

IN THE COURT OF APPEALS FOR THE STATE OF MISSISSIPPI

DALLAS B. MCCRARY

APPELLANT

V.

NO. 2011-TS-01206-COA

MARTI J. BRIDGES

APPELLEE

**APPEALED FROM THE CIRCUIT COURT
OF DESOTO COUNTY, MISSISSIPPI
CIVIL ACTION CV2009-0209**

BRIEF OF APPELLANT

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ORAL ARGUMENT IS REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

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

1. Dallas B. McCrary, Appellant;
2. Dawn Davis Carson, Russell B. Jordan, Hank Spragins and Hickman, Goza & Spragins, PLLC, Attorneys for Appellant;
3. Marti J. Bridges, Appellee;
4. A. Thomas Tucker, Jr., Tucker, Selden & Tucker, PLLC, Attorneys for Appellee;
5. Honorable Gerald Chatham, presiding trial judge.

HICKMAN GOZA & SPRAGINS, PLLC

By:



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STATEMENT OF ISSUES

- (1) Whether the trial court erred when it granted the plaintiff's motion for a new trial on the issue of damages, finding as a matter of law the plaintiff was entitled to an award of damages?
- (2) Whether the trial court erred when it denied the defendant's motion to reconsider granting new trial?

STATEMENT OF THE CASE

1. The nature of the case, the course of the proceedings, and its disposition in the court below

On July 15, 2009, the plaintiff, Marti J. Bridges (“Bridges”), filed a civil complaint against the defendant, Dallas McCrary (“McCrary”), in DeSoto County Circuit Court. R. 1:15-20.¹ The crux of the complaint alleged that McCrary operated his vehicle in a negligent manner, caused an accident to occur between his vehicle and the vehicle driven by Bridges, and that McCrary’s negligent conduct was the proximate cause of the injuries suffered by Bridges as a result of the accident. R. 1:15-20. In his Answer, McCrary admitted fault for causing the accident but specifically denied he was liable for damages, challenging Bridges’s assertion that he was the proximate cause of her injuries or re-injuries. R. 1:21-22, R. 1:37. Based on this, the trial court instructed the jury to find for Bridges and to award her reasonable damages based on the evidence they were presented by the parties. T. 1:85-86.

At trial, Bridges introduced the depositions of her treating physicians who testified on direct examination that she treated with them following the accident for neck and back pain and, based on the history they were provided, her injuries were related to the accident. T. 1:89, T. 1:93, T. 1:94, T. 2:153, T. 2:154. However, on cross-examination, McCrary presented substantial evidence proving that Bridges’s alleged damages were not causally related to McCrary’s conduct, namely Bridges’s significant history of chronic neck and back pain and her dishonesty and untruthfulness towards the defendant, the court, and the jury. R. 8:1070-71, R. 1:110-118, R. 2:265-276, R. 3:400-405. Thus, the opinions given by Bridges’s physicians on direct were, by

¹ Citations to documents within the clerk’s papers are as follows: R. [volume number]:[page(s)]. Citations to the transcripts are as follows: T. [volume number]:[page(s)]. The Record Excerpts of the Appellant are cited as R.E. [tab number].

nature, flawed, because she withheld material information related to her present condition during her treatment.

After three days, the jury returned a verdict for Bridges and awarded her \$0 damages. R. 7:1042, R.E. 10. Shortly thereafter, on May 17, 2011, Bridges filed a motion for new trial on the issue of damages. R. 7:1044, R.E. 8. The trial court heard arguments from counsel and granted Plaintiff's motion on July 28, 2011, finding that Bridges was entitled to damages as a matter of law. R. 8:1181, R.E. 3. After his motion to reconsider granting a new trial was denied, McCrary perfected his appeal to this Court. R. 8:1192, R.E. 2.

2. Statement of facts relevant to the issues presented for review

On November 6, 2007, while en route to a physical training session, McCrary, a young Marine, with three Marine-passengers, was involved in a light, low-speed automobile incident with Bridges. R. 1:33, T. 1:85. The facts of the incident are not disputed: both vehicles were stopped on the exit ramp from Interstate 55 to Church Road near Southaven, MS; Bridges's and McCrary's vehicles were one car length apart at this time; subsequently, McCrary released pressure from his gas pedal by lifting his foot, proceeded forward, was then alerted by a passenger that Bridges's vehicle was stopped, and quickly applied his brakes; as a result, McCrary's front fender "bumped" the rear fender of Bridges's vehicle. T. 1:85-86.

Both parties agree the contact between the vehicles was light. T. 1:85. McCrary testified that he was traveling no more than five miles per hour when his vehicle made insignificant contact with the rear of Bridge's automobile. R. 1:34. After contact, both parties exited their vehicles and spoke; Bridges communicated that she was not injured and did not need medical attention. R. 1:35. McCrary was also not injured in the incident and neither were his passengers. R. 1:35. There was no damage to McCrary's vehicle and very minor damage to rear of Bridges's

automobile. R. 8:1067. Both vehicles were drivable from the scene, and both parties left the scene following a police investigation. R. 8:1067.

a. Plaintiff's prior injuries

At the time of this incident, Bridges had a significant history of chronic neck and back pain. R. 7:1049-50 (Plaintiff's Motion for New Trial). More specifically, she received medical treatment for neck and back pain prior to, and relatively close to, the subject incident. R. 7:1049-50, R. 8:1071. In 2000, she was diagnosed with a disc herniation, documented by a MRI performed in March 2000. R. 7:1050. Her prior medical records note habitual complaints of neck and back pain. R. 2:268. In the year and six months prior to the accident, Bridges treated five times for neck and back issues with her primary care physician. R. 7:1049. And as recent as 2006, she made frequent trips to a local chiropractor with the same complaints, as well as a visit to the Memphis Spine Center the same year. R. 8:1080. As late as July 2007, only four months before the subject accident, her records at Southaven Internal Medicine document chronic neck and back pain. R. 8:1080.

But while receiving medical treatment following the subject accident, Bridges conveniently withheld this material information from her treating physicians, presenting only a history she felt was appropriate for treatment. By that means, each expert opinion on proximate causation was, *a priori*, in error.

Moreover, Bridges attempted to withhold her continued use of motorcycles – taking six road trips after the accident² – and horseback riding from the defendant, the court, and the jury. With the help of the social media outlet Facebook, McCrary was able to introduce evidence that she continued to take long motorcycle road trips and ride horses to the jury in the face of her prior testimony denouncing these activities. R. 4.586-89.

² R. 4.585.

b. Jury trial

Bridges filed suit against McCrary alleging, *inter alia*, that McCrary's negligence caused the accident, her injuries, and her resulting damages. R. 1:15-20. In short, Bridges alleged that McCrary's negligence was the proximate cause of her injuries and an aggravation of her preexisting health problems. R. 1:15-20, T. 1:51. McCrary subsequently admitted liability for bumping Bridges's automobile but firmly denied that Bridges was – in any way – injured as a result of the incident. R. 1:21-22, R. 7:1040-41. In other words, accepting that his conduct caused the minor contact between the two vehicles, McCrary denied that this act proximately caused any injury to Bridges, including any exacerbation of her preexisting conditions. R. 1:21-22, R. 7:1040-41. He vigorously contested causation and damages.

A jury trial was commenced on April 11, 2011. T. 1:36. In opening statements, Plaintiff's attorney, Mr. Thomas Tucker, smartly informed the jury of Bridges's significant history of back and neck issues. T. 1:51. Mr. Tucker further advised the jury that his client had, on multiple occasions since the accident, ridden horses, taken motorcycle trips, among other things, despite her steadfast contention that she was unable to work because of McCrary's conduct. T. 1:56. Riding horses and motorcycles, Bridges argued, was much less stressful to her neck and back than working as a chef. T. 1:57. Following opening statements, the trial court read to the jury the stipulations agreed to by the parties. T. 1:85. One particular stipulation read:

Dallas B. McCrary [] negligently caused the automobile which he was driving to come into contact with the automobile which the plaintiff, Marti J. Bridges, was driving. Defendant, Dallas B. McCrary, was then and there guilty of a negligent act or omission which caused the accident."

T. 1:85-86 (emphasis added).

As shown, the trial did not instruct the jury that Bridges was injured in the accident or that she was entitled to an award of damages, as neither party had stipulated to or admitted this before trial.

At trial, Bridges introduced the testimony of her treating medical providers by way of deposition: Walter Carnahan, M.D.³, Ashley Park, M.D.⁴, Kevin Foley, M.D.⁵, Mary Missak, M.D.⁶, and Kevin Olds, P.T.⁷ With these experts, Bridges intended to elicit testimony to prove that she was injured in the accident and, correspondingly, McCrary's conduct proximately caused her injuries – thus, he would be liable for damages.

Her treatment following the subject accident is unremarkable. The day following the accident, Bridges treated with a massage therapist, Bonnie Davis. R. 7:1050. The next day, she presented to Dr. Magdi Wassef, an internist with Southaven Internal Medicine. R. 7:1050. Ten days following the incident, Ms. Bridges presented for treatment to Dr. Walt Carnahan of the Carnahan Clinic, her primary care physician. Eventually, Dr. Carnahan referred the plaintiff to Dr. Ashley Park, an orthopedic specialist. Also during this same time, Ms. Bridges received treatment from Dr. Kevin Foley for neck and back pain.

On direct examination, most of Bridges's treating physicians related her injuries to the accident. One – Dr. Foley – testified that there simply was not enough information to reach an opinion to a reasonable degree of medical certainty. R. 3:404-05 (Deposition of Dr. Foley, p. 32-33). The others, though, on cross-examination, were presented substantial evidence that Bridges was not injured or reinjured in the subject accident. All of this led the jury to come to the reasonable conclusion that either McCrary was not the proximate cause of Bridges's alleged damages or that she was not really injured at all.

On direct, Dr. Carnahan testified that, based on the history he had been given by Bridges, her injuries and complaints were correlative to the accident. R. 1:106-08 (Deposition of Dr.

³ T 1: 88.

⁴ T 1: 93.

⁵ T 1: 94.

⁶ T 2:153.

⁷ T 2:154.

Carnahan, p. 34-36). However, on cross-examination, Dr. Carnahan's testimony was contradicted:

Q: Now, Mr. - - the plaintiff's counsel had advised us or advised you prior to me beginning my examination about Ms. Bridges's prior medical care. You - - when you first treated her in November, you had no inclination of any type of prior medical treatment that she had had. The only thing that you knew about was massage therapy?

A: And that she had been to a doctor that had given her muscle relaxers.

Q: Ok. Were you aware - -

A: And then the massage therapy.

Q: Were you aware that she had been diagnosed with a herniated disc at Campbell Clinic years before this accident happened?

A: Not that I'm aware of.

Q: Okay. Were you - - were you aware that she [sic] been treated by a chiropractor at Henry Chiropractic in 2006?

A: No.

R. 1:111-12 (Deposition of Dr. Carnahan, p. 39-40).

Q: Are you aware that Ms. Bridges was having pain in her neck that was causing her activities to be limited within a year of the time of the accident?

A: You mean a year after she - -

Q: Before the accident.

A: No.

R. 1:114 (Deposition of Dr. Carnahan, p. 42).

Bridges's dishonesty with her doctor was clear:

Q: Okay. And you were relying on [Bridges] to be truthful to you in providing the history of how the accident happened and what her injury was?

A: Yes.

R. 1:118 (Deposition of Dr. Carnahan, p. 46).

The same way, on direct examination, Dr. Ashley Park provided testimony relating Bridges's complaints to the subject accident. R. 2:259-60 (Deposition of Dr. Park, p. 33-34). Based on the history he was provided by Bridges, Dr. Park concluded, to a reasonable degree of medical certainty, her neck was not problematic prior to the accident (even though he noted she had a history of neck pain) and the 2007 incident aggravated her condition. R. 2:259 (Deposition of Dr. Park, p. 33). However, on cross, defense counsel revealed that Dr. Park did not review Bridges's prior MRI showing a disc herniation or even knew of this previous diagnosis prior to treatment. R. 2:265, 2:266. Extraordinarily, Dr. Park was unaware that Bridges previously treated with Campbell Clinic in 2000, had habitually complained of neck and back pain, or that she had seen a chiropractor as recent as 2006. R. 2:268-69. On cross-examination, defense counsel and Dr. Park had the following exchange:

Q: And we do know that her complaints made in 2008 are similar or consistent with what she's made in 2000 to Campbell Clinic?

A: Correct.

Q: In being able to form an opinion as to what was the cause of her neck pain, would it have been helpful for you to have known she was treating with a chiropractor as late as 2006?

A: I think it would be important because the history I got, like I said when I testified earlier, the question came up, a high degree of medical certainty that I feel that her problem was related to the motor vehicle accident. And I stated at the time that based on the history I received, so it all has to [sic] with the history that's being provided by the patient. If the patient is withholding information, then obviously its skews the opinion of the examining physician...The information that I got from her was...roughly correct...But I got no history of her getting further treatment as recent as 2006. So I didn't have that information at the time I saw her.

R. 2:275-76 (Deposition of Dr. Park, p. 49-50) (emphasis added).

Bridges also introduced the testimony of Dr. Foley, who stated, "[motor vehicle accidents] can aggravate preexisting problems, and there is certainly a possibility that the motor vehicle accident aggravated Ms. Bridges's problem." R. 3:397 (Deposition of Dr. Foley, p. 25) (emphasis added). More importantly, he continued, with "absolutely no records of her prior

visits for similar complaints, if they were present...I simply don't have enough information regarding her prior history to give you a different opinion than that." R. 3:397 (Deposition of Dr. Foley, p. 25). Dr. Foley ran into similar problems as the plaintiff's other treating physicians – lack of a complete, correct, and honest medical history. Unlike the other physicians, though, Dr. Foley acknowledged this on direct before giving the court his opinion on causation. In contrast, both Dr. Carnahan and Dr. Park causally linked the plaintiff's injuries to the incident on direct examination before they were aware of Bridges's misrepresentations. Thus, on cross examination, both doctors were confronted with irrefutable evidence that the plaintiff had attempted to conceal her significant medical history of neck and back issues in order to defraud her physicians. In sum, Bridges simply withheld material information related to her medical treatment in an effort to relate her doctor visits to the November 6, 2007 incident.

As shown, McCrary's evidence presented to the jury rebutted, refuted, and discredited Bridges's case.⁸ Furthermore, it became immediately apparent that, through her own efforts, Bridges suppressed (at a minimum): (a) a 2000 treatment with Campbell Clinic for severe neck pain; (b) a 2000 MRI showing "a large disc herniation at C6-7"; a 2006 trip to Henry Chiropractic where her pain scale was a 9 out of 10; (d) a 2006 treatment at Memphis Spine Center; (e) 5 visits to Henry Physical Therapy in 2006; (f) 2006 and 2007 trips to Southaven Internal Medicine for complaints of severe neck and back pain – the 2007 visit noting chronic pain; and – not to mention – (g) her six, long-distance motorcycle trips and continued horseback riding. R. 8:1076-1080. This does not prove that the plaintiff was or is a habitual liar. It is, however – at the very least – substantial and credible evidence that Bridges was not injured in the November 6, 2007, incident.

⁸ R. 8:1070-71, R. 1:110-118, R. 2:265-276, R. 3:400-405.

After a three-day trial, the jury returned a verdict for the plaintiff and awarded her \$0 damages. R. 7:1042, R.E. 10. On May 17, 2011, Bridges filed a motion for new trial on the issue of damages, arguing that the jury's verdict was against the overwhelming weight of the evidence or, alternatively, the result of bias, passion, and prejudice on the part of the jury. R. 7:1044-8:1066, R.E. 8. Relying on *Knight v. Brooks*, 881 So. 2d 294 (Miss. Ct. App. 2004), Bridges asserted that "the uncontradicted testimony of the plaintiff's treating doctors/expert witnesses who testified at trial by way of their depositions about the plaintiff's condition" proved she was, in fact, injured and deserved an award of damages. R. 7:1044, R.E. 8. McCrary filed a response, opposing a new trial on the issue of damages, and asked that the court uphold the jury's verdict. R. 8:1082, R.E. 7. In support, McCrary restated his position that Bridges was not injured in the subject accident and, consequently, she was not entitled to an award of damages. R. 8:1082, R.E. 7.

On July 14, 2011, the trial court heard arguments on the plaintiff's motion for a new trial. T. 3:341. After hearing arguments, the court, citing *Knight v. Brooks*, granted the plaintiff's motion, finding that the jury's award of \$0 damages was against the overwhelming weight of the evidence. T. 3:356, R.E. 3. In response, McCrary filed a motion to reconsider, again arguing that the jury's verdict was not the result of bias, passion, or prejudice or was not against the overwhelming weight of the evidence. R. 8:1119, R.E. 5. Four days later, on July 26, 2011, McCrary supplemented his motion to reconsider, distinguishing the case *sub judice* from *Knight v. Brooks* – the case Bridges and the trial court relied exclusively on to usurp the jury's role and, instead, substitute the court's judgment for that of the jury. R. 8:1172, R.E. 4. On August 9, 2011, after hearing arguments and reviewing the parties' motions, the trial court denied McCrary's motion to reconsider and ordered a new trial on the issue of damages. R. 8:1189, R.E. 2. In doing so, the court – essentially – directed a verdict in favor of the plaintiff, finding

that Bridges was entitled to at least some measure of damages as a matter of law. However, McCrary only admitted liability for causing the accident, not causing any injuries, and the trial court's ruling that the plaintiff must be awarded something was an improper usurpation of the jury's role as the trier of fact. Over three days, testimony was introduced to the jury to prove that the plaintiff was dishonest and untruthful with her treating physicians and that, as a result, their expert opinions were flawed. Moreover, substantial evidence was introduced showing the Bridges was not injured (at all) in the subject accident. After hearing all the testimony, the jury agreed. The trial court's peremptory instruction ordered the jury to find for the plaintiff – which they did – and to award a reasonable amount of damages to her based on the evidence presented at trial – which they also did. Under the circumstances, the trial court's commandeering of the jury's duty was an abuse of discretion. It is the responsibility of the jury to determine what evidence to believe and what evidence not to believe, not the trial court's. Simply put, the trial court disagreed with the jury's finding and improperly supplanted the jury's verdict for *its own*.

SUMMARY OF THE ARGUMENT

This case involves a personal injury suit brought by Marti J. Bridges against Dallas B. McCrary for damages allegedly caused when McCrary's vehicle bumped the rear of Bridges's automobile, while traveling less than five miles per hour. The accident produced no visible damage to the McCrary vehicle and very little to Bridges's. No party stated they were injured; both cars were drivable; and all parties went on about their day. However, Bridges eventually sought medical treatment for her chronic neck and back pain, which she alleges was aggravated in the accident. After incurring medical expenses related to this treatment, Bridges filed suit against McCrary, claiming that his negligence proximately caused her injuries and related damages. In response, McCrary admitted liability for causing the minor accident but firmly denied that Bridges was either injured or reinjured as a result of his conduct – contesting causation and damages.

At trial, Bridges introduced the expert testimony of her treating physicians in an effort to relate her damages to McCrary's conduct. More pointedly, on direct examination, her physicians testified on the extent of her injuries, the nature of her treatment, and their opinions as to causation. Each testifying physician – with the exception of one – opined on direct that the subject accident proximately caused Bridges's injuries. However, on cross-examination, McCrary introduced substantial evidence proving that Bridges withheld material information related to her preexisting condition from her physicians, including: her chronic neck and back pain, recent visits to the chiropractor, her habitual neck and back complaints, a 2000 disc herniation diagnosis, and prior neck and back treatment at Campbell Clinic. Consequently, each expert opinion given on direct was inaccurate, as they were made without the benefit of this information.

In the same way, Bridges tried to hide her extracurricular activities – motorcycle road trips and horseback riding – from the defendant, the court, and the jury, in an effort to bolster her case for recovery. However, the jury was presented with evidence of her continued motorcycle use and horseback trips, again proving that Bridges was not injured in the subject accident.

After a three-day trial, the trial court issued the jury a peremptory instruction, ordering the jury to find for Bridges and to award her reasonable damages, if any, based on the evidence presented to them. In accordance with the court's instructions, the jury returned a verdict in favor of Bridges and awarded her \$0 damages. In response, she filed a motion for a new trial on the issue of damages, arguing that the jury's verdict was against the overwhelming weight of the evidence or the result of bias, passion, or prejudice on the part of the jury. Relying on *Knight v. Brooks*, 881 So. 2d 294 (Miss. Ct. App. 2004), the trial court granted the motion, finding that the verdict was against the overwhelming weight of the evidence because, in the trial court's opinion, she had suffered an injury.

In doing so, however, the trial court misapplied *Knight v. Brooks* and overlooked the substantial evidence presented at trial proving that Bridges was not injured and that her alleged damages were not causally linked to McCrary's conduct. In addition, perhaps unknowingly, the trial court's order granting a new trial on the issue of damages, in essence, directed a verdict in favor of Bridges, finding as a matter of law she was entitled to some award of damages.

Because the trial court misapplied this Court's holding in *Knight v. Brooks* and, in the process, substituted its judgment for that of the jury's regarding the specific dollar amount a plaintiff was entitled to at trial, the lower court's order denying McCrary's motion to reconsider and granting Bridges a new trial on the issue of damages should be reversed and the jury's verdict reinstated.

ARGUMENT

I. THE TRIAL COURT'S ORDER GRANTING THE PLAINTIFF'S MOTION FOR NEW TRIAL ON THE ISSUE OF DAMAGES IS A FINAL JUDGMENT OF LIABILITY AND APPEALABLE

Ordinarily, an order granting a new trial is interlocutory in nature and cannot be appealed until a final judgment has been entered at the second trial. *See Sliman v. Nguyen*, 22 So. 3d 1173, 1174 (¶ 8) (Miss. 2009). Defense counsel acknowledged this before the lower court.⁹ “A brief review of Mississippi cases establishes that a trial court's grant of a new trial is interlocutory in nature and generally not appealable, since it is not a final disposition or a final judgment of the case.” *Id.* In *Sliman*, a defendant appealed a county court's granting of a motion for new trial under Rule 59. *Id.* at (¶ 9); *see also* M.R.C.P. 59. The circuit court, on appeal, affirmed, and the defendant appealed to the Supreme Court. *Id.* On review, the Supreme Court held that, because of the interlocutory nature of an order granting a new trial, it was error for the circuit court to review the county court's judgment. *Id.* at 1175 (¶ 12). In doing so, the Court quoted from *Standard Prods., Inc. v. Patterson*, 317 So. 2d 376, 379 (Miss. 1975). *Id.* at 1174 (¶ 8). *Sliman* stated:

Under the authority of a long line of cases, it is a general rule of this Court to respect and follow the holding of the trial judge with reference to his order in granting a new trial since such an order is not a final disposition of the case.

Id. (citing *Allstate Ins. Co. v. McGory*, 697 So. 2d 1171, 1174 (Miss. 1997) (quoting *Standard Prods.*, 317 So. 2d at 379); *see also Franklin v. Franklin*, 864 So. 2d 970, 975 (¶ 15) (Miss. Ct. App. 2003) (explanatory quotation omitted).

But the *Standard Prods.* opinion must be read in its entirety:

Under the authority of a long line of cases, it is a general rule of this Court to respect and follow the holding of the trial judge with reference to his order in granting a new trial since such an order is not a final disposition of the case. However, where it is evident that the trial judge failed to follow the general rule in

⁹ T. 3:357 (lines 15-17).

the light of the testimony, this Court will not hesitate to set aside the order improvidently granted and to reinstate the verdict of the jury.” *Standard Products, Inc. v. Patterson*, 317 So. 2d 376, 379 (Miss. 1975) (citing *Biloxi Electric Co., Inc. v. Thorn*, 264 So. 2d 404 (Miss. 1972) (citations omitted) (cases dealing with § 11-1-55) (emphasis added).

The decree of *Standard Prods.* is precisely what happened in the case *sub judice*: the trial court, in usurping the jury’s function and setting aside a responsive verdict, failed to follow the general rule and improvidently granted the plaintiff’s motion for new trial. Under the authority of *Sliman*, *McGory*, *Franklin*, and *Standard Prods.*, the trial court’s order in this case should be immediately appealable and, thus, reviewable by this appellate court.

The potential for endless litigation and uncertainty are the fruits which await a defendant under the circumstances in *Bridges*. Litigants – no matter who they are – have limited time and resources. Furthermore, litigation, no matter what stage, is an expensive endeavor, sometimes forcing parties to forgo pursuing a remedy in order to put supper on the table. Should this matter be reverted back to the circuit court, and the jury returns the exact same verdict – which the defendant predicts they will¹⁰ – it seems that, given how strongly the trial court felt before, it would have its hands tied and would grant the plaintiff a new trial on the exact same basis.¹¹ In fact, it was the trial court’s own opinion that *Bridges* was injured that led to the court granting the plaintiff’s motion. R. 8:1182, R.E. 3. Under these circumstances, the litigants would be right back where they started – minus the fees and costs attendant to the second trial. This senseless cycle could conceivably continue until one party simply runs out of money. The consequences, although seemingly unlikely, are genuine in existence and their merits deserve consideration by this Court.

¹⁰ As discussed, substantial evidence was presented demonstrating that *Bridges* was not injured in the November 6, 2007 incident.

¹¹ One commentator argues, at least on the federal level, that a trial court faced with an identical verdict as the one it set aside in the previous suit would likely deny a motion for new trial in the second suit. *See* 11 WRIGHT, MILLER, KANE, AND MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2803 (2d ed.). The treatise also notes the scarcity of authority on this issue.

Here, because “it is evident that the trial [court] failed to follow the general rule in the light of the testimony, this Court [should] not hesitate to set aside the order improvidently granted and to reinstate the verdict of the jury.” *Standard Prods.*, 317 So. 2d at 319.

II. THE TRIAL COURT’S ORDER GRANTING THE PLAINTIFF A NEW TRIAL ON THE ISSUE OF DAMAGES IS ANALOGOUS TO A JUDGMENT AS A MATTER OF LAW AND IS DIRECTLY APPEALABLE

It was understood even before trial that McCrary was admitting liability only for causing the accident, and not for causing any injuries. T. 3:302-03, 3:306-07 (emphasis added). But during arguments over jury instructions, the trial court refused the defendant’s instruction on the applicable law regarding the difference between causing an accident and having someone’s injuries causally related to your conduct. T. 3:325, R.E. 12. In doing so, the trial court found, essentially as a matter of law, that the plaintiff’s injuries were causally linked to the defendant’s conduct and, in consequence, she must be awarded some damages. However, Bridges failed to meet her burden to establish causation or damages; thus, the trial court abused its discretion when it interposed its judgment for that of the jury’s. By finding that Bridges suffered some injury based on the evidence presented at trial and was entitled to recover an award – despite the jury’s determination to the contrary, the trial court, in substance, directed a verdict for the plaintiff. R. 8:1181, R.E. 3, R. 8:1189, R.E. 2. This was entirely improper and should be subject to this Court’s review.

The trial court’s order granting the plaintiff a new trial on the issue of damages is akin to a directed verdict in favor of the plaintiff on the issue of causation. Essentially, the trial court found that, because there was an accident which the defendant admitted causing, and because the plaintiff incurred medical expenses because of this accident, she was entitled to recover damages from the defendant. This proposition, though, overlooks the trial court’s own understanding of the case – that the defendant was only admitting his conduct caused the accident, not that it

caused the plaintiff's injuries. Had McCrary conceded that he caused the accident and that his conduct proximately caused the plaintiff's injuries, a verdict for the plaintiff for \$0 damages would be against the overwhelming weight of the evidence because, as a matter of law, the plaintiff would be entitled to damages. But this hypothetical situation and the one that occurred in *Bridges* are entirely different. As stated, the defendant in *Bridges* never accepted that his conduct caused any damages – in fact, he specifically denied the plaintiff was injured at all. Thus, the trial court's order granting the plaintiff a new trial on the issue of damages was analogous to an order directing a verdict in favor of the plaintiff and such an order is directly appealable to this Court under *White v. Stewman*, 932 So. 2d 27 (Miss. 2006), and others.

III. THE EVIDENCE PRESENTED AT TRIAL WAS SUFFICIENT TO SUPPORT THE VERDICT

A motion for new trial “should be exercised with caution, and the power to grant a new trial should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict.” *Amiker v. Drugs for Less, Inc.*, 796 So. 2d 942, 947 (¶ 15) (Miss. 2000); *see Patterson v. Liberty Assocs., L.P.*, 910 So. 2d 1014, 1022 (¶ 24) (Miss. 2004) (holding courts should not become a thirteenth juror and substitute its judgment for that of the jury when reasonable jurors could differ on the verdict from the evidence presented).

“Because it is primarily the province of the jury to determine the amount of damages to be awarded, the award will normally not be set aside unless so unreasonable in amount as to strike mankind at first blush as being beyond all measure, unreasonable in amount and outrageous.” *Herring v. Poirrier*, 797 So. 2d 797, 808 (¶ 33) (Miss. 2000) (quoting *Harvey v. Wall*, 649 So.2d 184, 187 (Miss. 1995) (quoting *Rodgers v. Pascagoula Pub. Sch. Dist.*, 611 So.2d 942, 945 (Miss. 1992))). Awards set by juries are not merely advisory. *Rhodes v. Raffeo*, 74 So. 3d 915, 918 (¶ 10) (Miss. Ct. App. 2011) (citing *Maddox v. Muirhead*, 738 So. 2d 742, 743 (¶ 5) (Miss.

1999)). On review, courts must view the evidence in the light most favorable to the non-moving party, giving him any favorable inferences that may be drawn from it. *Id.*

The record and evidence in this case dictates a reversal of the trial court's order granting Bridges a new trial on the issue of damages. At trial, both parties presented evidence on their theory of the case – Bridges that she was injured, McCrary that she was not. The facts of this case wholly do not support the trial court's decision to remove the case from the province of the jury and, instead, to supplant its judgment for that of the trier of fact.

Bridges and the trial court relied heavily on *Knight v. Brooks* in advocating for a new trial. R. 7:1044-45, T. 3:356. However, the *Knight* case – even with the most liberal reading – lends absolutely no support to the plaintiff's position and therefore the trial court's decision should be reversed and the jury's verdict reinstated.

In *Knight*, Benny R. Knight sued Corey Brooks for damages arising out of a high-speed, major impact automobile accident that occurred in 1994. 881 So. 2d at 295 (¶ 1). The facts of *Knight* and this case are starkly different: as Knight's vehicle sat motionless at an intersection, he suddenly noticed a truck (driven by Brooks) approaching at a high rate of speed in his rear-view mirror. *Id.* at (¶ 2). Anticipating the substantial impact, Knight braced himself by tightly grabbing his steering wheel. *Id.* Still traveling at a high rate of speed, Brooks's vehicle struck the rear of Knight's vehicle, totaling the automobile. *Id.* As a result of the whopping impact, Knight suffered injuries.

As part of his case, Knight presented the medical testimony of his treating physicians to the jury. *Id.* at 295-296 (¶¶ 3-8). In detail, the day following the accident Knight visited his primary care physician but made no substantial complaints of injury. *Id.* at (¶3). Due to heart surgery in the summer of 1994, Knight was forced to wait six months before seeking further treatment. *Id.* at 296 (¶ 4). When he finally did, he presented to Dr. Wiggins, an orthopedic surgeon, who

testified that Knight suffered an avulsed distal tendon and, because of this, “Knight sustained ‘fifteen percent permanent partial disability to the left upper extremity because of pain and strength loss.’” *Id.*

In July 1995, Knight then presented to Dr. Harry Danielson, a neurosurgeon. *Id.* at (¶ 5). Dr. Danielson had previously performed surgery on Knight in 1993 for a disc injury caused in a 1992 accident. *Id.* For Knight’s new injuries, Dr. Danielson performed a neurological exam, an MRI, and a myelogram. *Id.* The results of the new examinations led Dr. Danielson to conclude that Knight suffered from a “herniated disk at C5-6 level.” *Id.* When Knight’s condition related to the 1994 accident did not improve, Dr. Danielson performed a discectomy in 1996. *Id.* At trial, Dr. Danielson testified that Knight’s 1994 accident worsened his preexisting back injury from the 1992 accident. *Id.* at (¶ 6). Additionally, Dr. Danielson gave Knight a “nine percent general physical impairment rating...” *Id.*

At trial, Knight also testified that he had incurred medical bills totaling \$23,000. *Id.* at (¶ 7). Moreover, Knight introduced evidence that he could no longer participate in activities he once enjoyed or ride in a car for long periods of time. *Id.*

“After Knight presented his case, **Brooks chose to rest and not to put on ANY evidence.**” *Id.* at (¶ 8) (emphasis added). As in the case *sub judice*, the trial court instructed the jury to find for the plaintiff and award damages. *Id.* Also similar between the cases, the jury rendered a verdict for the plaintiff but awarded \$0 in damages. *Id.* In *Knight*, the plaintiff moved for a new trial and the court denied his motion. *Id.* On appeal, this Court reversed, stating, “[u]pon reviewing the evidence presented at trial in the light most favorable to Brooks, it is clear that Knight suffered some injury from this accident.” *Id.* at 297-98 (¶ 12).

Knight was decided correctly: the verdict for Knight but awarding \$0 damages was against the overwhelming weight of the evidence because **“Knight presented his case and Brooks**

presented no evidence[.]” *Id.* at 295 (¶ 1) (second sentence of opinion) (emphasis added). As discussed, Knight introduced expert opinion testimony causally relating his aggravation of injury to the negligent conduct of Brooks, *supra*. Once Knight’s experts testified as to causation and damages, **“Brooks chose to rest and not put on ANY evidence.”** *Id.* at 296 (¶ 8) (emphasis added). Presenting substantial evidence to a jury proving that a plaintiff was not injured in a subject accident and not presenting any evidence at trial is a distinguishable characteristic in case law if there ever was one. Because of this, the trial court erred in relying exclusively on *Knight v. Brooks* when it granted the plaintiff’s motion for a new trial. While *Knight* and *Bridges* do have similarities, there is a stark difference between the evidence presented at trial: a defendant presenting material evidence to support his or her theory of the case and a defendant introducing absolutely no evidence at all – the former being more desirable than the latter.

A jury verdict for a plaintiff and awarding \$0 damages despite a finding of liability is not against the overwhelming weight of the evidence if the evidence presented at trial supports the verdict. *Horton v. American Tobacco Co.*, 667 So. 1289 (Miss. 1995). In *Horton*, similar to the case *sub judice*, the jury found that the defendant was negligent in his conduct towards the plaintiff. *Id.* at 1292. Thereupon, it rendered a verdict for the plaintiff and awarded zero damages. *Id.* The plaintiff appealed, arguing that, since the defendant was found to be liable, the plaintiff was entitled to a damages award. *Id.* The Supreme Court disagreed: “If the verdict is to be defeated, then it must be based on the conclusion that the jury assessment of fault is against the overwhelming weight of the credible evidence evincing, bias and prejudice on the part of the jury.” *Id.* at 1293. The jury in *Horton* was presented credible evidence that the plaintiff did not, in fact, suffer damages resultant from the defendant’s negligence. *Id.* at 1291-93. In the same way, the *Bridges* jury was presented colorable evidence that Bridges did not suffer any injury or reinjury in the automobile accident with McCrary. Like *Bridges*, the record in *Horton* was void

any of justification to set aside the verdict of the jury. The holding in *Horton* dictates a reversal of the trial court's order.

The recent decision by this Court, *Brooks v. Purvis*, 70 So. 3d 1166 (Miss. Ct. App. 2011), bolsters the case for reversal. In *Brooks*, a driver (Keith Brooks) and passenger (Sandra Brooks) brought a personal injury action against another driver (Purvis) for injuries allegedly sustained in an automobile accident. *Id.* at 1168 (¶ 1). After trial, the jury returned a verdict awarding Keith zero damages and Sandra \$75,000 in damages. *Id.* On appeal, the Brookses alleged, *inter alia*, that the jury's award of zero damages for Keith was against the overwhelming weight of the evidence. *Id.* at (¶ 4).

As part of his case, Keith presented evidence that he had incurred \$18,300.65 in damages in the form of medical expenses. *Id.* at 1173 (¶ 19). In response, the defendant presented evidence that Keith was living in chronic pain and was taking pain medications at the time of the accident. *Id.* at (¶ 20). In support, "[t]he jury also heard testimony from the parties, as well as videotaped deposition testimony from various experts, including physicians." *Id.* at 1173-74 (¶ 20). The Court of Appeals affirmed:

[I]n the case at hand, the record reflects that Purvis presented evidence showing that Keith was living in "chronic pain" before the automobile accident and possessed numerous preexisting physical health conditions. As a result, we find that the jury's award of zero damages for Keith is supported by the evidence presented at trial. As the supreme court reiterated in *Solanki v. Ervin*, 21 So.3d 552, 568 (¶ 41) (Miss.2009), the jury determines the weight and credibility of witnesses. Further, as previously stated, the amount of damages to be awarded is primarily for the jury to determine.

Brooks, 70 So. 3d at 1174 (¶ 23).

In a 2000 Supreme Court case, *Herring v. Poirrier*, 797 So. 2d 797 (Miss. 2000), a jury returned a verdict in favor of the plaintiff but awarded \$0 damages. *Id.* at 802 (¶ 15). Aggrieved, the plaintiff appealed and argued that the jury verdict was against the overwhelming weight of the evidence. *Id.* at 808 (¶ 34). Although not analogous, the facts between *Herring*

and *Bridges* are similar: in both cases, the plaintiff was the lead vehicle in a rear-end collision; the plaintiff stated they were not injured at the scene but later sought treatment; and both plaintiffs had preexisting injuries at the time of the accident. *Id.* at 799-802 (§§ 3-14). Though, what is indistinguishable between *Herring* and *Bridges* is the subsequent peremptory instruction and the resulting jury verdict. In *Herring*, as in *Bridges*, the trial court instructed the jury as to the defendant's negligence in causing the accident. *Id.* at 808 (§ 34). The jury's award, the court noted, could have been based on one of two things: First, the jury could have found that the plaintiff was not injured at all in the accident. *Id.* Second, a jury could determine that the plaintiff's alleged damages were not caused by the defendant. *Id.* Either way, this factual determination was within sole discretion of the jury, not the trial court.

Certainly, the *Bridges* jury could come to the same conclusion. As in *Herring*, the defendant in *Bridges* introduced evidence that the plaintiff's injuries were not caused by the subject accident and, at the same time, presented evidence that the plaintiff was not actually injured at all by the contact. *Cf. id.* at 808 (§§ 34-35). Based on the *Herring* case, it was a clear abuse of discretion for the trial court to displace the jury's verdict, set it aside, and order a new trial. Whether a plaintiff is injured in a subject accident or was injured in a previous accident is a question of fact for the jury to decide, not the trial court; and the trier of fact has every right to believe or not believe witness testimony he or she hears – whether the testimony is that of a doctor or of an eye witness. *See id.*

Colville v. Davidson, 934 So. 2d 1028 (Miss. Ct. App. 2006), also lends support to the defendant's appeal. The *Colville* case involved an automobile accident between Colville and Davidson, where Davidson admitted liability and the only issue for trial was damages. 934 So. 2d at 1029 (§ 1). At trial, Colville testified that he had incurred roughly \$17,000 in damages as a result of the accident. *Id.* at 1030 (§ 7). The jury rendered a verdict in favor of the plaintiff but

awarded only \$1,500 in damages. *Id.* Disputing the reasonableness of the judgment, Colville appealed. This Court's opinion analyzed the plaintiff's treatment resulting from the accident: "The jury was given the opportunity to hear the testimony of [the plaintiff and his treating physicians] to determine the injuries sustained by [the plaintiff] in the collision and award damages to compensate him for those damages." *Id.* at 1031 (¶ 10). Judge Myers continued, "It is the jury who determines the weight of the testimony and the credibility of the witnesses at trial and it is the primary province of the jury to determine the amount of damages to award." *Id.* at 1032 (¶ 14).

In *Colville* and *Bridges*, the jury was introduced evidence of the injuries allegedly sustained by the plaintiff from a rear-end collision. In both cases, the jury heard from the plaintiff's treating physicians, an employer, and the plaintiff him or herself. The difference being, though, was that the *Colville* jury determined that the plaintiff was injured in the accident, where the *Bridges* jury did not. The trial court committed reversible error in *Bridges* when it usurped the jury's function in awarding damages where the verdict was not against the overwhelming weight of the evidence but was, instead, responsive. As shown, the jury's verdict of \$0 damages in *Bridges* cannot be said to be against the overwhelming weight of the evidence, as substantial, credible testimony was introduced by the defendant proving that the plaintiff was not entitled to an award of damages. The trial court abused its discretion when it invaded the province of the jury by setting aside the jury's verdict and ruled that the jury must award the plaintiff damages.

In *Patterson v. Liberty Assocs., L.P.*, 910 So. 2d 1014 (Miss. 2004), one issue challenged on appeal was that the jury's verdict, finding that the plaintiff sustained no damages, was against the overwhelming weight of the evidence. 910 So. 2d at 1020 (¶ 16). The jury in *Patterson* was instructed to find for the plaintiffs but to only award damages which were the proximate result of the defendant's negligence. *Id.* at 1017 (¶ 17) (emphasis added). As mentioned, the jury

returned a judgment in favor of the plaintiff but awarded no damages. *Id.* In upholding the jury's verdict, the Supreme Court stated:

The burden of proving damages rests upon the plaintiffs. The Pattersons claim that they have presented uncontroverted evidence of their damages. While it is true that they have presented evidence concerning the expenditures made in connection with the purchase of the new home, and while it is true that the defendants were unquestionably negligent, the jury acted within its province from the evidence before it, when the jury found that the Pattersons had suffered no damages *as a proximate result of the defendants' negligence*.

Id. at 1019 (¶ 13) (emphasis in original) (addressing post-trial motions as to damages).

Bridges, like the plaintiffs in *Patterson*, was required to prove that her alleged damages were the proximate result of McCrary's negligence. As evidenced by the record in this case, she failed to meet this burden; thus, the trial court abused its discretion when it substituted its judgment for that of the jury. The verdict of the jury should be reinstated.

IV. THE JURY'S AWARD WAS RESPONSIVE TO THE EVIDENCE

In *Thompson v. Dung Thi Hoang Nguyen*, No. 2009-CA-01147-COA, 2002 WL 34591654 (Miss. Ct. App. Aug. 16, 2011), the trial court refused to grant the plaintiff a peremptory instruction directing the jury to find for the plaintiff and to award reasonable damages even though the defendant admitted liability. *Id.* at *6 (¶ 27). On appeal, the Court of Appeals held this to be error: "Had the trial court adopted [Plaintiff's] form of the special-verdict jury instruction, there would be no question as to the basis of the jury's action. A proper basis for granting a new trial is when the jury has been confused by faulty jury instructions." *Id.* at 8 (¶ 37). Unlike in *Thompson*, the trial court in *Bridges* granted Bridges a special peremptory jury instruction that directed the jurors to find for the plaintiff and to award her reasonable damages based on the evidence presented. Also unlike *Thompson*, substantial evidence was introduced at trial proving that the defendant was not the proximate cause of the plaintiff's injuries. For example, the plaintiff in *Thompson* introduced the depositions of her treating physicians and

therapist into evidence, which showed on direct that the plaintiff had not made similar complaints before the accident, that an MRI performed after the accident resulted in the discovery of degenerative disc disease, and that her treating physicians related her injuries to the accident. *Id.* at *2 (§ 7). One physician did, however, testify that the plaintiff suffered from degenerative disc disease even before the accident but reiterated that the condition was not related to the injuries she received in the accident. *Id.*

In a different manner, Bridges introduced the testimony of her treating physicians to the jury who testified that she treated with them following the accident, that she made complaints of neck and back pain, and that, based only on what she had told them, her injuries were causally linked to the November 6 incident. However, on cross-examination, each physician testified that, had they been aware of the plaintiff's significant history of chronic neck and back pain or recent treatments, their expert opinion would have been different. R. 8:1070-71, R. 1:110-118, R. 2:265-276, R. 3:400-405. Without this material information, it is unrealistic to assume that their medical opinions could be accurate. Based on the above and foregoing, it was entirely reasonable for the jury to surmise this from the evidence presented at trial, and the trial court abused its discretion when it substituted its judgment for that of the jury. Accordingly, the trial court's order denying the defendant's motion to reconsider granting a new trial should be reversed and the jury's verdict should be reinstated.

In another recent Court of Appeals decision, *Rhodes v. Raffeo*, 74 So. 3d 915 (Miss. Ct. App. 2011), this Court was "called to enter into speculation about the jury award which is not the function of an appellate court." *Id.* at 918 (§ 12). The two issues on appeal were whether the jury's verdict was against the overwhelming weight of the evidence, and whether the trial court erred in denying the plaintiff's motion for a new trial or additur. *Id.* at 917 (§ 2). At trial, Rhodes introduced evidence that she incurred damages in the form of an ambulance bill for

\$715, an emergency room bill for \$909.01, and a chiropractic bill for \$3,214. *Id.* at (¶ 6). After the parties rested, the jury returned a verdict for \$5,000, and the plaintiff subsequently filed a motion for an additur or, in the alternative, a new trial. *Id.* at 916-17 (¶ 1). The plaintiff's motion for new trial was, according to this Court, based on the premise she received an inadequate award of damages from the jury. *Id.* at 918 (¶ 12). Affirming the jury's verdict, the Court found that "it is just as reasonable to infer that the jury did not believe that the chiropractor's care was related to the accident and only awarded her the ambulance and emergency room bills." *Id.* The Court continued: "It is the jury [that] determines the weight of the testimony and the credibility of the witnesses at trial[,] and it is the primary province of the jury to determine the amount of damages to award." *Id.* at (¶ 13) (quoting *Teasley v. Buford*, 876 So. 2d 1070, 1075 (¶ 8) (Miss. Ct. App. 2004) (citing *Burge v. Spiers*, 856 So. 2d 577, 580 (¶ 9) (Miss. Ct. App. 2003))).

Just as it was reasonable to infer that the jury in *Rhodes* did not believe that a treating physician's care was related to the subject accident, it is reasonable to assume that the jury in the case *sub judice* did not believe that the plaintiff's medical expenses were related to accident caused by McCrary. It is the responsibility of the jury to determine how much weight to give testimony and how much credibility to give a witness, and the trial court in *Bridges* abused its discretion when it speculated the legitimacy of the jury verdict and substituted its own convictions regarding weight and credibility for that of the jury's.


CONCLUSION

A minor accident between Bridges and McCrary led to this lawsuit. Before trial, McCrary admitted that he caused the accident but firmly denied that Bridges was injured in the accident or that her damages were causally related to his negligent conduct. At trial, the court instructed the jury that the parties had agreed to these facts and that they should find for the plaintiff and award her reasonable damages based on the evidence presented at trial.

The jury did exactly that and rendered a verdict for the plaintiff and awarded her \$0 damages. In response, the court ordered a new trial on the issue of damages, stating that the verdict was against the overwhelming weight of the evidence because, in the court's opinion, the plaintiff was injured by the defendant and deserved an award.

However, because substantial and credible evidence was presented at trial to prove that the plaintiff did not sustain injuries in the subject accident, and the trial court's order fundamentally directs a verdict in favor of the plaintiff, ruling that Bridges was entitled to damages, McCrary prays that this Court reverse the lower court's order granting a new trial and reinstate the jury's verdict for the plaintiff for \$0.

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CERTIFICATE OF SERVICE


I do hereby certify that a true and exact copy of the foregoing Brief of Appellant has been mailed, by United States Mail, postage prepaid, or as otherwise noted, to the following:

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Dated this the 19th day of January, 2012.


Dawn Davis Carson