

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

**WACKENHUT SECURITY AND
ROZIVITO HOSKINS, INDIVIDUALLY AND AS
AN EMPLOYEE OF WACKENHUT SECURITY**

APPELLANT

VS.

CAUSE NO.: 2010-CA-00480

ERNIE FORTUNE

APPELLEE

**APPEAL FROM THE CIRCUIT COURT OF
HINDS COUNTY, MISSISSIPPI, FIRST
JUDICIAL DISTRICT**

SUPPLEMENTAL BRIEF OF APPELLEE

Oral argument is not 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 judges of the Court of Appeals may evaluate possible disqualification or recusal.

- I. Ernie Fortune, Appellee
- II. Rozivito Hoskins, Appellant
- III. G4S Secure Solutions Inc. f/k/a/ The Wackenhut Corp., Appellant
- IV. Honorable Winston Kidd, Circuit Judge
- V. Honorable Matthew A. Taylor, Esq., attorney for Appellant
- VI. Honorable J. Ashley Ogden, Esq. and James W. Smith, Jr., Esq. and the firm of Ogden & Associates, PLLC. attorneys for Appellee
- VII. Honorable Robert F. Wilkins, Esq. and the Rocky Wilkins Law Firm, Attorney for Appellee

RESPECTFULLY SUBMITTED, this the 9th day of August, 2011.

BY: J. Ashley Ogden
J. Ashley Ogden

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiff/Appellee does not request oral argument. Oral argument is unnecessary and would be a needless use of judicial time and resources. The issues in this appeal are not such that oral argument is necessary. Plaintiff/Appellee concedes that the trial court committed reversible error and respectfully requests that this cause be dismissed and remanded to the Hinds County Circuit Court for a new trial.

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STATEMENT OF THE ISSUES

- 1. Whether the trial court properly allowed testimony from Plaintiff's expert economist**
- 2. Whether the trial court erred in excluding evidence and testimony of Plaintiff's alcohol use.**
- 3. Whether the trial court properly denied Defendant's Motion in Limine to exclude evidence of future surgeries.**
- 4. Whether the trial court properly allowed substitution of Plaintiff's expert witness economist at trial.**
- 5. Whether the trial court properly allowed documentary evidence to be redacted following admission into evidence and publication to the jury.**
- 6. Whether the trial court erred in refusing proposed jury instruction D-11 regarding contributory negligence.**
- 7. Whether the trial court properly refused proposed jury instruction D-26 regarding use of reasonable force.**
- 8. Whether the trial court properly excluded evidence of Plaintiff's prior bad acts.**
- 9. Whether the trial court properly excluded referenced to Plaintiff's status as "homeless."**
- 10. Whether the trial court properly applied the "collateral source" rule at trial.**

STATEMENT OF THE CASE

This case is an action for damages by Ernie Fortune (hereinafter “Fortune”, “Plaintiff” or “Appellee”) against Defendants Wackenhut Security and Rozivito Hoskins, Individually and as an Employee of Wackenhut Security, (collectively referred to as “Defendants” or “Appellants”) for failing to supervise and regulate the conduct and activities of employees to protect invitees from physical harm; failing to exercise ordinary care in the discharge of their responsibility to prevent and protect patrons from incidents; negligently hiring and retaining a person whom the Defendants knew or should have known was a person of violent propensities; negligence in failing to adequately train the personnel employed and on duty at the restaurant; failing to remedy a dangerous condition which the Defendants caused to exist or of which the Defendants knew or should have been aware of and failing to render aid to Fortune.

Plaintiff sought damages for past and future medical, lost wages past, physical pain and suffering, emotional distress and mental anguish, permanent physical impairment, scarring and disfigurement, permanent loss of the use of his right arm, and other damages.

The trial was held before a jury of twelve (12) commencing on November 30, 2009 and ending on December 7, 2009. The case was submitted to the jury on instructions delivered by the lower court. The jurors found the issues in favor of the Plaintiff and against the Defendants. The jury found Wackenhut and Hoskins to be 75% negligent and secondary Defendants, My Joy, Inc. and Lockett to be 25% negligent. The jury assessed Plaintiff’s total damages to be one million dollars (\$1,000,000.00). On February 10, 2010 the trial court issued an order denying Defendants’ post trial motions. My Joy, Inc. and Lockett were released post-judgment by agreement. The remaining Defendants filed their appeal to this Court.

STATEMENT OF THE FACTS

Ernie Fortune was a daily and frequent customer of the McDonald's restaurant located at 2465 Highway 80 West in Jackson. He was referred to by the employees as a "super-sized" customer because he spent a lot of money at the restaurant. (Tr. 291:1-13). Plaintiff had established a history with McDonalds of going to the McDonalds, buying a drink or food and then coming back in the same day and buying more food or drinks and using the same McDonalds cup. (Tr. 570:15-570:27). On July 27, 2008 he made a purchase at McDonalds around 3 pm and returned later that day to buy dinner. (Tr. 573:1-15). Plaintiff brought his same McDonald's cup he had purchased at 3 pm. (Tr. 573:1-5). Plaintiff intended to go to the McDonald's and order a chicken sandwich and get a drink. (Tr. 573:17-15). On the date in question, the owner of the McDonald's location, My Joy, Inc., was under contract with The Wackenhut Corporation to provide security services at the restaurant. (Tr. 472:5-13). The security officer on duty at the time that Plaintiff entered the restaurant was Defendant, Rozivito Hoskins. (Tr. 551:28-552:4).

Fortune entered the store and went to the fountain drink machine to fill his cup with ice before getting in line at the counter. (Tr. 517:19-25). Plaintiff had established a pattern at McDonalds where he would fix his drink and then go to the counter to purchase his meal. (Tr. 571:10-27). McDonalds had accepted this routine. (Tr. 572:1-3). The night manager on duty on this date, Tracy Luckett, did not know Plaintiff, or that he was a frequent customer, and did not know his routine. (Tr. 514:11-25). She told Plaintiff he could not bring a cup into the restaurant and take ice from the drink machine because it was not sanitary. (Tr. 517:19-.25; 526:25-528:8; 531:2-8). Upon receiving the instruction Plaintiff walked out the door feeling embarrassed because he had been getting ice for months and the other managers did not prohibit him from doing so. (Tr. 576:11-16). Plaintiff retrieved a dollar and went back in the restaurant and laid a

dollar bill on the counter so that he could purchase a drink. (Tr. 576:16-21). He then went to the door to leave. (Tr. 578:17-24). When he reached the door he stopped and turned and began having a conversation with the manager who was behind the counter. (Tr. 580:1-16).

At this point, security guard, Rozivito Hoskins, aggravated by the exchange moved across the room, grabbed Plaintiff and pushed him through the glass door, knocking him down to the ground, and began to beat and stomp on Fortune. (Tr. 580:28-583:7). Plaintiff curled up into a fetal position on the ground and Hoskins continued to kick the Plaintiff. (Tr. 582:15-21; Exhibit "P-1" Video footage of the attack). Hoskins testified that the Plaintiff threatened him with a knife. (Tr. 552:3-560:25). Witnesses to the assault testified that they did not see Fortune brandish a knife or threaten anyone prior to being attacked by Hoskins. (Tr. 217:26-219:4; 230:14-21; 253:23-254:4). The Jackson Police department police report listed a knife found at the scene. (Tr. 209:12-17). However, the Wackenhut report stated that a fingernail file, not a knife was recovered. (Exhibit "P-6"). Hoskins testified Plaintiff had a pocket knife in his right hand, but it is not visible in the video surveillance. (Tr. 557:4-28). Plaintiff testified he did not have a knife. (Tr. 576:27-28).

SUMMARY OF THE ARGUMENT

Based on Mississippi Supreme Court's ruling in *Rebelwood Apartments RP, LP v. English*, 48 So. 3d 783 (Miss. 2010) handed down after this trial, the trial court erred in allowing an expert witness economist to utilize a work-life expectancy greater than that found on a standardized table for alleged future lost wages/lost of earnings capacity of the Appellee in this case.

The trial court properly excluded testimony and evidence regarding Fortune's past alcohol use. Evidence of Plaintiff's alcohol use is inadmissible under the rules of evidence because it is irrelevant and if relevant would be more prejudicial than probative.

The trial court properly admitted evidence of future surgeries at the trial. Medical experts opined to a reasonable degree of medical probability or certainty that Plaintiff requires a future surgery. It was not reversible error to allow testimony regarding future surgeries.

The trial court properly allowed the substitution of Plaintiff's expert witness economist at trial. There was no prejudice to the Defendants in allowing a qualified expert to give the opinions of Plaintiff's designated expert witness economist, Dr. Glenda Glover, when she was unavailable for trial.

The trial court properly allowed medical bills and records to be redacted following its admission into evidence. The documentary evidence was inadmissible under the rules of evidence because it was irrelevant and if relevant would be more prejudicial than probative. It was not reversible error to allow the un-redacted medical bills to be admitted into evidence because the bills were properly redacted before being published to the jury.

Appellee concedes that the trial court committed reversible error by denying Defendants' Proposed Jury Instruction D-11 on contributory negligence. There was conflicting evidence presented to the jury regarding whether or not the Plaintiff brandished a knife and threatened anyone prior to being assaulted by Hoskins. The Record provides a foundation in the evidence for a jury instruction on the Plaintiff's possible contributory negligence. The trial court's denial of Defendants' Proposed Jury Instruction D-11 prevented Defendants from presenting their theory of the case. It was reversible error not to instruct the jury on contributory negligence when proof was presented at trial. The Defendants are entitled to a new trial on this issue.

The trial court properly refused proposed Jury Instruction D-26 regarding use of reasonable force. Jury Instruction D-26 was not supported by the evidence and was properly refused by the trial court.

The trial court properly excluded evidence of Appellee's prior bad acts. Bad acts are not admissible as they are irrelevant and clearly more prejudicial than probative. Whether the Plaintiff had a criminal history is not relevant to his work life expectancy. A criminal history does not preclude one from having gainful future employment.

The trial court properly excluded reference to Appellee's status as "homeless." It is more prejudicial than probative to allow the Defendants to refer to Fortune as "homeless." The fact that the Plaintiff was "homeless" is not relevant to the facts and issues of this cause.

The trial court properly excluded evidence regarding collateral sources. Defendants argue that collateral source should have been admitted because Plaintiff testified he was unable to pay for additional treatment. The fact that Plaintiff is eligible for federal or state funding does not make his statement false allowing discussion of collateral source. The probative value, if any of collateral source, is substantially outweighed by danger of unfair prejudice. It was not error to exclude collateral source.

STANDARD OF REVIEW

The standard of review for evidentiary rulings by the trial court is abuse of discretion. *Debrow v. State*, 972 So. 2d 550 (Miss. 2007). "A district court abuses its discretion if it: (1) relies on clearly erroneous factual findings; (2) relies on erroneous conclusions of law; or (3) misapplies the law to the facts." *In re Volkswagen of Am., Inc.* 545 F.3d 304, 310 (5th Cir. 2008) (quoting *McClure v. Ashcroft*, 335 F.3d 404, 408 (5th Cir. 2003) (citation omitted). Abuse of discretion is defined as creating a prejudice to the party's case. *Edwards v. State*, 737 So.2d 275 (Miss. 1999).

"The standard of review for challenges to jury instructions is as follows: Jury instructions are to be read together and taken as a whole with no one instruction taken out of context. A defendant is entitled to have jury instructions given which present his theory of the

case, however, this entitlement is limited in that the court may refuse an instruction which incorrectly states the law, is covered fairly elsewhere in the instructions, or is without foundation in the evidence.” *Harris v. State*, 861 So. 2d 1003, 1012-1013 (Miss. 2003). The Supreme Court will reverse based on the denial of an instruction if the granted instructions, taken as a whole, do not fairly instruct the jury on the applicable law supported by each party’s proof. *Young v. Guild*, 7 So. 3d 251 (Miss. 2009).

ARGUMENT

I. At the Time of Trial the Economist Testimony was Proper

Prior to this Court’s ruling in *Rebelwood Apartment RP, LP v. English*, 48 So. 3d 483, 494 (Miss. 2010) which addressed the methods of acceptable lost wage testimony at trial, the trial court allowance of Plaintiff’s expert economist to testify to lost future income for the Plaintiff to his life expectancy was proper. After the trial of this matter this Court ruled in *Rebelwood* that a work-life expectancy outside of the nationally accepted tables for work-life is not allowed. This Court clarified in *Rebelwood* that lost future income can only be based on using nationally accepted tables for work-life expectancy tables. Plaintiff’s expert in this case provided lost future income based on a work life expectancy equal to the Plaintiff’s life expectancy and not his work-life expectancy. (Tr. 789:6-7). Plaintiff’s expert based this work life expectancy on today’s economy in which people do not retire as early and tend to work longer, including some who will work until they die. (Tr. 789:6-10). This is an emerging view among many economists today. However, based on this Court’s clarification in *Rebelwood* the expert’s testimony is now not admissible. The ruling in *Rebelwood* should not be retroactively applied since at the time the testimony was given it was not err to do so. At the time the economist’s opinion was given it was based upon the perception of the witness, founded in sufficient facts or data, and was the product of reliable principles and methods, and these principles and methods

were reliably applied to the facts of the case and admissible. Miss. R. Evid. 701, 702. On retrial Plaintiff will present the evidence of lost wages to comport with the ruling in *Rebelwood*.

II. The Trial Court Properly Excluded Evidence and Testimony of Plaintiff's Alcohol Use

Under Miss. R. Evid. 403 testimony regarding the relevance of Plaintiff's alcohol use is substantially outweighed by the danger of unfair prejudice, confusion of the issues, and would mislead the jury. *Ill. Cent. R.R. Co. v. Gandy*, 750 So. 2d 527 (Miss. 1999). Plaintiff filed a motion *in limine* to exclude, among other things, reference to irrelevant information in medical records. (R. 2496-2504). The trial court granted Plaintiff's motion *in limine* in part ruling, "With respect to past alcohol use that would not be admissible during this trial." (Tr. 69:5-6). The trial court ruled that Defendants could present evidence "with respect to whether or not the plaintiff had alcohol in his system at the time of the incident herein." (Tr. 69:5-8). Defendants argue two points: (A) Dr. Katz opened the door to admit all alcohol use and (B) medical bills were unredacted and opened the door to all alcohol use.

A. The door was not opened to evidence of alcohol use through the opinions of Dr. Katz.

Dr. Katz gave medical opinions about the potential for a future surgery. Defendants tried to argue Plaintiff's history of alcohol consumption would affect the need for the surgery. Outside the presence of the jury Defendants conducted a *voir dire* of Dr. Katz. Dr. Katz testified that plaintiff's future surgeries could be directly tied to his "lifestyle choices." (Tr. 347:29-348:27). His questioning about Fortune's alcoholism was specifically done outside the presence of the jury, so the jury never heard the testimony. (Tr. 346:25). After a lengthy discussion regarding alcoholism and possible future surgery the trial court ruled that prior alcohol use was still not admissible. (Tr. 355:20). During direct testimony in front of the jury the only thing stated by Dr. Katz was that "due to other medical conditions and what he chooses for his life, I

can't say that he will definitely have that surgery or that to a reasonable degree of medical certainty he will have that surgery." (Tr. 363:10-14). Dr. Katz never mentioned plaintiff prior alcohol use. During Defendants' cross-examination they asked Dr. Katz if he had any specific recollection of any toxicology reports and he answered no. (Tr. 387:12-13). The Defendants then asked Dr. Katz if he had seen the chemistry report regarding alcohol ethyl serum. The trial court sustained the Plaintiff's objection to this question. (Tr. 400:8-230). After this exchange Dr. Katz was asked and did testify that the document he was presented by the Defendants indicated the Plaintiff's blood alcohol level on the night of the incident was 276 milligrams per deciliter. (Tr. 400:25-401:1). The Defendants were allowed to elicit testimony of the Plaintiff's alcohol use on the night of incident. The Plaintiff objected to testimony regarding any alcohol use, but the trial court in its discretion found Fortune's use the night of the assault was relevant and would be more probative than prejudicial. The door was never "opened" to admission of all alcohol history. It would be more prejudicial than probative to allow testimony of past alcohol use of the Plaintiff. Miss. R. Evid. 403.

B. Plaintiff did not open the door to evidence of past alcohol use by introducing medical bills and a summary.

During the trial Plaintiff presented a total of medical bills in the amount of \$92,152.13. This amount included a \$145.00 bill charged for the use of alcohol to the Plaintiff for treatment in the hospital. Plaintiff did not single out the bill, but presented a total amount of bills. The medical bills total document was not published to the jury until after the \$145.00 amount had been redacted leaving an amount of \$91,877.05. Defendants, on cross-examination raised the issue of the specific \$145.00 bill. Plaintiff objected to the questions and a conference was held outside of the jury's presence regarding redaction of the bills. The trial court properly ruled Defendants suffered no prejudice. (Tr. 655:26-658:8). Exhibit "P-10" which had the amount in it was properly redacted before it was published to the jury. Because the jury was not allowed to

consider the \$145.00 bill and the bill was not presented to the jury as related to alcohol the trial court's refusal to allow the Defendants to develop and present it to the jury was proper. There was no prejudice to the Defendants.

If the door had been opened by Plaintiff mentioning that the hospital gave him alcohol while in the hospital Defendants would have been allowed to develop the facts through cross-examination. *Blake v. Clein*, 903 So. 2d 710, 727 (Miss. 2005). The Plaintiff did not testify that he was given alcohol in the hospital. The extent of his testimony was that he incurred medical bills while in the hospital. The trial court did not allow Defendants to question the Plaintiff about the specific \$145.00 charge because there was no violation of the rule. There was no abuse of discretion in excluding testimony regarding Plaintiff's alcohol use because the bills and records were properly redacted before the exhibit was presented to the jury. The jury was never told specifics about the bill. The jury was only presented with a \$91,877.05 total amount of bills.

Abuse of discretion is defined as creating a prejudice to the party's case. *Edwards*, 737 So.2d 275. The Defendants were not prejudiced. The evidence which the jury heard regarding the medical bills through the Plaintiff was not specific to the individual bills, but rather a broad indication that he had medical bills from University Medical Center, University Physicians, American Medical Response and other providers of \$92,152.13. (Tr. 588:23-593:7). The Plaintiff did not go through the individual bills or the treatment provided associated with the bills. Defendants, however on cross-examination, attempted to elicit testimony regarding a specific bill for \$145 from University Medical Center. (Tr. 655:14-17). The Plaintiff objected and a conference was held outside of the jury in which the trial court sustained the objection and censured both parties for submitting documents not properly redacted. (Tr. 655:26-658:8). Since the bills submitted to the jury did not contain the \$145.00 bill the Defendants objected to because

it was redacted there was no prejudice to the Defendants and the court's action did not rise to the level of reversible error.

III. The Trial Court Properly Denied Defendant's Motion in Limine to Exclude Testimony and Evidence of Future Surgeries

This issue is moot. Plaintiff will not raise the issue of future surgeries on re-hearing. The trial court properly admitted evidence regarding the Plaintiff's future surgeries. "Absolute certainty is not required...and whenever facts are in dispute, or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is allowed." *Ill. Cen. R.R. Co. v. Clinton*, 727 So. 2d 731, 735 (Miss. Ct. App. 1998) (quoting *Pitman v. Hodges*, 462 So. 2d 330, 334 (Miss. 1984)). It was not erroneous to allow testimony based on sufficient facts or data. Compensatory damages are to make the plaintiff whole. *McDaniel Bros. Const. Co. v. Jordy*, 195 So. 2d 922, 925 (Miss. 1967). The defendant must take his victim as he finds him and is responsible for all of the natural and probable consequences of his wrongful act, even though the consequences are more serious or harmful by reason of a pre-existing condition which exists in the injured person. *Brake v. Speed*, 605 So.2d 28, 33 (Miss.1992). The fact that the Plaintiff had some pre-existing conditions does not prevent him from recovering damages for his injuries.

Plaintiff's expert, Dr. Katz, testified to a reasonable degree of medical certainty Plaintiff would benefit from surgery. (Tr. 349:11-12; 351:17-19; 353:14-15; 363:6-18; 376:11-27). Dr. Katz testified without surgery Fortune had reached maximum medical improvement and would have an impairment rating of 28 percent. (Tr. 378:20-23). The Defendants presented evidence and cross-examined Dr. Katz regarding future surgeries. The jury is the finder of fact. *Thompson v. Lee County School Dist.*, 925 So. 2d 57, 70 (Miss. 2006). The evidence and credibility of witnesses is for the jury to determine. *City of Jackson v. Reed*, 102 So. 2d 342, 348 (Miss. 1958). The Court must "defer to the jury, which determines the weight and worth of testimony and the

credibility of the witness at trial.” *Odom v. Roberts*, 606 So.2d 114, 118 (Miss. 1992) (citing *Stubblefield v. Walker*, 566 So.2d 709, 712 (Miss. 1990)). Based on the evidence present it is the province of the jury to determine the amount of damages, if any, to be awarded. *Gatewood v. Sampson*, 812 So. 2d 212, 223 (Miss. 2002) (citations omitted). It was not an abuse of discretion to allow Dr. Katz to testify regarding future surgeries.

IV. The Trial Court Properly Allowed Substitution of Plaintiff’s Expert Witness Economist at Trial

The trial court properly allowed the substitution of Plaintiff’s expert witness economist at trial. (Tr. 770:25-771:7). Under Miss. R. Evid. 804(a)(4) Dr. Glover was unavailable for trial. She provided medical verification to the trial court of her infirmity and unavailability for trial. (Tr. 759:12-26). Plaintiff suggested to cure any problems raised by the Defendants that Dr. Glover could be brought into the courthouse and a video conference set up so that she could testify without the possibility of exposing those in the courtroom to illness. (Tr. 770:13-24). Dr. Glover had prepared an expert report which included all of her findings. (R. 360-68). This report was produced to the Defendants in discovery. (R. 231-368). Plaintiff requested that Dr. James Henley be allowed to testify to the contents of the Dr. Glover’s expert report. (Tr. 754:5-9). There was no prejudice to the Defendants in allowing a qualified expert to give the specific, exact same opinions of Plaintiff’s designated expert witness economist, Dr. Glenda Glover, when she was unavailable for trial. The Defendants were allowed by the trial court to depose James Henley before he provided testimony. The testimony provided by Henley was based solely on the report and finding of Glover which had been provided to the Defendants in discovery. (Tr. 755:12-20; 762:8-18; 770:25-771:7). The Defendants had sufficient notice and the testimony did not alter the findings in Dr. Glover’s written report. The testimony more than sufficiently satisfied the requirement of Miss. R. Evid. 804(b)(5). *Cf. E.I. Dupont De Nemours & Co. v. Strong*, 968 So. 2d 410 (Miss. 2007). Abuse of discretion is defined as creating a prejudice to the

party's case. *Edwards*, 737 So.2d 275. There is no prejudice created here to the Defendants' case. The trial court did not abuse its discretion by allowing the substitution of Dr. Henley for Dr. Glover.

V. The Trial Court Properly Allowed Medial Records and Bills to be Redacted Following Admission

As indicated above in section II, the trial court properly allowed documentary evidence to be redacted following its admission. The documentary evidence was ruled inadmissible by the trial court pursuant to the rules of evidence because it was irrelevant and if relevant would be more prejudicial than probative. The trial court addressed the non-redacted document in a conference censuring both parties for submitting documents not properly redacted prior to its submission. (Tr. 655:26-658:8). While it may have been error to allow the redaction after the document had been submitted it was not reversible error since there was no prejudice to the Defendants because the document was properly redacted before being presented to the jury.

VI. The Trial Court May Have Erred in Refusing Proposed Jury Instruction D-11 Regarding Plaintiff's Contributory Negligence

The trial court erred by denying Defendants' Proposed Jury Instruction D-11.

The standard of review when considering the grant or denial of jury instructions is whether, taking the evidence in the light most favorable to the party requesting the instruction, and considering all reasonable favorable inferences which may be drawn from the evidence, that no hypothetical, reasonable jury could find the facts in accordance with the theory of the requested instruction. *Church v. Massey*, 697 So. 2d 407, 410-11 (Miss. 1997). A party is entitled to have the jury instructed regarding a genuine issue of material fact so long as there is credible evidence in the record which would support the instruction. *Tharp v. Bunge Corp.*, 641 So. 2d 20, 26 (Miss. 1994).

Southland Enterprises, Inc. v. Newton County, 838 So. 2d 286, 289 (Miss. 2003). Considering the evidence in the light most favorable to the Appellants/Defendants, and considering all favorable inferences in the evidence, a reasonable juror could find the facts in accordance with

the theory of contributory negligence requested in Proposed Jury Instruction D-11. There is evidence which was presented by the Appellants/Defendants that arguably supports a contributory negligence instruction. Hoskins testified that he asked the Plaintiff to leave the premises. (Tr. 551:28-553:20; 559:25-560:6). After asking the Plaintiff to leave the premises, Hoskins approached the Plaintiff, who according to Hoskins, brandished a knife. (Tr. 552:3-11). Jackson Police Department officer, Reginald Cooper, testified that a knife was recovered and listed as evidence in the police incident report. (Tr. 209:12). However, the Wackenhut incident Report stated a fingernail file not a knife was recovered. (Exhibit P-6). The video introduced into evidence does not show a knife or a fingernail file. (Exhibit P-1). Neither a knife or fingernail file was introduced into evidence at trial.

Hoskins testified Fortune had a knife that was sizable enough that it was a threat. (Tr. 552:9-11). While the evidence is disputed by all other witness testimony, this evidence, meager as it is does support Defendants' Proposed Jury Instruction D-11. The theory of contributory negligence presented by the Defendants' was not represented in the jury instructions. See, *Ford v. State*, 975 So. 2d 859, 863-64 (Miss. 2008)(Defendant is entitled to have jury instructions given which presents his theory of the case). While the video of the incident does not show the Plaintiff brandishing a knife or fingernail file, the Defendant testified that he thought the Plaintiff had a knife. It is arguable that the Defendant should have been allowed to have an instruction on contributory negligence.

VII. The Trial Court Properly Refused Proposed Jury Instruction D-26 Regarding Use of Reasonable Force

The trial court properly refused proposed Jury Instruction D-26 on reasonable force. Defendants argued that the Plaintiff had a knife and Hoskins used reasonable force in the situation. (Tr. 551:28-552:21). The court may refuse an instruction which incorrectly states the law, is covered fairly elsewhere in the instructions, or is without foundation in the evidence."

Harris, 861 So. 2d at 1012-1013. There was not an adequate foundation in the evidence to support a jury instruction on reasonable force. The trial court arguably should have granted a jury instruction on contributory negligence which would also have fairly covered “reasonable force.”

Reasonable force is an affirmative defense that the Defendants bear the burden of proving at trial. *Woodard v. Turnipseed*, 784 So. 2d 239, 245-46 (Miss. 2000). The Defendants had to provide proof that Hoskins used “reasonable force not intended to cause death or serious harm to defend himself against unprivileged harmful or offensive contact or other bodily harm which he reasonably believes that another is about to inflict intentionally upon him.” *Id.* at 247 (quoting *Webb v. Jackson*, 583 So. 2d at 950-51 (Miss. 1991)). No reasonable person, viewing the video of the incident (Exhibit “P-1”) and considering all relevant eyewitness testimony, could find that Hoskins actions were reasonable or justified and certainly could not find that Hoskins could reasonably believe that Plaintiff was about to intentionally inflict bodily harm upon him. *Id.* at 247.

VIII. The Trial Court Properly Excluded Evidence of Plaintiff’s Prior Bad Acts

The trial court properly excluded evidence of Plaintiff’s prior bad acts. The Defendants sought to introduce evidence of Plaintiff’s criminal convictions and criminal history. Defendants argued that the evidence was relevant to the Plaintiff’s creditability, causation and damages. Tr. 31:6-10. The testimony has no probative value and is not admissible. The prejudicial value would substantially outweigh any probative value and confuse the jury as to the facts of the case. *See*, Miss. R. Evid. 401, 402, 403, 404, and 802.

The standard of review for evidentiary rulings such as this one is abuse of discretion. *Debrow*, 972 So. 2d 550. Abuse of discretion is defined as creating a prejudice to the party’s case. *Edwards*, 737 So.2d 275. The trial court did not abuse its discretion by prohibiting testimony of Plaintiff prior bad acts. The Defendants were allowed to thoroughly cross-examine

the Plaintiff on his work history. The fact that he has a criminal history which was partly a cause of the sporadic work history would clearly be more prejudicial than probative if presented to the jury.

IX. The Trial Court Properly Excluded Evidence Referencing Plaintiff's Status as "Homeless"

The trial court properly excluded evidence of Plaintiff's status as "homeless." In fact, Plaintiff was not "homeless" he was living at a hotel on Highway 80. (Tr. 26:15-17). Defendants argued "homeless" is relevant to the issues on damages and may also be relevant to Plaintiff. (Tr. 31:18-27). The testimony has no probative value and is not admissible. The overwhelmingly prejudicial effect would substantially outweigh any probative value and confuse the jury as to the facts of the case. *See*, Miss. R. Evid. 401, 402, 403, 404, and 802.

The standard of review for evidentiary rulings such as this one is abuse of discretion. *Debrow*, 972 So. 2d 550. Abuse of discretion is defined as creating a prejudice to the party's case. *Edwards*, 737 So.2d 275. The trial court did not abuse its discretion by prohibiting testimony that Plaintiff was "homeless." The Defendants were allowed to thoroughly cross-examine the Plaintiff on the places he has resided. The fact that he does not own a home or rent an apartment and referring to Plaintiff as "homeless" would clearly be more prejudicial than probative if presented to the jury.

X. The Trial Court Properly Excluded Evidence of Collateral Sources

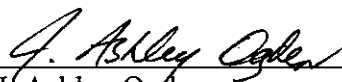
Defendants argue that collateral source should have been allowed to impeach the Plaintiff's testimony regarding medical treatment. Defendants improperly assert that collateral source payments should have been presented to the jury to explain Fortune's contention that he could not afford some medical treatment. This position is not supported by the law. A trial judge's decision to admit or deny evidence is reviewed under an abuse-of-discretion standard. *See, Whitten v. Cox*, 799 So. 2d 1, 13 (Miss. 2000). The Mississippi Supreme Court has stated

when determining whether a witness may be cross-examined on collateral-source payments there must be a fact-specific inquiry. *Robinson Property Group, L.P. v. Mitchell*, 7 So. 3d 240, 247 (Miss. 2009). Whether Fortune can afford to go to other treatment providers is not probative or relevant to the facts in this case. This was another qualification set out in *Robinson Property. Id.* For evidence to be admitted under evidence rule of impeaching a witness the court must first deem the evidence relevant and then determine if the probative value of the evidence is substantially outweighed by danger of unfair prejudice. *Robinson Property* at 245. Plaintiff received state and federal funding for his treatment. If the Court feels it is appropriate evidence for the jury on retrial, Plaintiff will allow such argument and advise the jury that the government has been paying for the Plaintiff's treatment and will be reimbursed for payments made out of any compensation received by the Plaintiff.

CONCLUSION

Plaintiff respectfully requests that the Court remand this cause for a new trial on the issues.

Respectfully submitted this the 9th day of August, 2011.

BY: 
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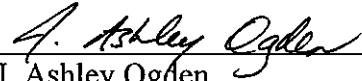
I, the undersigned counsel of record, hereby certify that I have this day forwarded, by U.S. Mail, postage prepaid, a true and correct copy of the foregoing Appellee's Brief to:

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So certified, this the 9th day of August, 2011.


J. Ashley Ogden