IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NO. 2010-CA-00184

KEITH BROOKS AND SANDRA BROOKS — APPELLANTS

VERSUS

VICTOR R. PURVIS — APPELLEE

ON APPEAL FROM PERRY COUNTY CIRCUIT COURT
TWELFTH JUDICIAL DISTRICT OF THE STATE OF MISSISSIPPI
CIRCUIT COURT CAUSE NO.: 2004-0046 C1

BRIEF OF APPELLANTS KEITH BROOKS AND SANDRA BROOKS

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ORAL ARGUMENT REQUESTED

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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. The Honorable Robert Helfrich, Circuit Court Judge;
5. Martin D. Crump, Leslie H. Lang, Mark W. Davis, and Ronald M. Feder of Davis & Crump, P.C. f/k/a Davis & Feder, P.A. in Gulfport, Mississippi, Attorneys for Appellants; and
6. C. Maison Heidelberg, of Heidelberg Harmon, PLLC in Ridgeland, Mississippi, Attorney for Appellee.

Dated: November 4th, 2010.

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Did the trial court err by allowing Defendant Purvis to present irrelevant and prejudicial evidence concerning the Brooks' Social Security disability applications and benefits?

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Was the jury's award of zero damages for Keith Brooks against the weight of the evidence, and a result of bias, passion, and prejudice?

STATEMENT OF THE CASE

This appeal arises out of evidentiary rulings by the trial court which resulted in the admittance of irrelevant and prejudicial evidence and inappropriate lay testimony. In addition, the jury's apportionment of fault and inadequate award of damages is against the overwhelming weight of the evidence, a result of prejudice and bias, and reflected the inappropriate testimony. The underlying litigation between Keith and Sandra Brooks (hereinafter "the Brooks", and/or "Keith", and "Sandra") and Victor R. Purvis (hereinafter "Purvis") arose from an October 2001 automobile accident in which the Brooks were injured. The Brooks filed suit in this matter on May 19, 2004.[1] Trial began on June 3, 2009, before a Perry County jury and a verdict was rendered in favor of the Brooks on June 4, 2009. The jury awarded zero damages to Keith and $150,000.00 total damages to Sandra, with each driver bearing fifty percent (50%) fault.[2]

[1] R. 8-11.
[2] Trial Tr. 228:7-19.

Judgment was entered on June 26, 2009.[3] The Brooks filed their Motion for a New Trial based on the denial of two motions in limine and that the verdict and damages were against the overwhelming weight of the evidence.[4] The trial court heard oral arguments on December 11, 2009, and subsequently denied Plaintiffs' motion.[5]

Statement of Facts

This cause of action is based on an automobile accident between the Brooks and Purvis which occurred on October 29, 2001, on Sand Ridge Road, in Beaumont, Mississippi. Sand Ridge Road is an unpaved road built and maintained by Perry County specifically for the Brooks after they worked out an agreement with the U.S. Forestry Service for access to their home located at the end of the road.[6] The road is made of sand, dirt, clay, and gravel and is approximately half a mile long.[7] It is bordered on the right by a dirt bank about two feet high and has a pine straw shoulder.[8]

The Brooks had lived on Sand Ridge Road for approximately a year and a half and traveled it daily.[9] On the day of the accident, the Brooks were taking their dog for a ride in their 1999 Dodge Neon. This was part of their daily routine. Keith was driving.[10] When the collision occurred, the Brooks were returning home, traveling west on Sand Ridge Road.[11] Keith testified that the accident occurred as he approached a curve. As he neared the curve, Keith was traveling approximately ten to fifteen miles per hour. When he caught a glimpse of Purvis' large dump

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[3] R. 317-318.
[4] R. 231-303. Plaintiffs initially filed the motion for a new trial on Jun. 19, 2009, prior to the entry of final judgment. Out of an abundance of caution, Plaintiffs re-filed their motion on Jul. 3, 2009. (R. 329-332).
[5] Defendant filed a *Motion for Judgment Notwithstanding the Verdict*. (R. 319-328). That motion was also denied at the Dec. 11 hearing. (Hr'g Tr. 240:15-18, Dec. 11, 2009). R. 371.
[6] Trial Tr. 23:1-22.
[7] Trial Tr. 24:8-17, 27:8-11.
[8] Trial Tr. 27:28-29.
[9] Trial Tr. 24:18-29, 25:1.
[10] Trial Tr. 26, 31:3-6.
[11] Trial Tr. 27:12-20.

truck over the bushes, he pulled as far to the right as he could and stopped prior to entering the curve.[12] Keith testified that he pulled as close to the dirt bank on the shoulder as he could before Purvis hit them.[13] The Brooks' car was damaged on the front driver's side near the front left tire and door, on the front near the radiator and fender, and on the front right side. It was towed from the scene.[14]

Purvis testified to having driven on Sand Ridge Road between fifty or a hundred times.[15] On the day of the accident, he was driving a large, double-axle, dump truck, and pulling a trailer.[16] He testified it weighed approximately 21,000 pounds.[17] He was driving east after delivering wood to a saw mill.[18] He estimated he was driving at a "reasonable speed" and was not quite into the curve when he saw the Brooks' vehicle and hit the brakes.[19] Purvis attributes sole responsibility for the accident to the Brooks. He admitted to driving in the center of the road, but claimed that he would have had time to move over if Keith had not been "flying" down the road at 60-70 miles per hour. He testified that Keith hit his dump truck.[20] As a result of the collision, the fuel tank of the dump truck dislodged and there was damage to the driver's side front area. Purvis drove the vehicle from the scene.[21]

Plaintiffs' Motion in Limine Regarding Opinion Testimony of Officer William Henry

Officer William Henry of the Perry County Sheriff's Department responded to the scene and completed an accident report.[22] In July 2007, the parties deposed Officer Henry. In October

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[12] Trial Tr. 27:21-29, 28:1-11.
[13] Trial Tr. 73:11-15, 71:20-28.
[14] Trial Ex. 31 (Henry Dep. 16:10-13, 17:16-25, 18:1-12, May 27, 2009); Trial Tr. 33:1-9.
[15] Trial Tr. 175:16-22.
[16] Trial Tr. 31:9-14.
[17] Trial Tr. 188:3.
[18] Trial Tr. 170:20-29.
[19] Trial Tr. 173:17-29, 174:1-8.
[20] Trial Tr. 174:14-24; 185:21-29, 186:1-3.
[21] Trial Ex. 31 (Henry Dep. 16:17-21, 17:11-13, May 27, 2009).
[22] Trial Ex. 31 (Henry Dep. 42:1-16, May 27, 2009).

2007, Purvis designated Officer Henry as an expert witness "who will testify consistently with his accident report including any expert testimony required to explain his finding and/or investigative decisions."[23] On May 27, 2009, after being advised that Officer Henry would be unavailable for trial, the parties deposed him by video-tape for use at trial.[24] Although Purvis previously designated him as an expert, Officer Henry was neither qualified nor tendered as an expert witness at any point during the proceedings.

During Officer Henry's trial deposition, defense counsel questioned him and he answered questions regarding his opinion of the point of impact of the accident.[25] On top of that, he gave opinions regarding the position of the vehicles at the moment of impact.[26] On May 28, 2009, the Brooks filed a Motion in Limine to such opinion testimony excluded at trial.[27] Purvis filed a response on June 2, 2009.[28] At trial, outside the presence of the jury, the parties argued their respective positions on the admissibility of Officer Henry's testimony. The Brooks petitioned the court to play an edited version of the deposition which excluded Officer Henry's speculative opinion testimony. Plaintiffs' counsel argued that examples of such testimony included Officer Henry's statements and opinions as to how the vehicles were actually traveling on the road prior to impact and his conclusions regarding points of impact.[29]

In response, Defendant's counsel argued that Officer Henry's testimony was simply his observations. In Officer Henry's opinion, the tire tracks were going down the middle of the road and stopped where the vehicle stopped. Defense counsel argued that he did not ask Officer

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[23] R. 81-84.
[24] Officer Henry works full time for the Mississippi National Guard and received orders from the U.S. Army and would be out of the country. Trial Ex. 31 (Henry Dep. 6:2-11, May 27, 2009).
[25] Hr'g Tr. 232:23-25, Dec. 11, 2009.
[26] Hr'g Tr. 238:27-29, Dec. 11, 2009.
[27] R. 174-175.
[28] R. 197-200.
[29] Trial Tr. 54:12-25.

Henry whose fault it was and did not ask him how he believed the vehicles were going in regard to speed, and therefore, his testimony was not impermissible opinion testimony.[30]

The court denied the Brooks' motion on June 3, 2009, stating, "I have reviewed the deposition of Lee Henry. I'm going to allow him -- I mean, I think that's just based on his observations. I'm going to allow that testimony."[31] No written order was issued. Officer Henry's video-taped deposition was played for the jury in its entirety.

Plaintiffs' Motion in Limine Regarding the Brooks' Social Security Disability

Prior to trial, the Brooks filed a Motion in Limine requesting that the court restrict Purvis from raising the topic or presenting evidence of their Social Security disability application and benefits.[32] The Brooks argued that information was irrelevant to the issues in this case because they did not make a claim for lost wages. Moreover, it would only serve to prejudice the jury against them and confuse the issues.[33] The parties argued this motion at trial outside of the jury's presence.

Plaintiffs believed that Purvis intended to use this irrelevant evidence to convince the jury that because the Brooks were receiving Social Security disability benefits and were disabled, there was factual question as to whether they could actually be hurt in an accident. Such statements are improper and prejudicial.[34] Defense counsel responded that the Brooks' disability status goes to their prior medical condition, motive for the lawsuit, and their ability to pay medical expenses. Counsel further argued that the Brooks put their health at issue, including

[30] Trial Tr. 55:13-26.
[31] Trial Tr. 57:5-7.
[32] R. 172-173.
[33] R. 172-173.
[34] Trial Tr. 51:20-29.

their Social Security issues.[35] The court denied the Brooks' motion on June 3, 2009, ruling that Purvis was:

> [E]ntitled to go into the disability issues, and I'm going to leave it with that. You know, if your defense is liability, you don't really need to go into all of that. But I will allow you to go into limited, and we don't go to the issues – the reasons for the P.T.S.D. [Post Traumatic Stress Disorder].[36]

No written order was issued.

The Jury's Verdict and Award of Damages

The jury returned a verdict for the Brooks, placed fault at fifty percent (50%) for each driver, and awarded the following damages:

1) for Keith Brooks' physical injuries, medical expenses, injury to property, and pain and suffering, the sum of zero dollars;

2) for Sandra Brooks' physical injuries, medical expenses, and injury to property, the sum of seventy-five thousand dollars ($75,000.00); and

3) for Sandra Brooks' pain and suffering, the sum of seventy-five thousand dollars ($75,000.00).[37]

Plaintiffs presented evidence that Keith Brooks suffered injuries to his left arm, right leg, and increased back pain as a result of the accident.[38] On the night of the accident, Keith received treatment from George County Hospital. A week later he sought follow-up treatment with a physician at the Veterans' Administration (hereinafter "V.A.") medical center. He continued follow-up visits for accident-related injuries with physicians at the V.A. facility and Dr. John

[35] Trial Tr. 51:2-12.
[36] Trial Tr. 54:5-12.
[37] Trial Tr. 228.
[38] Trial Tr. 29:21-29, 41:25-29, 42:1-22.

McCloskey for these injuries.[39] The medical bills in evidence showed Keith's accident-related treatment totaled $18,300.65.[40]

Sandra Brooks' medical bills totaled $65,928.01.[41] She was taken from the accident scene by ambulance to George County Hospital.[42] She suffered significant injuries to her face, mouth, and teeth as a result of the accident. For those injuries, her treating physicians included Dr. Bennett York and Dr. Melvyn Stromeyer who performed various dental work and oral surgeries. Both Dr. York and Dr. Stromeyer testified as experts at trial by video-taped depositions regarding their treatment of Sandra.[43]

Sandra also treated with Dr. John McCloskey, a neurosurgeon, for pain in her neck and lower back. Dr. McCloskey was qualified as an expert and testified at trial by video-taped deposition.[44] He referred her for physical therapy and ultimately assigned her a five percent (5%) impairment for her back, a five percent (5%) impairment for her neck, and a five percent (5%) impairment for her head injury.[45] Sandra was later referred to Dr. Brian Tsang for pain management of chronic low back pain for which she received epidural steroid injections.[46] Dr. Gordon Stanfield treated Sandra for hearing loss which was suffered as a result of the accident. Dr. Stanfield was also qualified as an expert and testified by video-taped deposition.[47]

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[39] Trial Tr. 62-63.
[40] Trial Ex. 18.
[41] Trial Ex. 29.
[42] Trial Tr. 128:14-23; 131:14-132:5.
[43] Dr. York's deposition DVD is Trial Ex. 32 and the transcript is Trial Ex. 34. Dr. York's supplemental report was entered into evidence as Trial Ex. 33. Dr. Stroymeyer's deposition DVD is Trial Ex. 35 and the transcript is Trial Ex. 36.
[44] Dr. McCloskey's deposition DVD is Trial Ex. 38 and the transcript is Trial Ex. 39.
[45] *Id.*; Trial Tr. 113:17-24.
[46] Trial Tr. 137:10-138:17.
[47] Dr. Stanfield's deposition DVD is Trial Ex. 37 and the transcript is Trial Ex. 40.

In response to Plaintiffs' evidence regarding Sandra Brooks' injuries, medical treatment and expenses, Purvis offered the testimony of Dr. John Davis.[48] Dr. Davis was qualified and tendered as an expert in the field of neurosurgery.[49] Dr. Davis never treated or examined Sandra Brooks.[50] The bulk of Dr. Davis' testimony related to his conclusion that the treatment administered to Sandra for her back pain was excessive.[51] He was especially critical of Dr. Tsang's ongoing pain management treatment.[52] Dr. Davis testified several times that Sandra was disabled and on Social Security. He countered Dr. McCloskey's impairment ratings by reiterating that Sandra was completely disabled prior to the October 2001 automobile accident.[53] He told the jury that she was "profoundly" disabled prior to the accident. He reinforced this testimony by stating, "So I don't know how you get much more disabled than being bed bound for days at a time unable to get out and function. I don't know how you really make that worse."[54] Apparently, Dr. Davis made no consideration for lengthy period of time during which Sandra was on a liquid diet due to the damage to her mouth and teeth or for the fact that her physical appearance is permanently altered.[55]

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[48] Due to Dr. Davis' schedule, he testified out-of-order by agreement of the parties. As a result, the jury heard his testimony prior to the testimony of Sandra Brooks and the testimony of all of her treating physicians. Trial Tr. 92:23-25.
[49] Trial Tr. 96:21-26.
[50] Trial Tr. 110:11-17.
[51] Trial Tr. 98:19-104-15.
[52] "[I] think we can safely say after a hundred injections that probably is not a prudent way to continue. In fact, as I've stated, I hope very clearly before that's something that in our practice would have been stopped way before August of 2008. Secondly, it would not appear after two-and-a-half years, I think, of physical therapy that that has been an effective mode of treatment. And in our office, you know, physical therapy does not continue on month after month after month after month after month unless significant durable symptom relief is appreciated." Trial Tr. 108:2-12, 113:25-28.
[53] Trial Tr. 122:7-12.
[54] Trial Tr. 107:19-24.
[55] Trial Tr. 140:23-141-3, 141:14-15.

Plaintiffs' Motion for a New Trial

The Brooks filed a Motion for New Trial and Supporting Memorandum on June 19, 2009.[56] That motion was based on the denial of the above-referenced motions in limine and the argument that the verdict and damages awarded were against the overwhelming weight of the evidence. The trial court heard oral arguments on December 11, 2009.[57] At that hearing, the court stated, "For the reasons previously stated in this record, I am going to deny both of your motions."[58] The court issued an Order on December 18, 2009 denying the Plaintiffs' motion for "the reasons set forth in the record."[59]

SUMMARY OF THE ARGUMENT

Issue One

The first issue arises out of a ruling by the trial court to admit the opinion testimony of Officer Henry related to the cause of the accident. In arguing against the admission of Officer Henry's opinion testimony, Plaintiffs' counsel directed the court's attention to the numerous admissions in his deposition that he is not an accident reconstructionist.[60] Because Officer Henry is not an accident reconstructionist, he is not qualified to give testimony about what was happening prior to impact or to determining the point of impact. Rather, his testimony should have been limited what he observed at the scene, such as the position of the vehicles when he arrived on scene. Officer Henry's testimony about how the vehicles were traveling on the road, specifically that he believes that both vehicles were traveling down the middle of the road, is

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[56] R. 231-316.
[57] Hr'g Tr. 232-240, Dec. 11, 2009. Defendant also filed a Motion for Judgment Notwithstanding the Verdict. That motion was denied. R. 371.
[58] Hr'g Tr. 240:16-17, Dec. 11, 2009.
[59] R. 371.
[60] Trial Ex. 31, 8:18-20, 20:19-23, 52:16-25.

speculative testimony couched as an opinion which he is not qualified to give.[61] Further, there is no basis for his opinion and it is nothing more than his hypothesis of how the accident occurred.

The trial court's admission of Officer Henry's entire deposition testimony exposed the jury to the opinions of an officer who was not tendered as an expert and, admittedly, is not qualified as an expert, and was clearly uncomfortable when asked to testify to his opinions related to the cause of the accident. The public holds police officers in great trust and it is highly likely that Officer Henry's opinion testimony improperly influenced the jury.[62]

Issue Two

The second issue arises out of the court's denial of Plaintiffs' Motion in Limine regarding the admission of testimony and evidence of the Brooks' Social Security disability application and benefits. As a result of the court's denial of the motion, Purvis solicited testimony from the Brooks that was manifestly irrelevant to the issues in this case. That evidence prejudiced the jury. In particular, the Brooks' receipt of Social Security disability benefits is irrelevant because they did not make a claim for lost wages. Purvis presented evidence and testimony regarding the Brooks' disability status. That evidence only served to prejudice the jury against the Brooks and confuse the issues. Purvis introduced such evidence to give the jury the impression that because the Brooks were considered disabled prior to the collision it was impossible for them to actually be injured as a result of the collision.

Issue Three

The third issue is that the jury's apportionment of fault and award of damages was against the weight of the evidence and a result of bias, passion, and prejudice. The jury's award of zero damages to Keith is a dramatic reflection of that. His medical expenses exceeded

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[61] Trial Tr. 54:12-29, 56:1-26.

[62] Officer Henry was deposed at Camp Shelby and testified in his military uniform, which also could have influenced the jury.

$18,000.00. The jury determined that he was fifty percent (50%) liable for the collision. Taking the total amount of medical expenses as valid, such a determination of liability would call for a minimum award of actual damages (medical expenses) at approximately $9,000.00.

ARGUMENT

DID THE TRIAL COURT ABUSE ITS DISCRETION BY PERMITTING POLICE OFFICER WILLIAM HENRY, WHO WAS NOT QUALIFIED AS AN EXPERT IN ACCIDENT RECONSTRUCTION, TO GIVE OPINION TESTIMONY?

Standard of Review

This Court has held a trial court should grant a motion in limine when "(1) the material or evidence in question will be inadmissible at a trial under the rules of evidence; and (2) the mere offer, reference, or statements made during trial concerning the material will tend to prejudice the jury."[63] An appellate court reviews the trial judge's decisions based on relevancy under an abuse of discretion standard.[64] To reverse a case on the admission of evidence, the ruling must result in prejudice and adversely affect a substantial right of the aggrieved party.[65]

Expert Testimony of an Accident Reconstructionist Under Mississippi Law

Testimony 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.[66] To be qualified under Mississippi law as an expert in accident reconstruction, one must have specialized training or education in the field of accident reconstruction and extensive experience

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[63] *James v. Carawan*, No. 2006-CA-02024-SCT (Miss. 2008) citing *Nunnally v. R.J. Reynolds Tobacco Co.*, 869 So.2d 373, (Miss. 2004) 2008-MS-0905.177).
[64] *Jones v. Jitney Jungle Stores of America, Inc.*, 730 So.2d 555 (Miss 1998).
[65] *Brandon Hma, Inc. v. Bradshaw*, 809 So.2d 611, 618 (Miss. 2001) citing *Terrain Enters., Inc. v. Mockbee*, 654 So.2d 1122, 1131 (Miss. 1995).
[66] *See Jitney Jungle*, 730 So.2d at 558, citing *Couch v. City of D'Iberville*, 656 So.2d 146, 152 (Miss. 1995).

working and investigating accidents.[67] Without being qualified as an accident reconstruction expert, Officer Henry should not have been allowed to give his opinion on those matters.

Purvis attempted to show through Officer Henry's opinion testimony how the accident occurred based on his interpretation of photographs depicting the scene of the accident, his estimation of the drivers' speed, his determination of the width of the road, and the ruts in the road. Officer Henry testified that the:

> Normal course of travel on the road is in the middle of the road because there are ditches on both sides of the road. The road is very narrow as I indicated before. I think I indicated in my prior deposition that it was a 1-lane road and my version of a 2-lane road is a road, I didn't measure the road, so I'm not sure what state standards are, but my version of a 2-line road is a road with a white line down the center that you can stay on either side of it. And this one doesn't meet that.[68]

Whether or not Sand Ridge Road meets Officer Henry's standard for a two-lane road is completely irrelevant. Officer Henry also testified that he determined how other drivers normally drove down Sand Ridge Road.

> Defense Counsel: Well, in the normal course of travel that you observed from the crown and the rut line, was that vehicles traveled down this road as if it was a 1-lane road; is that correct? (sic)
>
> Officer Henry: Yes.[69]

This opinion is purely speculative. Officer Henry is unqualified to make that conclusion as it would require specialized skill or knowledge related to the depth and width of the crown and rut line, as well as the surface of the road. This testimony and his conclusions constitute accident reconstruction testimony which is only admissible if he is qualified in the field of accident reconstruction, which Officer Henry admits he is not.

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[67] *Miller v. Stiglet*, 523 So.2d 55 (Miss. 1988).
[68] Trial Ex. 31 (Henry Dep. 34:2-15, May 27, 2009).
[69] Trial Ex. 31 (Henry Dep. 34:12-16, May 27, 2009).

Mississippi Law Regarding Lay Witness Testimony of Police Officers

Lay witnesses are not allowed to testify when special experience or expertise in necessary.[70] Mississippi Rule of Evidence 701 states:

> If a witness is not testifying as an expert, his 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 and (b) helpful to the clear understanding of his 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.

Rule 701 favors the admission of lay opinions when two considerations are met. The first consideration is the requirement of first-hand knowledge or observation. The second consideration is that the witness' opinion must be helpful in resolving the issues.[71]

In *Sample v. State*, this Court determined that if the witness requires some experience or expertise beyond that of a randomly selected adult, it is an expert opinion under Rule 702 and not Rule 701 lay witness opinion.[72] If a question requires a police officer to respond based on his experience as an officer investigating accidents it is by definition not a lay opinion.[73] Defense counsel's own questions verified that Officer Henry's ability to investigate and document accidents was based solely on his years as a patrolman and his experience in preparing accident reports, not as an investigator.[74]

Roberts v. Grafe Auto Co. Inc., involved the testimony of an officer who responded to an accident.[75] This Court held that admitting the officer's opinion testimony was reversible error and remanded the case for a new trial.[76]

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[70] *Jitney Jungle*, 730 So.2d at 559; MISSISSIPPI RULE OF EVIDENCE 701 (Comment).
[71] MISS. RULE. EVID. 701 (Comment).
[72] *Sample v. State*, 643 So.2d 524, 529-30 (1994).
[73] *Couch*, 656 So.2d at 153 (Miss. 1995), citing *Seal v. Miller*, 605 So.2d 240, 243 (Miss. 1992).
[74] Trial Ex. 31 (Henry Dep. 47:9-25, May 27, 2009).
[75] *Roberts v. Grafe Auto Co. Inc.*, 701 So.2d 1093 (Miss. 1997).
[76] *Id.*

> [I]t is clear that a police officer's testimony as to the cause of the accident, based on training, experience in investigation, etc., would be considered accident reconstruction testimony, allowable as expert testimony under Rule 702, if the officer is properly qualified.[77]

The Court's explanation is directly on point to the case at bar:

> Defense counsel questioned [the officer] as to his work experience in investigating automobile accidents for many years. [The officer] stated he did not have any specialized training, education or skill in accident reconstruction, and he stated he did not want to be an expert in the field of accident reconstruction. Defense counsel did not ask that [the officer] be recognized as an expert in the field of accident reconstruction, in fact [the officer] stated he did not want to be tendered as an expert in accident reconstruction.
>
> Notwithstanding the characterization of [the officer] as a "lay witness" at trial, the opinion which the defendants attempted to solicit was an expert opinion based on the training and experience as a law enforcement officer and experience in the investigation of accidents and physical findings at the scene of the accident.[78]

Just as Officer Henry in this case, the officer in *Roberts* was not tendered as an expert and stated that he was not an expert in accident reconstruction. Purvis simply relied on Officer Henry's preparation of numerous accident reports to present his testimony as that of an expert. This does not qualify him as an expert in accident reconstruction.[79]

Purvis repeatedly solicited Officer Henry's opinions based on his experience as a law enforcement officer and his physical findings at the scene of the accident. As the court explained in *Roberts*, the officer's "testimony was not based upon actually witnessing the accident, rather it was based on his investigation afterward."[80] Since Officer Henry is not an expert, "he could not give testimony about the point of impact for an accident he did not see..."[81] Officer Henry's testimony should have been limited to the facts.

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[77] *Id.* at 1099.
[78] *Id.*
[79] *Fleming v. Floyd*, 969 So. 2d 881 (Miss. 2006) citing *Fielder v. Magnolia Bev. Co.*, 757 So. 2d 925, 937-938 (Miss. 1999) (A law enforcement officer may not have sufficient expertise even when having substantial experience in preparing reports on accidents.).
[80] *Roberts*, 701 So.2d at 1099.
[81] *Ware v. State*, 790 So.2d 201 (Miss. 2001).

Officer Henry is not qualified to testify about the normal course of travel on Sand Ridge Road based solely on observations at the scene of one accident. He is also unable to determine where the vehicles were prior to impact because he was not there. However, the jury heard the following opinion testimony from Officer Henry:

> I believe that both vehicles were traveling in the natural rut line of the road and their vehicles centered pretty much on the crown of the road as the terrain of the road just kind of naturally draws you toward it with the crown being in the middle... so I believe they were both traveling somewhat in the middle of the road.[82]

Defense counsel pressed Officer Henry further:

Defense Counsel:	And so I guess the question is, where did the tire marks of the blue car end up in relation to the point of impact?
Plaintiffs' Counsel:	Objection. Calls for a conclusion.
Officer Henry:	Again, it's very hard to determine from the photographs. A Mack truck is going to leave more tire tracks than a Dodge Neon. However, I believe from the way the cars were sitting and my vague recollection of the incident, that I believe that both would have been traveling in the center of the road.
Defense Counsel:	Before the impact?
Officer Henry:	Before the impact.[83]

Finally, Officer Henry testified that he determined that the point of impact would have been somewhere near the center crown of the road.[84] As explained above, testimony determining the point of impact is strictly within the field of expertise of an accident reconstructionist.

The Prejudicial Effect of Admitting Officer Henry's Opinion Testimony

"Because members of the public hold police officers in great trust, the potential harm to an objecting party requires reversal where a police officer gives expert testimony without first

[82] Trial Ex. 31 (Henry Dep. 36:14-24, May 27, 2009).
[83] Trial Ex. 31 (Henry Dep. 38:5-18, May 27, 2009).
[84] Trial Ex. 31 (Henry Dep. 49:6-21, May 27, 2009).

being qualified as expert."[85] In the case at bar, Officer Henry's testimony strayed into the area of expert opinion and irreparably tainted the jury's apportionment of liability. He testified that both vehicles were being driven in the middle of the road and as a result, the jury found both parties were fifty percent (50%) at fault for the accident. Essentially, the jury split responsibility down the middle as Officer Henry concluded they should. Obviously, the jury assumed Officer Henry's conclusions were based upon specialized knowledge and experience and afforded them undue weight. The fact that the jury's finding of fault exactly followed the officer's testimony is indicative of its prejudicial effect.

Officer Henry usurped the role of the jury by testifying to the ultimate issues of fact. His testimony, couched as expert opinion, seriously affected the Brooks' right to have a jury determine the ultimate issues of fact. In *Fleming v. Floyd*, this Court explained, "to the jury, [the] investigating officer's report had the aura of impartiality. Unfortunately, there is no evidence that it had the content of reliability."[86] The trial court's denial of the Brooks' motion in limine and admission of Officer Henry's opinion testimony was reversible error and warrants a new trial.

DID THE TRIAL COURT ERR BY ALLOWING DEFENDANT PURVIS TO PRESENT IRRELEVANT AND PREJUDICIAL EVIDENCE CONCERNING THE BROOKS' SOCIAL SECURITY DISABILITY APPLICATIONS AND BENEFITS?

Standard of Review

As discussed above, the standard of review for the denial of a motion in limine and admission of evidence is abuse of discretion. Specifically relevant to the evidence and testimony related to the Brooks' Social Security disability status and benefits is the second prong of the motion in limine standard. It states that such a motion should be granted when "the mere offer,

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[85] *Roberts*, 701 So.2d at 1099.
[86] *Fleming*, 969 So.2d at 889.

reference, or statements made during trial concerning the material will tend to prejudice the jury."[87] Mississippi Rules of Evidence 401 and 402 govern the admission of relevant evidence. "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[88] "Evidence which is not relevant is not admissible."[89]

The Brooks' Disability Status and Benefits

The Brooks filed a Motion in Limine to preclude any evidence or testimony related to the fact that they were on Social Security disability prior to the October 2001 accident because such information is wholly irrelevant to causation and damages. The mere mention of Social Security disability and benefits had the risk of prejudicing the jury against the Brooks.

At trial, Purvis offered evidence related to the Brooks' physical and mental conditions which led to the adjudication of disability. Defense counsel cross-examined both plaintiffs about specific entries in their Social Security applications that had no direct relevance to the accident. He also questioned the Brooks as to when they were last employed. In fact, he asked Officer Henry where Keith was employed. Officer Henry responded, "Disabled."[90] It was completely inappropriate to bring that testimony in through Officer Henry. All of these questions were irrelevant considering the Brooks did not make claims for lost wages.

Purvis argued the Brooks' disability status is relevant to their pre-existing conditions. However, the Brooks do not dispute their pre-existing conditions. All of Keith's pre-existing conditions are well-documented in the medical records of the physicians who treated him for accident-related injuries. Therefore, his application for Social Security disability should have been excluded. Furthermore, the Defendant's cross-examination of Keith regarding his date of

[87] *See Carawan*, No. 2006-CA-02024-SCT.
[88] MISSISSIPPI RULE OF EVIDENCE 401.
[89] MISSISSIPPI RULE OF EVIDENCE 402.
[90] Trial Ex. 31 (Henry Dep. 41:15-21, May 27, 2009).

last employment and receipt of Social Security disability benefits was not specifically linked to any issue at trial.

The following line of questions is an example of the prejudicial effect of the testimony regarding Keith Brooks' disability status.

Defense Counsel:	Again, I'm going to ask you a few more of these medical questions just because there are 20,000 or 18,000 dollars in medical bills up here. Your issues, your medical issues, I think you said, went back to 1976, correct?
Keith Brooks:	Right.
Defense Counsel:	At least?
Keith Brooks:	With my back, yes, sir.
Defense Counsel:	Okay. And you applied for and have been receiving social security disability for a long time; haven't you?
Keith Brooks:	Yes, sir, because I haven't been able to work.
Defense Counsel:	You haven't worked at all in any capacity for how long?
Keith Brooks:	I was released from my job in 1992 up in Illinois where I worked in a deep freeze.
Defense Counsel:	Okay. And that was the last time that you worked?
Keith Brooks:	Yes, sir, they released me from not being able to perform all my duties.[91]

These questions 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. Again, Keith did not make a claim for lost wages, therefore his employment is irrelevant. Defendant's counsel questioned Keith in depth about his inability to work, financial problems, and other

[91] Trial Tr. 78:25-79:15.

unrelated issues, based on the Social Security file.[92] Plaintiffs' counsels' objection was overruled.[93]

Sandra's disability status prior to the accident was due to a mental condition, P.T.S.D., and not any physical injuries.[94] 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..."[95] Such a rule keeps collateral issues from being injected into the case.[96] Evidence and testimony related to Sandra's symptoms caused by P.T.S.D. has no bearing on the facts at issue. Additionally, Sandra's accident-related injuries were injuries to her teeth, jaw, mouth, and lower back. These are physical injuries unrelated to the basis of her Social Security disability adjudication.

Dr. Davis discussed her emotional health at length. He based that testimony on his review of her Social Security medical records. He testified that people like Sandra, who suffer 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.[97] He agreed with defense counsel that she had a pattern of "ongoing continued treatment of no durable benefit."[98] It is likely that his testimony prejudiced the jury against Sandra. Considering his opinions were based on information gathered from her Social Security file, and not just her accident-related medical records, it is easy to see why those records should have been excluded.

Defendant Purvis is likely to argue that Dr. Davis' testimony is relevant to Sandra's pre-existing conditions. However, any testimony related to her psychiatric condition is outside the

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[92] Trial Tr. 79:20-84-29.
[93] Trial Tr. 82:25-83:3.
[94] Mrs. Brooks was the victim of rape in 1992. (Trial Tr. 52:6-23).
[95] MISSISSIPPI RULE OF EVIDENCE 403.
[96] *See Hanna v. State*, 336 So.2d 1317 (Miss. 1976), cert. denied, 429 U.S. 1101, 97 S.Ct. 1125, 51 L.Ed.2d 551 (1977)).
[97] Trial Tr. 104:16-106:26.
[98] Trial Tr. 106:27-107:2.

field of knowledge for which he was qualified as an expert.[99] He is a neurosurgeon, not a psychiatrist, and therefore unqualified to opine to the jury regarding Sandra's mental status. Even if her emotional well-being prior to the accident has any probative value, that value is substantially outweighed by unfair prejudice. Finally, because the Brooks did not make a claim for mental or emotional damages, their mental status prior to the accident is immaterial.

Mississippi's Collateral Source Rule

Under Mississippi's long established collateral source rule, "a defendant tortfeasor is not entitled to have damages for which he is liable reduced by reason of the fact that a plaintiff has received compensation for his injury by and through a totally independent source, separate and apart from the defendant tortfeasor."[100] In other words, Purvis cannot use the "moneys of others . . . to reduce the cost of its own wrongdoing."[101] Examples of collateral sources include, but are not limited to, private insurance, Medicaid benefits, and gratuitous gifts.[102] Pursuant to this rule, Purvis should not be permitted to prejudice the jury by presenting evidence of such collateral payments.[103] By presenting such evidence, Purvis essentially attempted to convince the jury that the Brooks' damages were reduced and that is a clear violation of the collateral source rule.[104] Presenting evidence of Social Security benefits and V.A. medical payments was clearly offered to prejudice the jury in this manner.

In *Brandon HMA, Inc. v. Bradshaw*, the Court held that Medicaid payments are subject to the collateral source rule and cited Bradshaw's brief as follows, "[T]he Hospital (Brandon) does

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[99] Trial Tr. 96:21-26.
[100] *Robinson Property Group v. Mitchell*, 7 So.3d 240, 244 (Miss. 2009) (quoting *Cent. Bank of Miss. v. Butler*, 517 So.2d 507, 511-12 (Miss. 1987).
[101] *Brandon HMA, Inc.*, 809 So.2d at 618.
[102] *Id.*
[103] *See Eaton v. Gilliland*, 537 So.2d 405, 408 (Miss. 1989).
[104] *Id.*

not get a break on damages just because it caused permanent injuries to a poor person."[105] The same situation applies in the case at bar. Purvis does not get a break on damages just because he caused permanent injuries to disabled persons.

The Result of Admitting the Prejudicial Testimony

Defendant's entire defense to the Brooks' physical injuries was that their disability status somehow mitigated his responsibility for their accident-related injuries. This is contradicted by the testimony of the Brooks, their treating physicians, and the medical records. Evidence of disability benefits is irrelevant in this case and only served to confuse the issues and prejudice the jury against the Brooks. Given the jury's award of zero damages to Keith, it is reasonable to infer that they considered the testimony and evidence regarding his Social Security benefits and V.A. medical benefits as collateral source payments and used it to discount his damages. The fact that the jury awarded him no recovery for his medical expenses, despite having found for the Plaintiffs and finding him only fifty percent (50%) at fault is a clear indication of the jury's bias. This bias resulted from the needless and cumulative presentation of prejudicial evidence that he was disabled prior to the accident. The admission of such irrelevant and prejudicial testimony warrants reversal.

WAS THE JURY'S AWARD OF ZERO DAMAGES FOR KEITH BROOKS AGAINST THE WEIGHT OF THE EVIDENCE AND A RESULT OF BIAS, PASSION, AND PREJUDICE?

Standard of Review

The proper basis for granting a motion for new trial is "when the verdict is against the overwhelming weight of the evidence, or when the jury has been confused by faulty jury instructions, or when the jury has departed from its oath and its verdict is a result of bias,

[105] *Brandon Hma, Inc.*, 809 So.2d at 619.

passion, and prejudice."[106] Commonly, the sole proof of bias, prejudice or passion on the part of the jury is "an inference, if any, to be drawn from contrasting the amount of the verdict with the amount of the damages."[107] An appellate court will not disturb a jury's award of damages unless its size, in comparison to the actual amount of damage, shocks the conscience.[108] The damages awarded in this case, as compared to the medical expenses, are inadequate and clearly contrary to the overwhelming weight of credible evidence.

Keith Brooks' Medical Expenses and the Jury's Inadequate Damages Award

Keith's medical expenses totaled $18,300.65. As a veteran, he received the majority of his medical treatment from V.A. medical facilities. It is the nature of these facilities to rotate physicians frequently. Therefore, patients see whichever practitioner is available at the time. Because of this, it was necessary for Keith to review his entire medical history with each physician.[109] On many occasions, he was treated for both pre-existing and accident-related injuries.[110] While this may have made it difficult for a jury to distinguish between visits and expenses for injuries solely related to the accident, Mississippi law holds that "where the jury cannot apportion the damages between a pre-existing condition and the damage caused by the defendant, the defendant may be liable for the whole amount of damages."[111]

Looking solely to treatment Keith received from sources outside the V.A., it is clear the jury disregarded the evidence. He received treatment from George County Medical Center the night of the accident, and later sought treatment from Dr. John McCloskey, a neurosurgeon. These expenses totaled $660.88. Yet, the jury awarded zero dollars for his injuries. Clearly, a

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[106] *Knight v. Brooks*, No. 2002-CA-02093-COA (Miss. App. 2004) citing *Gatewood v. Sampson*, 812 So.2d 212, 222 (¶22) (Miss. 2002) citing *Hamilton v. Hammons*, 792 So.2d 956, 965 (Miss. 2001).
[107] *Knight* 2002-CA-02093-COA, citing *Green v. Grant*, 641 So.2d 1203 (Miss 1994).
[108] *Brandon Hma, Inc.*, 809 So.2d at 618.
[109] Therefore, the Social Security disability application and medical records was cumulative and irrelevant.
[110] Trial Tr. 63:22-25.
[111] *Koger v. Adcock*, 25 So.3d 1005 (Miss. App. 2010).

jury verdict of zero, in comparison to expenses of $18,000.00, is shocking. Even a zero dollar award in comparison to $660.00 is inadequate and clearly contrary to the overwhelming weight of credible evidence. It appears that the jury was prejudiced against Keith because of his disability status prior to the accident and biased against allowing recovery of his medical expenses because of improperly considering collateral sources of payments.

The jury's award of zero damages to Keith Brooks is wholly inadequate in light of the evidence of his medical expenses and testimony presented at trial. Mississippi's collateral source rule prevents Purvis from benefitting from his disability and veterans' benefits. However, that information clearly confused the jury and affected their award of damages. This Court may consider such a verdict so inadequate as to appear beyond all measure and unreasonable and outrageous and showing that the jury was motivated by passion, partiality, or prejudice.[112] Therefore, this Court can and should remand the case for a new trial.

CONCLUSION

Each of the three issues discussed above warrants a new trial based on liability and damages. Based on the improper evidence that Purvis presented, the jury ruled like he wanted them to:

1) Because Officer Henry concluded Keith Brooks and Purvis were driving down the middle of Sand Ridge Road they should allocate fault at fifty percent (50%) to each driver; and

2) the Social Security Administration had already determined that the Brooks were disabled and they should too.

Plaintiffs' Motion in Limine requesting that Officer Henry's opinion testimony be omitted from the trial deposition should have been granted. The admission of his opinion

[112] Miss. Code Ann. § 11-1-55; *See Brake v. Speed*, 605 So.2d 28 (Miss. 1992).

testimony was detrimental to the Plaintiffs' substantial right to a fair trial. It is not the function of a witness to substitute himself for the jury and advise them with regard to the ultimate disposition of the case. Throughout his testimony, Officer Henry admitted he was not an accident reconstructionist, but Purvis continued to solicit opinion testimony that required specialized skill and knowledge. Ultimately, Officer Henry testified that he concluded the drivers were both traveling in the middle of the road, implying each party was equally responsible. The jury rubber-stamped his opinions by their 50/50 verdict.

Purvis should not have been allowed to solicit testimony and present evidence related to the Brooks' Social Security disability applications and benefits. Even if this Court determines that the Social Security disability applications are relevant to the Plaintiffs' medical status prior to the collision, their collection of benefits and work status is irrelevant. In ruling against Plaintiffs' Motion in Limine on the admission of disability issues, the court advised Purvis that he would not need to go into the matter if his defense was based on liability.[113] However, Purvis brought up the Brooks' Social Security disability at every turn to unfairly prejudice the jury against the Brooks. The Brooks were concerned that Purvis would use their disability status to convince the jury that they were disabled prior to the accident and could not be injured any further. Their concern about the prejudicial nature of that evidence was legitimate. The jury was prejudiced against them based on their disability status and receipt of disability benefits.

The jury's verdict and award of zero damages to Keith Brooks was against the weight of the evidence and a result of bias, passion, and prejudice. The jury found in favor of the Plaintiffs and apportioned fault at fifty percent (50%) to each driver. Keith sought medical treatment the night of the accident; yet, the jury awarded him no recovery for any of his medical expenses. The improper testimony that was admitted caused Sandra's award to be reduced by half. This

[113] Trial Tr. 54:5-12.

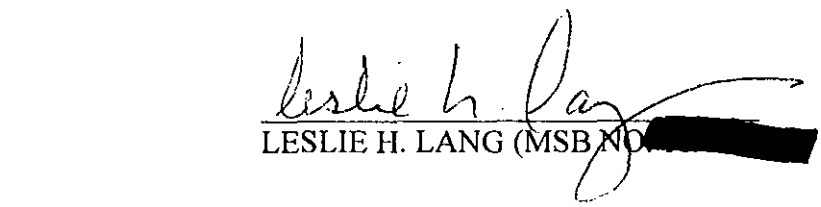
result cannot be reconciled without a determination that the jury was ruled by bias, passion, and prejudice.

Should this Court determine that no single issue warrants reversal, the Plaintiffs argue that the cumulative effect of the errors is sufficient to warrant reversal and remand for a new trial.[114]

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 4th day of November, 2010.

KEITH and SANDRA BROOKS
APPELLANTS



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[114] *See Blake v. Clein*, 903 So.2d 710, (Miss. 2005), *Estate of Hunter v. Gen. Motors Corp.* 729 So.2d 1264 (Miss. 1999), and *Ill. Cent. R.R. v. Clinton*, 727 So.2d 731 (Miss. Ct. App. 1998).

CERTIFICATE OF SERVICE

I, Leslie H. Lang, do hereby certify that I have this date served, via U.S. mail, postage paid, a true and correct copy of the foregoing *Brief of Appellants Keith Brooks and Sandra Brooks* to:

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