IN THE SUPREME COURT OF MISSISSIPPI

NO. 2018-CA-0091

LIBERTY INSURANCE CORPORATION

Defendant/Appellant

vs.

ANTHONY LEE TUTOR

Plaintiff/Appellee

BRIEF OF APPELLEE, ANTHONY LEE TUTOR

Appeal from the Circuit Court of Clay County, Mississippi
Civil Action No. 2013-0184-C

Lance L. Stevens (MBN 7877)
Roderick D. Ward, III (MBN 6953)
1855 Lakeland Drive, Ste. Q-200
Jackson, MS 39216
Telephone: 601.366.7777
Email: lstevens@stevensandward.com
rward@stevensandward.com

ATTORNEY FOR APPELLEE,
ANTHONY LEE TUTOR

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STATEMENT REGARDING ORAL ARGUMENT

Tutor does not object to the Court allowing oral argument on this appeal. However, from a precedential standpoint, it is unwarranted.

The appeal *sub judice* presents no novel issues of law. Workers' compensation bad faith law is well-settled and is based upon substantial precedent. *Leathers v. Aetna Cas. & Sur. Co.*, 500 So.2d 451 (Miss. 1986); *Luckett v. Mississippi Wood, Inc.*, 481 So.2d 288 (Miss. 1985); *Southern Farm Bureau Cas. Ins. v. Holland*, 469 So.2d 55 (Miss. 1984); *Butler v. Nationwide Mut. Ins. Co.*, 712 F. Supp 528, 529 (S.D. Miss. 1989); *see also Rogers v. Hartford Accident & Indemnity,* 133 F.3d 309 (5th Cir. 1998). The central sub-issue, the duty to reasonably and promptly investigate an insurance claim, is similarly backed by a legion of decisions. *Eichenseer v. Reserve Life Ins. Co.*, 934 F.2d 1377, 1382-1383 (5th Cir.1991); *Eichenseer v. Reserve Life Ins. Co.*, 682 F.Supp. 1355, 1366 (N.D. Miss. 1988) ["Mississippi imposes a clear duty upon an insurance company to promptly and adequately investigate an insured's claim before denying it."]; *Life & Cas. Ins. Co. of Tennessee v. Bristow*, 529 So.2d 620, 622 (Miss.1988).

And while the jury's verdict of $600,000.00 is significant, given the fact that Defendant UPS settled their $500,000.00 share of the verdict for an undisclosed amount, a mere $100,000 remains in controversy. At best, such a bad faith verdict would have to be considered small, even diminutive.

This Court has limited resources. This appeal includes substantial briefing and a record that includes 3,121 pages, 370 pleadings and over 100 exhibits. Oral argument, as well as assignment to Mississippi Supreme Court, is simply unnecessary.

STATEMENT OF ISSUES

The twelve (12) issues posited by Liberty in its Statement of Issues are largely repetitive. The issues addressed in Liberty's memorandum can be accurately be placed into four (4) queries.

1. Did the jury have adequate evidence to support a finding of bad faith (lack of legitimate, arguable reason) against Liberty for the denial of Tutor's workers' compensation claim?

2. Did former ALJ and former MWCC Commissioner Lydia Quarles offer testimony which meets the expert threshold, including the *Daubert* standard?

3. Did Tutor's damage evidence, testimony and documents, meet the reliability and relevance tests of the rules of evidence?

4. Were the jury's findings of conduct warranting punitive damages supported by the evidence?[1]

STATEMENT OF ASSIGNMENT

For all the reasons stated *supra,* supporting the proposition that oral argument is not warranted, this Court should decline to retain jurisdiction of this appeal. Further, the Court of Appeals has overwhelming expertise in the area of workers' compensation, given this Court's well-reasoned protocol for assigning workers' compensation appeals to that learned body.

Liberty failed to provide citations to cases sought to be overruled or perceived to be in conflict, as required by M.R.A.P. 28(A)(4).

STATEMENT OF THE CASE

I. NATURE OF THE CASE AND PROCEEDINGS IN LOWER COURT

Liberty's account of the proceeding in the lower court is sufficient. Any additional

[1]Tutor would add to that inquiry," Is that finding moot?" The jury found conduct warranting punitive damages, but awarded zero dollars nonetheless.

procedural facts, like Liberty's offer of 46 proposed jury instructions (CP. 2774-2775), far in excess of the six substantive jury instruction maximum allowed by UCRCCC 3.07, will be addressed *infra*.

II. STATEMENT OF THE FACTS

The factual account by Liberty is so woefully inadequate that Tutor must restate it in its entirety. Tutor's occupational, social and medical history, available to Liberty at all relevant times, are critical to this verdict.

Lee Tutor was a driver and package deliverer for United Parcel Service (UPS) for twenty-two (22) years. He made $31.00 per hour in regular wages. His entire career he worked ten (10) to eleven (11) hours per day. Tutor delivered packages up to 60 pounds in weight every single day and boxes up to 150 pounds once or twice a week (CP.2109). He loved his job, he enjoyed the people he worked with and he intended to work for UPS "as long as the Good Lord would let me work" (CP. 2011-2013).

Every move Tutor and his fellow drivers made while driving a UPS truck was monitored by satellite and internal truck controls. UPS could follow his route, determine if he used his blinker or shifted to reverse, see if his door was open at appropriate times and if he was wearing his seat belt. Deviations from route or company policy were disfavored (TCP.-2014).

During his 22 year tenure, as reflected in his personnel file, Tutor had never had an injury. He had passed out from heat exhaustion on one occasion years prior to the events of this lawsuit and may have missed a few hours. He was not late. He was never reprimanded, at least in any formal or relevant sense. In 22 years of lifting boxes and walking them down sidewalks, up stairs and across lawns, in and out of his truck, he had

never had a back injury or complained of a back problem to the company or its employees. He had never failed to get a scheduled annual raise (CP. 2015). There is no evidence that Tutor ever complained about his back or exhibited any work limitations. Not even once.

Tutor passed his annual Department of Transportation (DOT) physical exams without complaint or restriction, including shortly before the September 1 work injury. He intermittently saw a chiropractor before his route to help reduce the stress on his neck and back. The chiropractor would adjust his spine and provide a rolling bed massage that Tutor raved about. The visits typically lasted about ten minutes. Tutor had not seen the chiropractor in the seven (7) weeks prior to the injury at issue. By extension, this means Tutor worked 10-11 hours a day, delivering packages of substantial and varying weight, climbing the steps into his big UPS truck over and over without restriction, without complaint and without chiropractic massage. (CP. 2019-2022).

Regressing a bit so that the impact of the carrier's decisions can be absorbed, Lee Tutor was newly re-married, less than two years, to a lovely woman named Kim. The Tutors were financially supporting Lee's youngest daughter and Kim's youngest daughter in college. Lee Tutor also continued to pay child support for his youngest daughter, as he had his two older children, and had a spotless record of support. Kim worked full time and the Tutors needed both incomes to support the physical and educational needs of their family. (CP. 2049-2057).

This all changed on the date of his work-related accident. On September 1, 2011, Tutor arrived at work at his typical early hour and began his Clay County route at about 9 a.m. He delivered packages for some five (5) straight hours, because he skipped lunch for logistical reasons, before picking up a sixty (60) pound package to deliver to the elevated

porch of a home on his route. While climbing the porch steps with this heavy package, a dog (apparently awoke and) came running out from under the house barking. Tutor made a sudden, sharp twisting move in response, heard a "pop" in his back and immediately felt severe pain. (CP. 2023-2025; 2032).

Consistent with his training, Tutor immediately called his supervisor, a mean, mean woman named April Dallas, who had only taken the post a couple months earlier. He advised her of the work injury, just as described above. He advised that he had to stop the route due to the disabling pain. Dallas refused to allow this and, instead, took Tutor's field supervisor, named Gary Bishop, to Tutor's truck to handle Tutor's route with him. Bishop agreed to take the driver's seat so that Tutor could put himself in a less painful position in the passenger's seat. During the course of the several hours that the two men continued the route, Tutor advised Bishop of the same exact facts of the injury. (CP. 2025-2029).

At the conclusion of the route, around the 7:00 p.m., Bishop and Tutor made a phone call to Dallas at her home. Tutor sat slumped over with his head in his hands due to the intense pain. When Bishop advised Dallas that Tutor had previously seen a chiropractor, Dallas made the decision that Tutor's injury was pre-existing and not covered by workers' compensation. (CP. 2030-2031). It would later be determined that Dallas had no claims handling experience, no medical training, did not review Tutor's personnel file and made no attempts to secure the chiropractic records (CP. 2163; 2068-2171).

Tutor declined emergency room service that evening, deciding instead to go home and see his own doctor in the event the pain did not subside. He saw Dr. Brad Crosswhite the next day on September 2, 2011, and the history Crosswhite included in his records (Exh. J-50, Vol. 8 of 17, 1195) plainly describes the job injury from the day before and identifies

that point as the origin of his painful symptoms.

Tutor attempted to return to work on about the 6th and 12th of September, 2011, but could not do the job. Dallas advised Tutor that he had only two choices: Apply for short term disability (STD) or quit. She again refused to report the injury as work-related. There was "no wiggle room" in her two options. (CP. 2032-2033).

Tutor called his union steward, named Jimmy Pinkard, and reported the conundrum. Pinkard apparently had no more success in having the claim appropriately reported as work-related. He assigned an assistant named Rhonda Rutherford to assist Tutor in filing the STD claim. To expedite the process, Rutherford signed Tutor's name to the form. Tutor never saw the form during the entirety of the workers' compensation claim process. (CP. 2035-2037). Dr. Crosswhite obliged by also signing the form to afford Tutor some financial relief.

During the period from the injury to the conclusion of his six month, short term disability, Tutor received $96.98 per a week in short term disability payments.[2] Through this process, Tutor paid for doctor visits and medication with his private insurance carrier, which required he and his family to pay $2,689.00 in deductibles and co-pays out of their pocket, as well as paying for travel expenses to medical visits.[3] (CP. 2057-2058).

Tutor continued to provide UPS with the medical records related to his injury. Dallas simply put them in his file and never looked at them (CP. 2163 -2168). After

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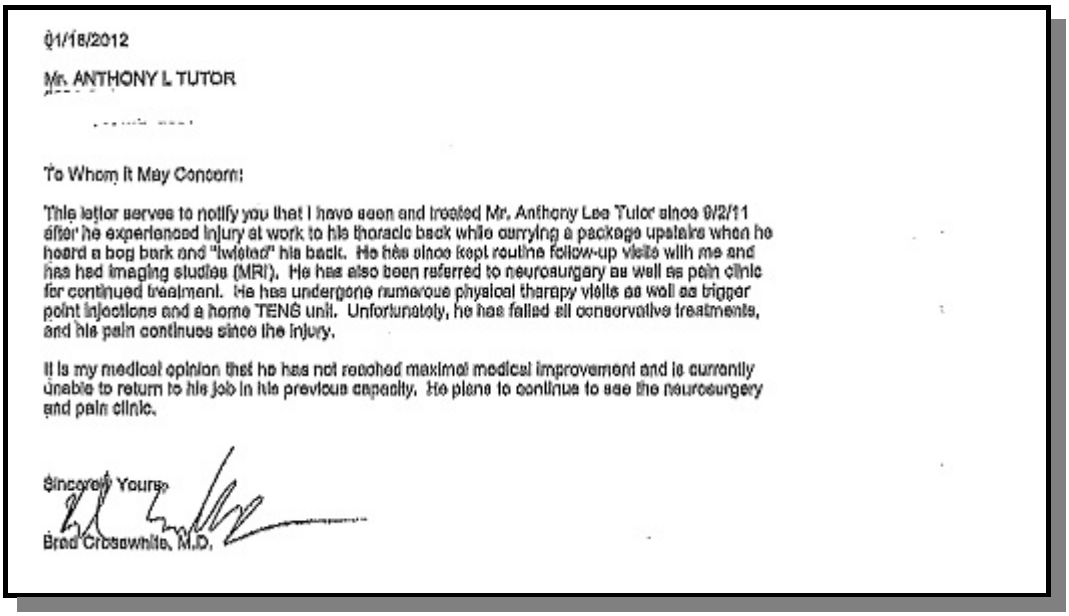
[2]Tutor's pre-injury average weekly wage was well over $1,000.00, per week (at $31,00.00, per hour) At Tutor's average weekly wage his workers' compensation indemnity benefits would have been the maximum allowed by law in 2011. That amount was $427.20 per week.

[3]Injured claimants pay no deductible or co-pays through workers compensation and they are reimbursed for mileage to and from the doctor.

consulting a lawyer in March of 2012, Tutor again submitted documents to UPS, which included a brief letter-narrative (Exh. J-10, Vol. 6 of 17, 759) from Dr. Crosswhite which reads:



01/18/2012

Mr. ANTHONY L TUTOR

To Whom It May Concern:

This letter serves to notify you that I have seen and treated Mr. Anthony Lee Tutor since 9/2/11 after he experienced injury at work to his thoracic back while carrying a package upstairs when he heard a bog bark and "twisted" his back. He has since kept routine follow-up visits with me and has had imaging studies (MRI). He has also been referred to neurosurgery as well as pain clinic for continued treatment. He has undergone numerous physical therapy visits as well as trigger point injections and a home TENS unit. Unfortunately, he has failed all conservative treatments, and his pain continues since the injury.

It is my medical opinion that he has not reached maximal medical improvement and is currently unable to return to his job in his previous capacity. He plans to continue to see the neurosurgery and pain clinic.

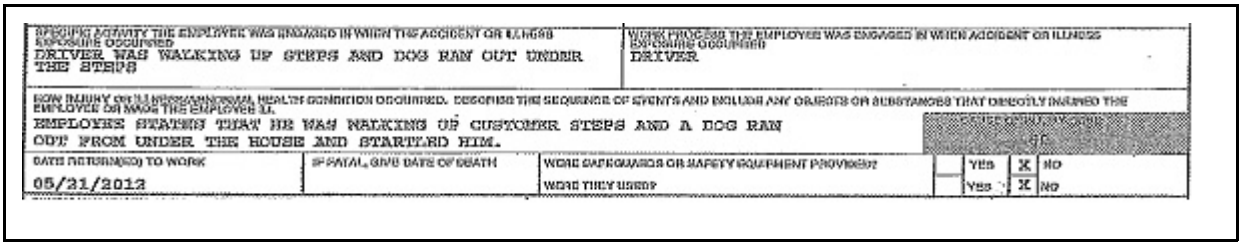
Sincerely Yours,

Brad Crosswhite, M.D.

With no action taken by UPS or its insurance carrier, Tutor filed a Petition to Controvert with the Mississippi Workers' Compensation Commission (MWCC) on May 9, 2012 (Exh. J-11, Vol. 6 of 17, 760-763). Tutor and his lawyer were unaware that UPS had never submitted the claim to its insurance carrier, Liberty Insurance.

UPS is an extraordinarily large client of Liberty. UPS finally reported the claim to Liberty. The claims supervisor assigned to the case, Bonnie King, in Dallas, Texas, only handled UPS cases. (Exh. J-60, Vol. II of 17, 1646-1649).

King allegedly interviewed Dallas by phone. Together they prepared a First Report of Injury or Illness Form, as prescribed by the MWCC, which detailed the accident *exactly as Tutor had reported it*. (Exh. P-36, Vol. 2 of 17, 172).



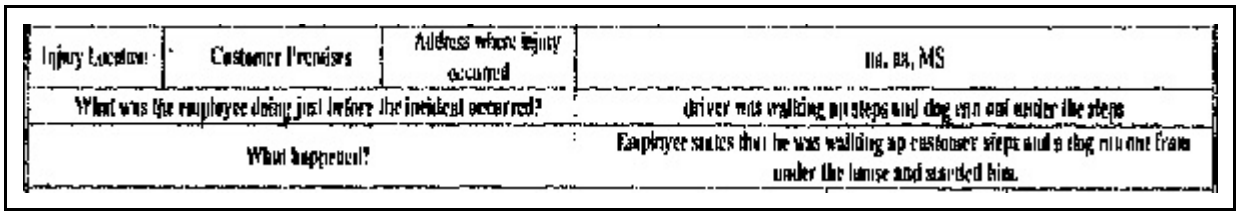
SPECIFIC ACTIVITY THE EMPLOYEE WAS ENGAGED IN WHEN THE ACCIDENT OR ILLNESS EXPOSURE OCCURRED	WORK PROCESS THE EMPLOYEE WAS ENGAGED IN WHEN ACCIDENT OR ILLNESS EXPOSURE OCCURRED
DRIVER WAS WALKING UP STEPS AND DOG RAN OUT UNDER THE STEPS	DRIVER

HOW INJURY OR ILLNESS/ABNORMAL HEALTH CONDITION OCCURRED. DESCRIBE THE SEQUENCE OF EVENTS AND INCLUDE ANY OBJECTS OR SUBSTANCES THAT DIRECTLY INJURED THE EMPLOYEE OR MADE THE EMPLOYEE ILL.

EMPLOYEE STATES THAT HE WAS WALKING UP CUSTOMER STEPS AND A DOG RAN OUT FROM UNDER THE HOUSE AND STARTLED HIM.

DATE RETURN(ED) TO WORK	IF FATAL, GIVE DATE OF DEATH	WERE SAFEGUARDS OR SAFETY EQUIPMENT PROVIDED? / WERE THEY USED?				
05/31/2012				Yes	X	NO
				Yes	X	NO

Dallas also provided King an "Injury Prevention Report" she prepared in response to Tutor's injury which warned UPS deliverymen system wide about injuries caused by dogs. (Exh. J-20, Vol. 6 of 17, 890).



Injury Location:	Customer Premises	Address where injury occurred	Ms. as, MS
What was the employee doing just before the incident occurred?			driver was walking up steps and dog ran out under the steps
What happened?			Employee states that he was walking up customer steps and a dog ran out from under the house and startled him.

Despite being required by law to file the First Report of Injury form with the Mississippi Workers' Compensation Commission, neither Liberty nor UPS ever filed it. In fact, Liberty hid the document from Tutor's counsel throughout the entire MWCC proceeding and through much of the bad faith litigation.[4]

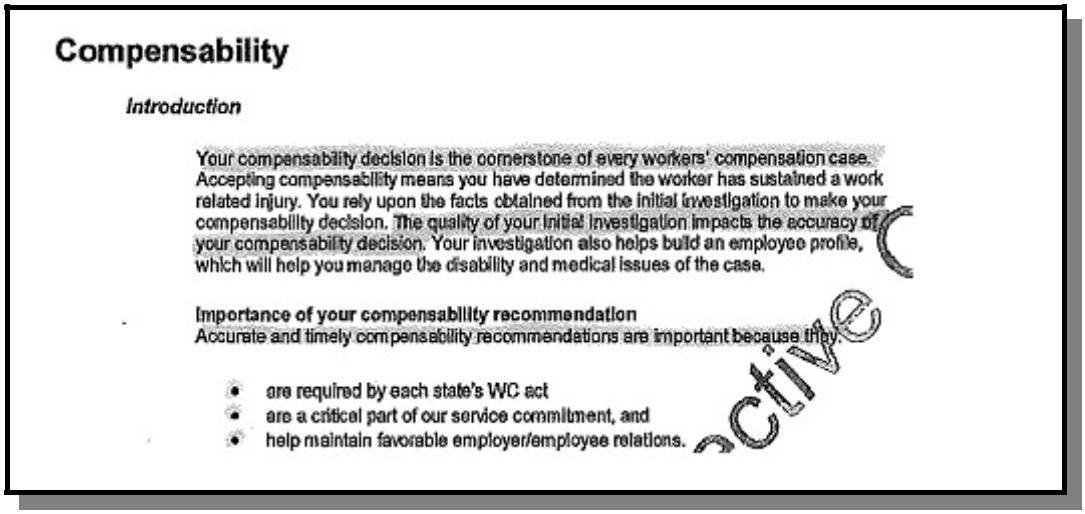
The report from Dallas in King's notes evidence that the circumstances were exactly as Tutor reported. (Exh. P-65, Vol. 2 of 17, 181).

Dallas also provided a form that listed Gary Bishop as a material witness (Exh. P-65, Vol. 2 of 17, 178-187). King never called.

[4]See Plaintiff's Motion for Summary Judgment and Memorandum in Support (CP.-255-259) for a detailed analysis of the manner in which the documents were secreted and the serendipitous way the documents were discovered by Tutor's counsel during the bad faith litigation.

Dallas did not provide King with any of the numerous pages of medical records in her file, nor did King ever ask for them. Dallas did not provide King with Tutor's spotless personnel record, nor did King ever ask for them.

Liberty's claims handling procedure is well laid out and is consistent with industry standards. (CP. 2392). The manual emphasizes the adjuster's duties, where compensability decisions are the "cornerstone" and demands an immediate quality investigation. (Exh. P-66, Vol. 5 of 17, 706-709).



Compensability

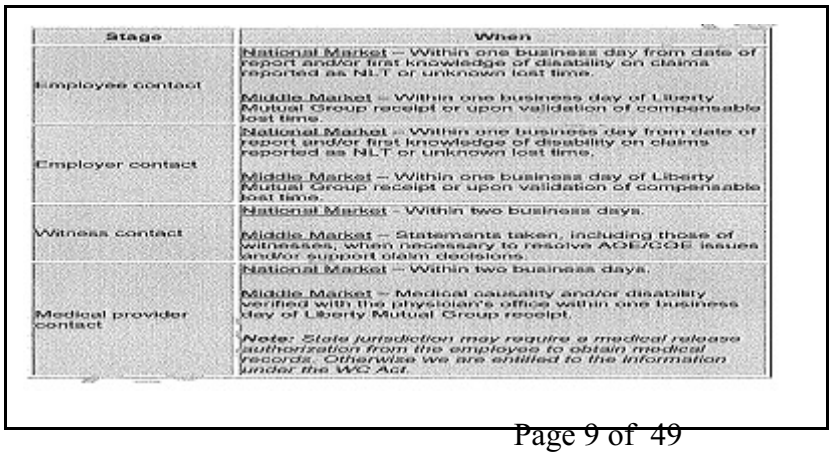
Introduction

Your compensability decision is the cornerstone of every workers' compensation case. Accepting compensability means you have determined the worker has sustained a work related injury. You rely upon the facts obtained from the initial investigation to make your compensability decision. The quality of your initial investigation impacts the accuracy of your compensability decision. Your investigation also helps build an employee profile, which will help you manage the disability and medical issues of the case.

Importance of your compensability recommendation
Accurate and timely compensability recommendations are important because they:

- are required by each state's WC act
- are a critical part of our service commitment, and
- help maintain favorable employer/employee relations.

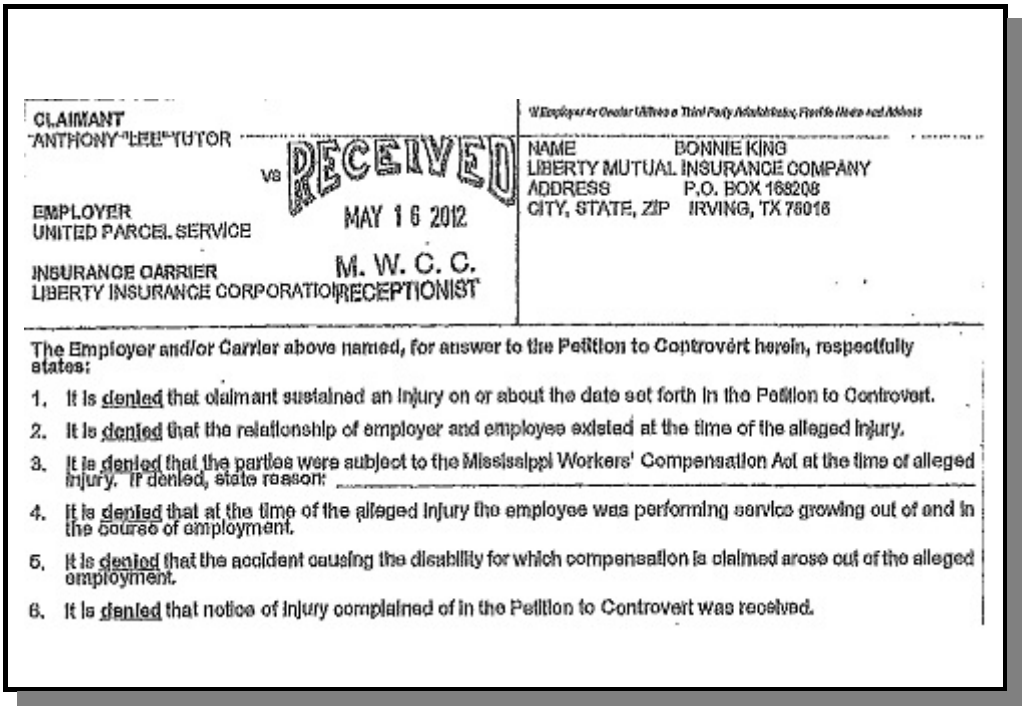
Most importantly, those procedures require contact with all material witnesses within one day and all relevant physicians within two days (CP. 2738-2741).



Stage	When
Employee contact	National Market – Within one business day from date of report and/or first knowledge of disability on claims reported as NLT or unknown lost time. Middle Market – Within one business day of Liberty Mutual Group receipt or upon validation of compensable lost time.
Employer contact	National Market – Within one business day from date of report and/or first knowledge of disability on claims reported as NLT or unknown lost time. Middle Market – Within one business day of Liberty Mutual Group receipt or upon validation of compensable lost time.
Witness contact	National Market – Within two business days. Middle Market – Statements taken, including those of witnesses, when necessary to resolve AOE/COE issues and/or support claim decisions.
Medical provider contact	National Market – Within two business days. Middle Market – Medical causality and/or disability verified with the physician's office within one business day of Liberty Mutual Group receipt. *Note: State jurisdiction may require a medical release authorization from the employee to obtain medical records. Otherwise we are entitled to the information under the WC Act.*

Liberty never spoke to Gary Bishop, the sole witness listed on Dallas' claim summary. Liberty did not speak with Tutor's treating physician or chiropractor, despite Tutor immediately providing medical authorizations to allow that contact. (CP. 2738-2739)/ Liberty did not contact Tutor's counsel for a recorded interview or for additional information. (CP. 2742).

Liberty is allowed 23 days to investigate a claim before being required to answer a Petition. (CP.2709). Instead, Liberty, after consultation with UPS executives in Nashville, inexplicably instructed its lawyer, Ginger Robey, to answer the Petition the next day and deny "all." (Exh. J-60, Vol. 11 of 17, 1646). Liberty's Answer (Exh. J-62, Vol. 12 of 17, 1655) denies Tutor was an employee; denies UPS is subject to the Workers Compensation Act; denies a work-related injury occurred, and denies they received notice of the injury, despite evidence from her own insured to the contrary. Unequivocally, DENIED.



CLAIMANT
ANTHONY "LEE" TUTOR

vs

EMPLOYER
UNITED PARCEL SERVICE

INSURANCE CARRIER
LIBERTY INSURANCE CORPORATION

RECEIVED
MAY 16 2012
M. W. C. C.
RECEPTIONIST

If Employer or Carrier Wishes a Third Party Administrator, Please Name and Address

NAME BONNIE KING
LIBERTY MUTUAL INSURANCE COMPANY
ADDRESS P.O. BOX 168208
CITY, STATE, ZIP IRVING, TX 75016

The Employer and/or Carrier above named, for answer to the Petition to Controvert herein, respectfully states:

1. It is denied that claimant sustained an injury on or about the date set forth in the Petition to Controvert.
2. It is denied that the relationship of employer and employee existed at the time of the alleged injury.
3. It is denied that the parties were subject to the Mississippi Workers' Compensation Act at the time of alleged injury. If denied, state reason: _____
4. It is denied that at the time of the alleged injury the employee was performing service growing out of and in the course of employment.
5. It is denied that the accident causing the disability for which compensation is claimed arose out of the alleged employment.
6. It is denied that notice of injury complained of in the Petition to Controvert was received.

During the time of the litigation of the Petition, Liberty's manual requires that the claims handler "must supervise the litigation." (Exh. D-28, Vol. 5 of 17, 702). No attempt was made to consult the claimant, the witness or the doctors outside of the litigation process. (CP. 2738-2742). The carrier's failure to provide medical care and indemnity (wage replacement) payments during the course of this claim, without any medical support for their denial, took an enormous toll on Tutor. He was paid $96.98 per week, instead of his $427.00 per week comp check, until the end of March 2012. By the end of March, giving credit for the STD, Tutor and his family were denied approximately $10,000.00 in temporary total disability (TTD) payments. He was paid nothing from that date until November 30, 2012.

Tutor's new wife paid all the bills. She paid for college expenses for both his daughter and hers. She paid the child support for his daughter, until she simply ran out of money. A contempt motion was filed by Tutor's ex-wife, after years and years of paying that support timely. At hearing, the judge reduced his obligation, based upon his disability, but required the payment of all back support at the previously established rate. Kim Tutor paid that Lee Tutor calls the ordeal "degrading." (CP. 2052-2054).

ASSESSMENT AND PLAN: This is a 48-year-old gentleman who suffered a well-documented work injury on 09/01/2011 that was reported immediately and led to a supervisor coming and working with him for the remainder of the day. The patient has consistently given exactly the same description of his injury of twisting while he was carrying a box weighing about 60 pounds due to a dog barking at him and perhaps lunging at him. While it is clear that Mr. Tutor did seek and receive chiropractic care for what was sometimes described as low back discomfort and sometimes described as mid back discomfort either on the left or the right hand side, he is clear in stating today that that was treatment he sought just because it helped with stress. Furthermore, the testimony of both of his supervisors was that he never complained of back or spine problems while working at UPS nor did he ever miss any work while at UPS due to a back or spine problem. Furthermore, his treating chiropractor in reevaluating him noted and wrote in a letter that his problems since 09/01/2011 are completely different from what he was treating the patient for prior to that date. Additionally according to the records that I have, Mr. Tutor's last visit with the chiropractor was on 07/13/2011 or greater than six weeks prior to his reported work injury of 09/01/2011.

The Tutors sold some exercise equipment and some lawn equipment to pay bills. They made an early withdrawal from Tutor's 401(k) plan, incurring about a $3,000 penalty. Tutor borrowed $1,500 from his dad–the "man that taught me [to] stand on my own two feet." They took out a $5,000 second mortgage to help with bills and school books. The cost of his health insurance rose. (CP. 2056-2058).

After months and months of litigation, having no medical support for their denial, Liberty finally scheduled Tutor for an employer medical examination (EME) with neurosurgeon John Davis, M.D., at NewSouth NeuroSpine in Flowood, Mississippi. Davis' opinion stated the obvious, noting that his examination and every single medical record supported the compensability of the claim. (Exh. P-17, Vol. 1, 117-128). Davis correctly described the records as evidencing a "well-documented work injury," a "consistent" history throughout, irrelevant prior chiropractic care and treatment to date which is indeed directly casually related to that (job) injury) (Exh. P-17, Vol. 1 of 17, 127).

Liberty relented, paying back indemnity benefits, out-of-pocket medical expenses and reimbursing subrogated interests like Tutor's STD provider and health insurance carrier. Ultimately, Liberty paid Tutor for his total loss of wage-earning capacity in the amount of $160,000.00, with his lawyer receiving the statutory percentage of that (25%), being $40,000.00 (Exh. J-44, Vol. 8 of 17, 1089).

Tutor now makes $7,600.00 per year driving a Tupelo school bus (CP.-2057).

SUMMARY OF THE ARGUMENT

The trial judge committed no error in the introduction of evidence or allowing the jury to make the factual determinations where conflicts in testimony and documents required their final conclusion, including competing expert witnesses.

The highly engaged trial judge astutely denied motions for directed verdict and judgment notwithstanding the verdict using the well-settled standard of review. All evidence and reasonable inferences were, and must be, viewed in the light most favorable to Tutor. Credible evidence supports that Liberty denied this claim without legitimate, arguable reason. The arguments now offered by Liberty are purely pre-textual.[5]

The well-instructed jury, who received some version of dozens of instructions offered by Liberty, returned a reasonable compensatory (*Veasley*) damage award, and both the quantum of those damages, as well as the zero punitive award. This illustrates that this jury was not blinded by passion or prejudice. The damages alleged by Tutor were undisputed

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[5] Despite its cheeky graphic, the PREAMBLE/THE SQUIRREL (in section D) provides an essential outline of why Liberty's arguments today are illegitimate. Those procedural facts are not provided in the lead up to the analysis out of necessity–they are a list of everything that is *not* in the record by virtue of the fact that Liberty did not do its job and has only created new arguments as a part of a poorly conceived Monday morning quarterback, bad faith cover-up.

and a reasonable juror could certainly find that Tutor's painful, humiliating and financial back- breaking ordeal was worthy of their modest award.

ARGUMENT

A. STANDARD OF REVIEW

Liberty states that they do not move for reversal and remand (new trial). This appeal urges this Court to *reverse and render only* for the trial judge's refusal to grant their motion for directed verdict (DV) at the close Tutor's case-in-chief and/or motion for judgment withstanding verdict (JNOV) after the jury's verdict.

The standard of review for decision is identical for both motions, *Estate of Gibson ex rel. Gibson v. Magnolia Healthcare, Inc.*, 91 So. 3d 616, 622 (Miss. 2012). Tutor will therefore address the standard of review for both motions in the aggregate.

The Court is required to test "the legal sufficiency of the evidence supporting the verdict, not the weight of the evidence." *Tharp v. Bunge Corp.*, 641 So.2d 20, 23 (Miss.1994). These concepts are quite basic, including the parameter that the Court must "consider all evidence in the light most favorable to the nonmoving party, and ...view all reasonable inferences in the (non movant) party's favor." *Braswell v. Stinnett*, 99 So.3d 175, 178 (Miss.2012) (*citing Thompson v. Nguyen*, 86 So.3d 232, 236 (Miss.2012)); *Jackson HMA, LLC v. Morales*, 130 So. 3d 493, 497 (Miss. 2013); *see also Smith v. Union Carbide Corp.*, 130 So. 3d 66, 68 (Miss. 2013)*; Fiddle, Inc. v. Shannon*, 834 So. 2d 39, 44 (Miss. 2003)*; City of Jackson v. Locklar*, 431 So.2d 475, 478 (Miss.1983); *Paymaster Oil Co. v. Mitchell*, 319 So.2d 652, 657 (Miss.1975); *General Tire and Rubber Co. v. Darnell*, 221 So.2d 104, 105 (Miss.1969).

As Justice Robertson stated, "All pure questions of fact and all questions having substantial factual components triable by a jury at common law may of right be subject to jury determination in civil actions in this state. *City of Jackson v. Locklar*, 431 So.2d 475, 478 (Miss.1983)." *Blue Cross & Blue Shield of Mississippi, Inc. v. Campbell*, 466 So. 2d 833, 854 (Miss. 1984)[J. Robertson, concurring] Justice Robertson eloquently reminds us that this immense deference has constitutional implications by concluding, "[i]n my view our polestar is Article 3, Section 31, Mississippi Constitution of 1890, and its guarantee to each citizen of the right to trial by jury in civil cases.... The *raison d'etre* of *Paymaster Oil* and progeny is to assure that the constitutional right to trial by jury remains secure."*Blue Cross & Blue Shield of Mississippi, Inc. v. Campbell*, 466 So. 2d 833, 854 (Miss. 1984)[J. Robertson, concurring].

Liberty has an even more insurmountable task than usual when one considers the typical factors for overturning a jury verdict: that the verdict is against the overwhelming weight of the evidence;[6] that the jury was confused by faulty jury instructions;[7] or that the jury verdict is a result of bias, passion, and prejudice.[8]" *Bobby Kitchens, Inc. v. Miss. Ins. Guar. Ass'n*, 560 So.2d 129, 132 (Miss.1989); *Griffin v. Fletcher*, 362 So.2d 594, 596 (Miss.1978); *Clayton v. Thompson*, 475 So.2d 439, 443 (Miss.1985); *Fiddle, Inc. v. Shannon*, 834 So. 2d 39, 45 (Miss. 2003).

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[6]Where each side had "battling expert witnesses."

[7]Where Liberty submitted an ostentatious 46 jury instructions, 7 times the number allowed by UCRCCC 3.07, over vehement protest of Tutor. (CP. 2774-2775).

[8]Where this jury found willful bad faith conduct in the punitive damage stage, yet was so restrained that they awarded $0 in punitive damages.

Finally, this Court must give "substantial weight, deference, and respect to the decision" of the venerable trial judge of Clay County, Mississippi, the Honorable Lee Coleman. *Fiddle* at 45. The reliability of such a trial judge's observations and rulings come from a "longstanding recogni[tion] that the trial judge is in the best position to view the trial....The trial judge who hears the witnesses live, observes their demeanor and in general smells the smoke of the battle is by his very position far better equipped to make findings of fact which will have the reliability" than a subsequent judge or appellate panel limited to the cold record. *Little v. State*, 233 So. 3d 288, 291 (Miss. 2017), *reh'g denied* (Jan. 25, 2018); *Gavin v. State*, 473 So.2d 952, 955 (Miss. 1985); *see also Cantrell v. Green*, 987 So. 2d 1002, 1007 (Miss. Ct. App. 2007).[9]

B. REASONABLE INFERENCE IS KEY

The reasonable inference standard is critical in bad faith claims. The questioning of savvy insurance executives is not like a Perry Mason movie, where the killer always admits to murder on the stand, or the slick courtroom scene from the military tribunal in the movie A FEW GOOD MEN, (Columbia Pictures, 1992):

> Lt. Daniel Kaffee (played by Tom Cruise): Colonel Jessep, did you order the Code Red?
>
> Judge Julius Randolph (played by J.A. Preston): You don't have to answer that question!
>
> Col. Nathan Jessep (played by Jack Nicholson): I'll answer the question! You want answers?
>
> Kaffee: I think I'm entitled to.

[9]Judge Coleman was not a passive observer. At each hearing, he added critical observations and relentlessly questioned counsel. His attention to the case details was acute and he performed independent research on key issues which he disclosed to counsel before peppering them with additional questions, evident in every oral argument.

Jessep: You want answers?

Kaffee: I WANT THE TRUTH!

Jessep: YOU CAN'T HANDLE THE TRUTH!

Kaffee: Did you order the Code Red?

Jessep: I did the job I...

Kaffee: [interrupts him] Did you order the Code Red?!

Jessep: You're *** damn right I did!

A well-rehearsed claims executive, even in the face of embarrassing documents, recordings, pictures and violations of protocol, never, ever breaks down on the stand and declares, "You're darn right I committed bad faith and my supervisors patted me on the back for it!" This does not happen.

Meeting the evidentiary burden and elements of a bad faith claim requires laying out the "dots" (evidence) for the jurors to "connect," oftentimes with an expert to explain the rules and interplay between the facts and procedures. The result is a common sense inference that a carrier denied a claim without legitimate, arguable reason and did so in a reckless, callous or grossly negligent manner.

Such was the case in the trial of *Lee Tutor v. Liberty Insurance Company*.

C. BATTLE OF THE EXPERTS

It can be debated whether either side was required to have an expert in this trial. Tutor's contention was simple and was irrefragable: Liberty Insurance denied Tutor's medical, travel expense and indemnity claim from the date of the Petition (May 9, 2012) until the date they conceded and paid (on or about November 30, 2012), a period of six (6)

months, *without a medical expert* to support their claim and in contravention of all the medical evidence in their possession.

In fact, Liberty could/should have simply paid Tutor his indemnity benefits until such time as they procured a medical expert's opinion. If they got such an opinion at a later date, they could suspend those benefits as allowed by the Act.

But complicated jury trials often boil down to a battle of the experts.[10] Both Tutor and Liberty offered experts regarding the industry standards for adjusting claims within the context of the Mississippi Workers' Compensation Act framework and whether Liberty complied with those standards. The disparity in the qualifications of each expert and the credibility of the basis for each's opinion as applied to the Court's jury instructions made the jury's decision predictable. Tutor's expert, former MWCC Commissioner Lydia Quarles, touches upon and annihilates virtually every point addressed in Liberty's brief herein.

(1) The disparity in qualifications

Lydia Quarles is an attorney, former Administrative Law Judge and former Commissioner at the MWCC and a nationally recognized consultant on the handling of workers' compensation claims by insurance adjusters. Along those lines, she has played a significant part in the development of state and national industry standards for the reasonable and prompt handling of workers' compensation claims by insurance company personnel. (CP. 2343-2355). She is one of only three such certified experts in the state. She

[10] *Mem'l Hosp. at Gulfport v. White*, 170 So. 3d 506, 509 (Miss. 2015)["the fact-finder…determines the winner of a battle of experts."]; *Kent v. Baptist Mem'l Hosp. N. Mississippi, Inc.*, 853 So. 2d 873, 883 (Miss. Ct. App. 2003)["(T)he jury had a classic battle of experts before them."];*Mack Trucks, Inc. v. Tackett*, 841 So. 2d 1107, 1112 (Miss. 2003), as corrected (Apr. 1, 2003 ["…battle of experts."]; *Brandon HMA, Inc. v. Bradshaw*, 809 So. 2d 611, 616 (Miss. 2001)["…battle of experts."](abrogated on other grounds).

wrote the curriculum for adjuster training in Mississippi. Her work nationally on claims handling standard is extensive. Quarles has also worked with Liberty on their claims handling manual and been retained by them more than once as an expert (CP. 2352) Tutor's counsel forced Quarles to admit that there is not "anyone who's better qualified" in the State of Mississippi. (CP. 2353). She was previously accepted as a claims handling expert in the workers' compensation field. *Smith v. Union Insurance Co.*, 2017 WL 2540620 (N.D. Miss. 2017).

Liberty's attempts to belittle Quarles on *voir dire* were nothing short of rude and embarrassing. (CP. 2355-2361) The jury knew she was the smartest person in the room.

By contrast, Liberty offered a (very fine) defense attorney and former ALJ named James Higginbotham. But Higginbotham had none of the experience nationally creating claims handling manuals for insurance adjusters. He had never contributed to a claims handling manual. (CP. 2700). His contribution to claims handling was merely that he would "speak to adjuster" on occasion at the conference Quarles chaired. (CP.2693). At best Higginbotham had served as a member of a couple of committees chaired by Quarles and, of course, had defended many employers and carriers in his career (CP. 2690). He also does 90% of his expert work for insurance companies, including several cases for Liberty and several for Liberty's current counsel. (CP. 2733-2735; 2701). In the shade created by Quarles' resume, and her work for claimants, employers, carriers and self-insureds, he was exposed as biased and minimally qualified in the area of carrier claims handling.[11]

[11]Tutor's counsel objected to Higgenbothem's qualifications and moved for his exclusion. (CP. 2703-2704). The motion was denied (CP. 2704).

(2) The expert testimony

Quarles began by admitting that Liberty could have no duty to investigate prior to May of 2012, when they were first given notice of Tutor's claim (R. 1056). She conceded in direct examination that Liberty's "Reference Guide," their claims handling manual, was "excellent" and quite consistent with the claims handling standards of the industry. (R. 1057).

Quarles guided the jury through the documents admitted, and testimony offered, opining that Liberty failed to conduct a reasonable, prompt investigation.[12] She critically pointed out the documents available to Liberty in the first twenty-four hours after notice (the Petition). They included:

•The First Report of Injury which claims supervisor Bonnie King prepared with April Dallas of UPS, making it crystal clear that Tutor had been injured on the day alleged (CP. 2395; Exh. P-36, Vol. 2 of 17, 172);[13]

•The Injury Prevention Report previously prepared by Dallas on or near the date of Tutor's injury, advising all UPS employees about work injuries caused by dogs (CP. 2395-

[12]It is worth noting here that the trial court ruled, over Tutor's objection, that Quarles was not allowed to use the phrases "bad faith" and "legitimate, arguable reason," as she did in her report. The expert testimony was limited by the Court to •the applicable industry standards for investigation and claims handling and •the Defendants compliance or non-compliance with those standards. (CP. 2725).

[13]The trial judge, over Tutor's objection, refused to allow Tutor to put on uncontroverted evidence that Liberty failed to provide Tutor the First Report in the MWCC litigation and, in fact, filed a response to a Motion to Compel specifically stating that no such document existed. Further, Liberty failed to provide the document(s) to Tutor in written discovery during the bad faith litigation until Liberty Claims supervisor, Bonnie King, during a deposition in her office in Dallas, Texas, inadvertently mentioned the document and was required to go onto her computer and produce it to counsel. (CP. 241-246).

2396; Exh. J-20, Vol. 2 of 17, 889-890);

•The personnel file of Tutor, evidencing a work history of over 25 years with no reported accidents, no lost time for any physical condition and years of DOT physical examinations showing Tutor was fit for his job (CP. 2373-2374; 2380-2381);

•Data from the employee "tracking system" at UPS, which showed that Tutor began his day on time and had delivered numerous packages successfully at the locations scheduled prior to the injury;

•The name and contact number of Tutor's immediate supervisor, Gary Bishop, who went to the scene immediately and was required to assist Tutor for the remainder of the route due to his back injury. Liberty did not contact him, though their own rules require contact with him within one day (CP. 1068-1069); and

•Liberty intentionally failed to secure the medical documents Tutor had faxed to UPS, that included a narrative from Tutor's treating physician, causally connecting his injury to his back condition.

Quarles also described how physicians typically require a medical waiver to discuss a patient's history and condition, while noting that Tutor provided Liberty that authorization "immediately." (CP. 2400).

Given the standard of review, these opinions are to be accepted as true. But a discussion of Liberty's expert, Mr. Higginbotham, sheds additional light. Unlike Quarles, who simply had better facts and conspicuous law on her side, Liberty's expert was required to make important concessions on cross-examination, some of which were juxtaposed to his testimony on direct examination.

Higginbotham tried to defend the outrageous denials in Liberty's Answer to the Petition by stating that anything short of a denial constitutes a binding admission (CP.2711), which every practitioner knows is untrue. He admitted that the rules allow a carrier to deny or admit "pending further investigation." (CP.2754). He claimed Liberty's claims personnel were handcuffed by the Petition, unable to reach the claimant or his attorney when litigation is initiated. (CP.2727). He admitted on cross that Liberty should have made efforts to contact Tutor's lawyer to obtain necessary information. (CP. 2743-2753).[14] He admits Liberty could have interviewed employees of its insured during the entirety of the claim. (CP. 2755). Their expert confesses that Liberty should have filed the First Report of Injury and did not. (CP. 2736).

Higginbotham claimed the carrier needed medical authorizations to get the critical medical records on direct. (CP. 2715-2716). He conceded on cross that Liberty's manual allowed them to get the records without an authorization and, in fact, Liberty did not even use the authorizations that Tutor promptly provided. (CP.2738-2739). Higginbotham admits that Lee Tutor complied with every request made. (CP. 2742).

But it was his (nearly) legal conclusions that sank Liberty. Liberty's expert admitted that Crosswhite's pre-litigation letter, which Liberty had access to, shifted the burden of proof on causation to the carrier. He agreed that where a claimant has shifted that evidentiary burden, a carrier must have medical testimony to support their causation defense. (CP. 2758-2764).

[14]It actually took impeachment from a prior sworn deposition in other case to get the expert to concede the (very obvious) point.

In all, Tutor was handily able to prove his case through Liberty's own favorite expert.

D. LACK OF LEGITIMATE, ARGUABLE REASON

PREFACE/THE SQUIRREL

The Court will do itself a favor if, at the conclusion of each argument by Liberty, it refers to this prefatory statement.

The feigned defense of Liberty is completely dependent upon their speculation that Tutor's disclosure of prior chiropractic treatment by Dr. Darrell Blain created a legitimate defense. They pretend to argue that the pre-existing condition may have vitiated the medical causation between the undisputed work injury and the symptoms that followed, "rebutting" Dr. Crosswhite's opinion on causation. They attempt also to discredit Tutor's work ethic with records from Dr. Laura Gray.

Stay cognizant of these indisputable facts:

●During the workers' compensation claim, neither Liberty nor the lawyer they assigned to investigate the claim talked to Dr. Blain, the chiropractor;

●During the workers' compensation claim, neither Liberty nor its lawyer requested a narrative from Dr. Blain or sent Dr. Blain a simple form to address Tutor's symptoms or the ultimate question of causation;

●During the workers' compensation claim, Liberty did not depose Dr. Blain nor subpoena him to any hearing;

●During the bad faith litigation, Liberty did not depose Dr. Blain, send witness interrogatories to Dr. Blain, nor call Dr. Blain as a witness at trial;

●During the bad faith trial, Liberty did not ask its expert a single question, nor elicit a single answer, that contained the word "Blain" or any form of the word "chiropractor" or

"pre-existing."

●● CONCLUSION: RELIANCE ON DR. BLAIN OR A "PRE-EXISTING CONDITION" IS A DIVERSION.

●During the workers' compensation claim, neither Liberty nor its lawyer requested a narrative from Dr. Crosswhite or sent Dr. Crosswhite a simple form to address Tutor's history, symptoms or the ultimate question of causation;

●During the workers' compensation claim, Liberty did not depose Dr. Crosswhite, send him witness interrogatories or subpoena him to any hearing;

●During the bad faith litigation, Liberty did not send Dr. Crosswhite witness interrogatories; it was Tutor, not Liberty, who noticed Dr. Crosswhite's deposition.

●●CONCLUSION: QUESTIONING OF CROSSWHITE'S OPINION IS A DIVERSION.

●During the workers' compensation claim, neither Liberty nor its lawyer requested a narrative from Dr. Gray or sent Dr. Gray a simple form to address Tutor's history, symptoms or the ultimate question of causation;

●During the workers' compensation claim, Liberty did not depose Dr. Gray or subpoena her to any hearing;

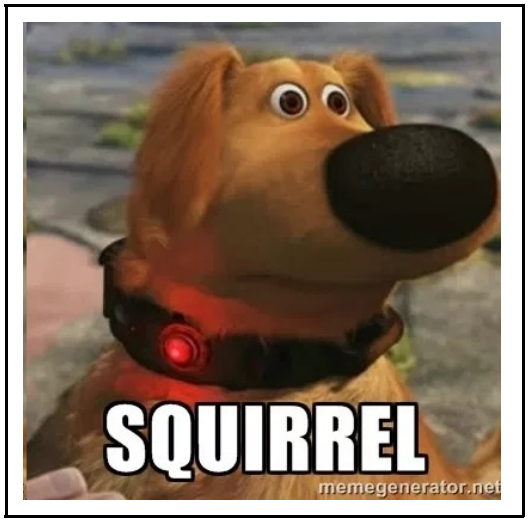
●During the bad faith litigation, Liberty did not send Dr. Gray witness interrogatories, depose Dr. Gray, or call her as a witness.

●During the bad faith trial, Liberty did not ask its expert a single question, nor elicit a single answer, that contained the word "Gray."

●●CONCLUSION: RELIANCE ON DR. GRAY IS A DIVERSION.

The old school term for a diversion is "red herring," a phrase with a colorful history

from William Cobbett involving thieves and hounds. The newer phrase is derived from the Disney movie *Up!*, where a lovable golden retriever (Dug) could be completely distracted by the presence of a common rodent. The new school term is "SQUIRREL!"



The chiropractic history is a SQUIRREL! The Laura Gray records are a SQUIRREL! And the reason is very, very simple. Lee Tutor, over the course of a 20 year employment history, never missed a day because of any physical ailment, including his back. Lee Tutor's pre-injury, baseline medical condition was one where he picked up, walked and climbed stairs with packages weighing up to 60 pounds on a daily basis and packages up to 150 pounds one or two times a week during his ten hour shifts. (CP. 2109). He did so without any complaint to any co-worker or supervisor. And, at the risk of redundancy, he never missed a day.

Now, we proceed to the substantive legal analysis.

(1) Elements of a workers' compensation claim

Broken down to its most basic level, a claimant must prove the following to establish a compensable claim pursuant to the Mississippi Workers' Compensation Act.

(a) He was an employee; and

(b) He was injured while acting in the course and scope of his employment with that employer, without regard to fault.

MISS. CODE ANNO.§ 71-3-7 (1972).

The issues in Tutor's claim are beyond dispute.

The purpose of the Act and its historical backdrop are insightful and are best summarized in Dunn, Vardaman S., MISSISSIPPI WORKER'S COMPENSATION, Section 2 (3rd. Ed. 1990).

> "The Act is social legislation which imposes liability without fault and is a radical departure from the common law. One of the primary purposes of the Act is to relieve society of the burden of supporting employees and their dependents because of economic loss due to injury or death in industrial accidents.... It takes from the employee and his dependents the common law action in tort and substitutes a measure of fixed economic relief for accidental industrial injuries without reference to negligence or fault as to the cause of the injury. On the other hand, it relieves the industry from the risk of common law actions and substitutes an assumption of risk for all covered accidents, within prescribed monetary limits, regardless of negligence or fault from the causative viewpoint."

Dunn, at 3; *see also* Bradley and Thompson, MISSISSIPPI WORKERS' COMPENSATION, §1.2 (2013 Ed.).

If those two prongs are met and there is no legitimate affirmative defense, then the Mississippi Workers' Compensation Act **commands** that payments be made. MISS. CODE ANNO. §71-3-7(1972).

UPS and Liberty have ostensibly tried to parse the Act to claim a denial was proper where Tutor admitted to receiving prior, chiropractic care for his back. Such an illegitimate position ignores both the facts and the relevant Mississippi law.

Tutor had not seen his chiropractor for over seven (7) weeks prior to the injury, a fact Liberty's neurosurgeon acknowledged when he found the well-documented work injury to be compensable. In fact, the record is entirely void of any testimony or record that Tutor had ever missed a day of work due to soreness in his back. Finally, the crescendo to this charade is the fact that Tutor had worked that entire week, reported this injury in the

middle of the day of the injury and April Dallas, the Inspector Clouseau of this fabricated scheme, took another man out to the job (Bishop) to assist Tutor in completing his route.

The law is equally clear that an accidental work injury which contributes or aggravates an existing condition is compensable. MISS. CODE ANNO. §71-3-3(B)(1972). "In other words, a claimant's preexisting weakness or infirmity does not defeat her claim for benefits when the work incident is a contributing cause of the disability…the 'employer takes his employees as they are.'" Bradley and Thompson at §424, *citing Ins. Dept. of Miss. v. Dinsmore*, 102 So.2d 691 (Miss. 1958). To break the causal chain, an employer/carrier must have a competent medical opinion in support of their position and that burden "rests squarely on the shoulders" of the employer. *A.F. Leis Co. v. Harrell*, 743 So. 2d 1059, 1061 (Miss. Ct. App. 1999) [emph. added].

(2) Summary of workers' compensation bad faith law

The Court is well versed in the elements of bad faith law. They are:

a. Existence of policy (good faith duty);

b. Failure to pay compensable, legitimate claim on policy (breach of duty);

c. No legitimate, arguable reason for refusal of payment; and

d. For punitive damages, the refusal to pay is either a willful and intentional wrong or gross and reckless negligence equivalent to such wrong.

Rogers v. Hartford Accident & Indemnity, 133 F.3d 309 (5th Cir. 1998).

Bad faith has long been recognized in the workers' compensation area, specifically in *Leathers v. Aetna Cas. & Sur. Co.*, 500 So.2d 451 (Miss. 1986)*, Luckett v. Mississippi Wood, Inc.*, 481 So.2d 288 (Miss. 1985) and *Southern Farm Bureau Cas. Ins. v. Holland*, 469 So.2d 55 (Miss. 1984). As noted in *Holland*, "A workers' compensation claimant

maintaining an action against the carrier based upon a wrongful refusal to pay his claim must, of course, allege and prove the recognized elements of such a claim in order to be entitled to punitive damages." *Holland* at 59; *see also Reserve Life Ins. Co. v. McGee*, 444 So. 2d 803, 808-809 (Miss. 1983).

(3) Duty to promptly and reasonably investigate

The Supreme Court has recognized that an insurance company has a duty to the insured to make a reasonably prompt investigation of all relevant facts. Damages may be awarded when an insurer wrongfully delays the payment of a valid claim. MISSISSIPPI LAW OF TORTS, Liability of Insurers and Agents §19:10(B)(2d Ed. 2008) "In *Eichenseer v. Reserve Life Insurance Co.*, a federal district court stated that, before denying a claim, the insurer must, **at a minimum**, …interview its agents and employees to determine if they have knowledge relevant to the claim, and make a reasonable effort to secure all medical records relevant to the claim." *Id.* at §19:10(A)[emph. added].

The case law commanding such a reasonably prompt, thorough investigation is legion. *Eichenseer v. Reserve Life Ins. Co.*, 934 F.2d 1377, 1382-1383 (5th Cir.1991); *Eichenseer v. Reserve Life Ins. Co.*, 682 F.Supp. 1355, 1366 (N.D. Miss. 1988) ["Mississippi imposes a clear duty upon an insurance company to promptly and adequately investigate an insured's claim before denying it."]; *Life & Cas. Ins. Co. of Tennessee v. Bristow*, 529 So.2d 620, 622 (Miss.1988)["Mississippi law does indeed impose a duty upon the insurance company to promptly and fully investigate any claim."]; *Bankers Life & Cas. Co. v. Crenshaw*, 483 So.2d 254, 276 (Miss. 1986); *Reserve Life Ins. Co. v. McGee*, 444 So.2d 803 (Miss. 1983); *see* Jackson, J., MISSISSIPPI INSURANCE LAW & PRACTICE, §9.2. (2012) As new evidence is presented or made available to an insurer, the insurer has a continuing

obligation to reevaluate the insured's claim and, where appropriate, to reverse early denials of the claim. *Eichenseer*, 682 F. Supp. at 1366; *see* Jackson, J., MISSISSIPPI INSURANCE LAW & PRACTICE, §9.3 (2012).

In the present claim, Liberty did not attempt to develop "new" evidence, nor did they review the evidence which was always at their fingertips, in hopes of reaching a desirable result for their own bottom line.

Liberty and UPS's actions, or deliberate inactions, delayed the payment of this claim for well over a year, despite Liberty handbook guidelines requiring that the investigation conclude in just days and despite the Act's requirement that payment of a compensable claim be made in fourteen (14) days. MISS. CODE ANNO. §71-3-37 ["first payment due"]. As to Liberty specifically, from the point Liberty answered until the point they first paid benefits was six over (6) months. That most certainly meets the criteria of a jury issue on bad faith.

In *AmFed Companies, LLC v. Jordan*, 34 So. 3d 1177 (Miss. Ct. App. 2009), the Court affirmed a punitive damage award where the workers' compensation insurance carrier discovered an error in underpayment and, without just cause, failed to tender the benefits for "seventy-six days—approximately eleven weeks." *Id.* at 1184. The Court acknowledged that the jury should consider such time frame as bad faith, given the carrier's actual knowledge of the financial stress the delay caused to the insured family. The *Jordan* Court concluded that "[a]n unreasonable delay in resolving a claim can qualify as recoverable bad faith. *See, e.g., Traveler's Indem. Co. v. Wetherbee,* 368 So.2d 829, 835 (Miss. 1979)." *Id.* at 1183.

The entire landscape of the claim, or "totality of the circumstances," was viewed to make the determination that the eleven week delay was "reckless" or "indifferent to the consequences." *Id.* at 1185.[15]

Liberty seems to contend that litigation, more specifically the use of the discovery rules afforded at the MWCC, acts as a shield for bad faith liability. In sum, Liberty contends that the discovery procedure constitutes a virtual *per se* reasonable investigation.

No such case authority exists. Liberty's own internal rules require that their adjuster continues the investigation of the claim and may not abdicate responsibility for the file to the lawyer assigned to the claim. (Exh. D-28, Vol. 5 of 17, 702-705).

Rogers v. Hartford Accident & Indemnity Co., 133 F.3d 309 (5th Cir. 1998) provides indistinguishable support for Tutor's position. In *Rogers*, the claimant was required to file a Petition to Controvert. Discovery ensued. A hearing on the merits was heard by the Administrative Law Judge. The ALJ opinion was appealed to the MWCC, the Circuit Court and then the Mississippi Supreme Court. *Rogers* at 311; *See Quick Change Oil & Lube, Inc. v. Rogers*, 663 So. 2d 585 (Miss. 1995). In *Rogers*, the Fifth Circuit reversed and rendered a summary judgment in the carrier's favor, remanding the claim to the trial court for the determination of damages only, despite use of litigation rules. *Rogers* at 315.

Several salient points are made in *Rogers*. One, the Court rejected Hartford's argument that they should not be required to pay the minimum benefits until the

[15] *Jordan* also prohibits Liberty from delegating the liability to the lawyer. "Here, there was no evidence that AmFed's delay was based solely upon (attorney) Bolen's advice. Instead, AmFed abdicated its investigation to Bolen and relied on him solely to perform the administrative functions of verifying that a lump-sum order existed and requesting a calculation of benefits. AmFed's own written policy stated that 'file abandonment to defense counsel is unacceptable.'" *AmFed Companies, LLC v. Jordan*, 34 So. 3d 1177, 1185 (Miss. Ct. App. 2009).

MWCC/appellate court determined their liability to do so. *Id.* at 314. Two, the Court similarly rejected Hartford's argument that its insured instructed them not to pay the claim (and failed to file a Notice of Injury form). *Id.*

An insurance company is under a duty to conduct a full and thorough investigation and that duty continues throughout the claim, "even after a lawsuit has been filed." *Anthony v. State Farm Fire & Cas. Co.*, 2009 U.S. Dist. LEXIS 112660, *4 (S.D. Miss. 2009); accord *Sobley v. S. Natural Gas Co.*, 302 F.3d 325, 339 (5th Cir. 2002); *Gregory v. Continental Ins. Co.*, 575 So.2d 534 (Miss. 1991). A claimant is allowed to introduce evidence of bad faith conduct after the litigation begins. *Lebon v. State Farm Fire & Cas. Co.,* No. 1:08cv509, 2010 WL 1064705, at *2 (S.D.Miss. Mar. 18, 2010)." *Russ v. Safeco Ins. Co. of America*, 203 WL 1310501 at *14 (S.D. Miss. 2013).

4. Liberty adjusting guidelines/industry standard

(a) Company policies are admissible, in general

A company's own safety regulations can establish the standard of care and basis for liability. *Phillips v. Montgomery Ward & Co.*, 125 F.2d 248, 249 (5th Cir. 1942)[company policy regarding aisle maintenance creates standard of care for that company and is admissible]*; Steele v. Inn of Vicksburg*, 697 So.2d 373, 377 (Miss. 1977)[violation of company's swimming pool safety regulations may create jury issue on negligence]; *Hasty v. Trans Atlas Boat, Inc.*, 389 F.3d 510 (5th Cir. 2004)[vessel's violation of company 'zero tolerance' alcohol policy evidence of negligence]; *Parker v. Wal-Mart Stores, Inc.*, 464 Fed. Appx. 224, 227-228 (5th Cir. 2010) *citing Steele v. Inn of Vicksburg* [Mississippi law is that breach of one's internal policies is a factor the jury may consider in determining whether a company has exercised the appropriate standard of care].

(b) Adjusting manuals are admissible in bad faith actions

"[Insurance carrier's] claims manuals are admissible because they can be used to demonstrate bad faith. *Chodos v. Ins. Co. of America,* 126 Cal.App. at 104. The probative value is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or considerations of undue delay. FED. R. EVID. 403." *Metropolitan Business Management, Inc. v. Allstate Ins. Co.*, 2009 WL 1037721, at *4 (C.D.Cal., 2009); *see also Kaufman v. Nationwide Mut. Ins. Co.*, 1997 WL 703175 *2 (U.S.D.C. Pa., Eastern District, 1997)[claims adjusting manual discoverable and "is relevant" in bad faith action].

"With respect to this request, 'it is well-settled that manuals and other training materials are relevant in bad faith insurance litigation where they contain instructions concerning procedures used by employees in processing claims.' *See Shellengerber,* 1996 WL 92092*, at *2." Stephens v. State Farm Fire and Cas. Co.*, 2015 WL 1638516, at *4 (M.D.Pa. 2015). Claims manuals or other materials used to process Plaintiff's insurance claims may be relevant to the cause of action for bad faith. *Platt v. Fireman's Fund Ins. Co.*, 2011 WL 5598359, at *2 (E.D.Pa. 2011); *see also Bonenberger v. Nationwide Mut. Ins. Co.*, 791 A.2d 378, 382, 2002 PA Super. 14, ¶ 9 (Pa.Super. 2002)["The manual was relevant evidence and offers support for the court's ultimate finding of bad faith."]

A company's training manual was also cited as a factor in upholding a bad faith verdict in *Massey v. Farmers Ins. Group*, 1993 WL 34770, at *6 (10th Cir. 1993).

(c) Routine practice is always admissible

It is also axiomatic that evidence of company policy, or "routine practice," is relevant. Evidence of custom and usage may not be the ultimate test of negligence, but is admissible solely for the purpose of assisting the jury, along with other evidence, in determining

whether the conduct of a party was that of a reasonably prudent man. *See* 65A C.J.S. *Negligence* § 232 (1966). *Dedeaux v. J.I Case Co., Inc.,* 611 So.2d 880 (Miss. 1992); *Catholic Diocese of Natchez-Jackson v. Jaquith,* 224 So.2d 216 (Miss. 1969). *See also* MISS. RULE OF EV. 406.

(d) Liberty's adjusting/claims manual in Tutor

Liberty's manual REQUIRES a thorough investigation. It outlines the means for accomplishing their good faith obligation and meaningful deadlines for interviewing witnesses (1-2 days) and acquiring medical records (2-3) days. (Exh. P-66, Vol. 5 of 17, 709). These obligations, and the acknowledgment of the time frames typical for the initial stages of investigation, are probative to the standard of care and Liberty's bad faith investigatory tactics.[16]

Liberty violated these guidelines, their OWN policies for adjusting claims. They are extraordinarily relevant and can only be said to be prejudicial because Liberty's conduct in the underlying claim is so egregious.

(e) The proper way to handle Tutor

Beyond simply complying with their own/industry standards, Liberty had a statutory "safe harbor" that it refused to recognize. Liberty could have authorized the payment of some or all of the benefits due, then, when they *finally* had medical evidence to support their speculation (something that never happened), they could terminate the benefits. MISS.CODE ANN. § 71-3-37 (1972).

[16] For the sake of brevity, Tutor encourages the Court to peruse all highlighted portions of the guidelines at Exh. P-66, Vol. 5 of 17, 702-717. Their transgressions are countless. These obligations are never limited to con-controverted.

A good example of this safe harbor is described in an unpublished Fifth Circuit decision.

> Aetna originally based its payment of benefits to Appellant solely upon the letter received from Appellant's examining physician, stating that a causal relationship existed between Appellant's work injury and his stroke. The record indicates that Aetna later learned that the examining physician disclaimed responsibility for the contents of that letter, and terminated Appellant's benefit payments... Aetna also complied with Mississippi law by notifying the Mississippi Worker's Compensation Commission of the termination of benefit payments. *See* MISS.CODE ANN. § 71-3-37.

McClain v. Aetna Cas. & Sur. Co., 985 F.2d 557 (5th Cir. 1993)[unpublished].

Liberty did not do this. They delayed and denied without any medical evidentiary support. They let UPS, their uber client, call the shots. They left Tutor to swing in the wind.

(5) Dr. Laura Gray's meaningless records

Reference to Dr. Laura Gray was made many times in the Appellant's brief. So important was Dr. Laura Gray that Liberty's brief notoriously included a picture of excerpts from her records. One might well read Liberty's brief and believe Dr. Gray was the centerpiece of the "legitimate, arguable" basis for Liberty's denial of Tutor's benefits.

The Court may be surprised to know that Dr. Gray was not deposed in the MWCC matter. Dr. Gray was not deposed in this bad faith matter. Dr. Gray's name *is not once mentioned in the testimony of Liberty's expert, Mr. Higginbotham* (CP.. 2689-2772). Gray's name was not mentioned in Liberty's DV motion. (CP. 2631-2661). Dr. Gray's name was once mentioned in Liberty's closing statement, not as a grounds for denial, but just to paint an inaccurate, poor picture of Mr. Tutor ("he wants to be out of work") (CP.. 3001), just as they attempt to do in their appeal brief.

There are two compelling reasons Liberty did not call Dr. Gray and barely mentioned her at trial, sans the brief, backhanded closing comment.

One, Dr. Gray never opines that Tutor's condition is non-job related. In fact, her note includes, "THE ONSET OF PAIN BEGAN ON 09/01/2011 WHILE DELIVERING A BOX WEIGHING APPROXIMATELY 60 POUNDS. HE WAS GOING UP STAIRS WHEN A DOG RUSHED FROM UNDER THE PORCH STARTLING HIM CAUSING HIM TO TWIST HIS BACK." (Exh. J-54(b), Vol. 10 of 17, 1360)[*caps in orig*.]

Dr. Gray does not, even once, suggest that Tutor's injuries are a product of any pre-existing condition.

Two, emphasizing Dr. Gray's errant opinion that Tutor could return to work would have created evidentiary heartache for Liberty. Gray called April Dallas and was informed that UPS had no jobs available for Tutor with his restrictions. (CP. 2089). Gray also refused to sign a long-term disability (LTD) form because she believed the injury was work-related (CP. 2112-2113).

Further, because Gray was left on the sidelines, Tutor's counsel also did not call UPS's area Human Resources manager, Terry White, who performed an ADA analysis of Tutor and concluded that UPS had no jobs available him.[17]

The Gray records provide Liberty no excuse for their bad faith denial.

(6) The short term disability form is irrelevant

The facts surrounding the short term disability (STD) application and related form do not support Liberty's contention.

[17]See CP. 241, Exh. 9, p. 37 and 46.

First and foremost, there is no evidence Liberty ever had the STD form during the MWCC matter. Their delay in procuring a form from their own insured is further testament to their utter lack of investigatory diligence. Additionally, the form was never a basis for their denial in any pleading or in the claim notes. By the time they actually procured the form, Liberty had several medical opinions relating the condition to the work injury (Crosswhite, Gray) and, of course, that includes the author of the STD form, Dr. Crosswhite. Liberty had retained a highly qualified expert, Dr. Davis, to review all the relevant documents. The conclusion of Dr. Davis' report was that Tutor gave "exactly the same description in every record." (Exh. P-17, Vol. 1 of 17, 127). *Even Liberty's own hired medical expert, Dr. Davis, ignored the SDT form.*

Second, the facts surrounding the form were well described at trial for the jury's consideration. After the injury, Tutor made two unsuccessful attempts to return to work; he was unable to perform the work. (CP. 2033-2034). April Dallas, his supervisor emphatically gave him two options: File for short term disability or resign. There was "no wiggle room." (CP. 2034). Beyond the sheer terror of quitting a job while injured–a job he faithfully performed for over 20 years– Tutor also wanted to keep the UPS job for as long as he could to reap the retirement benefits at the appropriate time. (CP. 2011-212; 2043-2044). Tutor's labor representative, Rhonda Rutherford, filled out a form to get Tutor the STD benefits (a form Tutor never saw until the bad faith litigation) and Dr. Crosswhite did what was needed to insure Tutor had some income. CP. 2035-2037).

Liberty's expert never mentioned the STD form from the stand. Liberty never questioned Tutor's expert, Lydia Quarles, about the STD form.

(7) Liberty cannot blame the lawyer

In Shakespeare's *Henry VI*, Dick the Butcher famously states, "The first thing we do, let's kill all the lawyers." While, in the play's context, the statement is actually a testament to the importance of lawyers and judges, litigants often seize upon the underlying negative sentiment to blame the lawyers for their misfortune. Liberty unsuccessfully attempted such a strategy at trial by musing why Tutor's lawyer filed a Petition to Controvert two months after being hired, rather than immediately demanding Liberty pay the claim. Blaming Tutor's lawyer is not a legitimate excuse and the jury saw through the time-line created by the documents to expose the disguise of that plea.

Tutor was advised early to hire a lawyer. He refused to do so because he feared for his job and he had witnessed April Dallas fire at least four individuals in her very short tenure for failing to bend to her will. (CP. 2104-2106). Yet, when his short term disability ran out and his long term disability was not offered, he had little choice but to hire lawyer Rod Ward on March 15, 2012. Tutor testified he had "no (other) option." (CP. 2141). Liberty's argument then clearly implies that Ward "sandbagged" and filed the Petition as some sort of set up.

Was that Ward's advice to Tutor? Most obviously, it was not. On *the next day after hiring Ward*, Tutor faxed even more records to his UPS supervisor. Included in that telefax were the following records: •An excellent cover letter with Tutor's signature detailing his course of treatment and his request that UPS provide him a job that accommodates his restrictions • The narrative letter of Dr. Crosswhite affirmatively stating his opinion that the job injury was the cause of his symptoms •The records of Dr. Gray, which included her return to work parameters. (Exh. J-10, Vol. 6 of 17, 755-759;CP. 2092). It appears that

somebody may have advised Tutor to give UPS every bit of information they needed to do the right thing, even the unflattering stuff, obviating any need for a lawyer. The jury figured out who that was.

Liberty did not plead any apportionment of responsibility to Tutor's lawyer(s) and such apportionment was not offered in their voluminous jury instructions.

The remaining *shot in the dark* was Liberty's uncorroborated accusation that Tutor's lawyer had knowledge that Liberty was not involved in the claim denial. Even Lee Tutor had no idea who all was involved in the claims process. Mega-companies like UPS often handle their own claims up to some self-retained minimum.

The carrier tried to blame the claimant lawyer in *Rogers* and even tried to blame their own lawyer in *Jordan v. Amfed,* previously cited, and the Court affirmed the bad faith nonetheless.

Shakespeare did a far superior job of interjecting lawyer drama into his play. The Tutor jury recognized Liberty's poor acting job. The trial judge recognized the legal invalidity of this Hail Mary.

(8) Liberty's legal authority lacks application

Liberty quickly surveys several Mississippi decisions begging application to the Tutor claim. Each decision is quite inapposite. They are divided into two categories, MWCC appeals and bad faith appeals.

●*MWCC appeals*

Walker v. Kinder Morgan, Inc., 242 So.3d 893 (C.A. Miss. 2017). Walker's neck and back claim were found non-compensable by the MWCC and the Court of Appeals affirmed on very solid grounds. Walker's injury was unwitnessed, like Tutor, but that is the

end of the similarities. Two supervisors testified that Walker did not report an injury that day or even the next day; Walker had an extensive prior medical history that included a two level (C5-C6 and C6-C7) cervical fusion surgery and lumbar complaints, with radiological findings, so significant that his doctor thrice recommended a lumbar surgery at L5-S1 prior to the alleged job injury; Walker had a second auto accident, which required treatment at the emergency room and prescription pain medication thirteen days before his unreported injury, had missed the entire week of work prior to his unreported injury and the injury allegedly occurred "on the first day back to work" after that accident. *Id.* at 895-897; the employer's EME physician found the symptoms unrelated to any work injury; Walker admitted to a co-worker he was unsure about the injury's etiology; and a witness testified to "horseplay" which belied Walker's contention he was in severe pain.

None of these facts are similar to Tutor. They are the converse of Tutor.

Short v. Wilson Meat House, LLC, 36 So.3d 1247 (Miss. 2010). Short claimed a neck/shoulder injury while unloading a desk at work. The Court listed eight (8) evidentiary facts supporting the MWCC's finding that his condition was unrelated. Id. at 1252-1253. A shorter list includes that Short had a reputation for lying; at least two employees denied he reported an injury and several claimed he was not unloading the desk; his medical records had inconsistent histories which documented an onset well before the injury date; Short often complained to co-workers about his neck or shoulder prior to the alleged injury; Short performed his job, and actually increased his output, without complaint for seven months after the alleged injury; a third party government official observed Short working without limitation after the alleged injury date. In addition, Short did not seek medical care for ten days after the purported event and he had previously been prescribed pain medicine.

Id. at 1249.

Realistically, none of these compare to the most important failure on Short's part: "Notably, Short failed to introduce evidence from a physician on the causation issue." *Id.* at 1250.

None of these facts are similar to Tutor. They are the converse of Tutor.

Price v. MTD Products and Safety National Cas. Corp, 242 So.3d 900 (C.A. Miss. 2017). Price alleged a work injury to his neck and back stemming from loading boxes. Price's supervisor testified that he did not report the pain as any kind of work injury. The plant nurse reiterated that observation, bolstered by the fact that she sent Price to the clinic used for non-work injuries. The company HR coordinator handled Price's FMLA claim and also confirmed he never mentioned a work injury. *Id.* at 902. Price's medical records from the next day documented that he made no complaint of a work injury, nor any onset of acute or sudden pain. His treating physician concluded that the pain was solely a product of degenerative changes. His medical records ten days following further confirm no complaint of a work-related injury. The EME of MTD, Dr. Murrell, opined that the injury was not work-related, which was repeated in the records of Price's neurosurgeon. *Id.* at 902-903.

None of these facts are similar to Tutor. They are the converse of Tutor.

●*Bad faith appeals*

Life & Cas. Ins. Co. Of Tennessee v. Bristow, 529 So.2d 620 (Miss. 1988) [pre-*Veasley*]. In this bad faith denial of a disability claim, the carrier "continually sought interviews with (the treating physician), without success," in discharge of their good faith obligation. *Id.* at 623. Freeland, the treating physician opined that Bristow was not

disabled from any occupation–the standard for payment under the policy. The Court also rested upon the long abandoned rule that, unless an insured is entitled to a directed verdict, no claim for bad faith may lie. *Id.* at 624. Of equal important in this pre-*Veasley* claim is that Bristow was required by the law existing at that time to "make a showing of malice, gross negligence, or wanton disregard of the rights of the insured." *Id.* Thus, the mere compensatory damages had to meet the standard for "intentional infliction of emotional distress," and not just any lack of legitimate, arguable reason. *Id.*

None of these facts, or even the applicable law, is similar to Tutor.

Pilate v. American Federated Ins. Co., 865 So.2d 387 (C.A. Miss. 2004). The Court of Appeals affirmed a summary judgment on a 5-5 plurality opinion, where Pilate claimed to pull a muscle while moving chairs at work. Pilate completed his shift and did not notify anyone of his alleged injury. He reported it "a day or two" later. X-rays revealed an old compression of the L1 spine. *Id.* at 388. AmFed's adjuster requested an additional thirty days to answer the claimant's Petition so that they could complete their investigation (as opposed to Liberty answering the next day with no investigation); but then AmFed ran into a brick wall. Pilate's attorney would not allow a recorded statement; Pilate refused to provide medical records or steadfastly refused to sign medical authorizations (as opposed to Tutor); Pilate missed the scheduled EME. In another display of reasonable-ness and good faith, AmFed admitted Pilate's injury and never denied his claim. *Id.* at 389 and 392. The Court differentiates *Pilate* from the bad faith verdict in *Traveler's Indemnity Co. v. Wetherbee*, 368 So.2d 829 (Miss. 1979) by concluding that "the record is devoid of any action undertaken by Pilate to assist with, cooperate in or expedite the resolution of his own claim." *Id.* at 399. Both experts in Tutor, including Liberty's, admit Tutor was cooperative

in every respect.

None of these facts, both as to AmFed's significant efforts to gather information informally and Pilate' obstinate refusal to cooperate in any way, mirror Tutor.

E. *VEASLEY* DAMAGES ARE SUPPORTED BY THE EVIDENCE

(1) The evidentiary standard for *Veasley* damages

Liberty meanders in and out of case law which addresses damages in various causes of action, while the law on bad faith damages has been well-settled for over thirty (30) years. In *Universal Life Ins. Co. v. Veasley*, 610 So. 2d 290 (Miss. 1992) the Supreme Court affirmed that, in the absence of conduct warranting punitive damages, a denial without legitimate, arguable reason gives rise to an award of compensatory damages. The judicially preferred nomenclature is "*Veasley* damages."[18]

Veasley damages include non-economic damages such as "worry, anxiety, insomnia, and depression," and economic damages such as attorney's fees. *Id.* at 295. The archaic rule requiring physical injury before a claim for emotional distress survives has long been abandoned in bad faith claims. *Smith v. Union Nat'l Life Ins. Co.*, 2018 WL 1021342, at *24 (S.D. Miss. Feb. 22, 2018); *Jones v. Tread Rubber Corp.*, 199 F. Supp. 2d 539, 549–50 (S.D. Miss. 2002); *Adams v. U.S. Homecrafters, Inc.*, 744 So.2d 736, 742 (Miss.1999).

"In *Veasley*, the Supreme Court found that the plaintiff's claim for emotional distress caused by the insurance company's refusal to pay a life insurance claim was supported by her testimony that the company's conduct '... caused her worry, anxiety, insomnia, and

[18]Of course, this jury in Tutor did affirmatively find the type of conduct which would permit an award of punitive damages. The point is simply that such a finding is not necessary for *Veasley* non-economic damages.

depression.' *Id*. Similar testimony has been found to be insufficient to establish a right to emotional distress damages in other contexts, see, e.g. *Adams*, 744 So.2d at 743-44, and it thus seems clear that the Supreme Court has been particularly willing to sanction emotional distress damages in the context of negligent denials of insurance claims." *Simpson v. Econ. Premier Assur. Co.*, 2006 WL 2590620, at *2 (N.D. Miss. Sept. 8, 2006).

The *Simpson* Court correctly notes that such damages arise "even absent proof of the sort of outrageous conduct which might make punitive damages appropriate." *Id*.

The standard of proof for such emotional damages is "particularly low." *Id*. at *2.[19] Mrs. Veasley, like Mr. Tutor, had to deal with the anxieties of "coping with daily life and children," *Veasley* at 295, while Tutor did so in constant, belittling back pain. Such distress is both foreseeable and recoverable in the insurance denial context, *Adams v. U.S. Homecrafters, Inc.*, 744 So. 2d 736, 742–43 (Miss. 1999), even in the absence of expert testimony. *Smith v. Union Nat'l Life Ins. Co.*, at *24.

Our Court has affirmed such a damage award even more specifically in the context of a workers' compensation denial, noting the standard of review offered by Tutor herein. *SW Mississippi Reg'l Med. Ctr. v. Lawrence*, 684 So. 2d 1257, 1269–70 (Miss. 1996). The award to Mrs. Lawrence, some 22 years ago, was $66,000. *Id*. at 1259. Tutor's $100,000 award, in 2018, pales in comparison.

[19]"It is thus clear that, in cases where an insurance claim was denied negligently and/or unreasonably, the Supreme Court has adopted a particularly low standard of proof for the recovery of emotional distress damages." *Simpson v. Econ. Premier Assur. Co.*, 2006 WL 2590620, at *2 (N.D. Miss. Sept. 8, 2006)

It is simply unnecessary and disingenous to delve into decisions addressing causes of action, other than bad faith, to make the determination on the propriety of these *Veasley* damages.

(2) The legal standard for reducing a verdict

Altering a jury verdict "crowd(s) against the inviolate right [of jury trial]." *Odom v. Roberts*, 606 So.2d 114 (Miss. 1992). Such verdicts are not "merely advisory" and the court has no authority to vacate an award simply because it would have awarded a different amount or it is too high or too low. Jackson, J., MISSISSIPPI CIVIL PROCEDURE, Additur and Remittitur, §23:3 (2018)(citing dozens of decisions).

MISS. CODE ANNO. §11-1-55 (MISS. 1972) lays the foundation on which a court must evaluate a trial judge's alleged abuse of discretion[20] in his decision to uphold a jury's verdict. The very familiar statutory standard is whether "the damages are excessive or inadequate for the reason that the jury or trier of the facts was influenced by bias, prejudice, or passion or that the damages awarded were contrary to the overwhelming weight of the credible evidence." *Id.*

Liberty faces an impossible task in arguing this was a "runaway jury." This jury, in the punitive damage phase, was allowed to learn that they could penalize Liberty for punitive damages. They were read the stipulation that Liberty's net worth was over $240 million. (CP. 3044). They found Liberty's denial met the legal criteria for punitive damages. And, yet, they felt the compensatory damages were enough and awarded zero

[20]Many decisions, likely due to the constitutional implications, have elevated the "abuse of discretion" standard in affecting jury verdicts to "substantially" abusing discretion or "manifestly" abusing discretion. Jackson, J. at §23:4, fn 4 and 5.

punitive damages. Dubbing this jury as biased or prejudiced or inflamed with undue passion would be downright pettifoggery.

(3) The facts supporting Tutor's damages

The testimony of Lee and Kim Tutor was far more compelling and far more specific than the *Veasley* assertion of mere anxiety and depression.

By the time Liberty got the claim, Tutor was owed 27 weeks of TTD. Even subtracting the amounts paid in STD, the figure owed over $10,000.00. During the six (6) months of the litigation without any STD being paid, Tutor accrued another $10,000.00, or so in TTD.

Lee Tutor was a high wage earner. He lived a typical middle class life. But when cut off from his income, all the time suffering from a painful back injury, he was forced to make demoralizing choices. He was newly married, less than two years, and his wife became the head of household, effectively their only financial support. (CP. 2051-2052). They took out a second mortgage (CP. 2057-2058). They cashed in retirement money and absorbed a high pre-payment penalty (CP. 2051-2052). Lee borrowed $1,500.00 from his father–the man who taught him to "stand on (his) own two feet." (CP. 2048).

Understandably, the Tutors worried about their financial future. Could they keep the house? Could they keep their girls in college? Would their lifestyle change forever?

The supreme insult was to follow. Tutor had faithfully parented and paid child support for his children from a previous marriage, as well as supporting his youngest in college at the time of the injury. But as his income dwindled to $96 per week, then was cut off entirely, he could not afford the court-ordered child support obligation. His ex-wife filed contempt charges. Without any income, Lee Tutor was left to attend the hearing, become

labeled as a deadbeat dad and, in most humiliating fashion, have his new wife pay his obligation. (CP. 2052-2054).

The evidence substantially supports the meager compensatory award of $100,000.00.

F. PUNITIVE DAMAGES: THE JURY'S FINDING OF RECKLESSNESS IS WELL-SUPPORTED AND MOOT

(1) The jury's "punitive verdict"

The Tutor trial was appropriately bifurcated by agreement of counsel. The well instructed jury found, in the compensatory stage, that Liberty lacked a legitimate, arguable reason for the denial of certain benefits and awarded *Veasley* damages against Liberty in the amount of $100,000.00–the subject of all the analysis *supra*.

In the punitive damage stage, the verdict form reveals that the jury found for Tutor on punitive damages; yet, apparently believing the compensatory award of $100,000 was enough, awarded zero in punitive damages. The same was awarded for UPS (CP. 1107-1109). Tutor, who would have (at a minimum) been entitled to attorney's fees, chose not to appeal this award, giving the appropriate constitutional deference to the jury's findings.

(2) The zero verdict is moot

With no award of punitive damages, all assignments of error in that regard are moot. The discussion should end on that ground. Tutor is hesitant to go further and give the appearance the issue should be addressed at the appellate level.

(3) Liberty's conduct was a jury issue

Out of an abundance of caution, Tutor offers this brief analysis of the jury's finding of willful or grossly negligent conduct.[21] It is hornbook law that the trial judge must first determine whether there is a jury issue as to the insurer's having committed a willful or malicious wrong, or acted with gross or reckless disregard for the insured's rights, before the trial is allowed to go to the punitive damage stage. *Stewart v. Gulf Guar. Life Ins. Co.*, 846 So. 2d 192, 201 (Miss. 2002).

Judge Coleman allowed the matter to go to the jury against both defendants. In particular, the evidence against Liberty included, among other things:

i. Their failure to interview UPS witnesses prior to their blanket denial;

ii. Their failure to read the medical records in UPS's possession prior to their blanket denial;

iii. Their failure to review the extensive personnel file of Lee Tutor prior to their blanket denial;

iv. Their failure to interview Gary Bishop, Tutor's supervisor who rode with him for hours after the injury and participated in the phone call to Dallas;

v. Their failure to request any interview of Tutor prior to their denial;

vi. Their failure to file or disclose (secretion of) the First Report of Injury, which clearly documents a job injury and notice to UPS, prior to their denial of both the job injury and proper notice;[22]

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[21]The form of the verdict offered by Liberty and accepted by the Court is unclear as to whether the jury found malice, recklessness and/or gross negligence. Each is an independent ground for punitive damages. This Court may use whatever descriptor requires the least evidence.

[22]The trial court prohibited Tutor from putting on evidence that Liberty intentionally failed to produce the First Report of Injury during the MWCC proceeding, even after a motion to compel, and during the majority of the bad faith litigation until Bonnie King accidentally mentioned it in a deposition, but the jury knew, through Liberty's own expert, that the First Report was never filed.

vii. Their failure to procure any medical opinion in support of their denial prior to the examination of Dr. John Davis;

viii. The violation of their own internal procedures for investigating, handling and denying a claim;

ix. Their absurd denial, at the behest of UPS execs, represented by their Answer to the Petition to Controvert; and

x. Their unsettling special relationship with UPS, giving them an enormous incentive to allow UPS to demand a blanket denial, despite a lack of factual, medical or legal basis to do so.

The jury had ample evidence to find gross negligence or recklessness.

V. CONCLUSION

The trial judge committed no error in the introduction of evidence or allowing the jury to make the factual determinations where conflicts in testimony and documents required their final conclusion, including competing expert witnesses.

The highly engaged trial judge astutely denied motions for direct verdict and judgment notwithstanding the verdict using the well-settled standard of review. All evidence and reasonable inferences were, and must be, viewed in the light most favorable to Tutor.

The well-instructed jury, who received some version of dozens of instructions offered by Liberty, returned a reasonable compensatory (*Veasley*) damage award and both the quantum of those damages, as well as the zero punitive award, illustrate that this jury was not blinded by passion or prejudice. The damages alleged by Tutor were undisputed and a reasonable juror could certainly find that Tutor's painful, humiliating and financially back-breaking ordeal was worthy of their modest award.

THIS the 15th day of January, 2019.

/s/ LANCE L. STEVENS
ATTORNEY FOR PLAINTIFF/APPELLEE
ANTHONY LEE TUTOR

CERTIFICATE OF SERVICE

I, Lance L. Stevens, attorney for Plaintiff / Appellee, Anthony Lee Tutor, hereby certify that on this day I electronically filed the foregoing pleading or other paper with the Clerk of the Court using the MEC system which sent notification of such filing to the following:

Honorable Lee Sorrels Coleman, Circuit Court Judge
Post Office Box 226
West Point, Mississippi 39773

Clifford K. (Ford) Bailey, III, Esq. (fbailey@wellsmar.com)
Gregg A. Caraway, Esq. (gcaraway@wellsmar.com)
Wells, Marble & Hurst, PLLC
Ridgeland, MS 39157
Counsel for Appellant Liberty Insurance Corporation

SO CERTIFIED, this the 15th day of January, 2019.

/s/ LANCE L. STEVENS
ATTORNEY FOR PLAINTIFF / APPELLEE,
ANTHONY LEE TUTOR

Lance L. Stevens, MSB #7877
lstevens@stevensandward.com
Roderick D. Ward III, MSB #6953
rward@stevensandward.com
Stevens & Ward, P.A.
1855 Lakeland Drive, Suite Q-200
Jackson, Mississippi 39216
Phone: (601) 366-7777
Fax: (601) 366-7781

Edward Blackmon, Jr., MSB #3354
edblackmon@blackmonlawfirm.com
Bradford J. Blackmon, MSB #104848
bjblackmon@blackmonlawfirm.com
Blackmon & Blackmon, PLLC
P.O. Box 105
Canton, MS 39046-0105
Phone: (601) 859-1567
Fax: (601) 859-2311