2010-CA-00189-COART

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SUMMARY OF THE ARGUMENT

The Brooks ask this court to consider the aspects of their trial which led to an unjust verdict. A new trial is appropriate when an "error within the trial mechanism itself has caused a legally incorrect or unjust verdict to be rendered."[1] The trial court's denial of the motions in limine discussed below led to a jury verdict that was against the weight of the evidence and based on bias and prejudice. Officer Henry testified to the ultimate issues in the case: causation, credibility, and negligence. The admission of his lay witness testimony was improper under the Mississippi rules of evidence and his opinions usurped the role of the jury.

Evidence and testimony from the Brooks' Social Security disability applications was irrelevant and prejudicial. The jury was confused and predisposed to believe that the Brooks were so severely disabled prior to the October 29, 2001 car accident that any injury that did occur in the accident had to be looked at with distrust. The award of zero damages to Mr. Brooks is a clear reflection of that and not a reflection of the actual testimony and evidence presented at trial. A zero damages award to Mr. Brooks was unreasonable and showed that the jury was motivated by prejudice.[2]

ARGUMENT

A. OFFICER HENRY'S OPINION TESTIMONY WAS NOT ADMISSIBLE

Officer Henry's first deposition was taken in July of 2008. Once the parties were notified that he would be unavailable for trial, the Brooks noticed a video-taped deposition of Officer Henry. Purvis filed an Emergency Motion to Quash and Objection

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[1] *Solanki v. Ervin*, 21 So. 3d 552, 569 (Miss. 2009), quoting *White v. Stewman*, 932 So. 2d 27, 33 (Miss. 2006).
[2] *See Brake v. Speed*, 605 So. 2d 28 (Miss. 1992).

to Notice of Deposition of Major William L. Henry.[3] The trial court denied Purvis' motion and the Brooks took Officer Henry's deposition on May 27, 2009.

An out-of-court deposition taken for use at trial is not an ideal situation. Officer Henry's testimony was taken in advance of trial and without the benefit of immediate evidentiary rulings from the bench. Purvis argues that the Brooks "opened the door" to testimony from Officer Henry and now object to that same testimony. That is simply not the case. Purvis designated Officer Henry as an expert in this case.[4] The Brooks had to treat him as a designated expert and delve into his training and background in order to establish his lack of qualifications to prepare for any Daubert motions that might become necessary. *Roberts v. Grafe Auto Co., Inc.*, 701 So. 2d 1093, 1098 (Miss. 1997) holds that "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." Because the trial court would not have the advantage of questioning Officer Henry directly about his background, it had to be established through his deposition.

In the end, Purvis did not qualify or tender Officer Henry as an expert in any field. The Brooks' counsel had to anticipate all scenarios in advance and rely on a motion in limine to address inadmissible testimony rather than being able to react as the trial progressed. Upon reviewing the deposition and prior to trial, the Brooks filed a motion in limine related to all opinion testimony of Officer Brooks. Unfortunately, the trial court denied the Brooks' motion in limine and admitted the video deposition in its entirety. At trial, once the video started, it was logistically difficult for plaintiffs' counsel to make

[3] 2 R. 150-169.
[4] 1 R. 81-84.

contemporaneous objections to Officer Henry's opinion testimony while the video was playing.

Additionally, Purvis argues that the following specific question as an example of the Brooks opening the door to Officer Henry's inadmissible opinion testimony.

> 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.[5]

Officer Henry's "yes" response is based on his first-hand observation of the scene after the accident. The remainder of the response is his opinion that the parties had a responsibility to slow down and move to the shoulder on the side of the road. An opinion on the responsibilities of the parties is testimony is within the field of expertise of an accident reconstruction expert.[6] It is not lay witness testimony within the scope of Mississippi Rule of Evidence 701 and was inadmissible. It was not based on his first-hand knowledge or observation of the parties' cars traveling on Sand Ridge Road on the date of the accident or at any time prior to the accident. Officer Henry's opinions improperly invaded the jury's province to determine ultimate issues of negligence and fault.

Mississippi Dept. of Transp. v. Cargile, 847 So. 2d 258, 264 (Miss. 2003), cited by Purvis, holds that "a lay person is qualified to give an opinion if he has firsthand knowledge which [the jury] does not have." *Cargile* goes further, holding that speculative testimony and testimony about facts that the witness has no personal

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[5] Trial Ex. 31 (Henry Dep. 13).

[6] See *Jones v. Jitney Jungle Stores of America, Inc.*, 730 So. 2d 555, 558 (Miss. 1998).

knowledge is not admissible.[7] Officer Henry's speculative opinions regarding fault were based on his interpretations of the photographs of the scene. The jury was capable of reviewing those photographs and arriving at their own opinions.

Purvis contends that Officer Henry's opinions were not based on specialized education, experience, knowledge or training. Further, Purvis offers Officer Henry's repeated statements that he was an accident reconstructionist as ample disclaimers for the jury to understand that his opinions were not to be given additional weight. However, these statements were insufficient to prevent the jury from taking his opinions as those of an expert, especially considering that Officer Henry, the police officer in this case, testified in his military uniform at a military installation, with the appearance of an authority figure with expert knowledge and experience.

Purvis suggests that any error in admitting Officer Henry's expert testimony was harmless. Looking at the entirety of the record and the jury's verdict, it is clear that the admission of the testimony did result in harm and prejudice to the Brooks. The verdict mirrored Officer Henry's unqualified determination of liability. He predetermined the outcome of the jury's decision before they had a chance to assess credibility, causation, and liability. The jury's verdict followed lock step with every one of Officer Henry's opinions.

B. THE ADMISSION OF THE SOCIAL SECURITY DISABILITY APPLICATION FILE WAS CLEARLY PREJUDICIAL

The Social Security evidence was inadmissible, especially as to Mrs. Brooks. Purvis contends that Mrs. Brooks' pre-existing conditions were relevant to causation, damages, pain, and suffering. However, most of the discussion focused on her pre-

[7] *Cargile*, 847 So. 2d at 264 (citing *K-Mart Corp. v. Hardy ex rel. Hardy*, 735 So. 2d 975, 985 (Miss. 1999), and *Jones v. State*, 678 So. 2d 707, 710 (Miss. 1996)).

existing depression, anxiety, and Post Traumatic Stress Disorder, and had no bearing on the injuries she suffered in the collision. Purvis introduced evidence of her pre-existing mental conditions through testimony from Dr. John Davis and through her Social Security records.[8]

Purvis also suggests the Social Security evidence was offered to impeach Mrs. Brooks' testimony. However, at trial, Dr. Davis, the defendant's medical expert, testified out of order.[9] Dr. Davis testified before Mrs. Brooks and so the jury heard his testimony about her depression, disability status, and his opinion of the effect it had on her accident-related injuries occurred prior to hearing from Mrs. Brooks herself. Furthermore, Mrs. Brooks dropped her claim for emotional damages prior to trial. Any evidence related to her emotional condition prior to the accident is irrelevant.

"Evidence is relevant if it is likely to affect the probability of a fact of consequence in the case."[10] Mrs. Brooks' diagnosis of P.T.S.D. had absolutely no likelihood of affecting the probability of facts of any consequence in this case. Evidence of her mental health-based disability determination had no bearing on the causation of her injuries or the issue of damages.

The *Doe ex rel. Doe v. North Panola School Dist.*, 906 So. 2d 57 (Miss. App. 2004), case is relevant to this matter. In that case, Jane Doe, a moderately retarded child, was sexually assaulted by fellow students.[11] A bench trial resulted in a final judgment in

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[8] Trial Tr. 104-110, 145.

[9] Plaintiffs agreed to allow Dr. Davis to testify out of order for his convenience.

[10] Mississippi Rule of Evidence 401 (comment) citing *Mississippi State Highway Commission v. Dixie Contractors, Inc.*, 375 So.2d 1202, appeal after remand 402 So.2d 811 (1979).

[11] *North Panola School Dist.*, 906 So. 2d at 59.

Jane Doe's favor.[12] The damages award of $20,197.03 was for $5,197.03 in past medical bills and $15,000 for future therapy at a training institute.[13] Jane Doe moved for additur or a new trial as to damages only which was denied by the trial judge.[14] She appealed, asserting that the trial judge erred in declining to consider Jane's pre-existing condition in awarding damages.[15] The appellate court found no error in the trial judge's determination that Jane needed therapy for the sexual assault rather than for her mental retardation.[16] The court held that the rule on pre-existing injuries is "generally limited to pre-existing physical — not mental—conditions."[17] In this case, Mrs. Brooks' pre-existing mental conditions were used by Purvis to unfairly prejudice the jury that her concepts of pain were somehow different from other victims of similar accidents. This more so true in the case at bar where there is no claim asserted for lost wages or emotional distress by either plaintiff.

Purvis also asserts that the admission of the Social Security evidence did not violate the collateral source rule and points to the court's holding in *Baugh v. Alexander*, 767 So. 2d 269 (Miss. Ct. App. 2000), in support of that assertion. *Baugh* can be distinguished from the facts in the Brooks' case. Baugh was in a motor vehicle accident and also suffered a fall while at work. In the workers compensation case, she claimed that physical pain and emotional distress was associated to disillusionment brought on by her employer's improper handling of her work-related injury claim.[18] At the trial for the motor vehicle accident, she claimed despair caused by her debilitating injuries in the

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[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.* at 60
[16] *Id.*
[17] *Id.* at 61 quoting ENCYCLOPEDIA OF MISS. LAW, Vol. 4, § 25:42 (2001).
[18] *Baugh*, 767 So. 2d at 270-271.

wreck had driven her into a depressed state that required extended psychological treatment.[19] She left work because she claimed she was unable to perform the essential duties of the job due to the prior fall at work.[20] She claimed that the injuries suffered in the car accident prevented her from ever returning to work.[21] She also received a determination from the Social Security Administration that she was totally disabled based on the injuries received prior to the car accident.[22] All of these claims were based on identical symptoms.[23]

The appellate court upheld the trial court's decision to deny the plaintiff's motion in limine to exclude evidence that Baugh had received health insurance, workers compensation, and Social Security disability benefits.[24] It ruled that the evidence did not violate the collateral source rule because it was probative for the jury because of Baugh's inconsistent claims in the workers compensation case and the motor vehicle accident trial.[25]

The Brooks did not make any inconsistent claims. They did not have any pending proceedings that contradict their claims in this case. At trial, Mr. Brooks testified that the injuries he suffered in the car accident exacerbated his pre-existing conditions, stating, "I've had a lot of increased pain since the accident. It just added to. I was already hurting. It's just added to it."[26]

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[19] *Id.* at 270.
[20] *Id.* at 271.
[21] *Id.*
[22] *Id.*
[23] *Id.* at 270-271.
[24] *Id.* at 270.
[25] *Id.* at 272.
[26] Trial Tr. 67.

Any information that was relevant to the Brooks' pre-existing physical conditions was clearly reflected in their accident-related medical records. Mr. Brooks' VA medical records from treatment for accident-related injuries also detailed his pre-existing conditions. Yet, defense counsel specifically asked Mr. Brooks about gout, a hearing test, and shingles based on information contained in the Social Security disability application that was completed a year and a half prior to the accident. These issues had no relation to symptoms Mr. Brooks claimed were related to the accident. It was simply an effort by Purvis to bias the jury against the Brooks. Accordingly, the Social Security evidence was irrelevant, prejudicial, and violated the collateral source rule.

C. THE JURY'S AWARD OF ZERO DAMAGES TO MR. BROOKS WAS NOT SUPPORTED BY THE EVIDENCE

Purvis points to *Herring v. Poirrier*, 797 So. 2d 797 (Miss. 2000), as a similar case. In that case, a jury determined that the plaintiff was either not injured or that the damages he alleged were not caused by the accident.[27] The facts and the medical testimony presented at trial distinguish *Herring* from the case at bar. Herring felt no pain or symptoms of injury at the scene of the accident and did not seek any treatment until two weeks after the accident.[28] Further, there was medical testimony in the *Herring* case that he failed to follow doctors' recommendations and there were major gaps in treatment.[29] In that case, there was a sufficient lapse of time between the accident and treatment for the jury to conclude that something else could have caused Herring's injury.

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[27] *Herring*, 797 So. 2d at 809.
[28] *Id.* at 799.
[29] *Id.* at 801.

In comparison, Mr. Brooks did complain of pain at the scene.[30] Just hours after the accident, Mr. Brooks sought treatment at George County Medical Center for his accident-related injuries.[31] Mr. Brooks testified and the medical records established that he presented to the hospital with complaints of pain to his neck and left arm. He said that his left arm was swollen and hurting, and bruised. He also had a bad headache. At the hospital, they performed X-rays on his wrist and spine. The doctor prescribed pain medication and placed Mr. Brooks' neck in a C-collar.[32] The George County Medical Center bills reflected the charges for the X-rays, pharmacy, and other emergency room charges.[33]

The physician at George County Medical Center recommended Mr. Brooks follow up with a physician should the pain continue. Mr. Brooks went to the emergency room and the clinic at the VA Medical Center several times in the next month complaining of pain related to injuries suffered in the accident. Additional X-rays were taken and physicians prescribed more pain medication. His medical records over the next several years documented that his preexisting pain was exacerbated by the injuries suffered in the motor vehicle accident. Additionally, Mr. Brooks testified that he injured his foot during the crash and sought treatment for pain related to that injury.[34]

Each of the bills from the VA Medical Center indicated that the treatment was related to an occurrence date of October 29, 2001, the admitting diagnosis code was

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[30] 2 R. 247, Ex. 25.

[31] Purvis contends that the inadequate damages award argument is procedurally barred because the Brooks did not raise it their motion for a new trial. The Brooks' motion for a new trial briefed the standard of law for a new trial based on damages and detailed the Brooks' medical expenses and the inadequacy of the jury's award of damages. 3 R. 303-316.

[32] Trial Tr. 41-43.

[33] Trial Tr. 62-63, Ex. 18.

[34] Trial Tr. 63-65, Ex. 18.

E929.0 (late effects of a motor vehicle accident), and was billed to the automobile insurance carrier, Progressive Insurance Company.[35] The Department of Veterans Affairs clearly viewed these bills, totaling $15,289.77 as treatment for accident-related injuries. Under Miss. Code Ann. § 41-9-119 (1993), proof that medical bills were incurred because of an injury is prima facie evidence that such bills were necessary and reasonable. In this case, the information contained in the VA bills is prima facia evidence that the physicians determined that Mr. Brooks continued pain was related to the accident which occurred on October 29, 2001. The admitting diagnosis codes and the occurrence date provide direct evidence that Purvis did not rebut.

It defies logic, given Mr. Brooks' pre-existing injuries, that he did not suffer any residual physical effects from the car accident. His vehicle was struck by a dump truck that Purvis testified weighs 21,000 pounds.[36] The jury awarded Mrs. Brooks $75,000 in compensatory damages for the injuries she suffered in the accident. If the jury determined that Mrs. Brooks' injuries were caused by the accident and were the proximate result of Purvis' negligence, it makes no sense that they did not make the same conclusion for Mr. Brooks when he sat only three feet away from her. The evidence presented at trial was sufficient for the jury to determine that he was in fact injured and that his pre-existing injuries were exacerbated as a proximate result of Purvis' negligence. The only explanation for the jury's award of zero damages to Mr. Brooks was that the jury's verdict was the result of bias and prejudice against him. The award of zero damages was beyond all measure and unreasonable in amount.

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[35] *Id.*
[36] Trial Tr. 188.

Finally, Purvis insinuates that Brooks have conceded that the jury's verdict should not be set aside. This is certainly not the Brooks' position. Purvis quotes only a portion of the Brooks' statement. In their response to Purvis' Motion for Judgment Notwithstanding the Verdict, the Brooks stated, "*Because 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." (emphasis added)[37] This sentence was specific to the issues raised in defendant's motion; specifically, the impact angle and location of the vehicles and the submission of photographs of the injuries to Mrs. Brooks' face. It is not applicable to the issues raised in the Brooks' appeal.

CONCLUSION

Officer Henry's testimony went beyond just his personal observations of the post-accident scene. His opinions were based on more than just his first-hand knowledge. They required knowledge and specialized training that he does not have. His testimony did not aid the jury in determining the issue of causation/fault, it determined it for them. The jury followed his determinations regarding liability, fault, and credibility exactly. The jury was improperly influenced by the admission of Officer Henry's "expert" testimony and the result was harmful to the Brooks' case.

The Social Security evidence was irrelevant and violated the collateral source rule. Purvis must take the Brooks as he found them.[38] Submitting the Social Security evidence to discount the Brooks' injuries both physically and monetarily is improper and

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[37] 3 R. 342.

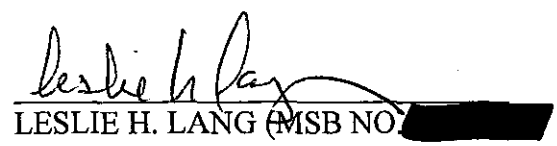
[38] See *Tri-State Transit Co. v. Martin*, 181 Miss. 388, 398, 179 So. 349, 351 (Miss. 1938) (negligent actor can be liable for heightened harm to plaintiff with physical condition rendering harm greater to him than average person).

prejudiced the jury against them. Their award of compensatory damages to Mrs. Brooks, but none to Mr. Brooks was not supported by the evidence. The award of zero damages to Mr. Brooks was a result of bias, passion, and prejudice, and shocks the conscience.

Considering the premises above, Keith and Sandra Brooks respectfully request this Court issue an order reversing and remanding this case for a new trial on liability and damages.

Respectfully submitted this 17th day of February, 2011.

KEITH BROOKS and SANDRA BROOKS
APPELLANTS



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