IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2010-CA-00045

CHARLES HUBBARD **APPELLANT**

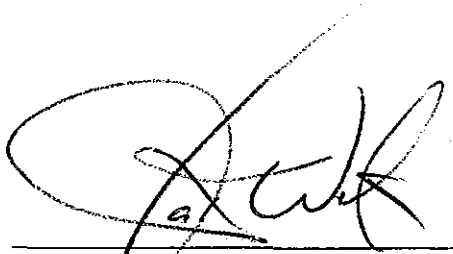
VERSUS

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

CERTIFICATE OF INTERESTED PERSONS

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

Charles Hubbard	Appellant
James K. Wetzel, Esquire	Counsel for Appellant
Delta Sanitation of Mississippi, L.L.C.	Appellee
Joshua W. Danos, Esquire	Counsel for Appellee
Honorable Lawrence Bourgeois	Circuit Court Judge



JAMES K. WETZEL,
Attorney for Charles Hubbard, Appellant

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is requested so that this Honorable Court will have the fullest opportunity to understand the Plaintiff's fundamental argument that he did not receive a fair trial and that the verdict of the Jury in the amount of Three Thousand Dollars ($3,000.00) was so contrary to the overwhelming weight of the credible evidence, that it should "shock the conscious of the Court".

STATEMENT OF THE ISSUES

I. The Circuit Court erred as a matter of law and abused its discretion in failing to impose an additur, pursuant to Mississippi Code §11-1-55; as the Jury verdict in the amount of Three Thousand Dollars ($3,000.00) was contrary to the overwhelming weight of the credible evidence.

II. The Circuit Court erred in a pre-trial ruling which denied the Plaintiff the fundamental right to present medical evidence of his prior neurological condition (multiple sclerosis); thus, denying the Plaintiff a fair and impartial trial.

III. The Circuit Court erred as a matter of law by entry of an Order awarding the Defendant Seven Thousand Twelve Dollars and 03/100 ($7,012.03) as costs, pursuant to Rule 68 of the Mississippi Rules of Civil Procedure.

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS AND DISPOSITION

This is an appeal from an adverse Jury verdict which has its genesis in the Circuit Court of Harrison County, Mississippi, First Judicial District. The Plaintiff, Charles Hubbard, hereinafter referred to as "HUBBARD", filed this cause of action on or about May 5, 2008 alleging that on December 1, 2006 at approximately 10:38 a.m., HUBBARD, traveling eastbound on Highway 90 in Harrison County, Mississippi, while stopped at the intersection of Highway 90 and Cowan Road, waiting for traffic to turn northbound on Cowan Road, was rear-ended by Delta Sanitation of Mississippi, L.L.C.'s, employee, hereinafter referred to as "DELTA". DELTA's employee was operating a vehicle weighing approximately 70-80,000.00 pounds. As a result of this incident HUBBARD incurred two herniated discs in the cervical (neck) area of his spine, which resulted in surgery carried out by his Neurosurgeon, Dr. Eric Graham, Orthopedic Surgeon, on April 25, 2008.

After commencing this cause of action, discovery ensued and the matter came on for trial on August 17-18, 2009 with the Honorable Lawrence Bourgeois, Jr., presiding. The Jury returned a verdict (10-2) on August 18, 2009 finding for HUBBARD as follows:

> "We, the Jury, find for the Plaintiff, Charles Hubbard, against the Defendant, Delta Sanitation of Mississippi, L.L.C., and assess his damages in the amount of $3,000.00."

HUBBARD, through counsel, filed a timely Motion for a judgment notwithstanding the verdict, or alternatively, a motion for new trial pursuant to Rule 59 of the Mississippi Rules of Civil Procedure and requested an additur pursuant to Mississippi Code Annotated §11-1-55.

DELTA filed a response to Plaintiff's Motion and filed a separate Motion for Cost and for Stay of Execution of the Judgment. Oral arguments were heard by the Circuit Court Judge on

December 10, 2009 and the Circuit Court Judge entered an Order overruling the Plaintiff's Motion for a new trial, or alternatively, for an additur. The Circuit Court Judge also entered a separate Order on December 10, 2009 finding that pursuant to Rule 68 of the Mississippi Rules of Civil Procedure that the Defendant had made an offer of judgment more than fifteen days prior to trial in the amount of Thirty Thousand Dollars ($30,000.00), which the Plaintiff refused. Pursuant to said rule the Circuit Court Judge found that the DELTA incurred costs totaling Seven Thousand Twelve Dollars and 03/100 ($7,012.03) and ordered that HUBARRD pay to DELTA Four Thousand Twelve Dollars and 03/100 ($4,012.03) which reflected the cost incurred, less the Jury verdict.

HUBBARD filed a timely Notice of Appeal to this Honorable Court alleging three separate issues which individually and collectively denied Plaintiff a fair trial. HUBBARD submits to this Honorable Court that he should be entitled to reversal of the lower Court Judgment in the amount of Three Thousand Dollars and 00/100 ($3,000.00), an additur granted or remanded for a new trial on damages only. HUBBARD also submits to this Honorable Court that there should be a reversal of that certain Order granting DELTA's costs totaling Seven Thousand Twelve Dollars and 03/100 ($7,012.03).

STATEMENT OF RELEVANT FACTS

On December 1, 2006, HUBBARD, age 50, was employed as a Senior Chemist with the Southern Company for 26½ years (P. 59-60). Prior to 2006 the only significant medical condition suffered by HUBBARD was in 2004 when he had surgery on both his left and right knees, had two tears in his rotator cuff in his right shoulder, which required surgery in 2004 (P. 62). Also in 2004, HUBBARD testified that he had seen Dr. Eric Graham, his Orthopedic Surgeon, for a bulging disc in his lower back for which he received lumbar epidural steroidal injection (P. 62, 63). HUBBARD testified that he never missed any appreciable work at all for the condition in his lower back and did not limit any of his social or normal engagements of his life (P. 63). HUBBARD testified that on or about April 17, 2006, before the vehicular collision of December 1, 2006, he began seeing Dr. Terry Millette, Neurologist, for neuropathic pain in his left arm and did not remember any type of neck injury prior to December 1, 2006 (P 64, 65). HUBBARD testified that he saw Dr. Donnis Harrison, Orthopedic Surgeon, in October of 2006 for left arm numbness and tingling and the he was referred to Dr. Harrison by Dr. Terry Millette, his Neurologist, not for anything that was due to his neck but for his unrelated neurological condition known as "Multiple Sclerosis" (P. 65, 66).

HUBBARD testified that on the morning of December 1, 2006 he never had any neck related complaints that morning and that he was scheduled to report to the Jack Watson plant where he was working for the Southern Company and that he left his home on Kelly Avenue at approximately 10:20 a.m. and drove down Highway 90 to Cowan-Lorraine Road, where the plant was located (P. 67). HUBBARD testified that the weather was completely clear, blue skies and that when he got to the intersection of Highway 90 and Lorraine Road he entered a turning lane that had a red light where he had to come to a complete stop before he could proceed north

onto Cowan-Lorraine Road (P. 67, 68). HUBBARD testified that he was at a complete stop for 5-10 seconds when the dump truck operated by DELTA's driver hit him from behind (P. 69). HUBBARD testified that he was driving a 2005 Dodge Ram quad cab truck, which is a heavy duty truck on a heavy duty frame, with 20" tires on it so it sat a little bit higher than a regular truck would. HUBBARD further testified that his truck had a heavy duty bumper and the trailer hitch was attached and the trailer assembly was attached directly to the frame itself and slightly below the bumper (P. 70). HUBBARD testified he did not see the vehicle coming prior to impact and did not have any knowledge whatsoever he was about to be impacted by DELTA's dump truck. HUBBARD described that at the time of impact he had both hands on the steering wheel with his foot on the brake and when the impact occurred it pushed him forward, close to a length of his vehicle, and that it pushed him beyond the white line where he had stopped (P. 71).

HUBBARD further testified that after the impact he looked in his rear-view mirror and DELTA's truck was still rolling and then it stopped (P. 72). HUBBARD testified that according to the Incident Report filed by the Gulfport Police Department that the vehicle operated by DELTA's employee was a 2006 Mac truck, that it was a larger size dump truck, more of a double size instead of a regular size dump truck, and that in his opinion was somewhere around 16-17 ton dump truck which was loaded with concrete slabs which would have made the load heavier than other debris. It was HUBBARD's opinion that this was somewhere around a 17 yard container on the back of the truck (P. 75).

HUBBARD described to the Jury the damage to the back of his bumper from the photographs introduced into evidence and that you could see the imprint of the bolts that held the bumper onto the dump truck, making a stamped indentation directly into his bumper (P. 77).

HUBBARD testified that no repairs had been performed to his truck and that the damage to his truck still existed as it did on December 1, 2006.

HUBBARD testified that he felt his body being pushed forward and that his body went back against the seat that he was occupying (P. 79). HUBBARD testified that he had conversations with the driver and the driver mentioned to him that he could not stop in time. When HUBBARD was questioned by the Officer, Kevin Jackson, he stated that he really did not have any pain but felt like he had a dull ache in the back of his neck and lower back and he remained at the scene of the accident for about 20 minutes (P. 82) HUBBARD testified that he arrived at his employment at approximately 11:00 and that he was still suffering with a dull ache in his neck and back and that it did not get worse until the next two-three days, particularly the third day when he had a linear progression of pain in both areas (P. 82).

HUBBARD testified that he did not consider going to the emergency room as he did not think it was anything life threatening and when he got to his place of employment he called and made an appointment with his general physician, Dr. Paul Matherne (P. 83).

HUBBARD testified that he saw Dr. Paul Matherne on December 22, 2006, which was the first appointment he could get, and he remembered telling his doctor that his neck was bothering him as well as his low back. HUBBARD testified that Dr. Matherne had some x-rays taken and after one or two visits recommended that he be evaluated by Dr. Eric Graham, Orthopedic Surgeon (P. 83). HUBBARD testified that he set-up an appointment with Dr. Graham and was seen the first part of February, 2007. By the time HUBBARD saw Dr. Graham the pain in his neck and back had progressed and got worse and worse each day. HUBBARD described the pain as radiating from his neck down his arm and into his hands (P. 85). HUBBARD testified that as he continued under Dr. Graham's care he began having weakness in

his arms, actually losing strength in his arms and that is when Dr. Graham recommended surgery (P. 85, 86).

HUBBARD further testified that in the calendar year 2006, prior to December 1, 2006 collision, he never had any radicular pain or weakness and had no similar symptoms of that sort prior to December 1, 2006 (P. 87). HUBBARD described the surgery performed by Dr. Graham where two discs had to be removed from his neck (P. 87, 88). As a result of the incision on the right side of his neck he had a permanent scar from the surgery (P. 88). HUBBARD testified that he was finally released from Dr. Graham on July 1, 2008 (P. 89, 90).

HUBBARD testified as to the affects that the surgery had on his physical activities and his ability to return back to physical activities (P. 91, 92, 93). HUBBARD testified that the total medical bills incurred from the surgery performed by Dr. Eric Graham and related treatment that he had leading up to and after his surgery was $138,294.15 (P. 98) and that he also had out-of-pocket expenses for mileage of $163.18 (P. 99) and had loss wages as a result of his injury and subsequent surgery in the amount of $14,074.48 (P. 105).

HUBBARD also testified that he had to have his vehicle repaired and the total amount of damages, which consisted of using after-market parts were $645.21 (P. 105, 106).

Dr. Eric Graham, Orthopedic Surgeon, testified by video deposition (P. 55). Dr. Graham testified he first began treating HUBBARD in July, 2004 when he was sent to him by a colleague for evaluation of his back and legs (Depo. P. 9). Dr. Graham testified that the diagnosis at that time in 2004 was spondylolisthesis at L4/5 (low back), which basically means an unstable segment (Depo. P. 9). Dr. Graham explained spondylolisthesis is a degenerative condition created by arthritis in which the spine begins to slip off of itself in such a fashion. As a result of this condition nerve roots that come out of these corners wind-up getting pinched between the

bone and the disc as it slides forward (Depo. P. 9). Dr. Graham testified that he prescribed physical therapy and a trial of epidurals and that HUBBARD had carried out these procedures for several years and never returned to the office to him pertaining to his low back until February, 2007 (Depo. P. 10). Dr. Graham testified that when HUBBARD returned in February, 2007 that HUBBARD had given a history that he had been hit behind from a dump truck in December, 2006. HUBBARD's complaints were mainly worsening back and leg pain as well as neck and arm pain (Depo. P. 10). Dr. Graham testified that Dr. Paul Matherne, his internist, had put him through physical therapy, which failed, and he was referred by Dr. Matherne for evaluation. Dr. Graham also testified that back in 2004, when he treated HUBBARD for his low back, there were never any neck complaints voiced at that time but when he saw him in February, 2007 that HUBBARD perfectly described the radiculopathy in his neck and arm (Depo. P. 10). The radiculopathy that HUBBARD described was a pain that travels down the arm in a certain fashion that follows a dermatome and in this case it was following the C6 dermatome. Dr. Graham testified that HUBBARD had an MRI done and when he saw him back in March, 2007 the MRI showed a left sided disc complex at C4/5 and C5/6 (Depo. P. 11). That he had a herniation of those discs that were impinging upon the nerves as it exits the spinal canal and that was causing the pain sensation or radiation into his upper extremities (Depo. P. 12). Dr. Graham testified that he discussed with HUBBARD conservative measure and continuing the epidurals, HUBBARD had also recently been diagnosed with multiple sclerosis and he advised HUBBARD that he needed to clear surgery with Dr. Millette, his Neurologist (Depo. P. 12). Dr. Graham testified that he spoke directly with Dr. Millette on April 24, 2008 and Dr. Millette agreed that HUBBARD was neurologically acceptable for surgery and by March, 2008 HUBBARD's neck and arm pain had worsened and had what was called "spurling sign" which is

like when you are looking down at the affected arm you lean on your head back you feel a shooting pain going down the arm and it is a primary reason to recommend surgery (Depo. P. 13). Dr. Graham testified that HUBBARD also began having motor deficits where he began to have weakness to wrist extension and bicep function and that he had the classic signs of a disc injury which you would expect by "text book", and in April, 2008 recommended surgery because he had the weakness and that the longer you live with the pressure sitting on the motor nerve the more likely it is to become a permanent fixture (Depo. P. 14). HUBBARD's surgery was carrier out on April 28, 2008 at two levels, C4/5 and C5/6, and had an anterior cervical discectomy and fusion (Depo. P. 15).

Dr. Graham testified that HUBBARD, after surgery, was 95% better than before the surgery after doing additional physical therapy and other conservative measures and continued to follow-up and on October 13, 2008 placed HUBBARD at maximum medical improvement (Depo. P. 21). Dr. Graham testified that based upon the two level anterior cervical discectomy and fusion he had a 26% medical impairment to the body as a whole and felt that HUBBARD could return back to work as a Senior Chemist with the Southern Company (Depo. P. 21).

The following question was asked of Dr. Graham regarding medical causation (Depo. P. 27):

> BY MR. WETZEL:
>
> Q. I meant to ask you one last question, Doctor. Based upon your history that you received from Mr. Hubbard relative to the December 2006 vehicular collision, based upon your - - your personal evaluation of him, the radiographic studies and the resulting surgery that you performed, as well as the permanent injury that he has, do you have an opinion based upon reasonable medical probabilities as to whether or not the vehicular collision that he alluded to that happened in

December of '06 was precipitating or contributing cause for the injury and resulting surgery?

A. Yes. I do.

HUBBARD called, as an additional witness, Denise Hubbard, who was the wife of HUBBARD who testified as to the injuries suffered by her husband what affects it had on his life style.

HUBBARD rested after having called three witnesses and the defense presented its case with two witnesses, Lloyd David Walker, driver of DELTA's vehicle, and Dr. Lennon Bowen, a Neurologist. Lloyd Walker testified that he was a roll-off driver in December, 2006 and testified that he and HUBBARD were both in the turning lane. That the light turned green and that the green light was a solid green, not a protected green arrow, so both proceeded forward. Lloyd Walker testified that HUBBARD stopped and that he (Walker) did not stop quick enough and rear-ended HUBBARD's vehicle (P. 188, 189). Lloyd Walker further testified that his vehicle struck HUBBARD's vehicle at approximately 5 m.p.h. range. Walter testified he remembered seeing a dent in HUBBARD's bumper and that DELTA's bumper was kind of a cowcatcher type and it looked actually like a bolt probably hit HUBBARD's bumper and made an indentation (P. 188, 189). Mr. Walker further testified that HUBBARD did not claim any injury at the time of the accident (P. 190). On cross-examination of Mr. Walker by HUBBARD's counsel herein, Mr. Walker testified that he had been working approximately a year prior to the December, 2006 incident with DELTA and that DELTA primarily removed construction debris. Mr. Walker testified that the vehicle he was operating was a 2006 Mac truck and that the container located on the bed of the tractor trailer was a roll-off 20 yard container and that the container weighed approximately 24-26,000 pounds (P. 193). Mr. Walker testified that he was working in east

Gulfport, where he picked up a load in that area and was heading to Cowan-Lorraine Road. Mr. Walker was loading dirt, concrete and miscellaneous wood (P. 194). Mr. Walker testified that that cattle guard type bumper that was affixed to the Mac truck was to protect the radiator and the housing of the engine (P. 198). Mr. Walker testified that his bumper was very stout and that it was bolted on and probably had three bolts on each side to bolt it to the steel bumper itself (P. 199). Mr. Walker further testified that this particular vehicle had a very stout steel bumper in front of it (P. 199).

Mr. Walker testified that when he hit HUBBARD's vehicle he did not know how far he may have pushed HUBBARD's vehicle but did agree that HUBBARD's vehicle was pushed from the point of the original impact (P. 200). Mr. Walker further testified that HUBBARD was at a complete stop when he struck the back of HUBBARD's vehicle (P. 200). Mr. Walker further testified that he called his supervisor, Bill MacWright, immediately who came to the scene and took photographs of the front of the Mac truck.

The only additional witness called by DELTA was Dr. Lennon Bowen, a Neurologist, who was retained by DELTA to review the records of the HUBBARD and give testimony in this case. Dr. Bowen testified that after looking at the imaging and medical records of HUBBARD, it was his opinion that it looked like HUBBARD had a slow progressive degenerative condition overall for several years and his imaging was fairly consistent with a normal degenerative process of the spine (P. 215). Dr. Bowen testified that normal in a sense is that once you develop some degeneration or age related changes or wear and tear, this is just one of the natural courses that would lead to some of the symptoms that HUBBARD complained of (P. 220). Dr. Bowen testified that HUBBARD complained of numbness radiating down the left arm for years and that he developed some weakness noted on the records that fit with the C6 nerve distribution to the

injury and that in his opinion that it was obvious looking through the records and image studies that HUBBARD's alleged injuries in the matter pre-existed the December 1, 2006 accident (P. 224). At no time did Dr. Bowen testify as to what required the need for surgery. On cross-examination, Dr. Bowen admitted that in the prior treatment that HUBBARD had by Dr. Lance Johansen prior to the wreck, it was not to diagnose a neck injury. Also, HUBBARD's referral to Dr. Donnis Harrison was not for a neck injury as well. Dr. Bowen agreed that both doctors did not diagnose a neck injury (P. 263, 264). Dr. Bowen also agreed that the numbness and tingling that was referred to in Dr. Johansen's notes and Dr. Millette's notes prior to the vehicular collision of December 2, 2006 were directly attributable to his neurological disorder (multiple sclerosis) that was unrelated to his neck condition (P. 264).

ARGUMENT

I. The Circuit Court erred as a matter of law and abused its discretion in failing to impose an additur, pursuant to Mississippi Code §11-1-55, as the Jury verdict in the amount of Three Thousand Dollars ($3,000.00) was contrary to the overwhelming weight of the credible evidence.

As this Court is well aware, the grant or denial of a motion for new trial for damages is always and has been a matter largely within the sound discretion of the trial judge. The Court's authority to order an additur or new trial on damages is found in *Miss. Code Ann.* §11-1-55 (1972), which reads as follows:

> Section 11-1-55 Authority to Impose Conditions or Additurs or Remittitur:
>
> The Supreme Court or any court of record in a case in which damages were awarded may overrule a motion for new trial or affirm on direct or cross appeal, upon condition of an additur or remittitur, if the court finds that the damages are excessive or inadequate for the reason that the jury or trier of the facts was influenced by bias, prejudice or passion, or that the damages awarded were contrary to the overwhelming weight of the credible evidence. If such additur or remittitur be not accepted, then the court may direct, a new trial on damages only. If the additur or remittitur is accepted and the other party perfects a direct appeal, then the party accepting the additur or remittitur shall have the right to cross appeal for the purpose of reversing the action of the court in regard to the additur or remittitur. (Emphasis supplied)

Pursuant to the above statute, this Honorable Court does have the authority to award an additur if it finds either (1) the jury or trier of fact was influenced by bias, prejudice or passion; or (2) the damages were contrary to the overwhelming weight of the credible evidence. *See, compare, Rodgers v. Pascagoula Public School Dist.*, 611 So.2d 942, 944 (Miss. 1992); *Leach v. Leach*, 597 So.2d 1295, 1297 (Miss. 1992); *Biloxi Elec. Co. v. Thorn*, 264 So.2d 404, 405 (Miss. 1972); *Boggs v. Hawks*, 772 So.2d 1082 (Miss. App. 2000); *Jack Gray Transport, Inc. v. Taylor*, 725 So.2d 898 (Miss. 1998); *Harvey v. Wall*, 649 So.2d 184 (Miss. 1995); *Flight Line v.*

Tanksley, 608 So.2d 1149 (Miss. 1992); *James v. Jackson*, 514 So.2d 1224 (Miss. 1987); *Polk v. Amoco Product Co.*, 430 So.2d 417 (Miss. 1983).

The Mississippi Supreme Court in *Leach, supra*, stated that each case involving the issue of additur must "necessarily be decided on its own facts". Further, according to *Rodgers, supra*, the Court stated:

> The only evidence of corruption, passion, prejudice or bias on the part of the jury is by way of inference, if any, to be drawn from contrasting the amount of the verdict with the amount of the damages.

Thorn, supra at 406; *Rodgers, supra* at 944-45; *Pham v. Welter*, 542 So.3d 884, 888 (Miss. 1989).

The Court in contrasting the amount of the verdict with the amount of damages which were proven in this case need only begin with the medical bills which were introduced into evidence without objection or comment by counsel for the Defendant (P. 31-32):

> MR. WETZEL: Four are the medical bills that the plaintiff incurred.
>
> THE COURT: Any objection?
>
> MR. WILKINSON: No objection, Your Honor.
>
> MR. WETZEL: Plaintiff's 5 is the out-of-pocket expenses incurred by the plaintiff.
>
> THE COURT: Any objection?
>
> MR. WILKINSON: No objection, Your Honor.
>
> THE COURT: All right. So P-1, -2, -3, -4, and -6 will all be admitted without objection, and it is my understanding that y'all are agreeing that both parties can use those exhibits during opening statement. Is that right, Mr. Wetzel?
>
> MR. WETZEL: That's correct.

THE COURT: Mr. Wilkinson?

MR. WILKINSON: That's correct, Your Honor.

THE COURT: Okay. Now, we have one more; is that right?

DIRECT EXAMINATION OF CHARLES HUBBARD BY MR. WETZEL

Q. Now let's talk about your lost wages for a moment, Charles. I have a document here that you prepared (P. 99).

MR. WETZEL: Judge, on subparagraph 11 of our complaint, 11-I specifically, subparagraph I, we put on there out-of-pocket expenses which he would not have otherwise incurred (P. 99).

And one of the out-of-pocket expenses was his lost wages which we have previously provided them just as we provided them the other out-of-pocket expenses. And we've also provided them the cost and estimate from Champion Dodge Chrysler for those out-of-pocket expenses.

Those have all been provided through discovery. And in terms of what our damages were, we listed every one of those, have given it to them. I think it's specifically pled enough under Rule 15.

(PLAINTIFF'S EXHIBITS 6 & 7 FOR IDENTIFICATION) (P. 103)

(JURY IN)

THE COURT: Okay. Mr. Wetzel, you may proceed.

MR. WETZEL: Thank you, Your Honor.

BY MR. WETZEL:

Q. Mr. Hubbard, before we took the comfort break for the jury, I have in front of you Plaintiff's Exhibit 6 marked for identification. It's a letter you prepared July 28, '08, on your letterhead; is that correct? (P. 103)

A. Yes, sir.
Q. And this is in regards to your loss of wages? (P. 104)

A. Yes, sir.

MR. WETZEL: We'd move that that be introduced as plaintiff's exhibit next, Your Honor. (P. 105)

THE COURT: Mr. Wilkinson?

MR. WILKINSON: We object to it, Your Honor, based upon the conference we had at the bench.

THE COURT: It's overruled. It will be received as Plaintiff's Exhibit 6.

(PLAINTIFF'S EXHIBIT 6 IN EVIDENCE) (P. 106)

BY MR. WETZEL:

Q. I have another document in front of you that's been marked Plaintiff's Exhibit 7 for identification. And would you describe what this particular document is, please, Mr. Hubbard. (P. 105)

A. This is an estimate from Champion Dodge place on Pass Road. That's where I bought my vehicle. The way they explained it to me is that - -

BY MR. WETZEL:

Q. What's the total amount of the damage for the repairs? (P. 105)

A. Okay. The total amount that they placed on the damage, which consisted of using junkyard after-market parts, was $645.21.

Q. They did not include a new bumper, but that was a after market?

A. Yes, sir.

Q. Does this truly and accurately depict the repair estimates that was provided to you from the place you purchased your vehicle?
A. Yes, sir.

MR. WETZEL: We'd move that that be introduced as plaintiff's exhibit next.

MR. WILKINSON: Your Honor, objection, the same basis as on Exhibit 6 and also on lack of this witness is not the individual that prepared that document.

THE COURT: It will be received as P-7. Mark it as evidence.

(PLAINTIFF'S EXHIBIT 7 IN EVIDENCE) (P. 106)

As this Honorable Court can readily ascertain, counsel for DELTA stipulated to the introduction of the medical bills without any statement that the medical bills were only being introduced for authenticity purposes. Once the medical bills were introduced, there was prima facia proof that the medical bills were both necessitated and sustained by HUBBARD for injuries arising directly from the December 1, 2006 vehicular collision. The total medical bills introduced into evidence, without objection, were $138,294.15. Also admitted through the testimony of HUBBARD was his loss of wages, which indicated his total wage loss following the collision of December 1, 2006 was $14,074.48. Also admitted through stipulation of counsel, were the mileage expenses incurred to and from doctor's appointments in the amount of $163.18. Also introduced were damages to HUBBARD's vehicle, which was uncontradicted, in the amount of $645.21.

As this Court is well aware, when counsel for DELTA stipulated to allow in the medicals and out-of-pocket expenses into evidence, a "stipulated fact is one which both parties agree is

true", further, "factual stipulations sets boundaries beyond which this Court cannot stray." *Accord, Wilbourn v. Hobson*, 608 So.2d 1187, 1189 (Miss. 1992).

In *Wilbourn, supra*, the Supreme Court recited the proposition that:

> Courts are bound to enforce stipulations which parties validly make, where they are not unreasonable or against good morals or against public policy.
>
> *Id.* at 1189.

Further, the Mississippi Supreme Court in *James v. Mabus*, 574 So.2d 596 (Miss. 1990) stated:

> Inherently probable, reasonable, credible and trustworthy testimony, uncontradicted by the evidence must be accepted as true.

The parties to this litigation herein stipulated that the medical expenses and out-of-pocket expenses resulting from the vehicular collision were uncontradicted, meeting the test set forth in *James*. Thus, the jury was provided with a minimum floor upon which to build its calculation of HUBBARD's damages. No witness, including the testimony of DELTA'S expert, Dr. Lennon Bowen, in any way refuted the amount or reasonableness of any of the medical bills included in the stipulation. Further, DELTA's expert medical witness, Dr. Lennon Bowen, never spoke to the issue nor gave any testimony to the issue as to whether the surgery, which was performed by Dr. Eric Graham, and the medical bills attendant thereto were not caused by the vehicular collision in question. This specifically retained expert stayed away from that particular issue and never gave any testimony relative to whether the surgery was directly attributable to the collision in question.

The testimony by HUBBARD's treating Orthopedist was unequivocal that in his opinion "that it was directly precipitated by the collision in question".

HUBBARD is ever mindful that the burden of proof lies with him seeking the additur, who must prove his injuries and other damages.

In determining whether this burden has been met by HUBBARD, this Court must view the evidence in the light most favorable to the Defendant, giving that party all favorable inferences that reasonably may be drawn therefrom. *Rodgers v. Pascagoula Public School Dist., supra.*

It is primarily the province of the Jury to determine the amount of damages to be awarded and the award normally may not be set aside unless so unreasonable an amount as to strike mankind at first blush as being beyond all measure, unreasonable in amount and outrageous. *See and compare Harvey v. Wall*, 649 So.2d 184, 187 (Miss. 1995); *Quinn v. President Broadwater Hotel, LLC*, 963 So.2d 1204 (Miss. App. 2007). In determining whether the Plaintiff is entitled to an additur herein, Mr. Hubbard would direct this Court to prior cases to where the Mississippi Supreme Court have granted additur in instances where the jury's monetary award left little or nothing for elements of damages which were uncontested or undisputed by the evidence. *See E. G. Maddox v. Muirhead*, 738 So.2d 742, 744-45 (Miss. 1999) (jury award of $2,900.00 after reduction of Plaintiff's fault, failed to compensate Plaintiff for uncontested medical bills and left nothing for pain and suffering); *Harvey v. Wall*, 649 So.2d 187 (Miss. 1995) (additur granted where jury award left $100.00 for uncontradicted elements of pain and suffering and permanent impairment); *Rodgers v. Pascagoula Public School Dist.*, 611 So.2d 942 (Miss. 1992) (additur granted where jury returned verdict equal to medical expenses despite uncontradicted proof of pain and suffering and permanent impairment); *Pham v. Welter*, 542 So.2d 884 (Miss. 1989) (additur granted where jury awarded $30,000.00 compensated Plaintiff for undisputed medical bills and loss wages in the amount of $26,682.00, but left only

the remainder for pain and suffering and permanent impairment which was supported by ample proof).

In the Court's determination and review of the evidence in this case and to determine the standard for review, the Mississippi Supreme Court in the recent case of *Entergy Mississippi, Inc. v. Bolden*, 854 So.2d 1051 (Miss. 2003) stated the following:

> "There are no fixed standards as to when an additur or remittitur is proper. *Leach v. Leach*, 597 So.2d 1295, 1297 (Miss. 1992). Therefore we proceed on a case by case basis in determining whether a jury award is excessive. *Biloxi Elec. Co. v. Thorn*, 264 So.2d 404, 405 (Miss. 1972). We will not disturb a jury's award of damages unless its size, in comparison to the actual amount of damage, shocks the conscious. *City of Jackson v. Locklar*, 431 So.2d 475, 481 (Miss. 1983).
>
> The Supreme Court continued.
>
> The bias, prejudice or passion standard is purely a circumstantial standard. *See Cade v. Walker*, 771 So.2d 403, 407 (Miss. App. 2000). "The evidence of corruption, passion, prejudice or bias on the part of the jury is an inference to be drawn from contrasting the amount of the verdict with the amount of the damages. *Rodgers*, 611 So.2d at 944-45."

The Court of Appeals recently in *Boggs v. Hawks*, 772 So.2d 1082 (Miss. App. 2000) stated the following with regard to the standard for overwhelming weight of the evidence:

> "Though stated differently, the standards for overwhelming weight of the evidence and whether the jury returns a verdict that is influenced by bias, prejudice or passion are basically the same thing. *Green v. Grant*, 641 So.2d 1203, 1208 (Miss. 1994). Essentially, the standard for overwhelming weight of the evidence is objective. It requires trial courts to apply this standard by reference to applicable law on recoverable damages in relation to the evidence before them. *Green*, 641 So.2d at 1208. The Court may infer bias, prejudice or passion by contrasting the amount of damages with the amount of the verdict."

In this Court's determination as to whether the verdict is the result of prejudice, bias or passion or is against the weight of the credible evidence, the Plaintiff would submit the following. This was an admitted liability case and the Defendant entered a Stipulation of Liability in this matter. The admission of the medical bills and out-of-pocket expenses were expressly stipulated to, along with the uncontradicted loss wages and the amount of property damage was never an issue. At no time did Defendant's counsel cross-examine the Plaintiff as to any of his medical bills that he sustained nor as to the out-of-pocket expenses but only questioned the Plaintiff as to the dates as outlined in the exhibit of how he came up with the loss wage information which was strictly related to the time he was off from work.

At no time, as stated above, did Dr. Lennon Bowen testify that the cervical surgery performed by Dr. Eric Graham was not causally related to the vehicular collision in question. The testimony of Dr. Eric Graham, Plaintiff's treating orthopedic surgeon, was unequivocal in his testimony that the cervical surgery he performed was directly and causally related to the vehicular collision.

If this Court were to review the direct testimony of Dr. Lennon Bowen, the Court can readily ascertain that the testimony of Dr. Bowen was very limited in scope. One, Dr. Bowen did not attempt to testify that the surgery provided by Dr. Eric Graham was not causally related to the wreck. Two, that Charles Hubbard suffered from age related degenerative disease of the spine (both c-spine and l-spine) which preexisted the December 1, 2006 automobile accident. Three, in addition to the degenerative disease of the spine, Mr. Hubbard suffered from a mild disc herniation in the cervical spine which was likely caused by age related degeneration or a previous automobile accident. Fourthly, Dr. Bowen testified that Mr. Hubbard suffered from impingement of a nerve root stemming from the cervical spine which resulted in pain, numbness

and loss of use of Mr. Hubbard's left arm and that the impingement was due to age related disc degenerative disease and preexisted the December 1, 2006 automobile accident.

As the Court can readily ascertain, there is absolutely no testimony that would contradict the testimony of Dr. Eric Graham who testified on Page 27 of his deposition as follows:

> Q: Based upon your history that you received from Mr. Hubbard relative to the December, 2006 vehicular collision, based upon your personal evaluation of him, the radiographic studies and the resulting surgery that you performed, as well as the permanent injury that he has, do you have an opinion based upon reasonable medical probabilities as to whether or not the vehicular collision that he alluded to that happened in December, 2006 was a precipitating or contributing cause and resulting surgery?
>
> A: Yes, I do.

Had the Defendant in this case refuted the surgery or refuted that the medical bills were related to the collision in question by expert testimony and/or other evidence in the case then the Court could make the determination that the verdict was not against the overwhelming weight of the credible evidence. Furthermore, when the Court contrasts the verdict to the damages proven in this case; even if the Court were to assume that the only medicals that may have been related was the two visits to Dr. Paul Matherne on December 22, 2006 and January 5, 2007, those medical bills only added up to $170.00. If the Court were to assume that the property damage claimed by the Plaintiff, which was in the amount of $645.21, was all the Plaintiff was entitled to these two items, would only add up to $815.21. How the jury could come up with a round amount of $3,000.00. The opinion of counsel herein was that this was a nominal sum that the jury awarded the Plaintiff and was not tied to any of the damages in this case. It is apparent that the jury totally disregarded the testimony of the Plaintiff, the Plaintiff's wife and also Dr. Graham who was uncontradicted in his testimony. Dr. Graham considered all of the medical

testimony and medical records of the prior treatment by Dr. Donnis Harrison who saw him within 6 months of the date of this collision and on page 40 of his deposition stated the following:

> "If you look at Donnis Harrison's examination and you look at mine you will see they are very close in terms of what we're looking at. And the fact that Donnis had an objective test of a negative EMG a month prior to the accident and then he develops weakness in such a short period of time that's pretty consistent solid objective evidence that this was related to the accident.
>
> The doctor continued on Page 41.
>
> There is no mention of any type of acute fragment as noted on these studies. It does say that he has left sided disc complex at C4/5 and C5/6. And then when you look at the 2/7/2007 study, it says that C4/5 there is a broad based disc protrusion, more severe left paracentral disc, as well as some osteophytes which encroach. So, again, he has preexisting arthritic changes. But I don't see that this was compared to the previous one. But here they are mentioning specifically a left paracentral disc that was severe and this one at C4/5 it's a broad based posterior disc protrusion with only mild flattening of the left anterior cord. So even if he did have a preexisting condition it was obviously worse on the subsequent MRIs in February, 2007."

Dr. Graham also considered the medical reports of Dr. Terry Millette (the treating neurologist who treated him for multiple sclerosis) regarding the left arm pain and stated the following on Page 45 of the deposition:

> "So he (Millette) ordered the test not because this gentleman was complaining of neck and arm pain. He orders it to look for if there was any evidence of demyelinating plaques, which we call oligoclonal bands. If there are big white patches in the white matter of the spinal cord, then that's diagnostically MS. And that's why this test was ordered. It wasn't ordered because he was complaining of radicular pain. So when that's presented to the radiologist, he didn't even mention it. So how do you know – that's what I'm asking. What was the reason behind this? That's my assumption why Dr. Millette would order it since he is the Neurologist treating the MS. But again, I would be more

> interested in Millette's clinic notes and what led to this test and what his examination was in 2006."

As it relates to the "mechanism of the injury", on cross-examination Dr. Graham stated the following:

> "If you would like an explanation of what possibly could have happened if we're throwing out all of these theoretical things that could occur if you have a preexisting injury or a preexisting problem at C4/5 with left sided disc complexes, you get into another accident, and the disc tears, you superimpose another annular tear on top of a previously degenerating disc. Now your having leakage of this chemical inside your disc onto the nerve creating a symptomatic radiculopathy. That led to a speed up of the degeneration of that disc. And as the foramen begins to collapse and the disc begins to collapse, you then begin to assert pressure on an exiting nerve root which is going to correspondingly result in weakness over time. And I would say that if I were to put that together in a picture that may be what happened. But I wasn't with him every single day."

Furthermore, there was no testimony submitted by Dr. Lennon Bowen that the lack of property damage indicated that there was not a severe physical impact that would cause the physical injury to HUBBARD. Furthermore, there was no testimony in any way that questioned any lapse of time between the accident and the subsequent doctor's visits. The only car wreck which HUBBARD had ever been in, prior to December 1, 2006, was in January, 2004 in which he only received approximately less than six weeks worth of chiropractic treatment for his neck.

In an attempt to define what constitutes a verdict that is against the overwhelming weight of the evidence, the Supreme Court has relied on several key phrases or concepts that are repeatedly used in this body of law. The cases rely on a short phrase that the Court will not alter a jury verdict unless the award of damages "shocks the conscious" of the Court. The "shock" must be experienced by the judicial conscious, not the actual conscious of the members of the Court. *See Bankers Life and Cas. Co. v. Crenshaw*, 483 So.2d 254 (Miss. 1985).

The phrase most often used as to benchmark for determining whether a verdict is against the overwhelming weight of the evidence, or perhaps narrates the circumstances where the judicial conscious is shocked, is that the Court will not set-aside a verdict unless it so unreasonable in amount as to strike mankind at first blush as being beyond all measure, unreasonable in amount and outrageous. *See Estate of Jones v. Phillips*, 992 So.2d 1131, 1150 (Miss. 2008), rehearing dismissed, (Nov. 6, 2008); *Mississippi Dept. of Public Safety v. Durn*, 861 So.2d 990 (Miss. 2003); *Herring v. Poirrier*, 797 So.2d 797 (Miss. 2000).

Occasionally, the Supreme Court adds a sentence to the "first blush" standard that ties in "passion" standard. The Court has suggested that an additur is appropriate when the facts of the case manifestly show the jury to have been actuated by passion, partiality, prejudice or corruption. What the Court is charged with undertaking, using the "objective" standard of "against the overwhelming weight", is to review the evidence presented, compare it to the amount awarded and conclude whether the verdict fits within the barrage of adverbs and adjectives such as "flagrantly outrageous", "extravagant", "beyond all measure" and "conscious shocking". The Mississippi Supreme Court has stated that a Circuit Court, as well as this Court, may alter a verdict that is so contrary to the weight of the evidence that it may not may be "reasonably explained". *See Flight Line, Inc. v. Tanksley*, 608 So.2d 1149 (Miss. 1992); *Toyota Motor Co., Ltd. v. Sanford*, 375 So.2d 1036 (Miss. 1976); *Walton v. Scott*, 365 So.2d 630 (Miss. 1978).

Even if the Court were to give every reasonable reference that may be drawn from the evidence, it is absolutely and abundantly clear that the jury selected a $3,000.00 amount which bares no relevance or resemblance to the damages in this case. This Court should proclaim that the verdict should be altered and make a specific finding that the jury verdict is so shocking that

it must have been influenced by bias, passion or prejudice or that it was against the overwhelming weight of the credible evidence.

Despite the Supreme Court's admonitions that alterations of a jury verdict is an extreme measure, the Supreme Court has also proclaimed that "in the past this Court has not hesitated to impose an additur when a jury's verdict did not sufficiently compensate a Plaintiff for pain and suffering, and "we do not hesitate to set-aside those verdicts which wholly fail to reasonably compensate a person who is entitled to recovery."

It is quite clear from the verdict in this case that the jury failed to consider the medical bills, lost wages, property damages, out-of-pocket expenses and completely ignored the pain and suffering and permanent injury which was testified to by Dr. Eric Graham when he assigned a 26% impairment to the body as a whole as a result of the surgery. It is also quite clear that the jury's award in the amount of $3,000.000 was a "paltry amount" and the Supreme Court has addressed this in *Gaines v. K-Mart Corp.*, 860 So.2d 1214 (Miss. 2003) and *Winston v. Cannon*, 430 So.2d 413 (Miss. 1983).

Furthermore, there was no testimony on cross-examination of the Plaintiff or Dr. Eric Graham that showed any material contradictions in the medical records from what the Plaintiff alleged occurred after the accident and the medical records of his treating physicians.

There is no way that if the jury only gave the property damage alone ($645.21) that it could come up with a verdict in the even amount of $3,000.00. As stated above, even if you assume that the jury gave the property damage and two visits to Dr. Matherne before ever being seen by Dr. Graham, those two alone would be less than $813.00.

Appellant, HUBBARD, requests this Honorable Court to enter an additur based upon the uncontradicted credible evidence produced by the Plaintiff herein pursuant to §11-1-55 of the

Mississippi Code 1972 as Amended. To do otherwise would be a miscarriage of justice, in that the jury disregarded their oaths and the Court's jury instructions.

II. THE CIRCUIT COURT ERRED IN A PRE-TRIAL RULING WHICH DENIED THE PLAINTIFF THE FUNDAMENTAL RIGHT TO PRESENT MEDICAL EVIDENCE OF HIS PRIOR NEUROLOGICAL CONDITION (MULTIPLE SCLEROSIS); THUS, DENYING THE PLAINTIFF A FAIR AND IMPARTIAL TRIAL.

Before voir dire began, the Court took up a Motion in Limine filed by the Plaintiff beginning on pg. 5 of the transcript where the Court stated the following:

> THE COURT: That motion is sustained. All right. Now, as I read it, we have No. 2, evidence of plaintiff's past medical treatment of prior injuries.
>
> MR. WETZEL: Judge, my client suffered with 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 the defendants that the MS has anything to do 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: Judge, we have no problem with that.
>
> THE COURT: All right.
>
> MR. DANOS: Your Honor, as long as the agreement is limited to evidence that the MS somehow caused his alleged injuries we stipulate to that.
>
> MR. WETZEL: What now?
>
> MR. DANOS: So long as it's limited to evidence of the MS and linked to the injuries, we stipulate to that. We don't plan on mentioning multiple sclerosis at all.
>
> MR. WETZEL: I don't really understand what you're saying. That's what we're trying to keep out is any MS not be mentioned whatsoever for any reason.
>
> MR. DANOS: Your Honor - -
>
> MR. WETZEL: If we stipulate it's not to be mentioned, it's not going to be mentioned.

MR. WILKINSON: That's correct.

MR. DANOS: We agree with that, Your Honor.

THE COURT: Will y'all please address the Court.

MR. WETZEL: I'm sorry. I was just trying to make sure I understood what counsel was trying to tell me.

THE COURT: All right. Now, Mr. Danos.

MR. DANOS: Yes, 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.

The Plaintiff, through counsel, after the Court sustained the motion requested the Court to reconsider the Motion in Limine which the Plaintiff filed and the following colloquy occurred between counsel herein and the Court:

THE COURT: Mr. Wilkinson.

MR. WILKINSON: Yes, Your Honor. I'll be very brief. Two matters. One is yesterday on the motion filed by Mr. Wetzel on the motion in limine on the issue of the MS, to which we did not oppose and still do not.

I just want to say that there's another side to that, and that is this. The jury certainly is not going to know that Mr. Hubbard has multiple sclerosis, but on the surgery that was done on Mur. Hubbard for his neck, his fusion, the doctor testified, and I think Mr. Hubbard did in the depo, that it was very painful because they had to remove bone from his hip to put into his neck because he had MS. But for MS, they used something totally different, not a piece of bone. They used something else.

In the interest of fairness, we would ask that testimony dealing with that, because it was caused only - - it was necessary only because of MS, be excluded. That's my first one.

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: 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?

Had the Court allowed the issue of multiple sclerosis to be addressed by all of the medical doctors concerned in the case, including the medical records, prior to opening arguments, Mr. Wilkinson, one of the attorneys for DELTA, addressed the Court regarding the multiple sclerosis issue:

MR. WILKINSON: Judge, after yesterday's ruling on the motion in limine filed by the plaintiff on the MS issue, I redacted out 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 inhere 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 field.

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 the jury and ask them individual questions.

Perhaps the Court could inquire. If all of them say, no, they don't have anything to 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 that 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 an 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: Than 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 on question regarding the back or the shoulder. He never asked on 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 gong in, and anything with regard to MS is to be redacted and no mention of multiple sclerosis, period.

The Court, by reversing itself without justifiable cause, committed grave evidentiary error in not allowing the Plaintiff to withdraw his objection as to the mention of multiple sclerosis in the case as the Plaintiff and Defendant agreed to the withdrawal of that particular objection made by the Plaintiff. The Plaintiff, HUBBARD, was limited in being able to explain that the symptomology that he had prior to the vehicular collision in his shoulder and what his doctors had advised him was a diagnosis of multiple sclerosis as shown by the records shown to the jury and admitted into evidence from Dr. Lance Johansen, Dr. Donnis Harrison and his Neurologist, Dr. Terry Millette. The overriding issue in this case is Dr. Lennon Bowen was able to extrapolate from these medical records of Dr. Lance Johansen, Dr. Donnis Harrison and Dr.

Terry Millette that he similar symptomology in his upper extremities and that he must have had pain and weakness in his arms because of a disc injury prior to the vehicular collision. When HUBBARD could not mention that he had multiple sclerosis and that the symptomology was similar in that he had radiating pain down his extremity, it was almost impossible to be able to explain to the jury through the testimony of HUBBARD as well as the testimony of Dr. Eric Graham as well as point out in the medical records of Dr. Johansen, Dr. Millette and Dr. Harrison that all of the symptomology as concluded by all three of these doctors as shown in the medical records introduced into evidence was all based upon multiple sclerosis and not radicular pain coming from a herniated disc.

The Circuit Court Judge's decision of not mentioning multiple sclerosis prejudiced HUBBARD and led to confusion of the jury. That the only thing that could be mentioned was a neurological disorder led to counsel herein being unable to affectively cross-examine Dr. Lennon Bowen because he could not mention that the Plaintiff had symptomology of multiple sclerosis as diagnosed by all three physicians, Johansen, Harrison and Millette.

HUBBARD's counsel was shackled by the fact that the Circuit Court Judge in refusing to allow this testimony into evidence totally confused the jury as to whether or not the prior symptomology was from multiple sclerosis or from a herniated disc. Plaintiff's counsel in cross-examination of Dr. Lennon Bowen, attempted to do the best that he could under the circumstances, as shown in the colloquy of testimony that follows herein:

Q. Did not Dr. Graham recommend surgery based upon two things; sensory loss and then a year later he had motor function deficits?

A. Clearly?

Q. Yes, sir.

A. No. He said they're new, they weren't there prior. He said, the reason why I'm doing it is because you got motor function loss and these are new deficits occurring. And they were clearly there on the - - the sensory loss was there. The weakness was there. I don't know what else to tell you. And it was also in the distribution of the C6 nerve root. So - -

Q. Are you finished?

A. That's what I'm telling you.

Q. Are you finished?

A. I'm finished.

Q. Dr. Johansen, Dr. Harrison, two orthopedic surgeons?

A. Correct.

Q Both confirm that the numbness in the left arm and the tingling in the left arm was not related to nerve entrapment, did they not?

A. The orthopedic - -

Q. Yes or no, sir.

A. No, sir. The orthopedic surgeon said this isn't an orthopedic problem. They usually don't - - won't go into a neurological issue or whatever. They'll pass it on.

In their records it clearly states that they don't' think that it's a shoulder problem. It has to be something else. Maybe it's due to this other neurological disease. That's for somebody else to figure out. But they didn't make the conclusion that they didn't have a nerve problem. Otherwise, the guy wouldn't have numbness and tingling in his dang arm. Something had to be going on. They didn't say.

Q. Do you know Dr. Terry Millette?

A. I do.

Q. He's a neurologist?

A. Of course.

Q. Like yourself?

A. Yes.

Q. How many years has he been practicing neurology?

A. A long time. Twenty years, about.

Q. Twenty years. And he concluded based upon orthopedic studies, based upon nerve studies, based upon MRI studies of the brain and neck - -

A. Right.

Q. - - based upon all studies that he had together, that the numbness and tingling was from one thing, a neurological disorder unrelated to his neck?

A. Why did he agree for spine surgery?

MR. DANOS: Objection.

Q. Yes or no, sir.

MR. DANOS: Objection, Your Honor.

THE COURT: Don't answer anything yet.

THE WITNESS: Okay.

MR. DANOS: If he's going to question him about Dr. Millette's opinions and finding and records, he needs to show the doctor those records.

MR. WETZEL: He's on cross-examination, Judge.

THE COURT: It's cross-examination.

BY MR. WETZEL:

Q. Isn't it true, Doctor, after all the studies were done and requested by Dr. Millette of Dr. Johansen, Dr. Harrison, done by the radiologists - -

A. It is my understanding looking at the records, Dr. Millette said, because this isn't due to the other condition is why he sent him to neck surgery.

Q. Dr. Millette - -

A. Am I missing something?

Q. Dr. Millette didn't treat him for the neck surgery, sir.

A. No, but he referred him on.

Q. No, sir.

A. Dr. Graham said in his testimony he talked to Dr. Millette, and Dr. Millette said that - -

THE COURT: Okay. Mr. Wetzel, you may proceed, sir.

BY MR. WETZEL

Q. Doctor, I will give you every chance to answer if you'll let me get my question out.

A. Yes, sir.

Q. We'll try to help the jury with this as we move and try to get through this.

A. Yes, sir.

Q. We had the break. Isn't it true that the medical records in this case and the testimony of Dr. Graham, Eric Graham, my client's orthopedic surgeon, he said that the only reason he referred him to Dr. Millette, his neurologist, was to clear him for surgery because of his unrelated neurological disorder?

A. I'm just trying to think of the working. I'm not sure. I know that he sent him to Millette for clearance, meaning that I think Dr. Millette being his doctor would say, yes, I

think he has a neck problem and needs surgery, as well as his other problem, isn't causing this problem. Is that correct is what you're asking me?

Q. Didn't Dr. Graham testify that, I sent him back to his neurologist to clear him for surgery?

A. Clearance for surgery means, as a neurologist, that a surgeon is not going to operate on my patient for no reason. If they have another neurological condition that could cause a similar symptom, then I would have to say as his physician, his neurologist, say I agree that this other problem - - he needs surgery.

Q. Did you see any records at all from - -

A. That's what neurological clearance is.

THE COURT: Wait a minute. Wait a minute. Wait a minute. Wait a minute. Mr. Wetzel is going to ask the questions. You're going answer the questions.

THE WITNESS: Yes, sir.

THE COURT: Y'all re not going to step on each other.

THE WITNESS: Yes, sir.

THE COURT: When he's speaking, you're not. When you're speaking, he's not.

THE WITNESS: Okay.

THE COURT: Now you may proceed, Mr. Wetzel.

BY MR. WETZEL:

Q. You have been given all the records of Dr. Millette?

A. Yes, sir.

Q. And you saw no record in Dr. Millette's records where Dr. Eric Graham sent Mr. Hubbard to Dr. Millette to confer with his opinion to do surgery or not, only to clear him

because he's got an underlying neurological disorder that you're aware of?

A. Yes, sir.

Q. And that's the reason he sent him to Dr. Millette, to have him cleared for surgery?

A. The term "clear" is, I'm not really sure what - -

Q. Clearance means very simple, is he a candidate for surgery with his underlying neurological disorder? Can I do this surgery on him without risk of putting him under and causing death to occur?

A. If that's what clearance means to Dr. Millette. I'm not sure.

Q. Well, what did you take it from Dr. Graham and his testimony to mean?

A. What I took it was is that Dr. Millette - - well, it doesn't really matter. I mean, yes, you're right in that sense. And also, if it's my patient, being that Dr. Millette knows a lot about the spine too, is, do you think this problem's causing his arm pain and numbness? I'm sure if he didn't think so, then he would have stated so. But that's - -

Q. Isn't it true in your review of all of Dr. Terry Millette's records, the neurologist, after he had the benefit of two orthopedic surgeons, his own opinions, all the diagnostic studies - -

A. Correct.

Q. - - every test that was performed, he made the conclusion that the numbness, the tingling, in the left arm that preceded this collision - -

A. Right.

Q. - - was caused by his underlying neurological disorder, was it not?

A. I don't know what Dr. Millette said. I don't think he has a record after the - - does he have the record that I know of after the event saying that. I'm not sure.

Q. Doctor, you read the records. I'm asking you.

A. I did. I didn't see where he said that in particular.

Q. Did anyone prior to Dr. Graham every say this man had a neck injury? Did Dr. Harrison say he had a neck injury?

A. His chiropractor did.

Q. Hold on a minute.

A. Okay.

Q. Did Dr. Johansen say he had a neck injury? Did Dr. Johansen diagnose a neck injury?

A. No, sir, he didn't.

Q. Did Dr. Harrison diagnose a neck injury?

A. No.

Q. Did Dr. Millette diagnose a neck injury?

A. He didn't diagnose a neck injury either way.

Q. Okay. Now, the only complaint we've got of any neck pain was back in 2004 with a chiropractor, correct?

A. Correct.

Q. That was two years earlier than this collision.

A. Well, we have a lot of notes that say a lot of pain and numbness.

Q. The pain and numbness you keep talking about, Doctor, is in Dr. Harrison's notes.

A. Right.

Q. Dr. Johansen's notes.

A. Okay.

Q. And Dr. Millette's notes.

A. Correct.

Q. And all three of those with those arm complaints said they were directly attributable to his neurological disorder that's unrelated to a neck condition. Yes or no?

A. I'm rehashing the records in my mind because I don't have them infront of me. I can't argue against. I'm not exactly sure if they said specifically that it was related to that other ting.

MR. WETZEL: No further questions.

As the Court can readily ascertain, the Circuit Court Judge, without legal authority, abused his discretion in not allowing counsel to mention multiple sclerosis which was in the medical records introduced before the jury, over objection of counsel; with counsel for HUBBARD being unable to refer to the diagnosis of MS by each one of these doctors in their medical records. HUBBARD was limited in not being able to mention multiple sclerosis in closing arguments or even make mention of multiple sclerosis in the testimony of Charles Hubbard or through Dr. Eric Graham as well. Appellant would submit this Honorable Court that the plaintiff was denied a fair and impartial trial and that the evidentiary ruling was an abuse of discretion.

III. THE CIRCUIT COURT ERRRED AS A MATTER OF LAW BY ENTRY OF AN ORDER AWARDING THE DEFENDANT SEVEN THOUSAND TWELVE DOLLARS AND 03/100($7,012.03) AS COSTS, PURSUANT TO RULE 68 OF THE MISSISSIPPI RULES OF CIVIL PROCEDURE.

Beginning on page 347 of the transcript the following colloquy occurred regarding DELTA's motion for cost under Rule 68 of the Mississippi Rules of Civil Procedure:

> MR. DANOS: Judge, this is a brief motion. We moved under Rule 68 Mississippi Rules of Civil Procedure which allow a defendant or actually any party to make an offer of judgment more than fifteen days prior to trial. We did so. We made an offer of judgment of $30,000. We did it in a timely fashion, and you also knew that the jury came back with a verdict of $3,000.
>
> Now, Rule 68 says, and I'm paraphrasing, if the offer is rejected and the verdict is less than the offer of judgment, then the defendants or the party which made the offer gets the costs incurred after the making of the offer.
>
> Judge, from the time of the make of the offer, and I did some research and I don't believe under Mississippi law that we're entitled to attorneys' fees, but I do believe we're entitled to those fees which I outlined in our brief. They're not fees, rather they're expenses.
>
> The expenses which I outlined come to an amount of $7,599.11. Now, Judge, if you take the verdict amount from the amount that we should get pursuant to our offer of judgment, it comes out to $4,599.11. Therefore, Your Honor, we seek this amount under Rule 68.
>
> MR. WETZEL: Your Honor, Josh is correct. They did make a motion. They did give us an offer of judgment in the amount of $30,000.
>
> You have to look at Rule 68 on this matter in the event you don't grant the additur. They've submitted an expert invoice from Dr. Bowen of $4,600. that was more than he testified to as to what his costs were in terms of providing expert costs at the trial. If you remember correctly, I went through that exclusively with him as to what he - - he couldn't remember how much. It was like $1,500. I think my memory and my notes indicate it was about $2,800 total, and now I'm seeing a bill for $4,600 even.

I don't think that Rule 68, I haven't see any cases that provide that we have to pay for their copy and printing costs of $1,076 or we have to pay for their demonstrative aids that they had the system from Dancel to come in here where they've charged $1,084. That was the overhead projector.

Court reporter costs of $251.50 for post trial motions I don't think we should be hung with. And I definitely don't think there's anything that said we have to pay for their food and travel. So we're supposed to pay for all their lunch expenses?

I'll let you review Rule 68, but I know of no case law that says they're entitled to these expenses, your Honor. Filing fees, subpoena costs, any of those type of costs associate d with the clerk's office, no questions about it.

Rule 68 of the Mississippi Rules of Civil Procedure provides the following:

"At any time more than 15 days before the trial begins, a party defendant 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 cost then accrued. If within 10 days after 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 thereon 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 cost. If the judgment finally obtained by the offerree is not more favorable than the offer, the offeree must pay the costs 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 affect as an offer made before trial if it is served within a reasonable time, not less than 10 days, prior to the commencement of hearing to determine the amount or extent of liability."

The official comments to Rule 68 provide the following:

COMMENT

> Rule 68 is intended to encourage settlements, avoid protractive litigation, and protect the party who is willing to settle from the burden of cost that's subsequently accrue.
>
> Although the privilege of an offer of settlement is extended only to the party defending against a claim, it furnishes a just procedure to all parties concerned. It is fair to the claimant because it does the defending party no good to make an offer of judgment that is not what the claimant might reasonably be expected to recover, he will not free himself of costs, if the judgment recovered is more than the offer. Likewise, it is fair to the defending party because it allows him to free himself of the court cost by offering to make a settlement. Finally, it benefits the Court because it encourages settlements and discourages vexatious suits. See 12 Wright and Miller, Federal Practice and Procedures, Civil §3001 – 3005 (1973); 7Moore's Federal Practice §68.01-.06 (1974).

In this particular case, HUBBARD does not contend that a proper Rule 68 motion was not made in the amount of $30,000.00 which was rejected in a timely fashion, however, the costs requested under Rule 68, are not the type of costs that are envisioned under the Mississippi Rules of Civil Procedure, and its counterpart, Federal Rules of Civil Procedure – Rule 68. On page 2 of DELTA's motion for costs and stay of execution of judgment, the following is set out:

> **B. Cost Incurred Post-Offer of Judgment**
>
> After the Offer of Judgment was made on July 27, 2009, Defendant incurred the following costs in preparation and in defense of the matter at trial:
>
> 1. Expert Fees: **$4600.00** *See Expert Invoices*, attached as "Exhibit D" (as redacted).
>
> 2. Copying/Printing Costs: **$1076.10** *See Copying/Printing Expenses*, attached as "Exhibit E".
>
> 3. Trial Materials (demonstrative aids, technical support, etc.): **$1084.43** *See Dancel Invoice*, attached as "Exhibit F".
>
> 4. Court Reporters: **$251.50** *See Merrill Legal Solutions Invoice*, attached as "Exhibit G."

5. Travel and Food: **$587.08** *See Travel and Food Expenses*, attached as "Exhibit H."

Total Expenses Incurred Post-Offer: **$7599.11**

As the Court can readily ascertain, DELTA was attempting to have its expert fees through Dr. Lennon Bowen, copy costs, stenographic bills, Court Reporter bills and travel and food expense in the total amount of $7,599.11 taxed its costs to the Plaintiff. The Plaintiff, through counsel, objected that these were not the type of costs that were recognizable or awardable under Rule 68 of the Mississippi Rules of Civil Procedure.

Under Rule 54(d) of the Mississippi Rules of Civil Procedure, definition of "cost" is set out specifically as it applies to Rule 68 as follows:

Subsection d. (Cost)

Except when express provision thereof is made in a statute, cost shall be allowed as of course to the prevailing party unless the court otherwise directs, and this provision is applicable in all cases in which the State of Mississippi is a party plaintiff in civil action as in cases of individual suitors. In all cases where costs are adjudged against any party who has given security for cost, execution may be ordered to issue against such security. Cost may be taxed by the clerk on one day's notice. On motions served within five days of the receipt of notice of such taxation, the action of the clerk may be reviewed by the court.

The official comment to Rule 54(d) of the Mississippi Rules of Civil Procedure is as follows:

"Three related concepts should be distinguished in considering Rule 54 (d); these are costs, fees and expenses. Costs refer to those charges that one party has incurred and is permitted to have reimbursed by his opponent and party of the judgment in the action. Although cost has an every day meaning synonymous with expenses, taxable costs under 54(d) is more limited and represents those official expenses such as court fees, that a court will assess against a litigate. Cost almost always amounts to less than a successful litigants total expenses in connection with a lawsuit and their recovery is nearly always awarded to the successful party.

> See Mississippi Code Annotated §11-53-27 (1972) (successful party to recovery cost, generally).
>
> Fees of those amounts paid to the Court or one of its officers for particular charges that generally are delineated by statute. Most commonly these include such items as filing fees, clerks and sheriff's charges and witness fees. In most instances an award of cost will include reimbursement for the fees paid by the party and whose favor the cost award is made.
>
> Expenses include all of the expenditures actually made by a litigant in connection with the action. Both fees and costs are expenses but by no means constitute all of them. Absence the special statute or rule, or an exceptional exercise of judicial discretion, such items such as attorney's fees, travel expenditures and investigatory expenses will not qualify either as statutory expenses or reimbursable costs. These expenses must be born by the litigants. 10 Wright & Miller, *supra* section 2666. See also 6 Moore's Federal Practice, §54.01-.43 (1972).

A literal reading of MRCP 54(d) clearly indicates that in the absence of special statute or rule or an exceptional exercise of judicial discretion, such items as attorney's fees, travel expenditures and investigatory expenses will not qualify either as a statutory fee or reimbursable costs. These expenses must be born by the litigants. *See and compare Miller v. Allstate*, 631 So.2d 789 (Miss. 1994).

HUBBARD, through counsel herein, would submit to this Honorable Court that he is aware of no Mississippi case law that would allow the expenses assessed as cost to the Plaintiff to be awarded either statutorily or by civil rule. It is abundantly clear that the Circuit Court Judge erred as a matter of law in awarding these expenses which are not recognized by the rules as recoverable costs as Rule 54(d) is applied to Rule 68 in this matter.

HUBBARD would also suggest to this Honorable Court that a review of the United States District Court opinion in *Thomas v. Caudill*, 150 F.R.D. 147 (N.D. Ind. 1993) is illustrative of the interpretation of Rule 68 which is almost identical to Rule 68 of the Mississippi

Rules. In *Thomas v. Caudill, supra*, the District Court held that 1)"cost" available with those ordinarily available to prevailing party; and 2) defendant could not recover attorney's fees, paralegal fees, or non-statutory expenses incurred in bringing witnesses to trial. The *Thomas* district court held as follows:

> "In Moore's Federal Practice, "cost" under Rule 68 refer to "those costs ordinarily awarded under Rule 549(d) to the prevailing party. *See* 7 Moore's Federal Practice §68.06(3) at pg. 68-21. However, recent cases have indicated that "costs" under Rule 68 refer to all post-offer costs incurred by the defendant. *See Lentomyyntie Oy v. Medivac, Inc.*, 997 F.2d 364, 375 (C.A. 7 Ind. 1993) (the 7th Circuit, in indicted, suggested that Rule 68 "mandates" payments of all costs.); *Crossman,* 806 F.2d at 333. The district court, therefore, correctly ruled that *Crossman*'s are responsible for all cost...") and *Denny v. Hinton*, 131 F.R.D. 659, 665 (M.D.N.C. 1990) (the defendant was entitled to "recover from the plaintiff all other costs incurred....the date of the offer of judgment"). The Supreme Court has indicated the position in Moore's Federal Practice is the correct definition of "costs" and that the costs which a defendant is entitled to recover under Rule 68 are limited to the costs allowable under Federal Rules of Civil Procedure 54(d). In *Marek*, the Supreme Court stated "Rule 68 does not come within a definition of cost; rather, incorporates the definition of cost that otherwise applies to the case." 473 U.S. at 11 n.2; 105 Supreme Court at 3017 n.2. The only issue presented to the Court in *Marek* was whether a Rule 68 offer affected the amount of attorney's fees which a prevailing party could recover and proceeding under 42 U.S.C. §1983. Although Justice Brenan disagreed with the holding of the majority on the attorney's fees ensue, in his dissenting opinion, Justice Brennan stated that "cost" as that term is used in the Federal Rules should be interpreted uniformly in accordance with the definition of costs set forth in 28 U.S.C. §1920"
>
> Indiana has adopted Rule 54(d) and 68 as part of his trial rules. In *Ingram v. Key*, 594 N.E.2d 477 (IN App. 1992) affirmed 600 N.E.2d 95 (IN. 1992), the appellate court concluded that "costs" have the same meaning in both trial Rule 54(d) and trial Rule 68: the defendant's contention that "cost" contemplated under TR 68 are more extensive than the "cost" covered under TR 54(d) is not persuasive. "Cost" is a term of art with a specific legal meaning, and we must presume that it was used consistently absent evidence of a contrary intent by the drafters. The defendant does not point

> to anything on the fact of TR 68 to indicate that the drafters intended a more expensive definition of cost than its traditional meaning as embodied in TR 54(d). Therefore, the *Thomas* claim for costs will be rule under Rule 54(d). 28 U.S.C. §1920 enumerates the costs which may be recovered: a judge or clerk of any court of the United States may tax its costs the following: 1) fees of the clerk and marshal; 2) fees of the court reporter for all or any part of the stenographic transcript necessarily for use in the case; 3) fees and disbursements for printing and witnesses; 4) fees for exemplification and copies of papers necessarily obtained for use in the case;. A bill of cost shall be filed in a case and, upon allowance, included in the judgment or decree. In *State of Ill. v.. Sangamo Const. Co.*, 657 F.2d 855 (C.A. Ill. 1981) the Court discussed the allowance of costs and stated: Rule 54(d) of the Federal Rules of Civil Procedure grants the District Court, in the absence of other statutory authority, discretionary authority to award costs to the prevailing party. But not all expenses incurred by a party in connection with a lawsuit constitute recoverable costs. Indeed major expenses such as attorney's fees, investigatory services and most travel and subsistent expenses generally are not recoverable "costs". Courts are to award, except in limited exceptional situations only those expenses specifically recognized by statues. 657 F.2d at 864. *Caudill* has included $36,796 in attorney's fees along with $375 in paralegal fees in his bill of cost. Under *Sangamon Construction* those expenses are not recoverable under Rule 54(d) or §1920.
>
> *Caudill* has included a variety of expenses associated with travel and lodging of witnesses. Under 28 U.S.C. §81(b) a witness is only entitled to "an attendance fee of $40 per day." Under §1821(c) a witness is also entitled to compensation at a fixed rate for his mileage to court. If the witness has traveled "by common carrier", a "receipt or other evidence of actual cost shall be furnished" before that cost may be awarded. *Caudill* is not entitled to recover for the non-statutory expenses incurred in bringing his witness to trial.
>
> *Caudill* may recover for photocopy expenses ($131.25), subpoena and mileage fees ($191.30), and depositions fees ($50.78). *Caudill* is entitled to costs in the total amount of $377.33.

Under the *Thomas v. Caudill* analogy and reviewing the state rules which were patterned after the federal rules, it would make rational analysis that DELTA is not entitled to any of the

costs that the Circuit Court awarded without legal basis. Also see *Upton v. Henderer*, 969 A.2d 252 (D.C. 2009) for similar holdings and interpretation of Federal Rule 68. For all those reasons cited above, HUBBARD would request this Honorable Court to reverse the actions of the Circuit Judge and deny the Rule 68 costs awarded.

CONCLUSION

In conclusion, HUBBARD would submit to this Honorable Court, as outlined in his arguments above, that he should be entitled to a reversal of the jury verdict and an additur granted or under Rule 59 granted a new trial for his failure to revive a fair trial and a reversal of the awarded costs to the defendant.

RESPECTFULLY SUBMITTED, this the 28th day of June, 2010.

CHARLES HUBBARD, Appellant

By: _____

JAMES K. WETZEL,
Attorney for Appellant

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I have this day mailed by United States Mail, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellant to: Joshua W. Danos, Esquire, with the law firm of Dogan, Wilkinson, Kinard, Smith & Edwards at their mailing address of Post Office Box 1618, Pascagoula, MS 39538 and Honorable Judge Lawrence Bourgeois, Circuit Court of Harrison County, Post Office Drawer 1461, Gulfport, MS 39502.

SO CERTIFIED, this the 28 day of Jan, 2010.

JAMES K. WETZEL

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