IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2010-CA-00045

CHARLES HUBBARD — APPELLANT

VERSUS

DELTA SANITATION OF MISSISSIPPI, LLC — APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT
NO. A2401-08-140

BRIEF OF APPELLEE

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

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

1. Charles Hubbard, Appellant
2. Delta Sanitation of Mississippi, LLC, Appellee
3. Honorable Lawrence P. Bourgeois, Jr.
4. James K. Wetzel, Esquire, Attorney for Appellant
5. Robert W. Wilkinson, Esquire and Joshua W. Danos, Esquire, Attorneys for Appellee

Respectfully submitted, this the 30th day of July, 2010.

APPELLEE, DELTA SANITATION OF MISSISSIPPI, LLC

By: _____
Joshua W. Danos (MSB#101501)
Robert W. Wilkinson (MSB#7214)

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BRIEF OF APPELLEE, DELTA SANITATION OF MISSISSIPPI, L.L.C.

COMES NOW, the Appellee, Delta Sanitation of Mississippi, L.L.C., in the above styled and numbered cause, by and through its attorneys of record, Dogan & Wilkinson, PLLC, and files this brief, to show as follows:

I. STATEMENT OF THE ISSUES

A. The Circuit Court of Harrison County, Mississippi did not commit reversible error in refusing to impose an additur as the Jury verdict of $3,000.00 was not against the overwhelming weight of the evidence;

B. The Circuit Court of Harrison County, Mississippi did not commit reversible error in ruling on evidentiary matters concerning Plaintiff's diagnosis of multiple sclerosis;

C. The Circuit Court of Harrison County, Mississippi did not err in awarding Defendant costs pursuant to a timely and proper Offer of Judgment.

II. STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS AND DISPOSITION OF CASE

The Plaintiff originally filed suit in Harrison County, Mississippi for alleged injuries he sustained when an employee of the Defendant rear-ended his vehicle in Gulfport, Mississippi. Prior to trial, Plaintiff moved *in Limine* to exclude evidence that he suffered from multiple sclerosis. This motion was unopposed. Although Plaintiff sought to withdraw this motion after voir dire was complete, the trial Judge correctly stood by his previous ruling to exclude said evidence pursuant to Plaintiff's own motion. Liability was stipulated at trial by the Defendant. Causation and damages, however, were vehemently contested.

At trial, Plaintiff called three witnesses, himself, his wife, and Dr. Eric Graham. Defendant called two witnesses, the driver of the vehicle, David Walker, and Dr. Lennon Bowen, a neurologist, offered to rebut causation and damages testimony offered in Plaintiff's case-in-chief. In closing, Plaintiff requested an award of $602,540.01, consisting of a replacement bumper, costs associated

with pre-surgery medical treatment, costs associated with a neck fusion performed by Dr. Eric Graham, costs associated with post-surgery treatment, lost wages related to the neck surgery, and an award for pain and suffering, mental anguish, scarring, and loss of enjoyment of life.

The Jury, finding liability (as stipulated), found in favor of the Plaintiff and awarded $3,000.00, presumably for the replacement bumper, medical treatment associated with those injuries deemed related to the accident, and any pain and suffering related to the accident. The trial Court entered this verdict.

Prior to the trial of this matter, Defendant made an Offer of Judgment pursuant to Mississippi Rule of Civil Procedure 68, in the amount of $30,000.00. The Offer was made more than 15 days before the date of trial as required by the Rule, but was promptly refused by Plaintiff prior to trial. The Offer of Judgment was, as seen herein, more than the ultimate verdict of the Jury. On appeal, Plaintiff does not challenge whether the Offer was properly made, nor whether costs should be awarded pursuant to the Offer. The sole issue on appeal relating to the Offer is whether the "costs" awarded are proper under Rule 68.

Plaintiff filed a Motion for Additur, or Alternatively, for New Trial on Damages claiming the verdict was so inadequate that it indicated bias, prejudice, or passion, and was additionally contrary to the overwhelming weight of the evidence.[1] The current appeal does not raise issues regarding bias, prejudice, or passion, therefore argument on these items appears moot. The trial Judge rightfully denied Plaintiff's motion.

Defendants timely filed a Motion for Costs relating to the above-referenced Offer of Judgment, claiming costs incurred after formal denial of the Offer. The trial Court granted

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[1] Merely as a point of record, Plaintiff did not move for a judgment notwithstanding the verdict as represented in his brief.

Defendant's motion and awarded $4,012.03 ($7,012.03 in costs incurred, less the $3,000.00 verdict in favor of the Plaintiff).

Plaintiff now appeals based on 1) the trial Court's refusal to grant additur, 2) the trial Court granting *Plaintiff's own* motion to exclude evidence, and 3) the award of Defendant's costs related to the Offer of Judgment.

B. STATEMENT OF RELEVANT FACTS

On December 1, 2006, Plaintiff was traveling on HWY 90 toward Cowan-Lorraine Rd. in Gulfport, Mississippi when he came to a stop at a traffic signal in an attempt to turn north. *See Complaint, Clerk's Record (CR) pg. 12.* Defendant's vehicle, driven by employee, David Walker[2], pulled behind Plaintiff's truck. *Id.* While the testimony at trial differed on whether Defendant came to a complete stop before proceeding, at some point Defendant rear-ended Plaintiff's vehicle. Again, liability was stipulated at trial. *See Stipulation of Liability*, marked as Record Excerpt (RE) 1-2.

As a result of the accident, Plaintiff claimed physical injuries to his lower back and neck. *See CR, pg. 14.* In deposition and again in trial, Plaintiff claimed progressive pain, weakness, tingling and numbness which radiated down his left arm as a result of the neck injury. *See Trial Transcript (TT), pg. 85.* Plaintiff admitted he suffered from lower back problems prior to the accident, including bulging discs. *See TT, pg. 62.* On lead examination, he claimed he had never experienced any type of neck injury prior to December 1, 2006 and had never been treated at any previous time for neck-related complaints. *See TT, pg. 65.* Additionally, Plaintiff claimed at trial he had never suffered from the alleged left arm symptoms until the accident. *See TT, pg. 87.*

Mr. Hubbard sought medical treatment for continued back and neck pain until 2008 when

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[2] Delta Sanitation of Mississippi, L.L.C. and/or David Walker will hereinafter be referred to as "Defendant" or "Delta."

Dr. Eric Graham performed a cervical spine fusion at two levels, C4/5 and C5/6. Dr. Graham was deposed on July 16, 2009 and his video deposition was played before the jury at trial.[3] Ultimately, Dr. Graham opined that Plaintiff's alleged neck injuries and related left arm impingement were causally related to the December 2006 accident. *See Graham Deposition, pg. 27.* In his opinion, Plaintiff's lumbar spine problems pre-existed the accident. *See Graham Deposition, pg. 31.*

Despite Plaintiff's assertion and Dr. Graham's belief that Mr. Hubbard's cervical issues and left arm impingement were a result of the accident, in Defendant's case-in-chief, much evidence was presented to the jury indicating these problems pre-existed the accident, and were therefore causally unrelated thereto. Evidence was also introduced by both parties that Plaintiff's lumbar problems were unrelated to the accident. Numerous medical records of the Plaintiff were introduced indicating Plaintiff suffered from lower back, neck, and left arm ailments prior to the accident. Defense expert, Dr. Lennon Bowen testified that based on his review of the medical records, the injuries alleged by the Plaintiff pre-existed December 1, 2006, and were thus unrelated to the accident. His exact testimony on these issues will be included herein. Accordingly, it was argued by counsel for the defense that surgery, medical treatment, medical bills, lost wages, pain and suffering, etc. claimed at trial were likewise unrelated to the accident.

Despite Plaintiff's appellate assertions that the verdict was against the overwhelming weight of the evidence, there was indeed, a substantial amount of proof from which a reasonable jury could

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Only portions of Dr. Graham's deposition were played before the jury as Plaintiff's counsel was instructed to redact testimony which mentioned multiple sclerosis. Plaintiff submitted a hard copy of the deposition to be marked for identification as Plaintiff's Trial Exhibit 8. While the copy marked reflects what Plaintiff's counsel intended to redact, the video, due to technical difficulties, included more than was anticipated, including Dr. Graham mentioning that Plaintiff suffered from multiple sclerosis. Because there is no trial record before the Court as to what was actually played to the jury, Defendant hereby moves the Court that either the deposition transcript be removed from the appellate record in whole, or that it be included in whole so as to not maintain an inaccurate or misleading appellate record. Out of an abundance of caution, Defendant will assume for purposes of this Brief, that the Court will allow the trial transcript in its entirety. If further briefing on this issue is required, Defendant will do so per the Court's instruction.

determine the vast majority of Plaintiff's alleged damages pre-existed December 1, 2006, and were thus causally unrelated to the accident.

III. SUMMARY OF THE ARGUMENT

First, there was substantial evidence offered at trial (via medical records and expert testimony) challenging causation which allowed the jury to return a verdict for less than the amount sought by Plaintiff. As such, the verdict was not against the overwhelming weight of the evidence and the trial court was justified in denying additur. Second, the evidence of multiple sclerosis was excluded on Plaintiff's own motion, therefore he has waived any right to appeal this issue. Furthermore, instead of using the term "multiple sclerosis" or "MS," Plaintiff was allowed to offer extensive evidence about the disease and its effects, instead referencing a "neurological disorder." Thus, no harm was visited by the exclusion and any error was harmless. Finally, the costs awarded upon Defendant's Motion for Costs pursuant to the Offer of Judgment are either 1) not appealable because not challenged at trial, or 2) entirely proper and within the province of Mississippi Rule of Civil Procedure 68. For these reasons, Plaintiff's appeal should be denied and the jury's verdict and trial court rulings should be affirmed in whole.

IV. ARGUMENT AND AUTHORITY

A. The Jury Verdict of $3,000.00 Was Supported by the Evidence at Trial

Plaintiff makes several assertions in suggesting the verdict of $3,000.00 was against the overwhelming weight of the evidence, including the following: 1) the amount of medical bills, lost wages, and property damage admitted into evidence was stipulated at trial, 2) Plaintiff's Expert, Dr. Eric Graham was "uncontradicted" in his opinion that the accident caused the alleged injuries and resulting surgery, and 3) the "jury [came] up with a round amount of $3,000.00."

i. Additur: Legal Authority

In reviewing a trial court's grant or denial of an additur, the Court's standard of review is limited to an abuse of discretion. *Rodgers v. Pascagoula Pub. Sch. Dist.*, 611 So.2d 942, 945 (Miss.1992); *State Highway Comm'n v. Warren*, 530 So.2d 704, 707 (Miss. 1988). The party seeking the additur bears the burden of proving his injuries, loss of income, and other damages. The evidence must be viewed in the light most favorable to the defendant, giving him all favorable inferences that may be reasonably drawn therefrom. *Rodgers*, 611 So.2d at 945; *Odom v. Roberts*, 606 So.2d 114 (Miss. 1992); *Copeland v. City of Jackson*, 548 So.2d 970, 974 (Miss. 1989); *Hill v. Dunaway*, 487 So.2d 807, 811 (Miss. 1986).

The amount of damages awarded is primarily a question for the jury. *South Cent. Bell Tel. Co. v. Parker*, 491 So.2d 212, 217 (Miss. 1986); *Edwards v. Ellis*, 478 So.2d 282, 289 (Miss. 1985). Awards set by jury are not merely advisory and generally will not be "set aside unless so unreasonable as to strike mankind at first blush as being beyond all measure, unreasonable in amount and outrageous." *Rodgers*, 611 So. 2d at 945 (*citations omitted*). Finally, "additurs represent a judicial incursion into the traditional habitat of the jury, and therefore should never be employed without great caution." *Gibbs v. Banks*, 527 So.2d 658, 569 (Miss. 1988).

ii. Was the Verdict Against the Overwhelming Weight of the Evidence?

a. Evidence of Medical Bills, Lost Wages, Mileage and Property Damage Were Introduced at Trial

Plaintiff correctly asserts that Defendant stipulated to the admissibility of the medical records/bills, mileage, and the amount of property damage occurring to the vehicle. Over objection, evidence of lost wages were similarly admitted. However, introduction of evidence of costs incurred by a plaintiff does not equate to an admission that all amounts before the jury were causally related

to the accident in question. Stipulation to the amounts of medical bills and/or mileage to and from a physician's office has no impact on the ability to challenge the causal link between the alleged wrongdoing and the treatment or expenses.

In support of his appellate brief, Plaintiff states that Defendant's stipulation to introduction of medical bills also constitutes an admission that the "medical bills were both necessitated and sustained by HUBBARD for injuries arising directly from the December 1, 2006 vehicular collision." *See Appellant's Brief, pg. 18.* This unfounded statement is patently false and is a misrepresentation of what occurred at the trial level and of the law in Mississippi.

First, the crux of Defendant's case at trial was that all injuries alleged by Plaintiff in this action (back, neck, and left arm) pre-existed December 1, 2006, thus no treatment, lost wages, or pain and suffering related to these injuries was causally related to the accident. This was an affirmative defense set forth in Defendant's answer, the subject of Defendant's Expert Designation, the prime topic of Defendant's opening and closing arguments, and the entirety of the substantive testimony offered by Defendant's expert, Dr. Lennon Bowen. To now assert causation was admitted at trial because medical bills were stipulated into evidence is wholly disingenuous.

Tellingly, at trial, during arguments regarding the form of the verdict, counsel for Plaintiff made the following astute observations:

> **Mr. Wetzel**:
> I think the jury could come back and find zero damages, but I don't see how you can find for the defendant. They've already admitted liability.
> ...
> If they find there's no damages, they put no damages.
> ...
> If you don't prove it, they simply put zero damages.

See TT, pg. 268. As such, despite briefing to the contrary, Plaintiff was acutely aware that causation was contested and could potentially result in less than the cumulation of the alleged damages he

posed to the jury.

Additionally, Plaintiff casually states as if it were law that stipulation of admissibility of medical bills deems all such bills causally related to the accident in question. This is not the law of Mississippi, much less any other relevant jurisdiction. Not surprisingly, no case law was cited by Plaintiff for this proposition.

There is case law to the contrary however, and it is quite long-standing. In Mississippi, to succeed in a claim for negligence, one must assert and prove the following elements: 1) duty owed, 2) breach of that duty, 3) **a causal relationship between the breach and the alleged damages**, and 4) damages. *Todd v. First Baptist Church of West Point*, 993 So.2d 827 (Miss. 2008). Thus, "an essential part of the claim in a personal injury tort case is to demonstrate, **not only the extent of the injury**, but that the negligence of the defendant was the **proximate cause** of the injury." *Busick v. St. John*, 856 So.2d 304, 307 (Miss. 2003).

In this case, Plaintiff arguably put on evidence of damages in the form of the bills, lost wages, etc. However, evidence of damages alone are insufficient to succeed in a personal injury claim of this nature. *Id.* As will be seen herein, much evidence was offered by Defendant to suggest the damages were, in fact, not causally related to the December 1, 2006 accident.

In short, while medical bills, lost wages, and mileage were allowed into evidence, Plaintiff still maintains the burden of proving causation relating to these alleged damages. *Id.* As will be demonstrated in the following section, the jury was presented extensive evidence refuting the element of causation. Based on the credible evidence, the jurors found most of the offered bills and expenses actually incurred by the Plaintiff (and admitted per stipulation), were not causally related to the wreck.

b. Medical Records and Expert Testimony Served as Evidence that Plaintiff's Alleged Injuries Were Not Causally Related to the Accident

Plaintiff claims Dr. Graham was "uncontradicted" in his opinion that the alleged injuries and subsequent treatment, surgery, lost wages, and expenses were caused by the accident. This statement is simply audacious.

The record is rife with evidence that Plaintiff suffered from the exact injuries he claimed at trial prior to the December 1, 2006 accident. At trial, the following admitted evidence demonstrated that Plaintiff's alleged neck, back, and arm maladies pre-existed the accident:

1. Memorial Hospital Radiology MRI Report dated 10/20/06 indicating Mr. Hubbard suffered from left arm pain, numbness, and paresthesia prior to the accident. *See Memorial MRI Report,* attached as RE 3-4 (marked at trial as Defense Exhibit 3).

2. Dr. Terry Millette's 10/6/06 office notes wherein Plaintiff's wife called Dr. Millette, complaining her husband's "left side spine [was] numb," and that he needed help moving his left arm. *See Millette Office Notes,* attached as RE 5 (marked at trial as Defense Exhibit 3).

3. Dr. Terry Millette's 4/17/06 office notes wherein Plaintiff presented with neuropathic pain to left arm. *See Millette Office Notes,* attached as RE 6-7 (marked at trial as Defense Exhibit 3).

4. Dr. Terry Millette's 3/28/06 office notes wherein Plaintiff presented with left arm and shoulder pain. *See Millette Office Notes,* attached as RE 8-9 (marked at trial as Defense Exhibit 3).

5. Davis Chiropractic records dating from 12/8/03-5/10/04 in which Mr. Hubbard was treated for cervical and lumbar pain. He visited this office no less that 35 times for said treatment and often attributed his neck pain to a 2004 automobile accident. *See Davis Chiropractic Records,* attached as RE 10-14 (marked at trial as Defense Exhibit 5).

6. Mississippi Orthopaedic Institute records dated 10/12/06 indicating Mr. Hubbard presented to their office complaining of "left shoulder/arm nerve/numbness/tingling." *See Mississippi Orthopaedic Institute records,* attached as RE 15-16 (marked at trial as Defense Exhibit 6).

7. Bienville Orthopaedic records dated 11/22/06 and 11/29/06 indicating Mr. Hubbard suffered from "significant shoulder pain for the last six months... [and] numbness and

tingling pain on the posterior aspect of his shoulder that radiates down the posterior aspect of his arm." *See Bienville Orthopaedic records,* attached as RE 17-24 (marked at trial as Defense Exhibit 7). Additionally, he acknowledged "significant weakness to ... his arm at 90 degrees by his side." *Id.*

8. Memorial Hospital radiology report for a cervical spine MRI, dated 4/18/06. *See Memorial Hospital records,* attached as RE 25-26 (marked at trial as Defense Exhibit 9). This report indicated Mr. Hubbard was suffering from left arm numbness for the past four months. *Id.* Also noted were disc protrusions at C4/5 and C5/6, the exact location of the surgery. *Id.*

9. Cedar Lake Surgery Center medical records demonstrating Mr. Hubbard was given numerous lumbar epidural steroid injections in 2004 and 2005 to treat "sharp, shooting, aching, and throbbing" pain in his lower back. *See Cedar Lake records,* attached as RE 27-46 (marked at trial as Defense Exhibit 4).

10. Opinion letter from Plaintiff's expert, Dr. Eric Graham, indicating Mr. Hubbard suffered from back pain due to "an L4-5 spondylolisthesis and resulting stenosis" as far back as July 22, 2004. *See Graham Opinion Letter,* attached as RE 47-48 (marked at trial as Defense Exhibit 8). Said letter also states, "I believe his lumbar problem was preexisting given the MRI findings in 2004 with no change in 2007." *Id.*

11. Memorial Hospital radiology report for a lumbar spine MRI, dated 8/10/06. *See Memorial Hospital records,* attached as RE 49-50 (marked at trial as Defense Exhibit 10). This report indicated Mr. Hubbard was suffering from spinal stenosis of the lumbar spine with "broad based disc protrusion" at L3/4 and L4/5. *Id.*

12. Testimony of defense expert, Dr. Lennon Bowen[4], was offered to prove Plaintiff's claimed injuries existed before the accident and were therefore unrelated thereto. He testified as follows:

> Q. And what are your opinions regarding Mr. Hubbard's alleged injuries in this matter?
>
> A. ...
>
> [T]hese are similar symptoms that he complained about prior to the injury and afterwards, and it really wasn't much of a change. Looking at his MIR (sic) of the spine leading up to the car wreck in 2006, there were no changes to the MIR (sic) afterwards. It was

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4 Dr. Bowen is a Neurologist practicing with the Neuroscience Center in Ocean Springs, Mississippi. The CV from his expert designation was marked at trial for identification purposes as Exhibit 13. *See CR, pg. 24-26.* Dr. Graham, per his expert designation, was offered to testify that the injuries alleged by Mr. Hubbard in this matter pre-existed his December 2006 accident. *Id.*

exactly the same.

His symptoms were similar in nature, and he had numbness radiating down the left arm complaining about for years. He had actually developed some weakness noted on the records that fit with the C6 nerve distribution prior to the injury, and there really isn't much else to say. It was pretty obvious looking through the records and the imaging.

Q. Are you of the opinion that Mr. Hubbard's alleged injuries in this matter preexisted the December 1, 2006, accident?

A. Yes, sir.

...

Q. So, Doctor, after having reviewed the MIR (sic) before the accident, the MIR (sic) after the accident, and Mr. Hubbard's complaints of neck pain and popping, what's your opinion regarding the nature of his neck condition?

A. His neck condition is he's got degenerative changes in his neck prior to his injury with persistent complaints of numbness and tingling radiating down the left arm in a, we call it radicular fashion, which is just that if you get a pinch of a nerve somewhere upstream from the arm, the symptoms radiate down the arm. Okay.

There was also some documentation of some weakness of the left arm on several occasions. And then we have the MIR (sic) that has no changes prior to the accident and after the accident. If there was a dramatic change or some damage caused during that accident, you'd really suspect that you'd see something different, one of the disc herniated more or something, you know.

...

Q. In your review of the record, were you able to locate complaints of radicular arm pain which preexisted the accident?

A. Yes.

...

Q. So, Doctor, in laymen's terms, what would this mean?

A. So this could mean that he already had some weakness due to some impingement of the C6 nerve root.

Q. And that's prior to the accident?

A. Prior to the accident.

...

Q. Okay. In reviewing all the medical records, the MIR's (sic), and hearing the testimony here today and yesterday, do you find the same complaints present before the accident which led to the surgery?

...

A. Yes, sir.

...

Q. Do you consider Dr. Graham's opinions in this case to be competent, objective evidence?

A. Yes. But misinformed in that, once again, he didn't know about all these other records prior to making his decision on what was the causation of this.

...

Q. Are you testifying in this case that Mr. Hubbard was not injured in any way in this collision?

A. I'm testifying that this was going on before.

Q. Yes or no.

...

A. I'm testifying that no.

Q. That he was not injured?

A. He was not injured.

See TT, pgs. 215-216, 220, 221, 225, 227-228, 246, and 249-250.

Despite the above evidence entered at trial, Plaintiff now suggests to this Court that causation testimony of Dr. Graham was "uncontradicted." Dumbfounded by this argument, Defendant can only point to the evidence placed before the jury and suggest there was ample evidence to support the verdict based on lack of causation.

c. "Round Number Verdict"

Extensive legal research has yielded no case law or statute prohibiting a jury from awarding a "round number verdict." Therefore, this argument is without merit. Positing the great many ways in which a jury might render a verdict for $3000.00 in this case, one likely scenario stands out. The

jury presumably awarded property damage for a new bumper, minimal treatment thereafter, and some amount of pain and suffering. In fact, the defense conceded these damages were proper in closing arguments as demonstrated in this passage: "Ladies and gentlemen, again, we owe him for his bumper, have from day one. We owe him for his inconvenience. We probably owe him to go to a doctor... But ladies and gentlemen, I submit to you, we don't owe him $602,000." *See TT, pgs. 318-319.* This would explain a "round number verdict" of $3000.00 given the evidence presented at trial. In any event, a "round number verdict," in and of itself, does not imply any sort of disregard for evidence as alleged in Plaintiff's Brief. Rather, it reflects a jury properly weighing the evidence before it and rendering a verdict based thereon.

d. Mississippi Case Law on Additur in General

Plaintiff cites a great deal of case law where additur was granted, including *Pham v. Welter*, 542 So.2d 884 (Miss. 1989), *Rodgers v. Pascagoula Public School District*, 611 So.2d 942 (Miss. 1992), *Maddox v. Muirhead*, 738 So.2d 742 (Miss. 1999), and *Harvey v. Wall*, 649 So.2d 184 (Miss. 1995). However, in each such case, causation was undisputed. In the immediate case, severing the causal link formed the core of the defense at trial. As such, these cases are inapplicable. In fact, each of the cases cited by Plaintiff was distinguished in *Quinn v. President Broadwater Hotel, LLC*, 963 So.2d 1204, 1206 (Miss.App. 2007) on the exact issue at bar. The *Quinn* court, in declining to extend the rulings in Plaintiff's cited cases noted, "our supreme court has refused to grant an additur where there is conflicting evidence before the jury concerning the claimed damages," including the extent of damages. *Id at 1206-1207* (citing *Green v. Grant*, 641 So.2d 1203, 1209 (Miss. 1994)). Causation and the extent of causally related damages were contested at trial, and as such, Plaintiff's citations are irrelevant.

Two recent cases from the Mississippi Court of Appeals are precisely on point and shed

much illumination on this issue. First, in *Dobbins*, a motorist brought suit for alleged injuries resulting from an automobile accident. *Dobbins v. Vann*, 981 So.2d 1041, 1046 (Miss.App. 2008). Plaintiff claimed damages in the amount of $200,000.00 for medical expenses, lost wages, mileage, future medical treatment, and a variety of other special damages. *Id.* While the Defendant "did not object to the reasonableness or necessity of the incurred medical expenses..., he did object to causation." *Id at 1046.* Defendant then questioned the credibility of the Plaintiff on the stand including introduction of evidence of a prior automobile accident in which Plaintiff sustained similar injuries he was alleging at trial. *Id.* The jury awarded Plaintiff $50,000.00 and he moved for additur. In upholding the trial court's denial of additur, the Court of Appeals stated:

> There is nothing in the record to reflect that the jury was biased or prejudiced in its decision. [The Plaintiff] put forth evidence of his damages; however, [the Defendant] also presented substantial evidence to rebut these claims. Ultimately, it was up to the jury to determine the credibility of this evidence, and there is substantial evidence in the record to support the jury's verdict. Viewing the evidence in the light most favorable to the defendant, it, therefore, is determined that the jury's award of $50,000 in damages was not contrary to the overwhelming weight of the evidence.

Id. The similarities with *Dobbins* and the present case are striking: 1) automobile accidents, 2) Plaintiffs claiming certain damages, 3) Plaintiffs' credibility is questioned in front of the jury regarding previous injuries, 4) juries awarding amounts less than those requested by Plaintiffs, and 5) "round number verdicts" were awarded. Here too, credibility and causation were questioned at trial. As such, additur is inappropriate.

The Mississippi Court of Appeals also handled a similar case in *Crews*. *Crews v. Mahaffey*, 986 So.2d 987 (Miss.App. 2008). In that case, Plaintiff was rear-ended by the vehicle of the Defendant and submitted medical bills in the amount of more than $40,000.00; the jury awarded only $5000.00. The case was termed by the Court of Appeals a "classic case of the battle of the experts."

Id at 997. In precisely the situation presented in the immediate case, Plaintiff's "experts contend[ed] that [plaintiff's] complaints relat[ed] to, or were aggravated by, the ... accident, while [the defendant's] expert contend[ed] [the plaintiff's] problems relat[ed] to her degenerative disc disease." *Id at 997.*

More to the point, the *Crews* court stated as follows:

> Although [defendant's] expert differs with [plaintiff's] experts as to the cause of [plaintiff's] problems for which she is seeking damages, apparently the jury found [plaintiff's] experts at least somewhat credible, as they awarded her $5,000. "[W]hen the evidence is conflicting or contradictory, [an appellate court] will defer to the jury's determination of the credibility of the witnesses and the weight and worth of their testimony." We cannot "set aside a verdict unless it is clear that the verdict is a result of prejudice, bias or fraud, or is manifestly against the weight of the credible evidence." **Therefore, a jury's verdict cannot be reversed simply because it found one expert more believable than another.**

Id at 997. Here again, in the instant case, the jury determined a just award after being presented with experts holding differing opinions regarding causation. Per the Mississippi Court of Appeals, such a verdict should not be disturbed. *Id.* Also worthy of note, the Court of Appeals again upheld a "round number verdict." As such, the evidence was not against the overwhelming weight of the evidence and Plaintiff's Appeal on this issue should be denied.

B. The Court Did Not Commit Reversible Error in Granting Plaintiff's Motion *in Limine* to Exclude Evidence of Plaintiff's Multiple Sclerosis

i. Evidence of Multiple Sclerosis Was Excluded Upon Plaintiff's Own Motion

First and foremost, it was the Plaintiff, not the Defendant, who moved *in limine* to exclude evidence that Plaintiff suffered from multiple sclerosis (MS). *See Plaintiff's Motion in Limine, CR pgs. 27-37.* While Plaintiff's Brief outlines extensive conversation regarding this subject, the following arguments on Plaintiff's Motion to Exclude evidence of MS are most telling:

Mr. Wetzel (counsel for Plaintiff):

Judge, my client suffered from multiple sclerosis, was diagnosed by his treating neurologist with MS before this incident occurred. And we believe that any testimony that he suffered with MS – which there has been absolutely no testimony adduced by defendants that the MS has anything to so with my client's disc injury to his neck and related surgery that was performed. So we believe that he shouldn't be able to mention anything about my client suffering with MS.

Mr. Danos (counsel for Defendant):
Judge, we have no problem with that.
...
Mr. Wetzel:
If we stipulate it's not going to be mentioned, it's not going to be mentioned.
...
Mr. Danos:
We agree with that, Your Honor.
...
The Court:
Mr. Wetzel says his client has MS, and he's moved in limine from you making reference to the fact that his client has MS.

Mr. Danos:
We will not.

The Court:
All right. So that motion is sustained, stipulated to. It's sustained. Next one.
...

See TT, pgs. 5-7.

Counsel for Plaintiff then allowed voir dire and empaneling of a jury to occur before attempting to withdraw his Motion to Exclude evidence of MS. After voir dire, Plaintiff finally attempted to withdraw his Motion, as follows:

Mr. Wetzel:
I was going to ask, if it's okay with you, I was going to withdraw. I went back last night and looked at the testimony, the doctor's testimony. Judge, it's so intermingled. I want to withdraw my motion in limine on the MS because I think it's too intertwined to be able to take it out of the doctor's testimony. Otherwise we would disrupt the whole flow of Dr.Graham's testimony.

So I have no problem with mentioning the MS, you know, because there's no testimony that - - I don't think he's going to, you know, bring out it's debilitating or anything of that nature. Can we have that agreement?

Mr. Wilkinson (counsel for Defendant):
Again, as I said yesterday, Your Honor, our doctor says it has nothing to do with this. The problem is we spent half the night going through everything taking it out, redacting it as Your Honor had suggested, and so we've done that. Everything we've redacted.

Mr. Wetzel:
I apologize. After we left here, I was getting ready to call you to tell you to tell you, look, I think it's just too intertwined to be able to remove it. I start taking out portions of the doctor's testimony. I couldn't get it to flow.

The Court:
All right. I'm going to let it in by agreement of the parties, and if something pops up, you'll just have to handle it on cross-examination.

Mr. Wilkinson:
Thank you.

The Court:
What's next?

...

Mr. Wilkinson:
Judge, after yesterday's ruling on the motion in limine filed by the plaintiff on the MS issue, I redacted out of my voir dire any questions to the jurors about multiple sclerosis.

That would be an issue that I would want to know; do any of them, has their father, mother, husband, whatever, do they have MS, because Mr. Hubbard suffers from that. And, you know, I wanted to find out if maybe they align with him and all that. And because of that motion, I did not ask a single question. I can show I had it in here and scratched it out.

Now we have put MS back into the case, and I don't know if any of these thirteen jurors, what their history or background they may have on that issue, and it's something, Your Honor, that I would have asked. It was important enough for me to ask in voir dire had the motion in limine not been filed.

The Court:
So what are you doing? Are you making some kind of motion now?

Mr. Wilkinson:
Your Honor, what I'm asking, inquiring, I think it would - - I don't want to get in front of - - now that we have a jury, not during jury selection, I don't want to get in front of this jury and ask them individual questions.

Perhaps the Court could inquire. If all of them say, no, they don't have anything to do with that, then we move on. If some of them respond in the affirmative, then that would be a problem.

The Court:
I'm not going to do that. I'm not going to do that. That motion came up. Both sides agreed to it yesterday that this was not part of the case. Then this morning both sides agreed again. I am not going to address the issue of multiple sclerosis.

Mr. Wilkinson:
Your Honor, can I respond?

The Court:
Yes, sir.

Mr. Wilkinson:
It was brought back up after voir dire was over by plaintiff's counsel saying - - when I was asking questions about the surgery and the hip, taking bone from there. And for the first time at the conclusion of voir dire it was brought up by the plaintiff that, hey, I decided that I didn't want to file that motion after all.

I'm not trying to cause problems, Your Honor, but it's something that I would have inquired of except for their motion, to which we agreed to and I took it out. So that's the box we're in.

The Court:
So then it's out. We'll stand by the ruling that was made yesterday and agreed to yesterday.

Mr. Wilkinson:
Thank you, Your Honor.

Mr. Wetzel:
Judge, he's already agreed that - - he stipulated we can go ahead and bring the MS in. There's no way to extract it out, Judge, at this point. Here's the whole thing. I don't understand what he would ask him about MS, because my client's got prior shoulder problems, prior back problems. He never asked one question regarding the back or the shoulder. He never asked one question. Why would he want to ask about MS, because we're not claiming MS was caused by this accident Judge. It's not even an issue.

The Court:
Mr. Wetzel, I am going to go with yesterday's ruling that was agreed to. No questions were posed to the jury about MS. Based on that ruling, those medical records are going in, and anything with regard to MS is to be redacted and no

mention of multiple sclerosis, period.

Mr. Wetzel:
We're going to have to probably take about - - I was going to play Dr. Graham's deposition as the first witness. So I'm going to have to take a break after opening argument to go through with the court reporter to be able to take out and extract what he comes up to that to be able to stop the recorder.

The Court:
Mr. Wetzel, I made this ruling yesterday. That should have been done last night.

Mr. Wetzel:
I know, but we just talked about that we both agreed to let it back in, Judge. Otherwise, I would have done that at lunchtime with the court reporter.

The Court:
It should have been done last night, because the ruling last night was it wasn't coming, and it was agreed.

Mr. Wetzel:
So can we have a ten-minute break after the opening arguments?

The Court:
Do it right now, because once we get started we're going. We're in recess.

See TT, pgs. 24-25, 33-37.

The Court can plainly see, the Motion to Exclude evidence of MS was that of the Plaintiff. It appears elementary, but once a party stipulates to admission or exclusion of evidence, "that party cannot later complain about ... [any] consequential prejudicial effect." *City of Natchez v. Jackson*, 941 So.2d 865, 872 (Miss.App. 2006). As such, Plaintiff has waived the ability to now challenge the ruling granting his own motion, whether he later attempted to withdraw the motion or not. The trial court, having granted Plaintiff's motion on this matter allowed voir dire to go forward under the stipulation that MS would not be mentioned. Only after voir dire was complete did counsel for Plaintiff attempt to withdraw his motion. It was too late at this juncture due to the reasons cited in the above excerpts. In any event, because the complained-of ruling was made in granting Plaintiff's

own motion, he has waived the right to now contest any alleged harm. *Id.*

ii. Plaintiff Has Waived the Opportunity to Challenge This Ruling As He Did Not Raise these Arguments at Trial

In his Appellate Brief, Plaintiff states he was prejudiced by the exclusion of evidence that he suffered from MS because he "was limited in being able to explain ... the symptomology that he had prior to the vehicular collision in his shoulder." He claims it was "almost impossible ... to explain ... [that] the symptomology ... in the medical records introduced into evidence was based upon multiple sclerosis and not radicular pain coming from a herniated disc." At trial, the sole prejudice cited by Plaintiff as a result of excluding evidence of MS was that redacting portions of Dr. Graham's deposition would "disrupt the whole flow" of his expert's video testimony. *See TT, pg. 24.* He did not raise the above objections at trial, and as such should be prohibited from doing so at this point. In other words, he waived the ability to challenge the Court granting his own motion by failing to make these objections at trial.

iii. A Rose By Any Other Name

Out an abundance of caution, if the Court allows Plaintiff's arguments to go forth despite his failure to raise them at trial, Defendant will address them herein. "For a case to be reversed on the admission or exclusion of evidence, it must result in prejudice and harm or adversely effect a substantial right of the party." *Crane Co. v. Kitzinger*, 860 So.2d 1196, 1199 (Miss. 2003). In essence, on appeal, Plaintiff complains the exclusion of evidence upon his own motion was reversible error as it did not allow him to explain to the jury certain symptoms he claims were related to MS. If error is found in the trial court's exclusion of evidence of MS, such error is undoubtedly

harmless.[5]

Instead of using the term "MS" or "multiple sclerosis," Plaintiff and his counsel instead referred to his disease as the "unrelated neurological disorder." In fact, a cursory review of the trial transcript yields dozens of references to this "other neurological disorder." Surely there can be no reversible harm found in preventing mention of MS when one can merely substitute a similar term. Plaintiff now claims he was hamstrung (so much so that reversible error occurred) in explaining that his MS was responsible for several symptoms found in the medical records, however the transcript reveals otherwise:

> **Mr. Wetzel**:
>
> Q. Okay. Now let's move forward to early part of 2006. I think you went a couple of years there no problem. Then you started having an **unrelated neurological problem**, I believe, in the latter part of '03, the first part of - - I'm sorry. The latter part of '05, first part of '06. Would that be correct? I think right before Katrina.
>
> A. Are you referring to left shoulder?
>
> Q. No. I'm talking about your **unrelated neurological condition**. You started seeing Dr. Millette, I believe, in April '05 right before Katrina.
>
> A. Let me think. No, sir. I was having **this neurological problem** in '05 where I was collapsing. I was sent to the hospital four or five times by ambulance. They couldn't figure it out until the last time. And the doctor took an MRI, and he realized kind of.
>
> Q. A brain MRI?
>
> A. Yes, sir, brain MRI. I don't remember what his statement was, but I was referred to Dr. Millette.

---

[5] Additionally, as mentioned previously, due to technical difficulties, during the jury's viewing of the video deposition of Dr. Eric Graham, the jury was allowed to hear Dr. Graham mention that Plaintiff suffered from multiple sclerosis. As the testimony was not transcribed by the trial court reporter, and pursuant to the presumption that this Court will view the transcript of Dr. Graham in its entirety, it is Defendant's position that multiple sclerosis was indeed presented to the jury for consideration. As such, any error in excluding evidence of MS is harmless.

Q. When do you remember seeing Dr. Millette for the first time for **this neurological condition** which he treats you, according to your notes?

A. My records, the first information I have from Dr. Millette is where Dr. Rickey Chance had made some comments about the first brain MRI, and he, you know, made notes of what he thought, and he was the one that referred me to Dr. Millette. The next paperwork I have is from 3/30/06. So I'm assuming that that's about when I first saw - - if you give me just a second I just want to make sure.

Q. Okay.

A. This must have been the first time I saw Millette is around 3/30/06, because he made the preliminary diagnosis.

Q. Okay. And then I think on the next visit would have been April or May of '06 is when he, after he did a brain MRI, he concluded that you were suffering with a **neurological disorder**; is that correct, sir?

A. Yes, sir. Went back to him on 4/18 of '06.

Q. All right.

A. I'm sorry. This 4/18/06 is a cervical spine MRI without and with contrast. So I don't know. I'm assuming this MRI was on 4/18/06. I'm not sure what the date I went back to him.

Q. Let me just make sure we got this clear for the jury. Dr. Millette, in his attempt to diagnose **your neurological condition**, did a brain MRI?

A. Yes, sir.

Q. Did a neck MRI?

A. Yes, sir.

Q. And after doing those two studies, did he conclude and give you a working final diagnosis that you had **a neurological condition of your brain**?

A. Yes, sir.

Q. Now, that was in April of '06, correct, approximately?

A. Yes, sir.

Q. You came under his care, and he started treating you with a prescription medication?

A. A couple of prescription medications.

Q. He still treats you to today with prescription medication?

A. Yes, sir.

Q. For that **same neurological condition** that he diagnosed in March and April of '06?

A. Yes, sir. It's an infusion, but I guess it's considered some type of medication.

Q. We're not going to get into what it is or anything of that nature. Now, let's move forward from April of '06. In April of '06, after that he sent you, Dr. Millette sent you to Dr. Lance Johansen, who's an orthopedic surgeon?

A. Yes, sir.

...

Q. Charles, before the break, we were going into making sure the jury understood, in April, March, April, you were diagnosed with **your neurological condition**. And Dr. Millette has been your neurologist up until today, we stand in this courtroom today?

A. Yes, sir.

Q. Now, Dr. Millette, did he refer you to Dr. Lance Johansen, who is an orthopedist, general orthopedist?

A. Yes, sir.

Q. Would you tell the jury your understanding of why he sent you to Dr. Johansen, please.

A. If I can read part of this as part of my answer. He sent me there to rule out any other things that, you know, could possibly be. He stated, Dr. Millette stated on here on this form, it says, patient was diagnosed with the **unrelated condition** by Dr. Millette, and he says, on problems are again related to the **unrelated medical condition** that he has diagnosed.

Q. When you say unrelated, you're talking about **the neurological condition**?

A. Yes, sir.

Q. You can say neurological. It will be fine.

A. Okay. Neurological. It says, Dr. Millette says the arm problems are related to **the neurological disease.**

...

Q. Now, Dr. Millette then was going to send you back again to Dr. Johansen because did the shoulder start getting worse?

A. It was one of those things where it would come and go. So that's another reason why, you know, it was considered part of **that neurological disease** is because of relapses and remittence and all that. So he was going to send me back. I'm not sure if he wanted me to go to the other doctor. I know there were - -

Q. Can I stop you just a minute?

A. Yes, sir

...

Q. Go ahead.

A. It says, seeing the fact that he does not have an infraspinatus tear or a suprascapular nerve lesion, in other words, compression of the suprascapular nerve, I feel that this has to be coming from his **unrelated neurological condition** that Dr. Millette is treating him.

Q. So he concluded that condition you were having from the standpoint of the weakness in the back of the shoulder, the arm numbness and tingling, that you were having was coming from **your neurological disorder**?

A. Yes, sir.

...

Q. So to conclude and make sure the jury understands, during the period 2006 is when you were diagnosed with **your neurological disorder**, correct?

A. That was in - - I was diagnosed in April of 2006.

Q. And after seeing two orthopedists evaluating your shoulder, they concluded

that was all part of **your neurological condition**?

A. Yes, sir.

Q. What medications do you take, are you presently taking or have been taking primarily since early 2006 for **your neurological disorder**?

A. Can I say the name of the medication?

...

Q. Let me just ask you this without going to the names. My question is real simple. Since you started taking these medications, does it affect your memory?

A. The disease itself affects my memory.

Q. So it's the disease itself?

A. Yes, sir.

See TT, pgs. 162-172 (selected portions). Plaintiff was also successful in obtaining testimony from defense expert, Dr. Lennon Bowen regarding the existence and effect of this "other neurological disorder." This testimony was accurately outlined in Plaintiff's Appellate Brief. Additionally, in closing arguments, counsel for Plaintiff stated as follows:

> **Mr. Wetzel**:
> February 2006 my client was diagnosed by his neurologist, Dr. Terry Millette, with **a neurological disorder**. Dr. Terry Millette, because he had continued pain on his shoulder, back side of his shoulder on the posterior side, and numbness and tingling in his hand and arm, sent him to Dr. Lance Johansen to determine whether or not there was any shoulder injury. Dr. Johansen ruled out any shoulder injury.
> ...
> Dr. Harrison, Dr. Johansen, Dr. Millette, three doctors said what this man was suffering with during the 2006 year was symptomology in the left arm coming from one thing, **his neurological disorder**, not a neck injury, not a preexisting neck injury.

See TT, pgs. 305-306.

Despite Plaintiff's allegations to the contrary, he was indeed permitted to attempt to "explain [that] ... the symptomology ... in the medical records introduced into evidence was based upon

multiple sclerosis and not radicular pain coming from a herniated disc." As such, any error found in the exclusion of evidence based on Plaintiff's own motion is harmless and not a basis for reversal.

C. The Court Properly Awarded Defendant's Motion for Costs Pursuant to the Offer of Judgment

Plaintiff finally challenges the award of costs pursuant to the Offer of Judgment. He admits the Offer was properly made, rejected by Plaintiff, and ultimately in excess of the verdict rendered. What Plaintiff argues however, is the costs awarded by the trial court are not those available under Mississippi Rule of Civil Procedure 68. The costs sought and awarded were outlined as follows:

> Expert Fees: **$4600.00**
> Copying/Printing Costs: **$1076.10**
> Trial Materials (demonstrative aids, technical support, etc.): **$1084.43**
> Court Reporter: **$251.50**
> Travel and Food: **$587.08**
>
> Total Expenses Incurred Post-Offer: **$7599.11**

Plaintiff claims Defendant is not entitled to any such expenses, thus they will be addressed respectively. It is worthy of note that Plaintiff failed to offer a written response to defendant's Motion for Costs, therefore any objections responsive thereto occurred at the oral hearing.

i. Expert Fees

First, Plaintiff did not object to the inclusion of expert fees, thus he cannot now challenge their imposition on appeal. At the hearing on this matter, counsel for Plaintiff objected to a great many number of the costs outlined in the motion, however when detailing those costs he conceded were allowable under the Rule, this exchange occurred:

> **Mr. Wetzel:**
> Filing fees, subpoena costs, any of those types of costs associated with the clerk's office, no question about it.
>
> **The Court:**
> And the expert witness fees as well?

Mr. Wetzel:
And expert fees can be considered. That's discretionary.

See TT, pgs. 349-350. Plaintiff failed to challenge the award of expert fees and thus has waived any right he might have had to appeal this issue.

ii. All Other Costs Awarded

Plaintiff correctly points out that Mississippi Rule of Civil Procedure 68 closely tracks the language of its federal counterpart. In fact, the Mississippi Court of Appeals has acknowledged "Rule 68 of the Mississippi Rules of Civil Procedure is patterned after Federal Rule 68." *Harbit v. Harbit*, 3 So.3d 156, ftn. 5 (Miss.App. 2009). As such, Mississippi courts can look to those costs awardable under the federal rule in determining whether appropriate in a state case. *See generally, Harbit* (Miss.App. 2009). As Mississippi law on the subject is scarce, a look at federal interpretation of Rule 68 appears justified.

"With the exception of routine overhead office expenses normally absorbed by the practicing attorney, all reasonable expenses incurred in case preparation, during the course of litigation or as an aspect of settlement of the case, may be taxed as costs." 21A Fed. Proc., L. Ed. § 51:41, *Costs Payable When Judgment is Not More Favorable Than Rejected Offer* (May 2010). Federal courts, ruling on costs available under Federal Rule of Civil Procedure 68, have interpreted "costs" as including "trial exhibits," "photocopying," and "transcripts." *See Agola v. Hagner*, 678 F.Supp. 988 (E.D.N.Y. 1987), and *Stokes v. City of Montgomery*, 157 F.R.D. 514 (M.D.AL 1994). The only remaining items are "travel and food" which represent costs incurred at trial as a direct result of Plaintiff's rejection of the Offer of Judgment.

Given the above, the trial court rightfully granted Defendant's Motion for Costs pursuant to the Offer of Judgment. Defendant hereby moves that the award be affirmed in whole or in part as

this Court deems proper.

V. CONCLUSION

There was substantial evidence offered at trial (via medical records and expert testimony) challenging causation which allowed the jury to return a verdict for less than the amount sought by Plaintiff. As such, the verdict was not against the overwhelming weight of the evidence and the trial court was justified in denying additur.

The evidence of multiple sclerosis was excluded on Plaintiff's own motion, therefore he has waived any right to appeal this issue. Furthermore, instead of using the term "multiple sclerosis" or "MS," Plaintiff was allowed to offer extensive evidence about the disease and its effects, instead referencing a "neurological disorder." Thus, no harm was visited by the exclusion and any error was harmless.

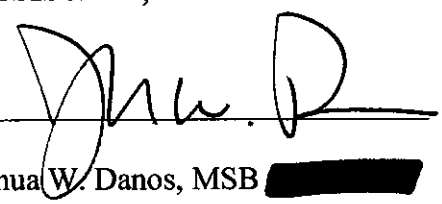
Finally, the costs awarded upon Defendant's Motion for Costs pursuant to the Offer of Judgment are proper. The issue of expert costs was not preserved for appeal, therefore Plaintiff cannot challenge the trial court's award of same. Additionally, Mississippi law, tracking federal law, allows for the award of the remaining costs granted by the trial court pursuant to Rule 68. For these reasons, Plaintiff's appeal should be denied and the jury's verdict and trial court rulings should be affirmed in whole.

WHEREFORE, PREMISES CONSIDERED, Appellee prays this Court AFFIRM the trial court's decision to refuse additur, grant Plaintiff's Motion to Exclude evidence of MS, and grant Defendant's Motion for Costs relating to the Offer of Judgment. Appellee also requests all further relief this Court deems just.

This the 30th day of July, 2010.

Respectfully submitted,

APPELLEE, DELTA SANITATION OF MISSISSIPPI, L.L.C.

By: 

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CERTIFICATE OF SERVICE

I, Joshua W. Danos, hereby certify that I have mailed, via United States First Class Mail, the original and four copies of BRIEF OF APPELLEE to the Clerk of the Supreme Court of the State of Mississippi, Kathy Gillis, Post Office Box 249, Jackson, MS 39205-0249, for filing in the record. I have also served the BRIEF OF APPELLEE, to the following, via United States First Class Mail:

James K. Wetzel, Esquire
JAMES K. WETZEL & ASSOCIATES
Post Office Box I
Gulfport, MS 39502

Honorable Lawrence P. Bourgeois, Jr.
Harrison County Circuit Court Judge
P.O. Box 1461
Gulfport, MS 39502

This the 30th day of July, 2010.

JOSHUA W. DANOS

ADDENDUM

C

We. St's Annotated Mississippi Code Currentness
Mississippi Rules of Court State
Mississippi Rules of Civil Procedure
Chapter VIII. Provisional and Final Remedies and Special Proceedings
Rule 68. Offer of Judgment

At any time more than fifteen days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within ten days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the court shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the cost incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict, order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time, not less than ten days, prior to the commencement of hearing to determine the amount or extent of liability.

Current with amendments received through June 1, 2009

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