IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2013-CA-00966

DEBRA BARTLEY-RICE — **APPELLANT**

V.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, IDALAN HAYMON, AND JUDY AUSTIN — **APPELLEES**

BRIEF OF JUDY AUSTIN
Appellee

ORAL ARGUMENT NOT REQUESTED

APPEAL FROM THE CIRCUIT COURT OF HOLMES COUNTY, MISSISSIPPI

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V.

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CERTIFICATE OF INTERESTED PERSONS

In order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal, the undersigned counsel of record certifies that the following persons have an interest in the outcome of this case:

a. Debra Bartley-Rice, Appellant

b. Idalan Haymon, Appellee

c. Judy Austin, Appellee

d. Tylvester Goss, Esq., Counsel for Appellant

e. Michael Williams, Esq., Counsel for Appellant

f. William M. Dalehite, Esq., Counsel for Appellee, Idalan Haymon;

g. Seth McCoy, Esq., Counsel for Appellee, Idalan Haymon;

h. Reeve G. Jacobus, Esq., Counsel for Appellee, Judy Austin;

i. Tiffany P. Grove, Esq., Counsel for Appellee, Judy Austin; and

j. Honorable Jannie Lewis, Circuit Court Judge.

This, the 17th day of March, 2014.

/s Tiffany Piazza Grove
On Behalf of Appellee, Judy Austin

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STATEMENT REGARDING ORAL ARGUMENT

This Appellee submits that the facts and legal arguments are adequately presented in this brief and appellate record, and that the decisional process of this Court would not be significantly aided by oral argument.

STATEMENT OF THE ISSUES

I. Whether the two assignments of error raised in the Appellant's Brief are properly before the Court.

II. Whether the Circuit Court had the authority to conform and/or reform the verdict and whether the verdict was sufficient to determine the intent of the jury.

III. Whether the unanimous jury verdict in favor of the defendants is supported by the evidence without evincing bias, prejudice and passion by the jury.

STATEMENT OF THE CASE

This cases arises from an automobile collision that occurred on Interstate 55 North in Madison County, Mississippi, on August 8, 2009. (R. 452, R.E. 13). This collision occurred following what all parties agreed was large tire debris located within the outside northbound lane of travel. (R. 452, R.E. 13). A negligence action was filed by Debra Bartley-Rice in Holmes County against Idalan Haymon, Judy Austin and State Farm Mutual Automobile Insurance Company[1] seeking monetary damages for personal injuries suffered as a result of the automobile accident. (R. 8-12, R.E. 1-5). A three (3) day jury trial was held in the Circuit Court of Holmes County in May of 2012. During the trial, the testimony of the parties provided very different factual accounts of what happened. However, all three parties agreed that there was large tire

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[1] Bartley-Rice filed suit against State Farm Mutual Automobile Insurance Company seeking uninsured motorist recovery.

debris in the right hand lane of I-55 North. (R. 452, R.E. 13).

A. Testimony of Debra Bartley-Rice

Bartley-Rice testified that there was no emergency situation, she was driving along the interstate and saw the red vehicle ahead of her making a fast brake, the back of the vehicle was weaving and smoke was coming from under the car. (T. 25-26, R.E. 25-26). According to Bartley-Rice, she had plenty of time to slow down, tap on her brakes several times, use her blinker and safely make a lane change to the left lane without incident. (T. 26, R.E. 26). She testified that after she changed lanes, she looked in her rear view mirror and saw Austin move over, colliding with Haymon's vehicle. (T. 27. R. 27). Then, after the impact between Austin and Haymon, Haymon's vehicle ran into the back of her vehicle. *Id.*

B. Testimony of Judy Austin

Austin testified that she had just gotten on the interstate and had been traveling about a mile, and was traveling behind Bartley-Rice in the right hand lane, when she saw Bartley-Rice's brake lights and her vehicle swerve to the left. (T. 80-84, R.E. 28-32). Austin testified that this was an emergency situation and she had nowhere else to go, she was on a bridge and had to swerve to the left when Bartley-Rice swerved to the left. (T. 85-87, R.E. 33-35). It all happened very quickly and she never saw Bartley-Rice use a blinker. (T. 87, R.E. 35). When she swerved to the left, she side swiped Haymon's vehicle, leaving a scrape down the side of the vehicle, but there was not much contact and not enough force to make Haymon lose control. (T. 80-81, R.E. 28-29). Austin is not sure if the collision between Bartley-Rice and Haymon occurred before or after her vehicle made contact with Haymon's vehicle. (T. 85, R.E. 33). After she pulled around, she saw the large debris in the road. (T. 84, R.E. 32).

C. Testimony of Idalan Haymon

Haymon testified that she was driving on the interstate when she saw brake lights ahead, vehicles swerving into her lane and smoke coming from a vehicle. (T. 93, R.E. 36). She testified that she slowed down because of the commotion, but Bartley-Rice's vehicle swerved into her lane and clipped the front end of her vehicle and then swerved back over to the right lane. (T. 95-96, R.E. 37-38). Haymon further testified that her airbag deployed after the impact with Bartley-Rice's vehicle, and then within seconds, Austin's vehicle came over into her lane and "went down the side" of her vehicle. (T. 96, 100-01, R.E. 38). Haymon, like Austin, never saw Bartley-Rice use a blinker. (T. 99, R.E. 39). Haymon also testified that she never lost control of her vehicle. (T. 101, R.E. 40).

D. Jury's Verdict

At the conclusion of the trial, the jury returned their verdict to the trial court on the Special Verdict Form 27 and handwritten on a piece of paper and after review of the two verdict forms; the trial court met with counsel outside the presence of the jury about the form of the verdicts and, without objection, agreed to "conform" the verdict and the jury was brought back in. (T. 188-89, R.E. 44-45). Before the two verdict forms were read, the jury foreperson was questioned about the verdict forms; the trial court confirmed that the two forms represented the same verdict and "that pretty much they both mean the same thing." (T. 189, R.E. 45). The special verdict form was completed following the trial court's instruction, allocating percentages of fault but awarding zero damages to the Plaintiff, and then the verdict was handwritten on a separate sheet of paper, which was in favor of the defendants, Idalan Haymon and Judy Austin, and read:

> We the jury conclude ***that the accident was unavoidable in any event***, And returned a verdict for the defendants Idaland (sic) Haymon and Judy Austin. The amount of damages is 0.

(T. 189-90 , R.E. 45-46; T. 187, R.E. 43) (emphasis added). The handwritten verdict was also made pursuant to the trial court's instruction[2] and used the same exact language found in the given unavoidable accident instruction, which states: "In other words, if you conclude ***that the accident was unavoidable in any event***, then you must return a verdict for the Defendants, Idalan Haymon and Judy Austin." (R. 426, R.E. 10) (emphasis added).

After the verdict was read, the trial court questioned the foreperson as to the intent of the jury and then polled each and every juror and found the verdict was unanimous, further confirming that their intent was reflected by the verdict. (T. 190-91, R.E. 46-47). No objection was made by any party as to the form of the verdict and no request was made to have the jury sent back for further clarification or deliberation. The trial court further clarified the verdict by entering a Final Judgment on May 14, 2013. (R. 464-68, R.E. 18-22).

Bartley-Rice filed a post trial Motion for Judgment Notwithstanding the Verdict, or in The Alternative, Motion for New Trial on The Issue of Damages, on May 29, 2013, beyond the ten day time limitation of Rule 59(b).[3] (R. 469-70, R.E. 23-24). Abandoning the untimely post-trial motion and aggrieved by the jury's unanimous verdict for the defendants, Bartley-Rice filed her appeal, limiting the subject appeal to only these two issues: 1.) Whether the trial court erred when it did not seek further clarification from the jury after the verdict forms were read,

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2 Jury Instruction No. C-CR-1 concluded by stating "When you reach a verdict in this case, it should be written on a separate sheet of paper and need not be signed by you." (R. 415, R.E. 9).

3 Instead of bringing the motion for hearing, Bartley-Rice pursued this appeal and abandoned the post trial motion. "[I]t is the movant's responsibility to obtain a ruling once a motion has been made, and failure to do so constitutes a waiver of that motion. *Martin v. State*, 354 So. 2d 1114, 1119 (Miss. 1978) (citation omitted). Accordingly, the motion has been waived and the trial court has thus made no rulings with regards to the jnov motion.

warranting a new trial, and 2.) Whether the unanimous jury verdict is unsupported by the evidence and evinces bias, prejudice or passion by the jury, warranting a new trial on damages only.

SUMMARY OF THE ARGUMENT

The only two assignments of error raised in the Appellant's Brief are not properly before the Court because neither issue was presented to the trial court for consideration. Procedural bar aside, the Circuit Court had the authority to conform and/or reform the verdict because counsel agreed to the conformation and/or reformation and the handwritten verdict was sufficient to clearly determine the intent of the jury. Furthermore, the unanimous jury verdict in favor of the defendants is supported by the evidence without evincing bias, prejudice and passion by the jury.

STANDARD OF REVIEW

A reversal of the trial court is warranted only if the factual findings of the trial judge appear to be "clearly erroneous or against the overwhelming weight of the evidence." *Dorrough v. Wilkes*, 817 So. 2d 567, 572 (Miss. 2002) (quoting *Tanner v. State*, 764 So. 2d 385, 393 (Miss. 2000; *citing Stewart v. State*, 662 So. 2d 552, 558 (Miss. 1995)). Our appellate courts have continually held that once the jury has returned a verdict in a civil case, the appellate courts "are not at liberty to direct that judgment be entered contrary to that verdict short of a conclusion on our part that, given the evidence as a whole, taken in the light most favorable to the verdict, no reasonable, hypothetical juror could have found as the jury found." *Bell v. Bay St. Louis*, 467 So. 2d 657, 660 (Miss. 1985) (citations omitted); *see also White v. Stewman*, 932 So. 2d 27, 38 (Miss. 2006) (quoting *Henson v. Roberts*, 679 So.2d 1041 (Miss. 1996)).

In addressing whether the verdict was against the overwhelming weight of the evidence and/or a product of bias, passion and prejudice, numerous appellate cases confirm the standard of review:

> In determining whether a jury verdict is against the overwhelming weight of the evidence, this Court must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial. Only when the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice will this Court disturb it on appeal.

Tentoni v. Slayden, 968 So. 2d 431, 440-441 (Miss. 2007) (citations omitted).

ARGUMENT

I. Whether the two assignments of error raised in the Appellant's Brief are properly before the Court.

Bartley-Rice is not entitled to raise new issues on appeal. The general rule under well established Mississippi law is that "an appellant is not entitled to raise a new issue on appeal, since to do so prevents the trial court from having an opportunity to address the alleged error." *Crowe v. Smith*, 603 So.2d 301, 305 (Miss. 1992) (citing *Cooper v. Lawson*, 264 So.2d 890, 891 (Miss. 1972) and *Howard v. State*, 507 So. 2d 58, 63 (Miss. 1987); see also *Shaw v. Shaw*, 603 So. 2d 287, 292 (Miss. 1992) ("One of the most fundamental and long-established rules of law in Mississippi is that the [appellate court] will not review matters on appeal that were not raised at the trial court level."); *McKee v. Bowers Window & Door Co.*, 64 So. 3d 926, 937 (Miss. 2011). The record does not reflect that Bartley-Rice timely presented either of her two arguments to the trial court level for consideration, therefore, Bartley-Rice should be barred from raising these two issues for the first time on appeal. *See, e.g., Purvis v. Barnes*, 791 So.2d 199, 202 (Miss. 2001).

To be clear, the trial court found the verdict was not inconsistent and afforded every opportunity for the parties to object or request another course of action. In fact, before the verdict was read in open court, the trial court addressed the issue of the verdict with all counsel at the bench, outside the presence of the jury:

> THE COURT: Let me see the attorneys at the bench.

(at the bench conversation.)

THE COURT: What the jury did, they completed the special verdict form and then they wrote out a verdict. And it's not really contradictory, it ends up being the same thing. So I'm wondering, do you all want me to try to send them back?

MR. DALEHITE: I would just make it conform by your orders. Make it conform to - - I don't think they should redo it again, if it's the same thing.

MR. WILLIAMS: I don't have a problem, if it's consistent, I don't have a problem with it. If it works out to about the same thing.

THE COURT: The end result is the same.

MR. WILLIAMS: Okay.

THE COURT: Okay.
(conclusion of bench conversation.)

(T. 188-89, R.E. 44-45).

Rather than objecting and requesting that the jury be sent back for further clarification, counsel for Bartley-Rice instead agreed "[i]f it works out to about the same thing." (T. 188, R.E. 44). No objection was raised by counsel and no request was made for any further clarity or conformity. Before the two verdict forms were read in open court, Judge Lewis questioned the jury foreperson to confirm the intention that the two verdict forms "pretty much they both mean the same thing." (T. 189, R.E. 45). The trial court then read both the special verdict form and the handwritten verdict form, and then asked each of the jurors if their verdict was represented. After polling the jury, the trial court noted that "We do have a unanimous verdict. The verdict will be recorded and filed." (T. 190-91, R.E. 46-47). Even after the verdict was read in open court and before the jury was dismissed, counsel for Bartley-Rice made no objection or request for further clarification. (T. 189 -90, R.E. 45-46). At the very end of the proceedings, after the

jury was dismissed, counsel for Bartley-Rice still made no objection and/or request for further clarification. (T. 192, R.E. 48). More importantly, no timely post-trial motions were filed.

Bartley-Rice actually *agreed* to allow the judge to conform the verdict, so long as "it works out to about the same thing." (T. 188-89, R.E. 44-45). Then, Bartley-Rice failed to give the trial court any opportunity to cure any perceived defect. Instead, she filed a post-trial motion out of time and then abandoned them in pursuit of this appeal, never bringing the issues before the trial court. Appellant should not be rewarded for such dilatory conduct and these issues should not be considered for the first time on appeal. Furthermore, Appellant should not be permitted to agree to the trial court's reformation before the verdict was read, only to complain upon learning the verdict was not in her favor.[4]

Regarding Appellant's argument that the verdict was unsupported by the evidence, there is specific authority delineating that such has not been preserved for appeal in this case. In *Cooper v. Lawson*, the Mississippi Supreme Court revisited the case of *Clark v. State*:

> the Court stated that before a litigant can avail himself of the contention the verdict is against the weight of the evidence, it is essential that the contention be embodied in a motion for a new trial in the lower court and be passed upon by the trial judge. The reason underlying the rule is that a trial judge cannot be put in

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4 *See, e.g, Ryals v. Pigott*, 580 So. 2d 1140, 1176-1177 (Miss. 1991)("late objection often results in delay, inconvenience, and unnecessary expense," *citing Madsen v. Prudential Federal Savs. & Loan Ass'n*, 767 P.2d 538, 542 (Utah 1988) ("A party who has a reasonable basis for moving to disqualify a judge may not delay in the hope of first obtaining a favorable ruling and then complain only if the result is unfavorable.")). *See also Pennington v. State*, 437 So. 2d 37, 40 (Miss. 1983) ("An attorney may not refrain from objecting to a question, thinking that the answer might be favorable to him, and, when it is unfavorable, object and ask for a mistrial."); *Jackson v. State*, 158 Miss. 524, 529 (Miss. 1930) (Counsel should not be permitted . . . to refrain from objecting to the competency of a witness until after his testimony has been given, for to hold otherwise would permit counsel . . . to withhold an objection . . . until it should appear whether the testimony given by him was favorable or unfavorable to the party objecting.").

> error on a matter which was never presented to him for decision. The case held that the rule applies in both criminal and civil cases and cited many Mississippi cases as authority.[5]

Cooper v. Lawson, 264 So. 2d 890, 891 (Miss. 1972) (citing *Clark v. State*, 39 So. 2d 783 (1949), suggestion of error overruled 206 Miss. 701, 40 So.2d 591 (1949)). "The purpose of the rule requiring an appellant to first present sufficiency of the evidence claims to the trial judge before appellate review may be undertaken of a jury verdict is to ensure judicial economy and to avoid putting a trial judge in error for something he has not had an opportunity to pass on." *Hodnett v. State*, 788 So. 2d 102, 106 (Miss. Ct. App. 2001). Accordingly, the issue is not properly before the Court and should not be considered.

II. Whether the Circuit Court had the authority to conform and/or reform the verdict and whether the verdict was sufficient to determine the intent of the jury.

Procedural bar notwithstanding, the trial court properly found that the jury intended to find for the defendants under the instructions it had received. The jury filled out the special verdict form, number 27 in the instructions, and then returned their verdict on a separate sheet of paper. The jury was presented with specific instruction to do just this; Jury Instruction No. C- CR-1 concluded by stating "When you reach a verdict in this case, it should be written on a separate sheet of paper and need not be signed by you." (R. 412-15, R.E. 5-9). No party objected to any portion of this instruction. This instruction was read to the jurors in open court and copies were also provided for use during deliberations. (T. 163, R.E. 42).

When the jury returned their verdict and Judge Lewis read the verdict, she took additional steps to cure any defect in form and ensure the verdict represented the clear intent of the jury.

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[5] *See also Gilmer v. Gunter*, 46 So.2d 447 (Miss. 1950); *Hoke v. State*, 232 Miss. 329, 98 So.2d 886 (1957) and *Colson v. Sims*, 220 So.2d 345 (Miss. 1969).

First, counsel was informed of the return of two verdict forms and asked if they wanted the jury to be sent back for further deliberation and/or clarification. (T. 188-89, R.E. 44-45). Rather than send the jury back, the parties agreed to let the trial court conform and/or reform the verdict to clearly reflect the intent of the jury. (T. 188-89, R.E. 44-45). If Appellant wanted the jury be sent back, such was not expressed to the trial court. Second, the trial court specifically questioned the jury foreperson to confirm that the verdict was consistent and both verdict forms represented the same verdict. (T. 189, R. E. 45). Third, the trial court asked each and every juror if their verdict was represented, concluding that "We do have a unanimous verdict." (T. 190-91, R.E. 46-47). Lastly, the trial court followed by entering its Final Judgment, which was filed on May 14, 2013, acknowledging that the verdict "was conformed, read, and accepted by the Court." (R. 464, R.E. 18).

"The basic test as to the sufficiency of a verdict as to form is whether or not it is an intelligent answer to the issues submitted and expressed so that the intent of the jury can be understood by the court." *Henson Ford, Inc. v. Crews*, 249 Miss. 45, 160 So. 2d 81 (1964); *Wilson v. State*, 197 Miss. 17, 19 So. 2d 475 (1944). In this case, the handwritten verdict clearly and intelligently informed the trial court that the jury found the accident was unavoidable. It was sufficiently certain as to enable the trial court to intelligently base judgment in favor of the defendants. *See, e e.g., Powell v. Thigpen*, 336 So. 2d 719, 720 (Miss. 1976) (citing *Poynter v. Trotter*, 250 Miss. 812, 168 So.2d 635 (1964). The handwritten verdict form was an accurate adoption of the unavoidable accident jury instruction that was given, which states: "In other words, if you conclude that the accident was unavoidable in any event, then you must return a verdict for the Defendants, Idalan Haymon and Judy Austin." (R. 426, R.E. 10). Accordingly, the jury's intent in finding the subject accident was unavoidable is crystal clear.

For further direction, we may look to *Hobbs Automotive, Inc. v. Dorsey*, 914 So. 2d 148 (Miss. 2005), where the appellate court was presented with whether the County Court was correct in reforming the form of the jury verdict. In *Hobbs Automotive, Inc.*, the jury returned a verdict in "an unusual form," finding the plaintiffs were entitled to "$ 100,000 for fraud." *Id.* at 152 (¶15). The trial court recognized that verdict was "a kind of special verdict", but also commented that "it is clear what they mean." Subsequently, the trial court reformed the verdict and entered a final judgement for the plaintiffs in the amount of $100,000. *Id.* The appellate court noted:

> Admittedly, the better procedure would have been for the trial judge to review the form of the verdict in the presence of the lawyers and note that it did not conform to the specific instruction given as to form of the verdict and then, direct that the jury should return to the jury room, tell the jury that they had already been properly instructed regarding the form of the verdict, read carefully the proper form of the verdict which had been submitted to them in the existing jury instructions and for them to write their verdict following the exact language of that instruction. This procedure was not followed by the trial judge. The trial judge reformed the verdict to reflect the intent of the jury. **The question for us now becomes, can we ascertain the unquestionable intent of the jury from the verdict which they rendered? The form of the jury verdict in the case at bar is sufficient for us to easily determine the intent of the jury.**

Hobbs Auto., Inc., 914 So. 2d at 152 (¶16) (emphasis added).

Likewise, even if the trial court should have sent the jury back in this case, the question now becomes, "can we ascertain the unquestionable intent of the jury from the verdict which they rendered?" Like *Hobbs Automotive, Inc.*, the form of the handwritten verdict in this case is clear and sufficient to easily determine the intent of the jury.

In *Cox v. Howard, Weil, Labouisse, Friedrichs, Inc.*, the appellant argued that the trial court erred in combining two special verdicts in order to form one general verdict after the jury had been discharged. 619 So. 2d 908, 915-16 (Miss. 1993). The Mississippi Supreme Court held

that the lower court's final judgment did not conflict with the jury's verdict "[b]ecause a judgment reflecting intent of a jury should be affirmed as long as the intent of the jury may be understood in a reasonably clear manner. *Id.* (citing *Harrison v. Smith*, 379 So. 2d 517, 519 (Miss. 1980)).

In addition to the intent to the jury, we may also look to the purpose of the "Special Verdict Form 27." (R. 443-44, R.E. 11-12). It is easy to ascertain that the purpose of the special verdict form was to assess the proximate cause of the damages and assist the jury in any allocation of fault. (R. 443-44, R.E. 11-12). Since the jury's ultimate finding was that this was an unavoidable accident, and since there was not a specific or separate area to clearly indicate such a finding on the special verdict form, the special verdict form was simply not necessary to arrive at the end result reached by the jury (award of zero damages) and general verdict returned by the jury in this particular case.

Furthermore, "where a jury verdict is responsive to the issue but also contains findings which are not necessary for the determination of the issue involved, such additional findings may be disregarded as surplusage." *Poynter*, 250 Miss. at 815 (citations omitted). In this specific instance, any apportionment of fault in the special verdict form became irrelevant and properly disregarded by the trial court as surplusage when no damages were awarded and the jury's handwritten verdict clearly found that "the accident was unavoidable in any event, [a]nd returned a verdict for the defendants . . . ." (T. 190 , R.E. 46). *See, e.g.*, *Meridian City Lines v. Baker*, 206 Miss. 58, 80 (Miss. 1949) (Court opined that the trial court committed no error in accepting the general verdict for $ 7,000 and in disregarding as surplusage the attempt of the jury to improperly apportion damages).

In contrast to this case, in *Gill v. W.C. Fore Trucking, Inc.*, 511 So. 2d 496 (Miss. 1987), the appellant actually asserted that the jury verdict should have been reformed pursuant to

Mississippi Code Annotated Section 11-7-159 (1972), rather than granting a new trial, arguing that "once the trial judge had realized that the form of the first jury's verdict was improper, he could and should have reformed the verdict to reflect the jury's intent." The Court ultimately held that the choice between reforming a jury verdict "and other available remedies would be a matter of [the trial court's] sound discretion." *W.C. Fore Trucking, Inc.*, 511 So. 2d at 498. Thus, in this case, the trial court acted within its sound discretion in conforming and/or reforming the verdict at the bar, to the extent it did so, in accordance with Mississippi Code Annotated Section 11-7-159, especially after all counsel agreed to such remedy.

Again, the intent of the jury is clear in this case. There is no evidence of error and the jury's verdict should remain undisturbed. Furthermore, the trial judge's decision to reform the verdict should be held proper under the particular facts of this case.

III. Whether the unanimous jury verdict in favor of the defendants is supported by the evidence without evincing bias, prejudice and passion by the jury.

Procedural bar aside, Bartley-Rice appears to be challenging the weight of the evidence but offers no proof of bias, passion or prejudice toward her, save that the jury did not find in her favor. Instead, Bartley-Rice's entire argument is premised on the incorrect assertion that the jury actually decided the issue of liability in her favor, completely ignoring the existence of the handwritten verdict, which reads "We the jury conclude that the accident was unavoidable in any event, [a]nd returned a verdict for the defendants Idaland (sic) Haymon and Judy Austin. The amount of damages is 0." (T. 189-90 , R.E. 45-46; T. 187, R.E. 43). In the absence of the handwritten verdict and the trial court's conformation and/or reformation, perhaps Bartley-Rice's argument would be logical. However, the appellate court cannot set aside the verdict in this case "unless it is clear that the verdict is a result of prejudice, bias or fraud, or is manifestly against the

weight of credible evidence." *See, e.g., Wilmoth v. Peaster Tractor Co.*, 544 So. 2d 1384, 1386-1387 (Miss. 1989).

The case at bar is fact driven; this is certainly a case where the evidence presented at trial was in dispute and differing conclusions could be reached. Great deference is given to the jury and "[i]t is the province of the jury to determine the weight and worth of testimony and credibility of the witness at trial." *Motorola Communications & Electronics, Inc. v. Wilkerson*, 555 So. 2d 713, 723-24 (Miss. 1989) (citing *Burnham v. Tabb*, 508 So.2d 1072, 1077 (Miss. 1987)). The appellate court "will assume that the jury at trial drew every permissible inference from all the evidence." *Id.*

There was certainly sufficient credible evidence and testimony supporting the jury's finding that this was an unavoidable accident and the ultimate verdict for the defendants. For example, in the plaintiff's case in chief, defendant Judy Austin was called to testify and she was asked "do you take any responsibility for this accident?" In response, Austin testified "I think we all did what we had to do. It was an emergency. There was a big tire debris in the road. And you know all I saw was the black car in front of me. And when Ms. Rice swerved, I had to. There was -- we were, it was on a bridge. I had no where else to go." (T. 85-86, R.E. 33-34). By way of another example, officer Keith Brown, an uninterested third party who investigated the subject accident, was asked on direct examination, "So did all three individuals [Bartley-Rice, Austin and Haymon] tell you that the truck tire was the cause of the accident?" He replied, "Yes." (T. 115, R.E. 41).

In consideration of the foregoing examples of credible evidence supporting the finding that the accident was unavoidable, there was sufficient evidence presented at trial to support the jury's ultimate finding and the trial court's conformation and/or reformation. In specific

response to the appellant's contention that the verdict was contrary to the overwhelming weight of the evidence and was the result of bias, passion and prejudice, the case of *Motorola Communications & Electronics, Inc. v. Wilkerson*, relied on by Bartley-Rice for the proposition that all evidence must be viewed in the light most consistent with the jury verdict, states:

> In resolving this question we are mindful of our duty to set aside a verdict whenever we can confidently say that the jury did not respond to reason and therefore acted from motives of bias, passion and prejudice. In so doing, the rule is that we must view the evidence in the light most favorable to the party in whose favor the jury decided. Moreover, we are not permitted to consider isolated parts of the evidence apart from the whole, and we must assume that the jury drew every permissible inference in favor of the successful party.

Motorola Comm., Inc., 555 So. 2d at 723 (quoting *Phillips v. Dow Chemical Co.*, 247 Miss. 293, 151 So.2d 199, 201 (Miss. 1963)). Based on the entirety of the evidence, it cannot be said that the jury in this case failed to respond to reason.

There has been absolutely no evidence of bias, prejudice and passion by the jury and the record contains sufficient evidence supporting the judgment awarded. Therefore, the Final Judgment should not be disturbed.

JOINDER IN BRIEF OF APPELLEE IDALAN HAYMON

To the extent not inconsistent with the arguments raised herein, Judy Austin adopts and joins in the additional arguments, analysis and support presented by the other appellee, Idalan Haymon, in her brief.

CONCLUSION

In consideration of the reasons provided herein, as well as those presented in the Brief of Appellee Idalan Haymon, Judy Austin submits that the trial court's findings and Final Judgment was not in error and should be AFFIRMED.

Respectfully submitted this 17th day of March, 2014.

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CERTIFICATE OF SERVICE

I, Tiffany Piazza Grove, do hereby certify that I have this day filed a copy of the foregoing *Brief of Judy Austin, Appellee,* to the Clerk of the Court via the ECF system and served the following via electronic filing and/or U.S. Mail:

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