IN THE SUPREME COURT OF MISSISSIPPI

NO. 2011-CA-01785-SCT

JACKSON HMA, LLC d/b/a CENTRAL MISSISSIPPI MEDICAL CENTER

v.

ADOLFO P. MORALES

DATE OF JUDGMENT:	09/27/2011
TRIAL JUDGE:	HON. WINSTON L. KIDD
COURT FROM WHICH APPEALED:	HINDS COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	THOMAS L. KIRKLAND, JR. ANDY LOWRY MARK P. CARAWAY CORY LOUIS RADICIONI TAMMYE CAMPBELL BROWN
ATTORNEY FOR APPELLEE:	LANCE L. STEVENS
NATURE OF THE CASE:	CIVIL - CONTRACT
DISPOSITION:	AFFIRMED IN PART, REVERSED IN PART AND REMANDED - 11/21/2013
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

RANDOLPH, PRESIDING JUSTICE, FOR THE COURT:

¶1. Dr. Adolfo P. Morales sued Jackson HMA, LLC., d/b/a Central Mississippi Medical Center ("Jackson HMA"), in the Circuit Court of Hinds County for breach of contract. A jury awarded Morales substantial damages. Jackson HMA filed a "Motion for Judgment Notwithstanding the Verdict, and, in the alternative, For a New Trial" and a "Motion for

Amendment of Judgment." Judge Winston Kidd denied the post-trial motions and Jackson HMA filed this appeal.

FACTS

¶2. In early 2004, based on a survey conducted by a third party, Jackson HMA recognized a shortage of ophthalmologists within its medical community. To address this perceived need, Jackson HMA undertook to recruit an ophthalmologist. Tess Shaw, physician recruiter for Jackson HMA, communicated with CompHealth Associates, Inc., a company which assists in matching physicians with hospitals. CompHealth had a contract with HMA, which is the parent corporation of Jackson HMA. CompHealth recommended Morales to Jackson HMA as a potential fit to meet the hospital's need. After conducting a background examination of Morales, Jackson HMA began negotiating terms to bring him to Jackson.[1]

¶3. On September 24, 2004, Shaw sent Morales a "letter of intent" outlining Jackson HMA's proposed offer.[2] The letter twice stated that the proposed offer required "preapproval" by "Corporate" (HMA). Although not requested or provided for, Morales signed and returned the letter. On it he wrote "I agree to all and accept the terms of your

[1]Morales was not to become an employee of Jackson HMA, but, rather, was to set up his own practice with the financial assistance of Jackson HMA.

[2]The terms of the letter included a gross collections income guarantee of $650,000 for one year, a two-year forgiveness period, a $10,000 signing bonus, up to $15,000 in residential relocation expenses, up to $7,500 in office relocation expenses, $8,000 in marketing assistance, and $1,500 in practice set-up assistance.

offer." At trial, Morales acknowledged that this letter was not a contract, as it "no doubt" required preapproval from the corporate office.

¶4. Subsequently, Jackson HMA sought approval from corporate HMA, but corporate did not approve the terms. Jackson HMA's CEO, Jay Finnegan, impressed upon corporate the need for an ophthalmologist and suggested new terms to corporate which reduced the guaranteed amount and period by half. Finnegan received approval of these reduced terms from Pete Lawson, HMA vice-president for the eastern part of the United States.

¶5. Thereafter, on November 11, 2004, Shaw sent Morales a second letter detailing the new "terms of our offer[,]" which reflected the reduced guarantees approved by corporate HMA. The letter lacked the phrase "letter of intent" and also made no reference to a requirement of corporate approval of the terms. The letter included the language, "[b]y signing and returning this letter, you will confirm your commitment to entering into a contractual agreement . . . . Accordingly we will begin the process of assimilating contract documents for your review."

¶6. Six days later, on November 17, 2004, Shaw sent Morales a "Memorandum" which restated the terms of the November 11 letter.[3] Attached to this memorandum were contract documents (entitled "Physician Recruitment Agreement") and several addenda to that agreement. Provision 7.01 of the Physician Recruitment Agreement provided, in pertinent part, "[t]his agreement, and any addenda or amendments thereto, shall not be effective or

[3]The signing bonus increased from $15,000 to $20,000.

legally binding on Physician or Hospital until they have been reviewed and approved in writing by Hospital's legal counsel." Morales signed the document, but approval never arrived. According to Shaw, HMA experienced an organizational restructure in the interim, and Jackson HMA no longer reported to Pete Lawson, but now reported to a new vice-president, John Vollmer. Shaw testified that Vollmer "did not feel that the recruitment of an ophthalmologist was a good return on . . . investment. So when the contract got to him, he did not approve it." In early March 2005, Shaw informed Morales that the contract had not been approved.

¶7. On November 30, 2005, Morales filed suit in the Circuit Court of Hinds County, alleging that Jackson HMA had breached its contract with him. He further alleged that he had relied to his detriment on misrepresentations made by Jackson HMA.

¶8. On September 12, 2011, the trial began. Morales and Shaw were the only two witnesses called at trial. Morales testified that the November 11 letter was issued after corporate approval and that it formed a contract. Shaw denied that the November 11 letter formed a contract. Shaw also denied that she had any authority to confer a final contract on Morales without receiving approval from corporate HMA.

¶9. On September 14, 2011, the jury returned a verdict in favor of Morales and assessed his damages at $2,275,000. Final judgment was entered on September 27, 2011. Jackson HMA filed this appeal.

ISSUES

¶10. Jackson HMA appeals the denial of its motions for directed verdict, judgment notwithstanding the verdict (JNOV), new trial, and/or remittitur. We address the following issues:

I. Whether there was sufficient evidence for the jury to find that the November 11, 2004, letter formed a contract between Jackson HMA and Morales.
II. Whether there was sufficient evidence to prove Morales's claim for damages to a reasonable certainty.
III. Whether the trial court erred in granting jury instruction 9.
IV. Whether the trial court erred by denying remittitur.

STANDARDS OF REVIEW

¶11. "This Court's standard of review on motions for directed verdict and judgment notwithstanding the verdict are the same." ***Estate of Jones v. Phillips ex rel. Phillips***, 992 So. 2d 1131, 1146 (Miss. 2008) (citing ***Spotlite Skating Rink, Inc. v. Barnes***, 988 So. 2d 364, 368 (Miss. 2008)). Motions for directed verdict and judgment notwithstanding the verdict consider whether the "evidence is sufficient to support a verdict for the non-moving party." ***Estate of Jones***, 992 So. 2d at 1146 (citing ***Spotlite Skating Rink, Inc.***, 988 So. 2d at 368). "When determining whether the evidence was *sufficient*, the critical inquiry is whether the evidence is of such quality that reasonable and fairminded jurors in the exercise of fair and impartial judgment might reach different conclusions." ***Poole ex rel. Wrongful Death Beneficiaries of Poole v. Avara***, 908 So. 2d 716, 726 (Miss. 2005) (citing ***Jesco, Inc. v. Whitehead***, 451 So. 2d 706, 713-714 (Miss. 1984)) (emphasis in original). "Thus, this Court considers whether the evidence, as applied to the elements of a party's case, is either so indisputable, or so deficient, that the necessity of a trier of fact has been obviated." ***Estate***

of Jones, 992 So. 2d at 1146 (citing ***Spotlite Skating Rink, Inc.***, 988 So. 2d at 368). "For purposes of our review, we consider all evidence in the light most favorable to the nonmoving party, and we view all reasonable inferences in the party's favor." ***Braswell v. Stinnett***, 99 So. 3d 175, 178 (Miss. 2012) (citing ***Thompson v. Nguyen***, 86 So. 3d 232, 236 (Miss. 2012)).

¶12. "When considering a trial court's denial of a motion for a new trial, this Court's standard of review is abuse of discretion." ***Bailey Lumber & Supply Co. v. Robinson***, 98 So. 3d 986, 991 (Miss. 2012) (citing ***Poole***, 908 So. 2d at 726).

¶13. "The standard of review for the denial of a remittitur is also abuse of discretion . . . ." ***Id***. (citing ***Entergy Mississippi, Inc. v. Bolden***, 854 So. 2d 1051, 1058 (Miss. 2003)).

ANALYSIS

I. Whether there was sufficient evidence for the jury to find that the November 11, 2004, letter formed a contract between Jackson HMA and Morales.

¶14. "Whether a contract exists involves both questions of fact and questions of law." ***Ham Marine, Inc. v. Dresser Indus., Inc.***, 72 F. 3d 454, 458 (5th Cir. 1995). However, where the existence of a contract turns on consideration of conflicting evidence, that presents a "question of fact properly presented to, and determined by, the jury." ***Id***. at 461. "Consequently, unless there was no credible evidence presented which might authorize the verdict, the jury's findings must stand." ***Id***.

¶15. At trial, Morales proceeded on the theory that the November 11 letter formed a binding contract. "[U]nder Mississippi law . . . the test for determining whether a writing

constitutes an enforceable contract is whether the parties have manifested an intention to be bound by its terms and whether the terms are sufficiently definite to be legally enforced." ***Knight v. Sharif***, 875 F. 2d 516, 523 (5th Cir. 1989) (citing ***Jones v. Mississippi Farms Co.***, 76 So. 880 (Miss. 1917)). Shaw testified, and Jackson HMA argued that the November 11 letter, corresponding electronic mail communications, and/or the November 16 Physician Recruitment Agreement (with addenda) signed by Morales did not form a contract, because corporate never approved the terms, as was required by the Physician Recruitment Agreement. However, an electronic mail communication was presented which indicated that corporate had approved the terms of the November 11 letter. *See infra* ¶ 17. Thus, not only was competing testimony offered by Morales and Shaw, Shaw's testimony presented a conflict with other evidence regarding corporate approval. "Under such circumstances intention must be determined from a consideration of the document and the acts and outward expressions of the parties." ***Mid-Continent Tel. Corp. v. Home Tel. Co.***, 319 F. Supp. 1176, 1189 (N. D. Miss. 1970) (citing ***Miss. Rice Growers Ass'n (AAL) v. Pigott***, 191 So. 2d 399 (Miss. 1966)).

¶16. The September 24 letter employed the phrase "letter of intent" and specifically stated that the terms of the letter required corporate preapproval. Morales admitted at trial that this letter did not form a contract because it "no doubt" required corporate preapproval, which was not forthcoming.

¶17. But, on November 9, Jackson HMA informed Morales, through an email exchange with Comphealth, that "[Jackson HMA] did get preapproval" for the new terms that Finnegan

had presented to corporate. Shaw followed up by sending Morales a second letter on November 11 which embodied the corporate-approved terms. In contrast to the September 24 letter, the November 11 letter did not include the phrase "letter of intent" and made no mention of the terms requiring further corporate approval.

¶18. Jackson HMA argues that the November 11 letter was not intended to be a contract, as it included the language, "[b]y signing and returning this letter, you will confirm your commitment to entering into a contractual agreement . . . . Accordingly, we will begin the process of assimilating contract documents for your review." Jackson HMA finished the "process of assimilating contract documents[,]" and sent Morales the Physician Recruitment Agreement, dated November 16, which contained terms approved by corporate and agreed to by Morales.

¶19. Jackson HMA also argues that the communications presented as evidence at trial show that the letter did not form a contract and that all parties understood that any final contract would have to obtain corporate approval. Along with the aforementioned letters and Physician Recruitment Agreement, the jury was presented numerous written and electronic mail communications. The evidence presented at trial was conflicting. But, it is the jury, and not this Court, "which resolves all conflicts of evidence." ***Venton v. Beckham***, 845 So. 2d 676, 687 (Miss. 2003). The jury resolved that conflict in favor of Morales. When "consider[ing] all evidence in the light most favorable to [Morales], and . . . view[ing] all reasonable inferences in [Morales's] favor," sufficient evidence was presented to support the jury's determination that a binding contract was formed between Morales and Jackson HMA.

Braswell, 99 So. 3d at 178. Therefore, the trial court did not err in denying Jackson HMA's motions for directed verdict and for judgment notwithstanding the verdict on this issue.

II. Whether there was sufficient evidence to prove Morales's claim for damages to a reasonable certainty.

¶20. This Court has stated, "[i]t is well-understood that in an action seeking damages, the plaintiff bears the burden of proof as to the amount of damages." ***J.K. v. R.K.***, 30 So. 3d 290, 299 (Miss. 2009) (citing ***Puckett Mach. Co. v. Edwards***, 641 So. 2d 29, 36 (Miss. 1994)). "[D]amages . . . must be proven to a reasonable certainty and must not place the injured party in a better position than they otherwise would have been in." ***Polk v. Sexton***, 613 So. 2d 841, 845 (Miss. 1993). "One injured by a breach of contract is entitled to a just and adequate compensation and no more." ***Id***. at 844 (quoting ***McDaniel Bros. Constr. Co. v. Jordy***, 195 So. 2d 922 (Miss. 1967)). In order to ensure that the nonbreaching party is not put in a better position than if the contract had been performed,[4] damages for lost future profits must be "proved with reasonable certainty" and should reflect "net profits as opposed to gross profits." ***Lovett v. Garner***, 511 So. 2d 1346, 1353 (Miss. 1987)). Thus, gross profits must be reduced by the reasonable overhead expenses common to the Jackson HMA service area for the contract period at issue.

¶21. At trial, Morales was the only witness who offered testimony on damages. Morales testified that, during the recruitment process, Shaw provided him with a document prepared

[4]*See* Jeffrey Jackson & Mary Miller, *Encyclopedia of Mississippi Law* § 25:40, 30 (2001) ("[N]o judgment may place the non-breaching party in a better position than would have been the case had the contract been performed.")

by MGMA, "a company that . . . surveys incomes and advises hospitals on what to expect." That document was a physician-compensation survey, including ophthalmology. Utilizing the survey, Morales testified, without objection, that the median income for an ophthalmologist was $645,558, the mean $708,128, and the top ten percent $1,097,381.[5]

¶22. Morales argues on appeal that "it would come as no surprise . . . if the majority opinion herein affirming the damage verdict includes a disclaimer, limiting the precedential value of the holding to those instances where a defendant provides actual, authoritative/reliable future *net* income estimates . . . ." (Emphasis added.) Basically, Morales argues that he should be allowed to rely solely on the document provided to him by Jackson HMA as credible evidence of his lost net income. As Morales's reliance on this particular document as evidence of lost net income is misplaced, we reject this argument.

¶23. Morales recognizes that lost income should reflect *net* income. *See supra* ¶ 22. Morales did not testify, nor does the document reveal, whether the MGMA survey represented gross or net income. When asked by his own attorney about MGMA, Morales conceded, "I don't know if I'm the right person to ask this because this is used more by the hospitals than doctors . . . ." Morales failed to provide sufficient evidence upon which the jury or a court could conclude that the income figures represented net income.[6]

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[5]The document reveals that the survey conducted for ophthalmologists consisted of 120 providers and 47 practices.

[6]I cannot agree with the dissent's characterization of the testimony regarding the MGMA survey. Morales's cross-examination of Shaw reveals Morales's knowledge of how to derive net income. However, no testimony was elicited to support net income. Shaw

¶24. Contrastingly, Shaw unequivocally testified that the numbers represented gross income.[7] She testified that Jackson HMA applied the median income for ophthalmologists

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testified on cross-examination:

> Q: MGMA, and this is the amount of money that they suggested you use as an income guarantee for someone that you recruit; is that correct?
> A: They survey physicians that want to participate, it's a volunteer survey, and they come up with the numbers that averages that this is what physicians make in the country of that specialty. There are several of those surveys.
> Q: Okay. You're saying that they come up with this. This is what they make?
> A: This is what they generate in their practice as gross income to cover their overhead or this is what they make as a salary. There's two different – in that book there's a lot of information. That just happens to be one page out of that book.
> Q: Okay. And do you recall from looking through that book how much income an ophthalmologist in this area would expect to earn on average?
> A: In this Jackson area?
> Q: Yes.
> A: No. It will not be that specific.
> Q: Okay.
> A: It is a national. It will have national numbers, it will have different parts of the country like south, east, west or north. It's not going to be Jackson specific. But, no, no.
> Q: I got you. I got you. You mentioned the word region. Do you recall what an ophthalmologist in this region would have expected.
> A: No. I do not recall.
> Q: Okay. But if Dr. Morales was able to pay all of his overhead, his people he's working for, his insurance and all of these other things that CMMC was not paying for, and he was paid $50,000 a month, okay, and all of those overhead expenditures were $20,000 a month, then I think we can do some simple math and he would make $30,000 a month, right?
> A: That would be his.

[7]Shaw's testimony on direct examination does not support the dissent's conclusion of equivocation. She testified, regarding the MGMA survey:

> Q: And what is the median income?
> A: 645,558, but that's gross.
> Q: That's gross, not net?
> A: Correct.

in the survey to arrive at the September 24 offer of $650,000 gross for one year. The November 11 offer also was based on the median income in the survey, as Jackson HMA cut both the guarantee period and amount by exactly half ($325,000 for six months). However, out of those guarantees, "[Morales] would pay his overhead and his salary[,] . . . his staff salary, his malpractice, his supplies, his lease, his utilities, everything that he needed to run his practice . . . ." By their plain language, the September 24 and November 11 letters specifically provided for "*gross* income collections guarantee[s]." (Emphasis added.) Therefore, the evidence submitted was insufficient to support the amount of damages awarded.[8]

¶25. Although this Court has allowed proof of lost profits to be accomplished through "a party's proof of its past profits[,]" the evidence of Morales's past income is likewise inadequate to support the damages awarded. ***Lovett***, 511 So. 2d at 1353. Morales testified at trial that he had been unemployed since July 2003 – more than thirteen months before he began negotiating with Jackson HMA. Prior to being unemployed, Morales had practiced in Arizona and Illinois. He testified that, while in Arizona, his *net* income was in the $140,000

[8]After modification, jury instruction 20 read, in pertinent part, "[i]ncome is that net profit after operating expenses, including taxes, are deducted from revenues through July 2007." Jackson HMA argues that this instruction was given in error as no evidence was presented as to "what the operating expenses, etc. would have been . . . ." Jackson HMA's argument that the instruction was given in error is correct because it lacked any evidentiary basis.

range. Following his move from Arizona to Illinois, Morales testified that he earned about $160,000 a year.[9]

¶26. Other evidence adduced at trial was inadequate to support the amount of damages. The November 11 letter provided Morales a "*gross* collections income guarantee of $325,000 for six months." (Emphasis added.) However, standing alone, the $325,000 gross guarantee, without consideration of the reasonable expenses to be incurred, is likewise inadequate to support the award.

¶27. The trial court did not err in denying Jackson HMA's motions for directed verdict and judgment notwithstanding the verdict, for Morales offered sufficient evidence that he had suffered damage. But, insufficient evidence was adduced to undergird the jury's award. As such, we reverse and remand for a new trial solely on the issue of damages.[10]

III. Whether the trial court erred in granting jury instruction 9.

¶28. Jackson HMA claims that the trial court should have granted its motion for a new trial because it erred in granting jury instruction 9. "Jury instructions are within the discretion of the trial court and the settled standard of review is abuse of discretion." ***Watkins v. State***, 101 So. 3d 628, 635 (Miss. 2012) (quoting ***Bailey v. State***, 78 So. 3d 308, 315 (Miss. 2012)).

¶29. Instruction 9 read as follows:

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[9]In support of his testimony, Morales entered into evidence his IRS tax returns from 2001-2005.

[10]Jackson HMA also argues that Morales presented insufficient proof of reliance damages. Because we reverse and remand for a new trial on damages, this argument will not be addressed.

> The Court instructs you that CMMC [Jackson HMA] is responsible for the acts of its employees done within the course and scope of their employment and within the line of her duties even though such acts may be contrary to the principal's express intentions.
>
> In the present case, CMMC is bound by the actions or statements of Tess Shaw and Jay Finnegan performed or omitted in the scope of their employment with CMMC during their contract negotiations with Dr. Morales.

¶30. We agree that instruction 9, in its entirety, should not have been granted. There was no evidentiary support that Finnegan or Shaw acted contrary to Jackson HMA's express intentions. The instruction also improperly implies that any and all acts done within the scope of a person's employment automatically binds the principal, without establishing that the employee possessed authority – either actual or apparent – to bind the principal.

¶31. However, the error is harmless, for no reasonable juror could have concluded that Finnegan or Shaw lacked, at a minimum, apparent authority when negotiating with Morales. Finnegan was the CEO of Jackson HMA. Shaw was the physician recruiter for Jackson HMA. She was involved with virtually all communications between Morales and Jackson HMA. She did all the leg work to bring Morales to Jackson, and she was responsible for sending Morales the September 24 letter, the November 11 letter, and the November 16 Physician Recruitment Agreement. Acting on behalf of Jackson HMA, she kept Morales informed throughout the negotiations and ultimate rejection.

¶32. Jackson HMA argues that "no representation was made" to Morales by Finnegan. However, the record, specifically the November 11 letter, suggests otherwise. The November

11 letter states, in pertinent part, "[t]his is to follow up on your conversation with Jay Finnegan regarding the terms of our offer . . . ."

IV. Whether the trial court erred by denying remittitur.

¶33. Based on the preceding discussion of damages, the trial court had insufficient evidence to order a remittitur without engaging in speculation and conjecture. As such, the trial court did not err in denying remittitur.

CONCLUSION

¶34. Based on this analysis, Morales presented sufficient evidence for the jury to find that a contract existed. However, Morales presented insufficient evidence to support the jury's damages award. We affirm the judgment for Dr. Morales, but reverse on the issue of damages and remand this case to the Circuit Court of Hinds County for a new trial solely on damages.

¶35. **AFFIRMED IN PART, REVERSED IN PART AND REMANDED**.

DICKINSON, P.J., LAMAR, PIERCE, KING AND COLEMAN, JJ., CONCUR. KITCHENS, J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION JOINED BY CHANDLER, J. WALLER, C.J., NOT PARTICIPATING.

KITCHENS, JUSTICE, CONCURRING IN PART AND DISSENTING IN PART:

¶36. I agree that the existence of a contract was a question of fact and that the jury was presented with sufficient evidence to find that the parties were bound by the communications made prior to the execution of the contemplated formal writing. ***WRH Properties, Inc. v. Estate of Johnson***, 759 So. 2d 394, 397 (Miss. 2000). Thus, the jury's finding of liability must be affirmed. However, I also would affirm the jury's award of damages. Dr. Morales's

testimony, together with an assortment of documentary evidence, provided a sufficient evidentiary basis from which the jury reasonably and fairly could determine the extent and limits of his losses. Because I would affirm *in toto*, I respectfully concur in part and dissent in part.

¶37. Our law regarding proof of damages is well settled. In many cases, an exact amount of damages is impossible to calculate due to the nature of the alleged harm. ***Cain v. Mid-South Pump Co.***, 458 So. 2d 1048, 1050 (Miss. 1984). Thus, the plaintiff must "place into evidence such proof of damages as the nature of [the] case permits, with as much accuracy as is reasonably possible." ***J.K.***, 30 So. 3d at 299 (citing ***Thomas v. Global Boat Builders & Repairmen Inc.***, 482 So. 2d 1112, 1116 (Miss. 1986)). In other words, "[t]he plaintiff will not be denied a substantial recovery if he has produced *the best evidence available* and it is sufficient to afford a reasonable basis for estimating his loss." ***Cain***, 458 So. 2d at 1050 (emphasis added).

¶38. In the present case, the general verdict in favor of Dr. Morales did not specify what portion of the total award represented lost earnings. Dr. Morales testified about the recruitment process and provided documentary evidence of HMA's representations of the favorable market for his services. According to these communications, the area was underserved, and there was a great need for medical services in his field of expertise. Dr. Morales was told that his practice would be quite profitable given the volume of patients he was likely to treat.

¶39. On appeal, the defendant focuses on the physician compensation survey, which was received as evidence without objection from the defense. At trial, Dr. Morales testified that he was shown this survey of incomes compiled by the "MGMA Commission," and that he was led by the defendant to believe that the numbers were "what they make," not gross revenue. In response to his attorney's request to "[t]ell us what the MGMA is," Dr. Morales responded, "They're a company that surveys, I don't know if I'm the right person to ask this because this is used more by the hospitals than doctors, but they are a company that sort of surveys incomes and advises hospitals on what to expect. They do work for the hospitals as well as for some doctors." The document showed a wide range of incomes; and, according to Dr. Morales, HMA's representations led him to believe that, once his practice was established, his income would be in the higher range.

¶40. Shaw confirmed Morales's description of the MGMA and testified that the document was a "physician compensation survey." According to Shaw, the survey was "a national guideline that is used to establish fair market value for positions of compensation packages either based on collection or income." Although Shaw said that the median numbers represented gross revenue, on cross-examination, she testified that the survey's numbers are "what they generate in their practice as gross income to cover their overhead *or* this is what they make as a salary." (Emphasis added.) Shaw explained that the offer to Morales guaranteed a certain level of revenue but that he would not be paid a salary; instead, Morales's "salary" (her word) would come out of his gross revenue, as would his operating expenses. Yet, regardless of Shaw's understanding of the survey or the distinctions between

salary and gross revenue as used by the MGMA, her testimony was evidence to be considered by the jury. As the finders of fact, the jurors were charged with resolving any conflicts between her testimony and Morales's testimony.

¶41. This Court has held that "a basic rule in proof of damages" is that the party bearing the burden of proof must offer "the best evidence available." ***Puckett Mach. Co. v. Edwards***, 641 So. 2d 29, 36 (Miss. 1994). Unlike other cases in which this Court has reversed damages awards, the evidence before this jury was not some arbitrary guess by Dr. Morales, but was evidence he had been provided by the defendant. In ***City of New Albany v. Barkley***, 510 So. 2d 805 (Miss. 1987), the Court found that the plaintiff's claim of lost profits and damage to his business property was entirely speculative. As for lost profits, the Court remarked that the plaintiff's "records of profits in prior years was available but he chose not to use them because he felt they would not provide an adequate basis on which to compute his future loss of profits. He apparently chose to 'guess' a number and the [trial] court allowed him to do so." ***Id.*** at 807. Regarding certain items lost as a result of the defendant's alleged negligence, the plaintiff admitted that the value assigned to many of the items was "arbitrarily chosen." ***Id.*** at 808. The Court reversed the case for a new trial on another issue, but "presume[d] that the deficiencies in the proof of damages [would] not recur."

¶42. Similarly, in ***Puckett Machinery***, 641 So. 2d 29, 36 (Miss. 1994), the Court found that the plaintiff's trial testimony provided insufficient proof of net profits when he admitted that records showing out-of-pocket expenditures, as well as his personal tax and banking records, were available. The opinion remarked that the plaintiff "failed to comply with a basic rule

in proof of damages," for it is "absolutely incumbent upon the party seeking to prove damages to offer into evidence the best evidence available [for] each and every item of damage. If he has records available, they must be produced." ***Id.*** (quoting ***Eastland v. Gregory***, 530 So. 2d 172, 174 (Miss. 1988)).

¶43. Unlike the plaintiffs in ***Puckett Machinery*** and ***Barkley***, Dr. Morales presented the best evidence of his damages available to him, which included, among other things, past tax returns and the income survey provided by HMA. The record supports Dr. Morales's understanding of the survey numbers and that the defendants had not represented the numbers to him as gross revenue. The defendants do not dispute that, until Shaw testified at trial, there had been no representations by HMA that the survey reflected gross revenue only. Even then, Shaw's testimony was equivocal, for she said that the physician compensation survey constituted either gross revenue or salary. Notably, the defendants' designated expert witness testified in his deposition that the survey numbers represented net income. Even though the defendants did not call this witness at trial, his deposition testimony was before the trial judge during post-trial motions, and it supports Dr. Morales's belief that HMA had presented him numbers representing anticipated net income.

¶44. Just as the plaintiff bears the burden of proving his damages, a defendant bears the burden of proving matters in mitigation or reduction of damages. ***J.K.***, 30 So. 3d at 299-300 (quoting ***Poteete v. City of Water Valley***, 207 Miss. 173, 42 So. 2d 112 (1949)). In this case, the two sides adduced evidence demonstrating lost earnings as well as competing data that could have reduced or mitigated the extent of Dr. Morales's damages. The amount of

damages was for the jury to decide, and its resolution of the evidence was not unreasonable and should not be disturbed on appeal. I would affirm the judgment of the Hinds County Circuit Court; but, because the majority reverses in part, I respectfully concur in part and dissent in part.

CHANDLER, J., JOINS THIS OPINION.