IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MARVIN RHODA,	APPELLANT,
V.	NO. 2010-CA-00797
EDITH W. WEATHERS,	APPELLEE.

BRIEF OF APPELLEE

Respectfully submitted,

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ORAL ARGUMENT REQUESTED

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V.	NO. 2010-CA-00797
EDITH W. WEATHERS,	APPELLEE.

CERTIFICATE OF INTERESTED PERSONS

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

1. Marvin Rhoda, Appellant;
2. Benjamin L. Taylor; John D. Watson; and Taylor, Jones & Taylor, Attorneys for Appellant;
3. Edith W. Weathers, Appellee;
4. Dawn Davis Carson; Russell B. Jordan; P.O. Box 16340, Memphis, Tennessee, 38186.
5. Honorable Alan B. Couch, presiding trial judge.
6. Honorable Robert P. Chamberlin, Circuit Court appellate judge.

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STATEMENT OF ISSUES

1. The court correctly denied plaintiff's Motion for New Trial based on evidence presented.
2. The court correctly denied plaintiff's Motion for Judgment Notwithstanding the Verdict based on evidence presented.
3. The court correctly denied plaintiff's Motion for Expenses on Failure to Admit.
4. The accident report was properly excluded and the trial court's ruling should be upheld although this issue is not properly before the Appellate Court.
5. The comparative fault instruction was permissible and the trial court's ruling should be upheld although this issue is not properly before the Appellate Court.
6. The trial court's decision to exclude portions of the testimony of Officer Brian Keller was correct although this issue is not properly before the Appellate Court.

STATEMENT OF THE CASE

On August 24, 2004, Marvin Rhoda filed a Complaint in the County Court of DeSoto County, Mississippi against Edith W. Weathers. (Appellee R.E. 1). On September 13, 2004, the defendant, Edith W. Weathers filed an Answer in the County Court of DeSoto County. (Appellee R.E. 2). Mr. Rhoda's complaint was dismissed for failure to prosecute on February 16, 2007. (Appellee R.E. 3). A new complaint was filed on April 9, 2007, and Ms. Weathers filed an Answer on July 19, 2007. (Appellee R.E. 5). The case was set for trial four times prior to being tried at the fifth setting.

On February 17, 2009, this matter was tried before a jury in the County Court of DeSoto County, Mississippi, with the Honorable Allen Couch presiding. After having heard the statement and argument of counsel, having heard the testimony of witnesses adduced in open court, having received and evaluated the exhibits to that testimony, and upon receiving instruction in the law from the court, returned its jury verdict form to open court saying that Edith W. Weathers was not guilty of negligence which proximately caused or contributed to the plaintiff's injuries and damages. (Appellee R.E. 6).

On February 24, 2009, the plaintiff filed a Motion for Judgment Notwithstanding the Verdict, Motion for New Trial and Plaintiff's Motion for Expenses for Failure to Admit. The motions were argued on March 30, 2009, and all motions were denied. (Trans. Vol. IV, p. 368). The court provided written opinions on his rulings denying the post-trial motions. (Appellee R.E. 7 and 8). A Notice of Appeal to the Circuit Court of DeSoto County was filed by the appellant, Marvin Rhoda, on May 12, 2009. (Appellee R.E. 9). On April 27, 2010, the Circuit Court provided its Order of Affirmance, affirming the findings of the County Court of DeSoto County. (Appellee R.E. 10).

RELEVANT FACTS

This matter involves an automobile accident that occurred on April 21, 2004. (Trans. Vol. II, p. 146, ll. 8-10). Mr. Rhoda was traveling in a Westbound direction on Church Road, in Southaven, Desoto County, Mississippi, on a rainy afternoon. Mr. Rhoda is a locksmith and was driving his van that he used in his trade at the time of the accident. Ms. Weathers, a retired school teacher, had driven from Oxford to pick up her grandchildren. (Trans. Vol. II, p. 146, ll. 27-29, p. 156, ll. 12-13). She was very familiar with the area, as she had grandchildren that lived near the intersection, and she went to see them a lot. (Trans. Vol. II, p. 156, ll. 12-29.) Ms. Weathers was traveling southbound on W.E. Ross Parkway planning to turn left onto Church Road to go to SBEC to pick up two grandchildren. (Trans. Vol. II, p. 147, ll.1-29).

Ms. Weathers testified that she came to a complete stop, up to the white line which was just a little past the stop sign. (Trans. Vol. II, p. 148, ll. 15-17, p. 149, ll. 20-29). She had her wheels on the white line, because she had to move up a little past the stop sign because of the construction sign. (Trans. Vol. II, p. 151,ll. 3-8). She does remember specifically stopping at the white line, and there is no doubt in her mind that she did stop. (Trans. Vol. II, p. 152, ll. 1, p. 160, 17-19). She did not enter Church Road at anytime before impact, but was stopped at the white line. (Trans. Vol. II, p. 20-26).

Melissa Stanford witnessed this accident, and at the time this accident occurred was working as head bank teller at BancorpSouth near the intersection of Church Road and W.E. Ross Parkway. (Trans. Vol. II, p. 125, ll. 16-23). Ms. Stanford stated she was sitting at the teller drive through window, looking outside. (Trans. Vol. II, p. 125, ll. 16-18). Ms. Stanford identified the bank where she worked, and the photo was marked as an Exhibit.

(Trans. Vol. II, p. 125, ll. 26-29). She was facing the direction of W.E. Ross Parkway, and she could see the intersection of W.E. Ross, the apartments on Church Road, and W. E. Ross and Church Road all the way down to the college. (Trans. Vol. II, p. 126, ll. 26-28). Exhibit 8 provided the direction and distance she could see. (Trans. Vol. II, p. 127, ll. 1-11). She testified that a construction sign was on the side where the apartments were located. (Trans. Vol. II, p. 127, ll. 12-17). At the time this accident happened, the intersection was controlled only by a stop sign for W.E. Ross Parkway. Today, there is a traffic control signal or red light. (Trans. Vol. II, p. 128, ll. 19-23). There was also a white line on W.E. Ross, but because of the construction sign, you had to drive up a little bit further to see traffic on Church. (Trans. Vol. II, p. 129, ll. 2-6). On the date of the accident, it had been raining all day. (Trans. Vol. II, p. 129, ll. 7-9). Water collected on the roadway and there was a big puddle of water on the same side as the sign, and Ms. Stanford noted the location on Exhibit 9. (Trans. Vol. II, p. 13-29). She testified that the puddle was there on the date the accident happened, and that she observed Mr. Rhoda driving, hitting the puddle, losing control and striking a burgundy SUV stopped at the stop sign on W.E. Ross and Church. (Trans. Vol. II, p. 130, ll. 20-29, p. 131, ll. 1). The burgundy SUV was at a complete stop at the time of the collision. (Trans. Vol. II, p. 131, ll. 2-4). The SUV was stopped on the white line on W.E. Ross Parkway. (Trans. Vol. II, p. 131, ll. 5-6). The van driven by Mr. Rhoda drove through the puddle, because she saw it slash (we will assume the record should be splash). (Trans. Vol. II, pg, 131, ll. 15-17, p. 143, ll. 14-16). Ms. Stanford was actually looking at the intersection when the accident happened. (Trans. Vol. II, p. 139, ll. 1-2). She was positive there was a sign at the corner of the intersection that blocked your view. (Trans. Vol. II, p. 141, ll. 12-13).

Ms. Stanford stated that she did not remember talking to anyone or making a statement to anyone about the accident after talking to the police other than a deposition, but after continued testimony, she said she did not. (Trans. Vol. II, p. 133, ll. 1-25). This accident happened in April, 2004. (Trans. Vol. II, p. 125, ll. 13-15). Ms. Stanford had provided a statement to Ms. Weathers' insurance carrier sometime after the accident, and plaintiff's counsel objected and requested a copy of the statement, but the court denied this request after an *in camera* review of the statement, and holding the plaintiff had ample opportunity to review and question the witness, but failed to do so prior to trial. (Trans. Vol. II, p. 145, ll. 1-29, p. 75, ll. 3-7). Basically, the request in a Motion in Limine for statements was inappropriate and should have been dealt with in a Motion to Compel and not the morning of trial. (Trans. Vol. II, p. 75, ll. 3-7).

The plaintiff requested that the accident report be placed into evidence, and defendant argued against it. (Trans. Vol. II, p. 77, ll. 2-10). The plaintiffs quoted *Copeland v. City of Jackson* as a basis for it coming in. (Trans. Vol. II, p. 77, ll. 11-22). The court declined for the accident report to just be placed into evidence without any testimony prior to the start of the trial. (Trans. Vol. II, pg, 78, ll. 4-5). Brian Keller, who now works for Desoto County Sheriff's Department, but at the time of the accident, was working at Southaven Police Department, testified that he investigated the accident and provided a report. Officer Keller was with Southaven Police Department for 12 years and was certified as a Level 1 reconstructionist. (Trans. Vol. III, p. 165, ll. 8-27). He was not familiar with the accident, and recalled very little about it. (Trans. Vol. III, p. 166, ll. 9-10). Office Keller used the accident report to refresh his memory when testifying. (Trans. Vol. III, p. 166, ll. 17-21). Objections were made concerning Officer Keller's ability to give conclusions of law, and he was voir dired as an expert, and it was

found that although he had training as an accident reconstructionist, he did not apply his skills as an accident reconstructionist in this case. (Trans. Vol. III, p. 171, ll. 14-29, p. 172, ll. 15-22). Officer Keller went so far as to say "And I certainly did not do that on this accident." (Trans. Vol. III, p. 172, ll. 22). No one asked Officer Keller to do an accident reconstruction of the accident that was subject to this lawsuit. (Trans. Vol. III, p. 175, ll. 12-14). The plaintiff then withdrew offering the Officer as an accident reconstructionist and offered him as a traffic officer. (Trans. Vol. III, p. 178, ll. 8-11). The plaintiff made a proffer as to the use of the officer. (Trans. Vol. III, p. 181, ll. 14-19 through p. 189 ll. 2).

Mr. Rhoda testified that he was not sure how to describe the rain, but it had been heavy as he drove on the interstate getting to Church Road, but it had lightened up. (Trans. Vol. III, p. 203, ll. 3-12). He testified that Ms. Weathers came to a rolling stop and pulled in front of him. (Trans. Vol. III, p. 204, ll. 1-9). Mr. Rhoda was driving at 40 miles per hour when the accident happened. (Trans. Vol. III, pg, 224, ll. 11-13). He agreed that it was raining pretty hard at the time of the accident. (Trans. Vol. III, p. 225, ll. 26-28).

SUMMARY OF THE ARGUMENT

The trial court was correct in denying plaintiff's Motion for New Trial, Motion for Judgment Notwithstanding The Verdict and denying the Motion for Costs for Failure to Admit Request for Admissions.

A. The Trial Court Correctly Denied Plaintiff's Motion for New Trial

The trial court correctly prevented use of the accident report as an exhibit, but did allow the investigating officer, Officer Keller to use the report to refresh his memory. Further, Officer Keller was tendered as an accident reconstructionist, but after admitting he had not performed any accident reconstruction on the present case and no one had asked that he do so, this tender by the plaintiff was withdrawn and he was tendered as a traffic officer, to which the defendant agreed. The court correctly withheld the accident report or allowing the Officer to testify from the report about his conclusions. The court allowed the Officer to testify about his observations made upon his arrival.

Melissa Stanford provided testimony that she did not remember that she provided a statement to anyone other than the Officer and at her deposition was not false testimony, but something that occurred that she did not remember. The plaintiff could have pursued this issue with her further to determine if she provided a statement by simply asking "Did you provide a statement to someone either over the phone or in person concerning how this accident happened?" The trial of this case was five years from the date of the accident, and the Officer had no memory of it whatsoever, making it perfectly understandable that a non-interested party might also not remember specific details. The statement was provided to the court for *in camera* review, and the court ruled that the statement would not be allowed to be provided to plaintiff. Further, this statement was taken by defendant's insurance carrier, and the plaintiff had

every right to contact the witness and her deposition was taken. The plaintiff's Motion in Limine requesting this information was improper, and should have been addressed in a Motion to Compel. There was no error in forbidding the use of the statement or allowing it to be provided to plaintiff's counsel.

There was no error in the use of the word "remnants" in the closing argument of counsel for Ms. Weathers. Although there is no index of the proceeding, the word remnants does not appear to be in any of the testimony of Officer Keller, at least it was unable to be located. The argument by defense counsel in closing was the following: "It was that she was not in this roadway, that she had pulled up to this, basically, remnants – I think Officer Keller had the correct word – of a white line here so she could see where traffic was coming." (Trans. Vol. IV, p. 354, ll. 8-12). Further, the plaintiff made no objection during closing regarding this statement, which was a mere mistake, and was not material to the case.

There was no improper argument by defense counsel or testimony from a key witness that was restricted as a result of granting a Motion in Limine.

B. The Trial Court Correctly Gave a Comparative Fault Instruction to the Jury.

The comparative fault instruction was properly given to the jury. Ms. Weathers testified that she was sitting still and had not entered Church Road when Mr. Rhoda hit her. Ms. Stanford testified that she saw Mr. Rhoda's vehicle hit the puddle and then hit Ms. Weathers' vehicle sitting still on W.E. Ross Parkway. It is obvious that there was sufficient evidence to prove that Ms. Weathers was not at fault for this accident, but fault rested with Mr. Rhoda.

C. The Trial Court Correctly Denied Plaintiff's Motion for Judgment Notwithstanding the Verdict.

The testimony that was provided was that Ms. Weathers' vehicle was stationary on W.E. Ross Parkway, and had not entered Church Road. Mr. Rhoda was driving 40 miles per

hour in the rain, hit a water puddle, left the roadway and collided with Ms. Weathers' vehicle. This evidence allowed for a fault allegation against Mr. Rhoda. The defendant, through testimony of an independent witness, Ms. Stanford, placed blame on Mr. Rhoda for causing the accident. The issue was correctly placed with the jury to render a conclusion.

D. The Trial Court Correctly Denied Plaintiff's Motion for Expenses on Failure to Admit

The Trial Court's ruling from the bench stating that the defendant did not have the knowledge to admit or deny information regarding the plaintiff's medical treatment was correct. The plaintiff was requesting that the defendant provide medical opinion about the health of the plaintiff or his injuries, and further admit that certain documents were true and correct when they were not properly authenticated, nor did the defendant receive the documents directly from the custodian. There is a proper and inexpensive manner to authenticate records provided for within Rule 902 of the Mississippi Rules of Evidence. The plaintiff failed to do this simple task and it was recognized by the trial court. No expenses should have been awarded.

That trial court correctly denied all the plaintiff's post-trial motions. The jury heard the case and provided a verdict based on the evidence that was presented. This verdict of the jury should be upheld.

STANDARD OF REVIEW

The proper standard of review for the trial court's grant or denial of a motion for new trial is an abuse of discretion. *Miss. Transp. Comm'n v. Highland Dev., LLC,* 836 So.2d 731, 734 (Miss.2002) (citing *Alpha Gulf Coast, Inc. v. Jackson,* 801 So.2d 709, 723 (Miss.2001)). The Supreme Court has state that, "we will only disturb a verdict when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice." *Bush v. State,* 895 So.2d 836, 844(18) (Miss.2005) (citation omitted).

The standard of review for Judgment Notwithstanding the Verdict "tests the legal sufficiency of the evidence supporting the verdict, not the weight of the evidence." *Corley v. Evans,* 835 So.2d 30, 36(¶ 16) (Miss.2003). When confronted with a motion for a JNOV, the trial judge must:

> *consider the evidence in the light most favorable to the non-moving party, giving that party the benefit of all favorable inferences that reasonably may be drawn therefrom. The trial court should consider the evidence offered by* ****836*** *the non-moving party and any uncontradicted evidence offered by the moving party.* If the evidence thus considered is sufficient to support a verdict in favor of the non-moving party, the motion for JNOV must be denied.

Id. at (¶ 17) (citation omitted) (emphasis added). "[I]f there is substantial evidence in support of the verdict, that is, evidence of such quality and weight that reasonable and fair-minded jurors in the exercise of impartial judgment might have reached different conclusions, affirmance is required." *Id.* at 37(¶ 19).

The plaintiff was correct in providing the standard of review for admission or exclusion of evidence and that is abuse of discretion as also cited by the trial court. *Univ. of Miss. Med. Ctr. v. Pounders*, 970 So.2d 141, 145 (Miss. 2007).

ARGUMENT

A. THE COURT CORRECTLY DENIED PLAINTIFF'S MOTION FOR JNOV AND/OR NEW TRIAL BASED ON EVIDENCE PRESENTED.

On February 19, 2009, the jury returned the following verdict:

> 1. Do you find the defendant, Edith W. Weathers, to be guilty of negligence which proximately caused or contributed to the plaintiff's injuries and damages?
>
> Yes: _____
> No: X

The plaintiff had the burden to prove that Ms. Weathers was negligent in causing the automobile accident and further that her negligence caused the injuries and damages to Mr. Rhoda. By the verdict returned by the jury, the plaintiff failed to meet his burden, and he is now asking that this Court grant him a new trial.

Pursuant to Rules 50 and 59 of the Mississippi Rules of Civil Procedure, the Court may enter judgment notwithstanding the verdict or, alternatively, grant a new trial but only when the facts considered so overwhelmingly point in favor of the movant, that reasonable men cannot have arrived at a contrary verdict. *American Fire Prot. v. Yarborough*, 653 So. 2d 1387, 1390-91 (Miss. 1995). The standard of review for the granting or denial of such a motion is identical to the standard of review on a motion for directed verdict. *Puckett Mach. v. Edwards*, 641 So. 2d 29, 32-33 (Miss. 1994). Whether to grant a directed verdict is a decision of law. *Fox v. Smith,* 594 So.2d 596, 603 (Miss. 1992). The standard for review, as this Court is no doubt aware, is a test of the legal sufficiency of the evidence. As stated above, this court is required to consider the testimony on behalf of the opposing party in the light most favorable to the opposing party, giving all reasonable inferences concerning that evidence to the opposing party. *Patton-Tully Trans. Co. v. Douglas*, 761 So. 2d 835, 838 ¶9 (Miss. 2000).

M.R.C.P. 50(a) provides:

> **Motion for Directed Verdict: When Made; Effect.** A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted without having reserved the right to do so and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the ***specific grounds*** thereof. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

(emphasis added).

¶ 24.

In *McKinzie v. Coon,* 656 So.2d 134, 137 (Miss. 1995), this Court stated:

> Miss.R.Civ.P. 50 requires the trial court to take a case from a jury and grant a directed verdict if any verdict other than the one directed would be erroneous as a matter of law. The comment to the Rule instructs the trial court to look "solely to the testimony on behalf of the opposing party; if such testimony, along with all reasonable inferences which can be drawn therefrom, could support a verdict for that party, the case should not be taken from the jury." *Kussman v. V & G Welding Supply, Inc.,* 585 So.2d 700, 702 (Miss. 1991). In considering a motion for a directed verdict, this Court must consider whether the "evidence in opposition to the motion was of such quality and weight that reasonable and fair-minded jurors in the exercise of impartial judgment could differ as to the verdict." If so, the motion must be denied and the verdict will stand. *Collins v. Ringwald,* 502 So.2d 677, 678 (Miss. 1987). If, however, the evidence is so overwhelmingly in favor of the appellant that reasonable persons could not have reached a different verdict, this Court must reverse. *Strong v. Nicholson,* 580 So.2d 1288, 1292 (Miss. 1991).

In considering the motion, the Court must disregard any evidence on the part of the movant which is in conflict with the most reasonable evidence in favor of the opponent. *Mongeon v. A & V Enter., Inc.*, 697 So. 2d 1183, 1997 WL 441937, *2 (Miss. 1997) (withdrawn from volume pending hearing) (citing *Bruner v. Univ. of S. Miss.*, 501 So.2d 1113, 1116 (Miss. 1987)). In order to grant such a motion, the Court must find, as a matter of law, that the

non-moving party's evidence is so lacking that reasonable jurors would be unable to reach a verdict in favor of that party. *Turnbough v. Steere Broad. Corp.*, 681 So. 2d 1325, 1326 (Miss. 1996).

a. Exclusion of The Accident Report

The trial court was correct in excluding the accident report as an exhibit in this case. The report contained hearsay statements of witnesses and conclusions by Officer Keller. Both of which are improper to be allowed to go to the jury. Officer Keller testified that he had very little memory of the accident itself, and needed the report to refresh his memories. In reviewing the report, he was able to testify about the accident, but stated that he arrived after the accident happened and did not perform an accident reconstruction. He was allowed to testify about his observations, who he talked to, and other factual information, but he was not allowed to provide hearsay statements or provide his conclusions as to who caused the accident. Plaintiff's counsel hung their hat on the case of *Copeland v. City of Jackson*, 548 So. 2d 970 (Miss. 1989) for the proposition that the report should be admitted into evidence. The trial court correctly pointed out that *Copeland* had unique circumstances including a deceased investigating officer. The trial court went further in applying and analyzing the present situation under *Fleming v. Floyd*, 969 So.2d 881 (Ct. App. Miss. 2006). *Fleming* interprets *Copeland*, and gives the court guidance stating that the record should not be provided when it contains hearsay information and further the conclusions of the officer should not be provided to the finder of fact when the officer has not been qualified as an accident reconstructionist or asked to perform the task of reconstructing the accident. The trial court provided the following language from *Fleming* in its order denying the Motion for New Trial:

> Even though the hearsay exception for public records categorically excludes opinions, an exception without that exclusion was available.

Police reports are also admissible as business records. *Copeland v. City of Jackson,* 548 So.2d 970, 975 (Miss. 1989) (discussing M.R.E. 803(6)). Admissibility does not depend on a distinction between facts and conclusions; the fault line is elsewhere. It has been held that "a police report which contained information obtained from a bystander was inadmissible; the officer qualified as one acting in the regular course of a business, but the informant did not." *Fisher v. State,* 690 So.2d 268, 273 (Miss. 1996) (quoting *Johnson v. Lutz,* 253 N.Y. 124, 170 N.E. 517 (1930)). The information must be based on the knowledge of the officer who prepared the record:

In holding such report admissible we should not be understood as holding all the contents of the report were necessarily admissible. For example, there may be notations in such a report which are recitations of statements of others, and would be inadmissible even though the officer were present in court testifying. The report is simply a substitute for the officer appearing in person and testifying.

Copeland, 548 So.2d at 975-76.

Despite these precedents, the business record exception is not an unfettered right to admit all information contained within a police report except for hearsay statements from witnesses. An opinion in the report is admissible "so long as 'the conclusion is based on a factual investigation and satisfies the Rule's trustworthiness requirement.' " *Jones v. State,* 918 So.2d 1220, 1231 (Miss. 2005) (quoting *Beech Aircraft Corp. v. Rainey,* 488 U.S. 153, 170, 109 S.Ct. 439, 102 l. Ed.2d 445 (1988)). In *Beech,* the United States Supreme Court held that an investigatory report by a U.S. Navy judge advocate concerning an airplane crash could not be excluded just because the report stated an opinion as to the cause of the crash. The Supreme Court noted that a lay witness is permitted to testify by "opinion or inferences" based on observations if helpful to the trier of fact. The fact that the evidence is an opinion would not categorically exclude it, but it should not be admitted if it is unreliable.

Applying these principles, we affirmed a trial court that excluded the report of a county forester from evidence. *Redhead v. Entergy Miss. Inc.,* 828 So.2d 801, 809 (Miss.Ct.App.2001). The report contained the forester's conclusion that trees had caught fire from contact with a power line running above the trees. Since the forester was not qualified to offer such an opinion, the statement was not trustworthy.

Quite similarly, before an alleged expert on accident reconstruction may be permitted to testify, the qualifications of that witness must be supported by evidence of actual expertise. A law enforcement officer may not have sufficient expertise even when having substantial experience in preparing

> reports on accidents. *Fielder v. Magnolia Bev. Co.*, 757 So.2d 925, 937-38 (Miss. 1999) first appeal concluded that law enforcement witness at original trial was not qualified. *Id.* at 927 (citing *Fielder v. Magnolia Bev. Co.*, 667 So.2d 640 (Miss.Ct.App. 1995) (mem)). A police officer who is not qualified as an expert in accident reconstruction should not be allowed to state opinions on causation or fault in an accident. *Id.; Thompson v. Lee County,* 925 So.2d 57, 67 n. 7 (Miss. 2006) (citing *Roberts v. Grafe Auto Co.*, 701 So.2d 1093, 1098-99 (Miss. 1997)). In *Thompson, Roberts* and the first *Fielder* trial the officers testified. The fact that here the opinion is in a business record does not insulate that opinion from the same rules.
>
> Though police officer Jones's report was a business record, there was no evidence that Jones was qualified to give an opinion on causation. Thus, Jones's opinions were not admissible as a business record. Had Jones's opinions appeared fully explained without the barrier of a code, the parties' agreement to the admission of the document that clearly revealed those opinions would have waived any objection to the opinions. On this document, though, there was a veil over the opinions, a veil that could be lifted only by new evidence. The jury as trier of fact needed either an expert or a written explanation of the codes to understand these parts of the document.

(*Quoting Fleming*, 969 So.2d at 885, 86 ¶¶18-21).

In yet another case, the Court of Appeals declined to allow an investigating officer to offer opinion testimony as an expert accident reconstructionist, where she was not qualified and had no personal knowledge of the accident. *Estate of Carter v. Phillips and Phillips Const. Co., Inc.*, 860 So.2d 332, 335 ¶ 12 (Miss.Ct.App. 2003). Because adverse counsel withdrew the tender of Officer Keller as an accident reconstructionist, Officer Keller clearly did not testify as an accident reconstructionist and only as a traffic officer. Further, Officer Keller never performed any tasks to reconstruct the accident and therefore could not have given an opinion as to causation even if the plaintiff had tendered him as an accident reconstructionist. The trial court was correct in denying the use of the accident report as an exhibit.

b. Exclusion of Officer Keller As An Expert

Plaintiff's counsel withdrew his offer of Officer Keller as an accident reconstructionist and just offered him as a traffic officer. For this reason, there is no basis for an appeal on this issue. Had the trial court made a ruling on this issue and denied to allow Officer Keller to testify as an expert, it would have been proper in doing so.

Officer Keller was questioned concerning his abilities and knowledge as an accident reconstructionist, and it was found that he had not performed an accident reconstruction of this particular accident. In fact, when asked if he had used the knowledge, skill and training that he had learned to become certified in accident reconstruction in making a determination of fault, he specifically testified, "I don't think so, quite honestly.". (Trans., Vol. III, p. 173, ll. 19-24). No one had asked him to do an accident reconstruction. Because he had not utilized his skills as an accident reconstructionist and had not performed a reconstruction, he could not offer an opinion as an accident reconstructionist.

The testimony of Officer Keller was allowed to be provided to the trier of fact within the constraints of the law. The plaintiff was allowed to ask him questions about what he saw when he arrived at the scene, who he spoke with, but not his opinion as to who was at fault or hearsay statements. The Officer had no real memory of the accident and needed the report to refresh his memory. Further, the report itself is hearsay and the court was correct in keeping it out.

c. Comparative Fault Instruction

Providing the comparative fault instruction was proper. Clearly, there was testimony that Ms. Weathers did not pull from the roadway into Church Road and that Mr. Rhoda's vehicle hydroplaned or hit water, he lost control and struck Ms. Weathers' vehicle which was sitting still on W.E. Ross Parkway. (Trans., Vol. II, pp. 130-31, ll. 27-6). Ms. Weathers testified that she had

not entered W.E. Ross Parkway. (Trans., Vol. II, pp. 160, ll. 23-26). Most notably, however, the defendant was not found negligent. As set forth in the jury verdict form, the jurors were not required to determine the comparative fault of the parties in reaching their verdict.

A new trial should not be awarded on the allegation that a comparative fault instruction should not have been given. The trial court correctly held that this was for the jury to decide as there was conflicting testimony.

d. Testimony of Melissa Stanford

The testimony provided by Ms. Stanford that she did not speak to anyone else after an automobile accident that occurred in 2004 (almost five years prior) is not material to the outcome of the case. The trial court correctly noted that Mississippi Rules of Evidence Rule 411 correctly states that insurance information is not admissible at trial. The mere mention to the jury that a party has insurance is prejudicial.

Further, the plaintiff had ample opportunity to seek the statement provided by Ms. Stanford through other means, such as discovery, deposition and Motion to Compel, but they failed to do so. The plaintiff also had the opportunity to speak with her at anytime, just as defense counsel did. It was not until February 13, 2009, that plaintiff filed a Motion in Limine requesting this information along with the claims file of State Farm. This was only two business days before trial. This was not a proper Motion in Limine as pointed out by the trial court. The plaintiff should have used the methods available through the discovery process to try to obtain the statement, or at least make an effort to do so. Rule 26 and Rule 37 of the Mississippi Rules of Civil Procedure provide for methods to obtain documents held by adverse parties and if one party refuses to disclose something, the party seeking the information can request the court's assistance to do so. The plaintiff failed to do this. The trial court denied plaintiff's attempt to

obtain this statement because of the means the plaintiff used to obtain it, a Motion in Limine. A new trial should not be granted based upon the mere fact that plaintiff's counsel failed to properly request the statement or that Ms. Stanford either failed to recall giving the statement or failed to provide testimony which was inadmissible due to Rule 411 of the Mississippi Rules of Evidence.

e. Improper Testimony of Witness or Argument of Counsel

The plaintiff alleges that he should also be granted a new trial based on "improper testimony given by a key witness", however, fails to identify the improper testimony except to state that this was the subject of a Motion in Limine which was not ruled upon prior to trial. Because the plaintiff fails to identify the witness or the specific testimony (assuming he is not referring to Ms. Stanford, discussed *supra*), he has failed to identify any grounds upon which he would be entitled to relief.

Plaintiff's counsel also cites defense counsel's characterization of Ms. Stanford's statement that plaintiff lost control when he hit a puddle of water as "hydroplaning," to be "improper argument by defense counsel as to how the accident occurred." Notably, Rhoda failed to object after the statement was made by defense counsel. For this reason, the issue is procedurally barred. *Rubenstein v. State*, 941 So.2d 735, 779 ¶193 (Miss. 2006). Notwithstanding the procedural bar, Ms. Stanford stated the plaintiff hit the puddle of water and lost control. This is a textbook definition of hydroplaning. The jury heard the same testimony, and if they felt that the statement was not correct, they had the ability to decide this on their own. The trial court heard this testimony and ruled from the bench stating there was no objection and this was not offering expert testimony. (R. Vol. IV, p. 385, ll. 9-22). Further, attorneys are allowed substantial leeway in their arguments, so long as the arguments offered are based upon

the evidence, reasonable deductions and conclusions that may be drawn from the evidence and the application of the law to the facts in evidence. *Ford v. State*, 975 So.2d 859, 868 ¶31(Miss. 2008). A new trial should not be provided on the bases that improper testimony was given by a key witness and improper arguments were made by defense counsel.

f. Use of The Word "Remnants" During Close

In review of the transcript, although this word could have been missed as there is no index, there is no statement by Officer Keller using the word "remnants." If this is correct, this may have been a word used by Officer Keller when not on the stand. The statement made by defense counsel during the close was not prejudicial to the plaintiff as it was a description of the line, which had no specific relevance to whether Ms. Weathers was negligent or not. Whether the line was clear and prominent or just a "remnant" has no effect on the outcome of the case as to whether or not the plaintiff or defendant was negligent. Further, this statement is not in anyway more prejudicial than statements that Mr. Rhoda is "an honest, hardworking man." There is no evidence of this and this is the personal opinions of counsel which should not be allowed. There is no specific error allowing for a new trial by defense counsel referencing the stop line as a "remnant." Clearly from the photos, the jury could see that the white line was difficult to see. Most notably, however, because the plaintiff failed to timely object to the statement, he is now procedurally barred from seeking relief on this basis. *Rubenstein v. State*, 941 So.2d 735, 779 ¶193 (Miss. 2006).

B. THE COURT CORRECTLY DENIED PLAINTIFF'S MOTION FOR EXPENSES ON FAILURE TO ADMIT.

The defendant admits that the Requests for Admission were provided to defense counsel and responded to accordingly and the responses were based on the specific requests as they were

worded by plaintiff's counsel. The defendant responded to these requests for admission based on the information provided and the facts of the case.

At the time of admission of the Requests for Admission, plaintiff had retained counsel, as plaintiff's counsel submitted the Requests for Admission. Plaintiff's counsel, in their Motion for Expenses made no specific mention of which requests he is stating should have been answered differently. As to the request concerning facts, these responses were provided based on the questions asked. If Ms. Weathers answered differently at court, then she could have been impeached with them. Plaintiff's counsel did not impeach the defendant with the Requests for Admission. As to the request concerning medical records or bills, there are proper ways for these to be admitted and Requests for Admission is not the proper way. The plaintiff is requesting that defendant admit information that she has no specific knowledge of. The defendant has no medical training and cannot admit whether the bills were incurred as a result of the accident or whether they are related to the automobile accident. The plaintiff had every opportunity to have the records admitted properly through Rule 902 of the Mississippi Rules of Evidence. This is an inexpensive method to have records entered.

CONCLUSION

The trial court was correct in denying plaintiff's post-trial motions. The verdict of the jury should stand finding that Ms. Weathers was not guilty of negligence which proximately caused or contributed to the plaintiff's injuries and damages.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that a true and exact copy of the foregoing Brief of Appellee has been sent by United States mail, postage prepaid, to the following:

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Dated this the 20th day of October, 2010.

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