2010-CA-01443 RT

CERTIFICATE OF INTERESTED PERSONS

Torsha Buckley v. Herley R. Pounds, II and Pearl River Valley Electric Power Association, 2010-CA-00683

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28(a)(1) have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Torsha Buckley	Appellant
Herley R. Pounds, II Pearl River Valley Electric Power Association	Appellees
Carlos E. Moore	Attorneys for the Appellant
Tangala L. Hollis	
LeAnn W. Nealey, Esq.	Attorneys for the Appellees
Patrick Bergin, Esq.	
Anthony A. Mozingo	Circuit Court Judge

Carlos E. Moore

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STATEMENT OF THE CASE AND RELEVANT FACTS FOR ISSUES ON REVIEW

This is a personal injury case on appeal from the Order of Judgment, and the Order Denial of the Circuit Court of Jefferson Davis County, wherein liability had been admitted prior to trial, and the jury rendered a verdict for Appellant Buckley for $15,000.00.

On or about January 2, 2008, Appellant Torsha Buckley (hereinafter Appellant Buckley) was stopped at a red light behind another vehicle at the intersection of Columbia Avenue and John Street in Prentiss, Mississippi. Appellee, Herley R. Pounds II, was driving a vehicle belonging to Pearl River Valley Electric Power Association, traveling Northbound on Columbia Avenue, and negligently collided into the rear of the Appellant Buckley's vehicle. Appellant Buckley suffered injuries as a result of the subject collision.

As a result of the foregoing, Appellant Buckley filed her original Complaint on the basis of motor vehicle negligence and general negligence in the Circuit Court of Jefferson Davis County against Appellee Herley R. Pounds II on or about August 26, 2008. (Rec. p.13-14). Appellant Buckley filed her Amended Complaint against Appellees Herley R. Pounds II and Pearl River Valley Electric Power Association (EPA) (hereinafter Appellees) on or about September 19, 2008. (Rec. p.17-18). Appellees filed their Answer to Appellant Buckley's Amended Complaint on or about November 25, 2008, wherein they admitted Appellant was stopped at a red light at the intersection of Columbia Avenue and John Street in Prentiss, Mississippi, Appellee Pounds was operating a vehicle owned by Appellee EPA, traveling Northbound on Columbia Avenue,

and Appellee Pounds negligently collided into the rear of Appellant Buckley's vehicle. (Rec. 23). Appellees also admitted that Appellee EPA was vicariously liable for Appellee Pounds' negligence under the theory of *respondeat superior*. (Rec. 23).

Appellant Buckley subsequently filed a motion for partial summary judgment based on Appellees' admission of negligence. An Agreed Order was entered granting Appellant Buckley's motion for partial summary judgment, leaving only the issue of damages to be determined. (Rec. 32).

The instant matter subsequently came on trial before a twelve (12) person jury and the Honorable R.I. Prichard, III, commencing on July 28, 2010, and ending July 29, 2010. An Order of Judgment reflecting the $15,000 verdict was entered August 11, 2010. (Rec. 280). Appellant Buckley filed a Motion for Judgment Not Withstanding the Verdict (JNOV), or in the Alternative, Motion for a New Trial on or about August 5th and 9th of 2010. (Rec. 287-288). Appellant Buckley also filed a Motion for Additur on or about August 19, 2010. (Rec. 282). Judge Prichard erroneously denied the motions, and entered an Order of Denial reflecting the same on August 23, 2010. (Rec. 290-292).

Appellant Buckley has now filed her Primary Brief, and Appellees Pounds, et al. have since filed their Response Brief. In said brief, Appellees Pounds, et al. make several inaccurate statements and false allegations. For instance, Appellees Pounds, et al. allege that Dr. Howard T. Katz, one of Appellant Buckley's evaluating physicians, never prohibited Appellant Buckley from working. *See* Appellee Br. at 5. However, Dr. Katz specifically testified during his sworn deposition that Appellant Buckley could not return to work as a CNA (Certified Nurse's Assistant), as he restricted Appellant Buckley to

light duty, and the work of a CNA is "above medium level." (Tr. Ex. 11 at 60:2-6). Further, regardless of Appellees Pounds, et al.'s redundant and asinine argument that the amount of damage to Appellant Buckley's vehicle is somehow indicative of the pain she suffered as a result of the subject accident, such an argument is without merit, and irrelevant. According to the Mississippi Supreme Court, the evidence is viewed in the light most favorable to the verdict awarding damages, and all reasonable inferences are given thereof. *Purdon v. Locke*, 807 So.2d 373 (Miss. 2001). There is not a shred of case law or other legal authority providing the proposition that visible damage to one's vehicle must be of a certain amount or significance in order to prove a person's injuries, and allocation of damages. While the burden of damages is on the plaintiff, Mississippi does not require that the damages be proven with absolute certainty. The plaintiff will not be denied a substantial recovery if he has produced the best evidence available, and it is sufficient to afford a reasonable basis for estimating his loss. *Raines v. Bottrell Ins. Agency, Inc.*, 992 So.2d 642 (Miss. App. 2008). Appellant Buckley produced more than sufficient evidence in the form of her medical and economic analysis evidence to establish a reasonable basis for her loss. Appellees' Pounds, et al. further their flawed argument by referencing the testimony of Officer Cooley.

In an attempt to bolster their weak and irrelevant argument that the alleged lack of significant physical damage to Appellant Buckley's vehicle evidences lack of injury, Appellees Pounds, et al., cite the unreliable testimony of Officer Cooley (the police officer who investigated the subject collision). While Appellees refer to Officer Cooley's

testimony during the trial that Appellant Buckley "did not need medical attention,"[1] Officer Cooley is hardly qualified to make such an allegation, and his opinion does not even reach the level of speculation. Further, Officer Cooley is grossly unreliable, as he admitted under oath to having indicated on the accident report that Appellant Buckley's car sustained "heavy damage," yet he testified that there were allegedly no dents on Appellant Buckley's car, and no damage the taillights or bumper. When asked about this obvious conflict in testimony by Appellant Buckley's counsel, Officer Cooley's explanation was that he notes "heavy damage" on all of the accident reports he compiles. Officer Cooley's opinions and testimony regarding the damage to Appellant Buckley's vehicle, and her need for medical attention are untrustworthy and baseless.

Finally, the award of $15,000.00 to Appellant Buckley was grossly unjust, and completely contrary to the evidence presented.

[1] *See* Appellee Br. at 8.

SUMMARY OF THE ARGUMENT

In their Response Brief, Appellees claim that Appellant Buckley failed to preserve her assignments of error for appeal. Nothing could be further from the truth, as Appellant Buckley preserved each and every assignment of error demonstrated in her Primary Brief, either in open court, or in chambers. Further, Appellant Buckley suffered extreme prejudice as a result of said errors, as effectively demonstrated in her Primary Brief.

Contrary to Appellees' claim that Appellant Buckley failed to raise her objection regarding Dr. Guy T. Vise's Independent Medical Evaluation (IME) not being admitted into evidence, Appellant Buckley's counsels raised said objection in Judge Prichard's chambers, and argued that the report should be admitted, as it proved that Appellant Buckley's physical disabilities and current physical complaints were proximately caused by the subject accident. Causation is one the key elements Appellant Buckley was charged to prove, in order to establish damages. While Appellees claim Buckley was not prejudiced because the jury heard from other physicians who treated and evaluated Buckley, said claim is completely false, as Appellees' subsequent medical expert (Dr. Vise was Appellees' initial expert before he passed away) never once treated or evaluated Appellant Buckley. In fact, despite Dr. Gandy being the physician who took over Dr. Vise's practice, and certainly being competent to testify to the findings of Dr. Vise (who actually evaluated Appellant Buckley first-hand), the jury was prohibited from hearing credible, relevant testimony demonstrating causation. Appellant Buckley was undoubtedly prejudiced because of this error of the trial court, as well as the trial court's error in excluding the report of Dr. Glenda Glover, the economic loss expert.

It should first be noted that Appellees are hopelessly confused regarding the events surrounding the exclusion of Dr. Glover's report. Appellant Buckley never agreed to the exclusion of Dr. Glover's report, as claimed by Appellees. *See* Appellee Br. at 9. It was only after the report was admitted without initial objection from Appellees, then was subsequently and untimely objected to, and then erroneously excluded, that Appellant Buckley consented to have the report marked for identification. After the report was erroneously excluded, consenting to it being marked for identification was the only option Appellant Buckley had. Further, Dr. Glover testifying about the findings in her report did not justify her report being excluded.

Finally, regardless of Appellees' counsel shameful attempt to characterize their misrepresentation of the law to the jury as a "passing comment" regarding liability for preexisting conditions, the jury's unjust verdict demonstrates that said misrepresentation led the jury render a verdict that was contrary to the law, facts, and evidence in the case. The record indicates that Appellant Buckley did not receive remotely close to what she was entitled.

ARGUMENT

The Court can disturb a jury verdict if the Court finds that the damages are excessive or inadequate for the reason that the jury was influenced by bias, prejudice, or passion, so as to shock the conscience, or that the damages awarded were contrary to the overwhelming weight of credible evidence, and the Supreme Court is not authorized to disturb a jury verdict as to damages because it seems too high or too low. *Junior Food Stores, Inc. v. Rice*, 671 So.2d 67 (Miss. 1996).

In reviewing a trial court's grant or denial of an additur, the Court of Appeals applies an abuse-of-discretion standard of review. *Clark v. Deakle*, 800 So.2d 1227 (Miss. App. 2001).

I. The trial Court abused its discretion in excluding testimony regarding Dr. Guy T. Vise's treatment and/or evaluation of Appellant Buckley.

As previously demonstrated in Appellant Buckley's Primary Brief, testimony regarding Dr. Guy T. Vise's treatment and/or evaluation of Appellant Buckley was necessary, and his Independent Medical Evaluation (IME) report was trustworthy. While Appellees claim Dr. Vise's IME report was too speculative to be admitted, Dr. Vise's IME report and opinions were certainly more reliable than Dr. Gandy's opinions, as he formed his opinions regarding Appellant Buckley's injuries and conditions, without ever actually treating and/or evaluating Appellant Buckley first-hand. Additionally, it was not within the trial court's discretion to determine the credibility of Dr. Vise's testimony. The weight and credibility of expert testimony are matters for determination by the [jury]. *Hubbard ex rel. Hubbard v. McDonald's Corp.*, 41 So.3d 670 (Miss. 2010). The issue of credibility regarding Dr. Vise's medical opinions concerning causation was improperly

taken from the jury, and said error was prejudicial to Appellant Buckley. Further, Dr. Vise's medical records fall under the business record exception to the hearsay rule.

As previously demonstrated in Appellant Buckley's Primary Brief, medical records are an exception to hearsay, as they are business records. It is undisputed that Dr. Gandy took over Dr. Vise's practice after he passed away. Appellees' claim that Dr. Gandy's access to Dr. Vise's records does not meet the foundational requirements of business record exception; however, binding law disagrees.

As shown in Appellant Buckley's Primary Brief, the foundational requirements for admitting evidence under the business records exception are: 1) the statement is in written or recorded form; 2) the record concerns acts, events, conditions, opinions or diagnoses; 3) the record was made at or near the time of the matter recorded; 4) the source of the information had personal knowledge of the matter; 5) the record was kept in the course of regular business activity; and 6) it was the regular practice of the business activity to make the record. *Flowers v. State,* 773 So. 2d 309, 322 (Miss. 2000). In *Flowers,* the Mississippi Supreme Court held that person who is familiar with the contents, terms, and meaning of a form is competent to give testimony regarding the foundational requirements of the business record exception. *Id.* at 332-33 . All of the aforementioned foundational requirements were clearly met in the instant case. 1) Dr. Vise's medical records regarding Appellant Buckley were in written form; 2) they concerned acts, events, conditions, opinions or diagnoses; 3) the records were made shortly after the evaluation(s); 4) Dr. Vise and Dr. Gandy have personal knowledge of Appellant Buckley's physical condition; 5) the records were undoubtedly kept in the course of regular business activity; 6) and it was certainly the regular practice of the

business to make the subject medical records. Regardless of Dr. Gandy allegedly being unaware of Dr. Vise's medical records regarding Appellant Buckley, specifically his IME report of Appellant Buckley, Dr. Gandy was certainly competent to testify as to its contents, just as he was competent to testify as to the contents of the other medical records he was provided, when he rendered his opinion. "It is not necessary to call or to account for all participants who made the record." *Miss. Gaming Comm'n v. Freeman*, 747 So. 2d 231, 242 (Miss. 1999); Miss. R. Evid 803(6) cmt. It is only necessary that testimony concerning the source of these documents is offered by an individual "with knowledge who is acting in the course and scope of the regularly conducted activity." *Id.* Despite Appellees' irrelevant and improper characterization of Dr. Vise's IME report as outdated and incomplete, it was the jury's role to determine whether Dr. Vise's IME report was credible or "outdated."

II. The trial Court erred in initially granting Appellant's motion to admit evidence after no objection from lead counsel for Appellees, then overruling previous admission of evidence after co-counsel for Appellees objected, resulting in evidence being marked solely for identification.

Appellees central argument for Dr. Glenda Glover's report being excluded is that it would have improperly "enhanced" Dr. Glover's testimony. Even if that were true, that is not the primary assignment of error. If Appellees desired to make such an objection to the introduction of Dr. Glover's report into evidence, Appellees should have properly made such objection initially, and not *after* the trial Judge had previously admitted the report, due to the indication of no objection from the lead Appellees' counsel. As this Honorable Court has been previously advised, the instant matter is solely on damages. The jury needed to have Dr. Glover's report in-hand, while evaluating Appellant

Buckley's damages. As a result of the jury being denied all of the pertinent information, Appellant Buckley received an unjust verdict, constituting reversal of the jury's verdict, and reversal of the trial Court's Order denying Appellant Buckley's Motion for Additur.

III. The trial Court erred in not issuing *sua sponte* motion to strike Appellees' counsel's misstatement of the law during closing arguments, and/or not administering curative instruction to jury, after Appellant alerted Court regarding Appellees' counsel's misstatement of the law during closing arguments.

Despite Appellees' attempt to characterize their misstatement of the law during closing arguments as a "passing comment,"[2] the fact remains that Appellees' counsel intentionally misled the jury in an effort to prohibit Appellant Buckley from receiving a just verdict. Appellees' counsel stated the following:

> 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.
> (Tr. at 335).

The Appellees' primary defense to Appellant Buckley receiving damages was that she had a preexisting condition, and her current pains and complaints were due to the alleged preexisting condition. In telling the jury that Appellant Buckley "cannot get any money" if her pains are due to "something else that preexisted," Appellees' counsel blatantly contradicted binding law. Under tort law, the defendant must take the plaintiff as the defendant finds him. *Kennedy v. Illinois Cent. R. Co.*, 30 So.3d 333 (Miss. 2010). This misrepresentation was obviously an attempt at ensuring that Appellant Buckley received very little, if any, compensation for her injuries, and the misrepresentation was effective.

[2] See Appellee Br. at 18.

Despite the fact that Appellees failed to produce a shred of evidence rebutting that the medical treatment Appellant Buckley received following the subject accident was reasonable and necessary, the jury awarded only $15,000.00 to Appellant Buckley, who had incurred $43,422.11 in medical expenses at the time of trial. Appellant Buckley was clearly prejudiced by Appellees' counsel's statement and the unjust verdict is evidence of the effect of Appellees' counsel's prejudicial statement.

As previously stated, Counsel for Appellant Buckley objected via sidebar to Appellees' counsel's misstatement of the law; thus preserving the issue for appeal.

IV. Court erred in granting jury instructions, reading them aloud to the jury, then subsequently, manually striking and denying the instruction he had approved regarding apportionment of damages, which are supported by case law.

As previously demonstrated in Appellant Buckley's Primary Brief, whether Appellant Buckley was entitled to compensation despite an alleged preexisting condition was a genuine issue of material fact that the jury deserved to be properly **and fully** instructed on. During the conference in chambers regarding the jury instructions, Judge Prichard granted Appellees' counsel's motion to strike the jury instruction providing that the tortfeasor is liable for aggravating a pre-existing condition, for the portion of aggravation, or liable for the entire injury, if no such apportionment can be determined. *Koger v. Adcock*, 25 So.3d 1105 (Miss. App. 2010); *Harkins v. Paschall*, 348 So.2d 1019 (Miss. 1977); *Doe ex rel. Doe v. North Panola School Dist.*, 906 So.2d 57 (Miss. App. 2004). Not only was it error to initially grant Appellees' motion (as the instruction is supported by a wealth of binding case law) but it was also error to subsequently approve the instruction, read it aloud, and then manually strike the instruction after Appellees'

counsel alerted the judge that he had read the instruction. While the crux of Appellees' case was that Appellant Buckley suffered from a preexisting condition, no clear evidence was presented showing what portion of Appellant Buckley's injuries, if any, were attributed to a preexisting condition. Therefore, the jury should have been properly and completely informed of all of their options regarding the allocation of damages when there is an allegation of a preexisting condition. The jurors were not properly instructed, Appellant Buckley was prejudiced as a result, and said error is reversible.

V. The trial Court erred in denying Appellant's Motion for Additur.

Under Mississippi Code Annotated § 11-1-55 (Rev.2002):

> The supreme court or any other court of record in a case in which money damages were awarded may overrule a motion for a new trial or affirm on direct or cross appeal, upon condition of an additur or remittitur, if the court finds that the damages are excessive or inadequate for the reason that the jury or trier of facts was influenced by bias, prejudice, or passion, or that the damages awarded were contrary to the overwhelming weight of credible evidence. If such additur or remittitur be not accepted then the court may direct a new trial on damages only. If the additur or remittitur is accepted and the other party perfects a direct appeal, then the party accepting the additur or remittitur shall have the right to cross appeal for the purpose of reversing the action of the court in regard to the additur or remittitur.

As this Honorable Court is well aware, Appellant Buckley's trial was one solely of damages. Liability had been admitted; therefore, the amount of damages was the only issue to be determined. Appellees presented **no evidence** rebutting Appellant Buckley's evidence of medical expenses incurred as a result of the subject incident; therefore, the jury should have deferred to Appellant Buckley. While testimony by a party that bills incurred were as a result of injuries complained of is *prima facie* evidence that bills were

necessary and reasonable, opposing party may rebut necessity and reasonableness of the bills by proper evidence, and the ultimate question is then for the jury. *Green v. Grant*, 641 So.2d 1203 (Miss. 1994). Without any evidence from Appellees to rebut the medical expenses Appellant Buckley incurred as a result of the subject incident, the medical treatment associated with the expenses should have been found to be reasonable and necessary, making Appellant Buckley entitled to damages equal to, at least, her medical expenses. A $15,000.00 verdict in case where liability is admitted, and the undisputed medical expenses exceed $40,000.00, is hardly justice. Just as the Court held in *Thompson v. Dung Thi Hoang Nguyen*, Cause No. 2009-CA-01147-COA (Miss. App. 2011), so should this Honorable Court hold, that the discrepancy between the amount of damages requested, and the verdict, coupled with the errors proven herein, the trial court erred in denying Appellant Buckley's Motion for Additur, or in the Alternative, for a New Trial.

CONCLUSION

For the foregoing reasons, the Appellant, Torsha Buckley, is asking this Honorable Court to reverse the jury verdict of the Jefferson Davis Circuit Court, and the trial court's denial of Appellant Buckley's Motion for Additur, and to remand the case to the Jefferson Davis Circuit Court for a new trial on damages. Appellant Buckley also prays for all other general relief this Honorable Court deems to be fair and just.

Respectfully submitted, this the 25th day of July, 2011.

Carlos E. Moore

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CERTIFICATE OF SERVICE

I, Carlos E. Moore, Appellant's attorney, do hereby certify that I have this day mailed via United States mail, postage prepaid, a true and correct copy of the above and foregoing document to the attorneys for Appellees:

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Honorable Anthony A. Mozingo
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THIS, the 25th day of July, 2011.

Carlos E. Moore

Carlos E. Moore, Esq.
Tangala L. Hollis, Esq.