IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2012-CA-00663-COA

CHERI W. HEFLIN **APPELLANT**

v.

STEPHEN MERRILL AND/OR THE ESTATE OF STEPHEN MERRILL AND NATIONWIDE INSURANCE COMPANY **APPELLEES**

DATE OF JUDGMENT:	10/14/2011
TRIAL JUDGE:	HON. JOHN C. GARGIULO
COURT FROM WHICH APPEALED:	HARRISON COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	NICHOLAS VAN WISER MATTHEW G. MESTAYER
ATTORNEYS FOR APPELLEES:	WILLIAM L. MCDONOUGH JR. JEREMY DALE HAWK NICHOLAS KANE THOMPSON JAMES LEROY BANKS IV
NATURE OF THE CASE:	CIVIL - PERSONAL INJURY
TRIAL COURT DISPOSITION:	ENTERED JUDGMENT AWARDING $32,500 TO APPELLANT
DISPOSITION:	AFFIRMED - 10/15/2013
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE IRVING, P.J., CARLTON AND JAMES, JJ.

JAMES, J., FOR THE COURT:

¶1. Cheri Heflin appeals the decision of a jury in the Harrison County Circuit Court awarding her $32,500 in damages for injuries sustained in a vehicle accident. Arguing that she was entitled to $76,000, she appeals, raising four issues: (1) the circuit court erred in granting Nationwide Insurance Company's motion in limine and excluding from evidence Nationwide's name and the existence of Heflin's uninsured-motorist policy, but permitting

counsel for Nationwide to participate in the trial; (2) the circuit court erred in excluding testimony regarding the speed at which Stephen Merrill was traveling at the time of the accident; (3) the circuit court erred in excluding statements made by Merrill to Heflin's husband, Mike Heflin, immediately following the accident; and (4) the circuit court erred in denying Heflin's motion for a new trial due to cumulative errors. Upon review, we find no error and affirm.

FACTS AND PROCEDURAL HISTORY

¶2. On January 21, 2005, Mike was driving his 2005 Ford F-150 truck with his wife, Heflin, in the passenger seat. While the Heflins were at a complete stop, Merrill hit the Heflins' truck from behind. Merrill was driving a 2004 Mercedes ML 350 SUV owned by Frank Ciuffetelli. Ciuffetelli's SUV was covered by an Allstate insurance policy. The Heflins' truck was covered by an uninsured/underinsured motorist (UM) policy with Nationwide.

¶3. On August 29, 2007, Heflin filed a complaint against Merrill and/or Merrill's estate,[1] Nationwide, and Ciuffetelli. Heflin alleged that Merrill was liable due to his negligent operation of the vehicle. She further alleged that her insurance provider, Nationwide, was liable under the provisions of the UM clause of her policy. Finally, Heflin alleged that Ciuffetelli was liable under a theory of negligent entrustment and/or respondeat superior because he owned the vehicle that caused the accident and had allegedly given Merrill

[1] On July 13, 2005, Merrill passed away due to circumstances unrelated to the wreck; therefore, Heflin named Merrill's estate as a defendant.

permission to use the vehicle.[2]

¶4. According to Heflin, she suffered from temporomandibular joint disorder (TMJ) as a result of the accident. Heflin claims that she presented evidence that her out-of-pocket medical bills were $40,000, and that she anticipated $100,000 in future medical bills. On February 5, 2010, Nationwide filed its designation of an expert witness, which was subsequently joined by Merrill's estate and Ciuffetelli, designating Robert T. Watts, DMD., as an expert. On February 10, 2010, Heflin filed her designation of expert witnesses, designating the following experts: Dr. Elmer Gaudet Jr., Helfin's treating orthodontist; and Dr. Edward Boos, DDS, Heflin's treating dentist and oral surgeon.

¶5. On October 3, 2011, Nationwide filed a motion in limine, which stated:

> Nationwide . . . has offered to stipulate [that] the policy made the subject of this suit was in full force and effect at the time of the subject accident and that it will be responsible for payment of any final judgment in excess of the liability coverage limit of [Merrill's estate]. The existence of the Nationwide . . . policy would have no relevance to any issue to be decided by the jury and should therefore be excluded under Mississippi Rule[s] of Evidence 402, 403, and 411.

On October 5, 2011, the circuit court granted Nationwide's motion in limine, preventing any mention to the jury of Nationwide's presence as a party to the lawsuit and any mention of the existence of the Heflins' UM policy with Nationwide. On October 6, 2011, the parties entered into a stipulation, which read:

> The parties agree and stipulate as follows:

---

[2] Ciuffetelli was eventually dismissed without prejudice from the suit by agreement of the parties.

> At the time of the accident, [Heflin] was insured by [Nationwide.] She maintained, through her husband, . . . an uninsured motorist (UM) policy with a policy limit of up to $600,000.00. Additionally, [Merrill] at the time of the accident qualified as an owner or occupier of an under insured motor vehicle and that any final judgment for [Heflin], if any, in excess of the insurance carrier by [Merrill], if any, would be the responsibility of [Nationwide] up to the policy limits of $600,000.00.

This stipulation was signed by counsel for each party and the circuit court judge.

¶6. On October 6, 2011, a trial was held on damages only. Heflin sought $76,000 in damages. On October 7, 2011, the jury returned a $32,500 verdict for Heflin. On October 14, 2011, the circuit court entered a judgment on the jury's verdict, awarding Heflin $32,500, plus eight percent interest per year until paid.

¶7. On October 25, 2011, Heflin filed a motion for a judgment notwithstanding the verdict (JNOV) or, in the alternative, for an additur or a new trial. She argued that the jury's verdict of $32,500 did not fairly represent the evidence presented and evinced prejudice, passion, or bias. The motion was denied. Heflin now appeals.

DISCUSSION

I. Whether the circuit court erred in granting Nationwide's motion in limine, preventing disclosure to the jury of Nationwide's name and the existence of Heflin's UM policy through Nationwide, but permitting counsel for Nationwide to participate in the trial.

¶8. This Court "will reverse [the circuit] court's denial or grant of a motion in limine only if the court abused its discretion in denying or granting the motion." *Wright v. Royal Carpet Servs.*, 29 So. 3d 109, 115 (¶13) (Miss. Ct. App. 2010). When granting a motion in limine, the circuit court must first find the following two factors present: "(1) the material or

evidence in question will be inadmissible at a trial under the rules of evidence; and (2) the mere offer, reference, or statements made during trial concerning the material will tend to prejudice the jury." *Id*. (quoting *Whittley v. City of Meridian*, 530 So. 2d 1341, 1344 (Miss. 1988)).

¶9. Under Rule 401 of the Mississippi Rules of Evidence, "'[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Further, "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Mississippi, or by these rules. Evidence which is not relevant is not admissible." M.R.E. 402. However, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." M.R.E. 403.

¶10. In the case before us, the Mercedes driven by Merrill was insured by Allstate. Nationwide was named as a defendant in the suit because it provided UM coverage to the Heflins. Nationwide filed a motion in limine to exclude any mention of Nationwide's presence as a party to the lawsuit and to exclude the existence of the Heflins' UM policy with Nationwide. In support of its motion in limine, Nationwide noted the stipulation agreed to by the parties, which stated "that any final judgment for [Heflin], if any, in excess of the insurance carrier by [Merrill], if any, would be the responsibility of [Nationwide] up to the

policy limits of $600,000.00."

¶11. After hearing arguments from both sides, the circuit court granted Nationwide's motion in limine, finding as follows:

> With regard to the initial motion, based on the parties' assertions, this issue has not been addressed by our state appellate courts. Though I do recognize there are different approaches to the instant issue with those approaches being extra jurisdictional approaches, I do understand, and it's the view of this court that **based on the circumstances of this particular case[,] where liability is admitted[,] and taking into account the stipulation agreed to by and between the parties, it is the extent of the plaintiff's injuries, if any, that are relevant to [the] instant litigation.**
>
> **Whether or not UM coverage exists is not relevant. And it's the court's opinion that introducing that issue along with the existence of Nationwide[']s coverage] . . . to the jury would potentially prejudice that jury as to a determination of damages.** Therefore[,] Nationwide's motion in limine is granted.

(Emphasis added).

¶12. We find that the circuit court was within its discretion to exclude Nationwide's policy because the parties stipulated that Nationwide would be responsible for any amount not covered by Allstate up to Heflin's policy limits. Additionally, liability was not an issue in the case. Instead, the only issue litigated and presented to the jury was the amount of damages. Therefore, there was no reason for the jury to consider the Nationwide UM policy. Admitting such evidence could only serve to possibly inflate or deflate a verdict or confuse the jury. As such, we find that the Nationwide policy was properly excluded.[3] In response

[3] We also note that at least one other jurisdiction has held that an insurance carrier is "not allowed to inform the jury that it was the uninsured motorist carrier for the plaintiff [or] that it would be the source of payment for any damages the jury might award." *See Allstate*

to the dissenting opinion, this Court finds the circuit court based its ruling on the limited facts in this case, where liability was admitted and there was a stipulation between the parties. The circuit court also recognized that this issue had not been addressed by our state appellate courts. This issue is without merit.

II. Whether the circuit court erred in excluding Mike's testimony regarding the speed at which Merrill was traveling at the time of the accident.

¶13. "A circuit court's admission or exclusion of evidence is reviewed for abuse of discretion." *Harrison v. Walker*, 91 So. 3d 41, 44 (¶13) (Miss. Ct. App. 2011). This Court "will not reverse the admission or exclusion of evidence unless the error adversely affects a substantial right of a party." *Id*. at 45 (¶13).

¶14. Heflin argues that the speed of Merrill's vehicle was relevant to her damages, and that the circuit court erred in excluding such evidence. At trial, the following exchange took place while Mike was on the witness stand:

> Q: Okay. When you're sitting there at the stop sign watching the traffic coming from the north on your left there, did you have any indication that there was about to be a wreck?
>
> A: . . . I was watching traffic to the north that was coming from the north to the south. And I had glanced back and glanced in my rearview mirror and saw Mr. Merrill as he was barreling down on top of us. And I knew at [that] instant that we were fixing to be hit.
>
> Q: Where did you see him, I mean, in the rearview mirror?

Ins. Co. v. Wade, 579 S.E.2d 180, 183 (Va. 2003) (citing *Travelers Ins. Co. v. Lobello*, 186 S.E.2d 80, 82 (Va. 1972)).

A: I saw him in the rearview mirror. And it was just a glance just before it happened.

Q: Okay. How hard did it hit you?

A: It hit us real hard, did a lot of damage to the back of my truck. I was concerned that it was going to push us out into the traffic . . . so I instinctively stepped on the brakes really hard and braced myself.

Q: Do you have an opinion as to how fast the Mercedes was going when it hit the back of your truck?

At that point, counsel for Merill's estate objected, arguing the following:

[COUNSEL FOR MERRILL'S ESTATE]: Objection, Your Honor. I don't think Mr. Heflin is qualified to render opinions about the speed of motor vehicles that he sees in the rearview mirror of his truck. He has no expertise or training in that regard, and he certainly hasn't been designated as an expert in that field.

THE COURT: What says the plaintiff as to that calling for speculation?

[COUNSEL FOR HEFLIN]: Your Honor, he was there. This is not like an accident reconstructionist. This is not based upon certain things that an expert would know. He was in the truck. He . . . saw the car coming. I'll be happy to give a little bit more of his background in terms of what he's basing this on. But first of all I just asked if he had an opinion.

I think he's entitled to have an opinion. And it's certainly subject to cross-examination. And they can find out whether or not he has [a] basis for that.

THE COURT: All right. I [will] allow him to answer as to whether he has an opinion or not. And then the further questioning with regard to that opinion, you may make your objection if you so see it fit, defense.

[COUNSEL FOR MERRILL'S ESTATE]: Yes, Your Honor.

Q: Do you have an opinion as to how fast he was going?

A: I do. He - -

[COUNSEL FOR MERRILL'S ESTATE]: Objection, Your Honor.

THE COURT: The objection is sustained.

The direct examination of Mike continued as follows:

Q: Okay. Without saying what that opinion is, okay. We're going to take baby steps here. Tell me the various things that you are relying upon in formulating that opinion. . . .

A: . . . Speed limit on the road was 25 miles per hour. When our truck was hit, it actually hit us with such force that it pulled concrete or the pavement - - the asphalt on the road where the tire had locked into the pavement and pushed us forward.

Q: Let me stop you right there. I want to refer you to Plaintiff's Exhibit Number 20. Have you ever seen that before?

A: Yes, I have.

Q: What is that for the jury?

A: It's a picture of a tire mark on a white line.

Q: Is that what you were talking about where the tire dug into the asphalt?

A: That's correct. I believe that's it.

Q: Go ahead.

A: Mr. Merrill had stated after we had gotten out of the car that he did not see our vehicle, that he had actually [sic] was looking to the north watching traffic, and that he was speeding into the southbound lane . . . .

¶15. After reviewing the transcript, it appears that no proffer was made regarding the speed of Merrill's vehicle. "When a trial court prevents the introduction of certain evidence, it is incumbent on the offering party to make a proffer of the potential testimony of the witness or the point is waived for appellate review." *Redhead v. Entergy Miss., Inc.*, 828 So. 2d 801, 808 (¶20) (Miss. Ct. App. 2001); *see also* M.R.E. 103(a)(2) ("Error may not be predicated upon a ruling which . . . excludes evidences unless a substantial right of the party is affected, and . . . the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked."). "To preserve the excluded testimony for appeal, a proffer would have to [be] made so this Court would know what testimony was excluded." *Redhead*, 828 So. 2d at 808 (¶20). We find that the speed issue is waived because it was not properly preserved for appeal. Accordingly, we affirm the circuit court's holding on this issue. In response to the dissenting opinion, the circuit court did not allow testimony concerning speed based on what Mike observed by "glanc[ing]" in his rearview

mirror. However, the circuit court did allow Mike to testify about the objective evidence of speed that he observed, such as the tire marks shown in Plaintiff's Exhibit Number 20. The car was traveling behind Heflin, and Heflin only saw the car at a glance. There is nothing apparent in the record that shows that Mike had a chance to observe the speed of the car and that he was prevented from testifying about it. Also, there was no proffer on anything Mike objectively observed.

III. Whether the circuit court erred in excluding statements made by Merrill to Mike immediately following the accident.

¶16. Heflin argues that the circuit court erred in excluding as hearsay statements made by Merrill to Mike right after the accident. Merrill's estate argues that the statements were properly excluded because Merrill was not available for cross-examination, and the statements were not relevant since liability was not an issue.

¶17. Under our rules of evidence, "'[h]earsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." M.R.E. 801(c). "Hearsay is not admissible except as provided by law." M.R.E. 802. Under Rule 801(d)(2)(A) of the Mississippi Rules of Evidence, a statement is "not hearsay" if it qualifies as an admission by a party-opponent, which occurs when "[t]he statement is offered against a party and is . . . the party's own statement, in either an individual or a representative capacity[.]" However, even if a statement is "not hearsay," and even if it is relevant under Rule 401, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or

misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." M.R.E. 403.

¶18. At trial, the following exchange took place while Mike was on the witness stand:

> Q: Let me stop you right there. I want to refer you to Plaintiff's Exhibit Number 20. Have you ever seen that before?
>
> A: Yes, I have.
>
> Q: What is that for the jury?
>
> A: It's a picture of a tire mark on a white line.
>
> Q: Is that what you were talking about where the tire dug into the asphalt?
>
> A: That's correct. I believe that's it.
>
> Q: Go ahead.
>
> A: Mr. Merrill had stated after we had gotten out of the car that he did not see our vehicle, that he had actually [sic] was looking to the north watching traffic, and that he was speeding into the southbound lane to where he could - -
>
> [COUNSEL FOR MERRILL'S ESTATE]: Your Honor, I'm going to object. That's hearsay testimony.
>
> [COUNSEL FOR HEFLIN]: Your Honor, that's an admission by a party opponent and it's defined under the rules and not hearsay.
>
> [COUNSEL FOR MERRILL'S ESTATE]: But he's not here to be cross-examined or defend that statement. I mean, they could just say whatever they want to say that he [said] at

	the accident scene.
THE COURT:	Take out the jury. (Jury out).
THE COURT:	All right. What's the basis for the objection?
[COUNSEL FOR MERRILL'S ESTATE]:	Your Honor, he's asking the witness to - - well, the witness stated that Mr. Merrill made certain statements about his operation of a motor vehicle while he was alive. And the objection is, it's a hearsay objection, Your Honor.
THE COURT:	All right. Go ahead and make your response to the objection, plaintiff.
[COUNSEL FOR HEFLIN]:	If the court please, under Mississippi Rule of Evidence 801(d)(2), the statement [is an] admission by a party opponent. The statement is offered against a party and is the party's own statement either in an individual or representative capacity, a statement which the party has manifested an adoption or belief in its truth or a statement made by a person authorized. . . . That is defined under Rule (d) as not hearsay. Now, the fact that he's not here, in addition to that it has the additional indicia of authenticity and

reliableness[,] is the fact that it was made immediately after the wreck when the testimony we're anticipating will show that Mr. Merrill came up and apologized and said that he was sorry and that - - why he didn't see him, why he didn't see the Heflins['] vehicle was because he was in fact accelerating so that he could merge into the traffic on Lorraine Road. That being the case, since Mr. Heflin was there and heard the defendant say it from his own mouth, he's entitled to relate that to the jury. It's certainly . . . subject to cross-examination on . . . the various issues that [counsel for Merrill's estate] has raised. But it's not hearsay.

THE COURT: What do you say, defense, as to whether it's an admission by a party opponent?

[COUNSEL FOR MERRILL'S ESTATE]: Your Honor, number one, we're admitting liability – . . . against our interest. But number two, we don't have a statement - - I mean, Mr. Merrill can't be here to confirm or deny. You know, he can't be asked, did you say this, and he says no and then they go to a

witness and the witness says, well, I heard you say it. So that's admission against interest, Your Honor. . . . I mean, Mr. Merrill is not here to take up for himself and to confirm that he either made this or didn't or even had a position on it.

THE COURT: [Counsel for Heflin], did you not seek to introduce - - was it Merrill's statement to Ciuffetelli?

[COUNSEL FOR HEFLIN]: No. That was what I tried to exclude.

THE COURT: And for what grounds did you try to exclude that? How is that different from what's - -

[COUNSEL FOR HEFLIN]: Because Mr. Ciuffetelli was not a party opponent. This was a statement made in the presence, you know, right there at the accident at the time of the accident. In other words[,] they can't get it in through Ciuffetelli. I can get it in through the Heflins.

THE COURT: What's the difference?

[COUNSEL FOR HEFLIN]: Well, for one thing[,] it was made at the time of the accident, and I think that since I'm representing the

party opponent, I think I could have gotten that statement in if I wanted to, Ciuffetelli, because it is - - when it is offered by a party opponent, that's part of the definition. You can't put it in if it's self-serving.

THE COURT: All right. What's the response to that?

[COUNSEL FOR MERRILL'S ESTATE]: Judge, I think they're the same. And if it's a time element, I went back and read - - I mean, it was my - - Mr. Ciuffetelli says later in his deposition it was two to three minutes. So my position is it would be two to three minutes after this impact. And so the time element is exactly the same, Your Honor.

THE COURT: . . . [W]hat is the anticipated substance of the statement you seek to introduce?

[COUNSEL FOR HEFLIN]: We are anticipating that Mr. Heflin is going to say that Mr. Merrill told him, came up to him right after the accident and said to the effect, gee whiz, I'm really sorry, I didn't even see you. I was watching the traffic coming from the north and was accelerating into the turning lane so that I could

merge. This is part of the - - and we've got some authorities on the issue of his qualifications to testify as to the speed of the vehicle we might as well get to while we've got the jury out. But so as a part of that, it explains why he was not slowing to stop, and this was not a question of a gentle tap. The issue of, although they have admitted liability, the issue of damages and the speed of the vehicle and as a result the credibility of Ms. Heflin's testimony in terms of the extent of the injuries is directly related to the speed of the impact at the time. And so that being the case, what the defendant said at the scene of the accident to the plaintiff's husband is relevant and is not hearsay.

THE COURT: Any response . . . ?

[COUNSEL FOR MERRILL'S ESTATE]: I'm just trying to get it clear in my head. . . . [A]re you trying to say that my guy was going to run the stop sign? Because that's not a merge only deal. There's a stop sign there. And you say that he was going to just merge into traffic and go around the Heflin vehicle?

[COUNSEL FOR HEFLIN]: That's what it sounds like from the testimony that Mr. Heflin will give. I don't know if he would have or not. He certainly was not going to do it with a Ford F-150 in his way.

[COUNSEL FOR MERRILL'S ESTATE]: That's why it's so preposterous. And Mr. Merrill not being here - -

THE COURT: All right. Don't argue with each other. What is your legal argument . . . ?

. . . .

[COUNSEL FOR MERRILL'S ESTATE]: I mean, I'm sticking with it's a hearsay objection, Your Honor. My guy is not available to be cross-examined about it. And so they could - - I mean, anyone, any witness could just make up whatever he said at the scene. We have nothing to base it on other than a witness's testimony.

. . . .

[COUNSEL FOR HEFLIN]: Availability of a witness is not a criterion for the determination of the definition of an admission by a party opponent as not being hearsay. It doesn't matter whether the party is available or not. It is merely a statement offered by a party opponent of what his opponent says. It is not hearsay.

THE COURT:	All right. Give me five minutes. I'll be out with a ruling. Mr. Heflin, you're still on the witness stand, sir. Please don't discuss your testimony with anyone . . . .
(Pause in proceedings)	
THE COURT:	**Okay. With regard to the instant objection, although the court sees it as an admission of a party opponent, I think in light of the fact that the person who made the statement is now deceased and that the defendant has admitted liability, I feel the statement, if introduced to the jury, will serve only to inflame and confuse as to the issues. Accordingly, the objection is sustained**. Let's bring the jury in.
[COUNSEL FOR HEFLIN]:	Could I go ahead and put on the proffer of what the testimony was going to be then?
THE COURT:	Yeah.

(Emphasis added). A proffer of Mike's testimony was made as follows:

> Q: Mr. Heflin, what that means is that for the purposes of preserving the record, I want you to go ahead and testify about the conversation that you had with the deceased defendant immediately when you got out of your truck.
>
> A: He basically told me, when he got out he said, God, I'm sorry, it was my fault. I was looking to the left. I was watching the traffic. I was fixing to speed [up] and merge into the traffic going south, and I looked up, and you were there, and I hit you.

Q: Okay. Did you have any other conversations with him concerning the accident?

A: Only that it was his fault at that time.

Q: Okay. Did he tell you whether or not he had even hit his brakes?

A: He did not say he hit his brakes.

Q: Did not say that. Just that he never saw you until he hit you.

A: He said he never saw us until he hit us.

Q: Okay. If the court please, that concludes the proffer.

¶19. In the case before us, the circuit court properly found that the statements made by Merrill to Mike were not hearsay because they qualified as admissions by a party-opponent under Rule 801(d)(2). However, the circuit court was within its discretion to exclude such statements under Rule 403 because Merrill was not available for cross-examination and because liability was not an issue. We cannot say that the circuit court abused its discretion in excluding such evidence. The dissenting opinion admits that the circuit court was within its discretion under Rule 403 to exclude the admission of a party-opponent since liability is not an issue. However, since liability is not an issue, further confusion would also exist if the evidence were not excluded because Merrill was unavailable for cross-examination. The circuit court, however, placed great weight on the fact that liability had been admitted. This issue is without merit.

IV. Whether the circuit court erred in denying Heflin's motion for a new trial due to cumulative errors.

¶20. Heflin argues that she should have been granted a new trial because of the cumulative

effect of the errors cited above. Our standard of review for the grant or denial of a motion for a new trial is as follows:

> Rule 59 of the Mississippi Rules of Civil Procedure authorizes the trial judge to set aside a jury verdict as to any or all parts of the issues tried and to grant a new trial whenever . . . justice requires. The grant or denial of a motion for a new trial is a matter within the trial court's sound discretion. A new trial may be granted in a number of circumstances, such as when the verdict is against the substantial or overwhelming weight of the evidence. On appeal, this Court may reverse the granting [or denial] of a new trial only when the trial court has abused its discretion.

White v. Yellow Freight Sys., Inc., 905 So. 2d 506, 510 (¶7) (Miss. 2004) (internal citations omitted).

¶21. Heflin argues that she should have been granted a new trial based on cumulative errors. Under the cumulative error doctrine, multiple errors at trial, which individually are not reversible, may combine to make reversible error. *Blake v. Clein*, 903 So. 2d 710, 718-19 (¶16) (Miss. 2005). Because we find no error in the issues raised and addressed above, there can be no cumulative error. Therefore, this issue is without merit.

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

CARLTON, J., CONCURS. IRVING, P.J., BARNES AND ROBERTS, JJ., CONCUR IN PART AND IN THE RESULT WITHOUT SEPARATE WRITTEN OPINION. GRIFFIS, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION, JOINED BY LEE, C.J., MAXWELL AND FAIR, JJ. ISHEE, J., NOT PARTICIPATING.

GRIFFIS, P.J., DISSENTING:

¶23. I find reversible error. Therefore, I respectfully dissent.

I. Whether the circuit court erred in granting Nationwide's motion in limine, preventing the disclosure to the jury of Nationwide's name and the existence of Heflin's uninsured motorist policy through Nationwide, but permitting counsel for Nationwide to participate at trial.

¶24. Nationwide filed a motion in limine that stated:

> Nationwide . . . moves the court to exclude any reference or comment before the venire or jury related to the insurance policy issued by Nationwide . . . made in the subject matter, and to exclude any evidence of the same, and in support thereof would show the following . . . :
>
> > Nationwide has offered to stipulate the policy made the subject of this suit was in full force and effect at the time of the subject accident and that it will be responsible for payment of any final judgment in excess of the liability coverage limit of Defendant Estate of Stephen Merrill. The existence of the Nationwide Insurance policy would have no relevance to any issue to be decided by the jury and should therefore be excluded under Mississippi Rules of Evidence 402, 403, and 411.

¶25. At the hearing, Nationwide argued that the stipulation resolved any issue for the jury to decide about the Nationwide policy. Counsel argued that the mention of the policy would "inject a lot of emotion into this and make it a case against the big old bad Nationwide Insurance Company." Nationwide also argued that the policy be excluded because it:

> would be overly prejudicial and, again, should be excluded under the rules of evidence. And what we would also offer, as we are discussing last week in the pre-trial conference, that under the stipulation to be entered, Nationwide would really play no active part in this other than assisting counsel for Mr. Merrill, that we would not make any separate opening statement, voir dire or closing argument, but we would essentially be in the background assisting counsel for Mr. Merrill if necessary.

Nationwide's counsel then acknowledged "there's no Mississippi law that we can ascertain, and it's kind of a flip of the coin which way the court wants to go, either the Virginia plan

where there is no evidence as to the insurance policy or the Florida plan and everything is admissible . . . ."

¶26. Heflin's counsel objected to the motion. Her counsel argued that had they not brought Nationwide in as a party, then Nationwide would have complained that it did not have the opportunity to participate and protect its rights. Now that it had participated and protected its rights, it wanted to "be hidden from the jury." She also argued that Nationwide was a proper defendant and the claim was a contractual claim, which the jury is entitled to know about. Thus, the exclusion of Nationwide would mislead the jury and would prejudice Heflin because the jury would think that her claim was only against a dead man's estate, when it is really a contractual claim against her own insurance company for benefits. Her counsel argued that it was critical to accurately portray the situation and the relationship of the parties to the jury.

¶27. Interestingly, the circuit court asked Nationwide's counsel, "How will we explain the style of the case to the jury if your motion is granted?" Counsel responded: Nationwide would simply come off the pleadings. It would not be there. Then it would be a suit reflecting the true dispute, that being the amount of damages that the plaintiff is entitled to. So Nationwide would not be – the jury would not need to know why Nationwide is here because there would be no appearance that Nationwide was in fact her.

¶28. The circuit judge held:

> [T]his issue has not been addressed by our state appellate courts. Though I do recognize there are different approaches to the instant issue with those approaches being extra jurisdictional approaches, I do understand, and it's the

> view of this court that based on the circumstances of this particular case where liability is admitted and taking into account the stipulation agreed to by and between the parties, it is the extent of the plaintiff's injuries, if any, that are relevant to [the] instant litigation.
>
> Whether or not UM coverage exists is not relevant. And it's the court's opinion that introducing that issue along with the existence of Nationwide Insurance Company to the jury would potentially prejudice that [the] jury as to a determination of damages. Therefore Nationwide's motion in limine is granted.

¶29. The majority affirmed and held that "the circuit court was within its discretion to exclude Nationwide's policy because the parties stipulated that Nationwide would be responsible for any amount not covered by Allstate up to Heflin's policy limits." I respectfully disagree with and dissent from this conclusion.

¶30. The parties and the circuit court recognize that this is an issue of first impression in Mississippi. The majority cites no Mississippi case authority for this holding.

¶31. The circuit court and the majority have treated this issue as an evidentiary issue, governed by the Mississippi Rules of Evidence. I believe that the circuit court's decision involved a procedural issue, and there is no authority for the circuit court to exclude the mention of a properly named party from the venire or the jury. Heflin properly brought a claim against Nationwide, Nationwide was present at the trial, Nationwide participated in the trial, and as a result, Nationwide should be disclosed as a party in the litigation.

¶32. Considering this case from an evidentiary perspective, we must note that this case is not an issue about the admissibility of liability insurance. Mississippi Rule of Evidence 411 provides:

> Evidence that a person was or was not insured against liability is not admissible upon the issue whether he acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

Rule 411 does not decide this issue. Similarly, this is not an issue about the admissibility of evidence to show possible bias of a witness. *See Wells v. Tucker*, 997 So. 2d 908, 914-17 (¶¶22-30) (Miss. 2008); M.R.E. 616.

¶33. Mississippi Rule of Evidence 402 provides that "[a]ll relevant evidence is admissible . . . . Evidence which is not relevant is not admissible." Rule 403 provides that "[a]lthough 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 . . . ." The circuit court determined "that introducing that issue along with the existence of Nationwide Insurance Company to the jury would *potentially prejudice* [the] jury as to a determination of damages." Clearly, the circuit court used an incorrect standard. The question to decide is not whether the evidence would, as the circuit court held, "potentially prejudice" the jury; instead, Rule 403 allows the court to exclude evidence where "the probative value is *substantially outweighed* by the danger of unfair prejudice, confusion of the issues, or misleading the jury." (Empahsis added).

¶34. We must recognize that Nationwide was a properly named defendant in the lawsuit. Nationwide was sued for payment under its insurance policy, to provide underinsured motorist coverage. Heflin had a viable direct action against Nationwide. I am aware of no case that has held that a court, under the Mississippi Rules of Evidence, may exclude the

mention of a party's name because it may potentially prejudice the jury.

¶35. Heflin's complaint asserted two separate claims. She brought a negligence claim against Merrill, as the person who caused the accident. She also brought what is called a "direct action" against Nationwide, her insurance carrier. This was a contractual claim for uninsured or underinsured benefits.

¶36. The joinder of Merrill and Nationwide as defendants in the same action was proper under Mississippi Rule of Civil Procedure 20. Therefore, she was entitled to present both claims to the jury. Nationwide could have, but did not, filed a motion for a separate trial under Rule 20(b) or to sever the claims under Mississippi Rule of Civil Procedure 21. Nationwide did not.

¶37. The question here, which has not been addressed in any Mississippi decision, is whether an uninsured or underinsured motorist insurer should be identified to the jury at trial when it has been named a party to a lawsuit. The parties recognized that other states have considered this issue and reached different results.

A. Virginia

¶38. Virginia does not allow an uninsured motorist insurer to be revealed to the jury in a lawsuit for personal injuries arising from an automobile accident where the tortfeasor is uninsured or underinsured. In *Travelers Ins. Co. v. Lobello*, 186 S.E.2d 80 (Va. 1972), the plaintiff sued three defendants on the basis of negligence for personal injuries suffered from a four-car accident. One of the defendants, Alfred Shelton, was uninsured. As a result, the plaintiff served a copy of the complaint on his own uninsured motorist carrier, Travelers

Insurance Company. Travelers then filed an answer and defenses and participated as a defendant in the case.

¶39. At trial, Travelers received permission from the trial court to inform the jury that it was the plaintiff's uninsured motorist carrier, that Shelton was an uninsured motorist, and that Travelers was assisting Shelton in his defense of the matter. *Id.* at 82. The jury was further informed that Travelers would be responsible for the payment of any verdict rendered against Shelton in favor of the plaintiff. *Id.* Following the trial, the jury awarded $15,000 against Shelton and a second defendant, jointly and severally.

¶40. The Virginia Supreme Court found that it was error "to permit the injection of insurance into the case," stating that "where two or more defendants may be jointly and severally liable, to say that one defendant has 'insurance backing' is to create a situation permitting the return of a possibly inflated verdict binding upon all defendants so liable." *Id.* The court also held that Travelers' attorney should have only been permitted to tell the jury, without identifying himself as insurance counsel, that he was present to assist Shelton in his defense. The court found that this would have sufficiently explained his presence and would have not have prejudiced any of the litigants. *Id.*

¶41. Virginia does not allow a direct action by an insured against his or her uninsured motorist insurer for alleged personal injuries suffered as a result of an accident with an uninsured tortfeasor. Virginia's uninsured motorist law provides:

> A. Except as provided in subsection J of this section, no policy or contract of bodily injury or property damage liability insurance relating to the ownership, maintenance, or use of a motor vehicle shall be issued or delivered in this

> Commonwealth to the owner of such vehicle . . . unless it contains an endorsement or provisions undertaking to pay the insured all sums that he is legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle . . . .
>
> . . . .
>
> F. If any action is instituted against the owner or operator of an uninsured or underinsured motor vehicle by any insured intending to rely on the uninsured or underinsured coverage provision or endorsement of this policy under which the insured is making a claim, then the insured shall serve a copy of the process upon this insurer in the manner prescribed by law, as though the insurer were a party defendant . . . The insurer shall then have the right to file pleadings and take other action allowable by law in the name of the owner or operator of the uninsured or underinsured motor vehicle or in its own name.

Va. Code Ann. § 38.2-2206(A) & (F) (2012). The courts of Virginia have interpreted this section to mean that an injured party seeking to recover through uninsured motorist coverage must show that a judgment has been obtained against an uninsured motorist before there can be any recovery against an insurer. *Macci v. Allstate Ins. Co.*, 917 A.2d 634, 636 (D.C. 2007). "[S]ection 38.2-2206 effectively bars direct action solely against an insurance carrier for uninsured motorist coverage." *Conteh v. Allstate Insurance Co.*, 782 A.2d 748, 751 (D.C. 2001)

¶42. Unlike Mississippi, in Virginia, an insured has no right to bring a direct action against his or her uninsured motorist insurer until there has been a judgment against the uninsured tortfeasor. This leads to the conclusion that an uninsured motorist carrier should not be identified to the jury during a trial because the carrier is not a named party to the action and the insured only has an action against the carrier once a judgment has been rendered against the tortfeasor.

B. Florida

¶43. Under Florida law, the jury should always be made aware that the uninsured motorist carrier is a party to the lawsuit when the carrier is properly sued and/or joined in the action. *Smith v . Baker*, 704 So. 2d 567, 568 (Fla. Dist. Ct. App. 1997). In fact, it is reversible error for a trial court to exclude from the jury the identity of the uninsured motorist carrier when that carrier has been made a party. *Medina v. Peralta*, 724 So. 2d 1188, 1190 (Fla. 1999). An uninsured motorist carrier that is lawfully sued by a plaintiff and properly joined as a party to the lawsuit must be disclosed to the jury as a party defendant (as opposed to being identified as a co-counsel for the tortfeasor). *Id.* at 1189.

¶44. The reasoning behind such a rule is:

> An uninsured or underinsured motorist carrier should not be able to hide its true identity by being severed from the lawsuit while retaining its influence over the conduct of the lawsuit as co-counsel for the tortfeasor. In this case, this procedure seems inherently unfair to the plaintiff, deceptive to the jury, contrary to the insurance contract entered into between the plaintiff and its insurer, and contrary to statute.

Krawzak v. Gov't Employees Ins. Co., 660 So. 2d 306, 310 (Fla. Dist. Ct. App. 1995), *approved*, 675 So. 2d 115 (Fla. 1996). Said differently, when an uninsured motorist carrier is made a defendant party or otherwise participates in the lawsuit by lining up against the plaintiff, it is inherently unfair and prejudicial to the plaintiff and a deception upon the jury to not allow identification of the carrier in the action.

¶45. Florida, like Mississippi, allows an insured to bring a direct action against his or her uninsured motorist carrier. *See* Fla. Stat. § 627.727(8) (2006) ("The provisions of s. 627.428

do not apply to any action brought pursuant to this section against the uninsured motorist insurer unless there is a dispute over whether the policy provides coverage for an uninsured motorist proven to be liable for the accident."); *see also Krawzak*, 660 So. 2d at 309 ("By contract, as well as by statute, plaintiff has a direct action against GEICO as her underinsured motorist carrier.").

C. Mississippi

¶46. I am of the opinion that Mississippi should follow the reasoning followed by Florida. Mississippi allows an insured to bring a direct action against his or her own uninsured motorist carrier without first having to obtain a judgment against the uninsured tortfeasor. *See, e.g., Vaughn v. State Farm Mut. Auto. Ins. Co.*, 445 So. 2d 224, 226 (Miss. 1984); *Harthcock v. State Farm Mut. Auto. Ins. Co.*, 248 So. 2d 456, 460 (Miss. 1971); *Farned v. Aetna Cas. & Sur. Co.*, 263 So. 2d 790, 791 (Miss. 1972); *Hodges v. Canal Ins. Co.*, 223 So. 2d 630, 634 (Miss. 1969).

¶47. Heflin's complaint asserted a negligence claim against Merrill and a contractual claim against Nationwide. Nationwide has defended its interests and fully participated throughout the litigation. Nationwide, even after this ruling, participated at trial by cross-examining a witness and making objections. The interests of justice require that the identity and role of Nationwide be revealed to the jury.

¶48. Heflin was completely within her right, under Mississippi law, to name Nationwide as a party to the action and seek relief against Nationwide. Similarly, Nationwide was completely within its right to defend this action and attempt to limit its liability. To allow

Nationwide to participate in the trial, yet not be disclosed to the jury, in my opinion was reversible error. It seems to me that Nationwide's motion in limine was not an evidentiary motion, but instead was an attempt to sever the claims under Rule 21. The circuit judge could have severed the claims, but I do not believe it was within the circuit judge's discretion to exclude all references to Nationwide from the jury.

¶49. As to this issue, I would reverse and remand for a new trial.

II. Whether the circuit court erred in excluding Mike's testimony regarding the speed at which Merrill was traveling at the time of the accident.

¶50. In this issue, Heflin argues that the circuit court was in error when it excluded Mike's testimony as to his opinion of the speed at which Merrill was traveling when he hit the vehicle from behind. The majority concluded that "the speed issue is waived because it was not properly preserved for appeal." I disagree with this conclusion.

¶51. To preserve an error involving the exclusion of evidence, the substance of the evidence must either be made known by an offer of proof (proffer) or must be apparent from the context of the record. *Lacy v. State*, 700 So. 2d 602, 606 (Miss. 1997) (citing M.R.E. 103(a)(2)). Here, there was no proffer of Mike's testimony. However, the evidence was "apparent from the context of the record" that Mike was going to give his opinion that Merrill was driving fast immediately before the accident. I would find that the issue is properly preserved for appeal.

¶52. At trial, the objection to this evidence was that it was improper opinion evidence and speculation. Mississippi law on this issue is well settled: "[A] layperson is competent to

offer an opinion as to the rate of speed of a moving car. However, such testimony must pertain to the speed of the offending vehicle at the time, or just prior to the collision." *Moore v. State*, 816 So. 2d 1022, 1028 (¶19) (Miss. Ct. App. 2002) (internal citation omitted).

¶53. I am of the opinion it was error for the circuit court to exclude Mike's testimony as to the speed of Merrill's vehicle on the grounds that it was speculation or not proper opinion testimony. If this case were remanded for a new trial, I would instruct the trial judge to admit such evidence.

¶54. I am not of the opinion, however, that this error was sufficiently prejudicial to be reversible error. Recently, we considered the proper manner in which to review error in the admission of evidence.

> Having concluded the trial court erred, we must next turn to the question of whether the error is prejudicial. We will reverse on the erroneous admission of evidence only where "a substantial right of a party is affected." Errors in the admission of evidence are subject to a harmless error analysis because, as is often said, a defendant is entitled to a fair trial, not a perfect one. An error is harmless when "the same result would have been reached had it not existed." We review the record de novo to determine the error's effect.

James v. State, 2012-KA-00157-COA, 2013 WL 1802589, *5 (¶18) (Miss. Ct. App. Apr. 30, 2013) (internal citations omitted). Applying this standard, I could not say that a different result would have been reached if this error had not existed.

III. Whether the circuit court erred in excluding statements made by Merrill to Mike immediately following the accident.

¶55. I concur with the majority's conclusion that the trial court correctly found that Merrill's statements to Mike after the accident were not hearsay because they qualified as

admissions by a party-opponent under Mississippi Rule of Evidence 801(d)(2). The majority then holds "the circuit court was within its discretion to exclude such statements under Rule 403 because Merrill was not available for cross-examination and because liability was not an issue." I agree with the majority that the circuit court was within its discretion to exclude such statements, under Rule 403, because liability was not in issue. However, there was no legal or factual basis, under Rule 403 or any other authority, for the circuit court to exclude an admission of a party-opponent "because [he] was not available for cross-examination." This is an incorrect statement of and application of the law.

¶56. As stated above, if this case were remanded, I would instruct the circuit court to consider whether to allow such statements to be admitted, but on proper grounds. Without remand for other reasons, however, I do not find this error to be reversible.

LEE, C.J., MAXWELL AND FAIR, JJ., JOIN THIS OPINION.