

Rel: September 1, 2023

Notice: This opinion is subject to formal revision before publication in the advance sheets of **Southern Reporter**. Readers are requested to notify the **Reporter of Decisions**, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 229-0650), of any typographical or other errors, in order that corrections may be made before the opinion is printed in **Southern Reporter**.

SUPREME COURT OF ALABAMA

SPECIAL TERM, 2023

SC-2022-0937

Brenda Jackson Terrell

v.

Alfonza Joshua

**Appeal from Jefferson Circuit Court
(CV-17-904420)**

MENDHEIM, Justice.

In this appeal, Brenda Jackson Terrell asserts that the Jefferson Circuit Court erred by denying her motion for new trial following the

entry of a judgment on a jury verdict against her and in favor of Alfonza Joshua that awarded Joshua \$675,000 in compensatory damages. We reverse and remand.

I. Facts

In 2005, Joshua was run off the road by a sleeping driver; Joshua injured his neck and back. In November 2013, Joshua was rear-ended at the junction of Interstate 459 and Highway 31 in Birmingham by a vehicle that was -- according to Joshua -- traveling at 55 to 60 miles per hour. Joshua again sustained injuries "to his neck and low back." On November 6, 2014, Joshua was a passenger in a vehicle that was T-boned by another vehicle traveling at a high rate of speed that ran a red light and hit Joshua's side of the vehicle. Joshua was not wearing a seat belt at that time, and he landed in the driver's lap after hitting his head on the ceiling of the vehicle. Joshua reported sustaining neck and back injuries after the 2014 accident, and he received treatment from a chiropractor and from physical therapists following that accident. The foregoing three accidents are not the immediate reason for this appeal, but those accidents -- particularly the November 2014 accident -- are the ultimate reason this case is before us.

The event that immediately precipitated this lawsuit occurred on November 3, 2015. On that date, Joshua was driving his pickup truck on 14th Street South in Birmingham, and he stopped behind other vehicles at a red light at the intersection of 14th Street and 6th Street. As his truck was sitting at the intersection, a vehicle driven by Terrell came up from behind and hit the rear end of Joshua's truck. Terrell's vehicle sustained the most damage in the accident, which was caused by the front of her car hitting the trailer hitch on Joshua's truck. Joshua was able to drive away from the accident and to continue using his trailer hitch after the accident.

Joshua did not seek medical attention immediately after the November 3, 2015, accident. However, on November 11, 2015, Joshua had an appointment with Dr. Scott A. Duca, a chiropractor, during which Joshua complained about having neck pain and back pain. Joshua told Dr. Duca that "he had been doing fine and did not have any of these symptoms until the accident." Joshua visited Dr. Duca several more times over the next few months for treatment. During a visit on November 23, 2015, Joshua told Dr. Duca that his neck pain was "affect[ing] him less than 25 percent of the time he [was] awake." At an

appointment on November 25, 2015, Joshua told Dr. Duca that his "neck is not bothering him and his lower back pain is reducing." On November 30, 2015, Joshua told Dr. Duca that his "lower back pain has vastly improved," and he did not mention any neck pain. In Dr. Duca's medical records for three appointments in December 2015, there was no mention of treating Joshua for neck pain. Joshua next visited Dr. Duca on February 16, 2016, and he reported feeling "some worsening since his last visit" of "[h]is left neck pain," that "[h]is mid back pain has slightly worsened," and that his "upper back pain has worsened to a small degree." Dr. Duca assessed Joshua's prognosis as "good at this time" because "[h]e has been responding to treatments and his symptoms have reduced in frequency, intensity, and duration."

On February 28, 2016, Joshua went to the University of Alabama at Birmingham Hospital ("UAB Hospital") emergency room because he felt "like [he] was having a heart attack or something," but Joshua also complained to UAB Hospital medical personnel about intermittent pain in his neck, his back, and his arms. Joshua testified that UAB Hospital personnel told him that he "need[ed] to see an orthopedic doctor." On April 9, 2016, Joshua went to the emergency room at Lafayette General

Medical Center in Louisiana because he had "an episode again where [he] felt like [he] was -- had been like shot in the chest."¹ Joshua also complained of "left lateral neck[,] upper back and shoulder pain." As part of his medical history, Joshua told medical personnel at Lafayette General Medical Center that he had been involved in a "very minor rear speed motor vehicle collision."

On April 13, 2016, Joshua went to see Dr. Jose Louis Ferrer, an orthopedic surgeon in Monroe, Louisiana. Joshua told Dr. Ferrer that he had been in an automobile accident in late 2015 and that he had been feeling neck pain, left-arm pain, and tingling in his hands since October 2015. Dr. Ferrer ordered an MRI for Joshua's neck, which was performed on April 15, 2016; on April 19, 2016, a report from a radiologist based on the MRI images was generated. The results of the MRI indicated that Joshua had a herniated disk in his neck. Based on that finding, on April 19, 2016, Dr. Ferrer had Joshua receive epidural injections into his neck. Joshua felt better after receiving those injections.

¹At the time Joshua visited Lafayette General Medical Center, he was in the process of moving from Birmingham to Lafayette, Louisiana, because Louisiana had been Joshua's home growing up and he "wanted to get closer to family."

However, a couple of months later, Joshua again started feeling pain in his neck, and so Dr. Ferrer -- who had retired from medical practice -- referred Joshua to Dr. Damon Patterson, an interventional neurologist located in Lafayette, for further treatment. Joshua's first appointment with Dr. Patterson was on June 16, 2016. Joshua told Dr. Patterson that he had started feeling pain in his neck in October 2015. Dr. Patterson ordered Joshua to undergo guided physical therapy. Joshua told the physical therapist that he had started having pain in his neck in October 2015. After some physical-therapy treatments, Joshua returned to Dr. Patterson in September 2016 and reported that his neck pain had improved to the point that Joshua only took Tylenol as needed for pain. On March 15, 2017, Joshua saw Dr. Patterson, and Joshua again reported that his neck discomfort had improved. Joshua then had an appointment with Dr. Patterson on June 26, 2017, at which Dr. Patterson noted that Joshua's "'neck pain [has] improved, [and] neck pain overall [is] controlled since the epidural steroid injection.'" Joshua did not report feeling back pain during his visits with Dr. Patterson in 2016 and 2017.

Nearly two years later, on March 29, 2019, Joshua returned to Dr. Patterson because Joshua reported feeling neck and intermittent

lower back pain. At that point, Dr. Patterson ordered an MRI for Joshua's lower back. Dr. Patterson testified that the MRI indicated that Joshua had a herniated disk in the L4-5 region. Dr. Patterson stated that Joshua's condition was exacerbated by the fact that he had degenerative disk disease. In an appointment on August 14, 2019, Dr. Patterson administered a lumbar epidural injection to Joshua. Joshua's last appointment with Dr. Patterson was on October 3, 2019.

On October 20, 2017, Joshua commenced this action in the Jefferson Circuit Court against Terrell and against Joshua's automobile-insurance carrier, State Farm Mutual Automobile Insurance Company ("State Farm"). Joshua asserted claims of negligence and wantonness against Terrell and a claim for underinsured/uninsured-motorist coverage against State Farm. On December 4, 2017, State Farm answered Joshua's complaint, admitting that it had issued an insurance policy to Joshua that provided underinsured/uninsured-motorist coverage, but denying all other allegations. On January 19, 2018, Terrell answered Joshua's complaint, admitting that she had been involved in a collision with Joshua's vehicle on November 3, 2015, but denying all other

allegations.² On April 28, 2020, State Farm filed a motion to opt out of the litigation pursuant to Lowe v. Nationwide Insurance Co., 521 So. 2d 1309 (Ala. 1988); the trial court granted that motion the following day.

On July 19, 2021, Joshua filed a motion in limine that sought -- among other things -- an order prohibiting Terrell's counsel and each witness called or questioned by Terrell from referring to, or introducing evidence regarding, any prior motor-vehicle accidents in which Joshua had been involved or any prior medical records and treatment stemming from those prior motor-vehicle accidents. There were three medical records concerning the treatment Joshua received after his November 2014 accident that Joshua sought to exclude from evidence. First, there was a December 22, 2014, medical record from Alabama Orthopaedic Surgeons entered by Dr. Frank. S. Hodges. In that record, Dr. Hodges related, in part, that Joshua

"was evaluated secondary to some lower back pain and some neck pain. He was sent for MRI scans. He was also sent for physical therapy. He was given 12 visits but has not completed all of them as of yet. He reports he is approximately 85-90% better and has no radicular symptoms in the upper or lower extremities. Denies significant lower back pain at this

²From the date Terrell's answer was filed on January 19, 2018, until July 13, 2021, Terrell was represented by State Farm's in-house counsel. Thereafter, Terrell was represented by counsel from an outside law firm.

time. His predominant complaint of discomfort is over the left medial scapula.

"....

"[Joshua] has mild pain reproduced with extremes of rotation with range of motion of the cervical spine. The patient has no evidence of reproduction of neck pain with range of motion of the lumbar spine or upper extremities. ...

"....

"Have discussed [Joshua's] condition with him today. Given the significant improvement and lack of radicular symptoms, I do not perceive any other treatment will be necessary other than completion of his already prescribed physical therapy. No surgical indication at this time. I do feel that the treatment recommended has been medically appropriate [and] necessary for the injury sustained as a result of a motor vehicle collision. I will see him back as needed."

Second, there was a February 23, 2015, medical record from Dr. Carter Slappey. In that record, Dr. Slappey related in part that Joshua initially had not sought medical attention after his November 2014 accident but that sometime afterward Joshua

"experienced worsening neck and upper back pain that extends down into scapula with headaches daily. [Joshua] also [complains of] intermittent [lower back pain] but reports a [history of] spinal stenosis and [degenerative disk disease at] L4-5. [Joshua] reported to Dr. Slappey where MRI was performed and [Joshua] referred to [physical therapy].

"....

"Problem #1 Chief Complaint: [Joshua] reports feeling good. He is confident he can maintain [home exercise program] independently.

"Goal Achieved Feb. 11, 2015

"[Joshua] will have 0/10 pain during light activity so that [Joshua] may return to [activities of daily living] and normal function pain free.

"....

"[Joshua] has demonstrated improved overall strength and [range of motion] and decreased pain in his neck, back, and upper quarter and is now independent with advanced [home exercise program].

"In my professional opinion, this client exhibits a good prognosis at time of discharge from skilled rehabilitative therapy in conjunction with a home exercise program."

Third, there was an April 3, 2015, medical record from Dr. Duca that began by explaining that "Mr. Joshua presented himself at our office on April 3, 2015, for treatment of his symptoms coming from a motor vehicle accident that he was involved in." In that record, Dr. Duca related, in part:

"An assessment of Mr. Joshua's current signs and symptoms was performed today. His neck and back pain [have] affected him as follows: His daily activities are not presently being affected by this symptom. He stated that his upper back pain has been affecting the patient as follows: Presently, this symptom is not affecting his daily activities. Today Mr. Joshua presents to the office and has no

complaints. He had only 1 slight episode but otherwise has been doing great. He says that his injuries related to the accident have been resolved and he feels like he did before it happened.

"We spoke and discussed closing his case as of today. It was also explained and understood that any future care he may want to receive after today would be his responsibility as his case is being closed."

On June 27, 2022, the first day of trial,³ presiding Judge Carole Smitherman heard arguments from counsel for the parties concerning Joshua's motion in limine.

"[Joshua's counsel:] Your honor, a lot of this is going to come down to -- all kind of intertwined. Mr. Joshua was in a motor vehicle accident in 2014 that predates the wreck we're here about today by a year. He had some treatment as a result of that wreck, but it's our position that any treatment or discussion of that wreck is irrelevant because there is medical testimony from his treating physicians at the time from the 2014 wreck that he completely healed from those injuries.

"They are neck and back injuries similar to what we're claiming here in this case. We feel like it is more prejudicial than probative to enter those records or talk about them or let the jury hear about those records and that treatment.

"[Judge Smitherman:] Is it your position that the second wreck aggravated the injuries from the first wreck?"

³The case initially was set to be tried before a jury in April 2020. However, in part because of delays created by the COVID-19 pandemic, the case was not called for trial until June 27, 2022.

"[Joshua's counsel:] Well, he had some preexisting condition, no doubt, but he testified in his deposition that he was pain free from those injuries in the 2014 wreck. There is a medical record from December 2018 -- excuse me, December 2014 -- may I approach, Your Honor?

"[Judge Smitherman:] Does she know what you're talking about?

"[Terrell's counsel:] Which one?

"[Joshua's counsel:] It's the [Dr.] Slappey records. In that record, Dr. Slappey [indicated] that Mr. Joshua was doing better, that he did not see any need for future treatment for the exception of him to finish the current regimen of physical therapy that he was on. There's a February 2015 record from the physical therapist that basically lists Mr. Joshua as a zero of a ten pain rating and that he completed his treatment and he was doing fine. In fact, I'll read it to you, Your Honor.

"[Judge Smitherman:] That's fine. I've got it. Ma'am?

"[Terrell's counsel:] Your Honor, he had two prior accidents. He had one in November of 2013 and one in [November] of 2014, this accident is November of 2015. It's all the exact same areas of his body. It's neck and back, so it's highly relevant to it. And when he's discharged from the '14 accident he's not a hundred percent healed. He's listed as having 85 to 95 percent back or whatever. Regardless, it's the same area of neck and back and he has so much degenerative -- there's tons of testimony in the doctor's deposition about his degenerative condition and this would have aggravated or exacerbated it, so I don't think we can have that in a vacuum.

"[Joshua's counsel:] Your Honor, the last visit from the 2014 accident is April 3rd of 2015 and he specifically -- this is

Mr. Joshua specifically say[ing] he feels like his issues with his neck and back from the 2014 accident have been resolved.

"[Judge Smitherman:] Okay. Anything else?

"[Terrell's counsel:] It's just highly probative the fact that he had all these accidents involving his neck and back.

"[Judge Smitherman:] I'm not going to let that in."

Although Judge Smitherman indicated in the foregoing colloquy that she had made her ruling to exclude any evidence or questioning related to the previous accidents, the parties went on to discuss whether testimony from Terrell's expert witness, Dr. John Davis, a radiologist, would be admitted into evidence, and that discussion led back to the admissibility of evidence pertaining to Joshua's previous accidents.

"[Judge Smitherman:] So tell me this ..., what is the relevance of the 2014 and 2015 accidents? Why is it that you feel that would enhance your chance and help define justice, if you will?

"[Terrell's counsel:] The relevance is that Dr. Ferrer testified that he had not seen the 2014 [MRI] film and it would have been an important part of his causation decision if he had had access to it. Now, he's in Louisiana where this radiologist was -- I don't know, but he didn't see it. [Dr.] Ferrer didn't see it. So Dr. Davis is going to testify that there's no change basically between the 2014 MRI and the 2016 MRI which is extremely relevant because he's claiming --

"[Judge Smitherman:] And what [does] the 2014 MRI show, the back and neck and all of that?

"[Terrell's counsel:] It's neck, yes, ma'am, they're both [the 2014 and 2016 MRIs] neck.

"[Joshua's counsel:] There's a neck and lumbar.

"[Terrell's counsel:] Yeah. But Dr. Davis is about the neck, not the lower back.

"[Judge Smitherman:] So are you telling the Court that your position is that [Joshua] was not injured in the -- in my case, [the] 2015 case?

"[Terrell's counsel:] Yes, basically. Our position is that according to the scans there were no additional injuries.

"[Joshua's counsel:] Your Honor, Dr. Ferrer testified in his deposition that he reviewed the films in the 2016 MRI and there's a herniation -- a large herniation at C4, C5 level of his spine, and it's one hundred percent related to his motor vehicle accident. That's the testimony from the treating physician.

"[Terrell's counsel:] And Dr. Davis will say that it was -- there's basically very little change and he already had this degeneration in his spine. There might be a teeny bit of nontraumatic additional degeneration between 2014 and 2016 and that's why it's extremely crucial and relevant and probative to this case because Dr. Ferrer was making his recommendations and his causation decisions with half the information.

"[Joshua's counsel:] That's not true, your Honor. Dr. Ferrer reviewed -- he reviewed the report from the 2014 [accident], and he reviewed the MRI scans and the report from the 2016 MRI, and that's what he based his opinion off of.

"[Terrell's counsel:] And Dr. Ferrer said I wish I had seen the 2014 actual films and he did not and that's why it's relevant.

"[Joshua's counsel:] But he did not -- he did not go back and backtrack on his opinion. He related the herniation in the C4, C5 to the 2015 wreck.

"[Judge Smitherman:] So you just want me to allow the 2015 wreck?

"[Joshua's counsel:] I'm sorry?

"[Judge Smitherman:] You just want me to allow the medical testimony about my case?

"[Joshua's counsel:] Yes, ma'am.

"[Judge Smitherman:] And they want to go 2014, 2015?

"[Terrell's counsel:] Yes, ma'am. The 2014 and the 2016 MRIs because they're basically identical.

"[Joshua's counsel:] And, Your Honor, I would agree with defense counsel about the prior records and treatment would be relevant if there was not evidence in the records that those issues had resolved prior to our wreck. We have not one but three different medical documents that show that Mr. Joshua had all of his issues from that 2014 wreck had been resolved.

"[Judge Smitherman:] Okay.

"[Terrell's counsel:] I mean, he -- [Joshua] admitted in his deposition he was still taking medications that were left over too so, Your Honor, I think it's -- the fact that it's an unchanged MRI basically is extremely probative.

"[Judge Smitherman:] And what is your law that tells me that I should let this in?

"[Terrell's counsel:] It's relevant. It's very relevant and very probative and I don't have a case right in front of me to cite that but it clearly -- almost serves as impeachment on his claim that it's all from this accident because he's claiming everything is from this accident and that's not true and the jury shouldn't be led to believe that everything is from post this accident.

"[Joshua's counsel:] Your Honor, just to be clear about what we're claiming. We're claiming that he was injured in this accident and he's got to have a surgery as a result of this accident, not one but two [surgeries] and that's what both doctors have testified to in our case.

"[Judge Smitherman:] Okay.

"[Joshua's counsel:] And there's medical evidence from the treatment prior to our wreck from Dr. Slappey that states that Mr. Joshua is not a surgical candidate at this time and he's referring to the 2014 wreck.

"[Judge Smitherman:] Oh, so it's -- well, I'm thinking without reading up that the jury should hear -- that these are jury questions and they should be framed that way. Why -- because they seem to be woven into the evidence or the testimony that you're going to offer. Am I hearing you guys correctly? Am I hearing you correctly?

"[Joshua's counsel:] Your Honor, we've been --

"[Judge Smitherman:] I'm trying to get your position straight.

"[Joshua's counsel:] Well, it's our position it's not relevant.

"[Judge Smitherman:] It is relevant. Now, whether or not it's admissible is another matter. And also, what happened is also -- see, my problem with this is that the jury -- if I open up 2014 and 2015 accident -- 2014 accident, the jury is going to want to know well, what happened, did [Joshua] get paid for that one?

"[Terrell's counsel:] He did.

"[Judge Smitherman:] There's a lot [of] that stuff that opens up.

"[Terrell's counsel:] A lot.

"[Judge Smitherman:] A lot of stuff.

"[Terrell's counsel:] And yeah, he got paid \$50,000 for the 2014 accident.

"[Judge Smitherman:] And you're going to try to bring that in?

"[Terrell's counsel:] No, ma'am, we were not going to but it's the same medical providers.

"[Judge Smitherman:] See, that complicates it.

"[Terrell's counsel:] Because Dr. Duca treated [Joshua] for all these prior accidents too and they're going to try to get Duca's records in so.

"[Judge Smitherman:] That complicates things. I'm going to have to think about that. I'm not prepared to make a ruling on that now. I will make one after we pick the jury.

"[Joshua's counsel:] Okay.

"[Judge Smitherman:] Because these kinds of things should be discussed well before now and it's important because my concern is always the jury and how it's going to impact them. You all are concerned about your clients and you should be, but ultimately keeping confusion down with the jury is most paramount for me, so I'm going to pick a jury and then we're going to go from there."

(Emphasis added.)

After the selection of the jury, Judge Smitherman and counsel for the parties concluded in chambers the admissibility hearing concerning evidence of Joshua's previous accidents:

"[Judge Smitherman:] ... The question has been going back and forth about the three prior accidents, the car accidents which have caused injury to [Joshua] and whether or not they are admissible. The testimony from [Joshua] is that he did not -- he was at zero pain level before having this accident and therefore, [Joshua] says that this is a new injury. [Terrell] says that [she] should be allowed to go into the other three accidents to show relevance. Is that right?"

"[Terrell's counsel:] Yes, Your Honor.

"[Judge Smitherman:] Do you wish to speak to the record?"

"[Terrell's counsel:] Yes, Your Honor, just for the record, Mr. Joshua, the Plaintiff, had a 2005 accident where he was run off the highway by a sleeping driver and injured his neck and his back which are the same body parts that he's claiming in this case. He saw an unnamed chiropractor at that time. He had another accident in November 2013 at the I-459 junction with 31 where he testified he was rear-ended at 55 to 60 miles an hour and sustained injuries again to his neck and

low back, treated at UAB [Hospital] and saw a chiropractor, Dr. Duca, who he saw after this case.

"He also had another accident in [November] 2014 where he was hit as a passenger and, again, injured his neck and back and went to the ER at UAB [Hospital] and, again, saw Dr. Duca who he sees in this accident. He continued to treat with Dr. Duca for a number of months after that [November] 2014 accident. And additionally, he had a fall which we believe is a question for the jury and so we take exception to us not being allowed to talk about it because it is the exact same body parts.^[4]

"We would cite to Gamble's [McElroy's Alabama Evidence] 60.01 Section 2 [(4th ed. 1991)] that states that prior injuries and incidents can be proven through the Plaintiff or through a third-party witness. We also cite to [Lassie v. Progressive Insurance Company, 655 So. 2d 952 (Ala. 1995)], a Supreme Court case from 1995 which upheld allowing the Defendant to question the Plaintiff concerning his prior injuries and that they were relevant to the issue of whether the problem with the Plaintiff in that case's back was attributable to the accident with the uninsured motorist or as [the Defendant] was attempting to prove it was attributable to the accident he sustained at work. We think that's directly on point. We take exception with any ruling that does not allow us to discuss his prior injuries to the exact same body parts.

"[Judge Smitherman:] Do you wish to be heard?

"[Joshua's counsel:] Just for the record, this is [Joshua's] position: that the wreck that occurred on November 3rd, 2015, caused a new injury to Mr. Joshua's neck and back according to the medical records that's been subpoenaed in this case.

⁴The parties later agreed that evidence concerning a fall Joshua had in January 2016 was admissible.

There's three different records that support that the injuries sustained and claimed in our case in hand is that it is a new injury to both the neck and to the back. The records from December 2014 that predates the motor vehicle wreck that's the basis of this claim suggest that there is no herniation in the C4, C5 level of Mr. Joshua's spine and then post our wreck there is a herniation in the C4, C5 level in the spine.

"There's also a physical therapy record dated, I believe, February 23rd of 2014 which predates the motor vehicle accident that's the basis of this claim. This suggests that Mr. Joshua is a zero of ten pain level from the 2014 accident and that he has met all his goals in physical therapy and the last remaining doctor's visit that Mr. Joshua sought for the 2014 motor vehicle accident he related to his doctor that all of his issues from the '14 accident has been resolved.

"[Terrell's counsel:] Just for the record, the accident we're here about today was November 3rd of 2015.

"[Judge Smitherman:] Okay. The Court finds that the case that is here before the Court is a new injury. Therefore, there will not be any testimony about the other three accidents. I think this is in the Court's discretion. I find that it would be much too harmful to the case on both sides because the jury can draw a lot of inferences from these three prior accidents that do not accurately reflect what happened based on what the argument of counsel has been. So we find this is a new injury and no testimony about the other three accidents. You [Terrell] are allowed to talk about the radiologist [Dr. Davis] -- is that the person that has the two opinions or two MRIs.

"[Terrell's counsel:] And we would just note our objection for the record.

"[Judge Smitherman:] It's on there."

(Emphasis added.)

In short, Judge Smitherman excluded all evidence and questioning of witnesses related to Joshua's previous car accidents as well as to treatment stemming from the November 2014 accident, except that she permitted Terrell to present testimony from Dr. Davis regarding his medical opinion comparing an MRI of Joshua's neck taken on November 26, 2014, to an MRI of Joshua's neck taken on April 15, 2016.

In addition to the foregoing evidentiary ruling, before the presentation of the case to the jury, Terrell conceded that she was negligent, but not that she had acted wantonly. Joshua, in turn, dismissed his wantonness claim against Terrell. Thus, the issues that remained for determination by the jury consisted of the cause of Joshua's injuries and the damages attributable to the November 2015 accident.

Joshua presented live testimony from himself and excerpts of deposition testimony from Dr. Ferrer and Dr. Patterson. Joshua testified concerning the extent of his neck and back pain following the November 2015 accident. Terrell was not permitted to cross-examine Joshua about his previous car accidents or the medical treatment he received after those accidents. Dr. Ferrer testified that the report produced after the

MRI on Joshua's neck in 2014 stated that there were "'no disk herniations'" in Joshua's neck at that time but that his review of the images from the MRI on Joshua's neck in 2016 showed that there was a herniated disk at the C4-C5 level. Dr. Ferrer admitted, however, that "it's important for me to see both scans" because that was "[t]he only way I can compare was it [the disk herniation] there before or not." Based on the information he had, Dr. Ferrer testified that, in his medical opinion, "the main cause" of the herniated disk in Joshua's neck was "the motor vehicle accident of November of 2015. The second cause, which will be less than fifty percent causation, is the degeneration of the cervical spine." Dr. Patterson similarly testified that, in his medical opinion, the herniated disk in Joshua's neck was caused by the November 2015 accident. Dr. Patterson also testified that an MRI of Joshua's back taken in mid-2019 showed that "there was an L4-5 disc herniation." Dr. Patterson stated that, in his opinion, the herniated disk in Joshua's back was caused by the November 2015 accident. Both Dr. Ferrer and Dr. Patterson testified that they believed that Joshua eventually would need fusion surgeries on his neck and his back to resolve the pain Joshua experienced in both areas. Terrell was not permitted to read to the jury

any portions of the doctors' depositions that discussed Joshua's previous accidents.

Terrell presented live testimony from Dr. Davis. Dr. Davis explained that he had compared an MRI scan of Joshua's cervical spine taken on November 26, 2014, to an MRI scan of Joshua's cervical spine taken on April 15, 2016. He testified that the images were "similar. ... [T]here was the similar reversals of the normal cervical lordosis. The disks were desiccated, meaning that they have lost their water content due to disk degeneration. There were disk bulges at several levels similar to the 2016 study." He further testified:

"Q. [Terrell's counsel:] And just to make sure we're clear, you compared the two MRIs and you didn't see any real difference between the 2014 and the 2016 images; is that correct?"

"A. That's correct. They were similar. The -- the only caveat as I -- a disclaimer was that the 2016 study had a lot of motion artifact. The 2014 study had some motion artifact but there did not appear to be any significant amount of change between the two studies."

Throughout the questioning of Dr. Davis, no context was given to the jury as to why Joshua had undergone an MRI of his cervical spine in November 2014.

After the presentation of evidence by the parties, Judge Smitherman charged the jury on the elements of Joshua's negligence claim:

"THE COURT: ... The Plaintiff, Alfonza Joshua, says that he was harmed by [Terrell's] negligent conduct. To recover damages on this claim, Mr. Joshua must prove to your reasonable satisfaction all of the following: One, that Brenda Terrell admits she was negligent. Take that off the table where she says she was negligent. Number two, that Alfonza Joshua was harmed; and three, that Defendant's negligence, that Ms. Terrell's negligence was the cause of Mr. Joshua's harm. Those are the elements of liability.

"You must decide whether [Terrell's] conduct caused Alfonza Joshua's harm if, one, the conduct naturally and probably brought about the harm, and two, the harm would not have happened without Ms. Terrell's conduct. Mr. Joshua's claims are for negligence. If Alfonza Joshua has not proven the claim, your verdict must be for [Terrell] in that claim and you do not have to consider damages. ...

"... The disputed issues of fact to be decided by you in this case are whether [Terrell] was negligent, she says she was. Whether [Terrell's] negligence caused [Joshua's] injuries and, if so, what amount of damages will fairly and reasonably compensate Mr. Joshua for those injuries."

On June 29, 2022, the jury returned a verdict in Joshua's favor, awarding \$675,000 in compensatory damages. Judge Smitherman entered a judgment on that verdict the same day.

On July 26, 2022, Terrell filed a motion for a new trial and an accompanying memorandum in which she contended that Judge Smitherman had exceeded her discretion by excluding evidence and preventing questioning of witnesses concerning Joshua's previous accidents. Terrell further argued that Judge Smitherman's alleged error had injuriously affected Terrell's substantial rights at trial. On September 8, 2022, Joshua filed a response in opposition to Terrell's motion for a new trial in which he contended that Judge Smitherman had acted within her discretion to exclude the evidence of previous accidents because, "[d]uring pre-trial motion arguments in this case," his counsel had "described and quoted from the medical records submitted ... showing that [Joshua] was cured of prior injuries and the doctor testimony establishing that the injuries were foreign and distinct from each other."

On September 9, 2022, following a hearing on Terrell's postjudgment motion, Judge Smitherman entered an order denying the motion. On October 20, 2022, Terrell appealed.

II. Standard of Review

""It is well established that a ruling on a motion for a new trial rests

within the sound discretion of the trial judge. The exercise of that discretion carries with it a presumption of correctness, which will not be disturbed by this Court unless some legal right is abused and the record plainly and palpably shows the trial judge to be in error.'"

"Curtis v. Faulkner Univ., 575 So. 2d 1064, 1065-66 (Ala. 1991) (quoting Kane v. Edward J. Woerner & Sons, Inc., 543 So. 2d 693, 694 (Ala. 1989), quoting in turn Hill v. Sherwood, 488 So. 2d 1357, 1359 ([Ala.] 1986)).'

"Baptist Med. Ctr. Montclair v. Whitfield, 950 So. 2d 1121, 1126 (Ala. 2006).

"In addition to this general standard, this Court has also addressed the standard of review specifically applied to evidentiary rulings of a trial court:

""The standard applicable to a review of a trial court's rulings on the admission of evidence is determined by two fundamental principles. The first grants trial judges wide discretion to exclude or to admit evidence.'" Mock v. Allen, 783 So. 2d 828, 835 (Ala. 2000) (quoting Wal-Mart Stores, Inc. v. Thompson, 726 So. 2d 651, 655 (Ala. 1998))....

""The second principle "is that a judgment cannot be reversed on appeal for an error [in the improper exclusion of evidence] unless ... it should appear that the error complained of has probably

injuriously affected substantial rights of the parties.'" Mock, 783 So. 2d at 835 (quoting Wal-Mart Stores, 726 So. 2d at 655, quoting in turn Atkins v. Lee, 603 So. 2d 937, 941 (Ala. 1992)). See also Ala. R. App. P. 45. "The burden of establishing that an erroneous ruling was prejudicial is on the appellant." Preferred Risk Mut. Ins. Co. v. Ryan, 589 So. 2d 165, 167 (Ala. 1991).'

"Middleton v. Lightfoot, 885 So. 2d 111, 113-14 (Ala. 2003) (emphasis omitted)."

Leftwich v. Brewster, 306 So. 3d 26, 33 (Ala. 2020).

III. Analysis

Terrell's primary contention in this appeal is that Judge Smitherman exceeded her discretion when she excluded from trial all evidence of and any reference to Joshua's previous accidents because, Terrell says, Judge Smitherman "render[ed] a finding of fact regarding the cause of Joshua's claimed injuries." Terrell's brief, p. 32. In making that argument, Terrell emphasizes Judge Smitherman's statement that "[t]he Court finds that the case that is here before the Court is a new injury." Terrell notes that it is nearly axiomatic that it is the jury's responsibility to decide issues of fact and the court's responsibility to decide issues of law. See, e.g., Hinkle Metals & Supply Co. v. Feltman, 280 So. 3d 1031, 1039 (Ala. 2019) (plurality opinion) ("'[I]t is the jury's

responsibility, not this court's, "to determine the credibility of the evidence, to resolve conflicts therein, to find the facts, and to express its findings in its verdict." Jones v. Baltazar, 658 So. 2d 420, 422 (Ala. 1995).'" (quoting Bell v. Greer, 853 So. 2d 1015, 1018 (Ala. Civ. App. 2003)); Degraffenreid v. Thomas, 14 Ala. 681, 686 (1848) ("[T]he court shall decide the law, and the jury find the facts."). Terrell argues that Judge Smitherman violated that basic principle regarding the respective roles of the jury and the trial judge by determining that the neck and back pain Joshua experienced after the November 2015 accident had no connection to Joshua's neck and back injuries sustained from previous accidents.

In response, Joshua denies that Judge Smitherman rendered a finding of fact that resided within the province of the jury. Instead, Joshua contends, Judge Smitherman merely made an admissibility-of-evidence determination under Rule 403, Ala. R. Evid., which provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Joshua

notes that in the course of the admissibility hearing Judge Smitherman stated that the previous-accident evidence "is relevant. Now, whether or not it's admissible is another matter." Joshua then stresses the amount of discretion an appellate court affords a trial court in making Rule 403 evidentiary determinations.

""[W]hen reviewing a Rule 403 determination, [an appellate court's] task is not to reweigh the prejudicial and probative elements of the evidence, but rather to determine if the [trial court] clearly abused its discretion in [admitting] the evidence. Duncan v. Wells, 23 F.3d 1322, 1323-24 (8th Cir. 1994); see United States v. Long, 574 F.2d 761, 767 (3d Cir.) ('If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal. '), cert. denied, 439 U.S. 985, 99 S.Ct. 577, 58 L.Ed.2d 657 (1978). See also United States v. Vetter, 895 F.2d 456, 459-60 (8th Cir. 1990) (per curiam).""

Cantrell v. Cantrell, [Ms. 2200590, May 6, 2022] ___ So. 3d ___, ___ (Ala. Civ. App. 2022) (quoting Gipson v. Younes, 724 So. 2d 530, 533 (Ala. Civ. App. 1998), quoting in turn Williams v. Nebraska State Penitentiary, 57 F.3d 667, 670 (8th Cir. 1995)). Joshua argues that Terrell failed to provide any substantial connection between the injuries caused by Joshua's previous accidents and the injuries Joshua sustained in the November 2015 accident beyond the "mere similarity between the body parts affected by the prior and current injuries." Joshua's brief, p. 29. In

light of the discretion we afford to a trial court's admissibility determinations, Joshua contends that that connection "fell short of meeting Rule 403 requirements ... when viewed concurrently with expert medical testimony to the contrary." Id.

The arguments from both parties contain flaws. Terrell's assertion that Judge Smitherman entirely usurped the jury's role of determining whether Joshua had sustained a new injury in the November 2015 accident is not completely accurate. First, as we conveyed in the rendition of the facts, the jury was specifically instructed to decide "[w]hether [Terrell's] negligence caused [Joshua's] injuries." Second, Judge Smitherman allowed the jury to hear testimony concerning Joshua's degenerative disk disease. Indeed, Dr. Ferrer expressly testified that Joshua's degenerative disk disease was a "second cause" of his neck pain, and Dr. Patterson testified that Joshua's degenerative disk disease made him "more susceptible" to sustaining a herniated disk in a motor-vehicle accident. Judge Smitherman also permitted Terrell to present testimony from Dr. Davis that compared the condition of Joshua's neck before the November 2015 accident to the condition of his neck after the accident based on MRI images.

However, Joshua is also incorrect in asserting that the only evidence of a connection between the injuries sustained by Joshua in his previous accidents and his injuries from the November 2015 accident was the similarity between the body parts affected. Despite Joshua's efforts to downplay it, the fact that the previous accidents implicated the same body parts is significant in itself to establishing that evidence's relevance. Moreover, Joshua contended in this case that he sustained new injuries in the November 2015 accident that were so significant that they would require neck and back surgeries. The fact that Joshua had been involved in three previous automobile accidents -- in particular one in which he was rear-ended by a driver traveling at a significant rate of speed, and another in which he was thrown from his passenger seat and hit his head on the ceiling of the vehicle in which he was traveling, both of which occurred within two years of the subject accident -- would seem to be highly probative toward determining the cause and extent of Joshua's injuries from the November 2015 accident. This is especially true given that the one significant difference between the two most recent previous accidents and the November 2015 accident was the November 2015 accident's seeming lack of severity: unlike the November 2013 accident

or the November 2014 accident, both Terrell and Joshua were able to drive away from the November 2015 accident, and Joshua did not seek medical treatment for eight days after the accident.

Furthermore, beyond the striking similarities between the previous accidents and the November 2015 accident, and the fact that Joshua sustained injuries to the same parts of his body in those accidents as he did in the November 2015 accident, there was also a striking similarity in the pattern of Joshua's pain and recovery following the November 2014 accident and following the November 2015 accident. Examination of the medical records following the November 2014 accident reveals that Joshua reported feeling better at the conclusion of his treatment with Dr. Hodges, but then shortly after that he reported problems with pain in his neck and his back to Dr. Slappey. Joshua then reported feeling better at the conclusion of his treatment with Dr. Slappey, but then shortly after that he reported problems with neck and back pain to Dr. Duca. Joshua then reported feeling better again at the conclusion of his treatment with Dr. Duca. Thus, what those medical records show is a pattern of the occurrence of pain in Joshua's neck and back, followed by a temporary recovery, followed by a recurrence of pain.

Examination of the medical records concerning Joshua's treatment following the November 2015 accident shows a similar pattern of intermittent pain and recovery in Joshua's neck and back. After the November 2015 accident, Joshua first had several treatment appointments with his chiropractor, Dr. Duca. In his initial appointments, Joshua mentioned having both neck and back pain, but, as his treatments continued, Joshua reported reduced back pain and, for a period, stopped complaining about neck pain entirely. Then Joshua reported that the pain had returned, but Dr. Duca assessed Joshua's prognosis as "good" because his symptoms had "reduced in frequency, intensity, and duration." When Joshua first began seeing Dr. Ferrer, he reported feeling neck pain, but no back pain. After Joshua received epidural injections for his neck pain, he started feeling better, but after a couple of months he sought further treatment for his neck from Dr. Patterson. During the appointments Joshua had with Dr. Patterson in 2016 and 2017, Joshua reported a continued lessening of pain in his neck, and he never reported having back pain. Nearly two years later, in March 2019, Joshua returned to Dr. Patterson and reported feeling pain primarily in his back. Toward the end of 2019, Joshua received epidural

injections from Dr. Patterson for his back pain, and he never returned to Dr. Patterson for further treatment.

In short, in the medical records concerning Joshua's treatment following the November 2015 accident, there is a pattern of pain and recovery for Joshua's neck and back -- in the case of Joshua's back pain even a complete cessation of pain for two years before it recurred -- similar to the pattern of pain and recovery Joshua experienced following the November 2014 accident. In the admissibility hearing, Joshua asserted that the medical records that addressed the treatment Joshua had received following his November 2014 accident -- and testimony from Dr. Ferrer and Dr. Patterson about those medical records -- demonstrated that Joshua was "completely healed" from the injuries he had sustained in the November 2014 accident and that, therefore, the pain Joshua now suffered from was categorically the result of new injuries he had sustained in the November 2015 accident. Judge Smitherman seems to have agreed with that assertion in declaring that "the case that is here before the Court is a new injury."⁵ But viewing

⁵Later in the trial when the parties briefly revisited this issue, Judge Smitherman similarly stated: "If this witness, if this Plaintiff told his doctor and therapist or whomever else it was that he was at zero pain,

Joshua's medical treatment following the November 2015 accident in light of his medical treatment following the November 2014 accident at the least raises an issue of fact regarding whether Joshua sustained a reagravation of injuries he had sustained in previous accidents, a possibility Terrell was not permitted to suggest or explore at trial because of Judge Smitherman's admissibility ruling. That limitation is troubling given that "where the facts tending to show whether the plaintiff was injured as a proximate consequence of the defendant's negligence are in dispute, ... 'it is peculiarly within the province of the jury to resolve those conflicts.'" Hall v. Thomas, 564 So. 2d 936, 938 (Ala. 1990) (quoting Pacheco v. Paulson, 472 So. 2d 980, 983 (Ala. 1985)).

Just as importantly, it is clear from Joshua's medical records following the 2014 accident that the evidence of the extent of Joshua's recovery from his injuries following that accident is based almost entirely on Joshua's own assessment of his condition as stated in those medical records.⁶ Of course, to a considerable degree, the same is true for the

that there was nothing wrong with him and then six months later he has another accident, I'm not going to let that in."

⁶Although in the admissibility hearing Joshua's counsel emphasized the opinions of Dr. Ferrer and Dr. Patterson concerning the

evidence of Joshua's lack of recovery from his injuries following the November 2015 accident. In other words, the determination of whether Joshua sustained a "new injury" from the November 2015 accident is largely dependent upon Joshua's credibility, just as the determination of the continuation of Joshua's pain following his treatments after the 2015 accident is dependent, at least in part, on his credibility. Judge Smitherman allowed Terrell to test through cross-examination Joshua's credibility concerning the extent of his pain after the 2015 accident, but she did not allow any such testing concerning whether Joshua had sustained a new injury in light of Joshua's previous accidents. Instead, Judge Smitherman foreclosed that testing and the jury's assessment of Joshua's credibility by excluding all evidence of and any references to Joshua's previous accidents and the medical treatment he received after the November 2014 accident. Yet, as we already have observed,

extent of Joshua's recovery from injuries he had sustained in the November 2014 accident, we question the relevance of those opinions given that neither of those doctors treated Joshua following the November 2014 accident. Regardless, the jury was never given the opportunity to assess those opinions. Cf. Breland ex rel. Breland v. Rich, 69 So. 3d 803, 812 n.2 (Ala. 2011) ("An expert opinion ... is admitted to assist the trier of fact. What weight, if any, is given such testimony is for the trier of fact." (quoting Robert J. Goodwin, McElroy's Alabama Evidence § 127.02(8) (6th ed. 2009))).

credibility is a fact issue to be assessed by the jury, not by the court, and the jury did not receive the full picture of Joshua's history of neck and back pain.

Finally, the previous-accidents evidence assumed added factual significance in light of Terrell's concession of liability, which anchored her defense around the severity of Joshua's injuries and the extent of Joshua's damages. The entire focus of the jury's determination was the November 2015 accident's contribution to Joshua's neck and back pain, and therefore how much compensation Terrell owed Joshua for those injuries. But while the jury was told that Joshua had degenerative disk disease, it was not informed about previous automobile accidents that caused similar injuries, information that was clearly relevant to the jury's determinations.

Given all the foregoing problems with Judge Smitherman's exclusion of all evidence of and any references to Joshua's previous accidents and the medical treatment he received after the November 2014 accident -- that she severely circumscribed the scope of the evidence available to the jury for assessing whether Joshua had sustained new injuries, that she ignored the existence of multiple similarities between

the previous accidents and the November 2015 accident, and that she relied exclusively on Joshua's own assessment of his condition following the November 2014 accident without affording Terrell any opportunity to test his credibility in that regard -- we are left with analyzing whether the high probative value of that evidence was "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury."⁷ Rule 403, Ala. R. Evid.

Judge Smitherman's chief concern seemed to be that admitting the previous-accidents evidence would confuse the jury, stating at one point in the admissibility hearing that "ultimately keeping confusion down with the jury is most paramount for me," and stating at another point to Terrell's counsel that "[w]hat's confusing are the [previous] wrecks. That's what is confusing and that is what the Court is not going to let in." It is true that "[a] trial court has discretion to exclude otherwise admissible evidence in order to avoid misleading the jury." Davis v. Hanson Aggregates Southeast, Inc., 952 So. 2d 330, 338 (Ala. 2006). We also have explained that "[i]t is within the discretion of the trial court to

⁷The other factors listed in Rule 403, Ala. R. Evid. -- "considerations of undue delay, waste of time, or needless presentation of cumulative evidence" -- are not relevant in this case.

limit evidence of other accidents or safety history when such evidence will work to divert the attention of the jury to a greater extent than is the probative worth of such evidence." Murray v. Alabama Power Co., 413 So. 2d 1109, 1114 (Ala. 1982).

However, as we already have explained, in this case the previous-accidents evidence illuminates the jury's determinations as to the cause and extent of Joshua's injuries as well as Joshua's credibility with respect to the severity and extent of his injuries. Joshua argues that "[t]he contested evidence would ... have led to confusion because, taking into account the uncontroverted expert medical testimony that the prior injuries had resolved, previous unrelated injury evidence would merely inform the jury of Joshua's prior physical state, not his physical state at the times relevant to this trial." Joshua's brief, p. 38 (emphasis in original). But that argument assumes the factual finding that Joshua's injuries from the November 2014 accident had completely healed, a finding that we have already stated was for the jury to make given that (1) it was dependent upon Joshua's own assessment of his condition and (2) the medical records indicated that Joshua had a propensity toward cycles of pain and recovery. Joshua also cites Judge Smitherman's

concern that the jury would wonder about whether Joshua had received compensation as a victim in the previous accidents. But the danger arising from any such speculation could have been ameliorated by instructions to the jury. See, e.g., Rule 105, Ala. R. Evid. ("When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly."). Thus, we do not believe that the risk of confusion or misleading the jury was sufficiently substantial to outweigh the high probative value of the evidence concerning Joshua's previous accidents. See generally Ex parte Vincent, 770 So. 2d 92, 96 (Ala. 1999) ("'Unfair prejudice' under Rule 403 has been defined as something more than simple damage to an opponent's case. A litigant's case is always damaged by evidence that is contrary to his or her contention, but damage caused in that manner does not rise to the level of 'unfair prejudice' and cannot alone be cause for exclusion. 'Prejudice is "unfair" if [it] has "an undue tendency to suggest decision on an improper basis."' Gipson v. Younes, 724 So. 2d 530, 532 (Ala. Civ. App. 1998), quoting Fed. R. Evid. 403 (Advisory Committee Notes 1972)." (some citations omitted)).

Finally, Joshua asserts that the exclusion of the previous-accidents evidence was harmless error because not all evidence of Joshua's prior pain was excluded from cross-examination. See Joshua's brief, pp. 49-51. Joshua first refers to the fact that Terrell's counsel was permitted to raise the fact that in the admitted medical records for the November 2015 accident Joshua had stated to at least three different doctors that he had started feeling neck pain in October 2015. However, that fact actually exacerbated the exclusion of the previous-accidents evidence. Without the context of the previous accidents, the jury had every reason to believe that Joshua had simply misstated the month in which his pain began rather than having any concrete evidence to explain why his pain might have existed before the November 2015 accident.⁸ Joshua also refers to the fact that Terrell's counsel was permitted to discuss Joshua's degenerative disk disease. But again, given that both Dr. Ferrer and Dr. Patterson testified that Joshua's degenerative disk disease made him more susceptible to sustaining herniated disks from automobile

⁸Lack of context was also a problem with respect to Terrell's being permitted to present testimony from Dr. Davis comparing the 2014 MRI on Joshua's neck to the 2016 MRI on Joshua's neck. The jury was never told why Joshua had an MRI on his neck in 2014.

accidents, Joshua's previous-accidents history would have shed a different light on the doctors' testimony than was presented to the jury at trial. There is simply no way around the fact that excluding all evidence of and any references to Joshua's previous accidents and his medical treatment following the November 2014 accident had an enormous impact on Terrell's ability to mount a defense in this case with regard to the cause of Joshua's injuries, the extent of Joshua's injuries, and the credibility of Joshua's testimony concerning those issues. In short, Judge Smitherman's ruling cannot be categorized as harmless error.

IV. Conclusion

Based on the foregoing, we conclude that Judge Smitherman erred by excluding from trial all evidence of and any references to Joshua's previous automobile accidents and the medical treatment he received following the November 2014 accident. Furthermore, that error injuriously affected Terrell's substantial rights during the jury trial in this case. Accordingly, the judgment is reversed, and the cause is remanded for a new trial.

SC-2022-0937

REVERSED AND REMANDED.

Parker, C.J., and Shaw, Wise, Bryan, Sellers, Stewart, Mitchell,
and Cook, JJ., concur.