IN THE SUPREME COURT OF MISSISSIPPI

No. 2010-CA-01443

TORSHA BUCKLEY

Appellant

vs.

HERLEY R. POUNDS, II and
PEARL RIVER VALLEY ELECTRIC POWER ASSOCIATION

Appellees

Appeal of the Order of Judgment of the Jefferson Davis County Circuit Court, Honorable R.I. Prichard III, Circuit Judge in Torsha Buckley v. Herley R. Pounds, II and Pearl River Valley Electric Power Association, Civil Action No. 2008-135P

BRIEF OF APPELLEES HERLEY R. POUNDS, II and PEARL RIVER VALLEY ELECTRIC POWER ASSOCIATION

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities 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. Torsha Buckley, Appellant
2. Herley R. Pounds, Appellee
3. Pearl River Valley Electric Power Association, Appellee
4. Carlos E. Moore, Counsel for Appellant
5. Tangala L. Hollis, Counsel for Appellant
6. Moore Law Office, PLLC, Counsel for Appellant
7. Patrick T. Bergin, Counsel for Appellees
8. Chynee A. Bailey, Counsel for Appellees
9. LeAnn W. Nealey, Counsel for Appellees
10. Paul M. Ellis, Counsel for Appellees
11. BUTLER, SNOW, O'MARA, STEVENS & CANNADA, PLLC, Counsel for Appellees

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On January 2, 2008, Herley Pounds' ("Pounds") automobile was stopped behind Torsha Buckley's ("Buckley") automobile at a traffic light in Prentiss, Mississippi. (Tr at 85:29-86:1.)[1] When it turned green, Pounds rear-ended Buckley. (*Id.* at 86:2-6.) Buckley testified:

> I had a little blue tooth in my ear . . . and I was sitting at the red light, the light was on red, I was sitting behind another car, and I looking up – because I'm always looking up. When I looked in the rearview mirror, I told [my cousin on the phone], I said, "This MF fixing to hit" – when I said "hit," my bluetooth flew off my ear, and all I could hear was her hollering.

(Tr. at 154:26-155:6.)

While Buckley testified she does not know how fast Pounds was driving when he rear-ended her, Pounds testified that he was traveling around 5 miles per hour. (*Id.* at 215:23-25, 81:25-82:5.) After the collision, Buckley and Pounds moved their cars to the parking lot of a nearby Piggly Wiggly. (*Id.* at 95:23-25, 220:14-17.) Officer Terrence Cooley with the Prentiss Police Department responded to the accident. (*Id.* at 240:14-20.) He found no damage to the front of Pounds' car and the only damage he found to Buckley's car was "a black mark going across her rear bumper." (*Id.* at 247:2.) After Officer Cooley finished his investigation, Buckley and Pounds drove their cars away and continued on their business. (*Id.* at 88:18-19, 219:8-15.)

About eight months later, Buckley sued Pounds for negligently hitting her car. (R. at 013-014.)[2] Buckley sought damages for "personal injuries including physical pain and suffering, mental anguish, emotional distress, lost wages, and past, present and future medical, hospital, and/or medically related expenses." (*Id.*) She subsequently filed an Amended Complaint adding Pounds' employer, Pearl River Valley Electric Power Association ("Pearl River Valley EPA") (Pearl River Valley EPA and Pounds are hereinafter collectively referred to as "Appellees"),

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[1] The trial transcript will be referred to as __ Tr.at __ (pg. no.).

[2] The court file will be referred to as R. at __ (pg. no.).

claiming it was vicariously liable for Pounds' negligence. (R. at 017-018) In their Answer, Appellees admitted that Pounds negligently ran into Buckley's automobile and that Pearl River Valley EPA was vicariously liable under the doctrine of *respondeat superior*. (R. at 023.) Appellees denied, however, that Buckley suffered any injuries from the collision. (*Id.*) The Circuit Court entered an Agreed Order granting Buckley's Motion for Partial Summary Judgment as to Liability and held a jury trial to determine what damages, if any, Buckley suffered from the automobile accident. (R. at 039-040.)

At trial, Buckley claimed she could no longer work due to the severity of her injuries from the automobile accident. (5 R.Tr. at 154:5-8.) She testified: "I don't have – really have use of my right – in my right side. I'm not – I don't really have use in my left side, my left side. I can comb my own hair. You know, to me, it's like I'm one-handed, so . . . ." (*Id.* at 152:12-16.) Buckley claimed that Pounds hit her so hard it knocked most of the letters in the "Corolla" emblem off the rear of her car, such that it "was not a 'Corolla', it was a 'la', according to the words that's left on there." (*Id.* at 156:24-157:10.) Buckley also claimed she incurred $43,422 in medical bills arising from the accident (*Id.* at 183:13-14.), and that she had to take numerous medications, such as Ambien, Lortab, Soma, and Xanax. (*Id.* at 188:3-9.)

While Buckley admitted she had previously been run over by a an 18-wheeler truck, and that a 250-pound man and a 300-pound woman fell on top of her at work, she claimed those accidents only caused injuries to her lower back and that she was healed of those injuries at the time of the automobile accident with Pounds. (*Id.* at 163:28-168:26.)

Buckley claimed she was therefore entitled to recover all of her future lost income from Appellees – nearly half a million dollars. In support of this figure, Buckley testified that she had worked as a nurse assistant for three home health companies since around 2001. (*Id.* at 190:18-192:5.) She claimed to have worked 30-40 hours a week for Southern Healthcare, occasionally

30-40 hours a week for Prime Care, and variable hours for Nursing Management based on their need and her availability. (*Id.* at 192:6-19.) Buckley claimed to have earned $8, $9, and sometimes $13 an hour working for these companies. (*Id.* at 153:14-20.) Her expert witness on economic losses, Dr. Glenda Glover, testified that based on Buckley's earning history and life expectancy, her total economic loss from the collision totaled $445,241. (*Id.* at 112:9-11.)

The jury heard quite a different story on cross-examination. Buckley admitted she had been unemployed for at least a year when the automobile accident occurred. (*Id.* at 189:21-28.) Moreover, when confronted with her income tax returns, Buckley admitted that she had not filed a state or federal tax return for the years 2005, 2006, 2007, or 2008. (*Id.* at 199:7-12.) The last tax return Buckley filed was in 2004 – wherein she reported to the IRS that her annual income was a mere $2,340. (*Id.* at 192:25-194:5.) Buckley was also confronted with records that she filed with the Social Security Administration to obtain benefits. (*Id.* at 195:27-198:7.) Those records showed that Buckley reported her annual income as a mere $46.40 in 2005, $1,769.30 in 2006, $109 in 2007, and $0 in 2008. (*Id.*)

Buckley also conceded her only work restriction – per her own physicians – was lifting heavy objects with her left arm and that she was otherwise free to work. (*Id.* at 201:27-202:10, 202:28-203:2.) However, other than "going to try to do private sitting for someone," she had not applied for any jobs, filled out any applications, or otherwise tried to work. (*Id.* at 201:7-16.)

Buckley's expert witness on her purported economic losses, Dr. Glover, also conceded on cross-examination that she premised her entire economic loss analysis on the erroneous and unfounded assumption that Buckley could not – and would not – *ever* return to work. (*Id.* at 117:23-26, 118:1-6, 123:1-5, 133:8-27, 136:16-141:20.) Furthermore, in calculating Buckley's alleged future lost income, Dr. Glover admitted that she initially based her calculations on Buckley working 32 hours each week at $9 an hour as a nurse assistant. (*Id.* at 122:8-10.) When

it was revealed that Dr. Glover did not obtain these figures from Buckley's income tax returns, pay stubs, or from any other objectively verifiable information and that she instead obtained this information from the unsubstantiated statements of Buckley's attorney, Dr. Glover changed the fabricated income data to an equally fictitious "average individual" who supposedly worked 40 hours a week and earned $7.25 an hour. (*Id.* at 120:11-122:29, 123:6-11, 124:4-24.) She then added 10% for fringe benefits that, in her experience and opinion, Buckley would have made if she were physically able to work. (*Id.* at 125:15-126:27.) Dr. Glover then assumed that Buckley would have worked every day of the week for the next twenty-seven years until she retired at the age of sixty-five, arriving at a grand total of nearly half a million dollars in lost income caused by her purported total and complete inability to work. (*Id.* at 112:9-11, 116:18-27, 125:2-14.)

Buckley not only admitted on cross-exanimation that she was physically able to work (but apparently chose not to do so), she also revealed that – for over a decade preceding her automobile accident with Pounds – she had suffered from fibromyalgia, which caused severe shooting pains in and around her back, shoulders, and neck. (*Id.* at 203:15-206:28, *see also* Tr.Ex. 11 at 11:8-15.) Buckley received treatment for this medical condition from Dr. Pennebaker once every three months beginning in 1996. (*Id.*) In fact, Buckley was on her way to see Dr. Pennebaker for treatment of her fibromyalgia when the automobile accident occurred. (*Id.* at 209:5-8.) Tellingly, Buckley's medical records on the date of the accident do not indicate she even mentioned the automobile collision. (*Id.* at 209:15-19.) While she did mention she was experiencing pain in her "neck trapezius areas, interscapular muscles, low back, and bilateral hips down to the knees, somewhat worse on the left," her medical records showed her fibromyalgia caused these same symptoms before the accident. (*Id.* at 210:12-19.) For example, in July of 2007, Dr. Pennebaker noted: "She is felt to have fibromyalgia . . . . She is having pain and stiffness in her neck, trapezius areas, interscapular muscles, low back, right hip, and leg, and

she has diffuse pain from the knees down on each side." (*Id.* at 211:24-212:4.) Buckley's medical records also showed that she took numerous medications to treat her fibromyalgia and related symptoms, including Xanax, Valium, Soma, Lortab, Effexor, and Lyrica – i.e., the same medications she claimed on direct she was taking because of the automobile accident with Pounds. (*Id.* at 188:3-9, 205:1-22, 207:28-208:9.)

All of the diagnostic tests performed on Buckley after the automobile accident (including three MRI's, a myelogram, and a CT scan), failed to show any objective injuries related to the collision. While an MRI showed that Buckley had some degenerative changes and a small disc bulge in her upper back, her own expert witness, Dr. Howard Katz, testified that he could not accurately determine whether the "mild bulge" was caused by the automobile accident and that, in any event, it was nothing more than an "abnormality" that was not the main cause of Buckley's purported pain:

> I don't think we can prove [the "mild bulge"] was caused by this accident to a reasonable degree of medical certainty. I also don't think you can prove that it wasn't. . . . It's just – it's – it's an abnormality that – it's probably a red herring. It's probably – it's not the main cause of her pain anyway.

(Tr. at 274:27-275:5, *see also* Tr.Ex. 11 at 61:22-25, 62:2-5.)[3]

Dr. Katz's ultimate diagnosis was that Buckley had a "left shoulder *strain*." (Tr.Ex. 11 at 37:14-20.) (emphasis added) While he limited Buckley to using her left upper extremity to light duty work, he did not place any medical restrictions on her "walking, standing, lifting with her right upper extremity, balancing, driving, kneeling, squatting, bending and stooping." (*Id.* at 45:9-16.) Dr. Katz testified that Buckley was physically capable of working, that he had never prohibited Buckley from working, and that her medical records did not indicate any other

[3] Dr. Katz also admitted he had not reviewed any of Buckley's medical records prior to the collision with Pounds. (Tr.Ex. 11 at 40:9-14.) Buckley did tell him, though, that she had "bad pain" in her neck, shoulders, low back, and legs before the automobile accident. (*Id.* at 17:5-15, 5 R.Tr. at 207:22-27.)

physician had stated Buckley could not work. (*Id.* at 19:14-23, 47:6-8.)

Buckley's other expert witness, Dr. Orhan Ilercil, a neurological surgeon, initially opined that Buckley had an "arthritic form of degeneration of the spine." (Tr. at 272:13-23, Tr.Ex. 10 at 10:23-24.) He thought the accident with Pounds could have "exacerbated" her condition "provided that there is no contradicting evidence as far as complaints regarding the neck or the arm prior to this motor vehicular accident." (Tr.Ex. 10 at 13:18-14:8.) On cross-examination, however, Dr. Ilercil discovered from Appellees' counsel that Buckley had made complaints regarding her neck prior to the automobile accident and had been diagnosed with fibromyalgia:

> Q. The patient's actually been diagnosed with fibromyalgia. Would that condition have any effect on the problems that she's described with her neck?
>
> A. When was she diagnosed with fibromyalgia?
>
> Q. I would have to look back at Dr. Pennebakers records, but –
>
> . . .
>
> A. I can cut through the chase if it helps and just say that – assuming you have documentation from another doctor with a diagnosis of fibromyalgia, the first thing I would say is I'm not the doctor who made that diagnosis, but that fibromyalgia, in and of itself, can cause all of these symptoms and more. I don't know if that's acceptable to both of you or answers the question.

(Id. at 39:19-40:15.)

After discovering this information, Dr. Ilercil changed his testimony and stated that he could no longer state with a reasonable degree of medical certainty that the automobile collision proximately caused Buckley's alleged left arm pain. (*Id.* at 50:21-51:25.) He also testified that the medical tests did not show anything objectively wrong with Buckley, that she "looked normal," and that she was not a candidate for surgery. (*Id.* at 19:22, 23:1-17, 26:21-25.) He concluded that Buckley had "no restrictions whatsoever" and "there's no reason why she couldn't work." (*Id.* at 32:5, 10-11.)

Appellees' expert witness, Dr. David Gandy, on the other hand, testified that he determined to a reasonable degree of medical certainty that Buckley's small disc bulge was caused by long-term degenerative effects and not by the automobile accident with Pounds. (Tr. at 281:8-21, Tr.Ex. 12 at 21:16-23.) He agreed with Dr. Katz that Buckley had, at most, a left shoulder strain. (Tr.Ex. 12 at 21:24-22:4.) Dr. Gandy concluded, "at the most, this would have been a temporary exacerbation of preexisting degenerative changes without an aggravation or worsening of her long-term outlook." (*Id.* at 23:14-16.)

The lack of any objectively verifiable physical injury to Buckley is consistent with and corroborated by the lack of any physical damage to Buckley's automobile. Officer Cooley (the police officer who investigated the accident and inspected the vehicles) testified the only damage to Buckley's automobile related to the collision was "a black mark going across her rear bumper." (Tr. at 247:2-3.) He testified there we no dents, no curled bumper, no busted taillights – only a superficial black mark on the paint of her car:

> A. The only thing I [saw] on Ms. Buckley's car was along the bumper here that could have been caused by the pick-up truck here. And it's a black mark that runs across the paint right here.
>
> Q. Okay. What about dents? Are there any?
>
> A. There's no dents. The bumper is not curled under, or anything like that. No taillights are busted.

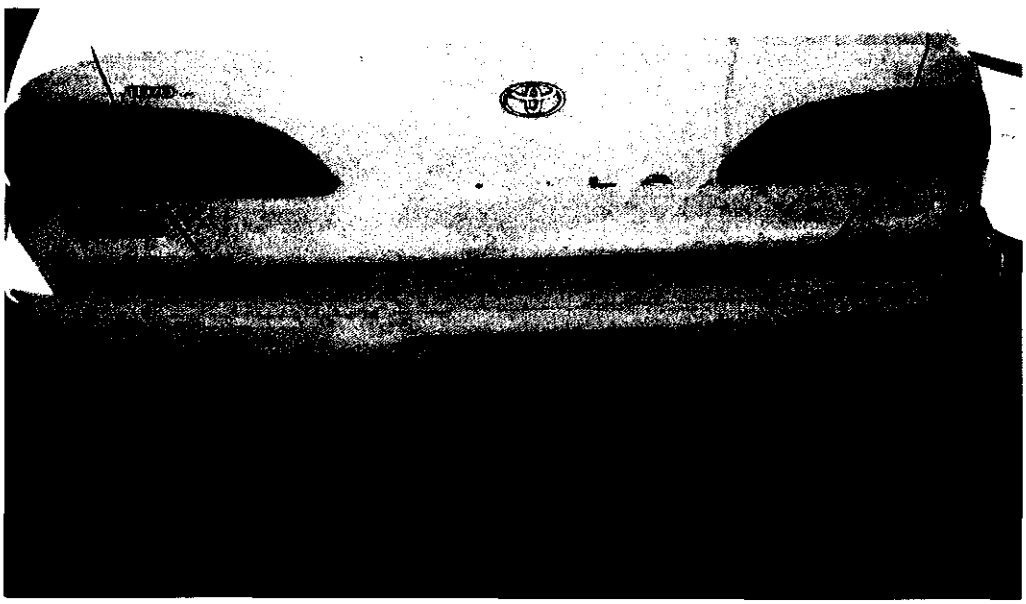
(*Id.* at 254:13-20; *see also* 257:18-20, 260:21-26.)

Officer Cooley also testified that he did not believe the collision with Pounds caused the missing letters in the "Corolla" emblem to fall off Buckley's car. He believed the evidence plainly showed the letters were previously lost due to prior damage and bodywork:

> [T]here's white paint been sprayed on the vehicle. And you can see it running on the back of the vehicle. That was showing me that there was prior damage, and somebody had painted over some marks to try to cover them up. . . . You can see paint spray on the tail ends on the right side, and you can see the two different tones of the paint on the vehicle here. You got a darker color on the outer edge,

of the emblem (or any debris from either of the vehicles for that matter) in the road. (*Id.* at 252:23-254:2.)

Officer Cooley testified that, based on his investigation and experience, he had no reason to doubt the accuracy of Pounds' statement that he was traveling about 5 miles per hour when he rear-ended Buckley. (*Id.* at 258:18-259:9.) In his opinion, Buckley did not need medical attention – she was not limping, did not appear disabled, and was in fact walking around her car looking for damage while he asked her routine questions. (*Id.* at 258:5-17.) The only damage that Officer Cooley discovered was a little black mark on the bumper of Buckley's car as documented in his photograph taken at the accident scene:



(*See* Tr.Ex. 3A, *see also* Tr. at 260:24-26.)

After a two-day trial, the jury returned a verdict in favor of Buckley and awarded her $15,000 in damages. (R. at 231.) The Circuit Court denied Buckley's Motion for Judgment Notwithstanding the Verdict, or in the Alternative, Motion for a New Trial. (*Id.* at 290-292.) It also denied Buckley's Motion for Additur, or in the Alternative, Motion for a New Trial. (*Id.*) Buckley thereafter filed this appeal. (*Id.* at 293-295.)

SUMMARY OF THE ARGUMENT

also denied Buckley's Motion for Additur, or in the Alternative, Motion for a New Trial. (*Id.*) Buckley thereafter filed this appeal. (*Id.* at 293-295.)

SUMMARY OF THE ARGUMENT

Buckley's assignments of error should be denied because she failed to preserve them for appeal, failed to support them with citations to the record and facts in her appellate brief, suffered no prejudice from the alleged technical defects, and is wrong on the merits.

With respect to the Circuit Court's alleged failure to allow her to introduce an Independent Medical Evaluation Report from Appellees' deceased expert witness, the record indicates that Buckley did in fact cross-examine Appellees' subsequently retained expert witness with the report. To the extent that Buckley is arguing the Circuit Court should have let her do more with the report, this argument is barred not only because she failed to raise it with the trial court, but also because she failed to make an offer of proof as to what evidence within the report the judge supposedly improperly excluded. Her assignment of error also fails on the merits because there is no evidence in the record showing the report qualifies under any exception to the hearsay rule. Even if it did, the Circuit Court properly excluded the report pursuant to Miss. R. Civ. P. 702 because it was not based upon sufficient facts or data because Buckley received additional medical treatment and examinations after it was written, and the report expressly states it is subject to revision upon receipt of additional information. Furthermore, the report could not have been introduced into evidence because the doctor who wrote it was not – and could not have been – qualified as an expert at the time of trial due to his untimely death. In any event, Buckley was not denied a substantial right by not being able to introduce as substantive evidence an outdated, incomplete report from a physician who is no longer living – especially considering the jury heard from three physicians who treated and evaluated Buckley based on her most recent and comprehensive diagnostic tests, examinations, and pertinent data.

The Circuit Court also properly excluded the report of Buckley's economic loss expert because it would have improperly enhanced the expert's testimony. Moreover, Buckley's counsel agreed to the exclusion of the report. In any event, Buckley suffered no prejudice because the expert testified in detail about the findings and conclusions of her report.

The assignment of error relating to the purported misstatement of law by Appellees' counsel during closing arguments fails for at least three reasons. First, it was not a misstatement of law. Second, Buckley is barred from raising this issue on appeal because she failed to make a contemporaneous objection at trial. Third, the Circuit Judge's jury instructions corrected any potential misstatement of law during closing arguments.

Buckley's argument that the Circuit Court failed to properly instruct the jury about Appellees' potential liability for aggravating her preexisting injury fails under established case law and because the jury's own verdict shows that it understood and followed the law.

Finally, the Circuit Court properly denied Buckley's motion for an additur as shown by a recent case from the Mississippi Court of Appeals, *Hubbard v. Delta Sanitation of Mississippi.* The "evidence" presented by Buckley not only failed to show she was entitled to her requested damages, it actually undermined her case at just about every turn. To the extent Buckley elicited any favorable testimony or evidence at trial, Appellees effectively rebutted that evidence on cross-examination by showing it to be false, misleading, and/or completely fabricated. Moreover, it was Appellees – not Buckley – who submitted the unrefuted medical testimony that her purported injuries were *not caused* by the automobile accident with Pounds. The record not only shows a complete lack of support for Buckley's claim for an additur, it shows quite overwhelmingly that Buckley received more than she should have.

ARGUMENT AND AUTHORITIES

I. The Circuit Court properly excluded Dr. Vise's Independent Medical Evaluation Report.

An appellate court "grants a high degree of deference to the trial court's decision to suppress or admit evidence and will not find error absent a clear abuse of discretion resulting in prejudice." *Jones v. Jones*, 43 So. 3d 465, 483 (Miss. Ct. App. 2009). The burden is on the proponent of the evidence. *Jolly v. State,* 269 So. 2d 650, 654-655 (Miss. 1972). Furthermore, "a party must do more than simply show some technical error has occurred before he will be entitled to a reversal on the exclusion or admission of evidence; there must be some showing of prejudice." *Baine v. River Oaks Convalescent Ctr.*, 791 So. 2d 844, 847 (Miss. Ct. App. 2001) (quoting *Pham v. State,* 716 So. 2d 1100, 1102 (Miss. 1998)).

Appellees' initial expert witness, Dr. Guy Vise, performed an Independent Medical Evaluation of Buckley and documented his findings in an Independent Medical Evaluation Report (the "Vise IME Report"). (*See* R. at 228.) A few weeks later, Dr. Vise passed away. (*Id.*) Appellees designated Dr. David Gandy as their new expert. (*Id.* at 089-098.)

Before trial, Appellees filed a *Motion In Limine to Exclude References to Independent Medical Evaluation of Dr. Guy Vise.* (*Id.* at 228-230.) Appellees argued the report was inadmissible under Miss. R. Civ. P. 702 because it was not based upon sufficient facts or data because Buckley underwent additional medical treatment and examinations after it was written. (*Id.*) Specifically, she received treatment from three additional physicians, underwent two MRI's, a myelogram, and a CT scan. Dr. Vise expressly stated in his report:

> The above analysis is based upon the available information at this time, including . . . the medical records and tests provided . . . . If more information becomes available at a later date, an additional report may be requested. Such information may or may not change the opinions rendered in this evaluation.

(*See id* at 229.)

Accordingly, Appellees claimed the Vise IME Report should not be admitted because it was speculative to assume that Dr. Vise's opinions would remain the same if he were still alive and had access to Buckley's additional medical records and diagnostic reports. (*Id.*) Appellees also noted the report was inadmissible hearsay and could not be authenticated (*Id.*) The record does not show that Buckley responded to Appellees' motion, argued any basis for admitting the report, or made any offer of proof. The Circuit Court granted the motion. (*Id.* at 281.)

Now, apparently for the first time on appeal, Buckley argues the Circuit Court erred in excluding the Vise IME Report. Because the record does not show Buckley raised this issue with the trial court, she is barred from doing so on appeal. *See, e.g., Crowe v. Smith,* 603 So. 2d 301, 305 (Miss. 1992) ("[A]n appellant is not entitled to raise a new issue on appeal, since to do so prevents the trial court from having an opportunity to address the alleged error."). Moreover, the record indicates that Buckley did in fact cross-examine Appellees' expert witness, Dr. Gandy, with the Vise IME Report in his videotaped deposition – which was apparently shown in its entirety at trial. (5 R.Tr. at 281:8-21, Tr.Ex. 12 at 40:12-49:6.) Thus, while the report *should have been* excluded at trial, it apparently was not.

To the extent that Buckley is arguing the Circuit Court should have let her do more with the Vise IME Report, her argument is barred not only because she failed to raise it with the trial court, but also because she failed to make an offer of proof as to what evidence within the report the judge supposedly improperly excluded.[4] "Mississippi Rule of Evidence 103(2) states that, if

[4] Even on appeal, Buckley makes only conclusory and vague allegations about the contents of the Vise IME Report without any citation to the record or other supporting facts. *See* App. Br. at 11-16. Mississippi Rule of Appellate Procedure 28(a)(6) states: "[T]he brief of the appellant shall contain . . . the contentions of [the] appellant with respect to the issues presented, and the reasons for those contentions, with citations to the authorities, statutes, and parts of the record relied on." Mississippi appellate courts have held the "[f]ailure to comply with M.R.A.P. 28(a)(6) renders an argument procedurally barred." *Birrages v. Ill. Cent. R.R.,* 950 So. 2d 188, 194 (Miss. Ct. App. 2006); *see also Estate of Bellino v. Bellino*, 52 So. 3d 423, 425 (Miss. Ct. App. 2010); *Sorey v. Crosby*, 989 So. 2d 485, 487 (Miss. Ct. App.

the court rules certain proposed evidence inadmissible, in order to assert that ruling as error on appeal, 'the substance of the evidence' must be 'made known to the court by offer' unless its relevancy is apparent from the context of the question." *Stapleton v. State*, 790 So. 2d 897, 900 (Miss. Ct. App. 2001) (quoting Miss. R. Evid. 103(2)). For this additional reason, the assignment of error is not proper for review and should be denied.

Buckley's assignment of error also fails on the merits. She claims the Vise IME Report should have been admitted into evidence because it falls within the "business record" exception to the hearsay rule. She argues, "Dr. Gandy, the physician who took over Dr. Vise's practice, admitted during his deposition testimony that he had access to all of Dr. Vise's medical records, making Dr. Vise's reports an exception to the hearsay rule under the business record exception." *See* App. Br. at 14. Just because Dr. Gandy might have had "access" to Dr. Vise's medical records, does not mean he can properly testify about the foundational requirements of the business record exception. *See, e.g., Harveston v. State*, 798 So. 2d 638, 641 (Miss. Ct. App. 2001) ("Problems may arise when one business organization seeks to introduce records in its possession but actually prepared by another. Obviously, mere possession or 'custody' of records under these circumstances does not qualify employees of the possessing party to lay the requisite foundation, and transmittal of information by the custodian regarding the contents of records in the custodian's possession does not qualify the recipient to lay the foundation.").

The record on appeal indicates that Dr. Gandy had no personal knowledge of whether the Vise IME Report met any of the foundational requirements of the business record exception.

2008); *Edwards v. State*, 856 So. 2d 587, 599 (Miss. Ct. App. 2003) ("It is the appellant's duty to provide authority and support for the issues he presents. Issues of error which are unsupported by citation or authority are considered abandoned.") For this additional reason, Buckley's assignment of error should be barred.

(Tr.Ex. 12 at 40:8-14, 49:13-51:14.) In fact, Dr. Gandy testified he was not even aware of the report. (*Id.* at 40:8-14.) Accordingly, Buckley's argument fails.

Buckley also argues – again, for the first time on appeal – that the Circuit Court should have crafted a special hearsay exception for the Vise IME Report pursuant to *Hercules, Inc. v. Walters*, 434 So. 2d 723 (Miss. 1983). In *Hercules*, the Mississippi Supreme Court held that a report from a deceased physician qualified as an exception to the hearsay rule in a worker's compensation case. *Id.* at 727. The Court stated, "[t]he two underlying reasons for any exception to the hearsay rule are: (1) a necessity for the exception, and (2) a circumstantial guaranty of the trustworthiness of the offered evidence." *Id.* It found necessity because there were no other medical records available. *Id.* It found a circumstantial guaranty of trustworthiness because the physician's nurse corroborated the underlying facts based on her personal knowledge and involvement, and because the report qualified as a business record. *Id.*

The only similarity between *Hercules* and the instant case is the unfortunate fact that a physician passed away after writing a medical report. Otherwise, the two cases are remarkably dissimilar. As a threshold matter, "[a]lthough deceased physician's reports have been held, under certain circumstances, to be admissible in worker's compensation cases, the holding has been limited to the area of worker's compensation." *Jones v. Hatchett*, 504 So. 2d 198, 203 (Miss. 1987). In any event, unlike the report in *Hercules*, there is no necessity for the Vise IME Report because all of Buckley's medical records are available. To be sure, the jury heard testimony from several physicians who had evaluated Buckley and had reviewed her medical records and diagnostic tests. Furthermore, unlike the nurse in *Hercules* who testified about the trustworthiness of the offered evidence based on her own personal knowledge, there is no such testimony in this case. In fact, the only "testimony" comes from Dr. Vise himself, when he states in his own report that it might not be accurate "[i]f more information becomes available at

the party against whom evidence has been erroneously received has been denied a substantial right." *Ponthieux v. State,* 532 So. 2d 1239, 1248 (Miss. 1988). This standard also applies when evidence has been erroneously omitted. *Heidel v. State,* 587 So. 2d 835, 844 (Miss. 1991). The jury heard from three physicians who treated and evaluated Buckley based on the most recent and comprehensive diagnostic tests, examinations, and pertinent data. Buckley was not denied a substantial right when the Circuit Court did not allow her to introduce as substantive evidence (but did allow her to cross-examine Dr. Gandy with) an outdated, incomplete IME report from a physician who is no longer living and who expressly stated the report was subject to revision upon receipt of additional information. For all the foregoing reasons, this assignment of error should be denied.

II. The Circuit Court properly excluded Dr. Glover's economic loss report.

Buckley argues the Circuit Court erred by initially ruling Dr. Glover's economic loss report could be introduced into evidence, but then ruling it could not after Appellees objected. *See* App. Br. at 16-17. While there was a slight delay in the objection, the Circuit Court apparently found it was not such to deem the objection waived. (Tr. at 107:10-108:13.) The Circuit Court excluded the report because it would improperly enhance Dr. Glover's testimony:

> [Appellees] can't cross-examine a report. And so it would be better to let [Dr. Glover] do her own testifying, and the report really doesn't need to – because then we're going to be in a position on appeal, the Supreme Court saying the jury heard from the witness, and then you enhanced that witness's testimony by offering a document that says the same thing the witness does. So you're highlighting one witness's testimony, which obviously isn't the proper way to get the testimony in.

(*Id.* at 109:12-25.)

This ruling is hornbook law. *See, e.g., Kroger Co. v. Scott,* 809 So. 2d 679, 687 (Miss. Ct. App. 2001) ("[A]dmitting both the incident report as well as the testimony of the author of the report is unnecessary. To admit both would produce cumulative evidence that merely bolsters

a later date . . . ." (*See* R. at 229.) Furthermore, as shown above, the report does not fall within the business record exception. Accordingly, the *Hercules* case does not support Buckley's post-mortem argument that the Vise IME Report was admissible under a special hearsay exception.

Even if the report did qualify for an exception to the hearsay rule, the Circuit Court nonetheless properly excluded it pursuant to Miss. R. Civ. P. 702 because it was not based upon sufficient facts or data because Buckley received additional medical treatment and examinations after it was written. In response to this argument, Buckley does not rely on any facts, citations to the record, legal arguments or authority – instead, she merely states: "[Dr. Vise's] findings were clearly based upon sufficient facts and data." App. Br. at 12. This is not only patently insufficient,[5] it is factually incorrect. As discussed in more detail above, after the report was written and Dr. Vise had passed away, Buckley underwent additional MRI's, a myelogram, a CT scan, and received additional treatment from several physicians. This, coupled with the fact that the Vise IME Report states it is subject to revision if more information becomes available, shows the report's facts and data are speculative at best and do not satisfy the requirements of Rule 702.

Additionally, the Vise IME Report could not have been introduced as evidence because Dr. Vise was not – and could not have been – qualified as an expert at the time of trial due to his untimely death. *See Univ. Med. Ctr. v. Martin,* 994 So. 2d 740, 745 (Miss. 2008) ("[T]he acceptance or refusal of expert testimony falls within the sound discretion of the trial court and . . . this Court will only reverse a trial judge's decision if it was 'arbitrary and clearly erroneous.'" (citation omitted)) For this additional reason, the report was properly excluded from evidence.

Finally, even if the Vise IME Report was erroneously excluded from evidence, this Court should nonetheless affirm as harmless error because the ruling did not deprive Buckley of a "substantial right." Rule 103(a) of the Mississippi Rules of Evidence "directs affirmance unless

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[5] *See* fn. 2.

one or the other."); *accord* 75 AMJUR TRIAL 2d § 268 (2011) ("[T]rial court may properly exclude exhibits, even if relevant, that are cumulative of testimony adduced at trial and would not assist the jury. For instance, an expert's report may be excluded if it was adequately summarized in the person's testimony, and therefore would have been cumulative.") (footnotes omitted) (citing *Kroger Co.*, 809 So. 2d at 687). Accordingly, the Circuit Court's ruling should be affirmed.

Moreover, Buckley's counsel agreed the report should not be introduced into evidence:

> THE COURT: Right. So do y'all want to just make [Dr. Glover's report] an ID, and let [Dr. Glover] go on and testify?
>
> Mr. Moore: Yeah.

(Tr. at 110:5-8.) *See also Maiden v. State*, 802 So. 2d 134, 136 (Miss. Ct. App. 2001) ("[N]ot only did [appellant] fail to contemporaneously object, he assented to [the] testimony.")

Buckley's objection was directed at Appellees' counsel "double teaming" Dr. Glover with objections. (Tr. at 108:26-28.) Her attorney stated, "we're just objecting to both of them objecting . . . ." (*Id.* at 109:26-29) Accordingly, Buckley is barred from raising this assignment of error. *See City of Natchez v. Jackson*, 941 So. 2d 865, 871 (Miss. Ct. App. 2006) ("If the objection on appeal differs from the objection at trial, the issue is not properly preserved for appellate review."); *Bogan v. State*, 754 So. 2d 1289, 1294 (Miss. Ct. App. 2000) ("[T]rial court will not be held in error on a matter that was never presented for its consideration.").

In any event, Buckley suffered no prejudice because Dr. Glover testified at length about the findings in her report. (Tr. at 110:21-147:3). *See Baine,* 791 So. 2d at 847 ("[A] party must do more than simply show some technical error has occurred before he will be entitled to a reversal on the exclusion or admission of evidence; there must be some showing of prejudice."). For the foregoing reasons, this assignment of error should be denied.

III. The Circuit Court did not err in not issuing a *sua sponte* motion to strike and/or curative instruction with respect to a purported misstatement of law during closing arguments.

Buckley argues that "[d]uring his closing arguments, counsel for Appellees claimed that if Appellant Buckley possessed a pre-existing condition, she was not entitled to any compensation." *See* App. Br. at 19. As with all of Buckley's other assertions in her appellate brief, this one contains no citation to the record.[6] It appears Buckley is referring to the following statements made during closing arguments:

> She's been saying my neck, my back, my shoulder for years and years according to the documents. What's interesting is she tried to say on the witness stand, my fibromyalgia, it went away in 2008. Now, all the same complaints I have that I had before is – this is the reason. It's not fibromyalgia anymore. Of course she would say that, because she cannot get damages – she cannot get a jury award without blaming it on this. If it were something else that preexisted, she cannot get any money. It's common sense, and you did not leave your common sense outside that door when you walked in here.

(Tr. at 335:10-26.) Likewise, without providing any citation to the record or any other factual support, Buckley summarily concludes "[a]s a result of Appellees' counsel's erroneous misstatement of the law, Appellant Buckley was prejudiced." App. Br. at 18.

This argument fails for at least three reasons. First, counsel's passing comment about Appellees' liability for Buckley's purported injuries is not a misstatement of law. If Buckley's injuries were caused by her fibromyalgia and not the automobile accident with Pounds, then she could not satisfy the causation element of her negligence claim – and, therefore, could not recover damages from Appellees. *See, e.g., Allen v. Choice Hotels Intern*, 942 So. 2d 817, 827 (Miss. Ct. App. 2006) ("plaintiff must prove causation in fact and proximate cause" to recover on negligence claim). Counsel never stated that Buckley was barred from recovering damages from Appellees if her purported injuries were caused in part by fibromyalgia and in part

[6] Buckley's assignment of error should therefore be barred. *See* fn.2.

by the collision with Pounds. In fact, counsel stated later in his closing argument that the jury could award Buckley damages if it found the automobile accident caused part of her injuries:

> But if you disagree, by the way – if you disagree, and you're inclined to award something, then consider this: Dr. Gandy gave her six weeks to recover from a sprain. Fine, recover her medical expenses for the six weeks, which would amount to around $3,000. You've got the medical expenses here. You want to give her some pain and suffering damages and all that non-economic stuff . . . give her [$10,000].

(Tr. at 330:19-331:2.)

Secondly, even if counsel's statement was somehow inaccurate, Buckley is barred from raising this issue on appeal because she failed to make a contemporaneous objection at trial. Buckley's counsel did not object to the comment until after Appellees' counsel had finished his closing argument, Buckley's counsel had finished his rebuttal argument, and the trial judge had sent the jury into deliberations. (*Id.* at 335:22-336:1.) The court admonished, "You should have objected during the closing. By not objecting, you waived it. . . . [I]t's going to necessitate me going through the transcript to see what he said, because the length of time, being that I have no independent recollection of him making that statement." (*Id.* at 336:2-4, 21-26.)

The case of *McGilberry v. State*, 741 So. 2d 894 (Miss. 1999) is instructive. There, a criminal defendant sought reversal of his conviction because the prosecutor allegedly made improper statements during closing arguments. *Id.* at 909. Defendant's counsel, however, waited until the jury had retired to deliberate before objecting and moving for a mistrial. *Id.* The Mississippi Supreme Court stated, "[b]y failing to lodge a contemporaneous objection, [the defendant] denied the trial judge the opportunity to cure any error that occurred as a result of the comments made by the prosecutor."[7] *Id.* at 910. Accordingly, the Court held "[t]his entire

[7] The Mississippi Supreme Court "has previously disapproved of the procedure followed by [defendant's] counsel at trial," stating:

> [I]t is the duty of a trial counsel, if he deems opposing counsel [is] overstepping

assignment of error is procedurally barred for failure to lodge a contemporaneous objection."[8] *Id.* at 911. For the same reason, Buckley's assignment of error should be barred.

Thirdly, the Circuit Judge instructed the jury about the law of the case, read those instructions to the jury, and then provided them with written instructions to consider during deliberations. For example, the Judge stated:

> To the members of the jury, at this time, I'm going to read the jury instructions. These instructions do state the law in the case to the members of the jury. Now, when you go to begin your deliberations, you will actually have these instructions, so you can re-read them, and go over them for yourself during your deliberations.

(Tr. at 283:11-20; 282:4-6.)

The first sentence of the first jury instruction states: "It is my duty to instruct you as to the law, and it is your duty as jurors to follow the law as stated in these instructions." (R. at 232.) Jury Instruction No. 8, which addresses Appellees' potential liability for aggravating

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> the wide range of authorized argument, to promptly make objections and insist upon a ruling by the trial court. The trial judge first determines if the objection should be sustained or overruled. If the argument is improper, and the objection is sustained, it is the further duty of trial counsel to move for a mistrial. The circuit judge is in the best position to weigh the consequences of the objectionable argument, and unless serious and irreparable damage has been done, admonish the jury then and there to disregard the improper comment.
>
> Defense counsel chose not to follow this familiar path, but to wait until the conclusion of the argument to object. This is quite illogical and extreme, and places the state in a "Catch 22" situation. To allow defense counsel to argue at conclusion of argument, to which no objection has been made, he is then entitled to a mistrial is not only inviting error, but also preventing the trial judge from taking the one step he could have taken to remove the possibility of prejudice. We cannot countenance assigned errors based on this sort of a proceeding.

McGilberry, 741 So. 2d at 909-10 (quoting *Johnson v. State,* 477 So. 2d 196, 209-10 (Miss. 1985)).

[8] *See also Williams v. State,* 512 So. 2d 666 (Miss. 1987) (defense counsel's failure to make contemporaneous objection to prosecutor's comments during closing argument is "fatal."); *Walker v. State*, 913 So. 2d 198, 238 (Miss. 2005) (collecting cases), *Box v. State,* 610 So. 2d 1148 (Miss. 1992) (motion for mistrial waived because defendant failed to contemporaneously object to prosecutor's remarks during closing argument); *Monk v. State,* 532 So. 2d 592, 600 (Miss. 1988) (if a contemporaneous objection during closing argument is not made, it is waived); *Gray v. State,* 487 So. 2d 1304, 1312 (Miss. 1986) (same); *Coleman v. State,* 378 So. 2d 640, 649 (Miss. 1979) (same).

Buckley's preexisting condition, states:

> You are instructed that if you find Plaintiff possessed a pre-existing condition, you may consider whether Defendants aggravated the pre-existing condition, if any.
>
> If you find that Plaintiff had a pre-existing condition, and Defendants aggravated such condition, Defendants bear[] the responsibility for the portion of the injury or the aggravation of the injury that they caused.

(R. at 241.)

Accordingly, any alleged misstatement of law during closing arguments was corrected by the jury instructions. The *McGilberry* case also supports this conclusion. As to other purportedly improper comments the prosecutor made during closing arguments (which defendant preserved with a timely objection), the Court found the jury instructions cured any potential misstatements. *McGilberry*, 741 So. 2d at 908. The Court cited its previous decision *Blue v. State,* 674 So. 2d 1184 (Miss. 1996), in which it found an improper comment during closing argument was not reversible error because "the instructions to the jury 'effectively eradicated' any effect the comment had on the jury's decision." *Id.* (quoting *Blue*, 674 So. 2d at 1215). The Court reasoned "[i]t is presumed that jurors obey and follow the instructions given to them by the trial court." *Id.* (quoting *Blue*, 674 So. 2d at 1213). *Accord Branch v. State*, 882 So. 2d 36, 75-76 (Miss. 2004) ("[E]ven if the comment were construed as error, it would be harmless in light of the court's instructions that counsel's arguments are not evidence and that if the argument has no basis in the evidence, the jury should disregard the argument."); *White v. State*, 919 So. 2d 1029, 1032 (Miss. Ct. App. 2005) ("[E]ven if the prosecutor's remarks were improper, the particular statement at issue is not a statement that caused serious and irreparable damage to [appellant's] case. Far more damaging to [her] case was the actual evidence put on by the State.").

Similarly, in the instant case, any purported misstatement during closing arguments was "effectively eradicated" by the jury instructions. Moreover, the jury awarded Buckley $15,000 in damages – which proves it was not allegedly misled or confused as to whether a preexisting conditiopn prevented her from recovering damages from Appellees. (R. at 231.) For all the foregoing reasons, this assignment of error should be denied.

IV. The Circuit Court properly denied Buckley's proposed jury instruction regarding Appellees' potential liability for aggravating Buckley's preexisting condition.

When reviewing challenges to jury instructions, an appellate court will affirm the trial court's ruling "'where the instructions actually given, when read together as a whole, fairly announce the law of the case and create no injustice.'" *Lepine v. State*, 10 So. 3d 927, 944 (Miss. Ct. App. 2009) (quoting *Ford v. State*, 975 So. 2d 859, 864 (Miss. 2008)).

Buckley argues the Circuit Court failed to properly instruct the jury about Appellees' liability for aggravating her preexisting condition. In support of this argument, Buckley cites *Koger v. Adcock*, 25 So. 3d 1105 (Miss. Ct. App. 2010). There, a defendant hit the plaintiff after running a red light, allegedly causing her a back injury. *Id.* at 1106-08. The defendant claimed plaintiff's injury pre-existed the collision. *Id.* at 1108. With respect to the defendant's liability for aggravating plaintiff's preexisting condition, the Circuit Court instructed the jury:

> A pre-existing condition is a condition that may have caused or contributed to the injury claimed by [the plaintiff], but is also a condition from which [the plaintiff] suffered before his motor vehicle accident with [the defendant]. Therefore, [the defendant] is not responsible for the injuries of [the plaintiff] which are the sole proximate result of his pre-existing conditions.

Id. at 1110.

The Court of Appeals found this instruction "provides a misleading and incorrect statement of the law" because it "implies that, *because* [the plaintiff] suffered from degenerative disc disease before the accident occurred, [the defendant] could not be held liable for any

condition caused by the degenerative disc disease." *Id.* (emphasis in original). In other words, "[t]he language of the instruction essentially eliminates any jury question regarding the aggravation of any preexisting injury or condition or the extent of any preexisting injury to [the plaintiff]." *Id.* Instead, "[t]he jury should have been instructed as to [the defendant's] responsibility if his negligence contributed to an aggravation of [the plaintiff's] asserted pre-existing condition." *Id.* at 1111.

In the instant case, the Circuit Court properly instructed the jury about Appellees' liability for aggravating Buckley's alleged preexisting condition. As previously mentioned, Jury Instruction No. 8 states: "You are instructed that if you find Plaintiff possessed a pre-existing condition, you may consider whether Defendants aggravated the pre-existing condition, if any." (R. at 241.) It further states: "If you find that Plaintiff had a pre-existing condition, and Defendants aggravated such condition, Defendants bear[] the responsibility for the proportion of the injury or the aggravation of the injury that they caused." (*Id.*) And, as initially read by the Circuit Court to the jury, Jury Instruction No. 8 included Buckley's requested additional language that "one who injures another who suffers from a preexisting condition is liable for the entire damage [when] no apportionment can be made between the preexisting condition and the damages caused by the defendant." (Tr. at 283:11-284:10.) The Circuit Court, however, properly removed this language from the written instructions provided to the jury based on its understanding of the case law. (*Id.* at 284:3-287:19.) *See, e.g., Jackson-Miller v. State Farm Ins. Co.*, 39 So. 3d 991, 995 (Miss. Ct. App. 2010) (holding circuit court correctly refused such an instruction because there was no apportionment issue presented at trial). Furthermore, the fact that the jury awarded Buckley $15,000 in damages shows that it was able to apportion damages between Buckley's preexisting condition and the damages caused in the automobile accident. For these reasons, Buckley's assignment of error should be denied.

V. The Circuit Court properly denied Buckley's Motion for Additur.

Mississippi Code Annotated § 11–1–55 (Rev. 2002) allows a trial court to grant a motion for an additur "if the court finds that the damages are . . . inadequate for the reason that the jury or trier of the facts was influenced by bias, prejudice, passion, or that the damages awarded were contrary to the overwhelming weight of credible evidence." Furthermore, the Mississippi Supreme Court has consistently held that: "'[a]wards set by jur[ies] are not merely advisory and generally will not be 'set aside unless so unreasonable as to strike mankind at first blush as being beyond all measure, unreasonable in amount and outrageous.'" *Thompson v. Dung Thi Hoang Nguyen*, No. 2009-CA-001147, 2002 WL 34591654, at *4 (Miss. Ct. App. Feb. 1, 2011) (quoting *Maddox v. Muirhead,* 738 So. 2d 742, 743 (Miss. 1999)). "'Additurs represent a judicial incursion into the traditional habitat of the jury, and therefore should never be employed without great caution.'" *Patterson v. Liberty Assocs., L.P.*, 910 So. 2d 1014, 1021 (Miss. 2004) (quoting *Gibbs v. Banks,* 527 So. 2d 658, 659 (Miss. 1988)).

In reviewing a trial court's denial of an additur, the standard of review is limited to an abuse of discretion. *Rodgers v. Pascagoula Pub. Sch. Dist.,* 611 So. 2d 942, 945 (Miss. 1992). "The party seeking the additur bears the burden of proving his [or her] injuries, loss of income, and other damages." *Gaines v. K–Mart Corp.,* 860 So. 2d 1214, 1220 (Miss. 2003). The evidence is viewed in the light most favorable to the opposing party, "giving [that party] all favorable inferences that may be reasonably drawn therefrom." *Id.*

In an analogous case, *Hubbard v. Delta Sanitation of Mississippi*, No. 2010-CA-00045-COA, 2011 WL 1549241 (Miss. Ct. App. Apr. 26, 2011) Charles Hubbard's pickup truck was rear-ended by a Mack truck owned by Delta Sanitation while he was stopped in the turning lane. *Id.* at *1. Photographs of Hubbard's bumper showed only slight indentations, which Hubbard alleged came from the bolts on the Mack truck. *Id.* Hubbard remained at the scene of the

accident for approximately twenty minutes, spoke to a police officer, and then drove his truck to work. *Id.* Hubbard claimed he had a "dull ache in his neck and back" which got worse two to three days after the accident. *Id.*

Hubbard's treating physician testified that while he had diagnosed Hubbard with a "degenerative condition created by arthritis" prior to the automobile collision, Hubbard had never complained of neck pain prior the accident. *Id.* at *2. The physician diagnosed Hubbard with a herniated disc in his neck and performed surgery to alleviate the problem. *Id.* at *3. The physician testified that "based upon a reasonable degree of medical probability, the December 2006 accident was a contributing cause for Hubbard's neck injury (herniated disc) and resulting surgery." *Id.* Hubbard testified that his medical bills for the surgery totaled $138,294.15, and that his lost wages during his recuperation totaled $14,074.48. *Id.* at *2.

Delta Sanitation presented two witnesses in its case-in-chief: the driver of its truck and a neurologist it retained to review Hubbard's medical records. *Id.* at *3. The driver testified that he rear-ended Hubbard's vehicle at approximately five miles per hour. *Id.* The neurologist testified that Hubbard's purported injuries pre-existed the automobile accident, that Hubbard had "a slow progressive degenerative condition in his spine for several years," and that Hubbard's records showed "he had been complaining of numbness radiating down the left arm for years." *Id.* at *4. After the close of evidence, the jury awarded Hubbard only $3,000 in damages. *Id.*

On appeal, Hubbard argued "the $3,000 jury award constitutes a miscarriage of justice as it bears no relevance or resemblance to the damages in this case." *Id.* at *4. He claimed "that proof of his medical bills, out-of-pocket expenses, and the property damage to his truck, in the total amounts mentioned above, were allowed into evidence without objection from Delta," and therefore "the jury was provided a minimum floor upon which to build its calculation of

damages." *Id.* Hubbard argued "the jury disregarded such proof, and it completely ignored the pain and suffering and permanent injury testified to by [his treating physician]." *Id.*

The Mississippi Court of Appeals rejected his arguments, noting "[a]t the outset, we find no merit to Hubbard's contention that the sum total of the expenses he introduced into evidence without objection from Delta provided the jury a minimum floor from which to build its calculation of damages" because "'even if, pursuant to [section] 41–9–119, [Hubbard's] medical bills were necessary and reasonable, [section] 41–9–119 does not mandate a finding that those medical bills were incurred as a result of the accident in question.'" *Id.* at *5 (quoting *Herring v. Poirrier,* 797 So. 2d 797, 809 (Miss. 2000)). It stated that even if Delta had not contested the necessity and reasonableness of Hubbard's medical expenses, it "challenged Hubbard's cause of action on the theory that the December 2006 accident – even though caused by its driver's negligence – was not the cause of the personal injuries Hubbard claimed had resulted." *Id.*

The court found Delta Sanitation "provided sufficient evidence in support of its case from which the jury could reasonably conclude that Hubbard's personal injuries were not caused by Delta's negligence." *Id.* at *8. It emphasized "[t]he weight accorded to differing opinions of experts is a question of fact for the jury" and "a jury's verdict cannot be reversed simply because it found one expert more believable than another." *Id.* (citations omitted). The court therefore affirmed the trial court's denial of Hubbard's motion for additur.[9] *Id.*

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[9] *See also Jackson-Miller v. State Farm Ins. Co.*, 39 So. 3d 991, 994 (Miss. Ct. App. 2010):

> Miller argues that the circuit court erred when it overruled her motion for a judgment notwithstanding the verdict or, in the alternative, a new trial. Miller asserts that she provided extensive testimony regarding her permanent injuries, medical bills, lost wages, and pain and suffering and that a verdict of only $30,000 ignores the fact that she suffered permanent injury. She argues that it also ignores the fact that she still continues to suffer pain from the car accident.
>
> Miller had suffered injuries in previous car accidents prior to the subject car accident. At trial, Miller's underlying injuries were shown to be reasonably present from

In the instant case, Buckley makes the exact same arguments as Hubbard (albeit without any citation to the record or factual support). Buckley's arguments should fail for the same reasons that Hubbard's arguments failed. Moreover, the evidence in the instant case shows that Buckley's arguments are far weaker than those of Hubbard. For example, unlike Hubbard's treating physician who diagnosed him with a herniated disc and testified that it was caused by the automobile accident, Buckley's own physicians testified that, at most, she had a "strained shoulder" that was nothing more than a "red herring" which might have, or might not have, been caused by the automobile accident with Pounds. Unlike Hubbard, who incurred $138,294.15 in medical expenses for surgery to alleviate his herniated disc, Buckley's own doctor testified she was not even a candidate for surgery. Instead, Buckley sought to recover thousands of dollars for evaluations, MRI's, myelograms, CT scans and other diagnostic tests that all showed there was nothing much, if anything, wrong with her. Unlike Hubbard, who incurred nearly $15,000 in lost wages while recuperating from surgery, Buckley had been unemployed for over a year and her own physicians testified she could work. Accordingly, the Circuit Court had even more reasons to deny Buckley's motion for additur than the Circuit Court in *Hubbard.*

While Buckley fails to mention the *Hubbard* case in her brief, she argues the case of *Thompson v. Dung Thi Hoang Nguyen*, No. 2009-CA-001147-COA, 2002 WL 34591654 (Miss. Ct. App. Feb. 1, 2011) shows she is entitled to an additur. App. Br. at 24-27. Buckley's assertion that the instant case "practically mirrors" the *Thompson* case is further proof of her

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other causes and factors. Her treating physician, Dr. Winkelmann, testified that Miller's five percent permanent impairment rating was consistent with Miller's injuries that existed prior to the subject accident. We find that the trial court did not err in denying Miller's motions; thus, this issue is also without merit.

bizarre disconnect with reality and unusually inaccurate interpretation of facts. While *Thompson* is similar to the instant case in that it involves an automobile accident in which a jury rendered a small verdict in favor of a plaintiff, it is remarkably dissimilar in that the plaintiff presented overwhelming and unrefuted evidence that her injuries were caused by the automobile accident. The Mississippi Court of Appeals catalogued the evidence presented by the plaintiff:

> Thompson testified to being injured as a result of the automobile accident. Thompson stated that she did not have neck or shoulder pain prior to the accident. Dr. Martin confirmed that there had been no complaints prior to the accident and that Thompson made an appointment with his office four days after the accident. During the initial appointment, Dr. Martin documented abrasions typical of seat-belt trauma, referred Thompson to Physical Therapy Solutions for physical therapy in order to ease her neck pain, and prescribed an MRI that resulted in the discovery of disc degeneration. Dr. Martin testified to a reasonable degree of medical certainty that Thompson's injuries were "caused or at least aggravated by that accident." Godfrey and Bosarge, both treating physical therapists, testified that Thompson suffered from disc pain and muscle spasms. Finally, Dr. Kesterson testified that Thompson suffered from degenerative disc disease prior to the accident, but the symptoms requiring the two surgeries were related to the accident. Dr. Kesterson testified that after he performed two surgeries, he referred Thompson to Physical Therapy Solutions for post-operative rehabilitation.

Id. at *5.

It appears the defendant's sole defense in that case was the plaintiff's car had no visible damage and she did not complain of an injury immediately after the accident. *Id.* at *2. It does not appear the defendant presented any expert testimony (or any other evidence) refuting the plaintiff's expert testimony that she "had a pre-existing condition, which was asymptomatic until the auto collision," that her "asymptomatic disc degeneration was aggravated by the automobile collision," that she "incurred medical expenses in excess of $234,316.49 in treating the previously asymptomatic injury," that her "medical expenses were . . . reasonable and necessary," and that she "could now expect long-term problems from the previously asymptomatic injury." *Id.* at *2, *4. The Court of Appeal's decision to remand for a new trial on damages was also based on the fact that "continuous requests [for information] from the jury

while in deliberation, suggests that the jury was confused by the jury instructions or departed from its oath, and the verdict is a result of bias, passion, and prejudice." *Id.* at *2-*3, *6.

As previously shown, the evidence presented by Buckley in the instant case is nothing like the well supported and unrefuted evidence presented by the plaintiff in *Thompson.* The evidence presented by Buckley not only failed to show she was entitled to damages from Appellees, it actually undermined her claim at just about every turn. To the extent Buckley elicited any favorable testimony or evidence at trial, Appellees effectively rebutted that evidence on cross-examination by showing it to be false, misleading, and/or completely fabricated. Moreover, it was Appellees – not Buckley – who submitted the unrefuted medical testimony that her purported injuries were *not caused* by the automobile accident with Pounds. The record not only shows a complete lack of support for Buckley's claim for an additur, it shows quite overwhelmingly that Buckley received more than she should have. Accordingly, the facts and holding of the *Thompson* case are wholly inapplicable to the instant case and this Court should affirm the Circuit Court's denial of Buckley's motion for an additur based on the facts and holding of the *Hubbard* case.

CONCLUSION

For the foregoing reasons, Appellees respectfully request this Court to affirm the Judgment of the Circuit Court.

THIS, the 6 day of June, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Paul M. Ellis, hereby certify that I have this day caused a true and correct copy of the foregoing Brief of Appellees to be delivered by United States mail, postage prepaid, to the following:

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CIRCUIT COURT JUDGE

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SO CERTIFIED, this 10th day of June, 2011.

PAUL M. ELLIS

CERTIFICATE OF FILING

I, Paul M. Ellis, certify that I have had hand-delivered the original and three copies of the Brief of Appellees and an electronic diskette containing same on June 27, 2011 addressed to Ms. Kathy Gillis, Clerk, Supreme Court of Mississippi, 450 High Street, Jackson, Mississippi 39201.

PAUL M. ELLIS

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