IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

KATHRYN LOYACONO — APPELLANT/PLAINTIFF

VS. — CAUSE NO.:2011-CA-00271

WATACHA SHELBY and THE TRAVELERS INSURANCE COMPANY — APPELLEES/DEFENDANTS

APPEAL FROM THE CIRCUIT COURT OF WARREN COUNTY, MISSISSIPPI
HON. RICHARD W. "DICKIE" MCKENZIE, SPECIAL CIRCUIT JUDGE

BRIEF OF APPELLANT KATHRYN LOYACONO

Oral argument requested

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VS.	**CAUSE NO.:2011-CA-00271**
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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following persons have an interest in the outcome of this case. These representations are made in order that justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

I. Honorable Richard W. "Dickie" McKenzie, Trial Judge

II. Kathryn Loyacono, Appellant/Plaintiff

III. St. Paul/Travelers Insurance Company, Appellee/Defendant

IV. Watacha Shelby, Appellee/Defendant

V. Rocky Wilkins, Counsel for Appellant/Plaintiff

VI. Tommy Y. Page & Louis G. Baine, III, Counsel for Appellee/Defendant Travelers

VII. R.E. "Gene" Parker, Jr., Counsel for Appellee/Defendant Travelers

RESPECTFULLY SUBMITTED, this the 24th day of January, 2012.

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STATEMENT OF ISSUES

The jury's verdict ignored the evidence at trial and the Plaintiff/Appellant should have another day in court. The following issues are addressed herein:

I. Did the trial court err when it allowed irrelevant and extremely prejudicial evidence of the Plaintiff's husband's attorney's fees from unrelated litigation?

II. Was the trial unfairly prejudiced by Watacha Shelby's conduct?

III. How could the jury have awarded zero damages when experts from both sides agreed that Mrs. Loyacono suffered some injury from the collision?

IV. Did defense counsel's discovery violations prejudice the Plaintiff?

V. Did defense counsel's repeated misconduct unfairly prejudice the Plaintiff?

VI. Did the trial court err in not conducting further inquiry into juror misconduct?

VII. Was the verdict against the overwhelming weight of the credible evidence?

STATEMENT OF THE CASE

A. Nature of the Case

On August 3, 2005, the Appellant/Plaintiff, Kathryn Loyacono (hereinafter "Mrs. Loyacono") filed a negligence claim against Appellee/Defendant Watacha Shelby (hereinafter "Ms. Shelby") in the County Court of Warren County, Mississippi, for damages resulting from injuries sustained in a motor vehicle crash on or about July 25, 2005.[1] (RE 1; 1 R. at 9). At the time of the crash, Ms. Shelby was an uninsured motorist, and on January 4, 2006, Mrs. Loyacono filed an Amended Complaint joining her insurance company (St. Paul Fire & Marine Insurance Company (hereinafter "Travelers") as the Co-Defendant.[2] (T. at 306; 1 R. at 20). On January 9, 2006, this cause was transferred to the Circuit Court of Warren County, Mississippi. (RE 1).

On March 1, 2006, Travelers filed its Answer and Defenses to the Amended Complaint and simultaneously filed a cross-claim against Ms. Shelby. (1 R. at 29). The standard discovery process ensued, and on Monday, October 4, 2010, a jury trial was held in the Circuit Court of Warren County, Mississippi, with Special Circuit Judge Richard "Dickie" McKenzie presiding.[3] (RE 2; T. at 86).

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[1]The trial transcript will be referenced to as "T. at ____ (pg. no.)" and the court file of five volumes containing the Clerk's papers/record other than the trial transcript will be referred to as "____ (vol. no.) R. at ____ (pg. no.)."

[2]The style of the case lists the defendant as "Travelers Insurance Company," and the record repeatedly refers to "Travelers" as one of the Defendants. It is uncontested that "Travelers" and "St. Paul" are interchangeable in this matter and that St. Paul/Travelers was Mrs. Loyacono's uninsured motorist insurance provider at the time of the subject incident. Therefore, the Defendant is referred to as "Travelers" herein.

[3] The Honorable Richard W. "Dickie" McKenzie was appointed Special Circuit Judge upon the recusal of Warren County Circuit Court Judges M. James Chaney, Jr. and Isadore W. Patrick. (RE 2; 2 R. at 248)

B. Course of Proceedings and Disposition in the Court Below

Despite the pretrial admission of liability by Travelers, the overwhelming amount of evidence and expert testimony that Kathryn Loyacono was injured in the crash, the trial court's directed verdict that Ms. Shelby was negligent and that she (Ms. Shelby) caused the crash, on Saturday, October 9, 2010, the jury returned a verdict of zero dollars and zero cents ($0.00) and awarded zero damages to Mrs. Loyacono. (RE 3; T. at 1209-1211, 1228; 1 R. at 106). Mrs. Loyacono subsequently filed a timely Motion for Judgment Notwithstanding the Verdict ("JNOV") and New Trial on Damages. (RE 4; R. at 464). On January 7, 2011, a post-trial hearing was held and the trial court denied same. (RE 5; T. at 1235-1256; 5 R. at 605).

Aggrieved by the numerous errors committed by the trial court, and the fact that the overwhelming weight of the evidence and all testimony (even the defense's experts) showed unequivocally that Mrs. Loyacono was injured in the crash, on February 10, 2011, the Plaintiff filed a timely Notice of Appeal, and requests that this Honorable Court reverse the lower court's ruling(s) and grant a New Trial on Damages and any other relief this Honorable Court finds appropriate. (5 R. at 608).

STATEMENT OF THE FACTS

The following facts are uncontested and were established by the pleadings, admissions, and/or stipulations:

1. On July 25, 2005, Mrs. Loyacono was driving home in her vehicle on Fort Hill Drive in Warren County;

2. At the same time, the Defendant, Ms. Shelby, was driving backwards in a zigzag manner, in the wrong direction, down Fort Hill Drive in Warren County Mississippi;

3. Despite Mrs. Loyacono coming to a complete stop, and sounding her horn, Ms. Shelby slammed into the front of Mrs. Loyacono's vehicle;

4. Mrs. Loyacono was immediately injured by the collision and was transported by ambulance from the scene to River Region Hospital for severe back, neck, and head pain;

5. Ms. Shelby was the proximate cause of the collision;

6. Ms. Shelby was an uninsured motorist; and

7. At the time of the collision, Mrs. Loyacono was insured up to $2,500,000.00 under an uninsured motorist policy with Defendant Travelers;

(T. at 306, 342; 1 R. at 107-109).

Shortly after arriving at the hospital on July 25, 2005, Mrs. Loyacono was examined and treated by orthopedic surgeon Dr. Daniel P. Dare.[4] (T. at 342; Trial Ex. P-1). At that time, Dr. Dare diagnosed Mrs. Loyacono with a severe cervical, thoracic, and lumbar sprain/strain, with obvious muscle spasms in her neck and back. (T. at 344). Dr. Dare testified that his diagnosis was based solely on objective proof and that her symptoms and condition could not be "fake[d]." (T. at 344).

In response to the injuries sustained from the collision, Dr. Dare prescribed several pain medications, a steroid, and ordered that Mrs. Loyacono begin physical therapy. (T. at 346). He further ordered that Mrs. Loyacono be re-examined the following week. (T. at 346).

At trial, the following testimony was given by Dr. Dare regarding the cause of her injuries and pain:

> Q. ... what was your opinion as to the cause of the severe cervical sprain/strain, thoracic strain, and lumbar sprain and strain?
>
> A. The motor vehicle accident (the subject incident) that she had had several hours before.

(T. at 346-47).

[4]Dr. Dare has been a practicing physician for approximately thirty-two (32) years.

At trial, Dr. Dare opined that after approximately three months of severe pain in her neck, head, and back, Mrs. Loyacono had "progressed from the acute sprain/strain of the neck and lower back to chronic [pain syndrome]." (T. at 350-51). Moreover, while under Dr. Dare's care and attention, an MRI was conducted, at which time it was discovered that Mrs. Loyacono had a "mild disc bulge with annular tears at the last two levels of the spine." (T. at 353).

Dr. Dare testified that Mrs. Loyacono, at the very least, suffered an "aggravation" or an "exacerbation" of a pre-existing low-back injury. (T. at 360). In an effort to provide Mrs. Loyacono relief from the pain, Dr. Dare referred her to several medical specialists for epidural steroid injections, physical therapy, deep massage treatments, and acupuncture therapy. (T. at 361). Dr. Dare believes that the Plaintiff's pain is not going to get better, but rather will stay the same, despite continued treatments. When questioned about the cause of her current condition, Dr. Dare testified as follows:

> Q. Dr. Dare, can you tell the jury, in your opinion, to a reasonable degree of probability, what injuries [Mrs. Loyacono] suffered on July 25th, 2005, that were caused by the wreck?
>
> A. An acute cervical sprain/strain which caused acute pain initially is now progressed to the chronic pain, and then, secondly, an acute lumbar strain/sprain – that's low back – which has now progressed to chronic pain.
>
> Q. And how long – or is it your opinion that these injuries will be permanent in nature?
>
> A. Yes.
>
> Q. Was all of the treatment that you rendered to her over the last five years reasonable and necessary medical treatment?
>
> A. Yes, sir

Q. And what about – what, if any treatment do you think she will probably need in the future?

A. More of what she's received.

(T. at 371).

Dr. Dare's testimony clearly established that Mrs. Loyacono was injured in the collision, and that her past, present, and future pain was/is a result of these injuries.

Dr. Don Jackson, an expert in general dentistry, and Mrs. Loyacono's dentist since 1995, testified that Mrs. Loyacono had no prior dental problems before the subject collision, but has since experienced approximately eight (8) cracked teeth, four (4) tooth extractions, crowns, root canals, titanium implants, and bone grafts, all of which were caused by Mrs. Loyacono grinding, clenching, and/or gritting her teeth from the pain caused by the collision. (T. at 747-749, 757-761, 768, 771-772). Dr. Jackson estimates that Mrs. Loyacono still faces and will likely incur over eighteen thousand dollars and 00/100s ($18,000.00) in future dental damages. (T. at 774-775; Trial Ex. P-18). Travelers thinks that Mrs. Loyacono's dental problems are attributable to her age, but, as Dr. Jackson stated, eight (8) teeth do not spontaneously crack. (T. at 795-800, 804).

Kathryn "Kit" Bonner has been Mrs. Loyacono's treating physical therapist, both prior to and after the wreck. Mrs. Bonner testified that after the collision Mrs. Loyacono showed obvious and objective signs of pain and stiffness in her neck all the way down to her legs. (RE 6, pp. 10-11; T. at 843; Trial Ex. P-21). Since that time, Mrs. Loyacono has never fully recovered to the level of functionality she maintained before the collision.[5] (RE 6, pp. 20-21; Trial Ex. P-21).

[5]Ms. Bonner testified that Mrs. Loyacono was treated only for low back pain prior to the subject wreck.

Every medical provider and expert that testified during trial acknowledged and confirmed that Mrs. Loyacono was injured in the collision caused by Ms. Shelby, including defense experts Dr. Keith Melancon and Dr. Richard Allnut. (RE 7; T. at 1115, 1118-1120, 1123-1124, 1129-1131; RE 8; T. at 1180, 1184-1185, 1200-1202). Both Dr. Allnut and Dr. Melancon agreed that Mrs. Loyacono was injured to some degree in the collision on July 25, 2005. (RE 7; RE 8). It is important to note that Dr. Allnut is routinely used as an insurance industry expert, and Dr. Melancon never met or personally examined Mrs. Loyacono. (RE 7; T. at 1118-1119; RE 8; T. at 1201). Nevertheless, Dr. Allnut opined that Mrs. Loyacono was injured in the collision (albeit not as extensively as the Plaintiff claimed), and Dr. Melancon stated that Mrs. Loyacono suffered approximately five (5) weeks of pain and suffering attributable to the collision. (RE 7; T. at 1115, 1118-1120; RE 8; T. at 1184-1185, 1200-1202).

Further, Dr. Michael Winkelmann was called as a defense witness and also testified that the Plaintiff suffered an injury in the July 25, 2005 collision.[6] (RE 9; Court's Ex. 2, pp. 29, 31, 38). Dr. Winkelmann testified that the Plaintiff had suffered from myofascial pain syndrome and had a 5% permanent impairment **that was caused by the collision**. (T. at 1145-1146, 1153). Dr. Winkelmann prescribed pain injections and physical therapy. He also referred Mrs. Loyacono to chiropractic treatment and to Dr. Jeff Summers for spine injections.

Moreover, the Plaintiff presented proof of substantial damages. Mrs. Loyacono incurred $73,000.00 in medical bills, and experts believe these bills are going to continue to increase, particularly with the anticipated dental work. (T. at 774-775, 904; Trial Ex. P-27). Accountant and economist Ken Hicks testified that Mrs. Loyacono has suffered between $291,000.00 - $490,000.00 in lost wages. (T. at 807-813; Trial Ex. P-20). Even more devastating are the

[6] Dr. Winkelmann was not present during trial, but his deposition testimony was read to the jury.

irreparable injuries Mrs. Loyacono has suffered from the loss of time with her husband, children, grandchildren, and her now deceased father. Though a monetary award would certainly provide some relief, nothing can truly heal the loss she has experienced from time stolen from her family.

SUMMARY OF THE ARGUMENT

Appellant, Kathryn Loyacono, was severely and permanently injured in a car crash by an uninsured motorist, Watacha Shelby. At the time of the subject car crash, Mrs. Loyacono was covered under an uninsured motorist policy guaranteed by Defendant Travelers. Through stacking, the UM policy covered up to two and a half million dollars ($2,500,000.00). It was originally uncontested that Ms. Shelby was an uninsured motorist and that she was the sole, proximate cause of the automobile crash.[7] (T. at 1210; 1 R. at 109). Moreover, it is uncontested that Mrs. Loyacono was injured in the crash.

Travelers was under a duty to ensure that Mrs. Loyacono would be protected should an uninsured motorist cause her injury. It is well understood that the purpose of uninsured motorist insurance is to adequately compensate individuals for the negligence of others, specifically, those that negligently operate a motor vehicle without sufficient insurance, and to place the insured into a position had the wreck not occurred. Mrs. Loyacono was completely denied compensation for any of her injuries, pain and suffering, medical expenses, and lost wages.

Refusing to honor Mrs. Loyacono's claim for damages, Mrs. Loyacono took this matter before the Warren County Circuit Court. Mrs. Loyacono's six (6) day jury trial in Warren County was plagued with errors and prejudicial conduct that denied her the right to a fair and

[7]Defense counsel tried to elicit that the collision was the result of a "sudden emergency," but the trial court prevented Travelers futile ploy. (T. at 1087-1092).

impartial trial. At the outset, Mrs. Loyacono was at an insurmountable disadvantage by the improper, conspiratorial relationship between the co-defendants, Watacha Shelby and Travelers. Ms. Shelby admitted that Travelers sent a chauffeur to her apartment in Memphis, Tennessee, to drive her to trial in Vicksburg. (T. at 157). The Defendant paid for Ms. Shelby's food and hotel room for an entire week at the nicest casino in town. (T. at 157, 160). Despite the cross-claim against Ms. Shelby made by Travelers, it was clear that there was an improper "Mary Carter" type agreement and that if Ms. Shelby would help Travelers defeat Mrs. Loyacono's claim, Travelers would pay all of Ms. Shelby's expenses and drop the cross-claim.

Not only was Mrs. Loyacono battling the two-headed monster spawned and paid for by Travelers, she also faced a lack of courtroom decorum that diminished the seriousness of her case and her injuries. The trial court allowed the jury to hear prejudicial evidence and see behavior that tainted the proceeding. Nevertheless, despite the numerous hurdles Mrs. Loyacono was forced to overcome, she successfully proved a *prima facie* case that (1) she was insured by Travelers under an uninsured motorist policy at the time of the subject car crash, (2) through stacking, her UM policy protected her up to $2,500,000.00 in coverage, (3) she was in a motor vehicle collision with an uninsured motorist (Ms. Shelby) on July 25, 2005, (4) Ms. Shelby was negligently operating her vehicle and the sole, proximate cause of the collision, and (5) she was undeniably injured in the collision caused by Ms. Shelby. Even Travelers' expert witnesses testified that Mrs. Loyacono was injured in the collision. Thus, this case was never a matter of whether Mrs. Loyacono was entitled to damages sustained from the collision. Rather, it was a question as to how much she should be awarded.

Regardless of the Defendants' responsibility for Mrs. Loyacono's injuries and damages, the prejudicial comments and conduct of counsel for Travelers, improper and inadmissible

evidence presented to the jury, faulty jury instructions, and juror misconduct resulted in the jury awarding Mrs. Loyacono zero damages. Thus, undersigned counsel's Motion for JNOV and New Trial on Damages should have been granted. Accordingly, Mrs. Loyacono asks that this Honorable Court reverse the trial court's ruling and order a new trial on damages only.

ARGUMENT

I. WHETHER THE TRIAL COURT ERRED BY DENYING THE PLAINTIFF'S MOTION FOR JNOV

The evidence and testimony presented at trial provided substantial and uncontradicted proof that Mrs. Loyacono's permanent injuries, medical bills, lost wages, and her pain and suffering amounted to a monetary value substantially higher than the zero dollars and zero cents ($0.00) jury verdict. Thus, based on the overwhelming weight of the evidence presented, Mrs. Loyacono was entitled to a judgment notwithstanding the verdict ("JNOV") as to her damages.

It is well settled that a JNOV is a matter of law. *White v. Stewman*, 932 So.2d 27, 31 (Miss. 2006). A JNOV challenges the substance of a party's factual evidence regarding the law of the case. *Id.* On appeal from the denial of a Motion for JNOV, a reviewing court, considering the evidence in the light most favorable to the nonmovant, will reverse and render a lower court's denial "[i]f the facts so considered point so overwhelmingly in favor of the appellant [movant] that reasonable men could not have arrived at a contrary verdict. *Id.* at 32. More simply stated, "[a JNOV goes] to the very heart of a litigant's case and test the legal sufficiency of that litigant's case. *Id.* The issue of granting or denying a Motion for JNOV should be reviewed by this Honorable Court under the *de novo* standard, therefore, applying the same criteria as that of the trial court. *Id.*

The standard for a Motion for JNOV was set forth in *Jesco, Inc. v. Whitehead,* 451 So.2d 706, 711 (Miss. 1984), as follows:

> The motion for j.n.o.v. tests the legal sufficiency of the evidence supporting the verdict.....It asks the Court to hold, as a matter of law, that the verdict may not stand. Where a motion for j.n.o.v. has been made, the trial Court must consider all of the evidence -- not just evidence which supports the non-movant's case -- in the light most favorable to the party opposed to the motion. **If the facts and inferences so considered point so overwhelmingly in favor of the movant that reasonable men could not have arrived at a contrary verdict, granting the motion is required.** See, e.g., *General Tire Rubber Company v. Darnell,* 221 So. 2d 104,105 (Miss. 1969); *Paymaster Oil Company v. Mitchell,* 319 So. 2d 652, 657 (Miss. 1975); *City of Jackson v. Locklar,* 431 So. 2d 475, 478 (Miss. 1983).

As shown below, given the evidence and testimony provided to the jury in this case, no reasonable person could have reached the conclusion that Ms. Shelby did not cause at least **some** of the Mrs. Loyacono's damages. Thus, the legal sufficiency of the evidence presented during trial, which is tantamount to a defense verdict, cannot stand.

A. The Verdict Is Against The Overwhelming Weight Of The Evidence and Shows Juror Bias Against Kathryn Loyacono

The undisputed evidence at trial showed that on July 25, 2005, at approximately 6:30 p.m., Ms. Shelby backed her car the wrong way down Fort Hill Drive in Vicksburg, Warren County, Mississippi into oncoming traffic and struck Mrs. Loyacono's vehicle. (1 R. at 107-109). There was overwhelming evidence presented at trial that Mrs. Loyacono suffered injuries because of the wreck. However, the jury awarded zero dollars in damages. (5 R. at 607).

Kathryn Loyacono incurred over $73,000.00 in medical bills because of Ms. Shelby's negligence. (T. at 774-775, 904; Trial Ex. P-27). The Plaintiff will need over $18,000.00 in additional dental surgery for her cracked teeth and will need medical treatment in the future. (T. at 774-775; Trial Ex. P-18). All of Mrs. Loyacono's treating medical providers that testified, including Dr. Daniel Dare, Kit Bonner, Dr. Don Jackson, and Dr. Michael Winkelmann, said that

Mrs. Loyacono suffered permanent painful injuries and that she is still suffering pain today due to the collision caused by Ms. Shelby. (RE 6, pp. 10-11, 20-21; T. at 342-344, 346-347, 350-351, 360-361, 371, 747-749, 757-761). This pain will continue in the future for the rest of her life. The medical records from the emergency room and Dr. Gordon Lyons also stated that the Plaintiff suffered injuries because of the wreck. (T. at 342). Defense expert Dr. Keith Melancon testified that the Plaintiff suffered some injury and incurred some medical treatment because of the wreck. Though he had never treated the Plaintiff, Dr. Melancon disagreed with Mrs. Loyacono's treating doctors about the **extent** of the injuries and the duration of recovery. (T. at 1200-1201). Thus, it was undisputed that Mrs. Loyacono incurred **some** damages. In fact, in closing, defense counsel acknowledged that Mrs. Loyacono had suffered by telling the jury to award her one-half of one percent of their $2.5 million dollar demand. The award of zero damages shows that the jury did not consider the overwhelming weight of the evidence and that the verdict was the product of bias, prejudice, or passion. *See Gatewood v. Sampson*, 812 So.2d at 222 (Miss. 2002)(holding that, commonly, the sole proof of bias, prejudice, or passion on the part of the jury is an inference, if any, to be drawn from contrasting the amount of the verdict with the amount of the damages). The uncontradicted expert testimony referenced above was clearly ignored by the jury.

Several witnesses also testified about the Plaintiff's injuries. Kathryn Loyacono testified regarding the injuries she sustained from the collision, and her past, present, and future pain and suffering. She testified that she has incurred in excess of $73,000.00 in medical bills and is expected to incur future medical expenses relating to the injuries caused by the subject collision. She testified that because of her injuries caused by the subject collision, her relationships with her friends, family, husband, and grandchildren were damaged. Prior to the collision, she loved

her job and worked full days managing her husband's law firm. Since the collision, she has been unable to resume the work schedule she previously maintained. Currently, because of the pain, she is only capable of working a few hours a day and is unable to sit for extended amounts of time. The pain and injuries sustained in the collision caused her to clinch/grind/grit her teeth, which resulted in extensive dental problems that remain today. (T. at 855-870, 873-880, 887-905, 905-914).

Kathryn Holland is Mrs. Loyacono's daughter and she testified about her mother's life before and after the subject collision. She testified that her relationship with her mother has greatly suffered since the collision. Prior to the injuries her mother sustained in the collision, Mrs. Loyacono would visit her and her family (including Mrs. Loyacono's grandchildren) at least once a month. Since the collision, her mother is always in pain and her memory has diminished. (T. at 719-725).

The Plaintiff's husband, Kelly Loyacono, testified about the day of the subject collision and effects of the collision on his wife, their relationship, and her job at his law firm. He testified that since the collision, his wife is in constant pain, which has drastically affected their personal relationship. He explained that prior to the collision his wife was very active and an exceptionally hard worker. Since the wreck, Mrs. Loyacono's constant pain has drastically effected her physical and mental condition and the lifestyle she once led. He testified that Mrs. Loyacono was invaluable to his law practice and that at the time of the collision her salary was $200,000.00. After the collision, because she was unable to fully resume her duties at his law firm, her salary was reduced to $150,000.00. (T. at 538-565, 665-688).

Laura Chambers was a former secretary at Mr. Loyacono's law firm and she testified to Mrs. Loyacono's ability to work before and after the subject collision. She testified that Mrs.

Loyacono trained and mentored her for over one (1) year. Before the wreck, Mrs. Loyacono never missed work and would work full days. After the wreck, Mrs. Loyacono was always in pain and was unable to resume her duties at the law firm. She testified that shortly after the subject collision, she could hear Mrs. Loyacono grinding her teeth, which she said sounded like "nails on a chalkboard." She further stated that when Mrs. Loyacono was in the office, she (Mrs. Loyacono) was unable stand up straight. (T. at 692-697).

Defendant Watacha Shelby testified on her own behalf by reading a prepared statement. (RE 10; T. at 1069-1075; RE 11; Court's Ex. C-1-A and C-1-B)(hereinafter "Statement"). The trial court reviewed the Statement *in camera* prior to it being read to the jury, and redacted several irrelevant and inflammatory parts. (RE 10; RE 11; Court's Ex. C-1-B). The trial court also removed other portions of the Statement after Plaintiff's counsel objected on the grounds of hearsay and relevancy. *Id.* Ms. Shelby then read her redacted Statement to the jury. On cross examination by Plaintiff's Counsel, Defendant Shelby admitted that she was driving backwards on Fort Hill Drive and going the wrong way at the time of the incident. (RE 10; T. at 1077-1087). Ms. Shelby also admitted that while driving backwards that there was an impact with the Plaintiff's car. (RE 10; T. at 1077-1082). Regardless, Ms. Shelby would not accept any responsibility for the collision, even though she admitted that Mrs. Loyacono did not cause or contribute to the wreck.

Although Travelers had previously admitted that Ms. Shelby was at fault, counsel for the insurance company attempted to elicit testimony from Ms. Shelby that the wreck was unavoidable due to a "sudden emergency." (RE 10; T. at 1087-1092). The trial court sustained Mrs. Loyacono's objection, and Travelers' ploy to avoid liability for the wreck was not allowed.

Travelers called Dr. Richard Allnut, an expert in biomechanical engineering. (T. at 1096). Dr. Allnut stated: (1) He did not inspect the vehicles or the scene; (2) He did not do any testing on the Plaintiff's car; (3) He did not know that Travelers had repaired structural damage to the vehicle caused by the wreck because Travelers had not informed him of this fact, which would have definitely changed his opinion; and (4) **That Mrs. Loyacono did suffer some muscle strain injury from the wreck**. (T. at 1115, 1122-24).

Travelers ended its case in chief with testimony from Dr. Keith Melancon, an expert in general and orthopedic medicine.[8] (T. at 1116). Like everyone else, Dr. Melancon testified that Mrs. Loyacono was injured by the July 25, 2005 collision. (T. at 1200-1202). However, Dr. Melancon said that the Plaintiff's injuries should have subsided after approximately 5 weeks of treatment and pain and suffering. (T. at 1200-1202). Importantly, Dr. Melancon never treated or examined Mrs. Loyacono before trial. (T. at 1201).

Based on the evidence and testimony presented by Mrs. Loyacono and the Defendants, the Plaintiff was entitled to recover for the damages she sustained in the collision caused by Ms. Shelby. Inexplicably, the jury returned a verdict awarding zero dollars and zero cents ($0.00). (T. at 1228-1232; 5 R. at 605). Because the overwhelming weight of the evidence clearly showed that Mrs. Loyacono sustained some injuries, but was denied any compensation for same, Mrs. Loyacono's Motion for JNOV should have been sustained. Accordingly, Mrs. Loyacono requests that this Honorable Court overrule the trial court's denial of her JNOV. Alternatively, the jury's verdict was against the overwhelming weight of the evidence and the Plaintiff should live to see another day in court.

[8]In Dr. Melancon's expert witness designation, he opined that the Plaintiff was most likely injured when she reached over to the glovebox for her insurance card and not from the impact. However, this outrageous opinion was not mentioned by him at trial.

II. WHETHER THE TRIAL COURT ERRED BY DENYING THE PLAINTIFF'S MOTION FOR NEW TRIAL ON DAMAGES

Should this Honorable Court not find itself compelled to enter a judgment notwithstanding the verdict nor find that the verdict was against the weight of the evidence, Appellant/Plaintiff requests that this Honorable Court order a new trial on damages. A new trial should be granted when (1) the verdict is against the overwhelming weight of the evidence, (2) the jury was confused by faulty or erroneous jury instructions, or (3) the jury departed from its oath and its verdict was a result of bias, passion, and/or prejudice. *Kitchens v. Miss. Ins. Guar. Ass'n*, 560 So. 2d 129, 132 (Miss. 1989); *citing Griffin v. Fletcher*, 362 So.2d 594, 596 (Miss. 1978) and *Clayton v. Thompson*, 475 So.2d 439, 443 (Miss. 1985). The motion for a new trial addresses the weight of the evidence and should be granted to prevent an unconscionable injustice. *Wall v. State,* 820 So. 2d 758, 759 (Miss. 2002); *Bridges v. State*, 790 So. 2d 230, 233 (Miss. 2001). Errors occurring at the trial cannot be reviewed without a motion for new trial. *Hayes v. Slidell Liquor Co.,* 55 So. 356, 357 (Miss. 1911). When reviewing whether or not the amount of the jury's verdict was "so inadequate as to evince prejudice or passion, every case on this issue must be determined from the facts in that particular case." *Campbell v. Schmidt*, 195 So.2d 87 (Miss. 1967). Pursuant to Mississippi Rule of Civil Procedure 59, the evidence established at trial shows that the Mrs. Loyacono is entitled to a new trial on damages.

The case at bar is similar to *Knight v. Brooks*, where the Mississippi Court of Appeals reversed a jury award of zero damages. *Knight v. Brooks*, 881 So.2d 294 (Miss.Ct.App. 2004). In *Brooks*, the plaintiff was rear ended while stopped at a red light. The plaintiff did not complain about injuries until six months after the collision, but was eventually diagnosed with a herniated disc. *Id.* at 295-296. One of the plaintiff's treating doctors testified that the plaintiff

also had an aggravation of a pre-existing condition. The medical bills totaled $23,000.00 and charges for surgery consultation were $7,650.00. The plaintiff testified that he was in chronic pain since the wreck and could not participate in certain activities that he once enjoyed. *Id.* at 296. However, the plaintiff admitted that he was still able to fish and work. *Id.* at 296. The jury returned a verdict that found for the plaintiff but awarded zero dollars in damages. *Id.* at 296. The plaintiff moved for a new trial on damages and the trial court denied the motion. The Court of Appeals found that an award of zero damages was against the overwhelming weight of the evidence and held as follows:

> In the case sub judice, **there was actually no award of damages since the jury assessed them at zero dollars. This cannot be viewed as an inadequate award of damages, but instead as no award at all.** Knight presented several expert witnesses at trial by way of their depositions, **each stating that Knight suffered some injury from the accident**...Upon viewing the evidence presented at trial in the light most favorable to [the defendant], **it is clear that [the plaintiff] suffered some injury from this accident.**

Id. at 298 (emphasis added).

The Court of Appeals reversed the trial court and remanded the case for a new trial on the extent and amount of damages only. *Id.* at 297-298.

Similarly, in *McCary v. Caperton*, 601 So.2d 866, 869-870 (Miss. 1992), the plaintiff was parked when struck by the defendant's vehicle. The plaintiff's doctor initially found minimal soft tissue injuries to the neck and lower back and then diagnosed the plaintiff with cervical strain, lumbosacral strain, and severe osteoarthritis. *Id.* at 867. The plaintiff submitted medical bills of approximately $3,000.00. Like Defendant Travelers, the defendant in *McCary* argued that the osteoarthritis was due to the aging process and not caused by the wreck. *Id.* at 867-868. The defendant also submitted evidence of pre-existing neck and back pain. *Id.* at 867-868. The trial

court then directed a verdict on negligence, and the case was submitted to the jury on damages only. The jury returned a verdict for the defendant. The Supreme Court found error in the trial court's giving the jury the latitude to determine that no damage was suffered, and held that the discretion given to the jury "effectively cancelled the peremptory language" previously given by the trial court and "obviously confused" their deliberations. *Id.* at 869 (citing *Griffin v. Fletcher*, 362 So.2d 594, 596 (Miss. 1978). The Supreme Court also found inclusion of the phrase "if any" in the jury instructions to be reversible error since there was unrefuted evidence that the plaintiff suffered injury and that the injury resulted in loss. The task of the jury under the circumstances was to determine the *extent* of McCary's injuries and loss, not whether any existed. *Id.* at 870. (Emphasis in original). *McCary* is directly on point with the case at bar.

Plaintiff Kathryn Loyacono initially submitted Jury Instruction P-6 which stated the following:

> When you reach a verdict in this case, you should write it on a separate piece of paper. You need not sign it, and may be in the following form:
>
> We, the jury, find for the Plaintiff and assess her damages at $ _____.

(RE 12; 4 R. at 463)

However, this instruction was amended at the urging of defense counsel to say "if" you reach a verdict instead of "when" you reach a verdict. (T. at 1213-1218). The jury should not have been given a choice on this issue, and they should have been instructed to find for Mrs. Loyacono and simply fill in a dollar amount for the extent of her damages. Based on *McCary*, it was reversible error to amend Jury Instruction P-6.

In *Odem v. Roberts*, 606 So.2d 114 (Miss. 1992), this Honorable Court analyzed nearly identical facts to the case at bar and the precise issues presented herein. In *Odem*, this Honorable

court set aside the trial court's Order denying the plaintiff's post-trial motions and imposed an additur pursuant to Miss. Code Ann. § 11-1-55 (Supp. 1990)." *Id.* at 118. *Odem* held that if a reviewing court, any other court of record, "finds that the damages [awarded by the jury] are excessive or inadequate" and those damages were contrary to the overwhelming weight of credible evidence, "**a motion for a new trial still may be overruled upon condition of additur or remittitur**." *Id.* (emphasis added). Finding that the defendant in *Odem* was at fault for the accident and that the plaintiff incurred **some** medical expenses as a result of the accident, that the evidence was uncontradicted, and that the jury failed to award the plaintiff damages pertaining to medical bills, this Honorable Court held that the "failure of the jury to award the [plaintiff medical expenses] shows that the damages awarded were contrary to the overwhelming weight of credible evidence." *Id.* Clearly, the lower court was in error on this issue and should be reversed.

III. WHETHER THE TRIAL COURT ERRED IN FAILING TO DIRECT A VERDICT ON CAUSATION OF DAMAGES

Respectfully, based on the uncontradicted evidence that Mrs. Loyacono suffered **some** injury, the trial court erred in not directing a verdict for the Plaintiff on causation. It is error to grant a jury instruction which is likely to mislead or confuse the jury as to the principles of law applicable to the facts in evidence. *Southland Enterprises, Inc. v. Newton County*, 838 So.2d 286 (Miss. 2003). Failing to direct a verdict on causation allowed the jury to decide whether Mrs. Loyacono was injured in the wreck at all, which was already conclusively established by the evidence.

The Plaintiff submitted Jury Instruction P-16, which instructed the jury to render a verdict for the Plaintiff. (RE 13; 4 R. at 453). During the jury instruction conference, Mrs. Loyacono

requested that the trial court grant a verdict for the Plaintiff on liability and causation and to simply let the jury determine a dollar amount for the extent of Mrs. Loyacono's damages. The trial court denied the Plaintiff's request and refused Jury Instruction P-16. (RE 13; T. at 1213-1221; 4 R. at 453).

Following the Fifth Circuit Court of Appeals, this Honorable Court has held that "where a jury correctly decides the issue of ***liability*** but proves to have rendered a damage award tainted by prejudice, the reviewing court may appropriately remand for a new trial on damages alone." *Johnson v. Fargo*, 604 So.2d 306, 311 (Miss. 1992)(citing *Edwards v. Sears, Roebuck and Co.*, 512 F.2d 276 (5th Cir. [Miss.] 1975)). In the case at bar, it was stipulated that Ms. Shelby negligently crashed her vehicle into the front of Mrs. Loyacono's vehicle. Evidence and testimony at trial proved at the very least that Mrs. Loyacono suffered some injury. Clearly, the jury's verdict for zero dollars was tainted by prejudice and Mrs. Loyacono should be granted a new trial on damages.

IV. WHETHER THE PLAINTIFF WAS UNFAIRLY PREJUDICED BY WATACHA SHELBY'S CONDUCT AND THE AGREEMENT BETWEEN THE CO-DEFENDANTS

Kathryn Loyacono filed her Complaint against Watacha Shelby on August 3, 2005. Though counsel for Travelers adamantly argued service was improper, it was clearly shown that Ms. Shelby was properly served and that she did not file an Answer. (T. at 149-154). The allegations in the Complaint were not disputed by Ms. Shelby, and she was in default. M.R.C.P. 12(a). In fact, for five years, Ms. Shelby took no part in this litigation. Conveniently, on the morning of trial, Ms. Shelby showed up and proceeded without an attorney.

Although Ms. Shelby's unfamiliarity of the laws, rules, and procedures of the court were anticipated to a certain degree by the parties, her blatant disregard and disrespect for the court

proceedings in front of the jury was highly prejudicial to Mrs. Loyacono's case. Further, it quickly became clear that the Defendants were in cahoots. (T. at 155-162). Travelers sent an investigator to Memphis, Tennessee, to pick Ms. Shelby up and drive her to Vicksburg, Mississippi. (T. at 157). Travelers paid for Ms. Shelby to stay in one of the casinos in Vicksburg for an entire week. (T. at 157). Travelers paid for her food and other expenses. (T. at 157, 160). This "Mary Carter" type agreement between Ms. Shelby and Travelers was not revealed until trial.

To further evidence the agreement, Travelers openly and regularly counseled Ms. Shelby and spoke on her behalf. (T. at 151-153, 594-595). Ms. Shelby testified that Travelers' attorneys advised her that the cross-claim was not a big deal, but merely a "procedural issue" that would get worked out.[9] (T. at 160-162). This constitutes legal advice by Travelers to an adverse party to the detriment of their insured, Mrs. Loyacono. While on the witness stand, Ms. Shelby was coached by Travelers on how to answer questions. (T. at 151-153). Travelers also provided Ms. Shelby with copies of documents and prepared questions for her to ask the Plaintiff's witnesses. (T. at 593-597). This conduct created an appearance of bias and a reason for Ms. Shelby to testify untruthfully and for the benefit of Travelers.

Despite bringing this conduct to the trial court's attention and requesting any and all documents evidencing payments and agreements, written or otherwise, between the Co-Defendants, the trial court did not order production of this evidence, but rather ordered that all parties stop contact with Ms. Shelby during trial. However, counsel for Travelers did not abide by the trial court's ruling. During this time, Travelers was still pursuing its cross-claim against

[9]During trial, Travelers dismissed their cross claim against Watacha Shelby. (T. at 607-609).

Ms. Shelby. Not surprisingly, Travelers dismissed the cross-claim against Ms. Shelby towards the end of the trial (T. at 607-609, 678, 681).

Even more telling, when Mrs. Loyacono made an oral Motion to Dismiss Ms. Shelby from the case, Ms. Shelby flatly refused to get out of the case. (T. at 1037-1038). The trial judge tried to convince Ms. Shelby to agree to the Motion, but Ms. Shelby explained that she did not want to be dismissed. (T. at 1032-1038). Thus, the trial court denied the Plaintiff's Motion to Dismiss, and court recessed for lunch. Immediately following the lunch break, after consulting with counsel for Travelers, Ms. Shelby changed her mind and asked the court to dismiss her from the case. (T. at 1094). This fact alone warrants further inquiry by this Honorable Court as to the existence of any payments and agreements between the Defendants.

To top it off, on Friday October 8th, 2010, the trial court asked the parties if it would be acceptable if Ms. Shelby left the trial early, with the understanding that she would come back for trial the next day. (T. at 1136-1137, 1163). In the spirit of good faith, the Plaintiff did not object to the trial court's request. (T. at 1136-1137). Inexplicably, when trial resumed the next day, **Ms. Shelby never returned to court**. Accordingly, Ms. Shelby was not present during closing arguments and no explanation was given to the jury by the trial court for her absence. The jury was never informed whether Ms. Shelby was still in the case or not. This clearly created confusion for the jury and was prejudicial to Mrs. Loyacono's trial.

Mary Carter agreements occur when a defendant settles with the plaintiff but remains a litigant in the case and will be reimbursed a specified amount of the plaintiff's recovery from the other defendants. *McDaniel v. Anheuser-Busch, Inc.*, 987 F.2d 298 (5th Cir.1993). Generally, such secret agreements are prohibited in Mississippi. Here, the Plaintiff should have been allowed to discover the full extent of payments by Travelers to Ms. Shelby, including but not

limited to the costs paid for any travel, lodging, meals, child care, etc. The Plaintiff should also be provided any agreements between Ms. Shelby and Travelers. This information is relevant to the issues of bias and interest. Because the Plaintiff did not have access to this information, she was unfairly prejudiced and reversal is warranted. *See Wells v. Tucker*, 997 So.2d 925 (Miss.Ct.App.2007)(in medical malpractice case, lower court erred by refusing to allow the plaintiffs to impeach the credibility of the defendant's experts by showing that the defendant and his experts were covered by same insurance company).

V. WHETHER THE TRIAL COURT ERRED BY ALLOWING REPEATED REFERENCES TO PLAINTIFF'S HUSBAND'S FINANCIAL STATUS AND HER HUSBAND'S PROFESSIONAL CAREER AS AN ATTORNEY

For years, Kathryn worked with her husband in Kelly Loyacono's law office. Mr. Loyacono is not a party to this litigation. In pre-trial motions, the trial court granted Plaintiff's Motion *in Limine* and denied the admission of evidence of Kelly and Kathryn Loyacono's financial status. (T. at 67). Nevertheless, over objection, the trial court allowed prejudicial evidence of the amount of Kelly Loyacono's legal fees in the Fen-phen litigation. (T. at 645-648). The total amount of Mr. Loyacono's recovery in an unrelated case was not relevant to the Mrs. Loyacono's lost wages. In fact, Mrs. Loyacono's salary was conclusively established through the testimony of accountant Ken Hicks and her tax documentation. (T. at 807-813). Therefore, any effort to inform the jury of the total amount of recovery was simply to create bias and prejudice against Mrs. Loyacono.

It is well known that the standard of review for a trial court's decision to either admit or exclude evidence is abuse of discretion. *Robinson Prop. Group, L.P. v. Mitchell*, 7 So.3d 240, 243 (Miss. 2009); *Beverly Enters., Inc. v. Reed*, 961 So.2d 40, 44 (Miss. 2007). A case shall be reversed on the admission or exclusion of evidence if said evidence results in prejudice and harm

or adversely affects a substantial right of a party. *Accu-Fab & Const. v. Ladner Ex Rel. Ladner*, 970 So.2d 1276, 1284 (Miss. Ct. App. 2000); *citing Terrain Enter., Inc. v. Mockbee*, 654 So.2d 1122, 1131 (Miss. 1995). Further, even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. M.R.E. 403 (See also *Accu-Fab & Const. v. Ladner*, 970 So. 2d 1276 (Miss. Ct. App. 2000)(In wrongful death suit against premises owner after deceased fell through a hole cut in a roof while performing his job as a metal fabricator, Court of Appeals upheld trial court's exclusion of positive drug test and marijuana cigarette found in decedent's pants as irrelevant and unfairly prejudicial)).

The admission of the amount of recovery by the Plaintiff's husband in the Fen-phen litigation was highly prejudicial and caused substantial harm to the Mrs. Loyacono's case.[10] It caused the jury to conclude that Kathryn Loyacono did not need the money from Travelers insurance company to compensate her for medical bills and pain and suffering. Defense counsel repeatedly argued that Kelly Loyacono was so wealthy that he could have paid his wife any amount of money as a salary. (T. at 815). While this may be true in many employer/employee relationships, it does not change what Kathryn Loyacono was actually paid for her work. It was Travelers' purpose to infer that Kelly and Kathryn Loyacono were wealthy and to create bias or prejudice with the jury. The failure to exclude this inflammatory and irrelevant evidence is reversible error.

[10]For example, Bill Gates likely could pay his Microsoft employees more money. However, that does not mean that if one of his employees is in a car wreck that Mr. Gates' net worth suddenly becomes relevant or admissible.

VI. WHETHER DEFENSE COUNSEL'S DISCOVERY VIOLATIONS PREJUDICED THE PLAINTIFF

The discovery violations of Defendant Travelers prejudiced the Plaintiff. First, Travelers hid the existence of a secret surveillance video of the Plaintiff. (T. at 69). During discovery, the Plaintiff specifically requested any and all secret surveillance videotapes. On February 24, 2010, counsel for Travelers told Plaintiff's Counsel in writing that there was no surveillance video of the Plaintiff. (T. at 70). This statement by defense counsel was false. At the pretrial conference on September 29, 2010, a mere six days before trial, defense counsel announced for the first time that secret surveillance video footage of the Plaintiff existed. (T. at 69). The Plaintiff viewed the video and learned that it was made in 2008, two years before she was assured by Travelers that no such tape existed. Amazingly, instead of confessing that the Defendant had misled the Plaintiff, the Defendant responded that they had not violated any rule because they had not said that a tape did not exist under oath or in any pleading. (T. at 70-71). This argument is truly sad, and this blatant discovery violation should be sanctioned.

Travelers also failed to produce all documents reflecting payment for property damage to the Plaintiff's vehicle that were requested in discovery. In fact, even though Travelers had full knowledge for five years that the wreck caused over $1,500.00 in property damage to the Plaintiff's vehicle's bumper, glovebox, and the alignment, the Defendant disingenuously argued in opening statements that the wreck was merely a "paint scraper." This assertion was knowingly false and it opened the door for Plaintiff to introduce evidence of the repairs to the Plaintiff's car. When the Plaintiff showed the trial court an invoice from Mercedes Benz and a refund check to Kathryn Loyacono for repairs that Travelers paid, counsel for Travelers denied any knowledge of repairs to the car for property damage. (RE 14; T. at 846-847; Trial Ex. P-26

and P-29). Travelers' claim of ignorance is ludicrous **considering that the Defendant paid the property damage bill and the Plaintiff showed the trial court a copy of an August 2005 check related to the payment**. (T. at 846-847). Although it is hornbook law that knowledge of the company is imputed to its attorneys, defense counsel actually blamed the Plaintiff for not reminding Travelers that it paid for the property damage. Travelers eventually produced a printout showing $261.62 in repairs paid by the Defendant to Higginbotham Mercedes Benz for property damage to Mrs. Loyacono's car that showed the payment was made on September 9, 2009. (RE 14; Trial Ex. P-26). However, Travelers' counsel would not reveal the specific location of the property damage even though the Plaintiff and her husband both testified outside the presence of the jury that the repairs were for the glove box and alignment.[11] Still, the trial court refused to allow the Plaintiff to introduce the invoice from Mercedes Benz into evidence. (T. at 1014-1020). This severely prejudiced the Plaintiff because the jury was not allowed to hear that the collision caused structural damage to the vehicle. The exclusion of this crucial evidence amounts to reversible error.

VII. WHETHER DEFENSE COUNSEL'S REPEATED MISCONDUCT UNFAIRLY PREJUDICED THE PLAINTIFF

Over the Plaintiff's contemporaneous objections, Travelers' counsel's prejudicial conduct denied Mrs. Loyacono a fundamentally fair trial. This conduct included repeated false, prejudicial, and nonsensical outbursts that had no basis in fact or law.

The prejudicial conduct includes but is not limited to the following:

[11]The Plaintiff also testified in her deposition that the collision caused damage to the glovebox and that Travelers paid for this property damage.

a. Showing a photograph of Mrs. Loyacono's vehicle to the venire during voir dire without first showing it to opposing counsel or asking for the trial court's permission, and before any evidence was admitted. One member of the venire announced to the entire panel that he could not be fair simply based on viewing the picture. (T. at 202-203, 255)

b. Accusing the Plaintiff of lying when she answered that she had not played golf "abroad" and then claiming that traveling abroad includes the State of Hawaii because Hawaii is not a part of the United States of America. (T. at 921-923).

c. Claiming that defense counsel attempted to take Dr. Don Jackson's deposition even though this claim was false. Defense counsel then stated that they could not take the deposition because Dr. Jackson's office door was locked. Again, this was false. (T. at 802).

d. Explicitly stating to the jury during closing arguments that a judgment would bankrupt Ms. Shelby, even though she was judgment proof and Travelers had previously dropped their cross-claim. (T. at 1225).

e. That the Rules allow the introduction of the actual deposition of party when there is no such Mississippi Rule of Civil Procedure. This created the appearance that the Plaintiff was hiding her deposition from the jury, which was not the case. (T. at 939-940).

f. Stating that the Plaintiff had agreed to prepare the videotape deposition clips for the Defendant at no cost when there was never a request made or agreement to do so. This disagreement stopped the trial for over an hour. (T. at 838-845)

g. Placing the definition of the word "sanctum" in evidence for no reason. (T. at 923-925)

h. Blurting out answers for Co-Defendant Watacha Shelby during questioning - specifically, by answering "No" in Ms. Shelby's stead when she was asked a question by Plaintiff's counsel. (T. at 151-153).

i. During the Plaintiff's voir dire and questioning of witnesses, defense counsel's repeatedly stood up, walked around, talked, read the newspaper, strolled around the courtroom, sat in the audience, and placed his arm on the bar of the trial judge's bench. All of this unprofessional behavior was a mere ploy to distract the jurors.

j. Continuing to roam the courtroom during trial, after being ordered to remain seated by the trial court.

k. Communicating with the jury after closing argument but before they retired for deliberations by making a "go get 'em" arm gesture to a member of the panel.

l. Repeated improper impeachment during cross examination of the Plaintiff. Counsel must ask the witness a question first and then confront the witness with the information. This was not done.

m. In an effort to delay the trial and tire the jury, claiming that the defense had not been given medical bills and a medical bill summary when the Plaintiff produced the same on September 3, 2010. Defense counsel then asked for an opportunity to review the materials, but did not look at them during the forty-five minute break.

n. Repeatedly hurling invective by referring to the Mrs. Loyacono's husband as a "personal injury attorney," even though Mr. Loyacono was not a party. (T. at 657)

o. Repeatedly making argumentative and speaking objections in the presence of the jury.

p. Intentionally delaying trial to argue Traveler's pre-trial oral Motion to Dismiss, which was baseless, as it was not presented 10 days before trial as required by the local rules and was therefore abandoned. U.C.C.C.R. 4.03(5).

q. Repeatedly questioning Kelly Loyacono about the legal basis for filing the Complaint and First Amended Complaint which were not the basis for the claim once the Second Amended Complaint was filed.

The cumulative effect of these and other actions by counsel for Travelers denied Mrs. Loyacono a fair trial as required by the law. *See Acevado v. State*, 467 So.2d 220, 225-226 (Miss. 1985).

VIII. WHETHER THE TRIAL COURT ERRED FOR NOT CONDUCTING FURTHER INQUIRY INTO JUROR MISCONDUCT

There is sworn proof that the jury not did not follow the trial court's instructions. (RE 15 4; 4 R. at 507). The Affidavit of juror Linda Barfield states that the jury did not elect a foreman when they retired to the jury room. (RE 15; 4 R. at 507). Ms. Barfield also states that the form of the verdict was not lost or misplaced as announced to the trial court, but destroyed by a juror. *Id.* The jury did not even discuss the issues in the case, but instead repeatedly discussed the irrelevant financial status of Kelly and Kathryn Loyacono. This violated the trial court's instruction to not consider Mr. Loyacono's net worth or financial status. *Id.* Further, before all the evidence was presented, a juror announced that he had already made up his mind. *Id.* This conduct warrants reversal because at least one juror ignored the trial court's directive to keep an open mind until all evidence had been presented.

When determining whether a new trial is warranted for juror misconduct, the Mississippi

Supreme Court follows the well established rules set forth in *Gladney v. Clarksdale Beverage Co., Inc.*, 625 So.2d 407 (Miss. 1993). In *Gladney*, the Mississippi Supreme Court held that "where such extra – record facts affect an issue of importance in the case and are qualitatively different from the evidence properly before the jury, a new trial may be ordered." *Id.* at 414. Nothing could be more important to a fair trial than keeping an open mind until all evidence is presented and the Plaintiff properly brought this issue before the trial court in post trial motions.

At the hearing on post trial motions, the trial court actually stated that further inquiry into juror misconduct was warranted by the Affidavit of Linda Barfield. (T. at 1235-1236). However, the trial court denied the Plaintiff's post trial motions without explanation on the juror misconduct issue. (RE 5). At the very least, the trial court should have conducted an investigation into this issue.

IX. WHETHER THE TRIAL COURT ERRED IN REFUSING OR AMENDING THE PLAINTIFF'S JURY INSTRUCTIONS

The trial court refused to grant the Plaintiff's jury instructions as submitted. Then, the Court amended or refused several jury instructions, including but not limited to Jury Instruction P-4 (jury should determine damages), Jury Instruction P-5 (categories of damages) and Jury Instruction P-16 (verdict for Plaintiff). Regarding Jury Instruction P-5, the Court changed "should" to "may" before identifying the categories of recoverable damages. (T. at 1215). As discussed in Section II. above, this was reversible error.

X. WHETHER THE TRIAL COURT ERRED IN GRANTING THE DEFENDANTS' JURY INSTRUCTIONS.

The trial court granted the Defendant's jury instructions that were objected to by the Plaintiff, including but not limited to Jury Instruction D-10 (damages), Jury Instruction D-14 (pre-existing conditions) and Jury Instruction D-22 (elements of case must be proven by

preponderance of evidence). (T. at 1221, 1222). Regarding Jury Instruction D-11, the trial court instructed the jury to consider damages "if you find for the Plaintiff." As stated above in Section II., this was error based on *Knight v. Brooks*. Regarding Jury Instruction D-14, there was no evidence of apportionment between any pre-existing injuries and the injuries caused by the subject collision. Thus, this instruction was improper. See *Brake v. Speed*, 605 So. 2d 28 (Miss. 1992).

CONCLUSION

As set forth above, Kathryn Loyacono's trial was riddled with prejudicial comments, irrelevant evidence, and erroneous legal rulings. As a result, the jury returned a verdict for zero dollars and zero cents ($0.00). The verdict was completely unsupported by the facts, evidence, and testimony given during trial. There was also evidence of juror misconduct. Accordingly, as set forth above, Mrs. Loyacono requests that this Honorable Court reverse the trial court and order a new trial on damages only.

RESPECTFULLY SUBMITTED, this the 24th day of January, 2012.

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CERTIFICATE OF SERVICE

I, Rocky Wilkins, of counsel for the Plaintiff in the above-referenced matter, do hereby certify that I have this day served, via facsimile and United States mail, postage pre-paid, the foregoing document to the following:

Judge Richard W. McKenzie
Special Circuit Court Judge
1301 West Pine Street
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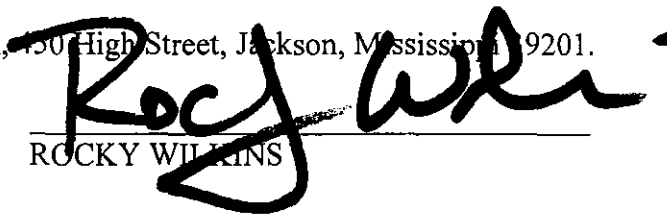
This the 24th day of January, 2012.

ROCKY WILKINS

CERTIFICATE OF FILING

I, Rocky Wilkins, of counsel for the Appellant/Plaintiff in the above-referenced matter, that I have hand delivered the original and four copies of the Brief of Appellant Kathryn Loyacono and an electronic diskette containing same on January 24, 2012, addressed to Ms. Kathy Gillis, Clerk, Supreme Court of Mississippi, 450 High Street, Jackson, Mississippi 39201.



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