IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2009-CA-01714-COA

BRENDA BURSON PERKINS **APPELLANT**

v.

STAR TRANSPORTATION, INC. AND LORAINE W. CLARK **APPELLEES**

DATE OF JUDGMENT:	09/25/2009
TRIAL JUDGE:	HON. JOSEPH H. LOPER JR.
COURT FROM WHICH APPEALED:	WEBSTER COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	JOHN M. "MICKEY" MONTGOMERY DOLTON W. MCALPIN
ATTORNEYS FOR APPELLEES:	MARK NOLAN HALBERT JAMES GRADY WYLY III
NATURE OF THE CASE:	CIVIL - PERSONAL INJURY
TRIAL COURT DISPOSITION:	JURY VERDICT IN FAVOR OF PERKINS FOR $556,800
DISPOSITION:	AFFIRMED: 04/12/2011
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

GRIFFIS, P.J., FOR THE COURT:

¶1. The award of sanctions under Rule 37(c) of the Mississippi Rules of Civil Procedure is the issue in this appeal. We find no reversible error and affirm.

FACTS AND PROCEDURAL HISTORY

¶2. On March 23, 2004, Brenda Burson Perkins was a passenger in a Toyota Camry driven by Nancy Fulgham. They were driving west on Highway 82 in Webster County, Mississippi. Fulgham stopped in the left-turn lane at a four-way stop at the intersection of

Highway 82 and Highway 15, in Mathiston, Mississippi. Highway 82 is a four-lane major thoroughfare with a sizeable median separating the two westbound lanes and the two eastbound lanes. When Fulgham turned south on Highway 15 and attempted to cross the two eastbound lanes of Highway 82, her automobile was struck by an eighteen-wheeler that was driven by Loraine W. Clark. The eighteen-wheeler was owned by Star Transportation, Inc.

¶3. On March 8, 2007, both Fulgham and Perkins filed separate complaints against Clark and Star Transportation. The same attorneys represented Perkins and Fulgham. Both complaints asserted a claim for negligence and gross negligence. The claim for gross negligence alleged that "the negligent acts of omission and commission on the part of Clark . . . were so gross as to amount to wantonness and were such character as to evidence a complete and total [dis]regard for and indifference to the safety of the traveling public, in general, and of [Perkins], in particular." Perkins's complaint asked for both compensatory and punitive damages.

¶4. On April 12, 2007, Clark and Star Transportation, through joint counsel, filed an answer to Perkins's complaint. Their answer admitted that the accident occurred but denied liability, either in general or on the grounds of insufficient information. Their answer included twenty-two affirmative defenses. Clark and Star Transportation alleged the following defenses:

SECOND AFFIRMATIVE DEFENSE

> And now further answering, the Defendants aver that the accident in question was not due to any negligent fault on the part of Defendants, but was caused in whole or in part through the proximate fault, strict fault, negligence or want

of care of Nancy Fulgham and/or Brenda Person Perkins in the following, but not exclusive respects:

a. Failing to maintain a proper lookout;

b. Failing to use due care;

c. Failing to maintain proper control over his vehicle;

d. Acting in a careless or reckless manner; and

e. Other acts of negligence that will be shown at the trial of this matter.

THIRD AFFIRMATIVE DEFENSE

And now further answering, the Defendants aver in the alternative, and only in the event that it is shown that there is any fault or negligence on the part of Defendants, all of which is denied, or that such negligence is the cause of any injury or loss to the Plaintiffs (which is also at all times denied), then in that event, Defendants affirmatively aver that Nancy Fulgham and/or Brenda Burson Perkins's own contributory fault or negligence operates as a complete bar, or alternatively in the mitigation of any damages which might otherwise be true.

FOURTH AFFIRMATIVE DEFENSE

Defendants aver that if the subject accident was caused by any acts or omissions on the part of the answering Defendants, which is expressly denied, such acts or omissions were the result of sudden emergency and/or hazard created by Nancy Fulgham and/or Brenda Burson Perkins, and/or others for whom the answering Defendants are not liable.

¶5. On July 31, 2007, Perkins served requests for admissions on Clark and Star Transportation. Clark responded on September 14, 2007, as follows:

a. Request for Admission No. 9: Do you admit or deny that you caused the collision that occurred between Plaintiff Nancy Fulgham and Defendants Loraine W. Clark and Star Transportation, Inc. on March 23, 2004?

Response to Request for Admission No. 9: Denied

b. Request for Admission No. 12: Do you admit or deny that you were driving in excess of the posted, legal speed limit at the time of the collision on March 23, 2004?

Response to Request for Admission No. 12: Denied

c. Request for Admission No. 17: Do you admit or deny that you failed to stop at the four-way stop located at the intersection of U.S. Highway 82 and MS Highway 15, the location of the subject collision?

Response to Request for Admission No. 17: Admitted

d. Request for Admission No. 18: Do you admit or deny that you failed to yield the right-of-way to the Plaintiffs' vehicle at the four-way stop located at the intersection of U.S. Highway 82 and MS Highway 15, the location of the subject collision?

Response to Request for Admission No. 18: Denied

Star Transportation also responded as follows:

a. Request for Admission No. 8: Do you admit or deny that the defendant caused the collision that occurred between Plaintiff Nancy Fulgham and Defendants Loraine W. Clark and Star Transportation, Inc. on March 23, 2004?

Response to Request for Admission No. 8: Denied

b. Request for Admission No. 11: Do you admit or deny that Defendant, Loraine W. Clark, was driving in excess of the posted, legal speed limit at the time of the collision on March 23, 2004?

Response to Request for Admission No. 11: Denied

c. Request for Admission No. 15: Do you admit or deny that Defendant, Loraine W. Clark, failed to stop at the four-way stop located at the intersection of U.S. Highway 82 and MS Highway 15, the location of the subject collision?

Response to Request for Admission No. 15: Admitted

d. Request for Admission No. 17: Do you admit or deny that Defendant, Loraine W. Clark, failed to yield the right-of-way to the Plaintiffs' vehicle at the four-way stop located at the intersection of U.S. Highway 82 and MS Highway 15, the location of the subject collision?

Response to Request for Admission No. 17: Denied

¶6. On December 12, 2007, counsel for Clark and Star Transportation took the deposition of Nancy Fulgham. In that deposition, Fulgham testified:

A. . . . We were traveling west on 82. And when we got to Mathiston there's a four-way stop. We were going to cross. We came to a stop, and I was fixing to cross, and that's when I got hit.

Q. Okay, you were taking a left on 15 there to go to Canton?

A. Yeah. I was taking a left on 15.

Q. Okay, you came to a full stop?

A. I did.

Q. As you approached that intersection, can you tell me what you remember seeing as far as other cars or trucks that were at the intersection or approaching the intersection?

A. *There was a car sitting on 82 facing east.* And when I pulled up there, I got there a little bit before she did, *but a lot of those cars take off any way. So I proceeded to cross, and I kept saying, please don't go. Please don't go. And I was focused on her vehicle*. And then when I got about midways through is when Ms. Clark hit me.

(Emphasis added). According to Perkins's deposition testimony, the vehicle approaching the intersection in the outside lane of the eastbound lanes of Highway 82 was a white pickup truck. Fulgham concentrated on that vehicle. Fulgham's testimony revealed that she

believed that the white pickup truck presented a danger, and she was watching it carefully as she proceeded across the highway. Driving her eighteen-wheeler, Clark was approaching the intersection in the innermost eastbound lane of Highway 82. It was between 12:00 and 12:30 p.m. The weather was clear. Fulgham had an unobstructed view of Highway 82 to the west for an extended distance. Fulgham's deposition testimony indicated that she never saw Clark approaching until the instant before impact when she screamed, "[o]h, s—!." In her own deposition testimony, Perkins confirmed Fulgham's version of events.

¶7. On December 13, 2007, counsel for Perkins took Clark's deposition. In that deposition, Clark testified that she did not know whether she stopped at the stop sign. She thought that Fulgham's car did not come to a complete stop but made a rolling stop.

¶8. Perkins's counsel served the plaintiff's designation of expert witnesses, and G.L. Rhoades was designated to testify as to fault or liability. The designation revealed that Rhoades was expected to testify as an accident-reconstruction expert. Rhoades would opine that, at the time of the accident, Clark ignored the traffic control devices, did not stop at the stop sign, was speeding at the time of the accident, did not apply her brakes before the collision, failed to apply the full braking capacity, and was traveling at approximately fifty-five miles per hour at the time of impact. Rhoades would also testify that Clark failed to use the proper braking capacity of the tractor-trailer, and the braking capacity was less than twenty-four percent at the time of the accident. Rhoades was also designated to testify that Star Transportation failed to maintain a proper safety program in accordance with the Department of Transportation's regulations and standard industry safety practices.

¶9. Thereafter, Star Transportation obtained the GPS and on-board computer data from its truck that Clark was driving at the time of the accident. This information revealed Clark had been mistaken about her speed at the time of the collision. As a result, on September 18, 2008, counsel for Clark and Star Transportation supplemented their discovery responses and provided Perkins's counsel with documents "downloaded from the onboard computer(s) in Loraine Clark's truck following the accident." This information established that the tractor-trailer Clark was driving was actually traveling fifty-two miles per hour two seconds before the accident and 48.5 miles per hour one second before the accident.

¶10. On November 20, 2008, counsel for Perkins took the Rule 30(b)(6)[1] deposition of Star Transportation's corporate representative, Ronnie Holland. Holland testified about the information from the onboard computer in Clark's truck and its speed immediately before the accident. Holland testified that Clark was driving fifty-two miles per hour two seconds before the collision. The posted speed limit on Highway 82 was sixty-five miles per hour. However, as a driver such as Clark approached the intersection of Highway 82 and Highway 15, the speed limit decreased in steps from sixty-five miles per hour to fifty-five miles per hour, then to forty-five miles per hour, and finally to thirty-five miles per hour. The posted speed limit immediately prior to arriving at the intersection was thirty-five miles per hour. Star Transportation's expert in accident reconstruction, Dr. Thomas Talbot, also conceded that Clark had been speeding immediately before the collision.

[1] M.R.C.P. 30(b)(6).

¶11. On December 15, 2008, Perkins's counsel served a notice of supplemental designation of expert witnesses, and Roger C. Allen was designated to testify as to liability. The designation revealed that Allen was expected to testify as an expert in the transportation industry and the Federal Motor Carrier Safety Regulations. According to the opinion provided with the designation, Allen was prepared to testify that Clark and Star Transportation were responsible for the accident and had violated several federal regulations. Allen opined that, after a review of the onboard computer logs, Clark had violated the hours of service regulations and had failed to keep a current log book, as required by the federal regulations. Allen also opined that Star Transportation should have been aware of such violation of these regulations. Allen was prepared to testify that Clark and/or Star Transportation had at least seven violations of the federal regulations. Allen's conclusion was the actions of Clark and Star Transportation were "negligent and most likely grossly negligent." Allen provided a supplemental report on January 23, 2009.

¶12. On March 27, 2009, Clark and Star Transportation filed a motion in limine and a motion to strike Rhoades's expert opinions. Clark and Star Transportation also filed a motion in limine and a motion to strike Allen's expert opinions concerning monitoring standards, hours of service violations, and brake-inspection compliance.

¶13. On March 27, 2009, Clark and Star Transportation filed a motion for partial summary judgment and asked the circuit court to dismiss Perkins's claim for punitive damages and additional claims raised in her amended complaint.

¶14. After a hearing on the motions, the circuit court executed, on June 10, 2009, an

opinion and order that granted the motion for partial summary judgment and dismissed Perkins's claim for punitive damages. The circuit court also dismissed the claims that Perkins had raised in her amended complaint. The circuit court's order specifically mentioned that Clark and Star Transportation had "concede[d] that Perkins is entitled to receive some amount of compensatory damages from them."

¶15. On June 16, 2009, the trial began. The transcript indicates the jury was selected, "called to the jury box[,] and given preliminary instructions by the court. Then the jury was sent to the jury room." The circuit court then considered preliminary motions, which included a motion for reconsideration of both the motion in limine and the motion for partial summary judgment.

¶16. The circuit court declined to change its position regarding punitive damages and denied the motion for reconsideration. During the argument on the motions, the following exchange occurred:

> By the Court: . . . I have kind of been baffled from the get go after reading everything I did about why y'all are still contending that there is some issue concerning liability. But that is your right.
>
> By defense counsel: Well, we could probably shorten this trial right now. Your Honor, we didn't admit liability, and we haven't although we have admitted we ran through the stop sign because there was the specter of punitive damages out there. Now once that order came down on Thursday, *we are willing to admit liability subject to having the right to prove that there is some apportionment to be made as to fault on the accident.*

(Emphasis added). After additional argument on other matters, counsel for Clark and Star

Transportation stated: "The last thing is that I would appreciate a short period of time to meet with my clients about this admission of liability because I appreciate what the court said." After a recess, counsel announced to the court: "Your Honor, my clients agree to admit the liability without any reservation." Then another lengthy discussion was held as to how this confession of liability would affect Perkins's presentation of evidence.

¶17. In his opening statement, counsel for Clark and Star Transportation admitted that Clark ran the stop sign and stated that the trial was about Perkins's damages. Perkins then called Jeremy Flora and Elizabeth Peacock to testify as eyewitnesses. Perkins also called Trooper Jason White, who had responded to the accident.

¶18. The next morning, counsel for Clark and Star Transportation asked the circuit court to limit Perkins's case-in-chief due to the fact that they had admitted liability. Perkins had intended to bring other witnesses to testify as to liability. When the circuit court had the jury brought into the courtroom, the circuit court made the following announcement:

> Good morning, ladies and gentlemen. We were taking up some more preliminary matters before we had you brought back out, and I want to make sure you understand. At this point, the Defendants, Star Transportation and Loraine Clark, are admitting that they are at fault in this accident. So I have ruled that no other testimony is necessary as to what happened, what occurred at the accident because they are admitting that they are at fault. So we are moving into damages which . . . you will decide at the end of the trial what type of compensation Ms. Perkins is . . . entitled to receive as a result of this accident. They are confessing though that they are liable. So the testimony from this point forward will be testimony concerning the damage phase where you decide after all the testimony and evidence has been presented . . . what type of compensation you believe that Ms. [Perkins] is entitled to. But I just wanted to explain that so you wouldn't be wondering why we didn't have other testimony about the accident. But since they have again conceded that they are at fault, [there] is no point in having any more testimony on that issue.

On the fourth day of the trial, counsel for Perkins informed the circuit court that he would like to call Clark and question her regarding her speed, the weight of her truck, the impact, her admissions, and "questions about prior inconsistent statements that would go to credibility." According to counsel for Perkins, those questions were "designed to go to damages." Counsel for the defendants argued that such questions were inappropriate in light of their admission of fault. After significant debate that resulted in Perkins being allowed to proffer Star Transportation's and Clark's responses to her requests for admissions, Star Transportation and Clark specifically offered to stipulate to the jury that they were one hundred percent at fault for the accident with no apportionment to Fulgham. The circuit court stated, "Well, I don't know if they will accept a stipulation." Counsel for Perkins confirmed the circuit court's suspicion and said, "[w]e are not stipulating."

¶19. Immediately before calling Clark, counsel for Perkins requested that the circuit court allow him to ask Clark whether she had caused or contributed to the cause "of the injuries of the Plaintiff, Brenda Perkins." The following exchange then transpired:

> BY THE COURT: I will allow you to ask if she concedes that Ms. Perkins was injured as a result of the accident. That's the only question that needs to be asked.
>
> COUNSEL FOR PERKINS: Judge, we have put on three days of proof that she has been injured. We know that. It's just who caused it.
>
> COUNSEL FOR THE DEFENDANTS: Then why ask it?
>
> COUNSEL FOR PERKINS: Because of causation, because she - -
>
> COUNSEL FOR THE DEFENDANTS: - - No, because you want to do something else with this, which is what - -

COUNSEL FOR PERKINS: - - No, I don't.

BY THE COURT: Well, I have made my ruling.

Perkins then called Clark as a witness, and she testified as follows:

Q. On March 23rd, 2004, were you employed as a truck driver for Star Transportation around 12:30?

A. Yes, sir.

Q. Okay, and you were involved in an automobile accident - - I mean a tractor trailer accident and an automobile accident on Highway 82 and Highway 15; is that correct?

A. Yes, sir.

Q. Okay, I want to ask you one question. Do you admit or deny that on March 23rd, 2004, that you were negligent in the operation of the tractor[-]trailer in an - - that resulted in a crash between your truck and Nancy Fulgham where Brenda Perkins was a passenger? Do you admit or deny that you were negligent in causing this collision?

A. Yes.

Q. What is your answer? Do you admit it or do you deny it?

A. I admit it.

Perkins then called Holland, Star Transportation's corporate representative, to testify:

Q. Do you as the representative of Star Transportation admit or deny that on March 23rd, 2004, at the time of the collision that the Defendant, Loraine Clark, was a truck driver and was acting in the course and scope of her employment with your company, the Defendant, Star Transportation?

A. Yes.

Q. And do you admit that Star Transportation would be vicariously liable for any damages because of the negligence of Mrs. Clark?

A. Yes.

. . . .

Q. Does Star Transportation admit liability in this case?

A. Yes.

¶20. At the conclusion of the trial, the jury awarded Perkins $556,800 in damages. On June 23, 2009, the circuit court entered the final judgment.[2]

¶21. On July 2, 2009, Perkins served Clark and Star Transportation with her motion for imposition of sanctions pursuant to Rule 37(c) of the Mississippi Rules of Civil Procedure. Perkins asserted that Clark and Star Transportation had failed to admit the truth of the matters requested under Mississippi Rule of Civile Procedure 36. As a result, Perkins claimed she was obligated to prove liability and had to employ Rhoades and Allen as expert witnesses. In addition, Perkins claimed she had incurred attorneys' fees and expenses, along with the expert witness fees, which would not have been incurred had Clark and Star Transportation properly responded to the Rule 36 requests for admission. Perkins asked the circuit court to award sanctions under Rule 37(c) in the amount of $192,000.

¶22. On September 25, 2009, the circuit court entered an opinion and order that denied the motion. In the opinion, the circuit court considered Mississippi Rules of Civil Procedure 11 and 37(c), along with Mississippi Code Annotated section 11-55-5 (Rev. 2002)(the

[2] Clark and Star Transportation have not appealed the judgment that awarded compensatory damages. Perkins has not appealed the order that granted the motion in limine to exclude expert witness testimony or the partial summary judgment that dismissed Perkins's claim of gross negligence. None of these issues are before this Court.

Mississippi Litigation Accountability Act). The circuit court then ruled:

> This court, having considered this matter finds that neither the testimony of G. L. Rhoades, nor Roger Allen was necessary in order for the plaintiff to prove that the defendants were at fault in causing the accident that occurred on or about March 23, 2004, even if the defendants had not conceded partial liability prior to trial, and total liability at trial. Also, while the defendants' theory that Nancy Fulgham was partially at fault in causing the accident was unlikely to be successful, that theory was not a frivolous defense. Additionally, because the defendants confessed liability, the plaintiff did not offer "proof" on the subject of liability. Accordingly, this court finds that the Plaintiff's Motion for Imposition of Sanctions against Star Transportation, Inc. and Loraine W. Clark pursuant to Rule 37(c) M.R.C.P., that was filed by the Plaintiff, Brenda Burson Perkins, on July 2, 2009, should be denied.

It is from this order that Perkins now appeals.

STANDARD OF REVIEW

¶23. "The trial court is vested with considerable discretion in its authority to award sanctions for discovery abuses." *State Farm Mut. Auto. Ins. Co. v. Jones*, 37 So. 3d 87, 90 (¶6) (Miss. Ct. App. 2009). We will reverse the circuit court's decision if it abused its discretion. *Id*. "We will affirm a trial court's decision unless we have a 'definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon the weighing of relevant factors.'" *Id*. (quoting *Jones v. Jones*, 995 So. 2d 706, 711 (¶13) (Miss. 2008)).

ANALYSIS

¶24. Perkins framed the issue on appeal as "whether or not the trial court should have entered an order granting to Plaintiff Brenda Burson Perkins her attorney's fees, witness fees, and costs as sanctions against Defendants Star Transportation, Inc. and Loraine W. Clark

pursuant to Rule 37(c), M.R.C.P., as set out in the Plaintiff's Motion for Imposition of Sanctions." Thus, we consider whether it was an abuse of discretion for the circuit court to deny the motion for sanctions under Rule 37(c).[3]

¶25. Our analysis ends when we determine that the circuit court was correct to determine that the allocation of fault was a viable issue for trial. The circuit court correctly concluded that, "while the defendants' theory that Nancy Fulgham was partially at fault in causing the accident was unlikely to be successful, that theory was not a frivolous defense."

¶26. Rule 37(c) provides:

> If a party fails to admit . . . the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the . . . truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. *The court shall make the order unless it finds that* (1) the request was held objectionable under Rule 36(a), or (2) the admission sought was of no substantial importance, or *(3) the party failing to admit had [a] reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.*

(Emphasis added). When we consider Fulgham's fault or negligence would be considered to apportion damages under Mississippi Code Annotated section 85-5-7 (Supp. 2010), we must also find that the circuit court was correct to rule that Clark and Star Transportation, as "the part[ies] failing to admit," indeed "had [a] reasonable ground to believe that he might prevail on the matter, or . . . there was other good reason for the failure to admit."

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[3] The issue as to whether Perkins was entitled to sanctions under Rule 11 of the Mississippi Rules of Civil Procedure or the Mississippi Litigation Accountability Act was cited in Perkins brief. However, Perkins does not argue that the circuit court was in error for not awarding sanctions under Rule 11 or Mississippi Code Annotated section 11-55-5.

¶27. Fulgham's complaint asserted claims for negligence and gross negligence. Clark and Star Transportation denied that they were negligent or grossly negligent and asserted affirmative defenses that the accident was caused in whole or in part by the negligence of Fulgham.

¶28. During discovery, Perkins served requests for admission that asked Clark and Star Transportation to admit to the claim of negligence. They refused. Instead, they specifically denied that: Clark had caused the accident; Clark was driving in excess of the posted speed limit; and Clark failed to yield the right-of-way to the vehicle driven by Fulgham. Clark did, however, admit that she "failed to stop at the four-way stop." Based on this response, the question of Clark and Star Transportation's negligence was an issue to be tried by the jury.

¶29. Perkins prepared to present evidence that would establish, by a preponderance of the evidence, the elements of negligence: (1) duty, (2) breach of duty, (3) causation, and (4) damages. *Fisher v. Deer* 942 So. 2d 217, 219 (¶6) (Miss. Ct. App. 2006). In routine car-accident cases, the elements of duty, breach of duty, and causation are proven by eyewitnesses and expert witnesses.[4] It is clear from the circuit court's order that the court did not believe it was necessary for Perkins to call expert witnesses to establish Clark and Star Transportation's negligence. In part, this was due to the earlier litigation brought by Fulgham.

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[4] *See, e.g., City of Jackson v. Harris*, 44 So. 3d 927, 930 (Miss. 2010); *Utz v. Running & Rolling Trucking, Inc.,* 32 So. 3d 450, 469 (¶53) (Miss. 2010); *Denham v. Holmes ex rel. Holmes*, 2008-CA-01933-COA, 2010 WL 1037494, *2-3 (¶¶10-14) (Miss. Ct. App. Mar. 23, 2010).

¶30. Perkins's counsel retained two expert witnesses. Rhoades was retained to testify as an accident reconstructionist. Allen was retained to testify as a transportation expert. Their testimonies were to be offered by the plaintiff to establish duty, breach of duty, and causation, and was offered to establish gross negligence.

¶31. Clark and Star Transportation's answers raised Fulgham's contributory negligence and their right to allocation of fault. The triable issues included not only the negligence of Clark and Star Transportation but also the negligence of Fulgham. The circuit court recognized that the issue of whether Fulgham was partially at fault was an issue to be tried regardless of the fact that Clark and Star Transportation denied or conceded their negligence.

¶32. The allocation of fault was a proper issue for the jury to consider a relevant issue for the parties to offer evidence. Perkins was required to offer evidence of negligent conduct so the jury could allocate fault between the potential wrong doers, Fulgham, Clark, and Star Transportation. Therefore, we must conclude that at the time that Clark and Star Transportation filed their responses to Perkins's requests for admissions, they had reasonable grounds to conclude that Fulgham's negligence in failing to see Clark's tractor-trailer approaching the intersection before Fulgham proceeded across the eastbound lanes of Highway 82 contributed, at least in part, to the collision. Clark and Star Transportation claim that, under the circumstances, and pursuant to Mississippi Code Annotated section 63-3-805 (Rev. 2004), Fulgham had a duty, before crossing Highway 82, to yield the right-of-way to a vehicle approaching the intersection so close as to constitute an immediate hazard. It is true that Clark and Star Transportation did not file a motion to correct or supplement their

responses to the requests for admissions. However, Mississippi Rule of Civil Procedure 37(c) provides no sanction for failure to supplement. Moreover, it appears that, as soon as Star Transportation obtained the GPS and onboard computer data, Star Transportation provided Perkins with that information. Furthermore, on November 30, 2008, Star Transportation's Rule 30(b)(6) representative, Holland, was deposed. Holland acknowledged that Clark was driving fifty-two miles per hour two seconds before the impact. Clark and Star Transportation's designated expert, Dr. Talbot, admitted that Clark had been speeding and that she caused the accident. We find that circuit court was correct to recognize that Fulgham's contributory negligence was indeed a triable issue for the jury. Fulgham's fault or negligence would be considered to apportion damages under Mississippi Code Annotated section 85-5-7 (Supp. 2010).

¶33. As a result, we find that the circuit court was within its discretion to find that "the party failing to admit had [a] reasonable ground to believe that he might prevail on the matter, or . . . there was other good reason for the failure to admit." For this reason, we affirm the circuit court's judgment denying the motion for attorneys' fees and sanctions.

¶34. **THE JUDGMENT OF THE WEBSTER COUNTY CIRCUIT COURT IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.**

BARNES, ROBERTS, CARLTON AND MAXWELL, JJ., CONCUR. IRVING, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY LEE, C.J., AND ISHEE, J. MYERS, J., NOT PARTICIPATING.

IRVING, P.J., DISSENTING:

¶35. The issue presented in this appeal is whether the trial court erred in refusing to grant

sanctions because of Loraine Clark and Star Transportation's[5] refusal to make a timely admission of negligence after Clark ran a stop sign and drove her eighteen-wheel tractor trailer into Nancy Fulgham's vehicle in which Brenda Burson Perkins was riding as a passenger.

¶36. The majority finds that the trial court correctly determined that Clark and Star Transportation's reason for not admitting liability—that Fulgham was guilty of contributory negligence—was not a frivolous defense; therefore, the trial court was not obligated to grant sanctions because Clark and Star Transportation "had reasonable ground to believe that [they] might prevail on the matter, or there was other good reason for [their] failure to admit [negligence]." M.R.C.P. 37(c). As I will explain later, there is no factual basis in the record to support this finding; therefore, any analysis based on this premise is flawed. It is clear to me that the circuit court abused its discretion when it refused to sanction Clark and Star Transportation in at least some amount as reimbursement for Perkins's expenses and attorneys' fees incurred in proving that Clark's negligence was the sole proximate cause of Perkins's injuries. Unfortunately, the majority sanctions (pun intended), rather than rectifies, that abuse. I would reverse and remand this case to the circuit judge to enter an appropriate award of sanctions under Rule 37(c).

¶37. The accident, out of which today's issue arose, occurred on March 23, 2004. Almost three years later, on March 8, 2007, Perkins filed separate suits against Clark and Star

[5] The tractor trailer was owned by Star Transportation, Inc., which was Clark's employer.

Transportation. On July 31, 2007, Perkins served twenty-two requests for admission on Clark. Five of those requests and Clark's responses to them are relevant to our inquiry. Those requests and responses are:

(a) **REQUEST FOR ADMISSION NO. 9:** Do you admit or deny that you caused the collision that occurred between Plaintiff Nancy Fulgham and Defendants Loraine W. Clark and Star Transportation, Inc. on March 23, 2004?

RESPONSE TO REQUEST NO. 9: Denied.

(b) **REQUEST FOR ADMISSION NO. 12:** Do you admit or deny that you were driving in excess of the posted, legal speed limit at the time of the collision on March 23, 2004?

RESPONSE TO REQUEST NO. 12: Denied.

(c) **REQUEST FOR ADMISSION NO. 17:** Do you admit or deny that you failed to stop at the four-way stop located at the intersection of U.S. Highway 82 and MS Highway 15, the location of the subject collision?

RESPONSE TO REQUEST NO. 17: Admitted.

(d) **REQUEST FOR ADMISSION NO. 18:** Do you admit or deny that you failed to yield the right-of-way to the Plaintiffs' vehicle at the four-way stop located at the intersection of U.S. Highway 82 and MS Highway 15, the location of the subject collision?

RESPONSE TO REQUEST NO. 18: Denied.

(e) **REQUEST FOR ADMISSION NO. 19:** Do you admit or deny that you operated her [sic] vehicle in a willful or wanton disregard for the safety of the traveling public at the intersection of U.S. Highway 82 and M.S. [sic] Highway 15, the location of the subject collision?

RESPONSE TO REQUEST NO. 19: Denied.

¶38. Perkins also served similar requests for admission on Star Transportation. The

requests and Star Transportation's responses are:

(a) **REQUEST FOR ADMISSION NO. 8:** Do you admit or deny that the defendant caused the collision that occurred between Plaintiff Nancy Fulgham and Defendants Loraine W. Clark and Star Transportation, Inc. on March 23, 2004?

RESPONSE TO REQUEST NO. 8: Denied.

(b) **REQUEST FOR ADMISSION NO. 11:** Do you admit or deny that Defendant, Loraine W. Clark, was driving in excess of the posted, legal speed limit at the time of the collision on March 23, 2004?

RESPONSE TO REQUEST NO. 11: Denied.

(c) **REQUEST FOR ADMISSION NO. 15:** Do you admit or deny that Defendant, Loraine W. Clark, failed to stop at the four-way stop located at the intersection of U.S. Highway 82 and MS Highway 15, the location of the subject collision?

RESPONSE TO REQUEST NO. 15: Admitted.

(d) **REQUEST FOR ADMISSION NO. 17:** Do you admit or deny that Defendant, Loraine W. Clark, failed to yield the right-of-way to the Plaintiffs' vehicle at the four-way stop located at the intersection of U.S. Highway 82 and MS Highway 15, the location of the subject collision?

RESPONSE TO REQUEST NO. 17: Denied.

(e) **REQUEST FOR ADMISSION NO. 18:** Do you admit or deny that defendant, Loraine W. Clark, operated her vehicle in a willful or wanton disregard for the safety of the traveling public at the intersection of U.S. Highway 82 and M.S. [sic] Highway 15, the location of the subject accident?

RESPONSE TO REQUEST NO. 18: Denied.

¶39. Rule 37(c) was promulgated to ensure that a party, who is treated as was Perkins here, can recover attorneys' fees and expenses for having to prove a fact that should have been

admitted by the opposing party. Rule 37(c) provides:

> If a party fails to admit . . . the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the . . . the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable under Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) *the party failing to admit had reasonable ground to believe that he might prevail on the matter, or* (4) *there was other good reason for the failure to admit*.

(Emphasis added).

¶40. In denying Perkins's motion for sanctions with respect to reimbursement for expenses, the circuit court stated:

> Because the defendants conceded partial liability prior to trial and total liability at the commencement of trial, the plaintiff was not required to prove that Clark was speeding, failed to yield the right-of-way, or that Clark and Star Transportation caused the accident. Additionally, given the lay testimony that was available concerning the accident, this court finds that the expert opinions of neither G.L. Rhoades nor Roger Allen would have been necessary to establish fault, even if the defendants had not conceded liability prior to trial. Thus, this court finds that the plaintiff is not entitled to receive reimbursement, by way of sanctions, for the money that she expended in hiring expert witnesses.

¶41. With respect to the denial of attorneys' fees, the circuit court stated:

> This court has been unable to find any decisions from the appellate courts of this state that offer any guidance on when attorney[s'] fees, as sanctions, should be awarded pursuant to M.R.C.P. 37(c). Thus this court has looked to the decisions as to when attorney[s'] fees should be awarded as sanctions pursuant to M.R.C.P. 11 and the Litigation Accountability Act of 1988 [Miss. Code Ann. § 11-55-1 (Rev. 2002)].
>
> Courts should award sanctions by way of awarding attorney[s'] fees if the court finds that a claim or defense was brought "without substantial justification." Mississippi Code Annotated § 11-55-5(1) [(Rev. 2002)].

"'Without substantial justification,' when used with reference to any action, claim, defense, or appeal, including without limitation any motion, means that it is frivolous, groundless in fact or in law, or vexatious, as determined by the court." Mississippi Code Annotated § 11-55-3(a) [(Rev. 2002)]. Similarly, Mississippi Rules of Civil Procedure 11(b) provides that:

> If any party files a motion or pleading which, in the opinion of the court, is frivolous or is filed for the purpose of harassment or delay, the court may order such a party, or his attorney, or both, to pay the opposing party or parties the reasonable expenses incurred by such other parties and by their attorneys, including reasonable attorney[s'] fees.

M.R.C.P. 11(b). A claim is considered frivolous under both the statute and Rule 11 "only when, objectively speaking, the pleader or movant has no hope of success." *Scruggs v. Saterfiel*, 693 So. 2d 924, 927 (Miss. 1997); *Leaf River Forest Prod*[.]*, Inc. v. Deakle,* 661 So. 2d 188, 197 (Miss. 1995); *Stevens v. Lake*, 615 So. 2d 1177, 1184 (Miss. 1993) "Thought [sic] a case may be weak or 'light-headed,' that is not sufficient to label it frivolous." *Leaf River*[, 661 So. 2d] at 195.

Here, the defendants admitted, well in advance of trial, that Clark was speeding and ran the stop sign/red light, and was partially at fault in causing the accident. The only thing they did not concede, prior to the day of trial, was that Fulgham played no role in causing the accident. Although, at trial this court was of the opinion that Fulgham could not be found to be even partially liable for causing the accident, the defendant[s'] theory to the contrary could in no way be considered as frivolous [footnote omitted]. It may have been a "weak" or "light headed" theory, but it certainly was not frivolous. Additionally, as noted in the previous section of this opinion, [the] plaintiff was never required to offer "proof" on the issue of liability. For these reasons, this court finds that the plaintiff is not entitled to recover attorney[s'] fees from the defendants.

¶42. I begin my analysis by pointing out the fallacy in the legal premises that somehow Fulgham could be held partially liable for causing the accident, thereby providing justification for Clark's and Star Transportation's refusal to admit liability from the beginning of this litigation. As stated, Perkins was riding as a passenger in Fulgham's

vehicle, which, immediately prior to the accident, was headed west on Highway 82. Highway 82 is a four-lane major thoroughfare with a sizeable median separating the two westbound lanes and the two eastbound lanes. The accident occurred in the inner eastbound lane of Highway 82 where it and Mississippi Highway15 intersect. Fulgham had brought her car to a stop at the four-way stop sign, that is posted at the inner westbound lane of Highway 82, before executing a left turn to travel onto Highway 15 South. After stopping at the four-way stop sign, Fulgham executed the left turn and traveled across the median[6] that divides the westbound and eastbound lanes of Highway 82. She faced no other stop sign. However, traffic traveling east on Highway 82, as was Clark, is required to stop at the four-way stop sign at the intersection of Highway 82 and Highway 15. Thus, it is clear that Fulgham had the right-of-way and was not required to yield to eastbound traffic on Highway 82, as all of this traffic was required to stop at the four-way stop sign for eastbound traffic. To contend that Fulgham was partially responsible for the accident because she did not see Clark's tractor trailer, which was required to stop, is tantamount to saying (1) that Clark had a right to run the stop sign, (2) that Fulgham should have known that Clark had that right and would exercise it, and (3) that Fulgham was negligent for not yielding the right-of-way to Clark in order to let Clark run the stop sign. Such reasoning is not undergirded by either our statutory or decisional law with respect to duties owed by drivers under the factual scenario presented here.

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[6] The median at that point is essentially a paved lead-in to Highway 15 South from the westbound lanes of Highway 82.

¶43. Next, I will address a point that the majority does not dwell on: whether Perkins proved at trial that Clark's negligence was the sole proximate cause of the accident as required by Rule 37(c) before expenses and attorneys' fees are allowed. I begin this discussion by pointing out that after the jury had been selected, it was sent to the jury room so that the circuit judge could resolve some pending motions. After some prodding by the circuit judge, Clark and Star Transportation first admitted partial liability, and toward the end of the proceedings, while the jury was still out, Clark and Star Transportation finally admitted total liability, without reservations. Thereafter, Perkins called three witnesses, Jeremy Flora, Elizabeth Peacock, and Trooper Jason White. Flora and Peacock testified that Clark ran the stop sign and struck Fulgham's vehicle. On the second day of the trial, the circuit judge orally instructed the jury as follows:

> At this point the defendants, Star Transportation and Loraine Clark, are admitting that they are at fault in this accident. So I have ruled that no other testimony is necessary as to what happened, what occurred at the accident because they are admitting that they are at fault. . . . They are confessing[,] though[,] that they are liable.

¶44. On the fourth day of the trial, Perkins attempted to call Clark to the witness stand. Counsel for Clark and Star Transportation inquired as to the purpose. A long discussion ensued between the court and Perkins's counsel regarding how Clark's testimony did or did not relate to damages, concluding with this exchange:

> DEFENSE COUNSEL: Your honor, just for clarification purposes; as I understand it, the other day Your Honor announced to the court or to the jury on the record that we admitted liability. So you are ruling now -- I'm not

saying it is different, but your ruling is to allow them to ask Ms. Clark one question about whether she admits liability. Is that correct?

THE COURT: Yes, because, you know, I think there [sic] might be appropriate to have proof that there was an issue. I mean you know, I have advised them of that, but I still think -- and they will be --

DEFENSE COUNSEL: -- can we not provide the Court a written stipulation?

THE COURT: Well, I don't know if they will accept a stipulation --

PLAINTIFF'S COUNSEL: -- We are not stipulating.

THE COURT: So you know, you can call and ask her if she admits she is at, that they were at fault.

DEFENSE COUNSEL: Okay, for that one question. That's what the Court will allow?

THE COURT: Correct.

PLAINTIFF'S COUNSEL: May I ask her when she decided to make that admission?

THE COURT: No, that is not relevant.

Thereafter, Perkins called Ronnie Holland, Star Transportation's corporate representative, who testified as follows:

Q. Do you as the representative of Star Transportation admit or deny that on March 23rd, 2004, at the time of the collision that the Defendant, Loraine Clark, was a truck driver and was acting in the course and scope of her employment with your company, the Defendant, Star Transportation?

A. Yes.

Q. And do you admit that Star Transportation would be vicariously liable for any damages because of the negligence of Mrs. Clark?

A. Yes.

* * * *

Q. Does Star Transportation admit liability in this case?

A. Yes.

Clark was the next witness to be called by Perkins, and Clark testified as follows:

Q On March 23rd, 2004, were you employed as a truck driver for Star Transportation around 12:30?

A. Yes, sir.

Q. Okay, and you were involved in an automobile accident -- I mean a tractor-trailer accident and an automobile accident on Highway 82 and Highway 15; is that correct?

A. Yes, sir.

Q. Do you admit or deny that on March 23, 2004, that you were negligent in the operation of the tractor trailer in an -- that resulted in a crash between your truck and Nancy Fulgham where Brenda Perkins was a passenger? Do you admit or deny that you were negligent in causing this collision?

A. Yes.

Q. What is your answer? Do you admit it or do you deny it?

A. I admit it.

¶45. Based on the testimonies of Flora, Peacock, Clark, and Holland, there can be little

doubt that Perkins proved liability at trial. There also can be little doubt that when the trial commenced, Clark and Star Transportation had not admitted liability. I know of no law that requires a plaintiff to accept a stipulation of liability once a trial has begun so as to allow a non-admitting party under Rule 37(c) off the hook for not having admitted a matter that the party should have admitted before commencement of the trial. When Clark and Star Transportation finally admitted liability, it was too late to avoid sanctions under Rule 37(c).

¶46. In *Peralta v. Durham*, 133 S.W.3d 339 (Tex. App. 2004), the Court of Appeals of Texas reviewed a decision of a trial judge who had granted sanctions in a case that is factually analogous to the facts here. There, Lauren Peralta and Charles Durham were involved in an accident. *Id*. at 340. Durham filed suit against Peralta and asked her to admit certain matters, including that she caused the accident. *Id*. Peralta made no objection, and denied each of the requests until immediately before trial, at which time she stipulated to liability. *Id*. After a jury had returned a verdict for compensatory damages against Peralta, Durham filed a motion for expenses under rule 215.4(b) of the Texas Rules of Civil Procedure, which is comparable to our Rule 37(c), for having to prove that Peralta caused the accident. *Id*. Peralta argued that "she had a right to make Durham prove his case and because he was never forced to prove liability at trial, he [was] not entitled to expenses." *Id*. at 341. The trial court granted sanctions. *Id*. On appeal, the appellate court affirmed the trial court, stating:

> Peralta's reading of rule 215.4(b) is too limited and would defeat the purpose of the rule. . . . If a party could avoid the sanction by admitting the matter on the eve of trial, after discovery has been done and expenses incurred by the

opposing party, the purpose of the rule 215.4(b) would be thwarted.

Id. at 342. *See also Campana v. Bd. of Dir. of the Mass. Housing Fin. Agency*, 505 N.E.2d 510 (Mass. 1987) (holding that sanctions pursuant to Rule 37 of Massachusetts Rules of Civil Procedure were proper when a party stipulated at the outset of trial to a matter that the party should have admitted pursuant to Rule 36). With respect to whether Durham proved Peralta's negligence at trial, the court stated:

> Although a judicial admission relieves the opposing party of his obligation to present evidence on the issue, the fact admitted is proved for the purposes of trial. . . . A judicial admission must be taken as true by the court and the jury, and the declarant cannot introduce evidence to contradict it. . . . Because Peralta's conduct was proved for purposes of the trial against her, we conclude rule 215.4(b) is applicable to her conduct.

Peralta, 133 S.W.3d at 342 (citations omitted). I find the reasoning in *Peralta* quite persuasive. Clark and Star Transportation should not and cannot be saved from sanctions because of their admission of liability, which did not occur until after the trial had started, although prior to any testimony being elicited.

¶47. I now return to the flawed analysis employed by the circuit judge and relied upon by the majority. The circuit court utilized an erroneous standard in determining whether to grant attorneys' fees as a sanction. It is plain to see that the circuit court utilized the "frivolous pleading" standard enunciated in the Litigation Accountability Act rather than the "reasonable ground to believe that he might prevail" standard that is mandated by Rule 37(c). Even using this erroneous standard, the circuit judge still should have granted sanctions, for he specifically found that "this court was of the opinion that Fulgham could not be found to

be even partially liable." If Fulgham could not be found to be even partially liable, it necessarily follows that Perkins and Star Transportation were without substantial justification for not admitting liability and that their stated reason for not admitting was groundless in fact and in law. Further, it is quite clear that the circuit judge, in denying Perkins's expenses for having to prove that Clark's negligence was the sole proximate cause of the accident, zeroed in on expenses for expert testimony, which in the circuit judge's view was not required to prove fault. As proof that such expenses were not required, the circuit judge noted that the plaintiff's attorneys, who are also the same attorneys that represented Fulgham until her case was settled, did not hire any experts for Fulgham's trial. The problem with this reasoning is that Perkins's case is a separate case, and her attorneys are free to present her case without regard to how they may have presented another person's case. Additionally, they may have learned from their experience in the prior case that they should do something differently in Perkins's case. In any event, Rule 37(c) does not limit the means by which the proof of a matter may be made as a condition of being reimbursed for proving it.

¶48. In this case, the trial began on June 16, 2009. The jury was selected and sent to the jury room. The circuit judge then conferred with counsel and considered pretrial motions. As stated, after the court decided the motions, Clark and Star Transportation, through counsel, finally admitted liability without reservation. The trial then continued, and Perkins called three witnesses before being allowed to call Clark and the corporate representative for Star Transportation. Each of the witnesses testified as to Clark's negligence.

¶49. Under Rule 37(c), the court may award expenses "[i]f a party fails to admit . . . the

truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves . . . the truth of the matter." M.R.C.P. 37(c). Requests for admissions are an important part of discovery and are to be taken "very seriously." *Scoggins v. Baptist Mem'l Hosp.-DeSoto*, 967 So. 2d 646, 648 (¶9) (Miss. 2007). In *Haley v. Harbin*, 933 So. 2d 261, 262-63 (Miss. 2005), the Mississippi Supreme Court noted in an order that: "The purpose of requests for admissions is to narrow and define issues for trial. . . . Properly used, requests for admissions serve the expedient purpose of eliminating the necessity of proving essentially undisputed and peripheral issues of fact." (Citations and quotations omitted). Rule 37(c) gives the court the power to enforce the parties' good-faith compliance with Rule 36.

¶50. Perkins asked Clark and Star Transportation to admit negligence or liability for the accident. They refused. Instead, they specifically denied that Clark had caused the accident and that Clark or Star Transportation were liable. Because of this, Perkins had to prepare for trial as if the issue of Clark's and Star Transportation's negligence or liability were in issue, i.e. to be tried for a decision by the jury.

¶51. In her preparations, Perkins had to prepare the evidence necessary to establish, by a preponderance of the evidence, the elements of negligence: (1) duty, (2) breach of duty, (3) causation, and (4) damages. *Fisher v. Deer*, 942 So. 2d 217, 219 (¶6) (Miss. Ct. App. 2006). In routine car-accident cases, the elements of duty, breach of duty, and causation are proven

by eyewitnesses and expert witnesses.[7]

¶52. Based on the claims made and the defenses asserted, Perkins prepared for trial and retained two expert witnesses. Rhoades was retained to testify as an accident reconstructionist.[8] Allen was retained to testify as a transportation expert. The experts' testimonies were to be offered by the plaintiff to establish duty, breach of duty, and causation. Neither Rhoades nor Allen testified at trial, but it was their fees and expenses that comprised a large portion of the expenses requested in the Rule 37(c) motion. The circuit court disregarded these expenses because it was the court's view that the plaintiff incurred these expenses in pursuit of her claim for gross negligence. I disagree with the circuit court in part because their testimonies not only went to the issue of gross negligence, but it also went to the issue of negligence. On remand, I would direct the circuit court to grant expenses for the expert-witnesses fees and expenses to the extent they were reasonable and necessary for Perkins to establish Clark's negligence.

¶53. Again, there was no factual basis for Clark or Star Transportation to deny that Clark was solely responsible for the accident and for Perkins's damages. Early in discovery, Clark admitted that she did not stop at the stop sign. Nonetheless, Clark and Star Transportation asserted an affirmative defense that the accident was caused in whole or in part by the

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[7] *See, e.g., City of Jackson v. Harris*, 44 So. 3d 927, 929-31 (¶¶7-15) (Miss. 2010); *Utz v. Running & Rolling Trucking, Inc.,* 32 So. 3d 450, 468-69 (¶¶52-54) (Miss. 2010).

[8] Rhoades has previously testified as an accident-reconstructionist expert witness. *See, e.g., Mack Trucks, Inc. v. Tackett,* 841 So. 2d 1107, 1111 (¶11) (Miss. 2003); *Gen. Motors Corp. v. Jackson*, 636 So. 2d 310, 318-19 (Miss. 1992).

negligence of Perkins, a mere passenger in the automobile. As already discussed, Clark and Star Transportation had no reasonable ground or other good reason to deny total liability. Clark and Star Transportation's stated reason for not admitting liability was the fear that such admission would work against them in their defenses of Perkins's claim for punitive damages. This explanation is a red herring. First, Clark and Star Transportation were asked to admit both negligence and gross negligence, as shown by requests for admission numbers nine and nineteen propounded to Clark and by requests for admission numbers eight and eighteen propounded to Star Transportation. They certainly could admit that Clark was negligent while denying that she was grossly negligent. Second, a jury cannot consider punitive damages unless the trial judge determines that there is a triable issue in that regard. By statute, a trial judge cannot submit the issue of punitive damages to a jury unless the jury has returned a verdict for compensatory damages. And even then, submission of the issue of punitive damages is not automatic. "The court shall determine whether the issue of punitive damages may be submitted to the trier of fact. . . ." Miss. Code Ann. § 11-1-65 (Supp. 2010).

¶54. For these reasons, I must respectfully dissent.

LEE, C.J., AND ISHEE, J., JOIN THIS OPINION.