IN THE SUPREME COURT OF MISSISSIPPI
CASE NO. 2010-CA-00184

KEITH BROOKS AND SANDRA BROOKS — APPELLANTS

VS.

VICTOR R. PURVIS — APPELLEE

On appeal from the Circuit Court
of Perry County, Mississippi

BRIEF OF APPELLEE VICTOR R. PURVIS

ORAL ARGUMENT NOT REQUESTED

C. Maison Heidelberg, MB [redacted]
HEIDELBERG HARMON PLLC
795 Woodlands Parkway
Suite 220
Ridgeland, Mississippi 39157
Phone: (601) 351-3333
Fax: (601) 956-2090

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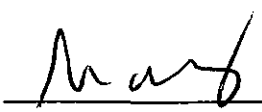
CERTIFICATE OF INTERESTED PERSONS

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

1. Keith Brooks, Appellant
2. Sandra Brooks, Appellant
3. Victor R. Purvis, Appellee
4. Leslie H. Lang, Attorney of record for Appellants
5. Martin D. Crump, Attorney of record for Appellants
6. C. Maison Heidelberg, Attorney of record for Appellee
7. The Honorable Robert B. Helfrich



C. MAISON HEIDELBERG, MB [redacted]
Attorney of record for Appellee

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rule 34 of the Mississippi Rules of Appellate Procedure, the Appellee states that oral argument is not necessary because the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities

STATEMENT OF THE ISSUES

(A) Whether Officer Henry's lay testimony was admissible;

(B) Whether the Brooks' social security disability application file was admissible; and

(C) Whether the jury's award of zero damages to Mr. Brooks was supported by the evidence.

STATEMENT OF THE CASE

A. Nature of the Case

On May 19, 2004, Plaintiffs Keith and Sandra Brooks ("the Brooks") filed suit against Victor R. Purvis ("Purvis"). *See* 1 R. 8-11. The Brooks sought damages arising out of an automobile accident that occurred on October 29, 2001, involving vehicles driven by Mr. Brooks and Purvis. 1 R. 9-10 at ¶ 9. The Brooks asserted that Purvis was negligent for failing to properly operate and control his vehicle and for failing to maintain a proper lookout. 1 R. 10 at ¶ 10.

B. Course of Proceedings and Disposition Below

A jury trial was held on June 3 and 4, 2009. 3 R. 305. The jury rendered a verdict in favor of the Plaintiffs, Sandra and Keith Brooks, although the Plaintiff Keith Brooks was found fifty percent (50%) negligent through comparative fault. 3 R. 305. Sandra Brooks was awarded compensatory damages in the aggregate amount of $75,000. 3 R. 305-06. Judgment was subsequently entered. 3 R. 306. The Brooks filed a motion for a new trial, which was denied by the trial court. 3 R. 234-35, 371. The Brooks then appealed to this Court. 3 R. 372.

C. Statement of Facts

On October 29, 2001, vehicles driven by Mr. Brooks and Purvis were involved in an accident on Sand Ridge Road in Beaumont, Mississippi. 4 R. 20, 26-27. The road was essentially a one-lane road, as it was difficult to pass oncoming vehicles; in order for vehicles to pass, one would have to move onto the shoulder of the road. 5 R. 178. The parties had differing versions of what happened to cause the accident; Purvis claimed that Mr. Brooks was speeding and ran into his vehicle, while the Brooks alleged that Purvis ran into them while they were stopped on the side of the road. 4 R. 27-28, 5 R. 173-176.

SUMMARY OF THE ARGUMENT

The Brooks allege three reversible errors by the trial court: (1) the trial court erred in admitting portions of Officer Henry's deposition testimony; (2) the court erred in admitting the Brooks' social security disability application file, and (3) the award of zero damages to Mr. Brooks was the result of jury bias and prejudice.

First, the Brooks contend that Officer Henry's testimony was inadmissible expert accident reconstruction testimony. However, this testimony was not expert accident reconstruction testimony. Officer Henry's testimony was based on his own observations and perceptions at the scene of the accident and his first-hand knowledge of Sand Ridge Road. Because this testimony was not based on any specialized education, experience, knowledge or training, it was admissible lay testimony under Rule 701 of the Mississippi Rules of Evidence. In addition, much of the testimony objected to by the Brooks was testimony similar to that which they themselves elicited from Officer Henry. In other words, the Brooks "opened the door" to testimony from Officer Henry about the condition of the road, the normal course of travel of the road, and the physical evidence documented by Officer Henry, testimony which the Brooks now complain was erroneously admitted.

Second, the Brooks complain that their social security disability application files were irrelevant, and admission of them violated the collateral source rule. The files, however, were relevant on two key issues: (1) causation, and (2) damages. The Brooks had extensive pre-existing injuries, and the social security evidence showed that injuries claimed in the lawsuit were not the result of the accident and were not as egregious as alleged. Moreover, this evidence was offered to impeach the Brooks' testimony; evidence in the social security files proved that the Brooks complained previously of conditions that they claimed at trial were caused by the

accident. Moreover, the admission of this evidence did not violate the collateral source rule. The social security disability application file was not offered to prove that the Brooks received social security benefits or other collateral source income; in fact, it was the Brooks' own counsel who offered evidence that the Brooks were receiving social security benefits. The collateral source rule applies only when the indemnity or compensation is for the same injury for which damages are sought, and the social security payments at issue in this case were for injuries preceding the accident. Accordingly, the collateral source rule was not violated, and the evidence was highly relevant as to both causation and damages.

Third, the award of zero damages to Mr. Brooks was supported by the evidence. Considering the evidence in the light most favorable to Purvis, there was substantial evidence that Mr. Brooks was not injured in the accident. Officer Henry indicated on the accident report that Mr. Brooks was not injured, and although Mr. Brooks complained of pain, he did not receive any treatment at the accident scene and did not leave in the ambulance. Mr. Brooks attempted to claim that his pain was greater after the accident, but Mr. Brooks was not a credible witness, and the jury clearly disregarded his testimony. Even assuming *arguendo* that an injury was proven, there was sufficient evidence for the jury to conclude that the injury was not caused by the accident. Mr. Brooks had an extensive pre-existing history of medical problems; before the accident, Mr. Brooks was living in "chronic pain" and was on pain medication. Even Mr. Brooks himself could not testify what, if any, of his alleged damages were caused by the accident. This case was not one where the jury was unable to apportion damages, as the Brooks allege; the jury simply concluded that any damages alleged by Mr. Brooks existed before the accident, and, thus, were not the result of Purvis's alleged negligence.

In sum, and as conceded by the Brooks in one of their post-trial briefs, "[b]ecause of the parties' conflicting testimony and their interpretation of the photographs of the accident scene, this case was in fact a question for the jury and *their verdict should not be set aside*." 3 R. 342 (emphasis added).

ARGUMENT

A. Officer Henry's lay testimony was admissible.

"[D]ecisions concerning the relevancy of evidence are in the broad discretion of the trial court." *Terrain Enterprises, Inc. v. Mockbee*, 654 So. 2d 1122, 1131 (Miss. 1995). A trial court's decision will not be reversed unless an abuse of that discretion is shown. *Id.* (citation omitted). "Further, for a case to be reversed on the admission or exclusion of evidence, it must result in prejudice and harm or adversely affect a substantial right of a party." *Id.*

Rule 701 of the Mississippi Rules of Evidence provides: "If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to the clear understanding of the testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702. Miss. R. Evid. 701. The comment to Rule 701 explains:

> The traditional rule regarding lay opinions has been, with some exceptions, to exclude them from evidence. Rule 701 is a departure from the traditional rule. It favors the admission of lay opinions when two considerations are met. The first consideration is the familiar requirement of first-hand knowledge or observation. The second consideration is that the witness's opinion must be helpful in resolving the issues. Rule 701, thus, provides flexibility when a witness has difficulty in expressing the witness's thoughts in language which does not reflect an opinion. Rule 701 is based on the recognition that there is often too thin a line between fact and opinion to determine which is which.

Miss. R. Evid. 701 cmt. "Stated differently, if a trial court must delve into a witness' background to determine if he possesses the necessary education, experience, knowledge or training in a specific field *in order for the witness to testify as to his opinions concerning that particular field*, then [Rule] 702 applies." *Roberts v. Grafe Auto Co., Inc.*, 701 So. 2d 1093, 1098 (Miss. 1997) (emphasis added).[1]

In this case, Officer Henry did not give any expert testimony about the accident or its cause. He repeatedly testified that he was not qualified as an accident reconstructionist. 2 R. 243, 255, 272; Exhibit 31 at pp. 8, 20, 37. His testimony was based on his own observations and perceptions at the scene of the accident and his first-hand knowledge of Sand Ridge Road. *Mississippi Dept. of Transp. v. Cargile*, 847 So. 2d 258, 264 (Miss. 2003) ("A layperson is qualified to give an opinion if he has firsthand knowledge which other laypeople, i.e., the jury, do not have."). It was not based on any specialized education, experience, knowledge or training. *Roberts*, 701 So. 2d at 1098.

Specifically, the Brooks complain that Officer Henry should not have been allowed to testify about the condition, or the normal course of travel, of Sand Ridge Road. Yet the Brooks themselves asked Officer Henry about the road's condition and its normal course of travel:

Q. What was the nature and character of the road that these folks were driving on?

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[1] The Brooks contend that "[t]estimony as to 'how an accident happened, the point of impact, the angle of travel, the responsibility of the parties involved, and the interpretation of photographs' taken at the scene of the accident can only be given by an expert qualified in the field of accident reconstruction." Appellants' brief at p. 11 (citing *Jones v. Jitney Jungle Stores of America, Inc.*, 730 So. 2d 555, 558 (Miss. 1998)). That is not what the *Jones* court held; the court instead agreed with the following proposition: "[a]n accident reconstruction expert should be permitted to give his opinion on how an accident happened, the point of impact, the angle of travel, the responsibility of the parties involved, and the interpretation of photographs." *Id.*

A. It was a loose sandy-type surface. The edges of the road I believe were pine straw. It was a very narrow and rutted road. And it's a really loose surface and it was curved and graded.

. . . .

Q. Was the road wide enough for two vehicles to pass?

A. Yes. But both of the vehicles would need to get on either shoulder of the road on their side of the road for the other vehicle to pass, and they would need to slow down.

2 R. 248, Exhibit 31 at p. 13. Accordingly, the Brooks opened the door to Officer Henry's testimony about the road condition and normal course of travel by questioning Officer Henry about them. *Jones v. State*, 761 So. 2d 907, 913 (Miss. Ct. App. 2000) (upholding admissibility of witness's opinion testimony about the point of impact in a vehicular accident when opposing counsel attempted to elicit his opinion that the physical evidence portrayed in the photographs more likely indicated that the point of impact was closer to, or in, the right of way).

Moreover, the Brooks did not object to some of the testimony that they now argue was admitted in error. On page 12 of their brief, they contend that Officer Henry's testimony regarding his "standard for a two-lane road" is irrelevant, yet the Brooks failed to object to this testimony to the trial court. *See* Exhibit 31 at p. 34 (lines 2-11 are not highlighted).

In any event, testimony about the road itself is not accident reconstruction testimony. Rather, the testimony was based on Officer Henry's first-hand knowledge and observation of the road both before *and* at the scene of the accident. 2 R. 248, Exhibit 31 at p. 13 (Q. "Had you been on that road before the day of the accident?" A. "I had."). Because this testimony was not based on any specialized education, experience, knowledge or training, it was admissible lay

testimony. *Cargile*, 847 So.2d at 265-66 (allowing non-expert lay opinion testimony as to the cause of the accident, the accumulation of water at the site, because it was made from his firsthand knowledge gained from observing and driving on the road; the witness had a familiarity with the road that the jury did not have).

The Brooks also complain about testimony from Officer Henry about the point of impact. Again, the Brooks themselves asked Officer Henry questions about the location of the vehicles before and at the point of impact. The Brooks asked Officer Henry specifically about the tire tracks, *see* 2 R. 255, Exhibit 31 at p. 20, and elicited Officer Henry's opinion, based on the tire tracks, of the vehicles' direction of travel and location in the road at the point of impact:

Q. From the photos, what direction does it appear that the tire tracks - -

A. It appears that those tire tracks were made as he was traveling from east to west.

Q. And what side of the road do you see those tire tracks on?

A. And it's hard to tell from the photograph, but the side of the road as he was facing east, would have been on the left side of the road and which would seem to indicate that the trailer was maybe on the center line of the road, maybe centered on the road with the crown of the road, and I refer to the center of the road being the crown, because it was just an area that was kind of rutted out, would have been kind of around this area.

2 R. 256, Exhibit 31 at p. 21.

Q. From the photograph that you took, what's the position of Defendant Purvis' vehicle?

A. That it would be in the middle - - it appears to be in the middle of the road.

Q. And what about the trailer?

A. It appears to be directly tracking behind the truck in the middle of the road, also.

Q. All right, sir. And what about the Brooks car? What position of the road is it on?

A. It appears to be on the right side.

2 R. 260, Exhibit 31 at p. 25. The Brooks actually solicited and opened the door to Officer Henry's testimony about the location of the vehicles before and at the point of impact. *Jones*, 761 So. 2d at 913.

Moreover, Officer Henry did not give an opinion as to the actual point of impact; he testified about the location of the vehicles' tire tracks. 2 R. 273, 284; Exhibit 31 at pp. 38 (Q. "[W]here did the tire marks of the blue car end up in relation to the point of impact?" A. "Again, it's very hard to determine from the photographs. A Mack truck is going to leave more tire marks than a Dodge Neon. However, I believe from the way the cars were sitting and my vague recollection of the incident, that I believe both would have been traveling in the center of the road." Q. "*Before the impact?*" A. "Before the impact." (emphasis added)), 49 (Q. "[D]o you have a memory one way or the other about where the blue car's tracks stopped?"). A police officer not qualified as an accident reconstruction expert "may testify to what he found and observed at the scene of the accident upon his arrival." *Ware v. State*, 790 So. 2d 201 (Miss. Ct. App. 2001).

Even if Officer Henry had opined about the point of impact, this would not have constituted expert testimony. In *Jones v. State*, 761 So. 2d 907 (Miss. Ct. App. 2000), the defendant argued that the trial court erred when it allowed a Highway Patrol officer to testify regarding the point of impact of an accident. The officer testified about his observations at the scene of the accident that were undertaken in the course of his assisting the sheriff's department in the accident investigation; the officer conducted an in-depth examination of the accident

scene, inspected the defendant's vehicle, observed the location of various strewn vehicle parts, noted the location of skid marks, and took photographs to record those things that he observed. *Id.* at 912. On direct, the officer testified about his interpretation of the photographs he had taken at the scene; he did not offer an opinion as to the point of impact on direct examination, although he referred to a depression appearing in the photograph that he had evidently determined to be the impact point. *Id.* On cross-examination, the defendant's attorney asked questions attempting to raise doubt as to whether the point of impact was, instead, at a point nearer or in the highway right of way where there was some sort of mark in the road. *Id.* On re-direct, the officer opined that the collision occurred at the point he had intimated earlier in his direct testimony. *Id.* The court concluded that it was not error to permit the officer to offer this opinion because it was, clearly, lay opinion evidence admissible under Mississippi Rule of Evidence 701. *Id.* The opinion was based on the officer's observations of the resting place of the defendant's vehicle after the accident and his ability to trace the path of the vehicle by following skid marks backwards from the resting place to a point where the physical evidence indicated that the accident had occurred. *Id.* The court stated:

> One need not be an expert accident reconstructionist to offer an opinion that tire marks appearing at the scene of accident indicate with some measure of precision the path the vehicle followed at the time of the accident. A lay person, through his ordinary experience of life, is capable of observing the typical physical phenomena that exist in the aftermath a vehicular collision, such as skid marks and debris location, and making an intelligent assessment of certain basic facts of the accident.

Id. The court, thus, concluded that the officer's testimony was based on his interpretation of the physical things he observed at the scene of the accident, not any specialized training, knowledge or experience. *Id. See also Seal v. Miller*, 605 So. 2d 240 (Miss. 1992) (holding that testimony by investigating police officer that he did not perceive any evidence which indicated that the car

had spun in circular motion before hitting utility pole did not require any special expertise or skill for purposes of Rule 701).

The Brooks rely almost exclusively on the case of *Roberts v. Grafe Auto Co.*, 701 So. 2d 1093 (Miss. 1997), to support their position. *Roberts*, however, is distinguishable from the case at hand. First, it was the Brooks' own counsel, not Purvis's, who asked Officer Henry about his training and experience. 2 R. 242-43; Exhibit 31 at pp. 7-8. Moreover, Purvis's counsel's questions evidence that Officer Henry's testimony was based on his observations at the scene of the accident, not any specialized training or experience. 2 R. 282; Exhibit 31 at p. 47 (Q. "You are accustomed to documenting exactly what you see at the scene, correct?" A. "That's correct."). In addition, in *Roberts*, the officer testified that the only contributing factor in causing the accident was a defective tire. *Roberts*, 701 So. 2d at 1098-99. Because "[t]he average, randomly selected adult could not conclude from examining the accident site that the defective tire was the only factor contributing to the accident," the court concluded that this was an expert opinion based upon the officer's specialized training and experience. *Id.* Here, Officer Henry's testimony, like the officer in *Jones*, was based on his observations of the accident scene, not any specialized training and experience. Accordingly, it was lay evidence admissible under Mississippi Rule of Evidence 701.

Moreover, even assuming *arguendo* that Officer Henry's testimony was expert testimony, any error in admitting the evidence was harmless. In *Seal v. Miller*, 605 So. 2d 240, 244 (Miss. 1992), this court held that opinion testimony from a police officer as to the driver of a vehicle at impact was based on the officer's special training and experience, and, thus, was not a lay opinion. The court, however, found the error harmless because the physical evidence

pointing to the officer's conclusion, and the lack of physical evidence to the contrary clearly overwhelmed any bias occasioned by the erroneous admission of the officer's opinion. *Id.* Likewise, in this case, the undisputed photographic evidence supported Officer Henry's testimony. *See, e.g.,* Purvis 0005, 0010, and 0013; 4 R. 34 (Q. "Mr. Brooks, I just handed you what I will represent to you is a photo taken by the officer at the scene of the accident. Can you tell me if that accurately reflects your recollection about the position of the vehicles?" A. "Yes, it does."). Accordingly, even if the trial court erred in admitting Officer Henry's testimony, such error was harmless.

B. The Brooks's social security disability application file was admissible.

"Decisions surrounding the admission or suppression of evidence are left to the sound discretion of the trial judge, and appellate courts must not reverse such decisions absent an abuse of that discretion." *Good v. Indreland,* 910 So. 2d 688, 692-93 (Miss. Ct. App. 2005) (citing *Sumrall v. Miss. Power Co.,* 693 So.2d 359, 365 (Miss.1997)).

1. The social security evidence was relevant and, thus, admissible.

The Brooks allege that the evidence in their social security files was irrelevant because they conceded their pre-existing conditions and were not seeking lost wages.[2] Appellants' brief

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[2] To the extent that the Brooks complain that this evidence was offered through inappropriate means, *see* Appellants' brief at p. 17 ("It was completely inappropriate to bring that testimony in through Officer Henry."), pp. 19-20 ("[A]ny testimony related to [Mrs. Brooks's] psychiatric condition is outside the field on knowledge for which he was qualified as an expert."), these arguments were not made to the trial court and are not supported by legal authority, and, thus, cannot be considered on appeal. *Ruff v. Estate of Ruff,* 989 So. 2d 366, 372 (Miss. 2008) (finding issues not raised before the lower court and not supported by relevant authority to be procedurally barred). In any event, there was no error in admitting this evidence through these witnesses. *See, e.g, University of Mississippi Medical Center v. Pounders,* 970 So. 2d 141, 146 (Miss. 2007) ("The scope of the witness's knowledge and experience, and not any artificial classification, governs the question of admissibility.").

at pp. 17-18. However, the Brooks sought redress for injuries allegedly incurred in the accident as well as aggravation of their pre-existing conditions. Thus, one of the key issues in this case was causation - whether the Brooks' injuries were caused by the accident. Because Purvis can only be liable for injuries resulting from his alleged negligence, "any evidence tending to show that any part of [the Brooks'] injury may have occurred as a result of some other cause was relevant." *Good*, 910 So. 2d at 693; *see also Hageney v. Jackson Furniture of Danville, Inc.*, 746 So. 2d 912, 919 (Miss. Ct. App.1999) ("This Court has held any evidence tending to show that any part of a plaintiff's injury may have occurred as a result of some other cause was relevant and, therefore, admissible when a plaintiff is seeking damages for personal injuries.").

This evidence was also relevant to the issue of damages, as the Brooks themselves concede. The testimony about Mr. Brooks' medical issues, including his inability to work, "implied to the jury the total medical expenses were out of line for someone who had ongoing medical issues since 1976 and was receiving Social Security disability." Appellants' brief at p. 18. Further, evidence that persons such as Mrs. Brooks, "who suffer[ed] from depression, anxiety, and P.T.S.D., have a different perception of pain and may undergo more treatment than other victims of similar accidents," as well as evidence that Mrs. Brooks had a pattern of "ongoing continued treatment of no durable benefit," was, clearly, relevant to the issue of damages, particularly Mrs. Brooks's alleged pain and suffering.

The Brooks complain that this testimony prejudiced the jury against them. The standard under Rule 403 of the Mississippi Rules of Evidence, however, is that evidence, to be excluded, must be *unfairly* prejudicial, and this evidence was not unfairly prejudicial. Miss. R. Evid. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed

by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."). Again, this evidence was offered to refute causation and the Brooks' claims of damages, not to evoke any emotional ill-will against the Brooks by the jury. *Abrams v. Marlin Firearms Co.*, 838 So. 2d 975, 981 (Miss. 2003) ("It is inherent that nearly all evidence is prejudicial to a party one way or another. The inquiry . . . is whether that prejudice is unfair. 'Unfair prejudice,' . . . means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.").

In a similar case, *Baugh v. Alexander*, 767 So. 2d 269 (Miss. Ct. App. 2000), Baugh and Alexander were involved in an automobile accident. *Id.* at 270. At issue was the extent of Baugh's injuries. *Id.* Baugh presented post-accident medical bills totaling in excess of $60,000 and testified that, because of chronic pain and irreversible symptoms of depression resulting from the vehicular accident, she did not expect to ever be able to return to gainful employment. *Id.* at 271. However, having heard evidence that Baugh had, in fact, been experiencing significant pre-accident pain symptoms and emotional problems alleged by her to have been caused by a fall at her employment, the jury returned a verdict of $2,740. *Id.* Baugh claimed on appeal that the trial court erred in not granting a new trial on damages or, alternatively, granting an additur. *Id.* The Mississippi Court of Appeals disagreed:

> In this case, there was substantial evidence that Baugh had, in a separate workers compensation case, asserted that the same injuries and the same medical expenses claimed in this case were the result of a fall at work occurring some seven weeks prior to the accident. There was substantial evidence in the record that Baugh had, in the weeks preceding the wreck, complained of extensive pain and attendant emotional difficulties arising out of her fall at work. The defense also presented evidence from which the jury could reasonably conclude that much of Baugh's post-accident medical treatment was nothing more than a continuation of a course

> of treatment for her work-related injuries that had begun before the accident and had continued largely unchanged in the time after the accident. There was, in fact, evidence presented that Baugh had, a few weeks after the motor vehicle accident, reported to a health care provider that her symptoms had essentially returned to what they were pre-accident.

Id. at 271-72. *See also Good*, 910 So. 2d at 692-93 (affirming denial of motion in limine seeking to exclude evidence of a prior workers' compensation claim for injuries at a motor vehicle collision trial; "any evidence tending to show that any part of [the] injury may have occurred as a result of some other cause was relevant.").

Likewise, in this case, the social security evidence was offered as evidence of the Brooks' extensive pre-existing injuries. *See, e.g.,* 4 R. 64-65, 4 R. 79-83, 5 R. 145-47, 5 R. 150-51, 5 R. 153-54. Again, Purvis can only be liable for damages resulting from his negligence; thus, this evidence, which shows that the Brooks' injuries were not the result of the accident and were not as egregious as alleged, is clearly relevant.

Moreover, this evidence was offered to impeach the Brooks' testimony; evidence in the social security files proved that the Brooks complained previously of conditions that they claimed were caused by the accident. *See, e.g.,* 4 R. 68, 4 R 69, 4 R 80-81, 5 R. 145, 5 R. 146, 5 R. 148-149, 5 R. 151-52. Evidence going to a witness's credibility is always admissible. *See generally* Miss. R. Evid. 616; *Meeks v. State*, 604 So. 2d 748, 755 (Miss. Ct. App. 1992) (noting that cross-examination is allowed as to "any matter affecting the credibility of the witness").

In sum, the Brooks bore the burden of establishing their claim by a preponderance of the evidence. *Id.* at 271. "An essential part of that 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." *Id.* The evidence in the Brooks' social security files, evidence

that the Brooks suffered extensive pre-existing injuries, were probative to these issues, and, thus, were properly admitted into evidence.

2. The admission of this evidence did not violate the collateral source rule.

The Brooks argue that, by offering the social security evidence, Purvis "essentially attempted to convince the jury that the Brooks' damages were reduced" in violation of the collateral source rule. Appellants' brief at p. 20. However, Purvis did not offer the social security disability application file to prove that the Brooks received social security benefits or other collateral source income; the Brooks's own counsel did:

Q. Are you, in fact, drawing social security disability benefits?

A. I am.

. . . .

Q. Did - - what's the reason for your social security disability?

A. Posttraumatic stress disorder.

5 R. 141. This Court has stated: "One may not complain on review of errors for which he was responsible . . . (a)n appellant will not be permitted to take advantage of errors for the commission of which he was responsible, or which he himself committed, caused, brought about, provoked, participated in, created, or helped to create, or contributed to." *Demyers v. Demyers*, 742 So. 2d 1157, 1160 (Miss. 1999).

In any event, the collateral source rule was not violated. "The collateral source rule in Mississippi holds that compensation or indemnity for the loss received by plaintiff from a collateral source, wholly independent of the wrongdoer, as from insurance, cannot be set up by

the [defendant] in mitigation or reduction of damages." *Baugh*, 767 So. 2d at 272 (citation and internal quotation marks omitted). In *Baugh*, the plaintiff claimed that the trial court violated this rule when it allowed evidence that she had received health insurance and workers compensation benefits through her employer and was receiving disability payments from the Social Security Administration. *Id.* The appellate court disagreed:

> The collateral source rule applies only when the indemnity or compensation is for the same injury for which damages are sought. It is undisputed that Baugh's payments through health and workers compensation insurance, as well as disability payments, were for an alleged injury that preceded the motor vehicle accident. The mere fact that this earlier injury produced symptoms largely indistinguishable from those symptoms Baugh alleged to have been caused by the wreck does not make them a collateral source of compensation for injuries received in the wreck. To the contrary, evidence of such payments based on assertions of causation in another proceeding by the plaintiff that are inconsistent with her assertions of causation in this case becomes quite probative for the jury in carrying out its duty to determine whether the plaintiff has met her burden of proving that the wreck caused the injuries for which she seeks compensation from the defendant.

Id. See also Horridge v. Keystone Lines, 2008 WL 4514313, *1 (S.D. Miss. 2008) (rejecting plaintiffs' argument that reference to collateral source social security benefits should be excluded because "evidence regarding causation of any previous injuries similar to those allegedly sustained by Plaintiffs in the accident in this case is relevant"). Accordingly, the admission of the social security evidence in this case did not violate the collateral source rule.

C. The jury's award of zero damages to Mr. Brooks was supported by the evidence.

The Brooks also allege that the trial court erred in denying their motion for a new trial on the ground that the jury's award of zero damages to Mr. Brooks was inadequate. "This Court reviews for abuse of discretion when determining whether a trial court erred in refusing . . . a new trial." *Herring v. Poirrier*, 797 So. 2d 797, 807-08 (Miss. 2000) (citations omitted).

"Because it is primarily the province of the jury to determine the amount of damages to be awarded, the award will normally not be set aside unless so unreasonable in amount as to strike mankind at first blush as being beyond all measure, unreasonable in amount and outrageous." *Id.* at 808 (citations and internal quotation marks omitted). The Court must view the evidence in the light most favorable to the non-moving party, giving him any favorable inferences that may reasonably be drawn therefrom. *Id.*

As in *Herring v. Poirrier*, the jury's refusal to award damages to Mr. Brooks was based either on the jury's finding that (1) Mr. Brooks was not injured, or (2) that the damages he alleged were not caused by the accident. *Id.* First, considering the evidence in the light most favorable to Purvis, there was evidence which suggested that Mr. Brooks was not injured in the accident. *Cf. Herring*, 797 So. 2d at 808 (affirming award of zero damages where there was evidence from which the jury could reasonably conclude that the plaintiff was not injured in the accident) *with Knight v. Brooks*, 881 So. 2d 294, 297-98 (Miss. Ct. App. 2004) ("Upon viewing the evidence presented at trial in the light most favorable to Brooks, it is clear that Knight suffered some injury from this accident. The jury verdict is, therefore, against the overwhelming weight of the evidence and is reversed.").[3] On the accident report, Officer Henry did not indicate that Mr. Brooks was injured, but only that he complained of pain. 2 R. 247, Exhibit 25. Mr. Brooks did not, however, receive any treatment at the accident scene and did not leave in the ambulance. 2 R. 264. Although Mr. Brooks testified that his pain was greater after the accident, *see* 4 R. 67, Mr. Brooks was not a credible witness. *See, e.g.,* 4 R. 67-70. Mr. Brooks testified:

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[3] In *Knight v. Brooks*, "[e]ssentially, the trial court was directing a verdict for Knight while leaving the issue of damages for the jury's determination." *Knight v. Brooks*, 881 So. 2d 294, 297 (Miss. Ct. App. 2004).

Q. Didn't you say that you had to take some pain management therapy after this accident or go to a pain clinic or something to that effect?

A. Well, they put me - - that's what they - - Dr. Minnan at the VA - - that's what they did. They - - I went and talked to - - well, it's the pain management program. It's just putting me - - they put me on the methadone just to see how it would - - and they told me that I just had to, you know, as always had to live with my pain.

Q. And that's exactly what they told you before this accident; isn't it?

A. Yes.

Q. Because in 1998 you also reported that you were going to pain clinics and you were told by the doctors that you would just have to learn to live with your pain; isn't that correct?

A. Yes.

4 R. 68-69. Mr. Brooks's own medical records evidenced that, before the accident, Mr. Brooks was living in "chronic pain" and was on pain medication. 4 R. 66-67, 81. Credibility is judged by the jury, and the jury clearly found Mr. Brooks' testimony about increased pain unconvincing. *Solanki v. Ervin*, 21 So. 3d 552, 568 (Miss. 2009) ("The jury determines the weight and credibility of witnesses.").

Second, even assuming *arguendo* that an injury was proven, there was sufficient evidence for the jury to conclude that the injury was not caused by the accident. *Herring*, 797 So. 2d at 808 (affirming award of zero damages where there was evidence from which the jury could reasonably conclude that the plaintiff's alleged damages were not caused by the accident).

It is true, as the Brooks aver, that if Purvis's negligence caused any aggravation of Mr. Brooks's pre-existing injuries, Purvis would be responsible for the portion of the injury he caused. *Koger v. Adcock*, 25 So. 3d 1105, 1110 (Miss. Ct. App. 2010). It is also true, however, that Mr. Brooks is not entitled to damages for any injuries which existed at the time of the accident with Purvis, and Mr. Brooks had an extensive pre-existing history of medical problems. *Id.*

Q. There is no question that prior to this accident on October 29, 2001, you had quite a few pre-existing medical conditions; did you not?

A. Yes, I did.

Q. Including degenerative disk disease, cervical disk disease, and arthritis, correct?

A. Yes, I did.

Q. You'd agree with me that you reported in 1998 that you were suffering from continual migraine headaches; didn't you?

A. Yes.

Q. You also reported on a disability application that you suffered from carpal tunnel syndrome, did you not?

A. Right.

. . . .

Q. You did report though in 1998 on this same application that you had compression of nerves due to degenerative disk as well as that your knees were getting bad, that you had pain in your hips, numbness in your hands and your arms, shingles, and your eyes were getting weak; you reported all that in 1998?

A. Yes, sir.

Q. About a year-and-a-half before this accident?

A. Yes.

Q. Did they not tell you and did you not report in 1998 that you can't even go outside due to your pain; that you have pain in your knees, back, and joints; you can't stay in one position at all because it hurts; you cannot lie for more than one hour due to the pain; you have to get up and sit in your recliner; isn't that what you reported your condition to be in 1998? . . . Mr. Brooks, again in 1998 you were also reporting that you're not able to walk except that every now and then you can walk around your trailer, and that's because of the pain radiating into both of your legs, your neck, and your arms, correct?

A. Yes, sir.

Q. And you also reported that you used a wheelchair to go to the grocery store, correct?

A. Right.

Q. You also reported that Elavil helped with you[r] pain, so you were clearly on pain medication a long time before this ever happened, right?

A. Yes, sir.

4 R. 64-65, 79-83. Even Mr. Brooks himself could not testify what, if any, of his alleged damages were caused by the accident. 4 R. 66 (Q. "Of the $18,300.65, do you have any idea how much of that is actually related to this accident?" A. "No, sir, I do not.").

This case was not one where the jury was unable to apportion damages, as the Brooks allege; the jury simply concluded that the damages alleged by Mr. Brooks existed before the accident, and, thus, were not the result of Purvis's alleged negligence. The evidence in this case supported the jury's verdict that Mr. Brooks did not sustain any damages as a proximate result of Purvis's negligence. *Patterson v. Liberty Associates, L.P.*, 910 So. 2d 1014, 1022 (Miss. 2004).

Accordingly, the jury's verdict was certainly not outrageous, and it is beyond the Court's authority to disturb. *Id.*[4]

Additionally, where, as here, there is a finding of comparative negligence, the jury has the right to take into account Mr. Brooks's negligence when assessing damages. *Akin v. Cowie*, 405 So. 2d 903, 908-09 (Miss. 1981) ("[T]he jury was not required to accept in its entirety the theory of either party and it was its duty to consider all the testimony of the witnesses and the physical facts and determine therefrom the negligence, if any, of the respective parties."). Thus, even assuming *arguendo* that the verdict was inadequate, this Court has held that "[t]he right to take comparative negligence into account may justify an otherwise inadequate verdict." *Id.*

CONCLUSION

The testimony offered by Officer Henry, through his deposition, met the requirements of Rule 701 of the Mississippi Rules of Evidence. Officer Henry's testimony was rationally related to what he personally perceived at the accident scene, e.g., the tire tracks and positions of the vehicles post-collision; this testimony was not based on any specialized knowledge or training. Further, Officer Henry's testimony assisted the jury in understanding the physical evidence which in turn aided them in the determination of the issue of causation/fault.

Further, the Brooks's social security disability application file was relevant and admissible under Rules 401 and 402 of the Mississippi Rules of Evidence on the causation and damages issues. This evidence was used to prove the Brooks's extensive pre-existing injuries.

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[4] Additionally, the Brooks argue that the zero dollar award was inadequate because Mr. Brooks received treatment the night of the accident from George County Medical Center and later from Dr. McCloskey, which totaled $660.88. This argument, however, is procedurally barred as it was not raised in the Brooks's motion for a new trial. *Graves v. Dudley Maples, L.P.*, 950 So. 2d 1017, 1021 (Miss. 2007). In any event, for the reasons discussed *supra*, the zero dollar award was supported by the evidence.

Purvis can only be liable for damages resulting from his negligence; thus, this social security evidence, which showed that the Brooks' injuries were not the result of the accident and were not as egregious as alleged, was clearly relevant. Moreover, this evidence was offered to impeach the Brooks' testimony; evidence in the social security files proved that the Brooks complained previously of conditions that they claimed were caused by the accident.

Finally, the jury's verdict was supported by the evidence and was not the result of bias or prejudice against the Brooks. Mr. Brooks had an extensive pre-existing history, did not testify credibly, and could not articulate a manner in which the jury could possibly award him damages because his post-accident medical visits mirrored his pre-accident medical visits.

In sum, and as the Brooks themselves have conceded, "this case was in fact a question for the jury *and their verdict should not be set aside*." 3 R. 342 (emphasis added).[1]

THIS the 14th of January, 2011.

Respectfully submitted,

C. MAISON HEIDELBERG, MB [redacted]
Attorney for Appellee

[1] Because there are no errors, it follows that there can be no cumulative effect of the errors, as the Brooks allege. *Goodyear Tire & Rubber Co. v. Kirby*, 2009 WL 1058654, *26 (Miss. Ct. App. 2009) ("[A] necessary predicate to an inquiry about the effect of cumulative errors is a determination that multiple errors in the conduct of the trial, in fact, occurred. Once the Court has determined that the asserted individual errors are without merit, then the defendant's claim of cumulative effect must be seen as without merit 'by simple logic.'" (citations omitted)).

OF COUNSEL:
HEIDELBERG HARMON PLLC
795 Woodlands Parkway
Suite 220
Ridgeland, Mississippi 39157
Phone: (601) 351-3333
Fax: (601) 956-2090

CERTIFICATE OF SERVICE

I, C. Maison Heidelberg, attorney for the Appellee, Victor R. Purvis, do hereby certify that I have this day served a true and correct copy of the above and foregoing document via United States Mail, postage prepaid, on the following:

Martin Crump, Esq.
Leslie H. Lang, Esq.
Davis & Crump, P.C.
Post Office Drawer 6829
Gulfport, Mississippi 39506

Honorable Robert Helfrich
Circuit Court Judge
P.O. Box 309
Hattiesburg, Mississippi 39403

THIS, the 4th day of January, 2011.

C. MAISON HEIDELBERG