

In *Hyundai Motor Am.*, the Supreme Court of Mississippi held that different expert opinions create “[f]act questions for the jury and [are] not a basis for exclusion.” *Hyundai Motor Am.*, 53 So. 3d at 757 (Miss. 2011). The Court further held that such testimony “goes to weight and credibility

of such evidence and not its admissibility.” *Id.* This would be the purpose for the trial court’s Jury Instruction No. 3, that states:

The rules of evidence provide that where scientific, technical, or other specialized knowledge might assist the jury in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify and state his opinion concerning such matters. You will recall that expert testimony has been given in this case. You should consider each expert opinion received in evidence in this case and give it such weight as you may think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence, then you may disregard the opinion entirely.

(R . 346.)

The case at hand is similar to *Johnson v. Willbros Constr. (U.S.), LLC*, 2009 WL 1635756 (S. D. Miss., June 10, 2009). Mitchell mentions this case in her brief, stating that Judge David Bramlette found that lack of forensic evidence made the pre-impact maneuvers of the vehicles speculative; however, Mitchell fails to mention the fact that Judge Bramlette allowed Hannah to testify in regards to several other issues. In that case, the defendants, who were represented by Mitchell’s counsel’s law firm, filed a Motion to Exclude the Expert Testimony of James Hannah. Hannah had formed opinions regarding:

[T]he conditions of the road at the time of the accident; the pre-impact speeds of the vehicles; the pre-impact and post-impact maneuvers of the vehicles; the relative ability of each driver to avoid the collision based on average perception and reaction times; and an overall opinion regarding which driver caused the accident in question.

While the district court held that, “[t]here was insufficient evidence to support Hannah’s opinions about the pre-impact maneuvers of the vehicles,” the district court also held that **Hannah would be allowed to testify** “[a]s to the condition of the roadway, **the estimated speed of each driver**, the post-impact maneuvers as they are supported by the physical evidence, and the post-impact condition of the vehicles.” *Johnson v. Willbros Constr. (U.S.), LLC*, 2009 WL 1635756 (S.

D. Miss., June 10, 2009). Moreover, **the district court stated that while Hannah's use of the drag sled method may not be the most technical method, it is nevertheless a method accepted in the field of accident reconstruction.** Additionally, the district court held that the defendants would be, "allowed to explore the weight to be given to Hannah's calculations through cross-examination and presentation of their own expert witness at trial." *Johnson v. Willbros Constr. (U.S.), LLC*, 2009 WL 1635756 (S. D. Miss., June 10, 2009). Again, Mitchell chose not to call Kazery or any other accident reconstructionist as a witness at trial. Had Mitchell called an accident reconstructionist to testify, the expert would have had the opportunity to refute Hannah's testimony. Mitchell may have strategically chosen not to call an accident reconstructionist, because there was always a chance that the expert would get up on the stand and have to admit that Hannah was right. Barnes should not be punished for Mitchell's decision to not call an expert.

In *Sheffield v. Goodman*, 740 So. 2d 854, 856 (Miss. 1999), the Supreme Court of Mississippi held that, "A trial judge's determination as to whether a witness is qualified to testify as an expert is given the widest possible discretion and that decision will only be disturbed when there has been clear abuse of discretion." *Sheffield v. Goodman*, 740 So. 2d 854, 856 (Miss. 1999) (citing *Palmer v. Biloxi Reg'l Med. Ctr., Inc.*, 564 So. 2d 1346, 1357 (Miss. 1990)). Hannah's testimony was reliable. It is clear that from his experience and training, as well as observing the scene of the accident, speaking with the investigating officer, speaking with Barnes, speaking with Delarosa, reviewing the accident report, reviewing the pleadings in the case, reading the depositions of Barnes and Mitchell, looking at the photographs and conducting a survey, that Hannah was qualified to testify as an expert in this matter. Also, Hannah's opinions were based upon the scientific methods and procedures that he used, as outlined above. Certainly James Hannah was qualified to give an opinion as to the speed of the motorcycle and as to which side of the motorcycle

sideswiped the front bumper of the car.

3. THE TRIAL COURT PROPERLY ALLOWED THE TESTIMONY OF OFFICER MICHELLE FOSTER REGARDING STATEMENTS MADE BY THE PARTIES TO THIS LAWSUIT AND PROPERLY ALLOWED THE INTRODUCTION OF HER REPORT WHICH INCLUDED THE SAME.

In her final assignment of error, Mitchell argues that the trial court should not have allowed Officer Foster to offer opinions as to fault and how the accident occurred. Said assignment of error lacks merit, because Officer Foster never offered any opinions. Moreover, Officer Foster was not offered as an accident reconstructionist, was never asked to give expert testimony and was never asked to give any opinions as to how the accident in question occurred. She simply took the information that Mitchell provided to her on the date of the accident and converted that information into language that was applicable on the report that she was filling out. Officer Foster testified at trial that, in filling out her report, she relied mostly upon the information and facts that were provided to her by Mitchell on the date of the accident in question. Tr. Transcr. vol. 4, 144:3-5. She testified that, for the most part, the main facts about how the accident occurred came from Mitchell. Tr. Transcr. vol. 4, 144:3-5.

According to Officer Foster, Barnes was being loaded into the ambulance when she arrived at the scene. Tr. Transcr. vol. 4, 133-134. Therefore, she was unable to talk to him at that time. Tr. Transcr. vol. 4, 135-136. The only person she spoke to at the accident scene was Mitchell. Tr. Transcr. vol. 4, 136-137. Officer Foster testified that Mitchell told her that "she was easing out in the road when she clipped the vehicle." Specifically, Officer Foster testified as follows with regards to what was said between her and Mitchell:

- A. I asked her if she was okay. She said yes. She was doing a whole lot of crying and everything. And I asked her what happened and that's when she said that she was easing out into the road when the vehicles collided when she clipped the vehicle. And I asked her what direction she was facing and where she was

trying to go.

Q. When she says easing out in the road, did she say she clipped the vehicle?

A. She did say she was easing out in the road when she clipped the vehicle.

Tr. Transcr. vol. 4, 137:22-138:4.

At trial, Mitchell questioned Officer Foster about why her report did not specifically say that Mitchell made the aforementioned statements. Said testimony was as follows:

Q. Your report doesn't say Ms. Mitchell made any of these statements, correct?

A. I don't say stated in my report.

...

Q. Typically when you fill out a report and you take statements from each of the drivers, you would say driver of vehicle 1 told me this, driver of vehicle 2 told me this, wouldn't you?

A. Before we changed our accident report form, we normally did it that way. But since we went to the new report form, we were not actually told or instructed to put stated by the drivers. We only put what information that we could actually verify.

Tr. Transcr. vol. 5, 163:12-164:1.

When asked whether or not she ever spoke to Barnes, Officer Foster said that she tried to talk to him at the hospital but stated that "[h]e was kind of out of it." Tr. Transcr. vol. 4, 143-144. She did, however, testify that she asked him about his speed at the time of the accident. Officer Foster testified that Barnes told her that he was traveling at a speed of approximately 30 miles per hour. Tr. Transcr. vol. 5, 156, 162. She also testified that the speed limit was 35 miles per hour. Tr. Transcr. vol. 5, 156.

Moreover, Officer Foster testified that Mitchell never said anything about what Barnes was doing at the time of the accident. Tr. Transcr. vol. 4, 138:13-15. Mitchell never told Officer Foster that Barnes was speeding and/or "popping a wheelie." If he had actually been doing either of the two, there is no question that Mitchell would have informed Officer Foster of those facts.

Furthermore, Officer Foster testified that she obtained some of the information on the police report by observing the scene of the accident. Tr. Transcr. vol. 4, 138. Officer Foster testified that

when she arrived at the scene she saw the motorcycle lying in the roadway. Her testimony was as follows:

A. When I got on scene, I saw a motorcycle in the road, people on the side. . . .

Tr. Transcr. vol. 4, 133:1-2.

She further testified that the motorcycle had stopped in the southbound lane of Old Canton Road. Tr. Transcr. vol. 4, 134:8-10. Officer Foster was asked to look at Exhibit P-3-C, which was a photograph of the accident scene. Through that photograph, Officer Foster showed the jury where the motorcycle was sitting over in the middle lane. Tr. Transcr. vol. 4, 135:9-14.

This is not a complicated accident. Officer Foster, the officer assigned to the this accident, had worked hundreds of accidents for the Jackson Police Department prior to the subject accident. She has extensive training in her profession. Officer Foster testified that she prepared the accident report in her regular course of business and stated that it was regular practice for the police department to make such a report. Tr. Transcr. vol. 4, 144. She further testified that all the information on the accident report was gathered by her. If Barnes would have been popping a wheelie, this information would have been given to the officer at the scene of the accident, either by Mitchell or one of the alleged witnesses. Moreover, this information would have been mentioned on the accident report. Additionally, if Barnes would have been traveling at a speed of sixty to eighty miles per hour, as Mitchell claims in her brief, Barnes would not have survived the accident.

When Officer Foster arrived at the scene, Mitchell's car was not on Old Canton Road, but was located in the Backyard Burger Parking lot. Officer Foster said that she found Mitchell sitting in the grass. At that time, the Officer knew nothing about the accident. It wasn't until the officer was able to speak with Mitchell that the facts of the subject accident were presented to her. Officer Foster stated that Mitchell told her where the accident occurred and showed her the location of her

car at the time of the accident. Officer Foster testified that, while at the accident scene, she asked for independent witnesses, but no one came forward. Tr. Transcr. vol. 4, 144. Therefore, the only way that Officer Foster was able to get the facts of the accident at the scene was from Mitchell. The officer testified that she put the facts on the accident report in the exact manner in which Mitchell presented them. Moreover, the diagram on the accident report was drawn in a manner replicating Mitchell's version of how the accident occurred. It was not until Barnes filed his lawsuit that Mitchell changed her version of the story.

Also, it was not error to allow Officer Foster to testify to the estimated speed of Barnes. Officer Foster received that information from Barnes himself.

Mitchell argues that Officer Foster determined that Mitchell was guilty of "failure to yield to the right of way." Officer did not determine this. Mitchell told Officer Foster this information. With regards to the category of "contributing circumstances" on the accident report, Officer Foster testified that she marked "[f]ailure to yield the right of way" with respect to Mitchell and "[n]o apparent improper driving" with respect to Barnes. **Officer Foster testified that she marked "[f]ailure to yield the right of way" based on what Mitchell had told her.** She also testified that she marked "[n]o apparent improper driving" based strictly on what she was told by the parties. 155:10-156:3. This was not her giving an opinion. As Mitchell stated in her brief, "statements and information contained within the report that are factual in nature would be admissible and qualify as information routinely obtained in the regular course of business under Rule 803(6)." *Bingham v. State*, 723 So. 2d 1189, 1192 (Miss. App. 1998).

The facts in *Rogers* are distinguishable from those present in this case. In the case at hand, you don't have to be an expert to know that Barnes had the right of way and that Mitchell's statement that she gave to Officer Foster was the equivalent of admitting that she had failed to yield the right

of way to Barnes' vehicle.

Also, in her final assignment of error, Mitchell argues that the admission of certain portions of the accident report into evidence was error. Again, said assignment of error lacks merit. Mitchell alleges that the information in the accident report contained inadmissible opinions and hearsay. Officer Foster testified that she asked if there were any witnesses, and testified that no witnesses appeared out at the scene. Tr. Transcr. vol. 4, 144:6-10. Therefore, the only individuals mentioned in the accident report are Mitchell and Barnes. As such, Mitchell is basically arguing that Officer Foster should have been prohibited from testifying as to what Mitchell and Barnes had told Officer Foster. However, Mitchell and Barnes are both parties to this lawsuit; therefore, anything that they would have told Officer Mitchell would not have been hearsay, but would have been an admission. Mitchell admitted to Officer Foster that she had failed to yield the right of way when she informed her that she clipped Barnes' vehicle. Under the law, this is failure to yield the right of way and is not an opinion of the officer. Said statement qualified as an admission and was not hearsay. Officer Foster never gave any opinions or expert testimony in this case. She only testified as to the information that she was given by the parties, primarily the facts that were provided to her by Mitchell. Basically, Mitchell admitted to the Officer that the wreck was her fault and then changed her story after the lawsuit was filed.

The trial court's rationale for allowing the accident report to come into evidence was that it constituted a business record under Miss. Rule of Evid. 803(6). Said rationale was correct. The Supreme Court of Mississippi has held that "police reports prepared during the investigation of an accident should be admissible into evidence." *Copeland v. City of Jackson*, 548 So. 2d 970, 975 (Miss. 1989). In analyzing the admissibility of police reports, the Court looked to Rule 803(6) of the Mississippi Rules of Evidence, which states:

Records of Regularly Conducted Activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness or self-authenticated pursuant to Rule 902(11), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Miss. R. Evid. 803(6).

The Court also looked at the comments to Rule 803(6), which states in part:

[H]owever, the source of the material must be an informant with knowledge who is acting in the course of the regularly conducted activity. This is exemplified by the leading case of *Johnson v. Lutz*, 253 N.Y. 124, 170 N. E. 517 (1930) which is still the applicable law today under the rule. That case held that a police report which contained information obtained from a bystander was inadmissible; the officer qualified as one acting in the regular course of business, but the informant did not.

Rule 803(6) specifically includes diagnoses and opinions as proper subjects of admissible entries, as well as the traditionally admissible entries pertaining to acts, events and conditions. The rule calls for the exercise of judicial discretion if there is an indication of a lack of trustworthiness. This permits the court to take into account the motivation of the informant. The phrase "data compilation" includes, but is not limited to, electronic information storage systems. . . .

Comments to Miss. R. Evid. 803(6).

The Court further held that "[i]n holding such report admissible [it] should not be understood as holding all the contents of the report [are] necessarily admissible. For example, there may be notations in such a report which are recitations of statements of others, and would be inadmissible even though the officer was present in court testifying." *Copeland*, 548 So. 2d at 975-976.

The case at hand is similar to *Fisher v. State*, 609 So. 2d 268, 273-274 (Miss. 1997). In *Fisher*, the detective obtained Fisher's age during the regular course of investigation. However, the source was Fisher, and Fisher was not routinely engaged in regularly conducted activity. Therefore, the statement regarding his age was inadmissible under the M.R.E. 803(6) hearsay exception.

Nevertheless, the Mississippi Supreme Court held that the statement of age made by Fisher to the investigating officer was admissible because the statement qualified as an admission and was not hearsay. Fisher, 690 So. 2d at 274. Such is the case here. In the case at hand, Officer Foster obtained facts regarding the accident in question during the regular course of investigation. The main source with regard to those facts was Mitchell. As Mitchell was not routinely engaged in regularly conducted activity, her statement regarding how the accident occurred would be inadmissible under the M.R.E. 803(6) hearsay exception; however, the statement would come into evidence as an admission and would not be hearsay.

Furthermore, "[i]n *Beech Aircraft*, the United States Supreme Court stated that certain portions of investigative reports would not be inadmissible simply because they might contain conclusions or opinions so long as 'the conclusion is based on a factual investigation and satisfies the Rule's trustworthiness requirement.'" *Jones v. State*, 918 So. 2d 1220, 1231 (Miss. 2005) (quoting *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 170 (1988)). Certainly, Officer Foster had no reason to suspect that Mitchell was lying when Mitchell was admitting that the accident was her fault. All initial evidence substantiated this.

Mitchell further argued that Officer Foster was allowed to introduce a diagram that she drew on the accident report showing her impression of how the accident happened, along with a written description of her conclusions. Officer Foster did not draw her impression of how the accident happened, or give her impression in a written description. She drew Mitchell's version of what had occurred in the accident, on the report. As far as the diagram on the accident report, Officer Foster based the drawing on the facts given to her at the accident scene by Mitchell. As Barnes was not able to give a statement at the accident scene and no witnesses came forward at the scene of the accident, Officer Foster had no other source at the scene, other than Mitchell. Mitchell showed

Officer Foster where the impact occurred, showed her the location of her car and Barnes' motorcycle, and told her that she pulled out onto Old Canton Road and clipped Barnes.

Officer Foster, in the course and scope of her employment, was dispatched to the scene of the accident. Upon arrival, as Barnes was being loaded into the ambulance, Officer Foster was only able to speak with Mitchell at the scene. Moreover, as Mitchell had moved her vehicle prior to the officer's arrival, Officer Foster was only able to gather the facts of the accident and create a diagram of said accident through statements and recreation of the accident through Mitchell. Without Mitchell, Officer Foster would have had no idea how this accident occurred. Mitchell supplied Officer Foster with the facts of how the accident occurred, and the officer put these facts into her report. The officer would not have made up these facts. Now, because Mitchell admitted at the scene of the accident that she pulled out onto Old Canton Road and clipped Barnes, causing the subject accident, Mitchell wants to exclude the officer's entire testimony and report. Everything in Officer Foster's report, other than Barnes' speed, came directly from Mitchell. Had the accident report been excluded from evidence, there would be no record of how Mitchell told the officer how the accident occurred. The accident report bolstered the testimony of the investigating officer.

The accident report was admitted into evidence, and Officer Foster was available to testify regarding her report. Mitchell was allowed to cross-examine Officer Foster regarding conflicting statements from her trial testimony and the report itself. As Officer Foster's testimony and report did not contain opinions as to fault and how the accident happened, this assignment of error lacks merit.

CONCLUSION

Barnes respectfully submits that, in regards to each of the three issues addressed

herein, the trial court did not err in its' decisions. The trial court refused to grant Mitchell's proposed Jury Instruction No. D-2, because it was an improper instruction. However, the trial Court gave Jury Instruction No. 9, which was almost identical to the speed instruction at issue in this case.

Furthermore, Hannah was qualified to testify as an accident reconstructionist at the trial of this matter, and the trial Court did not err in allowing his testimony. It is clear that from his experience and training, as well as observing the scene of the accident, speaking with the investigating officer, speaking with Barnes, speaking with Delarosa, reviewing the accident report, reviewing the pleadings in the case, reading the depositions of Barnes and Mitchell, looking at the photographs and conducting a survey, that Hannah was qualified to testify as an expert in this matter. Also, Hannah's opinions were based on the scientific methods and procedures that he used, as outlined above. Certainly James Hannah was qualified to give an opinion as to the speed of the motorcycle and as to which side of the motorcycle sideswiped the front bumper of the car.

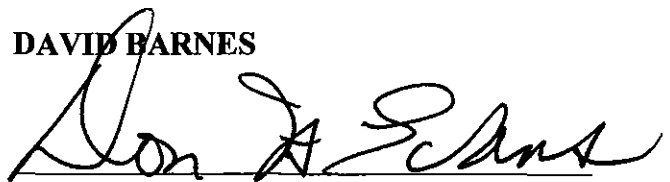
Finally, the trial Court did not err in allowing the testimony of Officer Michelle Foster regarding statements made by the parties to this lawsuit and did not err in allowing the introduction of her report which included the same. Officer Foster, in the course and scope of her employment, was dispatched to the scene of the accident. Officer Foster was only able to gather the facts of the accident and create a diagram of said accident through statements and recreation of the accident through Mitchell. Without Mitchell, Officer Foster would have had no idea how this accident occurred. Mitchell supplied Officer Foster with the facts, and the officer put these facts into her report. Furthermore, everything in Officer Foster's accident report, other than Barnes' speed, came directly from Mitchell. Had the accident report been excluded from evidence, there would be no record of how Mitchell told the officer how the accident occurred. The accident report bolstered the testimony of the investigating officer.


Although Mitchell would have you believe otherwise, this is a very simple case. Barnes, through all of the evidence and testimony, has shown that Mitchell pulled out onto Old Canton Road at a time when it was unsafe to do so and collided with Barnes' motorcycle, causing Barnes to suffer severe injuries. Prior to the filing of this lawsuit, both Barnes and Mitchell told this same recount of the accident. Afterwards, Mitchell changed her story. Now, because Mitchell has a different version of the subject accident, and because her three witnesses have given completely absurd, illogical, different, and utterly ridiculous testimonies of how the subject accident occurred, Mitchell feels that the trial Court should have granted an improper instruction, should have excluded Hannah's testimony, and should have excluded the testimony of Officer Michelle Foster regarding statements originally made by Mitchell at the scene of the subject accident as well as the introduction of her accident report, which included the same. Barnes would show that the Court did not err in its' decisions and that the both parties were provided a fair trial. The facts in this case were so overwhelmingly in favor of Barnes that one could easily see why the jury ruled in his favor. This Court should uphold the trial court's denial of Mitchell's Motion for Judgment Notwithstanding the Verdict, or in the Alternative, for a New Trial.

Respectfully Submitted,

DAVID BARNES

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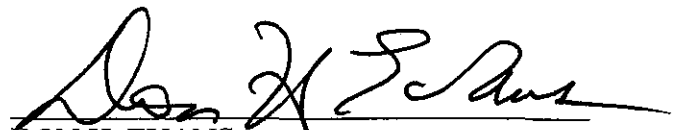
CERTIFICATE OF SERVICE

I, Don H. Evans, do hereby certify that I have this day mailed, via United States Mail, postage prepaid, a true and correct copy of the above and foregoing instrument to:

The Honorable Tomie T. Green
Hinds County Circuit Court Judge
P.O. Box 327
Jackson, MS 39205

Michael F. Myers, Esq.
Currie Johnson Griffin Gaines & Myers, P.A.
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This the 24th day of June, 2011.


DON H. EVANS