2010-CA-01493 T

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

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STATEMENT OF THE CASE

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).

SUMMARY OF THE ARGUMENT

Liability was admitted in the instant matter, thus, a determination of damages was the only issue to be resolved. Appellant Buckley incurred severe physical injuries as a result of the subject collision, which resulted in pain and suffering, a significant loss in wage earning capacity, and a substantial amount of medical expenses. Appellant Buckley incurred approximately $43,422.11 in medical expenses. The jury's award of only $15,000.00 was as a result of numerous errors of the trial Court, especially regarding pertinent evidence.

Judge Prichard erred in excluding testimony regarding Dr. Guy T. Vise's treatment and/or evaluation of Appellant Buckley. While Dr. Vise died prior to trial, Appellant Buckley's other treating and/or evaluating physician(s) had access to his records, and should have been allowed to testify thereto. Also, Judge Prichard erred in initially admitting evidence of Appellant Buckley's expert witnesses after no objection from lead counsel for Appellees, then overruling the admission, after co-counsel for Appellees objected, resulting in evidence being marked solely for identification. Judge Prichard also erred regarding the submission of jury instructions.

Judge Prichard erred in not administering curative instructions to the jury after Appellant Buckley's counsels alerted Judge Prichard that counsel for Appellees conveyed a misstatement of the law regarding damages to the jury during closing arguments. Additionally, the trial Court erred in not administering a *sua sponte* motion to strike Appellees' counsel's misstatement of the law during closing arguments. Judge Prichard also erred in granting jury instructions, reading them aloud to the jury, then subsequently,

manually, striking and denying the instructions he had approved regarding apportionment of damages, which are supported by case law.

Finally, the trial Court erred in denying Appellant Buckley's Motion for Judgment Not Withstanding the Verdict (JNOV), or in the Alternative, for a New Trial, and Appellant Buckley's Motion for Additur, or in the Alternative, for a New Trial.

ARGUMENT

Court can disturb a jury verdict if court finds that 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 Supreme Court is not authorized to disturb 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.

" 'Abuse of discretion' is found when the reviewing court has a definite and firm conviction that the court below committed a clear error of judgment and the conclusion it reached upon a weighing of the relevant factors." *Howard v. TotalFina E & P USA, Inc.*, 899 So.2d 882 (Miss. 2005). "When an appellate court reviews a decision that is within the trial court's discretion, it first asks if the court below applied the correct legal standard, and if the trial court applied the right legal standard, then the appellate court will affirm a trial court's decision, unless there is a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon weighing of relevant factors." *Scoggins v. Ellzey Beverages, Inc.*, (Miss. 1999). One of the decisions within the trial court's discretion is the admission of evidence. The admission of pertinent and significant evidence has a profound effect on the outcome of a case, particularly, a case that is being tried before a jury. In the instant matter, Appellant

Buckley had been treated by several physicians concerning her physical condition. Evidence of her treatment and her evaluations were pertinent to the jury's assessment of her compensatory damages. Judge Prichard abused his discretion when he excluded testimony regarding Dr. Guy T. Vise's treatment and/or evaluation of Appellant Buckley.

Appellees' counsels designated Dr. Guy T. Vise as one of their experts, who conducted an Independent Medical Evaluation (IME) of Appellant Buckley on or about November 19, 2009. Sometime in December of 2009, Dr. Vise passed away; however, Dr. David Gandy took over Dr. Vise's practice, and had access to all of Dr. Vise's records, including the IME Dr. Vise conducted of Appellant Buckley. Appellees subsequently sought leave of the trial Court to exclude testimony regarding Dr. Vise's evaluation of Appellant Buckley, alleging his findings were not based upon sufficient facts or data, and that his report was hearsay. However, not only was Dr. Vise's IME an exception to the hearsay rule, his findings were clearly based upon sufficient facts and data. "Two underlying reasons for any exception to hearsay rule are necessity for the exception, and circumstantial guaranty of trustworthiness of offered evidence." *Hercules, Inc. v. Walters*, 434 So.2d 723 (Miss. 1983). The instant matter is analogous to *Hercules, Inc. v. Walters*.

In *Hercules*, Mr. Robert J. Walters was employed by Hercules in 1945, and was injured on December 19, 1951, when he tripped and fell. *Hercules*, 434 So.2d 723, 724. He was treated by Dr. T.E. Ross at the Methodist Hospital Clinic in Hattiesburg, Mississippi. *Id.* Dr. Ross filed a surgeon's preliminary report in duplicate, with one copy being retained at the Hattiesburg Plant of Hercules, and the other copy being filed at the home office. *Id.* Dr. Ross' final report showed that he rendered first aid to Walters on

December 19, 1951, with office visits on December 28, 1951, January 9 and 15, 1952. *Id.* The report also showed that Walters was discharged with no disability. *Id.* Dr. Ross died three or four years before the workers' compensation hearing. *Id.*

At said hearing, Mrs. Margaret Cargill, a nurse, testified for Hercules. *Id.* Cargill testified that she worked for Dr. Ross in the afternoons after she got off from work at Hercules. *Id.* at 725.

In or about 1976, Walters sought to retire from Hercules, but desired to have his wrist checked before he retired. *Id.* Walters was set up with an appointment to see Dr. William G. Giles, who discovered a mass on Walters' left wrist, and diagnosed Walters as having severe degenerative arthritis. *Id.* Dr. Giles was shown the report of Dr. Ross and testified that if all the information contained in Dr. Ross' report was true, Walters' problem with his wrist was a result of a fracture of the wrist sustained nine years before his December 1951 work accident, and not from a sprain. *Id.* However, there were no records available at the hospital prior to 1951. *Id.*

Hercules filed a final report and settlement receipt with the Workmen's Compensation Commission on July 20, 1978. *Id.* The report showed that it had paid Walters $4,200 compensation for 25 percent loss of the use of the left wrist, $300 for temporary total disability, and medical, hospital and other expenses in the amount of $1,692.93. *Id.* Walters filed a motion to controvert on February 7, 1979. *Id.*

The administrative judge denied Walters' claim, holding that his current medical problem with his wrist was due to an old fracture which occurred before Walters' employment with Hercules. *Id.* This order was affirmed by the full Commission, and Walters appealed to the Circuit Court of Forrest County, which held that it was error to

admit the report of Dr. Ross into evidence as hearsay, and for the additional reason that the report of Dr. Ross was inadmissible because it was neither reliable nor trustworthy. *Id.* However, the Mississippi Supreme Court held that Dr. Ross' records were an exception to the hearsay rule, and his records were trustworthy.

The *Hercules* Court held that the 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.* at 727. Under *Hercules*, the Circuit Court of Jefferson Davis County should have held that Dr. Vise's IME report of Appellant Buckley was a necessity, and there was a circumstantial guaranty for the trustworthiness of his report. The IME report was certainly necessary, as it was developed by a physician who actually treated or evaluated Appellant Buckley, and who was certainly in a better position to render a reliable opinion. It is clear that the Appellees sought to exclude Dr. Vise' IME report because it was detrimental to their case, as the report substantiated that Appellant Buckley's physical disabilities and current physical complaints were proximately caused by the subject accident. There is no other reasonable explanation that counsel for the Appellees would seek to exclude the evidence of their *own* initial expert. Further, even if Dr. Vise's reports are declared as hearsay, 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.

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted

business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness or self-authenticated pursuant to Rule 902(11), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. *Miss. R. Evid. 803(6), Records of Regularly Conducted Activity.*

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 .

Under Rule 803(6), the focus is properly placed on the time period when the documents were created, the trustworthiness of the documents, and whether their creation was in the regular course of business. "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.* As demonstrated above, the records of a deceased or retired physician are passed on to the physician who takes over the practice, in the regular course of business. Therefore, Dr. Vise's records regarding Appellant Buckley, particularly, his IME, should not have been excluded, as Dr. Gandy was competent to testify as to their contents, and to authenticate the documents.

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.

The admissibility and relevancy of evidence is within the discretion of the trial court and, absent an abuse of that discretion, the trial court's decision will not be disturbed on appeal. *Reynolds v. State,* 784 So. 2d 929, 932 (Miss. 2001). "As long as the trial court remains within the confines of the Mississippi Rules of Evidence, its decision to admit or exclude evidence will be accorded a high degree of deference." *Johnston v. State,* 567 So. 2d 237, 238 (Miss. 1990). Additionally, "the admission or exclusion of evidence must result in prejudice or harm, if a cause is to be reversed on that account." *Jackson v. State,* 594 So. 2d 20, 25 (Miss. 1992). In only marking the economic report and resume of Dr. Glenda Glover for identification, and not admitting the same into evidence, Appellant Buckley was prejudiced, and harmed as a result.

In the instant matter, counsel for Appellant attempted to admit the report and resume of economic expert Dr. Glenda Glover into evidence during Dr. Glover's testimony. After counsel for Appellant had properly laid the foundation for said evidence, authenticated it, and obtained no objection from lead counsel for Appellees, the trial

Court granted counsel for Appellant's motion to admit the report and resume. Subsequent to the trial Court's admission of the evidence, second chair counsel for the Appellees objected to the admission of the evidence as duplicative, and the report and resume were only marked for identification. As a result, the jury was only allowed to hear testimony of Dr. Glover's report, which demonstrated Appellant Buckley's loss of earning and/or earning capacity, and was a significant element of Appellant Buckley's damages to be evaluated by the jury. Appellant Buckley was severely prejudiced in the trial Court's overruling itself, after initially admitting the evidence, in that the jury was deprived of the opportunity to have all of the pertinent documentation to evaluate Appellant Buckley's damages. As the trial was one solely of 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.

The trial judge is in the best position to determine if an alleged objectionable remark has a prejudicial effect. *Roundtree v. State*, 568 So. 2d 1173, 1177 (Miss. 1990). Furthermore, this Court has held that "when the trial judge sustains an objection to testimony and he directs the jury to disregard it, prejudicial error does not result." *Estes v. State*, 533 So. 2d 437, 439 (Miss. 1988). The jury is presumed to understand that the court disapproves of any testimony when an objection is sustained. *Id.* at 439. If

sustaining the objection alone is considered to be inadequate to remove the alleged prejudicial effect of the objected matter from the minds of the jury, then the court must be requested to instruct the jury to disregard the matter. *Anderson v. Jaeger*, 317 So. 2d 902, 906 (Miss. 1975). If opposing counsel does not consider the sustained objection to be adequate, then the trial court should instruct the jury to disregard the matter, otherwise there is no error. *Marks v. State*, 532 So. 2d 976, 981 (Miss. 1988); *General Motors Corp. v. Pegues, 738 So. 2d 746, 754 (Miss. Ct. App. 1998).* In the instant matter, it was not testimony that counsel for Appellant objected to, but statements of counsel for Appellees during his closing arguments. As a result of Appellees' counsel's erroneous misstatement of the law, Appellant Buckley was prejudiced.

In the closing argument a prosecutor is allowed to argue evidence that has been admitted. *Brooks v. State*, 763 So. 2d 859, 864 (Miss. 2000). However, "arguing statements of fact that are not in evidence or necessarily inferable from it[,] which are prejudicial to the defendant[,] is error." *Id. Dancer v. State*, 721 So. 2d 583 (Miss. 1998); *Banks v. State*, 725 So. 2d 711 (Miss. 1997). This Court does not condone the prosecution stating matters not in evidence and potentially causing the jury to disfavor the defendant. *Brooks*, 763 So.2d at 864; *Banks*, 725 So.2d at 711. The test for determining if improper argument by the prosecutor to the jury requires reversal is 'whether the natural and probable effect of the improper argument of the prosecuting attorney is to create an unjust prejudice against the accused as to result in a decision influenced by the prejudice so created." *Brooks*, 763 So. 2d at 864 (quoting *Davis v. State*, 660 So. 2d 1228, 1248 (Miss. 1995)). While the instant matter was not a criminal trial, the test under *Brooks* remains applicable.

During his closing arguments, counsel for Appellees claimed that if Appellant Buckley possessed a pre-existing condition, she was not entitled to any compensation. This inflammatory statement is completely untrue and contrary to applicable, binding law. Prior to counsel for Appellees' closing arguments, counsels for both parties met with Judge Prichard to agree on jury instructions. During said meeting, counsel for Appellant Buckley submitted the following jury instruction:

> 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 bears the responsibility for the portion of the injury or the aggravation of the injury that they caused.
>
> You are instructed that one who injures another suffering from a preexisting condition is liable for the entire damage when no apportionment can be made between the preexisting condition and the damage caused by the defendant.

Counsel for Appellees objected to the above jury instructions, although counsels for Appellant Buckley provided counsels and Judge Prichard with the applicable case law authority, simultaneously with the instructions. Counsel for Appellant Buckley also provided the trial Court with a copy of *Koger v. Adcock,* 25 So.3d 1105 (Miss. App. 2010), for its review, which practically mirrored the instant matter. However, after listening to counsel for Appellant Buckley's argument for the admission of the above jury instruction, and even after reviewing the case law precedent, the trial Court erroneously granted counsel for Appellees' motion to strike the above jury instruction. Therefore, when counsel for the Appellees stated in his closing arguments that Appellant Buckley was not entitled to compensation due to her alleged pre-existing condition (fibromyalgia),

the trial Court should have issued a *sua sponte* motion to strike Appellees' counsel's statement, as it is completely contradictory to existing and binding law. At the conclusion of closing arguments, counsel for Appellant Buckley alerted the trial Court to the matter.

Counsel for Appellant Buckley objected via sidebar, to Appellees' counsel's misstatement of the law that Appellant Buckley was not entitled to compensation if the jury found her to have a pre-existing condition. Appellant Buckley's counsel also asked the trial Court to issue a curative instruction to disregard Appellees' counsel's misstatement of the law. In response, Judge Prichard stated it was "too late" to do anything about the statement Appellees' counsel made; however, counsel for Appellant Buckley reminded Judge Prichard that the trial Court may issue a curative instruction to the jury at any time, before the jury reaches a verdict. However, Judge Prichard refused to do so, and thus, Appellant Buckley was prejudiced.

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.

The Circuit Court enjoys considerable discretion regarding the form and substance of jury instructions. Their overarching concern is that the jury [is] fairly instructed and that each party's proof-grounded theory of the case [is] placed before it. *Rester v. Lott,* 566 So.2d 1266, 1269 (Miss. 1990). The Mississippi Supreme Court is not so concerned with mere defects or inadequacies in particular instructions, as long as the aggregate of the instructions, taken as a whole, fairly, though not necessarily perfectly, express the applicable primary rules of law. *Payne v. Rain Forest Nurseries, Inc.,* 540 So.2d 35, 40-41 (Miss. 1989); *Detroit Marine Engineering v. McRee,* 510 So.2d 462,

465 (Miss. 1987); *Tippit v. Hunter*, 205 So.2d 267, 271 (Miss. 1967); *Walker v. Polles*, 248 Miss. 887, 896, 162 So.2d 631, 634 (1964). The appellate court views the evidence from the view of the party requesting the instruction, and accepts that a party has a right to have his theory of the case presented to the jury by instructions, provided there is credible evidence that supports that theory. *Alley v. Praschak Machine Co.*, 366 So.2d 661, 665 (Miss. 1979).

The refusal of a timely requested and correctly phrased jury instruction on a genuine issue of material fact is proper, only if the trial court -- and this Court on appeal - can say, taking the evidence in the light most favorable to the party requesting the instruction, and considering all reasonable favorable inferences which may be drawn from the evidence in favor of the requesting party, that no hypothetical, reasonable jury could find the facts in accordance with the theory of the requested instruction. *Lee v. State*, 469 So. 2d 1225, 1230-31 (Miss. 1985). Furthermore, the Mississippi Supreme Court has held that a party to an action is entitled to have the jury instructed regarding a genuine issue of material fact, so long as there is credible evidence in the record which would support the instruction. *Odier v. Sumrall*, 353 So.2d 1370, 1374 (Miss. 1978). In the instant matter, whether Appellant Buckley was entitled to compensation despite an alleged pre-existing condition was a genuine issue of material fact that the jury deserved to be properly instructed on.

As shown above, Appellant Buckley's counsel attempted to submit a jury instruction, supported by law, regarding Appellees' liability to Appellant Buckley, despite the jury's possible finding that Appellant Buckley suffered from a pre-existing condition. As stated above, during the conference 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). After said conference, counsels returned to Judge Prichard's chambers and Judge Prichard reviewed the jury instructions, including the one regarding a tortfeasor's liability for aggravating pre-existing conditions, granted them, and the conference was adjourned. After returning to the courtroom, Judge Prichard read the jury instructions aloud, including the instruction regarding a tortfeasor's liability for aggravating pre-existing conditions, and Appellees' counsel alerted Judge Prichard that he had done so, and Judge Prichard manually struck the instruction regarding a tortfeasor's liability for aggravating pre-existing conditions, and submitted the same to the jury. Not only was it error for the trial Court to initially disapprove the instruction (as it is adequately supported by law), but it was also error to subsequently *approve* it, read it aloud, and afterwards, manually strike the instruction. Striking the instruction after reading it aloud is certainly error in light of the fact that the trial court refused to issue a curative instruction to the jury after Appellant Buckley's counsel advised the Court that Appellees' counsel made a gross misstatement of the law concerning this very issue. As a result, Appellant Buckley was unduly prejudiced, and received an inadequate award of damages.

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.

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. During the trial, Appellant Buckley presented uncontested evidence that she had incurred approximately $43,422.11 in medical expenses, as a result of treatment following the subject car collision. 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). 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. Appellant Buckley also testified that she had forthcoming appointments for future medical needs, and thus had a claim for future medical expenses. Further, Appellant Buckley presented evidence of loss of future earnings in the amount of $445,241.00 from Dr. Glenda Glover, Appellant Buckley's designated economic expert. While Appellees did contest the amount of loss of future earnings, they neither presented evidence to rebut the figure, nor did they present an expert to rebut Appellant Buckley's

economic expert. Again, the jury should have deferred to Appellant Buckley's evidence. Despite the foregoing, the jury only awarded Appellant Buckley $15,000.00. Said award was grossly inadequate to even compensate Appellant Buckley for her uncontested medical expenses, much less her future medical expenses, pain and suffering, and loss of future earnings. The jury's award of damages for $15,000.00 was as a result of bias, prejudice, or passion, and was clearly contrary to the overwhelming weight of the evidence. As a result, Appellant Buckley filed a Motion for Additur, or in the Alternative, for a New Trial. Appellant Buckley's motion was erroneously denied. This issue is analogous to the recent holding in *Thompson v. Dung Thi Hoang Nguyen*, Cause No. 2009-CA-01147-COA.

In *Thompson*, Karen Thompson was rear-ended at a stop light by Dung Thi Hoang Nguyen. *Id.* at 1. Thompson filed suit against Nguyen seeking compensatory damages for injuries that allegedly resulted from the collision. *Id.* A jury sitting in Jackson County Circuit Court found in favor of Thompson, but awarded only a fraction of the requested damages. *Id.* Subsequently, Thompson filed a motion to reconsider and to vacate the judgment, which was denied. *Id.* Thompson appealed, raising the following issues: (1) whether the trial court erred by failing to grant her motion for a directed verdict on the issue of liability, (2) whether the trial court erred by failing to grant a motion for additur or, in the alternative, a new trial on damages alone, and (3) whether the trial court erred by refusing proposed peremptory jury instructions regarding liability, and refusing proposed jury instructions that explained how to calculate damages. *Id.*

Thompson filed her Complaint against Nguyen, alleging Nguyen negligently caused her vehicle to collide with Thompson's vehicle. *Id.* Thompson sought $234,316.49

in compensation for medical expenses, and compensation for her pain and suffering resulting from her injuries allegedly caused by the collision. *Id.* Thompson also provided an itemization of her medical expenses. *Id.* In her answer to the complaint, Nguyen admitted fault for the accident, but contested the issues of causation and the amount of damages. *Id.* The case went to trial. *Id.*

During the trial, Thompson presented evidence from her medical providers, including a doctor who testified that while Thompson suffered from a degenerative disc disease, the two surgeries Thompson underwent were related to the car accident. *Id.* at 2.

After several hours of deliberation, the jury returned a verdict in favor of Thompson, and awarded $9,131 in damages. *Id.* at 3. Thompson filed a motion for an additur or, in the alternative, for a new trial on damages only. *Id.* The trial court denied the motion, and Thompson appealed. *Id.*

The Court of Appeals of Mississippi held the following:

> Given the record before this Court, we are unable to say that Thompson received the most favorable result. The testimony was that Thompson had a pre-existing condition, which was asymptomatic until the auto collision. Thompson's asymptomatic disc degeneration was aggravated by the automobile collision. Thompson incurred medical expenses in excess of $234,316.49 in treating the previously asymptomatic injury. The medical expenses were testified to as being reasonable and necessary. Additionally, the testimony was unrefuted that Thompson could now expect long-term problems from the previously asymptomatic injury.
>
> *Id.* at 4.

The *Thompson* Court further held that there was a substantial discrepancy between the amount of damages proven by Thompson, and the amount of damages awarded by the jury. *Id.* The *Thompson* Court held that while the jury found in favor of Thompson, they only awarded a portion of Thompson's proven medical expenses. *Id.* According to the

Court of Appeals of Mississippi, Thompson was entitled to all past, present and future medical damages and compensation for pain and suffering proximately caused by Nguyen's negligence. *Id.* citing *Sharp v. Odom*, 743 So.2d 425 (Miss. App. 1999). The discrepancy between the uncontested medical expenses and the jury's award of damages suggested that the verdict may have been unresponsive to the evidence, further suggesting that Thompson did not receive the most favorable result. *Id.* citing *Dunn v. Jack Walker's Audio Visual Center*, 544 So.2d 829 (Miss. 1989). The *Thompson* Court also addressed the trial court denying Thompson's Motion for Additur, or in the Alternative, a New Trial.

During the trial, Thompson testified to being injured as a result of the automobile accident, stated she did not have neck or shoulder pain prior to the accident, and her general physician's testimony confirmed the same. *Id.* at 5. Despite Thompson's credibility being drawn into question, and the pictures of the vehicle taken after the accident (were introduced into evidence) documented no damage, the Court of Appeals of Mississippi found the jury's award to be unreasonable. *Id.* The *Thompson* Court held that the discrepancy between the amount of damages Thompson requested, $234,316.49, and the verdict, $9,131, coupled with the continuous requests from the jury while in deliberation, suggested that the jury was confused by the jury instructions or departed from its oath, and the verdict was a result of bias, passion, and prejudice. *Id.* at 6. Therefore, the Court of Appeals of Mississippi held that the trial court erred in denying Thompson's motion for a new trial on the sole issue of damages, reversed, and remanded the case for a new trial on the issue of damages. *Id.* The instant matter practically mirrors the *Thompson* case.

As held by the Court of Appeals of Mississippi in *Thompson*, so should this Honorable Court hold that Appellant Buckley did not receive the most favorable result. As in *Thompson*, Appellant Buckley presented irrefutable and uncontested evidence of $43,422.11 in medical expenses she had incurred as a result of the subject collision. Appellant Buckley also provided uncontested evidence of $445,241.00 in future earnings she lost as a result of the subject collision, calculated and provided by economic expert, Dr. Glenda Glover. Just as in *Thompson*, Appellees' central argument against the amount of damages sought by Appellant Buckley, was their theory that Appellant Buckley possessed a pre-existing condition. However, just as the Court of Appeals of Mississippi held in *Thompson*, so should this Court hold that the medical evidence demonstrates that the subject collision aggravated Appellant Buckley's alleged pre-existing condition, and Appellees are liable for said aggravation. Also similar to *Thompson*, Appellees attempted to misdirect the jury by showing photographs of Appellant Buckley's vehicle following the accident, and alleging the photos showed no visible signs of damage. However, despite the same strategy being attempted by the defendants in *Thompson*, the Court of Appeals of Mississippi found Thompson's award of $9,131, with medical expenses totaling $234,316.49, to be unreasonable. The same should be held in the instant matter. The uncontested evidence of medical bills totaling $43,422.11 and loss of future earnings totaling $445,241.00, coupled with the improper striking of Appellant Buckley's jury instruction regarding liability of tortfeasor for aggravating pre-existing condition, the trial judge's refusal to issue a curative jury instruction after Appellees' counsel's gross misstatement of the law regarding pre-existing conditions, and the trial judge's exclusion of testimony from one of Appellant Buckley's evaluating physicians, demonstrates

Appellant Buckley did not receive the most favorable result. Just as the *Thompson* Court held, so should this Honorable Court hold, 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 7th day of March, 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:

LeAnn W. Nealey, Esq.
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BUTLER SNOW
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Honorable Anthony A. Mozingo
Circuit Court Judge
P.O. Drawer 269
Purvis, MS 39475

THIS, the 7th day of March, 2011.

Carlos E. Moore

Carlos E. Moore, Esq.
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